

THE SOUTH AFRICAN RESERVE BANK: BLOWING WINDS OF CHANGE (PART 1)

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I INTRODUCTION

Since the early twentieth century, the South African Reserve Bank ('SARB' or 'Bank'), a creature of statute, has functioned as the central bank of the Republic of South Africa (RSA).¹ In this capacity, it has served and been subjected to the ever-changing needs and demands of the financial system in the RSA. These circumstances require a measure of flexibility, since the Bank needs to grow and change like a living organism in response to the needs and demands of the financial system and the economy it serves. This process of continuous evolution in response to the needs and demands of the financial system in the RSA is inevitable in order to ensure and maintain broadly based public support for the operations of the Bank. It is similar to other central banks that have evolved for centuries in matters such as their assigned tasks, their relationships to their respective governments, their interaction with financial markets, and their internal management and decision-making processes.²

In accordance with this phenomenon, in the past the Bank has not

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¹ The SARB was first established in Pretoria under the Currency and Banking Act 31 of 1920. This Act, as amended from time to time, was repealed by the South African Reserve Bank Act 29 of 1944, which consolidated the laws relating to the Bank. This 1944 Act was repealed on 1 August 1989 by the current South African Reserve Bank Act 90 of 1989. When the Constitution of the Republic of South Africa, 1996 (Constitution) was promulgated on 18 December 1996, s 223 of that Act established the SARB as the central bank of the RSA, regulated in terms of an Act of Parliament. See Johann de Jager 'The South African Reserve Bank: An evaluation of the origin, evolution and status of a central bank (part 1)' (2006) 18 SA Merc LJ 159 at 160 and F R Malan, J T Pretorius & S F du Toit *Malan on Bills of Exchange, Cheques and Select Promissory Notes* 5 ed (2009) 257.

² See the foreword by the (then) Governor of the Commonwealth Bank, H C Coombs, in Lyndhurst Falkiner Giblin *The Growth of a Central Bank: The Development of the Commonwealth Bank of Australia, 1924–1945* (1951) v; C Murat Baykal 'Evolving statutory mandates and governance structures of central banks' 4, a paper delivered at the Legal Issues in Central Banking Seminar in Ankara, Turkey, 8–10 November 2012; and M H de Kock *Central Banking* 4 ed (1974) 1.

only been subject to change but has also been subjected to certain developments calling for a change. In this vein, developments surrounding certain unfortunate actions by shareholders, the possibility of a revised supervisory framework, and the possible eventual abolition of exchange control were recently identified as factors that could give rise to substantial changes to the structure and activities of the Bank.³ Moreover, central banks worldwide have in the meantime been exposed to the various risks and fall-outs commensurate with a worldwide financial crisis that was not foreseen at the time.⁴

As part of this process of evolution, substantial changes were introduced in 2010 to the legal structure and operations of the Bank when the South African Reserve Bank Act 90 of 1989 (SARB Act) was amended by the South African Reserve Bank Amendment Act 4 of 2010 (Amendment Act).⁵ In this article, the nature, ambit and legal consequences of these changes are discussed as well as their effect on the status of the SARB, with specific reference to the shareholders and directors of the Bank, as well as its governance and management structure. Consideration is also given to the effect and consequences of the global crisis on the current and possible future operations of central banks in general, and the Bank in particular.

II LEGISLATIVE CHANGES TO THE LEGAL STRUCTURE AND OPERATIONS OF THE BANK

(a) *Shareholders*

In terms of section 21(1) of the SARB Act, the Bank has an authorised and issued share capital of two million rand, divided into two million ordinary shares of one rand each. Subject to certain limitations, these shares may be acquired, held and disposed of by any natural or legal person.

³ See Johann de Jager 'The South African Reserve Bank: An evaluation of the origin, evolution and status of a central bank (part 2)' (2006) 18 *SA Merc LJ* 274 at 290.

⁴ See para III *infra*.

⁵ The Amendment Act was assented to by the President of the RSA (President) on 8 September 2010 and came into operation on 13 September 2010, by means of Proclamation No. R 46, 2010 by the President, published in *Government Gazette* No. 33551, dated 13 September 2010. On the same date the Minister of Finance (Minister) by notice No. R 808, 2010 published regulations relating to the South African Reserve Bank, made in terms of section 36 of the SARB Act, in *Government Gazette* No. 33552 dated 13 September (Regulations). These Regulations repealed the (then) existing regulations relating to the South African Reserve Bank made in terms of section 36 of the SARB Act in 1990 (Old Regulations).

(i) *Concept*

Central banks in older European countries developed from normal commercial companies that, as they gradually assumed more and more powers and responsibilities of a public interest nature, became known as central banks. The public interest nature of central banks resulted in considerable difficulties in maintaining private shareholder structures, and led to the nationalisation of most of these banks. Central banks worldwide are therefore typically owned by their respective governments and do not have private shareholders. The SARB, though, is one of the few central banks that maintain a shareholding structure.⁶ Although the Bank's shareholding structure may be regarded as more of a historical legacy than a deliberate policy objective, it does introduce additional governance measures and enhances the independence of the Bank. Moreover, it is suggested that the shareholding structure of a central bank is based on the principle that the more representative a board of a central bank is of the wider community, the more likely it is to gain the support and acceptance of the public in the pursuit of monetary policy.⁷

The traditional model of a company is based on the concept that shareholders are owners of the institution who, by virtue of their ownership, are entitled to control the company and have it serve their interests alone.⁸ This concept supports shareholders' rights to elect the board of directors, to vote on corporate matters, to change the constitution of the company, and to rely on the common-law duties of directors to manage and control the institution in the best interest of the shareholders. However, an important factor that signifies a major difference between the rights, powers and status of shareholders in an ordinary profit-maximising company and those in the Bank is the ultimate profit motive of such a company as opposed to the non-profit motive of the SARB. The Bank, like other central banks, functions on a non-profitable, non-competitive basis in the public interest. In its capacity as a central bank, the Bank constitutes a public entity that needs to pursue its goals in the interest of balanced and sustainable growth in

⁶ See s 21(1) of the SARB Act; also H Davies & David Green *Banking on the Future: The Fall and Rise of Central Banking* (2010) 11 and De Jager op cit note 1 at 169.

