

REPUBLIC OF SOUTH AFRICA

**FINANCIAL INSTITUTIONS
AMENDMENT BILL**

(As amended by the Portfolio Committee on Finance (National Assembly))

(MINISTER OF FINANCE)

[B 10B—97]

REPUBLIEK VAN SUID-AFRIKA

**WYSIGINGSWETSONTWERP OP
FINANSIËLE INSTELLINGS**

(Soos gewysig deur die Portefeuljekomitee oor Finansies (Nasionale Vergadering))

(MINISTER VAN FINANSIES)

[W 10B—97]

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GENERAL EXPLANATORY NOTE:

- [] Words in bold type in square brackets indicate omissions from existing enactments.
- Words underlined with a solid line indicate insertions in existing enactments.
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BILL

To amend the Financial Institutions (Investment of Funds) Act, 1984, in order to substitute or delete certain definitions; to grant power to the registrar to institute certain civil proceedings in the High Court; and to provide for matters connected therewith.

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

Amendment of section 1 of Act 39 of 1984, as amended by section 14 of Act 6 of 1987, section 23 of Act 51 of 1988, section 38 of Act 55 of 1989 and section 33 of Act 83 of 1992 5

1. Section 1 of the Financial Institutions (Investment of Funds) Act, 1984, is hereby amended—

(a) by the substitution for the definition of “financial institution” of the following definition:

“ ‘financial institution’ means— 10

(a) any institution referred to in paragraph (a) or (b) of the definition of ‘financial institution’ in section 1 of the Financial Services Board Act, 1990 (Act No. 97 of 1990);

(b) any medical scheme registered in terms of the Medical Schemes Act, 1967 (Act No. 62 of 1967);” 15

(b) by the deletion of the definition of “principal”;

(c) by the substitution for the definition of “registrar” of the following definition:

“ ‘registrar’ means in respect of a financial institution referred to—

(a) in paragraph (a) of the definition of ‘financial institution’ in this section, in relation to an institution referred to in— 20

(i) paragraph (a) of the definition of ‘financial institution’ in section 1 of the Financial Services Board Act, 1990, the ‘registrar’ as defined in any of the Acts referred to in that paragraph;

(ii) paragraph (b) of the definition of ‘financial institution’ in section 1 of the Financial Services Board Act, 1990, the ‘executive officer’ as defined in section 1 of that Act; 25

- (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;” and
- (d) by the substitution for the definition of “trust property” of the following definition: 5
- “‘trust property’ means any corporeal or incorporeal, movable or immovable asset kept in trust.”.

Amendment of section 5 of Act 39 of 1984, as amended by section 15 of Act 6 of 1987

2. Section 5 of the Financial Institutions (Investment of Funds) Act, 1984, is hereby amended— 10

- (a) by the substitution for subsection (1) of the following subsection: 10
- “(1) An inspector appointed under section 2 of the Inspection of Financial Institutions Act, 1984 (Act No. 38 of 1984), may at any time at the direction of the registrar of a financial institution referred to in [**the said**] this Act, inspect the affairs of a [**board of executors, trust company or other company**] person who is a financial institution mentioned in [paragraph (g) of] the definition of ‘financial institution’ 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 [the financial institution in respect of which the registrar concerned was appointed] that person, in order to ascertain whether the provisions of this Act are being complied with.”; 15
- and 20
- (b) by the substitution for subsection (2) of the following subsection: 25
- “(2) The registrar of a financial institution referred to in this Act may cause the affairs of any [**company which**] person who is not a financial institution mentioned in the definition of ‘financial institution’ in section 1 of this Act, but who he or she has reasonable cause to believe [holds] invests, keeps in safe custody or otherwise controls or administers trust property, to be inspected in order to ascertain whether the provisions of this Act are applicable to it.”. 30

Insertion of sections 6A and 6B in Act 39 of 1984

3. The following sections are hereby inserted after section 6 of the Financial Institutions (Investment of Funds) Act, 1984:

“Civil proceedings by registrar 35

- 6A.** (1) Despite anything to the contrary contained in any other law, but subject to the Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996), and any provision in such other law relating to jurisdiction, procedure and evidence, the registrar has *locus standi in judicio* 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 necessary or desirable for him or her to do so in order— 40
- (a) to discharge any duty or responsibility imposed on him or her in terms of any law; 45
- (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, 50

subject to any additional procedural requirements which the court may impose in any particular instance to ensure fair and equitable legal proceedings.

(2) In paragraphs (a), (b), (c) and (d) of subsection (1) ‘law’ means this Act, the Inspection of Financial Institutions Act, 1984, 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, and includes any subordinate measure made under or in terms of any such Act.

