

REPUBLIC OF SOUTH AFRICA

FINANCIAL SECTOR LAWS AMENDMENT BILL

*(As introduced in the National Assembly (proposed section 75); explanatory summary of
Bill and prior notice of its introduction published in Government Gazette No. 43441
of 17 June 2020)*
(The English text is the official text of the Bill)

(MINISTER OF FINANCE)

[B 15—2020]

ISBN 978-1-4850-0651-0

No. of copies printed350

GENERAL EXPLANATORY NOTE:

[] Words in bold type in square brackets indicate omissions from existing enactments.

 Words underlined with a solid line indicate insertions in existing enactments.

BILL

To amend—

- the Insolvency Act, 1936, to clarify that the provisions of the Financial Sector Regulation Act, 2017, apply to the liquidation or sequestration of the estate of a designated institution; to exclude dispositions made in case of resolution from the application of the Insolvency Act; to clarify and refine the application of certain provisions of the Insolvency Act;
- the South African Reserve Bank Act, 1989, to provide for the performance of resolution functions by the Reserve Bank;
- the Banks Act, 1990, to exclude banks in resolution from the application of certain provisions; to provide for set-off against any amounts paid by the Corporation for Deposit Insurance; to repeal certain provisions;
- the Mutual Banks Act, 1993, to provide for the issuing of guidance notes and directives by the Prudential Authority; to provide for an offence in the case of non-compliance with a directive; to repeal certain provisions; to exclude a mutual bank in resolution from the application of certain provisions;
- the Competition Act, 1998, to exclude transactions in relation to resolution from the application of certain provisions; and to provide for consultation with the Competition Commission in relation to certain transactions;
- the Financial Institutions (Protection of Funds) Act, 2001, to exclude designated institutions in resolution from the application of certain provisions;
- the Co-operative Banks Act, 2007, so as to repeal certain provisions; and to exclude the application of certain provisions to co-operative banks as designated institutions;
- the Companies Act, 2008, to provide for the winding up of a company in resolution in certain circumstances; to exclude transactions, amalgamations or mergers or arrangements in relation to resolution from the application of certain provisions; to exclude an institution in resolution from the application of a Chapter;
- the Financial Markets Act, 2012, to exclude designated institutions from the application of certain provisions; and to exclude designated institutions in resolution from the application of certain provisions;
- the Financial Sector Regulation Act, 2017, to provide for the establishment of a framework for the resolution of designated institutions to ensure that the impact or potential impact of a failure of a designated institution on financial stability is managed appropriately; to designate the Reserve Bank as the resolution authority; to establish a deposit insurance scheme, including a Corporation for Deposit Insurance and a Deposit Insurance Fund; to provide for co-ordination, co-operation, collaboration and consultation between the

Corporation for Deposit Insurance and other entities in relation to financial stability and the functions of those entities; to make provision for designated institutions in connection with resolution matters; to further provide for information required to assess a levy; to effect consequential and technical amendments to certain provisions; to accordingly amend the long title and the Arrangement of Sections; and

- **the Insurance Act, 2017, to exclude certain insurers from the application of a Chapter; and to provide for matters connected therewith.**

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:—

Insertion of section 22A in Act 24 of 1936

1. The following section is hereby inserted in the Insolvency Act, 1936, after section 22: 5

“Liquidation of designated institutions

22A. Notwithstanding the provisions of this Act or any other law, the provisions of the Financial Sector Regulation Act, 2017 (Act No. 9 of 2017), relating to the liquidation of a designated institution as defined in section 1 of that Act, apply to the liquidation or sequestration of the estate of the institution in terms of this Act, and the trustee may not, in terms of this Act or any other law, set aside any action taken or disposition made by the Reserve Bank in the exercise of its resolution functions in terms of the Financial Sector Regulation Act, 2017.” 10

Amendment of section 35A of Act 24 of 1936, as amended by section 1 of Act 32 of 1995, section 2 of Act 104 of 1996, section 117 of Act 36 of 2004, section 111 of Act 19 of 2012 and section 290 of Act 9 of 2017 15

