Southern African Business Review
DHET accredited
ISSN: 1998-8125

Volume 21
2017

Forcing the few: Issues from the South African Reserve Bank's legal action against its delinquent shareholders

J. Rossouw & C. Rossouw

ABSTRACT

The SA Reserve Bank is a public company with shareholders in terms of the South African Reserve Bank Act, No. 90 of 1989 (Republic of South Africa 1989). This article considers shareholding in the SA Reserve Bank against the background of legislative amendments promulgated in 2010 and legal action instituted by the SA Reserve Bank against certain shareholders on the basis of these amendments. The amendments provide, *inter alia*, for shareholders regarded as associates in terms of the SA Reserve Bank Act to declare such relationship and their shareholding to the bank. While some associated shareholders made such declarations or provided undertakings to sell their shares, the central bank has reason to believe that the respondents against whom legal action is brought, are associates, but failed to disclose such associations in the manner prescribed by legislation. A matter for concern is that the legislative amendments of 2010 *ex post* reduce the rights of shareholders, while another option was available. The voting rights of all associated shareholders could simply have been reduced while permitting them to keep the shares, as was the case with a change of legislation pertaining to the SA Reserve Bank in 1944.

Key words: central banks, shareholders

Introduction

The South African Reserve Bank (hereafter SARB) is a public company with private shareholders[1] in terms of the SA Reserve Bank Act, No. 90 of 1989, as amended (Republic of South Africa [RSA] 1989). The SARB was established in terms of

Prof. J. Rossouw is Head of the School of Economic and Business Sciences, University of the Witwatersrand. Ms C. Rossouw is a BAcc LLB student at the University of Stellenbosch. E-mail: jannie.rossouw@wits.ac.za

legislation promulgated in 1920 (Union of South Africa 1920) as a public company with shareholders, and its status has since been retained, despite an international trend to nationalise most central banks that initially had shareholders (see discussion below). This provision for shareholding in terms of which members of the public can buy shares in the central bank places the SARB in the same category as a very small number of central banks, namely those in Belgium, Greece, Japan, Switzerland and Turkey. In addition, the Bank of Italy (the Italian central bank) and the 12 federal reserve banks in the United States (US) also have private shareholders, but in these instances only commercial banks in their jurisdictions can acquire shares.

Rossouw (2016) states that "the question whether private shareholders in central banks still add value to the operations of such institutions should be addressed" (2016: 20). No research has been done among central banks with private shareholding on the value added to such institutions by their private shareholders (Rossouw 2016). In its founding affidavit for a case in the Gauteng High Court, the SARB states its view on this matter, describing the benefits of shareholders in a central bank as follows (Case 88570/2014 2014):

> [t]he provision of shareholding in the Reserve Bank is based on the concept of shared community representation and participation in the Bank. It is intended to enhance the independence, transparency and accountability of the Bank, in the ultimate interests of the general public of the Republic of South Africa.
>
> The private shareholding in the Bank is also derived from the premise that the more representative the board of the central bank is of the wider community, the more likely it is of gaining the support and acceptance of the general public.

This view of the SARB is supported. Central bank shareholding increases their independence, transparency and accountability, as they have to report to their shareholders on their activities in the same way as is required of any other public company. This view of the SARB adds to existing literature, as Rossouw (2016) shows that central banks with shareholders generally refrain from expressing any view on the matter of the advantages/disadvantages of having private shareholders.

This article highlights the legal action brought by the SARB in the Gauteng Division of the High Court of South Africa, in Pretoria, against a number of its shareholders for allegedly contravening provisions in the 2010 amendments to the SA Reserve Bank Act (Case 88570/2014). As shown in this article, the purpose of the amendments was to ensure that no group of shareholders can exercise control over the affairs of the central bank. The purpose of the legal action is to obtain a court order to allow the SARB to give effect to the provisions of its amended legislation.

However, as shown below, another approach could have been used to achieve the same objective.

This article is organised as follows: section 2 reviews literature on central banks with private shareholding. Section 3 explains the shareholding of the SARB in its historical context, since its inception. Section 4 considers the legal action of the SARB against some of its shareholders. The conclusion follows in Section 5.

Literature review[2]

The available literature in English,[3] on central banks with private shareholders that could be traced, is limited to various editions of the book *Central Banking* by M.H. de Kock[4] (see, for instance, De Kock 1939; 1956; 1974) and, more recently, Rossouw & Breytenbach (2011a and b), Archer & Moser-Boehm (2013) and Rossouw (2016).

In 1939, De Kock (1939: 298) stated that the central banks of Australia, Bulgaria, China, Costa Rica, Denmark, Finland, Latvia, New Zealand, Russia, Sweden and Uruguay were owned exclusively by their respective governments, while the shareholding of the remainder of the 28 other central banks in existence at that time could be classified into the following categories:

(i) All the shares were held by private shareholders (juristic persons and the general public)
(ii) All the shares were held by banks
(iii) The shares were held by the government and private shareholders
(iv) Shares were held by the government and banks
(v) The shares were held by the government, banks and private shareholders
(vi) The shares were held by banks and private shareholders

The ownership structures of central banks changed from 1935. As part of their responses to the consequences of the Great Depression, the governments of a number of countries the world over reconsidered the private ownership structures of their central banks in instances where the banks were not owned by the government. A prevailing view in those countries was that governmental control over the central bank, rather than a central bank in private ownership, would be conducive to the prevention of financial hardship. De Kock (1939: 325) summarises the view at that time as follows: "under the stress of the world-wide depression […] [i]n many cases central banks were virtually obliged to provide the financial facilities demanded by the State". First to be nationalised was the Reserve Bank of New Zealand, in 1935 (Rossouw & Breytenbach 2011a: S125 and 2011b: 85) as part of an approach of so-called "big government" in New Zealand (Reserve Bank of New Zealand 2009).

