

South Africa

Financial Institutions (Protection of Funds) Act, 2001

Act 28 of 2001

Legislation as at 28 February 2014

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Financial Institutions (Protection of Funds) Act, 2001
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South Africa

Financial Institutions (Protection of Funds) Act, 2001 Act 28 of 2001

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[Amended by [Financial Services Laws General Amendment Act, 2008 \(Act 22 of 2008\)](#) on 1 November 2008]

[Amended by [Financial Markets Act, 2012 \(Act 19 of 2012\)](#) on 3 June 2013]

[Amended by [Financial Services Laws General Amendment Act, 2013 \(Act 45 of 2013\)](#) on 28 February 2014]

(English text signed by the President.)

ACT

To provide for, and consolidate the laws relating to, the investment, safe custody and administration of funds and trust property by financial institutions; to enable the registrar to protect such funds and trust property; to repeal the Financial Institutions (Investment of Funds) Act, 1984 ([Act No. 39 of 1984](#)); to improve the enforcement powers of the registrar; and to provide for matters incidental thereto.

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:—

Introductory provisions

1. Definitions

In this Act, unless the context indicates otherwise—

"**administrative sanction**" means a sanction contemplated in section [6D\(2\)](#);

[definition of "administrative sanction" inserted by section 41(a) of [Act 22 of 2008](#)]

"**applicant**" means the registrar or the directorate that refers a person to the enforcement committee;

[definition of "applicant" inserted by section 41(a) of [Act 22 of 2008](#)]

"**board**" means the Financial Services Board established by section 2 of the Financial Services Board Act, 1990 ([Act No. 97 of 1990](#));

[definition of "board" inserted by section 41(a) of [Act 22 of 2008](#)]

"**Companies Act**" means the Companies Act, 2008 ([Act No. 71 of 2008](#));

[definition of "Companies Act" inserted by section 156(a) of [Act 45 of 2013](#)]

"**company**" includes a close corporation referred to in the Close Corporations Act, 1984 ([Act No. 69 of 1984](#));

"**contravention**" includes any non-compliance with any law;

[definition of "contravention" inserted by section 41(b) of [Act 22 of 2008](#)]

"determination" means the finding of the enforcement committee, the administrative sanction, the reasons for the imposition of such sanction and any ancillary order made by the enforcement committee under this Act;

[definition of "determination" inserted by section 41(b) of [Act 22 of 2008](#)]

"directorate" means the Directorate of Market Abuse referred to in section 83 of the Securities Services Act, 2004 ([Act No. 36 of 2004](#));

[definition of "directorate" inserted by section 41(b) of [Act 22 of 2008](#)]

"enforcement committee" means the enforcement committee established in terms of section 10(3) of the Financial Services Board Act, 1990 ([Act No. 97 of 1990](#));

[definition of "enforcement committee" inserted by section 41(b) of [Act 22 of 2008](#)]

"financial institution" means—

- (a) any person or institution referred to in the definition of 'financial institution' in section 1 of the Financial Services Board Act, 1990 ([Act No. 97 of 1990](#));¹ or
- (b) any medical scheme contemplated in section 1 of the Medical Schemes Act, 1998 ([Act No. 131 of 1998](#));

"institution", for the purposes of sections 5, 6, 9 and 10, means—

- (a) a financial institution;
- (b) any person, partnership, company or trust in which, or in the business of which, a financial institution or an unregistered person has or had a direct or indirect interest;

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- (a) In terms of section 1 of the Financial Services Board Act, 1990, a "financial institution" is defined as—
 - (i) any pension fund organisation registered in terms of the Pension Funds Act, 1956 ([Act No. 24 of 1956](#)), or any person referred to in section 13B of that Act administering the investments of such a pension fund or the disposition of benefits provided for in the rules of such a pension fund;
 - (ii) any friendly society registered in terms of the Friendly Societies Act, 1956 ([Act No. 25 of 1956](#)), or any person in charge of the management of the affairs of such a society;
 - (iii) any 'unit trust scheme' as defined in section 1 of the Unit Trusts Control Act, 1981 ([Act No. 54 of 1981](#)), or any management company or trustee in relation to such a scheme;
 - (iv) any 'scheme' as defined in section 1 of the Participation Bonds Act, 1981 ([Act No. 55 of 1981](#)), or any manager or nominee company in relation to such a scheme;
 - (v) any 'stock exchange', 'member' or 'stockbroker' as defined in section 1 of the Stock Exchanges Control Act, 1985 ([Act No. 1 of 1985](#)), or any person referred to in section 4(1) of that Act managing investments as contemplated in that section;
 - (vi) any 'financial exchange', 'member' or 'recognised clearing house' as defined in section 1 of the Financial Markets Control Act, 1989 ([Act No. 55 of 1989](#)), or any person referred to in section 5(1) of that Act managing investments as contemplated in that section;
 - (vii) any 'registered insurer' as defined in section 1(1) of the Insurance Act, 1943 ([Act No. 27 of 1943](#));
 - (viii) any agent, broker or other person contemplated in section 20bis of the Insurance Act, 1943;
 - (ix) any person deemed, in terms of section 60 of the Insurance Act, 1943, to be carrying on insurance business in the Republic;
 - (x) any person rendering or who is to render services contemplated in section 23A(1) of the Insurance Act, 1943;
 - (xi) any 'central securities depository' or a 'depository institution' as defined in section I of the Safe Deposit of Securities Act, 1992 ([Act No. 85 of 1992](#)), or any member of such a securities depository;
- (b)
 - (i) a bank as defined in section 1(1) of the Banks Act, 1990 ([Act No. 94 of 1990](#)), or a mutual bank as defined in section 1(1) of the Mutual Banks Act, 1993 ([Act No. 124 of 1993](#)), which deals with trust property as a regular feature of its business; or
 - (ii) any other person who or which deals with trust property as a regular feature of his, her or its business, but who is not registered, licensed, recognised, approved or otherwise authorised to deal so in terms of any Act, other than the Companies Act, 1973 ([Act No. 61 of 1973](#)), the Close Corporations Act, 1984 ([Act No. 69 of 1984](#)), and the Trust Property Control Act, 1988 ([Act No. 57 of 1988](#));²

