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Introduction

Although there is a strong Roman–Dutch influence in South African law, particularly as regards security over property, it may, in the main, be regarded in respect of commercial and financial matters as a common law jurisdiction. Legal precedent and common law principles (inherited primarily from the UK legal system) govern the way in which the South African courts interpret contractual, corporate and commercial issues.

Thus, unless otherwise provided for by way of South African legal precedent, statute, regulation and subordinate legislation, banking law in South Africa remains subject to the common law.

Following closely the approach of the English banking system, South Africa has adopted the "Twin Peaks" model of banking and financial market regulation.

The name Twin Peaks (taken from a popular TV horror series!) was adopted in 1995 by Dr Michael Taylor, who at the time was an official with the Bank of England, as a suitable description for a new proposed banking regulatory system that he was advocating.

In his landmark paper, Taylor argued convincingly that a sectoral approach based on the erroneous assumption that financial institutions, whether they be banks, insurance companies or remittance payment institutions, ought to operate separately as silos only doing "banking", "insurance" or "remittances", as the case may be, was no longer appropriate. Greater legislative coordination was required, given the high degree of overlap between the activities of various financial institutions, the size of positions taken and the potential systemic risk resulting from an inadequate and fragmented supervision of the various financial institutions, their activities and corporate governance in the modern digital trillion-dollar economy.

Regulatory architecture: Overview of banking regulators and key regulations

The Twin Peaks system was initiated in South Africa by way of the Financial Sector Regulation Act 9 of 2017 (the "FSRA"), which was signed into law on 21st August 2017.

Prior to the FSRA, financial institutions other than banks were regulated by the Financial Services Board, while banks and mutual banks were regulated by the Registrar of Banks as part of the South African Reserve Bank (the "SARB"). The SARB is the Central Bank of South Africa and its main role is to ensure price stability with a view to facilitating sustainable economic growth as well as to oversee other banks.

On 1st April 2018, the Minister of Finance determined that operations commence under the FSRA. As a result, the Prudential Authority (the "PA") is now responsible for ensuring compliance of banks with the Banks Act 94 of 1990 (as amended) (the "Banks Act") and legislation passed thereunder.

The FSRA provides the legal basis for the Twin Peaks regulatory system of financial regulation, i.e., the PA and the Financial Sector Conduct Authority (the "FSCA"). The FSRA also confers further powers on the SARB by providing for the establishment of the Financial Stability Oversight Committee.

The PA, a juristic person created as "one peak" under the Twin Peaks system, acts within the administration of the SARB and is responsible for ensuring and maintaining a stable and sound financial monetary system. The PA is a key South African participant in international forums, including the Basel Committee on Banking Supervision (the "Basel Committee"). Implementation of the Basel Committee guidelines and recommendations is primarily carried out in South Africa under the auspices of the PA.

The FSCA constitutes the "other peak" under the Twin Peaks system. The FSCA regulates market conduct and aims to ensure market integrity and efficiency. Regulatory authorities in the financial sector now conduct their operations primarily under the auspices of the FSCA and/or the PA and the SARB, depending on the nature of the matter in question.

The FSCA website states that under current legislation, the FSCA is now responsible for administering the following Acts (as amended from time to time):

1. the Collective Investment Schemes Control Act (Act 45 of 2020);
2. the Credit Rating Services Act (Act 24 of 2012);
3. the Financial Advisory and Intermediaries Services Act (Act 37 of 2002);
4. the Financial Institutions (Protection of Funds) Act (Act 28 of 2001);
5. the Financial Intelligence Centre Act (Act 38 of 2001);
6. the Financial Markets Act (Act 19 of 2012);
7. the FSRA;
8. the Financial Services Board Act (Act 97 of 1990);
9. the Financial Services Ombud Schemes Act (Act 37 of 2004);
10. the Financial Supervision of the Road Accident Fund Act (Act 8 of 1993);
11. the Friendly Societies Act (Act 25 of 1956);
12. the Insurance Act (Act 18 of 2017);
13. the Long-term Insurance Act (Act 52 of 1998);
14. the Pension Funds Act 24 (Act 24 of 1956); and
15. the Short-term Insurance Act (Act 53 of 1998).