2. Section 35A of the Insolvency Act, 1936, is hereby amended by the substitution for the heading of the following heading:

“Transactions on [exchange] market infrastructure”. 20

Amendment of section 83 of Act 24 of 1936, as amended by section 24 of Act 16 of 1943, section 27 of Act 99 of 1965, section 30 of Act 54 of 1991, section 290 of Act 9 of 2017, and by section 1 of Act 18 of 2019

3. Section 83 of the Insolvency Act, 1936, is hereby amended—

(a) by the substitution for subsection (5) of the following subsection: 25

“(5) The creditor shall, as soon as possible after he or she has realized such property, other than property held as security in favour of a secured creditor for obligations arising out of a master agreement defined in section 35B(2) or a transaction referred to in section 35A (including eligible collateral in terms of the applicable standards or rules made under the Financial Sector Regulation Act, 2017 (Act No. 9 of 2017), or the Financial Markets Act, 2012 (Act No. 19 of 2012)), prove in terms of section forty-four the claim thereby secured and **[he]** the creditor shall attach to the affidavit submitted in proof of **[his]** the creditor’s claim a statement of the proceeds of the realization and of the facts on which **[he]** the creditor relies for his or her preference.”; 30 35

(b) by the substitution for subsection (10) of the following subsection:

“(10) Whenever a creditor has realized his or her security, other than property held as security in favour of a secured creditor for obligations arising out of a master agreement defined in section 35B(2) or a transaction referred to in section 35A (including eligible collateral in terms of the applicable standards or rules made under the Financial Sector Regulation Act, 2017 (Act No. 9 of 2017), or the Financial Markets Act, 2012 (Act No. 19 of 2012)), as hereinbefore provided **[he]** 40

the creditor shall forthwith pay the net proceeds of the realization to the trustee, or if there is no trustee, to the Master and thereafter the creditor shall be entitled to payment, out of such proceeds, of his or her preferment claim if such claim was proved and admitted as provided by section forty-four and the trustee or the Master is satisfied that the claim was in fact secured by the property so realized. If the trustee disputes the preference, the creditor may either lay before the Master an objection under section one hundred and eleven to the trustee's account, or apply to court, after notice of motion to the trustee, for an order compelling the trustee to pay **[him]** the creditor forthwith. Upon such application the court may make such order as to it seems just.”;

- (c) by the substitution in subsection (10A)(a) for the words preceding subparagraph (i) of the following words:
 “Whenever a creditor has realized property held as security in respect of claims arising out of a master agreement defined in section 35B(2) or a transaction referred to in section 35A (including eligible collateral in terms of the applicable standards or rules under the Financial Sector Regulation Act, 2017 (Act No. 9 of 2017), or the Financial Markets Act, 2012 (Act No. 19 of 2012)), such creditor may retain the proceeds of the realization for the settlement of the secured claim and shall as soon as possible after realization—”;
- (d) by the substitution in subsection (10A)(a)(i) for the words preceding item (aa) of the following words:
 “give written notice of that fact to the trustee or the Master and provide the trustee or the Master with a certified copy of the master agreement or contract in terms of a transaction referred to in section 35A and an affidavit confirming—”; and
- (e) by the substitution in subsection (10A)(a)(i) for item (aa) of the following item:
 “(aa) that the master agreement or contract in terms of a transaction referred to in section 35A had been entered into;”.

Amendment of Arrangement of Sections of Act 24 of 1936

4. The Arrangement of Sections of the Insolvency Act, 1936, is hereby amended—
- (a) by the insertion after item 22 of the following item:
 “22A. Liquidation of designated institutions”; and
- (b) by the substitution for item 35A of the following item:
 “35A. Transactions on **[exchange]** market infrastructure”.