⁷ Ross Cranston *Principles of Banking Law* 2 ed (2002) 119 and De Jager op cit note 1 at 163.

⁸ Like the Bank of England (established in 1694), many of the older central banks worldwide initially developed from commercially minded profit-maximisation companies. Although the concept of a shareholder in company law has undergone radical changes over time, it is evident that basic principles pertaining to members are still largely based on the traditional model of a company: De Jager op cit note 1 at 163 and 167. See also Davis & Green op cit note 6 at 11 and De Kock op cit note 2 at 1.

this country. At the same time, it is required, in the pursuit of its primary objective, to perform its functions independently and without fear, favour or prejudice.⁹ The Bank needs to pursue its goal, not for the benefit of its shareholders, but for the benefit of growth in the economy of the RSA and therefore in the general public interest. Accordingly, the rights, powers and status of shareholders of the Bank differ from those of shareholders in an ordinary commercial company, and are realigned to suit the unique nature of the SARB.¹⁰

In order to emphasise and entrench the Bank's unique status and absence of a profit motive, its shareholders do not share in any profits of the SARB but are paid a fixed return of ten per cent per annum per share on their shares held.¹¹ Since the Bank functions in terms of the SARB Act, shareholders have no authority to amend its structure, goals or powers. The powers of shareholders are confined to what is prescribed by the SARB Act. Their powers are limited to conditional voting rights at shareholders' meetings of the Bank,¹² the nomination of potential directors for election by the shareholders,¹³ and the election of seven directors to the Board of the Bank.¹⁴ At the Ordinary General Meeting (OGM) held annually, shareholders need to discuss the annual and audit reports of the Bank, appoint the external auditors and approve their remuneration, and consider any special business that may have been placed on the agenda of the meeting.¹⁵

Consequently, it is evident that a central bank should not be influenced or manipulated for the personal benefit of a controlling shareholder and other shareholders who are acting in concert with him, her or it. Instead, central banks should be able to fulfil their functions and obligations independently. The SARB Act recognises this need to

⁹ Section 3 of the SARB Act, read with s 224 of the Constitution. See also De Jager op cit note 1 at 162 and De Jager op cit note 3 at 283.

¹⁰ See De Jager op cit note 1 at 168.

¹¹ Section 24(e) of the SARB Act. The payment of a fixed dividend to shareholders has developed into a norm that emphasises the absence of a profit motive and reflects the unique nature of shareholding in a central bank: De Jager op cit note 1 at 163.

¹² A shareholder, together with his, her or its associates, is entitled to one vote in respect of every 200 shares held (up to a maximum of 50 votes). However, no shareholder who is not ordinarily resident in the RSA is entitled to any vote: s 23 of the SARB Act. Shareholders' meetings of the SARB consist of the Ordinary General Meeting, held after the end of the Bank's financial year end (reg 7 of the Regulations), and the Extraordinary General Meeting, which may be convened at any time by the Board or any two of the SARB's directors (reg 8 of the Regulations).

¹³ Section 4(1A) of the SARB Act. Persons nominated by the shareholders as potential directors are subject to vetting by a panel of persons: see para II(b)(v) *infra*.

¹⁴ Section 4(1)(c) of the SARB Act.

¹⁵ Regulation 7.3 of the Regulations.

prevent the exercising of material control by any one person or entity, through shareholding, over the activities of the Bank. A single shareholder of the Bank is thus restricted to holding not more than 10 000 shares and to no more than 50 votes at a shareholders' meeting of the Bank, calculated at one vote per 200 shares held.¹⁶

(ii) *Risks*

Experience has shown that private shareholding in a central bank does entail the risk of untoward actions by shareholders, taken in pursuit of personal objectives rather than the public interest.¹⁷ In this vein, the Bank has at times experienced what appeared to be deliberate attempts at circumventing the limitations of the SARB Act on shares held and controlled by single parties. Individual persons, by utilising the names of minors, relations, friends or other persons under their influence, accumulated unduly large numbers of Bank shares under their control. This resulted in undue concentrations of Bank shares under the ultimate control of single persons, who could potentially utilise the commensurate number of votes under their control to exercise undue influence on the Bank for personal purposes and their own financial gain.¹⁸ Shareholders also continuously attempted to ensure that they shared in the profits of the SARB instead of earning a fixed return on their shares.¹⁹

¹⁶ Sections 22 and 23 of the SARB Act. See also De Jager op cit note 1 at 168.

¹⁷ Davies & Green op cit note 6 at 12; Johann de Jager 'Shareholder activism in the South African Reserve Bank: A blessing or a curse?' *FSB Bulletin First Quarter* 2004 at 16; De Jager op cit note 1 at 169; Tonny Lybek & JoAnne Morris *Central Bank Governance: A Survey of Boards and Management* International Monetary Fund Working Paper (December 2004) 7n10 and *SARB Annual Report* (2009/10) 49.

¹⁸ An example of actions of this nature appear from facts disclosed by a foreign shareholder of the Bank in Germany during an interview, namely that: (a) He (the shareholder) had stumbled upon the astonishing fact that the SARB (being a central bank) was 100 per cent privately owned, and started buying himself into the organisation; (b) in order to side-step or circumvent the limitation of half a per cent of the issued shares that may be owned by a single shareholder, he ordered shares in the name of family members to their personal limit, resulting in his wife, children, parents and parents-in-law becoming part of the deal; (c) his family held about five per cent, his personal friends an estimated five per cent and partners who had joined the business owned an estimated five to ten per cent of the Bank's shares; (d) this business was not all too expensive for him, measured against the two million issued shares and their value expressed in euros; (e) his initial purpose for buying the shares, namely to prevent the erection of a nuclear power plant, had been superseded by an approach of achieving the maximum possible return on capital from his investment; and (f) he was persisting in his attempts to acquire more Bank shares: Martin Reim 'The central bank hunter' (2009) 10 *Börse Online* 59 at 60. See also De Jager op cit note 1 at 169 and Davies & Green op cit note 6 at 12.

