

B13

26 October 2016

Commercial Banking

The Directors
Scipio Technologies (Pty) Ltd
10 Haggie Road
Dunswart Ext 3
Boksburg
1459

Dear Claire Tomselt

Scipio Technologies (Pty) Ltd Registration number: 2016/108089/07

We herewith advise that after careful consideration, the Bank is terminating its banking relationship with you on 30 days notice. We will also no longer be extending any future facilities to you.

Account: 420867198

Balance: R82 487.12

We will close these accounts on 26 November 2016. Kindly provide us with the bank account details where the available funds, if any, in the accounts may be transferred to. Alternatively, a bank cheque(s) will be issued in your favour which will be ready for collection on the first business day after the closure date.

In the event that you may have any queries, please contact our Customer Relationship Centre on 0860 101 101.

Yours faithfully

₩ Mr Brian Busse

Head of Commercial Banking Channel Personal and Business Banking The Standard Bank of South Africa Limited

184 Hyde Lane Chr Jan Smuts and William Nicol avenues Flyde Park PO Box 413106 Craighall Park: SWIFT address; SRZA ZA JJ Wow, Standardbank.co za Tel: 011 280 4800 Fax: 0865 079 295

The Standard Bank of South Air is time too (Bog Sto. 1962/090738/06) Aprils and Counted songer and required fresh property (SEREPLS)



frameworks struggling to keep up with an increasingly integrated global economy. Navigating these complex and dynamic frameworks can be difficult and costly, and increasing scrutiny from regulators has heightened concerns that procedures will be deemed inadequate. According to KPMG, 63 percent of respondents felt regulators should provide more guidance on compliance measures, and 43 percent sought a stronger relationship with regulators. In the Middle East and Africa, 56 percent of KPMG respondents stated they would like to see increasing international cooperation to facilitate consistency of regulatory approaches. <sup>34</sup> Ultimately, the cost of regulatory compliance may be shifted to bank customers in the form of higher fees, restricted credit, and a reduction in available services and products. <sup>35</sup> For low-income individuals and low-profit margin businesses that are unable to absorb these additional fee structures, this cost-shifting may result in the effective discontinuation of services and exclusion from the financial sector.

### RISING FINES AND PENALITIES

Further influencing the risk-versus-profitability analysis for financial institutions is the imposition of massive fines for AML/CFT deficiencies and sanctions violations. Data from the Association of Certified Anti-Money Laundering Specialists (ACAMS) indicates that although there was a modest rise in AML/CFT-related enforcement actions in 2012, in the same year there was a 131-fold increase in fines and monetary settlements paid by banks for AML/CFT and sanctions violations. Regulatory fines and monetary settlements under deferred prosecution agreements rose from \$26.6 million in 2011 to \$3.5 billion in 2012. This includes a \$1.9 billion settlement paid by HSBC to US and UK regulators for their failure to properly monitor wire transfers that were linked to Mexican drug cartels, and for violation of sanctions laws through their business with clients in Iran, Libya, Sudan, Myanmar, and Cuba. Till is worth noting that, with the exception of Cuba, all of the sanctioned clients resided in significant oil exporting countries—which further suggests the Importance of profitability in the decision to assume risk.

Fallout from the 2008 financial crisis, including widespread negative media coverage, has contributed to the rise in monetary fines as regulators have come under increasing pressure to hold institutions accountable for misconduct. <sup>38</sup> Regulators have indicated that hefty fines and enforcement actions are imposed only on the most willful, sustained, and egregious offenders (for example, the 2012 HSBC fines marked the third time in a decade the bank had been penalized for lax controls and ordered by US authorities to improve its monitoring practices <sup>39</sup>). However, as William Hoffman, a former chief counsel at the US Office of Foreign Assets Control said, "It can be frustrating for banks because they are throwing millions of dollars a year into sanctions and AML compliance programs and are the front cops for the US Government, but they are still getting these huge penalties."

## REPUTATIONAL CONCERNS

The implications of non-compliance extend beyond the imposition of fines, which are often only the tip of the iceberg in terms of financial costs resulting from enforcement actions. Additional losses can be seen in the forced end of a business line or limitations on the provision of specific products. <sup>41</sup> In extreme cases, it can even result in the revocation of the bank's operating charter. One area of particular concern is the potential reputational damage incurred as a result of enforcement actions levied on the bank. As regulatory scrutiny increases, so does the likelihood that a bank will be found in violation of, or, at the very least, deficient, in its sanctions and AML/CFT procedures. Concern over the ability of banks to survive the resulting enforcement mechanisms can negatively affect relationships with investors and have a volatile impact on stock prices. For example, at HSBC, one high-profile fund manager announced in September 2013 that he was selling a multi-billion-dollar holding as a direct result of concern over the impact of future fines. <sup>42</sup> Rumors of impending enforcement actions for BNP Paribas triggered an overall market loss of approximately \$12.7 billion, despite a slight increase in stock

Understanding Bank De-risking

prices following the announcement that the bank had sufficient funding to pay the \$8.9 billion fine. <sup>43</sup> These enforcement actions also have implications for balance sheets, as regulators use their power to force firms to hold more capital, liquidity, solvency, or all three to protect against failure. <sup>44</sup> Although they are frequently cited as a main driver, the long-run implications of reputational damage remain to be seen. For example, every "global systemically important bank," or bank whose failure may trigger a financial crisis, as identified by the Financial Stability Board, has now been fined, which makes it difficult for investors and stakeholders to avoid engagement with tarnished institutions. <sup>45</sup>

On the other hand, de-risking itself has public relations repercussions, since banks are being portrayed as cutting off crucial lifelines to vulnerable communities. This builds upon existing negative perceptions of financial institutions resulting from their perceived responsibility for the 2008 financial crists. In turn, there are potential "reputation returns" for banks in continuing to engage with vulnerable communities, and highlighting this narrative may serve as a key entry point for reframing the conversation as one of corporate responsibility. Oxfam America is uniquely poised to assist in these types of efforts and has seen successes in this arena before, including a grassroots activism and media campalgn to encourage Starbucks to recognize Ethiopian coffee trademarks. For Starbucks, these types of initiatives, including others to reinvest in local communities and push for the sale of African-grown "free trade" coffee, have reduced criticisms of its exclusive business operations as they tapped into shifting public perceptions toward more socially conscious business models. Promoting the benefits of these types of returns may help recalibrate risk-reward analysis and establish a voluntary and private sector response to the de-risking market failure.

# ENHANCED CORPORATE AND INDIVIDUAL ACCOUNTABILITY

Historically, regulators have shled away from criminal prosecutions for AML violations over concern that the repercussions, including the potential revocation of a bank charter, would jeopardize the broader financial system, thus giving rise to the concept of "too big to jall." One of the cases most commonly cited as a deterrent to criminal prosecution is that of the accounting firm Arthur Andersen LLP, which in 2002 was convicted of obstruction of justice related to the shredding of documents tied to the Enron securities fraud case. This conviction was later overturned in 2005, but by then the firm had effectively gone out of business.

Instead of criminal prosecution, regulators in the UK and the US have traditionally relied on deferred prosecution agreements (DPAs), according to which banks voluntarily agree to a set of conditions in exchange for the suspension of criminal charges. DPA conditions can include monetary penalties, improvements in compilance measures, changes to bank management, and cooperation with regulatory and law enforcement authorities. For example, in addition to the \$1.9 billion fine levied on HSBC, the bank also signed a five-year DPA that included the placement of 100 monitors from US regulatory authorities to ensure that remedial actions were being implemented. If HSBC is found non-compliant during that period, it runs the risk of both a criminal conviction and the potential loss of its US banking license. 50 As the shock value of large fines dissipates, some are concerned that financial institutions have begun to view fines simply as "the cost of doing business," and as a result they are not likely to have an impact on changing underlying bank behaviors. In response, regulators have made a deliberate and significant shift toward stronger enforcement measures to ensure both corporate and individual accountability. 51 For example, France's largest bank, BNP Paribas, 52 pleaded guilty in June 2014 to charges related to the processing of more than \$8 billion in transactions on behalf of Sudanese, Iranian, and Cuban entities subject to US economic sanctions. This represented the first time that a global bank had pleaded guilty to large-scale systematic violations of US economic sanctions, and resulted in the imposition of an \$8.9 billion fine. Conditions of the BNP

Understanding Bank De-risking

Paribas plea deal included action against 45 employees, including dismissals, cuts in compensation, and demotions. 53

Beyond repercussions levied at the banking institutions, senior staff have also begun to incur direct personal impacts. Executives are routinely named and often dismissed in the aftermath of enforcement cases, and although they may escape criminal prosecution, they often face careerending reputational damage. <sup>64</sup> Setting an important precedent, the BNP Paribas deal does not mention immunity from prosecution for any associated individual. <sup>55</sup> As one European banking executive framed it, "From my point of view, there is an orange sult sitting in the US and the regulator is saying it's there waiting for me." <sup>66</sup>

Low profitability, rising compliance costs, reputational concerns, and increasing fears over civil and criminal penalties have all helped create a system in which risk avoidance has replaced risk management. However, the same factors that contribute to the high-risk assessment of these clients are also what make them most reliant on international banking services. For many of these clients, banking relationships offer critical access to the global financial system for vulnerable and otherwise underserved communities, and account closures negatively affect both financial inclusion and AML/CFT objectives in the immediate and longer terms.

# 3 MAPPING THE EXISTING NARRATIVES

There is currently a clear lack of leadership and accountability on de-risking. Responsibility for addressing the problem continually shifts among regulators, policymakers, banks, and the customer base. Regulatory authorities continue to emphasize a risk-based approach that relies on financial institutions' risk assessments and compliance monitoring mechanisms to identify, disclose, and terminate suspicious activity. Financial institutions have rejected the role of primary watchdog in select markets and instead opt to remove themselves from these markets altogether. However, the lack of transparent criteria for de-risking has left affected customers unclear of expectations and often feeling unduly persecuted. The client base has focused its messaging on the critical humanitarian impact these account closures will have on vulnerable communities; however, their pleas do not appear to resonate with business-minded financial executives, who may fear criminal liability and financial repercussions. Regulators have yet to step in to mitigate this market fallure and appear unwilling or unable to provide additional clarity regarding regulatory standards in this ever-changing compliance landscape.

To better assess and identify the current de-risking environment, the project team compiled a summary of some of the key stakeholder statements and guidance notes related to de-risking. This includes both public documents and themes discussed during private consultations between the research team and various stakeholders. This section is not presented as an exhaustive list but rather offers preliminary mapping of existing narratives. The accompanying listing of bibliographic resources also offers additional reading and an opportunity to delve deeper into individual narratives.

# INTERNATIONAL AML/CFT BODIES

### **Financial Action Task Force**

The Financial Action Task Force's (FATF) is:

an Inter-governmental body established in 1989 by the Ministers of its Member jurisdictions. The objectives of the FATF are to set standards and promote effective implementation of legal, regulatory and operational measures for combating money laundering, terrorist financing and other related threats to the integrity of the international financial system. The FATF is therefore a 'policy-making body' which works to generate the necessary political will to bring about national legislative and regulatory reforms in these areas. <sup>67</sup>

The FATF has formulated a series of recommendations recognized as international standards on AML/CFT and currently packaged as the "40 Recommendations." The 40 Recommendations include a comprehensive list of measures countries should undertake in order to combat money laundering and terrorist financing, and represent the core international standards on AML/CFT. The FATF has recognized the Importance of balancing AML/CFT with financial inclusion goals, and it issued revised guidance in 2013 to assist countries in developing policies that support these mutually reinforcing goals. In October 2014, the FATF raised the issue of de-risking at its triannual Plenary Session. In the resulting media advisory, it said:

'De-risking' should never be an excuse for a bank to avoid implementing a risk-based approach, in line with the FATF standards. The FATF Recommendations only require financial institutions to terminate customer relationships, on a case-by-case basis, where the money laundering and terrorist financing risks cannot be mitigated. This is fully in line with AML/CFT objectives. What is not in line with the FATF standards is the wholesale cutting loose of entire classes of customer, without taking into account, seriously and comprehensively, their level of risk or risk mitigation measures for individual customers within a particular sector.

The risk-based approach should be the comerstone of an effective AML/CFT system, and is essential to properly managing risks. The FATF expects financial institutions to identify, assess and understand their money laundering and terrorist financing risks and take commensurate measures in order to mitigate them. This does not imply a 'zero failure' approach. <sup>60</sup>

### The G20

It was expected that the G20, an assembly of governments and leaders from 20 of the world's largest economies, <sup>51</sup> would discuss the topic of de-risking at its annual meeting in November 2014, in Brisbane, Australia. Unfortunately, the resulting communiqué did not address de-risking or AML/CFT, although it did reiterate a commitment to strengthening the resilience of the global economy and the stability of the financial system more broadly. <sup>52</sup>

### **Basel Committee**

The Basel Committee on Banking Supervision<sup>63</sup> provides a global forum for cooperation on banking supervisory matters, with the goal of enhancing the understanding of key supervisory issues and improving the quality of banking supervision worldwide. In 2011 and 2013, it issued a comprehensive set of reform measures, called Basel III, designed to strengthen the regulation, supervision, and risk management of the banking sector. Although compliance is not

Understanding Bank De-risking

14

mandatory, it is often viewed as the global standard for financial institutions related to capital adequacy, stress testing, and market liquidity risk.

### NATIONAL GOVERNMENTS

### **United States**

The US dollar is the most commonly used currency for cross-border capital flows, rendering those transactions subject to US AML/CFT laws, which are jointly referred to as the Bank Secrecy Act or BSA. This has made the US a major player in AML/CFT regulation, so considerable attention has been paid to the regulatory climate and approaches adopted by US regulators. On the whole, US regulators have reiterated their commitment to the risk-based approach as the most effective means for balancing financial inclusion and AML/CFT goals. However, some view the US as applying a much stricter standard than that outlined in the FATF Recommendations.

In April 2005, <sup>67</sup> the Financial Crimes Enforcement Network (FinCEN) and the Federal Banking Agencies issued a joint guidance note on obtaining and maintaining banking services for MSBs. The note was designed to clarify the requirements for, and assist banking organizations in, appropriately assessing and minimizing risks posed by providing banking services to MSBs. In November 2014, FinCEN Issued a new statement on the topic, excerpted here:

Refusing financial services to an entire segment of the industry can lead to an overall reduction in financial sector transparency that is critical to making the sector resistant to the efforts of illicit actors. This is particularly important with MSB remittance operations.

FinCEN does not support the wholesale termination of MSB accounts without regard to the risks presented or the bank's ability to manage the risk. As noted, MSBs present varying degrees of risk, and not all [MSBs] are high-risk. Therefore, when deciding whether to provide services to an MSB customer, financial institutions should assess the risks associated with that particular MSB customer. 68

The Office of the Comptroller of the Currency (OCC) also issued a statement in November 2014, excerpted below:

As a general matter, the OCC does not direct banks to open, close, or maintain individual accounts, nor does the agency encourage banks to engage in the termination of entire categories of customer accounts without regard to the risks presented by an individual customer or the bank's ability to manage the risk. The OCC has always taken the position that banks must apply the requirements of the Bank Secrecy Act based on their own assessment of risk for all customer accounts.

The safety and soundness of an institution can be threatened when a bank lacks appropriate risk management systems and controls for the products or activities it provides or the customers it serves. Moreover, the failure to implement and maintain such controls can provide money launderers, fraudsters, terrorists, and other criminals with access to our financial system. 69

Additionally, Thomas J. Curry, Comptroller of the OCC, spoke on the topic at an ACAMS conference in March 2014:

You shouldn't feel that you can't bank a customer just because they fall into a category that on its face appears to carry an elevated level of risk. Higher risk categories of customers call for stronger risk management and controls, not a strategy of avoidance. Obviously if the risk posed by a business or an individual is too great to be managed

successfully, then you have to turn that customer away. But you should only make those decisions after appropriate due diligence. 70

### **European Union**

The euro is the second largest currency used in global payments. For this reason, EU AML/CFT policies and enforcement practices have the potential to affect de-risking decisions. This is particularly true as stringent enforcement mechanisms in the US may drive business transactions away from the US dollar and toward the euro.

In 2015, the European Union adopted the Fourth Anti-Money Laundering Directive (IP/13/87) to help strengthen AML/CFT frameworks. The Directive includes two legal instruments: a "Directive on the prevention of the use of the financial system for the purposes of money laundering and terrorist financing," and a "Regulation on information accompanying transfer of funds to secure "due traceability" of these transfers. The Directive went into effect in June 2015, with a two year implementation period for Member States. A statement by EU Commissioner Věra Jourová described the passage of the legislation:

The EU is leading by example by putting in place a robust framework, which focuses on greater effectiveness and improved transparency with no legal loopholes for criminals and terrorists to slip through and abuse the financial system. We now have the tools at hand to better detect and trace billions of euros which come from criminal proceeds or financial flows which support terrorist groups and activities.<sup>73</sup>

Additionally, in August 2015 the European Parliament adopted a revised Directive on Payment Services. The directive, known as PSD 2, strives to "Improve security, widen consumer choice, and promote innovation" Within the payment services Industry, which includes the MSB sector. A press release issued by the European Parliament on May 5, 2015 describes the directive's effect on widening consumer choice in the following way:

A bank servicing such an account [payment services account, which includes MSBs] could deny this third party access to a payer's payment account only for objectively justified and evidenced security reasons which have been reported to the supervisory authorities.<sup>75</sup>

Although PSD 2 is still awaiting a vote by the European Parliament and formal adoption by the EU Council of Ministers, it has the potential to improve the provision of banking services to the MSB sector.

## **United Kingdom**

Following the Barclays account closures, the UK has emerged as a key player in the de-risking arena. In July 2014, the British Joint Money Laundering Steering Group issued a guideline related to the provision of financial services to MSBs. This guideline, which was later given ministerial approval from HM Treasury, The reiterated the compliance requirements for the sector and provided clear examples of high- and low-risk indicators. Although the guideline was referred to as "legal safe harbor" in the UK Parliament, to not legally binding, and therefore compliance with the measures outlined does not guarantee protection from prosecution. With regards to account closures, it reads:

There is no requirement in the ML [money laundering] Regulations that a firm must close an account that is the subject of a suspicious activity report. Firms are therefore not expected automatically to terminate existing accounts of MSBs based solely on the discovery that the customer is an MSB that has failed to comply with registration requirements (although continuing non-compliance by the MSB may be an indicator of heightened risk). In these circumstances, further enquiries ought to be made. 79

ng MH

### **Australia**

In 2014, Australian MSBs faced significant account closures when the last remaining major bank processing these transactions, Westpac Bank, announced it was exiting these relationships. <sup>50</sup> Although the Somali diaspora is much smaller in Australia than in the UK or US, <sup>81</sup> it was able to partner with the Australian Remitters and Currency Providers Association (ARCPA) to create an effective and vocal lobby. In response, the Australian government developed an inter-agency task force, with legal, foreign affairs, regulatory, and law enforcement actors to serve as an intermediary between financial institutions and affected stakeholders, including hosting a multi-stakeholder meeting in December 2014. <sup>82</sup> There has also been engagement from ARCPA in developing a Remittance Code of Practice and Compliance Best Practices guideline to help banks assess more confidently the risk of maintaining MSB relationships. <sup>83</sup>

While this multi-stakeholder collaborative approach led by the Australian government has been noteworthy, affected stakeholders have expressed concerns about its effectiveness to date, in terms of eliciting solution-driven feedback from banks and government, or in reaching solution-focused outcomes.

Despite these challenges to date, it is hoped that direct engagement between affected stakeholders and banks toward reaching workable remittance solutions will continue, with assistance from the Australian Attorney-General's Department.<sup>84</sup>

Australia has a robust AML/CFT regime, one that is grounded in the AML/CTF Act 2006<sup>85</sup> and the Financial Transaction Reports Act 1988 (FTR Act)<sup>85</sup> and implemented by the Australian Transaction Reports and Analysis Centre (AUSTRAC), which serves as the national financial intelligence unit and AML/CFT regulator. Although Australia's national risk assessment remains classified (much as in other jurisdictions), AUSTRAC has published a scrubbed report aimed at strengthening the nation's AML/CFT regime by improving industry and public awareness of existing risks.<sup>87</sup> The production of this report, though sanitized, represents a noteworthy effort to improve transparency around AML/CFT risks and strategies. By providing insight into systemic vulnerabilities, regulators can assist financial institutions in calibrating their risk assessments and in developing mitigation strategies that do not necessitate the wholesale de-banking of customer bases.

# FINANCIAL INSTITUTIONS

Although financial institutions have found themselves at the center of the de-risking debate, they have been reluctant to speak on or off the record about their handling of the practice. The resulting ambiguity has led to further confusion about how the customer base can best adapt practices to avoid being de-banked. In private discussions with the research team, bank staff expressed the following themes and areas of concern:

- Regulators have been "asleep at the switch" for years and are now trying to catch up by shifting the regulatory burden to financial institutions.
- Basel III has falled to strengthen regulation, supervision, and risk management.
- There is a growing fear of "getting it wrong" among working-level compliance officers that
  has helped foster declining risk appetites, particularly over the possibility that compliance
  officers will now be held personally liable as corporate responsibility shrinks away.
- Senior management has provided this general direction and guidance as a translation of policy.
- Profitability is a driving concern for de-risking practices: it is simply "not worth the hassle and costs" to engage with this customer base.

- There is a need to incentivize financial institutions to engage with these customers and help realign the cost-benefit analysis.
- The financial system, largely a product of the 1970s, is "old and outdated." Without a costly
  and intensive overhaul, the system cannot manage these risks, given the prevailing
  regulatory climate, and so banks are opting simply to exit relationships.

In the media, financial institutions have traditionally focused their narrative on pressures from regulators. Below are a few quotations from financial executives highlighting the prevalent mentality.

We are kind of in a Ping-Pong match between financial inclusion and avoiding regulatory scrutiny and we are the ball."

---Pameia Dearden, managing director for financial crimes enforcement at JP Morgan Chase. \*\*

Our sense of how well we have to manage that risk is evolving with the regulatory landscape. And the result is that we are exiting and becoming more conservative about providing services to certain segments.

-Bob Werner, head of global financial crimes compliance and AML operations at HSBC Holdings Plc. 89

It is a risky world for us out there in terms of enforcement actions and other actions," said ...I think if there is a tipping point—[banks] are probably going to tip to de-risk. At this point, I don't think financial institutions can take their own risk of not making that determination to de-risk. <sup>90</sup>

-- Julie Copeland, general counsel for JPMorgan Chase.

Financial institutions have remained opaque even to the account holders with whom they are exiting relationships. For example, Merchants Bank of California recently terminated numerous accounts after receiving a Consent Order from the OCC requiring the bank to enhance its procedures to detect potential violations of the law. A letter received by affected account holders included little information as to the reason for the closure, citing only the "complexity of your business."

## THE CUSTOMER BASE

During the research team's discussions with representatives from affected customer bases, a common theme emerged related to the dire nature of the problem. MSBs reported a drastic reduction in services and highlighted the potentially catastrophic ramifications for recipient communities. The customer base has also expressed the sentiment that compliance efforts were being undervalued, and that regulatory burdens had become excessive and prohibitory.

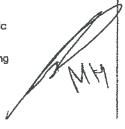
However, the customer base has yet to develop a unified voice with which to advocate for these Issues. Lack of clarity around those affected, competing business interests, the diversity and number of stakeholders, and political considerations within sectors have helped develop siloed arguments that focus on the nuanced challenges facing each unique customer base, rather than addressing the wholesale and systemic implications. Although a nuanced approach is necessary to fully understand the scale and scope of the problem, the development of a broader and overarching argument may help regulators and financial institutions to focus efforts on alleviating short-term concerns while contributing to long-term sustainable solutions.

## CIVIL SOCIETY

Although a number of organizations focus on financial inclusion, very few civil society groups are aware of or directly active in the de-risking space. For those that are, discussions have traditionally focused on the humanitarian impacts of the practice. While these make for dramatic

Understanding Bank De-risking

18



and compelling arguments, the research team believes they do not resonate with staff at financial Institutions who are focused on the bottom line. This disconnect has served to further isolate stakeholders and discourage the development of an open, inclusive, and comprehensive discussion of the topic. Although it is important to advocate for affected populations and demonstrate the impact these decisions have on real-world contexts, it is also important to align the discourse with the prevailing themes and drivers from Individual stakeholder perspectives in order to improve cooperation and coordination and develop sustainable long-, medium-, and short-term solutions.

# 4 IMPACTS OF DE-RISKING

The negative repercussions of financial exclusion are clear, and the de-banking of sectors that provide access points to the formal financial sector for underserved populations and jurisdictions stand to exacerbate these issues even further. However, beyond identifying sectors vulnerable to de-risking, it is challenging to identify which communities are most vulnerable and to assess the urgency and scale of the threat without information on the number and type of accounts being closed. Anecdotal evidence indicates that de-risking practices will likely result in the further isolation of vulnerable communities, particularly women, from the formal financial sector and may have wide-ranging humanitarian, economic, and security implications.

## SHIFTING AML/CFT RISK

Although de-risking is partly intended to reduce the vulnerability of the formal financial sector to abuse from money launderers and terrorist financiers, many have argued that the practice in fact has the opposite effect. With the closure of accounts at many major financial institutions, customers have been forced to rely on smaller banks and credit unions that may not have adequate capacity to deal with higher-risk customers. According to James Richards, a top AML official at Wells Fargo, "The ironic result of de-risking is re-risking you are sending them to banks that probably can't handle it."

The termination of account relationships may also encourage entities to move into less regulated channels, thus reducing transparency and limiting monitoring capacities. <sup>93</sup> These underground "shadow banking" systems, defined as transactions that do not use traditional financial systems, can have real and important economic contributions but can also be a key source of systematic risk due to their limited or lack of regulatory oversight. Shadow banking systems may also result in increased costs for customers, as they become customers' only available financial service option. Furthermore, they operate without oversight and thus are less accountable to customers, leaving customers with little recourse if services are not provided.

## REDUCTION IN TRADE FINANCE

The closure of correspondent banking accounts presents a tangible threat to international trade finance, particularly for the developing world. Correspondent banking relationships are the connective tissue linking various points across the global financial system, offering foreign banks access to US and European financial markets and, more importantly, foreign currency. This is important for emerging markets, as the majority of the world's cross-border capital flows, including commodity markets and trade finance, are conducted in US dollars. The US dollar is used for 44.6 percent of all world payments, followed by the euro at 28 percent and the British pound at nearly eight percent. 94

NA

As financial institutions close the correspondent accounts of foreign banks, they effectively cut off access to the currencies required to conduct international trade and enable international investment, essentially de-banking entire countries. For developing economies, this can have a significant impact on economic growth and in turn government provision of social and security services. Additionally, retreating from correspondent banking relationships has resulted in a growing concentration in correspondent banking business, with the majority of relationships being held by fewer and fewer banks. <sup>95</sup> This presents a threat, since the default of one of these interconnected banks could lead to closures of customer banks, as well as severely reduced access to the global financial system for developing economies.

It is difficult to assess the scope of the threat, but banking executives have indicated that firms are dropping as much as one-third of correspondent banking relationships, which has resulted in the closure of thousands of accounts. In the UK, a survey by the British Bankers' Association revealed an average seven-and-a-half percent decline in correspondent banking relationships since 2011, with two banks severing one-fifth of all accounts. Across the euro zone, daily transactions settled through domestic and international correspondent banking relationships averaged more than 1.1 trillion euros. Despite the large scale of transactions, the number of domestic and foreign corresponding banking relationships has steadily decreased since 2002, dropping from more than 25,000 to less than 15,000. In 2014, the Financial Times reported that, A leading central banker said at a private meeting in Davos that authorities were increasingly worried by 'financial abandonment' of some parts of the world as leading banks severed relationships with local lenders.

## **HUMANITARIAN CONCERNS**

The existing narrative about the impact of de-risking practices has focused largely on humanitarian issues, particularly those related to interruptions in global remittance flows. The most notable case studies come from Somalia, where more than 40 percent of the population relies upon remittance inflows, which account for between 25 to 45 percent of the country's total GDP. Any reduction in these flows would have a clear and tangible impact on the country, as well as on the vulnerable communities who receive the more than \$1.3 billion sent in global remittance flows each year. <sup>101</sup> Numerous reports have highlighted the personal and dire repercussions of any curtailment of remittance flows, including family members' inability to pay for health care, food, housing, and school fees. <sup>102</sup>

Syria is also vulnerable to reductions in remittance flows due to the pressing humanitarian concerns resulting from the ongoing violence. Despite completing its AML/CFT action plan, Syria remains subject to the FATF global monitoring process and is listed as a risky jurisdiction, largely as a result of its security situation. <sup>103</sup> The presence of terrorist groups in the country poses an additional transactional risk because of the potential misappropriation for terrorist financing. With more than 4 million Syrian refugees estimated to be outside the country and another 7.6 million displaced internally, reductions in remittance flows stand to further exacerbate an already dire humanitarian situation.

NPOs operating in conflict or unstable zones also suffer from de-risking. NPOs provide vital services in areas undergoing drastic humanitarian crises, and any interruption of services could have far-reaching effects. In the UK, there are a growing number of NPOs working in the Middle East and other high-risk geographic areas that have suffered from payment delays or account closures. <sup>104</sup> In July 2014 Ummah Welfare Trust saw its account abruptly terminated by HSBC Bank. The charify has an annual turnover of about \$39 million and works in a variety of jurisdictions across the Middle East and Asia, including Syria and Gaza. <sup>105</sup>

"If you are a person with good will and you decide you want to set up a charity in Somalia or Yemen or Syria, opening a bank account for that is really near to impossible," says Abdulrahman Sharif, executive director at the Muslim Charities Forum, who also indicated that as a re-

ng MH

sult, many organizations have stopped working in parts of the Middle East. <sup>106</sup> In these already vulnerable communities, any interruptions in work or service provision can have serious humanitarian and security repercussions.

# INCREASED FINANCIAL EXCLUSION

Although there is limited empirical evidence about the impact of de-risking on financial inclusion rates, it is likely that such an empirical assessment would largely underestimate the negative externality imposed. Existing banked populations are being cut off from financial services—whether directly or through the curtailment of services provided by alternative financial service providers—but equally important is the opportunity cost of lost potential for the unbanked population facing heightened barriers to inclusion. Given the well-documented evidence of the benefits of financial inclusion for poor and marginalized communities, we can in theory presume that the impact of curtailing access to financial services will be significant. On a macroeconomic level, access to financial services has been shown to reduce poverty and income inequality. From a microeconomic perspective, access to formal savings and credit instruments has allowed people to cope better with shocks, smooth income, and invest in income-generating activities. Evidence has also shown that the availability of financial services for poor households has translated into better nutrition and health outcomes, increased years of schooling for children, and female clients empowered to confront gender inequities more effectively. 106

From a financial inclusion perspective, de-risking stands to do the most harm in the developing world. Most of the world's 2.5 billion unbanked adults live in developing countries, with only 41 percent of adults in developing economies having an account at a formal financial institution, as compared to 89 percent in developed economies. 169 In these countries, the unbanked often face common parriers to financial inclusion, including a lack of financial literacy, low income and erratic cash flows, and high transportation and opportunity costs, as well as personal risk associated with traveling long distances to reach banks. Furthermore, banks have historically excluded the rural poor, since their business does not offer sufficient profit margins to offset the high transaction costs of opening branches in remote locations. 110 NPOs, governments, and financial institutions have devised innovative solutions to these challenges, including relying on alternative financial services and developing and supporting digital financial services platforms that capitalize on the high mobile phone penetration rates seen in many rural areas. But most of these still rely on connectivity with the formal banking system, and many of these platforms are falling Into a regulatory gray area with limited AML/CFT oversight. As banks' appetite for risky and less profitable business has declined, new challenges are being introduced that will likely halt, or even reverse, the progress of financial inclusion.

In addition, disruption to the operations of NPOs that expressly target financial inclusion in the developing world will have a direct impact on financial exclusion rates. These organizations have often served as the intermediary between banks and the financially-excluded poor in remote areas, linking informal community-based savings groups to formal financial services. As banks exit relationships with these organizations, these links may become unsustainable. For example, Uniónes de Crédito y Ahorro (UNICAs) are small self-organized community groups in Peru whose members pool savings and provide loans to each other. In operation since 2006, these have issued 90,000 loans and served more than 12,000 families who otherwise lacked access to financial services. 111 The Peruvian government is now working to link these groups with formal bank accounts, but the pooled nature of the funds and the challenge of identifying end recipients may discourage banks from engaging with these kinds of organizations, particularly in other jurisdictions where the government is not as actively engaged. The exact impact de-risking will have on financial inclusion remains difficult to assess in light of the reluctance of affected customer bases to speak about the loss of services, coupled with the lack of empirical data on de-banked communities that can be cross-referenced against the geographical operations of financial inclusion NGOs.

21

# VULNERABLE COMMUNITIES, GENDER, AND MINORITY ISSUES

Rural, low-income, and minority communities, such as women and youth, are disproportionately affected by lack of access to the formal financial sector. Among those living below the \$2 per day poverty line, women are 28 percent less likely than men to have a formal bank account. There is a gender gap of six to nine percentage points across income groups in developing countries, which underscores the higher barriers to financial inclusion women face. <sup>112</sup> Unequal distribution of power, resources, and responsibilities between men and women has led to discriminatory procedures inhibiting women's access to finance. For example, lower income can make bank accounts unaffordable for women; gender norms restricting their mobility can make it difficult for them to physically reach banks; and access to bank accounts may require evidence of property rights or a husband's signature. <sup>113</sup> However, although there are gender-specific barriers to financial inclusion, there are also gender-specific gains.

Women are a powerful driver of economic growth; in many developing economies, production inefficiency owing to the lack of a women's labor market creates a gender-specific incentive to use access to finance as a means of undertaking self-employment. 114 Women also exhibit spending patterns that are different from men's, often using increased access to funding for human development inputs such as food and education. This has been quantified in many instances across the developing world. For example, one study, conducted in ivory Coast, found that when women's share of cash income increased, the household spent significantly more on food and less on alcohol and cigarettes. The findings of another study, in Brazil, were that when women earned more non-labor income, increases in the probability of child survival were 20 times greater than when men earned increased non-labor income at comparative rates. 115

Furthermore, financial inclusion has been shown to contribute to women's empowerment, reducing gender inequality in developing regions. Increased access to financial resources and the ability to invest in income-generating activities can increase women's decision-making power within the household and their influence over how money is allocated. <sup>116</sup> As the financial inclusion of women may have a differential socioeconomic impact to that of men, it follows that their exclusion from the formal financial sector leaves these potential human development gains unlapped. To the extent that de-risking may exacerbate the difficulties women already experience gaining access to financial services, de-risking will also have a gender-specific effect on humanitarian outcomes.

## **HUMAN RIGHTS IMPLICATIONS**

There is a great deal of literature on the abuse of anti-terrorism and terrorism financing laws to persecute political dissidents and minority groups in both the developing and developed world. 

117 Although stronger customer due diligence protocols and de-risking may have benefits as far as limiting banks' exposure to entities that may be involved in these human rights controversies, it is possible that tightening AML/CFT regulations may give rise to further curtailments of free speech and minority rights globally as governments abuse counter-terrorism methods to target dissidents.

In the developing country context, where national laws and norms may conflict with internationally accepted human rights standards, financial exclusion in particular may increase the risk of human rights violations. To the extent that de-risking severs vulnerable populations' access to financial services, it may also force the poor to choose alternate coping strategies that put human rights at risk. One such strategy is the shift to child labor to supplement household income and mitigate economic shocks. Evidence has shown, for example, that child labor rates

ng MH

are higher in countries with underdeveloped financial systems <sup>118</sup> and that transitory shocks lead to greater increases in child labor where credit constraints are binding and access to finance is limited. <sup>119</sup>

There may also be concerns about domestic violence in developing regions. It has been shown that access to finance increases women's empowerment and can reduce incidents of domestic violence overall. A study conducted in rural South Africa found that economic and social empowerment of women through access to finance and education on women's rights contributed to reductions in intimate partner violence, with the risk of violent incidents reduced by more than half after two years. <sup>120</sup> Where bank de-risking increases financial exclusion, it may also limit the scope for such gains.

Additionally, the research team has encountered a perception among the customer base that these account closures are intentionally targeting specific demographics, such as those who identify as religiously or culturally Muslim. Although it is difficult to ascertain the validity of these claims without empirical data on account closures, there have been anecdotal reports of Muslim charity-focused account closures in the UK by HSBC. <sup>121</sup> HSBC maintains that the decisions to close accounts were "absolutely not based on race or religion," <sup>122</sup> and according to Tom Keatinge, director of the Centre for Financial Crime and Security Studies at the Royal United Services Institute, "The result of these [de-risking] decisions might look like Islamophobia but I am certain no UK bank is actively going to close out Islamic charities. They made decisions that predominantly affect Muslim charities given the regions they operate in." <sup>123</sup>

## NATIONAL AML/CFT REGIMES

In low-capacity countries actively engaged in AML/CFT activities, building frameworks that are compilant with international standards such as the 40 FATF Recommendations remains the primary focus. Much attention is paid to the development of adequate legal frameworks that often seek to align with the most stringent standards in order to receive positive risk assessments from international bodies. Although many of these boxes have been checked at the policy level, implementation of these standards can prove challenging, even for developed economies. The risk-based approach is designed to allow for the flexibility to address unique jurisdictional risks, but limited institutional and human resources in low-capacity countries have presented challenges to conducting the sector risk assessments necessary to identify the appropriate calibration. Coordinated and sustained capacity-building initiatives would help support effective implementation of AML/CFT standards, which would in turn strengthen financial integrity across the global system and help inspire trust between the financial institutions and sectors operating in low-capacity countries.

Given limited data on affected communities and jurisdictions, it is difficult to ascertain the impact of de-risking practices on the development of national AML/CFT regimes. It is possible that reductions in correspondent banking relationships will incentivize political will to strengthen AML/CFT regimes in developing economies. In select cases in some East African and Asian countries, the FATF Public Statement has been useful in galvanizing political support to strengthen frameworks in order to reduce risk ratings and encourage broader financial engagement and economic growth. Regardless of the motivations, any positive AML/CFT gains in high-risk jurisdictions will help strengthen the entire system and reduce vulnerabilities throughout the transactional chain.

# OPPORTUNITIES FOR INNOVATIVE SOLUTIONS

The exclusion of an entire customer base from the formal financial sector has created a window of opportunity for innovative banking solutions. This area is precisely the point where incentive for profit can be cultivated, yet it remains nascent and controversial. One of the most notable innovations for the developing world is the rise of mobile money platforms, which bring financial services directly to the rural unbanked by allowing users to conduct financial transactions, including bill payment and fund transfers. The most notable mobile money platform is M-Pesa, which is very successful in Kenya, with more than 15 million users performing more than 2 million transactions daily. <sup>124</sup> Another area that may offer promise for financial inclusion is the rise of digital currencles such as Bitcoin. Bitcoin is a virtual private currency that is not controlled by any central authority or supported by any economic system but offers the promise of substantially reduced fees. <sup>125</sup> Although its use has grown in developed countries, <sup>128</sup> lack of a broad technological understanding and infrastructure to handle transactions in digital currencies have limited and will continue to limit its implementation in developing economies in the near term.

Although these services are poised to fill the gap resulting from de-banking practices, they present additional complications for regulators who are already struggling to keep up with changing technological landscapes. Efforts have been made to address these disconnects, including the designation by FinCEN of cryptocurrencies as MSBs, which subjects them to existing regulatory frameworks. Beyond remedying the repercussions of de-risking, these technologies stand to advance financial inclusion goals significantly by tapping into existing networks and attracting lucrative investment opportunities that help tip the risk-reward balance back in favor of the customer base.

Conversely, decreased appetite for risk may leave banks reluctant to invest in new and innovative approaches to adapting international banking standards to developing contexts. Research has shown that reducing documentation requirements could potentially increase the share of adults with a formal bank account in Sub-Saharan Africa by 23 percent. 127 However, given heightened AML/CFT scrutiny and increasingly strict Know Your Customer (KYC)/CDD programs, this is an unappealing option. As costs of AML/CFT compliance increase, it is also unlikely that fees associated with opening and keeping a bank account will be reduced, despite the fact that high fees have been cited as a major barrier to financial inclusion of people living in poverty.

# 5 INSTRUCTIVE LEARNING: CASE STUDIES

The concept of de-risking is not new, and a number of sectors have struggled with complex legal and regulatory challenges that have restricted their access to the formal financial structure, or with perceptions of risk that have led to unfavorable cost-benefit analyses. The section below summarizes a number of relevant case studies that showcase innovative approaches to, and lessons learned from, addressing de-banking challenges across a variety of diverse sectors with varying degrees of banking incentives. The six case studies include:

- The steps being taken by the profitable US marijuana industry to mitigate legal complexities at the state and federal level;
- 2. The impact of political ramifications on embassy account closures;

rfsking

- The impact of negative blowback from Operation Choke Point on sectoral reputation and regulator engagement;
- Experiences developing a streamlined set of common requirements for mortgage loan originators;
- The potential for advocacy and resource linkages with cryptocurrency given the sector's US classification as an MSB; and
- 6. The current state of safe corridor and safe harbor initiatives and discussions.

# BANKING MARIJUANA BUSINESS PROCEEDS IN THE US

Although marijuana remains illegal at the federal level in the US, a number of states and the District of Columbia have passed laws in recent years legalizing it for both medical and recreational consumption. <sup>128</sup> This has led to the rapid development of marijuana dispensary businesses, which in turn need financial services to operate. The conflict between state and federal legislation presents a unique challenge for financial institutions looking to provide services to this growing industry, as engagement in the sector opens the bank up to civil and criminal penalties related to federal BSA, AML, and narcotics law violations. The tack of access to banking services has forced marijuana dispensaries to deal exclusively in cash, complicating state tax efforts, creating security risks, and providing a prime opportunity for potential abuse of the industry by money launderers. <sup>129</sup> Aaron Smith, executive director of the National Cannabis industry Association, has called the lack of banking services "the most urgent issue facing the legal cannabis industry today."

Regulators have attempted to address this burgeoning issue, and in February 2014 the US Department of Justice Issued a memo Indicating that the eight "federal law enforcement priorities" guiding prosecution in states where marijuana is legal would also apply to the federal prosecution of financial crimes for marijuana-related business. <sup>131</sup> The US Department of the Treasury also Issued a guidance note on the provision of financial services to marijuana-related businesses consistent with BSA obligations. <sup>132</sup> In essence, the message was that federal regulators would show prosecutorial restraint as long as banks are able to ensure that customers comply with state legislation and not violate any of the eight priorities, which include sale to minors, interstate smuggling, use of firearms, and adverse public health consequences. <sup>133</sup>

However, the guidance notes specifically do not offer any sort of "safe harbor" for financial institutions providing services to marijuana-businesses, specifically including the line; "Nothing herein precludes investigation or prosecution, even in the absence of any one of the factors listed above, in particular circumstances where investigation and prosecution otherwise serves an important federal interest." The argument from financial institutions engaged in this sphere is that these guidance notes are too vague and impose a heavy burden on banks to know not only their customers, but also their customers' customers. Don Childears, president and CEO of the Colorado Bankers Association says of the guidance notes, "At best, this amounts to 'serve these customers at your own risk' and it emphasizes all of the risks."

This is similar to the argument being made by financial institutions working with MSBs: Regulatory ambiguities, the potential for strict penalties, and burdensome compliance measures all increase the risk and cost associated with banking these clients. But given the potentially lucrative nature of the marijuana industry—considered the fastest growing industry in the US, totaling \$2.7 billion in 2014 136—there is a clear market incentive to assume the risk for marijuana businesses that does not exist for less remunerative clients, such as MSBs and NPOs. In addition, the profitability of the industry allows banks to price for the increased AML risk and enables marijuana businesses to absorb the high costs of compliance.

Understanding Bank De-risking

Given the legal sensitivities, marijuana businesses often remain tight-lipped about where they are obtaining financial services, but FInCEN director Jennifer Shasky Calvery has indicated that 105 banks and credit unions are currently working with the marijuana industry. <sup>137</sup> The 2014 FInCEN guidance indicates that banks are required to file suspicious activity reports (SARs) for all transactions related to marijuana businesses, as they remain "funds derived from illegal activity" under federal law. However, it outlines a three-fier system of filing designed to separate activities: those lawful under state legislation, those potentially violating state law, and those that have resulted in the decision to exit client accounts. <sup>138</sup> Although the legal caveat of "proceeds from illegal activity" does not apply to the customer base examined in this report, the tlered reporting system presents an interesting approach to mitigating risk and improving transparency. Given the high volume of transactions conducted by MSBs, the compliance burdens may preclude the sector from adopting this approach outright. However, it is worth further exploration to determine if some variation of this reporting method may be a viable solution to reducing bank liability and better balancing the burden of transaction monitoring and accountability between financial institutions and federal regulators.

Additionally, the marijuana industry has also fostered innovative financial market approaches at the state level, including the development of a credit union specifically for handling marijuana-related financial services. Colorado state banking regulators have approved a charter for this institution, the Fourth Corner Credit Union, but it has encountered delays in its application to the Federal Reserve Bank, potentially over concerns about the precedent this would set. The development of this type of niche banking is an avenue worth exploring for MSBs and other debanked clients, particularly given the lack of state-federal legality conflicts for these customers. If it could be properly incentivized, such a specialized system could reduce overall compliance costs and help create a standardized system for risk management.

# RESPONSES TO FOREIGN EMBASSY ACCOUNT CLOSURES

On May 13, 2004, FInCEN and the OCC Issued a \$25 million fine to Riggs Bank of Washington, DC, for violations of suspicious activity reporting and for failure to establish adequate AML controls for its numerous foreign diplomat and embassy clients. As a result of the subsequent reputational damage, Riggs Bank was forced to sell its operations to PNC Bank of Pittsburgh in July 2004. The ensuing crisis left embassies scrambling to find new banks to take their accounts, while the banks the embassies approached, wary of heightened scrutiny and reputational risk, were not eager to absorb their business. 141

Banks instead began shedding foreign embassy accounts. The embassy of Angola, in Washington, DC, was the first to have all of its US bank accounts closed against its will, when Bank of America terminated business with the embassy in November 2010. In response, the Angolan government threatened to close the bank accounts of US companies in Angola, such as Chevron, Exxon, BP, and Boeing, as well as all US embassy bank accounts. <sup>142</sup> American businesses with interests in Angola began to express their concern to government officials and banks. <sup>143</sup> With diplomatic and organizational interests at stake, pressure for a solution was mounting on both a political and business front.

In a letter to the American Bankers Association (ABA), then-US Treasury Secretary Timothy Geithner and then-US Secretary of State Hillary Clinton pressed banks to resume business with foreign embassles, warning of the negative effect of account closures on US diplomatic relations. ABA president and CEO Frank Keating responded that the regulatory regime made banking with embassles nearly impossible. 144 US Treasury and State Department officials were pushing banks to engage with embassles but could not guarantee leniency on behalf of regulators, who had warned that foreign embassles pose heightened money-laundering risks as diplomatic immunity exempts them from reporting the source of funds in their accounts. 146

MY

Although the stalemate among regulators, banks, and the US government is familiar given the current situation surrounding MSB account closures, the threat to US foreign relations and American businesses abroad made the political stakes much higher. At the request of the State Department and US Treasury, several large banks began reopening accounts with foreign embassies at a premium. <sup>146</sup> Without the political incentive to find a solution, MSBs or small charitable organizations are unlikely to see the same results.

# **OPERATION CHOKE POINT**

First made public in March 2013, Operation Choke Point was an initiative by the US Department of Justice for investigating financial institutions doing business with industries deemed to be at high risk for fraud. According to a Justice Department official quoted in the *Wall Street Journal*, "We are changing the structures within the financial system that allow all kinds of fraudulent merchants to operate [with the intent of] choking them off from the very air they need to survive."

Operation Choke Point was predicated on a 2012 policy announcement from the US Federal Deposit insurance Corporation (FDIC), which included a list of both legitimate and illegitimate merchant categories that have been "associated with high risk activity." <sup>148</sup> Operation Choke Point interpreted existing law to imply that providing financial services to these merchant categories creates a "reputational risk" that is sufficient to trigger a subpoena by the Department of Justice. <sup>149</sup> However, a report by the US House of Representatives Committee on Oversight and Government Reform found that the Department of Justice lacked adequate legal justification for this initiative and called for its dismantling. <sup>150</sup>

Additionally, the report disclosed evidence which suggested that the true goal of the operation was to target industries that were deemed "high risk," or that were otherwise perceived as questionable to the Obama administration. <sup>151</sup> The operation focused particularly on short-term lenders, including check cashlers and payday lenders, but also extended to other industries such as firearms and adult entertainment. The Department of Justice issued 50 subpoenas to banks and payment processors as part of the operation, which resulted in the abrupt closure of accounts associated with these merchant categories. <sup>152</sup> As a result of the operation, the report said, "Banks are put in an unenviable position: discontinue longstanding, profitable relationships with fully licensed and legal businesses, or face a potentially ruinous lawsuit by the Department of Justice. \*153

in response to backlash from Operation Choke Point, the FDIC issued a letter indicating that all banks should take a risk-based approach to assessing individual client relationships on a case-by-case basis and not by industry operational risk. <sup>154</sup> This was followed by a memorandum to supervisory staff requiring examiners to put in writing their recommendation to terminate an account, which the financial institution must then have reviewed before the account was terminated. <sup>165</sup> The Issuance of a defined list suggests that regulators were aware of the need for additional clarification around the definition of high-risk sectors but were forced to revert to the risk-based approach due to blowback from the operation, thus creating a potential credibility issue.

There are clear parallels between the de-banking resulting from Operation Choke Point and the de-risking challenges currently facing MSBs and other clients. Although there is no longer a federally defined list of high-risk merchant categories, stigmas and lingering reputational damage related to these customer bases continue to influence financial institution decisions, with MSBs also feeling unduly persecuted. Similarities also exist in the lack of clarity from regulators about what qualifies these industries as high risk, as well as what criteria trigger the decision to exit these relationships.

In both instances, the lack of clarity stems from concerns about regulatory enforcement and the broad assessment of risk based on entire merchant categories, not individual compliance

Understanding Bank De-risking

measures. Those affected by Operation Choke Point were able to show that de-risking activities in fact target the sector as a whole, a practice which was immediately disavowed by regulators. Although current de-risking practices are not as clearly linked to a defined government objective, it may be useful for de-banked customer bases to attempt to identify trends and patterns that both highlight the industry-focused targeting of de-risking practices and stress the humanitarian implications of these decisions.

# NATIONWIDE MORTGAGE LICENSING SYSTEM AND REGISTRY

As part of the Housing and Economic Recovery Act instituted in response to the 2008 mortgage crisis, the US passed the Secure and Fair Enforcement for Mortgage Licensing (SAFE) Act, which required states to implement licensing and registration systems for mortgage loan originators (MLOs). States were given the option of developing their own systems or participating in the Nationwide Mortgage Licensing System (NMLS) Federal Registry, an initiative created jointly by the Conference of State Bank Supervisors and the American Association of Residential Mortgage Regulators.

Although individual state requirements may vary, any MLO who works for a federal insured depository or is regulated by a federal banking agency is subject to so-called Common Requirements, including passage of a written qualified test and criminal background and credit checks, as well as pre-licensure education and continuing education requirements. <sup>157</sup> Building on these streamlined licensing procedures, the Federal Registry created a database including consolidated and standardized information about MLOs. Overall, the NMLS helped to improve information sharing among regulators, increase efficiencies by streamlining the licensing process and reducing regulatory burden, and enhance consumer protection and support antifraud measures. <sup>158</sup>

in 2012, NMLS was expanded to Include other non-depository entities, including MSBs (and is now sometimes referred to as the Nationwide Multistate Licensing System). However, only 24 states now use NMLS for the licensing or registration of MSBs or both. <sup>159</sup> For the rest, licensing and examination still falls under state jurisdiction. MSBs are currently required to register with FinCEN and provide a list of all associated agents, an estimate of business volume, and information regarding ownership and control. <sup>160</sup> FinCEN maintains an electronic database of all registered MSBs which is available for public access but includes a clear caveat that inclusion in the registry does not equate to a certification of legitimacy. <sup>161</sup> FinCEN has also undertaken efforts to standardize bank examination procedures with the Issuance of a BSA/AML Examination Manual in 2010.

The traditional reliance on a state-centric model has created a complicated regulatory web where MSBs doing business across state lines must comply with overlapping legal frameworks and licensure requirements. According to FinCEN, as of July 2014 there were 737 MSB companies holding a license to operate in more than one state. In total, these companies had registered more than 95,000 agent locations. The Standardizing these procedures can introduce transparency and accountability into the system, and the centralization of information can help prevent bad apples from exploiting regulatory gaps between jurisdictions. The further development and expansion of the NMLS may provide a key entry point for reducing compliance burdens and providing better transparency and accountability for MSBs, all of which may help reduce financial institutions' perception of risk for these customer bases.

ng MH

# CRYPTOCURRENCY AND OTHER TECHNOLOGY-BASED SOLUTIONS

Recently we have seen the explosion of cryptocurrency technology in the global financial marketplace. Most notable is tine rise of Bitcoin, which has both grown and then collapsed rapidly in the six years since its inception. Regardless of concerns about the stability and sustainability of specific cryptocurrency products, it has become clear that they represent a groundbreaking technological advancement. With this innovation comes great promise, including decreased financial fees, reduction in payment processing times, increased efficiencies in the financial system, user confidentiality and privacy protection, and the potential for expansion of financial services globally.

However, these benefits come with a price. Digital currencies are based on the concept of anonymity. Although transactions are logged in a transparent public ledger called a "blockchain," the ledger does not record customer information, only the IP address of the user. Along with the currently limited regulatory oversight of these technologies, this has made cryptocurrency technologies particularly attractive as havens for money laundering and other criminal activity. In 2014, Bitcoin exchange operator Robert Falella was arrested for supplying \$1 million in digital currency that allowed people to conduct illegal transactions on Silk Road, an online black marketplace known for selling drugs. <sup>165</sup> In the largest online money laundering charge in history, Liberty Reserve, a Costa Rican-based digital currency service, was indicted by the US government in 2013 over allegations it handled 55 million transactions involving criminal proceeds, totaling \$6 billion. Richard Weber, head of the internal Revenue Service (IRS) criminal investigation unit, said of Liberty Reserve, "If Al Capone were alive today, this is how he would be hiding his money."

Given the rapid pace of development and the divergent technological platforms currently being explored, it has become increasingly difficult for regulators to find ways to mitigate these risks without negatively affecting the potential for growth. In July 2011, US financial regulators took the first step in this process by amending the definition of money transmission services to include "other value that substitutes for currency." <sup>167</sup> In response to industry requests for further clarification, FinCEN Issued a guidance note in March 2013 that clearly defined which entities in the virtual currency realm are subject to BSA compliance. <sup>168</sup> Citing the point at which digital currencies are transferred into fiat currencies, the guidance defined the administrators and exchangers of digital currencies as MSBs but excluded users of virtual currencies. This designation has implications for cryptocurrency technologies, as they are now subject to registration, reporting, and record-keeping requirements.

The implications of this designation are still being determined by the cryptocurrency industry as it seeks to understand how CDD and SAR reporting requirements fit within existing structures. Meanwhile the industry continues to grow, and in 2014 global usage of digital currency averaged \$50 million a day. <sup>169</sup> Although this still lags well behind the \$32 billion processed by Visa and MasterCard daily, <sup>170</sup> it indicates a growing demand for the service, particularly given the limited infrastructure that exists for digital currency usage. This emerging industry is also backed by major power players: Netscape founder Marc Andreessen and Linkedin founder Reid Hoffman put \$315 million into Bitcoin-related projects last year, <sup>171</sup> Winklevoss twins Cameron and Tyler have invested heavily in a regulated Bitcoin exchange; <sup>172</sup> and even the New York Stock Exchange has supported digital wallet providers. <sup>173</sup>

The potential for high industry profitability and the involvement of well-funded and politically connected backers may serve as key "push factors" in the development of regulatory frameworks that favorably balance industry growth and AML/CFT risk mitigation. Additionally, cryptocurrency companies stand to benefit immensely from existing human capital—staff are highly trained technologically, which may help them develop innovative procedures to ease regulatory burdens. One such technology includes automated transaction monitoring and

Understanding Bank De-risking

filtering systems, which have recently been used by the New York Department of Financial Services to help identify millions of potentially illegal transactions at one bank. <sup>174</sup> Although cryptocurrencies are currently regulated much like MSBs, it is clear that the two sectors have very different operating practices. Innovations developed by the cryptocurrency industry may prove to be applicable, at least in part, to more traditional MSBs, but the exact extent of the cross-pollination remains to be seen at this time. Advocacy groups and MSB organizations may also want to capitalize on this regulatory pairing to tap into the power of the cryptocurrency lobby, effectively connecting themselves to the push factors in this new industry.

# SAFER CORRIDOR VERSUS SAFE HARBOR PROJECTS

Attempts have been made to improve the security and transparency of specific remittance corridors. For example, in partnership with the World Bank, the UK announced a Somalia-specific Safer Corridors project in 2013 to track payments from the UK to Somalia. This builds upon an earlier UK-supported program in Pakistan. Developed in 2009, the Pakistan program implemented strict monitors on money transfers into the country, which led to a dramatic increase in the funds transmitted, from \$6 billion between 2007 and 2008 to \$13 billion in 2011 and 2012. The current Somali Safer Corridors project has largely been deemed a failure, and individuals we consulted have further indicated that it has hit a series of potentially insurmountable obstacles.

Beyond specific corridors, international discussion has considered broader "safe harbor" policies. The term "safe harbor" applies to the legal provision of amnesty from criminal prosecution and civil enforcement actions. There have been no clear case studies where a legally binding safe harbor policy has come into effect related to money laundering and terrorist financing. There are potential benefits to such a system, which allow banks a short-term reprieve from enforcement actions while longer-term solutions to de-risking challenges can be addressed. However, the development and adequate implementation of broad-based safe harbor projects are challenging and politically sensitive.

# 6 CONCLUSION AND RECOMMENDATIONS

### CONCLUSION

De-risking represents a clear instance of market failure. Regulators are scrambling to catch up with the current money laundering and terrorist financing landscape. As a result, they are increasingly shifting monitoring burdens to financial institutions, and the customer base is feeling the brunt of this shift.

Financial institutions have been thrust into a policing role, which they refuse to take on in light of a dispassionate cost-benefit analysis that determines the risk is not worth the reward of banking high-risk clients.

Threatened with the loss of access to financial services, the customer base is calling for increased clarity about compliance standards and the streamlining of regulatory burdens in an effort to decrease the perception of risk within their sectors.

However, regulatory authorities appear hesitant to move beyond the general ambiguity of the risk-based approach, particularly given the complex and dynamic regulatory landscape. In fact, the existing public narratives indicate that the risk-based approach is here to stay.

All invested stakeholders are understandably acting in their own best interests in order to protect themselves and their profits, but this has served to limit financial access. De-risking has significant economic, humanitarian, and security implications, and in many ways may be undermine the goal of reducing risk in the global financial system.

In instances of market failure, there are precedents for regulatory intervention, but addressing the issue will require a comprehensive response involving regulators, policymakers, banks, and other stakeholders. Below is a set of recommendations for invested stakeholders.

## RECOMMENDATIONS

# For government and regulatory authorities in financial hubs

- Develop policies and procedures that facilitate the accrual of aggregate metrics, including regular, routine publication of reports and aggregate data on bank de-risking, to assist multilateral, civil society, and non-governmental actors in better identifying the consequences of de-risking trends, implications, and affected communities.
- Supplement the risk-based approach with clear rules- or principles-based guidance where relevant (for instance, as it applies to high-risk jurisdictions and geographies) to provide clarity about AML/CFT requirements involving those clients deemed inherently high risk.
- Assume a leadership role in creating space for stakeholder discussion to develop concrete across-the-board actions to harmonize regulatory approaches, improve compliance, realign market factors, and build trust across sectors and jurisdictions.
- Consider balancing punitive measures, such as sanctions, penalties, and fines, with
  constructive models rewarding risk mitigation, including incentive mechanisms for financial
  institutions to engage with high-risk clients—potentially leveraging the Community
  Reinvestment Act 177 and its impact on incentivizing participation in the Low-Income
  Housing Tax Credit program 178.
- Promote the continued integration of financial inclusion into mutual evaluation methodologies developed by the FATF and the World Bank to assess the impact of AML/CFT compliance on unbanked or vulnerable communities.
- Continue to support capacity-building programming in high-risk or low-capacity jurisdictions or sectors to improve compliance across the transactional chain and reduce ML/TF risks.
- For government and regulatory
  authorities in low-capacity and developing countries Continue to develop and refine the
  implementation of policies and legislative frameworks that align with international standards
  and promote financial inclusion goals, such as conducting national risk assessments and
  developing national AML/CFT strategies.
- Fast-track institutional development, such as that involving the financial intelligence unit or central bank, in order to facilitate trust-building in remittance-receiving countries' banking infrastructures and encourage foreign direct investment.
- Encourage regional cooperation and coordination on AML/CFT and focus on strengthening relationships with "conduit countries" through the signing of memoranda of understanding and increased information sharing.
- Promote effective regulation and legislation regarding emerging technologies such as mobile money as a means of promoting financial inclusion while balancing AML/CFT vulnerabilities.

les.

Understanding Bank De-risking

Invest in large-scale financial literacy awareness-raising programs focused on women, youth, and other financially excluded communities.

- Explore the adoption of non-traditional identification policies to alleviate a primary obstacle to financial inclusion for vulnerable communities (for instance, biometric print, clan elder physical identification).
- · Sign, Implement, and enforce anti-corruption declarations.

### For financial institutions

- Review and revise enterprise-wide KYC policies and procedures to better identify, mitigate, and manage risk.
- Continue to invest resources in compliance departments, but assure adequate staffing and resourcing of operational and technological teams, who are often tasked with the practical implementation of compliance directives.
- Consider and harness the reputational return of demonstrated corporate social responsibility campaigns focused on the extension of financial services, particularly to underserved communities and individuals.
- Formulate risk tiers that allow for the capture of multiple layers of complexity, and not inherently and disproportionately rooted in basic units of analysis such as "jurisdiction" or "nationality."
- Review and fine-tune client onboarding practices to collect necessary information, while explaining to the client how that information is used and what purpose it serves.
- Assess "simple" or "limited" bank accounts that have caps on overall value, frequency of use, and size of transactions as a means of extending financial inclusion, lowering the cost of banking small value accounts, and balancing money laundering and terrorist financing risk.
- Consider establishing a fee structure for high-risk accounts to help offset the cost of potential
  enforcement actions—where there is a business incentive, there is a way.
- Mitigate risk of insufficient CDD by customer agencies by implementing enhanced transaction monitoring processes and technologies.
- Engage with and provide adequate resources to technological stakeholders to explore innovative approaches to reducing compliance burdens and improving transactions monitoring.
- Conduct a proactive market assessment to identify areas for potential profitability while boosting access for the de-risked and unbanked.
- Consider joining MSB associations in an observer capacity, to enhance sector understanding and build trust.

## For the "customer base": MSBs, NPOs, among others

- Professionalize internal standard operating procedures and provide continued staff training on AML/CFT standards and practices, flagging of suspicious transactions, and whistleblowing.
- Conduct sectoral or multi-sectoral risk-based assessments to Identify core vulnerabilities and promote the effective allocation of resources to mitigate ML/TF risk.
- Focus on "front end" de-risking by conducting enhanced assessments prior to client onboarding.
- Establish or join local, national, and global sectoral associations to improve discussion and coordination regarding AML/CFT compliance efforts and to develop a unified voice of advocacy in de-risking forums.

- Capitalize on the classification of digital technologies such as MSBs to promote advocacy and resource linkages that will help develop innovative ways to reduce regulatory burdens and promote the sustainability of services for both sectors.
- Promote engagement and trust building by offering on-site tours for compliance officers and relationship managers to enable first-hand assessments of existing vulnerabilities and develop strategies to improve compliance.
- When approaching banks, disclose requested information during the onboarding process to demonstrate openness and transparency and to build trust.

### ADDITIONAL AREAS OF RESEARCH

- Analyze tax implications for the IRS related to de-banking practices—loss of revenue might serve as an incentive for legislative engagement.
- · Explore banking practices related to foreign terrorist fighter accounts.
- Include gender demographics in empirical research on vulnerable communities affected by de-risking. Explore whether existing behavioral studies related to risk and spending patterns of men versus women can be factored into financial institution's risk-analysis models.
- Explore angagement with international bodies, such as the UN, which have the ability to improve access to financial services for vulnerable communities.
- Explore the feasibility of developing an internationally recognized certification program to
  promote transparency and accountability related to AML/CFT programs and standards—for
  example, best-in-class certificates.



# **BIBLIOGRAPHY**

# RELEVANT LEGISLATION AND GUIDANCE NOTES

### **Australia**

#### AML/CFT legislation

"Anti-Money Laundering and Counter-Terrorism Financing Act 2006," Australian Government, 2006, http://www.comlaw.gov.au/Series/C2006A00169

"Financial Transaction Reports Act 1998," Australian Government, 1998, http://www.comlaw.gov.au/Details/C2013C00009

#### Australian Transaction Reports and Analysis Centre

"AUSTRAC Statement," Australian Transaction Reports and Analysis Center, 25 November 2014, http://www.austrac.gov.au/news/austrac-statement

### **Basel** committee

"International Regulatory Framework for Banks (Basel III)," Bank for International Settlements, http://www.bis.org/bcbs/basel3.htm?m=3%7C14%7C572

### **European Union**

"Directive of the European Parliament and of the Council on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing," http://eurlex.europa.eu/legal-content/EN/ALL/?url=CELEX:52013PC0045

### **Financial Action Task Force**

"Anti-Money Laundering and Terrorist Financing Measures and Financial Inclusion," Financial Action Task Force, February 2013, http://www.fatf-gafl.org/topics/financialinclusion/documents/revisedguidanceonamicftandfinancialinclusion.html

"FATF Recommendations," Financial Action Task Force, 2012, http://www.fatf-gafl.org/media/fatf/documents/recommendations/pdfs/FATF\_Recommendations.pdf

"Risk-Based Approach Guldance for Money Service Businesses," Financial Action Task Force, July 2009, http://www.fatf-gafi.org/media/fatf/documents/reports/RBA%20Guldance%20for%20Money%20Service%20Bus

gati.org/media/tatt/documents/reports/RBA%20Guldance%20for%20Money%20Service%20Bus Inesses.pdf

ing A

### **United Kingdom**

### **AML/CFT legislation**

The Proceeds of Crime Act 2002 (POCA) (as amended by the Serious Organised Crime and Police Act 2005 (SOCPA)), http://www.legislation.gov.uk/ukpga/2005/15/contents.

The Money Laundering Regulations 2007 (2007 Regulations), http://www.legislation.gov.uk/uksi/2007/2157/contents/made

The Terrorism Act 2000 (TA 2000) (as amended by the Anti-Terrorism, Crime and Security Act 2001 (ATCSA 2001) and the Terrorism Act 2006 (TA 2006)), http://www.legislation.gov.uk/ukpga/2000/11/contents

### Joint Money Laundering Steering Group

"Guidance in Respect of Money Service Businesses," Joint Money Laundering Steering Group, July 2, 2014, http://www.jmisg.org.uk/download/9752

"Further amendments to JMLSG Guidance," Joint Money Laundering Steering Group, November 21, 2014, http://www.jmlsg.org.uk/industry-guidance/article/jmlsg-guidance-current

### **United States**

### AML/CFT legislation

"Bank Secrecy Act of 1970," Pub. L. No. 91-508, 84 Stat. 1114-1124 (1970).

"Money Remittances improvement Act of 2014," Pub.L. no. 113-156 (2014), https://www.govtrack.us/congress/bills/113/hr4386/text.

"Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001," Pub. L. No. 107-56, 115 Stat. 272 (2001), http://www.gpo.gov/fdsys/pkg/BILLS-107hr3162enr/pdf/BILLS-107hr3162enr.pdf.

### **US Department of the Treasury**

"Bank Secrecy Act Regulations; Definitions and Other Regulations Relating to Money Services Businesses," US Department of Treasury, Federal Register, 76, no. 140 (July 21, 2011) http://www.gpo.gov/fdsys/pkg/FR-2011-07-21/pdf/2011-18309.pdf

### Financial Crimes Enforcement Network (FinCen)

"FInCEN Statement on Providing Banking Services to MSBs," Financial Crimes Enforcement Network, 10 November 2014, http://www.fincen.gov/news\_room/nr/html/20141110.html

"Guidance to Money Services Businesses on Obtaining and Maintaining Banking Services," Financial Crimes Enforcement Network, April 26, 2014, http://www.fincen.gov/statutes\_regs/guidance/pdf/fincenadv04262005.pdf

#### Federal Deposit Insurance Corporation (FDIC)

"FDIC Memorandum to Supervisory Staff: Requirements for Deposit Account Terminations," Federal Deposit Insurance Corporation, 28 January 2015, http://remittancesgateway.org/index.php?option=com\_docman&view=download&alias=366-recent-regulatory-guidance-regarding-the-banking-of-remittance-companies&Itemid=377

Understanding Bank De-risking

"Statement on Providing Banking Services," Federal Deposit Insurance Corporation, 28 January 2015, https://www.fdic.gov/news/news/financial/2015/fil15005.html

Office of the Comptroller of the Currency

"Statement on Risk Management Associated with Money Service Businesses," The Office of the Comptroller of the Currency, 19 November 2014, http://www.occ.gov/news-issuances/bulletins/2014/bulletin-2014-58.html

### **Wolfsberg Group**

"Wolfsberg Anti-Money Laundering Principles for Correspondent Banking," Wolfsberg Group, 2014, http://www.wolfsberg-principles.com/pdf/standards/Wolfsberg-Correspondent-Banking-Principles-2014.pdf

"Wolfsberg Group Anti-Money Laundering Questionnaire," Wolfsberg Group, 2014, http://www.wolfsberg-principles.com/pdf/home/Wolfsberg-Anti-Money-Laundering-Questionnaire-2014.pdf

"Wolfsberg Guidance on Mobile and Internet Payment Services (MIPS)," Wolfsberg Group, 2014, http://www.wolfsberg-principles.com/pdf/home/Wolfsberg-Group-MIPS-Paper-2014.pdf

"Wolfsberg Statement: Guldance on a Risk Based Approach for Managing Money Laundering Risks," Wolfsberg Group, 2006, http://www.wolfsberg-principles.com/pdf/standards/Wolfsberg\_RBA\_Guldance\_%282006%29.pdf

# GOVERNMENT REPORTS AND SOURCES

"The 9/11 Commission Report," 9/11 Commission, 22 July 2004, http://www.9-11commission.gov/report/911Report.pdf

Andrea Leadsom, "House of Commons Debates 9 September 2014," UK Parliament, Column 279WH, 9 September 2014,

http://www.publications.parliament.uk/pa/cm201415/cmhansrd/cm140909/hailtext/140909h0002 .htm#14090959000271

"Anti-money laundering annual report," Financial Conduct Authority, January 2014, http://www.fca.org.uk/static/documents/corporate/anti-money-laundering-annual-report-13-14.pdf

"Banks' Management of High Money Laundering Risk Situations," Financial Services Authority, June 2011, http://www.fsa.gov.uk/pubs/other/aml\_final\_report.pdf

\*BNP Paribas Agrees To Plead Gullty and To Pay \$8.9 Billion for Illegally Processing Financial Transactions for Countries Subject to US Economic Sanctions,\* Department of Justice, 30 June 2014, http://www.justice.gov/opa/pr/bnp-paribas-agrees-plead-guilty-and-pay-89-billion-lilegally-processing-financial

"Commissioner Jourová welcomes progress towards a stronger EU framework to combat money laundering," European Commission Statement, 10 February 2015, https://ec.europa.eu/commission/2014-2019/jourova/announcements/commissioner-jourova-welcomes-progress-towards-stronger-eu-framework-combat-money-laundering\_en

a-risking

Dahabshill Transfer Services Limited and Barciays Bank PLC, Neutral Citation Number: [2013] EWHC 3379 (ch), Case Number HC12E04616, High Court of Justice, Chancery Division, 11 May 2013, http://buddlefindlay.com/static/Dahabshill.pdf

"The Financial Crisis Inquiry Report: Final Report of the National Commission on the Causes of the Financial and Economic Crisis in the United States," Financial Crisis Inquiry Commission Pursuant to Public Law 111-21, January 2011, http://fcic-static.law.stanford.edu/cdn\_media/fcic-reports/fcic\_final\_report\_full.pdf

"Money Services Business Registration Fact Sheet," Financial Crimes Enforcement Network, https://www.fincen.gov/financial\_institutions/msb/pdf/FinCENfactsheet.pdf

"MSB Registrant Search," Financial Crimes Enforcement Network, nttp://www.fincen.gov/financial\_institutions/msb/msbstateselector.html

"Terrorism Financing in Australia 2014," Australian Transaction Reports and Analysis Centre, http://www.austrac.gov.au/publications/corporate-publications-and-reports/terrorism-financing-australia-2014

"US Money Laundering Threat Assessment," Department of Treasury, December 2005 http://www.treasury.gov/resource-center/terrorist-illicit-finance/Documents/mita.pdf

# **PUBLIC STATEMENTS**

"FATF Clarifles risk-based approach case-by-case, not wholesale de-risking," Financial Action Task Force, 23 October 2014, http://www.fatf-gafi.org/documents/news/rba-and-de-risking.html

"G20 Leaders' Communiqué Brisbane Summit," 15–16 November 2014, https://g20.org/wp-content/uploads/2014/12/brisbane\_g20\_leaders\_summit\_communique1.pdf

"G20 Leaders Declaration," G20 Meeting, Los Cabos, Mexico, 18–19 June 2012, http://www.afi-global.org/sites/default/files/publications/g20\_leaders\_declaration\_2012.pdf

Madalitiso Mandiwa, "Access to Financial Services in Malawi: Policies and Challenges," United Nations Conference on Trade and Development, Expert Meeting on the Impact of Access to Financial Services, Including by Highlighting the Impact on Remittances on Development: Economic Empowerment of Women and Youth, 12-14 November 2014, http://unctad.org/meetings/en/Presentation/ciem6\_2014\_Malawi\_en.pdf

"Presentation to investors and analysts," Macquarie Bank, 2 May 2014, http://static.macquarie.com/dafiles/Internet/mgl/au/about-macquarie-group/investor-relations/events-and-presentations/documents/2014/full-year-result/fy14-mgl-presentation.pdf?v=7

"The danger of driving both illicit markets and financial exclusion," Remarks from Financial Action Task Force President Roger Wilkins AO, delivered at the 6<sup>th</sup> Annual International Conference on Financial Crime and Terrorism Financing, Kuala Lumpur, 8 October 2014, http://www.fatf-gafi.org/topics/fatfgeneral/documents/danger-lllicit-markets-financial-exclusion.html

Thomas Curry, Comptroller of the Currency, "Remarks Before the Association of Certified Anti-Money Laundering Specialists," Hollywood, Florida, 17 March 2014, http://www.occ.gov/news-issuances/speeches/2014/pub-speech-2014-39.pdf

37 NH

### RESEARCH STUDIES AND REPORTS

"2013 FDIC National Survey of Unbanked and Underbanked Households," Federal Deposit Insurance Corporation, October 2014, https://www.fdic.gov/householdsurvey/2013report.pdf

Alyssa Peterson, "Predatory Payday Lending: Its Effects and How to Stop It," Center for American Progress, 20 August 2013, https://cdn.americanprogress.org/wp-content/uploads/2013/08/PredatoryLending-orief-1.pdf

"An Avalanche of Regulation," American Bankers Association, 2014, http://www.aba.com/issues/index/documents/2014regburdeninfographic.pdf

Andrew Leyshon, Shaun French, and Paola Signoretta, "Financial exclusion and the geography of bank and building society branch closure in Britain," *Transactions of the Institute of British Geographers* 33, no. 4, http://onlinelibrary.wiley.com/doi/10.1111/j.1475-5661.2008.00323.x/pdf

Anna Paulson et al., "Financial Access for Immigrants: Lessons from Diverse Perspectives," Federal Reserve Bank of Chicago and the Brookings Institute, May 2006, http://www.brookings.edu/~/media/research/files/reports/2006/5/demographics-paulson/20060504\_financialaccess.pdf

Anne Ritchie, "Community-Based Financial Organizations: A Solution to Access in Remote Rural Areas?" World Bank, 1 January 2007, http://siteresources.worldbank.org/INTARD/Resources/combasedfinance.pdf

Apanard (Penny) Prabha and Minoli Ratnatunga, "Undergound Lending: Submerging Asia?" Milken Institute, April 2014,

 $\label{lem:http://assets1b.milkenInstitute.org/assets/Publication/ResearchReport/PDF/Underground - Lending-Asia.pdf$ 

Asli Demirgüç-Kunt and Leora Klapper, "Measuring Financial Inclusion: Explaining Variation in Use of Financial Services Across and Within Countries," Brookings Institute, 1 January 2013, http://www.brookings.edu/~/media/Projects/BPEA/Spring-2013/2013a\_klapper.pdf?la=en

Asll Demirgüç-Kunt and Leora Klapper, "Measuring Financial Inclusion: The Global Findex Database," World Bank, April 2012, http://elibrary.worldbank.org/doi/pdf/10.1596/1813-9450-6025 (Subscription required)

"Banking on Change: Breaking the Barriers to Financial Inclusion," Barclays, http://www.barclays.com/content/dam/barclayspublic/docs/Citizenship/banking-on-change.pdf

Barbara Magnoni and Jennifer Powers, "Pure Perseverance: A Study of Women's Small Businesses in Colombia," Inter-American Development Bank and FOMIN, 2013, http://idbdocs.ladb.org/wsdocs/getdocument.aspx?docnum=38010274.

