

# **FINANCIAL INSTITUTIONS BILL 1999**

## **ARRANGEMENT OF SECTIONS**

### **PART I PRELIMINARY**

#### **SECTION**

1. Short title and commencement
2. Interpretation
3. Application and exemptions

### **PART II LICENCES**

4. Licences
5. Licensing of financial institutions
6. Fees
7. Inquiries
8. Minimum capital
9. Decision of Commissioner
10. Conditions
11. Licensing of agents of financial institutions
12. Licensing of ancillary financial service providers
13. Licence and other fees
14. Use of the word “bank” in title
15. Revocation of licence
16. Names of institutions not to be similar
17. Place of business
18. Capital shares and general conditions

19. Investigation of unlawful business

**PART III  
FINANCIAL REQUIREMENTS AND LIMITATIONS ON ACTIVITIES**

20. Capital
21. Capital accounts according to risk
22. Provision to be made for certain items
23. Minimum local assets
24. Minimum liquid assets
25. Limitations on specified operations and activities

**PART IV  
SECRECY**

26. Secrecy
27. Disclosable information

**PART V  
OFFENCES AND PENALTIES**

28. Scheduled offences and penalties for them
29. General penalty
30. Offences in relation to entries in books, documents etc.
31. Offences by institutions, servants and agents
32. Joinder of offences
33. Power of the Commissioner to compound offences
34. Attempts, preparations, abetments and conspiracies punishable as offences
35. Failure to maintain minimum requirements

**PART VI  
AUDITING AND REPORTING**

- 36. Appointment of auditors
- 37. Auditor to inform Commissioner
- 38. Appointment of Audit Committee
- 39. Functions of Audit Committee
- 40. Financial Statements
- 41. Financial records
- 42. Annual accounts

**PART VII  
DIRECTORS AND OFFICERS**

- 43. Qualifications of directors and officers
- 44. Duties of directors and officers
- 45. Conflict of interest
- 46. False and misleading statements
- 47. Suspension of director or officer
- 48. Appointments of directors, officers and branch managers

**PART VIII  
SUPERVISION OF FINANCIAL AND OTHER LICENSED INSTITUTIONS**

- 49. Responsibility for supervision
- 50. Returns
- 51. Extension of time
- 52. Examinations
- 53. Production of records and information for examiner
- 54. Power to issue orders or directions
- 55. Publication of information

**PART IX  
WINDING UP AND SEIZURE**

- 56. Exceptions to Companies Act
- 57. Acceptance of deposits or funds by insolvent licensed institutions
- 58. Seizure of licensed institution
- 59. Notice of seizure
- 60. Appeal for termination of seizure
- 61. Powers and duties of Commissioner's appointee upon seizure
- 62. Effects of seizure
- 63. Restriction of rights of creditor as to execution in seizure
- 64. Limitation on duration of seizure

**PART X  
ABANDONED PROPERTY**

- 65. Unclaimed funds and property
- 66. Reports and disposition
- 67. Failure to make a report or payment

**PART XI  
OTHER REQUIREMENTS AND RESTRICTIONS**

- 68. Reserve for losses due to negligence or dishonesty
- 69. Restrictions on payments of dividends
- 70. Credit requirements

**PART XII  
MISCELLANEOUS**

- 71. Power to issue guidelines etc
- 72. Financial holidays
- 73. Substitution for depositor's signature

- 74. Immunity
- 75. Reference to "this Act"
- 76. Appeals
- 77. Repeal

# FINANCIAL INSTITUTIONS BILL 1998

## A BILL

### for

An act to provide for the authorization, supervision and regulation of financial institutions, agents of financial institutions and ancillary financial service providers and for related matters.

## ENACTED BY THE PARLIAMENT OF LESOTHO

### PART I PRELIMINARY

#### Short title and commencement

1. This Act may be cited as the Financial Institutions Act 1998 and shall come into operation on the date of its publication in the Gazette.

#### Interpretation

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

"affiliate", in respect of any licensed institution means -

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

"ancillary financial service provider" means a person who engages in providing auxiliary services such as foreign exchange dealing services, electronic fund transfer services and other similar auxiliary financial services;

"bank" means any financial institution whose functions include receiving deposits, honouring instruments drawn against them, and paying interest on them as permitted by law;

"banking business" means the business of receiving funds from the public through the acceptance of money deposits payable upon demand or after a fixed period or after notice, or any similar operation through the sale or placement of bonds, certificates,

notes or other securities; and the use of such funds either in whole or in part for loans, investments or any other operation authorised either by law or by customary banking practices, for the account and at the risk of the person doing such business;

"Commissioner" means the Central Bank of Lesotho established by the Central Bank of Lesotho Act, 1978<sup>i</sup>;

"company" has the meaning assigned to it in the Companies Act, 1967<sup>ii</sup>;

"court" in relation to any licensed institution means the High Court of Lesotho and, in relation to any offence against this Act, includes a subordinate court having jurisdiction in respect of that offence;

"credit business" means the business of extending credit to any person from sources other than deposits from the public;

"deposit" means any sum of money paid on terms -

- (a) under which it will be repaid, with or without interest or a premium, and either on demand or at a time or in circumstances agreed by or on behalf of the person making the payment and the person receiving it;
  - (b) which are not referable to the provision of property or services or to the giving of security, and for the purposes of this paragraph, money is paid on terms which are referable to the provision of property or services or the giving of security if, and only if -
    - (i) it is paid by way of advance or part payment for the sale, hire or other provision of property or services of any kind and is repayable only in the event that the property or services is or are not in fact sold, hired or otherwise provided;
    - (ii) it is paid by way of security for payment for the provision of property or services of any kind provided or to be provided by the person by whom or on whose behalf the money is accepted; or
    - (iii) it is paid by way of security for the delivery or return of any property, whether in a particular state of repair or otherwise;
- "director" includes any person, by whatever title he may be referred to, carrying out or empowered to carry out substantially the same functions in relation to the direction of licensed institution as those carried out by a director of a company incorporated under the Companies Act, 1967 and any person in Lesotho responsible for carrying out such functions for a licensed institution not incorporated in Lesotho;

"financial institution" means an institution which performs banking business or credit business;

"foreign financial institution" means a financial institution, authorised or registered to conduct banking or other financial business under the laws of any state, country, colony, or territory other than Lesotho, doing banking business or other financial business in Lesotho, whether incorporated or not;

"licensed institution" -

- (a) in relation to a financial institution, means licensed under sections 4 and 5; and
- (b) in relation to an agent of a financial institution or an ancillary financial service provider means licensed under section 11 or 12 respectively;

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

"Minister" means the Minister of Finance;

"officer" means -

- (a) the chairman or deputy chairman of the board of directors, or president or vice-president;
- (b) the managing director, the general manager, comptroller, the secretary or the treasurer;
- (c) any other individual who holds the title or office or who performs any function similar to those normally performed by the holder of the offices specified in sub-paragraph (a) or (b);

"person" includes any individual or company, partnership, syndicate, association or body of persons, corporate or unincorporated;

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

"unsecured advances" or "unsecured credit facilities" means advances or credit facilities granted without security; or, in the case of advances and credit facilities granted against security, any part of such advances and 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 Commissioner whenever he deems that no market value exists for the said assets.

### **Application and exemptions**

3. This Act shall apply to all licensed institutions except -
- (a) an institution undertaking exclusively insurance business in Lesotho; and
  - (b) other institutions including Cooperative Societies, Associations, Societies and informal Self-Help organisations which may be exempted by the Commissioner by notice published in the Gazette either from all or part of the provisions of this Act.

## **PART II LICENCES**

### **Licences**

4. (1) No banking or credit business shall be transacted, either in Lesotho or abroad by a local financial institution, or in Lesotho by a foreign financial institution, unless that financial institution has been licensed by the Commissioner under this Act.

(2) No local financial institution shall be granted a licence under this Act unless it is incorporated as a public company under the Companies Act 1967.

(3) Notwithstanding sub section (2), no company intending to operate as a financial institution shall be registered without prior written approval of the Commissioner.

(4) A company licensed to carry on banking business in Lesotho on the date on which this Act comes into operation shall be deemed to have been issued a licence under this Act.

(5) Any person who contravenes the provisions of sub-section (1) commits an offence and shall be liable to the penalty provided in the First Schedule:

Provided that where the person found guilty of such offence is a body corporate, the term of imprisonment set out in the third column of the First Schedule shall apply to any director, officer or person responsible for carrying out such unauthorised business.

