Home of Parliament Watch Uganda

LEGAL ASPECTS OF CENTRAL BANKS' EMERGENCY RESCUE POWERS IN RESPECT OF DISTRESSED BANKS: LESSONS FOR UGANDA FROM THE SOUTH AFRICAN EXPERIENCE

POLICY SERIES PAPERS NUMBER 17 OF 2017

Published by CEPA

P. O. Box 23276, Kampala
Email: info@cepa.or.ug
Web site: http://www.parliamentwatch.ug
http://www.cepa.or.ug

Silver Kayondo[1]

Citation
Kayondo S, (2017). Legal aspects of central banks' emergency rescue powers in respect of distressed banks: lessons for Uganda from the South African experience; CEPA Policy Series Papers Number 17 of 2017. Kampala

Valuable inputs from

Okello Isaac, Programs Associate, CEPA

The views expressed in this publication are neither for the Centre for Policy Analysis nor its partners

[1] Master of Laws (University of Pretoria, South Africa), Bachelor of Laws (Uganda Christian University, Mukono), Post Graduate Diploma in Legal Practice (Law Development Centre, Kampala). Holder of an Advanced Certificate in International Insolvency and Restructuring under the Auspices of the South African Restructuring and Insolvency Practitioners Association (SARIPA). Advocate of the Courts of Judicature (Uganda). Email: lawyerkayondo@gmail.com

Abstract

In the aftermath of the 2008 Global Financial Crisis (GFC), distressed bank rescue has become a major topic of discussion. This has largely been prompted by public outrage against the several bail out packages extended to the financial services firms in the US and Europe. In post-GFC policy and legal framework, various jurisdictions are exploring risk allocation strategies that can transfer the risk of saving distressed banks from public costs to make them private costs. Furthermore, reliance on bail out schemes has been discredited by the problem of moral hazard- whereby bank owners and managers deliberately run the entities into a financial plunge with the expectation that governments will bail them out (socialization of losses and privatization of profits). Another justification for this shift in approach is the traditional insolvency theory that resources should be liberated from ineffectual enterprises and distributed to profitable going concerns. However, it is widely acknowledged that banks are not ordinary businesses. There is a high public interest because they operate using depositors'/customers' deposits. Furthermore, there are deeper public policy considerations underpinning the need and desire to maintain public confidence in the banking system in specific, and the financial system in general. This regulatory theory, therefore, makes it inevitable that Central Banks will exercise their lender of last resort function to save distressed banks suffering from temporary liquidity problems, with a view of safe-guarding the banking system.

Secondly, it is also widely acknowledged that some banks are Significantly Important Financial Institutions (SIFIs), and are so interconnected within the financial system that their collapse would destabilize the system as a whole. Such entities are increasing in size and complexity because of the concept of "universal banking". Some banks also provide vital products to the market and consumers, failure of which would cause massive public inconvenience and market distortion. The recent curatorship of African Bank and the 2015 amendments to the Banks Act will be explored in terms of legal ramifications on the powers and duties of the curator. These concepts are particularly important to the South African regulatory landscape because of the anticipated shift to the "Twin Peaks" model of financial sector regulation. Therefore, this article seeks to analyze the exercise of the distressed bank rescue mandate by the South African Reserve Bank (SARB), and Bank of Uganda (Uganda's Central Bank), with a view of advocating for a more rescue-based interventionist approach for Uganda.

For purposes of delimitation, this article will focus mainly on aspects pertaining to bank rescue. Therefore, aspects of bank resolution such as winding up procedures, depositor insurance protection schemes, and consultations concerning enactment of the South African Resolution Bill are outside the scope of this research.

I. INTRODUCTION

The SARB is the Central Bank of South Africa.[2] Its primary object is to protect the value of the currency in the interest of balanced and sustainable economic growth.[3] It is a juristic person, and is mandated to perform its functions independently and without fear, favour or prejudice, but with regular consultation between the Bank and the Cabinet member responsible for national financial matters.[4] Its powers and duties are those customarily exercised and performed by Central Banks, and must be exercised in accordance with the SARB Act.[5] It is managed by a board of fourteen directors consisting of a Governor, three Deputy Governors (of whom one is designated by the President of the Republic as Senior Deputy Governor) and three other directors, which Governor, Deputy Governors and other directors are appointed by the President of the Republic after consultation with the Minister and the Board; and seven directors elected by the shareholders.[6] The Banks Act No. 94 of 1990 (as amended) is the primary legislation that governs bank regulation and supervision in South Africa.[7]

On the other hand, the Bank of Uganda (BoU) is the Central Bank of Uganda.[8] It is a body corporate with perpetual succession and a common seal and may sue or be sued in its corporate name.[9] The Bank is mandated to formulate and implement monetary policy directed to economic objectives of achieving and maintaining economic stability.[10] The governing body is a board of directors consisting of the Governor (who is the chairperson), the Deputy Governor (who doubles as the deputy chairperson), the Secretary to the Treasury, and not less than four or more than six other directors.[11] The Financial Institutions Act, 2004 (hereinafter "FIA") is the primary legislation

[2] The SARB is the oldest Central Bank in Africa. It was established in 1921 after enactment of the Currency and Bank Act of 10 August 1920. Article 223 of the 1996 Constitution of the Republic of South Africa (hereinafter "the Constitution") recognizes the SARB as the Central Bank and is to be regulated in terms of an Act of Parliament. This Act is the South Africa Reserve Bank Act, gazetted as Act 90 of 1989 (hereinafter called "the SARB Act"). The purpose of this Act is to consolidate the laws relating to the SARB and the monetary system of the Republic; and to provide for matters connected therewith.

[3] Article 224(1) of the Constitution and section 3 of the SARB Act.

[4] See section 2 of the SARB Act and Article 224(2) of the Constitution.

[5] Article 225 of the Constitution. Section 10 of the SARB Act stipulates the powers and duties of the Bank.

[6] See sec 4 of the SARB Act.

[7] The objective of the Act is to provide for the regulation and supervision of the business of public companies taking deposits from the public; and to provide for matters connected therewith.

[8] BoU was established in 1966 by an Act of Parliament. This was eventually repealed by the Bank of Uganda Act, Cap. 51 Laws of Uganda, which commenced on 14th May 1993. It is augmented by Article 161 of the Constitution of the Republic of Uganda, 1995 (as amended). The purpose of the BoU Act as can be deciphered from its long title is to amend and consolidate the BoU Act of 1966 and the BoU Statute 5/1993 for regulating the issuing of legal tender, maintaining external reserves and for promoting the stability of the currency and a sound financial structure conducive to a balanced and sustained rate of growth of the economy and for other related purposes.

[9] Sec 2(2) of the BoU Act.

[10] See sec 4 of the BoU Act. Without prejudicing the generality of this section, BoU is tasked with *inter alia*, maintaining monetary stability; maintaining an external assets reserve; being the banker to financial institutions; supervising, regulating, controlling and disciplining all financial institutions and pension funds institutions.

[11] See sec 7 of the BoU Act.

that governs bank regulation and supervision in Uganda.[12] This law has had some amendments of 2016 to provide for Islamic banking, banc assurance, and changed some aspects of the depositor protection scheme. Most of these amendments are outside the scope of this research. A few of them pertaining to sections 82 and 88 will be considered in so far as they relate to the topic at hand.

In terms of the South African legal regime, it is imperative to note that this research is pertinent because the Banks Act stipulates that the provisions of sections 128 to 154 of the Companies Act of 2008 relating to business rescue do not apply to a bank.[13] Therefore, this research examines the mechanism which has been specifically provided for under legislation to deal with distressed bank rescue scenarios. This procedure is known as "curatorship" in terms of section 69 of the Banks Act. Under the Ugandan legal dispensation, the Central Bank is clothed with powers of statutory management under section 88 of the FIA. These two procedures will be analysed from the perspective of "breathing life" into a distressed bank and rescuing it to perform its normal undertakings as a going concern.

II. THE GFC AND SHIFT IN REGULATORY PARADIGM

The GFC exposed the major gaps within the global and national regulatory and supervisory frameworks of financial institutions.[14] For example, in the United Kingdom, the failure of Northern Rock epitomized regulatory failures that exposed the tax payer to losses.[15] In the United States, the inability to exercise and early rescue-focused regulatory interventionist approach in respect of Lehman Brothers, Bear Stearns, and the American Insurance Group (AIG) resulted into liquidation of Lehman Brothers and huge losses to the Federal Reserve.[16] This economic catastrophe led to measures such as enactment of the Emergency Economic Stabilization Act of 2008, which authorized the US Secretary to the Treasury to spend up to $700 billion in purchase of distressed financial assets and direct bail out packages.[17]

In the UK, a bank bailout package of about £500 billion (approximately $850 billion at the prevailing exchange rate) was disbursed by the British government to the banking system as a response to the GFC on 8th October, 2008 with a view of stabilizing the financial system, and

---

[12] The object of the Act is to revise and consolidate the law relating to financial institutions; to provide for the regulation, control and discipline of financial institutions by the Central Bank; to repeal the Financial Institutions Act, Cap. 54 and provide for other related matters.

[13] Section 51(1)(b) of the Banks Act.

[14] UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT REPORT, 2015: Making the international financial architecture work for development, see chapter IV.

[15] Northern Rock was a British bank that suffered a bank run (massive public rush to withdraw deposits, often characterized by long queues at the bank as a result of bad publicity or speculation about a bank's future prospects). It approached the Bank of England for a loan facility during the financial crisis after suffering losses arising from exposures in international capital and financial markets. It was eventually nationalized by the British Government in 2008 due to financial problems.

[16] **Lessons from the Financial Crisis**: **Causes**, **Consequences, and Our Economic Future**. Robert W. Kolb (Editor). ISBN: 978-0-470-56177-5, John Wiley & Sons p. 350.

[17] Hulse, Carl; (October 1, 2008). "Pressure Builds on House After Senate Backs Bailout". *The New York Times*, *http://www.nytimes.com/2008/10/02/business/02bailout.html?_r=0* (accessed on 10/8/2016).

providing state investment in the banks.[18] As evidenced by these two examples of responses, policy makers and regulators sought to undo the harm done to the domestic and global banking systems at the expense of public funds. In terms of regulatory policy and legal reform, the informal working group of regulators and Central Bank experts that was meeting in Basel prior to the GFC formalized their approach through formation of the Financial Stability Board (FSB) in April 2009.[19] The FSB presently coordinates the work of national banking and financial regulatory authorities at an international level. Since South Africa is part of the Group of 20 (G20) member states, I will examine the ramifications of international best practice in light of the Financial Sector Regulation Bill (FSRB), also known as the "Twin Peaks" Bill in the course of the discussion.