De Kock (1939: 324) states that "a definite trend in the direction of greater state intervention in the ownership and administration of [existing] central banks is to be observed in recent changes in central bank statutes". De Kock (1939: 324) adds that the 1937–1938 *Monetary Review* of the League of Nations stated on page 81 that "[i]n the statutes as drawn up or amended in recent years, the State has generally assumed a more important role both in respect of the ownership and management of central banks".

The most recent nationalisation of a central bank was the National Bank of Austria in 2010. This received very little attention at the time, as no shares were held by the general public. At the time of nationalisation, the Austrian government held 70.27% of the share capital of the National Bank of Austria, with the balance held by Austrian banks (as in [iv] above) (Oesterreichische Nationalbank 2009).

The remaining central banks with private shareholders are those in Belgium, Greece, Italy, Japan, South Africa, Switzerland and Turkey, and the 12 federal reserve banks in the US (see, e.g., Archer & Moser-Boehm 2013; Rossouw 2016). However, the structure of private shareholding in these central banks differs considerably:

- All shares are owned by private shareholders (juristic persons and the general public, which can include banks, but with no obligation on banks to hold such shares): Greece and South Africa.
- All shares are owned by banks: Italy and the 12 federal reserve banks.
- Shares are owned by the government and private shareholders (which can include banks, but with no obligation on banks to hold such shares): Belgium and Japan.
- Shares are owned by the government, banks and private shareholders: Switzerland (cantonal governments, rather than central government) and Turkey.

  Of particular interest in this group are the 12 federal reserve banks. The Federal Reserve Act (United States of America 1913) stipulates in Section 5.1 that the capital stock of each Federal Reserve Bank shall be divided into shares of $100 each. The outstanding capital stock shall be increased from time to time as member banks increase their capital stock and surplus or as additional banks become members, and may be decreased as member banks reduce their capital stock or surplus or cease to be members. Shares of the capital stock of Federal Reserve Banks owned by member banks shall not be transferred or hypothecated.

The Federal Reserve Act stipulates in Section 7.1(A) that stockholders of federal reserve banks are entitled to an annual dividend of 6% on the paid-in capital stock they hold in those banks (United States of America 1913). On closer inspection it transpires that the interests of member banks in the federal reserve banks should be regarded as bonds or reserve holdings (e.g. liquidity or solvency reserves), rather than as shares in the true sense of the word (in this regard, see also Rossouw 2016).

Table 1: Summary of salient features of central banks with shareholders

	Belgium	**Greece**	**Italy**	**Japan**	**South Africa**	**Switzerland**	**Turkey**
Official government shareholding	Yes	No	No	Yes	No	Yes*	Yes
Official shareholding by banks	No	No	Yes	No	No	Yes	Yes
General shareholding	Yes	Yes	No	Yes	Yes	Yes	Yes
General ownership limitations (e.g., citizens)**	No	Yes	Yes	No	No	No	Yes
Annual meeting of shareholders	Yes	Yes	Yes	No	Yes	Yes	Yes
Voting limitations	Yes	Yes	Yes	N/A	Yes	Yes	Yes
Dividend payment (profits permitting)	Maximum 6% of nominal value of shares as the first dividend A second dividend, calculated as 50% of the net proceeds after tax from the portfolio of assets which the bank holds as counterpart to its total reserves	Maximum 12% of nominal value of shares as a first dividend A supplementary second dividend is annually determined by the General Council (board) of the bank	Maximum 6% of nominal value of shares as a first dividend As a second dividend, 4% of nominal value of shares A third "supplementary" dividend not exceeding 4% of the amount of the reserves	Maximum 5% of paid-up capital	Maximum 10% of issue value of shares, subject to a dividend withholding tax of 15%	Maximum 6% of the share capital	Maximum 6% of nominal value of shares as the first dividend A second dividend of a maximum of 6% of nominal value of shares approved annually by the General Assembly (general meeting) of the bank

* Cantonal governments, rather than central government

** Some central banks (e.g., the SARB) limit the number of shares that shareholders may own

Sources: Rossouw and Breytenbach (2011a and 2011b); Rossouw (2016)

The central banks of Belgium, Greece, Italy, Japan, South Africa, Switzerland and Turkey have private shareholders akin to shareholding in other public companies. Table 1 summarises the rights of the shareholders in these institutions. A notable difference is the dividend policies: in most instances dividends are fixed by law at a certain percentage of the issue value of shares. The central banks of Belgium and Greece are notable exceptions, as their dividends are not capped or limited, and shareholders share pro tanto in the profits of these institutions. The profitability of the central bank of Greece has, however, declined after the financial crisis of 2008 and dividend payments were reduced to levels lower than before the crisis.

