Report of Commissioner, Adv JF Myburgh SC, in terms of s69A(11) of the Banks Act, 94 of 1990 - Regal Treasury Private Bank Ltd (in curatorship)

PART ONE

EXECUTIVE SUMMARY

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PART ONE

EXECUTIVE SUMMARY

Introductory

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1.1 Regal Treasury Private Bank Ltd ("Regal Bank" or "the bank") was placed in curatorship because it lost the confidence of its depositors and shareholders. The bank failed for a number of reasons:-

- the CEO, Levenstein was not a fit and proper person to be a director and CEO of a bank or its holding company, Regal Treasury Bank Holdings Ltd ("Regal Holdings" or "Holdings") and carried on the business of the bank and Holdings in a reckless manner;
- the boards of directors of the bank and its holding company acted in breach of the Banks Act[1], the regulations relating to banking, the Companies Act[2], and the standards of corporate governance and were knowingly parties to the carrying on of the business of the bank and Holdings in a reckless manner. (The boards of directors were composed of different directors

[1] Act 94 of 1990 ("Banks Act")
[2] Act 61 of 1973 ("Companies Act")

from time to time. Not all the directors were equally guilty of all the criticisms levelled against the board in this report. Some were entirely innocent. For example, some directors were members from inception until the end (Levenstein, Lurie, Buch, Diesel); some left before there were serious problems (Peter and Mark Springett, Lubner and Schneider); and some were appointed only in 2001 in an attempt to address the corporate governance concerns of the Reserve Bank (Cohen, Oosthuizen, Van der Walt and Scheepers). Part One must be read with Part Two, the body of the report, and where appropriate, with Part Three.

1.2 In addition:

- the external auditors, Ernest & Young ("EY"),
  - acted in breach of the Public Accountants and Auditors Act[3] and the Banks Act during the 2000 audit;
  - gave consent to the release of the 2001 preliminary financial results of Holdings when they had not completed the 2001 audit properly in two material respects;
- the Reserve Bank failed to act swiftly and decisively in October or November 2000 by not taking appropriate action for the removal of Levenstein as CEO.

[3] Act 80 of 1991 ("PAAB Act")

Levenstein

2 Levenstein was not a fit and proper person to be an executive director, CEO and chairman of Holdings and the bank in that:

- he did not exercise the utmost good faith and integrity in his dealings with and on behalf of the bank;
- he did not exercise reasonable skill and care;
- he did not always act in the best interests of the bank, depositors and shareholders;
- he permitted a conflict of interest to arise between his interests and those of the bank, its depositors and shareholders;
- his management of the bank was incompetent and amateurish;
- he acted dishonestly and fraudulently;
- he confused corporate governance with thuggery.

3 In short, Levenstein lacked three of the qualities required of a director of a bank in terms of s1A(a) of the Banks Act, namely:

- probity;
- competence and soundness of judgment.

4 The respects in which Levenstein was not a fit and proper person are the following:-

(1) With the support of the majority of the board Levenstein forced Peter Springett to resign for no good reason.[4]

(2) In the face of strong opposition from the Reserve Bank, he became chairman and remained CEO with the support of the majority of the directors and contrary to the recommendations of the King Report.[5] Thereafter he had unfettered power which he exercised malignantly.

(3) Having kept the Reserve Bank on a string for nineteen months, Levenstein arranged for his brother-in-law, Lurie, to be appointed chairman, with the support of the board.[6]

(4) Levenstein treated the board as an institution with utter contempt:-

- Aided and abetted by Lurie he did not get approval for the 2000 financial results.[7]
- He did not explain the Mettle deals to the board. The board was never aware of the nature and extent of the deals. Levenstein's excuses for not doing so were that the Mettle deals were an operational issue and in any event it was impossible to explain the deals to the board.[8]
- Levenstein misrepresented the Mettle deals to the board.[9] Cohen gave two illustrations. Cohen had been led to believe by Levenstein that there was an unconditional undertaking by

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4 §10 Part Two; §7 Part Three.
5 §12-14; §19 Part Two; §103 Part Three.
6 §20 Part Two; §5 Part Three.
7 §57-59 Part Two; §49 Part Three.
8 §91 Part Two; §19 part Three.

Mettle to buy 93 Grayston for R600m at the end of ten years. It was only during a meeting with Mettle on 30 May 2001 that he came to know of the right of Mettle to offer to put 93 Grayston to Regal Bank for R1.2bn at the end of fifteen years. The second was that at the joint board meeting of 30 May 2001 Levenstein said there could be no share price manipulation because the managed portfolio of 8m shares was independently managed by Mettle. It just so happened that 80% of the portfolio consisted of Regal Holdings shares.

(5) Levenstein lied to the board with impunity. He lied to the board when he told it that Lopes had been dismissed whereas in truth Lopes had resigned.[10] He lied to the board about the 93 Grayston structure. Oosthuizen testified that he asked Levenstein at a board meeting whether the 93 Grayston transaction was unconditional or not. Levenstein categorically denied that the property could revert to Regal. In Oosthuizen's words: "There was a blatant lie conveyed to me".[11]

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9 §14.3 Part Three.
10 §89.7 Part Two; §10.20-§10.22 Part Three.
11 §19.7 Part Three.

(6) Levenstein overruled the Holdings' committees. For example:

- At one time Levenstein had the final say if an advance was to be made to a client and he had the power to reverse a decision of the credit committee to turn down an application for credit taken by the credit committee.[12]
- At an investment committee meeting held on 31 January 2001 the committee decided that an independent opinion should be obtained from PWC in regard to an investment in Sempres Ltd; a presentation had to be made by the management of Sempres and then final approval by the board should be given to the transaction. On 16 March 2001 it was announced in the media that "Regal had invested in Sempres and vice versa". When Cohen confronted Levenstein because the decision of the investment committee had been completely ignored, Levenstein's response was that the transaction was cash neutral and did not need board approval. According to Cohen, Regal Bank lent Sempres about R13m – R14m to buy Holdings shares.[13]
- In about May 2001 the HR and remuneration committee approved bonuses for staff members in a total amount of R1m.

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12 §15.6 Part Three.

13 §30.2 Part Three.

Levenstein overruled the committee and reduced the bonuses to a total of ±R400 000.[14]

(7) Levenstein's main driver in running the bank was the share price of Regal Holdings shares, not the interests of depositors. Initially, there were two reasons for the emphasis on the growth of the share price: growth would have been an important element in attracting new capital into the bank and executive directors and senior management received shares to compensate them for the fact that they were under- remunerated and no provision was made for pensions.[15]

There is nothing inherently wrong with providing employees and directors with incentive shares, as long as they do not act primarily in their own interests with the predominant object of pushing up the share price. The driving force of management must not be gains in the share price in the short term. Particularly in the case of a bank, in which management has a duty to depositors to act conservatively in order, as a minimum, to preserve their deposits, an obsession with the share price is unhealthy.

Employees were encouraged to borrow money from the bank to buy shares but were prevented by Levenstein from selling their

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[14] §81 Part Three.
[15] §92 Part Three.

shares.[16] He did not want to drive the price down. So the directors and employees were unable to benefit from their ownership of shares. No incentive remained and there was no compensation for being underpaid.

The share price never met expectations. It reached a peak of 935c in about April 1999, Holdings having listed on 25 February 1999, steadily dropped to 475c in September 1999 and then climbed to 815c on 25 January 2000, a price the shares never achieved again. The price was fairly stable until about mid-April 2000 then it plunged to 315c, climbed to 510c on 25 July 2000, and thereafter remained at between 300c to 400c until 25 June 2001 when it slumped from 190c to 45c.[17]

One way the price was manipulated by Levenstein was to instruct the Incentive Trust to buy far more Holdings shares than it required to incentivise directors and employees of the bank.[18] Another way was for the Shareholders' Trust to buy shares. The two trusts steadily bought shares from 5 March 1999 until curatorship. By 31 August 2000 the two trusts between them held 14m shares, being 14% of the issued share capital of Holdings.[19]

The shares were not only bought by the trusts. At the date of listing, R23m of the bank's money was used to buy Holdings shares in the name of JL Associates, Levenstein Data and

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16 §76.9 Part Three.

17 Exhibit R141.

Forfin.[20] JL Associates and Levenstein were not legal entities; they were “account headings”, according to Lurie.[21]

The purchase of Holdings shares by the trusts was financed by Regal Bank against the sole security of the shares. As the share price declined, so did the value of the security. As at 31 August 2000, loans by the bank to the Incentive Trust were in total R51.4m against security of R33m worth of shares, a potential shortfall of R18.4m.[22] By 26 June 2001 the Incentive Trust owed the Bank R77.3m and the Shareholders Trust owed the bank R32.5m. As a nil value was ascribed to the shares, those amounts were regarded by the curator as irrecoverable.[23]

When Worldwide was unable to find a buyer for its 15% stake in Holdings in late 2000, Regal Bank bought the shares for R60m. The bank then offered the shares to Hanover Re. After KPMG had done a due diligence in 2001, Hanover Re declined the offer, with the consequence that at the date of publication of the 2001 preliminary results, 30 April 2001, and the date of curatorship, 26 June 2001, Regal Bank in its own name owned 15% of Holdings shares.[24]

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18 §17.6 Part Three.
19 §17 Part Three.
20 Part Three.
21 §90.9.1 Part Three.
22 §17.3 Part Three.
23 §17.1-§17.4 Part Three.
24 §92 Part Two; §51 Part Three.

Another way Levenstein manipulated the price was by giving the asset management division an unlawful instruction on 6 July 1999 not to sell the Holdings shares which they managed on behalf of clients.[25]

On 30 May 2001 Levenstein instructed the in-house stockbrokers to buy any Holdings shares on offer at a price of R5.30 on behalf of the Incentives Trust at a time when the trusts owned about 15% of the shares of Holdings, the legal limit. During the course of that month, May 2001, Levenstein had in addition given dealers instructions to buy Holdings shares for a fixed amount at the prevailing price. If those purchases had not been made, the price would have dropped.[26]

(8) Levenstein brooked no opposition. If you were not for him, you were against him. It was not enough for Levenstein to rid himself and the bank of anyone who stood up to him. He then harassed them and made their lives a misery. Attributes that a director might have had such as loyalty, friendship, skill, dedication, counted for nothing once a director crossed Levenstein. Levenstein even dismissed his brother Brian at the time Lopes resigned. Here is a synopsis of the way in which Levenstein dealt with directors and senior management:-

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25 §24-§26 Part Two; §6 Part Three.

26 §93.3-93.6 Part Three.

- Peter Springett was sued for the return of his shares eighteen months after he had resigned as chairman. The demand for the return was made the day after Mark, his son, had been dismissed. The litigation was mala fide – it was instituted to put pressure on Mark. There was no basis for the claim and yet it cost Peter Springett R500 000 in legal costs.[27]
- Mark Springett was dismissed for no reason without fair procedure, had criminal charges laid against him with the South African Police Services and actions instituted against him, all without any justification whatsoever.[28]
- Schneider was forced off the board of Holdings for calling for a meeting of the board to discuss the Mark Springett matter and for refusing to sign a round robin resolution to dismiss Mark, an entirely justifiable attitude to adopt.[29]
- Lubner was “removed” for the same reasons but in addition had to suffer the indignity of Levenstein barring him from attending a meeting of the board of directors of which he was a member and which the Reserve Bank was to attend.[30]
- Lopes was harassed: he was arrested; he spent a night in gaol; he faced criminal prosecution; terrible accusations were levelled

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27 §33 Part Two; §7 Part Three.
28 §24-32 Part Two; §6 Part Three.
29 §34 Part Two; §12 Part Three.
30 §34 Part Two; §9 Part Three.

at him; he was sued: all at the instigation of Levenstein. And all without any justification.[31]

- Brian Levenstein was dismissed by Levenstein on the day Lopes resigned when Brian confronted his brother about the consequences of an executive director resigning so soon after the branding income debacle. He was dismissed for insubordination. He was later re-employed in a nominal capacity to make peace within the Levenstein family.[32]
- Krowitz was one of the founders of the bank and a staunch ally of Levenstein during the Mark Springett saga. He was telephoned by Radus one night in November 1999 to be told that he had been suspended by Levenstein for “moaning”. He remained suspended until the December holidays. On his return he nominally worked at the bank until March 2000 when he resigned. Krowitz said that Levenstein “chopped off my head with no compunction”.[33]
- Nhleko was a non-executive director and the representative of Worldwide, the largest shareholder in Holdings. He attended only one board meeting in 2000, the one on 31 January 2000. Nhleko’s version is that when he refused to rubber stamp Levenstein’s demand for a R2m bonus and the allocation of 5m Regal Holdings shares, Levenstein “was quite abrasive” towards

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31 §89 Part Two; §10 Part Three.

32 §11 Part Three.

him. He came to the conclusion that his role on the board was inappropriate. Levenstein's explanation for Nhleko's non-attendance was that when Levenstein raised the issue of Worldwide's failure to bring in R1bn worth of asset management to Regal Bank, Nhleko was "… unbelievably aggrieved by the fact that I had effectively embarrassed him in front of the other board members".[34]

(9) Levenstein treated his directors in that shameful way by design. He wanted the remaining members of the board and management to be intimidated by him. If he gave an instruction, even an unlawful one, he expected that it be carried out. And unlawful instructions were carried out, time and time again, by people who should have known better.

(10) But if a director or employee was sycophantic and proved willing to carry out Levenstein's bidding, he was rewarded. Three examples suffice to make the point.

- Rabins was paid R1.1m on 29 September 2000 on the instructions of Levenstein. There is no apparent justification for that amount.[35]
- Van Rensburg was paid cash of R3 000 a month for a number of months in addition to his salary and Levenstein gave him a motor car valued at R180 000 paid for by the bank. The

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33 §88.1 Part Three.
34 §8 Part Three.
35 §76.6 Part Three.

justification for the transfer of the motor vehicle was a "restraint" but no agreement incorporating a restraint of trade was ever concluded between the bank and Van Rensburg.[36]

- Radus was given a motor vehicle costing the bank R332 950 by Levenstein as a "restraint", but Radus did not sign a restraint of trade agreement. Levenstein allowed Radus to remain on the payroll of the bank for two years from 1 February 2001 without the necessity for Radus to work at the bank. Radus said he worked at home on the bank's affairs, a story which is as credible as that of the tooth fairy.[37]

(11) Levenstein ran the bank with less sophistication than one would expect from the local fish-and-chips shop:-

- There was no human resources ("HR") department until that function was outsourced to Deloitte & Touche in late 2000.[38]
- There was no formal human resources and remuneration policy.[39]
- Levenstein had the sole discretion as to who received what benefits, bonuses and shares. In 2001 the HR and remuneration committee approved bonuses for staff members in a total amount of about R1m. Levenstein overruled the committee and approved bonuses in the amount of only about R400 000. Six

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36 §91.13 Part Three.
37 §76.7 Part Three.
38 §13.4 Part Three.
39 §81 Part Three.

members of the executive committee, including executive directors, were awarded bonuses in a total amount of R1m. Levenstein alone received R460 000, more than what all employees received together.[40]

- Levenstein gave instructions to Van Rensburg to have employees of Regal Securities followed to check what contact they had with SASFIN. A private detective was hired to investigate Lopes after he had resigned. Jacobson was followed for a week, as was Steen.[41]
- While Levenstein expected the executive directors, management and employees to adopt a "culture of sacrifice", he arranged for himself in the period February 2000 to May 2001 to be paid bonuses in the amounts of R2m, R650 000 and R460 000.[42]
- Another way the "culture of sacrifice" was undermined to the advantage of some employees and directors was by the payment of "loans" in anticipation of bonuses being earned. Levenstein alone received R870 000 during the period 6 February 1998 to 25 July 2000. The payments were hidden from scrutiny by the moneys being advanced by Regal Bank to the Shareholders Trust which, in turn, paid Levenstein the amounts.[43]

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40 §81 Part Three.
41 §91.13.3 Part Three.
42 §89 Part Three.
43 §89 Part Three.

- Employees were underpaid, given Holdings shares to incentivise them, and then not allowed to sell the shares.[44]
- There was a general lack of information regarding the employment relationship of the employees of Regal Bank.[45]
- The bank purchased motor vehicles, allocated the vehicles to employees, but did not transfer the vehicles to the employees. The result was that the motor vehicles were shown as assets of the bank while the employees regarded the motor vehicles as belonging to them, as part of their remuneration package.[46]
- Some employees were paid amounts for intellectual capital but there was no written or documentary confirmation of the payments and no evidence of appropriate approvals having been given for the payments.[47]
- Certain employees were described as “contractors”, whereas in reality they were employees. The incorrect label was given to the relationship for labour law and tax reasons.[48]
- There was no formal budget procedure and very few managers knew how to prepare a budget.[49]

(12) The financial affairs of the bank managed by Levenstein was a shambles:-

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44 §81; §76.9 Part Three.
45 §76.9 Part Three.
46 §76.9 Part Three.
47 §76.9 Part Three.
48 §76.9 Part Three.
49 §79 part Three.

- The chief financial officer ("CFO") of the bank from August 2000 was Ms de Castro. Until then Davis had been the CFO. Levenstein appointed de Castro as CFO even though she was only twenty-eight years old and had limited experience. She previously worked for Levenstein & Partners. Despite her title of CFO, de Castro was not in reality the CFO: she reported to Davis, not to Levenstein; she did not report to the board as CFO and she did not attend audit committee meetings.[50]
- The finance department was under-resourced. The financial reporting systems were inadequate.[51]
- Members of the department, including the nominal CFO, de Castro, carried out the instructions of Levenstein when they should not have done so. These examples of instructions given by Levenstein were given by de Castro in evidence:
  - ♦ to move all assets from one company to the other at book value because the depreciation that was being reflected in the financial results was too high and Levenstein was trying to cut costs;
  - ♦ he issued an instruction that depreciation was not allowed to be more than R200 000 a month; that was achieved by reducing the depreciation rates to below market norms;

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50 §77 Part Three.

51 §76.8 Part Three.

- two motor vehicles that were bought by the bank were moved from the books of the bank to restraint of trade and depreciated over twenty years.[52]

- Levenstein gave instructions that certain expenditures and questionable loans were to be offset against the Mettle Reserve account in the treasury department. The total debits to that account were in the region of R20m. The effect of those entries was to understate the expenditure by an amount of R20m for the 2001 financial year.[53]
- One of Levenstein's boasts was that Regal Bank had no bad debt. Within the week that he was there, however, Robinson came to the conclusion that there was between R30m and R50m in bad debts.[54]
- Accounts were not correctly described, for example, "overnight loans" were either not loans or not "overnight" loans and the so-called sale of Kgoro was reflected as a liability in an account styled "BOE Bank".[55]
- There was no effective internal audit department until late December or early 2001 when PricewaterhouseCoopers ("PWC") were appointed internal auditors.[56]

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52 §78 Part Three.
53 §86 Part Three.
54 §75 Part Three.
55 §76.2; §51.5 Part Three.
56 §21 Part Two.

- After curatorship it was established that the fixed asset register was not up to date. The depreciation rates on computer software, computer equipment and restraints of trade were not in accordance with GAAP or the rates recognised by the Receiver of Revenue.[57]
- In April 2001 Levenstein gave instructions that certain adjustments be made. One of the adjustments was a revaluation of art and furniture in an amount of R3.5m which was shown in a deferred income account. The result was that income would be inflated by that amount. There was no market valuation to support the revaluation. An amount of R2.9m was reversed by the new financial director, Zarca.[58]
- Zarca discovered after 1 July 2001 that the depositors' suspense account had never been reconciled. A reconciliation should take place at the end of each day. If a reconciliation is not done, there is a risk that incorrect information is given to depositors.[59]
- Income and expenditure attributable to the bank were reflected in the books of the Shareholders Trust to avoid dealing with them in the income statement of the bank.[60]

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57 §76.6 Part Three.
58 §76.6 Part Three.
59 §76.7 Part Three.
60 DT(1)13.

- Zarca found that a treasury bank reconciliation had not been done for some time, which could have resulted in considerable risk for the bank.[61]
- The bank's suspense account had not been reconciled for some time and as at 30 June 2001 there was R25m credit in the account.[62]
- It was unclear whether VAT had been claimed correctly or at all. The development of 93 Grayston had not been registered for VAT, with the result that R6m in input credits had never been claimed from the Receiver of Revenue.[63]
- DI returns which were inaccurate in material respects were submitted by the bank to the Reserve Bank.[64]
- On the day of curatorship Levenstein instructed Diesel to transfer R15m from the Mettle Reserve account to JL Trust overnight loan and to transfer R7m from the Mettle Reserve account to Forfin overnight loan account.[65]

(13) Although Levenstein's branding model was not original, it was a legitimate business venture. The pressure was on Levenstein in 1999 to do something about the share price, which was performing below expectations. Left to its own devices, the bank would have remained small in size and achieved modest returns

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61 §76.7 Part Three.
62 §76.7 Part Three.
63 §76.7 Part Three.
64 §87 Part Three.

for its investors and depositors. That was not good enough for Levenstein, hence the branding model. By April 2000, however, none of the branded entities had achieved any income for Holdings. Actual income was a *spes* (hope). The problem for Levenstein was that Holdings' results for 2000 were less than impressive without the recognition of some branding income. The profit for 1999 had been R50.2m. Without branding income, the profit for 2000 was 44m. The solution was to add R55m in branding income and, hey presto, profit was R99m, double what it had been the previous financial year.[66]

The bloody encounter with EY and KPMG during the 2000 audit left Holdings with only R5.5m recognised branding income. Holdings, in consequence, did have a slightly better year than the previous year, but only because R6m of "branding expenditure" was deferred.

After all the fuss one would have expected Levenstein to push for the branded entities to perform as he had said they would. He once boasted that "my branding, financial model has the capacity to enhance GDP boundaries for the country". But no, no more was to be heard of the branding model, except when it came to the recognition of income. Levenstein's evidence was that "…Tactically because of the madness of year-end 2000 we decided to minimise the

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65 §90.12 Part Three.

66 §48 Part Two; §45 Part Three.

emphasis on branding". EY's valuations at year-end 2001 of branding entities were Medsurg R2.5m, Regal Protea Health R1m, Regal Virtual Solutions nil and Kgoro, nil. At year-end, two of the branded entities were probably insolvent: Kgoro with an accumulated loss of R3.7m and Regal Virtual Solutions with a negative equity of R1.2m.

The conclusion one comes to is that Levenstein was never genuine about branding unless "income" could be earned from the concept from the beginning, without the branded entities being given the time and opportunity to prove themselves and to establish a track record.

(14) Without income from branding, how else could Levenstein show that Regal Bank was growing and worthy of attracting new deposits and new capital? He turned to structured finance.[67] He had a willing partner in Mettle Ltd. Eight of the ten Mettle deals were done after 16 May 2000, after Levenstein had lost enthusiasm for the branding model. The Mettle transactions were not illegal and were enforceable. Properly disclosed in the financial statements, they might have seen out their days. Properly disclosed they might not have had a material negative impact on the financial results. The Reserve Bank (and the shareholders) might have not been enchanted by the structures, however. Martin of the BSD testified that Regal Bank "deviated

significantly from its stated business objective of being a niche based private bank when it began entering into many structured transactions which do not fall into the realm of private banking". The way the Mettle deals *were* disclosed, the assets and liabilities showed a spectacular growth within the space of a year from ± R1bn to R1.6bn and income was inflated. It was all an illusion, a mirage for the thirsty investor in the desert. Levenstein, himself an auditor, knew that if the auditors became aware of the true state of affairs, they were bound to reflect the reality in the financial statements. And that did not suit Levenstein. So he did not make full disclosure. The preliminary results published on 30 April 2001 showed a distorted picture. Once EY realised that they had not seen all the Mettle deals and that the "risk and reward" of most of the deals lay with the bank, they were bound to withdraw their consent to the preliminary results. And that was the end of the bank.

(15) The most graphic and simple way of demonstrating how mediocre the performance of Regal Holdings (and of Regal Bank) was without branding and the Mettle deals is the following analysis:

[A] Assets and liabilities (in millions)

1999	2000		2001	
	Audited	Without Mettle	Audited	Without Mettle

[67] §91 Part Two; §18 Part Three.

Assets	723.1	998.1	±833.1	1593.8	±942.8
Liabilities	325.5	581.8	±406.8	1143.4	±596.4

[B] Income before taxation (profit) (in millions)

	1999	2000	2001
Income before taxation	50.2	55.5	71.5
Less: (i) Branding Income		5.5	21.1
(ii) Deferred branding expenditure		6.0	(6.0)
(iii) Other adjustments Proposed by EY			15.0
(iv) Surplus on revaluation of 93 Grayston			36.5
	50.2	44	4.9

Those figures do not take into account potential losses referred to in §59 Part Three or the effect of the spurious entries in the amount of R20m and R6m referred to in §86 Part Three and §51.26 Part Three respectively.

(16) In order to run the bank as a one man show, Levenstein ensured that the committees of Holdings did not function properly:-[68]

- He was a member of seven of the eight committees.
- He was the chairman of five of the eight committees.

[68] §15 Part Three.

- He was a member of the audit committee at a time when he was chairman of the board, contrary to the Banks Act and the King Report.
- Most of the committees did not keep minutes.
- Many of the committees were committees in name only. For example, the remuneration committee did not set the remuneration levels for executives and had no formal written policy for executive remuneration.
- Levenstein did not ensure that the auditors attended audit committee meetings. During the 2000 audit he gave an instruction that the auditors were not to be invited to an audit committee meeting which had been called "to approve the financials".[69]

(17) Rather than to concede that he was wrong about the recognition of branding income during the 2000 audit, Levenstein stubbornly, irrationally and mala fide persisted with his view: at three meetings with EY between 12 April and 15 May 2000, in correspondence with EY on 14 April and 15 May 2000 and in correspondence with the Reserve Bank on 4 May, 5 May and 14 May 2000. Levenstein was mala fide because he knew that the branding income could not be recognised in terms of GAAP (despite the fact that Holdings accounts were prepared in accordance with GAAP). At the meeting with the Reserve Bank on 15 May he persisted with

his attitude in the face of a threat by the Reserve Bank to close down the bank if EY qualified the 2000 results. Had Lurie and Buch not persuaded Levenstein to back down late on 15 May 2000, the bank would have been closed down then.[70]

(18) Levenstein had no idea of the concept of corporate governance or if he did have, he was indifferent to it. Many examples have been given so far in this report. Oosthuizen's evidence in this regard was the most memorable.[71] He said that Levenstein did not have the "foggiest clue" of the concept of corporate bank governance. The bank was to a large extent a one man band and the concepts of corporate governance, risk management, basic sound banking practice in many areas were disregarded or did not exist. Oosthuizen said that he could not get a straight answer from Levenstein. "I would ask a question and get an answer that totally obfuscated the issue or just totally just skirted the issue … The only direct answer that I got was when I asked the direct question, is there an irrevocable transaction sale of the Grayston Property and he said to me 'yes' – a direct lie."

<u>The directors</u>

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69 §15.7.7 Part Three.
70 §48 Part Two; §45 Part Three.
71 §85 Part Three.

5 The directors, executive and non-executive of Regal Holdings and Regal Bank ("the directors") acted in breach of the Banks Act and the regulations relating to banks[72] in that they failed:

- to act exclusively in the best interests and for the benefit of Regal Holdings, Regal Bank and its depositors[73];
- to perform their functions with diligence and care and with such a degree of competence as could reasonably be expected from a person with their knowledge and experience[74];
- to ensure that the risks that were of necessity to be taken by the bank were managed in a prudent manner[75].

6 The directors acted in breach of the standards of corporate governance recommended by the King Report[76] in that they failed:

- to exercise the utmost good faith, honesty and integrity in all their dealings with or on behalf of Regal Holdings and the bank;
- to exercise the care and skill which can reasonably be expected of persons of their expertise;
- to act in the best interests of Holdings and the bank;
- to ensure that the bank's strategies were collectively agreed by the board;

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72 Regulations published on 28 April 1996 in Government Gazette 17115 ("the regulations").
73 S60(1) and (2) of the Banks Act.
74 Reg 37(2) of the regulations.
75 Reg 37(2) of the regulations.
76 The King Report on Corporate Governance, 29 November 1994.

- to ensure that the boards of Holdings and the bank monitored the performance of management against budgets or business plans or industry norms.[77]

7 The directors were in breach of those statutory duties and the standards of corporate governance in one or more or all of the following respects:-

(1) The directors appointed Levenstein as chairman of the board at the time when he was CEO when they knew or should have known that:

- the Reserve Bank was opposed to Levenstein occupying the dual positions;
- it was contrary to sound corporate governance.[78]

(2) The directors appointed Lurie as chairman after Levenstein resigned as chairman. They did so because the Reserve Bank had insisted on the appointment of an independent chairman. The directors nevertheless appointed Lurie when they knew or should have known that Lurie was not independent or would be perceived as not being independent in that:

- he was Levenstein's brother-in-law;
- Lurie had had a long association with Levenstein;

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77 Chapter 5, §2.

78 §5 ch 7 of the King Report recommends that "The chair should be an independent and non-executive director".

- Levenstein was a domineering person who was intolerant of opposition.

(3) The directors signed the round robin resolution of August 1999 confirming the removal of Mark Springett ("Mark") from the board of Holdings:[79]

- when they knew that Mark had built up the asset management division from a zero base to managing about R500m worth of assets;
- when they had praised Mark's contribution to the bank at earlier board meetings;
- when they knew or should have known that Mark alleged that Levenstein had given the asset management division an unlawful instruction not to sell Holdings shares held by clients;
- when they knew or should have known that there were disputes of fact about that instruction and Mark's alleged misconduct;
- when they knew or should have known that Mark had called for a board meeting to discuss his dismissal;
- when they knew or should have know that Lubner and Schneider, fellow directors, had refused to sign the round robin resolution and had insisted on the matter being debated at a board meeting;

- when they knew or should have know that the appropriate way to deal with the matter was to debate it at a board meeting in view of the following:-
  - ♦ the importance of the matter – the removal of a respected member of the board;
  - ♦ the disputes of fact;
  - ♦ the chairman of the board was non-executive and not independent;
  - ♦ the chairman of the board was directly involved in the dispute;
- in condoning the dismissal of Mark as employee for no valid reason and without fair procedure.

(4) Instead of signing the round robin resolution in early August 1999 the directors should have immediately:

- removed Levenstein as chairman and appointed a non-executive director as chairman who was truly independent, and not waited until 29 September 1999 to do so;
- removed Levenstein as CEO for being unfit to occupy that position.

(5) At the joint meeting of the boards on 18 August 1999, chaired by Levenstein, it was minuted that: "The effective removal of B Lubner and G Schneider from the board and their

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[79] §24 – Part Two; §6 Part Three.

resignations were ratified and confirmed." The directors in doing so failed to act in good faith, with integrity and to exercise reasonable care. Lubner and Schneider had been forced by Levenstein to resign for acting correctly and in accordance with their duties as non-executive directors.[80]

(6) The directors who approved the payment of the R2m bonus, the R650 000 "dividends", and the allocation of 5m Holdings shares to Levenstein ("the additional remuneration") failed to act in the best interests of the bank, in good faith, with integrity, and with reasonable care, in that:

- the approval of the board was neither sought nor obtained;
- the additional remuneration was grossly excessive;
- they did not take reasonable steps to ensure that the additional remuneration was properly reflected in the financial statements of Holdings at year-end;
- the additional remuneration was contrary to Levenstein's policy of remuneration of a "culture of sacrifice" and not in accordance with a remuneration policy which was of application in an even-handed

[80] §39 Part Two.

way to all executive directors and members of senior management.

(7) The directors failed to ensure that the external auditors, EY, were invited to all audit committee meetings.[81]

(8) The board of Holdings failed:

- to ensure that the audit committee approved the financial results of 16 May 2000;
- itself to approve the results of 16 May 2000.[82]
- to ensure that the auditors approved the results of 16 May 2000;

(9) The board of Holdings failed to approve the statutory financial results published in September 2000 ("the glossies").

(10) The board of Holdings failed to consider and agree to the abandonment of the branding model during 2000 which Levenstein had promised would deliver "billions of Rands for my shareholders".

(11) The board of Holdings failed to consider and agree to the Mettle deals when they should have done so in view of the following considerations:

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81 §15.7 Part Three.

82 §49 Part Three.

- the change in strategic shift from a conservative banking model;
- the exposure to one counter-party, Mettle Ltd and its SPV's;
- the extent to which the Mettle deals purported to contribute to the balance sheet and income statement of Holdings.[83]

(12) The directors failed to act with diligence, reasonable care and competence:

- in approving or condoning the harassment of Lopes after his resignation on 18 August 2000;
- in allowing legal costs to be incurred in harassing Lopes, the Springetts and Kruger in the total amount of R1 039 496.19;
- in approving, without debate, the withdrawal of the cases against Lopes at the board meeting of 31 January 2001.

(13) The directors failed to debate, consider and approve a proper and full response to the DT s7 review at a board meeting when they should have done so in view of the many serious findings in that report.[84]

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83 §91 Part Three.
84 §74 Part Three.

(14) The directors failed to ensure that the committees of Holdings worked properly, inter alia:

- by being properly constituted;
- by having founding documents and formal terms of reference;
- by keeping proper minutes;
- by not being overruled by Levenstein.[85]

(15) The directors approved or condoned the purchase by the trusts, related parties and the bank of Holdings shares financed by Regal Bank when they should not always have done so[86]and which either constituted or bordered on improper conduct in terms of s78(1)(a),(b) or (c) of the Banks Act. In particular, the implications of the Pekane share purchase were not properly considered.

(16) The board of Holdings approved the 2001 preliminary results (published on 30 April 2001) which were inaccurate and misleading in the respects canvassed in Part Three with the consequence that the profits were overstated to a material extent.[87]

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[85] §15 Part Three.
[86] §17 Part Three.
[87] §50 Part Three.

8.1 The board of directors, including Levenstein and Buch, the chairman of the audit committee, did not ensure that the audit committee operated in accordance with the Bank's Act and the King Report.

8.2 The Banks Act provides that the board of a bank must appoint at least three of its members to form an audit committee.[88] The majority of the members, including the chairman of the audit committee, must be persons who are not employees of the bank or of its subsidiaries or of its holding company or of the holding company's subsidiaries.[89] The chairman of the board must not be appointed as a member of the audit committee.[90]

8.3 In terms of the King Report, the inter-action between the audit committee and the external auditors is an essential plank in corporate governance. The external and internal auditors and the financial director should attend all audit committee meetings. The chair of the board should not be a member of the audit committee. One of the primary functions of the audit committee should include reviewing significant transactions which are not a normal part of the company's business.[91]

8.4 The respects in which the audit committee operated in breach of the Bank's Act and the King Report were the following:-

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88 S64(1).
89 S64(2).
90 S64(2).
91 Chapter 13.

- While Levenstein was chairman of the bank or Holdings he was a member of the audit committee.[92]
- The auditors, EY, were not invited to all audit committee meetings. [93]
- The audit committee did not consider, let alone approve, the interim financial results of 31 August 1999.[94]
- The audit committee did not consider, let alone approve, the results of 16 May 2000.[95]
- The audit committee did not review the Mettle transactions.
- The audit committee did not review the Pekane transaction in terms of which Regal Bank paid Pekane R60m for its Regal Holdings shares.
- The audit committee did not review the transactions in terms of which Regal Bank financed the acquisition of Regal Holdings shares by the trusts and related parties.
- The CFO from August 2000, de Castro, was not invited to attend audit committee meetings.[96]

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92 §15.7 Part Three.
93 §15.7 Part Three.
94 §43 Part Three.
95 §49 Part Three.
96 §77 Part Three.

Non-executive directors

9 The role the non-executive directors played during the period August 1999 to December 2000 is worthy of separate analysis and comment.

10 In terms of the King Report, every director has equal responsibility whether he is an executive or a non-executive director. Directors have an equal and heavy responsibility when it comes to the question of good faith. It cannot be said that because someone is a non-executive director that his duties are less onerous than they would have been if he had been an executive director. One of the priorities of a non-executive director is to monitor and review the performance of the executive management more objectively than the executive director. A company [and for that read a bank] should not apply “cronyism” or “tokenism” in making non-executive appointments and should only make appointments on merit and the

needs of the corporation [or bank].

11 The inherent problem lay with the composition of the non-executive directors. The non-executive directors were elderly retired men (J Pollack, Slender and Kaminer) or friends or relatives of Levenstein (Lurie and Buch). Nhleko was the exception, but after the bonus dispute he had with Levenstein in January 2000, he played no further part in the affairs of the bank until Worldwide sold its shares.

12 Those particular non-executive directors either were *not* aware of their duties and responsibilities or *were* aware and acted in conflict with their duties and responsibilities. They were not prepared to do what Mark Springett described as “facing the bully in the schoolyard”. The non-executive directors might just as well have been playing bowls on a hot Sunday afternoon for all the energy they put into the discharge of their duties.

13 The non-executive directors of Holdings and the bank received no remuneration. The value of their contribution to Regal Bank was equal to their remuneration.

Ernest & Young

14 Ernest & Young were in an invidious position as the auditors of Regal Holdings:-

- They were the auditors of a client, Holdings, some of the directors of which were parties to mismanagement, deception and fraudulent non-disclosure.
- They were not invited to attend all the audit committee meetings.
- When they refused to recognise R55m of branding income during the 2000 audit they were vilified by Levenstein. In one letter, for example, dated 23 May 2000, which Levenstein wrote to the Registrar, he accused EY of being "negligent (possibly even grossly negligent) and unprofessional" and called on the Registrar "to ensure that Ernest & Young are prohibited from being appointed as statutory auditors of any South African Bank in the future".[97] Levenstein wrote that letter after: EY had been vindicated by KPMG; EY had compromised with Holdings by recognising some branding income; and EY had agreed not to qualify the 2000 statutory financial statements (glossies).[98]
- As result of the branding income dispute, EY would have resigned as auditors of Holdings and the bank if they could have done so.

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97 Exhibit N15.

98 Exhibit N8. In a letter dated 7 September 2000 which Levenstein wrote to the Registrar he accused Strydom of EY of having a "political agenda" and "conspiracy agenda".

Thereafter, they were locked into a relationship with a client with whom they did not have a relationship of trust.

- EY was not invited to the audit committee meeting of 4 September 2000 which approved the preliminary results of 31 August 2000.
- During the 2001 audit their client made false representations to them and did not disclose all the material information to them to enable EY to conduct a proper audit. Based on what was disclosed to them, EY consented to the preliminary results of 30 April 2001. After discovering the nature and extent of the non-disclosure, they were compelled to withdraw their consent.

15

15.1 Nevertheless, despite one's sympathy for EY and the fact that they alone stood up to Levenstein, EY did act in breach of the Banks Act, the banking regulations and the PAAB Act.

15.2 In terms of the Banks Act, a bank is obliged to appoint an auditor. The Registrar must approve the appointment of the auditor.[99] The auditor must furnish the Registrar with a report relating to an irregularity or suspected irregularity in the conduct of the affairs of a bank.[100] The auditor in writing must inform the Registrar of any matter which, in the opinion of the auditor, may endanger the bank's ability to continue as a going concern or

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99 S61.

100 S63(1)(a).

may impair the protection of the funds of the bank's depositors or may be contrary to the principles of sound management (including risk management) or amounts to inadequate maintenance of internal controls.[101] The regulations provide that the auditors of a bank must annually report on the bank's financial position and the results of its operations as reflected in all the DI returns that had been submitted to the Registrar as at the financial year-end of the reporting bank.[102] The auditor must annually report on any significant weaknesses in the system of internal controls relating to financial regulatory reporting, and compliance with the Banks Act and the regulations, which came to his attention while performing the necessary auditing procedures to enable him to furnish the reports required under sub regulation (2).[103]

15.3 The PAAB Act provides, in short, that if an auditor is satisfied or has reason to believe that a material irregularity has taken place which is likely to cause financial loss to the undertaking or to any of its members or creditors, he shall forthwith dispatch a report in writing to the person in charge, and, unless he has been satisfied within thirty days that no irregularity has taken place or that adequate steps have been taken for the recovery of any

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101 S63(1)(b)(ii).
102 Reg 6(1).
103 Reg 6(3).

loss caused, he shall forthwith furnish the PAAB with copies of the report.[104]

15.4 High standards of business and professional ethics are to be observed by external auditors. An external audit is an essential part of the checks and balances required and is one of the corner stones of corporate governance. Whilst auditors have to work with management they have to do so objectively and consciously aware of their accountability to the shareholders.[105]

15.5 On receipt on 17 May 2000 of the 2000 preliminary results of Holdings of 16 May 2000, EY should have reported to the directors of Holdings, the PAAB and the Reserve Bank for these reasons:

- Holdings had published the results of 16 May without the approval of EY;
- the description of the results as “audited” was false;
- Holdings had published the results without the approval of the audit committee;
- the operating expenses had been reduced by R6m on the basis that R6m of branding expenditure had been deferred without the approval of the audit committee and without the concurrence of EY;

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104 S20(5)(a) & (b).

105 Chapter 13 of King Report.

- the branding expenditure deferral of R6m could not be measured reliably and in terms of AC000 §89 should not have been recognised;
- the reference to R18m of branded expenditure was false;
- the statement that all branded expenditure had been taken into account was false because R6m had been deferred;
- the Holdings board had not approved earnings per share of 79.96 cents;
- the publication by Lurie and Levenstein of the 2000 preliminary results on 16 May 2000 was fraudulent.[106]

15.6 EY consented to the 2001 preliminary results of Holdings published on 30 April 2001. EY was at fault in respect of the 2001 audit in two material respects:-

(1) EY accepted the information furnished to them by Holdings that Pekane was a 15% shareholder and that the bank had lent “Phekani” R60m against the security of shares to the value of R70m. EY should have been sceptical of that information: Holdings was not to be trusted; EY had brought the integrity of management into question in its working papers of 29 November 2000; the “loan” of R60m was substantial; the nature of the security was vague. Had EY sought particulars of the agreement

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106 §65-§66 of Part Two; §61-63 Part Three

of loan and the security, the truth should have emerged.[107]

(2) EY should not have relied on the information Holdings furnished to it in respect of the Mettle transactions:

- the BSD had pertinently instructed EY to investigate the Mettle deals;
- the Mettle deals were significant for Holdings and the bank;
- EY knew that Holdings and Levenstein could not be trusted;
- EY had said at the meeting with the BSD on 12 February 2001 that they would meet with Mettle, long before the publication of the results on 30 April.[108]

The Registrar of Banks

16 The Registrar of Banks ("Registrar"), in carrying out his duties as the Regulator of Banks, must act discreetly and effectively, with a light touch. The Registrar cannot, and should not, become the manager of banks. In the words of a Deputy-Governor of the Bank of England: "The supervisors, of course, cannot and should not second-guess the management of individual institutions. They seek to ensure that institutions have adequate

107 §106.1 Part Two; §64 Part Three.
108 §106.2 Part Two; §65 Part Three.

capital and liquidity, fit and proper directors, managers and controllers and that there are systems and controls to monitor and contain the risk assumed. While the individual judgments, knowledge of the customers and the development of a competitive strategy may be questioned by the supervisor, the decisions themselves must remain the responsibility of each institution. Being a supervisor does not make me a shadow-director of 500 authorised banks, nor should it."[109]

17 In the management of risk, the Registrar is entitled to expect all the stakeholders in the bank, such as the shareholders, the directors, the audit committee and the external auditors of the bank, to play their part.[110]

18 The Registrar cannot act effectively unless he has sufficient and reliable information on which to make informed decisions. The Banks Act makes adequate provision for the gathering of information. In the normal course, the Registrar and the Bank Supervision Division ("BSD") of the Reserve Bank, has access to information through regular contact with banks and the information furnished on a regular basis by banks in terms of the Banks Act. If the need arises, the Registrar can obtain additional information by exercising the powers of inspection[111] which he enjoys in terms of the Act and by calling for

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109 §31.8 Part Three.
110 §32.2 Part Three.
111 S6(1).

information from a bank[112] or by directing a bank to furnish him with a report by a public accountant on any matter.[113]

19 Once the Registrar is properly informed he is in a position to make a decision and to execute the decision. At the extreme limits of his powers are the powers:-

- to apply to court for an order cancelling or suspending the Registration of a bank; [114]
- to make application for the winding-up of the bank;[115]
- to appoint a curator.[116]

If the Registrar were actually to exercise those powers, then to an extent the system of checks and balances which the Banks Act has put in place has already failed. Effective supervision by the Reserve Bank should usually avoid the necessity for taking any of those extreme measures. How then is the Registrar to regulate, without managing, discreetly and effectively, and yet avoid taking one of the extreme measures?

Until now the Registrar has done so with what he described in evidence as “moral suasion”. On occasions, such as during the 2000 audit in this case, he went further and threatened Regal Bank with the use of the stick – deregistration – if it did not fall into line. He did so effectively.

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112 S7(1)(a).
113 S7(1)(b).
114 S25.
115 S68.
116 S69.

20 The Registrar seeks greater powers:

- to remove a director from office, and
- to appoint an administrator with the power to advise a bank to apply to court for protection, similar to the Chapter 11 procedure in the United States of America, with a view to adopt the "turn-around" approach or to do a "work-out" with its creditors.[117]

21 This enquiry provides more than sufficient justification for the first additional power, the removal of a director from office. The second power, the appointment of an administrator with Chapter 11 powers, will fill a gap in the Banks Act. It is a power which could possibly have been used in this case instead of curatorship.

22 I turn now to consider whether the Registrar of Banks was at fault in any way in the demise of Regal Bank. In judging his conduct and that of the BSD one must take into account that, to their knowledge, about eleven banks had failed in the past decade for reasons of poor management and the failure of corporate governance. History repeated itself in the case of Regal Bank.

23 In most cases moral suasion probably does work, particularly when accompanied by the threat of the use of one of the extreme measures.

It is doubtful whether that would have worked in this case prior to November 2000. What the Registrar was dealing with was a lethal cocktail of an immoral megalomaniac chief executive officer and a supine board of directors which was either ignorant of, or acted in breach of, corporate governance.

24 On two separate and distinct occasions there was a serious failure of corporate governance and proof that Levenstein was unfit to be a director of a Bank, let alone chief executive officer:

- during the Mark Springett episode in July/August 1999,[118] and
- during the 2000 audit in April/May 2000.[119]

Had Levenstein been removed then, Regal Bank would have survived as a small bank showing modest – and safe – returns to depositors and shareholders.

25 The Registrar is not at fault for not acting in July/August 1999 because he did not know the extent of the breach of corporate governance. I have no doubt if the Registrar had known what the commission has discovered during this enquiry, he would have appreciated that the dispute between Mark Springett and Levenstein and the "resignations" of Schneider and Lubner necessitated a s7 enquiry. Unfortunately Schneider and Lubner did not convey to the Reserve Bank what they

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117 §31.13 Part Three.
118 §24-39 Part Two.

told the commission, namely, in short, that they were forced to resign for acting reasonably in insisting that the dismissal of Mark Springett be discussed at a board meeting. Had the Registrar known those facts and what Mark Springett told him had happened to him, and a proper s7 enquiry been conducted, proof would have been provided *at that time* that Regal Bank was heading for disaster unless Levenstein was removed and a truly independent non-executive chairman was appointed.

26 The second occasion was the 2000 audit. By 15 May 2000 the Registrar had had personal experience with Levenstein. He could and should have taken the view that Levenstein should be removed as director and CEO. In fact, at a meeting on 15 May 2000 with EY, the Registrar said that one of the options open to him was to remove Levenstein and he questioned whether Levenstein was “fit and proper to run a bank”. Can the Registrar be faulted for not taking steps then to remove Levenstein? In my view, the Registrar should get the benefit of doubt. He must have believed that the crisis with Levenstein was over: Levenstein did back down and accept EY’s view on the recognition of branding income and in EY’s letter of 17 May 2000 it was stated that EY would not qualify the statutory financial statements for 2000. It would have been an entirely different matter if EY had notified the Registrar on 17 May 2000 that Levenstein and Lurie had committed

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[119] §48-62 Part Two.

fraud and that Regal Bank had increased its profit by the deferral of R6m in branding expenditure when there was no proof whatsoever that any expenditure had been incurred on branding.

And, at that time, the bank was solvent, making a profit and there had been no run on the bank.

27 Five months later, and seven months before curatorship, the Registrar came to the conclusion that Levenstein, Lurie and four non-executive directors had to go. It was the evidence of the Registrar and Martin, deputy-general manager of the BSD, that it was their intention to tell the directors just that at a meeting with the full board of directors on 23 October 2000. However, they received legal advice that they should not convey that part of their plan of action to the board. Holdings was instead given time to respond in writing to the Deloitte & Touche ("DT") s7 report. Holdings did so on 29 November 2000. The Holdings reply was unconvincing.

28 The time had come for the Registrar to do what was expected of him. Having identified the appropriate corrective action, he was obliged to act swiftly and decisively. What was of the utmost urgency was to remove Levenstein. By then he had shown beyond doubt that he lacked three of the qualities required of a director of a bank in terms of the Banks Act, namely, probity, competence and soundness of judgment. Left to his own devices, Levenstein was sure to act in a

manner which would prejudice the depositors and shareholders. At the very time his conduct was being scrutinised by DT and the Reserve Bank was considering his removal, and thereafter until curatorship, Levenstein continued to act as before with dire consequences for depositors and shareholders.

29 The Registrar's excuse for not having Levenstein removed there and then was that he had no power to do so. True, but he could have reconvened a meeting of the directors of Holdings on 30 November or shortly thereafter and put his requirements to the board. It was his intention to do so on 23 October 2000. The bank's response of 29 November 2000 could not have changed his mind. He should have done what he had intended to do at the meeting on 23 October 2000. He could have tried "moral suasion", accompanied by threats of deregistration or curatorship. The financial position of the bank was still sound. Depositors and shareholders had not yet lost confidence in the bank. Instead what the Registrar did, inter alia, was to instruct EY at a meeting held only on 13 February 2001 to ensure compliance with the recommendations of the DT s7 report during the normal course of their audit, a process which would inevitably take time. In the result, Levenstein was replaced as CEO only on 18 June 2001, far too late.

The Shareholders

30 The directors were elected by the shareholders of Regal Holdings. The shareholders who held Holdings shares at the date of curatorship have lost their whole investment. They have no one else to blame but themselves. It was the directors that *they* elected whose actions were the main cause of the collapse of Regal Bank. In mitigation, the board of directors, its chairman, Lurie and Levenstein, its chief executive officer, kept the shareholders in the dark about the "dark side" of "Levenstein and company". The shareholders were always given a (distorted) rosy picture containing vistas of riches.

Share price manipulation

31 The commission conducted a limited investigation of the extent to which Levenstein manipulated the share price of Holdings shares[120] in view of the investigations which the Financial Services Board ("FSB") is presently conducting.

Recommendations

The continuation of curatorship

32

32.1 In terms of s69A(11)(a) of the Banks Act, the commissioner is required to express an opinion on whether or not it is in the interest of the depositors or other creditors of Regal Bank that the Bank remains under curatorship.

32.2 The curator gave evidence on 17 October 2001. He told the commission that he had reported to the Registrar on 31 August in terms of s69(2D) of the Banks Act that there was no reasonable probability that the continuation of the curatorship would enable the bank to pay its debts or meet its obligations and become a successful concern. He did so for two reasons:

- the bank's liabilities exceeds its assets significantly; and
- the curator had failed to interest the large six banks in acquiring Regal Bank as a going concern.

The curator, accordingly, is faced with the situation where he cannot sell the bank as a going concern and he must either move for the liquidation of the bank or organise a scheme of arrangement. If the bank is placed in liquidation depositors will receive 70c in the Rand, whereas if a scheme of arrangement is

[120] See §93 Part Three.

successfully negotiated, depositors will receive 75c in the Rand. The curator has had difficulty in arriving at a value of the assets:

- it has proved to be difficult to value the loans to the various property companies, Stone Manor and 93 Grayston;
- there are a number of legal actions pending against Regal Bank;
- it is difficult to estimate the prospects of recovery of a number of loans;
- in regard to many loans the only security is the holding of Regal shares, which the curator has valued at nil;
- the curator is in the process of proceeding against the borrowers in order to test their willingness and ability to repay the loans.

32.3 Investec Bank has made an indicative offer, which the curator is currently negotiating, and which may result in a scheme of arrangement by April 2002. In a letter dated 18 October 2001, the curator expressed the inclination to recommend to the Registrar that he should be given until 30 November 2001 to reach agreement with Investec Bank, failing which Regal Bank should be put under liquidation.

32.4 For the reasons advanced by the curator, it is recommended that Regal Bank remains in curatorship pending the outcome of the negotiations with Investec Bank. It is in the best interest of

depositors that a scheme of arrangement should be concluded rather than the bank being placed into liquidation.

Winding-up

33 In terms of s69A(11)(b) of the Banks Act, the commissioner is required to express an opinion whether or not it is in the interest of the depositors or other creditors of the bank that the Registrar applies to a competent court for the winding-up of the bank. Despite the fact that the bank's liabilities exceed its assets by an estimated amount of R110m, it is my opinion that unless the curator's negotiations with Investec Bank for a scheme of arrangement fail, Regal Bank should not be wound-up.

Disciplinary Steps

34

34.1 In terms of s20(8) of the PAAB Act, if a person who has been registered as an accountant and auditor:

(a) fails to perform any duties devolving upon him in the capacity of an auditor to any undertaking with such degree of skill and care as in the opinion of the board may reasonably be expected; or

(b) is negligent in the performance of such duties, the board may enquire into the circumstances.

34.2 Prima facie, the following auditors failed to perform their duties with care and skill or acted negligently:-

(a) Wixley, Van Heerden and Strydom in not reporting the fraud in the 2000 preliminary results of Holdings to the directors of Holdings, the PAAB and the Reserve Bank;[121]

(b) Strydom in issuing an unqualified opinion on the 2000 statutory financial statements of Holdings (the glossies) in the light of the above fraudulent results and the misstatement in the respects set out inter alia in §68 of Part Two;

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121 See§15.5 Part One; §65-66 Part Two.

(c) Strydom in consenting to the 2001 preliminary results of Holdings published on 30 April 2001 when he should not have done so.[122]

34.3 Accordingly, it is recommended that the Registrar refer this report to the PAAB with the request to hold an enquiry in terms of s20(8).

35

35.1 The disciplinary rules of the PAAB Act provide that any practitioner shall be guilty of improper conduct if he:

(a) without reasonable cause or excuse fails to perform any work or duties commonly performed by a practitioner with such a degree of care and skill as in the opinion of the board may reasonably be expected, or fails to perform the work or duties at all;[123]

(b) conducts himself in a manner which in improper or discreditable or unprofessional or dishonourable or unworthy on the part of a practitioner or which tends to bring the profession of accounting into disrepute.[124]

35.2 Prima facie, Wixley, Van Heerden and Strydom were guilty of improper conduct in the respects set out in §33.2 hereof.

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122 See §15.6 Part One; §106.1 Part Two.
123 §2.1.5.
124 §2.1.21.

35.3 Accordingly, it is recommended that the Registrar request the PAAB to conduct a disciplinary hearing into the conduct of those auditors.

36

36.1 The code of professional conduct ("the Code") of the South African Institute of Chartered Accountants ("the Institute") provides that a member of the accountancy profession must work to the highest standards of professionalism within a framework of professional ethics.

36.2 Prima facie, the following members of the institute breached the code in these respects:-

(a) Levenstein, inter alia, for committing fraud, misleading the auditors, the board of Holdings and the shareholders and for giving unlawful instructions;

(b) de Castro, for carrying out the unlawful instructions of Levenstein and making or authorising the making of false entries in the records of Holdings or the Bank;

(c) Davis, for carrying out the unlawful instructions of Levenstein and making or authorising the making of false entries in the records of Holdings or the Bank;

(d) Buch, as a director of Holdings and the bank,[125] and as chairman of the audit committee of Holdings,[126] for failing to carry out his duties with the necessary skill and care.

37

37.1 The code of ethics of the South African Institute of Chartered Secretaries and Administrators provides that a member is liable to disciplinary action if found guilty of misconduct, which includes the failure to exercise integrity, honesty, diligence and due care in carrying out his duties and responsibilities.

37.2 Lurie, as a member of the Institute of Chartered Secretaries and Administrators, is prima facie guilty of misconduct in that he failed to exercise integrity, honesty, diligence and due care in carrying out his duties and responsibilities as a director or chairman of Regal Holdings and the bank.

37.3 Accordingly, it is recommended that the Registrar request the South African Institute of Chartered Secretaries and Administrators to conduct a disciplinary enquiry into the conduct of Lurie.

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125 See §5-7 Part One.

126 See §8 Part One.

South African Revenue Services

38

38.1 There are a number of directors and employees of Regal Bank who received payments of money and benefits such as motor vehicles who may not have made full disclosure of those amounts and benefits to the South African Revenue Services for the purpose of paying personal income tax. A schedule containing the necessary particulars is attached to Part Three as Annexure “F”.

38.2 It is recommended that the Minister of Finance refer this report, and in particular Annexure “F”, to the South African Revenue Services for further investigation and to take appropriate action.

Publication of this report

39

39.1 In terms of s69A(13) of the Banks Act, the Registrar, after consultation with the Minister of Finance, may make part or whole of this report available to the public.

39.2 In view of the fact that the Commissioner heard most of the oral evidence in public, and there was widespread publication of the evidence, it is recommended that the whole of the report, except for §91.12 of Part Three, be published as soon as possible.

Seminars

40

40.1 One of the primary reasons for the collapse of Regal Bank was that the boards of directors of the bank and its holding company did not act in accordance with well established and, one would have thought, well-known standards of corporate governance. The non-executive directors in particular, failed to act with the necessary independence and diligence.

40.2 Accordingly, it is recommended that the Registrar consider arranging seminars with banks in order in a pro-active way to pass on the lessons learnt from the Regal debacle.

Amendments to Banks Act

41

41.1 The Registrar's view that he needs additional powers – to remove a director and to appoint an administrator with Chapter 11-like powers – is supported in principle.

41.2 The Registrar should consider amendments to s64 (audit committee) to incorporate the following recommendations in King II[127]:

> "3.3.1 …The majority of the members of the audit committee should be financially literate.
> 3.3.3 The audit committee should have written terms of reference, which deal adequately with its membership, authority and duties.
> 3.3.4 Companies should disclose in their annual report, whether or not the audit committee has adopted formal terms of reference and, if so, whether the committee satisfied its responsibilities for the year in compliance with its terms of reference.
> 3.3.5 Membership of the audit committee should be disclosed in the annual report, and the chairperson of the committee should be available to answer questions about its work at the annual general meeting."

41.3 A further amendment which should be considered is the addition of the words "or of its holding company" to the end of s78(1)(b), to read: "A bank shall not lend money to any person against security of its own shares or of its holding company".

Delinquent directors

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127 The draft King Report on Corporate Governance for South Africa ("King II").

42 Levenstein and Lurie should be disqualified from acting as directors under the Companies Act and their names should be included on any register of delinquent directors which may be opened by the Registrar of Companies in accordance with one of the recommendations of King II.

Criminal prosecutions

43

43.1 Prima facie, some directors and officers of Regal Holdings or Regal Bank committed:

- 18 counts of fraud;
- various contraventions of sections 38, 226, 249, 250, 251, 286, 288, 298 and 305 of the Companies Act;
- contraventions of section 75 read with 91 of the Banks Act.

43.2 Schedule A hereto, consisting of 89 pages, contains details of the charges.

43.3 This report will be handed by me to the Director of Public Prosecutions, Johannesburg on Friday, 16 November 2001 with the recommendation that criminal prosecutions be instituted as soon as possible.

PART ONE

ANNEXURE "A"

CRIMES

[A] 2000 Audited Results of Regal Holdings

Fraud

1 Levenstein and Lurie are guilty of the crime of fraud[1].

1.1 On or about 16 May 2000 and in Johannesburg and / or Sandton Levenstein and Lurie did unlawfully and with the intent to defraud expressly or impliedly and falsely represent[2] to EY and / or the Reserve Bank and / or Regal Bank's depositors and / or Regal Holdings' shareholders :

1.1.1 that the "Audited results for the year ended 29 February 2000" ("the 2000 preliminary results") had been audited at the time of publication thereof whereas in fact such results had not been audited at the time of such publication;

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[1] Fraud consists in unlawfully making, with intent to defraud, a misrepresentation which causes actual prejudice or which is potentially prejudicial to another : See ***Hunt, South African Criminal Law and Procedure*** Volume 2; ***Common-Law Crimes, 2nd ed., p 755***.

[2] See § 43-45; 48-64 Part Two and § 22. 35, 45, 47 and 67 Part Three. See also inter alia EY DT(1)178; KPMG170; R146; DT(1)177; E161, E55.1; E76; EY010047, EY010126; EY010227, EY010237, EY010244.3; EY010270; EY010277; EY010281; EY010292; EY010296; EY020133; EY020273; EY030427; EY130043; EY130065; EY130075; EY130077 KPMG168.

1.1.2 that the Regal Holdings board approved the year-end results reflecting earnings per share of 79,96 cents whereas in fact no board approval had been given;

1.1.3 that all expenditure incurred by Regal Bank to generate the branding income had been written off in the 2000 year whereas in fact R6m branding expenditure had been deferred;

1.1.4 that approximately R18m branding expenditure had been written off during the 2000 year whereas in fact such expenses had not been identified and written off during such year;

1.1.5 that generally accepted accounting practice allowed for setting off the abovementioned R18m branding expenditure against income deferral whereas in fact generally accepted accounting practice would not allow this as no such expenditure had been identified or incurred;

1.1.6 that a dividend was based on earnings of 79,96 cents per share "approved by the board" whereas in fact the Regal Holdings board had never approved such earnings.

1.2 At the same time and place Levenstein and Lurie, with the intent to defraud, failed to disclose :

1.2.1 to the Reserve Bank, Regal Bank's depositors and Regal Holdings' shareholders that Regal Bank had sought recognition of R55m of branding income and that only R5,5m

of branding income had been recognised by EY, incorporated in the results, and agreed to by Lurie and Levenstein;

1.2.2 to the Reserve Bank, Regal Bank's depositors and Regal Holdings' shareholders that an amount of R6 million of branding income had been deferred;

1.2.3 to Regal Bank's depositors and Regal Holdings' shareholders that EY had threatened to qualify the financial statements if Holdings insisted on including the amount of R55 million for branding income;

1.2.4 to Regal Bank's depositors and Regal Holdings' shareholders (after obtaining the written consent of the Registrar of banks in terms of section 7(5) of the Bank's Act) that KPMG was appointed by the Reserve Bank to review the different valuations provided by EY and Holdings;

1.2.5 to Regal Bank's depositors and Regal Holdings' shareholders that KPMG supported EY in principle and had opined that no income should be recognised for the branded entities.

1.3 The misrepresentations were actually or potentially prejudicial to EY and/or the Reserve Bank and/or Regal Bank's depositors and / or Regal Holdings' shareholders in one or more of the following respects:

1.3.1 the misrepresentations would or could have induced EY to express an invalid or defective audit opinion in respect of the 2001 financial year;

1.3.2 EY's audit opinion by EY would or could have influenced Regal Holdings shareholders or potential investors in Regal Holdings shares to buy, sell or hold such shares;

1.3.3 EY's audit opinion would or could affect the Reserve Bank supervisory function of Regal Bank, with potential prejudice to its depositors and Regal Holdings' shareholders.

Contravention of s 249(1) of the Companies Act

2

2.1 Levenstein and Lurie are guilty of a contravention of s 249(1)[3] of the Companies Act.

2.2 Levenstein and Lurie made statements in the 2000 preliminary results which were false in a material particular knowing them to false in the respects set out in paragraph 1 hereof.

Contravention of s 250(1) of the Companies Act

3

3.1 Levenstein and Davis are guilty of a contravention of s 250(1)[4] of the Companies Act.

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[3] s 249 **False statements and evidence**
(1) Any person who in any statement, return, report, certificate, financial statement or other document required by or for the purposes of any provision of this Act makes a statement which is false in any material particular, knowing it to be false, shall be guilty of an offence.

3.2 Levenstein and Davis, directors or officers of Regal Bank and Regal Holdings, made a false entry in a book, document, financial record or financial statement of Regal Bank or Regal Holdings:

3.2.1 by recording, in Regal Bank's accounting records, a false entry reflecting deferred expenditure of R6m;

3.2.2 by falsely reflecting in Regal Holdings' 2000 preliminary results an amount of R6m as deferred expenditure.

Contravention of s 251(1) of the Companies Act

4

4.1 Levenstein, Lurie and Davis are guilty of a contravention of s 251(1)[5] of the Companies Act.

4.2 Levenstein, Lurie and Davis, directors or officers of Regal Bank and Regal Holdings, and made, circulated or published or concurred in the

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[4] s 250 **Falsification of books and records**

(1) Any director or officer of a company or any other person who conceals, destroys, mutilates, falsifies or makes any false entry in or, with intent to defraud or deceive, makes any erasure in any book (including any minute book), register, document, financial record or financial statement of any company shall, subject to the provisions of subsection (2), be guilty of an offence.

(2) It shall be a defence to any charge under subsection (1) of concealing, mutilating, falsifying or making a false entry or erasure in any book, register, document, financial record or financial statement to prove that the accused had no intention either to defraud or to conceal any offence or any conduct which he believed might constitute an offence or render any person liable to any penalty or civil obligation.

[5] s 251 **False statement by directors and others**

(1) Every director or officer of a company or accountant employed by or auditor of a company or any other person employed generally or engaged for any special work or service by the company who makes, circulates or publishes or concurs in making, circulating or publishing any certificate, written statement, report or financial statement in relation to any property or affairs of the company which is false in any material particular, shall, subject to the provisions of subsection (2), be guilty of an offence.

(2) In any prosecution under subsection (1) it shall be a defence to prove that the person charged had, after reasonable investigation, reasonable grounds to believe and did believe that the certificate, written statement, report or financial statement was true, and that there was no omission to state any material fact necessary to make the statement as drafted not misleading.

making, circulating or publishing of a financial statement in relation to the property or affairs of Regal Bank and Regal Holdings which was false in the material particulars set out in paragraph 1 hereof.

[B] 2000 Statutory Annual Financial Statements of Regal Holdings

Contravention of s 288 of the Companies Act

5

5.1 Levenstein, Lurie, Buch and Davis are guilty of a contravention of s 288(2) read with s 288(3) of the Companies Act[6].

5.2 During or about the period 16 May 2000 to 25 October 2000 Levenstein, Lurie, Buch and Davis, directors or officers of Regal Holdings, failed to take all reasonable steps to secure that the Regal

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[6] s 288 **Obligation to lay group statements before annual general meeting**

(1) Where at the end of its financial year a company, which is not a wholly owned subsidiary of another company incorporated in the Republic (including an external company which is a subsidiary of a company incorporated in the Republic), has subsidiaries, group annual financial statements shall be made out and shall be laid before the annual general meeting of the company before which its own annual financial statements are so laid under section 286(1).

(2) Subject to the provisions of section 291 such group annual financial statements shall together with the company's own annual financial statements in conformity with generally accepted accounting practice fairly present the state of affairs and business of the company and all its subsidiaries at the end of the financial year concerned and the profit or loss of the company and all its subsidiaries for that financial year, as a whole so far as concerns the members of the company and shall for that purpose include at least the matters prescribed by Schedule 4, in so far as they are applicable and comply with any other requirements of this Act.

(3) (a) Any director or officer of a company who fails to take all reasonable steps to comply or to secure compliance with the provisions of this section or with any other requirements of this Act as to matters to be stated in group annual financial statements, shall be guilty of an offence.

(b) In any proceedings against any director or officer of a company under paragraph (a), the defence referred to in section 284 (4) (b) shall be available to him.

Holdings group annual financial statements complied with the provisions of s 288 (2) of the Companies Act.

5.3 The Regal Holdings group's 2000 annual financial statements did not comply with the provisions of s 288(2) of the Companies Act in one or more of the following respects[7]:

5.3.1 they falsely represented that Regal Holdings' corporate governance was strong, whilst in fact it was weak in number of respects;

5.3.2 they stated that the Regal group had formed the Regal Treasury Incentive Share Scheme, which was not operational at year-end. The statement was false in that by year-end amount of R15,1 million had been advanced by Regal Bank to the Regal Treasury Incentive Share trust;

5.3.3 they failed to disclose a written undertaking by Regal Holdings to issue to Levenstein 5 million Regal Holdings shares, which at the date of purported approval, gave rise to a potential commitment of approximately R36,5 million;

5.3.4 they falsely disclosed fully diluted earnings per share as 50,01 cents per share in that the 5 million Regal Holdings shares to be issued to Levenstein were not taken into account in computing such fully diluted earnings per share;

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[7] See § 67-68 Part Two and § 22,35,45, 47-49 Part Three; DT(1) 30; 58; 178; EY010277; EY020133; EY030283; EY030307; EY120133; EY130043; EY130060-130061; EY130064-65; EY130068; EY160069; EY130077; EY130077.2; EY130218 - 130237; I2:533; 581; I3:42; KD69; 71; R146; Strydom 3441

5.3.5 they falsely stated that the Regal Holdings board of directors had approved the financial statements, whereas the Regal Holdings board had never approved them;

5.3.6 they falsely stated that the financial statements had been signed by Lurie and Davis on behalf of the Regal Holdings board on 16 May 2000 when they were not available in their final and published form on 16 May 2000 and could therefore not have been signed on that date;

5.3.7 they failed to disclose that, included under the account caption of "Prepayments" of R7 million, was R6 million branding expenditure that had been deferred;

5.3.8 the R2 million bonus to Levenstein, described in the books of account as intellectual capital, was falsely included in the financial statements under the account caption "Fixed assets", instead of disclosing it separately as an intangible asset;

5.3.9 they falsely refer to "the group's conservative approach to risk management" when the group's approach to risk management was anything but conservative, as evidenced by the significant loans made to entities and non-entities to purchase Regal Holdings shares (Shareholders' Trust : R19,7 million; Incentive Trust R15,1 million; Levenstein Data 1 : R : R6,1 million; JL Associates & Trust R15,2 million; Forfin: R4,8 million and loans to start up entities with no

proven track record: Medsurg : R5,9 million; LAK Trading Company : R13,5 million);

5.3.10 they falsely indicated that there was no significant concentration of credit risk whilst in fact there was a significant concentration of risk in the following respects :

5.3.10.1 included in "Moneymarket assets and funds" of R632.8 million were preference shares in Mettle SPV's totalling approximately R162m. Those preference shares were also reflected as "Negotiable securities" whereas in fact they were preference shares, which were not readily negotiable;

5.3.10.2 included in the account caption "Advances" of R254,2 million were the following loans : Shareholders Trust : R19,7 million ; Incentive trust : R15,1 million ; Greek Community Foundation : R15,8 million.

5.3.11 they falsely reflected the total directors' remuneration as R2,1 million, thereby excluding the R2 million bonus paid by Regal bank to Levenstein;

5.3.12 they falsely failed to indicate that the Tradequick and RVM preference shares were encumbered in that their proceeds were to be used to discharge the associated deposits;

5.3.13 they falsely included under the account caption "Advances" an amount of R6,1 million in respect of Levenstein Data 1 whilst in fact such an advance to Levenstein Data 1 did not exist and failed to disclose that the R6,1 million (plus accumulated interest) had been used to acquire Regal Holdings shares;

5.3.14 they falsely included under the account caption "Advances" an amount of R15,2 million in respect of JL Associates & Trust whilst in fact such advance to J L Associates & Trust did not exist and failed to disclose that the R15,2 million (plus accumulated interest) had been used to acquire Regal Holdings shares;

5.3.15 they falsely reflected an amount of R164 145 946 as deposits from other banks whilst in fact these deposits were deposits made by Mettle SPV's in respect of Tradequick and RMV;

5.3.16 they recognised branding income of R5.5 million when such income could not be measured with sufficient reliability for it to be included in income;

5.3.17 they falsely failed to disclose related party transactions in respect of Levenstein Data 1, J L Associates and Trust, Forfin and the Shareholders Trust;

5.3.18 they failed to disclose amounts advanced to directors and managers of R2 929 099.

Contravention of s 286(4) of the Companies Act

6

6.1 Levenstein, Lurie, Buch and Davis are guilty of a contravention of s286(4) read with s 286(3) of the Companies Act[8].

6.2 During or about the period 30 May 2000 to 25 October 2000 Levenstein, Lurie, Buch and Davis, directors or officers of Regal Bank, failed to take all reasonable steps to ensure that the Regal Bank annual financial statements complied with the provisions of s286(3) of the Companies Act.

6.3 Regal Bank's 2000 annual financial statements did not comply with the provisions of s 286(3) of the Companies Act in one or more or all of the respects set out above.

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[8] S286 Duty to make out annual financial statements and to lay them before annual general meeting
(3) The annual financial statements of a company shall, in conformity with generally accepted accounting Practice, fairly present the state of affairs of the company and its business as at the end of the financial year concerned and the profit or loss of the company for that financial year and shall for that purpose be in accordance with and include at least the matters prescribed by Schedule 4, insofar as they are applicable, and comply with any other requirements of this Act.
(4)(a) Any director or officer of a company who fails to take all reasonable steps to comply or to secure compliance with the provisions of this section or with any other requirements of this Act as to matters to be stated in annual financial statements, shall be guilty of an offence.
(b) In any proceedings against any director or officer of a company under §(a), the defence referred to in s284(4)(b) shall be available to him.

[C] Levenstein's 2000 Director's Remuneration Notification

Fraud

7

7.1 Levenstein is guilty of the crime of fraud.

7.2 During or about the first half of 2000 in Johannesburg or Sandton Levenstein did unlawfully and with the intent to defraud expressly or impliedly and falsely represent[9] to EY and/or the Reserve Bank and/or Regal Bank's depositors and/or Regal Holdings' shareholders that his total director's remuneration for the 2000 financial year was R413 000.

