Ex parte: ***Annexure "B"***

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

19 September 2001

RULING (2)

1 The applicants are Regal Treasury Bank Holdings Ltd ("Regal Holdings") and its board of directors and the board of directors of Regal Bank at the date of curatorship. The purpose of the application is to obtain access to the record of the proceedings, including exhibits, and to obtain a ruling that certain of the directors are entitled to be re-examined by their legal representative. The directors to whom the ruling would apply are Cohen, Lurie, Buch, M Pollack, Oosthuizen, Scheepers, Diesel and Van der Walt ("the directors").

2 In the affidavit of Cohen, the non-executive chairman of Regal Holdings and Regal Bank, dated 11 September 2001, the application is motivated on 3 grounds:

- as a matter of fairness;
- the object of the commission would be better served by affording the directors such access so that they would be better placed for the relevant testimony which might be more cogently presented;

- to enable the directors to prepare fully and properly on the matters contained in s69A(11)(c)(d) of the Banks Act, 94 of 1990 ("Banks Act") which have a direct bearing on the conduct of the applicants and the Commissioner's opinion in relation thereto and their culpability if any. Those sub-sections provide that the commissioner shall report whether or not, in the opinion of the commissioner:

  "(c) it appears that any business of such bank was carried on recklessly or negligently or with the intent to default depositors or other creditors of the bank concerned or any other person, or for any other fraudulent purpose; and

  (d) should it appear that any business of such bank was carried on in a manner contemplated in paragraph (c), whether any person identified by the Commissioner was a party to the carrying on of the business of that bank in such manner."

3 The rights of the directors to the relief sought must be considered in the context of s69A and the Constitution (Act 108 of 1996).

4 A good starting point is the requirement of fairness. Without relying on any specific revision of the Constitution, one can assume that the proceedings of s69A(5) must be conducted fairly.[1] The requirement of fairness must be assessed taking into account the nature and purpose of

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[1] Cf: ***Leech a.o. v Farber NO ao*** 2000(2) SA 444 (W) at 405 B – D

the enquiry and the powers of the commissioner in terms of s69A. The commissioner must conduct an investigation into the business, trade, dealings, affairs or assets and liabilities of the bank under curatorship.[2] The investigation must be completed within 5 months of the date of his appointment.[3] After completing the investigation a written report must be prepared in which the commissioner must express an opinion, in addition to those matters referred to in paragraph 2 hereof, whether or not:

(a) it is in the interest of the depositors or other creditors of the bank concerned that the bank remains under curatorship; and

(b) it is in the interest of the depositors or other creditors of the bank that an application be made in a competent court for the winding-up of the bank.[4]

5 S69A does not prescribe how the investigation is to be conducted. A wide discretion is conferred on the commissioner. The only reference in s69A to a particular form that the investigation may take, in the discretion of the commissioner, is in sub-section (5), which provides that the commissioner may examine a person under oath. The person is entitled to have his legal adviser present at the examination.[5] Any person examined by a commissioner shall not be entitled to refuse to answer

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2 S69A(1)
3 S69A(11)
4 S69A(11)
5 S69A(5)

any question upon the ground that the answer would tend to incriminate him or upon the ground that he is to be tried on a criminal charge and may be prejudiced at such trial by his answer.[6]

6 Mr Subel, who appeared with Mr Peter for the directors, did not rely on s33(1) of the Constitution, which provides that everyone has the right to administrative action that is lawful, reasonable and procedurally fair, but he did refer to Jeeva v Receiver of Revenue, Port Elizabeth[7] in which Jones J held that a commission of enquiry authorised by the Master of the Supreme Court in terms of s417 and s418 of the Companies Act, 61 of 1972, is administrative action. Accordingly, the applicants who had been subpoenaed to testify at a s417 enquiry, were "entitled to prepare themselves to deal with the subject matter of the enquiry. They are entitled to equality before the law, which, in my view, includes equal access to the information held by the interrogator, especially if the interrogator is directly or indirectly an organ of State. … Much of the relevant information which will form the subject matter of the interrogation deals with the company affairs going back over the years. Some of it is contained in documents seized by the Receiver of Revenue in 1990. The applicants have not had sight to those documents since then. They cannot be treated fairly and equally at this interrogation if they do not have sight of these and other relevant documents before the hearing."[8] Jeeva's case was considered by the Constitutional Court in Bernstein[9] and by the High Court in Leech. Neither court decided that a s417 enquiry was not administrative action.

