

1 CHAPTER 1: INTRODUCTION

From 1985 to 1992 the South African Reserve Bank provided assistance to Bankorp and, after 1992, to its new owner ABSA. After the existence of that assistance eventually became public knowledge its exact nature and its validity has been the subject of controversy and public criticism.

On 15 June 2000 the Governor of the S A Reserve Bank announced the appointment of *The Governor's Panel of experts to investigate the S A Reserve Bank's role with regard to the financial assistance package to Bankorp* ("the Panel"), consisting of:

- The Hon Mr Justice DM Davis, Judge of the High Court of South Africa (Cape of Good Hope Provincial Division) as Chairperson;
- Prof L Harris, Director: Centre for Financial and Management Studies at SOAS, University of London;
- Mr PC Hayward, Financial Sector Advisor at the Monetary and Exchange Affairs Department, International Monetary Fund, who served on the Panel in a private capacity;
- Mr RM Kgosana, Chairperson of KMMT Inc Chartered Accountants;
- Mr RK Store, Chairperson of Deloitte and Touche Chartered Accountants; and
- Ms S Zilwa, Chairperson of Nkonki Sizwe Ntsaluba Chartered Accountants.

Mr Hayward served on the Panel in his personal capacity. The views expressed in the Panel's Report ("this Report") are entirely those of the Panel and should not be attributed to the International Monetary Fund.

Mr JJ Rossouw of the S A Reserve Bank served as the Panel's secretary.

It was initially envisaged that Mr G Lind, Advisor of the Swedish National Bank would also serve on the Panel, but owing to other commitments he could not accept the appointment to the Panel. However, the Panel did consult with him on its Report.

The deadline for the completion of this Report was initially set as the end of August 2000, but owing to the complexity of the matter under consideration, the time frame for completion was extended by the Governor.

1.1 Terms of reference

The Panel received and accepted as its terms of reference:

To determine:

- 1 whether the S A Reserve Bank, in providing financial assistance to Bankorp, has contravened the provisions of the S A Reserve Bank Act, No 90 of 1989, or any other Act;
- 2 whether the financial policies and procedures of the S A Reserve Bank with regard to financial assistance have been adhered to in the case of the Bank's assistance to Bankorp;
- 3 whether the S A Reserve Bank's conduct in the provision of financial assistance to Bankorp was in accordance with internationally accepted principles of best practice; and
- 4 guidelines and best practice with regard to possible future conduct of the S A Reserve Bank with regard to banks in distress.

On 16 February 2001 the terms of reference of the Panel were expanded to include:

- 5 in the event of a finding by the Panel that the financial assistance to Bankorp by the S A Reserve Bank was *ultra vires* the power of the Bank, the consideration of whether restitution can be claimed, and if so, the manner thereof.

The Panel interpreted these terms of reference to include the agreement between the S A Reserve Bank and ABSA, concluded in 1994 as a result of the acquisition of Bankorp by ABSA in 1992.

1.2 Work programme

When considering its work programme at the outset, the Panel noted that:

- certain matters included in its terms of reference had been the subject of scrutiny and other investigations over a number of years, e.g. by the Special Investigation Unit, headed at the time by The Hon Mr Justice W H Heath ("Heath Special Investigative Unit") and an enquiry in terms of section 417 of the Companies Act, No 61 of 1973, into the affairs of Tollgate Holdings Ltd;

- despite previous investigations, no definitive or comprehensive set of findings has been made available for public scrutiny;
- although some relevant material was readily available, in other cases substantial research was required;
- international best practice in this area is not well-documented;
- the evaluation of the assistance to Bankorp/ABSA against domestic and international best practice is complicated by the confidentiality surrounding such assistance in most countries, the time lapse since the assistance, and changing standards over time; and
- the assistance to Bankorp/ABSA has been the subject of continued media speculation for almost a decade.

In the consideration of its work programme and the analysis of available documentation, the Panel noted that the assistance granted to Bankorp/ABSA by the S A Reserve Bank has not only been the topic of media speculation over many years, but has also been investigated previously by a number of bodies, e.g. the Heath Special Investigative Unit. The difficulty which has confronted this entire issue has been the plethora of speculation and an absence of any set of clear conclusions based on an evaluation of evidence. The Panel had hoped, when it commenced its work, to have access to a comprehensive report from the Heath Unit on the assistance granted to Bankorp/ABSA following its lengthy period of investigation. However, despite requests by the Panel for a copy of a report by the Heath Unit, all that was made available was a draft summons and a media release, both of which proved to be substantively defective for reasons which will become apparent in further chapters of this Report. The unfortunate effect of these documents was that they created considerable confusion among public commentators, in particular regarding the quantum of any benefit, the identity of any beneficiaries and the considerable legal difficulties in pursuing litigation. Accordingly, one of the major objectives of the Panel was to produce a comprehensive Report and conclusions based on available evidence that would allow clarity and thus closure of this entire issue to be achieved.

This Report is based primarily on an analysis of documents listed in Annexures 4 and 5 to this Report, and interviews conducted by the Panel with:

- Dr CL Stals, Senior Deputy Governor of the S A Reserve Bank, 1981 to 1985, and Governor of the S A Reserve Bank, 1989 to 1999;

- Dr DC Cronjé (Group Chairman), Mr FJ du Toit (Group Executive Director: Finance), Mr JH Shindehütte (Group Executive: Finance) and JN Wepener (General Manager: Group Legal Services) of ABSA;
- Mr AS du Plessis, Executive Director: Sanlam, appearing in his private capacity; and
- Mr G Hoggarth, Senior Economist: Financial Industry and Regulation Division, of the Bank of England.

The Panel met on the following dates:

- from 1 to 3 September 2000 in Pretoria;
- on 27 and 28 October 2000 in Cape Town;
- from 26 to 28 January 2001 in Cape Town;
- from 23 to 25 February 2001 in Cape Town;
- on 27 and 28 April 2001 in London;
- from 8 to 10 June 2001 in Pretoria; and
- on 28 and 29 July 2001 in Cape Town.

1.3 Structure of the Report

CHAPTER ONE is an introduction following the executive summary.

CHAPTER TWO outlines the general economic, social, political and institutional environment at the time of the assistance.

CHAPTER THREE provides a chronology of the events concerning the assistance to Bankorp and its subsequent acquisition by ABSA.

CHAPTER FOUR relates to the Panel's first term of reference and considers the legality of the assistance to Bankorp/ABSA.

CHAPTER FIVE relates to the Panel's second term of reference and reviews the assistance to Bankorp in the context of the contemporary practices of the S A Reserve Bank for assisting banks in distress.

CHAPTER SIX relates to the third term of reference and analyses international practice for assisting banks in distress.

CHAPTER SEVEN relates to the fifth term of reference and considers the question of restitution. A legal opinion on this issue is attached as Annexure 3.

CHAPTER EIGHT, addressing the Panel's fourth term of reference, evaluates the current practice of the SA Reserve Bank in respect of distressed banks and related aspects of South Africa's financial and regulatory architecture.

CHAPTER NINE summarises the Panel's conclusions.

Five **ANNEXURES** accompany this Report.

1.4 Words of thanks

The Panel is greatly indebted to Mr JJ Rossouw for the superb assistance afforded to it throughout its work.

The Panel acknowledges the considerable effort of Mrs HM Nel of the S A Reserve Bank in the preparation of this Report.