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CURATORSHIP OF BANKS AS A MEASURE TO RESCUE FAILING BANKS

by

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A mini-dissertation submitted in partial fulfilment of the
requirements for the degree of

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DECLARATION STATEMENT

With the signature below I, Khomotso Nelson Tjiane, hereby declare that the work I present in this dissertation is based on my own research, and that I have not submitted this dissertation to any other institution of higher education to obtain academic qualification.

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DEDICATION

Save to thank my Supervisor for her dedicated guidance, I dedicate this research project to no one.

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Deo gratias.

ABSTRACT

The purpose of this study is to explore the current status in relation to the concept of curatorship as a measure to rescue failing banks. The world as we came to know it has changed the way banking is done. This dissertation therefore investigates the concept of curatorship of banks in South Africa in terms of the Banks Act and to determine what influences, if any, does the proposed Twin Peaks model of Regulation will have on it.

A closer examination of section 69 and 69A of the South African Banks Act is conducted in order to understand the impact of bank curatorship within the South African context. Not only is an examination conducted on the Banks Act, but also on the proposed Financial Sector Regulation Bill.

Comparatively this dissertation explores and examines curatorship under Botswana banking law, this is done on the premise that Botswana like any other global financial players has its fair share of financial markets challenges. It examines the measures that Botswana may have put in place in order to assist failing banks through the instrumentality of curatorship, or temporary management as it is known in Botswana.

There are several pertinent features that are identified to be contributing factors for banks to be placed under curatorship. These factors include amongst others lack of robust supervision by regulators, lack of risk and management disclosure by banks, poor management of banks, excessive lending and failure of a bank's management to conduct the business of banks in a prudent, safe and sustainable manner.

Internationally this dissertation explores international best practices and measures that are in place to deal with the concept of curatorship as a measure of rescuing failing banks. This is done on the understanding that international financial sector is globally integrated but regulated nationally. It is this concept of interconnectedness of banks that perhaps gave birth to the Basel Core Principles on responsible banking and its dedicated Basel Committee of Banking Supervisors to ensure the prudential and liquidity compliance of banks globally. This dissertation explores and examines some of the elements that are likely to lead to banks being placed under curatorship and identify them as lack of global regulation and cooperation amongst others. This lack of global regulation and cooperation are also seen as drivers that poses a risk to global financial markets.

Finally this study acknowledged that bank curatorship does not necessarily translate to prevention of banks failures but rather as a tool used to ensure that when failure occurs, it is addressed in an orderly manner so as to cause the least risk to the financial system. This dissertation concludes by making recommendations which incorporates measures that may be put in place for management and effective supervision of banks.



Table of contents

CHAPTER 1	4
GENERAL INTRODUCTION	4
1. Introduction	4
2. The African Bank experience.	4
3. The South African Reserve Bank intervention	5
4. Bank failures generally.	6
5. The 2008 Global Financial Crisis.....	13
5.1 The Bail outs in both Jurisdictions.	14
5.2 The Consequences.	14
5.3. The lessons learnt from the 2008 global financial crisis.	14
7. Purpose of the Study.....	15
CHAPTER 2	16
The Legal Framework of Curatorship of Banks in South Africa	16
1. Introduction.	16
2. Appointment of curator to bank.....	16
3. The powers of the curator	17
4. The legal proceedings against the bank under curatorship.....	20
5. Section 69A, Investigation of affairs of bank under curatorship	22
6. Conclusion.....	27
7. The effect of Twin Peaks Regulation on Section 69 of the Banks Act.....	27
7.1 What is the Twin Peaks model of regulation?	27
7.2 The Preamble to the Bill.....	28
7.3 Objectives and principles of crisis resolution framework as per the purport and spirit of the Bill.....	29
7.4 Effect of application of Part 2 of the Bill on powers of other organs of state.....	29
7.5 Procedure for identification of financial crisis	29
7.6 Crisis management responsibilities of Minister.....	29
7.7 Crisis management responsibilities of Reserve Bank	30
7.8 Powers of direction for Reserve Bank.....	31

7.9 Crisis management responsibilities of the regulatory authorities.....	32
7.10 Emergency regulations	32
8. The difference between the current curatorship regime and the proposed management and mitigation of financial crisis order.	33
9. Final remarks.....	35
10. Conclusion.....	36
CHAPTER 3	38
Curatorship of Banks in Botswana	38
1. Introduction	38
2. A brief description of Botswana Banking Industry.....	38
3. Past Banking crisis in Botswana	40
4. Botswana current position in implementation of Basel II, 2, 5 and Basel III Core Principles for Effective Bank Supervision	40
5. Bank supervision and crisis management under Botswana Banking Law	41
6. Duration of Temporary Management.....	43
7. The recent Kingdom Bank Africa Limited illiquidity and ultimate closure.....	43
8. Similarities and disparities of curatorship under both South African curatorship regime and Botswana temporary management regime.....	45
9. Conclusions and recommendations.....	48
CHAPTER 4	49
Summary of findings, conclusions and recommendations	49
1. Introduction	49
2. Summary of findings	49
3. Conclusions	51
4. Recommendations	52
REFERENCES.....	53

DEFINITIONS AND ACRONYMS

Bank	according to the Banks Act it means a public company registered as a bank in terms of Banks Act 94 of 1990.
Bank failure	occurs when a bank is unable to meet its obligations to its depositors or other creditors because it has become insolvent or too illiquid to meet its liabilities.
Basel Committee on Banking Supervision	refers to the primary global standard-setter for the prudential regulation of banks and provides a forum for cooperation on banking supervisory matters.
BoB	means Bank of Botswana
Curatorship of Banks	the process under which a bank is placed under the administrative control of the central bank.
Curator	refers to a person appointed to manage and oversee the affairs of the bank in trouble.
Financial Stability Board	refers to an international body that monitors and makes recommendations about the global financial systems.
KBAL	means Kingdom Bank Africa Limited.
Minister	means the Minister of Finance
SARB	means the South African Reserve Bank.

CHAPTER 1

GENERAL INTRODUCTION

1. Introduction

Banks are risk taking enterprises operating in an increasingly unpredictable and unstable business environment that are required to provide a multitude of information about their activities.¹ It is generally considered important that a banking crisis be resolved quickly to minimize the adverse effects that arise from distorted incentives caused by the operation of insolvent financial institutions.² Therefore the failure of banks has financial, economic and political implications. The banking sector has over the past 25 years undergone a considerable change in that countries no longer operate in isolation owing to globalisation, which has increased competition in global financial markets. The recent credit crunch of 2007-2009 is a point in reference and has led to increased calls arguing for even more risk and management disclosure.³ This financial crisis in turn led authorities worldwide to devise and put measures in place to deal with looming bank failures, either or in the form of accounting, legal and regulatory measures in place for a healthy banking system. This in turn will lead to greater prudential supervision of banks globally. Successful bank restructuring implies prompt corrective action and comprehensive approach addressing not only the immediate stock and flow problems of the weak and insolvent banks but also correcting shortcomings in the accounting and regulatory framework while improving supervision and compliance.⁴ In South Africa the Reserve Bank therefore serves as safety mechanism to provide liquidity support for failing banks. It is submitted that bank failures are an international phenomenon that calls for consolidated efforts amongst global countries, in view thereof that many countries have experienced banking problems in recent decades. The long and short of it is that depending on the nature of the crisis, the authorities can apply a number of support measures, amongst them curatorship or as in some jurisdictions, conservatorship. This chapter's main objective is therefore to analyse in an introductory manner issues relating to global financial crisis, the impact of the Basel principles of effective banking supervision and some related topics on the issue of curatorship.

2. The African Bank experience.

Recently the South African Stock Exchange listed bank African Bank fell into hard times. It appears that events leading to the looming fall of African Bank were owing to corporate governance issues by the bank's senior management.⁵ In case of African Bank it appears that the bank did not follow the prudential and best banking practices as prescribed by Banks Act which in turn led to the bank's being unable to meet its short and long term banking strategy, goals and needs

¹ Ano Risk and Risk Management Disclosures as a Corporate Governance Measure A Case of the ZSE Listed Banking and Financial Institutions (2013) (B.COM Hon Midlands State University, Gweru, Zimbabwe) (B.Com Honours) available on www.msu.ac.zw and as accessed on 08/04/2015.

² Burkhard Drees and Ceyla Pararbasiglu *The Nordic Banking Crises, Pitfall in Financial Liberalization* (IMF) Washington DC (2001) at P1.

³ Durst et.al, (2008) as quoted by Ano on Risk and Risk Management as a Corporate Measure dissertation *supra*.

⁴ Clausio Dziobek and Ceyla Pazarbasiglu *Lessons from Systemic Bank Restructuring: A Survey of 24 Countries* (1997) (IMF Working Paper) at P7.

⁵ Online article by: Lynley Donnelly African Bank rescue evades key questions <http://mg.co.za/article/2014-08-14-african-bank-rescue-evades-key-questions> as accessed on 08/04/2015.

It was therefore reported that the bank's bad business model was its own downfall.⁶ The bank's business model was a contributing factor to its financial woes.⁷ Unlike other banks, African Bank took almost no deposits but raised funds on local and international markets, which it then lent to consumers as unsecured credit at high interest rates.⁸ In response to increased competition in the unsecured market, African Bank aggressively expanded their lending, but when tough economic conditions hit lower end consumers non-performing loans soared.⁹ It will appear that by expanding its unsecured credit facilities to clients, African bank breached one or two of the Basel Core Principles for Effective Banking Supervision,¹⁰ which is credit risk and liquidity risk principles and thereby not only, putting African Bank in a systemic banking crisis but also put the broader financial system in a state of disarray. Although the banks trade internationally here at home the immediate institutions that were in line to be affected by African Banks' systemic failure was to include amongst others ABSA's money market, Public Investment Corporation, Coronation and Liberty Life's Stanlib.¹¹ The problem of financial institutions failure is prevalent in banking and financial markets in that one financial institution's failure may lead to other institutions failure within the same markets. Therefore the systemic failure of African Bank was not limited to the African Bank alone as it has been demonstrated above.

3. The South African Reserve Bank intervention.

Following the African Bank scare, the regulator, the South African Reserve Bank (SARB) moved swiftly to maintain confidence in the local financial sector. And on August 10th, 2014 SARB through its then Governor, Gill Marcus announced that SARB had put African Bank under curatorship.¹² Although no specific reasons were cited at that time it was clear that the bank was facing credit and liquidity risks.¹³ What is more important also was that SARB had intervened after consultation with Minister of Finance, and in the process both the ministry and SARB decided to implement a number of measures in order to return the bank back to profitability.¹⁴ According to Marcus the curatorship and resolution process was to ensure that the regular operations and collections of African bank continue effectively and efficiently.¹⁵

The SARB was to split African bank into two, viz the "good bank" and the "bad" bank and the appointed curator was to be PricewaterhouseCoopers, Tom Winterboer.¹⁶ According to Marcus the SARB was to identify performing loans and positive assets to be maintained in a good bank.¹⁷ A good bank with a loan value of 26-billion, which was to be recapitalised by 10-billion, underwritten by a consortium of private sector banks and the Public Investment Corporation; and the "Bad" Bank, with

⁶ *Ibid.*

⁷ *Ibid.*

⁸ *Ibid.*

⁹ Online article by: Lynley Donnelly African Bank rescue evades key questions <http://mg.co.za/article/2014-08-14-african-bank-rescue-evades-key-questions> as accessed on the 14/04/2015.

¹⁰ Basel Core Principles for Effective Banking Supervision (2012) available <http://www.bis.org/publ/bcbs230.htm> as accessed on 14/04/2015.

¹¹ *Supra* 5.

¹² *Supra* 10.

¹³ *Ibid.*

¹⁴ *Ibid.*

¹⁵ *Ibid.*

¹⁶ *Ibid.*

¹⁷ *Ibid.*

a book value of R17-billion, which the Reserve bank will take over and buy for R7-billion, said Marcus.¹⁸ The above intervention by SARB was a necessary measure that is sanctioned by section 69 of the Banks Act,¹⁹ which section provides for curatorship of banks in financial distress.

4. Bank failures generally.

Bank failure is very problematic within the financial structure of country, which then gives rise to systemic risk as a result of the interconnectedness of banks. Bank failures are not only a problem that is unique to a particular jurisdiction as it was evidence by the 2007-2009 global financial fallout. A wide range of countries has experienced banking system problems and the approaches to systemic bank restructuring have varied substantially.²⁰ South African banking system also suffered its fair share of bank failure prior and post democratic times.

4.1 The table below demonstrate the extent of Bank Failures in South Africa since 1990

(a) Bank failures in South Africa since 1990

The failure of banks has financial, economic and political implications. Banks are usually subjected to two types of regulation economic and prudential. Since 1990, a number of banks have failed in South Africa. Liquidity and poor management have been the prevalent reasons for bank failure in RSA.²¹

Year	Banks placed under curatorship	Principle causes	Banks liquidated	Banks deregistered
1990	Alpha Bank Limited (Curator: Ernst & Young)	High level fraud, which was heightened by the risk exposure of its holding company Pinnacle Holdings. SARB injected R150 million into the bank, primarily to protect depositors. However this was not sufficient to resuscitate the bank and after four years of curatorship the bank was placed in final liquidation in 1994. ²²		
1991-1992	Cape Investment Bank Limited	Cape Investment Bank (CIB) was also the		

¹⁸ .

¹⁹ Banks Act 94 of 1990.

²⁰ Claudia Dziobek and Ceyla Pazarbasioglu *Lessons from Systemic Bank Restructuring: A Survey of 24 Countries* (1997) (IMF Working Paper) at P4.

²¹ Training notes prepared by SARB General Counsel, Adv. Michael Blackbeard and presented at LLM lecture in Banking law at the University of Pretoria, September 2014.

²² *Ibid.*

Year	Banks placed under curatorship	Principle causes	Banks liquidated	Banks deregistered
	<p>(Curator: not provided for)</p> <p>Pretoria Bank Limited (Curator: Deloitte & Touche)</p>	<p>victim of fraud. In this case, it failed to disclose the significant number of non-performing assets in its balance sheet until this was exposed when Prima Bank (which subsequently failed itself) withdrew from a takeover deal. This led to a liquidity problem which caused the bank to fail in the second quarter of 1991. The SARB provided R5 million to compensate depositors.²³</p> <p>Pretoria Bank had been poorly managed for a while before failing in July 1991. Top management believed that merging Pretoria Bank with Masterbond – a dubious participation mortgage bond company - to form a company called Novabank would strengthen Pretoria Bank's balance sheet by providing high yield returns from the mortgage market in which Masterbond operated. However when Masterbond became unable to service its commercial paper and debenture obligations, which were the primary source of its funding, it collapsed. This caused the</p>		

²³ *Ibid.*

Year	Banks placed under curatorship	Principle causes	Banks liquidated	Banks deregistered
		proposed joint venture to fail and closed the strategic rescue line of Pretoria Bank, which then failed. The SARB repaid all the deposits which were placed with Pretoria Bank. ²⁴		
1993	Alpha Bank Limited (Liquidator: TAP du Plessis)			
1994	Sechold Bank (Curator: not provided for) Prima Bank Limited (Curator: Deloitte & Touche)	Sechold Bank failed in December 1993 because of liquidity problems brought on after a wholly owned subsidiary Securities Equities Limited lost R180 million in derivative trading positions. This resulted in a loss of depositor and investor confidence and resulted in significant erosion of the Sechold capital base. The SARB extended some liquidity to Sechold while it was in curatorship and Investec Bank Holdings acquired 78% and managerial control. Prima Bank had liquidity problems brought on by a large number of non-performing loans. The problems of Prima Bank were accentuated after the bank failed to		

²⁴ *Ibid.*

Year	Banks placed under curatorship	Principle causes	Banks liquidated	Banks deregistered
		<p>recapitalise via a complex joint venture which was to have led to the establishment of a corporate entity called Merchant Bank of Africa (MIBA). After the joint venture failed because of insufficient capital, in line with section 311 of the Companies Act 1973, the Court agreed to a restructuring proposal in which a portion of the assets of Prima Bank was transferred to Unibank, while another portion was placed in an escrow type of account to compensate unsecured depositors. Unsecured depositors recouped 50% of their deposits.²⁵</p>		
1995	The African Bank Limited (Curator: J Louw – KPMG)	<p>African Bank had liquidity problems. During investigations, it emerged that poor management and inadequate capital were considered to be the main problems. As a result, a restructuring plan was implemented and the government agreed to a recapitalisation plan in which it which it guaranteed African Bank's non-performing assets.²⁶</p>		