Barbara Magnoni, Annette Lovoi, Julia Brown, and Rebecca Thornton, "Risks Across Borders: A Study of the Potential of Microinsurance Products to Help Migrants Cope with Cross Border Risks," Inter-American Development Bank and FOMIN, September 2010, http://issuu.com/idb\_publications/docs/working\_en\_9406.

Beth A. Wilkinson and Alex Young K. Oh, "The Principals of Federal Prosecution of Business Organizations: A Ten-Year Anniversary Perspective," NYSBA Inside 27, no. 2, Fall 2009, http://www.paulwelss.com/media/1497187/pw\_nysba\_oct09.pdf

"Beyond Boundaries: How To Drive Regulatory Coherence," British Bankers Association, 17 October 2013, https://www.bba.org.uk/news/press-releases/new-bba-report-beyond-boundaries-how-to-drive-regulatory-coherence/#.VL8eXCvF-Sp

Understanding Bank De-risking

Diana E. Murphy, "The Federal Sentencing Guidelines for Organizations: A Decade of Promoting Compliance and Ethics," United States Sentencing Commission, January 2002, http://www.ussc.gov/sites/default/files/pdf/training/organizational-guidelines/selected-articles/Murphy1.pdf

"Eighth Survey on Correspondent Banking in Euro," European Central Bank, Payment and Settlement Systems Committee, April 2013, http://www.ecb.europa.su/pub/pdf/other/8thsurveycorrespondentbankingineuro2013en.pdf?ee8 6c863f372ed58dd70dd41a7dbe1e6

Era Dabla-Norris, Yen Ji, Robert Townsend, and D. Filiz Unsal, "Identifying Constraints to Financial inclusion and Their Impact on GDP and Inequality: A Structural Framework for Policy," IMF Working Paper 15/22, January 2015, http://www.imf.org/external/pubs/ft/wp/2015/wp15F22.pdf

"Global Financial Stability Report: Risk Taking, Liquidity, and Shadow Banking; Curbing Access While Promoting Growth," International Monetary Fund, October 2014, http://www.imf.org/external/pubs/ft/gfsr/2014/02/pdf/text.pdf

"Global Shadow Banking Monitoring Report 2014," Financial Stability Board, 30 October 2014, http://www.financialstabilityboard.org/wp-content/uploads/r\_141030.pdf?page\_moved=1

Gustav Ranis, Frances Stewart and Alejandro Ramírez, "Economic Growth and Human Development," World Development 28, no. 2, 197-219, 2000, http://www.econ.yale.edu/~granis/papers/cp0546.pdf

"Hanging by a Thread: The Ongoing Threat to Somalla's Remittance Lifeline," Adeso, Oxfam, Global Center on Cooperative Security Report, 19 February 2015, https://www.oxfam.org/sites/www.oxfam.org/files/file\_attachments/bn-hanging-by-thread-somalia-remittances-190215-en.pdf

Helen Parry, "Money laundering and Sanctions Compliance—A Survey of Global Trends," Thomson Reuters, June 2014. https://risk.thomsonreuters.com/sites/default/files/GRC01413.pdf

"Integrity in Mobile Phone Financial Services: Measures for Mitigating Risks from Money Laundering and Terrorist Financing," World Bank Working Paper no. 146, http://siteresources.worldbank.org/INTAML/Resources/WP146\_Web.pdf

"Issues in the Governance of Central Banks," Central Bank Governance Group, May 2009, http://www.bis.org/publ/othp04.pdf

James Bullard, Christopher J. Neely, and David C. Wheelock, "Systemic Risk and the Financial Crisis: A Primer," Federal Reserve Bank of St. Louis Review, September/October, Part 1 2009, http://research.stlouisfed.org/publications/review/09/09/part1/Bullard.pdf. P. 403-419

Jason Perry and Patrick de Fontnouvelle, "Measuring Reputational Risk: The Market Reaction to Operational Loss Announcements," Federal Reserve Bank of Boston, October 2005, https://www.bostonfed.org/bankinfo/qau/research/papers/jppd1005.pdf

J.C. Kim, et. al., "Understanding the Impact of a Microfinance-Based Intervention on Women's Empowerment and the Reduction of Intimate Partner Violence in South Africa," American Journal of Public Health 97 (10): 1794-1802, 2007, http://www.ncbi.nim.nih.gov/pmc/articles/PMC1994170/

Jennifer Powers and Barbara Magnoni, "A Business To Call Her Own: Identifying, Analyzing and Overcoming Constraints to Women's Small Businesses in Latin America and the Caribbean," Inter-American Development Bank and FOMIN, April 2010, https://publications.iadb.org/bitstream/handle/11319/6252/A%20Business%20to%20Call%20He

Understanding Bank De-risking

r%20Own%3a%20Identifying%2c%20Analyzing%20and%20OvercomIng%20Constraints%20to %20Women%C2%BFs%20Small%20Businesses%20in%20Latin%20America%20and%20the% 20Caribbean.pdf?sequence=1

Joe Valenti and Deirdre Heiss, "Financial Access in a Brave New Banking World," Center for American Progress, October 2013, https://cdn.americanprogress.org/wp-content/uploads/2013/10/FreeCheckingReport.pdf

Jordi Xifra and Enric Ordeix, "Managing Reputational Risk in an Economic Downturn: The Case of Banco Santander," *Public Relations Review*, 2009, http://www.academia.edu/9577716/Managing\_reputational\_risk\_in\_an\_economic\_downturn\_The\_case\_of\_Banco\_Santander (Registration required)

Kathleen Beegle, Rajeev Dehejla, and Roberta Gatti, "Child Labor, Crop Shocks, and Credit Constraints," NBER Working Paper no. 10088, November 2003, http://www.nber.org/papers/w10088.pdf

Kathleen Burke, Jonathan Lanning, Jesse Leary, and Jialan Wang, "CFPB Data Point: Payday Lending," Consumer Financial Protection Bureau, March 2014, http://files.consumerfinance.gov/fi/201403\_cfpb\_report\_payday-lending.pdf

"KPMG Global Anti-Money Laundering Survey," KPMG LLP, 2014, http://www.kpmg.com/KY/en/issuesAndinsights/ArticlesPublications/Publishing/mages/global-anti-money-laundering-survey-v3.pdf

Emiko Todoroki, Wameek Noor, Kuntay Celik, and Anoma Kulathunga, "Making Remittances Work: balancing financial integrity and inclusion," World Bank, 29 May 2014, https://openknowledge.worldbank.org/bitstream/handie/10986/18551/884820PUB0Box300EPI2 101090May292014.pdf?sequence=1

Mark Napler, Claire Melamed, Georgia Taylor, and Thomas Jaeggi, "Promoting Women's Financial Inclusion: A Toolkit," Department for International Development, February 2013, https://www.gov.uk/government/uploads/system/uploads/attachment\_data/file/213907/promoting-womens-financial-inclusion-toolkit.pdf

Mark Pitt, and Shahidur Khandker, "The Impact of Group-Based Credit Programs on Poor Households in Bangladesh: Does the Gender of Participants Matter?" Journal of Political Economy 106, no. 5 (October 1998): 958-996, http://darp.lse.ac.uk/frankweb/courses/EC501/pittkhandker.pdf

"Needed, A Hollstic Approach to Reputation Risk Management in Banks," Finacle, 2012, https://www.academia.edu/10740644/Needed\_A\_Hollstic\_Approach\_to\_Reputation\_Risk\_Management\_in\_Banks\_Needed\_a\_hollstic\_approach\_to\_reputation\_risk\_management\_in\_banks (Registration Required)

Niketa Mukherjee, Stefano Zambon, and Hakan Lucius, "Do Banks Manage Reputational Risk? A Case Study of European Investment Banking," https://fp7.portals.mbs.ac.uk/Portals/59/docs/KNPapers2/Do\_banks\_manage\_Reputational\_Risk.pdf

N.M. Argent and F.F. Rolley, "Financial Exclusion in Rural and Remote New South Wales, Australia: A Geography of Bank Branch Rationalisation," *Australian Geographical Studies* 38, no. 2, http://onlinelibrary.wiley.com/doi/10.1111/1467-8470.00110/abstract

Paul Makin and Dick Clark, "Safer Corridor for Remittances," FSD Africa, April 2014, https://www.gov.uk/government/uploads/system/uploads/attachment\_data/file/306312/Safe-corridors-Remittance-technology-options.pdf

"O"

Try out the new beta version of our site! Yes (http://beta.worldbank.org/en/topic/financialmarketintegrity/brief/de-risking-in-the-financial-sector)

THE WORLD BANK Working for a World Free of Poverty

No Topics (/en/topic) / Financial Market integrity (/en/topic/financialmarketintegrity)

(http://www.worldbank.org/)

# De-risking in the Financial Sector

October 7, 2016

The state of the composition of the state of

Financial Sector [/en/topic/financialsector]

#### **Key Points**

De-risking practices by global financial institutions threaten to cut off access to the global financial system for remittance companies and local banks in certain regions, putting them at risk of losing access to the global financial system.

If the current trend continues, people and organizations in the more volatile areas of the world or in small countries with limited financial markets could be completely cut off from access to regulated financial services,

Keeping Individuals and businesses in regulated financial systems is a precondition for effective systems to mitigate risks and combat financial crimes. Turning away customers could actually reduce transparency in the system by forcing transactions through unregulated channels.

#### What is De-Risking?

Global financial institutions are increasingly terminating or restricting business relationships with remittance companies and smaller local banks in certain regions of the world – a practice that is called "de-risking."

We know that de-risking is happening. At the request of G20, the World Bank Group conducted two surveys on de-risking

(http://www.worldbank.org/en/topic/financialmarketintegrity/publication/world-bankgroup-surveys-probe derisking-practices) in 2015, undertaken in cooperation with the Financial Stability Board, CPMI, and the G2D Partnership for Financial Inclusion. One survey covered remittances companies (money transfer operators – MTOs) and the other examined correspondent banking relationships (CBRs).

- Both surveys found that de-risking is indeed happening in pockets around the world – but its effects are unevenly distributed, with some regions more affected than others.
- Smaller countries with limited financial markets are particularly vulnerable to derisking practices, and we are seeing evidence of this, notably in the Caribbean region.

factors driving derisking tend to be a combination of cost/benefit considerations and concerns about AML/CFT risks. That is particularly acute for clients that generate low volumes, but present significant AML/CFT risks.

#### The Risks of De-Risking

De-risking may threaten progress that has been achieved on financial inclusion (http://www.worldbank.org/en/topic/financialindusion). It also has the potential to reverse some of the progress made in reducing remittance prices and fees (http://www.worldbank.org/en/topic/paymentsystemsremittances), if banks close or restrict access for money transfer operators.

Some humanitarian organizations have also reported that they have lost access to finandal services as a result of de-risking. The inability to get humanitarian assistance to refugees from political conflicts or natural disasters could result in death from starvation, exposure, and disease.

#### RESEARCH

World Bank Group Surveys Probe "De-Risking" Practices (Jen/Lopic/financial marketintegrity/publication/w orld-bank-group-surveys-probe-deristingpractices)

#### RELATED

Financial inclusion not Exclusion: Managing De-Risking (/en/events/2016/10/07/financialinclusion-not-exclusion-managingderisking) 0x 07, 2016

#### EVENT

Stakeholder Dialogue on De-risking (/en/events/2016/05/31/stakeholderdialogue-on-de-risking) May 31, 2016

#### PRESS RELEASE

World Bank Surveys Confirm Concerns over Reduced Access to Banking Services (/en/news/press-release/2015/11/20/world-bank-surveys-confirm-concerns-over-reduced-access-to-banking-services)
Nev 20, 2015

#### MULTIMEDIA



Ven/news/video/2016/10/07/financialindusion-not-exclusion-managing-derisking)

#### MOED

Financial Inclusion not Exclusion: Managing De-Risking //en/news/video/2016/10/07/financialinclusion-not-exclusion-managing-derisking)

http://www.worldbank.org/en/topic/financialmarketintegrity/brief/de-risking-in-the-fi...

2017/01/20

Try out the new detayers for the state of th

Financial integrity and financial inclusion are complementary. Financial inclusion is a necessary precondition to effectively mitigate risks and combat financial crimes. The Financial Action Task Force recognizes financial exclusion as a risk to financial integrity.

### What's the World Bank doing?

The World Bank is launching country pilot studies to analyze the effects of de-risking on consumers and on the wider economy in order to complement to the work Financial Stability Board is doing at the global level.

We are ready to work with all developing countries on this critical issue. As part of our work on Universal Financial Access, we are currently providing technical and financial support to national authorities to mitigate risks in the financial sector without harming financial inclusion efforts.

For example, with funding provided by the UK, we are assisting with the supervision of money transfer businesses in Somalia (http://www.worldbank.org/en/news/press-release/2016/06/10/world-bank-makes-progress to-support-remittance-flows-to-somalia)to strengthen business processes and enhance transparency and compliance. Remittances in 2015 were estimated to reach a total of US\$1.4 billion in Somalia and support 23% of the GDP.

In order to ensure that policies and regulations to mitigate risks do not unnecessarily restrict access to financial services, we offer support to national authorities to pursue a wide range of priorities:

- We help them improve systems for providing and verifying customers' identity, including through digital ID systems. Our identification for Development (ID4D) (http://www.worldbank.org/en/programs/id4d) initiative is working actively on this issue.
- We help them improve their supervisory and monitoring capacity, including through digital technologies and data analysis
- We help them introduce risk-based, tiered "Know-Your-Customer" requirements.

Digital technology also offers ways to mitigate de-risking pressures, when complemented with reforms and increased supervisory capacity. The G20 High-Level Principles for Digital Finandal Inclusion include suggested actions to help avoid negative impacts on financial inclusion caused by de-risking practices. We actively support countries' implementation of these actions.

2017/01/20

# IN THE HIGH COURT OF SOUTH AFRICA (GAUTENG DIVISION, PRETORIA)

CASE NO: 80978/16

In the matter between:

**MINISTER OF FINANCE** 

**Applicant** 

and

and	
OAKBAY INVESTMENTS (PTY) LTD	First Respondent
OAKBAY RESOURCES AND ENERGY LTD	Second Respondent
SHIVA URANIUM (PTY) LTD	Third Respondent
TEGETA EXPLORATION AND RESOURCES (PTY) LTD	Fourth Respondent
JIC MINING SERVICES (PTY) LTD	Fifth Respondent
BLACKEDGE EXPLORATION (PTY) LTD	Sixth Respondent
TNA MEDIA (PTY) LTD	Seventh Respondent
THE NEW AGE	Eight Respondent
AFRICA NEWS NETWORK (PTY) LTD	Ninth Respondent
VR LASER SERVICES (PTY) LTD	Tenth Respondent
ISLANDSITE INVESTMENTS ONE HUNDRED AND EIGHTY (PTY) LTD	Eleventh Respondent
CONFIDENT CONCEPT (PTY) LTD	Twelfth Respondent
JET AIRWAYS (INDIA) LTD (INCORPORATED IN INDIA)	Thirteenth Respondent
SAHARA COMPUTERS (PTY) LTD	Fourteenth Respondent
ABSA BANK LTD	Fifteenth Respondent

FIRST NATIONAL BANK LTD

Sixteenth Respondent

STANDARD BANK OF SOUTH AFRICA

Seventeenth Respondent

LIMITED

**NEDBANK LIMITED** 

Eighteenth Respondent

**GOVERNOR OF THE SOUTH AFRICAN** 

Nineteenth Respondent

**RESERVE BANK** 

**REGISTRAR OF BANKS** 

Twentieth Respondent

DIRECTOR OF THE FINANCIAL INTELLIGENCE CENTRE

Twenty-First Respondent

### **FILING SHEET**

Document to be filed:

Fifteenth Respondent's Answering Affidavit

Dated at \_\_\_\_\_\_\_ On often

on this the 22<sup>nd</sup> day of December 2016.

FILED BY:

**EDWARD NATHAN SONNENBERGS** 

Per.

Attorneys for Fifteenth Respondent

#50 West Street

Sandton

Tel: 011 269 7600 Fax: 011 269 7899

Email: <u>dlambert@ensafrica.com</u> (Ref: M Katz/ D Lambert/0416998)

### c/o GERHARD BOTHA & PARTNERS INC.

First Floor, Erasmus Forum Building B Cnr Rigel Avenue and Stokkiesdraai Erasmusrand Pretoria

Tel: 012 347 0480 Fax: 012 347 6839

Email: <u>brendon@bothapartners.co.za</u>

(Ref: Mr B Swart/Mr H Botha)

TO:

THE REGISTRAR HIGH COURT **PRETORIA** 

AND TO: STATE ATTORNEY

Attorneys for the Applicant

SALU Building

255 Francis Baard Street

Pretoria

Tel: 012 309 1575 Fax: 012 309 1649

Email: TNhlanzi@justice.gov.za

(Ref: Ms T Nhlanzi)

AND TO: VAN DER MERWE & ASSOCIATES

Attorneys for the First, Second, Third, Fourth, Sixth, Seventh, Tenth, Eleventh,

Twelfth and Fourteenth Respondents

62 Rigel Avenue North

Waterkloof Pretoria

Tel: 012 343 5432 Fax: 012 343 5435

Email: simone@vdmass.co.za (Ref: Mr GT VD Merwe/st/078)

AND TO: NORTON ROSE FULBRIGHT SOUTH AFRICA INC.

Attorneys for Sixteenth Respondent

34 Fredman Drive

Sandton

Email: aslam.moosajee@nortonrosefulbright.com

(Ref: Mr Moosajee/FNB 13954) c/o MONTLE JOOMA SABDIA INC.

Ground Floor, Duncan Manor

Cnr Jan Shoba and Brooks Streets

Booklyn

Tel: 012 362 3137

AND TO: BOWMAN GILFILLAN Inc.

Attorneys for Seventeenth Respondent

165 West Street

Sandton

(PO Box 785812, Sandton, 2146)

Tel: 011-669-9000 Fax: 011-669-9001

E-mail: clement.mkiva@bowmanslaw.com; alan.keep@bowmanslaw.com

Ref: C Mkiva/6164672 c/o Boschoff Attorneys

Ground Floor, Hazelwood Gate Office Park

14 Oaktree Avenue

Cnr Oaktree Avenue & Dely Road

Hazelwood, Pretoria Tel: 012-424-7500 Fax: 086-228-6805 Ref: Natasha Nortje

### AND TO: BAKER MCKENZIE

Attorneys for Eighteenth Respondent

Tel: 011 911 4300

Email: Gerhard.Rudolph@bakermckenzie.com Widaad.Ebrahim@bakermckenzie.com Callum.Oconnor@bakermckenzie.com

### c/o ADAMS & ADAMS

Adams & Adams Place

Lynwood Bridge 4 Daventry Street Lynwood Manor Pretoria

Tel: 012 432 6000 (Ref: Adele Jordaan)

### AND TO: WERKSMANS ATTORNEYS

Attorneys for Nineteenth and Twentieth Respondents

155 - 5th Street

Sandton

Tel: 011 535 8000 Fax: 011 535 8600

Email: <a href="mailto:cmanaka@werksmans.com">cmanaka@werksmans.com</a>

(Ref: SOUT 3267.63) c/o MABUELA INC.

Charter House 179 Bosman Street Pretoria Central Tel: 012 325 3966

Email: mabuela@tiscali.co.za

AND TO: MACROBERT ATTORNEYS

Attorneys for Twenty First Respondent

MacRobert Building

Cnr Jan Shoba and Justice Mahomed Street, Pretoria

Tel: 012 425 3436

Email: ghay@macrobert.co.za

(Ref: G K Hay)

1378

# IN THE HIGH COURT OF SOUTH AFRICA GAUTENG DIVISION, PRETORIA

CASE NO: 80978/16

In the matter between:

AND EIGHTY (PTY) LTD

**IN INDIA** 

CONFIDENT CONCEPT (PTY) LTD

JET AIRWAYS (INDIA) LTD (INCORPORATED

MINISTER	OF FINANCE	

Applicant

	• •
and	
OAKBAY INVESTMENTS (PTY) LTD	First Respondent
OAKBAY RESOURCES AND ENERGY LTD	Second Respondent
SHIVA URANIUM (PTY) LTD	Third Respondent
TEGETA EXPLORATION AND RESOURCES	Fourth Respondent
(PTY) LTD	•
JIC MINING SERVICES (PTY) LTD	Fifth Respondent
BLACKEDGE EXPLORATION (PTY) LTD	Sixth Respondent
TNA MEDIA (PTY) LTD	Seventh Respondent
THE NEW AGE	Eight Respondent
AFRICA NEWS NETWORK (PTY) LTD	Ninth Respondent
VR LASER SERVICES (PTY) LTD	Tenth Respondent
ISLANDSITE INVESTMENTS ONE HUNDRED	Eleventh Respondent

1 Zm

Twelfth Respondent

Thirteenth Respondent

SAHARA COMPUTERS (PTY) LTD

**ABSA BANK LTD** 

FIRST NATIONAL BANK LTD

STANDARD BANK OF SOUTH AFRICA

LIMITED

**NEDBANK LIMITED** 

**GOVERNOR OF THE SOUTH AFRICAN** 

RESERVE BANK

**REGISTRAR OF BANKS** 

**DIRECTOR OF THE FINANCIAL** 

INTELLIGENCE CENTRE

Fourteenth Respondent

Fifteenth Respondent

Sixteenth Respondent

Seventeenth Respondent

Eighteenth Respondent

Nineteenth Respondent

Twentieth Respondent

Twenty-First Respondent

### FIFTEENTH RESPONDENT'S AFFIDAVIT

I, the undersigned,

### YASMIN MASITHELA

do hereby make oath and state as follows:

I am the Head of Compliance for Absa Bank Ltd ("Absa"), the fifteenth respondent, and duly appointed in terms of section 60A of the Banks Act 94 of 1990 (as amended) ("the Banks Act"), read together with Regulation 47 of the Banks Act. I am duly authorised to depose to this affidavit on behalf of Absa.



- The facts contained in this affidavit are both true and correct, and within my personal knowledge, unless the context provides otherwise. Where relevant, I refer to the confirmatory affidavits of Mr Nicholas Swingler ("Mr Swingler"), the Head of Financial Crime of Absa, and Ms Maria Ramos ("Ms Ramos"), the Chief Executive Officer of Absa, both of whom have personal knowledge of certain facts that I shall refer to herein below.
- Where I make submissions of law, I do so on the advice of my legal representatives. However, full legal argument in relation to all the issues will be addressed to the Court at the hearing of this matter.
- I will refer to the fifteenth respondent as Absa and the first to fourteenth respondents, as the Oakbay companies collectively. Absa only banked some of the Oakbay companies, namely the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 11<sup>th</sup>, 12<sup>th</sup>, and 14<sup>th</sup> respondents.

### INTRODUCTION

- This affidavit is filed in response to the founding affidavit of the applicant ("the Minister").
- It appears from the Minister's founding affidavit that representatives of the Oakbay companies repeatedly asked him to intervene on their behalf in relation to the closure of their banking accounts with the 15th to 18th respondents (collectively referred to as "the Banks").



- In response, the Minister seeks a declaration that he is not by law empowered or obliged to intervene in the relationship between banks and their clients as regards the closing of those clients' bank accounts.
- Absa is deeply concerned by the Oakbay companies' efforts to persuade the Minister to intervene. Absa contends that these were attempts to persuade the Minister to act unlawfully by intervening in private banking relationships. If the Minister had acceded to these requests, the consequences would have been significant:
  - 8.1 The Minister's conduct would have been unlawful and *ultra vires* his powers.
  - 8.2 The intervention would have greatly undermined confidence in the banking sector and raised the spectre of state intervention in private commercial relationships, arbitrarily and at the instance of a select group of companies or persons.
  - 8.3 This would have been a dangerous precedent for the banking industry as a whole, would have been contrary to the public interest and would have created real risks for the confidentiality of the relationship between banks and clients.
  - 8.4 Such intervention would also have compromised Absa's contractual relationship as a correspondent bank with its international clearing banks.
- 9 At paragraph 29 of his founding affidavit the Minister states that:



"... the grant of the declaratory orders sought is called for, in the public interest. The continued public assertions that registered banks within the regulatory environment in South Africa acted for no adequate reason, irregularly and indeed for improper reasons in closing accounts are harmful to the reputation for integrity of South Africa's financial and banking sectors. So too is the continued uncertainty arising from Oakbay's simultaneous disinclination itself to seek a court's ruling. That uncertainty is prejudicial, as stated, to financial stability and the standing of the South African regulatory authorities, the operation of the banking and financial sectors, the South African economy at large and the employees whose interests Oakbay invokes."

- Absa agrees with the Minister's position in this regard. It considers that this application and the relief sought in it is essential in order to ensure that there is certainty and clarity regarding whether public functionaries are entitled to intervene in the relationship between banks and their clients. The events set out in the Minister's affidavit, as well as in this affidavit and those of the other banks, demonstrate that this is necessary. Absa therefore endorses the Minister's initiative to place this disputed legal issue before this Court for resolution and determination.
- In the circumstances, Absa supports the relief sought by the Minister in this application. Absa contends that no member of Cabinet is empowered nor obliged by law to intervene in the relationship between the Oakbay companies and the Banks.

- 12 In this affidavit, I will begin by outlining the basis on which Absa contends that this is the correct legal position.
- Absa has also noted the complaints by the Oakbay companies to the Minister (which appear at annexures A, E, G, and L to the founding affidavit) that Absa improperly closed their accounts.
  - In light thereof, I will deal with the facts relating to the termination by Absa of its banker-client relationship with the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 11<sup>th</sup>, 12<sup>th</sup>, and 14<sup>th</sup> respondents, as well as other entities and individuals closely associated with the Oakbay companies who are not cited as respondents in the application ("related parties").
  - 13.2 I wish to highlight the fact that the Oakbay companies deliberately after taking legal advice made an election not to legally challenge the decision of Absa to close their accounts, as is evident from the correspondence (Annexure E) attached to the Minister's application. They must be held to that election.
- Lastly, I set out Absa's response to questions raised by representatives of the National Executive Committee of the African National Congress ("the NEC") and meeting requests from the so-called "Inter-Ministerial Committee" ("the IMC") relating to the termination of banker-client relationships. These questions and meeting requests were made to Absa during April and May 2016 after Absa had closed the banking accounts of the Oakbay companies and related parties.



# THE MINISTER IS NEITHER EMPOWERED NOR OBLIGED TO INTERVENE

- As I have indicated, Absa's position is that the Minister (and any other Cabinet member) is neither empowered nor obliged to intervene in the relationship between the Oakbay companies, its related parties, and the Banks.
- While full argument will be advanced on this issue at the hearing of this matter, for present purposes and by way of outline, I emphasise two points.
- 17 First, the Minister does not have any such power or duty of intervention conferred on him by law.
  - 17.1 It is trite law that the Executive may exercise no power and perform no function beyond that conferred on them by law. This is a fundamental requirement of the rule of law and the supremacy of the Constitution. It has been a well-established part of our law since the decision of the Constitutional Court in Fedsure Life Assurance Ltd & Others v Greater Johannesburg Transitional Metropolitan Council & Others 1999 (1) SA 374 (CC) at para 58.
  - 17.2 There is no provision of the Constitution, national legislation, nor any regulation, that empowers or obliges the Minister to



intervene in banker-client relationships as urged by the Oakbay companies.

- 17.3 Any attempt to intervene in banker-client relationships would therefore be *ultra vires* the Minister's powers and unlawful.
- 18 Second, any attempt by the Minister to do so would constitute an impermissible intervention in the banker-client relationship. In terms of our law and the principles laid down in *Bredenkamp and Others v*Standard Bank of SA Ltd 2010 (4) SA 468 (SCA) ("Bredenkamp judgment"):
  - 18.1 The law of contract governs the relationship between a bank and its clients.
  - 18.2 A bank is entitled to terminate its contractual relationship with any client on reasonable notice.
  - 18.3 No person is entitled to insist that its contractual relationship with a bank should endure against the bank's will.
  - 18.4 Therefore, provided that it gives reasonable notice, a bank is entitled to terminate its banking relationship with any client, and is not obliged to give reasons for its decision to do so.
- 19 There is accordingly no basis upon which the Minister could have lawfully intervened as the Oakbay companies urged him to do. There is no executive power vested in the Minister, nor a power arising from



statute, that would permit Ministerial intervention at the instance of a client to interfere with the contractual relationship subsisting between a bank and its client.

20 Lastly, I have considered the legal opinions attached to the Minister's application as Annexures C and F. I am advised by Absa's legal representatives that these opinions correctly set out the legal position. I will not repeat same herein.

# ABSA'S TERMINATION OF THE BANKER-CLIENT RELATIONSHIPS WITH THE OAKBAY COMPANIES AND RELATED PARTIES

- 21 In dealing with the above issue, I will address the following matters:
  - 21.1 Absa's obligations to implement financial crime controls to manage the risk relating to money laundering and terrorist financing and to apply customer due diligence to high risk customers including Politically Exposed Persons ("PEPs").
  - 21.2 The basis upon which Absa decided to terminate the bankerclient relationship with the Oakbay companies and related parties; and
  - 21.3 The steps/processes followed by Absa to implement its aforesaid decision.
- I do so in light of the allegations by the Oakbay companies that Absa unlawfully and improperly terminated the banker-client relationships and



their attempts to influence the Minister to intervene which appear at annexures A, E, G, and L to the Minister's application.

## Absa's obligations to conduct customer due diligence

- Absa is registered and licensed as a bank in terms of the Banks Act by the South African Reserve Bank ("SARB"). Absa is 100% owned by Barclays Africa Group Ltd ("BAGL"), and the latter is registered as the bank controlling company, which is listed on the Johannesburg Securities Exchange.
- Absa, as a registered bank, has a clear and unequivocal obligation in terms of South African law to implement sound risk management processes, procedures and controls to manage financial crime risks, including the risks relating to money laundering and terrorist financing.
- In this regard I refer to the following two primary legal instruments which contain specific requirements relevant to the duties of Absa, as it relates to this matter:
  - 25.1 Regulation 36<sup>1</sup> issued under section 90 of the Banks Act
    - 25.1.1 Regulation 36 provides that every bank shall have in place comprehensive risk management processes and procedures to prevent the bank from being used for money laundering or other unlawful activity. The SARB

<sup>&</sup>lt;sup>1</sup> Regulation 36(17)(a)(iv)

("banking regulator") is empowered to revoke the Bank's licence for failure to comply with Regulation 36.

- 25.1.2 This regulation also requires any foreign branch, subsidiary or operation of the bank to implement and apply anti-money laundering and counter terrorist financing measures consistent with the Financial Action Task Force ("FATF") recommendations, as detailed below. The FATF is an inter-governmental body established by the G20 and it is responsible for the development and promotion of international policies and standards to combat money laundering and terrorist financing.
- 25.1.3 In addition, the Basel Committee on Banking Supervision's Guidelines on Sound Management of risks relating to Money Laundering and Financing of Terrorism (2014) states that banks should have "adequate policies and processes, including strict customer due diligence (CDD) rules to promote high ethical and professional standards in the banking sector and prevent the bank from being used, intentionally or unintentionally, for criminal activities".
- 25.2 Financial Intelligence Centre Act 38 of 2001 ("the Act")
  - 25.2.1 The Act stipulates that an accountable institution must implement specific controls to combat money laundering



and terrorist financing. As a registered bank, Absa falls within the definition of an accountable institution and must comply with the provisions of Section 21 of the Act read with Regulation 21 of the FIC Regulations. The duties under Section 21 and Regulation 21 are more fully explained under Guidance Note 3A ("the Guidance Note") issued by the Financial Intelligence Centre ("FIC") in March 2013.

- 25.2.2 The Guidance Note sets out the controls or mechanisms to identify high risk customers including PEPs. I attach a copy of the Guidance Note 3A as "YM1".
- 25.2.3 It furthermore requires a bank to perform enhanced due diligence in respect of such customers. It stipulates that a bank must "develop graduated client acceptance policies and procedures that require extensive due diligence for higher risk clients".
- 25.2.4 The Guidance Note enjoins banks to apply international best practice and the FATF standards that refer to ongoing risk-sensitive programmes to maintain relevant client details. It requires that accountable institutions should apply their client identification and verification procedures to existing clients on the basis of materiality and risk.



- 25.2.5 The Guidance Note further requires that they conduct due diligence reviews of such existing relationships at appropriate times.
- 25.2.6 The Guidance Note defines a PEP and sets out the measures that need to be put in place when dealing with a PEP. The definition is very broad and includes an individual who is or has in the past been entrusted with prominent public functions as well as their families and closely associated persons. In terms of this Guidance Note, the bank must put in place appropriate risk management processes and systems to determine whether a customer, a potential customer or the beneficial owner of an entity, is a PEP, and it must then conduct enhanced due diligence on all PEPs and their close associates.
- 25.2.7 The reason the Bank is required to conduct on-going enhanced due diligence in respect of PEPs and their close associates is because of the higher money laundering risk that PEPs pose. The risks associated with PEPs are that by virtue of their position and the influence that they hold, PEPs may be misused to conceal funds or assets which have been obtained illegally through the misappropriation of public funds or as a result of the PEP's power and influence.

- 25.3 A failure by Absa to adhere to its obligations to implement adequate financial crime controls would expose it to regulatory sanctions by the regulator. In this regard, Absa has to date incurred two administrative fines from the SARB totalling R20 million, coupled with directives from the SARB that Absa take remedial action by enhancing and strengthening its financial crime controls.
- 25.4 Absa thus continues to expend extensive resources in the form of people, processes and systems to manage financial crime controls in accordance with international and local best practice.
- In addition to these obligations which it bears as a South African bank,
  Absa bears further obligations by virtue of the fact that BAGL is majority
  owned by Barclays Bank PLC ("Barclays PLC"). In this regard, BAGL
  and all of its subsidiaries, including Absa, are subject to and bound by
  the UK and US regulatory requirements and the Barclays Group Policies
  relating to Anti-Money Laundering and Counter Financing of Terrorism.
  These policies are based on international standards and best practices.
  - In terms of the UK regulatory requirements, notably Regulation
    15 of the UK Money Laundering Regulations 2007 and standard
    SYSC 6.1.1R contained in the UK Financial Conduct Authority
    Handbook, Barclays PLC exercises oversight and governance
    over the Absa Financial Crime Risk Management Programme. I
    attach the relevant extracts of the regulations and standards as
    "YM2" and "YM3".

14

- Absa is therefore subject to the jurisdiction of foreign regulators including, but not limited to, the Financial Conduct Authority, the Prudential Regulatory Authority (in the United Kingdom), the Department of Justice, the Federal Reserve, and the Department of Financial Services (in the United States of America).
- 26.3 Accordingly, Absa must follow and apply the Barclays Global AML policy and standards to ensure that it applies adequate financial crime controls; in particular, as it relates to customer due diligence.
- A failure by Absa to adhere to the customer due diligence requirements and to implement adequate financial crime controls would expose both Absa and its holding company, Barclays PLC, to regulatory sanctions by international regulators.
- The Barclays Global AML policy and standards states that a high risk customer including a PEP is required to undergo enhanced due diligence at customer on-boarding as well as <a href="mailto:annually">annually</a>. I attach a statement released by Barclays PLC on Anti-Money Laundering and Counter-Terrorist Financing as annexure "YM4".
- 27 To ensure compliance with the abovementioned international and South African legal obligations, Absa's risk management procedures take into account the risk level of its customers to money laundering activities and apply enhanced due diligence procedures in respect of all PEPs. Accordingly, Absa has a policy of conducting annual reviews of all of its



high risk customers including its PEPs. This applies to, but is not limited to, a number of the individuals and entities associated with the Oakbay companies.

# Absa's 2014 annual PEP customer review / due diligence

- Pursuant to the above domestic and international legal and policy requirements, on 18 November 2014 an internal committee of Absa's Corporate and Investment Banking Division ("CIB") met to conduct an annual review of its customers who had been identified as PEPs and their related entities. The reviews included, amongst others, a review of the Oakbay companies.
- 29 The PEP committee's review of the Oakbay companies and related parties established that:
  - 29.1 The Oakbay companies were not using Absa as a primary or dual bank and were apparently moving their banking business to alternative financial institutions. As a consequence, Absa was limited in its ability to appropriately monitor and understand the customers' risk profiles in order to discharge its abovementioned obligations effectively.
  - 29.2 There was also evidence of large unexplained transfers of funds between the Oakbay companies and related parties, and to other banks. As already indicated, Absa could not account for these transfers in accordance with its above-mentioned obligations.



- 29.3 Moreover, the revenue received by Absa from the portfolio of the Oakbay companies' accounts had declined materially over the previous three years. The costs to Absa of fulfilling its monitoring obligations in respect of these accounts would accordingly be significant relative to the revenue that Absa would derive from the accounts concerned.
- 29.4 There was also adverse media publicity regarding the Oakbay companies and related persons that had occurred prior to the review. This increased the reputational and conduct risk for Absa arising from a continued relationship with these companies and persons.
- In the circumstances, and after having assessed the risks and rewards involved, it was determined by the PEP review committee that continuing to provide banking services to the Oakbay companies and related parties exceeded Absa's current and forward-looking risk appetite.
- Accordingly, on 18 November 2014, the committee decided to terminate its banker-client relationship with the Oakbay companies and related parties. The steps followed to close the accounts are set out more fully below.
- 32 I emphasise that the recent case of *Hlongwane and Others v ABSA*Bank Limited and Another (75782/13) [ZAGPPHC] 928 ("Hlongwane judgment") confirmed that the legal position in this regard is as follows:



"[30] ... [Absa] had no obligation to retain a client whose monitoring in terms of money laundering measures put in place would be more onerous when compared with the benefit, in terms of fees, it would receive from the applicants. I am of the view that [Absa's] bona fides in deciding to close the applicants' accounts cannot be questioned. In the Bredenkamp matter (supra) where the court was faced with facts similar to the facts in this case, the court held that...

[65] The appellants' response was that, objectively speaking, the Bank's fears about its reputation and business risks were unjustified. I do not believe it is for this court to assess whether or not a bona fide business decision, which is on the face of it reasonable and rational, was objectively 'wrong' where in the circumstances no public policy considerations are involved."

Absa's termination of the banker-client relationship was consistent with these principles and its legal obligations.

The process of closing the accounts of the Oakbay companies and the related parties

34 After the decision to terminate the banker-client relationships was taken,
Absa embarked on the necessary steps to ensure that the various



relationships were terminated in an orderly fashion without introducing any further risks. This included taking the following steps:

- 34.1 Absa coordinated its efforts across the various divisions within Absa and in the wider BAGL group.
- 34.2 Absa ensured that appropriate legal processes were applied including additional legal scrutiny of all the relevant Oakbay companies and related parties' contracts with considerations of the relevant notice periods.
- 34.3 Absa understood that it was entitled to terminate the relationship, provided reasonable notice was provided. Although a period of 30 days' notice would have been reasonable, Absa decided to provide for at least 60 days' notice to the Oakbay companies.
- 34.4 Absa then prepared the relevant notices to inform the Oakbay companies of the decision to terminate and engaged with the Oakbay companies to the extent set out below.
- On 18 December 2015, at a meeting with the authorised representatives of the Oakbay companies, Absa gave formal notice of its decision to terminate the banker-client relationship. I attach an example of the termination letters as "YM5".
- During this meeting the Oakbay companies, through their authorised representatives, expressed no objection to the closure of the accounts at the time or any questions regarding the notice period. The



representatives advised that the Oakbay companies had already made a decision to move their banking business to another financial institution.

- After the meeting, however, some of the Oakbay Companies, addressed letters to Absa recording that the directors of those companies were "taken aback" by Absa's sudden decision to close the accounts and asking for the rationale for the decision. I attach the letters dated 21 December 2015 as "YM6" and "YM7".
- On 23 December 2015, Absa responded to this correspondence. I attach an example of such a response as "YM8".
- On 29 December 2015, a further letter was addressed to the Chief Executive Officer of Absa recording dissatisfaction with the reasons given by Absa for closure. I attach the letter as "YM9".
- On 29 January 2016, Absa responded to this correspondence. I attach an example of such a response as "YM10".
- During the first week of February 2016, nine of the Oakbay companies wrote to Absa asking that their accounts be closed "with immediate effect". Copies of the letters are attached as "YM11.1" to "YM11.9".
- The accounts were formally closed by 16 February 2016. A copy of an example of a letter reflecting such closure is attached as "YM12".



- Thereafter, on 14 April 2016, the Oakbay companies requested an urgent meeting to discuss Absa's decision to terminate their banking services. I attach a copy of this letter as "YM13".
- On 25 April 2016, Absa replied to indicate that it did not consider that a meeting would be of assistance to either party and therefore politely declined the request. I attach a copy of this letter as "YM14".
- In relation to the 2014 PEP review, and the processes followed thereafter to terminate the banker-client relationships and close the relevant Oakbay accounts, I attached hereto a confirmatory affidavit by Mr Swingler who was personally involved in this process as annexure "YM15".

# ABSA'S RESPONSE TO QUESTIONS RAISED BY THE NEC AND THE MEETING REQUESTS OF THE IMC

- 46 Between April and May 2016, after the closure of the Oakbay companies and related party accounts, Absa received requests for meetings and information from both the NEC and the IMC respectively.
- It is appropriate to set out Absa's response to these requests as they demonstrate that Absa has been steadfast in its commitment to preserving the confidentiality of its clients and to avoiding any suggestion of unlawful executive intervention in the banker-client relationship.

## The ANC NEC meeting

- 48 On 20 April 2016, and at the request of the NEC, a meeting was held between representatives of Absa and representatives of the NEC at Albert Luthuli House.
  - 48.1 The Absa team was led by its Chief Executive Officer, Ms Ramos, and I was part of the delegation. A confirmatory affidavit by Ms Ramos is attached hereto marked annexure "YM16".
  - 48.2 The NEC delegation was led by Mr Gwede Mantashe and included Mr Enoch Godongwana, Ms Jessie Duarte, and Mr Krish Naidoo, amongst others.
- 49 Absa's understanding was that the stated purpose of the meeting was to discuss whether the NEC's investigation into state capture had triggered any account closures by Absa.
  - 49.1 At the commencement of the meeting, Ms Ramos emphasised that Absa was legally precluded from discussing any past, present or future clients' confidential information and as such would not discuss any specific clients.
  - 49.2 During the meeting, the NEC confirmed that the purpose for the meeting was not to discuss client or customer details but get an understanding of the following issues:
    - 49.2.1 The *Bredenkamp* judgment and the consistency of the application of the principles of the judgment;



- 49.2.2 The effects of the account closures on other companies and businesses; and
- 49.2.3 To get an understanding of the regulatory framework that governs the banker-client relationship.
- During the meeting, I provided the NEC with a summary of the regulatory context in which Absa operates and the legal and policy framework within which banker-client relationships are managed, including the concept of PEPs.
- The NEC then raised the issue of alleged collusion amongst the Banks to close the Oakbay companies and related parties accounts. Absa was categorical that it does not interact with other banks in relation to client matters and that it follows its own policies, procedures and the laws that apply to it. Absa invited the NEC to raise any concerns that it may have in this regard with the relevant regulators including the Banking Regulator.

# The IMC meeting requests

On 22 April 2016, the office of Ms Ramos, the Chief Executive Officer of Absa, received an email request from Ms Zarina Kellerman ("Ms Kellerman"), who purported to be the Acting Secretary to the IMC, inviting Absa to attend a meeting scheduled for 25 April 2016.



- The email explained that an IMC had been formed by Cabinet to consider "certain allegations made against certain financial institutions."

  Absa was requested to make a representative available to attend a discussion with the said IMC. It was stated that there was no set agenda for this meeting and that this would be a discussion convened for the purposes of gaining clarity on current media reports ("the first request"). I attach the e-mail request from the Acting Secretary to the IMC sent to Absa as "YM17".
- Absa requested further information relating to the nature of the meeting to be held and notified the IMC of its legal and regulatory obligations which precludes it from discussing any client confidential information. I attach Absa's response to the e-mail as "YM18".
- Ms Kellerman's response did not address the questions raised by Absa in its email. Instead, she conveyed that the "information shared during the discussion must of course be relayed to Cabinet for it to properly consider the media reports. Outside of that forum, all such information remains strictly confidential". I attach the response as "YM19".
- Absa did not consider that its questions were adequately answered, particularly its concerns around possible discussions relating to client confidential information. Absa therefore declined the invitation to meet with the IMC on this basis. Absa further reaffirmed, that as a regulated bank and responsible financial institution, Absa would cooperate with the appropriate authorities to discuss any matters which Absa is permitted



by law to discuss. I attach Absa's response recording its position as "YM20".

- Shortly thereafter, on 4 May 2016, a further invitation was extended by Ms Kellerman to Absa to attend a meeting with the IMC ("the second request"). This meeting was to be held on 5 May 2016. The stated purpose of the second request was inter alia to discuss public comments purportedly made by Absa around the decision taken by the banks to close the bank accounts of certain of its clients. The second request suggested that the meeting would discuss the deterrent effect that the closure of client bank accounts may have on potential investors who want to do business in South Africa. I attach the second request as "YM21".
- On behalf of Absa, I sent an email to Ms Kellerman declining the request and reaffirmed Absa's position by clarifying, amongst others, that:
  - The only public comment made by Absa was to the effect that it could not comment on client confidential issues and that as a regulated financial institution it would be inappropriate to discuss matters relating to prospective, current and past client information.
  - Absa is regulated by the SARB and its legal obligations arise from various pieces of legislation including, but not limited to, the Banks Act, the Prevention of Organised Crime Act, the Financial Intelligence Centre Act, the Protection of Constitutional



Democracy Against Terrorist and Related Activities Act, the Exchange Control regulations. Absa also has reporting obligations to the South African Revenue Services.

- 58.3 Absa was willing to cooperate with the appropriate authorities where necessary.
- 59 I attach Absa's response to the second request as "YM22".
- It is therefore clear that Absa has remained steadfast in its commitment to preserving the confidentiality of its clients and to avoiding any suggestion of unlawful executive intervention in the banker-client relationship.

## CONCLUSION

- In the circumstances, Absa supports the relief sought by the Minister in this application.
- As is set out above, Absa considers that it is essential that this Court make clear that no public functionary has the power or obligation to intervene in the relationship between banks and their clients.

**DEPONENT** 

DW

I hereby certify that the deponent knows and understands the contents of this affidavit and that it is to the best of the deponent's knowledge both true and correct. This affidavit was signed and sworn to before me at **SANDTON** on this the day of December 2016, and that the Regulations contained in Government Notice R.1258 of 21 July 1972, as amended by R1648 of 19 August 1977, and as further amended by R1428 of 11 July 1989, having been complied with.

Zamathiyane Mthiyane 155 - 5th Street Sandown, Sandton, 2196

Commissioner of Oaths
Ex-Officio / Practising Attorney R.S.A.

COMMISSIONER OF OATHS

Full names:

Address:

Capacity:





# Financial Intelligence Centre Guidance Note 3A Guidance for accountable institutions on client identification and verification and related matters

### **PREFACE**

Money laundering has been criminalised in section 4 of the Prevention of Organised Crime Act, 1998. A money laundering offence may be described as the performing of any act that may result in concealing the nature of the proceeds of crime or of enabling a person to avoid prosecution or in the diminishing of the proceeds of crime.

Apart from criminalising the activities constituting money laundering, South African law also contains a number of control measures aimed at facilitating the detection and investigation of money laundering. These control measures, as contained in the Financial Intelligence Centre Act, 2001 (the "FIC Act"), are based on three basic principles of money laundering detection and investigation, i.e. that:

- intermediaries in the financial system must know with whom they are doing business;
- the paper trail of transactions through the financial system must be preserved;
- possible money laundering transactions must be brought to the attention of investigating authorities.

The control measures introduced by the FIC Act include requirements for institutions to establish and verify the identities of their clients, to keep certain records, to report certain information and to implement measures that will assist them in complying with the FIC Act.





2

# FIC Guidance Note 3A for accountable institutions on customer identification and verification and related matters

The majority of obligations under the FIC Act apply to "accountable institutions". These are institutions that fall within any one of the categories of institutions listed in Schedule 1 to the FIC Act.

The FIC Act also established the Financial Intelligence Centre ("the Centre") as the agency responsible for the collection, analysis and disclosure of information to assist in the detection, prevention and deterrence of money laundering in South Africa. In addition, section 4(c) of the FIC Act empowers the Centre to provide guidance in relation to a number of matters concerning compliance with the obligations of the FIC Act.

### Application of this Guidance Note

This Guidance Note applies to the all accountable institutions that are referred to in Schedule 1 to the FIC Act.

The guidance provided in this Guidance Note is provided as general information only. The Guidance Note does not provide legal advice and is not intended to replace the FIC Act or the Money Laundering Control Regulations ("the Regulations") issued under the FIC Act in December 2002.

The Guidance Note is published by the Centre under section 4(c) of the FIC Act to assist accountable institutions and the relevant supervisory bodies with the practical application of certain client identification and client verification requirements of the FIC Act. Some of the terminology used in this Guidance Note is explained in a glossary attached as an addendum to the Guidance Note.

Guidance provided by the Centre is the only form of guidance formally recognised in terms of the FIC Act and the Regulations issued under the FIC Act. Guidance provided by the Centre is authoritative in nature. An accountable institution must apply guidance issued by the Centre, or demonstrate an equivalent level of compliance with the relevant obligations under the FIC Act. It is important to note that enforcement action may





3

emanate as a result of non-compliance with the FIC Act where an accountable institute does not follow guidance issued by the Centre and cannot demonstrate compliance with the legal obligation to which the guidance relates.

Guidance emanating from industry associations or other organisations, therefore, in the Centre's view, does not have a bearing on compliance with the obligations imposed by the FIC Act or interpretation of its provisions.

# ANTI-MONEY LAUNDERING AND TERRORIST FINANCING POLICIES AND PROCEDURES

 Board/senior management approval of an accountable institution's anti-money laundering and terrorist financing policies and procedures

Board of directors'/senior management's approval of an accountable institution's own internal policies and procedures to address money laundering and terrorist financing is critical if an accountable institution wishes to be considered serious about its appreciation of, and willingness to, mitigate money laundering and terrorist-financing risks in its daily operations.

The Centre therefore expects that the internal anti-money laundering and terrorist financing policies and procedures of an accountable institution should be adopted and approved by the board of directors of that accountable institution.

This will also ensure that the board/senior management of a particular accountable institution takes ownership of its obligations in terms of the FIC Act. The criminal and administrative penalties for failure to comply with the obligations of the FIC Act are severe, and directors/senior management may be held personally liable.



# FIC Guidance Note 3A for accountable institutions on customer identification and verification and related matters

Implementation of Guidance Note 1 in respect of a risk-based approach

Although the FIC Act and the Regulations do not expressly make reference to a risk-based approach, these measures allow limited scope to apply a risk-based approach to the verification of certain client particulars. This issue is covered in Guidance Note 1 issued by the Centre in April 2004.

Guidance Note 1 indicates that application of a risk-based approach to the verification of the relevant particulars implies that an accountable institution can accurately assess the risk involved. It also implies that an accountable institution can take an informed decision on the basis of its risk assessment as to the appropriate methods and levels of verification that should be applied in a given circumstance.

Guidance Note 1 further states that the assessment of these risk factors should best be done by means of a systematic approach to determine different risk classes and to identify criteria to characterise clients and products. In order to achieve this, an accountable institution would need to document and make use of a risk framework. Such a risk framework should preferably form part of the accountable institution's internal policies and procedures to address money laundering and terrorist financing referred to in paragraph 1, above.

### Risk Indicators

3. Risk indicators to be used to differentiate between clients
The FIC Act and the Regulations require that accountable institutions
identify all clients with whom they do business unless an exemption
applies in a given circumstance. Accountable institutions, however, are
not required to follow a "one size fits all" approach in the methods that



FIC Guidance Note 3A for accountable institutions on customer identification and verification and related matters

5

they use and the levels of verification that they apply to all relevant clients.

It is imperative that the money laundering risk in any given circumstance be determined on a holistic basis. In other words, the ultimate risk rating accorded to a particular business relationship or transaction must be a function of all factors that may be relevant to the combination of a particular client profile, product type and transaction.

A combination of the following factors may be applied to differentiate between high risk, medium risk and low risk clients:

- product type;
- business activity;
- client attributes, for example, whether the client is on the United Nations list, duration of client relationship with the accountable institution, etc;
- source of funds;
- jurisdiction of client;
- transaction value;
- type of entity.

This is not an exhaustive list. Please refer to Guidance Note 1 for further particulars on the implementation of a risk-based approach.

- 4. Client-profiling procedures for high-risk clients In terms of Regulation 21 of the Regulations, an accountable institution must obtain certain additional information whenever this information may reasonably be required to identify:
  - a business relationship or single transaction that poses a particularly high risk of facilitating money laundering activities; or
  - the proceeds of unlawful activity or money laundering activities.



6

FIC Guidance Note 3A for accountable institutions on customer identification and verification and related matters

In most instances it is a combination of factors, not any one factor that will lead to a conclusion that a transaction or relationship poses a money laundering risk. All circumstances surrounding a business relationship or transaction should be reviewed.

The risk factors referred to in paragraph 3, above, may be helpful to accountable institutions in assessing when additional information may be required in order to enhance the institution's profile of a particular client. In addition there are a number of further factors that may indicate that a business relationship or single transaction poses a high risk of facilitating money laundering activities, or the presence of the proceeds of unlawful activity. The following examples of such activities are applicable to the banking sector but can also be useful for non-banking institutions:

- a client appears to have accounts with several banks in one geographical area;
- a client makes cash deposits to a general account of a foreign correspondent bank;
- a client wishes to have credit and debit cards sent to destinations other than his or her address;
- a client has numerous accounts and makes or receives cash deposits in each of them amounting to a large aggregated amount;
- a client frequently exchanges currencies;
- a client wishes to have unusual access to safe deposit facilities;
- a client's accounts show virtually no normal business related activities, but are used to receive or disburse large sums;
- a client has accounts that have a large volume of deposits in bank cheques, postal orders or electronic funds transfers;
- a client is reluctant to provide complete information regarding the client's activities;



FIC Guidance Note 3A for accountable institutions on customer identification and verification and related matters

- 7
- a client's financial statements differ noticeably from those of similar businesses:
- a business client's representatives avoid contact with the branch;
- a client's deposits to, or withdrawals from, a corporate account are primarily in cash, rather than in the form of debit and credit normally associated with commercial operations;
- a client maintains a number of trustee accounts or client subaccounts;
- a client makes a large volume of seemingly unrelated deposits to several accounts and frequently transfers a major portion of the balances to a single account at the same bank or elsewhere.
- a client makes a large volume of cash deposits from a business that is not normally cash intensive;
- a small business in one location makes deposits on the same day at different branches;
- there is a remarkable transaction volume and a significant change in a client's account balance;
- a client's accounts show substantial increase in deposits of cash or negotiable instruments by a company offering professional advisory services;
- a client's accounts show a sudden and inconsistent change in transactions or patterns.

The examples referred to above may be legitimate features of certain categories of businesses, or may make business sense if viewed in the context of the client's business activities. However, it is equally possible that these features would be unexpected in relation to certain categories of businesses, or would have no apparent business purpose, given a particular client's business activities. The purpose of obtaining additional information concerning certain clients in these circumstances is to assist the accountable institution to more



8

accurately identify truly suspicious behavior or relationships and transactions that pose a risk of money laundering, on the basis of a broader profile of the client than the mere client identification particulars.

The information that an accountable institution must obtain in such circumstances must be adequate to reasonably enable the accountable institution to determine whether transactions involving a client are consistent with the accountable institution's knowledge of that client and that client's business activities and must include particulars concerning:

- the source of that client's income; and
- the source of the funds that the particular client expects to use in concluding the single transaction or transactions in the course of the business relationship.

#### 5. Client acceptance policies

Accountable institutions should develop clear customer acceptance policies and procedures, including a description of the type of customer that is likely to pose a higher than average risk to an accountable institution. In preparing such policies, accountable institutions should take into account all risk indicators, including factors such as the customer's:

- background;
- country of origin;
- public or high-profile position;
- linked accounts; and
- business activities.

Accountable institutions should develop graduated client acceptance policies and procedures that require extensive due diligence for higher risk clients. These policies and procedures should form part of an



9

accountable institution's risk framework, referred to in paragraph 2 above.

# ESTABLISHING AND VERIFYING IDENTITIES NATURAL PERSONS – SOUTH AFRICAN CITIZENS AND RESIDENTS

6. Clarification of an official identity document

The Regulations define an identification document in respect of a natural person who is a citizen of, or resident in, the Republic of South Africa, as an official identity document. The Department of Home Affairs describes an official identity document as a green bar-coded identity document. Therefore, old identity documents may not be construed as official identity documents.

Regulation 4 of the Regulations, however, provides for exceptional cases in which a person is unable to produce an official identity document. In such instances, the accountable institution must be satisfied that the client has an acceptable reason for being unable to produce an official identity document. This reason should be noted in the records of the accountable institution. The note should also reflect the details of the staff member who recorded the information. The accountable institution may then accept an alternative document, which contains the person's:

- photograph;
- full names or initials and surname:
- date of birth; and
- identity number.

It is good business practice for the staff member to also include the date on the note. The purpose of dating documents in this instance is an indication that the verification of the client was done at the take on stage of the relationship.



10

The following are examples of documents that may be accepted in such exceptional circumstances as an alternative form of verification:

- South African driver's licence: or
- South African passport.

Decisions concerning the reasons for being unable to produce an official identity document, which may be accepted by an accountable institution, and the documents that may be regarded as acceptable alternatives, should be based on an accountable institution's risk framework referred to in paragraph 2 above.

The Regulations furthermore define an identification document in respect of a natural person who is not a citizen of the Republic and not resident in the Republic as a passport issued by the country of which that person is a citizen.

7. Clarification of whether the address slip found in identity documents issued by the Department of Home Affairs provides adequate proof of verification of residential address

Regulation 4(3) of the Regulations requires that an accountable institution use "information which can reasonably be expected to achieve" verification of an address. It is the view of the Centre that the address slips issued by the Department of Home Affairs do not constitute information that can reasonably be expected to achieve verification of a person's current address. The Centre does not regard these address slips as independent source documents. In addition, the information contained in an address slip may be outdated and, therefore, may not reflect current information.



11

8. Alternate means of verification if identity document has been lost or stolen

This issue is addressed under paragraph 6 above.

 Acceptable client identification and verification procedures for non face-to-face verification

Regulation 4 of the Regulations concerning the verification of a person's identity is based on a view that the customer is met face-to-face when his or her particulars are obtained.

Regulation 18 of the Regulations provides for instances in which client information is obtained in a non face-to-face situation. In such cases, accountable institutions "must take reasonable steps" to confirm the existence of the client and to verify the identity of the natural person involved.

Additional guidance may be taken from the Core Principles. These indicate that accountable institutions should apply equally effective client identification procedures and ongoing monitoring standards for non face-to-face clients. In accepting business from non face-to-face clients:

- accountable institutions should apply client identification procedures to non face-to-face customers that are as effective as those that were applied to customers who were available for interview; and
- there must be specific and adequate measures to mitigate the higher risk.

According to the Core Principles, examples of measures to mitigate risk include:

certification of documents presented;

24

- 12
- requisition of additional documents to complement those that are required for face-to-face customers;
- independent contact with customer by the accountable institution;
- third party introduction.

Decisions concerning the additional steps to be taken in cases of a non face-to-face situation should be based on an accountable institution's risk framework, referred to in paragraph 2 above.

Practical examples that accountable institutions should consider including in their internal rules on the measures to mitigate risk in respect of non-face-to-face clients are:

- obtaining copies of documents that have been certified by a suitable certifier. Consideration should be given as to whether the certifying person is regulated or is otherwise a professional person subject to some sort of regulation or fit and proper person test who can easily be contacted to verify their certification of the documents;
- requiring the first payment for the product or service to be drawn from an accountable institution account in the client's name;
- sending a letter by registered post to validate the address of the client and ensuring that the service is not activated until the signed acknowledgement of receipt is returned;
- making a telephone call to the telephone number provided that has been independently validated;
- using electronic verification to confirm documents provided or using two or three documents from different sources to confirm the information set out in each document.

The above list is not exhaustive and is intended as a guide for accountable institutions when developing internal rules in respect of non face-to face clients.



13

10. Status of "faxed, scanned and e-mailed copies"

Faxed, scanned and e-mailed copies of documents may be relevant in instances when client information is obtained in a non face-to-face situation. In such cases, the principles discussed in paragraph 9 above would apply. This implies that documents that are certified as true copies of originals may be accepted, but an accountable institution would have to take additional steps to confirm that the said documents are in fact those of the client in question. In such cases mere reliance on a faxed, scanned or e-mailed document for verification, in the absence of other steps to confirm the client's particulars, is not an acceptable form of verification.

In cases when client information is received in a face-to-face situation, the relevant documents will be sighted as part of the verification process. If copies of those documents are not made at that stage for record keeping purposes, they may be faxed, scanned or e-mailed to the accountable institution in question within a reasonable time thereafter. The accountable institution should then record that the originals or certified copies of the documents, as the case may be, were sighted as part of the verification process.

The accountable institution must ensure that the copies of documents received electronically are in a format that is not susceptible to tampering or manipulation.

Client identification and verification must be done at the outset of the business relationship or single transaction. It is good business practice to date documents relating to the verification of a client. This is an indicator that the account opening and verification of the client was done simultaneously.



14

# FIC Guidance Note 3A for accountable institutions on customer identification and verification and related matters

 Examples of acceptable documentation to verify residential address of natural person

Regulation 4(3) of the Regulations sets out instances in which the residential address of a natural person needs to be verified. The most secure form of verification of a residential address would be achieved if a staff member and/or agent of the accountable institution were to visit the residential address of such a natural person to confirm that the person resides at the particular residential address.

In most instances, however, it would be sufficient to review the original document and to obtain a copy of a document that offers a reasonable confirmation of the information in question. Since the documentation must be current, a good practice would be to require documentation that is less than three months old.

It has come to the Centre's attention that accountable institutions are applying a restrictive approach in terms of the types of documentation it accepts to verify the residential address of a client. As a result this restrictive approach is frustrating the verification process for clients of accountable institutions.

Below are examples of documents that may, depending on the circumstances, offer confirmation of a residential address. This list is not exhaustive, and other forms of documentation may be used in the verification process. Decisions as to how residential addresses are to be verified should be based on an accountable institution's risk framework, referred to in paragraph 2 above.



15

Documents that may offer confirmation of residential address include the following:

- a utility bill reflecting the name and residential address of the person;
- a bank statement from another bank reflecting the name and residential address of the person if the person previously transacted with a bank registered in terms of the Banks Act;
- a recent lease or rental agreement reflecting the name and residential address of the person;
- municipal rates and taxes invoice reflecting the name and residential address of the person;
- mortgage statement from another institution reflecting the name and residential address of the person;
- telephone or cellular account reflecting the name and residential address of the person;
- valid television licence reflecting the name and residential address of the person;
- recent long-term or short-term insurance policy document issued by an insurance company and reflecting the name and residential address of the person;
- recent motor vehicle license documentation reflecting the name and residential address of the person; or
- a statement of account issued by a retail store that reflects the residential address of the person.

When a recent utility bill from a telephone or cellular account, Eskom or a local authority does not identify the physical street address of the property owner (that is, if the bill is sent to a postal address), the utility bill will still be acceptable provided the client's name and the erf/stand and township details are reflected on the utility bill. The client's physical



16

address, erf number and township should be recorded, and the township cross-referenced to the suburb in which the customer resides.

If thereafter there remains any doubt about the client or the physical address of the client, the erf/stand and township details should be verified by reference to the Deeds Office.

If none of the above is available accountable institutions may explore other means to verify a client's address such as an affidavit containing the following particulars from a person co-habiting with the client or an employer of the client:

- name, residential address, identity number of the client and the deponent of the affidavit;
- relationship between the client and the deponent of the affidavit;
   and
- confirmation of the client's residential address.
- 12. Acceptable documents for third party verification In terms of section 21 of the FIC Act, if a client is acting on behalf of another person, the accountable institution needs to establish and verify the identity of that other person and the client's authority to establish the business relationship or conclude the single transaction on behalf of that other person.

In terms of Regulation 17 of the Regulations, the accountable institution must obtain from the person acting on behalf of another person information that provides proof of that person's authority to act on behalf of that other natural person, legal person or trust.



17

An accountable institution must verify the information obtained by:

- comparing the particulars of the natural or legal person, partnership or trust with information obtained by the accountable institution from, or in respect of, the natural or legal person, partnership or trust in accordance with Regulation 4 (Verification of information concerning South African citizens and residents), Regulation 6 (Verification of information concerning foreign nationals), Regulation 8 (Verification of information concerning close corporations and South African companies), Regulation 10 (Verification of information concerning foreign companies), Regulation 12 (Verification of information concerning other legal persons), Regulation 14 (Verification of information concerning partnerships) or Regulation 16 (Verification of information concerning trusts) of the Regulations, as may be applicable; and establishing whether that information, on the face of it, provides
- The following are examples of documents that may be accepted to confirm the authority of a person to act on behalf of another person and to confirm the particulars of the person authorising the third party to
- power of attorney;

establish the relationship:

- mandate;
- resolution duly executed by authorised signatories; or

proof of the necessary authorisation.

 a court order authorising the third party to conduct business on behalf of another person.

#### 13. Legal incapacity

Regulation 3(2) of the Regulations provides for instances in which a natural person needs to be assisted by another person owing to his/her



18

legal incapacity. Regulation 4 of the Regulations also applies to the verification of the particulars referred to in Regulation 3(2) of the Regulations, namely, the name, date of birth, identity number and residential address of the person assisting the person without legal capacity.

## 14. Ongoing client detail maintenance

Regulation 19 of the Regulations states that an accountable institution must take reasonable steps, concerning the verification of client identities that may apply to that accountable institution in respect of an existing business relationship so as to maintain the correctness of particulars that are susceptible to change.

Decisions concerning the method by means of which such maintenance is to be achieved should be based on an accountable institution's risk framework, referred to in paragraph 2 above. Some guidance may be taken from international best practice and FATF standards that refer to on going risk-sensitive programmes to maintain relevant client details.

The following procedure for ongoing maintenance of client information may be considered:

- accountable institutions should apply their client identification and verification procedures to existing clients on the basis of materiality and risk, and should conduct due diligence reviews of such existing relationships at appropriate times;
- accountable institutions need to undertake regular reviews of their existing client records. An appropriate time to do so is when a transaction of significance takes place; or when there is a material change in the way the account is operated; and
- if an accountable institution becomes aware at any time that it lacks sufficient information about an existing client, it should



19

take steps to ensure that all relevant client identification and verification information is obtained as quickly as possible.

#### NATURAL PERSONS - FOREIGN NATIONALS

15. Identification and verification

Regulation 6(3) of the Regulations provides for instances in which an accountable institution deems it reasonably necessary to obtain, in addition to a person's identity document (foreign passport), further information or documentation verifying the identity of such a person.

In instances when an accountable institution requires further confirmation of the identity of a foreign national, the accountable institution may obtain such confirmation:

 a letter of confirmation from a person in authority (for example, from the relevant embassy) which confirms authenticity of that person's identity document (passport).

Decisions concerning when further confirmation of the identity of a foreign national may be required and the nature of such information should be based on an accountable institution's risk framework, referred to in paragraph 2 above.

#### LEGAL ENTITIES

16. Identification and verification of subsidiaries of listed companies Exemption 6(1) of the Exemptions, applies to companies that are listed on a stock exchange mentioned in the Schedule to the Exemptions. This Exemption does not apply to subsidiaries, whether wholly owned or not, of listed companies.



20

17. Identification and verification of pension and provident funds As a general rule, an accountable institution has to establish and verify the identity of a pension and a provident fund. A pension and a provident fund will fall into the category of "other legal person" (Regulation 11 of the Regulations).

The accountable institution must obtain from the natural person acting or purporting to act on behalf of the pension or provident fund:

- the name of the pension or provident fund;
- the address of the legal entity establishing the fund;
- the full names, date of birth and identity number or passport number of the trustees or any other persons appointed to act on behalf of the pension and provident fund or who purports to establish a business relationship or to enter into a transaction with the accountable institution on behalf of the pension and provident fund; and
- the residential address of the trustees or any other persons appointed to act on behalf of the pension and provident fund or who purports to establish a business relationship or to enter into a transaction with the accountable institution on behalf of the pension and provident fund.
- 18. Identification and verification of "off the shelf" companies Accountable institutions should identify and verify the information pertaining to "off the shelf" companies in the same way they would identify and verify any other company.

24

#### **PARTNERSHIPS**

19. The definition of a partnership

A partnership is a form of business enterprise. A partnership exists when there is a voluntary association of two or more persons engaged together for the purpose of doing lawful business as a partnership, for profit. Partnerships are assumed to exist when the partners actually share profits and losses proportionately, even though there may not be a written partnership agreement signed between the partners.

A partnership is not a legal entity and cannot conduct transactions in its own name. When a person conducts a transaction on behalf of a partnership, the transaction is conducted on behalf of all partners in that partnership jointly. All partners in a partnership are jointly and severally liable for the partnership's liabilities.

 Clarification of partnership agreements and whether all partners in a partnership should be identified

In terms of Regulation 13(b)(i) of the Regulations, accountable institutions are required to identify all partners within a partnership.

Where a client wishes to establish a business relationship or to conclude a single transaction the accountable institution must obtain the information that it needs for client identification and verification in terms of the FIC Act and the Regulations. In some instances, an accountable institution would be able (and would even be expected) to obtain information from third parties in order to establish and/or verify a prospective client's identity. The accountable institution must have policies and procedures that are designed to capture all the relevant information.



22

The Centre cannot prescribe to accountable institutions the form that such procedures should take, but the Centre would expect such procedures to inform a prospective client that the relationship with the accountable institution is dependent on them providing all required information (which, in the absence of a written partnership agreement would include disclosing all partners and identifying and verifying all disclosed partners).

Where two or more persons are co-signatories on an account the Centre expects those co-signatories to sign a declaration to the accountable institution that they do not act as a partnership.

Decisions concerning account-opening policies and procedures, in respect of whether confirmation of the identities of partners should be obtained from third parties, should be based on an accountable institution's risk framework, referred to in paragraph 2, above.

#### **TRUSTS**

#### 21. Identification of trusts

The following documents are required to identify a trust:

- trust deed or other founding document;
- letter of authority from the Master of the High Court in South Africa or letter of authority from a competent trust registering authority in a foreign jurisdiction;
- trustees' resolution authorising person/s to act;
- personal details of each trustee, each beneficiary, the founder and the person/s authorised to act (refer to applicable the FIC Act requirements).



23

- 22. Identification and verification of each trustee of a trust
  The following Regulations provide clarity on this matter:
  - Regulation 15(d)(i) of the Regulations requires that an accountable institution must establish the identity of each trustee.
  - Regulation 15(g) of the Regulations requires that the residential address and contact particulars in relation to each trustee be established.
  - Regulation 16 of the Regulations further explains how the identity of a trustee, as well as the residential address, must be verified.

There is therefore an obligation on all accountable institutions to establish and verify the identity and residential address of each trustee.

#### ORGANS OF STATE INCLUDING GOVERNMENT DEPARTMENTS

23. Identification and verification of Government departments and organs of state

The FIC Act places an obligation on all accountable institutions to establish and verify the identity of their clients. A client of an accountable institution may include a natural person, a juristic person, such as a close corporation and a company, a partnership, a trusts and organs of state including government departments.

There is an obligation on all accountable institutions to establish and verify the identity of their client even if the client is an organ of state including a government department.

