IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPEHIGH COURT, CAPE TOWN)

CASE NO: 3056/13

In the matter between:

THE REGISTRAR OF BANKS	Applicant
And	
NET INCOME SOLUTIONS CC	1st Respondent
CHRISTOPHER MARK WALKER	2nd Respondent
THE STANDARD BANK OF SOUTH AFRICA LTD	3rd Respondent
NETCASH (PTY) LIMITED	4th Respondent

JUDGMENT DELIVERED ON 25 JUNE 2013

YEKISO, J

[1] On 28 February 2013 and by way of a notice of motion issued out of this court, the applicant sought and was granted an order, in the form of a *rule nisi,*directed against the first, second, third and the fourth respondentsto show cause on 26 March 2013 why an order in the following terms should not be confirmed and made final, the terms of the order being:

[1.1.] an order restraining the first and the second respondents from conducting the business of a bank incontravention of section 11(1) of the Banks Act, 94 of 1990 (“the Banks Act”) by;

[1.1.1.] conducting the activities set out in paragraphs 2 and 3 of the Government Notice 498 published on 27 March 1997 in Government Gazette No 17895;

[1.1.2.] accepting deposits from the general public (including persons in the employ of persons so accepting deposits) as a regular feature of the business in question; and

[1.1.3.] soliciting or advertising for deposits.

[1.2.] an order that the first and the second respondents be prohibited from disposing of, or otherwise dealing with any of their assets while the contravention suspected of having been committed is being investigated.

[1.3.] that the inspectors appointed by the S A Reserve Bank and/or their authorised representatives be authorised to:

[1.3.1.] serve the order and the application which constitutes these proceedings (‘the application”) in terms of the rules of court on the first and the second respondents;

[1.3.2.] secure and remove all money found at the premises of the first and the second respondent's premises during a search performed in terms of section 4 of the Inspection of Financial Institutions Act, 80 of 1998 ("the Inspection Act") pending the finalisation of the inspection; and

[1.3.3.] obtain affidavits from the first and second respondents during the service of the order and the application and/or search performed in terms of section 4 of the Inspections Act of the whereabouts of all their assets.

[1.4.] That the orders in terms of sub-paragraphs 1.1 and 1.2of the order operate with immediate effect.

[2] As against the third and fourth respondents, that the inspectors appointed by the SA Reserve Bank and/or their authorised representatives be authorised to serve the order and the application in terms of the rules of court on the third and the fourth respondent.

[3] In terms of paragraph 7 of the order, thatthe third respondent be ordered to prevent the withdrawal of funds from the bank accounts held by the first and the second respondents at their institutions pending the finalisation of the investigation.

[4] As against thefourth respondent, the order required the fourth respondent to furnish the inspectors appointed by the S A Reserve Bank, within 12 hours of service

of the order, with a written summary of all transactions, whether finalised or pending, involving the first and the second respondent; and

[4.1.] not to deal with any funds under its control which relate to the affairs of the first and/or the second respondents; and

[4.2.] to disclose the full extent of funds held by it or under its control in any bank account or otherwise on behalf of the first and the second respondents.

THE PARTIES

[5] The applicant is the Registrar of Banks, appointed as such in terms of the provisions of section 4 read with section 3 of the Banks Act and having its principal place of business at 370 Church Street, Pretoria, Gauteng.

[6] The first respondent is Net Income Solutions CC ("NIS"), a close corporation duly incorporated and registered in accordance with the Close Corporation Act, 69 of 1994, bearing registration number 2007/084693/23 with a registered address at 20 Queens Close, Parklands, Cape Town and having its principal place of business at Unit 14, the Pavilion on Esplanade, Central Park, Century Way, Century City, Cape Town.

[7] The second respondent is Christopher Mark Walker, a major male businessman residing at Atlantic Beach Golf Estate, 4 Mooringview Close, Melkbosstrand, Cape Town and having his principal place of business at Unit 14, the

Pavilion on Esplanade, Central Park, Century Way, Century City, Cape Town. The second respondent is the sole member of NIS. The first and the second respondents will, where appropriate, be jointly referred to as the NIS respondents.

[8] The third respondent is the Standard Bank of South Africa Limited ("Standard Bank"), a public company with limited liability duly incorporated and registered in accordance with the company laws of the Republic of South Africa and a registered bank in terms of the Banks Act, with its registered address at the Standard Bank Centre, 5 Simmonds Street, Johannesburg.

[9] The fourth respondent is Netcash (Pty) Limited ("Netcash"), a private company with limited liability duly incorporated and registered in accordance with the company laws of the Republic of South Africa and bearing registration number 2001/019308/07, with its registered address at Netcash Square, 64 Parklands Main Road, Cape Town.

PURPOSE OF THE APPLICATION

[10] The purpose of the order sought, in the form of a *rule nisi*, which is still subject to confirmation, is to seek an interdict against the NISrespondents from contravening the provisions of section 11(1) of the Banks Act and from continuing with the activities complained as contemplated in section 81 of the Banks Act.

