

## CHAPTER 24:28

# TROUBLE FINANCIAL INSTITUTIONS (RESOLUTION) ACT

*Act 31/2004*

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**AN ACT to provide for the administration of troubled financial institutions; to provide for formulation and implementation of schemes of resolution in respect of such institutions; and to provide for matters connected with or incidental to the foregoing.**

[Date of commencement: 14th January, 2005.]

PART I

PRELIMINARY

**1 Title**

This Act may be cited as the Troubled Financial Institutions (Resolution) Act [*Chapter 24:28*].

**2 Application**

This Act shall apply to all financial institutions referred to in section 6(1), including those formed, registered or incorporated before the date of commencement of this Act:

Provided that if the Reserve Bank proposes to issue a declaration in relation to a financial institution, and, before such declaration is issued, there is made or presented to the court—

- (a) an application in terms of section 191 of the Companies Act for the sanctioning of a compromise or arrangement proposed between the financial institution and its creditors or members, sections 191 to 194 of that Act; or
- (b) a petition for the winding up of the financial institution in terms of section 207 of the Companies Act, Part V or VI of that Act; or
- (c) an application for a provisional judicial management order in terms of section 299 of the Companies Act, Part V or VI of that Act;

shall apply to such financial institution unless, within thirty days after the date of presentation of the petition or the making of the application, as the case may be, the Reserve Bank issues a declaration in respect of the financial institution.

**3 Interpretation**

In this Act—

“administrator” means an administrator appointed under section 6(1), and includes any assistant administrator appointed under that provision;

“administration”, in relation to a troubled financial institution, means the administration of the troubled financial institution in accordance with the notice of declaration or a scheme of resolution;

“associate”, “board”, “curator”, “director”, “chief executive officer”, “inspector”, “registered” and “supervisor” have the meanings assigned to those terms by the Banking Act;

“the Banking Act” means the Banking Act [*Chapter 24:20*];

“the Companies Act” means the Companies Act [*Chapter 24:03*];

“commencement of the administration” means the date when a declaration in relation to a financial institution takes effect in terms of section 6(7);

“court”, “Master”, “Registrar”, “secretary” and “share” have the meanings assigned to those terms by the Companies Act;

“declaration” means a declaration issued in terms of section 6;

“document” includes any document stored in electronic form in any computer;

“financial institution” means—

- (a) any banking institution registered or required to be registered in terms of the Banking Act [*Chapter 24:20*]; or
- (b) any building society registered or required to be registered in terms of the Building Societies Act [*Chapter 24:02*]; or

- (c) the People’s Own Savings Bank established in terms of the People’s Own Savings Bank of Zimbabwe Act [*Chapter 24:22*]; or
- (d) an asset manager as defined in the Asset Management Act [*Chapter 24:26*]; or
- (e) a collective investment scheme as defined in section 3 of the Collective Investment Schemes Act, 1997; or
- (f) any person who carries on a business of acceptance of deposits and other repayable funds from the public;

“member”, in relation to a financial institution, means—

- (a) a shareholder, debenture-holder or other person having a right to vote at meetings of the financial institution; or
- (b) any contributory as defined in section 202 of the Companies Act;

“Minister” means the Minister of Finance and Economic Development or any other Minister to whom the President may, from time to time, assign the administration of this Act;

“officer”, in relation to a troubled financial institution, includes an auditor of the institution;

“public funds” means funds held by or on behalf of the State (whether or not appropriated by Act of Parliament) and includes any moneys advanced by the Troubled Bank Fund;

“Reserve Bank” means the Reserve Bank of Zimbabwe referred to in section 4 of the Reserve Bank of Zimbabwe Act [*Chapter 24:22*];

“scheme of resolution” means a scheme referred to in section 26;

“specified person” means any person specified in terms of section 14(8);

“successor financial institution” means a successor to a troubled financial institution that is reconstructed, amalgamated or transferred in terms of section 10(a), (b) or (c);

“troubled financial institution” means a financial institution in respect of which a declaration has been made;

“Troubled Bank Fund” means the Troubled Bank Fund established by the Reserve Bank for the purpose of providing financial assistance to financial institutions.

## PART II

### DECLARATION OF TROUBLED FINANCIAL INSTITUTIONS

#### **4 Investigation of certain financial institutions**

(1) If the Reserve Bank has reasonable grounds for believing that a financial institution—

- (a) which is indebted to the Reserve Bank (whether by virtue of having received assistance from the Troubled Bank Fund or otherwise) is unable to repay its indebtedness to the Reserve Bank; or
- (b) will need to receive public funds in order to prevent systemic risk, that is to say, a risk that a failure on the part of such financial institution to meet its obligations may result in other such financial institutions being unable to meet their respective obligations; or
- (c) has failed to comply or is unlikely to be able to comply with any requirement relating to capital, reserves, assets, liabilities, credits, deposits or other requirement prescribed for the purposes of section 29, 30 or 31 of the Banking Act; or
- (d) is not conducting its business in accordance with sound administrative, accounting, corporate governance or risk management practices and procedures;

the Reserve Bank may direct an inspector to conduct an investigation into the financial institution concerned or any aspect of its management or activities.

(2) Sections 49 to 52 of the Banking Act shall apply in relation to an investigation of a financial institution in terms of subsection (1):

Provided that the Reserve Bank may require the financial institution to submit representations in terms of section 50(3) of the Banking Act within one week after receiving a summary of the inspector’s conclusions and recommendations, if the Reserve Bank considers that urgent action on the inspector’s report may be necessary to prevent irreparable harm to the financial institution or its depositors, creditors or members.

#### **5 Action where investigated financial institution not troubled but in default of Banking Act, etc.**

(1) If the Reserve Bank, after considering the report of—

- (a) an inspector following upon an investigation under section 4; or
- (b) a supervisor following upon an investigation under section 47 of the Banking Act;

is satisfied that—

- (c) the share capital of the investigated financial institution is substantially over-valued taking into consideration the institution’s net asset value; or
- (d) the investigated financial institution—
  - (i) has failed to comply with any requirement relating to capital, reserves, assets, liabilities, credits, deposits or other requirement prescribed for the purposes of section 29, 30 or 31 of the Banking

Act, but may be likely to comply with any such requirement if any person holding shares in the financial institution relinquishes his or her shareholding; or

- (ii) is not conducting its business in accordance with sound administrative, accounting, corporate governance or risk management practices and procedures but may be likely to do so if any person holding shares in the financial institution relinquishes his or her shareholding;

or

- (e) any shareholder of the investigated financial institution is not qualified in terms of the Banking Act to hold such shares;

the Reserve Bank may authorise the inspector or investigator, as the case may be—

- (f) in the case of a finding under paragraph (c), to undertake a valuation of the assets and liabilities of the financial institution in order to determine its net asset value, and section 15 shall apply to such valuation; or

- (g) to issue a written direction to any shareholder referred to in paragraph (d)(i) or (ii) or (e)—

- (i) directing the shareholder to dispose of his or her shares to another person (who must be qualified in terms of the Banking Act to hold such shares) within such reasonable period as the inspector or investigator shall specify in the notice; and

- (ii) suspending (notwithstanding anything contained in the memorandum and articles of the financial institution) all voting rights attaching to the shareholder's shares until such time as they are disposed of under subparagraph (i), and until they are so disposed of such shares shall be deemed not to form part of the share capital of the financial institution;

or

- (h) to undertake a valuation of the assets and liabilities of the financial institution under paragraph (f) and issue a notice in terms of paragraph (g).

(2) A person to whom a notice has been issued in terms of subsection (1)(f), (g) or (h) may, within fourteen days of receiving such notice, apply to the High Court to set it aside on the grounds that he or she—

- (a) is not responsible for the financial institution's failure to—

- (i) comply with any requirement referred to in subsection (1)(d)(i); or

- (ii) conduct its business in accordance with the practices and procedures referred to in subsection (1)(d)(ii);

or

- (b) is qualified to hold the shares in terms of the Banking Act;

as the case may be:

Provided that such person shall bear the onus of proving that he or she is not so responsible or is so qualified.

(3) If the shareholder to whom a notice has been issued in terms of subsection (1) is unable to dispose of his or her shares at a reasonable price within a reasonable time to any other person, he or she may offer them for purchase by the Reserve Bank, which may—

- (a) purchase the shares on behalf of the State; or

- (b) purchase the shares on behalf of the financial institution without the authority of a general meeting referred to in section 79 of the Companies Act.