²⁵ *Ibid.*

²⁶ *Ibid.*

Year	Banks placed under curatorship	Principle causes	Banks liquidated	Banks deregistered
1996	Community Bank (Mutual Bank)(Curator: PWC)	Community Bank failed due to problems with liquidity. Its liquidity problems were the result of a very high expense to income ratio which was the result of inefficient management and inadequate returns on investment at branch level. In December 1996, in agreement with the curator, Unibank acquired Community Bank for R50m. ²⁷		
1997-1998	Islamic Bank Limited (Liquidator: Wilkens-Ernst & Young)	Bad management and improper accounting and management systems (some imply corrupt management) caused the bank to fail. Apparently, a large amount of insider unsecured lending had taken place which resulted in a large proportion of non-performing assets in the balance sheet. The SARB agreed to compensate the investors up to a maximum of R50 000 per depositor. This covered 80% of depositors since the primary depositor base of ISBA is small depositors; mostly Muslim people who saw the IBSA were a community bank. ²⁸		

²⁷ *Ibid.*

²⁸ *Ibid.*

Year	Banks placed under curatorship	Principle causes	Banks liquidated	Banks deregistered
1999	FBC Fidelity Bank Limited (Curator: RK Store – Deloitte & Touche)	Bad management and liquidity problems lead to bank being placed under curatorship. Part of the bank was transferred to Peoples Bank Limited.		
2001	Cashbank (Mutual Bank) acquired by BOE Bank Limited Southern Bank of Africa Limited			
2002	Regal Treasury Bank Limited (Curator: RK Store – Deloitte & Touche) New Republic Bank Limited (Receiver: CC Allen – Ernst & Young) Saambou Bank Limited (Receiver: J Louw – KPMG)	Auditors rescinded their approval of the bank's controlling company's financial statements which caused a run on the bank. The Registrar appointed a commissioner to investigate the affairs of the bank which found improper conduct by directors and executive officers. Bad management and liquidity problems led to bank being placed under curatorship. Bad management and liquidity problems led to bank being placed under curatorship.		Brait Merchant Bank Limited Cadiz Investment Bank Limited CorpCapital Bank Limited FirstCorp Merchant Bank Limited International Bank of Southern Africa Limited Merril Lynch Capital Markets Bank Limited Old Mutual Bank Limited PSG Investment Bank Limited TA Bank of Southern Africa Limited

Year	Banks placed under curatorship	Principle causes	Banks liquidated	Banks deregistered
2003				African Merchant Bank Limited BOE Bank Limited Cape of Good Hope Bank Limited ING Bank NV SA Branch Nedcor Investment Bank Limited RMB Asset Finance Bank Limited Securities Investment Bank Limited Unibank Limited
2004			Regal Bank Limited (Liquidators: TAP du Plessis of D&N Trust and J Pema of Sekala Antrust (Pty) Limited	Gensec Bank Limited MLS Bank Limited New Republic Bank Limited Saambou Bank Limited
2005				Peoples Bank Limited
2009				MEEG Bank Limited
2010				Imperial Bank Limited

Year	Banks placed under curatorship	Principle causes	Banks liquidated	Banks deregistered

Conclusion: In 12 years (1990-2002) 11 banks were placed under curatorship, 3 were subsequently liquidated and the rest resolved in various ways (schemes of arrangement, transfer of assets and liabilities to other banks, mergers etc) the resultant effect thereof, however, caused 26 banks to exit the system.²⁹

African bank was the latest to experience hard times as was discussed above. However the above table illustrates how over the years the South African banking sector fell on hard times and importantly the intervention and measures that were put in place by the SARB as the central bank of the Republic. As evidence on the table above most of the financial institutions that experienced hard times and were placed under curatorship and or liquidated, had problems ranging from poor management, improper accounting to liquidity problems amongst others. Liquidity and poor management have been pointed out as having been the prevalent reasons for bank failure in RSA.³⁰ It is against this background that one can infer that for as long as the business of banking continues in operation, the concept of curatorship is important and should be strengthened or reformed in order to counter any aspect of bank failure.

5. The 2008 Global Financial Crisis.

In recent times the global financial markets suffered its fair share of global financial crisis, caused amongst others by excessive lending and poor management of banks. During this crisis many prominent banks across the globe experienced severe financial troubles and some even had to close down for business. The global financial markets as we know it today have suffered many hardships, from the great depression of the thirties, into the challenges of the eighties and in recent times, the global financial crisis of 2008. It has also been said that as the world has seen and lived through a few global financial crisis in the past, the 2008 crisis is certainly not the last.³¹

In Europe the 2008 global financial crisis led to BNB Paribas freezing 3 Securitization funds.³² And by February 2007, US based entity Freddie Mac announced no more sub-prime loans.³³ Bear Sterns liquidated 2 hedge funds with sub-prime mortgages in July 2007 and in the United Kingdom Northern Rocks was as of September 2007 unable to pay its debts.³⁴ In February 2008, Northern Rock was nationalised by the United Kingdom government and by March 2008 FedReserve granted

²⁹ *Ibid.*

³⁰ Charles C Okeahalam *The Political Economy of Bank Failure and Supervision in the Republic of South Africa* (1998) @ African Association of Political Science available on <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.550.9138&rep=rep1&type=pdf> as accessed on 14/04/2015.

³¹ Source, Banking, banking law and banking regulation & supervision (The 2008 Financial Crisis), lecture presented on 15-09-2014 by SARB General Counsel, Adv. Michael Blackbeard.

³² *Ibid.*

³³ *Ibid.*

³⁴ *Ibid.*

\$30 billion to JP Morgan to take over Bear Stearns.³⁵ By September 2007, the US government took over Freddie Mac & Fannie and refused to bail out Lehman Brothers.³⁶

5.1 The Bail outs in both Jurisdictions.

AIG received a bailout of \$85 billion by the US government whilst Goldman Sachs & Morgan Stanley became banks holding companies.³⁷ US government rejected a \$700 billion Wall Street rescue package and as a result the US stock market crashed.³⁸ In November-December 2008 CitiGroup rescued GM & Chrysler through granting of a loan.³⁹ In the United Kingdom, RBS, LOYDS and HBOS banks received bailouts from the United Kingdom government.⁴⁰ And generally G20 met in London on the 02nd April 2009 and offered a stimulus package of \$5 trillion.⁴¹ It was agreed that in addition to an amount of \$5 trillion offered, G20 member states will by the end of 2009 raise output by 4 per cent, and accelerate the transition to a green economy.⁴²

5.2 The Consequences.

The consequences of was a rapid increase in debts (140%), liquidity in markets dried up forcing central banks to act, developed economies (US, United Kingdom, Asia) fell into recession as a result of which the global GDP contracted by 2%, world exports plummeted by 35% and unemployment rates worldwide rose from 5,8% to 9%.⁴³

5.3. The lessons learnt from the 2008 global financial crisis.

Based on the above discussion it is generally accepted that the crisis was caused by human action or inaction and therefore could have been avoided.⁴⁴ Another factor was failures in financial regulations and supervision.⁴⁵ There were failures too in corporate governance and failures in financial institutions.⁴⁶ There was also presence of excessive borrowing, risky investments, lack of transparency, incentives, breakdown of accountability and ethics that in some instances had the elements of greed and criminality.⁴⁷

It is again generally accepted that the ill preparedness of the US for the crisis added to panic, over the counter (OTC) derivatives and risk taking contributed.⁴⁸ Mortgage securitisation lit and spread

³⁵ *Ibid.*

³⁶ *Ibid.*

³⁷ *Ibid.*

³⁸ *Ibid.*

³⁹ *Ibid.*

⁴⁰ *Ibid.*

⁴¹ London Summit-Leaders Statement (London) (02nd April 2009) available on https://www.imf.org/external/np/sec/pr/2009/pdf/g20_040209.pdf as accessed on 22/04/2015.

⁴² *Ibid.*

⁴³ Banking, banking law and banking regulation & supervision (The 2008 Financial Crisis) in a lecture dated the 15-09-2015 offered by SARB General Counsel, Adv. Michael Blackbeard.

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*

the flame of contagion.⁴⁹ Credit Rating Agencies failure to assess risks in international financial markets was also pointed out as a contributor to the crisis.⁵⁰

The above submissions remind a stark reminder that bank failures are indeed prevalent in modern times. It also calls on the regulators and bank supervisors to review their regulatory measures and supervisory tools regularly so as to prevent or alternatively reduce the impact of a bank failure.

6. Purpose of the Study

The purpose of this study is to investigate the concept of curatorship of banks in South Africa in terms of the Banks Act⁵¹ and also to determine what influence, if any, of the proposed Twin Peaks Model of Regulation will have on it.

7. Conclusion

This chapter has covered in an introductory manner, relevant indicators that may lead regulators to act swiftly in cases of imminent bank failures. From a broader picture, seamless curatorship comes as a result of external elements outside the powers of the SARB itself. Some of the elements that triggers curatorship are prevalent to corporate governance issues such as poor decision making by banks senior management. To this end there are also preconditions pursuant to curatorship, namely bank failures and its causes within the South African context. In this chapter we have explored in an introductory manner the intervention of the SARB in the recent case of African Bank and more importantly dealt with the 2008 global financial crisis. The above aspects, together represents background to the role of curatorship as a measure of rescuing failing banks and the preceding chapters shall be dedicated particularly to curatorship within the South African context and by extension curatorship in foreign financial markets.

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*

⁵¹ Banks Act 94 of 1990.

CHAPTER 2

The Legal Framework of Curatorship of Banks in South Africa

1. Introduction.

In South Africa the legal framework of curatorship is governed by section 69 of the Banks Act and by extension section 69A of the said Act.⁵² Section 69 of the Banks Act⁵³ provides for mechanisms and the procedure to be adopted and followed in the appointment of a curator for a failing bank.

2. Appointment of curator to bank.

If in the opinion of the Registrar, any bank will be unable to repay, when legally obliged to do so, deposits made with it or will probably be unable to do so, the Minister may, if he or she deems it desirable in the public interest, by notifying the chief executive officer or the chairperson of the board of directors of that bank in writing, appoint a curator to the bank.⁵⁴

It is submitted that the Registrar's opinion is important and though it might appear subjective, in practice it is an objective assessment since in arriving at a decision to recommend that the bank be placed under curatorship, he or she bases his or her decision on material assessment of facts before her or him, for he/she has an oversight powers over banks.

The written consent of the chief executive officer or chairperson of the board of directors of the bank to place a distressed bank under curatorship was required prior to the commencement of the Banks Amendment Act of 2013.⁵⁵ The Banks Amendment Act has revised this position and now all that is required is that the chief executive officer or chairperson be notified in writing.

The rationale for this legislative change was that the International Monetary Fund (IMF) was of the opinion that the requirements relating to the CEO or chairperson hamper the ability of the Registrar to act decisively when a bank encounters serious difficulty.⁵⁶

The registrar may also appoint a suitable assistant to the curator.⁵⁷ Such person should be a person other than a person who is in the employ of the bank under curatorship, who in the opinion of the Registrar has wide experience of and is knowledgeable about the specific field of activities in which the bank under curatorship is predominantly engaged, to assist the curator in the management of the affairs of the bank under curatorship.⁵⁸

Section 69 deals with the remuneration of such a suitable assistant and provides that the person appointed as aforementioned shall in respect of the services rendered by that person pursuant to his

⁵² S 69A of the Banks Amendment Act 22 of 2013.

⁵³ S 69 of the Banks Act 94 of 1990.

⁵⁴ S 69 (1) (a) of the Banks Amendment Act 22 of 2013.

⁵⁵ S 69 (1) (a) of the Banks Act 94 of 1990.

⁵⁶ IMF assessment report on compliance with the Core Principles, December 2013.

⁵⁷ S 69 (1) (b) and (c) of the Banks Act 94 of 1990 as quoted by J. Moorcroft in his book *Banking Act and Practice* (Lexus Nexis, Durban, October 2014).

⁵⁸ S 69 (1) (b) of the Banks Act of 94 of 1990.

or her appointment be paid such remuneration out of the funds of the bank under curatorship as the Registrar may after consultation with the curator determine.⁵⁹

The Minister shall appoint a curator by letter of appointment which shall set out⁶⁰

- the name of the bank in respect of which the curator is appointed and the address of its head office;⁶¹
- directions in regard to the security which the curator has to furnish for the proper performance of his or her duties;⁶² directions in regard to the remuneration of the curator;⁶³ and
- such other directions as to the management of the bank concerned or any matter incidental thereto, including directions in regard to the raising of money by that bank, as the Minister may deem necessary.⁶⁴

On appointment of a curator, the management of the bank concerned vests in the curator, subject to the supervision of the Registrar, and any other person vested with the management of the affairs of that bank shall be divested thereof; and the curator must recover and take possession of all the assets of the bank.⁶⁵

S 69 (2A) prescribes is that on appointment, the curator shall take control of the bank, and run it in the same way as the managers of the bank would manage it. Such curator will have powers to take possession of all the assets of the bank and manage it in the best interests of the bank, its creditors, employees and the banking sector in general. However the curator's powers are not unfettered as his/her actions are subjected to the supervision of the Registrar.

3. The powers of the curator

The curator shall subject to the supervision of the Registrar, conduct the management contemplated in section 69 (2A)(a) of the Banks Act in such a manner as the Registrar may deem to best promote the interest of the creditors of the bank concerned and of the banking sector as a whole.⁶⁶ The curator shall also comply with any direction of the Registrar;⁶⁷ keep such accounting records and prepare such annual financial statements, interim reports and provisional annual financial statements as the bank or its directors would have been obliged to keep or prepare if the bank had not been placed under curatorship;⁶⁸ convene the annual general meeting and any other meeting of members of the bank provided for the Companies Act and, in that regard, comply with all the requirements with which the directors of the bank would in terms of the Companies Act have been obliged to comply if the bank had not been placed under curatorship;⁶⁹ and have the power to bring

⁵⁹ S 69 (1) (b) of the Banks Act 94 of 1990.

⁶⁰ S 69 (2) of the Banks Act 94 of 1990.

⁶¹ S 69 (2) (a) of the Banks Act of 1990.

⁶² S 69 (2) (b) of the Banks Act of 1990.

⁶³ S 69 (2) (C) of the Banks Act of 1990.

⁶⁴ S 69 (2) (d) of the Banks Act of 1990.

⁶⁵ S 69 (2A) (a) and (b) of the Banks Act 94 of 1990.

⁶⁶ S 69 (2B) (a) of the Banks Act 94 of 1990.

⁶⁷ S 69 (2B) (b) of the Banks Act 94 of 1990.

⁶⁸ S 69 (2B) (c) of the Banks Act 94 of 1990.

⁶⁹ S 69 (2B) (d) of the Banks Act 94 of 1990.

or defend in the name and on behalf of the bank any action or other legal proceedings of a civil nature and, subject to the provisions of any law relating to criminal proceedings, any criminal proceedings.⁷⁰

Section 69 (2B) (a) is an empowering provision in that it vests the curator with the management of the bank, although the curator does not have unfettered managerial powers as indicated above. In exercising his/her managerial powers the curator must conduct the management of a bank in such a manner as the Registrar may deem to best promote the interests of the creditors of the bank concerned and of the banking sector as a whole and the rights of employees in accordance with relevant labour legislation.⁷¹ Thus the curator essentially steps in the shoes of the board.⁷²

The curator must also comply with any directive issued by the Registrar.⁷³ The curator must in terms of section 69 (B) (C) keep such accounting records and prepare such annual financial statements, interim reports and provisional annual financial statements as the bank or its directors would have been obliged to keep or prepare if the bank had not been placed under curatorship.

Notwithstanding the provisions of subsection (3), the curator may dispose of any of the bank's assets in the ordinary course of the bank's business.⁷⁴ Following the enactment of the new Company's Act, the South African legislature amended section 69 (2C) (b)⁷⁵ in order to bring the law in line with the newly enacted Company's Act.⁷⁶

The preceding subsections of section 69 outlines the position of the curator as well as the powers that the minister grants to the curator for management and effective curatorship of the bank under curatorship, these powers are therefore self-explanatory in nature.

