

THE FINANCIAL INSTITUTIONS ACT, 2005
(Act No. 6 of 2005)



I ASSENT

MSWATI III
King of Swaziland

26th October, 2005

AN ACT

entitled

An Act to provide for regulation and supervision of financial institutions and for matters incidental hereto.

ENACTED by the King and the Parliament of Swaziland.

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PART I

PRELIMINARY PROVISIONS

Short Title and Commencement.

1. This Act may be cited as the Financial Institutions Act, 2005, and shall come into operation on such date as the Minister may, by notice in the Gazette, appoint.

Interpretation-

2. In this Act, unless the context otherwise requires:

“affiliate,” in respect of any financial institution, means:

- (a) any company, association, syndicate, partnership or other body of persons corporate or unincorporate in which twenty-five percent or more of any class of voting shares or other voting participation is directly or indirectly owned or controlled by such financial institution, or is held by it with power to vote; or
- (b) any company, association, syndicate, partnership or other body of persons corporate or unincorporate in which the election of a majority of directors is controlled in any manner by such financial institution;

“Bank” means the Central Bank of Swaziland established under the Central Bank of Swaziland Order, 1974;

“bank” means a company incorporated in accordance with the provisions of the Companies Act, 1912, which is licenced under this Act to conduct banking business;

“banking business” means:

- (i) the business of receiving funds from the public through the acceptance of money, deposits of money payable upon demand or after a fixed period or after notice or any similar operation through the periodic sale or placement of bonds, certificates, notes or other securities and the use of such funds either in whole or in part for loans, advances, investments or any other operation authorized by law or customary banking practice, for the account and at the risk of the person doing such business;
- (ii) any other activity recognized by the Bank as customary banking practice which a financial institution may be authorized by the Bank to engage in;

“calendar year” means the period from 1st January to 31st December;

“credit institution” means any financial institution other than a bank;

“conglomerate” means a conglomerate as defined in Section 15(2);

“Court” means the High Court;

“director” includes any person, by whatever title he may be referred to, empowered, to carry out substantially the same functions in relation to the direction of a financial institution as those carried out by a director of a company as defined in the Companies Act, 1912;

"financial institution" means any person licensed under this Act to carry on banking business;

"financial year" means any continuous twelve month period designated by a financial institution as its accounting year;

"foreign financial institution" means any financial institution, incorporated or otherwise, other than a local financial institution, doing business in Swaziland, whether such business is banking or other business;

"licenced":

(a) in relation to an agent, means licenced under Section 17 of this Act;

(b) in relation to a financial institution, means licenced under Section 6 or 17 of this Act;

"local financial institution" means a financial institution established under the laws of Swaziland;

"Minister" means the Minister responsible for Finance;

"other financial institution" means any institution which may be licenced by or otherwise subject to the supervision and regulation of the Bank.

"place of business" means any branch or office of a financial institution in Swaziland, including a mobile agency, open to the public for the transaction of banking business;

"principal officer" means the Chief Executive Officer or other person in Swaziland, by whatever title he may be referred to responsible for the management of the affairs of a licenced financial institution;

"public in Swaziland" includes the Government of Swaziland, the Bank, any statutory body and every licenced financial institution;

"records" means any documents or information used in the ordinary course of the business of banks or financial institutions, whether in written form or kept on microfilm, magnetic tape or any other form of mechanical or electronic medium.

"unsecured" in relation to loans, advances or credit facilities means loans, advances, or credit facilities granted without special security; or in the case of loans, advances or credit facilities granted against special security, any part of such loans, advances or credit facilities which at any given time exceeds the market value of the assets comprising the security given, or which exceeds the valuation approved by the Bank whenever it deems that no market value exists for such assets.

Non-applicability of the Act.

3. (1) This Act shall not apply to:

- (a) a building society within the meaning assigned to it in the Building Societies Act, 1962;
- (b) a co-operative society within the meaning assigned to it in the Co-operative Societies Act, 2003; or
- (c) an insurer as defined in the Insurance Act, 2005;

(2) With the approval of the Minister, the Bank may after consultation with the primary supervisor of the institutions mentioned in subsection (1) above, make certain specified provisions of this Act applicable to such institutions.

Exemptions.

4. (1) The Bank may, after consultation with the Minister, by notice published in the Gazette, exempt any class of credit institutions from all or part of the provisions of Sections 19, 20(1)(b) and 24, for such period and under such conditions as the Bank may determine, whenever such exemptions may be deemed by it to be in the public interest:

Provided that such exemptions shall not be granted for periods exceeding two years, which period may however be extended in appropriate circumstances.

PART II

LICENCES

Prohibition Against Carrying-on of Business by a Financial Institution without a Licence.

5. (1) No business shall be transacted, either in Swaziland by a foreign financial institution or agent or in Swaziland or abroad by a local financial institution, unless such financial institution has been licenced in terms of this Act to carry on such business;
- (2) A person who contravenes subsection (1) commits an offence and shall be liable on conviction to a fine of not less than one hundred thousand Emalangi (E100,000) and an additional fine of not less than twenty-five thousand Emalangi (E25,000) in respect of each day on which the contravention continues.

Application for Licence to carry on Banking Business.

6. (1) No person shall carry on banking business in Swaziland unless he has been granted a license by the Bank.
- (2) An application to be licensed shall be made to the Bank in the form prescribed and shall be accompanied by:
- (a) an authenticated copy of the memorandum and articles of association, or, in case of a foreign financial institution, such similar documents regulating its affairs or such other documents as the Bank may require to establish the manner of control and regulation of such institution, and, in the case of a public company, a copy of its prospectus or similar document required under any law relating to companies, and the name, nationality, and address of every promoter;
 - (b) a statement of the address of its head office, and the name, nationality and address of its chairperson, of every director or partner, as the case may be, and of its principal officer;
 - (c) a copy of its balance sheet at a date within ninety days prior to the date of its application;
 - (d) full particulars of the business it proposes to carry on, and of the manner in which it proposes to carry on such business and a business plan covering the first three years of operation;
 - (e) the location of the principal place and other places of business in Swaziland and, in the case of a local financial institution operating outside Swaziland, any place where it proposes to carry on its activities, and in the case of a mobile agency, the area to be served by any mobile agency;
 - (f) evidence, in the case of a foreign financial institution, that it is subject to comprehensive supervision or regulation on a consolidated basis by the appropriate authorities in its home country; and
 - (g) any other information as the Bank may require.
- (3) The application and every document submitted in accordance with subsection (1) shall be signed by the principal officer of the applicant.
- (4) The applicant shall, when submitting the application:
- (a) pay to the Bank an investigation fee to be prescribed by the Bank by notice in the Gazette; and

(b) deposit with the Bank an annual fee for the first year:

Provided that such deposit shall be refunded to the applicant if the licence is refused.

(5) In considering an application for a licence, the Bank shall conduct such investigation as may be deemed necessary to ascertain the:

- (a) validity of the documents submitted under subsection (2);
- (b) financial status and history of the applicant;
- (c) character and experience of its managers;
- (d) adequacy of its capital structure;
- (e) convenience and needs of the community it intends to serve;
- (f) earning prospects afforded by the area primarily to be served; and
- (g) public interest.

(6) No person shall be granted a licence unless the requirements specified in Section 20 are fulfilled.

(7) Within ninety days after the receipt of an application, or if further information has been required, after the receipt of such information, the Bank shall, after consultation with the Minister, notify the applicant in writing either that it grants the licence or refuses to grant the licence.

(8) In granting a licence, the Bank may impose conditions to be satisfied by the licensee, including a condition that the licensee carry on business at a designated place or places, provide or refrain from providing specified services or facilities, or any other conditions which the Bank may consider appropriate.

(9) In the case of a foreign financial institution the Bank shall establish contact with the parent supervisory authority of the institution in order to ascertain that the institution is adequately supervised on a consolidated basis and notwithstanding the provisions of subsection (7), the Bank shall require as a condition that there be filed with it before commencement of operations:

- (a) a duly executed instrument in writing, by its term of indefinite duration and irrevocable, appointing the Bank its true and lawful agent, upon whom all process in any action or proceedings against it and a cause of action arising out of a transaction with any of its places of business in Swaziland may be served with the same force and effect as if it were established in Swaziland and had been lawfully served with process therein;
- (b) a written certificate of designation, which may be changed from time to time thereafter by the filing of a new certificate of designation, specifying the name and address of the officer, agent, or other person in Swaziland:
 - (i) to whom such process shall be forwarded by the Bank;
 - (ii) upon whom any person not served upon by the Bank under paragraph (a) may be served;
- (c) a written certificate that the appropriate authorities in the home country of the foreign financial institution have consented to the proposed establishment in Swaziland of the facility.

(10) In refusing to grant a licence, the Bank shall furnish to the applicant a written statement of the reasons for its decision.

- (11) Every licenced financial institution shall pay annually to the Bank for the account of the Consolidated Fund the prescribed annual fee.

Financial Institutions deemed to be Licenced under this Act.

7. All financial institutions licenced in terms of this Act shall be announced through the Gazette.

Investigation of Persons Suspected of Carrying on Business without a Licence.

8. (1) If the Bank has reason to believe that any person required to be licenced as a financial institution, or as agent within the meaning of Section 17, is carrying on banking business it shall in order to ascertain whether such person is carrying on banking business without a licence:
- (a) serve that person with an order to cease and desist and that person shall accordingly comply;
 - (b) direct that person by notice in writing to submit to it, within a period stated in the notice or within such further period as it may allow, any document or information concerning such business.
- (2) If the Bank determines that a person is carrying on banking business contrary to this Act, it shall immediately seize and take possession of any funds and assets of the person, whether acquired as a result of carrying on such unauthorized banking business or deposit taking activity or personal property, appoint a liquidator to commence proceedings leading to compulsory liquidation in conformity with the procedures as set out in the Schedule to this Act.
- (3) Any person who contravenes the provisions of this Section commits an offence and shall be liable on conviction to a fine of not more than two hundred and fifty thousand Emalangi (E250,000) or imprisonment for not more than one year or both.
- (4) Nothing in subsection (3) shall exempt any person from further criminal liability arising out of any contravention of this Act or any other law.

Authority to take Deposits.

9. (1) The Minister may, in consultation with the Bank, define, "deposit taking business" by regulation published in the Gazette.
- (2) No person shall, without the prior written authorization of the Bank, carry on deposit-taking business in Swaziland.
- (3) Where the Bank has reason to believe that a person is carrying on deposit-taking business without its prior written authorization, it may call for such information from that person as it may require; and such person shall be subject to the provisions of Section 8:
- (4) A person acting in contravention of this Section shall, in addition to the penalties specified in Section 8, be liable to a minimum administrative penalty imposed by the Bank of Twenty-Five Thousand Emalangi (E25,000) for each day of such unauthorized deposit-taking business.