### **Licensing of financial institutions**

5. (1) In order to obtain a licence under this Act as a financial institution, the applicant shall apply in writing to the Commissioner and submit -
- (a) authenticated copies of the memorandum and articles of association or, in the case of a foreign financial institution which is not incorporated in Lesotho, such similar documents regulating its affairs;

- (b) a statement of the address of its head office, and the name, nationality, qualifications, experience and address of its chairman, of every director and of every officer;
- (c) if it is a foreign financial institution, a statement from the supervisory authorities of the home country that its chairman, directors, principal officers and management team as a whole are fit and proper persons and that it is subject to comprehensive supervision on a consolidated basis;
- (d) where applicable, a copy of audited financial statements for the last two years and that of its head office or parent company;
- (e) the full particulars of the business it proposes to carry on, and of the manner in which it proposes to carry on that business;
- (f) the location of the principal and other places of business in Lesotho where it proposes to carry on its activities and, in the case of a mobile agency, the area to be served; and
- (g) such other information as the Commissioner may require.

(2) The application and every document submitted in accordance with subsection (1) shall be signed by the principal officer of the applicant.

(3) The Commissioner may amend the terms and conditions of any such licence on every anniversary of the issue thereof.

(4) The Commissioner may at his discretion refuse to grant such licence.

### **Fees**

6. The applicant shall -

- (a) pay an investigation fee to the Commissioner; and
- (b) deposit with the Commissioner the registration fee and the licence fee for the first year, as prescribed in the Second Schedule to this Act:

Provided that such deposit shall be returned to the applicant if the licence has not been granted.

### **Inquiries**

7. (1) In considering an application for a licence, the Commissioner shall conduct such investigation and inquiries as may be deemed necessary to determine whether the applicant is fit and proper to be granted a licence under this Act.

(2) In conducting such investigation and inquiries, the Commissioner shall consider the financial resources and history of the applicant, the character and experience of its management, the adequacy of its capital, the convenience and needs of the community it intends to serve, the earning prospects afforded by the area primarily to be served, the prospective effect that the opening of a financial institution may have on existing financial institutions in the area primarily to be served, and such other matters as the Commissioner deems appropriate.

### **Minimum capital**

8. A financial institution shall not be granted a licence unless it fulfills the minimum capital of not less than ten million Maloti of such required capital which the Commissioner may prescribe from time to time, by Regulations published in the Gazette, for different types of financial institutions doing business in Lesotho.

### **Decision of Commissioner**

9. (1) Within 90 days after the receipt of the complete and accepted application, or, where further information has been requested, after the receipt of such information, the Commissioner shall either grant a licence or inform the applicant that he has refused to grant a licence.

(2) Where the Commissioner has refused to grant a licence, he shall state the reasons for his decision, in writing.

### **Conditions**

10. (1) In granting a licence, the Commissioner may impose conditions to be satisfied by the licensee, including a condition that the licensee carry on business at a designated place or places, or provide or refrain from providing specified services or facilities.

(2) In the case of a foreign financial institution, without limiting the generality of the foregoing, the Commissioner shall require as a condition for the commencement of operations that there be filed with him-

(a) a duly executed instrument in writing, by its terms of indefinite duration and irrevocable, appointing with the prior written approval of the Commissioner a true and lawful agent resident in Lesotho, upon whom any action or proceeding against it on a cause of action arising out of a transaction with its places of business in Lesotho, may be served with the same force and effect as if it were organised in Lesotho had been lawfully served with process therein; and

(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 Lesotho-

(i) to whom such process shall be forwarded; or

- (ii) upon whom any process not served upon the agent under paragraph (a) may be served.

(3) A financial institution may be licensed to engage in more than one of the categories of financial services set out in this Act.

(4) No financial institution other than a licensed bank shall accept any deposit or funds from the public repayable on demand by cheque, draft or order drawn on the financial institution.

### **Licensing of agents of financial institutions**

11. (1) Any person, acting or proposing to act as agent of a financial institution, who is representing such institution, or undertaking any activity on its behalf in Lesotho, other than in the course of legal proceedings, shall, before engaging in such representation or activity, apply to the Commissioner for a licence under this section.

(2) In applying for a licence, the applicant shall submit in writing to the Commissioner full particulars of -

- (a) his authority;
- (b) the business he proposes to carry on;
- (c) the manner in which, and the place where, he proposes to carry on such business;
- (d) proof of satisfactory financial performance in the last five years;
- (e) adequacy of capital and financial backing by a parent company;
- (f) competence of management team and staff; and
- (g) proof of a good track record in complying with the laws, established practices, and norms, in the country of origin, supported by the authorities of the home country.

(3) The applicant shall, upon the granting of a licence, pay to the Commissioner the licence fee for agents of a financial institution as prescribed in the Second Schedule.

(4) The Commissioner may amend the terms and conditions of any such licence on every anniversary of the issue thereof.

(5) The Commissioner may at his discretion refuse to grant such licence.

(6) Any person who contravenes the provisions of sub-section (1) commits an offence and shall be liable to the penalty provided in the First Schedule:

Provided that where the person found guilty of such offence is a body corporate, the term of imprisonment set out in the third column of the First Schedule should apply to any director, officer, or person responsible for carrying out such unauthorised act.

### **Licensing of ancillary financial service providers**

12. (1) No ancillary financial service provider shall conduct its or his business without holding a valid licence issued by the Commissioner in accordance with the Regulations made under this Act.

(2) On the application of a person which intends to conduct ancillary financial service, the Commissioner shall consider such application and issue a licence if the applicant meets the requirements indicated in the Regulations issued by the Commissioner.

(3) Any person who contravenes the provisions of sub-section (1) commits an offence and shall be liable to the penalty provided in the First Schedule:

Provided that where the person found guilty of such offence is a body corporate, the term of imprisonment set out in the third column of the First Schedule shall apply to any director, officer or person responsible for carrying out such unauthorised business.

### **Licence and other fees**

13. (1) Every licensed institution shall so long as its licence is not revoked, pay to the Commissioner on or before the first day of January of each year, licence fees as prescribed in the Second Schedule.

(2) The Commissioner may from time to time, by notice published in the Gazette, amend the schedule of fees and specify such other annual fees which shall be paid by licensed institutions.

### **Use of the word "bank" in title**

14. (1) No person other than a licensed financial institution, or an agent of a financial institution licensed under section 11, shall use the word "bank" or any of its derivatives in any language, or any other word indicating the transaction of banking or credit business, in the name, description or title under which such person is transacting business in Lesotho, or make or continue to make any representation to such effect in any bill-head, letter-paper, notice, advertisement or in any other manner whatsoever for the purpose of transacting business in Lesotho.

(2) Nothing in subsection (1) shall prevent a person from using the word "bank" or any of its derivatives in any language, when -

- (a) it is for the sole purpose of establishing a company for the purpose of applying for a licence under this Act;

- (b) it is included in the title of an association formed by financial institutions for the purpose of representing the common interests of the members of such association; or
- (c) it is expressly permitted by the Commissioner.

### **Revocation of licence**

15 (1) The Commissioner may revoke the licence of any licensed institution if the holder -

- (a) fails to commence operations within a period of six months following the grant of the licence;
- (b) has, in the opinion of the Commissioner, obtained the licence on the strength of untrue or misleading information furnished by any person to the Commissioner;
- (c) fails to comply with the conditions of the licence or with any measure required by the Commissioner in accordance with section 54 (a);
- (d) ceases to carry on the business for which he is licensed or in the case of a financial institution of which the main place of business is situated outside Lesotho, the authorisation to conduct banking or financial business is revoked by the competent authority in such other country; or
- (e) is in breach of any other provision of this Act.

(2) Before revoking the licence of any institution, the Commissioner shall give such institution a notice of his intention to do so, and shall afford it a reasonable opportunity to show cause why such licence should not be revoked;

Provided that in no event shall a licence be revoked earlier than 28 days after the notice of intention is served on the institution; and

Provided further that the Commissioner may obtain a temporary injunction upon application to the court for the suspension of any part or all the business being conducted by such institution after the notice of intention has been served upon it.

(3) Where the Commissioner has revoked a licence, he shall as soon as possible publish the notice of the revocation in the Gazette and use other means appropriately calculated to inform the public of such revocation, including where possible, publication of notice of revocation in a newspaper of general circulation in each of the places in which there is situated a place of business of the licensed institution.

### **Names of institutions not to be similar**

16. (1) No licensed institution shall be granted or continue to hold a licence under a name which so closely resembles the name of an existing licensed institution as would be likely, in the opinion of the Commissioner, to mislead the public.

- (2) Except with the written consent of the Commissioner, no licensed institution shall use, or refer to itself by, a name other than the name under which it is licensed.

### **Place of business**

17. (1) Any licence granted under sections 4 to 13 shall authorise the licensee to carry on business at the place or places designated in the licence. A copy of the licence shall be displayed in each of its places of business.

(2) No licensed institution shall open a new place of business, or change the location of, or close an existing place of business without the prior written consent of the Commissioner.

