

REPUBLIC OF SOUTH AFRICA

FINANCIAL INSTITUTIONS (PROTECTION OF FUNDS) BILL

*(As introduced in the National Assembly as a section 75 Bill;
Bill published in Government Gazette No. 22215 of 10 May 2001)
(The English text is the official text of the Bill)*

(MINISTER OF FINANCE)

[B 23—2001]

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BILL

To provide for, and consolidate the laws relating to, the investment, safe custody and administration of funds and trust property by financial institutions; to enable the registrar to protect such funds and trust property; to repeal the Financial Institutions (Investment of Funds) Act, (Act No. 39 of 1984); and to provide for matters incidental thereto.

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

INTRODUCTORY PROVISIONS

Definitions

1. In this Act, unless the context indicates otherwise— 5

“**company**” includes a close corporation referred to in the Close Corporations Act, 1984 (Act No. 69 of 1984);

“**financial institution**” means—

- (a) any person or institution referred to in the definition of ‘financial institution’ in section 1 of the Financial Services Board Act, 1990 (Act No. 97 of 1990); 10
- or
- (b) any medical scheme contemplated in section 1 of the Medical Schemes Act, 1998 (Act No. 131 of 1998);

“**institution**”, for the purposes of sections 5, 6, 9 and 10, means—

- (a) a financial institution; 15
- (b) any person, partnership, company or trust in which, or in the business of which, a financial institution or an unregistered person has or had a direct or indirect interest;
- (c) 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 an unregistered person; 20
- (d) a participating employer in a pension fund organisation;
- (e) 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; or 25
- (f) any person, partnership, company or trust who or which is not registered, approved or otherwise authorised by the registrar under a relevant law to carry on the business of a financial institution, but who or which carries on such business or a business corresponding to a business normally carried on by a financial institution; 30

“**nominee company**” means a company, controlled by a financial institution, which—

- (a) is incorporated under the provisions of the Companies Act, 1973 (Act No. 61 of 1973);
- (b) has as its principal object to act as nominee for, or representative of, any person in the holding of any property in trust for such person or persons; 35
- (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 the company, and in terms of which such financial institution has undertaken to pay all the expenses of, and incidental to, its formation, operations and liquidation;

“registrar” means—

- (a) the registrar as defined in any of the Acts referred to in paragraph (a) of the definition of ‘financial institution’ in section 1 of the Financial Services Board Act, 1990;
- (b) the executive officer defined in section 1 of the Financial Services Board Act, 1990; or
- (c) the registrar of medical schemes referred to in section 1 of the Medical Schemes Act, 1998;

“trust property” means any corporeal or incorporeal, movable or immovable asset invested, held, kept in safe custody, controlled, administered or alienated by any person, partnership, company or trust for, or on behalf of, another person, partnership, company or trust, and such other person, partnership, company or trust is hereinafter referred to as the principal.

CHAPTER 1

FUNDS AND TRUST PROPERTY HELD BY FINANCIAL INSTITUTIONS

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

2. A director, member, partner, official, employee or agent of a financial institution or of a nominee company who invests, holds, keeps in safe custody, controls, administers or alienates any funds of the institution or any trust property—

- (a) must, with regard to such funds, observe the utmost good faith and exercise proper care and diligence;
- (b) must, with regard to the trust property and the terms of the instrument or agreement by which the trust or agency in question has been created, observe the utmost good faith and exercise the care and diligence required of a trustee in the exercise or discharge of his or her powers and duties; and
- (c) may not alienate, invest, pledge, hypothecate or otherwise encumber or make use of the funds or trust property or furnish any guarantee in a manner calculated to gain directly or indirectly any improper advantage for himself or herself or for any other person to the prejudice of the financial institution or principal concerned.

Declaration of interest

3. (1) A director, member, partner, official, employee or agent of a financial institution or of a nominee company who takes part in a decision to invest any of the funds of the institution or any trust property in a company or other undertaking in which he or she has a direct or indirect financial interest, must declare that interest in writing to the board of management or other governing body of the financial institution or nominee company, indicating the nature and extent of such interest, before such decision is made.

(2) For the purposes of subsection (1), ‘invest’ includes—

- (a) the purchase of shares in a company, or of an interest in a close corporation or partnership;
- (b) the granting of a secured or unsecured loan.

(3) A declaration of interest made in terms of subsection (1) must be recorded in the minutes of the meeting of the board or governing body at which the declaration is made or considered.

Investment of trust property

4. (1) A director, member, partner, official, employee or agent of a financial institution which administers trust property under any instrument or agreement may not cause such trust property to be invested otherwise than in a manner directed in, or required by, such instrument or agreement.

