

REPUBLIC OF SOUTH AFRICA

BANKS AMENDMENT BILL

*(As introduced in the National Assembly (proposed section 75); prior notice of
introduction and explanatory summary of Bill published in Government
Gazette No. 41595 of 25 April 2018)
(The English text is the official text of the Bill)*

(MR N F SHIVAMBU, MP)

[B 12—2018]

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GENERAL EXPLANATORY NOTE:

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

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

BILL

To amend the Banks Act, 1990, so as amend and insert certain definitions; to enable a state-owned company to register and conduct the business of a bank in terms of the Banks Act; to allow a state-owned company to register an appropriate memorandum of incorporation with the Commissioner appointed in terms of the Companies Act; to enable a state-owned company to exercise control over a bank; to allow a state-owned company to be eligible to apply for registration as a controlling company; and to provide for matters connected therewith.

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

Amendment of section 1 of Act 94 of 1990, as amended by section 1 of Act 42 of 1992, section 1 of Act 9 of 1993, section 1 of Act 26 of 1994, section 1 of Act 55 of 1996, section 1 of Act 36 of 2000, section 1 of Act 19 of 2003, section 1 of Act 20 of 2007, section 1 of Act 22 of 2013 and section 290 read with Schedule 4 of Act 9 of 2017 5

1. Section 1 of the Banks Act, 1990 (Act No. 94 of 1990) (hereinafter referred to as the “principal Act”), is hereby amended—

- (a) by the substitution for the definition of “bank” of the following definition: 10
 “**bank**” means a public company or a state-owned company registered as a bank in terms of this Act;”;
- (b) by the substitution for the definition of “branch” of the following definition:
 “**branch**” means an institution that is not a public company or a state-owned company as contemplated in section 11(1), but by means of which a foreign institution conducts the business of a bank in the Republic under an authorization referred to in section 18A;”;
- (c) by the substitution for the definition of “controlling company” of the following definition:
 “**controlling company**” means a public company or a state-owned company registered in terms of this Act as a controlling company in respect of a bank;”;
- (d) by the insertion after the definition of “securitisation scheme” of the following definition:
 “**state-owned company**” has the meaning ascribed to that expression 25
 in section 1 of the Companies Act;”.

Amendment of section 11 of Act 94 of 1990, as amended by section 5 of Act 26 of 1994

2. Section 11 of the principal Act is hereby amended by the substitution for subsection (1) of the following subsection:

“(1) Subject to the provisions of section 18A, no person shall conduct the business of a bank unless such person is a public company or a state-owned company and is registered as a bank in terms of this Act.”. 5

Amendment of section 13 of Act 94 of 1990, as amended by section 6 of Act 9 of 1993, section 9 of Act 19 of 2003, section 6 of Act 22 of 2013 and section 290 read with Schedule 4 of Act 9 of 2017 10

3. Section 13 of the principal is hereby amended by the substitution in subsection (2) for paragraph (c) of the following paragraph:

“(c) that the applicant will conduct the proposed business of a bank in the capacity of a public company or a state-owned company incorporated and registered under the Companies Act;” 15

Amendment of section 15 of Act 94 of 1990, as amended by section 7 of Act 26 of 1994, section 11 of Act 19 of 2003, section 7 of Act 22 of 2013 and section 290 read with Schedule 4 of Act 9 of 2017

4. Section 15 of the principal Act is hereby amended—

(a) by the substitution for subsection (1) of the following subsection: 20

“(1) No public company or a state-owned company shall without the written approval of the Authority be formed in terms of the Companies Act to conduct the business of a bank in accordance with the provisions of this Act.”; and

(b) by the substitution for subsection (3) of the following subsection: 25

“(3) Notwithstanding anything to the contrary contained in the Companies Act, the Commissioner shall not register in terms of that Act the memorandum of incorporation of a public company or a state-owned company formed for the purpose of conducting the business of a bank, unless the application for such registration is accompanied by the approval referred to in subsection (1).” 30

Amendment of section 42 of Act 94 of 1990, as amended by section 5 of Act 42 of 1992, section 33 of Act 26 of 1994, section 29 of Act 19 of 2003 and section 290 read with Schedule 4 of Act 9 of 2017

5. Section 42 of the principal Act is hereby amended by the substitution for subsection (1) of the following subsection: 35