¹⁹ *SARB Annual Report* (2004) 40 and *SARB Annual Report* (2009/10) 104.

(iii) New measures

These circumstances necessitated the introduction into the SARB Act of the concept of ‘associates’ in respect of shareholders or potential shareholders of the Bank, to prevent shareholders from circumventing the limits of shareholding by individuals.²⁰ The concept is based on a similar one in respect of shareholding in commercial banks and their controlling companies as contained in the Banks Act.²¹ A major implication of this amendment introduced by the Amendment Act is that henceforth the existing numbers of shares held by all persons who qualify as associates of a specific shareholder or potential shareholder of the SARB are taken into account in the determination of the number of

²⁰ Section 1 of the Amendment Act inserted the following definition of an ‘associate’ into s 1 of the SARB Act:

- “‘Associate’ in relation to a shareholder –
- (a) if the shareholder is a natural person, means –
 - (i) a close relative of the shareholder; or
 - (ii) any person who has entered into an agreement or arrangement with the shareholder, relating to the acquisition, holding or disposal of, or the exercising of voting rights in respect of, shares of the Bank;
 - (b) if the shareholder is a juristic person –
 - (i) which is a company, means any subsidiary or holding company of that company, any other subsidiary of that holding company and any other company of which that holding company is a subsidiary;
 - (ii) which is a close corporation registered under the Close Corporations Act, 1984 (Act 69 of 1984), means any member thereof as defined in section 1 of that Act;
 - (iii) which is not a company or a close corporation as contemplated in this paragraph, means another juristic person which would have been a subsidiary of the first-mentioned juristic person-
 - (aa) had such first-mentioned juristic person been a company; or
 - (bb) in the case where that other juristic person, too, is not a company, had both the first-mentioned juristic person and that other juristic person been a company;
 - (iv) means any person in accordance with whose directions or instructions the board of directors of or, in the case where the juristic person is not a company, the governing body of the juristic person is accustomed to act; and
 - (c) in respect of all shareholders, being either natural or legal persons-
 - (i) means any juristic person of which the board of directors or, in the case where such juristic person is not a company, of which the governing body is accustomed to act in accordance with the directions or instructions of the shareholder; and
 - (ii) includes any trust controlled or administered by the shareholder.’

Further, for the purposes of the determination of an associate, a ‘close relative’ means the shareholder’s spouse, child, sibling, step-child, parent or step-parent (s 1 of the SARB Act). The concept ‘spouse’ includes ‘a domestic or life partner or a party to any recognised union in terms of custom or the tenets of any religion’. ‘Close relative’ also includes the spouse of any child, sibling, step-child, parent or step-parent of the shareholder.

²¹ Section 37 of the Banks Act 94 of 1990.

shares (limited to 10 000 shares) that the specific shareholder may lawfully hold or acquire. The shareholding of a particular shareholder in the Bank, together with his, her or its associates, may therefore not exceed 10 000 shares in totality, and the number of votes that may be exercised by that group of shareholders (if entitled to vote) is limited to 50 votes.²²

If a Bank shareholder held more than 10 000 shares (owing to historical reasons or the implementation of the concept of associates) at the time of the implementation of the Amendment Act, then this shareholder and his, her or its associates may not lawfully acquire any more shares in the Bank for as long as that status quo is maintained. Irrespective of the number of shares held, voting would be limited to 50 votes. Moreover, if this shareholding at any stage was reduced to any number of shares above or equal to the 10 000 limit, this shareholder and his, her or its associates were prohibited from again acquiring a number of shares equal to the previous number of shares held in excess of the limit.²³ The Bank was also given enforcement powers in this regard. If at any stage it appears that a shareholder holds, or in aggregate with his, her or its associates held more than 10 000 shares in the Bank in contravention of the SARB Act, then the Bank is authorised to approach a court with jurisdiction for an appropriate order to redress the matter.²⁴

(b) Directors

Before the implementation of the Amendment Act, the unitary board of the Bank (Board) was structured in a manner suggesting that control of the SARB was shared equally between its shareholders and the Government.²⁵ The Board then consisted of fourteen directors, seven of whom were appointed by the Government and seven elected by shareholders. At the time, nominations for potential directors eligible for election by shareholders could be submitted only by shareholders and serving directors of the Bank.²⁶

(i) Revised Board structure

Despite the perceived shared control of the SARB between shareholders and the Government, in the past the latter could always under normal

²² Section 1, read with s 22 and s 23 of the SARB Act as amended by s 1, s 7 and s 8 of the Amendment Act.

²³ *Idem*.

²⁴ Section 22(1) of the SARB Act, as amended by s 7(a) of the Amendment Act.

²⁵ De Jager *op cit* note 1 at 168.

²⁶ Regulation 39 of the Old Regulations.

circumstances have exercised ultimate control over the Bank, even though the Board then consisted of an equal number of directors appointed by each of the parties.²⁷ The control of the Government on the Board was further strengthened by an amendment increasing the size of the Board by the addition of a further non-executive director appointed by the President.²⁸ Accordingly, the Board currently consists of fifteen directors: the Governor, three Deputy Governors (all appointed by the President, after consultation with the Minister and the Board),²⁹ four directors appointed by the President after consultation with the Minister,³⁰ and seven directors elected by the Bank's shareholders.³¹ In respect of the directors elected by the shareholders, before the SARB Act was amended four directors needed to be persons who were actively and primarily engaged in commerce and finance, one in agriculture and two in industry.³² This position left room for the interpretation that the directors appointed by the shareholders represented those sectors of the economy on the Board in which they were primarily engaged. The Amendment Act altered the position with regard to directors elected by shareholders, by prescribing that they should consist of persons with knowledge and skill in commerce and finance (two directors), agriculture (one director), industry (two directors), labour (one director) and mining (one director).³³ The amendment broadens the knowledge and skills base of the Board, and rules out any inference that directors act as representatives of other constituencies, when acting in their official capacities.

