OPINION

NATIONAL TREASURY

THE CONSTITUTIONAL VALIDITY OF THE BANKS AMENDMENT BILL B17-2014

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INTRODUCTION

1 Our advice is sought by National Treasury regarding the draft Banks Amendment Bill, 2014 ("the Bill"). We are asked to consider whether the Bill is consistent with the Constitution.

2 In doing so, we are asked to consider the text of the Bill in the form set out in Annexure A to this opinion.

3 In what follows, we first set out the nature of the amendments proposed in the Bill. We then turn to consider whether these amendments comply with the Constitution by considering the protection of property rights in section 25 of the Constitution and the constitutionality of retrospective legislation. Finally, we consider the opinion on the constitutionality of the Bill obtained by the subordinate noteholders.

THE NATURE OF THE AMENDMENTS

4 The Bill proposes various amendments to the Banks Act 94 of 1990 ("the Act"). In particular the amendments seek to broaden the powers of a curator to a bank appointed in terms of section 69 of the Act.

5 Some of the amendments proposed by the Bill merely seek to confirm powers that already vest in the curator, while others vest new powers in the curator. For present purposes, little turns on this distinction and so we do not consider it

further.

6 While we have considered the constitutionality of the various amendments proposed by the Bill, only two of those amendments require discussion.

7 First, the Bill proposes amendments to section 69(2C) of the Act, which deals with the circumstances under which the curator may dispose of the bank's assets and liabilities. Clause 1 of the Bill provides that section 69(2C) will be substituted with a provision as follows:

> *"(a) Notwithstanding the provisions of subsection (3), the curator may—*
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> *(i) dispose of any of the bank's assets;*
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> *(ii) transfer any of its liabilities; or*
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> *(iii) dispose of any of its assets and transfer any of its liabilities,*
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> *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—*
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> *(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 the provisions of section 54.*
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> *(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 whether—*
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> *(i) the creditors are treated in an equitable manner; and*
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> *(ii) a reasonable probability exists that a 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.

(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, notwithstanding the fact that the effects in paragraph (c)(i) or (ii) are not achieved 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."

8 The effect of this amendment is accordingly as follows:

8.1 It vests an express power in the curator to dispose of any of the assets or liabilities of the bank, outside the ordinary course of the bank's business.[1]

8.2 It provides that this power may only be exercised subject to section 54 of the Act. That section, in turn requires approval to be obtained for the transfer of a Bank's assets or liabilities. Such approval must be obtained from the Minister of Finance or the Registrar of Banks, depending on the extent of the transfer concerned.

8.3 The amendment provides that, for purposes of this approval, the curator must report to the Minister or Registrar, as the case may be, on the expected effect on the bank's creditors, including on:

8.3.1 whether the creditors are treated in an equitable manner; and

[1] The amendment does not, of course, allow the curator to impose such a disposal on an unwilling recipient. Rather it merely empowers the curator to engage in the disposal on behalf of the bank,

8.3.2 whether a reasonable probability exists that a creditor will not incur greater losses via the disposal than if the bank had been wound up.

8.4 Lastly, and significantly, it provides that even if the requirements mentioned above are not satisfied, the Minister or Registrar, as the case may be, may still grant permission for the disposal if in his or her opinion the disposal is reasonably likely to promote the maintenance of a stable banking sector or public confidence in the banking sector.

9 Second, the Bill proposes the insertion of a new section 69(3)(j) of the Act as follows:

> *"(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 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".*

10 The effect of this amendment is to provide that the curator has the power to raise funding from the Reserve Bank on behalf of the bank (including raising security over the bank's assets for this purpose). For present purposes what is important is that the curator is permitted to exercise this power "*notwithstanding any contractual obligations of the bank*".

THE PROTECTION OF PROPERTY UNDER THE CONSTITUTION

11 Section 25(1) of the Constitution is the provision which deals with property rights. However, it does not create absolute property rights or even a general right to property. Instead, the section regulates the circumstances in which two kinds of interference can occur with regard to property rights – "*deprivations*" and "*expropriations*".

12 The Constitutional Court has explained the difference between deprivations and expropriation as follows:

> *"Deprivation within the context of section 25 includes extinguishing a right previously enjoyed, and expropriation is a subset thereof. Whereas deprivation always takes place when property or rights therein are either taken away or significantly interfered with, the same is not necessarily true of expropriation. Deprivation relates to sacrifices that holders of private property rights may have to make without compensation, whereas expropriation entails state acquisition of that property in the public interest and must always be accompanied by compensation. There is therefore more required to establish expropriation although there is an overlap and no bold line of demarcation between sections 25(1) and 25(2). Section 25(1) deals with all property and all deprivations, including expropriation, although additional requirements must be met for deprivation to rise to the level of expropriation."*[2]

13 In the present case, we do not consider that it can be said that the State is acquiring any property rights concerned. The majority of the Constitutional Court made clear in *Agri SA* that there "*can be no expropriation in circumstances where deprivation does not result in property being acquired by the state*".[3]

13.1 In the present case, there is no property that is being acquired by the

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[2] *Agri SA v Minister for Minerals and Energy* 2013 (4) SA 1 (CC) at para 48 (emphasis added)

[3] At para 59

state.

