

## 7 CHAPTER 7: CONSIDERATION OF RESTITUTION

**(Fifth term of reference: to consider 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, whether restitution can be claimed, and if so, the manner thereof)**

### 7.1 Possible action by the S A Reserve Bank

On the basis of the Panel's finding (Chapter 4) that the agreements concluded from 1990 onwards between the S A Reserve Bank and Bankorp and thereafter ABSA were legally invalid in that the Bank acted outside the scope of its statutory powers, it is necessary to consider the question posed in the fifth term of reference, namely whether restitution can be claimed and, if so, in what manner.

Given the finding that the contracts were illegal, it would not be possible for the S A Reserve Bank to recover any loss under the law of contract. However, another legal avenue is open in such cases, namely on the basis of unjustified enrichment enjoyed by Bankorp/ABSA.

An analysis of the law relating to an enrichment action is both complex and, of necessity, entails a technical legal discussion. Accordingly the technical legal issues are canvassed in a separate Annexure to this Report (Annexure 3).

South African law accepts that performance under an illegal contract can be claimed, even in circumstances where the claimant does not come to court with clean hands, that is without turpitude. Even in such a case, considerations of public policy can justify a decision in favour of the claimant.

Notwithstanding allegations in the public domain about conspiracies, the Panel did not find any evidence which would have justified such a conclusion. Accordingly, the S A Reserve Bank would not come to court in a position where its previous office bearers were shown to have acted with knowledge of the Bank's lack of legal capacity to enter into such a transaction. Even if this was the case, there would be a compelling argument that public interest favoured restitution to a public institution which had been impoverished and which impoverishment would be for the account of the public.

For these reasons, the Panel concludes that, save for the determination as to the identity of the parties who benefited and proof of the amount of such benefits, the Reserve Bank would be legally justified in instituting an enrichment claim for its impoverishment caused by the donation of its funds to Bankorp/ABSA, in terms of which the latter parties had been enriched.

The issue of the nature of the benefits and the identity of any beneficiary is also important in that Sanlam, in documents placed before the Panel, adopted the approach that the Bank would be estopped from denying the validity of their conduct in granting the assistance. Without entering into a comprehensive analysis of the law of estoppel, an essential requirement is that the party pleading estoppel has to show that in acting on the strength of the representation, he altered his position to his prejudice (Autolec Ltd v Du Plessis 1965 (2) SA 243 (O) at 250H). Significantly Sanlam has argued, as set out below, that it did not benefit from the assistance granted to Bankorp. Hence the importance of the nature of any benefit to the evaluation of the validity of an argument based upon estoppel.

However, any possible action would be based upon enrichment as opposed to contract where estoppel may be relevant. Thus proof of the existence of a beneficiary would be the critical issue.

## **7.2 Quantification of benefits**

The question arises as to who benefited from these packages. In its evidence to the Panel, ABSA argued that the price paid by it for the Bankorp shares was enhanced by reason of the Reserve Bank assistance; in other words the price it paid took account of the value of the assistance of the Bank. ABSA was thus not enriched. On the basis of this argument the only possible direct beneficiaries of the assistance were the selling shareholders who benefited by virtue of the price paid to them for their shares.

By contrast Sanlam adopted the approach that it had contributed by the underwriting of rights issues of Bankorp and the taking up of shares pursuant to the assistance and thus had not been enriched. Further they contended that the enrichment, if any, was based upon an interest differential which was not recoverable in terms of an enrichment claim. To the extent that it could be contended that Sanlam benefited from the sale of shares, this could only constitute an “obscure” indirect benefit.

For reasons set out in Chapter 4, the Panel considers that the payment by the Reserve Bank to Bankorp/ABSA amounted to a gratuitous transfer of money, albeit that it was calculated on the basis of an interest differential. To determine whether an enrichment action could be justified, it becomes important to examine, on the basis of the available evidence, the possible benefits and the identity of the beneficiaries from such assistance.

ABSA paid R 1 230 million for the acquisition of all Bankorp ordinary shares in exchange for the allotment by ABSA on a ratio of 100 ABSA shares for every 390 Bankorp shares held.

At the time of the takeover, the cumulative value of the net interest stream (received and receivable) under the assistance packages since 1985 amounted to R 1 295 million. The purpose of the assistance packages was to make good the losses which Bankorp shareholders had incurred on irrecoverable debts. The eligible delinquent debts had been listed and, in fact, it was subsequently discovered that they amounted to less than Bankorp's total holdings of delinquent debts.

At the time of the takeover by ABSA, losses had already been recognised by Bankorp and the effect of the assistance packages was incorporated in the net asset value of Bankorp. A key point is that the value of the assistance packages incorporated into the net asset value was the accounting value of the total net interest stream (grant) already agreed with the Reserve Bank as continuing to 1995. Therefore, if ABSA paid a price equivalent to net asset value, it paid for the expected future interest stream (grant).

Indeed, before concluding the takeover ABSA sought and received assurance from the Reserve Bank, that in the event of a takeover in 1992, the assistance package would continue on the same central financial terms and for the same period as Bankorp had already agreed with the Reserve Bank.