Use of word "bank" in title.

10. (1) No person other than a licenced financial institution, or its agent, shall, without the prior written consent of the Bank, use the word "bank" or any of its derivatives in any language, or any other word indicating the transaction of banking business, in the name, description or title under which such person is carrying on business in Swaziland, or make or continue to make any representation to such effect in any notice, advertisement or in any other manner whatsoever for the purpose of transacting business in Swaziland.
- (2) A person who contravenes subsection (1) commits an offence and shall be liable on conviction to a fine of not less than two hundred and fifty thousand Emalangi (E250,000) or imprisonment for one year or both.

(3) Nothing in subsection (1) shall prevent a person from using the word "bank" or any of its derivatives, if it is:

- (a) for the sole purpose of establishing a company to the end of applying for a licence under Section 6, in which case the term "in-organization" shall be included as part of the name of the bank until such time as it is licenced by the Bank; or
- (b) included in the title of a bank staff association or a bank pension or provident scheme or fund or similar organization.

Certain words not to be used in name of Financial Institution.

11. (1) No financial institution shall be granted or continue to hold a licence under a name which closely resembles the name of an existing institution or which would be likely, in the opinion of the Bank, to mislead the public.
- (2) Except with the written approval of the King, the Bank shall not grant a licence to any financial institution the name of which contains the words "Royal" or "King of Swaziland" or any word which suggests Royal patronage or support in any language as part of its name.
 - (3) Except with the written consent of the Minister, the Bank shall not grant a licence to any financial institution the name of which contains the word "Government" or any word which suggests governmental support in any language as part of its name.
 - (4) Except with the written consent of the Bank, no financial institution shall use or refer to itself by a name other than the name under which it is licenced.

Local Financial Institutions to be Incorporated.

12. (1) No local financial institution shall be granted a licence in terms of this Act unless it is registered as a company under the Companies Act No. 7 of 1912.
- (2) No holder of shares issued by a local financial institution shall have voting rights in respect of such shares unless such shares are registered under his name in the register to be maintained by the institution.

Licensed Persons to Display name and Licence under Act.

13. (1) A person licensed under the Act shall display conspicuously in each of its places of business a copy of the licence.
- (2) No financial institution shall open a new place of business in Swaziland, or change the location of, or close, an existing place of business in Swaziland without the prior written consent of the Bank:

Provided that the Bank shall not grant such consent unless it is satisfied that the new place of business, or the financial institution as relocated, will continue to meet the provisions of Section 6.

- (3) No local financial institution shall open a new place of business outside Swaziland, or change the location of, or close, an existing place of business outside Swaziland without the prior written consent of the Bank.

General Prohibitions.

14. (1) No person may, without the prior written approval of the Bank, acquire by transfer either directly or indirectly any interest in the capital stock of a local financial institution which would confer upon him a voting share exceeding twenty percent of the total outstanding stock, and, in considering its approval, the Bank may call for such information as it may require.
- (2) No local financial institution shall, without the prior written approval of the Bank:

- (a) enter into a merger or consolidation;
 - (b) transfer the whole or any part of its assets in Swaziland other than in the ordinary course of its business;
 - (c) effect an increase or reduction of its authorized share capital or a reduction of its paid-up capital;
 - (d) alter its name as set out in its licence; or
 - (e) amend its memorandum or articles of association.
- (3) No foreign financial institution which is licenced under this Act shall, without the prior written approval of the Bank:
- (a) transfer the whole or any part of its assets in Swaziland other than in the ordinary course of its business;
 - (b) effect a reduction of its assigned capital in Swaziland; or
 - (c) alter its name as set out in its licence.
- (4) An application for the approval of the Bank in terms of this section shall be in writing and shall be accompanied by any information or document which the Bank may deem necessary including:
- (a) a statement of the nature of the transfer, merger or consolidation;
 - (b) a copy of the proposed agreement under which the transfer, merger or consolidation is to be effected; and
 - (c) in relation to a foreign financial institution, reasons for the reduction of its assigned capital in Swaziland.

Formation of Conglomerates.

15. (1) No person licensed to carry on banking business shall without the prior written authorization of the Bank form or participate in a conglomerate.
- (2) For the purpose of this Section a conglomerate may consist of:
- (a) a group of financial institutions;
 - (b) a group whose members include a financial institution, and insurers and/or securities dealers (whether foreign or local, separately incorporated, registered in terms of any applicable legislation, or carrying on as a regular feature of its business the business of insurance or dealing in securities); or
 - (c) a group whose members include a financial institution, any member referred to in subparagraph (b), and any other undertaking whose main business cannot be classified as falling within financial services or related sectors, of which one of its members controls another within the group; or such control belongs to one or more persons or members who act in concert to exercise control over two or more members of the group;
- (3) For purposes of subsection 2(c), control shall exist when a member, person, association of members or persons, or an entity:
- (a) directly or indirectly, or acting through one or more intermediaries owns, directs, or has the power to vote twenty-five percent or more of any class of voting securities or shares of a member of the conglomerate;

- (b) directs in any manner the election of a majority of the directors of a member of the conglomerate; or
 - (c) directly or indirectly exercise a controlling influence over the management or policies of a member of the conglomerate.
- (4) In granting such authorization the Bank may:
- (a) limit or order the reduction of the percentage shareholding or other ownership interests by any person or any of the members of the conglomerate in the financial institution to a maximum of twenty-four percent; 777
 - (b) limit the aggregate amount of existing and potential exposure to the capital and reserves of the financial institution:
 - (i) to ten percent in respect of any one member of the conglomerate; or
 - (ii) to twenty percent in respect of two or more members of the conglomerate;
 - (c) direct that certain categories of assets that would be classified in the ordinary course of credit evaluation and banking practice as doubtful or low-quality assets, shall not be acceptable as collateral security for transactions contemplated in subsection (5);
 - (d) direct that any transaction resulting in an exposure to the financial institution, as contemplated in subsection (5), shall be on terms and conditions that would have been offered to unrelated third parties, and that are consistent with safe and sound banking practices; or
 - (e) impose any terms and conditions which it may deem desirable or in the interest of sound prudential practice and a stable financial system.
- (4) For purposes of subsection (4)(b) "exposure" in relation to such member or members, means:
- (a) a loan or extension of credit to a member or members;
 - (b) a purchase of, or investment in, shares or other ownership interests of a member or members;
 - (c) a purchase of assets, including assets subject to an agreement to repurchase, from a member or members;
 - (d) the acceptance of shares or other ownership interests issued by a member or members as collateral security for a loan or extension of credit to such member or members; or
 - (e) the issue of a guarantee, acceptance, promissory note, or letter of credit, including an endorsement of any such instrument, on behalf of a member or members.
- (6) The Bank may, by notice published in the gazette, make Bylaws to ensure prudential rules, reporting and auditing of each member of the conglomerate and the conglomerate as a whole.
- (7) The Bylaws referred to in subsection (6) may differentiate between the different classes of conglomerates described in subsection (2) of this Section.

Revocation of Licence of a Financial Institution.

16. (1) The Bank may revoke the licence of any financial institution if the holder:
- (a) fails to commence operations within a period of one year following the grant of the licence;
 - (b) exceeds the terms of his licence or fails to comply with any conditions imposed under Section 6 or 17, or with any measures required by the Bank under Section 42;

(c) ceases to carry on the business for which he is licenced; or

(d) is in breach of any other of the provisions of this Act.

- (2) Before revoking the licence of any financial institution, the Bank shall consult with the Minister and give such institution notice of its intentions to do so, and shall afford it a reasonable opportunity to show cause why such licence should not be revoked:

Provided that no licence shall be revoked earlier than twenty-eight days after the notice of intention is served on the financial institution.

- (3) The Bank may obtain a temporary injunction upon application to the Court for the suspension of any part or all of the business being conducted by such institution after the notice of intention has been served upon it.
- (4) If the Bank has revoked a licence, it shall as soon as possible publish a notice of the revocation in the Gazette and in a newspaper of general circulation in the country and shall in addition cause a sufficiently large enough notice to be posted in a conspicuous place in each place of business of the financial institution.

Licensing of Agents and Annual Fees.

17. (1) Any person, other than a licenced financial institution, proposing to act as agent of a financial institution not licenced in Swaziland, who represents such institution, or undertakes any activity on its behalf, in Swaziland, other than in the course of legal proceedings, shall, before engaging in such representation or activity, apply to the Bank for a licence under this Section.
- (2) An application for a licence in terms of subsection (1) shall be in writing and shall contain full particulars of:
- (a) his authority to act as agent;
 - (b) the business he proposes to carry on; and
 - (c) the manner in which, and the places where, he proposes to carry on such business.
- (3) The licensee shall, upon the granting or renewal of his licence, pay to the Bank for the account of the Consolidated Fund the prescribed annual fee for agents which may from time to time be prescribed by the Minister by notice published in the Gazette.
- (4) The licence shall be granted for a period not exceeding one year, but may be renewed upon application to the Bank made prior to the expiry of the period for which the licence was granted:

Provided that the Bank may refuse to grant or renew such licence on good cause shown.

- (5) In granting or renewing a licence, the Bank may impose conditions to be satisfied by its holder including limitations on his activities.
- (6) The licence may be revoked by the Bank in the event that its holder fails to comply with the terms and conditions of the licence, or comes under the provisions of Section 49.
- (7) Before revoking any licence issued under this Section, the Bank shall give the holder notice of its intention to do so, and shall afford him a reasonable opportunity to show cause why such licence should not be revoked:

Provided that no licence shall be revoked earlier than twenty-eight days after the notice of intention is served on the holder.

- (8) The Bank may obtain a temporary injunction upon application to the High Court for the suspension of any part or all of the business being conducted by the holder after the notice of intention has been served upon him.

- (9) If the Bank has revoked a licence in terms of this Section, it shall as soon as possible publish a notice of the revocation in the Gazette and in a newspaper of general circulation in Swaziland.
- (10) Any person acting as an agent within the meaning of this Section without a valid licence therefor commits an offence and shall be liable on conviction to a fine of Fifty Thousand Emalangeni (E50,000) and an additional fine of not less than Twenty-Five Thousand Emalangeni (E25,000) in respect of each day on which the contravention continues.

Disclosable Information.

18. (1) With respect to any licenced financial institution or agent, the Bank shall disclose to any person upon request:
- the nature of the licence;
 - any terms, conditions and limitations attached to such licence;
 - the places where the holder of such licence may, according to his licence, carry on his activities; or
 - the name of the person upon whom process may be served in lieu of the holder of such licence, where such person has been named in a certificate of designation filed with the Bank.
- (2) For the purposes of this section "certificate of designation" means a certificate filed with the Bank by the licence holder appointing a person upon whom process may be served in lieu of the licence holder.

