

NO. 55 OF 1996: BANKS AMENDMENT ACT, 1996.

PRESIDENT'S OFFICE

No. 1755.
1 November 1996

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It is hereby notified that the President has assented to the following Act which is hereby published for general information:-

GENERAL EXPLANATORY NOTE:

Words in bold type indicate omissions from existing enactments.

Words in italics indicate insertions in existing enactments.

ACT

To amend the Banks Act, 1990, so as to define or further define certain expressions; to make further provision for the furnishing of information to the Registrar of Banks by a foreign banking institution applying for consent to establish a representative office in the Republic and to provide Or the periodical furnishing of prescribed, information by representative offices generally; to regulate investments by banks or controlling companies in joint ventures within or outside the Republic; to further regulate the amalgamation of two or more banks and the transfer by a bank of all or any part of its assets and liabilities to another bank or person and provide for the waiver, with the consent of the Minister of Finance, of certain duties, fees or charges payable in connection with the transfer of assets and liabilities necessitated by an amalgamation of banks or the disposal by a bank of the whole or any part-of its business; to abrogate the suspension of the operation of set-off in respect of any amount owing by a creditor to a bank under curatorship, and make the provisions of sections 35A, 35B and 46 of the Insolvency Act, 1936, applicable in relation to a bank under curatorship; and to provide for incidental matters.

(Afrikaans text signed by the President.)

(Assented to 24 October 1996.)

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

Amendment of section 1 of Act 94 of 1990, as amended by Government Notice R.1765 of 30 July 1991, section 1 of Act 42 of 1992, sections 1 and 25 of Act 9 of 1993 and section 1 of Act 26 of 1994

1. Section 1(1) of the Banks Act, 1990 (hereinafter referred to as the principal Act), is hereby amended-

(a) by the substitution for paragraph (a) of the definition of "deposit" of the following paragraph:

"(a) an equal amount or any part thereof will be conditionally or unconditionally repaid, either by the person to whom the money has been so paid or by any other person, with or without a premium, on demand or at specified or unspecified dates or in circumstances agreed to by or on behalf of the person making the payment and the person receiving it; and"; of the

- (b) by the insertion after the definition of "domestic shareholder" following definition:

"'employee in charge of a risk management function', in relation to a bank, means that employee of the bank who is ultimately responsible for the management of one or more of the following types of risk to which the bank is exposed, namely-

- (a) solvency risk;
 - (b) liquidity risk;
 - (c) credit risk;
 - (d) currency risk;
 - (e) market risk (position risk);
 - (f) interest rate risk;
 - (g) counterparty risk;
 - (h) technological risk;
 - (i) operational risk;
 - (j) or any other risk regarded as material by that bank;";
- (c) by the substitution for the definition of "executive officer" of the following definition: executive officer', in relation to any institution-
- (a) that is not a bank, includes any manager of such an institution and, in relation to an institution;
 - (b) that is a bank, includes any employee of the bank who is in charge of a risk management function of that the bank, and any manager of the bank who is responsible, or reports, directly to the chief executive officer of the bank;"; and
- (d) in the definition of "the business of a bank"-

- (i) by the deletion of the word "or" where it occurs at the end of paragraph (ee);

- (ii) by the substitution for paragraph (ff) of the following paragraph:

(ff) the effecting, subject to the provisions of any other Act of Parliament and to such conditions, if any, as the Registrar may from the time to time determine by notice in the Gazette, of a money lending transaction directly between a lender and a bank as borrower through the intermediation of a third party who does not act as a principal to the transaction

(hereinafter

funds

in this paragraph referred to as the agent), provided the

to be lent in terms of the money lending transaction are entrusted by the lender to the agent subject to a written contract of agency in which, in addition to any other terms thereof, at least the following matters shall be recorded:

- (i) Confirmation by the lender that the agent acts as his the agent of the lender; and

(ii) that the lender assumes, except in so far as he there may in law have be a right of recovery against the agent, all risks connected with the administration of the entrusted funds by the agent of the funds entrusted to him by the lender, as well as the responsibility to ensure that the agent executes his the instructions as recorded in the written contract of agency:

this
Provided that, notwithstanding the preceding provisions of paragraph, an agent that-

other
(i) is a natural or juristic person registered or established in terms of, by or under any other Act of Parliament and the main business activities of whom or of which are regulated or controlled in terms of, by or under such Act of Parliament; and

as
(ii) has been designated by the Registrar by notice in the Gazette, may, for the purposes of the effecting of the money lending transaction and subject to such conditions the Registrar may determine in the relevant notice, pool the funds entrusted by the lender to such agent with funds entrusted to such agent by other lenders; or"; and

(iii) by the addition after paragraph (ff) of the following paragraph:

"(gg) the activities, set forth in subparagraphs (A) and (B) hereunder, of a person (hereinafter in this paragraph referred to as the mandatory) that-

Act
(i) is a natural or juristic person registered in terms of, or a juristic person established by or under, any other of Parliament and the main business activities of whom or of which are regulated or controlled in terms of, by or under such other Act of Parliament; and

money
(ii) has been designated by the Registrar by notice in the Gazette, which mandatory, for purposes of effecting a lending transaction with a bank-

(A) accepts money from the mandator in terms of a prescribed contract of mandate; and

money
(B) in the execution of the mandate, and subject to such conditions as the Registrar may determine in the notice referred to in subparagraph (ii) above, deposits such into an account maintained by the mandatory with a bank, irrespective as to whether or not such money is so deposited together with money so accepted by the mandatory from other mandators."