Restriction on powers of registrar

6B. Despite any other provision of this Act, the registrar may not in respect of an exchange, member or stock-broker referred to in paragraph (a)(v) or (vi) of the definition of ‘financial institution’ in section 1 of the Financial Services Board Act, 1990, make an application under section 6 or institute or conduct proceedings under section 6A unless—

- (a) he or she has consulted with the committee or executive committee of the exchange in question; and
- (b) he or she and the committee or executive committee are satisfied that no other adequate remedy is available.”.

Amendment of section 1 of Act 55 of 1989, as amended by section 29 of Act 97 of 1990, section 23 of Act 54 of 1991, section 36 of Act 83 of 1992, section 1 of Act 55 of 1995 and section 1 of Act 73 of 1996

4. Section 1 of the Financial Markets Control Act, 1989, is hereby amended by the substitution for the definition of “unsolicited call” of the following definition:

“ ‘unsolicited call’, in relation to entering into an agreement in respect of listed financial instruments, means a personal visit made to someone or an oral communication made to someone without an express or tacit invitation from such person, but excluding any personal visit or oral communication made to someone on whose behalf the business of buying and selling of listed financial instruments has previously been carried on by the person who made that personal visit or oral communication, **[a stock-broker as defined in section 1 of the Stock Exchanges Control Act, 1985 (Act No. 1 of 1985), a member of a financial exchange or]** a financial institution referred to in paragraph [(a)] (b) [(c), (d), (e), (f) or (h)] of the definition of ‘financial institution’ in section 1 of the Financial Institutions (Investment of Funds) Act, 1984 (Act No. 39 of 1984), or paragraph (a) of the definition of ‘financial institution’ in section 1 of the Financial Services Board Act, 1990 (Act No. 97 of 1990).”.

Amendment of section 1 of Act 97 of 1990, as amended by section 1 of Act 41 of 1992 and section 67 of Act 104 of 1993

5. Section 1 of the Financial Services Board Act, 1990, is hereby amended—

- (a) by the substitution for the definition of “financial institution” of the following definition:

“ ‘financial institution’ means—

- (a) (i) any pension fund organisation registered in terms of the Pension Funds Act, 1956 (Act No. 24 of 1956), or any person referred to in section 13B of that Act administering the investments of such a pension fund or the disposition of benefits provided for in the rules of such a pension fund;
- (ii) any friendly society registered in terms of the Friendly

- Societies Act, 1956 (Act No. 25 of 1956), or any person in charge of the management of the affairs of such a society;
- (iii) any 'unit trust scheme' as defined in section 1 of the Unit Trusts Control Act, 1981 (Act No. 54 of 1981), or any management company or trustee in relation to such a scheme; 5
- (iv) any 'scheme' as defined in section 1 of the Participation Bonds Act, 1981 (Act No. 55 of 1981), or any manager or nominee company in relation to such a scheme;
- (v) any 'stock exchange', 'member' or 'stock-broker' as defined in section 1 of the Stock Exchanges Control Act, 1985 (Act No. 1 of 1985), or any person referred to in section 4(1) of that Act managing investments as contemplated in that section; 10
- (vi) any 'financial exchange', 'member' or 'recognised clearing house' as defined in section 1 of the Financial Markets Control Act, 1989 (Act No. 55 of 1989), or any person referred to in section 5(1) of that Act managing investments as contemplated in that section; 15
- (vii) any 'registered insurer' as defined in section 1(1) of the Insurance Act, 1943 (Act No. 27 of 1943);
- (viii) any agent, broker or other person contemplated in section 20*bis* of the Insurance Act, 1943; 20
- (ix) any person deemed, in terms of section 60 of the Insurance Act, 1943, to be carrying on insurance business in the Republic;
- (x) any person rendering or who is to render services contemplated in section 23A(1) of the Insurance Act, 1943; 25
- (xi) any 'central securities depository' or a 'depository institution' as defined in section 1 of the Safe Deposit of Securities Act, 1992 (Act No. 85 of 1992), or any member of such a securities depository;
- (b) (i) a bank as defined in section 1(1) of the Banks Act, 1990 (Act No. 94 of 1990), or a mutual bank as defined in section 1(1) of the Mutual Banks Act, 1993 (Act No. 124 of 1993), which deals with trust property as a regular feature of its business; or 30
- (ii) any other person who or which deals with trust property as a regular feature of his, her or its business, but who is not registered, licensed, recognised, approved or otherwise authorised to deal so in terms of any Act, other than the Companies Act, 1973 (Act No. 61 of 1973), the Close Corporations Act, 1984 (Act No. 69 of 1984), and the Trust Property Control Act, 1988 (Act No. 57 of 1988);"; and 35
- (b) by the addition of the following definition: 40
- “ ‘trust property’ means ‘trust property’ as defined in section 1 of the Financial Institutions (Investment of Funds) Act, 1984 (Act No. 39 of 1984).”.

