

FINANCIAL INSTITUTIONS (INVESTMENT OF FUNDS) ACT 39 OF 1984

[ASSENTED TO 20 MARCH 1984] [DATE OF COMMENCEMENT: 11 APRIL 1984]

(Signed by the President)

as amended by

Financial Institutions Amendment Act 6 of 1987
Financial Institutions Amendment Act 51 of 1988
Financial Markets Control Act 55 of 1989

ACT

To consolidate the laws relating to the investment, safe custody and administration by financial institutions of funds and trust property and to provide for matters incidental thereto.

ARRANGEMENT OF SECTIONS

- 1 Definitions
- 2 Duties of persons dealing with funds of, and with trust property controlled by financial institutions
- 3 Declaration of interest
- 4 Investment of trust property
- 5 Powers of inspection
- 6 Appointment of curator
- 7 Records and entries in account books admissible in evidence
- 8 Provisions relating to alienation of assets of a financial institution or trust property in certain cases
- 9 Offences
- 10 Application to South West Africa
- 11 Repeal of laws
- 12 Short title

Schedule - Laws repealed

1 Definitions

In this Act, unless the context indicates otherwise-

"company" includes a close corporation referred to in the Close Corporations Act, 1984 (Act 69 of 1984);

[Definition of "company" inserted by sec 23 of Act 51 of 1988.]

"financial institution" means-

- (a) an insurer registered in terms of the Insurance Act, 1943 (Act 27 of 1943);
- (b) a pension fund organization registered in terms of the Pension Funds Act, 1956 (Act 24 of 1956);

- (c) a friendly society registered in terms of the Friendly Societies Act, 1956 (Act 25 of 1956);
 - (d) a banking institution registered in terms of the Banks Act, 1965 (Act 23 of 1965);
 - (e) a mutual building society registered in terms of the Mutual Building Societies Act, 1965 (Act 24 of 1965), or a building society registered in terms of the Building Societies Act, 1986 (Act 82 of 1986);
- [Para (e) substituted by sec 14(a) of Act 6 of 1987.]
- (f) a unit trust scheme as defined in the Unit Trusts Control Act, 1981 (Act 54 of 1981);
 - (g) a board of executors or a trust company or any other company which invests, keeps in safe custody, controls or administers any trust property;
 - (h) a manager who in terms of the provisions of the Participation Bonds Act, 1981 (Act 55 of 1981), controls or administers a scheme;
 - (i) a financial exchange as defined in the Financial Markets Control Act, 1989;

[Para (i) added by sec 38 of Act 55 of 1989.]

"principal" means any person or body of persons, corporate or unincorporate, for whom or for which a financial institution invests, keeps in safe custody, controls or administers trust property under power of attorney or in terms of a verbal or other agreement;

"registered", in relation to a financial institution which requires registration under an Act of Parliament, includes provisionally registered;

"registrar" means the registrar appointed under the Acts referred to in paragraph (a), (b), (c), (d), (e), (f) or (i), as the case may be, of the definition of "financial institution";

[Definition of "registrar" inserted by sec 14(b) of Act 6 of 1987 and substituted by sec 38 of Act 55 of 1989.]

"trust property" means any asset held or administered by or on behalf of a financial institution in its capacity as an administrator, trustee or curator by virtue of a will, deed of settlement or order of court or as an agent for any such an administrator, trustee or curator or other principal.

2 Duties of persons dealing with funds of, and with trust property controlled by financial institutions

A director, official, employee or agent of a financial institution or of a nominee company controlled by a financial institution who invests, keeps in safe custody or otherwise controls or administers any funds of the institution or any trust property held by or on behalf of the institution for any beneficiary or principal-

- (a) shall, in the making of an investment or in the safe custody, control or administration of those funds, observe the utmost good faith and exercise proper care and diligence;
- (b) shall, in the making of an investment or in the safe custody, control, administration or alienation of the trust property, observe the utmost good faith and, subject to the terms of the instrument or agreement by

which the trust or agency concerned has been created, exercise the usual care and diligence required of a trustee in the performance or discharge of his powers and duties; and

- (c) shall not alienate, invest, pledge, hypothecate or otherwise encumber or make use of the funds or trust property or furnish any guarantee (whether or not, in the case of an insurer, such guarantee is incorporated in a policy) in a manner calculated to gain directly or indirectly any improper advantage for himself or any other person at the expense of the institution, trust, beneficiary or principal concerned.

