

Chapter four

The supervision by BSD of Regal Bank (and Regal Holdings)

31 The evidence of the Registrar of Banks

The Registrar of Banks handed in a prepared statement, the bulk of which was read onto the record. The evidence (3168-3199) of the

Registrar which is material, briefly stated, in his words was the following:-

31.1 The purpose of banking regulation and supervision is:

- to ensure the safety of the deposits of the public with banks;
- the maintenance of a sound and efficient banking system and, ultimately,
- a stable overall financial system.

31.2 The philosophy of bank regulation is that banks fulfil a pivotal role in the economy of a country since they are the only source of finance for a large number of borrowers and because they manage the payment system. If the banking system is placed in jeopardy the resultant financial disruption is likely to be more serious than in other sectors of the financial system. Banks must be reliable. The public must have confidence in banks. From a depositor's point of view, the confidence in banks is so great that the repayment of the deposit is regarded as guaranteed. Regulation must be such that the confidence is not shamed. It is not a bank regulator's role to manage banks or to stifle product development or to curb entrepreneurship unreasonably. Supervision is more of an art than a science. The regulator is heavily dependent on a

number of factors and other disciplines, such as the audit profession, the legal profession and the directors of the bank.

- 31.3 The international financial community has developed a wealth of knowledge and a sense for the correct regulation of banks in order to steer banks away from financial turbulence and ill winds which may spread contagion even to other sectors of the financial community, such as the insurance industry and the financial markets. The G20 countries have developed guidelines for the supervision of banks which are widely applied. The guidelines are known as the Core Principles for Effective Banking Supervision (Basel) 1997 (“the Core Principles”). The principles were accepted by South Africa. Regulation is not a rigid application of predetermined rules but a set of principles. Each principle allows the regulator ample latitude and discretion. The regulator must assess the financial situation and regulate with certain objectives in mind. The Core Principles are guidelines to attaining the objective of making banks universally credible institutions.
- 31.4 The regulations of banks, compared to the regulation of other financial institutions, is more strict, conservative and “hands on” in nature.
- 31.5 In order to protect depositors and creditors and prevent the spread of problems, a regulator must be able to conduct appropriate

intervention. A banking regulator must have at its disposal adequate supervisory measures to bring about prompt corrective action. In terms of the Banks Act, accordingly, the Registrar of Banks has the right to apply for the winding-up of the bank and to oppose an application for the winding-up of the bank. The Registrar has been given the power, in addition, to appoint a liquidator.

31.6 The Reserve Bank's adherence to the Core Principles and the application of its statutory powers are applied with common commercial sense as the Reserve Bank "walks the tight rope" with the view to serving the financial system as well as protecting the rights of all the stakeholders in a bank. The powers of regulatory persuasion are often more effective than the sledgehammer when one is dealing with corporate governance issues. The second King report points out that investors are prepared to pay 22% more for the shares of a company which is reputedly governed.

31.7 With the wisdom of hindsight, the Registrar was of the view that the distress of Regal Bank arose not from a lack of liquidity, nor from a lack of entrepreneurship, but from a lack of sound corporate governance.

- 31.8 When performing its functions, the regulator must adopt a bona fide even-handed approach keeping in mind that the regulator can adopt a narrow view, i.e. to protect the interests of the depositor by ensuring that the bank has adequate capital, the minimum reserve and liquid assets, as well as fit and proper directors. Or the regulator can take a broader view by ensuring a high level of efficiency in the provision of financial services; the securing of stability of the financial system and the protection of the interests of all parties. If the regulator were to achieve the latter objectives, the regulator would have to transcend the bounds of supervision and enter the realm of management and over regulation. This would be unhealthy for banking. As was said by a deputy-governor of the Bank of England: “The supervisors, of course, cannot and should not second-guess the management of individual institutions. ... Being a supervisor does not make me a shadow director of five hundred authorised banks, nor should it.”
- 31.9 In a case such as that of Regal Bank, the regulator was left with little other than a radical remedy, such as cancellation of the registration, liquidation, and curatorship. Other than the remedies set out in the Banks Act, the Registrar was left with only persuasion. The powers of persuasion, submitted the Registrar, should be backed up in law.

- 31.10 The Registrar submitted that the remedies in the Banks Act relating to investigation and reporting are adequate. Once the inspectors have reported and the problem properly diagnosed, one requires sharp measures which can be speedily applied in order to turn around the business of a bank in distress. The Registrar quoted from an International Monetary Fund publication, which reads: “To be effective, corrective action must be fair, swift and decisive.”
- 31.11 Not every bank should be saved. Those that threaten the financial system or are too large to fail should be assisted timeously through application of the correct remedy. Risk cannot, however, be totally eliminated. The remaining risk must be borne by all stakeholders equally, according to the merits of the investment decisions.
- 31.12 Banks are inextricably linked to the central bank through the lender of last resort principle (“LOLR”). Banks which have exhausted their credit facilities may be assisted through short term loans by the central bank. The decision to assist banks depends on whether the crisis was caused by a macro economic factor beyond the bank’s control as well as the duration of the liquidity crisis. Banks which brought on the crisis through poor corporate governance or undertaking unnecessary risk should not be assisted as a lender of last resort, lest it should send the wrong

signal to the banking community that banks will not be allowed to fail.

