

PC finance 17 March
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PARLIAMENT
OF THE REPUBLIC OF SOUTH AFRICA

LEGAL SERVICES

PO Box 15 Cape Town 8000 Republic of South Africa
Tel: 27 (21) 403 2911
www.parliament.gov.za

Tel: (021) 403-2626
Direct: (021) 403-8045
Fax: (021) 403-3888
E-mail: vngcobozi@parliament.gov.za

MEMORANDUM

[Confidential]

To : Mr YI Carrim, MP
Chairperson: Standing Committee on Finance

Copy to : Secretary to Parliament

From : Constitutional and Legal Services Office.
(Vuyokazi Ngcobozi: Parliamentary Legal Adviser)

Our Ref : 26 / 2015

Date : 16 March 2015

Subject : **LEGAL OPINION ON BANKS AMENDMENT BILL [17- 2014]**

MESSAGE : Attached please find opinion for your attention

V. Ngcobozi
Parliamentary Legal Adviser



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17-2014]**

Introduction

1. Our Office received a request from the Chairperson of the Standing Committee on Finance to scrutinise an opinion received by the said Committee from National Treasury (Treasury).
2. Treasury briefed Advocate David Unterhalter SC and Advocate Steven Budlender to provide a legal opinion (the opinion) on whether the Banks Amendment Bill (the Bill) is consistent with section 25 of the Constitution and to propose further amendments to the Bill if need be.
3. The opinion was subsequently submitted to the Standing Committee on Finance (the Committee) by Treasury in support of the amendments. It is against this backdrop that we were requested to scrutinise the opinion.

Background and applicable legal prescripts

4. The Committee is currently processing the Bill. The Bill seeks to amend certain provisions of the Banks Act, 1990 (Act No. 94 of 1990) (the Act). The first amendment seeks to amend section 69 (2C) of the Act by giving authority to the Minister to appoint a curator to dispose of any of the bank's assets or liabilities subject to section 54 of the Act.




5. Section 54 of the Act requires approval of the Minister and the Registrar before disposing the assets or the liabilities of the Bank.
6. The curator has to satisfy the Minister and the Registrar in terms of section 54 of the Act as to how the disposition is going to affect the creditors. The creditors are to be treated in an equitable manner and reasonable probability should exist that creditors will not incur greater loss in the disposal than if the bank had been wound up.
7. The percentage of shares to be disposed of determines whether the curator requires the approval of the Minister or the Registrar. Section 54 of the Act deals extensively with this issue. In circumstances where the curator requires the approval of the Minister, it is done through the Registrar.
8. Despite the effect of the disposal on creditors as indicated in section 54 of the Act, the Minister is authorised in terms of section 54 of the Act to still satisfy himself that the disposal is likely to promote the maintenance of a stable banking sector or public confidence in the banking sector.
9. What the Bill fails to do is to give similar powers to the Registrar of satisfying himself / herself of the effect of the disposal on the stability of the banking sector.
10. The opinion deals with this even though it is not as extensive. It is my view that the Bill should be amended to include the Registrar's powers as indicated in paragraph 9 and in the opinion.
11. Furthermore, the Bill seeks to authorise the curator to raise funds for the Bank, notwithstanding any contractual obligations of the bank.
12. In terms of this amendment, unlike the one discussed above, the curator does not require the consent or approval of the Minister or the Registrar in order to raise the funds. The curator is authorised to use his or her discretion in this instance.
13. The only amendment that requires the approval of the Minister or the Registrar is the first amendment, the one that deals with the transfer of assets and liabilities. The other amendments do not have such proviso. The opinion covers this issue and it is my considered view that since the curator will be performing an administrative function when acting in terms of second and third amendments of the Bill, the Promotion of Administrative Justice Act 3 of 2000 is a safety net which will assist creditors if aggrieved to approach the court for the review of the decision.



14. Section 25 (1) of the Constitution is the property clause that provides that, "No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property." The opinion extensively analyse the property clause and does not only deal with deprivation but goes to the heart of the differences between expropriation and deprivation in terms of the Constitution. The opinion gives enough authority in support of the constitutionality of the amendments.
15. The amendments deal with deprivation of property and the amendments are consistent with section 25 (1) of the Constitution.
16. The opinion further deals with whether the Bill will apply retrospectively or not. The Bill as it stands once it becomes law will not apply retrospectively. If the intention of the legislature is to have the Bill applied retrospectively, the Bill ought to have a provision that expressly indicates that intention.
17. The principle of retrospective application of the law is that unless expressly specified in the legislation, laws generally apply from the date of enactment.

Conclusion

18. Having perused the opinion, the Act, the Bill and the public comments, I am of the view that the provisions of the Bill as detailed in the opinion are not contrary to section 25(1) of the Constitution. I support the views expressed in the opinion including the proposed amendments.



V Ngcobozi
Parliamentary Legal Adviser