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GENERAL NOTICE

NOTICE 1427 OF 1998

DEPARTMENT OF FINANCE

BILLS OF EXCHANGE AMENDMENT **BILL**, 1998

The above-mentioned Bill is **published** in the Schedule for comment

Interested parties are invited **to** submit written comments, by no later than 4 August 1998, to:

The Registrar of Banks
P O **Box** 8432
PRETORIA
0001

Comments may also be transmitted to facsimile number (012)313-3758.

Please provide the name, address, telephone number and facsimile number of a person whom the Department could contact.

The Bill is explained in the Backgrounder preceding the attached Bill.

SCHEDULE

BILLS OF EXCHANGE AMENDMENT BILL, 1998

BACKGROUND

1. Summary

Pending a new Bills of Exchange Act and a separate Cheque Act, certain urgent reforms to the current Bills of Exchange Act are necessary. These reforms are aimed at clarification, protection of users, accommodation of technological changes, limitation of the liability of collecting bankers and reduction of the incidence of fraud.

2. Discussion

- 2.1 In August 1995, the South African Law Commission ("sALC") published its Report on the investigation into the Payment System in South African Law. The Report recommended that the existing Bills of Exchange Act be repealed and that a new Bills of Exchange Act and a separate **Cheque** Act be introduced.
- 2.2 Since these recommendations present a major departure from the existing legislation, it may take up to three years to debate and to implement the recommendations referred to in point 4.1.
- 2.3 In the meantime, certain urgent reforms have become necessary, owing to technological advancements and the perpetration of fraud with regard to certain types of **cheque**. It is thus proposed that certain interim amendments be made to the Bills of Exchange Act.
- 2.4 At the same time, the opportunity should be used to make certain other amendments in the interest of consumers, in order to simplify and **clarify certain** matters and to respond to certain developments in **common law**.
- 2.5 Accordingly, the amendments fall into the following broad categories:
 - 2.5.1 Amendments required for purposes of simplification and clarification of certain provisions and concepts.
 - 2.5.2 Amendments required in the interest of consumers.
 - 2.5.3 Amendment required in order to accommodate technological advancements.
 - 2.5.4 Amendment relating to collecting bank's **liability**.
 - 2.5.5 Amendments required in order to reduce the incidence of fraud.

3. Amendments for purposes of **simplification** and clarification

3.1 Section 1

The definition of "bank" is amended, and a definition of "**collecting** bank" is inserted, in order to give greater clarity to these terms.

Various redundant and anachronistic definitions are deleted.

3.2 Section 5

The initial purpose of section 5(3) was to protect the good faith of the purchaser and the payer of the instrument who paid on or received the instrument from the person holding it through a forged or unauthorised endorsement

Since section 22 provides that forged and unauthorised endorsements are wholly inoperative, the purchaser of the instrument cannot be holder in due course and the payer, in normal circumstances, cannot make a payment in due course in the circumstances described above. Section 5(3), however, makes endorsement in these circumstances **superfluous** to its negotiation, since negotiation will here be completed by **delivery** of the instrument.

No account is taken of the drawer's intention in respect of the phrase "non-existent" in English law. It **follows** that the question whether a payee is non-existent will be a question of fact.

Conversely, in English law, the intention of the drawer is imperative in deciding whether the payee is **fictitious**.

The payee will consequently be deemed to be fictitious when:

- (a) The payee is a figment of the drawer's imagination.
- (b) The payee's name was put in by pretence of the drawer.

Section 5(3) of the Bills of Exchange Act, in contrast with the comparative English statute, included only a "**fictitious**" payee.

The court, in Nedbank v Window Press, (1987(3)SA 761), opined that, in the South African context, "factitious" referred to a payee that existed only in the imagination of the drawer. It, therefore, follows that this can include an existing and a non-existing payee.

Section 5(3) is consequently amended, effecting the inclusion of a "non-existing" payee in order to deal with the problems that arose from the subjective interpretation that availed the term "factitious", since a factual scrutiny of the fact is apposite in the interpretation thereof.

3.3 Sections 13,63-66 and 70(a) and (b)

Acceptance and payment for **honour**, as well as the referee in case of need, are outmoded and have fallen into disuse. These sections are thus deleted in their entirety.

3.4 Section 18

The amendment is necessary, since stamp duty on **cheques** has been abolished, and the application of this section to **cheques** has led to confusion.

3.5 Section 23

This method of signing is archaic and is not in current use. Furthermore, it seems inequitable that a **principal** should escape **liability** merely because the agent used a special form of signature. In view of the uncertainties surrounding this section and the fact that the said method of signing has fallen into disuse, the section is repealed (SALC: 172: 173).

3.6 Sections 25,28 and 29

it is universally accepted that the doctrine of valuable consideration does not form part of South African law (SALC: 116: 123).

3.7 Section 39

The meaning of the words "by bill" have never been understood, and subsection 39(2)(a) is consequently amended.

3.8 Sections 49, 55(1)(iii), 74, 96, 97 and 98

Protest is **unnecessary** to found **liability** on a **cheque** in South African law and is generally outmoded. Bills of exchange are generally protested only when this is requested by a foreign party. The effect of these amendments is to make protest voluntary on all bills.

3.9 Section 54A

The Bills of Exchange Act does not currently not provide for the **liability** of **the** signer of an **aval**, since section 54 of the Bills of **Exchange** Act was taken over wholly from the English statute. In English law, the signer of an **aval** is not recognised as a party to a bill.

