OPINION

on

THE CONSTITUTIONALITY OF THE BANKS AMENDMENT BILL

for

ALLEN & OVERY LLP

Lionel Shaw

by

Alfred Cockrell SC and Isabel Goodman

10 March 2015

TABLE OF CONTENTS

INTRODUCTION

Background

1. Our advice is sought by a group of creditors ("the Subordinated Noteholders") which hold Tier 2 debt instruments issued by African Bank Limited ("ABL").

2. ABL was placed under curatorship on 10 August 2014. The curator has proposed that a new operating entity be established, which will be registered as a bank and recapitalised. The curator's stated intention is that the "good assets" and "good debt" in ABL will be transferred to the new bank, while the under- or non-performing assets and the debt owed to the Subordinated Noteholders will be retained in the existing entity ("the Proposal").

3. We are instructed that the Proposal cannot lawfully be implemented under the existing provisions of the Banks Act 94 of 1990 ("the Banks Act").

4. On 25 November 2014, a draft Banks Amendment Bill ("the Bill") was published in the Government Gazette. It appears that one of the purposes of the Bill is to remove the existing legislative impediments to the Proposal.

Questions for consideration

5. The Subordinated Noteholders seek our advice regarding the constitutionality of certain clauses of the Bill.

6. The version of the Bill with which we have been briefed, states on its cover page: "*as introduced in the National Assembly*". It is this version of the Bill

that we consider below. It seems likely that the Bill will be amended during the parliamentary process, in which case the conclusions in this opinion would have to be reconsidered.

THE IMPUGNED CLAUSES OF THE BILL

7. Section 69 of the Banks Act deals with the appointment of curators to banks. The Bill proposes two amendments to s 69 that are of concern to the Subordinated Noteholders.

8. The first proposed amendment is to s 69(2C) of the Banks Act. If the amendment were to be enacted, s 69(2C) would provide as follows:

> "(a) Notwithstanding the provisions of subsection (3), the curator may:
>
> (i) dispose of the bank's assets;
>
> (ii) transfer any of its liabilities; or
>
> (iii) dispose of any of its assets and transfer any of its liabilities,
>
> in the ordinary course of the bank's business.
>
> (b) Except in the circumstances contemplated in paragraph (a), the curator may not, notwithstanding the provisions of section 112 of the Companies Act –
>
> (i) dispose of any of the bank's assets;
>
> (ii) transfer any of its liabilities; or
>
> (iii) dispose of any of its assets and transfer any of its liabilities,
>
> otherwise than in accordance with section 54.
>
> (c) In seeking consent for a disposal of assets or transfer of liabilities or such disposal and transfer in terms of paragraph (b), the curator shall report to the Minister and the Registrar, as the case may be, on the expected effect on the bank's creditors and <u>whether –</u>
>
> <u>(i) the creditors are treated in an equitable manner; and</u>

(ii) a reasonable probability exists that the creditor will not incur greater losses, as 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.

(d) The Minister 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 notwithstanding the fact that the effects in paragraph (c)(i) and (ii) are not satisfied [sic], 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."

(our emphasis)

9. The second proposed amendment involves the addition of subsection (j) to s 69(3) of the Banks Act. If the amendment were to be enacted, s 69(3)(j) would provide as follows:

"*(j)* to raise funding on behalf of the bank and, notwithstanding any contractual obligations of the bank, 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 caused to any person as a result 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."

(our emphasis)

10. If enacted, the amendments would substantially expand the powers of the curator and the Minister in relation to a bank under curatorship. Three aspects of the expanded powers are of particular concern to the Subordinated Noteholders:

10.1. *First*: under s 69(2C) of the Banks Act in its current form, the curator is not authorised to transfer liabilities out of a bank. Similarly, the curator is currently not authorised in terms of s 69(2C) to split the bank's assets from its liabilities, or to hive off some of the assets and liabilities for preferential treatment. The proposed amendments will authorise the curator to do any of these things outside of the ordinary course of the bank's business, as long as the transaction is approved by the Minister in terms of s 54.

10.2. *Second:* if the proposed s 69(2C) were to be enacted, the Minister would be authorised to approve the transfer of assets or liabilities (or the transfer of assets and liabilities) on substantially altered grounds. Under s 69(2C)(b)(ii) of the Banks Act as it stands, the curator may only dispose of the bank's assets outside of the ordinary course of business where it is reasonably probable that the disposal will enable the bank under curatorship to pay its debts or to meet its obligations and become a successful concern. This requirement will be repealed by the Bill. In place thereof, the curator will be required to report to the Minister on whether the proposed transfer will treat creditors equitably and whether they are not likely to incur greater losses than they would have incurred had the bank been wound up on the date of the proposed transfer. The Minister may approve a transfer that treats creditors inequitably or places them in a worse position than they would have been if the bank were liquidated, provided that he considers this to be in the interests of banking stability or public confidence in the banking sector.

10.3. *Third*: if the amendments were to be enacted, the proposed s 69(3)(j) would authorise the curator to override the contractual obligations of the bank by raising new funding and providing security over the assets of the bank in respect of such funding. Assume, for example, that bank X has borrowed money from Y without furnishing security and that the loan contract prohibits X from encumbering its assets in the event of further borrowing. The proposed s 69(3)(j) means that the curator of X could ignore that contractual prohibition and could provide security over X's assets when borrowing money from Z. This is likely to prejudice Y, since Y would rank after Z in the event that X were to be wound up. Although Y would be afforded a right to sue X for damages a year later for any losses it suffered as a result of the new security, by that time the assets in X may well be insufficient to satisfy any claim for damages.

11. The Subordinated Noteholders consider that the use of these provisions would be prejudicial to their interests, and that there are more equitable ways to address the recapitalisation of ABL.

RETROSPECTIVITY AND INTERFERENCE WITH CONTRACTUAL RIGHTS

12. We begin by considering whether the provisions of the Bill would be susceptible to constitutional challenge on the basis that they operate retroactively or retrospectively, so as to deprive the Subordinated Noteholders of vested contractual rights.

The constitutional principles

13. The Supreme Court of Appeal has explained the distinction between "retroactive" and "retrospective" legislation as follows:

> "A retroactive statute is one that operates as of a time prior to its enactment. A retrospective statute is one that operates for the future only. It is prospective, but it imposes new results in respect of a past event. A retroactive statute operates backwards. A retrospective statute operates forwards, but it looks backward in that it attaches new consequences for the future to an event that took place before the statute was enacted. A retroactive statute changes the law from what it was; a retrospective statute changes the law from what it otherwise would be with respect to a prior event."[1]

14. Retrospective or retroactive legislation is not necessarily unconstitutional in a civil context:

14.1. The Constitution provides that it is unconstitutional for legislation retrospectively to criminalise conduct that took place prior to the commencement of the statute,[2] or to operate retrospectively in a manner that renders a criminal trial unfair.[3]

14.2. However, there are no equivalent constitutional provisions imposing a bright-line rule that limits the permissibility of retrospective

---

1 *National Director of Public Prosecutions v Carolus and Others* 2000 (1) SA 1127 (SCA) at para 34. See also *National Director of Public Prosecutions v Basson* 2002 (1) SA 419 (SCA) para 1; *Du Toit v Minister for Safety and Security and Another* 2009 (6) SA 128 (CC) paras 33-35.