31.13 The Registrar reviewed the regulatory tools available to the regulators in Canada, United Kingdom, United States of America (“USA”) and Australia. The Registrar came to the conclusion that consideration should be given to amending the Banks Act to give the Registrar the power:

- to remove a director from office;
- to appoint an administrator with the power to advise a bank to apply to court for protection, similar to the chapter 11 procedure in the USA or to adopt the “turn-around” approach or to do a “work-out” with its creditors.

The chapter 11 procedure allows a business to remain in operation while a plan of reorganisation is arrived at with its creditors. Control of the company passes to an administrator. A business does not have to be insolvent before filing for protection in terms of chapter 11. A chapter 11 order protects the business by establishing a moratorium from action against the company. Similar provisions relating to banks exist in Australia, the United Kingdom and Canada. The concepts “turn-around” and “work-out” form part of the “London approach”. The London approach enables the rescue of a business, in this case a bank, in time by or

to arrive at an agreement with its creditors, brokered by the central bank. The Registrar submitted that power should be given to the Registrar to negotiate with other banks to render assistance for the successful conclusion of work-out agreements with the creditors and customers of banks to whom they are largely exposed.

31.14 There were about 11 bank failures in the last decade. The failures were caused by bad management and failure of corporate governance (3204-5).

31.15 The Registrar expanded on his written statement by testifying that if the director of a bank is endangering the bank, he wants the power to remove the director and to reconstitute the board of directors. At the moment all he has is moral suasion (3217-8).

31.16 The Registrar said that the BSD were in the process of training “site teams” which in due course will look at corporate governance issues (3230) and “the procedures employed on controls within a bank” (3230-1). For the past 18 months the teams have been gaining experience but concentrating on the quality of the assets of the bank (3232).

The evidence of Martin

32 Martin, an assistant general manager of the Banking Supervision Department (“BSD”) of the Reserve Bank, handed in a written statement, which he confirmed in evidence (3257-3296). The salient aspects of his evidence were the following:-

32.1 The stated mission of the BSD is “to promote the soundness of banks through the effective application of international regulatory and supervisory standards”. The BSD fulfils its functions in line with three core philosophies:

- market principles underlie all activities and decisions;
- a service orientated approach is subscribed to;
- a relationship of mutual trust between the BSD and the key players in the risk management process.

32.2 The BSD regards the overall risk management process as being a partnership between several players, all of them have an important role to play. The key players are:

- the board of directors;
- management;
- the audit committee;
- external auditors;
- the BSD;

- the general public.

32.3 In regard to the general public, Martin testified that it includes depositors, the media and financial analysts. All have a role to play in the overall risk management process. It is important that the depositors, if capable, should make an assessment of the bank before placing deposits in the bank.

32.4 Martin's evidence on the role of the audit committee and external auditors is in line with the analysis done elsewhere in part 3.

32.5 Martin's evidence on the board of directors of a bank or its holding company is worthy of emphasis. The board of directors is ultimately responsible for the conduct of the business of the bank, and, therefore, the success or failure of the bank. Because banks are special institutions and are the custodians of public savings, directors of a bank are expected to have an understanding of banking business. In terms of the banking regulations, directors are required to have a basic understanding and knowledge of banking business and the laws and customs governing banks. A member of a board of directors is not required to be fully conversant with all aspects of the business of the bank. However, all directors are expected to have competence commensurable with the nature and scale of the bank's business. Directors are expected to perform their duties with such competence as could

be expected from persons with their knowledge and experience. Because the general public's savings are invested in banks, directors are expected to ensure that the risks undertaken by the bank are prudently managed. Directors are required to report annually that the system of internal controls is adequate (Regulation 39). As from 1 January 2001, in terms of Regulation 39(4)(a), directors must “assess and document whether the process of corporate governance implemented by the bank successfully achieves the objectives of the board”.

32.6 Martin emphasised that the director of a bank must be “fit and proper” to be a director. He referred to s1(A) of the Banks Act, which provides that the following qualities are important:

- general probity;
- competence and soundness of judgment for the fulfilment of the responsibilities of the office in question;
- the diligence with which the person concerned is likely to fulfil those responsibilities.

32.7 Management derives its responsibilities from the board of directors through delegation and it is important that managers understand all aspects of the business. The Committee on Banking Regulations and Supervisory Practices, identified the following responsibilities of bank management:

- staff needs to be professionally competent and have sufficient experience;
- proper control systems must exist and function adequately;
- the bank's operations must be conducted prudently and adequate provisions must be maintained to absorb losses;
- statutory and regulatory directives must be observed;
- the interests of depositors and other creditors must be adequately protected;
- financial statements must be prepared in accordance with national law. Regulation 41 requires all appointments to the senior management of a bank to be approved by the chairperson and the board of directors of the bank.

32.8 It follows that management, together with the board of directors, is responsible for ensuring that the bank is run along prudent lines, follows sound corporate governance and ethics, and is successful.

33 Levenstein as Chairman

33.1 The King Report on Corporate Governance dated 29 November 1994 (“King Report”) recommended that :

- The chairman of the board of directors must be able to be objective from the day-to-day running of the business;
- The role of the chairman should be separated from that of the CEO;
- The chairman should be an independent and non-executive director;
- Corporations should not apply “cronyism” in making non-executive appointments.