(4) Section 32 applies to any dispute about the value of shares required to be valued or sold pursuant to a notice issued in terms of subsection (1)(f) or (g).

## 6 Declaration of troubled financial institution

(1) If the Reserve Bank, after considering the report of—

- (a) an inspector following upon an investigation under section 4; or

- (b) a supervisor following upon an investigation under section 47 of the Banking Act;

is satisfied that the financial institution which is the subject of the report—

- (c) has failed to repay or is unlikely to be able to repay, in full and on due date, any moneys that have been advanced to it from the Troubled Bank Fund or other moneys it owes to the Reserve Bank; or

- (d) will need to receive public funds in order to prevent systemic risk, that is to say, a risk that a failure on the part of such financial institution to meet its obligations may result in other such financial institutions being unable to meet their respective obligations; or

- (e) has failed to comply or is unlikely to be able to comply with any requirement relating to capital, reserves, assets, liabilities, credits, deposits or other requirement prescribed for the purposes of section 29, 30 or 31 of the Banking Act;

the Reserve Bank may, after affording the financial institution an adequate opportunity to make representations in the matter, declare the financial institution to be a troubled financial institution and place it under the administration of an administrator named in the declaration:

Provided that, where the Reserve Bank considers that immediate action is necessary to prevent the disposal of any of the financial institution's assets or any other actual or potential prejudice to the institution's members,

creditors, depositors or employees, the Reserve Bank may take such action before affording the institution an opportunity to make representations in terms of this subsection, in which event it shall as soon as possible thereafter afford the chairperson of the institution's board and the institution's chief executive officer a reasonable opportunity to make representations, and for that purpose the administrator shall afford them reasonable access to the institution's books and records.

(2) A declaration shall state—

- (a) the name of the troubled financial institution;
- (b) the reasons for declaring the financial institution to be troubled;
- (c) the name of the administrator, and the names of such assistant administrators, if any, as the Reserve Bank may consider to be necessary to assist the administrator, who shall be under the control and direction of the administrator and to whom the administrator may delegate any of his or her or functions; and
- (d) directions that the troubled financial institution named therein shall be under the control and management of the administrator, and that any other person vested with the management of the institution's affairs shall from the commencement of the administration be divested thereof; and
- (e) such other directions as to the control and management of the troubled financial institution.

(3) A declaration shall, in addition to the troubled financial institution named therein, be deemed to be issued in relation to every associate of that financial institution, whether or not the existence or name of such associate is known to the Reserve Bank at the time the declaration is issued or is named in the declaration, unless the associate in question satisfies the administrator that—

- (a) its accounts are audited separately from those of the troubled financial institution; and
- (b) the circumstances referred to in section 6(1)(c), (d) or (e) are not present in relation to the associate; and
- (c) it is conducting its business in accordance with sound administrative, accounting, corporate governance or risk management practices and procedures.

(4) Even where an associate referred to in subsection (3) satisfies the administrator that it should not be included within the scope of a declaration, any share, right or interest in or claim upon the associate held by a specified person shall be dealt with in accordance with sections 14 and 20 as if the share, right or interest in or claim upon the associate were held by such person in a troubled financial institution.

(5) A single declaration may be made in respect of two or more troubled financial institutions, in which event a single administrator shall be appointed over every troubled financial institution named in the declaration.

(6) As soon as possible after issuing a declaration in terms of subsection (1), the Reserve Bank shall cause it to be published by notice in the *Gazette* and in one or more issues of a newspaper circulating in the area in which the financial institution concerned principally conducts its business.

(7) A declaration shall have effect—

- (a) as soon as it is delivered to the chief executive officer of the financial institution concerned or to a member of the institution's board; or
- (b) on the date on which it is published in the *Gazette*;

whichever is the earlier.

(8) The Reserve Bank may by notice published in the *Gazette* at any time amend or revoke a declaration, and section 8(2), (3) and (4) shall apply, with necessary changes, to such a notice.

## **7 Effect of declaration**

A declaration shall have the effect of—

- (a) placing the troubled financial institution under the control and management of the administrator; and
- (b) suspending the powers of every director, officer and member of the troubled financial institution, except to the extent that the administrator may permit them to exercise their powers; and
- (c) nullifying every disposition of the property, including rights of action, of the troubled financial institution and every transfer of shares or alteration in the status of its members, made after the commencement of the administration, unless the administrator otherwise orders; and
- (d) suspending the operation of any set-off by the troubled financial institution in respect of any amount owing by a creditor of the institution; and
- (e) suspending all rights of action against the troubled financial institution and every action or proceeding commenced against the institution except by leave of the administrator and subject to such terms as the administrator may impose; and
- (f) vacating any attachment or execution put in force against the assets of the troubled financial institution after the commencement of the administration; and
- (g) suspending any lien held by any financial institution or other person over the property of the troubled financial institution except a lien held by the Reserve Bank or by a payment system recognised by the Reserve Bank in terms of section 3(1) of the National Payment Systems Act [*Chapter 24:22*].

## **8 Transmission of declaration to certain officers**

(1) The administrator shall, within seven days of the commencement of the administration, transmit a copy of the declaration and of every notice amending or setting aside the same to the Registrar, Master and Sheriff and—

- (a) in respect of any immovable property within Zimbabwe which appears to be an asset of the troubled financial institution, to the Registrar of Deeds; and
- (b) to the messenger of every magistrates court by whose order it appears that property of the troubled financial institution is under attachment; and
- (c) in respect of any account with another financial institution known by the administrator to be operated by the troubled financial institution, to the chief executive officer of every such institution.

(2) Upon receipt by the Registrar of Deeds of a copy of a declaration he or she shall enter a caveat against the transfer of any immovable property or the cancellation or cession of any bond registered in the name of or belonging to the troubled financial institution.

(3) Every such public officer concerned shall register every copy of a declaration transmitted to him or her and note thereon the day and hour when it is received.

(4) Upon receipt of a copy of a declaration by the chief executive officer of a financial institution under subsection (1)(c), the chief executive officer shall cause such account to be immediately frozen.

## **9 Confirmation of declaration**

(1) No later than thirty days (or such longer period as a judge referred to in this section may allow) after a declaration takes effect under section 6(7), the Reserve Bank shall, by application made by the Reserve Bank or on its behalf, seek an order confirming the declaration from a judge in chambers on not less than fourteen days' written notice (accompanied by the documentation in support of the application referred to in subsection (2)(a) and (b)) to the shareholders, creditors and former members of the board of the troubled financial institution:

Provided that the publication by or on behalf of the Reserve Bank of a notice in the *Gazette* to shareholders, creditors and former members of the board (whether named individually or by class) notifying them of the intention of the Reserve Bank to make such an application not earlier than ten days from the date of publication of the notice in the *Gazette*, and in one or more issues of a newspaper circulating in the area in which the financial institution concerned principally conducts its business, and containing particulars of where the documentation in support of the application referred to in subsection (2)(a) and (b) may be collected by any party interested in the application, shall be deemed to constitute sufficient service of the notice of the application upon any such party.

(2) There shall be submitted together with the application referred to in subsection (1)—

- (a) a copy of the declaration relating to the troubled financial institution which is the subject of the application; and
- (b) a statement of the reasons why it appeared to the Reserve Bank that the circumstances referred to in section 6(1)(c), (d) or (e) were present in relation to the troubled financial institution; and
- (c) proof that the shareholders, creditors and former members of the board of the troubled financial institution have been served with or notified of the application under subsection (1).

(3) A judge before whom an application is made under subsection (1) may—

- (a) grant an order confirming a declaration unconditionally or subject to any amendment or variation; or
- (b) set aside a declaration and give such directions as may be necessary to reverse any of the effects of the declaration.

(4) A decision by a judge not to issue a confirming order in terms of subsection (1), or to issue it subject to any amendment or variation, shall not prevent the Reserve Bank from making a fresh application in terms of that subsection on the basis of new evidence obtained since the original application, or to correct any mistake in the original application, and subsections (1) and (2) shall apply to such fresh application.

(5) The Reserve Bank may appeal to the Supreme Court against any setting aside or amendment or variation of a declaration under subsection (3), and where such appeal is made the declaration shall continue to have effect until the appeal is determined.