2 Section 35(3)(l) provides that an accused person has a right not to be convicted of an act or omission that was not an offence at the time of commission. See *Masiya v Director of Public Prosecutions, Pretoria and Another (Centre for Applied Legal Studies and Another, Amici Curiae)* 2007 (5) SA 30 (CC) paras 47 – 57 and *Savoi and Others v NDPP* 2014 (5) SA 317 (CC) paras 75-78, describing the rationale underpinning the rule.

3 See *Veldman v DPP, Witwatersrand Local Division* 2007 (3) SA 210 (CC)

legislation in a civil context. To the contrary, the Constitutional Court has interpreted and applied retrospective provisions without adverse comment.[4] It appears that there is nothing intrinsically offensive in imposing civil obligations retrospectively.

14.3. Foreign jurisprudence suggests that the use of retrospective legislation will not necessarily violate constitutional guarantees in circumstances where no criminal penalties are imposed. The Court of Appeal in England and Wales has stated that "there is no general principle under the European Charter of Human Rights that changes in civil law should not operate retrospectively."[5] Similarly, the position in Canada has been summarised as follows:[6]

> "Apart from s 11(g) [of the Canadian Charter, which applies to criminal offences], Canadian constitutional law contains no prohibition on retroactive (or ex post facto) laws…. Retroactive statutes are in fact common. For example, a taxation law is often made retroactive to budget night, when the law was publicly proposed; otherwise, there would often be room for avoidance action by taxpayers during the hiatus between the budget and the enactment of the law. Another common example is a retroactive statute to change the law as it has been declared to be in a judicial decision: a law that has been interpreted in an unexpected way, or has been held to be invalid on remediable grounds, may be amended or invalidated retrospectively to restore the legal position to what it was believed to be before the judicial decision. The power to enact retroactive laws, if exercised with appropriate restraint, is a proper tool of modern government."

---

4 See, for example, *Du Toit* (supra) para 33.

5 *Heil v Rankin* [2000] 3 All ER 138 (CA) para 49:

6 Hogg *Constitutional Law of Canada* 3rd ed (1992) para 48.8

15. Although there is no general constitutional objection to the use of retrospective legislation in the civil context, legislation may be constitutionally offensive if its effect is to unsettle existing transactions in a manner that is inconsistent with the rule of law. We say so for the following reasons:

15.1. The rule of law is entrenched in s 1(c) of the Constitution. The rule of law requires, among other things, that the law must be certain and accessible, so that people can regulate their affairs in accordance with its prescripts.[7]

15.2. Retrospective legislation has the potential to undermine the rule of law by negating the ability of people to regularise their affairs in the shadow of the law. In *R v Nova Scotia Pharmaceutical Society* 10 CRR (2d) 34 the Canadian Supreme Court stated that "the rule of law" is based on "the principles of fair notice to citizens". A similar point was made by Mokgoro J in *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC) para 102:

> "The need for accessibility, precision and general application flow from the concept of the rule of law. A person should be able to know of the law, and be able to conform his or her conduct according to the law."

15.3. The rule-of-law objection to retrospective legislation is that it may undermine the ability of people to plan their conduct in the light of

---

7 *Affordable Medicines* at para 108; *Bertie van Zyl (Pty) Ltd and Another v Minister for Safety and Security and Others* 2010 (2) SA 181 (CC) para 22, 47; *South African Liquor Traders' Association and Others v Chairperson, Gauteng Liquor Board, and Others* 2009 (1) SA 565 (CC) para 27; *National Credit Regulator v Opperman and Others* 2013 (2) SA 1 (CC) para 46; *Veldman* para 60-62; *Savoi* para 73.

what the law demands.[8] The reason is obvious: "[o]ne cannot be guided by a retroactive law". [9]

15.4. The point is made by De Smith, Woolf and Jowell[10] in a passage that was quoted with approval in *Pharmaceutical Manufacturers Association of South Africa: In Re ex parte President of the Republic of South Africa* 2000 (2) SA 674 (CC) para 39:

> "The scope of the rule of law is broad. It has managed to justify - albeit not always explicitly - a great deal of the specific content of judicial review, such as the requirements that laws as enacted by Parliament be faithfully executed by officials; that orders of court should be obeyed; that individuals wishing to enforce the law should have reasonable access to the courts; that no person should be condemned unheard, and that power should not be arbitrarily exercised. In addition, the rule of law embraces some internal qualities of all public law: That it should be certain, that is, ascertainable in advance so as to be predictable and not retrospective in its operation; and that it be applied equally, without unjustifiable differentiation." (our emphasis)

15.5. The principles at stake were conveniently summarised in *Veale v Law Society of Alberta* [2002] 89 CRR (2d) 68 at 91-92:

> "Retrospective legislation, and particularly that which eradicates vested rights or imposes criminal penalties has, even before the Charter, been taken to seriously offend not only the principles of natural justice but also the rule of law. The primary justification for the presumption against interfering with vested rights was clear even in Lord Coke's day, as explained by Duff J. in Upper Canada College v. Smith, supra, at p. 417 S.C.R.:
>
> > 'The well-known passage may be recalled in which Lord Coke (2 Inst. 292) lays it down

---

8 *Bareki NO v Gencor Ltd* 2006 (1) SA 432 (T) at 439C-D

9 "The Rule of Law and its Virtue" (1977) 93 *Law Quarterly Review* 195 at 198

10 De Smith, Woolf and Jowell *Judicial Review of* Administrative *Action* 5th ed (1995) at 14-15 (footnotes omitted)

> that . . . statutory enactments generally are to be regarded as intended only to regulate the future conduct of persons [and] is, as Parke B. said in Moon v. Durden [(1848), 2 Ex. 22 at pp. 42 and 43],
>
> > "deeply founded in good sense and strict justice"
>
> because speaking generally it would not only be widely inconvenient but
>
> > "a flagrant violation of natural justice"
>
> to deprive people of rights acquired by transactions perfectly valid and regular according to the law of the time.'
>
> ...
>
> I have no doubt that retrospective legislation, at least presumptively, offends the principles of fundamental justice because it falls foul of such basic tenets and principles of our legal system as the rule of law and of natural justice, which are encompassed by s. 7."

16. The rule-of-law objection to retrospective legislation applies with particular force to legislation that interferes with vested contractual rights. The purpose of contractual arrangements is to allow parties to plan for the future. If legislation is enacted that unsettles existing contracts, then contracting parties are necessarily deprived of their ability to plan for the future by relying on their agreements. The enactment of legislation that allows for the unsettling of vested contractual rights is therefore particularly vulnerable to challenge on the grounds that it offends the rule of law.

17. If the proposed amendments to s 69 of the Banks Act were to be enacted, they would authorise the curator and the Minister to unsettle existing contracts and to expose creditors to new consequences that could not have been foreseen when they entered into their contracts with ABL, and which would not have been factored into the pricing of those contracts. This

renders the proposed amendments liable to challenge on the grounds that they contravene the rule of law.

