

REPUBLIC OF SOUTH AFRICA

FINANCIAL INSTITUTIONS (INVESTMENT OF FUNDS) BILL

(As introduced in the National Assembly as a section 75 Bill; explanatory summary of Bill published in Government Gazette No. 20801 of 7 January 2000) (The English text is the official text of the Bill)

(MINISTER OF FINANCE)

[B 6—2000]

REPUBLIEK VAN SUID-AFRIKA

WETSONTWERP OP FINANSIËLE INSTELLINGS (BELEGGING VAN FONDSE)

(Soos ingedien in die Nasionale Vergadering as 'n artikel 75-we tsontwerp; verduidelikende opsomming van Wetsontwerp in Staatskoerant No. 20801 van 7 Januarie 2000 gepubliseer) (Die Afrikaanse teks is die amptelike vertaling van die Wetsontwerp)

(MINISTER VAN FINANSIES)

[w 6—2000]

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BILL

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

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

Definitions

1. In this Act, unless the context indicates otherwise—
- “**company**” includes a close corporation referred to in the Close Corporations Act, 1984 (Act No. 69 of 1984); 5
- “**financial institution**” means—
- (a) any institution referred to in the definition “financial institution” in section 1 of the Financial Services Board Act, 1990 (Act No. 97 of 1990); or
- (b) any **medical** scheme contemplated in section 1 of the Medical Schemes Act, 1998 (Act No. 131 of 1998); 10
- “**nominee company controlled by a financial institution**” means a company which—
- (a) is incorporated under the provisions of the Companies Act, 1973 (Act No. 61 of 1973); 15
- (b) has as its principal object to act as nominee for, or representative of, any person or persons in the holding of any property in trust for such person or persons;
- (c) is precluded by its memorandum of association from **incurring** any liabilities other than liabilities to the persons on whose behalf it holds assets, to the extent of **their** respective rights to, and interest in, such assets; and 20
- (d) has entered into an irrevocable written agreement with a financial institution which **controls** the company, and in terms of which such financial institution has undertaken to pay all the expenses of, and **incidental** to, its formation, operations and liquidation; 25
- “**registrar**” means, in respect of a financial institution—
- (a) the registrar defined in any of the Acts referred to in paragraph (a) of the definition of “financial institution” in section 1 of the Financial Services Board Act, 1990;
- (b) the executive officer defined in section 1 of the Financial Services Board Act, 1990; or 30
- (c) the registrar of **medical** schemes contemplated in section 1 of the Medical Schemes Act, 1998;
- “**trust property**” means any corporeal or incorporeal, movable or immovable asset invested, held, controlled, administered or kept by any person, partnership, 35 company or **trust** for, or on behalf of, another person, partnership, company or trust.

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

2. A director, member, partner, official, employee or agent of a financial institution or of a nominee company controlled by a financial institution who invests, keeps in safe custody, alienates, controls or administers any funds of the institution or any trust property held by, or on behalf of, the institution for any trust, beneficiary or principal—
- (a) must, with regard to such funds, observe the utmost good faith and exercise proper care and diligence;
 - (b) must, with regard to the trust property and the terms of the instrument or agreement by which the trust or agency concerned has been created, observe the utmost good faith and exercise the care and diligence required of a trustee in the performance or discharge of his *or* her powers and duties; and
 - (c) may not alienate, invest, pledge, hypothecate or otherwise encumber or make use of the funds or trust property or furnish any guarantee in a manner calculated to gain directly or indirectly any improper advantage for himself or herself or for any other person at the expense of the financial institution, trust, beneficiary or principal concerned.

Declaration of interest

3.(1) A director, member, partner, official, employee or agent of a financial institution, or of a nominee company controlled by a financial institution, who takes part in a decision to invest any of the funds of the institution or any trust property in a company or other undertaking in which he or she has a direct or indirect financial interest, must declare that interest in writing to the board of management or other governing body of the financial institution or nominee company, indicating the nature and extent of such interest, before such investment is made. 25

(2) For the purposes of subsection (1), “invest” includes—

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

(3) Subsection (1) does not apply to a manager, branch manager or other official of a bank *or* mutual bank defined in the Banks Act, 1990 (Act No. 94 of 1990), or the Mutual Banks Act, 1993 (Act No. 124 of 1993), who acts within the limits of authority which has been properly delegated to him or her by the board of directors of such bank or mutual bank for the execution of his or her normal duties.