7.3 At the time when Levenstein made the representation it was false in that, in respect of the 2000 financial year, he earned the following additional remuneration:

7.3.1 a bonus of R2 million paid to him by Regal Bank on or about 15 February 2000;

7.3.2 the right to 5 million Regal Holdings with a value of approximately R36,5 million;

7.3.3 amounts paid to Levenstein by Regal Bank through a Standard Bank account outside Regal Bank's accounting records during the period 1 March 1999 to 29 February 2000 totalling R228 500.

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9 See § 43 -45 Part Two and § 46 Part Three; DT(1) : 28; DT(1):39; EY:020273.

7.4 The misrepresentations were actually or potentially prejudicial to EY and/or the Reserve Bank and/ or Regal Bank's depositors and/or Regal Holdings' shareholders.

Contravention of s 249(1) of the Companies Act

8

8.1 Levenstein is guilty of a contravention of s 249(1) of the Companies Act.

8.2 Levenstein, in a statement, return, report, certificate, financial statement or other document required by or for the purposes of any provision of the Companies Act, made a statement which was false in a material particular, knowing it to be false, by recording, in his 2000 directors remuneration notification, that his total directors' remuneration for the 2000 financial year was R413 000 whereas, during the 2000 year he received the additional remuneration set out in paragraph 7.

Contravention of s 251(1) of the Companies Act

9

9.1 Levenstein, is guilty of a contravention of s251(1) of the Companies Act.

9.2 Levenstein, was a director of Regal Bank and Regal Holdings and made, circulated or published or concurred in the making, circulating or publishing of a written statement, report or financial statement in

relation to the property or affairs of Regal Bank and Regal Holdings which was false in a material particular in that, in his directors' remuneration for the 2000 financial year, he recorded his total remuneration for the 2000 year was R413 000 whereas, during such year he received the additional remuneration set out in paragraph 7.

[D] Non-Approval of 2000 Financial Statements

Fraud

10

10.1 Levenstein is guilty of the crime of fraud.

10.2 On or about 14 May 2000 and in Sandton or Pretoria Levenstein did unlawfully and with the intent to defraud expressly or impliedly and falsely represent[10] to the Reserve Bank in a letter of that date that "the year end financials" had been approved unanimously by "the Board" and "the Audit Committee".

10.3 At the time when Levenstein made the representation it was false in that the "Audited results for the year ended 29 February 2000" had not been approved by either Regal Bank or the Regal Holdings boards of directors or by the audit committee.

10.4 The misrepresentations were actually or potentially prejudicial to the Reserve Bank in that the misrepresentation would or could affect the Reserve Bank supervisory function of Regal Bank, with potential prejudice to its depositors and Regal Holdings' shareholders.

Contravention of s 298 of the Companies Act

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[10] See § 45, 49, 67 Part Two; E78.; EY130065; EY130043; EY130218; Buch 2765; 2717 - 2723; Davis 2840; Levenstein 1340 - 1354; 1364 -1368; Lopes : 2030 -2034; Lurie : 2460 - 2461.

11

11.1 The directors of Regal Bank and Regal Holdings as at September 2000 are guilty of a contravention of s298[11] of the Companies Act.

11.2 During or about September 2000 the 2000 annual financial statements of Regal Bank and the 2000 annual financial statements of Regal Holdings had were issued, circulated or published :

11.2.1 without approval by the directors of respectively Regal Bank and Regal Holdings;

11.2.2 without a proper signing thereof as envisaged in s 298(1) of the Companies Act.

[E] <u>2000 Regal Holdings Half - Yearly Interim Report</u>

12

12.1 Levenstein and Davis are guilty of the crime of fraud.

12.2 On or about 21 September 2000 and in Johannesburg or Sandton Levenstein and Davis did unlawfully and with the intent to defraud expressly or impliedly and falsely represent[12] to EY and / or the

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[11] s 298 **Approval and signing of financial statements**

(1) The annual financial statements of a company other than the auditor's report, shall be approved by its directors and signed on their behalf by two of the directors or, if there is only one director, by that director, and group annual financial statements shall similarly be approved and signed by the directors of the holding company.

(2) If a copy of any annual financial statements, or group annual financial statements which have not been approved and signed as required by subsection (1), is issued, circulated or published, every director or officer of the company concerned who is a party to such issue, circulation or publication thereof, shall be guilty of an offence.

Reserve Bank and / or Regal Bank's depositors and / or Regal Holdings' shareholders that the unaudited income before tax for the six months ended 31 August 2000 was R40.2 million whereas the profits should have been reduced by at least the following items:

12.2.1 branding income of R5.5 million recognised in the 2000 financial year;

12.2.2 branding income of R20.5 million recognised in the 2001 financial year;

12.2.3 income reflected as received from Elul in respect of a branding fee R2.7 million;

12.2.4 a payment to Levenstein of R650 000 which was falsely included in creditors;

12.2.5 expenditure of Regal Bank in the amount of approximately R1,3m which was falsely reflected in the books of the Shareholders Trust and adjusted at the year end;

12.2.6 expenditure of Regal Bank of approximately R20 million that had been falsely credited to other expenditure/income and debited to branding work in progress during the relevant six month period and transferred to the BOE Bank account at year end. (The amount applicable to the six months cannot be determined by the commissioner.);

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[12] See §69-74 Part Two and §22, 50 and 60 Part Three; See also inter alia DT(1)28, DT(1)30-32, DT(1)38, EY010408; EY010413; EY110366; EY130119; EY180248; K(2)243.2.

12.3 At the same time and place Levenstein, and Davis, with the intent to defraud, made further misrepresentations in that they (under circumstances where they had a duty to do so) failed:

12.3.1 to disclose to the Reserve Bank, Regal Bank's depositors and Regal Holdings' shareholders that Regal Bank had made advances to the Shareholders' Trust totalling R36m against security of R17.6 million;

12.3.2 to disclose to the Reserve Bank, Regal Bank's depositors and Regal Holdings' shareholders that Regal Bank had made advances to the Share Incentive Trust totalling R51.4m against security of R33.3 million;

12.3.3 to disclose to Regal Bank's depositors and Regal Holdings' shareholders that the Reserve Bank had commissioned a s7 report and that significant issues had arisen as a result thereof;

12.3.4 to disclose to EY, the Reserve Bank, Regal Bank's depositors and Regal Holdings' shareholders that Regal Bank had undertaken to issue 5 million shares to Levenstein for no consideration.

12.4 The said misrepresentations were actually or potentially prejudicial to EY and/or the Reserve Bank and/ or Regal Bank's depositors and/ or Regal Holdings' shareholders.

<u>Contravention of s 249(1) of the Companies Act</u>

13

13.1 Levenstein and Davis are guilty of a contravention of s 249(1) of the Companies Act.

13.2 Levenstein and Davis, in a statement, return, report, certificate, financial statement or other document required by or for the purposes of any provision of the Companies Act, made a statement which was false in a material particular, knowing it to be false, by recording, in Regal Bank's accounting records, a false entry reflecting the items set out in paragraph 12.

Contravention of s 250(1) of the Companies Act

14

14.1 Levenstein and Davis are guilty of a contravention of s 250(1) of the Companies Act.

14.2 Levenstein and Davis, directors or officers of Regal Bank and Regal Holdings, made false entries in a book, document, financial record or financial statement of Regal Bank or Regal Holdings by recording, in Regal Bank's accounting records, the entries set out in paragraph 12.

Contravention of s 251(1) of the Companies Act

15

15.1 Levenstein and Davis are guilty of a contravention of s 251(1) of the Companies Act.

15.2 Levenstein and Davis, directors or officers of Regal Bank and Regal Holdings, made, circulated or published or concurred in the making, circulating or publishing of a financial statement in relation to the property or affairs of Regal Bank and Regal Holdings which was false in the material particulars set out in paragraphs 12.

Contravention of s 305(1) of the Companies Act

16

16.1 Levenstein and Davis are guilty of a contravention of s 305(1)[13] read with s 308 of the Companies Act.

16.2 On or about 25 September 2000 Levenstein, and Davis, directors or officers of Regal Holdings, failed to take all reasonable steps to secure that the Regal Holdings group annual financial statements complied with the provisions of s 305 of the Companies Act.

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[13] s 305 **Form and contents of interim report and provisional annual financial statements**
(1) For the purposes of sections 303 and 304 interim reports and provisional annual financial statements shall respectively be in accordance with and include at least the matters prescribed by Schedule 4 in so far as they are applicable and shall comply with the other requirements of this Act.

16.3 Regal Holdings' 2000 interim reports did not comply with the provisions of s 305 of the Companies Act in one or more of the respects set out in paragraph 12.

[F] 93 Grayston

Fraud

17

17.1 Levenstein is guilty of the crime of fraud.

17.2 On 17 November 2000 Regal Treasury Property Investments (Pty) Ltd ("RTPI"), a subsidiary of Regal Holdings, in terms of a forward sale agreement that would become effective in 2012, sold immovable property, 93 Grayston, to Mettle Properties International (Pty) Ltd ("MPI"), a Mettle Ltd subsidiary or SPV, for a purchase price of R600 million.

17.3 During or about the period 17 November 2000 to 26 June 2001 and in Johannesburg and / or Sandton Levenstein did unlawfully and with the intent to defraud expressly or impliedly and falsely represent[14] to EY, the Reserve Bank, Regal Bank's depositors, Regal Holdings' shareholders, the boards of Regal Bank and Regal Holdings, Cohen

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[14] See §91 Part Two and §18, 19 and 28 of Part Three; See also inter alia DT2:546.9; EY110199; EY110365; EY110399; EY160327; EY160328; EY110208 - 110210; EY130135; EY150027; EY150033; EY150034; F21.1; I3:30-32; K3:42; Cohen:1846 - 1847; 1853 - 1860; Kruse 528; Levenstein 2954 - 2968; Oosthuizen 3002 - 3005; Strydom 862; 960 - 980;1107.

and Oosthuizen that the sale of 93 Grayston was irrevocable, unconditional, final and an out-and-out sale.

17.4 At the time when Levenstein made the representation it was false in that :

17.4.1 the sale of 93 Grayston was not an irrevocable, unconditional, final and out and out sale;

17.4.2 in terms of the undermentioned put option, MPI had the right to sell the property back to RTPI at any time on or after 2 January 2017 at a base price of R1,2 billion adjusted per a designated formula.

17.4.3 At the same time and place Levenstein, with the intent to defraud, made further misrepresentations in that he (under circumstances where he had a duty to do so) failed to disclose to EY, the Reserve Bank, Regal Bank's depositors, Regal Holdings' shareholders, the boards of Regal Bank and Regal Holdings, Cohen and Oosthuizen:

17.4.3.1 that the sale of 93 Grayston was part of the 93 Grayston Mettle structured finance deal consisting, not only of a sale agreement, but also of a preference share agreement, a put option and a call option;

17.4.3.2 that in terms of the preference share agreement Regal Bank undertook to provide funding to MPI to

enable it to pay the purchase price in terms of the agreement of sale.

17.5 The said misrepresentations were actually or potentially prejudicial to EY, the Reserve Bank, Regal Bank's depositors, Regal Holdings' shareholders, the boards of Regal Bank and Regal Holdings, Cohen and Oosthuizen.

Contravention of s 251(1) of the Companies Act

18

18.1 Levenstein is guilty of a contravention of s 251(1) of the Companies Act.

18.2 Levenstein, a director of Regal Bank and Regal Holdings, made, circulated or published or concurred in the making, circulating or publishing of a financial statement in relation to the property or affairs of Regal Bank and Regal Holdings which was false in a material particular in that the "Audited results for the year ended 28 February 2001" falsely reflected income and an investment of R36,5 million in respect of the sale of 93 Grayston whereas in substance no such sale had taken place.

[G] Metshelf 1

Fraud

19

19.1 Levenstein is guilty of the crime of fraud.

19.2 During or about the period 29 November 2000 to 26 June 2001 and in Johannesburg and / or Sandton Levenstein did unlawfully and with the intent to defraud make the following express or implied representations[15] to EY, the Reserve Bank, Regal Bank's depositors and Regal Holdings' shareholders:

19.2.1 that the Shareholders Trust had sold eight million Regal Holdings shares to "Mettle", alternatively Mettle Ltd, further alternatively Mettle Securities Limited at a price of R5,50 per share;

19.2.2 that the sale of the eight million shares was made as part of the normal operations of the Shareholders Trust, i.e. to move the shares from weak to strong hands and that the sale was not part of the Mettle structured finance deals;

19.2.3 that the sale was an unconditional, arms length transaction and out and out sale to an institutional buyer and served as an indication of the market value of the shares.

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[15] See §91 Part Two and §18, 19, 24 and 52 Part Three; See also inter alia E:282; E:287; E:291; DT1:30;

19.3 At the time the representations were made, the representations were false in one or more or all of the following respects:

19.3.1 the eight million shares had not been sold as part of the normal operations of the Shareholders Trust, i.e. to move the shares from weak to strong hands;

19.3.2 the sale of the shares was part of the Metshelf 1 Mettle structured finance deal;

19.3.3 the sale of the shares was not a true indication of the market value of the shares at the time of the sale;

19.3.4 the sale of the shares was not an unconditional, arms length transaction and was not an out and out sale in that, in terms of the Metshelf 1 structured finance deal, Regal Bank bore all of the risk of a diminution in the value of the eight million shares in the event of a fall in the Regal Holdings share price.

19.4 The misrepresentations were actually or potentially prejudicial to EY, the Reserve Bank, Regal Bank's depositors and Regal Holdings' shareholders.

Contravention of s 38 of the Companies Act

20

DT(2)544; EY110200; EY110445; EY110218; EY110395; EY110487; EY130149; EY140276; EY180097; EY110200; EY110445; I1:238; KD:77; Davis 3426; Kruse 518; Prinsloo 2985 - 2986; 2996 -2999; Strydom 841 - 844; 943.

20.1 Regal Bank and its directors at the time of the undermentioned financial assistance are guilty of a contravention of s 38(1)[16] read with s 38(3) of the Companies Act.

20.2 On or about 27 October 2000 and at Johannesburg Regal Bank, by means of a loan, guarantee, the provision of security or otherwise, directly or indirectly, gave financial assistance Hollowprops (Pty) Ltd (a Mettle SPV, which later changed its name to Metshelf 106 (Pty) Ltd ("Metshelf 106")) in the amount of R44 million for the purpose of or in connection with a purchase by Metshelf 106 shares of its holding company, Regal Holdings.

20.3 The financial assistance made by Regal Bank to Metshelf 106 did not constitute the lending of money in the ordinary course of the business of Regal Bank as envisaged in s 38(2)(a)[17] of the Companies Act in that:

20.3.1 Metshelf 106 was a Mettle SPV;

20.3.2 Regal Bank bore the full risk of loss in respect of any diminution in the market price of the Regal Holdings shares purchased by Metshelf 106;

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[16] s 38 **No financial assistance to purchase shares of company or holding company**
(1) No company shall give, whether directly or indirectly, and whether by means of a loan, guarantee, the provision of security or otherwise, any financial assistance for the purpose of or in connection with a purchase or subscription made or to be made by any person of or for any shares of the company, or where the company is a subsidiary company, of its holding company.
(2) The provisions of subsection (1) shall not be construed as prohibiting-

[17] (a) the lending of money in the ordinary course of its business by a company whose main business is the lending of money;
(3) (a) Any company which contravenes the provisions of this section, and every director or officer of such company, shall be guilty of an offence.
(b) For the purpose of this subsection 'director', in relation to a company, includes any person who at the time of the alleged contravention was a director of the company.
(c) It shall be a defence in any proceedings under this section against any director or officer of a company if it is proved that the accused was not a party to the contravention

20.3.3 The interest on the financial assistance had been capitalised and by the time of curatorship on 26 June 2001 no part of the financial assistance had yet been recovered by Regal Bank.

Contravention of s 249(1) of the Companies Act

21

21.1 Levenstein is guilty of a contravention of s 249(1) of the Companies Act.

21.2 Levenstein, in a statement, return, report, certificate, financial statement or other document required by or for the purposes of any provision of the Companies Act, made a statement which was false in a material particular, knowing it to be false, by recording, in Regal Bank's accounting records, a false entry reflecting income of R5,2 million in respect of a preference share investment arising from the Metshelf 1 structured finance deal whereas in fact no such income should have been recognised.

Contravention of s 250(1) of the Companies Act

22

22.1 Levenstein is guilty of a contravention of s 250(1) of the Companies Act.

22.2 Levenstein, a director of Regal Bank and Regal Holdings, made a false entry in a book, document, financial record or financial statement of Regal Bank or Regal Holdings by recording, in Regal Bank's accounting

records, a false entry reflecting income of R5,2 million in respect of a preference share investment arising from the Metshelf 1 structured finance deal whereas in fact no such income should have been recognised.

Contravention of s 251(1) of the Companies Act

23

23.1 Levenstein is guilty of a contravention of s 251(1) of the Companies Act.

23.2 Levenstein, a director of Regal Bank and Regal Holdings, made, circulated or published or concurred in the making, circulating or publishing of a financial statement in relation to the property or affairs of Regal Bank and Regal Holdings which was false in a material particular in that the "Audited results for the year ended 28 February 2001" falsely reflected income of R5,2 million in respect of a preference share investment arising from the Metshelf 1 structured finance deal whereas in fact no such income should not have been recognised.

[H] Kgoro

Fraud

24

24.1 Levenstein is guilty of the crime of fraud.

24.2 During or about the period 26 April 2001 to 13 June 2001 and in Johannesburg and / or Sandton Levenstein did unlawfully and with the intent to defraud expressly or impliedly and falsely represent[18] to EY, the Reserve Bank, Regal Bank's depositors and Regal Holdings' shareholders that Regal Bank or Regal Holdings owned 25% shares in Kgoro, that such shareholding was of a short nature and that it would be disposed of within 6 - 9 months after year end.

24.3 At the time Levenstein made the representations they were false in that Regal Bank had sold its 25% Kgoro shares to a Mettle subsidiary of SPV on or about 11 October 2000.

24.4 The said misrepresentations were actually or potentially prejudicial to EY, the Reserve Bank, Regal Bank's depositors and Regal Holdings' shareholders.

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[18] See §91 Part Two and §18, 19 and 23 Part Three; See also inter alia DT(2)554; EY110361; EY110391; EY110394; EY130116; EY130136; EY140268; EY140276; I3:10; Aitken 947; Strydom 933.

Contravention of s 249(1) of the Companies Act

25

25.1 Levenstein is guilty of a contravention of s 249(1) of the Companies Act.

25.2 Levenstein, in a statement, return, report, certificate, financial statement or other document required by or for the purposes of any provision of the Companies Act, made a statement which was false in a material particular, knowing it to be false:

25.2.1 by recording, in Regal Bank's accounting records, a false entry reflecting an amount of R150 million as being due by BOE Bank in respect of the Kgoro transaction;

25.2.2 by recording, in Regal Bank's accounting records, a false entry reflecting income of R5,9 million in respect of a preference share investment arising from the Kgoro deal whereas in fact no such income should have been recognised.

Contravention of s 250(1) of the Companies Act

26

26.1 Levenstein and Davis are guilty of a contravention of s 250(1) of the Companies Act.

26.2 Levenstein and Davis, directors or officers of Regal Bank and Regal Holdings, made a false entry in a book, document, financial record or financial statement of Regal Bank or Regal Holdings :

26.2.1 by recording, in Regal Bank's accounting records, a false entry reflecting an amount of R150 million as being due by BOE Bank in respect of the sale;

26.2.2 by recording, in Regal Bank's accounting records, a false entry reflecting income of R5,9 million in respect of a preference share investment arising from the Kgoro deal whereas in fact no such income should have been recognised.

Contravention of s 251(1) of the Companies Act

27

27.1 Levenstein is guilty of a contravention of s 251(1) of the Companies Act.

27.2 Levenstein, a director of Regal Bank and Regal Holdings, made, circulated or published or concurred in the making, circulating or publishing of a financial statement in relation to the property or affairs of Regal Bank and Regal Holdings which was false in a material particular in that the "Audited results for the year ended 28 February 2001" falsely reflected income of R5,9 million in respect of a preference share investment arising from the Kgoro deal whereas in fact no such income should have been recognised and falsely reflected R150 million (less

certain irregular transfers) as a deposit whereas in fact no such deposit exists.

[I] Sempres

Fraud

28

28.1 Levenstein is guilty of the crime of fraud.

28.2 During or about the period 7 March 2001 to 24 June 2001 and in Johannesburg and / or Sandton Levenstein did unlawfully and with the intent to defraud expressly or impliedly and falsely represent[19] to the boards of Regal Bank and Regal Holdings, Cohen and Van der Walt:

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[19] See §19 and 30 Part Three; See also inter alia DT(2)552; K(3) 5.30; 6; 12; 13; 18; vdW 128, 141, 153, 164, 172, 176, 273; 280; TdeC48-49; Cohen 1837-1844; Oosthuizen 3002-3007; vdW 2573 - 2576.

28.2.1 that the Sempres transaction was a "cash neutral transaction, that no money was going to move";

28.2.2 that the R18m Sempres shares purchased by Regal Bank for R18m as part of the Sempres transaction had never been marked to market and would only be marked to market once the sustainability of the Sempres share price was evident;

28.2.3 that "no capital outlay was required" in respect of the Sempres transaction;

29

29.1 At the time when Levenstein made the representations they were false in that:

29.1.1 the Sempres transaction was not a "cash neutral transaction" due to the fact that, as part of the Sempres transaction, Regal Bank intended to make and in substance made a loan of R5m to KEB Holdings and Unitrade;

29.1.2 Levenstein's statement that the R18m Sempres shares purchased by Regal Bank had never been marked to market and would only be marked to market once the sustainability of the Sempres share price was evident was untrue in that, during April 2001, Levenstein instructed de Castro to recognise in the income of Regal Bank R1 million in respect of the Sempres shares; and in that during March 2001, de Castro was instructed by an unknown person (probably

Levenstein) to recognise in the income of Regal Bank R5 million in respect of the Sempres shares;

29.2 Levenstein's statement that "no capital outlay was required" in respect of the Sempres transaction was untrue in that R5m had been advanced to KEB Holdings and Unitrade in terms of the Sempres transaction;

29.3 The misrepresentations were :

29.3.1 actually or potentially prejudicial to Regal Bank, Regal Holdings, Cohen and Van der Walt in that, due to the misrepresentations, any decision or action by the boards, Cohen or Van der Walt in regard to the Sempres transaction was or would have been based on incorrect facts;

29.3.2 actually prejudicial to Regal Bank's depositors and Regal Holdings' shareholders and depositors in that the curator of Regal Bank concluded that the R5m loan was irrecoverable and that the intellectual capital stated at R14,1m had no value; or potentially prejudicial to Regal Bank's depositors and Regal Holdings' shareholders in that the recoverability of the loan depended on the value of the Sempres shares.

[J] <u>Metshelf 2</u>

<u>Contravention of s 38 of the Companies Act</u>

30

30.1 Regal Bank and all its directors at the time of the undermentioned financial assistance to are guilty of a contravention of s 38(1) read with s 38(3) of the Companies Act.

30.2 On or about 14 March 2000 and at Johannesburg or Sandton Regal Bank, by means of a loan, guarantee, the provision of security or otherwise, directly or indirectly, gave financial assistance Metshelf 106 (Pty) Ltd ("Metshelf 106") in the amount of R10m for the purpose of or in connection with a purchase by Metshelf 106 of the shares of its holding company, Regal Holdings[20].

30.3 The financial assistance made by Regal Bank to Metshelf 106 did not constitute the lending of money in the ordinary course of the business of Regal Bank as envisaged in section 38(2)(a) of the Companies Act in that:

30.3.1 Metshelf 106 was a Mettle SPV;

30.3.2 Regal Bank bore the full risk of loss in respect of any diminution in the market price of the Regal Holdings shares purchased by Metshelf 106;

30.3.3 The interest on the financial assistance had been capitalised and by the time of curatorship on 26 June 2001 no part of the financial assistance had yet been recovered by Regal Bank.

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[20] See §18, 25, 53 Part Three; See also inter alia DT(2)554; I(3)25; Strydom 852.

[K] Metshelf 3

Contravention of s 38 of the Companies Act

31

31.1 Regal Bank and its directors at the time of the undermentioned financial assistance are guilty of a contravention of s 38(1) read with s 38(3) of the Companies Act.

31.2 On or about 6 April 2000 and at Johannesburg or Sandton Regal Bank, by means of a loan, guarantee, the provision of security or otherwise, directly or indirectly, gave financial assistance Metshelf 106 in the amount of R10m for the purpose of or in connection with a purchase by Metshelf 106 of the shares of its holding company, Regal Holdings[21].

31.3 The financial assistance made by Regal Bank to Metshelf 106 did not constitute the lending of money in the ordinary course of the business of Regal Bank as envisaged in s 38(2)(a) of the Companies Act in that:

31.3.1 Metshelf 106 was a Mettle SPV;

31.3.2 Regal Bank bore the full risk of loss in respect of any diminution in the market price of the Regal Holdings shares purchased by Metshelf 106;

31.3.3 The interest on the financial assistance had been capitalised and by the time of curatorship on 26 June 2001 no part of the financial assistance had yet been recovered by Regal Bank;

[L] Pekane

Fraud

32

32.1 Levenstein and Cohen are guilty of the crime of fraud.

32.2 During or about the period 29 December 2000 to 26 June 2001 and in Johannesburg and / or Sandton Levenstein and Cohen did unlawfully and with the intent to defraud expressly or impliedly and falsely represent[22] to EY and / or the Reserve Bank and / or Regal Bank's depositors and / or Regal Holdings' shareholders:

32.2.1 that on or about 29 December 2000 Regal Bank had made a loan to "Phekani" in the amount of R67 400 808;

32.2.2 that the loan was secured by shares with a market value of approximately R70 million.

32.3 At the time when Levenstein and Cohen made the representations, the representations were false in that no such loan or security existed.

32.4 The misrepresentations were actually or potentially prejudicial to EY and/or the Reserve Bank and/ or Regal Bank's depositors and/or Regal Holdings' shareholders in one or more of the following respects:

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21 See §18, 25, 53 Part Three; See also *inter alia* DT2:554; I3:25; Strydom : 852.

22 See §92 Part Two and §51, 65, 83 Part Three; including inter alia E369; E:372; EY110399; EY130116; EY130149; EY140289; EY150027; EY150030; EY150034; EY180128; EY180233; EY180235; K(3)3; U1.4; U1.5; U1.6; U1.7; Cohen 1930; Davis 2878 - 2880; De Castro 2627-2629; Diesel 2628; Levenstein 1710 - 1720; 1749 -1759; Lurie 2544 -2545; 1759; Rod 3166; Strydom 806; 815; 839 - 849.

32.4.1 but for the misrepresentations EY would have insisted on a different accounting treatment of the Pekane transaction;

32.4.2 the misrepresentations would or could have contributed to EY's audit opinion in respect of the 2001 financial year;

32.4.3 EY's audit opinion by EY would or could have influenced Regal Holdings shareholders or potential investors in Regal Holdings shares to buy, sell or hold such shares.

32.4.4 EY's audit opinion would or could affect the Reserve Bank supervisory function of Regal Bank, with potential prejudice to its depositors and Regal Holdings' shareholders.

Contravention of s249(1) of the Companies Act

33

33.1 Levenstein is guilty of a contravention of s 249(1) of the Companies Act.

33.2 Levenstein, in a statement, return, report, certificate, financial statement or other document required by or for the purposes of any provision of the Companies Act, made a statement which was false in a material particular, knowing it to be false, by recording, in Regal Bank's accounting records, a false entry reflecting that Regal Bank had made a loan to Phekani in the amount of R67 400 808.

Contravention of s 250(1) of the Companies Act

34

34.1 Levenstein is guilty of a contravention of s 250(1) of the Companies Act.

34.2 Levenstein was a director or officer of Regal Bank and Regal Holdings and made a false entry in a book, document, financial record or financial statement of Regal Bank or Regal Holdings to the effect that Regal Bank had made a loan to Phekani in the amount of R67 400 808 (including inter alia interest).

Contravention of s 251(1) of the Companies Act

35

35.1 Levenstein, Cohen and Diesel are guilty of a contravention of section 251(1) of the Companies Act.

35.2 Levenstein, Cohen and Diesel were directors of Regal Bank and Regal Holdings circulated or published or concurred in the making, circulating or publishing of a written statement, report or financial statement in relation to the property or affairs of Regal Bank and Regal Holdings which was false in a material particular in that:

- a written statement by Regal Bank management falsely reflected that Regal Bank had made a loan to Phekani in the amount of

R60,2 million which was secured by shares with a market value of approximately R70 million whilst no such loan or security existed;

- Regal Bank's accounting records falsely reflected that Regal Bank had made a loan to Phekani in the amount of R67 400 808 (including inter alia interest) and that the loan was secured by shares with a market of approximately R70 million whilst no such loan or security existed;
- Regal Holdings' Audited results for the year ended 28 February 2001 falsely reflected that Regal Bank had made a advance to Phekani in the amount of R67 400 808 (including *inter alia* interest) whilst no such advance existed; and
- Regal Bank's accounting records for the 2001 financial year and Regal Holdings' Audited results for the year ended 28 February 2001 failed to reflect that, during December 2000, Regal Bank purchased Pekane's 15 454 546 Regal Holdings shares for R60 272 729,40 and that Regal Bank paid the purchase price of the shares to Pekane or its nominee.

[M] Mettle Reserve Account

Fraud

36

36.1 Levenstein and Davis are guilty of the crime of fraud.

36.2 During or about the period 11 October 2000 to 28 February 2001 and in Johannesburg or Sandton Levenstein and Davis did unlawfully and with the intent to defraud expressly and/or impliedly and falsely represent[23] to EY and/or the Reserve Bank and / or Regal Bank's depositors and/or Regal Holdings' shareholders:

36.2.1 that an account bearing the name "BOE Bank" reflected entries relating to BOE Bank;

36.2.2 that a deposit of R150m was properly allocated to and reflected in the BOE account;

36.2.3 that during or about the period 11 October 2000 to 28 February 2001 the following withdrawals had properly and justifiably been made from the BOE account : R14 740 160, R1 400 000, R5 700 000, R350 000, R157 255 and R290 616 totalling R22 638 031.

36.2.4 that Regal Holdings' before tax income for the 2001 year was R71 537 356;

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[23] See § 86 Part Three; See also *inter alia* EY:140304; I3:11; KD:72; 74; 75; Davis: 2878-2879; 3420-3433

36.3 At the time when Levenstein and Davis made the representations they were false in that :

36.3.1 the BOE Bank account did not in any way relate to BOE Bank but reflected entries relating to certain of the Mettle structured finance deals;

36.3.2 The R150m deposit was irregularly allocated to and reflected in the BOE account in that it was an amount received from Mettle Ltd (or one of its subsidiaries or SPV'S) in respect of the sale by Regal Bank of its 25% Kgoro shares and should properly have been reflected:

36.3.2.1 by crediting an income account with an amount of R150m (the excess of the sales proceeds over the carrying value of the shares); and then debiting the said income account with R150m and crediting a liability account to provide for Regal Bank's obligation in terms of the Kgoro structured finance deal to repurchase its 25% Kgoro shares ,or alternatively;

36.3.2.2 by reflecting separately a liability of R150m in respect of Regal Bank's obligation in terms of the Kgoro structured finance deal to repurchase its 25% Kgoro shares.

36.3.3 The withdrawals were irregular transfers to other, unrelated accounts in Regal Bank's records, made with the purpose to

extinguish debts, reduce expenses or raise income in such accounts so falsely to increase Regal Bank's income.

36.3.4 The consequence of Regal Bank's abovementioned irregular transfers from the BOE account was that Regal Holdings' before tax income for the 2001 year was overstated by at least R22 638 031;

36.4 The misrepresentations were actually or potentially prejudicial to EY and/or the Reserve Bank and/or Regal Bank's depositors and/or Regal Holdings' shareholders.

Contravention of s249(1) of the Companies Act

37

37.1 Levenstein and Davis are guilty of a contravention of s 249(1) of the Companies Act.

37.2 Levenstein and Davis, in a statement, return, report, certificate, financial statement or other document required by or for the purposes of any provision of the Companies Act, made a statement which was false in a material particular, knowing it to be false, by recording, in Regal Bank's accounting records, the false entries in the BOE account set out in paragraph 36.

Contravention of s 250(1) of the Companies Act

38

38.1 Levenstein and Davis are guilty of a contravention of s 250(1) of the Companies Act.

38.2 Levenstein and Davis, directors or officers of Regal Bank and Regal Holdings, made false entries in a book, document, financial record or financial statement of Regal Bank by recording, in Regal Bank's accounting records, the false entries in the BOE account set out in paragraph 36.

Contravention of s 251(1) of the Companies Act

39

39.1 Levenstein and Davis are guilty of a contravention of s 251(1) of the Companies Act.

39.2 Levenstein and Davis, directors or officers of Regal Bank and Regal Holdings, made, circulated or published or concurred in the making, circulating or publishing of a financial statement in relation to the property or affairs of Regal Bank and Regal Holdings which was false in the material particulars set out in paragraph 36.

[N] Levenstein Data 1

Fraud

40

40.1 Levenstein and Lurie are guilty of the crime of fraud.

40.2 During or about the period 20 April 1998 to 26 June 2001 and in Johannesburg and / or Sandton Levenstein and / or Lurie did unlawfully and with the intent to defraud expressly and / or impliedly and falsely represent[24] to EY and / or the Reserve Bank and / or Regal Bank's depositors and / or Regal Holdings' shareholders:

40.2.1 that Levenstein Data 1 was a legal person;

40.2.2 that Regal Bank had lent and advanced an amount of R6,5 million to Levenstein Data 1;

40.2.3 that from 20 April 1998 until the date of curatorship the R6,5 million loan attracted interest and remained owing by Levenstein Data 1.

40.3 At the time when Levenstein and Lurie made the representations they were false in that:

40.3.1 Levenstein Data 1 did not exist and was merely an "account heading";

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[24] See §17, 90 Part Three; See also inter alia DT(2)553; EY030283; EY130033; EY130077; EY130132; EY140289; EY140328; EY180128; KD70; Diesel 2634-2635; Levenstein 1774-1781; Lurie 2546-2551; Store 3409-3410; Strydom 909.

40.3.2 Regal Bank could therefore not and did not lend and advance R6,5 million or any other amount to Levenstein Data 1;

40.3.3 Regal Bank never owed the amount of the purported loan of R6,5 million to Levenstein Data 1 and the loan could not attract interest.

40.4 The misrepresentations were actually or potentially prejudicial to EY and/or the Reserve Bank and/ or Regal Bank's depositors and/or Regal Holdings' shareholders.

Contravention of s 249 of the Companies Act

41

41.1 Levenstein and Davis are guilty of a contravention of s 249(1) of the Companies Act.

41.2 Levenstein and Davis, in a statement, return, report, certificate, financial statement or other document required by or for the purposes of any provision of the Companies Act, made a statement which was false in a material particular, knowing it to be false, by recording, in Regal Bank's accounting records, a false entry reflecting an overnight loan / "call placement" of R6,5 million plus capitalised interest to Levenstein Data 1.

Contravention of s 250(1) of the Companies Act

42

42.1 Levenstein and Davis are guilty of a contravention of s 250(1) of the Companies Act.

42.2 Levenstein and Davis, directors or officers of Regal Bank and Regal Holdings, made a false entry in a book, document, financial record or financial statement of Regal Bank or Regal Holdings:

42.2.1 by recording, in Regal Bank's accounting records, a false entry reflecting an overnight loan / "call placement" of R6,5m plus capitalised interest to Levenstein Data 1 whilst no such overnight loan or "call placement" existed.

42.2.2 by falsely reflecting in Regal Holdings' 1999, 2000 and 2001 Audited results and in Regal Bank and Regal Holdings' 1999 and 2000 annual financial statements in respect of Levenstein Data 1 a loan or advance of R6,5m plus capitalised interest whilst no such loan or advance existed.

Contravention of s 251(1) of the Companies Act

43

43.1 Levenstein and Lurie are guilty of a contravention of s 251(1) of the Companies Act.

43.2 Levenstein and Lurie, directors or officers of Regal Bank and Regal Holdings, made circulated or published or concurred in the making, circulating or publishing of a financial statement in relation to the property or affairs of Regal Bank and Regal Holdings which was false by falsely reflecting in Regal Holdings' 1999, 2000 and 2001 Audited results and in Regal Bank and Regal Holdings' 1999 and 2000 annual financial statements in respect of Levenstein Data 1 a loan or advance of R6,5 million plus capitalised interest whilst no such loan or advance existed.

Fraud

Alternatively to paragraphs 40 to 43 above

44

44.1 Levenstein and Lurie are guilty of the crime of fraud.

44.2 During or about the period 20 April 1998 to 26 June 2001 and in Johannesburg or Sandton Levenstein and Lurie did unlawfully, with the intent to defraud, make the following misrepresentations to EY in that they (under circumstances where they had a duty to do so) failed to disclose EY:

44.2.1 that Levenstein Data 1 was a firm owned by Levenstein and/or Lurie;

44.2.2 that the purpose of the R6,5m loan by Regal Bank to Levenstein Data 1 on 20 April 1998 was to render financial assistance to it to purchase Regal Holdings shares;

44.3 During the same time and place Levenstein and Lurie did unlawfully, with the intent to defraud, furthermore expressly or impliedly and falsely represent to EY that the loan and advance to Levenstein Data 1 was secured by a pledge of cash for the amount of the advance in the form of a deposit of R7,8m. At the time when Levenstein or Lurie made this misrepresentation it was false in that no such security existed.

44.4 Paragraph 40.4 is repeated mutatis mutandis.

Contravention of s 38 of the Companies Act

45

45.1 Regal Bank and its directors at the time of the undermentioned financial assistance to Levenstein Data 1 are guilty of a contravention of s 38(1) read with s 38(3) of the Companies Act.

45.2 On or about 20 April 1998 and at Johannesburg or Sandton Regal Bank, by means of a loan, guarantee, the provision of security or otherwise, directly or indirectly, gave financial assistance in the amount of R6.5m for the purpose of or in connection with a purchase by Levenstein Data 1 or subscription made or to be made by Levenstein Data 1 of or for shares of its holding company, Regal Holdings.

45.3 The financial assistance made by Regal Bank to Levenstein Data 1 did not constitute the lending of money in the ordinary course of the business of Regal Bank as envisaged in section 38(2)(a) of the Companies Act in that:

45.3.1 Levenstein Data 1 was a related party;

45.3.2 the only security that Regal Bank obtained for the financial assistance was a pledge of the Regal Holdings shares concerned;

45.3.3 the interest on the financial assistance had been capitalised and by the time of curatorship on 26 June 2001 no part of the financial assistance had yet been recovered by Regal Bank.

Contravention of s 251(1) of the Companies Act

46

46.1 Levenstein and Lurie are guilty of a contravention of s 251(1) of the Companies Act.

46.2 Levenstein and Lurie, directors of Regal Bank and Regal Holdings, made, circulated or published or concurred in the making, circulating or publishing of a financial statement in relation to the property or affairs of Regal Bank and Regal Holdings which was false by falsely failing to disclose in Regal Holdings' 1999, 2000 and 2001 audited results and in Regal Bank and Regal Holdings' 1999 and 2000 annual financial statements in respect of Levenstein Data 1 that a loan or advance of

R6,5m plus capitalised interest had in substance been made to a director or directors of Regal Bank and Regal Holdings, namely Levenstein and / or Lurie.

Contravention of s 226 of the Companies Act

47

47.1 Levenstein and / or Lurie are guilty of a contravention of s 226(1)[25] read with ss226(4) and (5) of the Companies Act.

47.2 Levenstein and/or Lurie were directors of Regal Bank and the owner(s) of Levenstein Data 1 and authorised, permitted or were partie(s) to the making of a loan contrary to the provisions of s 226 of the Companies Act in that he authorised, permitted or was a party to the making by Regal Bank of an overnight loan of R6,5m to Levenstein Data 1 under circumstances where the exclusionary provisions set out in section 226(2) of the Companies Act do not apply.

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[25] s 226 **Prohibition of loans to, or security in connection with transactions by, directors and managers**
(1) No company shall directly or indirectly make a loan to-
(a) any director or manager of-
(i) the company; or
(ii) its holding company;
(4) Any director or officer of a company who authorizes, permits or is a party to the making of any loan or the provision of any security contrary to the provisions of this section, shall-
(a) be liable to indemnify the company and any other person who had no actual knowledge of the contravention, against any loss directly resulting from the invalidity of such loan or security; and
(b) be guilty of an offence.
(5) For the purposes of subsection (4) 'director or officer of a company' includes, where the company is a subsidiary, any director or officer of its holding company.

[O] J L Associates & Trust

Fraud

48

48.1 Levenstein and Lurie are guilty of the crime of fraud.

48.2 During or about the period 9 April 1998 to 26 June 2001 and in Johannesburg or Sandton Levenstein and Lurie did unlawfully and with the intent to defraud expressly or impliedly and falsely represent[26] to EY and / or the Reserve Bank and/or Regal Bank's depositors and/or Regal Holdings' shareholders:

48.2.1 that J L Associates & Trust was a legal person;

48.2.2 that Regal Bank had lent and advanced an amount of R13m to J L Associates & Trust;

48.2.3 that from 9 April 1998 until the date of curatorship the R13m loan attracted interest and remained owing by J L Associates & Trust.

48.3 At the time when Levenstein and Lurie made the representations they were false in that:

48.3.1 J L Associates & Trust did not exist and was merely an "account heading";

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[26] See §17 and 19 Part Three; See also inter alia DT(2)553; EY030283; EY130033; EY130077;

48.3.2 Regal Bank could not and did not lend and advance R13 million or any other amount to J L Associates & Trust;

48.3.3 Regal Bank never owed the amount of the purported loan of R13m to J L Associates & Trust and the loan could not attract interest.

48.4 The misrepresentations were actually or potentially prejudicial to EY and/or the Reserve Bank and/or Regal Bank's depositors and/or Regal Holdings' shareholders.

Contravention of s 249 of the Companies Act

49

49.1 Levenstein and Davis are guilty of a contravention of s 249(1) of the Companies Act.

49.2 Levenstein and Davis, in a statement, return, report, certificate, financial statement or other document required by or for the purposes of any provision of the Companies Act, made a statement which was false in a material particular, knowing it to be false, by recording, in Regal Bank's accounting records, a false entry reflecting an overnight loan / "call placement" of R13 plus capitalised interest to J L Associates & Trust.

Contravention of s 250(1) of the Companies Act

50

50.1 Levenstein and Davis are guilty of a contravention of s 250(1) of the Companies Act.

50.2 Levenstein and Davis, directors or officers of Regal Bank and Regal Holdings, made a false entry in a book, document, financial record or financial statement of Regal Bank or Regal Holdings:

50.2.1 by recording, in Regal Bank's accounting records, a false entry reflecting an overnight loan / "call placement" of R13 million plus capitalised interest to J L Associates & Trust whilst no such overnight loan or "call placement" existed.

50.2.2 by falsely reflecting in Regal Holdings' 1999, 2000 and 2001 Audited results and in Regal Bank and Regal Holdings' 1999 and 2000 annual financial statements in respect of J L Associates & Trust a loan or advance of R13m plus capitalised interest whilst no such loan or advance existed.

Contravention of section 251(1) of the Companies Act

51

51.1 Levenstein and Lurie are guilty of a contravention of s 251(1) of the Companies Act.

51.2 Levenstein and Lurie, directors or officers of Regal Bank and Regal Holdings, made, circulated or published or concurred in the making, circulating or publishing of a financial statement in relation to the property or affairs of Regal Bank and Regal Holdings which was false by reflecting in Regal Holdings' 1999, 2000 and 2001 Audited results and in Regal Bank and Regal Holdings' 1999 and 2000 annual financial statements in respect of J L Associates & Trust a loan or advance of R13m plus capitalised interest whilst no such loan or advance existed.

Fraud

Alternatively to paragraphs 48 to 51

52

52.1 Levenstein and Lurie are guilty of the crime of fraud.

52.2 During or about the period 9 April 1998 to 26 June 2001 and in Johannesburg or Sandton Levenstein and Lurie did unlawfully, with the intent to defraud, make the following misrepresentations to EY in that they (under circumstances where they had a duty to do so) failed to disclose EY:

52.2.1 that J L Associates & Trust was a firm owned by Levenstein or Lurie;

52.2.2 that the purpose of the R13m loan and advance by Regal Bank to J L Associates & Trust on 9 April 1998 was to render financial assistance to it to purchase Regal Holdings shares;

52.3 Paragraphs 48.4 is repeated mutatis mutandis

Contravention of s 38 of the Companies Act

53

53.1 Regal Bank and all its directors at the time of the undermentioned financial assistance to J L Associates & Trust are guilty of a contravention of s 38(1) read with s 38(3) of the Companies Act.

53.2 On or about 9 April 1998 and at Johannesburg or Sandton Regal Bank, by means of a loan, guarantee, the provision of security or otherwise, directly or indirectly, gave financial assistance in the amount of R13m for the purpose of or in connection with a purchase by J L Associates & Trust or subscription made or to be made by J L Associates and Trust of or for shares of its holding company, Regal Holdings.

53.3 The financial assistance made by Regal Bank to JL Associates & Trust did not constitute the lending of money in the ordinary course of the business of Regal Bank as envisaged in s 38(2)(a) of the Companies Act in that :

53.3.1 JL Associates & Trust was a related party;

53.3.2 the only security that Regal Bank obtained for the financial assistance was a pledge of the Regal Holdings shares concerned;

53.3.3 the interest on the financial assistance had been capitalised and by the time of curatorship on 26 June 2001 only part of the financial assistance had yet been recovered by Regal Bank;

53.3.4 shortly before curatorship Levenstein instructed Diesel to transfer an amount of R15m from the Mettle Reserve account (containing Regal Bank's money) to the J L Associates & Trust overnight loan account.

Contravention of s 251(1) of the Companies Act

54

54.1 Levenstein and Lurie are guilty of a contravention of section 251(1) of the Companies Act.

54.2 Levenstein and Lurie, directors of Regal Bank and Regal Holdings, made, circulated or published or concurred in the making, circulating or publishing of a financial statement in relation to the property or affairs of Regal Bank and Regal Holdings which was false by falsely failing to disclose in Regal Holdings' 1999, 2000 and 2001 Audited results and in Regal Bank and Regal Holdings' 1999 and 2000 annual financial statements in respect of J L Associates & Trust that a loan or advance

of R13 million plus capitalised interest had in substance been made to a director or directors of Regal Bank and Regal Holdings, namely Levenstein and/or Lurie.

Contravention of section 226 of the Companies Act

55

55.1 Levenstein and/or Lurie are guilty of a contravention of section 226(1) read with sections 226(4) and (5) of the Companies Act.

55.2 Levenstein and/or Lurie, director(s) of Regal Bank and the owner(s) of J L Associates & Trust, authorised, permitted or were partie(s) to the making of a loan contrary to the provisions of s 226 of the Companies Act in that he/they authorised, permitted or was partie(s) to the making by Regal Bank of an overnight loan of R13m to J L Associates & Trust under circumstances where the exclusionary provisions set out in s 226(2) of the Companies Act do not apply.

[P] Forfin Finance (Pty) Ltd ("Forfin")

Contravention of s 38 of the Companies Act

56

56.1 Regal Bank and its directors at the time of the undermentioned financial assistance to Forfin are guilty of a contravention of s 38(1) read with s 38(3) of the Companies Act.

56.2 On or about 3 April 1998 and at Johannesburg or Sandton Regal Bank, by means of a loan, guarantee, the provision of security or otherwise, directly or indirectly, gave financial assistance in the amount of R3 997 500 for the purpose of or in connection with a purchase by Forfin or subscription made or to be made by Forfin of or for shares of its holding company, Regal Holdings[27].

56.3 The financial assistance made by Regal Bank to Forfin did not constitute the lending of money in the ordinary course of the business of Regal Bank as envisaged in s 38(2)(a) of the Companies Act in that:

56.3.1 Forfin was a related party;

56.3.2 the only security that Regal Bank obtained for the financial assistance was a pledge of the Regal Holdings shares concerned;

56.3.3 the interest on the financial assistance had been capitalised and by the time of curatorship on 26 June 2001 no part of the financial assistance had yet been recovered by Regal Bank;

56.3.4 Regal Bank from time to time took unusual steps to conceal the repayment history in respect of the financial assistance;

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[27] See § 17 and 90 Part Three. See also DT(2)553; EY030283; EY130033; EY130077; EY130132; EY140289; EY150034; EY180128; KD2; vdW350; 352; 354; 355; 356; 360-363; 369-370; 388-402; Diesel 3072; Levenstein 1774-1777; 2496 -2499; 3492-3503; van der Walt : 3070.

56.3.5 shortly before curatorship Levenstein instructed Diesel to transfer an amount of R7 million from the Mettle Reserve account (containing Regal Bank's money) to the Forfin overnight loan account.

[Q] Shareholders Trust

Contravention of s 38 of the Companies Act

57

57.1 Regal Bank and all its directors at the time of the undermentioned financial assistance to the Shareholders Trust are guilty of a contravention of s 38(1) read with s 38(3) of the Companies Act.

57.2 During or about the period 5 March 1999 to 26 June 2001 and at Johannesburg or Sandton Regal Bank, by means of a loan, guarantee, the provision of security or otherwise, directly or indirectly, gave financial assistance in the amount of at least R46,6m for the purpose of or in connection with purchases by Shareholders Trust for shares of its holding company, Regal Holdings[28].

57.3 The financial assistance made by Regal Bank to Shareholders Trust did not constitute the lending of money in the ordinary course of the business of Regal Bank as envisaged in s 38(2)(a) of the Companies Act in that:

57.3.1 Shareholders Trust was a related party;

57.3.2 there was an unusual volume of purchases of Regal Holdings shares by the Shareholders Trust;

57.3.3 Regal Bank did not obtain any security for the financial assistance;

57.3.4 The interest on the financial assistance had been capitalised and by the time of curatorship on 26 June 2001 the financial assistance had not been recovered by Regal Bank.

57.3.5 the purchases of Regal Holdings shares by the Shareholders Trust were made to support the Regal Holdings share price.

[R] Loans to Directors

Fraud

58

58.1 Levenstein is guilty of the crime of fraud.

58.2 During or about the period December 1996 to June 2000 and in Johannesburg or Sandton Levenstein did unlawfully and with the intent to defraud expressly or impliedly and falsely represent[29] to EY and/or the Reserve Bank and/or Regal Bank's depositors and/or Regal Holdings' shareholders and/or the SARS that Regal Bank had made

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28 §17 Part Three; DT(1)32, 53-58; DT(2)553; K(3)26.

29 §89-90 Part Three; See also inter alia DT(1)13; DT(1)38; E289; EY130080; Levenstein 1527-1534.

bona fide loans and advances to the Shareholders Trust totalling the amount of R2 629 099.

59

59.1 At the time when Levenstein made the representations they were false in that:

59.1.1 Regal Bank did not make loans and advances to the Shareholders Trust in the above amounts but paid bonuses or made advances to the directors;

59.1.2 Regal Bank made the payments to directors and managers from a bank account outside its accounting systems;

59.1.3 Regal Bank did not record the payments in its accounting records;

59.1.4 on the instructions or with the knowledge of Levenstein, and in order to conceal the true nature thereof, Regal Bank falsely debited the payments to a discretionary loan account in the name of the Shareholders Trust.

59.2 The misrepresentations were actually or potentially prejudicial to EY and/or the Reserve Bank and/or Regal Bank's depositors and/or Regal Holdings' shareholders and / or the SARS.

Contravention of s 226 of the Companies Act

60

60.1 Levenstein is guilty of a contravention of section 226(1) read with sections 226(4) and (5) of the Companies Act.

60.2 During or about the period December 1996 to June 2000 and at Johannesburg or Sandton Levenstein authorised, permitted or was a party to the making of a loans to directors of Regal Bank and Regal Holdings totalling R2 629 099.

60.3 The exclusionary provisions set out in s 226(2) of the Companies Act do not apply in that:

60.3.1 the members of Regal Bank did not give its prior consent to the loans and no specific special resolution exists in regard to the loans;

60.3.2 Regal Bank did not make the loans *bona fide* in the ordinary course of its business in that:

- the loans had not been approved by Regal Bank's credit committee or board of directors;
- Regal Bank did not record the loans in its accounting system;
- Regal Bank channelled the loans through a special bank account outside of its accounting system in order to conceal the fact that they were loans to the directors;
- Regal Bank did not charge interest on the loans;

- the loans extended over an undetermined and unusually long period of time without any attempt to recover the loans or any part thereof.

Contravention of s 249(1) of the Companies Act

61

61.1 Levenstein is guilty of a contravention of s 249(1) of the Companies Act.

61.2 Levenstein, in a statement, return, report, certificate, financial statement or other document required by or for the purposes of any provision of the Companies Act, made a statement which was false in a material particular, knowing it to be false, by recording, in Regal Bank's accounting records, false entries reflecting that Regal Bank had made a loan to the Shareholders' Trust totalling R 2 629 099 during or about the period December 1996 to June 2000.

Contravention of s 250(1) of the Companies Act

62

62.1 Levenstein and Lurie are guilty of a contravention of s 250(1) of the Companies Act.

62.2 Levenstein and Lurie, directors of Regal Bank and Regal Holdings, made false entries in a book, document, financial record or financial statement of Regal Bank or Regal Holdings to the effect that Regal

Bank had made a loan to the Shareholders' Trust totalling R2 629 099 during or about the period December 1996 to June 2000.

Contravention of s 251(1) of the Companies Act

63

63.1 Levenstein and Lurie are guilty of a contravention of s 251(1) of the Companies Act.

63.2 Levenstein, directors of Regal Bank and Regal Holdings, made, circulated or published or concurred in the making, circulating or publishing of a written statement, report or financial statement in relation to the property or affairs of Regal Bank and Regal Holdings which was false in a material particular in that:

63.2.1 Regal Bank's accounting records falsely reflected that Regal Bank had made loans to The Shareholders' Trust totalling R 2 629 099 during or about the period December 1996 to June 2000 whilst no such loan existed;

63.2.2 Regal Holdings' Audited results for the year ended 28 February 2000 falsely reflected that Regal Bank had made advances to the Shareholders' Trust totalling R2 629 099 whilst no such advances existed; and

63.2.3 Regal Bank's accounting records for the 2000 financial year and Regal Holdings' Audited results for the year ended 29 February 2000 failed to reflect that, during or about December 1996 to

June 2000, Regal Bank had either made loans or advances to directors or managers or had incurred expenditure (paid bonuses) totalling R2 629 099.

[S] Advertising costs and Donations

Fraud

64

64.1 Levenstein is guilty of the crime of fraud.

64.2 During or about the period December 1996 to June 2000 and in Johannesburg or Sandton Levenstein did unlawfully and with the intent to defraud expressly or impliedly and falsely represent[30] to EY and/or the Reserve Bank and/or Regal Bank's depositors and/or Regal Holdings' shareholders that Regal Bank had made *bona* fide loans and advances to the Shareholders Trust totalling R55 951 and R145 382.

64.3 At the time when Levenstein made the representations they were false in that:

64.3.1 Regal Bank did not make loans and advances to the Shareholders Trust in the above amounts but in fact Regal Bank paid advertising costs in the total amount of R55 951 incurred by it to the suppliers of those services;

[30] See inter alia DT(1)13-14.

64.3.2 Regal Bank made donations in the total amount of R145 382 to various charitable and religious organisations;

64.3.3 Regal Bank made the payments in respect of advertising costs and donations from a bank account outside its accounting systems;

64.3.4 Regal Bank did not record the payments in its accounting records;

64.3.5 on the instructions or with the knowledge of Levenstein, and in order to conceal the true nature thereof, Regal Bank falsely debited the amounts to a discretionary loan account in the name of the Shareholders Trust.

64.4 The misrepresentations were actually or potentially prejudicial to EY and / or the Reserve Bank and/ or Regal Bank's depositors and / or Regal Holdings' shareholders.

Contravention of s 249(1) of the Companies Act

65

65.1 Levenstein is guilty of a contravention of s 249(1) of the Companies Act.

65.2 Levenstein, in a statement, return, report, certificate, financial statement or other document required by or for the purposes of any provision of the Companies Act, made a statement which was false in a material particular, knowing it to be false, by recording, in Regal Bank's accounting records, false entries reflecting that Regal Bank had made

loans to the Shareholders' Trust in the amounts of respectively R55 951 and R145 382 during or about the period December 1996 to June 2000.

Contravention of s 250(1) of the Companies Act

66 Levenstein is guilty of a contravention of s 250(1) of the Companies Act.

67 Levenstein, a director or officer of Regal Bank and Regal Holdings, made false entries in a book, document, financial record or financial statement of Regal Bank or Regal Holdings to the effect that Regal Bank had made loans to the Shareholders' Trust totalling amounts of respectively R55 951 and R145 382 during or about the period December 1996 to June 2000.

Contravention of s 251(1) of the Companies Act

68

68.1 Levenstein is guilty of a contravention of s 251(1) of the Companies Act.

68.2 Levenstein, a director of Regal Bank and Regal Holdings, made, circulated or published or concurred in the making, circulating or publishing of a written statement, report or financial statement in relation to the property or affairs of Regal Bank and Regal Holdings which was false in a material particular in that:

- Regal Bank's accounting records falsely reflected that Regal Bank had made loans to the Shareholders' Trust totalling amounts of

R55 951 and R145 382 during or about the period December 1996 to June 2000 whilst no such loans existed;

- Regal Holdings' Audited results for the year ended 28 February 2000 falsely reflected that Regal Bank had made advances to the Shareholders' Trust totalling amounts of R55 951 and R145 382 whilst no such advances existed; and
- Regal Bank's accounting records for the 2000 financial year and Regal Holdings' Audited results for the year ended 29 February 2000 failed to reflect that, during or about December 1996 to June 2000, Regal Bank had incurred advertising expenditure and donations of R55 951 and R145 382.

[T] 2001 Levenstein's Director's Remuneration Notification

Fraud

69

69.1 Levenstein is guilty of the crime of fraud.

69.2 During or about the first half of 2001 in Johannesburg or Sandton Levenstein did unlawfully and with the intent to defraud expressly or impliedly and falsely represent[31] to EY and/or the Reserve Bank and/or Regal Bank's depositors and/or Regal Holdings' shareholders that his total directors' remuneration for the 2000 financial year was R561 500.

69.3 At the time when Levenstein made the representation it was false in that, in respect of the 2001 financial year, he earned the following additional remuneration:

69.3.1 An amount of R650 000 paid to him by Regal Holdings during or about April 2000 (and falsely described as a dividend);

69.3.2 amounts paid to Levenstein by Regal Bank through a Standard Bank account outside Regal Bank's accounting records during the period 1 March 2000 to 28 February 2001 totalling R20 000.

69.3.3 a bonus of R460 000.

69.4 The misrepresentation was actually or potentially prejudicial to EY and / or the Reserve Bank and/ or Regal Bank's depositors and / or Regal Holdings' shareholders.

Contravention of s 249(1) of the Companies Act

70

70.1 Levenstein is guilty of a contravention of s 249(1) of the Companies Act.

70.2 Levenstein, in a statement, return, report, certificate, financial statement or other document required by or for the purposes of any provision of the Companies Act, made a statement which was false in a material particular, knowing it to be false, by recording, in his 2000 directors

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[31] §89 Part Three; DT(1)39; EY180091.

remuneration notification, that his total directors' remuneration for the 2000 financial year was R561 500 whereas, during the 2000 year he received the additional remuneration set out in paragraph 69.

Contravention of s 251(1) of the Companies Act

71

71.1 Levenstein, is guilty of a contravention of s 251(1) of the Companies Act.

71.2 Levenstein, a director of Regal Bank and Regal Holdings, made, circulated or published or concurred in the making, circulating or publishing of a written statement, report or financial statement in relation to the property or affairs of Regal Bank and Regal Holdings which was false in a material particular in that, in his directors' remuneration for the 2001 financial year, he recorded his total remuneration for the 2001 year was R561 500 whereas, during such year he received the additional remuneration set out in paragraph 69.

[U] DI Returns

Contravention of s 251(1) of the Companies Act

72

72.1 Levenstein is guilty of a contravention of 251(1) of the Companies Act.

72.2 Levenstein was a director of Regal Bank and Regal Holdings and made, circulated or published or concurred in the making, circulating or publishing of a certificate, written statement, report or financial statement in relation to the property or affairs of Regal Bank and Regal Holdings in that Levenstein procured the submission of DI returns to the Reserve Bank which were false in the following material particulars:[32]

72.2.1 In Regal Bank's DI 510 return as at 31 December 1999 Regal Bank reflects an amount of R235 650 000 as a deposit with BOE Bank. That entry was false. The relevant investment was not an investment with BOE Bank. The bulk of the investment related to the Tradequick and RVM structured finance deals. The largest part of the investment was an investment in the preference shares of certain Mettle subsidiaries or SPV's, the purchase price of preference shares having been paid by Regal Bank.

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[32] See §107 Part Two and §87 Part Three; See also inter alia EY020257; EY180268; EY180269 -180272; F159.1; F181.1; J13; Strydom 3455 - 3457; Zarca : 3047 - 3053.

72.2.2 In Regal Bank's DI 510 return as at 31 March 2001 Regal Bank reflected total large credit exposures of R438 157 000. R303 000 000 of this amount was reflected as an investment with BOE Bank. The balance of R135 137 000 was reflected as loans to "Phekani Investments" (R66 862 000) and the Incentive Trust (R68 295 000). The DI 510 return was false in the following respects:

72.2.2.1 the total large credit exposure as at 31 March 2001 was not R438 157 000, but in fact R775 706 000 (a difference of R337 549 000);

72.2.2.2 whilst Regal Bank reflected a deposit of R303 000 000 with BOE Bank as at the relevant date there was in fact was no such deposit;

72.2.2.3 Regal Bank reflected a loan of R66 862 000 as a loan to Phekani, whilst in fact it there was no loan to Phekani;

72.2.2.4 as at the relevant date Regal Bank had large credit exposures to RVM, New Heights, Tradequick, Metshelf 106 and Mettle in a total amount of R588 674 000; Regal Bank failed to disclose any of these exposures.

72.2.3 In Regal Bank's DI 400 return as at 31 March 2001 Regal Bank reflected capital requirements of R155 347 000 instead of R205 035 000 (a difference of R49 688 000).

The incorrect calculation was based on inter alia the false statements in inter alia Regal Bank's abovementioned DI510, hence also the false DI 400 return.

72.2.4 In Regal Bank's DI310 return as at 31 March 2001 Regal Bank reflected a minimum reserve balance of R15 469 000 instead of R27 544 000 (a difference of R12 075 000).

Contravention of s 75 of the Banks Act

73

73.1 Regal Bank is guilty of a contravention of ss91[33] read with s75[34] of the Banks Act.

Regal Bank contravened s91 read with s75 of the Banks Act as set out in paragraph 72.

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[33] s 91 **Offences and penalties**
(1) Any person who-
(a) fails to comply with a direction under section 7;
(aA) in completing any questionnaire contemplated in section 1 (1A) (c) furnishes the Registrar with any information which to the knowledge of such person is untrue or misleading in any material respect; or
(b) contravenes or fails to comply with a provision of section 7 (3), (4) or (5), 34, 35, 37 (1), 38 (1), 39, 41, 42 (1), 52 (1) or (4), 53, 55, 58, 59, 61 (2), 65, 66, 67, 70 (2), (2A) or (2B), 70A, 72, 73, 75, 76, 77, 78 (1) or (3), 79, 80 or 84 (2).shall be guilty of an offence.

[34] s 75 **Returns**
(1) A bank shall, in order to enable the Registrar to determine-
(a) whether the bank is complying with the provisions of-
(i) sections 70 and 72; or
(ii) section 10 of the South African Reserve Bank Act, 1989 (Act 90 of 1989); or
(b) the nature and amounts of the bank's assets, liabilities and contingent liabilities, furnish the Registrar, subject to the provisions of subsection (3A), with returns.
(2) .....
(3) A bank shall, in addition to the returns referred to in subsection (1), furnish the Registrar, subject to the provisions of subsection (3A), with the prescribed returns, including returns relating to the extent and management of risk exposures in the conduct of its business.

[V] 2001 Audited Results of Regal Holdings

74

74.1 Levenstein and Davis are guilty of the crime of fraud.

74.2 On or about 30 April 2000 and in Johannesburg or Sandton Levenstein and Davis did unlawfully and with the intent to defraud expressly and / or impliedly and falsely represent[35] to EY and / or the Reserve Bank and / or Regal Bank's depositors and / or Regal Holdings' shareholders that the audited income before tax for the year ended 28 February 2001 was R71.5 million whereas the profits should have been reduced by at least the following items:

74.2.1 branding income of R5,5 million recognised in the 2000 financial year;

74.2.2 branding income of R20.5 million recognised in the 2001 financial year;

74.2.3 income reflected as received from Elul in respect of a branding fee R2.7 million;

74.2.4 expenditure of Regal Bank of approximately R20 million that had been falsely credited to other expenditure/income and debited to branding work in progress during the relevant six month period and transferred to the BOE Bank account at

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(3A) The returns referred to in subsections (1) and (3) shall be prepared in conformity with generally accepted accounting practice and shall be furnished to the Registrar in respect of such period, at such times and on such a form as may be prescribed.

35 See §94 and 103 Part Two; §50, 55-59, 69 and 83 Part Three; See also inter alia EY110224; EY110342;

year end. (The amount applicable to the six months cannot be determined by the commissioner.);

74.2.5 a transfer of approximately R6 million into the Phekani loan account in respect of a debit which was probably irrecoverable.

74.3 At the same time and place Levenstein and Davis, with the intent to defraud, made further misrepresentations in that they (under circumstances where they had a duty to do so) failed to disclose to EY, the Reserve Bank, Regal Bank's depositors and Regal Holdings' shareholders that Regal Bank was committed to issue 5 million shares to Levenstein for no consideration.

74.4 The misrepresentations were actually or potentially prejudicial to EY and / or the Reserve Bank and/ or Regal Bank's depositors and / or Regal Holdings' shareholders.

Contravention of s 249(1) of the Companies Act

75

75.1 Levenstein and Davis are guilty of a contravention of s 249(1) of the Companies Act.

75.2 Levenstein and Davis, in a statement, return, report, certificate, financial statement or other document required by or for the purposes of any

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EY110353; EY110399; EY110413; EY110483; EY130043; EY130199; EY140123-4; EY140154; Davis 2878-9; 2902; 3420-3424; Strydom 3444-3448; 3453-3454.

provision of the Companies Act, made a statement which was false in a material particular, knowing it to be false, by recording, in Regal Bank's accounting records, a false entry reflecting the items set out in paragraph 74.

Contravention of s 250(1) of the Companies Act

76

76.1 Levenstein and Davis are guilty of a contravention of s 250(1) of the Companies Act.

76.2 Levenstein and Davis were directors or officers of Regal Bank and Regal Holdings and made a false entries in a book, document, financial record or financial statement of Regal Bank or Regal Holdings by recording, in Regal Bank's accounting records, the entries set out in paragraph 74.

Contravention of s 251(1) of the Companies Act

77

77.1 Levenstein, and Davis are guilty of a contravention of s 251(1) of the Companies Act.

77.2 Levenstein, and Davis were directors or officers of Regal Bank and Regal Holdings and made, circulated or published or concurred in the making, circulating or publishing of a financial statement in relation to

the property or affairs of Regal Bank and Regal Holdings which was false in the material particulars set out in paragraph 74.

Contravention of s 305(1) of the Companies Act

78

78.1 Levenstein and Davis are guilty of a contravention of s 305(1) read with s 308 of the Companies Act.

78.2 On or about 25 September 2000 Levenstein, and Davis, directors or officers of Regal Holdings, failed to take all reasonable steps to secure that the Regal Holdings annual financial statements complied with the provisions of s 305 of the Companies Act.

78.3 The Regal Holdings' 2000 interim results did not comply with the provisions of s 305 of the Companies Act in one or more of the respects set out in paragraph 74.

[W] Manipulation of Regal Bank's Accounting records to increase profits or hide losses

79

79.1 Regal Bank, Levenstein, Davis and de Castro are guilty of a contravention of s 284(4) read with s 284(1) of the Companies Act[36].

79.2 Regal Bank failed to comply with the provisions of s 284(1) of the Companies Act in that the accounting records kept by it failed fairly to represent the state of affairs and business of Regal Bank and to explain the transactions and financial position of the trade or business of Regal Bank in the following respects[37] :

79.2.1 During or about April 2001 Levenstein issued an instruction that Regal Banks depreciation rates on fixed assets be adjusted downwards. The rates to which certain categories of fixed assets were being depreciated were not in accordance with reasonable and market related estimates of

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[36] S 284 **Duty of company to keep accounting records**

(1) Every company shall keep in one of the official languages of the Republic such accounting records as are necessary fairly to present the state of affairs and business of the company and to explain the transactions and financial position of the trade or business of the company, including ...

(4) (a) Any company which fails to comply with any provision of this section and every director or officer thereof who is a party to such failure or who fails to take all reasonable steps to secure compliance by the company with any such provision, shall be guilty of an offence.

(b) In any proceedings against any director or officer of a company in respect of an offence consisting of a failure to take reasonable steps to secure compliance by a company with the requirements of this section, it shall be a defence to prove that the accused had reasonable grounds for believing and did believe that a competent and reliable person was charged with the duty of seeing that those requirements were complied with and was in a position to discharge that duty and that the accused had no reason to believe that the said person had failed in any way to discharge that duty.

the useful life of the assets concerned: software was depreciated at 10% per annum instead of the norm of 50% per annum; computer equipment was depreciated at 10% per annum instead of the norm of 33 1/3 per annum; restraint of trade payments were capitalised at 5% per annum whilst the restraints concerned covered a five year period and should have been depreciated at 20% per annum.

79.2.2 During or about April 2001, Levenstein instructed de Castro to debit goodwill and credit motor vehicles with an amount of R407 551,05 in respect of "Cars taken by Jack Probart and Gerhardt van Niekerk as restraint payments in lieu of shares". Regal Bank was writing these amounts off over a 20-year period. At an unknown date Levenstein instructed de Castro to debit goodwill and credit motor vehicles with an amount of R420 897,81 in respect of "restraint payments" to Johan van Zyl and Koos van Rensburg. Regal Bank was writing these amounts off over a 20-year period. The above amounts should have been charged to salaries immediately; alternatively, the amounts should have been written off over the period of the restraint.

79.3 During or about April 2001 Levenstein instructed de Castro to revalue Regal Bank's furniture and art. A revaluation of R3,5 million was

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[37] § 76, 78, 83, 84 Part Three. See also inter alia F159.2; F159.3; K(3) 13; TdeC 2; 5; 35; 43; 45; 48; 50; 59; Davis: 3426 -3427; de Castro 3385 –3389; Zarca 3052 - 3057.

credited to a deferred income account and R600 000 of this amount was recognised by Regal Bank as income. There was no market-related basis for the revaluation.

79.4 During or about June 2001 Levenstein instructed de Castro to debit Pekane shares/advances with R18.2 million and to credit "Mark / Market income" with R2 million and to credit the "Provision / reserve account Pekane" with R16,2 million. Levenstein further instructed de Castro that each month thereafter R2 million was to be reflected at mark / market income. Since this "loan" was in fact a purchase by Regal Bank of Regal Holdings shares it was inappropriate to reflect this purported increase as mark / market income.

79.5 During or about April 2001 Levenstein instructed de Castro to recognise as mark / market income R1 million in respect of Sempres. Since income was not reasonably certain at that stage it was inappropriate to recognise any income in respect of Sempres and in fact Levenstein subsequently indicated that the Sempres investment had been written down to R1.

79.6 During or about March 2001 Levenstein instructed de Castro inter alia to credit consulting fees and debit debtors' suspense as "the direct costs for the purchase of Worldwide shares will be recovered in cash". He also instructed de Castro to credit legal expenses with R210 286 and to debit goodwill/restraints with R153 286 and Grayston fixed asset account with R57 000. In addition he instructed de Castro to credit travel and accommodation and debit debtors suspense with R100 000

on the basis that this would be recovered from the sale of Worldwide shares to Hanover Re. There is no substance to the above transactions.

79.7 At a certain stage Regal Bank's records reflected a debit balance arising from Regal Banks sale of its RMI shares to RMI Investment Consortium. Levenstein instructed Davis to transfer the R6 million debit to the Pekane account. There was no basis for the transfer of the R6 million debit to the Phekani account. The transfer of the R6 million debit to the Phekani account constituted an invalid entry.

[X] Fraudulent or reckless trading

80

80.1 Directors and/or officers of Regal Holdings and / or Regal Bank from to time[38] ("the directors and officers") are guilty of a contravention of s 424 (3) read with s 424 (1) of the Companies Act.

80.2 During or about the period February 1998 to 26 June 2001 the business of Regal Bank and Regal Holdings was carried on recklessly and the directors and officers were knowingly parties to the reckless carrying on of the business of Regal Bank and Regal Holdings.

80.3 The businesses of Regal Bank and Regal Holdings was carried on recklessly inter alia in one or more of the respects set out in this report in Part One paragraph 7.

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[38] Read with Part One paragraph 1.1

PART TWO

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PART TWO

The period 1991 to 1997

1 In July 1991 Wingate Holdings Ltd applied to the Registrar of Banks ("Registrar") for a banking license. Wingate Holdings Ltd was the holding company of Wingate Finance Ltd, which was to change its name to Wingate Bank Ltd, if the application were successful. The application was refused on a number of grounds, one of which was that Wingate Finance Ltd was conducting the business of a bank at the time; the application for a banking license was to regulate its illegal activities rather than due to a genuine desire to render banking services. The Registrar directed that the business of Wingate Finance Ltd was to be wound down. The person who acted on behalf of Wingate Holdings Ltd was Levenstein. Two further applications were unsuccessful.

