

REPUBLIC OF SOUTH AFRICA

BILLS OF EXCHANGE AMENDMENT BILL

*(As introduced in the National Assembly as a section 75 Bill; explanatory summary of Bill
published in Government Gazette 21316 of 23 June 2000) (The English text is the official
text of the Bill)*

(MINISTER OF FINANCE)

[B 47—2000]

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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 Bills of Exchange Act, 1964, so as to provide for—

the clarification of certain provisions;
the protection of users;
the accommodation of technological advancements; and
the reduction of the incidence of fraud; and

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to provide for matters incidental thereto.

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

Amendment of section 1 of Act 34 of 1964, as amended by section 1 of Act 58 of 1977 and section 5 of Act 77 of 1986

1. Section 1 of the Bills of Exchange Act, 1964 (hereinafter referred to as the principal Act), is hereby amended— 5

- (a) by the deletion of the definition of “action”;
- (b) by the substitution for the definition of “banker” of the following definition:
“**[banker includes]** ‘bank’ 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 contemplated in the South African Reserve Bank Act, 1989 (Act No. 90 of 1989), a bank as defined in section 1 of the Banks Act, 1990 (Act No. 94 of 1990), a mutual bank as defined in section 1 of the Mutual Banks Act, 1993 (Act No. 124 of 1993), and 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 **[banker]** bank 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: 10
“ ‘collecting bank’ means a bank collecting payment of a cheque or other document contemplated 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 15
definition: 20 25

“ ‘non-business day’ means a day contemplated in section ~~[four]~~ 3 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 87;”;
- (i) by the deletion of the definition of “note” used as a 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”. 10

Amendment of section 5 of Act 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.”. 15

Amendment of section 6 of Act 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 ‘order’ or ‘cash or order’.” 20

Repeal of section 13 of Act 34 of 1964

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 Section 13 of the principal Act is hereby repealed.

Amendment of section 18 of Act 34 of 1964

5. Section 18 of the principal Act is hereby amended by the substitution for subsection (1) of the following subsection: 25

“(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.” 30

Amendment of section 19 of Act 34 of 1964

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

“No contract on a bill, whether it be the drawer’s, the acceptor’s, **[or]** an indorser’s, or that of a signer of an aval, shall be complete and irrevocable, until delivery of the instrument in question in order to conclude such a contract: ”. 35

Repeal of section 23 of Act 34 of 1964

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

Amendment of section 24 of Act 34 of 1964

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

“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 preprinted name of the principal appears with his signature, he is not personally liable thereon.”. 45

Substitution of section 25 of Act 34 of 1964

9. The following section is hereby substituted for section 25 of the principal Act:

“Holder for value

25. A holder takes a bill for value if he takes it under onerous title.”.

Amendment of section 29 of Act 34 of 1964

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10. 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 indorsing 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.”. 10

Amendment of section 30 of Act 34 of 1964

11. 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 **[must]** may, 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.”. 15

Amendment of section 39 of Act 34 of 1964

12. Section 39 of the principal Act is hereby amended by the substitution for paragraph (a) of subsection (2) of the following paragraph: 20

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

Insertion of section 43A in Act 34 of 1964

13. The following section is hereby inserted in the principal Act after section 43: 25

“Presentment for payment by bank

43A. (1) A cheque may, provided the requirements of section 43 are met, be presented for payment to a drawee bank by a collecting bank—

- (a) at a place designated in the rules of any clearing house of which both the drawee bank and the collecting bank are members; 30
- (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 the drawee bank and the collecting bank are party by, or on behalf of, the collecting bank to the drawee bank, identifying the cheque with reasonable certainty. 35

(2) For the purpose of paragraph (c) of subsection (1), a cheque is deemed to be identified with reasonable certainty if—

- (a) the sum ordered to be paid by the cheque;
 - (b) the number of the cheque, if any;
 - (c) the name and number of the account against which the cheque is drawn; and 40
 - (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) A collecting bank shall take care of any cheque deposited with it until presentment has been effected in accordance with subsection (1).” 45

Amendment of section 49 of Act 34 of 1964, as amended by section 3 of Act 58 of 1977

14. Section 49 of the principal Act is hereby amended—
- (a) by the deletion of subsection (1);
 - (b) by the substitution for subsection (1A) of the following subsection: 5
 - “(1A) (a) If **[an inland]** a bill has been dishonoured 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.
 - (b) If **[such]** a bill drawn payable at the place of business or residence 10 of some person other than the drawee, has been dishonoured 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.”;
 - (c) by the deletion of subsection (8); and 15
 - (d) by the substitution for the proviso to subsection (9) of the following proviso:
 - “Provided that if the cause of delay ceases to operate, the bill must be protested **[when necessary]** with reasonable diligence.”.