18. Against that background, we turn to consider the proposed s 69(2C) and the proposed s 69(3)(j) in turn.

19. In doing so, we have considered the terms of the Programme Memoranda for:

- ABL's R3 500 000 000 Domestic Medium-Term Note Programme dated 10 September 2001,

- ABL's R15 000 000 000 Domestic Medium-Term Note Programme dated 19 May 2011, and

- ABL's R25 000 000 000 Domestic Medium-Term Note Programme dated 1 June 2012

(collectively "the Programme Memoranda").

20. We have also reviewed the Pricing Supplements for the ABLS2A Notes, the ABLS2B Notes, the ABLS3 Notes (both in their original form and as amended), the ABLS4 Notes (both in their original form and as amended) and the ABLS5 Notes (tranches 1, 2 and 3). We shall refer to these collectively as "the Pricing Supplements".

21. Our assessment is based on the content of the Memoranda and the Pricing Supplements.

The proposed section 69(2C)

22. The proposed s 69(2C) provides for various powers that may be exercised by a curator or invoked by the Minister. There is nothing objectionable about this provision to the extent that it applies prospectively and does not seek to attach new consequences to events that took place before the Bill was enacted.

23. However, the position is different to the extent that the proposed s 69(2C) operates retrospectively by allowing the curator and the Minister to alter rights and obligations deriving from agreements that were concluded before the enactment of the Bill. To this extent, the proposed s 69(2C) contemplates the imposition of "new results in respect of a past event".[11] It is the retrospective operation of the proposed s 69(2C) that forms the subject matter of the discussion below.

24. The proposed s 69(2C) fundamentally changes the basis on which the curator and the Minister are required to exercise their powers. The current regime provides for the curator to dispose of assets only if the disposal is reasonably likely to enable the bank to pay its debts and to become a successful concern. The Bill removes that prerequisite. Instead it requires the curator and the Minister to consider whether creditors will be treated "equitably" or will be placed in no worse a position than they would have been if the bank had been wound up. Even if creditors will be treated inequitably or will be worse off than they would have been in a winding-up,

---

[11] *National Director of Public Prosecutions v Carolus and Others* 2000 (1) SA 1127 (SCA) at para 34.

the Minister may nevertheless approve the transfer as long as he is of the opinion that the requirements in the proposed s 69(2C)(d) are satisfied.

25. We are instructed that the curator and the Minister rely on those provisions of the Bill for at least two purposes:

25.1. In the first instance, the Proposal involves the subordination of the Subordinated Noteholders to the Senior Noteholders in circumstances where ABL is not in liquidation. In order to implement this aspect of the Proposal, the curator and the Minister will be required to consider whether the subordination involves treating creditors "in an equitable manner". If the subordination involves the Subordinated Noteholders being treated "in an inequitable manner", this will nevertheless be permitted as long as the Minister satisfies himself of the matters listed in the proposed s 69(2C)(d).

25.2. In the second instance, the curator has sought to justify the Proposal on the basis that it will leave the Subordinated Noteholders "no worse off" than if ABL were liquidated.[12] In order to implement the Proposal, the curator and the Minister will be required to consider whether creditors will not incur greater losses

---

[12] We are instructed that in a letter to Investec Asset Management (Pty) Ltd on 28 November 2014, the curator stated that

> "… the alternative available to the creditors of African Bank would have been a liquidation of the assets of African Bank, either through curatorship as a run off arrangement, or through formal liquidation. Under a liquidation or run off scenario, you will recognise that any recovery of value for the sub-ordinated debt holders would fall after that of the other creditors of African Bank. The announcement of 10th August and later comment has been consistent with this approach, seeking to ensure that no creditor is worse off under the announced approach than under the liquidation or run off scenarios available."

on the date of the transfer than they would have suffered if ABL had been wound up on that date (the "*no worse off*" principle).

26. In our view, each of these powers allows the curator and the Minister to override the vested rights that vest in the Subordinated Noteholders under their existing contractual arrangements. We say so for the reasons that follow.

Subordination in the absence of a winding-up

27. The Appellate Division has described subordination agreements as follows:

> "The essence of a subordination agreement, generally speaking, is that the enforceability of a debt, by agreement with the creditor to whom it is owed, is made dependent upon the solvency of the debtor and the prior payment of its debts to other creditors.
>
> Subordination agreements may take many forms. They may be bilateral, ie between the debtor and the creditor. They may be multilateral and include other creditors as parties. They may be in the form of a stipulatio alteri, ie for the benefit of other and future creditors and open to acceptance by them. The subordination agreement may be a term of the loan or it may be a collateral agreement entered into some time after the making of the loan.
>
> Save possibly in exceptional cases, the terms of a subordination agreement will have the following legal effect: the debt comes into existence or continues to exist (as the case may be), but its enforceability is made subject to the fulfilment of a condition. Usually the condition is that the debt may be enforced by the creditor only if and when the value of the debtor's assets exceeds his liabilities, excluding the subordinated debt. The practical effect of such a condition, particularly where, for example, the excess is less than the full amount of the subordinated debt, would depend upon the

> terms of the specific agreement under consideration and need not now be considered."[13]

28. As this dictum makes clear, the scope and effect of a subordination agreement must be established by interpreting the contractual provisions in question.[14] In the present circumstances, that involves interpreting the Programme Memoranda and the Pricing Supplements.

29. The following provisions of the Programme Memoranda are relevant to this interpretive exercise:

    29.1. The Programme Memoranda (read with the Pricing Supplements) confer rights on the Subordinated Noteholders to the payment of interest and capital in certain circumstances and at particular times. A failure to pay interest or capital on the due date constitutes an event of default under the Programme Memoranda.

    29.2. Condition 3 of the Programme Memoranda deals with the status of Senior Notes. It provides as follows:

> "The Senior Notes are direct, unconditional, unsubordinated and unsecured obligations of the Issuer [that is, ABL] and rank *pari passu* among themselves and, subject to Condition 4 and save for certain debts required to be preferred by law, equally with all other present and future unsecured and unsubordinated obligations of the Issuer from time to time outstanding."

---

13 *Ex Parte De Villiers and Another NNO: in re Carbon Developments (Pty) Ltd (in liquidation)* 1993 (1) SA 493 (A) at 504G-I.

14 See, in this regard, *Cape Produce Co (Port Elizabeth) (Pty) Ltd v Dal Maso and Another NNO* 2002 (3) SA 752 (SCA), particularly at paras 6-8, where the legal effect of a subordination clause was determined through the ordinary process of contractual interpretation.

29.3. Condition 5 of the Programme Memoranda described the Subordinated Notes as

> "direct, unconditional, unsecured and subordinated obligations of the Issuer [that] rank *pari passu* among themselves and at least *pari passu* with all other present and future unsecured and subordinated obligations of the Issuer, save for those that have been accorded preferential rights be law."

29.4. Condition 5 of the Programme Memoranda provides that the claims of Subordinated Noteholders will be subordinated to those of the Senior Noteholders if ABL were to be dissolved, wound up or liquidated. It states as follows:

> "Subject to applicable law, in the event of the dissolution of the Issuer or if the Issuer is placed in liquidation or wound-up, the claims of persons entitled to be paid amounts due in respect of the Subordinated Notes shall be subordinated to all other claims in respect of any other indebtedness of the Issuer except for other Subordinated Indebtedness. Accordingly, in any such event, and provided, as aforesaid, no amount shall be eligible for set-off or shall be payable to any or all persons entitled to be paid amounts due in respect of the Subordinated Notes in respect of the obligations of the Issuer thereunder until all other indebtedness of the Issuer which is admissible in any such dissolution, insolvency or winding-up (other than the Subordinated Indebtedness) has been paid or discharged in full."[15]
> (our emphasis)

---

[15] The June 2012 amendment to the programme terms provided that the rights of the subordinated creditors would be subordinated on the commencement of business rescue proceedings, as well as on dissolution, winding-up or liquidation.