Legislation pertaining to the SARB

As indicated earlier, in the 1920s it was exceptional for central banks not to have private shareholders. In keeping with the convention of the time, the SARB was therefore established as a central bank with shareholders in terms of the Currency and Banking Act of 1920 (Union of South Africa 1920). At its inception, the shareholding and voting rights of individual shareholders at ordinary general meetings (OGMs) of the central bank were limited to 20 000 shares per institution or individual. Voting rights in respect of shareholding could be exercised on condition that the shares were owned for at least six months prior to the OGM, and shareholders ordinarily resident outside of South Africa could not vote at OGMs.

These arrangements were maintained in 1944, when the Currency and Banking Act of 1920 was replaced by the SA Reserve Bank Act of 1944 (Union of South Africa 1944), save for the fact that the limit of 20 000 shares was reduced to 10 000 shares,[5] but existing shareholders exceeding the ceiling of 10 000 shares were granted permission to retain their shareholding. Their voting rights, however, were capped at the lower limit. This arrangement remained in place until the amendment of the SA Reserve Bank Act in 2010 (RSA 2010).

In the 2010 amendments, the limitations in respect of period of ownership and residency were retained, but the Act was amended to limit the voting rights of shareholders defined in the Act as "associates" to 10 000 shares (i.e. 50 votes), irrespective of the number of shares held (RSA 2010). The initiative for the 2010 legislative amendments originated in the central bank.

The 2010 amendments provide for associated shareholders to declare such shareholding to the SARB within 40 days from the promulgation of the Amendment Act, which entitles associates to the continued holding of the shares (RSA 2010), albeit with limited voting rights.

Associates are defined as

- shareholders in the SARB who are family members (e.g. spouses, partners, brothers, sisters, parents, parents-in-law, children and siblings); and
- subsidiary companies, close corporations and trusts controlling one another or under the control of SARB shareholder(s) (RSA 2010).

The SARB received 11 such declaration from groups of associated shareholders. To provide a remedy in instances where 'associates' did not make the necessary declarations within the prescribed period of 40 days, the 2010 legislative amendments stipulate that "the Bank may approach a court with jurisdiction for an appropriate order to redress the matter, which order may include, but is not limited to, an order for the disposal of shares in the Bank at a price per share and subject to such terms, conditions and restrictions as the court may determine" (RSA 2010). In itself this is a forceful approach, as the legislation could merely have followed the precedent set in 1944, when the voting rights of shareholders holding more than 10 000 shares (50 votes) were capped, but they were permitted to continue holding their shares. By contrast, the 2010 legislative amendments introduced the notion of *ex post* reducing shareholding (albeit by means of legislation), rather than only voting rights. The voting rights of groups of shareholders who made declarations were reduced; no explanation is provided of why this approach could not have been introduced for all groups of associated shareholders.

The objective of changes to the permissible shareholding and voting rights of shareholders of the SARB is to ensure that no 'group' or 'block' of shareholders can exercise undue control over the central bank by means of voting at the OGM. This is aligned to the constitutional mandate of the SARB, which states, *inter alia*, in Section 224 that the central bank must "perform its functions independently and without fear, favour or prejudice" (RSA 1996). However, as is shown in this article, this objective could have been achieved with a different approach, as was the case in 1944.

Legal action of the SARB against its shareholders or their representatives

On the occasion of the OGM of shareholders of the SARB held on 25 July 2014, the Governor of the Bank gave notice that

> [a]cting on legal advice, the Bank has embarked on a formal process to regularise shareholding in the Bank. This entailed addressing correspondence to all shareholders of the Bank who hold shares in contravention of section 22 of the SARB Act. These shareholders, together with their associates, hold more than 10 000 shares in the Bank without having made the prescribed disclosure as required by law. These shareholders were called on to provide the Bank with an

> irrevocable undertaking that they would dispose of the number of shares in the Bank as may be necessary to ensure that they, together with their associates, would in aggregate hold no more than 10 000 shares. Shareholders were advised that should they fail and/or refuse to provide the required undertaking and fail to dispose of the requisite shares in the Bank, legal proceedings against them in terms of section 22 of the SARB Act would be instituted for an appropriate order to redress the matter. This order may include the disposal of shares in the Bank at a price per share and subject to such terms, conditions and restrictions as a Court may determine. (SARB 2015).

At the same OGM it was explained by the Governor that

> the Bank had embarked on a formal process to regularise its shareholding aimed at those shareholders who hold, together with their associates, more than 10 000 shares in the Bank, without having made the prescribed disclosure as required by law. Shareholders who had not disclosed their associates voluntarily had been called upon to provide the Bank with an irrevocable undertaking that they would dispose of the number of shares in the Bank as may be necessary to ensure that they, together with their associates, would in aggregate not hold more than 10 000 shares. Shareholders had been advised that should they fail and/or refuse to provide the required undertaking and fail to dispose of the requisite shares in the Bank, legal proceedings against them in terms of section 22 of the SARB Act would be instituted for an appropriate order to address the matter [and] shareholders who had disclosed their associates within the required 40 days would not be subject to legal proceedings. However, such shareholders would be entitled to exercise only 50 votes regardless of them holding more than 10 000 shares together with their associates (SARB 2015).

