



New Economic Rights Alliance

supporting victims of corporations that put profit ahead of human rights.

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SECURITISATION: A CONSPIRACY OF SILENCE

Introduction to Securitisation in South Africa

Gone are the days when you could have a quiet chat with your bank manager to restructure your loan repayments. Instead, banks treat the customer with disdain, making no mention whatsoever of the fact that the customer's loan may well have been securitised.

Today, banks enjoy the benefits of misleading the public who honestly believe that they are being *loaned* money in the ordinary sense of the word. The customer simply has no idea that he/she is actively participating in a form of financial cannibalism: her own pension fund, or insurance policy, or even funds from her local municipality are being secretly re-invested back into her own debt.

While the customer makes huge behind-the-scenes profits for banks and secret third parties, heaven forbid she should fall behind on a payment. It is a conspiracy of silence and perhaps the **New Economic Rights Alliance**, a 140,000 strong non-profit organisation set up specifically to bring transparency to banking, can bring about change.

Since the 2008 credit crisis, the usually stalwart banking system has come under close scrutiny. LIBOR has claimed the scalps of the most senior banking executives and there have been recent bank related insurance scandals across the board. And now, hot off the press, this alarming question is being raised across the globe: *"where is our gold?"*

A good place to start your investigation into the murky secrets of money and banking is with your own credit agreements. Strange as this may sound, it is very likely that your bank does not own or control these agreements and has, in fact, already been paid out and profited from them. A complicated derivative structure has been set up called *securitisation* where bundles of loans are

sold off to multiple third parties. Contrary to what the banks would have you believe, the securitisation market in South Africa is rampant, with all major banks sharing an industry worth R30 billion per month.

What do the banks have to say about all this behind-the-scenes profiteering on their customer's loan agreements without any disclosure whatsoever? If you are lucky enough to get a response, it would be along the lines of: *"it's none of your business."*

Why are banks so shady about this issue? Well, if your loan has been securitised, and you catch wind of it, the bank cannot claim the repayments from you.

A Brief History of Securitisation

The idea began in the 1980's when David Bowie pre-sold the rights to the future sales of his albums. These rights were then *securitised* (converted into a security) so they could be traded on the Stock Exchange. Bowie received a fixed amount up front, and the public was invited to invest in the rock star. Despite taking the full risk that Bowie's albums might fail, the share issue was a huge success.

Today, securitisation can involve almost any business enterprise that provides a regular, future stream of income. Here in South Africa securitisation (the pre-selling of a future stream of regular payments) includes home loans, vehicles, credit cards, overdrafts and shop cards. Even the future revenue from traffic fines and toll roads can be securitised.

Most experts agree that reckless securitisation sell-offs caused the subprime mortgage fiasco in the US which in turn led to the 2008 financial crisis. What is subprime, you may ask? Well, it works like this:

1. Freddie is a McDonald's employee, earning \$1000 per month;
2. One day Freddie gets a phone call from a telesales agent: *"You can buy a home with no down payment, no deposit... and we won't even ask about your credit rating!"* [Sound familiar? Personal loans are said to be South Africa's subprime waiting to happen]
3. The bank takes Freddie's loan and bundles it with others from McDonalds, Starbucks and Taco Bell employees in a process called securitisation.
4. This bundle of dubious loans is given an overly flattering credit rating and the whole kit and caboodle is sold to third party investors, via the stock and bond markets, using a legal

entity called a *special purpose vehicle (SPV)*. These investors include pension funds and municipalities who, in many cases, are now horribly bankrupt.

5. Of course Freddie defaults, and so does his friend Fannie. Their houses are sold at a fraction of the purchase price because the banks urgently need to recoup funds to keep the scheme going. The ripple effect in the housing market causes prices to drop, in instances to 40% of the original value.
6. These "toxic assets" are offloaded by the banks quickly and quietly to any poor sucker who will agree to buy them... enter Greece, Ireland, Portugal, Spain, etc. Iceland is one country that refused to take responsibility for the actions of the private "banksters" who ruined them, so they ousted their government and re-structured their central bank. In Australia, several municipalities successfully sued Lehman Brothers for selling them similar "dud" loans.
7. Today, US\$40billion per month is being printed "out of thin air" by the US Central Bank to buy back trillions of failed mortgage backed securities. This is a result of co-called "quantitative easing" and clearly shows how far the banks will go to stop their pyramid from crashing.