Amendment of section 10 of Act 90 of 1989, as amended by section 3 of Act 10 of 1993, section 5 of Act 2 of 1996, section 2 of Act 39 of 1997 and section 290 of Act 9 of 2017

5. Section 10 of the South African Reserve Bank Act, 1989, is hereby amended by the substitution in subsection (1) for paragraph (d) of the following paragraph:
 “(d) form a company or acquire shares in a **[limited]** company formed and registered in accordance with the provisions of the Companies Act, **[1973,] 2008—**
 (i) for the purposes of the performance of its resolution functions in terms of the Financial Sector Regulation Act, 2017 (Act No. 9 of 2017); or
 (ii) if the Board is of the opinion that any such acquisition will be conducive to the attainment of any of the objects of this Act;”.

Amendment of section 51 of Act 94 of 1990, as amended by section 11 of Act 9 of 1993, section 34 of Act 19 of 2003, section 22 of Act 22 of 2013 and section 1 of Act 3 of 2015

6. Section 51 of the Banks Act, 1990, is hereby amended by the deletion in subsection (1) of paragraph (c).

Amendment of section 54 of Act 94 of 1990, as amended by section 6 of Act 42 of 1992, section 12 of Act 9 of 1993, section 36 of Act 26 of 1994, section 5 of Act 55 of 1996, section 36 of Act 19 of 2003, section 13 of Act 20 of 2007, section 90 of Act 17 of 2009, section 24 of Act 22 of 2013 and section 25 of Act 9 of 1993

7. Section 54 of the Banks Act, 1990, is hereby amended by the insertion after subsection (1C) of the following subsection: 5

“(1D) This section does not apply to a bank in resolution.”.

Amendment of section 60 of Act 94 of 1990, as substituted by section 1 of Act 81 of 1991 and amended by section 39 of Act 26 of 1994, section 40 of Act 19 of 2003, section 15 of Act 20 of 2007 and section 29 of Act 22 of 2013 10

8. Section 60 of the Banks Act, 1990, is hereby amended by the substitution in subsection (1B)(b) for subparagraph (ii) of the following subparagraph:

“(ii) thereafter to set off against any amount—
 (aa) paid by the Corporation for Deposit Insurance established in terms of section 166AE of the Financial Sector Regulation Act, 2017 (Act No. 9 of 2017), to or in respect of depositors of the bank; 15
 (bb) paid to depositors by [the Authority, a deposit insurance scheme,] a financial sector regulator or any governmental body[,] as part or full compensation for the losses suffered by depositors as a result of the bank being unable to repay their deposits; and” 20

Repeal of sections 68, 69 and 69A of Act 94 of 1990

9. (1) Sections 68, 69 and 69A of the Banks Act, 1990, are hereby repealed.

(2) Despite the amendments to the Banks Act, 1990, contained in subsection (1), an investigation by a commissioner in terms of section 69A of the Banks Act, 1990, that is pending and not concluded immediately before the date on which subsection (1) comes into effect must be concluded and reported on by the commissioner in terms of that section as if it had not been repealed. 25

Amendment of section 89A of Act 94 of 1990, as inserted by section 3 of Act 3 of 2015

10. The following section is hereby substituted for section 89A of the Banks Act, 1990: 30

“Fair administrative action

89A. Any administrative action taken in terms of this Act[, **including any administrative action taken by a curator appointed in terms of section 69,**] is subject to the Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000).” 35

Amendment of section 91 of Act 94 of 1990, as amended by section 23 of Act 9 of 1993, section 56 of Act 26 of 1994, section 16 of Act 36 of 2000, section 65 of Act 19 of 2003, section 32 of Act 20 of 2007, section 47 of Act 22 of 2013 and section 290 of Act 9 of 2017 40

11. Section 91 of the Banks Act, 1990, is hereby amended by the substitution in subsection (4) for paragraph (b) of the following paragraph:

“(b) section 17(6), 21, 22(3) or (8), 32(4)(a), [69A(14),] 78(2), 82(3), 83(3)(a), 84(1A), 84(8) or subsection (1), (2) or (3) of this section (excluding the offence in terms of subsection (1)(b), referred to in paragraph (a)), shall be liable to a fine or to imprisonment for a period not exceeding five years or to both a fine and such imprisonment.” 45