- (c) any person, partnership, company or trust which has or had a direct or indirect interest in a financial institution or unregistered person, or in the business of a financial institution or an unregistered person;
- (d) a participating employer in a pension fund organisation;
- (e) any person, partnership, company or trust that controls, manages or administers the affairs or part of the affairs of a financial institution or an unregistered person; or
- (f) any unregistered person;

"law", for the purposes of—

- (a) section 6, means—
 - (i) this Act;
 - (ii) the Financial Services Board Act, 1990;
 - (iii) the Inspection of Financial Institutions Act, 1998 ([Act No. 80 of 1998](#));
 - (iv) the Financial Services Ombud Schemes Act, 2004 ([Act No. 37 of 2004](#));
 - (v) an Act referred to in the definition of 'financial institution' in section 1 of the Financial Services Board Act, 1990;
 - (vi) the Medical Schemes Act, 1998 ([Act No. 131 of 1998](#));

and any subordinate legislation, enactment or measure made under these Acts;

- (aA) section 5A, means the Financial Intelligence Centre Act, 2001, ([Act No. 38 of 2001](#)), and the Acts referred to in paragraph (a), including any subordinate legislation, enactment or measure made under those Acts;

[paragraph (aA) inserted by section 156(b) of [Act 45 of 2013](#)]

- (b) sections 6A to 6I, means the Acts referred to in paragraph (a)—
 - (i) including any subordinate legislation, enactment or measure made under those Acts;
 - (ii) excluding—
 - (aa) the Medical Schemes Act, 1998;
 - (bb) the Banks Act, 1990 ([Act No. 94 of 1990](#));
 - (cc) the Mutual Banks Act, 1993 ([Act No. 124 of 1993](#)); and
 - (dd) the Co-operative Banks Act, 2007 ([Act No. 40 of 2007](#));

[paragraph (b) amended by section 156(c) of [Act 45 of 2013](#)]

- (c) Chapter 1A, means—
 - (i) a law referred to in paragraph (a) of the definition of 'financial institution' in section 1 of the Financial Services Board Act, 1990 ([Act No. 97 of 1990](#)); and
 - (ii) this Act,

including any subordinate legislation and an enactment or measure made under those laws;

[paragraph (c) added by section 156(d) of [Act 45 of 2013](#)]

[definition of "law" inserted by section 41(c) of [Act 22 of 2008](#)]

"**nominee company**" means a company, controlled by a financial institution, which—

- (a) is incorporated under the provisions of the Companies Act;
[paragraph (a) substituted by section 156(e) of Act 45 of 2013]
- (b) has as a special condition contemplated in section 15(2) of the Companies Act the requirement to act as nominee for, or representative of, any person in the holding of any property in trust for such person or persons;
[paragraph (b) substituted by section 156(e) of Act 45 of 2013]
- (c) is precluded as a special condition in its Memorandum of Incorporation from incurring any liabilities other than to the persons on whose behalf it holds assets, to the extent of their respective rights to, and interest in, such assets; and
[paragraph (c) substituted by section 156(e) of Act 45 of 2013]
- (d) has entered into an irrevocable written agreement with a financial institution which controls the company, and in terms of which such financial institution has undertaken to pay all the expenses of, and incidental to, its formation, operations and liquidation;

"**official web site**" means a web site as defined in section 1 of the Electronic Communications and Transactions Act, 2002 ([Act No. 25 of 2002](#)), set up by the board;

[definition of "official web site" inserted by section 156(f) of Act 45 of 2013]

"**person**" includes any institution, partnership or trust;

[definition of "person" inserted by section 41(d) of Act 22 of 2008]

"**registrar**" means—

- (a) the registrar as defined in any of the Acts referred to in paragraph (a) of the definition of 'financial institution' in section 1 of the Financial Services Board Act, 1990;
- (b) the executive officer defined in section 1 of the Financial Services Board Act, 1990; or
- (c) except for the purposes of sections [6A](#) to [6L](#), the registrar of medical schemes referred to in section 1 of the Medical Schemes Act, 1998;

[paragraph (c) substituted by section 41(e) of Act 22 of 2008]

"**respondent**" means any person identified by the registrar or the directorate as having allegedly contravened a law;

[definition of "respondent" inserted by section 41(f) of Act 22 of 2008]

"**trust property**" means any corporeal or incorporeal, movable or immovable asset invested, held, kept in safe custody, controlled, administered or alienated by any person, partnership, company or trust for, or on behalf of, another person, partnership, company or trust, and such other person, partnership, company or trust is hereinafter referred to as the principal;

"**unregistered person**" means any person, partnership, company or trust not registered, approved or otherwise authorised by the registrar under a relevant law to carry on the business of a financial institution, but who or which carries on such business or a business corresponding to a business normally carried on by a financial institution.

Chapter 1

Funds and trust property held by financial institutions

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

A financial institution or nominee company, or director, member, partner, official, employee or agent of the financial institution or nominee company, who invests, holds, keeps in safe custody, controls, administers or alienates any funds of the financial institution or any trust property—

- (a) must, with regard to such funds, observe the utmost good faith and exercise proper care and diligence;
- (b) must, with regard to the trust property and the terms of the instrument or agreement by which the trust or agency in question has been created, observe the utmost good faith and exercise the care and diligence required of a trustee in the exercise or discharge of his or her powers and duties; and
- (c) may not alienate, invest, pledge, hypothecate or otherwise encumber or make use of the funds or trust property or furnish any guarantee in a manner calculated to gain directly or indirectly any improper advantage for any person to the prejudice of the financial institution or principal concerned.

