

**SUBMISSION TO PARLIAMENTARY PORTFOLIO COMMITTEE**

**in respect of**

**THE BANKS AMENDMENT BILL [B17-2014]**

**DATE:** 28 January 2015

**TO:** **PARLIAMENTARY PORTFOLIO COMMITTEE**  
**THE COMMITTEE ON FINANCE**

**Attention:** The Chairperson of the Committee  
Hon. YI Carrim MP

c/o Secretary of Committee  
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**FROM:** The Curator of African Bank Limited  
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## 1. Introduction

- 1.1 Thank you for the opportunity to submit comments on the Banks Amendment Bill [B17 - 2014] ("**the Bill**"). The Bill is positive for curatorship in general and is positive for the curatorship of African Bank Limited ("**African Bank**") in particular. I accordingly support the Bill and its contents.
- 1.2 This submission is intended to provide some context for the Portfolio Committee on Finance ("**the Committee**") in its consideration of the Bill, and, following consultation with certain of the creditors of African Bank and senior counsel after the Bill was tabled, I will also suggest some minor amendments which are hoped to improve the Bill.
- 1.3 As you are aware, I have been the curator of African Bank since my appointment on 10 August 2014. I have the statutory powers contained in section 69(2C) of the Banks Act, 1990 ("**Banks Act**") and have been conferred with all the powers listed in section 69(3) of the Banks Act by the Minister of Finance ("**the Minister**"). I therefore have some working knowledge of the utility and necessity of these statutory powers, as well as their limits, when embarking upon the task of nursing a failing bank back to becoming a successful concern.
- 1.4 This submission will be divided into two parts:
- 1.4.1 the first part will explain why the proposed amendments in the Bill are essential to African Bank and without them why African Bank will probably be put into liquidation; and
- 1.4.2 the second part will go through the specific proposed amendments contained in the Bill and explain the reasons for my support, alternatively, my suggested changes and the reasons therefor.
- 1.5 I note at the outset that although this submission focuses on the curatorship of African Bank, the Bill introduces amendments to the Banks Act which are essential for the curatorship of all failing banks and the Bill reflects elements of international best practice for resolving failing banks. It is accordingly necessary to pass the Bill for the benefit of all bank resolutions and the interests of those whom bank resolutions are intended to protect: depositors, creditors and employees, as well as the banking sector as a whole.

## 2. The Amendment Bill is essential to the curatorship of African Bank

- 2.1 By August 2014, African Bank experienced a serious crisis. Its liabilities exceeded its assets and there were real concerns as to whether it would be able to pay its debts as and when they became due. There were grave concerns as to its financial stability and there was a prospect of a crisis for African Bank, its depositors, employees, creditors and the stability of the South African banking sector.
- 2.2 Fortunately, before such a crisis could materialise, the Minister intervened and placed African Bank under curatorship in terms of section 69 of the Banks Act.
- 2.3 I am responsible for nursing African Bank back to health. Or more formally, I am responsible for finding a resolution for African Bank so that it or its successor can continue as a successful concern. I have been working diligently at this since 10 August 2014, the date on which I was appointed.
- 2.4 At the time of my appointment, it was clear to the Minister, National Treasury and the South African Reserve Bank ("**the SARB**") that African Bank could not become a successful concern unless it was put on a new financial footing. As you will be aware it is exceedingly difficult, and in most cases impossible, to find parties willing to provide emergency support to recapitalise a failing bank.
- 2.5 Fortunately, a Consortium (consisting of 6 banks<sup>1</sup> and the Public Investment Corporation) stepped in and agreed to underwrite new equity in the amount of R10 billion to support the business.<sup>2</sup> The Consortium, however, refused to provide this R10 billion to African Bank due to the risks that may be attached to that entity and which were not known to the Consortium. The Consortium only agreed to provide this amount to a new bank to be established (which has been referred to in the press and statements issued by the Minister as "**Good Bank**") and into which certain assets and liabilities of African Bank would be transferred.
- 2.6 The Consortium has taken this approach because if the Consortium had agreed to put R10 billion into African Bank, there was (and is) the serious risk that unknown claims against African Bank would gradually become known. The R10 billion would then be used to settle these claims rather than to provide the necessary liquidity and capital buffer to allow the bank to re-establish itself. This risk is mitigated by putting the new capital into a new legal entity.