## **PART IV**

### **OBJECTS OF ADMINISTRATION AND FUNCTIONS OF ADMINISTRATOR**

## **10 Object of administration**

The object of administration is to safeguard the interests of the depositors, creditors and members of a troubled financial institution by restoring the troubled financial institution to a sound financial condition or, if it cannot be so restored, to safeguard the interests of the depositors, creditors and members by any one or more of the following modes of resolution—

- (a) reconstructing the troubled financial institution with a view to securing the registration of a successor financial institution that will succeed to the banking or other business undertaken by the troubled financial institution and to such of its assets and liabilities as remain after the administration; or

- (b) amalgamating the troubled financial institution or any part of its banking or other business with one or more other troubled financial institutions and securing the registration of a successor financial institution that will succeed to the assets, liabilities and banking or other business undertaken by the amalgamated financial institutions; or
- (c) transferring all or any part of the banking or other business of the troubled financial institution to any other financial institution together with all or part of the assets and liabilities of the troubled financial institution which remain after the administration; or
- (d) winding up the troubled financial institution in accordance with section 57 of the Banking Act, if any of the foregoing options are not, in the opinion of the administrator, feasible.

## **11 General powers of administrator in relation to troubled financial institution**

(1) The administrator shall have all the powers of a curator under section 55 of the Banking Act, and in addition the following powers, which he or she may exercise without the authority of the directors or shareholders of the troubled financial institution, but subject to any directions of the Reserve Bank—

- (a) to carry on or discontinue any part of the business of the troubled financial institution;
- (b) to freeze all or any class of deposits placed with the troubled financial institution indefinitely or for a fixed period;
- (c) to stop or limit the payment of any obligation, including interest;
- (d) to set aside any disposition of the property of the financial institution or of any specified person in terms of section 13;
- (e) to operate every account with a financial institution operated by the troubled financial institution immediately before the commencement of the administration;
- (f) to draw, accept, make and endorse any cheque, bill of exchange or promissory note in the name and on behalf of the troubled financial institution, and, for the purpose of carrying on the business of the troubled financial institution in terms of paragraph (a), to impose any additional liability upon the troubled financial institution;
- (g) to raise money in any way;
- (h) to bring or defend in the name and on behalf of the troubled financial institution any action or other legal proceeding of a civil nature and, subject to any law relating to criminal procedure, any criminal proceeding;
- (i) to agree to any offer of composition made to the troubled financial institution by any debtor or contributory and take any reasonable part of the debt in discharge of the whole or give reasonable time;
- (j) to compromise or admit any claim or demand against the troubled financial institution, including an unliquidated claim;
- (k) to execute in the name and on behalf of the troubled financial institution all deeds, receipts and other documents and for that purpose to use the troubled financial institution's seal;
- (l) to prove a claim in the estate of any contributory or debtor and receive payment in full or a dividend in respect thereof;
- (m) to submit to the determination of arbitrators any dispute concerning the troubled financial institution or any claim or demand by or upon the troubled financial institution;
- (n) to elect to adopt or to abandon any contract, entered into by the troubled financial institution before the commencement of the administration to buy or receive in exchange any immovable property, transfer of which has not been effected in favour of the troubled financial institution:

Provided that—

- (i) if the administrator does not make an election within six weeks after being required in writing to do so, the person entitled under the contract may apply by motion to the court for cancellation of the contract and delivery of possession of the immovable property and the court may make such order as it thinks fit;
  - (ii) nothing in this paragraph contained shall affect any concurrent claim against the troubled financial institution for damages for non-fulfilment of the contract;
- (o) to terminate any lease entered into by the troubled financial institution as lessee by notice in writing to the lessor, subject however to the following terms and conditions—
- (i) nothing in this paragraph contained shall affect any claim by the lessor against the troubled financial institution for damages he or she may have sustained by reason of the non-performance of the terms of the lease;
  - (ii) if the administrator does not, within three months of the commencement of the administration, notify the lessor that he or she is prepared to continue the lease on behalf of the troubled financial institution, he or she shall be deemed to have terminated the lease at the end of such three months;
  - (iii) the rent due under any lease so terminated from the commencement of the administration to the termination of the lease by the administrator shall be included in the costs of the administration;

- (iv) the fact that a lease has been terminated by the administrator shall not deprive the administrator of any right to compensation for improvements made during the period of the lease;
- (p) to sell, by public auction or otherwise, deliver or transfer the movable and immovable property of the troubled financial institution.

(2) In addition the administrator shall have the powers specified in sections 224, 228, 229, 230, 231, 232, 233, 234, 235, 237, 239 and 240 of the Companies Act, subject to such modifications as may be necessary, including in particular the substitution of references therein to the “court” or “liquidator” by references to the “administrator” and references to “winding-up” or the “making of a winding-up order” by “administration” or the “commencement of the administration”.

## **12 Application of certain provisions of Companies Act to administration**

Sections 220, 236, 269, 270, 278 and 290 of the Companies Act shall apply to the proof of claims against a troubled financial institution, the dissolution of a troubled financial institution, voidable and undue preferences made by a troubled financial institution before a declaration was issued in respect of it, the application of certain provisions of the law relating to insolvent estates to the troubled financial institution, the books to be kept by the administrator and the use of the books of the troubled financial institution and the administrator as evidence, subject to such modifications as may be necessary, including in particular—

- (a) in section 220, in subsection (1), the deletion of “section *one hundred and eighty-nine*” and the substitution of “subsections (4) to (6) of section 16”, and the deletion of subsection (2);
- (b) in section 236, the deletion of “upon the application of the Master,” in subsection (1) and the deletion of subsection (3), and the substitution of references to the “court” and “the registrar of the court” by references to the “administrator”, and references to “winding-up” by “administration”;
- (c) in section 269, the deletion of paragraphs (a) and (b) and the substitution of “commencement of the administration”;
- (d) in section 270, the deletion of “liquidator” wherever it occurs and the substitution of “administrator”;
- (e) in section 278, the deletion of references to “liquidator” and “Master” wherever they occur and the substitution of “administrator” and “Reserve Bank” respectively;
- (f) in section 290, the deletion of references to “being wound up” and “liquidators” and the substitution of “under administration” and “administrator” respectively.

## **13 Voidable dispositions of property by troubled financial institutions and specified persons**

(1) If an administrator has reasonable grounds for believing that a troubled financial institution or specified person has made any disposition of the property of such institution or of his or her own property, as the case may be, in collusion with another person for the purpose of securing that property against sequestration in the course of insolvency or administration proceedings, the administrator may, on not less than fourteen days’ written notice to the person in whose favour the disposition was made, apply to a magistrate or judge in chambers (depending on which court has jurisdiction in the matter) for an order setting aside such disposition and causing such property to be delivered to the administrator.

(2) A disposition shall not be set aside in terms of subsection (1) if the person in whose favour the disposition was made proves that the disposition was not collusive but made in the ordinary course of business without the intention of securing that property against sequestration in the course of insolvency or administration proceedings.

(3) For the avoidance of doubt it is declared that no criminal conviction for an offence under section 41 is required in order for the administrator to take action under this section.

## **14 Statement of troubled financial institution’s affairs**

(1) The administrator shall make and submit to the Reserve Bank a statement, as at the commencement of the administration or such other convenient date as the Reserve Bank may allow—

- (a) showing the particulars of the troubled financial institution’s assets, debts and liabilities (including its share capital as valued or revalued in accordance with section 15), the names, addresses and occupations of its creditors, the securities held by them respectively, the dates when the securities were respectively given and such further or other information as the Reserve Bank may require; and
- (b) identifying, subject to section 18, any past or present director or officer of the troubled financial institution or other person who it appears to the administrator was knowingly a party to the carrying on of the business of the institution in the manner or circumstances referred to in section 18(1), and indicating the extent, if ascertainable, to which any such person may be held liable for the debts and other liabilities of the institution:

Provided that if it is not possible to ascertain the extent to which any such person is so liable, it shall be presumed, unless the contrary is shown in any application referred to in subsection (7), that every such person is personally responsible, without limitation of liability, for all the debts and liabilities of the company;

- (c) determining, if possible, whether any share, right, or interest in or claim upon the troubled financial institution that is purported to be held by a person referred to in paragraph (b) was obtained by or resulted from any fraud committed by such person in relation to the institution:

Provided that, for the avoidance of doubt, it is declared that no criminal conviction for fraud is required in order for the administrator to make a finding of fraud under this paragraph.