(4) A declaration of interest made in terms of subsection (1) must be recorded in the minutes of the meeting of the board or governing body at which the declaration is made or considered. 35

Investment of trust property

4.(1) A director, member, partner, official, employee or agent of a financial institution which administers trust property under any instrument or agreement, may not cause such trust property to be invested otherwise than in a manner directed in, or required by, such instrument or agreement, 40

(2) In the absence of a direction or requirement referred to in subsection (1), a director, member, partner, official, employee or agent of a financial institution may not cause any trust property to be invested otherwise than in the name of— 45

- (a) the trust, beneficiary or principal concerned;
- (b) the financial institution in its capacity as administrator, trustee, curator or agent; or
- (c) a nominee company controlled by the financial institution, subject to clear identification of the trust property in the books of the financial institution as being property belonging to a specified trust, beneficiary or principal. 50

(3) (a) Despite subsections (1) and (2)—

- (i) where the articles of association of a company prohibit the registration of its shares or debentures in the name of—

- (au) a trust;
 (bb) a financial institution in its capacity as administrator, trustee or curator;
 or
 (cc) any nominee; and

(ii) where such shares or debentures form part of trust property administered by a financial institution, those shares or debentures must be registered in the name of a director, member, partner or manager of that financial institution. 5

(b) The director, member, partner or manager must hold those shares or debentures in a fiduciary capacity on behalf of the trust or beneficiary concerned. 10

(c) Prior to the registration of any shares or debentures in the name of a director, member, partner or manager contemplated in paragraph (a), the financial institution concerned must furnish security to the satisfaction of the Master of the High Court, if such security has not already been furnished in terms of the Trust Property Control Act, 1988 (Act No. 57 of 1988). 15

(4) This section also applies in a case where a financial institution holds office as an administrator, trustee, curator or agent jointly with another person or other persons by virtue of a will, deed of settlement, order of court, power of attorney or agreement.

(5) Trust property registered in the name of a financial institution or a nominee company controlled by it, may under no circumstances form part of the assets of the financial institution or such nominee company, despite anything to the contrary in any law or the common law. 20

Appointment of curator

5. (1) The registrar may, on good cause shown and without notice to a financial institution, apply to a division of the High Court having jurisdiction for the appointment of a curator to take control of, and to manage the whole or any part of, the business of that financial institution. 25

(2) Upon an application in terms of subsection (1) the court may—

(a) provisionally appoint a curator to take control of, and to manage the whole or any part of, the business of the financial institution on such conditions and for such a period as the court deems fit; and 30

(b) simultaneously grant a rule *nisi* calling upon the financial institution to show cause on a day mentioned in the rule why the appointment of the curator should not be confirmed.

(3) On application by the financial institution the court may anticipate the return day if not less than 48 hours' notice of such application has been given to the registrar. 35

(4) If at the hearing pursuant to the rule *nisi* the court is satisfied that it is desirable to do so, it may confirm the appointment of the curator.

(5) The court may make any order which it deems expedient with regard to costs relating to any application made by the registrar under subsection (1), 40

(6) The court may make any order which it deems expedient with regard to the remuneration of a curator appointed provisionally under subsection (2)(a) or finally under subsection (4).

(7) The curator acts under the control of the registrar who made the application under subsection (1), and may apply to that registrar for instructions with regard to any matter arising out of, or in connection with, the control and management of the business of the financial institution. 45

(8) The curator must furnish the registrar of the financial institution concerned with such information as the registrar may require concerning the affairs of that financial institution. 50

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

(b) A person who makes application contemplated in paragraph (a) must give notice of not less than 48 hours of such application to the registrar or the curator, as the case may be, and such registrar or curator is entitled to be heard at the hearing of such application. 55

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

Civil proceedings by registrar

6. (1) Despite anything to the contrary in any law or the common law, the registrar is entitled to institute **and** conduct proceedings in the High Court having jurisdiction in 5 order to—

- (a) discharge any duty or responsibility imposed on him or her in terms of any law;
- (b) compel any person to comply with any law or to cease contravening a law;
- (c) compel any person to comply with a lawful request, directive or instruction 10 made, issued or given by the registrar under a law; or
- (d) obtain a declaratory order on any point of law relating to any law or to the business of a financial institution.

(2) In paragraphs (a), (b), (c) and (d) of subsection (1) “law” means this Act, the Inspection of Financial Institutions Act, 1998 (Act No. 80 of 1998), or any other Act 15 referred to in the definition of “financial institution” in section 1 of the Financial Services Board Act, 1990, or the Medical Schemes Act, 1998, and includes any subordinate measure made under or in terms of any such Act.

(3) The registrar may take any reasonable steps, including issuing an instruction to carry out an inspection in terms of the Inspection of Financial Institutions Act, 1998, to 20 ensure that a person who is subject to an order of the court made in terms of subsection (1) complies with that order.