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<sup>1</sup> ABSA Bank Limited, Capitec Bank Limited, FirstRand Bank Limited, Investec Bank Limited, Nedbank Limited and The Standard Bank of South Africa Limited.

<sup>2</sup> SARB also agreed to sub-underwrite R5 billion of this and inject some cash into African Bank against security.

- 2.7 The Consortium is the only party to have offered to provide new funding for African Bank, or more specifically, for its business.
- 2.8 It is evident that, unless another party makes a proposal to recapitalise African Bank in the current legal entity and provide it with liquidity, the **only** way of resolving African Bank's continuing business is to dispose of its good assets and transfer liabilities of equivalent value to Good Bank so that the Consortium's support can be retained. Should such a disposal and transfer not be possible, and if no other party is willing to recapitalise and fund African Bank, there is a real possibility that African Bank **will fail and will be put into liquidation.**
- 2.9 The Banks Act, as currently drafted, does not provide for the curator to dispose of assets of the bank outside the ordinary course of its business where such disposal will not reasonably enable the bank, being the existing legal entity, to *inter alia* become a successful concern. As you are no doubt aware, section 69(2C)(b) currently provides that:

*"the curator may not, notwithstanding the provisions of section 112 of the Companies Act -*

*(i) dispose of any of the bank's assets otherwise than in accordance with section 54;*

*(ii) effect a disposal referred to in subsection (i) unless a reasonable probability exists that such disposal will enable the bank to pay its debts or meet its obligations and become a successful concern" (my emphasis).*

- 2.10 **It is evident that, absent the appearance of a third party with capital who is willing to take the risk of recapitalising African Bank in the current legal entity (and no such viable and funded proposal has presented itself since my appointment), nothing can be done to find a resolution for African Bank if the Banks Act is not amended. Section 69(2C)(b) needs to be amended in order to allow me to dispose of the good assets and transfer certain liabilities of African Bank to Good Bank and secure the R10 billion from the Consortium to find a resolution for African Bank.**
- 2.11 I note that the current limitations contained in section 69(2C)(b) of the Banks Act unnecessarily constrain the options available to the curator and do not utilise international best practice for the resolution of banks nor are they consistent with the

proposals published by the Financial Regulatory Reform Steering Committee on 1 February 2013.<sup>3</sup>

- 2.12 The proposed amendments contained in the Bill on the other hand enable the use of a technique consistent with international best practice for the resolution of a bank by forming a new recapitalised entity<sup>4</sup>. This is done in order to give it a fresh start to the bank without the risk of unknown or contingent liabilities arising, which put the resolution of the bank at risk.
- 2.13 Ultimately, if the Bill is not passed, I probably will not be able find a resolution for African Bank. At the moment the current proposed resolution (for the disposal of assets and transfer of liabilities to Good Bank) is the only credible transaction on the table with a reasonable prospect of success. If the Bill is not passed and if no viable alternative solution presents itself, African Bank will probably be placed into liquidation which will, in my opinion, be to the detriment of depositors and creditors (who will recover less of their claims), employees and the multitude of African Bank clients who rely on the bank to meet their finance needs.
- 2.14 Finally, the proposed amendments contained in the Bill will enable the Minister to give curators greater flexibility in rescuing banks, during the time in which the proposals of the Financial Regulatory Reform Steering Committee are being finalised. In this interim period, there will thus be more comprehensive curatorship provisions in the Banks Act which will no doubt serve the interests of depositors, employees, creditors and the South African banking sector as a whole.

### 3. **Comments on the individual clauses**

Please refer to the attached Annexe A which sets out my proposed amendments to the Bill in marked up format. My submissions on the specific clauses in the Bill are set out below. I note that I refer to "sections" below for ease of reference - albeit that I am aware that the Bill only includes clauses which constitute *proposed* amendments to sections.

- 3.1 The proposed amendment to sections 69(2C)(a) and 69(2C)(b) of the Bill enables a curator to transfer the whole or part of the business of a failed bank placed under

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<sup>3</sup>"Implementing a twin peaks model of financial regulation in South Africa" published for public comment by the Financial Regulatory Reform Steering Committee on 1 February 2013.