Section 69 (2D) up to and including Section 69 (4) therefore provides as that;

If at any time the curator is of the opinion that there is no reasonable probability that the continuation of the curatorship will enable the bank to pay its debts or meet its obligations and become a successful concern, he shall forthwith in writing inform the Registrar of such opinion.⁷⁷

⁷⁰ S 69 (2B) (e) of the Banks Act 94 of 1990.

⁷¹ S 69 (2B) (a) of the Banks Act 94 of 1990.

⁷² See *Alpha Bank Bpk en Andere v Registrateur van Banke en Andere* 1996 (1) SA 330 (A) 351B-352B as quoted by J. Moorcroft in his book *Banking Act and Practice* (Lexus Nexis, Durban, October 2014).

⁷³ S 69 (2B) (b) of the Banks Act 94 of 1990.

⁷⁴ S 69 (2C) (a) of the Banks Act 94 of 1990.

⁷⁵ S 69 (2C) (b) of the Banks Act 94 of 1990 has since been amended by the new section 69 (2C) (b) of the Banks Amendment Act 13 of 2013 and the amended section reads as follows, Section 69 of the Banks Act, 1990, is hereby amended— (a) by the substitution for subsection (2C) of the following subsection: “(2C) (a) Notwithstanding the provisions of subsection (3), the curator may— (i) dispose of any of the bank's assets; (ii) transfer any of its liabilities; or (iii) dispose of any of its assets and transfer any of its liabilities, in the ordinary course of the bank's business. (b) Except in the circumstances contemplated in paragraph (a) the curator may not, notwithstanding the provisions of section 112 of the Companies Act— (i) dispose of any of the bank's assets; [;(ii) effect a disposal referred to in subparagraph (i) unless a reasonable probability exists that such disposal will enable the bank to pay its debts or meet its obligations and become successful concern.] (ii) transfer any of its liabilities; or (iii) dispose of any of its assets and transfer any of its liabilities, otherwise than in accordance with the provisions of section 54[;].”

⁷⁶ Company's Act, Act 71 of 2008.

⁷⁷ S 69 (2D) of the Banks Act 94 of 1990.

Any money of the bank that becomes available to the curator must be applied by him in paying the costs of the curatorship and in the conduct of the bank's business in accordance with the requirements of the curatorship and, as far as the circumstances permit, in the payment of the claims of creditors which arose before the date of the curatorship.⁷⁸

The curator also has the powers to apply for the setting aside of voidable dispositions as empowered by section 69 (2F) (a) which provides that every disposition of the bank's property' which, if made by an individual, could for any reason be set aside in the event of such individual's insolvency, may, if made by a bank that is unable to pay its debts, be set aside by a court at the suit of the curator in the event of that bank being placed under curatorship, and the provisions of the law relating to insolvency shall *mutatis mutandis* apply in respect of such disposition.⁷⁹

The period during which any bank that is a mortgage debtor in respect of any mortgage bond is subject to curatorship in terms of this section shall be excluded in the calculation of any period of time for the purpose of determining whether such mortgage bond confers any preference in terms of section 88 of the Insolvency Act,⁸⁰ as applied to the winding-up of banks in terms of the Banks Act.⁸¹

The Minister may, in the letter of appointment or at any time subsequent thereto, empower the curator in his discretion, but subject to any condition which the Minister may impose to suspend or reduce, as from the date of his appointment as curator or any subsequent date, the right of creditors of the bank concerned to claim or receive interest on any money owing to them by that bank.⁸² He or she may also make payment, whether in respect of capital or interest, to any creditor or creditors of the bank concerned at such time, in such order and in such manner as he may deem fit.⁸³ He or she may cancel any agreement between the bank concerned and any other party to advance moneys due after the date of his appointment as curator, or to cancel any agreement to extend any existing facility, if, in the opinion of the curator, such advance or any loan under such facility would not be adequately secure or would not be repayable on terms satisfactory to the curator or if the bank lacks the necessary funds to meet its obligations under any such agreement or if it would not otherwise be in the interests of the bank.⁸⁴ He or she may also convene from time to time, in such manner as he or she may deem fit, a meeting of creditors of the bank concerned for the purpose of establishing the nature and extent of the bank's indebtedness to such creditors and for consultation with such creditors in so far as their interests may be affected by decisions taken by the curator in the course of the management of the affairs of the bank concerned.⁸⁵ He or she is also empowered to negotiate with any individual creditor of the bank concerned with a view to the final settlement of

⁷⁸ S 69 (2E) of the Banks Act 94 of 1990.

⁷⁹ S 69 (2F) (a) of the Banks Act 94 of 1990 and section 69 (2F) (b) which provides that for the purposes of section 69 (2F) (a) the event which shall be deemed to correspond with a sequestration order under the Insolvency Act, 1936 (Act No. 24 of 1936), in the case of an insolvent, shall be the presentation to the Court of the letter of appointment of the curator.

⁸⁰ Insolvency Act 24 of 1936.

⁸¹ S 69 (2G) of the Banks Act 94 of 1990.

⁸² S 69 (3) (a) of the Banks Act 94 of 1990.

⁸³ S 69 (3) (b) of the Banks Act 94 of 1990.

⁸⁴ S 69 (3) (c) of the Banks Act 94 of 1990.

⁸⁵ S 69 (3) (d) of the Banks Act 94 of 1990.

the affairs of such creditor with the bank.⁸⁶ He or she may make and carry out, in the course of his management of the bank concerned, any decision which in terms of the provisions of the Companies Act would have been required to be made by way of a special resolution contemplated in section [199] 65⁸⁷ of the Companies Act.⁸⁸ The Minister may also cancel any lease of movable or immovable property entered into by the bank concerned prior to its being placed under curatorship: Provided that, notwithstanding the provisions of section 69 (6) of the Banks Act, a claim for damages in respect of such cancellation may be instituted against the bank after the expiration of a period of one year as from the date of such cancellation.⁸⁹ He or she may cancel any guarantee issued by the bank concerned prior to its being placed under curatorship, excluding such guarantee which the bank is required to make good within a period of 30 days as from the date of the appointment of the curator: Provided that, notwithstanding the provisions of section 69 (6) of the Banks Act, a claim for damages in respect of any loss sustained by or damage caused to any person as a result of the cancellation of a guarantee in terms of this section 69 (3) (i) may be instituted against the bank after the expiration of a period of one year as from the date of such cancellation.⁹⁰ The curator shall duly record the nature of and the reason for each act performed by him or her under any power conferred upon him or her in terms of section 69 (3), and such records shall be examined as part of the normal audit performed in respect of the affairs of the bank concerned.⁹¹ Finally the Minister is also empowered to amend the directions in the letter of appointment at any time and in any manner the powers that he or she granted the curator under section 69 (3).⁹²

4. The legal proceedings against the bank under curatorship.

Section 69 (6) (a) of the Bank's Act deals with the position of the bank under curatorship and provides as that while such bank is under curatorship and provides that all actions, legal proceedings, the execution of all writs, summonses and other legal process against that bank shall be stayed and not be instituted or proceeded with without the leave of the court;⁹³

The effect of section 69 (6) (a) is that all actions against the bank under curatorship shall be stayed for the period of curatorship and shall not be instituted or be proceeded with, without the leave of the court. What this section provides is that the party seeking to institute a legal action against the bank under curatorship has two choices, firstly to wait until the bank is back on its feet once more again before he/she can institutes such a legal action, and secondly if he/she cannot wait for the bank to be a profitable concern once more again to approach the court on good cause shown and apply to the court, for the court to grant him/her leave to proceed against such a bank whilst curatorship is underway.

⁸⁶ S 69 (3) (e) of the Banks Act 94 of 1990.

⁸⁷ S 199 of the Companies Act (Act 61 of 1973 dealt with requirements for special resolution and it was repealed by S 65 of the new Companies Act (Act 71 of 2008), and the latter deals with the requirements for shareholders resolution, be it ordinary or special resolutions and provides for the procedure, approval, amendments and ratification of adoptions of such resolutions.

⁸⁸ S 69 (3) (f) of the Banks Act 94 of 1990.

⁸⁹ S 69 (3) (g) of the Banks Act 94 of 1990.

⁹⁰ S 69 (3) (i) of the Banks Act 94 of 1990.

⁹¹ S 69 (3A) of the Banks Act 94 of 1990.

⁹² S 69 (4) of the Banks Act 94 of 1990.

⁹³ S 69 (6) (a) of Banks Act 94 of 1990.

The Minister of Finance must be joined in an application for leave in terms of section 69 (6) of the Bank's Act.⁹⁴

While a bank is under curatorship the curator shall on a monthly basis furnish the Registrar with a written report containing an exposition of the affairs of the bank concerned and in which it is stated whether or not, in the opinion of the curator, a reasonable probability exists that the bank will be able to pay its debts or to meet its obligations and to become a successful concern.⁹⁵ Notwithstanding any provision to the contrary contained in the Banks Act, the provisions of sections 35A,⁹⁶ 35B⁹⁷ and 46⁹⁸ of the Insolvency Act,⁹⁹ shall *mutatis mutandis* apply to the curator of any bank under curatorship and to such a bank as if the curator were a trustee of an insolvent estate and the bank were an insolvent or a sequestrated estate as contemplated in those sections.¹⁰⁰

The Registrar must as soon as is practicable announce the appointment of a curator and the powers granted to him on his appointment, and any amendment or withdrawal of such powers, by notice in the Gazette.¹⁰¹ Notwithstanding anything to the contrary contained in any law, the suspension, cancellation or termination of the registration of a bank while such bank is under curatorship in terms of this section shall not affect¹⁰² any appointment made, direction issued, or any other thing done under this section in respect of such bank;¹⁰³ or any power to be exercised or duty to be executed in respect of that bank under curatorship by the Minister, the Registrar or the curator, by virtue of the provisions of this section, and the Minister, the Registrar and the curator, respectively, shall until such time as the curatorship is terminated continue to exercise their respective powers and to execute their respective duties under this section in respect of the public company of which the registration as a bank has been so suspended, cancelled or terminated, as if such suspension, cancellation or termination had not taken place.¹⁰⁴

The Minister may- at any time withdraw the appointment of a curator;¹⁰⁵ or upon application by the Registrar withdraw the appointment of a curator,¹⁰⁶ curatorship of a bank shall lapse upon- the issue by the Minister of written notification to that effect to the curator,¹⁰⁷ or the winding-up of the bank in terms of the provisions of section 68.¹⁰⁸

⁹⁴ Registrar of Banks v New Republic Bank Ltd [1999] 2 All SA 459 (D) 462.

⁹⁵ S 69A of the Banks Act 94 of 1990.

⁹⁶ S 35A of Insolvency Act 24 of 1936 deals with the so called "transaction on exchange".

⁹⁷ S 35B of Insolvency Act 24 of 1936 deals with agreements providing for termination and netting.

⁹⁸ S 46 of Insolvency Act 24 of 1936 deals with Set-off.

⁹⁹ Insolvency Act 24 of 1936

¹⁰⁰ S 69B of the Banks Act 94 of 1990.

¹⁰¹ S 69 (7) of the Banks Act 94 of 1990.

¹⁰² S 69 (8) of the Banks Act 94 of 1990.

¹⁰³ S 69 (8) (a) of the Banks Act 94 of 1990.

¹⁰⁴ S 69 (8) (b) of the Banks Act 94 of 1990.

¹⁰⁵ S 69 (9) (a) of the Banks Act 94 of 1990.

¹⁰⁶ S 69 (9) (b) of the Banks Act 94 of 1990.

¹⁰⁷ S 69 (10) (a) of the Banks Act 94 of 1990.

¹⁰⁸ S 69 (10) (b) of the Banks Act 94 of 1990, section 68 of the Banks Act provides for special provisions relating to winding-up or judicial management of bank and empowers the Registrar to make an application to the court for a winding-up of any Bank in terms of the provisions of Companies Act.

5. Section 69A, Investigation of affairs of bank under curatorship

While a bank is under curatorship, the Registrar may appoint a person to be a Commissioner for the purpose of investigating the business, trade, dealings, affairs or assets and liabilities of that bank or of its associate or associates.¹⁰⁹ In the recent matter of African Bank, Reserve Bank Registrar, Rene Van Wyk acting upon the powers vested on him by the provisions of section 69A (1) referred to above, appointed Advocate John Myburgh as the Commissioner for the purposes of investigation under this subsection.¹¹⁰ The appointed Commissioner, Advocate Myburgh once more found himself in a familiar position as he was some decade ago and in particular in 2002, when he was appointed as a commissioner to investigate the business, trade, dealings and affairs Regal Treasury Private Bank Ltd (in liquidation) as empowered by the provisions of section 69A (1) of the Banks Act.¹¹¹

The Registrar may appoint a person as an assistant or two or more persons as assistants to the Commissioner referred to in subsection in order to assist the Commissioner, subject to the control and directions of the Registrar, in an investigation contemplated in subsection (1).¹¹² In the African Bank case the Registrar went on to appoint Brian Abrahams and Advocate Vincent Maleka as two additional Commissioners in line with the provisions of section 69A (2) referred to above.¹¹³ The two Commissioners' mandate was to assist Advocate Myburgh in investigating the circumstances that gave rise to African Bank being placed under curatorship.¹¹⁴ The investigation was to probe the business, trade, dealings, affairs, assets and liabilities of African Bank, according to the South African Reserve bank.¹¹⁵ The investigation was to be conducted in terms of sections 4 and 5¹¹⁶ of the Inspection of Financial Institutions Act (IFIA).¹¹⁷

Before the Registrar appoints a Commissioner in terms of section 69A (1) or a person or persons in terms of section 69A (2), the Registrar shall take all reasonable steps to ensure that the person or persons so appointed will be able to report objectively and impartially on the affairs of the bank concerned or the associate or associates of such bank.¹¹⁸ A Commissioner appointed under section 69A (1) and any person or persons appointed under section 69A (2) shall for the purpose of their functions in terms of this section have powers and duties in all respects corresponding to the powers and duties conferred or imposed by sections 4 and 5 of the Inspection of Financial Institutions Act.¹¹⁹

¹⁰⁹ S 69A (1) of the Banks Act 94 of 1990.

¹¹⁰ Online article: Reserve Bank investigating Abil by Hannah Barry

<http://www.moneyweb.co.za/uncategorized/reserve-bank-investigating-abil/> as accessed on the 07-07-2015.

¹¹¹ *Ibid.*

¹¹² S 69A (2) of the Banks Act 94 of 1990.

¹¹³ *Supra* 136.

¹¹⁴ *Ibid.*

¹¹⁵ Statement by the South African Reserve bank dated 02nd September 2014 available on www.resbank.co.za as accessed on 07-05-2015.

¹¹⁶ S 4 of the Inspection of Financial Institutions Act deals with powers of Inspectors relating to institutions whilst section 5 deals with powers of Inspectors relating to other persons in relations to inspections.

¹¹⁷ Inspection of Financial Institutions Act 80 of 1998.

¹¹⁸ S 69A (3) of the Banks Act 94 of 1990.

¹¹⁹ Inspection of Financial Institutions Act 80 of 1998 and S 69A (4) of the Banks Act 94 of 1990.