This action taken by the SARB was to be expected, as it is not tenable for the central bank to allow a situation where shareholders hold their shares in contravention of legislation pertaining to such shareholding. It could be argued that the SARB should have instituted the action against those shareholders contravening the legislation immediately after the passing of the period of 40 days provided for in the legislation. This, to regularise such shareholding by means of a declaration to the central bank, as 11 groups of associated shareholders indeed made the necessary declarations within the prescribed period of 40 days (Case 88570/2014 2014).

In its *Annual report* for the 2014/15 financial year, the SARB (2015) explained the position prevailing in respect of the delinquent associated shareholders, i.e. those who did not make the prescribed declarations. On 7 March 2014, the SARB had addressed a letter to the delinquent associated shareholders, calling on them to dispose of their combined holding exceeding 10 000 shares, held in contravention of the legislation. This letter provided the shareholders with an opportunity to (i) submit evidence to the SARB that they were not associates, or (ii) undertake by not later than 6 May 2014 to dispose of the shares held in excess of 10 000 by 31 March 2015. In response

to this letter, some associated shareholders sold their shares and regularised their shareholding.

The SARB, which should have acted sooner against its associated shareholders who did not make the necessary disclosures within 40 days of the promulgation of the Amendment Act, has provided no acceptable explanation for this delay of some four years (from the promulgation of the legislation in 2010 to the communication by means of letter on 7 March 2014) for taking any action against them. Moreover, even without legal action, the SARB has already achieved its objective by restricting the voting rights of groups of associated shareholders, akin to the arrangement following the amendment of the 1944 legislative amendments. An approach similar to that of 1944 could have been followed. Alternatively, the legislature could simply have provided for the 'automatic' regularisation of shareholding of 'groups' of associated shareholders. If the 11 such groups who hold more than 10 000 shares, but with limited voting rights, cause no harm to the SARB, legislation could have provided for such an approach for all groups of associated shareholders.

Owing to the fact that some associated shareholders had ignored the SARB's letter, this left the SARB with no option but to institute further action. The SARB retained the services of Werkmans Attorneys in bringing a High Court application (Affidavit by Dr JJ de Jager 2015). As applicant, the SARB instituted legal action against these respondents (Case 88570/2014 2014), holding 297 810 shares in the SARB's issued capital of 2 000 000 shares, of which 178 510 shares (some 8.9%) would have to be sold to ensure that the associated shareholders conformed to the provisions of the amended legislation. As shown below, the matter is being opposed by certain shareholders. The SARB's initial expectation was that the matter would be placed on the unopposed court roll, however, as the matter is being opposed it will be placed on the court roll for opposed applications (SARB 2016: 40).

Failure to institute such action could have subjected the central bank to claims of negligence, in as much as a contravention of legislation would have been tolerated. It was necessary to follow a two-pronged approach in taking action against these shareholders (SARB 2015):

- The SARB obtained an order from the Pretoria High Court (Case 88570/2014 2014) on 12 December 2014 to authorise the service of the notice of the envisaged application on affected shareholders; and
- Following successful service of notice in accordance with the court order of 12 December 2014, the SA Reserve Bank lodged a court application for an order for the disposal of shares "at a price per share and subject to such terms, conditions and restrictions as the court may determine" (RSA 2010).

An order for the first aspect, namely the methodology for service of the notice, was granted by the Pretoria High Court on 12 December 2014 (SARB 2016: 40). Whereas the SARB's initial action covered the way in which motion of notice should be served on the respondents, in the second aspect of the application the SARB requests the High Court to grant an order in the following terms (Affidavit by Dr JJ de Jager 2015; see also SARB 2016: 40):

(i) directing the respondents to dispose of those SARB shares which they hold in aggregate with their associates, in excess of 10 000;
(ii) appointing Investec Securities Propriety Limited to act as an independent broker to facilitate the disposal of those shares over a period of two years from the date of the order, at a sale price of not less than R1.55; and
(iii) directing the General Council of the SARB to do all things necessary to enable the sale of the shares, including signing all necessary documentation and providing whatever assistance is necessary to the independent broker.

The SARB instituted legal action against shareholders deemed to be associates who represent only some 5% of its shareholders. These associated shareholders hold only some 15% of the issued share capital of the SARB amongst them, of which some 9% must be sold. This leaves the impression of forceful action being taken against a few shareholders – the notion that this action against shareholders holding a fairly insignificant percentage of the issued share capital is one of *forcing the few*. Moreover, these shareholders had held their shares for a considerable period of time before the legislative amendments of 2010, without any harm to the SARB being shown. It is therefore questionable whether it was really necessary for the 2010 legislative amendments to prescribe such forceful action.