In South African case law, however, the signer of an **aval** has been regarded as a party to a bill. This brought about some confusion with regard to the **reconcilability** of the common law principles of the construction of the **aval** and the liability incurred in terms of the provision of section **54** of the Bills of Exchange Act, in circumstances when a "stranger" to a bill signed the bill. The said uncertainty placed the **liability** of the "stranger" as surety, in terms of the common law construction of the **aval**, into sharp contrast with the "stranger's" **liability** as endorser to a holder in due course.

Section 54A brings the above-mentioned uncertainty into perspective. The signer of an **aval** will forthwith be liable only as surety, and not as an endorser, if the **aval** complies with the provisions the proposed amended section 54 of the Bills of Exchange Act.

3.10 Sections 55 and section 70(d)

Section 55(2) and 70(d) are repealed owing to developments in South African case law that make it possible to grant judgements in a foreign currency (*Murate Machinery Limited v Capelon Yarns (Pty) Limited* 1986(4) SA 671 (C), *Standard Chartered Bank of Canada v Nedperm Bank Limited* 1994(4) SA 747 (A)). A similar amendment has been made in the United Kingdom, where section 57(2) of the Bills of Exchange Act, 1882, was repealed in 1977.

3.11 Section 67

The rights of a holder of a bill that is destroyed are expressly stated.

3.12 Sections 73,76 and 77

These sections have been reworded.

3.13 Section 87 and 88

The definition of a promissory note is **clarified**. **Delivery** is necessary for the establishment of rights and obligations between the parties and should not affect the **validity** of the instruments.

3.14 Section 100

The **Bills** of Exchange Act does not purport to affect any of these laws. This section is thus unnecessary and is repealed.

4. Amendments in the interest of consumers

4.1 Section 1

The definition of a cheque is amended to include a so-called "bank **cheque**", which is very commonly used, but has never had any express legislative recognition.

4.2 Section 6

Currently, an instrument made payable to "cash or order" is not a bill of exchange. Subsection (2) is amended in order to assist the member of the public who often issues and accepts **cheques** made payable in this manner.

4.3 Section 24

The amendment to **subsection 24(1)** intends obviating the uncertainty that transpired in practice when the name of the client is printed on the client's **cheques** and an official of the client company then signs the cheque, without any qualification, with the intention to sign only as an authorised agent of the company.

The question arose in the South African **courts** whether this would **constitute** a composite signature, in **which** case, the **official**, although his signature is not **qualified** to indicate the office held with the company, would **not** personally be held liable. No certainty was attained in this regard, although there has been some indication that the courts would regard such a signature as being a composite signature.

It is established that section 24(1) applies to composite signatures. An unqualified signature of an official of a company would therefore render him personally liable. The amendment to subsection 24(1) thus **facilitates** a more equitable and practical solution to the above-mentioned situation.

4.4 Section 30

The public seems to be unaware of this requirement, and it is thus considered in the general interest to make the said requirement optional rather than mandatory.

4.5 Section 72A

Although it is general commercial **practice** for banks to **certify cheques**, the consequences of such a **certification** and the rights of parties relying thereon have not previously been defined. Section 72A serves this purpose.

4.6 Section 84

This section enables banks to act on behalf of a customer in circumstances in which the customer may be incapacitated or unavailable. **Currently**, this section applies only to negotiable **cheques**.

5. Amendment to take **account** of **technological advancement**

5.1 Section 43A

The Act currently requires physical presentation of **cheques at** the branch of the bank on which it is drawn. This is no longer the practice (**Navidas (Pty) Limited v Essop**; Metha v Esaop 1994 (4) SA 191 (A)). Technological advances have made it possible to present **cheques** and other instruments more **efficiently by** transmitting **essential** data electronically to the drawee. Section 43A makes provision for this mode of prevention without diminishing the rights of the customer.

A similar amendment has been made in New Zealand and is proposed for the United Kingdom.

6. **Amendment relating collecting banks' liability**

6. Section 81

The provisions of section 81(2) should not prejudice a collecting bank that did not act negligently. The case of Indac Electronics (Pty) Limited v Volkskas Bank Limited 1992(1) SA 783 (A) ("the **Indac Electronics** case") established that a collecting bank can be held liable in delict for negligent collections. Section 81(2) is consequently amended.

7. **Amendments for purposes of prevention of fraud**

7.1 Section 75A

The duty imposed on collecting banks as a consequence of the **Indace** Electronics case is particularly onerous with regard to the collection of non-transferable **cheques**. This type of cheque has been particularly prone to fraud, and banks have faced ever increasing liabilities. Section 75 will have the following effect

By ensuring **that** non-transferable cheques are conspicuous, banks would be more readily able to apply an **additional** scrutiny of these chequaa in the collection process.

By limiting the manner in which cheques may be rendered non-transferable and by deeming all non-transferable **cheques** to be crossed cheques, the burden on collecting banks are somewhat alleviated.

By specifying that non-transferable markings overrides an instruction to pay bearer, and that such markings may not be **cancelled**, the interest of the consumer is protected.

7.2 Section 72B

Historically, the law relating to chequea wee founded on the law of mandate. Consequently, banks had no authority to pay a **cheque** without a valid signature. Banks found themselves in a precarious position when a valid signature had been forged perfectly. This may have led to a situation in which account holders had no incentive to take reasonable care or to use safer payment mechanisms.

Section 72B creates a regime in which banks bear the risk of their own negligence during the collection process of a **cheque**, aa well as the risk of any fraudulent or unauthorised intervention that did not result from the negligence of the person on whose account a **cheque** was drawn.