29.5. This provision gives effect to Regulation 38(14)(b)(vi) of the 2008 Regulations[16] and of the 2012 Regulations.[17]

30. The effect of these provisions may be summarised as follows:

30.1. The Subordinated Notes rank below the Senior Notes in the event of a dissolution, liquidation or winding-up of ABL. In other words, the claims of the Subordinated Noteholders will be subordinated to the claims of the Senior Noteholders if ABL were to be dissolved, liquidated or wound up.

30.2. In the absence of a dissolution, liquidation or winding-up of ABL, there is nothing in the Programme Memoranda that would permit ABL to prefer the Senior Noteholders over the Subordinated Noteholders. In circumstances where a Subordinated Noteholder has an accrued right to the payment of interest or capital, ABL could not lawfully refuse to comply with that contractual obligation in order to pay a Senior Noteholder in preference. The failure to pay interest or capital to the Subordinated Noteholder in such circumstances would constitute an event of default.

31. The Pricing Supplements with stock codes ABLS2A and ABLS2B do not make any material alterations to the terms of the Programme Memoranda. The consequences set out in paragraph 30 above therefore apply. In other words, the claims of the Subordinated Noteholders could not be

---

16 Published in Government Gazette No 30629 of 1 January 2008.

17 Published in Government Gazette No 34838 of 15 December 2011

subordinated to those of the Senior Noteholders in the absence of a dissolution, liquidation or winding-up of ABL.

32. The position regarding the Pricing Supplements with stock codes ABLS3, ABLS4 and ABLS5 is more complicated, since these Pricing Supplements contain two additional terms:

32.1. The first is a term which provides that, where any amounts are due and payable under the Senior Notes, such amounts must be settled in full before any amount due and payable under the Subordinated Notes are paid. This term applies in circumstances where the claims of a Senior Noteholder and a Subordinated Noteholder are due and payable at the same time, and ABL is unable to discharge both liabilities. The term has no application in circumstances where amounts are not due and payable under the Senior Notes.

32.2. The second is a term which provides that in the event of a failure by ABL to pay interest or capital on the due date, the only remedy available to the Subordinated Noteholder is to apply for ABL's winding-up. We have indicated above that, in terms of the Programme Memoranda, the effect of such a winding-up is that the Subordinated Noteholders' claims would be subordinated to those of the Senior Noteholders. However, the Subordinated Noteholders would not be obliged to apply for the winding-up of ABL in such circumstances. If ABL were to default on the payment of interest or capital, the Subordinated Noteholders might conceivably elect not to apply for a winding-up in the hope that

ABL's financial position may improve. In that event, the claims of the Subordinated Noteholder would not be subordinated.

32.3. It follows that the Pricing Schedules do not alter the fact that the claims of Subordinated Noteholders holding notes under stock codes ABLS3, ABLS4 and ABLS5 are not subordinated in the absence of a dissolution, liquidation or winding-up of ABL.

33. We conclude that the Programme Memoranda and Pricing Supplements do not entitle ABL to subordinate the claims of the Subordinated Noteholders in the absence of a dissolution, liquidation or winding-up. Since ABL has not been dissolved, liquidated or wound-up, the claims of the Subordinated Noteholders could not be subordinated at the present time.

34. The next question is whether s 69 of the Banks Act empowers the curator to subordinate the claims of the Subordinated Noteholders at the present time even though this is not contemplated by the Programme Memoranda and Pricing Supplements:

34.1. Section 69(3)(a) of the Banks Act provides that the Minister may empower the curator to "suspend or reduce … the right of creditors of the bank concerned to claim or receive interest on any moneys owing to them by that bank". Significantly, this provision does not refer to the payment of capital. Moreover, it does not envisage the extinguishing of any contractual obligation to pay interest – it appears that interest continues to accrue, but the right to claim such interest is merely held in abeyance.

34.2. Section 69(3)(b) of the Banks Act provides that the Minister may empower the curator to "make payments, whether in respect of capital or interest, to any creditor or creditors of the bank concerned at such time, in such order and in such manner as the curator may deem fit." Section 69(3)(b) allows the curator to prioritise certain creditors for early payment. However, s 69(3)(b) probably does not authorise the curator to extinguish a claim for interest or capital that has already fallen due, since otherwise s 69(3)(a) would be redundant.

34.3. It follows that s 69(3) of the Banks Act probably does not empower the curator to subordinate the claims of Subordinated Noteholders in circumstances not contemplated in the Programme Memoranda and the Pricing Supplements.

34.4. But even if the preceding conclusion is incorrect, the powers listed in s 69(3) would have to be read subject to the other provisions of s 69. They include s 69(2D), which provides that the curator must forthwith notify the Registrar if he is of the opinion that "there is no reasonable probability that the continuation of the curatorship will enable the bank to pay its debts or meet its obligations and become a successful concern". They also include s 69(2C)(b)(ii), which provides that the curator may not dispose of ABL's assets outside of the ordinary course of business unless there is a reasonable probability that this will enable ABL to pay its debts and become a successful concern. In our view, the effect of these provisions is that the curator could not exercise any power he might have in

terms of section 69(3) so as to subordinate the claims of Subordinated Noteholders in circumstances not contemplated in the Programme Memoranda and the Pricing Supplements, if such subordination means that ABL would not become a successful concern.

34.5. In other words, even if the curator had the power in terms of s 69(3) to prefer the claims of Senior Noteholders over those of Subordinated Noteholders, he could only invoke that power to advance the objective of the curatorship – which is to return ABL to being a successful concern that can meet all of its obligations. He could thus only prefer creditors for payment if his election to do so was rationally related to the aim of making ABL a successful concern. He could not select creditors for payment in the knowledge that after he has done so, there will be no prospect of the remaining creditors being paid. It follows that the curator could not, under s 69 as it stands, give effect to the Proposal.

35. We therefore conclude that:

- the Programme Memoranda and Pricing Supplements do not entitle ABL to subordinate the claims of Subordinated Noteholders in the absence of a dissolution, liquidation or winding-up of ABL;

- the curator would not be entitled in terms of s 69 of the Banks Act in its current form to subordinate the claims of Subordinated Noteholders in circumstances not contemplated by the Programme Memoranda and Pricing Supplements.

36. However, this position would change if the Bill were to be enacted. The Subordinated Noteholders could then be subordinated during curatorship (i.e. in the absence of a dissolution, liquidation or winding-up), as long as the requirements in the proposed s 69(2C)(d) were satisfied.