The SARB has evidence showing that the following shareholders are 'associates' (Case 88570/2014 2014):

(i) The first and second respondents (Barit family): Lawrence Barit and Shimon Barit (father and son, respectively, each holding 10 000 SARB shares, thus 20 000 in total);
(ii) The twelfth to fourteenth respondents (Guizzardi family): Gina Guizzardi and her two sons, Oscar and Manrico Guizzardi, who are siblings, hold 10 000, 10 000 and 5 000 SARB shares, respectively (25 000 in total);
(iii) The fifteenth and sixteenth respondents (the Hathorn family): Christopher Blaikie Hathorn and his son, Walter Piper Hathorn, hold 10 000 and 1 010 SARB shares, respectively (11 010 in total);

(iv) The seventeenth and eighteenth respondents (Joubert family): George Rolland Joubert and his spouse, Sally Helen Hanscomb Joubert, hold 10 000 and 9 200 SARB shares, respectively (19 200 in total);

(v) The nineteenth and twentieth respondents (Michael Lang family): Michael Lang and his spouse, Sibylla Smude-Lang, both hold 10 000 SARB shares, respectively (20 000 in total);

(vi) The twenty-first to twenty-third respondents (Nicholas Lang family): Nicholas Hendrik Lang, his son Hermann Werner Lang and his daughter Zacharia Petronella Munnik (making the last two mentioned respondents siblings) each hold 10 000 SARB shares (30 000 in total);

(vii) The twenty-fourth to twenty-eighth respondents (Meyer family and trustees of the H Meyer family trust): Hendrik Meyer and his spouse Gwendoline Mildred Meyer each hold 10 000 SARB shares, while they are also, with Ivo Meyer, trustees of the H Meyer Family Trust, that holds 10 000 SARB shares (30 000 in total);

(viii) The twenty-ninth and thirtieth respondents (matters pertaining to the Piebatsch and Wood families): Mr Charles David Piebatsch and the late Richard Rudolf Piebatsch are assumed to be close relatives owing to a common surname and the fact that they lived at the same address. Their joint holding is 20 000 SARB shares, with the holdings of the Late Piebatsch, who died intestate (10 000 shares), currently under control of the Master of the High Court (thirtieth respondent).[6] Likewise, the shares of the late Graeme Dunbar Wood and the late Iris Stella Wood, who held 13 300 SARB shares (10 000 and 3 300 shares, respectively)[7], are under the control of the Master of the High Court (33 300 in total).

The Duerr[8] family (respondents three to eleven) warrants more extensive explanation. This family holds 90 000 SARB shares (4.5% of the issued share capital). The link between these respondents can best be depicted by means of a family tree (see Figure 1).

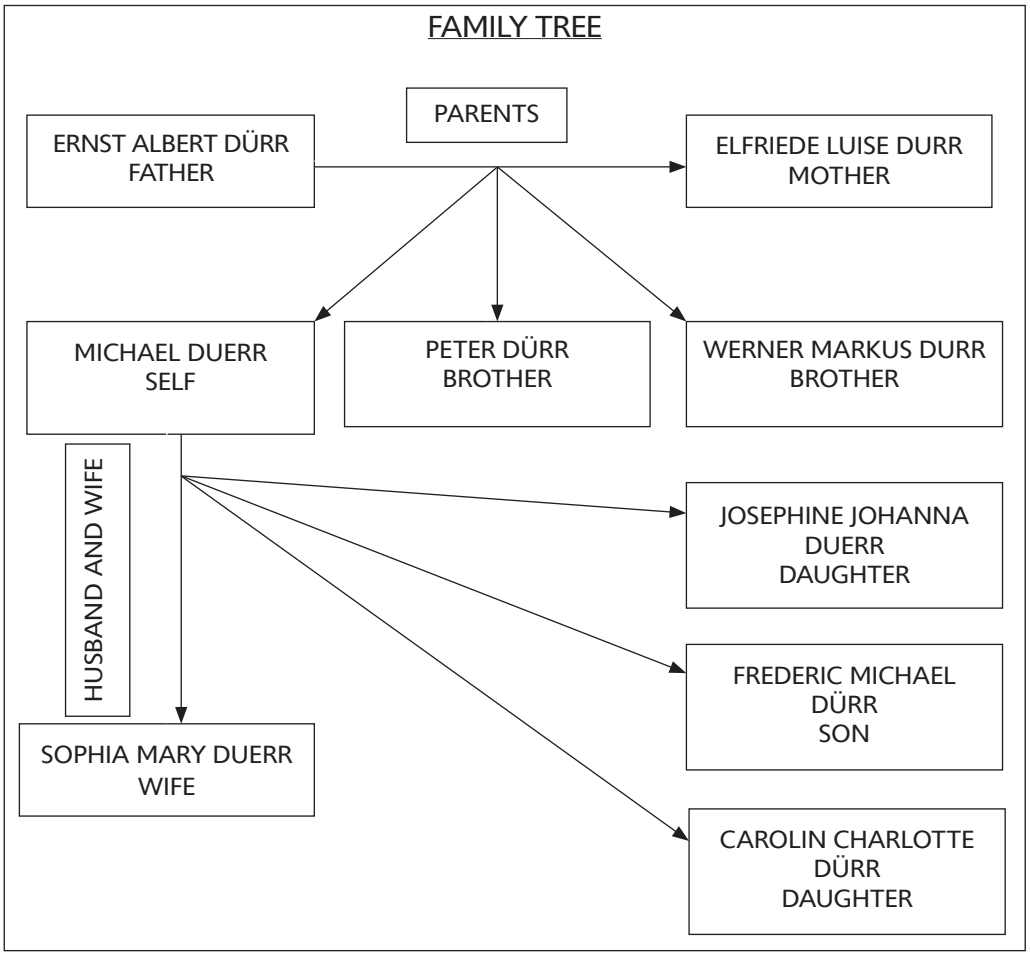

Figure 1: Duerr family tree

Source: Case 88570/2014 (2014)