On the other hand, the said **section** creates an obligation for companies, government departments and other entities with similar capacity to take reasonable care in the operation of their accounts, **in** the custody of cheque forms and in the drawing of chequeaa.

GENERAL EXPLANATORY NOTE:

[1 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 Bills of Exchange Act, 1964, so as to provide for the clarification of certain provisions; the protection of users; the accommodation of technological advancements; the limitation of the liability of collecting banks; the reduction of the incidence of fraud; and to provide for matters incidental thereto.

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

Amendment of section 1 of Act 34 of 1964, as amended by subsections I(a) and I(b) of Act No. 58 of 1977 and subsections 5(a) and 5(h) of Act No. 77 of 1986

1. Section 1 of the Bills of Exchange Act, 1964 (hereinafter referred to as the principal Act), is hereby amended-
 - (a) by the deletion of the definition of "action";
 - (b) by the substitution for the definition of "bank" of the following definition:

"bank[er]" [includes] means a body of persons, whether incorporated or not, [who carry] which carries on the business of [banking] a bank and includes the South African Reserve Bank as described in the South African Reserve Bank Act, 1989 (Act No 90 of 1989) and a bank as defined in section 1 of the Banks Act, 1990 (Act No 94 of 1990), or a mutual bank as defined in section 1 of the Mutual Banks Act, 1993 (Act No 124 of 1993), or the Post Office Savings Bank as defined in section 1 of the Post Office Act, 1958 (Act No 44 of 1958);"
 - (c) by the substitution for the definition of "cheque" of the following definition:

"cheque" means a bill drawn on a bank[er] payable on demand, and includes a bill drawn by a bank upon itself."
 - (d) by the insertion after the definition of "cheque" of the following definition:

"collecting bank" means a bank collecting payment of a cheque or other document referred to in section 82."
 - (e) by the deletion of the definition of "foreign bill";
 - (f) by the deletion of the definition of "inland bill";
 - (g) by the substitution for the definition of "non-business day" of the following definition:

"non-business day" means a day contemplated in section ~~three~~[four] of the Public Holidays Act, [1952 (Act No. 5 of 1952)]1994 (Act No. 36 of 1994);"
 - (h) by the substitution for the definition of "note", used as a noun, of the following definition:

"note" [used as a noun,] means a promissory note as defined in section eighty-seven;"
 - (i) by the deletion of the definition of 'note' used as verb;
 - (j) by the deletion of the definition of 'Post Office cheque';
 - (k) by the deletion of the definition of "value"; and
 - (l) by the deletion of the definition of "warrant voucher."

Amendment of section 5 of Act No. 34 of 1964

2. Section 5 of the principal Act is hereby amended by the substitution for subsection (3) of the following **subsection:**

"(3) If the **payee** is a **fictitious** or **non-existing** person, [or a person not having capacity to contract] the **bill** may be treated as **payable** to bearer."

Amendment of section 6 of Act No. 34 of 1964

3. Section 6 of the principal Act is hereby amended by the substitution for subsection(2) of the following **subsection:**

"(2) A **bill** is payable to bearer if it is expressed to be so payable, or if the only or last indorsement on it is an **indorsement** in blank, or if it is expressed to be payable to "cash" or "cash or order"."

Repeal of section 13 of Act No. 34 of 1964

4. Section 13 of the principal Act is hereby repealed.

Amendment of section 18 of Act No. 34 of 1964

5. Section 18 of the **principal** Act is hereby amended by the substitution for subsection(1) of the following **subsection:**

"(1) If a person **places** his signature **upon**, [and affixes a stamp to,] a blank paper and **delivers** such paper to any other person in order that it may be converted into a **bill**, it operates as a prima facie authority to **fill** it up as a complete **bill** for any amount [**such a stamp will cover,**] **using the said signature for** that of the drawer, the acceptor or an **indorser**."

Amendment of section. 19 of Act No. 34 of 1964 .

6. Section 19 of the **principal** Act is hereby amended by the substitution for subsection(1) of the following subsection:

"(1) No contract on a **bill**, whether it be a drawer's, the acceptor's, [**or**] an **indorser's, or an aval's** shall be complete and irrevocable, **until delivery** of the instrument in **question** in order to **conclude** such a contract Provided that if an acceptance is written on a **bill** and the drawee **gives** notice to, or according to the directions of, the person entitled to the bill that he has accepted it, the acceptance then becomes complete and irrevocable."

Repeal of section 23 of Act No. 34 of 1964

7. Section 23 of the **principal** Act is hereby repealed.

Amendment of section 24 of Act No. 34 of 1964

8. **Section 24** of the **principal** Act is hereby amended by the **substitution** for subsection (1) of the **following** subsection:

"(1) If a person signs a **bill** as drawer, acceptor or indorser and adds words to his signature indicating that he signs for or on behalf of a principal, or in a representative capacity, or if he signs as drawer and the name of the principal appears with his signature, he is not personally liable thereon: Provided that if such person had in fact no authority to sign for or on behalf of the person indicated as principal, or in a representative capacity, he **shall** be **personally** liable on the said **bill**."

Repeal of section 25 of Act No. 34 of 1964

9. Section 25 of the **principal** Act is hereby repealed.

Substitution of section 28 of Act No. 34 of 1964

10. The following section is hereby substituted for section 28 of the principal Act:

'28. [**Presumption as to value and good faith**] **Value and presumption as to holder in due course,**

(1) **A holder takes a bill for value if he takes it under onerous title. [Every party whose signature appears on a bill is prima facie deemed to have become a party thereto for value.]**

(2) Every holder of a bill is *prima facie* deemed to be a holder in due course: **Provided that if** in an **action** on a bill it is admitted or proved that the acceptance, issue or subsequent negotiation, of the **bill** is affected **with** fraud or **illegality**, the burden of proof **is** shifted, unless and until the holder proves that subsequent to **the alleged** fraud or **illegality** value has in good **faith** been given for the bill.