When an investigation is made under section 69A and section 4 of the Inspection of Financial Institutions Act¹²⁰ applies, 4 (1)(a) of the Inspection of Financial Institutions shall be deemed to have been amended to read as follows: In carrying out an investigation into the business, trade, dealings, affairs or assets and liabilities of a bank under curatorship, a commissioner may administer an oath or affirmation or otherwise examine any person who is, or formerly was, a director, servant, employee, partner, member or shareholder of the institution, provided that the person examined, whether under oath or not, may have his or her legal adviser present at the examination, provided further that on good cause shown the commissioner may direct that the proceedings under this paragraph shall be held in camera and not be accessible to the public.¹²¹

When an investigation is made under section 69A and section 5 of the Inspection of Financial Institutions Act¹²² applies, section 5 (1)(a) of the Inspection of Financial Institutions Act shall be deemed to have been amended to read as follows; in carrying out an investigation into the business, trade, dealings, affairs or assets and liabilities of a bank under curatorship, a Commissioner may administer an oath or affirmation or otherwise examine any person, if the Commissioner has reason to believe that such a person may be able to provide information relating to the affairs of the bank, provided that the person examined, whether under oath or not, may have his or her legal adviser present at the examination, provided further that on good cause shown the commissioner may direct that the proceedings under this paragraph shall be held in camera and not be accessible to the public.¹²³

Any person examined by a commissioner under section 69A shall not be entitled, at such examination, to refuse to answer any question upon the ground that the answer would tend to incriminate him or her or upon the ground that he or she is to be tried on a criminal charge and may be prejudiced at such trial by his or her answer.¹²⁴ Where any person gives evidence in terms of the provisions of section 69A and is obliged to answer questions that may incriminate him or her or, where he or she is to be tried on a criminal charge, that may prejudice him or her at such trial, the commissioner shall direct, in respect of such part of the proceedings, that no information regarding such questions and answers may be published in any manner whatsoever.¹²⁵ No evidence regarding any questions and answers contemplated in section 69A (6) (b), and no evidence regarding any fact or information that has come to light in consequence of any such questions or answers, shall be admissible in any criminal proceedings, except in criminal proceedings where the person concerned is charged with an offence in terms of section 69A (14).¹²⁶

In addition to the powers conferred upon the Commissioner by section 69A (4) the Commissioner shall for the purpose of the performance of his or her under section 69A have the power to summon before him or her any such person as he or she may examine in terms of the provisions of section 69A(5).¹²⁷

¹²⁰ Inspection of Financial Institutions Act 80 of 1998.

¹²¹ S 69A (5A) (1) (a) of the Banks Act 94 of 1990.

¹²² Inspection of Financial Institutions Act 80 of 1998.

¹²³ S 69A (5A) (1) (a) of the Banks Act 94 of 1990.

¹²⁴ S 69A (6) (a) of the Banks Act 94 of 1990.

¹²⁵ S 69A (6) (b) of the Banks Act 94 of 1990.

¹²⁶ S 69A (6) (c) of the Banks Act 94 of 1990.

¹²⁷ S 69A (7) of the Banks Act 94 of 1990.

Non-compliance with the summons has serious consequences in that should any person who has been duly summoned under section 69A (7) and to whom a reasonable sum for the expenses of such person has been tendered, fails to attend before a Commissioner at the time and place appointed by the summons without lawful excuse made to the Commissioner at the time of the sitting, the commissioner may cause the person so summoned to be apprehended and brought before the Commissioner for examination.¹²⁸ In terms of section 69A (8) any person duly summoned under section 69A (7) shall be entitled to such witness fees as such person would have been entitled to if he or she had been a witness in civil proceedings in a magistrate's court. In terms of section 69A (9) the Registrar shall be liable for payment of the costs and expenses incidental to an investigation held in accordance with the provisions of this section, unless the Registrar directs that the whole or any part of such costs and expenses shall be paid out of the assets of the bank concerned.

A Commissioner must complete the investigation within a period of five months as from the date of his or her appointment and must within a period of 30 days after completion of such investigation prepare a written report thereon.¹²⁹ Such a report shall state whether or not, in his or her opinion, it is in the interest of the depositors or other creditors of the bank concerned that the bank remains under curatorship.¹³⁰ The report shall further state whether or not it is in the interest of the depositors or other creditors of the bank concerned that the Registrar, in terms of the provisions of section 68(1)(a), applies to a competent court for,¹³¹ the winding-up of the bank concerned.¹³² Thirdly the report should state whether or not any business of such bank was carried on recklessly or negligently or with the intent to defraud depositors or other creditors of the bank concerned or any other person, or for any other fraudulent purpose.¹³³ Lastly should it appear that any business of such bank was carried on in the manner contemplated in section 69A (11) (c), such a report shall state such any person as identified by the Commissioner as being a party who carried on the business of that bank in the manner referred to in section 69A (11) (c).¹³⁴

In the recent matter of African Bank (in curatorship), it appears that the Commissioner has completed his report as early as March 2015, for he was appointed on the second day of September 2014 as per the South African Reserve Bank statement referred above.¹³⁵ However what remains to be seen is whether his report will be made public. The status *a quo* however is that African Bank is still under curatorship and therefore the conclusion is that the continued placing of African Bank under curatorship is in line with section 69A (11) (a), namely that is it is in the interests of the depositors or other creditors of the bank concerned that it remain under curatorship.

It should further be noted that report by a Commissioner completed in accordance with the provisions of section 69A must be forwarded to the Registrar;¹³⁶ the Minister;¹³⁷ and in the event of

¹²⁸ S 69A (8) of the Banks Act 94 of 1990.

¹²⁹ S 69A (11) (a) of the Banks Act 94 of 1990.

¹³⁰ S 69A (11) (a) of the Banks Act 94 of 1990.

¹³¹ S 69A (11) (b) of the Banks Act 94 of 1990.

¹³² S 69A (11) (b) (i) of the Banks Act 94 of 1990.

¹³³ S 69A (11) (c) of the Banks Act 94 of 1990.

¹³⁴ S 69A (11) (d) of the Banks Act 94 of 1990.

¹³⁵ Statement by the South African Reserve bank available on SARB website and as referred to by Hanna Barry, available on http://today.moneyweb.co.za/article?id=773353#.Vrs_TPI97lu 02nd September 2014 and accessed on 07-05-2015.

¹³⁶ S 69A (12) (a) of the Banks Act 94 of 1990.

a finding contemplated in section 69A (11) (c) and (d), the attorney-general (Director of Public Prosecution) concerned.¹³⁸ Any investigation or any report by a Commissioner under section 69A is private and confidential unless the Registrar, after consultation with the Minister, either generally or in respect of any part of such investigation or such report, directs otherwise.¹³⁹ It thus remains to be seen as to whether the investigation into African Bank report will be made public.

It must be noted that previously the investigation report regarding banks under curatorship were made public, as it was the case in Regal Treasury Private Bank Ltd (in liquidation) where commissioner Myburgh found that Regal Treasury Private Bank Ltd (“Regal Bank” or “the bank”) was placed in curatorship because it lost the confidence of its depositors and shareholders.¹⁴⁰ Commissioner Myburgh proceeded to find that the bank’s CEO, one Levenstein was not a fit and proper person to be a director and CEO of a bank or its holding company, Regal Treasury Bank Holdings Ltd (“Regal Holdings” or “Holdings”) and carried on the business of the bank and Holdings in a reckless manner.¹⁴¹ Another finding was that the boards of directors of the bank and its holding company acted in breach of the Banks Act, the regulations relating to banking, the Companies Act, and the standards of corporate governance and were knowingly parties to the carrying on of the business of the bank and Holdings in a reckless manner.¹⁴² The Commissioner also noted that the boards of directors were composed of different directors from time to time and therefore not all the directors were equally guilty of all the criticisms levelled against the board as contained in his report.¹⁴³ Not only a finding was made against Regal CEO and its Board but a finding was also made against Regal’s external auditors, Ernest & Young, in that Ernest & Young was also at fault in that the firm acted in breach of the Public Accountants and Auditors Act¹⁴⁴ and the Banks Act¹⁴⁵ during the 2000 audit by giving consent to the release of the 2001 preliminary financial results of Regal Holdings when they had not completed the 2001 audit properly in two material respects.¹⁴⁶ It was further found that the Reserve Bank failed to act swiftly and decisively in October or November 2000 by not taking appropriate action for the removal of Levenstein as CEO.¹⁴⁷

Section 69A (14) deals with non-compliance with summon and states that any person who has been duly summoned under the said section 69A (14) by a Commissioner and who fails, without sufficient cause, to attend at the time and place specified in the summons commits an offence.¹⁴⁸ An offence is also committed if a summoned person fails, without sufficient cause, to remain in attendance until excused by the Commissioner from further attendance,¹⁴⁹ refuses to be sworn or to affirm as a

¹³⁷ S 69A (12) (b) of the Banks Act 94 of 1990.

¹³⁸ S 69A (12) (c) of the Banks Act 94 of 1990.

¹³⁹ S 69A (13) of the Banks Act 94 of 1990.

¹⁴⁰ See report of Commissioner JF Myburgh, SC, prepared in terms of S 69A (11) of the Banks Act 1990 in re Regal Treasury Private Bank Ltd (in liquidation) available on http://www.gov.za/sites/www.gov.za/files/regalbank_0.pdf P 1-3, as accessed on the 04-6-2015.

¹⁴¹ *Ibid.*

¹⁴² *Ibid.*

¹⁴³ *Ibid.*

¹⁴⁴ Public Accountants and Auditors Act 80 of 1991.

¹⁴⁵ Banks Act 94 of 1990.

¹⁴⁶ *Supra* 166.

¹⁴⁷ *Ibid.*

¹⁴⁸ S 69A (14) (a) of the Banks Act 94 of 1990.

¹⁴⁹ S 69A (14) (b) (i) of the Banks Act 94 of 1990.

witness;¹⁵⁰ or fails, without sufficient cause to answer fully and satisfactorily any question lawfully put to such person by a Commissioner, notwithstanding that such answer may tend to incriminate him or her.¹⁵¹ Such person also commits an offence if he or she fails to produce books or papers in his or her custody or under his or her control of which a Commissioner has required him or her to produce.¹⁵² A summoned person further commits an offence under the provisions of section 69A (14) if he or she wilfully furnishes the Commissioner with any false information,¹⁵³ and or refuses or fails to comply to the best of his or her ability with any reasonable request made to him or her by the Commissioner in the exercise of the Commissioner's powers or the performance of the Commissioner's duties.¹⁵⁴ Finally a summoned person commits an offence if he or she wilfully hinders the Commissioner in the exercise of his or her powers or the performance of his or her duties,¹⁵⁵ and or fails to comply with any provision of a direction by the Commissioner or the Registrar as contemplated in this section 69A (14).¹⁵⁶ Should it be found that the person has committed the offences in section 69A (14), (a)-(f) such person shall be guilty of an offence.¹⁵⁷

The Registrar must as soon as is practicable after the appointment of a Commissioner, or of any person or persons under subsection (2), by notice in the Gazette, announce such appointment.¹⁵⁸

The provisions of section 69(8) shall mutatis mutandis apply in respect of a bank under curatorship of which the registration as a bank is suspended, cancelled or terminated while an investigation under this section in respect thereof is in progress.¹⁵⁹

For the purposes of subsection (16), the reference in section 69(8) to the Minister and the curator shall be deemed to be a reference to a Commissioner and any person appointed under subsection (2), respectively.¹⁶⁰

Section 69A (18) provides that for the purposes of this section 'associate' means an associate as defined in section 37(7).¹⁶¹

¹⁵⁰ S 69A (14) (b) (ii) of the Banks Act 94 of 1990.

¹⁵¹ S 69A (14) (b) (iii) (aa) of the Banks Act 94 of 1990.

¹⁵² S 69A (14) (b) (iii) (bb) of the Banks Act 94 of 1990.

¹⁵³ S 69A (14) (c) of the Banks Act 94 of 1990.

¹⁵⁴ S 69A (14) (d) of the Banks Act 94 of 1990.

¹⁵⁵ S 69A (14) (e) of the Banks Act 94 of 1990.

¹⁵⁶ S 69A (14) (f) of the Banks Act 94 of 1990.

¹⁵⁷ S 69A (14) (f) of the Banks Act 94 of 1990.

¹⁵⁸ S 69A (15) of the Banks Act 94 of 1990.

¹⁵⁹ S 69A (16) of the Banks Act 94 of 1990.

¹⁶⁰ S 69A (17) of the Banks Act 94 of 1990.

¹⁶¹ S 69A (18) of the Banks Act 94 of 1990. And an "Associate" is defined in section 37 (7) as in relation to a natural person, a close relative of that person or any person who has entered into an agreement or arrangement with the first-mentioned person, relating to the acquisition, holding or disposal of, or the exercising of voting rights in respect of, shares in the bank or controlling company in question; in relation to a juristic person 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; which is a close corporation registered under the Close Corporations Act, 1984 (Act No. 69 of 1984), means any member thereof as defined in section 1 of that Act; 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

6. Conclusion.

Section 69 and 69A of the Banks Act¹⁶² therefore provide for a mechanism whereby the Regulator comes not only to the aid of a bank under distress, but also safeguards depositors, employees and creditors of the bank against undue loss of their deposits, employment and interests held by the bank. Section 69 and 69A also protect the banking sector as a whole as well as the country's financial markets.

Moorcroft argues that in creating the curatorship mechanisms in section 69 it was the legislature intention to create an alternative option by which the administration of a bank with financial problems could be affected.¹⁶³

It is therefore submitted that by creating the procedure in section 69, the legislature has found a more balanced manner in which to safeguard the interests of those that are primarily involved in financial markets; as unlike the winding-up mechanism provided for in the Company's Act,¹⁶⁴ for the latter creates dire consequences for all those who are involved in the financial markets. It is my further submission that the South African Legislature should review section 69 regularly so as to ensure that it on par with international best practice, especially owing to new technological development that may aid effective and efficient curatorship and bank supervision. Fortunately steps have been taken into that direction in the form of sections 62 to 68 of the proposed Financial Sector Regulations Bill to be discussed hereunder. In light of the provisions of section 66 of the proposed Bill, it is apparent that curatorship mechanism created by sections 69 and 69A of the Banks Act will not be replaced by sections 62 to 68 of the proposed Financial Regulations Sector Bill, but rather the Bill seeks to supplement the tools created in sections 69 and 69A of the Banks Act.

7. The effect of Twin Peaks Regulation on Section 69 of the Banks Act.

7.1 What is the Twin Peaks model of regulation?

The Minister of Finance first introduced the Twin Peaks financial Sector regulations to the South African public in his 2011 budget speech.¹⁶⁵ Subsequent to that the South African legislature began with the process of drafting, consulting and tabling the Financial Sector Regulation Bill (the Bill)¹⁶⁶ in

other juristic person been a company, means any person in accordance with whose directions or instructions the board of directors of or, in the case where such juristic person is not a company, the governing body of such juristic person is accustomed to act; and (c) in relation to any person- (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 person first-mentioned in this paragraph; and (ii) includes any trust controlled or administered by that person.

¹⁶² Banks Act 94 of 1990.

¹⁶³ Johan Moorcroft "Banking Act and Practice" (Lexis Nexis, Durban, October 2014).

¹⁶⁴ Companies Act 71 of 2008.

¹⁶⁵ Media statement, titled implementing Twin Peaks Model Regulation in South Africa, (11 December 2013) available on

<https://www.fsb.co.za/Departments/twinpeaks/Documents/Twin%20Peaks%2001%20Feb%202013%20Final.pdf> and as accessed on 04/07/2015.

¹⁶⁶ Clause 3 (a) of Financial Sector Regulation Bill define the purpose of the bill as to promote a financial system that works in the interests of financial customers, and supports balanced and sustainable economic growth in the Republic, by establishing, in conjunction with the regulatory laws, a supervisory and regulatory framework

order to give effect to the Ministerial Budget speech of 2011.¹⁶⁷ This Bill is still undergoing its protracted legislative journey and it is expected that it will be passed into law well in advance in order for it to come into force around April 2016.¹⁶⁸

Unfortunately the Bill in its current form does not succinctly define what the Twin Peaks model of regulation entails. However it is generally accepted that the Twin Peaks model of regulation will create two regulators for the financial services sector, namely; a Prudential Regulator regulating the solvency and liquidity of the financial services sector;¹⁶⁹ and a Market Conduct Regulator regulating how financial services institutions conduct their business, design and price their products and treat their customers.¹⁷⁰

It is proposed that a new prudential authority within the South African Reserve Bank will be formed and be responsible for the oversight of the safety and soundness of banks, insurers and financial conglomerates.¹⁷¹ A newly established market conduct authority function as established within the Financial Services Board will be aiming at protecting customers of the financial services firms, and to improve the way financial service providers conduct their business.¹⁷² The latter authority will also be responsible for ensuring the integrity of financial markets, and promoting effective financial consumer education.¹⁷³ The Financial Services Board will have an oversight on this authority.¹⁷⁴

In the context of the Twin Peaks Financial model of regulation, the curatorship of bank will fall under the Prudential Authority and be retained under part 2, sections 62 to 68 of the draft Bill under the heading, Management and mitigation of financial crisis.

