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THE "PROPOSED" NATIONALISATION OF THE SOUTH AFRICAN RESERVE BANK: A COHERENT OR FALLACIOUS PROPOSAL?

by

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DECLARATION OF ORIGINALITY

I declare that this dissertation is my original work. Any sources that have been used have been referenced and acknowledged. This dissertation is submitted in partial fulfilment of the degree Master of Laws in Mercantile Law at the University of Pretoria.

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SUMMARY

Nationalisation remains very topical in democratic South Africa as we have seen this discourse manifest in the agenda to nationalise numerous industries. In 2017, following the Report of the Office of the Public Protector regarding the "life boat" given by the South African Reserve Bank (Reserve Bank) to Bankorp Limited and the failure to recover what has been deemed misappropriated funds, we have witnessed this discourse gain momentum with the African National Congress elective conference resolving to propose the nationalisation of the Reserve Bank. It is this leg of the nationalisation debate that is unpacked in this paper. The aim is to understand the core functions of the Reserve Bank in order to establish the possible impact of a move towards nationalisation. The Reserve Bank aims to protect the value of the currency, is tasked with inflation targeting and acts as a lender of last resort, among other functions. The theme of nationalisation maintained in this paper is one of a vehicle that is rooted in the democratic ideology of progressiveness and advancement of the economic interests of the majority. This view is understood against the backdrop of the policy framework of the Freedom Charter. Owing to the volatility of South Africa's socio-political and economic landscape however, pervasive corruption and other disadvantages such as state capture are advanced as having weakened and tainted the decision-making ability of government and are expounded upon to suggest that South Africa is not ready for nationalisation of an institution such as the Reserve Bank. A comparative analysis conducted against the National Bank of Austria which was nationalised in 2010 provides insights and key lessons to be learnt. In the concluding chapter, alternatives to the nationalisation of the Reserve Bank, in the form of the establishment of a state-owned bank independent of the Reserve Bank as well proposing for efficient and strategic use of existing government financial institutions are explicated.

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1. CHAPTER ONE: GENERAL INTRODUCTION

1.1 Background

This research paper seeks to analyse and evaluate whether the proposed nationalisation of the South African Reserve Bank (Reserve Bank) can be said to be viable or not in the context of South Africa's current socio-political and economic climate.

The nationalisation of central banks is not an uncommon phenomenon. "The world of central banking was transformed by a spate of nationalisations beginning in 1936."[1] Though not the first central bank to undergo the nationalisation process, the Reserve Bank of New Zealand, for example, was nationalised in 1936 with a view to grant the country's government with a significant role in the economy.[2] The national bank of Denmark was also nationalised in 1936 with an objective to provide parliament with insight into the affairs of the central bank.[3] This led to an increase in momentum in the nationalisation of central banks during the 20th century.[4] South Africa now remains as one of the few countries in the world where control of its central bank, the Reserve Bank, still rests under private ownership.[5]

An investigation was conducted following a complaint submitted to the Office of the Public Protector[6] in November 2010 by a certain Mr Hoffman (Complainant) on behalf of the Institute for Accountability in South Africa, into the alleged failure by the South African government to recover money that had been paid out by the Reserve

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[1] Singleton *Central banking in the twentieth century* (1995) 110.

[2] Reserve Bank of New Zealand *What is the Reserve Bank?* available at https://www.rbnz.govt.nz/about-us/what-is-the-reserve-bank (2018) (accessed 12 May 2018).

[3] De Kock *Central Banking* (2015) 319.

[4] Reserve Bank of New Zealand (see footnote 1 above).

[5] Roussouw *Why central banks with shareholders might not be such a bad idea* http://theconversation.com/why-central-banks-with-shareholders-might-not-be-such-a-bad-idea-after-all-43574 (2015) (accessed 2 October 2018).

[6] The Public Protector is an independent constitutional institutional established in terms of section 181(1)(a) of the Constitution of the Republic of South Africa, 1996 to strengthen constitutional democracy through investigating and redressing improper conduct in state affairs.

Bank between 1985 and 1995 to Bankorp Limited (Bankorp), now constituting part of ABSA Bank Limited (ABSA Bank).[7] The recovery process was recommended by the UK asset recovery agency, CIEX Limited (CIEX), after it conducted an investigation into the management of government funds by the apartheid regime. The apartheid regime refers to a period of institutionalised racial segregation which was enacted in South Africa in 1948.[8] Apartheid race laws institutionalised discriminatory practices that touched on every aspect of social life, including but not limited to, "physical separation between races, especially in urban areas" by amongst others, prohibiting inter-marriage and social integration.[9] The findings of this investigation were consolidated into Report No. 8 issued by the Office of the Public Protector on 19 June 2017.

In the Report, the current Public Protector Advocate Busisiwe Mkhwebane (Public Protector) asserted that the Reserve Bank has a duty which requires it to act in the interest of the public in a manner which is economically and efficiently viable.[10] It follows from this statement that she found the actions of the Reserve Bank that took place during the Bankorp transaction "in the form of a lifeboat did not constitute value for money".[11] The lifeboat was granted to Bankorp, as a form of financial aid through a series of loans as it was experiencing financial difficulties.[12] The lifeboat was found to have been given unlawfully to Bankorp by the Reserve Bank and it was found that the unlawfulness of the Reserve Bank's conduct further extended to its failure in attempting to recover the misappropriated funds.[13] The Public Protector's findings led her to suggest that the mandate of the Reserve Bank should be amended. As a result of this suggestion and additional findings contained in the Report, the African National Congress (ANC) elective conference resolved to propose the nationalisation of the Reserve Bank.

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[7] Office of the Public Protector, Report No. 8, *Alleged Failure to Recover Misappropriated Funds (2017/2018)* (2017) 8.

[8] SA History Online *A history of Apartheid in South Africa* https://www.sahistory.org.za/article/history-apartheid-south-africa (2018) (accessed 25 November 2018).

[9] I*bid*.

[10] *Idem* 40.

[11] *Ibid*.

[12] I*dem* 9.

Nationalisation of the Reserve Bank would lead to control of the Reserve Bank changing over from private to public ownership. This is a move that was found to have alarming consequences by the High Court in its 2017 ruling.[14] Notably the High Court set aside the remedial action proposed by the Public Protector in Report No. 8 which entailed a series of findings. The said remedial action was found to be in violation of the doctrine of the separation of powers which requires institutions to "not intrude into the domain of others".[15] The High Court also found that political interference in the operations of the Reserve Bank would affect the ability of the Reserve Bank to perform its functions.[16]

The Reserve Bank, as a central bank, is tasked with, among other functions, monetary policy formulation and implementation as well as the use of inflation targeting as a tool for maintaining price stability.[17] The Reserve Bank also has a dual function as a lender to the commercial banks and a lender of last resort.[18] It can be said that the Reserve Bank provides a cushion for the entire financial system through financial assistance and preventing unexpected adverse outcomes in the financial sector. In light of this, the position that is advanced in this dissertation is that, whilst the roots of the proposed nationalisation of the Reserve Bank are nationalistic in nature, the process is susceptible to manipulation. Nationalisation, in and of itself, is herein, not viewed as a "bad vehicle" as it advances the notion of the public acquiring an asset or industry that was once privately owned. This is a move that will be argued as being in line with the Freedom Charter and democratic ideology. However, the position that is maintained is therefore not that nationalisation should never be considered but rather that South Africa's current socio-political and economic climates are volatile and warrant that South Africa is not ready for a move toward nationalisation of the Reserve Bank.

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[13] *Idem* 45.
[14] *South African Reserve Bank v Public Protector and Others* 2017 (6) SA 198.
[15] *Idem* para 44.
[16] *Idem* para 49.
[17] De Waal and van Eyden *Monetary policy and inflation in South African: A VECM augmented with foreign variables* (2012) 1.
[18] *Ibid*.

While nothing has been set in stone or finalised regarding the proposed nationalisation of the Reserve Bank, this dissertation aims to understand the core functions of the Reserve Bank and to establish how nationalisation of the Reserve Bank is likely to impact on these functions. The research also touches on the impact of nationalisation on the socio-political and economic climate of South Africa.

1.2 Research Problem

The research problem that will be addressed is to analyse and evaluate whether the proposed nationalisation of the Reserve Bank is viable or not in the context of South Africa's current socio-political and economic climate.

1.3 Research Questions

This study will accordingly pursue the following research questions:

1.3.1 What are the role, mandate and functions of the Reserve Bank?

1.3.2 What is nationalisation?

1.3.3 Why is there a call for nationalisation of the Reserve Bank?

1.3.4 What are the socio-political implications of the nationalisation of the Reserve Bank against the backdrop of South Africa's current climate?

1.3.5 What are the economic implications of nationalisation (to be discussed in line with the established functions of the Reserve Bank)?

1.3.6 Are there any possible alternatives to the nationalisation of the Reserve Bank?

1.4 Methodology

The methodology to be employed is that of a literature review. The aim of which is to extract information from the writings of others on the topic of nationalisation. The literature will be gathered through various sources including case law, journal articles, newspaper articles, legislation, books, policy documents and internet sources. The information will be examined, scrutinized and produced in a logical manner to offer clarity on the problem question at hand, leading to a well-informed conclusion.

1.5 Overview of Chapters

Chapter One introduces the reader to the research topic. It lays the foundation by providing the background to the nationalisation debate as it informed and led to the commencement of this research. It gives a brief summary and overview of the direction that the research paper will take.