Amendment of section 29 of Act No. 34 of 1964

11. Section 29 of the **principal** Act is hereby amended by the substitution for subsection (4) of the **following** subsection:

“(4) **If** the holder of a bill payable to his order transfers it [for value] without endorsing **it**, the transfer **gives** the transferee such **title** as the transferor had in the bill, and the transferee in **addition** acquires the right to have the bill indorsed by the transferor.”.

Amendment of section 30 of Act No. 34 of 1964

12. Section 30 of the principal Act is hereby amended by the substitution for subsection 5 of the following subsection:

“(5) **If** in a bill payable to order, the payee or indorsee is wrongly designated, or his name is misspelt, he **may** [must], in order to effect a negotiation of the bill, indorse the bill as he is therein described, adding if he thinks fit his proper signature.”.

Amendment of section 39 of Act No. 34 of 1964

13. **Section 39** of the principal Act is hereby amended by the substitution for paragraph (a) of subsection (2) of the following paragraph:

“(a) if the drawee is dead or insolvent or is a fictitious person or a person not having capacity to contract **[by bill];**”

Insertion of section 43A in Act No. 34 of 1964

14. The following **section** is hereby inserted in the principal Act after section 43:

“43A. Presentment for **payment by bank**

(1) A **bill may, provided the other requirements of section 43 are met, be presented for payment to a drawee bank by a collecting bank-**

- (a) **at a place desiccated in the rules of any clearing house of which both the drawee and collecting banks are members or**
- (b) **at a place of payment designated by the drawee bank or**
- (c) **by means of data transmitted in terms of an agreement to which both drawee and collecting banks are party, by or on behalf of the collecting bank to the drawee bank identifying the bill with reasonable certainty.**

(2) For the purposes of paragraph (c) of subsection (1), a bill is deemed to be identified with reasonable certainty if-

- (a) **the sum ordered to be paid by the bill;**
- (b) **the number of the bill, if any;**
- (c) **the name and number of the account against which the bill is drawn; and**
- (d) **the drawee bank are specified or are readily ascertainable by the drawee bank from the data transmitted by or on behalf of the collecting bank.**

(3) **Where a bill is presented for payment in terms of this section without exhibiting it to the drawee bank, nothing in this section shall relieve the drawee bank from any liability to which it would have been subject in relation to the bill if it had been presented by being so exhibited.**”.

Amendment of section 49 of Act 34 of 1964, as amended by subsections 3(a), 3(b), 3(c) and 3(d) of Act No. 56 of 1977

15. Section 49 of the principal Act is hereby amended-

(a) by the deletion of subsection(1);

(b) in subsection (1A)

(i) by the substitution for paragraph (a) of the following paragraph:

“(a) If a[n inland] bill has been dishonored by non-acceptance or non-payment it may be protested for non-acceptance or non-payment, as the case may be, but it shall not be necessary so to protest any such bill to hold the drawer or any indorser liable.”; and

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

“(b) If [such] a bill drawn payable at the place of business or residence of some person other than the drawee, has been dishonored by non-acceptance it may be protested for non-payment, and in such event no further presentment for payment to, or demand on, the drawee is necessary.”; and

(c) by the substitution for subsection 9 of the following subsection:

“(9) Delay in protesting is excused if the delay is caused by circumstances beyond the control of the holder and not imputable to his default, misconduct, or negligence: Provided that if the cause of delay ceases to operate, the bill must be protested [when necessary] with reasonable diligence.”.

Substitution of section 54 of Act No. 34 of 1964

16. The following section is hereby substituted for section 54 of the principal Act:

“54. Liability of stranger signing a bill.

If a person signs a bill otherwise than as drawer or acceptor or the signer of an aval or the drawee certifying a cheque, he thereby incurs the liabilities of an indorser to a holder in due course.”;

Insertion of section 54A in Act No. 34 of 1964

17. The following section is hereby inserted in the principal Act after section 54:

“54A. **Liability of signer of aval**

(1) The liabilities of the parties to a bill or note may be secured by an aval.

(2) A person signs a bill or note as the signer of an aval where he signs the bill or note, and by words such as “as aval”, “as surety” or “as guarantor” expressly indicates that he is a surety: Provided that the unqualified signature made before endorsement by the payee on the back of a bill or note payable to order of a person other than the drawer, maker, drawee or payee shall be sufficient.

(3) The signer of an aval may specify in the cheque, bill or note the party for whom he is surety, and if he does not so specify, he shall be deemed to have given his aval for the drawer, acceptor or maker, respectively.

(4) The signer of an aval is liable jointly and severally with, and as surety for, the party for whom he has given his aval.

(5) Where the signer of an aval pays the bill or note, he acquires the rights arising out of the bill or note against the person for whom he has given his aval and against all parties liable to that person.”.

Amendment of section 55 of Act 34 of 1964**18. Section 55 of the principal Act is hereby amended-**

(a) by the substitution for subsection 1 of the following subsection:

“[(1)] Subject to the provisions of sub-sections (2) and (3), ~~if~~ if a bill is dishonored, the holder may recover from any party liable on the bill, and the drawer, if he has been compelled to pay the bill, may recover from the acceptor, and an indorser who has been compelled to pay the bill, may recover from the acceptor, the drawer or a prior indorser as damages, which shall be deemed to be liquidated-

(i) the amount of the bill;

(ii) interest thereon from the time of presentment for payment if the bill is payable on demand, or from the maturity of the bill in any other case.