Activities undertaken under the licence provisions of one or more regulatory authorities may overlap. Hence, approval may be required by the FSCA and one or other regulatory authority(s). For example, an applicant issued a licence to provide services under the Pension Funds Act 24 may also require the consent of the FSCA. This approach evidences the move towards a centralised licensing process under the Twin Peaks regime.

Financial institutions pursuing several activities should expect to be required to obtain an FSCA-approved licence covering the various activities that the financial institution proposes to pursue. Legislation invariably provides for a transitional period to ensure alignment between the FSCA and/or PA (as the case may be) on the one hand and existing regulatory bodies on the other hand. Licensing will continue under existing laws and regulations until replaced by new legislation.

South Africa is a Member State of the Southern African Development Community ("SADC"). SADC has established two groups with the aim of facilitating cooperation, coordination of exchange controls and an alignment of the respective supervisory and risk management controls of the Member States. SADC encourages all SADC Central Banks to harmonise their banking, investment, and foreign exchange policies.

Two groups have been set up to promote these aims: the Committee of Central Bank Governors (the Secretariat of which is hosted by the SARB), which facilitates cooperation between the Central Banks of the SADC Member States; and the SADC Banking Association, which coordinates the cross-border banking activities of the Member States.

The SARB is also a member of other international compliance and governance bodies such as: the International Monetary Fund; the G20; the BRIC Group, composed of Brazil, China, India and Russia; the Bank for International Settlements; and the Global Financial Innovation Network, which aims to encourage the global exchange of new ideas and information and to act as a bridge between financial institutions in South Africa and regulators throughout the world.

There is no equivalent in South Africa of the Glass–Steagall Act, passed in 1933, which, *inter alia*, prevented commercial banks in the USA from acting as investment entities.

To register as a bank in South Africa, Section 11 of the Banks Act provides that the applicant must be a public company incorporated under the Companies Act 71 of 2008 (the "Companies Act"). However, proposed amendments to the Banks Act published on 7th May 2018 will, if enacted, enable the creation of state-owned banks. The new legislation would permit financial institutions such as the Postbank and the Land Bank to be licensed as fully operational banks.

Banks are required to be licensed and any licence must be renewed annually. The PA may grant or refuse to grant authorisation subject to certain conditions.

Section 17 of the Banks Act, *inter alia*, provides that the PA must be satisfied that the business the applicant proposes to conduct is that of a bank. The "business of a bank" is defined in Section 1 of the Banks Act. Any applicant requesting a licence is obliged to ensure the request is to undertake activities amounting to the business of a bank as defined.

Mutual banks may also be established under the Mutual Banks Act, 1993. A mutual bank is described as a legal person registered as a mutual bank whose members qualify as such by being shareholders entitled to participate in exercising control in a general meeting. Some provisions of the Banks Act also apply to mutual banks. The PA is also the Regulator of mutual banks.

The Co-operative Banks Act 40 of 2007 regulates cooperative banks and recognises them as a different tier of the official banking sector.

Foreign applicants are entitled to apply to register as a bank but must comply with the "Regulations relating to conditions for the Conducting of the business of a bank by a Foreign Institution by means of a Branch in the Republic" (the "Foreign Institution Regulations")

Under the Foreign Institution Regulations, the PA is required to be satisfied that: the relevant foreign Regulator of the foreign applicant has authorised the establishment of the branch; minimum capital reserves will be maintained; liquid asset criteria are satisfied; and Basel Committee guidelines are being met.

Other key banking regulators include:

1. the National Credit Regulator, which oversees the regulation of the South African credit industry, established under the National Credit Act, 2005; and
2. the Information Regulator, which is responsible for enforcing data protection laws and regulations made under the Protection of Personal Information Act, 2013 (the "POPI").

Under the POPI, the Information Regulator has jurisdiction throughout South Africa and is independent. However the Information Regulator must act in accordance with the Constitution and the law, and is accountable to the National Assembly. The POPI provides that the Information Regulator is also responsible for monitoring public and private compliance with the POPI (including monitoring the use of unique identifiers of data subjects) and for examining any proposed legislation, including subordinate legislation or proposed policy of the Government that the Information Regulator considers may affect the protection of the personal information of data subjects. The Information Regulator is obliged to report to the Minister the results of his or her examination.