Short title and commencement

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6. This Act is called the Financial Institutions Amendment Act, 1997, and comes into operation on a date determined by the President by proclamation in the *Gazette*.

MEMORANDUM ON THE OBJECTS OF THE FINANCIAL INSTITUTIONS AMENDMENT BILL, 1997

Regulation for the protection of investors' interests is generally regarded as an essential element in the healthy development of a financial services industry. Fraudulent or dishonest conduct must be effectively outlawed and high standards need to be maintained in the interests of both the suppliers and users of financial services. Problems encountered in certain sectors of the financial services industry have revealed deficiencies in existing legislative measures promoting investor protection. Such problems have included unsuccessful litigation by the executive officer of the Financial Services Board in respect of persons doing unauthorised business. This Bill proposes to address only the most serious deficiencies.

The Bill proposes to amend the definition of "financial institution" in the Financial Institutions (Investment of Funds) Act, 1984 (Act No. 39 of 1984), in respect of newly established financial institutions. The current definition does for example not provide for a central securities depository and depository institutions and is consequently ineffective and outdated.

The definition of "registrar" causes problems (especially whenever curatorship is applied for under section 6) as it does not clearly designate the official who is to be the registrar in respect of the bodies mentioned in paragraph (g) of the present definition of "financial institution" (institutions not subject to any authorisation by the registrar). Legal opinion has in addition indicated that the interpretation of definitions of "principal" and "trust property" may be problematical.

Clause 1 proposes to effect improvements to these problematical definitions, with consequential amendments in clauses 2, 4 and 5.

Clause 3 proposes to insert two new sections in the current Act:

In the proposed section 6A, the registrar is to be empowered to apply to the High Court for orders for purposes of enabling the registrar to effectively discharge certain duties or responsibilities (for instance, an order prohibiting financial institutions from doing unauthorised business), or to enforce duties or responsibilities of financial institutions, or whenever the registrar may be in need of authoritative guidance from that Court on legal uncertainties. Such empowerment is regarded as necessary to enable the registrar to act expeditiously for the protection of investors, as is universally required of regulators. Similar provisions are currently already contained in many statutes, e.g. the Banks Act, 1990.

In the proposed section 6B, the registrar is to be put under the obligation to consult the executive body of the institution in question prior to acting under section 6 or the new section 6A, as such an executive body is vested with certain powers which could expedite the resolution of problems without the registrar having to resort to legal action.

In the opinion of the State Law Advisers, after consultation with the Financial Services Board, the Bill should be dealt with in terms of section 75 of the Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996).

Consultations with other persons/bodies:

The following persons and bodies, some of them over many years, have been consulted on the principles contained in the Bill:

- Actuarial Society of South Africa
- African National Congress
- Afrikaanse Handelsinstituut
- Association of Participation Mortgage Scheme Managers in South Africa
- Association of Property Unit Trust Management Companies
- Association of Retired Persons and Pensioners
- Association of Trust Companies in South Africa
- Association of Unit Trusts
- Auditor-General
- Black Management Forum
- Bond Exchange of South Africa
- Chief Master of the High Court
- Consulting Actuaries Society of South Africa
- Cosatu
- Council of South African Banks
- Federation of South African Labour Unions

Fund Managers' Association of South Africa
Inkatha Freedom Party
Institute of Financial Markets
Institute of Life and Pension Advisors
Institute of Pension Consultants and Administrators
Institute of Retirement Funds
Insurance Brokers Council of South Africa
Insurance Institute of South Africa
Johannesburg Stock Exchange
Law Review Project
Life Offices' Association of Southern Africa
National African Federated Chambers of Commerce and Industry
National Black Consumer Union
National Council of Trade Unions
National Economic, Development and Labour Council
Life Underwriters Association of South Africa
Pan Africanist Congress of Azania
Public Accountants' and Auditors Board
Public Property Syndication Association
Registrar of Banks
Registrar of Medical Schemes
Rooth & Wessels Attorneys
Shareholders Association of South Africa
South African Black Insurance Brokers Association
South African Chamber of Business
South African Futures Exchange
South African Institute of Chartered Accountants
South African Insurance Association
South African Insurance Brokers Association
South African Reinsurance Offices Association
South African Risk & Insurance Management Association