[(iii) the expenses of noting, and if protest is necessary and has been extended, the expenses of the protest.]”;

(b) by the deletion of subsection (2); and

(c) by the deletion of subsection (3).

Amendment of section 56 of Act No. 34 of 1964

19. Section 58 of the principal Act is hereby amended by the substitution for the word “banker” of the word “bank” where it occurs in the section.

Repeal of section 63 of Act No. 34 of 1964

20. Section 63 of the principal Act is hereby repealed.

Repeal of section 64 of Act No. 34 of 1964

21. Section 64 of the principal Act is hereby repealed.

Repeal of section 65 of Act No. 34 of 1964

22. Section 65 of the principal Act is hereby repealed.

Repeal of section 66 of Act No. 34 of 1964

23. Section 66 of the principal Act is hereby repealed.

Substitution of section 67 of Act No. 34 of 1964

24. The following section is hereby substituted for section 67 of the principal Act:

“67. Holder’s **rights if bill is lost or destroyed.**

(1) If a bill is lost or destroyed before it is overdue, the person who was the holder of it may request the drawer to give him another bill of the same tenor, giving adequate security to the drawer, if required, to indemnify him against all persons whatever in case the bill alleged to have been lost is found again.

(2) If the drawer on such request refusea to give such bill he may be compelled to do so.”.

Amendment of section 70 of Act No. 34 of 1964, as amended by section 4 of Act No. 56 of 1977

25. Section 70 of the principal Act is hereby amended-

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

(a) ~~the validity~~ of the bill as regards requisites in form is determined by the law of the place of issue, and the ~~validity~~, as regards requisites in form, of every supervening contract, such as acceptance] or endorsement [or acceptance for **honour supra protest,**] is determined by the law of the place where such contract was made, but-";

(b) by the substitution for subsection (b) of the following subsection:

"(b) subject to the provisions of this Act, the interpretation of the contract of the drawer, **indorser[, acceptor,] or acceptor [for honour supra protest,] of a bill is determined by the law of the place where such contract is made Provided that if a[n inland] bill payable in the Republic is indorred outside the Republic, the endorsement shall as regards the payer be interpreted according to the law of the Republic;**" and

(c) by the deletion of subsection (d).

Amendment of section 72 of Act No. 34 of 1964

26 Section 72 of the principal Act is hereby amended-

(a) in subsection (1)-:

(ii) by the substitution for the word "**banker**" of the word "bank where it occurs in paragraph (a); and

(iii) by the substitution for paragraph (b) of the following paragraph:

"(b) the holder of a cheque as to which such drawer or person is so discharged shall be a creditor, in lieu of such drawer or person, of such **bank[er]** to the extent of such discharge, and be entitled to recover the amount from **[him] it;**" and

(b) by the substitution for the word "bankers" of the word "banks" where it occurs in subsection (2).

Insertion of section 72A in Act 34 of 1964

27. The following section is hereby inserted in the principal Act after section 72:

"72A. Liability of drawee who has certified cheque

(1) A cheque is certified if the drawee signs it and by adding words to the cheque indicates that the cheque will be paid or that funds are available for its payment.

(2) The drawee of a cheque by certifying it -

(a) engages that he will pay the holder, or the drawer or an indorser who has paid the cheque, the amount recoverable in terms of section 55 according to the tenor of his certification;

(b) is precluded from denying to a holder in due course -

(i) the existence of the drawer, the genuineness of his signature, and his capacity and authority to draw the cheque;

(ii) the existence of the payee and his then capacity to indorse."

Insertion of section 72B in Act 34 of 1964

28. The following section is hereby inserted in the principal Act after section 72A:

"72B. Prevention of Fraud

(1) Any person who is required by law to have his financial statements audited by a person registered in terms of section 15 of the Public Accountants' and Auditors' Act, 1991 (Act 80 of 1991) or by the Auditor-General shall exercise reasonable care in the custody of cheque forms, the drawing of cheques and the operating of his account.

(2) If a bank pays a cheque in good faith and without negligence, and incurs any loss due to a forged or unauthorized signature, then - provided the loss was due to the negligence of the person on whose account the cheque was drawn, the bank shall have a claim against that person for the amount of the loss.

(3) If a cheque is deposited into an account of a depositor who - on the face of it - is not the holder of the cheque, and if the collecting bank has credited the depositor's account with the amount of the cheque, the collecting bank may prevent the depositor from withdrawing such amount for a period of up to one day as may be required to obtain urgent relief from a court of competent jurisdiction."

Substitution of section 73 of Act No. 34 of 1964

29. The following section is hereby substituted for section 73 of the principal Act:

"73. **Revocation of bank[er]'s authority.**

The duty and authority of a bank[er] to pay a cheque drawn on [him] it by [his] its customer are [determined] terminated by receipt of -

(a) countermand of payment;

(b) [receipt of] notice of the customer's death or incapacity;

(c) [receipt of] notice of the customer having [become insolvent] been sequestered or wound-up, or placed under judicial management or declared a prodigal; Provided such countermand or notice identifies the cheque (in the case of countermand) and customer with reasonable particularity and gives the drawee a reasonable opportunity to act on it."