PART III

FINANCIAL REQUIREMENTS AND LIMITATIONS

Capital and Reserve Account.

19. (1) Every financial institution shall at all times maintain unimpaired capital, either paid-up if it is a local financial institution, or assigned if it is a foreign financial institution, at least equal to the minimum amount specified in Section 20.
- (2) The assigned capital of a foreign financial institution shall serve the same purposes under this Act as the paid-up capital of a local financial institution.
- (3) Every financial institution shall maintain a Reserve Account and, before any dividend is declared or any profit is transferred to the head office or elsewhere, shall transfer to such Account out of the net profits of each year, after due provision has been made for taxation, a sum equal to not less than the minimum amount specified in Section 20.
- (4) The Reserve Account shall neither be reduced nor impaired.

Provided that the impairment of the Reserve Account may be permitted when it is the only means of preventing an impairment of the capital, in which case the Bank shall be notified within thirty days of the amount of such impairment.

- (5) No financial institution shall declare, credit or pay any dividend or make any other transfer from profits if there is an impairment of the paid-up or assigned capital or of the minimum required balance in its Reserve Account.

Amount of Capital and Reserve Account.

20. (1) The following requirements shall apply in respect of a financial institution:
- operating as a bank:

- (i) its minimum required capital shall be not less than the greater of the amount prescribed by the Bank by way of start-up capital, or five percent of its liabilities to the public in Swaziland in terms of the most recent balance sheet prepared in accordance with Section 35;
- (ii) it shall transfer each year to its Reserve Account a sum equal to not less than ten percent of its net profits until the balance in the Reserve Account is equal to its minimum required capital;
- (iii) the sum of capital and reserve accounts together shall not be less than eight percent of the sum of its risk weighted assets computed in the manner prescribed by the Bank from time to time by Notice in the Gazette;

Provided further that any bank required by a change in Bylaws made under this Section to increase its capital shall be afforded a reasonable period of time being not less than twelve months in which to comply therewith;

(b) operating as a credit institution or other financial institution:

- (i) its minimum required capital shall be not less than the amount prescribed by Bylaws in respect of the appropriate class of institutions:

Provided that such prescription shall not be inferior to the greater of the amount prescribed by the Bank by way of start-up capital or five percent of its liabilities to the public in Swaziland in terms of the most recent balance sheet prepared in accordance with Section 35; and

Provided further that any credit institution or other financial institution required by a change in Bylaws made under this Section to augment its capital shall be afforded a reasonable period of time, being not less than twelve months, in which to comply therewith;

- (ii) it shall transfer each year to its Reserve Account a sum equal to not less than twenty-five percent of its net profits until the balance in such Reserve Account is equal to its minimum required capital:

Provided that the Bank may, by issuing Bylaws, increase the percentages specified in paragraphs (a)(i) and (b)(i).

- (2) Where the minimum capital of a financial institution, prescribed in reference to its liabilities, exceeds the amount of its unimpaired capital, such institution may, provisionally and subject to the approval of the Bank for such period as it may approve, include in the computation of its capital any unimpaired balance in its reserve account.
- (3) Where the sum of capital and reserve accounts of a bank, falls below eight percent of the sum of its computed risk-weighted assets (or such higher percentage as may have been prescribed by the Bank under subsection (1)), such institution may, on application to the Bank, be granted a reasonable time not exceeding one year for compliance on the basis of a plan rectifying the deficiency.

Provisions to be made for Certain Items.

21. In making the calculations necessary to ascertain that a financial institution has complied with the requirements of Sections 19 and 20:

- (a) provisions shall be made by a financial institution to the satisfaction of the Bank for the following items:
 - (i) depreciation of assets and bad or doubtful debts (to be calculated at least once in each calendar quarter) and including accumulated depreciation and bad debts not yet written off;
 - (ii) operating and accumulated losses;

- (iii) preliminary expenses, representing expenses relating to organisation or extension or the purchase of business or goodwill, and including under-writing commission;
- (iv) the value of any assets lodged or pledged to secure liabilities incurred under any law if all the liabilities (including contingent liabilities) so secured are not included in the calculation and if the effect of such lodging or pledging is that such assets are not available for the purpose of meeting the liabilities of the institution to the public;
- (v) such other items as the Bank may prescribe in Bylaws;

(b) capital, paid-up or assigned as the case may be, liabilities, and risk-weighted assets shall be of such kinds and computed in such manner, as the Bank may prescribe in Bylaws

Prescribed Investments to be Maintained.

22. The Bank may from time to time, by notice published in the Gazette, prescribe that every financial institution of a given class or classes shall maintain in Swaziland specified investments of an amount to be determined as a percentage of its liabilities to the public in Swaziland as shown in its last preceding monthly statement furnished to the Bank under Section 36:

Provided that:

- (a) no such prescription shall require the total amount of such specified investments to exceed five percent of such liabilities; and
- (b) every such prescription shall afford every institution required to maintain such specified investments a reasonable period, not less than three months, in which to comply

Minimum Liquid Assets to be Maintained.

23. (1) The Bank may from time to time, by notice published in the Gazette prescribe that every financial institution of a given class or classes shall maintain liquid assets amounting to not less than a prescribed percentage or percentages, not exceeding twenty-five percent, of the total, or specified categories, of its liabilities to the public in Swaziland as shown in the last preceding monthly statement furnished to the Bank under Section 36:

Provided that no financial institution shall be required without prior approval of the Minister, to maintain liquid assets in excess of thirty percent of such total liabilities to the public in Swaziland.

- (2) The distribution of amounts between the various types of liquid assets required to be held under this Section shall be made at the discretion of each financial institution:

Provided that the Bank may, by notice published in the Gazette and with the approval of the Minister, prescribe the distribution of amounts between the types of liquid assets required to be held under this Section.

- (3) For the purpose of this Section, "liquid assets" shall consist of freely transferable assets, unencumbered by any charge or lien whatsoever, of the following classes:
 - (a) notes and coins that are legal tender in Swaziland and net balances held with the Bank;
 - (b) net balances withdrawable on demand and money at call at any financial institution in Swaziland;
 - (c) treasury bills and other securities issued by the Government and maturing within three hundred and seventy days;
 - (d) securities issued by the Bank and maturing within one hundred and eighty days;
 - (e) net balances withdrawable on demand, and money at call or at up to thirty-one days notice at such financial institutions, denominated in such currencies and located in such countries and available in accordance with such terms, as the Bank may approve;

- (f) negotiable instruments of such type as the Bank may approve bearing at least two good signatures, payable within a period of one hundred and eighty-six days and drawn on such places, and denominated in such currencies, as the Bank may approve;
- (g) treasury notes or bills issued by the Government of such countries, and denominated in such currencies, as the Bank may approve, and maturing within three hundred and seventy days; or
- (h) such other assets as the Bank, with the approval of the Minister, may, by notice published in the Gazette, approve.

Limitations on Specified Operations and Activities.

24. (1) No financial institution shall directly or indirectly:

- (a) grant to any person or permit to be outstanding any loan, advance or credit facility, or give any financial guarantee or incur any other liability on behalf of that person, such that the total value of the loans, advances or credit facilities to, and financial guarantees or other liabilities on behalf of, that person is at any time more than twenty-five percent of the unimpaired paid-up or assigned capital and unimpaired balance in the Reserve Account of the financial institution;

Provided that the limitation upon such transactions shall not apply if they:

- (i) represent loans, advances or credit facilities to, or guaranteed in writing both as to principal and interest by, the Government of Swaziland;
 - (ii) represent such loans, advances or credit facilities to, or guaranteed in writing both as to principal and interest by, such foreign governments, as the Bank may specify for the purposes of this Section;
 - (iii) are fully secured by cash and held in a segregated deposit account by the lending financial institution, or portions thereof.
- (b) grant any loans, advances or credit facilities against the security of its own shares or those of any other licenced financial institutions;
 - (c) grant or permit to be outstanding unsecured loans, advances or credit facilities of an aggregate amount in excess of fifty thousand Emalangeni (E50,000):
 - (i) to its directors whether such loans, advances or facilities are granted to them jointly or severally;
 - (ii) to any firm, partnership, syndicate, association, company or other body of persons incorporate or unincorporate in which it or any one or more of its directors is directly or indirectly interested as owner, shareholder, director, partner, manager, agent or member; or
 - (iii) to any individual, firm, partnership, syndicate, association, company or other body of persons incorporate or unincorporate of whom or of which it or any one or more of its directors is directly or indirectly a guarantor;
 - (d) grant or permit to be outstanding to any officer or employee unsecured loans, advances or credit facilities which in the aggregate amount exceed one year's emoluments of such officer or employee;
 - (e) engage, whether on its own account or on a commission basis, in the wholesale or retail trade, including the import or export trade, except insofar as may be necessary in exceptional circumstances with the prior written approval of the Bank in the course of banking business or in the course of the satisfaction of debts due to it; or

- (f) acquire or hold any part of the share capital or any financial, commercial, agricultural, industrial or other undertaking except such shareholdings as a financial institution may acquire in the course of the satisfaction of debts due to it, which shareholdings shall, however, be disposed of at the earliest suitable moment but not later than three years from the date of its original acquisition:

Provided that this paragraph shall not prevent the purchase and sale of shares of stock for trust account or upon the order and for the account of a customer without recourse;

Provided further that this paragraph shall not apply:

- (i) in respect of any shareholding approved by the Bank in any corporation established for the purpose of insuring deposits or of promoting the development of a money market or securities market or payments system in Swaziland or of improving the financial mechanism for the financing of economic development; or
- (ii) to any shareholdings in other undertakings the aggregate value of which does not at any time exceed twenty-five percent of the sum of its unimpaired paid-up or assigned capital and unimpaired balance in its Reserve Account:

Provided, however, that the acquisition of any voting shares of a local financial institution shall be subject to the prior written approval of the Bank;

- (2) If in the application of the limitation of subsection (1)(a) the Bank determines that the interests of a group of two or more persons are so interrelated that they should be considered as a unit, the total indebtedness of such group shall be combined and deemed to be in respect of a single person.
- (3) The Bank shall issue Bylaws to ensure prudential rules for the aggregation and attribution of loans and credit facilities for the purpose of ensuring compliance with subsection (1).
- (4) A financial institution shall report all credit exposures in excess of ten percent of its unimpaired paid-up or assigned capital and unimpaired balance in the Reserve Account to the Bank on a quarterly basis and may not incur such exposure to an extent that in total exceeds eight hundred percent of that calculation.

Loans and Advances Secured by Hypothec.

