PART ONE

EXECUTIVE SUMMARY

Introductory

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1.1 Regal Treasury Private Bank Ltd ("Regal Bank" or "the bank") was placed in curatorship because it lost the confidence of its depositors and shareholders. The bank failed for a number of reasons:-

- the CEO, Levenstein was not a fit and proper person to be a director and CEO of a bank or its holding company, Regal Treasury Bank Holdings Ltd ("Regal Holdings" or "Holdings") and carried on the business of the bank and Holdings in a reckless manner;
- the boards of directors of the bank and its holding company acted in breach of the Banks Act[1], the regulations relating to banking, the Companies Act[2], and the standards of corporate governance and were knowingly parties to the carrying on of the business of the bank and Holdings in a reckless manner. (The boards of directors were composed of different directors

[1] Act 94 of 1990 ("Banks Act")
[2] Act 61 of 1973 ("Companies Act")

from time to time. Not all the directors were equally guilty of all the criticisms levelled against the board in this report. Some were entirely innocent. For example, some directors were members from inception until the end (Levenstein, Lurie, Buch, Diesel); some left before there were serious problems (Peter and Mark Springett, Lubner and Schneider); and some were appointed only in 2001 in an attempt to address the corporate governance concerns of the Reserve Bank (Cohen, Oosthuizen, Van der Walt and Scheepers). Part One must be read with Part Two, the body of the report, and where appropriate, with Part Three.

1.2 In addition:

- the external auditors, Ernest & Young ("EY"),
  - acted in breach of the Public Accountants and Auditors Act[3] and the Banks Act during the 2000 audit;
  - gave consent to the release of the 2001 preliminary financial results of Holdings when they had not completed the 2001 audit properly in two material respects;
- the Reserve Bank failed to act swiftly and decisively in October or November 2000 by not taking appropriate action for the removal of Levenstein as CEO.

[3] Act 80 of 1991 ("PAAB Act")

Levenstein

2 Levenstein was not a fit and proper person to be an executive director, CEO and chairman of Holdings and the bank in that:

- he did not exercise the utmost good faith and integrity in his dealings with and on behalf of the bank;
- he did not exercise reasonable skill and care;
- he did not always act in the best interests of the bank, depositors and shareholders;
- he permitted a conflict of interest to arise between his interests and those of the bank, its depositors and shareholders;
- his management of the bank was incompetent and amateurish;
- he acted dishonestly and fraudulently;
- he confused corporate governance with thuggery.

3 In short, Levenstein lacked three of the qualities required of a director of a bank in terms of s1A(a) of the Banks Act, namely:

- probity;
- competence and soundness of judgment.

4 The respects in which Levenstein was not a fit and proper person are the following:-

(1) With the support of the majority of the board Levenstein forced Peter Springett to resign for no good reason.[4]

(2) In the face of strong opposition from the Reserve Bank, he became chairman and remained CEO with the support of the majority of the directors and contrary to the recommendations of the King Report.[5] Thereafter he had unfettered power which he exercised malignantly.

(3) Having kept the Reserve Bank on a string for nineteen months, Levenstein arranged for his brother-in-law, Lurie, to be appointed chairman, with the support of the board.[6]

(4) Levenstein treated the board as an institution with utter contempt:-

- Aided and abetted by Lurie he did not get approval for the 2000 financial results.[7]
- He did not explain the Mettle deals to the board. The board was never aware of the nature and extent of the deals. Levenstein's excuses for not doing so were that the Mettle deals were an operational issue and in any event it was impossible to explain the deals to the board.[8]
- Levenstein misrepresented the Mettle deals to the board.[9] Cohen gave two illustrations. Cohen had been led to believe by Levenstein that there was an unconditional undertaking by

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4 §10 Part Two; §7 Part Three.
5 §12-14; §19 Part Two; §103 Part Three.
6 §20 Part Two; §5 Part Three.
7 §57-59 Part Two; §49 Part Three.
8 §91 Part Two; §19 part Three.

Mettle to buy 93 Grayston for R600m at the end of ten years. It was only during a meeting with Mettle on 30 May 2001 that he came to know of the right of Mettle to offer to put 93 Grayston to Regal Bank for R1.2bn at the end of fifteen years. The second was that at the joint board meeting of 30 May 2001 Levenstein said there could be no share price manipulation because the managed portfolio of 8m shares was independently managed by Mettle. It just so happened that 80% of the portfolio consisted of Regal Holdings shares.

(5) Levenstein lied to the board with impunity. He lied to the board when he told it that Lopes had been dismissed whereas in truth Lopes had resigned.[10] He lied to the board about the 93 Grayston structure. Oosthuizen testified that he asked Levenstein at a board meeting whether the 93 Grayston transaction was unconditional or not. Levenstein categorically denied that the property could revert to Regal. In Oosthuizen's words: "There was a blatant lie conveyed to me".[11]

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9 §14.3 Part Three.
10 §89.7 Part Two; §10.20-§10.22 Part Three.
11 §19.7 Part Three.

(6) Levenstein overruled the Holdings' committees. For example:

- At one time Levenstein had the final say if an advance was to be made to a client and he had the power to reverse a decision of the credit committee to turn down an application for credit taken by the credit committee.[12]
- At an investment committee meeting held on 31 January 2001 the committee decided that an independent opinion should be obtained from PWC in regard to an investment in Sempres Ltd; a presentation had to be made by the management of Sempres and then final approval by the board should be given to the transaction. On 16 March 2001 it was announced in the media that "Regal had invested in Sempres and vice versa". When Cohen confronted Levenstein because the decision of the investment committee had been completely ignored, Levenstein's response was that the transaction was cash neutral and did not need board approval. According to Cohen, Regal Bank lent Sempres about R13m – R14m to buy Holdings shares.[13]
- In about May 2001 the HR and remuneration committee approved bonuses for staff members in a total amount of R1m.

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12 §15.6 Part Three.

13 §30.2 Part Three.

Levenstein overruled the committee and reduced the bonuses to a total of ±R400 000.[14]

(7) Levenstein's main driver in running the bank was the share price of Regal Holdings shares, not the interests of depositors. Initially, there were two reasons for the emphasis on the growth of the share price: growth would have been an important element in attracting new capital into the bank and executive directors and senior management received shares to compensate them for the fact that they were under- remunerated and no provision was made for pensions.[15]

There is nothing inherently wrong with providing employees and directors with incentive shares, as long as they do not act primarily in their own interests with the predominant object of pushing up the share price. The driving force of management must not be gains in the share price in the short term. Particularly in the case of a bank, in which management has a duty to depositors to act conservatively in order, as a minimum, to preserve their deposits, an obsession with the share price is unhealthy.

Employees were encouraged to borrow money from the bank to buy shares but were prevented by Levenstein from selling their

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[14] §81 Part Three.
[15] §92 Part Three.

shares.[16] He did not want to drive the price down. So the directors and employees were unable to benefit from their ownership of shares. No incentive remained and there was no compensation for being underpaid.

The share price never met expectations. It reached a peak of 935c in about April 1999, Holdings having listed on 25 February 1999, steadily dropped to 475c in September 1999 and then climbed to 815c on 25 January 2000, a price the shares never achieved again. The price was fairly stable until about mid-April 2000 then it plunged to 315c, climbed to 510c on 25 July 2000, and thereafter remained at between 300c to 400c until 25 June 2001 when it slumped from 190c to 45c.[17]

One way the price was manipulated by Levenstein was to instruct the Incentive Trust to buy far more Holdings shares than it required to incentivise directors and employees of the bank.[18] Another way was for the Shareholders' Trust to buy shares. The two trusts steadily bought shares from 5 March 1999 until curatorship. By 31 August 2000 the two trusts between them held 14m shares, being 14% of the issued share capital of Holdings.[19]

The shares were not only bought by the trusts. At the date of listing, R23m of the bank's money was used to buy Holdings shares in the name of JL Associates, Levenstein Data and

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16 §76.9 Part Three.

