REPUBLIC OF SOUTH AFRICA

SOUTH AFRICAN POSTBANK LIMITED AMENDMENT BILL

(As amended by the Portfolio Committee on Communications (National Assembly))
(The English text is the official text of the Bill)

(MINISTER OF COMMUNICATIONS)

[B 25B—2013]

ISBN 978-1-77597-075-0

No. of copies printed 1 800

GENERAL EXPLANATORY NOTE:

[ ] Words in bold type in square brackets indicate omissions from existing enactments.

Words underlined with a solid line indicate insertions in existing enactments.

BILL

To amend the South African Postbank Limited Act, 2010; so as to amend provisions that may negatively affect the operational autonomy and independence of the Office for Banks; to remove any inconsistencies with the Banks Act; and to provide for matters connected therewith.

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:—

Amendment of section 1 of Act 9 of 2010

1. Section 1 of the South African Postbank Limited Act, 2010 (Act No. 9 of 2010) (hereinafter referred to as the principal Act), is hereby amended by— 5

(a) the substitution for the definition of ''Minister'' of the following:

''**Minister**'' means the Minister responsible for communications; and

(b) the deletion of the definition of **"Registrar of Banks"**.

Amendment of section 3 of Act 9 of 2010

2. Section 3 of the principal Act is hereby amended by the substitution for subsection (2) of the following subsection: 10

''(2) Notwithstanding section 32 of the Companies Act **[and section 37 of the Banks Act]**, the Post Office shall, upon incorporation of the Company, be the sole member and shareholder of the Company.''.

Repeal of section 4 of Act 9 of 2010 15

3. Section 4 of the principal Act is hereby repealed.

Repeal of section 8 of Act 9 of 2010

4. Section 8 of the principal Act is hereby repealed.

Amendment of section 9 of Act 9 of 2010

5. Section 9 of the principal Act is hereby amended— 20

(a) by the substitution for subsection (1) of the following subsection:

''(1) The Company has the powers to enable it to realise the object referred to in section 2.''; and

(b) by the deletion of subsection (3).

Amendment of section 13 of Act 9 of 2010

6. Section 13 of the principal Act is hereby amended—

(a) by the substitution in subsection (1) for paragraph *(f)* of the following paragraph:

"*(f)* has at any time been removed from an office of trust on account of misconduct; **[or]**";

(b) by the substitution in subsection (1) for paragraph *(g)* of the following paragraph:

"*(g)* has any direct or indirect interest in conflict with the business of the Company; or";

(c) by the addition of the following paragraph:

"*(h)* is not fit and proper to hold the office of a member of the Board of a banking institution as contemplated in the Banks Act."; and

(d) by the substitution in subsection 3*(a)* for the words preceding subparagraph (i) of the following words:

"A person nominated for appointment as a member of the Board must, before appointment **[and upon a request from the Minister]**, submit to the Minister a written statement containing—"

Amendment of section 14 of Act 9 of 2010

7. Section 14 of the principal Act is hereby amended—

(a) by the substitution in subsection (1) for paragraphs *(a)* and *(b)* of the following paragraphs, respectively:

"*(a)* by notice in at least two national newspapers and in the *Gazette*, invite interested persons, within the period and in the manner determined in the notice, to submit the names of persons envisaged in section 12(1)*(a)* **[that are fit and proper persons to hold the office of a member of the Board of a banking institution, as contemplated in the Banks Act]**; and

(b) in writing invite the Post Office**[, acting with the concurrence of the Registrar of Banks,]** to submit the names of the persons envisaged in section 12(1)*(b)* **[that are fit and proper persons to hold the office of a member of the Board of a banking institution, as contemplated in the Banks Act]**."; and

(b) by the insertion in subsection 4*(a)* after subparagraph (v) of the following word "and"

(c) by the addition in subsection (4)*(a)* of the following subparagraph—

"(vi) banking experience;" and

(d) by the deletion in subsection (4) of paragraph *(d)*.

Amendment of section 15 of Act 9 of 2010

8. Section 15 of the principal Act is hereby amended by—

(a) the addition in subsection (2) after paragraph *(d)* of the following word:

"or"; and

(b) the deletion in subsection (2) of paragraph *(e)*.

Amendment of section 18 of Act 9 of 2010

9. Section 18 of the principal Act is hereby amended by the substitution in subsection (3) for paragraph *(a)* of the following paragraph:

"*(a)* must have the qualifications or experience relevant to the functions of the Company and must be fit and proper to hold the office of a chief executive officer of a banking institution as contemplated in the Banks Act;".