[11] In the course of its ordinary business, the applicant had reason to suspect that NISis conducting the business of a bank as defined in the Banks Actwithout being duly registered and authorised to conduct such business.

[12] Arising from the activities referred to in the preceding paragraph it is contended on behalf of the applicantthat the business practice and the activities of NIS, carried out and executed by Christopher Mark Walker ("Walker"), constitute the business of a bank which entitles the applicant to seek the relief available to it in terms of sections 81(1)(i), 81(1)(ii) and 81(1)(iii) of the Banks Act.

BACKGROUND

[13] The granting of the interdict, in the form of a *rule nisi*, was preceded by the following material facts of the background material:

[13.1.] One of the deputy governors of the South African Reserve Bank, based on information furnished to it,had reason to believe that the NISrespondents and the companies with which they were associated were conducting the business of a bank in contravention of section 11(1) of the Banks Act:

[13.2.] As a result, the deputy governor of the Reserve Bank directed the Registrar of Banks, in terms of section 12 of the South African Reserve Bank Act, 90 of 1989 ("the Reserve Bank Act"), to cause the NIS respondents' affairs to be inspected. Inspectors employed by the firm Price Waterhouse Coopers were appointed to

investigate the affairs of the respondents. As at the time the order, in the form of *rule nisi,* was granted, such investigations were on-going.

[14] The material findings of the inspectors were that:

[14.1.] the business account of Net Income Solutions had a positive balance of R324,032,787.29 immediately before it was frozen;

[14.2.] an extract from Net Income Solutions'bank statement showed that the entity was receiving and holding vast amounts of money. The investigations further revealed that an amount of R147,000.00, made up of small cash amounts, was deposited on a single day;

[15] In the course of the investigation, the inspectors appointed by the Registrar of Banks discovered that, in essence, the scheme and business operation of NIS involves the following:

[15.1.] NISoperates a website called "EFT For Me". The acronym EFT, it would appear, stands for "Emotional Freedom Techniques" The website ostensibly provides information about a form of stress relief. However, one of the headings on the website's home page is entitled "Income Opportunity". In that section of the website, a detailed description is provided of the NIS scheme of business operation. As a matter of fact, other than a one page description of the purported stress relief technique, all of the links within the website are to pages to do with how NIS's

business operation works – either how to sign up or explanations of how it works. There is no product of service available on the website other than participation in the scheme of business operation.

[15.2.] It appears on the basis of the investigation that depositors purchase points at a cost of R100.00 per point. Depositors earn R2.00 per day for a period of upto 75 days in return for purchasing one point which calculates to an amount of R150.00. What this, in effect, means is that each amount of R100.00 paid yields a monetary benefit of R50.00 over a period of 75 days. There is no limit to the amount of points that may be purchased.

[15.3.] A depositor (also referred to as “team leader”) earns a 10% commission on all points purchased by the depositors directly referred to the scheme by the team leader (“direct referrals”); and

[15.4.] A depositor (team leader) also earns a 5% commission on all points purchased by depositors referred to by his or her direct referrals (“indirect referrals”).

THE LEGISLATIVE FRAMEWORK

[16] For a proper determination of the issues in consideringwhether or not to confirm the *rule nisi,* it is necessary to navigate various provisions of the Banks Act; the Reserve Bank Act and the Inspection of Financial Institutions Act.

[17] Of importance, in as far as the Banks Act is concerned, is the definition of the term "the business of a bank" contained in section 1 of the Banks Act. The term "the business of a bank" is defined as follows in section 1 of the Banks Act:

> "(a) The acceptance of deposits from the general public (including persons in the employ of the person so accepting deposits) as a regular feature of the business in question;
>
> (b) The soliciting of or advertising for deposits;
>
> (c) The utilisation of money, or of the interest or other income earned on money, accepted by way of deposit as contemplated in paragraph (a) -
>
> (i) for the granting by any person, acting as lender in such person's own name or through the medium of a trust or a nominee, of loans to other persons;
>
> (ii) for investment by any person, acting as investor in such person's own name or through the medium of a trust or nominee; or
>
> (iii) for the financing, wholly or to any material extent, by any person of any other business activity conducted by such person in his or her own name, or through the medium of a trust or nominee;
>
> (d) the obtaining, as a regular feature of the business in question, of money through the sale of an asset to any person other than a bank, subject to an agreement in terms of which the seller undertakes to purchase from the buyer at a future date the asset so sold or any other assets; or
>
> (e) any other activity which the Registrar has, after consultation with the Governor of the Reserve Bank, by notice in the *Gazette*, declared to be the business of a bank."

