Bank Rescue in South Africa

Dissertation submitted in fulfillment of the requirements for the degree of Master of Laws (LLM) in Mercantile Law at the University of Pretoria, South Africa.

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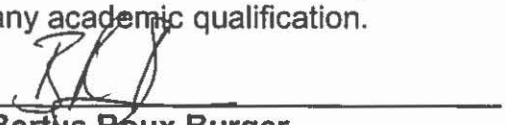
DECLARATION STATEMENT

With the signature appended hereunder, I Bertus Roux Burger, hereby declare that the work presented in this thesis is based on my own research, and that I have not submitted this thesis to any other University or institution of higher learning to obtain any academic qualification.



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Summary

The 2008 Global Financial Crisis has revealed the importance of maintaining financial stability. A big threat to the maintenance of financial stability is however bank failure. Especially if a bank is systemically important due to its size and interconnectedness it may propagate contagion and bank runs and trigger the collapse of a whole financial system. It is therefore pertinent that the issue of bank failures be addressed, preferably by extending assistance to such a failing bank where appropriate.

In South Africa bank rescue is currently facilitated in terms of section 69 of the Banks Act 94 of 1990 that provides for the Minister of Finance, on recommendation by the Registrar of Banks, to appoint a curator for a bank that is unable to pay its debts as they become due. The process of curatorship is however deficient when it comes to dealing with banks that are failing but of which some part may be rescued. This deficiency was revealed during the rescue of African bank when some innovative amendments had to be effected urgently to the Banks Act by means of the Banks Amendment Act 3 of 2015.

This dissertation explores the concept of curatorship and how the curatorship process and powers of the curator was changed as a result of the problems posed by the collapse of African Bank. It looks into the restructuring of the bank and also discusses the complimentary process of the investigation into the affairs of a failing bank as set out in section 69A of the Banks Act.

The dissertation further looks into international developments in the context of the prevention and mitigation of bank failures. Spesific regard is had to the Financial Stability Board's Key Attributes of Effective Resolution Regimes for Financial Institutions, pointing out that the rescue of African Bank actually comprised of bank resolution rather than curatorship in the strict sense.

INDEX

Chapter One Introduction to study

1.1 Introduction

Banks fulfill a special role in the financial system and the broader economy. They play an essential intermediation function within the economy by allocating financial resources from savings to investments and consumption, providing vehicles for wealth accumulation, performing maturity transformation functions that enable and facilitate financing for long-term projects, providing liquidity, and facilitating a payment, clearing and settlement function in the economy, including cross-border payments.[1] To execute all these functions, banks have become more complex, interconnected and integrated into the real economy. Consequently, a failure in a single bank could cause deadlock in critical financial markets and services, which could spread to other financial systems and negatively affect the financial system as a whole.[2]

Because a bank failure, especially in the case of a systemically important bank, can propagate contagion that can rapidly spread across the whole interconnected financial system it is pivotally important that measures be put in place to prevent the financial collapse of banks and, in instances where such collapse materializes, to facilitate the orderly resolution of an insolvent bank. It is in this context that the central bank has a very important role in terms whereof it can intervene to inject liquidity assistance to a solvent yet illiquid bank (emergency liquidity assistance otherwise known as ELA).[3] However in certain instances a mere temporary injection

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[1] "Strengthening South Africa's Resolution Framework for Financial Institutions" policy document released by National Treasury, the South African Reserve Bank (SARB) and the Financial Services Board on 20 August 2015, available at https:www.resbank.co.za/Publications/Detail_item?Publications.aspx? accessed on 8 November 2017 at 1.

[2] Ibid.

[3] ELA is a measure whereby a central bank grants money to a solvent financial institution that is experiencing temporary liquidity problems. See https://www.bundesbank.de/Navigation/EN/Service/Glossary/.../glossary.thml?IV2 accesed on 9 November 2017.

of liquidity assistance is not sufficient to aid a distressed bank in order to prevent it from collapsing and exiting the financial system. In such cases measures to enable a bank rescue are required. These measures generally take the form of curatorship or receivership under the waking eye of the central bank. At the core of this intervention power lies the pursuit of financial stability as public interest objective that emerged as apex regulatory pursuit after the 2008 Global Financial Crisis.[4]

South Africa currently does not have an explicit deposit insurance system that could mitigate the effects of bank failure-meaning that taxpayers often has to foot the bill for bank failures during a "bail-out".[5] This means that if a bank fails the South African Reserve Bank as central bank and lender of last resort can then, on a discretionary basis, decide to effect a bail-out of the failing bank. This situation is referred to as implicit/implied deposit insurance and is fraught with uncertainty as a bank has no guarantee that it will definitely be bailed out when it fails.[6] Because of the uncertainty about the possibility of bail-out it is likely that once bank customers obtain knowledge that their bank is failing they may effect a "run on the bank" which could then cause a liquidity crisis and even systemic disruption. Therefore, in accordance with the principle that prevention is better than cure, it is submitted that an effective bank rescue regime is essential to keep a country's financial system in a healthy and stable state. In South Africa bank rescue is currently facilitated by the process of curatorship in terms of section 69 of the Banks Act 94 of 1990.[7]

1.2 Nature and Scope of Dissertation

The curatorship process in South Africa has recently been severely tested when African Bank was on the brink of collapse in August 2014.The purpose of this dissertation is to explore the process of bank curatorship in terms of section 69 of the

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[4] Allen "What is 'financial stability'? The need for some common language in international financial regulation" 2014 *Georgetown Journal of International Law* 929.

[5] Avgouleas and Goodhart "Critical Reflections on Bank Bail-ins" (2015) Journal Of Financial Regulation 3-29.

[6] South Africa s however in the process of eventually moving towards an explicit deposit insurance scheme. See "Designing a Deposit Insurance Scheme for South Africa" policy document by the SARB and National Treasury available at https://resbank.co.za/Lists/News%20and%20Publications/.../DIS%20paper.pdf accessed on 8 November 2017.

[7] Bank failures that occurred since 1990 are that of Alpha Bank Ltd (1990); Cape Investment Bank Ltd and Pretoria Bank (1991-1992); Sechold Bank and Prima Bank (1993); The African Bank Ltd (1995); Community Bank (1996); Islamic Bank Ltd (1997-1998); FBC Fidelity Bank Ltd (1999); Regal Treasury Bank Ltd; Saambou Bank Ltd and New Republic Bank Ltd (2002); Regal Bank Ltd (2004).

Banks Act and the shortcomings in this process that was revealed during the attempts to save African Bank from completely exiting the financial system and potentially constituting a systemic event that could put the stability of the whole South African financial system at risk. This study will interrogate the reasons for the financial difficulties that fell upon African Bank and also look at the innovative amendments that subsequently had to be effected to the Banks Act in order to dig African Bank out of the trenches. It will also look at future developments in the context of bank rescue.