2 On 12 July 1995 Rand Treasury Ltd ("RTL") was incorporated. The shareholders included Levenstein, Buch, Diesel, Krowitz, Brian Levenstein and Lurie. The directors were Levenstein, Buch, Diesel, Krowitz, Lurie and Lopes. On 19 July 1995, at the first meeting of the board of directors, Levenstein was appointed chairman and Diesel managing director. At the second meeting of the board on 17 August 1995, Peter Springett was appointed as director and chairman,

Levenstein became deputy chairman and Krowitz chief executive officer. On 2 October 1995 the directors agreed that consideration should be given to an application for a banking license. The bank's services would be offered to "a niche market of professionals and select high net worth individuals". Slender was appointed to the board. On 24 January 1996 Schneider was appointed to the board and Kaminer was appointed his alternate. On 20 March 1996 it was minuted at a board meeting that the application for a banking license was in preparation. On 1 March 1996 the Rand Treasury Shareholders Trust ("Shareholders Trust") was created. The Shareholders Trust was used to buy (and sell) Holdings shares purportedly with the intention of moving shares from "weak hands" to "strong hands", but in reality to support the Holdings share price.

3 RTL applied to establish a bank on 15 April 1996. The application deserves scrutiny in view of what transpired during the bank's short life. The application referred extensively to a book written and edited by Levenstein and Krowitz, "Futures and Hedging Demystified" ("the book").

- In the introduction to the application it was stated: "RTL has been designed and resourced to match and satisfy non-fractionalised private banking requirements. A private bank may not entertain banking activities beyond the fixed framework of its call services and image profile. … In addition to a powerful mix of skills and expertise, an authentic private

banking concern must be driven by a strict and yet sophisticated risk management environment. The development of a particularly disciplined culture functions as the platform for the regulation and control of a risk management infrastructure, carefully managed to accommodate consistent standard of excellence."

- In the section of the application dealing with "liquidity risk", this quotation from the book appears: "… The liquidity management of a bank is ultimately and inextricably linked to its financial image profile in the marketplace. Banking culture and the ability of the board and management to preserve and grow the income statement in compliance with sound and well defined strategic boundaries, is the critical success factor which determines the effectiveness of liquidity management …".
- The opening paragraph of the section on "solvency risk" included this passage: "The strategic and operational call of the original Wingate team has been further strengthened by a carefully selected mix of risk management, banking and treasury skills. Commitment to risk management, risk avoidance and the satisfaction of shareholder expectations has functioned as the culture binding ingredient for the team building process. … The private banking objectives of RTL and accordingly the projected structure of both its balance sheet and income statement are specifically designed to dramatically minimise generally accepted capital or solvency risk requirements."
- Having stated under "credit risk" that "RTL will employ generally accepted banking practice for the application of credit risk [and that] traditional norms and practice will be merged with a specific culture

that it is intensely committed to risk avoidance", the book is quoted at some length. Two sentences strike one as particularly prescient: "Large exposure transactions are often driven by Ego and incentives. Indeed the Ego factor is endemic to the banking industry, and has the potential to shape disaster." The application stated that a credit committee approved and mandated by the board would have the necessary authority to approve advances in compliance and in conformity with a risk management policy framework.

- In dealing with "pricing risk" the application stated that "RTL's policy has a conservative and controlled approach over the pricing between assets and liabilities … A diverse mix of quality income streams from merchant banking, corporate finance, financial services and allied activities also forms the basis of risk management architecture to further cushion any unforeseen rate movements."

4 The qualifications of the directors who would play a prominent part in the affairs of the bank were described in the curricula vitae which formed part of the application:-

- Peter Springett ("Peter") was 65 years old. From 1956 until 1989 he had been employed by Barclays Bank, later renamed First National Bank ("FNB"). He had worked his way up through FNB from manager's assistant to executive director on the main board of the FNB group of companies. From 1990 to 1994 he was non-executive chairman of the Wingate Group.

- Levenstein was 45 years old. He was a chartered accountant who had been associated with a family firm of accountants, Levenstein & Partners, from 1977 until 1995. He was the deputy chairman of the Wingate Group from 1987 to 1994. He served on the board of Mercantile Bank Holdings Ltd in 1993-4.
- Krowitz was 33 years old. His qualifications were B Com Honours MBA. He had worked in different capacities for different employers such as Macsteel International (Pty) Ltd, Volkskas Merchant Bank Ltd and Santam Bank Ltd.
- Lopes was 40 years old. His academic qualifications were exaggerated. He had worked, *inter alia*, for National Discount House of SA Ltd and Mercantile Bank Ltd.
- Diesel was 34 years old. His main working experience had been obtained working in the treasury of Nedcor from 1989 to 1994.
- Lurie was 54 years old. He was a chartered secretary for 25 years and had been a promoter and founding shareholder of Wingate Holdings Ltd.
- Schneider was 50 years old. He was a chartered accountant practising as the senior partner of Schneider Katz Chartered Accountants.
- Slender was 67 years old. He worked for different businesses over the years to become managing director of Flexi Trainer Industrial (Pty) Ltd between 1987 and 1993.

- Buch was 44 years old. He was a chartered accountant and senior partner of Levenstein & Partners. He was a promoter and founding shareholder of the Wingate Group.

5 As at 10 July 1996, RTL had a share capital of R39.3m, debenture capital of R25m and revenue reserves of R1.3m. It was anticipated that RTL would have income of R6.8m for the first year. The anticipated expenditure was R2.9m.

6 On 20 August 1996 the application for authorisation to establish a bank in terms of s12 of the Banks Act, 94 of 1990 ("Banks Act") was granted. The Registrar took the view:

- that the application had been well considered by the applicants;
- the application bore evidence of a conservative, prudent approach to banking;
- the board of directors were people with experience and qualifications well above the average board member of other banks;
- the board members were not the same as those rejected in 1991, although some of them, including Levenstein, were the same.

7 RTL resolved on 16 September 1996 to change its name to Regal Treasury Private Bank Ltd ("Regal Bank" or "the bank"). On 2 January

1997 a certificate to conduct the business of a bank was issued in the name of Regal Bank.

8 Lubner and Mark Springett, the son of Peter, attended their first board meeting on 23 October 1996.

9 On 22 January 1997 Birrell and J Pollack became directors of the bank. It was minuted that share capital was expected to reach R56m by 28 February 1998. Anticipated net income for the financial year was R5m. The board of directors met once a month. On 1 March 1997 the bank moved from the premises that it had occupied in Rosebank to its own building, Stone Manor, in Sandton. Board members were requested to encourage "suitable friends and … present shareholders to participate in the bank's core business". As at 31 August 1997, the income of the bank was R5m and expenses R2.3m. Share capital was R55m. On 31 October 1997 it was minuted at a board meeting that interest income in excess of R1m for the month and revenue reserves of more than R10m had been reached. Assets under management were R40m. Davis was appointed chief financial officer ("CFO") with effect from 1 November 1997. He was a chartered accountant who had been employed at one time by Levenstein & Partners.

10 During the last six months of 1997 signs of conflict between Peter, the chairman, and Levenstein, the chief executive officer ("CEO"), were

recorded in the board minutes. At the meeting of 24 July 1997 it was minuted that: "6.5 CEO responsible for day-to-day running of the Bank. Lines of authority and mandate parameters between CEO and chairman now clearly defined. Relationship between CEO and chairman to evolve in compliance with standard industry norms.

6.7 Executive directors have a fiduciary duty in terms of the Banks Act and Companies Act and should speak with one voice." On 21 August 1997 it was minuted that negotiations were in progress to acquire a stockbroking firm. Peter Springett requested that the bank proceed with caution in the negotiations and that a final decision should not be made until a full feasibility study had been carried out. The issue of "stockbroking activity" was discussed at the board on 25 September 1997. It was agreed that a full feasibility study would be undertaken before any contracts were signed. Peter Springett tabled fourteen duties of the chairman of the board as required by the King report. It was further reported that the King report recommended that: "the board must retain full and effective control over the corporation, monitor the effective management and ensure that decisions on material matters are in the hands of the board." On 8 October 1997 Levenstein called a special meeting of the board to discuss his differences with Peter Springett and their apparent incompatibility. He launched a personal attack on Springett accusing him of anti-Semitic behaviour and of using "horrific divide and rule" tactics. The majority of the directors decided that Springett should resign immediately. He was given time, however,

to resign with his "profile intact". At a board meeting on 30 October 1997 it was recorded Peter Springett supported the stockbroking initiative.

11 The financial results for 1 March 1997 to 27 February 1998 reflected a growth in share capital from R51.6m to R54.6m. Profit after tax had grown from R4.3m to R8.3m. Deposits were over R100m. There were about 500 shareholders. The annual report described the nature of the business in these terms:

> "Regal Treasury Private Bank Ltd caters for the banking requirements of well to do individuals who seek professional expertise coupled with a high standard of personal service. … We consider ourselves to be the trustees in South Africa of the traditional values of integrity, service and discretion developed over centuries by the classical European private banks. … The risk profile of the bank is conservative by nature and design."

1998

12 The seeds of the demise of Regal Bank were sown early in 1998 when Peter resigned as chairman and Levenstein became acting chairman and later chairman of the board, while remaining on as CEO. The reasons for Peter Springett's resignation were various. Diesel spoke of a power struggle. Levenstein informed the bank supervision division ("BSD") of the South African Reserve Bank ("Reserve Bank") that there

was constant disagreement on strategic issues. The evidence of Peter was that Levenstein wanted to run the bank as a one man bank and that the majority of the board supported Levenstein. In Peter's words, it was a "classic case" of a lack of corporate governance leading to problems.

13 The departure of Peter was significant for a number of reasons. Peter was the one director who was an experienced banker. No one with his experience thereafter remained on the board. The executive directors had varying degrees of specialist expertise but none of them had served at a senior level in a reputable bank, as Peter had done. The bank lost an independent chairman who understood and applied sound corporate governance principles. Had Peter been replaced by someone with similar attributes, the path the bank took may have led in a different direction. Instead, Levenstein became chairman, a man with limited experience in banking and a contempt for corporate governance. The exposure Levenstein had had to banking had been his involvement with Wingate, which was not granted a banking license, and for a limited period with Mercantile Bank.

14 At the first meeting between Levenstein and the BSD on 18 February 1998 after he had become acting chairman, Martin, a deputy general manager of BSD, expressed his disapproval of Levenstein occupying the positions of both acting chairman and CEO. Levenstein said he

would be acting chairman "for the short term". On 24 February 1998 Martin followed up with a letter sent to Levenstein in which the opinion was expressed that Regal Bank "would not be exercising sound corporate governance if a non-executive chairman was not appointed to the board" of the bank. The Reserve Bank's objection was not discussed at a board meeting until 28 May 1998, when the board decided that "due to the current operating and financial success achieved with the CEO as acting chairman, the *status quo* should remain". On 30 September 1998 the Registrar of Banks ("the Registrar") addressed a letter to Levenstein in which he gave the bank until 31 December 1998 to appoint a suitable non-executive chairman. At a meeting of the board on 22 October 1998, the Registrar's letter was not tabled. The board instead agreed to appoint Levenstein as chairman. Lubner voiced reservations. Levenstein replied in a lengthy letter dated 29 October 1998 to the Registrar's letter of 30 September 1998. The letter spoke of the need for the fusion of the roles of CEO and chairman; that the appointment of an independent chairman could lead to "a wedge being driven between operational and strategic balance" which could "impair harmony and ultimately risk management focus". The bank's position was summarised in this passage: "In summary we strongly believe that having regard to Regal's historical development and its current operational focus and strategies, an 'enforced' separation of the roles of chairman and CEO at this juncture would, instead of enhancing shareholder protection, create sufficient operational and governance difficulties to in fact prejudice shareholders." A

few days later an application by Regal Treasury Bank Holdings Ltd ("Regal Holdings" or "Holdings") to register as a holding company was signed by Levenstein as chairman. On 17 November 1998 the Registrar informed Levenstein that he could remain on as chairman until Regal Holdings had been listed. At a board meeting on 26 November 1998, Lubner "tabled the sensitivities and complexities regulating the future dissection of the chairmanship and CEO roles." The board nevertheless decided that the *status quo* should remain.

15 During the course of the year, Worldwide Africa Investment Holdings Ltd ("Worldwide") and Regal Bank negotiated the acquisition of shares in Regal Bank by Worldwide. On 6 July 1998 an agreement was concluded. On the following day the bank applied to the Reserve Bank to allot 20% of the total issued shares to Worldwide. The application was granted. Two Worldwide representatives were appointed to the board of the bank, Nhleko and Chanesta. They attended their first board meeting on 22 October 1998. The Reserve Bank informed the bank on 15 December 1998 that an application by Worldwide to acquire more than 15% of the shares in Regal Holdings would have to be made to the Reserve Bank.

16 The activities of the bank expanded. A stockbroking division became operational on 2 March 1998. The assets under management reached R100m in April 1998, R120m in May 1998 and R130m in July 1998.

Two new directors, Radus and Kaminer, joined the boards of Holdings and the bank. Radus (59 years old) had been an attorney in a small private practice in Johannesburg for many years. Kaminer (75 years old) was a mechanical engineer who had been involved with various businesses over the years. He had not been a director of a bank. Birrell resigned as director in September 1998. At the third annual general meeting of the members on 23 July 1998 the authorised share capital was doubled from 100 000 to 200 000 ordinary shares. February 1999 was confirmed as the date for listing of Regal Holdings. On 5 November 1998 the Reserve Bank informed Regal Bank that non-banking business was to be structured under a controlling company as opposed to under a bank and that it did not object to the registration of Regal Holdings as the controlling company. Regal Holdings was incorporated on 27 November 1998. During the course of the year a unit trust management company was formed.

17 The financial results of Regal Holdings for the period 1 March 1998 to 28 February 1999 showed an increase from 1998 to 1999:

- in share capital from R54.6m to R335.1m;
- in profit after tax from R8.3m to R36.7m;
- in earnings per share (cents) from 19.4 to 48.1.

An analysis of “annuity” income revealed:

Asset management	18%
Corporate finance	15%

Information technology	13%
Stockbroking	36%
Structured finance	18%
	100%

1999

18 At the commencement of the year the board of directors of Regal Holdings consisted of six executive directors and eight non-executive directors. The executive directors were Levenstein (CEO and executive chairman), Diesel, Krowitz, Lopes, Mark Springett and Radus. The non-executive directors were Buch, Kaminer, Lubner, Lurie, Nhleko, J Pollack, Schneider and Slender.

19 On 17 November 1998 the Registrar had given the bank until the listing of Regal Holdings to appoint a non-executive chairman. Regal Holdings was listed on 25 February 1999. Levenstein nevertheless remained on as chairman. At a meeting between the BSD and Levenstein on 29 March 1998, Levenstein said that a proper candidate was not available and the solution would not be easy. Three possible candidates were named: Joffe of Bidwest, Lubner and J Pollack. Martin requested action to be taken before July 1999. On 20 April 1999 Martin wrote a letter to Levenstein in which he confirmed the telephone conversation of that day in which he had told Levenstein "that this office feel strongly that the

roles of chairman and chief executive officer should not vest in the same person." The Registrar wrote a letter to Levenstein to similar effect on 10 May 1999, expressing the belief that Levenstein's reasons for not separating the roles "are insufficient to override sound corporate governance principles, with which this offices believes banks should comply." Levenstein was told that the matter should be finalised by 31 July 1999. At a meeting of the boards of directors of Regal Holdings and Regal Bank on 23 June 1999 it was minuted that "discussions with the Reserve Bank on the splitting of the roles of chief executive officer and chairman continue". On 19 July 1999, Levenstein wrote a letter to the Registrar in which he stated that a number of factors made it extremely difficult and impractical to appoint a non-executive chairman by 31 July 1999. The factors listed by Levenstein included ongoing negotiations with certain institutions regarding potential investment in Regal; that the appointment of an independent chairman "could prove disastrous to the harmonious (and effective) prevailing leadership structures"; and that the "aftershock of a prior abortive attempt to foist a hierarchical executive structure upon Regal at an inappropriate time is still keenly felt within the Regal corridors". The Registrar responded on 28 July 1999 by giving the bank until 30 September 1999 to separate the roles. At a combined meeting of the boards of Holdings and the bank on 29 September 1999 Levenstein relinquished his position as chairman and Lurie was appointed as chairman.

20 In the face of opposition from the Reserve Bank, Levenstein was executive chairman and CEO for a nineteen month period, with the support of the majority of the board. From inception, the Reserve Bank had voiced its disapproval and placed the bank on terms to appoint a non-executive chairman. The issue was discussed at meetings between the BSD and the bank, letters were exchanged and extensions were given to comply, the final one expiring on 30 September 1999. Levenstein played with the BSD: at first he said that his appointment as acting chairman was for a short term; then he justified the failure to accede to the Reserve Bank's request on various grounds including that a wedge should not be "driven between operational and strategic balance"; later the excuse was that a suitable candidate could not be found. And ultimately, in an act of cynicism, Lurie was appointed as chairman. Lurie had never been mentioned as a potential candidate; he had been on the board all along; he had been associated with Levenstein in Wingate and in the formation of Regal Bank; Lurie had no experience of running a large corporation or a bank; and he was Levenstein's brother-in-law. Lurie was to remain chairman until March 2001, a period of eighteen months.

21 During 1999 and 2000 Regal Bank's internal audit function was poor. A meeting was held on 18 January 1999 between the BSD and the bank. The bank was represented by Davis, the CFO, and Hiralal. The BSD was represented by Nolte and Ms Pretorius. Hiralal had previously

been employed by Levenstein & Partners. He was appointed as the new internal auditor of the bank. BSD pointed out that the bank's growth required more staff to perform the internal audit function. The BSD followed up with a letter expressing the same view on 26 January 1999. Two years later, the internal audit function of the bank was still poor and the bank appointed Price Waterhouse Coopers ("PWC") as internal auditors. Strydom of Ernest & Young ("EY") testified that EY did not rely on the procedures performed by the bank's internal audit department. EY did not regard them as an independent internal audit department. In Strydom's view very little time was spent on internal auditing.

22 In the first half of the year, two events of note occurred:-

- The first was the listing of Regal Holdings on 25 February 1999. At a joint meeting of Holdings and the bank on 24 March 1999, it was recorded that "The share price is presently below the aspirations of the financial community. Nevertheless, the fundamentals in respect of a stronger share price remain in place." Mark Springett gave insight in his evidence into the pressures on the share price from the very beginning. He said that Levenstein refused to offer any shares to institutions prior to listing; he insisted on listing Holdings by way of introduction. The bank used its own stockbroking firm, instead of an independent stockbroker, as a sponsoring broker. Prior to listing, a sweepstake was held at the bank. Staff had to predict the Holdings

share price on listing. The lowest price predicted was R7.80 and the highest about R50. Levenstein's prediction was between R30 to R40. When the shares listed, the price was R7.50, i.e. well below the expectations of the bank's employees and management. In an apparent attempt to boost the Holdings share price, the Shareholders Trust was used to buy Regal Holdings shares from the time of listing. At a trustees' meeting on 24 March 1999 it was noted that "the share price subsequent to listing indicates that the equity base requires strengthening". Shares were bought by the trust to "channel shares into stronger hands". On 28 June Levenstein sent a note to Krowitz and Radus expressing his concern about Mark Springett's involvement with "front running", which had an influence, presumably negative, on the price of Holdings shares.

- The second was the conclusion of the first Mettle Ltd ("Mettle") transactions. On 10 February 1999 four contracts, making up the Tradequick structure, and on 18 March 1999 two contracts, making up the RVM structure, were concluded. The essence of the two structures was "back to back" preference share structures. In both instances the bank invested in preference shares in Mettle special purpose vehicles ("SPV's") and the SPV's deposited similar or lesser amounts with Regal Bank. The Tradequick and RVM structures were tax driven. The potential tax benefit was that the accrued preference share income would not be taxable and the accrued interest on the loan would be tax deductible.

23 During July 1999 and thereafter a series of events occurred which demonstrated that:

- the concept of corporate governance was foreign to Levenstein and the directors of Regal Holdings and Regal Bank;
- Levenstein was unfit to be chairman or CEO of a bank;
- the directors, including the non-executive directors, failed to act in accordance with their statutory duties and the recommendations of the King Report.

24 It all began to go wrong on 6 July 1999. Levenstein gave an instruction to the asset management division. There is a dispute of fact on the content of the instruction. On the one hand, there are the versions of Levenstein, Radus and Krowitz. Levenstein's version before the commission was that his instruction was to stop "front running" which he described as "using Regal shares inappropriately … This process where Regal shares will be pushed down artificially". The evidence of Radus was that Levenstein's instruction was "to try and avoid selling Regal shares through Regal Treasury Securities because it looked bad that we were selling our shares". Krowitz testified that Levenstein said: "I do not want the stockbrokers – the Regal Treasury stockbrokers – to sell Regal shares. Sell your shares, use somebody else." On the other hand, there is the evidence of Mark Springett ("Mark"), Kruger and Newman, directors of the asset management company. Mark's evidence was that

he was told by Bacher that he had received an instruction from Krowitz and Levenstein that "asset management was no longer allowed to sell any shares in Regal [Holdings] on behalf of any of its clients". While Bacher was telling Mark about that instruction, Levenstein walked into Mark's office and repeated the instruction. He left and returned later to tell Kruger to investigate the ramifications of advising a client that a client's instructions to sell Holdings shares would not be carried out. Levenstein repeated the instruction at an investment committee meeting later that day. Mark's evidence was corroborated by Kruger and Newman.

25 The probabilities favour the version of Mark, Kruger and Newman:-

- Mark and Kruger acted consistently with their version. They consulted Peter, Mark's father, and sought his advice; they consulted an attorney; they followed the attorney's advice to write a letter recording Levenstein's instruction and Mark's concerns and conveying those concerns to Levenstein. Mark drafted a contemporaneous letter dated 14 July 1999 which gives a detailed account of what transpired on 6 July 1999. Mark also raised the issue of the dual roles occupied by Levenstein. He handed Levenstein the letter.
- When Mark confronted Levenstein, Levenstein's response was not to deny the allegations there and then and to clear up what might have been a misunderstanding. Instead his response was an

aggressive one: he accused Mark of a breach of his fiduciary duties and immediately announced that he was removing Mark as CEO of the asset management division and as managing director of the unit trust management company.

- Levenstein's written response, in a letter of 14 July 1999 drafted by an attorney, was to deny Mark's version only in the baldest of terms. He did not on that day or subsequently dispute Mark's exposition of the facts or place his version on record.
- In his resignation letter of 26 July 1999, Kruger set out the same version. Again there was no response by Levenstein.
- Mark, Kruger and Newman were credible and convincing witnesses. Levenstein was not. As will be shown later, Levenstein is a liar. He lied to his fellow directors, he lied to the Reserve Bank, and he lied to the commission. Levenstein's version of the dismissal of Mark was not corroborated by Radus. Radus was a particularly poor witness. In regard to where the instruction was given he said: "I could have been sitting at Jeff's desk. I could have been sitting in Mark's office. I could have been sitting in Carl Kruger's office. … You know, it might have been just outside my office." Later he said the instruction was given in Levenstein's office. On Mark's version, the instruction was given in his office and then in the meeting room where the investment committee met.

- Mark's version is consistent with Levenstein's obsession with what he regarded as a low Holdings share price and his subsequent conduct in discouraging employees from selling their shares.

26 I find that on a balance of probabilities on 6 July 1999 Levenstein gave an unlawful instruction to the asset management division not to sell any Regal Holdings shares on behalf of its clients. That is strike one.

27 Levenstein summarily dismissed Mark late on 14 July 1999 without giving him a hearing. That is strike two.

28 In the dismissal letter of 14 July 1999 Levenstein accused Mark of breach of fiduciary duty and grossly insubordinate behaviour. There was no substance to those allegations. Mark was quite entitled to resist the unlawful instruction and to raise his concern about Levenstein not giving up the chairmanship. That is strike three.

29 After he had dismissed Mark, Levenstein accused Mark of more serious misconduct, namely, theft of between R5m and R10m, fraud and theft of client's money. When those allegations were initially made, he had no proof thereof at all. He relied on what Krowitz had told him, which was that "an asset management account can never run into debit". Krowitz was an uninformed layman. Some proof was later obtained, on 28 April 2000, when EY produced a draft report in support

of Levenstein's accusations. The EY report was convincingly and in fine detail disputed by Mark, who did know what he was talking about, and a forensic auditor whom he consulted. The charges were never proved and the allegations were subsequently abandoned. That is strike four.

30 Levenstein did not rest with merely making allegations against Mark. He instituted civil proceedings against Mark, Kruger and Newman for return of their Regal Holdings shares. The litigation in the High Court was converted into an arbitration. The arbitration was subsequently settled on the basis that Mark and Kruger could retain their shares or the proceeds. When she was sued, Newman returned her shares to avoid the costs of a legal battle. That is strike five.

31 Criminal charges were laid against Mark, first at the office of Serious Economic Offences and when that office declined to entertain the charges, at the South African Police Services ("SAPS"). Nothing came of the criminal prosecution. That is strike six.

32 The civil litigation cost the bank R806 945.69. That is strike seven.

33 On the day after Mark was dismissed, attorneys Werksmans, acting for Regal Bank, sent a letter of demand to Peter in which it was claimed that during the period of his chairmanship, which had ended eighteen

months before, he had caused to be issued to himself 925 000 shares without the authority of or disclosure to the board. On 16 July 1999, attorney Michael Krawitz, acting on behalf of Peter, pointed out that the shares had been issued with the knowledge of the board of directors, that share certificates were signed by duly authorised officials of the bank, and that the shares had been issued in tranches over a period of two years. Levenstein conceded in evidence that those allegations were factually correct. Nevertheless, civil litigation was instituted by the bank against Peter. This litigation was later consolidated with the arbitration against Mark and Kruger, and eventually settled on the basis that Peter could retain the proceeds of the shares that he had sold. Peter was therefore was completely vindicated. But by then he had spent approximately R500 000 in legal costs. The litigation against Peter was actuated purely by malice. He was sued because he was Mark's father to put pressure on Mark not because there was any substance to the claim against him. That is strike eight.

34 Levenstein must have obtained advice from the bank's attorneys that, in terms of the articles of association, in order to remove Mark as a director he needed a round robin resolution signed by all the directors. Such advice would have been in keeping with the articles of association of Regal Holdings. Two of the non-executive directors were Schneider, a chartered accountant of long standing, and Lubner, a well known and experienced businessman. When they were asked to sign a

round robin resolution, they refused on the basis that they wished to have Mark's dismissal debated at a board meeting. That was also Mark's wish. Levenstein refused. The only way Levenstein could comply with the articles of association was to force Schneider and Lubner off the board. Schneider resigned after he had been told to resign "with dignity", failing which he would be accused of being in breach of his fiduciary duties. There is a dispute of fact between Lubner and Radus and Krowitz. The latter two testified that Lubner indicated telephonically that he would resign. Lubner denied that he had resigned and at that time recorded his denial in at least two letters which he wrote to Levenstein. It is common cause that Lubner attempted to attend a board meeting on 28 July 1999,, at which the BSD was to be present, and that Levenstein refused to allow him to attend. Krowitz's description of what transpired between Levenstein and Lubner at the bank's premises on that occasion was that Levenstein "effectively denigrated Bertie Lubner, took his dignity, attacked him. It was disgraceful." Lubner thereafter played no further part in the affairs of Holdings or the bank and by his conduct resigned as director. Lubner and Schneider were removed. Levenstein had got his way. That is strike nine.

35 Despite nine strikes, Levenstein was not out. The board did not remove him as CEO and chairman. He remained chief executive officer and chairman, with no one left who was willing to stand up to him. The only

reason he resigned as chairman at the end of September 1999 was because the Reserve Bank had insisted he do so. Having rid the board of the two directors who showed their independence, he could remove Mark from the board with impunity without a board meeting. A round-robin resolution was circulated and signed by all the remaining directors in early August 1999, to their shame.

36 The signatories to the resolution were questioned at the commission about their role in that sorry saga.

- Nhleko, a non-executive director representing the major shareholder, testified that his view was that the issue should have been dealt with by the board. He was briefed by Levenstein and Krowitz and having heard their version of the allegations against Mark, went along with the CEO and the majority of the directors, who had signed the resolution before he did. At the time he signed, he did not know that Schneider and Lubner had resigned.
- Lurie was not told about Mark's allegations against Levenstein at the time; he accepted Levenstein's version; he could not recall that Mark had called for a special board meeting on 11 August 1999 or that Schneider and Lubner had supported Mark's call for the matter to be debated at a board meeting.
- Diesel signed the round-robin resolution on the information presented to him by Levenstein; he was not aware that Schneider

and Lubner had refused to sign the resolution and had demanded that the matter be discussed at a board meeting;

- Buch agreed “with hindsight” that Mark’s dismissal should have been discussed at a board meeting; he accepted Levenstein’s version that Mark had been involved in “some fraudulent activities”; he knew that Mark had called for a board meeting but he did not know that Schneider and Lubner had done so;
- Krowitz was not aware at the time that Schneider and Lubner had refused to sign the round-robin resolution and had insisted on a board meeting;
- J Pollack could not remember the dismissal of Mark;
- Kaminer, on his return from a game reserve, signed the resolution on the basis of what Radus and Krowitz told him and he said he saw the evidence the bank had against Mark.

37 The overwhelming impression one has after hearing all the evidence is that the directors spent as much time reflecting on the matter as they do when they decide whether to order Ceylon tea or Rooibos tea.

38 It was vital that the matter be discussed at a board meeting so that Mark’s allegations against Levenstein and his denial of Levenstein’s allegations against him could be ventilated. The directors would then have acted with knowledge of the relevant facts. Had all the facts been debated, the board should have come to the conclusion that Levenstein

had given an unlawful instruction and that he had dismissed Mark for no good reason and without following fair procedure. Levenstein would have had had to go; Mark, Lubner and Schneider would have remained on. (One suspects, however, that the majority of the board would have supported Levenstein, come what may.) Instead, it was only at this commission that the issues were properly ventilated, more than two years later too late for the depositors and shareholders.

39 After the dismissal and resignations, a joint board meeting was held on 18 August 1999. The “effective removal” of Lubner and Schneider was “confirmed and ratified”. After that meeting, the directors could not have been under any illusions that Lubner and Schneider had resigned voluntarily. On 7 September 1999, Levenstein met with the BSD. Levenstein told the BSD that there “was strong adherence to corporate governance in Regal”. Martin expressed the opinion that there might be a market perception that certain members of the board were removed because they did not accept how Mark had been dismissed. On 12 October 1999 Levenstein wrote a letter to the Registrar. He referred to the meeting of 7 September 1999 at which he had taken the opportunity, in his words, “to communicate a balanced risk management and corporate governance perspective regarding recent dismissals and “resignations” from our board.” On 22 October 1999 he wrote a letter to the Registrar complaining about the conduct of Barrow of the Financial Services Board (“FSB”). He said that Regal would

pursue the prosecution of Mark with serious intent. In a letter of 4 November 1999, in referring to “Lubner and Springett”, he wrote: “Risk management comes first. Corporate Governance requires strength, courage and an iron resolve.” As Levenstein was to demonstrate time and again, he confused corporate governance with thuggery.

40 On 21 September 1999 the Holdings results for the six months ended 31 August 1999 were published:-

- Publication took place without the auditors having any input and, of more significance, without the approval of the audit committee. The first time the audit committee saw the results was on publication. The first time the audit committee debated the results was at a meeting held on 29 September 1999, a week after publication. One of the more amusing entries in a minute that one can wish to see is this one: “The audit committee agreed that the proof of the interim results should be scrutinised by the audit committee before publication.”
- Three entries in those results merit discussion:-

	31/8/99	28/2/99
Income before taxation	R40.2m	R50.2m
Debenture capital	R30m	R30m
Deposits	R424.6m	R295m

  - The interim results foreshadowed a spectacular growth in income before taxation if R40.2m was earned in six months compared to R50.2m for the

whole previous year. But included in the R40.2m was R21m of branding income. At year-end only R5.5m of branding income for the whole year was recognised and the total profit before taxation was only R55.5m.

- At year-end, EY required the whole amount of R30m debenture capital to be set off and nil debenture capital was shown.
- Deposits showed an impressive increase from R295m as at 28 February 1999 to R424.6m six months later. Included in the latter amount, however, were the Tradequick R100m and RVM R50m amounts, which were not true deposits. Deduct those amounts from the sum of R424.6m and one is left with deposits of R274.6m, a decrease in deposits of R20.4m.

41 At the last joint meeting of the boards on 24 November 1999, under "Strategy", this was minuted: "Branding will provide significant revenue streams in future. Regal's backing, together with its banking infrastructure has served as a powerful draw card for ventures looking to expand and improve their profiles. The acquisition of equity stakes as consideration will give Regal an ongoing interest in the growth of such ventures. The strategy is unique and it is vital to protect it from the attention of the likes of Investec."

2000

42 The year 2000 began with another test for the directors, which, led by Lurie, they failed dismally.

43 On 29 December 1999 Levenstein wrote a letter to the directors of Holdings and the bank and submitted "that my efforts for Regal from inception to date justifies a cash bonus of R2m and a structural redesign of my restraint share allocation". He requested a further restraint allocation of 5m shares. On page 2 of the letter appears the signatures of Lurie and Buch and the following manuscript note in Lurie's handwriting: "The non-executive directors of Regal have unreservedly and unconditionally authorised and approved the contents of this letter relating to cash and the 5m shares requested by the chief executive officer – Mr Jeffrey Levenstein". On 14 February 2000 Holdings, the bank and Levenstein signed an agreement in terms of which Holdings and the bank agreed to pay Levenstein R2m and to issue 5m shares on or before 31 March 2000 as a restraint of trade payment. On 2 March 2000 a further agreement was concluded in terms of which, inter alia, Levenstein became entitled to receive dividends before the issue of the 5m shares.

44 Levenstein was paid the R2m on 15 February 2000. The 5m shares, which were worth about R36.5m at the time of the agreement, were

never issued. Levenstein was paid R650 000 during 2000 as "dividends" on the unissued shares.

45 The payments of R2m and R650 000 to Levenstein and the allocation of 5m shares ("the additional remuneration") are subject to these criticisms:-

45.1 The additional remuneration was not properly authorised:-

- The award of additional remuneration was not in accordance with Holdings articles of association.
- The boards of Holdings and the bank did not approve the additional remuneration.
- The boards did not authorise the non-executive directors to agree to the additional remuneration.
- There is a dispute of fact amongst the non-executive directors whether they did authorise the additional remuneration. Lurie said that all the non-executive directors agreed to the additional remuneration at a meeting on 25 January 2000. Buch testified that at that meeting the non-executive directors agreed that the terms and conditions on which the additional remuneration would be paid should first be established. Levenstein was so upset that there had not been automatic acceptance of his proposals that it was decided to discuss the matter the next day. On the following

day, 26 January 2000, all the non-executive directors agreed that the shares would be restraint shares and that the R2m bonus was to be based on Levenstein's performance in the future. Nhleko denied that he had agreed to Levenstein's request. He testified that Levenstein threatened to resign within days if his demands were not met. Nhleko found Levenstein's attitude abrasive. On 26 January 2000 he wrote a letter to Lurie in which he called for the establishment of a remuneration committee in accordance with the King Report and that that committee should review not only Levenstein's remuneration but that of all company employees. J Pollack could not remember the R2m bonus and the 5m share allocation. Kaminer's evidence was that he did not approve the R2m bonus. His evidence was that at a breakfast meeting the 5m shares were discussed. The directors wanted a meeting with Levenstein to discuss the allocation, but Levenstein did not arrive, and that was that.

- Lurie testified that the executive directors later agreed to the additional remuneration. Two of the executive directors disputed that they had ever agreed. Diesel testified that his approval was never sought and never given. He became aware of the R2m bonus only when it was paid. Lopes testified that he was told by Diesel that R2m had been paid to Levenstein. He saw documents on the desk of Brian

Levenstein which recorded the bonus and the allocation of 5m shares. Lopes was stunned. Levenstein told his colleagues that they were not entitled to receive any bonuses as he was the only one who deserved a bonus as he brought in 90% of the income.

- At an audit committee meeting of 9 November 2000 it was recorded that the R2m bonus had been passed by a resolution on a round robin basis. There was no round-robin resolution. The minute is incorrect.

45.2 The payments were at variance with Levenstein's policy on remuneration. He believed in a "culture of sacrifice" for the directors and employees (but a "culture of greed" for himself). Non-executive directors received no remuneration. Executive directors were underpaid. Their remuneration packages were significantly below the lower quartile of the market in terms of guaranteed package. The policy was to pay below market norms and to use the share option scheme as a potential means to increase remuneration. In early 2000, Levenstein, backed by some of the non-executive directors, decided that what was good for the goose was not good for the gander. He was to be paid far more than his fellow executive directors and his salary for the year was to jump from R413 000, less tax, to that amount plus R2 650 000. This amounted to a 741% increase in remuneration for that year.

45.3 It was fraudulent to describe the payment of R650 000 as "dividends" as no shares were ever issued. The payment was described as dividends to avoid the payment of personal income tax. The payments should have been disclosed by Holdings, the bank and Levenstein as remuneration.

45.4 The payment of R2m, as requested by Levenstein and approved by some of the non-executive directors, was a cash bonus for "efforts for Regal from inception to date", in the words of the letter of 29 December 1999. It was on that basis that some of the non-executive directors agreed to the payment. As a bonus, it should have been disclosed by Holdings, the bank and Levenstein as remuneration. Ernest & Young ("EY"), however, were not aware of the letters of 29 December 1999 and 27 January 2000 (in which Levenstein recorded the alleged agreement of the non-executive directors to the bonus). The R2m payment was reflected in EY's working papers as intellectual property, but there was no reference at all to that amount in the financial statements. It must have been included in fixed assets of R39m. Yet goodwill and intellectual property were not shown separately in the captions for fixed assets. It follows that the payment of R2m was hidden in the financial statements. No reader of those statements would have known that Levenstein had received R2m. In one of the working papers, EY recorded that "Regal has subsequently agreed to disclose this

> [the R2m payment] as director's emoluments and expensed the assets over 20 years." The payment was not, however, shown as director's remuneration in the financial statements. All that was disclosed to the auditors was that Levenstein earned a basic salary of R413 000.

46 In the early part of the year the BSD conveyed its concerns about corporate governance at Regal to EY and Regal. At a meeting with EY on 28 January 2000 it was minuted that "the board was run by management and was not perceived by BSD to be totally independent… It was concerning to BSD that Mr Jack Lurie, newly appointed chairman of the board, was the [brother]-in-law of Mr Levenstein. It was BSD's viewpoint that Mr Levenstein was playing an over-dominant role in the bank." On 3 February 2000 the Registrar wrote a letter to Lurie in which he referred to his letter of 1 October 1999 in which the statement had been made that it was strongly advisable for the bank to appoint new non-executive directors to the board in order to replace Lubner and Schneider. The Registrar reiterated his opinion. On 17 February 2000, Lurie responded by stating that "we are determined that the replacement directors will be of a calibre that adds value to the organisation. … I am also currently in consultation with other potential candidates as to their suitability." On 22 March 2000 the Registrar wrote a letter to Lurie in which he requested that a meeting be arranged "regarding the progress made towards ensuring that the composition of the board of directors of your bank complies with the

provisions of the Bank's Act, 1990, and the principles of sound corporate governance." The Registrar and Martin met with Lurie and Levenstein on 17 April 2000. The Registrar questioned the independence of the non-executive directors and stressed that the BSD wanted to avoid a situation where the executive directors prescribed to the non-executive directors and the latter were not in a position to be totally independent. Levenstein replied that Regal was considering the appointment of a totally independent chairman from outside the group.

47 Once again, however, Holdings and the bank ignored the BSD. No independent chairman was appointed in 2000 nor were new non-executive directors appointed. Unknown to the BSD, another example of a failure of corporate governance had occurred in early 2000 with the payments of R2m and R650 000 and the agreement to allocate 5m shares. And much worse was about to come.

48 In early April 2000 EY identified an issue relating to the recognition of income derived from branding in the 2000 financial year. The amount Levenstein wished to be included was R55m. In a handwritten note he justified R50.8m on this basis:

RMI	R23m
Kgoro	R15m
Medsurg	R8m
Protea Health	R4.8m
Total	R50.8

Senior management of EY immediately applied their minds to the question: Wixley, the chairman, Coppen, a technical partner, Strydom, a partner, and Van Heerden, the engagement partner. In the result, EY prepared a document for discussion at the audit committee meeting scheduled to take place on 12 April 2000. EY took the view that no branded income should be recognised. The audit committee met on 12 April 2000. No agreement could be reached on the correct treatment of a number of issues, including income from branding. The meeting ended on the basis that independent valuations would be obtained and the announcement of the results would be postponed. On the following day, 13 April 2000, Wixley and Van Heerden met with Levenstein. The EY representatives remained unconvinced at the end of the meeting by Levenstein's views on the valuation of the branded entities and what income was to be taken into account. EY and Levenstein thereafter corresponded on the issue. No agreement could be reached.

49 Some time prior to 18 April 2000, management gave instructions to a printer to print the "Preliminary results for the year-end 29 February 2000" ("the results of 18 April"). The results were never published. Their significance, however, lies in the following:-

- The audit committee did not approve those results. The audit committee meeting on 12 April 2000 did not approve *any* results inter alia because of the branding income dispute between Levenstein and EY.

- The board of directors could not have approved the results for the same reason. There is not even a minute of a board meeting at which the results were discussed. There was a suggestion in evidence by Buch that a board meeting was scheduled for 12 April 2000 and that one took place on that day. But there is no minute of such a meeting. The meeting of 26 March was the 51st meeting and the meeting of 24 May was the 52nd meeting.
- The results of 18 April contained these material entries:

	29/02/00	28/02/99
Other income	R76.6m	R17.7m
Operating expenses	R35.4m	R17.7m
Income before taxation	R99m	R50.2m
Earnings per share (cents)	79.96	48.10

- If the amount of R55m for branding income proposed by Levenstein is excluded, income before taxation would be R44m, less than the profit for the previous financial year (R50.2m).

50 On 26 April 2000 Regal Holdings obtained two valuations from Intellectual Property Valuators ("IPV"), one for Kgoro at between R126.9m and R177.7m and the other for RMI at between R92.4m and R129.4m. On 4 May 2000, Cooke of EY provided his valuations: R1m for Kgoro and R20.5m for RMI. On Cooke's valuations, Regal Bank's 25% share of those values was R250 000 and R5.1m respectively.

51 On 4 May 2000 EY and Levenstein met and discussed these highly disparate valuations. No agreement could be reached. EY informed Levenstein that if the Regal figures were not amended, EY would qualify the report. Levenstein said they should do so. EY offered to resign, an offer which was not taken up. On the same day, Levenstein wrote a letter to the Registrar in which he stated: "I have created a highly complex banking model, which transitions Regal into the New Economy. E & Y are struggling to blend Old Economy accounting standards with my model sophistication.

A dispute will accordingly crystallise into significant focus. I respectfully contend that they have deflected attention away from its complexities in order to simplify their task." On 5 May 2000 the BSD and EY met. EY explained the Regal branding model, said that there was disagreement between them and Levenstein on the valuation of the investments and how those were to be accounted for in terms of GAAP. The Registrar telephoned Levenstein and said that if EY qualified the 2000 financial statements, he would appoint a curator. The discussion ended on the basis that KPMG would be appointed in terms of s7 of the Banks Act to give a view.

52 Before KPMG produced their report on 15 May 2000, Levenstein continued to make the case that EY was wrong and he was right. On 5 May 2000 he wrote a letter to Van Heerden of EY in which he referred to EY's draft audit opinion as "unjustified and iniquitous" and stated that

: “We remain committed to our financials.” On the same day, Levenstein wrote a letter to the Registrar in which he contended that EY had not applied themselves professionally; that he was confident that KPMG would share his sentiments; and that there was absolute agreement that he had created a significant banking product that could revolutionise the banking industry. On 14 May 2000, Levenstein wrote a letter to the Registrar in which he repeated his views, with comments from other commentators, and stated that “the qualification envisaged by Ernest & Young is totally unjustified and indeed irresponsible”. He added: “Regal and myself remain totally committed to the year-end financials approved unanimously by the board and the audit committee.” Levenstein’s statement that the year-end financials had been approved by the board and the audit committee was false.

53 On 15 May 2000 KPMG produced its s7 report. A coherent explanation of Levenstein’s “branding concept” was set out in the report in these terms:

“Regal considers the essence of each of the trade-mark licence or branding transactions to be:

- Regal’s banking infrastructure is superimposed on the underlying branded entity.
- Regal and the branded entity gear annuity flows from their respective operational platforms.
- The branded entity has full intellectual and logistical access to Regal.

- Regal's banking model is enhanced by the brand control over the underlying entity, which in itself has intellectual capital, expertise and experience, market access and client bases.
- The branding model has the ability to attract talented entrepreneurs in innovative alliances at no cost to Regal.
- The branded entity inherits the profile and operating divisions of a bank without incurring the cost of capital associated with banking.
- Branding through the licence agreement secures control.
- Regal has no desire to control the company or impose its will on the branded entity; it has no desire to have representation on the branded entity's board or craft its strategic future.
- A fee is charged for the 'infusion of economic value' into the branded entity. Regal accepts equity participation in settlement of the licencee's obligations in lieu of cash. Regal considers the equity received as a principal investment, the cost of which equates to the licence fee billed and settled between knowledgeable, willing parties in an arms length transaction."

The branding model was measured by KPMG against AC000. The standard to be met for income to be recognised is: "It can be measured in monetary terms with sufficient reliability." KPMG found that the proposed branding income could not be measured in monetary terms with sufficient reliability. In regard to "fair value" the standard of AC111 §09 is: "The amount for which an asset could be exchanged or a liability settled between knowledgeable willing parties in an arms length transaction." KPMG came to this view: "For an unlisted

> investment in an entity that does not have a proven track record, the range of fair value estimates is generally significant. Therefore it is generally not possible to measure the fair value reliably. … Given the two new starter ventures, RMI and Kgoro, do not have proven track records as at 29 February 2000, it is difficult to assign an absolute fair value to the license fee underlying these transactions. This in turn indicates that we are unable to measure fair value with certainty."

54 Louw, the chairman of the KPMG forensic and investigative accounting group and managing partner of the financial services group, gave evidence. He confirmed the contents of the KPMG report. He emphasised that because income could not be measured "in monetary terms with sufficient reliability", it was inappropriate to recognise any income. Louw expressed the opinion that the purpose or main driver of the branding model was to increase the income of the bank, which might translate into a re-rating of the share price.

55 On 15 May 2000 the Registrar and members of the BSD held four meetings with (1) KPMG, (2) KPMG and Levenstein, (3) EY; and (4) EY, Lurie and Buch. At the first meeting KPMG presented its report to the BSD. At the second meeting, the KPMG report was put to Levenstein. Levenstein explained that he was "the only person who could render an opinion on the value and measurement of [branding income]" and that he would stick to his opinion. Levenstein stated that EY had

conducted an inappropriate audit and that it was not clear to him why the financial history of the underlying entities could not be detected. The Registrar replied that the BSD would rely on the opinions of EY and KPMG and that if Holdings were to publish qualified financial statements, the BSD would deregister the bank. Levenstein's response was that he would issue the financial statements, even if qualified by EY, regardless of the consequences. At the third meeting, the Registrar conveyed to EY that the BSD had three options: to appoint a curator; to apply to Court to deregister the bank or to remove Levenstein as CEO of the bank. Van Heerden of EY expressed the opinion that the board would not agree to the removal of Levenstein as CEO. The Registrar questioned whether Levenstein was fit and proper to run the bank if he was prepared to act against the advice of KPMG, EY and the Registrar. At the fourth meeting, Lurie and Buch both supported Levenstein's opinion that branding income should be recognised. Buch said that the audit committee was "comfortable with the way the transaction was accounted for and conveyed his surprise of the outcome of the KPMG report". He said that it was not clear to him why EY could have a problem with the valuations done by the independent valuators. The meeting concluded by Buch enquiring whether EY would approve the financial statements if their assessment of branded income, R5.5m, was accepted by Regal.

56 The Registrar conceded in evidence that Levenstein's conduct in rejecting the opinions of EY and KPMG and adopting the attitude that

he would go ahead with publication of the audited results even if qualified by EY (an attitude that would effectively lead to the closure of Regal Bank), was irrational and stubborn. But, said the Registrar, "We did not have any powers … to do something about it … Obviously it did create some reservation in our minds and that is why we expressed it to [the directors]".

57 From a mass of confusing and contradictory evidence one must try to pierce together what happened at Regal Bank on the night of 15 May 2000 and the day of 16 May 2000, i.e. between the meeting Buch and Lurie held with the BSD on 15 May and the publication of the "Audited results for the year ended 29 February 2000" ("the results of 16 May") in the evening of 16 May 2000. The most probable version is that Lurie and Buch, on their return to the bank from Pretoria, persuaded Levenstein "over a couple of hours", in the words of Buch, to back down. Levenstein, Lurie and Buch eventually agreed that only R5.5m of branded income would be recognised. During that period, Levenstein instructed Davis, then CFO: to prepare a document for transmission to EY in which branded "expenditure" of R22m was justified; to defer R6m of branding expenditure; and to obtain the approval of EY to the amended financial results. Because Levenstein was compelled to reduce branding income from R55m to R5.5m he had to find a way to avoid the 2000 results being worse than the 1999 results. The device employed by him was to defer R6m of branded expenditure. Davis duly

prepared a letter addressed to EY on Levenstein's instructions which purported to show branding "expenditure" of R22m, most of which Davis knew did not qualify as expenditure in terms of GAAP and would not be recognised by EY. Van Heerden of EY was out of town late on 15 May 2000 and the day of 16 May 2000. He did not receive Davis' letter. EY did not approve the results of 16 May. There was also no audit committee or board approval of the results.

58 Faced with the absence of a record of a meeting of either the audit committee or the board, Levenstein, Lurie and Buch struggled in evidence to explain when, how and by whom the results of 16 May were approved. Lurie, the chairman of the board, did not call a meeting of the board of Holdings on 15 May 2000 or the next day. He could not explain why he did not do so. Lurie testified that he spoke to all the directors on 16 May 2000 and that they informally approved to publication of the results, a version which was in conflict with the evidence of other directors. He could not recollect whether the directors had seen the results at the time of the discussion. Levenstein contended that the board did approve the results, even though the board did not meet. He said there must have been a round robin resolution, which might not have been in writing. He could not say which directors approved the results. He admitted that the audit committee had not met to approve the results. Buch's testimony was that an informal meeting of the audit committee took place on the night

of 15 May 2000, which he and Levenstein attended. The other member of the committee, Slender, was away and could not be contacted. There was no time for a formal meeting. On 16 May 2000, so Buch testified, he was not at the bank. He had no contact with anyone at the bank that day. He did not attend an audit committee meeting or a board meeting or sign a round-robin resolution or approve the results in any way.

59 The evidence of the other directors added to the confusion. Lopes testified that Davis told him that EY had approved the results that were to be published later that night of 16 May. There was no board meeting and no audit committee meeting to approve the results. J Pollack could not remember the events of April/May 2000. Kaminer could not remember whether there was a board meeting which approved the 2000 results; he could not remember that period, but he thought “they did approve it”. Radus could not remember whether he approved the results. He was not involved with the events of 15 and 16 May 2000. He could not remember the events of 16 May. Diesel was not involved in any way on 15 and 16 May 200 in approving the results; he was trying to do damage control; he concentrated on his areas of responsibility.

60

60.1 The results of 16 May were signed by Lurie, chairman, and Levenstein, chief executive officer, of Regal Holdings.

60.2 The material entries were:-

	28/2/00	28/2/99
Other income	R27m	R17.7m
Operating expenses	R29.4m	R17.7m
Income before taxation	R55.5m	R50.2m
Earnings per share (cents)	50.01	48.10

60.3 A comparison of those entries in the results of 18 April and 16 May is:

	18 April	16 May
Other income	R76.6m	R27m
Operating expenses	R35.4m	R29.4m
Income before taxation	R99m	R55.5m
Earnings per share	79.96	50.01

60.4 Included in other income in the results of 16 May was only R5.5m of branding income, hence the huge difference between other income and income before taxation between the results of 18 April and 16 May.

60.5 Operating expenses were reduced by precisely R6m, being the deferred expenditure in branding.

60.6 In a new section called “Banking Model”, written by Levenstein, it was stated inter alia:

“The model has, and will create enormous wealth for shareholders.

Regal are in disagreement with the Auditors regarding the disclosure and treatment of certain investment securities created by the model. By appointment the complexities and design features of the model are available for inspection and discussion at Regal's Rivonia office. Notwithstanding Regal's emphatic assertion that transactional norms have created and entrenched value for its investments securities, Regal has mandated Independent third party valuation specialists to report on the pricing value for its investment securities. Regal has mandated Independent third party valuation specialists to report on the pricing models that regulate treatment and disclosure; same are available for inspection. The reports endorse the Regal perspective regarding value. The divergence between old and new accounting standards manifests in a so-called valuation difference of R30.5m, after taxation, reducing earnings per share by 30 cents.

The Board approved the year end results reflecting earnings per share of 79.96 cents. At the request of the Registrar of Banks we have agreed to defer the valuation difference. All expenditure incurred to generate this income had been written off in the current year. We estimate that approximately R18m of expenditure relating to the new model has been accounted for on this basis. Generally accepted accounting practice allows for the setting off of this expenditure against the income deferral. Regal, as detailed above, has absorbed the full brunt of this expenditure in the current year. Regal is thus positioned very powerfully for the ensuing year." (The underlining is provided.)

61 The results of 16 May contained the following material fraudulent misrepresentations:-

(1) The document contained an implicit representation that the results had been approved by the Holdings board. The board had not approved the results.

(2) The results were described as “audited”, whereas EY had not seen the results before publication, let alone approved the results.

(3) The express statement that: “The board approved the year-end results reflecting earnings per share of 79.96 cents” was false. The board did not approve the year-end results and had not approved earnings per share of 79.96 cents. At a joint board meeting of 26 March it was minuted that “a dividend cover of 13 cents a share, being six times cover, was agreed upon.”

(4) The R18m of branding expenditure referred to in the section on banking model did not exist. To this day, no one, including Levenstein, the CEO, and Davis, the CFO, could provide any substantiation for that amount. Simply put, the figure was a figment of Levenstein’s imagination.

(5) The statement that all the branding expenditure had been accounted for or written off in the current year was false. R6m in branding expenditure was deferred.

62 The results of 16 May were misleading as much for what they did not disclose as for what they did disclose. It was not disclosed that:-

(1) the bank had sought recognition of R55m of branding income and that only R5.5m of branding income had been recognised by EY, incorporated in the results, and agreed to by Lurie and Levenstein;

(2) an amount of R6m of branding income had been deferred;

(3) EY had threatened to qualify the financial statements if Holdings insisted on including the amount of R55m for branding income;

(4) KPMG was appointed by the Reserve Bank to review the different valuations provided by EY and Holdings;

(5) KPMG supported EY in principle and had opined that no income should be recognised for the branded entities.

63 Faced with the publications on SENS on 16 May 2000 and in the morning newspapers of 17 May 2000 of the results of 16 May, EY wrote a letter to the directors of Holdings on 17 May. A copy of the letter was sent to the Registrar. A number of comments were made in the letter, including that the announcement was made without submission to EY as requested; that the announcement was not considered at a formal meeting of the audit committee; that although the changes had been explained to EY telephonically, they had not yet had an opportunity to check the entries; that a number of inaccuracies appeared in the "banking model" section. A correcting statement was called for in which Holdings was required to state that:

- the figures set out in the announcement were in accordance with GAAP and had the full approval of the directors;

- the changes to the financial statements were made following discussions with the auditors and were not made at the request of the Registrar of Banks; and
- the references to earnings per share of 79.96 cents in the announcement should be ignored.

EY stated in the letter that although they were not in full agreement with the changes to the entries, the differences did not materially affect the fair presentation of the company's results or its financial position, and subject to appropriate disclosure in the annual financial statements they were prepared to issue an unqualified opinion on the figures contained in the announcement.

64 Despite the fact that it failed to deal with all their concerns, a retraction by Holdings was published on 19 May 2000 which satisfied EY.

65 The actions and by EY on 17 May 2000 were hopelessly inadequate. EY had statutory duties in terms of the Banks Act and the Public Accountants and Auditors Act, Act 80 of 1991 ("PAAB Act"). In terms of s63(1) of the Banks Act the duties are as set out in 15.2 of Part One. The duties of an auditor in terms of the PAAB Act are set out in §15.3 Part 1.

66 EY were in breach of those statutory duties:-

66.1 What was known to EY on 17 May 2001 was that:

- Holdings had published the results of 16 May without the approval of EY;
- the description of the results as “audited” was false;
- Holdings had published those results without the approval of the audit committee;
- the operating expenses had been reduced by R6m on the basis that R6m of branded expenditure had been deferred;
- the branding expenditure could not be measured reliably and in terms of AC000 § 89 the deferral should not have been recognised;
- the reference to R18m of branded expenditure was false;
- the statement that all branded expenditure had been taken into account or written off was false because R6m had been deferred;
- the Holdings board did not approve earnings per share of 79.96 cents.

66.2 Wixley testified in evidence that EY was willing to accept the R6m deferral because he and Van Heerden felt that “there was a

basis for some small adjustment [R3m] and that viewed on balance the adjustment of 6m was not material to an appreciation of the financial results of the company or its financial position". Wixley said that he was not aware whether EY "were happy with the statement that approximately R18m of expenditure relating to the new model had been accounted for … I can only assume that at the time we believed that that was a reasonable statement".

66.3 The R6m deferral of branded expenditure, however, was significant way beyond its quantum:

- the expenditure had been deferred without EY's consent;
- the deferral of R6m of branding expenditure was contrary to AC000 § 89;
- without the deferral Holdings would have made less profit in 2000, R49.5m, than it had made in 1999, R50.2m.

66.4 On 17 May 2000 Holdings did not provide EY with any proof of the R18m branded expenditure. The only "proof" that EY was given related to the R6m. Davis' evidence was that he had obtained that amount from Levenstein (who relied in evidence on a document prepared by Davis!). When he was asked by EY on 18 May 2000 to justify the amount, he made this note: "At half-year expenses were R13.2m. Without increasing infrastructure to incorporate model expenses for year would be ±R26.5m. The expenses were 35.4m therefore effective branding model ±9m, R6m adjustment to expenses debited to prepayments". EY could not

possibly have believed that a speculative calculation such as that complied with GAAP.

66.5 The publication by Lurie and Levenstein of the results of 16 May 2000 was fraudulent. Fraudulent conduct is an irregularity in terms of s63(1)(a) and/or a matter which might endanger the bank's ability to continue as a going concern or might impair the protection of the funds the bank's depositors or might be contrary to the principles of sound management or might amount to inadequate maintenance of the internal controls in terms of s63(1)(b).

66.6 EY seemed to suffer from battle fatigue. They were relieved to have achieved the publication of an unqualified set of financial results. Their letter of 17 May 2000 must have lulled the Reserve Bank into believing the crisis was over. Had EY, however, pointed out that the results of 16 May 2000 were fraudulent, the Reserve Bank could have taken the appropriate steps in May 2000 to change the composition of the board and replace Levenstein. The nature of the appropriate steps is dealt with later in relation to the DT s7 report.

67 The statutory financial results ("the glossies") were published in about September 2000. Meetings of the Holdings board were held on 24 May,

28 June, 26 July and 30 August 2000. At none of those meetings did the board approve the results contained in the glossies.

68 The financial statements in the glossies were misleading in these respects:-

- In the Directors' Report it was said that the Incentive Trust was not operational at year-end whereas it was in fact operational and had been advanced R15m for the purchase of Regal Holdings shares to that value.
- The allocation of 5m shares which Regal Holdings agreed to make to Levenstein was not disclosed contrary to §10 of the Fourth Schedule to the Companies Act.
- In the balance sheet pre-payments of R7m were shown. The amount of R7m included the R6m deferred branding expenditure. The amount of R6m was sufficiently significant to warrant accurate disclosure as deferred expenditure.
- The R18m expenditure referred to in the "banking model" section of the results published on 16 May was not dealt with at all.
- A deposit of R164m was shown "from other banks", whereas in truth at least R150m of the deposits had been made by Mettle SPV's, which were not a bank.
- Branding income of R5.5 should not have been recognised as it could not be measured in monetary terms with sufficient reliability.

- R6m of branding expenditure should not have been deferred as any expenditure on branding could not be reliably measured.
- The statement was made that “there are no significant concentrations of credit risk” whereas in fact Holdings was exposed to Mettle or SPV’s for at least R150m.
- Negotiable securities in an amount of R227m were shown. Included in that amount were preference shares of R150m, which should have been disclosed in those terms.
- If the R2m payment to Levenstein was “intellectual property”, intellectual property should have been shown separately in the captions for fixed assets.
- The R2m was in truth remuneration as it was a bonus for past services. It should accordingly have been disclosed as part of directors’ remuneration.
- The earnings per share should have reflected fully diluted earnings per share, taking into account the obligation to issue 5m shares to Levenstein.
- Disclosure was made of “related party transactions”, but no disclosure was made of moneys lent to related parties such as Levenstein Data, JL Associates, Forfin Finance (Pty) Ltd (“Forfin”) and Shareholders Trust.

69 On 5 September 2000 Regal Holdings published its “unaudited results for the six months ended 31 August 2000” (“interim results for 31

August"). Income before taxation was R49.5m (compared to R55.5m for the whole 2000 financial year).

70 A major breakthrough in corporate governance for Holdings occurred in that the audit committee approved the interim results on 4 September 2000 *before* they were published.

71 However, EY were not invited to the audit committee meeting. Levenstein was asked to explain. His explanation was that it was "pure naivety"; it was not done maliciously or wilfully. In giving that evidence he had forgotten about an undated memorandum which he had addressed to Buch and Davis, according to him, during the 2000 audit in these terms: "An audit committee should now be convened as a matter of urgency to approve the financials. EY are not formal members of the committee, they accordingly must not be invited". He justified the instruction on the grounds that Strydom of EY was party to a political agenda and that Strydom and the auditors could not be trusted.

72 EY should have been invited to attend all audit committee meetings, especially meetings at which interim and final financial results were to be discussed. EY attended only one meeting out of five in the calendar year 2000.

73 The failure of Holdings to invite EY to attend the meeting of 4 September 2000 was egregious having regard to:

- Holdings' failure to hold an audit committee meeting before the publication of the results of 16 May;
- the branding income dispute between Levenstein and EY which arose during the 2000 audit;
- the recommendation of the King Report that external auditors should attend all audit committee meetings;
- the practice in the banking industry that external auditors attend all audit committee meetings. Louw testified that KPMG are the auditors of twenty-three banks and they attend every audit committee meeting of all those banks.

74

74.1 If the adjustments contended for by EY in evidence had been made to the interim results of 31 August 2000, a nominal profit of R650 000 would have been shown instead of the profit of R49.5m:

Profit before tax in announcement	49,5
Less:	
[A] 50% of errors rectified at year-end:	
• Overestimate of pref dividends	13,4
• Underestimate of depreciation	,3
• Bank expenses in Shareholders Trust	1,3
• Bad debt provision	4,0
[B] Reductions due to non-disclosure:	
• RMI: proceeds of sale	20,5
• RMI: 2000 valuation	5,5
• RMI: Elul fee	2,7
[C] Consolidation of Incentive Trust: elimination of interest to accord with year-end treatment	1,2
Subtotal	**48.8**
Total	**,65**

74.2 This does not take into account:

- potential losses on advances to employees and directors and/or the Incentive Trust (±R18m) and potential impairment to the Shareholders Trust (±R18m) (DT(1) 30-32);

- the payment of R650 000 to Levenstein as “dividends” (which was included as a debit balance in creditors at 31 August 2000 instead of being written off (DT(1)28);
- advances to directors and senior managers in the amount of R2.6m (referred to in §90.1 of Part Three and DT(1)38).

75 Unlike the dismissal of Mark Springett, the dispute about branding income was public knowledge. First there was the delay in the publication of the financial results from 18 April until 16 May 2000. Then there was the threat by EY to qualify the 2000 financial statements if all the branding income was included, a threat that was not carried out because only a nominal amount was eventually recognised. The erosion of confidence in the bank had begun. The share price plunged from a high of 815c on 25 January 2000 to a low of 315c on 25 May 2000.

76 On 14 August 2000, Lopes, a director of Holdings and the bank and chief operating officer of the bank, met with the Registrar. Lopes made over 30 allegations about the management of the bank. Some of the allegations were that:

- board members who did not agree with Levenstein were removed from the board;
- the bank had lost about twenty-five staff members, ten of them in senior management positions, within the past three months;

- about 95% Regal Holdings shares were being purchased by the bank;
- anyone who questioned Levenstein's branding idea were threatened;
- Levenstein's personal expenditures were paid by the bank without board approval.

77 The Registrar testified that the visit by Lopes to the Reserve Bank "highlighted certain things and that sort of solidified our opinion that we needed a [s7] report". The Registrar acted with commendable speed. On 16 August 2000 he met with Deloitte & Touche ("DT") with a view to the appointment of DT to do the s7 review "on the role of the board of directors, particularly the powerful role played by the CEO". It is recorded in the minutes of that meeting that if Lopes' allegations were confirmed "a meeting will be held with the shareholders with the intention of removing Mr Levenstein and/or dissolving the whole board". On 23 August 2000 the Registrar, Martin, and other members of BSD met with Lurie and three non-executive directors to discuss the Registrar's concern "about the recent dismissals and resignations at Regal. Negative market perceptions had influenced the share price and there were allegations of mismanagement within Regal." A discussion ensued about corporate governance, the branding strategy (which Lurie said would no longer be completely relied on); allegations of possible financial irregularities

and so on. The meeting concluded with support by the directors for "a s7 review on corporate governance" by Store and Schipper of DT.

78 By 6 September 2000 Schipper had done enough work to be able to report back to the Registrar. A meeting was held on that day between the Registrar, Martin and other members of the BSD and Store, Schipper and Oberholzer of DT. Schipper reported on many of the issues which are contained in the written report, to which reference is made later. It was minuted that the Registrar expressed the opinion that Regal Bank had no future and that it would be requested to deregister voluntarily. Schipper indicated that he needed more time to finalise his report. The meeting adjourned on that basis. On 4 October 2000 another meeting took place between DT and BSD. Store conveyed to BSD that the bank was solvent and had a high capital base. Various issues that were to form part of the written report were canvassed. The Registrar expressed the wish to replace Levenstein, as did Martin. The Registrar noted that the BSD had lost trust in Levenstein's ability to run the bank. Schipper said that he needed another week to finish the report. On 23 October 2000 the Registrar and the BSD were in a position to meet with the board of directors of Holdings. The meeting was attended by ten representatives of Holdings, including Lurie, Levenstein and Buch, the BSD, Rooth & Wessels and Schipper of DT. The Registrar made a slide presentation which dealt with the rationale for the s7 review, an overview of the

terms of reference, the BSD's views of the findings and overall observations. A draft report was tabled, which Schipper indicated could be regarded as the final document. Levenstein dealt in some detail with many of the issues raised in the slide presentation. At the conclusion of the meeting it was agreed that Holdings would prepare a written response to the DT s7 report.

79 The Registrar testified before the commission that if he had had the power to do so at the time, he would have removed Levenstein "right there and then" and he would have had the board of Holdings reconstituted; unfortunately, he did not have the power to do so; all he could use was "moral suasion". He believed, on the basis of the DI returns, that the bank was complying with its prudential requirements. Had there been deficiencies in the prudential requirements, the Reserve Bank would have acted a lot faster. Martin's evidence before the commission was that, acting on the advice of the Reserve Bank's attorney, the presentation by the Registrar to the Holdings directors on 23 October did not include the corrective actions which the BSD required the board to take. The actions the BSD wished the board to take included the following:

- the appointment of a new chairman who was independent and seen to be independent;

- the appointment of at least four independent, non-executive directors, at least two of whom should have had extensive banking experience;
- the appointment of a new CEO.

80 There is no doubt that the Registrar and Martin were justified in coming to the conclusion that Lurie and Levenstein should be replaced and that new suitably qualified independent non-executive directors should be appointed to the board. The DT s7 report gave the BSD an objective view by an independent expert of the inner workings of Regal Bank. The report consists of fifty-two pages. These are some of the highlights:

- most of the committees had no founding documents or formal terms of reference;
- many of the committees did not keep minutes;
- Levenstein sat on seven of the eight committees and was chairman of five of the committees;
- none of the non-executive directors had any banking experience, including the chairman, Lurie;
- Lurie was Levenstein's brother-in-law and the perception of his independence was tainted;
- a number of senior executives had been dismissed without due process;

- money was lent by Regal Bank to the Shareholders Trust to buy Holdings shares;
- from March 2000 the purchasers “by Regal” comprised a significant proportion of the daily activity, on occasions as much as 90% of daily movements;
- payments in the sum of R2.6m had been made to directors from December 1996 to July 2000 “from a bank account outside the bank’s accounting systems” as advances against bonus incentives;
- personal expenditure of Levenstein amounting to R9 850 per month was paid by the bank;
- the remuneration of all the bank’s executives lay significantly below the lower quartile of the market in terms of guaranteed package;
- non-executive directors were not remunerated;
- there were no service contracts for executive and non-executive directors;
- the remuneration policy was not documented nor formulised;
- the lack of procedure for the appointment and dismissal of directors and senior management was a cause for concern;
- the Regal group was overly dependent on Levenstein’s vision and management;
- there was no proper infrastructure below the chief executive officer;
- the payment of R650 000 to Levenstein as “dividends” on unissued shares;

- the advances made by the bank to Shareholders Trust were in total R36m against the security of Holdings shares to a value at that time, 31 August 2000, of R17.6m only;
- the Incentive Trust was indebted to the bank for R51.4m against security of R33m;
- there were loans to directors and related parties in the sum of R96.4m.

81 Schipper testified that drafts of the DT s7 report were discussed on various occasions with Van der Walt, Davis and Levenstein. By the time the report was finalised, the factual allegations were common cause between DT and Regal Bank.

82 The DT s7 report and the conduct of Levenstein during the 2000 audit, which was known to the BSD, demonstrated that Levenstein was unfit to be CEO of the bank and Lurie and the non-executive directors were either supporters of Levenstein, unfit as he was, or incapable of exercising control over Levenstein.

83 The time had come, if it had not passed a year before, for action by the BSD. In the words of an authority quoted by the Registrar in his evidence:

"To be effective, corrective action must be fair, swift and decisive."

The BSD had decided on the corrective action – the removal of Lurie and Levenstein, the appointment of at least four suitably qualified independent, non-executive directors, and the appointment of a new chairman and CEO. Time was of the essence. What remained was "fair, swift and decisive" execution of the corrective action. In the result what happened may have been fair - giving Holdings an opportunity to respond in writing to the DT s7 report – but it was neither swift nor decisive, leaving Levenstein in place as CEO until 18 June 2001, by which time the death-knell of the bank had been sounded.

84 Holdings responded in writing to the DT s7 report on 29 November 2000. The body of the report consists of nine pages. The response is superficial. No material disputes of fact were raised. Two of the allegations in the DT report which were denied were that the committee structure was weak and that Levenstein was in an overly dominant position on the committees. Presumably, that denial was done tongue-in-cheek. Remedial steps were said to have been taken, such as taking minutes of meetings, and to be taken, such as outsourcing the human resource function to DT Human Capital Corporation and "strengthening the ranks of non-executive board members". The DT concern about the shortfall between the loans to the trust and the value of Holdings shares was addressed by reference to a transaction described in these terms: "Mettle Ltd has acquired 8 million shares at a price of R5.50 per share from the trust. The purchase price is in excess of the average price at which

the trust had bought the shares." As will be shown later, that description of the Metshelf 1 transaction with Mettle amounted to a fraudulent non-disclosure.

85 On receipt of the Holdings response, the BSD could not have been persuaded that the steps they wished to take, including the removal of Levenstein, were not warranted. If anything, the Holdings response should have reinforced the BSD's concerns and prompted "swift and decisive" action by removing Levenstein, as a minimum.

86 Instead, what the BSD did was:

- to instruct lawyers to give it legal advice on various issues unrelated to the removal of Levenstein;
- to insist that Holdings – led by Lurie and Levenstein – take corrective measures (which did *not* include the replacement of Lurie and Levenstein with more suitable candidates);
- to instruct EY on 12 February 2001, more than two months after receiving the Holdings response, to verify that remedial steps had been taken by completion of the year-end audit.

87 The Registrar complained that he did not have the power to remove Levenstein. True, but he could have used "moral suasion" backed by the threat of curatorship or an application to deregister the bank. He had played that hand very effectively on 15 May 2000, the

consequence of which was that the 2000 financial statements were not qualified by EY. He did not even put his action plan to the board, let alone try to persuade the board to agree to it.

88 To underline the urgent need to change the composition and leadership of the Holdings board in October/November 2000 four events in the latter half of 2000 are analysed:

- the resignation and subsequent harassment of Lopes;
- the response of the directors to the DT s7 review;
- the conclusion of more Mettle deals by Levenstein and the lack of understanding of the directors of those transactions;
- the purchase by Regal Bank of Worldwide's Regal Holdings shares on 29 December 2000 for R60m and the subterfuge that was employed to disguise the true nature of that transaction in the records of Regal Bank.

89

89.1 On 18 August 2000 Lopes went to work. While he was in his office Levenstein approached him on three separate occasions. The essence of the message which Levenstein gave Lopes was, in the words of Lopes, "if I do not fit in with his culture and his methodology and agree with him 150% all the way in connection with the branding and everything he does, I can pack my stuff and leave immediately." After the third visit by Levenstein, Lurie

telephoned Lopes and said: “You are supposed to be working on the annual report, why are you upsetting Jeff? Why do you not support Jeff 150%?”. Lopes then resigned.