<sup>4</sup> In particular, the amendments are consistent with Key Attribute 3.3 in "*Key Attributes of Effective Resolution Regimes for Financial Institutions*" published by the Financial Stability Board in October 2011, as amended, which provides that resolution authorities should have the power to transfer selected assets and liabilities of a failed firm to a third party without requiring the consent of any interested party or creditor. The *Key Attributes of Effective Resolution Regimes for Financial Institutions* have been endorsed by the Financial Regulatory Reform Steering Committee.

curatorship to a new entity. Such transfer is allowed notwithstanding that the remaining legal entity will be unable to pay its debts or meet its obligations and become a successful concern. I support this proposal.

3.2 The proposed insertion of section 69(2C)(c) maintains creditor protection without being unnecessarily stifling for the curator concerned. I also support this proposal.

3.3 On the advice of senior counsel, I further suggest removing the guidance given to the Minister or Registrar (as the case may be) in section 69(2C)(d), that the Minister or Registrar should only consent to a transfer or disposal if it is reasonably likely to promote a stable banking sector or public confidence in the banking sector. There is no doubt in my mind that the Minister or Registrar will consider these two factors when deciding whether to consent (so my suggested deletion should not be read as suggesting these factors are not relevant to deciding whether to consent). However, there may be additional factors or alternative factors that are more relevant to consenting to a particular disposal or transfer and the Minister or Registrar should be free to consider these factors as well. My suggested deletion is therefore intended to introduce as much flexibility as possible for the Minister or Registrar so s/he can exercise his or her discretion reasonably (as s/he is already required to do).

3.4 The proposed amendment to section 69(3)(f) allows a curator to make decisions in respect of a failed bank placed under curatorship, which would ordinarily require the approval of the shareholders of the bank's holding company. This proposal is made so that the curator is not prevented from performing his or her duties by shareholders of the bank's holding company, whose interests may naturally conflict with the objectives of the curatorship. I support this proposed amendment as, given the holding structure of all registered banks in South Africa (that is, where the public holds shares in a holding company and not directly in a bank), the existing section 69(3)(f) does not enable the Minister to empower the curator in the manner that the legislature originally intended.

3.5 The addition of section 69(3)(j) allows a curator to raise funds from either the SARB, or any entity under its control, and to provide security over the assets of the bank under curatorship in respect of such funding without prejudicing the existing real security rights of any creditor of the bank. The curator's ability to raise funds is essential to the successful resolution of any failed bank placed under curatorship. I accordingly support the proposal.

4. Thank you once again for this opportunity to make submissions on the Bill. Should you have any queries or require greater amplification on an issue addressed in this

submission, my representatives, who will make oral submissions to you at the public hearings on the Bill, will be happy to be of assistance.

**Mr Tom Winterboer**  
**28 January 2015**

REPUBLIC OF SOUTH AFRICA

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# BANKS AMENDMENT BILL

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*(As introduced in the National Assembly (proposed section 75); explanatory summary of  
Bill published in Government Gazette No. 38247 of 25 November 2014)  
(The English text is the official text of the Bill)*

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(MINISTER OF FINANCE)