7.2 The Preamble to the Bill

The Bill has as its preamble, to establish regulatory authorities for the purposes of strengthening financial stability and the fair treatment of financial customers in the interest of a safer financial sector; to establish and provide for the Financial Stability Oversight Committee, the Prudential Authority, and the Market Conduct Authority; to provide for co-operation between the regulatory authorities, including cooperation in rule making; to provide for co-operation between regulatory authorities and other financial regulators; to promote the maintenance of financial stability; to provide for the management and mitigation of financial crisis; to provide for administrative penalties; to provide for the establishment of the Financial Services Tribunal to hear appeals; to provide for regulations and codes of good practice; to provide for transitional provisions; and to provide for matters connected therewith.

that promotes amongst others financial stability, the safety and soundness of financial institutions and fair treatment and protection of financial customers.

¹⁶⁷ *Ibid.*

¹⁶⁸ *Ibid.*

¹⁶⁹ PricehouseWaterCoopers paper titled Regulatory Intelligence (March 2013) available on <http://www.pwc.co.za/en/assets/pdf/regulatory-newsletter-march-2013.pdf> as accessed on 04/07/2015.

¹⁷⁰ *Ibid.*

¹⁷¹ Media statement, titled implementing Twin Peaks Model Regulation in South Africa, (11 December 2013) available on <https://www.fsb.co.za/Departments/twinpeaks/Documents/Twin%20Peaks%2001%20Feb%202013%20Final.pdf> and as accessed on 04/07/2015

¹⁷² *Ibid.*

¹⁷³ *Ibid.*

¹⁷⁴ *Ibid.*

7.3 Objectives and principles of crisis resolution framework as per the purport and spirit of the Bill.

Accordingly an effective resolution framework will aim to;¹⁷⁵

- Restore financial stability in a crisis with the least possible loss of value and public cost.
- Increase the resolvability of systemically significant elements in the financial system, preferably without public support.
- Maintain and restore confidence in the financial system.
- Ensure that key functions in the financial system continue (for example, payment systems, securities settlement, and an essential degree of financial intermediation).
- Prevent loss of value through prompt and appropriate intervention.
- Let losses, where they do occur, be absorbed by appropriate buffers, shareholders and, if necessary, creditors, rather than by the retail customers or taxpayers.

7.4 Effect of application of Part 2 of the Bill on powers of other organs of state

Clause 62 of the Bill provides that the application of Part 2 on the management of a financial crisis does not affect the continuation of the powers of other organs of state regulating aspects of the South African economy that impact on the resolution of the crisis in accordance with Part 2 of the Bill, provided that the exercise of those powers is consistent with any decisions taken by the Reserve Bank or the Financial Stability Oversight Committee for purposes of resolving the crisis; and any regulations made by the Minister in terms of Part 2.¹⁷⁶

It is also provided that in the event of an inconsistency between the exercise of a power by an organ of state referred to in clause 62 (1) and a decision of the Reserve Bank or the Financial Stability Oversight Committee for purposes of resolving the crisis, the decision of the Reserve Bank or the Financial Stability Oversight Committee prevails, unless otherwise determined by the Minister.¹⁷⁷

7.5 Procedure for identification of financial crisis

The new Bill provides that in the event that a particular risk, weakness, development or disruption detected in the financial system by the Financial Stability Oversight Committee, including a risk to an individual financial institution, gives rise to a material likelihood of a financial crisis taking place, the Governor must¹⁷⁸ promptly advise the Minister;¹⁷⁹ determine, in consultation with the Minister, whether the situation constitutes an actual or potential financial crisis;¹⁸⁰ and keep such determination under regular review.¹⁸¹

7.6 Crisis management responsibilities of Minister

¹⁷⁵ Implementing a Twin Peaks model of Financial Regulation in South Africa as published for comments by the Financial Regulatory Reform Steering Committee (1 February 2013) available on www.treasury.gov.za/twinpeaks as accessed on 08/07/2015.

¹⁷⁶ Clause 62 (1) and S 62 (1) (a) and (b) of the Financial Sector Regulation Bill.

¹⁷⁷ Clause 62 (2) of the Financial Sector Regulation Bill.

¹⁷⁸ Clause 63 of the Financial Sector Regulation Bill.

¹⁷⁹ Clause 63 (a) of the Financial Sector Regulation Bill.

¹⁸⁰ Clause 63 (b) of the Financial Sector Regulation Bill.

¹⁸¹ Clause 63 (c) of the Financial Sector Regulation Bill.

The Minister is at all times solely responsible for taking decisions relating to crisis management which may have an actual or potential impact on public finances,¹⁸² including:

- an increase, or risk of an increase, in public expenditure;¹⁸³
- an increase, or risk of an increase, in actual or contingent liabilities assumed by the Government;¹⁸⁴ or
- anything that may affect the price at which the Government is able to raise money in the debt markets.¹⁸⁵

The Minister may further designate a financial institution as a systemically important financial institution.¹⁸⁶

The requirement that the Minister is at all times solely responsible for taking decisions relating to crisis management which may have an actual or potential impact on finances as per the provisions of clause 64 (a) of the Bill is problematic in itself. The problem with this centralisation of powers is that the Minister's decision may be subjective and in most instances be influenced by his or her political consciousness. It is submitted that in this era of corporate governance culture to place such important task in the hands of an individual offends corporate governance principles. It is further submitted that the legislature should revise this provision and create a committee (like crisis management committee) to be responsible for taking decisions relating to crisis management.

7.7 Crisis management responsibilities of Reserve Bank

Clause 65 (1) of the Bill provides that in the event of a determination, in terms of clause 63, that a particular risk, weakness, development or disruption detected in the financial system constitutes an actual or potential financial crisis, the Reserve Bank, including in its capacity as resolution authority, must endeavour to manage and mitigate the crisis as speedily and effectively as possible in accordance with its powers in terms of this Bill, or any other, Act.¹⁸⁷

Clause 65 (2) of the Bill provides that in exercising its responsibilities in terms of clause 65 (1), the Reserve Bank must act with due regard to the need;

- for maintaining and protecting financial stability;
- managing and mitigating the crisis with the lowest possible public cost, the minimum disruption to the financial system and the least negative impact on the economy;
- ensuring continuity in the provision of financial services by systemically important financial institutions; and
- protecting, as appropriate, the various interests of depositors, policyholders, investors and other financial customers affected by the crisis.¹⁸⁸

¹⁸² Clause 64 (1) of the Financial Sector Regulation Bill.

¹⁸³ Clause 64 (a) of the Financial Sector Regulation Bill.

¹⁸⁴ Clause 64 (b) of the Financial Sector Regulation Bill.

¹⁸⁵ Clause 64 (c) of the Financial Sector Regulation Bill.

¹⁸⁶ Clause 64 (2) of the Financial Sector Regulation Bill.

¹⁸⁷ Clause 65(1) of the Financial Sector Regulation Bill.

¹⁸⁸ Clause 65 (2) and S 65 (2) (a), (b), (c) and (d) of the Financial Sector Regulation Bill.

The Governor may, for the purposes of facilitating flexible, efficient and expedient coordination and execution of the crisis management responsibilities and powers of the various authorities provided for in Part 2, establish a crisis management committee.¹⁸⁹

7.8 Powers of direction for Reserve Bank.

Clause 66 (1) of the Bill provides that in the event of a determination in terms of section 63 that a particular risk, weakness or disruption detected in the financial system constitutes an actual or potential financial crisis, the Reserve Bank may, subject to clause 64, take direct responsibility for¹⁹⁰ the operation of the resolution powers;¹⁹¹ and the use of regulatory action by the regulatory authorities for preventative or remedial purposes.¹⁹²

Clause 66 (2) provides that in order to give effect to clause 65 (1), the Governor may direct a regulatory authority to¹⁹³ exercise a resolution power;¹⁹⁴ or exercise any other power granted to it in terms of this bill or a regulatory law,¹⁹⁵ if such action is needed to;

(a) support the use of a resolution power;¹⁹⁶

(b) prevent the spread of risk, weakness or disruption through the financial system;¹⁹⁷ or

(c) increase the resilience of a financial institution to risk, weakness or disruption.¹⁹⁸

A direction by the Governor in terms of clause 65 (2) may require a regulatory authority, consistent with its powers, to¹⁹⁹

- take specific action.²⁰⁰
- take action in a specific manner;²⁰¹
- desist from taking specific action;²⁰² or
- exercise any other function arising from a regulatory law.²⁰³

In exercising powers under this section, the Governor must consider whether an action is likely to have an actual or potential impact on public finances as contemplated in clause 65 of the Bill.²⁰⁴ If the Governor believes that an action or inaction may have an actual or potential impact on the

¹⁸⁹ Clause 65 (3) of the Financial Sector Regulation Bill.

¹⁹⁰ Clause 66 (1) of the Financial Sector Regulation Bill.

¹⁹¹ Clause 66 (1) (a) of the Financial Sector Regulation Bill.

¹⁹² Clause 66 (1) (b) of the Financial Sector Regulation Bill.

¹⁹³ Clause 66 (2) of the Financial Sector Regulation Bill.

¹⁹⁴ Clause 66 (2) (a) of the Financial Sector Regulation Bill.

¹⁹⁵ Clause 66 (2) (b) of the Financial Sector Regulation Bill.

¹⁹⁶ Clause 66 (2) (b) (i) of the Financial Sector Regulation Bill.

¹⁹⁷ Clause 66 (2) (b) (ii) of the Financial Sector Regulation Bill.

¹⁹⁸ Clause 66 (2) (b) (iii) of the Financial Sector Regulation Bill.

¹⁹⁹ Clause 66 (3) of the Financial Sector Regulation Bill.

²⁰⁰ Clause 66 (3) (a) of the Financial Sector Regulation Bill.

²⁰¹ Clause 66 (3) (b) of the Financial Sector Regulation Bill.

²⁰² Clause 66 (3) (c) of the Financial Sector Regulation Bill.

²⁰³ Clause 66 (3) (d) of the Financial Sector Regulation Bill.

²⁰⁴ Clause 66 (4) of the Financial Sector Regulation Bill.

public finances, the Governor must immediately notify the Minister;²⁰⁵ present the Minister with the facts of the case, and the options under consideration;²⁰⁶ advise the Minister on an appropriate course of action;²⁰⁷ and implement whatever course of action the Minister decides upon.²⁰⁸

7.9 Crisis management responsibilities of the regulatory authorities ²⁰⁹

Clause 67 of the Bill deals with crisis management responsibilities of the regulatory authorities and provides that in the event of a determination under clause 63 that a particular risk, weakness or disruption detected in the financial system constitutes an actual or potential financial crisis, a regulatory authority must promptly comply with any direction made by the Governor in terms of clause 66(2) of the bill.²¹⁰ Such regulatory authority must continue to exercise its functions, independently and consistent with the law, in respect of all other matters,²¹¹ and in doing so

- provide the Governor with any information which it considers may be relevant to the ongoing actual or potential financial crisis, including any actual or potential impact on public finances;²¹² and
- consult the Governor before taking any course of regulatory action which it considers may be relevant to the ongoing actual or potential financial crisis, including any actual or potential impact on public finances.²¹³

7.10 Emergency regulations

Clause 68 (1) deals with emergency regulations and provides that the Minister may by notice in the Government Gazette, make any regulations necessary for managing and mitigating an impending or actual financial crisis, including regulations.²¹⁴ He or she may make regulations prohibiting, suspending, regulating or making compulsory for purposes of resolving the crisis a specific practice, procedure or activity in the financial system or in relation to a specific financial institution or

²⁰⁵ Clause 66 (5) (a) of the Financial Sector Regulation Bill.

²⁰⁶ Clause 66 (5) (b) of the Financial Sector Regulation Bill.

²⁰⁷ Clause 66 (5) (c) of the Financial Sector Regulation Bill.

²⁰⁸ Clause 66 (5) (d) of the Financial Sector Regulation Bill.

²⁰⁹ Clause 1 of the Bill define “regulatory authority or authorities” as (a) the Market Conduct Authority; or (b) the Prudential Authority;

²¹⁰ Clause 67 (1) (a) of the Financial Sector Regulation Bill.

²¹¹ Clause 67 (2) of the Financial Sector Regulation Bill.

²¹² Clause 67 (2) (i) of the Financial Sector Regulation Bill.

²¹³ Clause 67 (2) (ii) of the Financial Sector Regulation Bill.

²¹⁴ Clause 68 (2) provides that a regulation that suspends, modifies, qualifies or applies an Act of Parliament as contemplated in sub-clause (1)(c) or (d), may be made only if; clause 68 (2) (a) provides that the Minister has consulted the Cabinet member responsible for the relevant legislation; and; clause 68 (2) (b) provides that such suspension, modification, qualification or application is urgently needed for purposes of resolving the crisis and any delay that might be caused by the parliamentary process in passing the requisite legislation is likely to defeat the object for which such suspension, modification, qualification or application is needed; whilst clause 68 (3) provides that the Minister must within 30 days of publication of any regulations in terms of sub-clause (1), submit a copy of the regulations together with a report on the expediency, effect and implication of the regulations to the National Assembly.

category of financial institutions;²¹⁵ and regulations regulating the use of any powers relevant to the management and mitigation of the crisis.²¹⁶ He or she may make regulations suspending, modifying or qualifying the application for purposes of resolving the crisis of any legislation specified in the regulations, for a period and on conditions so specified, to

- a specific financial institution or category of financial institutions;²¹⁷ or
- a specific person or category of persons that is subject to any regulatory law.²¹⁸

The Minister may further make regulations that provides for purposes of resolving the crisis for the application of any legislation specified in the regulations, for a period and on conditions so specified, to such institution, category of institutions, person or category of persons;²¹⁹ regulations that provides for issues that urgently need to be addressed for purposes of resolving the crisis that are currently not clearly or appropriately dealt with in terms of a regulatory law;²²⁰ and regulations providing for criminal sanctions for any contravention or failure to comply with a regulation.²²¹

Regulations made in terms of clause 68 (2) may be amended by the Minister in accordance with the said clause 68 (2);²²² and lapse after one year from the date of their publication, unless ratified by an Act of Parliament;²²³ or a longer period specified by the Minister.²²⁴

8. The difference between the current curatorship regime and the proposed management and mitigation of financial crisis order.

Proposed provisions embodied in the Financial Regulations Bill (“Bill”) differ in many significant aspect from the current regime of curatorship as contained in section 69 and 69A of the Banks Act. Whilst both respective regimes aim to achieve financial stability in specific financial markets, they differ in methodologies to be applied in achieving financial stability in given financial markets. In fact the proposed management and mitigation of financial crisis of the Bill aims to substitute the curatorship regime in its entirety.

Curatorship as contained in sections 69 and 69A of the Banks Act focuses largely on aiding financial institutions that are on the brink of collapse whilst proposed clause 62 to 68 of the Bill employs the technique of prevention is better than cure approach, as it provides for early detection, management and mitigation of financial crisis.

Curatorship under the Banks Act put the curatorship of a bank in the hands of the curator appointed by the Registrar in consultation with the Minister of Finance, however the Bill has to a large extend

²¹⁵ Clause 68 (1) (a) of the Financial Sector Regulation Bill.

²¹⁶ Clause 68 (1) (b) of the Financial Sector Regulation Bill.

²¹⁷ Clause 68 (1) (c) (i) of the Financial Sector Regulation Bill.

²¹⁸ Clause 68 (1) (c) (ii) of the Financial Sector Regulation Bill

²¹⁹ Clause 68 (1) (d) of the Financial Sector Regulation Bill

²²⁰ Clause 68 (1) (e) of the Financial Sector Regulation Bill

²²¹ Clause 68 (1) (f) of the Financial Sector Regulation Bill

²²² Clause 68 (4) (a) of the Financial Regulations Bill.

²²³ Clause 68 (4) (b) (i) of the Financial Regulations Bill.

²²⁴ Clause 68 (4) (b) (ii) of the Financial Regulations Bill and clause 68 (5) which provides that while regulations remain in force in terms of sub-clause (4) (b) (ii), the Minister must submit a report annually to the National Assembly on the status of the regulations.