Other key banking legislation includes:

1. the Currency and Exchanges Act 9 of 1933 (as amended by the Currency and Exchanges Amendment Act 23 of 1996), which regulates legal tender, currency exchanges and banking. Exchange Control Regulations have been issued under this Act imposing controls that restrict the export of capital; and
2. the National Payment Systems Act 78 of 1998, which regulates payment, remittances, clearing and settlement.

Recent regulatory themes and key regulatory developments

Recent developments in the South African banking industry have revolved around the implementation by the PA and the FSCA of their respective mandates under the Twin Peaks system, notably in the areas of banking conduct, capital and liquidity requirements and insolvency.

On 1st December 2020, Joint Standard 1 of 2020, published by the PA and the FSCA on 1st June 2020, became effective.

Joint Standard 1 of 2020 applies to "significant owners" of financial institutions as well as to financial institutions. Joint Standard 1 of 2020 defines a "person" (which may be a natural person, legal person or organ of state) as a significant owner of a financial institution if the person directly or indirectly, alone or together with a related or inter-related person, has the ability to control or influence materially the business or strategy of a financial institution.

Joint Standard 1 of 2020, issued pursuant to Chapter 11 of the FSRA and more particularly Section 159 of the FSRA, provides for the FSCA to develop standards on the fit and proper requirements for significant owners of financial institutions.

Joint Standard 1 of 2020 also provides for what constitutes an increase or a decrease in the extent of the ability of a person, alone or together, with a related or inter-related person, to control or materially influence the business or strategy of a financial institution.

Joint Standard 1 of 2020 amends Prudential Standard GOI 4: Fitness and Proprietary of Significant Owners and Key Persons of Insurers made by the PA under the Insurance Act, 2017 by deleting the term "significant owner" wherever it appears as well as repealing sections of the Prudential Standard.

Exemptions in respect of certain insurance institutions are also dealt with in Joint Standard 1 of 2020.

Restructuring and insolvency law in South Africa is governed primarily by the following legislation: (1) the latest Companies Act; (2) the previous Companies Act 61 of 1973; (3) the Insolvency Act 24 of 1936 (the "Insolvency Act"); (4) the Cross-border Insolvency Act 42 of 2000; (5) the Financial Matters Amendment Act 18 of 2019 (the "Financial Matters Amendment Act"); and (6) the Banks Act.

The Companies Act follows a similar approach to the USA Chapter 11 administration proceedings and replaces the procedure of "judicial management" by a system of "business rescue" with amended schemes of arrangement. The new system tilts the judicial scales in favour of the debtor.

Surprisingly, there is no provision in the Companies Act for a "fixed and floating charge" mechanism as exists under English law.

The fixed and floating charge provides for the creation of floating charges that automatically "crystalise" and is deemed to be a fixed charge should certain agreed defaults or insolvency events arise under the terms of a debenture agreement. The fixed and floating charge facilitates the prompt liquidation of assets by the creditor without the cumbersome procedure of trying to realise assets subject to security, such as a notarial bond.

The Financial Matters Amendment Act has amended Section 83 of the Insolvency Act to allow a creditor holding collateral under a master agreement (e.g., an ISDA (International Swaps and Derivatives Association) master agreement) to retain the proceeds of the realisation for the settlement of the secured claim subject to certain conditions and provided the net proceeds (if any) after such settlement are immediately given to the trustee appointed or, if there is no trustee appointed, to the Master of the High Court.

Previously, participants in the "over-the-counter" ("OTC") derivatives market risked being obliged under the Insolvency Act to pay the proceeds to the liquidator of a South African party.

The COVID-19 pandemic has been the source of new emergency legislation outside of the Twin Peaks system. For example, Regulation 355, described as the "COVID-19 Block Exemption for the banking sector 2020", was issued by the Minister of Trade, Industry and Competition, pursuant to Section 10 (10) read with Section 78 (1) of the Competition Act 89 of 1998, as amended in March 2020 for the purpose of strengthening the Government's programmes designed to fight COVID-19, after having declared a National State of Disaster published in Government Notice No. 313 of *Government Gazette* No. 43096 on 15th March 2020.

Bank governance and internal control

The Companies Act (as amended) and the Banks Act provide the legislative basis for governance and internal compliance of banks.