13.2 The most that could be said is that is that the curator is a state-appointed functionary and that he is temporarily vested with powers over the bank, including those of the shareholders. This is not sufficient to result in an expropriation.

14 The real question then is whether the Bill produces a deprivation of property and, if so, whether it complies with section 25(1) of the Constitution. That section provides:

> *"No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property."*

15 In a series of cases, the Constitutional Court has set out the test for what constitutes a deprivation of property. The following principles apply:

15.1 The meaning of "*property*" in section 25 is to be understood broadly. It includes both corporeal and incorporeal property.[4]

15.2 The Court initially took the view that a deprivation of property occurs where there is "*any interference with the use, enjoyment or exploitation of private property*."[5]

15.3 However, it subsequently restated the test for deprivation more narrowly, as follows:

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[4] *Law Society of South Africa and Others v Minister for Transport and Another* 2011 (1) SA 400 (CC) at para 83

[5] *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) at para 57

> *"Whether there has been a deprivation depends on the extent of the interference with or limitation of use, enjoyment or exploitation…. (S)ubstantial interference or limitation that goes beyond the normal restrictions on property use or enjoyment found in an open and democratic society would amount to deprivation."*[6]

15.4 In its most recent judgment it relied on this dictum and held that a deprivation occurs "*when property or rights therein are either taken away or significantly interfered with*".[7]

16 In the present context, we are of the view the amendments allow for deprivations of property in at least one, and possibly two, respects.

17 First, the amendments allow the curator (with the permission of the Minister/Registrar) to transfer the assets or liabilities of the bank to another party in circumstances where this may not treat creditors in an equitable manner and where this may result in the creditor incurring greater losses than if the Bank had been wound up.

17.1 The Constitutional Court found in the *National Credit Regulator* case that a personal right to claim restitution of money amounts to "*property*" in terms of the Constitution.[8] While that statement was made in the context of a claim for unjustified enrichment, there appears no reason that it would not apply equally to a claim by a creditor against a bank on whatever basis it is brought.

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[6] *Mkontwana v Nelson Mandela Metropolitan Municipality and Another; Bissett and Others v Buffalo City Municipality and Others; Transfer Rights Action Campaign and Others v MEC, Local Government and Housing, Gauteng and Others (KwaZulu-Natal Law Society and Msunduzi Municipality as Amici Curiae)* 2005 (1) SA 530 (CC) at para 32

[7] *Agri SA v Minister for Minerals and Energy* 2013 (4) SA 1 (CC) at para 48

[8] *National Credit Regulator v Opperman and Others* 2013 (2) SA 1 (CC) at paras 57 - 64

17.2 The *National Credit Regulator* case concerned a provision which had the effect of extinguishing the right to claim. That is not the case here. However, the ability to succeed in the claim might well be substantially and adversely affected. For example, the amendments permit a situation where a party with a claim against a bank now finds that the claim lies against some other potentially unrelated third party, which may or may not have the ability to satisfy the debt. The amendments also permit a situation where the party with the claim continues to have a claim against the bank, but all or many of its assets have been transferred to a third party.

17.3 This appears to us to involve a "*significant interference*" with the right concerned and thus amount to a deprivation of property. We refer to this as "*the first deprivation*".

18 Second, the amendments allow the curator to provide security over the bank's assets, notwithstanding any contractual obligations of the bank.

18.1 The effect of the curator exercising this power may well be to subvert the existing hierarchy of creditors, for example undermining or removing the right of certain creditors to have their claims accorded preferential status.

18.2 It is significantly less clear that this amounts to a deprivation of property. Nevertheless, particularly given that the Constitutional Court has expressly held that incorporeal property rights are protected by section 25(1), we consider that it is at least arguable that the exercise of this power will in some instances result in a deprivation of property.

18.3 Therefore, for present purposes, we assume that this amounts to a deprivation of property.

18.4 We refer to this as "the second deprivation".

19 However, what is critical is that section 25(1) of the Constitution does not prohibit all deprivations of property. Rather it requires only that deprivations take place in terms of a law of general application (which is not in issue here) and that they not be "*arbitrary*".