Other than the shareholders in association who had agreed to dispose of their shares by 31 March 2015, responses to the letter of 7 March 2014 were also received from a number of respondents named above:

(i) The first respondent (Lawrence Barit):
Mr Barit informed the SARB in writing that the Bank had all along (and even at the time of purchase of shares) known that he and his son owned in excess of 10 000 SARB shares. Moreover, Mr Barit is of the opinion that the price submitted in the founding affidavit is too low. However, as Mr Barit and/or his son did not make the necessary declaration and did not undertake to

dispose of the shares held jointly above 10 000, this action is brought against them. If Mr Barit is indeed correct in averring that the share price in the case brought by the SARB is too low, he can attempt to sell his shares on the open market. If he successfully sells 10 000 shares, the SARB's action against him and his son will lapse. This option is indeed available to all groups of associated shareholders.

(ii) The third respondent (Michael Duerr):
The response in German, received on 10 July 2014, was translated into English. Mr Duerr's response can be summarised as (a) the association among the Duerr family has been known to the SARB for a long time and therefore required no declaration; (b) a verbal challenge of the family, directed at the Governor of the SARB, about the management of the institution, in the main pertaining to the fact that financial losses had been shown during the past five years, contributed to the action to be taken; (c) the SARB will not *get* (literal translation of the actual German word used) the Duerr family's shares; and (d) the price submitted in the founding affidavit is too low.[9] However, as no member of the Duerr family made the necessary declaration and did not undertake to dispose of the shares held jointly above 10 000, this action is brought against them. The option of selling the shares in the open market is available to the Duerr family.

(iii) The seventeenth respondent (George Rolland Joubert):
Mr Joubert informed the SARB that he and his wife had held their SARB shares for many years and accordingly suggests the imposition of a limit on voting rights.[10] However, as Mr Joubert and/or his wife did not make the necessary declaration and did not undertake to dispose of the shares held jointly above 10 000, this action is brought against them.

(iv) The twenty-fourth respondent (Hendrik Meyer):
Mr Meyer apologised on his own behalf and on behalf of his wife and the family trust for the oversight in lodging the necessary declaration prescribed at the time of the promulgation of the SARB Amendment Act (RSA 2010) and requested permission to retain the shares, subject to the imposition of a voting limitation.[11] However, as Mr Meyer and/or his wife and/or the family trust did not make the necessary declaration and did not undertake to dispose of the shares held jointly above 10 000, this action is brought against them. The Meyer family was negligent in not making the necessary declaration and cannot be treated differently merely on the basis of tendering an apology. Again the option of selling shares held in excess of 10 000 is available.

The sale price of the shares (R1.55 per share) to be considered by the High Court is based on a valuation obtained from KPMG (2014). In its valuation, KPMG considered a number of aspects, including an assessment of the provisions in the SARB legislation for the liquidation of the central bank and the return on preference shares of commercial banks in South Africa, based on an assumption that SARB shares have many characteristics of preference shares. A price of R1.55 and a dividend yield of 10c per share per annum before tax, puts the share on a dividend yield of 6.45% per annum before withholding tax of 15% per annum on dividends. On an after-tax basis the yield is 5.48% per annum.

It is probably more appropriate to value the shares on the basis of a consul (an indefinite period stock, aka a bond), given the fact that the shares have neither any redemption date, nor scope for dividend growth. As South Africa has no indefinite period bonds, the yield in the longest-dated government bond can be used as a proxy. The R2048, maturing on 28 February 2048, was the South African government bond with the longest outstanding term to maturity at the time of the valuation. In September 2014 (at the time of the KPMG valuation) the yield on this bond was 8.82% per annum. Naturally the interest earned on this bond is taxable in the hands of the bondholder if the holder is an individual, which applies to the majority of the respondents in the case under consideration. Assuming an average tax rate of 30% per annum, the after-tax yield on the R2048 in September 2014 was 6.174% per annum. On this basis the valuation per SARB share should have been R1.3767 (R1.38 rounded), rather than R1.55, i.e. valued at an after-tax yield of 6.174% per annum. It seems that the amendment to Section 22 of the SA Reserve Bank Act (RSA 2010) should have provided for the court to determine a yield (e.g. commensurate with long-dated government bonds), rather than a price for the shares, as bonds trade on yield. SARB shares are akin to bonds, rather than to shares.

As shown above, however, some respondents in this matter are of the opinion that the share price in the application to the High Court is too low, rather than too high. The views of these respondents cannot be supported. If interest rates and yields in South Africa increase over the two-year period after the successful granting of the court order, it will not be possible to sell the SARB shares at R1.55 per share, owing to the fact that their value will decline as bond yields increase.