Sections 61 and 62 of the Banks Act provide that only auditors approved by the PA may be appointed by banks and controlling companies.

Section 63 of the Banks Act also provides that auditors be subject to reporting obligations to the PA should they become aware of any matter likely to affect the banks ability to continue as a going concern, conflict with principles of sound management or amount to inadequate maintenance of internal controls.

In order to reinforce compliance measures and internal controls, Section 27 of the Amendment Act 1 of 2017 (the "Amendment Act") (amending the Financial Intellegence Centre Act 38 of 2001, the "Intelligence Centre Act") provides that the directors of an "accountable institution" (e.g., a person who carries on the "business of a bank" as defined in the Banks Act) must ensure compliance by the accountable institution and its employees with the provisions of the Intelligence Centre Act. Thus, an accountable institution must develop, document, maintain and implement internal rules concerning prescribed matters under the Amendment Act, including a programme for anti-money laundering and counter-terrorism financing risk management and compliance. It is further provided that a Risk Management and Compliance Programme must be set up to enable the accountable institution to identify, assess, monitor, mitigate, manage and guard against the risk that the products or services provided by the accountable institution may involve or facilitate wittingly or unwittingly money laundering activities or the financing of terrorism and related activities.

The Amendment Act provided for the estabishment of the Financial Intelligence Centre, which is responsible for ascertaining the proceeds of crime, as well as combatting money laundering and the financing of terrorist organisations. The Amendment Act, *inter alia*, provides for: the Centre to administer measures pursuant to resolutions adopted by the Security Council of the United Nations; the sharing of additional information; and guidance to accountable institutions in respect of the freezing of property, as well as for the strengthening of customer due diligence measures.

Bank capital requirements

In 2009, South Africa became a member of the Basel Committee. The Basel Committee was founded to determine and disseminate international guidelines designed to improve the regulation and supervision of, and risk management within, the banking sector.

Basel Committee recommendations implemented in South Africa are implemented pursuant to South African law. Prescribed capital and liquidity requirements are covered in Section 70 of the Banks Act.

The Banks Act provides that "allocated capital and reserve funds" and "qualifying capital and reserve funds" in each case as described in the Banks Act are held in minimum prescribed amounts depending on whether the business of the bank in question: (i) does not include trading in financial instruments; (ii) consists solely of trading in financial instruments; or (iii) includes trading in financial instruments. Banks are expected under Regulation 38 of the Banks Act Regulations, published on 12th December 2012, to hold the greater of R250 million and a prescribed amount, currently set at 8% of risk-weighted assets as calculated under said Regulations.

The Basel III accord raised the minimum capital requirements for banks from 2% in Basel II to 4.5% of common equity, as a percentage of the bank's risk-weighted assets. There is also an additional 2.5% buffer capital requirement that brings the total equity to 7%. Banks may use the buffer when faced with financial stress. As from 2015, the Tier 1 capital requirement increased from 4% in Basel II to 6% in Basel III. Basel IV is currently being prepared by the Basel Committee.

Minimum prescribed Basel Committee guidelines in South Africa have been issued under Directive D4/2020 by the PA. The PA has also issued Directive D1/2020 to implement temporary measures to alleviate the impact of the COVID-19 pandemic by easing compliance with the prescribed liquidity coverage ratio and Directive D2/2020 to provide temporary capital relief.

On 2nd June 2020, the PA and the FSCA published Joint Standard 2 of 2020, entitled "Margin requirements for non-centrally cleared OTC derivative transactions", which prescribes the margin requirements for non-centrally cleared OTC derivative transactions.

For the purposes of Joint Standard 2 of 2020, the following collateral is listed as eligible to be taken into account when a provider of collateral is calculating the relevant required initial and variation margin:

a. cash;
b. gold;

c. such high-quality Government and Central Bank debt securities as may be specified in writing by the authorities;
d. such high-quality corporate bonds as may be specified in writing by the authorities;
e. such equities included in major indices as may be specified in writing by the authorities; and
f. such other assets or instruments as may be specified in writing by the authorities.