A Zu

24

Certain organs of state are incorporated as companies and registered with the Registrar of Companies to conduct business and must be identified as companies. In other instances, Government institutions are constituted as legal persons by statute. Regulations 11 and 12 provide for a category of client referred to as "other legal person", which includes organs of state constituted as legal persons by statute.

Sound business practice would indicate that organs of state that are neither incorporated as companies nor constituted as legal persons by a statute should be dealt with in a manner similar to that used in respect of "other legal persons". This would apply to national, provincial and local government departments.

This implies that, among others, the identities of the persons acting on behalf of an organ of state would have to be established and verified. In some circumstances, this may include the Chief Financial Officer ("CFO") acting on behalf of a Government department. In such instances, the full name, date of birth and identity number in respect of individuals acting on behalf of the relevant organs of state should be obtained and verified. In addition, information concerning the contact particulars of such persons should be obtained.

# INTERNATIONAL STANDARDS AND BEST BANKING PRACTICE

24. Extent to which international standards (FATF Recommendations, Core Principles) and best banking practice, (the Wolfsberg Principles) apply to South African banks where ever they operate In interpreting and applying the relevant legislation, international best practice should serve as a reference to clarify what is expected from the banking industry. The FATF Recommendations form the contextual basis for the implementation of the FIC Act. International standards such as the FATF Recommendations and the Core



25

Principles provide the minimum requirements with which countries must comply.

The international standard for bank supervision is based on the Core Principles, which set out the standards that have been designed to be applied by all countries in the supervision of the banks in their jurisdictions. Similarly, all banks supervised by a banking supervisor that adopt the Core Principles are duty bound to adhere to the Principles as a matter of best banking practice.

The approach of the Basel Committee on Banking Supervision to KYC adopts a wider prudential method of review.

Sound KYC procedures must be seen as a critical element in the effective management of banking risks. KYC safeguards go beyond simple account opening and record keeping and require banks to formulate a customer acceptance policy and a tiered customer identification programme which involves more extensive due diligence for higher risk clients and which includes proactive account monitoring for suspicious activities.

In terms of principle 15 of the Core Principles, banking supervisors must determine that-

"Banks have adequate policies, practices and procedures in place, including strict "know-your-customer" rules, that promote high ethical and professional standards in the financial sector and prevent the bank being used, intentionally or unintentionally, by criminal elements".

As a result it is fundamental to the market integrity and financial stability of the South African domestic banking system that international standards, as set out in the Core Principles and best banking practice,



26

is adopted by the banking industry as an extra prudential measure when legislation does not adequately address a specific issue. Supervisory bodies should be enforcing the implementation of best practices in the industries that they supervise.

### POLITICALLY EXPOSED PERSONS (PEPs)

25. Definition of a politically exposed person (PEP) and the measures that need to be put in place when dealing with a PEP A Politically exposed person or PEP is the term used for an individual who is or has in the past been entrusted with prominent public functions in a particular country. The principles issued by the Wolfsberg Group of leading international financial institutions give practice guidance on these issues. These principles are applicable to both domestic and international PEPs.

The following examples serve as aids in defining PEPs:

- Heads of State, Heads of Government and cabinet ministers;
- influential functionaries in nationalised industries and government administration;
- senior judges;
- senior party functionaries;
- senior and/or influential officials, functionaries and military leaders and people with similar functions in international or supranational organisations;
- members of ruling or royal families:
- senior and/or influential representatives of religious organisations (if these functions are connected to political, judicial, military or administrative responsibilities).

According to the Wolfsberg principles, families and closely associated persons of PEPs should also be given special attention by the

The In

27

institution. The term "families" includes close family members such as spouses, children, parents and siblings and may also include other blood relatives and relatives by marriage. The category of "closely associated persons" includes close business colleagues and personal advisers/consultants to the PEP as well as persons, who obviously benefit significantly from being close to such a person.

An accountable institution should conduct proper due diligence on both a PEP and the persons acting on his or her behalf. Similarly, KYC principles should be applied without exception to PEPs, families of PEPs and closely associated persons to the PEP.

- 26. Treatment of PEPs in relation to other high-risk clients
  In terms of the FATF standards, specific action should be taken in relation to PEPs as a category of high-risk client. In addition to performing customer due diligence measures, accountable institutions should put in place appropriate risk management systems to determine whether a customer, a potential customer or the beneficial owner is a PEP. In addition accountable institutions:
  - should obtain senior management approval for establishing business relationships with a PEP. When the client has been accepted, the accountable institution should be required to obtain senior management approval to continue the business relationship;
  - should take reasonable measures to establish the source of wealth and the source of funds of customers and the beneficial owners identified as PEPs;
  - should conduct enhanced ongoing monitoring of a relationship with a PEP.

M

28

#### 27. Policies for dealing with PEPs

It is crucial that accountable institutions address the issue of PEPs in their risk framework, referred to in paragraph 2, and group money laundering control policy. PEPs should be regarded as high-risk clients and, as a result, enhanced due diligence should be performed on this category of client. Heightened scrutiny has to be applied whenever PEPs or families of PEPs or closely associated persons of the PEP are the contracting parties or the beneficial owners of the assets concerned, or have power of disposal over assets by virtue of a power of attorney or signature authorisation.

The Wolfsberg principles provide additional guidance on how to recognise and deal with a PEP. In addition to the standardised KYC procedures, the following prompts are appropriate to recognise a PEP:

- the question whether clients or other persons involved in the business relationship perform a political function should form part of the standardised account opening process, especially in cases of clients from corruption prone countries;
- client advisers should deal exclusively with clients from a specific country/region to improve their knowledge and understanding of the political situation in that country/region;
- the issue of PEPs should form part of an accountable institution's regular KYC training programs;
- accountable institutions may use databases listing names of PEPs (and their entourage).

A Dr

#### CORRESPONDENT BANKS

 Measures that need to be put in place in respect of correspondent banking relationships

Correspondent banking is the provision of banking services by one bank (the "correspondent bank") to another bank (the "respondent bank"). Correspondent bank accounts enable banks to conduct business and provide services that the banks do not offer directly.

According to the Core Principles, banks should only establish correspondent relationships with foreign banks that are effectively supervised by the relevant authorities. For their part, respondent banks should have effective customer acceptance and KYC policies.

In particular, the Core Principles provide that banks should refuse to enter into or continue a correspondent banking relationship with a bank incorporated in a jurisdiction in which it has no physical presence and which is unaffiliated with a regulated financial group (i.e. shell banks). Banks should pay particular attention when continuing relationships with respondent banks located in jurisdictions that have poor KYC standards or have been identified by FATF as being "non co-operative" in the fight against anti-money laundering.

The Wolfsberg principles sets out the following risk indicators that a Bank shall consider, to ascertain what reasonable due diligence or enhanced due diligence it will undertake:

 the correspondent banking client's domicile - the jurisdiction where the correspondent banking client is based and/or where its ultimate parent is headquartered may present greater risk.
 Certain jurisdictions are internationally recognised as having inadequate anti-money laundering standards, insufficient

The Tark

30

regulatory supervision, or presenting greater risk for crime, corruption or terrorist financing. Institutions will review pronouncements from regulatory agencies and international bodies, such as the FATF, to evaluate the degree of risk presented by the jurisdiction in which the correspondent banking client is based and/or in which its ultimate parent is headquartered.

- the correspondent banking client's ownership and management structures - the location of owners, their corporate legal form and the transparency of ownership structure may present greater risks. The involvement of a PEP in the management or ownership of certain correspondent banking clients may also increase the risk.
- the correspondent banking client's business and customer base - the type of businesses the correspondent banking client engages in, as well as the type of the markets the correspondent banking client serves, may present greater risks. Consequently, a correspondent banking client that derives a substantial part of its business income from higher risk clients may present greater risk. Higher risk clients are those clients of a correspondent banking client that may be involved in activities or are connected to jurisdictions that are identified by credible sources as activities or countries being especially susceptible to money laundering. Each institution may give the appropriate weight to each risk factor, as it deems necessary.

FATF Recommendation 13 states that financial institutions such as banks should, in addition to performing normal due diligence measures, do the following in relation to cross-border correspondent banking and other similar relationships:



- 31
- gather sufficient information about a respondent bank to understand fully the nature of the respondent's business and to determine from publicly available information the reputation of the bank and the quality of supervision, including whether the institution has been subject to a money-laundering or terroristfinancing investigation or regulatory action;
- assess the respondent bank's anti-money laundering and terrorist-financing controls;
- obtain approval from senior management before establishing new correspondent relationships;
- document the respective responsibilities of each bank;
- with respect to "payable-through accounts" (correspondent accounts that are used directly by third parties to transact business on their own behalf), be satisfied that the respondent bank has verified the identity of and performed on-going due diligence on the customers having direct access to accounts of the correspondent bank and that the respondent bank is able to provide relevant customer identification data upon request to the correspondent bank.

#### **EXEMPTIONS**

29. Clarification of Exemption 5 – foreign clients

Exemption 5 of the Exemptions deals with countries situated in a foreign jurisdiction. According to Exemption 5 accountable institutions are exempted from compliance with the provisions of section 21 of the FIC Act that require the verification of the identity of a client of that institution, if:

 the client is situated in a country, where, to the satisfaction of the relevant supervisory body, anti-money laundering regulation and supervision of compliance with such anti-money laundering



32

regulation, which is equivalent to that applicable to the accountable institution, are in force;

- a person or institution in that country, which is subject to antimoney laundering regulation confirms in writing, to the satisfaction of the accountable institution that the person or institution, has verified the particulars concerning that client that the accountable institution had obtained in accordance with section 21 of the FIC Act; and
- the person or institution undertakes to forward all documents obtained in the course of verifying such particulars to the accountable institution.

The country in which the client is situated must have anti-money laundering regulation and supervision of compliance with such anti-money laundering regulation in force. All FATF member countries are deemed to have adequate anti-money laundering legislation and supervision of compliance with such legislation in place.

If a country is not a FATF member country, more careful scrutiny of the anti-money laundering/combating of terrorist financing systems in that country should be undertaken to establish whether the requirements applicable to a specific institution are equivalent to the requirements of the South African legislation. If this is not the case, this exemption does not apply, and the entity has to be identified and verified as stipulated in the FIC Act and the Regulations.

 Clarification of the difference between Exemptions 5 and 16 identifying an accountable institution or a client of a foreign country or institution

In terms of Exemption 16 of the Exemptions, an accountable institution in South Africa is exempted from having to identify an accountable

My Dr

33

institution in another country when the anti money laundering regulation and supervision that applies to that foreign accountable institution is to the satisfaction of the supervisory body for accountable institutions in South Africa, in other words, the South African Reserve Bank. This exemption applies in the case of transactions between the two accountable institutions and not to transactions of the underlying clients of the foreign accountable institution.

Exemption 5 of the Exemptions relates to the underlying clients of a foreign institution. This exemption exempts an accountable institution in South Africa from the verification of a foreign client's identity in cases when a regulated institution in the relevant country can verify that client's identity. The South African accountable institution still has to establish the client's identity, but can rely on the verification undertaken by the foreign institution.

The conditions to this exemption are that the institution providing the verification of the client's identity must be subject to anti-money laundering regulation and supervision to a standard that meets the satisfaction of the relevant supervisory body. The foreign institution should forward all documents relative to the verification of the client's identity to the South African accountable institution, in due course.

Both of these exemptions require an indication from the appropriate supervisory body as to which countries it considers to be applying satisfactory anti-money laundering regulation and supervision to the relevant institutions. In the absence of such an indication, as is currently the case, effect may not be given to these exemptions.



## 34

#### **GLOSSARY**

The term "accountable institution" in this guidance note refers to institutions that are listed in Schedule 1 to the FIC Act.

"The Centre" means the Financial Intelligence Centre established by section 2 of the FIC Act.

"Financial Intelligence Centre Act" (herein referred to as the FIC Act) refers to the Financial Intelligence Centre Act, 2001 (Act No 38 of 2001).

"KYC" means Client Identification and Verification.

Money Laundering Control Regulations (herein referred to as "the Regulations") refers to the regulations made in terms of section 77 of FIC Act and promulgated in Government Notice 1595 published in Government Gazette No. 24176 of 20 December 2002.

Money Laundering Control Exemptions (herein referred to as "the Exemptions") refers to exemptions made under section 74 of FIC Act and promulgated in Government Notice 1596 published in Government Gazette No. 24176 of 20 December 2002.

The Financial Action Task Force ("FATF") is an inter-governmental body that develops and promotes policies to protect the global financial system against money laundering, terrorist financing and the financing of proliferation of weapons of mass destruction. The FATF is both a policy-making and standard setting body. It was created in 1989 and works to generate the necessary political will to bring about legislative and regulatory reforms in these areas. Further information concerning the FATF is available at <a href="https://www.fatf-gafi.org">www.fatf-gafi.org</a>.



35

The FATF Recommendations refers to the revised FATF Recommendations on Combating Money Laundering and the Financing of Terrorism and Proliferation. The FATF Recommendations are recognised as the global antimoney laundering and counter-terrorist financing standard. The FATF Recommendations are intended to be of universal application and have come to be accepted by organisations such as the World Bank and the International Monetary Fund to be the international standard to benchmark efforts to combat money laundering and terrorist financing. Since its creation the FATF has spearheaded the effort to adopt and implement measures designed to counter the use of the financial system by criminals. The FATF Recommendations can be accessed from <a href="https://www.fatf-gafi.org">www.fatf-gafi.org</a>.

The Core Principles refer to the Basel Core Principles for Effective Banking Supervision which is the comprehensive set of twenty-five Core Principles that have been developed by the Basle Committee on Banking Supervision, a Committee of banking supervisory authorities which was established by the central bank Governors of the Group of Ten countries in 1975, as a basic reference for effective banking supervision. The Core Principles were designed to be applied by all countries in the supervision of the banks in their jurisdictions. The Core Principles can be accessed from <a href="https://www.bis.org">www.bis.org</a>.

The Wolfsberg Principles refer to Global Anti Money Laundering Guidelines for Private Banks, which sets out global guidance for sound business conduct in international private banking, Correspondent Banks and Politically Exposed Persons. The principles can be accessed from <a href="https://www.wolfsberg-principles.com">www.wolfsberg-principles.com</a>.

The United Nations List means the list of individuals and entities as issued by the United Nations 1267 Sanctions Committee. The updated UN list can be accessed from <a href="www.un.org/Docs/sc/committees/1267/1267ListEng">www.un.org/Docs/sc/committees/1267/1267ListEng</a>. This list is published in the Gazette from time to time by proclamation under section 25 of the Protection of Constitutional Democracy against Terrorist and



36

# FIC Guidance Note 3A for accountable institutions on customer identification and verification and related matters

Related Activities Act, 2004 (Act No. 33 of 2004). The current proclamation can be accessed from

http://www.saps.gov.za/docs\_publs/legislation/terrorism/gazette27598pg 1\_32.pdf and

http://www.saps.gov.za/docs\_publs/legislation/terrorism/gazette27598pg 33\_64.pdf.

Organs of State as defined under section 239 of the Constitution of the Republic of South Africa 1996 (Act 108 of 1999) means

- a) any department of state or administration in the national, provincial or local sphere of government; or
- b) any other functionary or institution
  - exercising a power or performing a function in terms of the Constitution or a provincial Constitution; or
  - ii) exercising a public power or performing a public function in terms of any legislation,

but does not include a court or judicial officer.

Shell Banks refers to a bank incorporated in a jurisdiction in which it has no physical presence and which is unaffiliated with a regulated financial group.

Payable through accounts refers to correspondent accounts that are used directly by third parties to transact business on their own behalf.

Issued by the Director
Financial Intelligence Centre
28 March 2013



STATUTORY INSTRUMENTS

1442

## 2007 No. 2157

# FINANCIAL SERVICES

# The Money Laundering Regulations 2007

Made - - - -

24th July 2007

Laid before Parliament

25th July 2007

Coming into force - -

15th December 2007





(6) For the purpose of deciding whether a person is a known close associate of a person referred to in paragraph (5)(a), a relevant person need only have regard to information which is in his possession or is publicly known.

#### Branches and subsidiaries

- 15.—(1) A credit or financial institution must require its branches and subsidiary undertakings which are located in a non-EEA state to apply, to the extent permitted by the law of that state, measures at least equivalent to those set out in these Regulations with regard to customer due diligence measures, ongoing monitoring and record-keeping.
- (2) Where the law of a non-EEA state does not permit the application of such equivalent measures by the branch or subsidiary undertaking located in that state, the credit or financial institution must—
  - (a) inform its supervisory authority accordingly; and
  - (b) take additional measures to handle effectively the risk of money laundering and terrorist financing.
  - (3) In this regulation "subsidiary undertaking"-
    - (a) except in relation to an incorporated friendly society, has the meaning given by section 1162 of the Companies Act 2006(a) (parent and subsidiary undertakings) and, in relation to a body corporate in or formed under the law of an EEA state other than the United Kingdom, includes an undertaking which is a subsidiary undertaking within the meaning of any rule of law in force in that state for purposes connected with implementation of the European Council Seventh Company Law Directive 83/349/EEC of 13th June 1983(b) on consolidated accounts;
  - (b) in relation to an incorporated friendly society, means a body corporate of which the society has control within the meaning of section 13(9)(a) or (aa) of the Friendly Societies Act 1992(c) (control of subsidiaries and other bodies corporate).
- (4) Before the entry into force of section 1162 of the Companies Act 2006 the reference to that section in paragraph (3)(a) shall be treated as a reference to section 258 of the Companies Act 1985(d) (parent and subsidiary undertakings).

#### Shell banks, anonymous accounts etc.

- 16.—(1) A credit institution must not enter into, or continue, a correspondent banking relationship with a shell bank.
- (2) A credit institution must take appropriate measures to ensure that it does not enter into, or continue, a corresponding banking relationship with a bank which is known to permit its accounts to be used by a shell bank.
- (3) A credit or financial institution carrying on business in the United Kingdom must not set up an anonymous account or an anonymous passbook for any new or existing customer.
- (4) As soon as reasonably practicable on or after 15th December 2007 all credit and financial institutions carrying on business in the United Kingdom must apply customer due diligence measures to, and conduct ongoing monitoring of, all anonymous accounts and passbooks in existence on that date and in any event before such accounts or passbooks are used.
- (5) A "shell bank" means a credit institution, or an institution engaged in equivalent activities, incorporated in a jurisdiction in which it has no physical presence involving meaningful decision-making and management, and which is not part of a financial conglomerate or third-country financial conglomerate.

(b) OJ No L 193, 18.7.1983, p. 1.

(d) 1985 c. 6.

<sup>(</sup>a) 2006 c. 46.

<sup>(</sup>c) 1992 c. 40. Section 13(9)(aa) was inserted by paragraph 11 of Part II of Schedule 18 to the 2000 Act.

This website uses cookies. By continuing to browse this website you are agreeing to our use of cookies or view our cookie policy

1444

Financial Conduct Authority



#### SYSC 6.1 Compliance

[Note: ESMA has also issued guidelines under article 16(3) of the ESMA Regulation covering certain aspects of the MiFID compliance function requirements. See http://www.esma.europa.eu/content/Guidelines-certain-aspects-MiFID-compliance-function-requirements.]

SYSC 5.1.1 R 01/07/2011 A firm must establish, implement and maintain adequate policies and procedures sufficient to ensure compliance of the firm including its managers, employees and appointed representatives (or where applicable, fied agents) with its obligations under the regulatory system and for countering the risk that the firm might be used to further financial crime.

[Note: article 13(2) of MiFID and article 12(1)(a) of the UCITS Directive]

SYSC 6.1.1A

G D1/D4/2013 The FCA provides guidance on steps that a firm can take to reduce the risk that it might be used to further financial crime in FC (Financial crime: a guide for firms).

SYSC 6.1.2

01/04/2013

A common platform firm and a management company must, taking intoaccount the nature, scale and complexity of its business, and the nature and range of financial services and activities undertaken in the course of that business, establish, implement and maintain adequate policies and procedures designed to detect any risk of fallure by the firm to comply with its obligations under the regulatory system, as well as associated risks, and put in place adequate measures and procedures designed to minimise such risks and to enable the appropriate regulator to exercise its powers effectively under the regulatory system and to enable any other competent authority to exercise its powers effectively under MiFID or the UCITS Directive.

[Note: article 5(1) of the MiFID implementing Directive and article 10(1) of the UCITS implementing Directive]

SYSC 6.1.2A

G 06/08/2009 Other firms should take account of the adequate policies and procedures rule (SYSC 6 1.2 R) as if it were guidance (and as if should appeared in that rule instead of must) as explained in SYSC 1 Annex 1 3 3 G.

SYSC 6.1.3

R 01/07/2011 A common platform firm and a management company must maintain a permanent and effective compliance function which operates independently and which has the following responsibilities

- (1) to monitor and, on a regular basis, to assess the adequacy and effectiveness of the measures and procedures put in place in accordance with SYSC 6.1.2 R, and the actions taken to address any deficiencies in the firm's compliance with its obligations; and
- (2) to advise and assist the relevant persons responsible for carrying out regulated activities to comply with the firm's obligations under the regulatory system.

[Note: article 6(2) of the MiFID implementing Directive and article 10(2) of the UCITS implementing Directive]

SYSC 6.1.3A

G 06/08/2009

- (1) Other firms should take account of the compliance function rule (SYSC 6 1 3 R) as if it were guidance (and as if should appeared in that rule instead of must) as explained in SYSC 1 Annex 1 3 3 G.
- (2) Notwithstanding SYSC 6.1.3 R, as it applies under (1), depending on the nature, scale and complexity of its business, it may be appropriate for a *firm* to have a separate compliance function. Where a *firm* has a separate compliance function the *firm* should also take into account SYSC 6.1.3 R and SYSC 6.1.4 R as guidance

SYSC 6.1.4

R 01/07/2011 In order to enable the compliance function to discharge its responsibilities properly and independently, a common platform firm and a management company must ensure that the following conditions are satisfied:

- (1) the compliance function must have the necessary authority, resources, expertise and access to all relevant information,
- (2) a compliance officer must be appointed and must be responsible for the compliance function and for any reporting as to compliance required by SYSC 4 3 2 R;
- (3) the relevant persons involved in the compliance functions must not be involved in the performance of services or activities they monitor;

(4) the method of determining the remuneration of the relevant persons involved in the compliance function must not compromise their objectivity and must not be likely to do so

[Note: article 6(3) first paragraph of the MiFID implementing Directive and article 10(3) of the UCITS implementing Directive

# SYSC 6.1.4-A

In setting the method of determining the remuneration of relevant persons involved in the compliance function.

G | 01/07/2015

- (1) firms that SYSC 19A applies to will also need to comply with the Remuneration Code;
- (2) BIPRU firms will also need to comply with the BIPRU Remuneration Code;
- (3) firms that SYSC 19D applies to will also need to comply with the dual-regulated firms Remuneration Code; and
- (4) firms that the remuneration part of the PRA Rulebook applies to will also need to comply with it.

#### SYSC 6.1.4A

R 26/07/2013

- (1) A firm which is not a common platform firm or management company and which carries on designated investment business with or for retail clients or professional clients must allocate to a director or senior manager the function of:
  - (a) having responsibility for oversight of the firm's compliance, and
  - (b) reporting to the governing body in respect of that responsibility.
- (2) In SYSC 6 1 4A R (1) compliance means compliance with the rules in:
  - (a) COBS (Conduct of Business sourcebook):
  - (b) COLL (Collective Investment Schemes sourcebook);
  - (c) CASS (Client Assets sourcebook), and
  - (d) ICOBS (Insurance: Conduct of Business sourcebook)

#### SYSC 6.1.4-B

G 22/07/2013 In setting the method of determining the remuneration of relevant persons involved in the compliance function, full-scope UK AIFMs will need to comply with the AIFM Remuneration Code

#### SYSC 6.1.4C

R 01/04/2014 A debt management firm and a credit repair firm must appoint a compliance officer to be responsible for ensuring the firm meets its obligations under SYSC 6.1.1 R for any compliance function the firm has and for any reporting as to compliance which may be made under SYSC 4.3.2 R.

#### SYSC 6.1.4-C

G

07/03/2016

- (1) This guidance is relevant to a relevant authorised person required to appoint a compliance officer under SYSC 6.1.4R.
- (2) Taking account of the nature, scale and complexity of its activities, the *firm* should have appropriate procedures to ensure that the removal or any other disciplinary sanctioning of the compliance officer does not undermine the independence of the compliance function.
- (3) In the FCA's view, it will be appropriate, in many cases, for the removal or any other disciplinary sanctioning of the compliance officer to require the approval of a majority of the management body, including at least a majority of its members who do not perform any executive function in the firm.

#### SYSC 6.1.5

R 01/07/2011 A common platform firm and a management company need not comply with SYSC 6.1.4 R (3) or SYSC 6.1.4 R (4) if it is able to demonstrate that in view of the nature, scale and complexity of its business, and the nature and range of financial services and activities, the requirements under those rules are not proportionate and that its compliance function continues to be effective.

[Note: article 6(3) second paragraph of the MiFID implementing Directive and article 10(3) second paragraph of the UCITS implementing Directive]

#### SYSC 6.1.6

G 06/08/2009 Other firms should take account of the proportionality rule (SYSC 6.1.5 R) as if it were guidance (and as if should appeared in that rule instead of must) as explained in SYSC 1 Annex 1.3.3 G.

#### SYSC 6.1.7

R 01/10/2011

- (1) This rule applies to a common platform firm conducting investment services and activities from a branch in another EEA State
- (2) References to the regulatory system in SYSC 6.1.1R, SYSC 6.1.2 R and SYSC 6.1.3 R apply in respect of a firm's branch as if regulatory system includes a Host State's requirements under MiFID and the MiFID implementing Directive which are applicable to the investment services and activities conducted from the firm's branch.

[Note: article 13(2) of MiFID]





## **Barclays Bank PLC**

# Statement of Anti-Money Laundering (AML) and Counter-Terrorist Financing (CTF) Policies and Principles

Money laundering and terrorist financing have been identified as major threats to the Barclays Group and, indeed, the international financial services community. The United Kingdom, in common with many other countries, has passed legislation designed to prevent money laundering and to combat terrorism. This legislation, together with regulations, rules and industry guidance, forms the cornerstone of AML/CTF obligations for UK firms and outline the offences and penalties for failing to comply.

The requirements of EU/UK legislation apply to the Barclays Group globally. Group Companies may have additional local policies and procedures designed to comply with their local legislation, regulations and any government approved guidance in the jurisdiction(s) in which they operate.

Barclays Bank PLC is authorised and regulated by the UK Financial Conduct Authority (FCA). Its registered number is 122702. Barclays Bank PLC and its branches and subsidiaries trade as Barclays Capital, Barclaycard and Barclays Wealth amongst others. Barclays Bank PLC is listed on the London Stock Exchange and New York Stock Exchange. Further, some branches and subsidiaries are listed and/or regulated in their own right.

Barclays Bank PLC is a member of the Wolfsberg Group (www.wolfsberg-principles.com), an association of eleven global banks that aims to develop financial services industry standards for Know Your Customer (KYC), AML and CTF.

#### Legal and Regulatory Framework:

The principal requirements, obligations and penalties, on which Barclays Financial Crime Systems and Controls are based, are contained in:

- The Proceeds of Crime Act 2002 (POCA), as amended by the:
  - i. Serious Organised Crime and Police Act 2005 (SOCPA); and the
  - ii. Proceeds of Crime Act (Amendment) Regulations 2007;
- The Terrorism Act 2000, as amended by the:
  - i. The Anti Terrorism, Crime & Security Act 2001; and the
  - ii. Terrorism Act (Amendment) Regulations 2007;
- The Terrorism Act 2006;
- The Bribery Act 2010;
- The Money Laundering Regulations 2007, transposing the requirements of the EU's Third Money Laundering Directive;
- The FCA Handbook of Rules and Guidance, and in particular, the Senior Management Arrangements, Systems and Controls (SYSC) Sourcebook, which relates to the management and control of money laundering risk; and
- The Joint Money Laundering Steering Group (JMLSG) Guidance for the UK Financial Sector on the prevention of money laundering/combating terrorist financing.

#### **Barclays Group Policies & Principles:**

Barclays Financial Crime Team owns and is responsible for the following Group Policies covering:

- 1. Anti-Money Laundering/Counter-Terrorist Financing / Counter-Proliferation Financing;
- 2. Sanctions;
- 3. Anti-Bribery & Anti-Corruption; and
- 4. Introducers.

M In

1

These policies and principles are designed to ensure that all Group Companies comply with the legal and regulatory requirements applicable in the UK as well as with their local obligations.

#### Anti-Money Laundering (AML) Policy:

The Barclays Group AML Policy is designed to ensure that all Group Companies comply with the requirements and obligations set out in UK legislation, regulations, rules and Industry Guidance for the financial services sector, including the need to have adequate systems and controls in place to mitigate the risk of the firm being used to facilitate financial crime. The AML Policy sets out the minimum standards which must be complied with by all Barclays Group Companies and includes:

- The appointment of a Group Money Laundering Reporting Officer (GMLRO) and Business Unit Money Laundering Reporting Officers (MLROs) of sufficient seniority, who have responsibility for oversight of Group and Business Unit compliance with relevant legislation, regulations, rules and industry guidance;
- Establishing and maintaining a Risk Based Approach (RBA) towards assessing and managing the money laundering and terrorist financing risks to the Group;
- Establishing and maintaining risk-based customer due diligence, identification, verification and know your customer (KYC) procedures, including enhanced due diligence for those customers presenting higher risk, such as Politically Exposed Persons (PEPs) and Correspondent Banking relationships;
- Establishing and maintaining risk based systems and procedures to monitor ongoing customer activity;
- Procedures for reporting suspicious activity internally and to the relevant law enforcement authorities as appropriate;
- The maintenance of appropriate records for the minimum prescribed periods:
- Training and awareness for all relevant employees; and
- The provision of appropriate management information and reporting to senior management of the Group's compliance with the requirements;

#### 2. Sanctions Policy:

The Barclays Group Sanctions Policy is designed to ensure that the Group complies with applicable sanctions laws in every jurisdiction in which it operates.

All Barclays Group Companies are required to screen against United Nations, European Union, UK Treasury and US Office of Foreign Assets Control (OFAC) sanctions lists at a minimum in all jurisdictions in which we operate, unless to do so would conflict with local legislation.

All employees receive training on the Sanctions Policy at least once a year, with more detailed and advanced training for those whose roles involve heightened sanctions risks. Failure to comply with the policy may give rise to disciplinary action, up to and including dismissal.

#### 3. Anti-Bribery & Anti-Corruption Policy:

Barclays has a zero tolerance policy towards bribery and corruption. Barclays recognises that bribery and corruption have an adverse effect on communities wherever they occur. If endemic, they can threaten laws, democratic processes and basic human freedoms, impoverishing states and distorting free trade and competition. Corruption is often associated with organised crime, money laundering and on occasions the financing of terrorism. In addition, the level and efficacy of investment and financing can be reduced, particularly within economically disadvantaged societies.

Barclays is committed to applying high standards of honesty and integrity consistently across our global operations and in all our business dealings. We are subject to the provisions of the UK Bribery Act 2010 and the US Foreign Corrupt Practices Act, which have extra-territorial effect globally, as well as applicable local anti-bribery laws in relevant jurisdictions.

My In

#### 4. Introducer Policy

In addition to the Anti-Bribery and Anti-Corruption Policy, Barclays has an Introducer Policy. The Policy covers the activities of all third parties that generate or retain business, or secure a business benefit, for Barclays. These third parties are termed "introducers" by Barclays. Potential examples would include senior advisors, lead generators and financial advisers. The Barclays Introducer Policy is designed to protect Barclays against the bribery and corruption risks, reputational risk, and wider operational and conduct risks associated with introducers. Barclays employees must apply the specific controls and procedures set out in the policy.

#### **Group Governance & Conformance:**

Regular reviews of the effectiveness of these Group Policies are carried out in addition to audits periodically undertaken by the Barclays Internal Audit function. This provides senior executive management oversight committees and the Board Audit Committee with the necessary assurance regarding the operating effectiveness of the Group's controls relating to these policies.



66 ABSA

"YM5"

1449

Corporate and bilestreen Banking

15 A ce Lare Sandson

Sundkin. Johanneshung 2198

Privite Bar X10055 Sundion 2146

70 - 27 10)11 825 6960 Far +27 (10)11 825 7601

Swift address ABS4 ZA I

abs mapalal com

18 December 2015

The Directors
TNA Media (Pty) Ltd
Private Bag X180
Halfway House
1685

Our ref: 2010/006569/07

Dear Sir

# RE: NOTICE OF CLOSURE OF BANK ACCOUNT IN THE NAME OF TNA MEDIA (PTY)LTD - (ACCOUNT NUMBER: 407-646-2329 )

We refer to the above.

TNA Media (Pty) Ltd has a bank account at Absa Bank Limited ("the Account") which Account is subject to Absa's standard terms and conditions applicable to the opening and use of any cheque account at Absa Bank Limited ("the Bank Account Terms and Conditions").

In terms of the Bank Account Terms and Conditions, Absa is entitled, in its discretion, to close the Account at any time following the expiry of reasonable notice.

We do hereby give you notice that Absa will be closing your bank account number 407-646-2329 as at 16 February 2016.

We urge you to make alternative arrangements in this regard.

Should you have any queries please contact Sefiso Mkhabela on (010) 245-4364.

Member of





Yours sincerely,

Temi Ofong
For and on behalf of Absa Bank Limited





21 December 2015

Sefiso Mkhabela ABSA Bank Limited 15 Alice Lane Sandton 2196

Your reference: 2011/003219/07

Dear Sefiso

Re: Notice of closure of bank accounts for Infinity Media

The directors of Infinity Media have asked that I write to you with regards to your letter of 18 December 2015, giving us notice of your decision to close our bank accounts.

We were naturally taken aback by the sudden decision to close our accounts with effect from February 16, 2016 as we have had a historical relationship since the launch of Infinity's news channel, ANN7.

Following a discussion among board members, I have been asked to approach you to understand the rationale for closing the accounts. The directors have asked that I request that you please provide them with a briefing note on your rationale in order for them to take remedial action within our business should we be at fault in any way.

We look forward to your urgent response to this letter explaining the reasons for the closure of our accounts.

Yours sincerely

Nazeem Howa Chief Executive

infinity media Networks (Pty) Ltd.

कर्मका । इस्ति कि कर्न प्रस्ति । कार्न स

A BB Comments out Discussible on Sulvey And state for Proposition More Print Comments on Man

Tela son de gabingar. Faxo des não mondo

email: 1512 en 1520 web: 1000s ann7com





21 December 2015

Sefiso Mkhabela ABSA Bank Limited 15 Alice Lane Sandton 2196

Your reference: 2010/006569/07

Dear Sefiso

Re: Notice of closure of bank accounts for TNA Media.

I write on behalf of TNA Media in regard to your letter of 18 December 2015, giving us notice of your decision to close our bank account.

Given the historical nature of the relationship between yourselves and ourselves, we were naturally taken aback by the sudden decision to close our accounts with effect from February 16, 2016.

The directors of TNA Media have met to discuss your decision and have asked that I approach you to understand the rationale for your decision.

As we are sure sound business reasoning would be the basis for your decision, the directors have asked that you please provide them with a briefing note on your rationale in order for them to take remedial action within our business should we be at fault in any way.

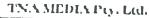
We look forward to your urgent response to our request.

Yours sincerely

Nazeem Howa

your

Chief Executive



Pirectors Abupta / Silowa / G Saidour



"YM 8"

**⊘** ABSA

Corporate and Investment Banking

15 Alice Lane Sandton Johannesburg 2196 Private Bag X10056 Sandton 2146

Tel +27 (0)11 895 6000 Fax +27 (0)11 895 7802 www.absacapital.com

The Directors
Infinity Media Networks (Pty) Ltd.
52 Lechwe Street
Corporate Park
Midrand

Our ref: Sefiso Mkhabela

23 December 2015

WITHOUT PREJUDICE

Dear Sirs

RE: NOTICE OF CLOSURE OF BANK ACCOUNT IN THE NAME OF INFINITY MEDIA NETWORKS (PTY) LTD - (ACCOUNT NUMBER: 407-081-1352)

We refer to your letter of 21 December 2015.

You will note from our letter of 18 December 2015 that Absa Bank Limited (Absa) has given notice of its intention to exit the relationship on the strength of a clause in the agreement that provides for Absa to do so at its discretion. As such, Absa is not legally obliged to show cause. The brief reasons set out in this letter are therefore provided without any admission of liability to do so and without prejudice to any of Absa's rights. They are further not intended to be exhaustive.

Absa, as part of its risk management framework, periodically reviews its business relationships to ensure that the relationships operate within the risk appetite set by the Absa Board. This includes taking a view on existing and expected future reputation risk.

The review undertaken by Absa in respect of the Sahara Group of companies (the Group), of which Infinity Media Networks (Pty) Ltd. is a member, showed that the Group exceed Absa's current and forward-looking reputation risk appetite.

Yours faithfully

For and on behalf of Absa Bank Limited

Menstler of

**BARCLAYS** 

Corporate and Investment Banking, a division of Absa Bank Limited, Reg. No. 1986/004794/06.

Descript, G. Gr. En (Charman) "At Ramms (Chef Execution) of Briggs YZ C thank Brinsta (Australian) SA Fall of TATP material AN Huster AP Enkirt (Brinst) P. in Bund (Brinsh) PB Mad are TM Member 25 Mondams in (Assamble on) 15 Manday SC Protocus "Liver Arman State on Sample on

Aus 5589878Aus Service Production and Conf. theose and the Nation St.







29 December 2015

Maria Ramos Chief Executive Absa Bank

Dear Maria

My apologies for directing this correspondence directly to you, especially since we have not been in contact for so many years.

I am currently part of the leadership team at Oakbay Investments, the holding company for the Gupta family's business dealings.

I am reaching out to you now following the unilateral decision by Absa to shut down the bank accounts of all of our group, through the issuing of letters on Friday, December 18, giving us two months to make alternative plans.

We have been trying since then to establish the reasons for the bank's decision, but have only been told it is in terms of the current terms and conditions on which the bank granted us facilities and more lately due to the "risk management" process at ABSA.

We have requested further clarity as we do not believe that this decision could be taken lightly given the consequences for our company, but are yet to receive a response to our last letter sent last week Thursday.

I am sure you are very well aware of the media's coverage of the Gupta family, and I would hope the same discussions we had so many years ago when you were Director General in Treasury will remind you of the need to separate perception and reality when it comes to media coverage.

Naturally, if we have contravened any bank regulation in the management of any of our accounts, we would like to understand that as well in order to ensure that we take remedial steps within our business.

We are happy to meet with you and any of your officials at a time convenient to discuss their decision. Attached to this letter is some of the recent correspondence related to this matter.

I look forward to hearing from you.

Yours sincerely

Nazeem Howa Chief Executive

TNAMEDIA Pro. Ltd. Lake Nation (Market of

52 Lechne Street.

Tel: 27 [15]2 [25]2 Fax: 0867:117000

์ เกมป์ : โกโด a tramedia.cv.za , well: now.thenewage.co.za



"Ymlo"

1455

**C** ABSA

Corporate and Investment Banking

CONFIDENTIAL

15 Alice Lane Sandton Johannesburg 2196 South Africa

Private Bag X10056 Sandton 2146 South Africa

Tel +27 (0)11 895 6000 Fax+27 (0)11 895 7802

www.absacapital.com

The Directors
TNA Media (Pty) Ltd
52 Lechwe Street
Corporate Park
Midrand

Our Ref: Phakamani Hadebe

CONFIDENTIAL

29 January 2016

Dear Sirs

BANK ACCOUNT IN THE NAME OF TNA MEDIA (PTY) LTD - (ACCOUNT NUMBER: 407-646-2329)

We refer to your letter of 23 December 2015, and the subsequent correspondence.

By way of introduction, I am the Chief Executive of Corporate and Investment Banking South Africa, a division of Absa Bank Limited (Absa), and I have been fully mandated to deal with this matter.

As explained in our previous correspondence, Absa has given notice of termination of banking arrangements with the Sahara Group of companies and this is based on a legal right which allows Absa to give notice of termination at its discretion, without providing reasons.

Member of BARCLAYS

2W

The reasons we provided to you in our letter of 23 December 2015 were provided merely as a courtesy. Absa would prefer not to enter into an exchange regarding the points you have raised in your various letters pertaining to the termination of our banking arrangements with the Sahara Group of companies.

We trust that this clarifies the position.

Yours faithfully

Phakamani Hadebe

Chief Executive, CIB South Africa





3 February 2016

Temi Ofong

1457

ABSA CORPORATE AND INVESTMENT BANKING

15 ALICE LANE

SANDTON

**JOHANNESBURG** 

2196

Dear Sir

Re: CLOSURE OF ACCOUNT - WILINK TELECOMS (PTY) LTD - 4071265849

Your letter dated 18 December 2015 refers.

Kindly close the above mentioned account with immediate effect and note that we will not bear any charges thereafter.

Kindly send us confirmation that the account is closed.

Yours faithfully

DIRECTOR

**RONICA RAGAVAN** 

Wilink Telecoms Pty. Ltd.

52 Lechwe Ave Corporate Park South Old Pretor a Main Rd Midrand, Johannesburg

Tel- +27 (0)11 314 2003 Fax-+27 (0)86 552 8888

info@wilink co za http://www.wilink co za





Sahara Systems (Pty) Ltd. Tel: 011 542 2020, Fax: 086 733 4414 e-mail: info@saharasystems.co.za Web: www.saharasystems.co.za

3-15 5 Suni Avenue, Corporate Park, Old Pretoria Main Road, Midrand, John

03 February 2016

1458

Temi Ofong

ABSA CORPORATE AND INVESTMENT BANKING 15 ALICE LANE **SANDTON JOHANNESBURG** 2196

Dear Sir / Ma'am

REQUEST TO CLOSE BANK ACCOUNT – SAHARA SYSTEMS 405-426-5985

This letter serves to request a closure of bank account number 4054265985. Please be advised that we will not bear any further charges

Kindly provide written confirmation that the account is closed.

Sincerely

4720189010

Directors: A Chawia



















"YM 11.3"



Localiga (Pty) Ltd.

JIC House, 106A, 16th Road, Midrand PO Box 1501, Hallway House, 1685 Tel: +27 11 564 9400 Fax: +27 11 315 378

▶ Reg No 2005,034534 07

1459

3 February 2016

Temi Ofong

ABSA CORPORATE AND INVESTMENT BANKING

15 ALICE LANE

SANDTON

**JOHANNESBURG** 

2196

Dear Sir

Re: CLOSURE OF THE LOCALIGA PTY LTD -4074574390

Your letter dated 18 December 2015 refers.

Kindly close the above mentioned account with immediate effect and note that we will not bear any charges thereafter.

Kindly send us confirmation that the account is closed.

Yours faithfully

DIREC'TOR

RONICA RAGAVAN

M In



1460

SAHARA DISTRIBUTION (PTY) LTD.

> Reg. No.: 2002/003031/07

> > VAT No.: 4420197404

Cape Town

Unit G5-6 Centurion Business Park Milnerton, Cape Town

Tel: (+27 21) 551 5595 Fax: (+27 21) 551 0185 e-mail: info@cpt.sahara.co.za

Durban

Unit No. 4, 23 Intersite Ave Umgeni Business Park Durban

Tel: (+27 31) 263 1885 Fax: (+27 31) 263 1779 e-mail: info@dbn.sahara.co.za

> Port Elizabeth 12 4th Avenue Newton Park

Port Elizabeth

Tel: (+27 41) 365 2911 Fax: (+27 41) 365 2920 e-mail: info@pe.sahara.co.za

Temi Ofong

03 February 2016

ABSA CORPORATE AND INVESTMENT BANKING 15 ALICE LANE **SANDTON JOHANNESBURG** 2196

Dear Sir / Ma'am

REQUEST TO CLOSE BANK ACCOUNT - SAHARA DISTRIBUTION -4055102865

This letter serves to request a closure of bank account number 4055102865. Please be advised that we will not bear any further charges

Kindly provide written confirmation that the account is closed.

Sincerely

ized Signatory

website: www.sahara.co.za

Oriectors A.K.Gupta SJD Nel

Official distributors for:





Intel FOXCORD Microsoft AMDI CRE\_TIVE MEDIO LEXMARK EPSON & AMARIA SINDTEC SMC











"YMII.5"

03 February 2016

Temi Ofong

ABSA CORPORATE AND INVESTMENT BANKING 15 ALICE LANE SANDTON JOHANNESBURG 2196

Dear Sir / Ma'am

REQUEST TO CLOSE BANK ACCOUNT — SAHARA CONSUMABLES 405-449-6374

This letter serves to request a closure of bank account number 4054496374. Please be advised that we will not bear any further charges

Kindly provide written confirmation that the account is closed.

Sincerely

Authorized Signatory

SAHARA CONSUMABLES (PTY) LTD

Imaging · Printers · Supplies

Reg No.: 2001/019162/07

VAT No.: 4120197043

Head Office

Johannesburg
89 Gazelle Azenue Corporale Park
Cld Pretoria Main Road Midrand
Johannesburg South Africa

Private Bag X180 Halfway House 1695 South Africa

Tel (+27 11) 542 1600 Fax. (+27 11) 542 1100 e mat: info ésahara co zo

Cape Town

Unit G5 & Centurion Busness Pork Milnerton Cape Town

Tel (+27 21) 551 5595 Fox. (+27 21) 551 0185 e mai inferset sahara co za

Durban

Unit No. 6 2 Corpbrick Drive Riverhorse Valley Durban

Tel. (+27 31) 534 9600 Fax: (+27 31) 534 1779 e-mai: efaikhan sahara da za

Port Elizabeth

12 4in Avenue Newton Park Part Exacteth

Tel: (+27 41) 365 2911 Fax: (+27 41) 365 2920 a mai into Eca softano casa

Website:

Directors A.K Gupta R Govender

LEXMARK











"YM 11-6"
SAHARA

SAHARA HOLDINGS (PTY) LTD.

Reg. No.: 2002/002230/07

Head Office
Johannesburg
89 Gazelle Avenue
Corporate Park South
Old Pretoria Main Road
Midrand
Johannesburg
South Africa

Private Bag X180 Halfway House 1685, South Africa

Tel: (+27 11) 542 1000 Fax: (+27 11) 542 1100

e-mail: info@sahara.co.za

03 February 2016

Temi Ofong

ABSA CORPORATE AND INVESTMENT BANKING 15 ALICE LANE SANDTON JOHANNESBURG 2196

Dear Sir / Ma'am

REQUEST TO CLOSE BANK ACCOUNT – SAHARA HOLDINGS 407-244-4965

This letter serves to request a closure of bank account number 4072444965. Please be advised that we will not bear any further charges

Kindly provide written confirmation that the account is closed.

Sincerely

Authorized Signatory

www.sahara.co.za

A.K. Gupta
C. Gupta
A. Gupta
R. Moonsamy
S.M. Mthethwa
M.S. Razak
M.D. Steyn

SAHARA









"YM //.7"

Tegeta Resources (Pty) Ltd. Registration No 2007/024754:07

Lower Ground Floor, Grayston Ridge Block A,144 Katherine Street, Sandown. Sandton, 2146, South Africa. Postal Address: Postnet Suite 458, Private Bag X9, Benmore, 2010 Tel: +27 11 262 3870 Email: infor@legta.com; joym@legeta.com www.legeta.com

03 February 2016

Temi Ofong

ABSA CORPORATE AND INVESTMENT BANKING 15 ALICE LANE SANDTON JOHANNESBURG 2196

Dear Sir / Ma'am

REQUEST TO CLOSE BANK ACCOUNT – TEGETA RESOURCES 407-244-4486

This letter serves to request a closure of bank account number 4072444486. Please be advised that we will not bear any further charges.

Kindly provide written confirmation that the account is closed.

Sincerely

**Authorized Signatory** 

In



"YM 11. 8

5 February 2016

Temi Ofong

ABSA CORPORATE AND INVESTMENT BANKING 15 ALICE LANE SANDTON JOHANNESBURG 2196

Dear Sir

Re: CLOSURE OF ACCOUNT - INFINITY MEDIA NETWORKS (PTY) LTD - 407 081 1352

Your letter dated 18 December 2015 refers.

Kindly close the above mentioned account with immediate effect and note that we will not bear any charges thereafter.

Kindly send us confirmation that the account is closed.

Yours, faithfully

DIRECTOR N HOWA



Fin Ring tim 2017/2004749 GZ

Directors I N Goyal | A Gupta | N Howa | V Gupta | A Goel

U1, 52, Lechtwe Street Corporate Park South, Midrand, Old Pretoria Main Road, Midrand 1685 Tel . +27 11 542 1222 Fax: 086 733 7000 email: info@ann7.com

PO Box 5728, Halfway House, Midrand, 1635





5 February 2016

Temi Ofong

ABSA CORPORATE AND INVESTMENT BANKING 15 ALICE LANE SANDTON JOHANNESBURG 2196

Dear Sir

Re: CLOSURE OF ACCOUNT - TNA MEDIA (PTY) LTD - 407 646 2329

Your letter dated 18 December 2015 refers.

Kindly close the above mentioned account with immediate effect and note that we will not bear any charges thereafter.

Kindly send us confirmation that the account is closed.

Yours faithfully

PIRECTOR







#### Business Bank

Bardays Pretoria Campus 1st Floor Rock B 270 Meggs Str Wallon Partoris 0184

Tel: 0113544157 Fax: 0867532080 SwiftAddress: ABSAZAJJ http://www.absa.co.za

#### Besigheidsbank

Barclays Pretoria Campus 1st Floor Eleck B 270 Magas Str Visition Pretoria 0184

Tel: 0113544157 Fals: 0867532080 Swft-Adres: AESA ZA JI http://www.ahss.co.zs 1466

15 February 2016

The Directors
TEGETA RESOURCES (PTY) LTD
PRIVATE BAG X180
HALFWAY HOUSE
1685

Dear Valued Client

Closure of Cheque Account

We confirm that the following bank account has been closed.

Account name:

TEGETA RESOURCES (PTY) LTD

Account number:

40-7646-2329

Date Closed:

12/02/2016

Trust you find the above to be in order.

Yours faithfully

Relationship Support Manager

Member of the BARCLAYS Group





14th April 2016

Phakamani Hadebe Chief Executive CIB South Africa Absa

Dear Sir

We write to you today to request an urgent meeting to discuss your decision to terminate our banking services.

We would like to take this opportunity to share with you various changes that have been made within our business and its structure to set your mind at ease around any concerns you may have had which prompted your decision to terminate our services.

Our delegation will be led by Terry Rensen, the lead independent director and the chair of Oakbay Resources and Energy, another independent director, and Ore's CFO, Trevor Scott. I will accompany the delegate as Oakbay's Chief executive.

We would need no more than 30 minutes in your diary and we hope you will find the time for us to meet as a matter of urgency.

Yours sincerely

Nazeem Howa Chief Executive

The The



Corporate and Investment Banking 1468

CONFIDENTIAL

15 Alice Lane Sandton Johannesburg 2196 South Africa

Private Bag X10056 Sandion 2146 South Africa

Tel +27 (0)11 895 6000 Fax +27 (0)11 895 7802

www.absacapital.com

25 April 2016

Nazeem Howa

**Chief Executive** 

Oakbay Investments (Pty) Ltd

Our Ref: Phakamani Hadebe

CONFIDENTIAL

Dear Sir

#### **OAKBAY INVESTMENTS (PTY) LTD**

We refer to your letter dated 14 April 2016.

We refer you to our previous correspondence in terms of which we advised you of our decision to terminate our relationship with Oakbay Investments (Pty) Ltd.

We do not wish to debate our decision and therefore we do not believe that a meeting would be of assistance to either party, and accordingly we politely decline your request to meet.

Yours faithfully

Phakamani Hadebe

Chief Executive, CIB South Africa

Member of

**BARCLAYS** 

Absa Bank Limited Reg No 1985/004794/05 Authorised Financial Services Provider Registered Credit Provider Reg No NCRCP7



"YM15"
1469

# IN THE HIGH COURT OF SOUTH AFRICA GAUTENG DIVISION, PRETORIA

CASE NO: 80978/16

**Applicant** 

In the matter between:

MINISTER OF FINANCE

AND EIGHTY (PTY) LTD

IN INDIA)

**ABSA BANK LTD** 

CONFIDENT CONCEPT (PTY) LTD

SAHARA COMPUTERS (PTY) LTD

FIRST NATIONAL BANK LTD

JET AIRWAYS (INDIA) LTD (INCORPORATED

and

First Respondent
Second Respondent
Third Respondent
Fourth Respondent
·
Fifth Respondent
Sixth Respondent
Seventh Respondent
Eight Respondent
Ninth Respondent
Tenth Respondent
Eleventh Respondent

Twelfth Respondent
Thirteenth Respondent
Fourteenth Respondent
Fifteenth Respondent
Sixteenth Respondent



THE STANDARD BANK OF SOUTH AFRICA

Seventeenth Respondent

LIMITED

**NEDBANK LIMITED** 

Eighteenth Respondent

**GOVERNOR OF THE SOUTH AFRICAN** 

Nineteenth Respondent

**RESERVE BANK** 

**REGISTRAR OF BANKS** 

Twentieth Respondent

DIRECTOR OF THE FINANCIAL

Twenty-First Respondent

INTELLIGENCE CENTRE

# **CONFIRMATORY AFFIDAVIT**

I, the undersigned

### **NICHOLAS SWINGLER**

do hereby make oath and say that:

- I am the Head of Financial Crime at Absa Bank Limited ("Absa"), the fifteenth respondent in this matter.
- The facts contained herein are within my personal knowledge and are true and correct.
- 3. At the time that the decision was taken to terminate the banker-client relationship with the Oakbay companies and related parties, I was the Chief Operations Officer of Absa's Corporate and Investment Banking Division ("CIB"). I was a member of the PEPs Review Committee which was convened on 18 November 2014 and was involved in the process / steps that followed thereafter.



4. I have read the Answering Affidavit deposed to by YASMIN MASITHELA and confirm the correctness thereof insofar as it relates to me or my involvement in the matter.

DEPONENT

# I certify that:

- I. the Deponent acknowledged to me that:
  - A. He knows and understands the contents of this declaration;
  - B. He has no objection to taking the prescribed oath;
  - He considers the prescribed oath to be binding on his conscience.
- II. the Deponent thereafter uttered the words, "I swear that the contents of this declaration are true, so help me God".
- III. the Deponent signed this declaration in my presence at the address set out hereunder on 32 December 2016.

h

# COMMISSIONER OF OATHS

Designation and Area:

LOURINA WILSON-ERASMUS

Full Names:

Commissioner of Oaths / Kommissaris van Ede Practising Attorney / Praktiserende Prokureur Unit 2, Hemel-en-Aarde Craft Village

Street Address

onr R43 and Main Road Sangpaa

Hermanus 7200

"YM/6"
1472

# IN THE HIGH COURT OF SOUTH AFRICA GAUTENG DIVISION, PRETORIA

CASE NO: 80978/16

In the matter between:

MINISTER OF FINANCE	Applicant
and	
OAKBAY INVESTMENTS (PTY) LTD	First Respondent
OAKBAY RESOURCES AND ENERGY LTD	Second Respondent
SHIVA URANIUM (PTY) LTD	Third Respondent
TEGETA EXPLORATION AND RESOURCES	Fourth Respondent
(PTY) LTD	
JIC MINING SERVICES (PTY) LTD	Fifth Respondent
BLACKEDGE EXPLORATION (PTY) LTD	Sixth Respondent
TNA MEDIA (PTY) LTD	Seventh Respondent
THE NEW AGE	Eight Respondent
AFRICA NEWS NETWORK (PTY) LTD	Ninth Respondent
VR LASER SERVICES (PTY) LTD	Tenth Respondent
ISLANDSITE INVESTMENTS ONE HUNDRED AND EIGHTY (PTY) LTD	Eleventh Respondent
CONFIDENT CONCEPT (PTY) LTD	Twelfth Respondent
JET AIRWAYS (INDIA) LTD (INCORPORATED	Thirteenth Respondent
IN INDIA)	
SAHARA COMPUTERS (PTY) LTD	Fourteenth Respondent
ABSA BANK LTD	Fifteenth Respondent
FIRST NATIONAL BANK LTD	Sixteenth Respondent



THE STANDARD	BANK	<b>OF SOUTH</b>	<b>AFRICA</b>
--------------	------	-----------------	---------------

Seventeenth Respondent

LIMITED

**NEDBANK LIMITED** 

Eighteenth Respondent

**GOVERNOR OF THE SOUTH AFRICAN** 

Nineteenth Respondent

**RESERVE BANK** 

**REGISTRAR OF BANKS** 

Twentieth Respondent

**DIRECTOR OF THE FINANCIAL** 

Twenty-First Respondent

INTELLIGENCE CENTRE

#### **CONFIRMATORY AFFIDAVIT**

I, the undersigned

#### MARIA DA CONCEICAO DAS NEVES CALHA RAMOS

do hereby make oath and say that:

- I am the Chief Executive Officer of Barclays Africa Group Ltd and of Absa Bank Limited, the fifteenth respondent in this matter.
- 2. The facts contained herein are within my personal knowledge and are true and correct.
- I have read the Answering Affidavit deposed to by YASMIN MASITHELA and confirm the correctness thereof insofar as it relates to me or my involvement in the matter.

DEPONENT

#### I certify that:

- I. the Deponent acknowledged to me that :
  - A. She knows and understands the contents of this declaration;
  - B. She has no objection to taking the prescribed oath;
  - C. She considers the prescribed oath to be binding on her conscience.
- II. the Deponent thereafter uttered the words, "I swear that the contents of this declaration are true, so help me God".

III. the Deponent signed this declaration in my presence at the address set out hereunder on 22<sup>nd</sup> December 2016

COMMISSIONER OF OATHS

**Emile Schmidt** 

Commissioner of Oaths Practising Attorney
SOHN & ASSOCIATES
11 PITT STREET KNYSNA
REPUBLIC OF SOUTH AFRICA

Designation and Area:

Full Names:

Street Address



4 YM 17 1475

From: Zarina Kellerman [mailto:Zarina.Kellerman@dmr.gov.za]

Sent: 22 April 2016 11:44 To: Botha, Alison: Barclays Africa

Libject: NTER-MINISTERIAL COMMITTEE - CONSULTATION WITH BARCLAYS AFRICA GROUP LIMITED

Dear Alison

I refer to our brief discussion a short while ago.

As explained, as the Acting Secretary for the Inter-Ministerial Committee set up by Cabinet to look into certain allegations made against certain financial institutions ("the IMC"), I have been requested to make contact with Ms Ramos alternatively a suitable alternative with requisite authority, and request that she please make herself available for a discussion with the IMC on Monday, 25 April 2016 at 10h00-10h30. There is no set agenda for the discussion but, I am advised, is anticipated to be a discussion to gain clarity on the current media reports. Should Ms Ramos not be available in person, a teleconference call could certainly be accommodated.

Should the allotted time not be suitable, we will attempt to accommodate you accordingly. Given the nature of the matter and the sensitivities involved, the IMC apologises for the late notice but would certainly appreciate the engagement.

200

Should Ms Ramos not be willing to participate, please advise me accordingly so that I may indicate same to the IMC.

I look forward to your response.

Sincerely Zarina Kellerman 083 960 9188 012 444 3400

1.

Advisor to the Minister of Mineral Resources and Acting Secretary to the IMC





From: Botha, Alison: Barclays Africa

Sent: 22 April 2016 16:50

To: 'Zarina.Kellerman@dmr.gov.za'

Subject: NTER-MINISTERIAL COMMITTEE - CONSULTATION WITH BARCLAYS AFRICA GROUP LIMITED

Dear Zarina

On behalf of Ms Ramos, I would like to confirm receipt of your e-mail requesting a meeting.

Kindly advise us of the following:

- 1. The nature of the discussion anticipated to allow for appropriate preparation. This will also determine the attendees from a Barclays Africa perspective
- 2. The names and designations of the IMC attendees
- 3. The status of the committee and the meeting and the treatment of any information shared during the meeting; and
- 4. The venue for the meeting.

Your request refers to current media reports, within this context, please note that as a Bank we have legal and regulatory obligations which prevent us from discussing any client confidential information.

We confirm that we have informed the South African Reserve Bank our primary regulator of the meeting request.

Kind regards

Alison Botha | Office of Mana Ramos | Chief Executive Officer. Barclays Africa Group Limited

Tel +27 (0:11 350 0304 | Mobile +27 (0)79 504 9939 ;Fax +27 (0)86 753 1692 | email: alison.botha@barclaysafrica.ccm

8th Floor, Barclays Towers West 15 Troye Street Johannesburg 2001

Respect | Integrity | Service | Excellence | Stewardship Helping people achieve their ambitions – in the right way

Zu.

----Original Message-----

From: Zarina Kellerman [Zarina Kellerman@dmr.gov.za]

Sent: Sunday, April 24, 2016 05:29 AM South Africa Standard Time

To: Botha, Alison: Barclays Africa

Subject: Re: NTER-MINISTERIAL COMMITTEE - CONSULTATION WITH BARCLAYS AFRICA

**GROUP LIMITED** 

Dear Alison

As the Acting Secretariat for the Committee, I am not mandated to respond to the questions raised below suffice to note the following:-

a. The Committee is constituted by Cabinet; and

b. Information shared during the session must of course be relayed to Cabinet for it to properly consider the media reports. Outside of that forum, all such information remains strictly confidential.

The venue for the discussion is as follows:-

Department of Mineral Resources The Office of the Minister 4th Floor 70 Trevenna Campus Building 2C Cnr Francis Baard & Meintjes Streets Sunny side Pretoria

The remainder of the contents of your email are noted and will be brought to the attention of the IMC at its sitting. Please confirm if Barclays will be participating.

Sincerely Zarina

# Masithela, Yasmin: Barclays Africa

"4M20"

From:

Masithela, Yasmin: Barclays Africa

Sent

24 April 2016 13:44

To:

'Zarina.Kellerman@dmr.gov.za'

Cc:

**ABMR789**; **ABCB930** 

Subject:

Inter Ministerial Consultation - Barclays Africa Group Limited

#### Dear Ms Kellerman

Thank you for your email received by our Alison Botha at 5:29 am today. I note that you are not mandated to respond to the questions of clarification which were sent to you on Friday 22 April 2016, in response to your invitation which was also sent on Friday 22 April 2016. This directly impacts on our decision on whether to attend such a meeting.

You have indicated that it is proposed that current media reports will be discussed at the proposed meeting. I assume that these media reports relate to a particular company. I reiterate that it will not be appropriate for us as a bank, to discuss any matters relating to client / customer confidential information at such a meeting, whether such a lient / customer is a prospective, current or past client.

In the circumstances, we respectfully decline the invitation for a meeting.

As a regulated bank and responsible financial institution, we are obviously more than willing to cooperate with the appropriate authorities to discuss any matters which we are permitted by law to discuss.

Ms Ramos has requested that any future communication on this matter be directed to me and I will respond on behalf of Barclays Africa Group Limited.

Yours faithfully

Yasmin Masithela Barclays Africa Group Head of Compliance

Sent with Good (www.good.com)



"YM21"

1480

From: Zarina Kellerman [mailto:Zarina.Kellerman@dmr.qov.za]

Sent: 04 May 2016 11:12

To: Botha, Alison: Barclays Africa

Subject: Further meeting of the IMC

Dear Alison

The IMC is holding further sessions and I have been mandated to extend a further invitation to Barclays Africa group (including ABSA) to meet with the IMC on Thursday, 05 May 2016 at 13h00. I am now mandated to further advise as follows:-

a. The IMC consists of the Ministers of Labour, Communications, Mineral Resources and Finance; and

b. The engagements will take the form of a discussion with the bank's representatives. The scope of the discussions will centre around public comments made by ABSA and/or Barclays around the decision taken by the institutions to close the banks accounts of certain of its clients. Whilst Cabinet appreciates the terms and conditions of the banks, the acts may deter future potential investors who may want to do business in South Africa. Cabinet has

1

endbrsed that the Ministers open a constructive engagement with he banks to find a lasting solution to the matter.

I look forward to your response.

Sincerely Adv Zarina Kellerman Secretariat to the IMC

This e-mail is sent by or on behalf Barclays Africa Group Limited and or one or more of its subsidiaries. Absa Bank Limited is a subsidiary of Barclays Africa Group Limited and is an Authorised Financial Services Provider and Registered Credit Provider, registration number: NCRCP7. Absa Bank Limited provides services to Barclays Africa Group Limited and its subsidiaries. This e-mail and any files transmitted with it may contain information that is confidential, privileged or otherwise protected from disclosure. If you are not an intended recipient of this e-mail, do not duplicate or redistribute it by any means. Please delete it and any attachments and notify the sender that you have received it in error. Unless specifically indicated, this e-mail is not an offer to buy or sell or a solicitation to buy or sell any securities, investment products or other financial product or service, an official confirmation of any transaction, or an official statement of Barclays Africa Group Limited or any of its subsidiaries. Any views or opinions presented are solely those of the author and do not necessarily represent those of Barclays Africa Group Limited or any of its subsidiaries. This e-mail is subject to disclaimer terms available at the following link: http://www.absa.co.za/disclaimer. The disclaimer forms part of the content of this email. If you are unable to access the disclaimer, send a blank e-mail to disclaimer@absa.co.za and we will send you a copy. By messaging with Barclays Africa Group Limited and or any of its subsidiaries you consent to the foregoing.



a ymzz

## Masithela, Yasmin: Barclays Africa

From:

Masithela, Yasmin: Barclays Africa

Sent:

04 May 2016 17:04

To:

Zarina.Keilerman@dmr.gov.za

Cc:

Ramos, Maria: Chief Executive Barclays Africa Group; Wheeler, Charles: Barclays

Africa; Botha, Alison: Barclays Africa

Subject:

RE: Further meeting of the IMC

Importance:

High

Tracking:

Recipient

Delivery

Read

Zarina.Kellerman@dmr.gov.za

Ramos, Maria: Chief Executive

Barclays Africa Group

Delivered: 04/05/2016 17:04

Wheeler, Charles: Bardays Africa

Botha, Alison: Barclays Africa

Delivered: 04/05/2016 17:04

Read: 04/05/2016 17:18

Dear Ms Kellerman

Thank you for your email to our Alison Botha received at 11:12am this morning (04 May 2016), in which you invite us to a meeting at 13h00 tomorrow afternoon (05 May 2016).

- (1) In paragraph (b) of your mail you indicate that "...The scope of the discussions will centre around public comments made by ABSA and/or Barclays around the decision taken by the institutions to close the banks accounts of certain of its clients." We must emphasise that neither ABSA nor Barclays has made any public comment as indicated by you. The only public comment we have made is to the effect that we cannot comment on client confidential issues. We have repeatedly stated both to you and the media that as a regulated financial institution it is not appropriate for us to discuss any matters relating to client/customer confidential information whether such a client/customer is prospective, current or a past.
- (2) Absa Bank Ltd ('Absa') as a responsible Systematically Important Financial Institution (SIFI) (a financial Institution that is so important to the economy such that its failure could lead to a widespread economic crisis) is committed to complying with our national laws, rules, regulations and policies as well as international laws.
- (3) We are highly regulated by the South African Reserve Bank who supervise our activities and ensure our compliance with regulation on a daily basis. The main legal obligations of a bank relating to customers arise from various pieces of legislation, the main ones being:
  - The Banks Act 94 of 1990;
  - The Prevention of Organised Crime Act 121 of 1998 (POCA) which creates and prohibits serious money laundering offences;
  - The Financial Intelligence Centre Act 38 of 2001 (FICA); The Protection of Constitutional Democracy against Terrorist and Related Activities Act 33 of 2004 (POCDATARA) creates money laundering and anti-terrorism compliance obligations for financial institutions;
  - Exchange Control Regulations; and
  - We have reporting obligations to the South African Revenue Services
- (4) Your response at paragraph (a) simply indicates the membership of the IMC, this does not adequately address our request for the details of the attendees of the meeting nor address the specific question regarding the status of the meeting.
- (5) In the circumstances, we politely decline the request for a meeting for the reasons stated above.

Filling sheet - FirstRand's (16th respondent's) supporting affidavit

# IN THE HIGH COURT OF SOUTH AFRICA GAUTENG DIVISION, PRETORIA

Case No 80978/16

In the matter between:

Minister of Finance	Applicant
and	
Oakbay Investments (Pty) Ltd	1 <sup>st</sup> Respondent
Oakbay Resources and Energy Ltd	2 <sup>nd</sup> Respondent
Shiva Uranium (Pty) Ltd	3 <sup>rd</sup> Respondent
Tegeta Exploration and Resources (Pty) Ltd	4 <sup>th</sup> Respondent
JIC Mining Services (Pty) Ltd	5 <sup>th</sup> Respondent
Blackedge Exploration (Pty) Ltd	6 <sup>th</sup> Respondent
TNA Media (Pty) Ltd	7 <sup>th</sup> Respondent
The New Age	8 <sup>th</sup> Respondent
Africa News Network (Pty) Ltd	9 <sup>th</sup> Respondent
VR Laser Services (Pty) Ltd	10 <sup>th</sup> Respondent
Islandsite Investments One Hundred and Eighty (Pty) Ltd	11 <sup>th</sup> Respondent
Confident Concept (Pty) Ltd	12 <sup>th</sup> Respondent
Jet Airways (India) Ltd (incorporated in India)	13 <sup>th</sup> Respondent
Sahara Computers (Pty) Ltd	14 <sup>th</sup> Respondent
ABSA Bank Ltd	15 <sup>th</sup> Respondent
FirstRand Bank Limited	16 <sup>th</sup> Respondent
Standard Bank of South Africa Limited	17 <sup>th</sup> Respondent

**Nedbank Limited** 18<sup>th</sup> Respondent 19<sup>th</sup> Respondent Governor of the South African Reserve Bank 20<sup>th</sup> Respondent Registrar of Banks

## FILING SHEET - FIRSTRAND'S SUPPORTING AFFIDAVIT

Document presented for service and filing:

**Director of the Financial Intelligence Centre** 

# FirstRand's supporting affidavit and annexures

Signed at Sandton on this 29th day of November 2016.

Norton Rose Fulbright South Africa Inc Attorneys for 16<sup>th</sup> respondent

34 Fredman Drive Sandton

Tel: 011 685 8860

21st Respondent

Email: aslam.moosajee@nortonrosefulbright.com

Ref: Mr Moosajee/FNB13954 c/o Mothle Jooma Sabdia Inc

Ground Floor, Duncan Manor

Cnr Jan Shoba and Brooks Streets

Brooklyn

Tel: 012 362 3137

Email: EbrahimJ@mjs-inc.co.za Ref: Mr Jooma/NOR1.0152

To:

The Registrar of the High Court Pretoria

#### And to:

The State Attorney

Attorneys for applicant SALU Building 255 Francis Baard Street

Pretoria

Tel: 012 309 1575

Email: TNhlanzi@justice.gov.za

Ref: Ms T Nhlanzi Ref: 2427/16/232

And to:

Van der Merwe & Associates 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 10<sup>th</sup>, 11<sup>th</sup>, 12<sup>th</sup> and 14<sup>th</sup> respondents' attorneys 62 Rigel Ave North Waterkloof, Pretoria

Tel: 012 343 5432

Email: <u>legal2@vdmass.co.za</u> <u>simone@vdmass.co.za</u>

And to:

**Edward Nathan Sonnenbergs** 

15<sup>th</sup> respondent's attorneys 15 West Street, Sandton

Tel: 011 269 7600

Email: dlambert@ensafrica.com
Ref: M Katz/D Lambert/0416998
c/o Gerhard Botha & Partners Inc
1st Floor, Erasmus Forum Building B
Cnr Rigel Ave / Stokkiesdraai

Erasmusrand, Pretoria Tel: 012 347 0480

Email: brendon@bothapartners.co.za

Ref: Mr B Swart/Mr H Botha

And to:

Service by email

Service by email

Service by email

Bowman Gilfillan

17<sup>th</sup> Respondent's attorneys 165 West Street, Sandton

Tel: 011 669 9000 Ref: C Mkiva/6164672

Email: clement.mkiva@bowmanslaw.com

alan.keep@bowmanslaw.com c/o Boshoff Attorneys

Ground Floor, Hazelwood Gate

Office Park

14 Oaktree Avenue

Cnr Oaktree Ave / Dely Road

Hazelwood, Pretoria Tel: 012 424 7500 Ref: Natasha Nortie

Email: Natasha@boshoffinc.co.za

And to:

Baker & McKenzie

18<sup>th</sup> respondent's attorneys

Tel: 011 911 4300

Email:

Gerhard.Rudolph@bakermckenzie.com Widaad.Ebrahim@bakermckenzie.com

Callum.OConnor@bakermckenzie.com

c/o Adams & Adams

Adams & Adams Place

Lynnwood Bridge

4 Daventry Street, Lynnwood Manor

Pretoria

Tel: 012 432 6000 Ref: Adele Jordaan

Email: adele.jordaan@adamsadams.com

And to:

**Werksmans Attorneys** 19<sup>th</sup> & 20<sup>th</sup> respondents' attorneys

155 - 5th Street, Sandown

Tel: 011 535 8145

Ref: Mr C Manaka / Mr C Moraitis

Email: <a href="mailto:cmanaka@werksmans.com">cmanaka@werksmans.com</a>

cmoraitis@werksmans.com c/o Mabuela Incorporated

Charter House, 179 Bosman Street

Pretoria

Tel: 012 325 3966

Email: mabuela@tiscali.co.za

Service by email

Service by email

Service by email

And to:

MacRobert Attorneys
21st respondent's attorneys
MacRobert Building
Cnr Jan Shoba / Justice Mahomed

Pretoria

Tel: 012 425 3436

Ref: G K Hay

Email: ghay@macrobert.co.za

Service by email

### FirstRand's supporting affidavit

# IN THE HIGH COURT OF SOUTH AFRICA GAUTENG DIVISION, PRETORIA

Case No.: 80978/16

Ninth Respondent

In the matter between:

MINISTER OF FINANCE	Applicant
and	
OAKBAY INVESTMENTS (PTY) LTD	First Respondent
OAKBAY RESOURCES AND ENERGY LTD	Second Respondent
SHIVA URANIUM (PTY) LTD	Third Respondent

	-
TEGETA EXPLORATION AND	
RESOURCES (PTY) LTD	Fourth Respondent
JIC MINING SERVICES (PTY) LTD	Fifth Respondent
BLACKEDGE EXPLORATION (PTY) LTD	Sixth Respondent
TNA MEDIA (PTY) LTD	Seventh Respondent
THE NEW AGE	Eighth Respondent

VR LASER SERVICES (PTY) LTD	Tenth Respondent
ISLANDSITE INVESTMENTS ONE	
HUNDRED AND EIGHTY (PTY) LTD	Eleventh Respondent

AFRICA NEWS NETWORK (PTY) LTD

CONFIDENT CONCEPT (PTY) LTD	Twelfth Respondent
JET AIRWAYS (INDIA) LTD	

(INCORPORATED IN INDIA)	Thirteenth Respondent
SAHARA COMPUTERS (PTY) LTD	Fourteenth Respondent

ABSA BANK LTD Fifteenth Respondent



FIRSTRAND BANK LIMITED

Sixteenth Respondent

STANDARD BANK OF SOUTH AFRICA

LIMITED

Seventeenth Respondent

**NEDBANK LIMITED** 

Eighteenth Respondent

GOVERNOR OF THE SOUTH AFRICAN

RESERVE BANK

Nineteenth Respondent

**REGISTRAR OF BANKS** 

Twentieth Respondent

DIRECTOR OF THE FINANCIAL INTELLIGENCE CENTRE

Twenty First Respondent

#### FIRSTRAND'S SUPPORTING AFFIDAVIT

I, the undersigned,

#### JOHAN PETRUS BURGER

do hereby make oath and state that:

- I am the Chief Executive Officer of FirstRand Bank Limited 1. ("FirstRand"). First National Bank ("FNB") is a division of FirstRand. The sixteenth respondent should have been cited as FirstRand. I am authorised to depose to this affidavit on its behalf.
- 2. The contents of this affidavit are true and correct and, save where the context indicates otherwise, within my personal knowledge.