The second chapter provides the historical background to the establishment of the Reserve Bank as a solution for unsatisfactory monetary and financial conditions post the World War. The legal framework of the Reserve Bank as provided for in the Currency and Banking Act No. 31 of 1920 (Currency and Banking Act), South African Reserve Bank Act No. 90 of 1920 (Reserve Bank Act) as well as the Constitution of the Republic of South Africa Act, 1996 (Constitution) will be discussed. The Constitution is particularly important because the Reserve Bank derives its ownership, mandate and autonomy from the Constitution, which will be discussed in greater detail hereinafter. The various enactments will be discussed in so far as they provide for the strategic objectives of the Reserve Bank, namely: to protect the value of the currency, achieve and maintain financial stability through the prism of a monetary policy framework rooted in inflation targeting and providing a cushion for the entire financial system.

Chapter Three entails an analysis of nationalisation as a concept, touching on its definition and the elements that constitute it. The history of nationalisation in South Africa shall be analysed, commencing with its Freedom Charter roots stemming as far back as the apartheid era. This is aimed at establishing and contextualising the landscape of the nationalisation debate in South Africa. A brief analysis of the nationalisation debate as it pertains to the mining industry will be conducted so as to establish if there are any similarities that may be drawn in the context of the proposed nationalisation of the Reserve Bank. In this Chapter we begin to unpack the proposed nationalisation of the Reserve Bank debate. We focus on the ANC elective conference that led to the call for nationalisation. This Chapter will be constructed with the aid of arguments formulated and presented to the South African public through media platforms, especially.

Due to the fact that the Public Protector's Report set the tone for this debate Chapter Four unpacks the Report and its findings as they related to the alleged failures of the Reserve Bank and led to the opinion that the mandate of the Reserve Bank should be revised. The dominant theme in the Public Protector's position appears to be that the public was prejudiced by the conduct of the Reserve Bank and government, as the institutions acted contrary to the constitutional provision of redressing social injustice and promoting efficiency. The controversial counter arguments raised by ABSA Bank in their rebuttal will be assessed. This is followed by a closer look at the 2017 High Court case of the *South African Reserve Bank v Public Protector and Others* 2017 (6) SA 198.

Chapter Five will endeavour to analyse the recent progress of the nationalisation debate that has led to the tabling of the South African Reserve Bank Amendment Bill, Government Gazette No. 41657 of 25 May 2018 (SARB Amendment Bill) before parliament. An analysis of the core assertions in support of the SARB Amendment Bill will also be conducted. The volatility of the political and economic climate of South Africa will herein be highlighted. This Chapter also contains a comparative case study against the National Bank of Austria (Oesterreichische Bank) that was recently nationalised in 2010. The assessment will look into the situation in Austria leading up to and post nationalisation and contrast it with the circumstances of South Africa and its central bank.

The concluding Chapter Six will offer solutions in the form of alternatives to the nationalisation of the Reserve Bank. We unpack the proposals for the establishment of a state-owned bank independent of the Reserve Bank as well as the efficient and strategic use of existing government owned financial institutions in order to achieve the growth trajectory desired by the economic landscape of South Africa.

2. CHAPTER TWO: THE CONTRIVANCE OF THE SOUTH AFRICAN RESERVE BANK

2.1 Establishment of the Reserve Bank

Prior to the establishment of the Reserve Bank in South Africa, commercial banks were printing their own banknotes and issuing these to the public. The notes were recognised as legal tender in commercial transactions across the country. There was no legislative framework that regulated the issuing of banknotes except for the requirement that the value of the paper money printed by the commercial banks had to be linked directly to gold, this was referred to as "the gold standard system".[19] Mbuya remarks that "[t]his situation, of course, led to a lack of uniformity with the issuing of banknotes and the possibility of an over-issuing of notes under the laws of certain provinces".[20]

Post World War I there was mounting pressure on commercial banks as the price of gold in South Africa experienced a steady decline. Many banks across the country started buying gold at a lower price and reselling the gold in London at a higher price.[21] Due to the gold standard, commercial banks were forced to buy gold in London at a much higher price than they converted banknotes into gold to back the banknotes that they were issuing.[22] This was not commercially viable for the commercial banks and their profit margins began dropping tremendously. In a bid to sustain their ability to generate sufficient income to meet their operating commitments, commercial banks requested government to do away with the gold standard. In many countries across the world there was already a move toward a national or central bank with the "sole mandate or principal right to issue banknotes

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[19] South African Reserve Bank *Background* https://www.resbank.co.za/AboutUs/History/Background/Pages/Background-Home.aspx (2017) (accessed 24 November 2017).

[20] Mbuya JC *The Pillars of Banking* (2008) 195.

[21] *Idem* 11.

[22] *Ibid*.

and acting as banker for the government".[23] South Africa followed suit and a central banking system was established.

The Reserve Bank was established in 1921 as the central bank of South Africa in terms of the Currency and Banking Act. The Reserve Bank was established to be the sole issuer of banknotes in South Africa as well as the custodian of cash reserves for other banks.[24] Accordingly at the onset, the establishment of the Reserve Bank was aimed at ensuring that South Africa had a legislative framework for the issuing of banknotes and maintaining minimum credit balances for commercial banks to ensure that at any given moment they were able to meet their liabilities.[25] The latter of the functions of the Reserve Bank, led to it becoming a lender of last resort.[26] De Jager submits that as lenders of last resort, central banks are "the source from which all banks could obtain liquidity in times of crisis".[27] Accordingly, the Reserve Bank, in assuming the role of a lender of last resort, now serves as a credit granting institution in order to ensure that there is systemic risk management to limit adverse outcomes from financial distress in the financial sector which are likely to lead to a contagion.[28] This provided safety for the financial system of South Africa as the Reserve Bank was in a position to offer loans to banks in the event that they experienced financial difficulty.[29] This function strengthened the financial system and financial viability of the banking sector.

2.2 Autonomy of the Reserve Bank

It is important to highlight that the Reserve Bank continues to enjoy a great deal of autonomy in so far as the Constitution provides that, in pursuing its primary objective, the Reserve Bank "must perform its functions without fear, favour or

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[23] Mbuya (footnote 20 above) 196.
[24] *Id*em 198.
[25] De Jager *Central Bank, lender of last resort assistance: An elusive concept?* (2010) 231.
[26] *Idem* 232.
[27] *Idem* 232.
[28] According to Allen and Carletti *What is systemic risk?* (2013) contagion refers to the likelihood that the distress of a financial institution may spread to other institutions in the financial system, with a likely effect of leading to systemic crisis. Contagion is derived from the interconnectedness of the financial system and inter-financial institution exposure.
[29] De Jager (footnote 25 above) 231.

prejudice".[30] The fact that the Reserve Bank enjoys this autonomy does not mean that the Reserve Bank is an unaccountable institution. De Jager explains that "[c]entral bank independence and autonomy is based on the premise that, *inter alia*, the State is tasked with ensuring a sound financial system".[31] This requires that the Reserve Bank and the State should be guided by public interest to ensure that the financial system is developed and strengthened in a manner that mitigates risk, in other words, macroprudential regulation.[32] The accountability of the Reserve Bank is noticeable with the requirement to furnish information to the Department of Finance and to parliament at regular intervals.[33]

At the close of business on the last business day of every month, the Reserve Bank is required to prepare a statement of financial position indicating its' assets and liabilities for the Department of Finance.[34] Within three months after the end of each financial year, the Reserve Bank is required to produce two copies of its financial statements signed by the Governor, Deputy Governor and the chief financial officer together with an audit report.[35]

A further requirement is that the Reserve Bank must furnish the Department of Finance with a list containing the full names, addresses and number of shares held by each shareholder.[36] This an important requirement as the current nature of the shareholding and ownership of the Reserve Bank is one of the key proponents used for the proposal for nationalisation of the central bank. At the ANC elective conference, where government was instructed to commence with the nationalisation process, members of the ANC raised concern regarding the private shareholding of the bank, which they suggest should be 100% in the hands of the public in order to ensure that public benefit takes priority over the status quo.[37] This position is

[30] Constitution of the Republic of South Africa Act, 1996 s223.
[31] De Jager (footnote 25 above) 233.
[32] De Jager (footnote 25 above) 233.
[33] South African Reserve Bank Act, 90 of 1920 s31.
[34] *Idem* s32(1)(a).
[35] *Idem* s32(1)(b).
[36] *Idem* s32(1)(c).
[37] Hunter *ANC tells state to nationalise Reserve Bank* https://www.businesslive.co.za/fm/fm-fox/2017-12-21-anc-tells-state-to-nationalise-reserve-bank2/ (2017) (accessed 30 April 2018).

maintained in the SARB Amendment Bill which, in dealing with the share capital of the Reserve Bank, proposes that the state should be the sole shareholder of the Reserve Bank.[38]

Since 1921, the Reserve Bank has always been privately owned.[39] It is owned by approximately 650 shareholders.[40] It has an authorised share capital of 2,000,000 shares.[41] The maximum number of shares owned by a single shareholder is capped at 10,000 shares.[42] The bank's shareholders are paid dividends of not more that 10% per share.[43] This transaction takes place after a tax on profits is conducted.[44] Remaining funds are then paid over to the government.[45]