[18] Of equal importance, in as far as the Banks Act is concerned, is the definition of the term “deposit”. The term “deposit” is defined as follows in section 1 of the Banks Act:

> ““deposit’” when used as a noun, means an amount of money paid by one person to another person subject to an agreement in terms of which –
>
> (a) an equal amount or any part thereof will be conditionally or unconditionally repaid, either by the person to whom the money has been so paid or by any other person, with or without a premium, on demand or at specified or unspecified dates or in circumstances agreed to by or on behalf of the person making the payment and the person receiving it; and
>
> (b) no interest will be payable on the amount so paid or interest will be payable thereon at specified intervals or otherwise, notwithstanding that payment is limited to a fixed amount or that a transferable or non-transferable certificate or other instrument providing for the payment of such amount *mutatis mutandis* as contemplated in paragraph (a) or for the payment of interest on such amount *mutatis mutandis* as contemplated in paragraph (b) is issued in respect of such amount.”

[19] The other section of the Banks Act which is equally of importance in considering the issues to be determined, is section 11 of the Banks Act which provides that, “Subject to section 18A,no person shall conduct the business of a bank unless such person is a public company and is registered as a bank in terms of this Act.” Section 11 of the Banks Act also provides that any person who contravenes section 11 of the Banks Act, shall be guilty of an offence.

[20] It would appear that this application was brought in terms of section 81 of the Banks Act. This section provides that if the Registrar has reason to suspect that any person who is not registered as a bank in terms of the Banks Act:

> "(a) is likely to conduct the business of a bank in contravention of the provisions of section 11 (1) or section 18A(6) or
>
> (b) has so contravened the provisions of section 11(1) or 18A(6)orhas contravened the provisions of section 22(4) or (5), or that such a contravention is likely to be continued or repeated,
>
> the Registrar may apply to a division of the High Court having jurisdiction (hereinafter in this section referred to as the court) for an order –
>
> (i) prohibiting the anticipated contravention referred to in paragraph (a);
>
> (ii) prohibiting the continuation or repetition of a contravention referred to in paragraph (b) or
>
> (iii) prohibiting the person concerned from disposing of or otherwise dealing with any of the assets of that person while the contravention suspected of having been committed or of being committed is investigated."

[21] And then of course there is section 12 of the Reserve Bank Act under the heading "Inspection of affairs of persons, partnership, close corporation, company or other juristic person not registered as bank or mutual bank". Section 12 of the Reserve Bank Act reads as follows:

> "(1) If the Governor or a Deputy Governor has reason to suspect that any person, partnership, close corporation, company or other juristic person who or which is not registered in terms of the Banks Act 1990 (Act No 94 of 1990), as a bank or in terms of the Mutual Banks Act, 1993 (Act No 124 of 1993), as a mutual bank, is carrying on

> the business of a bank or a mutual bank, he or she may direct the Registrar of Banks referred to in section 4 of the Banks Act, 1990, to cause the affairs or any part of the affairs of such person, partnership, close corporation, company or other juristic person to be inspected by an inspector appointed under section 11(1), in order to establish whether or not the business of a bank or mutual bank, as the case may be, is being carried on by that person, partnership, close corporation, company or other juristic person."

[22] The Reserve Bank Act provides that sections 4, 5, 8 and 9 of the Inspection of Financial Institutions Act, 38 of 1984 apply to an inspection in terms of section 12(1) of the Reserve Bank Act. The 1984 version of the Inspection of Financial Institutions Act has since been repealed. The repealed act was succeeded by the current Inspection of Financial Institutions Act, 80 of 1998 ("the Inspection Act").

[23] Section 4 of the Inspection Act deals with the power of inspectors relating to institutions. These powers are wide and include powers such as the power to administer an oath and examine certain persons; the power, without notice, to search premises and require the production of documents; and the right to retain seized documents for as long as they may be required for criminal or other proceedings.

[24] There are, in essence, two forms of conduct which fall under the meaning of the term "the business of a bank". There is

[24.1.] conduct which falls within the definition of “the business of a bank”, read with the definition of “deposit” in the Banks Act; and

[24.2.] any other activity which the Registrar has, after consultation with the governor of the Reserve Bank, by notice in the *Gazette*, declared to be the business of a bank.

[25] The Registrar of the Reserve Bank has made the declaration referred to in the preceding paragraph. That declaration is in the form of Government Notice 498 of 27 March 1997 (“the 1997 Notice”). In terms of this government notice the Registrar of Banks declared the following activities to constitute the business of a bank, the activities referred to in the noticebeing:

[25.1.] the acceptance or obtaining of money, directly or indirectly, from members of the public, as a regular feature of a business practice, with prospect of such members (referred to as “participating members”) receiving payments or other money related benefits directly or indirectly;

[25.2.] on or after the introduction of other members of the public (referred to as “the new participating members”) to the business practice from which new participating members, in their turn, money is accepted or obtained, directly or indirectly, as a regular feature of the business practice;

[25.3.] the soliciting of, or advertising for, directly or indirectly, money and/or persons for introduction into or participation in a business practice as defined in the preceding two sub-paragraphs.