Repeal of section 74 of Act No. 34 of 1964

30. Section 74 of the principal Act is hereby repealed.

Amendment of section 75 of Act No. 34 of 1964

31. Section 75 of the principal Act is hereby amended-

(a) by the substitution for subsection (1) of the following subsection:

"(1) If a cheque bears across its face an addition of [-

(a) the words "and Company", or any abbreviation thereof, between two parallel transverse lines, either with or without the words "not negotiable"; or (b) two parallel transverse lines [simply], either with or without the words "not negotiable", that addition constitutes a crossing and the cheque is crossed generally."; and

(b) by the substitution for the word "banker" of the word "bank where it occurs in subsection (2).

Insertion of section 75A in Act 34 of 1964

32. The following section is hereby inserted in the principal Act after section 75:

"75A. Non-transferable cheques

(1) A non-transferable cheque is a cheque which is payable to a specified person, whether or not expressed to be payable to such person only or to such person or order or to such person or bearer, and which contains the words "not transferable" written boldly across the face of it by the drawer.

(2) Notwithstanding the provisions of subsection (5) of section 6, a cheque other than a non-transferable cheque shall be negotiable.

(3) The words prohibiting transfer may not be cancelled and any purported cancellation shall be of no effect.

(4) A non-transferable cheque, unless it is crossed specially, shall be deemed to be crossed generally."

Amended of section 76 of Act No. 34 of 1964**33. Section 76 of the principal Act is hereby amended-**

- (a) by the **substitution** for subsection 1 of the following subsection:

“(1) A **cheque** may be crossed generally or specially by the drawer or a collecting bank.”;

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

“(5) If a **cheque** is crossed specially, the **bank[er]** to **[whom] which** it is crossed may again cross it specially to another **bank[er]** for collection.”; and

(aa) by the deletion of subsection (6).

Substitution of section 77 of Act No. 34 of 1964

34. The following section is hereby substituted for **section 77** of the principal Act:

77. Crossing a material part of cheque.

A **crossing** authorized by this Act is a material part of the **cheque**, and it shall not be lawful for any person to [obliterate] cancel or, except as authorized by this Act, to add to or **alter** such a crossing.”.

Amendment of section 78 of Act No. 34 of 1964.

35. Section 78 of the principal Act is hereby amended-

- (a) by the substitution for subsection(1) of the following subsection:

“(1) If a **cheque** is crossed generally, the **bank[er]** on **[whom] which** it is drawn shall not pay it to any person other than a banker.”;

- (b) by the substitution for subsection (2) of the following subsection:

“(2) If a **cheque** is crossed specially, the **bank[er]** on **[whom] which** it is drawn shall not pay it to any **person** other than the **bank[er]** to **[whom] which** it is crossed, or the latter's agent for collection, if **[he] it is** a banker.”;

- (c) by the **substitution** for subsection (3) of the following subsection:

“(3) If a **cheque** is crossed **specialy** to more than one **bank[er]**, except when crossed to two **bank[er]s** of **[whom]-** the one is an agent for collection of the other, the **bank[er]** on **[whom] which** it is drawn shall refuse payment thereof.”; and

- (d) by the substitution for subsection (4) of the following subsection:

“(4) If the **bank[er]** on **[whom] which** a **cheque** is drawn-

- (a) **pays such cheque if it** is crossed as is contemplated in sub-section (3);

- (b) **paye such cheque** to any person other than a **bank[er]** if it is crossed generally or

- (c) **pays such cheque**, if it is crossed specially, to any person other than the **bank[er]** to **[whom] which** it is crossed or the **latter's agent** for collection, if **[he] it is** a **bank[er]**, **[he] it is liable** to the true owner of the **cheque** for any loss he may sustain owing to the **cheque** having been so paid: Provided that if a **cheque** is presented for payment and it does not, at the time of presentment, appear to be crossed or to have had a crossing which has **been obliterated**, or to have a crossing which has been added to or altered, otherwise than as authorized by this Act, the **bank[er]** paying the **cheque** in good faith and without negligence **shall** not be responsible or incur any liability, nor shall the payment be questioned, **by reason of the** **cheque** having been crossed, or of the crossing having been obliterated or having been added to or altered otherwise than as authorized by this **Act**, and of payment having been made to a person other than a **bank[er]** or the **bank[er]** to

[whom] which the cheque is or was crossed, or the letter's agent for **collection** [who] which is a bank[er], as the case maybe.'.

Substitution of section 79 of Act No. 34 of 1984

36. The following section is hereby substituted for section 79 of the principal Act

"79. Protection to **bank[er]** and drawer where **cheque is crossed**,

If the **bank[er]** on [whom]_ a crossed **cheque** is drawn, in good faith and without negligence paye it, if crossed generally, to a **bank[er]**, and, if crossed specially, to the **bank[er]** to [whom] which it is crossed, or the latter's agent for collection, [who] which is a **bank[er]**, the **bank[er]** paying the cheque, and, if the **cheque** has come into the hands of the payee, the drawer shall respectively be **entitled** to the same rights and be placed in the same position as if payment of the **cheque** had been made to the true owner thereof."