Restriction on powers of registrar

7. Despite any other provision of this Act, the registrar may not in respect of a stock exchange, financial exchange, member or stock-broker referred to in paragraph (a)(v) 25 and (vi) of the definition of “financial institution” in section 1 of the Financial Services Board Act, 1990, make an application under section 5 or institute or conduct proceedings under section 6 unless he or she—

- (a) has consulted with the committee or executive committee of the stock 30 exchange or financial exchange in question; and
- (b) is satisfied that no other adequate remedy is available.

Records and entries in books of account admissible in evidence

8. In any proceedings conducted in terms of this Act, the records and books of account of a financial institution and of a nominee company controlled by it or a trust administered by such institution are admissible as *prima facie* evidence of the matters, 35 transactions and accounts recorded therein, if supported by a document purporting to be an affidavit by a person who alleges in that affidavit that—

- (a) (i) he or she is a director, member, partner, official, employee or agent of such financial institution, nominee company or trust; or
- (ii) he or she is an inspector appointed under the Inspection of Financial 40 Institutions Act, 1998, section 11 or 12 of the South African Reserve Bank Act, 1989 (Act No. 90 of 1989), section 6 of the Banks Act, 1990, or section 4 of the Mutual Banks Act, 1993; and
- (b) such records or books of account are or have been the ordinary records and 45 books of account of that institution, company or trust.

Provisions relating to alienation of assets of financial institution or trust property in certain cases

9. If a director, member, partner, official, employee or agent of a financial institution, or of a nominee company controlled by a financial institution, purports to alienate any funds or other assets of the financial institution or any trust property to another person 50 in contravention of, or without complying with, the provisions of this Act, the alienation is invalid unless that other person proves that at the time of the acquisition he or she—

- (a) was unaware of, and had no reason to suspect, the contravention or non-compliance with the provisions of this Act;
- (b) acquired the funds, assets of the financial institution or trust property, as the case may be, for valuable consideration.

Offences

5

10. (1) A person who contravenes any provision of this Act, or fails to comply with any provision thereof with which it is his or her duty to comply, is guilty of an offence and on conviction is liable to a fine or imprisonment for a period not exceeding 10 years or to both such fine and imprisonment.

(2) A court may, in addition to any penalty it may impose in terms of subsection (1), 10 order that such person—

(a) pay the financial institution, trust, beneficiary or principal concerned for any profit he or she made; and

(b) compensate the institution, trust, beneficiary or principal concerned for any damage suffered as a result of the contravention or failure. 15

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

Repeal of laws

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

Transitional provision

12. Anything done or deemed to have been done under any provision of a law repealed by section 11 and which could be done under a provision of this Act, is deemed 25 to have been done under the last-mentioned provision.

Short title

13. This Act is called the Financial Institutions (Investment of Funds) Act, 2000.

SCHEDULE**LAWS REPEALED OR AMENDED**

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

MEMORANDUM ON THE OBJECTS OF THE FINANCIAL INSTITUTIONS (INVESTMENT OF FUNDS) BILL, 2000

1 SCOPE OF THE BILL

The Bill repeals and replaces the Financial Institutions (Investment of Funds) Act, 1984 (Act No. 39 of 1984) ("the Act"). The Bill regulates the investment, keeping in safe custody and administration by financial institutions of funds and trust property. The essential approach of the Act has not been changed.

Although the initial intention was to propose amendments to the Act, it became apparent after the consultation process, and particularly after consultation with the State Law Advisers, that virtually every section of the Act required amendment. In general, the Act is outdated and difficult to read and understand. It has therefore been decided to repeal the Act and propose a new Bill.

2 THE CONSULTATIVE PROCESS

A proposed draft Amendment Bill was circulated on 24 March 1999. As a result of comments received and subsequent consultation with the State Law Advisers, it was decided to draft an entirely new Bill.

A summary of the bodies consulted and their responses are contained in **Annexure A** attached hereto.

3 ORGANISATIONAL AND PERSONNEL IMPLICATIONS

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

4 FINANCIAL IMPLICATIONS

The Bill does not have financial implications for the state.

5 COMMUNICATION IMPLICATIONS

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

6 PARLIAMENTARY PROCEDURE

In the opinion of the Financial Services Board and the State Law Advisers this Bill should be dealt with in terms of section 75 of the Constitution. None of the procedures laid down in section 74 and 76 are applicable.