(2) The part of the statement relating to the matters referred to in subsection (1)(a) shall be submitted and verified by affidavit by one or more of the persons who are at the relevant date the directors and by the person who is at that date the secretary of the troubled financial institution or by such of the persons hereinafter in this subsection mentioned as the administrator may require to submit and verify the statement, that is to say, persons—

- (a) who are or have been officers of the institution;
- (b) who have taken part in the formation of the institution at any time within one year before the relevant date;
- (c) who are in the employment of the institution or have been in the employment of the institution within the said year and are in the opinion of the administrator capable of giving the information required;
- (d) who are or have been within the said year officers of or in the employment of a company which is, or within the said year was, an officer of the institution to which the statement relates.

(3) The part of the statement relating to the matters referred to in subsection (1)(b) and (c) shall be given to the persons named therein or published in such manner as, in the opinion of the administrator, will give any person affected by it an adequate opportunity of getting to know of it:

Provided that the publication by the administrator by notice in the *Gazette* of the names of the persons mentioned in the relevant part of the statement, together with an allegation that they were knowingly parties to the carrying on of the business of the troubled financial institution in the manner or circumstances referred to in subsection (1)(b), and a statement of the extent—

- (a) whether limited or unlimited, to which they are personally liable for the debts and liabilities of the institution; and
- (b) to which any share, right or interest in or claim upon the institution purportedly held by any of them was obtained by or resulted from any fraud committed by any of them;

shall be sufficient notice to any person specified in the notice.

(4) The statement shall be submitted within twenty-one days from the commencement of the administration or within such extended time as the Reserve Bank may for special reasons allow.

(5) Any person making or concurring in making the statement and affidavit required by subsection (2) shall be allowed and shall be paid out of the assets of the troubled financial institution such costs and expenses incurred in and about the preparation and making of the statement and affidavit as the administrator may consider reasonable.

(6) If any person, without reasonable excuse, makes default in complying with the requirements of subsection (2), he or she shall be guilty of an offence and liable to a fine not exceeding level eight.

(7) Any person objecting to—

- (a) being identified as a party who knowingly carried on the business of the troubled financial institution in the manner or circumstances referred to in subsection (1)(b); or
- (b) the extent to which he or she is stated to be personally liable for the debts and liabilities of the troubled financial institution; or
- (c) a finding that any share, right, or interest in or claim upon the troubled financial institution that is purported to be held by him or her was obtained by or resulted from any fraud committed by him or her in relation to the institution;

may, within seven days of the notification thereof in terms of subsection (3), make written representations to the administrator to amend the part of the statement relating to the matters referred to in subsection (1)(b) or (c) accordingly, and, if the administrator refuses to make the amendment, the administrator shall, within twenty-one days after the date of a notification in terms of subsection (3), apply to a judge in chambers for an order confirming the identification or finding referred to in paragraph (a) or (c), or confirming the extent to which the person may be held liable for the debts and liabilities of the troubled financial institution, whichever matter is the subject of the objection.

(8) Where a person referred to in subsection (1)(b) or (c) makes no objection to any matter referred to in subsection (7)(a), (b) or (c) within seven days of the notification thereof in terms of subsection (3), or where a judge issues a confirming order in terms of subsection (7) in relation to any matter in issue, the person concerned shall become a specified person for the purposes of this Act.

(9) A person referred to in subsection (7) shall bear the onus of satisfying the administrator or a judge that any amendment, rescission or variation of any matter referred to in paragraph (a), (b) or (c) of that subsection should be made in his or her favour.

(10) A decision by a judge not to issue a confirming order in terms of subsection (7), or to issue it subject to any amendment, rescission or variation of any matter referred to in paragraph (a), (b) or (c) of that subsection in favour of a respondent, shall not prevent the administrator from making a fresh application in terms of that subsection on the basis of new evidence obtained since the original application, or to correct any mistake in the original application, and subsections (3), (7), (8) and (9) shall apply to such fresh application.

(11) Any person shall be entitled by himself or herself or by his or her agent at all reasonable times, on payment of the prescribed fee, to inspect the statement submitted in pursuance of this section and to a copy thereof or extract therefrom.

### **15 Revaluation of assets, liabilities and share capital of troubled financial institutions**

(1) Immediately after assuming office, the administrator shall undertake a valuation of the assets and liabilities of the troubled financial institution in order to determine its net asset value.

(2) If, following a valuation undertaken in terms of subsection (1), the administrator considers that the share capital of the troubled financial institution is substantially over-valued taking into consideration the institution's net asset value, he or she may, subject to this section, and with the approval of the Reserve Bank, reduce the nominal value of all or any class of the institution's shares.

(3) Sections 92 to 97 of the Companies Act, concerning the reduction of a company's share capital, shall not apply to any revaluation of a troubled financial institution's shares carried out under this section.

(4) At least three weeks before reducing the nominal value of a troubled financial institution's shares an administrator shall cause notice of his or her intention to do so—

- (a) to be sent in writing or by telefacsimile or electronic mail to the shareholders concerned; and
- (b) to be published in a newspaper circulating in every area where the troubled financial institution carries on business.

(5) Section 32 applies to any objections received by the administrator from any member or creditor of the troubled financial institution in response to a notice referred to in subsection (4).

### **16 Initial meeting of creditors and members**

(1) The administrator shall as soon as possible after completing the statement referred to in section 14, convene separate initial meetings of the creditors and the members of the troubled financial institution, which shall be held as nearly as may be—

- (a) in the case of a meeting of creditors, in the manner prescribed for creditors' meetings under the law relating to insolvency; or
- (b) in the case of a meeting of members, in the manner prescribed by rules made under section 359 of the Companies Act.

(2) The purpose of a meeting referred to in subsection (1) shall be—

- (a) to consider a report of the administrator incorporating—
  - (i) the statement referred to in section 14; and
  - (ii) a statement of the reasons why it appeared to the Reserve Bank that the circumstances referred to in section 6(1)(c), (d) or (e) were present in relation to the troubled financial institution; and
  - (iii) particulars as to any source from which money has or is to be raised for the purposes of carrying on the business of the troubled financial institution; and
  - (iv) the considered opinion of the administrator as to the prospects of the troubled financial institution being restored to a sound financial condition or, if it cannot be so restored, which of the options mentioned in section 10(a), (b), (c) and (d) will best serve the interests of the depositors, creditors and members of the institution;
- (b) in the case of a meeting of creditors, the proving of claims against the troubled financial institution;
- (c) the election by the creditors and members of one person each (who need not be a creditor or member) to represent their interests to the administrator:

Provided that if a meeting of the creditors or members fails, neglects or refuses to elect any person for the purpose of this paragraph, the administrator shall appoint one of their number for that purpose.

(3) Subsections (4) to (9) shall apply to the initial and every subsequent meeting of creditors and members.

(4) During an administration every creditor shall be entitled to vote at any meeting of creditors of the troubled financial institution as soon as his or her claim has been proved:

Provided that—

- (i) he or she may not vote in respect of a claim that is dependent upon the fulfilment of a condition until he or she proves that the condition has been fulfilled or, on written application by the creditor to the administrator, the administrator otherwise orders;
- (ii) he or she may not vote in respect of any claim acquired by him or her by cession or purchase from any person after the commencement of the administration.

(5) The vote of a creditor shall be reckoned according to the value of his or her claim.

(6) Any creditor holding any security, other than a general notarial bond, shall put a value on his or her security when proving his or her claim and, except in the election of the administrator and upon any question affecting his or her security, his or her vote shall be reckoned according to the value of the balance, if any, of his or her claim remaining after deduction therefrom of the said value of his or her security.

(7) At every meeting of members of a troubled financial institution the votes of each member shall be those to which he or she is entitled according to the articles of the institution in force at the commencement of the administration.

(8) No creditor or member who is a specified person shall participate, whether in person or by proxy, in any meeting of creditors or members.

### **17 Subsequent meetings of creditors and members**

(1) The administrator shall to the extent possible inform the representatives elected or appointed in terms of section 16(2)(c) (hereinafter referred to as “the representatives”) of the manner in which he or she intends to exercise any of his or her powers in terms of section 11, and, to the extent that it is not possible to so inform them, the administrator shall inform them as soon as possible after the exercise of any such power.