When entering into cross-border OTC transactions, the provider of collateral must ensure that the following provisions apply:

a. the relevant foreign jurisdiction has implemented margin requirements based on the Basel Committee and the International Organization of Securities Commissions Margin Requirements for Non-Centrally Cleared Derivatives Framework;
b. the foreign counterparty is subject to the margin requirements of the foreign jurisdiction; and
c. the provider is required to comply with, or is subject to, the margin requirements in the foreign jurisdiction.

Underpinning the posting of collateral pursuant to the terms of the above-mentioned Financial Matters Amendment Act and the Joint Standard 2 of 2020 is the requirement that the jurisdiction of the foreign counterparty recognises the enforceability of a netting agreement in the event of the insolvency of the counterparty and the enforceability of a collateral agreement upon the default of the counterparty.

If the jurisdiction of the foreign counterparty is deemed (and confirmed by way of an externally obtained legal opinion) to be a "non-netting jurisdiction", Joint Standard 2 of 2020 provides for certain limitations on the obligation to post margin.

Given the substantial change that the provisions of Joint Standard 2 of 2020 have introduced into South African netting and off-set law, Joint Standard 2 of 2020 envisages financial thresholds be met and the margin requirements be phased in in stages from the "effective date" of the Joint Standard 2 of 2020 (to be determined) until 1st September 2024.

The phased-in margin requirements under Joint Standard 2 of 2020 are applicable as from the effective date until 31st August 2021 for providers and their counterparties in which the aggregate month-end average gross national amount of OTC derivatives exceed, respectively: R30 trillion for the months of March, April and May; R23 trillion from 1st September 2021 to 31st August 2022; R15 trillion from 1st September 2022 to 31st August 2023; R8 trillion from 1st September 2023 to 31st August 2024; and thereafter, on a permanent basis, R100 billion from 1st September 2024.

Although published, the effective date under Joint Standard 2 of 2020 will only come into effect once agreed by the PA and the FSCA after consultation with relevant stakeholders.

On 12th June 2020, the Government tabled the Financial Sector Laws Amendment Bill with the Treasury, announcing that "this Bill will therefore reinforce and strengthen financial stability in South Africa". The Government statement further provides that the Bill will enable South Africa to meet basic international standards, following the 2008 Global Financial Crisis, as endorsed by G20 countries. The Bill aims to address the problem of banks that are considered "too big to fail".

The "resolution and deposit insurance" framework contained in the Bill provides that:

1. public funds will no longer be the default source of funding used to bail out failing banks and other large financial institutions;

2. a deposit insurance scheme, "Corporation for Deposit Insurance", shall be established and managed by the SARB;
3. losses incurred because of the failure of a financial institution shall be borne by way of a bail-in process initially by shareholders and creditors; and
4. further powers are to be given to the SARB to mitigate the effects of a serious failure of a financial institution and to ensure critical services are maintained, particularly in the event of the failure of a financial institution designated as a Systemically Important Financial Institution ("SIFI").

Section 29 of the FSRA stipulates that the Governor of the SARB may, by written notice to a financial institution, designate such institution as a SIFI. Once so designated, an institution is put on notice as being "too big to fail" given its systemic importance to the economy.

When determining whether a financial institution is a SIFI, the Governor is obliged to consider: the size of the institution; its complexity; its links with other financial institutions inside or outside of South Africa; whether there are other readily available substitute institutions able to replace the financial institution in question; and the recommendations of the Financial Stability Oversight Committee.

Rules governing banks' relationships with their customers and other third parties

On 3rd July 2020, the FSCA published Conduct Standard 3 of 2020 (Banks), otherwise known as the Conduct Standard for Banks (the "Conduct Standard").

The Conduct Standard is the first issued Conduct Standard specifically aimed at the banking sector.

Communication 38 of 2020 (Banks) issued by the FSCA states that the Conduct Standard is "the first step towards rolling out a comprehensive market conduct regulatory framework for the banking sector" and that "the main objective of the Conduct Standard is to introduce requirements ensuring the fair treatment of financial customers of banks".

The FSCA's statement supporting the Conduct Standard (the "Supporting Statement") notes that the motivation behind the process of establishing a market regulatory framework for the banking sector has been in no small measure encouraged by the revelations of the manipulation of foreign exchange rates by banks to increase their profits. The Supporting Statement further notes that six global banks (the Bank of America, UBS, the Royal Bank of Scotland, JPMorgan, Citigroup and Barclays) were fined more than USD5.6 billion by the US Department of Justice in settlement of the matter.