25. (1) Subject to this Section, a financial institution may, on completion of a deed of hypothecation, secure any loans or advances by a hypothec of crops or other agricultural or external produce, whether attached to the soil or not, felled timber, animals, fodder, industrial and fishing materials, rolling stock, boats, fishing tackle or nets, raw materials, equipment, machinery, stock-in-trade and generally all produce of labour and things necessarily used in connection with production, or other movable property (including incorporeal rights) of whatsoever kind of description, of which the borrower is the owner and in respect whereof he has the right of use and disposal, whether or not as on the date such deed of hypothecation the property offered as security is in existence or has been acquired by the borrower.

(2) Any deed of hypothecation entered into under this Section shall:

(a) include:

- (i) a statement that the institution has, through its servant or agent, explained to the borrower the effect of making such deed and that the borrower understands the explanation;
- (ii) the amount of the loan or advance secured by the hypothec;
- (iii) a description of the property offered as security;
- (iv) such matters as may be prescribed by legislation.

- (b) be lodged by the financial institution with the Registrar of Deeds within thirty days of its execution and thereafter registered in the register of deeds of hypothecation; and
- (c) be endorsed by the signature of an officer who has been duly authorized thereto, either generally or specially, by the institution concerned.

(4) A deed of hypothecation entered into under this Section shall be of no effect unless and until it has been registered in accordance with subsection (2).

(5) Immediately upon payment by the financial institution of the loan or advance or any part thereof to or on behalf of the borrower, and subject to subsection (3), notwithstanding any other law, all property hypothecated and progeny or produce thereof shall be deemed to be pledged in favour of the institution for the amount owing in respect of such loan or advance, including interest and costs, as fully and effectually as if it had been pledged by delivery to such institution.

(6) The security created under subsection (4) shall not be extinguished by any delivery to another person of the property without the written consent of the financial institution:

Provided that this subsection shall not apply to:

(a) any delivery by or on behalf of the borrower to another person in good faith if the value of the property so delivered does not exceed fifty Emalangeni (E50); or

(b) any subsequent delivery to another person for value in good faith, even if the person so delivering the property has acquired it in bad faith from the borrower.

(7) The financial institution may at any time, upon such conditions as it deems fit, grant permission in writing to the borrower to dispose of the property which has been hypothecated in terms of this Section or to substitute any other property of the same description therefor, and any property so substituted shall be deemed to have been validly hypothecated in terms of this Section:

Provided that the financial institution shall cause the details of such substitution to be noted against the deed of hypothecation lodged with the Registrar of Deeds in terms of subsection (2) hereof and until so noted, such substitution shall be of no effect as against persons other than the borrower.

(8) Any movable property already hypothecated by any registered notarial bond shall not be hypothecated under this Section, except with the consent in writing of the holder of such bond.

(9) Any borrower who, without the prior written authority of the financial institution, disposes of, destroys or consumes any property hypothecated under this Section or removes any property from the land where it is to be kept by agreement with the financial institution, commits an offence and shall be liable on conviction to a fine of not less than one thousand Emalangeni (E1,000) or imprisonment for one year or both:

Provided that it shall be a good defence in any prosecution under this subsection if the accused establishes that the amounts secured under the deed of hypothecation were fully paid by or on his behalf to the financial institution concerned immediately after the disposal, destruction, consumption or removal as the case may be.

(10) If, at a trial in respect of a contravention of subsection (8), it is proved that the accused failed, on the demand of any person designated by the institution for such purpose, to produce the property hypothecated or any part thereof, the accused shall be presumed to have disposed of, destroyed, consumed or removed the property in question as the case may be according to the charge, unless the contrary is proved.

(11) Every financial institution shall maintain a register of all deeds of hypothecation entered into in terms of this Section at the principal place of business and such register shall be open for inspection by members of the public without charge during normal hours of business of the institution.

(12) Upon recovery or repayment of any loan or advance secured by a hypothec together with interest thereon to the date of such repayment and any costs which may have been incurred in connection with such loan or advance and recoverable in terms thereof or of any law, the institution shall issue a receipt for such moneys and notify the Registrar of Deeds who shall forthwith cancel the entry in the register of deeds of hypothecation.

Foreclosure of Hypothec.

26. (1) Any deed of hypothecation lodged with the Registrar of Deeds in terms of Section 25 shall be deemed to be a liquid document for the purposes of any application to any court of competent jurisdiction for summary judgement or provisional sentence.
- (2) In the case of loans secured by hypothec, upon any event specified in a hypothec entered into in terms of Section 25 permitting the seizure of any property subject thereto, a financial institution may file with the clerk or registrar of any court of competent jurisdiction a certified statement by an authorized employee of the financial institution on oath as correct, setting forth the said event and describing the property liable to seizure and annexing thereto a copy of the relevant deed of hypothec.
- (3) A copy of the statement referred to in subsection (2) shall be posted by the financial institution to the borrower simultaneously with it being filed with the clerk or registrar of the court.
- (4) A statement shall on being filed in terms of subsection (2) have all the effects of, and any proceedings may be taken thereon, as if it were, a civil judgement lawfully given in that court in favour of a financial institution authorizing the seizure of such property.
- (5) No financial institution which has seized property in terms of subsection (4) shall dispose of such property without having obtained a court order from a court of competent jurisdiction in which the statement referred to in subsection (2) was filed.

Allocation of Proceeds.

27. (1) Notwithstanding any other law, the proceeds of a sale in execution or under the judgment of a court of any property hypothecated under Section 25 shall be applied, firstly, towards any costs or expenses incidental to the taking of possession and sale of such property, and, secondly, to the discharge of the loan or advance or balance thereof outstanding and any interest thereon to the date of receipt of proceeds of sale, and thereafter any surplus remaining, shall be repaid to the borrower or his successor in title or assigns, as the case may be.
- (2) For the purposes of this Section the expression "his successor in title" includes his curator bonis and any executor, administrator, trustee or liquidator of his estate.

Hypothecation Deeds to be Prepared by the Financial Institution.

28. (1) A deed of hypothecation to secure a debt to a financial institution and a deed evidencing the discharge of any debt so secured may be prepared by the financial institution and the borrower shall pay such charges in connection therewith as may be approved by the Bank from time to time.
- (2) Notwithstanding any regulations made under the Deeds Registry Act No. 37 of 1968 or any other law, all such documents prepared by a financial institution in accordance with subsection (1) which are registerable in the Deeds Office shall be registerable without it being necessary for any person to appear before the Registrar of Deeds.
- (3) A deed of hypothecation lodged with the Registrar of Deeds in terms of Section 25 shall be substantially in the form prescribed by regulation, but may contain such terms and conditions as are not inconsistent with this or any other law.

PART IV

AUDIT, INFORMATION AND EXAMINATION

Appointment and Duties of Auditors

29. (1) Every financial institution shall annually appoint an independent auditor, satisfactory to the Bank, whose duty shall be to make a report to the shareholders of a local financial institution or to the head office of a foreign financial institution upon the annual balance sheet and profit and loss account, and in every such report he shall state whether in his opinion the balance sheet and profit and loss account have been prepared in accordance with standard banking practice, whether they fairly present the financial institution's affairs and, if the auditor has called for explanations or information from the directors, officers or agents of the financial institution, whether such are satisfactory.
- (2) The report of the auditor shall be read together with the report of the board of management of the financial institution at the annual meeting of shareholders of each local financial institution and shall be transmitted to the head office of each foreign financial institution, and a copy thereof sent to the Bank.
- (3) If a financial institution fails to appoint an auditor in accordance with subsection (1), or the Bank is not satisfied with the report of the auditor appointed by the financial institution, the Bank shall have the power to appoint an auditor and his remuneration shall be paid by the financial institution.
- (4) No person having any interest in a financial institution otherwise than as a depositor and no officer, employee or agent of a financial institution shall be eligible for appointment as an auditor to such financial institution, and any person appointed as an auditor to any financial institution who shall after such appointment acquire such interest or become an officer, employee or agent of such financial institution shall forthwith cease to be such auditor.
- (5) If an auditor, in the course of the performance of his duties is satisfied that:
- (a) there has been a serious breach of or non-compliance with the provisions of this Act, or Regulations or Bylaws made under this Act, the Central Bank of Swaziland Order No.6 of 1974, or the Companies Act No. 7 of 1912;
 - (b) a criminal offence involving fraud or other dishonesty has been committed;
 - (c) losses have been incurred which reduce the paid-up or assigned capital, as the case may be, of the financial institution by twenty-five percent or more;
 - (d) serious irregularities have occurred, including those that jeopardize the security of depositors and creditors; or
 - (e) he is unable to confirm that the claims of depositors and creditors are still covered by the assets,

he shall immediately report the matter to the Bank.

- (5) The Bank may, if it considers it necessary, from time to time, being at least once a year, arrange trilateral meetings with each financial institution and its auditors, to discuss matters relevant to the Bank's supervisory responsibilities which have arisen in the course of the statutory audit of that financial institution, including relevant aspects of the financial institution's business, its accounting and internal control systems, and its annual balance sheet and profit and loss accounts.
- (6) The Bank may, if it considers it desirable or necessary in the interests of depositors, from time to time arrange bilateral meetings with auditors of financial institutions.

- (7) No duty of confidentiality to which an auditor of a financial institution may be subject shall be regarded as contravened and no civil, criminal or disciplinary proceeding shall lie against him by reason of his communicating in good faith to the Bank, whether or not in response to a request made by it, any information or opinion which is relevant to the Bank's functions under this Act, or Regulations or Bylaws made under this Act, or the Acts referred to in subsection (5).

Auditor's Right of Access to Books.

30. Every auditor of a financial institution shall have the right of access at all times to such books, accounts, vouchers, and securities of that institution and shall be entitled to require from the officers and agents of that institution such information and explanations as he requires to correctly perform his duties as auditor.

Powers of the Bank in Relation to Auditors.

31. (1) The Bank may impose all or any of the following duties on an auditor in addition to those provided under Section 29:
- (a) a duty to submit such additional information in relation to his audit as the Bank considers necessary;
 - (b) a duty to carry out any other examination or establish any procedure in any particular case;
 - (c) a duty to submit a report on any of the matters referred to in paragraphs (a) and (b);
 - (d) a duty to submit a report on the financial and accounting systems and risk management controls of the financial institution; or
 - (e) a duty to certify that the systems of loan classification, provisioning and write-offs prescribed by the Bank are being followed and whether or not suitable measures to counter the possibility of money-laundering have been adopted by the financial institution and are being implemented in accordance with such Bylaws that the Bank may prescribe.
- (2) The financial institution shall remunerate the auditor in respect of the discharge by him of all or any of these additional duties.

Audit Committee.