Amendment of section 25 of Act 9 of 2010

10. Section 25 of the principal Act is hereby amended—

(a) by the substitution for subsection (1) of the following subsection:

"(1) The Minister may, **[with the concurrence of the Minister of Finance]** until such time as the Company is registered as a banking institution in terms of the Banks Act, direct the Company to take any action specified by the Minister if the Company—

(a) is being mismanaged;

(b) fails to perform its functions effectively or efficiently;

(c) has acted unfairly or in a discriminatory or inequitable way towards a person to whom it owes a duty under this Act; or

(d) has failed to comply with any law or any policy envisaged in this Act."; and

(b) by the substitution for subsection (3) of the following subsection:

"(3) If the Company fails to remedy the situation within the stated period, the Minister may **[, with the concurrence of the Minister of Finance]**—

(a) after having afforded the Company a reasonable opportunity to be heard; and

(b) after having afforded the Company a hearing on any submissions received, replace the members of the Board in the same manner as the departing members have been appointed or, where circumstances so require, appoint a person as an administrator to take over the relevant function of the Company.".

Amendment of section 26 of Act 9 of 2010

11. Section 26 of the principal Act is hereby amended by the deletion of subsections (2) and (3).

Insertion of section 26A of Act 9 of 2010

12. The following section is hereby inserted in the principal Act, after section 26:

"**Application of Banks Act**

26A. In the event of any conflict between the provisions of the Banks Act and this Act, the provisions of the Banks Act prevail.".

Substitution of section 30 of Act 9 of 2010

13. The following section is hereby substituted for section 30 of the principal Act:

"**Transitional provisions**

30. (1) Notwithstanding the repeal of sections 51(1), (3) and (4), 52, 53, 55 and 58 of the Postal Services Act by section 31, until the **[Company is registered as a bank as contemplated in section [4(2),]** former Postbank is transferred as contemplated in section 7, the former Postbank continues to function without any interruption, as if those sections have not been repealed.

(2) Any exemption under the Banks Act applicable to the former Postbank immediately prior to the transfer date, continues to apply to the Company until such time as the Company is registered as a banking institution in terms of the Banks Act.".

Short title

14. This Act is called the South African Postbank Limited Amendment Act, 2013.

MEMORANDUM ON THE OBJECTS OF THE SOUTH AFRICAN POSTBANK LIMITED AMENDMENT BILL, 2013

1. BACKGROUND

1.1 The South African Postbank Limited Act, 2010 (Act No. 9 of 2010) (''Act''), was assented to on 1 December 2010 and commenced on 22 July 2011. The purpose of the Postbank Act is to provide for the incorporation of the Postbank Division of the South African Post Office; to provide for the transfer of the enterprise of that Division to the new Postbank company and to provide for the governance and functions of the Postbank.

1.2 The Act provides, among other things, for the corporatisation of the Postbank and stipulates that it must be registered as a bank after it has satisfied the requirements of relevant banking legislation.

1.3 Some provisions of the Act impact significantly on the operations of the Office for Banks. The effect of these provisions is that they provide the Postbank with an unfair advantage over other registered banks in that the Postbank will benefit from the award of a banking license without having met the Office for Banks' licensing criteria or undergoing the same rigorous supervision as other registered banks.

1.4 The Office for Banks is responsible for, among other functions, registering institutions as banks, enforcing all the requirements of the Banks Act, 1990 (Act No. 94 of 1990)(''the Banks Act''), and supervising these institutions registered as banks. Supervision covers, inter alia, the establishment of certain capital and liquidity requirements, as well as the continuous monitoring of the institutions' adherence to legal requirements formulated in terms of supervisory standards, guidelines and statements of best practice recommended by the Basel Committee on Banking Supervision (''BCBS''). This is in keeping with the Office for Banks' mission to promote the soundness of the domestic banking system and to minimise systemic risk through the effective and efficient application of international regulatory and supervisory standards.

1.5 The cornerstone of the BCBS's reforms comprise the recommendations in the Basel Capital Accord and the 25 Core Principles for Effective Banking Supervision, which may be summarised as follows—

(a) The current Basel Capital Accord framework, which was first launched in 1988 before being revised in 2006 and again in December 2010 to constitute what is currently known as Basel III, is a comprehensive set of reform measures developed by the BCBS to strengthen the regulation, supervision and risk management of the banking sector. These measures aim to improve the banking sector's ability to absorb shocks arising from financial and economic stress irrespective of the source; improve risk management and governance within banks; and strengthen their transparency and disclosures.