(3) Before granting consent, the Commissioner may require to be satisfied by inspection whether the new place of business, or the licensed institution as relocated, will continue to meet the criteria, as applicable.

### **Capital shares and general conditions**

18. (1) All shares endowed with voting rights, which are issued by a local financial institution, shall be in registered form.

(2) Without prior approval of the Commissioner, no person may acquire either directly or indirectly any interest in the capital stock of a local financial institution which would confer upon him a voting share exceeding ten per cent of the total.

(3) In considering any application for such approval, the Commissioner may call for such information as he may require.

(4) Without the prior approval of the Commissioner, no local financial institution shall -

- (a) enter into a merger or consolidation;
- (b) transfer the whole or any part of its assets in Lesotho other than in the ordinary course of its business;
- (c) effect an increase or reduction of its authorised 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.

(5) Without the prior approval of the Commissioner, no foreign financial institution which is not incorporated in Lesotho shall -

- (a) transfer the whole or any part of its assets in Lesotho other than in the ordinary course of its business;
- (b) effect a reduction of its assigned capital in Lesotho; or
- (c) alter its name as set out in its licence.

### **Investigation of unlawful business**

19. (1) Whenever the Commissioner has reason to believe that any person is engaging in banking or credit business or acting as an agent of a financial institution or an ancillary financial service provider without a valid licence, he may call for and examine the books, accounts and records of such person in order to ascertain whether such person is so acting. Any person refusing to make available for examination such books, accounts and records after having been duly requested to do so by the Commissioner shall be guilty of an offence and shall be liable to the penalty provided in the First Schedule to this Act.

(2) Where a person transacts banking or credit business or acts as an agent of a financial institution or an ancillary financial service provider, without being licenced as required by this Act, and holds moneys or other property by transacting such business or so acting, the Commissioner may make application to the Court for directions in respect of the disposal of such moneys or property. The Court shall give such directions as will, so far as possible, ensure the speedy and efficient return of such moneys or property to the depositor or owner thereof, and may, without prejudice to the generality of the foregoing, direct that such moneys or property be transferred to the custody of the Commissioner for the distribution to the depositors or owners concerned.

(3) Nothing in subsection (2) shall relieve any person from liability to criminal proceedings arising out of any contravention of the provisions of this Act.

## **PART III FINANCIAL REQUIREMENTS AND LIMITATIONS ON ACTIVITIES**

### **Capital**

20. (1) Every financial institution shall at all times maintain unimpaired the minimum required capital, either paid-up or assigned if it is a foreign financial institution not incorporated in Lesotho, set out in section 8.

(2) In this section -

- (a) “paid-up share capital” means capital obtained through the issuance of ordinary shares or noncumulative nonredeemable (perpetual) preferred shares, excluding such ordinary or preference shares issued in pursuance of the capitalization of reserves from a revaluation of assets; and
- (b) “assigned capital” means capital funds transferred from the head office of a foreign financial institution which is not incorporated in Lesotho

and specifically assigned to the capital account of such foreign financial institution licensed to operate in Lesotho. Such assigned capital funds shall be maintained in Lesotho in such form as may be acceptable to the Commissioner and shall serve the same purposes under this Act as the paid-up share capital.

(3) Every financial institution shall maintain a reserve account and, before any dividend is declared or any profit is transferred to the head office, parent company 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 amounts specified in subsection (4).

(4) There shall be transferred each year to its reserve account a sum equal to-

- (a) not less than fifty per cent of its net profits until the balance in the reserve account is equal to one-half the amount of its paid-up share or assigned capital account; or
- (b) not less than twenty-five per cent of its net profits whenever the balance in the reserve account is equal to more than one-half but is less than the whole amount of the paid-up share or assigned capital account.

(5) The reserve account shall neither be reduced nor impaired.

Provided that the impairment of the reserve account shall be permitted when it is the only means of preventing an impairment of paid-up share or assigned capital, in which case the Commissioner shall be notified within ten days of the amount of such impairment.

(6) Whenever there is an impairment of the paid-up share or assigned capital or impairment of its reserve account, no financial institution shall declare, credit or pay any dividend or make any other transfer from profits.

### **Capital accounts according to risk**

21. The Commissioner may also require a financial institution to maintain capital accounts in an amount not less than a percentage of total assets, contingencies and off-balance-sheet commitments as the Commissioner may specify, taking into account the different types of risks taken by such financial institution.

### **Provision to be made for certain items**

22. In making the calculations necessary to ascertain that a financial institution has complied with the requirements of sections 20 and 21, provision shall be made to the satisfaction of the Commissioner and of the auditor of such institution appointed under section 36 (1) for the following items -

- (a) depreciation of assets and bad or doubtful debts;
- (b) operating and accumulated losses;

- (c) preliminary expenses, representing expenses relating to organisation or extension or the purchase of business or goodwill;
- (d)
- (e) the value of any assets lodged or pledged to secure liabilities incurred under any law where all the liabilities (including contingent liabilities) so secured are not included in the calculation and where 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; and
- (e) such other items as may be prescribed by Regulations.

**Minimum local assets**

23. (1) The Commissioner may, by Regulations published in the Gazette, require a financial institution to maintain a prescribed minimum amount of local assets against such liabilities and capital accounts as may be specified in the Regulations.

(2) For the purposes of this section, "local assets" means any asset consisting of advances and credit facilities to persons doing business or resident in Lesotho, properties and other assets situated in Lesotho and such other assets as may be specified in the Regulations.

**Minimum liquid assets**

24. (1) The Commissioner may, by Regulations published in the Gazette, determine the minimum, or minimum average of liquid assets which a financial institution shall hold at any time, or over the period of time against such liabilities as may be specified in the Regulations.

(2) If a financial institution fails to comply with the Regulations made under subsection (1), it shall immediately in writing report such failure to the Commissioner and shall in such report state the reasons for such failure.

(3) During any period of time which a financial institution fails, or is unable to comply with the rules under sub section (1), it shall not grant any loan or credit to any person without the prior written approval of the Commissioner.

**Limitations on specified operations and activities**

25. (1) No financial institution shall directly or indirectly -

- (a) grant to any person any advance or credit facility, or give any financial guarantee or incur any other liability on behalf of such person, so that the total value of such advances or credit facilities, to, and financial guarantees or other liabilities on behalf of such person is at any time more than twenty - five per cent of the sum of its unimpaired paid-up or assigned capital and unimpaired balance in the Reserve Account.

Provided that the limitation upon the foregoing transactions shall not apply in respect thereof if such transactions -

- (i) represent loans to, or loans guaranteed by, the Government of Lesotho;
  - (ii) represent loans fully collateralised by deposits with the financial institution, or by obligations of the Government of Lesotho;
  - (iii) represent such loans to, or loans guaranteed by the World Bank or other similar multilateral lending organisation, or such foreign governments, as the Commissioner may specify for the purposes of this section;
  - (iv) represent such loans secured by a written financial guarantee issued by a reputable financial institution acceptable to the Commissioner or by a pledge of financial assets having value in excess of the amount of obligation secured thereby by a percentage to be determined by the Commissioner; or
  - (v) represent such other loans or extensions of credit or guarantee as may be determined by the Commissioner;
- (b) grant any advances or credit facilities against the security of its own shares or those of any other licensed financial institution;
- (c) grant or permit to be outstanding unsecured advances or unsecured credit facilities of an aggregate amount in excess of one percent of the sum of its unimpaired paid-up or assigned capital and unimpaired balance in its reserve account -
- (i) to any one of its directors or officers;
  - (ii) to any firm, partnership, syndicate, association, company or other body of persons corporate or unincorporated in which it or any one or more of its directors or officers is interested as owner, director, officer, partner, manager, agent, member or shareholder holding at least ten per cent share; or
  - (iii) to any individual, firm, partnership, syndicate, association, company or other body or persons corporate or unincorporated of whom or of which it or any one or more of its directors or officers is a guarantor;
- (d) grant or permit to be outstanding to its employees unsecured advances or unsecured credit facilities which in aggregate amount for any one employee exceed one year's emoluments of such 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 in

so far as may exceptionally be necessary in the course of banking or credit business or in the course of satisfaction of debts due to it;

- (f) acquire or hold any part of the share capital of any financial, commercial, agricultural, industrial or other undertaking except such share-holdings as a financial institution may acquire in the course of the satisfaction of debts due to it which share-holdings shall, however, be disposed of at the earliest suitable moment:

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: and

Provided further that it shall not apply -

- (i) in respect of any share-holding approved by the Commissioner in any corporation set up for the purpose of insuring deposits or of promoting the development of a money market or securities market or payments system in Lesotho or of improving the financial mechanism for the financing of economic development;
- (ii) to all share-holdings in other undertakings the aggregate value of which does not at any time exceed twenty-five per cent of the sum of its unimpaired paid-up or assigned capital and unimpaired balance in its Reserve Account:

Provided, however, that, notwithstanding the provisions of subparagraph (ii), the acquisition of voting shares of a local financial institution shall be subject to the prior authorization of the Commissioner.