17 Exhibit R141.

Forfin.[20] JL Associates and Levenstein were not legal entities; they were “account headings”, according to Lurie.[21]

The purchase of Holdings shares by the trusts was financed by Regal Bank against the sole security of the shares. As the share price declined, so did the value of the security. As at 31 August 2000, loans by the bank to the Incentive Trust were in total R51.4m against security of R33m worth of shares, a potential shortfall of R18.4m.[22] By 26 June 2001 the Incentive Trust owed the Bank R77.3m and the Shareholders Trust owed the bank R32.5m. As a nil value was ascribed to the shares, those amounts were regarded by the curator as irrecoverable.[23]

When Worldwide was unable to find a buyer for its 15% stake in Holdings in late 2000, Regal Bank bought the shares for R60m. The bank then offered the shares to Hanover Re. After KPMG had done a due diligence in 2001, Hanover Re declined the offer, with the consequence that at the date of publication of the 2001 preliminary results, 30 April 2001, and the date of curatorship, 26 June 2001, Regal Bank in its own name owned 15% of Holdings shares.[24]

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18 §17.6 Part Three.
19 §17 Part Three.
20 Part Three.
21 §90.9.1 Part Three.
22 §17.3 Part Three.
23 §17.1-§17.4 Part Three.
24 §92 Part Two; §51 Part Three.

Another way Levenstein manipulated the price was by giving the asset management division an unlawful instruction on 6 July 1999 not to sell the Holdings shares which they managed on behalf of clients.[25]

On 30 May 2001 Levenstein instructed the in-house stockbrokers to buy any Holdings shares on offer at a price of R5.30 on behalf of the Incentives Trust at a time when the trusts owned about 15% of the shares of Holdings, the legal limit. During the course of that month, May 2001, Levenstein had in addition given dealers instructions to buy Holdings shares for a fixed amount at the prevailing price. If those purchases had not been made, the price would have dropped.[26]

(8) Levenstein brooked no opposition. If you were not for him, you were against him. It was not enough for Levenstein to rid himself and the bank of anyone who stood up to him. He then harassed them and made their lives a misery. Attributes that a director might have had such as loyalty, friendship, skill, dedication, counted for nothing once a director crossed Levenstein. Levenstein even dismissed his brother Brian at the time Lopes resigned. Here is a synopsis of the way in which Levenstein dealt with directors and senior management:-

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25 §24-§26 Part Two; §6 Part Three.

26 §93.3-93.6 Part Three.

- Peter Springett was sued for the return of his shares eighteen months after he had resigned as chairman. The demand for the return was made the day after Mark, his son, had been dismissed. The litigation was mala fide – it was instituted to put pressure on Mark. There was no basis for the claim and yet it cost Peter Springett R500 000 in legal costs.[27]
- Mark Springett was dismissed for no reason without fair procedure, had criminal charges laid against him with the South African Police Services and actions instituted against him, all without any justification whatsoever.[28]
- Schneider was forced off the board of Holdings for calling for a meeting of the board to discuss the Mark Springett matter and for refusing to sign a round robin resolution to dismiss Mark, an entirely justifiable attitude to adopt.[29]
- Lubner was “removed” for the same reasons but in addition had to suffer the indignity of Levenstein barring him from attending a meeting of the board of directors of which he was a member and which the Reserve Bank was to attend.[30]
- Lopes was harassed: he was arrested; he spent a night in gaol; he faced criminal prosecution; terrible accusations were levelled

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27 §33 Part Two; §7 Part Three.
28 §24-32 Part Two; §6 Part Three.
29 §34 Part Two; §12 Part Three.
30 §34 Part Two; §9 Part Three.

at him; he was sued: all at the instigation of Levenstein. And all without any justification.[31]

- Brian Levenstein was dismissed by Levenstein on the day Lopes resigned when Brian confronted his brother about the consequences of an executive director resigning so soon after the branding income debacle. He was dismissed for insubordination. He was later re-employed in a nominal capacity to make peace within the Levenstein family.[32]
- Krowitz was one of the founders of the bank and a staunch ally of Levenstein during the Mark Springett saga. He was telephoned by Radus one night in November 1999 to be told that he had been suspended by Levenstein for “moaning”. He remained suspended until the December holidays. On his return he nominally worked at the bank until March 2000 when he resigned. Krowitz said that Levenstein “chopped off my head with no compunction”.[33]
- Nhleko was a non-executive director and the representative of Worldwide, the largest shareholder in Holdings. He attended only one board meeting in 2000, the one on 31 January 2000. Nhleko’s version is that when he refused to rubber stamp Levenstein’s demand for a R2m bonus and the allocation of 5m Regal Holdings shares, Levenstein “was quite abrasive” towards

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31 §89 Part Two; §10 Part Three.

32 §11 Part Three.

him. He came to the conclusion that his role on the board was inappropriate. Levenstein's explanation for Nhleko's non-attendance was that when Levenstein raised the issue of Worldwide's failure to bring in R1bn worth of asset management to Regal Bank, Nhleko was "… unbelievably aggrieved by the fact that I had effectively embarrassed him in front of the other board members".[34]

(9) Levenstein treated his directors in that shameful way by design. He wanted the remaining members of the board and management to be intimidated by him. If he gave an instruction, even an unlawful one, he expected that it be carried out. And unlawful instructions were carried out, time and time again, by people who should have known better.

(10) But if a director or employee was sycophantic and proved willing to carry out Levenstein's bidding, he was rewarded. Three examples suffice to make the point.

- Rabins was paid R1.1m on 29 September 2000 on the instructions of Levenstein. There is no apparent justification for that amount.[35]
- Van Rensburg was paid cash of R3 000 a month for a number of months in addition to his salary and Levenstein gave him a motor car valued at R180 000 paid for by the bank. The

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33 §88.1 Part Three.
34 §8 Part Three.
35 §76.6 Part Three.

justification for the transfer of the motor vehicle was a "restraint" but no agreement incorporating a restraint of trade was ever concluded between the bank and Van Rensburg.[36]

- Radus was given a motor vehicle costing the bank R332 950 by Levenstein as a "restraint", but Radus did not sign a restraint of trade agreement. Levenstein allowed Radus to remain on the payroll of the bank for two years from 1 February 2001 without the necessity for Radus to work at the bank. Radus said he worked at home on the bank's affairs, a story which is as credible as that of the tooth fairy.[37]

(11) Levenstein ran the bank with less sophistication than one would expect from the local fish-and-chips shop:-

- There was no human resources ("HR") department until that function was outsourced to Deloitte & Touche in late 2000.[38]
- There was no formal human resources and remuneration policy.[39]
- Levenstein had the sole discretion as to who received what benefits, bonuses and shares. In 2001 the HR and remuneration committee approved bonuses for staff members in a total amount of about R1m. Levenstein overruled the committee and approved bonuses in the amount of only about R400 000. Six

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36 §91.13 Part Three.
37 §76.7 Part Three.
38 §13.4 Part Three.
39 §81 Part Three.

members of the executive committee, including executive directors, were awarded bonuses in a total amount of R1m. Levenstein alone received R460 000, more than what all employees received together.[40]

- Levenstein gave instructions to Van Rensburg to have employees of Regal Securities followed to check what contact they had with SASFIN. A private detective was hired to investigate Lopes after he had resigned. Jacobson was followed for a week, as was Steen.[41]
- While Levenstein expected the executive directors, management and employees to adopt a "culture of sacrifice", he arranged for himself in the period February 2000 to May 2001 to be paid bonuses in the amounts of R2m, R650 000 and R460 000.[42]
- Another way the "culture of sacrifice" was undermined to the advantage of some employees and directors was by the payment of "loans" in anticipation of bonuses being earned. Levenstein alone received R870 000 during the period 6 February 1998 to 25 July 2000. The payments were hidden from scrutiny by the moneys being advanced by Regal Bank to the Shareholders Trust which, in turn, paid Levenstein the amounts.[43]

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40 §81 Part Three.
41 §91.13.3 Part Three.
42 §89 Part Three.
43 §89 Part Three.