Amendment of section 81 of Act No. 34 of 1964

37. Section 81 of the principal Act is hereby amended-

(a) by the substitution for subsection (1) of the following subsection:

"(1) If a cheque was stolen or lost while it was crossed as authorized by this Act and while it bore on it the words "not negotiable", and it was paid by the **bank[er]** upon [whom] which it was drawn, under circumstances which do not render such **bank[er]** liable in terms of this Act to the true owner of the cheque for any lose he may sustain owing to the cheque having been paid, the true owner shall, if he suffered any lose es a **result** of the theft or loss of the **cheque**, be **entitled** to recover from any person who was a possessor thereof **after** the theft or lose, and either gave a consideration therefor or took it as a donee, an amount equal to the true owner% said loss or the amount of the **cheque**, whichever is the lesser.";

(b) by the substitution for subsection (2) of the following subsection:

"(2) If a pereon, other than a collecting bank, has after the theft or loss paid any such cheque into his account with a **bank[er]** after having paid, or for the purpose of paying, the amount of the cheque or part thereof to the person from whom he received the cheque, or, on his direction, to any other pereon, he shell, for the purposes of subsection (1), be deemed to have been a possessor of the cheque and to have given a **consideration therefor**: Provided that the foregoing provisions of this sub-section shall not apply to a **collecting** banker **employing** another banker **as his agent for the collection of any such cheque**."; and

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

"(5) **For the purposes** of subsection (1), a **bank[er]** [who] which receives payment of any such cheque for a customer shall, subject to the provisions of 'sub-section (3), not be regarded as having given a consideration therefor, merely because [he] **it** has in [his] **its** own books **credited [his] its customer's** account with the amount of the cheque before receiving payment thereof, or because any such payment is applied towards the reduction or sefflement of any debt owed by the customer to the banker]."

Substitution of section 82 of Act No. 34 of 1964

38. The following section is hereby substituted for section 82 of the principal Act

"82. Application of sections 75 to 81 to **certain documents other than cheques**.

Sections seventy-five to and including eighty-one shall also apply to any document issued by a customer of **any bank[er]** and intended to enable any pereon to obtain payment on demand of the sum mentioned in such document from such **bank[er]** (or from any **bank[er]**, if the document was issued on behalf of the State), and shall so apply **as** if the said document were a cheque, and the said sections shall **mutatis mutandis** also apply to any document which-

(a) was issued on behalf of the State;

- (b) is drawn upon or addressed to a servant of the State (hereafter in this section called the drawee); and
- (c) is intended to enable any person to obtain payment on demand of the sum mentioned in such document from the drawee or from or through a bank[er], as if the said document were a cheque and as if the drawee were a bank[er] and the State his customer. Provided that nothing in this section contained shall render any such document a negotiable instrument.

Amendment of section 83 of Act No. 34 of 1964

39. Section 83 of the principal Act is hereby amended:

- (a) by the substitution for subsection (1) of the following subsection:

“(1) If a bank[er] in good faith and in the ordinary course of business credits the account of [a] its customer [of his] with or pay to another bank[er] the amount of—

- (a) any cheque drawn on [him] it;
- (b) any other document issued by [a] customer [of his] and intended to enable any person to obtain payment on demand of the sum mentioned in such document from [him] it (or from any bank[er], if the document was issued on behalf of the State); or
- (c) draft payable on demand drawn by such first mentioned bank[er] upon [himself] itself, or upon [his] its agent who is a bank[er], whether payable at the head office or some other office of [his] its bank or of such agent, [he] it shall not incur any liability by reason only of the absence of, or irregularity in, indorsement thereof, and such cheque, document or draft shall be discharged by such crediting of the account in question or by such payment.”; and

- (b) by the substitution for paragraph (c) of subsection (2) of the following paragraph:

4(C) is intended to enable any person to obtain payment on demand of the sum mentioned in such document from the drawee or from or through a bank[er], as if the said document were a cheque and as if the drawee were a bank[er] and the State his customer.

Substitution of section 84 of Act No. 34 of 1964

40. The following section is hereby substituted for section 84 of the principal Act:

“84. Rights of bank[ers] if unendorsed or irregularly indorsed cheques or certain other documents are delivered to them for collection.

(1) If a cheque, or draft or other document referred to in section eighty-three, which is payable to order, is delivered by the holder thereof to a bank[er] for collection, and such cheque, draft or document is not indorsed or was irregularly indorsed by such holder such bank[er] shall have such rights, if any, as [he] & would have had if, upon such delivery, the holder had indorsed it in blank.

(2) If a non-transferable cheque as defined in section 75A is delivered by the holder thereof to a bank for collection, such bank shall have such rights, if any, as it would have had, had it been the payee of such cheque.”.

Substitution of section 85 of Act No. 34 of 1964

41. The following section is hereby substituted for section 85 of the principal Act:

“85. **Evidential value of payment of unendorsed or irregularly indorsed cheques or certain other documents.**

If an unendorsed or irregularly indorsed cheque, or draft or other document referred to in section eighty-three, has been paid by the bank[er] (including a drawee referred to in sub-section (2) of the said section) on [whom] which it is drawn, such payment shall be prima facie evidence of the receipt by the payee of the sum mentioned in such cheque, draft or document.”.

Amendment of section 87 of Act No. 34 of 1964

42. Section 87 of the principal Act is hereby amended-

- (a) by the deletion of subsection (2); and
- (b) by the deletion of subsection (3).

Amendment of section 88 of Act No. 34 of 1964

43. Section 88 of the principal Act is hereby deleted.

Amendment of section 93 of Act No. 34 of 1964

44. Section 93 of the principal Act is hereby amended by the substitution for subsection (3) of the following subsection:

- “(3) The following provisions as to bills do not apply to notes, namely, the provisions relating to-
- (a) presentment for acceptance
 - (b) acceptance; and
 - [(c) acceptance for honour supra protest;]**
 - (c) bills in a set.”.

Substitution of section 95 of Act No. 34 of 1964 as amended by section 6 of Act No. 77 of 1986

45. The following section is hereby substituted for section 95 of the principal Act:

“[(1)] If by this Act, any instrument or writing is required to be signed by any person it is not necessary that he should sign it ~~with~~ his own hand, but it is ~~sufficient~~ if his signature is written ~~or Printed~~ thereon by some other person, by or under his authority, and the authorized sealing or ~~stamping~~ with a seal ~~or stamper~~ of a corporation shall be sufficient and be deemed to be equivalent to the signing or endorsement of any such instrument or writing.