19.1 In *First National Bank*, the Court made clear that a deprivation of property would be arbitrary in two circumstances:[9]

19.1.1 Where it was procedurally unfair; or

19.1.2 Where it took place "*without sufficient reason*".

19.2 In relation to the "*sufficient reason*" standard, the Court held that it meant that:

> *"there must be an appropriate relationship between means and ends, between the sacrifice the individual is asked to make and the public purpose this is intended to serve. It is one that is not limited to an enquiry into mere rationality, but is less strict than a full and exacting proportionality examination."*[10]

19.3 The Court held also that the "*sufficient reason*" standard is a variable standard which depends on a range of factors:

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[9] *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) at para 100. 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) at para 52

[10] *First National Bank* at para 98

"(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.

(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 s 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 s 25."[11]

20 It is thus necessary to consider whether the amendments allow for deprivations that are:

20.1 procedurally unfair; or

20.2 substantively arbitrary – that is without sufficient reason.

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[11] *First National Bank* at para 100.

21 We begin by considering the first deprivation identified – the effect on claims of creditors.

22 We do not consider that the amendments allow for a procedurally unfair deprivation in this regard.

22.1 The curator is not able to transfer the assets or liabilities without the permission of the Minister / Registrar.

22.2 The amendments do not deal with whether and to what extent a creditor is entitled to be heard by the Minister/Registrar before such permission is granted. They are entirely silent on this issue.

22.3 This does not necessarily mean that no hearing is required. The Bill would introduce a new section 89A into the Banks Act. It provides:

> *"Any administrative action taken in terms of this Act, including any administrative action taken by a curator appointed in terms of section 69, is subject to the Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000)."*

22.4 Indeed, even without this provision it is now well established that all statutory administrative powers must be read subject to and together with the Promotion of Administrative Justice Act 3 of 2000 ("PAJA"), unless on a proper construction they are inconsistent with it.[12]

22.5 This means that, in exercising their discretionary powers under the amendments, the Minister/Registrar would be obliged to act in compliance with PAJA, including the duty to act in a procedurally fair

[12] *Zondi v MEC for Traditional and Local Government Affairs and Others* 2005 (3) SA 589 (CC) at para 101

manner.[13] In this regard, PAJA makes clear that what is procedurally fair depends on the circumstances of the case.[14] Moreover, PAJA allows for administrators to depart from the requirements of procedurally fair administrative action where this is reasonable and justifiable in the circumstances.[15] The Constitutional Court has specifically upheld this approach in the context of deprivations of property where, for example, there were multiple people who would have had to be heard.[16] Thus, while the exercise of administrative power will generally require a hearing in advance of the decision, this is not invariably the case.

22.6 For purposes of this opinion, it is not necessary for us to express a view as to whether the Minister/Registrar would have to provide a hearing in advance of their decision and in what circumstances. Moreover, doing so in the abstract is very difficult as this will depend in substantial part on the facts of the decision concerned. However, we would caution that, when exercising their powers, the Minister/Registrar will need to be alive to the potential need to provide a hearing and may well need to seek legal advice on this score, in the context of the facts then at hand.

22.7 For present purposes and in relation to considering the constitutionality of the Bill, what is clear is that the Minister/Registrar will have to comply with the procedural fairness requirements of PAJA in taking the

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[13] It may well be the case that the curator is himself obliged to act in a procedurally fair manner before even seeking the approval of the Minister/Regulator. But it is not necessary for us to express any view on this issue.

[14] Section 3(1)(a) of PAJA

[15] Section 3(4) of PAJA

[16] *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government, and Another* 2009 (6) SA 391 (CC) at paras 44 - 45

decisions concerned. Once this is so, it cannot be said that the amendments allow for procedurally unfair deprivations of property.

22.8 We emphasise that the Bill sensibly does not result in an automatic deprivation by virtue of operation of law. Nor does it result in the Minister/Registrar being required to approve the deprivation if certain jurisdictional facts are satisfied. The deprivation produced by the Bill is consequently quite different to that declared unconstitutional in the *National Credit Regulator* case.

22.8.1 In that case, the statute provided that once a court had found that a credit agreement was unlawful, the court was required to direct that the rights of the credit provider to recover money paid were cancelled or forfeited to the state. When counsel for the Minister sought to contend that that the deprivation was not procedurally unfair due to the involvement of the court, this argument was understandably rejected:

> *"The problem is of course that the court is denied any discretion to decide on a just and equitable order. This Court indicated in Mohunram that a lack of discretion on the part of a court to forfeit property would result in an arbitrary deprivation of property."*[17]

22.8.2 By contrast, in the present case, there is nothing in the Bill that requires the Minister/Registrar to approve the request by the curator. On the contrary, sections 54 and 69(2B) make expressly clear that there is a discretion vested in the

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[17] *National Credit Regulator* at para 69

Minister/Registrar. For example, even where the Minister/Registrar concludes under section 69(2C)(d) that the disposal is reasonably likely to promote the maintenance of a stable banking sector, they are then merely empowered to approve it – they are not required to do so. The same applies when the requirements of section 69(2C)(c) are satisfied.