- Employees were underpaid, given Holdings shares to incentivise them, and then not allowed to sell the shares.[44]
- There was a general lack of information regarding the employment relationship of the employees of Regal Bank.[45]
- The bank purchased motor vehicles, allocated the vehicles to employees, but did not transfer the vehicles to the employees. The result was that the motor vehicles were shown as assets of the bank while the employees regarded the motor vehicles as belonging to them, as part of their remuneration package.[46]
- Some employees were paid amounts for intellectual capital but there was no written or documentary confirmation of the payments and no evidence of appropriate approvals having been given for the payments.[47]
- Certain employees were described as “contractors”, whereas in reality they were employees. The incorrect label was given to the relationship for labour law and tax reasons.[48]
- There was no formal budget procedure and very few managers knew how to prepare a budget.[49]

(12) The financial affairs of the bank managed by Levenstein was a shambles:-

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44 §81; §76.9 Part Three.
45 §76.9 Part Three.
46 §76.9 Part Three.
47 §76.9 Part Three.
48 §76.9 Part Three.
49 §79 part Three.

- The chief financial officer ("CFO") of the bank from August 2000 was Ms de Castro. Until then Davis had been the CFO. Levenstein appointed de Castro as CFO even though she was only twenty-eight years old and had limited experience. She previously worked for Levenstein & Partners. Despite her title of CFO, de Castro was not in reality the CFO: she reported to Davis, not to Levenstein; she did not report to the board as CFO and she did not attend audit committee meetings.[50]
- The finance department was under-resourced. The financial reporting systems were inadequate.[51]
- Members of the department, including the nominal CFO, de Castro, carried out the instructions of Levenstein when they should not have done so. These examples of instructions given by Levenstein were given by de Castro in evidence:
  - ♦ to move all assets from one company to the other at book value because the depreciation that was being reflected in the financial results was too high and Levenstein was trying to cut costs;
  - ♦ he issued an instruction that depreciation was not allowed to be more than R200 000 a month; that was achieved by reducing the depreciation rates to below market norms;

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50 §77 Part Three.

51 §76.8 Part Three.

- two motor vehicles that were bought by the bank were moved from the books of the bank to restraint of trade and depreciated over twenty years.[52]

- Levenstein gave instructions that certain expenditures and questionable loans were to be offset against the Mettle Reserve account in the treasury department. The total debits to that account were in the region of R20m. The effect of those entries was to understate the expenditure by an amount of R20m for the 2001 financial year.[53]
- One of Levenstein's boasts was that Regal Bank had no bad debt. Within the week that he was there, however, Robinson came to the conclusion that there was between R30m and R50m in bad debts.[54]
- Accounts were not correctly described, for example, "overnight loans" were either not loans or not "overnight" loans and the so-called sale of Kgoro was reflected as a liability in an account styled "BOE Bank".[55]
- There was no effective internal audit department until late December or early 2001 when PricewaterhouseCoopers ("PWC") were appointed internal auditors.[56]

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52 §78 Part Three.
53 §86 Part Three.
54 §75 Part Three.
55 §76.2; §51.5 Part Three.
56 §21 Part Two.

- After curatorship it was established that the fixed asset register was not up to date. The depreciation rates on computer software, computer equipment and restraints of trade were not in accordance with GAAP or the rates recognised by the Receiver of Revenue.[57]
- In April 2001 Levenstein gave instructions that certain adjustments be made. One of the adjustments was a revaluation of art and furniture in an amount of R3.5m which was shown in a deferred income account. The result was that income would be inflated by that amount. There was no market valuation to support the revaluation. An amount of R2.9m was reversed by the new financial director, Zarca.[58]
- Zarca discovered after 1 July 2001 that the depositors' suspense account had never been reconciled. A reconciliation should take place at the end of each day. If a reconciliation is not done, there is a risk that incorrect information is given to depositors.[59]
- Income and expenditure attributable to the bank were reflected in the books of the Shareholders Trust to avoid dealing with them in the income statement of the bank.[60]

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57 §76.6 Part Three.
58 §76.6 Part Three.
59 §76.7 Part Three.
60 DT(1)13.

- Zarca found that a treasury bank reconciliation had not been done for some time, which could have resulted in considerable risk for the bank.[61]
- The bank's suspense account had not been reconciled for some time and as at 30 June 2001 there was R25m credit in the account.[62]
- It was unclear whether VAT had been claimed correctly or at all. The development of 93 Grayston had not been registered for VAT, with the result that R6m in input credits had never been claimed from the Receiver of Revenue.[63]
- DI returns which were inaccurate in material respects were submitted by the bank to the Reserve Bank.[64]
- On the day of curatorship Levenstein instructed Diesel to transfer R15m from the Mettle Reserve account to JL Trust overnight loan and to transfer R7m from the Mettle Reserve account to Forfin overnight loan account.[65]

(13) Although Levenstein's branding model was not original, it was a legitimate business venture. The pressure was on Levenstein in 1999 to do something about the share price, which was performing below expectations. Left to its own devices, the bank would have remained small in size and achieved modest returns

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61 §76.7 Part Three.
62 §76.7 Part Three.
63 §76.7 Part Three.
64 §87 Part Three.

for its investors and depositors. That was not good enough for Levenstein, hence the branding model. By April 2000, however, none of the branded entities had achieved any income for Holdings. Actual income was a *spes* (hope). The problem for Levenstein was that Holdings' results for 2000 were less than impressive without the recognition of some branding income. The profit for 1999 had been R50.2m. Without branding income, the profit for 2000 was 44m. The solution was to add R55m in branding income and, hey presto, profit was R99m, double what it had been the previous financial year.[66]

The bloody encounter with EY and KPMG during the 2000 audit left Holdings with only R5.5m recognised branding income. Holdings, in consequence, did have a slightly better year than the previous year, but only because R6m of "branding expenditure" was deferred.

After all the fuss one would have expected Levenstein to push for the branded entities to perform as he had said they would. He once boasted that "my branding, financial model has the capacity to enhance GDP boundaries for the country". But no, no more was to be heard of the branding model, except when it came to the recognition of income. Levenstein's evidence was that "…Tactically because of the madness of year-end 2000 we decided to minimise the

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65 §90.12 Part Three.

66 §48 Part Two; §45 Part Three.

emphasis on branding". EY's valuations at year-end 2001 of branding entities were Medsurg R2.5m, Regal Protea Health R1m, Regal Virtual Solutions nil and Kgoro, nil. At year-end, two of the branded entities were probably insolvent: Kgoro with an accumulated loss of R3.7m and Regal Virtual Solutions with a negative equity of R1.2m.

The conclusion one comes to is that Levenstein was never genuine about branding unless "income" could be earned from the concept from the beginning, without the branded entities being given the time and opportunity to prove themselves and to establish a track record.

