



The Exclusion of Supervisory Liability and the Possible Constitutional Rights Issues: A Discussion of Section 65 of the Financial Services Laws General Amendment Act 45 of 2013

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Abstract

In a number of jurisdictions the issue of financial sector supervisory immunity has been associated with unending debate by scholars, the judiciary and policy makers. At the heart of that discussion is the conflict between such immunity and certain fundamental constitutional rights. In South Africa, such debate was spurred by the enactment of section 65 of the Financial Services Laws Amendment Act 45 of 2013 which protects the Financial Sector Conduct Authority from third-party suit. This article argues that in as far as this issue has not been extensively debated and for as long as the conceptual limits of section 65 of the Financial Services Laws Amendment Act have not been tested or constitutionally challenged, it can be concluded that there is a long way to go before congruence between that immunity and human rights can be attained. Further, this article contends that maintaining the status quo where the law seems to give preference to the concept of immunity seems to preserve economic considerations associated with the supervisory function at the expense of the universally accepted right to adjudication. In so far as that seems to be in conflict with issues of social justice, that state of affairs is indefensible. It avers that though noble, the regime ushered by section 65 is associated with unintended and yet far-reaching repercussions that warrant a thoughtful discussion. This debate is timely especially because of late there has been growing scholarship discussing the intersection between human rights, securities and business.

Keywords: FSCA, Human Rights, Financial Sector, Constitution, Immunity, Supervisory Immunity

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1 INTRODUCTION

An often-discussed issue in financial regulation is the necessity of promoting economic and social growth agendas such as sustainability in free-market economies through robust financial supervisory systems.¹ It is also acknowledged that for financial supervisors to effectively undertake their functions, they must operate within an enabling environment.² More specifically, it is contended that while performing their delegated administrative duties, financial supervisors must not be exposed to the threat of third-party (shareholders, depositors and investors) liability as that might inhibit or distract them in their pursuance of statutory objectives.³ To that end, South Africa has recently enacted section 65 of the Financial Services Laws Amendment Act 45 of 2013 (hereafter the 'Amendment Act') which came into effect on 28 February 2014 with a view to protecting the Financial Sector Conduct Authority (hereafter 'the FSCA') from third-party suit for prejudicial consequences arising from the wrongful performance of its supervisory functions.

Much less discussed – though equally important in the constitutional realm – are the potential human rights implications of this regulatory architecture. As such, with a view to generating debate on this issue, this article endeavours to consider whether the exclusion excluding supervisory liability has adverse effects on constitutional rights. It avers that though noble, the regime ushered by section 65 of the Amendment Act is associated with unintended and yet far-reaching repercussions that warrant a thoughtful discussion. This debate is timely especially because of late there has been growing scholarship discussing the intersection between human rights, securities and business.⁴ In that vein, this brief article seeks to make a contribution to that literature, albeit by considering the linkage between supervisory immunity and personal liberties.

2 THE POTENTIAL JUSTIFICATION OF SECTION 65 OF THE FINANCIAL SERVICES LAWS AMENDMENT ACT

Pro-supervisory immunity scholars have alluded to operational concerns to be the crucial reason for supporting the exclusion of supervisory liability.⁵ As stated above, an appealing contention made in favour of immunity is that supervisors undertake a critical role in the economy and that their function of ensuring the safety and soundness of financial institutions should not be distracted by events not related to the pursuance of such goals.⁶ More particularly, it is argued that the risk of civil liability is likely to bring about "defensive conduct"⁷ on the part

1 See generally Masciandaro, Pansini and Quintyn "The Economic Crisis: Did Financial Supervision Matter?" IMF Working Paper WP/11/261 (2011) <https://www.imf.org/external/pubs/ft/wp/2011/wp11261.pdf> (accessed 20-03-2014); Basel "Core Principles for Effective Banking Supervision" <http://www.bis.org/publ/bcbs230.htm> (accessed 28-02-2014); Avgouleas *Governance of Global Financial Markets: The Law, the Economics, the Politics: International Corporate Law and Financial Market Regulation* (2012) 261; Barth, Caprio and Levine *Rethinking Bank Supervision and Regulation: Till Angels Govern* (2006)..