23 We also do not consider that the amendments allow for a substantively arbitration deprivation to occur. They ensure that there is sufficient reason for the deprivation, due mainly to the following factors:

23.1 First, the rights of creditors are not extinguished. They may well be affected in a significant way, as we have explained above, but they are not extinguished.

23.2 Second, the scheme of the amendments makes clear that the Minister/Registrar is required to consider the important considerations of whether creditors are being treated in an equitable manner and whether it is probable that approving the transfers will lead to fewer losses than if the bank were wound up. Where these considerations are met these will be powerful considerations that operate against the deprivation being arbitrary.

23.3 Third, while the Minister/Registrar are given the power to grant permission for the transfer or disposal where these considerations are not satisfied, they may do so only where this is reasonably likely to promote the maintenance of a stable banking sector or public confidence

in the banking sector. These are very weighty considerations and are certainly capable of providing "*sufficient reason*" for the deprivations concerned. Indeed, a deprivation that is "*likely*" to promote the maintenance of a stable banking sector or public confidence in the banking sector may well be the very antithesis of an "*arbitrary*" deprivation. This is, however, subject to a question of proportionality – which we deal with next.

23.4 Fourth, while the Bill does not expressly require the Minister/Registrar to consider whether the deprivation is proportional to the aims sought to be achieved, we consider that – on a proper construction of the section – the Minister/Registrar will indeed be required to consider this issue in exercising their discretion.

23.4.1 This is made clear by the series of cases concerning asset forfeiture decided by our courts under the Prevention of Organised Crime Act 121 of 1998. That Act does not specifically mention "*proportionality*" as a factor relevant to the granting of a forfeiture order. However, the courts have nevertheless held repeatedly that a need for appropriate proportionality is inherent in a constitutionally-compliant interpretation of the Act.[18]

23.4.2 This is significant in the present case. As important as the purposes contemplated in section 69(2C)(d) are, it must be borne in mind that the extent of the deprivations occasioned by

[18] *Prophet v National Director of Public Prosecutions* 2007 (6) SA 169 (CC) at paras 58 – 69; *Mohunram v NDPP (Law Review Project as Amicus Curiae)* 2007 (4) SA 222 (CC) at paras 56 – 75

the Minister/Registrar granting their approval might be very significant in respect of the individuals affected. It is therefore necessary that the Minister/Registrar weigh up the extent of the need for the approvals concerned against the extent of the deprivation occasioned and consider whether this is proportional – albeit that this will need to bear in mind that the test for arbitrariness under section 25(1) is "*less strict than a full and exacting proportionality examination*".[19] This is especially important where only the latter of the purposes mentioned in section 69(2C)(d) – public confidence in the banking sector – is at issue, given that this consideration is by its nature somewhat ephemeral.

23.4.3 We thus consider that that, despite the absence of a reference to "*proportionality*" in the Bill, this is inherent in the Bill. This assists in rendering the Bill constitutionally permissible, but must of course also then be taken into account by the Minister/Registrar when exercising their powers. While the Minister/Registrar may well require separate legal advice on the precise factors to consider in this proportionality enquiry, they will likely include a consideration of the identity of the parties whose property rights are being affected; how those rights came about; the extent of the deprivations; the need for the deprivations; and possible alternatives to the deprivations.

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[19] *First National Bank* at para 98

23.5 Fifth, any decision by the Minister/Registrar could be challenged on review on substantive grounds in the High Court in terms of PAJA. This is an important factor in preventing arbitrary deprivation. This is demonstrated by an SCA decision dealing with deprivations of property in a different context – *MTN v SMI*.[20] There, the SCA explained the effect of the ability to review under PAJA:

> *"[This] has two effects: first, on the macro-level, because [the empowering provision] can only validly be exercised in accordance with administrative-justice rights, it insulates the [empowering provision] against constitutional invalidity by serving as a hedge against arbitrary deprivation; and secondly, when a particular deprivation is challenged, the requirements of administrative justice determine whether it was, on the micro-level, arbitrary or not."*[21]

24 In respect of the second deprivation, we reach the same conclusions – albeit for slightly different reasons.

24.1 In respect of the curator's powers under section 69(3)(j), it appears that these are not necessarily subject to any need to obtain approval from the Minister/Registrar. However, we do not consider that the amendments allow for a procedurally unfair deprivation.