33.2 The Registrar opined in evidence that the chairman of the bank or of the holding company of the bank is very important. “He has to ensure that proper corporate governance is applied within the bank. He has to ensure that all senior [management], including directors and executives are fit and proper and his role in establishing the culture, the compliance culture, the culture within the organisation is very important.” (3207).

33.3 Levenstein was CEO from inception until 18 June 2001.

33.4 Peter Springett was non-executive chairman from inception until 21 January 1998. Levenstein became acting chairman on that date.

33.5 On 18 February 1998 at a meeting between Regal Bank and the BSD (C14) Levenstein informed the BSD that he would fulfil the role of acting chairman “in the short term”. Martin of BSD expressed his disapproval. See, too, Martin’s letter of 24 February 1998 (C16).

33.6 At a meeting of the board of Regal Bank on 28 May 1998 the directors decided that Levenstein should continue to act as chairman and remain CEO (K(2)126).

33.7 On 30 September 1998 the Registrar of Banks asked Levenstein what progress had been made in appointing a suitable candidate as chairman and requested that the issue be resolved by 31 December 1998 (C97).

33.8 On 29 October 1998 Levenstein responded in a letter in which he refused to separate the roles. His motivation was:

“... the historical and ongoing profile of Regal provides what we believe to be an interesting platform for a different perspective on this issue. The ground floor conceptualisation, creation and organic development of Regal motivates a fusion of the roles of CEO and Chairman. Indeed we strongly believe that any attempt to “shoehorn” a separation between these respective roles will in the specific context of Regal, draw substantial tension and conflict into the equation.

Strategic vision and objectives are often inextricably linked to the entrepreneurial spirit that formulates the architectural and financial design of a business concern.

The cultural and psychological characteristics that impact upon the relationship between CEO and Chairman can lead to a wedge being driven between operational and strategic balance. Political sensitivities and complexities surface at both Board and operational levels which impair harmony and ultimately risk management focus. In our experience the perception that reporting lines between Chairman and CEO are well defined

and structured tend to moderate the active participation of non-executive directors. In Regal's context the fusing of the respective roles appears to illicit [sic] greater participation and interaction regarding all policy and strategic issues.

Responsibility and accountability becomes more clearly defined and even aggressive, yet healthy and constructive Board meetings evolve as the norm. The mix and diversity of the Board, in addition to unique circumstances, shapes impact.

As Regal's life cycle extends and matures a separation of the chairman role will be initiated. Regal does not reject the principle that sound corporate governance may require a clear distinction between CEO and Chairman. In summary we strongly believe that having regard to Regal's historical development and it's current operational focus and strategies, an "enforced" separation of the roles of Chairman and CEO at this juncture would, instead of enhancing shareholder protection, create sufficient operational and governance difficulties to in fact prejudice shareholders."(C98)

33.9 On 17 November 1998 the Registrar of Banks replied to the letter of 29 October and gave Levenstein until after the listing of Regal Holdings (anticipated to be in February 1999) to separate the roles (C124). Regal Holdings in fact was listed on 25 February 1999.

33.10 At a meeting of 29 March 1999 between Regal and BSD, Martin requested that action be taken before June 1999. Levenstein replied that a "proper candidate was not available at the moment" (D145). Levenstein testified that "... we wanted to find someone from beyond our border completely ... someone completely and absolutely independent ... it was my recommendation that Joe Pollack ... be appointed because he had a very independent profile, but some of the non-executive objected to that, they felt that Joe was getting on in years and that Jack should be appointed" (1566 – 7).

33.11 On 10 May 1999 the Registrar gave Levenstein until 31 July 1999 to finalise the matter (D207).

33.12 On 19 July Levenstein in a letter addressed to the Registrar said that a number of factors made it “difficult and impractical” to appoint a non-executive chairman by 31 July 1999:

“These factors include:

- The ongoing negotiations with certain institutions and corporates regarding potential substantial investments in Regal. These negotiations have taken longer than was anticipated when we met on 29 March 1999.
 - The evolvement of a culture at Regal which would accommodate a radical shift from its entrenched “flat structure” system will take time and implementation of a structure, at this time, which is more conducive to a hierarchical system, could prove disastrous to the harmonious (and effective) prevailing leadership structure.
 - The “after shock” of a prior abortive attempt to foist a hierarchical executive structure upon Regal at an inappropriate time is still keenly felt within the Regal corridors. Any attempt to re-visit this territory now is likely to be injurious to Regal, its shareholders and clients.”
- (D287)

33.13 On 28 July 1999 the Registrar of Banks instructed Levenstein to separate the roles of Chairman and CEO “as soon as possible but by no later than 30 September 1999.” (D286)

33.14 On 29 September 1999 Levenstein resigned as chairman and Lurie was appointed Chairman by the board of directors.

33.15 Levenstein testified that the Reserve Bank was “a hundred percent correct that the CEO role and the chairmanship role should be divorced from each other and we had every intention of doing so” (1192).