- (ii) a reasonable probability exists that ~~an~~ creditor will ~~not~~ incur greater losses, as at the date of the proposed disposal, transfer or disposal and transfer, than would have been incurred if the bank had been wound up under section 68 of this Act on the date of the proposed disposal, transfer or disposal and transfer. 5
- (d) The Minister or the Registrar, as the case may be, must, in addition to the requirements of section 54, consider the curator's report as provided in paragraph (c) in making his or her decision in terms of section 54: Provided that the Minister or the Registrar, as the case may be, may consent to the disposal, transfer or disposal and transfer, 10  
 notwithstanding the fact that the effects in paragraph (c)(i) ~~and~~ (ii) are not ~~satisfied, achieved" the Minister may, subject to section 54, consent to the disposal, transfer or disposal and transfer if it is, in his or her opinion, reasonably likely to promote the maintenance of —~~  
~~(i) a stable banking sector in the Republic; or~~  
~~(ii) public confidence in the banking sector in the Republic.';~~
- (b) by the substitution in subsection (3) for paragraph (f) of the following paragraph: 15  
 “(f) to make and carry out [ **in the course of the curator's management of the bank concerned,**] any decision in respect of the bank which in terms of the provisions of the Companies Act, [or] the bank's memorandum of incorporation or the rules of any securities exchange, on which any securities of the bank or its controlling company are listed, would have [been] required [to be made by way of] an ordinary resolution or a special resolution [contemplated in section 65 of the said Act and in terms of the bank's memorandum of incorporation] of shareholders of the bank or its controlling company;” 20
- (c) by the substitution in subsection (3) for paragraph (i) of the following paragraph: 25  
 “(i) to cancel any guarantee issued by the bank concerned prior to its being placed under *curatorship*, excluding such guarantee which the bank is required to make good within a period of 30 days as from the date of the appointment of the curator: Provided that, notwithstanding the provisions of subsection (6), a claim for damages in respect of any loss sustained by or damage caused to any person as a result of the cancellation of a guarantee in terms of this paragraph, may be instituted against the bank after the expiration of a period of one year as from the date of such cancellation[.]; and”; and 30
- (d) (by the addition in subsection (3) of the following paragraph: 35  
 “(j) to raise funding from the Reserve Bank, or any entity controlled by the Reserve Bank, on behalf of the bank and, notwithstanding any contractual obligations of the bank, but without prejudice to existing real security rights, to provide security over the assets of the bank in respect of such funding: Provided that, notwithstanding the provisions of subsection (6), any claim for damages in respect of any loss sustained by, or damage caused to any person as a result of such security, may be instituted against the bank after the expiration of a period of one year as from the date of such provision of security.” 40

#### Short title, commencement and application

1. This Act is called the Banks Amendment Act, 2014 and comes into operation upon publication by the President in the Government Gazette.
2. Where, upon the coming into operation of this Act, there is a curatorship already in force in terms of the Banks Act, the provisions of this Act will apply to the curatorship concerned.

**DRAFT MEMORANDUM ON THE OBJECTS OF THE BANKS  
AMENDMENT BILL, 2014**

**1. BACKGROUND**

- 1.1 The mission of the Bank Supervision Department (“BSD”) is to promote the soundness of the banking system and contribute to financial stability. A sound banking system and financial stability are two of the prerequisites for the attainment of the mission of the South African Reserve Bank (“SARB”) which is “the achievement and maintenance of price stability”.
- 1.2 In order to promote the soundness of the banking system it is imperative that the regulation and supervision of banks are based on international standards and best practice. The framework for the regulation and supervision of banks and bank controlling companies in South Africa is contained in the Banks Act, 1990 (Act No. 94 of 1990) (“the Banks Act”), together with the regulations relating to banks made in terms of section 90 of the Banks Act.
- 1.3 Although the Banks Act contains extensive provisions relating to the resolution of a failed bank and concomitant powers afforded to the curator appointed to effect such resolution, it has become necessary to revise some of the provisions of section 69 of the Banks Act that are unnecessarily stifling such resolution efforts.

**2. OBJECTS OF BILL**

The objects of the Bill are to—

- (a) provide an alternative to the recovery of a bank within the existing corporate entity;
- (b) facilitate the transfer of all or part of a bank’s business to a successor entity pursuant to a transfer under section 54 of the Banks Act; ~~and~~
- (c) facilitate the provision of emergency funding to a bank by the SARB on a secured basis; and
- ~~(e)~~(d) facilitate the implementation of the above steps by the curator.

**3. PROPOSED AMENDMENTS**

- 3.1 Power of curator to dispose of assets:
- (a) Although the curator is, amongst others, permitted to dispose of assets of the bank under curatorship pursuant to section 54 of the Banks Act, section 69(2C)(b)(ii) of the Banks Act, however, provides that such a disposal should enable the bank to pay its debts or meet its obligations and become a successful concern. In the context of a failed bank placed under curatorship, the requirement of becoming “a successful concern” as a result of a disposal of assets from such bank is illogical and unnecessarily stifling to any resolution process proposed by a curator.
- (b) It is therefore proposed that section 69(2C) of the Banks Act be amended (clause 1(a) of the Bill) to enable the curator to enter into transactions in which the business of the bank is, in whole or part, transferred in circumstances where a reasonable probability exists that ~~the transferee entity will be able to meet the transferred liabilities and that~~ as a result of the transfer the bank’s creditors will not incur greater losses as a result of such transfer than would have been incurred if the bank had been wound up under section 68 of the Banks Act on the date of the proposed transfer. This will enable the ~~transfer~~disposal of assets and transfer of liabilities of a bank under curatorship in terms of a prudent and responsible framework without the unnecessarily restrictive provision that the transfer would enable such a bank to “become a successful concern”.
- 3.2 Powers of the curator to manage the bank:
- (a) Section 69(3) of the Banks Act enables the Minister to empower the curator, subject to conditions, to perform specified powers in respect of the bank. The curator may make decisions ~~on behalf in respect~~ in respect of the bank’s, ~~which would ordinarily require the approval of the bank’s shareholders during the course of the management of the bank.~~ This power does not extend to ~~a bank having corporate shareholders~~ decisions which require the approval of the shareholders of a bank’s holding company. It is proposed to amend section 69(3)(f) (clause 1(b) of the Bill) that the curator should also be able to make decisions ~~on behalf of corporate shareholders~~ in respect of the bank which would otherwise require