2 See Calomiris "Market-based Banking Supervision" *The Financial Regulator* (1999) 33; Das and Quintyn "Financial Crisis Prevention and Crisis Management—The Role of Regulatory Governance" in Litan, Pomerleano and Sundararajan (eds) *Financial Sector Governance: The Roles of the Public and Private Sectors* (2002); Das, Quintyn and Chenard "Does Regulatory Governance Matter for Financial System Stability?" IMF Working Paper WP/04/89 (2004); Quintyn and Taylor "Regulatory and Supervisory Independence and Financial Stability" 2003 *CESifo, Economic Studies* 259.

3 See for instance Delston and Campbell "To Protect or not to Protect, that is the Question: Statutory Protections for Financial Supervisors – How to Promote Financial Stability by Enacting the Right Laws" <http://www.imf.org/external/np/seminars/eng/2006/mfl/rd.pdf> (accessed 05-03-2014); Giesen "Regulating Regulators through Liability – The Case for Applying Normal Tort Rules to Supervisors" 2006 *Utrecht LR* 8; Kinports 2010 *Penn St. LR* 1291; *Barret v London Borough of Enfield* [1999] 3 All ER 193.

4 See for instance Sarfaty "Human Rights meets Securities Regulation" 2013 *Virginia Journal of International Law* 97; De Feyter 2004 "The International Financial Institutions and Human Rights: Law and Practice" *Human Rights Review* 56; Genasci and Pray 2008 "Extracting Accountability: The Implications of the Resource Curse for CSR Theory and Practice" *Yale Human Rights & Dev LJ* 37; Implementing the United Nations "Protect, Respect and Remedy" Framework, Human Rights Council, U.N. Doc. A/HRC/17/31 (21 March 2011).

5 See for example Lastra and Shams *Public Accountability in the Financial Sector* (2001); Majone 1994 European University Institute Working Papers No 94/3; Quintyn and Taylor International Monetary Fund Working Paper WP/05/51; Quintyn and Taylor *CESifo, Economic Studies* (2003) 259.

6 See Masciandaro et al IMF Working Paper WP/11/261 (2011); Basel "Core Principles for Effective Banking Supervision"; Avgouleas *Governance of Global Financial Markets* 261; Barth et al *Rethinking Bank Supervision* (2006).

7 See *Three Rivers District Council v Governor and Company of the Bank of England* [2000] 3 CMLR, 205; Yuen

of the supervisor, which would consequently impede or undermine *inter alia* the supervisory authority's discretion and therefore minimise their capability to attain statutory objectives.⁸ The contention is that by its nature, civil suit litigation "though necessary to ensure that officials comply with the law, exacts heavy costs in terms of efficiency and expenditure of valuable time and resources that might otherwise be directed to the proper execution of work."⁹ Supervisory immunity therefore provides some form of incentive for the supervisors to act in the public interest.¹⁰

Recent events in the financial sector have also been used to rationalise the protection of supervisors. The current macroeconomic environment in which they undertake their delegated mandate is characterised by a highly globalised financial market, which operates under intensive market stress and is susceptible to financial sector volatility.¹¹ Some commentators and scholars have contended that the necessity and processes of containing these risks through robust supervision is however associated with the risk of exposing the supervisor to liability.¹² The well-documented public denunciation of financial supervisors for their failure to act proactively and timeously to prevent or mitigate the catastrophic consequences of the 2007–2009 global financial crisis gives credence to this assertion.¹³

In response to these public condemnations, regulators have embarked on extensive policy reformulation and supervisory agency restructuring such as South Africa's Financial Markets Act 19 of 2012, as well as the introduction of section 65 of the Amendment Act.¹⁴ It is worth noting the irony that it was the most mature and solid supervisory systems that happened to be the worst hit and experienced the greater financial destruction of the scandals.¹⁵ This paradox is arguably a manifestation of the fact that the mere existence of intensive and rigorous supervision of financial institutions is insufficient to curtail financial crises. It is therefore fair to say that notwithstanding the robustness of financial regulation, financial establishments remain susceptible to failure.¹⁶ With the inevitability of such failures and crises, financial supervisors will inescapably remain exposed to the risk of third-party suits, either as primary defendants or as "peripheral tortfeasors"¹⁷ for the misconduct of the individuals and firms they supervise. The need to protect them from such eventualities is therefore a functional necessity. The need to shield them is reinforced further by the fact that micro-prudential financial supervision is in any case not meant to act as a guarantee against financial institution failures but merely to

Kun-Yeu v Attorney General of Hong Kong [1988] AC 175 (PC).