Based on the analysis of the autonomy of the Reserve Bank, one is able to reach the same conclusion as suggested by Mbuya, that the Reserve Bank's operations are not capitalistic in nature as they are not driven by a profit motive.[46] The Reserve Bank's operations are driven by serving public interest. This objective was further confirmed by the current Governor of the Reserve Bank Lesetja Kganyago (Governor) in his response to the ANC's resolution to call for the nationalisation of the Reserve Bank. The Governor asserted that the shareholding of the Reserve Bank does not affect the bank's policy or regulation.[47] This can be considered true if one comprehends the fact that the mandate of the bank is derived from the Constitution and the Reserve Bank Act which requires that the bank's duties be exercised without fear, favour or prejudice in order to achieve and maintain financial

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[38] South African Reserve Bank Amendment Bill, Government Gazette No. 41657 of 25 May 2018 s9.
[39] Mbuya (footnote 20 above) 171.
[40] South African Reserve Bank *Monetary Policy* https://www.resbank.co.za/MonetaryPolicy/Pages/MonetaryPolicy-Home.aspx (2017) (accessed 30 April 2018).
[41] *Ibid.*
[42] *Ibid*.
[43] *Ibid*.
[44] *Ibid*.
[45] *Ibid*.
[46] Mbuya (footnote 20 above) 171.
[47] Le Cordeur *Reserve Bank speaks out on ANC resolution to nationalise bank* https://www.fin24.com/Economy/anc-sticks-to-policy-decision-to-nationalise-sarb-20171220 (2017) (accessed 24 November 2017).

stability by way of a monetary policy that focuses on price stability, as discussed in more detail below.

2.3 Mandate of the Reserve Bank

The mandate of the Reserve Bank is set out in its enabling legislation which was initially the Currency and Banking Act. Soon after its establishment, the mandate of the Reserve Bank was expanded. This expansion in mandate can be closely linked to the fact that post World War I, a lot of disruptions occurred globally leading to financial instability and unsatisfactory monetary conditions that required intervention. The mandate of the Reserve Bank at the time of the Public Protector's report was stipulated in the Reserve Bank Act as protecting the value of the currency in the interest of balanced and sustainable economic growth in the Republic. As indicated this mandate was subsequently confirmed in section 224 of the Constitution.

The Reserve Bank is thus charged with formulating and implementing monetary policy.[48] Accordingly, the primary objective of the Reserve Bank is to ensure that price stability is maintained and that financial stability is achieved. This supports the earlier statement contained in Chapter One that the Reserve Bank is tasked with inflation targeting. This is because the monetary policy of the central bank is premised on ensuring that inflation and interest rates are kept at a minimum. Mbuya explains that "[p]rice stability reduces uncertainty in the economy and, therefore, provides a favourable environment for growth and employment creation".[49]

As alluded to above, the Reserve Bank as a central bank, functions as a lender of last resort. This function further sustains financial stability in the economy. De Jager points out that "[c]entral banks, by their very nature, are deeply involved in systemic risk management and acknowledge that a close correlation exists between monetary and financial stability".[50] The idea behind this function is that linkages between firms in the financial system create a ripple effect that can give rise to contagion risk.[51] The

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[48] Mbuya (footnote 20 above) 173.
[49] *Idem* 23.
[50] De Jager (footnote 25 above) 232.
[51] Einsberg and Noe *Systemic Risk in Financial Systems* (2001) 236.

dangers of systemic risk in the context of South Africa were evident in the recent contagion that stemmed following the collapse of African Bank resulting in widespread disturbances due to the interconnected nature of the financial sector.[52] To combat the impact of ailing financial institutions and its effect on the financial system, the Reserve Bank provides a cushion for the financial system by availing liquid assets to banks and other financial institutions that are distressed to prevent severe instability that may affect the entire financial industry.[53]

Other functions of the Reserve Bank include: monitoring the financial system to ensure that disruptions are detected and eradicated, acting as a banker to the banks by holding cash reserves on behalf of other banks whilst maintaining a liquidity requirement, and safeguarding the banking system.[54]

2.4 Chapter Summary

Whilst the Reserve Bank was established in 1921 as a direct response to the mounting pressure on commercial banks that were printing banknotes and their inability to continue to meet their obligations because of the requirement of the value of paper money being linked to gold; its establishment resulted in the financial stability of South Africa's financial system. Through the monetary policy adopted by the Reserve Bank in the early 2000s of price stability, South Africa's financial industry witnessed the preservation of the value of the Rand currency by virtue of inflation targeting being the primary tool for achieving price stability and long-term economic growth. The legislative framework underpinning the Reserve Bank has granted the bank self-governing power, but this is not without limitations as the Reserve Bank is required to remain accountable to the Department of Finance and parliament as provided for in the Reserve Bank Act. Accordingly, even though the Reserve Bank has autonomy it remains an accountable institution.

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[52] Ford *African Bank Limited: Demise and Rebirth African Business Magazine* http://africanbusinessmagazine.com/uncategorised/tom-winterboer-african-bank-investments-ltd/ (2014) (accessed 1 May 2018).

[53] Mbuya (footnote 20 above) 34.

[54] Mbuya (footnote 20 above) 178.

3. CHAPTER THREE: CONCEPTUALISING NATIONALISATION DISCOURSE

3.1 What is nationalisation?

The history of nationalisation is said to go as far back as the 1970s with the expropriation of foreign owned property and the nationalisation of industries such as oil, transportation and health care.[55] The rise in nationalisation was as a result of a purpose driven attempt by governments globally to obtain sovereignty over once privately owned property for the benefit of public interest. The dominant view in nationalisation discourse is that there should be national control of essential resources so that "government gains a greater income share" which can be used for prompting an economic agenda that benefits the majority.[56]

Nationalisation is defined as the "taking of privately owned corporations, industries, and resources by government with or without compensation".[57] For nationalisation to be deemed to have taken place, a property right that once vested with the private sector must undergo a change of ownership over to the public such that the property right fully vests with the public.[58] Spaeth thus remarks that "[i]t is not uncommon, for industries such as mining, energy, water, health care, education, transportation, police and military defense to operate nationally or municipally within democracies under arrangements in which taxpayers, through elected officials, may exert some measure of control over services that are required by a large majority of citizens".[59] As mentioned in the preceding paragraph, from the 1970s to date, nationalisation of

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[55] Melek *Productivity, Nationalisation, and the Role of "News": Lessons from the 1970s* https://www.kansascityfed.org/publicat/reswkpap/pdf/rwp14-06.pdf (2016) (accessed 1 May 2018).

[56] Coetzee *The proposed nationalisation of mines in South Africa - A Critical Assessment IGR Unit Province of KwaZulu-Natal Provincial Treasury 10* http://kzntopbusiness.co.za/site/user_data/files/Mine_Nationalisation_2.pdf (2010) (accessed 21 November 2017).

[57] Business Dictionary *Nationalisation* http://www.businessdictionary.com/definition/nationalisation.html (2018) (accessed 30 April 2018).

[58] Melek (footnote 55 above).

[59] Spaeth *Nationalisation Economic Policy* https://www.britannica.com/topic/nationalisation (2018) (accessed 13 May 2018).

the central banking system has gained so much momentum that South Africa remains one of the few countries whose central bank is not nationalised.

There are many reasons why the decision to endeavour to nationalise takes place, such as, the need for a fair distribution of income and the need to alleviate poverty by way of generating wealth for the masses.[60] In the case of the proposed nationalisation of the Reserve Bank, the assertion is that ownership and the proceeds derived thereof should not be left to vest in the 650 shareholders of the Reserve Bank but should be transferred to the broader society.

According to Katzarov, nationalisation is based on the desire to achieve peace and attain social justice.[61] This, he suggests, cannot be achieved if effective control of corporations and industries is left to operate and function as is. Katzarov suggests that the reason why the advancement of nationalisation should be channelled with much determination is premised on the massive disparity between those that exploit property rights and the thousands of citizens that carry on the activity of production and distribution.[62] This suggestion is championed because when one looks at the status quo, the operational structure pertaining to corporations and industries is one of exploitation of the masses who work for the benefit of the minority that are in possession of property rights. Nationalisation is thus understood against the backdrop of progressiveness that is rooted in the advancement of the economic interests of the majority. Singleton reiterates this notion in so far as he suggests that nationalisation would lead to "full democratic participation in decision making".[63] This is considered an essential element in a democratic country like South Africa.

Unfortunately the incorrect basis that continues to dominate nationalisation discourse is the notion that nationalisation is merely a means to an end through which the state is given ownership and inherently the economic functions that attach thereto.[64] This

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[60] Coetzee (footnote 56 above).
[61] Katzarov *The Theory of Nationalisation* (1964) 2.
[62] *Id*em 14.
[63] Singleton (footnote 1 above) 14.
[64] Katzarov (footnote 61 above) 2.

is perceived to be an incorrect assertion where nationalisation is undertaken in its purist form and the implementation thereof stems from this notion.