In terms of ABSA's evidence presented, the Panel established that if the assistance package had been terminated at the time of the takeover, either ABSA would have paid a lower price for Bankorp, or there would have been no transaction.

Available information indicates:

Total purchase price paid by ABSA	R 1 230 million
Net asset value of Bankorp	R 1 222 million

The price paid was practically equivalent to Bankorp's calculated net asset value of R 1 222 million. ABSA paid 288,5 cents per Bankorp share in April 1992, whilst Bankorp's last quoted share price on 31 March 1992 was 280 cents.

The Panel is of the view that ABSA paid for the continued assistance of Bankorp by the Reserve Bank and therefore could not be regarded as beneficiaries of the Reserve Bank package.

### **7.2.1 Bankorp shareholders**

The Panel has distinguished between the majority shareholder and the minority shareholders at the time of the takeover. Sanlam, the majority shareholder (which held 88 per cent of the shares at the time of the takeover), was involved in the negotiations regarding the future of Bankorp and was well aware of the consequences of the negotiations; the minority shareholders were a passive party. Therefore, the intention of Sanlam was crucial to a conclusion as to what could have happened to Bankorp without an assistance package.

Dr Stals told the Panel that, in his view, ABSA would not have taken over Bankorp without the assistance package. The majority shareholder of Bankorp would not have any interest in selling at a lower price, hence the continuation of the assistance was a condition of the transaction between Sanlam and ABSA. This evidence supports the conclusion that the major Bankorp shareholder was aware that it would have received no value or less value for their shareholding absent Reserve Bank assistance.

Sanlam, as the major shareholder, was a major beneficiary of the Reserve Bank assistance package. Minority shareholders also benefited.

### **7.2.2 Quantum of the benefits**

Due to the complex nature of the impact the various packages might have had on the value of capital invested in Bankorp, it is difficult for the Panel to assess with

accuracy the quantum of the benefits derived by Bankorp shareholders. However, the value of the net interest stream (grants) which was received by Bankorp from the Reserve Bank was as follows:

	Nominal value (R'000)
1985 to 1986	20 000
1986 to 1990 (R30 million per annum)	150 000
June 1991	150 000
June 1992	225 000
June 1993	225 000
June 1994	225 000
June 1995	225 000
June 1996	<u>75 000</u>
	1 295 000

An argument of Sanlam is that, as a condition of the Reserve Bank assistance, they injected additional capital in Bankorp. Owing to this capital injection and the subsequent capitalisation of dividends, Sanlam's shareholding of Bankorp had increased to 88 per cent by 1992. Moreover, Sanlam had to provide a low-interest loan to Bankorp, yielding a net interest of R 51 million per annum for 10 years. The financial effect could be summarised as:

	Nominal value (R'000)
Rights offer in 1990	
(some 80 per cent of R 526 million)	419 000
Net interest stream of R 51 million per annum for 10 years	<u>510 000</u>
Capital injection by Sanlam from 1990	929 000

In these calculations the Panel has not taken account of the rights offer in 1989 because it appears that Sanlam would have made that contribution in any event. It also ignored the R 45 million capitalised dividends, which would not have been received had Bankorp been liquidated in 1990.

At the purchase of Bankorp in 1992, ABSA paid Bankorp shareholders a total amount of R 1 230 million. Of this amount, 88 per cent was paid to Sanlam as the majority shareholder, whilst the minority shareholders received the balance. However, after completion of a due diligence by ABSA and a deterioration in the financial position of Bankorp, Sanlam repaid in total an amount R 151,5 million to ABSA (although minority shareholders made no repayments). Therefore, the net proceeds to Sanlam were:

	Nominal values (R'000)
ABSA's purchase price	1 230 000
Less: payment to minorities	<u>147 600</u>
Initial payment to Sanlam	1 082 400
Less repayment by Sanlam	<u>151 500</u>
Net proceeds to Sanlam	930 900

On these figures, it can be argued that Sanlam received a benefit of approximately R 1,9 million (R 930,9 million less R 929 million) at the time of takeover by ABSA. However, this conclusion ignores the real possibility that Sanlam could have been required to inject further funds to ensure the continued existence of Bankorp without the Reserve Bank assistance. To have walked away and written off its investment in Bankorp would have risked possible litigation from depositors and other adverse consequences from such an action.

The value of the net interest stream (grant) amounted to R 1 295 million and the additional capital Sanlam invested as a condition of the Reserve Bank's assistance package amounted to R 929 million. This indicates Bankorp's required capital injection and, had it not been for the Reserve Bank, Sanlam would have had to inject an additional R 1 295 million to ensure Bankorp's continued existence.

The sums presented here represent the book value of the transactions at the time they occurred. In relation to any claim for restitution these sums would have to be adjusted to allow for the passage of time to the date of restitution.

The Panel is of the view that the difficulties pertaining to the quantification of the enrichment and the identity of the beneficiaries (e.g. as a mutual society at the time,

much of the enrichment would have been enjoyed by Sanlam's policy holders) render problematic the prosecution of an enrichment claim.