More fundamentally in terms FSB influence on the core aspects of this research is the notion of international best practice such as adoption of Basel III regulatory requirements like a countercyclical capital buffer for Globally Systemically Important Financial Institutions (G-SIFIs), reducing "too big to fail" challenges such as identification of Domestically Systemically Important Banks (D-SIBs), enhanced capital adequacy requirements for such entities, and adoption of bail-in as a stabilization tool to reduce moral hazard and allocate the expenses associated with bank failure from the public to the shareholders. Another important aspect in relation to bank rescue is the need to contain systemic risk.[20]

III. CURATORSHIP AS A FORM OF BANK RESCUE IN SOUTH AFRICA

(a) The nature of curatorship: roles, duties and obligations of a curator

Section 69 of the Banks Act stipulates circumstances under which a curator can be appointed, and spells out the powers and duties of the curator. In terms of section 69(1) (a), if in the opinion of the Registrar of Banks, any bank will be unable to repay deposits made with it, or meet any of its obligations when required to do so, the Minister of Finance may appoint a curator to the affected bank in public interest.[21] The appointment is done by way of an appointment letter which must set out the name of the bank in respect of which the curator is appointed and the address of its head office; directions in regard to the security which the curator has to furnish for the proper performance of his or her duties; directions in regard to the remuneration of the curator; and such

[18] See Langley, Paul (2015*). Liquidity Lost: The Governance of the Global Financial Crisis*. Oxford University Press. pp. 83–86. ISBN 0199683786.

[19] See Stijn Claessens and Laura Kodres, **The Regulatory Responses to the Global Financial Crisis: Some Uncomfortable Questions**, IMF Working Paper WP/14/46 at p. 8.

[20] Systemic risk refers to a negative economic situation or an event that poses a significant threat to the financial system as a whole thereby impairing the normal functioning of the banking and financial system. Closely related to this is the concept of contagion. Contagion spread is the probability that the instability of one financial institution will spread to other parts of the financial system (or other financial institutions) thus leading to a system-wide or an institution-wide crisis. For a detailed explanation of these concepts, see Smaga P *'The Concept of Systemic Risk'* (2014) SRC Special Paper No. 5, pp. 1-11.

[21] In terms of sec 69(1)(b), the Registrar of Banks may appoint a person, other than a person who is an employee of the bank under curatorship, who in the opinion of the Registrar has wide experience of and is knowledgeable about the specific field of activities in which the bank under curatorship is predominantly engaged, to assist the curator in the management of the affairs of the bank under curatorship.

other directions as to the management of the bank concerned or any matter incidental thereto, including directions in regard to the raising of money by that bank as the Minister may deem necessary.[22]

Appointment of a curator has certain legal implications. For instance, the management of the bank concerned vests in the curator, subject to the supervision of the Registrar of Banks, and any other person vested with the management of the affairs of that bank is divested thereof; and the curator must recover and take possession of all the assets of the bank.[23]

The Banks Act further imposes some obligations on the curator. He or she must conduct the management of the bank under curatorship in such a manner as the Registrar of Banks may deem fit to best promote the interests of the creditors of the bank concerned and of the banking sector as a whole, and the rights of employees in accordance with relevant labour legislation.[24] From the outset, it is clear that the Registrar is the major role-player in this process and the curator enjoys delegated powers and responsibility. The curator must comply with any direction of the Registrar.

The curator is further required to keep such accounting records and prepare such annual financial statements, interim reports and provisional annual financial statements as the bank or its directors would have been obliged to keep or prepare if the bank had not been placed under curatorship.[25] Additionally, he or she must convene the annual general meeting and any other meeting of members of the bank provided for by the Companies Act and, in that regard, comply with all the requirements with which the directors of the bank would in terms of the Companies Act have been obliged to comply if the bank had not been placed under curatorship; and enjoys the mandate to bring or defend in the name and on behalf of the bank any action or other legal proceedings of a civil nature and, subject to the provisions of any law relating to criminal proceedings, any criminal proceedings.[26]

In regard to powers of the curator, he or she is empowered to dispose of any of the bank's assets; transfer any of its liabilities; or dispose of any of its assets and transfer any of its liabilities in the ordinary course of the bank's business.[27] However, in exercise of this power, the curator must not, notwithstanding the provisions of section 112 of the Companies Act dispose of any of the bank's assets; transfer any of its liabilities; or dispose of any of its assets and transfer any of its liabilities, otherwise than in accordance with the provisions of section 54 of the Banks Act.[28] While seeking

[22] Section 69(2) of the Banks Act.
[23] Sec 69(2A) of the Banks Act.
[24] Section 69(2B)(a) of the Banks Act.
[25] Section 69(2B)(c) of the Banks Act.
[26] Sections 69(2B)(d) and (e) of the Banks Act.
[27] Section 69(2C)(a) of the Banks Act.
[28] Section 54 of the Banks Act makes provision for amalgamations, mergers and arrangements. The Minister must consent in writing and conveyed through the Registrar to an amalgamation, merger or arrangement referred to in Chapter 5 of the Companies Act and which involves a bank as one of the principal parties to the relevant transaction; and an arrangement for the transfer of more than 25 per cent of the assets, liabilities or assets and liabilities of a bank to another person.

the ministerial consent for a disposal of assets or transfer of liabilities or such disposal and transfer required hereunder, the curator must report to the Minister or the Registrar, as the case may be, on the expected effect on the bank's creditors and whether the creditors are treated in an equitable manner; and a reasonable probability exists that a creditor will not incur greater losses, as at the date of the proposed disposal, transfer or disposal and transfer, than would have been incurred if the bank had been wound up under section 68 of the Banks Act on the date of the proposed disposal, transfer or disposal and transfer.[29]

It is imperative to note that the Minister or Registrar must in addition to the requirements imposed by section 54 of the Banks Act above, consider the curator's report while making the decision whether to grant consent to the proposed disposal, transfer or disposal and transfer of the bank's assets. However, the Minister or Registrar as the case may be has the discretion to consent to any disposal, transfer or disposal and transfer of assets if it is reasonably likely to promote the maintenance of a stable banking sector; or public confidence in the banking sector in the Republic.[30]

The curator has the duty to inform the Registrar if at any time the curator is of the opinion that there is no reasonable probability that the continuation of the curatorship will enable the bank to pay its debts or meet its obligations and become a successful concern.[31] It is submitted that the main object of curatorship is nursing the distressed bank back to a healthy status in interest of the public, and to preserve stability of the banking system. If "sickness" or distress persists, the curator is under obligation to inform the Registrar about this scenario, and the Registrar can prescribe another solution depending on the nature and extent of the distress.

In regard to financial obligations on the curator and preference in payments, any money of the bank that becomes available to the curator must be applied by him or her in paying the costs of the curatorship and in the conduct of the bank's business in accordance with the requirements of the curatorship and, as far as the circumstances permit, in the payment of claims of creditors which arose before the date of the curatorship.[32]

The Banks Act also addresses the aspect of dispositions of a bank's property and assets prior to curatorship. Every disposition of its property, which if made by an individual could for any reason be set aside in the event of such individual's insolvency, may, if made by a bank that is unable to pay its debts, be set aside by a court at the suit of the curator in the event of that bank being placed

[29] Section 69(2C)(c) of the Banks Act.
[30] Section 69(2C)(d) of the Banks Act.
[31] Section 69(2D) of the Banks Act.
[32] Section 69(2E) of the Banks Act.

under curatorship, and the provisions of the law relating to insolvency (the Insolvency Act of 1936) applies *mutatis mutandis* in respect of such disposition.[33]

Further implications arising from insolvency law in respect of a bank under curatorship relates to mortgage bonds and calculation of the maturity period of such bonds. The period during which any bank that is a mortgage debtor in respect of any mortgage bond is subject to curatorship in terms of section 69 of the Banks Act is excluded in the calculation of any period of time for the purpose of determining whether such mortgage bond confers any preference in terms of section 88 of the Insolvency Act, 1936 as applied to the winding-up of banks in terms of the Banks Act.[34] In the event of winding up of the bank that was under curatorship, preference law will not consider the time when the bank was under curatorship to confer any preference to a creditor of the bank holding such mortgage bond for the duration of time that the bank was under curatorship.

The Minister is given discretion to confer on the curator additional specific powers in his or her letter of appointment or at any time. For instance, the Minister may subject to any condition imposed, empower the curator to suspend or reduce, as from the date of the curator's appointment as such or any subsequent date, the right of creditors of the bank concerned to claim or receive interest on any money owing to them by that bank; and/or make payments, whether in respect of capital or interest, to any creditor or creditors of the bank concerned at such time, in such order and in such manner as the curator may deem fit.[35]

The Minister also has the discretion to empower the curator to cancel any agreement between the bank concerned and any other party to advance moneys due after the date of the curator's appointment as such, or to cancel any agreement to extend any existing facility, if, in the opinion of the curator, such advance or any loan under such facility would not be adequately secured or would not be repayable on terms satisfactory to the curator or if the bank lacks the necessary funds to meet its obligations under any such agreement or if it would not otherwise be in the interests of the bank.[36]

Additional powers may further include authority to convene from time to time, in such manner as the curator may deem fit, a meeting of creditors of the bank concerned for the purpose of establishing the nature and extent of the bank's indebtedness to such creditors and for consultation with such creditors in so far as their interests may be affected by decisions taken by the curator in the course of the management of the affairs of the bank concerned.[37] The Minister can further

[33] Section 69(2F) of the Banks Act. For the purposes of this subsection the event which shall be deemed to correspond with a sequestration order under the Insolvency Act, 1936 (Act No. 24 of 1936), in the case of an insolvent, shall be the presentation to the Court of the letter of appointment of the curator.
[34] Section 69(2G) of the Banks Act.
[35] Section 69(3)(a) and (b) of the Banks Act.
[36] Section 69(3)(c) of the Banks Act.
[37] Section 69(3)(d) of the Banks Act.

empower the curator to negotiate with any individual creditor of the bank concerned with a view to the final settlement of the affairs of such creditor with the bank.[38]

Another vital power the Minister can give to the curator is the authority to make and carry out any decision in respect of the bank which in terms of the provisions of the Banks Act, the Companies Act, the bank's memorandum of incorporation or the rules of any securities exchange, on which any securities of the bank or its controlling company are listed, would have required an ordinary resolution or a special resolution of shareholders of the bank or its controlling company.[39] The legal import of this provision is that the curator will be clothed with powers which the ordinary board of directors would not have, to dispense away with requirements of resolutions in respect of certain decisions relating to securities of the bank under curatorship or its controlling company.