1.3 Methodology

The methodology applied in this dissertation will comprise of desktop research encompassing relevant policy documents and legislation as well as text books and journal articles. Where appropriate reference will also be made to case law.

1.4 Chapter Lay-out

Chapter One sets out the introduction to the study, the nature and scope of the research, the research statement and research questions, delimitation and chapter lay-out.

Chapter Two comprises of a detailed overview of the process of curatorship as set out in section 69 of the Banks Act prior to the rescue of African Bank.

Chapter Three contains a discussion of the African Bank near collapse and subsequent rescue as well as the amendments that had to be effected to the Banks off to pull off the innovative rescue of African Bank

Chapter Four looks at international developments in the context of bank failures. It spesifically explores the Financial Stability Board's Key Attributes of Effective Resolution Regimes for Financial Institutions and the powers given to resolution authorities to effect the orderly resolution of banks.

Chapter Five contains the conclusions of the study as well as some recommendations made in the light of recent global trends in financial regulation.

Chapter Two Art 69: The curatorship process just prior to African Bank's collapse

2.1 Curatorship in terms of section 69 of the Bank's Act

The purpose of curatorship prior to the collapse of African bank was to restore a failing bank back to financial health.[8] In terms of section 69 the Minister of Finance if he deems it in the public interest, may appoint a curator for a bank, in instances where in the opinion of the Registrar of Banks, the bank concerned cannot repay deposits when legally obliged or probably will be unable to meet its obligations.[9]Another person (not in the employ of the bank) who in the opinion of the Registrar has wide experience and is knowledgeable about the specific field of activities in which the bank under curatorship is predominantly engaged, may be appointed to assist the curator. [10]

On his appointment the management of the bank vests in the curator[11] The curator must then recover and take possession of all the assets of the bank.[12] To prevent creditors from enforcing claims against the failing bank and derailing the curatorship section 69 provides for a moratorium on legal proceedings against the distressed bank: in terms of section 69(6) 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.

The curator is accountable to the Registrar of Banks and the Minister of Finance. The Registrar supervises the curatorship process. The curator must therefore conduct the management of the failing bank in such a manner as the Registrar may deem to best promote the interests of creditors of the bank concerned and the banking sector as a whole. Accordingly the curator must comply with any direction by

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[8] Schulze "The Institution of Curatorship of a Bank in terms of Section 69 of the Banks Act 94 of 1990-A Rare Decision." (1999) 11 *SA Merc LJ* 428.
[9] Section 69(1)(a).
[10] Section 69 (1)(b).
[11] Section 69(2).
[12] Section 69(2A)(a) and (b).

the Registrar and must keep such accounting records and prepare such financial statements, interim reports and provisional annual financial statements as the bank or its directors would have had to keep had it not been placed under curatorship. The curator must also convene the annual general meeting and any other meetings of members of the bank provided for in the Companies Act.

The curator has wide powers to deal with the curatorship of the bank concerned. He may bring or defend, in the name and on behalf of the bank, any action or other legal proceedings of a civil nature and any criminal proceedings.[13] He may dispose of any of the bank's assets in the ordinary course of the bank's business.[14] Any other disposal of the bank's assets can only be made with the consent of the Minister. Such other disposal can only be done if a reasonable probability exists that the disposal will enable the bank to pay its debt or meet its obligations and become a successful concern again.[15] Any money of the bank that becomes available to the curator must be used to pay the costs of curatorship, conduct of the bank's business in accordance with the requirements of the curatorship and for payment of the claims of creditors which arose before the date of curatorship.[16] The curator may apply to court to set aside any disposition that the bank has made of its property, which if made by an individual could for any reason be set aside in the event of such individual's insolvency.[17] It is further provided that the period during which any bank that is a mortgage debtor in respect of any mortgage bond is subject to curatorship in terms of section 69 must 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, as applied to the winding-up of banks in terms of section 68 of the Banks Act.[18]

The curator has other wide powers that facilitate the curatorship and rescue of a failing bank. The Minister of Finance may, in the letter of appointment or at any time subsequent thereto, empower the curator, give the curator the following additional powers:[19]

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[13] Section 69(2B)(c) to (e). See also *African Bank v Theron and Another* [1996] 4 All SA 156 (E)162-163.
[14] Section 69(2C)(a).See further section 54 regarding the consent to be obtained from the Minister.
[15] Section 69(2C)(b)(i) and (ii).
[16] Section 69(2E).
[17] Section 69(2F)(a). The provisions of the law relating to insolvency, as set out in section 26 to 31 of the Insolvency Act 24 of 1936, apply to these dispositions.
[18] Section 69(2G).
[19] Section 69(3)(a) to (i).

(a) to suspend or reduce the right of creditors of the bank to claim or receive interest on any money owing to them by that bank;

(b) to make payments of capital or interest to any creditor of the bank concerned at such time, in such order and in such manner as the curator may deem fit;

(c) to cancel any agreement between the bank and any other party to advance moneys due after the date of the curator's appointment, 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 secured 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).[20]

(d) to convene meetings of the creditors of the bank for the purpose of establishing the nature and extent of the bank's indebtedness to such creditors and for consultation with them insofar as their interests may be affected by decisions taken by the curator in the course of the curatorship;

(e) to negotiate with any individual creditor of the bank with a view to the final settlement of the affairs of such creditor with the bank;

(f) to make and carry out 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;

(g) to cancel any lease of movable or immovable property entered into by the bank prior to it being placed under curatorship.(A claim for damages in respect of such cancellation may however be instituted against the bank under curatorship after the expiration of a period of one year as from the date of such cancellation).

(h) to 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.[21]

Note must also be taken of section 69(6B) which states that "[N]otwithstanding anything to the contrary contained in this Act, sections 35A, 35B and 46 of the

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[20] *Rand Bank v Lornadawn Investments (Pty) Ltd* 1978 (4) SA 868 (T); *Registrar of Banks v Regal Treasury Private Bank Ltd (under curatorship) (Regal Treasury Bank Holdings Ltd Intervening)* 2004 (3) SA 560 (W).

[21] A claim for damages in respect of any loss sustained by or damage caused to any person as a result of such cancellation of a guarantee, may be instituted against the bank after the expiration of a period of one year as from the date of cancellation of the guarantee.