Amendment of section 50 of Act 34 of 1964

15. Section 50 of the principal Act is hereby amended by the substitution for 20 subsection (4) of the following subsection:
- “(4) Subject to the provisions of section 43A, when a holder of a bill presents it for payment, he shall exhibit the bill to the person from whom he demands payment, and when a bill is paid, the holder shall forthwith deliver it up to the party 25 paying it.”.

Substitution of section 54 of Act 34 of 1964

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

“Liability of stranger signing bill

54. If a person signs a bill otherwise than as drawer, **[or] acceptor, signer of an aval or drawee certifying a cheque**, he thereby incurs the liabilities of 30 an indorser to a holder in due course.”.

Insertion of section 54A in Act 34 of 1964

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

“Liability of signer of aval

54A. (1) The liabilities of the parties to a bill or note may be secured by 35 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 of a person other than the drawer, maker, drawee or payee made 40 on the back of the bill or note payable to order before indorsement by the payee shall be sufficient for such indication.

(3) The signer of an aval may specify in the bill or note the party for whom he has given his aval and if he does not so specify, he shall be deemed to have given his aval for the drawer or maker, as the case may be: 45 Provided that, if a bill has been accepted, whether before or after the signing of the aval, the signer of that aval shall be deemed to have given his aval for the acceptor.

(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 or is deemed to have given his 50 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 or is deemed to have given his aval and against all parties liable to that person.”.

Amendment of section 55 of Act 34 of 1964

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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 a bill is dishonoured, 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 10 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 15 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). 20

Amendment of section 58 of Act 34 of 1964

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

Repeal of section 63 of Act 34 of 1964

20. Section 63 of the principal Act is hereby repealed. 25

Repeal of section 64 of Act 34 of 1964

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

Repeal of section 65 of Act 34 of 1964

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

Repeal of section 66 of Act 34 of 1964

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

Substitution of section 67 of Act 34 of 1964

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

“Holder’s rights if bill is lost or destroyed

67. (1) If a bill is lost or destroyed before it is overdue, the person who 35 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 or destroyed is found again.

(2) If the drawer on such request refuses to give such bill he may be 40 compelled to do so.”.

Amendment of section 70 of Act 34 of 1964, as amended by section 4 of Act 58 of 1977

25. Section 70 of the principal Act is hereby amended—
- (a) by the substitution in paragraph (a) for the words preceding subparagraph (i) of the following words: 5

“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, indorsement **[or acceptance for honour supra protest]** or that of an aval, is determined by the law of the place where such contract was made, but—”; and 10
 - (b) by the substitution for paragraph (b) of the following paragraph:

“(b) subject to the provisions of this Act, the interpretation of the contract of the drawer, indorser, acceptor **[or acceptor for honour supra protest]** or signer of an aval of a bill is determined by the law of the place where such contract is made: Provided that if **[an inland]** a bill payable in the Republic is indorsed outside the Republic, the indorsement shall as regards the payer be interpreted according to the law of the Republic;”. 15

Amendment of section 72 of Act 34 of 1964

26. Section 72 of the principal Act is hereby amended— 20
- (a) by the substitution for the word “banker” of the word “bank” wherever it occurs in paragraph (a) of subsection (1); and
 - (b) by the substitution for paragraph (b) of subsection (1) 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 **[banker]** bank to the extent of such discharge, and be entitled to recover the amount from **[him]** it.”; and 25
 - (c) by the substitution for the word “bankers” of the word “banks” in subsection (2). 30

Insertion of sections 72A and 72B in Act 34 of 1964

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

“Liability of drawee who has certified cheque

- 72A.** (1) A cheque is certified if the drawee signs it and adds words to the cheque that indicate that the cheque will be paid or that funds are available for its payment. 35
- (2) When a drawee of a cheque certifies it he—
- (a) undertakes that he will pay the holder, or the drawer or an indorser who has been compelled to pay the cheque, the amount recoverable in terms of section 55 according to the tenor of his certification; 40
 - (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.