- 8 See for instance Delston and Campbell *To Protect or not to Protect, that is the Question* <http://www.imf.org/external/np/seminars/eng/2006/mfl/rd.pdf> (accessed 19-03-2014); Giesen 2006 *Utrecht LR* 8; Kinports "Iqbal and Supervisory Immunity" 2010 *Penn St. LR* 1291; *Barret v London Borough of Enfield* [1999] 3 All ER 193.
- 9 *Ashcroft v Iqbal*, 129 s.Ct. 1937, 1954 (2009) 1953.
- 10 Athanassiou *Financial Sector Supervisors' Accountability a European Perspective* <https://www.ecb.europa.eu/pub/pdf/scplps/ecblwp12.pdf> (accessed 19-03-2014).
- 11 See BIS *The Financial Sector in the Advanced Industrial Economies* <http://www.bis.org/publ/arpdf/ar2008e7.pdf> (accessed 28-02-2014); Delston *Statutory Protections for Banking Supervisors* <http://www1.worldbank.org/finance/assets/images/Appendix1-web.PDF> (accessed 28-02-2014).
- 12 See generally Brouwer, Haas and Kiviet *De Nederlandsche Bank* (3-4 June 2002); Seabrooke and Tsingou "Global Credit Crisis: The Politics of Financial Reform" 2010 *BJPIR* 313.
- 13 See generally Buiters *Lessons from the North Atlantic Financial Crisis* http://www.researchgate.net/publication/228389198_Lessons_from_the_North_Atlantic_financial_crisis (accessed 03-03-2014); Palmer and Cerruti *Is there a Need to Rethink the Supervisory Process?* http://siteresources.worldbank.org/EXTLACOFFICEOFCE/Resources/870892-1243630619860/John_Palmer_paper.pdf (accessed 07-03-2014); Avgouleas 2009 *Capital Markets LJ* 201.
- 14 In the UK for instance, the Financial Services Authority has been abolished and replaced by the Financial Conduct Authority. Likewise, in the USA the Securities and Exchange Commission's once unassailable reputation has also been discoloured by a catalogue of inauspicious unfolding events that led to the crisis. It resulted in extensive initiatives and reforms on the entire financial sector through laws aimed at stimulating financial stability, financial system accountability and transparency.
- 15 See for instance Masciandaro, Vega-Pansini and Quintyn *The Economic Crisis: A Story of Supervisory Failure and Ideas for the Way Forward* <http://www.suerf.org/download/studies/study20122.pdf> (accessed 19-03-2014).
- 16 This somber and yet true assessment is reinforced by many scholars, including Julia Black who points out that: "For we know there will be another crisis, but do not know when it will come or the form it will take." Black *Rethinking Financial Regulation and Supervision in Times of Crisis* (2012) 3. For further scepticism on the efficacy of post-crisis regulatory responses and evidence of the cyclical nature of financial crisis, especially the fact that underlying causes of the recent crisis have not gone away, see for instance Brown "Stumbling Toward the Next Crash" *New York Times* (18 December 2013).
- 17 For a discussion of this concept of incidental liability see for instance Rogers and Van Boom *Unification of Tort Law: Multiple Tortfeasors* (2004) 141.

minimise the occurrence of such failures through preventative measures.¹⁸

On account of the foregoing and in line with what has generally been embraced as best practice,¹⁹ South Africa has statutorily sought to protect the FSCA from wrongful supervision suits at the instance of aggrieved third parties. Section 65 of the Amendment Act provides that:

No person shall be liable for any loss sustained by, or damage caused to any other person as a result of anything done or omitted by that person in the *bona fide* exercise of any power or the carrying out of any duty or the performance of any function under or in terms of this Act.²⁰

