



MINISTRY: COMMUNICATIONS
REPUBLIC OF SOUTH AFRICA

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Mr. I Vadi, MP
Chairperson
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Parliament of the Republic of South Africa
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Dear Honourable Chairperson

LEGAL OPINION- SOUTH AFRICAN POSTBANK BILL

Your letter dated 03 June 2010 refers.

In your letter you requested the Department of Communications (DoC) and National Treasury (NT) to look at alternative proposals on the governance structure of the Postbank that would give greater power to the Executive to intervene in governance matters at the Company, should the need arise.

The DoC and NT met in order to consider the matter, and also consulted with the Office of the Chief State Law Adviser (SLA) on legal implications.

One alternative mechanism to ensure greater power to the Executive is to make the Minister the shareholder in the South African Postbank. This possibility was mentioned during the deliberations of the Portfolio Committee on Communications on 18 May 2010. The SLA was requested to provide their views on the legal implications of the Minister being the shareholder as opposed to the South African Post Office, as the Bill currently provides in clause 3(2). The SLA provided the following views that clearly explain the implications:

"If the Minister is the shareholder, the Postbank is no longer a subsidiary of the Post Office and the Post Office has no relationship



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with the Postbank. It must be kept in mind that the Post Office is a wholly owned State enterprise. Thus, if the Post Office remains the shareholder of the Postbank, the State (in effect the Minister) would be able, through the Post Office, to hold the Postbank accountable for any of its actions.

Furthermore, the Post Office is a Major Public Entity listed in Schedule 2 of the Public Finance Management Act, 1999 (Act No. 1 of 1999), and must comply with all the requirements of that Act relating to public entities. In terms of the same Schedule, "(a)ny subsidiary or entity under the ownership control of the ... (Post Office)" is also a public entity. Thus, similarly to the Post Office, the Postbank will have to comply with the PFMA. See also paragraph 5.1.15.2. of the Protocol On Corporate Governance, in terms of which the directors of a wholly owned state owned enterprise (SOE) are required to keep the Executive Authority informed of the operations of the SOE and its subsidiaries, and to give the Executive Authority such information in relation to those operations as the Executive Authority may require from time to time. The said protocol applies to all public entities (such as the Post Office) and any subsidiaries of such public entity.

Note further that if the Minister becomes the shareholder, the Bill will have to be scrutinised for any unintended consequences. E.g. clause 9 of the Bill seeks to authorise the Postbank to render its services "...through the physical assets, systems, employees and general infrastructure of the Post Office". This provision was drafted based on the fact that the Postbank is a wholly owned subsidiary of the Post Office. Should this provision still apply if there is no longer any relationship between the Post Office and the Postbank?

We assume that the Post Office will be given an opportunity to respond should the possible change of ownership of the Postbank be considered by the Committee."

We are not in favour of establishing the Postbank as an independent state-owned enterprise at this stage for the reasons indicated above and prefer the current structure in the Bill that creates the Postbank as a subsidiary of the Post Office. The current governance structure will allow sufficient power to the Executive to intervene.

The policy and regulatory power in clause 25 further empowers the Minister to guide the Postbank where necessary. As suggested during the Portfolio Committee meeting of 18 May 2010, provision has also been made in clause 14 for the designation of two members of the Board of the Post Office to serve as



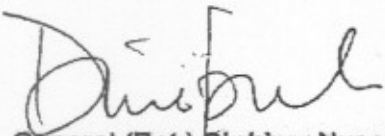
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members of the Board of the Postbank. The Minister further remains responsible for the appointment and removal of members of the Board.

To further strengthen the powers of the Executive, it is proposed that a clause similar to clause 25 of the South African Post Office Bill [Bill 2 - 2010] be considered for insertion authorizing intervention by the Minister in certain circumstances.

In view of the discussions between the DoC, NT and SLA, the governance structure in the attached revised Bill is proposed, retaining the Post Office – Postbank subsidiary relationship. Other amendments proposed during the deliberations of the Portfolio Committee on 18 May 2010 have also been considered and inserted, as requested.

Yours sincerely


General (Ret.) Sipiwe Nyanda
Minister
2010-07-28



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