The Supporting Statement issued by the FSCA further provides that as the Conduct Standard is the first applicable to banks, much of the language is "high level" and does not specify in detail how the banks ought to satisfy the Conduct Standard.

Section 4 (3) provides that "[a] bank must establish and implement appropriate oversight arrangements to monitor and review the design and suitability of its financial products and financial services on an ongoing basis".

Section 4 (9) provides that "[a] bank must regularly review the oversight arrangements referred to in this section to ensure that they remain effective and up to date".

Section 4 (10) provides that "[a] bank must ensure that timeous remedial action is taken in respect of those financial products and financial services that are reasonably expected to lead, or are leading, to unfair outcomes for financial customers".

However, the Supporting Statement confirms that the Conduct Standard is only the first step in a more comprehensive and detailed overview of the conduct of banks. Notwithstanding the "high level" approach, the Supporting Statement further notes that the Conduct Standard is designed to "follow the sequencing of the six Treating Customers Fairly (TCF) Outcomes in a typical product cycle". Hence, the Conduct Standard requirements provide:

> "*TCF Outcome 1: Customers are confident that they are dealing with financial institutions in which the fair treatment of customers is central to their culture.*
>
> *TCF Outcome 2: Entails that products and services marketed and sold in the retail market are designed to meet the needs of identified customer groups and are targeted at these customer groups.*
>
> *TCF Outcome 3: Customers are provided with clear information and kept appropriately informed before, during and after point of sale.*
>
> *TCF Outcome 4: Where advice is given, it is suitable and takes account of customer circumstances.*
>
> *TCF Outcome 5: Products perform as firms have led customers to expect, and service is of an acceptable standard and as they have been led to expect.*
>
> *TCF Outcome 6: Customers do not face unreasonable post-sale barriers imposed by firms to change products, switch providers, submit a claim or make a complaint.*"

The Supporting Statement states that these standards are not inclusive and thus apply in addition to any other requirements and/or regulatory provisions already in place.

Although yet to be enacted, the Conduct of Financial Institutions Bill ("COFI") is being drafted with the intention of replacing and overhauling various conduct provisions in financial sector laws. COFI, once enacted, will amend and repeal provisions in certain Acts and repeal other Acts altogether. It is hoped this Bill will reduce the fragmented nature of the South African regulatory regime and achieve the Twin Peaks aim of streamlining legislation under the auspices of the PA and an adequately resourced FSCA acting in close collaboration with the SARB. The Acts that will be affected under COFI include:

1. The Collective Investments Schemes Control Act, 2002.
2. The Financial Institutions Act, 2001.
3. The Financial Advisory and Intermediary Services Act, 2002.
4. The FSRA.
5. The Insurance Act, 2017.
6. The Long-term Insurance Act, 1998.
7. The Short-term Insurance Act, 1998.
8. The Pension Funds Act, 1956.

COFI states that it seeks to "provide for the establishment of a consolidated, comprehensive and consistent regulatory framework for the conduct of financial institutions" and thereby, *inter alia*, "protect financial customers; promote the fair treatment and protection of financial customers by financial institutions; promote innovation and the development of and investment in innovative technologies; processes and practices; promote trust and confidence in the financial sector; and assist the SARB in maintaining financial stability".

COFI, once enacted, will impose requirements on persons deemed to be undertaking critical functions. Certain institutions (e.g., insurance brokers) shall be obliged to appoint at least one "Key Individual", and such individuals shall be expected to undergo annual examinations or an externally supervised continuing education programme to ensure they are knowledgeable of and understand current developments affecting their industry.

COFI will also provide that banks, other financial institutions such as the insurance sector and, in all likelihood, financial sector participants in the fintech and cryptocurrency industries serving the retail and non-retail sector, shall be required to be licensed by the FSCA.

The advent of COFI is timely given the recent announcement on 11th February 2021 by the Intergovernmental Fintech Working Group (the "IFWG") of the launch of the Project Khokha 2 fintech initiative concerning distributed ledger technology, the testing of the concept of a wholesale digital settlement token and of a wholesale Central Bank-issued digital currency. The membership of the IFWG includes the Competition Commission, the Financial Centre, the FSCA, the National Credit Regulator, the National Treasury, the South African Revenue Service, and the SARB.