[26] The term “business practice” is defined in the 1997 Government Notice to include:

[26.1.] any agreement, arrangement or understanding whether legally enforceable or not, between two or more persons; or

[26.2.] any scheme, practice or method of trading, including any method of marketing or distribution.

[27] It therefore follows logically that the term “business practice” as defined in the 1997 Notice should be read together with the definition of the “business of a bank” in the Banks Act. If either one of them is established, then section 11(1) of the Banks Act must be found to have been contravened.

THE ISSUES ARISING

[28] Having thus navigated the relevant legislative framework in order to establish whether or not the provisions of section 11(1) of the Banks Act have been contravened, the following issues arise for determination, these being:

[28.1.] consideration of the test applicable in proceedings such as these;

[28.2.] the proper meaning of the term “the business of a bank”;

[28.3.] the question as to whether, on the facts of this case, the NIS respondents have conducted the business of a bank by operating a scheme; and

[28.4.] whether a proper case has been made out for the relief sought in the notice of motion.

[29] In addition to the issues highlighted in the preceding paragraph, the following matters arise from the defences put up by the NIS respondents in their answering affidavits, these being:

[29.1.] whether Walker’s personal account ought to be frozen; and

[29.2.] whether the conduct of the NIS respondents in operating the scheme falls within the ambit of government notice 1176 of 1 December 2006 (“the 2006 notice”) which excludes certain conduct from the definition of “the business of a bank”. Paragraph 2 of the 2006 Notice contains a list of activities which have been designated by the Registrar of Banks as not falling within the meaning of “the business of a bank”.

TEST APPLICABLE TO THESE PROCEEDINGS

[30] What the *rule nisi* envisages, should it be confirmed, in the first instance, is an order prohibiting the NIS respondents from conducting the business of a bank and, in the second instance, an order prohibiting the NIS respondents from disposing of or otherwise dealing with their assets while the contravention suspected of having been committed is being investigated.

[31] Section 81 of the Banks Act, in order for a court to grant an order prohibiting the NIS respondents from conducting the business of a bank, requires proof that there is a reasonable likelihood that there will be a continuation or a repetition of a contravention of section 11(1) of the Banks Act. Furthermore, section 81, in order for a court to grant an order prohibiting the NIS respondents from disposing of or otherwise dealing with the assets while the contravention suspected of having been committed is being investigated, requires proof that there is a reasonable likelihood that a contravention of section 11(1) of the Banks Act has been committed or is being continued.

[32] The applicant makes a point in its submissions that the notion of a "reasonable likelihood" should be distinguished from the precise prediction of a future outcome. The submission is that the test is of a less stringent standard. The point being made in this submission is that to require a test which effectively establishes a precise prediction of a future outcome is not what section 81(1) contemplates. Thus, the question is whether the NIS respondents might commit the conduct in question, not will commit the conduct in question. Put differently, the question is whether there is a reasonable prospect, which is not too remote, that the conduct in question might be committed.

[33] All that must be shown in these proceedings is that there is a reasonable prospect that section 11(1) has been contravened and might be contravened again by the NIS respondents if the relief sought in the notice of motion is not granted.

APPLICATION FOR A POSTPONEMENT

[34] Now that I have dealt with the test applicable in these proceedings, I might as well deal with the matter of an application for a postponement launched before the hearing of the matter on 5 June 2013. The purpose of the application was to seek an indulgence to afford the NIS respondents an opportunity to expand their defence to include a challenge on the constitutionality of the threshold "reasonable likelihood" as a test for granting the relief contemplated in section 81 of the Banks Act. The application for a postponement was based on a contention that the threshold for the relief contemplated in section 81 of the Banks Act is markedly different to the onus of proof required in the ordinary course of litigation between the contesting parties. The contention goes further to suggest that the threshold of an onus as provided for in section 81 makes it much easier for the applicant, and, in the instance of this matter, the Registrar of Banks, to obtain the interdictory relief contemplated in section 81 thus placing litigants in the position of the NIS respondents at a distinct disadvantage as the minimum threshold facing the applicant is less stringent than the ordinary proof on a balance of probabilities.

[35] The NIS respondents finally made a point in their endeavour to have the proceedings postponed that the standard of proof based on the "reasonable likelihood" impacts negatively on their rights to trade; their rights to property; and their right of access to courts as contemplated in sections 22, 25 and 34 of the Constitution of the Republic of South Africa, 1996. The NIS respondents' contention boils down thereto that there is no proper basis, in the interpretation and the

application of the provisions of section 81, to depart from the ordinary approach to civil litigation in which a case must be made out on the balance of probabilities.

[36] The application for a postponement was opposed. After hearing argument I dismissed the application. I did not then give reasons for the order I gave but I did indicate to the parties that my reasons for dismissing the application would be included in my main judgment in the matter. In the paragraph which follows is my reason for having refused the application for a postponement.