32. (1) Every financial institution shall, by resolution of its board of directors, establish an audit committee that shall regularly report to the board on all matters set forth in Sections 29 and 31.
- (2) The audit committee shall include at least three non-executive directors and its meeting shall be attended by the auditor appointed under Section 29 and by the internal auditor of the financial institution.
- (3) The functions of an audit committee shall be to:
- (a) assist the board of directors in its evaluation of the adequacy and efficiency of the internal control systems, accounting practices, information systems and auditing processes applied within the financial institution concerned in the day-to-day management of its business;
 - (b) facilitate and promote communication, regarding the matters referred to in paragraph (a), risk management or any other related matters between the board of directors and the executive officers of the financial institution concerned and the auditor appointed under Section 29 and the employee charged with the internal auditing of the transactions of the financial institution;
 - (c) introduce such measures as in the audit committee's opinion may serve to enhance the credibility and objectivity of financial statements and reports prepared with reference to the affairs of the financial institution concerned.

Termination of Appointment of Auditor.

33. (1) A financial institution that decides to terminate the services of an auditor appointed under Section 29 before the expiration of the term of appointment must do so by resolution of its board of directors and must give prior written notice to the Bank of its intention to remove or replace the auditor.
- (2) If the financial institution is a branch of a foreign financial institution carrying on banking business in Swaziland, it must present the written approval of its head office to the Bank.
- (3) An auditor appointed under Section 29 shall give written notice to the Bank if that auditor:
- (a) intends to resign before the expiration of the term of office; or
 - (b) intends not to seek reappointment.

Financial Records.

34. Every financial institution shall keep such records in Swaziland as are necessary to show clearly and correctly the state of its affairs and to explain its transactions and financial position and to enable the Bank to determine whether the institution has complied with the provisions of this Act, and Regulations and Bylaws made under this Act, and it shall preserve every such record for a period of at least five years as from the date of the last entry therein.

Annual Account.

35. (1) Not later than three months after the expiry of its financial year, every local financial institution, in respect of all business transacted by it, and every foreign financial institution in respect of all business transacted through its places of business in Swaziland, shall prepare, with reference to that year, a balance sheet and a profit and loss account as of the last working day of that year in such form as the Bank may approve, under the joint signatures of the principal officer and the majority of directors of a local financial institution or of the principal officer and the next most senior officer in Swaziland of a foreign financial institution.
- (2) The balance sheet and profit and loss account prepared in accordance with subsection (1) shall be audited in terms of Section 29.
- (3) Every financial institution shall:
- (a) within fourteen days after receipt of the audited balance sheet and profit and loss account in accordance with subsection (1):
 - (i) send copies thereof to the Bank;
 - (ii) publish a copy of such balance sheet in the Gazette and in at least one newspaper of general circulation in Swaziland; and
 - (b) exhibit throughout the year in a conspicuous position in each of its places of business in Swaziland, other than a mobile office, a copy of such balance sheet.

Returns.

36. (1) Every financial institution shall submit to the Bank in duplicate:
- (a) not later than the fourteenth day of each month a statement prepared in accordance with written instructions and in such form as the Bank may from time to time prescribe showing the assets and liabilities at the close of business on the last business day of the preceding month; and
 - (b) not later than fourteen days after the last day of each calendar quarter ending on 31st March, 30th June, 30th September and 31st December, a statement prepared in

accordance with written instructions and in such form as the Bank may from time to time prescribe giving an analysis of its assets and liabilities and income and expense at the close of the last business day of the calendar quarter:

Provided that the Bank may from time to time call for any additional Information which it may require for the purpose of the administration of this Act from any financial institution about its operations.

- (2) A financial institution which contravenes subsection (1) shall be liable to a minimum administrative penalty to be imposed by the Bank of fifty thousand Emalangeni (E50,000) plus an additional fine of twenty-five thousand Emalangeni (E25,000) in respect of each day in which the offence continues.

Failure to Provide Information.

37. (1) The Bank may serve an order to cease and desist upon a financial institution which fails to furnish information as requested by the Bank after the expiry of the time by which the bank had requested such information.

- (2) A financial institution which contravenes subsection (1) shall be liable to a minimum administrative penalty to be imposed by the Bank of fifty thousand Emalangeni (E50,000) plus an additional fine of twenty-five thousand Emalangeni (E25,000) in respect of each day in which the offence continues.

Reporting of Suspicious Transactions.

38. (1) No financial institution shall carry out a transaction which it knows or suspects to be related to a serious criminal activity until it reports the information regarding the transaction that indicates such activity to the Bank.

- (2) A financial institution shall provide all necessary information relating to the suspicious transaction in accordance with any law authorizing such exchange of information.
- (3) A financial institution shall not disclose to any person, other than a court, competent authority, or other person authorized by law, that information has been transmitted to or requested by the authorities, that an investigation is being carried out, or that instructions not to execute a transaction are being carried out.
- (4) Where a financial institution provides information that is referred to in subsection (1) and (2) in good faith, the financial institution shall be exempted from liability of any kind for complying with this Section and/or for breach of any restriction on disclosure of information, except as provided in subsection (3).
- (5) For the purposes of this Section, "financial institution" includes the employees, directors, officers and owners of a financial institution.

Examinations.

39. (1) The Bank shall cause regular on-site examinations of the operations and affairs of every financial institution, and, where the Bank so specifies, foreign branches, if any, of such financial institutions, to be made by officers of the Bank so appointed to conduct such examinations.

- (2) The purpose of an examination under subsection (1) shall be to determine whether:
- (a) the financial institution concerned is in a sound financial condition;
 - (b) the provisions of this Act, Regulations and Bylaws are being complied with by the financial institution; and
 - (c) the business of a financial institution is being operated in a lawful and prudent manner.

- (3) For the purpose of determining the condition of a financial institution and its compliance with this Act, Regulations and Bylaws, the Bank may cause an examination to be made of any of the financial institution's affiliates in Swaziland to the same extent that an examination may be made of the financial institution.
- (4) The Bank shall also cause such examination to be made where application is made by one-fifth of the total number of depositors, or by any number of depositors holding not less than one-third of the liabilities to the public in Swaziland of such institution:

Provided that the applicants shall submit to the Bank such evidence as it may consider necessary to justify an examination.

Production of Records and Information for Examiner.

40. (1) Every financial institution and every affiliate of such institution shall, pursuant to an examination conducted under Section 39, produce for the inspection of any examiner duly authorized by the Bank, at such times and in such places as the examiner may specify (being times and places which, in the opinion of the examiner, are not detrimental to the conduct of the normal daily business of such institution), all books, minutes, accounts, cash, securities, documents and vouchers in their possession or custody, relating to their business and shall supply all information concerning their business as may reasonably be required by such examiner within such time as the examiner may specify.
- (2) If any books, minutes, accounts, cash, securities, documents and vouchers are not produced or information not supplied in accordance with subsection (1), the defaulting financial institution or affiliate, or both, as the case may be, commits an offence and shall be liable on conviction to a fine of not less than fifty thousand Emalangeni (E50,000) and an additional fine of not less than twenty-five thousand Emalangeni (E25,000) in respect of every day during which the default continues.
- (5) If any information supplied or item produced under subsection (1) is false in any material particular, the financial institution or affiliate, or both, as the case may be, commits an offence and shall be liable on conviction to a fine of not less than five hundred thousand Emalangeni (E500,000).
- (6) As soon as possible after the conclusion of an examination, the Bank shall forward a summary of the examiner's report containing its salient points to the head office of the financial institution concerned.
- (7) All expenses of, and incidental to, an examination shall be paid by the financial Institution as the Bank may prescribe in Bylaws.

Other Offences.

41. Any director, officer, employee or agent of a financial institution commits an offence and shall be liable on conviction to a fine of one hundred thousand Emalangeni (E100,000), or imprisonment for not less than one year or both, if he:
- (a) obstructs the proper performance by an auditor of his duties in accordance with the provisions of this Act, or a lawful examination of such institution by an examiner duly authorized by the Bank;
- (b) with intent to deceive makes any false or misleading statement or entry, or omits any statement or entry that should be made, in any book, account, report, or statement of such institution.

Powers After Examination.

42. Without derogating from its powers under Part V of this Act or the Schedule hereto, the Bank may, if, in its opinion, an examination or other information about the institution shows that the financial institution concerned is conducting its business in an unlawful or unsound manner or that

it is otherwise in an unsound condition:

- (a) require such institution to take such measures as the Bank may consider necessary to rectify the situation;
- (b) appoint a person, who in its opinion has had proper training and experience, to advise the financial institution on measures to be taken to rectify its situation, and shall fix his remuneration which shall be paid by the financial institution.

Confidentiality of Information.

43. (1) Nothing in this Act shall authorize the Minister or the Bank to inquire or cause an inquiry to be made into the affairs of any individual customer of a financial institution.
- (2) Except for the purpose of the performance of his duties or the exercise of his functions or when lawfully required to do so by any court under any law, no person appointed under Section 39 to examine the affairs of a financial institution or under Section 42 to advise a financial institution, shall disclose to any person any information relating to the affairs of any financial institution or other person, including any customer of a financial institution, which he has acquired in the performance of his duties or the exercise of his functions.
- (3) Every such examiner or adviser shall, before acting in the execution of his office, take and subscribe before a Commissioner of Oaths such oath of fidelity or secrecy as may be prescribed by Bylaws:

Provided that this provision shall not apply to a person who has already taken the oath prescribed in Section 20 of the Central Bank of Swaziland Order No.6 of 1974.

- (4) Every such examiner or adviser who in contravention of the true intent of the oath of fidelity or secrecy taken by him and without lawful excuse, reveals any matter which has come to his knowledge in his official capacity commits an offence and shall be liable on conviction to a fine of not less than five thousand Emalangeni (E5,000) or imprisonment for two years or both.
- (5) Any such examiner or adviser who acts in the execution of his office before he has taken the prescribed oath he commits an offence and liable on conviction to a fine of not less than five hundred Emalangeni (E 500).

Publication of Information.

44. (1) The Bank may publish in whole or in part, in such form and at such time as it may determine, any information or data furnished or collected under this Act:

Provided that no information or data shall be published which might disclose the particular affairs of a financial institution or of a customer of a financial institution unless the consent of the financial institution or customer, as the case may be, has been obtained.

- (2) The Bank may communicate confidential information obtained in the course of its examination and its receipt of reports made under Section 38 to the central banks and banking supervisory authorities of other countries.

Annual Report by Bank.

45. The Bank shall annually submit to the Minister a report on all financial institutions and agents licensed under this Act and on all matters relating to such institutions and agents during the year under review, and the Minister shall lay the report before Parliament.

PART V

MISCELLANEOUS PROVISIONS

Enforcement of Compliance.