Since the implementation of the Amendment Act, any member of the public may now also nominate persons to serve as elected directors of the Bank.³⁴ This amendment endeavours to ensure that the Board is more representative of the wider community in the RSA.

²⁷ Under the seven directors appointed by the President are the Governor and three Deputy Governors, who constitute the executive directors. The Governor, or in his or her absence, a Deputy Governor, is required to preside at meetings of the Board. The person presiding at such a meeting has a deliberative and casting vote: s 7 of the SARB Act.

²⁸ Section 4(1) of the SARB Act, as amended by s 2(a) of the Amendment Act.

²⁹ Section 4(1) of the SARB Act.

³⁰ Section 4(1)(a) of the SARB Act, as amended by s 2(b) of the Amendment Act. The number of non-executive directors appointed by the President after consultation with the Minister was increased from three to four. Furthermore, in the appointment of these directors the Board is no longer consulted, as was the requirement before the amendment.

³¹ Section 4(1)(b) of the SARB Act.

³² Section 4(3) of the SARB Act.

³³ Section 4(3) of the SARB Act, as amended by s 2(f) of the Amendment Act.

³⁴ Section 4(1A) of the SARB Act, as inserted by s 2(d) of the Amendment Act.

(ii) *Criteria*

Contemporary commentary on corporate governance may be divided into two main camps, namely, between those who consider corporate governance to be about building effective mechanisms and measures to satisfy either the expectations of a variety of individuals, groups, and entities that inevitably interact with the corporation, or, alternatively, the narrower expectations of shareholders. Having regard to the public interest nature of the SARB, it is evident that the Bank needs to focus on the wider of these alternatives.³⁵ The Bank therefore needs to be governed and managed by directors and managers with proven ability and integrity who, in full understanding of the unique nature of the SARB, pursue its public interest goals with due regard to all its stakeholders. In this vein, the non-executive directors on the Board are required to contribute to the governance of the Bank as part of the mechanism of checks and balances aimed at ensuring that the Governor and Deputy Governors (in their capacity as the executive directors of the SARB) execute their management powers as envisaged in terms of the Constitution, the Act and recognised principles of central banking.

The SARB Act determines that the Governor should be a person of tested banking experience.³⁶ In addition, the Old Regulations determined that each director stood in a fiduciary position towards the Bank, requiring him or her to hold office and exercise powers and duties in a bona fide manner and to the advantage of the SARB. Each director was obliged to exercise the care and skill required by that office and reasonably to be expected from every director.³⁷ These provisions of the Old Regulations were largely similar to the common-law duties of directors of ordinary companies. It could therefore be asserted, for the purposes of the interpretation and application of these provisions of the Old Regulations, that established legal principles pertaining to the common-law duties of directors of ordinary companies would in general apply to Bank directors. Although the SARB is a creature of its own statute and therefore not subject to the Companies Act,³⁸ this assertion could be justified on the basis that the Bank's structure and model display features similar to companies incorporated in terms of

³⁵ J J du Plessis, James McConvill & Mirko Bagaric *Principles of Contemporary Corporate Governance* (2005) 14. See also Irene-marie Esser 'Corporate social responsibility: A company law perspective' (2011) 23 SA *Merc LJ* 317 at 321 and I Esser & J J du Plessis 'The stakeholder debate and directors' fiduciary duties' (2007) 19 SA *Merc LJ* 346 at 351.

³⁶ Section 4(2)(a) of the SARB Act.

³⁷ Regulation 42 of the Old Regulations. For the full references to the Old Regulations and the (New) Regulations, see note 5 supra.

³⁸ Act 61 of 1973. Likewise, the Companies Act 71 of 2008 does not apply to the SARB.

company legislation. Moreover, the governance structures of central banks were usually influenced by traditions from company law.³⁹ Common-law duties of directors are, however, subject to uncertainty and a lack of conformity, which were unfortunately not addressed effectively by the Old Regulations.

The established common-law principle with regard to a company director is that he or she owes an onerous fiduciary duty and a less-onerous duty of care and skill to the company that he or she serves. Although no specific meaning may be given to the term ‘fiduciary duty’, it does at least consist of an obligation on a director to act in relation to a matter concerning the company that he or she serves in good faith and in a manner that is in the best interest of that institution. It obliges a director to act selflessly and with undivided loyalty in furthering the best interests of the company in respect of which he or she holds office. Whether a breach of a fiduciary duty has occurred depends on the circumstances of each case. With regard to the duty of care and skill, the common law requires a director to exercise his or her duties with care and to apply such skills as he or she possesses to the advantage of the company. However, the standards by which the degree of care and skill needs to be measured are not clear. Although the level of care may at times be objectively ascertained, the test for the required level of skill is normally a subjective test, which varies from person to person and may at times be pitched at an unacceptably low level.⁴⁰

(iii) *Difficulties*

In the past, the SARB occasionally experienced certain behaviour by directors elected by shareholders that displayed a disregard for the

³⁹ As indicated before in para II(a)(i) supra, most older central banks originally developed from ordinary commercial companies: De Jager op cit note 1 at 163. See also De Kock op cit note 2 at 1 and Lybek & Morris op cit note 17 at 32.