(2) The representatives may at any time, on not less than seven days’ notice to the administrator, convene joint or separate meetings of the creditors and members at which the creditors or members may make any recommendation—

(a) rejecting any action proposed to be taken by the administrator in the exercise of his or her powers and additionally, or alternatively, recommending an alternative course of action; or

(b) reversing any action taken by the administrator in the exercise of his or her powers, to the extent that such reversal is possible; or

(c) generally as to the manner in which the administrator is to exercise his or her powers; and the administrator shall promptly respond in writing to any such recommendation, but he or she shall not be bound by any such recommendation unless—

(d) there is no difference in the recommendation of the creditors and members; and

(e) either of both of the following conditions apply, namely, that—

(i) the claims of the creditors participating at the meeting represent more than seventy-five *percent* in value of the debts owed to them by the troubled financial institution; or

(ii) the interests of the members participating at the meeting represent more than seventy-five *percent* in value of the shares or assets of the troubled financial institution.

(3) Where the administrator rejects any recommendation that he or she is not bound by, either or both of the representatives may appeal in writing to the Reserve Bank against the administrator’s decision no later than seven days after being informed of it, and the Reserve Bank may on such appeal confirm, vary or set aside the administrator’s decision.

## **PART IV**

### **SPECIFIED PERSONS IN RELATION TO TROUBLED FINANCIAL INSTITUTIONS**

### **18 Identification of persons responsible for causing financial institution to be troubled**

(1) If in the course of compiling a statement under section 14, the administrator is of the opinion that any past or present director, officer or member of the troubled financial institution or other person who it appears to the administrator was knowingly a party to the carrying on of the business of the institution—

(a) recklessly; or

(b) with gross negligence; or

(c) with intent to defraud any person or for any fraudulent purpose;

or that a fraud has been committed by any person in the promotion or formation of the institution, the administrator may summon any person who is or has been a director, officer or member of the institution or has taken part in the promotion or formation of the institution to attend before him or her on a day and at a place he or she shall appoint for that purpose and be examined as to the promotion or formation or the conduct of the business of the institution or as to his or her conduct and dealings as director or officer thereof.

(2) An administrator shall for the purposes of this section have the power of summoning and examining witnesses, administering oaths, requiring the production or delivery of documents, punishing defaulting or recalcitrant witnesses in terms of subsections (3) to (9), and allowing costs and expenses to witnesses.

(3) If any person who has been summoned under subsection (1) fails to appear in answer to the summons or if that person fails to remain in attendance at the examination, the administrator at the examination may issue a warrant authorising any member of the police to apprehend that person and to bring him or her before the administrator.

(4) Upon the apprehension and production before the administrator of any person in terms of subsection (3), the administrator may, unless satisfied that that person had a reasonable excuse for failing to appear at or to attend

the examination or for absenting himself or herself from the examination, commit the person to prison to be detained there for a period not exceeding forty-eight hours.

(5) The officer in charge of a prison to which a person has been committed in terms of subsection (4) shall detain the person and produce him or her at the time and place appointed by the administrator.

(6) If a person summoned in terms of subsection (1) appears in answer to the summons but fails to produce any book or document which he or she was summoned to produce or if any person so summoned refuses—

(a) to be sworn by the administrator; or

(b) to answer fully and satisfactorily any question lawfully put to him or her;

the administrator may issue a warrant committing that person to prison until he or she has undertaken to do what is required of him or her.

(7) If a person who has been released from prison after having undertaken in terms of subsection (6) to do what is required of him or her fails to fulfil his or her undertaking, the administrator may recommit him or her to prison as often as may be necessary to compel him or her to do what is required of him or her.

(8) A person committed to prison in terms of this section may apply to the High Court for his or her discharge from custody and the court may order his or her discharge if it is of the opinion that he or she was wrongfully committed to prison or is being wrongfully detained.

(9) In connection with the apprehension of a person or with the committal of a person to prison in terms of this section the administrator shall enjoy the same immunity which is enjoyed by a judicial officer in connection with any act performed by him or her in the exercise of his or her functions.

(10) The person examined shall be examined on oath and shall answer all such questions as the administrator may put to him or her, notwithstanding that any answer may tend to incriminate him or her.

(11) A person ordered to be examined under this section may at his or her own cost employ a legal practitioner, who shall be at liberty to put to him or her such questions as will enable the person to explain or qualify any answers given by him or her.

(12) Notes of the examination shall be taken down in writing and shall be read over to or by and signed by the person examined, and may thereafter be used in evidence against him or her, and shall be open to the inspection of any creditor or member at all reasonable times.

## **19 Special commissioners for taking evidence**

(1) For the purpose of taking evidence or holding any inquiry under this Act in cases where any director or officer of a troubled financial institution or other person who is or has been a director, officer or member of the institution or has taken part in the promotion or formation of the institution is resident in any part of Zimbabwe or outside Zimbabwe, the administrator may appoint as commissioners one or more assistant administrators or other persons, and the administrator may refer the whole or any part of the examination of any witnesses or of any inquiry under this Act to any person hereby appointed commissioner.

(2) Any creditor or member may be present at an inquiry referred to in subsection (1) or be represented by a legal practitioner.

(3) Every commissioner within Zimbabwe shall have in the matter so referred to him or her the same powers of summoning and examining witnesses, of requiring the production or delivery of documents, of punishing defaulting or recalcitrant witnesses, and of allowing costs and expenses to witnesses, as the administrator under section 18.

(4) The examination so taken shall be returned or reported to the administrator in such manner as the administrator directs.

## **20 Forfeiture or vesting in State of rights of, or disposal of shares held by, specified persons**

(1) The administrator shall cancel or nullify any share, right or interest in or claim upon a troubled financial institution purportedly held by a specified person which was obtained by or resulted from any fraud committed by the specified person.

(2) Any share, right or interest in or claim upon a troubled financial institution held by a specified person that is not a share, right or interest in or claim upon the institution referred to in subsection (1) and which properly vests in a specified person shall, with effect from the date he or she becomes a specified person in terms of section 14(8) and subject to subsection (4), vest in the State, which, in consideration therefor, shall apply the same by way of set-off towards discharging the specified person's liability for any or all of the debts and liabilities of the institution.

(3) The administrator may, in accordance with a scheme of resolution—

(a) consolidate or redivide any shares referred to in subsection (2) into any number of shares of any denomination equivalent to the true or fair value of the shares previously held by the culpable person;

(b) convert any right, interest or claim referred to in subsection (2) into shares equal in value to the true or fair value of the right, claim or interest previously held by the specified person;

and the shares resulting from the exercise of the administrator's powers under paragraph (a) or (b) shall be issued to the State.

(4) If, after the setting off of any shares in terms of subsection (2) that are held by, and properly vest in, a specified person, any shares remain to him or her, the administrator may, by written notice to the specified person—

- (a) direct the specified to dispose of his or her shares to another person (who must be qualified in terms of the Banking Act to hold such shares) within such reasonable period as the administrator shall specify in the notice; and
- (b) suspend (notwithstanding anything contained in the memorandum and articles of the financial institution) all voting rights attaching to the shares held by the specified person until such time as they are disposed of under paragraph (a), and until they are so disposed of such shares shall be deemed not to form part of the share capital of the financial institution.

(5) If a specified person to whom a notice has been issued in terms of subsection (4) is unable to dispose of his or her shares at a reasonable price to any other person, he or she may offer them for purchase by the administrator, who may—

- (a) purchase the shares on behalf of the Reserve Bank in right of the State; or
- (b) purchase the shares on behalf of the financial institution without the authority of a general meeting referred to in section 79 of the Companies Act.

## **21 Attachment of assets of specified persons in satisfaction of their liabilities to troubled financial institution**

(1) If a judge issues an order in terms of section 14(7) confirming the extent, whether limited or unlimited, to which a specified person is liable for the debts and liabilities of a troubled financial institution, such order have the effect, for purposes of enforcement, of a civil judgment in favour of the troubled financial institution for the satisfaction of—

- (a) such of its debts and liabilities as have been attributed to the specified person by the order; and
- (b) the administration expenses referred to in section 39(2).