Bona fide or good faith in this case means “[a] state of mind consisting in (1) honesty in belief or purpose, (2) faithfulness to one’s duty or obligation, (3) observance of reasonable commercial standards of fair dealing in a given trade or business, or (4) absence of intent to defraud or to seek unconscionable advantage.”²¹ By requiring that the supervisor should act in good faith, section 65 of the Amendment Act essentially asserts that, at all times when they are executing their duties, supervisory personnel must be acting in the best interest of the organisation and in accordance with their duties. To that end claimants can only circumvent that protection by adequately proving, not gross negligence – as was the case in the repealed section²² – but the absence of good faith (and therefore the presence of bad faith) in the conduct resulting in loss.

This provision largely mirrors what other jurisdictions have devised in a bid to protect their financial regulators from third-party suits. For instance, schedule 1 para 19(1) of the United Kingdom’s Financial Services and Markets Act states that:

Neither the Authority nor any person who is, or is acting as, a member, officer or member of staff of the Authority is to be liable in damages for anything done or omitted in the discharge, or purported discharge, of the Authority’s functions.

Similar supervisory protection is offered in New Zealand where under section 179(2) of the Reserve Bank of New Zealand Act, No 157 of 1989, employees of the Reserve Bank are protected from liability for all third-party losses arising from, or anything done or omitted in good faith while they carry out or purportedly carry out their delegated supervisory powers. Perhaps the extent of this protection is best demonstrated in a recent United States of America case²³ filed against the United States Securities and Exchange Commission (the “SEC”) for what the plaintiffs (investors) alleged were financial losses they suffered as a result of the supervisor’s failure to adequately investigate Bernard Madoff. In the case of South Africa, no case has ever been brought against a supervisor.²⁴

3 CONSTITUTIONAL OBJECTIONS AND THE CASE FOR A REAPPRAISAL OF SUPERVISORY IMMUNITY

While the foregoing section has presented a need to accord the FSCA with some form of protection, a crucial public interest debate centres on whether the ambit of that protection erodes fundamental aspects of individual rights as expressed in the Bill of Rights in the Constitution of South Africa, 1996. In particular, section 34 states that:

18 See for instance Athanassiou *Financial Sector Supervisors; Vaubel Why the Current Plans for European Banking Supervision* http://www.openeuropeberlin.de/Content/Documents/121203_Roland_Vaubel_-_Gastbeitrag.pdf (accessed 29-03-2014).

19 For an overview of the implementation of supervisory immunity in different jurisdictions see Athanassiou *Financial Sector Supervisors; Tison 2003 Financial Law Institute Working Paper No. 2003-04* <http://ssrn.com/abstract=414901>

20 This is line with the International Organisation of Securities Commissions (of which South Africa is a member) which states that securities regulators and their personnel must be adequately protected against third-party legal actions while acting in the *bona fide* discharge of their functions and powers <http://www.iosco.org/>

21 *Black’s Law Dictionary* 8 ed (2004) 713. For an extensive discussion of this concept see Nowicki “A Director’s Good Faith” 2007 *Buffalo LR* 482–86; Furlow “Good Faith, Fiduciary Duties, and the Business Judgment Rule in Delaware” 2009 *Utah LR* 1061.

22 Section 23 of the amended section provided that: “No person shall be liable for any loss sustained by, or damage caused to any other person as a result of anything done or omitted by that person in the *bona fide*, but not grossly negligent, exercise of any power or the carrying out of any duty or the performance of any function.”

23 *Molchatsky, et al. v. United States* 11-2510-cv(L).

24 See De Jager “Three Rivers District Council v Governor and Company of the Bank of England: A Red Flag or a Red Herring for Bank Supervisors in South Africa?” 2001 *SMLJ* 532

Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.