In South Africa, securitisation has been prominent for almost two decades. According to the BASA website, banks are securitising approximately R30billion per month. Since then tens, possibly even hundreds of thousands of foreclosures and judgments have been handed down in favour of the banks. Many of these repossessions and judgements took place unlawfully, which means the banks have handed us a massive opportunity to usher in a golden age of prosperity.

The Secrecy of Securitisation

Generally speaking, securitisation in South Africa is openly discussed. However, it is very difficult to find any detailed information, and discovering which loans have been securitised is almost impossible. With only one exception that we know of (the Louis Louw case discussed below), not one single Member of our organisation has received confirmation by their bank that their loan has been securitised. FNB, for example, responds to their customers by saying: "*The request is not applicable to your Credit Card Facility and the relevance of same on the merits of your default is questionable;*"

Standard Bank sends out two almost identical emails to those customers who ask whether their loan has been securitised. The only difference between the two responses is that, in some responses, they include this additional sentence: "*We also confirm that your loan was not securitized.*" Therefore, Standard Bank is able to trace this information and they are willing to share non-securitised loan information with their customers. However, if the loan has been

securitized, like all the other banks, they remain deathly silent.

Standard Bank went even further. Despite the above, their senior manager emailed one NewERA Member stating: *"The bank has confirmed that it does not securitize its loans and the information that has prompted you (New ERA) has no validity at all, is misleading and without any legal basis."* However, in the recent Telling case, the very same senior manager stated in an affidavit under oath as follows: *"...the bank has from time to time entered into securitization transactions."*

There are several reasons for the allusiveness, but according to **NewERA** by far the most important is that once a bank securitises a loan, they lose all rights to the asset. In other words, banks are not allowed to appear in Court because they do not have *locus standi* (legal standing). The **NewERA** has a letter from the Registrar of Banks at the South African Reserve Bank that confirms this *"...when transferring assets to a SPV a bank transfers its full ownership to such a SPV and has no legal standing in respect of the assets thereafter."*

Furthermore, if a bank no longer has a right to an asset sold in securitisation, they are not allowed to pretend that they do. For example, banks send out regular letters and statements of account, collections agents threaten customers on a daily basis and Debt Counsellors obtain information from the banks on behalf of their clients. If the bank securitised their customer's loan without disclosure, and gained from the sale, then how can they allude that they still own it? And how can a bank advertise and promise to "lend" money that it never possessed in the first place? The banks refuse to answer the simplest of questions.

In a recent local case, Mr. Louis Louw was sued by ABSA bank for defaulting on his home loan. *"Hang on,"* said Mr. Louw, *"I have proof that you have securitised my loan."* ABSA immediately withdrew their case against him. However, Mr. Louw's elation was short lived. Immediately after ABSA withdrew the case against him he received another summons, this time from a new entity called **Home Obligers Mortgage Enhanced Securities (Pty Ltd)**. This is the special purpose vehicle (SPV) who traded his loan as a security on the stock exchange / bond market. Interestingly, the summons originated from the same legal firm who represented ABSA with no mention of any mandate to act on behalf of the SPV. When the court date appeared, this mysterious new entity quietly removed the case from the court role.

Over the recent months, the High Court has seen a spate of cases where the third party entity (SPV) attempts to sue for the assets of the customer. Entities with bizarre sounding names such as "Changing Tides," "Home Obligers Mortgage Enhanced Securities," "Blue Granite 2" and "Nitro Securitisation 4" are applying to the Court when the original agreement with the customer was supposed to be held with their bank. Who are these strange companies? Why has the customer

never heard of any of them? Is there a valid contract in place?