The Minister may also accord the curator a wide range of cancellation powers, such as the power to cancel any lease of movable or immovable property entered into by the bank concerned prior to its being placed under curatorship provided that a claim for damages in respect of such cancellation may be instituted against the bank after the expiration of a period of one year as from the date of such cancellation;[40] and/or cancellation of any guarantee issued by the bank concerned prior to its being placed under curatorship, excluding such guarantee which the bank is required to make good within a period of 30 days as from the date of the appointment of the curator provided that a claim for damages in respect of any loss sustained by or damage caused to any person as a result of the cancellation of a guarantee in terms of this paragraph, may be instituted against the bank after the expiration of a period of one year as from the date of such cancellation.[41]

The curator can further be empowered to raise funding from the SARB, or any entity controlled by the SARB on behalf of the bank and, notwithstanding any contractual obligations of the bank, but without prejudice to real security rights, to provide security over the assets of the bank in respect of such funding provided that any claim for damages in respect of any loss sustained by, or damage caused to any person as a result of such security, may be instituted against the bank after the expiration of a period of one year as from the date of such provision of security.[42]

Without limiting the power of the curator in terms of section 69, the curator can be empowered by the Minister to propose and enter into an arrangement or compromise between the bank and all its creditors, or all the members of any class of creditors, in terms of section 155 of the Companies Act.[43]

Just like it is with any other legal mandate, power comes with responsibility. The Banks Act imposes some checks and balances on how this delegated power to the curator must be exercised.

[38] Section 69(3)(e) of the Banks Act.
[39] Section 69(3)(f) of the Banks Act.
[40] Section 69(3)(g) of the Banks Act.
[41] Section 69(3)(i) of the Banks Act.
[42] Section 69(3)(j) of the Banks Act.
[43] Section 69(3)(k) of the Banks Act.

For any action or decision taken by the curator in exercise of the above provisions, he or she must duly record the nature of and the reasons for each act performed by him or her, and such records shall be examined as part of the normal audit performed in respect of the affairs of the bank concerned.[44] The Minister may also at any time and in any manner, amend the directions in the letter of appointment, and the powers granted to the curator.[45]

In order not to jeopardize the curatorship process with law suits, the law imposes a moratorium on specified legal actions and execution proceedings against a bank in curatorship. All actions, legal proceedings, the execution of all writs, summonses and other legal process against that bank shall be stayed and not be instituted or proceeded with without leave (permission) of court.[46]

While a bank is under curatorship the curator must furnish the Registrar on a monthly basis with a written report containing an exposition of the affairs of the bank concerned and in which it is stated whether or not, in the opinion of the curator, a reasonable probability exists that the bank will be able to pay its debts or to meet its obligations and to become a successful concern.[47]

In terms of categorization of the rescue procedure as a rescue mechanism and the office of the curator as a rescue practitioner, it is imperative to note that notwithstanding any provision to the contrary contained in the Banks Act, sections 35A, 35B and 46 of the Insolvency Act, 1936 (Act No. 24 of 1936), *mutatis mutandis* apply to the curator of any bank under curatorship and to such a bank as if the curator were a trustee of an insolvent estate and the bank were an insolvent or a sequestrated estate as contemplated in those sections.[48]

[44] Section 69(3A) of the Banks Act.
[45] Section 69(4) of the Banks Act.
[46] Section 69(6)(a) of the Banks Act.
[47] Section 69(6A) of the Banks Act.
[48] Section 69(6B) of the Banks Act. Section 35A of the Insolvency Act relates to transactions at an exchange as defined under section 1 and licensed under section 9 of the Financial Markets Act, 2012. Section 35B of the Insolvency Act governs agreements providing for termination and netting. Section 46 of the Insolvency Act makes provision for set off. If two persons have entered into a transaction the result whereof is a set-off, wholly or in part, of debts which they owe one another and the estate of one of them is sequestrated within a period of six months after the taking place of the set-off, or if a person who had a claim against another person (hereinafter in this section referred to as the debtor) has ceded that claim to a third person against whom the debtor had a claim at the time of the cession, with the result that the one claim has been set-off, wholly or in part, against the other, and within a period of one year after the cession the estate of the debtor is sequestrated; then the trustee of the sequestrated estate may in either case abide by the set-off or he may, if the set-off was not effected in the ordinary course of business, with the approval of the Master disregard it and call upon the person concerned to pay to the estate the debt which he would owe it but for the set-off, and thereupon that person shall be obliged to pay that debt and may prove his claim against the estate as if no set-off had taken place: Provided that any set-off shall be effective and binding on the trustee of the insolvent estate if it takes place between an exchange or a market participant as defined in section 35A and any other party in accordance with the rules of such an exchange, or if it takes place under an agreement defined in section 35B. These provisions apply to the curator of a bank with the necessary qualifications, adaptations and modifications.

Upon appointment of the curator, the Registrar must as soon as is practicable announce the appointment and the powers granted to the curator o, and any amendment or withdrawal of such powers by notice in the Gazette.[49]

It is important to note that notwithstanding anything to the contrary contained in any law, the suspension, cancellation or termination of the registration of a bank while such bank is under curatorship in terms of section 69 of the Banks Act does not affect any appointment made, direction issued, or any other thing done under this provision in respect of such bank; or any power to be exercised or duty to be executed in respect of that bank under curatorship by the Minister, the Registrar or the curator, by virtue of the provisions of this section, and the Minister, the Registrar 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 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.[50]

The Minister has wide latitude in terms of discretionary power to withdraw the appointment of a curator at any time on the Minister's own volition, or upon application by the Registrar to withdraw such appointment.[51] The law specifically provides for circumstances under which curatorship lapses. The issue by the Minister of written notification to that effect to the curator; or winding-up of the bank in terms of the provisions of section 68 of the Banks Act are the situations that can trigger lapse of curatorship.[52]

In a nutshell, the policy consideration behind curatorship is that the curator, with oversight of the Registrar of Banks, is given autonomy and flexibility in running the management and affairs of the distressed bank while it is under curatorship. In exercising this mandate, the main objective is to rescue the bank as a going concern in order to protect stability of the banking system and preserve the integrity of, and the public confidence in the system as a whole by ensuring that the entire process is conducted in a manner that puts the public interest and depositor protection above the whims of the bank directors, managers and shareholders.

(b) Curatorship of African Bank and the 2015 amendment of section 69 of the Banks Act

In 2014, African Bank, a commercial bank which was part of the African Bank Investment Ltd. (ABIL) announced that it had made major losses and required billions of Rands in capital injunction in order to survive.[53] According to the National Credit Regulator (NCR), the major reason for the bank's failure was due to alleged reckless lending practices and the inherently risky business model adopted by the bank. It was not taking deposits from the public, but raising capital

[49] Section 69(7) of the Banks Act.
[50] Section 69(8) of the Banks Act.
[51] Section 69(9) of the Banks Act.
[52] Section 69(10) of the Banks Act.
[53] African Bank was the largest unsecured lender in South Africa. This business model was unsustainable because of advancement of loans to low-income earners without backing of security/assets.

through debt and equity issuances in order to provide unsecured loans to low-income earners. The bank functioned without a diversified business portfolio.[54] Another reason for the bank's failure was its acquisition of Ellerine Furnishers (Pty), a furniture retailer for R9.2 billion just before the GFC in 2008. This deal was disastrous for the bank and caused a huge drain on the capital and liquidity due to losses and massive write downs. The crisis then weakened their investment and the company.[55]

The failure of African Bank in and of itself was not a possible source of systemic risk to the banking system of the Republic because African bank is not a systemically important bank, and it is also a stand-alone financial institution (not a conglomerate). In fact, credit rating agency Standard & Poor's (S&P) advised that there was no need to downgrade the credit rating of South African banks because they believed that African Bank failure did not pose a systemic risk, and the prompt action of the SARB and other private banks had limited the risk of contagion spread.[56] However, because of its acquisition of Ellerine, there was fear that the interconnectedness of the companies could have resulted in a possible systemic risk. Furthermore, the predominant exposure of the vulnerable members of society (low income earners) necessitated rescue intervention in order not to hamper the repaying ability of this class of borrowers and negatively impact their credit access and financial inclusion.

Basing on the above justifications, the SARB intervened when African Bank suffered financial distress and placed it under curatorship on 10th August, 2014. According to African Bank (in curatorship) Annual Financial Statements (2015), the following actions were taken during curatorship[57]:

1. The SARB formed a consortium comprised of six banks in South Africa (Absa Bank, Capitec Bank, First Rand Bank, Investec Bank, Nedbank Limited and Standard Bank), the Public Investment Corporation (PIC) and the SARB. The consortium was formed along with the Government Employees Pension Fund in South Africa in order to support and underwrite the restructuring. These investors agreed to inject a sum of R10 billion to acquire part of "the Good Bank business" and form a new bank, the "Good Bank". To practically implement this, the loan book of the entire bank was divided into good (performing) and bad (non-performing) loans.[58]
2. The SARB purchased the "bad" or "residual" book for R7billion, and the R10 billion provided by the consortium was used to re-capitalize ABIL via a new entity called Residual

[54] https://www.lendico.co.za/blog/african-bank-bailout-136.html (accessed on 15/8/2016).
[55] Ibid.
[56] Ford N *'African Bank Investments Ltd: Demise and Rebirth'* (2014).
[57] Winterboer, T 'African Bank Limited (in curatorship) Annual Financial Statements' (2015) 5.
[58] http://theconversation.com/why-south-africa-bank-crisis-is-not-a-big-threat-to-the-countrys-sovereign-rating-30837 (accessed on 16/8/2016).

Debt Services. The good loans were moved to the new entity as part of the restructuring plan.[59]

3. Then there was transfer of the senior funding liabilities and retail deposits from African Bank to the good bank, after haircutting their value by 10% and agreeing to compensation plans for the senior bondholders and subordinated bondholders in line with the restructuring proposal.

To implement this curatorship plan, the curator and the SARB realized the need to amend section 69 of the Banks Act to give the curator enhanced powers to enable him restore the bank to a successful going concern status. Consequently, section 69(2C) was amended to give the curator flexibility in transfer of the bank's assets and liabilities. This means that the curator is empowered to make decisions on behalf of corporate shareholders and rise funding by providing security over the assets of a bank in curatorship in respect of such funding without consulting or getting approval from the bank's investors/shareholders. The stringent requirements of shareholder consent prior to the 2015 amendment had stifled the curator's power to take any meaningful steps to save the ailing bank. To impose checks and balances on the curator's power of disposal and/or transfer of assets and liabilities of a bank, the amendment requires the curator to seek prior approval from the Minister or the Registrar. Approval can only be given after provision of a report by the curator.