[37] To start with, this is no ordinary application in motion proceedings. The office of the Registrar is afforded certain powers set out in sections 81 to 84 of the Banks Act.Those powers are designed to protect the general public when deposits are taken from general members of the public by unregulated and unsupervised persons and entities. These proceedings should be seen in the context of the Registrar of Banks being empowered to take action against unregistered persons in order to prevent the kind of mischief which the provisions of section 81 were designed to prevent.

[38] Section 81 of the Banks Act is an instrument available to the Registrar of Banks which may be used as a precursor to enforcing repayment in terms of section 83 and 84 of the Banks Act relating to repayment of money unlawfully obtained and, management and control of repayment of money unlawfully obtained, respectively. It is an enforcement mechanism for the recovery of funds acquired in schemes designed to contravene the provisions of section 11(1) of the Banks Act. The test

based on “reasonable likelihood” is the jurisdictional fact for granting relief of the kind contemplated in section 81. At the time the application for the relief sought was made the Registrar had been furnished with the information which excited suspicion that section 11(1) of the Banks Act was being contravened and that there was a likelihood that there would be a repetition of such contravention. It is on the basis of an objective assessment of such facts as may have been placed before the Registrar, in circumstances where investigations for the conduct complained of are on-going, that such a relief can be granted. Thus, in my view, the contemplated constitutional challenge absolutely had no merit and that is precisely the reason I dismissed the application for a postponement. Having thus determined the test applicable in these proceedings, the next question to determine is the meaning of the term “the business of a bank” and to what extent the activities of the NIS respondents constitute “the business of a bank” in contravention of the provisions of section 11(1) of the Banks Act..

THE BUSINESS OF A BANK

[39] A reference has already been made in paragraph [17] of this judgment to the definition of the term “the business of a bank” contained in the definitions section of the Banks Act. A reference has also been made to the definition of that term in the 1997 Notice. In paragraph 13 of the replying affidavit the deputy Registrar of Banks states that for a proper formulation of the definition of “the business of a bank” regard must also be had to Government Notice 1134 of 1999. Having regard to the definition of the term “the business of a bank” in the definition section of the Banks Act, the 1997 Notice as well as the 1999 Notice, a definition of the term “the

business of a bank" emerges which contains the following elements, the elements being:

[39.1.] the acceptance or obtaining of money, directly or indirectly, from members of the public;

[39.2.] as a regular feature of a business practice;

[39.3.] with the prospect of such members receiving payments or other money related benefits, directly or indirectly;

[39.4.] on or after the introduction of other members of the public to the business practice; and

[39.5.] from funds accepted or obtained from participating members or new participating members in terms of the business practice.

[40] Evidence tends to suggest that all the elements of the term "the business of a bank" referred to in the preceding paragraph have been satisfied. As a starting point Mr Walker, in paragraph 15 of his supplementary answering affidavit, sets out the total number of usernames registered in the scheme. That figure, according to the supplementary affidavit of Mr Walker, is 195233. On the other hand, the inspectors have ascertained that there have been a total number of 218 391 individual deposits with a total value of R815,973,697.33 into the NIS's business

bank account pursuant to the scheme. In simple terms, members of the public have deposited amounts slightly in excess of R800m into NIS's bank account in order to participate in the scheme. It therefore would appear that the first component of the definition of "the business of a bank" being the acceptance or obtaining of money directly or indirectly from members of the public has been satisfied.

[41] The acceptance of money from members of the public must be a regular feature of a business practice conducted by the entity concerned. In this regard not only was the acceptance of money from the public a "regular feature" of NIS's business, it was the core feature of the business. This is amply demonstrated by an analysis of NIS's business account conducted by the inspectors. The inspectors discovered that a total amount of R812,345,892.49 flowed into NIS's account. Of that amount, deposits received from participants in the scheme constituted R805,973,697.33. Based on this analysis, deposits received from participants in the scheme constituted 92,2% of all money received by NIS in its business account. Based on this evidence, there can thus be no doubt that acceptance of money from the public was the very purpose of the scheme and, therefore, a regular feature of its business practice.

[42] Based on the supplementary affidavit of Mr Walker, a person who participates in the scheme stand to receive up to an amount of R150.00 in exchange for having deposited an amount of R100.00. This clearly constitutes a payment or other money related benefit. Evidence tends to suggest that payments were made to members of the public participating in the scheme as has been established by the

inspectors during the course of their investigation. Evidence tends to suggest the following:

[42.1.] between April and December 2012, a total number of 11 510 payments were made to members of the public participating in the scheme from NIS's own bank account. In rand value, this amounted to a total of R15,163,096.82.