3.2 Nationalisation and the Freedom Charter

The call for nationalisation of the Reserve Bank is rooted in the Freedom Charter. This policy document states that the people of South Africa "shall share in the country's wealth and that the mineral wealth beneath the soil, the banks and monopoly industry shall be transferred to the ownership of the people as a whole".[65] Though the interpretation of the provisions of the Freedom Charter is open to divergent opinion, consensus should prevail regarding the fact that the underlying notion of the concept of nationalisation as referred to therein is the ideology of people being granted access and control over the means through which they earn a living. It is essential to highlight the regime of apartheid that prevailed at the time in which the Freedom Charter was carved.[66] This was a period when the freedom of the oppressed was the primary goal of liberation movements.[67] Private ownership of resources vested in the minority that advanced the agenda of racial segregation. Accordingly nationalisation in the context of the Freedom Charter was informed by a people that sought to eradicate white minority rule, and for them nationalisation stood to symbolise emancipation. It being noted that the Freedom Charter sought to advance a national movement that was non-racial and this cohesiveness spills over into nationalisation and its core element of an all-inclusive public interest which represents the demographics of South Africa.[68]

Davies comments that "[i]t is generally known that South African capitalism has long been dominated by monopoly".[69] He suggests that this position has resulted in a greater problem of centralisation and concentration of capital.[70] He further uses the

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[65] *The Freedom Charter* (1955).

[66] South African History Online *Significance of the Congress of the People and the Freedom Charter* https://www.sahistory.org.za/article/significance-congress-people-and-freedom-charter (2011) (accessed 13 May 2018).

[67] *Ibid.*

[68] *Ibid.*

[69] Davies *Nationalisation, Socialization and the Freedom Charter' in After Apartheid: Renewal of the South African Economy* (1998) 86.

[70] *Ibid.*

mining industry as a practical example to depict monopoly as it is evident that the industry is controlled by elites that constitute the Chamber of Mines.[71] Concentration and centralisation both result in an intensification of the flow of capital to the minority. The complication posed by capital concentration being that it leads to unwanted social consequences, chief of which entails exploitation. Therefore nationalisation in the context of the Freedom Charter seeks to decentralise this capital concentration by ensuring that it is redistributed and dispersed by way of public ownership through an eradication mechanism that seeks to do away with the exploitation of monopoly power.

3.3 The "proposed" nationalisation of the Reserve Bank

Nationalisation of the Reserve Bank is not the first call for a move toward public ownership in South Africa. In previous years, conversation emerged regarding the nationalisation of mines. This policy agenda was propelled by the youth league branch of the ANC (ANCYL). The assertion of the ANCYL was that nationalisation would result in an increase of the state's fiscus, safeguard state sovereignty and increase job capacity as well as better working conditions.[72] The ANCYL asserted at the time, and continues to hold the view that nationalisation of the mining industry is a move that is in line with the Freedom Charter and aimed at strategic political and economic transformation.[73] It was further contemplated by the ANCYL that nationalisation of the mining industry would change "the structure of the economy and the distribution of wealth and income in our society".[74]

Since the discovery of minerals in South Africa as far back as the 1800s with the gold rush that subsequently ensued, the mineral industry has contributed immensely to the development of the country's economy.[75] South Africa continues to supply the global market with its mineral resources which have created a booming trade

[71] *Idem* 53.
[72] ANCYL *ANCYL plan for nationalising mines* http://www.politicsweb.co.za/documents/ancyl-plan-for-nationalising-the-mines (2010) (accessed 30 April 2018).
[73] Shivambu *ANCYL Statement on the Nationalisation of mines Research* http://www.cosatu.org.za/show.php?ID=4288 (2010) (accessed 21 May 2018).
[74] *Ibid*.
[75] Davies (footnote 69 above) 56.

industry. The ANCYL justifiably subscribes to the notion that because mineral resources play a crucial role in the economy of the country, control of this industry cannot be left to sustain monopolies to the detriment of broader society and that there is a need for economic alleviation of the position of the marginalised majority.[76] This will now be expounded on with a brief analysis of the mineral industry in Botswana, a country, like South Africa that was previously colonised, is now democratic and is situated in the Southern African region.

Debswana Diamond Company Ltd (Debswana is, a diamond mining company in Botswana, which consists of four mines that were previously monopolised by a subsidiary of the De Beers Group of Companies (De Beers), is now the country's largest private sector employer.[77] This is a journey that began with a gradual move toward nationalisation where the country was able to grow its government ownership of the mines from 15% to 50%, transforming the economic landscape of Botswana and granting the country access to the middle-income country segment.[78] The country has managed to sustain a steady development of the economy of the country through the proceeds derived as a result of the government regaining control of its mineral resources from the monopoly.

The gloomy reality for South Africa, as highlighted by the ANCYL is that, whilst the De Beers subsidiary operating in South Africa is required to ensure that 30% of its share and control rests in the hands of those that are historically marginalised, a select few of the previously disadvantaged who are elites, benefit.[79] As the ANCYL correctly puts it "the principle should forever be people sharing in the country's wealth".[80] Assertions such as the preceding one are the reason why nationalisation of the Reserve Bank is immensely topical.

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[76] *Idem* 56.
[77] Debswana *Our History* http://www.debswana.com/About-Us/Pages/Our-History.aspx (2018) (accessed 24 May 2018).
[78] *Ibid*.
[79] Davies (footnote 69 above) 56.
[80] *Ibid.*

The current debate on the nationalisation of the Reserve Bank emanated from Report No. 8 issued by the Public Protector which suggested that there should be a revision of the mandate of the Reserve Bank following failure by the bank to recover misappropriated funds.[81] The ANC at the national elective conference in December 2017 resolved to instruct the state to begin implementing measures aimed at legitimising the proposal.[82]

The Governor of the Reserve Bank has strongly criticised this call for nationalisation. A strong advocate for the independence and transparency of the bank, the Governor has expressed concern at the fact that nationalisation has the potential to undermine monetary policy, as well as the Reserve Bank's independence and accountability.[83] As pointed out by Group of Thirty[84], central bank independence constitutes a crucial element in the use of policy instruments to pursue monetary goals without political interference.[85] There is off course no denying that the independence of the Reserve Bank is imperative if the bank is to achieve its long term goals. However it is submitted that the independence of the Reserve Bank would not be eroded at the instance of public ownership. Rather, it is submitted that in light of the current political landscape and its competing objectives, nationalisation may pose a threat to the independence of the Reserve Bank, and that in the absence of nationalisation such, independence would not be tainted.

The expensive nature of nationalisation has also been highlighted as a deterrent, with the Reserve Bank asserting that nationalisation is merely a cosmetic change

[81] Office of the Public Protector (footnote 7 above) 54.

[82] *Idem* 21.

[83] Smith *Kganyago: Challenge for central banks to ensure independence not undermined* https://www.fin24.com/Economy/kganyago-challenge-for-central-banks-to-ensure-independence-not-undermined-20180302 (2018) (accessed 1 May 2018).

[84] According to Group of Thirty *About the Group of Thirty http://group30.org/about* (2018) (accessed 17 December 2018) "The Group of Thirty, established in 1978, is a private, non-profit, international body composed of very senior representatives of the private and public sectors and academia. It aims to deepen understanding of international economic and financial issues, and to explore the international repercussions of decisions taken in the public and private sectors."

[85] Group of Thirty *Fundamentals of central banking Lessons from the Crisis* (2015) 64.

that will entail transformation in the organisation's ownership structure.[86] The Reserve Bank pointed out that its mandate of protecting the currency through inflation targeting would continue to function as is.[87] The Reserve Bank has highlighted that the shareholders of the bank have no responsibility in the monetary policy of the bank and are involved in a mere oversight capacity in so far as the operations of the bank are concerned.[88] Whilst government exercises control over the Reserve Bank through the legislative enactments that ensure that the central bank remains an accountable institution to government, the fact that the Reserve Bank is still privately owned suggests that the objectives of the Freedom Charter, as discussed above, are futile.

Many contributors to this debate neglect the question of whether the Reserve Bank will be able to continue to perform its functions post a move toward nationalisation, which is one of the most important aspects of the nationalisation agenda. The Deputy Governor of the Reserve Bank can be commended for having addressed this issue at the Reserve Bank's monetary policy forum in April 2018, where he responded to possible concerns as a result of nationalisation by reminding those present that many central banks across the world are already nationalised and operating successfully.[89] He further commented on the fact that the bank has a legislative framework that underpins its powers and functions which cannot be tampered with irrespective of ownership.[90]

The National Union of Metalworkers of South Africa (NUMSA) is a staunch supporter of the call for nationalisation of the Reserve Bank. In 2010 the national chairperson of NUMSA, Gwede Mantashe, asserted that "our support for the nationalisation of the Reserve Bank is informed by our 2006 December Central Committee which

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[86] Business Day *Reserve Bank sniffs at ANC's plan to nationalise it* https://www.businesslive.co.za/bd/national/2017-12-21-reserve-bank-sniffs-at-ancs-plan-to-nationalise-it/ (2017) (accessed 24 May 2018).
[87] *Ibid.*
[88] *Ibid.*
[89] Magubane SARB mandate secure with or without nationalisation, deputy governor says https://www.fin24.com/Economy/sarb-mandate-secure-with-or-without-nationalisation-deputy-governor-says-20180411 (2018) (accessed 1 May 2018).
[90] *Ibid.*

instructed our structures to vigorously pursue and campaign for the nationalisation of the Reserve Bank".[91]

3.4 Chapter Summary

It can thus be concluded that nationalisation and the transferring of property to the community is imperative if the wealth of South Africa is to be utilised in a manner that propagates an all-inclusive public interest. The status quo that has led to the call for nationalisation is one of frustration with the fact that there is centralisation of capital that sees an increase in the quantity of resources controlled by the minority and not by the masses. Whilst the ANC has called for the nationalisation of the Reserve Bank without an indication of how this can be achieved, the Governors assertions that this move will undermine monetary policy is refuted, especially when one considers the fact that there are many central banks across the world that have nationalised and continue to have a monetary policy that remains entrenched in the core functions of what the central banking system sought to accomplish when it was established.[92]

The Reserve Bank has continued to use various mouth pieces to release statements opposing nationalisation and whilst the risks that have been highlighted may be warranted, the desire for the bank not wanting to succumb to the nationalisation process should not be hidden behind the veil of ignorance regarding the nationalisation process and the benefit it has for the economy. The Reserve Bank has continued to advance a deconstructive narrative to nationalisation for reasons that do not appreciate the sincere and humble beginnings of the nationalisation discourse. This being a discourse that sympathises with a majority that have yet to experience the fruits of economic transformation, who now desire to control the means through which they earn a living in a manner that decentralises the control and share of white monopoly capital dominated by a small shareholding for the benefit of the greater South African community.