ANNEXURE A:
CONSULTATION PROCESS

[Note: The following parties were consulted on the Financial Institutions (Investment of Funds) Amendment Bill, 1999. As stated, on the advice of the State Law Advisers, a completely new Bill was drafted after the consultation process. Consequently, the clauses below in Part 4 refer to the corresponding clauses in the final draft of the Financial Institutions (Investment on Funds) Bill, 1999]

1 Parties consulted

Dept of Health
 Dept of Justice
 SA Law Commission
 Master of the High Court
 Office for Public Enterprises
 Select Committee on Public Accounts
 Commission of Enquiry into the Affairs of the Masterbond Group
 Association of Banking Lawyers of South Africa
 Association of Chartered Certified Accountants
 Association for the Advancement of Black Accountants
 Black Management Forum
 Chartered Institute of Management Accountants
 Consulting Actuaries Society of Southern Africa
 Corporate Lawyers Association of South Africa
 General Council of the Bar of South Africa
 General Law Society of South Africa
 Lawyers for Human Rights
 National NGO Coalition
 Pension Lawyers Association
 SA Institute of Chartered Secretaries and Administrators
 Registrar of Medical Schemes
 Registrar of Banks (Bank Supervision Department) Securities Regulation Panel
 Afrikaans Handelsinstituut
 Business South Africa
 National African Federated Chamber of Commerce and Industry
 South African Chamber of Business
 Consumer Institute of South Africa
 Free Market Foundation
 National Black Consumer Union
 National Consumer Forum
 Bankers Council
 The Banking Council of South Africa
 Institute of Bankers in SA
 Association of Property Unit Trust Management
 Association of Participation Mortgage Scheme Managers in SA
 Association of Unit Trusts
 Public Property Syndication Association
 SA Property Owners' Association
 Association of Bond Issuers of South Africa
 Association of Corporate Treasurers
 Fund Managers Association of South Africa
 Institute of Financial Markets
 Limited Investment Services Providers' Association
 Shareholders' Association of South Africa
 Institute of Pension Consultants and Administrators
 Institute of Life and Pensions Advisors
 Insurance Brokers Council

SA Insurance Brokers Association
 SA Reinsurance Brokers Association
 Dept Mercantile Law (University of Pretoria)
 South African Black Insurance Brokers Association
 Insurance Institute of South Africa
 Life Underwriters Association of SA
 SA Insurance Association
 Association of Retired Persons and Pensioners
 Institute of Pension and Provident Fund Trustees of Southern Africa
 Institute of Life and Pension Advisers
 Institute of Retirement Funds of SA
 Congress of South African Trade Unions
 Federation for South African Labour Unions
 National Council of Trade Unions
 National Health and Allied Workers Union
 Federation of Unions of South Africa
 ABSA Life
 SA Institute for Chartered Accountants
 Actuarial Society of SA
 DTI — Registrar of Companies
 DTI — National Consumer Affairs Office
 DTI — Business Practices Committee
 Department of Labour
 ABSA Life
 Sanlam Senior Management
 Association of Black Securities and Investment Professionals
 Life Offices' Association of South Africa
 Investigating Directorate: Serious Economic Offences
 The Ombudsman for Short-term Insurance
 The Ombudsman for Long-term Insurance
 The Ombudsman for Banking
 The Pension Funds Adjudicator
 Public Accountants and Auditors Board
 Office of the Auditor-General
 The Johannesburg Stock Exchange
 The South African Futures Exchange
 The Bond Exchange of SA
 Gauteng Dept of Finance and Economic Affairs
 Mpumalanga: Dept of Economic Affairs and Gaming
 Western Cape: Dept of Economic Affairs
 Kwazulu-Natal: Dept of Economic Affairs
 Free State: Dept of Economic Affairs
 Eastern Cape: Dept of Economic Affairs
 Northern Cape: Dept of Economic Affairs
 Northern Province: Dept of Economic Affairs
 North West: Dept of Finance and Economic Affairs
 Responses to press release:
 Mrs Malie Bester
 PG Harvey and Company

2 Parties who approved of the Bill, without comment

SA Institute for Chartered Accountants
 Association of Retired Persons and Pensioners
 Life Offices' Association of South Africa
 Public Accountants and Auditors Board
 Gauteng Dept of Finance and Economic Affairs
 Mrs Malie Bester