Prevention of fraud

72B. (1) A 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 No. 80 of 1991), or by the Auditor-General, and a person obliged to appoint an accounting officer in terms of section 59 of the Close Corporations Act, 1984 (Act No. 69 of 1984), shall exercise reasonable care while having custody of cheque forms and in the reconciliation of his bank statements. 5

(2) 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 court day as defined in the rules of the Magistrate's and High Courts." 10

Substitution of section 73 of Act 34 of 1964 15

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

"Revocation of bank's authority

73. The duty and authority of a **[banker]** bank to pay a cheque drawn on **[him]** it by **[his]** its customer are **[determined]** terminated by receipt of— 20

- (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: 25

Provided such countermand or notice identifies the cheque, in the case of countermand, and the customer with reasonable particularity and gives the drawee a reasonable opportunity to act on it." 30

Repeal of section 74 of Act 34 of 1964

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

Amendment of section 75 of Act 34 of 1964 30

30. 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 35
 - (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" wherever it occurs in subsection (2). 40

Insertion of section 75A in Act 34 of 1964

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

“Non-transferable cheques

75A. (1) A non-transferable cheque is a cheque which is payable to a payee, whether expressed to be payable to such payee only or to such payee or order or to such payee or bearer, and which contains the words ‘not transferable’ written boldly across the face of it by the drawer. 5

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

(3) The words ‘not transferable’ may not be cancelled and any purported cancellation shall be of no effect. 10

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

Amendment of section 76 of Act 34 of 1964

32. Section 76 of the principal Act is hereby amended— 15

(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 [banker] bank to [whom] which it is crossed may again cross it specially to another [banker] bank for collection.”; and 20

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

Substitution of section 77 of Act 34 of 1964

33. The following section is hereby substituted for section 77 of the principal Act: 25

“Crossing material part of cheque

77. 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.”.

Substitution of section 78 of Act 34 of 1964 30

34. The following section is hereby substituted for section 78 of the principal Act:

“Duties of banks as to crossed cheques

78. (1) If a cheque is crossed generally, the [banker] bank on [whom] which it is drawn shall not pay it to any person other than a [banker] bank.”; 35

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

(3) If a cheque is crossed specially to more than one [banker] bank, except when crossed to two [bankers] banks of [whom] which the one is an agent for collection of the other, the [banker] bank on [whom] which it is drawn shall refuse payment thereof. 40

(4) If the [banker] bank on [whom] which a cheque is drawn—

(a) pays such cheque if it is crossed as is contemplated in sub-section (3); 45

(b) pays such cheque to any person other than a [banker] bank if it is crossed generally; or

(c) pays such cheque, if it is crossed specially, to any person other than the [banker] bank to [whom] which it is crossed or the latter’s agent for collection, if [he] it is a [banker] bank, 50

[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 [banker] bank 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 [banker] bank or the [banker] bank to [whom] which the cheque is or was crossed, or the latter's agent for collection [who] which is a [banker] bank, as the case may be.”.

Substitution of section 79 of Act 34 of 1964

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

“Protection to bank and drawer where cheque is crossed

79. If the [banker] bank on [whom] which a crossed cheque is drawn, in good faith and without negligence pays it, if crossed generally, to a [banker] bank, and, if crossed specially, to the [banker] bank to [whom] which it is crossed, or the latter's agent for collection, [who] which is a [banker] bank, the [banker] bank 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 34 of 1964

36. 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 [banker] bank upon [whom] which it was drawn, under circumstances which do not render such [banker] bank liable in terms of this Act to the true owner of the cheque for any loss he may sustain owing to the cheque having been paid, the true owner shall, if he suffered any loss as 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 loss, and either gave a consideration therefor or took it as a donee, an amount equal to the true owner's said loss or the amount of the cheque, whichever is the lesser.”; and

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

“(5) For the purposes of subsection (1), a [banker who] bank which receives payment of any such cheque for a customer shall, subject to the provisions of subsection (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 settlement of any debt owed by the customer to the [banker] bank.”.