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[91] ANCYL (footnote 72 above).
[92] Singleton (note 1 above) 14.

The position maintained in this paper is one of an appreciation of why the call for nationalisation exists, a desire to eventually see South Africa move in the direction of implementing nationalisation processes for its industries, but one which admits that the current political landscape does not permit that this implementation be undertaken in the current South African economic landscape.

4. CHAPTER FOUR: THE "LIFE-BOAT" SCANDAL AND ENSUING COUNTERMEASURES

4.1 Deciphering the Public-Protector's interim Report No.8

This section discusses the findings of the investigation conducted by the Office of the Public Protector that were consolidated into Report No. 8. Following the Report, the Public Protector called for a revision of the mandate of the Reserve Bank which has propelled the current nationalisation debate.

CIEX, had been requested by the government to conduct an investigation into allegations of misappropriation of funds by the Reserve Bank. In the CIEX report, a lifeboat that was afforded to banks that now constitute part of ABSA Bank was alleged to have been illegally given as a gift.[93] It was further alleged that ABSA Bank had made provisions for the payment to the post-apartheid government of the funds that had been used as a lifeboat together with interest thereon.[94] The history behind the Public Protector's investigation was that the Complainant lodged a grievance with the Public Protector that the government had failed to act with regards to the findings that were contained in the CIEX report. This was based on the fact that the findings of the CIEX report which alleged that government and the Reserve Bank should engage in a recovery process in respect of the Bankorp lifeboat, were never brought to the attention of the public and it thus appeared as though the findings of the report were not addressed.[95] The Complainant was of the opinion that a large amount of public money could be recovered and he sought to also gain clarity on why the contract between government and CIEX was suspended.[96]

The lifeboat concerned was given in the form of loans that were provided by the Reserve Bank to Bankorp as well as its subsidiaries between 1985 to 1995. The loan

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[93] Office of the Public Protector (footnote 7 above) 3.
[94] *Id*em 8.
[95] *Ibid*.

agreements and said repayment plans were initially between the Reserve Bank and the Bankorp Group. Payment arrangements were later made with ABSA Bank when it subsequently took ownership of the Bankorp Group.[97]

The Public Protector found that government entered into a contractual relationship with CIEX and paid a sizeable amount to the company in order to conduct investigations into the alleged misappropriated funds and to provide for a way forward.[98] Though the CIEX report had advised that government should enter into a recovery process in order to obtain the misappropriated funds, this recovery process was never undertaken. This omission was found to be in contravention of section 195 of the Constitution which provides for the accountability and transparency of the state and its institutions in public administration proceedings.[99] The section 231 requirement regarding the diligent and speedy performance on constitutional obligations was also found to not have been adhered to.[100] This, as asserted in Report No. 8, was improper conduct and tantamount to maladministration as the government also paid 600,000 pounds for the services of CIEX, which it never used.[101]

The Reserve Bank was found to have failed to act in a manner that is economically and efficiently viable as the lifeboat was considered as not constituting value for money.[102] The lifeboat was found to have been given unlawfully by the Reserve Bank and the unlawfulness of the bank's conduct further extended to its failure in attempting to recover the misappropriated funds.

The Public Protector's Report was not well received and was challenged by both the Reserve Bank and ABSA Bank. This led to a court challenge, which judgement contained in *South African Reserve Bank v Public Protector and Others* 2017 (6) SA 198, will be discussed in detail below.

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[96] *Ibid*.
[97] *Ibid*.
[98] *Ibid.*
[99] Constitution of the Republic of South Africa, 1996 s31.
[100] *Ibid.*

4.2 South African Reserve Bank v Public Protector

The Reserve Bank approached the High Court in order to have the remedial action proposed by the Public Protector set aside. In *South African Reserve Bank v Public Protector*, the Court found that the Public Protector had overstepped the confines within which she is mandated to conduct her duties.[103] Section 182 of the Constitution gives the Public Protector power to investigate improper conduct that is reported to her office regarding state affairs or public administration.[104] Once the Public Protector has conducted an investigation into the alleged improper conduct she is required to compile a report pertaining to her findings.[105] The Public Protector is also empowered to give recommendations on remedial action that may be taken pursuant to the improper conduct and her subsequent findings.[106] The Court highlighted the fact that the constitutional provisions granted the Public Protector these powers in so far as the improper conduct is concerned. The court however held that there was no complaint brought before the Public Protector regarding the mandate of the Reserve Bank which questioned such mandate and called for the investigation into its mandate.[107] Furthermore, the court alleged that "it is doubtful whether the constitutional definition of the Reserve Bank's primary object can ever constitute maladministration, improper or prejudicial conduct".[108]

The Governor of the Reserve Bank alleged that "the key function of central banks in protecting the value of the currency is recognised worldwide because there is consensus that stable and low inflation provides the foundation for sustainable economic growth".[109] This assertion is accepted because the modern day mandate of the central banks focuses on price stability which is achieved through inflation targeting. This is a mandate that is aimed at ensuring financial stability beyond the

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[101] Office of the Public Protector (footnote 7 above) 31.
[102] *Idem* 4.
[103] *South African Reserve Bank v Public Protector* (footnote 14 above) para 59.
[104] Constitution of the Republic of South Africa, 1996 s182(1)(a).
[105] *Idem* s182(1)(b).
[106] *Idem* s182(1)(c).
[107] Office of the Public Protector (footnote 7 above) 41.
[108] *Ibid.*
[109] *Idem* 47.

traditional framework of supervision and regulation. This monetary policy stance grants the Reserve Bank the ability to keep inflation low and stable and can therefore be hailed as the anchor of the economy.

4.3 ABSA Bank Rebuttal

One way in which central banks offer financial support and assistance to institutions is to grant bail-outs. Bail-outs are a form of financial rescue where external parties offer aid to an institution that is likely to go insolvent.[110] Normally a bail-out will take the form of government stepping in and using taxpayers' money to offer financial relief to the institution.[111] Bail-outs are generally undertaken when central banks have the resources to grant them because they wish to mitigate the systemic threat posed by the insolvency of a financial institution. The problem with bail-outs is, however, that they place a burden on taxpayers and also that they undermine market discipline. In a free market economy, shareholders and creditors bear the burden of loss of failed initiatives by central banks which has a destabilising impact on public finances for the banking system through bail-outs which are funded by the money of taxpayers.[112]

As indicated in Chapter Two, the Reserve Bank is a creature of statute which *inter* alia has the role and function of lender of last resort. As a lender of last resort, the Reserve Bank is also tasked with ensuring the safety and soundness of the financial system as well as maintaining economic stability. The threat of a financial institution going insolvent, especially a bank, poses a threat to the entire financial system.[113] Central banks often try to avoid such occurrence by offering financial support and assistance.[114] According to ABSA Bank, this was the approach undertaken by the

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[110] The Telegraph *Good points of the proposed bail out* https://www.telegraph.co.uk/news/3087027/Financial-crisis-Good-points-and-bad-points-of-US-bail-out.html (2008) (accessed 21 November 2017).
[111] Smith (footnote 83 above).
[112] Avogouleas and Goodhard Critical Reflections on Bail-ins (2015) 3.
[113] Politics Web *The SARB-Bankorp lifeboat explained - Absa* http://www.politicsweb.co.za/documents/the-sarbbankorp-lifeboat-explained--absa (2017) (accessed 21 November 2017).
[114] Avogouleas and Goodhard (footnote 112 above).

Reserve Bank in the Bankorp bail-out. The central bank also wished to preserve and protect the money of depositors that was vested in the banks.[115]

While ABSA Bank's assertions regarding the central bank's objective to protect depositors are generally true and valid, the Report compiled on behalf of the Governor of the Reserve Bank suggests otherwise in the case of the funds transferred by the Reserve Bank to Bankorp. The Report found that there was no legal basis on which the Reserve Bank could have entered into a financial assistance and support transaction with Bankorp and also stated that the assistance was *ultra vires*.[116] The Reserve Bank was found to have given some of the loans as a donation - which it is not empowered to do as Bankorp was required to purchase Government Stock Bonds, as a form of collateral, which would be payable when the Government Stock Bonds reach maturity or sold by Bankorp.[117] This is in so far as the Reserve Bank granted an initial loan that was not repaid.[118] Despite the fact that the loan had not been repaid, the Reserve Bank nevertheless terminated the agreement as though the loan had been repaid.[119] The Reserve Bank also granted loans where set off would take place in order to repay the loans undertaken between the parties.[120] These Government Stock Bonds were then ceded to the Reserve Bank and later used as set-off instruments to extinguish debt.[121] This was also stated in the Report as tantamount to the Reserve Bank giving a donation.