Amendment of section 34 of Act 94 of 1990, as amended by section 25 of Act 9 of 1993 and section 27 of Act 26 of 1994

2. Section 34 of the principal Act is hereby amended-

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

"(2A) If the Registrar grants an application in terms of subsection (2) for his consent to the establishment of a representative office in the Republic he shall on the prescribed form issue to the foreign institution concerned a certificate of authorization for the establishment of a representative office in the Republic A foreign institution applying in terms of subsection (2) may be required by the Registrar to furnish him with such information and documents as he may deem necessary, over and above any information and documents which have been furnished by such foreign institution by virtue of that subsection.";

(b) by the insertion of the following subsections after subsection (2A):

"(2B) After having considered all information and documents furnished to him for the purposes of an application in terms of subsection (2), the Registrar may grant the application, either unconditionally or subject to such conditions as he may determine, if satisfied that-

(a) the foreign institution making that application lawfully conducts a business similar to the business of a bank in a country other than the Republic;

(b) the competent authority responsible in that other country for the supervision of that foreign institution-

(i) has duly authorized the proposed establishment of a representative office in the Republic by that foreign institution;

(ii) accepts, is committed to and complies with the proposals, guidelines and pronouncements of the Basle Committee on Banking Supervision;

(iii) is not legally precluded from fulfilling its obligations in terms of subparagraph (ii); and

(iv) will on a continuous basis furnish the Registrar with all material information regarding the financial soundness of that foreign institution; and

(c) the establishment of a representative office in the Republic by that foreign institution will not be detrimental to the public interest.

(2C) Upon granting an application for consent to the establishment of a representative office in the Republic, the Registrar, against payment of the prescribed fee by the foreign institution, shall issue to the foreign institution, on the prescribed form, a certificate of authorization for the establishment of a representative office in the Republic."; and

(c) by the addition of the following subsection after subsection (4):

"(5) Representative offices established in accordance with the provisions of this section shall furnish the Registrar, at such-time or times or at such intervals or in respect of such period or periods and in such form as may be prescribed, with such prescribed information as he may require reasonably for purposes of the performance of his functions under this Act.".

3. Section 52 of the principal Act is hereby amended-

(a) in subsection (1)-

(i) by the insertion after paragraph (a) of the following paragraph:

"(aA) invest in a joint venture within or outside the Republic if the investment, or the investment together with one or more investments already made by the bank in that joint venture, results in the bank being exposed to an amount representing more than five per cent of its capital and reserves:

Provided that for as long as the bank is exposed to the aforementioned extent, such approval must be obtained whenever it seeks to make a further investment in that joint venture;"; and

(ii) by the substitution for paragraph (c) of the following paragraph:

"(c) acquire an interest in any undertaking conducting business having its registered office or principal place of business outside the Republic;"; and

(b) by the addition after subsection (5) of the following subsection:

more parties
"(6) For the purposes of this section and section 53 "joint venture" means a contractual arrangement between two or more persons, one or of whom is a bank or a controlling company, in terms whereof the parties undertake an economic activity that is subject to their joint control."

Amendment of section 53 of Act 94 of 1990

4. Section 53 of the principal Act is hereby amended by the insertion of the following paragraph after paragraph (a):

"(aA) any joint venture contemplated in section 52(1)(aA);".

Amendment of section 54 of Act 94 of 1990, as substituted by section 6 of Act 42 of 1992 and amended by sections 12 and 25 of Act 9 of 1993, Proclamation 132 of 1994 and section 36 of Act 26 of 1994

5. Section 54 of the principal Act is hereby amended-

(a) by the substitution for subsection (3) of the following subsection:

subsection
"(3) Upon the coming into effect of a transaction effecting the amalgamation of one bank with another bank as contemplated in

(2)(b) or a transaction effecting the transfer of all or part of the assets and liabilities of one bank to another bank or person as contemplated in subsection (2)(c)-

(a) All the assets and liabilities of the amalgamating banks or, in the case of such transfer of assets and liabilities, those assets and liabilities of the transferor bank by which the transfer is effected that are transferred in terms of the transaction, shall vest in and become binding upon the amalgamated bank or, as the case may be, the bank or person taking over transfer of such assets and liabilities;