89.2 On 21 August 2000 Lurie informed Martin that Lopes had been dismissed by Levenstein on 18 August 2000 and Lurie and Levenstein sent Martin a document prepared by Radus. Altogether about twenty-nine specific allegations of misconduct were levelled against Lopes, including sexual harassment, taking kickbacks, unlawfully suppressing the share price, incompetency, dishonesty, lying, fraud and corruption: all allegations which pre-dated Lopes’ visit to the Reserve Bank on 14 August 2000.

89.3 On 23 August 2000 Lurie told the BSD at a meeting between Regal and the BSD that Lopes “had not applied his mind” in regard to the financial statements. No other allegations of misconduct were made.

89.4 On 7 September 2000, Jonathan Myers, representing Regal, replied to a letter of Michael Krawitz of 5 September 2000 in which he alleged that, *inter alia*, Lopes had unlawfully suppressed or caused a reduction of the share price of Regal Holding’s shares on the JSE and that Regal Bank or Holdings was quantifying its damages in order to sue Lopes.

89.5 Lopes described what happened to him after he resigned. Initially, he was merely telephoned and told to return to the bank

a computer he had at home. He then received a telephone call in late September 2000 from Jonathan Myers, representing Regal Bank, in which Myers said that if Lopes would sign a letter supporting Levenstein, describing him as a good CEO, and confirming that he had not been to the Reserve Bank, Regal Bank would not proceed with various criminal charges which the bank had laid against Lopes. The charges which were mentioned by Myers included fraud. Lopes refused to agree to the blackmail. Lopes denied the various allegations of misconduct. The only one he admitted was that he had stated in the application for a bank licence that he had a B. Com. degree. He admitted that he did not have a degree, but said that Levenstein was aware that he had no degree. In fact, it was at Levenstein's suggestion that instead of describing the degree as "uncompleted", Levenstein insisted that the word "uncompleted" be removed. One night Lopes was arrested at home at 21:30. The police said that fraud charges had been laid against him by Levenstein and he was accused of having two passports. The accusation was that he was about to leave the country. Lopes spent the night in gaol and was released on bail only the next day after counsel threatened to bring an application in the High Court for bail. Bail was set at R10 000. The criminal charges were of fraud. Lopes appeared in court four times. He never received a charge sheet and eventually the charges were

withdrawn against him. During the period from his resignation until the charges were withdrawn, Lopes and his wife received many telephone calls. At one stage he received forty-six calls on his answering machine, a minute apart. “We did not answer any of them. There was nobody on the other side”.

89.6 At a meeting of the board of directors on 31 January 2001 Levenstein informed the board that the criminal charges against Lopes had been withdrawn and that the matter settled out of court. The litigation with Lopes (and Steen) cost the bank R232 550.50 in legal costs.

89.7 Levenstein’s evidence was that Lopes resigned on 18 August 2000. The evidence was in conflict with the letter Lurie sent to the BSD on 21 August 2000 in which he alleged: “On 18 August the CEO terminated services of Mr BK Levenstein (“BKL”) and Mr JR Lopes. … On the same date Mr JR Lopes resigned from the board of the bank and Regal Treasury Bank Holdings Limited.” At first Levenstein was adamant that the letter was wrong. He did not dismiss Lopes. In the DT s7 report, however, Schipper recorded that Levenstein had told him that he had fired Lopes. Levenstein again denied in evidence that he dismissed had Lopes. Levenstein then changed tack and testified that the allegation of a dismissal was “tactically to minimise the misinformation … It could have been tactical … When a bank fails, people commit suicide, people have heart attacks etc … A tactical theme would have been

conveyed to [Lurie] … I probably … Conveyed to Jack Lurie in order to minimise the threat against the bank". At the Regal Bank board meeting on 25 October 2000 it was minuted that Lopes was fired as a staff member. Levenstein said that: "It would have been the information I conveyed to the board … A white lie … to protect the bank … With a man going out into the market place literally bring a bank to its knees, which to me is an act of treason and terrorism, to bring a South African institution to its knees … I believe that it calls for unusual action in the way as President Bush has to respond to the status quo …".

90

90.1 On 28 August 2000 Schipper of DT met with Lurie to discuss the terms of reference of the s7 review. Lurie welcomed the review, as did Levenstein, with whom Schipper met later that day. The work of DT commenced on that day.

90.2 On the same day that Lurie and Levenstein were pledging their support for the DT review, Radus signed a letter to the Registrar on behalf of the executives of Regal Bank. The letter placed on record the "total support" of the executives for Levenstein, alleged that the DT appointment was unfounded and totally unnecessary, that Levenstein's "integrity and track record … speaks for itself" and ended by calling upon the Registrar "to support and stand behind" Levenstein. In his evidence, Radus at first said that Levenstein drafted the letter and he, Radus, signed

it. Later in his evidence Radus said that he might have done a draft and Levenstein changed it "… Or he did the letter. I cannot remember. Really. It is certainly not my language, that is all I can tell you. But I did agree with this and the executives agreed with this." Asked who the other executives were on whose behalf he wrote the letter, Radus said that the only other executive was Diesel. Later on in his evidence, Radus again said that he could not remember who the author of the letter was, but is was written at Levenstein's initiative.

90.3 On 30 August 2000, while the s7 review was in progress, the boards of Regal Holdings and Regal Bank met. The audit committee met on 4 September 2000. The s7 review was not discussed at all.

90.4 On 25 October 2000, two days after the meeting between the BSD and directors of Regal Bank, there was no mention, let alone discussion, of the meeting with the BSD and the s7 report at the meeting of the board of directors of Regal Bank, the meeting of the board of directors of Regal Holdings, or the annual general meeting of Regal Holdings.

90.5 Lurie was questioned about why the boards of directors did not discuss the DT s7 review at all in the meetings held at the time. He had no acceptable explanation. According to him, Davis was instructed to deal with the various issues raised in the report. He assumed that because most of the directors had attended the

meeting with the BSD on 23 October, “there was no necessity to rehash it”.

91

91.1 Between 1 July 2000 and 17 November 2000, Levenstein negotiated various agreements with Mettle. The focus for the moment is on the corporate governance aspects of the Mettle transactions as corporate governance was the focus of the DT s7 report. To emphasise the importance of the Mettle deals to Holdings, the contribution of *all* the Mettle transactions was to purport to increase the assets and liabilities on the balance sheet from ±R1bn to ±R1.6bn.

91.2 The Mettle transactions should have been debated and agreed to by the board of directors for these reasons:

- the transactions reflected a change in strategic shift;
- the large total size of the transactions in relation to the total assets and liabilities of Holdings;
- the exposure to one counter party, Mettle Ltd, or its SPV’s.

Yet the minutes of the meetings of the board meetings show that the transactions were *never* discussed by the directors. The evidence of the directors on the Mettle deals is analysed in detail in Part Three. For present purposes, it is sufficient to refer to the following:-

- Levenstein said that he would have discussed the “broad architecture” of the Mettle deals with Exco, because the

deals were difficult to understand and very complex. His evidence on whether the Mettle deals were ever discussed with the boards of Regal Holdings and the bank was contradictory. While contending that there was no requirement for him to discuss the deals with the boards, as these were "operational issues", he said that it was in any event impossible to explain the deals: "you needed a mathematical background, you needed an understanding of derivatives, arbitrage activities, etc".

- Lurie said that the Mettle deals were discussed "at length at board room level". He believed that the deals "were so intricate and so involved that a lot of them did not really understand what this was about". Lurie did not know the details and extent of the Mettle transactions. The deals were "highly complex" and not in his "field of expertise".
- Diesel's evidence was that the Mettle deals were all done by Levenstein. There was no prior discussion of any of the transactions. The first time Diesel would become aware of a "structured deal was when in all instances I was given handwritten instructions outlining the transaction".
- Buch said that he was not too involved with the Mettle deals. He had an understanding of the RMI and 93 Grayston structures. He relied on the auditors.

- Radus said he never saw the Mettle agreements. He had a vague idea about some of the transactions. In regard to one transaction, Levenstein told him: "I would not understand the intricacies of the financials".

92

92.1 Pekane Investments (Pty) Ltd ("Pekane") was the registered holder of 15.5m shares in Regal Holdings. Pekane was a subsidiary of Worldwide. On 29 December 2000 Regal Bank paid Worldwide R60m for those shares. Precisely why it did so was a matter of lengthy debate and confusing evidence at the commission. On a reading of documents produced by Nhleko, however, the matter is quite simple. Regal Bank bought the shares from Worldwide on 12 December 2000 at a price of R3.90 a share. A term of the agreement was that delivery of the shares would take place on 29 December 2000 against payment of the total price.

92.2 The Pekane transaction is analysed in Part Three and dealt with later in Part Two in relation to the 2001 audit. All that needs to be said about it to close off the discussion on the 2000 year is that the true nature of the transaction was not shown in the records of Regal Bank. Levenstein did not want it to be known that the bank had acquired, and therefore owned, 15% of Regal Holdings shares (in addition to the 15% of Holdings shares held

by the two trusts). The transaction, accordingly, was reflected as follows:-

- In the draft statutory financial statement of Holdings, Pekane was shown as a major shareholder of 15.5m shares, representing 15% of Regal Holdings shares. The financial statements were approved by the board of directors.
- The payment of R60m was shown as an overnight loan to “Phekani Investments” secured by shares with a market value of approximately R70m.
- Diesel’s evidence was that he was informed by Levenstein in December 2000 that Pekane had offered the Regal shares for repurchase in terms of the original sale agreement. The price was below the current market price. Diesel, as treasurer, was asked by Levenstein to ensure that there was R60m cash available to pay the price. On returning from leave in early January 2001 Diesel noticed that a loan had been created in the name of Pekane. Levenstein told Diesel to leave the loan in place as a sale of the shares to a third party was imminent.

2001

93

93.1 The year 2001 commenced on a positive note. The corporate governance concerns of the BSD were addressed, albeit too late to save the bank.

93.2 Cohen, formerly of Mercantile Bank and SASFIN, was approached by Levenstein and Rabins in about mid-October 2000 to identify weaknesses in the bank and to produce a plan to rectify the weaknesses. He commenced in about mid-November 2000 as a part-time consultant. He worked his way through the DT s7 report. Cohen's initial findings and recommendations were, inter alia:

- the whole issue of corporate governance had to be looked at expeditiously;
- to appoint more bankers to the boards of directors;
- to write charters for the committees of the board;
- to introduce staff policies, a matter on which Van der Walt was working at the time;
- to address the lack of succession planning;
- to remunerate non-executive directors properly;
- to introduce an effective internal audit function.

93.3 During the course of 2001 Cohen was appointed a director of both Regal Holdings and Regal Bank, officially from 28 March,

but practically from January. He became chairman of Regal Holdings on 28 March, chairman of Regal Bank on 1 May, chairman of the risk management, credit, and HR committees and was a member of the corporate governance committee. He served as chairman of the audit committee until he became chairman of the bank.

93.4 Cohen arranged for the appointment of Oosthuizen, a former Deputy-Registrar of Bank, and Scheepers, formerly of PWC, as directors. Oosthuizen became chairman of the corporate governance committee. Scheepers became chairman of the audit committee after Cohen.

93.5 During late 2000 and early 2001 a number of improvements were made: charters for the committees were prepared; the taking of minutes was outsourced; the human resources function was assumed by a division of DT; PWC became internal auditors; a financial director, Zarca, was appointed with effect from 1 July; and Taylor was appointed compliance officer.

93.6 With effect from 18 June 2001, Robinson, formerly of Absa Bank Limited, became CEO.

93.7 Had those changes been made six months earlier, Regal Bank would still be in business and depositors' money would not be at risk.

94

94.1 A nail in the coffin for Regal Bank was the notification by EY to the Reserve Bank on 25 June 2001 that it intended to withdraw its consent to the preliminary results of Holdings for 2001 (“the 2001 preliminary results”). The story of how that came about, after EY had originally approved the preliminary results, is now told.

94.2 EY audited Regal Holdings, Regal Bank, the Incentive Trust and the Shareholders Trust for 2001. The audits of the trusts were conducted for the first time.

94.3 In their working papers of 29 November 2000 EY identified as “internal control considerations” the 2000 branding dispute between the bank and EY which “brought into question the integrity of management”. The dominance of Levenstein introduced the risk that “management override may occur … negating the effect of the internal controls”. The risk of fraud was said to be “quite high”.

94.4 On 30 November 2000 EY finalised its planning board report for submission to the audit committee. Overall materiality for the year ending 28 February 2001 was assessed to be R6m. A factor which was taken into account in arriving at that amount was “the higher risk associated with the loss of senior members of staff during the year”. One of the risk areas referred to in the

planning board report was “the recognition of income from Regal’s branding entities”.

94.5 On 8 December 2000 the audit committee approved the EY planning board report.

94.6 On 31 January 2001 the audit committee met. EY was present. The letter of engagement was handed to Cohen. The audit was to commence on 17 February 2001.

94.7 On 28 March 2001 the audit committee met. EY was present. EY tabled Appendix A, a document setting out issues identified by EY, the response of management, and the resolution of the issues. Appendix A was updated from time to time and presented to various audit committees thereafter.

94.8 On 12 April 2001 the draft financial statements were discussed at an audit committee meeting. Income before taxation was shown as R115.8m. EY required substantial adjustments to the figures presented.

94.9 On 25 April 2001 the profit announcement as tabled by management was approved by the audit committee. Income before taxation was R71.5m, a reduction of R44.3m from the R115.8m, after EY’s adjustments had been taken into account.

94.10 On 26 April 2001 Regal Holdings provided EY with a letter of representation. The letter was signed by Cohen as audit committee chairman and Levenstein as CEO. The letter

contained a number of representations which were subsequently found to be false by EY.

94.11 The 2001 preliminary results were published on 30 April 2001 ("the 2001 preliminary results". At about the same time a presentation was made to analysts. The income before taxation was R71.5m (compared to R55.5m as at 28 February 2000).

94.12 At an audit committee meeting on 21 May 2001 EY reported that it would provide an unqualified audit report subject to the finalisation of a few outstanding issues.

94.13 Regal Holdings issued a second letter of representation on 13 June 2001, signed by Cohen only. Unlike in the first letter, the representations in this letter were qualified by the phrases: "to the best of our knowledge and belief" and "based on undertakings given by management".

94.14 An audit committee meeting took place on 21 May 2001. EY undertook to provide an unqualified audit report, subject to the finalisation of a few outstanding issues.

94.15 During the Investec due diligence, which is described later, on Saturday, 23 June 2001, Van der Walt mentioned four matters to Strydom of EY:

- the sale of 8m Regal Holdings shares to Mettle was not a true sale in that the "risk and reward" of the shares remained with Regal Bank;

- the purchase of Regal Holdings shares by the Incentive Trust and the Shareholders Trust was not good practice;
- Regal Holdings had bought the 15% shareholding of Worldwide through Pekane in terms of s38(2) of the Banks Act;
- After year-end, two bundles of R10m worth of preference shares had been bought by Mettle SPV's, but the effect of which was that the risk and reward remained with Regal Bank.

Strydom was so concerned at these disclosures that he requested the chairman of EY, Wixley, to join him. On the Sunday, Hourquebie, the CEO of EY, joined Wixley and Strydom at the bank. EY attended the board meeting that night.

94.16 On Monday, 25 June 2001, Strydom met with the BSD. EY withdrew its consent for the publication of the audited financial results. The reasons were contained in the letter EY sent to Regal Holdings on 9 July:

"It appears that certain information was withheld from us during the course of our audit and that certain representations made to us were untrue. …

Without limiting the extent of our re-assessment, we specifically refer to:

- A number of structured transactions in which the ultimate effect of the transactions might be different from that presented to us.

- Regal Bank financing the purchase of some 45% of the shares of Regal Holdings. We believe that it might be difficult to demonstrate that each of these advances were given "in the ordinary course of business" in terms of Section 38 of the Companies Act … Regal Bank might also be in contravention of Sections 37, 38 or 78 of the Banks Act regarding the funded shares …
- The possibility that one or more material irregularities and/or undesirable practices may have been committed which required to be reported by us under the Public Accountant and Auditors Act and the Banks Act, respectively."

95 The misrepresentations made by Regal Holdings to EY during the 2001 audit were the following:-

95.1 Holdings represented to EY that Pekane was the holder of 15.5m shares in Regal Holdings and that the bank had lent Pekane R60m. The representations were false in that Regal Bank had bought those shares from Pekane for R60m:-

95.1.1 EY knew that Pekane was the registered holder of 15.5m shares in Regal Holdings. In the draft financial statements for 2001, approved by the board of directors, in the "analysis of share register" Pekane was reflected as a major shareholder of 15.5m shares, representing 15% of Regal Holdings shares.

95.1.2 The facts as disclosed to EY at the time of the audit were the following:

- EY requested Regal Bank to furnish information on, and the recoverability of, “Phekani Investments (overnight loans) R60.2m”. On 12 March 2001 Cohen gave EY this response, prepared by Davis: “Phekani – this is secured by shares with a market value of approximately R70m.” EY thereafter recorded the transaction in a schedule of overnight loans with Treasury in these terms:

  “Phekani Inv: on loan: R67 400 805: This secured by shares with a market value of approximately R70m”.

- Strydom’s evidence was that he did not make the connection between Phekani Investments and Pekane, the investment arm of Worldwide.

- At a board meeting of Regal Holdings on 31 January 2001 Levenstein reported that “the return of the Worldwide shares would create an opportunity to distribute smaller parcels in blocks of perhaps 50 000 to loyal Regal supporters at a small discount to the market price …”. Strydom understood from that minute that “Regal was placing the shares … being a conduit” and was not a buyer of the shares.

95.1.3 Prior to 23 June 2001 EY was not aware that Regal Bank had bought the Pekane shares in December 2000 and had paid R60m for the shares on 29 December 2000.

95.1.4 Strydom testified that if he had been told the truth during the audit process he would have reported the matter to the BSD because, in effect, Regal Bank would have owned 30% of Regal Holdings shares and that was not good business practice. It was "a fairly incestuous investment". He would have ensured that any interest that Regal Bank earned on the loan to Pekane would not be recognised as income in the financial statements of Regal Bank as it would have been "income earned in effect from yourself".

95.2 Holdings represented to EY that Mettle had bought 8m Holdings shares from the Shareholders Trust in an arms length transaction. The representation was false in that the risk and reward remained mainly with Holdings and the bank.

95.2.1 The knowledge that EY had prior to 23 June 2001 about the 8m Regal Holdings shares sold to Mettle was the following:

- In the DT s7 review of 31 October 2000 it was said that the loans of R36m to the

Shareholders Trust were secured by Regal Holdings shares worth R17.6m. No provision or adjustment was made by the bank for any potential write-off. The review continued: "The CEO and management are confident that there is no permanent diminution in the value of the shares and that no provision is necessary. He also informed us that a substantial number of shares will be placed with a new shareholder at a price of between R5 and R6 per share."

- EY was informed by the bank that 8m Regal Holdings shares had been sold to Mettle during late 2000 for R5.50 per share, a premium of about R1 per share. EY assumed that that was the transaction that is referred to in the DT s7 review. EY was assured that it was an out-and-out sale.
- In Appendix A, which was tabled at various audit committee meetings, this was noted:

  "5. Sale of 8m Regal Shares at R5.50 by the Shareholders Trust to Mettle:

  Bank Supervision informed us that Mettle indicated in an article in the Financial Mail of 1

December 2000 that they did not have a stake in Regal and pointed out that the sale was merely a security provided by Regal for the back leg of a structured finance transaction."

- In the first letter of representation dated 26 April 2001 Regal Holdings made the following representation:

  "That the sale of 8 million Regal shares at R5.50 by the Shareholders Trust to Mettle was unconditional and that the shares are registered in Mettle's or its nominee's name".

- In the second letter of representation the same representation was made but preceded by the words: "based on representations by management".

- The 2001 preliminary results reflected Mettle Securities Ltd as the owner of 8 million shares.

- On 11 May 2001 EY sent an e-mail to Davis in which Davis was asked, in regard to the 8 million shares sold to Mettle: "Was this transaction part of the normal operations of the trust i.e. placing shares in strong hands, or was it part of one of the structured deals with Mettle?

If it was part of the structured deals, which one was it part of?" The answer given by Davis was: "The transaction was simply a means of achieving the objectives of the trust, i.e. moving shares from weak to strong hands. I think SARB's concern arises from an FM article, where Hein Prinsloo of Mettle was misquoted." Davis said that he obtained that information from Levenstein.

- At an audit committee meeting held on 28 March 2001 it was minuted that the 8m shares sold by the Shareholders Trust to Mettle were unconditionally registered in Mettle's name.
- In dealing with the BSD queries arising from the DT s7 review, EY on 14 May 2001 accepted Regal Bank's representations: "The Mettle transaction forms part of the normal operations of the Rand Shareholders Trust i.e. 'to allocate shares from weak hands into strong hands'".

95.2.2 On an analysis of all the Metshelf 1 contracts concluded on 22 October 2000, Strydom came to the view, which is correct, that the risk and reward

in respect of the 8m shares remained with Regal Bank.

95.3

95.3.1 Van der Walt told Strydom on 23 June 2001 about two lots of R10m that Regal Bank put in a structure to finance the purchase of Regal Holdings shares after the year-end. Strydom subsequently identified the structures at Metshelf 2 and 3. Van der Walt told Strydom that the structures were normal in the market place and there was nothing illegal about them.

95.3.2 Strydom, however, was concerned that the transactions were not good banking. Taking into account the other transactions that Van der Walt described to him, Strydom came to the view that Regal Bank in effect owned 45% of Regal Holdings shares.

96 EY's concern was that if the 45% shareholding was cancelled, the share capital and reserves of approximately R441m would be reduced below the required R250m share capital. If the Mettle structures were not cancelled, on the calculations EY did, Regal Bank would move to a capital adequacy below the required 8%.

97

97.1 EY concurred with the recognition of branding income in the 2001 preliminary results in the sum of R24m, made up as follows:

Regal Protea Health	R1 m
Medsurg	R2.5m
RMI	R21.5m
	R24m

97.2 The amount of R21.5m was the difference between the sale price of R26m and the amount of R5.5m recognised in the 2000 financial year.

97.3 EY set off the amount of R21.5m against an amount of ±R20m in respect of a royalty agreement which it regarded as an onerous contract.

97.4 At the time of the audit EY was not shown three of the agreements which made up the RMI structured finance deal: the preference share agreement, the security deposit agreement and the pledge and cession of securities. Had EY been shown those agreements, it would not have regarded the sale as an actual or real sale and it would have reversed the income of R21.5m and reduced the profit by R26m.

98

98.1 EY concurred with the recognition of income of R5.9m earned on the preference shares of R150m in respect of the Kgoro deal.

98.2 Fundamental to the recognition of the interest was proof that a deposit had been made. Regal Bank contended that Mettle had made the deposit. In a board report submitted to the audit committee, EY called for confirmation from Mettle "as to the existence of a R150m deposit held by them with Regal". As at the end of April EY had not received confirmation but assumed that the deposit had been made as it was "the opposite side of the R153m preference share investment. … At no time when we discussed confirming the deposit (with Mettle) with the audit committee or Jonathan Davis have they denied that it is a deposit". On about 27 May 2001 EY contacted Mettle and requested confirmation. Confirmation has never been received.

98.3 What EY did not know was that the preference share agreement was part of a structured finance deal. EY did not have knowledge of the sale agreement and the call option agreement.

98.4 Had EY known the true facts, they would have realised that a deposit of R150m had not been made and they would not have recognised the income of R5.9m as there was no true sale.

99

99.1 EY concurred with the recognition of a dividend of R5.2m on an investment of R125.5m in Metshelf 106 preference shares.

99.2 Unknown to EY, the underlying portfolio consisted of Regal Holdings shares. Had EY known the true facts, they would not have recognised the income.

100

100.1 Regal Bank wanted EY to agree to the recognition of R185m in respect of the forward sale contract of 93 Grayston Drive. The amount was “based on a R600 million maturity value and yield of 12.47%, the amortised value of the forward sale contract of 93 Grayston Drive is approximately R185,261,126.00”.

100.2 EY informed the audit committee on 28 March 2001 that they required a valuation of the immovable property from an independent valuator.

100.3 EY was aware of the sale of property and addendum but was unaware of the existence of the preference share agreement, the put option agreement and the call option agreement.

100.4 Regal Bank obtained a valuation from a valuer, De Vos, who placed a value of R144m on the property. One of the assumptions he made was that the property would be fully let. EY accepted the valuation.

100.5 In the board report EY recognised “other income” of R88m. That amount included R36.5m as “revaluation on 93 Grayston Drive”.

100.6 In the summary of audit differences it was said that the following items had not been adjusted for and included:

	Balance Sheet	Income Statement
Onerous contract – no provision made	(20,463,573)	20,463,573
Over accrual for valuation of Regal Protea Health	(600,000)	600,000
Under accrual for revaluation of property	17,500,000	(17,500,000)
Net Effect:	**(3,563,573)**	**3,563,573**

100.7 The total of the amounts of R36.5m and R17.5m, R54m, was arrived at by deducting the cost of development of 93 Grayston (R90m) from the De Vos valuation (R144m). R36.5m of the R54m was appropriated to “other income” and R17.5m was set off against the onerous contract and the over accrual for the revaluation of Regal Protea Health. Strydom conceded that, but for the onerous RMI contract, EY would have recognised another R17.5m in “other income”. The set-off was a compromise between Regal Holdings and EY.

100.8 It follows that 93 Grayston contributed 41.4% of “other income” if R36.5m is recognised (and 62.5% if R54m had been recognised).

100.9 Taking into account the true nature of the 93 Grayston structured finance deal, EY would still have permitted the recognition of the R54m but under another caption. In the income statement the R54m would not have been shown as “profit on financial instruments” but rather as “revaluation of investment property”.

In the profit announcement "financial instruments" were shown to constitute 41.46% of "non-interest income" of R88m.

100.10 Analysts would regard profit on financial instruments as more significant for a bank than a revaluation of immovable property.

101

101.1 The impact on the preliminary financial results for 2001 if the EY adjustments were made is that the profit of R71.5m would have been reduced by the following adjustments:

	Rm
RMI: sale proceeds	20,5
RMI: 2000 valuation	5,5
RMI: Fee from Elul	2,7
Kgoro:	5,9
Metshelf:	5,2
Protea Health	,6
Interest reversed Pekane "loan"	1,2
	41,6

The profit of R71.5m, reduced by R41.6m, would have been R29.9m. But for the profit of R36.5m disclosed on 93 Grayston, the bank would have made a loss.

101.2 This does not take into account:

- potential losses on advances to employees and directors totalling R34.8m (130119) to buy Holdings shares;

- the debits of R20m and R6m referred to in §86 and §51.26 of Part Three.

102

102.1 A major respect in which the 2001 preliminary results were misleading was the inclusion of the Mettle transactions in the assets and liabilities. Unaudited entries in the general ledger disclosed that as at 26 June 2001 the contribution of the various transactions was as follows:-

Date of transactions	**Transactions: number and name**	**Resulting assets Rm**	**Resulting liabilities Rm**
February/March 1999	(2) Tradequick & RVM	211	212
30 August 2000	(1) Regal Securities	106	98
July/August 2000	(1) RMI	25	2
11 October 2000	(1) Kgoro	164	150
17 November 2000 30 August 2000	(2) 93 Grayston & Stone Manor	Not implemented	Not implemented
27 Oct 2000 / 14 March and 6 April 2000	(3) Metshelf	145	85
	10	**651**	**547**

102.2 The increase in assets and liabilities would have been important for Regal Bank as a sign of healthy growth and possible gain in market share and might have had a positive impact on the share price.

102.3 Levenstein was interviewed on radio by Moneyweb on 30 April 2001, the day the preliminary results were released. He was asked how Regal Holdings had achieved a growth in total assets from R998m to R1.6bn. In his reply, Levenstein referred to

anything but the Mettle deals. When asked to whom he was lending the money, Levenstein replied: "The crème de la crème of the professional market, by reference of course to Wingate and the accountancy market, knowledge to the people and high net worth individuals."

102.4 The truth, which Levenstein did not disclose, was that it was the Mettle deals that accounted for the "growth". In reality, there was no growth. As Prinsloo of Mettle explained: most of the structures "should have been treated from an accounting point of view with set-off. In other words, I have got my asset – my preferent share and I have my corresponding liability that secures that asset. So it should not grow your asset in your liability book, it should not … You cannot show it as gross assets and gross liabilities".

102.5 Had the Mettle deals been excluded, the total assets would not have increased as dramatically.

103 In the result, the 2001 preliminary results were inaccurate in a number of material respects. The fault lay at the door of Regal Holdings, Levenstein and EY.

104 Regal Holdings was at fault for not making full and accurate disclosure of all material information to its auditors.

105 Levenstein was at fault as CEO of Holdings for not ensuring that Holdings furnished all relevant information to EY and for not disclosing all the Mettle transactions to the boards of Holdings and the bank, to management and to EY.

106 EY was at fault in two material respects:

106.1

106.1.1 EY's knowledge at the time of the 2001 audit about Pekane, in essence, was that Pekane, a subsidiary of Worldwide, was the registered holder of 15.5m shares in Regal Holdings and that there was an overnight loan of R60.2m to "Phekani Investments", secured by shares with a market value of approximately R70m.

106.1.2 Strydom said that he did not make the connection between "Phekani Investments" and "Pekane" until after the profit announcement. He was not aware that the security of shares of R70m was not investigated by EY. It was only on 23 June 2001 that he became aware that the shares were Regal Holdings shares. When pertinently asked: "Should Ernest & Young not have investigated what the security was and what its value was?", Strydom replied: "Yes … probably I think that Ernest & Young accepted the

representation from Regal management too easily on that one". Strydom conceded that the "overnight loan" of R60m was a "very large exposure".

106.1.3 EY did not ask to see the alleged loan agreement, the alleged agreement of security, and what shares had been provided for security. They should have done so. They had been placed on their guard in the previous year in regard to the branding dispute and the publication of the financial results on 16 May 2000. This was not a client that deserved trust. Had EY made enquiries of the kind required, they would have realised that Regal Bank had bought Regal Holdings shares for R60m and that Worldwide was no longer a shareholder.

106.2

106.2.1 At the meeting between BSD and EY on 12 February 2001, Martin emphasised that the main focus of the audit for the 2001 year would be the DT s7 review. A number of issues raised in the s7 review were dealt with in the meeting. Relevant for present purposes is that the relationship between Regal Bank and Mettle was canvassed in various respects. EY was specifically instructed:

- "To review the transaction between Mettle Ltd and the trust …
- the rationale of the Mettle transaction;
- to review involvement of Mettle Ltd in the branding strategy;
- to review contractual and legal relationships between the bank and Mettle Ltd with regard to various transactions;
- to review the shares purchased off the market price;
- to determine the need for specific provisions;
- if the accounting treatment of this transaction was incorrect, Ernst & Young should disclose how it should be correctly reported." It was minuted that Strydom said he would "visit Mettle to get the whole picture of the transaction and clarification on related issues before he could draw a conclusion on the Mettle transaction …" .

106.2.2 At the audit committee meeting on 12 April 2001, the draft audited financial statements were tabled. It was minuted that "Ernst & Young requested more time to finalise the accounts and to clear outstanding issues … The proposed dates for the release and publication of the results was 2 May, but not later than

3 May … In view of this deadline, it was agreed that management and the auditors would expedite all unresolved matters that could delay the finalisation of the accounts." It was further agreed, according to the minutes, "that all outstanding issues pertaining to corporate governance, regulatory compliance and internal controls be dealt with as a matter of urgency by management in consultation with the internal and external auditors".

106.2.3 Cohen testified that included in the matters which EY and management were required to resolve were the R150m deposit from Mettle and that the 8m shares had been sold to Mettle.

106.2.4 At the audit committee meeting on 25 April 2001 the group and bank audited financial statements as tabled by EY were approved, subject to minor adjustments. According to Cohen, that meant that the outstanding issues had been dealt with by management and EY.

106.2.5 The evidence of Prinsloo of Mettle was that a meeting was arranged with EY somewhere in April or May 2001, which was cancelled by Levenstein. Prinsloo said that if EY had telephoned Mettle, EY could have "got all the contracts in one file. And

when anyone looks objectively at the preference share agreements, one should ask whether the Mettle SPV's had any balance sheet? No. What is my security? It is an NCD from Regal. Simple, so you cannot show the two separate. Just a few questions would have showed that … If you know they have invested in a preference share, that is it. It is just the logical next question … What is my security".

106.2.6 Strydom's explanation for not seeing Mettle before 30 April 2001 (the date of the publication of the 2001 preliminary results) was that it was not normal for an auditor to visit the suppliers of a bank and initially EY thought the documentation given to them by the bank was sufficient. After the publication of the interim results, it became clear that certain information was not true, that made EY suspicious and hence their insistence on seeing Mettle. The meetings that were arranged were cancelled and EY "had to insist that they be reinstated" .

When it was put to Strydom that he had told the BSD on 12 February 2001 that he would visit Mettle, Strydom said that "we thought the easiest

way was to see Mettle … Later on [we] decided that we had received the full picture".

106.2.7 EY cannot hide behind the non-disclosure of the Mettle deals by Levenstein and Holdings:-

- The BSD had pertinently instructed EY to investigate the Mettle deals.
- The Mettle deals were significant for Holdings and the bank: assets and liabilities had been increased by ±R600m from R1bn to R1.6bn.
- EY knew that Holdings and Levenstein could not be trusted. In its own working papers of 29 November 2000 the integrity of management was brought into question and the risk of the fraud was said to be quite high.
- EY had said at the meeting with the BSD on 12 February 2001 that they would meet with Mettle, long before the publication of the results on 30 April 2001.

107 A further disturbing feature of the way Regal Bank conducted its business is the inaccuracy of the DI returns which it submitted to the Reserve Bank:-

- Strydom handed in a comparison of the DI510 returns as submitted by Regal Bank in March 2001 and after a revised audit had been done by EY in June. In March the large exposures were shown as:

	000
Phekani Investments	66 862
Incentive Trust	68 295
BOE	303 000
TOTAL	438 157

  On the face of it the BOE transaction was an inter-bank transaction and did not attract a capital requirement.

- Once the truth was established that the exposure was not to a bank, BOE, but to Mettle and its SPV's, the capital requirement on those transactions increased substantially.

- The impact of the accurate reflection of the Mettle deals is clearly shown in a comparison between the March and June 2001 DI 400 returns (180269), in which capital is calculated:

	March	20%
DI 100		501 487
	June	
DI 100		34 404

- Another misrepresentation in the March DI 100 return was that the amount of R192.4m was shown in the 50% category on the basis that that was the sum of the loans secured by mortgages on residential properties. The bank was not able to provide EY with any of the mortgage bonds. As a consequence, EY regarded those loans as unsecured and placed them in the 100% category.

- A further consequence of falsely disclosing the Mettle transactions as transactions with a bank, is that Regal Bank should have held R27.6m worth of liquid assets with the Reserve Bank, whereas in reality it held only R13.9m.

108 On 25 April 2001 the HR committee, chaired by Cohen, approved the payment of bonuses to executive directors and Exco members in the sum of R1.2m and to employees in the sum of R1m. Levenstein's bonus was R460 000. Levenstein overruled the HR committee and reduced the amount to be paid to employees to R400 000. It follows that Levenstein alone was paid a greater bonus than all the employees. This is another example of Levenstein's even-handed approach to remuneration and fine sense of sound corporate governance.

109 The event which triggered a loss of confidence in Regal Bank resulting in a run on the bank was the publication on 25 May 2001 of an article "Betting on a Brand" in the Financial Mail ("FM"). The author pointed out that banks like Regal are "exposed to the confidence game – they rely on spotless records and careful transparency to attract the public's money". The author had carefully analysed the court papers in the voluntary liquidation application by RMI which Regal Bank had successfully opposed. An interview was held with Levenstein. The article was negative. It concluded with quoting Levenstein saying that the R10m – R13m branding model he had "brought to the income statement" was a

"big achievement". "But", said the article, "some shareholders, at least, will be less than impressed with the short lifetime of the model and the fortunes it has delivered."

110 On 29 May 2001 Cohen received an advanced copy of an article which was due to appear in the FM on 1 June 2001. Levenstein explained to Cohen that Mettle had "full discretion to buy and sell shares in the portfolio where preferent share returns are linked to portfolio performance". He denied that Regal had any influence over the purchase of the shares. Cohen discussed the matter with Martin of the BSD and informed him that a joint meeting of the boards of directors had been called for the next day. The liquidity level on 29 May 2001 was R107m.

111 On 30 May 2001 the boards of Holdings and the bank met to discuss the FM article and the issues raised in it, especially the litigation with RMI. Diesel reported that "Treasury is down R22m – R25m on the week to date in response to the negative publicity". Cohen emphasised the need to monitor liquidity on a minute-by-minute basis and to report any negative trends.

112 On 1 June 2001 the article appeared in the FM with a headline, "Surprising surge in price: Mettle rides to the rescue". In the opening paragraphs it was stated: "After last week's Cover Story, which brought to

light the chaos in small bank Regal Treasury's branding income stream, readers may have been surprise to see the share price appreciate 7%.

Mettle Securities snapped up the vast majority of shares for sale since Thursday last week. A number of sources say Mettle got its hands on more than seven thousand shares, worth about R3.8m, on Thursday, Friday, and this Monday. Close to 1m changed hands – a third of the average for an entire month. This Tuesday, though, Mettle seems to have turned seller again."

113 On 5 June 2001 the liquidity level of Regal Bank was down to R98.8m.

114 On 8 June 2001 a pipe bomb was found at the offices of Polaris Shipping next door to SASFIN. On the following day, 9 June 2001, a fire caused damage to the Polaris Shipping premises. On the evidence presented to it, the commission is unable to make any findings on the probabilities of whether those attacks were destined for SASFIN and orchestrated by Regal Bank. The evidence before the commission is analysed in detail in Part Three. The significance of the incidents is that the publicity which accompanied the incidents on 22 June 2001 must have contributed to the loss of confidence in the bank which culminated in curatorship four days later.

115 On 11 June 2001 the liquidity level was down to R70.3m. The bank experienced a "liquidity shortfall" which necessitated it using a marginal

lending facility of R18m at the Reserve Bank's money market department. The facility was repaid on 12 June 2001.

116 On 13 June 2001 a meeting of the joint boards took place. One of the issues discussed was that Regal Bank would enter into a preferent share agreement of R100m with Rand Merchant Bank ("RMB"). On the following day Cohen met with RMB to discuss such a transaction, in the words of Cohen, "to try and shore up the liquidity" of the bank.

117 On 18 June 2001 the bank, represented by Cohen, Lurie and Oosthuizen, met with the BSD represented, inter alia, by Wiese and Martin. One of the matters Cohen reported on was that he was not satisfied with the liquidity position of the bank and the steps he was taking to address the problem. The three directors of the bank expressed optimism about the future of the bank. Cohen asked the Registrar, so he testified, whether "Third tier liquidity provision would be available … Wiese replied in the negative because, unlike FBC Fidelity, the bank-client basis was in the high net worth market".

118 On the same day, Robinson commenced employment as CEO. His major concern was that there was no surplus liquidity. He commenced taking steps to arrange a credit line with other banks.

119 On 20 June 2001 Cohen was informed by Guard Risk that the underwriters were not committed to the RMB preferent share deal. Diesel reported to Cohen that the bank was “at the 75% limit on the statutory liquidity with the Reserve Bank”.

120 On 21 June 2001 Cohen requested Oosthuizen to visit Martin at home to reopen the possibility with the Reserve Bank of a third tier liquidity facility. Oosthuizen did so. His overtures were rejected.

121 On Friday, 22 June 2001, Regal Holdings and Investec met. According to Robinson, the “ostensible purpose of the meeting was to create some standby credit lines in case of a liquidity run on the bank”. The meeting concluded on the basis that Investec would conduct a due diligence over the weekend with a view to acquiring the bank.

122 On the same day, an article appeared in the Business Report, with the headline “Regal Treasury Bank employee arrested after bomb attacks”. In the article it was alleged that the South African Police Services (“SAPS”) had launched an investigation following the arrest of a Regal Bank employee who had been linked to an attempted bomb attack on business premises in Johannesburg; on 8 June 2001 a pipe bomb was thrown at office buildings in Waverley, but failed to detonate properly; on 9 June 2001, a petrol bomb was thrown in the same direction, causing a fire at an office owned by Polaris Shipping; Polaris Shipping

is adjacent to SASFIN Bank head office; one of the suspects was an employee of Regal Bank.

123 There was a hive of activity on Saturday, 23 June 2001. Investec commenced the due diligence. The Reserve Bank met with SASFIN and Regal Bank. Included in the Reserve Bank team were Ms Marcus, the Registrar and Martin. Included in the Regal team were Cohen, Lurie, Van der Walt, Scheepers and Oosthuizen. Robinson attended as CEO. Levenstein did not attend. At the Regal meeting, Cohen reported on a number of issues including corporate governance, the Mettle deals, death threats, the SASFIN bombing and the sale of Regal to Investec.

124 On Sunday, 24 June 2001, Investec completed its due diligence investigation. Investec decided not to buy Regal Bank. The Investec team had a number of major concerns with Regal Bank, including the financing by the bank of the acquisition of Holdings Shares, the Mettle deals, the development of 93 Grayston Drive, the R71m attributable income and the role played by Levenstein with “almost unfettered powers”.

125 A meeting of the joint boards took place on the night of 24 June 2001. Investec informed the meeting that it would not buy the bank but would buy R350m of the book debts for R305m. Strydom of EY expressed his

concerns about the 45% shares held indirectly by the bank and the financing of the acquisition of the shares by the bank. It was resolved that the following would be presented to the Reserve Bank the following morning for approval: "(a) Cancel 45% of shares – bring issued capital down to R200m; (b) J Levenstein announced retirement, with immediate effect; (c) Securitisation/sale of book to Investec – R300m within one week; (d) Ask the Reserve Bank to assist liquidity for one week." EY conveyed to the meeting that it would withdraw the auditors' statement "subject to opinion from H Vorster on treatment of dividends".

126 On Monday, 25 June 2001, the Reserve Bank, represented inter alia by Ms Marcus and the Registrar, met with EY and later with EY and Investec. At the first meeting, Strydom reported on what had transpired over the weekend and the resolution of the Holdings board the night before. At the second meeting, Investec informed the meeting of its offer. Strydom said that EY would withdraw their consent to the 2001 preliminary results published on 30 April 2001. A cautionary statement was drafted and issued to the public and to shareholders in these terms:

"Shareholders are advised that the Board of Directors of Regal have decided to undertake a significant restructure of the affairs of the company and of Regal Treasury Private Bank Limited ("Regal Bank").

The proposed restructure will, *inter alia*, involve the following:

1. The cancellation of approximately 45% of the ordinary shares of Regal in issue and held by certain trusts and other entities;

2. The restructure of the Board of Directors, it being advised the Mr Jeff Levenstein has tendered his resignation as a director of both Regal and Regal bank and will hold no further responsibilities;

3. A substantial portion of Regal Bank's advances book will be acquired by Invested Bank Limited;

4. An asset disposal programme will be undertaken over the forthcoming months.

Following the proposed restructure, the capital of Regal Bank will be comfortably above the minimum statutory requirement.

As a result of this proposed restructure, the auditors, Ernst & Young, have advised that they have withdrawn their consent to the publication of the preliminary audited results for the year ended 28 February 2001 which results were published on 30 April 2001. They have advised that in view of the proposals and new information that has come to their attention, they are required to perform further work before an audit opinion can be expressed on the annual financial statements of Regal for the year ended 28 February 2001." Moneyweb carried the story. Business Report reported on the SASFIN bombing. The share price slumped from 190c to 45c.

127 On Tuesday, 26 June 2001, there was media coverage in Business Day and Business Report. The Investec deal was announced. The Reserve Bank, including Ms Marcus and the Registrar, met with Store of DT. It was agreed to put the option of curatorship to Cohen. The

Reserve Bank and Store thereafter met with Cohen and Scheepers. Cohen told the meeting that the share price had “plunged” and that R250m had been withdrawn “following the announcement by Levenstein that he had not resigned but was away for a few days”. Cohen applied for curatorship. Investec wrote a letter to the Registrar in which application was made in terms of s54 of the Banks Act for the transfer of a substantial portion of Regal Bank’s advances book to Investec. The book would comprise loans, overdrafts, mortgage loans and instalment sale debtors. The Reserve Bank made application to the Minister of Finance for the appointment of Store as curator. The Minister agreed, with reservations. On the following day, curatorship was announced.

Ex parte:

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

Date: 15 November 2001

PART THREE

INDEX

Chapter one

4 Levenstein: Chairman and CEO

4.1 This matter is dealt with in §33.

5 Lurie as chairman

5.1 On 29 September 1999 Levenstein resigned as chairman and Lurie was appointed chairman by the board of directors. (D279)

5.2 Lurie is the brother-in-law of Levenstein. He was involved with Levenstein with the creation of Wingate Holdings Ltd and Regal Bank and he was a non-executive director of the bank from inception. Levenstein's evidence was that Lurie was "… too independent… it made it difficult for me to interact with him" (1568). Lurie was appointed because "… we did not find a suitable alternative" (1576).

5.3 On 22 March 2000 Wiese wrote to Lurie, as chairman, calling for a meeting on corporate governance (E32.1).

5.4 At a meeting between BSD and Regal on 17 April 2000, Levenstein said that Regal was considering the appointment of a "totally independent chairman from outside the group" (E40)

5.5 In the DT s7 report which was sent to Lurie on 31 October 2000 the point was made that Lurie was Levenstein's brother-in-law and that "the perception of independence is tainted". (DT(1)9).

5.6 At a meeting between BSD and EY on 12 February 2001, in reviewing the DT report, BSD found the independence of Lurie questionable because he was the brother-in-law of Levenstein (F32).

5.7 On 16 March 2001 Lurie told a meeting of the board of directors of Regal Bank that "he would relinquish his post in order to avoid any potential conflict of interest in view of his familial relationship with the Chief Executive Officer". (K(3)49). Lurie's evidence was that there was no conflict of interest and that the minute is incorrect. He resigned only in order to make way for Cohen who had "immense experience" (2397).

5.8 Lurie testified that after he became chairman he telephoned the bank 5 or 6 times a day and went to the bank weekly (2372). He liased with Davis, then company secretary, and Ms De Castro, the chief financial officer ("CFO") at the time (2372). He was in continual touch with the non-executive directors (2374).

5.9 Lurie said J Pollack was chosen as chairman but he became ill and the non-executive directors then asked Lurie to become chairman (2381).

5.10 Lurie testified that he regarded himself as "fearlessly objective and independent of management" (2390).

6 Mark Springett ("Mark")

6.1 Mark joined RTL on 19 August 1996. He became a director of RTL, later Regal Bank, on 25 September 1996 and a director of Regal Holdings on 27 November 1998. He originally joined the bank in order to start a portfolio management division. The division grew into an asset management division. He recruited Ms Newman and later Kruger. When they started they had no assets to manage. In due course they created Regal Treasury Unit Trust Management Company Ltd ("Manco") of which he became the managing director. At the date of his dismissal, 14 July 1999, the value of assets under management had grown from zero to about R500m (2184-2190).

6.2 Mark explained that when Regal Bank was listed in February 1999, "Levenstein was very keen on listing the bank by way of introduction. He did not want to offer any shares because he felt that if we placed shares we were going to put a price on what the share would come on at. And he felt that if we listed by way of introduction the share price would come on at a high inflated

value." Mark disagreed with Levenstein. His view was that the bank had only one institutional shareholder, Worldwide, who owned about 15% of the shares. He was keen on placing some shares with some institutions prior to the listing and when the listing occurred "they would be there to support the share price and buy shares. They had a reason to buy shares." (2190-2191).

6.3 The expectation within the bank was that the shares would list at a high price. A sweepstake was held in the bank. The lowest price was R7.80 and the highest about R50. Levenstein's assessment was at about R30-R40. One secretary put money on the lowest price. When the share listed, the share price was R7.50. She won the sweepstake. The result was that Levenstein "was under tremendous pressure because the share price had not performed like he said it was going to. He was very, very negative about anyone selling shares because he felt it was going to depress the share price even further. He felt the share price should have been much higher and so anyone who sold shares was really made to feel very uncomfortable." (2192). Another problem which Mark had with the listing was that the bank had used its own stock broking firm as a sponsoring broker. He was opposed to that. He believed that an independent sponsoring broker should be used, someone with a name in the market, whereas the bank was

sponsoring its own listing and he thought that was poor. There was also no roadshow because Levenstein did not want to set a share price (2194).

6.4 Mark formed the view that many of the clients' portfolios were very heavily skewed in their weightings in holding Regal Holdings shares. The portfolio of some of the clients consisted of 80-90% of Regal Holdings shares. Mark thought it was prudent for an independent asset manager to advise his clients to diversify out of this one single holding into other shares. Whenever he sold shares on behalf of a client and distributed them into other assets he was made to feel very uncomfortable, particularly, by Krowitz, who was head of the stockbroking firm. He was put under "a lot of pressure not to sell clients' shares" (2193).

6.5 Mark's evidence was that on 6 July 1999, Bacher, a portfolio manager, came to him and told him that he had an instruction from Krowitz and Levenstein that "asset management was no longer allowed to sell any shares in Regal Treasury on behalf of any of its clients." While Bacher was telling Mark and Kruger about this instruction, Levenstein walked in and he repeated the instruction. He left and returned later to tell Kruger to investigate the ramifications of informing the client that the client's instructions would not be carried out and telling the client to take

his business elsewhere. A few hours later an investment committee meeting was held, which Mark chaired. Levenstein, who did not normally attend the meetings, attended and said he wished to make a statement. He repeated the instruction to everyone who was in the meeting. Attendees included other executive directors of the bank, executive directors of the stock broking firm, portfolio managers, and so on. Levenstein said that the share price was way too low. One of the portfolio managers asked Levenstein "What happens if the share price rises, can we then start selling shares for our clients". Levenstein said "No, not without my express permission" (2194-2196).

6.6 Mark and Kruger decided to consult Peter Springett, Mark's father. Peter's advice was that the instruction was unlawful and unethical. They then decided to consult an attorney, Michael Krawitz. The first time they were able to see him was on the 12th or 13th of July 1999. His advice was that Mark should write a letter setting out his version and his concerns. The further advice of Krawitz was that the asset management company had a duty to manage the portfolios in the interest of their clients, not in the interests of the bank (2198-2199).

6.7 The letter that Mark drafted is dated 14 July 1999 (G181). Mark set out in detail his version of what had transpired on 6 July 1999

and he raised a further concern, namely, the dual position of Levenstein as chairman and CEO. At about 11:00, Mark and Kruger met with Levenstein. Levenstein read the letter. His response was one of hostility. He said he could no longer have a personal relationship with Mark and that Mark had breached his fiduciary duties by disclosing to Kruger and Newman the fact that the Reserve Bank was concerned about his holding both the chairmanship and CEO roles. He called in Radus and Krowitz. He told them that he wished to place on record that he was "removing Mark as CEO of the asset management division and as managing director of the unit trust management company". Levenstein said he wished to place on record that he was not firing Mark but that he would recommend to the board that he be dismissed. Mark then left to consult his attorney. Levenstein instructed Krowitz to search the bags of Kruger and Mark. He was very loud and aggressive (2203-7).

6.8 Michael Krawitz drafted a letter which Mark took to the premises (G185). Mark met with Levenstein. Levenstein said: "Look, I think we can sort this all out". Mark suggested that they take time "to cool out and to cool down" and discuss the matter the next day. Levenstein insisted that they have the discussion there and then. When Mark refused, Levenstein handed Mark an envelope,

containing a letter (G190) in which Mark was dismissed for breach of fiduciary duty as a director of Regal Bank and for grossly insubordinate behaviour. Krowitz then accompanied Mark to his desk, inspected what Mark took with him, and escorted him off the premises (2207-9).

6.9 Mark thereafter made contact with three non-executive directors, Lubner, Schneider and Nhleko. He tried, too, to call an urgent board meeting for 11 August 1999. On 11 August 1999 at 09:00 Mark arrived at the bank for the meeting. He had sent out notices for the urgent board meeting. He was met by Krowitz. Krowitz refused him entry on the basis that Mark was no longer a director, was not entitled to call a board meeting, and was not allowed on the premises (2211-18).

6.10 A round-robin resolution was taken by the directors of Regal Holdings in the period 4 – 10 August 1999 (T116), in which Mark's dismissal from Holdings was confirmed. All the directors, save for Mark, Lubner and Schneider signed the resolution.

6.11 Mark informed the director of surveillance of the inspectorate division of the Johannesburg Stock Exchange, the FSB and the Reserve Bank of what had happened. As allegations were made by Regal Bank against Mark, he reported them to those institutions (2219-20).

6.12 Regal Bank laid charges against Mark at the Office of Serious Economic Offences. When that office declined to entertain the charges, Regal Bank went to the South African Police Services with a copy of the Ernst & Young report, which had been prepared at the request of the bank. The allegations which were made against Mark were that he had stolen between R5m and R10m, fraud and theft of clients' money. Civil actions were instituted against Mark. He took the bank to the CCMA for unlawful dismissal. Having dismissed Mark, the bank attempted to recover the shares Mark was entitled to in terms of his contract of employment and to hold him to a restraint of trade agreement. All the litigation was eventually channelled into an arbitration, which was ultimately settled (2221-6).

6.13 The allegations against Mark were investigated by EY. On 28 April 2000 EY produced a draft report on behalf of Regal Bank in which Mark, Kruger and Fatima Newman were accused of conducting accounts on such a basis that "funding practices constitute misappropriation and misuse of client funds"; that client shares had been traded "off-book" for personal gain and that certain accounts were used as "slush funds". It was recommended that the matter be handed to the commercial branch of the SAPS (G235, G237-8).

6.14 On 28 September 2000, an accountant, Harvey Wainer, produced a letter for Michael Krawitz in which he said that EY had misunderstood how a bank operates and that even on EY's own version, there was no misappropriation of funds (G356).

6.15 On 28 September 2000 Springett, Kruger and Newman prepared a detailed response to the EY report (G117) in which they disputed that there had been any wrongdoing.

6.16 At a meeting of the board of directors of Regal Bank on 31 January 2001 it was recorded that the "Springett case" would be settled out of court (K(3)42). Levenstein testified that Cohen accused him of being too litigious and that the case against Mark should be settled. Accordingly, the criminal case was withdrawn and the case against Mark was settled on the basis that he and his colleagues retained a certain portion of their shares. The case against Mark, Peter and Kruger cost the bank R806 945.69 (vdW371).

6.17 Levenstein testified that prior to 14 July 1999 he and Krowitz suspected that Mark had manipulated or misused trust funds (1181). He denied that he had placed a blanket embargo on trading (as alleged by Mark). He testified that he told Mark to stop "front running", which he described as "… using Regal shares inappropriately … this process where Regal shares will be

pushed down artificially" (1208-9). Levenstein said that, acting on the advice of a labour lawyer, he had offered Mark a hearing prior to his dismissal, which Mark had refused to attend (1213).

6.18 When Levenstein was questioned on why he did not call a board meeting before dismissing Mark, he said that "when client funds go into debit … because we knew that an individual would be used here to wreak havoc, to destabilise the bank, to distribute disinformation into the market place it was dealt with in a particular manner to accommodate very unusual circumstances" (1226).

6.19 On being questioned about why the demand was made on Peter Springett (referred to in §7.9 hereof) Levenstein said that it was "a matter of pure unadulterated warfare … this was not a Mark Springett, this is essentially a Peter Springett issue" (1230).

6.20 Mark's evidence was that: "What we did there is that it was simply a case of facing the bully in the schoolyard and eventually the day they had to put their money on the table for the collapse fee they crumbled and they signed a settlement agreement." (2226). In terms of the settlement agreement (T44.1), all the allegations of criminal conduct were withdrawn against Mark and "Regal" undertook to pay Mark R1.3m. When asked, in evidence, what the litigation had cost him, Mark did not want to measure it in monetary terms. "You know, the money was one thing, but … my wife and I were planning on starting a family. We had to put that on hold. My father … aged a lot. They

made unbelievable allegations against us. … At the end of the day … [Levenstein] has a lot of things to answer for and – yes, it was very unpleasant" (2228-9).

6.21 Mark's version of what transpired in the period 6 – 14 July 1999 was corroborated in every material respect by the evidence of Kruger (2082-2096). Kruger was an executive director of Manco.

6.22 Kruger's further evidence was that he went to work on 15 July 1999, after Mark had been dismissed the previous day. He was asked questions about Manco and how it operated. He was cold-shouldered the rest of the week until he resigned on 26 July 1999 (2098-2100). In the letter of resignation (T41), which was directed to the chairman and directors of Regal Holdings, Kruger stated:

"1. On the 6th July 1999, I received a direct instruction from the chief executive officer (CEO) of the Bank, Jeff Levenstein, not to sell or facilitate the sale of Regal shares on behalf of managed clients, pension and provident funds, our unit trusts and private clients, whether acting on what we deemed to be in the best interest of our clients or on behalf of direct instructions received from our clients. I was further instructed by the CEO to investigate the legal ramifications of refusing to act on behalf of a client wishing to sell shares in Regal, handing back our mandate with the client and closing the account.

I consider the above instructions to be unethical and not in the best interests of our clients, shareholders, staff, directors and the bank as a whole."

6.23 Three companies in the Regal Group sued Kruger for the return of the shares and to enforce an implied restraint of trade. The action against Kruger formed part of the arbitration referred to earlier. The claims against him were settled in terms of the same deed of settlement. “Regal” undertook to pay him R372 000 in full and final settlement (2102-7).

6.24 The version of Mark and Kruger about the events of 6 July 1999 were corroborated, in turn, by the evidence of Ms Newman (2349-50). At the time she was an executive director of Manco. She resigned on 26 July 1999. When she was sued for the return of her shares, she returned her shares, in order to avoid the costs of litigation (2350-1).

6.25 Nhleko signed the round-robin resolution on 10 August 1999 confirming the dismissal of Mark. Mark had phoned him to tell him about his dismissal. Nhleko’s view was that it should be dealt with by the board. He was then briefed by Levenstein and Krowitz and told their version of various allegations against Mark (2318-2326). He went along with the CEO and the majority of the bank, who had signed the resolution before he did (2326). At the time he signed, he did not know that Schneider and Lubner had resigned (2334).

6.26 Lurie was away from 14 – 31 July 1999. On his return, Levenstein told him that Mark was guilty of round tripping and "money had gone astray within the unit trust division". Lurie was not told at the time about Mark's allegations against Levenstein (2519-20). He found out later when Mark delivered documents to his home (2521). He accepted Levenstein's version (2522). He could not recollect Mark calling for a special board meeting on 11 August 1999 (2523). He could not recall that Schneider and Lubner had supported Mark's call for the matter to be debated at a board meeting (2525). Lurie was one of the directors who signed the letter confirming Lubner's resignation (N91).

6.27 Diesel signed the round-robin resolution on the information that was presented to him by Levenstein. Diesel was aware that Mark had requested the fact of his dismissal to be discussed at a board meeting. He conceded that it was wrong not to grant Mark such opportunity (2678). He was not aware that Schneider and Lubner had refused to sign the resolution and had demanded that the matter be discussed at a board meeting (2678).

6.28 Buch agreed "with hindsight" that Mark's dismissal should have been discussed at a board meeting. He accepted Levenstein's version that Mark had been involved in "some fraudulent activities". He knew that Mark had called for a board meeting but

he did not know that Schneider and Lubner had done so (2790-4) and that they had refused to sign the round-robin resolution (2798).

6.29 Krowitz testified that he was present when Levenstein said: "I do not want the stockbrokers – the Regal Treasury stockbrokers – to sell Regal shares. Sell your Regal shares use somebody else. Now he was vehement about this" (2927). A few days later, Krowitz was called into a meeting between Levenstein, Mark and Kruger at which Mark was handed the dismissal letter (2929). After the meeting, Krowitz accompanied Mark to collect his belongings in his office (2930). It was Krowitz who initiated the investigation into the asset management accounts because "an asset management account cannot ever run in debit" (2932). He was not aware at the time that Schneider and Lubner had refused to sign the round-robin resolution and had insisted on a board meeting (2934-5).

6.30 J Pollack could not remember the dismissal of Mark (3017).

6.31 Kaminer did remember Mark's dismissal. Mark saw him and gave him documents. He went to a game reserve over that period. On his return, Radus and Krowitz told him that Mark was in the wrong. He saw the evidence the bank had against Mark, and on that basis he signed the round-robin resolution (3027-8).

6.32 Radus said he overheard the instruction which was given by Levenstein to Mark and Kruger. Levenstein told Mark and Kruger "to try and avoid selling Regal shares through Regal Treasury Securities because it looked bad that we were selling our own shares. But they could sell them through other brokers with pleasure." (3121). Radus was asked how it came about that he overheard the conversation. His answer was "I could have been sitting at Jeff's desk. I could have been sitting in Mark's office. I could have been sitting in Carl Kruger's office, I just – it is possible. You know, it might have been just outside my office. It was all open plan and these discussions took place everywhere."(3122). He later said the instruction was given in Levenstein's office (3123).

6.33 Radus testified that he was called to the meeting during which Mark handed Levenstein the first letter of 14 July 1999. The letter was "very insulting to Jeff". Levenstein was very calm. Mark and Kruger left. A labour lawyer was consulted. He drafted two letters: in the one letter Mark was disciplined but not dismissed; in the other Mark was dismissed "for breach of his fiduciary duties and things like that". Later that afternoon Radus telephoned Mark with the request that he return to the bank. Mark returned "very arrogant and very angry". Mark refused to sit

down. He handed Levenstein a lawyer's letter. Levenstein then dismissed Mark (3118-3120).

7 Peter Springett ("Peter")

7.1 He is 70 years old, a veteran of the banking industry. He commenced his career in 1950 and retired in 1989 as a director of companies within the First National Bank group ("FNB") (A30–33).

7.2 He commenced his relationship with Levenstein in the Wingate group in 1990 and was non-executive chairman from 1990 to 1994 (A33).

7.3 In 1996 he was appointed executive chairman of RTL. He was a shareholder of RTL (A27).

7.4 Peter's evidence was that he worked a 12 hour day for no remuneration as executive chairman. He had a good working relationship with Levenstein. There were no problems with corporate governance. In mid-1997 Peter went overseas. On his return, he found that Levenstein's attitude towards him had changed. Levenstein did not want to report to Peter. "He wanted to run it as a one man bank". Peter found it impossible and unpleasant to work. The majority of the board supported

Levenstein. In Peter's words, it was a "classic case" of a lack of corporate governance leading to problems (2171-2).

7.5 In mid-1997 Peter changed his role from executive chairman to non-executive chairman.

7.6 Peter illustrated the lack of corporate governance by giving two examples. Firstly, Levenstein put the idea to the board that the bank should start a brokerage. At a meeting of the board Peter called for a business plan and financial projections before approval could be given. The board agreed to postpone its decision. Levenstein then canvassed the directors privately and individually who in turn put pressure on Peter not to be the sole dissenting voice at the next board meeting. Peter agreed not to oppose the idea; Levenstein then obtained board approval, without a business plan and financial projections (2173-4). Secondly, Peter was chairman of the remuneration committee. The committee never met. Levenstein unilaterally decided on salary increases, bonuses and share incentives, which had to be awarded to the staff and to himself. When Peter expressed his opposition to Levenstein's conduct, Levenstein replied that he was the CEO and he would decide what the employees would be paid (2175).

7.7 Peter resigned on 22 January 1998 ((K2)103; 2180).

7.8 At a meeting between Regal and BSD on 18 February 1998 Levenstein alleged that there was constant disagreement between him and Peter on strategic issues (C14).

7.9 The day after Levenstein dismissed Mark, attorneys Werksmans acting for Regal Bank, sent a letter of demand to Peter (G207) in which is was claimed that during the period of his chairmanship (17/08/95 – 22/01/98) he had, without the authority of or disclosure to the board of directors of Regal Bank, caused to be issued to himself 925 000 shares. On 16 July 1999 Michael Krawitz responded on behalf of Peter (G213) by saying that the allegations were "laughable" as the shares had been issued with the knowledge of the board of directors, certificates were signed by duly authorised officials of Regal Bank and issued in tranches over a period of two years (2176-7).

7.10 Various companies in the Regal Group of Companies thereafter sued Peter in the High Court in which they sought return of their shares. That action was subsequently combined with claims against Mark, Kruger and Ms Newman and the various claims and counterclaims were all referred to arbitration. The arbitration was settled. The claim against Peter was settled on the basis that he was entitled to keep the proceeds of the shares, which he had sold by then (2177-9).

7.11 While the settlement agreement amounted to a complete vindication of Peter's right to the shares, the litigation cost him about R500 000 in legal costs (2177).

7.12 Levenstein justified the letter to Peter shortly after the dismissal of Mark on the basis that he did not know the facts until after the dismissal. He said the letter was "designed to put pressure on Mr Peter Springett who was co-ordinating the dissemination of disinformation into the market place" (1234). Levenstein admitted that the allegations made in the letter of 16 July 1999 of Michael Krawitz were correct (1236). He said he did not know whether the demand was pursued to finality or not.

7.13 The costs for the bank in litigating with Peter and Mark Springett and Kruger, including legal costs and the costs of the forensic audit, came to R806 945.69 (vdW371).

8 Nhleko

8.1 Nhleko is one of the finding shareholders of Worldwide. He is executive chairman of the company. He has been a director of other listed companies. He became a non-executive director of Regal Bank on 22 October 1998 and a non-executive director of Regal Holdings on 27 November 1998. He represented

Worldwide on those boards, Worldwide having approximately a 15% shareholding in Regal Holdings.

8.2 Nhleko attended only one board meeting in 2000 on 31 January 2000. His explanation was that he received a copy of Levenstein's letter of 29 December 1999 in which Levenstein requested the R2m bonus and 5m Regal Holdings shares. Nhleko could not remember attending a meeting held on 25 January 2000 of the non-executive directors, though it is clear that he did so. He wrote a letter on the following day, 26 January 2000 (U58), in which he referred to the meeting on the previous day and stated his views on Levenstein's request as follows:

"I hereby confirm that in principle I have no qualms with Jeff Lievenstein's remuneration structure being reviewed together with a re-assessment of Regal's restraint agreement with Jeff. However, I am of the view that this review needs to be put into context on the following basis:

- Regal needs to establish a remuneration committee in accordance with the "King code" for corporate governance.
- The committee should be tasked not only with the review of Jeff Lievenstein's package and contractual arrangements, but more broadly to set a workable market related remuneration structure which can be applied annually to all company employees. Quite obviously, in order for the committee to establish a market related remuneration structure suitable for Regal, the committee members would have to access the information and expertise in this area."

Nhleko denied in evidence that he had agreed to Levenstein's request. Accordingly, he disputed that Lurie's note on the letter (DT175) and Levenstein's letter of 27 January 2000 (DT176) correctly reflect that all the non-executive directors agreed to the bonus and share allocation (2290).

8.3 Nhleko testified that Levenstein threatened to resign within days if his demands were not met. Nhleko found Levenstein's attitude "abrasive". He came to the conclusion that "his role on that board was inappropriate" (2286).

8.4 Nhleko received a letter dated 31 January 2000 (U1) from Levenstein in which Levenstein castigated Worldwide and Nhleko. Nhleko was accused of making "derogatory and potentially damaging statements about my harsh and unrelenting style". Levenstein referred to Nhleko "evading your fiduciary duties". Levenstein "placed on record" that Worldwide and Nhleko had "grossly misrepresented your group's capacity for fuelling Regal's annuity and fee flows".

8.5 Nhleko responded on the same day (U3) in which various allegations were denied. Nhleko posed the question: "Is it really tenable to continue to serve on a board where I am perceived to be of "danger to the culture" of the company, particularly if the

CEO is of the view that I have not grasped the 'conceptual strategic and operational nuances' inherent in his approach?"

8.6 Levenstein admitted that Nhleko had not attended board meetings. His explanation was that Worldwide were required to bring in a R1bn of asset management to Regal Bank and when Worldwide failed to do so, Levenstein raised the issue at a board meeting. Nhleko was "… unbelievably aggrieved by the fact that I had effectively embarrassed him in front of other board members" (1594-5).

8.7 Nhleko played no further role in the affairs of the bank in 2000. Yet he did not resign as director. He simply abdicated his responsibilities as non-executive director.

9 Lubner

9.1 Lubner, represented by attorney Levenburg, applied in camera for his evidence to be heard in camera. Four grounds were advanced. Lubner was said to be concerned about:

(a) previous intimidation that might affect him and his family;

(b) confidential discussions at various stages between the Reserve Bank and himself;

(c) publication of his evidence of his evidence might give rise to actions in the nature of defamation actions and so on;

(d) embarrassment he might be caused by events which occurred at Regal Bank after he had resigned.

Evidence was led in some detail in support of grounds (a) and (b). It was ruled that those grounds constituted good cause for hearing the evidence in camera, but not grounds (c) and (d). There is no reason for not disclosing the balance of this report in respect of Lubner.

9.2 Lubner is a very experienced businessman and director of companies. He entered the Lubner family business in 1950. He was a director, joint chief executive officer and eventually chairman of the group at the time of his resignation in 1991. For 15 years he served on various boards in the Nedbank group of companies (2136).

9.3 Lubner and his brother were approached by Peter Springett to become investors in Regal Bank. Peter indicated that he was to become chairman. Lubner knew Peter Springett and was impressed by him (2136-7).

9.4 Lubner was subsequently appointed a director of Regal Holdings on 27 October 1998 and a director of Regal Bank on 24 October 1996.

9.5 Lubner's evidence was that there was no personal animosity between him and Levenstein prior to the events of late July 1999. There were, however, strong differences of opinion:-

- Lubner was originally impressed by the strong corporate governance attitude of Peter Springett. When the relationship between Levenstein and Peter became strained, Lubner and other directors tried "to find a working relationship". After Peter resigned, Lubner felt "very strongly" that there should be "an independent chairman and a separate CEO". He expressed that view at board meetings (2137).
- Another matter of concern for Lubner was that the boards were not "really independent". There were too many executive directors and a number of the directors had close personal ties to Levenstein (2138).
- Lubner did not approve of the impression that was created by the bank that it was a Jewish bank. It was not the reality and was not beneficial for the bank (2139).

9.6 In July 1999 Lubner was telephoned by Mark Springett. He requested an urgent meeting. Lubner agreed, reluctantly, because he was in mourning for his brother who had recently died in France. At the meeting Lubner advised Mark not to take further action until he had spoken to Levenstein. Lubner telephoned

Levenstein. Levenstein agreed that the matter would be discussed at a board meeting. Lubner thought that the appropriate time to discuss the matter was at the board meeting of 28 July 1999 before or after the meeting with the SARB. Lubner wanted "all sides of the story" to be heard by the board. Mark was "highly considered by the board" (2142 – 2145).

9.7 On or about 26 July 1999, Radus telephoned Lubner and told him that a round-robin resolution had been prepared confirming Mark's dismissal. Lubner said that that was contrary to his agreement with Levenstein and he insisted on the matter being debated at a board meeting (2146).

9.8 On 27 July 1999, Radus again telephoned and repeated Levenstein's strong request or instruction that Lubner should sign the round-robin resolution. Lubner refused (2147). On the same day Lubner wrote a letter to Levenstein (N101) in which he dealt with his interaction with Mark Springett. He said that Radus had phoned him and asked him to sign a board resolution confirming the dismissal of Mark but he felt that a meeting should be held prior to the board meeting without Mark and Levenstein present "to allow the board to have a free discussion with all executive and non-executive directors present."

9.9 On the morning of 28 July 1999 Radus telephoned Lubner and told him *not* to attend the board meeting that afternoon. Lubner said he *would* attend. On his arrival at the bank, Lubner introduced himself to members of the SARB. Levenstein called him one side and in the presence of Krowitz, Levenstein, in a flaming temper, accused Lubner of disloyalty and said "You have officially resigned and we accept your resignation" (2149). Lubner disputed that he had resigned. Krowitz interrupted to say he had heard Lubner resign. Levenstein said that "… If you come into this board meeting I will embarrass you and the board and I will declare the meeting closed until you leave the meeting." Lubner left. On returning home, he wrote a letter dated 28 July 1999 in which he confirmed that he had arrived at the board meeting to be advised by Levenstein that he had resigned and that his resignation had been accepted and he therefore could not attend the board meeting (N99; 2147-51).

9.10 On 29 July 1999 Lubner wrote to Levenstein in which he invited face-to-face discussions (N98). On 6 August 1999 Lubner wrote to Levenstein in which he denied that the had sought the chairmanship of the company but stated that he was of the view that "we should have an independent and prestigious personality as chairman, which view I still strongly hold." (N96)

9.11 Levenstein responded on 11 August 1999 (N85) in which he set out the allegations against Mark Springett and then threatened to sue Lubner for damages "with vigour". On the same day a second letter was written in which Levenstein said that had Lubner not "resigned with dignity I would have removed you from the board" for various reasons (N86). On the same day a number of directors sent letters in similar terms to Lubner (N87 – N92).

9.12 Lubner at no stage formally resigned. He testified that at a point in time he accepted that he would resign (2150-1).

9.13 At a meeting between BSD and Regal on 17 April 2000 Levenstein admitted getting rid of Lubner (E40). On 25 August 2000 a meeting was held at the residence of Lubner with the Registrar of Banks and Martin. Lubner said that Levenstein "had a very difficult management style and if confronted by opinions differing to his, he often acted irrationally and had the person or persons differing from him removed from their positions on the board or from management." (E168). On 9 September 2000 at a meeting between BSD and DT it was conveyed to BSD that Lubner had been dismissed after he had refused to sign the dismissal of Mark Springett on a round-robin basis. (E184). The DT report of September 2000 refers to the dismissal of Lubner, presumably setting out the version of Levenstein. Lubner's behaviour on the board was described as

"destructive". (E229). At a meeting between Regal Holdings, BSD and DT on 23 October 2000 Levenstein said that Lubner had been concentrating on driving a personal agenda at the expense of the bank – he wanted the chairmanship; that Lubner's termination had been well debated; that Lubner had been afforded the opportunity to defend himself, but had refused and that Regal had complied with procedures with regard to Lubner's termination (E208).