Substitution of section 82 of Act 34 of 1964

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

“Application of sections 75 to 81 to certain documents other than cheques

82. Sections 75 to and including 81 shall also apply to any document issued by a customer of any [banker] bank and intended to enable any

person to obtain payment on demand of the sum mentioned in such document from such **[banker] bank** (or from any **[banker] bank**, 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— 5

- (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 10 a **[banker] bank**,

as if the said document were a cheque and as if the drawee were a **[banker] bank** and the State **[his] its** customer: Provided that nothing in this section contained shall render any such document a negotiable instrument.”.

Amendment of section 83 of Act 34 of 1964 15

38. Section 83 of the principal Act is hereby amended—

- (a) by the substitution for subsection (1) of the following subsection:
 - “(1) If a **[banker] bank** in good faith and in the ordinary course of business credits the account of **[a] its** customer **[of his]** with or pays to another **[banker] bank** the amount of— 20
 - (a) any cheque drawn on **[him] it**;
 - (b) any other document issued by **[a] its** 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 **[banker] bank**, if the document was issued on behalf of the State); or 25
 - (c) draft payable on demand drawn by such first-mentioned **[banker] bank** upon **[himself] itself**, or upon **[his] its** agent who is a **[banker] bank**, 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 30
- (b) by the substitution for subsection (2) of the following subsection:
 - “(2) The provisions of sub-section (1) shall *mutatis mutandis* also 35 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 40 through a **[banker] bank**,

as if the said document were a cheque and as if the drawee were a **[banker] bank** and the State **[his] its** customer.”. 45

Substitution of section 84 of Act 34 of 1964 45

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

“Rights of banks if unindorsed or irregularly indorsed cheques or certain other documents are delivered to them for collection

84. (1) If a cheque, or draft or other document referred to in section 83, which is payable to order, is delivered by the holder thereof to a **[banker] bank** for collection, and such cheque, draft or document is not indorsed or was irregularly indorsed by such holder, such **[banker] bank** shall have such rights, if any, as **[he] it** would have had if, upon such delivery, the holder had indorsed it in blank. 50

(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: Provided 55

that nothing herein contained shall afford the collecting bank a stronger or better right to payment against the drawer than the payee had.”.

Substitution of section 85 of Act 34 of 1964

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

“Evidential value of payment of unindorsed or irregularly indorsed cheques or certain other documents 5

85. If an unindorsed or irregularly indorsed cheque, or draft or other document referred to in section 83, has been paid by the **[banker]** bank (including a drawee referred to in subsection (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.”. 10

Amendment of section 93 of Act 34 of 1964

41. Section 93 of the principal Act is hereby amended by the substitution for subsection (3) of the following subsection: 15

“(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;** 20
 (d)] bills in a set.”.

Substitution of section 95 of Act 34 of 1964, as amended by section 6 of Act 77 of 1986

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

“Signature 25

95. **[(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 stamp of a corporation shall be sufficient and be deemed to be **[quivalent]** equivalent to the signing or indorsement of any such instrument or writing. 30

[(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.]”. 35

Repeal of section 97 of Act 34 of 1964

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

Amendment of section 98 of Act 34 of 1964

44. Section 98 of the principal Act is hereby amended by the substitution for subsection (1) of the following subsection: 40

“(1) If a dishonoured 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 dishonoured, 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, 45
 and such certificate shall in all respects operate as if it were a formal protest of the bill.”.

Short title and commencement

45. This Act is called the Bills of Exchange Amendment Act, 2000, and comes into operation on a date fixed by the President by proclamation in the *Gazette*.

MEMORANDUM ON THE OBJECTS OF THE BILLS OF EXCHANGE AMENDMENT BILL, 2000

1. INTRODUCTION

Bills of exchange, of which cheques are the most commonly known example, were the first alternative to cash payment. A cheque enables a person, “the drawer”, to leave his or her money with another person, “the drawee”, and, then, to make payment to a third person, “the payee”, by instructing the drawee to pay on the drawer’s behalf.

The instruction must be unconditional, in writing and for a specific amount of money, for payment on a specified date.

When the law on bills of exchange was developed in the 17th and 18th centuries, the benefit of branch networks, which we have today, did not exist. An important feature of cheques is thus that they are negotiable, which means that a payee can transfer the cheque to someone else, “the holder”. The holder then has the right to receive payment from the drawee instead of the payee, or to transfer the cheque further.