46. (1) Whenever the Bank shall find that a financial institution or any of its directors, officers, employees, controlling shareholders, or connected persons has engaged in unsafe or unsound practices in conducting the business of the institution, or has violated any provision of this Act, Regulations, Bylaws, agreement with, or order of the Bank to which the institution is subject, or the Bank has reasonable cause to believe that such actions or violations are about to occur, the Bank may decide to take any one or more of the following courses of action:
- (a) issue a written warning incident to or supplementing an examination report;
 - (b) conclude a written agreement providing for a program of remedial action;
 - (c) issue an order to cease and desist that requires the institution and/or the responsible person to cease and desist from the actions and violations specified in the order and that may, further, require affirmative action to correct the conditions resulting from any such actions or violations;
 - (d) issue an order to suspend from office in the institution any person who has engaged in, or is about to engage in, or is otherwise responsible for, such actions or violations and the suspension shall be for an initial period of thirty days which may be extended for similar periods or made permanent;
 - (e) impose an administrative penalty against the institution and/or any responsible person of not more than twenty-five thousand Emalangeni (E25,000) for each day during which a violation continues of any provision of this Act, Regulations, Bylaws, agreement or order; or
 - (f) revoke the licence of the institution to do banking business.
- (2) Any course of action taken in terms of subsection (1) shall be notified in writing to the financial institution or the responsible person, as the case may be, and shall take effect upon receipt and if no complaint is made within eight days, consent to such action shall be presumed.
- (3) If the recipient of the notice files a complaint and requests a hearing, the Bank shall provide an opportunity for the recipient to be heard and present arguments within eight days.
- (4) If after the hearing, the Bank does not find that the complaint is justified, it shall be reviewed by the board of the Bank and the decision of the board, which shall be rendered within eight days, shall be final unless the recipient seeks its review by the Court within thirty days of that decision.

Liabilities of Directors and Officers.

47. Any person being a director, chief executive officer, manager, or other officer of a Financial institution, who:
- (a) knowingly violates any law, rule, regulation, bylaw, agreement with an order by the Bank to which the institution is subject;
 - (b) participates or assents to such violation; or
 - (c) commits gross negligence or intentional wrong in the course of his duties or intentional wrong to the financial institution;

shall be liable in his personal and individual capacity for all damages which the financial institution, its shareholders or any other persons shall have sustained in consequence.

Failure to Secure Compliance.

48. Any director, chief executive officer, manager, or other officer of a financial institution who fails to take all reasonable steps to secure compliance by the institution with any requirement of this Act, or Regulations or Bylaws made under this Act, and the Central Bank of Swaziland Order, 1974, commits an offence and shall be liable on conviction to a fine of not less than fifty thousand (E50,000) or imprisonment for not less than one year, or both.

Persons Disqualified as Directors, etc.

49. (1) Without prejudice to anything in any other law, no person shall act or continue to act as a director or manager of, or otherwise be directly or indirectly involved in the management in Swaziland of, a financial institution, or be an agent within the meaning of Section 17, or otherwise represent in Swaziland any financial institution:

(a) if his estate is declared insolvent or bankrupt in Swaziland or any other country, if such person has not been rehabilitated by order of a court; or

(b) if he is convicted of an offence involving dishonesty or fraud.

(2) No person who has been a director or manager of, or otherwise directly or indirectly concerned in the management of, any financial institution which has been wound-up, whether in or out of Swaziland, shall, without the approval in writing of the Bank, act or continue to act as a director or manager of, or otherwise be directly or indirectly concerned in the management in Swaziland of, any financial institution.

(3) Any person who contravenes subsection (1) or (2) commits an offence and shall be liable on conviction to a fine of not less than two hundred and fifty thousand Emalangeni (E250,000) or imprisonment for two years or both.

(4) A person who is a director, officer or employee of a financial institution shall not serve at the same time as a director, officer or employee of any other financial institution except where the Bank after consultation with the Minister permits, in writing, such service in respect of not more than one such other institution.

Reserve for Losses due to Negligence or Dishonesty.

50. Every financial institution shall either maintain a special reserve account which is, in the opinion of the Bank, adequate and which is reserved exclusively for the purpose of making good any loss resulting from the negligence or dishonesty of any of its officers and other personnel, or it shall insure itself against such loss, to an amount which the Bank deems adequate, with a person approved by the Bank and carrying on insurance business or the business of guaranteeing against any such loss.

Financial Holidays.

51. (1) The Minister may declare by notice in the Gazette any day to be a financial holiday on which no financial institution may be open for business with the public.

(2) Except with the approval of the Bank, all financial institutions shall remain open for business with the public on such days, other than public holidays and financial holidays, and during such hours, as may be prescribed by Regulation or Bylaw.

(3) Any private obligation which can only be fulfilled at a financial institution and which would fall due on any day on which such institution is not open for business under this Section, shall be deemed to fall due on the next day on which such institution is open for business.

Substitution for Depositor's Signature.

52. If in any transaction connected with the opening of, deposit into, or withdrawal from, a deposit account, the depositor is unable to sign, his thumb impression affixed in the presence of an officer of the financial institution shall have the same legal effect as if it were the depositor's signature.

Acceptance of Deposits by Insolvent Financial Institutions.

53. (1) A financial institution which receives any deposits at a time when its liabilities exceed its assets commits an offence and shall be liable on conviction to a fine of not less than one hundred thousand Emalangeni (E100,000).
- (2) A director, officer or employee of a financial institution who knows of, or, in the proper performance of his duties, should know that the liabilities of such institution exceed its assets, and who receives, or authorises the acceptance of, a deposit commits an offence and shall be liable on conviction to a fine of not less than fifty thousand Emalangeni (E50,000) or imprisonment for not less than one year or both.
- (3) In any prosecution under subsection (1) or (2), it shall be a defence if the accused establishes that at the time of the acceptance of the deposit, the depositor was aware of the situation of the financial institution.

Anti-Competitive Agreements.

54. Every contract, combination or conspiracy in restraint of banking business shall be illegal and any person who shall make any such contract or engage in any such combination or conspiracy commits an offence and liable on conviction to a fine of not less than five hundred thousand Emalangeni (E500,000) or to imprisonment for one year or both.

Tying Provisions.

55. (1) A financial institution shall not extend credit, lease or sell property of any kind, or furnish any service on the condition or requirement:
- (a) that the customer shall obtain or provide some additional credit, property or service from or to such financial institution, its holding company or any other subsidiary of that company, other than those related to and usually provided in connection therewith as determined by the Bank;
 - (b) that the customer shall not obtain some other credit, property or service from a competitor of such financial institution, its parent company or any other subsidiary of that company, other than a condition or requirement that such financial institution shall reasonably impose in a credit transaction to assure the soundness of the credit.
- (2) The Bank may permit such exceptions to this prohibition as it considers will not be contrary to its purpose.
- (3) Where the Bank has reason to believe that a financial institution is in breach of subsection (1) above, it shall carry out an investigation to determine whether there is such a breach.
- (4) The procedure for any investigation in terms of this Section shall be prescribed in Bylaws made by the Bank.
- (5) If, following the investigation, a financial institution is found to be in breach of this Section, it shall be liable to a minimum administrative penalty to be imposed by the Bank of fifty thousand Emalangeni (E50,000) plus an additional fine of twenty-five thousand Emalangeni (E25,000) in respect of each day in which the breach continues.

Board of Directors.

56. (1) Within a period of six months from the coming into force of this Act, the board of a financial institution shall consist of not fewer than five or more than fifteen directors of which at least 50% shall be Swazi citizens including the Chairman and the principal officer of the financial institution shall be a member of the board.
- (2) The principal officer acting in the capacity of board member shall not be the chairman of the board.

- (3) No person shall serve as director, or principal officer of a bank without the prior written approval of the Bank if:
- (a) the bank holds an unreimbursed loss attributable to a charged-off obligation of, or holds a judgement against the person or an entity that was controlled by the person at the time of funding and at the time of default on the loan or other advance of credit that gave rise to the judgement or charged-off obligation; or
 - (b) the person has been convicted of a criminal offence involving fraud or other dishonesty.
- (4) If the shareholders of a financial institution do not elect directors before the 61st day after the date of its regular annual meeting, the Bank may appoint a curator in terms of this Act.
- (5) If the curator is unable within ninety days following the appointment to nominate and elect persons willing and able to serve as directors, and the shareholders of the financial institution have not elected directors during this time period, the financial institution shall be liquidated in accordance with the Schedule to this Act.
- (6) Where there is a vacancy on the board that reduces the number of directors to fewer than five, the remaining directors shall nominate and elect a person(s) willing and able to serve as a director(s) by not later than thirty days after the date the vacancy occurs.
- (7) The Bank may, sixty days after the date the vacancy referred to in subsection (6) occurs appoint a curator in terms of this Act to operate the financial institution and nominate and elect a person(s) willing and able to serve as a director(s) so that the board shall consist of not fewer than five persons.
- (8) If the curator is unable to nominate or elect a person(s) willing and able to serve as a director to increase the number of directors to not less than five within ninety days following the appointment of the curator, the financial institution shall be liquidated in accordance with the Schedule to this Act.
- (9) Before a person commences to serve as a director, the person shall submit an affidavit for filing in the minutes of the financial institution stating that the person, to the extent applicable:
- (a) accepts the position and is not disqualified from serving in the position;
 - (b) will not violate or knowingly permit any director, principal officer, or other employee of the financial institution to violate any provision of this Act;
 - (c) will diligently perform the duties of the position; and
 - (d) acknowledges and accepts the responsibility for the overall supervision of the bank.
- (10) The board shall meet as often as the business of the financial institution may require but not less frequently than once during each calendar quarter.
- (11) At each regular meeting the board shall review and approve the minutes of the prior meeting and review the operations, activities, and financial condition of the bank.
- (12) The board may designate committees from among its members to perform these duties and approve or reject the committees' reports at each regular meeting.
- (13) The board shall keep minutes of its proceedings.
- (14) The board shall appoint a principal officer who shall primarily be responsible for the execution of board policies, supervision of the daily operations of the financial institution, and the maintenance and storage of all books and records of the financial institution. The board may appoint other officers of the financial institution as it considers necessary.

- (15) Unless expressly authorized by the board and recorded in its minutes, an officer or employee of the bank may not create or dispose of an asset of a financial institution or create or incur a liability on behalf of the financial institution.

Transactions Involving Directors, Principal Shareholders, Officers, or Affiliates.

57. (1) Without the prior approval of a disinterested majority of the board recorded in the minutes, or if a disinterested majority cannot be obtained the prior written approval of the Bank, a bank may not directly or indirectly:
- (a) sell or lease an asset of the financial institution to a director, principal shareholder, officer, or an affiliate; or
 - (b) purchase or lease an asset in which a director, principal shareholder, officer, or affiliate of the bank has an interest in:

Provided that in relation to the property mentioned in subsection (1)(b) above, a lease may not be concluded, renewed, or extended without the prior written approval of the Bank.