[paragraph (c) substituted by section 157(b) of [Act 45 of 2013](#)]

[section 2 amended by section 157(a) of [Act 45 of 2013](#)]

3. Declaration of interest

- (1) A director, member, partner, official, employee or agent of a financial institution or of a nominee company who takes part in a decision to invest any of the funds of the financial institution or any trust property in a company or other undertaking in which he or she has a direct or indirect financial interest, must declare that interest in writing to the board of management or other governing body of the financial institution or nominee company, indicating the nature and extent of such interest, before such decision is made.
- (2) For the purposes of subsection (1), 'invest' includes—
 - (a) the purchase of shares in a company, or of an interest in a close corporation or partnership;
 - (b) the granting of a secured or unsecured loan,
 - (c) acquiring a financial interest in an agreement or other matter in which the financial institution or nominee company has a material interest.

[paragraph (c) added by section 158 of [Act 45 of 2013](#)]

- (3) A declaration of interest made in terms of subsection (1) must be recorded in the minutes of the meeting of the board or governing body at which the declaration is made or considered.

4. Investment of trust property

- (1) A financial institution or nominee company, or director, member, partner, official, employee or agent of a financial institution or nominee company which administers trust property under any instrument or agreement may not cause such trust property to be invested otherwise than in a manner directed in, or required by, such instrument or agreement.

[subsection (1) substituted by section 159(a) of [Act 45 of 2013](#)]

- (2) In the absence of a direction or requirement referred to in subsection (1), a financial institution or nominee company, or director, member, partner, official, employee or agent of the financial

institution or nominee company, may not cause any trust property to be invested otherwise than in the name of—

- (a) the principal concerned;
- (b) the financial institution in its capacity as administrator, trustee, curator or agent; or
- (c) a nominee company.

[subsection (2) amended by section 159(b) of [Act 45 of 2013](#)]

- (3) (a) Despite subsections (1) and (2)—
 - (i) where the Memorandum of Incorporation of a company has as a special condition under section [15\(2\)](#) of the Companies Act which prohibits the registration of its shares or debentures in the name of—
 - (aa) a trust;
 - (bb) a financial institution in its capacity as administrator, trustee or curator; or
 - (cc) any nominee; and

[subparagraph (i) amended by section 159(c) of [Act 45 of 2013](#)]

 - (ii) where such shares or debentures form part of trust property administered by a financial institution,
those shares or debentures must be registered in the name of a director, member, partner or manager of that financial institution.
 - (b) The director, member, partner or manager must hold those shares or debentures in a fiduciary capacity on behalf of the principal concerned.
 - (c) Prior to the registration of any shares or debentures in the name of a director, member, partner or manager as contemplated in paragraph (a), the financial institution concerned must furnish security to the satisfaction of the Master of the High Court, if such security has not already been furnished in terms of the Trust Property Control Act, 1988 ([Act No. 57 of 1988](#)).
- (4) A financial institution must keep trust property separate from assets belonging to that institution, and must in its books of account clearly indicate the trust property as being property belonging to a specified principal.
- (5) Despite anything to the contrary in any law or the common law, trust property invested, held, kept in safe custody, controlled or administered by a financial institution or a nominee company under no circumstances forms part of the assets or funds of the financial institution or such nominee company.
- (6) This section also applies in a case where a financial institution invests, holds, keeps in safe custody, controls, administers or alienates trust property under any instrument or agreement jointly with another person.

Chapter 1A On-site visits

[Chapter 1A inserted by section 160 of [Act 45 of 2013](#)]

4A. On-site visits

- (1) In this Chapter—

‘business document’ means a document that—

- (a) relates to the carrying on of a regulated activity; or
- (b) may reasonably be required for purposes of an on-site visit;

‘business premises’ means a building or part of a building that is used in connection with the carrying on of a regulated activity;

‘document’ includes books, records, securities or accounts and any information, including information stored, transmitted or recorded electronically, digitally, photographically, magnetically, optically or in any other intangible form;

‘on-site visit’ means a visit at the business premises of a regulated person—

- (a) to determine compliance with a law; or
- (b) aimed at the overarching supervision of a regulated activity or regulated persons;

‘outsource’ means an arrangement of any form between persons referred to in the definition of a ‘regulated person’ in terms of which a person referred to in paragraph (b) of the definition of ‘regulated person’ performs a regulated activity which would otherwise be performed by a person referred to in paragraph (a) of the definition of ‘regulated person’ itself;

‘regulated activity’ means any activity or a part of that activity regulated under a law; and

‘regulated person’ means a person—

- (a) that is authorised, licensed, registered, appointed or otherwise approved to perform an activity regulated under a law;
- (b) to whom a person referred to in paragraph (a) has outsourced the performance of a regulated activity.