33.16 Nhleko testified that he was concerned about the dual roles and supported Lubner when Lubner raised his concerns at board

meetings (2302). He did nothing more, nor did he oppose the appointment of Lurie as chairman.

33.17 Lurie agreed that the roles of chairman and CEO should have been separated. They tried to find a chairman “in the marketplace” but could not find an adequate replacement (2378).

33.18 Diesel said he could “possibly ... have been more assertive in terms of perhaps bringing a nomination to put somebody else in the chair” (2669). He agreed that there was not proper control of Levenstein by the directors (2671).

33.19 The Registrar was of the view that the bank failed because Levenstein was doing transactions that endangered the bank itself and there were insufficient checks and balances by the audit committee and the board of directors. (3214-5, 3220).

33.20 Martin made the point in his evidence that it only became a legal requirement in terms of Regulation 40 from 1 January 2001 that the chairman of the bank should be a non-executive director. Prior to that date moral suasion was required to persuade the parties to make a change (3268-9).

34 Springett/Lubner/Schneider

34.1 On 20 August 1999 Mark Springett and Carl Kruger met with Martin and Nolte of the BSD. We do not have a minute of the meeting. According to Springett, he and Carl Kruger expressed their serious concerns about the manner in which Levenstein was managing the bank, in particular, the instruction given by Levenstein to restrict the sale of Regal Treasury shares. They provided the BSD with correspondence. (G145).

34.2 On 7 September 1999 Wiese met with Levenstein. We do not have minutes of the meeting. On 1 October 1999 Wiese wrote a letter to Levenstein (D284) in which the meeting was referred to in these terms:

“You indicated that there was strong adherence to corporate governance in Regal. Our Mr J A Martin was, however, of the opinion that there might be a market perception that certain board members were “removed” from their positions because they did not easily accept the manner in which Mr M Springett was dismissed.

In the above regard we stated that it was strongly advisable for a bank to appoint new non-executive directors who would be perceived to be strongly independent ...”.

34.3 On 12 October 1999 Levenstein wrote a letter to Wiese in which he dealt with the meeting of 7 September 1999, spoke of “Regal’s

boardroom surgery” and denied Mark Springett’s allegations (DT(1)87). On 22 October 1999 he wrote a further letter to Wiese in which he said that Regal Bank would pursue the prosecution against Mark Springett with serious intent and added that: “We are stressed by any possible conduct that may endanger shareholders or depositors” (N31). On 4 November 1999 Levenstein wrote a letter to Martin in which he dealt with Lubner and Mark Springett and added: “Risk management comes first. Corporate Governance requires strength, courage and iron resolve. Anyone who endangers the system, or impairs the risk management culture must be dealt with expeditiously”(DT(1)88).

- 34.4 On 28 January 2000 the BSD met with EY (E9). The minutes of the meeting record the following: “The issue surrounding BSD’s concerns on corporate governance were discussed with the auditors. Mr Martin informed the auditors of BSD’s opinion regarding the dismissals and resignations of directors during the past year of Regal. The content of the meetings held with the difference parties involved – Messrs Springett, Lubner, Schneider and delegates of the Financial Services Board (“FSB”) and Regal were conveyed to the auditors ... Mr Martin stressed BSD’s concerns on the corporate governance issue at Regal. Not only was the bank in contravention of the provisions of s60(3)(b) of the Banks Act, in which not more than 49% of the directors of the bank shall be employees of that bank ... but it was also BSD’s opinion that the board was inappropriately structured ... The board was run by management and was not perceived by BSD to be

totally independent. Mr Martin referred to the problems experienced with the dual roles performed by Mr Levenstein as chief executive officer and chairman of the board. Furthermore, it was concerning to BSD that Mr Jack Lurie, newly appointed chairman of the board was the father-in-law of Mr Levenstein. It was BSD's viewpoint that Mr Levenstein was playing an over-dominant role in the bank." (E10) (Lurie is in fact the brother-in-law of Levenstein.) See, too, Martin's letter of 10 February 2000 to Van Heerden referring to the meeting (E6).

34.5 On 3 February 2000 Wiese wrote a letter to Lurie in which he "strongly" advised Regal Bank to appoint "new non-executive directors, who would be perceived to be strongly independent by the general public and investors to the board in order to replace Messrs Lubner and Schneider." (DT(1)96).

34.6 On 17 February 2000 Lurie responded (DT(1)100) by saying that he was in consultation with potential candidates as to their suitability and that "we are determined that the replacement directors will be of the calibre that adds value to the organisation". (DT(1)100).

34.7 On 29 March 2000, in a document signed by almost all the directors of Regal Holdings, it was said, *inter alia*: "All the bank's employees are required to maintain high ethical standards, thereby ensuring that the bank's business practices are conducted in a manner that is above reproach. The board is responsible to the shareholders for setting the

direction of the group through the establishment of strategies, objectives and key policies. Implementation of these is monitored through a structured approach to reporting and accountability. Appropriate aspects of internal accounting and administrative systems are reviewed and tested by our external auditors.” (K(2)221).

34.8 On 17 April 2000 the BSD (including Wiese and Martin) and Regal Bank (Lurie and Levenstein) met to discuss BSD’s concerns about corporate governance (E39). Lurie and Levenstein said that Regal Holdings Board would be “totally reformed” and that only Levenstein and Steen will remain on the board. Wiese questioned the independence of the non-executive directors. Levenstein said that “Regal was considering the appointment of a totally independent chairman from outside the group”.