A further complication is that shareholders will retain their share certificates once their shares are sold by the SARB. This is problematic in at least two respects:

(i) The certificates could be lodged as security at commercial banks for commercial loans and would be of no value after the shares are sold; and
(ii) Respondents who cannot be reached by the SARB might not be aware of the sale of their shares by the central bank. Such shareholders might subsequently

sell their shares in good faith to a third party[12] who will only become aware of the fact that the share certificate is worthless once it is tendered with a duly-completed CM42 form at the SARB (transfer secretary) for transfer.

Conclusion

This article has identified the group of central banks with private shareholders, although the institutional structures and rights of these shareholders differ considerably. Shareholding by the general public is allowed only in the central banks of Belgium, Greece, Japan, South Africa, Switzerland and Turkey (with non-resident shareholders excluded in the cases of Japan and Turkey). Moreover, the rights of shareholders are often limited by aspects such as the number of shares an individual can hold, and/or limitations on voting rights.

Table 1 highlights differences in the approach of central banks with shareholders to the payment of dividends, with such payments capped by law in most instances. The only exceptions are the central banks of Belgium and Greece, where shareholders share in the profitability of these institutions. However, in the aftermath of the 2007/8 financial crisis, the Greek central bank could not sustain its dividend payments. The matter of shareholders in the SARB not sharing in the profits in the same way as shareholders in the central banks of Belgium or Greece is important in this analysis. The implication is that SARB shares trade on yield like bonds, rather than on price.

Changes over time in the legal framework for holding shares in the SARB have been considered. These changes show a clear trend in limiting the rights of shareholders over time. Initially shareholders could own and vote in respect of 20 000 shares per individual at the OGM of the SARB. This was reduced to voting in respect of 10 000 shares in 1944 and further limited to voting in respect of 10 000 shares per group of 'associated' shareholders (e.g. close relatives) in 2010. These limitations were introduced to ensure that no 'group' or 'block' of shareholders can exercise undue influence by means of voting at the OGM of the central bank, which is aligned to its constitutional mandate. However, the requirement to dispose of shares not declared within 40 days is a forceful approach, compared to the more lenient route followed when a stricter shareholding limitation was introduced in 1944.

The 2010 legislative amendments provide for associates to declare such relationship to the SARB. While some shareholders made the necessary declarations, the respondents in the matter brought by the SARB failed to do so and the central bank has reason to believe they are associates. However, the delay of some four years between the promulgation of the legislation in 2010 and the letters addressed to delinquent shareholders in March 2014 cannot be explained. During this period the

identified shareholders of the SARB held shares in the central bank in contravention of its own legislation. No harm from such continued holding has been shown by the SARB, as the respondents were treated in the same way as associated shareholders who made declarations (i.e. a limitation on voting rights).

The legal action of the SARB is being opposed by several shareholders. The SARB therefore has an interesting court battle on its hands. The time lapse between the promulgation of legislation and action taken by the SARB might be raised as a defence by those respondents challenging the legal action of the central bank. If the holding of shares in contravention of legislation since 2010 has not yet brought any demonstrable disadvantage to the central bank or the broader community (and the SARB shows no such disadvantage in its application, other than to point out that the respondents contravene legislation that was promulgated in 2010), a court could hold the view that the amended legislation infringes on the constitutional rights of shareholders to hold shares in the central bank. The 2010 amendment to the SA Reserve Bank Act will then be referred to the Constitutional Court for final consideration.

The approach followed in 1944 in respect of the reduction in voting rights, compared to the forceful approach followed in the 2010 amendments, would also have been more acceptable to the respondents in the SARB's legal action. An approach akin to the 1944 legislative amendment had indeed been granted to groups of associated shareholders after they made timely declarations in accordance with the prescribed amended legislation. The legislation should have extended this approach to all shareholders.

The SARB runs the danger that the granting of the application might be a hollow victory: it may very well not be possible to sell the shares within a period of two years from the date of a court order at a price of R1.55 per share: the share price valuation might be too high under current circumstances and the share price will decline with rising interest rates. The amendment to Section 22 of the SA Reserve Bank Act (RSA 2010) should have provided for the court to determine a yield (commensurate with long-dated government bonds), rather than a price for the shares, in the event of legal action instituted by the central bank.

Notes

1. The terminology 'private shareholding/private shareholders' is used in this article to make a distinction between central banks with shareholding by parties other than their respective governments and those with exclusive government shareholding. 'Private shareholding' is also the terminology used by De Kock (1939) (see Section 2 in this regard).

