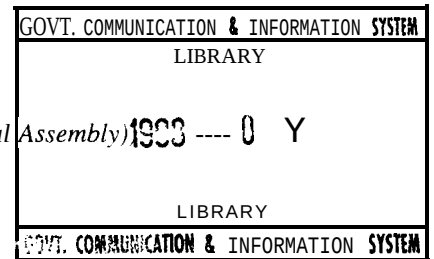


REPUBLIC OF SOUTH AFRICA

INSPECTION OF FINANCIAL INSTITUTIONS BILL

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

(MINISTER OF FINANCE)



[B 88B—98]

REPUBLIEK VAN SUID-AFRIKA

WETSONTWERP OP INSPEKSIE VAN FINANSIËLE INSTELLINGS

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

(MINISTER VAN FINANSIES)

[W 88B—98]

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BILL

To provide for the inspection of the affairs of financial institutions; the inspection of the affairs of unregistered entities conducting the business of financial institutions; and for matters connected therewith.

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

Definitions

1. In this Act, unless the context indicates otherwise—
- “associated institution” means—
- (a) any person, partnership, company or trust in which, or in the business of which, a financial institution, or unregistered person, has or had a direct or indirect interest;
 - (b) any person, partnership, company or trust which has or had a direct or indirect interest in a financial institution or unregistered person, or in the business of a financial institution or unregistered person;
 - (c) a participating employer in a pension fund organisation;
 - ... (d) any person, partnership, company or trust that controls, manages or administers the affairs or part of the affairs of a financial institution or an unregistered person;
- “company” includes a close corporation referred to in the Close Corporations Act, 1984 (Act No. 69 of 1984);
- “document” includes books, records, securities or accounts, and any information, including information stored or recorded electronically, digitally, photographically, magnetically or optically;
- “financial institution” means—
- (a) any institution referred to in the definition of ‘financial institution’ in section 1 of the Financial Services Board Act, 1990 (Act No. 97 of 1990);
 - (b) a medical scheme registered in terms of the Medical Schemes Act, 1967 (Act No. 72 of 1967);
- “inspector” means a person appointed as an inspector under section 2;
- “institution” means a financial institution, an associated institution and an unregistered person;
- “legal representative” means an attorney as defined in section 1 of the Attorneys Act, 1979 (Act No. 53 of 1979), and an advocate as defined in section 1 of the Admission of Advocates Act, 1964 (Act No. 74 of 1964);
- “registered”, in relation to a financial institution, includes provisionally registered;
- “registrar” means the executive officer defined in section 1 of the Financial Services Board Act, 1990, but in relation to a medical scheme registered in terms of the Medical Schemes Act, 1967, the registrar of medical schemes appointed under section 13 of that Act;
- “unregistered person” means a person, partnership, company or trust inspected under section 3 (2).

Appointment of inspectors

2. (1) The registrar may from time to time appoint inspectors under this Act.
- (2) The registrar must furnish every inspector with a certificate of appointment signed by the registrar.
- (3) An inspector must, before commencement of an inspection or the examination of 5 any person, produce his or her certificate of appointment.
- (4) An inspector may, with the consent of the registrar, appoint any person to assist him or her in carrying out an inspection.

Inspection of institutions

3. (1) The registrar may at any time instruct an inspector to carry out an inspection of 10 the affairs, or any part of the affairs, of a financial institution or associated institution.
- (2) If the registrar has reason to believe that a person, partnership, company or trust which is not registered or approved as a financial institution, is carrying on the business of a financial institution, he or she may instruct an inspector to inspect the affairs, or any part of the affairs, of such a person, partnership, company or trust. 15
- (3) Any person who holds shares in an institution as a nominee or in trust on behalf of another person, must upon the request of an inspector or the registrar, disclose the name of that other person.
- (4) Before the registrar instructs an inspector to carry out an inspection he or she must take all reasonable steps to ensure that the person so instructed will be able to report 20 objectively and impartially on the affairs of the institution.