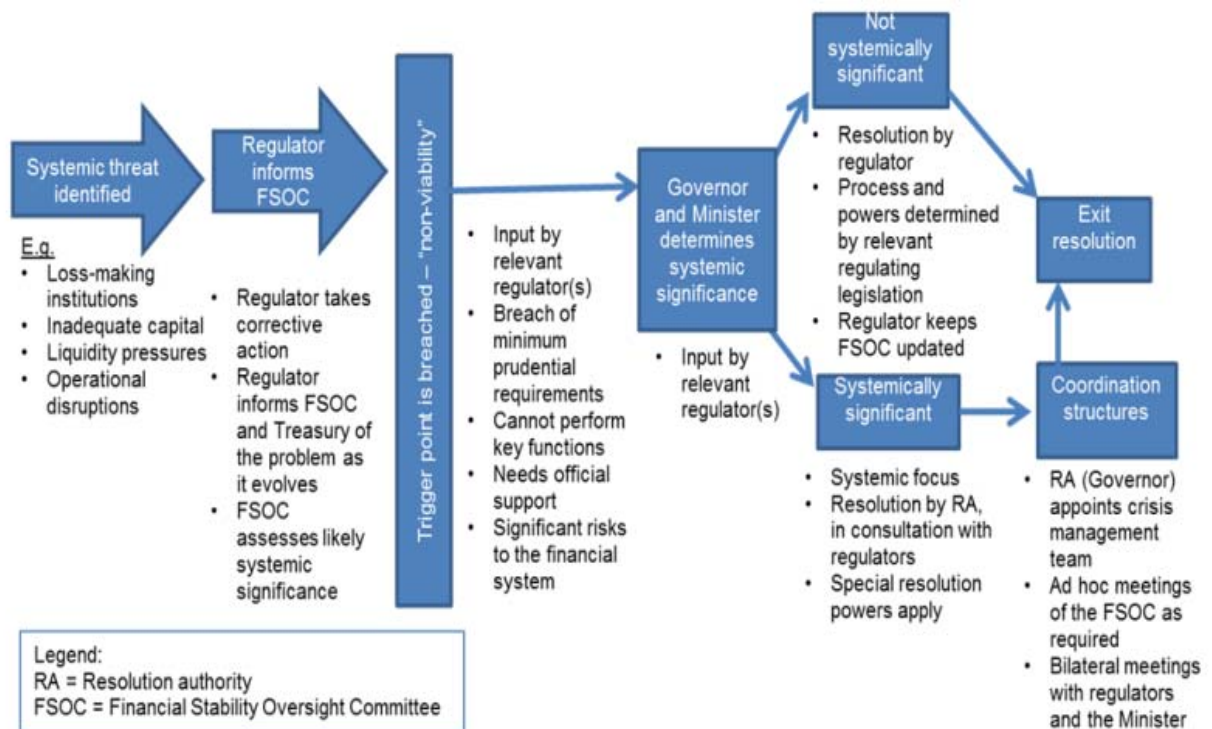
decentralised and spread the resolution of financial crisis across a spectrum of financial resolution role-players and creates the resolution authority with defined objectives and goals.

Under the current curatorship regime the taxpayer is to a greater extent the ultimate funder aiding troubled financial institutions, whilst the Bill's core goal is to move away from this position by seeking to resolve disruptions in the financial system at a minimal public cost while containing the negative effects on the real economy. The Bill also provides further that in instances where the taxpayer's money is likely to be used, the Governor of Banks must inform the Minister so that the latter becomes part of the resolution process. While curatorship under the Banks Act provides the Registrar with the powers to appoint a commissioner for the purposes of investigating the affairs of the banks as per section 69A of the Banks Act, crisis management and resolution under the Bill provides for a detailed procedure for resolution path to be adopted in aiding the troubled financial institution, the so-called resolution framework for systemic and non-systemic institutions.

The powers to assist the troubled financial institutions under curatorship in terms of the Banks Act lies with individuals, irrespective of their reporting lines, whilst under crisis management and resolution such powers lies with the resolution authority consisting of a number of individuals. The Bill also creates emergency regulations under the provision of section 68, which is something that section 69 of the Banks Act does not make provision for.

The diagram below represents the graphic resolution path to be adopted by resolution authorities as per provisions of the Bill:²²⁵

²²⁵Implementing a Twin Peaks model of Financial Regulation in South Africa as published for comments by the Financial Regulatory Reform Steering Committee (1 February 2013) at P61 and available on <https://www.fsb.co.za/Departments/twinpeaks/Documents/Twin%20Peaks%2001%20Feb%202013%20Final.pdf> and as accessed on the 11-07-2015.



Another noticeable difference from the curatorship regime in section 69 and crisis management under the Bill is that whilst Section 69 of the Banks Act puts a bar on legal proceedings against bank under curatorship, the Bill is silent on what will be the legal position of the institution under financial crisis. The rationale behind the exclusion of this legal proceedings bar may be that the legislature has had as its objective, early detection and management of financial crisis when drafting the Bill, which in turn means that the financial institution in crisis will still continue to conduct business in the ordinary course of business, which business will include the ability to sue or to be sued.

Although some of the differences between both section 69 and 69A of the Banks Act and management and mitigation of financial risks as contained in clauses 62 to 68 of the Bill has been pointed out above, the end result is that the provisions of clauses 62 to 68 of Bill are not intended to supplement the provisions of section 69 and 69A of the Banks Act, but to replace the latter in its entirety.

9. Final remarks

It has almost been over three years since the adoption of *“The Key Attributes of Effective Resolution Regime for Financial Institutions”* (“Key Attributes”) by G20 member states. This key attributes were released by Financial Stability Board (FSB)²²⁶ in October 2011, with its purpose to set out the core elements that the FSB considers to be necessary for an effective resolution regime. South Africa along with other 19 states is a member state of G20. By the time of the adoption of Key Attributes, the South African Minister of Finance had earlier on, around February 2011 proposed in his budget speech the need for South Africa to adopt the Twin Peaks model of Financial Resolution. In a way the

²²⁶ Financial Stability Board is an international body that monitors and makes recommendations about the global financial system, definition available on www.financialstabilityboard.org as accessed on 08/07/2015.

South African parliament was technically speaking sensing this policy shift in the way developed as well as developing economies intends to do business in the financial markets in the near future.

Two years after the adoption of the Key Attributes by G20 and in particular on the 11th December 2013, the South African National Treasury issued a Media statement wherein it invited the South African public to participate in the commentary process on the draft Bill.²²⁷

The enactment of the Bill into law will effectively mean that South Africa has transposed the Key Attributes into South African national law. In particular sections 62 to 68 of the draft Bill has been modelled on the Key Attributes of Effective Resolution Regimes for Financial Institutions proposed and released by the FSB and adopted by G20. It is expected that once the Bill will have completed its protracted legislative journey, it will come into effect in or around April 2016.

The enactment of the Bill into law will also ensure that South African financial sector institutions are on par with countries like Netherlands and Australia of whom it is recorded that they weathered the 2008 financial storm fairly well.²²⁸ Whilst it is appreciated that both systems main aim is to achieve one goal, which is financial stability in a given financial market, it appears that the proposed system provide for improved mitigation of financial crisis. At the end the proposed section 62 to 68 of the Bill has as it central objective management and mitigation of financial crisis and not to prevention thereof. The Financial Regulatory Reform Steering Committee has observed this aspect when it wrote that a resolution regime is not intended to prevent the failure of financial institutions, nor does it imply that the financial institutions will necessarily be supported or bailed out.²²⁹

10. Conclusion

It is submitted that the proposed reforms of resolution of financial crisis should be supported and be embraced, not only because that is the direction that developed and developing economies are taking, but because it puts resolution at the core of financial crisis. Its realisation that the financial markets are interconnected and that there is a need to resolve the problem of financially distressed financial institutions without severe systemic disruption or exposing taxpayers to loss whilst protecting vital economic functions should be welcomed with both hands. Because the Bill is not yet enacted into law, it will remain to be seen what impact it will have on South African financial markets once passed into law. Whatever the benefits or shortcomings of the Bill once passed into law, either in its current form or in a revised form, the South African regulators, policy makers and lawmakers should work together with their global counterparts to improve and strengthen the regulation of financial markets for the benefit of their domestic and global economies.

²²⁷ Media Statement: TWIN PEAKS available on www.treasury.gov.za/comm_media/press/2014 and as accessed on the 10/07/2015.

²²⁸ Article on how Australia weathered the financial storm while Europe failed available on <http://www.theguardian.com/commentisfree/2013/aug/28/australia-global-economic-crisis> and as accessed on the 08/07/2015.

²²⁹ *Supra* 252 ff.

CHAPTER 3

Curatorship of Banks in Botswana

1. Introduction

Like other banking industries in other jurisdictions the Botswana Banking Industry is also an important sector of Botswana's national economy. It has been stated that the Botswana banking sector plays a very important role in the Botswana Stock Exchange (BSE), where it dominates market capitalisation and has been a driving force in the growth of the BSE.²³⁰ It is against this background that in 1995 Botswana lawmakers passed an important piece of legislation that regulates the banking industry in that country. The Botswana Banking Act²³¹ was assented on the 22nd day of June 1995 and came into operation on the 6th day of November 1995. According to the preamble of the Act, the aim of the Act is to provide for the licensing, control and regulation of banks, and for matters incidental thereto.²³² The discussion hereinafter shall focus on curatorship of Banks under the Banking Act of Botswana.

The curatorship of Banks in Botswana is provided for under section 33 of Banking Act,²³³ and unlike in South Africa where such process is called curatorship, in Botswana is called "temporary management". As such for the purposes of this chapter reference will be made to temporary management rather than curatorship.

2. A brief description of Botswana Banking Industry.

A brief overview of the Banking industry in Botswana is necessary before we can proceed to deal with the whole concept of temporary management as it exists in the Botswana banking Industry.

Botswana's banking sector has grown and changed considerably over the period since 1990.²³⁴ Historically, the sector was relatively small, and dominated by Barclays and Standard Chartered banks.²³⁵ Both of these banks' operations in Botswana date back to the 1950s, and were originally run as branches of the groups' South African subsidiaries.²³⁶ In the 1970s they were both incorporated in Botswana as independent operations within the overall international structures of Barclays and Standard Chartered banks, in line with the requirements of the Financial Institutions Act, and came under the supervisory purview of the Bank of Botswana (BoB), which was established in 1975.²³⁷

²³⁰ Keith Jefferis *Overview of the Botswana Banking Sector, Technical report*, (July 2009), Gaborone, Botswana at p3.

²³¹ The Banking Act 13 of 1995.

²³² Preamble to Botswana Banking Act 13 of 1995.

²³³ The Banking Act 13 of 1995.

²³⁴ An Analysis by Keith Jefferis and Abo Tacheba *Botswana Financial Sector Overview*, (2009/2010) available on <http://www.econsult.co.bw/tempex/BOTSWANA%20FINANCIAL%20SECTOR%20OVERVIEW.pdf> as accessed on the 28/07/2015.

²³⁵ *Ibid.*

²³⁶ *Ibid.*

²³⁷ *Ibid.*

The two banks co-existed as a comfortable duopoly, with limited competition between them.²³⁸ The situation changed somewhat in 1982, when the Bank of Credit and Commerce Botswana (BCCB) was established; however, this bank remained relatively small, and did not fundamentally challenge the dominance of the two major existing banks.²³⁹

The other financial institutions existing during this time were largely government-owned.²⁴⁰ These included:²⁴¹

- the Botswana Savings Bank (originally the Post Office Savings Bank, this was established in 1911 as a branch of the South African Post Office Savings Bank, and has the longest continuous existence of any financial institution in Botswana);
- the National Development Bank (NDB), (established in 1964, initially with a focus on lending to agriculture);
- the Botswana Development Corporation (BDC), (established in 1970, to invest in commercial and industrial projects through the provision of loans and equity finance);
- the Financial Services Company (FSC), (established as a subsidiary of BDC and NDB, mostly offering property loans);
- the Botswana Building Society (BBS), (originally established as a branch of the South African United Building Society in 1970, and locally incorporated in 1977, with majority government shareholding).

Unlike many other countries, there has never been a government-owned commercial bank in Botswana. However, the government has been an extensive provider of finance in the economy, through the above institutions and also through the Public Debt Service Fund (PDSF), which lent directly from government funds to state-owned (parastatal) enterprises, and for many years the PDSF was the largest lending entity in Botswana.²⁴² During the 1980s, Botswana boasted a banking sector that was sound and reasonably well-run in narrow banking terms but which was unadventurous and not actively developing financial intermediation in the economy.²⁴³

With the exception of Kingdom Bank Africa Ltd (KBAL) which exited Botswana financial markets in 2015, the present structure of the Botswana Banking Sector is as follows:²⁴⁴

- ABN AMRO Bank.
- African Banking Corporation of Botswana Limited (trading as 'BancABC').
- Bank Gaborone Limited.
- Bank of Baroda (Botswana) Limited.

²³⁸ *Ibid.*

²³⁹ *Ibid.*

²⁴⁰ *Ibid.*

²⁴¹ *Ibid.*

²⁴² Keith Jefferis *Overview of the Botswana Banking Sector*, Technical report, (July 2009), Gaborone, Botswana at p5.

²⁴³ *Ibid.*

²⁴⁴ Banks currently licensed to conduct banking business in Botswana available on <http://www.bankofbotswana.bw/index.php/content/2009103015021-banks> as accessed on the 19/08/2015.

- Bank of India (Botswana) Limited.
- Barclays Bank of Botswana Limited.
- Capital Bank Limited.
- First National Bank of Botswana Limited.
- Kingdom Bank Africa Limited.
- Stanbic Bank of Botswana Limited.
- Standard and Chartered Bank of Botswana Limited.
- State Bank of India (Botswana) Limited.

All the above institutions are largely regulated and supervised by the Bank of Botswana (BoB) as central bank.

3. Past Banking crisis in Botswana

Botswana has never had a full blown banking crisis, and where banks have faced problems these have been dealt with without threatening the integrity of the banking system.²⁴⁵

Past banking problems have included:

- the BCCI crisis (1991): when the Bank of Credit and Commerce International was closed by the Bank of England, its Botswana subsidiary (Bank of Credit and Commerce Botswana) was taken over temporarily by the BoB, and was eventually sold as a going concern to the newly-licensed First National Bank of Botswana;²⁴⁶
- Zimbank Botswana (1993): this subsidiary of a Zimbabwean bank was unprofitable, with an eroding capital base, and the BoB co-ordinated a takeover by FNB in order to pre-empt the collapse of the bank.²⁴⁷
- Botswana Co-operative Bank (1995): originally established to serve the co-operative sector of the economy, it obtained a commercial banking licence but never operated profitably and was eventually closed by the BoB;²⁴⁸
- Kingdom Bank Africa Limited (2005): the offshore bank's capital base was eroded due to unprofitable operations, and the bank was taken under temporary BoB management while it was restructured and recapitalised. This was achieved successfully, and the bank was returned to its management and owners within three months.²⁴⁹

4. Botswana current position in implementation of Basel II, 2, 5 and Basel III Core Principles for Effective Bank Supervision

²⁴⁵ Keith Jefferis *Overview of the Botswana Banking Sector, Technical report*, (July 2009), Gaborone, Botswana at p10-11.

²⁴⁶ *Ibid.*

²⁴⁷ *Ibid.*

²⁴⁸ *Ibid.*

²⁴⁹ *Ibid.*

Although Botswana is not a member of G20, it has however been implementing Basel I rules regarding capital requirements.²⁵⁰ And while on the other hand Botswana is not obligated to comply with Basel II, the fact that most of Botswana's banks are subsidiaries of major regional or international banking groups has an effect on the implementation of Basel II in Botswana financial markets as those banks implements Basel II in their home countries.²⁵¹ In 2014 the study by the Financial Stability Institute (FSI) also found that Bank of Botswana adopted a gradual approach to Basel II/III implementation commencing with a parallel-run of Basel I and Basel II simple approaches in 2014, culminating in the adoption of the advanced approaches by qualifying banks in 2017.²⁵² Full implementation of simple approaches will occur in 2015.²⁵³ The central bank has adopted the capital definition under Basel III; however, capital buffers and leverage ratios have been deferred to a later stage.²⁵⁴ The central bank has also drafted liquidity guidelines based on the new liquidity standards and the draft has been sent to the market for comment and will be finalised by the end of 2014.²⁵⁵ The aforementioned has created a norm in that Botswana will and is open to adopt Basel II and III in its banking policy and legislation and by extension it will follow that Botswana will be readily amenable to also adopt the Key Attributes of Effective Resolution Regime for Financial Institutions as adopted by G20 member states and in particular the management and mitigation of financial crisis regime as proposed by South African Financial Sector Regulation Bill.²⁵⁶ Botswana like any other country has come to realise that its domestic financial institutions are part of a large international group that should ascribe to best banking practices, hence its readiness to adopt the Basel I, II and III despite being not part of the G20 member states.