Furthermore, the 2015 amendment to section 51 of the Banks Act introduced a cross-reference application of section 155 of the Companies Act to a bank under curatorship. This alleviates the concerns raised in favour of protection of the bank's creditors during the process of curatorship. By this enactment, the curator is given power to enter into arrangements and compromises with the bank's creditors. The curator must also ensure that the creditors are treated fairly and equally. In terms of section 89A introduced by this amendment to the Banks Act, any administrative action taken in terms of the Banks Act, including any administrative action taken by a curator appointed in terms of section 69, is made subject to the Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000).

By and large, the power to dispose or transfer assets and liabilities of a bank under curatorship can only be exercised by the curator in circumstances where a reasonable probability exists that a creditor will not incur greater losses as at the date of the proposed disposal, transfer or disposal and transfer, than would have been incurred if the bank had been wound up. The overriding public policy considerations underpinning bank rescue remain maintenance of a stable banking sector, and public confidence in the banking sector in the Republic.

(c) Some judicial considerations of the curatorship procedure

[59] Moyagabo Maake, 'African Bank advances bond buyback to reduce cash pile' http://www.bdlive.co.za/business/financial/2016/07/15/african-bank-advances-bond-buyback-to-reduce-cash-pile (accessed on 20/8/16).

There have been some judicial decisions in cases involving curatorship and powers of the curator. In *African Bank Ltd v Theron and Another*,[60] the court considered whether an earlier version of section 69 which was in exact *pari materia* with the present version on the aspect that upon appointment of a curator, persons vested with the bank's management are divested thereof and the management vests in the curator. The same similarity and legal effect of the legal provision under the old Banks Act dispensation (Act No. 23 of 1965) applies to the power of the curator to initiate and defend legal proceedings on behalf of the bank. The court held that:

"These are sections of wide import. Their intention is to clothe the curator with full powers of management. He steps into the shoes of the board of directors. He has all the powers of the directors, which he must exercise in a manner which he considers most economic and most promotive of the interests of its members and creditors."[61]

It is submitted that the above judicial guidance is still good law and applicable to the true nature, extent and legal import of section 69. Furthermore, the scope of the curator's power is very wide and flexible enough to exceed the domain of the usual powers of the board of directors of a solvent bank, and their objective is different. Whereas the board of directors in normal circumstances is in charge of steering the ship (company) towards specific targets and goals, the role of the curator, metaphorically speaking, is to rescue the sinking titanic and steer it back to the shores (normal course of business) in safe and sound condition (as a going concern).

Further judicial consideration is found in *ABP 4x4 Motor Dealers (Pty) Ltd v IGI Insurance Co Ltd*.[62] In this case, the Supreme Court of Appeal had to determine the meaning of 'a person under curatorship' in terms of section 13(1)(a) of the Prescription Act No. 68 of 1969. Whereas this was not a typical case of bank curatorship, the learned judge, Marais JA drew an analogy with a curator appointed in terms of the Banks Act to resolve the legal issue at hand. He observed that:

"By way of contrast, s 69 of the Banks Act of 1990 provides for appointment of a curator 'to' any bank in financial difficulties. The effect is profound: those who had been managing the bank are divested of control and the management of the bank is vested in the curator (subject to the supervision of the Registrar of Banks); the curator must recover and take possession of all the assets of the bank; the curator may be empowered to do a variety of far-reaching acts in the exercise of his or her discretion which the erstwhile managers of the bank would not have been empowered to do."

By and large, the above excerpt affirms the position that the underlying consideration of section 69 of the Banks Act is to give the curator, acting under the Registrar's oversight, a wider mandate to take over management and control of the affairs of a distressed bank and do business in a manner that is beneficial to the interests of depositors, creditors, employees and the wider general public guided by the notions of public interest and ensuring stability of the banking system as a whole.

[60] [1996] 4 All SA 156 (SE).
[61] See page 162 of the judgment for this excerpt.
[62] 1999 (3) SA 924 (SCA).

(d) Investigation of affairs of bank under curatorship

Another important aspect relating to the curatorship procedure is investigation of affairs of a bank under curatorship in terms of section 69(A) of the Banks Act. While a bank is under curatorship, the Registrar has the discretion to appoint a person known as a commissioner for the purpose of investigating the business, trade, dealings, affairs or assets and liabilities of that bank or of its associate or associates.[63]

To ensure fairness in the process of investigation into the affairs of the affected bank, the law imposes on the Registrar an obligation to take all reasonable steps to ensure that before appointment, the person appointed as commissioner or persons appointed to assist the commissioner will be able to report objectively and impartially on the affairs of the bank concerned or the associate or associates of such bank.[64]

The nature and extent of the powers of the commissioner and his or her team are also stipulated. For instance, in carrying out an investigation into the business, trade, dealings, affairs or assets and liabilities of a bank under curatorship, the commissioner may administer an oath or affirmation or otherwise examine any person, if the commissioner has reason to believe that such a person may be able to provide information relating to the affairs of the bank provided that the person examined, whether under oath or not, may have his or her legal adviser present at the examination, and provided further that on good cause shown the commissioner may direct that the proceedings under this investigation be held *in camera* and not be accessible to the public.[65]

Any person examined by a commissioner under this provision is not be entitled, at such examination, to refuse to answer any question upon the ground that the answer would tend to incriminate him or her or upon the ground that he or she is to be tried on a criminal charge and may be prejudiced at such trial by his or her answer.[66] Where any person gives evidence in terms of the provisions of this section and is obliged to answer questions that may incriminate him or her or, where he or she is to be tried on a criminal charge, that may prejudice him or her at such trial,

[63] Section 69(A)(1) of the Banks Act. The Registrar also has the discretion to appoint a person as an assistant or two or more persons as assistants to the commissioner to assist the commissioner, subject to the control and directions of the Registrar, in an investigation of affairs of a bank under curatorship in terms of subsection (2).
[64] Section 69(A)(3) of the Banks Act.
[65] Section 69(A)(5A)(1)(a) of the Banks Act. In terms of general powers, a commissioner appointed under subsection (1) and any person or persons appointed under subsection (2) of section 69A 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 sections 4 and 5 of the Inspection of Financial Institutions Act, 1998 (Act No. 80 of 1998), upon a registrar or an inspector contemplated in the Inspection of Financial Institutions Act, 1998 provided that for the purposes of this section, any reference to an 'institution' or a 'financial institution' in sections 4 and 5 of the Inspection of Financial Institutions Act, 1998, shall be deemed to be a reference to a bank under curatorship or any of its associates; and any reference to 'the registrar' and 'an inspector' in sections 4 and 5 of the Inspection of Financial Institutions Act, 1998, shall be deemed to be a reference to the commissioner and any person appointed under subsection (2), respectively.
[66] Section 69A(6)(a) of the Banks Act.

the commissioner must direct, in respect of such part of the proceedings, that no information regarding such questions and answers may be published in any manner whatsoever.[67]

The commissioner is further given powers to summon any person to attend the inquiry.[68] If any person who has been duly summoned and to whom a reasonable sum for the expenses of such person has been tendered, fails to attend before a commissioner at the time and place appointed by the summons without lawful excuse made to the commissioner at the time of the sitting, the commissioner may cause the person so summoned to be apprehended and brought before the commissioner for examination.[69] Any person duly summoned shall be entitled to such witness fees as such person would have been entitled to if he or she had been a witness in civil proceedings in a magistrate's court.[70]

In order not to increase financial burden on the already distressed bank, the Registrar is liable for payment of the costs and expenses incidental to an investigation held in accordance with the provisions of this section, unless the Registrar directs that the whole or any part of such costs and expenses must be paid out of the assets of the bank concerned.[71] The commissioner is given a time limit of up to five months as from the date of appointment to complete the investigation, and must within thirty days after completion of such investigation prepare a written report thereon, in which, *inter alia*, he or she must state in his or her opinion whether it is in the interest of the depositors or other creditors of the bank concerned that the bank remains under curatorship; or whether it is in the interest of the depositors or other creditors of the bank concerned that the Registrar, in terms of the provisions of section 68(1)(a), applies to a competent court for the winding-up of the bank concerned.[72]

The commissioner must also state whether it appears that any business of such bank was carried on recklessly or negligently or with the intent to defraud depositors or other creditors of the bank concerned or any other person, or for any other fraudulent purpose; and should it appear that any business of such bank was carried on in such a detrimental manner contemplated in terms of this provision, any person identified by the commissioner as party to the carrying on of the business of that bank in such manner must be identified and named in the report.[73] Upon completion, copies of the commissioner's report must be forwarded to the Registrar, the Minister, and in the event of a finding that the business of such bank was carried on recklessly or negligently or with the intent

[67] Section 69A(6)(b) of the Banks Act. 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) of the Banks Act.
[68] Section 69A(7) of the Banks Act.
[69] Section 69A(8) of the Banks Act.
[70] Section 69A(9) of the Banks Act.
[71] Section 69A(10) of the Banks Act.
[72] Section 69A(11)(a) and (b) of the Banks Act.
[73] Section 69A(11)(c) and (d) of the Banks Act.

to defraud depositors or other creditors of the bank concerned or any other person, or for any other fraudulent purpose, a copy should be forwarded to the attorney-general concerned.[74]

One of the contentious provisions under this section is the stipulation to the effect that 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.[75] This might pose a threat to the right to access of information and official records.

The Act also creates offences in relation to the inquiry. Any person has been duly summoned under this section by a commissioner and who fails, without sufficient cause, to attend at the time and place specified in the summons; or fails, without sufficient cause, to remain in attendance until excused by the commissioner from further attendance; refuses to be sworn or to affirm as a witness; or fails without sufficient cause to answer fully and satisfactorily any question lawfully put to such person by a commissioner, notwithstanding that such answer may tend to incriminate him or her; or to produce books or papers in the custody of such person or under the control of such person which a commissioner has required him or her to produce, is guilty of an offence.[76] The nature and wording of this provision seems to impose strict liability offences.