- (2) In the absence of a direction or requirement referred to in subsection (1), a director, member, partner, official, employee or agent of a financial institution may not cause any trust property to be invested otherwise than in the name of—
- (a) the principal concerned;
 - (b) the financial institution in its capacity as administrator, trustee, curator or agent; or
 - (c) a nominee company.
- (3) (a) Despite subsections (1) and (2)—
- (i) where the articles of association of a company prohibit the registration of its shares or debentures in the name of—
 - (aa) a trust;
 - (bb) a financial institution in its capacity as administrator, trustee or curator; or
 - (cc) any nominee; and
 - (ii) where such shares or debentures form part of trust property administered by a financial institution,
- those shares or debentures must be registered in the name of a director, member, partner or manager of that financial institution.
- (b) The director, member, partner or manager must hold those shares or debentures in a fiduciary capacity on behalf of the principal concerned.
- (c) Prior to the registration of any shares or debentures in the name of a director, member, partner or manager as contemplated in paragraph (a), the financial institution concerned must furnish security to the satisfaction of the Master of the High Court, if such security has not already been furnished in terms of the Trust Property Control Act, 1988 (Act No. 57 of 1988).
- (4) A financial institution must keep trust property separate from assets belonging to that institution, and must in its books of account clearly indicate the trust property as being property belonging to a specified principal.
- (5) Despite anything to the contrary in any law or the common law, trust property invested, held, kept in safe custody, controlled or administered by a financial institution or a nominee company under no circumstances forms part of the assets or funds of the financial institution or such nominee company.
- (6) This section also applies in a case where a financial institution invests, holds, keeps in safe custody, controls, administers or alienates trust property under any instrument or agreement jointly with another person.

CHAPTER 2

ENFORCEMENT

Appointment of curator

5. (1) The registrar may, on good cause shown, apply to a division of the High Court having jurisdiction for the appointment of a curator to take control of, and to manage the whole or any part of, the business of an institution.
- (2) Upon an application in terms of subsection (1) the court may—
- (a) provisionally appoint a curator to take control of, and to manage the whole or any part of, the business of the institution on such conditions and for such a period as the court deems fit; and
 - (b) simultaneously grant a rule *nisi* calling upon the institution and other interested parties to show cause on a day mentioned in the rule why the appointment of the curator should not be confirmed.
- (3) On application by the institution the court may anticipate the return day if not less than 48 hours' notice of such application has been given to the registrar.
- (4) If at the hearing pursuant to the rule *nisi* the court is satisfied that it is desirable to do so, it may confirm the appointment of the curator.
- (5) The court may make an order with regard to—
- (a) the suspension of legal proceedings against the institution for the duration of the curatorship;
 - (b) the powers and duties of the curator;
 - (c) the remuneration of a curator appointed provisionally under subsection (2)(a) or finally under subsection (4);

- (d) the costs relating to any application made by the registrar under subsection (1);
- (e) the costs incurred by the registrar in respect of an inspection of the affairs of the institution concerned in terms of the Inspection of Financial Institutions Act, 1998 (Act No. 80 of 1998); or
- (f) any other matter which the court deems necessary.

(6) The curator acts under the control of the registrar who made the application under subsection (1), and may apply to that registrar for instructions with regard to any matter arising out of, or in connection with, the control and management of the business of the institution.

(7) The curator must furnish the registrar of the institution concerned with such information concerning the affairs of that institution as the registrar may require.

(8) (a) Any person, on good cause shown, may make application to the court to set aside or alter any decision made, or any action taken, by the curator or the registrar with regard to any matter arising out of, or in connection with, the control and management of the business of an institution which has been placed under curatorship.

(b) A person who makes application contemplated in paragraph (a) must give notice of not less than 48 hours of such application to the registrar or the curator, as the case may be, and such registrar or curator is entitled to be heard at such application.

(9) The court may, on good cause shown, cancel the appointment of the curator at any time.

Powers of registrar

6. (1) The registrar may institute proceedings in the High Court having jurisdiction in order to—

- (a) discharge any duty or responsibility imposed on the registrar in terms of any law;
- (b) compel any institution to comply with any law or to cease contravening a law;
- (c) compel any institution to comply with a lawful request, directive or instruction made, issued or given by the registrar under a law; or
- (d) obtain a declaratory order on any point of law relating to any law or to the business of an institution.