(b) The Core Principles for Effective Banking Supervision were first issued by the BCBS in 1997, updated in 2006 and are currently undergoing further revision. They provide a benchmark against which the effectiveness of bank supervisory regimes can be assessed.

1.6 The two above-mentioned methodologies are not only rigorously applied by the Office for Banks, but their principles are enacted in their entirety in the Banks Act, the Regulations relating to Banks and Banks Act directives.

1.7 In adhering to the said principles, the Office for Banks ensures that all the banks it has registered and currently supervises either meet its requirements or exit the banking system. There is no middle course. As supervisor, the Office for Banks is duty-bound to level the playing fields by maintaining an environment in which all entities operating in the banking sector adhere to the same principles in order to be supervised effectively by the Office for Banks.

1.8 It is against this background that amendments are required to the Postbank Act to adopt a minimalist approach to drafting. In other words, the Postbank Act must be limited to the most fundamental features of the Postbank, namely, its transition from a Division of SAPO to a separate, stand-alone and corporatized public entity. References to sections of the Banks Act or use of any terms specific to the Banks Act should accordingly be avoided whenever and wherever practicable. This is necessary to avoid infringement of the powers and functions of the Office for Banks. The amendments also seek to remove any inconsistencies with the Banks Act.

2. OBJECTS OF BILL

The Bill seeks to amend the Postbank Act, to achieve the following objectives:

2.1 to protect the operational autonomy and independence of the Office for Banks; and

2.2 to remove any inconsistencies with the Banks Act.

3. CLAUSE BY CLAUSE ANALYSIS

The Bill contains the following clauses:

3.1 ***Clause 1***

Clause 1 seeks to delete the term ‘‘Registrar of Banks’’ since it is not used and is therefore redundant.

3.2 ***Clause 2***

Clause 2 seeks to amend section 3 of the Act by deleting the exclusion of section 37 of the Banks Act. Section 37 of the Banks Act deals with permission to acquire shares in a bank or bank controlling company. It is necessary for the Office of Banks to monitor and approve the acquisition of shares or interests by shareholders, the holdings of which are above specified thresholds or that exercise a material influence on the operations of a bank. The Office for Banks is required to assess the fitness, propriety or other qualification tests of entities wishing to acquire shares in a bank or controlling company.

3.3 ***Clause 3***

Clause 3 seeks to repeal section 4 of the Act. To register as a bank, the Postbank will be required to comply with the Banks Act in all respects. This includes consolidated supervision, which seeks to evaluate the strength of the entire banking group, taking into account all risks which may affect a bank, regardless of whether these risks are carried in the books of the bank or by its related entities including controlling company. Thus section 4 is removed to avoid any overlap, confusion or contradiction with the Banks Act.

3.4 ***Clause 4***

Clause 4 seeks to delete section 8 of the Act since exemption from tax liability should be the subject of a Money Bill.

3.5 ***Clause 5***

Clause 5 seeks to amend section 9 of the Act since some of the powers set out in section 9 relate to areas already governed by the provisions of the Banks Act and require the prior notification or the approval of the Registrar of Banks.

It unnecessarily overlaps with the jurisdiction of the Office for Banks, which is bound to cause confusion and legal difficulties.

3.6 ***Clause 6***

Clause 6 seeks to add an additional requirement in section 13 of the Act, to make it clear that no person may be appointed as or remain a board member if such a person is not fit and proper to hold the office of a member of a Board of a banking institution as contemplated in the Banks Act.

3.7 ***Clause 7***

Clause 7 seeks to amend section 14 of the Act to remove references to ''fit and proper'' and the required ''concurrence of the Registrar of Banks''. These provisions are not required anymore due to the amendment of section 13. Clause 7 further seeks to align section 14(1)*(b)* with section 8(5) of the South African Post Office SOC Ltd Act, 2011 (Act No. 22 of 2011), to avoid confusion.

3.8 ***Clause 8***

Clause 8 seeks to delete section 15(2)*(e)* since it is not necessary following the addition of section 13(1)*(h)*.

3.9 ***Clause 9***

Clause 9 seeks to amend section 18 to make it clear that the managing director of the Postbank must be fit and proper to hold the office of chief executive officer of a banking institution as contemplated in the Banks Act.

3.10 ***Clause 10***

Clause 10 seeks to amend section 25 to ensure that the powers of the Minister to intervene fall away once the Company is registered as a banking institution in terms of the Banks Act. This is necessary since provisions such as sections 60(6), 69 and 69A of the Banks Act which provide clear guidelines to address mismanagement, non-compliance or any areas of material maladministration apply from registration. Once the South African Postbank Limited is registered as a bank, there should be no restriction on the application of the Banks Act.