For purposes of public notice, the Registrar must as soon as is practicable after the appointment of a commissioner, or of any person or persons to assist the commissioner, announce such appointment by notice in the Gazette.[77] It is very important to observe that the provisions of section 69(8) of the Banks Act *mutatis mutandis* apply in respect of a bank under curatorship of which the registration as a bank is suspended, cancelled or terminated while an investigation under this section in respect thereof is in progress. Such actions do not terminate the investigation.[78]

The appointed commissioner in the African Bank saga was Advocate JF Myburgh. [79] In the report, the commissioner found that"

[74] Section 69A(12) of the Banks Act.
[75] Section 69A(13) of the Banks Act.
[76] See section 69A(14) of the Banks Act. Other stipulated offences are: wilfully furnishing the commissioner with any false information; refusing or failing to comply to one's best ability with any reasonable request made to any person by the commissioner in the exercise of the commissioner's powers or the performance of the commissioner's duties. However, this is also clouded in ambiguity and poses challenges in proving subjective terms like one's best ability. Hindering the commissioner in the exercise of his or her powers or the performance of his or her duties, and failure to comply with any provision of a direction by the commissioner or the Registrar are also offences.
[77] Section 69A(15) of the Banks Act.
[78] Section 69A(16) of the Banks Act. For the purposes of subsection (16), the reference in section 69(8) to the Minister and the curator shall be deemed to be a reference to a commissioner and any person appointed under subsection (2), respectively.
[79] Advocate John Myburgh, SC is an experienced South African lawyer and a member of the Johannesburg Bar. He had also conducted the earlier inquiry into the dealings and transactions of Regal Treasury Private Bank Ltd (in curatorship) and issued a report of the findings to the SARB. In the African Bank (in curatorship) inquiry, The Registrar subsequently appointed Advocate V Maleka SC and Mr B Abrahams as assistants to the Commissioner in

"ABIL and the bank acted negligently in underestimating the financial implications of issues such as bad debts; impairments; the cost of funding Ellerines; the risk of the market losing confidence in ABIL and the bank and the funders failing to continue to support ABIL and the bank."[80]

Since there were no findings of fraud, no criminal prosecution was recommended by the commissioner, but the Chief Executive Officer (CEO), Leon Kirkinis was blamed for exhibiting "hubris" in his corporate governance and management style.[81]

IV. THE SEARCH FOR A NEW REGULATORY PARADIGM: THE PROPOSED "TWIN PEAKS" MODEL IN THE SOUTH AFRICAN CONTEXT

In 2007, the South African government launched a formal review of the country's financial sector regulatory framework, which was expanded in 2009 to incorporate lessons learnt from the GFC of 2008.[82] The policy document observed that in as much as South Africa's financial system had weathered the negative economic shocks caused by the GFC because of the country's sound macro-economic policies and a robust financial sector regulatory system, a shift towards the "Twin Peaks" model of financial sector regulation was proposed with a view of achieving more holistic regulatory outcomes such as financial stability, consumer protection, access to financial services and combatting financial crime.[83]

While speaking about this proposed regulatory and supervisory change in his 2012 Budget Speech, the Minister of Finance, Pravin Gordhan observed that:

"As announced last year, we intend to shift towards a twin peaks system for financial regulation, where we separate prudential from market conduct supervision of the financial sector. Consultations will continue this year, with a view to tabling legislation in early 2013."[84]

The Financial Sector Regulation Bill (FSRB) was first published for public comment in December 2013, with a revised version published for comment in December 2014. The Bill was then tabled

terms of s69A(1)(b) of the Banks Act. Mr C Moraitis, Ms A Berman and Ms Z Mthiyane of Werksmans acted as instructing attorneys. Ms Z Mshengu and Mr K Mohale of the SARB assisted the Commission.

[80] See pg. 476 [para. 693] of the Report, available at the SARB official website.

[81] See pg. 405 [para. 598] of the Report. "Hubris often indicates a loss of contact with reality and an overestimation of one's own competence, accomplishments or capabilities, especially when the person exhibiting it is in a position of power. Kirkinis believed that: *he* was right; everyone else was wrong.

[82] This review culminated into publication of a policy document, *A Safer Financial Sector to Serve South Africa Better* (2011), by the Minister of Finance.

[83] The "Twin Peaks" model of financial sector regulation was propounded by Michael Taylor in his seminal publication *"Twin Peaks": A regulatory structure for the new century*, Centre for the Study of Financial Innovation (1995) wherein he proposed that the UK financial regulatory system be redesigned around the twin peaks of systemic protection and consumer protection. He proposed that the first peak, the Financial Stability Commission, would ensure that there were adequate and effective prudential measures to guarantee soundness of the financial system, capital adequacy of banks and risk management. The second peak, the Consumer Protection Commission, would enforce the market/business conduct regulation of financial firms to ensure that customers are treated in a fair and honest manner.

[84] National Treasury (2012) "2012 Budget Speech" (Pretoria: National Treasury, 22 February 2012), pg. 28.

in Parliament in October 2015.[85] This Bill proposes to introduce a new revolutionary legal regime in as far as banking and finance sector regulation in South Africa is concerned. For purposes of context, the scope of the discussion will be limited only to provisions that are relevant to bank rescue.

Firstly, the major objective of the proposed FSR Act is to achieve a stable financial system that works in the interests of financial customers and that supports balanced and sustainable economic growth in the Republic, by establishing, in conjunction with the specific financial sector laws, a regulatory and supervisory framework that promotes financial stability, the safety and soundness of financial institutions, fair treatment and protection of financial customers, efficiency and integrity of the financial system, prevention of financial crime, financial inclusion, and public confidence in the financial system.[86] The Minister of Finance will be responsible for administration of the Act when it comes into force.[87]

The Bill further proposes the two regulatory peaks- the Prudential Authority (PA) as a juristic person operating within the administration of the SARB. As the name suggests, this will be in charge of regulating the prudential standards of financial institutions.[88] The other peak, the Financial Sector Conduct Authority (FSCA) will be an independent juristic person outside the SARB, but working in close co-operation and consultation with the SARB and the PA. As the name suggests, it will be responsible for financial firms' market conduct regulation and supervision.[89]

In relation to financial stability, it is proposed that the SARB should take the lead on the financial stability mandate by having the responsibility to protect and enhance financial stability, and if a systemic event has occurred or is imminent, for restoring or maintaining financial stability.[90] Furthermore, the SARB will be required to monitor and keep under review the strengths and weaknesses of the financial system; and any risks to financial stability, and the nature and extent of those risks, including risks that systemic events will occur and any other risks contemplated in matters raised by members of the Financial Stability Oversight Committee (FSOC) or reported to the SARB by a financial sector regulator.[91]

The SARB must furthermore, take steps to mitigate risks to financial stability, including advising the financial sector regulators, and any other organ of state, of the steps to take to mitigate those risks; and regularly assess the observance of principles in the Republic developed by international standard setting bodies for market infrastructures, and report its findings to the financial sector

[85] National Treasury "Publication update for Twin Peaks financial sector regulatory reform programme" Media Statement, 21 July 2016.
[86] Clause 7 of the FSRB.
[87] Clause 8 of the FSRB.
[88] See clauses 32-34 of the FSRB for the establishment, objective and functions of the PA.
[89] See clauses 56-58 of the FSRB for the establishment, objective and functions of the FSCA.
[90] Clause 11(1) of the FSRB.
[91] Clause 12(a) of the FSRB.

regulators and the Minister, having regard to the circumstances and the context within the Republic.[92] At least every six months, the SARB must make an assessment of the stability of the financial system, herein referred to as the "financial stability review", which review must set out SARB's assessment of financial stability in the period under review; its identification and assessment of the risks to financial stability in at least the next 12 months; an overview of steps taken by it and the financial sector regulators to identify and manage risks, weaknesses or disruptions in the financial system during the period under review and that are envisaged to be taken during at least the next 12 months; and an overview of recommendations made by it and the FSOC during the period under review and progress made in implementing those recommendations.[93]

The Governor of the SARB will be made the major role-player in determination and management of systemic events.[94] The Governor may, after having consulted the Minister, determine in writing that a specified event or circumstance, or a specified combination of events or circumstances is a systemic event.[95] In relation to systemic events, the SARB must take all reasonable steps to prevent systemic events from occurring; and if a systemic event has occurred or is imminent, to mitigate without delay the adverse effects of the event on financial stability; and manage the systemic event and its effects.[96] It is submitted that bank rescue (curatorship) is one of the available mechanisms SARB can use to achieve these objectives. However, when acting under this mandate, the SARB must have regard to the need to minimize adverse effects on financial stability and economic activity; protect, as appropriate, financial customers; and contain the cost to the Republic of the systemic event and the steps taken.[97]

Another important provision with ramifications on bank curatorship/rescue powers is the designation of systemically important financial institutions (SIFIs).[98] The Governor will have power to designate an institution as a SIFI.[99] In deciding on this designation, the Governor will have to take into account the size of the financial institution, the complexity of the financial institution and its business affairs, the interconnectedness of the institution with other financial institutions within or outside the Republic, whether there are readily available substitutes for the financial products and financial services that the financial institution provides, recommendations of the FSOC, submissions made by or for the institution, and any other matters that may be

[92] Clause 12 (b) and (c) of the FSRB.
[93] See clause 13 of the FSRB.
[94] In terms of clause 1 of the Bill, "systemic event" means an event or circumstance, including one that occurs or arises outside the Republic, that may reasonably be expected to have a substantial adverse effect on the financial system or on economic activity in the Republic, including an event or circumstance that leads to a loss of confidence that operators of, or participants in, payment systems, settlement systems or financial markets, or financial institutions, are able to continue to provide financial products or financial services.
[95] Clause 14(1) of the FSRB.
[96] Clause 15(1) of the FSRB.
[97] Clause 15(2) of the FSRB.
[98] A SIFI means a financial institution designated in terms of clause 29 of the Bill.
[99] See clause 29 of the FSRB.

prescribed by Regulation.[100] It is submitted that these considerations may also be put into account by the SARB when reaching a decision on whether to consider rescue/curatorship for any distressed bank. Conditions like interconnectedness and complexity are major considerations when deliberating on the aspect of bank rescue procedures. However, in terms of the designation of SIFIs in South Africa, it is very important to note that the designation of a financial institution as a systemically important financial institution does not imply or entitle the financial institution to a guarantee or any form of credit or other support from any organ of state.[101] In my view, this provision is intended to curb moral hazard that can arise from the designation of an institution as a SIFI.