It is common cause that the Bill of Rights enshrines the rights of all the people of South Africa and affirms the democratic values of human dignity, equality and freedom.²⁵ As such the Bill of Rights embodies fundamental or basic rights “which must not be taken away by any legislation or act of the state.”²⁶ International human rights law also reiterates that having legal actions adjudicated before an independent and impartial court or tribunal constitutes a fundamental human right.²⁷ It is similarly worth restating that these rights “allow us to develop fully and use our human qualities... [and] [t]heir denial is not only an individual and personal tragedy but also creates conditions of social and political unrest, sowing the seeds of violence and conflict within and between societies and nations.”²⁸

However, it should be noted that in all other circumstances where statutory immunity does not apply, a claim could be instituted under common law. A special remedy is available under South African common law’s *actio legis Aquiliae*²⁹ through which a civil suit for the recovery of economic loss against the supervisor can be instituted.³⁰ Much as that option exists, and despite the fact that numerous corporations have been sanctioned for conduct which could have ordinarily resulted in the *actio legis Aquiliae* being invoked, no suit has yet been brought against the South African supervisor. This cannot be on account of the fact that South African investors are averse to litigation when compared to their counterparts in other jurisdictions such as the USA, where privately instituted claims or “class actions” are dominant.³¹ Neither can the statutory immunity under section 73 of the Financial Markets Act or previously under section 23 of the repealed Securities Services Act be said to have made that process impossible.

The logical explanation for the lack of effectiveness or absence of civil suits against the South African supervisor can be attributed not so much to legal obstacles³² but arguably to the fact that the FSCA has always expansively made use of the disgorgement of illicit profits as one of its preferred enforcement mechanisms. Unlike the approach in other jurisdictions such as the USA, section 82(4) of the Financial Markets Act 19 of 2012 (formerly section 77 and section 105(1) of the Securities Services Act 36 of 2004) provides an effective enforcement strategy which delivers an equitable form of relief by which the defendant can be compelled to give up

25 See under s 7(1) of the Constitution of the Republic of South Africa No. 108 of 1996.

26 Mubangizi *The Protection of Human Rights in South Africa: A Legal and Practical Guide* (2004) 2; Currie and De Waal *The Bill of Rights Handbook* (2013); Devenish *A Commentary on the South African Bill of Rights* (1999).

27 See generally Universal Declaration of Human Rights (Art 10); Reinisch *International Organizations Before National Courts* (2000); Reinisch and Weber “In the Shadow of Waite and Kennedy” 2004 *International Organizations LR* 61; See also Art 14(1) of the International Convention on Civil and Political Rights.

28 United Nations *Human Rights: Questions and Answers* (1987) 4.

29 See for instance *Matthews v Young* 1922 AD 492 at 503-505; *Guardian National Insurance Co Ltd v Van Gool* 1992 (4) SA 61 (A); *Government of the Republic of South Africa v Ngubane* 1972 (2) SA 601 (A); *Administrateur, Natal v Edouard* 1990 (3) SA 581 (A).

30 This is a complex claim where, in order to succeed, the plaintiff would have to prove the existence of a positive act or commission by the financial supervisor. For that reason, a mere omission on the part of the defendant would not suffice unless the defendant had a legal duty to act positively to guard against any potential harm to the plaintiff (*Minister of Law & Order v Kadir* 1995 (1) SA 303 (A)). In addition, having considered *inter alia*, public and legal policy factors as well as societal notions of justice, that action must be shown to be wrongful (*Trustees, Two Oceans Aquarium Trust v Kantey & Templer (Pty) Ltd* 2006 (3) SA 138 (SCA); *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA); *Fourway Haulage SA (Pty) Ltd v SA National Roads Agency Ltd* 2009 (2) SA 150 (SCA); De Jager “Three Rivers District Council v Governor and Company of the Bank of England: A Red Flag or a Red Herring for Bank Supervisors in South Africa?” 2001 *SMLJ* 532 and the authorities cited therein). The third element that the plaintiff would need to plead and prove would be that the supervisor acted with fault. This element necessitates proving the existence either negligence (*culpa*) or subjective intent (*dolus*) (*Media 24 v SA Taxi Securitisation (437/2010)* [2011] ZASCA 117 (5 July 2011); *Minister of Finance v Gore* NO 2007 (1) SA 111 (SCA); *South African Post Office v De Lacy* 2009 (5) SA 255 (SCA)). Furthermore, the plaintiff must allege that as a result of the actions of the defendant, he has suffered either pecuniary or patrimonial loss. Finally, the plaintiff would need to establish a causal link between that supervisor’s unlawful conduct and damage or loss suffered (see generally Neethling *Tort and Insurance Law* (2009)123). In the absence of any one of those requirements, liability would not arise.