2. This section draws on Rossouw and Breytenbach (2011a).
3. An earlier search for Spanish or Portuguese literature on central banks nationalised in 1975 (see Rossouw & Breytenbach [2011] in this regard) revealed no literature on the matter of central banks with private shareholders.
4. De Kock served as deputy governor (1932–1945) and as governor (1945–1962) of the SARB (Meiring 1994). *Central Banking*, first published in 1939, was regarded as one of the first comprehensive textbooks on this topic and was translated into Spanish, Portuguese, Japanese, Hindi and Gujarati.
5. Ownership of 10 000 shares entitles a shareholder to 50 votes at a ratio of one vote for every 200 shares.
6. If the shares of the late Richard Rudolph Piebatch were to be transferred to beneficiaries (e.g. his children), the Piebatch family would no longer meet the definition of associates, except if the shares were transferred to the siblings or children of Mr Charles David Piebatch. However, in the latter instance the SARB transfer secretary will refuse the transfer of the shares.
7. If the shares of the late Graeme Dunbar Wood and the late Iris Stella Wood were to be transferred to their children, the Wood family will still meet the definition of associates and their children (being siblings) will have to reduce their number of shares.
8. Some members of the Duerr family spell their surname Dürr. The use of 'ue' rather than 'ü' is a common variation between the German and English languages.
9. The summary of the Duerr response provided does not do justice to extensive earlier correspondence and other contact between Mr Duerr and various executives and officials of the SARB and even altercations between Mr Duerr and successive governors of the SARB, particularly at OGMs of the SARB (see, e.g., Bloomberg 2008; *Mail & Guardian* 2008; SARB 2012).
10. Mr Joubert proposes an approach akin to the 1944 legislative change; an approach also alluded to as an alternative in this article.
11. This is similar to the approach suggested by Mr Joubert.
12. It is important to note that the SARB provides an over-the-counter share trading facility for the trading and transfer of its shares, but that these shares can nevertheless trade privately and be submitted for transfer, provided that the buyer meets the legal requirements to take ownership of the shares.

References

Affidavit by Dr JJ de Jager. 2015. *In The High Court of South Africa: Gauteng Division, Pretoria*, 28 July 2015.

Archer, D. & Moser-Boehm, P. 2013. *Central Bank Finances*, BIS Papers No. 71. Basel: Bank for International Settlements.

Bloomberg. 2008. *Mboweni rebukes South African Reserve Bank shareholders at AGM*, 18 September.

Case 88570/2014. 2014. *Founding affidavit of the SA Reserve Bank in the Gauteng High Court against 30 shareholders or their representatives*, December.

De Kock, M.H. 1939. *Central Banking*. London: P.S. King and Son Ltd.

De Kock, M.H. 1956. *Central Banking* (3rd edition). London: Staples Press Limited.

De Kock, M.H. 1974. *Central Banking* (4th edition). London: Staples Press Limited.

KPMG. 2014. *Valuation of the South African Reserve Bank Shares*. KPMG Financial Services Proprietary Limited, September.

Mail & Guardian. 2008, September 18. Belligerence abounds at Reserve Bank AGM.

Meiring, J.G. 1994. *Biographical Sketches of Directors*. Pretoria: SARB.

Oesterreichische Nationalbank. 2009. *Annual Report*. Vienna: Oesterreichische Nationalbank.

Reserve Bank of New Zealand. 2009. *The History of the Reserve Bank of New Zealand*. Wellington: Reserve Bank of New Zealand.

Rossouw, J. 2016. 'Private shareholding and public interest: An analysis of an eclectic group of central banks', *SA Journal of Economic and Management Sciences*, 19(1) (April): 150–159.

Rossouw, J. & Breytenbach, A. 2011a. 'Identifying central banks with shareholders: A review of available literature', *Economic History of Developing Regions*, 26 (Suppl 1): S123–S130.

Rossouw, J. & Breytenbach, A. 2011b. 'When private shares meet public interest', *Central Banking*, XXII(2) (November): 85–87.

RSA (Republic of South Africa). 1989. *SA Reserve Bank Act*, Act No. 90 of 1989, as amended. Pretoria: Government Printers.

RSA (Republic of South Africa). 1996. *Constitution of the Republic of South Africa*, Act No. 108 of 1996. Pretoria: Government Printers.

RSA (Republic of South Africa). 2010. *SA Reserve Bank Amendment Act*, Act No. 4 of 2010. Pretoria: Government Printers.

SARB (South African Reserve Bank). 2012. *Annual report 2012*. (Minutes of the 91st Ordinary General Meeting of shareholders). Pretoria: SARB. [Online] Available at: http://www.resbank.co.za/publications/detail-item-view/pages/publications.aspx?sarbweb=3b6aa07d-92ab-441f-b7bf-bb7dfb1bedb4&sarblist=21b5222e-7125-4e55-bb65-56fd3333371e&sarbitem=6770.

SARB (South African Reserve Bank). 2015. *Annual report 2015*. Pretoria: SARB. [Online] Available at: http://www.resbank.co.za/publications/detail-item-view/pages/publications.aspx?sarbweb=3b6aa07d-92ab-441f-b7bf-bb7dfb1bedb4&sarblist=21b5222e-7125-4e55-bb65-56fd3333371e&sarbitem=6770.

SARB (South African Reserve Bank). 2016. *Annual report 2016*. Pretoria: SARB. [Online] Available at: http://www.resbank.co.za/publications/detail-item-view/pages/publications.aspx?sarbweb=3b6aa07d-92ab-441f-b7bf-bb7dfb1bedb4&sarblist=21b5222e-7125-4e55-bb65-56fd3333371e&sarbitem=6770

Union of South Africa. 1920. *Currency and Banking Act*, Act No. 31 of 1920, as amended.

Union of South Africa. 1944. *SA Reserve Bank Act*, Act No. 29 of 1944, as amended.
United States of America. 1913. *Federal Reserve Act*, 1913. For more information, visit [Online] Available at: http://www.investopedia.com/terms/f/1913.