

RECENT CHANGES IN FINANCIAL INSTITUTIONS REGULATION - (Sipho Ziga, Partner)

On the 11th of November 2016, the Non-Bank Financial Institutions Regulatory Authority Act No.2 of 2007 ("the Repealed Act") was repealed and replaced by the Non-Bank Financial Institution Act 2016 ("The Act"). The Repealed Act was promulgated on the 28th of May 2007 to provide for the regulation of non-bank financial institutions. The term *non-bank financial institutions* is widely defined in the legislation to include, *inter-alia*, administrators of pensions or provident funds (otherwise known as retirement funds) and asset/investment managers. The Repealed Act made it mandatory for all non-bank financial institutions to be licensed by the Non-Bank Financial Institutions Regulatory Authority.

The licensing provisions of the Repealed Act came into force on the 28th of May 2007, however due to lack of regulations, most non-bank financial institutions (save for those who had separate legislation, such as insurance companies) were exempted from licensing in terms of Section 48 of the Repealed Act from the provisions of Part III of the Repealed Act, (which imposed licensing obligations) pending the promulgation of licensing regulations. They were however, obliged to abide by the other provisions of the Repealed Act.

This continued to be the case until the 11th of November 2016 when the Repealed Act was replaced by the Act which continues to vest regulatory powers over non-bank financial institutions. However, a major change is that the new legislation no longer has provisions for the licensing of non-bank financial institutions, and instead, it is envisaged that financial services laws will be passed to make provisions for licensing of specific non-bank financial institutions.

Pursuant to this:

- in respect of persons carrying on securities business, which includes asset/investment managers, a securities broker or dealer, a central securities depository, a participant in the central securities depository of Botswana, central counterparty, market maker, an investment advisor, a custodial business, and a transfer agent or a transfer secretary. Such persons now have to be licensed under section 4 of the Securities Act No. 26 of 2014 which came into force on the 1st April 2017.
- in respect of retirement funds (formerly known as pension or provident funds), such persons now have to be licensed under section 4 of the Retirement Funds Act No. 27 of 2014 which came into force on the 1st April 2017.
- in respect of persons carrying on the business of the administrators of retirement funds (formerly known as pension or provident funds), such persons now have to be licensed under section 21 of the Retirement Funds Act No. 27 of 2014 which came into force on the 1st April 2017.

The gap is that there is no specific provision that requires other non-bank financial institutions who are not subject to any specific financial services law, such as finance and leasing companies, microlenders and pawnshops to be licensed.

Significantly, there are transitional provisions under the Act which allow non-bank financial institutions that were licensed under the Repealed Act to have their licenses remain valid until their expiry date, whereupon they became obligated to apply for licenses to the Non-Bank Financial Institutions Regulatory Authority in terms of the relevant financial services laws. This means that license holders under the Repealed Act continue to operate notwithstanding the commencement of the Act.

However, the transitional provisions do not apply to non-bank financial institutions that were exempted from licensing under the Repealed Act due to the fact that the Act does not have any provision for exemption. The effect of this is that non-bank financial institutions that were exempted under the Repealed Act now have to be licensed under their respective financial services laws. This affects the majority of non-bank financial institutions that were exempted under the Repealed Act such as, *inter alia*, pension or retirement funds, pension administrators and securities businesses who with effect of the 1st April 2017, are obliged to be licensed under the respective financial services laws.