

AFRICAN BANK LIMITED SENIOR CREDITOR CO-ORDINATING COMMITTEE

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

With a copy to:

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

17 March 2015

Dear Mr. Wicomb,

This letter is sent to you by the co-ordinating committee of senior creditors of African Bank Limited (in curatorship) (the “**Committee**” and “**African Bank**”) in respect of the proposed Banks Amendment Bill (B17-2014) (the “**Bill**”), which is currently under consideration by the Standing Committee on Finance.

The Committee is a representative group of major senior lenders to African Bank (and other financial institutions in South Africa) which holds in excess of 50% of the total debt of African Bank.

We have recently concluded a further process of deliberation with National Treasury and have considered the new wording of the Bill proposed by National Treasury (attached hereto as Annexure A for ease of reference). The Committee views the Bill as an interim measure until the promulgation of the more detailed restructure mechanisms under the “Twin Peaks” model.

In order to expedite the finalization of the restructure of African Bank and although we note that National Treasury has not included a substantial number of our previous comments in the revised wording of the Bill (the “**Revised Bill**”), we wish to nevertheless express our general support for the Revised Bill. We specifically support the “**No Creditor Worse Off Than In Liquidation Principle**” test currently contained in Section 69(2C)(ii) of the Revised Bill, as we believe this to be an internationally-accepted principal which is entrenched in “Key Attributes of Effective Resolution Regimes for Financial Institutions” published by the Financial Stability Board, an international body that monitors and makes recommendations about the global financial system and amongst whose members include National Treasury.

Our support for the Revised Bill is caveated by the following, which the members of the Committee consider to be of particular importance in ensuring the protection of the rights of senior creditors of African Bank and of other banks which may enter curatorship in the future:

1. *Publication of Proposed Terms of Reserve Bank Funding*

The Revised Bill proposes that Section 69(3) of the Banks Act be amended to empower the curator to raise secured funding for a bank. National Treasury has proposed amendments to the draft Bill to specify that (i) secured funding may be obtained only

from the South African Reserve Bank, and (ii) any security granted in connection with such funding would be without prejudice to real security held by existing secured creditors. Whilst these changes to the draft Bill are welcome, they do not go far enough in protecting the position of existing creditors and we believe, in the interests of transparency and administrative justice, that it is also critically important that the curator be obliged to publish the terms upon which any such funding will be granted prior to or at the same time that a resolution proposal is published.

To the extent that this proposal can be accommodated, we believe that the Revised Bill adequately addresses the concerns of the senior creditors represented by the Committee.

Yours faithfully,

The Senior Creditor Co-ordinating Committee*

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

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)

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.
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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

42. 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.~~1.~~

(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) and/or (ii) are not satisfied, the Minister may, subject to section 54, consent to the disposal, transfer or disposal and transfer 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 into 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

2.4.(1) This Act is called the Banks Amendment Act, 2014.

(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.

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