[42.2.] between January and the end of February 2013, a total number of 122 payments were made to members of the public participating in the scheme from NIS's own bank account. In the same period a total number of 187 747 payments were made by NIS via Netcash's banking account. In rand value this amounted to a total of R291,261,605.00. Arising from this evidence there clearly is no doubt that deposits made by members participating in the scheme yielded benefits, by way of payments from the NIS respondents or other money related benefits directly or indirectly,which satisfies the third element of the definition of the term "the business of a bank".

[43] In paragraph 32(d) of his first answering affidavit Mr Walker explained that should a participant ensure the participation by others in the plan, he or she would be rewarded therefor by means of the earning of commission. This then satisfies the element of the definition "on or after the introduction of other members of the public to the business practice (referred to in the definition as the "new participating

members") from which new participating members, in their turn, money is accepted or obtained, directly or indirectly, as a regular feature of the business practice".

[44] In their investigations, the inspectors have been able to determine, by analysing the bank accounts of NIS respondents, that there was no re-investment of funds deposited by participants in the scheme. The funds simply remained in the bank account of NIS. Therefore the business did not earn any revenue by re-investing the money. It is thus quite clear, on the basis of this evidence, that the only way that the NIS respondents could pay to members the amounts to which they were entitled in terms of the scheme rules, was with the funds deposited by new members.

THE SCHEME OPERATED BY THE NIS RESPONDENTS

[45] As can be seen from the portion of this judgment which deals with the activities of the NIS respondents constituting "the business of a bank", the scheme being run by the NIS respondents is open to any member of the public. In order to join the scheme, a member of the public has to create a user profile on NIS's website after inserting the name of his or her sponsor. The sponsor is the person who referred the new user to the scheme.

[46] During the registration process, the new user provides a username and cellphone number. This combination of information is described as a "unique identifier". Once this process has been completed, the new user is then able to deposit money into NIS's bank account, using the "unique identifier" as a reference.

After three days, the funds deposited by the user will be allocated to that user's e-wallet, which is a virtual bank account within the system.

[47] Once funds reflect in the e-wallet, they can be used to purchase what the system describes as "points". Each point costs R100.00. According to the website points can be used to earn a profit or to book a place at workshops or seminars. Insofar as profit is concerned, each point earns R2.00 or 2% per earning day for 75 earning days. These earnings are paid back into the e-wallet on a daily basis. The earnings may then either be used to purchase more points or may be withdrawn from the e-wallet and deposited into the user's bank account.

[48] It is also possible for existing members of the scheme to earn commission by sponsoring new point-buying members to the scheme. Existing members receive 10% of the value of the new member's contribution. They also receive 5% of the value of the contribution of any subsequent members introduced by that member. This then is how the scheme operates

NIS RESPONDENTS' DEFENCES

[49] The NIS respondents proffer certain defences to an allegation that they are conducting a business of a bank in contravention of section 11(1) of the Banks Act and/or that NIS's business practice constitutes the business of a bank contemplated in the 1997 Notice. In this regard, the NIS respondents seek to suggest that the purchasing of points to attend workshops was a core feature of the scheme. The workshops in question related to some emotional freedom technique mentioned in

the NIS website. In his interview with the inspectors during a search in his home on 28 February 2013 Mr Walker described NIS as a referral marketing company and that, amongst others, its products comprised of “Emotional Freedom Technique”. He referred to this product as EFT workshops. By way of points purchased, the participants can access these workshops and thus benefit from this product.

[50] The defence then appears to boil down thereto that the participants in the scheme were not making cash deposits in expectation of earning high rates of interest. Rather, they were making cash deposits in order to buy points. The points, in turn, would be used either to accumulate rewards or to buy access to workshops. This attitude on the part of the NIS respondents is reflected in a disclaimer which was placed on the NIS website which provided that “If you make a purchase from Net Income Solutions you are purchasing our products or services. You are not making any form of investment.”

[51] The disclaimer referred to in the preceding paragraph, in my view, is an attempt to convert an illegal scheme into a legal scheme. To do so would be to place form over substance rather than to focus on the way in which the scheme has been described by its operators. The proper focus of the scheme must be on the true nature of the scheme operated by the NIS respondents as set out in paragraphs [45] to [48] of this judgment.

[52] The Registrar has shown that, in the months of September and November 2012, between only 0,3% and 0,7% of all participants in the scheme attended

workshops. Furthermore, all of the workshops (i.e., 3, attended by 150 people in total) were held in September and November. There was none after that. Between the end of November 2012 and 28 February 2013 participation in the scheme grew from 31 816 to approximately 195 000. During that time, no workshop was held and, therefore, not one of the members attended one.

[53] It is quite clear, therefore, that the workshops did not form a significant feature of the business of the NIS respondents. They were part of what the Registrar describes as the "veneer of legitimacy" in his founding affidavit. They were provided to make the scheme appear to be a legitimate business when in fact it was an illegal deposit-taking scheme.