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6 S69A(6)

7 1995(2) SA 433 (SECLD)

Both courts, however, cast serious doubt on the correctness of the finding of Jones J that such an enquiry did constitute administrative action. In Bernstein, Ackerman J said: "I have difficulty in seeing how the enquiry in question can be characterised as administrative action. It forms an intrinsic part of the liquidation of a company, in the present case the liquidation of a company unable to pay its debts. … The enquiry in question is an integral part of the liquidation process pursuant to a Court order and in particular that part of the process aimed at ascertaining and realising assets of a company. Creditors have an interest in their claims being paid and the enquiry can thus, at least in part, be seen as part of this execution process. I have difficulty in fitting this into the mould of administrative action. I also have some difficulty in seeing how s24(c) of the Constitution can be applied to the enquiry, because it is hard to envisage an 'administrative action' taken by the commissioner in respect whereof it would make any sense to furnish reasons. The enquiry after all is to gather information to facilitate the liquidation process. It is not aimed at making decisions binding on others."[10] In Leech Nugent J, after quoting the passage of Jeeva referred to earlier, said: "Although references are made to the right to fair administrative action, it seems from the passage above that the real grounds upon which the learned Judge considered the document should be disclosed was to ensure equality between examiner and examinee. I regret that I am unable to subscribe to the view that the right to equality requires the examiner and the examinee to be placed in the same position. They are manifestly in differing positions, with differing interests, and to seek to 'equalise' their respective positions is, in my view, a fallacious approach to the right to equality."[11]

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8 At 443I – 444C

9 ***Bernstein a.o. v Bester a.o. NNO*** 1996(2) SA 751 (CC)

10 §'s [96] and [97]

7 I am not bound by the judgment in Jeeva. While s69A may bear a resemblance to s417 and s418, it is not an identical twin.

8 In any event, for similar reasons to those advanced in Bernstein and Leech, I am of the view that an enquiry in terms of s69A of the Banks Act is not administrative action. The commissioner merely conducts an investigation and at its conclusion expresses an opinion. His opinion is not binding on anyone and he does not determine anyone's rights. No judgement sounding in money is given nor is anyone convicted of a criminal offence.

9 A basis which comes to mind on which it may be said to be fair for a person to have access to the record and exhibits before giving evidence is to enable the person to prepare for his examination by the commissioner. That is the third ground relied upon by the directors. To prepare properly, the person would need:

- the record, the exhibits referred to in the prior proceedings, and the exhibits to which the person is to be referred in his examination; and
- sufficient time to read and digest the record and exhibits. The commissioner would not be entitled to examine the person until the person had had sufficient time to read and digest the record and

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[11] 453 F - H

exhibits. Without sufficient time to prepare, the right to access to the record and exhibits would be an illusory one.

10 Any investigation of any bank under curatorship is likely to have these characteristics:

- a need to interview many witnesses;
- complex factual and expert evidence containing elements of an accounting, banking and legal nature;
- reference to a mass of documentation.

That likelihood is borne out by the facts of this investigation. Regal Bank was a small private bank. It had a short life. The investigation so far has focussed on only the years 1999, 2000 and 2001. Only eight witnesses have testified. Many more are to follow. And yet there are already 33 lever-arch files of documents and the record is 1 393 pages long. A full day's evidence is recorded on about 160 typed pages. It takes me at least a day to read a record of 160 pages and the exhibits to which reference is made in those pages and to make notes of the evidence. Even if a potential witness were to accelerate that process, it would take days to be prepared for his examination. If one adds to that the time it would take to read documents to which no reference has yet been made in the proceedings, the period of preparation will be substantially extended. Persons who are examined further down the line, will face a longer record and more exhibits.

11 At worst, the commissioner must complete the investigation in five months. At best, the commissioner must do so sooner. The investigation must proceed expeditiously. Two of the matters on which the commissioner must report must be dealt with urgently, namely, whether the bank must remain under curatorship and whether there must be an application for the winding-up of the bank.