 Where I make legal submissions, I do so on the advice of FirstRand's legal representatives.

#### A. INTRODUCTION

- 4. The applicant ("the Minister") seeks a declarator that he is not by law empowered or obliged to intervene in the relationship between the first to fourteenth respondents and the fifteenth to eighteenth respondents "as regards the closing of the banking accounts held by the former with the latter".
- 5. The issue arises, according to the Minister's founding affidavit, out of repeated requests (as the Minister understands them) for his intervention in the issue of the closing of the first to fourteenth respondents' bank accounts by the fifteenth to eighteenth respondents.
- 6. I am advised and respectfully submit that the declarator sought by the Minister raises a narrow legal point as to his powers or obligation to intervene in these relationships, which are in essence banker-client relationships.
- 7. This affidavit is filed in support of the Minister's application and, in particular, the relief sought by the Minister. FirstRand has adopted this stance because of the obvious interest it has in the relief sought by the Minister.

B) gs

#### 8. This affidavit:

- 8.1. deals with the allegation (in so far as it relates to FNB), attributed by the Minister to the first to fourteenth respondents, that the banks acted improperly or irregularly in closing the accounts of the first to fourteenth respondents; and
- 8.2. states FNB's position on a matter of principle and law, which is that the Minister does not have the power or obligation to interfere in a relationship between banks and their customers.

#### B. THE FACTS

- 9. The fourth respondent ("Tegeta"), the seventh respondent ("TNA Media"), the eleventh respondent ("Islandsite"), and the fourteenth respondent ("Sahara Computers") all held bank accounts with FNB.
- Save for the twelfth respondent, which holds mortgage redemption accounts with FNB (which accounts are not terminable on reasonable notice), the remainder of the respondents, that are opposing this application ("the Oakbay respondents"), hold no bank accounts with FNB.
- 11. FNB closed all of the bank accounts referred to in 9 above. It did so, by giving reasonable notice, by letters sent to the relevant respondents on 1 April 2016, which letters are annexures "FNB1", "FNB2", "FNB3" and "FNB4".



- 12. FNB was in law entitled to terminate its relationship with the relevant respondents. This was on the basis of *Bredenkamp and Others v Standard Bank of SA Ltd* 2010 (4) SA 468 (SCA), a decision which was endorsed by the Constitutional Court when it refused Mr Bredenkamp leave to appeal on the ground that he had no prospects of success on appeal. I attach as annexure "FNB5" the Constitutional Court's order refusing leave to appeal.
- 13. Since FNB was in law entitled to terminate its relationship with the relevant respondents on reasonable notice, FNB's reasons for doing so are irrelevant. The relevant respondents did not contest FNB's legal entitlement to terminate the banking relationships. This is apparent from a letter written by Mr Nazeem Howa (representing the relevant respondents) to FNB, dated 6 April 2016, which did not dispute FNB's legal entitlement to terminate the banking relationships, but merely requested from FNB "a full explanation for the termination of the accounts that we hold with you". I attach this letter as annexure "FNB6".
- Pursuant thereto, FNB provided its reasons for closing the accounts.It did so in a letter to Mr Howa and Mr Stephen Nel dated 13 April2016, paragraph 3 of which states:

"Our client took a careful and considered decision to close the bank accounts of various entities due to the associated reputational and business risks."



15. This letter is attached hereto as annexure "FNB7". Neither prior to this request nor at any stage thereafter did the relevant respondents dispute FNB's legal entitlement to terminate the accounts. Nor could they. Indeed, Mr Howa (apparently speaking on behalf of the first to fourteenth respondents) goes further, in a letter to the Minister dated 24 May 2016 (annexure E of the founding affidavit), to say that:

"Given the time challenges facing us during the meeting and your suggestions around legal remedies, I thought it prudent to place on record that following detailed discussions with several legal advisors, we are of the strong view that given the contractual rights the banks have, any legal approach may indeed be still-born.

It is certainly our view that this flies in the face of the banking code of good practice, yet, as case law suggests, will fail in a court of law. Given this position, as well as the decisions of the responsible regulators, we seem to have no options open to us other than our appeal to you for assistance."

- 16. The other point that emerges from the above letter is the fact that the Oakbay respondents attempted unlawfully and improperly to get the Minister to intervene in a private banking relationship. This attempt, as the Minister makes clear in his founding affidavit, has no legal basis and was improper. It is on this basis that FirstRand supports the declaratory relief sought.
- 17. Finally, I record that on 24 October 2016, after this application had been issued, attorneys for the Oakbay respondents wrote to FNB requesting, at paragraph 8 of their letter:

All As

- "... copies of any and all information including any possible suspicious or unusual transactions, correspondence and/or reasons causing your client (First National Bank) to close our clients' accounts and to refuse to conduct any further business with our clients, its associated entities or its shareholders."
- 18. This letter is attached hereto as "FNB8". The information sought by the Oakbay respondents is irrelevant to the relief sought by the Minister, and in support of which this affidavit is filed. Consequently FNB's attorneys advised Oakbay's attorneys in writing (attached as "FNB9") that FNB is not allowed to release the information to them.

#### 19. To summarise the position:

- FirstRand supports the declaratory relief sought by the Minister.
- 19.2. FNB was entitled as a matter of law to close the bank accounts of the relevant respondents. Its reasons for doing so are irrelevant to the legal issue in this application.
- 19.3. The Oakbay respondents attempted unlawfully and improperly to get the Minister to interfere in the relationship between them and the banks.
- I now turn to answer, seriatim, the Minister's founding affidavit,
   confining myself to such issues as affect FirstRand.

A gys

#### 21. AD PARAGRAPHS 1 TO 3

I admit the contents of these paragraphs.

#### 22. AD PARAGRAPHS 4 TO 12

Save for stating that:

- 22.1 the correct citation for the 16<sup>th</sup> respondent is FirstRand

  Bank Limited; and
- 22.2 First National Bank is a division of FirstRand Bank Limited,

I note the contents of these paragraphs.

#### 23. AD PARAGRAPH 13

I agree with the legal advice that the Minister says he received.

#### 24. AD PARAGRAPH 14

I admit this paragraph.

#### 25. AD PARAGRAPH 15

I note the contents of this paragraph.



#### 26. AD PARAGRAPH 16

- 26.1. I note the contents of this paragraph.
- 26.2. I have already pointed out, and repeat, that the Oakbay respondents are correct in saying that, as a matter of law, they could not successfully challenge the closure of their accounts by the banks. Certainly, they could not successfully challenge the closure by FNB of the relevant respondents' accounts.

#### 27. AD PARAGRAPHS 17 AND 18

I note the contents of these paragraphs.

#### 28. AD PARAGRAPH 19

I agree with the legal contentions in this paragraph and note the content of the remainder of this paragraph.

#### 29. AD PARAGRAPHS 20 AND 21

I note the content of these paragraphs.

#### 30. AD PARAGRAPHS 22 TO 25

30.1. To the best of my knowledge, FNB complied with its FICA reporting obligations.



- 30.2. In the light of the issue in this application, there is no need for FNB to provide details of any reports it may have made.
- 30.3. I am aware of the Carte Blanche interview and I admit the contents of paragraph 23.
- 30.4. Apart from FirstRand's obligations in terms of South African legislation including, but not limited to, FICA and the Banks' Act, FirstRand also has to bear in mind international legislation such as the UK's Bribery Act and the USA's Foreign Corrupt Activities Act, by virtue of FirstRand's transactions and counterparty relationships not being limited to South Africa.
- 30.5. FirstRand, as is expected of it by the South African Reserve Bank, seeks to comply with international best practices and standards applicable to the banking sector. Complying with these practices and standards is critical for the integrity of our banking sector. These practices and standards require us to take steps to prevent FirstRand being used for money laundering or other unlawful activities.
- 30.6. An example of the prejudice FirstRand will suffer if it does not adhere to international best practices and standards and if it does not protect its reputation, is the following: FirstRand has correspondent banking relationships with a number of

W K

international banks. If it does not adhere to international best practices and standards and if it does not protect its reputation, FirstRand's ability to secure appointments as a correspondent bank will be affected. It may also result in international banks not wanting to accept appointments as FirstRand's correspondent bank. This would be prejudicial not only to the business of FirstRand but also to FirstRand's clients.

30.7. Consequently it is important for FirstRand to be permitted to choose its clients, identify the risks that clients expose it to and determine whether these risks justify the termination of relationships with specific clients.

#### 31. AD PARAGRAPHS 26 TO 28

I note the content of these paragraphs.

#### 32. AD PARAGRAPHS 29 AND 30

- 32.1. I agree that it is in the public interest to grant the declaratory order sought.
- 32.2. In this regard and in addition to what is stated in this affidavit, I draw attention to the following:
- 32.2.1 On 22 April 2016, an advisor to the Minister of Mineral



Resources, who suggested that she was acting as the secretary to the Inter-Ministerial Committee ("IMC") that had been set up, invited FNB's CEO to attend a meeting with the IMC, which FNB had been advised, was set up to "look into certain allegations made against certain financial institutions";

- 32.2.2 In response, I, on 23 April 2016, requested, amongst others, details of who on behalf of the IMC would attend the meeting, what specific allegations had been levelled against FNB and the nature and scope of the IMC process;
- 32.2.3 The Acting Secretary to the IMC responded, on 24 April 2016, by indicating that she was not mandated to respond to the questions and consequently I declined the invitation to attend the meeting;
- 32.2.4 On 4 May 2016, I received a further invitation to meet with the IMC on 5 May 2016 at 12h30. I was advised that:

"Whilst Cabinet appreciates the terms and conditions of the banks, the acts [of the banks] may deter future potential investors who may want to do business in South Africa."

32.2.5 I responded to the further invitation by indicating that I would meet if all the members of the IMC were present. I also made it clear that while we could discuss the regulatory framework



banks are required to operate within, we could not discuss specific client matters.

- 32.2.6 Since I had not received confirmation that all the IMC members would be present at a meeting on 5 May 2016, at about 11h45 on5 May 2016, I declined the invitation to meet.
- 32.2.7 There was at the time uncertainty regarding the powers of the IMC and I believe that the declaratory order will avoid such situations in future and will encourage public officials to only act in accordance with the Constitution and national legislation (particularly if one has regard to the fact that the Acting Secretary to the IMC extended a further invitation on 4 May 2016 to an IMC meeting, which was after senior and junior counsel had already on 25 April 2016 provided an opinion that the IMC meeting was not authorised by legislation and would be unlawful);
- 32.3. I deny that FNB acted irregularly or improperly in closing the relevant respondents' accounts;
- 32.4. I support the determination of this matter on an expeditious basis.



#### C. CONCLUSION

33. For all the above reasons, FirstRand supports the Minister's application and submits that the relief he seeks should be granted.

JOHAN PETRUS BURGER

The deponent has acknowledged that he knows and understands the contents of this affidavit, which was signed and sworn to before me at SANDTON on this the 29<sup>th</sup> day of NOVEMBER 2016, the regulations contained in Government Notice No. R1258 of 21 July 1972, as amended, and Government Notice No. R1648 of 19 August 1977, as amended, having been complied with.

COMMISSIONER OF OATHS

SARAH MATHETSI MOERANE 155 - 5th Street Sandown, Sandton, 2196

Commissioner of Oaths
Ex-Officio / Practising Attorney R S.A.

1 April 2016

By email
Strictly Private and Confidential

Tegeta Exploration and Resources (Pty) Limited <a href="math@sahara.co.za">rnath@sahara.co.za</a>

For attention: Mr Ravindra Nath

# NORTON ROSE FULBRIGHT

Norton Rose Fulbright South Africa Inc 15 Alice Lane Sandton 2196 South Africa

Tel +27 11 685 8500 Fax +27 11 301 3200

Direct fax +27 11 301 3309 PO Box 784903 Sandton 2146 Docex 215 Johannesburg nortonrosefulbright.com

Direct line +27 11 685 8860

Email aslam.moosajee@nortonrosefulbright.com

Your reference Our reference FNB13954 / Mr A Moosajee

Dear Sirs

#### Termination of relationship

- 1 We act on behalf of First National Bank, a division of FirstRand Bank Limited (FNB).
- Our client is entitled to terminate its relationship with you by giving you reasonable notice and our client hereby gives such notice.
- Consequently, the accounts held with our client referred to below, will be closed on **Tuesday 31 May 2016** unless an earlier closure date is requested or if any circumstances arise in the future which warrant an earlier closure of the account:
- 3.1 Commercial cheque account with no. 62117356990; and
- 3.2 Money Market account with no. 62547290586

(collectively referred to as "the accounts")

- Please ensure that the necessary steps are taken to ensure that no deposits are made into the accounts on or after 31 May 2016 and that no further cheques or payment instruments are drawn against the accounts on or after 31 May 2016.
- Please also provide us with bank details into which any credit balances in the accounts as at 31 May 2016 should be transferred to once the accounts are closed. If you do not provide us with bank details timeously, the bank will issue a bank cheque and the cheque will be posted to Graystone Ridge Office Park, 144 Katherine Street, Sandown, 2146.
- If you need to communicate with FNB in relation to either the closure of the accounts or any operational issues relating to the accounts, please direct all such correspondence directly to the writer.

tion Room Fulleright South Africa Int (Roy No 1904/0003288221) Distance: SWAN Date (shishward RA City (swanping director) It Alexable Mr Alexabetic CP Arter 8 Architecty Mile Act Th Bisset SN4 South Int Bisset SN5 Southway PR Sortin Mr College And Date (SN5 Southway PR Sortin Mr College And PR Sortin Mr College And PR Sortin Mr College And Proceeding And Date (SN5 Southway PR Sortin Mr College And Per Sortin Mr

emissions: TJ de Wet MR Clinos



1 April 2016

Yours faithfully

Asiam Moosajee Director Norton Rose Fulbright South Africa Inc This is an electronic submission and is therefore unsigned NORTON ROSE FULBRIGHT



FNBD

1 April 2016

By Hand
Strictly Private and Confidential

TNA Media (Pty) Limited 52 Lechwe Street Corporate Park South Old Pretoria Main Road 1685

## NORTON ROSE FULBRIGHT

Norton Rose Fulbright South Africa Inc 15 Alice Lane Sandton 2196 South Africa

1504

Tel +27 11 685 8500 Fax +27 11 301 3200

Direct fax +27 11 301 3309 PO Box 784903 Sandton 2146 Docex 215 Johannesburg nortonrosefulbright.com

Direct line +27 11 685 8860

Email

aslam.moosajee@nortonrosefulbright.com

Your reference

Our reference

FNB13954 / Mr A Moosajee

Dear Sirs

#### Termination of relationship

- 1 We act on behalf of First National Bank, a division of FirstRand Bank Limited (FNB).
- Our client is entitled to terminate its relationship with you by giving you reasonable notice and our client hereby gives such notice.
- 3 Consequently, the accounts held with our client referred to below, will be closed on Tuesday 31 May 2016 unless an earlier closure date is requested or if any circumstances arise in the future which warrant an earlier closure of the account:
- 3.1 Commercial cheque account with no. 62282303321;
- 3.2 Money on Call account with no. 62561420482;
- 3.3 Business credit card with no. 4790552507968000;
- 3.4 Business credit card with no. 4790552507969000;
- Business credit card with no. 4790552507970000; and
- 3.6 Business credit card with no. 8812712910109000

(collectively referred to as "the accounts")

- 4 Please ensure that the necessary steps are taken to ensure that no deposits are made into the accounts on or after 31 May 2016 and that no further cheques or payment instruments are drawn against the accounts on or after 31 May 2016.
- 5 Please also provide us with bank details into which any credit balances in the accounts as at 31 May 2016 should be transferred to once the accounts are closed.
- FNB13954: FNB / Sahara Systems (Pty) If you need to communicate with FNB in relation to either the closure of the accounts or any operational issues relating to the accounts, please direct all such correspondence directly to the writer.

Incident Ration Full right Statis Addition for (Figs Not 188400008647). Director: TRANS Out-by Internating AC Only Internating offencing X Alcohol Mild Absonder CF Armor & Anthony CF Alcohol Absonder CF Armor & Anthony CF Armor & Anthony CF Alcohol Absonder CF Armor & Anthony CF Alcohol Absonder CF Armor & Anthony CF Armor & Anthony CF Alcohol Absonder CF Armor & Anthony CF Armor &

mediant TJ de Wel MR Olbern

Natural Rose Fullright Senth, Africe Pos, Herica Rose Fullright LLP, Natura Rose Fullright LLP, Africe Rose Fullright LLP, Africa Rose Fullright LLP, Africa

1 April 2016

Yours faithfully

Aslam Moosajee Director Norton Rose Fulbright South Africa Inc NORTON ROSE FULBRIGHT

A at

FNB3

1 April 2016

By Hand
Strictly Private and Confidential

Islandsite Investments 180 (Pty) Limited 89 Gazelle Avenue Corporate Park South Midrand 1685 NORTON ROSE FULBRIGHT

Norton Rose Fulbright South Africa Inc 15 Alice Lane Sandton 2196 South Africa

1506

Tel +27 11 685 8500 Fax +27 11 301 3200

Direct fax +27 11 301 3309 PO Box 784903 Sandton 2146 Docex 215 Johannesburg norlonrosefulbright.com

Direct line +27 11 685 8860

Email aslam.moosajee@nortonrosefulbright.com

Your reference Our reference

FNB13954 / Mr A Moosajee

Dear Sirs

#### Termination of relationship

- 1 We act on behalf of First National Bank, a division of FirstRand Bank Limited (FNB).
- Our client is entitled to terminate its relationship with you by giving you reasonable notice and our client hereby gives such notice.
- Consequently, the accounts held with our client referred to below, will be closed on **Tuesday 31 May 2016** unless an earlier closure date is requested or if any circumstances arise in the future which warrant an earlier closure of the account:
- 3.1 Business Credit Card with no. 4257152624690000; and
- 3.2 Business Credit Card with no. 8812712905829000

(collectively referred to as "the accounts")

- Please ensure that the necessary steps are taken to ensure that no deposits are made into the accounts on or after 31 May 2016 and that no further cheques or payment instruments are drawn against the accounts on or after 31 May 2016.
- Please also provide us with bank details into which any credit balances in the accounts as at 31 May 2016 should be transferred to once the accounts are closed. If you do not provide us with bank details timeously, the bank will issue a bank cheque and the cheque will be posted to 89 Gazelle Avenue, Corporate Park South, Midrand, 1685.
- If you need to communicate with FNB in relation to either the closure of the accounts or any operational issues relating to the accounts, please direct all such correspondence directly to the writer.



4/5

Notice Rose Full-right South Africa to 10,700 to 10,100 to 100-100-100-100 to 10,700 to 10,100 t

nomitent: TJ de Wet M

1 April 2016

Yours faithfully

Aslam Moosajee Director Norton Rose Fulbright South Africa Inc NORTON ROSE FULBRIGHT





FNB4

1508

1 April 2016

By email Strictly Private and Confidential

Sahara Computers (Pty) Limited atul@sahara.co.za

NORTON ROSE FULBRIGHT

Norton Rose Fulbright South Africa Inc 15 Alice Lane Sandton 2196 South Africa

Tel +27 11 685 8500 Fax +27 11 301 3200

Direct fax +27 11 301 3309 PO Box 784903 Sandton 2146 Docex 215 Johannesburg nortonrosefulbright.com

Direct line +27 11 685 8860

Email

aslam.moosajee@nortonrosefulbright.com

Your reference

Our reference

FNB13954 / Mr A Moosajee

Dear Sirs

#### Termination of relationship

- We act on behalf of First National Bank, a division of FirstRand Bank Limited (FNB).
- Our client is entitled to terminate its relationship with you by giving you reasonable notice and our client hereby gives such notice.
- 3 Consequently, the accounts held with our client referred to below, will be closed on Tuesday 31 May 2016 unless an earlier closure date is requested or if any circumstances arise in the future which warrant an earlier closure of the account:
- 3.1 Commercial cheque account with no. 62009883663;
- 3.2 Call account with no. 62009883738;
- 3.3 Business credit card with no. 4257152610262000;
- 3.4 Business credit card with no. 4257152613990000; and
- 3.5 Business credit card with no. 8812129036830000

(collectively referred to as "the accounts")

- Please ensure that the necessary steps are taken to ensure that no deposits are made into the accounts on or after 31 May 2016 and that no further cheques or payment instruments are drawn against the accounts on or after 31 May 2016.
- 5 Please also provide us with bank details into which any credit balances in the accounts as at 31 May 2016 should be transferred to once the accounts are closed. If you do not provide us with bank details timeously, the bank will issue a bank cheque and the cheque will be posted to 89 Gazelle Avenue, Corporate Park, Midrand 1685.
- 6 If you need to communicate with FNB in relation to either the closure of the accounts or any operational issues relating to the accounts, please direct all such correspondence directly to writer.

1 April 2016

NORTON ROSE FULBRIGHT

Yours faithfully

Aslam Moosajee Director Norton Rose Fulbright South Africa Inc This is an electronic submission and is therefore unsigned



1510



### CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 55/10

In the matter between:

JOHN ARNOLD BREDENKAMP

First Applicant

BRECO INTERNATIONAL LTD

Second Applicant

HAMILTON PLACE TRUST

Third Applicant

INTERNATIONAL CIGARETTE MANUFACTURERS (PTY) LTD

Fourth Applicant

and

STANDARD BANK OF SOUTH AFRICA LTD

First Respondent

MINISTER FOR FINANCE

Second Respondent

### ORDER DATED 16 JULY 2010

CORAM: Ngcobo CJ, Moseneke DCJ, Cameron J, Froneman J, Jaffa J, Nkabinde J, Van der Westhuizen J, and Yacoob J.

The Constitutional Court has considered the application for leave to appeal. It has concluded that the application should be dismissed with costs as it bears no prospects of success.

Order:

All gs

(1) The application for leave to appeal is dismissed with costs.

MSTANDER SENIORREGISTRAR

TO: WERTHEIM BECKER INC. Applicants' Attorneys

Applicants' Attorneys 1st Floor Oxford Manor

196 Oxford Road

Illovo

**JOHANNESBURG** 

Tel: (011) 268 1130

Fax: (011) 268 1140

Ref: A Kika /sl/34586

AND TO: DENEYS REITZ ATTORNEYS

Respondent's Attorneys

82 Maude Street

Sandown

**JOHANNESBURG** 

Tel: (011) 6858860 Fax: (011) 5355204

Ref: Mr A. Moosajee/STD10096

AND TO: MINISTER FOR FINANCE

c/o: STATE ATTORNEY

10th Floor

North State Building

95 Market Street

Cnr Kruis Street

**JOHANNESBURG** 

Tel: (011) 330 7652

Fax: (011) 337 7182







FNB6 - 1512

First National Bank

FNB Bankcity Johannesburg South Africa 2000

6 April 2016

Dear Mr Celliers,

We acknowledge your letter, received by us on Friday  $1^{\pm}$  April terminating our banking relationship with you.

We kindly request that you provide us with a full explanation for the termination of the accounts that we hold with you.

We would be grateful if we could receive this within the next two working days.

Kind regards,

Nazeem Howa, CEO, Oakbay Investments



FNB7

13 April 2016

Strictly Private and confidential

By Email: nazeemh@tnamedia.co.za sjd@sahara.co.za

Mr Nazeem Howa and Mr Stephen Nel

NORTON ROSE FULBRIGHT

Norton Rose Fulbright South Africa Inc 15 Alice Lane Sandton 2196 South Africa

1513

Tel +27 11 685 8500 Fax +27 11 301 3200

Direct fax +27 11 301 3309 PO Box 784903 Sandton 2146 Docex 215 Johannesburg nortonrosefulbright.com

Direct line +27 11 685 8860

Email aslam.moosajee@nortonrosefulbright.com

Your reference Nazeem Howa Our reference

FNB13954 / Mr A Moosajee

Dear Mr Howa and Mr Nei

Our client: First National Bank (FNB)

- We have been advised by our client that you have requested a meeting with FNB.
- In view of the decision already made by our client, which our client reconfirmed following your request for a meeting, our client instructs us that no point would be served in convening a meeting for the purposes of discussing the "closure of accounts".
- Our client took a careful and considered decision to close the bank accounts of various entities due to the associated reputational and business risks.
- Our client was entitled to exercise its rights to give reasonable notice of the closure of the relevant bank accounts.
- 5. We reiterate that if you need to communicate with FNB in relation to either the closure of the accounts or any operational issues relating to the accounts, please direct all such correspondence directly to the writer.

Yours faithfully

Aslam Moosajee
Director
Norton Rose Fulbright South Africa Inc
This is an electronic submission and is therefore unsigned

# ap

7476114\_1

Marine Resp. Publicités Semile Africa Inc. (Reg. 10: 1864003355521) Directors; 2014 du gérminezai RA City (managing afracts) K. Alesda Ini Alexander CP Anne S Anhary TM Baker SH Bermit He Bland SES Bellaryo SE Bellar OG Beurver PA Structure And Charges SE, Chemistry C Cantro MR Cree Ini O Des V Dond Sid Sel Desay Me Visual Director And Structure And Charges SE Anhary TM Baker SH Harried He Harri MC Festrated SP Harris SE Research J. James or Research J. James SE Research J. James J. Jame

Considerit MS Ask JMR Coldew PM Chronis MR Officers

Notices (Sees Publicity) Edestion Address (Sees Publicity) LLU. Modern Risson Federicky) LLU. Modern Risson Federicky) Annotates, Modern Risson Federicky) Annotates, Modern Risson Federicky) Annotates, Modern Risson Federicky Commiss, a British Sees Publicity (Sees Annotates) and Annotates and A



FNBP

1514

Attorneys • Notaries • Conveyancers • Prokureurs • Notarisse • Aktevervaardigers

Director / Direkteur: Gert van der Merwe (BLC, LLB)

Associate/Associaat
Ilanie Loots (LLB)

Assisted by / Bygestaan deur-Ilze van der Merwe (LLB) Ilze Mattheus (B.Com, LLB, LLM)

\*Nico Hager (B.Iuris LLB)

Reg No: 2006/015908/21 VAT/BTW No: 4630239152

Pretoria
Street Address / Straatadres:
62 Rigel Avenue, Waterkloof
Ridge, Pretoria

Postal Address / Posadres:
Posbus / P.O. Box 27756
Sumnyside
0132
Tel: 087 654 0209
Fax/Faks: 012 343 5435
Email/Epos:
legal2@ydmass.co.za

\*Sandton Tel: 011 542 2000 Fax/Faks: 086 603 4356 Our Ref: MR GT VD MERWE/st/078

Your Ref: MR ASLAM MOOSAJEE

24-10-2016

Norton Rose Fulbright South Africa Incorporated Aslam.moosajee@nortonrosefulbright.com Jocelyn.evans@nortonrosefulbright.com

Dear Sir/Madam,

OAKBAY INVESTMENTS (PTY) LTD AND TWENTY OTHERS / MINISTER OF FINANCE CASE NUMBER: 80978/2016

We refer to the abovementioned matter and in particular your notice served on behalf of the Sixteenth Respondent, First National Bank.

You are obviously aware of the fact that our clients have always maintained the view that your client acted in bad faith in not only by closing our clients' accounts but also refusing to furnish proper reasons for doing so.

We have, recently, been furnished with the application in question from which it seems as if certain transactions were reported in terms of the provisions of the Financial Intelligence Centre Act, No. 38 of 2001.

We are in the process of collating the bundle of documents which we intend to use in drafting our clients' opposing affidavit. Your client, our clients' erstwhile banker, has information pertaining to the transactions referred to in Annexure "P2" of the founding papers to



the application (we must assume this since it has not been disclosed to us) and your client must have considered certain facts when your client decided to terminate its relationship with our clients.

It was widely reported in the media that our clients were frustrated with the refusal of the banks to furnish reasons for the closure of bank accounts and from the annexures to the application it is evident that our clients maintained the view that the banks closed their accounts as a result of political agendas and ulterior motives.

In correspondence the Applicant (the Minister of Finance) indicated that he was concerned that these allegations of impropriety would harm a stable banking sector in South Africa. In this regard we take the liberty of quoting the following from paragraph 24 of the affidavit deposed to by Minister Gordhan:

"If the banks have acted lawfully and within the parameters of their statutory duty these should evidence the bases on which each reporting bank has concluded that the dealing in question could directly or indirectly make that bank a party to or accessory to contraventions of law. Conversely, the full reports, if disclosed pursuant to FICA, would confirm whether there is any substance to the serious contentions advanced by Oakbay that the banks have acted improperly in closing the accounts". (sic)

We direct this formal letter to you requesting you to furnish us with copies of any and all information including any possible suspicious or unusual transactions, correspondence and/or reasons causing your client (First National Bank) to close our clients' accounts and to refuse to conduct any further business with our clients, its associated entities or its shareholders.

May we kindly request you to furnish us with copies of any and all such documents and/or access to any such information within the next 5(Five) days since we are in the process of drafting our clients' opposing papers and, if possible, would like to include any information held by our clients' erstwhile bankers.

We obviously tender the reasonable costs for furnishing us with the aforesaid copies and/or access to information held by your client in this regard. If we do not receive any



formal response or feedback we will assume that your client does not have any such information or documentation at its disposal.

All our clients' rights remain strictly reserved.

Kind regards.

Gert van der Merwe VAN DER MERWYE & ASSOCIATES



31 October 2016

By Email:

simone@vdmass.co.za

legal2@vdmass.co.za

Van der Merwe & Associates

### NORTON ROSE FULBRIGHT

Norton Rose Fulbright South Africa Inc 15 Alice Lane Sandton 2196 South Africa

Tel +27 11 685 8500 Fax +27 11 301 3200

Direct fax +27 11 301 3309 PO Box 784903 Sandton 2146 Docex 215 Johannesburg nortonrosefulbright.com

Direct line +27 11 685 8860

Email

aslam.moosajee@nortonrosefulbright.com

Your reference
MR GT VD MERWE/st/078 FNB13954/Mr Moosajee

Dear Sirs

#### Minister of Finance / Oakbay Investments (Pty) Ltd and twenty others

- 1 We refer to your letter dated 24 October 2016.
- Our client was contractually entitled to terminate its relationship with your clients on reasonable notice.
- 3 The motive for our client exercising its contractual rights is irrelevant.
- Despite this, our client had in a letter dated 13 April 2016 to the then senior officials of your clients, advised your clients that our client took the decision to close the bank accounts due to the associated reputational and business risks.
- It is therefore not correct for your clients to suggest that our client did not provide your clients with any reasons for the closure of the bank accounts.
- Your clients' request for information that may have been furnished by our client to the Financial Intelligence Centre is misdirected. The Financial Intelligence Centre Act does not allow our client to release information to you or your clients. In any event, such information is not relevant to the issue to be determined in the application, namely whether the Minister is empowered by law or obliged to intervene in the relationship between the banks and your clients, regarding the closure of the bank accounts that were held by your clients with the banks.
- Our failure to deal with the remaining contentions contained in your letter should not be construed as an admission of the correctness thereof and our client's rights to deal with them, if it becomes necessary in the future, are reserved.

Yours faithfully

Aslam Moosajee Director Norton Rose Fulbright South Africa Inc This is an electronic transmission and is therefore unsigned



4

8200765\_1

Notion Research Section Area for (Fig. 1) to INSCREAMACKE) (Province, NAVI Only Information of Divisio Incomplete Section), Information II. (Information of Divisio Incomplete Section), Information II. (Information of Divisio Incomplete Section), Information II. (Information of Divisio Information), Information II. (Information) Contains Off Contains On Information III. (Information) Contains Off Contains Off Contains Off Contains III. (Information) Contains II

Consultant; M& Ash JHR Cuidear PM Cresspo MR Officers

17th AA Z3z 1518

# IN THE HIGH COURT OF SOUTH AFRICA (GAUTENG DIVISION, PRETORIA)

#### CASE NO: 80978/2016

In the matter between:

MINISTER OF FINANCE

AFRICA NEWS NETWORK (PTY) LTD

Applicant

9th Respondent

and

OAKBAÝ INVESTMENTS (PTY) LTD	1 <sup>st</sup> Respondent
OAKBAY RESOURCES AND ENERGY LTD	2 <sup>nd</sup> Respondent
SHIVA URANIUM (PTY) LTD	3 <sup>rd</sup> Respondent
TEGETA EXPLORATION AND RESOURCES (PTY) LTD	4 <sup>th</sup> Respondent
JIC MINING SERVICES (PTY) LTD	5 <sup>th</sup> Respondent
BLACKEDGE EXPLORATION (PTY) LTD	6 <sup>th</sup> Respondent
TNA MEDIA (PTY) LTD	7 <sup>th</sup> Respondent
THE NEW AGE	8 <sup>th</sup> Respondent

VR LASER SERVICES (PTY) LTD	10 <sup>th</sup> Respondent	
ISLANDSITE INVESTMENTS ONE HUNDRED AND EIGHTY (PTY)	11 <sup>th</sup> Respondent	
CONFIDENT CONCEPT (PTY) LTD	12 <sup>th</sup> Respondent	
JET AIRWAYS (INDIA) LTD (INCORPORATED IN INDIA)	13 <sup>th</sup> Respondent	
SAHARA COMPUTERS (PTY) LTD	14 <sup>th</sup> Respondent	
ABSA BANK LTD	15 <sup>th</sup> Respondent	
FIRST NATIONAL BANK LTD	16 <sup>th</sup> Respondent	
THE STANDARD BANK OF SOUTH AFRICA LIMITED	17 <sup>th</sup> Respondent	
NEDBANK LIMITED	18 <sup>th</sup> Respondent	
GOVERNOR OF THE SOUTH AFRICAN RESERVE BANK	19 <sup>th</sup> Respondent	
REGISTRAR OF BANKS	20 <sup>th</sup> Respondent	
DIRECTOR OF THE FINANCIAL INTELLIGENCE CENTRE	21 <sup>st</sup> Respondent	
FILING SHEET		

THE FOLLOWING IS PRESENTED FOR SERVICE AND FILING:

The Explanatory Supporting Affidavit of Standard Bank.

DATED AT SANDTON on this the 3 day of December 2016.

BOWMAN GILFILLAN INC 17<sup>th</sup> Respondent's Attomeys 165 West Street Sandton 2146

Tel: 011-669-9000 Fax: 011-669-9001

Email: clement\_mkiva@bowmanslaw.com/

alan.keep@bowmanslaw.com
Ref: C Mkiva/ 6164672
c/o BOSHOFF ATTORNEYS

Ground Floor, Hazelwood Gate Office Park

14 Oaktree Avenue

Cnr Oaktree AVENUE & Dely Road

Hazelwood, Pretoria Tel: 012-424-7500 Fax 086-228-6805

Ref: Natasha Nortje / NN1564

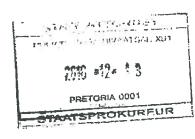
TO: THE REGISTRAR OF THE ABOVE HONOURABLE COURT PRETORIA

AND TO:

STATE ATTORNEY
Applicant's Attorneys
SALU Bullding
255 Francis Baard Street
Pretoria
Tel: 012 309 1575

Tel: 012 309 15/5 Fax: 012 309 1649

E-mail: TNhalnzi@justice.gov.za Ref: 2427/16/Z32. Ms T Nhlanzi



A 15/130

#### AND TO:

VAN DER MERWE AND ASSOCIATES
Attorneys for the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 10<sup>th</sup>, 11<sup>th</sup>, 12<sup>th</sup> and 14<sup>th</sup> Respondents 62 Rigel Ave North
Waterkloof, Pretoria
Tel: 012 343 5432
E-mail: simone@dvmass.co.za

#### AND TO:

EDWARD NATHAN SONNENBERGS 15th Respondent's attorneys 150 West Street Sandton Tel: 011 269 7600 Fax: 011 269 7899

Ref: Mr GT VD Merwe/st/078

E-mail: dlambert@ensafrica.com
Ref: M Katz/D Lambert/0416998
c/o GERHARD BOTHA & PARTNERS
First Floor, Erasmus Forum Building B
Cnr Rigel Avenue and Stokkiesdraai
Erasmusrand
Pretoria

Tel: 012 347 0480 Fax: 012 347 6839

E-mail: <u>brendon@bothapartners.co.za</u> Ref: Mr B Swart / Mr H Botha

#### AND TO:

NORTON ROSE FULBRIGHT SOUTH AFRICA INC.

16th Respondent's attorneys 34 Fredman Drive, Sandton Tel: 011 685 8860

E-mail: <u>aslam.moosajee@nortonrosefilbright.com</u> / <u>jocelyn.evans@nortonrosefulbright.com</u> Ref; Mr Moosajee/FNB13954

c/o MOTHLE JOOMA SABDIA INC.
Ground Floor, Duncan Manor
Cnr Jan Shoba and Brooks Street
Brooklyn

Tel: 012 362 3137

E-mail: <u>EbrahimJ@mjs-inc.co.za</u> Ref: Mr Jooma/NOR1.0152

#### AND TO:

#### **BAKER & MCKENZIE**

18th Respondent's Attorneys

Tel: (011) 911 4300

Email: Gerhard.Rudolph@bakermckenzie.com / Widaad.Ebrahim@bakermckenzie.com

Callum.OConnor@bakermckenzie.com

Ref: G Rudolph/CO c/o ADAMS & ADAMS Adams & Adams Piace Lynnwood Bridge 4 Daventry Street Lynnwood Manor Pretoria Tel: (012) 432 6000

Tel: (012) 432 6000 Ref: Adele Jordaan

#### AND TO:

WERKSMANS

19th and 20th Respondents' Attorneys 155 5th Street

Sandton

Tel: 011 535 8000 Fax: 011 535 8600

Email: cmoraitis@werksmans.com / CManaka@werksmans.com

Ref: SOUT 3267.63

C/O MABUELA INCORPORATED

Charter House 179 Bosman Street Pretoria Central Tel: 012 325 3966

Email: mabuela@tiscali.co.za

#### AND TO:

MACROBERT ATTORNEYS
21st Respondent's Attorneys
MacRobert Building
Cnr Jan Shaba & Justice Mahomed Streets

Tel: 012 425 3436 Email: ghay@macrobert.co.za

Ref: G K Hay

# IN THE HIGH COURT OF SOUTH AFRICA (GAUTENG DIVISION, PRETORIA)

CASE NO: 80978/2016

In the matter between:

MINISTER OF FINANCE

Applicant

and

OAKBAY INVESTMENTS (PTY) LTD	1 <sup>st</sup> Respondent
OAKBAY RESOURCES AND ENERGY LTD	2 <sup>nd</sup> Respondent
SHIVA URANIUM (PTY) LTD	3 <sup>™</sup> Respondent
TEGETA EXPLORATION AND RESOURCES (PTY) LTD	4 <sup>th</sup> Respondent
JIC MINING SERVICES (PTY) LTD	5 <sup>th</sup> Respondent
BLACKEDGE EXPLORATION (PTY) LTD	6 <sup>th</sup> Respondent
TNA MEDIA (PTY) LTD	7 <sup>th</sup> Respondent
THE NEW AGE	8 <sup>th</sup> Respondent
AFRICA NEWS NETWORK (PTY) LTD	9 <sup>th</sup> Respondent

1 bu

VR LASER SERVICES (PTY) LTD	10 <sup>th</sup> Respondent
ISLANDSITE INVESTMENTS ONE HUNDRED AND EIGHTY (PTY)	11 <sup>th</sup> Respondent
CONFIDENT CONCEPT (PTY) LTD	12 <sup>th</sup> Respondent
JET AIRWAYS (INDIA) LTD (INCORPORATED IN INDIA)	13 <sup>th</sup> Respondent
SAHARA COMPUTERS (PTY) LTD	14 <sup>th</sup> Respondent
ABSA BANK LTD	15 <sup>th</sup> Respondent
FIRST NATIONAL BANK LTD	16 <sup>th</sup> Respondent
THE STANDARD BANK OF SOUTH AFRICA LIMITED	17 <sup>th</sup> -Respondent
NEDBANK LIMITED	18 <sup>th</sup> Respondent
GOVERNOR OF THE SOUTH AFRICAN RESERVE BANK	19 <sup>th</sup> Respondent
REGISTRAR OF BANKS	20 <sup>th</sup> Respondent
DIRECTOR OF THE FINANCIAL INTELLIGENCE CENTRE	21 <sup>st</sup> Respondent

I, the undersigned,

1 h

EXPLANATORY SUPPORTING AFFIDAVIT OF STANDARD BANK

### lan Hamish Scott Sinton

Do hereby state under oath that:

1.

1.1. I am the Group General Counsel of The Standard Bank of South Africa Limited ("Standard Bank"). Standard Bank is joined as the 17th respondent in these proceedings. I am duly authorised to depose to this affidavit on behalf of Standard Bank. It has authorized me to do so in support of the relief sought by the Minister of Finance ("the Applicant"), and also in support of the additional relief set out in the notice of motion annexed hereto as "SB1"

The facts described herein fall within my personal knowledge, unless I state otherwise or the context of what I say makes it clear that they do not. I confirm that the facts set out herein are, to the best of my knowledge and belief, true and correct. Where relevant I refer to the confirmatory affidavit of the Chief Executive Officer of Standard Bank, Mr Sim Tshabalala, who has personal knowledge of certain of the facts to which I shall refer. Mr. Tshabalala also confirms that Standard Bank seeks the extended relief that is set out in annexure "SB1". Mr Tshabalala's confirmatory affidavit is annexed hereto marked "SB2"

1.3. Standard Bank has taken legal advice from its legal representatives in respect of the issues which arise in this application. It has been advised that it is desirable and convenient for it not only to support the relief sought by the Applicant but also

-3-

Mu

to seek the extended relief of its own in the terms set out in annexure "SB1". ! explain below the circumstances which justify that relief and the contentions upon which Standard Bank relies for that relief.

1.4. Insofar as make submissions on legal matters i do so on the advice of Standard Bank's legal representatives obtained in the course of consultations and preparation of this affidavit which advice I accept as correct.

#### Basis of Standard Bank's relief in annexure "SB1"

- 2. Until 6 June 2016 Standard Bank and the 1<sup>st</sup> respondent ("Oakbay"), as well as several entities associated with it and the Gupta family, had a banker-customer relationship. Apart from Oakbay, the 3<sup>rd</sup>, 6<sup>th</sup>, 7<sup>th</sup>,10<sup>th</sup>, 11<sup>th</sup>, 12<sup>th</sup> and 14<sup>th</sup> respondents and other entities which are not cited in this application had banker-customer relationships with Standard Bank (in this affidavit I will refer to these entities as entities that are associated with Oakbay). Standard Bank terminated those relationships in circumstances which I shall explain more fully below.
- Arising from a notice given by Standard Bank on or about 6 April 2016 to Oakbay and its associated entities of Standard Bank's Intention to terminate all banker-customer relationships with effect from 6 June 2016<sup>1</sup>, Standard Bank became the subject of a wholesale public campaign, through paid advertisements in the media and pressure from several political parties (including the African National Congress ("ANC") and the South African Communist Party ("the SACP")), trade unions (more particularly the Congress of

4 -

In respect of the 10<sup>th</sup> Respondent, Standard Bank sent a letter of termination on 29 July 2016 and the banker-customer relationship with Standard Bank terminated on 29 October 2016.

South African Trade Unions ("COSATU") that referred the account closures to the National Economic Development and Labour Council ("Nedlac")), and some members of the Cabinet of the Republic of South Africa (the "Republic"), to reconsider and reverse its decision, and re-instate the relationships.

3.1. The public campaign and political pressure brought to bear upon Standard Bank to review and reverse its decision, as more fully described later in this affidavit, was orchestrated by Oakbay and its associated entities which relied on their apparent political connections and influence in Government to mount them. As part of such campaigns Standard Bank's senior executives were requested to attend a meeting with some members of the National Executive Committee of the ANC and a meeting with a committee of Cabinet purportedly led by the Minister of Mineral Resources, Mr Mosebenzi Zwane, to account to them for Standard Bank's decision. While I am aware that it is unclear whether the committee is a task team or an inter-ministerial committee of Cabinet, I refer to this committee of Cabinet simply as ("the Committee"). Later in this affidavit I record how, in those meetings, Standard Bank declined to discuss the affairs of any customers, including those of Oakbay and Its associated entities; the point here made is that in Standard Bank's view the purpose of each request for a meeting was to pressure Standard Bank into retaining banking relationships with Oakbay and its associated entities.

3.2. The pressure brought to bear on Standard Bank, in the context described above and at the instance of Oakbay and its associated entities, is unprecedented, and to the best of my knowledge has not been experienced by it or any of the other members of the Standard Bank group, in connection with or arising from a

-5.

decision to terminate a banker-customer relationship, with any other of its erstwhile customers. Included in that pressure has been a request by Minister Zwane, or attributed to him, ostensibly on behalf of the Cablnet of the Republic, that the decision of Standard Bank and other banks to terminate their relationship with Oakbay and its associated entities be investigated and reported on by a judicial commission of inquiry. It also led to Ministerial threats to review the prevailing banking regulatory and supervisory legal framework. Whilst the Office of the Presidency, at the time, distanced itself from the public statements and threats made by Minister Zwane on behalf of the Cabinet, it has not positively repudiated the threat to establish a judicial commission of inquiry or to review the prevailing banking regulatory and supervisory legal framework, on the ground only of the termination by the banks of their relationships with Oakbay and its associated entities.

- 3.3. In fact as recently as 23 November 2016, in the context of questions being posed to the President by Members of Parliament with regards to the intervention of Government in respect of the termination of banking relationships with Oakbay and its associated entities, the President stated, when asked by, amongst others, a Member of Parliament, Mr. Bantu Holomisa, about the status of the recommendation of a judicial commission of inquiry as referred to him by Minister Zwane allegedly at the request of the Cabinet, that such intervention is still under consideration by the President.
- 4. From the facts and circumstances explained in this affidavit, Standard Bank reasonably apprehends that the above threats could be carried out as the President has gone as far as to acknowledge in Parliament that they are under consideration. Because of the advice

1 Delin

that there is no legal basis for these threats, and because of the advice that there is no lawful basis for public functionaries, whether they be members of the Committee or other individual Ministers or the Executive collectively, to utilize their public office and influence to intervene in Standard Bank's erstwhile banker-customer relationships at the instance of Oakbay and its associated entities, Standard Bank has been advised to not only support the relief sought by the Applicant but also to seek the additional relief set out in annexure "SB1" hereto.

- To avoid possible contentions of non-joinder, Standard Bank's attorneys have been asked to ensure that a copy of this affidavit is made available to the President, as the head of the National Executive and Cabinet, so that he or any other member of the National Executive authorised by him may participate in these proceedings, should he elect or be advised to do so.
- 6. In this affidavit I,
- describe international standards and best practices, and domestic obligations, which have a bearing on the banker-customer relationship as are applicable to local banks, including Standard Bank;
- 6.2. then describe the adverse consequence to which Standard Bank and other offshore banks associated with it, as subsidiaries of Standard Bank Group Limited
  ("SBG"), are likely to suffer in the event of their failure to comply with international
  and domestic regulatory obligations and standards on banker-customer
  relationships and/or in the event of any such compliance being overturned
  pursuant to interventions of the type that the Applicant is resisting by means of

this application and that Standard Bank has been subjected to as more fully described hereafter;

- 6.3. thereafter, describe the real and potential adverse implications for South Africa's economy and financial system if local banks including Standard Bank are prevented from adhering to and complying with their international and domestic obligations on banker-customer relationships;
- 6.4. proceed to explain the process and considerations which gave rise to the decision by Standard Bank to give notice of its intention to terminate its banker-customer relationships with Oakbay and its associated entities, and thereafter implement that decision;
- explain the basis of Standard Bank's apprehension that threats made to it, based upon an unjustified assertion that its compliance with domestic and international legal obligations was unlawful, could be implemented, in the absence of any unconditional, express and positive public repudiation of those threats by Minister Zwane and the Presidency;
- 6.6. respond to the averments made by the Applicant in his founding affidavit, to the extent that it is necessary to do so;
- 6.7 finally, conclude with motivating the appropriate order sought by Standard Bank.

-8-

International regulatory obligations

Standard Bank is required, by law, to comply with several international and domestic obligations in the conduct of its banking business. In this section of the affidavit, the nature and extent of these obligations, with reference to international legal instruments which are applicable to banks operating in the Republic, and legislation promulgated by Parliament, are set out. This is done in order to show that the Committee's interventions on behalf of Oakbay and its associated entities, followed by Minister Zwane's threats, which were stated to be on behalf of Cabinet, to both procure the establishment of a judicial commission of inquiry into Standard Bank's compliance with those obligations and to have Government review the prevailing legal framework governing that compliance, are unfounded and have no basis in law and fact.

#### The BASEL Rules

- 8. The South African Reserve Bank is a member of the Bank for International Settlements ("BIS"). BIS has its headquarters in Basel, Switzerland and has 60 member central banks which are representative of various countries from around the world. BIS was created pursuant to an International treaty (the Hague Agreement of 1930). The mission of BIS is to serve central banks in their pursuit of monetary and financial stability, which is a precondition for sustained economic growth and prosperity. Its rules and recommendations are of application in the domestic setting and regulate the conduct of banks, including Standard Bank.
- 9. The BIS created the Basel Committee on Banking Supervision ("the Basel Committee"), as a forum of representatives from the member central banks. Its purpose is to facilitate regular cooperation on banking supervisory matters. South Africa is represented on the Basel Committee by officials of the South African Reserve Bank. The Basel Committee

1 Sam

meets regularly to agree on risk management rules that affect all banks worldwide. The rules of the Basel Committee and other committees of the BIS are commonly referred to as the Basel Rules.

- In January 2014 the Basel Committee issued its guidelines on "Sound management of risks related to money laundering and financing of terrorism". The stated purpose of the guidelines is to describe how banks should include money laundering ("ML") and financing of terrorism ("FT") risks within their overall risk management. The purposes of sound ML/FT risk management are two-fold. First, they are intended to protect the reputation of banks and national banking systems by preventing and deterring the use of banks to launder illicit proceeds or to raise or to move funds in support of terrorism. The second is to preserve the integrity of the international financial system and the work of governments in addressing corruption and in combating the financing of terrorism.
- A central feature in the implementation of the guidelines is on-going surveillance or monitoring of customers' activities through their bank accounts. This is considered to be essential because banks can effectively manage their risks only if they have an understanding of the normal and reasonable banking activity of their customers to enable them to identify attempted and unusual transactions which fall outside the regular patterns of banking activity.
- 12. Banks are required to have systems in place that detect "unusual or suspicious transactions". In this regard, banks are required to consider their customers' risk profile, which is developed as a result of the collation of the information pertaining to their customers, which includes information obtained from external sources.

The mentioned guidelines deal with the reporting of suspicious transactions and asset 13. freezing. Paragraph 56 provides that -

> \*Ongoing monitoring and review of accounts and transactions will enable banks to identify suspicious activity, eliminate false positives and report promptly genuine suspicious transactions. The process of identifying, investigating and reporting suspicious transactions to the Financial Intelligence Unit should be clearly specified in the bank's policies and procedures and communicated to all personnel through regular training".

- Paragraph 58 of the mentioned guidelines provides that once a suspicion has been raised 14. in relation to an account or relationship, in addition to reporting that suspicious activity a bank should ensure that appropriate action is taken to adequately mitigate the risk of the bank being used for criminal activities. This may include a review of either the risk classification of the customer or account or of the entire relationship itself. Appropriate action may necessitate escalation to the appropriate level of decision-making to determine how to handle the relationship, taking into account relevant factors. Due to the length of the guidelines, only the relevant extracts of the guidelines are attached hereto marked 'SB3'2.
- The statement issued by the Basel Committee in December 1988, in the document titled 15. "Prevention of Criminal Use of the Banking System for the Purpose of Money Laundering" is also relevant to banks' discharge of their international obligations. A copy of that document is annexed hereto and marked "SB4". It notes the following:

<sup>&</sup>lt;sup>2</sup> For a full copy of the guidelines, please visit the following link: http://www.bis.org/bcbs/publ/d353.pdf. Please note that a full copy of the guidelines will be made available to the Court at the hearing of the application.

"Public confidence in banks, and hence their stability, can be undermined by adverse publicity as a result of inadvertent association by banks with criminals. In addition banks may lay themselves open to direct losses from fraud, either through negligence in screening undesirable customers or where the integrity of their own office has been undermined through association with criminals."

- 16. For this reason, the Basel Committee set out a general statement that explains measures that must be taken to screen customers and to monitor banking accounts. These principles include customer identification, in terms of which banks are required to ensure that the financial system is not used as a channel for criminal funds. As a result, banks are urged to take reasonable efforts to determine the true identity of all customers that require the services of banks. The ownership of all accounts must be identified. Furthermore, banks are required to ensure compliance with all applicable laws. Banks must ensure that they do not offer services or provide active assistance "in transactions which they have good reason to suppose are associated with money laundering activities".
- 17. The above international regulatory guidelines and best practices apply to Standard Bank, and other local banks in equal measure. A fallure to comply with them will attract adverse legal and reputational consequences which I describe elsewhere in this affidavit.

## Domestic regulatory obligations

18. Standard Bank is a registered bank in accordance with the relevant provisions of the Banks Act, 94 of 1990, as amended ("the Banks Act"). In terms of section 35 of the Banks Act, Standard Bank is obliged to conduct its banking business pursuant to a licence

issued by the Registrar of Banks and renewed annually.

- In accordance with the provisions of section 60B of the Banks Act, Standard Bank is required to establish and maintain an adequate and effective process of corporate governance to ensure that it, amongst others, complies with all laws and regulations applicable to it. Pursuant to the regulations published in terms of the Banks Act in Government Notice R.1029, Government Gazette 35950 of 12 December 2012, a registered bank such as Standard Bank is required, by law, to establish and maintain policies and procedures that facilitate the reporting of suspicious customers and suspicious transactions.
- 20. The primary legislation that gives effect to local banks' compliance with international standards, like the Basel Rules, and their obligation to report suspicious customers and suspicious transactions is the Financial Intelligence Centre Act 38 of 2001 ("the FIC Act" or "the FICA"). It was developed on the recommendations of, and having regard to the framework developed by, the BIS (Including its Basel Committee) and the Financial Action Task Force ("FATF"). The stated purpose of the FIC Act is to combat money laundering activities, financial terrorism and related activities.
- 21. Section 3 of the FICA sets its principal objective as being "to assist in the identification of the proceeds of unlawful activities and the combating of money laundering activities and the financing of terrorist and related activities"
- 22. Section 29 of the FICA provides for the obligatory reporting of suspicious and unusual transactions ("a Report"). The provisions of section 29(1) of the FICA impose an obligation on a bank and its employees, in circumstances where they are party to or facilitate certain

A Dom

transactions or activities and know or ought reasonably to have known that it or they may receive the proceeds of unlawful activity, to report such transactions to the Financial intelligence Centre ("the Centre" or "the FIC").

- in terms of section 29(1) of the FICA, transactions or activities that Standard Bank and its employees are obliged to report have the following attributes:
- 23.1. the bank has received or is about to receive proceeds of unlawful activities or property which is connected to an offence relating to the financing of terrorist or related activities;
- 23.2. a transaction or series of transactions to which it is a party.
- 23.2.1. facilitated or is likely to facilitate the transfer of proceeds of unlawful activities or property which is connected to an offence relating to the financing of terrorist and related activities;
- 23.2.2. has no apparent business or lawful purpose;
- 23.2.3. is conducted for the purpose of avoiding giving rise to a reporting duty under the FICA;
- 23.2.4. may be relevant to the investigation of an evasion or attempted evasion of a duty to pay any tax, duty or levy imposed by legislation

A SIM

administered by the Commissioner for the South African Revenue Service;

23.2.5.

relates to an offence relating to the financing of terrorist and related activities; or

23.2.6.

it has been used or is about to be used in any way for money laundering purposes or to facilitate the commission of an offence relating to the financing of terrorist and related activities.

- 24. Whilst a bank is obliged, under pain of criminal prosecution should it breach this obligation in terms of section 52 of the FIC Act quoted below, to make a Report to the Centre in respect of the above types of transactions, section 29(3) of the FIC Act expressly prohibits a person who makes or is obliged to make a Report in terms of section 29(1) of the FIC Act from disclosing the making of a Report or the contents thereof to any other person, including a person who is the subject of a Report. It follows therefore that Standard Bank does not have the liberty to voluntarily disclose the fact that it made or did not make a Report about or concerning Oakbay and its associated entities.
- 25. Attention has been drawn to the provisions of section 29(3) of the FiC Act because any unauthorized disclosure by Standard Bank or any of its officials would constitute a contravention of section 29(3) of the FiC Act and be an offence, in terms of section 53 of the FiC Act, that could attract a sentence of imprisonment of up to 15 years, or a fine of up to R100 million, in terms of section 68 of the FIC Act.

1 Dam

26. Additionally section 52 of the FIC Act reads as follows:

#### \*52 Failure to report suspicious or unusual transactions

- (1) Any person who fails, within the prescribed period, to report to the Centre the prescribed information in respect of a suspicious or unusual transaction or series of transactions or enquiry in accordance with section 29 (1) or (2), is guilty of an offence.
- (2) Any person referred to in section 29 (1) or (2) who reasonably ought to have known or suspected that any of the facts referred to in section 29 (1) (a), (b) or (c) or section 29 (2) exists, and who negligently fails to report the prescribed information in respect of a suspicious or unusual transaction or series of transactions or enquiry, is guilty of an offence."

Section 68 of the FIC Act provides for a criminal penalty for non-compliance with the said section 52 of up to 15 years imprisonment or a fine of up to R100 million.

- It is submitted that logic dictates that, faced with the risk of criminal prosecution should it or they merely "negligently fail" to report a transaction that it or they "reasonably ought to have known or suspected" is suspicious or unusual, a bank's and its employees' best avoidance of this risk is to terminate dealings with customers who engage or are likely to engage in transactions that are unusual or suspicious. As pointed out above, if and to the extent that a bank terminates a customer relationship for this reason, it would be prohibited by law from disclosing that fact to any person including the applicable customer. Disclosing that fact would itself expose Standard Bank and its employees to the risk of criminal prosecution.
- 28. Section 39 of the FIC Act provides that a certificate issued by an official of the Centre that Information specified in the certificate was reported or sent to the Centre in terms of section 28, 29, 30(2) or 31 of the FIC Act is, subject to section 38(3) of the FIC Act, on its



mere production in a matter before a court, admissible as evidence of any fact contained in it of which direct oral evidence would be admissible. It is assumed that the information disclosed to the Applicant in annexure "P2" of the founding affidavit was collected by the Centre in terms of the FIC Act and conveyed to him in terms of section 39 thereof. Annexure "P1" of the founding affidavit states that this is the case.

- 29. In March 2008 the Centre issued a Guldance Note, known as "Guidance Note 4 on Suspicious Transaction Reporting" ("the Guidance Note"). It was published in the Government Gazette under Gazette number 30873 dated 14 March 2008. It explains inter alia the practical implementation of the obligations sourced in the FICA with regard to the reporting of suspicious transactions and provides guidance on the nature of "suspicion" as referred to in section 29 of the FICA.
- 30. In its opening section, the Guidance Note states that it is imperative that banks that come into contact with financial transactions that are potentially linked to money laundering or terrorist financing must report those transactions to the Centre. The reporting of suspicious and unusual transactions is regarded as an essential element of the anti-money laundering program for every country.
- 31. Part 3 of the Guidance Note explains the circumstances that trigger the obligation to report. It makes it clear that the obligation applies where there is actual knowledge as well as in circumstances where a mere suspicion exists. While the FIC Act does not define what constitutes a suspicion, the Guidance Note states that the "ordinary meaning of this term includes [the] state of mind of someone who has an impression of the existence or presence of something or who believes something without adequate proof, or the notion of a feeling that something is possible or probable. This implies an absence of proof that a

fact exists...the starting point to considering whether circumstances give rise to a suspicion would be when those circumstances raise questions or give rise to discomfort, apprehension or mistrust."

- The Guidance Note further explains that although the notion of a suspicion is subjective, the FIC Act introduces an objective element by introducing the phrase "ought reasonably to have known or suspected" in section 29(1) of the FIC Act. Paragraph 3.8 of the Guidance Note states that, "[a] particular category of transactions that are reportable under section 29(1) of the FIC Act is transactions which a person knows or suspects to have no apparent business or lawful purpose. This refers to situations where customers enter into transactions that appear unusual in a business context or where it is not clear that purpose of the transaction(s) is lawful. In order to identify situations where customers wish to engage in these unusual transactions a person would have to have some background information as to the purpose of a transaction and evaluate this against several factors such as the size and complexity of the transaction as well as the person's knowledge of the customer's business, financial history, background and behavior."
- 33. Part 4 of the Guidance Note sets out examples of indicators of suspicious and unusual transactions, which include the following:
- 33.1. Deposits of funds with a request for their immediate transfer elsewhere;
- Unwarranted and unexplained international transfers;
- 33.3. The payment of commissions or fees that appear excessive in relation to those



#### normally payable;

33.4.	Lack of concern about high commissions, fees, penalties, etc. incurred as a result
	of a particular type of transaction or particular method of transacting;

- 33.5. Transactions that do not appear to be in keeping with normal industry practices;
- 33.6. Purchase of commodities at prices significantly above or below market prices;
- 33.7. Unnecessarily complex transactions;
- 33.8. Unwarranted involvement of structures such as trusts and corporate vehicles in transactions;
- 33.9. A transaction seems to be unusually large or otherwise inconsistent with the customer's financial standing or usual pattern of activities;
- 33.10. Buying or selling securitles with no apparent concern for making a profit or avoiding a loss;
- 33.11 Unwarranted desire to involve entitles in foreign jurisdictions and transactions.
- 34. As can be seen from the above synopsis, the scope of a bank's obligations and the ambit

of the nature of the transactions that must be reported upon are wide. These obligations are considered as necessary to achieve the overall objectives of the FIC Act, South Africa's compliance with international best practices and standards under the BIS's Basel Rules and the FATF's recommendations. To the extent that Standard Bank would have been required to submit any reports under Section 29 to the FIC relative to Oakbay and its associated entities, the submission would have been in respect of transactions described in the Guidance Note. Due to the length of the Guidance Note, only relevant extracts of the Guidance Note are annexed hereto marked "SB5"<sup>3</sup>.

- 35. Relevant legislation that, apart from the FIC Act, had a bearing upon Standard Bank's decision to terminate banking relationships with Oakbay and its associated entities is the Prevention of Organized Crime Act 121 of 1998, as amended ("POCA"). It prohibits, inter alia, receipt or dealing in the proceeds of unlawful activities. POCA defines "unlawful activities" in broad terms.
- 36. POCA makes it an offence for any person to deal with any property (including funds) that he/she ought to suspect is the proceeds of unlawful activities. A person charged with such an offence is liable to a fine not exceeding R100 million or to imprisonment for a period not exceeding 30 years.
- Section 7A of POCA avails any person charged with receiving funds suspected to be the proceeds of crime with the defence that the suspicion was reported under the FICA. Thus a bank and its employees, faced with suspicious activity by a customer, are required by law to either not deal with that customer or, if they choose to deal with the customer, bear

1 Dan

<sup>&</sup>lt;sup>3</sup> For a full copy of the Guidance Note, please visit the following link <a href="http://www.gov.za/documents/financial-intelligence-centre-ext-guidance-note-4-suspicious-transaction-reporting">http://www.gov.za/documents/financial-intelligence-centre-ext-guidance-note-4-suspicious-transaction-reporting</a>. Please note that a full copy of the Guidance Note will be made available to the Court at the hearing of the application.

the risk of prosecution under the FICA and/or POCA should they fall to report each suspicious transaction that they ought to have detected. Again, the best method of avoiding any such prosecution is to not have dealings with customers who have engaged in or are likely to engage in suspicious or unusual transactions identified as such in accordance with the Guidance Note.

- 38. Further legislation which is of relevance is the Prevention and Combatting of Corrupt Activities Act 12 of 2004 ("PRECCA"). It prohibits, inter alia, any participation in corrupt activities. It also provides for compulsory reporting obligations relating to corrupt activities that are independent of those regulated by the FIC Act.
- Section 34(1) of PRECCA obliges every person who holds a position of authority and who ought to have knowledge or suspicion of the commission of certain offences to the value of R100 000 or more to report such offence to the Directorate for Priority Crime Investigation under pain of criminal prosecution for failing to do so. A report in terms of section 29(1) of the FIC Act differs from a report under section 34 of PRECCA. PRECCA exposes banks or their officials to criminal prosecution if they fail to detect and report corrupt activity by customers, let alone themselves have dealings with customers whom they ought to know or suspect are engaged in corrupt activity. Again, the best method of averting any such prosecution is to not have dealings with customers who engage or are likely to engage in corrupt activities.
- 40. I, together with Standard Bank's Chief Executive Officer, Mr Tshabalala, represented Standard Bank in a meeting on 5 May 2016 (more fully described later in this affidavit) with two of the three members of the Committee that was tasked to look into the banks' closing of Oakbay related accounts. During the course of that meeting, I directed the

attention of those Ministers (Ministers Zwane and Oliphant) to the above international best practices and standards and domestic regulatory obligations of Standard Bank and explained the role that they play in Standard Bank's decision to close accounts. None of the Ministers present at that meeting suggested that those obligations did not apply to Standard Bank, or can be ignored by it without incurring any regulatory or criminal penalty. Mr Tshabalala confirms these facts in his confirmatory affidavit.

- 41 Moreover, the Ministers did not question the validity of the applicable legislative instruments and regulatory framework which establish the said regulatory obligations. Nor did either of them indicate that it has become necessary to establish a judicial commission of inquiry to inquire into the closure by the banks of the Oakbay accounts, notwithstanding the existence of these regulatory obligations.
- 42. Standard Bank has been advised, and respectfully submits, that compliance by it with its regulatory obligations in terms of the above domestic and international standards and practices, as well as its decision to terminate its relationships with Oakbay and Its associated entities in compliance with those obligations, cannot constitute a permissible and justifiable basis to threaten the institution of a judicial commission of inquiry into such compliance, or review the applicable and existing regulatory framework. To the extent that these threats have been made and repeated, Standard Bank has been advised that they are unlawful and invalid and, in this regard, Standard Bank prays for the relief set out in annexure "SB1".

Potential adverse consequences to SBG, Including Standard Bank

43. This section deals with the circumstances of Standard Bank, as a member and subsidiary

of Standard Bank Group Limited ("SBG"), relating to the drastic consequences which could flow should Standard Bank not comply, whether due to negligence on its part or interventions of the type being resisted by the Applicant, with the international standards and its domestic regulatory obligations.

- 44. SBG is registered as a bank controlling company under the Banks Act and its shares are listed on the JSE Securities Exchange. SBG conducts banking under the Standard Bank and Stanbic Bank brands through licenced and regulated subsidiaries, branches or representative offices in twenty African countries, the United States of America, the United Kingdom, Brazil, Dubal, Jersey, Isle of Man, Hong Kong and China. Naturally all of these subsidiaries, branches and representative offices are obliged to comply with, inter alia, the anti-corruption and anti-money laundering laws of each applicable jurisdiction at all times.
- To illustrate the consequences of any perceived non-compliance, reference is made to the fact that in 2012 SBG's subsidiary in Tanzania employed a local company part-owned by "politically exposed persons" (or "PEPs") to assist that subsidiary and another, Standard Bank Pic in London, in Jointly procuring a sovereign debt raising mandate from the Tanzanian government. That employment was deemed to be suspicious by the Serious Fraud Office ("the SFO") of the United Kingdom and the Department of Justice ("DOJ") and Securities and Exchange Commission ("SEC") in the United States. The SFO and DOJ opened investigations into possible corruption. The SEC opened an investigation into whether American investors in the sovereign debt raised had been misled by a non-disclosure of the Involvement of the mentioned PEPs. This culminated in 2015 when the Crown Court of Southwark, in the United Kingdom ("the Crown Court") under case number U20150854, delivered a preliminary judgment following a hearing on 4 November 2015, a copy of which is annexed hereto marked "SB6", and a final judgment, dated 30 November

2015, a copy of which is annexed hereto marked "SB7", endorsing a Deferred Prosecution Agreement ("the DPA"), concluded by Standard Bank Plc with the SFO, in terms of section 45 and schedule 17 of the Crime and Courts Act 2013 of the United Kingdom.

46. The DPA concluded between Standard Bank Plc and the SFO resolved an indictment flowing from the said employment of a company part-owned by PEPs in Tanzania. The nature of the indictment is contained in paragraph 19 of the preliminary judgment (annexure "SB6"):

\*Standard Bank Pic, now known as ICBC Standard Bank Pic, between 1<sup>st</sup> day of June 2012 and the 31<sup>st</sup> day of March 2013, failed to prevent a person or persons associated with Standard Bank Pic, namely Stanbic Bank Tanzania Limited and/or Bashir Awale and/or Shose Sinara, from committing bribery in circumstances which they Intended to obtain or retain business or an advantage in the conduct of business for Standard Bank Pic, namely by:

- (i) Promising and/or giving EGMA Limited 1% of the monies raised or to be raised by Standard Bank Plc and Stanbic Bank Tanzania Limited for the government of Tanzania, where EGMA Limited was not providing any or any reasonable consideration for this payment; and
- (ii) Intending thereby to induce a representative or representatives of the government of Tanzania to perform a relevant function or activity improperly, namely, showing favour to Standard Bank Pic and Stanbic Bank Tanzania in the process of appointing or retaining them in order to raise the said monies."

- 24 -

- As a consequence of that indictment, and in order to lawfully dispense with the prosecution, Standard Bank Plc concluded the DPA that had to be endorsed by the Crown Court. The essence of the DPA can be gleaned from the two judgments in annexures "SB6" and "SB7"
- 48. The judgments of the Crown Court make clear the multi-jurisdictional nature of the alleged offences in question. Bearing in mind that the alleged bribery offence took place in Tanzania, but exposed a Standard Bank entity to possible prosecutions in the United Kingdom and the United States of America, the DPA imposes upon all members of the SBG, including, Standard Bank, an enhanced consciousness and responsibility concerning their compliance with anti-money laundering and anti-bribery laws and regulations.
- In its judgments, the Crown Court (per Sir Brian Leveson, the second most senior judge in the United Kingdom) found that the charge against Standard Bank Pic (being the charge under the UK's Bribery Act of failing to prevent an act of bribery by an associate) was justified because, notwithstanding the SFO's charge having been based upon circumstantial evidence only, employees of Standard Bank Pic had not been adequately trained to detect, and act upon, a number of "red flags" indicating that bribery by an associate in Tanzania could occur. The DPA provided for payment of compensation and voluntary fines of some US\$38 million (inclusive of the fine levied by the SEC), a review by an independent expert of Standard Bank Pic's policies and training relative to bribery and corruption and prosecution of the charge to be suspended for three years, whereafter the charge will be withdrawn if Standard Bank Pic has complied with all of its obligations under the DPA in the interim.

1 Denn

See for example, paragraphs 14 and 21 in Annexure "SB6"

- As mentioned already, the DOJ also investigated the same Tanzanian transaction for possible violations of the United States' Foreign Corrupt Practices Act and the SEC investigated possible violations of the USA's securities laws. Because of the fact that the SBG subsidiaries involved had self-reported their own suspicions to the relevant authorities, conducted and disclosed the results of their own internal investigations, fully co-operated with the resultant investigations by the SFO, SEC and the DOJ, and then voluntarily entered into the DPA, the DOJ closed its investigation into the matter. It cautioned, though, that it could re-open the investigation if other information of possible contravention of the Foreign Corrupt Practices Act were to surface. Separately but simultaneously, and for the same reasons, the SEC offered to enter into a deferred prosecution agreement to dispense with a charge, in essence, that Standard Bank Plc had omitted to disclose to American investors that PEPs had been involved in the sovereign debt raising.
- 51. Since all members of the SBG are associated with one another they are each required, as a result of the scrutiny of the SFO, SEC and the DOJ, to be extra-vigilant against ignoring red flags that indicate possible corruption or money-laundering or being used in any way to facilitate corruption or money-laundering.
- 52. It should be emphasised that the indictments of the SFO and SEC against Standard Bank Pic, as were resolved by respective DPAs, were not based upon direct evidence or confessions of corruption in Tanzania but on inferences drawn from circumstantial evidence voluntarily disclosed by members of the SBG group pursuant to their reporting obligations. The mentioned engagements with the SFO, SEC and DoJ illustrate the global reach of anti-money laundering and anti-bribery laws and law-enforcement agencies, the dire consequences that can follow if red flags (or circumstantial evidence) of possible



corruption are evident but ignored and the benefits (such as the non-prosecution outcome of a deferred prosecution agreement) that can be derived from compliance with reporting obligations when suspicions of unlawful activities do arise.

# Failure to comply with regulatory obligations and standards

- Compliance with these international and domestic obligations by Standard Bank is not only a requirement of law. In order for Standard Bank to participate in the global financial system, and thereby in international trade and investment, it is imperative that South Africa's regulatory regime is perceived to be compliant with international standards, including the Basel Rules and the recommendations of the FATF, and that South Africa's banks are not perceived to be too risky by the international banking community.
- Standard Bank, and indeed all banks in the Republic, requires relationships with correspondent banks (as more fully described in the BIS's report on "Correspondent Banking" mentioned below) in jurisdictions with which South Africa trades in order to be part of the global financial system and enable South Africans to make and receive payments in foreign currencles. These correspondent banks are required by law to be concerned not only with compliance with their own anti-money laundering ("AML") and anti-bribery and corruption ("ABC") laws but also with the quality of the AML and ABC laws and regulation in the jurisdictions of their respondent banks, and with the quality of compliance with AML and ABC laws by their respondent banks. More pointedly, correspondent banks are becoming increasingly averse to providing banking services to respondent banks that are perceived to be high-risk themselves from an AML and/or ABC perspective and/or are perceived to operate in high risk jurisdictions. In this context a high-risk jurisdiction or country is one where AML/ABC and combatting the financing of

9.27



terrorism ("CFT") laws are perceived to be inadequate and/or not adequately enforced.

