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**SAKELIGA SUBMISSIONS:**

**SECTION 16(8) OF THE POSTAL SERVICES ACT 124 OF 1998:**

**GOVERNMENT NOTICE 4333 OF 5 FEBRUARY 2024 IN GAZETTE**

**NO. 50077**

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**To:** Department of Communications and Digital Technologies

Ms Phendile Dlamini: [pdlamini@dcdt.gov.za](mailto:pdlamini@dcdt.gov.za)

#### **ABBREVIATIONS**

- i. **Act:** Postal Services Act 124 of 1998
- ii. **SAPO:** South African Post Office
- iii. **Reserved postal services:** Reserved postal services, as defined in the Act.

#### **OVERVIEW**

1. Sakeliga NPC is a not-for-profit business organisation operating in the public interest. Sakeliga has around 9,000 business members that make use of postal services in various forms, including courier services for parcels less than 1 kilogram.
2. We therefore make comments as called for in Government Notice 4333 of 5 February 2024 in Gazette No. 50077 (“the notice”).
3. These comments / submissions should not be construed as being Sakeliga’s full and final say on the matters herein addressed, and we reserve the right to

make further comments, submissions and arguments going forward in various applicable forums. All our rights are reserved.

4. The notice is vague. It invites public comment, but does not specify in respect of which matter public comment is sought. The notice simply indicates that the Minister intends to review the exclusivity period and that the public must comment on this fact. The vagueness does not allow for proper public consultation. The public is not informed of the relevant issues that stand to be addressed.

## **PRELIMINARY ISSUES**

1. Section 15(1) of the Postal Services Act 124 of 1998 (“PSA”) determines that no person may operate a reserved postal service except under and in accordance with a licence issued to that person. Section 16(1) and (2) then provide that any person may make an application to the Regulator for a licence in the manner prescribed, provided that applications may only be considered in accordance with policy directions issued by the Minister in terms of section 2A.
2. Section 16(3) then deals with SAPO’s deemed application for a license to provide reserved postal services. It determines that at the date of commencement of the section, SAPO must have been regarded to have applied for a license which would have been approved with a period of validity of 25 years from the date of commencement of the section.
3. The commencement date of the Act was 1 April 2000, meaning that the SAPO’s license to provide reserved postal services at all will expire on 1 April 2025.
4. Section 16(8) further determines that in SAPO’s license issued in terms of section 16(3), there must be specified in respect of reserved postal services rendered by the postal company a fixed period or from time to time any extended period, during which no person other than the postal company may be licensed to provide a similar service (“exclusivity period”).

5. The first license issued to SAPO in terms of section 16 of the Act, on 17 August 2001 under General Notice 1865 in Government Gazette 22574, determines in paragraph 3 that the exclusivity period shall be for 3 (three) years from the commencement date (1 April 2000) and that the extension of the Licence is subject to review as determined in the Act.
6. SAPO's license was, however, amended under General Notice 149 in Government Gazette 35080 of 24 February 2012 ("amended license"). In terms of an exclusivity period, the amended license simply provides that SAPO shall provide reserved postal services on an exclusive basis subject to clause 7.3.2 of this licence. Clause 7.3.2 simply confirms that the period of exclusivity to provide reserved postal services is subject to review by the Minister in terms of section 16(8) of the Act.
7. The issue is that section 16(8) of the Act requires that the fixed period of exclusivity or, from time to time, any extended period of exclusivity, must be specified in the license itself. The amended license provides for no such period. It simply provides that SAPO shall provide reserved postal services on an exclusive basis. This is a fatal defect and contrary to the requirements in the Act.
8. Accordingly, it is not possible for the Minister, as section 16(8) of the Act requires, to review "any such period", because no such period is specified in the license. It is therefore strange that on 30 March 2017, a notice was published in the Government Gazette extending the purported exclusivity period during which no other person than SAPO may provide reserved postal services, for five years. Patently, there was nothing to extend at the time as the amended license does not provide for any such original period.
9. Be that as it may, even if one accepts that in the absence of a period specified in SAPO's amended license, the Minister can simply by notice in the Government Gazette extend the deemed period of exclusivity, such extension would have lapsed on 30 March 2022.

10. Presently, thus, SAPO does not have a license to exclusively render reserved postal services.

11. In the premises, the notice in the Government Gazette of 5 February 2024 is improper and nonsensical. One cannot review an exclusivity period that does not exist and, concomitantly, the public cannot comment on the appropriateness of an exclusivity period that does not exist.