- (g) purchase, acquire or lease real property except as may be necessary for the purpose of conducting its business, including provision for future expansion or housing its staff or in such circumstances as the Commissioner may approve, provided that a financial institution may secure a debt on any real or other property and in default of repayment may acquire such property for resale by the financial institution as soon as possible thereafter;
- (h) grant to any of its shareholders holding at least ten percent share any advance or credit facility, or give any financial guarantee or incur any other liability on behalf of such shareholders.

(2) In the application of the limitation of subsection (1) (a), if the Commissioner shall determine that the interests of a group of two or more persons are so inter-related that

they should be considered as a unit, the total indebtedness of that group shall be combined and deemed to be in respect of a single person.

(3) Any financial institution which, prior to the commencement of this Act, entered into any transactions incompatible with the provisions of this section shall within three months after commencement of this Act submit a statement thereof to the Commissioner and shall, subject to agreement with the Commissioner, liquidate all such transactions as soon as possible.

#### **PART IV SECRECY**

##### **Secrecy**

26. (1) Except for the purpose of the performance of his duties or the exercise of his functions or when lawfully required to do so by a competent court or under the provisions of any Act, no Commissioner, officer, employee, or agent of the Commissioner's office, including any examiner duly authorised by the Commissioner to examine the affairs of, or advise concerning, any person, shall disclose to any person any information of **non-public nature** relating to such office or to the affairs of any person, including any customer of a licensed institution, which he has acquired in the performance of his duties or the exercise of his functions.

(2) Every person subject to subsection (1) 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 Regulations.

(3) Every person 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 is liable to the penalty set out in the First Schedule.

(4) If any person acts in the execution of his office before he has taken the prescribed oath he commits an offence and is liable to the penalty set out in the First Schedule.

(5) Save as otherwise provided under the provisions of any law or unless he is lawfully required to do so by a court of competent jurisdiction, no person who has held any office in a licensed institution or who has been its employee or agent, shall disclose to any person any information of non-public nature relating to such office or to the affairs of any person including any customer of a licensed institution, which he acquired in the performance of his duties or the exercise of his functions.

(6) A person who contravenes subsection (5) is guilty of an offence and is liable to the penalty set out in the First Schedule.

##### **Disclosable information**

27. Notwithstanding section 26, the Commissioner may, upon request disclose-

- (a) the nature of the licence;
- (b) any conditions and limitations attached to such licence;
- (c) the places where the holder of such licence may, according to his licence carry on his activities;
- (d) the name of the person upon whom process may be served in lieu of the holder of such licence, when a certificate of designation has been filed with the Commissioner;
- (e) any information relating to the banking and financial sector to a representative of a foreign country which may assist such a person in the performance of his official duties.

## **PART V OFFENCES AND PENALTIES**

### **Scheduled offences and penalties for them**

28. (1) Any person who committed an offence in terms of –
- (a) sections 4 (5), 11 (6), 12 (3), 19 (1), 26 (3) (4) (6), 30, 34, 43 (4), 45 (7), 46, 53 (2) (3), 57 (1) (2) and 67 shall be liable to a fine not exceeding the amount set out in the fourth column of the First Schedule and in the case of a continuing offence, shall in addition be liable to a daily fine not exceeding the amount set out in the fifth column of the First Schedule for everyday during which the offence continues
  - (b) sections 4 (5), 11 (6), 12 (3), 19 (1), 26 (3) (6), 30, 34, 43 (4), 45 (7), 46 and 57 (2) may in addition to a fine be liable upon conviction to imprisonment not exceeding the term set out in the third column of the First Schedule;

Provided that where the person who committed an offence is a body corporate, the term of imprisonment set out in the third column shall not apply to it.

- (2) The Commissioner may, from time to time, by notice published in the Gazette, amend the First Schedule –
- (a) by deleting the whole of any item therein, whereupon the provisions of section 29 shall apply to the offence specified in that item;
  - (b) by adding a new item thereto and providing the fines therefor under the fourth and fifth columns of that schedule which shall not be in excess of M100 000 and M2 000, respectively;
  - (c) by increasing or decreasing the amount of fines provided under the fourth and fifth columns, respectively;

Provided that the aggregate of increases from time to time of any fine provided in the fourth column shall not, in any case, be in excess of M100 000 or in a case of fine provided in the fifth column be in excess of M2 000.

### **General penalty**

29. (1) The Commissioner may impose by written notice to any licensed institution or any person subject to this Act who contravenes –

- (a) any provision of this Act or
- (b) any regulation, specification or requirement made, or any order in writing, direction, instruction, or notice given, or any limit, term, condition or restriction imposed, or any other thing howsoever done, in the exercise of any power conferred under, pursuant to, or by virtue of, any provision of this Act

a fine not exceeding M100 000 and in the case of a continuing offence, an additional daily fine not exceeding M2 000.

(2) Such penalty shall be determined by the Commissioner in an amount he deems necessary, taking into account the gravity of the conduct, the presence or absence of wrongful intent of the licensed institution or the concerned person, the financial resources of the licensed institution or the concerned person, and any extenuating or mitigating factors the Commissioner wishes to consider and shall be paid within thirty days of the issue of the notice directly to the Commissioner.

### **Offences in relation to entries in books, documents etc**

30. A person who, with intent to deceive-

- (a) makes or causes to be made a false entry;
- (b) omits to make, or causes to be omitted, any entry; or
- (c) alters, abstracts, conceals or destroys, or causes to be altered, abstracted, concealed or destroyed, any entry, in any book or record, or in any report, slip, statement or other document whatsoever, relating to the business, affairs, transactions, condition, property, assets, liabilities or accounts, of a licensed institution commits an offence and shall, on conviction, be liable to the penalty provided in the First Schedule.

### **Offences by institutions, servants and agents**

31. (1) Where any offence against any provision of this Act has been committed by any person who at the time of the commission of the offence was a director, or officer, of a licensed institution purporting to act in any such capacity, or was in any manner or to any extent responsible for the management of any of the affairs of such institution, or was assisting in such management, he shall be guilty of that offence unless he proves that the offence was committed without his consent or

connivance and that he exercised all such diligence to prevent the commission of the offence as he ought to have exercised, having regard to the nature of his functions in that capacity and to all the circumstances.

(2) Where any person (in this subsection referred to as the "principal") would be liable under this Act to any punishment or penalty for any action, omission, neglect or default, he shall be liable to the same punishment or penalty for every such act, omission, neglect or default of any clerk, servant or agent of his, or of the clerk or servant of such agent:

Provided that such act, omission, neglect or default was committed by the principal's clerk or servant in the course of his employment, or by the agent when acting on behalf of the principal, or by the clerk or servant of such agent in the course of his employment by such agent or otherwise on behalf of the agent.

### **Joinder of offences**

32. Notwithstanding anything contained in any other written law, where a person is accused of more than one offence under this Act, he may be charged with and tried at one trial for any number of such offences committed within the space of any length of time.

### **Power of the Commissioner to compound offences**

33. (1) The Commissioner, may , in a case where he deems it fit and proper to do so, compound any offences committed by any person which is punishable under section 28 or 29, or under any other provision of this Act, by making a written offer to such person to compound the offence by paying to the Central Bank of Lesotho within such time as may be specified in the offer such a sum of money as may be specified in the offer which shall not exceed fifty per cent of the amount of the maximum fine (including the daily fine, if any, in the case of a continuing offence) to which that person would have been liable if he had been convicted of the offence.

(2) An offer under subsection (1) may be made at any time after the offence has been committed, but before any prosecution for it has been instituted, and where the amount specified in the offer is not paid within the time specified in the offer, or any extension of it which the Commissioner may grant, prosecution for the offence may be instituted at any time thereafter against the person to whom the offer was made.

(3) Where an offence has been compounded under subsection (1), no prosecution shall thereafter be instituted in respect of such offence against the person to whom the offer was made.

### **Attempts, preparations, abetments and conspiracies punishable as offences**

34. (1) Any person who -

- (a) attempts to commit any offence under this Act;
- (b) does any act preparatory to or in furtherance of the commission of any offence under this Act; or

- (c) abets or is engaged in a criminal conspiracy to commit any offence under the Act, whether or not the offence is committed in consequences thereof,

shall be guilty of such offence and shall be liable to the penalty provided in the First Schedule for such offence.

(2) Any provision of this Act which contains a reference to an offence under any specific provision of this Act shall be read as including a reference to an offence under subsection (1) in relation to the offence under that specific provision.