(14) Without income from branding, how else could Levenstein show that Regal Bank was growing and worthy of attracting new deposits and new capital? He turned to structured finance.[67] He had a willing partner in Mettle Ltd. Eight of the ten Mettle deals were done after 16 May 2000, after Levenstein had lost enthusiasm for the branding model. The Mettle transactions were not illegal and were enforceable. Properly disclosed in the financial statements, they might have seen out their days. Properly disclosed they might not have had a material negative impact on the financial results. The Reserve Bank (and the shareholders) might have not been enchanted by the structures, however. Martin of the BSD testified that Regal Bank "deviated

significantly from its stated business objective of being a niche based private bank when it began entering into many structured transactions which do not fall into the realm of private banking". The way the Mettle deals *were* disclosed, the assets and liabilities showed a spectacular growth within the space of a year from ± R1bn to R1.6bn and income was inflated. It was all an illusion, a mirage for the thirsty investor in the desert. Levenstein, himself an auditor, knew that if the auditors became aware of the true state of affairs, they were bound to reflect the reality in the financial statements. And that did not suit Levenstein. So he did not make full disclosure. The preliminary results published on 30 April 2001 showed a distorted picture. Once EY realised that they had not seen all the Mettle deals and that the "risk and reward" of most of the deals lay with the bank, they were bound to withdraw their consent to the preliminary results. And that was the end of the bank.

(15) The most graphic and simple way of demonstrating how mediocre the performance of Regal Holdings (and of Regal Bank) was without branding and the Mettle deals is the following analysis:

[A] Assets and liabilities (in millions)

1999	2000		2001	
	Audited	Without Mettle	Audited	Without Mettle

[67] §91 Part Two; §18 Part Three.

Assets	723.1	998.1	±833.1	1593.8	±942.8
Liabilities	325.5	581.8	±406.8	1143.4	±596.4

[B] Income before taxation (profit) (in millions)

	1999	2000	2001
Income before taxation	50.2	55.5	71.5
Less: (i) Branding Income		5.5	21.1
(ii) Deferred branding expenditure		6.0	(6.0)
(iii) Other adjustments Proposed by EY			15.0
(iv) Surplus on revaluation of 93 Grayston			36.5
	50.2	44	4.9

Those figures do not take into account potential losses referred to in §59 Part Three or the effect of the spurious entries in the amount of R20m and R6m referred to in §86 Part Three and §51.26 Part Three respectively.

(16) In order to run the bank as a one man show, Levenstein ensured that the committees of Holdings did not function properly:-[68]

- He was a member of seven of the eight committees.
- He was the chairman of five of the eight committees.

[68] §15 Part Three.

- He was a member of the audit committee at a time when he was chairman of the board, contrary to the Banks Act and the King Report.
- Most of the committees did not keep minutes.
- Many of the committees were committees in name only. For example, the remuneration committee did not set the remuneration levels for executives and had no formal written policy for executive remuneration.
- Levenstein did not ensure that the auditors attended audit committee meetings. During the 2000 audit he gave an instruction that the auditors were not to be invited to an audit committee meeting which had been called "to approve the financials".[69]

(17) Rather than to concede that he was wrong about the recognition of branding income during the 2000 audit, Levenstein stubbornly, irrationally and mala fide persisted with his view: at three meetings with EY between 12 April and 15 May 2000, in correspondence with EY on 14 April and 15 May 2000 and in correspondence with the Reserve Bank on 4 May, 5 May and 14 May 2000. Levenstein was mala fide because he knew that the branding income could not be recognised in terms of GAAP (despite the fact that Holdings accounts were prepared in accordance with GAAP). At the meeting with the Reserve Bank on 15 May he persisted with

his attitude in the face of a threat by the Reserve Bank to close down the bank if EY qualified the 2000 results. Had Lurie and Buch not persuaded Levenstein to back down late on 15 May 2000, the bank would have been closed down then.[70]

(18) Levenstein had no idea of the concept of corporate governance or if he did have, he was indifferent to it. Many examples have been given so far in this report. Oosthuizen's evidence in this regard was the most memorable.[71] He said that Levenstein did not have the "foggiest clue" of the concept of corporate bank governance. The bank was to a large extent a one man band and the concepts of corporate governance, risk management, basic sound banking practice in many areas were disregarded or did not exist. Oosthuizen said that he could not get a straight answer from Levenstein. "I would ask a question and get an answer that totally obfuscated the issue or just totally just skirted the issue … The only direct answer that I got was when I asked the direct question, is there an irrevocable transaction sale of the Grayston Property and he said to me 'yes' – a direct lie."

<u>The directors</u>

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69 §15.7.7 Part Three.
70 §48 Part Two; §45 Part Three.
71 §85 Part Three.

5 The directors, executive and non-executive of Regal Holdings and Regal Bank ("the directors") acted in breach of the Banks Act and the regulations relating to banks[72] in that they failed:

- to act exclusively in the best interests and for the benefit of Regal Holdings, Regal Bank and its depositors[73];
- to perform their functions with diligence and care and with such a degree of competence as could reasonably be expected from a person with their knowledge and experience[74];
- to ensure that the risks that were of necessity to be taken by the bank were managed in a prudent manner[75].

6 The directors acted in breach of the standards of corporate governance recommended by the King Report[76] in that they failed:

- to exercise the utmost good faith, honesty and integrity in all their dealings with or on behalf of Regal Holdings and the bank;
- to exercise the care and skill which can reasonably be expected of persons of their expertise;
- to act in the best interests of Holdings and the bank;
- to ensure that the bank's strategies were collectively agreed by the board;

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72 Regulations published on 28 April 1996 in Government Gazette 17115 ("the regulations").
73 S60(1) and (2) of the Banks Act.
74 Reg 37(2) of the regulations.
75 Reg 37(2) of the regulations.
76 The King Report on Corporate Governance, 29 November 1994.

- to ensure that the boards of Holdings and the bank monitored the performance of management against budgets or business plans or industry norms.[77]

7 The directors were in breach of those statutory duties and the standards of corporate governance in one or more or all of the following respects:-

(1) The directors appointed Levenstein as chairman of the board at the time when he was CEO when they knew or should have known that:

- the Reserve Bank was opposed to Levenstein occupying the dual positions;
- it was contrary to sound corporate governance.[78]

(2) The directors appointed Lurie as chairman after Levenstein resigned as chairman. They did so because the Reserve Bank had insisted on the appointment of an independent chairman. The directors nevertheless appointed Lurie when they knew or should have known that Lurie was not independent or would be perceived as not being independent in that:

- he was Levenstein's brother-in-law;
- Lurie had had a long association with Levenstein;

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77 Chapter 5, §2.

78 §5 ch 7 of the King Report recommends that "The chair should be an independent and non-executive director".

- Levenstein was a domineering person who was intolerant of opposition.

(3) The directors signed the round robin resolution of August 1999 confirming the removal of Mark Springett ("Mark") from the board of Holdings:[79]

- when they knew that Mark had built up the asset management division from a zero base to managing about R500m worth of assets;
- when they had praised Mark's contribution to the bank at earlier board meetings;
- when they knew or should have known that Mark alleged that Levenstein had given the asset management division an unlawful instruction not to sell Holdings shares held by clients;
- when they knew or should have known that there were disputes of fact about that instruction and Mark's alleged misconduct;
- when they knew or should have known that Mark had called for a board meeting to discuss his dismissal;
- when they knew or should have know that Lubner and Schneider, fellow directors, had refused to sign the round robin resolution and had insisted on the matter being debated at a board meeting;

- when they knew or should have know that the appropriate way to deal with the matter was to debate it at a board meeting in view of the following:-
  - ♦ the importance of the matter – the removal of a respected member of the board;
  - ♦ the disputes of fact;
  - ♦ the chairman of the board was non-executive and not independent;
  - ♦ the chairman of the board was directly involved in the dispute;
- in condoning the dismissal of Mark as employee for no valid reason and without fair procedure.