(b) the amalgamated bank or, in the case of such transfer of assets

and liabilities, the bank or person taking over transfer of such assets and liabilities, shall have the same rights and be subject to the same obligations as those which immediately before the amalgamation or transfer the amalgamating banks or, as the case may be, the transferor bank by which the transfer has been effected may have had or to which they or it may then have been subject to immediately before the amalgamation or transfer;

- the
- (c) all agreements, appointments, transactions and documents entered into, made, drawn up or executed with, by or in favour of any of the amalgamating banks or, as the case may be, the transferor bank by which the transfer has been effected, and in force immediately prior to the amalgamation or transfer, but excluding such agreements, appointments, transactions and documents that, by virtue of the terms and conditions of the amalgamation or transfer, are not to be retained in force, shall remain of full force and effect and shall be construed for all purposes as if they had been entered into, made, drawn up or executed with, by or in favour of the amalgamated bank or, as the case may be, the bank or person taking over transfer of the assets and liabilities in question, and
- advances,
- (d) any bond, pledge, guarantee or instrument to secure future facilities or services by any of the amalgamating banks or, as the case may be, by the transferor bank transferring such assets and liabilities, which was in force immediately prior to the amalgamation or transfer, shall remain of full force and effect and shall be construed as a bond, pledge, guarantee or instrument given to or in favour of the amalgamated bank or, as the case may be, the bank or person taking over transfer of such assets and liabilities, as security for future advances, facilities or services
- by that bank or person except where, in the case of such transfer, any obligation to provide such advances, facilities or services is not included in the transfer.";

- (b) in subsection (4), by the substitution for paragraph (b) of the following paragraph:

and

"(b) in the case of a transaction effecting the transfer of assets and liabilities of one bank to another bank or a person as contemplated in subsection (2)(c), to confirmation at a general meeting of shareholders of the transferor bank by which the transfer is effected and the bank or person taking over transfer of such assets and liabilities,";

- (c) by the substitution for subsection, (5) of the following subsection:

transaction

"(5) Notice of the passing of the resolution confirming, as contemplated in subsection (4), any compromise, amalgamation or arrangement, or any arrangement for the transfer of assets and liabilities, together with a copy of such resolution and the terms and conditions of the relevant agreement or arrangement, duly certified by the chairman chairperson of the meeting at which such resolution was passed and by the secretary of the bank or person concerned, shall be sent to the Registrar by each of the banks involved or, in the case of a transaction effecting the transfer of assets and liabilities of one bank to another bank or a person as contemplated in subsection (2)(c), by the relevant transferor bank by which the transfer is effected and

the bank or person taking over transfer of such assets and liabilities, and the Registrar shall after having received such notices from all the parties to the relevant agreement or arrangement, the Registrar shall register such those notices.";

(d) by the substitution for subsection (8) of the following subsection:

and
"(8) The Registrar of Companies, every Master of the Supreme Court every officer or person in charge of a deeds registry or any other office in which, if, in his office or any register under his control there-

(a) is registered any title to property belonging to, or any bond or other right in favour of, or any appointment of or by;

(aA) is registered any share, stock, debenture or other marketable security in favour of; or

(b) has been issued any licence to or in favour of, any bank which has amalgamated with any other bank or any bank which has transferred all or part of its assets and liabilities to any other bank or person or any bank which has transferred part of its assets and liabilities to a wholly owned subsidiary of the transferor bank's controlling company, shall, if he is satisfied-

(i) that the Minister has consented in terms of subsection (1) consented to the amalgamation or transfer; and

(ii) that such amalgamation or transfer has been duly effected, and upon the production to him of any relevant deed, bond, share, stock, debenture, certificate, letter of appointment, licence or other document, make such endorsements thereon and effect such alterations in his registers as may be necessary to record the transfer thereof of the relevant property, bond or other right, share, stock, debenture, marketable security, letter of appointment or licence and of any rights thereunder to the amalgamated bank or, as the case may be, to the bank or person or the said wholly owned subsidiary which that has so taken over transfer of the said assets and liabilities."; and

(e) by the insertion after subsection (8) of the following subsection:

"(8A) No transfer duty, stamp duty, registration fees, licence duty or other charges shall be payable in respect of-

(a) a transfer contemplated in subsection (8) taking place in the execution of a transaction entered into at the instance of the Registrar in the interest of the effective supervision of banks or the maintenance of a stable banking sector; or

(b) any endorsement or alteration made to record such transfer, upon submission to the Registrar of Companies, or the Master, officer or person referred to in subsection (8), as the case may be, of a written confirmation by the Registrar of Banks that the Minister,

on
the recommendation of the last-mentioned Registrar and after consultation with the Commissioner for Inland Revenue, has

consented
to the waiver of such duties, fees or charges.".\$

42 of 992, sections 17 and 25 of Act 9 of 1993 and section 43 of Act 26 of 1994

6. Section 69 of the principal Act is hereby amended-

(a) by the deletion of paragraph (b) of subsection (6); and

(b) by the insertion after subsection (6A) of the following subsection:

"(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."

Short-title

7. This Act shall be called the Banks Amendment Act, 1996.