### **Failure to maintain minimum requirements**

35. The Commissioner may impose on any financial institution which fails to maintain the minimum requirements prescribed under sections 23 and 24 a penalty based on the amount of the deficiency, as may be specified in the Regulations.

## **PART VI AUDITING AND REPORTING**

### **Appointment of auditors**

36. (1) Every financial institution shall, annually, with the approval of the Commissioner appoint an independent auditor.

(2) The duties of the independent auditor appointed under subsection (1) shall include the following -

- (a) to make a full review of the financial institution's records and accounts and to make a report to the shareholders in the case of a local financial institution and to the head office in the case of a foreign financial institution not incorporated in Lesotho 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 are full and fair and properly drawn up, whether they exhibit a true and correct statement of the affairs of the institution in accordance with auditing and accounting standards, and requirements as to format and content which may be specified by the Commissioner, and if the auditor has called for explanation or information from the officers or agents of the financial institution, whether a satisfactory response was received;
- (b) to make a full review of the financial institution's internal control structure, systems for loan classification, provisioning and debt write-offs and risk management procedures, and make a full and fair report of the same to the directors of the institution; and
- (c) to make a full review of the financial institution's procedures for compliance with the requirements of this Act, and make a full and fair report of the same to the directors of the institution.

(3) The reports of the auditor shall be read together with the report of the board of directors of the financial institution at the annual meeting of shareholders of each local financial institution and in the case of a foreign financial institution not incorporated in Lesotho shall forthwith be transmitted to the head office, and a copy thereof sent to the Commissioner.

(4) If a financial institution fails to appoint an auditor in accordance with subsection (1), the Commissioner may appoint that auditor and the remuneration of such auditor shall be paid by the financial institution.

(5) 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 a financial institution.

(6) Any person who, after appointment as auditor, acquires any interest, or becomes an officer, employee or agent of such financial institution, shall forthwith cease to be such auditor.

### **Auditor to inform the Commissioner**

37. (1) If an auditor, in the course of the performance of his duties, learns of any fact, transaction or course of conduct which

- (a) may pose a substantial risk to the condition of the financial institution;
- (b) may result in a significant loss to the financial institution;
- (c) may prejudice the interest of the financial institution's depositors and creditors;
- (d) is in violation of this Act or any other Act to which it is subject; or
- (e) in his opinion may be of concern to the Commissioner having regard to the Commissioner's supervisory functions, in terms of this Act in respect of the financial institution concerned;

the auditor shall, as soon as possible, report such matter to the Commissioner.

(2) Upon request by the Commissioner, the auditor shall make available documents, management letters and such other information relating to his audit.

(3) The Commissioner may, from time to time, arrange meetings with the auditor of financial institutions.

(4) Whenever an auditor furnishes the Commissioner with written information, he may at the same time furnish the chief executive officer of the financial institution to which such information relates with a copy of the relevant document.

(5) The furnishing of information in good faith by an auditor shall in no circumstances be held to constitute a contravention of any provision of the law or a breach of any provision of the law or a breach of any provision of a code of professional conduct to which such auditor may be subject.

(6) Nothing in this section shall be construed as conferring upon any person any right of action against an auditor which, but for the provisions of this section, he would not have had

### **Appointment of Audit Committee**

38. The board of directors of a financial institution shall appoint at least three of its members to form an audit committee, of whom at least two shall not be employees of the institution.

### **Functions of Audit Committee**

39. (1) The functions of the Audit Committee shall be -
- (a) to 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 that financial institution in the day-to-day management of its business;
  - (b) to facilitate and promote communication regarding the matters referred to in paragraph (a) or any other related matter, between the board of directors and the executive officers of the auditor appointed under section 36 and the employee charged with the internal auditing of the transactions of the institution; and
  - (c) to introduce such measures as in the committee's opinion may serve to enhance the credibility and objective of financial statements and reports prepared with reference to the affairs of the financial institution.
- (2) All the members of the audit committee may be and the majority of such members shall be, persons who are not employees of the institution.

### **Financial statements**

40. Every financial institution shall prepare its financial statements in accordance with the requirements of internationally accepted accounting practices.

### **Financial records**

41. Every financial institution shall keep such records in Lesotho as are necessary to exhibit clearly and correctly the state of its affairs and to explain its transactions and financial position and to enable the Commissioner to determine whether the institution has complied with the provisions of this Act, and it shall preserve every such record for a period of at least ten years as from the date of the last entry therein.

### **Annual accounts**

42. (1) Not later than three months after the expiration 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 Lesotho shall submit audited balance sheet and profit and loss account as of the last working day of that year in such a form as the Commissioner may prescribe and under the joint signatures of the principal officer and majority of directors in the case of a local financial institution and of the manager and next most senior officer of

the principal place of business in Lesotho in case of a foreign financial institution to the Commissioner.

(2) The balance sheet and profit and loss account prepared in accordance with subsection (1) shall be audited in the manner prescribed in section 36.

(3) Every financial institution shall -

- (a) within fourteen days after the preparation of a balance sheet and profit and loss account in accordance with the provisions of subsection (1) publish a copy of such audited balance sheet in the Gazette and, where possible, in at least one newspaper of general circulation in Lesotho; and
- (b) exhibit throughout the year in a conspicuous position in every place of business of the financial institution in Lesotho excluding a mobile agency a copy of its latest such balance sheet.

## **PART VII DIRECTORS AND OFFICERS**

### **Qualifications of directors and officers**

43. (1) No person shall be a first director of a newly licensed institution and no person shall be elected or appointed a director or officer of a licensed institution if the person -

- (a) has contravened any provision made by or under an enactment appearing to the Commissioner to be designed for protecting members of the public against financial loss due to dishonesty, incompetence or malpractice by persons concerned in the provision of banking, credit or other services or the management of companies or against financial loss due to the conduct of discharged or undischarged insolvents;
- (b) has been convicted of a felony or of any offence involving fraud, dishonesty or breach of trust;
- (c) has been found mentally incompetent to manage his affairs and has not recovered from such condition;
- (d) is more than two months delinquent without adequate cause as determined by the Commissioner in his sole discretion, with respect to any loan, extension of credit, guarantee or other obligation to that person by any licensed institution for which that person is liable;
- (e) is under suspension or removal from office by order or direction of the Commissioner pursuant to this Act;
- (f) has engaged in any business practice appearing to the Commissioner to be deceitful or oppressive or otherwise improper (whether lawful or not) or which otherwise reflects discredit on his method of conducting business;

- (g) has an employment record which leads the Commissioner to believe that the person carried out an act of impropriety in the handling of his employer's business;
- (h) has engaged in or been associated with any other business practices or otherwise conducted himself in such a way as to cast doubt on his competence and soundness of judgement;
- (i) is an undischarged insolvent; or
- (j) is not a fit and proper person in terms of section 44.

(2) Any person who is a director or officer of a licensed institution shall forthwith cease to hold office upon -

- (a) becoming insolvent, suspending payments or compounding or proposing a compromise with that person's creditors generally;
- (b) being convicted of a felony or any offence involving fraud, dishonesty or breach of trust;
- (c) being declared mentally incompetent in any official proceeding under the laws of Lesotho or elsewhere; or
- (d) being suspended or removed from office by order of the Commissioner pursuant to this Act.

(3) No person who has been a director or officer of, or directly or indirectly concerned in, the management of a licensed institution, the licence of which has been revoked, shall, without the approval of the Commissioner, act or continue to act as a director or officer or be directly or indirectly concerned in the management of any licensed institution.

(4) Any person who contravenes this section commits an offence and shall be liable to the penalty provided in the First Schedule.

#### **Duties of directors and officers**

44. (1) Every director or officer of a licensed institution, in exercising the powers and discharging the duties of his office shall -

- (a) be a fit and proper person to hold the particular position which he holds;
- (b) act honestly and in good faith with a view to the best interests of the licensed institution; and
- (c) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.

(2) In determining whether a person is a fit and proper person under subsection (1), regard shall be had to his probity, to his competence and soundness of judgement for fulfilling the responsibilities of that position, to the diligence with which he is fulfilling or is likely to fulfil those responsibilities and to whether the interests of depositors or creditors or potential depositors or creditors of licensed institutions are or are likely to be in any way jeopardised by his holding that position.

### **Conflict of interest**

45. (1) A director or officer of a licensed institution who -

- (a) is a party to a material loan, contract or transaction, or a proposed material loan, contract or transaction with the licensed institution; or
- (b) is a director or officer of, or has a material interest in or a material relation to, any person who is a party to a material loan, contract or transaction, or a proposed material loan, contract or transaction with the licensed institution, shall disclose, in writing, to the licensed institution the nature and extent of the material interest or relation.