5. Bank supervision and crisis management under Botswana Banking Law

When the Central Bank is satisfied, or has reasonable cause to and believe, in respect of any bank that²⁵⁷

- its unimpaired capital does not meet the requirements of section 13 of the Banks Act;²⁵⁸

²⁵⁰ Keith Jefferis *Overview of the Botswana Banking Sector, Technical report*, (July 2009), Gaborone, Botswana at p9.

²⁵¹ *Supra* 261.

²⁵² Financial Stability Institute survey titled "*Basel II, 2, 5 and III Implementation*" in jurisdictions that are members of neither the Basel Committee on Banking Supervision (BCBS) nor the European Union (EU) (July 2014) available on <http://www.bis.org/fsi/fsiop2013.pdf> as accessed on the 15/08/2015.

²⁵³ *Ibid.*

²⁵⁴ *Ibid.*

²⁵⁵ *Ibid.*

²⁵⁶ Clause 3 (a) of the Financial Sector Regulation Bill define the purpose of the bill as to promote a financial system that works in the interests of financial customers, and supports balanced and sustainable economic growth in the Republic, by establishing, in conjunction with the regulatory laws, a supervisory and regulatory framework that promotes amongst others financial stability, the safety and soundness of financial institutions and fair treatment and protection of financial customers.

²⁵⁷ S 33 (1) of the Banking Act 13 of 1995.

²⁵⁸ S 33 (1) (a) of Banking Act 13 of 1995, Section 13 deals with capital requirements and provides amongst others that Every bank shall maintain paid up unimpaired capital at least equal to such percentage of such bank's total assets as may be prescribed for the purpose subsection (2) provides that where a bank fails to maintain its unimpaired capital at the level required in accordance with subsection (1), the Central Bank may impose on and collect from it a levy not. Subsection (3) deals with the definition of capital and provides that capital, in relation to a bank, means the bank owner's equity, and includes- (i) issued and paid-up ordinary shares of the bank; (ii) issued and paid-up non-redeemable, non-cumulative preference shares of the bank; (iii) Such other issued and paid-up preference shares of the bank, or debentures which the Central Bank may

- its business is being conducted in an unlawful or imprudent manner, or
- that it is otherwise in an unsound financial condition;²⁵⁹
- the continuation of its activities is not in the best interest of its depositors;²⁶⁰
- it has refused or refuses to permit an examination;²⁶¹ or
- it has been served with notice of intention to revoke its licence under section 11,²⁶²

it may, after consultation with the Minister, serve on the principal officer of such bank at its registered office, a notice announcing its' intention of temporarily managing the bank with effect from such date and time as may be specified in the notice.²⁶³

Upon the date and time specified in the notice referred to in section 33 (1), full and exclusive powers of management and control of the bank concerned shall vest in the Central Bank, either directly or through a representative duly appointed by the Central Bank.²⁶⁴ Such powers include the power to continue or discontinue the operations of the bank, to stop or limit the payment of its obligations, to employ any necessary officers or employees, to execute any instrument in the name of the bank and to initiate, defend and conduct in its name any action or proceedings to which the bank may be a party.²⁶⁵

The effect of section 33 (3) is that the bank's board of management is divested of the powers to manage and control the bank, and that such powers are vested with BoB and the latter will exercise

approve in accordance with specified conditions; (iv) undivided profits, retained income and other reserves which are disclosed in the bank's annual accounts and which are freely available for the purpose of meeting losses; (v) undivided profits, retained income and other reserves which are freely available for meeting losses but which are not disclosed in the bank's financial statements; (vi) such percentage of reserves of the bank resulting from the revaluation of certain fixed assets as may be prescribed; (vii) general provisions held against unidentified and unforeseen losses which may arise from the bank's assets. Subsection (4) deals with the definition of "unimpaired" in relation to the capital of a bank and provides that "unimpaired" in relation to the capital of a bank means the absence of any legal or technical covenant, term, restriction or encumbrance which would otherwise render such capital not to be freely available for distribution to depositors or other creditors in the event of the liquidation or dissolution of the bank, and the absence of any condition or arrangement which would, in the opinion of the Central Bank, diminish the value of the whole or any portion of the capital of the bank. Subsection (5) provides that the Central Bank shall, from time to time, determine which of the funds identified under subsection (3) shall constitute core capital, and which shall constitute supplementary capital. Subsection (6) provides that the core capital of any bank shall constitute a minimum of fifty percent of the total capital of such bank as determined by the Central Bank. Subsection (7) provides that the unimpaired capital and liabilities of any bank shall be of such kinds, and computed in such manner, as may be determined by the Central Bank. Subsection (8) provides that the Minister may, after consultation with the Central Bank, and upon good cause shown by a bank, exempt such bank from the capital requirements specified by or under this Act for a period not exceeding twelve months, on the basis of a schedule agreed between such bank and the Central Bank specifying the progressive compliance by such bank with the said capital requirements. While subsection (9) provides that the minimum capital required in respect of any bank shall be the greater of such amount as may be prescribed or such percentage of its assets, or groups of assets, and other risk exposures as may, from time to time, be determined by the Central Bank.

²⁵⁹ S 33 (1) (b) of the Banking Act 13 of 1995.

²⁶⁰ S 33 (1) (c) of the Banking Act 13 of 1995.

²⁶¹ S 33 (1) (d) of the Banking Act 13 of 1995.

²⁶² S 33 (1) (e) of the Banking Act 13 of 1995.

²⁶³ A copy of the notice referred to in subsection (1) must be sent to the High Court, and a copy must be posted at each place of business of the bank in Botswana.

²⁶⁴ S 33 (3) of the Banking Act 13 of 1995.

²⁶⁵ S 33 (3) of the Banking Act 13 of 1995.

those powers in the same manner as the board of management would have exercised them. BoB may also delegate those powers to another person or persons to take control and management of the troubled bank.²⁶⁶ Such a person or persons is called temporary manager(s).

As soon as possible after the Central Bank has assumed temporary management of a bank, the Central Bank must prepare an inventory of the assets vested in, belonging to or held by such bank, and must send a copy thereof to the High Court, where it shall be available for examination by interested parties.²⁶⁷

All expenses of and incidental to the temporary management of a bank under section 33 of the Banking Act must be paid by such bank in such manner as the Central Bank may determine.²⁶⁸

Upon the date and time specified in the notice, and subject to any appeal to the High Court, any term, statutory, contractual or otherwise, on the expiry of which a right of action of the bank would cease or be extinguished, will be extended by six months, or until fifteen days after the Central Bank restores the bank to its board of management or its owners, as the case may be, whichever event shall first occur.²⁶⁹

A bank on which notice has been served under this section may, within a period of ten days after the date of such service, appeal to the High Court against being put under temporary management.²⁷⁰ It is further provided that no execution shall be returned against the property of a bank during any period during which it is managed by the Central Bank under the provisions of this section.²⁷¹

6. Duration of Temporary Management

When the Central Bank has served notice on a bank under section 33, it must, within a period of ninety days from the date specified in such notice, or within such longer period as may be permitted by the High Court²⁷² restore the bank to its board of management or owners, as the case may be;²⁷³ or arrange for the sale of the bank;²⁷⁴ or propose a compromise or arrangement between the bank and its creditors, or a reconstruction of such bank, (in accordance with the relevant provisions of the Companies Act);²⁷⁵ or petition the High Court for a winding-up order or a judicial management order in respect of the bank.²⁷⁶

7. The recent Kingdom Bank Africa Limited illiquidity and ultimate closure

In recent times and as early as February 2015, the provisions of the Botswana Banking Act were put in motion, courtesy of Kingdom Bank Africa Limited (hereinafter referred to as KBAL).

²⁶⁶ S 33 (3) of the Banking Act 13 of 1995.

²⁶⁷ S 33 (4) of the Banking Act 13 of 1995.

²⁶⁸ S 33 (5) of the Banking Act 13 of 1995.

²⁶⁹ S 33 (6) of the Banking Act 13 of 1995.

²⁷⁰ S 33 (7) of Banking Act 13 of 1995, and that the ten days period referred to in this section may be extended on sufficient cause being shown to the High Court.

²⁷¹ S 33 (8) of the Banking Act 13 of 1995.

²⁷² S 34 of the Banking Act 13 of 1995.

²⁷³ S 34 (a) of the Banking Act 13 of 1995.

²⁷⁴ S 34 (b) of the Banking Act 13 of 1995.

²⁷⁵ S 34 (c) of the Banking Act 13 of 1995.

²⁷⁶ S 34 (d) of the Banking Act 13 of 1995.

KBAL was licensed in 2003 to conduct offshore investment in Botswana; it also provided superlative trade and treasury services.²⁷⁷ Its parent company is based in Zimbabwe, Afrasia Holdings Zimbabwe Limited.²⁷⁸ Following KBAL's failure to meet some of the Bank of Botswana requirements, it was taken over and placed under temporary management by BoB.²⁷⁹ BoB through its Head of communication, Mr Andrew Sesinyi, announced through public notice that BoB had assumed temporary management of KBAL, in accordance with the provisions of section 33 of the Banking Act.²⁸⁰

The placing of KBAL under temporary management was owing to the fact that it was in unsound financial condition and that its board and management had failed to conduct the business in a prudent, safe and sustainable manner.²⁸¹ The consequence of the aforementioned was that BoB was satisfied that KBAL was unable to meet in particular the requirements of section 33 (1), (a), (b) and (c) of the Banking Act, prompting BoB to issue notice of temporary management in terms of the provisions of section 33 of Banking Act.²⁸²

Following this notice BoB announced that its suspended withdrawals from deposit accounts held by the KBAL and that it had prepared an inventory of assets vested in, belonging to or held by KBAL.²⁸³ It is also apparent that BoB's preparation of such an inventory was sanctioned by section 33 (4) of the Banking Act.²⁸⁴

The effect of these actions by BoB was that depositors could not transact upon their accounts while the temporary management process was underway.²⁸⁵ During the period of temporary management the operations of KBAL was to be restricted to KBAL only receiving repayments of loans and advances made by customers and that KBAL would not extend any new loans.²⁸⁶ BoB also explained in its statement that the temporary management process would not have any financial impact on domestic banking industry as KBAL had no depositors in Botswana.²⁸⁷

Subsequent to this BoB issued a second public notice wherein it updated members of the public that it had prepared an inventory of the assets vested in, belonging or held by KBAL.²⁸⁸ The second notice

²⁷⁷ Article by Kabo Mokgoabone titled BoB Takes Over Management Of Troubled Bank as appeared on Business Week online publication of 27-06-2005 available on <http://allafrica.com/stories/200506270878.html> and as accessed on the 22/07/2015

²⁷⁸ Article by Sunday Standard online publication newspaper titled Kingdom Bank illiquid and insolvent written by Godfrey Ganetsang (29-03-2015) available on <http://www.sundaystandard.info/%E2%80%98kingdom-bank-illiquid-and-insolvent%E2%80%99-bob> as accessed on the 22/07/2015.

²⁷⁹ *Ibid.*

²⁸⁰ Public Notice in the temporary management of Kingdom Bank Africa Limited by Mr Andrew Sesenyi, dated the 16th February 2015 and available on <http://www.bankofbotswana.bw/assets/uploaded/approved-press-release-kingdom-bank-africa-limited-kbal-pdf.pdf> as accessed on the 02/07/2015.

²⁸¹ *Supra* 302.

²⁸² Banking Act 13 of 1995.

²⁸³ *Supra* 304.

²⁸⁴ *Supra* 302 ff.

²⁸⁵ *Supra* 304 ff.

²⁸⁶ *Ibid.*

²⁸⁷ *Ibid.*

²⁸⁸ Public Notice in the temporary management of Kingdom Bank Africa Limited under and in terms of section 33 of the Banking Act by Mr Andrew Sesinyi, dated the 10th March 2015 and available on <http://www.bankofbotswana.bw/assets/uploaded/Public%20Notice%20-%20KBAL%20100315.pdf> as accessed on the 22/07/2015.

also advised members of the public that the aforesaid inventory had been completed and copy thereof was available for inspection, in terms of section 33 (4) of the Act, at the High Court, Botswana.²⁸⁹

Following the temporary management of KBAL and on 12 May 2015 BoB finally decided that KBAL could not be saved and approached the High Court in terms of the provisions of section 34 (d) of the Banking Act for final winding up of KBAL.²⁹⁰ BoB advised members of the public that the period of temporary management of KBAL came to an end on May 18, 2015 and that BoB was determined, in accordance with section 34 (d) of the Banking Act, to petition the High Court for a winding-up order on the grounds that KBAL was insolvent and that its liabilities exceeded its assets by approximately USD17 million.²⁹¹ BoB announced further that KBAL had been closed down and that during the temporary management period, the temporary managers found that the assets base of the bank had been severely eroded due to a number of factors which gave rise to liquidity problems and ultimately insolvency.²⁹² The High Court granted a final winding-up order as requested and appointed Mr Max Marinelli and Chris Bray, both Chartered Accountants of Gaborone, to act as joint liquidators.²⁹³

The effect of the aforementioned was that unlike in 2005 where BoB successfully rescued KBAL and returned it to its owners within three months of being placed under temporary management in line with section 34 (a) of the Banking Act, this time around KBAL could not be saved.

8. Similarities and disparities of curatorship under both South African curatorship regime and Botswana temporary management regime.

As a point of departure it is noteworthy to recognise that both South Africa and Botswana have adopted the institutional approach of financial markets regulations, although South Africa is in the process of adopting the Twin Peaks model of financial regulation. The Institutional approach entails that a firm's status determines how it operates and who regulates it (i.e registered banks are regulated by a banking regulator, whereas registered insurers are regulated by an insurance regulator), whilst the Twin Peaks model of financial regulation entails that there is a separation of regulatory functions, so that one regulator provides the prudential oversight, whilst the another provides market conduct oversight over the whole range of financial institutions active in its financial market.²⁹⁴

8.1 The table below represents the extent of similarities and disparities that exists under both legal systems.

²⁸⁹ *Ibid.*

²⁹⁰ Public Notice in the Temporary Management of Kingdom Bank Africa Limited under and in terms of section 33 of the Banking Act and consequent winding-up order by Mr Andrew Sesinyi, dated the 19th May 2015 and available on <http://www.bankofbotswana.bw/assets/uploaded/kbal-public-notice-pdf.pdf> as accessed on the 22/07/2015.

²⁹¹ *Ibid.*

²⁹² *Ibid.*

²⁹³ *Ibid.*

²⁹⁴ KPMG study titled Africa Banking Survey' available on <https://www.kpmg.com/Africa/en/IssuesAndInsights/Articles-Publications/Documents/Africa%20Banking%20Survey.pdf> and as accessed on 25/07/2015.

South African
Botswana

1. Process name ➤ Curatorship	➤ Temporary Management
2. Name of Administrator in charge of the Process ➤ Curator	➤ Temporary Manager
3. Who made a determination as to whether a particular bank may be unable to repay deposits made with it? ➤ Registrar	➤ Central Bank
4. What then becomes the position? ➤ She/he informs the Minister of Finance, and if the Minister deems it desirable in the public interest, he/she will notify the chief executive officer or the chairperson of the board of directors of that bank in writing, and thereafter appoint a curator to that bank. ²⁹⁵	➤ The Central Bank will after consultation with the Minister, serve on the principal officer of such bank at its registered office, a notice announcing its' intention of temporarily managing the bank with effect from such date and time as may be specified in the notice. ²⁹⁶
5. What is the legal position of a troubled bank during period of curatorship or temporary management? ➤ All actions, legal proceedings, the execution of all writs, summonses and other legal process against the troubled bank are stayed while curatorship is underway. ➤ Leave of the court will be required in order to proceed with legal proceedings against the bank under curatorship. ²⁹⁷	➤ All actions, legal proceedings, the execution of all writs, summonses and other legal process against the troubled bank are stayed while temporary management is underway. ➤ There is an absolute prohibition on legal proceedings against a bank under temporary management. ²⁹⁸
6. Additional appointment of officer (s) whilst the bank is under curatorship. ➤ Commissioner is appointed for the purpose of investigating the business, trade, dealings, affairs	➤ There is no such corresponding provision under Botswana Banking Act.