Insolvency Act ... shall mutatis mutandis apply to the curator of any bank under curatorship and to such bank as if the curator were the trustee of an insolvent estate and the bank were an insolvent or a sequestrated estate as contemplated in those sections." This allows for netting of outstanding derivative transactions.[22]

The Minister may, at any time and in any manner, amend the directions in the letter of appointment, and the powers granted to the curator under section 69(3).[23] The nature of and the reasons for each act performed by the curator under any power conferred upon him by the Minister must be duly recorded.[24]

While the bank is under curatorship the curator is obliged to report to the Registrar on a monthly basis, providing an exposition of the affairs of the bank and stating whether or not, in his opinion, a reasonable possibility exists that the bank *"will be able to pay its debts or meet its obligations and become a successful concern".*[25] If he is of opinion that this will not be the case, he must notify the Registrar immediately.[26]

It is provided that curatorship of a bank shall lapse upon the issue by the Minister of written notification to that effect by the curator; or the winding-up of the bank in terms of the provisions of section 68 of the Bank's Act.[27] No fixed time limit for the duration of the curatorship is prescribed.

The Minister of Finance may at any time withdraw the appointment of a curator. He can also withdraw the curator's appointment upon application by the Registrar.[28] No grounds for such withdrawal are given in section 69 thus it appears that the Minister has quite a wide discretion in this regard.

2.2 Investigation of affairs of bank under curatorship

In addition to curatorship in terms of section 69 the Banks Act makes provision in section 69A for the appointment of a Commission to investigate the affairs of the bank under curatorship. This Commission then has to make certain findings relating to whether recklessness or fraud was perpetrated in the bank's business dealings

[22] Section 35
[23] Section 69(4).
[24] Such records are examined as part of the normal audit performed in respect of the affairs of the bank concerned.
[25] Section 69(6A). Author's emphasis.
[26] Section 69(2D).
[27] Section 69(10).
[28] Section 69(9).

and whether any specific person was responsible for such conduct. This would then create a basis for persons harmed by such conduct to institute a civil claim against the person so identified.

In terms of section 69A the Registrar may appoint an independent person as Commissioner. The Commissioner, who may be assisted by assistants appointed by the Registrar, must investigate the business, trade, dealings, affairs or assets and liabilities of the bank under curatorship or of its associate(s).[29] The Commissioner and his assistants have wide investigative powers: it is provided that they 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[30], upon a registrar or inspector contemplated in that Act.[31] The Commissioner can examine any person who is or formerly was a director, servant, employee, partner, member or shareholder of the bank. He can also examine any person, if he has reason to believe that such a person may be able to provide information relating to the affairs of the bank.[32] The Commissioner may summons before him any person that he wishes to examine. If a person is summonsed and that person fails to attend before the Commissioner without a lawful excuse, the Commissioner can order that person to be apprehended and brought before him for examination.[33]

The investigation in terms of section 69A must be completed within five months from the date of the Commissioner's appointment. Within 30 days thereafter the Commissioner must prepare a written report. The Report must indicate whether or not, in the Commissioner's opinion, it is in the interest of the depositors or other creditors of the bank concerned that the bank remains under curatorship or otherwise that the Registrar apply to a competent court for the winding-up of the bank. The Commissioner must also indicate whether it appears that any business of the 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 fraudulent purpose. If any business of such bank was carried on recklessly or fraudulently, the report must identify any person who was a party to such conduct.

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[29] Section 69A(1).
[30] Act 80 of 1998.
[31] Section 69A(4)(a) and (b).
[32] Section 69A (6)(b). Section 69A(6)(a) provides that any person examined by a Commissioner under section 69A shall not be entitled, at such examination, to refuse to answer questions that may incriminate him or her or, where he or she is to be tried on a criminal charge and may be prejudiced at such trial by his answer. o information regarding incriminating questions and answers may be published in any manner whatsoever.
[33] Section 69A(7) and (8).

The examination and Commissioner's report are private and confidential unless the Registrar, after consultation with the Minister, either generally or in respect of any part of the examination or report, directs otherwise.[34]

Chapter Three Saving African Bank

3.1 Introduction

African Bank highlighted a vital lesson that unsecured lending was a specialised business; it allowed high yields, but required excess capital and reserves and strong shareholders. African Bank, a subsidiary of African Bank Holdings Ltd, had a rather unique business model: it provided unsecured lending and served a large portion of low-income earners that were not in a position to provide collateral and would otherwise be foreclosed from access to finance. It thus pursued a high risk business model, not generally taking deposits and raising capital through debt and equity issuances. [35] It had virtually no business diversification.[36] The bank was a mono-line bank, which means that it offered and earned monies from only one product: unsecured loan finance. It did not provide and earn fees from any transactional services. The bank was therefore not a traditional bank. It obtained "wholesale funding" from institutional investors and relied on that to fund its business. The bank was thus funded through corporate and capital market borrowings and raised money from the wholesale market by issuing different kinds of debt instruments.[37]

African Bank was initially very profitable for quite a number of years but then matters started going seriously downhill.[38] Despite ABIL's glossy integrated reports which purported to paint a picture of ABIL (Holding Company of African Bank) as a model corporate citizen and winning the "Banker of the Year" award in 2012, the bank still failed.

The reason for its financial demise was to a large extent its unsustainable unsecured lending business and its acquisition of a large furniture retailer, Ellerines Furnishers (Pty) Ltd, for an amount of R9,2 billion just before the 2008 Global Financial Crisis (GFC). This doomed and disastrous acquisition drained African Bank of many

[34] Section 69A(13).
[35] Deposits comprised approximately 1% of its portfolio.
[36] https://www.lendico.co.za/blog/african-bank-bailout-136.html
[37] Myburgh Report 27.
[38] Myburgh Report 28.

millions of rands every month causing it to run into serious financial trouble. [39] As matters got worse Leon Kirkinis, the CEO of African Bank was basically forced to resign and the bank projected an expected loss of at least R6.4 billion shortly after the market dug deep into its pockets to raise R5.5 billion in a rights offer in December 2013.[40]

The Bank Supervision Department (BSD) at the South African Reserve Bank (as prudential supervisor of banks) took some steps when it became aware that African Bank was experiencing financial problems.[41] The BSD raised its concerns about the rising levels of impairments at various formal meetings with Abil's executive management and board of directors since August 2011. From August 2013 the BSD monitored the bank's liquidity position on a daily basis. When Abil and African Bank ran into difficulties in September 2013 due to losses as a result of impaired loans, the BSD required Abil to develop a credible liquidity and capital plan, which resulted in a successful rights offer. The BSD formally requested Abil and African Bank to increase the minimum capital adequacy ratio requirement from 20,5% to 25% from 1 January 2014. On 6 June 2014 the BSD formally requested Abil to dispose of Ellerine Furnishers.[42]

On 10 August 2014 Gill Marcus, the then Governor of the SARB, announced that the Registrar and the Minister of Finance had decided to place the failing bank under curatorship. Mr Tom Winterboer from Price Waterhouse Coopers was appointed as curator.