Louis Louw's case with ABSA deepens. Mr Louw called the contact person from *Home Obligers Mortgage Enhanced Securities* to see who would answer. Lo and behold, it was ABSA bank who answered the call. According to the research undertaken by NewERA, securitisation falls outside the business of a bank. It is an absolute requirement of all securitisation schemes that a bank totally divests itself from all its interest in a securitised loan.

Something is rotten in the state of banking.

How Does Securitisation Affect You?

The banks will argue that securitisation is a wonderful way for them to move loans "off balance sheet." This allows them to maintain liquidity, so they can in turn lend out more money. This benefits the customer because they can lend more people more money. However, **NewERA** believes that the reality is far more sinister. In fact, we have a long list of reasons as to why securitisation is a deadly game.

Firstly, we are dealing with highly secretive and deeply convoluted structures. We have dozens of examples whereby customers asked their bank if their loans have been securitised. The banks do not give any substantial answer – or explanation. The question is: WHY THE SECRECY?"

NewERA believes that once a loan has been securitised nobody, not even the third party SPV, can foreclose on the asset. It is like taking a glass of fresh water (your loan) and then pouring it into a fish pond where it mixes with many other loans. The fish pond (the securitisation pool) is now a completely separate security with a different registration number.

Neither the bank nor the SPV can retrieve that glass of fresh water (your loan) from the pond, and take judgment on the underlying asset, any more than a chef can unscramble his eggs. They are forced, via a busy Courtroom, to show any old glass of water to the Judge, alluding from a distance that the water is fresh. In the absence of any information to the contrary, the Court will (and has) taken the word of the bank as the truth, and granted judgment as a result.

Unbeknown to the customer, the SPV has taken out an insurance policy in case the customer defaults. This is usually called a *credit default swap*. In the US, global insurance giant AIG required a sizeable bailout (US\$180 billion) to remain afloat after selling insurance to investors of securitised loans, also known as mortgage backed securities (MBS) and asset back securities

(ABS). Here in South Africa, the investors have the same insurance protection: if you default on your loan, the investor will get paid out by the insurance policy. Naturally, the bank has already been paid out (and profited) from the original sale of your loan. So, if there is nobody losing out financially, then how is it possible that banks can be allowed to take away your home and assets?

NewERA has a further list of gripes with securitisation. They include the following:

- Banks pretend to be the lender at first instance, but they are actually acting as agents or intermediaries. This dramatically changes their legal position.
- Banks, who have a fiduciary duty to protect their customers, do exactly the opposite and protect their investors and the scheme instead.
- Banks extend loans in areas not conducive to economic growth (instead of loaning to small businesses, for example, they are trapped in housing “bubbles” which will must eventually burst).
- Many experts believe that subprime mortgages were merely the straw that broke the camel’s back. The entire *derivatives market* is the primary problem. Today, the estimated size of the global derivatives market (of which securitisation forms part), is 20 times larger than the GDP of the entire planet. [Source: <http://www.itmtrading.com/occ-report-on-derivatives/>]
- In order to collect loans on behalf of the SPV, the banks should be registered and comply with debt collection regulations. The customer has no idea that their debt to the bank has already been settled (set-off) and that the bank is unlawfully collecting on behalf of a secret third party.
- To ensure that there is always a supply of money to purchase these *derivatives*, banks lend money to investors to buy them. This is called “leverage” because the future income from the derivatives can be leveraged to buy even more derivatives. Because debt is used to invest in more debt, the result is a rapidly expanding Ponzi-type scheme that perpetuates an ever-expanding rampage of devastation.
- Lack of disclosure to the customer, and downright secrecy over the entire securitisation process leaves the customer, and their legal right to protect their Constitutional assets, high and dry. [*NewERA suggests that you immediately demand that your bank give you the securitisation status on every single credit agreement you have with them. See this article: <http://www.newera.org.za/sa-banks-must-pay-out-big-time/> for a list of eight questions everyone should ask their bank.*]

Moral Implications

When faced with the implications of this information, here are the most common concerns:

"This is just a loophole that will be simply be closed by the banks."