34.9 The Registrar said that the Mark Springett issue was regarded by the BSD as an “isolated situation” which it did take up with the FSB. Had the BSD known all the facts, as elicited in this commission, it would have acted differently (3249-3252).

34.10 Martin said that the BSD debated at length whether a s7 review should be conducted. One of the considerations, in addition to cost, a fact that the Registrar mentioned in his evidence, was that “a section 7 review is a step not taken lightly because if that does leak outside of the bank it can have a negative effect on the bank, it can cause a run” (3302).

35 The threat by EY to qualify the 2000 audited results

35.1 On 5 May 2000 the BSD and EY met (E41). EY explained the Regal branding model and referred in particular to the bank's 25% share in RMI and 23% share in Kgoro. EY said that there was disagreement between EY and Levenstein on the valuation of the investments and how these were to be accounted for in terms of GAAP. Wiese telephoned Levenstein and said that if EY qualified the 2000 financial statements, he would appoint a curator. The discussion ended on the basis that KPMG would be appointed in terms of s7 of the Banks Act to give a view.

35.2 KPMG was appointed.

35.3 After receiving the s7 report at a meeting with KPMG on 15 May 2000 (E49) it was decided to meet with Levenstein to convince him of the impact of his decision to continue with qualified financial statements. The BSD and KPMG met with Levenstein (E52), who “explained that he was the only person to render an opinion on the value and measurement of money and that he would stick to his opinion.” At a meeting with EY, Wiese said that the BSD had three options (E43): to appoint a curator, to approach the court in an attempt to deregister the bank, and to remove Levenstein as CEO. Wiese posed the question whether Levenstein was fit an proper to run

the bank. He was prepared to act “in contradiction with the opinions raised by two audit firms and the Registrar of Banks”. BSD then called in Lurie, the chairman of Regal Bank, and Buch, the chairman of the audit committee (E45). They backed down when threatened with deregistration.

35.4 The 2000 financial statements were not qualified by EY, Regal Bank continued to carry on business, Levenstein remained CEO and Lurie remained chairman.

35.5 The Registrar conceded in evidence that Levenstein’s conduct in not accepting the opinions of EY and KPMG on 15 May and the attitude he adopted in the meeting on that day, was irrational and stubborn, but “we did not have any powers ... to do something about it ... obviously it did create some reservation in our minds and that is why we expressed it to [the directors].” (3246-7).

36 Lopes

36.1 On 14 August 2000 Lopes met with Wiese. We do not have minutes of the meeting. Some of the allegations made by Lopes were that board members who did not agree with Levenstein were removed from the board; Regal had lost about 25 staff members in the past three months, at least 10 of them in senior

management positions; anyone who questioned Levenstein's "branding" idea was threatened (E149).

- 36.2 The Registrar gave evidence that the visit by Lopes to the Reserve Bank "highlighted certain things and that sort of solidified our opinion that we need to commission a [s7] report."(3224).
- 36.3 On 16 August 2000 the BSD met with DT (E149), the purpose of the meeting being to appoint DT to conduct a s7 review on the role of the board of directors, particularly the powerful role played by Levenstein.
- 36.4 On 18 August 2000 the BSD and DT held a meeting (E151) in which DT conveyed the content of discussions they had held with Lopes. The terms of reference of DT were discussed.
- 36.5 On 21 August 2000 Martin reported to Ms Marcus, the Deputy-Governor, on the appointment of DT and meetings to be held with Regal Bank (G91).
- 36.6 On 23 August 2000 the BSD (including Wiese and Martin) met with Regal Bank (Lurie and three non-executive directors) to discuss BSD's concern about "Recent dismissals and resignations at Regal. Negative market perceptions that influenced that share price and there were allegations of mismanagement within Regal" (E159). Lurie gave an explanation for the various dismissals and resignations. Wiese

said that the BSD had decided to appoint DT to do a s7 review. On the same day Wiese wrote a letter to Lurie in which he instructed Regal Holdings to provide a report in terms of s7 by 8 September 2000. The instruction was motivated by referring to “possible breaches of corporate governance in Regal Holdings” (E165).

36.7 On 25 August 2000 Wiese and Martin met with Lubner, Barnes, Nhleko and Forman (E168). Wiese reported on the s7 report and Lubner and Nhleko told the meeting about Levenstein’s management style.

36.8 On 28 August 2000 Radus signed a letter which he sent to Wiese (E170). The letter purported to be one by the executives in support of Levenstein. Two of the passages in the letter are: “The CEO of the Bank deserves your support, in particular an individual such as Jeff Levenstein based on his integrity and track record which speaks for itself. The nature and purpose of the accusations are obviously designed to protect ZL. As elucidated above. Our CEO should be on the receiving end of your unconditional support. The executives of Regal are disillusioned and saddened by your stance”. In his evidence, Radus at first said that Levenstein drafted the letter and he, Radus, signed it (3447). Later in his evidence Radus said that he might have done a draft and Levenstein changed it “... or he did the letter. I cannot remember,

really. It is certainly not my language, that is all I can tell you. But I did agree with this and the executives agreed with this.” (3149). Asked who the other executives were on whose behalf he wrote the letter, Radus said the only other executive was Diesel. Later on in his evidence, Radus again said that he could not remember who the author of the letter was, but it was written at Levenstein’s initiative (3150).