3.2 Restructuring outcome under Curatorship of Tom Winterboer

On 10 December 2014 ABIL and the Curator issued an update on the restructuring of African Bank and its engagement with shareholders on SENS,[43] In this update it

[39] Bloomberg- Bonorchis and Spillane 'In Africa a Bright Idea in Banking Leaves a Trail of Ruin' available at http://www.bloomberg.com/news/articles/2014-08-27/how-brightest-brain-kirkinis-failed-with-his-african-bank accessed on 2 April 2017. Ellerines sold furniture on credit, thus displaying a similar business model as African Bank, but after its acquisition began to record unsustainably large losses inter alia with declining product sales.

[40] Jones 'African Bank in Curatorship: sharing the pain' http://www.financialmail.co.za/coverstory/2014/08/14/african-bank-in-curatorship-sharing-the-pain accessed on 6 October 2017.

[41] Myburgh Report 28.

[42] Myburgh Report 31.

[43] Stock Exchange News Service (SENS).

was indicated that the curatorship gave SARB the legal means to implement a plan capable of ensuring that the business of the bank gained "a secure perspective for the future as a lending institution with a transformed business model". In terms of the rescue plan the bank would be split into two parts:

- A Good bank which would be recapitalised with R10 billion from a consortium as indicated below, and which had a book value of R26 billion nett of portfolio impairments ("the good bank");
- the bad book (transferred to as the bad bank), with a book value net of specific impairments of R17 billion, for which SARB would pay R7 billion, would be housed in a vehicle with the support of SARB.
- A consortium of six South African banks, together with the Government Employees Pension Fund (represented by PIC), had undertaken, on terms, to underwrite a capital raising exercise in the amount of R10 billion, to be used for capitalisation of a new "Good Bank" to be formed. The Good Bank would be a newly registered bank and a wholly owned subsidiary of a newly established holding company, which was intended to be listed on the JSE in due course. The core lending assets of the bank, referred to in the SARB announcement of 10 August 2014 as having a book value of R26 billion, which was net of portfolio investments, would be transferred to Good Bank – see section 3.6 for more detail.
- Senior bonds would be transferred to the new bank, after a 10% haircut, and equity and subordinated bondholders would be offered the opportunity to participate in the recapitalization of the good bank. Senior bondholders were to receive a new senior bond to the value of 80 cents in the Rand, issued by the good bank as well as a cash payment of 10 cents in the Rand. A new instrument for the remaining 10 cents would be issued out of the old African Bank and would represent a residual claim. Subordinated bondholders would receive compensation to the value of 37.5 cent in the Rand. Ninety per cent of this compensation would be in a Tier II instrument in the new 'good bank' with the remaining 10% in the form of a cash pay-out.[44]

[44] 'Debt-holders support African Bank restructuring proposal' available at http://citizen.co.za/392066/debt-holders-support-african-bank-restructuring-proposal/ accessed on 6 October 2017.

3.3 Amendments that had to be made to the Banks Act

Although the curatorship process as provided by section 69 contained many provisions that enabled effective curatorship it had some shortcomings that needed to be addressed by means of amendments to the Banks Act in order to enable the above plan for the rescue of African bank to be implemented.

Under the Banks Act the curator could dispose of assets but only if the bank would then be able to meet its obligations, which was problematic if the bank was still financially distressed. Section 69 did not make provision for the transfer of liabilities. It also did not allow for taxpayer support to be repaid before creditors claims. The curator could only make decisions on behalf of shareholders during the course of management of the bank, but this did not extend to corporate shareholders. This meant that these corporate shareholders was in a position to stall a rescue plan by voting against various restructuring agreements for the failing bank.[45]

The Minister of Finance, Reserve Bank and curator thus required an amendment of the Banks Act on an urgent fast-tracked basis and on 29 June 2015 the Banks Amendment Act 2015 was passed. The Amendment Act effected the following amendments to section 69:

Section 69(2)(C) was substituted. The new section 69(2)(C) provided that the curator may not only dispose of the bank's assets but also transfer its liabilities or dispose of any of its assets *and* transfer any of its liabilities in the ordinary course of the bank's business.[46] Where the curator seeks a consent for a disposal of assets or a transfer of liabilities or for a disposal and transfer-combo other than in the ordinary course of the bank's business, he must report to the Minister or the Registrar, advising them on the expected effect of the transfer or disposal on the bank's creditors. He must also indicate whether the creditors are treated in an equitable manner and whether a reasonable probability exists that a creditor will not incur greater losses (no creditor worse off-principle), as at the date of the proposed disposal , transfer or disposal and transfer, than would have been incurred if the bank had on that date been wound up under the Banks Act. The Minister or the Registrar may however consent to the disposal, transfer or disposal *and* transfer

[45] See www.coronation.com.za/institutional/the-banks-amendment-bill-2015 accessed on 22 November 2017.
[46] Section 2(a) of the Banks Amendment Act 3 of 2015.

notwithstanding that it may prejudice the bank's creditors if such disposal or transfer or disposal and transfer is "reasonably likely to promote the maintenance of a stable banking sector in the Republic or public confidence in the banking sector in the Republic"-thus meaning that the public interest in financial stability overrides the interests of individual creditors.

Section 69(3)(f) was substituted to provide that the curator can make and carry out, any decision in respect of the bank which, in terms of the provisions of the Banks Act, Companies Act, the bank's memorandum of incorporation or the rules of any securities exchange, on which any securities of the bank or its controlling company are listed, would have required an ordinary resolution or a special resolution of shareholders in the bank or its controlling company.[47]

Section 69 3(j) was added to enable the curator to raise funding from the Reserve Bank, or any entity controlled by the Reserve Bank, on behalf of the bank under curatorship. It provides that the curator may, notwithstanding any contractual obligations of the bank under curatorship, but without prejudice to real security rights, provide security over the assets of the bank in respect of such funding.[48] The curator is also enabled to propose and enter into an arrangement or compromise between the bank and all its creditors, or all the members of any class of creditors, as contemplated in the Companies Act.[49]

Thus the problematic provision that a curator was permitted to dispose of assets of a bank under curatorship, provided that such disposal will enable the bank to pay its debts or meet its obligations and become a successful concern was addressed. The Amendment Act stipulates that the curator is entitled to effect the transfer of assets in circumstances where there exists a *reasonable probability* that the transferee entity would be able to meet the transferred liabilities, and that the bank's creditors would not incur greater losses as a result of such transfer than if the bank had been wound up.

Removing the constraints on a curator, within reason, would thus assist the curator to be more decisive in making decisions aimed at rescuing the bank. On 4 April 2016

[47] Section 2(c) Banks Amendment Act 30 of 2015.
[48] In terms of section 69(6), any claim for damages caused to any person as a result of such security, may be instituted against the bank after expiration of one year as from the date of such provision of security.
[49] Section 2(d) banks Amendment Act 3 of 2015.

the new good Bank, named African Bank, was successfully launched.