12. The notice should therefore be withdrawn.

13. Only for the sake of argument, Sakeliga will hereinbelow make substantive submissions on the Constitutionality, lawfulness and appropriateness of any form of exclusivity for SAPO to render reserved postal services. We do so based on an untenable assumption that a lawful exclusivity period is currently operative and that the notice is proper.

## **EXCLUSIVITY WOULD BE UNCONSTITUTIONAL AND UNLAWFUL**

### **SAPO is insolvent and operationally defunct**

14. The most obvious reason why SAPO should not be afforded exclusivity when it comes to reserved postal services or any other services is because of its insolvency and well-known operational breakdown.

15. SAPO faces significant operational and financial challenges, highlighted by its commercial insolvency and substantial losses amounting to nearly R1.8 billion last year.

16. With the majority of its branches operating at a loss and a staggering backlog of 4.8 million undelivered items, it is by no means realistic to think that SAPO will be able to give effect to a statutory monopoly over reserved postal services.

17. Most importantly, any such attempts at attaining/maintaining exclusivity over reserved postal services would be grossly unfair and detrimental to the public – businesses and consumers in particular – and the economy at large.
18. Despite state failure, South Africa has relatively flourishing business communities plugged into global communications and product supply and delivery chains. Effective operation of businesses is reliant on world-class postal delivery and courier services, as are currently offered by the private sector. SAPO, as a potential exclusive provider, would never be able to come close to providing such services at the same rate and efficiency. SAPO's delivery times lag considerably behind those of private courier services, exacerbated by factors like load shedding and irregular international flight schedules.
19. Any attempts to provide SAPO with an exclusive right to render reserved postal services, and to enforce such exclusivity, will violate section 22 of the Constitution, which guarantees the freedom of trade, occupation, and profession.

**SAPO cannot comply with its license conditions and the conditions imposed by the Act**

20. Licensees in terms of section 16 of the Act must comply with the conditions of the licenses issued.
21. SAPO is unable to meet many of the conditions stated in its amended license and has forfeited its entitlement to exclusivity. In reviewing the exclusivity period, the Minister should consider, for instance, that SAPO is currently unable to:
  - a. Provide retail outlets at which customers can mail basic letters and other postal items (7.4.1(b) of the amended license)

- b. ensure that there are sufficient retail outlets in the under serviced areas (7.4.1(e) of the amended license)
- c. improve service performance standards (7.4.1(f) of the amended license)

22. One can take the matter even further. Since SAPO was first granted exclusivity over reserved postal items in 2001, it has never attempted to and/or been able to claim such exclusivity in respect of reserved postal services. The private sector has predominantly been providing such services. 23 years later, SAPO should forfeit its exclusivity license entirely. The alternative would mean that many flourishing businesses would have to forfeit their core value offering for the sake of a domain of business that SAPO simply has not and now definitely cannot administer.

### **Irrationality and unreasonableness**

23. Any attempts to limit the rights of businesses to trade in the reserved postal services sphere so that SAPO can attempt to exercise a statutory monopoly would be irrational.

24. The only purpose that one would be able to derive from such a limiting of rights would be to enable SAPO to activate new income streams that it has previously forfeited. This would be irrational because SAPO is unable to effectively render such services and new income streams would not salvage SAPO, for which liquidation is imminent.

25. Such limiting of rights would also be unreasonable because it would cause the closure of many businesses and hamper innovation within the postal services sector. The absence of competitive pressures will result in complacency, reducing the incentive for SAPO to pursue service improvements or technological advances. This stagnation will affect not only service providers but also consumers, who will face limited choices and reduced service quality.

## **CONCLUSION**

26. There is currently no exclusivity period operative within which SAPO may exclusively render reserved postal services. The notice and call for public comment is therefore improper and nonsensical and should be withdrawn as no public participation can be made about non-existent regulatory affairs.

27. If one assumes that an exclusivity period is operative and that it is thus reviewable, the Minister should consider in the review that any attempts to afford any / further exclusivity for SAPO to render reserved postal services, would be unconstitutional and severely damage many businesses, the interests of consumers, the economy and the public at large.

**8 March 2024**

**Tian Alberts**  
Legal and Liaison Officer  
Sakeliga NPC