The last 20 years have seen significant developments: Technology has improved, branch networks have been extended, and new payment mechanisms, such as electronic transfers, credit cards, debit cards and smart cards, have been developed. The consequence of these developments is that cheques have a more limited role in payments and that cheque law can be simplified in the interest of consumers. A further result of improved technology is that cheques have become more susceptible to forgeries and to fraud.

It is consequently proposed that the Bills of Exchange Act, 1964 (Act No. 34 of 1964 — hereinafter referred to as “the principal Act”), be amended in order to achieve the following broad objectives:

- Simplifying and clarifying certain provisions of the principal Act.
- Promoting the interest of consumers.
- Accommodating technical advancements.
- Reducing the incidence of fraud.

The history of these amendments is as follows:

In August 1995, the South African Law Commission published its Report on the Investigation into the Payment System in South African Law, “the Report”. The Report recommended far-reaching reforms to the existing law.

Since these recommendations presented a major departure from the existing law, leading academics in the field raised concerns that we would lose the benefit of the many years of judicial interpretation and certainty that had developed with regard to the principal Act.

It was thus decided to retain the principal Act and to address only the most important reforms recommended by the Law Commission, as well as other reforms that have since become necessary. This culminated in the Bills of Exchange Amendment Bill, 2000 — (hereinafter referred to as “the Bill”).

In the explanations that follow, the term “cheque” is used to refer to bills of exchange in general.

2. AMENDMENTS FOR PURPOSES OF SIMPLIFICATION AND CLARIFICATION

2.1 Amendments to clause 1

The term “banker” is outdated. The definition of “banker” in section 1 of the principal Act has therefore been amended to become a definition of “bank”.

The Act does not currently contain a definition of “collecting bank”. Because this term is used in the new sections 43A and 84 of the principal Act, a definition is now required.

The phrase “used as a noun” in the definition of “note” is superfluous and has therefore been deleted.

Various redundant and anachronistic definitions have been deleted.

2.2 Clause 2

The purpose of section 5(3) of the principal Act is to protect the purchaser or payer of a cheque who paid on or received the cheque from a person holding it through a forged or unauthorised endorsement, that is, when the person negotiating the cheque had no right to do so.

Section 5(3) currently provides that this protection is available only when the forged or unauthorised endorsement purports to be that of a fictitious person.

The court, in Nedbank Ltd v Window Press (Pty) Ltd (1987(3) SA 761) (SE), decided that, in the South African context, “fictitious” referred to a payee that existed only in the imagination of the drawer. This requires that the intention of the forger has to be established before this protection is available. The amendment will extend the protection to circumstances in which the payee can objectively be found not to exist.

The protection of the purchaser has therefore been extended by the insertion of the phrase “or non-existing”.

2.3 Clauses 4, 20 to 23, inclusive, and 25

The concepts of acceptance and payment for honour, as well as of the referee in case of need, are outmoded and have fallen into disuse. These clauses serve to repeal and amend sections 13, 63, 64, 65, 66 and 70 of the principal Act, which provide for these outmoded concepts.

2.4 Clause 5

Section 18 of the principal Act makes reference to a stamp on cheques. Stamp duty on cheques has been abolished. Section 18 of the principal Act has therefore been amended to delete the reference to a stamp on a cheque.

2.5 Clause 7

Signature by procuration has become outmoded and is not in current use. Section 23 of the principal Act has therefore been deleted.

2.6 Clauses 9 and 10

Sections 25 and 29(4) of the principal Act currently refer to the doctrine of valuable consideration. It is universally accepted that the **doctrine of valuable consideration** does not form part of South African law. The above-mentioned references have therefore been deleted.

2.7 Clause 12

The meaning of the words “by bill” contained in section 39 of the principal Act has never been understood and has therefore been deleted.

2.8 Clauses 14, 18, 29, 43 and 44

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 the amendments to sections 49, 55, 74, 97 and 98 of the principal Act is to make protest voluntary on all cheques.

When section 55(2) of the principal Act was drafted it was not possible to obtain judgments in a foreign currency. Because of developments in South African case law, this is now possible. The section has therefore been amended. 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.