⁴⁰ H S Cilliers & M L Benade et al *Cilliers & Benade: Corporate Law* 3 ed (2000) 139; Michele Havenga ‘The business judgment rule – Should we follow the Australian example?’ (2000) 12 *SA Merc LJ* 25 at 34; Monray Marsellus Botha ‘The role and duties of directors in the promotion of corporate governance: A South African perspective’ (2009) 30 *Obiter* 702 at 706; *Fisheries Development Corporation of SA Ltd v Jorgensen; Fisheries Development Corporation of SA Ltd v AWJ Investments (Pty) Ltd and Others* 1980 (4) SA 156 (W); *Wolpert v Uitzigt Properties (Pty) Ltd and Others* 1961 (2) SA 257 (W); Johannes Jurgens de Jager *The Management of Banks in South Africa: Legal and Governance Principles* (LLD thesis, Rand Afrikaans University, 2000) 280; Michele Havenga ‘Duties of the company chairman’ (2005) 17 *SA Merc LJ* 137 at 143; Natasha Bouwman ‘An appraisal of the modification of the director’s duty of care and skill’ (2009) 21 *SA Merc LJ* 509; Kathleen van der Linde ‘The personal liability of directors for corporate fault – An exploration’ (2008) 20 *SA Merc LJ* 439 at 440; and E Jones ‘Directors’ duties: Negligence and the business judgment rule’ (2007) 19 *SA Merc LJ* 326.

public interest role of the Bank, for the sake of self-interested profit motives. For example, a person elected by shareholders as a director, at the same OGM at which the particular person was appointed to that position, against the explicit advice of the Board called for a resolution to be passed to the effect that the Bank should amend the SARB Act to allow for shareholders (instead of their earning a fixed dividend of ten per cent per annum on the value of their SARB shares) to share in ten per cent of the annual net profits of the SARB.⁴¹ The Bank also continuously ran the risk of having persons elected by shareholders as directors of the SARB who could not be regarded as fit and proper to hold this office. In unfortunate endeavours of this nature, the culprits (nominee directors) often relied on considerable numbers of votes in their favour emanating from undue concentrations of shares nominally held by family members and other associates, but under the control of these nominee directors. A glaring lack of probity on the part of a nominee director was illustrated when he became so intent on being elected as a director of the SARB that he offered in writing to provide out of his own pocket a pecuniary benefit to any shareholder who could prove that he or she had voted in favour of the former person's appointment as a director of the Bank.

(iv) Clarification of duties

In order to address these issues, it was deemed appropriate to ensure legal certainty by clarifying the duties of directors of the Bank in the SARB Act instead of in the Regulations. It was evident that the core notions underlying the duty of one person to act bona fide in the interest of someone else, and for the former person not to prefer his or her interests above those of the latter, arose from the factual situation in terms of which the former person stood in such a position of trust and power over the property of the latter that the law required the former to act in the latter's best interest. Since a factual relationship of this nature exists between the SARB and its directors, the SARB Act was amended to place the duties underlying that factual relationship explicitly on these officers.⁴² Since the core notions of the duty are based on principle, any

⁴¹ SARB *Annual Report* (2004) 40 and De Jager op cit note 1 at 169.

⁴² Section 4(2)(aA) of the SARB Act, as inserted by s 2(e) of the Amendment Act, states:

‘Each director of the Bank shall be a fit and proper person with appropriate skills and experience, who shall at all relevant times-

- (i) act *bona fide* for the benefit of and in the interest of the Bank;
- (ii) avoid any conflict of interest between his or her interests and the interests of the Bank;
- (iii) possess and maintain the knowledge and skill that may reasonably be expected of a person holding the same appointment and carrying out

potential breach by a director of his or her stated duties towards the Bank should depend on the question of whether society, having regard to the peculiar facts of the matter, condemns the conduct in question as irregular. As the community's perception of what standard of conduct the law should expect from those who assume ascendancy or dominance over the property and affairs of the SARB may change with the passage of time, the open-ended approach has the benefit of permitting changing community perceptions to be encompassed in law applicable to central banks.⁴³

The particular amendment to the SARB Act also imposes a duty of care and skill on a director of the SARB and defines the dimensions of this duty.⁴⁴ It clarifies the common-law uncertainty relating to the test applicable in determining whether the duty has been discharged. As indicated above, common-law interpretations favour a subjective test.⁴⁵ An objective test for both the duty of skill and the duty of care of the directors of the SARB now applies. The test disallows an actual lower level, either of care or skill on the part of a director, to result in the lowering of the required level of care or skill, as the case may be, that may reasonably be expected of a director under the same circumstances. Consequently, the level required in each particular case is limited to a minimum level of care and skill that could reasonably be expected from a director holding the same position in the Bank under the same circumstances. A subjective test will apply only if the director in question holds a higher level of skill than the minimum level that may be required in terms of the objective test. In that event, the higher level of skill must be taken into account in the determination of whether a reasonable

- the same functions as are carried out by the director in question in relation to the Bank; and
- (iv) exercise such care in the carrying out of his or her functions in relation to the Bank as may be reasonably expected of a diligent person holding the same appointment under similar circumstances and who possesses both the knowledge and skill mentioned in subparagraph (iii), and any such additional knowledge and skill as the director in question may have.'

⁴³ See in general Johann de Jager 'Comments on the effects of Section 40 of the Banks Amendment Act 19 of 2003 on Section 60 of the Banks Act 94 of 1990' (2005) 17 *SA Merc LJ* 170 at 173; *Van Castricum v Theunissen and Another* 1993 (2) SA 726 (T); J J du Plessis 'The duties of directors with special reference to deposit-taking institutions' 1993 *TSAR* 56 at 57; and De Jager op cit note 40 at 280.

⁴⁴ See note 42 supra.