- The Republic is generally regarded as having AML/ABC/CFT laws that are compliant with the Basel Rules and the FATF's recommendations and enforced to an acceptable standard. However, should Government subvert that enforcement by, for example, seeking to overturn Standard Bank's decision to terminate a banking relationship that was made in accordance with applicable AML/CFT/ABC laws it could, for the reason set out below, cause South Africa to be re-rated by its correspondent banks and/or their regulators to a high-risk jurisdiction with attendant disruption of its access to international financial markets.
- A July 2016 report by the BIS's Committee on Payments and Market Infrastructures titled 'Correspondent Banking', a copy of the relevant extracts of which are annexed hereto marked "SB8"<sup>5</sup>, contains the following useful explanations and observations as to why this could occur:

#### 56.1. At paragraph 2.1 of the report.

"Correspondent banking can be defined, in general terms as "an arrangement under which one bank (correspondent) holds deposits owned by other banks (respondents) and provides payment and other services to those respondent banks". The ECB uses a similar basic definition in its correspondent banking survey, referring to "agreements or contractual relationships between banks to provide

1 Sper

<sup>&</sup>lt;sup>5</sup> For a full copy of the report, please visit the following link: https://www.bis.org/cpmi/publ/d147.htm. Please note that a full copy of the report will be made available to the Court at the hearing of the application.

payment services for each other". A more detailed definition by the Wolfsberg Group establishes that "[c]correspondent Banking is the provision of a current or other liability account, and related services, to another financial institution, including affiliates, used for the execution of third-party payments and trade finance, as well as its own cash clearing, liquidity management and short-term borrowing or investment needs in a particular currency". At the most basic level, correspondent banking requires the opening of accounts by respondent banks in the correspondent banks' books and the exchange of messages to settle transactions by crediting and debiting those accounts.

All these definitions highlight the main components of correspondent banking: a bilateral agreement between two banks by which one of them provides services to the other, the opening of accounts (by the respondent in the books of the correspondent) for the provision of services and the importance of payment services as a core function of correspondent banking. As the ECB definition highlights, these relationships are frequently reciprocal, in that each institution provides services to the other, normally in different currencies. Correspondent banking is especially important for cross-border transactions, as its importance for domestic payments within a single jurisdiction has diminished greatly due to the use of financial market infrastructures. On a cross-border level, however, correspondent banking is essential for customer payments and for the access of banks themselves to foreign financial systems for services and products that may not be available in the banks' own jurisdictions."

#### 56.2. The executive summary of the report:

"Through correspondent banking relationships, banks can access financial services in different jurisdictions and provide cross-border payment services to their customers, supporting international trade and financial inclusion."

"Banks have traditionally maintained broad networks of correspondent banking relationships, but there are growing indications that this situation might be changing. In particular, some banks providing these services are reducing the number of relationships they maintain and are establishing few new ones. The impact of this trend is uneven across jurisdictions and banks. As a result, some respondent banks are likely to maintain relationships, whereas others might risk being cut off from international payment networks. This implies a threat that cross-border payment networks might fregment and that the range of available options for these transactions could narrow."

\*Rising costs and uncertainty about how far customer due diligence should go in order to ensure regulatory compliance (i.e. to what extent banks need to know their customers' customers – the so-called KYCC) are cited by banks as among the main reasons for cutting back their correspondent relationships. To avoid penalties and related reputational damage, correspondent banks have developed an increased sensitivity to the risks associated with correspondent

banking. As a consequence, they have cut back services for respondent banks that (i) do not generate sufficient volumes to overcome compliance costs; (ii) are located in jurisdictions perceived as too risky; (iii) provide payment services to customers about which the necessary information for an adequate risk assessment is not available; or (iv) offer products or services or have customers that pose a higher risk for anti-money laundering/combating the financing of terrorism (AML/CFT) and are therefore more difficult to manage."

- The Impact of this de-risking is well documented by organizations including the BIS, the United Kingdom's Financial Conduct Authority ("FCA"), the International Monetary Fund ("IMF") and the World Bank. The withdrawal of correspondent banking services has already adversely impacted countries, financial institutions and business sectors considered to be too risky.
- A February 2018 study on the "Drivers & Impacts of Derisking" was conducted for the FCA. Due to the length of the study, a copy of only the relevant extract of the study is annexed hereto marked "SB9". It shows that the FCA is aware that, in recent years, international banks have removed bank account/services from clients associated with higher money laundering risk. This process, termed "de-risking", has been attributed to the increasing overall cost of complying with regulatory requirements. These include prudential and conduct obligations as well as the threat of enforcement action for failing to meet obligations in relation to anti-money laundering/combatting financing of terrorism (AML/CFT).

1 Jan

<sup>&</sup>lt;sup>e</sup> For a full copy of the study, please visit the following link: https://www.fca.org.uk/publication/research/drivers-impacts-of-derisking.pdf. Please note that a full copy of the study will be made available to the Court at the hearing of the application.

- 59. The FATF, of which South Africa is a member, sets the international standards for AML/CFT. A declaration of the Ministers and Representatives of the FATF states that "[e]ffective action against money laundering and terrorist financing, including both preventative and law enforcement measures, is essential for securing a more transparent and stable international financial system."
- 60. International banks are trying to do what they believe is expected of them, under the risk-based approach to AML/CFT, by exiting relationships that present too high a perceived risk of being abused for the purpose of financial crime.
- The FCA report shows that its researchers were told that banks are seeking much more specific guidance on managing high-risk relationships of the types that result in account exits, if there is criticism from regulators and government that they are behaving improperly.
- SBG and its banking subsidiaries have been impacted directly by de-risking in a number of African countries in which they operate. These include Angola, Lesotho, Malawi, Mauritius, Swaziland, Tanzania, Zambia and Zimbabwe.
- 63. The June 2016 IMF Staff Discussion Note titled "the Withdrawal of Correspondent Banking Relationships: A Case for Policy Action" ("the IMF Note") outlines how correspondent banking relationships have been terminated in some jurisdictions. Emerging markets and developing economies in Africa have been affected. Decisions to withdraw are based on considerations that include changes in the regulatory and enforcement environment. International banks are required to comply with economic and trade sanctions, AML/CFT requirements and anti-bribery and tax evasion regulations

1 Mm

applicable in the jurisdiction in which they operate, as well as with those in their home jurisdictions.

- In the IMF Note it is acknowledged that the withdrawal of correspondent banks has reached a critical level in some countries which could have a systemic impact if unaddressed. Coordinated efforts by the public and private sectors are called for by the IMF to mitigate the risk of financial exclusion and the potential negative impact on financial stability. The IMF Note records that timely implementation of the Financial Stability Board's 2015 action plan endorsed by the G20 Summit will be critical.
- The IMF Note includes a case study on Angola where the withdrawal of correspondent banks, due to Angola being perceived as a high-risk jurisdiction, has reached a critical level. It observed that a large global bank had withdrawn U.S. Dollar correspondent banking relationships from all Angolan banks (including Standard Bank Angola) and that a European bank had stopped clearing client payments in U.S. Dollars for all Angolan banks. As a result, a single European bank had become the sole provider of U.S. Dollars to Angolan banks.
- 66. The U.S. Dollar correspondent bank which withdrew its correspondent services from all Angolan banks, inclusive of Standard Bank Angola, made reference to the "increasingly stringent international regulatory compliance environment that is characterized by heightened compliance expectations as well as more frequent and extensive administrative fines" and the "global focus that regulators are placing on financial crime compliance"
- 67. Since publication of the IMF Note the aforementioned single European bank providing

U.S. Dollars clearing has also now formally exited the country. Angolan banks are therefore now being forced to offer U.S. Dollar payments and receipts for their customers through their European correspondent banks, resulting in significantly higher costs. The Central Bank of Angola's interventions in the foreign exchange market are now primarily in Euros with many external trade transactions increasingly invoiced in Euros. This loss of correspondent banks willing to make or receive U.S. Dollar payments for the Angolan banks and their customers has undermined the financial system in a country already struggling with the macroeconomic impact of lower oil prices, weak profitability and high levels of non-performing loans.

- One point of mentioning Angola's predicament, as noted by the IMF Note and directly experienced by Standard Bank Angola, is to illustrate how severe the impact can be when the majority of international banks offering correspondent services perceive a country to be high-risk from an AML/CFT/ABC perspective, with a consequential withdrawal (or derisking) from that jurisdiction and stifling of financial flows and with it trade and investment. Due to the length of the IMF Note, only the relevant extracts of the IMF Note are annexed hereto marked "SB10\*7.
- Another point of mentioning Angola's predicament is to dispel the belief that the closure of bank accounts in compliance with domestic obligations and international expectations could have had a negative impact on investor confidence in South Africa. As appears from the statement issued by Minister Zwane on 1 September 2016, the Committee was allegedly established to investigate closure of the Oakbay related accounts because of the "the impact that the actions would have not only for job losses for 7500 South Africans but also the impact that it would have on investor confidence". Standard Bank submits it to be

For a full copy of the IMF Note, please visit the following link: s://www.imf.org/external/pubs/ft/sdn/2016/sdn1606.pdf. Please note that a full copy of the IMF Note will be made available to the Court at the hearing of the application.

clear that the conduct of the banks will have, in light of the de-risking explained above and its demonstrable negative impact on countries such as Angola, strengthened rather than weakened investor confidence in South Africa. It is further submitted that I have demonstrated by reference to the Tanzanian sovereign debt raising that international regulators of investments such as the SEC would regard Standard Bank's conduct as promoting rather than prejudicing South Africa's reputation as an investment destination.

- Dike any other bank, Standard Bank funds its activities, from amongst various sources, by borrowing money, especially foreign currencies, from International banks. Because of the global reach of international standards such as the Basel Rules and the FATF's recommendations it has for a number of years been an invariable practice for these international lenders to include in their loan covenants a commitment to comply with all applicable anti-money laundering and anti-corruption laws. Breach of these laws would render all loans containing such covenants immediately due and payable. An example of these covenants can be found at clause (i) of the extract of the finance agreement that is annexed hereto marked "SB11". From this it can be seen that from an international finance perspective Standard Bank's compliance with South Africa's laws in this regard enhances rather than detracts from South Africa's reputation as an investment destination.
- 71. During November 2016 the Basel Committee issued proposed revisions to its guidelines on 'Sound management of risks related to money laundering and financing of terrorism', which I mentioned earlier in this affidavit. The stated purpose for the proposed revisions to the Basel Committee's guidelines is the following:

"The purposes of the proposed revisions is to ensure that the banks conduct

correspondent banking business with the best possible understanding of the applicable requirements regarding anti-money laundering and countering the financing of terrorism. The clarifications are proposed as the international community has been increasingly concerned about de-risking in correspondent banking, since a decline in the number of correspondent banking relationships may affect the ability to send and receive international payments, or drive some payment flows underground."

- 72. This document is mentioned in order to highlight the real and potential disastrous effects that could occur to South Africa's banking sector if South Africa is perceived to be too risky from an AML/CFT/ABC perspective. As the revision notes, the international banking community is becoming increasingly concerned about de-risking in correspondent banking, an issue dealt with above.
- The proposed revision states that one of the risk indicators that correspondent banks should consider is "the quality and effectiveness of banking regulation and supervision in the respondent's country (especially AML/CFT [Anti-Money Laundering/Combating the Financing of Terrorism] laws and regulations) and the respondent's parent company country where the respondent is an affillate." In the context of what has already been outlined in this affidavit, it is clear that an attempt to render less effective South Africa's AML/CFT laws would lead to South African banks being perceived as more risky for purposes of correspondent banking. A copy of the relevant extract of the proposed revision document is annexed hereto marked "SB12"

Standard Bank's termination of relationship with Oakbay and associated entities

For a full copy of the IMF Note, please visit the following link: http://www.bis.org/bcbs/publ/d389 htm. Please note that a full copy of the document will be made available to the Court at the hearing of the application.



74. In this section the process and considerations which led to Standard Bank's decision to terminate the bank-customer relationships with Oakbay and its associated entities, are set out. I begin by making brief observations on the legal relationship between a bank and its customer; I then proceed to reference the yardstick that is summarised by the Ombudsman for Banking in respect of termination of that relationship; and thereafter I describe the relevant facts and considerations which gave rise to the notice of termination, and Standard Bank's subsequent implementation thereof.

### The legal relationship

- 75. From a reading of the Applicant's founding affidavit, it is apparent that the Applicant has received legal opinions from his legal representatives on this aspect of the case.

  Standard Bank's legal representatives have advised that they correctly set out the law.
- 76. For the present purposes Standard Bank has been advised and accepts that the correct legal position is summarised in the decision of the Supreme Court of Appeal in Bredenkamp and Others v Standard Bank of SA Ltd 2010 (4) SA 468 (SCA), in paragraphs 53 to 65.
- Recently, this Honourable Court had occasion to express itself on that legal position, in the context of bank accounts of Politically Exposed Persons ("PEPs") and their related entities. The neutral citation of that case is *Hiongwane and Others v ABSA Bank Limited and Another* (75782/13) [ZAGPPHC] 928 (10 November 2016). I direct attention to paragraph 30 of that judgment, given its striking instructiveness to the facts of the present case. There, this Honourable Court held:

"[30] Furthermore, it is apparent that the first respondent made the decision to close the applicants' account after it became apparent that the first applicant had become a PEP, there was not only a commercial but also a reputational risk to the first respondent in keeping the first applicant and his related entities as clients. The first respondent had no obligation to retain a client whose monitoring in terms of money laundering measures put in place would be more onerous when compared with the benefit, in terms of fees, it would receive from the applicants. I am of the view that the first respondent's bona fides in deciding to close the applicants' accounts cannot be questioned. In the Bredenkamp matter (supra) where the court was faced with facts similar to the facts in this case, the court held that:

'[65] The appellants' response was that, objectively speaking, the Bank's fears about its reputation and business risks were unjustified. I do not believe it is for a court to assess whether or not a bona fide business decision, which is on the face of it reasonable and rational, was objectively 'wrong' where in the circumstances no public policy considerations are involved."

Oakbay, its related entitles and its shareholders fall into the category of politically exposed persons (or PEPs), given their close connections and influence with several public officials and public entities, as well as allegations of their improper or inappropriate business



relationships with several public entities. As I explain below and having due regard to SBG's learnings from its association with a PEP owned entity in Tanzania, this is one (but by no means the only one) of the considerations which affirmed Standard Bank's decision to implement its notice to terminate its banker-customer relationships with Oakbay and its associated entities.

# The Ombudsman's yardstick

- During October 2016 the Ombudsman for Banking Services issued Consumer Information

  Note Number 14 relating to the closure of banking accounts which is titled "Closure of

  Bank Accounts Circumstances under which Banks close Customer's accounts" ("the

  Information Note"). A copy of the Information Note is annexed hereto marked "SB13". It

  summarises the various pieces of legislation that are applicable and the responsibilities of

  banks in instances of suspected criminal activity. It notes a study by the United Nations

  Office on Drugs and Crime that estimates that the sum of money laundered globally in one

  year is 2% to 5% of global GDP or USD800 billion to USD2 trillion.
- 80. The Information Note highlights the following relevant laws, proposed laws, conventions, recommendations, codes and concepts:
- 80.1 The United Nations Convention against Corruption, Article 68(1) of the United Nations Resolution 58/4 of 31 October 2003;
- 80.2. The Financial Action Task Force's recommendations on money laundering:

1 Sur

- 80.3. The Financial Intelligence Centre Act;
- 80.4. "Politically exposed persons". This term as applicable in financial regulation describes "someone who has been entrusted with a prominent public function". The definition of the term includes the family members and close associates of politically exposed persons. These persons "generally present a higher risk for potential involvement in bribery and corruption by virtue of their position and influence that they may hold".
- 80.5. The Financial Intelligence Centre Amendment Bill (33B 2015);
- 80.6. The Prevention and Combating of Corrupt Activities Act 12 of 2004;
- 80.7 The Banks Act 94 of 1990;
- 80.8. The Inspection of Financial Institutions Act 80 of 1998;
- 80.9. The Prevention of Organised Crime Act 121 of 1998, and
- 80.10. The Code of Banking Practice. Clause 7.3 of the Code of Banking Practice deals with the closing of banking accounts. It makes it clear that a bank reserves a right to protect its interests in its discretion. In general accounts are closed after reasonable notice has been given prior to the closure of the account. However, certain circumstances might impel a bank to close an account without notice

where it is compelled to do so by law or international best practice, the account has not been used for a significant period of time or the bank has reasons to believe that the account is being used for any illegal purpose.

- The Information Note records the contractual nature of the relationship between a bank and its customers. It states that a term within the contractual relationship which allows the bank at will, subject only to giving reasonable notice to terminate the contract, provided the termination is procedurally fair and does not offend constitutional values, is not unusual, onerous or unconscionable. In conclusion, the information Note states that banks are entitled to close accounts in terms of the contract that establishes the banker-customer relationship subject to certain conditions. Moreover, banks are obliged to do so in terms of domestic and international law obligations when particular situations are present.
- These international standards and best practices and domestic obligations make it clear that Standard Bank should not only be circumspect in its dealings with persons who are politically exposed, but should also take active steps to avoid the possibility of improper criminal conduct pursuant to those relationships.
- 83. In the present case, Standard Bank gave notice on 6 April 2016 to Oakbay and its associated entities of its intention to terminate the banker-customer relationships with them as from 6 June 2016, a notice period of two months. On the latter date Standard Bank officially terminated those relationships. The next section explains the opportunity furnished to representatives of Oakbay to make representations to Standard Bank on why the relationships with it and its associated entities should not be terminated. Having considered those representations, Standard Bank elected to abide by its notice of

-41-

termination as from 6 June 2016.

#### Relevant considerations

- While Standard Bank informed Oakbay of the reasons for its decision to terminate the banking relationship with Oakbay and its associated entities on 1 June 2016, the notice of intention to terminate the relationship was given on 6 April 2016. In the letter of 6 April 2016, Standard Bank stated that it would, with effect from 6 June 2016, terminate the banking relationship with Oakbay and its associated entities. A copy of the letter is annexed marked "SB14". The names of the affected entities that are not respondents in this application have been redacted due to confidentiality considerations.
- 85. On 13 April 2016 Standard Bank communicated with each of the affected entities Informing them of its decision to terminate their accounts with effect from 6 June 2016. The individual letters of termination that were sent to the respondents in this application are not attached, but should they be required, copies will be provided.
- in a letter dated 14 April 2016, Oakbay represented to an international shareholder of SBG that Standard Bank's decision to close the bank accounts would impact negatively on Oakbay and its 'portfolio companies', as they would allegedly be unable to pay their "4500" current employees without access to banking services. Oakbay asked for the intervention of the shareholder, without disclosing to Standard Bank that it had approached this shareholder to intervene on its behalf.
- 87. What's more troubling about Oakbay's conduct is that, in its approach to the shareholder,



it endorsed a campaign that unjustifiably accused Standard Bank of acting in an uncompetitive manner and of acting in collusion with other banks. Oakbay also attributed a racist motive to Standard Bank, as part of 'big capital', when it decided to terminate the banking relationships with Oakbay and its associated entities. The accusations were and are offensive, unlawful and unfounded.

- Oakbay's letter is, in some respects, similar to the letter that Oakbay sent to the Applicant on 8 April 2016 (annexure "A" to the founding affidavit). A copy of Oakbay's letter of 14 April 2016 is attached hereto marked "SB15". The name of the shareholder concerned has been redacted at its request; Standard Bank having made an undertaking of confidentiality not to disclose the name of the shareholder to whom the letter was addressed by Oakbay.
- Oakbay's letter cast negative aspersions on Standard Bank. They are injurious to the persons that are ultimately responsible for running the day-to-day affairs of Standard Bank and sought to improperly influence the *bona fide* exercise of the functions of Standard Bank's executive management team members. Such conduct affected and irretrievably broke down the trust relationship that ought to have existed between Standard Bank *qua* banker and Oakbay (and its associated entities) *qua* customer.
- 90. As set out hereunder and in the Applicant's founding affidavit, Oakbay continued to engage in political strategies and public campaigns to secure the reversal of the decision to close its and its associated entities' banking accounts. An example of the public campaign is the press release, annexed hereto marked "SB16", in which Oakbay's attempt to gamer public sympathy and pressure is evident. This was all in an attempt to exert pressure on Standard Bank, amongst others, to reverse its decision, when it was



legally entitled to terminate its relationships with Oakbay and its associated entities and in circumstances where Oakbay and its associated entities had not sought to legally challenge the decision. It is apparent from Oakbay's letter of 24 May 2016 to the Applicant (annexure "E" to the founding affidavit) that Oakbay obtained legal advice which confirmed that any attempt to challenge the lawfulness of Standard Bank's decision would fail.

Whilst conducting its media campaign Oakbay representatives requested that they be given the opportunity of meeting with Standard Bank to make representations in an attempt to persuade it to reverse its decision. Standard Bank agreed and on 13 May 2016 I, together with a number of senior officials of Standard Bank, held a meeting with five officials of Oakbay and its associated entities. The meeting took place at Standard Bank's offices in Rosebank, Johannesburg. Standard Bank agreed to consider Oakbay's representations after the meeting and convey the result in due course.

91

On 24 May 2016, and before Standard Bank had conveyed any post-meeting decision to Oakbay, Standard Bank received a letter (the letter is currently incorrectly dated 5 December 2016, being the date it was printed by Standard Bank's legal representatives) from Oakbay's attorneys in which they threatened to bring an urgent court application against Standard Bank unless it kept open the Oakbay group of companies' accounts (pending the institution of litigation proceedings, alternatively a complaint to the Competition Commission), and confirmed that it would do so after 12h00 on 24 May 2016 if no formal response was received from Standard Bank. A copy of that letter is annexed hereto and marked "SB17". On the same day that Oakbay's attorneys were threatening Standard Bank with an urgent application as aforesaid, Oakbay's then Chief Executive Officer, Mr. Nazeem Howa, advised the Applicant, per annexure 'E' to the founding affidavit, that Oakbay had obtained legal advice that informed it that any legal proceedings

to reverse the banks' decisions would be 'still-bom'.

- 93. do not repeat the contentions set out in annexure "SB17" hereto. They are clearly unfounded and will be dealt with, if necessary, at the hearing of this application. Standard Bank handed the letter of Oakbay's attorneys to its attorney for a response. That response is set out in the letter of Werksmans attorneys annexed hereto and marked "SB18" wherein they confirmed that Standard Bank acted lawfully, and in good faith, when it gave the notice of its intention to terminate its relationships with Oakbay and its associated entities, and that it would not accede to Oakbay's demands.
- 94. Thereafter, Mr Howa of Oakbay asked Standard Bank, during a conference call in which I participated, if he and Oakbay's other representatives could again meet with senior representatives of Standard Bank in pursuit of Oakbay's efforts to persuade Standard Bank to not implement the decision to terminate the relationships. Mr Howa was informed that such a meeting would be inappropriate in circumstances where the above-mentioned urgent application was being threatened. Oakbay's response was to direct a letter to Standard Bank in which it recorded that the letter of its aftorneys which threatened an urgent application on its behalf was sent in error and invited Standard Bank to resume commercial negotiations with a view to continue a banking relationship with it. A copy of Oakbay's letter is annexed hereto and marked "SB19"
- During a telephone call on 1 June 2016, Mr Howa was Informed that his representations had not persuaded Standard Bank to revoke its decision to terminate the banking relationships. He asked that Standard Bank furnish Oakbay with its reasons. I accordingly set out some of the reasons in a letter that was addressed to Mr Howa, a copy of which is annexed hereto marked "SB20".

1 Som

## 95.1. The letter records amongst other things:

"Without waiving our right not to furnish reasons for our decisions and without inviting any debate about the correctness of our decisions, I point out that the law, inclusive of South Africa's Companies Act (regulation 43), Prevention of Organised Crime Act, Prevention and Combating of Corrupt Activities Act and Financial Intelligence Centre Act as well as the USA's Foreign Corrupt Practices Act and the UK's Bribery Act, prevents us from having dealings with any person or entity where a reasonably diligent and vigilant person would suspect that such dealings could, directly or indirectly, make us a party to, or accessory to, contraventions of such law.

We have conducted enhanced due diligence on the Oakbay entities as required by the Financial Intelligence Centre Act and have concluded that continuing with any banker/customer relationship with them would increase our risk of exposure to contravention of the aforementioned law to an unacceptable level."

### 95.2. In addition to the above reason, Standard Bank stated:

"Moreover, an indispensable requirement of a relationship between a banker and a customer is that of mutual trust. The campaign on behalf of the Oakbay entities (to coerce Standard Bank into maintaining all banker/customer relationships) has falsely and publicly accused Standard Bank of illegal collusion with our competitors and

- 48 -

creating the perception that it is intentionally excluding black South Africans from the economy. Such accusations are wholly disruptive of that trust and prevent any banker/customer relationship from being maintained."

- As more fully explained above, one of the best practices and standards for a bank to mitigate its risk is to review its relationships with customers when adverse information about them comes to its attention. When adverse information about the shareholders of Oakbay and entities within the Oakbay group came to Standard Bank's attention in or about the first quarter of 2016 Standard Bank conducted a full review, in light of that adverse information, of the entities that were directly or indirectly owned by and/or associated with members of the Gupta family and had a relationship with Standard Bank. Following such review, Standard Bank sent the letter of 6 April 2016 wherein it indicated that it would, with effect from 6 June 2016, terminate the banker-customer relationships that it had with Oakbay and its associated entities. Standard Bank sent a notice of termination of the banker-customer relationship between it and the 10<sup>th</sup> respondent on 29 July 2016. The relationship terminated on 29 October 2016.
- 97. Some of the adverse information that influenced Standard Bank's decision included, inter alia, the following:
- 97 1. Media reports showing that a transaction involving the acquisition of Optimum Coal Mine ("OCM") from Glencore Pic ("Glencore") by Tegeta Exploration and Resources (Pty) Ltd ("Tegeta") for R2.15 billion was alleged to have been politically influenced. Particularly, it was alleged that the Minister of Mineral Resources, Minister Zwane, accompanied members of the Gupta family to a

meeting in Zurich, Switzerland with Mr Ivan Glasenberg, the Chief Executive Officer of Glencore, to facilitate the negotiation of the transaction between Tegeta and Glencore. A copy of such a media report setting this out is annexed hereto marked "SB21". The Public Protector's report, which I deal with further below, confirms that members of the Gupta family and the son of the President of the Republic hold interests in Tegeta.

97.2.

In a copy of an article that appeared in the Financial Mail attached hereto as "SB22", it was reported that Mr Howa of Oakbay had emphatically denied that Minister Zwane had attended the Zurich negotiations yet the Minister's spokesperson readily admitted that he had. Also the Department of Mineral Resources had issued a media statement, dated 1 February 2016, that confirmed that Minister Zwane had met with Glencore in Switzerland. A copy of the media statement is annexed hereto marked "SB23". Mr Howa's reported denial was a red flag of the type that the Crown Court ruled should not be ignored.

97.3.

Media reports had mentioned that Tegeta was awarded a contract of R4 billion to supply coal to the Amajuba power station in Mpumalanga by Eskom and that the Democratic Alliance contended that this contract should not have been awarded because of the poor quality of the coal, which had been rejected in the past by Eskom. In addition, it was reported that Eskom had suspended some of its senior employees for questioning the quality of the coal being supplied by Tegeta to the Amajuba power station. A copy of a media report stating the aforementioned is annexed hereto marked "SB24"



97.4.

Media had reported that members of the Gupta family, Mr Rajesh Gupta, Mr Atul Gupta and Mr Ajay Gupta, were accused of "state capture" through their connection with the President of the Republic. These allegations were made as a consequence of public statements made by the current Deputy Minister of Finance, Mr Mcebisi Jonas to the effect that members of the Gupta family had offered to procure his promotion to the Finance Minister's position in 2015, prior to the dismissal of Mr Nhlanhla Nene, who was the previous Minister of Finance. Mr Jonas claimed that he had rejected the alleged offer. A copy of the relevant media statement issued by Deputy Minister Jonas is annexed hereto and marked "SB25". Whereas corruption related charges by the SFO and SEC had been based upon circumstantial evidence, this direct evidence, published in writing, of a prima facie contravention of PRECCA was considered by Standard Bank to be more than just a red flag.

97.5.

As appears from annexure "SB26" hereto, it had been reported that a former Member of Parliament, Ms. Vytjie Mentor, had alleged that members of the Gupta family had offered her the position of Minister of Public Enterprises provided certain commercial decisions would be taken to favour entities linked to the businesses of the Gupta family. This prima facie contravention of PRECCA was yet another red flag.

97.6.

As appears from annexure "SB27" hereto, the Democratic Alliance announced that it had laid criminal charges against members of the Gupta family in terms of section 4 of PRECCA following the disclosures of Mr Jonas and Ms Mentor mentioned above. The Democratic Alliance being the complainant was not a factor; what was relevant was the fact of the formal laying of charges under

PRECCA against persons In control of various entities with which Standard Bank had relationships.

- As appears from annexure "SB28" hereto, the media reported that Mr Themba 97.7 Maseko (the previous Head of Government Communication and Information Systems) had claimed that President Zuma had requested him to assist the Gupta family and that in a subsequent meeting with the family, Mr Maseko refused the demand made to acquire advertising space in a newspaper which is ultimately owned by the Gupta family. Yet another red flag.
- As appears from annexure "SB29" hereto, it had been reported that other local 97.8. banks had terminated their banking relationship with the Gupta family and its associated entities. Furthermore, the Oakbay group's auditor, KPMG, had terminated its relationship with Oakbay citing "association risk" as the reason. Raising more red flags.
- As appears from annexure 'SB30" hereto, an inter-Ministerial Committee had 97.9. concluded and reported that the Gupta family had used a military air force base for personal purposes by misrepresentation and political influence. One inference to be drawn from this is that a "gratification" as defined in PRECCA could have been offered to secure the landing rights.
- Reports such as the ones annexed as annexure "SB31" and "SB32" of the 97 10. existence of documentary evidence of an Oakbay subsidiary, Westdawn Investments, having secured a loan from the Bank of Baroda for the benefit of the President's family in the face of a denial by Oakbay's subsidiary that any Gupta

related assistance had been given. Such denial justified adverse inferences about the circumstances of the loan.

- Some of the claims that are mentioned in the aforementioned media reports have since been investigated by South Africa's Public Protector. The Public Protector produced a report, released to the public on 2 November 2016, titled "State of Capture". Again, the contents of the report is not repeated, save to point out that it confirms some of the mentioned claims in the media concerning Oakbay and the other entities linked to the Gupta family. Due to its length, a copy of the report is not annexed but it will be made available to the above Honourable Court at the hearing of this matter.
- 99. Separately, a factor that influenced Standard Bank's resolve to abide by its termination decision was the improper manner in which Oakbay sought to portray Standard Bank in the public eye as having a callous disregard for the livelihoods of Oakbay's employees and their dependents and use its political influence to exert pressure on Standard Bank to reverse that decision.
- The above Honourable Court has already been referred to annexure "SB16" which is an example of the regular advertisement put into the media in which Oakbay stated, in terms, that Standard Bank held "the livelihoods of Oakbay's 7500 employees and dependents...in [its] hands" and that Standard Bank ought to "do the right thing and restore banking services to Oakbay". The obvious purpose of these advertisements was to solicit public support, and thereby pressure, by falsely claiming that Standard Bank had no valid reason for closing the accounts (i.e. "it had not done the right thing") and was responsible for any consequential job losses and hardship.

- The above Honourable Court has also already been referred to the example of Oakbay requesting the intervention of a SBG shareholder by falsely informing it that Standard Bank had colluded (implicitly illegally) with its competitors and had racist motives in closing Oakbay's accounts.
- The first illustration of Oakbay invoking direct political pressure on Standard Bank, was its request (as admitted by Mr Howa during his attempt to persuade Standard Bank to reverse its decision to terminate banking relationships) to the ANC that it intervene for its benefit. This resulted in Mr Sim Tshabalala, the Chief Executive Officer of Standard Bank, being invited by the Secretary General of the ANC to meet at Luthuli House to account for Standard Bank's decision to terminate the Oakbay related accounts. He and I attended that meeting on 21 April 2016. The ANC was represented by, amongst others, Mr Gwede Mantashe, Ms Jesse Duarte and Mr Enoch Ngodongwana. Mr Tshabalala confirms these facts in his confirmatory affidavit.
- At the commencement of the meeting the ANC representatives accepted Standard Bank's position that it was legally prevented from discussing Oakbay related matters and nor could it disclose its reasons for closing any oustomer's accounts including those of the Oakbay entities, and therefore the discussions should be about the factors taken into account generally when deciding to close bank accounts rather than specific customers. Nevertheless, Standard Bank was asked in the meeting to respond to the accusation that it was colluding with "monopoly capital" to oppress a black-owned business, the self-same accusation as had been included in Oakbay's letter to the SBG shareholder. Standard Bank was also asked to explain why it continued to bank construction companies that had been fined for collusion in the construction of stadia (Standard Bank, citing confidentiality obligations, neither admitted nor denied that it banked any such companies) yet had

MI

closed the accounts of Gupta related companies that had not been convicted by any court.

- Standard Bank has no difficulty in engaging with the governing party or any other political party about issues of national concern or interest and nor does it take issue with requests for such meetings. However, the fact that the ANC requested the meeting at the behest of Oakbay (as admitted by Mr. Howa during our 13 May 2016 meeting, which I deal with later) with the intended purpose of pressuring Standard Bank into reversing its decision for Oakbay's benefit evidences the extent of Oakbay's political influence and willingness to bring it to bear to reverse a lawful and good faith decision taken in compliance with legal and regulatory obligations.
- 105. Another instance of impermissible political interference was COSATU's submission of the bank account closure issue to a meeting of Nedlac as reported on 3 May 2016 (annexure "SB33" hereto). This was followed by a request to Standard Bank for a meeting to discuss the closure of the Oakbay accounts at the purported instance of the three members of the Committee comprised of Minister Zwane, Minister Oliphant and the Applicant, on 5 May 2016. A copy of the e-mail requesting the meeting and Mr. Sim Tshabalala's response thereto is annexed hereto marked "SB34"
- Oakbay's employees, and disclosed to the media, in which it is stated that Oakbay had requested the intervention of the President as well as the Ministers of Mineral Resources (Mr Zwane), Labour (Ms Oliphant) and Finance (the Applicant). It is noteworthy that the Committee appointed to investigate the account closures was made up of those self-same Ministers. Although Mr Howa's letter is undated the media, as per annexure "SB36",

published the letter on 8 April 2016, which was prior to the establishment of the Committee on 13 April 2016.

- During the course of this litigation, Oakbay's attorneys have requested certain documents from the Applicant. One of the documents requested from and provided by the Applicant is a letter dated 22 April 2016 from the Applicant to Minister Zwane, copying Minister Oliphant. A copy of the letter is annexed hereto marked "SB37". Amongst other things, the letter records that following the Applicant's consultation with Cabinet's Secretariat it emerged that at a Cabinet meeting on 13 April 2016 no inter-ministerial committee was established but that the three Ministers were nominated to, it is assumed, investigate the Oakbay account closures and that no one Minister was designated as the convenor.
- In his media statement of 1 September 2016 (annexure "SB38" hereto), Minister Zwane recorded that "On 13 April 2016, Cabinet established an Inter-Ministerial Committee (IMC) to consider allegations that certain banks and other financial institutions acted unilaterally and allegedly in collusion, when they closed bank accounts and/or terminated contractual relationships with Oakbay Investments". The statement records that Minister Zwane issued the statement in his alleged capacity as the Chairperson of the Committee.
- The Chief Executive Officer of Standard Bank, Mr Tshabalala, and I attended that meeting, held on 5 May 2016, on behalf of Standard Bank. Ministers Zwane and Oilphant attended the meeting but the Applicant did not attend. Mr Mzwanele Manyi was also present; he stated that he was attending the meeting in his capacity as a ministerial advisor. These averments are confirmed by Mr Tshabalala in his confirmatory affidavit.

110. The Ministers accepted, at the request of Standard Bank, that the meeting could not be

- 54 -

of and

about the Oakbay entities and that Standard Bank would instead explain to the Committee the factors that influence its decision to close accounts generally. Despite this it became clear from the contents of the enquiries directed by the Ministers and their advisor that their main concern was the closure of the Oakbay accounts. They wanted to secure an outcome favourable to Oakbay, by using their political and executive power. For instance, they were concerned about the criteria used by Standard Bank to identify PEPs and the risk to PEPs of being denied banking facilities; they raised an allegation that Standard Bank was not treating its clients fairly in terminating the Oakbay related banking relationships; they queried whether the four large banks had "colluded" on behalf of "monopoly capital" in the manner in which Oakbay was treated; just as the ANC had done, they asked Standard Bank to explain why it had continued to bank construction companies that had been fined for anti-competitive collusion yet closed the accounts of Oakbay entities that had not been convicted by any court and they suggested that the banks should be accountable for any job losses caused by account closures affecting Oakbay and its related entities. In short, the nature and tone of the Ministers' queries was substantially the same as contained in Oakbay's letter to the SBG shareholder and those posed on behalf of the ANC. Again, these averments are confirmed by Mr Tshabalala in his confirmatory affidavit.

After this meeting Standard Bank prepared a summary of the meeting, a copy of which is annexed hereto marked "SB39". The summary was sent to the two Ministers, by way of an e-mail from Mr Tshabalala. By e-mail reply the two Ministers' representative thanked Mr. Tshabalala for his input. A copy this e-mail is annexed hereto marked "SB40". It appears that the contents of Standard Bank's letter to the Ministers was not made available to the President as it seems unlikely that the President would have made the statements that he did in Parliament on 23 November 2016, if he had been afforded an opportunity to consider the contents of the letter. The statements that were made by the

f An B

President are set out later in this affidavit.

- As previously mentioned, as a result of representations by Oakbay's former Chief Executive Officer, Mr Howa, to the effect that it would be unfair for Standard Bank to implement its decision to terminate banking relationships without Oakbay having been given an opportunity to dissuade Standard Bank from doing so, Oakbay was invited to a meeting with senior executives of Standard Bank where it could make its case. This meeting took place on 13 May 2016 where Oakbay was represented by, amongst others, Mr Howa and Mrs Ronica Ragavan. I was part of the Standard Bank delegation, and therefore have personal knowledge of what transpired at the meeting.
- 113. At the meeting Oakbay's representatives requested that Standard Bank reverse its termination decision for three principal reasons, specifically that (a) the relevant members of the Gupta family and Mr Duduzane Zuma (the President's son) had resigned all executive positions within Oakbay and its associated entities so that they could no longer influence their behaviour, (b) no Oakbay entity had been found guilty of wrongdoing and (c) without access to transactional banking facilities Oakbay and its associated entities might not be able to pay their employees and job losses could follow.
- 114. Oakbay's representatives then offered to address any concerns that Standard Bank may have. Standard Bank accepted that offer and asked for explanations regarding some of the adverse information that had appeared in the media and is mentioned in paragraph 97 above. Suffice to say for present purposes that the explanations given by Oakbay's representatives were insufficient, unconvincing and in one instance demonstrably dishonest and served to harden Standard Bank's resolve to terminate all the banker-customer relationships rather than persuade Standard Bank to reverse that decision. As a

f Am &

result, Standard Bank proceeded to terminate the relationships as per its earlier notice, having provided a full opportunity to Oakbay to make representations.

115. Standard Bank respectfully submits that It was entitled to terminate the banker-customer relationships with Oakbay and its associated entities in order to protect its reputation, and also to avoid or reduce the risk of being used or become involved, unwittingly, in improper or unlawful activities. It terminated those relationships in good faith. Standard Bank rejects the accusations levelled by Oakbay's representatives who sought to impugn Standard Bank's bona fides, by making unfounded and unlawful claims through well-orchestrated public campaigns.

### Standard Bank's reasonable apprehension

- As mentioned above, on 13 April 2016 Cabinet established the Committee to consider allegations that certain banks and other financial institutions had \*acted unilaterally and allegedly in collusion\* when they closed bank accounts or terminated contractual relationships with Oakbay and its associated entities. It appears that the Committee was chaired by Minister Zwane.
- 117. The Committee reported that it had meetings with various banks, financial institutions and insurance companies and representatives of Oakbay. In his founding affidavit, the Applicant indicates that he did not participate in the meetings of the Committee. The Applicant was not present during the meeting between Standard Bank and the other members of the Committee.



- 118. On 1 September 2016, Minister Zwane, speaking on behalf of the Committee, announced that the Committee made certain recommendations to Cabinet and that, based on those recommendations, Cabinet had resolved as follows:
- To recommend to the President to appoint a judicial inquiry in terms of section 84(2)(f) of the Constitution.
- To consider the current mandates of the Banking Tribunal and the Banking Ombudsman. It claimed that the evidence presented to the Committee indicated that:

"All of the actions taken by the banks and financial institutions were a result of innuendo and potentially reckless media statements, and as a South African company, Oakbay had very little recourse to the law."

- To consider the current Financial Intelligence Centre Act and the Prevention and Combating of Corrupt Activities Act on reporting since "evidence presented to the [Committee] was unclear on whether the various banks and financial institutions as well as the Reserve Bank and Treasury complied with these and other pieces of legislation".
- To reconsider South Africa's clearing bank provisions to allow for new banking licenses to be issued. The statement claimed that the evidence before the Committee suggested that:



"The South African banking system is controlled by a handful of clearing banks which ensured that every other local or international bank participating in the South African banking sector would need to go through these clearing banks in order to have their transaction cleared, thereby creating an oligopoly".

- The establishment of a state bank of South Africa with a possible corporatisation of the post bank being considered as an option.
- 119. A copy of the statement, as it appears as a formal notice on the Department of Mineral Resources' website, is annexed hereto marked "SB38".
- 120. On 2 September 2016 the Presidency Issued a statement, a copy of which is annexed hereto marked "SB41". In it, the Presidency purported to repudiate the statement issued by Minister Zwane. Notwithstanding the comprehensive nature of the statement issued by the Department for Mineral Resources through Minister Zwane, the Presidency's statement was terse and simply recorded:

"The statement Issued by the Minister of Mineral Resources, Mr Mosebenzi Zwane yesterday on 1 September 2016, on the work of the task team established to consider the Implications of the decisions of certain banks and audit firms to close down their accounts and withdraw audit services from the company named Oakbay Investments, was issued in his personal capacity and not on behalf of the Task Team or Cabinet.



Minister Zwane is a member of the Task Team. He does not speak on behalf of Cabinet and the contents of his statement do not reflect the position or views of Cabinet, the presidency or government. The unfortunate contents of the statement and the inconvenience and confusion caused by the issuing thereof are deeply regretted.

- 121. What is lacking from the statement of the Presidency is a confirmation or otherwise on whether the Committee, or task team, discussed and made the recommendations contained in its statement to Cabinet. Furthermore, what is not stated is whether or not as a matter of fact Cabinet considered and made the recommendations that are contained in the statement by the Ministry of Mineral Resources through Minister Zwane.
- The result of this lack of clarity creates the reasonable belief that a real possibility remains that some of the recommendations contained in the statement issued by Minister Zwane could, in one form or the other, be carried out and given effect. This belief is re-enforced by claims that the Gupta family still has business interests in the Republic and that the decision of Standard Bank and other banks to close their accounts jeopardises the interests of employees of business entitles linked and/or controlled by the Gupta family.
- 123. Following the Presidency's disassociation with Minister Zwane's unauthorised statement, the latter advised that the matter could only be decided once the President had sufficiently applied his mind to it. A media article recording that fact is annexed hereto marked annexure "SB42". This is a further indication that Cabinet or at the very least some Cabinet Ministers might associate with the statement and action pursuant to that statement may still be taken.



- A clear indication that the Government may take some action pursuant to Minister Zwane's statement is President Zuma's answers to parliamentarians during the President's question and answer session on 23 November 2016. Annexed hereto marked "SB43" is a transcript of the relevant portion of the President's statements in Parliament. The President's initial remarks were in response to a Member of Parliament, Mr. Bantu Holomisa, about the status of the recommendation of a judicial commission of inquiry as referred to him by Minister Zwane allegedly at the request of the Cabinet.
- Highlighted below are three extracts in terms of which the President's statements provide insight into the President's belief that the Executive is entitled to intervene in such circumstances:

"...cabinet appointed the Ministers of Finance, Labour and Mineral Resources to open a constructive engagement with the banks on the matter of the closure of bank accounts..."

"...if a number of banks act in the same way simultaneously, not one bank, not two banks, including some financial institutions. To any ordinary person that is not an ordinary act. It suggests that there is something, the banks can't act together in the same manner in the same way. It gives a feeling that there is something going on here. Now if you are a government, as government intervenes in many things if it believes it is putting the image of the country into some problems bear in mind that the government has always continued to ask for private sector to invest including the investors from outside of South Africa. If you are sitting at the level of government and you see an action of this nature highly publicised you have to say what will the investors out there think of coming to

invest in South Africa if they think the banks can willy-nilly and act in a manner that suggests collusion about the economy of your country. As a government you can't sit and say I am doing nothing. It was therefore absolutely correct because if the investors don't come here, because they fear the actions of the banks the country will say what is the government doing. We therefore needed to know what is happening as a government, there is no law that says that you cannot do so. You are talking about the bank and individual, here there was an action by a number of banks at the same time, it suggested there is something untoward here and as government we wanted to constructively to interact with the banks to find out what is this, what are they doing, where has this come from? That was the reason."

"The action looks suspicious and as government responsible to govern this country, we'll certainly have to investigate what is this and we started very politely by sending a team to meet the Banks to say what is happening."

- 126. The President's statements in Parliament show that:
- The President considers the banks' decision to close Oakbay and its associated entitles' accounts as having being taken without due consideration (i.e. "willy-nilly");
- The President, like Oakbay, believes that there may have been collusion between the banks and other financial institutions in terminating their relationships with Oakbay;

1 Min

- 126.3. Government will continue to "deal" with the banks' decisions to terminate the banking relationship with Oakbay and its related entities;
- The President's primary concern arising from the banks' termination of relationships with Oakbay and its associated entities appears to be that such actions will deter investors from investing in South Africa;
- The contents of Minister Zwane's unauthorised statement are still being considered, which means that they may still be given effect to. This is despite the President alleging that he reprimanded Minister Zwane for his unauthorised statement.
- 127 It is clear that Government seeks to further intervene with Standard Bank's decision to terminate its relationships with Oakbay and its associated entities. Standard Bank contends that the intervention that has already occurred and that which is being considered by the President were and would be unlawful for the reasons set out in this affidavit that can be succinctly summarised as follows:
- 127.1. Where Standard Bank has terminated its relationship with Oakbay and its associated entities in order to avoid contraventions of, and therefore in compliance with the FICA, POCA and/or PRECCA not any Minister or the Executive or any judicial commission of inquiry can lawfully direct that the terminated relationship be re-instated;
- 127.2. Judicial commissions of inquiry, generally, require there to be a matter of public

- 63 -

1 m

concern to justify their establishment. If Oakbay and its associated entities have, through the Commission, persuaded the President to give consideration to establishing a judicial commission of inquiry into the termination of their banking relationships there are no issues of public concern that could justify interfering in a private contractual arrangement between Standard Bank and Oakbay (and its associated entities).

127.2,1.

Firstly, any "collusion" as invoked by the President would fall under the exclusive jurisdiction of the Competition Commission. In its letter dated 24 May 2016 to Standard Bank, annexure "SB17" hereto, Oakbay had threatened that, as an alternative to the urgent High Court proceedings, it would lay a formal complaint with the Competition Commission. As far as Standard Bank is aware, Oakbay and its associated entities have not approached the Competition Commission to lodge a complaint against Standard Bank.

127.2.2.

Secondly, in as much as reliance for establishing the Committee, as repeated by the President, was placed upon alleged public concern about the impact on investor confidence that closing the Oakbay accounts may have had, Standard Bank has demonstrated in this affidavit that such reliance was mis-placed and unjustified; if anything, Standard Bank's compliance with anti-money faundering and anti-corruption laws to an acceptable global standard was to the public's patent benefit as it would have enhanced rather than diminished South Africa's reputation as an investment destination and helped to avoid de-risking by our banking industry's correspondent banks.

127.2.3.

Thirdly, it stands to reason that all banks in South Africa are bound by the same laws so when they all independently behave in the same way in order to comply with those same laws in response to widely publicised reports of illegal conduct on the part of common customers such behaviour cannot justify an inference of collusion or oppression of investors let alone be a matter of public concern.

128. Having regard to the above facts, I respectfully submit that a proper case is made out for the relief sought in annexure "SB1" hereto.

# Responses to the averments made in the founding affidavit

129. have read the contents of the founding affidavit, and set out Standard Bank's response thereto as follows.

## 130. Ad paragraphs 1 - 3

Save as stated below, these allegations are admitted.

## 131. Ad paragraph 4

These allegations are noted.

# 132. Ad paragraphs 5 - 6

1 Jun

Save as stated below, these allegations are admitted.

## 133. Ad paragraphs 7 - 8

- The allegations that are attributed to Oakbay that Standard Bank has acted unlawfully or improperly are unfounded. Although Standard Bank took into account the fact that other banks had terminated their banking relationships with Oakbay, its own decision was not co-ordinated or taken in concert with any other bank or financial institution.
- Standard Bank acted independently and without any prior discussions with any of its competitors. The allegation that Standard Bank acted improperly and irregularly is equally denied and has been addressed in this affidavit.

# 134. Ad paragraph 9

The allegation that Standard Bank gave no justification for its decision to close the accounts is denied. As stated above, Oakbay knew the reasons for the closure of the accounts. At the request of Oakbay, the reasons were reduced to writing and thereafter disclosed by Mr Howa during an interview with Carte Blanche, a television production, that was broadcast nationally on 19 June 2016.

### 135. Ad paragraph 10

Mar

Standard Bank does not in any way condone the loss of jobs for reasons not of the employees' making. However, it is denied that there is any connection between the decision to close the accounts of Oakbay (and its associated entities) and any possible loss of jobs, which Oakbay in any event has failed to prove.

#### 136, Ad paragraph 11

The contents of this paragraph are noted.

#### 137. Ad paragraph 12

- 137 1. The contents of the legal opinion are noted. Standard Bank associates itself with the contents thereof.
- 137.2. in the letter dated 22 April 2016, annexure "SB37" hereto, the Applicant informed Minister Zwane, copying Minister Ollphant, that he was seeking legal advice on what could be done in light of the legislative framework governing the financial sector. The Applicant stated that it would be advisable that the members of the Committee consult on the legislative framework for purposes of any discussion with the financial institutions. The Applicant proposed that such consultation take place on 26 April 2016.
- On 25 April 2016 the Applicant's counsel furnished the Applicant with an opinion 137.3. which inter alia stated that the Committee's contemplated meeting with the banks was not authorised by law. If the Applicant met with Ministers Zwane and

Oliphant on 26 April 2016, as he had proposed, then an inference can be drawn that he shared the opinion or its conclusions with them. Despite the opinion, the secretary of the Committee sought a meeting with Standard Bank on 4 May 2016.

# 138. Ad paragraphs 13 – 14

- 138.1 In addition to the laws mentioned in the legal advice, additional statutes and other considerations must be mentioned:
- 138.1.1. The Prevention of Organised Crime Act 121 of 1998;
- 138.1.2. The Prevention and Combating of Corrupt Activities Act 12 of 2004;
- Standard Bank is part of a global banking group which conducts business through banks, branches or representative offices in 20 African countries, the United States of America, the United Kingdom, Brazil, Dubai, Jersey, Isle of Man, Hong Kong and China. Therefore, as stated above, Standard Bank is bound by the anti-money laundering, anti-corruption and anti-terrorism laws of each of those jurisdictions. It must comply with those laws even when it conducts business in South Africa.
- Additionally, when Standard Bank raises funds that it would lend to its customers from international financial markets it is an invariable term of each loan agreement that Standard Bank commits to full compliance with the anti-money laundering, anti-corruption, and anti-terrorism financing laws in all of the

- 68 -

an

Jurisdictions where it operates. I have annexed an example of such a term as annexure "SB11" hereto.

# 139. Ad paragraphs 15 - 20

- The allegations are noted. I have dealt elsewhere in this affidavit with the possible consequences that such interference could have on South Africa's banking system.
- 139.2. The alleged risk to job opportunities also needs to be placed in context.
- 139.3. Firstly, there is no evidence of any link between the conduct of Standard Bank in closing bank accounts and possible job losses. None has ever been demonstrated.
- Secondly, Oakbay was told during the 13 May 2016 meeting with Standard Bank that more than twenty licensed entitles offer payment services in South Africa.

  Oakbay was asked to explain the contention why jobs would be lost if just four of these entities withdraw their services from Oakbay and its associated entities;

  Oakbay had no compelling answer beyond a general statement that the nature of its businesses required country wide banking coverage.
- 139.5. Thirdly, transactions which violate the laws of the country, such as money laundering and corruption, pose a far greater risk to the banking system and the financial stability to the country than can closure by Standard Bank of

transactional accounts of individual businesses.

## 140. Ad paragraph 21

This is noted.

## 141. Ad paragraphs 22 - 23

- As noted above, Standard Bank first and foremost is entitled as of right to terminate a banking relationship and is not obliged to provide reasons when doing so. On the facts of this particular case, Standard Bank acted in a way that is procedurally fair and had sufficient grounds for terminating the banking relationship.
- Standard Bank views its regulatory obligations and the protection afforded to it under the provisions of the FICA in a serious light. Standard Bank maintains that it acted in accordance with its legislative obligations to the extent that any Reports listed in the Certificate issued by the Centre, attached as annexure P2 to the Applicant's founding affidavit, were filed by it and remains mindful of the consequences of contravening the prohibition in sections 29 (3) and 29 (4) of the FICA.
- Any information which may have been submitted by Standard Bank, and which may appear as a Report in the Certificate, would have been submitted as a result of Standard Bank complying with section 29 of the FICA and applying the

70 -

guidelines set out in the Guidance Note, including the indicators set out therein.

141.4.

The information adverse to Oakbay and its associated entities that came to light compelled Standard Bank to observe its regulatory obligations. This has been addressed above, however, some aspects require emphasis. Standard Bank, having considered all the publicly available and privately held adverse information, formed the reasonable suspicion that there had been or could in the future be possible contraventions of the FICA, read with the corruption-curbing related legislation, on the part of Oakbay and its associated entities. Particularly, Standard Bank took into account the following:

141.4.1.

In 2013 an Inter-Ministerial Task Team concluded that a civilian aircraft was allowed to land at air force base Waterkloof as a result of "false pretences, as a result of the manipulation of the process by the Gupta family", and various public officials "who shared a common purpose and acted in concert" with the Gupta family. The members of the Gupta family were accused of bringing to bear undue influence on various state officials. Due to the length of the report, only the relevant extract of the report is annexed hereto marked "SB30"

141 4.2.

In December 2015 ABSA Bank terminated all relationships with Oakbay. While no reasons have been publicly announced by ABSA Bank, it stands to reason that it was also equally concerned about the risk of a continued association with Oakbay.

-71-

<sup>\*</sup> For a full copy of the study, please visit the following link: http://www.tusilce.gov/.ps/report/lips/gther/20130517-jcps-waterkhod-report.pdf. Please note that a full copy of the study will be made available to the Court at the hearing of the application.

141.4.3.

It had been reported (and is now common knowledge, since the report of the Public Protector) that Minister Zwane accompanied a delegation from Oakbay/Tegeta to Switzerland to facilitate the acquisition of Optimum Coal by Tegeta, yet Oakbay had denied this to be the case.

141.4.4.

Regardless of the report by the Public Protector, it had been public knowledge from media reports that such a trip was undertaken by Minister Zwane. This fact was of concern since Minister Zwane would have known that, as the responsible regulator, he would be required by section 11 of the Minerals and Petroleum Resources Development Act to (impartially) approve any resultant acquisition and therefore should not have "entered the arena" in this way.

141.4.5.

The allegations of offers of promotions to Deputy Minister Jonas and former MP Mentor by members of the Gupta family would, if true, evidence a breach of the provisions of PRECCA. This certainly had been the conclusion reached by the Democratic Alliance in laying criminal charges, as appears from annexure "SB27" hereto.

141.4.6.

More relevant is Standard Bank's obligation under POCA not to deal in what it ought to suspect are the proceeds of crime; if either or both offers had been accepted, benefits flowing therefrom to Oakbay's and its related entities' via their accounts with Standard Bank would arguably be the proceeds of crime and if similar offers had already been made to other government officials, not disclosed and accepted

then benefits flowing therefrom to the Oakbay entities via their Standard Bank accounts would similarly, arguably, already be the proceeds of crime in the hands of Standard Bank.

141.4.7

Around March 2016 the media reported that Mr Themba Maseko (the previous Head of Government Communication and Information Systems) had mentioned that President Zuma had requested him to assist the Gupta family. In a subsequent meeting with the family, Mr Maseko refused the demand made to acquire advertising space in a newspaper which is ultimately owned by the Gupta family. Upon his refusal, a threat was made against him and he does not discount the possibility that he lost his job because of his refusal to assist the Gupta family. Standard Bank could not ignore the reasonable suspicion of a possible contravention of PRECCA created by this disclosure; If Mr Maseko had taken up advertising space in these circumstances the purchase consideration in the hands of the bankers to the newspapers would arguably be the proceeds of crime.

141.4.8.

Oakbay's auditors had terminated their audit contract with Oakbay and its associated entities citing "association risk". Since auditors usually have much greater access to a company's books, records and affairs than does the bank providing transactional accounts, Standard Bank could validly infer from the auditors' decision that they had access to adverse information that Standard Bank ought not to ignore.



141.4.9.

The reports about financial assistance to the President's family as mentioned in annexures "SB31" and "SB32" were of concern.

### 142. Ad paragraphs 24-25

- 142.1. The Court is referred to the contents of annexure P2 to the founding affidavit. It is submitted that the information contained therein suffices for purposes of this application. The FIC is the correct repository of all the information supplied to it, from which the certificate marked annexure P2 to the founding affidavit was drawn. The disclosure of information by the FIC is regulated by applicable legislation.
- In amplification of the stance adopted by Standard Bank, this Honourable Court is asked to take into account the media statement published by the FIC on 11 November 2016, a copy of which is attached hereto marked annexure "SB44". It is apparent that the FIC saw fit to clarify what it terms "a general misunderstanding of a report on a transaction, which a reporter deems suspicious or unusual and [its] role in protecting the reported information.' The FIC goes on to describe the content of a report on a suspicious or unusual transaction, as one which "includes information about a person's identity as well as the person's most private information such as bank account details, signatories on accounts, balances in accounts, and so on. It also contains information about financial transactions the parties involved, amounts involved, etc. This is non-public, private and confidential information about a person that is protected under the Protection of Private Information Act and the Constitution of the Republic of South Africa."



- 142.3. The FIC's position with regards the disclosure of Reports is made clear in an unequivocal statement that it "can categorically state that the [Centre] has never, since its inception, given copies of reports on suspicious or unusual transactions to investigators, politicians (including the Minister of Finance who is the Executive Authority responsible for the FIC) or any other person, or allowed any such person to access to such reports."
- It is underliable that the FIC assumes its responsibilities and its role as the admitted gatekeeper of the information reported to it under section 29 of the FICA with due consideration to the prohibitions set out therein and the penalties that may ensue should disclosure occur. In light of the public stance adopted by the FIC on this issue, Standard Bank respectfully submits that its approach in addressing paragraphs 24 and 25 of the Applicant's founding affidavit, in the manner that it has, is warranted.

### 143. Ad paragraph 26

These allegations are noted. As they are not within the knowledge of Standard Bank, I will not respond to them.

#### 144. Ad paragraph 27 and 28

144.1. The funds were indeed transferred from Standard Bank to the Bank of Baroda. In response to the Applicant's application, Oakbay's attorney issued a statement wherein he confirmed transfer of the funds by Standard Bank to the Bank of



Baroda. A copy of the media statement is annexed hereto marked "SB45".

144.2. The circumstances under which the transfer took place were the following:

144.2.1.

On 21 April 2016, Ms Ronica Ragavan (representing Oakbay Investments (Pty) Ltd) addressed an e-mail to Standard Bank informing it of the amount of R1.456 billion held by Standard Bank for Oakbay and the intention of Oakbay to move the money to a different bank. A copy of the e-mail is annexed marked "SB46".

144.2.2

On 22 April 2016 Standard Bank responded to the request for the movement of the funds. In an e-mail of the same date, annexed hereto marked "SB47", it was indicated that the funds could not be moved to a different account since the holder of the account was the Optimum Mine Rehabilitation Trust ("the Trust"). It was mentioned that in order for the transfer of the funds to be effected, the appointed trustees of the Trust would have to issue the necessary resolutions.

144.2.3.

Within a matter of days the Trust's trustees were replaced by nominees of Oakbay as is apparent from the attached Letters of Authority, dated 26 April 2016, marked "SB48". The new Trustees were Althaf Emmamally, Pushpaveni Ugeshi Govender and Trevor William Scott.

144.2.4.

A document dated 5 May 2016 from the Department of Mineral

I My

Resources, Witbank, to Tegeta, signed by the Regional Manager: Mpumalanga Mineral Regulation, with the reference Mr NA Tshivjandekano, which is annexed hereto marked "SB49" was provided by Oakbay to Standard Bank. The document stated that the DMR \*acknowledges the moving of the funds for financial provision held in a Trust Account with Standard Bank to the Bank of Baroda, Johannesburg, provided that such bank is registered with the Reserve Bank of South Africa."

144.2.5.

On 27 May 2016 Standard Bank wrote a letter to the Trust and OCM's business rescue practitioners informing the Trust that pursuant to the sale of shares agreement between Optimum Coal Holdings (Pty) Ltd and Tegeta, it would be terminating its relationships with all companies that had been acquired by Tegeta pursuant to the sale of shares agreement. Consequently, Standard Bank would be terminating its relationship with the Trust and any transfer of the funds held in the account of the Trust to another institution would require the prior written approval of the Department of Mineral Resources. A copy of the letter is annexed hereto marked "SB50"

144.2.6.

On 13 June 2016 a copy of a resolution by the Trust, which is annexed hereto marked "SB51", was provided to Standard Bank, as evidence that the new Trustees had resolved that "the Funds presently held with Standard Bank should be transferred to the account with Bank of Baroda, Johannesburg once the account is

1 am

opened." PU Govender "in her capacity as a Trustee of the Trust" was authorized to sign all the documents required to give effect to the transfer.

144.2.7

It was only at this point, having satisfied itself that the necessary approvals from the Trust and the Department of Mineral Resources had been obtained, that Standard Bank agreed to transfer the funds to the Bank of Baroda. Following the transfer, on 21 June 2016 I wrote a letter to the Minister of the Department of Mineral Resources, Minister Zwane, informing him of the transfer to the Bank of Baroda. A copy of the letter is annexed hereto marked "SB52". I received no acknowledgement or reply.

144.3. Standard Bank has no knowledge of what happened to the funds after they were transferred to the Bank of Baroda.

#### 145. Ad paragraph 29

As noted above, Standard Bank seeks an expanded relief in view of the possible threats of further executive interference.

### Appropriate remedy

146. It is respectfully submitted that Standard Bank has made out a case for the relief set out in annexure "SB1". It is also submitted that Standard Bank will be entitled to a cost order in

78 -

/ an

the event of any of the respondents or any other party opposing the relief sought by it in annexure "SB1".

IAN HAMISH SCOTT SINTON

I CERTIFY that this affidavit was signed and sworn to before me at JOHANNESBURG on this the May of DECEMBER 2016, by the deponent who acknowledged that he knew and understood the contents of this affidavit, had no objection to taking this oath, considered this oath to be binding on his conscience and who uttered the following words: "I swear that the contents of this affidavit are true, so help me God".

COMMISSIONER OF OATHS

COMMISSIONER OF OATHS (ex officio)

Jeson Michael Smith Practising Attorney - J.M.S. Inc Suite 1, 26 Baker Street, Rosebank Tel: 011 447 8188

18th AA - 1602

# IN THE HIGH COURT OF SOUTH AFRICA (GAUTENG DIVISION, PRETORIA)

NATIONAL TREASURY
RECEIVED

CASE NO: 80978/16

In the matter between:

2316 -12- 13

MINISTER OF FINANCE

LEGAL SERVICES

Applicant

and

OAKBAY INVESTMENTS (PTY) LTD

First Respondent

OAKBAY RESOURCES AND ENERGY LTD

Second Respondent

SHIVA URANIUM (PTY) LTD

Third Respondent

TEGETA EXPLORATION AND RESOURCES (PTY) LTD

Fourth Respondent

JIC MINING SERVICES (PTY) LTD

Fifth Respondent

**BLACKEDGE EXPLORATION (PTY) LTD** 

Sixth Respondent

TNA MEDIA (PTY) LTD

Seventh Respondent

THE NEW AGE

Eight Respondent

AFRICA NEWS NETWORK (PTY) LTD

Ninth Respondent

VR LASSER SERVICES (PTY) LTD

Tenth Respondent

ISLANDSITE INVESTMENTS ONE HUNDRED AND EIGHTY (PTY) LTD

Eleventh Respondent

CONFIDENT CONCEPT (PTY) LTD

Twelfth Respondent

JET AIRWAYS (INDIA) LTD (INCORPORATED IN INDIA)

Thirteenth Respondent

SAHARA COMPUTERS (PTY) LTD

Fourteenth Respondent

**ABSA BANK LTD** 

Fifteenth Respondent

FIRST NATIONAL BANK LTD

Sixteenth Respondent

STANDARD BANK OF SOUTH AFRICA

LIMITED

Seventeenth Respondent

**NEDBANK LIMITED** 

Eighteenth Respondent

**GOVERNOR OF THE SOUTH AFRICAN** 

RESERVE BANK

Nineteenth Respondent

**REGISTRAR OF BANKS** 

Twentieth Respondent

DIRECTOR OF THE FINANCIAL INTELLIGENCE CENTRE

Twenty-First Respondent

### **FILING SHEET**

PRESENTED FOR FILING: The Eighteenth Respondent's answering affidavit.

DATED at PRETORIA on the 12th day of DECEMBER 2016.

BAKER & McKENZIE

Attorney's for the Eighteenth Respondent

Tel:(011) 911 4300

Fax:(011) 784 2855 Email: Gerhard.Rudolph@bakermckenzie.com

Widaad.Ebrahim@bakermckenzie.com Callum.OConnor@bakermckenzie.com

Ref: G Rudolph/ CO

c/o ADAMS & ADAMS

Adams & Adams Place Lynnwood Bridge

4 Daventry Street Lynnwood Manor

Pretoria

Tel: (012) 432 6000

Adele Jordaan

TO: THE REGISTRAR THE ABOVE HONOURABLE COURT **PRETORIA** 

10:55

### THE STATE ATTORNEY

Attorneys for the Applicant SALU Building 255 Francis Baard Street Pretoria Tel 012 309 1575

Fax: 012 309 1649

Fax to Email: 086 629 3073 Email: TNhlanzi@justice.gov.za Ref: 2427/16/Z32. Ms T Nhlanzi



Acknowledge receipt this December 2016

Signed



**VAN DER MERWE AND ASSOCIATES** 

Attorney's for the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 10<sup>th</sup>, 11<sup>th</sup>, 12<sup>th</sup> and 14<sup>th</sup> Respondents 62 Rigel Avenue North Waterkloof Pretoria

Ref: Mr GT VD Merwe/st/078 Tel: 012 343 5432

Email: simone@vdmass.co.za

VAN DER MERWE EN ASS

RIGEL LAAN 62 WATERKLOOF RIDGE - PRETORIA TEL: 012 343 5432 / 087 654 0209 FAKS: 012 343 5435 / 086 500 7587

Acknowledge receipt this 12 day of December 2016

Signed

### AND TO

**EDWARD NATHAN SONNENBERGS** 

Attorney's for the 15th Respondent 150 West Street Sandton

Email: dlambert@ensafrica.com Ref: M Katz/ D Lambert/0416998

c/o GERHARD BOTHA & PARTNERS INC

First Floor, Erasmus Forum Building B Cnr Rigel Avenue & Stokkiesdrrai Erasmusrand

Tel: 012 347 0480

Email: brendon@bothapartners.co.za

Ref: Mr B Swart/ Mr H Botha

Acknowledge receipt this \ December 2016

Signed

GERHARD BOTHA & PARTNERS INC. Erasmus Forum Building "8" Cnr. Rigel Avenue & Stokkiesdraal Erasmusrand 0181

AND TO

NORTON ROSE FULBRIGHT

Attorneys for 16th Respondent 34 Fredman Drive, Sandton

Email:

aslam.moosaice@nortonrosefulbright.com

Ref: Mr Moosajee/FNB 13954 c/o MONTLE JOOMA SABDIA INC

Ground Floor, Duncan Manor

Cnr Jan Shoba and Brooks Streets Brooklyn

Tel: 012 362 3137

Acknowledge receipt this day of December 2016M Mothle Joonie Sahdia

Signed

1 2 DEC 2016

Pretoria Branch Tel: 012 362 3137 · Fax: 012 362 4139 Received without Prejudice

### AND TO: BOWMANS

Attorneys for the 17<sup>th</sup> Respondent 165 West street Sandton

Tel: 011 669 9000 Fax: 011 669 9001

Email: cle

clement.mkiva@bowmanslaw.com/ alan.keep@bowmanslaw.com

Ref: C Mkiva/ 6164672
c/o BOSHOFF ATORNEYS
Ground Floor, Hazelwood Gate Office Park
14 Oaktree Avenue
Hazelwood
Pretoria
Tel: 012 424 7500

Fax: 086 228 6805 Ref. Natasha Nortje

# AND TO WERKSMANS

Attorneys for the 19<sup>th</sup> and 20<sup>th</sup> Respondents 155- 5th. Street Sandton

Tel: +27 11 535 8000 IF: +27 11 535 8600

Ref. Mr C Manaka / Mr C Moraitis Email: <a href="mailto:cmanaka@werksmans.com">cmanaka@werksmans.com</a> <a href="mailto:cmanaka@werksmans.com">cmanaka@werksmans.com</a>

Ref: SOUT 3267.63

### c/o MABUELA INCORPORATED

Charter House, 179 Bosman Street

Pretoria Central Tel: 012 325 3966

Email: mabuela@tiscali.co.za

# AND TO MACROBERT ATTORNEYS

Attorneys for the 21<sup>st</sup> Respondent MacRobert Building Cnr Jan Shaba & Justice Mahomed Street Tel: 012 425 3436

Email: ghay@macrobert.co.za

Ref: G K Hay

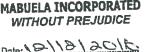
## BOSHOFF INSURFORATED Received without prejudice

2018 -12- 12

11 8

Acknowledge receipt this \_\_\_ day of December 2016

Signed



Time: 12 1130 pc

Acknowledge receipt this \_\_\_\_ day of December 2016

Signed

Acknowledge receipt this \_\_\_ day of December 2016

Signed MacRobert Attorneys

2016 -12- 12

11:3

Without prejudice of clients rights Sonder benedeling van kliente se regte

Sign / Gateken .....

# IN THE HIGH COURT OF SOUTH AFRICA (GAUTENG DIVISION, PRETORIA)

CASE NO: 80978/16

In the matter between:

MINISTER OF FINANCE

Applicant

and

OAKBAY INVESTMENTS (PTY) LTD

OAKBAY RESOURCES AND ENERGY LTD

SHIVA URANIUM (PTY) LTD

TEGETA EXPLORATION AND RESOURCES

(PTY) LTD

JIC MINING SERVICES (PTY) LTD

**BLACKEDGE EXPLORATION (PTY) LTD** 

TNA MEDIA (PTY) LTD

THE NEW AGE

AFRICA NEWS NETWORK (PTY) LTD

VR LASER SERVICES (PTY) LTD

ISLANDSITE INVESTMENTS ONE HUNDRED AND EIGHTY (PTY) LTD

CONFIDENT CONCEPT (PTY) LTD

JET AIRWAYS (INDIA) LTD (INCORPORATED IN INDIA)

SAHARA COMPUTERS (PTY) LTD

First Respondent

Second Respondent

Third Respondent

Fourth Respondent

Fifth Respondent

Sixth Respondent

Seventh Respondent

Eight Respondent

Ninth Respondent

Tenth Respondent

Eleventh Respondent

Twelfth Respondent

Thirteenth Respondent

Fourteenth Respondent



**ABSA BANK LTD** 

Fifteenth Respondent

FIRST NATIONAL BANK LTD

Sixteenth Respondent

STANDARD BANK OF SOUTH AFRICA

Seventeenth Respondent

LIMITED

**NEDBANK LTD** 

Eighteenth Respondent

GOVERNOR OF THE SOUTH AFRICAN RESERVE BANK

Nineteenth Respondent

REGISTRAR OF BANKS Respondent

Twentieth

DIRECTOR OF THE FINANCIAL INTELLIGENCE CENTRE

Twenty-First Respondent

ANSWERING AFFIDAVIT OF THE EIGHTEENTH RESPONDENT (NEDBANK)

I, the undersigned,

## MICHAEL WILLIAM THOMAS BROWN

do hereby make oath and state -

I am an adult male and the Chief Executive Officer of Nedbank Limited ("Nedbank"). Nedbank is the Eighteenth Respondent in the above application. Nedbank is a commercial bank, registered as such under the auspices of the Banks Act, 1990 and operating under the supervision of the South African Reserve Bank.

- The facts herein contained are within my personal knowledge save where otherwise stated or where the contrary appears from the context, and are both true and correct.
- By virtue of the position I hold, I am authorised by Nedbank to depose to this affidavit.

### THE PURPOSE OF THIS AFFIDAVIT

- On 24 October 2016, Nedbank electronically served a notice of appointment as attorneys of record on those parties already represented by attorneys ("the Notice"). A copy of the Notice is attached as "MB1". In the Notice, Nedbank:
  - 4.1 noted its support for the relief sought by the Minister of Finance ("the Minister") in this application; and
  - 4.2 confirmed that it may file an affidavit within the timeframes prescribed for the filing of answering affidavits.
- 5 This is the affidavit foreshadowed in the Notice.
- The present application emanates from the individual decisions of various banks to terminate their relationships with entities associated with the Gupta family. Copies of media reports where the First Respondent has publicly confirmed the termination of its relationships with the banks, including a related announcement published by the Second Respondent, are collectively attached as "MB 2". The closure of these bank accounts has garnered significant media attention as well as the attention of Government so much so that Cabinet convened an inter-ministerial committee to review the issue ("the IMC").