- (2) All transactions, both debit and credit, with directors, principal shareholders, officers, or an affiliate shall be on terms and conditions as are offered to members of the general public, that are consistent with safe and sound banking practices, and are in full compliance with the bank's operating policies and procedures.
- (3) The Bank shall issue Bylaws governing the extension of loans and other credit facilities to directors, principal shareholders, officers, and affiliates, and their related interests.

Acquisition and Ownership of Facilities, Fixed Assets, and other Real Property.

58. For the purposes of this Section, "facility" means real property, including an improvement, that a financial institution owns or leases, to the extent the lease or the leasehold improvement is capitalised, for the purpose of:
- (a) providing space for employees of the financial institution to perform their duties and for employees and customers of the financial institution to park;
 - (b) providing housing accommodation for its staff;
 - (c) conducting banking business, including meeting the reasonable needs and convenience of the public and the financial institution's customers, computer operations, document and other item processing, maintenance and storage of foreclosed collateral pending disposal;
 - (d) holding, improving, and occupying as an incident to future expansion of the financial institution's facilities; or
 - (e) conducting any other activity as may be authorised by the Bank.

Investment in Facility.

59. (1) A financial institution shall not, without the prior written approval of the Bank, directly or indirectly invest an amount in excess of its unimpaired paid-up or assigned capital and unimpaired balance in the reserve account in facilities, furniture, fixtures, equipment, or vehicles.
- (2) Real property acquired for the purposes envisaged in Section 58(d) and not improved and occupied by the financial institution ceases to be a facility on the third anniversary of the date of its acquisition unless the Bank grants a delay in the improvement and occupation of the property by the financial institution.
- (3) A financial institution shall comply with regulatory accounting principles in accounting for its investment in and depreciation of facilities, furniture, fixtures, equipment, and vehicles.

Other Real Property.

60. A financial institution may not acquire real property except:

- (a) as provided in Section 58 for use by a financial institution as a facility;
- (b) through foreclosure on debts previously contracted in good faith; or,
- (c) as the Bank may prescribe in Bylaws.

Liquidation and Re-organisation of a Financial Institution.

61. (1) Notwithstanding the provisions of the Companies Act, No.7 of 1912, the Insolvency Act, No. 81 of 1955 or any other law, the liquidation and re-organisation of financial institutions shall be subject to the provisions stated in the Schedule to this Act.

(2) The Minister may, in consultation with the Bank, amend the schedule to this Act by Notice published in the Gazette.

PART VI**GENERAL PROVISIONS AND REPEAL****Regulations.**

62. The Minister may, in consultation with the Bank, make Regulations for the better carrying out of the purposes and provisions of this Act, including:

- (a) prescribing annual license fees for financial institutions, their agents and branches;
- (b) prescribing the form of deed of hypothecation;
- (c) prescribing the oath of fidelity and secrecy;
- (d) declaring financial holidays; or
- (e) prescribing the manner of making appeals.

Bylaws.

63. The Bank shall make Bylaws, including prescribing:

- (a) minimum required capital;
- (b) computation of risk weighted assets;
- (c) classes of institutions;
- (d) minimum liquid assets;
- (e) the distribution between the various types of liquid assets required;
- (f) prudential rules for the aggregation and attribution of loans and credit facilities;
- (g) a system of loan classification and minimum provisioning requirements for bad and doubtful debts;
- (h) reporting format and content of returns;
- (i) prudential rules for the acquisition of real property;

- (j) minimum shareholding to be held by Swazi citizens; and
- (k) a time limit for localization of senior management positions.

Appeals.

64. (1) Any decisions taken by the Bank under this Act including any refusal or revocation of a licence, shall be subject to appeal to the Minister.
- (2) The appeal shall be noted in the manner and within the time prescribed by regulation in terms of Section 62.

Application to Swaziland Development and Savings Bank.

65. This Act shall apply to the Swaziland Development and Savings Bank to the extent that it is not inconsistent with any law regulating the affairs of that bank.

Repeal.

66. The Financial Institutions (Consolidation) Order No.23 of 1975 is hereby repealed.

SCHEDULE

PART I

CURATORSHIP

1. Where the Bank deems it necessary in order to conserve the assets of a financial institution for the benefit of its depositors and other creditors, it shall appoint a curator, which may be the Bank, in which instance the Bank shall appoint a specific employee of the Bank to manage the curatorship, or another person, upon finding that:
- (a) the capital of the financial institution is impaired or such impairment is threatened;
 - (b) the financial institution is violating the provisions of this Act or the Central Bank of Swaziland Order No. 6 of 1974;
 - (c) the financial institution is engaging in fraudulent or questionable practices in the conduct of its business which endangers its reputation or threatens its solvency;
 - (d) the financial institution is conducting business in an unsafe or unauthorized manner; or,
 - (e) the financial institution is violating any conditions of its licence, any Regulation or Bylaw made under this Act, or order of the Bank.
2. The curator shall:
- (a) assume the management of the financial institution, all of its property, books, records and effects;
 - (b) exercise all powers necessary to preserve, protect and recover any of the assets of the financial institution; and
 - (c) recover all monies and debts due to the institution; and
 - (d) institute any legal proceedings on behalf of the institution and defend suits against it.
3. The powers of the board of directors shall be suspended during the period of the curatorship until the conclusion of the curatorship.

4. The curator shall have the power to overrule or revoke decisions of the board of directors and management of the financial institution.
5. The remuneration of the curator, and the indemnification of the curator from liability to third persons on account of all actions taken in good faith, shall be borne by the financial institution.
6. The curator shall report to and be responsible to the Bank and the term of the curator shall continue, unless replaced by a successor, until such time as the Bank finds either:
 - (a) that the financial institution is rehabilitated or reorganized, so that it may be returned to management or new management under such conditions as are necessary to prevent a recurrence of the conditions that gave rise to the curatorship; or
 - (b) that the financial institution is in such condition that its continuance in business would involve probable loss to its depositors and other creditors, in which case the provisions of Part III of this Schedule shall apply.
7. The curator shall have power to:

- (a) suspend, in whole or in part, the repayment or withdrawal of deposits and other liabilities of the financial institution:

Provided that deposits and other credits received while the financial institution is under curatorship shall not be subject to any limitation as to repayment or withdrawal but shall be segregated and not used to liquidate any indebtedness of the financial institution existing at the time the curator was appointed or subsequent indebtedness incurred in order to discharge such indebtedness;

- (b) repudiate any contract or lease to which the financial institution is a party other than a financial contract (such as a securities contract, commodity contract, forward contract, repurchase agreement, swap agreement or other similar agreement that the Bank determines to be a financial contract for the purposes of this provision); Provided, however, that the curator may repudiate a financial contract that in his opinion is fraudulent;
- (c) enforce any contract other than a financial contract entered into by the financial institution notwithstanding any provision of the contract providing for termination, default or acceleration by reason of insolvency or the appointment of a curator.
8. The curator shall seek the authority of the Bank to rehabilitate the financial institution and return it to management or to reorganize it in accordance with the provisions of this Schedule.
9. (1) If the Bank authorizes the curator to proceed to reorganize the financial institution, the curator shall, after granting a hearing to all interested parties, propose a reorganization plan and send a copy of it to all depositors and other creditors.
 - (2) The copy of the reorganization plan shall be accompanied by a notice stating that if the reorganization plan is not refused in writing within a period of (thirty) days by persons holding at least (one-third) of the aggregate amount of deposits and creditors comprising at least (one-third) in value of the aggregate of the claims of creditors (other than subordinated creditors), the curator shall, with the approval of the Bank, proceed to carry out the reorganization plan.
10. In deciding whether to approve a reorganization plan, the Bank shall consider whether:
 - (a) the reorganization plan is equitable, and likely to protect the interests of the depositors, creditors and shareholders;
 - (b) the reorganization plan provides for bringing in new funds so as to establish adequate ratios between:
 - (i) capital and deposits;

- (ii) capital and risk assets; or
 - (iii) liquid assets and deposits; or
 - (c) the reorganization plan provides for the removal of any director, officer, or employee responsible for the circumstances which necessitated the appointment of the curator.
11. When in the course of reorganization it appears that circumstances render the plan inequitable or its execution undesirable, the curator may recommend to the Bank to order the compulsory liquidation of the financial institution in accordance with the provisions of Part III of this Schedule.
12. During the period of curatorship, an aggrieved party may appeal against an action or order of the curator or of the Bank to the Court.

PART II

VOLUNTARY LIQUIDATION

13. (1) Any voluntary liquidation of a financial institution shall be subject to the written authorization of the Bank.
- (2) The Bank may grant such authorisation if it appears to the Bank that:
- (a) the financial institution is solvent and has sufficient liquid assets to repay its depositors and other creditors without delay;
 - (b) the liquidation has been approved by shareholders representing two-thirds of its capital at a meeting called expressly for this purpose.
14. Upon receipt of the authorization of the Bank, the financial institution shall:
- (a) immediately cease to do business, retaining only the powers to do the necessary business for the purpose of effecting an orderly liquidation;
 - (b) repay its depositors and other creditors; and
 - (c) wind up all operations undertaken prior to the receipt of the authorization.
15. Within thirty days from the receipt of the authorization referred to in Section 13 of this Schedule a notice of voluntary liquidation, setting forth such information as the Bank may prescribe, shall be sent by mail to all depositors, other creditors, and persons otherwise entitled to funds or property held by the financial institution as a fiduciary or lessor of a safe deposit box.
16. In addition, the notice shall also be posted conspicuously on the premises of each office and branch of the financial institution and shall be given such other publication as the Bank may direct.
17. The authorization to go into voluntary liquidation shall not prejudice the rights of a depositor or other creditor to payment in full of his claim or the right of an owner of funds or other property held by the financial institution to the return thereof and all lawful claims shall be paid promptly and all funds and other property held by the financial institution shall be returned to their rightful owners within such maximum period as the Bank may prescribe.
18. (1) If in the opinion of the Bank the financial institution has discharged all of its obligations, it shall be struck from the list of authorized institutions and the remainder of its assets shall be distributed among its shareholders in proportion to their respective rights.
- (2) No such distribution shall be made before:
- (a) all claims of depositors and other creditors have been paid or, in the case of a disputed claim, before a financial institution has turned over to the Bank, or to any other person proposed by the liquidating financial institution and approved by the Bank,

sufficient funds to meet any liability that may be judicially determined;

- (b) any funds payable to a depositor or other creditor who has not claimed them have been turned over to the Bank or to any other person proposed by the liquidating financial institution and approved by the Bank; and
- (c) any other funds and property held by the financial institution that could not be returned to the rightful owners in accordance with the provisions of Section 16 of this Schedule have been transferred to the Bank, or to any other person proposed by the liquidating financial institution and approved by the Bank, together with the relevant inventories.

19. (1) Any property not claimed within a period of ten years following their transfer shall be presumed to be abandoned property and shall be dealt with as determined by the Bank.