12 In the affidavit of Cohen he seeks to limit the class of person who would enjoy the right of access to the record and documents contended for on the basis that the directors' "object and legal interest is sufficiently different from creditors of the bank, shareholders of the holding company, and the public generally who do not have sufficient legal interest to justify the access sought in this application." It seems to me, however, that if the right of access were to exist it should be a right enjoyed at least by all those persons whose conduct will be scrutinised and possibly adversely commented upon by the commissioner. Those persons would include the directors of the holding company and the bank, employees of the bank, internal and external auditors, and those who have a supervisory role to play in the banking industry, such as the Registrar of Banks and other employees of the South African Reserve Bank. That is a large class of persons.

13 It would be impractical, if not impossible, to conduct the investigation effectively and expeditiously if every person who falls into that class is to be given access to the record and exhibits and to be given sufficient time to prepare for his examination. The objects and purpose of s69A would be defeated. And it is significant that the right to access sought by the directors is not one that has been recognised in respect of s417 enquiries, despite the existence of such a procedure in the Companies Act for many years.

14 Any prejudice which a particular person can show by not having had sight of a document can be met by the person who is being examined requesting time during the examination to read any document.

15 This investigation has taken place in the open since 8 September. Anyone, including the directors, is entitled to attend the proceedings, to hear the evidence, take notes and prepare for his examination. Some of the directors have attended the proceedings regularly, as is their right. The evidence given in public so far cannot come as a surprise to the directors. They should be prepared to testify in respect of that evidence.

16 What remains to consider is the submission that the directors are entitled to be re-examined by their legal representative. The authority for the proposition was the case of In re: Cambrian Mining Co (1881) 20 Ch

376. I do not have access to that law report. It is referred to by Henochsberg on the Companies Act at p881 in the context of s415(6) of the Companies Act. That section provides that any person called upon to give evidence at any meeting of creditors may be represented at his interrogation by an attorney with or without counsel. Henochsberg states: "The right to representation is, it is submitted, intended to be a right to effective representation. This implies, it is submitted, that the attorney or counsel is entitled to question the witness whom he represents for the purpose (and only for such purpose) of enabling him to explain something stated by him under the interrogation. … Although stated with reference to a private enquiry under provisions similar to those of s417, it is submitted that the views of Hall VC in In re Cambrian Mining Co … are apposite in the present context: 'As regards the question of re-examination, it seems to me that re-examination would only be properly and reasonably allowed for the particular purpose of explaining the evidence given by the deponent during his examination on behalf of the liquidator, - that it ought to be confined and limited to that particular purpose, and it would be quite legitimate only when so confined … I therefore hold that the re-examination is proper when so limited and confined ….'". Mr Subel did not cite any South African judgments in which Cambrian Mining has been followed, nor does Henochsberg refer to any authorities either in relation to s415(6) or s417(1A). But it is the practice in s417 enquiries to allow re-examination. It must be emphasised, however, that the right of re-examination is only "for the particular purpose of explaining the evidence given by the deponent during his examination". It has an extremely limited purpose. That limited right of

re-examination, in my view, should also be recognised in respect of a s69A examination.

17 S69A does not contain two provisions which are to be found expressly in the Companies Act. The one is contained in s415(1) and s418(1)(c) which provides that the Master or providing presiding officer or commissioner "shall disallow any question which is irrelevant or would in his opinion prolong the interrogation unnecessarily." The other is s418(4) which entitles a witness, at his cost, to a copy of the record of his evidence. In my view it is implicit in s69A that the examination of a person under subsection (5) must be relevant and not unnecessarily prolonged. The legal representative of the person being examined is entitled to object to an examination which does not meet either of those criteria. It is further implicit that a person who is examined is entitled to a record of his evidence. An enquiry under s418 is private and confidential unless directed otherwise (s417(7). Similarly, there does not appear to me to be any compelling reason why a person who has been examined in terms of s69A(5) of the Banks Act, whether in camera or not, should not be entitled to a copy of his evidence.

18 The application for access to the record and exhibits is refused. The application to allow re-examination (of the limited kind referred to in §16) is granted.

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J F MYBURGH SC