37. The effect of this is that, whereas the claims of the Subordinated Noteholders can currently only be subordinated in the event of the liquidation or dissolution of ABL (in which event they would acquire all the rights and remedies that accrue in insolvency proceedings), the enactment of the Bill would mean that the Subordinated Noteholders face the prospect of subordination during the curatorship, with none of concomitant rights that would otherwise be available to them in insolvency. This is a new consequence that they could not have foreseen at the time when they entered into their contractual arrangements with ABL, which was not factored into the pricing of the Subordinated Notes and which they cannot now take steps to avoid. In effect, it means that the Bill contemplates that the Subordinated Noteholders may be deprived of vested contractual rights.

38. In our view, it is arguable that such an interference with existing contractual rights violates the rule of law.

Application of the "no worse off" principle

39. If the Bill were to be enacted, the proposed s 69(C) would require the curator and the Minister to consider whether the transfer means that creditors will not incur greater losses on the date of the transfer than they would have incurred had the bank been wound up on that date. This would

expand the powers of the curator and the Minister in a manner that has the potential to unsettle existing contractual rights:

39.1. We have indicated above that the Programme Memoranda and the Pricing Supplements provide for subordination of the claims of the Subordinated Noteholders in the event that ABL were to be dissolved, liquidated or wound-up. They do not provide for those consequences to be visited upon the Subordinated Noteholders in the absence of a dissolution, liquidation or winding-up of ABL. In particular, they do not allow ABL to decline to make a payment to the Subordinated Noteholders by relying on the principle that they would be "no worse off" if ABL were to be liquidated.

39.2. Similarly, s 69 of the Banks Act in its current form envisages that certain powers may be conferred on a curator for the purposes envisaged in that section – namely, to return the bank to being a successful concern that can meet all of its obligations. The curator could not exercise those powers by having regard to what the position would be if ABL were to be liquidated. As s 69(2D) and s 69(2C)(b)(ii) make clear, the whole purpose of curatorship is to avoid a liquidation. In other words, curatorship is an alternative to liquidation; it is not a proxy for liquidation.

39.3. If the proposed s 69(2C) were to be enacted, it would allow the curator and the Minister to implement a transfer by having regard to the counterfactual position that would exist if ABL were to be wound up – but in circumstances where ABL has not been wound

up and where the Subordinated Noteholders are therefore not afforded the remedies that would be available to them in the case of a winding-up.[18] This would blur the distinction between curatorship and liquidation:

39.3.1. The object of insolvency is to "ensure a due distribution of assets among creditors in their order of preference".[19] A liquidation order crystallises the position of the company being wound up and, from that moment, the rights of the general body of creditors have to be taken into consideration. After the grant of the order, no transaction can be entered into by a single creditor to the prejudice of the general body of creditors because this will interfere with the *concursus creditorum* as it existed at the date of the liquidation.[20]

39.3.2. Curatorship is an alternative to liquidation, entered into with the aim of restoring the bank to solvency. It currently proceeds in the expectation that all debts and obligations will eventually be discharged, and that the bank will be restored to being a successful concern.[21]

---

18 Including, for example, the ability to challenge impeachable transactions under the Insolvency Act, to apply for an enquiry to be convened under s 417 of the Companies Act 61 of 1973, and to seek to extend liability for the bank's debts in terms of s 424 of the Companies Act.

19 *Walker v Syfret N.O.* 1911 AD at 166

20 See *British Eagle International Airlines Ltd v Compagnie Nationale Air France* [1975] 2 All ER 390

21 That is clear from s 69(2C)(b)(ii) which requires that any disposal made outside the ordinary course of the bank's business must be reasonably probably to restore the bank to being a successful concern. It is also implied by s 69(2D), which requires the

> By choosing curatorship, the Registrar forgoes the power of liquidation contained in section 68 of the Banks Act, at least temporarily.[22]

39.4. If the curator were empowered to conclude a transaction with reference to what the position would be in a winding-up, the nature of curatorship (and the rights of creditors) would be changed in two fundamental ways. First, the object of the curatorship would no longer be to settle all the bank's debts and obligations and to restore the bank to success, but rather to settle only some of them. Second, the curator would be entitled to prefer some creditors over others, and effectively to alter the *concursus creditorum*, in the absence of a liquidation and where his decision to do so will not constitute an impeachable transaction under the Insolvency Act.

39.5. These are the very consequences that would ensue if the Bill were to be enacted. Section 69(2C) would then envisage that the Subordinated Noteholders may be deprived of the statutory rights that they would otherwise have enjoyed in an insolvency, in circumstances where the bank has not been wound up. That amounts to a retrospective change to their contractual rights that they could not have foreseen at the time when they entered into their contracts with ABL and which would not have been priced for.

---

curator immediately to report to the Registrar if he forms the view that there is no reasonable probability that the continuation of the curatorship will enable the bank to pay its debts or meet its obligations and become a successful concern. It appears that the Registrar is then required to end the curatorship and to begin winding up proceedings. See also the reporting requirements imposed by s 69(6A).

22 That is clear from s 69(10) which provides that curatorship lapses on the winding up of the bank under s 68.

In short, at the moment when they concluded their contracts with ABL, the Subordinated Noteholders could not have anticipated the application of the "no worse off" principle in the event that ABL were to be placed into curatorship.

40. We conclude that, if s 69(2C) were to be enacted, it would be open to challenge on the basis that it violates the rule of law for this reason as well.

Summation

41. The proposed s 69(2C) would allow the curator and the Minister to interfere with vested contractual rights and existing contractual arrangements in the respects described above. In our view, it is arguable that this would violate the rule of law in a manner that is constitutionally impermissible.

The proposed section 69(3)(j)

42. The proposed s 69(3)(j) would authorise the curator to raise new funding and to provide security over the assets of the bank in respect of such funding, even if this were prohibited by the terms of an existing loan agreement. The proposed s 69(3)(j) therefore envisages the imposition of "new results in respect of a past event". [23]

43. Condition 4 of the Programme Memoranda includes a negative pledge. ABL undertook, for as long as any of the Senior Notes remained outstanding, not to encumber any of its present or future businesses, undertakings, assets or revenues to secure any present or future debt

---

[23] *National Director of Public Prosecutions v Carolus and Others* 2000 (1) SA 1127 (SCA) at para 34.

without simultaneously securing the Senior Notes to the same extent or providing such security as may be approved by extraordinary resolution of all the Noteholders.

44. Condition 4 conferred rights on the Senior Noteholders and the Subordinated Noteholders:

44.1. The Senior Noteholders were entitled to insist on "equal and rateable" security.

44.2. If this was not provided, any security would have to be approved by an extraordinary resolution of all the Noteholders. The Subordinated Noteholders could then vote against the provision of security to the Senior Noteholders. In the absence of a sufficient majority for the extraordinary resolution to be carried, the negative pledge would operate.

45. These contractual rights would be rendered nugatory by the proposed s 69(3)(j). If enacted, it would allow the curator to override the vested contractual rights of both the Senior Noteholders and the Subordinated Noteholders..

46. In our view, it is arguable that this violates the rule of law and renders the proposed s 69(3)(j) unconstitutional to the extent that it applies to contracts concluded before the Bill was enacted.