3 Declaration of interest

(1) A director, official, employee or agent of a financial institution or of a nominee company controlled by a financial institution who takes, or takes part in, any decision to make out of the funds of the institution or out of any trust property held by or on behalf of the institution for any beneficiary or principal, an investment in the shares of, or to grant a loan, whether secured or unsecured, to, a company or firm in which he has a direct or indirect personal interest, whether by way of shareholding or the relationship of creditor and debtor or otherwise, shall declare, in writing or otherwise, that interest to the board of directors or other governing body of the financial institution or nominee company, as the case may be, before that investment or loan is made: Provided that a manager, branch manager or other official of a banking institution as defined in the Banks Act, 1965 (Act 23 of 1965), who acts within the limits of authority which has been properly delegated to him by the board of directors of the banking institution concerned for the execution of his normal duties, is exempt from the obligation of thus declaring any interest.

(2) A record of every declaration of interest in terms of subsection (1) to a board of directors or other governing body, indicating the nature and extent of the interest, shall be made in the minutes of the meeting of that board or governing body at which the declaration is made or considered.

4 Investment of trust property

(1) Where a financial institution holding trust property in its capacity as administrator, trustee, curator or agent is directed or required by the instrument or agreement under which the trust property is being administered, to invest that property in the name of a specified or ascertainable person or persons or in the name of the trust or principal concerned or in the name of the financial institution in its capacity as administrator, trustee, curator or agent, no director, official, employee or agent of that institution shall invest the property or, where registration is usually required to complete the investment, cause the investment to be registered, otherwise than in the name of such person or persons or of that trust or principal or in the name of that institution in its capacity as administrator, trustee, curator or agent, as the case may be, or, if for any reason investment or registration in that manner cannot legally be effected, otherwise than in the manner contemplated in subsection (2).

(2) Subject to the provisions of subsection (3) no director, official, employee or agent of a financial institution shall, in the absence of a direction referred to in subsection (1), invest such trust property or, where registration is usually required to complete the investment, cause the investment to be registered, otherwise than-

- (a) in the name of the trust or principal concerned or in the name of the institution in its capacity as administrator, trustee, curator or agent, as the case may be; or

(b) subject to clear identification of the trust property or investment in the books of the financial institution as being property or an investment belonging to a specified trust or principal, in the name of a nominee company which shall be so controlled by the financial institution which exercises control over it that it incurs no liabilities other than on behalf of a trust or principal for whose benefit it holds assets and in each case to an extent not exceeding the value of the assets belonging to the trust or principal.

(3) Where the articles of association of a company prohibit the registration of shares or debentures of that company in the name of a trust or of a financial institution in its capacity as administrator, trustee or curator or of a nominee company, the shares or debentures belonging to a trust shall be registered, subject to the identification mentioned in subsection (2) and upon security being furnished by the financial institution to the Master of the Supreme Court to his satisfaction (if satisfactory security has not already been furnished in terms of the Trust Moneys Protection Act, 1934 (Act 34 of 1934)), in the name of a director or manager of the financial institution itself, and that director or manager shall thereupon hold those shares or debentures in a fiduciary capacity on behalf of the trust concerned.

(4) The provisions of this section also apply in cases where a financial institution by virtue of a will, deed of settlement, order of court, power of attorney or agreement holds office as an administrator, trustee, curator or agent jointly with another person or other persons.

(5) Notwithstanding anything to the contrary in any law or the common law contained, trust property which is expressly registered in the name of a financial institution in its capacity as administrator, trustee, curator or agent, as the case may be, shall not under any circumstances form part of the assets of the financial institution.

5 Powers of inspection

(1) An inspector appointed under section 2 of the Inspection of Financial Institutions Act, 1984, may at any time at the direction of the registrar of a financial institution referred to in the said Act, inspect the affairs of a board of executors, trust company or other company mentioned in paragraph (g) of the definition of "financial institution" in section 1 of this Act and of a nominee company controlled by the financial institution in respect of which the registrar concerned was appointed, in order to ascertain whether the provisions of this Act are being complied with.

[Subsec (1) substituted by sec 15(a) of Act 6 of 1987.]

(2) The registrar of a financial institution referred to in this Act may cause the affairs of any company which he has reasonable cause to believe holds or administers trust property, to be inspected in order to ascertain whether the provisions of this Act are applicable to it.

[Subsec (2) substituted by sec 15(b) of Act 6 of 1987.]

(3) The provisions of the Inspection of Financial Institutions Act, 1984, apply in respect of an inspection carried out in terms of subsection (1) or (2).

6 Appointment of curator

(1) If as a result of an inspection of the affairs of a financial institution under any law, the registrar of a financial institution is of the opinion that it is for any reason desirable to do so, he may without notice to the financial institution concerned apply to a division of the Supreme Court having jurisdiction (hereinafter referred to as the

court) for the appointment of a curator to take control of and to manage the whole or any part of the business of that financial institution.