[the approval of the shareholders of the bank's holding company](#), in order to avoid additional fetters on his or her ability to perform his or her duties.

- (b) It is proposed to empower the Minister to enable the curator to raise funds [from either the Reserve Bank or any entity under its control](#) and provide security over the assets in respect of such funding [\(without prejudicing existing real security rights\)](#) (addition of paragraph (j) to section 69(3) in clause 1(c) of the Bill). Section 69(6) provides that while a bank is under curatorship, all legal processes against the bank are stayed and may not be instituted or proceeded with without leave of the court. Like in the case of section 69(3)(g) and (i), it is also proposed in section 69(3)(j) to override section 69(6) and to allow the institution of claims against the bank for damages in respect of any loss sustained by, or damages caused to any person as a result of the security after the expiry of a period of one year from the date of the provision of the security.

#### 4. ORGANISATIONS AND INSTITUTIONS CONSULTED

Consultation with various stakeholders was undertaken which include the South African Reserve Bank, the Registrar of Banks, individual banks and auditing firms.

#### 5. APPLICATION

[The Bill, once enacted, will apply to curatorships already in force in terms of the Banks Act so that the provisions of the Banks Act will apply to the curatorship concerned.](#)

#### 5.6. FINANCIAL IMPLICATIONS FOR STATE

The Bill will expedite the curatorship of African Bank Limited, and will thus reduce the possible financial liability to the State in the event that African Bank Limited fails.

#### 6.7. CONSTITUTIONAL IMPLICATIONS

None.

#### 7.8. PARLIAMENTARY PROCEDURE

~~7.1~~[8.1](#) The State Law Advisers and the National Treasury are both of the opinion that this Bill must be dealt with in ~~terms in~~ accordance with the procedure established by the provisions of section 75 of the Constitution of the Republic of South Africa, 1996, since it contains no provision to which the procedure set out in section 74 or 76 of the Constitution applies.

~~7.2~~[8.2](#) We have considered the tagging of the Bill in light of Chapter 4 of the Constitution of the Republic of South Africa, 1996 (“the Constitution”), which provides for procedures that Bills must follow in Parliament. Section 75 deals with ordinary Bills not affecting provinces.

~~7.3~~[8.3](#) The Constitutional Court judgement in the case of [Stephen Segopotsa Tongoane and Others v Minister for Agriculture and Land Affairs and Others CCT 100/9 \[2010\] ZACC 10](#) at paragraphs 70 and 72, stated that—

*“the test for determining how a Bill is to be tagged must be broader than that for determining legislative competence. Whether a Bill is a section 76 Bill is determined in two ways. First by the explicit list of legislative matters in section 76(3), and second by whether the provisions of a Bill in substantial measure fall within a concurrent legislative competence.”*

~~7.4~~[8.4](#) This test compels us to consider the substance, purpose and effect of the subject matter of the proposed Bill. This Bill seeks to provide an alternative to the recovery of a bank within the existing corporate entity, to facilitate the transfer of all or part of a bank’s business to a successor entity pursuant to a transfer under section 54 of the Banks Act and to facilitate the implementation of the said measures by the curator. These matters do not fall within any of the matters listed in section 76(3) of, or Schedule to, the Constitution. In our view this Bill is therefore an ordinary Bill not affecting the provinces as envisaged in section 75 of the Constitution.

| ~~7.58.5~~ 7.58.5 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 the provisions 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.