(2) The disclosure required by subsection (1) shall be made by the director or officer when the matter or proposed contract comes or ought reasonably to come to the attention of the director or officer.

(3) A general notice in writing to the board of directors by a director or officer, disclosing at the time such person assumes or is appointed to his office and from time to time (but in no event less than annually) every material commercial, financial, agricultural, industrial or other business or family interest that such person has at the time, stating that the person is to be regarded as interested in any material contract between the financial institution and any person named in the disclosure, shall be a sufficient declaration of material interest in relation to any such contract.

(4) A director who has a material interest or a material relation within the scope of subsection (1) or (3) shall leave any meeting at which the matter is discussed, and shall refrain from voting on any matter related thereto which becomes the subject of action by the board of directors of the licensed institution:

Provided that such an interest, if so disclosed, shall not disqualify the interested person for purposes of constituting a quorum.

(5) For the purposes of subsections (1) and (3), an interest, loan, contract or transaction shall be material if it is material with reference to the wealth, business, or family interest of the person with the interest, and a person has material interest in any company of which the person is, directly or indirectly, a shareholder or equity holder with a ten percent or more interest in such company, or a director or officer thereof.

(6) Where a director or officer fails to disclose a material conflict of interest in accordance with this section -

- (a) the court may, on the application of the licensed financial institution, or shareholder or the Commissioner, nullify or set aside the loan contract or transaction on such terms as it thinks fit; and
- (b) the Commissioner may, by written order, suspend the director or officer from office for any period not exceeding one year.

(7) A director or officer who contravenes subsection (1) or (3) commits an offence and shall be liable to the penalty provided in the First Schedule.

#### **False and misleading statements**

46. A director, officer, employee or agent of a licensed institution who 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 licensed institution or obstructs or endeavours to obstruct the performance by an auditor of his duties in accordance with the provision of this Act; or a lawful examination of the licensed institution by a duly authorised examiner appointed by the Commissioner commits an offence and shall be liable to the penalty provided in the First Schedule.

#### **Suspension of director or officer**

47. The Commissioner may, by written order, suspend from office for any period not exceeding one year any director or officer concerned in the management of a licensed institution who fails to take all reasonable steps to secure compliance by the licensed institution with the requirements of this Act:

Provided that before a person is suspended he shall be given a reasonable opportunity of being heard in his defence.

#### **Appointments of directors, officers and branch managers**

48. Every licensed institution shall notify forthwith the Commissioner of any appointment of its directors, officers and managers of its branches.

### **PART VIII**

## **SUPERVISION OF FINANCIAL INSTITUTIONS AND OTHER LICENSED INSTITUTIONS**

#### **Responsibility for supervision**

49. The Commissioner shall be responsible for the supervision of financial institutions and other licensed institutions.

#### **Returns**

50. Every licensed institution shall send to the Commissioner in duplicate -

- (a) not later than the twenty-first day of each month a statement in such form as the Commissioner may prescribe showing the assets and liabilities of its places of

business in Lesotho at the close of business on the last business day of the preceding month;

- (b) not later than thirty days after the last day of each quarter ending 31st March, 30th June, 30th September and 31st December, a statement in such form as the Commissioner may prescribe giving an analysis of its assets and liabilities in Lesotho at the close of the last business day of the quarter:

Provided that the Commissioner may from time to time call for any additional information which he may require for the purpose of the administration of this Act from any licensed institution about its operations in Lesotho or those of its affiliates in Lesotho or from a local financial institution about its operations and those of its affiliates abroad.

### **Extension of time**

51. At the request of a licensed institution, the Commissioner may, in his discretion, extend from time to time any period within which such financial institution is, under the provisions of this Act, obliged to furnish any document or information.

### **Examinations**

52. (1) The Commissioner shall, from time to time, appoint examiners to examine, with or without any prior notice, the books or other documents, accounts and transactions of any licensed institution and of any office outside Lesotho of a local financial institution.

(2) An examination shall be conducted in respect of any licensed institution in order to determine that it is in a sound financial condition and that the requirements of this Act have been complied with in the administration of its affairs.

(3) For the purpose of determining the financial conditions of a licensed institution and its compliance with this Act in the course of an examination undertaken pursuant to subsection (1), the Commissioner may cause an examination to be made of any of its affiliates in Lesotho to the same extent that an examination shall be made of the licensed institution.

(4) The Commissioner shall also cause such an examination to be made where application is made by one-fifth of the total number of depositors or creditors, or by any number of depositors or creditors holding not less than one-third of the liabilities to the public in Lesotho of that licensed institution:

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

### **Production of records and information for examiner**

53. (1) Every licensed institution and every affiliate of such institution shall, pursuant to an examination conducted under section 52, produce for the inspection of any examiner duly authorised by the Commissioner to examine their affairs, at such times and in such places as the examiner may specify (being times and places which, in the opinion of the examiner, would not be 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 and any other information relating to their business.

(2) If any books, minutes, accounts, cash, securities, documents and vouchers are not produced or information is not supplied in accordance with subsection (1), the defaulting licensed institution or affiliate, or both as the case may be commits an offence and shall be liable to the penalty provided in the First Schedule in respect of everyday during which the default continues.

(3) If any information supplied or item produced is false in any material particular, the licensed institution or affiliate, or both as the case may be, commits an offence and shall be liable to the penalty provided in the First Schedule.

(4) As soon as possible after the conclusion of an examination, the Commissioner shall forward a summary of the examiner's report containing its salient points to the management of the licensed institution concerned.

(5) All expenses of, and incidental to, an examination shall be paid by the licensed institution as may be prescribed by Regulations.

(6) The examiner may make copies of any books, accounts and other documents required for the purposes of his report.

(7) There shall be no restrictions of the manner in which the examiner receives the information other than those imposed by the laws of Lesotho.

(8) The examiner may take possession of any books or other documents, accounts, titles, securities or cash to which he has access under subsection (1) where in his opinion: -

- (a) the inspection, copying, or the making of extracts thereof, cannot reasonably be undertaken without taking possession of them;
- (b) they may be interfered with or destroyed unless he takes possession of them; or
- (c) they may be needed as evidence in any legal proceedings, whether civil or criminal, which may be instituted under or in connection with this Act, or any other written law.

#### **Power to issue orders or directions**

54. Where, in the opinion of the Commissioner a licensed institution, or any affiliate, director, officer or employee thereof is conducting its business in an unsafe or unsound manner or that it is in an unsound financial condition, or in violation of this Act the Commissioner may -

- (a) require such institution forthwith to take such measures as he may consider necessary to rectify the situation and in particular, but without limiting the generality of the foregoing -

- (i) require the licensed institution to refrain from adopting or pursuing a particular course of action or to restrict the scope of its business in a particular way;
  - (ii) impose any limitation on the licensed institution's acceptances of deposits or funds, the granting of credit or the making of investments; or
  - (iii) require the suspension or removal from office of any director, officer or other person; or
- (b) appoint a person, who in his opinion has had proper training and experience, to advise the institution on measures to be taken to rectify its situation, and shall fix his remuneration which shall be paid by the licensed institution.

### **Publication of information**

55. (1) The Commissioner may publish or require publication in whole or in part, in such form and at such time as he 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 particular customer of a licensed institution unless the consent of that customer has been obtained in writing prior to such publication.

## **PART IX WINDING UP AND SEIZURE**

### **Exceptions to Companies Act**

56. (1) Subject to the provisions of this section, the provisions of the Companies Act, 1967, relating to the winding up and judicial management of companies (Part IV), the winding up of unregistered associations (Part V), or the winding up of external companies (Part VI) shall be applicable to licensed institutions which are companies, unregistered associations or external companies, respectively, within the meaning of the Companies Act:

Provided that -

- (a) for the purposes of this section and notwithstanding section 278 of the Companies Act, an unregistered association shall be subject to the provisions of Part V of the Companies Act regardless of the number of its members;
- (b) notwithstanding sections 279, 292 (2), and 264 to 271, inclusive, of the Companies Act shall be applicable mutatis mutandis to licensed institutions which are unregistered associations or external companies;
- (c) the powers and functions assigned to the Master under the Companies Act shall be exercised by the Commissioner or a person approved by the Commissioner; and

(d) the provisions of the Companies Act specially applicable to a creditor's voluntary winding up (sections 218 to 221, inclusive) shall not apply to licensed institutions.

(2) There shall be no winding up, whether voluntary or by the court, or judicial management of a licensed institution without the prior consent in writing of the Commissioner:

Provided that the consent of the Commissioner for a voluntary liquidation shall be granted on such terms and conditions as he may determine and only if it appears to him that the institution is solvent and has sufficient liquid assets to repay its depositors, and other creditors in full and without delay.