[54] There are other defences proffered by the NIS respondents, these relating to earning days not falling on consecutive calendar days; the setting up of computer literacy training courses; a denial on the part of the NIS respondents that they solicited or advertised for deposits from the members of the public; and, the suggestion by the NIS respondents that money deposited into the scheme could not be withdrawn. I have considered the merits of these defences individually and, in my view, there is absolutely no merit in such defences. They are merely an attempt on the part of the NIS respondents to circumvent the clear provisions of section 11 (1) of the Banks Act. Having considered the true facts of this matter, together with all other facts that are largely common cause, the defences and the version as proffered by the NIS respondents are implausible and so far-fetched that they fall to be rejected.

[55] On 28 February 2013 this court granted a *rule nisi* in terms of paragraph 3 and 4 of the notice of motion. In order for the *rule nisi* to be confirmed the Registrar has to surmount two hurdles and these are:

[55.1.] that there is a reasonable likelihood that a contravention of section 11(1) of the Banks Act will be continued or repeated by the NIS respondents if prayer 3 of the notice of motion is not granted; and

[55.2.] that there is a reasonable likelihood that a contravention of section 11(1) of the Banks Act has been committed or is being continued.

[56] On the basis of the evidence before me, I am satisfied that there is overwhelming evidence that the NIS respondents have contravened section 11(1) of the Banks Act and for that reasons, prayer 4 of the notice of motion ought to be confirmed and made final.

[57] The NIS respondents have filed two answering affidavits vigorously opposing the order sought. As has already been stated elsewhere in this judgment, on their version the NIS scheme is lawful. This is a clearest indication that the NIS respondents have every intention of resuming the operations of the NIS scheme if the Registrar is not successful in this application. In my view, there is thus a proper basis for granting the relief sought in prayer 3 of the notice of motion.

MR WALKER'S PERSONAL ACCOUNT

[58] In paragraph 12b of his first answering affidavit Mr Walker takes issue with the fact that the Registrar seeks confirmation of an order freezing his personal account. Mr Walker asserts that there is absolutely no case made out on the papers as to why his personal bank account had to be frozen and that the aspect of the order that freezes his personal banking account falls outside the relief contemplated in section 81 of the Banks Act. In advancing this contention Mr Walker avers in paragraph 53 of his first answering affidavit that the deponent of the founding affidavit does not aver anywhere in paragraphs 9 to 12 of the founding affidavit or in any of the remainder of the affidavit why, in his personal capacity, is he being suspected of conducting the business of a bank.

[59] In support of this contention Mr Walker asserts that he has never sought participation or deposit into the scheme in his personal capacity; that his personal bank account is evidence that no purchases occurred via deposits made into his personal account; that whenever he addressed meetings he did so as a representative of NIS; had the Registrar considered the information provided by the investigators, there would have been no doubt that Mr Walker acted on behalf of NIS; that he was not involved in any decision regarding whether the funds paid by depositors would be re-invested since the account belonged to NIS and not to him; that he has never acted personally or entered into a deposit-taking scheme with anyone; and, that he did not accept any deposits into his personal account.

[60] But the evidence discovered by the inspectors establishes that Mr Walker is, effectively, NIS. He is the sole member of the CC and the person running the scheme. All decisions by NIS were taken by him. Because he is the sole member of NIS any profits which NIS makes are to his benefit. Based on the evidence contained in paragraphs 24 and 25 of the replying affidavit, it is clear that Mr Walker utilised the bank account of NIS as his personal bank account. The investigators have cited several instances where funds were transferred from the NIS bank account into Mr Walker's personal bank account. The investigations have revealed that Mr Walker has diverted amounts in excess of R20m from NIS's account into his personal account for his personal benefit. Based on this evidence, Mr Walker has demonstrated an inclination to treat NIS's money as his own.

[61] What was discovered by the inspectors on the eve of the launch of these proceedings is of considerable significance: until February 2013, and, as has already been pointed out, on the eve of the launch of these proceedings, all of the accounts of NIS belonged to Mr Walker in his personal capacity. Thus, from April 2012 to the end of January 2013, when a significant portion of the operations of the NIS scheme was conducted, the scheme was run through Mr Walker's personal bank accounts. Based on this evidence, the relief sought against Mr Walker, in his personal capacity, appears to be appropriate. NIS was nothing other than an alter ego of Christopher Mark Walker.

THE 2006 NOTICE

[62] A reference has already been made in paragraph [29.2] of this judgment to Government Notice No 1176 of 1 December 2006 ("the 2006 Notice"). As has already been pointed out on that part of this judgment, the 2006 Notice contains a list of activities which have been designated by the Registrar of Banks as not falling within the meaning of "the business of a bank".

[63] In their supplementary answering affidavit, the NIS respondents make a point that the NIS scheme, which is a subject of dispute in these proceedings, is similar to activity which has been defined as not falling within "the business of a bank" by virtue of the 2006 Notice. In order to drive this point home, the NIS respondents make a point that there is absolutely no indication in the founding affidavit that the Registrar considered the 2006 Notice in considering whether or not the activity which constitute the NIS scheme fall within the business of a bank. The NIS respondents may have had a stokvel in mind as a designated activity. But the scheme of the NIS respondents is clearly not a stokvel.