- There are two intersecting narratives that are relevant to this application. The first narrative has to do with the individual decisions of various banks to close the accounts of companies associated with the Gupta family. The second narrative has to do with Cabinet's decision to convene the IMC. The two narratives intersect because the establishment of the IMC was prompted by the individual banks' decisions to close the accounts of companies associated with the Gupta family.
- 8 My affidavit describes both narratives from the perspective of Nedbank.
- Annexure "L" to the founding affidavit is a letter from the First Respondent to the Minister dated 25 July 2016. The letter attaches "the notice letter from all four banks". Although the attachments do not form part of Annexure "L", I assume that the notice letter(s) from Nedbank must have been attached to Annexure "L".
- 10 : attach as "MB 3" a copy of the termination letter that was addressed by Nedbank to the First Respondent on 7 April 2016 ("the Nedbank termination letter"). Similar termination letters were addressed by Nedbank to the First, Eleventh, Twelfth and Fourteenth Respondents and the Tenth Respondent ("the Affected Respondents") on 7 April 2016 and 4 May 2018 respectively.
- 11 The Nedbank termination letter states as follows:

"Dear Sirs

- We refer to the abovementioned account held with Nedbank Ltd.
- 2. Nedbank is of the view that any continued relationship with Oakbay Investments (Pty) Ltd may create material business risks and could

- pose significant reputational risk to Nedbank and as such we are unfortunately not prepared to continue our banking relationship.
- 3. We hereby terminate the banking relationship, as we are entitled to do, and provide you with 30 (thirty) days' notice to find alternative bankers. As Nedbank is not your primary banker we believe that the notice period is reasonable and provides you with adequate time to find alternative banking facilities."
- I have annexed the Nedbank termination letter to my affidavit because it was made available by the First Respondent to the Minister. I am advised that the First Respondent has thereby waived any confidentiality that may have attached to the Nedbank termination letter.
- The reason for Nedbank's decision to close the bank accounts of the Affected Respondents is set out in paragraph 2 of the Nedbank termination letter.
- The Affected Respondents appear to dispute this. Annexure "A" to the founding affidavit is a letter in which the CEO of the First Respondent states that "we have received no justification whatsoever to explain why ABSA, FNB, Sasfin, Standard Bank and now Nedbank have decided to close our business accounts". In addition, Annexure "L" to the founding affidavit is a letter in which the CEO of the First Respondent states to the Minister that "[h]opefully, we can jointly find a way to understand the <u>real reasons</u> for the banks decision to unilaterally close our accounts" (my underlining).

A.

- These statements are difficult to understand because paragraph 2 of the Nedbank termination letter provides the "real reason" for Nedbank's decision to close the bank accounts of the Affected Respondents.
- On 18 November 2016, Nedbank's attorney of record addressed to the Affected Respondents' attorney the letter annexed as "MB 4", in which the Affected Respondents were requested to consent to the waiver of confidentiality in so far as it pertains to the termination of their banking relationships with Nedbank. The Affected Respondents declined to do so in a letter dated 24 November 2016. The response and the further reply from Nedbank's attorneys are annexed as "MB 5.1" and "5.2" respectively.
- 17 I make the following observations regarding the position adopted by the Affected Respondents:
  - 17.1 The Affected Respondents have placed it in the public domain that their bank accounts were terminated by Nedbank.
  - 17.2 The First Respondent walved confidentiality over the Nedbank termination letter when it made the letter available to the Minister.
  - 17.3 The reasons for Nedbank's decision to close the Affected Respondents' bank accounts are set out in paragraph 2 of the Nedbank termination letter. The Affected Respondents are therefore wrong when they assert that they have received "no justification whatsoever to explain why" Nedbank closed their bank accounts (annexure A to the founding affidavit). The First, Eleventh, Twelfth and Fourteenth Respondents have been aware of these reasons



since 7 April 2016, and in the case of the Tenth Respondent, since 4 May 2016.

- 17.4 The Affected Respondents accept that Nedbank acted lawfully when it terminated their bank accounts. This is apparent from annexure E to the founding affidavit, where the Affected Respondents state that they are of the "strong view" that any legal challenge to the banks' decision to close their accounts would be "still-born" and would "fail in a court of law".
- 17.5 Although they accept that Nedbank and the other banks acted lawfully when they terminated the bank accounts, the Affected Respondents have nevertheless requested the Minister to intervene. This is apparent from Annexure E to the founding affidavit, where the Affected Respondents "appeal to [the Minister] for assistance" in relation to the closure of their bank accounts.
- 17.6 The Minister is of the view that he has no power in law "to interfere with the relations between registered banks and their clients" (annexure M to the founding affidavit).
- 17.7 i am advised that the Minister's view is correct in law.
- 17.8 The Affected Respondents have refused to accept the correctness of the Minister's view and have persisted in their requests that the Minister must interfere in the relationship between the banks and the Affected Respondents. Those requests are unjustified and unlawful. Nedbank files this affidavit in support of the Minister's position that he



has no power in law (or otherwise) to accede to the requests of the Affected Respondents.

- In this affidavit I explain why Nedbank supports the relief sought by the Minister.I adopt the following structure below:
  - 18.1 I deal first with the events that are relevant to Nedbank's termination of its relationships with the Affected Respondents and the establishment of the IMC.
  - I then explain the regulatory framework under which Nedbank operates. I do so because it provides necessary context to understanding the risks and business objectives that underpin the operations of banks in the local and international market. This also highlights that banks are legally entitled to close client accounts.
  - 18.3 conclude with some brief remarks regarding the importance of the relief sought by the Minister.
- Since Nedbank supports the relief claimed by the Minister, it is unnecessary for me to respond on a paragraph-by-paragraph basis to the allegations and submissions contained in the Minister's founding papers. I merely note that in paragraph 25 of his founding affidavit, the Minister states that it is open to the banks to disclose certain reports filed under section 29 of the Financial Intelligence Centre Act 38 of 2001. It is unnecessary for me to address this issue because it has been overtaken by events. On 25 November 2016, the Affected Respondents (together with some of the other cited respondents) launched an application against the Director of the Financial Intelligence Centre

out of this honourable court under case number 92027/16, in which they seek disclosure of the reports referred to in Annexure "P2" to the Minister's application.

# THE TERMINATION OF NEDBANK'S BANKING RELATIONSHIPS WITH THE AFFECTED RESPONDENTS AND THE ESTABLISHMENT OF THE IMC

- Prior to May /June 2016, Nedbank had a banking relationship with the Affected Respondents. To the best of my knowledge, all of the Affected Respondents were multi-banked and Nedbank was in no instance their primary and/or sole banker. For the duration of the relationships with the entities comprising the First, Eleventh, Twelfth and Fourteenth Respondents, Mr RavIndra Nath was their representative and the point of contact between these entities and Nedbank.
- In mid-February 2016, Nedbank started conducting a review of its relationships with the Gupta family and associated entities including the Affected Respondents. This review continued during March to early April 2016. It was during this time, on 16 March 2016, that the Deputy Finance Minister, Mcebisi Jonas, released a press statement to the effect that he had been offered the position of Minister of Finance by Mr Ajay Gupta. (A copy of the press release is attached as "MB 6".)
- On 4 April 2016, it was reported in the media that KPMG and Sasfin had severed ties with Oakbay Resources and Energy Ltd (the Second Respondent) reportedly "due to a scandal" over the relationship between the Gupta family and President Jacob Zuma. Two days later it was announced in the media that First National Bank Ltd (the Sixteenth Respondent) had closed the accounts.

held by the First Respondent with It. Copies of the media reports referred to in this paragraph are attached as "MB 7" and "MB 8" respectively.

- On 6 April 2016, Nedbank decided to terminate its contractual relationship with the Affected Respondents (amongst others). The reasons for this decision are recorded in paragraph 2 of the Nedbank termination letter to which I have already referred.
- On 7 April 2016 a meeting was held between Nedbank (represented by Kandis Swanepoel, Marie Strydom and Brent van Wyk) and Mr Nath (representing the Affected Respondents, save for the Tenth Respondent). During this meeting, Nedbank's representatives conveyed to Mr Nath the bank's Intention to terminate the relationships and presented him with termination letters, including the Nedbank termination letter (attached as "MB3") and the letters to the Eleventh, Twelfth and Fourteenth Respondents (amongst others), confirming the reasons for the decision to terminate.

### 25 In response, Mr Nath:

- 25.1 refused to accept delivery of the termination letters, asking that they be delivered to the entities concerned; and
- 25.2 asked that Nedbank make no media statement in relation to the termination of the relationships, asserting client confidentiality, and threatened civil action against Nedbank should it make the termination public. Without acknowledgement of any obligation to do so, Nedbank has, to date, honoured this request.

G.

- 26 Identical termination letters were addressed to each of the Affected Respondents via registered post. The affected banking accounts were duly terminated within the Indicated timeframe. Notice to the Tenth Respondent was given on 4 May 2016.
- On 13 April 2016 Government announced the establishment of the IMC to investigate the closure of the "Oakbay accounts". The IMC would apparently be made up of the Applicant, the Minister of Mineral Resources (Mosebenzi Zwane) and the Minister of Labour (Mildred Oliphant).
- I have no personal knowledge as to whether the IMC was properly constituted by Government. The Minister has made available in terms of Rule 35(12) a letter that he addressed to Minister Zwane on 22 April 2016, in which he states that "no Inter-Ministerial Committee was established" at the Cabinet meeting held on 13 April 2006. (A copy of the letter is annexed as "IMB 9".) Where I refer below to the IMC, this should not be taken to suggest that the IMC was properly constituted. I reiterate that this is a matter in respect of which I have no knowledge.
- In a letter dated 14 April 2016, the day after the apparent establishment of the IMC, Mr Nazeem Howa (the then Chief Executive Officer of the First Respondent) wrote to Nedbank, requesting an urgent meeting regarding "the decision to terminate banking services to various companies within our group."

  A copy of Mr Howa's correspondence, received by email on 19 April 2016, is attached marked "MB 10".

Ran V.

The parties met on 3 May 2016. Nedbank was represented by Mr Ciko Thomas, Mr Sandile Shabalala and Ms Marie Strydom. The First Respondent was represented by Mr Howa, Mr Trevor Scott, Mr Terry Renson, Ms Ronica Ragavan and Mr Mark Pamensky. I was not present at the meeting, but I am advised that the reasons for Nedbank's termination of the Affected Respondents' bank accounts were discussed and reaffirmed. (Confirmatory affidavits from Mr Thomas and Ms Strydom will be delivered together with this affidavit.) I do not deal further with what was discussed at the meeting for the reasons I have explained in paragraph 16 above.

31

On 4 May 2016 Nedbank was contacted by the secretary of the IMC, Ms Zarina Kellerman, requesting my attendance at a meeting with the IMC. The meeting was scheduled for 6 May 2016. I attended on behalf of Nedbank along with Ms Anna Isaac, Chief Legal Counsel for Nedbank and Mr Thomas. Attending on behalf of the IMC was Minister Zwane, Ms Kellerman and various other attendees who at the time were unknown to me. Minister Oliphant and Minister Gordhan were not present. In response to our specific enquiry, we were assured that the IMC was quorate and that Ministers Oliphant and Gordhan were aware of the meeting and that they had mandated Minister Zwane to proceed in their absence. On 6 May 2016, after the meeting and on my instructions, my executive personal assistant, sent an email to Ms Kellerman, requesting confirmation of the full names and titles of the persons in attendance on behalf of government. A copy of the request, together with the response received on 9 May 2016 is attached as "MB 11". To the extent that the list records Minister Oliphant as having been in attendance at the meeting, this is incorrect.

12

- Minister Zwane asserted that the IMC meeting was confidential in nature. I am advised that there is no basis in law for Minister Zwane's statement that the meeting was to be confidential. In any event, I was under the impression that the proceedings were being recorded for transcription purposes.
- 33 In broad terms, what transpired at the meeting was as follows:
  - 33.1 At the outset of the meeting, Minister Zwane assured me that the purpose of the meeting (and the IMC) was not to represent any particular family or company, but rather to resolve the apparent issues of investor confidence and reported potential job losses that had emerged, which ostensibly numbered in the thousands.
  - 33.2 I confirmed that, due to client confidentiality, I was not at liberty to discuss any client specific matters and, further, that any news reports regarding the termination of banking relationships did not emanate from Nedbank who had maintained strict client confidentiality.
  - 33.3 I then detailed the generic underlying principles which may be considered by a bank when deciding to terminate its relationship with any client, and the overriding principles surrounding the regulatory environment within which South African banks operate. (I shall say more about these principles below.)
  - During the meeting, and notwithstanding the Minister's assurances regarding the mandate of the IMC, several questions were posed in relation to the specific circumstances surrounding Nedbank's termination of its relationships with persons and entitles related to the Gupta family (which at the time included the Affected Respondents)

and questioning the seemingly "unanimous" decision by South African banks to close accounts. Minister Zwane, while acknowledging that Nedbank was not the primary transactional bank for the various entities, suggested that Nedbank consider stepping in "to save jobs, considering the relevant family [had] resigned from these companies". I reiterated that Nedbank was not in a position to discuss client-specific matters. I also confirmed that Nedbank had decided to terminate the relevant relationships independently, without reference to (or consultation with) any other bank(s).

- 33.5 The overall impression I came away with was that the purpose of the meeting was to determine whether there was a co-ordinated decision amongst the major South African banks to terminate the accounts of persons affiliated with the Gupta family, and whether Nedbank would consider engaging with the relevant entities as their primary banker.
- 33.6 At the conclusion of the meeting, Minister Zwane commented on some banks which had apparently declined to appear before the IMC, noting his surprise that they had refused to attend "a meeting with government" as they receive their licences from government.
- On 1 September 2016 Minister Zwane released a press statement (annexure "MB 12") stating that:
  - 34.1 the IMC had held various meetings with various banks, financial institutions, insurance companies and representatives from the First Respondent;

14 P

- 34.2 Minister Gordhan was part of the IMC but did not attend its meetings;
- 34.3 a report "of recommendations" had been tabled at Cabinet;
- 34.4 after discussion of the report, Cabinet had resolved to:
  - 34.4.1 recommend that the President consider establishing a Judicial Enquiry under 64(2)(f) of the Constitution; and
  - 34.4.2 "consider the current mandates of the Banking Tribunal and Ombudsman, as evidence presented to the IMC indicated that all of the actions taken by the banks and financial institutions were as a result of innuendo and potentially reckless media statements..."
- On the very next day, the Presidency distanced itself from the statement released by Minister Zwane and stated that no decision had been taken on the IMC's findings. Copies of media reports which followed the release of Minister Zwane's statement and the steps taken by the Presidency are attached as "MB 13".

## NEDBANK SUPPORTS THE MINISTER'S APPLICATION

As Indicated above, I have no knowledge regarding whether the IMC was properly established. If the IMC was properly established, then Cabinet will presumably in due course consider whatever recommendations have been made or will be made by the IMC. I respectfully submit that the relief sought by the Minister in this application will be material in guiding the Cabinet on its further deliberations.

£15 V.

The case law which underpins the contractual nature of the relationship between a banker and its client is included in the opinions attached to the Minister's founding affidavit. These do not warrant repetition in this affidavit but will be addressed in argument, if necessary. It suffices to say that, for the reasons advanced in those opinions, Nedbank agrees that the Minister is not empowered or obliged in law to intervene in the relationship between the Affected Respondents and Nedbank as regards the closing of the Affected Respondents' bank accounts. I respectfully submit that the declaratory relief sought by the Minister is necessary to preserve the Integrity of South Africa's financial system. I elaborate below upon the reasons for this submission.

In the Minister's letter of 24 May 2016 addressed to the First Respondent (attached to the Minister's founding affidavit as "B"), he states that South African banks operate in a highly-regulated environment. The Minister makes the same point in the letter that he addressed to Minister Zwane on 22 April 2016, in which he refers to "the intensive legislative framework that we have governing the financial sector". (A copy of this letter is already annexed as "MB 9".)

As the Chief Executive Officer of Nedbank, I confirm that South African banks operate in a highly-regulated environment. The information document attached to the Minister's letter (annexure B to the founding affidavit) outlines the regulatory framework governing the banking sector and financial sector, and serves to buttress his statement. This is only a small part of the myriad of regulations and laws within which Nedbank and other registered banks in South Africa operate.

16

I do not propose to detail the full extent of financial regulation that Nedbank is subject to, either locally or globally. I merely set out below a summary of the rationale for local and international anti-money laundering legislation and counter-financing of terrorism legislation, as well as relevant anti-bribery and corruption legislation. I note that, in the letter which is attached to the Minister's founding affidavit as "L", the First Respondent acknowledges the relevance of this legislation when he says the following: "Let me clearly state our support for any and all legislation which advances the clampdown on corruption and money-laundering." The remaining parts of this affidavit sketch the regulatory framework that is referred to in Annexure "L" and that is accepted by the First Respondent as being relevant to this application.

### ANTI-MONEY LAUNDERING LEGISLATION

- South Africa's principal anti-money laundering legislation is the Financial Intelligence Centre Act 38 of 2001 ("FICA"). FICA has its roots in, and is modelled on, international best practice in global anti-money laundering efforts.
- Generally speaking, global anti-money laundering instruments criminalise the laundering of the proceeds of criminal activity. Typically anti-money laundering legislation also establishes an infrastructure for the detection and investigation of suspicious transactions. International best practice dictates that this infrastructure also creates a framework for certain institutions, including banks, to identify their clients and to verify their identity and other particulars and to

<sup>1</sup> Much of what follows on anti-money laundering is attributable to De Koker, South African Money Laundering and Terror, Financing Law, Lexis Nexis, 2015.

monitor their activities. This identification procedure is commonly known as "Know Your Client/Customer" (or "KYC").

- The anti-money laundering infrastructure requires banks, if they know or suspect that a banking client has engaged in a suspicious transaction, to report that knowledge or suspicion to a designated authority for further investigation ("Suspicious Transaction Reports"). This reporting obligation creates a symbiotic relationship between the banks and the State: it is the State that bears the obligation to prosecute crime, but banks cannot afford to be associated with money-laundering and other criminal activity, for the reasons I set out further below.
- South Africa is a signatory to various United Nations ("UN") Conventions, which provide the basis for the international expansion of the anti-money laundering framework. These Conventions impose obligations on signatories to criminalise money laundering and require their financial institutions to verify the particulars of their clients and to file suspicious transactions reports. (Some of these UN Conventions also established certain obligations relevant to corruption, discussed further below.)
- 45 The UN Conventions include:
  - 45.1 the 1988 UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances,
  - 45.2 the 1999 UN International Convention for the Suppression of the Financing of Terrorism,
  - 45.3 the 2000 UN Convention Against Transnational Organised Crime and

- 45.4 the 2003 UN Convention Against Corruption.
- In addition to these UN Conventions, an inter-governmental body known as the Financial Action Task Force ("FATF") was established in 1989 by the Ministers of the FATF's member Institutions. The objectives of the FATF are to set standards and promote effective implementation of legal, regulatory and operational measures for combating money laundering, terrorist financing and other related threats to the integrity of the international financial system. The FATF is therefore a "policy-making body" that works to generate the necessary political will to bring about national legislative and regulatory reforms in these areas.
- The Republic of South Africa is one of the 35 FATF members, representing the overwhelming majority of financial centres in the world. All of the members of the BRICS alliance (Brazil, the Russian Federation, India, China and South Africa) are members of the FATF, as are the United Kingdom ("UK") and the United States ("US").
- 48 In essence, FATF:
  - 48.1 monitors the progress that members make in implementing measures to combat *inter alia* money laundering;
  - 48.2 reviews techniques to launder money; and
  - 48.3 globally promotes the adoption and implementation of measures to combat money laundering.

- South Africa is also a member of the Eastern and Southern Africa AML Group ("ESAAMLG"), which was established to serve as a regional FATF-styled body for Eastern and Southern African countries. The purpose of ESAAMLG is to combat *inter alia* money laundering. It co-operates with other international organisations concerned with combatting money laundering and studies emerging regional typologies and coordinates technical assistance where necessary. A notable feature of ESAAMLG is that its members take into account regional factors in the implementation of AML measures.
- In its monitoring role, the FATF observes the progress of member states in meeting its standards through self-assessment and mutual evaluation with FATF's recommendations. In addition, the FATF, the World Bank and the International Money Fund ("IMF") have established a common methodology for assessing compliance with the FATF's anti-money laundering standards.
- In 2003 and 2008, South Africa's money-laundering control system was evaluated positively by the FATF (the 2008 evaluation was performed in conjunction with ESAAMLG). However, the FATF's ratings indicated that more work was required to move South Africa towards meeting FATF's standards. In particular, South Africa was encouraged to do more to come up to standard on seven of the FATF's recommendations where it was rated as non-compliant. I note in particular that South Africa was rated as non-compliant in respect of the FATF's recommendations on politically exposed persons.
- As recently as March 2015, the IMF published an assessment of South Africa's anti-money laundering program. I am advised that overall the findings were encouraging. The report found that South Africa had made significant progress.

in improving its anti-money laundering legal and institutional framework since the FATF's 2008 assessment.

- The IMF's 2015 assessment focused on the Banking Supervision Department ("BSD") of the South African Reserve Bank. The IMF recommended that the BSD should consider formally adopting a risk-based approach to anti-money laundering supervision.<sup>2</sup> The IMF's recommendation finds application in the FICA Amendment Bill ("FICA Bill"), which has been passed by Parliament but has not yet received the assent of the President.
- 54 Two of the objectives of the FICA Bill are:
  - 54.1 to establish a stronger anti-money laundering and counter-financing of terrorism regulatory framework, by enhancing current know-your-client requirements; and
  - 54.2 to provide for the adoption of a risk-based approach in the identification and assessment of anti-money laundering and counter-financing of terrorism risks.<sup>3</sup>
- As identified by the Minister in the Aide Memoire attached to his letter of 24 May 2016 to Mr. Howa (Annexure "D" to the founding affidavit), a failure to adhere to global best practice on anti-money laundering legislation (as recommended by FATF) would inevitably lead to Nedbank being excluded from the global financial payments system. Nedbank's core business and service offering to its clients relies on its continued inclusion and access to the global financial



<sup>&</sup>lt;sup>1</sup> IMF Anti-money laundering and combeting the financing of terrorism (AML/CFT) – Technical note (Financial Sector Assessment South Africa) IMF Country Report 15/51 (2015).

<sup>3</sup> Draft National Treasury Memorandum on the objects of Financial Intelligence Centre Amendment Bill. 2015.

system, including its ability to facilitate international money transfers for global trade and commerce, foreign direct investment, credit card transactions and insurance.

From Nedbank's perspective, it is critical that South Africa remains part of the global financial system. Nedbank recognises the crucial role that compliance with anti-money laundering legislation plays in South Africa's continued membership of the global financial system.

# ANTI-BRIBERY AND CORRUPTION LEGISLATION

57 Corruption has been identified as one of the most important problems facing the world today.<sup>4</sup> To this end, South Africa ratified the 2004 UN Convention Against Corruption, which was the first legally binding international anticorruption and bribery standard. The Convention requires member states to implement several anti-corruption and bribery measures. The foreword to the UN Convention Against Corruption recognises that:

"Corruption is an insidious plague that has a wide range of corrosive effects on societies. It undermines democracy and the rule of law, leads to violations of human rights, distorts markets, erodes the quality of life and allows organized crime, terrorism and other threats to human security to flourish."

Jr

<sup>4 2013</sup> World Independent Network/Gallup International Annual Survey (covering 65 countries). BBC 2010, and Pew Research Centre 2014 (which covered between 26 and 34 countries, respectively). The World Economic Forum's 2016 Global Risks Report ranks "Fallure of national government (e.g., fallure of rule of law, compution, political deadlock, etc.)" as the sight-highest closer.

- The UN Convention Against Corruption introduced a comprehensive set of antibribery and corruption standards, measures and rules that member states can apply in order to strengthen their legal and regulatory regimes to fight corruption. It also calls for preventive measures and the criminalization of the most prevalent forms of corruption in both public and private sectors.
- On 11 May 2016, the IMF published a discussion paper entitled "Corruption:

  Costs and Mitigating Strategies". The paper recognises that addressing corruption has become increasingly urgent in an environment where growth and employment prospects in many countries remain subdued and a number of high-profile corruption cases have fuelled moral outrage. The paper further recognises that corruption can undermine the State's ability to deliver inclusive economic growth in a number of different areas.
- There is a direct link between anti-money laundering measures and anti-bribery and corruption measures in many respects, particularly for banks. This is because banks may be used by their clients to further acts of corruption or to launder the proceeds of bribery. The Wolfsberg Group's Anti-Corruption Guidance<sup>5</sup> provides the following examples:
  - 60.1 a client directing or collecting funds for the purpose of paying a bribe;
  - a recipient of a bribe placing proceeds of the illicit bribe payment into the financial system:

J.

<sup>5</sup> Available at http://www.wolfsbergprinciples.com/pdf/standards/Wolfsberg%20Anti%20Comption%20Guldance%20Paper%20August%2018-2011%20(Published).pdf The Wolfsberg Group is an association of thirteen global banks which sins to develop frameworks and guidance for the management of financial crime risks, particularly with respect to Know Your Customer, Anti-Money Laundering and Counter Terrorist Financing policies.

- 60.3 the deposit of misappropriated State assets; and
- 80.4 the clearing of transactions in any of the above cases.6
- In many instances, it will not be immediately apparent to a bank from a client's 61 account activity that misuse has occurred or is occurring. It is accordingly difficult for banks to distinguish between accounts and transactions associated with bribery and corruption, on the one hand, and legitimate business, on the other. Global research in this respect demonstrates that transactions involving the proceeds of corruption often follow money-laundering patterns. Accordingly, adherence to anti-money laundering policies and procedures are important in the fight against corruption.7
- The local expression of South Africa's efforts to address bribery and corruption 62 is found in the Prevention and Combatting of Corrupt Activities Act, No. 12 of 2004 ("PRECCA"). PRECCA is the central anti-corruption law in South Africa. In general terms, PRECCA criminalises corruption, establishes procedures for reporting and investigating acts of corruption and establishes a register of persons convicted of corruption.
- In terms of section 34 of PRECCA, a failure by a person in a position of authority 63 to report knowledge or suspicion of corrupt activity (including the commission of the offence of corruption, theft, fraud, extortion, or forgery in excess of ZAR100 000) is a criminal offence and carries the possibility of a fine.8 There is a relationship between the reporting obligations contained in FICA and PRECCA, which overlap in certain instances. Accordingly, in certain instances,

<sup>&</sup>lt;sup>6</sup> Paragraph 4 of the Wolfsberg Group's Anti-Corruption Guidance.

<sup>7</sup> Paragraph 4 of the Wolfsberg Group's Anti-Corruption Guidance.

when Nedbank files a Suspicious Transaction Report in terms of section 29 of FICA, it will also be required to file a section 34 PRECCA report.

- The potential risks faced by banks in the above regulatory framework are well-known, both locally and internationally and as such the closure of client accounts is not an unusual practice. This is illustrated in the attached extract from the 2016 annual report of JP Morgan Chase & Co, marked as "MB 14". In the extract, the Chairman notes the following:
  - 64.1 it had stopped doing business with 18000 clients in 2015, pursuant to a new anti-money laundering system being put in place;
  - 64.2 the costs of KYC diligence on a client increased dramatically, making many relationships immediately unprofitable;
  - 64.3 the main reason for exiting relationships was because of the "extraordinary legal risk" if a bank were to make a mistake; and
  - 64.4 the costs of a mistake include both monetary and reputational risks.

I note that there has been a marked trend in recent years towards a more aggressive approach by overseas enforcement authorities to anti-bribery and corruption, particularly those in the US and UK. Both of these countries have enacted tough and far-reaching anti-bribery and corruption legislation, notably the Foreign Corrupt Practices Act, 1977 and the UK Bribery Act, 2010. This legislation is being aggressively enforced by both the US and the UK authorities on a domestic and extra-territorial basis. As a result, foreign law enforcement bodies are increasingly working together to enforce local and international anti-bribery and corruption laws against both corporations and individuals.

1

- Nedbank and other South African banks are exposed to the extra-territorial application of this foreign anti-bribery and corruption legislation, and to potentially significant fines from US and UK authorities if they inadvertently facilitate any transactions in contravention of these UK and US statutes.
- Contraventions of international legislation hold high risks for banks. By way of example, I refer to the following fines imposed by foreign regulators (highlighted in the most recent consumer information note published by the South African Ombudsman for banking services on 24 October 2016, attached marked "MB 15"):
  - in December 2012 HSBC Bank was fined USD 1,9 billion following a
     US Senate Sub-committee investigation; and
  - 67.2 in March 2012, a record fine of £ 8,75 million was imposed on Coutts

    Bank by the Financial Services Authority.
- I also refer to the recent settlement concluded between Standard Bank of South Africa Ltd (the Seventeenth Respondent) and the UK Serious Fraud Office. The bank is reported to have been ordered to pay a financial penalty of USD16.8 million, for its role in failing to prevent bribery and corruption. A copy of the report is annexed as "MB 16".
- It is accordingly important for banks not only to comply with their statutory reporting obligations (as provided for in FICA and PRECCA) but to be able to terminate a banking relationship with clients on suspicion of involvement in bribery and/or corruption.

£26

#### THE IMPORTANCE OF THE RELIEF SOUGHT BY THE MINISTER

- Against the background set out above, I respectfully submit that the relief 70 sought by the Minister in this application is of the utmost importance to Nedbank and to the South African financial system as a whole. A bank might choose to terminate a banking relationship with its client for a variety of reasons, and neither the Minister nor any sphere of Government has the power in law to intervene when this occurs or to interrogate why a bank account was closed. If the position were otherwise, one of the implications would be that Government has the power to intervene even if a bank has terminated its relationship with a client in order to give effect to the anti-money laundering legislation and antibribery and corruption legislation summarised above. That would have severely prejudicial consequences for banks in particular, and for South Africa in general. For the reasons I have explained above, Government has no competence in law to interrogate why a bank has terminated its relationship with a client in general, or to enquire whether a bank has terminated its relationship with a client in order to give effect to anti-money laundering legislation and anti-bribery and corruption legislation in particular.
- 1 therefore endorse the statement in paragraph 19 of the founding affidavit that the continued assertion by the First Respondent that the Minister should intervene in the closure of the bank accounts of the Affected Respondents \*is harmful to the banking and financial sectors, to the regulatory scheme created by law, and the autonomy of both the governmental regulators and the registered banks themselves\*.

27

WHEREFORE Nedbank supports the relief sought by the Applicant In the Notice of Motion.

MICHAEL WILLIAM THOMAS BROWN

Signed and sworn before me on this the day of DECEMBER 2016 at Landler, by this the deponent who has acknowledged that she knows and understands the contents of this affidavit, that she has no objection to taking the prescribed oath and that she considers the prescribed oath to be binding on her conscience.

COMMISSIONER OF OATHS

NAME:

ADDRESS:

COMMISSIONER OF OA EX OFFICIO PRACTISING ATTORNEY 1 PROTEA PLACE, SANDI 10HANNESSI IDG

CAPACITY:

#### MB<sub>1</sub>

### IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: 80978/16

In the matter between:

MINISTER OF FINANCE

**Applicant** 

and

OAKBAY INVESTMENTS (PTY) LTD

First Respondent

OAKBAY RESOURCES AND ENERGY LTD

Second Respondent

SHIVA URANIUM (PTY) LTD

Third Respondent

TEGETA EXPLORATION AND RESOURCES

Fourth Respondent

(PTY) LTD

JIC MINING SERVICES (PTY) LTD

Fifth Respondent

BLACKEDGE EXPLORATION (PTY) LTD

Sixth Respondent

TNA MEDIA (PTY) LTD

Seventh Respondent

THE NEW AGE

Eight Respondent

AFRICA NEWS NETWORK (PTY) LTD

Ninth Respondent

VR LASER SERVICES (PTY) LTD

Tenth Respondent

ISLANDSITE INVESTMENTS ONE HUNDRED AND EIGHTY (PTY) LTD

Eleventh Respondent

CONFIDENT CONCEPT (PTY) LTD

Twelfth Respondent

JET A!RWAYS (INDIA) LTD (INCORPORATED IN INDIA)

Thirteenth Respondent

SAHARA COMPUTERS (PTY) LTD

Fourteenth Respondent

**ABSA BANK LTD** 

Fifteenth Respondent

FIRST NATIONAL BANK LTD

Sixteenth Respondent

STANDARD BANK OF SOUTH AFRICA

Seventeenth Respondent

LIMITED

NEDBANK LIMITED

Eighteenth Respondent

GOVERNOR OF THE SOUTH AFRICAN

Nineteenth Respondent

RESERVE BANK

REGISTRAR OF BANKS

Twentieth Respondent

DIRECTOR OF THE FINANCIAL INTELLIGENCE CENTRE

Twenty-First Respondent

#### NOTICE OF APPOINTMENT AS ATTORNEYS OF RECORD

TAKE NOTICE THAT the Eighteenth Respondent supports the relief sought by the applicant.

TAKE NOTICE FURTHER THAT the Eighteenth Respondent will accept electronic service of all documents in this application by email at -

Gerhard, Rudolph@bakermckenzie.com

Widaad, Ebrahim@bakermckenzle.com

Callum, OConnor@bakermckenzie.com

TAKE NOTICE FURTHER THAT the Eighteenth Respondent may file an affidavit within the timeframes prescribed for the filing of answering affidavits and reserves the right to seek further relief in this application, should the need arise.

19

Signed at Sandton on this this 24th day of OCTOBER 2016

BAKER & McKENZIE Attorneys for the Eighteenth Respondent Tel: (011) 911 4300

Email: Gerhard.Rudolph@bakermckenzie.com Wldaad.Ebrahim@bakermckenzie.com Callum.OConnor@bakermckenzie.com

Ref. G Rudolph/CO
c/o ADAMS & ADAMS
Adams & Adams Place
Lynnwood Bridge
4 Daventry Street
Lynnwood Manor
Pretoria
Tel: (012) 432 6000
Ref. Adele Jordaan

TO: THE REGISTRAR THE ABOVE HONOURABLE COURT PRETORIA

STATE ATTORNEY
Attorneys for the Applicant
SALU Bullding
255 Francis Baard Street
Pretoria
Tel: 012 309 1575
Fax: 012 309 1649
Email: TNhlanzi@justice.gov.za
(Ref. Ms T Nhlanzi)

AND TO: VAN DER MERWE & ASSOCIATES Attorneys for the 1st, 2nd, 3rd, 4th, 6th, 7th, 10th, 11th, 12th & 14th Respondents Waterkloof Ridge PRETORIA email: <a href="mailto:legal2@vdmass.co.za">legal2@vdmass.co.za</a>

AND TO:
JIC MINING SERVICES (PTY) LTD
Fifth Respondent
JIC House
16th Road
Midrand

AND TO: THE NEW AGE

Eighth Respondent 52 Lechwe Street Corporate Park South Old Pretoria Main Road Midrand 1685 Tel: 011 542 1222 Fax: 086 733 7000

#### AND TO:

AFRICA NEWS NETWORK (PTY) LTD Ninth Respondent Fourth Floor, Sandown Mews 88 Stella Street, Sandown Johannesburg Tel: 011 542 1222 Fax: 086 733 7000

AND TO:

JET AIRWAYS (INDIA) LIMITED (INCORPORATED IN INDIA) Thirteenth Respondent 5th Floor, Bedford Centre Office Tower Smith Road Bedford Gardens 2008 Johannesburg

AND TO:

EDWARD NATHAN SONNENBERGS Attorneys for the Fifteenth Respondent 150 West Street, Sandton dlambert@ensafrica.com

AND TO:

NORTON ROSE FULBRIGHT
FIRST NATIONAL BANK LTD
Attorneys for the Sixteenth Respondent
34 Fredman Drive, Sandton
aslam.moosajee@nortonrosefulbright.com

AND TO:

BOWMAN GILFILLAN INC
Attorneys for the Seventeenth Respondent
165 West Street, Sandton
clement.mkiva@bowmanslaw.com / alan.keep@bowmanslaw.com

AND TO: THE GOVERNOR OF THE SOUTH AFRICAN RESERVE BANK Nineteenth Respondent 370 Helen Joseph Street Pretoria

AND TO: THE REGISTRAR OF BANKS Twentieth Respondent 370 Helen Joseph Street Pretoria AND TO:
DIRECTOR OF THE FINANCIAL
INTELLIGENCE CENTRE
Twenty-First Respondent
Woodhill Centre
St Bernard Drive
1 Garsfontein
Pretoria

A

MB2(a)

# NewsDaily

# Your best source for breaking news

# FNB CLOSES GUPTAS BUSINESS ACCOUNTS

Veronicah Basson | April 8, 2016 | Business, News | No Comments

Oakbay Resources and Energy on Wednesday confirmed that First National Bank (FNB) had become the second bank to cancel its business accounts after Absa had cut ties with the firm earlier this week.

This was the latest in a series of backlashes by corporate South Africa against Oakbay Resources after allegations of "state capture" by the controversial Gupta family, and their alleged influence on the business of government through their close ties to President Jacob Zuma and his family.

Oakbay Resources director Nazeem Howa, in a statement on Wednesday, challenged their detractors, calling them "the purveyors of the numerous false allegations" and said they must provide evidence of wrongdoing against the company.

"We challenge the purveyors of the numerous false allegations made against us in recent months to provide any evidence of wrongdoing. It is time to put up, or shut up," Howa said in a statement.

Howa said they would approach Jacques Celliers, the Head of FNB, to demand answers for the closing of the Oakbay's accounts.

But he said Oakbay was already in the process of moving its accounts to "a more enlightened institution".

\*Oakbay has received no reason whatsoever justifying FNB's actions. We find the timing of FNB's decision staggering, given Oakbay's accounts are in excellent financial health and we have been a loyal and profitable customer for many years," Howa said

Howa said Oakbay had Invested more than R10 billion in South Africa and employed more than 4,500 people.

He also said the deal to acquire Optimum Coal Mine, which will supply Eskom with five percent of its coal, would double their staff compliment whose jobs would be jeopardised by these latest developments.

Howa further said the Gupta family detractors were talking about state capture when only one percent of the family's business comes from government.

Oakbay Resources is an investment vehicle in mining and exploration business owned by the Gupta family, whose vast business interests range from mining, print and broadcast media, and information technology.

KPMG on Friday resigned as Oakbay Resources auditors with immediate effect after 15 years, citing "risk of association", while banking partner Sasfin Capital gave the firm notice of their intention to terminate services effective from June 1, saying it was in fine with an internally driven strategic review.

Last month, Deputy Finance Minister Mcebisi Jonas dropped a bombshell by confirming reports that the Gupta family had approached him to take over as finance minister a few days before Zuma fired Nhlanhia Nene from the post in December.

But in response, Zuma told Parliament that the Gupta family had never appointed any Cabinet minister.

Howa, who earlier in the day spoke at a The New Age business breakfast on "State Capture", also said Oakbay did not believe that Mark Pamensky, sitting on the Oakbay and Eskom boards, constituted a conflict of Interest, nor that it was unusual.

"When there is a discussion about Oakbay at Eskom, I can swear from our side that [Pamensky] recuses himself immediately," Howa said.

Howa also defended the Gupta family relationship with President Zuma's son, Dudzane, who is a director in 11 companies owned by them.

FNB declined eNCA's request for an interview but said in a statement it can confirm that it has no banking account with Oakbay Investments (Pty) Ltd.

"We can further confirm that we have given notice to close various banking accounts of entities that may be associated with Oakbay Investments (Pty) Ltd," the statement said.

FNB said due to the confidential nature of its customer relationships, it is not in a position to provide any further details.

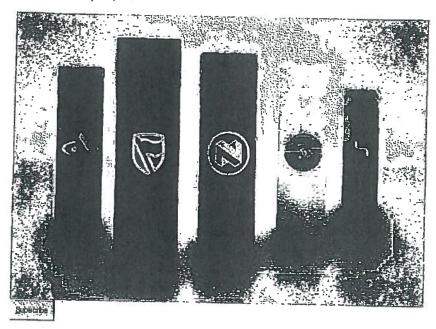
- Africa News Agency

SHARE ARTICLE:

MB2(b)

# Guptas dropped by all major South African banks

By Staff Writer April 8, 2016



In an update on the state of its relationships with South African banks, Gupta-owned Oakbay Resources says that all major banks in the country have dropped them — but they continue to get support from foreign banks in the country.

In a SENS update on the matter, the group clarified that reports of FNB dropping the company only apply to the holding company, Oakbay investments.

Meanwhile, Absa's decision to drop Oakbay Resources was made in December 2015, but only communicated in April 2016, the group said.

The group added that the last local bank supporting them — which remained unnamed in the update — had given notice on Thursday (7 April) that it, too, would be terminating its relationship with the company.

"As of yesterday, (Oakbay Resource's) remaining local banking service provider has given notice regarding the termination of their banking services on June 6, 2016," it said.

This brings the total list of finance groups turning against the company to five: FNB, Absa, KPMG, Sasfin and the unnamed SA finance group.

According to Oakbay, "despite the cessation of the provision of services by the major local banks, the Group continues to be serviced by a major Asian bank with a presence in South Africa."

The bank, however, made a specific request not to be named.

"The terminations will not impact the operations of the Group and the Company is confident that the remaining banking relationship is sufficient to fully service the operational requirements of the Group.".

On Friday, Oakbay Resources announced that its non-executive chairman, Atul Gupta, and its chief executive officer, Varun Gupta, had resigned with immediate effect, in the wake of what it called a political attack against the family.

Additionally, President Jacob Zuma's son – Duduzane Zuma – resigned as a Non-Executive Director of Shive Uranium, a major subsidiary of the company, and from all of his positions at Oakbay Investments, the company owned by the Gupta family.

2

2/2/2016

ORL - Oakbay Resources And Energy Limited - Update Regarding Banking Relationships - 08/04/2018

Oakbay Resources And Energy Limited - Update Regarding Banking Relationships

Release Date: 08/04/2016 16:38:00

Code(s): ORL

UPDATE REGARDING BANKING RELATIONSHIPS

Oakbay Resources and Energy Limited (Incorporated in the Republic of South Africa) Registration number: 2009/021537/06 Share code: ORL ISIN: ZAE000196085 ("Oakbay Resources" or "the Company")

UPDATE REGARDING BANKING RELATIONSHIPS

It has been reported in the media that First National Bank, a division of FirstRand Bank Limited ("FNB"), has recently terminated its service offering to the Company's holdingcompany, Oakbay Investments Proprietary Limited ("Oakbay Investments"). Oakbay Resources wishes to confirm that FNB has not provided banking services to the Companyand its subsidiaries ("the Group") since its listing on the exchange operated by JSE Limited in November 2014 and that this changein banker has occurred at holding company level.

Further to this, the Company confirms that Absa Bank Limited terminated its banking services to the Group in December 2015, whileas of yesterday, the Group's remaining local banking service provider has given notice regarding the termination of their banking services on June 6, 2016.

Despite the cessation of the provision of services by the major local banks, the Group continues to be serviced by a major Asian bank with a presence in South Africa, which bank has requested that the Company not communicate their name in this update. Consequently, the terminations will not impact the operations of the Group and the Company is confident that the remaining banking relationship is sufficient to fully service the operational requirements of the Group.

Johannesburg 8 April 2016

Sponsor Sasfin Capital (a division of Sasfin Bank Limited)

Date: 08/04/2016 04:38:00 Produced by the DSE SENS Department. The SENS service is an information dissemination service administered by the DSE Limited ('DSE'). The DSE does not, whether expressly, tacitly or implicitly, represent, warrant or in any way guarantee the truth, accuracy or completeness of the information published on SENS. The DSE, their officers, employees and agents accept no liability for (or in respect of) any direct, indirect, incidental or consequential loss or damage of any kind or nature, howsoever arising, from the use of SENS or the use of, or reliance on, information disseminated through SENS.

,



The Director(s)
Oakbay investments (Pty) Ltd
Private Bag X180
Halfway House
1685

BY HAND

07 April 2016

Dear Sir(s),

#### ACCOUNT NUMBER: 1469163981

- 1. We refer to the abovementioned account held with Nedbank Limited ('Nedbank').
- Nedbank is of the view that any continued relationship with Oakbay investments (Pty) Ltd may create material
  business risks that could pose significant reputational risk to Nedbank and as such we are unfortunately not
  prepared to continue our banking relationship.
- 3. We hereby terminate the banking relationship, as we are antitled to do, and provide you with 30 (thirty) days' notice to find alternative bankers. As Nedbank is not your primary banker we believe that the notice period is reasonable and provides you with adequate time to find elternative banking facilities.

Saritite Skahajaja

Yours faithfully,

Managing Executive Business Banking

Nedbank Ltd

Tel: +27(0)11 294 8166

Email: SandileS@nedbank.co.ze

Business Banking Head Offics Sandion 135 Alvada Rand Bandom Septies Geneng 2185 PD Box 76(1985 Sendien 2146 South Alica Tel 911 224 444 Fea 917 295 0009 Ways Assaulte 222

Charles V Haiseo (Charles ) Mart Resea (Charles Dal Adsorptio)\* Th Develope th Codes to Codes "W Hashing Publishment (If La Liberton 10' Liberton 10

linearment and fing the 1937/000000000 of diversed in receipt medicipal medicipal medicipal file (RECEP 16)

A MANUTUAL ON OLD MUTUAL ON

Page to 1st



18 November 2016

MB4

Baker & McKenzie

1 Commerce Square 36 Rivonia Road Sandhurst, Sandion Johannesburg South Africa

Tal: +27 11 911 4300 Facc +27 11 784 2865

Gest van der Merve Van Der Merwe & Associates

Our ref: Mr G Rudolph/CO/sc Your ref: Mr GT vd Marwers VO78

By email simone@vdmass.co.za

Dear Sira

OAKBAY INVESTMENTS (PTY) LTD AND OTHERS / MINISTER OF FINANCE **CASE NUMBER: 80978/16** 

the termination of various banking relationships is proffered, by your clients, as the reason for their advances to the Minister of Finance ("the Minister") for assistance, which precipitated his extant application;

Further to our letter to you on 3 November 2016, it appears common cause that:

our client's closure of certain of your clients' accounts (and the 1,2. termination of these banking relationships) is a live issue before the

We also note that on 25 July 2016 you provided the Minister with, inter alia, our client's letters of termination, addressed to certain Oakbay entities. That notwithstanding, our client remains mindful of its notional obligations of confidentiality towards those of your clients who held banking accounts with it, and of the principle that such confidentiality is capable of waiver only by them. Our client has thus far observed this principle astutely.

Accordingly, please advise if your clients consent to the walver of their confidentiality in so far as it pertains to the termination of the erstwhile relationship(s) between our respective clients, as conveyed in our 3 November 2016 letter, and for the purpose of these proceedings.

d Rudolph +27 (0) 11 911 4370

Gerhard. Rudolph@bakermckenzie.com

Threefors Adder ARRO, Archalter, John Rell, Dany Reposition, John Bolles, Vand Cletty, Not Dahbels, Sook De Valen, Wals of Person, Water Del San Lander, San Reposition, Control Palacet, Water Person, Water Del San Relation of Control Palacet, C

Baker & McKenzie la a member of Baker & McKenzie International, a Swiss Verein

Your feithfully



Attorneys • Notaries • Conveyances • Prokureus • Notarisse • Aktevervaardigers

Oeri van der Menre (BLC, LLB)

Associate/Associate
lianic Loois (LLB)

Assisted by / Bynesiann deny:
The van der Menwe (LLB)
Ilzo Mattheus (B.Com, LLB,
LLM)

Consultant
\*Nice Hager (B.Juris LLB)

Reg No: 2006/015908/21 YAT/BTV No: 4630/239152

Preteria Sircet Address / Streatedres: 62 Rigel Avenue, Waterkloof Ridge, Pretoria

Poshis / P.O. Box 27756
Sunnysida

Tel: 087 654 0209
Fax/Faix: 012 343 5435
Email/Epox:
simone@vdmass.co.za

Tel: 011 542 2000 Fax/Fals: 086 603 4356 Our Ref: MR GT VD MERWEIst/078

Your Ref: G RUDOLPH/CO

24-11-2016

URGENT

Baker & McKenzle
Gerhard.Rudolph@bakermckenzie.com
Widaad.Ebrahim@bakermckenzie.com
Gallum.OConnor@bakermckenzie.com

Dear Sirs.

OAKBAY INVESTMENTS (PTY) LTD AND OTHERS / MINISTER OF FINANCE (BAKER & MCKENZIEON BEHALF OF NEDBANK) CASE NUMBER: 80978/16

We refer to the abovementioned matter as well as your letter to us dated 18 November 2016.

Your firm served a notice in terms of which you indicated that you act on behalf of Nedbank Limited in the application issued by the Minister of Finance under case number 80978/16.

it is common cause that we requested you (and or your client) to furnish us with the detail surrounding the reasons for closing our clients' various accounts.

Your letter under reply calls on us to "consent to the waiver of our clients' right to confidentiality in so far as it pertains to the termination of the erstwhile relationship between our respective clients".

The writer is somewhat perplexed by your request and will gladly address you on this issue since it might, in future, be relevant if and



when an investigation with regards to your client's conduct is necessary or undertaken by which ever authority will have the power to do so.

Up and until now your client did not disclose the information to us despite our clients' request to be furnished with the said information.

What your client wants us to do is to consent to "a walver of confidentiality" in order for your client to share this information (which is still a secret) in court papers.

It is a well-known fact that we have indicated that we are of the view that this application is an abuse of process and merely used as a forum to discredit our clients and to prejudice their business. We will deal with these allegations in detail when we file papers in the application.

What you suggest is that your client be afforded the opportunity to "disclose" information which we have never seen and to which we never had the opportunity to respond, same doing that under the auspice of a "consent or a waiver".

It is impossible for us to advise our client to consent to the release of "confidential information" if you refuse to share it with us in order to consider the contents thereof.

We, therefore, repeat that we would like to have copies of the documentation and/or access to the information you refer to and your client has no right to breach its duties towards our clients, including the duty to furnish us with whatever information your client seems to deem "confidential".

In order to prevent any uncertainty we wish to record that our client will, as was our instruction since the commencement of these proceedings, deal with the allegations raised against them in the application.

We submit that your client's persistent refusal to share the information with our client (but only tender to do so if it is in the public domain) is unreasonable and inconsistent with your client's obligations towards our clients.

We hope to receive your kind though urgent feedback.



Regards.

Gert van de Merwe VAN DED MERWE & ASSOCIATES



Baker & McKenzie

1 Commerce Square 39 Rivorie Roed Sandhurst, Sandien Johannesburg

Tel: +27 11 911 4300 Fax +27 11 784 2855 www.balermclenzie.com

6 December 2016

Gert van der Merwe Van der Merwe & Associates Our set: G Rudolph/W Ebrahim/18074338-50272593-0000 Your ref: Mr GT vd Merwels 1/078

By email Simone@vdmass.co.za

Dear Sins

#### OAKBAY INVESTMENTS (PTY) LTD & OTHERS / MINISTER OF FINANCE CASE NUMBER: 80978/16

- We refer to your letter dated 24 November 2016, estensibly in reply to our earlier correspondence of 18 November 2016.
- Your clients have been aware of our client's reasons for the closure of their accounts since respectively 7 April 2016 and 4 May 2016 (in relation to VR Lasor Services (Pty) Ltd).
- Your offices have similarly received correspondence confirming the reasons for the termination of these relationships, and have been aware of such reasons since at least May 2016.
- Your clients' continued assertions (as reiterated in your correspondence under reply) that our client has not provided this information is simply untrue.
- 5. In our letter of 18 Novembar 2016, our client sought consent / waiver of the inherent confidentiality of its interactions with your client(s) regarding the closure of the various accounts, including:
  - 5.1. meetings held; and
  - 5.2. correspondence exchanged with your clients reiterating our client's decision to terminate the various relationships and the reasons for such termination.
- 6. There is no "secret" which is sought to be disclosed in court papers, since both you and your clients are well aware of the outcome(s) of the meetings held and the further content of the relevant correspondence exchanged. Your inference in this respect is misguided.
- 7. To the extent that it seems necessary to do so, we attach copies of:
  - 7.1. one of the letters of termination delivered to your clients on 7 April 2016 (and disclosed by your clients to the Minister of Finance in correspondence dated 25 July 2016);

Directors Adec Adro. No. Altid. John SEL. Decc BENNETEN. John Hotes, VacidHetty, Note Dilites, Socia De Vydes, Wade Directors, White Dilites, Wade Directors, White Directors, White Directors, White Directors, White Directors, White Directors, Directors, White Directors, Directors, White Directors, Directors,

Bakar & McKenzie is a member of Baker & McKenzie International, a Swiss Verein



- 7.2. our client's letter of 6 May 2016;
- 7.3. the further correspondence exchanged between your office and our client on 9 and 10 May 2016; and
- 7.4. our most recent letter of 3 November 2016.
- 8. It is still our client's intention to deliver an affidavit in support of the present application. Since the termination of our client's relationship(s) with certain of your clients is a live issued before the Court, and to the extent that your clients' have now refused to consent to the disclosure of the meetings held between our respective clients and the letters following 7 April 2016, such refusal will be included in the affidavit, together with this correspondence (excluding the annexures referenced in paragraphs 7.2-7.4 above) which are not in the public domain.

Yours faithfully

Gerhard Andolph

011 911 4370

Gerhard Rudolph@bakermekenzie.com

2



#### **MEDIA STATEMENT**

## STATEMENT BY DEPUTY MINISTER OF FINANCE MR. MCEBISI JONAS (MP)

- I have decided to respond to and clarify certain questions that have been in the
  public domain recently. I do so in accordance with my conscience, my political values
  and the best traditions of my organisation, the ANC, of which I have been a member
  since my early teens.
- 2. I regard our Constitution as being sacrosanct and it embraces the values that South Africans struggled for, and what we live by. I was appointed Deputy Minister in terms of the Constitution by the President of the Republic. Any practice that conflicts with the prescripts of the constitution must be challenged in the interest of our democracy and the accountability we have to our people. The ANC that we have been and continue to be proud members of, has offered us the opportunity to serve our country, an honour that I do not take for granted. My historical commitment to the liberation of our people has not waned.
- 3. My daily decisions and actions are informed by the understanding that true political freedom will be achieved through deliberate and active management of a transformed yet inclusive growing economy. The current economic climate presents many risks for our country, which requires responsible leadership to avoid a full-blown crisis. We have to unite on the key issues relating to managing the macro-economic risks, while urgently unlocking new sources of growth and job creation. South Africa requires "all hands on deck".
- The extent to which we are able to navigate the current macro-economic challenges, restore investor confidence and rapidly stimulate growth, will depend on heightened levels of political leadership.
- 5. The narrative that has grown around the Issue of "state capture" should be of concern to all responsible and caring South Africans, particularly those of us who have accepted the task to lead our people. We cannot afford to ignore the obvious impact these sentiments may have on our country and the resultant potential of undermining our moral authority. Neither can we afford to allow the attempts to capture the state to divert us from dealing with the challenges that our country faces.

Enquirles: Communications Unit Email: media@ireasury.gov.za Tel: [012] 315 5944





History will judge us on the extent to which we have stayed true to the commitments we have made to our people through our public pronouncements and private conduct.

- Therefore let me state the facts on the matter of whether I was approached by nongovernmental individuals in respect of the position of Minister of Finance. Members
  of the Gupta family offered me the position of Minister of Finance to replace thenMinister Nene. I rejected this out of hand. The basis of my rejection of their offer is
  that it makes a mockery of our hard earned democracy, the trust of our people and
  no one apart from the President of the Republic appoints ministers. Let me also place
  it on record that there was no discussion between the Deputy Secretary General of
  the ANC Ms Jessie Duarte and myself on this matter.
- 7. I have hesitated to speak out publicly on this matter until now, but I feel it is no longer possible to remain quiet. Of primary concern to me is that this issue has a real danger of diverting attention away from the real and urgent challenges we face as a country.
- 8. I am committed to good governance, abiding by the constitution of our country and being accountable to our people who repeatedly express their confidence and trust in us, election after election. It is this constant state of awareness and consciousness drummed into most of us throughout our service in the national democratic revolution led by the ANC, that has provided us with the moral capital and tools to apply sound judgement to navigate challenges that emerge in the natural course of societal leadership. It is only through these values and moral covenants that I serve my organisation, my fellow country men and women, my beloved South Africa.
- 9. Finally, I remain confident that the challenges that we face as a nation will be overcome if we collectively use our efforts for the benefit of all. I am resolute in playing my part in preserving the integrity of National Treasury as an institution in my capacity as Deputy Minister. I'm also committed to in making my contribution towards building a prosperous South Africa led by the glorious movement of our people, the African National Congress.

Issued on behalf of the Ministry of Finance

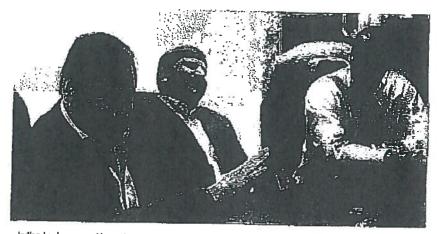
Date: 16 March 2016

Enquiries: Communications Unit Email: media@treasury.gov.za Tal: (012) 315 5944



http://www.ilmesilve.co.za/sundaytimes/busiasssilmes/2016/04/KPMG-Sasfin-cul-links-with-Gupte-8rm 1/3 SUNDAY TIMES BUSINESS BY ED CROPLEY AND THISETSO MOTSOENENG, 2016-04-04

### KPMG, Sasfin cut links with Gupta firm



Indian businessmen Ajay and Atul Gupta, and Sahara director, Duduzane Zuma at the New Age Newspaper's offices in Midrand, Johannesburg, South Africa on 4 March 2011. image: Gallo Images/City Press/Muntu Vilakazi

Global accountancy firm KPMG and South African investment bank Sasfin have severed ties with a company owned by the Guptas, a family of Indian-bom businessmen, due to a scandal over their relationship with President Jacob Zuma.

In an email to KPMG staff seen by Reuters, local Chief Executive Trevor Hoole said he had decided to stop auditing Oakbay Resources and Energy, a Gupta mining firm, after consulting regulators, clients and KPMG's internal risk departments.

"I can assure you that this decision was not taken lightly but in our view the association risk is too great for us to continue," Hoole said in the email.

"There will clearly be financial and potentially other consequences to this, but we view them as justifiable,"

Oakbay confirmed the end of the 15-year relationship and said it understood it had been a "very reluctant decision" for KPMG. A KPMG spokesman declined to comment.

Sasfin spokeswoman Cathryn Pearman said the bank had resigned as Oakbay advisers effective from June 1.

The three Gupta brothers moved to South Africa from India at the end of apartheid in the early 1990s and went on to build a business empire that stretches from technology to the media to mining.

They have also forged a close personal relationship with Zuma, whose son, Duduzane, sits on the board of at least six Gupta-owned companies, according to company registration papers.

Zuma has denied numerous allegations of the relationship allowing the Guptas to wield undue influence.

However, parts of corporate South Africa are turning their backs, especially since Deputy Finance Minister Mcebisi Jonas alleged last month the Guptas had offered him the top job at the Treasury before Zuma fired Jonas' boss, Nhlanhla Nene, in December,

Pearman declined to give reasons for Sasfin's decision to resign, but confirmed it had been taken two days after a newspaper report suggested the Guptas may have had a hand in Zuma's abrupt sacking of Nene.

PSG Capital, the investment banking arm of Stellenbosch-based PSG Group, was listed as an adviser to Oakbay in its purchase of struggling miner Optimum Coal from Glencore in December.

However, a source close to the bank said there was no long-term relationship, describing the deal as a "once-off thing"

Reuters

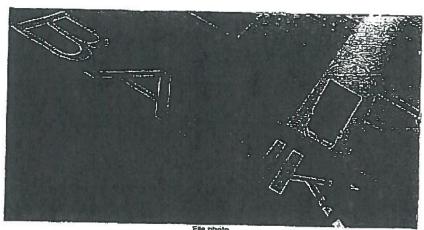


12/8/2016 SUNDAY TIMES - FNB closes accounts held by Guptas - Oakbay

http://www.limestive.co.za/sundayilmes/busineasilmes/2016/04/06/FNB-closes-accounts-held-by-Guptas---Oakbay 1/3

SUNDAY TIMES BUSINESS BY TIISETSO MOTSOENENG, 2016-04-06

# FNB closes accounts held by Guptas - Oakbay



File photo. Image: Gallo Imagea/Thinkstock

First National Bank has closed the accounts of a company owned by the Gupta family following a scandal over the family's relationship with President Jacob Zuma.

Oakbay Investment said In a statement on Wednesday that FNB, owned by FirstRand, had closed its accounts without giving a reason.

FirstRand follows three other companies - KPMG, Barclays Africa and Sasfin - that have severed ties with a company owned by the Guptas due to concerns about their relationship with Zuma,

"We find the timing of FNB's decision staggering given Oakbay's accounts are in excellent financial health and we have been a loyal and profitable customer for many years," Oakbay said.

Allegations of the Gupta family meddling in politics burst into the open last month when deputy finance Minister suggested that they may have had a hand in Zuma sacking his finance minister Nhianhia Nene.

FNB told Oakbay it did not need its business anymore on Friday, a source familiar with the matter said, a day after a top court ruled that Zuma breached the constitution for ignoring an order to repay the state a portion of R246 million spent on his private home.

Nainesh Desai, head of risk at FNB, declined to comment, citing client confidentiality agreements.

Zuma has denied numerous allegations of the Guptas wielding undue influence. The Guptas have also routinely dismissed reports of their alleged influence, saying they are pawns in a political plot to get Zuma out of office.

The three Gupta brothers moved to South Africa from India at the end of apartheid in the early 1990s and went on to build a business empire that stretches from technology to the media to mining.

They have also forged a close personal relationship with Zuma, whose son, Duduzane, sits on the board of at least six Gupta-owned companies, according to company registration papers.

Zuma survived an impeachment motion by the opposition on Tuesday thanks to his African National Congress party's majority in parliament.

- Reuters

2



## MINISTER: FINANCE REPUBLIC OF BOUTH AFRICA

Private Beg X115, Postoria, 0801, Tel: +27 12 823 8811, Fax: +27 12 328 3262 PO Bax 29, Cape Yovin, 8000, Tel: +27 21 464 8180, Fax: +27 21 461 2634

Mr MJ Zwane Minister of Mineral Resources Private Bag X59 PRETORIĀ 0001

Dear Minister Zwane

INTER-MINISTERIAL COMMITTEE IN RESPECT OF ALLEGATIONS LEVELLED AGAINST FINANCIAL INSTITUTIONS

I refer to your latter dated 20 April 2016, emailed to my office at 11h48am on 22 April 2018.

As you are aware, I was not present at the Cabine! meeting you refer to but I have consulted the Cabinet Secretariat on the matter.

.The following emerges:

- 1. The Cabinet meeting was on the 13th April 2016 not 18th April 2016 which was a
- 2. No Inter-Ministerial Committee was established.
- Three Ministers were nominated: Finance, Labour and Mineral Resources.
- 4. No one Minister was designated as convenor.
- The finencial services sector is not "already distressed" as your letter indicates, and care must be taken not to compromise financial stability.

Whilst I appreciate the urgency of the matter for some, I must emphasise that the legal and regulatory environment has both global (BASEL III, Financial Action Task Force) and local (SA Reserve Bank; Financial Services Board; Financial intelligence Centre; National Consumer Commission; etc.) regulators and regulations.

I am currently seeking legal advice on what could be done in the present dicumstances, given the intensive legislative framework we have governing the financial sector.

in the circumstances, it will be advisable for the three Ministers to first consult on the framework for any discussion with financial institutions. I prefer that this takes place on the

mergins of the Cabinet meeting of the  $26^{th}$  April 2018. You might also be aware that discussions of the nature envisaged have already taken place elsewhere.

Accordingly, I look forward to discussing the way forward next Tuesday.

Kind regards

PRAVIN J GORDHAN, MP MINISTER OF FINANCE Date: 22 - 4-2014

co, Ms MN Oliphani, MP Minister of Labour

OAKBAY NVETEMBER (PLYCER)

14th April 2016

Sandile Shabala Managing Executive: Business Banking Nedbank

Dear Sir

We write to you today to request an urgant meeting with your client to discuss your decision to terminate banking services to various companies within our group

We would like to take this opportunity to share with you various changes that have been made within our business and its structure to set your mind at ease around any concerns you may have had which prompted your decision to terminate our services.

Our delegation will be led by Terry Rensen, the lead independent director and the chair of Oakbay Resources and Energy, another independent director, and Ore's CFO, Trevor Scott. I will accompany the delegate as Oakbay's Chief executive.

We would need no more than 30 minutes in your diary and we hope you will find the time for us to most as a matter of urgency.

Yours sincerely

Nazeem Howa Chief Executive

From: Zarina Kellerman [mailto:Zarina Kellerman@dmr.gov.za] Sent: 09 May 2016 12:59 PM To: Buckley, E. (Emma) < EmmaB@Nedbank.co.za> Subject: Re: inter-Ministerial Committee Importance: High

Hi Emma

Apologies for the delay. The team consisted of the following:-

Minister Faith Muthambi, as well as her advisors Mr Mzwanele Manyi and Mr Sandile Nene Minister Mikired Oliphant, as well as her advisors Mr Herbert Mkhize and DDG Mr Virgil Scafield Minister Zwane and his advisor, Adv Zarina Kellerman (as Secretariat)

I trust this is in order.

Sincerely Zarina

On 06 May 2016, at 2:19 PM, Buckley, E. (Emma) < RmmaB@Nedbank.co.za> wrote:

Hi Zarina,

Please can you email me the full names and titles of government that attended today's meeting.

Thank you.

Kind Regards,

<mage001.jpg>

Executive Personal Assistant to Mike Brown, Chief Executive | Nedbank Group Limited First Floor Block A Nedbank 135 Rivonia Campus 135 Rivonia Road Sandown Sandton 2196 South Ah t+27 (0)11 295 9687 f+27 (0)11 294 9687 @emmab@nedbank.co.za

Website: nedbank.co.za

<image@02.jpg> THINK BEFORE YOU PRINT - At Nedbank we are committed to minimising environmental impact and encourage the preservation of natural capital.



Media Statement To all media 1 September 2016

STATEMENT OF THE CHAIRPERSON OF THE INTER-MINISTERIAL COMMITTEE SET UP BY CABINET TO CONSIDER THE IMPLICATIONS OF THE DECISIONS OF CERTAIN BANKS AND AUDIT FIRMS TO CLOSE THE ACCOUNTS OF AND/OR WITHDRAW AUDITING SERVICES FROM OAKBAY INVESTMENTS

On 13 April 2016, Cabinet established an Inter-Ministerial Committee (IMC) to consider allegations that certain banks and other financial institutions acted unilaterally and allegedly in collusion, when they closed bank accounts and/or terminated contractual relationships with Oakbay Investments. The IMC was chaired by myself as the Minister of Mineral Resources.

The situation warranted close scrutiny by Government because of the impact that the actions would have, not only on job losses for 7500 South Africans but also the impact that it would have on investor confidence.

The IMC conducted a number of meetings with various banks, financial institutions and insurance companies as well as with representatives of Oakbay Investments. Although the Minister of Finance was a member of the constituted IMC, he did not participate in its meetings.

A Report of recommendations was tabled at Cabinet. After discussion of the Report, Cabinet has now resolved as follows:-

- a. To recommend to the President that given the nature of the ellegations and the responses received, that the President consider establishing a Judicial Enquiry in terms of section 84(2)(f) of the Constitution;
- b. To consider the current mandates of the Banking Tribunal and the Banking Ombudsman. Evidence presented to the IMC indicated that all of the actions taken by the banks and financial institutions were as a result of innuendo and potentially reckless media statements, and as a South African company, Oakbay had very little recourse to the law. Looking into these mandates and strengthening them would go a long way in ensuring that should any other South African company.

find itself in a similar situation, it could enjoy equal protection of the law, through urgent and immediate processes being available to it as it required by the Constitution;

- c. To consider the current Financial Intelligence Centre Act and the Prevention of Combatting of Corrupt Activities Act regarding the relevant reporting structures set out therein as evidence presented to the IMC was unclear on whether the various banks and financial institutions as well as the Reserve Bank and Treasury compiled with these and other pieces of legislation. The IMC was also briefly ceased with the implications of legal action against any of these entities and the potential impact that would have on the volatility of the Rand as well as the measures that could be put in place to protect the economy. This was not something that fell within the mandate of the IMC and should therefore be considered by the Judicial Enquiry;
- d. To re-consider South Africa's clearing bank provisions to allow for new banking licences to be Issued and insodoling, to create a free market economy. The IMC was presented with evidence suggesting that the South African banking system is controlled by a handful of clearing banks which ensured that every other local or international bank participating in the South African banking sector would need to go through these clearing banks in order to have their transactions cleared, thereby creating an oligopoly. Evidence was also presented that these institutions may have placed undue pressure on banks that sought to assist the company by subjecting them to unwarranted auditing processes. It is unclear why the Reserve Bank will not issue new banking ficences to other banks and this would need to be given careful attention by the Judicial Enquiry as it did not fall within the purview of the IMC; and
- e. The establishment of a State Bank of South Africa with the possible corporatisation of the Post Bank being considered as an option. Evidence presented to the IMC suggested that all of South Africa's economic power vests in the hands of very specific institutions, institutions who have shown that their ability to ect unliaterally is within their mandate and is protected. These institutions are owned by private shareholders and report to National Treasury who in turn do not need to act on information provided to it.

It was further agreed that the IMC would monitor the process of finalising these matters and would reportback to Cabinet on their progress.

For further media enquiries, kindly contact Mr Martin Madlala on 0635054199 Martin.Madlala@dmr.gov.za Ends-

Issued by the Department of Mineral Resources



ANC DESCRIBES ZWANE'S STATEMENT AS RECKLESS AND APPALLING



Many laws of Course Many Array and minister or Restrict Course of Many Limits from Francis and opticity is landed Course than Array or or collections in the Array of Course than Array or or collections in the Array of Course than Array or or collections in the Array of Course than Array or or collections in the Array of Course than Array or or collections in the Array of Course than Array or or collections in the Array of Course than Array or or collections in the Array of Course than Array or or collections in the Array of Course than Array or or collections in the Array of Course than Arr

(AMANNESSING - The section of African Martional Congress (AMC) has described the statement by Minoral Resources Librario Mossional 2005to as cardinal and positions in 1870 to 1870 to

last week, Zwane based a striament citizating to be on behalf of calinet, which called for a jude tal inquiry to be established into the dissing of the Gapta fareily's bank accounts

The ANCS Ziel Rodors says Zwana has brought the country into disreputs.

"Because that bind of a conduct that is sending away shacking rub numprication of South Abrica's standing in leadersh p in surms of investments and

On Friding, Zwarrel's spokesperson Marian Madibia admitted in an interview that the sustement they had released uses intolexising and was not on belief of

The governing party says Zwenne's actions seent stractorares strongly the markets and har described his across as outrageout,

The ANC has called on the president to "tilexipline" and "reprimend" Evens for his somment regarding an imputy into the major banks

ld, "He shirk it was not enough that this presidency distanced band, and the cablest from that extended. The president most discipline zounge."

CONTINUENTING MESSAGES MAY FRUSTAATE SA SCOLIOMY

cis have warned then the controdicting interrupes from government over the Gupon (am'ly and an lover-Michaelal Commission's and done regarding that bent accourage may forther frestrate the enarkets

Greep chief conversity of Standard Bank Gordam Baillen said, "South Africa has volunessed, over the lost couple of wealth, conflicting voices among lag, out four povernment but also from the party, clearly tensions, divisions and lights vitive the perty is beginning to a pill into government."

Economist David Boult said raing agendus are watching and taking note

"The confusion that is going in government. The contradictions that we've getting from government, the relations at leadership that we get from government is easily something that we sit need to be eatermely concerned about."

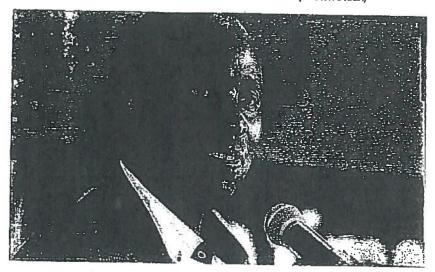
CONSTRUCTOR WIT FROM IS RELEASED | JUNEAR & CONSUMERS ALLIANS WHOCHOMORE

MB13(b)

# DAILY MAVERICK

# Presidency: Statement of Minister of Mineral Resources is not Government position

DAILY MAVERICK STAFF REPORTER SOUTH AFRICA 02 SEP 2016 08:19 (SOUTH AFRICA)



Minister Zwane does not speak on behalf of Cabinet and the contents of his statement do not reflect the position or views of Cabinet, the Presidency or government.

The statement issued by the Minister of Mineral Resources, Mr Mosebenzi Zwane yesterday on 1 September 2016, on the work of the task team established to consider the implications of the decisions of certain banks and audit firms to close down the accounts and withdraw audit services from the company named Oakbay Investments, was issued in his personal capacity and not on behalf of the task team or Cabinet.

A

Minister Zwane is a member of the task team. He does not speak on behalf of Cabinet and the contents of his statement do not reflect the position or views of Cabinet, the Presidency or government. The unfortunate contents of the statement and the inconvenience and confusion caused by the issuing thereof, are deeply regretted.

The Presidency wishes to assure the public, the banking sector as well as domestic and international investors of Government's unwavering commitment to the letter and spirit of the country's Constitution as well as in the sound fiscal and economic fundamentals that underpin our economy.

Enquiries: Dr Bongani Ngqulunga on 082 308 9373 or bongani@presidency.gov.za Issued by: The Presidency

Photo: Minister of Mineral Resources Mosebenzi Zwane (GCIS)

- DAILY MAVERICK STAFF REPORTER
- SOUTH AFRICA



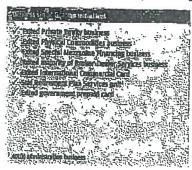
# **MB14**

Have you completed your major de-risking initiatives?