(2) The administrator may submit for registration the copy of the order referred to in subsection (1) to the court of any magistrate which would have had jurisdiction to make the order had the matter been determined by it, or, if the decision, order or determination exceeds the jurisdiction of any magistrates court, the High Court.

(3) If any statement in terms of section 14(1)—

- (a) specifies the extent, whether limited or unlimited, to which a specified person is liable for the debts and liabilities of a troubled financial institution; and
- (b) such statement has not been confirmed by a judge because the specified person did not object to it in terms of section 14(7);

the administrator may, within a period of six months from the date when the statement was first notified to the specified person in terms of section 14(3), and on not less than fourteen days' written notice to the specified person, apply to a judge in chambers for an order confirming the statement, and subsection (1) and (2) shall, if the judge confirms the statement, apply to the order of the judge confirming it.

## **22 Powers of administrator in relation to specified persons**

For the duration of the administration or a period of six months from the commencement of the administration, whichever is the shorter period, the administrator shall have power—

- (a) to call for the production of, and examine, take extracts from and take possession of any books, accounts or records belonging to or in the custody of a specified person or any other person employed by or associated with the specified person;
- (b) to examine any property of the specified person;
- (c) to question a specified person or any other person employed by or associated with the specified person;
- (d) to enter any premises—
  - (i) belonging to or controlled by a specified person;
  - (ii) wherein or whereon he or she has reason to believe there may be evidence as to any transaction carried out by or on behalf of a specified person.

## **23 Transactions by specified persons**

(1) For the duration of the administration or a period of six months from the commencement of the administration, whichever is the shorter period, a specified person shall not, subject to this section—

- (a) expend or in any way dispose of any of his or her property; or
- (b) enter into any contract for the disposal of any of his or her property; or
- (c) operate any account with any financial institution; or
- (d) increase his or her indebtedness or adversely affect his or her estate;

without the approval of the administrator or otherwise than in accordance with any conditions imposed by the administrator.

(2) The administrator may—

- (a) grant general approval for any specified class of transactions on the part of the specified person concerned; and
- (b) impose conditions on any approval granted by him or her in terms of this section.

(3) Subsection (1) shall not apply in respect of—

- (a) any transaction on the part of a specified person where the total value of the property or expenditure does not exceed one hundred thousand dollars; or
- (b) anything done in pursuance of any order of any court.

(4) Any transaction carried out in contravention of subsection (1) shall be void, and where any property has been transferred as a result of any such transaction, the administrator may, on behalf of the specified person, recover any such property by proceedings in any court of competent jurisdiction.

#### **24 Offences by specified persons**

(1) Any specified person who—

- (a) threatens, resists, hinders or obstructs or uses foul, abusive or insulting language towards or at the administrator; or
- (b) fails or refuses to answer fully, to the best of his or her ability, any question put to him or her by the administrator; or
- (c) fails to produce any book, account, record or other document when required to do so by the administrator; or
- (d) conceals, destroys, alters, falsifies or obliterates any book, account, record or other document that may be required by the administrator to be produced to him or her;

shall be guilty of an offence and liable to a fine not exceeding level five or to imprisonment for a period not exceeding six months or to both such fine and such imprisonment.

(2) Any specified person who contravenes section 23(1) or who takes part in any transaction prohibited by that subsection, shall be guilty of an offence and liable to a fine not exceeding level ten or to imprisonment for a period not exceeding five years or to both such fine and such imprisonment.

#### **25 Power of administrator to compromise with persons liable to be specified or prosecuted**

(1) An administrator may enter into a written agreement with any person liable to be specified under section 18(1) or prosecuted under section 41 under which the administrator undertakes not to specify or cause such person to be prosecuted in return for—

- (a) full disclosure by such person of the circumstances that led to a financial institution becoming troubled, including evidence concerning the involvement of any other person liable to be specified under section 18(1) or prosecuted under section 41 who may have contributed to those circumstances; and
- (b) the payment of moneys and the surrender to the Reserve Bank of any shares, rights or interests in or claims upon the troubled financial institution held by such person towards discharging the whole or an agreed part of such person's liability for the debts and liabilities of the institution and for the administration expenses referred to in section 39(2).

(2) If a person with whom the administrator has concluded an agreement under subsection (1) does not, within the agreed period or on the agreed date, honour any undertakings referred to in—

- (a) subsection (1)(a) or (b) the administrator may institute proceedings for the specification or prosecution of such person or both;
- (b) subsection (1)(b), the administrator may institute civil action in a court of competent jurisdiction for the recovery of any moneys due or the surrender of any shares, rights or interests in or claims upon the troubled financial institution held by such person, and section 21 shall apply to such action.

### **PART V**

#### **SCHEMES OF RESOLUTION AND INTERIM MANAGEMENT OF SUCCESSOR FINANCIAL INSTITUTIONS**

#### **26 Powers of administrator with respect to scheme of resolution**

(1) Subject to section 27, the administrator shall, subject to the directions of the Reserve Bank, have powers to formulate and implement a scheme of resolution of the troubled financial institution, for which purpose the administrator may do any one or more of the following things—

- (a) issue to the Reserve Bank in right of the State shares or other securities in a successor financial institution in satisfaction of the indebtedness of the troubled financial institution to the Reserve Bank;
- (b) consolidate or redivide shares of the same or different classes held by a member in a troubled financial institution into any number of shares (whether of the same or different classes) of any denomination equivalent to the true or fair value of the shares previously held by the member;
- (c) cancel any shares held by a member in a troubled financial institution and issue to such member any number of shares of any denomination in a successor financial institution that are equivalent to the true or fair value of the shares previously held by the member;

- (d) convert any right, interest or claim held by a creditor in relation to a troubled financial institution into shares equal in value to the true or fair value of the right, claim or interest previously held by the creditor and issue the shares to the creditor as fully paid up shares;
- (e) issue to any creditor of the troubled financial institution any debentures or other securities not being shares in a successor financial institution in satisfaction of any claim, right or interest held by the creditor in relation to the troubled financial institution;
- (f) amend the memorandum and articles of association of the troubled financial institution;
- (g) amalgamate the troubled financial institution with any of its associates;
- (h) where two or more troubled financial institutions are administered by the same administrator, amalgamate both or any of them;
- (i) if so directed by the Reserve Bank, amalgamate the troubled financial institution with any other troubled financial institution administered by another administrator;
- (j) dissolve the troubled financial institution or any of its associates and secure the formation of one or more financial institutions, which shall be the successor financial institution or institutions to the troubled financial institution or any of its associates;
- (k) redistribute the assets and liabilities of the troubled financial institution and any of its associates between them or between its successor financial institution or institutions formed pursuant to paragraph (j);
- (l) dissolve the board of directors of the troubled financial institution and substitute therefor any assistant administrator;
- (m) confirm in office any director of the troubled financial institution;
- (n) appoint and vest the management of any successor financial institution in an interim board of directors of any successor financial institution which shall hold office until the next annual general meeting of the members of the institution following its administration.

(2) An administrator may register a successor financial institution in any class of business referred to in section 6 of the Banking Act or as any other type of financial institution for the registration of which provision is made under any enactment, notwithstanding that the class of business for which the successor financial institution is registered is not the same as that carried on by the troubled financial institution.

(3) Where the Reserve Bank has appointed administrators in respect of two or more troubled financial institutions and it gives the administrators a direction to amalgamate the troubled financial institutions concerned in terms of subsection (1)(i), it may itself, through those administrators, exercise all of the powers referred to in subsections (1) and (2) as if it were the sole administrator of both or all of the troubled financial institutions to be amalgamated.

## **27 Special provisions for the repayment of depositors of troubled financial institutions**

(1) In this section—

“depositor” means a person who made any deposit of money with a troubled financial institution otherwise than as a speculative investment;

“speculative investment” means any money invested in a troubled financial institution with the object of securing a return on the investment in excess of the return on Treasury Bills at the time when the money was invested.

(2) Subject to subsection (3), the administrator shall, pursuant to a scheme of resolution, make special provisions for the repayment of depositors in whole or in part.