Wide-ranging legislation has also been introduced directly aimed at protecting the interests of the consumer such as the POPI, which regulates the processing of personal information so as to align South African regulations with international standards. Many of the provisions of the POPI became effective on 1st July 2020.

Conclusion

Since becoming a member of the Basel Committee in 2009 and pursuing a policy of alignment with international best practice, South African banking legislation has evolved substantially. Twin Peaks legislation and measures introduced by the PA and the SARB have been formulated to ensure capital reserves are maintained in line with Basel Committee recommendations. In addition, measures have been introduced under the auspices of the FSCA to ensure that banks act in a manner with their clients such that funds are disbursed in a transparent, agreed and prudent manner. Furthermore, restructuring, administration and other insolvency-related legislation has been introduced to mitigate the effect of insolvency on market participants.

However, notwithstanding the stated aims of legislation, different concerns often cause competing interpretations to arise between the rights and obligations of the financial institutions, individual consumers and the state. Ultimately, it is for the courts to arbitrate and adjudicate to ensure the law is upheld. In this respect, all South African citizens and institutions have the right and obligation to rely on and adhere to the Constitution. The South African Constitutional Court's decision of 4th February 2021 is a case in point. The Constitutional Court ruling declares, *inter alia*, that certain provisions of the Regulation of Interception of Communication and Provision of Communication-Related Information Act ("RICA")[1] are unconstitutional to the extent that such provisions of RICA fail to adequately prescribe procedures to ensure data obtained pursuant to the interception of communication is managed lawfully and not used, interfered with or retained unlawfully.

Although the case concerns phone tapping and other surveillance measures, the principals extracted from this decision ought to be borne in mind in the wider context by all financial institutions that collect, transmit and store data by way of the various forms of digital applications and other forms of fintech technology.

The decision is salutary in that it puts on notice those who use data and information received or collected with or without consent that such information and data may only be obtained, stored and used lawfully.

To date, there is no specific legislation in South Africa aimed at the plethora of fintech communication, data transmission and collection, whether it be "business-to-business" back office systems, related software applications, internet, mobile phone banking, Bitcoin, or other forms of cryptocurrency technology. Consequently, until Parliament legislates, stakeholders in the fintech industry shall be obliged to rely mainly, if not exclusively, on the common law, rules of contract and enabling legislation such as the FSRA and subordinate legislation, directives and guidance notes issued thereunder. In this context, the recent FSCA Joint Conduct Standard 3 of July 2020 is of immense importance. For the first time, a Conduct Standard specifically aimed at the regulation and supervision of banks outlines how banks should conduct themselves and treat financial customers.

* * *

Endnote

1. *AmaBhungane Centre for Investigative Journalism NPC and Another v Minister of Justice and Correctional Services and Others*; and *Minister of Police v AmaBhungane Centre for Investigative Journalism NPC and Others* [2021] ZACC 3.

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Philip Webster qualified as a Solicitor of the Supreme Court of England & Wales, in England in 1987 (now referred to as the 'Senior Courts of England & Wales').

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With over 30 years of experience, Philip has advised financial institutions (including the African Development Bank, the Development Bank of Southern Africa Limited, IFC, the World Bank, BNP Paribas, Barclays, Deutsche Bank and JPMorgan), governments and state agencies (including Equatorial Guinea, Madagascar, Mozambique, Namibia, Rwanda, South Africa and Uganda), as well as project sponsors/developers and financiers on energy and infrastructure projects.

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Mirellê Vallie has been a practising attorney in South Africa since 2010.

She was an estate controller at the Master of the High Court in Durban, a government department in South Africa, has worked at Absa Trust, a financial institution, as an estate administrator and was an acting assistant master at the High Court in Johannesburg.

She specialises in corporate advisory services, governance and compliance, acquisitions, mergers and transfers of business, commercial law, private international law, public international law, estates and insolvency.

She is a member of the Legal Practice Council of South Africa.

Mirellê has more than nine years' experience in the ruling regulatory framework governing organs of state.

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