

THE FINANCIAL INSTITUTIONS (INVESTMENT OF FUNDS) BILL, 1999**BILL**

To amend the Financial Institutions (Investment of Funds) Act, No. 39 of 1984, so as to amend, insert, substitute or delete certain definitions and expressions; to accommodate the commencement of related new legislation; to provide for increased control by financial institutions over their nominee companies; to remove restrictions to the registrar's right to apply to the High Court for the appointment of a curator; to provide for the registrar to take over the role of the Court in supervising curators; to provide for the allocation of costs incurred in applications to Court and for the remuneration of curators in certain instances; to empower the registrar to ensure that certain orders of court are being complied with.

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

1. Section 1 of the Financial Institutions (Investment of Funds) Act, 1984 (hereinafter referred to as the principal Act) is hereby amended -

(a) by the substitution for paragraph (b) of the definition of "financial institution" of the following paragraph:

"(b) any medical scheme [registered in terms of the Medical Schemes Act, 1967 (Act 62 of 1967)] as defined in section 1 of the Medical Schemes Act, 1998 (Act No. 131 of 1998);";

(b) by the deletion of the definition of "registered";

(c) by the substitution for paragraph (b) of the definition of "registrar" of the following paragraph:

"(b) in paragraph (b) of the definition of 'financial institution' in this section, the 'registrar' of medical schemes as defined in section 1 of the Medical Schemes Act, [1967] 1998;"; and

(d) by the substitution for the definition of "trust property" of the following definition:

"'trust property' means any corporeal or incorporeal, movable or immovable asset [kept in trust] held, controlled, administered or kept by any person, partnership, or company for or on behalf of another person, partnership or company.".

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

(a) by the substitution for the words preceding paragraph (a) of the following words:

"2 Duties of persons dealing with funds of, and with trust property controlled by, financial institutions

A director, member, partner, official, employee or agent of a financial institution or of a nominee company controlled by a financial institution who invests, keeps in safe custody or otherwise controls or administers any funds of the institution or any trust property held by or on behalf of the institution for any trust, beneficiary or principal -";

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

"(b) shall, in the making of an investment or in the safe custody, control administration or alienation of the trust property, observe the utmost good faith and, subject to the terms of the instrument or agreement by which the trust or agency concerned has been created, exercise the usual care and diligence required of a trustee in the performance or

discharge of his or her powers and duties; and"; and

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

"(c) shall not alienate, invest, pledge, hypothecate or otherwise encumber or make use of the funds or trust property or furnish any guarantee (whether or not, in the case of an insurer, such guarantee is incorporated in a policy) in a manner calculated to gain directly or indirectly any improper advantage for himself or herself or any other person at the expense of the institution, trust, beneficiary or principal concerned."

3. Section 3 of the principal Act is hereby amended by the substitution for subsection (1) of the following subsection:

"(1) A director, member, partner, official, employee or agent of a financial institution or of a nominee company controlled by a financial institution who takes, or takes part in, any decision to make out of the funds of the institution or out of any trust property held by or on behalf of the institution for any trust, beneficiary or principal, an investment in the shares of, or to grant a loan, whether secured or unsecured, to, a company or firm in which he or she has a direct or indirect personal interest, whether by way of shareholding or the relationship of creditor and debtor or otherwise, shall declare, in writing or otherwise, that interest to the board of directors or other governing body of the financial institution or nominee company, as the case may be, before that investment or loan is made **[: Provided that]** ; but a manager, branch manager or other official of a **[banking institution] bank or mutual bank** as defined in the Banks Act, **[1965 (Act 23 of 1965)] 1990 (Act No. 94 of 1990), or the Mutual Banks Act, 1993 (Act No. 124 of 1993)**, who acts within the limits of authority which has been properly delegated to him or her by the board of directors of **[the banking institution] such bank or mutual bank [concerned]** for the execution of his or her normal duties, is exempt from the obligation of thus declaring any interest."

4. Section 4 of the principal Act is hereby amended -

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

"(1) Where a financial institution holding trust property **[in its capacity]** as administrator, trustee, curator or agent is directed or required by the instrument or agreement under which the trust property is being administered, to invest that property in the name of a specified or ascertainable person or persons or in the name of the trust, beneficiary or principal concerned or in the name of the financial institution in its capacity as administrator, trustee, curator or agent, no director, member, partner, official, employee or agent of that institution shall invest the property or, where registration is usually required to complete the investment, cause the investment to be registered, otherwise than in the name of such person or persons or of that trust, beneficiary or principal or in the name of that institution in its capacity as administrator, trustee, curator or agent, as the case may be, or, if for any reason investment or registration in that manner cannot legally be effected, otherwise than in the manner contemplated in subsection (2).";