2.9 Clauses 16 and 17

The duty of any person to pay a cheque may be guaranteed by a guarantor, either by signing on the cheque or by a separate agreement. The principal Act is currently unclear about the liability of a guarantor who signs on the cheque. The uncertainty arises because the principal Act currently deems any unidentified signatory on a cheque to be liable as indorser to all subsequent parties to the cheque. As a result, a person who currently intends to sign as a guarantor for a specific party to the cheque incurs an unintended liability towards subsequent parties.

The proposed amendment to section 54 of the principal Act provides certainty with regard to the liability of a guarantor. The amendment accordingly provides that a person who intends to sign as a guarantor for a specific party will incur liability only towards that party and would therefore not be held liable to any other subsequent party to the cheque.

In order to be consistent with the laws of other countries, the guarantor is referred to as the “signer of an aval”.

2.10 Clause 24

Currently, section 67 of the principal Act gives rights to a holder when a cheque has been lost. There is no reason for this protection not to be available when a cheque has been destroyed. This amendment extends the protection to such cases.

2.11 Clauses 19, 26, 28, 32, 34, 35, 36, 37, 38, 39 and 40

Because the definition of “banker” has been changed to “bank”, certain grammatical changes had to be made to sections 58, 72, 73, 76, 78, 79, 81, 82, 83, 84 and 85 of the principal Act.

Other minor changes have been made to terminology in these sections for purposes of simplicity and clarification.

3. AMENDMENTS IN THE INTEREST OF CONSUMERS

3.1 Clause 1

Many people who do not have cheque accounts make payment by way of a “bank cheque” (which is a cheque in respect of which the bank is both the drawer and the drawee). The principal Act currently defines a cheque as an instrument drawn “by one person on another” (that is, it is assumed that the drawer and drawee are different persons). Consequently, the principal Act does not currently recognise a bank cheque.

Because use of a bank cheque has become common practice, the definition of “cheque” contained in section 1 of the principal Act is amended to recognise this type of cheque.

3.2 Clause 3

Currently, an instrument made payable to “cash or order” or “order” is not a bill of exchange. Clause 3 proposes to amend section 6(2) of the principal Act, in order to assist members of the public who often issue and accept cheques made payable in this manner.

3.3 Clause 8

Section 24(1) of the principal Act allows persons to sign cheques without incurring personal liability by adding words to their signature indicating that they are signing in a representative capacity or on behalf of another. Currently, it is uncertain whether this section applies 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 not to incur personal liability.

The effect of the amendment is to clarify that a person signing in the above circumstances will not incur personal liability.

3.4 Clause 11

Section 30 of the principal Act currently provides that negotiation of a cheque on which the payee’s or indorsee’s name is misspelt can take place only if the person whose name has been misspelt endorses the cheque using his or her misspelt name and adding his or her proper signature. Since the public seems to be unaware of this requirement, it is considered in the general interest to make this requirement optional.

3.5 Clause 27

Banks undertake that the cheques of certain esteemed clients will not be dishonoured by non-payment. This undertaking is commonly known as “certification” of the cheque. The consequences of such a certification are currently not defined. The proposed new section 72A provides such a definition, in order to establish legal certainty in this regard. The consequence of this amendment is that banks will be obliged to honour cheques when the criteria of a certification provided for in this section have been met.

3.6 Clause 39

Section 84 of the principal Act gives a bank certain rights in respect of unendorsed or irregularly endorsed cheques. Currently, these rights are given only for negotiable cheques.

Consequently, it is currently impossible for banks to claim against the drawer of a non-transferable cheque (which may be necessary when the depositor of the cheque is absent or incapacitated). The amendment extends these rights to non-transferable cheques.

4. AMENDMENT TO TAKE ACCOUNT OF TECHNOLOGICAL ADVANCEMENTS

4.1 Clauses 13 and 15

Since a cheque is an instruction given to the drawee bank by the drawer, the drawee bank cannot make payment in good faith without verifying the drawer’s instruction as embodied in the cheque. Presentment means the conveying of the drawer’s instruction to a drawee bank, in order for the bank to undertake this verification.

In order for presentment to take place, the principal Act currently requires the physical handing over of the cheque. Technological advancements have, however, made it possible to present cheques more efficiently, by means of the electronic transmission of the essential data pertaining to the instruction. The proposed new section 43A and

amendment to section 50(4) of the principal Act make provision for this mode of presentation without diminishing the rights of the customer.