Yes, we have completed our major de-risking initiatives, and some were pretty draconian. In the chart below, I show just a few of the

actions that we were willing to take to reduce various forms of risk:

#### Executed Significant Business Simplification Agenda



Simplified the place builting products from \$7 to \$15 products

Consideration stockers learn

De risking by Gerondromy control between 1 with high-yild places in high-yild productions

The risking by Gerondromy control between 1 with high-yild places in high-yild productions

The risking by Gerondromy control between 1 with high-yild places 1 with high-yild places 1 with productions

Control Burling closed - 1 with yild places

Three Burling Control - 1 with places 1 with the places 1 with the

However, we are going to be extremely vigilant to do more de-risking if we believe that something creates additional legal, regulatory or political risks. We regularly review all our business activities and try to exceed – not just meet – regulatory demands. We also now ask our Legal Department to be on the search for "emerging legal risks." We try to think differently; for example, we try to look at legal risks not based on how the law is today but based on how the law might be interpreted differently to years from now. It is perfectly reasonable for the legal and regula-

tory agencies to want to improve the quality of the businesses they oversee, particularly around important issues such as customer protection. We also expect this refinement frequently will be achieved through enforcement actions as opposed to the adoption of new rules that raise standards. For many years, regulations generally were viewed as being static. As we do everywhere else, we should be striving for constant improvement to stay ahead of the curve.

Do you think you now have "fortress controls" in place?

We are good and are getting better. The intense efforts over the last few years across our operating businesses – Risk, Finance, Compliance, Legal and Audit – are now yielding real results that will protect the company in the future. We have reinforced a culture of accountability for assuming risk and have come a long way in self-identifying and fixing shortcomings. Many new permanent organizational structures have been

put in place to ensure constant review and continuous improvement. For example, we now have a permanent Oversight & Control Group. The group is charged with enhancing the firm's control environment by looking within and across the lines of business and corporate functions to identify and remediate control issues. This function enables us to detect control problems more quickly, escalate issues promptly and engage other stakeholders to understand

The state of the s

common themes across the firm. We have strengthened the Audit Department and risk assessment throughout the firm, enhanced data quality and controls, and also strengthened permanent standing committees that review new clients, new products and all reputational issues.

#### The effort is enormous.

Since 2011, our total headcount directly associated with Controls has gone from 24,000 people to 43,000 people, and our total annual Controls spend has gone from \$6 billion to approximately \$9 billion annually over that same time period. We have more work to do, but a strong and permanent foundation is place. Far more is spent on Controls if you include the time and effort expended by front-office personnel, committees and reviews, as well as certain technology and operations functions.

We have also made a very substantial amount of progress in Anti-Money Laundering/Bank Secrecy Act.

We deployed a new anti-money laundering (AML) system, Mantas, which is a monitoring platform for all global payment transactions. It now is functioning across our company and utilizes suphisticated algorithms that are regularly enhanced based on transactional experience. We review electronically \$105 trillion of gross payments each month, and then, on average, 55,000 transactions are reviewed by humans after algorithms identify any single transaction es a potential issue. Following this effort, we slopped doing business with 18,000 customers in 2015. We also are required to file suspicious activity reports (SAR) with the government on any suspicious activity. Last year, we filed 180,000 SARs, and we estimate that the industry as a whole files millions each year. We understand how important this activity is, not just to protect our company but to help protect our country from criminals and terrorists.

We exited or restricted approximately 500 foreign correspondent banking relationships and tens of thousands of client relationships to simplify our business and to reduce our AML risk. The cost of doing proper AML/ KYC (Know Your Customer) diligence on a client increased dramatically, making many of these relationships immediately unprofitable. But we did not exit simply due to profitability - we could have maintained unprofitable client relationships to be supportive of countries around the world that are allies to the United States. The real reason we exited was often because of the extraordinary legal risk if we were to make a mistake. In many of these places, it simply is impossible to meet the new requirements, and if you make just one mistake, the regulatory and legal consequences can be severe and disproportionale.

THE REPORT OF THE PROPERTY WAS ARRESTED FOR ADMINISTRATION OF THE PROPERTY OF

We also remediated 130,000 accounts for KYC - across the Private Bank, Commercial Bank and the Corporate & Investment Bank. This exercise vestly improved our data, gave us far more information on our clients and also led to our exiting a small number of client relationships. We will be vigilant on onboarding and maintaining files on all new clients in order to stay as far away as we can from any client with unreasonable risk.

in all cases, we carefully tried to get the balance right while treating customers fairly.

You can see that we are doing everything in our power to meet and even exceed the spirit and the letter of the law to avoid making mistakes and the high cost – both monetarily and to our reputation – that comes with that. But we also tried to make sure that in our quest to eliminate risk, we did not ask a lot of good clients to exit. We hope that in the future, the regulatory response to any mistakes – if and when they happen, and they will happen – will take into account the extraordinary effort to get it right.

# **MB15**



# **Consumer Information Note 14**

# Closure of Bank Accounts – Circumstances under which banks close customers accounts

Distribution:

Members of the Banking Association of South Africa

Other Financial services Ombudsmen

Consumer NGO's

Government Consumer Bodies

The Media

28.10.2016 CP/KvR CN14 Closure of Bank Accounts



#### DISCLAIMER

Please note that the information provided does not constitute expert legal or financial advice. You should consult a legal professional or financial adviser for expert advice.

We have only mentioned sections of the various Acts where they are applicable to the complaints we receive. These Acts however contain many other sections and detail that may not have been mentioned. There may also be other legislation that is applicable. For more information and detail on the Acts and other applicable legislation you should consult a legal professional. The purpose of the document is to provide you with practical information based on our experience. Each case we investigate is however assessed on its own merits.

#### 1. Introduction

It needs to be stressed that the office of the Banking Ombudsman is impartial and independent. This article is not in defence, nor criticism of the business practices of any company or the conduct of any individual or action by any bank.

It is intended solely to expound upon the salient principles that ought to be adhered to, to ensure that South African institutions are compliant with both local and international laws and conventions, to effectively combat financial crime.

26.10,2016 CP/KvR CN14 Closure of Bank Accounts

#### 2. Background

Earlier this year, several banks closed the accounts of a certain investment company. Whilst the confidential nature of the bank/customer relationship precluded the banks from furnishing reasons for the closures, it is widely speculated that a possible reason is that the owners of the company allegedly exercise considerable influence over the South African President and use that influence to secure favours.

An intimation as to the reason for the action by the banks appears in a statement attributed to the Banking Association, where it is reported as stating that banks have to comply with regulations relating to the Financial Intelligence Centre Act (FICA) and Money Laundering.

With the reported reference by the Banking Association to FICA and money laundering, we think it apposite to touch on some of the relevant legislation and conventions with which financial institutions have to comply.

### 3. The Mischief - Money laundering

#### 3.1 What is money laundering?

Criminal activity generates substantial profits to the individual or group that carries out the act. Money laundering is the processing of these criminal proceeds to disguise their illegal origin. This process is of critical importance, as it enables the criminal to enjoy these profits without jeopardising their source.

3 26.10,2016 CP/KvR CN14 Closure of Bank Accounts

#### 3.2 How much money is laundered per year?

The United Nations Office on Drugs and Crime (UNODC) estimates that the sum of money laundered globally in one year is 2% 5% of global GDP, or USD 800 billion to USD 2 trillion.

#### 4. Laws and Conventions

Some features of the more immediate laws and conventions that financial institutions have to comply with are highlighted.

4.1 United Nations Convention against Corruption --Article 68(1) of United Nations Resolution 58/4 of 31 October 2003

South Africa is a signatory to the United Nations Convention against Corruption, which came into effect on the 14th December 2005. It is a globally legally binding International anti-corruption instrument which requires States to implement several anti-corruption measures which may affect their laws, institutions and practices. These measures are aimed at preventing corruption, including domestic and foreign bribery, embezzlement, trading in influence and money laundering.

28,10,2016 CP/KvR CN14 Closure of Bank Accounts



# 4.2 The Financial Action Task Force (FATF) on money laundering

In response to mounting concerns over money laundering and recognising the threat posed to the banking system and to financial institutions, the FATF, which is an inter-governmental body was established in 1989 by the ministers of it's various member jurisdictions. It is a policy making body and has no investigative authority.

The objectives of the FATF are to set standards and promote effective implementation of legal, regulatory and operational measures for combating money laundering, terrorist financing and other related threats to the integrity of the international financial system.

In April 1990, the FATF issued a report containing a set of Forty Recommendations, intended to provide a comprehensive plan of action needed to fight money laundering and terrorist financing.

These recommendations were revised in 1996, 2001, 2003, 2012 and 2014 to ensure the further strengthening of the agreed international standards for combating money laundering and terrorist financing.

5 26.10,2016 CP/KvR CN14 Closure of Bank Accounts

#### 4.3 The Financial Intelligence Centre Act

Pressure from the FATF and the international environment to implement effective money laundering control legislation led to the development of the Financial intelligence Centre Act (FICA). South Africa's commitment to the implementation of the FATF recommendations codified in FICA meant South Africa became the first African country to become a fully-fledged member of FATF.

South Africa was accepted as a member of the FATF in June 2003 after it was evaluated and found to have developed a comprehensive legal structure to combat money laundering activities.

The Financial Intelligence Centre Act (38 of 2001) (FICA) came into effect on the 1<sup>st</sup> July 2003 and was introduced to fight financial crime, such as money laundering, tax evasion, and terrorist financing activities.

#### 4.4 A Politically Exposed Person (PEP)

In financial regulation, a PEP is a term describing someone who has been entrusted with a prominent public function. A PEP generally presents a higher risk for potential involvement in bribery and corruption by virtue of their position and the influence that they may hold.

6 26,10,2016 CP/KvR CN14 Closure of Bank Accounts



4.5 The Financial Intelligence Centre Amendment Bill (33B - 2015)

Section 21G of the Bill introduces the concept of a domestic prominent influential person (PIP). Section 21G(c) obliges a bank to conduct enhanced orgoing monitoring of any business relationship with a PIP.

Parliament has already passed the Amendment Bill and it is with the President for signature.

If the President does not sign the Amendment Bill, South Africa will be non-compliant with the FATF recommendations. FATF will then Issue its public statement identifying the Republic as a jurisdiction with strategic deficiencies in the anti-money laundering / countering the financing of terrorism measures.

4.6 Prevention and Combatting of Corrupt Activities Act (Act 12 of 2004).

The Prevention and Combatting of Corrupt Activities Act (Act 12 of 2004), imposes a duty on banks to report knowledge of corrupt activities.

In terms of Chapter 7, Section 34 (1)(b) of the Act, any person who holds a position of authority and knows or ought to reasonably have known or suspected that any other person has committed an act of corruption involving an amount of R 100 000-00 or more, must report such knowledge or suspicion or cause such knowledge or suspicion to be reported to any police official.

7 26,10,2016 CP/KvR CN14 Closure of Bank Accounts



Naturally, failure to comply with the provisions of this Act, could result in a fine and/or a term of imprisonment and/or a further fine equal to 5 times the value of the gratification involved in the offence.

#### 4.7 The Banks Act (94/1990)

In terms of the Section 6(2) of the Banks Act (the Act), as amended by Section 3(b) of the Banks Amendment Act (19/2003), Banks are obliged to submit to the supervision and control of the Registrar of Banks and must meet and maintain various standards imposed upon it by the Act including details of the funds held and their business practices.

Failure on the part of a bank to meet these standards may result in a bank being flable for losses and even criminal sanction.

# 4.8 The Inspection of Financial Institutions Act (80/1998)

In terms of Section, 5 of The Inspection of Finandal Institutions Act (80/1998), banks are subject to the Investigation and Inspection of their affairs. Failure to cooperate on the part of banks could render them Ilable to the payment of a fine or to imprisonment or both such fine and Imprisonment.

8 26.10.2016 CP/KyR CN14 Closure of Bank Accounts



# 4.9 The Prevention of Organised Crime Act (POCA) (121/1998)

Banks have to comply with the measures spelt out in POCA, especially Sections 4-6, to combat money laundering.

Fallure to comply with these measures could attract a fine of R 100 million or 30 years imprisonment.

#### 4.10 Code of Banking Practice

The Code of Banking Practice states that a bank will not close an account without giving reasonable prior notice. A bank however reserves the right to protect its interests in it's discretion, and this might include closing an account without giving prior notice. If a bank is compelled to do so by law (or by international best practice); if an account has not been used for a significant period of time; or the bank has reason to believe that an account is being used for any illegal purposes.

#### 6. A bank's contractual right

Our courts have upheld a bank's right to close accounts on the basis that the agreement that establishes the banker / customer relationship constitutes a contract like any other and that the general rules of contractual interpretation apply.

9 26.10,2016 CP/KvR CN14 Closure of Bank Accounts



A term within that contract which allows the bank at will, subject only to giving reasonable notice to terminate the contract, provided the termination is procedurally fair and does not offend constitutional values, is not unusual, onerous or unconscionable.

#### 7. Conclusion

So, not only are banks entitled to close an account in terms of the contract that establishes the banker / customer relationship, subject to certain conditions, they are indeed obliged to do so in terms of domestic and international law and international convention.

Banks must take care to ensure that they comply with their statutory and common law obligations, since a failure to do so could attract huge monetary penalties.

Recent examples of penalties imposed on banks for alleged money laundering offences include:

- 7.1 In December 2012 HSBC Bank was fined the sum of USD 1,9 billion following a US Senate Sub-committee investigation.
- 7.2 In March 2012, a record fine of £ 8,75 million was imposed on Coutts Bank by the Financial Services Authority.

10 25.10.2016 CP/KvR CN14 Closure of Bank Accounts



7.3 On the 12<sup>th</sup> October 2016 Swiss Federal Prosecutors opened criminal proceedings against Falcon Private Bank for alleged money laundering offences.

Clive Pillay
Ombudsman for Banking Services
Johannesburg, South Africa
October 2016

11 26.10.2016 CP/KvR CN14 Closure of Bank Accounts



Page 1 of 14 MB16

GLOBAL ABC AND INVESTIGATIONS 01 JAN 2016

Bribery and corruption: what now for 2016?

2015 proved to be an eventful year in the fight against bribery and corruption. Highprofile global investigations and prosecutions dominated the headlines and, closer to home, the Serious Fraud Office (SFO) scored a double first: its first Deferred Prosecution Agreement (DPA) and first conviction for the corporate offence of failure to prevent bribery.

However, it would seem that businesses are still not doing enough to prevent bribery, particularly in relation to the risks posed by third-party agents and intermediaries. The continued increase in investment opportunities in high-risk jurisdictions means that companies need to ensure their policies work at the coalface. Complacency is not an option. Here we look back at the developments of 2015, the key themes emerging, and the implications for companies in 2016.

# The SFO flexes its enforcement muscles

In 2014, the SFO added to its enforcement armoury (see BRIEF RECAP). In 2015, it took its new toys out of the box.

First DPA

On 30 November, Sir Brian Leveson approved the first DPA between the SFO and ICBC Standard Bank Pic (Standard Bank) in relation to a section 7 offence.

https://www.ashurst.com/en/news-and-insights/legal-undates/hribery-and-corruption-

Page 2 of 14

Standard Bank had acted together with its Tanzanian sister company, Stanbic Bank Tanzania Ltd (Stanbic), on a joint mandate in relation to a sovereign note placement for the Government of Tanzania. The charge underlying the DPA was based on payments that were made to a local partner and turned out to be the conduit for bribery of government officials. The payments were made by two key individuals at Stanbic and, given their seniority, Stanbic itself. However, given that both companies stood to benefit from the transaction and were acting jointly (with different but complementary roles), the employees and Stanbic were deemed to be "associated persons" of Standard Bank performing services on its behalf and for its benefit. Standard Bank was therefore liable for the section 7 offence.

# THE UK BRIBERY REGIME: BRIEF RECAP

The UK Bribery Act has been in force since July 2011. This introduced the section 7 corporate offence of failure on the part of a commercial organisation to prevent bribery being committed by an associated person with the intention of benefiting that organisation (section 7 offence). However, an organisation will have a complete defence if it can show that "adequate" procedures designed to prevent bribery were in place.

The SFO added to its enforcement armoury in February 2014 when it became able to enter into DPAs with corporates guilty of economic crimes. Under a DPA, proceedings are instituted but then deferred on terms (such as the payment of a financial penalty, compensation and implementation of a compliance programme). If, within the specified time, the terms of the agreement are met, proceedings are discontinued; a breach of the terms of the agreement can lead to the suspension being lifted and the prosecution pursued.

Finally, in October 2014, sentencing guidelines on financial penalties for companies convicted of economic crimes came into force. They will be used to inform the level of any financial penalty that forms part of a DPA or in sentencing anyone found guilty of a Bribery Act offence.

For further detail on the Bribery Act, see our Quickguide.

As to adequate procedures, Standard Bank had relied on Stanbic to carry out the necessary compliance checks. That reliance, and the consequent failure to spot the red flags inherent in the transaction and ask its own questions, meant that its procedures were held to be inadequate.

个

Page 3 of 14

The Bank was ordered to puy compensation to the Tanzanian Government (i.e., pay back the bribe of US\$6m plus interest), disgorge the profit made (US\$8.4m), co-operate in further investigations, undergo a compliance review, and pay the SFO's legal costs (£330,000). It also had to pay a financial penalty of US\$16.8m.

#### First section 7 conviction

On 18 December 2015, Sweett Group PLC (Sweett) pleaded guilty to securing and retaining contracts in Dubai through bribery committed by its UAE subsidiary. Sweett is expected to be sentenced in February 2016 at Southwark Crown Court. This will provide further guidance on how the sentencing guidelines are applied in practice.

In addition to securing its first DPA and section 7 conviction, the SFO opened 16 new investigations in 2015 and has confirmed that 2016 will see more DPAs and Bribery Act 2010 convictions. Separately, in Scotland, we saw the first concluded settlement for a contravention of the section 7 offence (involving Brand-Rex Limited) - the third concluded corporate selfreport and civil settlement in Scotland.

As these developments illustrate, the SFO's appetite for prosecution has not decreased. They also show that DPAs are not an "easy option". The Judgment of Sir Brian Leveson highlights how difficult it will be for companies to secure a DPA and the level of cooperation and engagement with the SFO that is required. The Standard Bank case was, in many ways, the perfect test case for a DPA, and so uncertainties remain as to how high the bar is set for securing one. That said, it has provided some long-awaited insight into how the section 7 offence works in practice and the DPA process generally.

# The section 7 offence

Implications for group companies and joint venture arrangements The Standard Bank case confirms that sister companies in a group acting together can be regarded as acting on behalf of each other and with the intention to benefit each other as well as themselves. Given the level of involvement of and reward to Standard Bank in this case (the fee was split 50/50), this finding is hardly surprising.

The decision does, however, raise potential issues for those entering into a joint venture arrangement with a local partner. If the local partner (via its employees or agents) commits bribery intending to secure a contract that benefits the JV business, then a UK-based JV partner could be liable under section 7. The Ministry of Justice guidance on contractual joint ventures states that liability will turn on the degree of control of the organisation over the joint venture arrangement — a question of fact to be decided by the courts on a caseby- case basis. Based on the SFO's analysis in the *Standard Bank* case, if two entities are equal partners in a transaction, albeit with different roles, this may be enough.

#### Adequate procedures

The more surprising findings from the Standard Bank DPA relate to the adequate procedures required in order to put up a defence to a section 7 offence in these types of arrangements where there is often delegation or sharing of compliance responsibilities.

As you would expect from a bank, Standard Bank had detailed policies and procedures in place. However, these were found to be inadequate. Many reasons were given in the Statement of Facts, but essentially the failings related to Standard Bank's delegation of its compliance responsibilities to Stanbic. In order to push the deal through more quickly, the Standard Bank team chose to interpret its procedures in a way that allowed it to rely solely on its sister company to carry out the necessary compliance checks in relation to the local partner. These checks turned out to be completely inadequate. This reliance on an unclear policy, and Standard Bank's consequent failure to spot the obvious red flags inherent in the transaction and ask its own questions, meant its procedures were deemed inadequate.

So, where does this leave companies going forward? Ben Morgan, the SFO's joint head of bribery and corruption, gave guidance on adequate procedures in his speech on 1 December 2015. He emphasised the importance of "a culture in which people are able to spot what is in front of them, and react to it" and that "the effectiveness of an organisation's procedures should be judged by how things manifest themselves in a particular transactional context, not in the abstract. The quality of an organisation's compliance culture isn't defined by how much money it has spent on trying to implement it, or how earnestly people at the top talk about it, but rather by how people at the coalface actually live it". 1

# Securing a DPA

#### Co-operation is key

The Standard Bank DPA, and in particular the approvals of Sir Brian Leveson, confirmed that early self-reporting and genuine co-operation with the SFO are essential if a DPA is to be secured.

httns://www.ashurst.com/en/news-and-insights/legal-undates/hribery-and-committon-

20161121059

Sir Brian Leveson made particular reference to the fact that the Bank's initial disclosure to the SFO was within days of the suspicions coming to the Bank's attention – before its solicitors had commenced, let alone completed, the Bank's own investigation. Crucially, the weight given to an organisation's self-report will depend on the totality of information that an organisation provides to the prosecutor. Standard Bank conducted a detailed internal investigation that had been sanctioned by the SFO and reported its findings. It also gave the SFO access to electronic and documentary evidence and a summary of first accounts of interviewees. As a result, the SFO was able to review the material and conduct its own interviews of those involved, facilitated by Standard Bank.

The SFO has been quick to praise the "innovative approach" of Standard Bank and its advisers in engaging proactively with the SFO, and it hopes that such an approach will become commonplace going forward. In his recent speech, Ben Morgan gave further insight into what the SFO will regard as "full co-operation". He noted that there appear to be two schools of practice – those who choose to genuinely engage with the SFO and those who try to game the system by offering "pseudo-co-operation". Only the former will suffice. He added that "genuine cooperation" involves "prompt reporting, scoping and conducting your own investigation in conjunction with [the SFO's], taking into account [the SFO] interests in doing so and providing access to the kind of material [the SFO] needs to test the quality of evidence gathered and your own conclusions on it". "Pseudoco-operation" on the other hand involves Internal investigations that are kept from the SFO right until the end, and that culminate in a "whitewash" document intended to put the matter to bed before the SFO even looks at it.

The requirement for full co-operation is highlighted when you compare the fates of Standard Bank and Sweett. What is most interesting about the Sweett case is the apparent deterioration of the relationship between the SFO and Sweett following its self-report in July 2014. In a statement published in November 2014, Sweett commented that the SFO no longer viewed the company as co-operative. The sole reason for this seems to be the company's decision, based on legal advice, to continue with its own independent investigation. The SFO took this position, notwithstanding that Sweett publicly stated that it would continue to comply with all reasonable requests made by the SFO, subject to legal professional privilege.

#### Level of judicial scrutiny

The key differentiating factor between the US and UK approach to DPAs is the level of judicial scrutiny. The Standard Bank DPA Illustrates how seriously the courts view their role and how high the court has set the bar in deciding whether a DPA is in the public interest. As both the SFO and the court were keen to emphasise, DPAs are not an easy option.

https://www.ashurst.com/en/news-and-insights/legal-updates/bribery-and-corruption-

Page 6 of 14

#### Level of fine

The other interesting observation in relation to the DPA relates to how the sentencing guidelines will be applied in practice in setting any fine. Despite its early self-reporting and co-operation, the fine imposed on Standard Bank was still placed at the higher end of the scale in recognition of the serious fallings on the part of the Bank to deal with the unethical conduct (as it had received previous warnings from the FCA in relation to its policies) and the substantial harm to the public (as it involved diversion of government funds). A multiplier of 300 per cent was therefore applied to the harm (gross profit generated by the bribe). However, a one-third reduction was made in line with a guilty plea.

In addition, the SFO also conferred with the US authorities to check that the fine was comparable to the fine they would have imposed.<sup>2</sup> It has since been confirmed that this US sense-checking will be the norm going forward.<sup>3</sup>

# Other UK developments

#### No relaxing of the Bribery Act 2010...

In July 2015, it was revealed the UK Government had asked industry leaders to comment on whether the Bribery Act had had an impact on their businesses and whether guidance issued to help business people avoid problems under the Act would be useful. Many interpreted this as the UK Government seeking to water down the Bribery Act in light of the current climate of business deregulations in the UK. However, encouragingly, the entire consultation produced only one notable response of discontent. The consultation therefore confirmed that the Bribery Act was not causing problems for businesses.

...but a potential extension of section 7 offence is still on the cards In 2015, David Green had hoped to finally achieve his goal of removing the key barrier to effective prosecution of corporate crime: the "directing mind" test. Throughout 2014, he had lobbled for an extension to section 7 to create a corporate offence of failing to prevent "economic crime". In December 2014, the UK Government's Anti-Corruption Plan confirmed it would examine the proposal and respond by June 2015. In September 2015, however, the Government announced that the proposed extension of the corporate criminal offence was to be shelved.

The rationale for the reversal was twofold: first, the UK already has corporate criminal liability legislation and commercial organisations could be and were being prosecuted for wrongdoing; and, second, the fact that there had been no prosecutions under section 7 indicated that there was little evidence of corporate economic wrongdoing going unpunished.

https://www.ashurst.com/en/news-and-insights/legal-updates/bribery-and-corruption-...

2016/12/06 /

Page 7 of 14

The second reason prompted many to query whether the Government was simply waiting for the first prosecution under section 7 before committing itself to any reform. Interesting then that on 16 December 2015, the UK's then shadow attorney general, Catherine McKinnell, announced that she had written to her counterpart calling for a "full and transparent" review on corporate criminal liability.5 David Green has also confirmed that he will continue to lobby for change. We therefore continue to watch this space.

#### Government focus

The fight against corruption was also a big focus for the UK Government in 2015. In July, it revealed plans for an Anti-Corruption Summit in 2016 and there has also been discussion of Unexplained Wealth Orders. And, in August 2015, the new International Corruption Unit was launched as the central point for investigating international corruption in the UK. We therefore expect 2016 to bring a significant increase in money laundering and bribery cases, and a higher likelihood of prosecutions of individuals involved in corruption.

#### The future of the SFO

Despite the SFO's recent success, it has been a mixed year for its director, David Green, with many speculating on what would happen at the end of his four-year tenure, and the Home Secretary's plans to roll the SFO into the UK's National Crime Agency (NCA). However, Green has reportedly been approached about extending his contract by another two years. The SFO's future would therefore appear to be secure, at least in the immediate term.

# Regulatory focus on individual rather than corporate liability

Recent years have seen the escalation of corporate fines imposed by the UK and US regulatory and criminal authorities. The LIBOR and Forex scandals alone generated fines in the billions. However, attention appears now to be focused more on the individuals involved in the wrongdoing rather than the corporates. This looks set to continue into 2016.

In August 2015, the joint FCA-PRA final rules on improving individual accountability in the UK banking sector were published. The new accountability regime covers the Senior Managers Regime, the Certification Regime and new Conduct Rules, and it is due to come into force in March 2016. This is supported by the surge in criminal convictions following cases brought by the Financial Conduct Authority. The conviction rate has increased from two in 2014 to 14 in 2015. Martin Wheatley, then FCA Chief Executive, commented that these rules were "the latest changes aimed at embedding personal accountability in the culture of financial services and are a crucial step in rebuilding public trust".

https://www.ashursi.com/en/news-and-insights/legal-updates/bribery-and-corruption-...

This was followed, in September 2015, by the US Department of Justice (DoJ) issuing new policies in relation to individual accountability for corporate wrongdoing. The policies, announced by Deputy Attorney General Sally Yates in the Yates Memorandum, are intended to be adopted as steps taken in any investigation of corporate misconduct.

This shift in focus is not confined to the UK and US. In Hong Kong and China, for example, there were a number of investigations and convictions of highprofile individuals in 2015. These included the former chairman of ABC Communications (Holdings) Limited, and the former Television Broadcasts Limited general manager Stephen Chan Chi-Wan and his former assistant Edthancy Tscng Pei-kun.7 More significant is the ongoing investigation into the final months of former Chief Executive Donald Tsang's office in 2012 for misconduct in public office. Tsang is the highestranking Hong Kong official to be prosecuted for corruption.

It remains to be seen whether these developments will have an impact on the cases the SFO chooses to pursue, particularly where the guidance is already clear that prosecution of a company is no substitute for prosecution of individuals.

# Third-party liability still a concern

Oversight of third parties is still one of the greatest challenges in managing ABC compliance programmes. This is largely because of the growth in the role of these intermediaries in companies' interactions with governments, and the fact that supply chains have become more complex in the context of business globalisation.

Notwithstanding this increased risk, many companies are still not properly assessing and monitoring their intermediaries for anti-bribery and corruption risk. According to a recent survey by KPMG International, of the 73 per cent of companies that confirmed they have a formal risk-based third-party onboarding process, only 45 per cent have rights to audit clauses in their third-party contracts and only slightly more than half (23 per cent of the total) of those exercised these rights. Auditing third parties for ABC compliance ranked as the most challenging ABC issue faced by the respondents.<sup>8</sup>

A separate report by Kroll and Compliance Week reinforced these findings. Roughly half of all compliance officers surveyed expected their bribery and corruption risks to increase in 2016, primarily due to expansion into new markets and engaging more third parties. Only 27 per cent train their third parties at least once a year on anti-bribery and corruption; 24 per cent train third parties less often than that; and 48 per cent never train on anti-bribery and corruption issues. Third-party relationships will therefore continue to be a serious risk and a heavy burden on compliance programmes in 2016.

2/05

Page 9 of 14

The number of investigations and prosecutions concerning bribes paid to or by third parties further highlights the increased risk and fallure by corporates to deal with the issue. Examples include the *Standard Bank* case (a local partner in Africa), the Sweett case (payments to a third party in Dubai), and the US fine agreed with PBSJ Corporation (now known as Atkins North America Holdings Corporation, paying bribes and employing foreign officials to win Qatari Government contracts).

# Implications for companies

#### To self-report or not to self-report?

As the SFO has been at pains to stress, DPAs will only be offered where they are appropriate. The Standard Bank DPA shows that securing a DPA will not be easy given the high level of co-operation and engagement required with the SFO. The level of judicial scrutiny means that there is uncertainty as to whether a DPA will ultimately be approved. Even if a company chooses to self-report, there are no guarantees. The Sweett case is a prime example. That said, the DPA did enable Standard Bank to keep the matter confidential and out of the media until the DPA was announced. Reputational damage was therefore minimised. This alone may prove to be sufficient incentive to engage with the SFO.

Many have suggested that this was a "safe case" to bring, as it clearly satisfied all the DPA criteria and, as such, there remains uncertainty for companies in scenarios where all the criteria are not met. Although the SFO has confirmed that meeting all the criteria is not necessary, it is unclear how much leeway there is. What is clear, however, is that early self-reporting and full co-operation with the SFO will be key to the decision.

Whether companies self-report or are willing to take the risk and see if they can "quietly fix the problem" may depend on whether other agencies or prosecutors have to be notified; for example, where an NCA report is required (as for Standard Bank). If the SFO is going to find out via other channels, prompt self-reporting may be the obvious option.

1

https://www.ashurst.com/en/news-and-insights/legal-updates/bribery-and-corruption-...

Page 10 of 14

# Internal investigations: impact of individual liability

The focus on individual liability going forward raises issues for companies regarding its employees. As noted above, the SFO – and other regulators/prosecutors – seem keen to hold individuals to account. This creates a conflict of interest between a company and its directors, officers and employees. To increase its chances of securing a DPA, a company has to demonstrate genuine co-operation with the SFO. This is likely to involve the handing over of interviews and the names of the individuals involved. Extra caution will therefore be needed if investigations are run in landem with the SFO. The risk of individual liability may also mean employees are more reluctant to assist the company with its investigation, which could hamper a company's ability to investigate alleged bribery offences.

# Internal Investigations: claiming privilege

The level of co-operation required to secure a DPA will require the handing over of a substantial amount of documentation, including documents generated during any internal investigation. The issue of privilege, and over which documents legal privilege applies, will be important. Although the SFO does not require disclosure of documents that are subject to a valid claim of legal privilege, the SFO will challenge any claims to privilege that it considers are not valid. The ongoing case involving Barclays ple is a case in point. In this high-stakes legal battle, the SFO has applied to the Crown Court to decide whether evidence must be turned over as part of the agency's criminal probe into Barclays' £5.8hn emergency cash call at the height of the financial crisis. Private hearings took place in July and December at Southwark Crown Court. The December judgment, if published, should hopefully shed further light on the position.

# Making sure employees can spot and address red flags

As highlighted by the *Standard Bank* case, unless employees are properly alive to the bribery issues that can arise in their business and know-how to deal with them, the best drafted policies will be worthless in

terms of mounting an adequate procedures defence. Another common trend that we continue to experience is the disproportionate attention paid to low-risk areas (e.g. general corporate bospitality) and not enough time and resource spent on the key risks (e.g. agents and intermediaries).

As highlighted by Ben Morgan, what is required is a culture in which employees are able to spot a bribery risk and react appropriately. The effectiveness of an organisation's procedures will ultimately be judged by how things manifest themselves in practice, in other words, how people at the coalface actually live it. Regular, focused and properly targeted training is therefore key, logether with spot-checking to ensure compliance.

1

Page 11 of 14

# UK developments in context: the global fight against corruption

The Global Enforcement Report, published annually by TRACE, highlights that the enforcement of anti-bribery laws remains a priority across the globe. While the US leads the world in total number of investigations and enforcement actions, more and more countries are beginning to take action against companies and individuals who have bribed foreign officials. Non-US enforcement actions have more than doubled in the past few years.

#### Australla

Anti-bribery and corruption continued to be a focus for Australia in 2015. The introduction of new legislative and various Senate Inquiries demonstrate a clear intention to bolster Australian legislative policy in 2016. In particular, the NSW Parliament amended the law to ameliorate the effects of a High Court decision on the Independent Commission Against Corruption, restoring its jurisdiction to investigate collusive tendering for government contracts and fraudulent obtaining of government mining leases. There is also a Senate inquiry regarding the impact of the unavailability of "deferred prosecution agreements" in Australia. In the criminal sphere, there are also reports that a number of anti-bribery and corruption investigations are ongoing in relation to activities in foreign countries. This has led to renewed pressure on the Australian Federal Police to investigate and prosecute foreign bribery offences.

#### The Middle East

Further signs that local governments are making efforts to combat fraud, bribery and corruption can be seen in the Middle East. In Oman, there have been prosecutions relating to corruption in the oil and gas sector, with senior officials from the Al Maha Petroleum Product Marketing Company being jailed in July for embezziement and smuggling subsidised diesel. In November, a special court was set up in Muscat to deal with cases involving financial and administrative corruption. In Abu Dhabi, a new anticorruption unit was established in 2015. The new unit, to be part of the Abu Dhabi Accountability Authority, is tasked with Investigation of financial irregularities and corruption, and identifying gaps in legislation and internal audit regulations. In Jordan, a new draft integrity and anti-corruption bill, providing for the establishment of a national centre to boost integrity and combat corruption, was approved by Cablnet. The draft bill is currently before the Parliament. In Kuwalt, the Constitutional Court annulled, in December, a 2012 law which had established the Kuwait Anti-Corruption Commission. However, a new anticorruption bill has been prepared and the establishment of a new anti-corruption body is planned. It remains to be seen whether such measures will make a difference to corporate business practices in the region.

Page 12 of 14

#### China

China has embarked upon a sweeping anti-corruption campaign under President XI Jinping, which shows no sign of abating. In 2015, the Central Commission for Discipline Inspection (CCDI) inspected more than 71,000 officials and Imposed more than 23,000 penalties. The GlaxoSmithKline case demonstrated that Chinese bribery investigations could have broader implications under the FCPA and the UK Bribery Act. The campaign has also targeted senior military officials and state-owned companies, including former vice public security minister LI Dongsheng, who was sentenced to 15 years in prison for accepting bribes, and ex-oil executive Zhou Yongkan, who was sentenced to 20 years in prison. The People's Liberation Army said earlier this year that 14 generals were convicted of corruption or placed under investigation. In his recent speech at the beginning of a three-day meeting of the CCDI, Xi sald this campaign will not be eased and that he's determined to make China a place where "nobody dares to be corrupt". 10

#### The US

Enforcement activity in 2015 was not of the level seen in 2014, but this should not be taken as a sign that the US has relaxed its stance against bribery and corruption. The DoJ is finalising new guidance detailing the circumstances under which companies would be forced to plead guilty for violations of foreign corruption laws, as well as how to avoid the outcome. Following the publication of the DoJ's corruption guidelines in the Yates Memorandum (see above), we are likely to see an increase in the number of Individuals prosecuted for corporate wrongdoing in 2016.

#### Cross-border co-operation

2015 has also seen an increased level of cross-border co-operation. Examples of this include the *Sweett* case, a cross-border investigation conducted by the DoJ and the SFO in the UAE and elsewhere. Another prominent example is the parallel investigations into the FIFA corruption and bribery scandal in May 2015 undertaken by the DoJ and other international authorities, including in Switzerland. It also is clear that global co-operation between state authorities has increased. For example, the Standard Bank DPA was the result of cross-border co-operation between the SFO and the US DoJ in conjunction with the SEC. In addition to the penalties and disgorgement to be paid as part of the DPA, Standard Bank agreed to pay US\$4.2m to settle SEC charges for failing to disclose the US\$6m in payments by Stanbic in documents and statements provided to investors in connection with the sovereign debt offering.

Notes

<sup>1</sup> See, http://www.sia.gov.uk/about-us/aur-views/atherspeeches/speeches-2015/first-dpa-and-use-af-s7-bribery-act.aspx

https://www.ashurst.com/en/news-and-insights/legal-updates/bribery-and-corruption-

Page 13 of 14

- <sup>2</sup> The DoJ confirmed that the financial penalty is comparable to the penalty that would have been imposed had the matter been dealt with in the US.
- $^3$  The company also faces related scrutiny in the US where the Department of Justice (DoJ) has been in discussion with the company.
- $^{4}$  GIR UK shadow attorney general calls for review of corporate liability, 16 December 2015.
- <sup>5</sup> See: https://www.fca.org.uk/news/fca-publishes-rules-on-how-it-willappiy- the-new-accountability-regime
- <sup>6</sup> HKSAR -v- Chen Jiasang (DCCC 319/2015); HKSAR -v- Chan-Chi Wan and Tseng Pel-Kun (CACC 183/2014); HKSAR -v- Donald Tsang Yam-kuen (ESCC3247/15)
- $^{7} \; \mathsf{See:} \; https://assets.kpmg.com/content/dam/kpmg/pdf/2015/09/antibribery-corruption-2015.pdf$
- B See: https://www.complianceveek.com/system/liles/resources/Kroll-CW%20ABC%20Report%202015.pdf?token=aoa2-4XrHoxv7i LluJJQHTa6BPErVtK1R2wpaEz3EoSexpires=1452709908
- 9 See: http://www.blcomberg.com/news/articlee/2016-01-13/xl-calls-for-achina- in-2016-where-nobody-dares to-be-compt-

Page 14 of 14

# **Key Contacts**



Angela Pearson PARTNER LONDON

 $\bowtie$ 



Lindsey Roberts
SENIOR ASSOCIATE LONDON

 $\square$ 

This publication is not intended to be a comprehensive review of all developments in the law and practice, or to cover all aspects of those referred to. Readers should take legal advice before applying the information contained in this publication to specific issues or transactions.

# IN THE HIGH COURT OF SOUTH AFRICA (GAUTENG DIVISION, PRETORIA)

CASE NO: 80978/16

In the matter between:

MINISTER OF FINANCE

**Applicant** 

and

OAKBAY INVESTMENTS (PTY) LTD

OAKBAY RESOURCES AND ENERGY LTD

SHIVA URANIUM (PTY) LTD

TEGETA EXPLORATION AND RESOURCES (PTY) LTD

(11) 110

JIC MINING SERVICES (PTY) LTD

BLACKEDGE EXPLORATION (PTY) LTD

TNA MEDIA (PTY) LTD

THE NEW AGE

AFRICA NEWS NETWORK (PTY) LTD

VR LASER SERVICES (PTY) LTD

ISLANDSITE INVESTMENTS ONE HUNDRED AND EIGHTY (PTY) LTD

CONFIDENT CONCEPT (PTY) LTD

JET AIRWAYS (INDIA) LTD (INCORPORATED IN INDIA)

SAHARA COMPUTERS (PTY) LTD

First Respondent

Second Respondent

Third Respondent

Fourth Respondent

Fifth Respondent

Sixth Respondent

Seventh Respondent

Eight Respondent

Ninth Respondent

Tenth Respondent

Eleventh Respondent

Twelfth Respondent

Thirteenth Respondent

Fourteenth Respondent

A May

ABSA BANK LTD

Fifteenth Respondent

FIRST NATIONAL BANK LTD

Sixteenth Respondent

STANDARD BANK OF SOUTH AFRICA LIMITED

Seventeenth Respondent

**NEDBANK LTD** 

Eighteenth Respondent

GOVERNOR OF THE SOUTH AFRICAN

Nineteenth Respondent

RESERVE BANK

**REGISTRAR OF BANKS** 

Twentieth Respondent

DIRECTOR OF THE FINANCIAL INTELLIGENCE CENTRE

Twenty-First Respondent

# CONFIRMATORY AFFIDAVIT

I, the undersigned,

# MACHTELD-MARIÉ MATHILDA STRYDOM

do hereby make oath and state -

- I am an adult female and the Divisional Head of Credit Risk, Gauteng at Nedbank Limited, the Eighteenth Respondent in the above application.
- The facts herein contained are within my personal knowledge save where 2 otherwise stated or where the contrary appears from the context, and are both true and correct.
- I have read the answering affidavit deposed to by Michael William Thomas Brown and confirm its contents in so far as they pertain to me.

DEPONENT

I hereby certify that the deponent has acknowledged that she knows and understands the content of this affidavit, which was sworn to and signed before me at <u>Sanction</u> on the <u>911</u> day of December 2016, the regulations contained in Government Notice no. R1258 of 21 July 972, as amended, and Government Notice no. R1648 of 19 August 1977, as amended, having been complied with.

COMMISSIONER OF OATHS

NAME:

ADDRESS:

CAPACITY:

EUGENE BESTER
COMMISSIONER OF OATHS
EX OFFICIO
PRACTISING ATTORNEY RSA
1 PROTEA PLACE, SANDOWN
LONG TO THE PROTES PLACE SANDOWN
TO THE PROTES

A STATE OF THE STA

# IN THE HIGH COURT OF SOUTH AFRICA (GAUTENG DIVISION, PRETORIA)

CASE NO: 80978/16

In the matter between:

MINISTER OF FINANCE

**Applicant** 

and

OAKBAY INVESTMENTS (PTY) LTD

OAKBAY RESOURCES AND ENERGY LTD

SHIVA URANIUM (PTY) LTD

TEGETA EXPLORATION AND RESOURCES

(PTY) LTD

JIC MINING SERVICES (PTY) LTD

BLACKEDGE EXPLORATION (PTY) LTD

TNA MEDIA (PTY) LTD

THE NEW AGE

AFRICA NEWS NETWORK (PTY) LTD

VR LASER SERVICES (PTY) LTD

ISLANDSITE INVESTMENTS ONE HUNDRED AND EIGHTY (PTY) LTD

CONFIDENT CONCEPT (PTY) LTD

JET AIRWAYS (INDIA) LTD (INCORPORATED IN INDIA)

SAHARA COMPUTERS (PTY) LTD

First Respondent

Second Respondent

Third Respondent

Fourth Respondent

Fifth Respondent

Sixth Respondent

Seventh Respondent

Eight Respondent

Ninth Respondent

Tenth Respondent

Eleventh Respondent

Twelfth Respondent

Thirteenth Respondent

Fourteenth Respondent

**ABSA BANK LTD** 

Fifteenth Respondent

FIRST NATIONAL BANK LTD

Sixteenth Respondent

STANDARD BANK OF SOUTH AFRICA

Seventeenth Respondent

LIMITED

**NEDBANK LTD** 

Eighteenth Respondent

GOVERNOR OF THE SOUTH AFRICAN

Nineteenth Respondent

RESERVE BANK

**REGISTRAR OF BANKS** 

Twentieth Respondent

DIRECTOR OF THE FINANCIAL INTELLIGENCE CENTRE

Twenty-First Respondent

# **CONFIRMATORY AFFIDAVIT**

I, the undersigned,

# CIKO JOSHUA THOMAS

do hereby make oath and state

- I am an adult male and the Group Managing Executive: Retail and Business

  Banking of Nedbank Limited, the Eighteenth Respondent in the above application.
- The facts herein contained are within my personal knowledge save where otherwise stated or where the contrary appears from the context, and are both true and correct.

3 I have read the answering affidavit deposed to by Michael William Thomas Brown and confirm its contents in so far as they pertain to me.

CIKO JOSHUA THOMAS

I hereby certify that the deponent has acknowledged that he knows and understands the content of this affidavit, which was sworn to and signed before me at day of December 2016, the regulations contained in Government Notice no. R1258 of 21 July 972, as amended, and Government Notice no. R1648 of 19 August 1977, as amended, having been complied with.

COMMISSIONER OF OATHS

NAME:

ADDRESS:

COMMISSIONER OF OATH:

PRACTISING ATTORNEY RSA 1 PROTEÀ PLACE, SANDOWN

CAPACITY:

1

# IN THE HIGH COURT OF SOUTH AFRICA GAUTENG DIVISION, PRETORIA

Case Number: 80978 / 16

In the matter between

MINISTER OF FINANCE

**Applicant** 

and

**OAKBAY INVESTMENTS (PTY) LTD** 

First Respondent

**OAKBAY RESOURCES AND ENERGY LTD** 

Second Respondent

SHIVA URANIUM (PTY) LTD

Third Respondent

TEGETA EXPLORATION AND RESOURCES (PTY) LTD

Fourth Respondent

JIC MINING SERVICES (PTY) LTD

Fifth Respondent

**BLACKEDGE EXPLORATION (PTY) LTD** 

Sixth Respondent

TNA MEDÍA (PTY) LTD

Seventh Respondent

THE NEW AGE

Eighth Respondent

AFRICA NEWS NETWORK (PTY) LTD

Ninth Respondent

	/
VR LASER SERVICES (PTY) LTD	Tenth Respondent
ISLANDSITE INVESTMENTS ONE HUNDRED AND EIGHT (PTY) LTD	Eleventh Respondent
CONFIDENT CONCEPT (PTY) LTD	Twelfth Respondent
JET AIRWAYS (INDIA) LTD (INCORORATED IN INDIA)	Thirteenth Respondent
SAHARA COMPUTERS (PTY) LTD	Fourteenth Respondent
ABSA BANK LTD	Fifteenth Respondent
FIRST NATIONAL BANK LTD	Sixteenth Respondent
STANDARD BANK OF SOUTH AFRICA LIMITED	Seventeenth Respondent
NEDBANK LIMITED	Eighteenth Respondent
GOVERNOR OF THE SOUTH AFRICAN RESERVE BANK	Nineteenth Respondent
REGISTRAR OF BANKS	Twentieth Respondent
DIRECTOR OF THE FINANCIAL INTELLIGENCE CENTRE	Twenty-First Respondent

NINETEENTH RESPONDENT'S AFFIDAVIT

I, the undersigned,

#### **LESETJA KGANYAGO**

do hereby make oath and say:

- I am the Governor of the South Africa Reserve Bank ("the Reserve Bank"), the nineteenth respondent in this application. I was appointed as the Governor with effect from 9 November 2014 in terms of section 4(1)(a) of the South African Reserve Bank Act 90 of 1989 ("the SARB Act").
- 2 I am authorised to depose to this affidavit on behalf of the Reserve Bank.
- The facts to which I depose are within my personal knowledge except where it is apparent from the context that they are not.
- The submissions of law I make in this affidavit are made on the advice of the Reserve Bank's lawyers.
- I have read the founding papers filed on behalf of the applicant the Minister of Finance. I have also read the affidavit of the Registrar of Banks, the twentieth respondent, ("the Registrar") that will be filed together with this affidavit and I confirm its contents in so far as they relate to me.

I abide the decision of the court in this matter. I wish, however, to place certain facts before the court that are relevant to the application.

### The powers of the Reserve Bank

Fed to

- The primary object of the South African Reserve Bank is to protect the value of the currency in the interest of balanced and sustainable economic growth.

  This is reflected in sections 224(1) of the Constitution and section 3 of the South African Reserve Bank Act 90 of 1989.
- In terms of section 224(2) of the Constitution, the Reserve Bank must, in pursuit of this object, perform its functions independently and without fear, favour or prejudice. This means the Reserve Bank must act independently, and must be seen to act independently, of all external influences, including those of private parties and the government. The independence of the Reserve Bank is fundamental to the execution of its primary object and to promote financial stability and investor confidence in the country.
- There is no provision of law that entitles the Reserve Bank to interfere in the relationship between banks and their clients.

#### The April Oakbay letters

In April 2016, I, like the Minister, received a letter from Mr Howa of Oakbay asking me to intervene with the banks that had closed Oakbay accounts. Mr



Howa complained that since the "unexplained decision of a number of banks, and of [their] auditors, to cease working with us, and of continued press coverage of unsubstantiated and false allegations against the Gupta family, it has become virtually impossible to continue to do business in South Africa".

- He claimed that this was the result of "an anti-competitive and politically motivated campaign to marginalise [their] business". He said that Oakbay had received "no justification whatsoever" for why ABSA, FNB, Sasfin, Standard Bank and Nedbank had decided to close its business accounts.
- Mr Howa asked for my help "to end the deadly stranglehold" that the banks had placed on the Oakbay business. He implied that because the Reserve Bank had the ultimate responsibility to regulate the financial sector, it should intervene with the banks. I attach a copy of the letter marked "SARB1".
- Mr Howa is wrong. The Reserve Bank's regulation of the financial sector does not extend to the relationships between banks and their clients. I explained this to him in a letter on 22 April 2016. I attach a copy of my reply marked "SARB2".
- I said that the Reserve Bank does not have the legal authority to instruct a bank to serve a client or not to serve a particular client.



- 15 I pointed out that the law makes provision for customers to lodge grievances with the Banking Ombud and I suggested that he raise his concerns with this body or approach the courts for relief.
- To the best of my knowledge, none of the Oakbay companies has utilised these remedies available to them.

#### My April letter to the Minister

- On 26 April 2016, after there were reports that Cabinet had appointed a subcommittee of ministers to engage with the banks about the closures of the Oakbay accounts, I wrote to the Minister. My letter is referred to in paragraph 20 of the founding affidavit and is attached as annexure J.
- I said I was concerned that the appointment of this subcommittee could be viewed as undue political interference with the operation of the banks. Any such interference, or even the perception of such interference, could introduce heightened levels of uncertainty and pose a risk to South Africa's financial stability.
- 19 I emphasised that the proper channels to deal with the Oakbay grievances existed in the regulatory scheme. The Oakbay companies could approach the Banking Ombud or the courts if their accounts had been unfairly terminated. This approach would enhance the credibility of our institutional and regulatory environment, public trust and investor confidence.

#### The October Oakbay letters

- On 5 October 2016, I received a further letter from Mr Howa. The letter ignored the point I made in my April letter that I had no power to intervene in the contractual relationships between banks and their customers. This time, Mr Howa asked for my assistance because some of the smaller banks that had opened bank accounts with the Oakbay companies were facing "difficulties" from "various quarters". He requested a meeting with me to discuss Oakbay's challenges. I attach a copy of this letter marked "SARB3".
- 21 I responded on 13 October 2016. I attach a copy of this letter as "SARB4".
- I emphasised the critical importance of the independence of the Reserve

  Bank and its obligation to maintain the confidentiality of its dealings with the banks it regulates.
- I said that I understood his request to have been made on behalf of "smaller banks" which were being hampered in their ability to provide financial services to the Oakbay companies. I said I found it strange that these smaller banks had not engaged directly with the Reserve Bank as their regulator if they felt that their provision of financial services was being impeded.
- I also emphasised that the Reserve Bank could not discuss any internal affairs of the banks with a third party, unless specifically authorised to do so





by the banks concerned. I said that I was willing to meet with members of the public if the circumstances required it and therefore sought more information from Mr Howa about his complaint in order to determine whether a meeting was warranted.

- I asked him for information about the banks that had closed the Oakbay accounts together with copies of any reasons that they had provided for these terminations. I requested copies of mandates from the "smaller banks" authorising him to represent them and to discuss their internal affairs. Finally, I asked for full details about the difficulties that these smaller banks were experiencing and the reasons for them.
- 26 I have never received a response to this letter.

#### Conclusion

- The Oakbay companies have on two occasions sought my assistance to intervene in their contractual relationships with banks. I have told them that I have no power to do so and that they have readily available remedies to correct any unfairness done to them. Instead of using these remedies, they have continued to seek alternate forms of intervention and influence.
- The Reserve Bank has a constitutional duty to act independently. It cannot be influenced, or even be seen to be influenced, by private or political pressure in exercising its powers in terms of the constitution and relevant laws. The





1707

stability of the financial system depends on this independence. The role that the Oakbay companies have asked me to play in relation to their bank accounts is inconsistent with that independence and threatens the country's financial stability.

LESETJA KGANYAGO

I hereby certify that the deponent knows and understands the contents of this affidavit and that it is to the best of his knowledge both true and correct. This affidavit was signed and sworn to before me at \( \frac{12 \text{Colored}}{12 \text{Colored}} \) on this the \( \frac{10}{10} \) day \( \frac{12 \text{Colored}}{12 \text{Colored}} \) on this the \( \frac{10}{10} \) day of \( \frac{12 \text{Colored}}{12 \text{Colored}} \) and that the Regulations contained in Government Notice R.1258 of 21 July 1972, as amended, and Government Notice No R1648 of 19 August 1977, as amended, having been complied with.

**COMMISSIONER OF OATHS** 

Full names:

Address:

Capacity:

HANS DIMPANYANA RAMMUTL.
Charter House, Pretoria
COMMISSIONER OF OATHS
Practising Attorney, RSA

14/64 SOLF PHO GLAC BOX

7

2101/003

OAKBAY

Onwann's Office Santh Affirm Raser's Back 370 Belen Joseph Streat Pretoria 5002

14<sup>th</sup> April 2016

Describ BL Kganyago,

re 1,400 potential job losses at daugay investmènte & dur portrelo companies

I wasted to take this apportantly to provide you with advance vaming that Orthry involvement and our particular communics may usen be insuring rigalizated job insure.

Following the mempirimed decision of a number of banks, and of our suddons, to come working with us, and of conditied press coverage of membersalisted and filter allegations agricust the Chapta filmity, it has become virtually impossible to continue to do business in Seath Affice.

We believe that this is the renti of an anti-compelitive and politically unorivoid compalys designed in marginalise our businessas. We have received an justification wholesever to expisio why ABNA, FIND, Banile, Bussierd Buck and new National beard action of ceises our fractions accepted. EFIAC flarmanyes said fast there was no stall transmit on and their work with tw.

Oskbey has a 23 year twelk record of straing hashness performance and turnscround skills in a number of acctors. Our ability in its a distriptor in som sectors, whallanging the dominant businesses and global players in Apith Ahim, is the source of vernicesse,

Between 2012 and 2015, 47,000 Jobs have here lost to Routh Africa's valuing seater. In fact, since 2015, the top three mining normanies in Seath Africa here readed prove them (5,000 people relandant. In contrast, we have received 3,500 Jobs in subley. Our acquisition of Copinson from Clescove-sizes prevented a Republisher that would have seen more than 3,000 South African scheing jobs lost.

All of these jobs arrayow at risk.

With our brok accounts closed, we are currently useble to pay many of its salasian of our nore than 4,500 comployees. We find it labelly meansquishe that the tens of the stored of their dependences would have to notice as a result of the cumpaign against Oakhay sed the Ungia Eurily.

Therefore the Crepin facilly have come to the conclusion flui it is time to reliminate control of Onkhoy investments and have steeped down from all executive and non-custofive positions and any involvement in the day-to-day remains of the business.

A)

12

14/66 BB1C MMQ 6137 2AX

D141/172

 $\theta y$  daing  $m_{\rm c}$  they hope to end the political cample ign against Oublity.

As the CES innowings to staw a line under the corporate builting had end-compelling pressing use have head from the banks. The Beethoods of too easy people are at his should our best account runnin closed.

I hope that you appreciate my tondoor and can see that we are daing everything the cost to save themesees of south African lake.

We are saiding year halp as Governor of the Massave Bank With the responsibility to regulate the flavorial extincts and the Smithystrangick and this banks have pixed on our law businesses. If you have any questions, please do not be distinct to combact rose.

Yours should

/4ora

Nazoera Hores CEO, Dalhard marthmanis

A)



Mr N Howa Chief Executive Officer Oakbay Investments (PTY) LTD 144 Katherine Street Sandton 2031

Dear Mr Howa

### POTENTIAL JOB LOSSES AT OAKBAY INVESTMENTS AND ITS PORTFOLIO COMPANIES

Thank you for letter of 14 April 2016. I have taken note of the contents of your letter.

The South African Reserve Bank and the Office of the Registrar of Banks regulates commercial banks in terms of the Banks Act, 1990. Our regulatory powers are also derived from other financial sector laws.

The Reserve Bank and the Registrar of Banks do not have the legal authority to instruct a bank to serve a client or not to serve a particular client. The relationship between a bank and its customers is governed by consensual contract which falls outside of our legal ambit.

The law makes provision for customers to lodge grievances with the Banking Ombud. We suggest you raise your concerns with this body or approach the courts for relief.

Yours sincerely

Lesetja Kganyago

Governor

Date: 22 APR 2016

## SARB3'



1711

5 October 2016

Lesetja Kganyago Governor South Africa Reserve Bank Pretoria

Dear Governor

You will recall my earlier letter to you and your response dated April 22, 2016 around the closure of our banking facilities.

I write to you today to ask for assistance around claims from some of the smaller banks about the difficulty they are facing from various quarters due to their opening accounts with ourselves. You will understand the concomitant pressures these placed on our ability to conduct our day-to-day transactions.

I am sure you will support the principle of all South Africans having access to banking and would therefore assist us in removing obstacles to us continuing to run our business and to maintain and grow the 7 991 work opportunities we have in our business.

I look forward to hearing from you about a time in your diary for us to meet and discuss our challenges.

Yours sincerely

Nazeem Howa Chief Executive

CC: Public Protector

89 Gazelle Avenue, Corporate Park South, Old Pretoria Main Road, Midrand Johannesburg, South Africa
Postal Address: Private Bag X 180, Halfway House, 1685, Johannesburg, South Africa
Tel.: +27 11 542 1000 Fax: +27 11 542 1100 www.oakbay.co.za

SARB4'



File ref. no.: 9/1/11

Mr Nazeem Howa Chief Executive Oakbay Investments Private Bag X180 Halfway House Johannesburg 1685

Dear Sir

**RE: REQUEST FOR A MEETING** 

Your letter dated 5 October 2016 refers.

The South African Reserve Bank ("SARB") is a creature of statute in terms of the Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996), read with the South African Reserve Bank Act, 1989 (Act No. 90 of 1989), which functions independently as the central bank of the Republic of South Africa ("RSA"). In its capacity as the central bank, the SARB conducts its business in accordance with relevant policies of government, of which improved access to financial services for all constitutes but one.

In this regard, the SARB (through its Bank Supervision Department) serves its stakeholders, inter alia, by regulating and supervising all the banks operating in the RSA with the strategic focus of enhancing their safety, soundness and integrity. The Banks Act, 1990 (Act No. 94 of 1990 — "Banks Act"), predominantly provides the regulatory structure for such supervision and provides for various related matters, such as the legal relationship between banks and the SARB and the flow of information between the parties. It forms an important basis for the unique relationship that exists between the banks and the SARB as their central bank. Moreover, with regard to the information of the clients of banks, it is regarded of importance to emphasise that the maintenance of confidentiality in respect of information pertaining to their clients, remains one of the internationally recognised comerstones of banking. In this vein, banks in the RSA may in terms of the said unique relationship between banks and their central banks be regarded as clients of the SARB.

In the second paragraph of your letter you mention that you are seeking assistance: "...around claims from some of the smaller banks about the difficulty they are facing from various quarters due to their opening accounts with [your] selves." On the face of it, it creates the impression that some small banks are claiming to be unjustifiably impeded from providing financial services to you, and that you have been mandated, on their behalf, to raise the matter with me and/or the SARB.

In the circumstances, having regard to the aforesaid unique relationship in existence between all the banks in the RSA and the SARB, it appears strange that the alleged banks involved do not raise their issues directly with the SARB (as their regulator and supervisor), but rather elect to mandate a client of theirs/third person from the general public to deal with the matter on their behalf. Whatever the case may be, neither the SARB nor I would be in any position to discuss the internal affairs of any of the banks in question with you or any unrelated third party from the general public in their absence, unless they provide us with explicit authority in respect of the same. Nevertheless, I am not averse to meeting with anyone from the general public if the circumstances dictate the need for, and efficacy of such a meeting. In order for this Office to duly consider your request for a meeting, it would in the light of the above be appreciated if you could provide me with the following information:

- (1) The names of the banks involved and the reasons given by them for closing your accounts (supported by their official correspondence to you stating the reasons);
- (2) the full names and duly completed mandates of the smaller banks allegedly experiencing difficulties in opening accounts for you, authorising you to represent them and to discuss their internal affairs at the meeting envisaged with me;
- (3) full details, including all the relevant documentation of yourself and the banks, setting out the alleged difficulties as well as the reasons underpinning them.

Your kind cooperation and assistance in the matter will be appreciated.

Yours sincerely

Lesetja Kganyago

Governor

Date: 13 OCT 2016

20th Rig/Rails AA

#### IN THE HIGH COURT OF SOUTH AFRICA

#### **GAUTENG DIVISION, PRETORIA**

**CASE NO. 80978/16** 

In the matter between:  NATIONAL TREASURY  RECEIVED  MINISTER OF FINANCE  2016 -12- 2 2  and  LEGAL SERVICES	Applicant
OAKBAY INVESTMENTS (PTY) LTD	1 <sup>ST</sup> Respondent
OAKBAY RESOURCES AND ENERGY LTD	2 <sup>ND</sup> Respondent
SHIVA URANIUM (PTY) LTD	.3 <sup>RD</sup> Respondent
TEGETA EXPLORATION AND RESOURCES (PTY) LTD	4 <sup>TH</sup> Respondent
JIC MINING SERVICES (PTY) LTD	5 <sup>TH</sup> Respondent
BLACKEDGE EXPLORATION (PTY) LTD	6 <sup>TH</sup> Respondent
TNA MEDIA (PTY) LTD	7 <sup>TH</sup> Respondent
THE NEW AGE	8 <sup>TH</sup> Respondent
AFRICA NEWS NETWORK (PTY) LTD	9 <sup>TH</sup> Respondent
VR LASER SERVICES (PTY) LTD	10 <sup>™</sup> Respondent
ISLANDSITE INVESTMENTS ONE HUNDRED AND EIGHT (PTY) LTD	11 <sup>TH</sup> Respondent
CONFIDENT CONCEPT (PTY) LTD	12 <sup>TH</sup> Respondent
JET AIRWAYS (INDIA) LTD (INCORPORATED IN INDIA)	13 <sup>TH</sup> Respondent
SAHARA COMPUTERS (PTY) LTD	14 <sup>TH</sup> Respondent
ABSA BANK LIMITED	15 <sup>TH</sup> Respondent
FIRST NATIONAL BANK LTD	16 <sup>TH</sup> Respondent

17<sup>TH</sup> Respondent STANDARD BANK OF SOUTH AFRICA LIMITED **NEDBANK LIMITED** 18<sup>TH</sup> Respondent **GOVERNOR OF THE SOUTH AFRICAN RESERVE BANK** 19<sup>TH</sup> Respondent 20<sup>TH</sup> Respondent **REGISTRAR OF BANKS** DIRECTOR OF THE FINANCIAL INTELLIGENCE CENTRE 21<sup>ST</sup> Respondent

FILING NOTICE

PRESENTED FOR SERVICE AND FILING:

20<sup>TH</sup> RESPONDENT'S ANSWERING AFFIDAVIT

DATED at JOHANNESBURG on this the 22<sup>nd</sup> day of December 2016

WERKSMANS ATTORNEYS
19<sup>TH</sup> and 20<sup>TH</sup> Respondents' Attorneys

155 - 5th Street Sandown, Sandton

Tel: (011) 535 8145

Email: cmanaka@werksmans.com cmoraitis@werksmans.com

Ref: Mr C Manaka / Mr C Moraitis

Ref: SOUT 3267.63

C/O MABUELA INCORPORATED Charter House, 179 Bosman Street

Pretoria Central

Pretoria

Tel: 012 3253966

Email: mabuela@tiscali.co.za

TO: THE REGISTRAR OF THE ABOVE HONOURABLE COURT **PRETORIA** 

AND TO:

STATE ATTORNEY

Attorneys for the Applicant

SALU Building

255 Francis Baard Street

Pretoria

Tel: 012 309 1575 Fax: 012 309 1649

Email: TNhlanzi@justice.gov.za

Ref: Ms T NHLANZI Ref: 2476/16/Z32

SERVICE BY EMAIL

AND TO:

**VAN DER MERWE & ASSOCIATES** 

Attorneys for 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 10<sup>th</sup>, 11<sup>th</sup>, 12<sup>th</sup> and 14<sup>th</sup> Respondents

62 Rigel Avenue North

WATERKLOOF

Pretoria

Ref: Mr GT VD Merwe / st / 078

Tel: 012 343 5432 Fax: 012 343 5435

Email: simone@vdmass.co.za

SERVICE BY EMAIL

AND TO:

**EDWARD NATHAN SONNENBERGS** 

Attorneys for the 15<sup>th</sup> Respondent

150 West Street

Sandton

Email: dlambert@ensafrica.com

SERVICE BY EMAIL

AND TO:

**NORTON ROSE FULBRIGHT** 

Attorneys for the 16<sup>th</sup> Respondent

34 Fredman Drive

Sandton

Email: aslam.moosajee@nortonrosefulbright.com

SERVICE BY EMAIL

AND TO:

**BOWMAN GILFILLAN INC.** 

Attorneys for the 17th Respondent

165 West Street

Sandton

Email: clement.mkiva@bowmanslaw.com

alan.keep@bowmanslaw.com

SERVICE BY EMAIL

#### AND TO:

BAKER & McKENZIE ATTORNEYS Attorneys for the 18<sup>th</sup> Respondent Tel: 011 911 4300

Email: Gerhard.Rudolph@bakermckenzie.com

Widaad.Ebrahlm@bakermckenzie.com

Callum.Oconnor@bakermckenzie.com

#### c/o ADAMS & ADAMS

Adams & Adams Place

Lynnwood Bridge

4 Daventry Street

Lynnwood Manor

Pretoria

Tel: 012 432 6000

Ref: Adele Jordaan

#### SERVICE BY EMAIL

#### AND TO:

#### **MACROBERT ATTORNEYS**

Attorneys for the 21<sup>st</sup> Respondent

MacRobert Building

Corner Jan Shoba and Justice Mohamed Streets

**PRETORIA** 

Tel: 012 425 3436

Email: ghay@macrobert.co.za

Ref. G K Hay

SERVICE BY EMAIL

# IN THE HIGH COURT OF SOUTH AFRICA GAUTENG DIVISION, PRETORIA

CASE NO. 80978/16

In the matter between:

MINISTER OF FINANCE	Applicant
and	
OAKBAY INVESTMENTS (PTY) LTD	1 <sup>ST</sup> Respondent
OAKBAY RESOURCES AND ENERGY LTD	2 <sup>ND</sup> Respondent
SHIVA URANIUM (PTY) LTD	3 <sup>RD</sup> Respondent
TEGETA EXPLORATION AND RESOURCES (PTY) LTD	4 <sup>TH</sup> Respondent
JIC MINING SERVICES (PTY) LTD	5 <sup>TH</sup> Respondent
BLACKEDGE EXPLORATION (PTY) LTD	6 <sup>TH</sup> Respondent
TNA MEDIA (PTY) LTD	7 <sup>TH</sup> Respondent
THE NEW AGE	8 <sup>TH</sup> Respondent
AFRICA NEWS NETWORK (PTY) LTD	9 <sup>TH</sup> Respondent
VR LASER SERVICES (PTY) LTD	10 <sup>™</sup> Respondent
ISLANDSITE INVESTMENTS ONE HUNDRED AND EIGHT (PTY) LTD	11 <sup>™</sup> Respondent
CONFIDENT CONCEPT (PTY) LTD	12 <sup>TH</sup> Respondent
JET AIRWAYS (INDIA) LTD (INCORPORATED IN INDIA)	13 <sup>TH</sup> Respondent
SAHARA COMPUTERS (PTY) LTD	14 <sup>TH</sup> Respondent
ABSA BANK LIMITED	15 <sup>TH</sup> Respondent
FIRST NATIONAL BANK LTD	16 <sup>TH</sup> Respondent

STANDARD BANK OF SOUTH AFRICA LIMITED

17<sup>TH</sup> Respondent

18<sup>TH</sup> Respondent

GOVERNOR OF THE SOUTH AFRICAN RESERVE BANK

19<sup>TH</sup> Respondent

REGISTRAR OF BANKS

20<sup>TH</sup> Respondent

DIRECTOR OF THE FINANCIAL INTELLIGENCE CENTRE

21<sup>ST</sup> Respondent

FILING NOTICE

PRESENTED FOR SERVICE AND FILING:

#### 20<sup>TH</sup> RESPONDENT'S ANSWERING AFFIDAVIT

DATED at JOHANNESBURG on this the 22<sup>nd</sup> day of December 2016

WERKSMANS ATTORNEYS

19<sup>TH</sup> and 20<sup>TH</sup> Respondents' Attorneys
155 - 5th Street
Sandown, Sandton

Tel: (011) 535 8145

Email: cmanaka@werksmans.com cmoraitis@werksmans.com

Ref: Mr C Manaka / Mr C Moraitis

Ref: SOUT 3267,63

C/O MABUELA INCORPORATED Charter House, 179 Bosman Street

Pretoria Central

Pretoria

Tel: 012 3253966

Email: mabuela@tiscali.co.za

TO: THE REGISTRAR OF THE ABOVE HONOURABLE COURT PRETORIA AND TO:

STATE ATTORNEY

Attorneys for the Applicant

SALU Building

255 Francis Baard Street

Pretoria

Tel: 012 309 1575 Fax: 012 309 1649

Email: TNhlanzi@justice.gov.za

Ref: Ms T NHLANZI Ref: 2476/16/Z32

AND TO:

VAN DER MERWE & ASSOCIATES
Attorneys for 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>,
7<sup>th</sup>, 10<sup>th</sup>, 11<sup>th</sup>, 12<sup>th</sup> and 14<sup>th</sup> Respondents 62 Rigel Avenue North

WATERKLOOF

Pretoria

Ref: Mr GT VD Merwe / st / O78

Tel: 012 343 5432 Fax: 012 343 5435

Email: simone@vdmass.co.za

AND TO:

**EDWARD NATHAN SONNENBERGS** 

Attorneys for the 15<sup>th</sup> Respondent

150 West Street

Sandton

Email: dlambert@ensafrica.com

AND TO:

NORTON ROSE FULBRIGHT

Attorneys for the 16th Respondent

34 Fredman Drive

Sandton

Email: aslam.moosajee@nortonrosefulbright.com

AND TO:

**BOWMAN GILFILLAN INC.** 

Attorneys for the 17th Respondent 165 West Street

Sandton

Email: clement.mkiva@bowmanslaw.com alan.keep@bowmanslaw.com

AND TO:

BAKER & McKENZIE ATTORNEYS Attorneys for the 18<sup>th</sup> Respondent Tel: 011 911 4300

Email: Gerhard.Rudolph@bakermckenzie.com Widaad.Ebrahim@bakermckenzie.com

Callum.Oconnor@bakermckenzie.com

c/o ADAMS & ADAMS

Adams & Adams Place

Lynnwood Bridge

4 Daventry Street

Lynnwood Manor

Pretoria

Tel: 012 432 6000 Ref: Adele Jordaan

AND TO:

**MACROBERT ATTORNEYS** 

Attorneys for the 21<sup>st</sup> Respondent

MacRobert Building

Corner Jan Shoba and Justice Mohamed Streets

**PRETORIA** 

Tel: 012 425 3436

Email: ghay@macrobert.co.za

Ref: G K Hay

# IN THE HIGH COURT OF SOUTH AFRICA GAUTENG DIVISION, PRETORIA

Case Number: 80978 / 16

In the matter between

**MINISTER OF FINANCE** 

**Applicant** 

And

**OAKBAY INVESTMENTS (PTY) LTD** 

First Respondent

**OAKBAY RESOURCES AND ENERGY LTD** 

Second Respondent

SHIVA URANIUM (PTY) LTD

Third Respondent

TEGETA EXPLORATION AND RESOURCES (PTY) LTD

Fourth Respondent

JIC MINING SERVICES (PTY) LTD

Fifth Respondent

**BLACKEDGE EXPLORATION (PTY) LTD** 

Sixth Respondent

TNA MEDIA (PTY) LTD

Seventh Respondent

THE NEW AGE

Eighth Respondent

AFRICA NEWS NETWORK (PTY) LTD

Ninth Respondent

VR LASER SERVICES (PTY) LTD	Tenth Respondent	
ISLANDSITE INVESTMENTS ONE HUNDRED AND EIGHT (PTY) LTD	Eleventh Respondent	
CONFIDENT CONCEPT (PTY) LTD	Twelfth Respondent	
JET AIRWAYS (INDIA) LTD (INCORORATED IN INDIA)	Thirteenth Respondent	
SAHARA COMPUTERS (PTY) LTD	Fourteenth Respondent	
ABSA BANK LTD	Fifteenth Respondent	
FIRST NATIONAL BANK LTD	Sixteenth Respondent	
STANDARD BANK OF SOUTH AFRICA LIMITED	Seventeenth Respondent	
NEDBANK LIMITED	Eighteenth Respondent	
GOVERNOR OF THE SOUTH AFRICAN RESERVE BANK	Nineteenth Respondent	
REGISTRAR OF BANKS	Twentieth Respondent	
DIRECTOR OF THE FINANCIAL INTELLIGENCE CENTRE	Twenty-First Respondent	
TWENTIETH RESPONDENT'S AFFIDAVIT		



I, the undersigned,

#### **KUBEN NAJDOO**

do hereby make oath and say:

- I am the Registrar of Banks in the Office for Banks in the South Africa Reserve Bank. I was appointed the Registrar of Banks in terms of section 4, read with section 3 of the Banks Act 94 of 1990. I am also the Deputy Governor of the South African Reserve Bank. I was appointed as such in terms of section 4(1)(a) of the South African Reserve Bank Act 90 of 1989. I am the twentieth respondent in this application.
- The facts to which I depose are within my personal knowledge except where it is apparent from the context that they are not.
- The submissions of law I make in this affidavit are made on the advice of my lawyers.
- 4 I have read the founding papers filed on behalf of the applicant the Minister of Finance. I have also read the affidavit of the Governor of the South African Reserve Bank, the nineteenth respondent, and confirm its contents in so far as they relate to me.



I abide the decision of the court. I wish, however, to place certain facts before the court that are relevant to the application and to describe the applicable regulatory environment.