Powers of inspectors relating to institutions

4. (1) In carrying out an inspection of the affairs of an institution under section 3 an inspector may—
- (a) administer an oath or affirmation or otherwise examine any person who is or 25 formerly was a director, servant, employee, partner, member or shareholder of the institution;
 - (b) at any time without prior notice enter and search any premises occupied by the institution and require the production of any document relating to the affairs of that institution; 30
 - (c) open any strongroom, safe or other container in which he or she suspects any document of the institution is kept;
 - (d) examine and make extracts from and copies of any document of the institution or, against the issue of a receipt, remove such document temporarily for that purpose; 35
 - (e) against the issue of a receipt, seize any document of the institution which in his or her opinion may afford evidence of an offence or irregularity;
 - (f) retain any seized document for as long as it may be required for any criminal or other proceedings.
- (2) An institution or its authorised representative may, during normal office hours, 40 examine and make extracts from any document seized from the institution under subsection (1)(e), under the supervision of the registrar or an inspector.

Powers of inspectors relating to other persons

5. (1) In order to carry out an inspection of the affairs of an institution under section 3, an inspector may— 45
- (a) administer an oath or affirmation or otherwise examine any person, if he or she has reason to believe that such person may be able to provide information relating to the affairs of the institution;
 - (b) on the authority of a warrant, at any time without prior notice—

- (i) enter any premises and require the production of any document relating to the affairs of the institution;
 - (ii) enter and search any premises for any documents relating to the affairs of the institution;
 - (iii) open any strongroom, safe or other container which he or she suspects 5 contains any document relating to the affairs of the institution;
 - (iv) examine, make extracts from and copy any document relating to the affairs of the institution or, against the issue of a receipt, remove such document temporarily for that purpose;
 - (v) against the issue of a receipt, seize any document relating to the affairs of 10 the institution, which, in his or her opinion, may afford evidence of an offence or irregularity;
 - (vi) retain any seized document for as long as it may be required for criminal or other proceedings,
- but an inspector may proceed without a warrant, if the person in control of any 15 premises consents to the actions contemplated in this paragraph.

(2) (a) A warrant contemplated in subsection (1)(b) maybe issued, on application of an inspector, by a judge or magistrate who has jurisdiction in the area where the premises in question is located.

(b) Such a warrant may only be issued if it appears from information under oath that 20 there is reason to believe that a document relating to the affairs of the institution being inspected, is kept at the premises concerned.

(3) Any person from whom a document has been seized under subsection (1)(b)(v), or his or her authorised representative, may examine such document and make extracts therefrom under the supervision of the registrar or an inspector during normal office 25 hours.

Time and place of examinations

6.(1) An inspector may determine the time and place of any examination in terms of section 4 or 5 and may determine who may be present at such an examination.

(2) Despite the provisions of subsection(1), a person examined in terms of section 4 30 or 5, whether under oath or otherwise, may have his or her legal representative present.

Right to legal professional privilege

7. Section 4 or 5 shall not be construed so as to infringe upon the common law right to professional privilege between an attorney and his or her client in respect of information communicated to the attorney, whether in writing or verbally, so as to 35 enable him or her to provide advice, or render other legal assistance to or defend the client in connection with an offence under any law with which he or she is charged, in respect of which he or she has been arrested or summoned to appear in court or in respect of which an investigation with a view to instituting criminal proceedings is being conducted against him or her.

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Observance of secrecy

8. A person carrying out an inspection under this Act, including a person appointed in terms of section 2(4), must preserve, or aid in preserving, secrecy with regard to all matters that may come to his or her knowledge in the performance of his or her duties and may not communicate any such matter to any person except the registrar, or unless 45 a court of law orders such communication, or insofar as such communication is necessary to properly carry out the inspection.