31 See e.g. Hurter “Access to Justice: To Dream the Impossible Dream?” 2011 *CILSA* 408.

32 For instance, Athanassiou *Financial Sector Supervisors* 15, argues that the standard of proof in common-law suits proves to be a major hindrance for third-party claims and the onerous standards are cited as providing a major hurdle and consequently a critical ammunition shielding supervisors from third-party claims.

any ill-gotten profits as part of the fine.³³ The extracted amount is then distributed to persons who would have been prejudiced by the offender.³⁴ As such, the existence of an alternative remedy against market malfeasance arguably makes delictual actions by individual consumers against the supervisor and offending corporations redundant. That onerous option, however, is only available where the supervisor's wrongfulness is not protected by section 65 of the Amendment Act.

4 STRIKING A BALANCE BETWEEN THE RESPECT OF INDIVIDUAL RIGHTS AND SUPERVISORY IMMUNITY

That there is a need to protect the supervisor is generally not in issue. As such this discussion does not ignore nor discredit the need for supervisory independence. Rather, it avers that such a pursuit should not be at the expense of individual constitutional rights. What has so far been made evident is that section 65 of the Amendment Act has blurred the line between the need to protect the supervisor and the constitutional rights. For this reason, there is a need to ensure that the current extensive scope of section 65 is proportionate to the legitimate aim of protecting individual rights as pronounced in the Bill of Rights.

Likewise, and as shown above, in the current paradigm of the deprivation of an individual's right to seek a judicial remedy against the supervisor for a loss arising from its failure to adequately supervise firms, can give rise to an arguable case for violation of established principles of human rights under the Bill of Rights. Depriving individuals of their constitutional right to litigate with a view to attaining reparation for financial pecuniary loss from those who are charged with avoiding such prejudice is difficult to justify. Athanassiou summarises this as follows:

[T]o bar claims of liability towards third parties ... would fly in the face of the basic right to judicial redress for losses suffered through the wrongful acts or omissions of another, especially where such losses cannot be recovered from another source. This would also run counter to the legitimate expectations of third parties that supervision is conducted effectively, so that harm or damage to third parties is avoided.³⁵

The broad implications of the immunity regime under section 65 of the Amendment Act reflect the protection accorded to international financial institutions (IFIs). For that reason, crucial and instructive lessons can be drawn from arguments made against the immunity that IFIs enjoy. Generally, IFIs are bestowed with protection against legal action in national courts. Such immunity from judicial scrutiny is said to be "functionally necessary" so as to enable them to effectively discharge their functions within the member state.³⁶ Widening scholarship has been calling for the reassessment of the scope of such immunity in light of its human rights implications.³⁷

Calls for its reconsideration are mainly premised on the need to "give due consideration to contemporary norms of accountability for human rights violations."³⁸ The understanding is that it is not justifiable to maintain such expansive immunity when it is fundamentally inconsistent with prevailing human rights ideals.³⁹ There are also nuances of capture that have

33 See *Insider Trading and other Market Abuses* http://www.jse.co.za/Libraries/JSE_-_Regulatory_Environment_-_Insider_Trading/Insider_Trading_Booklet.sflb.ashx (accessed 15-03-2014).

34 This has been effective in complementing common-law remedies of rescission and restitution. Even more attractive is that, unlike the common-law remedies, disgorgement is not limited to compelling the restoration of the *status quo ante*. Under s 82(2) of the Financial Markets Act, 19 of 2012 the FSCA can order repayment of three times the profits made or that could have been made (see FSCA Annual Reports <ftp://ftp.fsb.co.za/public/documents/ARReport2008.pdf> (accessed 15-03-2014). For instance, between 1998 and 2005 the Insider Trading Directorate recovered R51 608 589 from which 1 218 claimants benefited. During 2010–2011, the Directorate of Market Abuse distributed R2,3 million to 14 claimants (for a comprehensive outline of the amounts disgorged and distributed to claimants see for instance the FSCA 2010/11 Annual Report 100 <https://www.fsb.co.za/Departments/communications/Documents/FSB%20Annual%20Report%202011.pdf> (accessed 15-03-2014).