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

"(2) Subject to the provisions of subsection (3) no director, member, partner, official, employee or agent of a financial institution shall, in the absence of a direction referred to in subsection (1), invest such trust property or, where registration is usually required to complete the investment, cause the investment to be registered, otherwise than-

(a) in the name of the trust, beneficiary or principal concerned or in the name of the institution in its capacity as administrator, trustee, curator or agent, as the case may be; or

(b) subject to clear identification of the trust property or investment in the books of the financial institution as being property or an investment belonging to a specified trust, beneficiary or principal, in the name of a nominee company **[which shall be so]** controlled by the financial institution **[which exercises control over it that it incurs no liabilities other than on behalf of a trust or principal for whose benefit it holds assets and in each case to an extent not exceeding the value of the assets belonging to the**

trust or principal].";

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

"(3) Where the articles of association of a company prohibit the registration of shares or debentures of that company in the name of a trust or of a financial institution in its capacity as administrator, trustee or curator or in the name of a nominee company, the shares or debentures belonging to a trust shall be registered, subject to the identification mentioned in subsection (2) and upon security being furnished by the financial institution to the Master of the **[Supreme] High Court** to his or her satisfaction (if satisfactory security has not already been furnished in terms of the **[Trust Moneys Protection Act, 1934 (Act 34 of 1934)] Trust Property Control Act, 1988 (Act No. 57 of 1988)**), in the name of a director, member, partner or manager of the financial institution **[itself]**, and that director, member, partner or manager shall thereupon hold those shares or debentures in a fiduciary capacity on behalf of the trust concerned.";

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

"(5) Notwithstanding anything to the contrary in any law or the common law **[contained]**, trust property **[which is expressly]** registered in the name of a financial institution **[in its capacity as administrator, trustee, curator or agent, as the case may be]** or a nominee company controlled by it, shall not under any circumstances form part of the assets of the financial institution or such nominee company."; and

(e) by the insertion after subsection (5) of the following subsection:

"(6) For the purposes of this section a 'nominee company controlled by a financial institution' means a company which -

(a) is incorporated under the provisions of the Companies Act, 1973 (Act No. 66 of 1973);

(b) has as its principal object to act as nominee for or representative of any person or persons in the holding of any trust property for such person or persons;

(c) is precluded by its memorandum of association from incurring any liabilities other than those to the persons on whose behalf it holds assets to the extent of their respective rights to and interest in such assets; and

(d) has entered into an irrevocable written agreement with a financial institution which controls it in terms of which such financial institution has undertaken to pay all the expenses of and incidental to its formation, operations and liquidation."

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

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

"(1) An inspector appointed under section 2 of the Inspection of Financial Institutions Act, **[1984 (Act No. 38 of 1984)] 1998, (Act No. 80 of 1998)** may at any time at the direction of the registrar **[of a financial institution referred to in this Act,]** inspect the affairs of **[a person who is]** a financial institution **[mentioned in the definition of 'financial institution']** as defined in section 1, **but who is not otherwise subject to inspection in terms of the Inspection of Financial Institutions Act, 1984, and of a nominee company controlled by that person, in order to ascertain whether the provisions of this Act are being complied with]**.";

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

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

"(3) The provisions of the Inspection of Financial Institutions Act, **[1984] 1998**, apply in

respect of an inspection carried out in terms of subsection (1) **[or (2)]**."

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

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

"(1) If **[as a result of an inspection of the affairs of a financial institution under any law,]** the registrar **[of a financial institution]** is of the opinion that it is for any reason desirable to do so, he or she may without notice to the financial institution concerned apply to a division of the **[Supreme] High Court** having jurisdiction (hereinafter referred to as the court) for the appointment of a curator to take control of and to manage the whole or any part of the business of that financial institution.";

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

"(5) The curator shall act under the control of the **[court]** registrar who made the application under subsection (1), and **[he]** may apply to **[the court]** that registrar for instructions in regard to any matter arising out of or in connection with the control and management of the business of the financial institution.";

(c) by the deletion of subsection (6);

(d) by the deletion of subsection (7);

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

"(8) The court may make any order which it deems expedient with regard to -

(a) the costs relating to any application made by the registrar under subsection (1); and

(b) the remuneration of any curator appointed provisionally under subsection (2)(a) or finally under subsection (4); but until such time as the assets of the financial institution concerned have been exhausted, such remuneration must be defrayed from the proceeds of those assets."; and

(f) by the insertion after subsection (9) of the following subsection:

"(10) The court may at any time on good cause shown set aside or alter any decision made or any action taken by a curator or the registrar of the financial institution concerned in regard to any matter arising out of or in connection with the control and management of the business of that financial institution."