Disclosure to certain affected parties

9. If the registrar has reason to believe that—

- (a) an offence or irregularity has been committed relating to the affairs of an 50 institution inspected under this Act; or

- (b) an institution so inspected is in an unsound financial condition, he or she may convey any information obtained during an inspection to—
- (i) any department or organ of State;
 - (ii) any regulatory authority;
 - (iii) any self-regulating association or organisation; 5
 - (iv) any statutory board charged with supervisory or regulatory duties;
 - (v) any shareholder, partner, member, director, auditor, accounting officer, liquidator, curator, executor or trustee of an institution inspected under this Act;
 - (vi) any participating employer in a pension fund organisation inspected under this 10 Act;
 - (vii) an authority contemplated in section 22(2) of the Financial Services Board Act,
- if the person or entity referred to in subparagraphs (i) to (vii) is affected by, or has an interest in, such information. 15

General disclosure

10. (1) If as a result of an inspection under this Act, the registrar deems it necessary to convey information to any person, group of persons or entity not provided for in section 9. or to publish information, he or she may—
- (a) if it is an unregistered person, convey or publish such information after 20 affording that person an opportunity to state his or her case;
 - (b) if it is a financial institution, apply to a judge or magistrate in chambers for an order to convey such information in any manner which the judge or magistrate may determine.
- (2) An application contemplated in subsection (1)(b) must— 25
- (a) be lodged in writing with the registrar of the High Court or the clerk of the Magistrate's Court, as the case may be;
 - (b) state briefly the reasons for the application.
- (3) On receipt of an application in terms of subsection (1), the registrar or clerk of the court must without delay cause it to be placed before a judge or magistrate in chambers. 30
- (4) An application in terms of subsection (1) must be heard *in camera*.
- (5) The judge or magistrate referred to in subsection (1)(b) must without delay make a ruling regarding—
- (a) the manner in which service of such application must take place on the financial institution concerned; 35
 - (b) the time within which and the manner in which such financial institution must respond to the application; and
 - (c) the date and time on which the application will be heard, having due regard to the urgency of the matter.
- (6) The judge or magistrate referred to in subsection (1)(b) may make any order 40 regarding the publication or disclosure of the information as he or she deems fit, and may make any order as to costs.
- (7) When making an order in terms of subsection (6), the judge or magistrate must take into account—
- (a) the interest of the public; , 45
 - (b) the interest of any person or group of persons affected by the information;
 - (c) the interest of the financial institution concerned;
 - (d) the nature of the information;
 - (e) the reliability of the information;
 - (f) the possibility that an offence or irregularity has been committed, 50
- and may take into account any other factor which he or she deems appropriate.

Costs of inspections

11. All expenses necessarily incurred by and the remuneration of any inspector appointed under section 2 may be recovered from—
- (a) a person who has applied for an inspection of an institution, and the registrar 55

- may require such person to furnish such security as the registrar may deem satisfactory and sufficient to cover such expenses and remuneration; or
- (b) the institution being inspected, if the registrar so decides, after having considered the results of the inspection.

Offences and penalties

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12. A person who—

- (a) when requested by an inspector to take an oath or to make an affirmation, refuses to do so;
- (b) without lawful excuse refuses or fails to answer a question put by an inspector and relating to the affairs of an institution being inspected; 10
- (c) wilfully gives any false information to an inspector;
- (d) without lawful excuse refuses or fails to comply with any reasonable request by an inspector in the exercise of his or her powers or the performance of his or her duties;
- (e) wilfully hinders an inspector in the exercise of his or her powers or the 15 performance of his or her duties;
- (f) contravenes section 8,

is guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding two years or to both such fine and imprisonment.

Repeal and amendment of laws

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13. (1) The Inspection of Financial Institutions Act, 1984 (Act No. 38 of 1984), is hereby repealed.