- 36.9 Wiese replied on 31 August 2000 and said that he had a duty to depositors and other stakeholders to take action when required and that the reasons for the s7 review and appointment were discussed with Lurie and other non-executive directors (E181).
- 36.10 On 6 September 2000 the BSD and DT met to discuss the DT report in detail (E183). Wiese expressed the opinion that Regal Bank had no future and that it would be requested to deregister voluntarily (E186).
- 36.11 On 12 September 2000 the BSD met with Levenstein to discuss allegations that Levenstein had made in correspondence with Wiese (attacking EY). Levenstein was told that the s7 report would be discussed with him in due course (E192).
- 36.12 On 4 October 2000 the BSD, Rooth & Wessels and DT met (E195). DT said that Regal was solvent and had a high capital base. Various allegations were made including dealing in shares. Wiese expressed his desire, as did Martin, that Levenstein should

be replaced and stated that the BSD had lost trust in Levenstein's ability to run Regal.

36.13 On 23 October 2000 the BSD, DT (Schipper) met with the Regal Holdings board of directors (E206). Wiese made a presentation in slide format. Levenstein gave explanations for their trading in shares, his personal expenditure, the dismissal of various directors and in regard to the branding income, Levenstein said that "he was appalled by Mr Wiese's conclusion that three auditing firms had agreed that the branding income could not be measured with accuracy or certainty". The meeting ended on the basis that Regal Holdings would prepare a response.

36.14 Martin's evidence was that, acting on the advice of its attorney, the presentation by the BSD to the board of directors on 23 October 2000, did not include the corrective actions which the BSD required the board to take (3274). The actions the BSD wished the board to take included the following:

- the appointment of a new chairman who was independent and seen to be independent;
- the appointment of at least four independent, non-executive directors, at least two of whom should have had extensive banking experience;
- the appointment of a new CEO (DT(2)483 – 95).

36.15 Regal's response is dated 29 November 2000 (E282).

36.16 On 22 January 2001 BSD met with DT and Rooth & Wessels.

The Regal response was discussed in some detail. The meeting concluded on the basis that "most of the issues could only be verified once EY had completed the year-end audit of Regal" (F6).

36.17 On 12 February 2001 the BSD met with EY (F27). A number of issues were discussed, including corporate governance issues. EY reported that Cohen, Van der Walt and Oosthuizen had been appointed directors and that a financial director was to be appointed within the next two months. The BSD requested EY to confirm a number of matters relating to Levenstein's personal expenditure, the payment of R650 000.00 as dividends, the Mettle deals, and so on.

36.18 On 18 April 2001 Wiese wrote a letter to Cohen, chairman of the audit committee of Regal Bank (F23) setting out the items which were to be included in the year-end audit of the bank (following on the meeting with EY on 12 February). On the same day Wiese sent Strydom a copy of the minutes of the meeting of 12 February 2001 (F26).

36.19 On 9 May 2001 Wiese expressed reservations to Regal Holdings about the appointment of Cohen as chairman (F43). On 10 May 2001 Levenstein defended the appointment (F44).

36.20 The Registrar testified that the issues identified by the DT s7 report were not unearthed by EY or by the normal BSD procedures, which did not include audits. BSD does not manage banks, it supervises banks (3227-8).

36.21 The response of the Reserve Bank to the DT s7 report was two fold:

- to insist that the bank itself take corrective measures; and
- to instruct EY to report to the Reserve Bank “after the audit that these things have been rectified” (3233).

36.22 The Registrar testified that if he had had the power to do so at the time, i.e. in October 2000, he would have removed Levenstein “right there and then” and he would have had the board reconstituted. But he did not have the power to do so. All he could use was “moral suasion” (3234-3241). The Reserve Bank believed, on the basis of the DI returns, that Regal Bank was complying with its prudential requirements. Had there been deficiencies the prudential requirements, the Reserve Bank would have acted a lot faster (342-3).

37 Curatorship

- 37.1 Regal Bank began to get bad press from 25 May 2001 with the publication of the Financial Mail (“FM”) article (S12), the Business Report article “Regal claims ‘threat’ from Zeltis over shares” (S15); a Sunday Independent article on or about 27 May 2001 (K(3)20); and an article in the FM on 1 June 2001 (110460) (There was another article on 8 June 2001 in the FM “Regal Treasury: hitting back at the FM” (S17)).
- 37.2 As at 29 May 2001, the liquidity of the bank was healthy, despite the negative publicity (Cohen 1874). On 29 May 2001, Cohen received an advanced copy of the article which was due to appear on the FM on 1 June 2001. Cohen and Van der Walt went to see Levenstein at his home to discuss the article. Levenstein explained that Mettle had “full discretion to buy and sell shares in the portfolio where preferent share returns are linked to portfolio performance” (Cohen 1875). Levenstein denied that Regal had any influence over the purchase of the shares. Cohen discussed the matter with Martin of BSD and informed him that a joint meeting of the boards had been called for the next day.
- 37.3 On 30 May 2001, before the meeting of the joint boards, Cohen met with Mettle.