²⁹⁵ S 69 (1) (a) of the Banks Act 94 of 1990.

²⁹⁶ S 33 of the Banking Act.

²⁹⁷ S 69 (6) (a) of the Banks Act 94 of 1990.

²⁹⁸ S 33 (3) of the Banking Act read with S 33 (8) of the same Act.

<p>or assets and liabilities of that bank or of its associate or associates.</p> <ul style="list-style-type: none"> ➤ such appointment is made by the Registrar.²⁹⁹ 	
<p>7. Statutory duration under which a troubled bank may be placed under curatorship.</p> <ul style="list-style-type: none"> ➤ Six (6) months³⁰⁰ 	<ul style="list-style-type: none"> ➤ Ninety (90) days or such longer period as may be permitted by the High Court.³⁰¹
<p>8. What then becomes the position after the lapse of statutory time-period under which the troubled bank was placed under curatorship?</p> <ul style="list-style-type: none"> ➤ The Minister may issue a written notification to the curator that curatorship has come to an end,³⁰² ➤ The Registrar may apply to the competent court for a winding-up or judicial management of the bank in terms of the provisions of section 68.³⁰³ ➤ A troubled bank registration as a bank may be suspended, cancelled or terminated.³⁰⁴ 	<ul style="list-style-type: none"> ➤ The bank may be restored back to its board of management or owners,³⁰⁵ ➤ arrange for sale of the bank,³⁰⁶ ➤ propose a compromise or arrangement between the bank and its creditors; or a reconstruction of such bank, in accordance with the relevant provisions of the Companies Act and³⁰⁷ ➤ Petition the High Court for a winding-up order or a judicial management order in respect of the bank as the case maybe.³⁰⁸

While both jurisdictions share a common goal in their parallel processes it is submitted that the South African curatorship provides for a more detailed procedure and mechanism on aiding failing banks. This is evident in the inclusion of section 69A within the South African Banking Act, wherein a Commissioner is appointed to investigate the business affairs of the troubled bank. According to my understanding although the investigation is about the troubled bank, the outcome of such an investigation may be used as a case study either for policy review in order to minimise future bank

²⁹⁹ S 69A (1) of the Banks Act 94 of 1990.

³⁰⁰ S 69A (11) of the Banks Act 94 of 1990.

³⁰¹ S 34 of the Banking Act 13 of 1995.

³⁰² S 69 (10) (a) of the Banks Act 94 of 1990.

³⁰³ S 69 (10) (b) of the Banks Act 94 of 1990.

³⁰⁴ S 69A (16) of the Banks Act 94 of 1990.

³⁰⁵ S 34 (a) of the Banking Act 13 of 1995.

³⁰⁶ S 34 (b) of the Banking Act 13 of 1995.

³⁰⁷ S 34 (c) of the Banking Act 13 of 1995.

³⁰⁸ S 34 (d) of the Banking Act 13 of 1995.

failures or an educational tool for those that are involved in financial markets in order to improve their corporate governance structures.

9. Conclusions and recommendations

As mentioned before Botswana like South Africa follows an institutional approach of financial markets regulations. Banks in Botswana are regulated by BoB in terms of the Banking Act and the associated Banking regulations.³⁰⁹ BoB issues banking licences and undertakes prudential supervision.³¹⁰ It is recorded that the “credit crunch” and subsequent global financial and economic crisis, the last of which was in 2008 did not had severe impact on the Botswana banking system.³¹¹ It was stated that there were a number of reasons for this, and such reasons included the structure of the bank’s balance sheets, bank profitability and the level of regularity oversight.³¹² BoB was also said to have maintained an effective risk based regulatory and supervisory system that has prevented the bank from taking on excessive risk and that the general level of capital requirements in relation to risk-weighted assets has been in excess of the internationally agreed minimum.³¹³ The reality again is that because of developments in international banking business such as technological developments and product and service innovation which come with benefits which are equally associated with risks, Botswana will not want to be left behind. The issue is therefore not about whether Botswana is a member of G20 or not, but about the financial stability in its financial markets. It against this background that when Botswana finally decides to adopt Basel II and III (if indeed it will adopt same) in its financial markets it should review and strengthen its temporary management regime so as for it to be more comprehensive than it is now. It is submitted that because of the interconnectedness of banks globally, Botswana should consider adopting the Key Attributes of Effective Resolution Regime for Financial Institutions in its financial markets in order to strengthen its temporary management regime in particular and financial sector stability and growth in general.

³⁰⁹ Keith Jefferis Overview of the *Botswana Banking Sector, Technical report*, (July 2009), Gaborone, Botswana at p10.

³¹⁰ Preamble to Banking Act 13 of 1995.

³¹¹ An Analysis by Keith Jefferis and Abo Tacheba *Botswana Financial Sector Overview*, (2009/2010) available on <http://www.econsult.co.bw/tempex/BOTSWANA%20FINANCIAL%20SECTOR%20OVERVIEW.pdf> as accessed on the 28/07/2015.

³¹² *Ibid.*

³¹³ *Ibid.*

CHAPTER 4

Summary of findings, conclusions and recommendations

1. Introduction

The study set out to investigate the concept of curatorship of banks in South Africa in terms of the Banks Act³¹⁴ and also to determine what influence, if any, of the proposed Twin Peaks Model of Regulation will have on it. The relevance of this study is also seeking to establish whether curatorship as a measure of rescuing a failing bank is sufficient to assist banks in distress, or whether additional measures are required to expand the powers of a central bank to rescue failing banks. The study explored relevant literature on curatorship and its related aspect namely, bank failure, in order to come up with informed recommendations.

The main purpose of this study was to establish how curatorship as we know it can be enhanced, embraced and developed in order for the banking sector (either globally or within a particular jurisdiction) to meet their primary goals, which is financial stability and growth. In doing so this study examined recommendations made by different Basel committees, i.e. recommendations made by the Basel Committee on Banking Supervision and Financial Stability Board recommendations. Within the South African context the study examined the curatorship regime as contained in sections 69 and 69A of the Banks Act and management and mitigation of financial crisis order as brought about by the proposed Financial Sector Regulation Bill.³¹⁵ In conclusion the study also used comparative studies in relation to curatorship as it exists in other jurisdictions (see chapter 3), and more importantly willingness or lack thereof of countries (both G20 and non G20 member states) in embracing the Resolution Progress Report³¹⁶ of Financial Stability Board, titled Key Attributes of Effective Resolution Regimes for Financial Institutions (“the Key Attributes”) and as adopted by G20 member states as a new international standard for resolution regimes.³¹⁷

2. Summary of findings

2.1. The extent of compliance with banking laws and Basel core principles for effective banking supervision.

The study found that many jurisdictions have enacted in their banking laws the minimum prudential requirements that banks should meet in conducting their business. For instance in South Africa those prudential requirements are contained in chapter IV, from sections 70 to 75³¹⁸ of the Banks

³¹⁴ Banks Act 94 of 1990.

³¹⁵ See chapter 2.

³¹⁶ Resolution Progress Report available on www.financialstabilityboard.org as accessed on 18-09-2015, Resolution Progress Report is defined as the report that puts more emphasis on Key Attributes of Effective Resolution Regimes for Financial Institutions. These Key Attributes set out twelve essential features that should be part of resolution regimes in all jurisdictions. Their objective is to enable authorities to resolve any financial firm that could be systemically significant or critical in the event of failure, irrespective of its size, the nature of its business or its geographical reach, without severe systemic disruption and without exposing taxpayers to loss.

³¹⁷ See chapter 2.

³¹⁸ S 70 deals with minimum share capital and unimpaired reserve funds, section 70A deals with minimum capital and reserve funds in respect of a banking group, section 71 which provided for minimum reserve balance has been repealed, section 72 deals with minimum liquid assets, section 73 deals with large exposures,

Act³¹⁹ whilst in Botswana, for example, prudential requirements are found in Part III, section 13³²⁰ of Banking Act.³²¹ In both jurisdictions it was found that failure to meet the statutory prudential requirements as set out in sections 70 to 75 of the Banks Act and section 13 of Banking Act has some consequences. The results also indicated that depending on the nature and degree of non-compliance with the aforesaid statutory prudential requirements, failure to comply with the prudential requirements has consequences and that range from revocation of the bank's licence, placing such a bank under curatorship or the winding up of the bank concern.

Within the South African curatorship regime the study also found that a South African listed company, African Bank, was recently placed under curatorship due to its business model, which was held to be the contributing factor to the bank's financial woes.³²² It was found that unlike other banks, African Bank took almost no deposits but raised funds on local and international capital markets, which it then lent to consumers as unsecured credit at high interest rates.³²³ In response to increased competition in the unsecured market, African Bank aggressively expanded their lending, but when tough economic conditions hit lower end consumers African Bank's non-performing loans soared.³²⁴

The research also found that in Botswana Kingdom Bank of Africa Limited (KBAL) was placed under temporary management as early as February 2015 owing to the fact that it was in an unsound financial condition and that its Board and management had failed to conduct the business in a prudent, safe and sustainable manner.³²⁵ Internationally the study found that there are minimum standards for sound supervision that have been set, known as the Basel Core Principles for Effective Bank Supervision.³²⁶ Those Core Principles are a framework of minimum standards for sound supervisory practices and are considered universally applicable.³²⁷ The Core Principles are broadly categorised into two groups: the first group (Principles 1 to 13) focus on powers, responsibilities and functions of supervisors, while the second group (Principles 14 to 29) focus on prudential regulations and requirements for banks.³²⁸ The Basel Committee on Bank Supervision (the Committee) issued the Core Principles as its contribution to strengthening the global financial system.³²⁹ It was also indicated that it is the Committee's position that weaknesses in the banking system of a country,

section 74 deals with failure or inability to comply with prudential requirements whilst section 75 deals with returns.

³¹⁹ Banks Act 94 of 1990.

³²⁰ S 13 of the Banking Act 13 of 1995 deals with capital requirements.

³²¹ The Banking Act 13 of 1995.

³²² See chapter 1 for Mail & Guardian online publication article titled "African Bank rescue evades key questions" available on questions <http://mg.co.za/article/2014-08-14-african-bank-rescue-evades-key-questions> as assessed on the 16/09/2015.

³²³ *Ibid.*

³²⁴ *Ibid.*

³²⁵ See chapter 3 for article by Sunday Standard online publication newspaper titled Kingdom Bank illiquid and insolvent written by Godfrey Ganetsang (29-03-2015) available on <http://www.sundaystandard.info/%E2%80%98kingdom-bank-illiquid-and-insolvent%E2%80%99-bob> as accessed on the 22/07/2015.

³²⁶ Basel Core Principles for Effective Banking Supervision (2012) available on <http://www.bis.org/fsi/fsiop2013.pdf> as accessed on and as accessed on 16/09/2015.

³²⁷ Basel Core Principles for Effective Banking Supervision, available on <http://www.bis.org/fsi/fsiop2013.pdf> as accessed on 16/09/2015.

³²⁸ *Ibid.*

³²⁹ *Ibid.*

whether developing or developed, can threaten financial stability both within that country and internationally due to the global interconnectedness of banks.³³⁰ The Committee believes that implementation of the Core Principles by all countries would be a significant step towards improving financial stability domestically and internationally, and provide a good basis for further development of effective supervisory systems.³³¹ Lastly it is the study's finding that the vast majority of countries have endorsed the Core Principles and have implemented them.³³²

Overall it was the study's finding that banks curatorship is prevalent in cases where failing banks fail to follow prudential banking practices as outlined in the banking legislation, regulations relating to banking and recommendations contained in Basel Core Principles for Effective Bank Supervision resolutions. Other cases of bank failure that have been identified by this study include lack of robust supervision by regulators and lack of risk and management disclosure by banks. Poor management of banks, excessive lending (as was the case in the African Bank case), and failure of a bank's management to conduct the business of the bank in a prudent, safe and sustainable manner are also some of the causes of bank failure.

2.2. The statutory mechanism of section 69 and 69A of the Banks Act.

The study also examined the statutory curatorship mechanisms provided for in section 69 of the Banks Act³³³ and the procedure set out in section 69A of the Banks Act (see chapter 2).³³⁴ It also investigated whether the statutory mechanisms and the procedure referred to in section 69 and 69A is sufficient in modern financial economic markets or whether the proposed Twin Peaks Model of financial regulation as contained in the Financial Regulations Bill should be embraced.

2.3. Volatility of International financial markets

The research found that bank failures are an international phenomenon that calls for consolidated efforts amongst countries globally, in view of the fact that many countries have experienced banking problems in recent decades. It is the study's finding that because financial sector is globally integrated but regulated nationally,³³⁵ the lack of global regulation and cooperation poses a risk to global financial markets because of the said interconnectedness of banks.

The study indicated that the world has seen and lived through a few global financial crisis in the past, and that the 2008 crisis is certainly not the last.³³⁶ Following the crisis it is generally accepted that the crisis was caused by human action or inaction and therefore could have been avoided.³³⁷

3. Conclusions

³³⁰ *Ibid.*

³³¹ *Ibid.*

³³² *Ibid.*

³³³ Banks Act 94 of 1990.

³³⁴ *Ibid.*

³³⁵ Implementing a Twin Peak Model of Financial Regulations in South Africa as published for public comments by Financial Regulatory Reform Steering Committee (1 February 2013) available on <https://www.fsb.co.za/Departments/twinpeaks/Documents/Twin%20Peaks%2001%20Feb%202013%20Final.pdf> and accessed on the 17/09/2015.

³³⁶ Banking, banking law and banking regulation & supervision (The 2008 Financial Crisis), in a lecture dated the 15/09/2015 offered by SARB General Counsel, Adv Michael Blackbeard.

³³⁷ *Ibid.*

It can also be concluded that the world has lived and seen many economic crisis and there exists a likelihood that bank failures and economic crisis may occur in years to come. Another conclusion is bank supervision should not be translated to mean prevention of bank failures. However, supervision should aim to reduce the probability and impact of a bank failure, *inter alia* by working with resolution authorities, so that when failure occurs, it is addressed in an orderly manner so as to cause the least risk to the financial system.³³⁸

4. Recommendations

Based on the conclusions reached in this study, the following recommendations are made;

- In view of the fact that banks are risk taking enterprises operating in an increasingly unpredictable and unstable business environment, it is pivotal that countries should review their banking legislation on a regular basis, and adopt without exception the principles of good corporate governance and international best banking practice.
- Introduction of penalties such as financial penalties, directors' bars, imprisonment of non-compliant managers within institutions, and imposition of personal liability of delinquent directors similar to that provided for in section 77³³⁹ and sections 423 to 426³⁴⁰ of the Companies Act,³⁴¹ should be considered and be enacted in the banking legislation. This will in turn complement the current curatorship mechanism as provided for in section 69A (11) (c) and (d) of the Banks Act³⁴².
- Because bank failure is systemic in nature, perhaps it may be the right time for the Banking Association of South Africa (BASA) to adopt a code similar to the Code of Good Banking Practice in their banking practice but focusing on enhancing financial stability of banks. Such a code should deal mainly with prudential requirements and should create a guardian fund to be applied in assisting failing banks.
- Regulators and bank supervisors must strengthen on a regular basis, regulatory measures to ensure that there is more continuous timeous risk assessment and management disclosure by banks.
- Within the South African context the introduction of the Twin Peaks Model of regulation by the proposed Financial Regulation Bill is a step in the right direction. As such the Bill should enjoy the support of the South African banking society so that it can be enacted and implemented.
- Finally it is recommended that the South African Legislature should review the curatorship regime regularly so as to ensure that it is on par with international best practice, and in the process adopt the latest technological innovation and developments that may aid effective and efficient curatorship and bank supervision.

³³⁸ *Supra* 362.

³³⁹ S 77 of the Companies Act deals with liability of directors and prescribed officers for common law offences relating to breach of fiduciary duty, for loss, damages or costs sustained by the company as a consequence of any breach by the director or such prescribed officers.

³⁴⁰ S 423 of the Companies Act provides for delinquent directors and others to restore property and to compensate the company, section 424 deals with liability of directors and other for fraudulent conduct of business, section 425 provides for application of criminal provisions of the law relating to insolvency and section 426 makes provision for private prosecution of directors and others.

³⁴¹ Companies Act 17 of 2008.

³⁴² Banks Act 94 of 1990.

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