(4) Instead of signing the round robin resolution in early August 1999 the directors should have immediately:

- removed Levenstein as chairman and appointed a non-executive director as chairman who was truly independent, and not waited until 29 September 1999 to do so;
- removed Levenstein as CEO for being unfit to occupy that position.

(5) At the joint meeting of the boards on 18 August 1999, chaired by Levenstein, it was minuted that: "The effective removal of B Lubner and G Schneider from the board and their

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[79] §24 – Part Two; §6 Part Three.

resignations were ratified and confirmed." The directors in doing so failed to act in good faith, with integrity and to exercise reasonable care. Lubner and Schneider had been forced by Levenstein to resign for acting correctly and in accordance with their duties as non-executive directors.[80]

(6) The directors who approved the payment of the R2m bonus, the R650 000 "dividends", and the allocation of 5m Holdings shares to Levenstein ("the additional remuneration") failed to act in the best interests of the bank, in good faith, with integrity, and with reasonable care, in that:

- the approval of the board was neither sought nor obtained;
- the additional remuneration was grossly excessive;
- they did not take reasonable steps to ensure that the additional remuneration was properly reflected in the financial statements of Holdings at year-end;
- the additional remuneration was contrary to Levenstein's policy of remuneration of a "culture of sacrifice" and not in accordance with a remuneration policy which was of application in an even-handed

[80] §39 Part Two.

way to all executive directors and members of senior management.

(7) The directors failed to ensure that the external auditors, EY, were invited to all audit committee meetings.[81]

(8) The board of Holdings failed:

- to ensure that the audit committee approved the financial results of 16 May 2000;
- itself to approve the results of 16 May 2000.[82]
- to ensure that the auditors approved the results of 16 May 2000;

(9) The board of Holdings failed to approve the statutory financial results published in September 2000 ("the glossies").

(10) The board of Holdings failed to consider and agree to the abandonment of the branding model during 2000 which Levenstein had promised would deliver "billions of Rands for my shareholders".

(11) The board of Holdings failed to consider and agree to the Mettle deals when they should have done so in view of the following considerations:

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81 §15.7 Part Three.

82 §49 Part Three.

- the change in strategic shift from a conservative banking model;
- the exposure to one counter-party, Mettle Ltd and its SPV's;
- the extent to which the Mettle deals purported to contribute to the balance sheet and income statement of Holdings.[83]

(12) The directors failed to act with diligence, reasonable care and competence:

- in approving or condoning the harassment of Lopes after his resignation on 18 August 2000;
- in allowing legal costs to be incurred in harassing Lopes, the Springetts and Kruger in the total amount of R1 039 496.19;
- in approving, without debate, the withdrawal of the cases against Lopes at the board meeting of 31 January 2001.

(13) The directors failed to debate, consider and approve a proper and full response to the DT s7 review at a board meeting when they should have done so in view of the many serious findings in that report.[84]

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83 §91 Part Three.
84 §74 Part Three.

(14) The directors failed to ensure that the committees of Holdings worked properly, inter alia:

- by being properly constituted;
- by having founding documents and formal terms of reference;
- by keeping proper minutes;
- by not being overruled by Levenstein.[85]

(15) The directors approved or condoned the purchase by the trusts, related parties and the bank of Holdings shares financed by Regal Bank when they should not always have done so[86]and which either constituted or bordered on improper conduct in terms of s78(1)(a),(b) or (c) of the Banks Act. In particular, the implications of the Pekane share purchase were not properly considered.

(16) The board of Holdings approved the 2001 preliminary results (published on 30 April 2001) which were inaccurate and misleading in the respects canvassed in Part Three with the consequence that the profits were overstated to a material extent.[87]

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[85] §15 Part Three.
[86] §17 Part Three.
[87] §50 Part Three.

8.1 The board of directors, including Levenstein and Buch, the chairman of the audit committee, did not ensure that the audit committee operated in accordance with the Bank's Act and the King Report.

8.2 The Banks Act provides that the board of a bank must appoint at least three of its members to form an audit committee.[88] The majority of the members, including the chairman of the audit committee, must be persons who are not employees of the bank or of its subsidiaries or of its holding company or of the holding company's subsidiaries.[89] The chairman of the board must not be appointed as a member of the audit committee.[90]

8.3 In terms of the King Report, the inter-action between the audit committee and the external auditors is an essential plank in corporate governance. The external and internal auditors and the financial director should attend all audit committee meetings. The chair of the board should not be a member of the audit committee. One of the primary functions of the audit committee should include reviewing significant transactions which are not a normal part of the company's business.[91]

8.4 The respects in which the audit committee operated in breach of the Bank's Act and the King Report were the following:-

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88 S64(1).
89 S64(2).
90 S64(2).
91 Chapter 13.

- While Levenstein was chairman of the bank or Holdings he was a member of the audit committee.[92]
- The auditors, EY, were not invited to all audit committee meetings. [93]
- The audit committee did not consider, let alone approve, the interim financial results of 31 August 1999.[94]
- The audit committee did not consider, let alone approve, the results of 16 May 2000.[95]
- The audit committee did not review the Mettle transactions.
- The audit committee did not review the Pekane transaction in terms of which Regal Bank paid Pekane R60m for its Regal Holdings shares.
- The audit committee did not review the transactions in terms of which Regal Bank financed the acquisition of Regal Holdings shares by the trusts and related parties.
- The CFO from August 2000, de Castro, was not invited to attend audit committee meetings.[96]

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92 §15.7 Part Three.
93 §15.7 Part Three.
94 §43 Part Three.
95 §49 Part Three.
96 §77 Part Three.

Non-executive directors

9 The role the non-executive directors played during the period August 1999 to December 2000 is worthy of separate analysis and comment.

10 In terms of the King Report, every director has equal responsibility whether he is an executive or a non-executive director. Directors have an equal and heavy responsibility when it comes to the question of good faith. It cannot be said that because someone is a non-executive director that his duties are less onerous than they would have been if he had been an executive director. One of the priorities of a non-executive director is to monitor and review the performance of the executive management more objectively than the executive director. A company [and for that read a bank] should not apply “cronyism” or “tokenism” in making non-executive appointments and should only make appointments on merit and the

needs of the corporation [or bank].

11 The inherent problem lay with the composition of the non-executive directors. The non-executive directors were elderly retired men (J Pollack, Slender and Kaminer) or friends or relatives of Levenstein (Lurie and Buch). Nhleko was the exception, but after the bonus dispute he had with Levenstein in January 2000, he played no further part in the affairs of the bank until Worldwide sold its shares.

12 Those particular non-executive directors either were *not* aware of their duties and responsibilities or *were* aware and acted in conflict with their duties and responsibilities. They were not prepared to do what Mark Springett described as “facing the bully in the schoolyard”. The non-executive directors might just as well have been playing bowls on a hot Sunday afternoon for all the energy they put into the discharge of their duties.

13 The non-executive directors of Holdings and the bank received no remuneration. The value of their contribution to Regal Bank was equal to their remuneration.