(3) Provision under subsection (2) may be made—

- (a) to repay deposits in cash over a period of up to twenty-four months;
- (b) to issue shares in the successor financial institution of the troubled financial institution of a nominal value equivalent to any deposits in exchange for such deposits;
- (c) to issue debentures in the successor financial institution of the troubled financial institution on the following terms, or on terms not less favourable to the depositors than the following terms, namely, that each debenture shall—
  - (i) secure a sum equivalent to the money value of the deposit at the date of administration; and
  - (ii) bear zero interest or interest at a fixed rate only; and
  - (iii) be payable to bearer; and
  - (iv) have a maturity date not exceeding thirty-six months from the date when the scheme of resolution is approved under section 28, and be fully redeemable by the successor financial institution on maturity;
- (d) to transfer deposits in the troubled financial institution to the successor financial institution, where such deposits may be frozen for a period not exceeding twenty-four months;
- (e) for any combination of the foregoing, and for the differential treatment of depositors according to the size and nature of their deposits.

(4) No repayment of a deposit with a troubled financial institution under this section shall be made to a depositor who is a specified person in relation to that institution.

(5) Repayment in whole or in part of a speculative investment shall only be made, if at all, after provision has been made for the repayment in full of all the depositors of the troubled financial institution in which the speculative investment was made.

## **28 Approval of scheme of resolution**

(1) No later than two months after the commencement of the administration the administrator shall produce a provisional scheme of resolution providing for any of the matters specified in section 26 and present it to a joint meeting of creditors and members.

(2) The administrator may vary the provisional scheme of resolution in accordance with the opinions and wishes of the creditors and members expressed at the meeting referred to in subsection (1).

(3) As soon as possible after the meeting referred to in subsection (1) the administrator shall submit the provisional scheme of resolution, with variations, if any, to the Reserve Bank, together with a report summarising the opinions and wishes of the creditors and members in relation to it.

(4) The Reserve Bank may, after considering the provisional scheme of resolution and the report referred to in subsection (3), approve the scheme or approve it subject to such variations as it may direct, whereupon it shall become the final scheme of resolution.

(5) As soon as possible after the Reserve Bank has approved the final scheme of resolution the administrator shall present it to a joint meeting of creditors and members.

(6) Any person who is aggrieved by a final scheme of resolution may, within fourteen days after it is presented in terms of subsection (5), seek a review of the scheme by the Reserve Bank by notice filed in such manner and within such period as may be prescribed.

## **29 Consequences where resolution not possible**

If, after representations made to it by the administrator, the Reserve Bank—

(a) is of the opinion that, in the circumstances pertaining to the troubled financial institution, no feasible scheme for its resolution can be formulated except by advancing additional public funds to it; and

(b) such funds are unavailable;

the Reserve Bank shall cancel the declaration in terms of section 40 and thereupon section 57 of the Banking Act shall apply to such institution.

## **30 Implementation of scheme of resolution and matters incidental thereto**

(1) The administrator shall do and have power to do all things necessary to carry out the scheme of resolution approved for a troubled financial institution in terms of section 28.

(2) The Minister shall nominate the persons who, on behalf of the State, will hold the shares of the State in any successor financial institution.

(3) Any dividends or other moneys received by a person referred to in subsection (2) in right of or on the disposal of any share or right acquired by the State by virtue of this Act shall be paid into the Troubled Bank Fund.

(4) Stamp duty shall not be chargeable under the Stamp Duties Act [*Chapter 23:09*] in respect of any share issued to the State or any other person in accordance with a scheme of resolution.

(5) It shall not be necessary for the Registrar of Deeds to make any endorsement on title deeds or other documents or in his or her registers in respect of any immovable property, right or obligation which passes to a successor financial institution from a troubled financial institution, but the Registrar of Deeds, when so requested in writing by the administrator or interim board, shall cause the name of the successor financial institution to be substituted, free of charge, for that of the troubled financial institution on the appropriate title deed or other document or in the appropriate register.

(6) No fee or charge shall be payable by an administrator for registering a successor financial institution in any class of business referred to in section 6 of the Banking Act or as any other type of financial institution for the registration of which provision is made under any enactment.

## **31 Duties of interim board**

An interim board shall, subject to the memorandum and articles of the successor financial institution—

(a) take over from the administrator and assume the management of the institution; and

(b) manage the institution in such manner as it may consider most economic and most likely to promote the interests of the members and creditors of the institution; and

(c) lodge with the Registrar a copy of the scheme of resolution relating to the institution within seven days of its appointment; and

(d) comply with any of the requirements of section 123 of the Companies Act with which the institution would have been obliged to comply if it had not been placed under administration; and

- (e) keep such accounting records and prepare such annual financial statements as the institution or its directors would have been obliged to keep or prepare if it had not been placed under administration; and
- (f) convene the annual general meeting and other meetings of members of the institution provided for by the Companies Act and, in that regard, comply with all the requirements with which the directors of the company would in terms of the Companies Act have been obliged to comply if the institution had not been placed under administration; and
- (g) convene meetings of the creditors of the institution by notices issued separately on the dates on which the notices convening annual general meetings of the institution are issued or on which any interim report is sent out to members; and
- (h) submit to meetings of creditors convened under paragraph (g) reports showing the assets and liabilities of the institution and its debts and obligations as verified by the auditor of the institution, and all such information as may be necessary to enable the creditors to become fully acquainted with the institution's position as at the end of the financial year or the end of the period covered by any such interim report; and
- (i) lodge with the Master copies of all the documents submitted to the meetings as provided in paragraphs (f) and (h).

## PART VI

### GENERAL

#### **32 Arbitration where valuation of shares, etc. by administrator or Reserve Bank disputed**

(1) Whenever any director, officer, member or creditor of a financial institution or any other interested person (including a specified person) takes issue with the valuation placed on any share, right, claim, interest or asset of the institution by an administrator or the Reserve Bank in terms of section 5, 15, 20(3)(a) or (b) or 25(1)(b), (c) or (d), such person shall object to the valuation in writing to the administrator or the Reserve Bank, as the case may be, within a reasonable or prescribed period after it is made.

(2) Upon receiving an objection under subsection (1) the administrator or the Reserve Bank, as the case may be, shall attempt to resolve the objection by negotiation with the objector and, if he or she is unable to resolve it within a reasonable time, shall submit the objection to arbitration in terms of the Arbitration Act [*Chapter 7:15*]:

Provided that the administrator or Reserve Bank shall not entertain any objection under this section by a person who claims to be the creditor of a troubled financial institution unless he or she has proved his or her claim against the troubled financial institution under section 16 or, if the proposed valuation occurs before claims against the institution are proved under that section, the person provisionally proves his or her claim to the satisfaction of the administrator or Reserve Bank, as the case may be.

#### **33 Persons employed by troubled financial institution before its administration**

To the extent that it is possible to do so without prejudicing the viability of the troubled financial institution or the successor financial institution, the administrator and interim board shall endeavour to retain in employment every person, other than a specified person, employed by the institution immediately before the commencement of its administration on terms not less favourable than those enjoyed by him or her immediately prior to the commencement of the administration.

#### **34 Application of assets during administration**

(1) The administrator or interim board shall not, without the leave of the Reserve Bank, sell or otherwise dispose of any of the assets of a troubled financial institution or successor financial institution except in the ordinary course of the institution's business.

(2) Any moneys of the troubled financial institution which become available to the administrator or an interim board shall be applied by the administrator or interim board towards—

- (a) paying the costs of the administration; and
- (b) conducting the institution's business in accordance with the declaration or scheme of resolution; and
- (c) so far as circumstances permit, paying the claims of creditors which arose before the commencement of the administration.

(3) The costs of the administration and the claims of creditors of the troubled financial institution shall be paid in accordance with the law relating to insolvency as if those costs were costs of the sequestration of an estate and those claims were claims against an insolvent estate.

#### **35 Remuneration of administrator and assistant administrators**

(1) An administrator and any assistant administrator shall be entitled to such reasonable remuneration for their services as may be fixed by the Reserve Bank from time to time.

(2) In fixing the remuneration of an administrator or assistant administrator in terms of subsection (1), the Reserve Bank shall take into account the manner in which the administrator or assistant administrator has

performed his or her functions and any recommendation by the members or creditors of the troubled financial institution relating to such remuneration.

### **36 Liabilities incurred by administrator and interim board to have preference over pre-administration liabilities**

(1) All liabilities incurred or to be incurred by the administrator or interim board in the conduct of the troubled or successor financial institution's business shall be paid in preference to all other liabilities not already discharged, exclusive of the costs of the administration, and thereupon all claims based upon such first-mentioned liabilities shall have preference in the order in which they were incurred over all unsecured claims against the institution except claims arising out of the costs of the administration.

