Annexure "A"

Ex parte:

REGAL TREASURY PRIVATE BANK LTD ("*Regal Bank*")

23 August 2001

RULING

Introductory

1 In terms of s69(1)(a) of the Banks Act, 94 of 1990 ("Banks Act") if, in the opinion of the Registrar of Banks ("Registrar"), any bank will be unable to repay, when legally obliged to do so, deposits made with it or will probably be unable to meet any other of its obligations, the Minister of Finance ("Minister") may, if he deems it desirable in the public interest, with the written consent of the chief executive officer or the chairman of the board of directors of that bank, appoint a curator to the bank. The Minister appointed Mr Tim Store of Deloitte & Touche as curator of Regal Treasury Private Bank Ltd ("Regal Bank") with effect from 26 June 2001. In the press release issued by the Registrar at the time of the announcement of the appointment of Mr Store it was stated that recent events pertaining to Regal Bank had evidently led to unusually large scale withdrawals by depositors of their deposits held with Regal Bank and the concomitant outflow of funds had apparently

resulted in the bank experiencing difficulties in maintaining its required levels of liquidity.

2 On 13 July 2001 the Registrar appointed me with immediate effect as a commissioner in terms of s69A of the Banks Act to conduct an investigation into the affairs of Regal Bank. In the press release of 16 July, in which the announcement of the appointment was made, it was said that the appointment was considered appropriate given the following:

> "There were unusual events leading to the placing of Regal under curatorship and, consequently, intense public interest has been expressed in various media reports.
>
> The curator's investigations have confirmed that Regal entered into a number of material, unusual and highly technical transactions, which could impact on its financial position.
>
> These events and transactions merit further independent investigation, the pursuance of which lies outside the powers granted to a curator as prescribed in terms of section 69 of the Banks Act." The Registrar went on to express his belief that the appointment was "both in the public interest and in the interests of the promotion of the sound, stable and efficient banking system."

3 Subsequent to my appointment, the Registrar appointed Messrs Abrahams, Delport and Potgieter as assistants to the commissioner in terms of s69 A(2) of the Banks Act.

4 The investigation of the affairs of Regal Bank commenced at the time of my appointment. The investigation took a particular form on Monday, 20 August, when the examination under oath of witnesses commenced. On that day, Mr Vernon Wessels of Business Report approached me with a request that the hearing be open. I advised him to consult lawyers and to make application when convenient to do so. On the following day, Tuesday 21 August, Mr Jammy, instructed by Webber Wentzel Bowens appeared for Independent Newspapers (Pty) Ltd, the publisher of Business Report to move the application. It was arranged that the Registrar would file an affidavit in support of his view that the hearing should be in camera; Independent Newspapers were given an opportunity to file an answering affidavit and the matter was set down for argument on Thursday, 23 August, at 08:00. At the hearing on Thursday, Mr Jammy was instructed by Burt Meaden, and Independent Newspapers were joined in their application by Business Day and Personal Finance ("the applicants"). Mr Oelofse appeared on behalf of the Registrar and Mr Klein represented Deloitte & Touche. After hearing oral argument, this ruling was reserved until Friday, 24 August, at 10:00.

Does the commissioner have a discretion?

5 S69A provides:

"(4) A commissioner appointed under subsection (1) and any person or persons appointed under subsection (2) shall for the purpose of their functions in terms of this section have powers and duties in all respects corresponding to the powers and duties conferred or imposed by section 4(1), (2), (3), (4) and (6) of the Inspection of Financial Institutions Act, 1984 (Act No. 38 of 1984 – hereinafter in this section referred to as the Inspection Act), upon a registrar or an inspector contemplated in the Inspection Act: ….

(5) In the application, in relation to an investigation under this section, of section 4 of the Inspection Act, subsection (2) of that section shall be deemed to have been amended to read as follows:

'(2)(a) In carrying out an investigation into the business, trade, dealings, affairs or assets and liabilities of a bank under curatorship, a commissioner may examine under oath, in relation to such bank or any of its associates, any person who is or formerly was a director, auditor, attorney, valuator, agent, servant, employee, member, debtor, creditor or shareholder of that bank or any of its associates, or any person whom the commissioner deems capable of giving information concerning the business, trade, dealings, affairs or assets and liabilities of that bank or such associate, and the commissioner may administer an oath or affirmation to that person for the purpose of such an examination: Provided that the person examined, whether under oath or not, may have his legal adviser present at the examination.