IRRATIONAL LEGISLATION AND ARBITRARY DIFFERENTIATION

The constitutional principles

47. Section 9(1) of the Constitution prohibits differentiation between categories of people, unless it is rationally connected to a legitimate government purpose.[24] Legislation that differentiates arbitrarily or displays naked preferences will violate the equal protection requirements of s 9(1).[25]

48. Such legislation would also authorise arbitrary or irrational conduct on the part of the State and may therefore be challenged on the basis that it violates the rule of law.[26]

The proposed section 69(2C)

49. If the Bill were to be enacted, s 69(2C) of the Banks Act will authorise the Minister to approve:

- a transfer of assets or liabilities (or assets and liabilities) that treats some creditors inequitably or exposes them to substantial loss; or

- transactions that separate the bank's assets and liabilities such that some creditors have no realistic hope of recovering money loaned to the bank,

provided the Minister considers the transaction "reasonably likely" to promote a stable banking sector or public confidence in the banking sector.

---

24 *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC) paras 43; 54.

25 *Prinsloo v van der Linde* 1997 (3) SA 1012 (CC) para 25.

26 *New National Party of South Africa v Government of the Republic of South Africa* 1999 3 SA 191 (CC) para 24

50. The proposed s 69(2C) thus authorises the curator and the Minister to differentiate between creditors by treating some less favourably than others. For example, with the Minister's approval the curator may transfer to a new entity both the bank's assets and the bank's indebtedness owed to creditor X, leaving all creditors other than X with no assets against which to seek repayment of their loans.

51. The pertinent question is whether the differentiation between creditors authorised by the proposed s 69(2C) is rationally connected to the government purpose underpinning the provision – that is, the maintenance of a stable banking sector and public confidence in the banking sector.

52. It is well-established that the rationality requirement imposes the "lowest possible threshold"[27] for validity and affords the legislature "the widest possible latitude within the limits of the Constitution".[28] Constitutional challenges based on a complaint that legislation is irrational are thus difficult to win. The Constitutional Court has explained the matter as follows:[29]

> "[W]hen making laws, the legislature is constrained to act rationally. It may not act capriciously or arbitrarily. It must only act to achieve a legitimate government purpose. Thus, there must be a rational nexus between the legislative scheme and the pursuit of a legitimate government purpose."
>
> …
>
> "It is by now well settled that, where a legislative measure is challenged on the ground that it is not rational, the court

---

27 *Democratic Alliance* para 42.

28 *Affordable Medicines Trust and Others v Minister of Health and Others* 2006 (3) SA 247 (CC) para 86.

29 *Law Society of South Africa and Others v Minister for Transport and Another* 2011 (1) SA 400 (CC) paras 32, 34 and 35

> must examine the means chosen in order to decide whether they are rationally related to the public good sought to be achieved."
>
> "It remains to be said that the requirement of rationality is not directed at testing whether legislation is fair or reasonable or appropriate. Nor is it aimed at deciding whether there are other or even better means that could have been used. Its use is restricted to the threshold question whether the measure the lawgiver has chosen is properly related to the public good it seeks to realise. If the measure fails on this count, that is indeed the end of the enquiry. The measure falls to be struck down as constitutionally bad."

53. We nevertheless consider it at least arguable that the proposed s 69(2C) would violate s 9(1) of the Constitution on the grounds that it is not rationally connected to the purpose it seeks to achieve. The argument would proceed on the following lines:

53.1. The proposed s 69(2C) would authorise the curator and, indirectly, the Minister to select certain creditors for preferential treatment and stronger rights, without stipulating how such creditors should be selected. The curator and the Minister would be authorised to do so as long as they are of the opinion that such differentiation is reasonably likely to promote the maintenance of a stable banking sector or public confidence in the banking sector.

53.2. However, differentiating between creditors of a bank in financial distress is inherently inimical to the stability of, and public faith in, the banking sector. That is because those legislative objectives are achieved at an institutional level by promoting *ex-ante* certainty in banking regulation – particularly among investors. A regulatory scheme that allows for creditors' rights to be determined or varied

on an *ad hoc* basis, at the discretion of a curator and the Minister, could never serve to encourage investment and faith in the banking sector, and is thus incapable of achieving the government purpose at issue.[30]

53.3. We are instructed that since the Bill was published, asset managers have already received instructions to curtail their investments in banking loan instruments because of the perceived heightened risk introduced by the Bill. As we understand it, the reason for this is that these asset managers are concerned that the enactment of the Bill would undermine the maintenance of a stable banking sector.

53.4. The argument would therefore be that the proposed s 69(2C) envisages differential treatment of the creditors of a bank in curatorship, in circumstances where such differentiation could never promote the objects sought to be achieved (i.e. the maintenance of a stable banking sector or public confidence in the banking sector) at an institutional level. Differently expressed, the proposed s 69(2C) provides for differentiation between creditors that is not rationally linked to the governmental purpose purportedly underpinning it.

---

30 See, by analogy, *Matinkinca and Another v Council of State, Republic of Ciskei and Another* 1994 (4) SA 472 (Ck) at 496G-H, where the court found that legislation providing for indemnities from prosecution could not achieve the stated aims of advancing national security, territorial integrity, public safety or the prevention of disorder and crime.

53.5. Legislation that violates a right in the Bill of Rights may be saved where it is found to be reasonable and justifiable under s 36 of the Constitution. [31] However, legislation that lacks a legitimate government purpose cannot be justified under s 36.[32] It follows that s 69(2C) cannot be saved by the general limitation clause in the Constitution.

54. The proposed s 69(2C) contains an inbuilt "safety valve" that forecloses the constitutional objections outlined above in some circumstances. The safety valve involves the jurisdictional requirement that the Minister must be of the opinion that the unequal treatment of creditors is reasonably likely to promote the maintenance of a stable banking sector or public confidence in the banking sector. We make the following observations in this regard:

54.1. The safety valve would operate in circumstances where the Minister forms the view that unequal treatment of creditors is not likely to promote the maintenance of a stable banking sector and

---

31 Section 36 states:

> "(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-
>
> (a) the nature of the right;
>
> (b) the importance of the purpose of the limitation;
>
> (c) the nature and extent of the limitation;
>
> (d) the relation between the limitation and its purpose; and
>
> (e) less restrictive means to achieve the purpose.
>
> (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights."

32 *Van der Merwe v Road Accident Fund and Another (Women's Legal Centre Trust as Amicus Curiae)* 2006 (4) SA 230 (CC) para 63.

public confidence in the banking sector. In such circumstances, the proposed transfer could not be implemented.

54.2. The position is more complex where the Minister forms the view that unequal treatment of creditors will promote the maintenance of a stable banking sector or public confidence in the banking sector, but where the unequal treatment of creditors will not in fact have such consequences:

54.2.1. The safety valve would operate if the Minister's decision were vitiated by a reviewable irregularity such that it could be set aside on review. In the event that the Minister's decision were to be set aside on review, the proposed transfer could not be implemented.

54.2.2. But if the Minister's decision were not vitiated by a reviewable irregularity, then the transfer could be implemented even if the unequal treatment of creditors would not, in fact, promote the maintenance of a stable banking sector or public confidence in the banking sector opinion. This is because the proposed s 69(2C) does not require that the unequal treatment of creditors must in fact promote the maintenance of a stable banking sector or public confidence in the banking sector opinion; it merely requires that the Minister must be of the opinion that this is reasonably likely.