9.14 Levenstein in evidence accused Lubner of being part of the Peter Springett/Birrell/Lubner clique on the board which behaved in a "divide and rule" manner on the board (1241). Lubner was said to be a party to a "predator strategy … that would have eroded confidence in the bank" (1251). The specific complaint was that Lubner had not gone to the bank as he had been requested to do to consider the evidence against Mark (1244). Lubner testified that at that time he was in the seven day mourning period after his brother's funeral and he did not want to be influenced by anyone until the board meeting (2158). Levenstein insisted that Lubner orally told Radus that he resigned (1247, 1255). He denied that he had orchestrated the letters of the non-executive directors (1260) and repudiated statements that he had made in correspondence and to

DT that Lubner had been removed and dealt with "in tandem" with Mark (1264).

9.15 Lurie was one of the directors who signed a letter confirming Lubner's resignation (N91), despite having no personal knowledge of the facts. He did so "to give support to my CEO" (2531). He denied that Levenstein had orchestrated the letters to be sent on the same day, 11 August 1999 (2535).

9.16 Buch had the good grace to admit that it was at Levenstein's request that he had written the letter of 11 August 1999 to Lubner. Before sending the letter he had discussed it with Slender and Lurie (2801).

9.17 Krowitz was in the office of Radus when he heard Lubner say that he would resign (2936). He heard a "small portion" of the conversation. He did not know the context (2936). Krowitz was present on 28 July 1999 when Levenstein called Lubner into an office as Lubner arrived for the board meeting. Krowitz's description of what happened was "Jeffrey effectively denigrated Bertie Lubner, took his dignity, attacked him. It was … disgraceful. It was something that I am still ashamed about" (2936-7). Krowitz was asked what he thought about the way Lubner was treated. He replied: "Your hands were effectively tied by Levenstein at that point in time because

it is double jeopardy with him, you know at the end of the day either you comply or you are right in the firing line" (2938).

9.18 The evidence of Radus was that when he telephoned Lubner with the request that he sign the round-robin resolution, he told Lubner that he should inspect the information at the bank which the bank had against Mark Springett. Lubner, having said that he would not go to the bank, said "Well I think I'm going to resign from the bank". The next morning Radus reported the conversation to Levenstein. Levenstein instructed Radus to telephone Lubner to tell him that "we accept his resignation". Radus telephoned Lubner. During that conversation, part of which Krowitz overhead, Lubner said "well I will resign". Radus accepted the resignation (3125). Radus said he did not know that Lubner wanted the matter discussed at a board meeting (3127). Radus was present when Lubner was prevented from attending the board meeting on 28 July 1999 (3130-1).

10 Lopes

10.1 Lopes, represented by attorney Michael Krawitz, applied in camera for his evidence to be heard in camera. The case that Michael Krawitz sought to make out was that Lopes had "a very

real fear" that the evidence of Lopes would enrage Levenstein and that as result harm would come to Lopes and his family. The evidence was that on 9 January 2000 Levenstein wrote a letter to attorney Larry Kalmeyer in which he stated that: "I will kill for Regal – literally … Colin … appeared reticent to accept the challenge of launching an offensive against a colleague …". Levenstein carries a .375 magnum pistol. A mysterious bomb incident occurred at premises adjacent to Sasfin. Lopes believes the bomb was somehow connected to Regal Bank and destined for Sasfin. Lopes gave evidence of what occurred to him after he resigned on 18 August 2000, which is dealt with fully below. On 23 September 2001 he received an anonymous telephone call with this message: "Be careful what you have to say Lopes". (1999–2007).

10.2 On the basis of that evidence I was satisfied that Lopes made out a case that his evidence should be heard in camera.

10.3 Lopes is 44 years old. His career commenced with Standard Bank in January 1978. At one time he was employed by Mercantile Bank. According to the initial application for the registration of RTL (15 April 1996) he was meant to become joint managing director (A58). He held 975 000 shares in RTL (A60). Lopes was a director of RTL and Regal Holdings from inception. He was an executive director.

10.4 Lopes described his job as director of operations, which included setting up the bank in premises; liasing with the IBF, the Reserve Bank and the Banking Council; overseeing the payment of salaries, arranging the terms of employment of employees and resolving disputes between the bank and employees (2020-1).

10.5 On 14 August 2000 Lopes met with the Registrar of Banks (E149). Some of the allegations made by Lopes were:

- board members who did not agree with Levenstein were removed from the board;
- the bank had lost about 25 staff members within the past three months, at least 10 of them in senior positions;
- about 95% of Holdings shares were being purchased by Regal Bank;
- anyone who questioned Levenstein's branding idea was threatened (E149). Lopes testified that he gave the Registrar a document containing 35 points (similar to (G83.2), and proposed a solution, namely, that the chairman and the CEO should be suspended and a hearing should be held on the accusations that he was making (2036). Although he had not told anyone at Regal Bank that he was going to see the Reserve Bank, he had discussed his concerns as documented with Lurie, Joe

Pollack, Slender and Diesel (2038). On his return from the Reserve Bank, he did not tell anyone of Regal Bank, except his secretary, that he had been to the Reserve Bank (2040).

10.6 On 16 August 2000 a meeting was arranged between BSD and DT to discuss the Lopes allegations and the way forward (E149).

10.7 On 17 August 2000 Lopes saw Store and Schipper of DT and told them what he had told the Registrar of Banks (2041).

10.8 On 18 August 2000 Lopes went to work. While he was in his office Levenstein approached him on three separate occasions. The essence of the message which Levenstein gave Lopes was, in the words of Lopes, "if I do not fit in with his culture and his methodology and agree with him 150% all the way in connection with the branding and everything he does, I can pack my stuff and leave immediately." After the third visit by Levenstein, Lurie telephoned Lopes and said: "You are supposed to be working on the annual report, why are you upsetting Jeff? Why do you not support Jeff 150%?" (Lopes 2041 – 2042). Lopes then resigned. He was not dismissed (2042-3).

10.9 On 21 August 2000 the BSD reported to the Deputy-Governor of SARB on the Lopes allegations (G91). On the same day Lurie

informed Martin that Lopes had been dismissed by Levenstein on 18 August 2000 (G104) and Lurie and Levenstein sent Martin a document prepared by Radus (G105 – 107). Altogether about 29 specific allegations of misconduct were levelled against Lopes, including sexual harassment, taking kickbacks, unlawfully suppressing the share price, incompetency, dishonesty, lying, fraud and corruption: all allegations which pre-dated Lopes' visit to SARB on 14 August 2000 (2045-7).

10.10 On 23 August 2000 a meeting was held between Regal Bank and BSD. Lurie led the Regal team. All he said about Lopes was that Lopes "had not applied his mind" in regard to the financial statements (E160).

10.11 On 24 August 2000 Levenstein wrote to Martin alleging that Lopes had sold his shares a few weeks before his dismissal and was about to leave the country (G103).

10.12 On 30 August 2000 Levenstein informed the Registrar that Lopes had "fraudulently misrepresented to both SARB and Regal that he has a B. Com. degree" (G101).

10.13 On 7 September 2000 Jonathan Myers, representing Regal, replied to a letter of Michael Krawitz of 5 September 2000 in which he alleged that, *inter alia*, Lopes had unlawfully

suppressed or caused a reduction of the share price of Regal Holding's shares on the JSE and that Regal Bank or Holdings was quantifying its damages in order to sue Lopes (G97). At the meeting between the BSD and DT on 6 September 2000 Schipper in essence cleared Lopes' name (E183). The various allegations of Regal against Lopes are repeated in the DT s7 report at E229.

10.14 At a meeting between BSD and DT on 4 October 2000, Martin informed the meeting that Lopes had been arrested on fraud charges and had been jailed for two nights (E195).

10.15 At a meeting between BSD, Regal Holdings, Rooth & Wessels and DT on 23 October 2000 Radus enquired what steps were being taken against Lopes by BSD "since he had submitted false information to the Registrar of Banks" (E208).

10.16 Lopes described what happened to him after he resigned. Initially, he was merely telephoned and told to return to the bank a computer he had at home. He then received a telephone call in late September 2000 from an attorney, Jonathan Myers, representing Regal Bank, in which Myers said that if Lopes would sign a letter supporting Levenstein, describing him as a good CEO, and confirming that he had not been to the Reserve Bank, Regal Bank would not proceed with various criminal

charges which the bank had laid against Lopes. The charges which were mentioned by Myers included fraud. Lopes refused to agree to the blackmail (2043-4). Lopes denied the various allegations of misconduct (2045-7). The only one he admitted was that he had stated in the application for a bank licence that he had a B.Com. degree (2047). He admitted that he did not have a degree, but said that Levenstein was aware that he had no degree. In fact, it was at Levenstein's suggestion that instead of describing the degree as "uncompleted", Levenstein insisted that the word "uncompleted" be removed (2010-11). One night Lopes was arrested at home at 21:30. The police said that fraud charges had been laid against him by Levenstein and he was accused of having two passports. The accusation was that he was about to leave the country. Lopes spent the night in gaol and was released on bail only the next day after counsel threatened to bring an application in the High Court for bail. Bail was set at R10 000. The criminal charges were of fraud. Lopes appeared in court four times. He never received a charge sheet and eventually the charges were withdrawn against him (2002-3, 2052-4). During the period from his resignation until the charges were withdrawn, Lopes and his wife received many telephone calls. At one stage he received 46 calls on his answering machine, a minute apart.

"We did not answer any of them. There was nobody on the other side". Lopes was advised by Oosthuizen, who was employed by Regal Bank, that his telephones were being bugged (2003).

10.17 At a meeting of the board of directors of Regal Bank on 31 January 2001 Levenstein informed the board that the criminal charges against Lopes had been withdrawn and the matter settled out of court. (K(3)42).

10.18 Levenstein commenced his evidence on the basis that prior to the date of the resignation or dismissal of Lopes, he had had no quarrel with Lopes (1273-4). Lopes, according to Levenstein, became part of a new "divide and rule" scenario with Steen (1274). Lopes was targeted as a catalyst for causing chaos and mayhem (1275). Lopes resigned. He was not dismissed (1273, 1284). As his evidence progressed, however, Levenstein changed his evidence. He said that prior to 18 August 2000 he had "certain suspicions regarding kickbacks etc etc" (1276-7). He took no steps against Lopes because he had been accused by the Reserve Bank of being too dominant, too quick to remove people (1278).

10.19 Levenstein testified that he did not know, until giving evidence, that Lopes had been to the Reserve Bank on 14 August 2000. He

thought Lopes had gone to the Reserve Bank after he had resigned on 18 August 2000 (1280).

10.20 When Lurie's letter of 21 August 2000 (G104) was put to him, Levenstein at first was adamant that the letter was wrong: he did not dismiss Lopes (1285). The DT s7 review (E229) was put to him in which Schipper recorded that Levenstein had told him that he had fired Lopes (1286-7). Levenstein again denied that he had dismissed Lopes. Until his resignation, Lopes had received his unconditional support (1287).

10.21 Levenstein changed tack and testified that the allegation of a dismissal was "tactically to minimise the misinformation … it could have been tactical … when a bank fails, people commit suicide, people have heart attacks etc. … a tactical theme would have been conveyed to [Lurie] … I probably … conveyed to Jack Lurie in order to minimise the threat against the bank" (1288 – 1296).

10.22 At the Regal Bank board meeting on 25 October 2000 it was minuted that Lopes was fired as a staff member ((K2)(245). Levenstein said that was "an extension of the tactical issue … I would have made a decision [before the meeting] to protect the bank … and it is the responsibility of the CEO to manage these highly sensitive issues … it would have been the information I conveyed to the board … a white lie … to protect the bank … with a man going out into the market place to literally bring a

bank to its knees, which to me is an act of treason and terrorism, to bring a South African institution to its knees … I believe that it calls for unusual action in the way as President Bush has to respond to the status quo …" (1298 – 1302).

10.23 Radus headed up the initiative to have Lopes arrested. Criminal charges were laid against him. All the charges were withdrawn against Lopes as Levenstein "was advised to bring these things to finality as it was not in the best interest of the bank to pursue litigation" (1304).

10.24 Lurie testified that Lopes resigned. Any document, such as a letter or minute of a meeting, recording that Lopes had been dismissed, was incorrect (2539-41).

10.25 Radus gave evidence that he was not at the bank when Lopes left. There was "always a debate whether he resigned or whether he was dismissed". After Lopes left, private investigators were appointed by the bank to investigate Lopes. That is how the discovery was made that Lopes did not have a B. Com. degree. Levenstein instructed an attorney, Jonathan Myers, to lay a charge of fraud against Lopes. Lopes was investigated "because Jeff wanted to get back Lopes' restraint shares" (3138-9).

10.26 Radus prepared a memorandum (G106) at the request of Levenstein which contained various allegations against Lopes. When questioned about the content of the memorandum, Radus testified that he kept a black book in which he wrote "all the lies and stories that Zack Lopes told". Behr, who was the chief legal officer at the time, kept the book. Radus showed Levenstein the book "many times" (3143).

10.27 To litigate with Lopes (and Steen) cost the bank R232 550,50 in legal costs (vdW371).

Brian Levenstein ("Brian")

11

11.1 Brian is Levenstein's brother. He is a qualified attorney. He joined the Regal Group in May 1998. He regarded himself as an employee of the "Group". He was a director of some of the subsidiary companies.

11.2 Between May and August 2000 he and Lopes tried to "steady the ship" of the bank, rebuild staff morale and improve the public image of the bank (2355).

11.3 One day in August 2000, which we know must have been the 18th, Lopes informed Brian that he was resigning. "My heart went

into my shoes", testified Brian. Shortly thereafter he was called into a meeting in Levenstein's office. He was advised that Lopes had been dismissed. Levenstein called for "our total loyalty". Brian found this to be provocative and unnecessary as he thought it went without saying that he was loyal. In the words of Brian: "Things got a bit heated and I might have even used a few expletives which I do not normally do… I just knew that the dismissal of a director would now re-ignite sort of the focus on Regal and cause future turbulence and I told [Levenstein] so in no uncertain terms." Levenstein told Brian that he was being insubordinate. Brian said "Well in that case you must fire me", which Levenstein did (Brian 2355-2357; Levenstein 1583-1585).

11.4 The dismissal of Brian caused severe strain in his family. He and Levenstein agreed that he would return, not as a director of any companies, but as his "personal assistant, if you want to call it that" (Brian 2359). He left the bank in February 2001 and became a part time consultant.

Schneider

12

12.1 Schneider was appointed a non-executive director of Regal Bank on 24 January 1996 and of Regal Holdings on 27 November 1998.

12.2 On 19 July 1999 Mark Springett visited Schneider after Schneider had been overseas for two months. He handed Schneider a bundle of documents including Mark's letter of 14 July 1999, which contained the allegation that Levenstein had issued an instruction not to sell shares (and Levenstein's reply). Schneider was disturbed about that allegation and the controversy surrounding Levenstein's failure to separate the roles of chairman and CEO. Schneider took the view that the allegations should be discussed at a board meeting as a matter of urgency (1981-5). On the following day, Mark telephoned Schneider and told him that he was trying to arrange a board meeting for 21 July 1999. Mark telephoned later to say that he had been told that no board meeting would take place until the meeting scheduled for 28 July 1999 between the board and BSD (1985-6).

12.3 On 26 July 1999 Buch told Schneider that a round-robin resolution was being circulated "to remove Springett". Schneider

told Buch that a full board meeting should take place. On the same day Radus telephoned Schneider about the round-robin resolution. Schneider again adopted the stance that a board meeting should discuss the issue. Radus said "that they were investigating charges of impropriety against Springett" and that Springett had to be removed before the next board meeting (1986-7).

12.4 On 27 July 1999 Schneider received a faxed copy of the agenda for the following day's board meeting. The only items on the agenda related to a presentation to BSD (1988).

12.5 On the night of 27 July 1999 Radus telephoned Schneider and told him that he should resign as a director with dignity. His motivation was that Schneider's "loyalty to [Levenstein] is not evident" (1990).

12.6 Schneider decided not to attend the meeting on 28 July 1999. On that day Mark telephoned Schneider and told him various things, including that he had been told that he could not attend the board meeting (1992).

12.7 On 29 July 1999 Krowitz telephoned Schneider and said that if Schneider did not resign with dignity, they intended to send him a letter accusing him of a breach of fiduciary duty (1994).

12.8 On 2 August 1999 Schneider resigned as director (1995).

12.9 On 18 August 1999 at a joint Regal Holdings and Regal Bank board meeting it was minuted that: "the effective removal of B Lubner and G Schneider from the Board and their resignations ratified and confirmed" ((K(2)196).

12.10 Levenstein testified that Schneider resigned because they had a fall-out over the Mark Springett issue; Levenstein had a brief altercation with him; and in any case Schneider was too busy with his practice (1586). Schneider, too, was criticised for not coming to the bank to look at the case against Mark Springett. Levenstein wanted his immediate participation, whereas Schneider wanted to see his attorneys (1587).

12.11 Krowitz denied that it was he who had telephoned Schneider. He said it must have been Radus (2942).

12.12 Radus testified that Krowitz took the round-robin resolution to Schneider. Schneider then telephoned Radus and said that he first wanted to consult his attorneys, Werksmans. When Radus reported the conversation to Levenstein, Levenstein was "not very happy" with that answer and instructed Radus to telephone Schneider and accuse him of being in breach of his fiduciary duties for not examining the information which they had against Mark Springett. Radus described the conversation as "really unpleasant". Schneider thereafter resigned. Radus denied

knowing that Schneider wanted the matter to be discussed at a board meeting (3126-7).

13 The appointment of Cohen

13.1 Cohen was approached by Levenstein and Rabins in about mid October 2000 to identify weaknesses in the bank and to produce a plan to rectify the weaknesses. He commenced in about mid November as a part time consultant (1832-3). He worked his way through the DT s7 review. Cohen's initial findings and recommendations were:

- the whole issue of corporate governance had to be looked at expeditiously;
- the additional risks referred to in the new regulations under the Banks Act which were about to be published had to be managed by a new "corporate governance model";
- to appoint more bankers to the boards of directors;
- to write charters for the committees of the boards;
- to introduce staff policies, a matter on which Van der Walt was working at the time;
- to address the issue of the personal expenditure of Levenstein and others;

- to address the lack of succession planning;
- to remunerate non-executive directors properly;
- to introduce an effective internal audit function (1833-5).

13.2 During the course of 2001 Cohen was appointed a director of both Regal Holdings and Regal Bank, officially from 28 March 2001, but practically from January. He became chairman of Regal Holdings on 28 March 2001, chairman of Regal Bank on 1 May 2001, chairman of the risk management, credit, and HR committees and was a member of the corporate governance committee. He served as chairman of the audit committee until he became chairman of the bank (1828-31).

13.3 Cohen arranged for the appointment of Oosthuizen, a former Deputy-Registrar of Banks, and Scheepers, formerly of PWC, as directors. Oosthuizen became chairman of the corporate governance committee. Scheepers became chairman of the audit committee after Cohen (1864-5).

13.4 During late 2000 and early 2001 a number of improvements were made: charters for the committees were prepared; the taking of minutes was outsourced; the human resources function was assumed by a division of DT; PWC became internal auditors; a financial director, Zarca, was appointed; and Taylor was appointed compliance officer.

13.5 In Diesel's opinion, Cohen strengthened the board with his appointment of Oosthuizen and Scheepers. "Proper corporate governance was introduced with committee structures being put in place" (2623).

14 Cohen as Chairman and Levenstein as CEO

14.1 Cohen found Levenstein to be an extremely bright person who did "not like people contradicting or opposing him". There was no room for healthy debate in board meetings, "it just became a shouting match". Many people were scared of Levenstein. Some directors, however, such as Van der Walt and Diesel, did stand up to Levenstein (1836).

14.2 Levenstein's non-adherence to corporate governance norms was illustrated by Cohen in relation to the Sempres transaction (1837-42); see §30.2 hereof.

14.3 Cohen's perspective of two of the Mettle transactions was described by him in these terms. After he had read the FM article of 25 May 2001 and various negative newspaper reports, he became "extremely suspicious". Consequently, on 30 May 2001 he met with Prinsloo and Collins of Mettle. Two concerns of Cohen were debated. The first was that Cohen thought there was

an unconditional or irrevocable undertaking by Mettle to buy 93 Grayston for R600m at the end of 10 years. During the meeting Cohen for the first time came to know of the right of Mettle to offer to put 93 Grayston to Regal Bank for R1.2bn at the end of 15 years. The second concern was how it had come about that the price of Regal Holdings shares had gone *up* after the negative publicity. Cohen discovered in the meeting that although Mettle had a discretion what shares to buy for the managed portfolio, it so happened that 80% of the portfolio consisted of Regal Holdings shares (1844-8).

14.4 Later that day, 30 May 2001, at the joint meeting of the Regal Holdings and Regal Bank boards (K(3)13), Cohen sought an explanation from Levenstein of the Mettle portfolio (K(3)19). Levenstein said that there could be no share price manipulation because the portfolio was independently managed by Mettle. The boards agreed that an opinion on the structure would be sought from Prof. Vorster (1848-9).

14.5 After the meeting, on Strydom's return from Germany, Cohen and Strydom agreed to call a meeting with Prof. Vorster and Mettle on 28 June 2001 (1845, 1849).

14.6 Cohen's evidence was that he and his fellow directors (save for Levenstein), in common with Strydom and EY, did not know the

full extent of the 93 Grayston structure (1854). The directors' knowledge was based on what was conveyed to them at the Regal Bank board meeting of 31 January 2001 (K(3)42): "The Grayston Drive project will be completed by October or November 2001 and has been sold for R610m to Mettle, with payment in ten years time in terms of a contractual agreement with no risk to Regal and with rental income during this period accruing to Regal." (1853-4).

14.7 Another element of the 93 Grayston structure which was not disclosed to the board was that "there was a R610m … to fund the transaction at the end of 10 years by Regal … that would have meant an impairment of capital of 1% for the next 10 years" (Cohen 1859).

14.8 On 21 June 2001 Levenstein cancelled the meeting with Mettle and EY as "the auditors had no right to meet with the bank's commercial partners" (Cohen 1850).

14.9 On Tuesday, 26 June 2001, according to Cohen, he received a number of SMS messages from Levenstein calling on Cohen to retract what Cohen had said the previous night on the Moneyweb radio programme. Levenstein telephoned Cohen that morning. Levenstein was fairly agitated. Levenstein demanded that Cohen apologise to him or he would be a "dead man" (1924).

14.10 Van der Walt testified about a perceived power struggle between Levenstein and Cohen. Levenstein told Van der Walt that he did not trust Cohen and that he would tolerate him because of his apparent contacts and networking abilities. Levenstein constantly spoke of a conspiracy involving the Reserve Bank, past directors of Regal Holdings and Cohen. Van der Walt gave examples of behaviour that made the de facto management of the bank almost impossible. One of the examples given by Van der Walt was when it was decided at a meeting between Cohen, Levenstein and Van der Walt to initiate disciplinary proceedings against a member of staff and a consultant to the bank. It was decided that the contracts of the two persons would be suspended. A statement had to be taken from Van Zyl, the bank's chief intelligence officer. When Van Zyl was asked by Van der Walt to make a statement, he declined to do so, on the basis that Levenstein had told him that he need not do so as he (Levenstein) had only humoured Cohen by initially agreeing to the suspension of the employees (2569-70).

Chapter two

Committees of the Holdings Board

15 The membership of the committees referred to below is as at 31 October 2000. The analysis reflects the position until changes were made in 2001.

15.1 Directors' Affairs Committee

In about October 2000 a directors' affairs committee was established consisting of the non-executive directors. No minutes were kept of the meetings. The committee apparently met before board meetings.

15.2 Remuneration Committee

The remuneration committee consisted of Lurie, Levenstein and M Pollack. It kept no minutes. It did not set the remuneration levels for executives. There was no formal written policy for executive remuneration.

The executives were under-remunerated. Their remuneration packages were significantly below the lower quartile of the market in terms of guaranteed package. Levenstein, the CEO and for a period of 18 months the chairman, earned a total monthly package, excluding incentives, of R37 812. The policy of the

bank was to pay below market norms and to use the share option scheme as a potential means to increase remuneration.

The executive directors did not have service contracts.

No provision was made for pension benefits, which were the responsibility of the executives and employees.

The remuneration committee was one in name only.

15.3 Investment Committee

The investment committee consisted of Levenstein, Diesel and Buch.

The mandate of the investment committee was to optimise the returns on portfolios within the risk framework of the bank and its clients.

No formal minutes were kept.

15.4 Alco

The members of the committee were Levenstein, B Levenstein, Diesel and Buch.

The functions of the committee were to manage the bank's liquidity.

No formal minutes were kept.

15.5 Exco

The members of Exco were Levenstein, B Levenstein, Van der Walt, Davis, Diesel and Radus.

The committee met at least on a weekly basis. It was responsible for understanding the risks run by the bank and to ensure that the risks were appropriately managed and for making and implementing executive decisions.

Exco decisions were minuted.

During 2000 Van der Walt found that irregular meetings were held of Exco. No executive decisions were taken. It was merely a meeting of the various divisions and subsidiaries of the Regal Group (2561).

15.6 Credit Committee

The members of the credit committee were Levenstein, Radus, B Levenstein and Davis.

The credit committee did not meet formally. New advances were generally approved on a round robin basis, with a meeting only taking place if there was dissension.

At one time Levenstein had the final say if an advance was to be made to a client and he had the power to reverse a decision to turn down an application for credit taken by the credit committee.

Schipper of DT was informed that Levenstein's authority in that regard had been rescinded and that advances were approved on a unanimous basis – Levenstein no longer had the power to override the decision. Levenstein's evidence was that it happened on a regular basis that he would overrule the credit committee when the committee agreed to a deal and he disagreed (1606). Levenstein could not explain why the factual content of the DT s7 report was not disputed at the time the report was prepared and when Regal Bank replied to the report (1606). Nor could he explain why it was necessary for the audit committee on 26 July 2000 to minute: "The audit committee agrees that three members must approve all lending deals. The CEO cannot veto a decision to reject a proposal" (K(2)237.2) (1610).

15.7 Audit Committee

15.7.1 The King Report recommended that all the affected corporations should have audit committees. The audit committee should be chaired by a non-executive director. The committee should consist of at least one non-executive director and preferably the majority should be non-executive directors. The external and internal auditor and the financial director should attend all audit committee meetings. The chairman of the board should not be a

member of the audit committee. The audit committee's primary functions include reviewing, *inter alia*, significant transactions which are not a normal part of a company's business.

15.7.2 In terms of s64(1) of the Banks Act, the board of directors of a bank must appoint at least three of its members to form an audit committee. In terms of subsection (3), the majority of the members of the audit committee, including the chairman of the committee, must be persons who are not employees of the bank. The chairman of the board of directors of the bank must not be appointed as a member of the audit committee. In terms of s64(2)(c) one of the functions of the audit committee shall be to introduce such measures as, in the committee's opinion, may serve to enhance the credibility and objectivity of financial statements and reports prepared with reference to the affairs of the bank.

15.7.3 Levenstein was chairman of the bank from February 1998 to September 1999. During that period he was a member of the audit committee: see minutes of meeting of BSD, EY and the audit committee on 29 September 1998 (C103); audit committee minutes K(2)175.1 of 24 February 1999;

K(2)195.2 of 23 June 1999 and K(2)205.1 of 29 September 1999.

15.7.4 The King Report recommended that external auditors should attend all audit committee meetings. Louw testified (645 – 6) that KPMG are the auditors of 23 banks in South Africa and they attend every audit committee meeting of all those banks. An analysis of the audit committee meetings reveals that EY attended three out of the four meetings during calendar year 1999; one out of the five meetings of 2000 and all the meetings of 2001. At none of the meetings in 1999 and 2000 were the branding strategy or the Mettle deals discussed by the audit committee. There was discussion of some of those issues at the audit committee meetings of 28 March 2001 ((K3)98) , 12 April 2001 ((K3)104) and 25 April 2001 ((K3)110).

15.7.5 The audit committee did not approve the financial results for 2000 (KPMG 170) which were published on SENS ON 16 May and in the morning papers of 17 May 2000. It did not even meet to consider the results.

15.7.6 The members of the audit committee at 30 August 2000 were Buch, M Pollack, Levenstein, Hiralal and Davis.

The audit committee had terms of reference that had been confirmed by the board of directors. Formal minutes were kept.

15.7.7 On the second day of his testimony, Levenstein said that the omission to invite EY to audit committee meetings was "pure naivety"; it was not done maliciously or wilfully (1629). On the following day, a memorandum was put to him which he had prepared and addressed to Buch and Davis during the 2000 audit in these terms: "An audit committee should now be convened as a matter of urgency to approve the financials. EY are not formal members of the committee, they accordingly must not be invited". He justified the instruction on the grounds that Strydom was party to a political agenda and that Strydom and the auditors could not be trusted (1652-3).

16

16.1 Most committees had no founding documents or formal terms of reference. Levenstein sat on seven of the eight committees, i.e. all the committees except the non-executive directors affairs committee. He was the chairman of five of the eight committees. Schipper was told by Davis that Levenstein played a major role on the committees on account of his "vision and experience".

16.2 On his appointment as consultant in mid November 2000, Cohen found that while there were many committees, they consisted mainly of management, and most of the committees did not keep minutes (1867). The board minutes were not of a standard "one would find in any banking organisation". There were a "lot of holes" for example, in regard to missing round-robin resolutions (Cohen 1866). As for the functioning of the boards of directors, Cohen discovered that certain of the directors did not regularly attend board meetings, other directors were getting on in age, and a major concern for Cohen was that independent directors were not truly independent because they had vested financial interests in the bank in that they had shares in the bank and were not remunerated (1867-8).

16.3 Van der Walt attempted to introduce the changes contemplated in the Regal Holdings response to the DT s7 review, such as the reconstitution of Exco, the introduction of an appropriate human resource and remuneration system, and the closure of Shareholders' Trust. He introduced a more formal budget procedure for the 2001/2002 financial year (2562).

Chapter three

Regal Bank financed the acquisition of Regal Holding shares by related parties against security of the shares

17

17.1 As at date of curatorship, the records of Regal Bank reflected that the bank had lent money to related parties to buy Regal Holdings shares (DT(2)553-4):

	Entity	Number of shares (in millions)	% holding	Total amount in millions of Rands lent (including interest) by Regal Bank to buy shares
1	Shareholders Trust	7,222	7,05	32,5
2	Incentive Trust	14,147	13,82	77,3
3	Phekani Investments	15,455	15,09	64,9
4	Mettle portfolio	11,502	11,23	-
5	JL Associates	3,087	3,02	1,3
6	Levenstein Data	0,101	,10	8,9
7	Forfin Finance	0,618	,60	5,6
		52,132	**50,91**	**190,5**

17.2 The sole security for the loans or advances was the pledge of the Regal Holdings shares to Regal Bank.

17.3 As at 31 August 2000 the amount advanced to the Incentive Trust was R51.4m against security of R33 m (± 9.5 m shares at R3,50 a share), a potential shortfall of R18.1 m (DT(1)32).

17.4 As at date of curatorship, a nil value was ascribed to the shares and the curator treated the sum of R190.5m (DT(2)553) as irrecoverable.

17.5 Shareholders Trust bought the Regal Holdings shares, according to what management told DT during curatorship, in order to transfer the shares to "strong hands" in due course.

17.6 The Incentive Trust bought Regal Holdings shares with the ostensible purpose of transferring them to employees. R35 m of the sum of R77.3 m was lent by the trust to employees to finance the acquisition of shares. At the date of the DT s7 report, about 3.8m shares had been allocated to employees at an allocation price lower than the average acquisition cost. If the share price of the remaining holding did not increase a "provision of R18m or more may have to be considered" (DT(1)32. The 2001 financial statements reflected that the Incentive Trust owned 12.5m Regal Holdings shares, of which 6.5m had been "taken up" by employees, leaving 6m shares as surplus to requirements (130119) .

17.7 The amounts of R32.5m and R77.3m were recorded as "advances".

17.8 There was no documentation on file as proof of authorisation or containing the terms of the various loans.

17.9 Although the sum of R64.9 m was recorded as an overnight loan by Regal Bank to "Phekani Investments", the curator was told by Diesel that the true nature of the transaction was that Regal Bank had bought R60m worth of Regal Holdings shares from Pekane on 29 December 2000 (which represented the Worldwide shareholding in Regal Holdings).

17.10 The amount of R1.3 m due by JL Associates represents a loan of R13m made in about 1998 plus accrued interest less proceeds of deposits but shown as an overnight loan. DT was told that JL stands for Jack Lurie.

17.11 The sum of R8.9m, which includes accrued interest, was advanced to Levenstein Data in about 1998, but shown as an "overnight" loan.

17.12 The sum of R5.6 m was reflected as an overnight loan to Forfin Finance, which DT regards as a related party. When the sum was actually advanced we do not know. It is not shown as part of the R96m in the schedule drawn up as at 30 August 2000 (DT(1)37).

17.13 The table contained in paragraph 17.1 was presented to the directors of the bank or Holdings on 27 July and to Levenstein on 28 July, without eliciting any denial of the material facts.

17.14 Levenstein's evidence was that Lubner suggested that about 3m Regal Holdings shares be transferred to nominee entities for the

purposes of selling the shares to Rothschilds Bank and Nexus (1775). Shares were transferred to Forfin Finance, an incorporated company, having 16 shareholders, JL Associates and Levenstein Data, which were Lurie's "treasury vehicles". The acquisition of the shares was financed by Regal Bank and in a sense the bank owned the shares (1776-8). The bank paid Regal Holdings for the shares (1780) as a loan (1780-1).

The structured finance or "Mettle" structures

A The impact on the balance sheet

18

18.1 The apparent contribution of the Mettle transactions was to increase the assets and liabilities on the balance sheet from ± R1bn to ± R1.6bn.

18.2 The increase in assets and liabilities would have been important for Regal Bank as a sign of healthy growth and possible gain in market share (Store 231) and might have had a positive impact on the share price.

18.3 Unaudited entries in the general ledger disclosed that as at 26 June 2001 (DT(2)544) the contribution of the various transactions was as follows:-

Date of transactions	Transactions: number and name	Resulting assets Rm	Resulting liabilities Rm
February/March 1999	(2) Tradequick & RVM	211	212
30 August 2000	(1) Regal Securities	106	98
July/August 2000	(1) RMI	25	2
11 October 2000	(1) Kgoro	164	150
17 November 2000 30 August 2000	(2) 93 Grayston & Stone Manor	Not implemented	Not implemented
27 Oct 2000 / 14 March and 6 April 2001	(3) Metshelf	145	85
	10	**651**	**547**

18.4 The evidence of Prinsloo of Mettle was that most of the structures "should have been treated from an accounting point of view with set-off. In other words, I have got my asset – my preferent share and I have my corresponding liability that secures that asset. So it should not grow your asset in your liability book, it should not … You cannot show it as gross assets and gross liabilities." (2995).

18.5 The curator reported on 17 October 2001 that he had offered the Mettle structures to the six major banks. They all turned the structures down. Two of the banks did so on the ground that the tax risk attached to the structures was unacceptable. He consequently decided to unwind the structures by agreement with Mettle at an estimated cost of about R3m. The Stone Manor and

93 Grayston structures have already been wound down in order to facilitate the sale of the immovable properties (Store 3406-7).

B Corporate Governance

19

19.1 These transactions should have been discussed at, and agreed to by, the board of directors for these reasons:

- the transactions reflected a change in strategic shift;
- the large total size of the transactions in relation to the total assets and liabilities;
- the exposure to one counter-party, Mettle Ltd, or its SPV's.

19.2 The minutes of the board meetings show that the transactions were never discussed by the directors.

19.3 Levenstein said that he would have discussed the "broad architecture" of the Mettle deals with Exco, because the deals were difficult to understand, and very complex (1613). His evidence on whether the Mettle deals were ever discussed with the boards of Regal Holdings and the bank was confusing. While contending that there was no requirement for him to discuss the deals with the boards, as these were "operational issues" (1615), he said that it was in any event impossible to explain the deals:

"you needed a mathematical background, you needed an understanding of derivatives, arbitrage activities, etc." (1617-8). He did obtain resolutions of the board, which were signed by Lurie (1621-2).

19.4 Lurie said that the Mettle deals were discussed "at length at boardroom level". He believed that the deals "were so intricate and so involved that a lot of them did not really understand what this was about". The directors had faith in Levenstein "to run with the ball" (2375). Levenstein's door was "always open" to a director who wished to be better informed on the deals (2376).

Lurie did not know the extent of the Mettle transactions. The deals were "highly complex" and not in his "field of expertise". These questions and answers give insight into what he understood:

"Q: What did you understand to be the commercial benefits of the Mettle deals to the bank?

A: That it will bring significant income to the bank.

Q: How?

A: The deals were too complex to understand that.

Q: What income would be brought into the bank?

A: I can't answer that.

Q: You do not know that either?

A: No." (2414)

19.5 Diesel's evidence was that the Mettle deals were all created by Levenstein. There was no prior discussion of any of these transactions. The first time Diesel would become aware of a "structured deal was when in all instances I was given handwritten instructions outlining the transaction." The handwritten instructions were kept by Diesel in two files labelled Mettle 1 and Mettle 2. Both files disappeared from his desk within a few days after curatorship (2625). Diesel said he had an understanding of the Mettle deals' "in generic terms". The transaction he knew best was the one involving 93 Grayston and he did not know that Mettle had an option to put the property to Regal Bank for R1.2bn (2675).

19.6 Buch said that he was not too involved with the Mettle deals. He had an understanding of the RMI and 93 Grayston structures. He "certainly had relied on the auditors Ernst & Young who were mandated by South African Reserve Bank specifically to deal with all the Mettle structures… I certainly as a non-executive director relied on Ernst & Young's involvement… I remember Mr Strydom I think had told us at an audit committee or at possibly a board meeting even that he would not be able to issue an unqualified report or would not be able to issue his report at all until he had satisfied himself with all the section 7 issues" (2810).

19.7 Oosthuizen was a non-executive director of the bank and Holdings from 31 January 2001. He became chairman of the

corporate governance committee. His evidence was that on his return from overseas in early June 2001, he became aware that the Mettle transactions were not quite as he had understood them to be. At a board meeting in June: "I directly enquired from Mr Levenstein whether the [93 Grayston] transaction in terms of which Mettle had to pre-sell the property 10 years hence, whether that was unconditional or not. And Mr Levenstein informed me unequivocally, yes, it had been". Oosthuizen said that his initial impression was that the Regal Group had no exposure to the transaction. What he did not know was that at the expiry of the 10 year period "the property could revert to Regal". Levenstein categorically denied that the property could revert to Regal. "There was a blatant lie conveyed to me" (3003-4).

19.8 Radus said he never saw the Mettle agreements. He had a vague idea about some of the transactions. In regard to one transaction, Levenstein told Radus "I would not understand the intricacies of the financials". Radus thought the deal would be a "good deal for the bank" on the basis of what Levenstein told him (3134-5).

19.9 Prinsloo, an executive director of Mettle and head of the structured products division, testified that the first two transactions (Tradequick and RVM) were negotiated by him directly with Levenstein with input from Brian Levenstein and

Krowitz. Thereafter Mettle was represented by Collins, who has emigrated to Canada. Collins dealt directly with Levenstein. Levenstein was the "front man" (2950). Mettle obtained resolutions authorising Regal Bank or its subsidiaries to conclude the transactions from the chairman and CEO (2951).

19.10 Martin testified that it was clear that during the last year Regal Bank "deviated significantly from its stated business objective of being a niche based private bank when it began entering into many structured transactions which do not fall into the realm of private banking." (3288).

C Tradequick and RVM

20

20.1 On 10 February 1999 Regal Bank concluded a preference share agreement in terms of which it subscribed for preference shares in Tradequick 171 (Pty) Ltd ("Tradequick") at a price of R100 m. The price was payable on 1 March 1999 against issue of the shares. The shares were redeemable 5 years from 1 March 1999.

20.2 About that time a loan agreement was concluded in terms of which Ritzshelf 57 (Pty) Ltd ("Ritzshelf") agreed to lend and advance the sum of R93.3 m ("the capital") to Regal Bank on 1 April 1999. In order to facilitate the advance of the capital,

Ritzshelf undertook to procure that an unidentified bank would deliver a negotiable certificate of deposit ("NCD") issued by NBS, a division of BOE, on 1 March 1999. On 1 April 1999 Regal Bank could present the NCD to NBS for payment. On payment, Ritzshelf would be deemed to have advanced the capital to Regal Bank.

20.3 Mettle Ltd stood surety for Ritzshelf's obligations.

20.4 On 18 March 1999 Regal Bank and Tradequick concluded an option agreement in terms of which Tradequick agreed that if it failed to redeem the preference shares, breached the preference share agreement or if it or Ritzshelf were placed in liquidation, Regal Bank could require Ritzshelf to purchase the preference shares at the put purchase price. The put purchase price was the aggregate of all amounts owing to the holder of the preference shares in terms of the preference share agreement.

20.5 On 10 February 1999 Regal Bank ceded and pledged its rights to the preference shares to Ritzshelf.

20.6 Tradequick and Ritzshelf were special purpose vehicles ("SPV's") created by Mettle.

20.7 The assumption is that the difference between the price of the preference shares of R100 m and the loan of R93.3 m would accrue to Mettle.

20.8 The price of the preferent shares was to increase at a rate of 16% p.a. while the interest rate on the loan was 19.25% p.a. At the end of the five-year period the loan and accrued interest would equal the value of the preference shares and the accrued dividends.

20.9 The RVM structure, created on 18 March 1999, was in similar terms. The price of the preference shares was R50m and the amount lent was R46,6m.

20.10 The essence of the two structures is what is described as "back-to-back" preference share structures. The bank invested in preference shares (in Tradequick and RVM) and an SPV deposited a similar or a lesser amount with Regal Bank. (Kruse 558, Store 277).

20.11 The benefit to the bank was that its assets grew by R211 m and its liabilities by R212 m. The assets would continue to grow as preference shares produced income over the five-year period while the liabilities grew as interest accrued on the loan. No cash flows took place until the end of the five-year period.

20.12 The potential tax benefit was that the accrued preference share income was not taxable and the accrued interest on the loan was tax deductible.

20.13 The SARS might not have allowed the tax deductions if the sole purpose of the structures was the avoidance of tax.

D Regal Securities

21

21.1 On 30 August 2000 seven contracts were concluded.

21.2 Leaving aside addendums to the agreements and agreements which dealt with the provision of security, the outcome of the transactions was that in terms of the subscription agreement Mettle Finance Trading (Pty) Ltd ("MFT") undertook to subscribe for 238 ordinary shares in Regal Treasury Securities Ltd ("Regal Securities") for an amount of R95 m when called upon to do so by Regal Bank. The amount increased on prescribed dates. A subscription price was payable on the subscription date of the shares in Regal Securities.

21.3 The sale of shares agreement provided that MFT would sell the 238 shares to Regal Bank for R95 m, payable on 31 August 2005.

21.4 Mettle Finance (Pty) Ltd ("Mettle Finance") placed an amount of R88.5 m with Regal Bank on 31 August 2000 in terms of the deposit agreement. The deposit could not be withdrawn until 31 August 2005.

21.5 The deposit plus accrued interest would equal the subscription price plus accrued interest at 31 August 2005.

21.6 According to DT, one purpose of the structure might have been to capitalise Regal Securities in a tax effective way.

21.7 Another purpose might have been to increase the balance sheet of Regal Bank by increasing the assets by R106 m and increasing the liabilities by R98 m.

21.8 To avoid Regal Securities being placed in default by the Johannesburg Stock Exchange ("JSE"), the curator sold the business of Regal Securities to Sasfin.

E RMI

22

22.1 On 5 November 1999, in terms of a trademark and license agreement, Regal Bank granted RMI the right to use certain trademarks for a period of 20 years. RMI undertook to pay the bank R23 m by the issue of 25% of the shareholding in RMI.

22.2 On ± 1 July 2000 a sale of shares agreement was concluded in terms of which Regal Bank sold its shares in RMI to Jacobson and Levenstein as nominees for a company to be formed. DT's understanding is that a company was later formed called RMI Investment Consortium (Pty) Ltd ("RMI Consortium"). The price

was R26 m, payable by way of a deposit of R5 m and R21 m to be paid into a loan account on the declaration of dividends.

22.3 On 17 July 2000 a sale of rights and trademark agreement was concluded in terms of which RMI sold its rights and trademark to the "RMI model for Australia & Britain" for R25 m to Elul Investments Ltd ("Elul").

22.4 On 18 July 2000 Elul sold to Regal Bank a call option in terms of which Regal Bank could acquire the intellectual property rights to the Australian and British markets for a "strike price" of R30 m.

22.5 On 30 August 2000 a number of agreements were concluded. In the first, Regal Bank ceded to Mettle Ltd its rights to the call option. In the second, Mettle exercised the option and acquired from Elul the intellectual property as defined for R22.5 m. In the third, Mettle granted Regal Bank the exclusive right to use the intellectual property within Australia and Great Britain for 10 years. Regal Bank undertook to pay royalties twice a year. In the fourth, Regal Bank subscribed for 100 preference shares in Dreamwise Props 21 (Pty) Ltd ("Dreamwise") for R22.6 m redeemable on 31 August 2010. Dividends could be declared twice a year. In the fifth, on the incurrence of certain events, Regal Bank could put all the preference shares to Mettle Finance at an amount equal to the redemption price in the preference share

agreement. In the sixth, Mettle finance agreed to place deposits with Regal Bank on the dates Regal Bank was obliged to pay the royalties. The deposit was repayable on 31 August 2010. The deposits initially varied between R1.3 m and R2 m. In the seventh, Regal Bank ceded and pledged to Mettle finance its right and title to the preference shares. In the eighth, it was recorded that Mettle had discounted the royalty payments to Mettle Finance and therefore Mettle Finance had acquired all Mettle's rights to the royalties.

22.6 The ostensible purpose of the RMI structure, according to what Levenstein told DT during curatorship, was to acquire the intellectual property rights to the business model in the UK and Australia. If operations were not established in those countries, however, royalties would have been paid for and no value received.

22.7 The bank's assets were shown as at 26 June 2001 as having increased: the preference shares, which were originally purchased for R22.6 m, increased in value to R25 m due to the accrued dividends. The liabilities were R2 m, being the Mettle finance deposits which increased with accrued interest.

22.8 The dividends were “roll-up” dividends in that they accrued every six months but were not paid until the preference shares were redeemed at the end of the period.

22.9 Regal Bank’s recourse for dividends was against Dreamwise, an SPV. It had no recourse against Mettle.

22.10 A possible tax benefit was that the interest on the deposits paid to Mettle Finance and the royalties paid to Mettle were tax deductible and the dividends on the preference shares would not be taxable. But if the intellectual property rights were never used, SARS might not allow the tax deductions.

22.11 The one amount that was actually paid was the amount of R22.6m which was paid to Dreamwise for the preference shares.

22.12 According to DT, Elul is a company in which Levenstein has an interest as shareholder and director. Levenstein testified that Elul made a R2m profit, which was paid to Regal Bank (1788).

22.13 There is a suggestion in the evidence (Rathbone 494) that Regal Bank might have advanced the money to Elul to pay the R21 m. See, too, I3 (9.2, 9.3). There is a dispute between Regal Bank and Jacobson as to whether Elul paid RMI.

F Kgoro

23

23.1 All eight Kgoro structure agreements were concluded on 11 October 2000.

23.2 In terms of an agreement of sale Regal Bank sold its 25% shareholding in Kgoro to Really Useful Investments 10 (Pty) Ltd ("Really Useful") for R150 m. The price was payable on delivery of the shares.

23.3 In terms of a preference share agreement Regal Bank subscribed for preference shares in New Heights 85 (Pty) Ltd ("New Heights") at a subscription price of R153 m. The shares were redeemable five years after 11 October 2000.

23.4 A call option agreement provided that Really Useful granted Regal Bank a call option to acquire the 25% shareholding in Kgoro. The option was exercisable on or after 10 October 2005. The consideration was R1 m payable by Regal Bank to Really Useful on 11 October 2000.

23.5 A second call option agreement was concluded in terms of which Mettle granted Regal Bank an option to purchase the entire share capital of Really Useful. The price was R1 m. The option was

exercisable on or about 11 September 2005 or an earlier redemption date.

23.6 Regal Bank granted Mettle a put option to sell the entire share capital in Really Useful for R1 m. The option was exercisable on or before 10 November 2005.

23.7 Really Useful ceded and pledged its 25% shareholding in Kgoro to Regal Bank as security for the performance of its obligations in terms of the first call option agreement.

23.8 In the event that an option event occurred (such as a failure by New Heights to redeem the preference shares) Regal Bank could require Really Useful to purchase all its preference shares in New Heights.

23.9 An umbrella agreement was concluded in terms of which Regal Bank, Mettle, New Heights and Really Useful recorded that the agreements were to be concluded simultaneously to ensure that Really Useful had sufficient funds to pay for the shares in terms of the sale of shares agreement.

23.10 The impact on the balance sheet was to increase the assets by R164 m and to increase the liabilities by R150 m.

23.11 According to DT, as at 26 June 2001 (and at the end of the financial year, 28 February 2001) Regal Bank did not reflect the

Kgoro structure in its financial records. The records showed an investment of 25% in Kgoro shares at nil value (Kruse 502).

23.12 Mettle informed DT that New Heights, a Mettle SPV, had a "zero balance sheet". New Heights apparently did not trade and had no source of income to pay the preference share dividends – other than an injection of funds by Mettle.

23.13 DT's understanding of the financial records is that Really Useful, another Mettle SPV, paid Regal Bank R150 m for the shares in Kgoro and Regal Bank paid New Heights R153 m for the preference shares. The source of funds for the Really Useful payment is not known, unless it was the R153 m paid to New Heights, which somehow made its way to Really Useful.

23.14 The possible tax benefit to Regal Bank was that the dividends on the preference shares would not bear tax.

G Metshelf Structures

Metshelf 1

24

24.1 Five agreements were concluded on 27 October 2000.

24.2 In terms of a preference share agreement Regal Bank subscribed for 100 preference shares in Hollowprops 1 (Pty) Ltd, which later

changed its name to Metshelf 106 (Pty) Ltd ("Metshelf 106") for R125 m on 27 October 2000.

24.3 In terms of a subordinated loan agreement Metshelf Trading 1 (Pty) Ltd ("Metshelf Trading") borrowed R124 m from Mettle Finance on 27 October 2000.

24.4 Metshelf Trading appointed Mettle Securities (Pty) Ltd ("Mettle Securities") to manage a portfolio of shares in its discretion with an initial market value of R124 m from 27 October 2000 to 28 October 2003.

24.5 Metshelf Trading granted Regal Bank a put option entitling Regal Bank to sell to it all the preference shares Regal Bank had subscribed for in Metshelf 106.

24.6 Mettle granted the Shareholders Trust a call option in terms of which the trust could call on Mettle until 28 October 2000 to buy the entire share capital of Metshelf Trading for R100 000. Shareholders Trust paid R300 000 for the option.

Metshelf 2

25

25.1 Four agreements were concluded on 14 March 2001.

25.2 The agreements were similar to those described in paragraphs 28.2 to 28.5 save that the price of the preference shares was R10 m; the amount of the loan was R9 850 000; the contract date was 14 March 2001 and the "maturity" date was 5 years from 14 March 2001.

25.3 There was no fifth leg to the structure as in the Metshelf 1 structure set out in paragraph 24.6.

Metshelf 3

26

26.1 Four agreements were concluded on 6 April 2001.

26.2 The agreements were similar to the Metshelf 2 agreements, the only differences being the date of the agreements, 6 April 2001, and the maturity date, 5 years from 6 April 2001.

27

27.1 The first advantage to Regal Bank of the Metshelf structures was that the assets increased by R145 m and the liabilities increased by R85 m.

27.2 The purpose of the structures might have been to make an investment indirectly in the Mettle portfolio. The return on the investment in preferent shares was directly linked to the performance of the portfolio.

27.3 A wide discretion was notionally vested in Mettle Securities to manage the portfolio "so as to achieve the best possible investment results at generally accepted risk levels" ((I1)238). The management fee was R20 000 p.a. ((I1)239). Yet the curator found that 80% of the portfolio consisted of Regal Holdings shares. The balance of the shares consisted of Absa and Stanbic shares (Kruse 518).

27.4 The majority of the merchant banks to whom the Metshelf structures were shown by the curator regarded the structures as unusual. One of the unusual features was that as the performance of the preference shares was directly linked to the portfolio all the risk of the investment was ultimately borne by Regal Bank.

27.5 Prinsloo testified that although Mettle "from a legal perspective" had full control over the portfolio, in practice Levenstein "gave

guidance" to Mettle to buy 8m Regal Holdings shares in 2000 and 3m Regal Holdings shares in May 2001 (2985-6, 2996-7). The purchase of the 8m shares was negotiated prior to the conclusion of the Metshelf One agreement on 27 October 2001 and the shares were delivered on that date. (KD77)

27.6 Mettle did not invest in Regal Holdings shares for any of its clients for whom it administered share portfolios (2988).

27.7 The total portfolio amount was R145m, made up of R125m plus R10m plus R10m, of which about 40% consisted of Regal Holdings shares, which made up about 90% of the equity portfolio (2991).

H 93 Grayston and Stone Manor

93 Grayston

28

28.1 Four agreements were concluded on 17 November 2000.

28.2 In terms of an agreement of sale, Regal Treasury Property Investments (Pty) Ltd ("Regal Properties"), a subsidiary of Regal Holdings, sold the immovable property known as 93 Grayston ("the property") to Mettle Properties International (Pty) Ltd ("Mettle International"). The effective date was 1 January 2012. The price of R600m was payable against registration.

28.3 The preference share agreement provided that Regal Bank subscribed for 100 preference shares at a subscription price of R605m on the subscription date, being the date the property was to be registered in the name of Mettle International. The shares were redeemable 5 years after 1 January 2012.

28.4 Regal Properties granted Mettle International a put option to sell the property to Regal Properties on or after 2 January 2017 for R1.2bn.

28.5 Mettle Properties (Pty) Ltd ("Mettle Properties") granted Regal Properties a call option to buy all the issued shares of Mettle International for R1m. The option could be exercised at any time after 2 January 2012. Regal Properties undertook to pay Mettle Properties R300 000 on 17 November 2000 for the grant of the option.

28.6 Levenstein told DT (Kruse 528-) that the property was developed to enhance his business model. The building would be turned into a financial instrument. It did not matter whether the building was ever occupied. Regal Holdings would be entitled to value the property periodically. The value would be reflected in the balance sheet. The value was based on the R600m payable in 2012. In an undated letter addressed to Store and Kruse (DT(2)546.9) Levenstein stated: "93 Grayston was used as the platform for creating

banking paper. … The property was used simply as a legal and accepted conduit for the creation of banking paper. … Rental income is not needed to generate yield income for Regal shareholders. … The value of 93 Grayston in year 10 (the maturity value) is based conservatively on the capitalisation of rental flows. Negotiations with Mettle were persuasively intense. The conclusion of negotiations and the forward sale was a significant financial victory for Regal. Generally accepted banking practise in this regard, must however be appreciated and understood".

28.7 A valuation was obtained by Regal Bank from De Vos. He based his valuation of R144m on the capitalisation of income flows as if the property were fully let. EY accepted the valuation (160328).

28.8 DT tried to sell 93 Grayston as a "financial structure" but there was no interest from potential buyers: no financial institution was interested in stepping into the shoes of Regal bank. Mettle has agreed to unwind the deal and DT is attempting to sell 93 Grayston as immovable property (Kruse 542).

28.9 Prinsloo of Mettle testified that Levenstein had a fixation with creating a yield curve investment. Levenstein wanted to smooth his income to create a yield to maturity income stream. So, if the 93 Grayston property cost R1m to construct and was sold for R600m in 12 years time, Levenstein "was going to accrue income from growing from [100] to [600] million over a period of time." (2954-6).

28.10 From Mettle's perspective it was willing to participate in creating the structure if Regal Bank financed the purchase price of R600m, Mettle had no risk, and Mettle had an option to put the property to the bank 5 years later. The sale agreement should have been conditional on the bank providing the funding, instead it was the preference share agreement which contained the condition, presumably for selective disclosure to the auditors (2958-68).

28.11 The price of R600m was arrived at by looking at rental yields in the Sandton area and arriving at a discounted cash flow (2963).

Stone Manor

29

29.1 Four agreements were concluded on 30 August 2000.

29.2 Regal Properties sold the immovable property known as Stone Manor 1 to 5 ("the properties") to Mettle International for R435m with effect from 31 August 2020.

29.3 Regal Bank subscribed for 100 preference shares in Mettle International for a subscription price of R435m. The price was payable to Mettle International on the date of registration of the properties into the name of Mettle International.

29.4 Regal Bank granted Mettle International a put option to sell the properties to it. The price for the option was R100 000, payable on 31 August 2000. Mettle International had the right to sell the properties to Regal Bank by exercising the option any time after 31 August 2025. The purchase price of the properties was R756.9m.

29.5 Mettle Properties granted Regal Properties a call option to purchase all the issued shares in Mettle International for R1m¸the option to be exercised any time after 2020.

30 The Sempres Transaction

30.1 The nature of the Sempres transaction was not described by any witness but the contracts were handed in (vdW128).

30.2 At an investment committee meeting held on 31 January 2001 Levenstein requested the committee to consider an investment in Sempres Ltd. The potential exposure to Regal Bank was R76m. The committee decided that an independent opinion should be obtained from PWC; a presentation made by the management of Sempres, and then final approval by the board be given to the transaction. On 16 March Cohen read in a newspaper that “Regal had invested in Sempres and vice versa”. Cohen was outraged

because the decision of the investment committee had been completely ignored. When he confronted Levenstein, Levenstein "got extremely aggressive". Levenstein's response was that the transaction was cash neutral and did not need board approval. The board subsequently approved the transaction on the assumption that it was cash neutral and that there was no capital impairment. In May or June Cohen and Van der Walt discovered that Regal Bank had lent Sempres about R13–14m to buy Regal Holdings shares. The transactions were therefore not cash neutral nor had the loans been approved "through the proper channels" (Cohen 1838-1844).

30.3 Van der Walt's testimony was that when Levenstein put a "share swop" proposal involving Sempres to Exco it was decided that the proposal would be put to the investment committee. On 7 March 2001, Van der Walt, then chief operating officer, was instructed by Levenstein to sign two contracts with Sempres, a user status agreement and a sale of shares agreement. After curatorship, Van der Walt was shown three additional contracts, signed by Levenstein, the substance of which was that Regal bank had undertaken to lend Sempres R5m - a loan which had never been discussed, let alone authorised, by the investment committee or the board (R2575-6).

30.4 Oosthuizen testified that when Levenstein initially introduced the Sempres transaction, he, Oosthuizen, expressed concern about the transaction. The decision was that the matter should be referred to the investment committee to investigate. On his return from overseas in early June, he found that the deal had been done without the matter having "gone through the proper channels in the sense that I became aware that the investment committee had referred the transaction back and had requested a complete viability study in search in additional information to be presented to it". When Oosthuizen queried the matter at a board meeting, Levenstein and Van der Walt were quite aggressive, and asked whether the executive committee was subservient to the board. Oosthuizen said that he confirmed that it was, "absolutely". (3005-3007).

Chapter four

The supervision by BSD of Regal Bank (and Regal Holdings)

31 The evidence of the Registrar of Banks

The Registrar of Banks handed in a prepared statement, the bulk of which was read onto the record. The evidence (3168-3199) of the

Registrar which is material, briefly stated, in his words was the following:-

31.1 The purpose of banking regulation and supervision is:

- to ensure the safety of the deposits of the public with banks;
- the maintenance of a sound and efficient banking system and, ultimately,
- a stable overall financial system.

31.2 The philosophy of bank regulation is that banks fulfil a pivotal role in the economy of a country since they are the only source of finance for a large number of borrowers and because they manage the payment system. If the banking system is placed in jeopardy the resultant financial disruption is likely to be more serious than in other sectors of the financial system. Banks must be reliable. The public must have confidence in banks. From a depositor's point of view, the confidence in banks is so great that the repayment of the deposit is regarded as guaranteed. Regulation must be such that the confidence is not shamed. It is not a bank regulator's role to manage banks or to stifle product development or to curb entrepreneurship unreasonably. Supervision is more of an art than a science. The regulator is heavily dependent on a

number of factors and other disciplines, such as the audit profession, the legal profession and the directors of the bank.

31.3 The international financial community has developed a wealth of knowledge and a sense for the correct regulation of banks in order to steer banks away from financial turbulence and ill winds which may spread contagion even to other sectors of the financial community, such as the insurance industry and the financial markets. The G20 countries have developed guidelines for the supervision of banks which are widely applied. The guidelines are known as the Core Principles for Effective Banking Supervision (Basel) 1997 ("the Core Principles"). The principles were accepted by South Africa. Regulation is not a rigid application of predetermined rules but a set of principles. Each principle allows the regulator ample latitude and discretion. The regulator must assess the financial situation and regulate with certain objectives in mind. The Core Principles are guidelines to attaining the objective of making banks universally credible institutions.

31.4 The regulations of banks, compared to the regulation of other financial institutions, is more strict, conservative and "hands on" in nature.

31.5 In order to protect depositors and creditors and prevent the spread of problems, a regulator must be able to conduct appropriate

intervention. A banking regulator must have at its disposal adequate supervisory measures to bring about prompt corrective action. In terms of the Banks Act, accordingly, the Registrar of Banks has the right to apply for the winding-up of the bank and to oppose an application for the winding-up of the bank. The Registrar has been given the power, in addition, to appoint a liquidator.

31.6 The Reserve Bank's adherence to the Core Principles and the application of its statutory powers are applied with common commercial sense as the Reserve Bank "walks the tight rope" with the view to serving the financial system as well as protecting the rights of all the stakeholders in a bank. The powers of regulatory persuasion are often more effective than the sledgehammer when one is dealing with corporate governance issues. The second King report points out that investors are prepared to pay 22% more for the shares of a company which is reputably governed.

31.7 With the wisdom of hindsight, the Registrar was of the view that the distress of Regal Bank arose not from a lack of liquidity, nor from a lack of entrepreneurship, but from a lack of sound corporate governance.

31.8 When performing its functions, the regulator must adopt a bona fide even-handed approach keeping in mind that the regulator can adopt a narrow view, i.e. to protect the interests of the depositor by ensuring that the bank has adequate capital, the minimum reserve and liquid assets, as well as fit and proper directors. Or the regulator can take a broader view by ensuring a high level of efficiency in the provision of financial services; the securing of stability of the financial system and the protection of the interests of all parties. If the regulator were to achieve the latter objectives, the regulator would have to transcend the bounds of supervision and enter the realm of management and over regulation. This would be unhealthy for banking. As was said by a deputy-governor of the Bank of England: "The supervisors, of course, cannot and should not second-guess the management of individual institutions. … Being a supervisor does not make me a shadow director of five hundred authorised banks, nor should it."

31.9 In a case such as that of Regal Bank, the regulator was left with little other than a radical remedy, such as cancellation of the registration, liquidation, and curatorship. Other than the remedies set out in the Banks Act, the Registrar was left with only persuasion. The powers of persuasion, submitted the Registrar, should be backed up in law.

31.10 The Registrar submitted that the remedies in the Banks Act relating to investigation and reporting are adequate. Once the inspectors have reported and the problem properly diagnosed, one requires sharp measures which can be speedily applied in order to turn around the business of a bank in distress. The Registrar quoted from an International Monetary Fund publication, which reads: "To be effective, corrective action must be fair, swift and decisive."

31.11 Not every bank should be saved. Those that threaten the financial system or are too large to fail should be assisted timeously through application of the correct remedy. Risk cannot, however, be totally eliminated. The remaining risk must be borne by all stakeholders equally, according to the merits of the investment decisions.

31.12 Banks are inextricably linked to the central bank through the lender of last resort principle ("LOLR"). Banks which have exhausted their credit facilities may be assisted through short term loans by the central bank. The decision to assist banks depends on whether the crisis was caused by a macro economic factor beyond the bank's control as well as the duration of the liquidity crisis. Banks which brought on the crisis through poor corporate governance or undertaking unnecessary risk should not be assisted as a lender of last resort, lest it should send the wrong

signal to the banking community that banks will not be allowed to fail.

31.13 The Registrar reviewed the regulatory tools available to the regulators in Canada, United Kingdom, United States of America ("USA") and Australia. The Registrar came to the conclusion that consideration should be given to amending the Banks Act to give the Registrar the power:

- to remove a director from office;
- to appoint an administrator with the power to advise a bank to apply to court for protection, similar to the chapter 11 procedure in the USA or to adopt the "turn-around" approach or to do a "work-out" with its creditors.

The chapter 11 procedure allows a business to remain in operation while a plan of reorganisation is arrived at with its creditors. Control of the company passes to an administrator. A business does not have to be insolvent before filing for protection in terms of chapter 11. A chapter 11 order protects the business by establishing a moratorium from action against the company. Similar provisions relating to banks exist in Australia, the United Kingdom and Canada. The concepts "turn-around" and "work-out" form part of the "London approach". The London approach enables the rescue of a business, in this case a bank, in time by or

to arrive at an agreement with its creditors, brokered by the central bank. The Registrar submitted that power should be given to the Registrar to negotiate with other banks to render assistance for the successful conclusion of work-out agreements with the creditors and customers of banks to whom they are largely exposed.

31.14 There were about 11 bank failures in the last decade. The failures were caused by bad management and failure of corporate governance (3204-5).

31.15 The Registrar expanded on his written statement by testifying that if the director of a bank is endangering the bank, he wants the power to remove the director and to reconstitute the board of directors. At the moment all he has is moral suasion (3217-8).

31.16 The Registrar said that the BSD were in the process of training "site teams" which in due course will look at corporate governance issues (3230) and "the procedures employed on controls within a bank" (3230-1). For the past 18 months the teams have been gaining experience but concentrating on the quality of the assets of the bank (3232).

The evidence of Martin

32 Martin, an assistant general manager of the Banking Supervision Department ("BSD") of the Reserve Bank, handed in a written statement, which he confirmed in evidence (3257-3296). The salient aspects of his evidence were the following:-

32.1 The stated mission of the BSD is "to promote the soundness of banks through the effective application of international regulatory and supervisory standards". The BSD fulfils its functions in line with three core philosophies:

- market principles underlie all activities and decisions;
- a service orientated approach is subscribed to;
- a relationship of mutual trust between the BSD and the key players in the risk management process.

32.2 The BSD regards the overall risk management process as being a partnership between several players, all of them have an important role to play. The key players are:

- the board of directors;
- management;
- the audit committee;
- external auditors;
- the BSD;

- the general public.

32.3 In regard to the general public, Martin testified that it includes depositors, the media and financial analysts. All have a role to play in the overall risk management process. It is important that the depositors, if capable, should make an assessment of the bank before placing deposits in the bank.

32.4 Martin's evidence on the role of the audit committee and external auditors is in line with the analysis done elsewhere in part 3.

32.5 Martin's evidence on the board of directors of a bank or its holding company is worthy of emphasis. The board of directors is ultimately responsible for the conduct of the business of the bank, and, therefore, the success or failure of the bank. Because banks are special institutions and are the custodians of public savings, directors of a bank are expected to have an understanding of banking business. In terms of the banking regulations, directors are required to have a basic understanding and knowledge of banking business and the laws and customs governing banks. A member of a board of directors is not required to be fully conversant with all aspects of the business of the bank. However, all directors are expected to have competence commensurable with the nature and scale of the bank's business. Directors are expected to perform their duties with such competence as could

be expected from persons with their knowledge and experience. Because the general public's savings are invested in banks, directors are expected to ensure that the risks undertaken by the bank are prudently managed. Directors are required to report annually that the system of internal controls is adequate (Regulation 39). As from 1 January 2001, in terms of Regulation 39(4)(a), directors must "assess and document whether the process of corporate governance implemented by the bank successfully achieves the objectives of the board".

32.6 Martin emphasised that the director of a bank must be "fit and proper" to be a director. He referred to s1(A) of the Banks Act, which provides that the following qualities are important:

- general probity;
- competence and soundness of judgment for the fulfilment of the responsibilities of the office in question;
- the diligence with which the person concerned is likely to fulfil those responsibilities.

32.7 Management derives its responsibilities from the board of directors through delegation and it is important that managers understand all aspects of the business. The Committee on Banking Regulations and Supervisory Practices, identified the following responsibilities of bank management:

- staff needs to be professionally competent and have sufficient experience;
- proper control systems must exist and function adequately;
- the bank's operations must be conducted prudently and adequate provisions must be maintained to absorb losses;
- statutory and regulatory directives must be observed;
- the interests of depositors and other creditors must be adequately protected;
- financial statements must be prepared in accordance with national law. Regulation 41 requires all appointments to the senior management of a bank to be approved by the chairperson and the board of directors of the bank.

32.8 It follows that management, together with the board of directors, is responsible for ensuring that the bank is run along prudent lines, follows sound corporate governance and ethics, and is successful.

33 Levenstein as Chairman

33.1 The King Report on Corporate Governance dated 29 November 1994 ("King Report") recommended that :

- The chairman of the board of directors must be able to be objective from the day-to-day running of the business;
- The role of the chairman should be separated from that of the CEO;
- The chairman should be an independent and non-executive director;
- Corporations should not apply "cronyism" in making non-executive appointments.

33.2 The Registrar opined in evidence that the chairman of the bank or of the holding company of the bank is very important. "He has to ensure that proper corporate governance is applied within the bank. He has to ensure that all senior [management], including directors and executives are fit and proper and his role in establishing the culture, the compliance culture, the culture within the organisation is very important." (3207).

33.3 Levenstein was CEO from inception until 18 June 2001.

33.4 Peter Springett was non-executive chairman from inception until 21 January 1998. Levenstein became acting chairman on that date.

33.5 On 18 February 1998 at a meeting between Regal Bank and the BSD (C14) Levenstein informed the BSD that he would fulfil the role of acting chairman "in the short term". Martin of BSD expressed his disapproval. See, too, Martin's letter of 24 February 1998 (C16).

33.6 At a meeting of the board of Regal Bank on 28 May 1998 the directors decided that Levenstein should continue to act as chairman and remain CEO (K(2)126).

33.7 On 30 September 1998 the Registrar of Banks asked Levenstein what progress had been made in appointing a suitable candidate as chairman and requested that the issue be resolved by 31 December 1998 (C97).

33.8 On 29 October 1998 Levenstein responded in a letter in which he refused to separate the roles. His motivation was:

> "… the historical and ongoing profile of Regal provides what we believe to be an interesting platform for a different perspective on this issue. The ground floor conceptualisation, creation and organic development of Regal motivates a fusion of the roles of CEO and Chairman. Indeed we strongly believe that any attempt to "shoehorn" a separation between these respective roles will in the specific context of Regal, draw substantial tension and conflict into the equation.
>
> Strategic vision and objectives are often inextricably linked to the entrepreneurial spirit that formulates the architectural and financial design of a business concern.
>
> The cultural and psychological characteristics that impact upon the relationship between CEO and Chairman can lead to a wedge being driven between operational and strategic balance. Political sensitivities and complexities surface at both Board and operational levels which impair harmony and ultimately risk management focus. In our experience the perception that reporting lines between Chairman and CEO are well defined

> and structured tend to moderate the active participation of non-executive directors. In Regal's context the fusing of the respective roles appears to illicit [sic] greater participation and interaction regarding all policy and strategic issues.
>
> Responsibility and accountability becomes more clearly defined and even aggressive, yet healthy and constructive Board meetings evolve as the norm. The mix and diversity of the Board, in addition to unique circumstances, shapes impact.
>
> As Regal's life cycle extends and matures a separation of the chairman role will be initiated. Regal does not reject the principle that sound corporate governance may require a clear distinction between CEO and Chairman. In summary we strongly believe that having regard to Regal's historical development and it's current operational focus and strategies, an "enforced" separation of the roles of Chairman and CEO at this juncture would, instead of enhancing shareholder protection, create sufficient operational and governance difficulties to in fact prejudice shareholders."(C98)

33.9 On 17 November 1998 the Registrar of Banks replied to the letter of 29 October and gave Levenstein until after the listing of Regal Holdings (anticipated to be in February 1999) to separate the roles (C124). Regal Holdings in fact was listed on 25 February 1999.

33.10 At a meeting of 29 March 1999 between Regal and BSD, Martin requested that action be taken before June 1999. Levenstein replied that a "proper candidate was not available at the moment" (D145). Levenstein testified that "… we wanted to find someone from beyond our border completely … someone completely and absolutely independent … it was my recommendation that Joe Pollack … be appointed because he had a very independent profile, but some of the non-executive objected to that, they felt that Joe was getting on in years and that Jack should be appointed" (1566 – 7).

33.11 On 10 May 1999 the Registrar gave Levenstein until 31 July 1999 to finalise the matter (D207).

33.12 On 19 July Levenstein in a letter addressed to the Registrar said that a number of factors made it "difficult and impractical" to appoint a non-executive chairman by 31 July 1999:

> "These factors include:
>
> - The ongoing negotiations with certain institutions and corporates regarding potential substantial investments in Regal. These negotiations have taken longer than was anticipated when we met on 29 March 1999.
> - The evolvement of a culture at Regal which would accommodate a radical shift from its entrenched "flat structure" system will take time and implementation of a structure, at this time, which is more conducive to a hierarchical system, could prove disastrous to the harmonious (and effective) prevailing leadership structure.
> - The "after shock" of a prior abortive attempt to foist a hierarchical executive structure upon Regal at an inappropriate time is still keenly felt within the Regal corridors. Any attempt to re-visit this territory now is likely to be injurious to Regal, its shareholders and clients." (D287)

33.13 On 28 July 1999 the Registrar of Banks instructed Levenstein to separate the roles of Chairman and CEO "as soon as possible but by no later than 30 September 1999." (D286)

33.14 On 29 September 1999 Levenstein resigned as chairman and Lurie was appointed Chairman by the board of directors.

33.15 Levenstein testified that the Reserve Bank was "a hundred percent correct that the CEO role and the chairmanship role should be divorced from each other and we had every intention of doing so" (1192).