Ernest & Young

14 Ernest & Young were in an invidious position as the auditors of Regal Holdings:-

- They were the auditors of a client, Holdings, some of the directors of which were parties to mismanagement, deception and fraudulent non-disclosure.
- They were not invited to attend all the audit committee meetings.
- When they refused to recognise R55m of branding income during the 2000 audit they were vilified by Levenstein. In one letter, for example, dated 23 May 2000, which Levenstein wrote to the Registrar, he accused EY of being "negligent (possibly even grossly negligent) and unprofessional" and called on the Registrar "to ensure that Ernest & Young are prohibited from being appointed as statutory auditors of any South African Bank in the future".[97] Levenstein wrote that letter after: EY had been vindicated by KPMG; EY had compromised with Holdings by recognising some branding income; and EY had agreed not to qualify the 2000 statutory financial statements (glossies).[98]
- As result of the branding income dispute, EY would have resigned as auditors of Holdings and the bank if they could have done so.

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97 Exhibit N15.

98 Exhibit N8. In a letter dated 7 September 2000 which Levenstein wrote to the Registrar he accused Strydom of EY of having a "political agenda" and "conspiracy agenda".

Thereafter, they were locked into a relationship with a client with whom they did not have a relationship of trust.

- EY was not invited to the audit committee meeting of 4 September 2000 which approved the preliminary results of 31 August 2000.
- During the 2001 audit their client made false representations to them and did not disclose all the material information to them to enable EY to conduct a proper audit. Based on what was disclosed to them, EY consented to the preliminary results of 30 April 2001. After discovering the nature and extent of the non-disclosure, they were compelled to withdraw their consent.

15

15.1 Nevertheless, despite one's sympathy for EY and the fact that they alone stood up to Levenstein, EY did act in breach of the Banks Act, the banking regulations and the PAAB Act.

15.2 In terms of the Banks Act, a bank is obliged to appoint an auditor. The Registrar must approve the appointment of the auditor.[99] The auditor must furnish the Registrar with a report relating to an irregularity or suspected irregularity in the conduct of the affairs of a bank.[100] The auditor in writing must inform the Registrar of any matter which, in the opinion of the auditor, may endanger the bank's ability to continue as a going concern or

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99 S61.

100 S63(1)(a).

may impair the protection of the funds of the bank's depositors or may be contrary to the principles of sound management (including risk management) or amounts to inadequate maintenance of internal controls.[101] The regulations provide that the auditors of a bank must annually report on the bank's financial position and the results of its operations as reflected in all the DI returns that had been submitted to the Registrar as at the financial year-end of the reporting bank.[102] The auditor must annually report on any significant weaknesses in the system of internal controls relating to financial regulatory reporting, and compliance with the Banks Act and the regulations, which came to his attention while performing the necessary auditing procedures to enable him to furnish the reports required under sub regulation (2).[103]

15.3 The PAAB Act provides, in short, that if an auditor is satisfied or has reason to believe that a material irregularity has taken place which is likely to cause financial loss to the undertaking or to any of its members or creditors, he shall forthwith dispatch a report in writing to the person in charge, and, unless he has been satisfied within thirty days that no irregularity has taken place or that adequate steps have been taken for the recovery of any

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101 S63(1)(b)(ii).
102 Reg 6(1).
103 Reg 6(3).

loss caused, he shall forthwith furnish the PAAB with copies of the report.[104]

15.4 High standards of business and professional ethics are to be observed by external auditors. An external audit is an essential part of the checks and balances required and is one of the corner stones of corporate governance. Whilst auditors have to work with management they have to do so objectively and consciously aware of their accountability to the shareholders.[105]

15.5 On receipt on 17 May 2000 of the 2000 preliminary results of Holdings of 16 May 2000, EY should have reported to the directors of Holdings, the PAAB and the Reserve Bank for these reasons:

- Holdings had published the results of 16 May without the approval of EY;
- the description of the results as “audited” was false;
- Holdings had published the results without the approval of the audit committee;
- the operating expenses had been reduced by R6m on the basis that R6m of branding expenditure had been deferred without the approval of the audit committee and without the concurrence of EY;

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104 S20(5)(a) & (b).

105 Chapter 13 of King Report.

- the branding expenditure deferral of R6m could not be measured reliably and in terms of AC000 §89 should not have been recognised;
- the reference to R18m of branded expenditure was false;
- the statement that all branded expenditure had been taken into account was false because R6m had been deferred;
- the Holdings board had not approved earnings per share of 79.96 cents;
- the publication by Lurie and Levenstein of the 2000 preliminary results on 16 May 2000 was fraudulent.[106]

15.6 EY consented to the 2001 preliminary results of Holdings published on 30 April 2001. EY was at fault in respect of the 2001 audit in two material respects:-

(1) EY accepted the information furnished to them by Holdings that Pekane was a 15% shareholder and that the bank had lent “Phekani” R60m against the security of shares to the value of R70m. EY should have been sceptical of that information: Holdings was not to be trusted; EY had brought the integrity of management into question in its working papers of 29 November 2000; the “loan” of R60m was substantial; the nature of the security was vague. Had EY sought particulars of the agreement

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106 §65-§66 of Part Two; §61-63 Part Three

of loan and the security, the truth should have emerged.[107]

(2) EY should not have relied on the information Holdings furnished to it in respect of the Mettle transactions:

- the BSD had pertinently instructed EY to investigate the Mettle deals;
- the Mettle deals were significant for Holdings and the bank;
- EY knew that Holdings and Levenstein could not be trusted;
- EY had said at the meeting with the BSD on 12 February 2001 that they would meet with Mettle, long before the publication of the results on 30 April.[108]

The Registrar of Banks

16 The Registrar of Banks ("Registrar"), in carrying out his duties as the Regulator of Banks, must act discreetly and effectively, with a light touch. The Registrar cannot, and should not, become the manager of banks. In the words of a Deputy-Governor of the Bank of England: "The supervisors, of course, cannot and should not second-guess the management of individual institutions. They seek to ensure that institutions have adequate

107 §106.1 Part Two; §64 Part Three.
108 §106.2 Part Two; §65 Part Three.

capital and liquidity, fit and proper directors, managers and controllers and that there are systems and controls to monitor and contain the risk assumed. While the individual judgments, knowledge of the customers and the development of a competitive strategy may be questioned by the supervisor, the decisions themselves must remain the responsibility of each institution. Being a supervisor does not make me a shadow-director of 500 authorised banks, nor should it."[109]

17 In the management of risk, the Registrar is entitled to expect all the stakeholders in the bank, such as the shareholders, the directors, the audit committee and the external auditors of the bank, to play their part.[110]

18 The Registrar cannot act effectively unless he has sufficient and reliable information on which to make informed decisions. The Banks Act makes adequate provision for the gathering of information. In the normal course, the Registrar and the Bank Supervision Division ("BSD") of the Reserve Bank, has access to information through regular contact with banks and the information furnished on a regular basis by banks in terms of the Banks Act. If the need arises, the Registrar can obtain additional information by exercising the powers of inspection[111] which he enjoys in terms of the Act and by calling for

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109 §31.8 Part Three.
110 §32.2 Part Three.
111 S6(1).

information from a bank[112] or by directing a bank to furnish him with a report by a public accountant on any matter.[113]

19 Once the Registrar is properly informed he is in a position to make a decision and to execute the decision. At the extreme limits of his powers are the powers:-

- to apply to court for an order cancelling or suspending the Registration of a bank; [114]
- to make application for the winding-up of the bank;[115]
- to appoint a curator.[116]

If the Registrar were actually to exercise those powers, then to an extent the system of checks and balances which the Banks Act has put in place has already failed. Effective supervision by the Reserve Bank should usually avoid the necessity for taking any of those extreme measures. How then is the Registrar to regulate, without managing, discreetly and effectively, and yet avoid taking one of the extreme measures?

Until now the Registrar has done so with what he described in evidence as “moral suasion”. On occasions, such as during the 2000 audit in this case, he went further and threatened Regal Bank with the use of the stick – deregistration – if it did not fall into line. He did so effectively.