(b) Unless directed otherwise by the commissioner, the proceedings under paragraph (a) shall be held in camera and not be accessible to the public.' " S69A(13), however, provides that "[a]ny investigation or any report by a commissioner under this section shall be private and confidential unless the Registrar, after consultation with the Minister, either generally or in respect of any part of such investigation or such report, directs otherwise."

6 It was submitted by Mr Oelofse, contrary to the position adopted by the Registrar in his affidavit, that in terms of s69A(13) the Registrar is the only person who has a discretion to direct that the hearing of oral evidence be accessible to the public is the Registrar. If that submission is upheld, the consequence would be that the words "unless directed otherwise by the commissioner" in s4(2)(b) of the Inspection Act must be ignored, taken as deleted and of no force or effect. The words of a statute should not lightly be so ignored and I must attempt to reconcile what appear to be conflicting provisions in the same section of the statute. If the Legislature had intended that the commissioner should have no discretion, s4(2)(b) of the Inspection Act, when incorporated into the Banks Act by s69A(5)(b), would simply have provided: "The proceedings under paragraph (a) shall be held in camera and not be accessible to the public."

7 The "proceedings" referred to s4(2)(b) of the Inspection Act are the proceedings at which oral evidence is heard, and not the investigation as a whole. Accordingly, it seems to me on a proper interpretation of s69A that an investigation into the affairs of a bank under curatorship is "in camera" or "private and confidential" *except* when the investigation takes a particular form, namely, the hearing of oral evidence, in which event the commissioner has a discretion to allow evidence to be accessible to the public. Such an interpretation avoids the deletion, in effect, of the contentious phrase in s4(2)(b) of the Inspection Act and allows for an application of the kind in question to be made at the hearing of oral evidence.

The exercise of the discretion

8 The applicants contend that the media should be allowed access to the hearings and only in appropriate cases, such as when evidence of a confidential nature is led, should the hearing be in camera. The Registrar, on the other hand, contends that if I find that the commissioner does have a discretion in terms of s4(2)(b) of the Inspection Act, I should rule that the hearings will be held in camera - without exception.

9 The discretion vested in the commissioner should be exercised judicially, objectively and impartially.

10 The factors taken into account in the exercise of my discretion are the following:-

- The commissioner appointed in terms of s69A is not a court nor an "independent and impartial tribunal or forum" as envisaged by s34 of the Constitution (Act 108 of 1996). That section provides: "Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum." (The emphasis is mine.) Although the commissioner is required to act objectively and impartially in terms of s69A(3), the commissioner does not resolve disputes. What the commissioner does is to conduct an investigation. He then reports on the affairs of the bank under curatorship in a written report in which he or she must express an opinion on various issues (s69A(11)). The report is forwarded to the Registrar and the Minister and possibly the prosecution authorities (s69A(12)). The report is private and confidential unless the Registrar, after consultation with the Minister, either generally or in respect of any part of the report, directs otherwise (s69A(13)).

- In terms of s14(d) of the Constitution everyone has the right to privacy, which includes the right not to have the privacy of their communications infringed. In Bernstein ao v Bester ao NNO 1996(2) SA 751 (CC) the Constitutional Court considered s417 of the Companies Act, Act 61 of 1973, a provision on which s69A of the Banks Act has been modelled. Ackerman J said in §'s [83] and [84]: "It is difficult to see how any information which an individual possesses which is relevant to the purpose of the inquiry can truly said to be private. One is after all concerned here with the affairs of an artificial person with no mind or other senses of its own; it depends entirely on the knowledge, senses and mental powers of humans for all its activities. … it can hardly be said that the knowledge of the director, official or auditor bearing relevantly on the affairs of a company that has failed, can be said to fall within such person's domain or personal privacy. I would hold the same in relation to a mere debtor or creditor of a company. If such knowledge is relevant, it is relevant because of some legal relationship between such person and the company, which can hardly be said to be private."
- In the affidavit filed by him, the Registrar, after referring to s4(2)(b) of the Inspection Act, stated:

  "As I read this section, it does give the Commission a discretion to deviate from this provision and to order that the proceedings shall be held in public. It is submitted that the Commissioner has the right to have certain portions of the

hearings, particularly where public interest so dictates, in public, rather than in camera. The underlying principle is once again bank secrecy.

Banks are customers of the central bank as have been said above but banks in turn have customers to whom they owe the principles of secrecy. In the event of bank in distress, it is my function as the supervisor to establish whether that distress can be remedied. The mechanism provided for in section 69A, is designed to assist my office in making a diagnosis as to the cause of the ailment. In this process confidential information relating to other banks and customers of that bank who may also be customers of other healthy banks may be disclosed, if the proceedings are not held in camera. If so disclosed, it could have a damaging effect on the financial stability of both customers and other banks. This in itself may have a ripple effect and cause instability in the financial system and at the same time not be to the benefit of depositors i.e. customers of other banks. The bank secrecy principle is one of the oldest in banking law and exists for the protection of depositors in the commercial world who do have an interest in keeping their affairs private and secret."