(2) If a declaration is superseded by a winding-up order—

- (a) the preference conferred in terms of subsection (1) shall remain in force except in so far as claims arising out of costs of the winding up are concerned; and
- (b) all claims based on such liabilities incurred by the administrator or interim board shall be taken to have been proved, and section 220 of the Companies Act shall not apply in respect thereof.

### **37 Period of administration excluded in determining preference under mortgage bond**

The time during which any troubled financial institution, which is a debtor under a mortgage bond, is subject to administration, shall be excluded from the calculation of any period for the purpose of determining whether the mortgage confers any preference in terms of section 111(3) of the Insolvency Act [*Chapter 6:04*] as applied to the winding up of companies by the Companies Act.

### **38 Position of auditor during administration**

Notwithstanding the issue of a declaration in respect of any troubled financial institution and for so long as the declaration is in force, the provisions of the Banking Act or Companies Act relating to the appointment and reappointment of an auditor and the rights and duties of an auditor shall continue to apply as if any reference in those provisions to the directors of the troubled financial institution were a reference to the administrator.

### **39 Administration expenses**

(1) The expenses of the administration of a troubled financial institution (hereinafter in this section referred to as "administration expenses"), including in particular the remuneration of the administrator and any assistant administrator, shall be defrayed in the first instance by the troubled financial institution, but every specified person shall, to the extent mentioned in subsection (2), be liable to repay the institution for administration expenses.

(2) Every specified person shall be liable for administration expenses to the extent of fifty *per centum* of the amount of the debts and other liabilities of the troubled financial institution for which such person is liable, or, if the liability of such person is unlimited, to the extent of fifty *per centum* of the amount of the administration expenses:

Provided that if the amount due from all specified persons for administration expenses exceeds the actual amount of administration expenses, the amount due from each specified person shall be prorated accordingly.

### **40 Cancellation of declaration**

(1) If at any time the administrator notifies the Reserve Bank in writing that the purpose of the declaration has been fulfilled or that for any reason it is undesirable that the declaration should remain in force, the Reserve Bank may, by notice published in the *Gazette*, cancel the declaration and thereupon the administrator shall be divested of his or her functions.

(2) In cancelling any declaration the Reserve Bank may (insofar as these matters have not been provided for under a scheme of resolution relating to the troubled financial institution) give such directions as may be necessary for the resumption of the management and control of the institution by the officers thereof, including directions for the convening of a general meeting of members for the purpose of electing directors of the institution.

(3) Upon the cancellation of a declaration any action or proceeding commenced against the financial institution concerned at the time when the declaration was issued, or right of action held against the institution at that time, shall be revived or may be recommenced, as may be appropriate.

### **41 Offences consequent upon administration**

(1) Where a troubled financial institution is under administration, every person shall be guilty of an offence and liable to imprisonment for a period not exceeding three years who, at any time within the six months immediately preceding the commencement of the administration, and while being an officer of the institution, does any of the following acts, unless he or she satisfies the court, in each case, that he or she had no intention to defraud, namely, every person who—

- (a) conceals, destroys, alters, falsifies or obliterates, or is privy to the concealment, destruction, mutilation or falsification, of any book or document relating to the property or affairs of the troubled financial institution or makes or is privy to the making of any false entry in any such book or document; or

- (b) conceals any part of the property of the troubled financial institution to the value of one hundred thousand dollars or upwards which ought by law to be divided amongst the creditors of the institution; or
- (c) causes or permits any property of the troubled financial institution, which it has obtained on credit and has not paid for, to be pledged, mortgaged or disposed of otherwise than in the ordinary course of the institution's business.

(2) Every person shall be guilty of an offence and liable to imprisonment for a period not exceeding three years who, while being an officer of a troubled financial institution and with intent to defraud the creditors of the institution in the event of its being subjected to insolvency or administration proceedings—

- (a) does any act specified in subsection (1); or
- (b) removes or disposes of any part of the property of the institution to the value of one hundred thousand dollars or upwards; or
- (c) parts with or is privy to the removal or disappearance of any books or documents relating to the property or affairs of the institution.

(3) Where a troubled financial institution is under administration, every person shall be guilty of an offence and liable to imprisonment for a period not exceeding three years who, within the twelve months immediately preceding the commencement of the administration and while being an officer of the institution, acts as follows, unless he or she satisfies the court that he or she had no intention to defraud, namely, every such person who, when making any statement either verbally or in writing in regard to the business or affairs of the institution and for the information of its creditors or of any person who became its creditor on the faith of such a statement, conceals any liability, present or future, certain or contingent, which the institution may then have contracted or mentions, as if it were an asset of the institution, any right or property which, at the time, is not an asset or in any way conceals or disguises or attempts to conceal or disguise any loss which the institution has sustained or gives any incorrect account thereof, unless he or she satisfies the court that he or she had no intent to defraud.

(4) Every person shall be guilty of an offence and liable to imprisonment for a period not exceeding one year who, while being an officer of the troubled financial institution—

- (a) causes or knowingly permits an undue preference as defined by the Insolvency Act [*Chapter 6:04*] to be given by the institution; or
- (b) causes or knowingly permits any debt or debts to the aggregate amount of one hundred thousand dollars or upwards to be contracted by the institution without any reasonable expectation that the institution will be able to discharge the same and the institution thereafter, being still a debtor for the said debt or debts, is subjected to administration.

(5) Every person shall be guilty of an offence and liable to imprisonment for a period not exceeding two years who, while being a director, secretary or officer of a troubled financial institution and at any time during the administration of the institution—

- (a) knowing or suspecting that a false debt has been or is about to be proved against the institution, fails for a period of seven days to inform the administrator thereof in writing; or
- (b) fails to disclose to the administrator to the best of his or her knowledge all the property of the institution of any kind and the manner in which, the person to whom, the consideration for which and the time when any part thereof was disposed of unless he or she satisfies the court that he or she had some lawful excuse for such failure; or
- (c) fails to deliver to the administrator all books, documents, papers and writings in his or her custody or under his or her control relating to the property or affairs of the institution, unless he or she satisfies the court that he or she had some lawful excuse for such failure; or
- (d) prevents the production or delivery to the administrator of any books, documents or papers relating to the property or affairs of the institution.

(6) Every person shall be guilty of an offence and liable to imprisonment for a period not exceeding one year who, while being a director, secretary or officer of a troubled financial institution and at any time during the administration of the institution, grants, promises or offers any consideration in order to induce any person to refrain from the investigation of the affairs of the institution or from the prosecution on a criminal charge of any officer of the institution or of any person with whom the institution may have had business relations.

(7) Where a troubled financial institution is under administration, every person shall be guilty of an offence and liable to imprisonment for a period not exceeding six months who, while being a director, secretary or officer of the institution and being under examination at a meeting and being thereto required by the administrator or any creditor or member or their respective agents, fails to account for or to disclose what has become of any of the property of the institution which is proved to have been in his or her possession or, to his or her knowledge, in the possession of the institution so recently before the commencement of the administration that in the ordinary course he or she ought to be able to account for the same.

(8) For the purposes of subsections (5), (6) and (7), a person who is a director, secretary or officer of a financial institution at the commencement of the administration thereof shall be deemed to be a director, secretary

or officer during the administration thereof notwithstanding that his or her duties may have ceased or that he or she is no longer gainfully employed by the institution or by its administrator on its behalf.

(9) Any person who falsely holds himself or herself out to be an administrator, assistant administrator or a member of an interim board shall be guilty of an offence and liable to a fine not exceeding level ten or to imprisonment for a period not exceeding five years or to both such fine and such imprisonment.

#### **42 Regulations**

(1) Subject to subsection (2), the Minister may make regulations providing for all matters which by this Act are required or permitted to be prescribed or which, in his or her opinion, are necessary or convenient to be prescribed for carrying out or giving effect to this Act.

(2) Regulations in terms of subsection (1) may provide penalties for contraventions thereof:

Provided that no such penalty shall exceed a fine of level eight or imprisonment for a period of six months or both such fine and such imprisonment.

#### **43 Cap. 14:28 not to apply**

The Competition Act [*Chapter 14:28*] shall not apply to any amalgamation, merger or transfer of any financial institution carried out in accordance with this Act.