(2) For the purpose of ensuring compliance with a law, or if the registrar has reason to believe that an institution is contravening or failing to comply with, or has contravened or failed to comply with, any provision of a relevant law, the registrar may—

- (a) by notice direct that institution to—
 - (i) furnish the registrar within a specified period with any specified information or documents in the possession or under the control of that institution and which relate to the matter of such contravention or failure;
 - (ii) appear before the registrar at a specified time and place for questioning by the registrar in connection with such matter; or
 - (iii) make arrangements to the satisfaction of the registrar for the discharge of all or any part of that institution's obligations in terms of such law;
- (b) if it appears that prejudice has occurred or might occur as a result of such contravention or failure to comply, apply to a court having jurisdiction for an order restraining such institution from continuing business or dealing with trust property pending an application to court by the registrar as contemplated in section 5, or pending the exercising of such other legal remedy as may be available to the registrar.

(3) (a) If the registrar has reason to believe that an institution has contravened a law, or has failed to comply with a request, directive or instruction made, issued or given by the registrar under such law, the registrar may publish a statement to that effect in such manner as the registrar considers appropriate.

(b) Before publishing a statement, the registrar must give the institution concerned a notice warning it of the proposed publication of such statement, the reason therefor and the proposed date of publication.

(c) The institution concerned may before the proposed date of publication of the notice make representations to the registrar concerning the proposed action.

(d) If the registrar thereafter decides to publish the statement, the registrar must, without delay, give the institution concerned a notice which sets out the terms of the statement to be published.

(4) In paragraphs (a), (b), (c), and (d) of subsection (1), in subsection (2) and in subsection (3) 'law' means this Act, the Inspection of Financial Institutions Act, 1998, 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, 1998, and includes any subordinate measure made under or in terms of any such Act. 5

(5) The registrar may take any reasonable steps, including the issue of an instruction to carry out an inspection in terms of the Inspection of Financial Institutions Act, 1998, to ensure that an institution which is subject to an order of court made in terms of subsection (1) or (2) is complying with that order.

Declaration of certain practices as irregular or undesirable 10

7. (1) The registrar may, by notice in the *Gazette*, declare a specific practice or method of conducting business an 'irregular or undesirable practice' or an 'undesirable method of conducting business' for a specific category or categories of financial institutions, or for all such institutions.

(2) The registrar may not issue a declaration referred to in subsection (1) unless the registrar— 15

- (a) has invited interested persons to make written representations concerning the intended declaration so as to reach him or her within 21 days before the proposed date of publication of that notice; and
- (b) has consulted with any advisory committee or board established in respect of the supervision, regulation and control of the financial institutions concerned. 20

(3) A financial institution may not, on or after the date of the notice referred to in subsection (1), carry on the relevant business practice or method of conducting business.

(4) The registrar may, by notice in the *Gazette*, direct a financial institution which carries on the relevant business practice or method of conducting business on or after the date of such notice referred to in subsection (1), to rectify, repair or repay to the satisfaction of the registrar anything which was caused by, or arose out of, that business practice or method of conducting business. 25

(5) A financial institution which is directed to rectify, repair or repay anything in terms of subsection (4), must do so within 60 days after the institution is so directed. 30

Restriction on powers of registrar

8. Despite any other provision of this Act, the registrar may not act under section 5, 6, or 7 in respect of a stock exchange, financial exchange, member or stock-broker referred to in paragraph (a)(v) and (vi) of the definition of 'financial institution' in section 1 of the Financial Services Board Act, 1990, unless the registrar— 35

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

Records and entries in books of account admissible in evidence

9. In any proceedings conducted in terms of this Act, the records and books of account of an institution, a nominee company or a trust administered by such institution are admissible as *prima facie* evidence of the matters, transactions and accounts recorded therein, if supported by an affidavit by a person who alleges in that affidavit that he or she— 40

- (a) (i) is a director, member, partner, official, employee or agent of such institution, nominee company or trust; or
- (ii) is an inspector appointed under the Inspection of Financial Institutions Act, 1998 (Act No. 80 of 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 (Act No. 94 of 1990), or section 4 of the Mutual Banks Act, 1993 (Act No. 124 of 1993); and
- (b) such records or books of account are or have been the ordinary records and books of account of that institution, company or trust. 50

Offences

10. (1) A person who contravenes or fails to comply with any provision of this Act is guilty of an offence and on conviction is liable to a fine or imprisonment for a period not exceeding 10 years.

(2) A court may, in addition to any penalty it may impose in terms of subsection (1), 5
order that such person—

- (a) pay the institution or principal concerned any profit he or she made; and
- (b) compensate the institution or principal concerned for any damage suffered,
as a result of the contravention or failure.

(3) A court may, in addition to any penalty imposed in terms of subsection (1) and an 10
order made in terms of subsection (2), order that such person may not serve as a director,
member, partner or manager of any financial institution for such period as the court may
deem fit.