⁴⁵ See note 40 supra. Also *Re City Equitable Fire Insurance Co Ltd* [1925] Ch 407 (CA) and J T Pretorius et al *Hahlo's South African Company Law through the Cases: A Source Book* 6 ed (1999) 278.

director possessing such additional skill would have acted in the same manner as the director in question under the same circumstances.⁴⁶

(v) Panel

In order to give effect to 'fit and proper' principles with regard to directors elected by shareholders, unfortunate experiences such as those mentioned above indicated that a process was required by means of which persons nominated for potential election by shareholders as non-executive directors of the SARB could be scrutinised for the purposes of ascertaining whether they met the required standards. Consequently, the SARB Act was amended to provide for a procedure by which a panel of persons (Panel), established and convened by the Governor, could evaluate people nominated as potential non-executive directors of the Bank.⁴⁷ The Panel consists of the Governor as chairperson, a retired judge and one other person, both nominated by the Minister, as well as three persons nominated by the National Economic Development and Labour Council (NEDLAC).⁴⁸

The Panel receives and considers all duly submitted nominations of persons nominated for possible election by shareholders into vacant positions on the Board. No formal procedure is prescribed in terms of which the Panel must consider the nominations and the format is left in its discretion. In the normal course of business, the procedure should evidently be limited to an evaluation of the documentation submitted by or on behalf of each of the nominee directors. Nevertheless, the Panel needs to verify in respect of each nominee his or her eligibility for election as a director of the Bank, taking into consideration the requirements of the SARB Act, recognised central banking standards

⁴⁶ Section 60 of the Banks Act contains similar provisions: De Jager op cit note 43 at 173. See also J S McLennan 'Directors' fiduciary duties and the 2008 Companies Bill' 2009 TSAR 184.

⁴⁷ Section 4(1C) of the SARB Act, as inserted by s 2(d) of the Amendment Act. The Governor needs to establish a Panel at least three months before, and convene it at least two months before the OGM at which directors are to be elected.

⁴⁸ Section 4(1D) of the SARB Act, as inserted by s 2(d) of the Amendment Act. Members of the Panel other than the chairperson are appointed by the Governor: s 4(1E) of the SARB Act, as inserted by s 2(d) of the Amendment Act. In the performance of the functions of the Panel, the Governor has a deliberative and casting vote, and a quorum consists of the Governor and three other members: s 4(1F) of the SARB Act, as inserted by s 2(d) of the Amendment Act. The National Economic Development and Labour Council (NEDLAC) was established in terms of the National Economic and Labour Council Act 35 of 1994. Organised business, labour, community and development interests as well as the state are represented on the council. Since the state is already represented on the Panel, the three representatives of NEDLAC on the Panel are respectively from business, labour, and community and development. This is for the purposes of providing wider community representation and influence on the Panel.

and fit and proper principles. Once the process is completed, the Panel must compile a list of the nominees confirmed as suitable for possible election to the Board, provided that not more than three nominees per vacancy may be confirmed as eligible for election. A copy of this list must be sent to shareholders no later than thirty days before the date of the OGM at which the nominees are eligible for election to the Board.⁴⁹

(vi) Disqualification

Prior to its amendment, the SARB Act as well as the Old Regulations contained the grounds for disqualification of persons to act as directors of the SARB.⁵⁰ In terms of the SARB Act, no person could be appointed or elected as, or remain a director of the SARB if such a person was not resident in the RSA; was a director, officer or employee of a bank or a mutual bank; was a Minister or Deputy Minister or was a member of Parliament or provincial legislature.⁵¹ The New Regulations no longer deal with this issue, and it is currently provided for solely in the SARB Act. In addition to the aforementioned disqualifications, the amended SARB Act currently determines⁵² that a person shall be disqualified if he or she was a director, officer or employee of a bank controlling company or a cooperative bank; a member of a municipal council; an unrehabilitated insolvent; dismissed from a position of trust as a result of misconduct or disqualified or suspended from practising any profession on the grounds of professional misconduct; convicted of prescribed criminal offences;⁵³ mentally or physically incapable of performing the duties of a director; contractually incapacitated or an employee of Government.⁵⁴ Moreover, the tenure of a director would, unless other-

⁴⁹ Section 4(1G) and s 4(1H) of the SARB Act, as inserted by s 2(d) of the Amendment Act.

⁵⁰ Issues pertaining to the retirement and disqualification of directors were addressed partly in s 4(4) of the SARB Act and partly in reg 54 and reg 55 of the Old Regulations.

⁵¹ Section 4(4) of the SARB Act.

⁵² Section 4(4) of the SARB Act, as amended by s 2(g) of the Amendment Act.

⁵³ Section 4(4)(f) of the SARB Act, as amended by s 2(g) of the Amendment Act disqualifies any person who

‘was convicted of an offence listed in Part 1 or 2 of Schedule 1 to the Criminal Procedure Act, 1977 (Act 51 of 1977), an offence under this Act, the Prevention and Combating of Corrupt Activities Act, 2004 (Act 12 of 2004), the Prevention of Organised Crime Act, 1998 (Act 121 of 1998), the Prevention of Counterfeiting of Currency Act, 1965 (Act 16 of 1965), perjury, or any other offence involving an element of dishonesty in respect of which he or she has been sentenced to imprisonment without the option of a fine or to a fine exceeding R1 000’.

⁵⁴ An ‘employee of Government’ is defined in s 1 of the SARB Act as ‘any person who is employed by or works for Government and who either receives or is entitled to receive a salary

wise agreed by the Board, terminate automatically⁵⁵ if the director, without reasonable cause, absents him or herself from three consecutive meetings of the Board without leave of absence granted by the chairperson (who is prohibited from granting leave of absence from more than three meetings); if a director fails to declare to the Bank any direct or indirect interest in any agreement or proposed agreement with the Bank; or unlawfully discloses to any person any information described in section 33 of the SARB Act.⁵⁶

(c) Governance and management structure

In common with large companies, the SARB maintains a hierarchical, impersonal structure with layered ranks of superiors and subordinates, all performing various tasks and shouldering different degrees of responsibility.

(i) General

The SARB Act provides and maintains the Bank's structure, effective power is dispersed throughout the organisation, and administrative

in respect of such employment or work, or derives the major part of his or her income from such employment or work'.

⁵⁵ Section 4(5) of the SARB Act, as inserted by s 2(h) of the Amendment Act.