- 37.4 On 30 May 2001 the boards of Regal Holdings and Regal Bank met to discuss the FM article and the issues raised in it, especially the litigation with RMI (K(3)16-17). The Sunday Independent article was also discussed. Diesel presented a report on the bank's liquidity and reported that "Treasury is down R22 – R25 m on the week to date in response to the negative publicity." Cohen emphasised the need to monitor liquidity on a minute-by-minute basis and to report any negative trends.
- 37.5 On 1 June 2001 the article appeared in the FM with the headline, "Surprising surge in price: Mettle rides to the rescue", which alleged that Regal Holdings shares appreciated by 7% on the back of an acquisition by Mettle Securities of 700 000 Regal Holdings shares worth about R3.8m (110460). Prinsloo testified that Mettle acquired about 3m Regal Holdings shares for R20m, probably at the request of Levenstein (2997).
- 37.6 On 1 June 2001 Cohen sent draft minutes of the meeting of 30 May 2001 to Wiese and asked for his assistance in dealing with the negative publicity generated by Sasfin (F107). Wiese replied sympathetically on 12 June (F106).
- 37.7 On 5 June 2001 (F78) and 11 June 2001 (F105.1) Cohen reported to Wiese on liquidity levels:

29 May 2001 - R107 334 000

5 June 2001 - R 98 834 000

11 June 2001 - R 70 334 000

37.8 On 11 June 2001 Cohen and Oosthuizen met to discuss a number of issues, such as the Mettle managed portfolio, non-disclosure to the board, and the acquisition of shares by Shareholders' Trust, which it had been decided by the audit committee on 28 March 2001 should be terminated within 3 months (K(3)101). They decided to meet with Prof. Vorster, Mettle and EY, and to accumulate evidence in order to report to the BSD.

37.9 On 11 June 2001 the bank experienced a "liquidity shortfall" which necessitated it using a marginal lending facility of R18 m at the Reserve Bank's money market department. The facility was repaid on 12 June 2001 (G395).

37.10 On 13 June 2001 the boards of Regal Holdings and Regal Bank met (K(3)22) and discussed a number of issues including corporate governance; the approval of the "securitisation transaction proposed by Mettle Ltd and RMB". The meeting resolved that all purchases of Regal Holdings shares by Shareholders' Trust must be ratified by the full board and that an exposure of R5m to the trust was approved. The matter would be assessed on a daily basis and further exposures would be considered by way of a round-robin (K(3)26).

- 37.11 On the same day Wiese reported to the Governor's committee (G392) on "current developments at Regal". One of the "actions to be taken" was "replacement of the bank's CEO" (G395)
- 37.12 On 14 June 2001 Cohen met with RMB to discuss a possible preference share transaction of R100m "to try and store up the liquidity" of the bank (Cohen 1891).
- 37.13 On 15 June 2001 Levenstein asked to be excused from a meeting of 18 June 2001 which had been arranged between the bank and BSD (Cohen 1892). On the same day, Cohen informed Wiese of Robinson's appointment as CEO of Regal Bank (F120).
- 37.14 On 18 June 2001 the bank, represented by Cohen, Lurie and Oosthuizen, met with the BSD represented by, inter alia, Wiese and Martin (F120.1). Cohen reported on the improvement on corporate governance and the various improvements that had been made; his concerns about Sempres and the Shareholders Trust; that he was not satisfied with the liquidity position of the bank and the steps he was taking to address the problem. The three directors expressed optimism about the future of the bank. According to Cohen, he asked Wiese whether "third tier liquidity provision would be available Wiese replied in the negative because, unlike FBC Fidelity, the bank-client basis was in the high nett worth market" (Cohen 1896).

On the same day Robinson commenced employment as CEO of Regal Bank. His major concern was there was no surplus liquidity. He commenced taking steps to arrange a credit line with other banks (Robinson 1816).

37.15 On 20 June 2001 Cohen was informed by Guard Risk that the underwriters were not committed to the RMB preference share deal. Diesel reported that the bank was “at the 75% limit on the statutory liquidity with the Reserve Bank” (Cohen 1900).

37.16 On 21 June 2001 Cohen requested Oosthuizen to visit Martin at home to reopen the possibility of a third tier liquidity facility. Oosthuizen testified that he met Martin in Pretoria and discussed the growing pressure on liquidity and what the options could be. Martin informed Oosthuizen, after a discussion with the Registrar of Banks, that there would not be any form of assistance from the Reserve Bank in respect of its liquidity pressure. He conveyed that to Cohen. The following morning he received another telephone call from Martin to confirm that the official position of the Reserve Bank was that there would not be any form of assistance. (3008-9). Cohen told Levenstein and advised him that a standby facility should be sought from another bank, namely, Investec (Cohen 1900 – 1901)

37.17 On Friday, 22 June 2001, Regal Holdings and Investec met.

According to Robinson, the “ostensible purpose of the meeting was to create some standby credit lines in case of a liquidity run on the bank”. The meeting concluded on the basis that Investec would conduct a due diligence over the week-end with a view to acquiring the bank (1817; Cohen 1903 – 1904).