24.1.1 Section 69(3)(j) does not compel the curator to act in a manner that contravenes the existing contractual rights concerned. He is merely given a discretionary power to do so.

24.1.2 The curator's powers are derived from the Banks Act and his appointment by the Minister. He is moreover exercising a public function or fulfilling a public purpose in his role, as is

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[20] *Mobile Telephone Networks (Pty) Ltd v SMI Trading CC* 2012 (6) SA 638 (SCA)

[21] At para 35 (emphasis added)

demonstrated by the fact that the Minister may only appoint him where he or she deems it "*desirable in the public interest*".[22] It thus appears that in exercising his powers under the new sections in a manner that potentially erodes existing contractual rights, he will likely be exercising administrative powers that are subject to PAJA.[23]

24.1.3 It is again not necessary for us to set out in this opinion precisely when this will be the case, nor when the exercise of such powers will require a hearing or what form such hearing will have to take. We do note that section 69(3)(d) of the Act already permits the curator "*to convene from time to time, in such manner as the curator may deem fit, a meeting of creditors of the bank concerned for the purpose of establishing the nature and extent of the bank's indebtedness to such creditors and for consultation with such creditors in so far as their interests may be affected by decisions taken by the curator in the course of the management of the affairs of the bank concerned*". That may well be an appropriate way of satisfying the procedural fairness requirements of PAJA.

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[22] Section 69(1)(a)

[23] See, for example, *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council and Another* 2007 (1) SA 343 (CC) at paras 40 – 41; *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others (No 2)* 2014 (4) SA 179 (CC) at paras 52 - 54

24.1.4 For present purposes what is important is that, as indicated above, the applicability of PAJA serves as a protection against procedurally unfair deprivations.

24.2 We also do not consider that the amendments result in a substantively arbitrary derivation of property:

24.2.1 The extent of the deprivation is limited. Section 69(3)(j) makes expressly clear that a party who suffers damages as a result of the curator exercising his powers in terms of those sections will be entitled to claim damages, provided that this may only occur a year after the provision of the security concerned.

24.2.2 In any event, the curator is merely empowered (not required) to act contrary to his contractual obligations – he will have to consider whether to do so and to what extent. In doing so, the curator will have to bear in mind the effect that his decisions would have on existing property rights and consider whether he has sufficient reason for doing so.

24.2.3 The curator's decision will again be subject to review in terms of PAJA in the High Court. Thus, again, as the SCA has explained this acts "*as a hedge against arbitrary deprivation*".[24]

24.2.4 These powers are plainly conferred for an important public purpose – to enable the curator to fulfil his functions of acting in

[24] *Mobile Telephone Networks (Pty) Ltd v SMI Trading CC* at para 35

the public interest in the extraordinary circumstance that a bank is unable to repay its deposits or meets its obligations.

24.2.5 Lastly, the discussion of proportionality set out above is equally applicable here.

25 In all the circumstances, we consider that the amendments do not permit arbitrary deprivations of property and are accordingly not in breach of section 25(1) of the Constitution.

26 In the circumstances, it is not necessary to engage in the section 36 limitations analysis. Indeed, the Constitutional Court has rightly twice expressed some doubt as to how a deprivation which was arbitrary and thus in breach of section 25(1) could ever pass constitutional muster under section 36(1).[25]

RETROSPECTIVE LEGISLATION

27 It might be contended that the amendments brought about by the Bill operate retrospectively or retroactively[26] in two respects.

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[25] *First National Bank* at para 110; *National Credit Regulator* at paras 73 - 75

[26] There is technically a distinction between retroactive and retrospective legislation. As the Constitutional Court has explained:

> "[There is a] fine distinction between the broad concept of retrospectivity and the distinctive notion of retroactivity. A retrospective provision operates for the future only but imposes new results in respect of past events. A retroactive provision operates as of a time prior to the enactment of the provision itself and changes the law applicable with effect from a past date."
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> *Du Toit v Minister for Safety and Security and Another* 2009 (12) BCLR 1171 (CC) at para 33

However, for present purposes, nothing on turns on this disctinction.

27.1 First, clause 4 of the Bill makes clear that, if immediately before the amendments take effect, a bank is under curatorship, the provisions of the Bill apply to the curatorship concerned.

27.2 Second, the amendments permit the curator to act in a manner that might be said to undermine or remove pre-existing rights of the parties concerned.

28 For present purposes it is not necessary for us to express any view regarding whether this means that the amendments operate retrospectively and, if so, to what extent. We therefore express no view on this issue. This is because, even on the assumption that the amendments operate retrospectively, we do not consider that they are unconstitutional.