3.11 ***Clause 11***

3.1.1 Clause 11 seeks to amend section 26 of the Act to remove the requirement that the Minister make policies for the Postbank. All registered banks are expected to adhere to the Regulations relating to Banks, which are subordinate only to the Banks Act. The mission of the Office for Banks is to promote the soundness of the domestic banking system through the effective and efficient application of international regulatory and supervisory standards and best practice. To achieve this objective, the Office for Banks has two cornerstones for its regulatory and supervisory framework, namely, the Basel Capital Accord and the Core Principles. Accordingly, the Registrar of Banks cannot be bound by the provisions of the Postbank Act and policies made in terms of the said Act.

3.1.2 Furthermore, good banking and governance practice requires that the Postbank's board of directors approve and regularly review the policies of the bank and then oversee management's actions and their consistency with board policies as part of the checks and balances embodied in sound corporate governance. Requiring Cabinet to approve the policies and any further changes to the policies is out-of-line with such good practice. The associated confusing multiple

lines of responsibility may also exacerbate a problem through slow or diluted responses.

3.12 ***Clause 12***

Clause 12 proposes to insert a new section 26A to provide that in the event of any conflict between the provisions of the Banks Act and the Act, the provisions of the Banks Act prevail. If, for example, an offence under the Act is not an offence under the Banks Act or if the disclosure requirements of directors differ between these two Acts, this provision will makes it clear that the Banks Act prevails.

3.13 ***Clause 13***

Clause 13 seeks to amend section 30 of the Act to ensure that any exemption under the Banks Act applicable to the former Postbank immediately prior to the transfer date applies to the South African Postbank Limited from the transfer date until it is registered as a bank as contemplated in section 3.

3.14 ***Clause 14***

Clause 14 of the Bill contains the short title.

4. ORGANISATIONS AND INSTITUTIONS CONSULTED

The Bill resulted from a consultative process between the Department of Communications, National Treasury, South African Reserve Bank (the Office of the Registrar of Banks (''the Office for Banks'') of the South African Reserve Bank), South Africa Post Office SoC Ltd and the Postbank Division of the South Africa Post Office SoC Ltd.

5. FINANCIAL IMPLICATIONS

No additional financial implications are anticipated for government as a result of the amendments in this Bill.

6. CONSTITUTIONAL IMPLICATIONS

6.1 Sections 223 to 225 of the Constitution of the Republic of South Africa, 1996 (the Constitution) provides as follows:

''***CENTRAL BANK***

Establishment

223. *The South African Reserve Bank is the central bank of the Republic and is regulated in terms of an Act of Parliament.*

Primary object

224. *(1) The primary object of the South African Reserve Bank is to protect the value of the currency in the interest of balanced and sustainable economic growth in the Republic.*

(2) The South African Reserve Bank, in pursuit of its primary object, must perform its functions independently and without fear, favour or prejudice, but there must be regular consultation between the Bank and the Cabinet member responsible for national financial matters.

Powers and functions

225. *The powers and functions of the South African Reserve Bank are those customarily exercised and performed by central banks, which powers and*

functions must be determined by an Act of Parliament and must be exercised or performed subject to the conditions prescribed in terms of that Act.".

6.2 The South African Reserve Bank is subject to and derives its powers and functions from the South African Reserve Bank Act, 1990 (Act No. 95 of 1990).

6.3 Sections 41(1)(e) and (g) of the Constitution provides as follows:

"***41.*** *Principles of co-operative government and inter governmental relations:*

(1) All spheres of government and all organs of state within each sphere must—

(e) respect the constitutional status, institutions, powers and functions of government in the other spheres;

(g) exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere;".

6.4 The operational autonomy and independence of the Office for Banks is honoured by the Banks Act, 1990 (Act No. 94 of 1990), and affords the Office for Banks original powers. The Office for Banks is an institution of statute and has exclusive powers to perform its functions in terms of the Banks Act.

7. PARLIAMENTARY PROCEDURE

7.1 The State Law Advisers and the Department of Communications are of the opinion that the Bill must be dealt with in accordance with the procedure established by section 75 of the Constitution, since it contains no provision to which the procedure set out in section 74 or 76 of the Constitution applies.

7.2 The State Law Advisers are of the opinion that it is not necessary to refer this Bill to the National House of Traditional Leaders in terms of section 18(1)*(a)* of the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003), since it does not contain provisions pertaining to customary law or customs of traditional communities.

Printed by Creda Communications

ISBN 978-1-77597-075-0