REGAL TREASURY PRIVATE BANK LTD ("Regal Bank")

3 October 2001

RULING 3

1 Mr Lurie was a director of Regal Treasury Private Bank Ltd ("Regal Bank") and Regal Treasury Private Bank Holdings Ltd ("Regal Holdings"). For the period 30 September 1999 to 1 May 2001 he was the chairman of Regal Bank and Regal Holdings. When he was called to testify under oath, his attorney, Mr Ziman, made application that the evidence of Mr Lurie which might incriminate him should be heard in camera. After argument had been concluded, Mr Wessels of Business Report requested that Business Report should be given an opportunity to make representations. At a subsequent hearing of the commission, Mr Jammy again represented Business Report. Both he and Mr Ziman made submissions.

2 Mr Ziman initially placed on record that his client's appearance at the commission should not be taken as a waiver of his right to contend that the commission was not properly constituted. The matter was left there.

3 The substance of the application on behalf of Mr Lurie may be summarised as follows. Mr Lurie is willing to testify in public. He feels that he has nothing to hide. He cannot envisage anything that he has

done that could possibly incriminate him. He cannot envisage that he has committed any offences. He does not seek a ruling that all his evidence should be heard in camera. When a question is to be put which might incriminate him, Mr Lurie should be given notice and the subsequent proceedings in which potentially incriminating evidence might be elicited, should be held in camera. The submission of Mr Ziman was in these precise terms:

"… If the answer might elicit or if the question might elicit an answer which is incriminating I should imagine that the examiner will know that. In which case my submission is that he ought to then advise us that a question that he is about to ask has a number of answers one of which might incriminate the witness in which case I would then ask that the answer be given in camera."

4 The provisions of s69 A of the Banks Act, 94 of 1990 ("Banks Act") which are relevant are:

- ss (5), which is quoted in full in the first ruling, and which provides for the proceedings to be in camera, unless the commissioner otherwise directs;
- ss (6): "(a) Any person examined by a commissioner under this section shall not be entitled, at such examination, to refuse to answer 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.

(b) Where any person gives evidence in terms of the provisions of this section and he is obliged to answer questions that may incriminate him or, where he is to be tried on a criminal charge, may prejudice him at such trial, the commissioner shall direct, in respect of such part of the proceedings, that no information regarding such questions and answers may be published in any manner whatsoever.

(c) No evidence regarding any questions and answers contemplated in paragraph (b), and no evidence regarding any fact or information that has come to light in consequence of any such questions or answers, shall be admissible in any criminal proceedings, except in criminal proceedings where the person concerned is charged with an offence in terms of subsection (14)."

- Ss (13): "Any 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."

5 S69 A introduces three different concepts in relation to the nature of the investigation:

- the proceedings during which a person is examined under oath must be held in camera and not be accessible to the public, unless the commissioner otherwise directs;

- the commissioner must direct that no information regarding questions and answers which may incriminate a person that gives evidence may be published in any manner whatsoever;
- any investigation or any report by the commissioner shall be private and confidential (unless directed otherwise).

6 The genesis of the provisions of s69 A of the Banks Act under consideration appears to be, at least in part, provisions of the Insolvency Act, 24 of 1936 ("Insolvency Act"). The Insolvency Act contains similar concepts in a different form. S39(6) provides that a meeting of creditors "shall be accessible to the public". S65 provides that at an interrogation of the insolvent or other witnesses at a meeting of creditors, the witness "… shall not be entitled … to refuse to answer 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 a trial by his answer" (ss(2)). In terms of ss(2A)(a) where any person gives evidence and is obliged to answer questions which may incriminate him or, where he is to be tried on a criminal charge, may prejudice him at such trial, the presiding officer shall, notwithstanding the provisions of s39(6), order that such part of the proceedings be held in camera and that no information regarding such questions and answers may be published in any manner whatsoever.

7 The differences between the Banks Act and the Insolvency Act are these:-

- In the former, the hearing must be in camera, unless the commissioner otherwise directs, whereas in the latter the meeting of creditors is in public.
- In the Insolvency Act, when incriminating evidence is led, the meeting of creditors must be in camera and there may be no publication of the incriminating evidence, whereas the Banks Act does not have a similar express provision requiring incriminating evidence to be held in camera (when the commissioner has directed that the proceedings be accessible to the public).

8 The Banks Act, by necessary implication, however, seems to me to envisage that potentially incriminating evidence must be heard in camera. Firstly, the investigation is private and confidential and the proceedings under oath as a matter of course must be in camera, until the commissioner specifically directs otherwise. In the normal course, all evidence, including incriminating evidence, must be heard in camera. Secondly, both in the Insolvency Act and in the Banks Act, the *quid pro quo* for a person being compelled to give incriminating evidence is that the incriminating evidence is given in private and cannot be published. It follows that the commissioner has no discretion to direct potentially incriminating evidence to be heard in public: the evidence must be heard in camera.

9 Information which “may” be incriminating, is information which is possibly incriminating. The possibility must not be speculative, far-fetched or fanciful. Evidence which may be embarrassing, and no more, will be heard in public.

10 If either the examiner or the person being examined or his legal representative is of the view that the evidence of the witness may be incriminating, a motivated submission to that effect must be made to the commissioner. If the commissioner is satisfied that the evidence may well be incriminating, the evidence must be heard in camera.

11 It is not clear to me what the purpose of this application is. I have heard the evidence of approximately twenty-four witnesses so far. Not one has taken the point nor expressed concern that his or her evidence may be incriminating. The previous applications for evidence to be heard in camera were not based on this ground. And from Mr Lurie’s point of view, he himself says that he does not envisage his evidence being incriminating.

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J F MYBURGH SC