37.18 There was a hive of activity on Saturday, 23 June 2001. Investec commenced the due diligence. The Reserve Bank met with Sasfin (G401) and Regal Bank (G396). Included in the Reserve Bank team were Ms Marcus, Wiese and Martin. Included in the Regal team were Cohen, Lurie, Diesel, Buch and the new directors, Van der Walt, Scheepers and Oosthuizen. Robinson attended as the new CEO. Levenstein did not attend. At the Regal meeting, Cohen reported on a number of issues including corporate governance, the Mettle deals, death threats, the Sasfin bombing and the “sale of Regal to Investec.” (Cohen 1907-9)

37.19 On Sunday, 24 June 2001, Investec completed its due diligence investigation. Its report dated 29 June 2001 (G417) is worth considering. The Investec team had a number of major concerns with Regal Bank, including the financing by the bank of the acquisition of Holdings shares, the Mettle deals, the development

of 93 Grayston Drive, the R71 m attributable income and the role played by Levenstein with “almost unfettered powers”.

37.20 A meeting of the boards of Regal Bank and Regal Holdings took place the night of 24 June 2001 ((K(3)58.1). Investec informed the meeting that it would not buy the bank but would buy R350m of the book debts for R305m; Strydom expressed his concerns about the 45% shares held indirectly by the bank and the financing of the acquisition of the shares by the bank; the unwinding of the various structures was discussed; Strydom explained what curatorship would mean to the bank. It was resolved that the following would be presented to the Reserve Bank the following morning for approval:

“a) cancel 45% of shares – bring issued capital down to R200m; b) J Levenstein announced retirement, with immediate effect; c) securitisation/sale of book to Investec – R300m within one week; d) ask the Reserve Bank to assist liquidity for one week.” EY conveyed to the meeting that it would withdraw the auditors’ statement “subject to opinion from H Vorster on treatment of dividends”.

Levenstein testified that before the meeting Cohen said to him that unless he played along, the Registrar of Banks would deregister the bank. He was manipulated, blackmailed, scared and bullied into agreeing to the cancellation of the shares (1676-9).

He disputed that the meeting of 24 June 2001 was a meeting of the board of directors of Regal Holdings and Regal Bank. He said a select few members of the board were called to the bank. He thought he was required to “further the negotiations” with Investec. He was not invited to the board meeting (1766 – 1769).

Cohen testified that there was a quorum, only two directors were unable to attend, and that minutes of the meeting were taken, signed and ratified on 22 August 2001 (1918). Cohen disputed that he had blackmailed or bullied Levenstein. He said he had seen him on the Sunday morning clearing out his office and he told Levenstein that he did not expect Ms Marcus “to take any prisoners” at the meeting scheduled for early Monday morning and he expected Levenstein to be constructive during the meeting (1919).

37.21 On Monday, 25 June 2001, the Reserve Bank (including Marcus and Wiese) met with EY (G404) and then with EY and Investec (G407). At the first meeting, Strydom reported on what had emerged during the Investec due diligence and said that the Regal Holdings board had agreed to collapse 45% of the capital and that the Mettle deals had to be collapsed, reducing the assets from R1.6 bn to R1 bn. At the second meeting, Investec informed the meeting of its offer; Cohen reported on behalf of the Regal

Holdings board in similar terms to Strydom. Strydom said that EY would withdraw their consent to the preliminary results published on 30 April 2001. A cautionary statement (G409) was drafted and issued to the public (Q107) and to shareholders (R11). Moneyweb carried the story (S18). Business Report reported on the Sasfin bombing (S19). The share price slumped from 190c to 45c (S30.2).

37.22 On Tuesday, 26 June 2001, there was widespread media coverage in Business Day (S20, S22) and Business Report (S24). The Investec deal was announced (Q106). The Reserve Bank, including Marcus and Wiese, met with DT (Store) (G410). It was agreed to put the option of curatorship to Cohen. The Reserve Bank and DT thereafter met with Cohen and Scheepers (G411). Cohen said that the share price had “plunged” and that R250m had been withdrawn “following the announcement made by Mr J I Levenstein that he had not resigned but was away for a few days”. (Diesel confirmed the figure of R250m in evidence (2649).) Cohen applied for curatorship. Investec applied to the Reserve Bank to buy the book (loans, overdrafts, mortgage loans and instalment sale debtors) for R350 m (G414). The Reserve Bank made application to the Minister of Finance for the

appointment of Store. The Minister of Finance agreed, with reservations (R1 – R10).

37.23 On Wednesday, 27 June 2001, the curatorship was announced (Q105, S25); Store produced his first report (R15) and Regal Bank had a meeting with DT and EY (K(3)59). The resignation of Levenstein and the sale to Investec were “finalised”.

37.24 Van der Walt was of the view that at the board meeting on 24 June 2001, EY had undertaken that they would withhold any decision on withdrawing their consent until Regal Bank had obtained tax advice. Contrary to that undertaking, EY announced their withdrawal of consent the following day, Monday, 25 June 2001 (2582, 2600).

37.25 Oosthuizen said he was “very taken aback by the fact that [EY] had done that, it was a unique action by an auditing firm, I do not know of any precedent to that” (3012).