7. Section 6A of the principal Act is hereby amended -

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

"(1) **[Despite] Notwithstanding** anything to the contrary **[contained]** in any **[other]** law or the common law, but subject to the **[Constitution of the Republic of South Africa, 1996 (Act 108 of 1996),]** provisions thereof [and any provision in such other law relating] applicable to jurisdiction, procedure and evidence relating to a court, the registrar has **[locus standi in judicio]** a right of appearance to institute and conduct proceedings in the High Court having jurisdiction (after this referred to as the court) **[in an instance where no other statutory provision makes such provision,]** if **[he or she has reasonable cause to believe that]** it is reasonably necessary or desirable **[for him or her to do so in order]** -

(a) to discharge any duty or responsibility imposed on him or her in terms of any law;

(b) to compel any person to comply with any law or to cease contravening a law;

(c) to compel any person to comply with a lawful request, directive or instruction made, issued or given by the registrar under a law; or

(d) to obtain a declaratory order on any point of law relating to any law or to the business of a financial institution in general,

subject to any additional procedural requirements which the court may **[impose] order [in any particular instance] so as** to ensure fair and equitable **[legal proceedings] judicial process.**";

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

"(2) In paragraphs (a), (b), (c), and (d) of subsection (1) 'law' means this Act, the Inspection of Financial Institutions Act, **[1984] 1998**, or any other Act referred to in the definition of 'financial institution' in section 1 of the Financial Services Board Act, 1990, or the Medical Schemes Act, **[1967] 1998**, and includes any subordinate measure made under or in terms of any such Act."; and

(c) by the insertion after subsection (2) of the following subsection:

"(3) The registrar may take any reasonable steps, including an instruction to carry out an inspection in terms of the Inspection of Financial Institutions Act, 1998, to ensure that a person who is subject to an order of the court made in terms of subsection (1) is complying with that order."

8. Section 7 of the principal Act is hereby amended by the substitution for section 7 of the following section:

"The records of a financial institution and of a nominee company or trust controlled or administered by that institution and the books of account of the institution, company or trust are, in any proceedings under this Act, admissible as *prima facie* evidence of the matters, transactions and accounts therein recorded, on the production of a document purporting to be an affidavit by one of the directors, members, partners, officials, employees or agents of the institution or company or by an inspector appointed under the Inspection of Financial Institutions Act, **[1984, or section 8A of the South African Reserve Bank Act, 1944 (Act No. 29 of 1944)] 1998**, section 11 or 12 of the South African Reserve Bank Act, 1989 (Act No. 90 of 1989), section 6 of the Banks Act, 1990, or section 4 of the Mutual Banks Act, 1993, or of other sufficient evidence, to the effect that those records or books of account are or have been the ordinary records and books of account of the institution, company or trust and that those records have been kept or those entries have been made in the books of account in the ordinary course of business."

9. Section 8 of the principal Act is hereby amended by the substitution for section 8 of the following section:

"If a director, member, partner, official, employee or agent of a financial institution or of a nominee company controlled by such an institution purports to alienate any funds or other assets of the institution or any trust property to another person in contravention of or without complying with the provisions of this Act, the alienation is invalid unless that other person proves that at the time of the acquisition he or she was not aware of and had no reason to suspect the contravention or non-compliance and that he or she acquired the funds, assets or trust property, as the case may be for valuable consideration."

10. Section 9 of the principal Act is hereby amended -

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

"(1) A person who contravenes any provision of this Act or fails to comply with any provision thereof with which it is his or her duty to comply, is guilty of an offence and liable on conviction to a fine **[not exceeding R10 000]** or to imprisonment for a period not exceeding 10 years or to both **[that] such** fine and **[that]** imprisonment, and is in addition liable to the financial institution, trust, beneficiary or principal concerned for any profit

made by him or her and for any damage suffered by the institution, trust, beneficiary or principal as a result of the contravention or failure."; and

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

"(2) A court which convicts a director, member, partner or other person vested with the management of the business of a financial institution of an offence in terms of subsection (1) may, in addition to any penalty it may impose, order that the director, member, partner or such other person shall not serve as a director, partner, member or be vested with the management of the business of any financial institution for such period as the court may in the circumstances deem fit."

11. Savings and transitional provisions

(1) The provisions of this Act shall not affect anything done or omitted under, in terms of or by virtue of any provision of the principal Act, before the date of commencement of this Act, which could have been done or omitted under, in terms of or by virtue of the provisions of the principal Act as amended by this Act.

(2) The provisions of this Act shall not affect any legal proceedings in which the registrar as defined in section 1 of the principal Act is involved, and which are pending in any court of law immediately prior to the date of commencement of this Act, which proceedings shall proceed in all respects until final disposal thereof as if this Act has not been passed.

12. Short title

This Act is called the Financial Institutions (Investment of Funds) Amendment Act, 1999.