- In another passage of his affidavit the Registrar said:

"**Intimidatory tactics**

Allegations have been made relating to the management style of Mr J I Levenstein which includes the use of extreme intimidation of subordinates. In the event of an enquiry not being held in camera witnesses may be diffident in coming forward when making disclosure of the true fact which infringed or may have infringed the corporate governance system applicable at Regal Bank for fear of victimisation."

- It is in the public interest, and in particular in the interests of the Registrar, the banking industry, the shareholders and depositors of Regal Bank, that a thorough investigation into the affairs of Regal

Bank takes place. In view of the number of small banks which have failed in the last decade or so, it is vital to establish why Regal Bank was placed in curatorship; to learn any lessons which can gainfully be learned from the "Regal" experience; and to consider whether anyone should be held accountable. Witnesses should not be inhibited from testifying or co-operating with the commissioner for fear of reprisals or for concern that they might disclose confidential information. Unless the whole story is told, the truth will not emerge.

- Mr Klein placed on record that Deloitte & Touche had co-operated with the commissioner on the basis and in the belief that the evidence of the Deloitte & Touche witnesses would be given in camera. Two members of Deloitte & Touche testified in camera on 20 and 21 August. He gave concrete examples of the respects in which Deloitte & Touche evidence would be confidential, the breach of which confidence could have serious consequences.
- Of all the persons affected by the curatorship of Regal Bank (and what may follow), the persons who have the greatest interest in knowing what went wrong are the depositors. They placed their funds in Regal Bank in the belief that their money would be safe. If the hearing is held in camera they may never know what happened. While the Registrar, acting in terms of s69A(13), may direct the commissioner's report, in whole or in part, to be disclosed, equally, he may *not* do so. If he treats the whole of the report as private and

confidential, and this hearing was held in camera, the whole investigation would have been shrouded in secrecy. And that, in my view, would be an unsatisfactory state of affairs.

- A blanket ban on access of the media to the hearing would be an unjustifiable infringement of the right of freedom of expression contained in s16 of the Constitution. S16 provides, insofar as is relevant:

  "(1)(a) Everyone has the right to freedom of expression, which includes-

  (a) freedom of the press and other media;

  (b) freedom to receive or impart information or ideas …". Freedom of speech is "the matrix, the indispensable condition of nearly every form of freedom" per Cardoza J in Palko v Connecticut 302 US 329 (1937), quoted with approval by Joffe J in Government of the Republic of SA v "Sunday Times" Newspaper 1995(2) SA 221 (T) at 226 H. It was said by O'Regan J in SA National Defence Union v Minister of Defence 1999(4) SA 469 (CC) § [7]: "Freedom of expression lies at the heart of the democracy. It is valuable for many reasons, including its instrumental function as a guarantor of democracy, its implicit recognition and protection of the moral agency of individuals in our society and its facilitation of the search for truth by individuals and society generally. The Constitution recognises

that individuals in our society need to be able to hear, form and express opinions and views freely on a wide range of matters."

- These hearings are taking place at the same time that the curator is considering the financial position of Regal Bank and how best to deal with the bank and its assets. I am satisfied that there is a real risk that the publication of evidence before me could jeopardise the task of the curator to the prejudice of shareholders and depositors and that cannot be in the public interest. The curator should take a final view by 31 August 2001, i.e. in a week's time. It seems to me that it would be more appropriate to give a ruling after the curator has taken a final view on the solvency of the bank and what should be done with the bank or its assets.

11 Once that is out of the way, it seems to me that the factors that I have considered, some of which are conflicting, may be reconciled by a direction in the following terms:-

"1 The hearing of oral evidence in terms of s4(2)(a) of the Inspection Act, read with s69A(5) of the Banks Act, will be accessible to the public.

2 Any witness who wishes the whole or part of his or her evidence to be heard in camera must make application to that effect.

3 The application may be made informally.

4 The application must be justifiable.

5 The application itself may be held in camera on good cause shown.

6 A ruling on each application will be given before the evidence of the witness is given."

12 In the meanwhile, the hearing will be in camera.

13 The applicants and the Registrar and any other interested parties may place further evidence before me and make further submissions before a final ruling is given at a time and on a date to be arranged with Mr Delport or Mr Potgieter.

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J F MYBURGH SC
24-08-2001