[(2) For the purpose of subsection (1) the printing ~~by a computer of the name of an authorized signatory of a warrant-voucher or a Post Office cheque on a warrant-voucher~~ or Post Office ~~cheque~~ shall be ~~sufficient~~, and shall be deemed to be the signing thereof.]”.

Repeal of section 96 of Act No. 34 of 1964

46. Section 96 of the principal Act is hereby repealed.

Amendment of section 97 of Act No. 34 of 1964

47. Section 97 of the principal Act is hereby repealed.

Amendment of section 98 of Act No. 34 of 1964

48. Section 98 of the principal Act is hereby amended by substitution for subsection (1) of the following subsection:

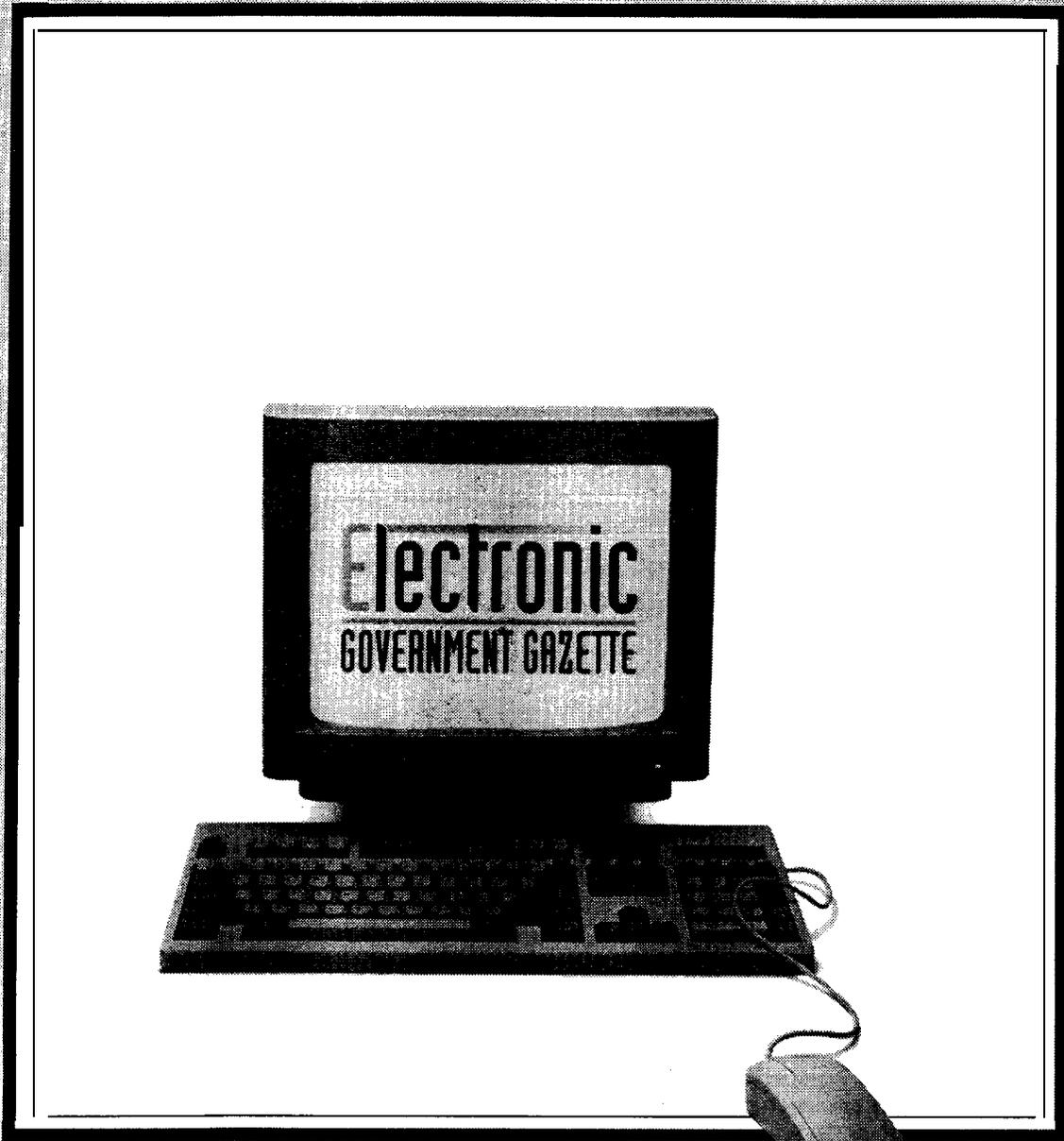
“(1) If a dishonored bill or note is authorized [or required] to be protested, and the services of a notary cannot be obtained at the place where the bill or note is dishonored, any landowner or householder of the place may, in the presence of ~~two witnesses~~, give a ~~certificate~~, signed by them, attesting the ~~dishonour~~ of the bill, and such ~~certificate~~ shall in all respects operate as if it were a formal protest of the bill.”.

Repeal of section 100 of Act No. 34 of 1964

49. Section 100 of the principal Act is hereby repealed.

Short title and commencement

50. ~~This Act shall~~ be called the Bills of Exchange Amendment Act, 1998, and shall come into operation on a date fixed by the President of South Africa by proclamation in the Gazette.



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