4.4 Chapter Summary

In light of the Report findings, it appears that the Reserve Bank overreached its role as a lender of last resort. The dominant view held by the Public Protector is that the

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[115] *South African Reserve Bank v Public Protector* (footnote 14 above) para 21.

[116] South African Reserve Bank *Bankorp Limited: Report of the Governor's panel of experts to investigate to SA Reserve Bank's role with regard to the financial assistance package to Bankorp Limited* https://www.resbank.co.za/publications/detail-item-view/pages/publications.aspx?sarbweb=3b6aa07d-92ab-441f-b7bf-bb7dfb1bedb4&sarblist=21b5222e-7125-4e55-bb65-56fd3333371e&sarbitem=18 (2017) (accessed 21 November 2017).

[117] Office of the Public Protector (footnote 7 above) 33.

[118] *Ibid.*

[119] *Ibid.*

[120] *Ibid.*

[121] Magubane (footnote 89 above).

public was prejudiced by the conduct of the Reserve Bank and government as it went against the constitutional provisions of redressing social injustice and promoting efficiency. Whilst the conduct of the Reserve bank was *ultra* vires, the court, in its assessment, was of view that the Public Protector did not act within the confines of her duties in calling for the mandate of the Reserve Bank to be revised. The position maintained by the court relates to the fact that the complaint brought before the Public Protector pertained to possible improper conduct regarding the granting of the lifeboat and that the mandate of the central bank was never in question. The issue that now remains to be discussed, which has been fuelled by the Public Protector's findings is one of whether the call for revising the mandate of the Reserve Bank and embarking on nationalising of this institution is viable. This discussion will be considered against the backdrop of whether South Africa possesses or lacks the required political and economic stability to sustain the nationalisation process.

5. CHAPTER FIVE: PROPOSED INTRATERRITORIAL IMPLEMENTATION OF NATIONALISATION

5.1 The South African Reserve Bank Amendment Bill

On 16 August 2018 Julius Malema (Malema) tabled the SARB Amendment Bill before parliament. The long awaited SARB Amendment Bill was hailed as the vehicle that would address some of the key assertions dealt with herein relating to the call for nationalistion of the Reserve Bank. Whilst the Public Protector, summarily called for a revision of the mandate of the Reserve Bank and it would seem that proponents of the ruling party also seek an amendment to the Reserve Bank's mandate, Malema's proposed bill however, does not seek to amend the mandate of the bank. The SARB Amendment Bill instead, *inter alia*, seeks to address issues relating to the control of the Reserve Bank.

Section 9 of the SARB Amendment Bill stipulates that the state should be "the sole holder of shares in the Bank and the rights attached to the shares in the Bank must be exercised by the Minister of Finance on behalf of the state".[122] This differs from the Reserve Bank Act where the 2,000,000 ordinary shares constituting the share capital of the bank are vested in its shareholders.[123] Accordingly, should the proposed bill be passed, the current shareholding of the bank will be disbanded and the shareholding of the bank will vest entirely in the state via public ownership.

The Minister of Finance is empowered in terms of the amendment to section 30 of the SARB Amendment Bill to appoint two audit firms of public accountants to act as auditors of the Reserve Bank.[124] The appointment of public accountants is currently left to the shareholders to decide at the annual general meeting.[125] The Minister of

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[122] South African Reserve Bank Amendment Bill (footnote 38 above) s9.
[123] Constitution of the Republic of South Africa, 1996 s21.
[124] South African Reserve Bank Amendment Bill (footnote 38 above).
[125] South African Reserve Bank Act (footnote 33 above) s30.

Finance may intervene at present by way of causing an investigation into the affairs of the bank by officers from the Department of Finance.[126] The proposed amendment however sees an increase in the role played by the Minister of Finance in matters relating to the Reserve Bank, from the current supervisory role to a more active role in the operational activities of the bank.

The SARB Amendment Bill proposes that the directors of the Reserve Bank are to be appointed by the Minister of Finance.[127] This sees a departure from the authority granted to the shareholders by the Reserve Bank Act. The board of directors of the Reserve Bank is constituted of 14 directors, 7 of which are appointed by the shareholders.[128] The other members are appointed by the President after consultation with the Minister of Finance and the board and these members include the Governor, the 3 Deputy Governors (one of whom is designated as the Senior Deputy Governor) and an additional 4 members.[129] Accordingly, with the proposed amendment, the shareholders will be completely dismantled and disempowered.

The Reserve Bank responded to the SARB Amendment Bill by stating that "the bank has noted that the proposed SARB Amendment Bill does not in any way alter either its primary mandate of price stability, neither its independence".[130] However, there is a removal of the control formerly held by the shareholders in the operational activity of the bank as a whole. The amendments dealt with above indicate that the SARB Amendment Bill is in line with the earlier assertions that nationalisation will lead to the state having control and the dissolution of shareholding in the Reserve Bank.

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[126] *Id*em s30(2).
[127] South African Reserve Bank Amendment Bill (footnote 38 above) s1.
[128] South African Reserve Bank Act (footnote 33 above) s4(1)(b).
[129] *Id*em 4(1)(a).
[130] Omarjee SARB: EFF amendment bill does not challenge mandate, independence https://www.fin24.com/Economy/sarb-eff-amendment-bill-does-not-challenge-mandate-independence-20180817 2018) (accessed 23 September 2018).

5.2 South Africa: Socio-political and economic climate

It is submitted that in a country like South Africa that is plagued by political instability political interference in the Reserve Bank would have unwanted consequences. It is therefore imperative that the Reserve Bank remain independent and free from all forms of intervention in order to achieve its mandate.

John Locke asserted that "it may be too great a temptation for the humane frailty, apt to grasp at powers, for the same persons who have power of making laws to have also in their hands the power to execute them".[131] Locke was alluding to the fact that there should be checks and balances that are put in place to ensure that there is no over concentration of power that would lead to abuse of power. The idea being that a division in roles and responsibilities in the state will ensure that control and power are restricted.

Whilst the bill tabled before parliament does not tamper with the independence of the Reserve Bank and merely seeks to change the control and ownership of the Reserve Bank, it is apparent that the prospect of interference cannot be far removed should the state become the sole holder of shares in the Reserve Bank. The prevailing relationship between corruption and state capture suggests that South Africa's political climate is one tainted by the manipulation of policy and institutional reforms that contradicts the rule of law. This is because there is tendency of families, businessmen and government officials influencing the very same structures meant to safeguard the interests of society as a whole for their own benefit. Therefore interfering by altering the control of the Reserve Bank as asserted by the Public Protector would result in an obstructive effect to the primary objective of the Reserve Bank as the central bank of South Africa.

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[131] Locke *Two Treatises of Government* (1690) s143.

State capture is defined as systemic political corruption where individual or group actions influence the state's decision making process for their advantage.[132] According to Shivhambu, the influence is extended to the formation of laws, regulations and government policies.[133] It is important to note that the state and economy are perceived as one entity where state capture is concerned.[134] According to Martin and Hussein state capture "undermines the efficiency of the state, especially where there is a direct relationship between state capture and corruption".[135]

In 2017/2018 reports have been dominating the media regarding the fact that government ministries and state-owned enterprises are captured. One such report has been in relation to the Finance Ministry. It was asserted that the former Finance Minister, Malusi Gigaba, usurped the power of different stakeholders within his Ministry and engaged in unilateral decision making that is in the interest of the ruling elite and powerful families and businessmen.[136] This conduct gives an indication of the possibility of undermining of the independence of the Reserve Bank should it be nationalised.

The independence of the Reserve Bank is required to ensure freedom from undue political pressure as very often political pressure is coupled with short term objectives and agendas whereas the monetary policy applied by the central bank needs to focus on policies with long term objectives.[137] In fact, the Reserve Bank's independence is imperative if the central bank is to pursue its monetary policy goals without political interference. Governments have a tendency of engaging in poor decision making when it comes to monetary regimes which is influence by short term political considerations. After the 2008 Global Financial Crisis (GFC), many countries initiated a move toward the independence of central banks in order to ensure price

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[132] Shivambhu *State Capture: It's criminal, and it is nothing new* https://www.dailymaverick.co.za/opinionista/2016-03-24-state-capture-its-criminal-and-it-is-nothing-new/ (2016) (accessed 2 November 2017).
[133] *Ibid*.
[134] *Ibid*.
[135] Martin and Hussein *Understanding the Phenomenon of "State Capture"* (2017) 22.
[136] *Ibid*.
[137] Mbuya (footnote 20 above) 173

stability.[138] An independent central bank should have the ability to set its policy instruments in order to achieve its objectives. This is referred to as "functional independence".[139] Therefore central banks have been given the power to set the short term interest rate in the market.[140] Mbuya states that "[a]ny obstacle to the ability of central banks to affect market interest rates should be considered as an obstacle to their independence".[141] One of the ways in which this obstruction could take place is through central banks being obligated to provide governments with financial aid where there is a deficit.[142]

According to De Jager, "the bank needs to grow and change like a living organism in response to the needs and demands of the financial system and the economy it serves".[143] As it stands the Reserve Bank is a very efficient and agile institution. It is able to react to global events that affect our financial system. At the hands of government intervention, the Reserve Bank may not be as agile as it currently is in reacting to global events thus rendering it mandates of financial stability, ineffective.