3.4 The Report of the Myburgh Commission of Investigation

Advocate John Myburgh, the Commissioner who was appointed in terms of section 69A to investigate the business and affairs of African Bank, compiled a detailed report setting out the relevant history of the bank and the reasons for its demise. [50] Commissioner Myburgh and his team inter alia indicated in their report that the board of ABIL allowed itself to be "dominated" by former chief executive, Leon Kirkinis, and that some of the unsecured loans to its furniture or retail business Ellerine were reckless. Inadequate provisioning and high (and ultimately, unsustainable) credit growth as well as the lack of seeming proper authority and disclosure around the purchase of Ellerines and the ongoing financial support provided by African Bank to the furniture retailer (at a time when African Bank itself was under severe financial strain).

The Commission also identified multiple and significant corporate governance failures spesifically the lack of required care and skill exercised by the directors of African Bank in approving the loans from the bank to Ellerines. It was found that the directors of the Bank Board acted "in breach of their fiduciary duty to the bank" as the directors did not act for the benefit of the bank and did not act in the best interests of the bank

Another problematic aspect was the continued acceptance of the appointment (which lasted ten years) of a Chief Risk Officer, Mr Sokutu, who was, according to Commissioner Myburgh, unqualified for the job – and reportedly incapacitated due to a severe drinking problem. Other concerning matters were the rapid growth of African Bank's loan book just before the strikes started and unemployment began to rise: it wrote loans to clients whose circumstances changed and were unable to repay their loans. The Bank further had insufficient capital levels and there was overstatement of assets and underprovisioning due to the incorrect application of the "in duplum rule", as per Section 103 (5) of the NCA,[51] whereby future interest to be received was discounted at zero percent creating a higher asset(loan) value and a

[50] Myburg Report on Investigation in terms of Section 69A of the Banks Act 94 of 1990 available at https:www.resbank.co.za/publications/detail-item.../publications/aspx? accessed on 27 October at 49.
[51] National Credit Act, 35 of 2005

lower impairment.[52]

In its report the Commission also referred to section 63 of the Banks Act which imposes certain reporting requirements on the external auditor of a bank. It pointed out that when the external auditor of a bank furnishes a report in terms of s20(5)(b) of the Auditing Profession Act[53] to IRBA[54] relating to an irregularity or suspected irregularity in the conduct of the affairs of the bank, the auditor is required to furnish the Registrar with a copy and particulars of the report.The external auditor is required in terms of section 63 of the Banks Act to inform the Registrar in writing of any matter relating to the affairs of the bank which the auditor became aware in the performance of the auditor's functions as auditor of the bank; and which in the opinion of the auditor might endanger the bank's ability to continue as a going concern or might impair the protection of the funds of depositors or might be contrary to principles of sound management or amounts to inadequate maintenance of internal controls. The Myburgh Report indicated that Deloitte had raised concerns, one of which related to a lack of conservatism in the credit impairment model of African Bank: they felt that the provisions were understated by between R150 million to R250 million.

[52] The future interest to be discounted was to be done at market related interest at the time in line with International Accounting Standards "IAS "39 –Financial Instruments Recognition and Measurement/Replaced by IFRS 9 Financial Instruments which all banks are in the process of implementing, especially to measure impairments to assets.

[53] Auditing Profession Act 26 of 2005.
[54] Independent Regulatory Board for Auditors.

Chapter Four International Developments: Orderly Bank Resolution

4.1 Introduction

As indicated in Chapter One, the 2008 Global Financial Crisis (GFC) caused a big shift in the regulatory paradigm that emerged post GFC. The pursuit of financial stability became a core pursuit of financial regulation after the Crisis. Part of this new regulatory paradigm was that measures were introduced to deal with the orderly resolution of failing banks. In this regard the Financial Stability Board issued the *Key Attributes of Effective Resolution Regimes for Financial Institutions* in 2011. These Key Attributes (KAs) were updated in 2014.[55]

4.2 The Key Attributes of Effective Resolution Regimes for Financial Institutions

The KAs set out twelve essential features that should be part of the resolution regimes of all jurisdictions. They relate to the following matters: scope; resolution authority; resolution powers; setting-off, collateralisation and segregation of client assets; safeguards, funding of firms in resolution; legal framework conditions for cross-border cooperation; Crisis Management Groups; institution specific cross border cooperation agreements; recovery and resolution planning and finally, access to information and information sharing.[56]

The preamble to the KAs states that an objective of an effective resolution regime is to make feasible the resolution of financial institutions without causing severe systemic disruption and also without exposing taxpayers to loss, while protecting vital economic functions through mechanisms that makes it possible for shareholders and secured and uninsured creditors to absorb losses in a manner that respects the hierarchy of claims.[57] From the preamble it is thus clear that the intention is for the

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[55] "Key Attributes of Effective Resolution Regimes for Financial Institutions" available at http://www.fsb.org/wp-content/uploads /r_11104cc.pdf accessed on 2 November 2017.These updates consist of guidance documents. As explained in the Key Attributes at 2 no changes were made to the text of the original twelve key attributes adopted in October 2011. The Annexes to the Key Attributes provide guidance on implementing and interpreting the key attributes. They do not form part of the Key Attributes standard.

[56] Key Attributes (KAs) at 1.

[57] KAs at 3.

regulatory culture to move away from bail-outs of insolvent financial institutions with taxpayers money to a culture of bail-in where those who stand to gain from profits by the financial institution now also bear the losses in the event of failure.

Importantly the preamble to the KAs further state that an effective resolution regime should:

"(i) ensure continuity of systemically important financial services, and payment , clearing and settlement functions;

(ii) protect, where applicable and in coordination with the relevant insurance schemes and arrangements , such depositors, insurance policy holders and investors as are covered by such schemes and arrangements, and ensure the rapid return of segregated client assets;

(iii) allocate losses to firm owners (shareholders) and unsecured and uninsured creditors in a manner that respects the hierarchy of claims;

(iv) not rely on public solvency support and not create an expectation that such support will be available;

(v) avoid unnecessary destruction of value, and therefore seek to minimize the overall cost of resolution in home and host jurisdictions and, where consistent with the other objectives, losses for creditors;

(vi) provide for speed and transparency and as much predictability as possible through legal and procedural clarity and advanced planning for orderly resolution;

(vii) provide a mandate in law for cooperation, information exchange and coordination domestically and with relevant foreign authorities before and during a resolution;

(viii) ensure that non-viable firms can exit the market in an orderly way; and

(ix) be credible and thereby enhance market discipline and provide incentives for market-based solutions."