35 Athanassiou *Financial Sector Supervisors* 34.

36 Herz "Rethinking International Financial Institution Immunity" in Bradlow and Hunter (eds) *Rethinking International Financial Institution Immunity* (2010) 162.

37 See for e.g. Sarfaty 2013 *Virginia J Int'l L* 97; De Feyter 2004 *Human Rights Review* 56; Genasci and Pray 2008 *Yale Human Rights & Dev. LJ* 37; Implementing the United Nations "Protect, Respect and Remedy" Framework, Human Rights Council, U.N. Doc. A/HRC/17/31 (21 March 2011).

38 Herz "Rethinking International Financial Institution Immunity" 162.

39 See for example Singer 1995–1996 "Jurisdictional Immunity of International Organizations: Human Rights and

been linked to this skewed state of affairs. It has been argued that “free market policies lead to the expansion of the private sector [which works hand in hand with the financial supervisor], which becomes more powerful than states [which are supposed to champion human rights] and has a reputation for violating, or at least participating in the violation of human rights.”⁴⁰

This should however not be interpreted to mean that section 65 of the Amendment Act should be done away with. Rather, criticism is targeted at its expansive boundaries and there have been several propositions that are aimed at trimming and bringing it within the realm of natural justice. One alternative requires a stipulation that immunity would be invoked only where there are alternative strategies that provide fair and impartial remedies to third-party claims.⁴¹ In this manner a balance between constitutionally-derived and individual rights, and the interests of the supervisor could be struck. Put differently, the existence of an alternative tool for redress would avoid the current situation where the operational considerations of the FSCA supersede the right to fair due process.

The answer may also lie in the US’s approach. The Federal Tort Claims Act (FCTA) states that federal courts:

shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.⁴²

This provision creates an exception to the rule that the US is characteristically immune from third-party actions and it is worth considering such protection within the context of supervisory immunity in South Africa. Furthermore, through the “Substantive Due Process Analysis” strategy, a mechanism for determining the exceptional circumstances when fundamental human rights may be limited, is available in the US.⁴³

The provision of a right to fair process in South Africa should not be narrowly understood to refer only to courts and tribunals.⁴⁴ Rather, any form of fair and public hearing by an independent and impartial body established by law would be commendable. Alternatively, and in addition, the FSCA could adopt a policy where, if the justice so demands, it could waive its immunity. This is in addition to the suggestion that there should be recourse to some form of judicial review where some independent body could be burdened with the crucial task of deciding whether immunity should be invoked. Where the supervisor seeks to invoke immunity, it should be incumbent upon it to show that litigation would threaten its capacity to execute its core mandate and the decision should therefore be contextual. In view of the fact that arguments for immunity have not been empirically vindicated (put differently, it has not been shown in any way how narrowed immunity would affect the attainment of its supervisory objectives), it would not be amiss to suggest that immunity should only be circumstantial and

Functional Necessity Concerns” *Virginia. J Int’l L* 53; Kunz 1947 “Privileges and Immunities of International Organizations” *The American J Int’l L* 828.

40 Kamga and Heleba 2012 “Can Economic Growth Translate into Access to Rights? Challenges faced by Institutions in South Africa in Ensuring that Growth Leads to Better Living Standards” *International Journal on Human Rights* 82 at 90 [emphasis added]. For a detailed discussion of the private sector’s capacity to capture both the supervisory function and the legislature see generally Kalt and Zupan 1984 “Capture and Ideology in the Economic Theory of Politics” *American Economic Review* 279; Baxter 2012 “Capture Nuances in the Contest for Financial Regulation” *Wake Forest LR* 537; Baxter 2011 “Capture in Financial Regulation: Can we Channel it toward the Common Good?” *Cornell Journal of Law & Public Policy* 175; Stigler 1971 “The Theory of Economic Regulation” *Bell Journal of Economics and Management Science* 3; Spiller 1990 “Politician, Interest Groups, and Regulators: A Multiple-principals Agency Theory of Regulation, or ‘Let them be Bribe’” *Journal of Law and Economics* 65; Seubert “On the Nature of the Corrupt Firm: Where to Situate Liability?” (2005) *Discussion Paper of the Economics Faculty of Passau University, No. V-33-05*; Posner 1974 “Theories of Economic Regulation” *Bell Journal of Economics and Management Science* 335.