The state has already proved to struggle in managing state-owned enterprises that are supposed to be adding value and supporting the economy.[144] It remains that little confidence is inspired in the ability to manage a vital institution such as the Reserve Bank. Government inefficiencies, particularly in financial institutions and their operations are evident in the delays in the take-off of SASSA grant disbursements, for example.[145] Bureaucracy will potentially expose financial regulation to manipulation, corruption and cronyism. The problem with engaging in the process of nationalisation during a period where South Africa is plagued by state capture and

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[138] Smaghi *Central bank independence: from theory to practice, European Central Bank* https://www.ecb.europa.eu/press/key/date/2007/html/sp070419.en.html (2007) (accessed 2 November 2017).
[139] *Ibid*.
[140] *Ibid*.
[141] *Ibid.*
[142] *Ibid*.
[143] De Jager *The South African Reserve Bank: Blowing winds of change (Part 1)* (2013) 342.
[144] Thamm (2017) Sassa grants: Pressure mounts for solutions but Dlamini remains silent https://www.enca.com/opinion/sassa-grants-pressure-mounts-for-a-solution-but-dlamini-remains-silent (2017) (accessed 2 November 2017).
[145] *Ibid*.

widespread corruption is that the very same risks will manifest where ownership of an institution like the Reserve Bank is acquired by the state. Whilst nationalisation is aimed at facilitating economic growth, this cannot prevail in a corruption ridden and captured country. It will lead to widening the pot of influence and money available to the corrupt elite. The independence of the Reserve Bank is important in ensuring that monetary policy is not used in a manner that has positive effects in the short term but ill effects in the long run. The price for high inflation is paid over time in the medium to long term. Independence of the Reserve Bank will ensure that there is lower inflation thus promoting a stable economic environment and likely to decrease inflation.

5.3 Comparative analysis: Nationalisation of National Bank of Austria - Oesterreichische Bank

In this paragraph I will address nationalisation of central banks by referring to the nationalisation of the Austrian central bank and juxtaposing it with the position relating to the Reserve Bank.

De Kock indicates that before 1936, various central banks were state-owned, for example in countries such as Sweden and Finland.[146] As mentioned in Chapter One of this dissertation, the discussion of nationalisation herein, turns to the modern day nationalisation processes that erupted from 1936 to date, which nationalisation processes were greatly influenced by the global instability pursuant to the World Wars.

One of the most recent central banks to be nationalised is Oesterreichische Bank, which was nationalised in 2010, by transferring all shares not yet held by the Republic of Austria to the government.[147] It is understood that at least 70% of the shareholding of Oesterreichische Bank vested with the government of Austria. Accordingly, the shareholding was partially privatised.[148]

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[147] Rossouw and Breytenbach *Identifying central banks with shareholding: A review of available literature* (2011) 127.
[148] *Idem* 126.

Before the nationalisation of this central bank Roussouw and Breytenbach indicate that the "Austrian government, Austrian citizens or legal persons or partnerships under commercial law with their head offices in Austria and which are neither directly nor indirectly majority-owned by foreigners, were permitted to hold shares in the bank".[149] The position differs in South Africa under the current construct and ambit of the Reserve Bank Act as its shareholding vest with individuals, including foreigners and the state does not currently own shares in the Reserve Bank.

Among the key issues that have marred the Reserve Bank's shareholding has been the fact that certain individual shareholders have managed to exert control over the bank's affairs.[150] In 2010, it was reported that one of the more vocal shareholders of the Reserve Bank, German Michael Deurr, with a shareholding of 57.5% (100,000 shares), was able to influence at least 25% of the voting rights.[151] This, among other reasons, led to the revision of the number of shares that a sole shareholder could own in the Reserve Bank. The result being to revise the number of shares held by a single shareholder down to 10,000 shares.[152]

Whilst the shareholding held by a sole shareholder was revised down to 10,000 shares, this does not negate the ability of shareholders to form a consortium and exert influence in the bank. There are two lenses through which one may view the ability to exert and apply pressure on the Reserve Bank by minority shareholders. On the one hand we have the lens that would advocate for the disbanding of the shareholding within the Reserve Bank to ensure that shareholders are disempowered. However, the other lens, which draws on the prevalent problem in South Africa as a result of the state capture crisis has an appreciation for the fact that the Reserve Bank has been susceptible to influence by certain families or key individuals in the past.[153] It is submitted that under the control of a government that has over the years acted as a direct result of the influence of political corruption, the

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[149] *Ibid*.
[150] De Waal *Reserve Bank targets eight families* https://www.fin24.com/economy/reserve-bank-targets-eight-families-20100607 (2010) (accessed 2 October 2018).
[151] *Ibid*.
[152] *Ibid*.
[153] See earlier discussion at paragraph 5.2 above.

Reserve Bank may fall victim to an undermining of its independence. Furthermore, it can be asserted that shareholding increases the accountability of the Reserve Bank as there are annual meetings which take place where the office bearers within the Reserve Bank are questioned on operational and other matters of the central bank.

The nationalisation of Oesterreichische Bank was aimed at increasing the supervisory role that the government of Austria possessed over the institution.[154] As previously addressed, central banks have a crucial role in the cushioning of the financial system hence the importance of government oversight. In the case of South Africa, the Reserve Bank is charged with ensuring price stability which will advance economic growth and create favourable conditions for employment creation. The Reserve Bank is also tasked with systemic risk management, formulating and implementing monetary policy as well as being a lender of last resort. Whilst in Austria one of the proponents for nationalisation was to expand government's ability to observe and direct the national bank of Austria, the current construct of the Reserve Bank Act grants the Finance Ministry supervision of the Reserve Bank and its conduct in ensuring that the above mandate is fulfilled.[155] The Reserve Bank is required to regularly report to the Finance Minister and the Minister is able to cause an investigation into the affairs of the Reserve Bank as and where necessary or applicable.[156] This adds weight to the accountability and transparency of the institution.

Roussouw and Breytenbach also indicate that another propeller in the decision to nationalise Oesterreichische Bank was "to avoid conflict of interest".[157] This stemmed from the fact that a number of the banks that were supervised by Oesterreichische Bank were shareholders in the bank as well.[158] In South Africa this conflict of interest is not prevalent as the shareholders of the Reserve Bank are individuals and not the very same banking institutions that the Reserve Bank is required to supervise, among its other functions. One of the important aspects of

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[154] Roussouw and Breytenbach (footnote 147 above) 126.
[155] South African Reserve Bank Act (footnote 33 above) s30.
[156] *Ibid*.
[157] *Ibid*.

private shareholding is that shareholders are not in a position to influence the formulation and implementation of monetary policy.[159] Roussouw and Breytenbach comment that "[t]his implies that shareholders cannot manipulate monetary policy decisions in an attempt to reap personal benefits".[160] As highlighted herein, in South Africa, monetary policy aims to maintain price stability by reducing uncertainty in the economy and ensuring that through low inflation, the purchasing power of South Africans (especially the marginalised) is protected.[161] Conflict of interest in a central bank that arises from banks that are in themselves shareholders may cause challenges especially because the monetary policy concerns of banks' include the manipulation of and changing short-term interest rates.[162] The advantage in a central banking system with private shareholding, as Roussouw suggests is "the implication that shareholders are excluded from the core function of these institutions".[163]

5.4 Chapter Summary

Oesterreichische Bank was nationalised to mitigate various challenges that proved problematic to the banking system in Austria. It has been indicated that the challenges highlighted in the comparative analysis do not necessarily pose grave risk in the context of South Africa. This is in so far as South Africa's legislative framework prioritises the independence of the bank in fulfilling its mandate and ensuring that the mandate is fulfilled without fear, favour or prejudice (as provided for in the Constitution).[164] The Finance Minister is furnished with a supervisory role over the Reserve Bank and has an ability to cause investigations to be undertaken at any time in the operational activity of the bank. This, coupled with the accountability to the shareholder, increases the transparency and surveillance required by a central bank in its operations. Oesterreichische Bank was nationalised after a period of partial privatisation and perhaps this may be seen as one of the transitionary

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[158] *Ibid*.
[159] Roussouw (footnote 5 above).
[160] *Ibid*.
[161] South African Reserve Bank (footnote 40 above).
[162] The Editors of Encyclopedia Britannica *Monetary Policy* https://www.britannica.com/topic/monetary-policy (2018) (accessed 2 October 2018).
[163] Roussouw and Breytenbach (footnote 147 above) 131.
[164] Constitution of the Republic of South Africa, 1996 s223.

methods that may be investigated for possible implementation in South Africa prior to engaging in full scale nationalisation. This would provide for a framework against which to measure government's actions as a shareholder in the Reserve Bank as opposed to engaging in a hypothetical analysis. Partial privatisation may provide a solution in proving that government is not ill-equipped to handle control of an institution like the Reserve Bank.

6. CHAPTER SIX: CONCLUDING REMARKS, ALTERNATIVES AND RECOMMENDATIONS

The call for the nationalisation of the Reserve Bank can be summarised into two main objectives. Firstly, it is a tool to enhance strategic political transformation whilst safeguarding state sovereignty and secondly, it is a measure to advance the inclusive economic transformation agenda. Two alternatives to nationalisation of Reserve Bank are explored and expounded upon in this Chapter, namely, the proposal of a state-owned bank independent of the Reserve Bank and the efficient and strategic use of existing government financial institutions.