The KAs propose that jurisdictions should have resolution regimes in place that provides the resolution authority with a broad range of powers and options to resolve a firm that is no longer viable and has no reasonable prospect of becoming so. The resolution regime should accordingly include stabilisation options that achieve continuity of systemically important functions. This can be done by means of a sale or transfer of the shares in the firm or of all parts of the firm's business to a third party, either directly or through a bridge institution , and/or officially mandated

creditor-financed recapitalisation of the entity that continues to provide the critical functions. It must also include liquidation options that provide for the orderly closure and winding-down of all or parts of the firm's business in a manner that will protect insured depositors, insurance policy holders and other retail customers.[58]

The KAs indicate that any financial institution that could be systemically significant or critical if it fails should be subject to a resolution regime with attributes that conform to the KAs. Each jurisdiction should also have a designated administrative authority or authorities responsible for exercising the resolution powers mentioned in the KAs.[59]

The resolution authority should pursue financial stability and ensure continuity of systemically important financial services as well as payment, clearing and settlement functions. It should protect, where applicable and in coordination with the relevant insurance schemes and arrangements, the depositors , insurance policy holders and investors that are covered by such schemes and arrangements. The resolution authority should further avoid unnecessary destruction of value and must seek to minimize the overall costs of resolution as well as losses to creditors. It is further required to also consider the potential impact of its resolution actions in other jurisdictions.[60]

In terms of the KAs resolution should be initiated when a firm is no longer viable or is likely to be no longer viable and has no reasonable prospect of becoming viable again. Timely and early entry into resolution should occur before a firm is balance-sheet insolvent and before all equity has been fully wiped out.[61]

4.2.1 Resolution powers

General resolution powers include the following:[62]

(a) Removal and replacement of senior management and directors and recovery of money from responsible persons, including claw-back of variable remuneration;

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[58] KAs at 3 and 4.
[59] KAs at 5.
[60] KAs at 6.
[61] KAs at 6 and 7. It is stated that there should be clear standards or suitable indicators of non-viability to help guide decisions on whether firms meet the conditions for entry into resolution.
[62] KAs 7 and 8.

(b) Appointment of an administrator to take control of and manage the affected firm with the objective of restoring the firm, or parts of its business, to ongoing and sustainable viability;

(c) Operation and resolution of the firm, including powers to terminate contracts, to continue or assign contracts, purchase or sell assets, write down debt and to take any other action that is necessary to restructure or wind down the firm's operations;

(d) Ensuring continuity of essential services and functions by requiring other companies in the same group to continue to provide essential services to the entity in resolution, any successor or an acquiring entity. It also includes ensuring that the entity in resolution can temporarily provide such services to a successor ar acquiring entity and includes procuring necessary services from affiliated third parties;

(e) Overriding rights of shareholders of the firm in resolution, including requirements for approval by shareholders of particular transactions, in order to permit a merger, acquisition, sale of substantial business operations, recapitalisation or other measures to restructure and dispose of the firm's business or its liabilities and assets;

(f) Transfer or sell assets and liabilities, legal rights and obligations, including deposit liabilities and ownership in shares, to a solvent third party, notwithstanding any requirements for consent or novation that would otherwise apply;

(g) Establish a temporary bridge institution to take over and continue operating certain critical functions and viable operations of a failed firm;

(h) Establish a separate asset management vehicle to manage and run-down non-performing loans or difficult-to-value assets;

(i) Carry out bail-in within resolution as a means to achieve or help achieve continuity of essential functions;[63]

(j) Temporarily stay the exercise of early termination rights that may otherwise be triggered upon entry of a firm into resolution or in connection with the use of resolution powers;

(k) Imposing a moratorium with a suspension of payments to unsecured creditors and customers[64] and a stay on creditor actions to attach assets or otherwise collect

[63] This can be done by recapitalising the entity that provided these functions and is no longer viable or alternatively by capitalising a newly established entity or bridge institution to which these functions have been transferred following closure of the non-viable firm (the residual business of which would then be wound up and the firm liquidated).

[64] Except for payments and property transfers to central counterparties and those enetered into the payment, clearing and settlement systems.

money or property from the firm, while protecting the enforcement of eligible netting and collateral agreements; and

(l) Effecting the closure and orderly winding-down of the whole or part of a failing firm with timely pay-out or transfer of insured deposits and prompt access to transactions and segregated client funds.

4.2.2 Bridge Institutions

The KAs also suggest that resolution authorities should have the power to transfer selected assets and liabilities of the failed firm to a third party institution or to a newly established bridge institution. Such transfer of assets or liabilities should not require the consent of any third party or creditor to be valid. It should also not constitute a default or termination event in relation to any obligation relating to such assets or liabilities or under any contract to which the failed firm is a party.[65]

The KAs contains extensive provisions dealing with bridge institutions. It states that resolution authorities should have the power to establish one or more bridge institutions to take over and continue operating certain critical functions and viable operations of a failed firm, including:

(a) the power to enter into legally enforceable agreements by which the authority transfers, and the bridge institution receives, assets and liabilities of the failed firm as selected by the authority;

(b) the power to establish terms and conditions under which the bridge institution has the capacity to operate as a going concern. This includes the manner in which the bridge institution obtains capital or operational financing or other liquidity support; the prudential and other regulatory requirements that apply to the operations of the bridge institution; the selection of management and the manner by which the corporate governance of the bridge institution may be conducted; and the performance by the bridge institution of such other temporary functions as the authority may from time to time prescribe;

(c) the power to reverse, if necessary, transfers of assets and liabilities to a bridge institution subject to appropriate safeguards , such as time restrictions; and

(d) the power to arrange a sale or winding-down of the bridge institution , or the sale of some or all of its assets and liabilities to a purchasing institution, so as best to effect the objectives of the resolution authority.

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[65] KAs at 8.

4.2.3 Bail-in powers

As observed the KAs make it clear that bail-in (instead of bail-out as frequently happened before the GFC) is the preferred approach to resolving a failed institution. Accordingly the KAs provide that the resolution authority should have bail-in powers that enable it to write down in a manner that respects the hierarchy of claims in liquidation, equity or other instruments of ownership in the firm and unsecured and uninsured creditor claims to the extent necessary to absorb the losses. It must also include the power to convert into equity or other instruments of ownership of the firm that is being resolved (or any successor in resolution or the parent company within the same jurisdiction) all or parts of unsecured and uninsured creditor claims in a manner that respects the hierarchy of claims in liquidation. Further it must have the power, upon entry into resolution to convert or write-down any contingent convertible or contractual bail-in instruments whose terms had not been triggered prior to entry into resolution and treat them in line with the two powers previously mentioned in this paragraph.[66]

It is provided that the resolution regime should make it possible to apply bail-in within resolution in conjunction with other resolution powers[67] to ensure the viability of the firm or newly established entity pursuant to the implementation of bail-in.[68]

4.2.4 Resolution Powers

Regarding the exercise of resolution powers the KAs state that resolution authorities should have the legal and operational capacity to: apply one or a combination of resolution powers , with resolution actions being either combined or applied sequentially; apply different types of resolution powers to different parts of the firm's business[69] and initiate a winding-down for those operations that, in the particular circumstances, are judged by the authorities to be not critical to the financial system or the economy.[70]

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[66] KAs 8 and 9.
[67] For example, removal of problem assets, replacement of senior management and adoption of a new business plan.
[68] KAs at 9.
[69] For example retail and commercial banking, trading operations and insurance.
[70] KAs at 10.

