

**BANKS ACT, 1990 SHOWING AMENDMENTS PROPOSED IN BANKS
AMENDMENT BILL [B 17-2014] AND PROPOSED AMENDMENTS BY NATIONAL
TREASURY**

51. Application of Companies Act to banks and controlling companies

(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.

(2) The Minister may with the concurrence of the Minister of Trade and Industry by notice in the *Gazette* declare that a provision of the Companies Act specified in such notice—

(a) shall not apply to any company registered as a bank or as a controlling company;

(b) shall only apply to any such company subject to such adjustments and qualifications as may be specified in the notice; or

(c) the administration of which vests in the Commissioner, shall in respect of companies registered as banks or as controlling companies vest in the Registrar.

69. Appointment of curator to bank

(1) (a) If, in the opinion of the Registrar, any bank will be unable to repay, when legally obliged to do so, deposits made with it or will probably be unable to meet any other of its obligations, the Minister may, if he or she deems it desirable in the public interest, by notifying the chief executive officer or the chairperson of the board of directors of that bank in writing, appoint a curator to the bank.

(b) The Registrar may appoint a person, other than a person who is in the employ of the bank under curatorship, who in the opinion of the Registrar has wide experience of and is knowledgeable about the specific field of activities in which the bank under curatorship is predominantly engaged, to assist the curator in the management of the affairs of the bank under curatorship.

- (c) The person appointed in terms of paragraph (b) shall in respect of the services rendered by that person pursuant to his or her appointment be paid such remuneration out of the funds of the bank under curatorship as the Registrar may after consultation with the curator determine.
- (2) The Minister shall appoint a curator by letter of appointment which shall set out—
 - (a) the name of the bank in respect of which the curator is appointed and the address of its head office;
 - (b) directions in regard to the security which the curator has to furnish for the proper performance of his or her duties;
 - (c) directions in regard to the remuneration of the curator; and
 - (d) such other directions as to the management of the bank concerned or any matter incidental thereto, including directions in regard to the raising of money by that bank, as the Minister may deem necessary.
- (2A) On appointment of a curator—
 - (a) the management of the bank concerned shall vest in the curator, subject to the supervision of the Registrar, and any other person vested with the management of the affairs of that bank shall be divested thereof; and
 - (b) the curator shall recover and take possession of all the assets of the bank.
- (2B) The curator shall—
 - (a) subject to the supervision of the Registrar, conduct the management contemplated in subsection (2A) (a) in such a manner as the Registrar may deem to best promote the interests of the creditors of the bank concerned and of the banking sector as a whole and the rights of employees in accordance with relevant labour legislation;
 - (b) comply with any direction of the Registrar;
 - (c) keep such accounting records and prepare such annual financial statements, interim reports and provisional annual financial statements as the bank or its directors would have been obliged to keep or prepare if the bank had not been placed under curatorship;
 - (d) convene the annual general meeting and any other meeting of members of the bank provided for by the Companies Act and, in that regard, comply with all the requirements with which the directors of the bank would in terms of the Companies Act have been obliged to comply if the bank had not been placed under curatorship; and
 - (e) have the power to bring or defend in the name and on behalf of the bank any action or other legal proceedings of a civil nature and, subject to the provisions of any law relating to criminal proceedings, any criminal proceedings.
- (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) ~~transfer any of its liabilities; or 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 a successful concern.~~

(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 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."

(2D) If at any time the curator 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, the curator shall forthwith in writing inform the Registrar of such opinion.

(2E) Any money of the bank that becomes available to the curator shall be applied by him or her in paying the costs of the curatorship and in the conduct of the bank's business in accordance with the requirements of the curatorship and, as far as the circumstances permit, in the payment of the claims of creditors which arose before the date of the curatorship.

(2F) (a) Every disposition of its property, which if made by an individual could for any reason be set aside in the event of such individual's insolvency, may, if made by a bank that is

unable to pay its debts, be set aside by a court at the suit of the curator in the event of that bank being placed under curatorship, and the provisions of the law relating to insolvency shall mutatis mutandis apply in respect of such disposition.