The SARB Amendment Bill seeks to change the Reserve Bank Act to allow for a state-owned bank with a fully-fledged banking license that will allow it to compete directly with commercial banks.[165] The proposed amendment also seeks to allow state-owned companies' to set-up or acquire an existing commercial bank.[166]

The ANC has adopted a policy stance in support of a state-owned central bank. The ANC has referred to a review of the financial sector charter in relation to financial inclusion, access to finance for small and informal business.[167] This stance was taken as part of the ANC's move towards inclusive economic transformation through access and affordability by operating sector specific banks such as co-operative banks, stokvels[168] and construction banks.[169] This firm stance has led to the commissioning of a feasibility and viability study at a provincial level with the

[165] De Wet *Here it is: The simple Bill with which the EFF wants to revolutionise the banking industry* https://www.businessinsider.co.za/here-is-the-floyd-shivambu-eff-draft-bank-amendment-bill-text-2018-5 (2018) (accessed 7 October 2018).
[166] *Ibid*.
[167] Phakathi *Cyril Ramaphosa supports the creation of a state bank* https://www.businesslive.co.za/bd/national/2018-05-09-cyril-ramaphosa-supports-the-creation-of-a-state-bank/ (2018) (accessed 7 October 2018).
[168] According to the Co-operative Banks Development Agency *Combined Annual Report of the Supervisors of the Co-operative Banks Development Agency and the South African Reserve Bank* (2010/11) "[s]tokvels are clubs, associations or syndicates in which members contribute regularly and receive payouts in rotation".
[169] De Wet (footnote 165 above).

Gauteng provincial state-owned bank that aims to support the provinces turnaround strategy and to grow the economy by funding township-based enterprises.[170] The current Gauteng premier David Makhura revealed the plan to operate a provincial state-owned bank during his reply to the provincial legislation in September 2018.[171]

The move towards the establishment of a fully-fledged state bank, sector specific banks and allowing state-owned companies to establish or acquire existing banks would broaden access to finance to the citizens of South Africa, especially the marginalised population. Such institutions would allow the state to intervene in areas that the traditional banks deem as risky by providing access to banking products tailored to the needs of the people that the government discharges its mandate to. This includes the informal enterprise sector that provides a means of living to a large sector of the population of South Africa.[172]

Such institutions would aid government in achieving its mandate of inclusive economic transformation by providing a democratic and inclusive financial system. According to the World Bank, in 2015 83% of adult South Africans had access to financial services offered by authorised and/or regulated banks, however there is a wider gap in account ownership among the poorest in comparison to other BRICS nations.[173] Malete points out that in accordance to the Finscope survey,[174] 46% of township enterprises fund their start-ups from friends and family, 32% from personal savings and 9% from stokvels - thus authorised/regulated banks have virtually no impact in funding township business.[175] This finding was attributed to the fact that

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[170] Malete *A state-owned bank would ensure financial inclusion in Gauteng* https://city-press.news24.com/Voices/a-state-owned-bank-would-ensure-financial-inclusion-in-gauteng-20180703 (2018) (accessed 8 October 2018).

[171] *Ibid*.

[172] *Ibid* and The World Bank *Achieving Effective Financial Inclusion in South Africa: A Payment perspective* http://www.treasury.gov.za/publications/other/Achieving%20Effective%20Financial%20Inclusion%20in%20South%20Africa.pdf (2018) (accessed 2 October 2018). .

[173] *Ibid*.

[174] According to FinMark Trust Finscope http://finmark.org.za/programmes/finscope (2018), the Finscope Survey is conducted by the FinMark Trust and it explores financial inclusion, attitudes and demographics comprehensively (accessed 26 November 2018).

[175] Malete (footnote 170 above).

small township businesses do not meet the stringent risk criteria set out by the formal banking sector, therefore excluding them from the formal lending market.[176]

An efficiently run state-owned bank could see the national government close the gap of financial exclusion by increasing the number of transactional banking products available to the poor, addressing the banking needs of small township enterprises and providing access to housing finance which could potentially lead to a decrease in the call for expropriation of land without compensation.[177] Township run businesses provide employment and financial security to a large sector of the population, and a state-owned bank could be a means of capitalisation of small existing business for expansion and growth, thus indirectly contributing to the reduction of unemployed individuals.[178] A state-owned bank could also be a means of catering to the banking needs of saving models that the current banking system excludes due to lack of understanding of how they operate, such as, the communal savings stokvel vehicle.[179] State-owned banks could provide more affordable banking solutions to a large sector of the population due to a less aggressive profit motive agenda in comparison to the more aggressive profit motive of traditional commercial banking that seeks to maximise shareholder value by pricing financial products through risk premiums whose matrixes are based on traditional risk assessment procedures that are not cognisant of past imbalances.[180] A state-owned bank could also encourage a greater savings culture of disposal income as less of this income would be eroded by higher transactional costs and traditional risk premiums. This approach would possibly advance the agenda of inclusive economic growth and of a democratic financial system.

However, there are a few concerns that attach to a fully-fledged state-owned bank. A major concern is due to more recent findings of susceptibility of state-owned enterprises and organs to organised crime and exploitative self-interest executed through complex state capture activities. Complex state capture activities are

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[176] Malete (footnote 170 above).
[177] The World Bank (footnote 172 above) and Malete (footnote 170 above).
[178] *Ibid*.
[179] *Ibid*.

detrimental as we have witnessed politically connected individuals who influence the appointment of key individuals in government and state owned enterprises in order to weaken the governance of these institutions.[181] The individuals are directed by perpetrators of state capture to conduct activities in ways that favour the perpetrators, mostly in a manner that is financially beneficial to the perpetrator.[182] Inefficiencies experienced in the running of state-owned enterprises have led to massive losses that needed to be footed by taxpayers through bailouts, thus draining large amounts out of the fiscus. There is also a potential threat of systemic risk that could be caused to the current banking system if government were to impose that all government departments and state-owned organs are to keep their accounts with a state-run bank, and this would be worsened if public servants were captured.[183] This is a major concern that was highlighted by the Banking Association of South Africa (BASA) which also raised concerns over possible political interference in a state-owned bank and the possibility of a state-owned bank not being subject to the same regulation as current banks, therefore not making the playing fields level.[184]

The discussion of the use of existing government vehicles proposes the efficient and strategic use of financial institutions that were established to contribute to economic development. The Development Bank of Southern Africa, with a mandate set out in its empowering legislation, the Development Bank of Southern African Act No. 13 of 1997, whose objectives are, sustainable growth and development impact, championing integrated infrastructure solutions and contributing to financial stability.[185] The Land and Agricultural Development Bank of South Africa, with a mandate set out in its empowering legislation, the Land and Agricultural Development Bank Act No. 15 of 2002, whose primary objective is to serve South

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[180] *Ibid*.
[181] Shivambhu (footnote 132 above) and Martin and Hussein (footnote 135 above).
[182] *Ibid*.
[183] Ensor *EFF call for state-owned bank a 'systemic risk' for banking sector, says Basa* https://www.timeslive.co.za/politics/2018-09-04-eff-call-for-state-owned-bank-a-systemic-risk-for-banking-sector-says-basa/ (2018) (accessed 9 October 2018).
[184] Ensor *Why Treasury is not opposed to state banks* https://www.businesslive.co.za/bd/national/2018-09-05-why-treasury-is-not-opposed-to-state-banks/ (2018) (accessed 9 October 2018).

Africa's commercial and emerging agriculture by providing specially designed financial services.[186] The Industrial Development Corporation, with a mandate set out in its empowering legislation, the Industrial Development Corporation Act No. 22 of 1940, a national development finance institution set up to promote economic growth and industrial development.[187] The National Empowerment Fund, with a mandate set out in its empowering legislation, the National Empowerment Fund Act No. 105 of 1998, set up by the government to provide financial and non-financial support to black empowered business and promote a culture of savings and investment amongst black South Africans.[188]

These strategic institutions could have a more impactful role in delivering governments mandate of inclusive economic growth if they could be more efficiently run and managed. Reduced lending red tape, turnaround lending time as well as becoming more geared toward assisting the excluded demographic to accessing funding and financing products, are additional avenues through which these strategic institutions may be developed.

The Reserve Bank Act should be amended in such a way that government is able to establish a full-fledged bank, more sector specific banks and allow government departments or state-owned enterprises to acquire banks. This will allow government to be an active player in the financial system and increase access to finance and banking products to those that are excluded by the traditional banking model. Government will also be able to play a more direct role in discharging its mandate of economic growth and financial democratic inclusion. Government should also seek ways or methods to run its existing financial institutions in a manner that contributes to its strategic mandate which forms part of the support structure to the fiscus of the economy. When and if the two, were to be executed effectively and efficiently, we

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[185] DBSA *DBSA as an organization* https://www.dbsa.org/EN/About-Us/Pages/About-Us.aspx (2018) (accessed 17 October 2018).

[186] Land and Agricultural Development Bank of South Africa *What we do* https://landbank.co.za/Pages/Home.aspx (2018) (accessed 17 October 2018).

[187] Industrial Development Corporation *Who are we* https://www.idc.co.za/about-the-idc.html (2018) (accessed 17 October 2018).

[188] National Empowerment Fund *Strategic Role and Positioning* https://www.nefcorp.co.za/about-the-nef/strategic-role-positioning/ (2018) (accessed 17 October 2018).

would see a direct impact in inclusive economic growth, increased economic activity and ultimately the economy of South Africa would expand.

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