29 In this regard, we emphasise that there is no constitutional principle which prohibits retrospective laws in the civil context. While retrospective laws in the criminal context raises real constitutional problems,[27] the position in the civil context is quite different.

29.1 There is no decision of which we are aware (and certainly none of the Constitutional Court) holding that expressly retrospective statutes in a civil context are unconstitutional. Indeed, on the contrary, there are decisions of the Court interpreting and applying civil statutes that were deliberately retrospective in nature, without any adverse comment.[28]

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[27] *Masiya v Director of Public Prosecutions, Pretoria and Another (Centre for Applied Legal Studies and Another, Amici Curiae)* 2007 (5) SA 30 (CC) at paras 47 - 57 *Veldman v Director of Public Prosecutions (WLD)* 2007 (3) SA 210 (CC)

[28] Eg: *Du Toit v Minister for Safety and Security and Another* 2009 (12) BCLR 1171 (CC) at para 33

29.2 Similarly, the foreign law experience indicates that retrospective civil statutes are not, without more, unconstitutional.

29.3 For example, although Article 1, Section 9, Clause 3 of the United States Constitution provides that "*no ... ex post facto law shall be passed*", this prohibition has generally been held to apply only to a law which imposes criminal punishment.[29] Thus, in a civil context, the US Supreme Court treats retrospectivity as constitutionally unobjectionable, and has held that:

> *"The strong deference accorded legislation in the field of national economic policy is no less applicable when that legislation is applied retroactively. Provided that the retroactive application of a statute is supported by legitimate legislative purpose and by rational means, judgments about the wisdom of such legislation remain within the exclusive province of the legislative and executive branches."*[30]

29.4 The similar position in Canada has been summarised by Professor Hogg as follows:

> *"Apart from Section 11(g) [of the Canadian Charter, which applies to criminal offences] Canadian constitutional law contains no prohibition on retroactive (or ex post facto) laws. There is a presumption of statutory interpretation that a statute should not be given retroactive effect, but if the retroactive effect is clearly expressed, then there is no room for interpretation and the statute is effective according to its terms. Retroactive statutes are in fact common. For example, a taxation law is often made retroactive to budget night, when the law was publically 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*

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[29] Tribe 'American Constitutional Law' 2nd Ed (1988) 632-641

[30] Finch and Benefit Guarantee Corporation v Gray 467 US 717 at 729

enact retroactive laws, if exercised with appropriate restraint, is a proper tool of modern government."[31]

29.5 The position in Europe is much the same, as the Court of Appeal of England and Wales has made clear:

"There is no general principle under the European Charter of Human Rights that changes in civil law should not operate retrospectively."[32]

30 We thus consider that there is no general constitutional principle prohibiting retrospective laws.

31 This is not to say that a specific retrospective statute could not be successfully challenged by relying on one of the rights protected by the Bill of Rights or one of the founding values in the Constitution.

31.1 In particular, most challenges to retrospective legislation are likely to contend that retrospective effect of the legislation results in an arbitrary deprivation of property in breach of section 25(1) of the Constitution.

31.2 However, we have already explained in detail why we do not consider that the Bill can be said to violate section 25(1) of the Constitution.

32 We therefore consider that even if the Bill can be said to have retrospective effect (an issue on which we express no opinion), the Bill is not unconstitutional.

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[31] Hogg Constitutional Law of Canada at para 48.8 (emphasis added). This passage was cited with approval in *Robertson and another v City of Cape Town and another* 2004 (5) SA 412 (C) at para 134

[32] *Heil v Rankin* [2000] 3 All ER 138 (CA).

THE OPINION PREPARED FOR THE SUBORDINATE NOTEHOLDERS

33 We have had sight of an opinion prepared for the subordinate noteholders by Alfred Cockrell SC and Isabel Goodman. We refer to this as "*the subordinate noteholders' opinion*".

33.1 The subordinate noteholders' opinion considers the constitutionality of the Bill. It does not conclude that the Bill is necessarily or even likely unconstitutional.

33.2 Instead, its conclusion is significantly more limited. The opinion concludes at para 69 only that it is "*arguable*" that certain of the amendments introduced by the Bill are unconstitutional. It then qualifies this conclusion as follows at para 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."*

34 We are of the respectful view that even this limited and qualified conclusion is not correct. While it is not necessary for us to set out our views on all aspects of that opinion, we emphasise two points.

35 First, we consider that the subordinate noteholders' opinion fails to distinguish sufficiently clearly between the unconstitutionality of the Bill itself and the possibility of challenging administrative decisions made after the Bill has been enacted.