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112 S7(1)(a).
113 S7(1)(b).
114 S25.
115 S68.
116 S69.

20 The Registrar seeks greater powers:

- to remove a director from office, and
- 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 United States of America, with a view to adopt the "turn-around" approach or to do a "work-out" with its creditors.[117]

21 This enquiry provides more than sufficient justification for the first additional power, the removal of a director from office. The second power, the appointment of an administrator with Chapter 11 powers, will fill a gap in the Banks Act. It is a power which could possibly have been used in this case instead of curatorship.

22 I turn now to consider whether the Registrar of Banks was at fault in any way in the demise of Regal Bank. In judging his conduct and that of the BSD one must take into account that, to their knowledge, about eleven banks had failed in the past decade for reasons of poor management and the failure of corporate governance. History repeated itself in the case of Regal Bank.

23 In most cases moral suasion probably does work, particularly when accompanied by the threat of the use of one of the extreme measures.

It is doubtful whether that would have worked in this case prior to November 2000. What the Registrar was dealing with was a lethal cocktail of an immoral megalomaniac chief executive officer and a supine board of directors which was either ignorant of, or acted in breach of, corporate governance.

24 On two separate and distinct occasions there was a serious failure of corporate governance and proof that Levenstein was unfit to be a director of a Bank, let alone chief executive officer:

- during the Mark Springett episode in July/August 1999,[118] and
- during the 2000 audit in April/May 2000.[119]

Had Levenstein been removed then, Regal Bank would have survived as a small bank showing modest – and safe – returns to depositors and shareholders.

25 The Registrar is not at fault for not acting in July/August 1999 because he did not know the extent of the breach of corporate governance. I have no doubt if the Registrar had known what the commission has discovered during this enquiry, he would have appreciated that the dispute between Mark Springett and Levenstein and the "resignations" of Schneider and Lubner necessitated a s7 enquiry. Unfortunately Schneider and Lubner did not convey to the Reserve Bank what they

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117 §31.13 Part Three.
118 §24-39 Part Two.

told the commission, namely, in short, that they were forced to resign for acting reasonably in insisting that the dismissal of Mark Springett be discussed at a board meeting. Had the Registrar known those facts and what Mark Springett told him had happened to him, and a proper s7 enquiry been conducted, proof would have been provided *at that time* that Regal Bank was heading for disaster unless Levenstein was removed and a truly independent non-executive chairman was appointed.

26 The second occasion was the 2000 audit. By 15 May 2000 the Registrar had had personal experience with Levenstein. He could and should have taken the view that Levenstein should be removed as director and CEO. In fact, at a meeting on 15 May 2000 with EY, the Registrar said that one of the options open to him was to remove Levenstein and he questioned whether Levenstein was “fit and proper to run a bank”. Can the Registrar be faulted for not taking steps then to remove Levenstein? In my view, the Registrar should get the benefit of doubt. He must have believed that the crisis with Levenstein was over: Levenstein did back down and accept EY’s view on the recognition of branding income and in EY’s letter of 17 May 2000 it was stated that EY would not qualify the statutory financial statements for 2000. It would have been an entirely different matter if EY had notified the Registrar on 17 May 2000 that Levenstein and Lurie had committed

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[119] §48-62 Part Two.

fraud and that Regal Bank had increased its profit by the deferral of R6m in branding expenditure when there was no proof whatsoever that any expenditure had been incurred on branding.

And, at that time, the bank was solvent, making a profit and there had been no run on the bank.

27 Five months later, and seven months before curatorship, the Registrar came to the conclusion that Levenstein, Lurie and four non-executive directors had to go. It was the evidence of the Registrar and Martin, deputy-general manager of the BSD, that it was their intention to tell the directors just that at a meeting with the full board of directors on 23 October 2000. However, they received legal advice that they should not convey that part of their plan of action to the board. Holdings was instead given time to respond in writing to the Deloitte & Touche ("DT") s7 report. Holdings did so on 29 November 2000. The Holdings reply was unconvincing.

28 The time had come for the Registrar to do what was expected of him. Having identified the appropriate corrective action, he was obliged to act swiftly and decisively. What was of the utmost urgency was to remove Levenstein. By then he had shown beyond doubt that he lacked three of the qualities required of a director of a bank in terms of the Banks Act, namely, probity, competence and soundness of judgment. Left to his own devices, Levenstein was sure to act in a

manner which would prejudice the depositors and shareholders. At the very time his conduct was being scrutinised by DT and the Reserve Bank was considering his removal, and thereafter until curatorship, Levenstein continued to act as before with dire consequences for depositors and shareholders.

29 The Registrar's excuse for not having Levenstein removed there and then was that he had no power to do so. True, but he could have reconvened a meeting of the directors of Holdings on 30 November or shortly thereafter and put his requirements to the board. It was his intention to do so on 23 October 2000. The bank's response of 29 November 2000 could not have changed his mind. He should have done what he had intended to do at the meeting on 23 October 2000. He could have tried "moral suasion", accompanied by threats of deregistration or curatorship. The financial position of the bank was still sound. Depositors and shareholders had not yet lost confidence in the bank. Instead what the Registrar did, inter alia, was to instruct EY at a meeting held only on 13 February 2001 to ensure compliance with the recommendations of the DT s7 report during the normal course of their audit, a process which would inevitably take time. In the result, Levenstein was replaced as CEO only on 18 June 2001, far too late.

The Shareholders

30 The directors were elected by the shareholders of Regal Holdings. The shareholders who held Holdings shares at the date of curatorship have lost their whole investment. They have no one else to blame but themselves. It was the directors that *they* elected whose actions were the main cause of the collapse of Regal Bank. In mitigation, the board of directors, its chairman, Lurie and Levenstein, its chief executive officer, kept the shareholders in the dark about the "dark side" of "Levenstein and company". The shareholders were always given a (distorted) rosy picture containing vistas of riches.

Share price manipulation

31 The commission conducted a limited investigation of the extent to which Levenstein manipulated the share price of Holdings shares[120] in view of the investigations which the Financial Services Board ("FSB") is presently conducting.

Recommendations

The continuation of curatorship

32

32.1 In terms of s69A(11)(a) of the Banks Act, the commissioner is required to express an opinion on whether or not it is in the interest of the depositors or other creditors of Regal Bank that the Bank remains under curatorship.

32.2 The curator gave evidence on 17 October 2001. He told the commission that he had reported to the Registrar on 31 August in terms of s69(2D) of the Banks Act that there was no reasonable probability that the continuation of the curatorship would enable the bank to pay its debts or meet its obligations and become a successful concern. He did so for two reasons:

- the bank's liabilities exceeds its assets significantly; and
- the curator had failed to interest the large six banks in acquiring Regal Bank as a going concern.

The curator, accordingly, is faced with the situation where he cannot sell the bank as a going concern and he must either move for the liquidation of the bank or organise a scheme of arrangement. If the bank is placed in liquidation depositors will receive 70c in the Rand, whereas if a scheme of arrangement is

[120] See §93 Part Three.

successfully negotiated, depositors will receive 75c in the Rand. The curator has had difficulty in arriving at a value of the assets:

- it has proved to be difficult to value the loans to the various property companies, Stone Manor and 93 Grayston;
- there are a number of legal actions pending against Regal Bank;
- it is difficult to estimate the prospects of recovery of a number of loans;
- in regard to many loans the only security is the holding of Regal shares, which the curator has valued at nil;
- the curator is in the process of proceeding against the borrowers in order to test their willingness and ability to repay the loans.