- (2) The Registrar may conduct an on-site visit and such visit must be conducted with strict regard to decency and good order.
- (3) The Registrar when conducting an on-site visit in terms of subsection (2) has a right of access to any business document and may—
 - (a) at any time during business hours—
 - (i) enter a regulated person’s business premises and such person must, upon request, provide any business document;
 - (ii) examine, make extracts from and copy any business document;
 - (iii) question any person the registrar believes may have information relevant to the on-site visit;
 - (iv) where a contravention of a law has been detected—
 - (aa) issue an instruction prohibiting the removal or destruction of any business document; or
 - (bb) against a receipt, remove any business document to prevent its concealment, removal, dissipation or destruction until the completion of any proceedings or regulatory action;
 - (b) instruct the regulated person to produce at a specified time and place and in the manner determined by the registrar—
 - (i) any specified business document or a business document of a specified description in the possession or under the control of the regulated person; or
 - (ii) furnish the registrar with information in respect of that business document; and

- (c) instruct any person that is in possession or has under his or her or its control any business document relating to the business of the regulated person to—
 - (i) produce that business document; or
 - (ii) furnish the registrar with information in respect of that business document, at a specified time, place and in the manner determined by the registrar.
- (4) A regulated person may, during normal office hours and under the supervision of the registrar, examine and make extracts from any document removed under subsection (3)(a)(iv).
- (5) Subsection (3) shall not be construed so as to infringe upon the common law right to professional privilege between an attorney and his or her client in respect of information communicated to the attorney, whether in writing or verbally, so as to enable him or her to provide advice, or render other legal assistance to or defend the client in connection with an offence under any law with which he or she is charged, in respect of which he or she has been arrested or summoned to appear in court or in respect of which an investigation with a view to instituting criminal proceedings is being conducted against him or her.

[section 4A inserted by section 160 of Act 45 of 2013]

Chapter 2 Enforcement

5. Appointment of curator

- (1) The registrar may, on an *ex parte* basis, apply to a division of the High Court having jurisdiction for the appointment of a curator to take control of, and to manage the whole or any part of, the business of an institution.
[subsection (1) substituted by section 161(a) of Act 45 of 2013]
- (2) Upon an application in terms of subsection (1) the court may—
 - (a) on good cause shown, provisionally appoint a curator to take control of, and to manage the whole or any part of, the business of the institution on such conditions and for such a period as the court deems fit; and
[paragraph (a) substituted by section 161(b) of Act 45 of 2013]
 - (b) simultaneously grant a rule *nisi* calling upon the institution and other interested parties to show cause on a day mentioned in the rule why the appointment of the curator should not be confirmed.
- (3) On application by the registrar or the institution the court may anticipate the return day if not less than 48 hours' notice of such application has been given to the other party.
[subsection (3) substituted by section 161(c) of Act 45 of 2013]
- (4) If at the hearing pursuant to the rule *nisi* the court is satisfied that it is desirable to do so, it may confirm the appointment of the curator.
- (5) The court may, for the purposes of a provisional appointment in terms of subsection (2)(a) or a final appointment in terms of subsection (4), make an order with regard to—
 - (a) the suspension of legal or foreclosure proceedings against the institution for the duration of the curatorship;
 - (aA) the authority of the curator to investigate the affairs of the institution or any associated entity;

- (b) the powers and duties of the curator;
- (c) the remuneration of the curator;
- (d) the costs relating to any application made by the registrar;
- (e) the costs incurred by the registrar in respect of an inspection of the affairs of the institution concerned in terms of the Inspection of Financial Institutions Act, 1998 ([Act No. 80 of 1998](#));
- (eA) the method of service or publication of the order; or
- (f) any other matter which the court deems necessary.

[subsection (5) substituted by section 161(d) of [Act 45 of 2013](#)]

- (6) The curator acts under the control of the registrar who made the application under subsection (1) and in accordance with guidelines prescribed by the registrar by notice in the *Gazette*, and the curator may apply to that registrar for instructions with regard to any matter arising out of, or in connection with, the control and management of the business of the institution.

[subsection (6) substituted by section 161(e) of [Act 45 of 2013](#)]

- (7) The curator must furnish the registrar concerned with such reports or information concerning the affairs of the institution as the registrar may require.

[subsection (7) substituted by section 161(e) of [Act 45 of 2013](#)]

- (8)
 - (a) Any person, on good cause shown, may make application to the court to set aside or alter any decision made, or any action taken, by the curator or the registrar with regard to any matter arising out of, or in connection with, the control and management of the business of an institution which has been placed under curatorship.
 - (b) A person who makes application contemplated in paragraph (a) must give notice of not less than 48 hours of such application to the registrar or the curator, as the case may be, and the registrar or curator is entitled to be heard at such application.

[paragraph (b) substituted by section 161(f) of [Act 45 of 2013](#)]

- (9) The court may, on good cause shown, cancel the appointment of the curator at any time.
- (10) Despite subsections (1) to (9), the registrar may on good cause, by agreement with an institution and without the intervention of the court, appoint a curator for the purpose set out in subsection (1).

[subsection (10) added by section 161(g) of [Act 45 of 2013](#)]

- (11) The terms of the appointment contemplated in subsection (10) must be set out in a letter of appointment issued by the registrar to the curator and—
 - (a) must include—
 - (i) the powers and duties of the curator; and
 - (ii) the remuneration of the curator; and
 - (b) may include any other matter agreed upon between the registrar and the institution.

[subsection (11) added by section 161(g) of [Act 45 of 2013](#)]

- (12) The rights of any creditor or client of the institution are not affected by the appointment of a curator in terms of subsection (10).