(3) Within fourteen days from the granting of consent by the Commissioner under subsection (2) for winding up, a notice setting forth such information as the Commissioner may prescribe shall be sent by mail to all depositors, other creditors, and persons otherwise entitled to the funds or property held by the licensed institution as a trustee, fiduciary, lessor of a safe deposit box or bailee.

(4) The notice shall also be posted conspicuously on the premises of each place of business of the licensed institution, and the licensed institution shall publish it in the Gazette and in such other places as the Commissioner may prescribe.

(5) Notwithstanding the provisions of sections 187 (2) and 226 (2) of the Companies Act and the relevant provisions of the law relating to insolvent estates, a depositor or creditor of a licensed institution, evidence of whose claim appears, to the satisfaction of the liquidator, in the books, accounts or other documents of such institution, shall be deemed to have proved such claim for the purposes of the aforesaid provisions.

(6) Any other funds or property held by the licensed institution as a trustee, fiduciary, lessor of a safe deposit box, or bailee, which have not been returned to their rightful owners in the course of the winding up of such institution shall, together with the inventories pertaining thereto be placed in the custody of the Commissioner.

(7) Notwithstanding section 256 of the Companies Act 1967 and section 103 of the Insolvency Proclamation 1957<sup>iii</sup>, in the winding up of a licensed institution unable to pay its debts, any balance of the free residue after making provision for the expenditure mentioned in sections 97 to 102, inclusive of the law, shall be applied in payments of the remaining claims in the following order -

- (a) deposits and other funds received from the public and interest accrued thereon up to an amount stipulated in the Rules to be made by the Commissioner;
- (b) deposits and other funds received and interest accrued thereon of nationals or residents of Lesotho;
- (c) other deposits and funds received from the public and interests accrued thereon;
- (d) other claims.

### **Acceptance of deposits or funds by insolvent licensed institutions**

57. (1) A licensed institution which receives any deposits or fund while insolvent commits an offence and shall be liable to the penalty provided in the First Schedule.

(2) A director, officer or employee of a licensed institution who knows of, or in the proper performance of his duties, should know of the insolvency of such institution and who receives, or authorises the acceptance of, a deposit or funds commits an offence and shall be liable to the penalty provided in the First Schedule.

### **Seizure of licensed institution**

58. The Commissioner may appoint a person or persons to take possession of any licensed institution-

- (a) whose capital is impaired beyond fifty percent of the required amount if it is a bank and twenty five per cent in the case of other licensed institution or whose condition is otherwise unsound;
- (b) whose business is being conducted in an unlawful or imprudent manner;
- (c) when the continuation of its activities is detrimental to the interests of its depositors or creditors;
- (d) that refuses to permit an examination to be made as provided in section 52 or has otherwise obstructed such examination; or
- (e) on which notice of intention to revoke its licence has been served under section 15 (2).

### **Notice of seizure**

59. (1) When taking possession, the Commissioner shall post at each place of business of a licensed institution a notice announcing his action pursuant to section 58 specifying the time when such possession shall take effect.

(2) A copy of the notice shall be transmitted to the Court.

### **Appeal for termination of seizure**

60. Within ten days after the date on which the appointee of the Commissioner has taken possession of a licensed institution, the institution may institute proceedings in the Court to have the seizure lifted.

#### **Powers and duties of Commissioner's appointee upon seizure**

61. (1) When the appointee of the Commissioner has taken possession of a licensed institution, he shall be vested with the full and exclusive powers of management and control of the institution, including, without limiting the generality of the foregoing, the power to continue or discontinue its operations, to stop or limit the payment of its obligations, to employ any necessary officers or employees, or execute any instrument in the name of the licensed institution, to initiate, defend and conduct in its name any action or proceedings to which the institution may be a party, to terminate possession by restoring the institution to its board of directors or owners, as the case may be.

(2) As soon as possible after taking possession of a licensed institution, the Commissioner's appointee shall make an inventory of the assets and property of the institution and transmit a copy thereof to the Court.

(3) The copy of the inventory shall be available for examination by interested parties at the office of the Commissioner or the Court.

#### **Effects of seizure**

62. When the Commissioner's appointee has taken possession of a licensed institution -

- (a) any term, statutory, contractual or otherwise, on the expiration of which a claim or right of the institution would expire or be extinguished, shall be extended by 6 months from the date of seizure;
- (b) any attachment or lien, except an attachment or lien exceeding six months prior to the seizure of the institution shall be vacated and no attachment or lien, except an attachment or lien created by the Commissioner's appointee in the application of section 61, shall attach to any of the assets or property of the institution so long as such possession continues;
- (c) any transfer of an asset or property of the institution made after or in contemplation of its insolvency or seizure by the Commissioner's appointee with intent to effect a preference shall be void.

#### **Restriction of rights of creditor as to execution in seizure**

63. No execution shall be returned against the assets or property of a seized licensed institution except, in the discretion of the Court, an execution effected pursuant to a judgement rendered prior to the date of the seizure.

#### **Limitation on duration of seizure**

64. When the Commissioner's appointee has taken possession of a licensed institution, he shall within a maximum period of 60 days counting from the effective date of seizure specified pursuant to section 59 -

- (a) terminate the seizure;
- (b) apply to the Court by petition for a winding up or judicial management order under the provisions of the Companies Act 1967; or
- (c) propose a compromise or arrangement between the licensed institution and its creditors under section 161 of the Companies Act 1967 or a reconstruction of such institution under section 163 of the said Act:

Provided that for the purposes of this paragraph the provisions of sections 161 to 164, inclusive, of the Companies Act shall apply **mutatis mutandis** to unregistered associations regardless of the number of members and to external companies.

## **PART X ABANDONED PROPERTY**

### **Unclaimed funds and property**

65. (1) The following items held or owing by a licensed institution, except as provided in subsection (2), shall be presumed to be abandoned-

- (a) any general deposits or funds placed in Lesotho with such licensed institution, together with any interest or dividend, excluding any lawful charges;
- (b) any funds paid in Lesotho toward the purchase of shares or other interests in such licensed institution, together with any interest or dividend, excluding any lawful charges;
- (c) any sum payable on cheques certified in Lesotho, or on written instruments issued in Lesotho, on which such licensed institution is directly liable;
- (d) any contents of a safe deposit box upon which the lease or rental period has expired and concerning which notice of the licensed institution's intent to deliver said contents into the custody of the Commissioner has been sent by registered letter to the last known address of the lessee.

(2) The items enumerated in subsection (1) (a), (b) and (c) shall not be presumed to be abandoned if the owner has, within fifteen years of the date of (a) initial deposit or any subsequent deposit or withdrawal, (b) payment of funds, or (c) issuance of instruments, as the case may be -

- (a) increased or decreased the amount of the deposits or funds or presented the passbook or other record for the crediting of interest or dividends in respect of the items enumerated in subsection (1) (a) or (b);

- (b) corresponded in writing with the licensed institution concerning the items enumerated in subsection (1) (a), (b) or (c); or
- (c) otherwise indicated an interest in the items enumerated in subsection (1) (a), (b) or (c), as evidenced by a memorandum concerning them on file with the licensed institution.

### **Reports and disposition**

66. (1) Every licensed institution holding any funds presumed to be abandoned under section 65 shall annually report such holding to the Commissioner, and thereafter pay or deliver to the Accountant-General all abandoned funds listed in the report, as may be prescribed by Regulations.

(2) Upon paying or delivering abandoned funds into the custody of the Accountant General, a licensed institution shall be relieved of all liability to the extent of the value of such funds or other property for any claim in respect thereof.

(3) Any funds paid to the Accountant General under subsection (1) (a) shall be credited to the Consolidated Revenue Account as may be prescribed by Regulations:

Provided that if any person entitled thereto subsequently proves to the satisfaction of the Accountant General his claim to such funds he shall be repaid from said Account.

### **Failure to make a report or payment**

67. Any licensed institution which wilfully fails to file the report to the Commissioner, or to pay funds presumed to be abandoned into the custody of the Accountant General, in accordance with section 66 commits an offence and shall be liable to the penalty provided in the First Schedule.

## **PART XI OTHER REQUIREMENTS AND RESTRICTIONS**

### **Reserve for losses due to negligence or dishonesty**

68. Every licensed institution shall either maintain a special reserve account which is, in the opinion of the Commissioner, 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 Commissioner deems adequate, with a person approved of by the Commissioner carrying on insurance business or the business of guaranteeing against such loss as aforesaid.

### **Restrictions on payments of dividends**

69. (1) A licensed institution shall not pay any dividend on its shares until all its capitalised expenditure (including preliminary expenses, organisation expense, shares selling commission, brokerage, amount of losses incurred, and any other item of expenditure not represented by tangible assets) has been completely written off.