[64] The 2006 Notice referred to in the supplementary answering affidavit of the NIS respondents is annexed to the Registrar's replying affidavit as annexure "MSB30" at page 496 of the record. Paragraph 2 of the 2006 Notice contains a list of activities which have been designated by the Minister of Finance as not falling within "the business of a bank". The preamble to the list of designated activities makes it clear that the 2006 Notice applies to the acceptance by or on behalf of a group,

between the members of which there exists a common bond, of money from such members, the pooling of such money, and the utilisation thereof for one or more of certain listed objectives.

[65] The emphasis on the designated activities in respect of which the 2006 Notice apply is a common bond between members of the relevant groups, as far an example, members of a specific group of employees of the same employer who are members of the same savings and credit scheme that is operated or administered on behalf of that group of employees in accordance with set rules; members of a stokvel; members of a specific group, governed in terms of rules, "exclusively established for the purpose of raising funds and applying or holding available such funds for housing advances to member" and there is a whole list of these designated activities none of which apply to the NIS respondents. I have considered the whole list of such designated activities. The 2006 Notice does not apply to this application. It is of no assistance to the NIS respondents.

CONCLUSION

[66] Based on the evidence as a whole it is quite clear that the NIS scheme involves the acceptance of deposits from the general public as a regular feature of the scheme. The NIS respondents, at paragraph 32 of the first answering affidavit at page 172 of the record, do explain that, as part of the scheme, any person may purchase points from NIS. More so, the NIS respondents do not deny a specific allegation in the founding affidavit that payments received from the public were a regular, if not dominant, feature of the NIS respondents.

[67] Evidence before me clearly shows that none of the activities of the NIS respondents falls within any one of those listed activities designated by the Minister of Finance in paragraph 2 of the 2006 Notice as not falling within the meaning of "the business of a bank". On the other hand, there is overwhelming evidence to show that the activities of the NIS respondents fall squarely within the definition of "the business of a bank" as defined in section 1 of the Banks Act or, within the meaning of that term as declared in the 1997 Notice as well as the 1999 Notice. Thus, the *rule nisi* stands to be confirmed.

[68] Prayers 2, 5 and 7 relating to the return date of the *rule nisi*; service of order by the inspectors and to obtain affidavits from the NIS respondents; and service of the order on the third and the fourth respondent are effectively academic at this stage of the proceedings and there is no need to confirm those aspects of the order. However, prayers 5.2 should be confirmed as it relates to the power of the inspectors to retain all money found at the premises of the NIS respondents pending finalisation of the investigation. As for an application for a postponement launched before the commencement of the proceedings on 5 June 2013, I did not make a costs order once that application was disposed of. A cost order therefor, which follows the result, will be included in the order I am about to give.

[69] In the result, I make the following order:

[69.1.] The first and the second respondents are prohibited from conducting "the business of a bank", in contravention of section 11(1) of the Banks Act, 1990 (Act No 94 of 1990 – Banks Act), by:

[69.1.1.] conducting the activities set out in paragraphs 2 and 3 of Government Notice 498 that was published on 27 March 1997 in the Government Gazette 17895;

[69.1.2.] accepting deposits from the general public (including persons in the employ of the person so accepting deposits) as a regular feature of the business in question; and

[69.1.3.] soliciting or advertising for deposits.

[69.2.] The first and the second respondents are prohibited from disposing of, or otherwise dealing with any of their assets while the contravention suspected of having been committed is investigated.

[69.3.] The inspectors appointed by the South African Reserve Bank and/or their authorised representatives are authorised to retain under their control all money found at the premises of the first and the second respondents' premises during a search performed in terms of section 4 of the Inspection of Financial Institutions Act, 1998 (Act No 80 of 1998 – Inspection Act) pending the finalisation of the inspection.

[69.4.] The third respondent is ordered to prevent the withdrawal of funds from the bank accounts held by the first and the second respondents at their institutions pending the finalisation of the investigation.

[69.5.] The fourth respondent is ordered:

[69.5.1.] not to deal with any funds under its control which relates to the affairs of the first and/or second respondents;

[69.5.2.] to disclose the full extent of funds held by it or under its control in any bank account or otherwise on behalf of the first and/or second respondents.

[69.6.] The first and the second respondent are ordered to pay the applicant's costs, jointly and severally, the one paying the other to be absolved, duly taxed or as agreed, which costs shall include the following:

[69.6.1.] Costs arising from the postponement of the matter on 26 March 2013;

[69.6.2.] Costs of application for a postponement of the matter on 5 June 2013;

[69.6.3.] Costs consequent upon employment of two counsel.

N J Yekiso, J