[subsection (12) added by section 161(g) of [Act 45 of 2013](#)]

- (13) Subsections (6) and (7) apply to an appointment in terms of subsection (10).
[subsection (13) added by section 161(g) of Act 45 of 2013]
- (14) An appointment in terms of subsection (10) lapses—
- (a) if the registrar after consultation with the curator withdraws the letter of appointment; or
 - (b) by order obtained at the instance of the institution in terms of subsection (9).
- [subsection (14) added by section 161(g) of Act 45 of 2013]*

5A. Statutory management

- (1) Despite any other law, the registrar may, by agreement with a financial institution and without the intervention of a court, appoint a statutory manager for that financial institution, if it appears that—
- (a) the financial institution—
 - (i) has in a material respect failed to comply with a law;
 - (ii) is likely to be in an unsound financial position; or
 - (iii) is maladministered; and
 - (b) it is advisable to appoint a statutory manager in order to protect—
 - (i) the interests of the clients of the financial institution;
 - (ii) the safety and soundness of financial institutions in general; or
 - (iii) the stability, fairness, efficiency and orderliness of the financial system.
- (2) An appointment under subsection (1) takes effect immediately, but the registrar must, as soon as practicable, after the appointment and in any event within 30 days after the appointment, apply to the High Court for an order confirming the appointment.
- (3) On hearing the application in terms of subsection (2), the court must confirm the appointment, unless satisfied that the grounds for making the appointment no longer exist.
- (4) The statutory manager of a financial institution—
- (a) must be allowed full access to the accounting records, financial statements and other information relating to the affairs of the financial institution;
 - (b) must participate in the management of the affairs of the financial institution with its executive directors or managers: Provided that where there is disagreement between the statutory manager and the executive directors of the financial institution, the statutory manager shall take the final decision; and
 - (c) is entitled to receive such remuneration from the institution as the Court may order.
- (5) (a) The statutory manager of a financial institution and the financial institution must manage the affairs of the institution with the greatest economy possible compatible with efficiency and, as soon as practicable, report to the registrar and indicate what steps should be taken to ensure that the financial institution—
- (i) complies with the law;
 - (ii) becomes financially sound; and
 - (iii) is properly administered.

- (b) If the statutory manager considers that it is not practicable to take steps in terms of paragraph (a), he or she must report to the registrar and must indicate—
 - (i) whether steps should be taken to transfer the financial services business or a part thereof of the financial institution to an appropriate person and, if so, on what terms; or
 - (ii) whether the financial institution should be wound up or placed under curatorship.
- (6) The statutory manager of a financial institution and the financial institution must comply with directives issued by the registrar from time to time in relation to the statutory manager's functions and report to the registrar should the statutory manager be hindered in giving effect to any such directives.
- (7) The statutory manager of a financial institution and the financial institution may, after giving notice to the registrar, at any time apply to the court for directions.
- (8) The registrar may at any time apply to the court to—
 - (a) terminate the statutory management; or
 - (b) remove a statutory manager from office and, subject to subsection (2), to confirm the appointment of a replacement.
- (9) The statutory manager of a financial institution is not liable for loss suffered by the financial institution unless it is established that the loss was caused by the statutory manager's fraud, dishonesty or wilful failure to comply with the law.
- (10) The provisions of this section must not be construed as limiting any of the powers of the registrar under section 5.

[section 5A inserted by section 162 of [Act 45 of 2013](#)]

6. Powers of registrar

- (1) The registrar may institute proceedings in the High Court having jurisdiction in order to—
 - (a) discharge any duty or responsibility imposed on the registrar in terms of any law;
 - (b) compel any institution to comply with any law or to cease contravening a law;
 - (c) compel any institution to comply with a lawful request, directive or instruction made, issued or given by the registrar under a law;
[paragraph (c) substituted by section 163(a) of [Act 45 of 2013](#)]
 - (d) obtain a declaratory order relating to any law or the business of an institution;
[paragraph (d) substituted by section 163(a) of [Act 45 of 2013](#)]
 - (e) prevent the concealment, removal, dissipation or destruction of assets or evidence thereof by any institution;
[paragraph (e) added by section 163(b) of [Act 45 of 2013](#)]
 - (f) seize and remove the assets of an institution for safe custody pending the exercising of such other legal remedy as may be available to the registrar.
[paragraph (f) added by section 163(b) of [Act 45 of 2013](#)]

- (2) For the purpose of ensuring compliance with a law, or if the registrar has reason to believe that an institution is contravening or failing to comply with, or has contravened or failed to comply with, any provision of a law, the registrar may—
- (a) by notice direct that institution to—
 - (i) furnish the registrar within a specified period with any specified information or documents in the possession or under the control of that institution and which relate to the matter of such contravention or failure;
 - (ii) appear before the registrar at a specified time and place for questioning by the registrar in connection with such matter;
 - (iii) make arrangements to the satisfaction of the registrar for the discharge of all or any part of that institution's obligations in terms of such law; or
 - (b) if it appears that prejudice has occurred or might occur as a result of such contravention or failure to comply, by notice prohibit such institution from continuing business or dealing with trust property pending an application to court by the registrar as contemplated in section 5, or pending the exercising of such other legal remedy as may be available to the registrar.

[subsection (2) substituted by section 163(c) of Act 45 of 2013]

- (3) (a) If the registrar has reason to believe that a person has contravened a law, or has failed to comply with a request, directive or instruction made, issued or given by the registrar under such law, the registrar may publish a statement to that effect in such manner as the registrar considers appropriate.
- (b) Before publishing a statement, the registrar must give the person concerned a notice warning it of the proposed publication of such statement, the reason therefor and the proposed date of publication.
- (c) The person concerned may before the proposed date of publication of the statement make representations to the registrar concerning the proposed action.
- (d) If the registrar thereafter decides to publish the statement, the registrar must, without delay, give the person concerned a notice which sets out the terms of the statement to be published.
- (4) (a) The registrar may accept an undertaking by a person to do something or to refrain from doing something in connection with a matter regarding which the registrar has a function or power.
- (b) The person may withdraw or vary the undertaking at any time, but only with the registrar's consent.
- (c) If the registrar considers that the person who gave the undertaking has breached a term of the undertaking, the registrar may apply to the High Court for an order under paragraph (d).
- (d) If the court is satisfied that the person has breached a term of the undertaking, the court may make—
- (i) an order directing that person to comply with that term of the undertaking; or
 - (ii) any other order the court considers appropriate.