(2) Anything done or deemed to have been done under any provision of a law repealed by subsection (1) and which could be done under a provision of this Act, is deemed to have been done under the last-mentioned provision. 25

Short title

14. This Act is called the Inspection of Financial Institutions Act, 1998.

MEMORANDUM ON THE OBJECTS OF THE INSPECTION OF FINANCIAL INSTITUTIONS BILL, 1998

PART 1

1. OBJECTS AND EXPLANATION

- 1.1 Legislation governing the inspection of financial institutions forms an important part of the supervisory task of the Financial Services Board. Due to fast-moving developments in the financial services sector, as well as the commencement of the Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996), it has become necessary to review the applicable legislation. Furthermore, economic crime has become a major concern and an increase in the number of unregistered entities seeking to exploit the public, is symptomatic of this state of affairs. The Inspection of Financial Institutions Act, 1984 (Act No. 38 of 1984) has a number of shortcomings regarding these issues.
- 1.2 Material shortcomings in the current Act are:
 - 1.2.1 limited powers of inspection in relation to unregistered entities;
 - 1.2.2 the registrar has to obtain ministerial approval before unregistered entities can be inspected, which might cause delays in matters where time is of the essence;
 - 1.2.3 the registrar has limited powers to convey information to affected parties;
 - 1.2.4 the Act is likely to fall short regarding some constitutional aspects; and
 - 1.2.5 the structure of the Act causes unnecessary repetition of phrases.
- 1.3 A new Bill is now introduced. In general the Bill seeks to improve readability and clarity and ease of interpretation. The powers of inspectors are enhanced to deal more effectively with offences and irregularities. New powers to disclose information to affected parties are granted to the registrar. ”

PART 2

2. CLAUSE BY CLAUSE ANALYSIS

- Clause 1
 - 2.1 Deals with the definitions.
- Clause 2
 - 2.2 Provides for the appointment of inspectors, as well as persons with specific expertise to assist inspectors.
- Clause 3
 - 2.3 Grants the registrar the power to instruct inspectors to inspect the affairs of financial institutions, associated institutions and unregistered persons.
- Clause 4
 - 2.4 Deals with the powers of inspectors regarding the inspection of institutions; amongst others, examination ~~under~~ oath or otherwise, search and seizure, and retention of documents for criminal or other proceedings. Provides for access to seized documents by the institution under the supervision of the registrar.
- Clause 5
 - 2.5 Deals with the powers of inspectors regarding persons other than institutions. Grants inspectors similar powers to those in clause 4, but provides for a warrant as far as search and seizure is concerned.

Clause 6

2.6 Grants inspectors the power to determine the time and place of examinations and who may be present thereat. This power is subject to the examinee's right to legal representation.

Clause 7

2.7 Provides that the provisions of the Bill do not interfere with legal professional privilege in criminal proceedings.

Clause 8

2.8 Provides that inspectors must preserve secrecy with regard to all matters that come to their knowledge during the performance of their duties, with some exceptions.

Clauses 9 and 10

2.9 Grant powers of disclosure to the registrar and provide for procedures in this regard.

Clause 11

2.10 Provides for the recovery of costs of inspections under justifiable circumstances.

Clause 12

2.11 Provides for certain applicable offences, amongst others wilfully giving false information to an inspector or hindering an inspector in the exercise of his or her duties.

PART 3

3. OTHER BODIES CONSULTED

3.1 A proposed draft Amendment Bill was circulated to interested parties on 25 June 1997. As a result of comments received and subsequent discussions, it was decided to draft an entirely new Act.

3.2 The Amendment Bill was circulated as widely as possible. A list of interested parties to whom the Bill was circulated is attached as an Annexure.

3.3 A press release was issued to notify interested parties of the draft Bill and to invite comments. No comment was received from the general public.

3.4 A meeting of interested parties was held on 10 December 1997 where the Bill was discussed. All the issues raised at the meeting were taken into account during the final drafting of the Bill.

PART 4

4. IMPLICATIONS FOR PROVINCES

None.

PART 5

5. PARLIAMENTARY PROCEDURE

In the opinion of the Department, the Financial Services Board and the State Law Advisers this Bill should be dealt with in terms of section 75 of the Constitution. None of the procedures laid down in section 74 and 76 are applicable.