33.16 Nhleko testified that he was concerned about the dual roles and supported Lubner when Lubner raised his concerns at board

meetings (2302). He did nothing more, nor did he oppose the appointment of Lurie as chairman.

33.17 Lurie agreed that the roles of chairman and CEO should have been separated. They tried to find a chairman "in the marketplace" but could not find an adequate replacement (2378).

33.18 Diesel said he could "possibly … have been more assertive in terms of perhaps bringing a nomination to put somebody else in the chair" (2669). He agreed that there was not proper control of Levenstein by the directors (2671).

33.19 The Registrar was of the view that the bank failed because Levenstein was doing transactions that endangered the bank itself and there were insufficient checks and balances by the audit committee and the board of directors. (3214-5, 3220).

33.20 Martin made the point in his evidence that it only became a legal requirement in terms of Regulation 40 from 1 January 2001 that the chairman of the bank should be a non-executive director. Prior to that date moral suasion was required to persuade the parties to make a change (3268-9).

34 Springett/Lubner/Schneider

34.1 On 20 August 1999 Mark Springett and Carl Kruger met with Martin and Nolte of the BSD. We do not have a minute of the meeting. According to Springett, he and Carl Kruger expressed their serious concerns about the manner in which Levenstein was managing the bank, in particular, the instruction given by Levenstein to restrict the sale of Regal Treasury shares. They provided the BSD with correspondence. (G145).

34.2 On 7 September 1999 Wiese met with Levenstein. We do not have minutes of the meeting. On 1 October 1999 Wiese wrote a letter to Levenstein (D284) in which the meeting was referred to in these terms:

> "You indicated that there was strong adherence to corporate governance in Regal. Our Mr J A Martin was, however, of the opinion that there might be a market perception that certain board members were "removed" from their positions because they did not easily accept the manner in which Mr M Springett was dismissed.
>
> In the above regard we stated that it was strongly advisable for a bank to appoint new non-executive directors who would be perceived to be strongly independent …".

34.3 On 12 October 1999 Levenstein wrote a letter to Wiese in which he dealt with the meeting of 7 September 1999, spoke of "Regal's

boardroom surgery" and denied Mark Springett's allegations (DT(1)87). On 22 October 1999 he wrote a further letter to Wiese in which he said that Regal Bank would pursue the prosecution against Mark Springett with serious intent and added that: "We are stressed by any possible conduct that may endanger shareholders or depositors" (N31). On 4 November 1999 Levenstein wrote a letter to Martin in which he dealt with Lubner and Mark Springett and added: "Risk management comes first. Corporate Governance requires strength, courage and iron resolve. Anyone who endangers the system, or impairs the risk management culture must be dealt with expeditiously"(DT(1)88).

34.4 On 28 January 2000 the BSD met with EY (E9). The minutes of the meeting record the following: "The issue surrounding BSD's concerns on corporate governance were discussed with the auditors. Mr Martin informed the auditors of BSD's opinion regarding the dismissals and resignations of directors during the past year of Regal. The content of the meetings held with the difference parties involved – Messrs Springett, Lubner, Schneider and delegates of the Financial Services Board ("FSB") and Regal were conveyed to the auditors … Mr Martin stressed BSD's concerns on the corporate governance issue at Regal. Not only was the bank in contravention of the provisions of s60(3)(b) of the Banks Act, in which not more than 49% of the directors of the bank shall be employees of that bank … but it was also BSD's opinion that the board was inappropriately structured … The board was run by management and was not perceived by BSD to be

totally independent. Mr Martin referred to the problems experienced with the dual roles performed by Mr Levenstein as chief executive officer and chairman of the board. Furthermore, it was concerning to BSD that Mr Jack Lurie, newly appointed chairman of the board was the father-in-law of Mr Levenstein. It was BSD's viewpoint that Mr Levenstein was playing an over-dominant role in the bank." (E10) (Lurie is in fact the brother-in-law of Levenstein.) See, too, Martin's letter of 10 February 2000 to Van Heerden referring to the meeting (E6).

34.5 On 3 February 2000 Wiese wrote a letter to Lurie in which he "strongly" advised Regal Bank to appoint "new non-executive directors, who would be perceived to be strongly independent by the general public and investors to the board in order to replace Messrs Lubner and Schneider." (DT(1)96).

34.6 On 17 February 2000 Lurie responded (DT(1)100) by saying that he was in consultation with potential candidates as to their suitability and that "we are determined that the replacement directors will be of the calibre that adds value to the organisation". (DT(1)100).

34.7 On 29 March 2000, in a document signed by almost all the directors of Regal Holdings, it was said, *inter alia*: "All the bank's employees are required to maintain high ethical standards, thereby ensuring that the bank's business practices are conducted in a manner that is above reproach. …. The board is responsible to the shareholders for setting the

direction of the group through the establishment of strategies, objectives and key policies. Implementation of these is monitored through a structured approach to reporting and accountability. Appropriate aspects of internal accounting and administrative systems are reviewed and tested by our external auditors." (K(2)221).

34.8 On 17 April 2000 the BSD (including Wiese and Martin) and Regal Bank (Lurie and Levenstein) met to discuss BSD's concerns about corporate governance (E39). Lurie and Levenstein said that Regal Holdings Board would be "totally reformed" and that only Levenstein and Steen will remain on the board. Wiese questioned the independence of the non-executive directors. Levenstein said that "Regal was considering the appointment of a totally independent chairman from outside the group".

34.9 The Registrar said that the Mark Springett issue was regarded by the BSD as an "isolated situation" which it did take up with the FSB. Had the BSD known all the facts, as elicited in this commission, it would have acted differently (3249-3252).

34.10 Martin said that the BSD debated at length whether a s7 review should be conducted. One of the considerations, in addition to cost, a fact that the Registrar mentioned in his evidence, was that "a section 7 review is a step not taken lightly because if that does leak outside of the bank it can have a negative effect on the bank, it can cause a run" (3302).

35 The threat by EY to qualify the 2000 audited results

35.1 On 5 May 2000 the BSD and EY met (E41). EY explained the Regal branding model and referred in particular to the bank's 25% share in RMI and 23% share in Kgoro. EY said that there was disagreement between EY and Levenstein on the valuation of the investments and how these were to be accounted for in terms of GAAP. Wiese telephoned Levenstein and said that if EY qualified the 2000 financial statements, he would appoint a curator. The discussion ended on the basis that KPMG would be appointed in terms of s7 of the Banks Act to give a view.

35.2 KPMG was appointed.

35.3 After receiving the s7 report at a meeting with KPMG on 15 May 2000 (E49) it was decided to meet with Levenstein to convince him of the impact of his decision to continue with qualified financial statements. The BSD and KPMG met with Levenstein (E52), who "explained that he was the only person to render an opinion on the value and measurement of money and that he would stick to his opinion." At a meeting with EY, Wiese said that the BSD had three options (E43): to appoint a curator, to approach the court in an attempt to deregister the bank, and to remove Levenstein as CEO. Wiese posed the question whether Levenstein was fit an proper to run

the bank. He was prepared to act "in contradiction with the opinions raised by two audit firms and the Registrar of Banks". BSD then called in Lurie, the chairman of Regal Bank, and Buch, the chairman of the audit committee (E45). They backed down when threatened with deregistration.

35.4 The 2000 financial statements were not qualified by EY, Regal Bank continued to carry on business, Levenstein remained CEO and Lurie remained chairman.

35.5 The Registrar conceded in evidence that Levenstein's conduct in not accepting the opinions of EY and KPMG on 15 May and the attitude he adopted in the meeting on that day, was irrational and stubborn, but "we did not have any powers … to do something about it … obviously it did create some reservation in our minds and that is why we expressed it to [the directors]." (3246-7).

36 Lopes

36.1 On 14 August 2000 Lopes met with Wiese. We do not have minutes of the meeting. Some of the allegations made by Lopes were that board members who did not agree with Levenstein were removed from the board; Regal had lost about 25 staff members in the past three months, at least 10 of them in senior

management positions; anyone who questioned Levenstein's "branding" idea was threatened (E149).

36.2 The Registrar gave evidence that the visit by Lopes to the Reserve Bank "highlighted certain things and that sort of solidified our opinion that we need to commission a [s7] report."(3224).

36.3 On 16 August 2000 the BSD met with DT (E149), the purpose of the meeting being to appoint DT to conduct a s7 review on the role of the board of directors, particularly the powerful role played by Levenstein.

36.4 On 18 August 2000 the BSD and DT held a meeting (E151) in which DT conveyed the content of discussions they had held with Lopes. The terms of reference of DT were discussed.

36.5 On 21 August 2000 Martin reported to Ms Marcus, the Deputy-Governor, on the appointment of DT and meetings to be held with Regal Bank (G91).

36.6 On 23 August 2000 the BSD (including Wiese and Martin) met with Regal Bank (Lurie and three non-executive directors) to discuss BSD's concern about "Recent dismissals and resignations at Regal. Negative market perceptions that influenced that share price and there were allegations of mismanagement within Regal" (E159). Lurie gave an explanation for the various dismissals and resignations. Wiese

said that the BSD had decided to appoint DT to do a s7 review. On the same day Wiese wrote a letter to Lurie in which he instructed Regal Holdings to provide a report in terms of s7 by 8 September 2000. The instruction was motivated by referring to "possible breaches of corporate governance in Regal Holdings" (E165).

36.7 On 25 August 2000 Wiese and Martin met with Lubner, Barnes, Nhleko and Forman (E168). Wiese reported on the s7 report and Lubner and Nhleko told the meeting about Levenstein's management style.

36.8 On 28 August 2000 Radus signed a letter which he sent to Wiese (E170). The letter purported to be one by the executives in support of Levenstein. Two of the passages in the letter are: "The CEO of the Bank deserves your support, in particular an individual such as Jeff Levenstein based on his integrity and track record which speaks for itself. The nature and purpose of the accusations are obviously designed to protect ZL. As elucidated above. Our CEO should be on the receiving end of your unconditional support. The executives of Regal are disillusioned and saddened by your stance". In his evidence, Radus at first said that Levenstein drafted the letter and he, Radus, signed it (3447). Later in his evidence Radus said that he might have done a draft and Levenstein changed it "... or he did the letter. I cannot remember,

really. It is certainly not my language, that is all I can tell you. But I did agree with this and the executives agreed with this." (3149). Asked who the other executives were on whose behalf he wrote the letter, Radus said the only other executive was Diesel. Later on in his evidence, Radus again said that he could not remember who the author of the letter was, but it was written at Levenstein's initiative (3150).

36.9 Wiese replied on 31 August 2000 and said that he had a duty to depositors and other stakeholders to take action when required and that the reasons for the s7 review and appointment were discussed with Lurie and other non-executive directors (E181).

36.10 On 6 September 2000 the BSD and DT met to discuss the DT report in detail (E183). Wiese expressed the opinion that Regal Bank had no future and that it would be requested to deregister voluntarily (E186).

36.11 On 12 September 2000 the BSD met with Levenstein to discuss allegations that Levenstein had made in correspondence with Wiese (attacking EY). Levenstein was told that the s7 report would be discussed with him in due course (E192).

36.12 On 4 October 2000 the BSD, Rooth & Wessels and DT met (E195). DT said that Regal was solvent and had a high capital base. Various allegations were made including dealing in shares. Wiese expressed his desire, as did Martin, that Levenstein should

be replaced and stated that the BSD had lost trust in Levenstein's ability to run Regal.

36.13 On 23 October 2000 the BSD, DT (Schipper) met with the Regal Holdings board of directors (E206). Wiese made a presentation in slide format. Levenstein gave explanations for their trading in shares, his personal expenditure, the dismissal of various directors and in regard to the branding income, Levenstein said that "he was appalled by Mr Wiese's conclusion that three auditing firms had agreed that the branding income could not be measured with accuracy or certainty". The meeting ended on the basis that Regal Holdings would prepare a response.

36.14 Martin's evidence was that, acting on the advice of its attorney, the presentation by the BSD to the board of directors on 23 October 2000, did not include the corrective actions which the BSD required the board to take (3274). The actions the BSD wished the board to take included the following:

- the appointment of a new chairman who was independent and seen to be independent;
- the appointment of at least four independent, non-executive directors, at least two of whom should have had extensive banking experience;
- the appointment of a new CEO (DT(2)483 – 95).

36.15 Regal's response is dated 29 November 2000 (E282).

36.16 On 22 January 2001 BSD met with DT and Rooth & Wessels. The Regal response was discussed in some detail. The meeting concluded on the basis that "most of the issues could only be verified once EY had completed the year-end audit of Regal" (F6).

36.17 On 12 February 2001 the BSD met with EY (F27). A number of issues were discussed, including corporate governance issues. EY reported that Cohen, Van der Walt and Oosthuizen had been appointed directors and that a financial director was to be appointed within the next two months. The BSD requested EY to confirm a number of matters relating to Levenstein's personal expenditure, the payment of R650 000.00 as dividends, the Mettle deals, and so on.

36.18 On 18 April 2001 Wiese wrote a letter to Cohen, chairman of the audit committee of Regal Bank (F23) setting out the items which were to be included in the year-end audit of the bank (following on the meeting with EY on 12 February). On the same day Wiese sent Strydom a copy of the minutes of the meeting of 12 February 2001 (F26).

36.19 On 9 May 2001 Wiese expressed reservations to Regal Holdings about the appointment of Cohen as chairman (F43). On 10 May 2001 Levenstein defended the appointment (F44).

36.20 The Registrar testified that the issues identified by the DT s7 report were not unearthed by EY or by the normal BSD procedures, which did not include audits. BSD does not manage banks, it supervises banks (3227-8).

36.21 The response of the Reserve Bank to the DT s7 report was two fold:

- to insist that the bank itself take corrective measures; and
- to instruct EY to report to the Reserve Bank "after the audit that these things have been rectified" (3233).

36.22 The Registrar testified that if he had had the power to do so at the time, i.e. in October 2000, he would have removed Levenstein "right there and then" and he would have had the board reconstituted. But he did not have the power to do so. All he could use was "moral suasion" (3234-3241). The Reserve Bank believed, on the basis of the DI returns, that Regal Bank was complying with its prudential requirements. Had there been deficiencies the prudential requirements, the Reserve Bank would have acted a lot faster (342-3).

37 Curatorship

37.1 Regal Bank began to get bad press from 25 May 2001 with the publication of the Financial Mail ("FM") article (S12), the Business Report article "Regal claims 'threat' from Zeltis over shares" (S15); a Sunday Independent article on or about 27 May 2001 (K(3)20); and an article in the FM on 1 June 2001 (110460) (There was another article on 8 June 2001 in the FM "Regal Treasury: hitting back at the FM" (S17)).

37.2 As at 29 May 2001, the liquidity of the bank was healthy, despite the negative publicity (Cohen 1874). On 29 May 2001, Cohen received an advanced copy of the article which was due to appear on the FM on 1 June 2001. Cohen and Van der Walt went to see Levenstein at his home to discuss the article. Levenstein explained that Mettle had "full discretion to buy and sell shares in the portfolio where preferent share returns are linked to portfolio performance" (Cohen 1875). Levenstein denied that Regal had any influence over the purchase of the shares. Cohen discussed the matter with Martin of BSD and informed him that a joint meeting of the boards had been called for the next day.

37.3 On 30 May 2001, before the meeting of the joint boards, Cohen met with Mettle.

37.4 On 30 May 2001 the boards of Regal Holdings and Regal Bank met to discuss the FM article and the issues raised in it, especially the litigation with RMI (K(3)16-17). The Sunday Independent article was also discussed. Diesel presented a report on the bank's liquidity and reported that "Treasury is down R22 – R25 m on the week to date in response to the negative publicity." Cohen emphasised the need to monitor liquidity on a minute-by-minute basis and to report any negative trends.

37.5 On 1 June 2001 the article appeared in the FM with the headline, "Surprising surge in price: Mettle rides to the rescue", which alleged that Regal Holdings shares appreciated by 7% on the back of an acquisition by Mettle Securities of 700 000 Regal Holdings shares worth about R3.8m (110460). Prinsloo testified that Mettle acquired about 3m Regal Holdings shares for R20m, probably at the request of Levenstein (2997).

37.6 On 1 June 2001 Cohen sent draft minutes of the meeting of 30 May 2001 to Wiese and asked for his assistance in dealing with the negative publicity generated by Sasfin (F107). Wiese replied sympathetically on 12 June (F106).

37.7 On 5 June 2001 (F78) and 11 June 2001 (F105.1) Cohen reported to Wiese on liquidity levels:

29 May 2001 - R107 334 000

5 June 2001 - R 98 834 000

11 June 2001 - R 70 334 000

37.8 On 11 June 2001 Cohen and Oosthuizen met to discuss a number of issues, such as the Mettle managed portfolio, non-disclosure to the board, and the acquisition of shares by Shareholders' Trust, which it had been decided by the audit committee on 28 March 2001 should be terminated within 3 months (K(3)101). They decided to meet with Prof. Vorster, Mettle and EY, and to accumulate evidence in order to report to the BSD.

37.9 On 11 June 2001 the bank experienced a "liquidity shortfall" which necessitated it using a marginal lending facility of R18 m at the Reserve Bank's money market department. The facility was repaid on 12 June 2001 (G395).

37.10 On 13 June 2001 the boards of Regal Holdings and Regal Bank met (K(3)22) and discussed a number of issues including corporate governance; the approval of the "securitisation transaction proposed by Mettle Ltd and RMB". The meeting resolved that all purchases of Regal Holdings shares by Shareholders' Trust must be ratified by the full board and that an exposure of R5m to the trust was approved. The matter would be assessed on a daily basis and further exposures would be considered by way of a round-robin ((K3)26).

37.11 On the same day Wiese reported to the Governor's committee (G392) on "current developments at Regal". One of the "actions to be taken" was "replacement of the bank's CEO" (G395)

37.12 On 14 June 2001 Cohen met with RMB to discuss a possible preference share transaction of R100m "to try and store up the liquidity" of the bank (Cohen 1891).

37.13 On 15 June 2001 Levenstein asked to be excused from a meeting of 18 June 2001 which had been arranged between the bank and BSD (Cohen 1892). On the same day, Cohen informed Wiese of Robinson's appointment as CEO of Regal Bank (F120).

37.14 On 18 June 2001 the bank, represented by Cohen, Lurie and Oosthuizen, met with the BSD represented by, inter alia, Wiese and Martin (F120.1). Cohen reported on the improvement on corporate governance and the various improvements that had been made; his concerns about Sempres and the Shareholders Trust; that he was not satisfied with the liquidity position of the bank and the steps he was taking to address the problem. The three directors expressed optimism about the future of the bank. According to Cohen, he asked Wiese whether "third tier liquidity provision would be available …. Wiese replied in the negative because, unlike FBC Fidelity, the bank-client basis was in the high nett worth market" (Cohen 1896).

On the same day Robinson commenced employment as CEO of Regal Bank. His major concern was there was no surplus liquidity. He commenced taking steps to arrange a credit line with other banks (Robinson 1816).

37.15 On 20 June 2001 Cohen was informed by Guard Risk that the underwriters were not committed to the RMB preference share deal. Diesel reported that the bank was "at the 75% limit on the statutory liquidity with the Reserve Bank" (Cohen 1900).

37.16 On 21 June 2001 Cohen requested Oosthuizen to visit Martin at home to reopen the possibility of a third tier liquidity facility. Oosthuizen testified that he met Martin in Pretoria and discussed the growing pressure on liquidity and what the options could be. Martin informed Oosthuizen, after a discussion with the Registrar of Banks, that there would not be any form of assistance from the Reserve Bank in respect of its liquidity pressure. He conveyed that to Cohen. The following morning he received another telephone call from Martin to confirm that the official position of the Reserve Bank was that there would not be any form of assistance. (3008-9). Cohen told Levenstein and advised him that a standby facility should be sought from another bank, namely, Investec (Cohen 1900 – 1901)

37.17 On Friday, 22 June 2001, Regal Holdings and Investec met. According to Robinson, the "ostensible purpose of the meeting was to create some standby credit lines in case of a liquidity run on the bank". The meeting concluded on the basis that Investec would conduct a due diligence over the week-end with a view to acquiring the bank (1817; Cohen 1903 – 1904).

37.18 There was a hive of activity on Saturday, 23 June 2001. Investec commenced the due diligence. The Reserve Bank met with Sasfin (G401) and Regal Bank (G396). Included in the Reserve Bank team were Ms Marcus, Wiese and Martin. Included in the Regal team were Cohen, Lurie, Diesel, Buch and the new directors, Van der Walt, Scheepers and Oosthuizen. Robinson attended as the new CEO. Levenstein did not attend. At the Regal meeting, Cohen reported on a number of issues including corporate governance, the Mettle deals, death threats, the Sasfin bombing and the "sale of Regal to Investec." (Cohen 1907-9)

37.19 On Sunday, 24 June 2001, Investec completed its due diligence investigation. Its report dated 29 June 2001 (G417) is worth considering. The Investec team had a number of major concerns with Regal Bank, including the financing by the bank of the acquisition of Holdings shares, the Mettle deals, the development

of 93 Grayston Drive, the R71 m attributable income and the role played by Levenstein with "almost unfettered powers".

37.20 A meeting of the boards of Regal Bank and Regal Holdings took place the night of 24 June 2001 ((K(3)58.1). Investec informed the meeting that it would not buy the bank but would buy R350m of the book debts for R305m; Strydom expressed his concerns about the 45% shares held indirectly by the bank and the financing of the acquisition of the shares by the bank; the unwinding of the various structures was discussed; Strydom explained what curatorship would mean to the bank. It was resolved that the following would be presented to the Reserve Bank the following morning for approval:

"a) cancel 45% of shares – bring issued capital down to R200m; b) J Levenstein announced retirement, with immediate effect; c) securitisation/sale of book to Investec – R300m within one week; d) ask the Reserve Bank to assist liquidity for one week." EY conveyed to the meeting that it would withdraw the auditors' statement "subject to opinion from H Vorster on treatment of dividends".

Levenstein testified that before the meeting Cohen said to him that unless he played along, the Registrar of Banks would deregister the bank. He was manipulated, blackmailed, scared and bullied into agreeing to the cancellation of the shares (1676-9).

He disputed that the meeting of 24 June 2001 was a meeting of the board of directors of Regal Holdings and Regal Bank. He said a select few members of the board were called to the bank. He thought he was required to "further the negotiations" with Investec. He was not invited to the board meeting (1766 – 1769). Cohen testified that there was a quorum, only two directors were unable to attend, and that minutes of the meeting were taken, signed and ratified on 22 August 2001 (1918). Cohen disputed that he had blackmailed or bullied Levenstein. He said he had seen him on the Sunday morning clearing out his office and he told Levenstein that he did not expect Ms Marcus "to take any prisoners" at the meeting scheduled for early Monday morning and he expected Levenstein to be constructive during the meeting (1919).

37.21 On Monday, 25 June 2001, the Reserve Bank (including Marcus and Wiese) met with EY (G404) and then with EY and Investec (G407). At the first meeting, Strydom reported on what had emerged during the Investec due diligence and said that the Regal Holdings board had agreed to collapse 45% of the capital and that the Mettle deals had to be collapsed, reducing the assets from R1.6 bn to R1 bn. At the second meeting, Investec informed the meeting of its offer; Cohen reported on behalf of the Regal

Holdings board in similar terms to Strydom. Strydom said that EY would withdraw their consent to the preliminary results published on 30 April 2001. A cautionary statement (G409) was drafted and issued to the public (Q107) and to shareholders (R11). Moneyweb carried the story (S18). Business Report reported on the Sasfin bombing (S19). The share price slumped from 190c to 45c (S30.2).

37.22 On Tuesday, 26 June 2001, there was widespread media coverage in Business Day (S20, S22) and Business Report (S24). The Investec deal was announced (Q106). The Reserve Bank, including Marcus and Wiese, met with DT (Store) (G410). It was agreed to put the option of curatorship to Cohen. The Reserve Bank and DT thereafter met with Cohen and Scheepers (G411). Cohen said that the share price had "plunged" and that R250m had been withdrawn "following the announcement made by Mr J I Levenstein that he had not resigned but was away for a few days". (Diesel confirmed the figure of R250m in evidence (2649).) Cohen applied for curatorship. Investec applied to the Reserve Bank to buy the book (loans, overdrafts, mortgage loans and instalment sale debtors) for R350 m (G414). The Reserve Bank made application to the Minister of Finance for the

appointment of Store. The Minister of Finance agreed, with reservations (R1 – R10).

37.23 On Wednesday, 27 June 2001, the curatorship was announced (Q105, S25); Store produced his first report (R15) and Regal Bank had a meeting with DT and EY (K(3)59. The resignation of Levenstein and the sale to Investec were "finalised".

37.24 Van der Walt was of the view that at the board meeting on 24 June 2001, EY had undertaken that they would withhold any decision on withdrawing their consent until Regal Bank had obtained tax advice. Contrary to that undertaking, EY announced their withdrawal of consent the following day, Monday, 25 June 2001 (2582, 2600).

37.25 Oosthuizen said he was "very taken aback by the fact that [EY] had done that, it was a unique action by an auditing firm, I do not know of any precedent to that" (3012).

Chapter five

The role of the external auditors, Ernest & Young ("EY")

A Statutory Framework

Companies Act, 61 of 1973

38 In terms of s286(3) the annual financial statements of a company shall, in conformity with generally accepted accounting practice, fairly present the state of affairs of a company and its business at the end of the financial year concerned and the profit or loss of the company for that financial year and include at least the matters prescribed by Schedule 4 of the Act and comply with any other requirements of the Act. The Accounting Practices Board issues statements of generally accepted accounting practice, known as "big GAAP". Practices which are not codified and contained in a statement may also constitute generally accepted accounting practice, known as "little gaap". But as indicated in circular 8/99 dated December 1999 issued by the South African Institute of Chartered Accountants companies are required to report in terms of GAAP. A company should disclose the precise basis of its accounting policy (ie GAAP or gaap) in its financial statements: Henochsberg on the Companies Act, p 551. S300 provides that it is the duty of the auditor of a company –

(a) to examine the annual financial statements and group annual financial statements to be laid before its annual general meeting;

(b) to satisfy himself that proper accounting records as required by the Act have been kept by the company. Section 301(1) provides that when the auditor of a company has complied with the requirements of, and has satisfied himself as to the matters stated in s300, and has carried out his audit free from any restrictions whatsoever, he shall make a report to the members of the company to the effect that he has examined the annual financial statements and group annual financial statements, and that in his opinion they fairly present the financial position of a company and its subsidiaries and the results of its operations and that of its subsidiaries in the manner required by the Act.

Banks Act, 94 of 1990

39

39.1 In terms of s63(1) the auditor of a bank –

(a) shall, whenever he furnishes, in terms of s20(5)(b) of the Public Accountants' and Auditors' Act 80 of 1991, the Public Accountants' and Auditors' Board ("the Board") with copies of the report relating to an irregularity or suspected irregularity in the conduct of the affairs of the bank for which he has been

appointed, also furnish the Registrar of Banks with such copies and particulars, and;

(b) shall in writing inform the Registrar of any matter relating to the affairs of a bank of which such auditor became aware in the performance of his functions as auditor and which, in the opinion of the auditor, may endanger the bank's ability to continue with a going concern or may impair the protection of the funds of the bank's depositors or may be contrary to the principles of sound management (including risk management) or amounts to inadequate maintenance of internal controls.

39.2 The regulations issued on 26 April 1996 in terms of the Act provide that the annual financial statements of the bank and of a controlling company shall be compiled in accordance with generally accepted accounting practice as required by s286(3) of the Companies Act, 1973 (reg. 4(1)). The consolidated annual financial statements of a bank or a group of banks shall be prepared in accordance with generally accepted accounting practice (reg. 5(3)). The auditor of a bank shall annually, in addition to any other report that a bank is statutorily required to obtain from him, report on the bank's financial position and the results of its operations (reg. 6(1)). The auditor shall annually report on any significant weaknesses in the system of internal

controls relating to financial regulatory reporting and compliance with the Act and the regulations, which came to his attention while performing the necessary auditing procedures to enable him to furnish the reports required under sub-regulation (2). (Reg. 6(3)).

Public Accountants' and Auditors' Act no 80 of 1991

40 Section 20(5)(a) provides that if any person acting in the capacity of auditor to any undertaking is satisfied or has reason to believe that in the conduct of the affairs of such undertaking a material irregularity has taken place or is taking place which has caused or is likely to cause financial loss to the undertaking or to any of its members or creditors, he shall forthwith despatch a report in writing to the person in charge of that undertaking giving particulars of the irregularity, at the same time drawing the attention of such person in charge to the provisions of paragraphs (b) and (c) and requesting him to acknowledge receipt of such report in writing.

In terms of s20(5)(b) unless within 30 days after an auditor has despatched such a report, he has been satisfied that no such irregularity has taken place or is taking place or that adequate steps have been taken

for the recovery of any such loss so caused or for the prevention of any such loss likely to be so caused, he shall forthwith furnish the Public Accountants and Auditors Board ("PAAB") with copies of the report and of any acknowledgement of receipt thereof and reply thereto and such other particulars as he may deem fit.

Chapter 13 of the King Report

41 The King report points out that the audit provides an independent and objective check on the way in which the financial statements have been prepared and presented by the directors exercising their stewardship to the stakeholders. An annual audit is an essential part of the checks and balances required and is one of the cornerstones of corporate governance. Generally accepted accounting practices should only be departed from in the interest of fair presentation. Whilst auditors have to work with management they have to do so objectively and consciously aware of their accountability to the shareholders. The highest standards of business and professional ethics are to be observed by the external auditors.

42 The Registrar testified that as a fact the Reserve Bank relies "very heavily on the external auditors …. They are providing us with independent opinion of the affairs of a bank, specifically as far as the solvency of a bank is concerned and adherence to prudential requirements" (3203, 3221).

B The 2000 Audit

The interim results for 1 March 1999 – 31 August 1999

43 The interim results were published on 22 September 1999 (010009), without the approval of the audit committee which met only on 29 September 1999 ((K2)205.2). Levenstein's justification was that the bank was keen to get its results into the market as soon as possible as "the year-end results, the share price had been badly hit" (1553).

Materiality

44 The materiality level was originally set at R5m (010015), revised to R5.5m (010036) and just before finalisation of the audit was R6.9m (020041). The materiality level increased despite the reduction in the before tax profits of Regal Holdings which were originally estimated at R80m and finally determined at R55.5m.

The branding dispute between EY and Regal Bank for the 2000 financial year

45

45.1 In early April 2000 EY identified an issue relating to the recognition of income derived from branding. On 6 April 2000 Wixley, the chairman of EY, Coppen, a technical partner, Strydom and Van Heerden, the engagement partner, met to discuss the issue (Van Heerden 1021).

45.2 Following on that meeting, and in preparation for an audit committee meeting to be held on 12 April 2000, a document containing "Audit Issues" was drafted by EY. In regard to branding it was said:

> "It is extremely unusual for the measurement of income to be based on an internal valuation. This is because internal valuations will always be subject to some or other bias. Thus income is normally based on transactions with third parties, or by reference to an active market. If none of the above bases is available to establish a value of the income, a conservative approach should be used, and no income recognised until the profits are realised in a transaction with a third party.
>
> … It is not accepted practice to recognise income from investments upfront. Rather the income should be recognised when an investment is sold to an independent party." (010126).

45.3 On 10 April 2000 a board report was prepared by EY (010103) and on 11 April 2000 Van Heerden and Wixley met to discuss the audit committee meeting which was to take place the following day (Van Heerden 1026).

45.4 The audit committee met on 12 April 2000 (010133). There is no minute of the meeting. Van Heerden's recollection is that the "Audit Issues" document was discussed. No agreement could be reached between EY and Regal Bank on the correct treatment of a number of issues, including income from branding (Van Heerden 1027). Buch was a director of Regal Holdings and Regal Bank from inception. He was chairman of the audit committee in 2000. He recalled the audit committee meeting of 12 April 2000. According to Buch, Van Heerden said that EY "had a problem with the branding income". Buch was shocked that EY had raised the issue at such a late stage. The dispute could not be resolved at the meeting. After a lengthy discussion, it was agreed that independent valuations would be obtained (2713-4).

45.5 On the following day, 13 April 2000, Wixley and Van Heerden met with Levenstein. At the end of the discussion, the EY representatives remained unconvinced by Levenstein's views on the valuation of the branded entities and what income was to be taken into account (Van Heeden 1028).

45.6 On 14 April 2000 Van Heerden sent a fax to Levenstein in which he referred to the significant outstanding issues, one of which was "the finalisation of the branding accounting treatment and evaluation thereof". Levenstein was informed that Thayser, an EY partner in the corporate finance division, would place a value on the branded investments (010133). Levenstein objected to Thayser. Cooke of the corporate finance department of EY then replaced him.

45.7 On 14 April 2000 Levenstein replied to Van Heerden's fax of the same day. Levenstein asserted: "I confidentially (sic) and emphatically assert however that the conceptual ideology and philosophy regulating and supporting my financial model neutralises the material issues which your correspondent crystallises into focus from an EY perspective. The model creates certain new financial and economic fundamentals that transcend traditional norms." (010135). Levenstein did not complain that EY had raised the dispute too late.

45.8 The preliminary results for 2000 were due to be released on or about 18 April 2000 (KPMG 168). The results are signed by Lurie and Levenstein. They were not released. The original results had been described as "audited" but were changed to

"preliminary" when the branding income dispute with EY arose (Levenstein 1366).

45.9

45.9.1 There are no minutes of a board meeting in April 2000.

45.9.2 Levenstein alleged in evidence that the results of 18 April 2000 were approved by the board at a formal meeting (1364-8).

45.9.3 Lurie said that if there was no minute of a meeting, then no meeting had taken place (2460-1).

45.9.4 Buch came with a new version, which was that there was a board meeting on 12 April 2000, after the audit committee meeting of that day (2715), but he could not explain why the meeting of the board on 26 March 2000 (K(2) 219) was the 51st meeting and that the meeting on 24 May 2000 (K(2) 225) was the 52nd meeting (2721). Buch testified that the board was informed about the branding income dispute. The board nevertheless approved the financial results in the hope that the issue with EY would be resolved in the bank's favour, i.e. if EY retracted their opposition to the branding income, the results would be approved. The board had in its possession a document similar to the "preliminary results" dated 18 April 2000.

The board approved earnings per share of 79.96 cents (2717-2723, 2765).

45.9.5 Diesel could find no minute of a board meeting in April 2000 or May 2000. His recollection was that there was an audit committee meeting and a board meeting on the same day at about that time "and it was made known to the directors at that point in time that there was a dispute over the branding income" (2659).

45.9.6 The evidence of Davis was heard in camera after a successful application in camera. In essence, the submission on behalf of Davis, was that he is a "mental wreck" as result of abuse that he was subjected to at the bank, particularly at the hands of Levenstein. A letter by a clinical psychologist was handed in, in which the view was expressed that "due to his intensive anxiety, severe stress and being emotionally labile, … if he's exposed to a public enquiry and the media, it would be detrimental to my patient and his present treatment protocol." Davis became very emotional during the application and at one time the commission stood down to enable him to recover.

At the time of the 2000 audit, Davis, who is a chartered accountant, was the chief financial officer and group

company secretary (2832). One of his functions was to keep minutes of board meetings.

45.9.7 He testified that during the course of December 1999 an employee of EY spoke to him about the branding income item on the trial balance sheet, at that time in an amount of about R20m. Levenstein instructed him to provide details of the income to EY "only if they signed a non-disclosure agreement because he referred to it as our recipe for Coke". Davis never saw EY again during the course of the interim audit. EY left the branding income issue "until the death of the audit" (2835).

Davis attended the audit committee meeting of 12 April 2000. He described the disagreement between Levenstein and Van Heerden in detail. Davis added that the meeting ended on the basis that independent valuations would be obtained and the announcement of the results would be postponed for three weeks.

He had no recollection of a board meeting that day. Had a board meeting been held, he would have attended and kept minutes (2840).

45.9.8 He was the creator of the financial part of the preliminary results of 18 April 2000 (KPMG 168) and Levenstein the author of the commentary (2843).

45.10 At the time the results of 18 April 2000 were to be published, Levenstein, and at least the other members of the audit committee, knew that EY had not approved the results. EY raised their contentions about branding income at the audit committee meeting on 12 April 2000; EY met with Levenstein on 13 April 2000 and on 14 April 2000 correspondence about the dispute was exchanged. Yet the bank was so determined to publish its version of the results, that it instructed printers to produce a glossy one page set of results without the approval of its auditors. The disputed branding income made a massive difference to the results: in 1999 other income was R17.6m whereas in 2000 as at 18 April 2000 it was R76.5m (Levenstein 1423).

45.11 On 4 May 2000 EY received Cooke's valuations. He valued the business of RMI at R20.5m, of which Regal Bank's 25% share was worth R5.1m (010172) and he placed a nominal value of R1m on Kgoro, of which the bank's 25% share was worth R250 000 (010161 – 010181).

45.12 The amount Levenstein included in branded income was R55m. Justification for R50.8m, was given in a document in his handwriting as follows:

RMI	R23m
Kgoro	R15m
Medsurge	R8m
Protea Health	R4.8m
	R50.8M

(KPMG 37)

45.13 On 4 May 2000 Wixley, Van Heerden and Heeger of EY met with Levenstein. Extensive discussions did not resolve the dispute. EY informed Levenstein that if the Regal figures were not amended, EY would qualify their report. Levenstein said they should do so. EY offered to resign (Van Heerden 1031).

45.14 On 4 May 2000 Levenstein wrote a letter to Wiese in which the dispute with EY was foreshadowed (N26). Annexures were enclosed. (The annexures may be those at N39 – N69.) He stated: "E&Y are struggling to blend Old Economy accounting standards with my model's sophistication" .

45.15 On 5 May 2000 the BSD and EY met (E41) EY explained the Regal branding model and referred in particular to the bank's 25% share in RMI and 25% share in Kgoro. EY said that there was disagreement between them on the valuation of the investments and how these were to be accounted for in terms of

GAAP. Wiese telephoned Levenstein and said that if EY qualified the 2000 financial statements, he would appoint a curator. The discussion ended on the basis that KPMG would be appointed in terms of s7 of the Banks Act to give a view.

45.16 On the same day Levenstein wrote a letter to Van Heerden of EY (N105) in which Levenstein motivated his position. The letter ended as follows: "Every effort was made to 'work around' your inability to accept the complexities of my various structures and products. My attempts, for example, to accommodate your unjustified and iniquitous draft audit opinion. This was only done to protect and safeguard shareholder and depositor interests. We remain committed to our financials. We strictly reserve all our rights".

45.17 On the same day Levenstein wrote a letter to Wiese in which he contended that EY had not applied themselves professionally; that he was confident that KPMG would share his sentiments; and that there was absolute agreement that he had created a significant banking product that could revolutionise the banking industry (N11).

45.18 On 9 May 2000 Levenstein was interviewed by Alec Hogg on radio in which he was asked about the "franchising business that caused so much trouble at your last financial year". Levenstein explained the branding model and said: "…. the important thing is that track record has been achieved, we've confirmed value in

most cases by converting equity. We received equities in lieu of cash, we've converted them into cash, so that issue has been resolved completely" (S1).

45.19 On 14 May 2000 Levenstein wrote a letter to Wiese in which he repeated his views with comments from other commentators that "the qualification envisaged by Ernst & Young is totally unjustified and indeed irresponsible". He added: "Regal and myself remain totally committed to the year-end financials approved unanimously by the Board and the Audit Committee." (E78). (At the meeting on 5 May 2000 EY had told the BSD that they had been unable to convince the audit committee, at two meetings, that the branding income should not be allowed.)

45.20 On 15 May 2000 KPMG produced its s7 report (E56; DT309).

KPMG was given an undated document signed by Levenstein (KPMG163) in which Levenstein gave the make-up of the amount of R55m which he claimed should be included in "other income" in the audited financial statements (E60). The amount of R50.8 m was included in the amount of R76 595 841 given as "other income" in Regal Holdings preliminary results dated 18 April 2000 (but not released) (KPMG 168).

The report described the branding model (E61).

The model was measured against AC000. In regard to "income" it was found that the model met all relevant criteria, save one, namely:

Standard:	KPMG's comments:
"It can be measured in monetary terms with sufficient reliability.	There is however uncertainty surrounding the value which in turn cast doubt over the reliability of the value. The reason for this uncertainty arises from a lack of being able to verify with certainty the basis on which the branding fee was calculated. In addition, independent valuations performed in support of two of the transactions, are based on projected cash flows, which are in turn dependent on a number of assumptions largely due to the lack of a financial track record in support of these branded entities …" (E71)

In regard to "fair value" the criteria of AC111 §09 was: "The amount for which an asset could be exchanged or a liability settled between knowledgeable willing parties in an arms length transaction".

KPMG came to the conclusion that the amounts reflected in the financial results did not meet the current requirements of South African GAAP (E76).

The conclusion was: "Given that the two new start up ventures, RMI and Kgoro, do not have proven track records as at 29 February 2000, it is difficult to assign an absolute fair value to the licence fee underlying these transactions. This in turn indicates that we are unable to measure fair value with certainty" (E74).

45.21 On 15 May 2000 the BSD held four meetings (I think in this order): with KMPG; with Levenstein and KPMG; with EY; and with EY, Lurie and Buch (E42 – E52). For present purposes it is sufficient to emphasise:

- Levenstein refused to back down and was willing to take the consequences of EY qualifying the 2000 financial statements (E53) (Levenstein 1407);
- Lurie and Buch initially supported Levenstein, but when faced with the threat of deregistration of the bank (E46) agreed that the financial statements could reflect EY's valuations (E48). The amount EY allowed for branding income was R5.5m (010227).

45.22 On 16 May 2000 Regal Holdings published on SENS its "audited" results for the year ended 29 February 2000 (E55.1) In

regard to the "banking model", a great deal was said, including the following: "The leverage of our statutory framework to bridge the gap between a bank and business concern, creates a new financial instrument: and by overlaying the profile of the bank onto a business platform, the risks inherent in the created instrument are dramatically reduced. … Prevailing accounting standards do not have the flexibility to account for the model… The model has and will create enormous wealth for shareholders … Regal are in disagreement with the Auditors regarding the disclosure and treatment of certain investment securities created by the model … The diversions between old and new accounting standards manifests in a so called valuation difference of R30,5 m, after taxation, reducing earnings per share by 30 cent. The board approved the year-end results reflecting earnings per share of 79,96 cents. At the request of the Registrar of Banks we have agreed to defer the valuation difference."

45.23 Van Heerden was out of town on the night of 15 May 2000 and the day of 16 May 2000. During the day on 16 May 2000 he responded to a message to call Martin of BSD. Martin told Van Heerden that Regal intended publishing the results that evening and that he had a final draft of what was to be published. Wixley, Strydom and Van Heerden met at about 20:00 that night. They had a poor copy of a fax which Martin had sent them. Before they could obtain a more legible copy, the Regal Holdings results were released onto SENS (010244.03) (Van Heerden 1041 – 1043).

45.24 After receiving the Business Day of 17 May 2000 in which the audited results were published by Regal Holdings (010292) Wixley wrote a letter to Regal Holdings (010296). A number of comments were made. The first was that the draft announcement was not sent to EY by Regal Holdings prior to its submission for publication, as EY had requested, nor was it considered at the formal meeting of the audit committee. After setting out a number of other concerns the letter asked for a correcting statement that should clearly state that:

"- the figures set out in the announcement are in accordance with generally accepted accounting practice and have the full approval of the directors;

- the changes to the financial statements were made following discussions with the auditors and were not made at the request of the Registrar of Banks; and

- the references to earnings per share of 79.96 cents in the announcement should be ignored."

45.25 EY's objections to the financial statements of Regal Holdings published on 16 May 2000 were these:-

-The results should not have been described as "audited" as EY had not approved the results (Van Heerden 1049).

- In the Income Statement the earnings per share were shown as 50.01 cents (010292) whereas in the commentary on the

"Banking Model" it was said that the "Board approved the year-end results reflecting earnings per share of 79.96 cents".

- The final paragraph of the section on "Banking Model" contained these allegations: "All expenditure incurred to generate this income has been written off in the current year. We estimate that approximately R18m of the expenditure relating to the new model has been accounted for on this basis. Generally accepted accounting practice allows for the setting off of this expenditure against the income deferral." The truth is that not all the expenditure had been written off: R6m had been deferred (Van Heerden 1052, 010227).

45.26 On 18 May 2000 a report appeared in Business Report: "Regal's share reels on news of accounting disagreement" (E55.2) Levenstein is quoted as saying that he had been prepared to accept an exceptional qualification to the results, but Wiese had threatened to close down the bank if Levenstein accepted the qualification as a bank could not release qualified accounts.

45.27 On 19 May 2000 Regal Holdings published this retraction on SENS (010300): "Regal directors together with our auditors Ernst & Young wish to place on record that the 50 cents per share referred to in the results was arrived at in accordance with generally accepted accounting practice and that further reference

to the amounts of 79.96 cents per share were based on alternative valuation and accounting methodologies".

45.28 On 23 May 2000 Levenstein wrote two letters to Wiese (N15 and N20) in which he explained the branding model and attacked EY for being negligent "(possibly even grossly negligent) and unprofessional" in various respects. The one letter ends off as follows: "While I obviously cannot prescribe to you regarding your role as the Registrar of Banks, I trust that your observations of Ernst & Young's conduct during this sorry saga will prompt you to ensure that Ernst & Young are prohibited from being appointed as statutory auditors of any South African bank in the future." (N16).

45.29 At a meeting between the SARB and Regal Bank on 23 August 2000 Lurie said that "Regal would no longer rely completely on [the branding] strategy. … The non-executive directors were confident with the current status of the branding strategy." (E161).

45.30 There were four material differences between the preliminary results of 18 April 2000 (KPMG168), which were not released, and those that were released on 16 May 2000 (E55.1):

a) in the former the "other income" was R76 595 841while in the latter it was R27 045 839, a difference of R49 550 002;

b) in the latter the section on “Banking Model” was added (which incensed EY), a day after the meetings between Regal and the BSD;

c) operating expenses were R35.3m in the preliminary results of 18 April 2000 and R29.3m in the results of 16 May 2000, the difference being R6m, the precise amount of expenditure which was deferred (010227).

d) The word “audited” was removed from the results of 18 April 2000 and replaced with “preliminary” when the branding dispute arose with EY (Levenstein 1395) and yet the results of 16 May 2000 were described as “audited” even though EY had not seen them before publication and the operating expenses had been changed. Levenstein testified that he anticipated the approval of EY (1452). The word “audited” was deliberately chosen (1453). Levenstein said that on the night of 15 May 2000 Davis made contact with Van Heerden of EY and Van Heerden agreed to all the entries (1455-6). Davis said Van Heerden had not agreed to anything (2848).

45.31

45.31.1 Branding expenditure of R18m could not be substantiated. Levenstein said that EY subsequently audited the amount (1410). The only expenditure

referred to in the bank's documents was the R9m in Davis' handwriting (010237) of which R6m was recognised by EY (010227). Levenstein alleged that Davis prepared an "analytical document" (1414, 1418, 1434, 1439). When faced with the handwritten Davis note, Levenstein said that the expenditure must have been R24m (1422). Lurie also testified that Davis had prepared "an analytical document proving the R18m figure" (2467). The coincidence that both Levenstein and Lurie should describe a document as "analytical" cannot be accepted. The probabilities are that they discussed the matter after Levenstein had given evidence and came up with that description.

45.31.2 Levenstein alleged that he did not know that the R6m of expenditure had been deferred (1421, 1437). He wanted to defer the whole R18m but did not do so because EY did not make contact on 16 May (1426, 1434). He did not know that if the R6m had not been deferred, the bank would have made less profit in 2000 than in 1999 (1436-8). Later in his evidence, Levenstein said that Davis would

have discussed the R6m with him and he would have given Davis guidelines (1454).

45.31.3 Lurie said he did know about the deferral of R6m and the reduction in expenditure from ±R35m to ±R29m: he was told by Levenstein or Davis (2466).

45.31.4 Buch testified that "with hindsight", as he had not seen the 16 May 2000 results until they were published, he now knows that R6m branding expenditure was deferred; that there was further expenditure because of the R18m referred to in the "banking model" section in the 16 May 2000 results; and that R24m expenditure must have been incurred (2756-7). He first applied his mind to the results late on 16 May 2000 or on 17 May 2000. He never received any documentary proof of the R6m, R18m or R24m expenditure (2757-8). He had never seen the Davis note (010237) before (2772). Buch was shown the note and asked if that was a proper way to arrive at expenditure. His answer was "No, I do not think that is a very sophisticated way of

calculating the expenditure that was incurred" (2773).

45.31.5 On 15 May 2000, according to Davis, he was requested to contact Van Heerden of EY. He left a message on Van Heerden's cell phone. Van Heerden returned the call. Davis mentioned the issue of expenditure. Van Heerden said he was away at a two day conference and he did not know if he could arrange for someone from EY to go to the bank the next day (2846). Van Heerden did not agree to anything in that conversation (2848). There was no discussion about the R6m expenditure deferral (2875).

45.31.6 On the instructions of Levenstein, Davis prepared a document dated 15 May 2000 which he sent to Van Heerden by fax or e-mail on 15 May 2000 (030427). The document is important. The material part is quoted in full: "Please note the following in respect of the Branding income:-

a) The branding strategy represented a formal departure from conventional old economy strategies;

b) As a result of this change in strategy, corporate finance was closed down. Had Corporate Finance continued it would

have generated approximately an additional R6m in net income, through additional deal flow;

c) By pursuing the Branding strategy, the Bank changed its view on gilts, opting to invest in R100 m, instead of R200 m. At a 5% spread, the Bank relinquished the opportunity to generate an additional R3 m in interest turn;

d) Approximately R2m in costs were incurred in opening the growth gates, in order to support the brand model, through bringing in Neck Steen, the Syfrets 6 and the utilisation of Jeff's time and effort, etc;

e) Free-funding allocated to new buildings to house the model's growth resulted in lost interest income of approximately R2 m;

f) The growth in costs, in anticipation of the Branding model have been approximately R9m.

In summary, total costs of approximately R22m were incurred in developing and growing the banking model. On the basis that your valuation of R5.25m in respect of Kgoro and RMI is recognised in income, costs of approximately R20m should be removed as they pertain to the unrecognized portion of the branding income. The net effect is that R2m of expenses remained to be deducted against the R5.25m of branding income. On this basis, net income after taxation would drop by R16.8 m and eps by 16.5 cents."

45.31.7 Van Heerden had no recollection of seeing the Davis letter of 15 May 2000 on his return to office. While Davis did say that he sent the letter by e-mail or fax, no proof was provided of delivery in either form.

45.31.8 The information in the document was given to Davis by Levenstein, so testified Davis. Levenstein was looking for a R20m adjustment. Davis conceded that all the expenditure reflected in the document was not genuine expenditure, could not be recognised as expenditure, and he did not expect EY to agree to the figure (2856-2863).

45.31.9 On being recalled to give evidence, Levenstein denied that the letter was the "analytical" one he had referred to earlier (3473). He said that he could "remember seeing financial arithmetic arriving at the R18m figure" (3475). Levenstein agreed that at least one of the amounts which made up the R22m did not qualify as expenditure (3478).

45.31.10 According to Davis, the amount of R6m for deferred expenditure was given to him by Levenstein (2849). Davis did not know how

Levenstein had arrived at that amount (2849-50). He thought the figure was probably "designed to avoid releasing a profit warning" (2851).

45.31.11 The Davis note (010237), quoted in full in paragraph 47.3 hereof, was created on 18 May 2000 when EY sent Heeger to the bank to check the adjustments made in the results published on 16 and 17 May 2000 (2854-5). The calculation was done in that rough and ready way at the suggestion of Heeger (2856). Davis agreed that the amount of R9m, R6m of which was deferred, would not meet the requirements of GAAP (2865).

The section in the 16 May 2000 results "banking model" was Levenstein's insertion, according to Davis (2867). Davis denied that the figure of R18m branding expenditure came from him (2868).

45.31.12 Davis' evidence was that some time after the audit Levenstein, when he "was trying to build up some sort of case against Ernst & Young" requested Davis to lie. Levenstein later repeated the request. Davis could not recall the content of the lie: "he asked me to say that Andre

[Van Heerden] had accepted the deferral or that he had said he was going to send somebody over" (2870-2873).

45.32 Levenstein emphasised that branding income was recognised by EY, applying GAAP, even though it was for a much lower amount (R5.5m) than he would have wanted (R50.8m)(1472-3).

45.33 The audited results published on 16 May 2000 were significant for what was not disclosed. The new section on the "banking model" by implication was critical of EY, promised "enormous wealth for shareholders" and stated that the divergence between the old and new accounting standards had led to a valuation difference of R30.5 m, after taxation. But what was not said was that:

- the bank intended to reflect "other income" of R76.5 m instead of the R27 m actually shown;
- EY had threatened to qualify the financial statements if Holdings insisted on reflecting the higher amount;
- the dispute related to projected income from branding, a vital element of the banking model;
- KPMG was appointed by the Reserve Bank to review the valuations;
- KPMG supported EY and went further and opined that no value should be attached to the branded entities;

- Lurie, Levenstein and Buch had agreed the previous day, to the EY valuations.

45.34 Levenstein admitted in evidence that Regal Holdings was obliged to comply with GAAP. He contended that Regal Holdings did comply with GAAP (1322, 1328, 010047). Levenstein does not appear to be contending that EY and KPMG (and now DT) were not applying South African GAAP correctly. And that is a major problem for him. They were not negligent if, according to GAAP, the income could not be recognised and the assets increased in respect of the branding entities.

45.35 Louw of KPMG explained that Regal Bank's stated accounting policy for unlisted investments was to account for them at cost, less provisions for any losses due to a diminution in value. In line with that policy, Levenstein attempted to persuade EY that the investment in the branded entities, such as Kgoro, was at cost. To arrive at the cost of the fee, in the form of a shareholding in the branded entity, he was obliged to value the entity, such as Kgoro, which he did by obtaining the SPV valuations (576-8; 597).

45.36 According to Louw, the purpose or main driver of the branding model was to increase the income of the bank, which might translate into a re-rating of the share price (591, 595, 605).

45.37 Louw was of the opinion that because income could not be measured "in monetary terms with sufficient reliability", it was inappropriate to recognise *any* income. EY nevertheless recognised R5.5m branding income in the 2000 financial statements (010227).

45.38 The original branding strategy appears not to have been pursued after 16 May 2000 (but branded income continued to be included). Levenstein said: "… tactically because of the madness of year-end 2000 we decided to minimise the emphasis on branding …" (1545). EY's valuations at year-end 2001 of branding entities were Medsurge R2.5m, Regal Protea Health R1m, Regal Virtual Solutions nil, Kgoro nil (110204, 110205). At year-end two of the branded entities may have been insolvent, Kgoro with an accumulated loss of R3.7m (150265) and Regal Virtual Solutions, which had a negative equity of R1.2m (110286). Levenstein devoted his energies to the Mettle deals: in 2000: RMI July/August; Stone Manor 30 August; Regal Securities 30 August; Kgoro 11 October; Metshelf 1 27 October; 93 Grayston 17 November; and in 2001 the Metshelf 2 and 3 structures were put in place.

The R2m payment to Levenstein

46

46.1 On 29 December 1999 Levenstein wrote a letter to the directors of Regal Holdings and the bank and submitted "that my efforts for Regal from inception to date justifies a cash bonus of R2m and a structural redesign of my restraint share allocation". In addition to the cash bonus he requested 5m shares. Lurie recorded in handwriting on the letter that the request was approved by the non-executive directors (DT(1)174). There is no record of a discussion at a meeting of the board of directors and consequently no approval by the board of directors: see minutes of meetings on 26 January 2000 and 26 March 2000 (K(2)214-219). (The 5m shares, for various reasons, were never issued to Levenstein).

46.2 On 27 January 2000 Levenstein recorded the approval of the non-executive directors in a letter of that date (DT(1)176).

46.3 On 14 February 2000 Regal Holdings, Regal Bank and Levenstein signed an agreement in terms of which Regal Holdings and Regal Bank agreed to pay Levenstein R2m and to issue 5m shares on or before 31 March 2000 as a restraint of trade payment (DT(1)177). (The original restraint agreement was signed on 7 September 1995 (G56.1).) Levenstein said the "underlined basis, the rationale … refers to goodwill essentially"

(1498). The R2m, although a restraint payment, was allocated to goodwill in the books of the bank and was called goodwill on the balance sheet (Levenstein 1505).

46.4 On 2 March 2000 a further agreement was concluded in terms of which, inter alia, Levenstein became entitled to receive dividends before the issue of shares (DT(1)183). The bank paid Levenstein R2m on 15 February 2000 (E38.1).

46.5 EY were not aware of the letters of 29 December 1999 and 27 January 2000 at the time of the 2000 audit (Van Heerden 1058). It follows that Van Heerden did not know that the R2m was described as a "cash bonus" nor did he know about the 5m shares.

46.6 In the EY document prepared in April 2000 which dealt with "Audit Issues" it was stated under the heading, Disclosure of Intellectual Capital: "The fixed assets include an amount of R2 139 067, being a restraint of trade payment (R139 067) and intellectual capital (R2m) paid to the CEO, Jeff Levenstein. … Lump sum payments to directors fall within the disclosure requirements of the Companies Act. The Act requires disclosure of the full amount in the year the payment is made. The appropriate accounting treatment will depend on the substance of the payment. In this case, as the payment has been made for past

services rendered, the payment should be expensed in full when the agreement has been concluded." (010127).

46.7 Subsequently EY recorded that "Regal has subsequently agreed to disclose this [the R2m payment to Levenstein] as directors' emoluments and expense the asset over 20 years" (010148). Levenstein denied that there was an agreement to treat the payment as director's emoluments (1518).

46.8 While the R2m payment was reflected in EY's working papers as intellectual property, there was no reference at all to the amount in the financial statements (Van Heerden 1067; 010279.2). It must have been included in fixed assets of R39m (010270, Levenstein 1560). However, goodwill and intellectual property were not shown separately in the captions for fixed assets (130077.2). Accordingly the payment of R2m was hidden in the financial statements. No reader of the financial statements would have known that Levenstein had received R2m.

46.9 The payment of R2m to Levenstein was not shown as directors' remuneration in the financial statements. The total directors' remuneration shown was R2.1m (010281).

46.10 In the directors' remuneration notification which Levenstein signed all he disclosed was a basic salary of R413 000 (020273).

46.11 At an audit committee meeting of 9 November 2000 (K(2) 249.2) it was falsely recorded that the R2m bonus had been passed by a resolution on a round-robin basis.

46.12 Lopes was told by Diesel that R2m had been paid to Levenstein. Lopes saw documents on the desk of Brian Levenstein which recorded the bonus and the allocation of 5m shares. Lopes was stunned. Levenstein told his colleagues that they were not to receive any bonuses as he was the only one entitled to do so because he brought in 90% of the income. The board of directors did not approve the payment of R2m or the allocation of shares (Lopes 2023 – 6). Levenstein told Diesel, according to Lopes, "to secure all the deposits that were held in treasury of Jack Lurie and Ronnie Buch and that they were not allowed to trade those accounts until they had signed his agreement" (relating to the R2m bonus and 5m shares) (2024).

46.13 Nhleko's version of the R2m bonus and 5m shares is found in paragraphs 8.2 and 8.3 hereof.

46.14 Lurie testified that he called a breakfast meeting of the non-executive directors on 25 January 2000. He had earlier sent a memorandum (U1.1) containing excerpts of Levenstein's letter of 29 December 1999. No one "dissented to addressing the so-called imbalance" (2494-5). On the next day he received Nhleko's letter

of 26 January 2000 (U58). He regarded the payment of R2m and the allocation of 5m shares as a "restraint", "to address the goodwill imbalance that prevailed from inception" (2492). Lurie said that the executive directors later agreed to the bonus and shares (2498, 2503). He could not explain how the approval of a "cash bonus" by the non-executive directors came to be converted into a "restraint" payment (2499 – 2500).

46.15 None of the directors examined by the commission could explain why the R2m bonus and agreement to allocate 5m shares were not recorded in the 2000 statutory financial statements.

46.16 Diesel testified that the R2m bonus and 5m allocation of shares were not discussed at a board meeting. His approval was never sought and never given. He became aware of the allocation of shares in about December 1999 and the R2m bonus when it was paid 15 February 2000 (2661).

46.17 Buch testified that at the breakfast meeting on 25 January all the non-executive directors agreed that the terms and conditions on which the bonus and allocation of shares would take place should first be established (2780). Levenstein was "very upset … that there had not been an automatic acceptance of the situation". So it was decided to discuss the matter the next day to let Levenstein "settle down". On the following day, all the non-executive

directors agreed that the shares would be restraint shares and that the R2m bonus was "going to be based on performance going forward in the future" (2781).

46.18 Buch agreed "with hindsight", that the allocation of 5m shares to Levenstein should have been disclosed in the 2000 statutory financial statements as there was an obligation on Regal Holdings to issue the shares (2789). It is estimated that at the date the obligation arose the shares were worth R36.5m.

46.19 J Pollack could not remember the R2m bonus and 5m share allocation (3018).

46.20 Kaminer's evidence was that he did not approve the R2m bonus "not at all" (3032). At a breakfast meeting the 5m shares were discussed. The directors wanted a meeting with Levenstein to discuss the allocation, but Levenstein did not arrive "and that was that" (3032).

46.21 Radus testified that he was told by Levenstein that the non-executive directors had agreed to the payment of R2m and the allocation of 5m shares. He and Krowitz signed the restraint agreement after having checked with Lurie that the non-executive directors had approved of the agreement. He thought that payment and the allocation was done on the basis of a restraint (3154-6).

R6 m deferred expenditure

47

47.1 EY allowed R6m of expenditure to be deferred on the basis that it related to "accomplishing the branding concept" (010227).

47.2 The first time EY knew of the deferral was on the morning of 17 May 2000 when the EY team of Wixley, Strydom and Van Heerden saw the legible copy of the 2000 financial statements in the Business Day. The deferral had never been discussed with EY before. EY was faced with a fait accompli. EY decided that the deferral was not material, hence this statement in the EY letter of 17 May: "Although we are not in full agreement with the changes, the differences, in our view, do not materially affect the fair presentation of the company's results or of its financial position, and subject to appropriate disclosures in the annual financial statements we are prepared to issue an unqualified opinion on these figures." (010296).

47.3 The amount of R6m was post de facto justified in this way: "At half year expenses were R13.2m. Without increasing infrastructure to incorporate model expenses for year would be ± R26.5m. The expenses were 35.4m therefore effective branding model ±9m, R6m adjustment to expenses debited to pre-payments." (010237).

47.4 The deferral was material because without the deferral, the profits for 2000 would have been less than the profits for 1999. The income before taxation for 2000 as published on 16 May was R55.5m. The figure for 1999 was R50.2m (010292).

47.5 AC000 § 89 provides: "An asset is recognised in the balance sheet when it is probable that the future economic benefits will flow to the enterprise and the asset has a cost of value that can be measured reliably." Neither of the requirements are met. Firstly, the future economic benefits had already been recognised in the income of R5.5m. Secondly, the expenditure on branding could not be reliably measured.

"Deposits from other banks"

48

48.1 In the notes to the 2000 financial statements, note 5 (130075) showed deposits from other banks in the sum of R164m.

48.2 The deposits were in fact those made by a Mettle SPV in terms of the Tradequick and RVM structures.

48.3 As neither Mettle nor SPV is a bank (Prinsloo 2980) note 5 is an inappropriate disclosure.

48.4 Statements were handed in by Diesel (KD64-5, 3094) which reflected the depositor as "BOE Bank". Diesel explained that "at

that point in time … there was a relationship between Mettle and BOE … I think that Mettle was a subsidiary of BOE" (3094-5).

48.5 Mettle was not a subsidiary of BOE as at 30 June 1998, according to the annual financial statements of Mettle: BOE owned only 30% of Mettle.

49 The failure of the board to approve the "audited" financial results of 16 May

49.1 There is no minute of an audit committee meeting or a board meeting of either Regal Holdings or Regal Bank approving the "preliminary results" of 18 April 2000 or the "audited results" of 16 May 2000.

49.2 Levenstein contended in evidence that the board of Regal Holdings and the audit committee approved the 2000 financial statements before EY raised their difficulties with branding income (1330, 1334, 1364). EY raised the dispute only shortly before the intended release of the results, necessitating a cancellation of the IES presentation and a postponement of the publication of the results (1331-3). (The correspondence reveals that Levenstein did not raise this complaint at the time.)

49.3 The results that were published were those that went out on SENS on 16 May 2000 and on 17 May 2000. Levenstein contended that the board approved those results (1336) although the board did not meet. There must have been a round-robin resolution (1337), which might not have been in writing (1338). (Art 80.1 of the articles of association of Regal Holdings requires a round-robin resolution to be in writing, signed by a quorum of the directors, and inserted in the minute book (D78).) Levenstein did not know whether the "round-robin process ran its course entirely" (1340). The results could not be delayed again. It would have been catastrophic. There would have been a run on the bank (1340-1). Levenstein was nevertheless adamant that the financial results were approved by the board (1342) but he could not say which directors approved the financial results (1345). The audit committee too did not meet to approve the results (1352). Levenstein could not explain why a minute or written resolution was not subsequently produced after the crisis of 16 May was over (1354).

49.4 The evidence of Lopes was that on 15 May 2000, after the Regal Bank delegation returned from Reserve Bank meetings, J Pollack, Kaminer, Lurie, Buch and Lopes agreed that branding income of R55m should not be included in the 2000 financial statements.

Buch was opposed to the inclusion of the section "Banking Model" in the document which was being worked on (KPMG170). Levenstein nevertheless insisted that it should be included.

Davis told Lopes, according to Lopes, that EY had approved the results that were to be published later that night of 16 May (2033). Lopes was led to believe that Davis was "drafting up what that expenditure was and submitting it to Ernst & Young" (referring to the R6m deferred expenditure (2034)). There was no board meeting and no audit committee meeting to approve the results (2030 – 2031).

49.5 At the meeting Lurie and Buch attended with BSD on 15 May 2000, Lurie undertook to discuss branding income with "the board of Regal" (E47). Yet Lurie did not call a meeting of the board of either Holdings or the bank on his return to the bank on that day or the next day (16 May 2000). He could not explain why he did not do so (2443). Nor could Lurie explain why he did not realise that Levenstein's judgment was suspect. After all, Levenstein was willing to have the bank closed down, so to speak, rather than to agree with SARB, EY and KPMG. All Lurie could say was "I think he lived this bank 24 hours a day, he was very, very committed" (2451).

49.6 Lurie alleged in evidence that he spoke to all the directors on 16 May and that they informally agreed to publication of the results (2453-4), even though he could not recollect whether the directors had even seen the results (2455, 2462). With hindsight, he thought he should have called a meeting or obtained a written round-robin resolution (2463). He contacted all the directors who were not at the bank, including Nhleko. Buch was at the bank. All the directors agreed to the results (2487).

49.7 Diesel was not involved in any way on 15 and 16 May 2000 in approving the results. He was trying to do damage control; he concentrated on his areas of responsibility. He was not aware of the R6m deferral in expenses (2657-8).

49.8

49.8.1 Buch's account of what happened at the meeting of 15 May 2000 with the Reserve Bank does not differ materially from the minute of the meeting. His evidence, further, was that when he and Lurie left the meeting to return to Regal Bank the only adjustment which would be made was to reduce the branding income from R55m to R5.5m (2726-30).

49.8.2 On his return to the bank, it took him "a couple of hours" to convince Levenstein to accept the R5.5m branding income "which we did do eventually" (2731-2). Those at the meeting (at which Levenstein was present) discussed deferring the expenditure which had been incurred in deriving the branding income (2733). Davis was contacted and told to discuss the matter with EY (2733-4). Davis was mandated to agree the amount with EY (2741). Buch's testimony was that an informal meeting of the audit committee took place the night of the 15th of May 2000 and that he and Levenstein were present. The other member of the committee, Slender, was away and could not be contacted. There was no time for a formal meeting (2751).

49.8.3 On 16 May 2000, Buch was not at the bank, so he testified. He was at work. He told management that if he was needed they should contact him (2735). He had no contact with anyone at the bank that day (2739).At about 13:22, after the results had gone through SENS, he received a fax (KPMG 170.1) of the results signed by Lopes and Davis (2736-8). He did not attend an audit committee meeting or a board meeting or sign a round-robin resolution or approve the results in any way that day (2739).

49.9 J Pollack was a non-executive director of the bank and Regal Holdings from inception until 31 December 2000. He is 81 years old. He suffers from memory loss. He could not remember the events of April/May 2000 (3016-7).

49.10 Kaminer was an alternate director to Schneider. After Schneider's resignation, he became a non-executive director of Regal Bank and Regal Holdings. He resigned on 31 December 2000. He is 78 years old. He could not remember whether there was a board meeting which approved the 2000 results; he could not remember that period, but he thought "they did approve it" (3026-7).

49.11 Radus could not remember whether he approved the 2000 results. He was not involved with the events of the night of 15 May 2000.

He was not even sure if he was at the bank on 16 May 2000. He could not remember the events of that day (3113-8).

The 2001 Audit

50

50.1 EY audited Regal Holdings, Regal Bank, the Incentive Trust and the Shareholders Trust for 2001. The audits of the trusts was conducted for the first time.

50.2 On 4 September 2000 the audit committee met ((K2)243.2). The committee, consisting of Buch, M Pollack and Levenstein, approved the interim results for the six months ending 31 August 2000. EY were not invited to the meeting, contrary to banking industry practice.

50.3 On 5 September 2000 the interim results were published (010408) while the s7 review was taking place. An increase in "other income" from R27m (for the year ended 29 February 2000) to R33.4m (for the six months ended 31 August 2000) was shown. In regard to earnings it was said: "Among Regal's many financial innovations is the franchising of the Regal name to organisations that stand to reap enhanced benefits from the application of that brand to their operations. In the year to 28 February 2000, the income earned from Regal's franchising structures was deferred, pending the establishment of a reasonable track

record. Certain of these structures have since achieved the requisite track records and, accordingly, the relevant realised fee income has been included in the interim figures."

50.4 On 21 September 2000 EY wrote a letter to the directors of Regal Holdings (010413) raising a number of concerns: "To our knowledge, no audit committee meeting was held to approve the interim report, nor has the accounting treatment of the franchising structures for the half-year been discussed with us. … It is a matter of considerable concern to us that:

- The interim results were issued without the apparent approval of an audit committee meeting.
- Statements were made to the press by your directors alleging that differences with our firm had been resolved without prior discussion with us.
- The accounting policy set out in the previous financial statements do not appear to have been complied with in the interim report."

50.5 On 28 September 2000 EY, represented by Wixley and Strydom, met with Regal Holdings, represented by Levenstein and Buch. It was agreed that Regal Holdings would not publish financial statements or make an announcement in regard to financial statements without EY being involved and that EY would be invited to all audit committee meetings (Strydom 696).

50.6 In its working papers of 29 November 2000 EY identified as "internal control considerations" the 2000 branding dispute

between the bank and EY which "brought into question the integrity of management" (140123). The dominance of Levenstein introduced the risk that "management override may occur … negating the effect of the internal controls" (140124). The risk of fraud was said to be "quite high" (140154).

50.7 On 30 November 2000 EY finalised its planning board report for submission to the audit committee. Overall materiality for the year ending 28 February 2001 was assessed to be R6m (110020). A factor which was taken into account in arriving at that amount was "the higher risk associated with the loss of senior members of staff during the year" (140083). One of the risk areas referred to in the planning board report was "the recognition of income from Regal's branding entities" (110013).

50.8 On 8 December 2000 the audit committee approved the EY planning board report (K2) 259).

50.9 On 25 January 2001 EY submitted its engagement letter to Regal Holdings (110025). The letter was signed on behalf of Regal Holdings by Cohen on 14 February 2000. In the letter it was stated: "As auditors of the group our objective (and our duty under the Companies Act) is to examine the annual financial statements presented to us by the directors, and then to report to the shareholders. As directors, you are responsible for the maintenance of proper accounting records and the

preparation of annual financial statements which fairly present the financial position, results of operations and cash flows of the group in conformity with generally accepted accounting practice and in a manner required by the Companies Act. … To enable us to fulfil our audit responsibilities, you will provide us with full access not only to all accounting records, but also to other documents such as minute books, share registers, statements, correspondence etc." Included in EY's "terms of business" was the following statement: "Our work will be conducted in accordance with Statements of South Africa Auditing Standards and will be planned and performed to enable us to obtain reasonable assurance that the financial statements are free of material misstatement".

50.10 On 31 January 2001 the audit committee met. EY was present. The letter of engagement was handed to Cohen. The audit was to commence on 17 February 2001 (110150).

50.11 On the same day the board of Regal Bank met (110043). Cohen and Oosthuizen were appointed to the board and it was noted that Van der Walt was to be appointed to the board. It was stated that the Africa Consulting Group had been appointed to keep and distribute minutes of all meetings. Price Waterhouse Coopers were appointed internal auditors.

50.12 On 28 March 2001 the audit committee met (110198). EY was present. It was noted that Scheepers had been appointed a non-executive director of Regal Bank and Regal Holdings with effect

from 1 April 2001 and that Zarca had been appointed group financial director and a director of Regal Bank and Regal Holdings with effect from 1 July 2001. EY tabled Appendix A, a document setting out issues identified by EY, the response of management, and the resolution of the issues. Appendix A was updated from time to time and presented to various audit committees thereafter.