- (b) For the purposes of this subsection the event which shall be deemed to correspond with a sequestration order under the Insolvency Act, 1936 (Act No. 24 of 1936), in the case of an insolvent, shall be the presentation to the Court of the letter of appointment of the curator.
- (2G) The period during which any bank that is a mortgage debtor in respect of any mortgage bond is subject to curatorship in terms of this section shall be excluded in the calculation of any period of time for the purpose of determining whether such mortgage bond confers any preference in terms of section 88 of the Insolvency Act, 1936, as applied to the winding-up of banks in terms of this Act.
- (3) The Minister may, in the letter of appointment or at any time subsequent thereto, empower the curator in his or her discretion, but subject to any condition which the Minister may impose—
 - (a) to suspend or reduce, as from the date of the curator's appointment as such or any subsequent date, the right of creditors of the bank concerned to claim or receive interest on any money owing to them by that bank;
 - (b) 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;
 - (c) to cancel any agreement between the bank concerned and any other party to advance moneys due after the date of the curator's appointment as such, or to cancel any agreement to extend any existing facility, if, in the opinion of the curator, such advance or any loan under such facility would not be adequately secured or would not be repayable on terms satisfactory to the curator or if the bank lacks the necessary funds to meet its obligations under any such agreement or if it would not otherwise be in the interests of the bank;
 - (d) 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;
 - (e) to negotiate with any individual creditor of the bank concerned with a view to the final settlement of the affairs of such creditor with the bank;
 - (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 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;
 - (g) to cancel any lease of movable or immovable property entered into by the bank concerned prior to its being placed under curatorship: Provided that, notwithstanding the provisions of subsection (6), a claim for damages in respect of such cancellation may be instituted

against the bank after the expiration of a period of one year as from the date of such cancellation;

(h).

(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;

(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."

(3A) The curator shall duly record the nature of and the reasons for each act performed by the curator under any power conferred upon the curator in terms of subsection (3), and such records shall be examined as part of the normal audit performed in respect of the affairs of the bank concerned.

(4) The Minister may, at any time and in any manner, amend the directions in the letter of appointment, and the powers granted by the Minister under subsection (3) to the curator.

(5)

(6) While such bank is under curatorship—

(a) all actions, legal proceedings, the execution of all writs, summonses and other legal process against that bank shall be stayed and not be instituted or proceeded with without the leave of the court; and

(b).

(6A) While a bank is under curatorship the curator shall on a monthly basis furnish the Registrar with a written report containing an exposition of the affairs of the bank concerned and in which it is stated whether or not, in the opinion of the curator, a reasonable probability exists that the bank will be able to pay its debts or to meet its obligations and to become a successful concern.

(6B) Notwithstanding any provision to the contrary contained in this Act, sections 35A, 35B and 46 of the Insolvency Act, 1936 (Act No. 24 of 1936), shall mutatis mutandis apply to the curator of any bank under curatorship and to such a bank as if the curator were a trustee of

an insolvent estate and the bank were an insolvent or a sequestrated estate as contemplated in those sections.

- (7) The Registrar shall as soon as is practicable announce the appointment of a curator and the powers granted to the curator on the appointment of the curator, and any amendment or withdrawal of such powers, by notice in the Gazette.
- (8) Notwithstanding anything to the contrary contained in any law, the suspension, cancellation or termination of the registration of a bank while such bank is under curatorship in terms of this section shall not affect—
 - (a) any appointment made, direction issued, or any other thing done under this section in respect of such bank; or
 - (b) any power to be exercised or duty to be executed in respect of that bank under curatorship by the Minister, the Registrar or the curator, by virtue of the provisions of this section, and the Minister, the Registrar and the curator, respectively, shall until such time as the curatorship is terminated continue to exercise their respective powers and to execute their respective duties under this section in respect of the public company of which the registration as a bank has been so suspended, cancelled or terminated, as if such suspension, cancellation or termination had not taken place.
- (9) The Minister may—
 - (a) at any time withdraw the appointment of a curator;
 - (b) upon application by the Registrar withdraw the appointment of a curator.
- (10) Curatorship of a bank shall lapse upon—
 - (a) the issue by the Minister of written notification to that effect to the curator; or
 - (b) the winding-up of the bank in terms of the provisions of section 68.

89A. Fair administrative action

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).