“(1) Subject to the provisions of section 37, no person other than a bank or an institution which has been approved by the Authority and which conducts business similar to the business of a bank in a country other than the Republic may exercise control over a bank, unless such person is a public company or a state-owned company and is registered as a controlling company in respect of such bank.” 40

Amendment of section 43 of Act 94 of 1990, as amended by section 34 of Act 26 of 1994, section 30 of Act 19 of 2003, section 10 of Act 20 of 2007, section 19 of Act 22 of 2013 and section 290 read with Schedule 4 of Act 9 of 2017

6. Section 43 of the principal Act is hereby amended— 45

(a) by the substitution in subsection (1) for the words preceding paragraph (a) of the following words:

“Subject to section 42, a public company or a state-owned company—”;

(b) by the substitution in subsection (1) for paragraph (b) of the following paragraph: 50

“(b) which is a holding company, as defined in section 1 of the Companies Act, in respect of any other public company or a state-owned company which has applied in terms of section 16 for registration as a bank,”; and

(c) by the substitution for subsection (3) of the following subsection:

“(3) A public company or a state-owned company applying in terms of subsection (1) for registration as a controlling company shall submit such additional particulars in connection with its application as the Authority may require.”.

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Amendment of section 44 of Act 94 of 1990, as amended by section 10 of Act 9 of 1993, section 31 of Act 19 of 2003, section 20 of Act 22 of 2013 and section 290 read with Schedule 4 of Act 9 of 2017

7. Section 44 of the principal Act is hereby amended by the substitution for subsection (7) of the following subsection:

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“(7) A public company or a state-owned company which on the date immediately preceding the date of commencement of the Deposit-taking Institutions Amendment Act, 1993 (hereinafter in this subsection referred to as the Amendment Act), is, in terms of the provisions of this Act as those provisions existed prior to the amendment thereof by the Amendment Act, registered as a controlling company in respect of a deposit-taking institution, shall, with effect from the date of the re-registration of the deposit-taking institution concerned as a bank in terms of section 33, be deemed to be a controlling company registered as such in terms of this section in respect of the bank as so re-registered.”.

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Amendment of section 51 of Act 94 of 1990, as amended by section 11 of Act 9 of 1993, section 34 of Act 19 of 2003, section 22 of Act 22 of 2013, section 1 of Act 3 of 2015 and section 290 read with Schedule 4 of Act 9 of 2017

8. Section 51 of the principal Act is hereby amended by the substitution in subsection (1) for paragraph (a) of the following paragraph:

“(a) the provisions of the Companies Act governing the conversion of public companies or state-owned companies into other forms of companies shall not apply to any such company;”.

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Amendment of section 68 of Act 94 of 1990, as amended by section 16 of Act 9 of 1993, section 42 of Act 26 of 1994, section 9 of Act 36 of 2000, section 46 of Act 19 of 2003, section 36 of Act 22 of 2013, and section 290 read with Schedule 4 of Act 9 of 2017

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9. Section 68 of the principal Act is hereby amended by the substitution in subsection (5) for the words following paragraph (b) of the following words:

“and the Authority, the Master of the High Court, the provisional liquidator or liquidator, respectively, shall, until the affairs of the public company or a state-owned company of which the registration as a bank has been so suspended, cancelled or terminated have been completely wound up as contemplated in section 82 (1) of the Companies Act or until the winding-up is stayed or set aside by an order of a competent court continue to exercise their respective powers and to perform their respective duties under this section or in terms of the Companies Act, in respect of the public company or a state-owned company of which the registration as a bank has been so suspended, cancelled or terminated, as if such suspension, cancellation or termination had not taken place.”.

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Amendment of section 69 of Act 94 of 1990, as amended by section 8 of Act 42 of 1992, sections 17 and 25 of Act 9 of 1993, section 43 of Act 26 of 1994, section 6 of Act 55 of 1996, section 10 of Act 36 of 2000, section 47 of Act 19 of 2003, section 37 of Act 22 of 2013, section 2 of Act 3 of 2015 and section 290 read with Schedule 4 of Act 9 of 2017

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10. Section 69 of the principal Act is hereby amendment by the substitution in subsection 8 for the words following paragraph (b) of the following words:

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“and the Minister, the Authority and the curator, respectively, shall until such time as the curatorship is terminated continue to exercise their respective powers and to execute their respective duties under this section in respect of the public company or a state-owned company of which the registration as a bank has been so

suspended, cancelled or terminated, as if such suspension, cancellation or termination had not taken place.”.