54.3. In short, the safety valve would not operate in circumstances where the Minister forms the opinion that unequal treatment of creditors is

reasonably likely to promote the maintenance of a stable banking sector or public confidence in the banking sector, and where that opinion is at variance with the facts but is not vitiated by a reviewable irregularity. We shall refer to this as "an incorrect decision". (The Proposal, if implemented, may conceivably fall into this category of decision.)

54.4. Public confidence in the banking sector may be undermined by the mere existence of the possibility that an incorrect decision may be made in the future. In other words, investors may conceivably lose confidence in the banking sector merely because of the *ex ante* possibility that an incorrect decision may be made once the Bill is on the statute book. If this were the case, it would mean that the proposed s 69(2C) would not be rationally connected to a legitimate governmental purpose, since its mere existence on the statute book would lead to the very opposite of the outcome intended by government (viz. the maintenance of a stable banking sector public confidence in the banking sector). The proposed s 69(2C) would then fall foul of the requirement of rationality that informs the rule of law.

54.5. But even if this were not the case, public confidence in the banking sector would be undermined if and when an incorrect decision is in fact made by the Minister.

54.6. A constitutional challenge to the proposed s 69(2C) would be directed at the fact that an incorrect decision may be taken, or has already been taken, by the Minister. It is possible that a court may

take the view that any challenge to the proposed s 69(2C) is moot unless and until the Minister were to satisfy himself that the relevant transaction will in fact promote the maintenance of a stable banking sector or public confidence in the banking sector. It would therefore probably be necessary to wait until the curator and the Minister exercise their respective powers under the proposed s 69(2C) before instituting any legal challenge. The Minister's decision to approve a transaction proposed by the curator under the proposed s 69(2C) (including the Proposal currently under consideration) would constitute administrative action.[33] It would thus be susceptible to challenge on the broad grounds set out in the Promotion of Administrative Justice Act 3 of 2000 ("PAJA"). Those grounds include a complaint that the decision is unconstitutional,[34] and so the substantive grounds of challenge set out above would be preserved.

Summation

55. We conclude that there is an arguable case to be made that the proposed s 69(2C) – or its invocation in order to give effect to the Proposal – may violate s 9(1) of the Constitution and the rule of law by providing for arbitrary differentiation. Such arbitrary differentiation would occur in circumstances where the Minister forms the opinion that unequal treatment of creditors will

---

33 If the curator's decision is considered in isolation, it would probably not qualify as administrative action in terms of PAJA. In effect, the curator merely makes a recommendation to the Minister; it has no direct external legal effect on the Subordinated Noteholders' rights unless and until the Minister approves it. Consequently his decision is the first step that leads to the administrative decision; it is not the administrative decision itself. See, by analogy, *New Clicks South Africa (Pty) Ltd v Tshabalala-Msimang NO* 2005 (2) SA 530 (CC) para 40.

34 Section 6(2)(i) of PAJA.

promote the maintenance of a stable banking sector or public confidence in the banking sector, and where such an opinion is at variance with the facts but is not vitiated by a reviewable irregularity. The mere possibility that such a decision may be made at some time in the future, may conceivably undermine public confidence in the banking sector and a stable banking sector to such an extent that the proposed s 69(2C) is not rationally connected to its stated purpose. We emphasise, however, that the argument is a demanding one that is by no means guaranteed of success.

ARBITRARY DEPRIVATION OF PROPERTY

The constitutional principles

56. Section 25 of the Constitution protects the right to property. Insofar as relevant for present purposes, it provides as follows:

> "(1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.
>
> (2) Property may be expropriated only in terms of law of general application-
>
> (a) for a public purpose or in the public interest; and
>
> (b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court."

57. It is now well accepted that the constitutional concept of "property" is not restricted to corporeal assets but includes a vast range of other rights and interests (both real and personal) which have economic value:

57.1. In *Minister of Defence, Namibia v Mwandinghi* 1992 (2) SA 355 (Nm SC), the Namibian Supreme Court made the point as follows (at 367E-F):

> "The right to property is one of the rights entrenched in chap 3 of the Constitution. The word "property" has been interpreted liberally by the courts. It was so defined in Corpus Juris Secundum vol 16c para 984 (at 321-2). It was there said that
>
> > '[t]he term "property" within the constitutional guarantee against deprivation of property without due process has been held to include various items of property, and various rights and interests, such as a cause of action, including a chose-in-action, contract rights …'."

57.2. Section 25 of the Constitution protects not just physical property, but also incorporeal property[35] and the right to restitution of money paid.[36]

57.3. In our view, the accrued contractual rights of the Subordinated Noteholders constitute "property" within the scope of s 25.

58. A deprivation of property occurs whenever an aspect of the right to use, enjoy or exploit the property is substantially interfered with, limited or removed.[37] However, the impact of the incursion must be sufficiently

---

35 See *Laugh It Off Promotions CC v SAB International (Finance) BV t/a Sabmark International (Freedom of Expression Institute as* Amicus Curiae*)* 2006 (1) SA 144 (CC) and *Phumelela Gaming and Leisure Ltd v Gründlingh and Others* 2006 (8) BCLR 883 (CC)

36 *Opperman* para 63.

37 *Opperman* para 66. See also *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government and Another* 2009 (6) SA 391 (CC) para 34;*Offit Enterprises (Pty) Ltd and Another v Coega Development Corporation (Pty) Ltd and Others* 2011 (1) SA 293 (CC) para 41.

serious to warrant constitutional engagement. A loss of a trivial or worthless aspect of the property will not amount to a deprivation.[38]

59. A deprivation will be arbitrary (and therefore unconstitutional) if it occurs without "sufficient reason".[39] The Constitutional Court has explained that the question whether sufficient reason exists to justify a deprivation entails the following assessment:

> "(a) It is to be determined by evaluating the relationship between means employed, namely the deprivation in question, and ends sought to be achieved, namely the purpose of the law in question.
>
> (b) A complexity of relationships has to be considered.
>
> (c) In evaluating the deprivation in question, regard must be had to the relationship between the purpose for the deprivation and the person whose property is affected.
>
> (d) In addition, regard must be had to the relationship between the purpose of the deprivation and the nature of the property as well as the extent of the deprivation in respect of such property.
>
> (e) Generally speaking, where the property in question is ownership of land or a corporeal moveable, a more compelling purpose will have to be established in order for the depriving law to constitute sufficient reason for the deprivation, than in the case when the property is something different, and the property right something less extensive. This judgment is not concerned at all with incorporeal property.
>
> (f) Generally speaking, when the deprivation in question embraces all the incidents of ownership, the purpose for the deprivation will have to be more compelling than when the deprivation embraces only some incidents of ownership and those incidents only partially.

---

38 *Offit Enterprises* para 41.

39 *First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services and Another; First National Bank of SA Limited t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 100.

> (g) Depending on such interplay between variable means and ends, the nature of the property in question and the extent of its deprivation, there may be circumstances when sufficient reason is established by, in effect, no more than a mere rational relationship between means and ends; in others this might only be established by a proportionality evaluation closer to that required by section 36(1) of the Constitution.
>
> (h) Whether there is sufficient reason to warrant the deprivation is a matter to be decided on all the relevant facts of each particular case, always bearing in mind that the enquiry is concerned with "arbitrary" in relation to the deprivation of property under section 25."