3 Parties who did not respond, or did not comment

Dept of Health
 Dept of Justice
 SA Law Commission
 Master of the High Court
 Office for Public Enterprises
 Select Committee on Public Accounts
 Commission of Enquiry into the Affairs of the Masterbond Group
 Association of Banking Lawyers of South Africa
 Association of Chartered Certified Accountants
 Association for the Advancement of Black Accountants
 Black Management Forum
 Chartered Institute of Management Accountants
 Consulting Actuaries Society of Southern Africa
 Corporate Lawyers Association of South Africa
 General Council of the Bar of South Africa
 General Law Society of South Africa
 Lawyers for Human Rights
 National NGO Coalition
 Pension Lawyers Association
 SA Institute of Chartered Secretaries and Administrators
 Registrar of Medical Schemes
 Securities Regulation Panel
 Afrikaans Handelsinstituut
 Business South Africa
 National African Federated Chamber of Commerce and Industry
 South African Chamber of Business
 Consumer Institute of South Africa
 Free Market Foundation
 National Black Consumer Union
 National Consumer Forum
 Bankers Council
 The Banking Council of South Africa
 Institute of Bankers in SA
 Association of Property Unit Trust Management
 Association of Participation Mortgage Scheme Managers in SA
 Association of Unit Trusts
 Public Property Syndication Association
 SA Property Owners' Association
 Association of Bond Issuers of South Africa
 Association of Corporate Treasurers
 Fund Managers Association of South Africa
 Institute of Financial Markets
 Limited Investment Services Providers' Association
 Shareholders' Association of South Africa
 Institute of Pension Consultants and Administrators
 Institute of Life and Pensions Advisors
 Insurance Brokers Council
 SA Insurance Brokers Association
 SA Reinsurance Brokers Association
 Dept Mercantile Law (University of Pretoria)
 South African Black Insurance Brokers Association
 Insurance Institute of South Africa
 Life Underwriters Association of SA
 SA Insurance Association
 Institute of Pension and Provident Fund Trustees of Southern Africa
 Institute of Life and Pension Advisers

Institute of Retirement Funds of SA
 Congress of South African Trade Unions
 Federation for South African Labour Unions
 National Council of Trade Unions
 National Health and Allied Workers Union
 Federation of Unions of South Africa
 ABSA Life
 DTI — National Consumer Affairs Office
 DTI — Business Practices Committee
 Department of Labour
 ABSA Life
 Sanlam Senior Management
 Association of Black Securities and Investment Professionals
 Life Offices' Association of South Africa
 Investigating Directorate: Serious Economic Offences
 The Ombudsman for Short-term Insurance
 The Ombudsman for Long-term Insurance
 The Ombudsman for Banking
 The Pension Funds Adjudicator
 Office of the Auditor-General
 The Bond Exchange of SA
 Western Cape: Dept of Economic Affairs
 Kwazulu-Natal: Dept of Economic Affairs
 Free State: Dept of Economic Affairs
 Eastern Cape: Dept of Economic Affairs
 Northern Cape: Dept of Economic Affairs
 Northern Province: Dept of Economic Affairs
 North West: Dept of Finance and Economic Affairs
 PG Harvey and Company

4 Parties who disagreed or requested changes to the Bill

[Note: No parties disagreed with the Amendment Bill, or suggested major changes. Most parties listed here approved of the Amendment Bill with minor changes]

Party consulted clause on which com- ments were received	Minor changes		Major changes		Disagree		Index reference
	Accepted	Refused	Accepted	Refused	Accepted	Refused	
1 Registrar of Banks (Bank Supervision Department)							1
1.1 Clause 5(7)	x						
1.2 Clause 5(9)		x					
1.3 Clause 9(b)		x					
2 Actuarial Society of SA							2
2.1 Clause 3		x					
3 Registrar of Companies							3
3.1 Clause 1	x						
4 Investigating Directorate: Serious Economic Offences							4
4.1 Clause 4(2)		x					
4.2 Clause 4(3)		x					
4.3 Clause 4(5)		x					
4.4 Clause 4(6)		x					
4.5 Clause 6		x					
4.6 Clause 9		x					
5 The Johannesburg Stock Exchange							5
5.1 Clause 4(2)		x					
5.2 Clause 4(5)		x					
5.3 Clause 1		x					
6 Mpumalanga: Dept of Economic Affairs and Gaming Directorate: Serious Economic Offences							6
6.1 Clause 5	x						
6.2 Clause 10	x						
7 North West: Dept of Finance and Economic Affairs							7
7.1 Clause 2	x						
7.2 Clause 4(3)	x						
7.3 Clause 4(5)	x						
7.4 Clause 5		x					

Party consulted clause on which com- ments were received	Minor changes		Major changes		Disagree		Index reference
	Accepted	Refused	Accepted	Refused	Accepted	Refused	
8 The South African Future Exchange							8
8.1 Clause 1		x					
8.2 Clause 5(9)	x						
8.3 Clause 6		x					
8.4 Clause 10		x					