Repeal of laws

11. The laws mentioned in the Schedule are hereby repealed to the extent set out in the 15
third column of the Schedule, subject to the provisions of section 12.

Transitional provision

12. Anything done or deemed to have been done under any provision of a law
repealed by section 11 and which could be done under a provision of this Act, is deemed
to have been done under the last-mentioned provision. 20

Short title

13. This Act is called the Financial Institutions (Protection of Funds) Act, 2001.

SCHEDULE**LAWS REPEALED**

Number and year of law	Short title	Extent of repeal
Act No. 39 of 1984	Financial Institutions (Investment of Funds) Act, 1984	The whole
Act No. 6 of 1987	Financial Institutions Amendment Act, 1987	Sections 14, 15, 16 and 17
Act No. 51 of 1988	Financial Institutions Amendment Act, 1988	Section 23
Act No. 55 of 1989	Financial Markets Control Act, 1989	First item of Schedule
Act No. 83 of 1992	Financial Institutions Amendment Act, 1992	Section 33
Act No. 104 of 1993	Financial Institutions Second Amendment Act, 1993	Section 55
Act No. 22 of 1997	Financial Institutions Amendment Act, 1997	Sections 1, 2 and 3

MEMORANDUM ON THE OBJECTS OF THE FINANCIAL INSTITUTIONS (PROTECTION OF FUNDS) BILL, 2001

1 BACKGROUND

- (a) The Bill repeals and replaces the Financial Institutions (Investment of Funds) Act, 1984 (Act No. 39 of 1984) ("the Act").
- (b) The Bill further replaces the Financial Institutions (Investment of Funds) Bill ("the previous Bill") approved by Cabinet during 1999 and published for public information in *Government Gazette* No. 20801 of 7 January 2000.
- (c) The previous Bill was withdrawn in consultation with the Chairperson of the Portfolio Committee on Finance and the State Law Advisers after the promoters of the Bill had decided on the addition of further clauses in order to extend the remedies of the regulator for the sake of protecting consumers of financial services.

2 SCOPE OF THE BILL

- (a) The provisions of the Bill contained in the latest text are divided into two Parts:
 - (i) Part 1 which regulates the investment, keeping in safe custody and administration by financial institutions of funds and trust property. These are comprised by clauses 2, 3 and 4, the provisions of which essentially repeat the provisions of the Act, however in clearer language.
 - (ii) Part 2, comprising clause 5 up to and including clause 10, which deals with the enforcement powers of the registrar and which applies not only to financial institutions but also to associated institutions and unregistered persons. Clause 5, which deals with curatorship orders, succeeds an equivalent provision of the Act with some modification and more clarity so as to enhance the applicability of this extremely useful regulatory tool.

Clause 6 likewise repeats a similar provision in the Act, again with an extension to provide for more effective intervention powers for the regulator.

Clause 7 is completely new and although an equivalent provision does not appear in either the Act or the previous Bill, this type of provision is by no means strange in regulatory laws. This is a preventative measure aimed at the eradication of undesirable practices and consequential losses to the public.

Clauses 8, 9 and 10 again repeat similar provisions contained in the Act.

Clauses 11, 12 and 13 deal with the repeal of existing laws, transition and the short title of the Bill.

3 CONSULTATIVE PROCESS

- (a) The previous Bill was submitted for comment to a large number of persons and institutions (approximately 90). Of these only eight parties responded, suggesting minor changes. Full details are to be found in the aforementioned *Government Gazette* of 7 January 2000 and are not repeated.
- (b) After the previous Bill had been withdrawn, the present Bill was subjected to public comment. In addition to being placed on the Financial Services Board website, copies of the Bill were either e-mailed or faxed to the parties.
- (c) With the exception of criticisms directed at clause 6(2)(b) of the Bill, comments on the Bill were mainly favourable. Useful suggestions were also received. All comments were duly considered and both criticisms and proposals were accommodated when the Bill was thereafter reviewed and its present text framed.

4 ORGANISATIONAL AND PERSONNEL IMPLICATIONS

The Bill does not have organisational or personnel implications for the State, other than to reduce the burden of the courts in removing the duty to exercise control over curators.

5 FINANCIAL IMPLICATIONS

The Bill does not have financial implications for the State.

6 COMMUNICATION IMPLICATIONS

The Bill does not have communication implications other than the commencement of the Bill as an Act of Parliament being published in the *Gazette*.

7 PARLIAMENTARY PROCEDURE

In the opinion of 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 sections 74 and 76 are applicable.

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