

Sub-committee meeting, DBSA offices Midrand, 9 April 2015, 10h00

The Standing Committee on Finance is currently in the process of finalising the Banks Amendment Bill [B17-2014]. The Bill flows, in major part, from the challenges around the African Bank and there are major disputes between creditors that the Committee feels should be mediated by a Sub-committee before the full Committee meets. These matters need to be addressed expeditiously in view of the urgency of the Bill. It was therefore consensually decided at the Committee meeting of 25 March 2015, that a multi-party Sub-Committee of 3 members should meet before the next parliamentary quarter starts.

The sub-committee comprised of the following Members of Parliament:

1. Dr Makhosi Khoza (MK) - Chairperson
2. Mr David Ross (DR)
3. Ms Thandi Tobias-Pokolo (unable to attend due to illness)

The Committee met at the Development Bank of Southern Africa (DBSA) offices in Midrand, Johannesburg on Thursday, 9 April 2015.

Parliamentary staff comprised of:

1. Adv Frank Jenkins (FJ)
2. Ms Bridgette Diutweleng (BD)
3. Mr Allan Wicomb (AW)

National Treasury, as well as the South African Reserve Bank (SARB) were represented by the following people:

1. Mr Ismail Momoniat (IM)
2. Mr Roy Havemann (RH)
3. Mr Vukile Davidson (VD)
4. Adv Empie van Schoor (EvS)
5. Mr Francois Groepes (FG)

The following entities were present and made submissions at the meeting:

Curator of Africa Bank

Adv. Kuper (K)

Ms Nashleen Dilrajh (ND)

Mr Peter Bradshaw (PB)

Mr Michael Cooper (MC)

Senior Creditors Committee

Ms Aldene de Vos (AdV)

Stephanus de Swardt (SdS)

Tier II Debtholders Committee

Ms Thea Hartman (TH)

Adv Alfred Cockrell SC (AC)

Ms Isabel Goodman (IG)

Ms Lisa Botha (LB)

Mr Lionel Shawe (LS)

Opening remarks

Opened and welcomed, introductions. Still need to find common ground, engage outside of this setting.

Sub-committee will compile a report and present to broader Committee.

National Treasury

Curatorship taking place, and ongoing. Negotiating with debt holders and other parties to reach agreement. Two balls, 2nd is the need for legislation, must get specific amendments through. This is also the most important. 1st ball is negotiations, parallel to legislation.

SARB

Two weeks ago asked to get involved in negotiations, intensive process involving debt holders. Significant progress, list of terms agreed. Further feedback received, engagements continuing. Next Friday reach agreement.

Any additional month adds additional liabilities, transfer total of R350m. Additional interest charged will result in R2.2b (should have been done by 31 March but now 30 September). the longer this drags out the more likelihood of public money being deployed. The longer this drags on the more the risk increases. DFI's, have fewer rights, approached through negotiated settlement.

Amendments will have a limited shelf life, as the Twin Peaks will require further amendments.

Tier II

Clients have been working hard, and will continue to do so over the next 10 days. Deal seeks to protect everyone's rights. Not intention to hinder or halt the Bill. Made various submissions to Committee, raised concern with regard to impact adoption of Bill will have on Tier II creditors. Understand that Bill is an interim measure.

Adv Cockrell, SC

Extraordinary how much opinion is agreed between all opinions, difference is the conclusions. Will be risk to constitutional challenge.

1. Retrospectivity

Impact of amendment will allow contractual rights to be taken away. Common cause, paragraph 31 of NT opinion, not disputed in Parliament opinion either. If bill were enacted, will it take away vested rights? It would interfere. No opinion from NT disputing the findings of opinion. If a challenge to retrospective legislation will succeed, this is an instance where it will succeed.

2. Irrational legislation and arbitrary differentiation

Not in dispute, Bill will authorise differentiation. If Bill enacted, the curator can take all assets out of ABIL and put in Good bank, can transfer liabilities to creditor X. Difference between opinions, ours is that it can be challenged, NT says not.

3. Property challenge

MTN case, given such prominence but case had little substance.

Constitutional opinions are grey areas, cannot conclude with any confidence this Bill will not be unconstitutional.

Q, MK - What brings about Banks Amendment Bill? What is the context? We have a situation where there was a crisis, and the only options were liquidation or curatorship. Trustees were informed by Pension Fund Act, appreciate rule of law, but fail to follow context. Are contractual rights not compromised by taking the high risk investment decision in the first place? Find it difficult to be persuaded on the constitutionality issue. Seem to be ignoring the market factor.

A, AC – Contracts concluded, expectation was that contracts will be governed. Was by current clause, not aware that after contract was approved legislation was changed. Examples are not retro-activity, but past event allows curator to impose new consequences that was not present at the time of negotiating contracts.

Q, DR – Might be provisions that is unconstitutional. Understand the urgency and cost involved. Had sense deal was close to being struck. National interest to solve this, in

interest of financial and banking sector. Have to take note of provisions that may be unconstitutional. What will this hold for confidence in the system?

Is investment in a bank not subject to Reserve Bank oversight?

A, IM – Almost as if some investors slept through the 2008 banking crisis. If there is problems with liquidity, rules get changed. Based on their argument the global response to the crisis is wrong. They should not be trusted with investing pension money, how could they not advise their funds of risks and crisis.

A, FG – Problematic to limit amendments to ABIL. Example they used problematic,

A, LS – Pension fund investment, largest share of debt held by asset managers representing pension funds. Tier II debt ranks the same as senior debt, but is the risk of liquidation they take.

Senior Creditors

No formal presentation, will solution not be to put bank through liquidation?

MK – Based on context FG gave, that is not an option.

FG – Seniors will lose substantially, they will get R16b out of potential R43b. Stand more to lose through liquidation. 90% sure agreement will be reached. Liquidation is a possible outcome but all parties will lose.

Curator

Endorsing statements made by FG, biggest loser of all will be subordinated creditors, they have no place in the liquidation queue. Liquidation is a disaster for everyone, Tier II, jobs, reputation of SA banking system. Only prospect of curatorship is that offers could come, to avoid liquidation. The curator has to say in the offer. Only answer is from consortium of banks, no one else will or can deal with it. Curator has exactly the same problems as the Committee, has to look at general interest of general body of creditors.

When advisors to Tier II advised they will invest in Tier II rather than senior, they knew what they were doing. They knew of the risks involved. When a company or individual is insolvent, talk of contractual right should be taken with a pinch of salt.

As the Banks Act stands, section 69 (3) (b), existing power in Act. The amendments are merely bringing curatorship up to date. Do believe Tier II overstated their position. In the main, will only face subordination at liquidation.

Amendments are there to equip the curator to do the job, and find the best solution possible. The urgency of this must be stressed. People have jobs that need to be secured, reputation of the banking system.

National Treasury

When constitution was drafted, this was envisaged. The legislature can't make decisions on constitutionality. Counsel made it clear, if a party feels their constitutional rights have been infringed, they are free to challenge it before the constitutional court.

Weights of evidence (different opinions in favour as opposed to against) points to this being constitutional, but this can be challenged.

Never had this level of engagement with previous amendments to the original Act.

Parliamentary Legal Advisor

Nothing glaringly unconstitutional in opinions. Opinions are based on briefs, not answering another.

Will be worried to pass a law dealing only with African Bank, need a law of general application.

Closing remarks

Think objective of the day was achieved. Will recommend, taking into account all presentations. Will be important to take in account all factors put forward: banking system etc. and other pieces of legislation.

No intention of members to discount impact on pension fund members. Have to accept we are dealing with a difficult situation.