[Subsec (1) substituted by sec 16(a) of Act 6 of 1987.]

(2) Upon an application in terms of subsection (1) the court may-

(a) provisionally appoint a curator to take control of and to manage the whole or any part of the business of that financial institution upon such conditions and for such period as it deems fit; and

(b) simultaneously grant a rule *nisi* calling upon the financial institution to show cause upon a day mentioned in the rule why the appointment of the curator should not be confirmed.

(3) Upon the application of the financial institution the court may anticipate the return day if not less than 48 hours' notice of such application has been given to the registrar of that financial institution.

[Subsec (3) substituted by sec 16(b) of Act 6 of 1987.]

(4) If at the hearing pursuant to the rule *nisi* the court is satisfied that it is desirable to do so, it may confirm the appointment of the curator.

(5) The curator shall act under the control of the court, and he may apply to the court for instructions in regard to any matter arising out of or in connection with the control and management of the business of the financial institution.

(6) The curator shall furnish the registrar of the financial institution concerned with such information concerning the affairs of that financial institution as he may from time to time require, and shall give him notice of any application which he may make to the court in terms of subsection (5).

[Subsec (6) substituted by sec 16(c) of Act 6 of 1987.]

(7) The registrar of the financial institution concerned is entitled to be heard personally or by a representative at any application by the curator in terms of subsection (5), and he may himself make an application to the court with reference to the control and management of the business of that financial institution by the curator

[Subsec (7) substituted by sec 16(c) of Act 6 of 1987.]

(8) The curator is entitled to receive such remuneration out of the funds of the financial institution concerned as the court may direct.

[Subsec (8) substituted by sec 16(c) of Act 6 of 1987.]

(9) The court may at any time cancel the appointment of the curator on good cause shown.

7 Records and entries in account books admissible in evidence

The records of a financial institution and of a nominee company or trust controlled or administered by that institution and the books of account of the institution, company or trust are, in any proceedings under this Act, admissible as *prima facie* evidence of the matters, transactions and accounts therein recorded, on the production of a document purporting to be an affidavit by one of the directors, officials, employees or agents of the institution or company or by an inspector appointed under the Inspection of Financial Institutions Act, 1984, or section 8A of the South African Reserve Bank Act, 1944 (Act 29 of 1944), or of other sufficient evidence, to the effect that those records or books of account are or have been the ordinary records and books of account of the institution, company or trust and that

those records have been kept or those entries have been made in the books of account in the ordinary course of business.

[Sec 7 substituted by sec 17 of Act 6 of 1987.]

8 Provisions relating to alienation of assets of a financial institution or trust property in certain cases

If a director, official, employee or agent of a financial institution or of a nominee company controlled by such an institution purports to alienate any funds or other assets of the institution or any trust property to another person in contravention of or without complying with the provisions of this Act, the alienation is invalid unless that other person proves that at the time of the acquisition he was not aware of and had no reason to suspect the contravention or non-compliance and that he acquired the funds, assets or trust property, as the case may be, for valuable consideration.

9 Offences

(1) A person who contravenes any provision of this Act or fails to comply with any provision thereof with which it is his duty to comply, is guilty of an offence and liable on conviction to a fine not exceeding R10 000 or to imprisonment for a period not exceeding 10 years or to both that fine and that imprisonment, and is in addition liable to the financial institution, trust, beneficiary or principal concerned for any profit made by him and for any damage suffered by the institution, trust, beneficiary or principal as a result of the contravention or failure.

(2) A court which convicts a director of a financial institution of an offence in terms of subsection (1) may, in addition to any penalty it may impose, order that the director shall not serve as a director of any financial institution for such period as the court may in the circumstances deem fit.

10 Application to South West Africa

This Act and any amendment thereof also apply in the territory of South West Africa, including the Eastern Caprivi Zipfel.

11 Repeal of laws

(1) Subject to the provisions of subsection (2) the laws mentioned in the Schedule are hereby repealed to the extent set out in the third column thereof.

(2) Anything done or deemed to have been done under any provision of a law repealed by subsection (1) and which could be done under a provision of this Act is deemed to have been done under the last-mentioned provision.

12 Short title

This Act is called the Financial Institutions (Investment of Funds) Act, 1984.

Schedule LAWS REPEALED

Number and year of law	Short title	Extent of repeal

Act 56 of 1964	Financial Institutions (Investment of Funds) Act, 1964	The whole
Act 36 of 1981	Financial Institutions Amendment Act, 1981	Section 22

© 2005 Juta and Company, Ltd.