[subsection (4) deleted by section 42 of Act 22 of 2008 and inserted by section 163(d) of Act 45 of 2013]

- (5) The registrar may take any reasonable steps, including the issue of an instruction to carry out an inspection in terms of the Inspection of Financial Institutions Act, 1998, to ensure that an institution which is subject to an order of court made in terms of subsection (1) or (2) is complying with that order.

- (6) (a) The notification of anything done by the registrar may be by notice on the official web site.
- (b) Notification under paragraph (a) does not affect any obligation of the registrar to publish by notice in the *Gazette*.

[subsection (6) added by section 163(e) of Act 45 of 2013]

6A. Referral to enforcement committee

- (1) (a) Despite anything to the contrary in any other law, if a registrar is of the opinion that a person has contravened a provision of a law in respect of which the registrar is not authorised to impose a penalty or a fine, the registrar may refer the alleged contravention to the enforcement committee.
- (b) The board may authorise a registrar to impose any sanction that the board is authorised to impose under the Financial Intelligence Centre Act, 2001 ([Act No. 38 of 2001](#)).

[subsection (1) substituted by section 164 of Act 45 of 2013]

- (2) The directorate may, after an investigation carried out by the directorate under Chapter X of the Financial Markets Act, 2012, refer an alleged contravention to the enforcement committee.

[subsection (2) substituted by section 111 of Act 19 of 2012]

[section 6A inserted by section 43 of Act 22 of 2008]

6B. Enforcement committee proceedings

- (1) A referral under section [6A\(1\)](#) or [\(2\)](#) must be accompanied by—
 - (a) a notice setting out the details and nature of the alleged contravention; and
[paragraph (a) substituted by section 165(a) of Act 45 of 2013]
 - (b) an affidavit by or on behalf of the applicant setting out the facts and documents supporting the notice.
- (2) The applicant must, on referral of a matter under section [6A\(1\)](#) or [\(2\)](#)—
 - (a) cause a copy of the notice and affidavit referred to in subsection [\(1\)](#) to be delivered to the respondent's residential address, registered office or principal place of business; and
 - (b) afford the respondent the opportunity to submit an answering affidavit within 30 days of delivery of the notice and affidavit to the respondent.
- (3) Any answering affidavit by or on behalf of the respondent must—
 - (a) be filed by the respondent with the enforcement committee and a copy thereof must be delivered to the applicant;
 - (b) state which of the allegations of the applicant are admitted and which are denied and, if denied, the respondent's version of the relevant facts.
- (4) Within 30 days of delivery to the applicant of the respondent's answering affidavit, the applicant may deliver a replying affidavit in the manner stated in subsection [\(2\)\(a\)](#) or at another address elected by the respondent for such service.
- (5) No further affidavits may be filed without the permission of the enforcement committee.
- (6) The applicant that referred a matter may at any time withdraw a referral under subsection [\(1\)](#) or [\(2\)](#) on notice to the enforcement committee and the respondent.

- (7) (a) The applicant may, prior to the referral of a matter to the enforcement committee or during or after the enforcement committee proceedings, enter into a written settlement agreement with the respondent.
- (b) The agreement must be filed with the chairperson or deputy chairperson of the enforcement committee to be made an order of the enforcement committee, as contemplated in section 6D(2).
- [paragraph (b) substituted by section 165(b) of Act 45 of 2013]*
- (8) (a) The chairperson of the panel designated by the enforcement committee to hear a matter contemplated in subsection (2) may, on the written request of a party and on good cause shown, extend the time period to file such affidavit.
- (b) A written request contemplated in paragraph (a) must be filed with the chairperson on or before the expiry date within which to file the relevant affidavit.
- (c) A party seeking an extension of time must first approach the other party and the written request must indicate whether the parties have agreed to an extension.

[subsection (8) added by section 165(c) of Act 45 of 2013]

[section 6B inserted by section 43 of Act 22 of 2008]

6C. Hearing by enforcement committee

- (1) The enforcement committee must inform the applicant and respondent of the date, time and place of the hearing, which must not be less than 30 days after the expiry of the time periods for the filing of the affidavit referred to in section 6B(2), or 6B(4) if applicable.
- [subsection (1) substituted by section 166(a) of Act 45 of 2013]*
- (2) The applicant and respondent must not be given less than 30 days notice of the date of the hearing.
- (3) Where a matter cannot properly be decided on affidavit, in exceptional circumstances and when it is necessary to come to a just decision, the enforcement committee may order any person to appear before the panel to be examined and cross-examined as a witness and to produce a document specified in the summons.
- [subsection (3) substituted by section 166(b) of Act 45 of 2013]*
- (4) Subject to this section the chairperson of the panel designated to hear a matter determines the procedure for the hearing.
- (5) Without derogating from the generality of subsection (4), the chairperson may—
- (a) in an urgent matter order that such matter be disposed of at such time, in such manner and in accordance with such procedure as the chairperson deems appropriate;
 - (b) with the consent of the parties, rule that a matter may be presented to the enforcement committee by way of a stated case, abbreviated pleadings or any other procedure which will expedite the matter;
 - (c) rule on the discovery and inspection of documents;
 - (d) require heads of argument to be filed by the parties;
 - (e) allow legal representation to the parties; or
 - (f) order that the issues be argued before the enforcement committee.