ANNEXURE

1.	ABASA	No reply
2.	Actuarial Society of South Africa	Supported the Bill
3.	African Life Employee Benefits	Had reservations which were addressed in the Bill
4.	Afrikaans Handelsinstituut	No reply
5.	Association of General Banks	No reply
6.	Association for the Advancement of Black Accountants	No reply
7.	Association of Black Securities and Investment Professionals	No reply
8.	Association of Bond Issuers of SA	No reply
9.	Association of Corporate Treasurers of South Africa	No reply
10.	Association of Law Societies	No comment
11.	Association of Participation Mortgage Scheme Managers in South Africa	No reply
12.	Association of Trust Companies in South Africa	Supported the Bill
13.	Association of Unit Trusts	Supported the Bill
14.	Black Management Forum	No reply
15.	Bond Exchange of South Africa	Supported the Bill
16.	Business South Africa	No reply
17.	Chairman Taxation Panel	No reply
18.	Commission of Inquiry into the affairs of the Masterbond Group	No reply
19.	Commissioner for South African Revenue Services	Supported the Bill
20.	Consulting Actuaries Society of Southern Africa	No reply
21.	Consumer Council	No reply
22.	COSATU	No reply
23.	Council of South African Banks	Strongly supported the Bill
24.	Department of Economic Affairs (Eastern Cape)	No reply
25.	Department of Economic Affairs (Free State)	No reply
26.	Department of Economic Affairs (Gauteng)	No reply
27.	Department of Economic Affairs (Kwazulu-Natal)	No reply
28.	Department of Economic Affairs (Mpumalanga)	Supported the Bill
29.	Department of Economic Affairs (North Cape)	No reply
30.	Department of Economic Affairs (Northern Province)	Supported the Bill
31.	Department of Economic Affairs (North West)	No reply
32.	Department of Economic Affairs (Western Cape)	Supported the Bill
33.	Department of Finance	Supported the Bill
34.	FABCOS	No reply
35.	FEDSAL	No reply
36.	Financial Intermediaries Federation of Southern Africa	No reply
37.	Foundation for African Business and Consumer Services	No reply
38.	Free Market Foundation	No reply
39.	Fund Managers Association of South Africa	Supported the Bill, strong reservation re disclosure provisions
40.	General Representative in South Africa for Lloyds of London	No reply
41.	Institute of Financial Markets	No reply
42.	Institute of Life and Pension Advisors	Supported the Bill
43.	institute of Pension Consultants and Administrators	Had minor reservations that was addressed in the Bill
44.	Institute of Retirement Funds of South Africa	Minor reservations
45.	Insurance Brokers Council	No reply

46.	Insurance Institute of South Africa	No reply
47.	Johannesburg Stock Exchange	Supported in principle, minor reservations
48.	Life Offices' Association of SA	Supported the Bill, minor recommendations
49.	Life Underwriters Association	No reply
50.	Mr. Clive Kneale	No reply
51.	NACTU	No reply
52.	National African Federated Chamber of Commerce	No reply
53.	National Black Consumer Association	No reply
54.	National Consumer Affairs Office	Supported the Bill
55.	National Consumer Forum	No reply
56.	National NGO Coalition	No reply
57.	Office of the Auditor-General	Supported the Bill
58.	Ombudsman for Long-term Insurance	No reply
59.	Ombudsman for Short-term Insurance	No reply
60.	Public Accountants and Auditors Board	No reply
61.	Registrar of Banks	Supported the Bill in principle. minor reservations
62.	Registrar of Companies	No reply
63.	Registrar of Medical Schemes	Supported the Bill
64.	Rooth & Wessels Attorneys	No reply
65.	SA Insurance Association	Supported the Bill in principle, minor reservations
66.	SA Insurance Brokers Association	No reply
67.	SA Law Commission	No reply
68.	SA Reinsurance Brokers Association	No reply
69.	SOPOA	No reply
70.	South African Black Insurance Brokers Association	No reply
71.	South African Chamber of Business	No reply
72.	South African Futures Exchange	No reply
73.	South African Institute of Chartered Accountants	Supported the Bill