When applying its resolution powers to individual components of a financial group located within its jurisdiction the resolution authority is further required to take into account the impact on the group as a whole and on financial stability in other jurisdictions. It must undertake best efforts to avoid taking actions that could reasonably be expected to trigger instability elsewhere in the group or financial system.[71]

4.2.5 Safeguards

Certain safeguards are provided for in the KAs. The first of these is in respect of the creditor hierarchy and the "no creditor worse off" principle. In this regard it is stated that resolution powers should be exercised in a way that respects the hierarchy of claims while providing flexibility to depart from the general principle of equalt treatment of creditors of the same class, with transparency about the reasons for such departures, if necessary to contain the potential systemic impact of the firm's failure or to maximize the value for the benefit of all creditors. It is particularly provided that equity should absorb losses first and that no loss should be imposed on senior debt holders until subordinated debt has been written-off entirely. It is further provided that creditors should have a right to compensation if they do not receive at a minimum that which they would have received in liquidation of the specific financial institution ("no creditor worse off" safeguard).[72]

Insofar as legal remedies and judicial action are concerned it is provided that the resolution authority should have the capacity to exercise resolution powers with the necessary speed and flexibility, subject to constitutionally protected legal remedies and due process. Also, the legislation establishing resolution regimes should not provide for judicial actions that could constrain the implementation of, or result in a reversal of, measures taken by resolution authorities acting within their legal powers and in good faith. Instead it should provide for redress by awarding compensation.[73]

4.2.6 Funding of firms in resolution

Insofar as funding of firms in resolution is concerned the KAs indicate that jurisdictions should have statutory or other policies in place so that authorities are

[71] Ibid.
[72] KAs at 11. It is further provided that directors and officers of the institution under resolution should be protected in respect of actions they took in compliance with decisions by the resolution authority.
[73] Ibid.

not constrained to rely on public ownership or bail-out funds for purposes of resolution. Where temporary sources of funding to maintain essential functions are needed to accomplish orderly resolution, the resolution authority must make provision to recover any losses incurred from shareholders and unsecured creditors subject to the "no creditor worse off than in liquidation" principle or, if necessary from the financial system more widely.[74]

The KAs further require jurisdictions to have privately-financed deposit insurance or resolution funds, or a funding mechanism with ex post recovery from the industry of the costs of providing temporary financing to facilitate the resolution of a firm. It is stated that any provision by the authorities of temporary funding should be subject to strict conditions that minimize the risk of moral hazard. Such provisions should include the following:

(a) a determination that provision of temporary funding is necessary to foster financial stability and will permit implementation of a resolution option that is best able to achieve the objectives of an orderly resolution, and that private sources of funding have been exhausted or cannot achieve these objectives; and

(b) the allocation of losses to equity holders and residual costs, as appropriate, to unsecured and uninsured creditors and the financial industry through ex post assessments, insurance premiums or other mechanisms.[75]

4.2.7 Recovery and resolution planning

In terms of the KAs resolution authorities should regularly undertake, at least for globally systemically important institutions (G-SIFIs), resolvability assessments that evaluate the feasibility of resolution strategies and their credibility in light of the likely impact of the firm's failure on the financial system. It is indicated that in order to improve a firm's resolvability, supervisory authorities or resolution authorities should have powers to require, where necessary, the adoption of appropriate measures, such as changes to a firms business practices, structure or organization, to reduce the complexity and costs of resolution.To enable the continued operations of systemically important functions authorities are also required to evaluate whether to require that these functions be segregated in legally and operationally independent entities that are shielded from group problems. [76]

[74] KAs at 12.
[75] Ibid.
[76] KAs at 15-16.

The KAs also dictate certain requirements relating to recovery and resolution planning. Jurisdictions are required to put in place an ongoing process for recovery and resolution planning, covering at a minimum domestically incorporated firms that could be systemically significant or critical if they fail. These firms are obliged to have Recovery and Resolution Plans (RRPs) in place.[77]

Recovery plans are plans that identifies options to restore strength and viability when the firm comes under severe stress. According to the KAs these plans should include credible options to cope with a range of scenarios both idiosyncratic (individual) and market wide stress; scenarios that address capital shortfalls and liquidity pressures; and processes to ensure timely implementation of recovery options in arrange of stress situations.[78]

Resolution plans are intended to facilitate the effective use of resolution powers to protect systemically important functions with the aim of making the resolution of any firm feasible without severe disruptions and also without exposing taxpayers to loss. In terms of the KAs a resolution plan should include a substantive resolution strategy agreed upon by top officials and an operational plan for its implementation and identify, in particular: financial and economic functions for which continuity is critical; suitable resolution options to preserve those functions or wind them down in an orderly way; data requirements on the firm's business operations , structures and systemically important functions; potential barriers to effective resolution and actions to mitigate those barriers ; actions to protect insured depositors and insurance policy holders and that ensure the rapid return of segregated client assets; and also clear options or principles for the exit from the resolution process.

With regards to resolution plans it is further stated that firms shoud be required to ensure that key Service Level Agreements can be maintained in crisis situations and in resolution, and that the underlying contracts include provisions that prevent

[77] KAs 16. The firm's senior management should be responsible for providing the necessary input to the resolution authorities for the assessment of the recovery plans and also for the preparation by the resolution authority of resolution plans.
[78] KAs 16-17.

termination triggered by recovery and resolution events and that these contracts also facilitate transfer of the contract to a bridge institution or a third party acquirer.[79]

Chapter Five Conclusions and Recommendations

5.1 Conclusions

It is clear that banks fulfil an important intermediary role in the financial system and that the failure of a significant, large and heavily interconnected bank can expose the financial system to severe risk that may potentially occasion the collapse of the whole system and even spread across borders to other jurisdictions. It is therefore critically important that measures should be in place to deal with bank failures and ideally , where appropriate , to rescue failing banks and so to avoid them exiting the financial system and denting financial system stability or even eroding it completely.