Any funds remaining unclaimed for a period of more than five years following their transfer to the Bank shall be dealt with as determined by the Bank.

20. If the Bank finds that the assets of a financial institution whose voluntary liquidation has been authorized will not be sufficient for the full discharge of all of its obligations or that completion of the liquidation is unduly delayed, it shall appoint itself or another person as liquidator to take possession of the financial institution and commence proceedings leading to its compulsory liquidation in conformity with the procedures set forth below.

PART III

COMPULSORY LIQUIDATION

21. Notwithstanding the provisions of the Company's Act No. 7 of 1912 and the Insolvency Act No. 81 of 1955, the Bank may appoint itself, in which instance the Bank shall appoint a specific employee of the Bank as manager of the liquidation, or another person as liquidator, to take possession of a financial institution upon a finding by the Bank that:

- (a) its capital is impaired or its condition is otherwise unsound:

Provided, that, the condition of a financial institution shall be deemed to be unsound when the ratio of its capital to total assets is less than three percent;

- (b) its business is being conducted in an unlawful, fraudulent, unsafe or unsound manner;
- (c) the continuation of its activities is detrimental to the interests of its depositors;
- (d) its licence has been revoked or suspended; or
- (e) notice of intention to revoke the licence of the financial institution has been served under Section 16 of this Act.

22. (1) When taking possession in terms of Section 21 of this Schedule, the liquidator shall post on the premises of the financial institution a notice announcing its action pursuant to this Schedule, and the time when such possession shall be deemed to take effect which time shall not be earlier than the posting of the notice.

- (2) A copy of the notice shall be lodged with the Court.

23. Within a period of thirty days after the date on which the liquidator has taken possession of the financial institution, the financial institution or any other interested party may institute proceedings in Court to have its rights determined:

Provided that such proceedings shall not operate as a stay to any action that the liquidator is authorized to take under this Schedule.

24. The liquidator shall as soon as possible after his appointment commence proceedings leading to compulsory liquidation and take such other measures as he may deem appropriate in accordance with Section 25 of this Schedule.
25. (1) After taking possession of a financial institution, the liquidator shall be vested with the full and exclusive power of management and control of that financial institution, including the power to:
- (a) continue or discontinue its operations;
 - (b) stop or limit the payment of its obligations;
 - (c) employ any necessary staff;
 - (d) execute any instrument in the name of the financial institution;
 - (e) initiate, defend in its name any action or proceedings to which the financial institution may be party;
 - (f) terminate possession by restoring the financial institution to its board of directors; or
 - (g) liquidate or take such other measures as it may deem appropriate under this Section.
- (2) The liquidator shall succeed to all rights, titles, powers and privileges of the financial institution, of any shareholder, account holder, depositor, officer, or director of the financial institution with respect to it and its assets.
- (3) The liquidator may, with the approval of the Bank and in terms of Section 21 of this Schedule:
- (a) merge or consolidate the financial institution with another financial institution;
 - (b) transfer any asset or liability of the financial institution; or
 - (c) offer the assets or shares of the financial institution for sale to any interested party or as security for loans from the Bank.
26. (1) The actions of the liquidator of a financial institution under Section 25 of this Schedule may be confirmed by the Bank.
- (2) To facilitate the liquidation of a financial institution, the Bank may:
- (a) purchase any of the assets of the financial institution or assume any of its liabilities;
 - (b) guarantee another financial institution against loss by reason of such financial institution merging or consolidating with or assuming the liabilities and purchasing the assets of such financial institution; or
 - (c) make loans or contributions to, or deposits in, or purchase the securities of, such other financial institution.
- (3) The Bank may provide any investor acquiring control of, merging with, consolidating with or acquiring the assets of a financial institution with the financial assistance that it is authorized to provide under subsection (2).
- (4) Pending such further action as is contemplated under subsection (1), the Bank may grant a licence for the operation of a temporary financial institution for not longer than two years.
- (5) The temporary financial institution may:
- (a) assume such deposits and other liabilities; or

- (b) purchase such assets, as the Bank may deem appropriate, of a financial institution that becomes subject to Part III of this Schedule.
- (6) The Board of Directors of the temporary financial institution shall be appointed by and be responsible to the Bank.
- (7) In determining the course of action to be taken in the liquidation of a financial institution under this Part, the Bank shall be guided by the following considerations:
- (a) least cost to the Bank and any funds which it may administer in order to protect depositors;
 - (b) convenience to the community in maintaining banking facilities; and
 - (c) tendency to create a monopoly or to restrict competition in the area served.
27. (1) When the liquidator has taken possession of a financial institution:
- (a) any term, statutory, contractual or otherwise, on the expiration of which a claim or right of the financial institution would expire or be extinguished shall be extended by six months from the date of the seizure;
 - (b) any attachment or lien except a lien existing six months prior to the seizure of the financial institution shall be vacated and no attachment or lien except a lien created by the liquidator in the application of these provisions shall attach to any of the property or assets of the financial institution so long as such possession continues; and
 - (c) any transfer of an asset of the financial institution made after or in contemplation of its insolvency or the seizure with intent to effect a preference within six months thereof shall be void. In the latter case, the liquidator may recover the asset transferred or its value from the initial transferee or any subsequent transferee except a transferee who has acquired the asset for value in good faith.
28. No execution shall be returned against the assets of a seized financial institution except, in the discretion of the court, an execution effected pursuant to a judgment rendered prior to the date of the seizure for an amount not exceeding ten thousand Emalangi (E10,000).
29. The liquidator shall have power to:
- (a) suspend, in whole or in part, the repayment or withdrawal of deposits and other liabilities of the financial institution;
 - (b) repudiate any contract or lease to which the financial institution is a party other than a financial contract, including securities contract, commodity contract, forward contract, repurchase agreement, swap agreement or other similar agreement that the Bank determines to be a financial contract for the purposes of this provision:
- Provided, that the liquidator may repudiate a financial contract which in his opinion is fraudulent; or
- (c) enforce any contract other than a financial contract entered into by the financial institution notwithstanding any provision of the contract providing for termination, default or acceleration by reason of insolvency or the appointment of a liquidator.
30. As soon as possible, the liquidator shall take the necessary steps to terminate all fiduciary functions performed by the financial institution, return all assets and property held by the financial institution as a fiduciary to the owner thereof, and settle its fiduciary accounts.
31. (1) As soon as possible after taking possession, the liquidator shall make an inventory of the assets of the financial institution and lodge a copy thereof with the Registrar of the Court and this copy of the inventory shall be available for examination by interested parties at the office of the Registrar of the Court.

- (2) The liquidator shall, not later than one hundred and twenty days after his appointment, send by mail, to the address shown on the financial institution's books, to all depositors, other creditors, safe deposit box lessees, a statement of the nature and amount for which their claim is shown on the financial institution's books.
 - (3) Any objection to the statement shall be filed with the liquidator not later than thirty days after receipt of the statement.
 - (4) The liquidator shall inform safe deposit box lessees to withdraw their property in person within thirty days after receipt of the statement.
32. (1) The contents and any unclaimed property held by the financial institution as custodian, together with inventories pertaining thereto, shall be deposited by the liquidator in the Bank or in such depository as the Bank may direct and shall be kept for ten years, unless claimed by the owner before the expiration of that period.
- (2) On the expiration of the ten years all funds and property not claimed shall be presumed to be abandoned property and shall be dealt with as determined by the Bank.
33. Within ninety days after expiration of the thirty days specified in Section 31 of this Schedule, the liquidator shall:
- (a) reject any claim if it doubts the validity thereof;
 - (b) determine the amount, if any, owing to each known depositor or other creditor and the priority class of his claim under the provisions of this Schedule;
 - (c) prepare for filing with the Court a schedule of the steps proposed to be taken; and
 - (d) notify each person whose claim has not been allowed in full, and publish in a newspaper of general circulation once a week for three consecutive weeks, a notice of the date and place where the schedule of the steps the liquidator proposes to take will be available for inspection, and the date, not sooner than thirty days counting from the date of the third publication in the newspaper, on which the liquidator will file the schedule with the Court.
34. (1) Within twenty days after the filing of the schedule with the Court, any depositor, other creditor, or shareholder, and any other interested party may file an objection to any step proposed and any such objection shall be considered by the Court following notice to the liquidator, and any interested parties.
- (2) If an objection is upheld, the Court shall direct that an appropriate Modification of the schedule be made.
- (3) After filing the schedule the liquidator may, from time to time, make partial distribution to the holders of claims which are undisputed or which have been allowed by the Court, on condition that a proper reserve is established for the payment of disputed claims and as soon as possible after all objections have been decided upon, the liquidator shall make final distribution.
35. (1) The following claims shall have priority against the general assets of a financial institution in the order indicated below:
- (a) any necessary and reasonable costs, charges and expenses incurred by the liquidator, including his remuneration, in application of the provisions of this Schedule;
 - (b) any wages and salaries of officers and employees of the financial institution in liquidation for the three month period preceding the seizure of the Bank;
 - (c) any taxes, rates and deposits owed to the Government;

(d) any savings and time deposits which when aggregated do not exceed an amount of Ten Thousand Emalangi (E10,000) per depositor;

(e) other deposits; and

(f) other liabilities.

(2) In the event of the winding up of a financial institution the provisions of section 47 of this Act shall apply.

(3) After payment with interest thereon at a rate to be fixed by the liquidator with the approval of the Court of all the claims filed on time, any remaining claims which were not filed within the prescribed time shall be paid.

(4) If the amount available for any class is insufficient to provide payment in full, the said amount shall be distributed pro rata among the members of that class.

36. Any assets remaining after all claims have been paid shall be distributed among all the shareholders in proportion to their participation.

37.(1) Unclaimed funds remaining after the final distribution shall be deposited by the liquidator in the Bank or such depository as the Bank may direct and shall be kept for ten years, unless claimed by the owner before the expiration of that period.

(2) On the expiration of the said period the funds remaining unclaimed shall be presumed to be abandoned property and shall be dealt with as determined by the Bank.

38.(1) Once all assets have been distributed in accordance with the provisions of this Schedule, the liquidator shall render an audited account to the Court and upon approval of this account by the Court, the name of the financial institution shall be struck from the list of authorized institutions and the Registrar of Companies shall be notified of the fact of the striking off.

(2) The liquidator shall be relieved of any liability in connection with the liquidation and the liquidation shall then be declared by the Court which shall terminate the judicial existence of the financial institution in Swaziland.

39. The curator, liquidator or the Bank may bring a civil action against any director, chief executive officer, manager, officer, employee, agent or independent contractor of a financial institution for gross negligence or intentional wrong for damages caused to that financial institution and may recommend to the Director of Public Prosecutions the criminal prosecution of any such person.