60. The test thus requires that there be a rational connection between the deprivation and the end sought to be achieved and, where the deprivation is severe, that it be proportionate.[40] A proportionality analysis assesses the purpose of the law in question, the nature of the property involved, the extent of the deprivation and whether there are less restrictive means available to achieve the purpose in question.[41] The stronger the property interest and the more extensive the deprivation, the more compelling the State's purpose has to be to justify the deprivation at issue.[42]

The proposed section 69(2C)

61. The proposed s 69(2C) may be challenged on the basis that it authorises an arbitrary deprivation of property because the deprivation of the Subordinated Noteholders' vested contractual rights in certain circumstances is not rationally connected to the purpose of promoting confidence in, or the stability of, the banking sector. This argument would mirror the rationality challenge outlined above in the context of the

---

40 *Reflect-All* para 48.

41 Ibid.

42 *Opperman* para 68.

constitutional right to equality. What is stated above regarding the "safety valve" provided by the exercise of the Minister's discretion, applies equally to any challenge based on arbitrary deprivation of property. The safety valve would not operate in circumstances where the Minister forms the opinion that unequal treatment of creditors will promote the maintenance of a stable banking sector or public confidence in the banking sector, and where such an opinion is at variance with the facts but is not vitiated by a reviewable irregularity. The fact that such an incorrect decision may be made in the future, or has already been made, would form the target of any constitutional challenge to the proposed s 69(2C).

62. In addition, it may be argued that the proposed s 69(2C) constitutes an arbitrary deprivation of property because it is disproportionate to the end sought to be achieved. The argument would proceed along the following lines:

62.1. The proposed s 69(2C) authorises a potentially severe deprivation of property. In an extreme case, a creditor may find that its claim against a bank has been rendered worthless because all of the bank's assets have been transferred to another entity, or because its claim has been subordinated in the absence of a liquidation and the protections that it entails.

62.2. Where the extent of the deprivation is so far-reaching, the legislative means should be narrowly tailored.[43] However, this is not the case here.

62.3. Moreover, the purpose underpinning the deprivation must be compelling. The purpose of the proposed s 69(2C) is to provide a mechanism to facilitate the recovery of a bank in financial distress. This is undoubtedly a legitimate and important government purpose, but it may not justify the extremely serious property rights incursions authorised by the scheme – particularly because the existing provisions of the Banks Act provide an alternative regime that is substantially less restrictive of creditors' rights.

62.4. The argument would therefore be that the deprivation authorised by s 69(2C) is arbitrary and violates s 25(1) of the Constitution.

62.5. Once again, a violation of the right may be justified under s 36 of the Constitution.[44] However, a court is unlikely to find that a law that authorises arbitrary or disproportionate deprivations of property is constitutionally justifiable.[45]

63. An argument along the same lines could, in our view, be used to challenge the invocation of the proposed s 69(2C), once enacted, in order to give effect to the Proposal.

---

43 *Opperman* para 71.

44 See *FNB* para 110 and *Opperman* paras 73-74 both suggest that the limitations analysis must be undertaken in respect of any violation of the rights provided for in s 25 of the Constitution.

45 *Opperman* paras 75-79.

The proposed section 69(3)(j)

64. We have already indicated that the proposed s 69(3)(j) authorises a curator to override existing contractual rights. The curator is thereby authorised to effect a deprivation of property.

65. The proposed s 69(3)(j) does not of itself effect any deprivation of property; it merely confers a power on the curator to do so. While it may plausibly be contended that the curator must exercise his discretion by having regard to the property guarantee in the Constitution, the Constitutional Court has held that "the Legislature must take care when legislation is drafted to limit the risk of an unconstitutional deprivation of the discretionary powers it confers".[46] In our view, the proposed s 69(3)(j) probably provides inadequate guidance to the curator as regards what he should take into account when he exercises his discretion. The requirement in the proposed s 69(2C) that regard must be had to whether a transfer will promote the maintenance of a stable banking sector or public confidence in the banking sector, does not apply to the proposed s 69(3)(j). It is therefore arguable that the proposed s 69(3)(j) authorises an arbitrary deprivation of property.

66. It is also arguable that the proposed s 69(3)(j) provides for a deprivation of property that is disproportionate to the end sought to be achieved. The argument would proceed along the following lines:

66.1. The proposed s 69(3)(j) authorises a potentially severe deprivation since a creditor may effectively be deprived of its contractual

---

46 *Dawood v Minister of Home Affairs* 2000 (3) SA 936 (CC) para 48

entitlement. The affected creditors' property rights are accordingly wholly undermined.[47]

66.2. Where the extent of the deprivation is so far-reaching, the legislative means should be narrowly tailored.[48] However, that is not the case here. The proposed s 69(3)(j) affords the curator a virtually unfettered discretion to decide when and in what manner to deprive a creditor of its rights. That militates against a finding that the deprivation is made with sufficient reason.

66.3. Moreover, the purpose underpinning the deprivation must be compelling. Again, we accept that facilitating the recovery of a bank in financial distress is a legitimate government purpose. It may nevertheless be insufficient to justify the extremely serious incursions authorised by the provision, especially where less restrictive means are available.

67. Once again, we consider a challenge along the same lines to be available to impugn the constitutionality of a decision taken under the proposed s 69(3)(j), in order to effect the Proposal.

Summation

68. We conclude that there is an arguable case to be made that the proposed s 69(2C) and the proposed s 69(3)(j) (or their application) violate s 25(1) of the Constitution by providing for arbitrary deprivation of property. We emphasise, however, that the argument is by no means guaranteed of

---

47 See, by analogy, *Opperman* para 70.

48 *Opperman* para 71.

success. The Subordinated Noteholders' prospects of success will be strongly affected by the cogency of the reasons that the State advances to justify the deprivation. Much will turn on whether there are viable and less restrictive means of undertaking the resolution of a bank in distress.

CONCLUSION

69. Our main conclusions may be summarised as follows:

69.1. It is arguable that the proposed section 69(2C) and the proposed s 69(3)(j) violate the rule of law because they allow for vested contractual rights of the Subordinated Noteholders to be overridden with retrospective effect.

69.2. It is arguable that the proposed s 69(2C) is irrational (in contravention of the rule of law), provides for arbitrary differentiation (in contravention of s 9(1) of the Constitution) and authorises arbitrary deprivation of property (in contravention of s 25(1) of the Constitution). This would be the position where the Minister approves a transfer after forming the opinion that unequal treatment of creditors is reasonably likely to promote the maintenance of a stable banking sector or public confidence in the banking sector, and where such an opinion is at variance with the facts but is not vitiated by a reviewable irregularity. The mere possibility that such a decision may be made at some time in the future may conceivably undermine public confidence in the banking sector and the stability of the banking sector to such an extent that

the proposed s 69(2C) is not rationally connected to its stated purpose.

69.3. It is also arguable that the proposed s 69(3)(j) provides for arbitrary deprivation of property (in contravention of s 25(1) of the Constitution).

69.4. While we regard the arguments described above as plausible, we emphasise that they are by no means guaranteed of success and that much will depend on the cogency of the reasons advanced by the State for enacting the Bill, or by the Minister and the curator for taking the decisions that ensue.

ALFRED COCKRELL SC

ISABEL GOODMAN

Chambers, Sandton

10 March 2015