50.13 On 12 April 2001 the draft financial statements were discussed at an audit committee meeting (110224). Income before taxation was shown as R115.8m. EY required substantial adjustments to the figures presented. An updated appendix A was tabled (110253, 110235). Levenstein testified that the adjustments required by EY (110366) and agreed to at the audit committee meeting of 12 April were not due to error but in order to scale down profitability: the adjustments were "orchestrated" between Cohen and Strydom. The audit committee meeting was "purely theatre" (1645). Yet Levenstein conceded that one major adjustment was necessary, namely, an adjustment for R26.7m for "overprovision of dividends to be received on preference share agreements and under approval of interest to be paid on associated deposits (1647). Cohen said that the figures were not "orchestrated". When Strydom expressed the view that the profit

was too high, Cohen said that it was “out of the bounds of reality” and that instead of a 80% - 90% growth in earnings, the maximum should be 30%. When Strydom subsequently produced the list of adjustments referred to earlier, Cohen accepted them (1962 – 1965).

50.14 On 25 April 2001 the profit announcement as tabled by management was approved by the audit committee. Income before taxation was R71.5m (110353, 110342), a reduction of R44.3m from the R115.8m, after EY’s adjustments had been taken into account.

50.15 On 26 April 2001 Regal Holdings provided EY with a letter of representation (110391). The letter is signed by Cohen as audit committee chairman and Levenstein as CEO. The letter contained a number of factual allegations which were subsequently found to be false by EY. One of the errors which Levenstein conceded was that the bank was shown as having a 25% shareholding in Kgoro, whereas the shares had been sold on 11 October 2000 (1666). The shareholding was also incorrectly shown in the presentation to analysts (110400).

50.16 The audited results for 2001 were published on 30 April 2001 (110399). At about the same time a presentation was made to analysts (110401).

50.17 At an audit committee meeting on 21 May EY reported that it would provide an unqualified audit report subject to the finalisation of a few outstanding issues (110413).

50.18 On 25 May 2001 the FM article "Betting on a brand" appeared (110463), followed by another article in the FM on 1 June 2001 "Surprising surge in price" (110460).

50.19 Regal Holdings issued a second letter of representation on 13 June 2001, signed by Cohen only. Unlike in the first letter, the representations in this letter were qualified by the phrases: "to the best of our knowledge and belief" and "based on undertakings given by management" (110483).

50.20 On Friday, 22 June 2001, Strydom was requested to join Cohen at the meeting with Investec.

50.21 On the following morning, representatives of Regal Bank, EY and Investec met at the bank. The due diligence commenced at 12:00. During the course of the day Strydom and Van der Walt had a discussion about the possible acquisition. It is common cause between Strydom and Van der Walt (2590) that Van der Walt mentioned four matters to Strydom: -

- the sale of 8m Regal Holdings shares to Mettle was not a true sale in that the "risk and reward" of the shares remained with Regal Bank;

- the purchase of Regal Holdings shares by the Incentive Trust and the Shareholders Trust was not good practice;
- Regal Holdings had bought the 15% shareholding of Worldwide through Pekane in terms of s38(2) of the Banks Act;
- After year-end, two bundles of R10m worth of preference shares had been bought, the effect of which was that the risk and reward remained with Regal Bank.

Strydom was so concerned at these disclosures that he requested the chairman of EY, Wixley, to join him. On the Sunday, Hourquebie, the CEO of EY, joined Wixley and Strydom at the bank. EY attended the board meeting that night.

50.22 On Monday, 25 June 2001, Strydom met with the BSD. EY withdrew its consent for the publication of the audited financial results. The reasons were contained in the letter EY sent to Regal Holdings on 9 July 2001 (110488):

"It appears that certain information was withheld from us during the course of our audit and that certain representations made to us were untrue. …

Without limiting the extent of our re-assessment, we specifically refer to:

- A number of structured transactions in which the ultimate effect of the transactions might be different from that presented to us.
- Regal Bank financing the purchase of some 45% of the shares of Regal Holdings. We believe that it might be difficult to demonstrate

that each of these advances were given "in the ordinary course of business" in terms of Section 38 of the Companies Act … Regal Bank might also be in contravention of Sections 37, 38 or 78 of the Banks Act regarding the funded shares …

- The possibility that one or more material irregularities and/or undesirable practices may have been committed which required to be reported by us under the Public Accountant and Auditors Act and the Banks Act, respectively."

D The misrepresentations to EY

51 Pekane

51.1 Pekane Investments (Pty) Ltd ("Pekane") was the registered holder of 15,5m shares in Regal Holdings (180235). Pekane was a subsidiary of Worldwide African Investment Holdings (Pty) Ltd ("Worldwide").

51.2 EY was aware of the facts set out in § 51.1 above.

51.3 Van der Walt informed DT on 17 August 2001 that:

"2. Regal Bank apparently repurchased the above shares from Pekane on 29 December 2000 for the consideration of R60m. The funding for this shows as an interest bearing overnight loan in Treasury.

6. A number of Bank staff members were entitled to shares in a holding company in terms of various service agreements. Due to the unavailability of

shares, these were never issued. A letter signed by the Chairman and CEO was sent to the abovementioned staff members ceding the right to any dividend receipts on the Pekane shares to them in lieu of their entitlement in terms of their service agreements." An example of a letter was attached to the Van der Walt memorandum. In the letter an undertaking was given to an employee that the bank would procure the transfer to the employee of 5 000 Regal Holdings shares, the registered holder was described as Pekane and the beneficial holder was said to be the Shareholders Trust. (180233-4).

51.4 Prior to 23 June 2001, EY was not aware of the purchase of the Regal Holdings shares by Regal Bank on 29 December 2000 for R60m.

51.5 The facts as disclosed to EY at the time of the audit were the following:

- EY requested Regal Bank to furnish information on, and the recoverability of, "Phekani Inv. (overnight loans) R60.2m" (150027). On 12 March 2001 Cohen gave EY this response, prepared by Davis: "Phekani – this is secured by shares with a market value of approximately R70m."(150034 read with 150030.2). EY thereafter recorded the transaction in a schedule of overnight loans with Treasury in these terms:

"Phekani Inv: on loan: R67 400 805: This secured by shares with a marked value of approximately R70m" (180128).

- Strydom's evidence was that he did not make the connection between Phekani Investments and Pekane, the investment arm of Worldwide.
- At a board meeting of Regal Holdings on 31 January 2001 Levenstein reported that "the return of the Worldwide shares would create an opportunity to distribute smaller parcels in blocks of perhaps 50 000 to loyal Regal supporters at a small discount to the market price …" ((K3)3). Strydom understood from that minute that "Regal was placing the shares … being a conduit" and was not a buyer of the shares (Strydom 827).

51.6 Strydom discussed the purchase of the Regal Holdings shares by Regal Bank on 29 December 2000 with Cohen some time after the conversation with Van der Walt. Cohen repeated what Van der Walt had said on 23 June 2001, namely, that the acquisition was one in terms of s38(2) of the Banks Act. On 11 July 2001 Cohen furnished EY with a copy of an opinion written by Prof. Vorster on 20 December 2000.

51.7 In the draft 2001 financial statements in the "Analysis of Share Register" Pekane was reflected as a major shareholder of 15.5m shares, representing 15% of Regal Holdings shares (130149). The financial statements were approved by the board of directors.

51.8 Strydom testified that if he had been told the truth during the audit process he would have reported the matter to the BSD because, in effect, Regal Bank would have owned 30% of Regal Holdings shares and that was not good business practice. It was "a fairly incestuous investment" (Strydom 839). He would have ensured that any interest that Regal Bank earned on the loan to Pekane was not recognised as income in the financial statements of Regal Bank as it would have been "income earned in effect from yourself" (Strydom 840).

51.9 Levenstein's recollection of the agreement with Worldwide was that the bank agreed to pay below the market price, R3.90 per share instead of R4.80 or so, and Worldwide ceded to the bank their dividends, while Worldwide remained the beneficial shareholders; the agreement was not a "buy-back". It must have been a written agreement (1710).

51.10 Levenstein said that the statement in the letter addressed to the employees (18234) that the beneficial shareholder was Shareholders Trust was a brilliant strategy devised by Prof.

Vorster (1712). However, when the point was made that his earlier evidence had been that the bank was acting as a nominee for a designated buyer, he said the terminology was wrong (1713).

51.11 Levenstein said that it would have been Diesel that described the payment of R60m as a loan; he would not have been aware of the technical nuances of s38(2) of the Banks Act (1720). The incorrect recording of the transaction was "of no consequence" (1724). Davis did not understand the complexity of the transaction (1729).

51.12 During December 2000 Diesel was contacted by Levenstein at home while he was on leave. He was informed by Levenstein that Pekane had offered the Regal shares for repurchase in terms of the original sale agreement. The price was below the current market price. Diesel, as treasurer, was asked by Levenstein to ensure that there was R60m cash available to pay the price. On returning from leave, in early January 2001, Diesel noticed that a loan had been created in the name of Pekane. Levenstein told Diesel to leave the loan in place as a sale of the shares to a third party was imminent (Diesel 2627-9).

51.13 Levenstein handed in a document dated 22 December 2000 which had been sent to the directors of Regal Holdings and Regal Bank

(E365). It purported to explain the agreement with Worldwide. The document was prepared by Levenstein (1752). It contained the statement that the Worldwide shares had been "acquired" at R3.90 per share; the "borrower" of the R60m was "Jeff Levenstein and Ian Radus"; and the security was a pledge of approximately 16m Regal Shares. The period of the funding was up to 6 months.

51.14 Levenstein testified that he and Radus would not have been the true borrower. The true borrower was the "designated third party" (1749-51). The true purchaser was the designated third party (1751), despite the statement that the shares had already been acquired.

51.15 At the time, however, in late December 2000, there was no designated third party. The negotiations with Hanover RE and Mettle in 2001 came to nought. No one ever stepped into the shoes of Regal Bank. To all intents and purposes, it had paid R60m for the Worldwide shares, which it acquired, albeit with the intention to transfer them into strong hands.

51.16 Nhleko handed in correspondence between Worldwide and Lurie in terms of which Worldwide offered its Regal Holdings shares to Regal Bank on 1 December 2000 (U1.4) for R5.50 per share. On 12 December Lurie, acting on behalf of Regal Bank made a

counter offer at R3.90 a share for a total price of R60.2m (U1.6), which Worldwide accepted (U1.7) (Nhleko 2314).

51.17 According to Levenstein, the shares were delivered to Regal Bank (1759) after payment of the R60m to Worldwide.

51.18 There was a loan of R60m, not to Pekane (as reflected in the bank's records), but to the designated third party (Levenstein 1762).

51.19 Cohen was the person who sought advice from Prof. Vorster on 20 December 2000. He asked Vorster if the Worldwide shares could be bought "pending on–sale to a third party or into the market" (Cohen 1930). Vorster furnished a written opinion (E369). The material facts contained in the opinion are: "Worldwide held 16% of the issued shares in RTBH in respect of which other shareholders held a pre-emptive right. This right was exercised, the share certificates were delivered together with transfer forms signed in blank as to the transferee and the purchase price was paid with funds made available by Regal Treasury Private Bank Ltd ("the Bank"). The shares are now in the possession of Regal nominees, a wholly-owned subsidiary in the RTBH group. The funds advanced by the bank had been booked as a loan, presumably to the shareholders who exercised the pre-emptive rights. It is the intention to place the shares in the

market within 6 months from the date of purchase." (110479). In evidence Cohen admitted that, save for the first and last sentences, all the facts were incorrect. He could not explain how that had come about (1934).

51.20 The opinion ended on this note: "Section 38(2)(c) provides, however, that the shares may be registered for a period not exceeding six months in the name of a company controlled by the bank (i.e. Regal Securities or Nominees) or in the name of an employee of the bank if it is necessary to facilitate delivery to the purchaser.

I would suggest that, unless the Registrar consent to the holding of the shares in the present form pending the sale (which he is entitled to do), the shares be registered in the name of two or more employees of the bank in compliance with s38(2)(c)" (E372).

51.21 Cohen believed that the letter sent to the directors (referred to in §51.13) was drafted in accordance with the opinion (1936) but the advice given was not correctly executed (1941). The letter to the employees in which the Shareholders' Trust was described as the beneficial owner of the Pekane shares was also incorrect (1944).

51.22 Lurie's understanding was that Pekane sold the shares to the bank for R60m to be "housed in entities for a period of six months to give effect to a transfer … into some strong hands" (2544-5). The board approved the purchase at a meeting or by round-robin resolution (2545).

51.23 Rod, who worked in the treasury, was instructed to generate a cheque in favour of Standard Bank Stockholders and "to generate it in the form of a loan account". It was probably Kay who gave him the instruction. He carried out the instruction (3166).

51.24 Radus' understanding of the Pekane transaction was that "Regal would buy back the Pekane shares … and they would be housed in some sort of company or something or other pending the purchase by a proposed purchaser of those shares. … I think Regal must have paid for the shares." (3136).

51.25 Diesel testified that the interest on the Pekane "loan" was R5.36m, increasing the opening balance of R60.27m to R65.64m (3088).

51.26 Davis, however, testified that the debit in Regal's books of R6m in respect of the RMI dividend was transferred to the account on Levenstein's instruction. Davis conceded that this was not a valid entry (2878-80).

The 8 m shares sold to Mettle

52

52.1 The knowledge that EY had prior to 23 June 2001 about the 8m Regal Holdings shares sold to Mettle was the following:

- In the DT s7 review of 31 October 2000 it was said that the loans of R36m to the Shareholders Trust were secured by Regal Holdings shares worth R17.6m. No provision or adjustment was made by the bank for any potential write-off. The review continued: "The CEO and management are confident that there is no permanent diminution in the value of the shares and that no provision is necessary. He also informed us that a substantial number of shares will be placed with a new shareholder at a price of between R5 and R6 per share." (DT(1)30).
- EY was informed by the bank that 8m Regal Holdings shares had been sold to Mettle during late 2000 for R5.50 per share, a premium of about R1 per share. EY assumed that that is the transaction that is referred to in the DT s7 review. EY was assured that it was an out-and-out sale (Strydom 841).

- In Appendix A, which was tabled at various audit committee meetings, this was noted:

  "5. Sale of 8m Regal Shares at R5.50 by the Shareholders Trust to Mettle:

  Bank Supervision informed us that Mettle indicated in an article in the Financial Mail of 1 December 2000 that they did not have a stake in Regal and pointed out that the sale was merely a security provided by Regal for the back leg of a structured finance transaction." (110218).

- In the first letter of representation dated 26 April 2001 Regal Holdings made the following representation:

  "That the sale of 8 million Regal shares at R5.50 by the Shareholders Trust to Mettle was unconditional and that the shares are registered in Mettle's or its nominee's name. (110395).

- In the second letter of representation the same representation was made but preceded by the words: "based on representations by management" (110487).

- The draft 2001 financial statements reflected Mettle Securities Ltd as the owner of 8 million shares (0130149).

- On 11 May 2001 EY sent an e-mail to Davis in which Davis was asked, in regard to the 8 million shares sold to Mettle: "Was this transaction part of the normal operations

of the trust i.e. placing shares in strong hands, or was it part of one of the structured deals with Mettle? If it was part of the structured deals, which one was it part of?" The answer given by Davis was: "The transaction was simply a means of achieving the objectives of the trust, i.e. moving shares from weak to strong hands. I think SARB's concern, arises from an FM article, where Hein Prinsloo of Mettle was misquoted." (180097). Davis said that he obtained that information from Levenstein (3426).

- At an audit committee meeting held on 28 March 2001 it was minuted that the 8m Regal shares sold by the Shareholders Trust to Mettle were unconditionally registered in Mettle's name (110200).
- In dealing with the BSD queries arising from the DT s7 review, EY on 14 May 2001 accepted Regal Bank's representations: "The Mettle transaction forms part of the normal operations of the Rand Shareholders Trust i.e. 'to allocate shares from weak hands into strong hands'" (110445).

52.2 On 23 June 2001 Van der Walt told Strydom that the 8 million shares were placed in a structure behind preference shares and that the 8 million shares were in a portfolio and that the portfolio was part of a preference share structure. Strydom understood Van

der Walt to mean that the risk and reward in regard to the 8 million shares remained with the bank (Strydom 844). On analysing the Metshelf One transaction Strydom came to the same view as Van der Walt.

52.3 Levenstein in evidence said that Scheepers had given Strydom "an insightful, complete, categoric, immutable insight" into the Mettle portfolio. He alleged that it was an arms-length transaction and that the risk and reward did not lie solely with the bank (1740-1741). Scheepers testified that all he gave Strydom was a "very superficial" insight.

Metshelf 2 and 3 Structures

53

53.1 Van der Walt told Strydom on 23 June 2001 about two lots of R10m that Regal Bank put in a structure to finance the purchase of Regal Holdings shares after the year-end. Strydom subsequently identified the structures at Metshelf 2 and 3. Van der Walt told Strydom that the structures were normal in the market place and there was nothing illegal about them. (Strydom 852).

53.2 Strydom, however, was concerned that the transactions were not good banking. Taking into account the other transactions that Van der Walt described to him, Strydom came to the view that Regal Bank in effect owned 45% of Regal Holdings shares.

54 EY's concern was that if the 45% shareholding was cancelled, the share capital and reserves of approximately R441m would be reduced below the required R250m share capital. If the Mettle structures were not cancelled, on the calculations EY did, Regal Bank would move to a capital adequacy below the required 8% (Strydom 8454).

The recognition of branding income

55

55.1 EY concurred with the recognition by Holdings of branding income in the sum of R24m, made up as follows:

Regal Protea Health	R1 m
Medsurg	R2.5m
RMI	R20.5m
	R24m

55.2 The amount of R20.5m was the difference between the sale price of R26m and the amount of R5.5m recognised in the 2000 financial year (Strydom 919).

55.3 EY set off the amount of R20.5m against an amount of ±R20m in respect of a royalty agreement which it regarded as an onerous contract (Strydom 926).

55.4 At the time of the audit EY was not shown three of the agreements which made up the RMI structured finance deal: the preference share agreement, the security deposit agreement and the pledge and cession of securities. Had EY been shown those agreements, it would not have regarded the sale as an actual or real sale and it would have reversed the income of R20.5m and reduced the profit by R26m (Strydom 927).

56

56.1 EY concurred with recognition of R5.9m as income earned on preferent shares of R150m in New Heights in respect of the Kgoro deal. (140276, Strydom 933).

56.2 Fundamental to the recognition of the interest was proof that a deposit had been made. Regal Bank contended that Mettle had made the deposit. In a board report submitted to the audit committee, EY called for confirmation from Mettle "as to the existence of a R150m deposit held by them with Regal" (110361). As at the end of April EY had not received confirmation but assumed that the deposit had been made as it was "the opposite side of the R153m preference share investment. … At no time when we discussed confirming the deposit (with Mettle) with the audit committee or Jonathan Davis have they denied that it is a deposit." (140268). On about 27 May 2001 EY contacted Mettle and requested confirmation. Confirmation has never been received (Aitken 947).

56.3 What EY did not know was that the preference share agreement was part of a structured finance deal. EY did not have knowledge of the sale agreement and the call option agreement.

56.4 Had EY known the true facts, they would have realised that a deposit of R150m had not been made and they would not have

concurred with the recognition of income of R5.9m as there was no true sale.

57

57.1 EY concurred with the recognition of income of R5.2m on a value of R125.5m for Metshelf 106 preference shares (140276).

57.2 Unknown to EY, the underlying portfolio consisted of Regal Holdings shares. Had EY known the true facts, they would not have concurred with the recognition of the income (Strydom 943).

58

58.1 Regal Bank wanted EY to recognise income of R185m in respect of the forward sale contract of 93 Grayston Drive. The amount was "based on a R600 million maturity value and yield of 12.47%, the amortised value of the forward sale contract of 93 Grayston Drive is approximately R185,261,126.00". (160327)

58.2 EY informed the audit committee on 28 March 2001 that they required a valuation of the immovable property from an independent valuator (110199).

58.3 EY was aware of the sale of property and addendum but was unaware of the existence of the preference share agreement, the

put option agreement and the call option agreement (Strydom 962).

58.4 Regal Bank obtained a valuation from a valuer, De Vos, who placed a value of R144m on the property. One of the assumptions he made was that the property would be fully let. EY accepted the valuation.

58.5 In the board report EY reflected "other income" of R88m. That amount included R36.5m as "revaluation on 93 Grayston Drive". (110365).

58.6 In the summary of audit differences it was said that the following items had not been adjusted for and included:

	Balance Sheet	**Income Statement**
Onerous contract – no provision made	(20,463,573)	20,463,573
Over accrual for valuation of Regal Protea Health	(600,000)	600,000
Under accrual for revaluation of property	17,500,000	(17,500,000)
Net Effect:	**(3,563,573)**	**3,563,573**

(110366)

58.7 The total of R54m of the amounts of R36.5m and R17.5m was arrived at by deducting the cost of development of 93 Grayston (R90m) from the De Vos valuation (R144m). R36.5m of the R54m was appropriated to "other income" and R17.5m was set off against the onerous contract and the over accrual for revaluation of Regal Protea Health. Strydom conceded that, but for the onerous RMI contract, EY would have recognised another R17.5m in "other income" (Strydom 969). The set-off was a compromise between Regal Holdings and EY.

58.8 It follows that 93 Grayston contributed 41.4% of "other income" if R36.5m is recognised (and 62.5% if R54m had been recognised).

58.9 Taking into account the true nature of the 93 Grayston structured finance deal, EY would still have concurred with the recognition of the R54m but under another caption. In the income statement the R54m would not have been shown as "profit on financial instruments" but rather as "revaluation of investment property" (Strydom 972). In the profit announcement (110399) "financial instruments" were shown to constitute 41.46% of "non-interest income" of R88m.

58.10 Analysts would regard profit on financial instruments as more significant for a bank than a revaluation of immovable property (Strydom 972).

The impact on the preliminary 2001 Financial Results if EY adjustments were made

59

59.1 Prior to the publication of the profit announcement on 15 May 2001, management had contended for a profit of R115,8m, which EY had adjusted by R44.3m and reduced to R71.5m.

59.2 On EY's evidence, had full and honest disclosure been made to them the profit would have been reduced by the following adjustments:

	Rm
RMI: sale proceeds	20,5
RMI: 2000 valuation	5,5
RMI: Fee from Elul	2,7
Kgoro:	5,9
Metshelf:	5,2
Protea Health	,6
Interest reversed Pekane “loan”	1,2
	41,6

59.3 The profit of R71.5m, reduced by R41.6m, would have been R29,9m. But for the profit of R36.5m disclosed on 93 Grayston, the bank would have made a loss.

59.4 The profit on 93 Grayston of R54m should have been separately disclosed as a revaluation of immovable property and not disclosed as profit financial instrument.

59.5 This does not take into account:

- potential losses on advances to employees and directors totalling R34.8m (130119) to buy Holdings shares;
- the debit of R20m referred to in §86 hereof.

The impact on the interim results of 31 August 2000 if EY adjustments were made

60

	Rm
Profit before tax in announcement	49,5
Less:	
[A] 50% of errors rectified at year-end:	
• Overestimate of pref dividends	13,4
• Underestimate of depreciation	,3
• Bank expenses in Shareholders Trust	1,3
• Bad debt provision	4,0
[B] Reductions due to non-disclosure:	
• RMI: proceeds of sale	20,5
• RMI: 2000 valuation	5,5
• RMI: Elul fee	2,7
[C] Consolidation of Incentive Trust: elimination of interest to accord with year-end treatment	1,195
Subtotal	**48.8**
Total	**,65**

60.1

60.2 Had Regal Holdings accounted correctly at half year-end it would have had a nominal profit of ± R650 000.00.

60.3 This does not take into account:

- potential losses on advances to employees and directors and/or the Incentive Trust (±R18m) and potential impairment to the Shareholders Trust (±R18m) (DT(1) 30-32);
- the payment of R650 000 to Levenstein as “dividends” (which was included as a debit balance in creditors at 31 August 2000 instead of being written off (DT(1)28);
- advances to directors and senior managers in the amount of R2.6m (referred to in §90.1 hereof and DT(1)38).

Criticisms of EY

2000 Audit

61

61.1 EY itself, in the document of 12 April 2000, came to the conclusion that no branding income should be recognised: "… income is normally based on transactions with third parties, or by reference to an active market. If none of the above bases is available to establish a value of the income, a conservative approach should be used, and no income recognised until the profits are realised in a transaction with a third party. … It is not accepted practice to recognise income from investments upfront. Rather the income should be recognised when an investment is sold to an independent party". (The emphasis is mine.)

61.2 Cooke of EY thereafter did his valuations. He valued Regal Bank's 25% share of RMI at R5.1m and 25% of Kgoro at R250 000.00.

61.3 KPMG was appointed by SARB in terms of s7 to express a view on branding income. Their conclusion was that no income should be recognised.

61.4 EY nevertheless eventually recognised R5.5m.

61.5 No amount should have been recognised. True, it was a much smaller amount than the amount Levenstein wanted recognised

(R50.8m) but by recognising some income, as Levenstein pointed out, EY acknowledged that Levenstein could recognise income when it could not be reliably measured, whereas, in truth, the original EY view and the KPMG view were in accordance with GAAP, the standard to which Regal Bank ascribed.

62

62.1 Wixley, the chairman of EY, testified that he took the conduct of Regal Holdings about which he complained in his letter of 17 May 2000 "very seriously" (3462). It was for that reason that he forwarded the letter to the Registrar. He believed the necessary corrections to the financial results of 16 May 2000 (KPMG170) were made in the retraction by Regal Holdings on 19 May 2000 (010300)(3463).

62.2 Wixley said that EY was willing to accept the R6m deferral because, during the meeting he had with Van Heerden on 17 May 2000, their feeling was "that there was a basis for some small adjustment [R3m] and that viewed on balance the adjustment of 6m was not material to an appreciation of the financial results of the company or its financial position" (3466).

62.3 Wixley said that he was not aware whether EY "were happy with the statement that approximately R18m of expenditure relating to the new model

had been accounted for … I can only assume that at the time we believed that that was a reasonable statement" (3469-70).

63 On 17 May 2000, EY, instead of writing the weak letter of that date, should have notified Regal Bank and the Reserve Bank that they would persist in qualifying their results for these reasons:-

63.1 The agreement between the Reserve Bank and Lurie and Buch on 15 May was that EY's recommended R5.5m for branding income should be recognised.

63.2 When EY saw the results on late 16 May 2000 and early 17 May 2000, they realised that Regal Bank had changed the expenditure figures and that R6m of "branding expenditure" had been deferred.

63.3 The R6m deferral of expenditure was significant way beyond its quantum:

- the expenditure of R6m was deferred without EY's consent;
- the recognition of R6m expenditure was contrary to AC000 paragraph 89;
- the deferral had the effect of avoiding disclosure of a reduction in profits;

63.4 The objections which EY had to the financial statements of 16 May 2000 were all valid:

- the results should not have been described as "audited" as EY had not approved the results;
- in the income statement the earnings per share were shown as 50.1 cents whereas elsewhere in the document reference was made to earnings of 79.9 cents per share "approved by the Board";
- the statement that about R18m of branding expenditure had been written off in the current year was false, as R6m had been deferred.

63.5 EY knew that the branding expenditure was *not* R18m. The only document that EY saw was the Davis document in which he deduced, on the most speculative possible basis, that the branding expenditure was about R9m, R6m of which he deferred.

2001 Audit

64

64.1 At the meeting between BSD and EY on 12 February 2001 (F27), Martin emphasised that the main focus of the audit for the 2001 year would be the DT s7 review. A number of issues raised in the s7 review were dealt with in the meeting. Relevant for present purposes is that the relationship between Regal Bank and Mettle

was canvassed in various respects. EY was specifically instructed to review specific areas on behalf of BSD, including:

- "To review the transaction between Mettle Ltd and the trust …
- the rationale of the Mettle transaction;
- to review involvement of Mettle Ltd in the branding strategy;
- to review contractual and legal relationships between the bank and Mettle Ltd with regard to various transactions;
- to review the shares purchased off the market price;
- to determine the need for specific provisions;
- if the accounting treatment of this transaction was incorrect, Ernst & Young should disclose how it should be correctly reported." (F36).

It was minuted that Strydom said he would "visit Mettle to get the whole picture of the transaction and clarification on related issues before he could draw a conclusion on the Mettle transaction …" (F35).

64.2 At the audit committee meeting on 12 April 2001, the draft audited financial statements were tabled. It was minuted that "Ernest & Young requested more time to finalise the accounts and to clear outstanding issues … The proposed dates for the release and publication of the results was 2 May, but not later than 3 May … In view of this deadline, it was agreed that management and the auditors would expedite all unresolved matters that could delay the finalisation of the accounts." It was further agreed, according to the minutes, "that all outstanding issues pertaining to corporate governance, regulatory compliance and

internal controls be dealt with as a matter of urgency by management in consultation with the internal and external auditors" ((K3)106-7).

64.3 Cohen testified that included in the matters which EY and management were required to resolve were the R150m deposit from Mettle and that the 8m shares had been sold to Mettle (1969).

64.4 On 18 April 2001 the Reserve Bank wrote a letter to Cohen, in his capacity as chairman of the audit committee, requiring that various items be included in the year-end audit of Regal Bank. The list is similar to the one canvassed by the BSD with EY on 12 February 2001. Included in the list of items are the Mettle transactions, the financing of shares by the bank when purchased by the trusts and so on (F23).

64.5 At the audit committee meeting on 25 April 2001 (K(3)112) the group and bank audited financial statements as tabled by EY were approved, subject to minor adjustments. According to Cohen, that meant that the outstanding issues had been dealt with by management and EY (1970).

64.6 On 30 April 2001 the audited results for the year-end of 28 February 2001 were published (110399).

64.7 The meeting between EY and Mettle never took place. It was scheduled for 28 June 2001, but curatorship intervened. Had the meeting taken place before 30 April 2001, as should have happened, and had Mettle made full disclosure, Strydom could not have agreed to the publication of the audited results on 30 April 2001.

64.8 Van der Walt's evidence was that what he told Strydom on 23 June 2001, by way of off-the-cuff remarks, he had himself discovered over a period of time. Since February he had become suspicious about certain matters. He made investigations. He thought EY could, and should, have done so themselves (2591, 2601).

64.9 The evidence of Prinsloo of Mettle was that a meeting was arranged with EY somewhere in April or May 2001, which was cancelled by Levenstein. Prinsloo said that if EY had telephoned Mettle, EY could have "got all the contracts in one file" (2953, 2993). "And when anyone looks objectively at the preference share agreements, one should ask whether the Mettle SPV's had "any balance sheet? No. What is my security? It is an NCD from Regal. Simple, so you cannot show the two separate. Just a few questions would have showed that … If you know they have invested in a preference share, that is it. It is just the logical next question … What is my security" (2995-6).

64.10 Strydom's explanation for not seeing Mettle before 30 April 2001 was that it was not normal for an auditor to visit the suppliers of a bank and initially EY thought the documentation given to them by the bank was sufficient (3444, 3447). After the publication of the interim results, it became clear that certain information was not true, that made EY suspicious and hence their insistence on seeing Mettle (3445). The meetings that were arranged were cancelled and EY "had to insist that they be reinstated" (3447).

When it was put to Strydom that he had told the BSD on 12 February 2001 that he would visit Mettle, Strydom said that "we thought the easiest way was to see Mettle … Later on [we] decided that we had received the full picture" (3448).

65

65.1 Cohen's evidence was that when he met with Strydom on 14 February 2001 he pointed out to Strydom "this Pekane transaction or the s38(2)(c) transaction" (1974). Strydom's evidence was that it was only after he had spoken to Van der Walt on 23 June 2001 that Cohen told him that the acquisition was one in terms of s38(2) of the Banks Act and on 11 July 2001 Cohen furnished Strydom with a copy of the Vorster opinion of 20 December 2000.

65.2 EY's knowledge at the time of the 2001 audit about Pekane, in essence, was that Pekane, a subsidiary of Worldwide, was the registered holder of 15.5m shares in Regal Holdings and that and that there was an overnight loan of R60.2 m to "Phekani Investments", secured by shares with a market value of approximately R70m.

65.3

65.3.1 On 31 January 2001 at a meeting of the Holdings board Levenstein reported that "the return of the Worldwide shares would create an opportunity to distribute smaller blocks of perhaps 50 000 to loyal Regal supporters …" (K(3)(1)). Strydom testified that his understanding of that minute was that the bank would act as broker, not as purchaser and later as seller of Holdings shares (3451).

65.3.2 Strydom said that he did not make the connection between "Phekani Investments" and "Pekane" until after the profit announcement (3452). He was not aware that the security of shares of R70m was not investigated by EY. It was only on 23 June 2001 that he became aware that the shares were Regal Holdings shares (3452-3). When pertinently asked: "Should Ernest & Young not have investigated what the security was and what its value was?", Strydom replied:

"Yes … probably I think that Ernest & Young accepted the representation from Regal management too easily on that one" (3453). Strydom conceded that the "overnight loan" of R60m was a "very large exposure" (3453-4).

65.4 EY did not ask to see the alleged loan agreement, the alleged agreement of security, and what shares had been provided for security. They should have done so. They had been placed on their guard in the previous year in regard to the branding dispute and the publication of the financial results on 16 May 2001. This was not a client that deserved trust. Had EY made enquiries of the kind required, they would have realised that Regal Bank had bought Regal Holdings shares for R60m and that Worldwide was no longer a shareholder.

Critique of the Financial Statements of Regal Holdings for 2000 and 2001

The interim results of 31 August 1999

66

66.1 The audit committee did not approve the interim results. It met only on 29 September 1999, after the results had been published on 21 September 1999. EY attended the meeting.

66.2 The results (130042.1) had these significant entries:-

- Income before taxation was R40m for the six month period, compared to R50m for the whole previous year. The inference is that branding income was included. Davis testified that R21m in branding income was recognised (3429). At year-end the income before taxation was R55.5m.
- Debenture capital of R30m was shown. At year-end EY required the whole amount to be set off and therefore nil debenture capital was shown.
- Deposits showed an increase from R295m to R425m. Included in the latter amount were the amounts of the Tradequick (R100m) and RVM (R50m) transactions.

The results for 29 February 2000

67

67.1 The "audited" results published on 16 May 2000 are analysed in detail above.

67.2 The statutory financial results ("the glossies") (130043) are dated 16 May 2000 (130065). As at that date the board had not approved the results. The glossies were published in about September 2000. At no time after 16 May 2000 and before publication did the board on any occasion approve the glossies.

67.3 The financial statements were misleading in these respects:-

- In the Directors' Report it was said that the Incentive Trust was not operational at year-end whereas it was in fact operational and had been advanced R15m for the purchase of Regal Holdings shares to that value (020133).
- The allocation of 5m shares which Regal Holdings agreed to make to Levenstein was not disclosed contrary to paragraph 10 of the Fourth Schedule to the Companies Act.
- In the balance sheet pre-payments of R7m were shown. The amount of R7m included the R6m deferred branding expenditure. The amount of R6m was sufficiently significant to warrant accurate disclosure as deferred expenditure.

- The R18m expenditure referred to in the "banking model" section of the results published on 16 May 2000 was not dealt with at all.
- A deposit of R164m was shown (130075) "from other banks", whereas in truth at least R150m of the deposits had been made by Mettle SPV's, which were not a bank.
- Branding income of R5.5 should not have been recognised as it could not be measured in monetary terms with sufficient reliability.
- R6m of branding expenditure should not have been deferred as any expenditure on branding could not be reliably measured.
- The statement is made that "there are no significant concentrations of credit risk" (130077) whereas in fact Holdings was exposed to Mettle for at least R150m.
- Negotiable securities in an amount of R227m were shown (130077). Included in that amount were preference shares of R150m, which should have been disclosed in those terms.
- The R2m was in truth remuneration as it was a bonus for past services. It should accordingly have been disclosed as part of directors' remuneration.

- The earnings per share should have reflected fully diluted earnings per share, taking into account the obligation to issue 5m shares to Levenstein.
- Disclosure was made of "related party transactions", but no disclosure was made of moneys lent to related parties such as Levenstein Data, JL Associates, Forfin Finance and Shareholders Trust.
- The glossies purported to have been approved on 16 May 2000 (130065) whereas in truth they were never approved.

The interim results for 31 August 2000

68

68.1 The interim results were published on 5 September 2000 (010408), having been approved by the audit committee on the previous day (K(2)243.2) EY was not invited to attend the meeting.

68.2 The income before taxation was R49.5m. If the EY adjustments now contended for by EY had been made at that time, a nominal profit of R650 000 would have been made. In fact, if the further adjustments and potential adjustments were reflected a loss of

R2.6m (see §60.2 hereof) and a potential loss of R36m would have been shown.

The preliminary results of 28 February 2001

69

69.1 The preliminary results were published on 30 April 2001 (110399).

69.2 The profit was R71.5m. On EY's evidence, had full and honest disclosure been made to them, the profit would have been reduced by an amount of R41.6m, leaving a profit of only R29.9m.

69.3 This does not take into account:

- potential losses on advances to employees and directors totalling R34.8m (130119) to buy Holdings shares;
- the debit of R20m referred to in §86 hereof or the R6m in §51.26 hereof.

The solvency of Regal Bank

70 A solvency review was done by the curator during July 2001 and updated thereafter. The position at the time that Marshall of DT testified

on 24 August 2001 was as follows (Marshall 371 et seq; DT(2)552 et seq):

		R000
(1)	Shareholders funds (excess of book value of assets over book value of liabilities):	452 721
(2)	Less:	
	(a) Loss on Investec sale	-45 032
	(b) Related loans	-190 507
	(c) Provision: other loans	-27 710
	(d) Provision: inter-company loans	-38 865
	(e) Structured finance transactions	-105 156
	(f) Impairment of fixed assets	-25 830
	(g) Impairment of investments	-9 668
	(h) Sundry asset impairment	-12 638
(3)	Net recoverable asset value	-2 690

71

71.1 Ad paragraph (1): Shareholders Funds

Shareholders funds are made up of share capital and retained earnings less amounts distributed, for example, by way of dividends. The liabilities consist mainly of deposits.

71.2 Ad paragraph (2)

(a) Loss on Investec Sale

The amount of R45 m is the difference between the value of the advances book of R350m and the price of R305m paid by Investec.

(b) Related loans

The sum of R190m is dealt with earlier.

(c) Provision: other loans

Management made a provision of R15.5m for loans which were regarded as irrecoverable. DT reviewed about 93% of the advances book and came to the conclusion that the amount should actually be R43.2m. Accordingly, an additional provision of R27.7m was made. A number of

the loans were secured by Regal Holdings shares, which, at a nil value, rendered the security valueless.

(d) Provision: Inter-company loans

The management accounts of Regal Bank reflected loans to related parties, most of which were subsidiaries of either the bank or Regal Holdings:

	Rm
Regal Securities	25,3
Regal Fund Managers	7,1
RMI	1,0
Regal Treasury Trust Services	1,4
Regal Outsourcing	0,7
Regal Asset Management	1.1
Other inter-company loans	2,0
	R38,9m

The related parties were not able to repay the loans. It did not appear that the bank could continue as a going concern and hence the related parties could not continue to operate.

(e) Impairment of fixed assets

The sum of R25,8m was made up as follows:

		Rm
(i)	Technology (Sempres)	14,2
(ii)	Intellectual capital	1,7
(iii)	Sundry impairment	9,9
		R 25,8m

(i) On the assumption that the bank could not continue as a going concern, the technology which the bank had acquired from Sempres Ltd was regarded as impaired to the extent of R14.2 m.

(ii) Management informed DT that the amount of R1.7m was possibly the sum of R2m paid to Levenstein which had been amortised.

(iii) On the assumption that the bank would not continue as a going concern, the remainder of the fixed assets were impaired. For example, furniture, fittings and computer equipment were impaired by 50% and restraints of trade by 100%.

(f) Impairment of investments in branded entities and other institutions

(i) A value of R900 000 was ascribed to the investment in 18m Sempres shares.

(ii) The investments in the branded entities Medsurge (R350 000), Protea Health (R2.4m) and Regal Virtual Solutions (R750 000) were impaired as no buyers could be found for the shares. An investment in furniture and art of R3.2m was regarded as being worth R1.6m, leaving an impairment of R1.6m.

(iii) An overnight loan of R5m to Sempres was secured by shares worth R600 000, leaving an impairment of R4,4m.

(iv) An amount of R7m was invested in the Regal Guilt and Hedge fund. After winding up the fund R6.1m was realised, leaving an impairment of R900 000.

(v) The Mettle portfolio held shares in Absa and Stanbic at a market value of R2.3m.

(vi) An investment in a United States company, Bright Spark Investments, of R2.2m, was found to have been not bright.

(vii) The shortfall between assets (R45m) and liabilities (R45.2m) of a Regal Bank subsidiary, Rand Treasury Credit, was R282 000.

(viii) The amount of R9.7m was accordingly made up as follows:

Total impairment of investments in §'s (ii), (iii), (iv), (vi) & (vii):	R12,9m
Less value of investments in §'s (i) and (v)	R 3,2m
	R9,7m

(g) Sundry asset impairment

The sum of R12.6m was made up as follows:

		Rm
(i)	Accounts receivable	-0,9
(ii)	Prepaid expenses	-1,9
(iii)	Unallocated bank items	-4,9
(iv)	Deferred tax asset	-4,8
		R12,6m

Balance Sheet of Regal Bank

72 The unaudited adjusted balance sheet as at 26 June 2001 was:

Assets	**R000**
Cash	310.674
Overnight treasury loans	22.261
Loans to property companies	129.549
Inter-company loans	4.448
Advances	94.138
Listed shares	4.065
Fixed assets	6.519
Unlisted investments	8.930
Accounts receivable	6.750
TOTAL ASSETS	587.330
Liabilities	
Deposits	579.000
Accounts payable	2.418
Taxation	8.602
TOTAL LIABILITIES	590.020
NET LIABILITY	-2.690

73

73.1 The summarised balance sheet as at 31 August 2001 was provided to the commission by the curator on 18 October 2001 (DT(2)563):

	R million
Cash	190
Overnight treasury loans	16
Loans to property companies	115

Intercompany loans	15
Advances	102
Listed shares	2
Fixed assets	3
Unlisted investments	9
Accounts receivable	8
TOTAL ASSETS	460
Deposits	560
Other creditors	10
TOTAL LIABILITIES	570
ESTIMATED DEFICIT	110

Notes:

(1) Assets represent the curator's best estimate of recoverable amounts. Current discussion with a potential offeror's estimate of the total recovery value of assets ranging between R376 million to R406 million.

(2) Provision has not been made for any possible legal claims against the bank.

(3) The deficit indicates a loss for creditors of 19c in the Rand. A minimum of a further 11 c will be incurred in liquidation costs and other expenses.

73.2 The comparison between the position as at 26 June 2001 and 31 August 2001 is:

	26 June 2001	31 August 2001
Assets	R587.3m	R460m
Liabilities	R590m	R570m
Estimated deficit	R2.7m	R110m

73.3 The threatened legal claims against the bank are for:

- R20m by RMI;
- R70m by a depositor on the basis that his demand for repayment was made prior to curatorship;
- R1bn by Kgoro on the basis that promises were made to Kgoro as part of the branding transaction which have not been carried through. The curator regards the claims as ill-founded.

73.4 The curator is pursuing possible claims by the bank against Sempres, Forfin Finance, Levenstein Data and JL Associates (3409). The prospects of recovery are not encouraging (3410).

73.5 The curator informed the commission that he has received an offer for the Stone Manor complex and that interest has been shown in 93 Grayston, although no offer has been received. The immovable properties have been written down by an amount which is equivalent to 3c per Rand for each depositor. In the curator's discussions with Investec Bank, it places a lower valuation on the properties. If Investec Bank is correct, an additional 2c could be lost for depositors (3412-3).

73.6 The curator was requested to provide an explanation for the increase in the estimated deficit of R2.7m as at 26 June 2001 to R110m as at 31 August 2001. This is the explanation (DT(2)566):

	Balance @ 30 June	Curator Adjustment	Adjusted Balance	Reason
Assets				
Cash	311	121	190	1
Overnight treasury loans	22	6	16	2
Loans to property companies	130	15	115	3
Inter company loans	4	-11	15	4
Advances	94	-8	102	5
Listed shares	4	2	2	6
Fixed assets	7	4	3	7
Unlisted investments	9	-	9	
Accounts receivable	7	-1	8	
TOTAL ASSETS	587	127	460	
Liabilities				
Deposits	579	19	560	8
Accounts payable	2	-8	10	
Taxation	9	9	-	
TOTAL LIABILITIES	590	20	570	
NET LIABILITY	-3	107	-110	

Reason:

1. Payments since date of curatorship included R 78m for cheques inadvertently R/D'd on 26 June, R32m for hardship payments, building completion costs and operating expenses
2. Revaluation in lieu of recoverability of security
3. Revaluation in lieu of valuation of properties
4. Revaluation in lieu of recoverability
5. Deterioration of arrears position due to non-payment
6. Revaluation of shares in terms of market value
7. Revaluation in terms of valuation of assets by sworn appraisers
8. Deposits adjusted for payments made in lieu of hardships and interest accrued

Chapter six

The s7 review by DT into corporate governance

74

74.1 At a meeting between Lopes and the Registrar of Banks on 14 August 2000, Lopes made a number of allegations of irregularities which were taking place at Regal Bank. Relevant to the issue of corporate governance, were these allegations:

- members of the board who did not agree with Levenstein were removed from the board;
- Regal had lost about 25 staff members within the previous 3 months, at least 10 of whom had been in senior management positions;
- anyone who questioned Levenstein's "branding" idea were threatened (E149, DT(1)60).

74.2 On 23 August 2000 the Registrar appointed DT to provide a s7 report in response to the Lopes allegations. It is minuted that DT was required to prepare a review of the role of the board of directors of the bank and in particular the "powerful role" played by Levenstein. On the same day, the Registrar and Martin met with Lurie, J Pollack, Nhleko and Matsobane, all directors of Regal Bank (E159). The corporate governance concerns of the BSD were conveyed to the directors of the bank. Lurie's response

was that the dismissals and resignations "resulted from the fact that there was a lack of competent members at management levels and this had created unnecessary pressure for the CEO". He said that the bank had acted on Wiese's advice and created a directors' affairs committee, consisting of non-executive directors. Lurie expressed the view that Lopes, Brian Levenstein and Steen should not have been appointed directors in the first place. He alleged that the board had suggested that Levenstein needed a strong independent financial director and human resource manager.

74.3 On 28 August 2000 Schipper of DT met with Lurie to discuss the terms of reference. Lurie welcomed the review, as did Levenstein, with whom Schipper met later that day. On the same day that Lurie and Levenstein were pledging their support for the DT review, Radus signed a letter to the Registrar (E170) on behalf of executives of Regal Bank. The letter placed on record the "total support" of the executives for Levenstein, alleged that the DT appointment was unfounded and totally unnecessary; that Levenstein's "integrity and track record … speaks for itself"; and the letter ended by calling upon the Registrar "to support and stand behind" Levenstein.

74.4 Van der Walt, then a consultant to Regal Bank, was assigned by the bank to DT as the link between DT and the bank, during the s7 investigation. The work of DT commenced on that day.

74.5 During the course of the next few weeks, Schipper met with various members of staff and directors such as Levenstein, Brian Levenstein, Jonathan Davis, a former CFO, Terri de Castro, at that time the CFO, and Lubner, a former director.

74.6 On 30 August 2000, while the s7 review was in progress, the boards of Regal Holdings and Regal Bank met. According to the minutes of those meetings, the s7 review was not discussed at all ((K2)238 – 241).

74.7 The DT investigation concluded on 4 October 2000. Drafts of the report were discussed on various occasions with Van der Walt, Davis and Levenstein. They confirmed the accuracy of the factual allegations in the report.

74.8 During the period of investigation Levenstein wrote a number of letters to the Registrar. On 7 September 2000 (E187) he criticised Strydom of EY, spoke of a "conspiracy agenda"; on the same day he wrote a second letter (N3) in which he informed the Registrar that Lopes had been arrested on grounds of fraud and corruption. Levenstein's attack on Strydom was pursued at a meeting with the BSD on 12 September 2000 (E192). Following on that

meeting, on 13 September 2000, Levenstein wrote a letter to the Registrar in which he alleged that there was a "take-over consortium" provided by the Reserve Bank and which included the participation of Peter Springett and Lubner and others. (N7)

74.9 On 23 October 2000 representatives of the BSD, Schipper and directors of Regal Bank, including Lurie, Levenstein and Van der Walt, met to discuss the DT s7 report (E206). Levenstein gave explanations for the resignations or dismissals of Lubner, Mark Springett and Lopes. The meeting concluded on the basis that Regal Bank would prepare a written response.

74.10 Two days later, on 25 October 2000, there was no mention, let alone discussion, of the s7 report of DT or the meeting of 23 October 2000 or the concerns expressed by the Registrar about corporate governance at Regal Bank at:

- the meeting of the board of directors of Regal Bank (K(2)245);
- the meeting of the board of directors of Regal Holdings (K(2)248);
- the AGM of Regal Holdings (F21.2).

74.11 On 31 October 2000 DT issued the s7 report (E211).

74.12 On 29 November 2000 Regal Holdings responded to the DT s7 report (E282). The report was prepared by Van der Walt (2562).

74.13 Lurie was questioned about why the boards of directors did not discuss the DT s7 review at all in the meetings held at the time. He had no acceptable explanation. According to him, Davis was instructed to deal with the various issues raised in the report (2425). He assumed that because most of the directors had attended the meeting with BSD on 23 October, "there was no necessity to rehash it" (2429).

Mismanagement of Regal Bank

75 In the week that he was CEO, from 18 – 26 June 2001, Robinson identified these areas of concern with the management of the bank:

- the lack of corporate governance, which Cohen was addressing (1825);
- the reason Regal Bank allegedly had no bad debt was that there was no review of credit, which is standard practice at other banks (1825);
- there had been no credit manual, until Brown had recently produced one (1825);
- the branding structures were "laying in the bank with no activity but with amounts due", which Robinson felt would probably have to be written off (1825);

- his “gut feel” was that the bank had between R30m to R50m in bad debts (1826);
- there were property developments, i.e. 93 Grayston Drive, which were “not the knitting” and would have to be disposed of (1826).

76 During curatorship the following came to light:-

76.1 Normally a bank should be able to provide an explanation for any difference between cash-in-hand and cash in the general ledger. Put more prosaically, the books should balance and if they do not do so, the bank must explain the discrepancy. In the case of Regal Bank, reconciliations had not been done properly for months. The bank’s suspense accounts had large outstanding debits and credits which had not been cleared for months. The norm in the banking industry is to clear suspense accounts regularly, possibly on a daily basis. One particular amount of R10m had been in a suspense account since 10 April 2001. Management were unable to provide DT with acceptable explanations. (Marshall 352 et seq; memo’s from Zarca to Tim Store of 17 July 2001 and 30 July 2001 F159.3 and F181.2.)

76.2 Overnight loans are normally loans of short duration made to banks or large corporations in need of short-term financial

assistance. Regal Bank classified ordinary loans as overnight loans. An analysis of those loans by DT showed that:

- money was lent for long periods of time;
- money was lent to related parties;
- money was lent to external parties without any supporting documentation;
- loans were made without any internal process having been followed, such as consideration and approval by a credit committee. Management informed DT that loans were made on the instructions of Levenstein.

76.3 An inspection of the fixed assets register by DT revealed that there was a transfer of fixed assets consisting of furniture, fittings and computer equipment from Regal Bank to two related companies, Chezvan Property Investments (Pty) Ltd and Stone Manor (Pty) Ltd. The value of the fixed assets was about R7m. *Prima facie* the beneficiaries of the transfer had no use for the assets. Management was unable to explain to DT why the transfers took place and what the benefit was to Regal Bank.

76.4 Investments were made in shares which were incorrectly described as overnight loans. The most significant example is the Pekane transaction.

76.5 Loans were made against the sole security of Regal Holdings shares. As the share price fell, the value of the security declined.

76.6 Zarca, a chartered accountant who had worked for four years in the office of the Receiver of Revenue, seven years for Standard Bank and five years at Sasfin, was appointed as the financial director of Regal Holdings on 1 July 2001. He submitted a report to the curator on 17 July 2001 (F159.1). He confirmed the report in evidence:-

- The DI returns for the year-end February 2001 that had been submitted to the Reserve Bank were incorrect. The primary error was that the Mettle transactions were incorrectly shown as inter-bank funding (3048). He assumed that the same error had been made from in respect of the first Mettle transaction.
- The fixed asset register was not up to date. The depreciation rates on computer software, computer equipment and restraints of trade were not in accordance with GAAP and the rates recognised by the Receiver of Revenue. The interest rates had been reduced in April, apparently on the instructions of Levenstein. By reducing the interest rates, expenditure was minimised and profit was maximised (3052-3).
- The bank paid cash for motor vehicles which were shown as fixed assets of the bank. The vehicles were allocated to

employees who used them in the belief, according to the employees, that the ownership in the vehicles had been transferred to them in lieu of goodwill or restraints of trade payments. The employees, however, were not paying tax on the value of the fringe benefit (3054-7).

- Zarca found that a number of adjustments had taken place in April 2001. One of the adjustments was a revaluation of art and furniture in an amount of R3.5m which was shown in a deferred income account. The result was that income would be inflated by that amount. There was no market valuation to support the revaluation. An amount of R2.9m was reversed by Zarca (3057).
- Included in an amount of R2.1m as restraint of trade payments were two vehicles to the value of R828 000 which had been transferred from an account "motor vehicles" to Van Zyl and Van Rensburg on 26 April 2001, apparently on the instructions of Levenstein. The contracts of employment of Van Zyl and Van Rensburg, however, did not provide for such a benefit. Zarca reversed the entry. Another element of the amount of R2.1m was a restraint of trade payment to Rabins of R1.1m on 29 September 2000, for which no justification could be found (3058-9).

- The depositors' suspense account had never been reconciled. Zarca testified that a reconciliation should take place at the end of each day. If a reconciliation is not done, there is a risk that incorrect information is given to depositors and "your records are absolutely a shambles" (3059-60).

76.7 On 30 July 2001 Zarca submitted a second report to the curator (F181.1), which he confirmed in evidence:-

- The DI returns for June had not been submitted.
- A motor vehicle which cost R332 950 was shown as an asset of the bank but was in the possession of Radus. Radus was on the payroll although he no longer worked for the bank (3063). Radus admitted that he was on the payroll but did not attend work at the bank. He said that from 1 February 2001 he was a consultant for the bank and worked at home. Levenstein had said to him that he could work for two years for the bank at home. He worked about 5 hours a day, not as a lawyer but making phone calls and speaking to staff and having meetings with various members of staff. Levenstein gave him the car as "part of my bonus". Levenstein said he could not sell the car for two years "so it was like a restraint"(3151-3154))

- A treasury bank reconciliation had not been done for some time, which could have resulted in considerable risk for the bank (3064).
- The bank's suspense account had not been reconciled for a long time and as at 30 June 2001 there was R25m credit in the account (3064).
- It was unclear whether VAT had been claimed correctly or at all. The development of 93 Grayston had not been registered for VAT, with the result that R6m in input credits had never been claimed from the Receiver of Revenue (3065).

76.8 Zarca was "totally unimpressed" by the state of the financial records of the bank. The financial reporting systems were inadequate. The financial department was underresourced and the members of the department carried out the instructions of Levenstein without asking the necessary questions, out of fear of recrimination (3045, 3067).

76.9 In his evidence on 17 October 2001 the curator referred to a number of issues which had arisen during the retrenchment process:

- there were several instances where employees were paid amounts for intellectual capital but there appeared to be no

written or documentary confirmation of those amounts and no evidence of board or other approval;

- employees claimed that they were given motor vehicles as part of their package in lieu of a lesser basic salary or as a payment for intellectual capital;
- there were instances where employees who elected to dispose of their Regal Holdings shares were prevented from doing so by Levenstein;
- one employee informed DT that she was compelled by Levenstein to acquire shares notwithstanding that she did not want to escalate her personal debts;
- certain employees were described as "contractors" whereas in reality they were employees and the contractor label was given to them for labour law and tax reasons;
- there was a general lack of information regarding employee relationships. In the words of the curator: "The documentation was not what we would have expected to see in a good corporate governance system" (3408).

77 Ms de Castro was appointed CFO during about August 2000. She was 28 years old at the time. Although she is a chartered accountant, she had had only 2½ years experience out of articles. She previously worked at Levenstein & Partners. It is clear that while she was nominally CFO, in

fact she was not. She reported to Davis, not Levenstein; she was not on the Exco; she did not attend audit committee meetings; she attended board meetings only on some occasions and then as company secretary (3390-3). She herself found "it was pretty weird that they had a young 28 year-old who needed a lot to learn as the CFO and they did not have a financial director … I found that very odd."(3401)

78

78.1 De Castro gave evidence that in about April 2001 she received the following instructions from Levenstein:

- "To move all assets from one company to the other at book value because the depreciation that was being reflected in the financials was too high and he was trying to cut costs" (3385);
- Depreciation was not allowed to be more than R200 000 a month: that was achieved by changing the depreciation rates (3386-7);
- Two motor vehicles that were bought by Regal Bank were to be moved from the books of the bank to restraint of trade and depreciated over twenty years (3386-8).

78.2 De Castro handed in a file containing a series of instructions from Levenstein for which she did not receive adequate explanations

and which had the effect of increasing the bank's income. Two examples are:

- "June debit Pekane shares advances R18.2m credit mark/market income R2m credit provision/reserve account/Pekane R16.2m. Each month thereafter R2m per months to mark/market income" (TdeC2).
- "April debit Sempres provision account R1m credit mark/market income R1m" (TdeC48). (The R1m was subsequently reversed.) Those instructions were given in 2001. Another instruction was received from Levenstein to pay R160 000 to JL Trust & Associates and debit branding income "in terms of an agreement between JIL and HR" (TdeC59). JIL is Levenstein and HR is Rabins. JL Trust & Associates does not exist.

79 Van der Walt discovered that there was no formal budget procedure. Budgeting was done on a very informal basis; it was normally left to the very last minute and then income and expenditure budgets would be prepared over hastily (2563). In Van der Walt's view, very few line managers knew how to prepare a budget. There were no formal guidelines. During the budget process, he had to conduct a series of training sessions, resulting in delays in the finalisation of budgets. While

he was in the process of doing so, Cohen, without prior discussion with Van der Walt, appointed Price Waterhouse Coopers to complete the budget process (2568).

80 According to Van der Walt, it was common for an employee to bypass his immediate superior and approach Levenstein directly. This had a detrimental effect on management and line functions and the willingness and ability of managers to accept responsibility for their divisions (2563-4). Van der Walt gave two examples. The first was that when he had disagreements with a member of Exco, Rabins, Levenstein removed Rabins from Exco and told Rabins to report directly to him, Levenstein. Secondly, Levenstein told Van der Walt that Flekser would report to him. Van der Walt laid down certain conditions for future funding for Regal Protea. Although the conditions were not met, Regal Protea was lent a further R1.5m at the end of February 2001, Flekser having obtained the extra funding from Levenstein. Regal Protea is about to be liquidated (2564-5).

81 Van der Walt found that there was no formal human resources and remuneration policy. There was, what was referred to as, a “culture of sacrifice”, meaning that employees were expected to work for below industry average remuneration in exchange for the promise of wealth which was to be created through the issue of shares. The CEO had the sole discretion as to who received what benefits, bonuses and shares.

During May 2001, Van der Walt was asked by Levenstein to prepare a schedule of bonus payments for deserving staff. As there were no performance appraisal systems in place, Van der Walt recommended that all staff be paid an across-board bonus proportionate to their salaries. Levenstein refused to do so and proceeded to allocate bonuses to only some members. Members of Exco were treated differently. The HR and remuneration committee approved bonuses for staff members in a total amount of about R1m. Levenstein overruled the committee and reduced the bonuses to an amount of only ±R400 000. Six members of the executive committee, including executive directors, were awarded bonuses in a total amount of R1m. Levenstein alone received R460 000, more than what all employees received together (vdW119), (Van der Walt 2565-6). Van der Walt's grievance about Levenstein overruling the remuneration committee and deciding on the bonuses himself is similar to the complaint of Peter Springett. In 1997, four years before, Levenstein unilaterally decided on salary increases, bonuses and share incentives.

82 Van der Walt testified that Regal Bank received legal advice to liquidate RMI to put an end to the protracted litigation between the bank and RMI. Van der Walt conveyed the advice to Levenstein. Levenstein said that liquidation was not an option "and that should I ever repeat his advice to anyone he would fire me". Van der Walt believed that

Levenstein was motivated by personal interest. He stood surety for a loan of about R20m to RMI Investment Consortium and if the RMI transaction was found to have contravened s38 of the Companies Act, Levenstein could be liable for the amount of the loan (2571-2).

83 The "loan" to Pekane increased from plus minus R60.5m in December 2000 to plus minus R67m at date of curatorship. Davis explained the increase. Levenstein instructed him to debit the Pekane overnight loan with R6m, an amount which related in some way to a "dividend" of R6m payable in terms of the RMI transactions and which had nothing whatsoever to do with the purchase of Worldwide shares (2878-9).

84 Levenstein boasted from time to time that Regal Bank had no bad debts, e.g. in interviews with Moneyweb on 9 May 2000 (S2) and on 30 April 2001 (S9). One way that was achieved, according to the evidence, was to ignore bad debts. Ritoff gave an example of R150 000 of bad debts in Regal Securities. He instructed the auditors "to write them off". Davis thereafter came into his office and said "our bank does not have bad debts, will you please write them back, you can provide for them but you cannot write them off" (2902).

85 Oosthuizen testified that Levenstein did not have the "foggiest clue" of the concept of corporate governance. The bank was to a large extent a "one man band" and "the concepts of corporate governance, of risk management, of basic sound banking practising in many areas were disregarded or did not exist".

Oosthuizen said that he had great difficulty in getting straight answers from Levenstein. "I would ask a question and get an answer that totally obfuscated the issue or just totally just skirted the issue. … The only direct answer that I got was when I asked the direct question, is there an irrevocable transaction sale of the Grayston property and he said to me yes – a direct lie." (3008-11)

86 Levenstein gave unlawful instructions that certain expenditures and questionable loans were to be "offset against the Mettle Reserve account" in the treasury department (Davis 3422). The total debits to that account were in the region of R20m (3424). The effect of those entries was to understate expenditure [or increase income] by the amount of R20m for the 2001 financial year (Davis 3424). The "Mettle Reserve" account was the account to which the R150m on the sale of Kgoro (I311) was credited. The account was actually called "BOE Bank" (KD74).

87

87.1 Strydom handed in a comparison of the DI510 returns as submitted by Regal Bank in March 2001 and after a revised audit had been done in June (180268). In March the large exposures were shown as:

Phekani Investments	66 862
Incentive Trust	68 295
BOE	303 000
TOTAL	438 157

On the face of it the BOE transaction was an inter-bank transaction and did not attract a capital requirement.

87.2 Once the truth was established that the exposure was not to a bank, BOE, but to Mettle and its SPV's, the capital requirement on those transactions increased substantially (Strydom 3455).

87.3 The impact of the accurate reflection of the Mettle deals is clearly shown in a comparison between the March and June 2001 DI 400 returns (180269), in which capital is calculated:

	March	20%
DI 100		501 487
	June	
DI 100		34 404

The capital requirement accordingly increased from R155m to R205m.

87.4 Another misrepresentation in the March DI 100 return was that the amount of R192.4m was shown in the 50% category on the basis that that was the sum of the loans secured by mortgages on residential properties. The bank was not able to provide EY with any of the mortgage bonds. As a consequence, EY regarded those loans as unsecured and placed them in the 100% category (Strydom 3456).

87.5 A further consequence of falsely disclosing the Mettle transactions as transactions with a bank, is that Regal Bank

should have held R27.6m worth of liquid assets with the Reserve Bank, whereas in reality it held only R13.9m (180272, Strydom 3456).

87.6 Levenstein's evidence was that Strydom was "totally and absolutely and emphatically incorrect" (3481). He refused to accept that it was a misrepresentation to describe the Mettle deposits as "bank" deposits (3483-6).

Levenstein's management style

88

88.1 In addition to the way Levenstein dealt with his fellow directors, when they opposed him, which is described earlier, the following incidents were recounted by witnesses:

- Van der Walt was told by Van Rensburg that Levenstein had told him that Van der Walt and Cohen were conspiring to have him removed as CEO. Accordingly, so Van Rensburg told Van der Walt, Levenstein instructed Van Rensburg to "bug" Van der Walt's house. Van Rensburg never did so. Nevertheless, at about the time of the conversation between Van der Walt and Van Rensburg, Levenstein telephoned Van der Walt at home and accused him of conspiring with Cohen

to remove him as CEO. Levenstein said in that conversation: "You know of course that any attempt to have me removed as CEO will result in the death squads being released" (2612).

- Diesel was the treasurer. He was a founding director of the bank and Holdings. On the day Lopes resigned, Diesel was telephoned by Levenstein. Levenstein said, according to Diesel's evidence: "Keith, I love you, but unless I have your unconditional support you can go". Diesel telephoned Martin at the BSD. Martin asked Diesel if things were as bad as Lopes had made out. Diesel's reply was in the affirmative (2621). Lopes informed Diesel later that day, on Diesel's version, that one of his staff had been promised 100 000 Regal Holdings shares "to get me to leave the bank" (2624).
- Diesel said that during November 2000 he was pressurised by Levenstein to resign from the board of Regal Holdings. It was his impression that Levenstein wanted to be the only executive on the holding company board. He gave in to the pressure (2625).
- Van der Walt's description of Levenstein's management style was "very autocratic; single minded; very loyal to the organisation and very intolerable of anyone who dare resist

any suggestions that he may make in terms of the strategic direction that he wanted the organisation to go in" (2583).

- Diesel said that when Peter Springett left, and Levenstein became chairman and remained CEO, his "management style changed, it became more dictatorial; he became unapproachable in certain instances and literally dictated to all those around him" (2653). Diesel described the bank as a monarchy, with Levenstein a monarch (2668). Diesel testified that if he had discussed the R2m bonus and 5m shares "it would have resulted in my departure from the bank" (2672). Diesel was concerned about the "associated persecution … similar to what happened to Mr Lopes" (2672).
- Buch has known Levenstein for 25 to 30 years. He described Levenstein as a "very passionate and very committed individual". Levenstein's "bark was worse than his bite". When Levenstein's treatment of Mark, Peter, Lubner, Schneider and Lopes was put to Buch, he responded by saying that Levenstein's "people skills were very poor". But Levenstein never lied to him and what Levenstein did "was always in the best interest of the bank" (2812-3).
- Krowitz was a founding executive director of Regal Bank and Regal Holdings. He regarded himself as one of those

directors, which included Diesel and Lopes, who "started building the operation" (2906). He acted in various capacities over the time, nursing fledgling operations, such as merchant banking and stock broking (2907). He and Levenstein worked closely together until late 1999, when Levenstein became a different person, it was "chalk and cheese" (2908). Krowitz gave two examples:-

- During the Mark Springett incident, Levenstein wanted a document urgently. Levenstein said to Krowitz that if the document was not produced, Krowitz could not go on holiday. Krowitz had saved up over a long period of time to take his wife and children to Mauritius. Krowitz subsequently discussed the matter with Levenstein. Levenstein said that he had cancelled Krowitz's leave as "punishment" (2909-10).
- In November 1999 Radus telephoned Krowitz one Saturday night to tell him that Levenstein had "suspended" him for "moaning". Krowitz assumed that Radus was referring to a conversation Krowitz had had with Friedman, the gist of which was that Krowitz had said to Friedman that Levenstein "is putting pressure on the guys in respect of profitability and we need to

perform" (2912). Krowitz was very upset. He tried to telephone Levenstein on a number of occasions to discuss the suspension with him. Levenstein would not take his telephone calls. Eventually when he did discuss the matter with Levenstein, Levenstein said it was "risk management". Krowitz believes that Levenstein wanted him out of the bank to make way for Steen. Krowitz did not return to work in 1999. He took leave in December, returning to work in January. He resigned in March 2000, five years after joining the bank. He wanted to qualify for his share options. He described Levenstein's management in these words: "Levenstein ruled by Levenstein's rule" (2917).

- Krowitz described the effect his "suspension" had on him: "It destroyed me. … You create a world, you build trust with people across there that you actually bring into that business. … I fought to get people into that bank. … And he chopped off my head with no compunction" (2919).

89 Payments to, or benefits received by, Levenstein

89.1 As at August 2000 Levenstein's monthly package, excluding incentives, was R37 812.00 per month (DT(1)47).

89.2 As at August 2000 Levenstein was paid R9 850.00 per month for personal expenditure at home (DT(1)14, Schipper pp 68 *et seq*).

89.3 Levenstein was paid R2m on 15 February 2000.

89.4 According to the DT s7 review, Levenstein was paid R650000 as dividends on the 5 million shares, even though they had not been issued (DT(1)28; Schipper p 90 *et seq*). BSD requested EY to investigate the payment. EY found in 2001 that "the dividend appears to have been reversed in the accounting records and correctly reflected as a salary expense" (Strydom 827; 120194). Levenstein admitted receiving the R650 000. After receiving the DT s7 review, legal advice was obtained that it was not possible to pay a dividend on shares that had not been issued (Levenstein 1496-7). The intention was not to evade tax, but he did not pay personal income tax on the R650 000 (1501). Lurie approved of the payment of R650 000. He though Prof Vorster had opined that dividends could be paid on shares not issued. (Lurie 2508-10), although "in the normal course it is not justifiable" (2510-11). All Diesel knew about the R650 000.00 was that he was instructed to

effect payment to Levenstein of that amount. He was never asked as a director to approve the payment (2667).

89.5 During the period 6 February 1998 to 25 July 2000 Levenstein received R871 549.00 from the Shareholders' Trust, the amount having been advanced by Regal Bank to the Trust, apparently as advance payments for bonuses to be earned (DT(1)13 read with DT(1)38; and Schipper pp 60, 65, 129). Levenstein justified the payments to him (the total amount of which he disputed) on the basis that the payments to him and the other executives were made to compensate them for the "unbelievably small remuneration" (1526). The "culture of sacrifice had to be preserved" (1531). Peter Springett was the author or the scheme (1527). No one repaid the amounts, which Levenstein described as "loans" (1528), because budget targets were never met (1532-4).

89.6 On 10 May 2001 Brown, general manager, group risk management, reported to the board of Regal Bank (F46.1) that Levenstein had borrowed R236 000 and R83 000 from the bank. Levenstein said that he had paid back the amounts, save for an amount of R70 000 on his mortgage bond, and about R85 000 on one of his motorcars (1542). All the amounts have subsequently been repaid by Levenstein.

89.7 There were loans to Levenstein recorded in the books of Regal Bank of R176 472.54, R338 007.24 and R335 529.26, totalling R850 009.04 as at 31 August 2000. (DT36-37; Schipper pp 114, 130 and 140). The first three amounts have been repaid (KD79). The amount of R850 009.04 has not been repaid. The curator regards that amount as remuneration, although Levenstein has probably not disclosed receipt of the various amounts making up that total to the Receiver of Revenue nor was it disclosed as directors' remuneration in Holdings' financial statements.

89.8 Levenstein confirmed that the remuneration paid to him within the meaning of s297 of the Companies Act was R561 500 for the financial year ended 28 February 2001 (Strydom 897; 180091). It follows that Levenstein did not declare the R650 000 as remuneration.

89.9 The articles of association of Regal Holdings provide that the remuneration of directors shall from time to time be determined by the company in general meeting (Art 55); a director may be employed or hold any office of profit under the company or a subsidiary of the company in conjunction with the office of director and shall do so upon such terms as to appointment, remuneration and otherwise as the directors may determine (art 65); the managing director may be paid additional remuneration

as determined by disinterested quorum of directors (art 74); and a director who serves on Exco or other committee or who devote special attention to the business of the company may be paid extra remuneration fixed by disinterested quorum of directors (art 81(2)).

90 Payments to friends and relatives of Levenstein

90.1 The facts in the DT s7 report of 31 October 2000 were canvassed by Schipper with the directors and management of the bank at the time to avoid factual inaccuracies. Regal Bank replied to the report in its response of 29 November 2000 (E282). None of the factual allegations are denied: the payments totalling R2.6 m by the Shareholders' Trust as advances against bonuses; the monthly expenditure of Levenstein at home in the amount of R9 850; the related party loans of R96.4 m; the payment of R2 m and the allocation of 5 m shares; the R650 000 dividend. Some justification is given for the R2.6 m payments and the payment of R9 850 per month (E289).

90.2 A schedule as been prepared, annexure "F" hereto, of the amounts received by directors and employees which might not have been disclosed by them as remuneration to the Receiver of Revenue. It

is recommended that the Minister of Finance require the Receiver of Revenue to investigate the matter further.

90.3 As at 31 August 2000, included in the R2.6 m advance to employees in anticipation of bonuses, was included an amount paid to BK Levenstein of R142 500 (DT(1)38).

90.4 As at 31 August 2000, included in the R96.4 m loans to related parties were the following loans in total (DT(1)36 – 37):

• Levenstein Data 1	7 911 906.61
• J Pollack	6 438 322.10
• BK Levenstein	389 309.21
• J Lurie	315 130.22
• JL Associates & Trust	18 982 196.41
• JL Investment Trust	99 564.82

90.5 As at 26 June 2001 DT incorporated the following into the R190.5 m it regarded as irrecoverable related party loans (DT(2)553):

	R
• JL Associates	1 296 000.00
• Levenstein Data 1	8 901 000.00
• Forfin Finance	5 599 000.00

90.6 The total of the payments to BK Levenstein was R531 809.21.

90.7 Against the loan to Levenstein Data of R8.9m was security of a cash deposit of R7.8m (Strydom 909). If DT is willing to write

off the loan of R8.9m, one wonders what happened to the cash deposit of R7.8m.