[section 6C inserted by section 43 of Act 22 of 2008]

6D. Determination by enforcement committee

- (1) The enforcement committee must determine whether the respondent has contravened a law.
- (2) If the enforcement committee is satisfied on a balance of probabilities that there was a contravention as contemplated in subsection (1) the enforcement committee may, despite the provisions of any law, impose any one or more of the following administrative sanctions:
 - (a) Impose a penalty by ordering the respondent to pay a sum of money to the board; and
[paragraph (a) substituted by section 111 of Act 19 of 2012]
 - (b)
 - (i) order the respondent, other than a respondent referred to in subparagraph (ii), to pay to any person who suffered patrimonial loss or damage as a result of the contravention of a law a compensatory amount determined by the enforcement committee to make good the patrimonial loss or damage so suffered; or
 - (ii) if the respondent contravened section 78 of the Financial Markets Act, 2012, order the respondent to pay to the board an amount calculated in accordance with section 82 of that Act.
[subparagraph (ii) substituted by section 111 of Act 19 of 2012]

[subsection (2) amended by section 167(a) of Act 45 of 2013]
- (3) When determining an appropriate administrative sanction, the enforcement committee may have regard to the following factors:
 - (a) The nature, duration, seriousness and extent of the contravention;
 - (b) any loss or damage suffered by any person as a result of the contravention;
 - (c) the extent of the profit derived or loss avoided by the respondent from the contravention;
 - (d) the impact which the respondent's conduct may have on the relevant sector of the financial services industry;
 - (e) whether the respondent has previously failed to comply with a fiduciary duty or law;
 - (f) any previous fine imposed or compensation paid for the contravention based on the same set of facts;
 - (g) the deterrent effect of the administrative sanction;
 - (h) the degree to which the respondent co-operated with the applicant and the enforcement committee; and
 - (i) any other factor, including mitigating factors submitted by the respondent, that the enforcement committee considers to be relevant.
- (4)
 - (a) A determination of a panel on a matter assigned to it must be in writing and must state the reasons for the determination.
 - (b) The decision of a majority of the members of a panel is a determination of the enforcement committee.
- (5) The enforcement committee may as part of a determination make such order as to—
 - (a) costs as it may deem suitable and fair, including the cost of constituting the enforcement committee panel and all expenses reasonably incurred by the applicant in investigating the alleged non-compliance and referring the matter to the enforcement committee; and

- (b) the payment of interest on any amount contemplated in subsections (2) and (5)(a) at the rate prescribed in terms of section 1(2) of the Prescribed Rate of Interest Act, 1975 ([Act No. 55 of 1975](#)).

[subsection (5) substituted by section 167(b) of [Act 45 of 2013](#)]

[section 6D inserted by section 43 of [Act 22 of 2008](#)]

6E. Notification and enforcement of determination

- (1) As soon as the enforcement committee has issued a determination it must—
- (a) cause a copy of the determination to be delivered to the applicant and the respondent at the address stated in section [6B\(2\)\(a\)](#) or any other address elected by the respondent—
- (i) by hand delivery;
- (ii) by facsimile transmission or electronic means to a number or electronic address furnished by the respondent: Provided that a confirmatory copy of the determination is sent by ordinary mail or by other suitable method within one day of such facsimile or electronic transmission; or
- (iii) by prepaid registered post; and
- [paragraph (a) substituted by section 168 of [Act 45 of 2013](#)]*
- (b) in a simultaneous written notice advise the respondent—
- (i) to comply with the administrative sanction imposed by the enforcement committee within the period specified in the notice;
- (ii) of the possibility of an appeal in terms of section [6E](#); and
- (iii) that failure by the respondent to comply with the notice in terms of this subsection will result in the process contemplated in subsection (2).
- (2) A determination by the enforcement committee has legal force as if made by the High Court, and if the respondent fails to comply with the notice in terms of subsection (1)(b) and an appeal has not been noted, the applicant may forthwith file with the registrar of a competent court a certified copy of the notice and the determination, and the determination thereupon has the effect of a civil judgment and may be enforced as if lawfully given in that court in favour of the applicant.

[section 6E inserted by section 43 of [Act 22 of 2008](#)]

6F. Appeal against determination

- (1) A determination of the enforcement committee may be taken on appeal to the High Court as if the determination were a decision of a magistrate in a civil matter.
- [subsection (1) substituted by section 169 of [Act 45 of 2013](#)]*
- (2) The launching of appeal proceedings does not suspend the operation or execution of a determination, unless the chairperson of the enforcement committee which dealt with the matter directs otherwise.

[section 6F inserted by section 43 of [Act 22 of 2008](#)]

6G. Disclosure of determination

- (1) A determination of the enforcement committee must be made public by the registrar or the directorate in a manner deemed appropriate by him or her.

- (2) Subsection (1) equally applies to any judgment on appeal or a settlement agreement made an order in terms of section 6B(7)(b).

[section 6G inserted by section 43 of [Act 22 of 2008](#)]

6H. Utilisation of administrative sanction

- (1) Any payment received by the board pursuant to an administrative sanction imposed under section 6D(2)(a) must, after recovering costs, and subject to subsection (2), exclusively be utilised for purposes of consumer education or the protection of the public.

[subsection (1) substituted by section 170 of [Act 45 of 2013](#)]

- (2) A compensatory amount received pursuant to an order under section 6D(2)(b)(ii) must be dealt with in accordance with section 82(4) to (7) of the Financial Markets Act, 2012.

[section 6H inserted by section 43 of [Act 22 of 2008](#) and substituted by section 111 of [Act 19 of 2012](#)]

6I. Saving of rights

- (1) Subject to subsection (2), no provision of this Act, whether it relates to civil or criminal matters, and no act performed under any such provision, may be construed as limiting any right of a person affected by the contravention to seek appropriate legal redress in terms of the common law or any other statutory law.
- (2) If a court assesses the penalty to be imposed on a person convicted of an offence in terms of any law, the court must take into account any administrative sanction imposed in respect of the same set of facts.
- (3) An administrative sanction imposed by the enforcement committee does not constitute a previous conviction as contemplated in chapter 27 of the Criminal Procedure Act, 1977 ([Act No. 51 of 1977](#)).