The proposed amendment to section 43A of the principal Act imposes a duty on a collecting bank in the custody of cheques deposited for collection.

Since the relationship between a bank and its client is one of debtor and creditor, and not one of depositor and custodian, there is no common law duty regarding the custody of instruments handed in for collection.

Banks have historically held that they collect as agent for the depositor and that their indebtedness to the depositor only arises once the funds have been cleared (i.e. once the drawee bank has made irrevocable payment). Banks do not currently accept liability for lost instruments. Once a duty is imposed, a bank can be held liable in delict for a failure or omission to comply with that duty.

The provision thus strengthens the rights of a depositor against a collecting bank.

5. AMENDMENTS FOR PURPOSES OF PREVENTION OF FRAUD

5.1 Clause 31

A collecting bank is the bank at which the payee deposits his/her cheques. The collecting bank then presents the cheque, on behalf of its customer (the depositor), to the drawee bank.

Our law has imposed a duty of care on collecting banks in accepting cheque deposits from its customers. This duty requires that the collecting bank ensures that cheques are accepted into an account of a person who has a right to receive payment of the cheque.

When a drawer instructs on a cheque that payment should be made to the payee only (for example, by marking the cheque “not transferable”), the collecting bank’s duty of care is considerably increased, since the exact identity of the depositor has to be established. Because of the high incidence of fraud, increasing use is being made of this type of cheque.

By ensuring that non-transferable cheques are conspicuous, banks would be more readily able to apply the additional scrutiny required to comply with its duty of care. In order to achieve this, the Bill proposes that the manner in which cheques may be rendered non-transferable be restricted to the “not transferable” marking.

This proposal enhances the bank’s ability to perform the duty of care without diminishing the rights of the depositor. Furthermore, the likelihood of fraud on non-transferable cheques will be greatly reduced.

5.2 Clause 27

When a cheque is presented to a drawee bank, the drawee bank compares the signature on the cheque with the drawer’s specimen signature in its records. Further validation of the instruction, for example, by telephoning the drawer each time that a cheque is presented is not commercially possible.

It is not equitable for banks to be liable for losses resulting from the erroneous payment of cheques when the drawer’s signature, owing to the fault of the drawer, has been perfectly forged. In order to encourage responsible behaviour on the part of drawers who are readily able to prevent the occurrence of such forgeries, the proposed new section 72B creates an obligation for companies, close corporations, government departments and similar entities to take reasonable care when having custody of cheque forms and in the reconciliation of their bank statements. This obligation does not, however, extend to natural persons.

Losses resulting from a bank's payment of a cheque on which the drawer's signature is forged may be summarised as follows:

If the bank has been negligent in paying a cheque, for example, when the bank should have detected that the drawer's signature had been forged, the bank would have to bear the loss.

If a drawer's signature has been perfectly forged, but not owing to the fault of the drawer, a bank paying such a cheque would have to bear the loss.

As a result of the proposed amendment, if a drawer's signature has been perfectly forged, owing to the fault of the drawer (in contravention of the obligation imposed by the proposed new section 72B(1)), the drawer would have to bear the loss. This will, however, apply only if the drawer is a company, a close corporation, a government department or a similar entity.

If the signature of a natural person is perfectly forged, such a person would bear the loss only if he or she had knowledge of the forgery and did not give notice of such a forgery to the bank. The ordinary consumer's interests are thereby protected to the extent that his or her liability for such losses is much more restricted than in the case of a company, government department or a similar entity.

6. FINANCIAL IMPLICATIONS FOR THE STATE

There are no direct financial implications for the State.

7. OTHER DEPARTMENTS/INSTITUTIONS/BODIES CONSULTED

A draft of the Bill was circulated to approximately 50 consumer and other representative bodies for comment.

In addition, the Department of Justice and the Department of Trade and Industry have also been consulted.

The Policy Board for Financial Services and Regulation has approved the proposed amendments.

8. PARLIAMENTARY PROCEDURE

The Department of Finance and the State Law Advisers are of the opinion that the Bill should be dealt with in accordance with the procedure prescribed by section 75 of the Constitution since it contains no provision to which section 74 or 76 of the Constitution applies.