90.8 J Pollack was a director of Regal Holdings from 27 November 1998 and of Regal Bank from 2 June 2000 until he resigned on 31 December 2000 (F183). The total amount lent to J Pollack as at 30 September 2001 is R5.4m

90.9 As at 30 September 201 the loans to related parties came to R233 555 7 86, as shown on DT564-5.

90.10

90.10.1 Lurie's evidence was that Levenstein Data was a "so-called account heading that was a designated fund for pool funds of clients of mine … We controlled certain clients' monies" (2546-7). He denied that there was a loan of ± R8m to Levenstein Data (2547-8). The clients' money is still in the bank (2549).

90.10.2 Diesel testified that an account was opened called Levenstein Data. By agreement between Levenstein and Mark Springett, money was lent to the asset management division of the bank to enable Regal Holdings shares to be purchased by clients of that division on the listing of Regal Holdings. The

"performance of the shares on listing changed the aspirations of the asset management clients" (2634-2636).

90.11

90.11.1 Lurie's explanation of JL & Associates is that it was intended to be a vehicle for holding 3m Regal Holdings shares to be on sold to an "overseas counter party". Regal Holdings borrowed the money (2549-50). He did not know what Holdings had done with the loan (2550). The shares would be pledged a security for the loan (2551). JL & Associates was just an account heading (2551).

90.11.2 Diesel had a different version about JL & Associates was. He testified that Regal Bank lent Lurie and/or his clients money to buy 2m Regal Holdings shares on the listing of Regal Holdings against the security of deposits made by Lurie or his associates. The shares were issued and registered in the name of JL Associates (2631-4).

90.12 Diesel's evidence was that Forfin finance is a registered company. Prior to the listing of Regal Holdings, Levenstein subscribed for shares in the name of Forfin. Levenstein told

Diesel that he and Rabins were directors of Forfin. Subsequent enquiries established that Levenstein was not a director, but a shareholder (2637).

90.13 Diesel testified (2645) that on the day of curatorship Ms Hosiasky, Levenstein's secretary and sister-in-law, handed Diesel a note written by Levenstein (Diesel 2), in these terms: "Transfer R15m from Mettle reserves account to JL Trust overnight loan. Transfer R7m from Mettle reserve account to Forfin overnight loan account". Diesel did not carry out the instructions. "Mettle Reserve" was an account containing R150m of Regal Bank's money (Diesel 2646, Davis 3420). Ms Hosiasky, Levenstein's secretary, confirmed in evidence that she handed the note to Diesel on the day of curatorship (3042). Levenstein admitted giving the instruction. His justification was: "I knew that the bank had been sabotaged. It was no longer possible to risk manage this open position. It is generally accepted banking practice to use reserve to write off an open position of that nature, certainly in the circumstances and that is all I did. And any other CEO would have done the same thing in the circumstances." (3492) He said that there was no debt to repay: "We are talking about an internal flow of funds where the bank ended up holding shares effectively in the holding company." (3495).

90.14 Kay worked in the treasury department and had done his articles at Levenstein & Partners. His evidence was that Forfin Finance

was a property holding company. At one time he was asked to transfer excess funds to Forfin's accounts held in Regal Bank (2705-62705-6).

90.15 Kay said that Levenstein Data was an old company in the group that was "entirely controlled by Jack Lurie …. The account was held by Jack Lurie and used for transactions on a daily basis of which there were quite a few on a daily basis" (2706).

90.16 Buch's evidence was that Forfin Finance was a property owning company. There were 12 to 16 shareholders, university friends, of whom Levenstein was one (2711).

90.17 Krowitz testified that he knew about Forfin Finance: "Levenstein bought equity prior to the listings. … And I think that is where he put his equity" (2944-5).

90.18 At the request of the commission, Van der Walt investigated the loan to Forfin Finance. He prepared notes, with supporting documentation (vdW350), which he confirmed in evidence (3070). The amounts referred to below have been rounded off. On 2 April 1998 an amount of R3.9m was received by the bank for the credit of Forfin. On the next day, 3 April 1998; Levenstein applied for a subscription in Regal Bank shares on behalf of Forfin in an amount of R3.9m; an overnight loan was created for that amount in favour of Forfin; and Regal Bank issued a cheque

in favour of Forfin in that amount. The cheque was deposited into a Standard Bank account. On 20 April 1999 a loan agreement was concluded between Forfin and Regal Bank, the agreement being signed on behalf of Forfin by Levenstein, and the credit committee approval form being signed by Levenstein! The amount of the loan was R4.3m, being the original amount of R3.9m plus accrued interest. The overnight loan of R4.3m was settled by means of a Regal Advances cheque. On 19 June 2000 the outstanding balance, including accrued interest on the overnight loan, was R5m. The loan was settled by means of an overnight loan in Regal Bank's treasury division. It is that loan which as at 12 October 2001 was R5.9m and remains payable.

90.19 The Standard Bank of South Africa Ltd ("Standard Bank") was subpoenaed to produce documents relating to Forfin Finance. The documents revealed that on 16 November 1988 Levenstein signed a resolution as a director of Forfin Finance to open a bank account with Standard Bank. Levenstein was purportedly a director and authorised signatory. Forfin Finance was incorporated on 16 October 1978. As at 2 July 2001 the bank was in credit in an amount of R16 636.84 (vdW388-402).

90.20 On being recalled to testify, Levenstein said in regard to JL Associates and Forfin Finance that no money was lent: "The flows

were internal. It is the closest that the company could have got the bank to owning its own shares in the holding company in order to enforce and to highlight and emphasise the fact for example that Forfin was a nominee." (3488). Levenstein was shown an agreement of loan for R13m (KD44) between Regal Bank, represented by him, and JL Associates, represented by Lurie. He said "There was no legal substance to this … document. … There was no substance to it, no fraud, no misrepresentation, he was simply giving the assistance to risk manage an unusual open position" (3490-1).

90.21 Levenstein, on being recalled to give evidence, denied that there was a loan to Forfin Finance. He said: "That is simply treasury terminology because on the treasury system it is reflected as a debt, that is all. … We were effectively dealing with the holding in our own shares" (3496).

90.22 When Van der Walt's analysis of the various transactions between Regal Bank and Forfin Finance were put to Levenstein, including the issue of a check for R3.9m in favour of Forfin Finance, Levenstein said: "It could only have functioned as a conduit for a private banking client who wanted confidentiality" (3499).

91 The SASFIN bombing and other skullduggery

91.1 On 9 June 2001, Van Rensburg, a security officer at Regal Bank, confessed to Van der Walt, so Van der Walt testified, that he had planted a pipe bomb at the offices of SASFIN on the instructions of Levenstein and Cohen. Van der Walt doubted the truthfulness of the confession. Accordingly, he sought legal advice. The advice was that he should convene a board meeting to discuss the allegations and he should inform the BSD. Before Van der Walt could act on the advice, he was telephoned by a journalist from The Star newspaper, asking for comment. Van der Walt then urgently attempted to make contact with the Registrar of Banks. He was out of town. He was referred to the Reserve Bank's attorney on 21 June 2001. The attorney took the view that it was "a storm in a teacup". At the meeting with SARB on Saturday, 23 June 2001, however, the Reserve Bank indicated that the bombing incident was regarded in a very serious light and had nearly caused an international incident (2576-9).

91.2 Subsequent to curatorship, Van der Walt discussed Van Rensburg's allegations with Cohen, who said the allegations were preposterous.

91.3 Diesel corroborated Van der Walt's version of the attempts to contact the Reserve Bank after The Star telephone call to Van der Walt and the meeting with the Reserve Bank's attorney on 21 June 2001. Diesel handed in a written instruction to "Menachem" by Levenstein. The instruction is marked "private and confidential". The document directs that cash to the value of R25 000 be given to Van Rensburg. A bank statement showing that R25 000 had been withdrawn from a Regal Bank suspense account on 14 May 2001 was handed in by Diesel (Diesel 1 and 8, 2640).

91.4 Diesel handed in another document (2641) in Levenstein's handwriting. The document is undated. It is in these terms: "Cash payment to police fund (orphans) designed to entrench police headquarters into 93 Grayston. Must be cash … Cash parcel must be handed to Jeff Levenstein by hand" (Diesel 9). Ms Van Wyk, the financial manager of the SA Police Widows and Orphans Fund, gave evidence that the fund had not received any donations from Regal Holdings, Regal Bank, Levenstein or Van Rensburg from 1 April to 17 October 2001 (3330).

91.5 Kay, the Menachem to whom Levenstein addressed the instruction, testified that Levenstein came into his office, wrote

the instruction and instructed Kay to arrange the cash. Kay did so and handed R25 000 to Van Rensburg (2693-99).

91.6 Davis said that he was once asked by Levenstein to draw R20 000 in cash and to hand it to Van Rensburg, which he did. He did not know the purpose of the payment (2886).

91.7 De Castro's estimate of the cash amounts paid to Van Rensburg was up to R15 000 a month for a period of seven to eight months (3398-9).

91.8 Jacobson, who fell out with Levenstein over RMI, requested permission to testify on an alleged arson which had occurred at his surgery in Alberton. The surgery was totally gutted by fire on the night of 19/20 May 2001. A case of arson was opened with the Southern African Police Services ("SAPS").

91.9 At the request of the commission, Diesel investigated the amount of R30 000. He traced a cash cheque for R30 000 dated 18 June 2001 (KD66). His information was that the cash was drawn by Ms Harris and Moran who handed the cash to Kay, who gave it to Levenstein (3087).

91.10 Van Zyl was employed by Regal Bank as chief intelligence officer from 18 September 2000. From that date until 25 October 2000 he acted as Levenstein's bodyguard. During the course of this year, Levenstein instructed Van Zyl to prevent RMI going

into liquidation “absolutely at all costs”. Van Zyl refused to carry out the instruction (3338-43).

91.11 The SAPS were not willing to give the commission access to police docket CR154-06-2001 unless it was handed in in camera. After the docket had been handed in, Van Rensburg was subpoenaed to give evidence before the commission. He did so in camera at his request and that of the SAPS. The basis on which the application was granted was that a public hearing might prejudice the investigation into the charges which Van Rensburg faced. He faces charges in two separate criminal trials, the one relating to the illegal possession of firearms and the other to the SASFIN pipe bombing incident. The contents of the police docket must remain confidential until the criminal trials have been concluded.

The importance of the share price

92 The price of Regal Holdings shares played an unhealthy part in the fortunes of the bank:

- the “loans” to related parties in the sum of R190.5m, the sole security for which was Regal Holdings shares; in fact the “loans”

included purchases by the bank of shares in its holding company of approximately R81m and in addition R64m of the bank's funds were used to buy Holdings shares via the Mettle structures;

- it would have been in the bank's interests to grow its capital by attracting limited issues because preference shares are limited by tax practice to the amount of a bank's own capital (Store 251);
- The Metshelf transactions were driven by the performance of the Regal Holdings shares;
- if Regal Bank was able to demonstrate a consistently strong and growing share price, this would have enhanced its ability to attract participants into the branded entity relationships (Store 251);
- the growth in the price of the shares would have been an important element in attracting new capital into the bank (Store 251);
- at the date of listing (February 1999) R23.5m was expended by the bank to purchase Holdings shares via JL Associates, Levenstein Data and Forfin Finance;
- executive directors and senior management received shares to compensate them for the fact that they were under remunerated and no provision was made for pensions;
- the only "remuneration" non-executive directors received was in the form of shares;

- Robinson was offered a million Regal Holdings shares spread over 4 years on appointment as CEO. He moved from Absa to Regal Bank for the shares, not the remuneration package, which was more or less the same (1813).

Share price manipulation

93

93.1 When Regal Holdings listed on 25 February 1999, according to Mark Springett the price of the Regal Holdings shares was much lower than expectations. The result was that Levenstein "was under tremendous pressure because the share price had not performed like he said it was going to. He was very, very negative about anyone selling shares because he felt it was going to depress the share price even further. He felt the share price should have been much higher and so anyone who sold shares was really made to feel very uncomfortable" (2192).

93.2 Lopes testified that at one time he was reprimanded by Levenstein for selling some of his Regal Holdings shares. Levenstein told him that he was not to sell any shares. This was consistent with the general instruction to employees not to sell their shares (2019). Employees were encouraged by Levenstein to

borrow money from Regal Bank against security of their shares rather than to sell their shares. Levenstein would say: "you cannot sell your shares, the shares are going to go up … and when the shares hit R100 you can sell your shares." (2037).

93.3 Taylor joined Regal Bank on 1 May 1997. On 30 May 2001 he was the compliance officer of the bank. Faber, a stockbroking dealer, approached the compliance officer of Regal Securities, Ritoff, at a time when Taylor was in the office of Ritoff. Faber informed him that he had had received an instruction from Levenstein "to buy any Regal shares offered on the market at a price of R5.30" on behalf of the Incentive Trust. Taylor informed him that this was not permissible. Ritoff's response, according to Taylor, was that "We could not buy at a fixed price and if we were buying on behalf of a trust, it had to be for one of the members… You could not just buy shares in the market for a trust" (2342). Taylor and Faber then went to see Levenstein in his office. Levenstein justified the instruction on the basis that he had obtained a legal opinion that the trust could buy shares of Regal Holdings. Levenstein instructed Faber to carry out his instructions. Taylor went to see Cohen because he was concerned about the instruction. While he was waiting for Cohen, who was on the telephone, Levenstein arrived and "shouted at me that if I

did not but-out he would break my neck" or words to that effect, according to Taylor (2344). Taylor prepared a memorandum immediately thereafter on 30 May 2001 (Q5), which Cohen undertook to discuss at a board meeting which was to take place later that day.

93.4 Ritoff, a director and the compliance officer of Regal Securities, confirmed the version of Taylor on what transpired on 30 May 2001. Ritoff had been advised by Taylor earlier that the Incentive Trust and the Shareholders' Trust were "full", i.e. that between them the trusts owned about 15% of Regal Holdings shares. Ritoff had then instructed Farber not to buy anymore shares on behalf of the trusts. Levenstein, so Farber told Ritoff and Taylor, overruled the instruction and insisted that Farber buy shares (2895-6).

93.5 Ritoff explained Levenstein's *modus operandi*, particularly in May 2001. As shares became available for acquisition, Levenstein gave dealers instructions to buy shares for a fixed amount, say R50 000, at a specified price, the prevailing price. In Ritoff's view, had Levenstein not given the instruction to buy, the price would have dropped (2897-9).

93.6 Levenstein's version was that the instruction he gave to Faber related to the Shareholders Trust and not the Incentive Trust. He

said that he was acting in accordance with the board resolution (3514-5).

Annexure "A"

Ex parte:

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

23 August 2001

RULING

Introductory

1 In terms of s69(1)(a) of the Banks Act, 94 of 1990 ("Banks Act") if, in the opinion of the Registrar of Banks ("Registrar"), any bank will be unable to repay, when legally obliged to do so, deposits made with it or will probably be unable to meet any other of its obligations, the Minister of Finance ("Minister") may, if he deems it desirable in the public interest, with the written consent of the chief executive officer or the chairman of the board of directors of that bank, appoint a curator to the bank. The Minister appointed Mr Tim Store of Deloitte & Touche as curator of Regal Treasury Private Bank Ltd ("Regal Bank") with effect from 26 June 2001. In the press release issued by the Registrar at the time of the announcement of the appointment of Mr Store it was stated that recent events pertaining to Regal Bank had evidently led to unusually large scale withdrawals by depositors of their deposits held with Regal Bank and the concomitant outflow of funds had apparently

resulted in the bank experiencing difficulties in maintaining its required levels of liquidity.

2 On 13 July 2001 the Registrar appointed me with immediate effect as a commissioner in terms of s69A of the Banks Act to conduct an investigation into the affairs of Regal Bank. In the press release of 16 July, in which the announcement of the appointment was made, it was said that the appointment was considered appropriate given the following:

> "There were unusual events leading to the placing of Regal under curatorship and, consequently, intense public interest has been expressed in various media reports.
>
> The curator's investigations have confirmed that Regal entered into a number of material, unusual and highly technical transactions, which could impact on its financial position.
>
> These events and transactions merit further independent investigation, the pursuance of which lies outside the powers granted to a curator as prescribed in terms of section 69 of the Banks Act." The Registrar went on to express his belief that the appointment was "both in the public interest and in the interests of the promotion of the sound, stable and efficient banking system."

3 Subsequent to my appointment, the Registrar appointed Messrs Abrahams, Delport and Potgieter as assistants to the commissioner in terms of s69 A(2) of the Banks Act.

4 The investigation of the affairs of Regal Bank commenced at the time of my appointment. The investigation took a particular form on Monday, 20 August, when the examination under oath of witnesses commenced. On that day, Mr Vernon Wessels of Business Report approached me with a request that the hearing be open. I advised him to consult lawyers and to make application when convenient to do so. On the following day, Tuesday 21 August, Mr Jammy, instructed by Webber Wentzel Bowens appeared for Independent Newspapers (Pty) Ltd, the publisher of Business Report to move the application. It was arranged that the Registrar would file an affidavit in support of his view that the hearing should be in camera; Independent Newspapers were given an opportunity to file an answering affidavit and the matter was set down for argument on Thursday, 23 August, at 08:00. At the hearing on Thursday, Mr Jammy was instructed by Burt Meaden, and Independent Newspapers were joined in their application by Business Day and Personal Finance ("the applicants"). Mr Oelofse appeared on behalf of the Registrar and Mr Klein represented Deloitte & Touche. After hearing oral argument, this ruling was reserved until Friday, 24 August, at 10:00.

Does the commissioner have a discretion?

5 S69A provides:

"(4) A commissioner appointed under subsection (1) and any person or persons appointed under subsection (2) shall for the purpose of their functions in terms of this section have powers and duties in all respects corresponding to the powers and duties conferred or imposed by section 4(1), (2), (3), (4) and (6) of the Inspection of Financial Institutions Act, 1984 (Act No. 38 of 1984 – hereinafter in this section referred to as the Inspection Act), upon a registrar or an inspector contemplated in the Inspection Act: ….

(5) In the application, in relation to an investigation under this section, of section 4 of the Inspection Act, subsection (2) of that section shall be deemed to have been amended to read as follows:

'(2)(a) In carrying out an investigation into the business, trade, dealings, affairs or assets and liabilities of a bank under curatorship, a commissioner may examine under oath, in relation to such bank or any of its associates, any person who is or formerly was a director, auditor, attorney, valuator, agent, servant, employee, member, debtor, creditor or shareholder of that bank or any of its associates, or any person whom the commissioner deems capable of giving information concerning the business, trade, dealings, affairs or assets and liabilities of that bank or such associate, and the commissioner may administer an oath or affirmation to that person for the purpose of such an examination: Provided that the person examined, whether under oath or not, may have his legal adviser present at the examination.

(b) Unless directed otherwise by the commissioner, the proceedings under paragraph (a) shall be held in camera and not be accessible to the public.' " S69A(13), however, provides that "[a]ny 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."

6 It was submitted by Mr Oelofse, contrary to the position adopted by the Registrar in his affidavit, that in terms of s69A(13) the Registrar is the only person who has a discretion to direct that the hearing of oral evidence be accessible to the public is the Registrar. If that submission is upheld, the consequence would be that the words "unless directed otherwise by the commissioner" in s4(2)(b) of the Inspection Act must be ignored, taken as deleted and of no force or effect. The words of a statute should not lightly be so ignored and I must attempt to reconcile what appear to be conflicting provisions in the same section of the statute. If the Legislature had intended that the commissioner should have no discretion, s4(2)(b) of the Inspection Act, when incorporated into the Banks Act by s69A(5)(b), would simply have provided: "The proceedings under paragraph (a) shall be held in camera and not be accessible to the public."

7 The "proceedings" referred to s4(2)(b) of the Inspection Act are the proceedings at which oral evidence is heard, and not the investigation as a whole. Accordingly, it seems to me on a proper interpretation of s69A that an investigation into the affairs of a bank under curatorship is "in camera" or "private and confidential" *except* when the investigation takes a particular form, namely, the hearing of oral evidence, in which event the commissioner has a discretion to allow evidence to be accessible to the public. Such an interpretation avoids the deletion, in effect, of the contentious phrase in s4(2)(b) of the Inspection Act and allows for an application of the kind in question to be made at the hearing of oral evidence.

The exercise of the discretion

8 The applicants contend that the media should be allowed access to the hearings and only in appropriate cases, such as when evidence of a confidential nature is led, should the hearing be in camera. The Registrar, on the other hand, contends that if I find that the commissioner does have a discretion in terms of s4(2)(b) of the Inspection Act, I should rule that the hearings will be held in camera - without exception.

9 The discretion vested in the commissioner should be exercised judicially, objectively and impartially.

10 The factors taken into account in the exercise of my discretion are the following:-

- The commissioner appointed in terms of s69A is not a court nor an "independent and impartial tribunal or forum" as envisaged by s34 of the Constitution (Act 108 of 1996). That section provides: "Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum." (The emphasis is mine.) Although the commissioner is required to act objectively and impartially in terms of s69A(3), the commissioner does not resolve disputes. What the commissioner does is to conduct an investigation. He then reports on the affairs of the bank under curatorship in a written report in which he or she must express an opinion on various issues (s69A(11)). The report is forwarded to the Registrar and the Minister and possibly the prosecution authorities (s69A(12)). The report is private and confidential unless the Registrar, after consultation with the Minister, either generally or in respect of any part of the report, directs otherwise (s69A(13)).

- In terms of s14(d) of the Constitution everyone has the right to privacy, which includes the right not to have the privacy of their communications infringed. In Bernstein ao v Bester ao NNO 1996(2) SA 751 (CC) the Constitutional Court considered s417 of the Companies Act, Act 61 of 1973, a provision on which s69A of the Banks Act has been modelled. Ackerman J said in §'s [83] and [84]: "It is difficult to see how any information which an individual possesses which is relevant to the purpose of the inquiry can truly said to be private. One is after all concerned here with the affairs of an artificial person with no mind or other senses of its own; it depends entirely on the knowledge, senses and mental powers of humans for all its activities. … it can hardly be said that the knowledge of the director, official or auditor bearing relevantly on the affairs of a company that has failed, can be said to fall within such person's domain or personal privacy. I would hold the same in relation to a mere debtor or creditor of a company. If such knowledge is relevant, it is relevant because of some legal relationship between such person and the company, which can hardly be said to be private."
- In the affidavit filed by him, the Registrar, after referring to s4(2)(b) of the Inspection Act, stated:

  "As I read this section, it does give the Commission a discretion to deviate from this provision and to order that the proceedings shall be held in public. It is submitted that the Commissioner has the right to have certain portions of the

hearings, particularly where public interest so dictates, in public, rather than in camera. The underlying principle is once again bank secrecy.

Banks are customers of the central bank as have been said above but banks in turn have customers to whom they owe the principles of secrecy. In the event of bank in distress, it is my function as the supervisor to establish whether that distress can be remedied. The mechanism provided for in section 69A, is designed to assist my office in making a diagnosis as to the cause of the ailment. In this process confidential information relating to other banks and customers of that bank who may also be customers of other healthy banks may be disclosed, if the proceedings are not held in camera. If so disclosed, it could have a damaging effect on the financial stability of both customers and other banks. This in itself may have a ripple effect and cause instability in the financial system and at the same time not be to the benefit of depositors i.e. customers of other banks. The bank secrecy principle is one of the oldest in banking law and exists for the protection of depositors in the commercial world who do have an interest in keeping their affairs private and secret."

- In another passage of his affidavit the Registrar said:

"**Intimidatory tactics**

Allegations have been made relating to the management style of Mr J I Levenstein which includes the use of extreme intimidation of subordinates. In the event of an enquiry not being held in camera witnesses may be diffident in coming forward when making disclosure of the true fact which infringed or may have infringed the corporate governance system applicable at Regal Bank for fear of victimisation."

- It is in the public interest, and in particular in the interests of the Registrar, the banking industry, the shareholders and depositors of Regal Bank, that a thorough investigation into the affairs of Regal

Bank takes place. In view of the number of small banks which have failed in the last decade or so, it is vital to establish why Regal Bank was placed in curatorship; to learn any lessons which can gainfully be learned from the "Regal" experience; and to consider whether anyone should be held accountable. Witnesses should not be inhibited from testifying or co-operating with the commissioner for fear of reprisals or for concern that they might disclose confidential information. Unless the whole story is told, the truth will not emerge.

- Mr Klein placed on record that Deloitte & Touche had co-operated with the commissioner on the basis and in the belief that the evidence of the Deloitte & Touche witnesses would be given in camera. Two members of Deloitte & Touche testified in camera on 20 and 21 August. He gave concrete examples of the respects in which Deloitte & Touche evidence would be confidential, the breach of which confidence could have serious consequences.
- Of all the persons affected by the curatorship of Regal Bank (and what may follow), the persons who have the greatest interest in knowing what went wrong are the depositors. They placed their funds in Regal Bank in the belief that their money would be safe. If the hearing is held in camera they may never know what happened. While the Registrar, acting in terms of s69A(13), may direct the commissioner's report, in whole or in part, to be disclosed, equally, he may *not* do so. If he treats the whole of the report as private and

confidential, and this hearing was held in camera, the whole investigation would have been shrouded in secrecy. And that, in my view, would be an unsatisfactory state of affairs.

- A blanket ban on access of the media to the hearing would be an unjustifiable infringement of the right of freedom of expression contained in s16 of the Constitution. S16 provides, insofar as is relevant:

  "(1)(a) Everyone has the right to freedom of expression, which includes-

  (a) freedom of the press and other media;

  (b) freedom to receive or impart information or ideas …". Freedom of speech is "the matrix, the indispensable condition of nearly every form of freedom" per Cardoza J in Palko v Connecticut 302 US 329 (1937), quoted with approval by Joffe J in Government of the Republic of SA v "Sunday Times" Newspaper 1995(2) SA 221 (T) at 226 H. It was said by O'Regan J in SA National Defence Union v Minister of Defence 1999(4) SA 469 (CC) § [7]: "Freedom of expression lies at the heart of the democracy. It is valuable for many reasons, including its instrumental function as a guarantor of democracy, its implicit recognition and protection of the moral agency of individuals in our society and its facilitation of the search for truth by individuals and society generally. The Constitution recognises

that individuals in our society need to be able to hear, form and express opinions and views freely on a wide range of matters."

- These hearings are taking place at the same time that the curator is considering the financial position of Regal Bank and how best to deal with the bank and its assets. I am satisfied that there is a real risk that the publication of evidence before me could jeopardise the task of the curator to the prejudice of shareholders and depositors and that cannot be in the public interest. The curator should take a final view by 31 August 2001, i.e. in a week's time. It seems to me that it would be more appropriate to give a ruling after the curator has taken a final view on the solvency of the bank and what should be done with the bank or its assets.

11 Once that is out of the way, it seems to me that the factors that I have considered, some of which are conflicting, may be reconciled by a direction in the following terms:-

"1 The hearing of oral evidence in terms of s4(2)(a) of the Inspection Act, read with s69A(5) of the Banks Act, will be accessible to the public.

2 Any witness who wishes the whole or part of his or her evidence to be heard in camera must make application to that effect.

3 The application may be made informally.

4 The application must be justifiable.

5 The application itself may be held in camera on good cause shown.

6 A ruling on each application will be given before the evidence of the witness is given."

12 In the meanwhile, the hearing will be in camera.

13 The applicants and the Registrar and any other interested parties may place further evidence before me and make further submissions before a final ruling is given at a time and on a date to be arranged with Mr Delport or Mr Potgieter.

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J F MYBURGH SC
24-08-2001

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

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

Ex parte *Annexure "D"*

REGAL TREASURY PRIVATE BANK LTD ("Regal Bank")

3 October 2001

RULING (4)

1 During the hearing of the application referred to in ruling (3), Mr Jammy, representing Business Report, raised a concern his client had with the in camera hearings which had taken place in terms of the directions issued on 23 August 2001. In terms of those directions any witness who wished the whole or part of his or her evidence to be heard in camera was entitled to make application to that effect and the application itself could be held in camera on good cause shown.

2 Two witnesses who have testified so far, Messrs Lubner and Lopes, had their evidence heard in camera. In each case a similar procedure was followed. The attorney representing the witness applied for the application for the evidence to be heard in camera to be held in camera on the ground that otherwise the purpose of hearing the evidence in camera would be defeated. Having heard submissions and evidence in camera in support of each application, it was ruled that the evidence would be heard in camera. In retrospect, having gained insight into each application, I am satisfied that it would have been inappropriate to have heard the application in public.

3 The Business Report's legitimate concern is that because both the application and the evidence are heard in camera, the media has no way of knowing if it was appropriate for the evidence to be heard in camera.

4 How then must one reconcile conflicting rights:

- the right of freedom of expression contained in the Bills of Rights in the Constitution;
- the right of a witness to give evidence in camera in appropriate circumstances;
- and the right (and obligation) of the commissioner to conduct a proper and effective investigation in terms of s69 A of the Banks Act, 94 of 1990?

The dilemma is illustrated by an entirely hypothetical example of what might occur. A witness believes that if he gives evidence in public, he will antagonise someone who will then, in some way, harm him and his family. If that fear were to be disclosed in open in the application to hear evidence in camera, the witness believes that that mere allegation will enrage the person whom he fears will harm him and his family.

5 The one way it seems to me that the media's concern and the conflicting rights may be reconciled is to allow the media to have a lawyer present during the application in camera (to hear the evidence in camera). If the application is unsuccessful, the evidence will be heard in public. If the application is successful, and the evidence is to

be heard in camera, the lawyer can report to the media on the application. I expect, and trust, that the lawyer will use his or her discretion in what information is conveyed to the media. I also expect the media to act responsibly. In the hypothetical example which I have given, I would expect the media to respect the ruling in order to avoid the risk of harm befalling the witness and his family.

6 If the witness objects to the presence of a lawyer representing the media, the objection and the media's response to the objection, if any, will have to be considered on an *ad hoc* basis.

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J F MYBURGH SC

Annexure "E"

CHRONOLOGY

Regal Treasury Private Bank Ltd

("*Regal*")

BSD	**=**	**Bank Supervision Department**
EY	**=**	**Ernst & Young**
DT	**=**	**Deloitte & Touche**
Shareholders' Trust	**=**	**Rand Treasury Shareholders' Trust**
RTL	**=**	**Rand Treasury Ltd**
RMI	**=**	**Regal Medical Initiatives Ltd**
WW	**=**	**Worldwide Africa Investment Holdings**
SARB	**=**	**South African Reserve Bank**

Date	Event	Bundle
18/01/91	SARB memo: Wingate Finance Ltd	G33
01/07/91	SARB memo to Stals: Wingate application should be refused	G29
22/10/91	New application by Wingate	G45
13/11/91	SARB to Levenstein @ Wingate: application refused	G51
15/07/92	SARB to Wingate (Levenstein): deposits have not been repaid	G52
27/10/92	Wingate to SARB	G49
07/12/92	SARB to Wingate	G47
17/12/92	Wingate's attorneys to SARB: another application to be made	G53

09/03/93	New application made by Wingate reviewed by SARB	G36
26/03/93	Wingate application refused	G56
1993	"Wingate merged into Mercantile"	N17
01/07/95	"Cancelled" Levenstein restraint agreement	A323
17/07/95	RTL meeting	(K1)1
19/07/95	1st meeting of board of RTL – Levenstein chairman, Diesel MD	(K1)5
20/07/95	RTL combined meeting	(K1)2
17/08/95	2nd meeting of RTL: appointments: • Peter Springett chairman • Levenstein deputy-chairman • Krowitz CEO	(K1)9
07/09/95	Levenstein restraint agreement	G56.1
21/09/95	3rd meeting of RTL	(K1)15

26/10/95	4th meeting of RTL	(K1)20
28/11/95	5th meeting of RTL	(K1)29
24/01/96	6th meeting of RTL	(K1)48
21/02/96	7th meeting of RTL	(K1)57

- Banking license in preparation

01/03/96	Trust deed of Rand Shareholders' Trust signed	Q18, L3, L72
25/04/96	9th meeting of RTL: application to SARB on 24/04/96	(K1)74
26/04/96	Application by Rand Treasury Ltd	G61, A1
09/04/96	RTL's application to establish a bank	A1

- Peter Springett chairman
- Levenstein deputy chairman
- Krowitz: CEO
- Predominant business activities (A20)
- Springett CV: career in banking; FNB then with

	Wingate 1990 – (A30) Levenstein CV (A40): CA; Wingate 1986 – 94; Mercantile (A42) • Solvency risk (A148) esp @ A151; "*The Ego factor*"; counter-party risk (A156) • Memorandum of Association (A208)	
29/05/96	10th meeting of RTL: share capital R6.4 m	(K1) 79
26/06/96	SARB review of application of "*Rand Treasury Ltd*" • See original list of directors, joint MD s etc (G9) • Reference to audit committee (G13) • Directors not interviewed (G14)	G1
03/07/96	BSD memorandum to Wiese on Rand Treasury application: Lopes (G26); CVS etc (G24)	G15
04/07/96	RTL: Lopes: Joint MD: debentures	A293
11/07/96	RTL: Lopes to SARB	A312
20/08/96	Rand Treasury application: BSD memorandum	G57

- Review of Wingate (G58)
- Rand Treasury's proposed business described (G60)

21/08/96	1st AGM of RTL	(K1)108
21/08/96	13th meeting of RTL • Mark Springett joins the company	(K1)110
10/9/96	Application for a banking license granted	A319
16/09/96	RTL changes its name to Regal Treasury Private Bank Ltd	(K1)115
25/09/96	14th meeting of Regal • Mark Springett appointed to the board	(K1)117
23/10/96	15th meeting of Regal • Lubner's 1st meeting • Purchase of property for R7 m	(K1)125
07/11/96	Mark's restraint agreement	T44.25
07/11/96	Mark's contract of employment	T44.28
20/11/96	16th meeting of Regal	(K1)142

06/11/96	Peter Springett, Levenstein and Slender appointed trustees of Shareholders' Trust	L65
26/11/96	"Cancelled" restraint agreement of Levenstein	A321
11/12/96	17th meeting of Regal: bonus approved	(K2)3
22/01/97	18th meeting of Regal: share capital R56 m	(K2)17
25/02/97	19th meeting of Regal: at new premises at Stone Manor	(K2)21
20/03/97	20th meeting of Regal	(K2)39
17/04/97	21st meeting of Regal	(K2)45
22/05/97	22nd meeting of Regal: • Mark Taylor employed • asset & portfolio management: R12 m	(K2)74
26/06/97	23rd meeting of Regal	(K2) 74
22/07/97	BSD to Regal re debenture capital	B1

24/7/97	24th meeting of Regal: CEO/chairman relationship defined	(K2)78
21/08/97	Second AGM of shareholders	B2
21/08/97	25th meeting of Regal: negotiations with stockbrokers	(K2)82
25/08/97	Notice of appointment of Mark Taylor as director from 01/05/97	B17
23/09/97	Mark Ber resigns	B28
25/09/97	26th meeting of Regal: stockbroker deal discussed; chairman's duties listed	(K2)86
08/10/97	Special board meeting of Regal: Levenstein attack on Peter Springett	(K2)93.1
30/10/97	27th meeting of Regal: assets being managed R40 m; agreed to proceed with stockbrokers	(K2)95
03/11/97	Appointment of Davis as CFO	B29
11/11/97	Application to launch & subsidiary "*RT Securities Ltd*"	B40

20/11/97	28th meeting of Regal	(K2)99
17/12/97	Regal to Wiese re application	B56
21/01/98	Peter Springett resigns	(K2)103
22/01/98	29th meeting of Regal: Peter Springett's last meeting	(K2)104
18/02/98	Regal & BSD meeting • Profits of R12 m projected • Resignation of Peter Springett • Levenstein to act as chairman "*for the short term*"	C13
24/02/98	Martin to Levenstein letter eg • Opposed to Levenstein as chairman & CEO	C16
26/02/98	30th meeting of Regal: managed assets R67 m; WW interested in 10%; increase in share capital to R100 m	(K2)108
28/02/98	Regal Bank's statutory financial results	130162
26/03/98	31st meeting of Regal: net income after tax for 1998 year-end R8.3 m	(K2)112

23/04/98	Appointment of Radus as executive director	C19
23/04/98	32nd meeting of Regal: managed assets R100 m; WW negotiations; capital R80 m	(K2) 116
25/05/98	Levenstein, Slender & Radus: trustees of Shareholders' Trust	L46
28/05/98	33rd meeting of Regal: minimums set of investments: R1 m for individuals, Levenstein to continue as acting chairman	(K2)123
10/06/98	Application granted to establish Regal Treasury Corporate Finance Ltd	C32
25/06/98	34th meeting of Regal: managed assets R120 m; negotiations with WW continue	(K2)128
29/06/98	EY sends DI returns to SARB	C36
06/07/98	WW agreement with Regal Bank	U13
07/07/98	Regal application establish a Unit Trust Management Co	CA2

07/07/98	Request for permission ito s37 by Regal & WW shareholding of 20%	C44
15/07/98	Meeting EY & BSD • *"No concerns about Regal"* • No significant risks • Committees (C71)	C59 D113
21/07/98	SARB to Regal: bank can't establish subsidiaries	C73
21/07/98	Shareholders' Trust to buy Regal shares	L44
23/07/98	35th meeting of Regal: managed assets R130 m	(K2)136
23/07/98	3rd AGM of shareholders: protection of shareholders and depositors, increase in share capital	C94, (K2)133
17/08/98	Application for WW shares granted	C84
27/08/98	36th meeting of Regal: WW directors cannot attend	(K2)143
17/09/98	Regal: Birrell to resign as director	C93

23/09/98	37TH Meeting of Regal	(K2)148
29/09/98	Regal audit committee/EY/BSD Meeting	C103
30/09/98	SARB to Levenstein: given until 31/12/98 to appoint a chairman	C97
20/10/98	Shareholders' Trust to remain in existence despite listing of Regal Holdings	L43
22/10/98	38th meeting of Regal: WW directors attend first meeting; Levenstein appointed chairman; Lubner's input	(K2)153
23/10/98	Levenstein to Wiese re appointment of chairman (read with C98)	N24
29/10/98	Levenstein to Wiese: Refuses to appoint chairman: motivation for retaining both "*a wedge*"; "*prejudice shareholders*"	C98
05/11/98	SARB approval for holding co to be registered	C100

17/11/98	Wiese to Levenstein: pending listing of Regal Holdings Levenstein can remain acting chairman	C124
19/11/98	Application for registration of Regal Holdings: Levenstein chairman • Organogram C129	C125
25/11/98	Regal & SARB re: re Unit Trust Management Co	C193
26/11/98	39th Regal meeting: Lubner & chairmanship	(K2)158
27/11/98	Regal Holdings incorporated	D35
14/12/98	Approval given to Regal Holdings	C194
15/12/98	SARB to Regal Bank re issues of shares of Regal Holdings	C195
21/12/98	Approval given by SARB of "*equity directors*"	C198
07/01/99	Application for Kaminer's as director	D1

07/01/99	Application by WW to buy shares in Regal Holdings	D8
18/01/99	Regal/BSD internal audit meeting	D15, D27
20/01/99	Regal to SARB i.e. WW Shareholding	D11
25/01/99	SARB letter to Competition Board: WW + 15% in Regal Holdings (no objection: G82)	G75
26/01/99	SARB to Hiralal of Regal i.e. internal audit department	D12
26/01/99	Scheme of arrangement of Regal approved by TPD (?)	G80
27/01/99	40th meeting of Regal. Possible deal with Liberty; RMB team joins securities; unit trusts	(K2)163
10/02/99	Regal & Metshelf 57: pledge of shares	(I1)325
10/2/99	Metshelf 57 & Regal option agreement	(I1)333
10/2/99	Metshelf 57 and Regal & Mettle Ltd loan agreement	(I1)345
10/2/99	Regal & Tradequick 171: preference share agreement	(I1)357

24/2/99	Audit committee meeting	(K2) 175.1
24/02/99	41st meeting of Regal: Regal securities R1bn; Unit Management Co registered	(K2)172
25/02/99	BSD/EY meeting re Regal – "*Regal very control conscious*"	D128
25/02/99	Regal Holdings listed on JSE	Q1
26/02/99	Application to register Unit Trust Co as subsidiary of Regal Holdings	D107
28/02/99	Statutory financial results	130001
10/03/99	Application granted	D109
11/03/99	BSD letter to EY re meeting of 25/2/97	D112
18/3/99	Regal & RVM Equity Investments: preference share agreement	(I1) 377
18/3/99	Metshelf & Regal & Mettle Ltd: loan agreement	(I1) 394

24/03/99	42nd meeting of Regal: share price below expectations; WW contribution	(K2)177
24/03/99	Shareholders' Trust meeting	L42
29/3/99	Regal/BSD meeting • Regal no new products • All new products & ventures to be discussed with audit committee • Regal Holdings discussed • CEO/chairman : June 1999 • Suitable candidate not available	D142
09/4/99	Audit committee agenda (no minutes)	(K2) 178.1
20/04/99	BSD letter to Regal re meeting	D136
28/04/99	43rd meeting of Regal: share price restored	(K2)180
28/04/99	Shareholders' Trust meeting: "*shares into stronger hands*"	L41

28/04/99	BSD/Regal Treasury meeting	D171 D174
28/04/99	BSD/Regal Corporate Finance meeting	D191 D174
29/04/99	Application for subsidiaries	D165
04/05/99	BSD letter to Regal re Treasury meeting of 28/4/99	D169
04/05/99	BSD letter to Regal re Corporate Finance meeting	D189
05/05/99	Shareholders' Trust authorisation for Regal to recoup loan	L70
05/05/99	Regal/Shareholders' Trust loan agreement for R5 m	L88
05/05/99	Pledge & cession	L93
06/05/99	Special meeting of Regal: WW's participation questioned	(K2)183
10/05/99	Wiese to Levenstein letter re chairmanship	D207

17/05/99	Authorisation given for subsidiaries	D209
26/05/99	44th meeting of Regal: discussions with Liberty; Steen to join Regal	(K2)189
26/05/99	Shareholders' Trust meeting re purchase of Regal shares	L40
10/06/99	Shareholders' Trust: OD of R5 m with Regal	L86, L115, L125
15/06/99	EY returns ito regulations	D213
23/06/99	Audit committee minutes: Levenstein to be chairman by agreement with EY	(K2)195.1
23/06/99	45th meeting of Regal: Steen to start on 01/08; discussions with SARB re chairmanship	(K2)192
24/06/99	Regal application re subsidiaries	D223
28/06/99	Shareholders' trust: memo by Levenstein about "*front running*"	L39

29/06/99	Subsidiaries application granted	D226
June 1999	Jacobson introduced "*business model*" to Regal	J94
01/07/99-23/7/99	Correspondence RMI/Regal re NEWCO	J177 – 195
01/07/99	Steen to be appointed as director on 1/8/99	D230
06/07/99	Levenstein gives instruction not to sell shares	G181
08/07/99	Declarations by directors re internal controls	D243
14/07/99	<u>Mark Springett dismissed</u> Springett to Levenstein: (a) "instruction given not to <u>*sell*</u> Regal shares: price "*too low*" (b) Chairman/CEO: SARB instruction to Levenstein to split the two defied	G122 G145
14/7/99	Lawyer's letter for Springett to Levenstein: reaction to letter G181	G185

14/07/99	Levenstein to Mark Springett summarily dismissing him	D269.3, G190
14/07/99	Addendum to License Agreement RMI	H317
15/7/99	Werksmans (Regal) letter re shares of Peter Springett	G207
16/7/99	Krawitz reply on behalf of Peter Springett	G213
16/7/99	Krawitz, on behalf of Mark, to Levenstein: dismissal not accepted	T72
18/7/99	Elul/Regal Call option	H320
19/07/99	Letter from Levenstein to Wiese re chairmanship (kicks for touch)	D287
19/07/99	Krawitz – on behalf of Mark – to Lubner	T75
20/07/99	Woodhouse – on behalf of Regal – replies to letter of 18 July	T78
23/07/99	E submits audit reports to BSD	D257

26/07/99	Kruger's resignation letter: instruction not to sell shares	T41
27/07/99	Lubner to Levenstein on Mark Springett & dismissal	N101
27/07/99	Mark to Davis: items on agenda for meeting of 28/07/99	T81
27/07/99	Davis to Mark: access denied	T85
28/07/99	Wiese to Levenstein re chairmanship: separate the two by 30/9/99	D286
28/07/99	Werksmans to Krawitz: Mark no longer a director	T82
28/07/99	Lubner to Levenstein denying that he has resigned: 2X	N100, N99
29/07/99	Regal seeks SARB approval for AGM resolutions	D265
29/07/99	Lubner to Levenstein: "upset following on meeting on 28th"	N98
30/07/99	Werksmans to Krawitz: Mark spoke to Nhleko and	T90

	made "defamatory allegations"	
4-10/8/99	Round-robin resolution of Regal Holdings dismissing Mark	T116
06/08/99	Lubner to Levenstein denying any interest in chairmanship	N96
06/08/99	Mark to Lubner re meeting of 11 August 1999 and agenda	(K2)195.4-
11/08/99	Mark Springett's proposed agenda for board meeting setting out his contentions: "refused entry to bank to discuss the issues"	T42
11/08/99	Levenstein to Lubner re Mark Springett & Lubner's resignation.	N85
11/08/99	Werksmans to Mark: board has resolved to remove you	T109
11/08/99	Levenstein to Lubner re resignation	N86, N87-92
12/08/99	Krawitz to Werksmans: Mark denied access on 11/08/99	T110
18/8/99	46 th meeting of Regal: Lubner & Schneider resignations confirmed; Mark Springett ao discussed; allegations of theft etc made; Nhleko raises concerns about impact on share price	(K2)196

18/8/99	Shareholders' Trust meeting: Mark Springett's allegations discussed	L37
18/08/99	Levenstein to Martin re the Springetts joining an asset management co	D269.1
25/08/99	Regal AGM	D290
20/8/99	Meetings between Mark Springett & BSD/JSE/FSB dealing with Springett's allegations against Regal	G145
07/09/99	BSD & Levenstein meet to discuss dismissals & resignations	D284
21/09/99	Regal Holdings interim results at 31/8/99	130042.1
29/9/99	Audit committee meeting: Mark Springett's dismissal; Levenstein to resign as chairman	(K2)205.1, D278
29/09/99	47th meeting of Regal: Lurie appointed chairman in place of Levenstein; civil and criminal steps to be taken against Mark Springett	(K2)202
01/10/99	Wiese & Levenstein re meeting of 7/9/99 about corporate governance: Lurie chairman on 29/9/99; resignations & removals; funding of Shareholders' Trust to be reviewed	D284

07/10/99	Regal to Wiese re election of Lurie	DT86
12/10/99	Levenstein to Wiese: deals with resignations and dismissals: being "risk managed"; no problems with funding of purchase of shares	DT87
21/10/99	Regal proposal to buy Greenwich Group	L99 – L114
22/10/99	Levenstein to Wiese: prosecuting Mark Springett	N30
27/10/99	48th meeting of Regal: discussions with Greenwich	(K2)206
04/11/99	Levenstein to Martin: "corporate governance requires strength" re Mark Springett & Lubner	DT(1)89
5/11/99	Trademark License Agreement Regal & RMI	E122
12/11/99	Wiese to Levenstein: proof of board approval for issue of Holdings shares	DT91

19/11/99	Wiese to Levenstein	D294
23/11/99	Shareholders' Trust: Equity & borrowings. Price R5.72	L63
23/11/99	Levenstein reply to DT91	DT92
24/11/99	Audit committee meeting	(K2)213.2
24/11/99	49th meeting of Regal: legal proceedings against Springetts; branding income in future	(K2)210
25/11/99	Regal/RMI negotiations	J275
01/12/99	Offer to purchase assets of Protea Medical Services	H202
03/12/99	Regal letter to shareholders of NEWCO (Regal Protea)	H88
06/12/99	Regal to Regal Protea (Jacobson) loan of R6 m & R3 m	H86, H241
06/12/99	FSB report on asset management of Regal: "lack of proper management & inadequate control measures"	D229.1
08/12/99	FSB inspection report: "no serious irregularities found"	T45

14/12/99	FSB report on R T Unit Trust Management Co lack of control etc (D229.16)	D229.16
24/12/99	Regal loans to LAK Trading Co no 2 (Protea Health Products)	H26, H34
29/12/99	Levenstein to Lurie asking R2 m & R5 m shares & agreed to by non-executive directors (see handwritten note).	DT174
19/01/00	Trademark License Agreement Regal & Kgoro Upliftment Projects Ltd (p 1 missing) – Description of Kgoro's business	E83 E91
24-28/1/00	Correspondence between Springett's attorneys & Regal attorneys	G83-90
25/1/00	Note by Lurie for meeting of non-executive directors re R2m bonus	U1.1
26/01/00	50th meeting of Regal: Springetts; branding	(K2)214
26/01/00	Nhleko to Lurie re remuneration of Levenstein	U58

27/01/00	Levenstein records approval of R2 m & R5m shares	DT176
28/01/00	LAK Trading becomes Regal Protea	H221
28/01/00	Meeting BSD/EY: re corporate governance etc	E9
31/1/00	Regal's application to establish an off-shore interest for Regal Technologies Ltd	E1
31/01/00	Levenstein to Nhleko: "lack of support"; misrepresentation etc	U1
31/01/00	Nhleko reply: denial	U3
03/02/00	Wiese to Lurie: appoint more non-executive directors	DT96, E5.2
03/02/00	Wiese to Levenstein: reply to correspondence	E5.1
07/02/00	Regal to FSB about Mark Springett: Springett is working for ARCAY	E5.4
10/2/00	BSD report to Van Heerden (EY) re Regal Bank– corporate governance; internal audit; banking risks	E6
14/02/00	The R2 m & R5 m shares as part of a restraint of trade agreement	DT177
15/02/00	Levenstein paid the R2m	E38.1
17/02/00	Lurie to Wiese: looking for suitable candidates for board	DT100, E5.7
21/02/00	FSB to Levenstein in reply to letter of 07/02/00	T6
28/02/00	Statutory financial results	130043

02/03/00	Addendum to restraint agreement: Levenstein can get dividends even though no shares issued	DT183
14/03/00	Protea Health & Medsurg update	H53
22/03/00	Wiese to Lurie: to arrange a meeting re corporate governance	E32.1
26/03/00	51st meeting of Regal: forensic audit re Springett ao, 1st dividend to be declared	(K2)219
29/03/00	Regal to SARB re compliance of internal controls and "high ethical standards"	(K2)221
06/04/00	EY meeting to discuss branding income	Van Heerden 1021; 010126
10/04/00	EY Board report	010103
11/04/00	E1 application refused.	E33
11/04/00	Protea Health Products & Regal re debtors & stock	H46
12/04/00	Audit committee meeting (no minutes): agenda : meeting	(K2)223.1 Van Heerden 1027
12/04/00	Levenstein to Van Heerden of EY re value of business model, Kgoro etc (no reference to board meeting)	N107, KPMG 165

13/04/00	Meeting EY with Levenstein	Van Heerden 1028
(?)13/4/00	Lurie to Levenstein: re meeting with Cooke	
14/04/00	Van Heerden (EY) fax to Levenstein: "outstanding issues"	010133
14/04/00	Levenstein reply to Van Heerden	010135
17/04/00	Meeting BSD (Wiese, Martin) and Regal Bank (Lurie, Levenstein) • Meeting to address corporate governance issues; independent chairman being considered • Appointment of Steen defended	E39
18/04/00	(Unpublished) preliminary results	KPMG 168
26/04/00	IPV valuation of Kgoro @ between R126.9 m and 177.7 m.	E97 – I1 322.2
26/4/00	IPV valuation of RMI @ between R92.4 and R129.4 m	KPMG 124
28/04/00	EY report asset management @ Regal re Mark Springett	G235
03/05/00	Cooke's valuations of branding income	010161
04/05/00	Levenstein to Wiese re EY & "new economy"	N26 N39 – N69
04/05/00	EY meets with Levenstein: branding income	Van Heerden

1031

05/05/00	BSD/EY meeting re threat by EY of qualifying financial statements re valuation of RMI & Kgoro	E41
05/05/00	Levenstein to Van Heerden of EY on Draft Audit Opinion: “franchise model”.	N105
05/05/00	Levenstein to Wiese: attacking EY & supporting KPMG appointment	N11
09/05/00	Levenstein on radio to Moneyweb	S1
10/05/00	EY management letter: CEO has final say on advances (DT167); other concerns raised	DT165 – 172
14/05/00	Regal Bank letter to Wiese re s7 report	E78
15/05/00	s7 Review done by KPMG	E56; DT309
15/05/00	[1] BSD/KPMG meeting to discuss s7 report (E53) (valuations on branded companies range from R4	E49

to R50 m!)

15/05/00	[2] BSD/KPMG/ Levenstein meeting: threat to deregister bank if Regal Bank publish financial statements.	E52
15/05/00	[3] BSD/EY meeting re the KPMG report (s7) re valuation: • EY: issue detected at end of January; Wiese raises options including curatorship/removing Levenstein.	E42
15/05/00	[4] BSD/EY/Regal (Lurie & Buch) meeting: discussion on EY & KPMG attitude to valuations of threat of qualifying reports. Lurie & Buch defend Regal's valuations and accounting.	E45
15/05/00	Davis to Van Heerden re Branding expenditure of R22m	030427
16/05/00	Fax copy of "audited results" sent to Buch	KPMG 170.1
16/05/00	SENS announcement of Regal Holdings results	010244.03
17/05/00	EY letter to Regal Bank objecting to information contained in publication of Regal's financial results. Retraction sought.	E54

17/05/00	Publication of "audited" financial statements	010292
17/05/00	EY letter to Regal Holdings calling for retraction	010296
18/05/00	Business Report on Regal's 2000 results: "reporting" controversy with EY	E55.2
19/05/00	SENS "retraction" by Regal	010300
23/05/00	Levenstein to Wiese: further attack on EY: threat of damages claim	N15
±23/05/00	Regal branding model (pp3 – 5) explanation: • RMI • Branding	N17
23/05/00	Levenstein to Wiese: Regal Branding model	N20
Undated	Document apparently prepared by Levenstein on Shareholders Trust and funding of Trust by Regal	N77 – 81
24/05/00	52nd meeting of Regal: forensic report re Springett ao	(K2)225
24/05/00	Shareholders' Trust decision to buy 5m Regal Holdings	Q34, L34

	shares	
12/06/00	Internal memo from Lopes a.o. to Levenstein and Lurie re EY audit.	E134, R237
23/06/00	Levenstein response	E137
26/06/00	Davis note to Diesel re 5m shares of Levenstein	U1.2
28/06/00	Shareholders' Trust decides to buy more shares	Q35, L33
28/06/00	53rd meeting of Regal: new committees; Steen to go	(K2)227
28/06/00	13th meeting of Regal Holdings; Kgoro gives presentation	(K2)230
04/07/00	Inter-office memo, to Lurie, raising issues eg the dividend; Nhleko; R2m bonus, etc	G83.1
Undated	Draft sale of shares from Regal to Jacobson in RMI	H296
10/07/00	Regal Bank (Levenstein) to SARB re "*Regal's banking model*" re list of branded companies	E138 (DT303)
17/07/00	RMI/Elul agreement	J262
17/07/00	EY report to SARB i.t.o. regs 6(1) and 6(2) (a) and (b) and 6(3), 6(6) of Banks Act	E144

17/07/00	JIL stands surety for RMI Consortium	vdW(123)
26/07/00	14th meeting of Regal Holdings; report back on Kgoro	(K2)235
26/07/00	Shareholders' Trust decides to buy more shares	Q36, L32
26/07/00	Audit committee meeting minutes	(K2)237.2
26/07/00	54th meeting of Regal: concern at Nhleko not attending; 93 Grayston to discuss R110m; Shareholders' Trust buying shares	(K2)231
11/08/00	Mettle proposal re RMI	J117, K196
14/8/00	Lopes & BSD meeting	G91, E149
14/08/00	New Heights 118 incorporated	H268
16/08/00	Meeting BSD/DT to hold s7 enquiry: emphasis to be on corporate governance	E149
18/08/00	Meeting BSD/DT discussions on alternatives	E151

	"*curatorship last resort*" – see terms of reference re corporate governance	E153
18/08/00	Lopes dismissed or resigned	
21/08/00	BSD memo to Deputy Governor re Lopes meeting of 14/8/00 – Lopes alluded to disputes/ on board; income not "*real*"; etc; s7 enquiry to be initiated	G91
21/08/00	Lurie letter to BSD: Levenstein dismissed Lopes	G104
23/08/00	Meeting BSD/non-executive directors of Regal Bank to discuss "*recent dismissals & resignations*"; branding strategy.	E159
23/8/00	Wiese instructs s7 enquiry by DT	E165
24/08/00	Levenstein to Martin re Lopes	N33
25/08/00	SARB meeting at Lubner's house re Levenstein	E168
28/08/00	Radus of Regal Bank letter to Wiese: supporting Levenstein & attacking DT's appointment	E170, N5
30/08/00	55th meeting of Regal; concern at Nhleko not attending;	(K2)238

	Regal not in property business; rating of Regal; Lopes discussed briefly	
30/08/00	15th meeting of Regal Holdings: report back on Kgoro; Steen to be reported to SARB etc	(K2)241
31/08/00	Wiese reply to Radus letter (E170)	E181
31/08/00	RMI financials	H309
31/08/00	RMI resolution signed by Radus	J254
Undated	Regal: "RMI strategy-buy-out"	N70
Sept 00	"The branding strategy"	N38
Undated	Regal/Levenstein document (30 pages) on branding etc • "Divine & cosmic symphony" (N47) • "Trust me" (N52) • "Best banking model … on the globe" • Corporate governance (N61)	N39 – N69
04/09/00	Audit committee meeting: "branding" income; RMI	(K2)243.2

	sale; Buch compliments Levenstein	
05/09/00	Interim results published	010408
04/9/00-13/9/00	Correspondence between lawyers: Regal/Lopes/Steen	G94-111
06/09/00	<u>Meeting DT & BSD</u> • Discussion on role of Levenstein; Lopes, audit committee; state of mind of Levenstein; the trusts and shares of Regal Bank	<u>E183</u>
07/09/00	• Levenstein letter to SARB re EY; "*conspiracy agenda*"; "*I will not weaken*" • Appointment of de Castro as CFO: 28 years old and worked for Levenstein & Partners	E187, N8 E269
07/09/00	Levenstein to Wiese re Lopes	N3
12/09/00	Meeting BSD/Levenstein: EY accused of having political agenda, allegations made against Strydom of EY	E192
13/09/00	Levenstein to Wiese: SARB "*takeover*" of Regal;	G116, N7

	suppression of share price	
15/09/00	Steen to Martin (BSD) raising concerns about branding; corporate governance	G112
21/09/00	Shareholders' Trust to buy 1.6 m shares	Q37, L28
21/09/00	EY letter to Regal Holdings about the interim results	180088
26/09/00	Levenstein to Krowitz: WW "exiting at wrong time"	U8
28/09/00	Report by Mark Springett a.o. to Martin, BSD. • Criticises report of EY • Corporate Governance • FSB/JSE	G117
28/09/00	EY and Regal Bank meeting: EY to be invited to all audit committee meetings	Strydom 696
28/09/00	Harvey Wainer report to attorneys of Mark Springett on EY investigation (G235)	G356
04/10/00	Meeting BSD/DT to review s7 results: Wiese & Martin have lost trust in Levenstein	E195
05/10/00	Levenstein to Nhleko: Regal will fund WW's shareholding	U9
10/10/00	Levenstein to Wiese: call on SARB to intervene: Steen & Lopes.	N10

11/10/00	Really Useful Investments no 108 & Regal: Deed of pledge & cession	(I1) 249
11/10/00	Regal & Really Useful Investments no 10: sale of shares agreement	(I1) 257
11/10/00	Regal & Mettle Ltd: put option agreement	(I1) 269
11/10/00	Really Useful Investments no 11 & Regal: call option agreement	(I1) 278
11/10/00	Mettle Ltd & Regal: call option	(I1) 287
11/10/00	Regal & New Height 85 & Mettle Ltd & Really Useful Investments no 10: Umbrella Agreement	(I1) 295
11/10/00	Really Useful Investments no 10 & Regal: put option agreement	(I1) 301
11/10/00	Regal & New Heights 85: preference share agreement	(I1) 313
11/10/00	Radus to Martin re Peter Springett	N32
20/10/00	Internal meeting of BSD	E205

23/10/00	Meeting DT/BSD/board of directors of Regal to discuss DT s7 report; Levenstein deals with allegations eg personal expenditure; shares; resignation of directors; branding	E206, DT455
Undated	Document apparently by Levenstein re DT report	N74
25/10/00	56th meeting of Regal: Nhleko's non-attendance; deposit book R930 m; Lopes to resign as director, dismissed as employee	(K2)245
25/10/00	AGM of Regal Holdings	F21.2
25/10/00	16th meeting of Regal Holdings: report back on Kgoro	(K2)248
27/10/00	Regal subscribes for R125.5 m shares from Metshelf 106	(I1) 56
27/10/00	Mettle Finance (Pty) Ltd & Metshelf Trading 1 (Pty) Ltd: subordinated loan agreement	(I1) 68
27/10/00	Metshelf Trading 1 & Mettle Securities: portfolio	(I1) 77

	management agreement	
27/10/00	Regal & Metshelf Trading 1: put option Agreement	(I1) 88
27/10/00	Mettle Ltd & Shareholders' Trust: put option agreement	(I1) 100
27/10/00	Davis note to vdW re s7 DT report	vdW (221)
Undated	JIL's memo on s7 DT report	vdW (225)
30/10/00	SARB letter to Regal re EY report of 17/7/00	E216
31/10/00	DT s7 report • The bank & its committees (E216) • Conclusion on corporate structures (E220) • Regal buying its own shares from 3/2000 (E221) • Dismissals since July 1999 (E229) • Overly dominant CEO (E234) • Purchase of shares by trusts & loans by Regal to trusts (E238, E262) • Branding strategy (E243)	E211
08/11/00	Jacobson suretyship for New Heights 119	H322
09/11/00	Audit committee minutes: payments to directors to be salary; bonus to Levenstein approved	(K2)249.2

15/11/00	SARB to Regal re franchise of a trading license	E280
17/11/00	Regal & Mettle Properties: sale of 93 Grayston Drive	(I1) 191
17/11/00	Regal & Mettle Properties International: preference share agreement	(I1) 205
17/11/00	Regal Treasury Property Investment & Mettle Properties International: put option agreement	(I1) 220
17/11/00	Mettle Properties & Regal Treasury Property Investments: call option agreement	(I1) 234
24/11/00	Correspondence: Regal & RMI's lawyers	H292
29/11/00	EY working papers: "integrity of management"	140123
29/11/00	Audit committee minutes	(K2)257
29/11/00	Regal's response to DT s7 report & attaching legal opinions (E294) & constitutions for various committees e.g. exco (E324) audit committee (E342)	E282 DT375
30/11/00	EY planning board report: materiality at R6m	110020
01/12/00	FM: Mettle (+ 8% stake in Regal)	S6
01/12/00	WW to Lurie re sale of Pekane shares	U1.4

08/12/00	Audit committee minutes: EY present; Levenstein admits to “a few people mistakes”	(K2)259
12/12/00	Nhleko to USBC: re sale of WW’s shareholding in Regal	U11
12/12/00	WW to Lurie recording sale of Pekane shares for R60m to Regal	U1.6
13/12/00	Sumitomo re Regal Protea	H169
15/12/00	Lurie to WW accepting WW’s offer	U1.7
19/12/00	Regal letters of undertaking for Protea	H195
20/12/00	Lurie receives letter of disposal from WW	Cohen -
20/12/00	Vorster Opinion	P6
22/12/00	Letter to Slender and other directors re R60m Pekane shares and “acquisition”	E365
22/12/00	Levenstein/Jacobson discussions re sale of shares in RMI	J277
27/12/00	SCMB to WW re Pekane shares	U59
29/12/00	Regal Bank buys Holdings shares from Phekani for ± R61 m and records transaction as “overnight loan”	Marshall 388
31/12/00	R60.2m transfer in “Phekani Investments”	Diesel (7)
04/01/01	Regal to SARB re issue of R300m preference shares	FO.1
22/01/01	Meeting DT/BSD: to review Regal’s response (E282)	F1, DT497
22/01/01	List of shareholders of Regal	F7

23/01/01	Regal to SARB re employee share incentive: price paid 50c more than market price	F10.9
24/01/01	Exco meeting minutes: litigation eg Lopes & Springett discussed; no bad debts; Sempres to go to Investment Committee	
25/01/01	EY engagement letter to Regal Holdings	110025
26/01/01	Shareholders' Trust: no equity bought to date	L35
30/01/01	Regal to SARB: compliance function	F10.11
31/01/01	Regal Holdings board meeting: return of WW shares discussed	(K3)1
31/01/01	58th Regal board meeting: Lopes and Mark Springett cases to be settled	(K3)40
31/01/01	Audit committee meeting	(K3)94
02/02/01	Regal to FSB answering queries re DT report; Mark Springett etc	F118.2
05/02/01	Letter Regal to Wiese re new appointments	F11
08/02/01	Regal to SARB: risk management	F13.1

12/02/01	Meeting BSD/EY reviewing DT s7 report; EY responsibilities spelt out i.t.o. regs 38- 48; to review concerns eg CEO; trusts, branding.	F27
12/02/01	Second meeting of Regal Securities • Assets under management R798 m	(K3)126
Feb 01	Jacobson valuations of RMI	H326, J280-2
13/02/01	Letters of undertaking by Regal for Protea	H199
14/02/01	Meeting Strydom (EY) and Cohen (Regal)	Cohen 1951, 1973
14/02/01	1st meeting of ALCO	(K3)62
14/02/01	VD Walt appointed to Regal board	F13.3
19/02/01	Appointment of Cohen as director	F15

19/02/01	Rooth & Wessels letter to SARB & Opinion on Companies Act, Banks Act, etc	G359
21/02/01	Exco meeting: minutes	vdW (270)
24/02/01	Oosthuizen appointed to Board	F10.1
26/02/01	First meetings of Regal Employee Benefits and Regal Fiduciary Services Ltd	(K3)5.17
28/02/01	Shareholders' Trust to sell 3 m shares in Holdings to Sempres	L23
±28/2/01	Levenstein note to Davis: 93 Grayston "unconditional"	F21.1
28/02/01	Statutory financial results (approved 13/06/01)	130090
01/03/01	Regal Shareholders Trust to continue buying shares in Regal Holdings	L22
07/03/01	Regal Bank to Sempres contracts	vdW (128-)
14/03/01	Minutes of first meeting of Regal Unit Trust Management Co ("MANCO")	(K3)5.23
14/03/01	Regal & Metshelf 106: preference share agreement	(I1) 111
14/03/01	Mettle Finance & Metshelf Trading1: subordinated loan agreement	(I1) 124
14/03/01	Metshelf Trading 1 & Mettle Securities: portfolio	(I1) 133

	management agreement	
14/03/01	Regal & Metshelf Trading 1: put option agreement	(I1) 144
15/03/01	Regal to EY to oppose RMI liquidation	H332
16/03/01	1st meeting of corporate governance committee	(K3)83
16/03/01	59th Regal board meeting: Lurie resigns as chairman "*conflict of interest*" Cohen chairman; minutes of various committees noted	(K3)47
19/03/01	3rd meeting of Regal Securities	(K3)134
20/03/01	Vorster Opinion re s38; Insider Trading etc	P12
22/03/01	Levenstein to Cohen re RMI & Mettle deal	H345 – 348;N72
23/03/01	Exco meeting: Sempres deal finalised (see deals concluded on 9/5/01)	vdW (2875)
22/03/01	Levenstein to Van der Walt: RMI & s37	N71
23/03/01	Levenstein meeting with Aitken	180244

27/03/01	2nd meeting of ALCO	(K3)66
28/03/01	Settlement agreement: Regal Holdings Co and Peter Springett a.o.	T44.1
28/03/01	Audit committee meeting: EY audit; value of 93 Grayston; Shareholders' Trust to be terminated	(K3)98
02/04/01	Mark Springett to FSB: all allegations have been withdrawn	T12
03/04/01	1st meeting of Trustees of Retirement Fund	(K3)12.17
06/04/01	Regal & Metshelf 106: preference share agreement	(I1) 158
06/04/01	Mettle Finance & Metshelf Trading: subordinated loan agreement	(I1) 170
06/04/01	Metshelf Trading 1 & Mettle Securities: portfolio management agreement	(I1) 178
12/04/01	Audit committee: draft financial statements tabled by EY; profits R115.8m	(K3)104

18/04/01	Letter SARB to Cohen (audit committee) re EY report on eg shares; restraints, branding, trusts	F23
18/04/01	Exco meeting	vdW (294)
25/04/01	Letters of undertaking Regal for Regal Protea	H117
25/04/01	2nd meeting of Corporate Governance Committee	(K3)86
25/04/01	Audit committee meeting: profits R71.5m	(K3)110
26/04/01	Regal loan to New Heights 118 & sureties	H245
26/04/01	Bonus schedule: JIL receives R460 000 of R1.8m; employees receive R400 000.	vdW (119)
26/04/01	Regal Holdings letter of representation	110391
30/04/01	Levenstein on radio to Moneyweb (assets of R1.6b)	S9
30/04/01	Scheepers appointed to Board	F22.2
30/04/01	2001 Audited results published	110399, S63
±30/04/01	Presentation to analysts	110401
02/05/01	Cohen gives notice: appointed as chairman of Regal Holdings & Regal Bank	F40
09/05/01	Wiese expresses reservations about Cohen's appointment	F43
09/05/01	Additional Sempres contracts with the bank signed by	VdW (164-)

	Levenstein	
10/05/01	Levenstein supports Cohen's appointment	F44
10/05/01	Levenstein's credit facilities: R236 068.00 instalment sale; bond finance R83 276.41	F46.1
11/05/01	Letters to staff members offering Pekane shares	180234
14/05/01	R25 000 withdrawal for Van Rensburg	Diesel (1+8)
Undated	JIL note: cash for Police Fund	Diesel (9)
15/05/01	Cohen letter to Wiese re appointment of Oosthuizen	F47
17/05/01	Schedule of payments of Levenstein's private expenses: 09/30/01 – 17/05/01: R82 795.57	K48.7
18/05/01	3rd ALCO meeting: R65 m new treasury accounts opened	(K3)71
May 01	KPMG due diligence for Hanover Reinsurance • Companies in Regal Group (F54) • RMI (F58) • EY letter to Hanover 18/5/01 (F70) giving the guarantees etc.	F49
21/05/01	Regal Holdings board meeting: WW sale: due diligence by Hanover	(K3)6

21/05/01	First meeting of Regal Risk management committee	(K3)79
21/05/01	Audit Committee meeting: EY to give unqualified report	(K3)116
21/05/01	Corporate Governance Committee	(K3)12.1
22/05/01	Meeting of Regal Fiduciary Services	(K3)12.4
22/05/01	Meeting of MANCO	(K3)12.13
22/05/01	Hanover inform SARB of due diligence to buy ±10% of Regal's shares	F48.1
22/05/01	Regal Securities meeting "could not continue as a loss leader"	(K3)140
23/05/01	Exco meeting	VdW (301)
24/05/01	2nd meeting of Employee Benefits	(K3)12.19
24/05/01	2nd meeting of Trustees of Retirement Fund	(K3)12.23

25/05/01	FM article: "betting on a brand" focuses particularly on RMI & "Regal" brand	F75, Q1, S12
28/05/01	Business Report: Sempres shares down from R3.10 to 19c + Regal owns 18 m ordinary shares	S15
30/05/01	Cohen sees Mettle re 93 Grayston and Mettle portfolio	Cohen 1845
30/05/01	Regal Holdings and Regal Bank board meeting: reaction to FM article of 25/05/01	(K3)13
30/05/01	Meeting of Levenstein, Farber & Taylor: share trading	Q5
Undated	FSB interview with Farber	T1
30/05/01	Regal to Mettle: Hanover deal off	N83
31/05/01	Regal to sue RMI	H288
June 01	Shareholders' Trust: 75% trading in shares	Q2
01/06/01	Cohen to Wiese endorsing Minutes of board meeting of 31/5 of Regal and Regal Holdings • RMI & negative press	F107 F109

05/06/01	Cohen to Wiese: net liquidity position being closely monitored	F78
06/06/01	FM article: "surprising surge in price"	110460
07/06/01	EY feedback on s7 report	F80
	• Group financial position 28/02/01	F85
	♦ Mettle deals discussed (F93)	
	♦ Branded Income (F100)	
08/06/01	Cohen to Wiese: Wilf Robinson appointed Chief Operating Officer; KPMG due diligence report for Hanover Re	F104
08/06/01	FM: "Regal hitting back at FM"	S17
10/06/01	JSE interview with Farber re share dealings	Q2
11/06/01	Liquidity position	F105.1
11/06/01	Meeting: Cohen & Oosthuizen: discuss various concerns	Cohen --
12/06/01	Wiese replies to Cohen's letter (F107) sympathetically	F106

12/06/01	Regal to SARB “life assurance subsidiary”	F118.1
13/60/01	2nd letter of representation by Regal Holdings	110483
13/06/01	Joint board meeting of Regal & Holdings: board changes etc	(K3)22
13/06/01	Appointment of Oosthuizen queried by SARB	F119
13/06/01	Wiese to Governor’s Committee on Regal: sets out the steps taken by Regal in response to DT report	G392
14/06/01	Cohen meets with RMB: R100m pref share Store up liquidity	Cohen -
15/06/01	Robinson appointed CEO of Regal	F120, Q108
15/06/01	Levenstein refuses to attend meeting with SARB on 18/06/01	Cohen -
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