[section 6I inserted by section 43 of [Act 22 of 2008](#)]

7. Declaration of certain practices as irregular or undesirable

- (1) (a) The registrar may, by notice in the *Gazette*, declare a specific practice or method of conducting business an 'irregular or undesirable practice' or an 'undesirable method of conducting business' for a specific category or categories of financial institutions, or for all such institutions.
- (b) In determining whether or not a declaration contemplated in paragraph (a) should be made, the registrar must be guided by whether the practice concerned has or is likely to have the effect of—
- (i) harming the relations between financial institutions or any category of financial institutions, or any financial institution and clients or the general public;
 - (ii) unreasonably prejudicing any client;
 - (iii) deceiving or misleading any client; or
 - (iv) unfairly affecting any client,
- and whether, if the practice is allowed to continue, one of more objects of the law in question will, or are likely to, be defeated.

[subsection (1) substituted by section 171 of [Act 45 of 2013](#)]

- (2) The registrar may not issue a declaration referred to in subsection (1) unless the registrar—
- (a) has invited interested persons to make written representations concerning the intended declaration so as to reach him or her within 21 days before the proposed date of publication of that notice; and
 - (b) has consulted with any advisory committee or board established in respect of the supervision, regulation and control of the financial institutions concerned.
- (3) A financial institution may not, on or after the date of the notice referred to in subsection (1), carry on the relevant business practice or method of conducting business.
- (4) The registrar may, by notice in the *Gazette*, direct a financial institution which carries on the relevant business practice or method of conducting business on or after the date of the notice referred to in subsection (1), to rectify or repair to the satisfaction of the registrar anything which was caused by, or arose out of, that business practice or method of conducting business: Provided that the Registrar may not make an order contemplated in section 6D(2)(b).
- [subsection (4) substituted by section 44 of Act 22 of 2008]*
- (5) A financial institution which is directed to rectify or repair anything in terms of subsection (4), must do so within 60 days after the financial institution is so directed.

[subsection (5) substituted by section 44 of Act 22 of 2008]

8. ***

[section 8 deleted by section 111 of Act 19 of 2012 and repealed by section 172 of Act 45 of 2013]

9. Records and entries in books of account admissible in evidence

In any proceedings conducted in terms of this Act, the records and books of account of an institution, a nominee company or a trust administered by such institution are admissible as *prima facie* evidence of the matters, transactions and accounts recorded therein, if supported by an affidavit by a person who alleges in that affidavit that person—

- (a) (i) the person is a director, member, partner, official, employee or agent of such institution, nominee company or trust; or
 - (ii) the person is an inspector appointed under the Inspection of Financial Institutions Act, 1998 ([Act No. 80 of 1998](#)), section 11 or 12 of the South African Reserve Bank Act, 1989 ([Act No. 90 of 1989](#)), section 6 of the Banks Act, 1990 ([Act No. 94 of 1990](#)), or section 4 of the Mutual Banks Act, 1993 ([Act No. 124 of 1993](#)); and
- (b) such records or books of account are or have been the ordinary records and books of account of that institution, company or trust.

9A. Verification of information

Before making a determination in accordance with any law as to whether or not a person is fit and proper to hold office or continue to hold office in a financial institution, the registrar may request for the verification of information or may verify information at the registrar's disposal by making enquiries to any state department, credit bureau or other source of relevant information concerning that person.

[section 9A inserted by section 173 of Act 45 of 2013]

10. Offences

- (1) A person who contravenes or fails to comply with any provision of Chapter 1 is guilty of an offence and on conviction liable to a fine not exceeding R10 million or to imprisonment for a period not exceeding 10 years, or to both such fine and such imprisonment.

[subsection (1) substituted by section 174 of [Act 45 of 2013](#)]

- (2) A court may, in addition to any penalty it may impose in terms of subsection (1), order that such person—
- (a) pay the institution or principal concerned any profit he or she made; and
 - (b) compensate the institution or principal concerned for any damage suffered, as a result of the contravention or failure.
- (3) A court may, in addition to any penalty imposed in terms of subsection (1) and an order made in terms of subsection (2), order that such person may not serve as a director, member, partner or manager of any financial institution for such period as the court may deem fit.

11. Repeal of laws

The laws mentioned in the Schedule are hereby repealed to the extent set out in the third column of the Schedule, subject to the provisions of section 13.

12. Status of footnote

- (1) The footnote in section 1 has been inserted for ease of reference to the definition of ‘financial institution’ in section 1 of the Financial Services Board Act, 1990 ([Act No. 97 of 1990](#)).
- (2) The footnote is not part of this Act and does not have the force of law.

13. Transitional provision

Anything done or deemed to have been done under any provision of a law repealed by section 11 and which could be done under a provision of this Act, is deemed to have been done under the last-mentioned provision.

14. Short title

This Act is called the Financial Institutions (Protection of Funds) Act, 2001.

Schedule
Laws repealed

Number and year of law	Short title	Extent of repeal
Act No. 39 of 1984	Financial Institutions (Investment of Funds) Act, 1984	The whole
Act No. 6 of 1987	Financial Institutions Amendment Act, 1987	Sections 14, 15, 16 and 17
Act No. 51 of 1988	Financial Institutions Amendment Act, 1988	Section 23
Act No. 55 of 1989	Financial Markets Control Act, 1989	First item of Schedule
Act No. 83 of 1992	Financial Institutions Amendment Act, 1992	Section 33
Act No. 104 of 1993	Financial Institutions Second Amendment Act, 1993	Section 55
Act No. 22 of 1997	Financial Institutions Amendment Act, 1997	Sections 1, 2 and 3