Short title and commencement

11. This Act is called the Banks Amendment Act, 2018, and comes into operation on a date determined by the President by proclamation in the *Gazette*. 5

MEMORANDUM ON THE OBJECTS OF THE BANKS AMENDMENT BILL

1. INTRODUCTION

The Banks Act, 1990 (Act No. 94 of 1990) (“Banks Act”), amongst other things, imposes certain requirements which an institution must comply with before it may carry on the business of a bank or in the lawful carrying on, of the business of a bank. In terms of the Banks Act, no person may conduct the business of a bank unless such person is a public company and is registered as a bank in terms of the Banks Act. A public company is defined in the Companies Act, 2008 (Act No. 71 of 2008) (“Companies Act”), as a profit company that is not a state-owned company, a private company or a personal liability company. Further in the Companies Act a state-owned company is defined as an enterprise that is registered in terms of that Act as a company, and either is listed as a public entity in Schedule 2 or 3 of the Public Finance Management Act, 1999 (Act No. 1 of 1999) (“PFMA”), or is owned by a municipality, as contemplated in the Local Government: Municipal Systems Act, 2000 (Act No. 32 of 2000), and is otherwise similar to an enterprise listed in the PFMA.

The requirements imposed by the Banks Act before a person may conduct the business of a bank, and register as such, makes it impossible for a state-owned company registered in terms of the Companies Act to conduct the business of a bank.

2. OBJECTS OF THE BILL

The Bill amends the Banks Act, 1990 (Act No. 94 of 1990), to enable state-owned companies to register and conduct the business of a bank in terms of the Banks Act. The Bill seeks to allow state-owned companies to register a memorandum of incorporation with the Commissioner appointed in terms of the Companies Act. The Bill further seeks to enable state-owned companies to exercise control over a bank and to allow state-owned companies to be eligible to apply for registration as a controlling company.

3. CONTENTS OF THE BILL

3.1 Clause 1 amends section 1 of the Act by amending and inserting certain definitions.

3.2 Clause 2 amends section 11 of the Act to allow a state-owned company to be able to register and conduct the business of a bank.

3.3 Clause 3 amends section 13 of the Act. In terms of the proposed amendment, the Registrar may grant authorisation to a state-owned company to establish a bank, if the state-owned company will conduct the business of a bank in the capacity of the state-owned company incorporated and registered under the Companies Act.

3.4 Clause 4 amends section 15 of the Act to enable a state-owned company to register with the Commissioner, appointed in terms of section 189 of the Companies Act, a memorandum of incorporation of a state-owned company formed for the purposes of conducting the business of a bank.

3.5 Clause 5 amends section 42 of the Act. The proposed amendment seeks to enable a state-owned company to exercise control over a bank in a country other than the Republic.

3.6 Clause 6 amends section 43 of the Act and enables a state-owned company to be eligible to apply for registration as a controlling company.

- 3.7** Clause 7 amends section 44 of the Act. This amendment makes the provisions of section 44(7), which apply to public companies, applicable to state-owned companies as well.
- 3.8** Clause 8 amends section 51 of the Act. In terms of the proposed amendment, the provisions of the Companies Act governing the conversion of state-owned companies into other forms of companies will not apply to such company.
- 3.9** Clause 9 amends section 68 of the Act by making the provisions of section 68(5)(b) applicable to state-owned companies as well.
- 3.10** Clause 10 amends section 69 of the Act. The proposed amendment makes the provisions of section 69(8), which apply to public companies, to be applicable to state-owned companies as well.
- 3.11** Clause 11 provides for the short title.

4. FINANCIAL IMPLICATIONS FOR THE STATE

None.

5. PARLIAMENTARY PROCEDURE

- 5.1** The Member proposes that the Bill be dealt with in accordance with the procedure established by section 75 of the Constitution since it contains no provisions to which the procedures set out in section 74 or 76 of the Constitution apply.
- 5.2** The Member is of the opinion that it is not necessary to refer this Bill to the National House of Traditional Leaders in terms of section 18(1)(a) of the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003), since it does not contain provisions pertaining to customary law or customs of traditional communities.

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