

## AFRICAN BANK LIMITED SENIOR CREDITOR CO-ORDINATING COMMITTEE

Mr. A. Wicomb  
National Assembly  
3<sup>rd</sup> Floor, 90 Plein Street  
Cape Town 8000  
Republic of South Africa

With a copy to:

Mr. R. Havemann  
National Treasury  
By email to: roy.havemann@treasury.gov.za

28 January 2015

Dear Mr Wicomb,

This letter is sent to you from the co-ordinating committee of senior creditors of African Bank Limited (in curatorship).

We refer to our previous written submission dated 23 January 2015 (“**Previous Submission**”). This letter serves to supplement the content of the Previous Submission. Words and phrases defined in the Previous Submission shall have the same meaning when used in this letter unless the context requires otherwise.

We have been informed by the National Treasury that those portions of the amendments proposed by the Committee, to the Banks Amendment Bill (“**our submission**”) that require the curator to make information available to creditors or requiring creditors that rank *pari passu* to be treated equally, are unnecessary as the Minister’s consent, as required in terms of s54 of the Banks Act 90 of 1990 (“**Banks Act**”), would constitute an administrative act, which is subject the requirements of the Promotion of Administrative Justice Act, Act 3 of 2000 (“**PAJA**”).

### 1. Remedies under PAJA

- 1.1. The remedy available to creditors under PAJA is to take an administrative act by an administrator on judicial review if one or more of the grounds for judicial review is present. The requirements for judicial review are twofold: (1) the occurrence of administrative action and (2) the presence of one or more of the grounds for judicial review.
- 1.2. An administrative action is to paraphrase the relevant definition in PAJA, defined as a natural person or organ of state taking a decision or failing to take a decision in the course of

exercising a public power which decision must (a) adversely affect someone's rights and (b) have a direct external legal effect.

1.3. The grounds for judicial review are listed exhaustively in PAJA.

## **2. PAJA Remedies inappropriate for curatorship**

We are of the view that PAJA is not entirely appropriate in the context of curatorship under the Banks Act, for the following reasons:

### **2.1. *Uncertainty as to which act is covered by the remedies under PAJA***

2.1.1. The Banks Act involves a number of actions by the curator and the minister prior to the implementation by the curator of his proposal which, because they may not necessarily involve the implementation of the proposal (and thus may have no adverse effect on creditor rights and may have no direct external legal effect) would not be capable of being challenged by the creditors under PAJA. Such acts could include the mere formulation of the restructure plan by the curator, as well as referring a plan to the Minister for consent in terms of s54 by the curator.

2.1.2. It is only at the time that the plan is implemented by the curator, and after the s54 approval, that the creditors would be able to claim that an administrative act has occurred. The effect of implementation by the curator of his plan may be difficult or impossible to reverse once approved by the Minister or implemented and, irrespective of whether or not it could be set aside in whole or in part, could cause irreparable and irreversible harm to the interests creditors (and thus to confidence in the banking system in the Republic). To avoid this scenario, it is important to reduce uncertainty around the procedures required to be followed under PAJA read together with the Banks Act.

### **2.2. *Uncertainty as to which administrator must afford the creditors with a right to procedural fairness:***

2.2.1. Given that the plan to be implemented will involve an interaction between the Minister and the curator (each of whom is given responsibilities under the Banks Act), it is unclear from PAJA which of these functionaries would be responsible for affording the creditors the procedural fairness rights conferred by PAJA. This creates uncertainty as to what is required procedurally for all stakeholders: the curator, the Minister, the investors and the creditors alike. This would be allayed by specifying, broadly, the procedure to be followed in the Banks Act itself.

2.2.2. Procedural fairness under PAJA consists of:

2.2.2.1. giving the person affected adequate notice of the nature and purpose of the proposed administrative action;

2.2.2.2. giving the person affected a reasonable opportunity to make representations to the administrative decision maker;

- 2.2.2.3. giving the person affected a clear statement of the administrative action proposed to be taken;
- 2.2.2.4. giving the person affected adequate notice of any right of review or internal appeal, where applicable; and
- 2.2.2.5. giving the person affected adequate notice of the right to request reasons in terms of section 5 of PAJA.

Again, it is unclear which of the Minister or the curator would be required to fulfil these requirements and at what stage of the Section 54 process this would have to occur. Clearly specifying in the legislation that the curator is required to provide information to the creditors prior to submitting the proposal to the Minister would go a long way to creating legal certainty in respect of the third procedural fairness requirement (a clear statement of the administrative action proposed to be taken) and, by extension, the first two requirements of procedural fairness.

2.3. ***Exceptions to procedural fairness:***

2.3.1. PAJA permits procedural fairness to be departed from in certain instances, taking into consideration, amongst other things, the urgency of taking the administrative action. Given the position adopted thus far by the curator that the implementation of the restructure is of critical urgency, the creditors fear that reliance will be placed on this exception to depart from or otherwise truncate the principles of procedural fairness. This fear would be allayed if the procedure to be followed was mandatory and could not be departed from by the curator.

2.4. ***Codifying procedural requirements provide certain grounds for judicial review:***

2.4.1. Codifying a procedure for the curator to follow permits reliance on “A mandatory and material procedure or condition prescribed by an empowering provision not being complied with” as a ground for judicial review which is much more easily assessed than the less certain ground of “Procedural unfairness”.

The Committee reserves the right to make oral submissions in support of this written submission at any public hearing in respect of the contents hereof. White & Case LLP in Johannesburg (the legal advisor to the Committee) will contact you directly in this regard.

Yours faithfully,

**The Senior Creditor Co-ordinating Committee\***

\* The Senior Creditor Co-ordinating Committee currently comprises Allan Gray Proprietary Limited, Cadiz Asset Management (Pty) Ltd, Investec Asset Management Pty Ltd, Old Mutual Investment Group Proprietary Limited, Peregrine Capital (Pty) Ltd, Sanlam Investments (Pty) Ltd and Taquanta Asset Managers (Pty) Limited.