⁵⁶ Section 33 of the SARB Act is a preservation of secrecy clause. Under s 33(1),

'No director, officer or employee of the Bank, and no officer in the Department of Finance, shall disclose to any person, except to the Minister or the Director-General: Finance or for the purpose of the performance of his or her duties or the exercise of his or her functions or when required to do so before a court of law or under any law-

(a) any information relating to the affairs of –

(i) the Bank;

(ii) a shareholder of the Bank; or

(iii) a client of the Bank,

acquired in the performance of his or her duties or the exercise of his or her functions; or

(b) any other information acquired by him or her in the course of his or her participation in the activities of the Bank,

except, in the case of information referred to in paragraph (a) (iii), with the written consent of the Minister and the Governor, after consultation with the client concerned'.

In addition, under s 33(2),

'No person shall disclose to any other person any information contained in any written communication which is in any manner marked as confidential or secret and which has been addressed by the Bank to any person or which has been addressed by any person to the Bank, except –

(a) for the purposes of the performance of his duties or the exercise of his powers in terms of any law or when required to do so before a court of law; or

(b) with the written consent of both the sender and the recipient of that communication'.

decisions are largely corporate products rather than the choice of single persons. The SARB Act establishes company officers, organs and authorities, empowers and places duties upon them, and limits the sphere of their jurisdiction. It results in numbers of people being enabled to act in an official, non-personal capacity in order to execute the business of the Bank.

(ii) Deconcentration of powers

Before its amendment, the SARB Act determined that the Bank should be managed by the Board, consisting of executive and non-executive directors.⁵⁷ It indicated that the Board, as an organ of the SARB, was clothed with original powers of management of the Bank. In practice, the Board, with the retention of certain of its powers of management in respect of specified aspects of the business of the SARB, delegated all its remaining powers of management to the Governor and Deputy Governors (Governors).⁵⁸ In terms of the deconcentration of powers concept, based on outdated principles pertaining to the devolution of powers among the organs of companies, limited discretionary powers of management were ostensibly delegated to the Governors on behalf of the Board. In legal terms, this meant that the Board retained full authority over and responsibility for the acts of the Governors and could withdraw these delegated powers at any time.⁵⁹

In law, this position was susceptible to the interpretation that the Governors derived their powers of management from the Board and managed the Bank on its behalf and under its control. However, the concept of deconcentrated powers on the part of the Governors was in material respects not reconcilable with all their responsibilities in terms of the SARB Act.⁶⁰ For example, the Bank, like other central banks, is responsible for the implementation of monetary policy in the area of its jurisdiction.⁶¹ The monetary policy decision-making process is conducted independently in committee by the Monetary Policy Committee (MPC), consisting of the Governors and four senior employees of the SARB.⁶² The Board has no authority and plays no role in this regard. It is therefore, because of the *nemo plus iuris* rule, unable to delegate any

⁵⁷ Section 4(1) of the SARB Act.

⁵⁸ This was achieved by means of a Board resolution reliant on s 8(1) of the SARB Act.

⁵⁹ With regard to the concepts of deconcentrated and decentralised powers, see De Jager op cit note 40 at 261.

⁶⁰ De Jager op cit note 1 at 173.

⁶¹ Davies & Green op cit note 6 at 18. See also s 3 of the SARB Act.

⁶² SARB *Annual Report* (2009/10) 25. In most central banks, the monetary policy committee makes the interest rate decision: Stanley Fischer 'Comments on Charles

powers of this nature to the Governors.⁶³ Moreover, in accordance with prevalent company practice, the governance of a company (as opposed to its management) is regarded as the responsibility of its board. Owing to this trend, there has been a gradual shift of effective power and control from the board to the management of the company. As a result, the board was substituted for the general meeting with regard to the supervision of management. The implementation of measures pertaining to corporate governance, instead of the management of the company, is now regarded as the main function of the board of a public company. The nature and ambit of the business of large modern companies dictate that the management of the day-to-day business of such entities be entrusted to their executive officers.⁶⁴

(iii) *Decentralised powers*

In practice, not all the directors of the SARB devote their full time to the Bank's affairs, and its day-to-day management is reserved for the Governors in their capacity as the executive directors. This follows the modern trend in respect of the business activities of large corporations which dictates that the day-to-day running of their business be managed by relatively few, but expert hands.

The SARB Act was thus amended to rearrange the devolution of powers between the Board and management of the SARB in order to reflect the current factual position as dictated by prevalent management and governance principles.⁶⁵ In terms of the amendment, the Board is no longer responsible for the management of the SARB, but for the

Goodhart's paper "The changing role of central banks" (2010), a paper delivered at the Annual BIS Research Conference, Luzern, Switzerland, on 24 June 2010.

⁶³ In terms of the *nemo plus iuris ad alium transferre potest quam ipse haberet* rule, no person is able to transfer more rights to another person than the former person has. See P J Badenhorst, Juanita M Pienaar & Hanri Mostert *Silberberg and Schoeman's The Law of Property* 5 ed (2006) 73; *Rasi v Madaza and Another* [2001] 1 All SA 498 (Tk) 511; *Gainsford NO and Others v Tiffski Property Investments and Others* [2011] 4 All SA 445 (SCA) 456; and De Jager op cit note 1 at 173.

⁶⁴ J J du Plessis 'Besturende direkteure as interne maatskappyorgane' 1991 TSAR 577 at 588; Jean Jacques du Plessis *Maatskappyregtelike Grondslae van die Regsposisie van Direkteure en Besturende Direkteure* (LLD thesis, University of the Orange Free State, 1990) 431; M L Benade et al *Ondernemingsreg* 3 ed (2003) 101; *AWA Ltd v Daniels trading as Deloitte Haskins & Sells and Others* (1992) 7 ACSR 759 (NSWSC) 866, and on appeal as *Daniels v Anderson* (1995) 118 FLR 248, 13 ACLC 614 (NSWCA); De Jager op cit note 40 at 252; and Jean J du Plessis 'Directors' duty to use their powers for proper or permissible purposes' (2004) 16 SA Merc LJ 308.