It is also imperative to note that this new legal framework will be more preventive of bank distress, than reactive. There is a lot of emphasis on curbing crises and systemic events than fire-fighting after the events have occurred. And where systemic events have occurred, there are more augmented powers for immediate action to contain contagion. One of the provisions that look at preventative measures is in respect of additional enhanced prudential measures for SIFIs. In order to mitigate the risks that systemic events may occur, the SARB, may after consulting the PA, direct the PA to impose, either through prudential standards or regulator's directives, requirements applicable to one or more specific SIFIs, or to such institutions generally in relation to aspects pertaining to solvency measures and capital requirements, which may include requirements in relation to counter-cyclical capital buffers; leverage ratios; liquidity; organizational structures; risk management arrangements, including guarantee arrangements; sectoral and geographical exposures; required statistical returns; recovery and resolution planning; and any other matter in respect of which a prudential standard may be made that is prescribed by Regulations made on the recommendation of the Governor.[102]

I submit that this provision will further have implications on curatorship in the sense that appointment of a curator for a SIFI; placing the financial institution under business rescue or adopting of a business rescue plan for the financial institution; and entering into a compromise arrangement with its creditors will all require concurrence of the SARB.[103] Any of these actions taken without the SARB's concurrence will be void.[104]

As noted earlier, the shift to the "Twin Peaks" model will introduce a more intrusive regulatory and supervisory regime on the financial services industry. As major players, banks will have additional compliance requirements to meet. From the perspective of curatorship, the law strives to draw a balance between the public interest and private interest of bank shareholders through deliberate interventions to contain moral hazard, reckless trading and enhancing institutional safety through designation of entities such as SIFIs and controls on conglomerate groups. It remains to

[100] Clause 29(3) of the FSRB.
[101] Clause 29(5) of the FSRB.
[102] Clause 30 of the FSRB.
[103] Clause 31(1) of the FSRB.
[104] Clause 31(2) of the FSRB.

be seen as to whether these regulatory safeguards will be effective to meet the required objectives in the practical context.

V. THE UGANDAN SCENARIO: A BRIEF HISTORY OF THE EVOLUTION OF BANKING REGULATION IN UGANDA

The historical evolution of the present bank regulatory and supervisory regime in Uganda is closely linked to bank failure. In the early 1990s and 2000s, eight banks failed, mainly because of poor corporate governance, and BoU closed most of them, and some were sold to new owners.[105] In 1998 and 1999 alone, four banks (Greenland Bank, Co-operative Bank, Trust Bank and International Credit Bank), which collectively held 12.1% of Uganda's total bank deposits were closed by BoU.[106] In 1997, following a spree of bank failures, a decade-long moratorium was imposed against licensing of new banks in Uganda.[107]

Soon after the closure of Greenland Bank in April 1999, BoU had to intervene in the management of Uganda Commercial Bank (UCB) by placing it under statutory management (a concept I will discuss fully in due course). UCB was also insolvent, but alone, it held 22.8% of the entire country's banking system's deposits.[108] Closure of UCB was therefore an option because Government wanted to preserve its branch network all over the country and because of its size as the largest bank then and systemic importance in the market, it remained open after BoU's intervention and capital injection.[109] However, under the privatization regime, UCB was acquired by the Standard Bank Group of South Africa in 2001, and merged into Stanbic Bank (Uganda) Limited, which continues to be Uganda's largest private bank by assets.[110]

Interestingly, the approach of BoU was different in respect of how it handled the bank failures. In some instances, it used closed bank resolution (closure) and in other scenarios, open bank resolution was deployed (the bank remained open under statutory management). For example, the International Credit Bank was closed as soon as its insolvency became known. Some of Co-operative Bank's deposits were transferred through a transaction known as a purchase of assets and assumption of liabilities (P&A) to two private sector banks.[111]

---

[105] Emmanuel Tumusiime-Mutebile: Corporate governance and banking regulation in Uganda (November 2012)

[106] Martin Brownbridge, Resolving Bank Failures in Uganda: Policy Lessons from Recent Bank Failures, Development Policy Review, 2002, 20(3): 279-291

[107] The moratorium was lifted in 2007, and 12 new commercial banks were licensed between 2008 and 2013.

[108] Ibid. UCB was a state-owned bank that had been partially privatized by selling a 49% equity stake to Westmont Land Bhd, a Malaysian company in 1998. The bank's failure was linked to Greenland Bank's failure because Westmont had borrowed money from Greenland Bank to finance the acquisition of equity in UCB. Westmont had secretly assigned its shares in UCB to Greenland Bank as the security for the loan.

[109] Ibid.

[110] As of 31 December 2015, Stanbic Uganda's total assets were approximately UGX 3.729 trillion and its shareholders' equity was approximately UGX 544.8 billion. It is also listed on the Uganda Securities Exchange.

[111] Most of Greenland's private deposits were transferred to UCB, and UCB received BoU securities to back the deposit liabilities it had taken on.

Three other very small private sector banks (Nile Bank, Sembule Bank and Teffe Bank) also suffered distress within this period and BoU had to subject them to regulatory directives.[112] Teffe Bank was closed down in 1994.[113] Due to the inadequate depositor protection funds available, the government repayed the private sector deposits in the failed banks at the expense of the tax payer.[114] In 2000, a judicial commission of inquiry chaired by Justice James Ogoola was set up to inquire into the circumstances surrounding causes of failure and closure of International Credit Bank, Greenland Bank and Co-operative Bank.[115]

It has been argued that this history of bank failures influenced the enactment of the present legal regulatory regime for the banking sector- the Financial Institutions Act, 2004.[116] This piece of legislation is underpinned on the CAMELS (Capital, Assets, Management, Earnings, Liquidity, and Sensitivity analysis) framework which requires banks to have the necessary capital requirements, liquidity, corporate governance structures, internal controls and risk management policies that allow them to operate and function in a prudent and stable manner.[117] This legal framework will be analyzed within the context of bank rescue, with special attention on BoU power of statutory management, case studies of how this power has been exercised, and recommendations towards a more rescue-oriented approach, learning from the SARB experience with African Bank.

VI. STATUTORY MANAGEMENT AS A TOOL OF DISTRESSED BANK RESCUE

The power of management take-over is bestowed on the BoU by section 88 of the FIA in circumstances where a bank is *inter alia*, conducting its business in contravention of the Act, and/or the continuation of its activities would be detrimental to the interests of depositors.[118] On taking over management under this provision, the Central Bank assumes exclusive powers of management and control of the affairs of the financial institution.[119] Just like as it is under curatorship in the South African context, the management is divested of its duties and the Central Bank (or person appointed by the Central Bank) takes over management.

---

[112] Each of them had to sign a Memorandum of Understanding (MoU) with the Central Bank committing to recapitalize and cure the management and managerial lapses identified by BoU.

[113] Tumwine-Mukubwa G.P, *Essays in African Banking Law and Practice*, 2nd Ed, pg. 6. (2009).

[114] In 1999, deposits of up to a maximum of UGx 3 million (about US $2,000) at the then interest rate were protected under the deposit insurance fund. After the closure of Greenland, government announced that it would pay all of its deposits. The deposits in ICB and Cc-operative Bank were also re-paid under various arrangements involving Government, BoU securities, liquid assets from the Co-operative Bank and direct payments handled by BoU in the case of ICB, which had a very tiny fraction of customers.

[115] The Commission report released in August 2001 highlighted regulatory lapses and concluded that BoU's supervision department was not adequately staffed, and lacked the necessary technical expertise to conduct supervision and inspection of all the banks. See Peter Edepu, 'Infrastructure to Detect and Control Money Laundering and Terrorist Funding in Uganda', pg. 115.

[116] Tumwine-Mukubwa, pg. 6.

[117] Lawrence Bategeka & Luka Jovita Okumu, Banking Sector Liberalisation in Uganda Process, Results and Policy Options Research Report, Centre for Research on Multinational Corporations (December 2010).

[118] Section 88(1)(a)&(b) of the FIA.

[119] Section 89(1) of the FIA.

BoU has the discretion to appoint a statutory manager to manage, control and direct the affairs of the financial institution.[120] Upon appointment of a statutory manager, the board of directors stand suspended.[121] Furthermore, a statutory manager appointed in terms of this section takes over the functions of the members of the board of directors collectively and individually, including the board's powers of delegation and use of the seal until such a time as the Central Bank shall appoint an advisory board.[122] In terms of comparative analysis with the South African context under curatorship, there is a point of departure here in the sense that there is no advisory board appointed when a curator takes over a distressed bank.

The law further imposes checks and balances on the exercise of the statutory manager's mandate and requires him or her to perform a balancing act of the various interests at stake. A statutory manager must, upon assuming the management, control and conduct of the affairs and business of an institution, discharge his or her duties with diligence and in accordance with sound banking and financial principles and in particular, with due regard to the interests of the institution, its depositors and other creditors.[123]

The duties of the statutory manager are also stipulated in the Act. These include tracing and preserving all the property and assets of the institution; recovering debts and other sums of money due and owing to the institution; evaluating the capital structure and management of the institution and recommending to the Central Bank any restructuring or re-organization which he or she considers necessary and which, subject to the provisions of any other written law, may be implemented by him or her on behalf of the institution; entering into contracts in the ordinary course of the business of the institution, including raising of funds by borrowing on such terms as he or she may consider reasonable; obtaining from any officers or employees of the institution any documents, records, accounts, statements or information relating to its business; issuing a new balance sheet and profit and loss accounts; and any other duties that may be assigned to him or her by the Central Bank.[124] It is submitted that by and large, these juxtapose with the same duties and powers available to a curator under the South African regime. However, the Ugandan law does not make any specific provision equivalent to section 69(2C) of the South African Banks Act, in regard to disposal of assets and transfer of liabilities of a bank under statutory management in circumstances where a statutory manager is appointed. It appears that BoU retains this power, and may exercise it as it deems fit.