"You borrowed money, so you must pay it back."

"This will bring down the banking system."

"You cannot get something for nothing."

Firstly, this is not a loophole. It is a legal, factual and Constitutional right. To "fix" this in the banks favour, the entire South African legal structure would have to be re-written from the ground up, beginning with the basic and most fundamental principle of contract and common law: *be honourable in your agreements*.

Furthermore, to generate funds, an SPV sells the securities on the local and international bond markets and stock exchanges. As such, there is no arms-length agreement between the bank and the investors, nor is there any relationship between the customer and the investors. There is simply no conceivable way for the bank, who has divested its right and title to the asset, to obtain a judgment. And any investor who gambled in that stock or bond did so fully at their own risk. So what we have here is a casino where investors are betting on the fact that the South African people are so apathetic that they will continue to make their monthly payments to the bank, plus interest, purely on the basis that they feel morally obliged to do so.

Regarding the second point, whether it is securitised or not, money is never "borrowed" from a bank in the ordinary sense of the word. By combining the concepts of seignorage and fractional reserve banking (both of which are covered extensively in our court papers), one can see that money does not exist per-se, and the promise-to-pay money (or bank IOU's) that are used to simulate money in today's economy, are owned by the bank. In South African law, the moment a customer deposits money (which is merely a bank IOU), that "money" becomes the property of the bank. Therefore, the entire notion of "borrowing" money is a complete illusion, as illustrated beautifully by the origin of the word "credit" from Latin "credere" meaning: "a belief."

Thirdly, the banking system will not crash due to securitisation. Should the banking system crash, this will be due to forces outside those of the common man learning the truth. However, it must

be said that bailouts, inflation, high taxes and severe austerity measures will be imposed on the people until the system is reformed.

The final point regarding “something for nothing” should be addressed in a forum dedicated to a complete overhaul and reform of the monetary system.

The Contract

In South African law, “The Contract is King.” The banks argue that the customer agreed to have his security “ceded” as part of the original agreement, thus giving them permission to engage in securitisation. Again, the **New Economic Rights Alliance** does not concur. Even if the customer did agree to cede the debt, they certainly did not expressly consent to its *sale in securitisation*. There is a distinction between a cession and a sale, and one must remember that banks have a fiduciary (honourable) duty to do what is best for their customer.

A deceptive and misleading contract that clearly had no meeting-of-the-minds and is absent of full disclosure cannot possibly be valid or Constitutional. For example, few people realise that a despicable clause exists in most home loan agreements stating that *“the borrower agrees to pay all legal fees, whether they win or lose the case.”*

What does the **South African Reserve Bank** have to say about all this? The SARB is supposed to be the watchdog of all the banks. In an internal memo NewERA has in its possession, it indicates that up until this year, the SARB had not asked for, nor received any disclosure from the banks in regard to securitisation. For two decades, the SARB has allowed the banks to engage in rampant securitisation, possibly resulting in the unlawful stripping of billions in assets. Despite recent SARB requirements for securitisation, s33 of the Reserve Bank Act means that the inner workings of the Banks will continue to be kept secret.

Conclusion

The situation in our country cannot be disputed: *a banking system based on secretive securitisation, fractional reserve banking and seignorage requires urgent investigation and reform*. Recent cases in the UK, Ireland, Canada, India, US, and even Hawaii have shown that mortgages not transferred correctly due to securitisation have either been reversed, or compensation has been paid to the aggrieved party. Securitisation is clearly not a phenomenon unique to South Africa and it is only a matter of time before the breakthrough occurs here.

Once again, the people will remain in the dark and the banking system will remain a conspiracy of silence unless the people are exposed to its inner workings. When the penny drops, an opportunity for a golden age will occur. A new era will dawn where a sizable portion of South Africa's debt will be wiped clean, to be reinvested in sustainable, practical and natural alternatives that support people, not bubbles.

The New Economic Rights Alliance is a duly registered non-for-profit organisation. For more information, please visit www.thebigcase.co.za and www.newera.org.za.