⁶⁵ Section 4A of the SARB Act, which specifies the functions and powers of the Board, was inserted by s 3 of the Amendment Act.

corporate governance of the Bank.⁶⁶ In fulfilling this function, the Board needs to ensure compliance with principles of good corporate governance, and must adopt rules and determine policies for the sound accounting, administration and functioning of the SARB.⁶⁷ The Board is also responsible for approving the budget of the Bank, its annual reports and financial statements, the appointment and the termination of the service of the SARB's secretary and assistant secretary, the general remuneration policy of the Bank, the allocation of funds to the SARB's retirement fund for the purposes of addressing an actuarial shortfall and the appointment of an employees' trustee in respect of that fund.⁶⁸ Finally, the Board is also responsible for authorising certain prescribed actions of the SARB,⁶⁹ making recommendations to the Minister in respect of regulations in respect of the Bank⁷⁰ or its liquidation,⁷¹ and performing any other function specifically assigned to the Board in terms of the SARB Act.⁷² Apart from these powers and duties of the Board, all other powers and duties of the Bank under the SARB Act vest in, and are exercised by, the Governors.⁷³

The Governors are thus currently vested with vast decentralised original powers of management that under normal circumstances are

⁶⁶ Section 4A(1) of the SARB Act.

⁶⁷ Section 4A(1)(a) and (b) of the SARB Act.

⁶⁸ Section 4A(1)(c)(i), (ii), (iii), (iv) and (v) of the SARB Act.

⁶⁹ In terms of s 4A(1)(d) the Board must authorise the following: (1) The formation, or taking up of shares or acquisition of an interest in any company or other juristic person that provides (a) a service for the purpose of or associated with; or (b) any facility for or associated with, the utilisation of any such payment, clearing or settlement system; (2) the acquisition of shares in a limited company formed and registered in accordance with the provisions of the Companies Act, if the Board is of the opinion that any such acquisition will be conducive to the attainment of any objects of the SARB Act; (3) the acquisition of immovable property required by the Bank for business purposes or for the purposes of providing a dwelling for any officer of the Bank, and sell, dispose of, donate or otherwise alienate any such immovable property; and (4) the allocation of any surplus remaining at the end of a financial year of the SARB, as contemplated in s 24 of the SARB Act.

⁷⁰ Regulations are made by the Minister in terms of s 36 of the SARB Act and may be made in relation to: (1) The election of directors by shareholders; (2) the conditions (other than those relating to remuneration) of the appointment of directors, and the circumstances in which a director shall vacate his or her office; (3) meetings of the Board and the procedure thereat, including the minutes to be kept thereof; (4) meetings of shareholders, the matters to be dealt with thereat and the procedure thereat, including the quorum necessary therefor and the minutes to be kept thereof; (5) any matter which is required or permitted to be prescribed by regulation under the SARB Act; and (5) generally, all matters which he or she considers it necessary or expedient to prescribe in order that the purposes of the SARB Act may be achieved.

⁷¹ In terms of s 38 of the SARB Act the Bank may not be placed in liquidation except by an Act of Parliament.

⁷² An example would be s 35 of the SARB Act whereby the Board is authorised to make rules for the good governance and conduct of the business of the SARB.

⁷³ Section 4A(2) of the SARB Act.

exercisable without reference to, or interference by, the Board. A clear distinction is drawn between the supervisory powers of the Board and the management powers of the Governors, and it is evident that the latter may for the purposes of institutional conduct be classified as internal organs of the Bank.

(iv) Terms of office

The turnover of Governors may constitute an important factor in ensuring central bank independence. If the political authorities in a country are afforded the opportunity to replace the Governors frequently, this usually indicates a lower level of independence on the part of the central bank of that country. The authorities are thus enabled to appoint those persons who are likely to do their will and to terminate the services of those who choose to challenge their policies. In the event of high turnover rates, the tenure of central bank Governors is normally shorter than those of the executives in Government. It may render the Governors susceptible to influence by those executives and could discourage the Governors from attempting to implement longer-term policies, especially those that would extend beyond the election cycle.⁷⁴

Before its amendment, the SARB Act, without any room for flexibility with regard to their terms of office, provided that the Governor and Deputy Governors should hold office for a period of five years.⁷⁵ This also applied to any term of reappointment of these officers. Since this inflexible approach to the terms of appointment ostensibly posed some difficulties, the Amendment Act introduced what may be regarded as a compromise, in that Governors may now on reappointment (after serving their initial term of five years) be appointed for a term of less than five years.⁷⁶ Although the amendment does provide some flexibility, it also introduces the risk of these shorter unprescribed periods of appointment of Governors being utilised by Government executives in a manner that may compromise the independence of the SARB.

Directors who are Government representatives hold office for a

⁷⁴ Alex Cukierman, Steven B Webb & Bilin Neyapti 'Measuring the independence of central banks and its effect on policy outcomes' (1992) 6 *The World Bank Economic Review* 353 at 363; Baykal op cit note 2 at 9; and Davies & Green op cit note 6 at 287.

⁷⁵ Section 5(1) of the SARB Act.

⁷⁶ Section 5(1)(a) of the SARB Act, as amended by s 4(a) of the Amendment Act, states:

'The Governor and Deputy Governors shall hold office for a period of five years: Provided that the President of the Republic may, after consultation with the Minister and the Board, on any re-appointment of a Governor or Deputy Governor at the end of his or her term of office, appoint such officer for a term not exceeding five years.'

period of three years.⁷⁷ Directors elected by shareholders hold office for a period commencing on the first day of their election as such at an OGM held during a specific calendar year and terminating on the date of the OGM held during the third calendar year following upon the OGM at which they were elected.⁷⁸

(To be continued.)

⁷⁷ Section 5(1)(b) of the SARB Act.

⁷⁸ Section 5(1)(c) of the SARB Act.