The process of curatorship in terms of section 69 of the Banks Act has been used in the past with mixed success to rescue banks that were in financial trouble. In principle the curatorship process has many features that makes it a useful tool in the context of bank rescue. The moratorium on enforcement of debt whilst the bank is under curatorship gives the curator some breathing space within which to figure out the best way to get the failing bank out of its troubled financial waters. The other powers of the curator relating to transfer of assets, payment of creditors, cancellation of contracts and so forth also aid in this process of rescuing a failing bank. However, as emerged from the "rescue" of African Bank, section 69 of the Banks Act also had various shortcomings pertaining to aspects such as transfer of liabilities and shareholder voting powers that could thwart rescue attempts. These problematic aspects were addressed by the 2015 Banks Amendment Act that enabled the curator of African Bank to effectively deal with the curatorship of the bank.

However it should be noted that the rescue of African Bank was actually a unique event and that it does not fit the mould of the traditional curatorship process aimed at restoring the business of the bank to viability again. As pointed out by Van

[79] KAs at 17.

Heerden[80] the African Bank rescue rather exhibited some the features of bank resolution in accordance with the FSB Key Attributes of Resolution Regimes for Financial Institutions. This is because African Bank as a whole was not saved and restored to viability through the process of curatorship. What actually transpired in the rescue of African Bank was that only the good part (good bank) of the business of that bank was saved and through a process of bail-in that part of the bank was recapitalised and released onto the financial system as a new good bank. The bad part of the bank was severed from the good performing book and was bailed-out by the South African Reserve Bank.

As indicated in Chapter Three the Global Financial Crisis of 2008 has significantly changed approaches to financial regulation across the globe and has emphasised that the core objective of financial regulation should be to promote and maintain financial system stability. This new regulatory focus also placed emphasis on the orderly resolution of financial institutions so as not to disrupt the financial system and to facilitate the ongoing provision of critical functions of financial institutions that encounter failure. The KAs are quite innovative as the set out various principles that jurisdictions can incorporate into their domestic legislation in order to create domestic regimes for effective recovery and resolution of financial institutions. It is also clear that the KAs create the obligation for financial institutions to be pro-actively and actively involved in managing their financial woes in the interest of financial stability which in the end serves the broader public interest.

It is therefore to be welcomed that South Africa, being a member of the G20 with a robust banking sector that is mainly due to good regulation, has declared its intention to embark on the process of strengthening its resolution framework as per the policy document "Strengthening South Africa's resolution Framework that was released in August 2015 by National Treasury , SARB and the financial Services Board.[81] Such a move would align the South African approach to bank resolution with international best practice and will enable the avoidance of financial system collapse.

5.2 Recommendations

[80] Van Heerden , LLM lecture on bank curatorship at the University of Pretoria, 24 October 2017.
[81] "Strengthening South Africa's Resolution Framework for Financial Institutions", policy document by National Treasury , SARB and the financial Services Board, dated 20 August 2015 available at https://www.resbank.co.za/Publications/Detail item/Publications.aspx? Accessed on 8 November 2017.

Some recommendations can be made in the context of the endeavour to strengthen South Africa's resolution framework especially given the "blurring of the lines" that occurred during the African Bank rescue.

It is recommended that specific consideration be given to the process of curatorship of banks and whether it should be retained. It is submitted that generally in practice the rescue of a bank would entail that the bad book is split from the good book. The notion that curatorship is only feasible where the business of a bank as a whole can be restored so that its becomes a viable concern again is outdated. If one has regard to the curatorship process and the powers of the curator, especially in its format prior to the 2015 amendments to the Banks Act, it would actually seem to be a kind of modified insolvency administration process aimed at restoring the (for all practical purposes, insolvent) bank to financial and economic viability. Generally insolvency procedures serve the interest of the insolvent institutions creditors. However in the post GFC landscape that promotes the concept of orderly bank resolution, it appears that the interests of the broader public in the stability of the financial system is the main objective. This means that there is a definite change in focus insofar as dealing with distressed banks are concerned. Having regard to the KAs that requires banks to take responsibility for their own financial situation and alleviating the burden of the regulators in this regard it may transpire that bank curatorship will be replaced by a system where the focus is on orderly resolving the bank by retaining its good part and discarding its bad part , just like what happened in the case of African Bank.

It is therefore further recommended that research be conducted into the rights of creditors in the context of bank failure and what the best way would be to deal with such creditors. It is also recommended that the global regulatory move from a culture of bail-out with taxpayers money towards a culture of bail-in where shareholders take responsibility for losses incurred by the failing bank is a positive step that should be embraced.

Bibliography

Journal Articles

- Allen "What is 'financial stability'? The need for some common language in international financial regulation" 2014 *Georgetown Journal of International Law* 929
- Avgouleas and Goodhart "Critical Reflections on Bank Bail-ins" (2015) Journal Of Financial Regulation 3-29
- Schulze "The Institution of Curatorship of a Bank in terms of Section 69 of the Banks Act 94 of 1990-A Rare Decision." (1999) 11 *SA Merc LJ* 428

Internet Sources

- Bloomberg- Bonorchis and Spillane 'In Africa a Bright Idea in Banking Leaves a Trail of Ruin' available at http://www.bloomberg.com/news/articles/2014-08-27/how-brightest-brain-kirkinis-failed-with-his-african-bank
- 'Debt-holders support African Bank restructuring proposal' available at http://citizen.co.za/392066/debt-holders-support-african-bank-restructuring-proposal/
- Jones 'African Bank in Curatorship: sharing the pain' http://www.financialmail.co.za/coverstory/2014/08/14/african-bank-in-curatorship-sharing-the-pain

Lectures

- Van Heerden, LLM lecture on bank curatorship at the University of Pretoria, 24 October 2017

Legislation:

- Banks Act 94 of 1990
- Banks Act Amendment Act 3 of 2015

- South African Reserve Bank Act 90 of 1989
- The Insolvency Act, 24 of 1936

Policy Documents

- "Key Attributes of Effective Resolution Regimes for Financial Institutions" available at http://www.fsb.org/wp-content/uploads /r_11104cc.pdf
- "Strengthening South Africa's Resolution Framework for Financial Institutions", policy document by National Treasury , SARB and the financial Services Board, dated 20 August 2015 available at https://www.resbank.co.za/Publications/Detail_item/Publications.aspx?
- "Designing a Deposit Insurance Scheme for South Africa" policy document by the SARB and National Treasury available at https://resbank.co.za/Lists/News%20and%20Publications/.../DIS%20paper.pdf

Reports

- Myburgh Report on Investigation in terms of Section 69A of the Banks Act 94 of 1990 available at https:www.resbank.co.za/publications/detail-item.../publications/aspx?

Cases

- *African Bank v Theron and Another* [1996] 4 All SA 156 (E)
- *Rand Bank v Lornadawn Investments (Pty) Ltd* 1978 (4) SA 868 (T)
- *Registrar of Banks v Regal Treasury Private Bank Ltd (under curatorship) (Regal Treasury Bank Holdings Ltd Intervening)* 2004 (3) SA 560 (W).