41 See generally Herz “Rethinking International Financial Institution Immunity” 137

42 [28 USC § 1346(b)]

43 See generally Berenson “Immunity for International Organizations? Squaring the Concept of immunity with The Fundamental Right to a Fair Trial: The Case of the OAS” Law Justice and Development Week 2010, held in Washington D.C.

44 Such proposal has been made in the discussions pertaining to IFIs liability, see for instance Herz “Rethinking International Financial Institution Immunity” 137. In the South African context see for example Webb 1998 “The Constitutional Court of South Africa: Rights Interpretation and Comparative Constitutional Law” *Journal of Constitutional Law* 205; Townsend-Turner and *Another v Morrow* (524/2003, 6055/2003) [2003] ZAWCHC 53.

be available only when it is strictly necessary to accomplish its obligations.

Considering that the supervisor is characteristically under-resourced, the FSCA might not be in a position to investigate all cases.⁴⁵ As such there may be situations where choices will have to be made pertaining to the allocation of its meager resources. Economic and policy considerations – especially the fact that it is a risk-based regulator – might dictate that the FSCA fails to apprehend the risk that brings about the loss. In such situations immunity probably would be justifiable.

5 CONCLUSION

By analysing the implications of section 65 of the Financial Services Law General Amendment Act 2013, this article has attempted to show that the superiority of the supervisory immunity conferred under that section has rendered certain fundamental rights impotent. This has negative connotations on constitutional rights and the rule of law and warrants a cautionary statement to the effect that “[w]ithout proper respect for the rule of law... legal guarantee of human rights cannot be effectively implemented and remain relatively meaningless.”⁴⁶ The need for equal treatment of all public law-governed institutions, which should see the supervisor being subjected to the usual checks and balances of constitutional requirements, is therefore an imperative one.

It should be restated that the remarks made here are not meant to belittle the need for the independent functioning of the supervisor through immunity. Rather this article is meant to amplify calls for the balance between that protection and individual liberties. In as far as this issue has not been extensively debated and for as long as the conceptual limits of section 65 of the Amendment Act have not been tested or constitutionally challenged, it can be concluded that there is a long way to go before congruence between that immunity and human rights can be attained. Maintaining the *status quo* where the law seems to give preference to the concept of immunity seems to preserve economic considerations associated with the supervisory function at the expense of the universally accepted right to adjudication.⁴⁷ In so far as that seems to be in conflict with issues of social justice, that state of affairs is indefensible. Instead, the guiding principle should be that “[w]here the norm at issue is considered to be *jus cogens* or is enshrined in the UN Charter, the human rights principle is indisputably a higher order obligation than the commitment to immunity and should prevail.”⁴⁸ Unless that regulatory paradigm is reconstructed to create some semblance of equilibrium between the interests of the supervisory function and human rights, the reality is that discussions of the inherent conflict between the two concepts will for a long time remain, arguably, a mere academic grumble.

45 See generally MacNeil and O’Brien *The Future of Financial Regulation* (2010).

46 Langa 2011 “The Role of the Constitution in the Struggle against Poverty” *Stellenbosch LR* 448.

47 See generally Pillay 2012 “The Role of Meaningful Engagement” *International Journal of Constitutional Law* 732; Cottrell and Ghai “The Role of the Courts in the Protection of Economic, Social and Cultural Rights” in Cottrell and Ghai (eds) *Economic and Social Rights in Practice: The Role of Judges in Implementing Economic, Social and Cultural Rights* (2004) 65; Dugard 2008 “Courts and the Poor in South Africa: A Critique of Systemic Judicial Failures to Advance Transformative Justice” *SA J Human Rights* 237.

48 Herz “Rethinking International Financial Institution Immunity” 162.