Another area of similarity between the South African curatorship procedure, and the Ugandan statutory management process is the power to impose a moratorium. In the Ugandan context, for the purposes of discharging his or her functions, the statutory manager may declare a moratorium

[120] Section 89(1)(g) of the FIA.
[121] Section 89(8) of the FIA.
[122] Section 89(9) of the FIA.
[123] Section 89(10) of the FIA.
[124] Section 90(4) of the FIA.

on the payment by the institution of its liabilities to depositors and other creditors.[125] To provide the necessary checks and balances on the exercise of this power, the law further outlines circumstances and conditions under which it must be exercised. The declaration of a moratorium must be applied equally and without discrimination to all classes of creditors.[126] The statutory manager must also limit the maximum rate of interest which shall accrue on deposits and other debts payable by the institution during the period of the moratorium to the minimum rate as may be prescribed by the Central Bank by notice for the purposes of this section except that this paragraph shall not be construed so to impose an obligation on the institution to pay interest or interest at a higher rate to any depositor or creditor than would otherwise have been the case; suspend the running of time for the purposes of any law of limitation in respect of any claim by any depositor or creditor of the institution; or cease to apply upon the termination of the manager's appointment in which case the rights and obligations of the institution, its depositors and creditors shall, except to the extent provided, be the same as if there had been no declaration of such moratorium.[127]

The power of a statutory manager to require any person who has at any time been an officer or director of the financial institution to provide him or her with information relating to business of the financial institution in question is buttressed under the Act.[128] This power is also available to the curator under the South African model. Additionally, just like it is the case under the Banks Act, the FIA also provides for criminal liability (offences) arising from willful failure, refusal, or neglect by any person to provide any information requested by the statutory manager in the exercise of his or her mandate.[129]

In order to prevent jeopardizing the statutory management process, there is imposition of a requirement that for one to commence or continue with any legal proceeding in any court against a financial institution while the financial institution is under management of the Central Bank, he or she must seek leave of court on ground that he or she would be caused exceptional hardship if leave were not granted; or prior written consent of the Central Bank.[130]

In respect to the principles of sanctity of contracts, a party to a contract with a financial institution is not relieved of his or her obligations on the ground that the financial institution is under management of the Central Bank.[131] In regard to the costs incurred during statutory management,

[125] Section 90(5) of the FIA.
[126] Section 90(6)(a) of the FIA.
[127] Section 90(6)(b),(c) and (d) of the FIA.
[128] Section 90(7) of the FIA.
[129] Section 90(8) of the FIA.
[130] Section 91 of the FIA. An application for leave of court must not be filed unless the Central Bank receives thirty days' notice of the intention to apply, and the Central Bank may apply to the court to be joined as a party to the proceedings for leave.
[131] Section 92 of the FIA.

the bill is on the affected financial institution, and is treated as a debt due from that financial institution to the Central Bank.[132]

Unlike the South African position, the Ugandan law is also restrictive in the sense that it imposes a time-limit under which statutory management should be exercised. The Central Bank must exercise statutory management over a financial institution for the minimum time necessary to bring the financial institution into compliance with prudential standards.[133] Where the financial institution does not comply with prudential standards within six months after its being placed under statutory management, the Central Bank must close the financial institution and place it under receivership.[134]

In a nutshell, whereas the South African Banks Act gives the curator as much freedom and flexibility in his mandate to rescue a sinking bank, the Ugandan legal regime is quite restrictive in nature. It is also noteworthy that the BoU exercises this power in a very rigid and conservative approach. As I will demonstrate by examples from the most recent bank failures, no external rescue practitioner has been appointed as a statutory manager. As soon as bank failure is looming, the Ugandan Central Bank takes over management and closes the affected bank. Matters are not made any easy by the existence of a six months limitation period within which statutory management lapses. From a practical point of view, a restructuring and turn-around of a bank and nursing it back to stability might take longer than six months. In as much as the aim is to protect depositors, there is need for more flexibility in terms of lifting of this time limitation. It would be a better rescue-oriented regime if the discretion is left to the statutory manager and BoU to liaise on the viability of the affected bank to be restored as a going concern just like it is under the South African Banks Act.

VII. RECENT BANK FAILURES AND EXERCISE OF STATUTORY MANAGEMENT POWERS BY BOU

To examine how BoU has used the statutory management powers in respect of distressed banks, it is important to analyze the most recent bank failures and the mode of Central Bank intervention in those entities.

(a) National Bank of Commerce (NBC)

NBC was a small private commercial bank that had started out in 1991 as Kigezi Bank of Commerce, with an aim of providing cheap loans and financial services to the Kigezi Community, an indigenous group in Uganda. As of April 2009, it held about $20 million in assets, representing about 0.25% of the total banking sector assets in Uganda. Through a press release on September 27th 2012, the Deputy Governor of BoU, Louis Kasekende stated that the Central Bank had taken over the management of NBC in exercise of BoU powers under Section 88(1) (a) & (b) of the FIA

[132] Section 93 of the FIA.
[133] Section 90(5) of the FIA.
[134] Section 90(6) of the FIA.

because the continuation of NBC's activities was detrimental to the interests of its depositors. The Management and the Board of Directors of NBC were suspended, and the depositors' accounts were transferred to Crane Bank, another commercial bank in Uganda.[135]

Official details about the bank's activities remain scanty, but according to media reports, since 2010, the bank had incurred continuous losses and had many non-performing loans. Furthermore, the Deputy Governor is quoted to have revealed that since 2008, the bank had achieved no growth and its market share of deposits had dwindled to 0.08% making it the worst performing bank in the country.[136]

Interestingly from a legal context, this matter turned contentious because NBC filed a case in the Constitutional Court where it contends that such action of BoU *inter alia*, violates the right to property enshrined under Article 26 of the Ugandan Constitution.[137] It sought temporary relief by way of an interim injunction. On 28th September 2012, the Constitutional Court issued an interim injunction against the BoU temporarily restraining the sale of the assets or business of NBC in liquidation. The Order also temporarily halted the implementation of the winding up order of NBC dated the 27th September 2012, and the suspension of the Managing Director of NBC (In Liquidation).[138]

On 2nd October 2012, BoU issued a clarification stating that an interim order, being negative in nature, can as a matter of law only maintain the status quo but cannot reverse it. The existing status quo was that NBC had been closed by BoU as the Regulator on the 27th September 2012 at 1.00pm and all its three branches, being the Cargen House Kampala Road branch, Plot 13A Kampala Road, the Kabale branch Plot 131 Kabale Road, Kabale and the Head Office on Yusuf Lule Road were physically seized and closed and are in the possession of BoU; NBC's banking licence had been revoked by BoU on the 27th September 2012 pursuant to Section 17(f) of the FIA and therefore NBC could no longer carry out financial institutions business; and selected assets and all deposits of NBC were on the 27th September 2012 sold and assumed by Crane Bank Limited which was duty bound to allow former NBC depositors to access their deposits.[139] BoU further contended that in light of the above circumstances, the Interim Order was incapable of any practical implementation other than restraining the calling for and payment of other creditors as aforementioned.

---

[135] The press release can be accessed via BoU's official website https://www.bou.or.ug/bou/media/from_the_bank/BoU_Takes_Over_NBC.html (last accessed on 20/8/16).

[136] See 'BoU: National Bank of Commerce Was in Financial Mess' accessed via http://ugandaradionetwork.com/a/story.php?s=45936 (last accessed on 20/8/16).

[137] The official case number is *Constitution Petition No 44 of 2012, Humphrey Nzeyi vs. Bank of Uganda and Attorney General*.

[138] *Humphrey Nzeyi vs. Bank of Uganda and Attorney General, Misc Application No. 38 of 2012.*

[139] The clarification can be obtained via the official BoU website https://www.bou.or.ug/bou/media/statements/Status_of_NBC_Closure.html (last visited on 20/8/16).

The Central Bank further invoked section 101(1) of the FIA, which is to the effect that, notwithstanding anything to the contrary in any other law, a court shall not entertain any application for stay of proceedings in relation to the liquidation or winding up of a financial institution under the FIA.[140] It reiterated that its primary mandate is to protect the interests of depositors and ensure the stability of the financial sector. It is in keeping with this mandate that the Central Bank acted swiftly in ensuring that the depositors' funds are safe and available to the depositors immediately and in full which was done through the purchase of assets and the assumption of deposits by Crane Bank Ltd. The Constitutional Court is yet to give a judgment on the merits of the case.

In this scenario, BoU statutory management powers were used to augment a bank closure/resolution procedure, not a rescue. NBC's banking license was revoked, and the bank was wound up.

(b) Global Trust Bank Ltd (GTBL)

GTBL was also a small private commercial bank that started operations in Uganda in 2008. As of May 2014, 45.3% of its stake was owned by Industrial and General Insurance Company (IGI) from Nigeria, and the other shareholders included corporate and individual investors. BoU took over management of the bank and revoked its license on 25th July 2014. There is not much detail about what necessitated this course of action, but according to media reports, the bank had accumulated losses of about UGx 60 billion (about US$24 million), had serious corporate governance deficiencies, and had provided inaccurate information to the Central Bank in violation of the FIA.[141]

In a press release, the BoU Governor stated that following the takeover of management and revocation of GTBL's license, the Central Bank went ahead and ordered winding up of its affairs under sections 17(f), 89(2)(f) & (7)(c) and 99(1) of the FIA. In Exercise of its liquidation powers, BoU concluded a Purchase and Assumption (P&A) agreement with DFCU Bank, another private commercial bank operating in Uganda, which took over all of the deposits of GTBL in full. The depositors were able to access their deposits from any branch of DFCU and the former GTBL branches at Owino, Bwaise, Pallisa, Phaida, Nateete, and Kikuubo with effect from the first working day of the next week.[142]

From this case study, it is evident that the power of statutory management take over was exercised within the resolution (not rescue/recovery) context. After takeover, BoU revoked the license,

[140] BoU argued that whilst this provision does not prevent the Petitioner from questioning the constitutionality of the FIA, the provision prevents any court from entertaining any application for stay of proceedings in relation to the liquidation or winding up of a financial institution.
[141] Daily Monitor, 'Global Trust Bank shut down' http://www.monitor.co.ug/News/National/Global-Trust-Bank-shut-down/-/688334/2397474/-/10bmt7i/-/index.html (last accessed on 20/8/16).
[142] The press release can be obtained via https://www.bou.or.ug/bou/bou-downloads/press_releases/2014/Jul/Closure-of-Global-Trust-Bank_July-25-2014.pdf (last accessed on 20/8/16).

closed down the bank and liquidated its assets. Perhaps, this was a case study that involved extreme violations of the FIA, and depositor protection was the major overriding factor.

(c) Imperial Bank Ltd

Imperial Bank was also a very small bank that had two major shareholders, Mukwano Group (a business conglomerate in Uganda), and Imperial Bank (Kenya) Limited as the parent company. In October 2015, following the death of Imperial Bank Group's Managing Director, the Central Bank of Kenya (CBK) unearthed massive fraud and placed Imperial Bank (Kenya) limited under statutory management due to unsafe and unsound business practices and conditions to operate banking business.[143] On the same day, BoU invoked sections 88 and 89 of the FIA to take over management of Imperial Bank (Uganda) Ltd following the suspension by the CBK of the operations of Imperial Bank Ltd. Kenya, who were the majority shareholder of Imperial Bank Uganda Ltd. BoU clarified that this was intended to be a temporary statutory measure to allow for seamless operations as the affairs of the majority shareholder in Kenya are resolved. Consequently, Imperial Bank Uganda Ltd remained open and its operations continued normally, but under the control of BoU.[144]

This is an interesting case study because it involved cross-border regulation and statutory management of a subsidiary bank whose parent bank in Kenya was experiencing turbulent times. Imperial Bank (Kenya) did not recover within the anticipated time, and BoU announced the sale of all the shares of Imperial Bank Limited (In Receivership) in Imperial Bank (Uganda) Limited, to Exim Bank (Uganda) Limited for the sum of US$6.788 million net of interbank deposits and other transaction costs. The amount due to Kenya Deposit Insurance Corporation was US$3.685 million that was handed over by BoU. This was communicated in the press release issued by the CBK, which was supportive of the sale.[145] Imperial Bank (Uganda) Limited was re-named Exim Bank.