32.3 Investec Bank has made an indicative offer, which the curator is currently negotiating, and which may result in a scheme of arrangement by April 2002. In a letter dated 18 October 2001, the curator expressed the inclination to recommend to the Registrar that he should be given until 30 November 2001 to reach agreement with Investec Bank, failing which Regal Bank should be put under liquidation.

32.4 For the reasons advanced by the curator, it is recommended that Regal Bank remains in curatorship pending the outcome of the negotiations with Investec Bank. It is in the best interest of

depositors that a scheme of arrangement should be concluded rather than the bank being placed into liquidation.

Winding-up

33 In terms of s69A(11)(b) of the Banks Act, the commissioner is required to express an opinion whether or not it is in the interest of the depositors or other creditors of the bank that the Registrar applies to a competent court for the winding-up of the bank. Despite the fact that the bank's liabilities exceed its assets by an estimated amount of R110m, it is my opinion that unless the curator's negotiations with Investec Bank for a scheme of arrangement fail, Regal Bank should not be wound-up.

Disciplinary Steps

34

34.1 In terms of s20(8) of the PAAB Act, if a person who has been registered as an accountant and auditor:

(a) fails to perform any duties devolving upon him in the capacity of an auditor to any undertaking with such degree of skill and care as in the opinion of the board may reasonably be expected; or

(b) is negligent in the performance of such duties, the board may enquire into the circumstances.

34.2 Prima facie, the following auditors failed to perform their duties with care and skill or acted negligently:-

(a) Wixley, Van Heerden and Strydom in not reporting the fraud in the 2000 preliminary results of Holdings to the directors of Holdings, the PAAB and the Reserve Bank;[121]

(b) Strydom in issuing an unqualified opinion on the 2000 statutory financial statements of Holdings (the glossies) in the light of the above fraudulent results and the misstatement in the respects set out inter alia in §68 of Part Two;

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121 See§15.5 Part One; §65-66 Part Two.

(c) Strydom in consenting to the 2001 preliminary results of Holdings published on 30 April 2001 when he should not have done so.[122]

34.3 Accordingly, it is recommended that the Registrar refer this report to the PAAB with the request to hold an enquiry in terms of s20(8).

35

35.1 The disciplinary rules of the PAAB Act provide that any practitioner shall be guilty of improper conduct if he:

(a) without reasonable cause or excuse fails to perform any work or duties commonly performed by a practitioner with such a degree of care and skill as in the opinion of the board may reasonably be expected, or fails to perform the work or duties at all;[123]

(b) conducts himself in a manner which in improper or discreditable or unprofessional or dishonourable or unworthy on the part of a practitioner or which tends to bring the profession of accounting into disrepute.[124]

35.2 Prima facie, Wixley, Van Heerden and Strydom were guilty of improper conduct in the respects set out in §33.2 hereof.

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122 See §15.6 Part One; §106.1 Part Two.
123 §2.1.5.
124 §2.1.21.

35.3 Accordingly, it is recommended that the Registrar request the PAAB to conduct a disciplinary hearing into the conduct of those auditors.

36

36.1 The code of professional conduct ("the Code") of the South African Institute of Chartered Accountants ("the Institute") provides that a member of the accountancy profession must work to the highest standards of professionalism within a framework of professional ethics.

36.2 Prima facie, the following members of the institute breached the code in these respects:-

(a) Levenstein, inter alia, for committing fraud, misleading the auditors, the board of Holdings and the shareholders and for giving unlawful instructions;

(b) de Castro, for carrying out the unlawful instructions of Levenstein and making or authorising the making of false entries in the records of Holdings or the Bank;

(c) Davis, for carrying out the unlawful instructions of Levenstein and making or authorising the making of false entries in the records of Holdings or the Bank;

(d) Buch, as a director of Holdings and the bank,[125] and as chairman of the audit committee of Holdings,[126] for failing to carry out his duties with the necessary skill and care.

37

37.1 The code of ethics of the South African Institute of Chartered Secretaries and Administrators provides that a member is liable to disciplinary action if found guilty of misconduct, which includes the failure to exercise integrity, honesty, diligence and due care in carrying out his duties and responsibilities.

37.2 Lurie, as a member of the Institute of Chartered Secretaries and Administrators, is prima facie guilty of misconduct in that he failed to exercise integrity, honesty, diligence and due care in carrying out his duties and responsibilities as a director or chairman of Regal Holdings and the bank.

37.3 Accordingly, it is recommended that the Registrar request the South African Institute of Chartered Secretaries and Administrators to conduct a disciplinary enquiry into the conduct of Lurie.

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125 See §5-7 Part One.

126 See §8 Part One.

South African Revenue Services

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38.1 There are a number of directors and employees of Regal Bank who received payments of money and benefits such as motor vehicles who may not have made full disclosure of those amounts and benefits to the South African Revenue Services for the purpose of paying personal income tax. A schedule containing the necessary particulars is attached to Part Three as Annexure “F”.

38.2 It is recommended that the Minister of Finance refer this report, and in particular Annexure “F”, to the South African Revenue Services for further investigation and to take appropriate action.

Publication of this report

39

39.1 In terms of s69A(13) of the Banks Act, the Registrar, after consultation with the Minister of Finance, may make part or whole of this report available to the public.

39.2 In view of the fact that the Commissioner heard most of the oral evidence in public, and there was widespread publication of the evidence, it is recommended that the whole of the report, except for §91.12 of Part Three, be published as soon as possible.

Seminars

40

40.1 One of the primary reasons for the collapse of Regal Bank was that the boards of directors of the bank and its holding company did not act in accordance with well established and, one would have thought, well-known standards of corporate governance. The non-executive directors in particular, failed to act with the necessary independence and diligence.

40.2 Accordingly, it is recommended that the Registrar consider arranging seminars with banks in order in a pro-active way to pass on the lessons learnt from the Regal debacle.

Amendments to Banks Act

41

41.1 The Registrar's view that he needs additional powers – to remove a director and to appoint an administrator with Chapter 11-like powers – is supported in principle.

41.2 The Registrar should consider amendments to s64 (audit committee) to incorporate the following recommendations in King II[127]:

> "3.3.1 …The majority of the members of the audit committee should be financially literate.
> 3.3.3 The audit committee should have written terms of reference, which deal adequately with its membership, authority and duties.
> 3.3.4 Companies should disclose in their annual report, whether or not the audit committee has adopted formal terms of reference and, if so, whether the committee satisfied its responsibilities for the year in compliance with its terms of reference.
> 3.3.5 Membership of the audit committee should be disclosed in the annual report, and the chairperson of the committee should be available to answer questions about its work at the annual general meeting."

41.3 A further amendment which should be considered is the addition of the words "or of its holding company" to the end of s78(1)(b), to read: "A bank shall not lend money to any person against security of its own shares or of its holding company".

Delinquent directors

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127 The draft King Report on Corporate Governance for South Africa ("King II").

42 Levenstein and Lurie should be disqualified from acting as directors under the Companies Act and their names should be included on any register of delinquent directors which may be opened by the Registrar of Companies in accordance with one of the recommendations of King II.

Criminal prosecutions

43

43.1 Prima facie, some directors and officers of Regal Holdings or Regal Bank committed:

- 18 counts of fraud;
- various contraventions of sections 38, 226, 249, 250, 251, 286, 288, 298 and 305 of the Companies Act;
- contraventions of section 75 read with 91 of the Banks Act.

43.2 Schedule A hereto, consisting of 89 pages, contains details of the charges.

43.3 This report will be handed by me to the Director of Public Prosecutions, Johannesburg on Friday, 16 November 2001 with the recommendation that criminal prosecutions be instituted as soon as possible.