35.1 Thus, the opinion raises concerns about the effect of decisions that could be made pursuant to the Bill in relation to the specific position of subordinate noteholders. But these concerns can be raised by the subordinate noteholders in their representations to the Curator and Minister/Registrar. They would have to be taken into account by Curator and Minister/Registrar in exercising their powers in terms of the Bill. If necessary, the decisions of the Curator and Minister/Registrar can be taken on review.

35.2 In this regard, we reiterate that the SCA has made clear that the ability to review an administrative decision under PAJA plays a critical role in preventing a statute being in breach of the Constitution. As the Court held in *MTN v SMI*,[33] where the party whose property rights are deprived is able to review the decision under PAJA, this "*insulates the [empowering provision] against constitutional invalidity by serving as a hedge against arbitrary deprivation*".[34]

35.3 We note that the opinion prepared for the subordinate creditors does not deal with the SCA judgment, despite it being an obstacle to the arguments advanced on unconstitutionality.

35.4 Indeed, the opinion appears to rest on the proposition that the arbitrary deprivation would result if:

> *"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*

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[33] *Mobile Telephone Networks (Pty) Ltd v SMI Trading CC* 2012 (6) SA 638 (SCA)

[34] At para 35

in the banking sector, and where such an opinion is at variance with the facts but is not vitiated by a reviewable irregularity".

35.5 Even assuming that such a scenario is possible despite the breadth of the PAJA review grounds (an issue we express no view on), we do not consider that the Courts will find that this very narrow scenario means the section violates section 25(1) of the Constitution. This is especially the case given the important need for the Curator to be vested with these powers.

36 Second, in addition to the reliance placed on section 25(1) of the Constitution, the subordinate creditors' opinion concludes that it is "arguable" that that the proposed section 69(2C) is "irrational" and provides for "arbitrary differentiation" – thus violating sections 1(c) and 9(1) of the Constitution.

36.1 We do not consider that such a challenge is sustainable.

36.2 Indeed, the very high threshold that must be overcome for such a challenge to succeed is demonstrated by the fact that in the past twenty years, there have only been two cases in which a rationality or arbitrary differentiation challenge to a piece of legislation[35] has succeeded in the Constitutional Court.

36.3 The first was the case of *Van der Merwe*, where there was a challenge to certain distinctions drawn in the Matrimonial Property Act. In that case however, the Minister of Justice, who was responsible for the administration of the Act, expressly conceded that the distinctions drawn

[35] As opposed to administrative decisions or the making of regulations.

were out-dated and irrational and himself supported a declaration of invalidity.[36]

36.4 The second was the case of *Print Media* which concerned two irrational elements – an obvious error in the legislation which was expressly conceded by counsel acting for the Minister, and a patently irrational distinction which the legislation itself draw between newspapers and magazines.[37]

36.5 By contrast, in numerous other cases challenging legislation on grounds of irrationality, the Constitutional Court has dismissed the challenge.[38]

36.6 In our view there is nothing in the present Bill which meets this threshold.

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[36] *Van der Merwe v Road Accident Fund & Another (Women's Legal Centre Trust as amicus curiae)* 2006 (4) SA 230 (CC) at para 10

[37] *Print Media South Africa and Another v Minister of Home Affairs and Another* 2012 (6) SA 443 (CC) at paras 79-81 and 85-87

[38] For example: *Ronald Bobroff & Partners Inc v De La Guerre* 2014 (3) SA 134 (CC) at paras 10 – 11; *SATAWU v Garvas* 2013 (1) SA 83 (CC) at para 50; *Glenister v President of the RSA* 2011 (3) SA 347 (CC) at paras 70 and 162; *Bertie van Zyl (Pty) Ltd v Minister for Safety & Security* 2010 (2) SA 181 (CC) at para 64; *Weare and Another v Ndebele NO and Others* 2009 (1) SA 600 (CC); *Merafong Demarcation Forum and Others v President of the Republic of South Africa and Others* 2008 (5) SA 171 (CC) para 115; *Union of Refugee Women v Director: Private Security Industry Regulatory Authority* 2007 (4) SA 395 (CC) at para 42; *Affordable Medicines Trust and Others v Minister of Health and Others* 2006 (3) SA 247 (CC) para 100; *United Democratic Movement v President of the Republic of South Africa and Others (African Christian Democratic Party and Others Intervening; Institute for Democracy in South Africa and Another as Amici Curiae) (No 2)* 2003 (1) SA 495 (CC) paras 69, 70 and 74; *New National Party of South Africa v Government of the Republic of South Africa and Others* 1999 (3) SA 191 (CC) paras 26 to 27 and 31 to 33; *Jooste v Score Supermarket Trading (Pty) Ltd (Minister of Labour Intervening)* 1999 (2) SA 1 (CC) para 17; *S v Lawrence S v Negal S v Solberg* 1997 (4) SA 1176 (CC) para 70; *Prinsloo v Van der Linde and Another* 1997 (3) SA 1012 (CC) paras 39 to 40.