This case study further highlights that in era of regionalization under the East African Community (EAC) and other regional blocs, and cross-border operation of banks, a proper distressed bank rescue mechanism should be both in-ward and out-ward looking. Distress can also arise from a parent company miles away and spread contagion on a subsidiary company operating within a particular jurisdiction. This is also another scenario where BoU used statutory management as a resolution tool as opposed to a rescue mechanism.

(d) Crane Bank Limited

[143] George Ngigi, and Brian Ngugi (13 October 2015) "Central Bank of Kenya puts Imperial Bank under statutory management", Daily Nation.

[144] See the press release via https://www.bou.or.ug/bou/bou-downloads/press_releases/2015/Oct/Imperial-Bank.pdf (last visited on 21/8/16).

[145] The press release from the CBK can be accessed via https://www.centralbank.go.ke/images/docs/media/PressReleaseSaleofImperialBankUganda_Limited.pdf (last visited on 21/8/16).

On 20th October 2016, BoU invoked its powers under sections 87(3), 88(1) (a) & (b) of the FIA and took over management of Crane Bank upon determination that it was a significantly under-capitalized financial institution that posed a systemic risk to the country's financial system.[146] The bank's problems arose after posting a consolidated pre-tax loss of UGX 7.353 billion ($2.14 million) in 2015.[147] A statutory manager was appointed and the Board of Directors of the bank was suspended by BoU. It is noteworthy that Crane Bank is a domestically systemically important bank (D-SIB) among the top four lenders, and has a network of forty five branches around the country.[148] At the time of completing this article, no further action had been taken by BoU.

VIII. THE 2015 BOU CRISIS MANAGEMENT PLAN WITHIN THE CONTEXT OF DISTRESSED BANK RESCUE

The BoU Financial Crisis Management Plan of March 2015 also has some aspects that can be analysed within the context of bank rescue.[149] The Plan provides a framework for the decision-making process in the event of a systemic shock to the banking sector. The primary objective is to facilitate the orderly resolution of a crisis, while minimising losses to depositors, the government, and the real economy by stabilising market confidence and reducing the risk of bank runs.

In terms of bank rescue, the framework recognizes statutory management powers as a tool to use in case of a systemic event or crisis.[150] Another avenue to take in respect of saving a distressed bank is use of corrective actions stipulated in Part IX of the FIA.[151] In terms of section 82 of the FIA, BoU may intervene in the business affairs of a bank where regulatory capital or liquidity requirements are breached, or when there are significant corporate governance lapses in an institution. These actions are discussed hereunder.

If the Central Bank has reason to believe or finds that the affairs of the financial institution are conducted in a manner detrimental to the interests of the depositors or prejudicial to the interests of the financial institution or in contravention of the FIA or any other written law, BoU may order in writing that the affected financial institution takes remedial action to comply with the Act or regulations, notices, or orders issued.[152] The Central Bank is further clothed with the discretion to

---

[146] See press release by the Governor accessed via https://www.bou.or.ug/bou/bou-downloads/press_releases/2016/Oct/PRESS-RELEASE-Crane-Bank-Oct-20-2016.pdf (last visited on 22/10/2016).

[147] According to BoU, Crane Bank was operating below four percent (4%) of its Risk-Weighted Assets, far below the required regulatory threshold.

[148] See pg. 17 of the BoU Annual Supervision Report, December 2015. The D-SIBs at December 2015 were Stanbic bank, Standard Chartered bank and Crane bank.

[149] BoU in partnership with the World Bank undertook measures to enhance Uganda's financial crisis preparedness. This involved a crisis simulation conducted in 2012. This exercise highlighted some gaps in the ability of BoU to respond quickly and effectively to the onset of a financial crisis. One of the recommendations arising from the crisis simulation exercise was to prepare a 'Financial Crisis Management Plan' or 'Contingency Plan'.

[150] This augments section 88 of the FIA which empowers BoU to place an institution into statutory management if the financial condition continues to deteriorate, whereby BoU will have exclusive powers of management and control of the affairs of the financial institution.

[151] See section 82 of the FIA.

[152] Section 82(1)(a) of the FIA.

issue directions regarding measures to be taken to improve the management, financial soundness or business methods of the financial institution; require the directors or management of the financial institution to execute an agreement concerning their implementation of orders or directions issued; and/or perform or appoint an agent to perform a special examination of the financial institution to determine the financial condition of the institution and evaluate resolution options, at the cost of the financial institution.[153]

Where the affected bank fails, refuses or neglects to comply with an order, direction, or agreement issued or made by BoU, then the regulator is given authority to initiate a legally binding cease and desist order, of either temporary or indefinite duration requiring the financial institution and its management to stop the improper or unacceptable practice, put a limit to lending and other credit accommodation[154], or stop any declaration of dividends.[155] The Central Bank may also remove or suspend any person from the management of the affairs of the financial institution, and impose penalties on the offending member of the management to be met personally.[156]

Interestingly, apart from statutory management, the law further clothes BoU with powers to appoint a person who, in its opinion is suitably qualified and competent to advise and assist the institution generally or for the purposes of implementing the orders, directions or agreements and the advice of a person so appointed shall have the same force and effect as a direction, and shall be deemed to be a direction of the Central Bank.[157] It is submitted that the Ugandan legal regime has adequate room for bank rescue procedures, but this is being hampered by a strong distressed bank liquidation culture that has been adopted by BoU. This can be attributed to various factors such as inadequate technical expertise in bank rescue procedures, insufficient monetary resources at the disposal of BoU to engage in such processes, a history of poor corporate governance on the side of financial institutions thus giving BoU the justification to punish such lapses with an iron hand.[158] There has also been limited scholarship and research on BoU's powers with a view of suggesting recommendations and areas of improvement in line with modern trends in Central Banking.

---

[153] Section 82(1)(b),(c)&(d) of the FIA.
[154] See section 28 of the Financial Institutions (Amendment) Act, 2016.
[155] Section 82(2)(a) of the FIA.
[156] Section 82(2)(b) & (c) of the FIA.
[157] Section 82(2)(d) of the FIA. BoU is further empowered to appoint a person, suitably qualified and competent in the opinion of the Central Bank, to manage the affairs of the financial institution for such period as shall be necessary to rectify the problem; require the financial institution to reconstitute its board of directors within such period as shall be specified; withhold approvals on establishment of new branches; withdraw the foreign exchange dealers' license; require the financial institution to add such capital as may be specified; or impose any other sanctions as the Central Bank may deem appropriate in the circumstances.
[158] The aspect of insufficient technical skills is further elucidated by Brownbridge who uses the case study of Greenland Bank as one scenario where the BoU attempted an open resolution, but did not work out because of gross mismanagement of the bank, egregious violations of the banking laws, and deliberate concealment of the bank's assets and liabilities from the regulator. He argues that the ability of bank regulators in developing countries to manage distressed banks successfully back to a position of solvency is limited because the managerial resources at their disposal are very limited.

IX. RECOMMENDATIONS AND CONCLUSION

The curatorship of African Bank provides an important case study in the area of bank rescue because the bank has continued to run as a going concern, with a few alterations in the disbursement of loans to change the business model from unsecured loans that were major causes of the distress to secure/less risk loans. The curator further set certain suspensive conditions for the restructuring of African Bank, such as approval of the restructuring by the Minister of Finance and approval of the registration of the "Good Bank" by the Registrar of Banks. Both of these approvals were cleared and the restructuring of the Bank was accomplished.

These are important lessons for Uganda in the sense that there is need for more flexibility of powers given to the statutory manager to turn around the bank from the depth of the gutters of insolvency to a position of solvency as a going concern business. It has been the practice of BoU to exercise the statutory management powers itself, but there is need to also look at external rescue practitioners to work with the Central Bank staff to implement bank rescues as a form of protecting depositors, saving employment, skills, tax base and maintaining market and financial stability.

Secondly, the African Bank case study makes a compelling case on the need for a cultural and attitudinal shift from a liquidation culture to a rescue culture. At the time of enactment of the FIA, Uganda had experienced a banking crisis and a history of bank failures that even necessitated a moratorium on registration of new banks, the banking industry is now more stable and growing. Therefore, there is need for a shift in business and regulatory culture to match the changing times. A culture of rescue has benefits such as better dividends for creditors as opposed to liquidation in case of successful rescue, and the moratorium under such processes gives a breathing space to work out a rescue plan without pressure from creditors. These are positive aspects that benefit not only the affected bank, but also other stake holders like creditors and shareholders.

Lastly, there is need to implement early warning and early intervention policies. For example, the situation of Crane Bank should not have been allowed to deteriorate to a level of significant under-capitalization (operating below 4% of its Risk Weighted Assets). Once the core capital is significantly eroded and the bank reaches a point of non-viability (PONV), then it is impossible to carry out a rescue. However, curatorship and statutory management cannot work in isolation. Therefore, there is need for more improved regulation in terms of data gathering, inspections, solvency assessments and transparency. Curatorship should only be attempted when there is still some value left in the bank. It is suitable when the institution is undercapitalized, but still solvent enough to attract new investors. Therefore, a proper bank rescue policy must be supportive to banks that can be both recapitalized and restructured into viable going concern businesses again with very minimal or no disruption to banking services.

SELECTED REFERENCES

NATIONAL CONSTITUTIONS

The Constitution of the Republic of South Africa, 1996

The Constitution of the Republic of Uganda, 1995 (as amended)

ACTS OF PARLIAMENT

South Africa

The Banks Act, No. 94 of 1990

The Banks (Amendment) Act, No. 3 of 2015

The Companies Act, No. 71 of 2008

The Insolvency Act, No. 24 of 1936

The National Credit Act, No. 34 of 2005

The South Africa Reserve Bank Act, No. 90 of 1989

Uganda

The Bank of Uganda Act, Cap. 51 Laws of Uganda

The Financial Institutions Act, 2014 (as amended in 2016)

BILLS

South Africa

The Financial Sector Regulation Bill, 2015