- (2) A licensed institution shall notify the Commissioner of its declaration of dividends.

### **Credit requirements**

70. (1) A director or officer of a licensed institution shall not give any credit facility in excess of the limit, or outside the scope of any terms and conditions, imposed on him by the licensed institution, or in contravention of any directions given to him, or any agreement made with him, by the licensed institution.

- (2) The Commissioner may by a written notice direct a licensed institution to -
- (a) submit any information relating to its policy and procedure for the giving of any credit facility;
  - (b) submit a report on the limit or the terms and conditions imposed, the directions given, and the agreements made, in relation to the authority of every director or officer of the institution authorised to give credit facilities or exercise any power in respect thereof; or
  - (c) make such amendments to the policies or procedures referred to in paragraph (a), or to make such variations in the matters mentioned in paragraph (b), as the Commissioner deems to be fit and proper, either generally, or in relation to any class of director or officer, and such amendments and variations shall be binding on the institution and its directors and officers.

## **PART X11 MISCELLANEOUS**

### **Power to issue guidelines etc**

71. (1) The Commissioner may make such Regulations, notices and issue such guidelines, determinations, directions or instructions as may be necessary or expedient for giving full effect to the provisions of this Act, for carrying out or achieving the objects and purposes of this Act or any provisions thereof, for the further, better or more convenient implementation of the provisions of this Act.

(2) Notwithstanding subsection (1), the Commissioner may, by written notice to a licensed institution or by Regulations, may specify general or specific prudential requirements pertaining to -

- (a) the maintenance of reserves for bad or doubtful debts in such amounts as the Commissioner deems necessary for the protection of depositors or clients;
- (b) the classification and reporting of overdrafts, loans, investments and other assets and contingencies which are past due, on which interest is not accruing,

where the collection of principal or interest due is questionable or doubtful, or which otherwise exhibit significant risks of collection;

- (c) the writing off in whole or in part of loans, investments or other assets which are not collectable;
- (d) credit concentration, country and transfer risk exposures;
- (e) off balance sheet credit exposures;
- (f) funding activities and liquidity requirements;
- (g) electronic funds transfers and large payments;
- (h) interest rate risk management activities;
- (i) foreign exchange risk;
- (j) financial relationships with affiliates and related parties;
- (k) securities investment and trading activities; and
- (l) such other matters as may affect the safety and soundness of the licensed institution's activities.

(3) The Commissioner may, by notice published in the Gazette, specify requirements governing the reporting to the Commissioner by licensed institutions of currency transactions by clients of such licensed institution, including requirements relating to cash transactions, large currency deposits and similar matters.

### **Financial holidays**

72. (1) The Commissioner may declare, by appropriate notices, any day to be a financial holiday on which no licensed institution may be open for business with the public.

(2) Except with the approval of the Commissioner, all licensed 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 Regulations.

(3) Any private obligation which can only be fulfilled at a licensed 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 said institution is open for business.

### **Substitution for depositor's signature**

73. In all transactions connected with the opening of, deposit into, or withdrawal from, a deposit account, whenever 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.

## **Immunity**

74. Neither the Commissioner nor any officer, employee or agent of the Commissioner's office shall be liable in damages for anything done or omitted in the discharge or purported discharge of his functions under this Act, unless it is shown that the act or omission was done in bad faith.

## **Reference to "this Act"**

75. Reference to "this Act" shall include any regulations, determinations, directions, instructions or notices made under this Act.

## **Appeals**

76. (1) Any person aggrieved by a decision taken by the Commissioner under a provision of this Act may within the prescribed period and in the prescribed manner and upon payment of prescribed fees appeal against such decision to the Tribunal established by subsection (2).

(2) For the purposes of this Act there is hereby established a Tribunal which shall consist of three members –

- (a) the chairman who shall be a judge and who shall be appointed by the Minister acting in consultation with the Chief Justice;
- (b) one member who shall be appointed by the Minister on account of his wide experience and knowledge of the financial industry; and
- (c) another member who shall be appointed by the Minister who shall be a chartered accountant with not less than ten years experience in the accounting profession.

(3) If before or during the hearing of any appeal in terms of subsection (1) it transpires that any member of the Tribunal has any direct or indirect interest in the matter, such member shall recuse himself and the remaining members of the Tribunal shall hear and determine the appeal.

(4) A member of the Tribunal shall hold office for a period of three years and may on the expiration of his term of office be eligible for reappointment.

(5) Any vacancy that occurs on the Tribunal shall be filled by the appointment of another person by the Minister consistent with the requirements of subsection (2), and such person so appointed shall hold office for the unexpired portion of the period of office of his predecessor.

(6) In the hearing of an appeal, both parties shall have the right to appear in person or be represented by a legal representative of their own choice.

(7) The Minister may make regulations with respect to appeals pertaining to –

- (a) the period within which and the manner in which such appeals are to be brought;
  - (b) the fees payable by any party to the appeal;
  - (c) the costs or expenses which the Tribunal directs to be paid; and
  - (d) any other matter connected with such appeals.
- (8) An appeal under subsection (1) shall be heard on the date and at the place and time fixed by the Tribunal, which shall have in writing notified the appellant as well as the Commissioner thereof.
- (9) The Tribunal may for the purposes of an appeal lodged with it -
- (a) summon any person who, in its opinion, may be able to give material information concerning the subject of the appeal or who it believes has in his possession or custody or under his control any document which has any bearing upon the subject of the appeal, to appear before it at a time and place specified in the summons, to be interrogated or to produce that document, and retain for examination any document so produced; and
  - (b) administer an oath to or accept an affirmation from any person called as a witness at the appeal.
- (10) The procedure at the hearing of an appeal shall be determined by the Tribunal.
- (11) The Tribunal may after hearing the appeal confirm or reverse the decision which is the subject of the appeal but shall not have the power to vary it except -
- (a) where the decision was to revoke a licence, the Tribunal may direct the Commissioner to restrict it instead;
  - (b) where the decision was to impose or vary any restriction, the Tribunal may direct the Commissioner to impose a different restriction or to vary it in a different way; or
  - (c) where the decision was to give or vary a direction, the Tribunal may direct the Commissioner to give a different direction or to vary it in a different way.
- (12) The decision of a majority of the members of the Tribunal shall be the decision of that Tribunal.
- (13) The decision of the Tribunal shall be in writing, and a copy thereof shall be furnished to the appellant as well as to the Commissioner.
- (14) If the Tribunal sets aside any decision by the Commissioner, the prescribed fees paid by the appellant in respect of the appeal in question shall be refunded to him.

(15) A member of Tribunal shall in respect of his services as such a member be paid out of the Consolidated Revenue Account such remuneration, including reimbursement for transport, travelling and subsistence expenses incurred by him in the performance of his functions as such a member, as the Minister may from time to time determine.

**Repeal**

77. The Financial Institutions Act of 1973<sup>iv</sup> is repealed.

---

**NOTE**

- i. Act No 13 of 1978
- ii. Act No 25 of 1967
- iii. Proclamation No 51 of 1957
- iv. Act No 23 of 1973

**FIRST SCHEDULE**

**OFFENCES AND PENALTIES**

<b>First Column</b>	<b>Second Column</b>	<b>Third Column</b>	<b>Fourth Column</b>	<b>Fifth Column</b>
No.	Provisions of this Act under .....	Imprisonment	Fines in Maloti	Daily fine in Maloti
1. Licensing	Section 4 (5)	1 Year	20,000	500
	11 (6)	1 Year	20,000	500
	12 (3)	1 Year	20,000	500
2. Investigation	Section 19 (1)	1 Year	20,000	-
3. Secrecy	Section 26 (3)	2 Years	40,000	-
	(4)	-	1,000	-
	(6)	2 Years	40,000	-
4. False entries	Section 30	1 Year	20,000	-
5. Conspiracies	Section 34	1 Year	20,000	-
6. Disqualification	Section 43 (4)	2 Years	40,000	-
7. Disclosure	Section 45 (7)	1 Year	20,000	-
8. False Statements	Section 46	1 Year	20,000	-
9. Examination	Section 53 (2)	-	-	1,000
	(3)	-	100,000	-
10. Insolvency	Section 57 (1)	-	100,000	-
	(2)	1 Year	20,000	-
11. Reporting	Section 67	-	10,000	-

**SECOND SCHEDULE**

**LICENCE AND OTHER FEES**

Maloti

Financial Institutions

Investigation fee	2,500
Registration fee	5,000

Licence fee

For the first and only place of business	5,000
For every other places of business	2,500

Agents of Financial Institutions

Licence fee	3,000
-------------	-------

- 
- i. Act No 13 of 1978
  - ii. Act No 25 of 1967
  - iii. Proclamation No 51 of 1957
  - iv. Act No 23 of 1973