CONCLUSION

37 We therefore consider that the Bill is consistent with the Constitution.

DAVID UNTERHALTER SC

STEVEN BUDLENDER

Chambers
Johannesburg
16 March 2014

ANNEXURE A – text of Bill considered

REPUBLIC OF SOUTH AFRICA

BANKS AMENDMENT BILL

(Proposed amended text 6-3-2015)

(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)

(MINISTER OF FINANCE)

[B 17 — 2014]

GENERAL EXPLANATORY NOTE:

[ ] Words in bold type in square brackets indicate omissions from existing enactments.

_____ Words underlined with a solid line indicate insertions in existing enactments.

BILL

To amend the Banks Act, 1990, so as to adjust the application of the provisions on arrangements and compromises in the Companies Act, 2008, for banks under curatorship; to expand the basis on which a curator may dispose of all or part of the business of a bank to enable an effective resolution of a bank under curatorship; to provide for the application of the Promotion of Administrative Justice Act, 2000, to any administrative action taken in terms of the Banks Act; and to provide for matters connected therewith.

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:—

Amendment of section 51 of Act 94 of 1990, as amended by section 11 of Act 9 of 1993, section 34 of Act 19 of 2003 and section 22 of Act 22 of 2013

1. Section 51 of the Banks Act, 1990 (hereinafter referred to as the principal Act), is hereby amended by the substitution for subsection (1) of the following subsection:

"(1) A company registered as a bank or as a controlling company shall continue to be a company in terms of the Companies Act, and the provisions of that Act shall, subject to the provisions of subsection (2), continue to apply to any such company to the extent to which they are not inconsistent with any provision of this Act: Provided that—

(a) the provisions of the Companies Act governing the conversion of public companies into other forms of companies shall not apply to any such company; [**and]**

(b) the provisions of sections 128 to **[155]** 154 of the Companies Act relating to business rescue **[and compromise with creditors]** shall not apply to a bank**[.]**;

(c) the provisions of section 155 of the Companies Act relating to an arrangement or compromise between a company and its creditors shall not apply to a bank unless it is under curatorship in terms of section 69 and the Minister has empowered the curator to propose and enter into an arrangement or compromise in terms of section 69(3)*(k)*; and

(d) references to the board of a company, the liquidator of a company and an authorised director in section 155 of the Companies Act shall be regarded as a reference to a curator.".

Amendment of section 69 of Act 94 of 1990, as amended by section 8 of Act 42 of 1992, section 17 of Act 9 of 1993, section 43 of Act 26 of 1994, section 6 of Act 55 of 1996, section 10 of Act 36 of 2000, section 47 of Act 19 of 2003 and section 37 of Act 22 of 2013

2. Section 69 of the Banks Act, 1990, is hereby amended—

(a) by the substitution for subsection (2C) of the following subsection:

"(2C)*(a)* Notwithstanding the provisions of subsection (3), the curator may—

(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,

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) effect a disposal referred to in subparagraph (i) unless a reasonable probability exists that such disposal will enable the bank to pay its debts or meet its obligations and become successful concern.]

(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 the provisions of 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 whether—

(i) the creditors are treated in an equitable manner; and

(ii) a reasonable probability exists that a 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.

(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, notwithstanding the fact that the effects in paragraph *(c)*(i) or

(ii) are not achieved 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:

"*(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 this Act, 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;";

(c) by the substitution in subsection (3) for paragraph *(i)* of the following paragraph:

"*(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

(d) by the addition to subsection (3) of the following paragraphs:

"*(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 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; and

(k) without limiting any other power of the curator in terms of this section, to propose and enter into an arrangement or compromise between the bank and all its creditors, or all the members of any class of creditors, in terms of section 155 of the Companies Act.".

Insertion of section 89A in Act 94 of 1990

3. The following section is hereby inserted in the principal Act, after section 89:

"Fair administrative action

89A. Any administrative action taken in terms of this Act, including any administrative action taken by a curator appointed in terms of section 69, is subject to the Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000).".

Short title, commencement and application

4.(1) This Act is called the Banks Amendment Act, 2015, and takes effect when first published in the *Gazette* as an Act.

(2) If, immediately before this Act takes effect, a bank is under curatorship in terms of section 69 of the principal Act, the provisions of this Act apply to the curatorship.