#### **DOMESTIC REGULATION**

- The Banks Act provides the primary framework for the regulation and supervision of the business of banks. In my capacity as the Registrar, I am tasked with the administration of the Banks Act. The extent of my authority is set out in, among others, sections 3 to 8 of the Banks Act.
- My supervisory authority as contemplated in the Banks Act and other relevant financial sector legislation does not extend to the supervision and regulation of contractual relationships between banks and their clients. The Registrar is not empowered to intervene in disputes between a bank and its client, and in particular, there is no basis to interfere with a bank's decision to terminate a banking relationship with any client.
- Section 29 of the Financial Intelligence Centre Act 38 of 2001 places an obligation on accountable institutions to report any suspicious or unusual transactions to the Financial Intelligence Centre as prescribed. Banks are accountable institutions under FICA. When these reports are made, section 34 of FICA empowers the Centre to investigate the transactions and, where appropriate, direct the accountable institutions not to proceed with the

S VM

transaction and inform the National Director of Public Prosecutions about the transaction.

- 9 Under section 45(1) of FICA, the South African Reserve Bank, the Registrar of Banks and other supervisory authorities listed in Schedule 2 to the Act have the responsibility to ensure that accountable institutions comply with their obligations under the Act, including the obligation to report suspicious or unusual transactions. Section 45C empowers the Reserve Bank and the Registrar of Banks to issue administrative sanctions on any bank or any other person within the bank to whom FICA applies, when that the bank or person has failed to comply with the provisions of FICA or any order, determination or directive made in terms of the Act.
- 10 Currently, FICA does not require banks to have internal controls to manage relationships with politically exposed persons ("PEPs"). However, the Financial Intelligence Centre Amendment Bill will require banks to conduct enhanced due diligence when entering into a business relationship with a PEP, as well as known associates and family members of the PEP.
- Although both houses of Parliament approved the FIC Amendment Bill, on 28

  November 2016, the President referred the Bill back to the National Assembly for reconsideration because clause 32 of the Amendment Bill will provide for warrantless searches when inspections are done under section 45B of FICA.



- 6
- 12 Ironically, the current version of FICA provides that all inspections under section 45B of FICA will take place without a warrant. The Bill, by contrast, introduces the requirement that searches must be undertaken with a warrant and only in exceptional circumstances, will warrantless searches be permitted.
- The President's referral sets the country back in fulfilling its international obligations to the Financial Action Task Force. I deal with the role of FAFT in more detail below when I discuss the transnational regulatory environment. However, the point for present purposes is that South Africa's failure to bring the FIC Amendment Bill into operation will likely result in a negative statement from FAFT that our country's framework for addressing money-laundering and combatting the financing of terrorism does not meet international standards. The statement will require other FAFT member countries to re-evaluate the risks of dealing with South African financial institutions given their non-adherence to the required international standards.
- This re-evaluation may result in foreign banks cutting off their correspondent banking relationships with South African banks. This would have a negative impact not only on the ability of South African banks to conduct cross border financial transactions but also undermine the ability of South African corporates to do business with the rest of the world.

TRANSNATIONAL REGULATION

AM

In addition to ensuring compliance with domestic laws governing suspicious or unusual transactions, the Bank Supervision Department in the Office of the Registrar of Banks enforces international standards and imposes additional obligations on banks to combat money laundering and the financing of terrorism. It does so in compliance with a series of obligations derived from international instruments.

#### FATF Recommendations

- The Financial Action Task Force (FATF), an inter-governmental body established in 1989 by the ministers of its member jurisdictions, sets standards and promotes effective implementation of legal, regulatory and operational measures for combating money laundering, terrorist financing and other related threats to the integrity of the international financial system.

  Currently FATF comprises of 35 member jurisdictions and 2 regional organisations, representing most major financial centres in all parts of the globe. South Africa's major trading partners as well as fellow BRICS members are all members of FATF. South Africa is the only African country that is a member.
- 17 FATF recommendation 26 requires member countries to ensure that financial institutions are subject to adequate regulation and supervision and effectively implement the FATF recommendations.



- FATF recommendations 12 and 22 require countries to ensure that financial institutions and designated non-financial business and professions implement measures to prevent the misuse of the financial system and non-financial businesses and professions by PEPs, and to detect such potential abuse if and when it occurs.
- 19. FATF recommendation 12, which applies to financial institutions, requires countries to implement measures requiring financial institutions to have appropriate risk management systems in place to determine whether customers or beneficial owners are foreign PEPs, or related or connected to a foreign PEP, and, if so, to take additional measures beyond performing normal customer due diligence to determine if and when they are doing business with them. In order to assist the countries and the financial institutions, the FATF, in June 2003, issued a Guidance Paper on PEPs which, amongst others, details the scope of recommendation 12 and the measures applicable to different types of PEPs.
- FATF recommendation 27 requires supervisors to have adequate powers to supervise or monitor, and ensure compliance by, financial institutions with requirements to combat money laundering and terrorist financing, including the authority to conduct inspections. The supervisors are required to be authorised to compel production of any information from financial institutions that is relevant to monitoring such compliance, and to impose sanctions, in line with FATF recommendation 35, for failure to comply with such



requirements. The sanctions may include withdrawing, restricting or suspending the financial institution's licence.

A copy of the FATF recommendations and the Guidance Paper on PEPs are attached as "RB1" and "RB2" respectively.

#### Basel Core Principles

- The South African Reserve Bank is a member of the Bank for International Settlements (BIS), the world's oldest international financial organisation established in 1930 and headquartered in Basel, Switzerland. The BIS has 60 member central banks, representing countries from around the world that together make up about 95% of world's gross domestic product (GDP).
- The mission of the BIS is to serve central banks in their pursuit of monetary and financial stability, to foster international cooperation in those areas, and to act as a bank for central banks. The BIS promotes international cooperation among monetary authorities and financial supervisory officials through its meetings programmes and through the Basel Process hosting and supporting international committees and standard-setting bodies and facilitating their interaction.
- The Basel Committee on Banking Supervision, the primary global standardsetter for the prudential regulation of banks, has developed "Basel III" - a

Q Vm

comprehensive set of reform measures to strengthen the regulation, supervision and risk management of the banking sector.

- 25 The Basel Committee has issued Core Principles for Effective Banking Supervision. Basel Core Principle 29 requires supervisors to determine that banks have adequate policies and processes, including strict customer due diligence rules to promote high ethical and professional standards in the financial sector and prevent the banks from being used for criminal activities, including money laundering and terrorist financing.
- 26 A copy of the Basel Core Principles is attached as "RB3".

#### THE REGISTRAR'S INVOLVEMENT WITH THE OAKBAY COMPANIES

- On 28 July 2016, the Minister of Finance wrote to me about the approaches that he had received from Oakbay representatives after numerous banks terminated their relationships with entities in the Oakbay Group.
- He asked me to indicate whether the Office of the Registrar of Banks had received any reports in terms of the applicable banking legislation about the Oakbay Group. A copy of this letter is attached as annexure I to the Minister's founding affidavit. I responded on 12 August 2016. My letter is attached as annexure K to the Minister's founding affidavit.

D VM

- 29 I explained that my office had not received any reports from the banks about their dealings with the Oakbay entities. This is unsurprising because FICA requires the banks to make their reports of suspicious transactions to the Centre and not to the Reserve Bank or the Office of the Registrar of Banks.
- 30 I did, however, flag that the Financial Surveillance Department, which monitors exchange control compliance, had received information from Standard Bank about a particular foreign exchange transaction involving one of the companies in the Oakbay Group VR Laser Asia. The Financial Surveillance Department is still investigating that alleged breach of exchange controls.

#### CONCLUSION

The Registrar of Banks monitors banks' compliance with their obligations to report suspicious and usual transactions under FICA. The Bank Supervision

Department in the Office of the Registrar of Banks also oversees the implementation of international standards for anti-money laundering and combatting the financing of terrorism.

Neither of these oversight roles extends to interfering in the contractual relationship between banks and their clients. The Registrar has no power to interfere with these relationships.

**KUBEN NAIDOO** 

I hereby certify that the deponent knows and understands the contents of this affidavit and that it is to the best of her knowledge both true and correct. This affidavit was signed and sworn to before me at Rosebank on this the 22 day of December 2016, and that the Regulations contained in Government Notice R.1258 of 21 July 1972, as amended, and Government Notice No R1648 of 19 August 1977, as amended, having been complied with.

COMMISSIONER OF OATHS

Full names:

VICTOR MORAKE MAFAFO
COMMISSIONER OF CATHS
PRACTISING ATTORNEY
6TH FLOOR, OFFICE 6C, 88 MARSHALL STR
SAMANCOR HOUSE, JHB
TEL: (011) 492-2748 FAX: (011) 492-1000
Email: Informatiafeatterneys@taikomsa.net

Address:

Capacity:

W



### FATE GUIDANCE

# POLIFICALLY EXPOSED PERSONS (REGO) VIVIENDATIONS 12 (AND 22)

June 2013



The Financial Action Task Force (FATF) is an independent inter-governmental body that develops and promotes policies to protect the global financial system against money laundering, terrorist financing and the financing of proliferation of weapons of mass destruction. The FATF Recommendations are recognised as the global anti-money laundering (AML) and counter-terrorist financing (CFT) standard.

For more information about the FATF, please visit the website:

www.fatf-gafi.org



© 2013 FATF/OECD. All rights reserved.

No reproduction or translation of this publication may be made without prior written permission.

Applications for such permission, for all or part of this publication, should be made to
the FATF Secretariat, 2 rue André Pascal 75775 Paris Cedex 16, France

[fax: +33 1 44 30 61 37 or e-mail: contact@fatf-gafl.org].



#### **CONTENTS**

ACR	DNYMS2
L	INTRODUCTION
II.	DEFINITIONS4
III. AND	THE RELATIONSHIP BETWEEN RECOMMENDATIONS 10 (CUSTOMER DUE DILIGENCE) RECOMMENDATION 12, AND THE SPECIFIC REQUIREMENTS FOR PEPS
A. B. C.	Foreign PEPs
īV.	SCOPE OF RECOMMENDATION 1210
A. B. C. V.	Prominent public function
4.	R FAMILY MEMBERS & CLOSE ASSOCIATES
A. B.	Ensuring client CDD information is up-to-date
C.	Internet and media searches14
D.	Commercial databases15 Government issued PEP-lists16
E F.	In-house databases and Information sharing within financial groups or countries
G.	Asset disclosure systems
н.	Customer self-declarations
i.	Information sharing by competent authorities18
VI.	MEASURES APPLICABLE TO THE DIFFERENT TYPES OF PEPS
Α.	Foreign PEPs and high risk business relationships with domestic & International organisation
PE	Obtain senior management approval
	Establish the source of wealth and source of funds
	Conduct enhanced ongoing monitoring of the business relationship22
В.	Domestic & international organisation PEPs when not higher risk23
C.	Life insurance policies with higher risks23
VII.	SUPERVISION23
	Internal controls (Recommendation 18)25
VIII.	OTHER ISSUES
A. B. C.	Immunity from prosecution and conviction
ANNI	EX 1: PEPS RED FLAGS / INDICATORS27
ANN	EX 2: SOURCES OF CASE INFORMATION

POLITICALLY EXPOSED PERSONS (RECOMMENDATIONS 12 AND 22)

#### **ACRONYMS**

AML/CFT

Anti-Money Laundering / Countering the Financing of Terrorism

CDD

Customer Due Diligence

**DNFBPs** 

Designated Non-Financial Business or Professions

FIU

Financial Intelligence Unit

ML

Money Laundering

PEP

Politically Exposed Person

STR

Suspicious Transaction Report

TF

**Terrorist Financing** 

UNCAC

United Nations Convention against Corruption

D vm

#### I. INTRODUCTION

- 1. A politically exposed person (PEP) is defined by the Financial Action Task Force (FATF) as an individual who is or has been entrusted with a prominent public function. Due to their position and influence, it is recognised that many PEPs are in positions that potentially can be abused for the purpose of committing money laundering (ML) offences and related predicate offences, including corruption and bribery, as well as conducting activity related to terrorist financing (TF). This has been confirmed by analysis and case studies. The potential risks associated with PEPs justify the application of additional anti-money laundering / counter-terrorist financing (AML/CFT) preventive measures with respect to business relationships with PEPs. To address these risks, FATF Recommendations 12 and 22 require countries to ensure that financial institutions and designated non-financial businesses and professions (DNFBPs) implement measures to prevent the misuse of the financial system and non-financial businesses and professions by PEPs, and to detect such potential abuse if and when it occurs.
- 2. These requirements are preventive (not criminal) in nature, and should not be interpreted as stigmatising PEPs as such being involved in criminal activity. Refusing a business relationship with a PEP simply based on the determination that the client is a PEP is contrary to the letter and spirit of Recommendation 12.
- 3. The FATF first issued mandatory requirements covering foreign PEPs, their family members and close associates¹ in June 2003.² In February 2012, the FATF expanded the mandatory requirements to domestic PEPs and PEPs of international organisations, in line with Article 52 of the United Nations Convention against Corruption (UNCAC).³ Article 52 of the UNCAC defines PEPs as "individuals who are, or have been, entrusted with prominent public functions and their family members and close associates", and includes both domestic and foreign PEPs. The main aim of the obligations in Article 52 of UNCAC is to fight corruption, which the FATF endorses. However, it is important to note that the aim of the 2012 FATF requirements extends more broadly to the fight against ML and its predicate offences (designated categories of offences), including corruption, and TF.
- 4. Consistent with this objective, Recommendation 12 requires countries to implement measures requiring financial institutions to have appropriate risk management systems in place to determine whether customers or beneficial owners are foreign PEPs, or related or connected to a foreign PEP, and, if so, to take additional measures beyond performing normal customer due diligence (CDD) (as defined in Recommendation 10) to determine if and when they are doing business with them.
- 5. For domestic PEPs and international organisation PEPs, financial institutions must take reasonable measures to determine whether a customer or beneficial owner is a

10 Nov

See the 2003 FATF 40 Recommendations: Recommendation 6 (for financial institutions) and Recommendation 12 (for DNFBPs).

The 2003 FATF Recommendations encouraged countries to extend the requirements to domestic PEPs.

The UNCAC is also referred to as the *Mérida Convention*, after the Mexican city where the high level signing Conference was held. The UNCAC was adopted by the United Nations General Assembly in October 2003, and subsequently entered into force in December 2005.

domestic/international organisation PEP, and then assess the risk of the business relationship. For higher risk business relationships with domestic PEPs and international organisation PEPs, financial institutions should take additional measures consistent with those applicable to foreign PEPs.

- 6. Recommendation 12 applies to financial institutions, and Recommendation 22 requires countries to apply these requirements to DNFBPs.
- 7. Effective implementation of the PEPs requirements has proven to be challenging for competent authorities, financial institutions and DNFBPs worldwide. This is evident from the results of the assessments of compliance with the 2003 FATF 40 Recommendations, undertaken by the FATF, FATF-style regional bodies, International Monetary Fund and World Bank. Implementation challenges have also been identified through publicly available supervisory reports and regulatory actions, and high profile cases of (former) government leaders and their relatives who appeared to have significant assets available abroad which were inconsistent with their official or licit income.
- 8. It is also important to note that the effective implementation of Recommendations 10, 12 and 22 have to be part of a full and effective implementation of the FATF Recommendations as a whole. See the Reference Guide and Information Note on the Use of the FATF Recommendations to Support the Fight Against Corruption.
- 9. This guidance paper is *non-binding* and should be read in conjunction with FATF Recommendations 12 and 22, and their Interpretive Notes. It is a guidance tool that is based on the experiences of countries, international organisations, the private sector and non-governmental organisations, and which may assist competent authorities and financial institutions and DNFBPs to effectively implement those Recommendations.

#### II. DEFINITIONS

- 10. For the purpose of this guidance paper, the definitions set out in the Glossary to the FATF Recommendations apply. The FATF Glossary definition of politically exposed person is meant to have the same meaning as the term persons with prominent public functions (as used in UNCAC Article 52).
- 11. In particular, the following definitions, which do not cover middle ranking or more junior individuals, apply to this guidance paper:
  - Foreign PEPs: individuals who are or have been entrusted with prominent public functions by a foreign country, for example Heads of State or of government, senior politicians, senior government, judicial or military officials, senior executives of state owned corporations, important political party officials.

Vm

All FATF Mutual Evaluations are published on the website of the FATF, <a href="www.fatf-gafi.org">www.fatf-gafi.org</a>, which also holds links to the websites of the FATF-style regional bodies, the IMF and World Bank. See the assessment of Recommendations 6 and 12 of the 2003 FATF 40 Recommendations in each of these reports.

See in particular, the Giossary definitions of: beneficial owner, competent authorities, country, criminal activity, financial institutions, designated non-financial businesses and professions, international organisations, politically exposed person, reasonable measures, risk, satisfied, should, and supervisors.

- Domestic PEPs: individuals who are or have been entrusted domestically with prominent public functions, for example Heads of State or of government, senior politicians, senior government, judicial or military officials, senior executives of state owned corporations, important political party officials.
- International organisation PEPs: persons who are or have been entrusted with a prominent function by an international organisation, refers to members of senior management or individuals who have been entrusted with equivalent functions, i.e. directors, deputy directors and members of the board or equivalent functions.
- Family members are individuals who are related to a PEP either directly (consanguinity) or through marriage or similar (civil) forms of partnership.
- Close associates are individuals who are closely connected to a PEP, either socially or professionally.
- 12. The difference between a foreign PEP and a domestic PEP is the country which has entrusted the individual with the prominent public function. Pursuant to the definition of PEPs, other factors, such as country of domicile or nationality, are not relevant in determining the type of PEP, but may be relevant in determining the level of risk of a specific domestic PEP (as foreign PEPs are always high risk). It should also be noted that a domestic PEP is subject to the foreign PEPs requirements if that individual is also a foreign PEP through another prominent public function in another country.
- 13. Throughout the remainder of this guidance paper, references to *Recommendation 12* should be interpreted to mean both Recommendations 12 and 22, as the PEPs requirements are applicable to both financial institutions and DNFBPs.
- III. THE RELATIONSHIP BETWEEN RECOMMENDATIONS 10 (CUSTOMER DUE DILIGENCE) AND RECOMMENDATION 12, AND THE SPECIFIC REQUIREMENTS FOR PEPS.
- 14. Recommendations 10 and 12 are both part of the overall set of customer due diligence (CDD) requirements. The ability to determine if customers or beneficial owners are PEPs fully depends upon the effective implementation of CDD measures, including the identification, verification, and ongoing due diligence requirements as set out in Recommendation 10 (for financial institutions) and Recommendation 22 (for DNFBPs), as well as the effective application of a risk based approach (Recommendation 1). CDD measures are the indispensable starting point as they must be applied to any type of customer.
- 15. Recommendation 10 does not require CDD measures to be applied to customers who conduct "occasional" transactions below the applicable thresholds in the circumstances which are described in Recommendations 10 and 16 (wire transfers). Consequently, financial institutions and DNFBPs are not expected to determine whether such customers are PEPs, or to apply in such cases the enhanced measures required by Recommendation 12. However, if the financial institution or DNFBP







was provided with information which clearly indicates a PEP status of the occasional customer, it would obviously have to apply the requirements of Recommendation 12.

16. The relationship between Recommendations 10 and 12, and the resulting requirements for determining if clients are foreign or domestic/international organisation PEPs can be summarised in three steps. Although these steps are sequenced, to determine if a new customer is a PEP (at the on-boarding or customer intake stage), it is understood that the three steps can take place at the same time. The three steps are further explained in the following table:

#### Step 1: Full and effective implementation of Recommendation 10

For foreign and domestic/international organisation PEPs

- Implement effective CDD measures in line with Recommendation 10.
- Recommendation 10 is the indispensable starting point for the effective implementation of Recommendation 12.
- Recommendation 12 imposes additional requirements for PEPs which are summarised in step 2 and 3.

#### Step 2: Determine if a customer is a PEP<sup>6</sup>

#### For foreign PEPs

- Recommendation 12 requires appropriate risk management systems to determine whether the customer or beneficial owner is a foreign PEP.
- This means that proactive steps
  must be taken, such as assessing
  customers on the basis of risk criteria,
  risk profiles, the business model,
  verification of CDD information, and
  the institution's own research, to
  determine whether a customer or a
  beneficial owner is a foreign PEP.

#### For domestic/international organisation PEPs

- Recommendation 12 requires taking reasonable measures, based on the assessment of the level of risk, to determine whether the customer or beneficial owner is a domestic PEP.
- This means reviewing, according to relevant risk factors, CDD data collected pursuant to Recommendation 10 in order to determine whether a customer or beneficial owner is a domestic PEP.
- Determine the risk of the business relationship and, in low risk cases, no further steps to determine if a customer is a PEP are required.

#### Step 3: Take risk mitigation measures

#### For foreign PEPs

 Apply the enhanced risk mitigation measures of Recommendation 12 in all cases.

#### For domestic/international organisation PEPs

- In cases of a higher risk business relationship with the PEP, apply the enhanced risk mitigation measures of Recommendation 12.
- 17. The different sets of requirements to detect PEPs (one for foreign PEPs, and one for domestic/international organisation PEPs) reflect that the level of risks are different. In practice financial institutions and DNFBPs will often use one customer on-boarding procedure for all customers.

For the purposes of determining whether a customer or beneficial owner is a PEP, use of commercial databases is not required by the FATF Recommendations, and is not sufficient for the implementation of Recommendation 12.

- 18. When considering whether to establish or continue a business relationship with a PEP, the focus should be on the level of ML/TF risk associated with the particular PEP, and whether the financial institution or DNFBP has adequate controls in place to mitigate that ML/TF risk so as to avoid the institution from being abused for illicit purposes should the PEP be involved in criminal activity. This decision should be taken on the basis of the customer due diligence process and with an understanding of the particular characteristics of the public functions that the PEP has been entrusted with. The decision to establish or continue a customer relationship with a PEP should be guided primarily by an assessment of ML/TF risks, even if other considerations, such as regulatory risk, reputational risk or commercial interests, are taken into account.
- 19. Financial institutions and DNFBPs should consider whether they may be more vulnerable to domestic PEPs compared to foreign PEPs. For example, small financial institutions, with little or no exposure to foreign financial markets, who determine they are dealing with a foreign PEP, should consider in detail the reasons why such a relationship is being started. Financial institutions who operate in domestic markets where there are known issues relating to corruption should consider whether their exposure to domestic PEPs may be higher than to foreign PEPs.
- 20. In all cases, where a financial institution or DNFBP suspects or has reasonable grounds to suspect that funds are the proceeds of criminal activity, a STR (Suspicious Transaction Report) should be filed with the FIU (Financial Intelligence Unit).

#### A. FOREIGN PEPS

- 21. Pursuant to Recommendation 12, financial institutions and DNFBPs are required to have appropriate risk management systems as part of their internal rules to determine if a customer or beneficial owner is a foreign PEP. What risk management system is appropriate for a financial institution or DNFBP depends on the nature of the institution's business, the nature of its client profile, expected transactions and on other risk factors.
- 22. Financial institutions and DNFBPs doing business with a foreign PEP may not have much first-hand knowledge or direct access to information about variables such as what a reasonable income would be for a foreign public official at a particular level or in a particular position. This can make it more difficult to assess information, both at the account opening stage and during monitoring of the customer relationship. Consequently, appropriate risk management systems need to be implemented to address these particular risks both at the account opening/CDD stage, and when existing foreign customers become PEPs. If one of the tools used for the determination of foreign PEPs (see Section V below) indicate the presence of a PEP, but if doubts still exist, further investigation is necessary to be able to reach a sufficiently clear decision on the classification of the customer.
- 23. Foreign PEPs are always considered high risk and require the application of enhanced due diligence measures, as for all higher risk customers as described in Recommendation 10.7 Recommendation 12 requires that the decision to engage or maintain the business relationship with the foreign PEP customer should not be taken at the ordinary level of the hierarchy, but at the level of the senior management. This should further lead to more proactive steps, in particular, to an

& vm

See paragraph 20 of the Interpretative Note to Recommendation 10.

#### IN THE HIGH COURT OF SOUTH AFRICA

#### **GAUTENG DIVISION, PRETORIA**

1743

CASE NO. 80978/16

In the matter between:

MINISTER OF FINANCE	Applicant	
and	*	
OAKBAY INVESTMENTS (PTY) LTD	1 <sup>ST</sup> Respondent	
OAKBAY RESOURCES AND ENERGY LTD	2 <sup>ND</sup> Respondent	
SHIVA URANIUM (PTY) LTD	3 <sup>RD</sup> Respondent	
TEGETA EXPLORATION AND RESOURCES (PTY) LTD	4 <sup>™</sup> Respondent	
JIC MINING SERVICES (PTY) LTD	5 <sup>™</sup> Respondent	
BLACKEDGE EXPLORATION (PTY) LTD	6 <sup>TH</sup> Respondent	
TNA MEDIA (PTY) LTD	7 <sup>TH</sup> Respondent	
THE NEW AGE	8 <sup>TH</sup> Respondent	
AFRICA NEWS NETWORK (PTY) LTD	9 <sup>TH</sup> Respondent	
VR LASER SERVICES (PTY) LTD	10 <sup>TH</sup> Respondent	
ISLANDSITE INVESTMENTS ONE HUNDRED AND EIGHT (PTY) LTD	11 <sup>TH</sup> Respondent	
CONFIDENT CONCEPT (PTY) LTD	12 <sup>TH</sup> Respondent	
JET AIRWAYS (INDIA) LTD (INCORPORATED IN INDIA)	13 <sup>TH</sup> Respondent	
SAHARA COMPUTERS (PTY) LTD	14 <sup>TH</sup> Respondent	
ABSA BANK LIMITED	15 <sup>TH</sup> Respondent	
FIRST NATIONAL BANK LTD	16 <sup>TH</sup> Respondent	

STANDARD BANK OF SOUTH AFRICA LIMITED

17<sup>TH</sup> Respondent

18<sup>TH</sup> Respondent

GOVERNOR OF THE SOUTH AFRICAN RESERVE BANK

19<sup>TH</sup> Respondent

REGISTRAR OF BANKS

20<sup>TH</sup> Respondent

DIRECTOR OF THE FINANCIAL INTELLIGENCE CENTRE

21<sup>ST</sup> Respondent

**FILING NOTICE** 

PRESENTED FOR SERVICE AND FILING:

19<sup>th</sup> RESPONDENT'S ANSWERING AFFIDAVIT

DATED at JOHANNESBURG on this the 22<sup>nd</sup> day of December 2016

WERKSMANS ATTORNEYS

19<sup>TH</sup> and 20<sup>TH</sup> Respondents' Attorneys

155 - 5th Street Sandown, Sandton

Tel: (011) 535 8145

Email: cmanaka@werksmans.com cmoraitis@werksmans.com

Ref: Mr C Manaka / Mr C Moraitis

Ref: SOUT 3267.63

**C/O MABUELA INCORPORATED**Charter House, 179 Bosman Street

Pretoria Central

Pretoria

Tel: 012 3253966

Email: mabuela@tiscali.co.za

TO: THE REGISTRAR OF THE ABOVE HONOURABLE COURT PRETORIA AND TO:

STATE ATTORNEY

Attorneys for the Applicant

SALU Building

255 Francis Baard Street

Pretoria

Tel: 012 309 1575 Fax: 012 309 1649

Email: TNhlanzi@justice.gov.za

Ref: Ms T NHLANZI Ref: 2476/16/Z32

**SERVICE BY EMAIL** 

AND TO:

**VAN DER MERWE & ASSOCIATES** 

Attorneys for 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 10<sup>th</sup>, 11<sup>th</sup>, 12<sup>th</sup> and 14<sup>th</sup> Respondents

62 Rigel Avenue North

WATERKLOOF

Pretoria

Ref: Mr GT VD Merwe / st / O78

Tel: 012 343 5432 Fax: 012 343 5435

Email: simone@vdmass.co.za

SERVICE BY EMAIL

AND TO:

**EDWARD NATHAN SONNENBERGS** 

Attorneys for the 15<sup>th</sup> Respondent

150 West Street

Sandton

Email: dlambert@ensafrica.com

SERVICE BY EMAIL

AND TO:

NORTON ROSE FULBRIGHT

Attorneys for the 16<sup>th</sup> Respondent

34 Fredman Drive

Sandton

Email: aslam.moosajee@nortonrosefulbright.com

SERVICE BY EMAIL

AND TO:

**BOWMAN GILFILLAN INC.** 

Attorneys for the 17th Respondent

165 West Street

Sandton

Email: clement.mkiva@bowmanslaw.com

alan.keep@bowmanslaw.com

SERVICE BY EMAIL

#### AND TO:

#### **BAKER & McKENZIE ATTORNEYS**

Attorneys for the 18<sup>th</sup> Respondent

Tel: 011 911 4300

Email: Gerhard.Rudolph@bakermckenzie.com Widaad.Ebrahim@bakermckenzie.com Callum.Oconnor@bakermckenzie.com

#### c/o ADAMS & ADAMS

Adams & Adams Place Lynnwood Bridge 4 Daventry Street Lynnwood Manor

Pretoria

Tel: 012 432 6000 Ref: Adele Jordan

#### **SERVICE BY EMAIL**

#### AND TO:

#### **MACROBERT ATTORNEYS**

Attorneys for the 21<sup>st</sup> Respondent MacRobert Building Corner Jan Shoba and Justice Mohamed Streets PRETORIA

Tel: 012 425 3436

Email: ghay@macrobert.co.za

Ref: G K Hay

SERVICE BY EMAIL

# IN THE HIGH COURT OF SOUTH AFRICA GAUTENG DIVISION, PRETORIA

Case Number: 80978 / 16

In the matter between

**MINISTER OF FINANCE** 

**Applicant** 

and

OAKBAY INVESTMENTS (PTY) LTD

First Respondent

**OAKBAY RESOURCES AND ENERGY LTD** 

Second Respondent

SHIVA URANIUM (PTY) LTD

Third Respondent

TEGETA EXPLORATION AND RESOURCES (PTY)

Fourth Respondent

\_\_\_

JIC MINING SERVICES (PTY) LTD

Fifth Respondent

**BLACKEDGE EXPLORATION (PTY) LTD** 

Sixth Respondent

TNA MEDIA (PTY) LTD

Seventh Respondent

THE NEW AGE

Eighth Respondent

AFRICA NEWS NETWORK (PTY) LTD

Ninth Respondent

VR LASER SERVICES (PTY) LTD

Tenth Respondent

**ISLANDSITE INVESTMENTS ONE HUNDRED AND** 

EIGHT (PTY) LTD

Eleventh Respondent

CONFIDENT CONCEPT (PTY) LTD

Twelfth Respondent

JET AIRWAYS (INDIA) LTD (INCORORATED IN

INDIA)

Thirteenth Respondent

SAHARA COMPUTERS (PTY) LTD

Fourteenth Respondent

**ABSA BANK LTD** 

Fifteenth Respondent

FIRST NATIONAL BANK LTD

Sixteenth Respondent

STANDARD BANK OF SOUTH AFRICA LIMITED

Seventeenth Respondent

**NEDBANK LIMITED** 

Eighteenth Respondent

**GOVERNOR OF THE SOUTH AFRICAN RESERVE** 

BANK

Nineteenth Respondent

**REGISTRAR OF BANKS** 

Twentieth Respondent

DIRECTOR OF THE FINANCIAL INTELLIGENCE **CENTRE** 

Twenty-First Respondent

**NINETEENTH RESPONDENT'S AFFIDAVIT** 

I, the undersigned,

#### **LESETJA KGANYAGO**

do hereby make oath and say:

- I am the Governor of the South Africa Reserve Bank ("the Reserve Bank"), the nineteenth respondent in this application. I was appointed as the Governor with effect from 9 November 2014 in terms of section 4(1)(a) of the South African Reserve Bank Act 90 of 1989 ("the SARB Act").
- I am authorised to depose to this affidavit on behalf of the Reserve Bank.
- The facts to which I depose are within my personal knowledge except where it is apparent from the context that they are not.
- The submissions of law I make in this affidavit are made on the advice of the Reserve Bank's lawyers.
- I have read the founding papers filed on behalf of the applicant the Minister of Finance. I have also read the affidavit of the Registrar of Banks, the twentieth respondent, ("the Registrar") that will be filed together with this affidavit and I confirm its contents in so far as they relate to me.

I abide the decision of the court in this matter. I wish, however, to place certain facts before the court that are relevant to the application.

#### The powers of the Reserve Bank

- The primary object of the South African Reserve Bank is to protect the value of the currency in the interest of balanced and sustainable economic growth.

  This is reflected in sections 224(1) of the Constitution and section 3 of the South African Reserve Bank Act 90 of 1989.
- In terms of section 224(2) of the Constitution, the Reserve Bank must, in pursuit of this object, perform its functions independently and without fear, favour or prejudice. This means the Reserve Bank must act independently, and must be seen to act independently, of all external influences, including those of private parties and the government. The independence of the Reserve Bank is fundamental to the execution of its primary object and to promote financial stability and investor confidence in the country.
- There is no provision of law that entitles the Reserve Bank to interfere in the relationship between banks and their clients.

#### The April Oakbay letters

In April 2016, I, like the Minister, received a letter from Mr Howa of Oakbay asking me to intervene with the banks that had closed Oakbay accounts. Mr

175

Howa complained that since the "unexplained decision of a number of banks," and of [their] auditors, to cease working with us, and of continued press coverage of unsubstantiated and false allegations against the Gupta family, it has become virtually impossible to continue to do business in South Africa".

- He claimed that this was the result of "an anti-competitive and politically motivated campaign to marginalise [their] business". He said that Oakbay had received "no justification whatsoever" for why ABSA, FNB, Sasfin, Standard Bank and Nedbank had decided to close its business accounts.
- Mr Howa asked for my help "to end the deadly stranglehold" that the banks had placed on the Oakbay business. He implied that because the Reserve Bank had the ultimate responsibility to regulate the financial sector, it should intervene with the banks. I attach a copy of the letter marked "SARB1".
- Mr Howa is wrong. The Reserve Bank's regulation of the financial sector does not extend to the relationships between banks and their clients. I explained this to him in a letter on 22 April 2016. I attach a copy of my reply marked "SARB2".
- I said that the Reserve Bank does not have the legal authority to instruct a bank to serve a client or not to serve a particular client.

- I pointed out that the law makes provision for customers to lodge grievances with the Banking Ombud and I suggested that he raise his concerns with this body or approach the courts for relief.
- To the best of my knowledge, none of the Oakbay companies has utilised these remedies available to them.

#### My April letter to the Minister

- On 26 April 2016, after there were reports that Cabinet had appointed a subcommittee of ministers to engage with the banks about the closures of the Oakbay accounts, I wrote to the Minister. My letter is referred to in paragraph 20 of the founding affidavit and is attached as annexure J.
- I said I was concerned that the appointment of this subcommittee could be viewed as undue political interference with the operation of the banks. Any such interference, or even the perception of such interference, could introduce heightened levels of uncertainty and pose a risk to South Africa's financial stability.
- 19 I emphasised that the proper channels to deal with the Oakbay grievances existed in the regulatory scheme. The Oakbay companies could approach the Banking Ombud or the courts if their accounts had been unfairly terminated. This approach would enhance the credibility of our institutional and regulatory environment, public trust and investor confidence.

#### The October Oakbay letters

- On 5 October 2016, I received a further letter from Mr Howa. The letter ignored the point I made in my April letter that I had no power to intervene in the contractual relationships between banks and their customers. This time, Mr Howa asked for my assistance because some of the smaller banks that had opened bank accounts with the Oakbay companies were facing "difficulties" from "various quarters". He requested a meeting with me to discuss Oakbay's challenges. I attach a copy of this letter marked "SARB3".
- 21 I responded on 13 October 2016. I attach a copy of this letter as "SARB4".
- I emphasised the critical importance of the independence of the Reserve

  Bank and its obligation to maintain the confidentiality of its dealings with the banks it regulates.
- I said that I understood his request to have been made on behalf of "smaller banks" which were being hampered in their ability to provide financial services to the Oakbay companies. I said I found it strange that these smaller banks had not engaged directly with the Reserve Bank as their regulator if they felt that their provision of financial services was being impeded.
- 24 I also emphasised that the Reserve Bank could not discuss any internal affairs of the banks with a third party, unless specifically authorised to do so

by the banks concerned. I said that I was willing to meet with members of the public if the circumstances required it and therefore sought more information from Mr Howa about his complaint in order to determine whether a meeting was warranted.

- I asked him for information about the banks that had closed the Oakbay accounts together with copies of any reasons that they had provided for these terminations. I requested copies of mandates from the "smaller banks" authorising him to represent them and to discuss their internal affairs. Finally, I asked for full details about the difficulties that these smaller banks were experiencing and the reasons for them.
- 26 I have never received a response to this letter.

#### Conclusion

- The Oakbay companies have on two occasions sought my assistance to intervene in their contractual relationships with banks. I have told them that I have no power to do so and that they have readily available remedies to correct any unfairness done to them. Instead of using these remedies, they have continued to seek alternate forms of intervention and influence.
- The Reserve Bank has a constitutional duty to act independently. It cannot be influenced, or even be seen to be influenced, by private or political pressure in exercising its powers in terms of the constitution and relevant laws. The

stability of the financial system depends on this independence. The role that the Oakbay companies have asked me to play in relation to their bank accounts is inconsistent with that independence and threatens the country's financial stability.

#### **LESETJA KGANYAGO**

I hereby certify that the deponent knows and understands the contents of t	his
affidavit and that it is to the best of his knowledge both true and correct. This affida	avit
was signed and sworn to before me at on this the o	lay
of December 2016, and that the Regulations contained in Government Not	ice
R.1258 of 21 July 1972, as amended, and Government Notice No R1648 of	19
August 1977, as amended, having been complied with.	

#### **COMMISSIONER OF OATHS**

Full names:

Address:

Capacity:

1756

14/94 9014 PMB 6:56 72X

2001/202



Governor's Office South Affirm Reserve Back 570 Helen Jeseph Street Protoria 9002

14<sup>th</sup> April 2016

Dear Mr H L Eganyago,

re 7,500 potential 300 losses at dakbay investments 4 our portfolio companies

I wanted to take this opportunity to provide you with advance warning that Orthey Investments and our partialin companies may more be insutting algalitant job locust,

Following the manufactual decision of a practice of builts, and of our auditors, to come weaking with us, and of continued press coverage of membricalized and false allegations against the Cleyta fixedly, it has become virtually impossible to continue to do business in deputh Africa.

We believe that this is the result of an auth-compellitive and politically motivated compellin designed to marginalise our businesses. We have stocked an justification whatenever to explain veloy AESA, FFRB, Bastin, Banderd Hank and our Norbank beave decided to close our business acceptes. XFAO frequentives said that there was no suddivisions to each their work with ne.

Oakbay kas a 23 year track record of storing husiness perfocusates and termerotrad stells in a number of sectors. Our ability to be a disreptor in easy sectors, challenging the demissant businesses and global players in South Albica, is the source of our numbers.

Between 2012 and 2015, 47,000 Jobs have been lest in Stanth Africa's subting sector. In flat, since 2015, the top flams unioning companies in South Africa have made more than 10,000 people perhadant. In contrast, we have strained 3,500 Jobs in mining. Our sequelations of Optimizate from Genesors also permisted a Septidistion flat would have seen more than 3,000 South African mining jobs lost.

All of these jobs are now at risk.

With our hunk accounts closed, we are correctly unable to pay many of the aderim of our more than 4,500 comployers. We find it lotally unacceptable flut the tens of thousands of their dependency would have to notice as a result of the competing against Onliney and the Grapta Entity.

Therefore the Oupla family have come to the conclusion that it is time to refinguish sound of Outliey Invasionates and have simpled down from all examples and non-executive positions and may involvement in the day-to-day remains of the business.

14/94 RDIE THE 4:57 PAS

7

D102/202

By deing so, they hope to end the political compelen against Ouklay,  $% \left\{ \left( 1\right) \right\} =\left\{ \left( 1\right) \right\}$ 

At the CEO I new hope in stree a line under the torporate bullying and emi-competitive precidence we have based from the banks. The theliboods of too sussey people are at first should out bank account present closes.

) hope that you appreciate my condour and can see that we are stoled everything we can to save should of South African John.

We are sealing your help as Governor of the Reserve Bank with the responsibility to signifest the flamechol sector to each the deadly strangehold the banks have placed on our fundaments. If you have any questions, please do not healthful to contact me.



Mr N Howa Chief Executive Officer Oakbay Investments (PTY) LTD 144 Katherine Street Sandton 2031

Dear Mr Howa

### POTENTIAL JOB LOSSES AT OAKBAY INVESTMENTS AND ITS PORTFOLIO COMPANIES

Thank you for letter of 14 April 2016. I have taken note of the contents of your letter.

The South African Reserve Bank and the Office of the Registrar of Banks regulates. commercial banks in terms of the Banks Act, 1990. Our regulatory powers are also derived from other financial sector laws.

The Reserve Bank and the Registrar of Banks do not have the legal authority to instruct a bank to serve a client or not to serve a particular client. The relationship between a bank and its customers is governed by consensual contract which falls outside of our legal ambit.

The law makes provision for customers to lodge grievances with the Banking Ombud. We suggest you raise your concerns with this body or approach the courts for relief.

Yours sincerely

Lesetja Kganyago

Governor

Date: 22 APR 2016

5 October 2016

Lesetja Kganyago Governor South Africa Reserve Bank Pretoria

Dear Governor

You will recall my earlier letter to you and your response dated April 22, 2016 around the closure of our banking facilities.

I write to you today to ask for assistance around claims from some of the smaller banks about the difficulty they are facing from various quarters due to their opening accounts with ourselves. You will understand the concomitant pressures these placed on our ability to conduct our day-to-day transactions.

I am sure you will support the principle of all South Africans having access to banking and would therefore assist us in removing obstacles to us continuing to run our business and to maintain and grow the 7 991 work opportunities we have in our business.

I look forward to hearing from you about a time in your diary for us to meet and discuss our challenges.

Yours sincerely

Nazeem Howa Chief Executive

CC: Public Protector

SARB4



File ref. no.: 9/1/11

Mr Nazeem Howa Chief Executive Oakbay Investments Private Bag X180 Halfway House Johannesburg 1685

Dear Sir

**RE: REQUEST FOR A MEETING** 

Your letter dated 5 October 2018 refers.

The South African Reserve Bank ("SARB") is a creature of statute in terms of the Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996), read with the South African Reserve Bank Act, 1989 (Act No. 90 of 1989), which functions independently as the central bank of the Republic of South Africa ("RSA"). In its capacity as the central bank, the SARB conducts its business in accordance with relevant policies of government, of which improved access to financial services for all constitutes but one.

In this regard, the SARB (through its Bank Supervision Department) serves its stakeholders, inter alia, by regulating and supervising all the banks operating in the RSA with the strategic focus of enhancing their safety, soundness and integrity. The Banks Act, 1990 (Act No. 94 of 1990 — "Banks Act"), predominantly provides the regulatory structure for such supervision and provides for various related matters, such as the legal relationship between banks and the SARB and the flow of information between the parties. It forms an important basis for the unique relationship that exists between the banks and the SARB as their central bank. Moreover, with regard to the information of the clients of banks, it is regarded of importance to emphasise that the maintenance of confidentiality in respect of information pertaining to their clients, remains one of the internationally recognised cornerstones of banking. In this vein, banks in the RSA may in terms of the said unique relationship between banks and their central banks be regarded as clients of the SARB.

In the second paragraph of your letter you mention that you are seeking assistance: "...around claims from some of the smaller banks about the difficulty they are facing from various quarters due to their opening accounts with [your] selves." On the face of it, it creates the impression that some small banks are claiming to be unjustifiably impeded from providing financial services to you, and that you have been mandated, on their behalf, to raise the matter with me and/or the SARB.

In the circumstances, having regard to the aforesaid unique relationship in existence between all the banks in the RSA and the SARB, it appears strange that the alleged banks involved do not raise their issues directly with the SARB (as their regulator and supervisor), but rather elect to mandate a client of theirs/third person from the general public to deal with the matter on their behalf. Whatever the case may be, neither the SARB nor I would be in any position to discuss the internal affairs of any of the banks in question with you or any unrelated third party from the general public in their absence, unless they provide us with explicit authority in respect of the same. Nevertheless, I am not averse to meeting with anyone from the general public if the circumstances dictate the need for, and efficacy of such a meeting. In order for this Office to duly consider your request for a meeting, it would in the light of the above be appreciated if you could provide me with the following information:

- (1) The names of the banks involved and the reasons given by them for closing your accounts (supported by their official correspondence to you stating the reasons);
- (2) the full names and duly completed mandates of the smaller banks allegedly experiencing difficulties in opening accounts for you, authorising you to represent them and to discuss their internal affairs at the meeting envisaged with me;
- (3) full details, including all the relevant documentation of yourself and the banks, setting out the alleged difficulties as well as the reasons underpinning them.

Your kind cooperation and assistance in the matter will be appreciated.

Yours sincerely

Lesetja Kganyago

Governor

Date: 13 OCT 2016

### IN THE HIGH COURT OF SOUTH AFRICA (GAUTENG DIVISION, PRETORIA)

"SBI"

CASE NO: 80978/2016

In the matter between:

MINISTER OF FINANCE

Applicant

and

OAKBAY INVESTMENTS (PTY) LTD

1<sup>st</sup> Respondent

OAKBAY RESOURCES AND ENERGY LTD

2<sup>nd</sup> Respondent

SHIVA URANIUM (PTY) LTD

3rd Respondent

TEGETA EXPLORATION AND RESOURCES (PTY) LTD

4<sup>th</sup> Respondent

JIC MINING SERVICES (PTY) LTD

5<sup>th</sup> Respondent

**BLACKEDGE EXPLORATION (PTY) LTD** 

6<sup>th</sup> Respondent

TNA MEDIA (PTY) LTD

7<sup>th</sup> Respondent

THE NEW AGE

8<sup>th</sup> Respondent

AFRICA NEWS NETWORK (PTY) LTD

9<sup>th</sup> Respondent

I Am

VR LASER SERVICES (PTY) LTD	10 <sup>th</sup> Respondent				
ISLANDSITE INVESTMENTS ONE HUNDRED AND EIGHTY (PTY) LTD	11 <sup>th</sup> Respondent				
CONFIDENT CONCEPT (PTY) LTD	12 <sup>th</sup> Respondent				
JET AIRWAYS (INDIA) LTD (INCORPORATED IN INDIA)	13 <sup>th</sup> Respondent				
SAHARA COMPUTERS (PTY) LTD	14 <sup>th</sup> Respondent				
ABSA BANK LTD	15 <sup>th</sup> Respondent				
FIRST NATIONAL BANK LTD	16 <sup>th</sup> Respondent				
THE STANDARD BANK OF SOUTH AFRICA LIMITED	17 <sup>th</sup> Respondent				
NEDBANK LIMITED	18 <sup>th</sup> Respondent				
GOVERNOR OF THE SOUTH AFRICAN RESERVE BANK	19 <sup>th</sup> Respondent				
REGISTRAR OF BANKS	20 <sup>th</sup> Respondent				
DIRECTOR OF THE FINANCIAL INTELLIGENCE CENTRE	21 <sup>st</sup> Respondent				
NOTICE OF MOTION					



TAKE NOTICE THAT The Standard Bank of South Africa Limited (the 17<sup>th</sup> Respondent) asks for an order in the following terms.

- 1. It is declared that no member of the National Executive of Government, including the President and all Members of the Cabinet, acting of their own accord or for and/or on behalf of Cabinet, is empowered to intervene in any manner whatsoever in any decision taken by the 17<sup>th</sup> Respondent to terminate its banking relationships with Oakbay Investments Proprietary Limited and its associated entities.
- Further and/or alternative relief.
- Costs in the event of opposition.





45B2<sup>™</sup>

## IN THE HIGH COURT OF SOUTH AFRICA (GAUTENG DIVISION, PRETORIA)

CASE NO: 80978/2016

In the matter between:

MINISTER OF FINANCE

Applicant

and

OAKBAY INVESTMENTS (PTY) LTD	1 <sup>st</sup> Respondent
OAKBAY RESOURCES AND ENERGY LTD	2 <sup>nd</sup> Respondent
SHIVA URANIUM (PTY) LTD	3 <sup>rd</sup> Respondent
TEGETA EXPLORATION AND RESOURCES (PTY) LTD	4 <sup>th</sup> Respondent
JIC MINING SERVICES (PTY) LTD	5 <sup>th</sup> Respondent
BLACKEDGE EXPLORATION (PTY) LTD	6 <sup>th</sup> Respondent
TNA MEDIA (PTY) LTD	7 <sup>th</sup> Respondent
THE NEW AGE	8 <sup>th</sup> Respondent
AFRICA NEWS NETWORK (PTY) LTD	9 <sup>th</sup> Respondent
VR LASER SERVICES (PTY) LTD	10 <sup>th</sup> Respondent
ISLANDSITE INVESTMENTS ONE HUNDRED AND EIGHTY (PTY) LTD	11 <sup>th</sup> Respondent
CONFIDENT CONCEPT (PTY) LTD	12 <sup>th</sup> Respondent
JET AIRWAYS (INDIA) LTD (INCORPORATED IN INDIA)	13 <sup>th</sup> Respondent
SAHARA COMPUTERS (PTY) LTD	14 <sup>th</sup> Respondent
ABSA BANK LTD	15 <sup>th</sup> Respondent
FIRST NATIONAL BANK LTD	16 <sup>th</sup> Respondent
THE STANDARD BANK OF SOUTH AFRICA LIMITED	17 <sup>th</sup> Respondent
NEDBANK LIMITED	18 <sup>th</sup> Respondent
GOVERNOR OF THE SOUTH AFRICAN RESERVE BANK	19 <sup>th</sup> Respondent
REGISTRAR OF BANKS	20 <sup>th</sup> Respondent

1 Am

#### DIRECTOR OF THE FINANCIAL INTELLIGENCE CENTRE

21st Respondent

#### **CONFIRMATORY AFFIDAVIT**

I, the undersigned,

#### SIMPIWE KENNETH TSHABALALA

do hereby state under oath that:

- I am an Executive Director and the Chief Executive Officer of The Standard Bank of South Africa Limited, the seventeenth respondent in these proceedings ("Standard Bank").
- 2. The facts contained herein are within my personal knowledge and are true and correct.
- 3. I have read the Explanatory Supporting Affidavit of Mr. Ian Hamish Scott Sinton to which this Affidavit is annexed and confirm:
- 3.1 the contents thereof insofar as they refer to me; and
- 3.2 for the reasons set out in Mr. Sinton's affidavit, Standard Bank's support for the relief sought by the applicant, and the additional relief set out in annexure "SB1" to Mr. Sinton's affidavit.

SIMPIWE KENNETHTSHABALALA

Mr Do

3

on this the day of DECEMBER 2016, by the deponent who acknowledged that he knew and understood the contents of this affidavit, had no objection to taking this oath, considered this oath to be binding on his conscience and who uttered the following words: "I swear that the contents of this affidavit are true, so help me God"

COMMISSIONER OF OATHS

COMMISSIONER OF OATHS (ex officio)

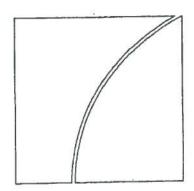
Jason Michael Smith Practising Attorney - J.M.S. Inc Suite 1, 26 Baker Street, Rosebank Tel: 011 447 8188



Note: The BCBS issued in February 2016 a new release of this document, enlarged with a new Annex 4: General Guide to Account Opening. http://www.bis.org/bcbs/publ/d353.htm

"SB3"

# Basel Committee on Banking Supervision



Sound management of risks related to money laundering and financing of terrorism

January 2014





Note: The BCBS issued in February 2016 a new release of this document, enlarged with a new Annex 4: General Guide to Account Opening. http://www.bis.org/bcbs/publ/d353.htm

This publication is available on the BIS website (www.bis.org).

Bank for International Settlements 2014. All rights reserved. Brief excerpts may be reproduced or translated provided the source is stated.

ISBN 92-9131-313-0 (print) ISBN 92-9197-313-0 (online)

M

# Note: The BCBS issued in February 2016 a new release of this document, enlarged with a new Annex 4: General Guide to Account Opening. http://www.bis.org/bcbs/pub/d353.htm

#### Contents

Sol	and m	nana	gement of risks related to money laundering and financing of terrorism	1
I.	Intro	odu	tion	1
K.	Esse	entia	l elements of sound ML/FT risk management	3
_	1.	Ass	essment, understanding, management and mitigation of risks	4
		(a)	Assessment and understanding of risks	4
			Proper governance arrangements	
			The three lines of defence	
			Adequate IT systems	
	2.		tomer acceptance policy	
	3.		tomer and beneficial owner identification, verification and risk profiling	
	4.		going monitoring	
	5.		nagement of information	
	5.		Record-keeping	
		(a)	Updating of information	12
		(0)	Supplying information to the supervisors	12
	_	(C)	porting of suspicious transactions and asset freezing	12
	6.		Reporting of suspicious transactions	
		(a)	Asset freezing	12
П.	AM	L/CI	T in a group-wide and cross-border context	1:
	1.	Glo	obal process for managing customer risks	1/
	2.	Ris	k assessment and management.	11
	3.	Co	nsolidated AML/CFT policies and procedures	1.4
	4.	Gr	oup-wide Information-sharing	14
	5.		xed financial groups	
IV.	The	rol	e of supervisors	1
			ing another bank, financial institution or third party to perform customer due diligence	
			rrespondent banking	
			t of relevant FATF recommendations	
Am	nov 2	l lie	t of relevant FA i t recommendations www.www.www.www.www.www.www.www.www.ww	



Note: The BCBS issued in February 2016 a new release of this document, enlarged with a new Annex 4: General Guide to Account Opening. http://www.bis.org/bcbs/publ/d353.htm

# Sound management of risks related to money laundering and financing of terrorism

#### I. Introduction

- Being aware of the risks incurred by banks of being used, intentionally or unintentionally, for criminal activities, the Basel Committee on Banking Supervision is issuing these guidelines to describe how banks should include money laundering (ML) and financing of terrorism (FT) risks within their overall risk management.
- 2. The Committee has a long-standing commitment to promote the implementation of sound Anti-Money Laundering and Countering Financing of Terrorism (AML/CFT) policies and procedures that are critical in protecting the safety and soundness of banks and the integrity of the international financial system. Following an initial statement in 1988, it has published several documents in support of this commitment. In September 2012, the Committee reaffirmed its stance by publishing the revised version of the Core principles for effective banking supervision, in which a dedicated principle (BCP 29) deals with the abuse of financial services.
- 3. The Committee supports the adoption of the standards issued by the Financial Action Task Force (FATF). In February 2012, the FATF released a revised version of the *International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation* (the FATF standards), to which the Committee provided input. In March 2013, the FATF also issued *Financial Inclusion Guidance*, which has also been considered by the Committee in drafting these guidelines. The Committee's intention in issuing this paper is to support national implementation of the FATF standards by exploring complementary areas and leveraging the expertise of both organisations. These guidelines embody both the FATF standards and the Basel Core Principles for banks operating across borders and fits into the overall framework of banking supervision. Therefore, these guidelines are intended to be consistent with and to supplement the goals and objectives of the FATF standards, and in no way should they be interpreted as modifying the FATF standards, either by strengthening or weakening them.
- 4. In some instances, the Committee has included cross-references to FATF standards in this document in order to assist banks in complying with national requirements based on the implementation of those standards. However, as the Committee's intention is not to simply duplicate the existing FATF standards, cross-references are not included as a matter of routine.
- The Committee's commitment to combating money laundering and the financing of terrorism is fully aligned with its mandate "to strengthen the regulation, supervision and practices of banks
- See BCBS, Prevention of criminal use of the banking system for the purpose of money-laundering, December 1988, accessible at www.bis.org/publ/bcbsc137.pdf.
- The FATF is an intergovernmental body that develops international standards and promotes policies to protect the global financial system against money laundering, terrorist financing and the financing of proliferation of weapons of mass destruction. The FATF defines money laundering as the processing of criminal proceeds in order to disguise their illegal origin. The FATF works in close cooperation with other entities involved in this area, and in particular FATF associate members and observers. The Committee has observer status within the FATF.
- Annex 3 contains an excerpt of the most relevant FATF Recommendations that banks and supervisors should comply with when implementing their AML/CFT measures. This is not exhaustive and other FATF Recommendations, including the Interpretive Notes, may be relevant. The full document is accessible at www.fatf-gafl.org/recommendations.

My

## Note: The BCBS issued in February 2016 a new release of this document, enlarged with a new Annex 4: General Guide to Account Opening. http://www.bis.org/bcbs/publ/d353.htm

worldwide with the purpose of enhancing financial stability". Sound ML/FT risk management has particular relevance to the overall safety and soundness of banks and of the banking system, the primary objective for banking supervision, in that

- it helps protect the reputation of both banks and national banking systems by preventing and deterring the use of banks to launder illicit proceeds or to raise or move funds in support of terrorism; and
- it preserves the integrity of the international financial system as well as the work of governments in addressing corruption and in combating the financing of terrorism.
- The Inadequacy or absence of sound ML/FT risk management exposes banks to serious risks, especially reputational, operational, compliance and concentration risks. Recent developments, including robust enforcement actions taken by regulators and the corresponding direct and indirect costs incurred by banks due to their lack of diligence in applying appropriate risk management policies, procedures and controls, have highlighted those risks. These costs and damage could probably have been avoided had the banks maintained effective risk-based AML/CFT policies and procedures.
- 7. It is worth noting that all these risks are interrelated. However, in addition to incurring fines and sanctions by regulators, any one of them could result in significant financial costs to banks (eg through the termination of wholesale funding and facilities, claims against the bank, investigation costs, asset seizures and freezes, and loan losses), as well as the diversion of limited and valuable management time and operational resources to resolve problems.
- 8. Consequently, this paper should be read in conjunction with a number of related Committee papers, including the following:
- Core principles for effective banking supervision, September 2012<sup>s</sup>
- The internal audit function in banks, June 2012<sup>6</sup>
- Principles for the sound management of operational risk, June 2011<sup>7</sup>
- Principles for enhancing corporate governance, October 2010<sup>8</sup>
- Due diligence and transparency regarding cover poyment messages related to cross-border wire transfers, May 2009<sup>9</sup>
- Compliance and the compliance function in banks, April 2005<sup>10</sup>
- 9. In an effort to rationalise the Committee's publications on AML/CFT guidance, this document merges and supersedes two of the Committee's previous publications dealing with related topics: Customer due diligence for banks, October 2001 and Consolidated KYC risk management, October 2004. In updating these papers, the Committee has also increased its focus on risks associated with the usage by banks of third parties to introduce business (see Annex 1) and the provision of correspondent banking services (see Annex 2). Despite their importance and relevance, other specific risk areas such as
- See Basel Committee on Banking Supervision, Charter, January 2013, accessible at www.bls.org/bcbs/charter.pdf.
  - Accessible at www.bis.org/publ/bcbs230.pdf.
- Accessible at www.bis.org/publ/bcbs223.pdf.
- Accessible at www.bis.org/publ/bcbs195.pdf.
- Accessible at: www.bis.org/publ/bcbs176.pdf.
- Accessible at: www.bis.org/publ/bcbs154.pdf.
- Accessible at: www.bis.org/publ/bcbs113.pdf.

m

# Note: The BCBS issued in February 2016 a new release of this document, enlarged with a new Annex 4: General Guide to Account Opening. http://www.bis.org/bcbs/publ/d353.htm

politically exposed persons (PEPs), private banking and specific legal structures that were addressed in the previous papers have not been specifically developed in this guidance, since they are the subject of existing FATF publications.<sup>11</sup>

- 10. With respect to the scope of application, these guidelines should be read in conjunction with other standards and guidelines produced by the Committee that promote supervision of banking groups on a consolidated level. <sup>12</sup> This is particularly relevant in the context of AML/CFT since customers frequently have multiple relationships and/or accounts with the same banking group, but in offices located in different countries.
- 11. These guidelines are applicable to all banks. Some of the requirements may require adaptation for use by small or specialised institutions, to fit their specific size or business models. However, it is beyond the scope of this guidance document to address these adjustments.
- 12. These guidelines specifically target banks, banking groups (parts II and III respectively) and banking supervisors (part IV). As stated in BCP 29, the Committee is aware of the variety of national arrangements that exist for ensuring AML/CFT compliance, particularly the sharing of supervisory functions between banking supervisors and other authorities such as financial intelligence units. Therefore, for the purpose of these guidelines, the term "supervisor" might refer to these authorities. In jurisdictions where AML/CFT supervisory authority is shared, the banking supervisor cooperates with other authorities to seek adherence to these guidelines.
- 13. It should be noted that the FATF standards that require countries to apply other measures in their financial sectors and other designated non-financial sectors, or establishing powers and responsibilities for the competent authorities, are not dealt with in this document.

# II. Essential elements of sound ML/FT risk management

In accordance with the updated *Core principles for effective banking supervision* (2012), all banks should be required to "have adequate policies and processes, including strict customer due diligence (CDD) rules to promote high ethical and professional standards in the banking sector and prevent the bank from being used, intentionally or unintentionally, for criminal activities". <sup>14</sup> This requirement is to be seen as a specific part of banks' general obligation to have sound risk management programmes in place to address all kinds of risks, including ML and FT risks. "Adequate policies and processes" in this context requires the Implementation of other measures in addition to effective CDD rules. These measures should also be proportional and risk-based, informed by banks' own risk assessment of ML/FT risks. This document sets out guidance in respect of such measures. In addition, other guidelines (see paragraph 8 above) are applicable or supplementary where no specific AML/CFT guidance exists.

- See in particular the FATF Guidance on Politically Exposed Persons (recommendations 12 and 22), accessible at www.fatf-gafl.org/fr/documents/documents/peps-f12-r22.html.
- See for example BCP 12 in Core principles for effective banking supervision, September 2012.
- Financial Intelligence units are described in Recommendation 26 in the FATF Standards.
- See BCP 29 in Core principles for effective banking supervision, September 2012.

Jan S

Note: The BCBS issued in February 2016 a new release of this document, enlarged with a new Annex 4: General Guide to Account Opening. http://www.bis.org/bdbe/publ/d353.htm

- Assessment, understanding, management and mitigation of risks
- (a) Assessment and understanding of risks
- 15. Sound risk management<sup>15</sup> requires the identification and analysis of ML/FT risks present within the bank and the design and effective implementation of policies and procedures that are commensurate with the identified risks. In conducting a comprehensive risk assessment to evaluate ML/FT risks, a bank should consider all the relevant inherent and residual risk factors at the country, sectoral, bank and business relationship level, among others, in order to determine its risk profile and the appropriate level of mitigation to be applied. The policies and procedures for CDD, customer acceptance, customer identification and monitoring of the business relationship and operations (product and service offered) will then have to take into account the risk assessment and the bank's resulting risk profile. A bank should have appropriate mechanisms to document and provide risk assessment information to competent authorities such as supervisors.
- A bank should develop a thorough understanding of the inherent ML/FT risks present in its customer base, products, delivery channels and services offered (including products under development or to be launched) and the jurisdictions within which it or its customers do business. This understanding should be based on specific operational and transaction data and other internal information collected by the bank as well as external sources of information such as national risk assessments and country reports from international organisations. Policies and procedures for customer acceptance, due diligence and ongoing monitoring should be designed and implemented to adequately control those identified inherent risks. Any resulting residual risk should be managed in line with the bank's risk profile established through its risk assessment. This assessment and understanding should be able to be demonstrated as required by, and should be acceptable to, the bank's supervisor.
- (b) Proper governance arrangements
- 17. Effective ML/FT risk management requires proper governance arrangements as described in relevant previous publications of the Committee. <sup>17</sup> In particular, the requirement for the board of directors to approve and oversee the policies for risk, risk management and compliance is fully relevant in the context of ML/FT risk. The board of directors should have a clear understanding of ML/FT risks. Information about ML/FT risk assessment should be communicated to the board in a timely, complete, understandable and accurate manner so that it is equipped to make informed decisions.
- 18. Explicit responsibility should be allocated by the board of directors effectively taking into consideration the governance structure of the bank for ensuring that the bank's policies and procedures are managed effectively. The board of directors and senior management should appoint an appropriately qualified chief AML/CFT officer to have overall responsibility for the AML/CFT function with the stature and the necessary authority within the bank such that issues raised by this senior officer receive the necessary attention from the board, senior management and business lines.
- 15 See in particular BCP 15 in Core principles for effective banking supervision, September 2012 as well as Principle 6 in Principles for enhancing corporate governance, October 2010.
- Where appropriate, AML/CFT risk assessments at a supranational level should be taken into account.
- 17 See, in particular, The Internal audit function in banks, June 2012; Principles for enhancing corporate governance, October 2010; Compliance and the compliance function in banks, April 2005.

I pur

- 53. Adequate records documenting the evaluation process related to ongoing monitoring and review and any conclusions drawn should also be maintained and will help to demonstrate the bank's compliance with CDD requirements and ability to manage ML and FT risk.
- (b) Updating of information
- 54. Only if banks ensure that records remain accurate, up-to-date and relevant by undertaking regular reviews of existing records and updating the CDD information can other competent authorities, law enforcement agencies or financial intelligence units make effective use of that information in order to fulfil their own responsibilities in the context of AML/CFT. In addition, keeping up-to-date information will enhance the bank's ability to effectively monitor the account for unusual or suspicious activities.
- (c) Supplying information to the supervisors
- 55. A bank should be able to demonstrate to its supervisors, on request, the adequacy of its assessment, management and mitigation of ML/FT risks; its customer acceptance policy; its procedures and policies concerning customer identification and verification; its ongoing monitoring and procedures for reporting suspicious transactions; and all measures taken in the context of AML/CFT.
- 6. Reporting of suspicious transactions and asset freezing
- (a) Reporting of suspicious transactions
- Ongoing monitoring and review of accounts and transactions will enable banks to identify suspicious activity, eliminate false positives and report promptly genuine suspicious transactions. The process for identifying, investigating and reporting suspicious transactions to the FIU should be clearly specified in the bank's policies and procedures and communicated to all personnel through regular training. These policies and procedures should contain a clear description for employees of their obligations and instructions for the analysis, investigation and reporting of such activity within the bank as well as guidance on how to complete such reports.
- 57. There should also be established procedures for assessing whether the bank's statutory obligations under recognised suspicious activity reporting regimes require the transaction to be reported to the appropriate law enforcement agency or FIU and/or supervisory authorities, if relevant. These procedures should also reflect the principle of confidentiality, ensure that investigation is conducted swiftly and that reports contain relevant information and are produced and submitted in a timely manner. The chief AML/CFT officer should ensure prompt disclosures where funds or other property that is suspected to be the proceeds of crime remain in an account.
- 58. Once suspicion has been raised in relation to an account or relationship, in addition to reporting the suspicious activity a bank should ensure that appropriate action is taken to adequately mitigate the risk of the bank being used for criminal activities. This may include a review of either the risk classification of the customer or account or of the entire relationship itself. Appropriate action may necessitate escalation to the appropriate level of decision-maker to determine how to handle the relationship, taking into account any other relevant factors, such as cooperation with law enforcement agencies or the FIU.

#### (b) Asset freezing

59. Financing of terrorism has similarities compared to money laundering, but it also has specificities that banks should take into due consideration: funds that are used to finance terrorist activities may be derived either from criminal activity or from legal sources, and the nature of the funding sources may vary according to the type of terrorist organisation. In addition, it should be noted that transactions associated with the financing of terrorists may be conducted in very small amounts.

In So

#### Note: The BCBS issued in February 2016 a new release of this document, enlarged with a new Annex 4: General Guide to Account Opening. http://www.bis.org/bcbs/pub//d353.htm

supervisory process should include not only a review of policies and procedures but also, when appropriate, a review of customer documentation and the sampling of accounts and transactions, internal reports and STRs. Supervisors should always have the right to access all documentation related to the transactions conducted or accounts maintained in that Jurisdiction, including any analysis the bank has made to detect unusual or suspicious transactions.

- 88. Supervisors have a duty to ensure their banks maintain sound ML/FT risk management not only to protect their own safety and soundness but also to protect the integrity of the financial system. Supervisors should make it clear that they will take appropriate action, which may be severe and public if the circumstances warrant, against banks and their officers who demonstrably fail to follow their own internal procedures and regulatory requirements. In addition, supervisors (or other relevant national authorities) should be able to apply appropriate countermeasures and ensure that banks are aware of and apply enhanced CDD measures to business relationships and to transactions when called for by the FATF or that involve jurisdictions where their AML/CFT standards are considered inadequate by the country. In this aspect, the FATF and some national authorities have listed a number of countries and jurisdictions that are considered to have strategic AML/CFT, deficiencies or that do not comply with international AML/CFT standards, <sup>36</sup> and such findings should be a component of a bank's ML/FT risk management.
- 89. Supervisors should also consider a bank's overall monitoring and oversight of compliance at the branch and subsidiary level as well as the ability of group policy to accommodate local regulatory requirements and ensure that where there is a difference between the group and local requirements, the stricter of the two is applied. Supervisors should also ensure that in cases where the group branch or subsidiary cannot apply the stricter of the two standards, the reasons for this and the differences between the two should be documented and appropriate mitigating measures implemented to address risks identified as a result of those differences.
- 90. In a cross-border context, home country supervisors on simpediments in verifying a bank's compliance with group-wide AML/CFT policies and procedures during on-site inspections. This may well require a review of customer files and a sampling of accounts or transactions in the host jurisdiction. Home country supervisors should have access to information on sampled individual customer accounts and transactions and on the specific domestic and international risks associated with such customers to the extent necessary to enable a proper evaluation of the application of CDD standards and an assessment of risk management practices. This use of information for a legitimate supervisory need, safeguarded by the confidentiality provisions applicable to supervisors, should not be impeded by local bank secrecy or data protection laws. Although the host country supervisors and/or
- Many supervisors also have a duty to report any suspicious, unusual or illegal transactions that they detect, for example, during on-site examinations.
- For instance, jurisdictions may be publicly identified by :
  - the FATF's Public Statement, which identifies:
    - (i) jurisdictions that have strategic AML/CFT deficiencies and to which countermeasures apply;
    - jurisdictions with strategic AML/CFT deficiencies that have not made sufficient progress in addressing the deficiencies or have not committed to an action plan developed with the FATF to address the deficiencies.
  - The FATF public document, improving Global AML/CFT Compliance: On-going Process, which identifies jurisdictions with strategic AML/CFT deficiencies that have provided a high-level political commitment to address the deficiencies through implementation of an action plan developed with the FATF.
- in those countries where the examination process is undertaken by external auditors, this exemption should also apply to the competent auditors.

M. M.

# PREVENTION OF CRIMINAL USE OF THE BANKING SYSTEM FOR THE PURPOSE OF MONEY-LAUNDERING (December 1988) "SB4"

#### Preamble

- Banks and other financial institutions may be unwittingly used as intermediaries for the transfer or deposit of funds derived from criminal activity. Criminals and their associates use the financial system to make payments and transfers of funds from one account to another; to hide the source and beneficial ownership of money; and to provide storage for bank-notes through a safe-deposit facility. These activities are commonly referred to as money-laundering.
- 2. Efforts undertaken hitherto with the objective of preventing the banking system from being used in this way have largely been undertaken by judicial and regulatory agencies at national level. However, the increasing international dimension of organised criminal activity, notably in relation to the narcotics trade, has prompted collaborative initiatives at the international level. One of the earliest such initiatives was undertaken by the Committee of Ministers of the Council of Europe in June 1980. In its report the Committee of Ministers concluded that "... the banking system can play a highly effective preventive role while the cooperation of the banks also assists in the repression of such criminal acts by the judicial authorities and the police". In recent years the issue of how to prevent criminals laundering the proceeds of crime through the financial system has attracted increasing attention from legislative authorities, law enforcement agencies and banking supervisors in a number of countries.
- 3. The various national banking supervisory authorities represented on the Basle Committee on Banking Regulations and Supervisory Practices do not have the same roles and responsibilities in relation to the suppression of money-laundering. In some countries supervisors have a specific responsibility in this field; in others they may have no direct responsibility. This reflects the role of banking supervision, the primary function of which is to maintain the overall financial stability and soundness of banks rather than to ensure that individual transactions conducted by bank customers are legitimate. Nevertheless, despite the limits in some countries on their specific responsibility, all members of the Committee firmly believe that supervisors cannot be indifferent to the use made of banks by criminals.
- 4. Public confidence in banks, and hence their stability, can be undermined by adverse publicity as a result of inadvertent association by banks with criminals. In addition,

Inn

Measures against the transfer and safeguarding of funds of criminal origin. Recommendation No. R(80)10 adopted by the Committee of Ministers of the Council of Europe on 27th June 1980.

banks may lay themselves open to direct losses from fraud, either through negligence in screening undesirable customers or where the integrity of their own officers has been undermined through association with criminals. For these reasons the members of the Basle Committee consider that banking supervisors have a general role to encourage ethical standards of professional conduct among banks and other financial institutions.

- 5. The Committee believes that one way to promote this objective, consistent with differences in national supervisory practice, is to obtain international agreement to a Statement of Principles to which financial institutions should be expected to adhere.
- 6. The attached Statement is a general statement of ethical principles which encourages banks' management to put in place effective procedures to ensure that all persons conducting business with their institutions are properly identified; that transactions that do not appear legitimate are discouraged; and that cooperation with law enforcement agencies is achieved. The Statement is not a legal document and its implementation will depend on national practice and law. In particular, it should be noted that in some countries banks may be subject to additional more stringent legal regulations in this field and the Statement is not intended to replace or diminish those requirements. Whatever the legal position in different countries, the Committee considers that the first and most important safeguard against money-laundering is the integrity of banks' own managements and their vigilant determination to prevent their institutions becoming associated with criminals or being used as a channel for money-laundering. The Statement is intended to reinforce those standards of conduct.
- 7. The supervisory authorities represented on the Committee support the principles set out in the Statement. To the extent that these matters fall within the competence of supervisory authorities in different member countries, the authorities will recommend and encourage all banks to adopt policies and practices consistent with the Statement. With a view to its acceptance worldwide, the Committee would also commend the Statement to supervisory authorities in other countries.

In the

## Statement of Principles

#### I. Purpose

Banks and other financial institutions may unwittingly be used as intermediaries for the transfer or deposit of money derived from criminal activity. The intention behind such transactions is often to hide the beneficial ownership of funds. The use of the financial system in this way is of direct concern to police and other law enforcement agencies; it is also a matter of concern to banking supervisors and banks' managements, since public confidence in banks may be undermined through their association with criminals.

This Statement of Principles is intended to outline some basic policies and procedures that banks' managements should ensure are in place within their institutions with a view to assisting in the suppression of money-laundering through the banking system, national and international. The Statement thus sets out to reinforce existing best practices among banks and, specifically, to encourage vigilance against criminal use of the payments system, implementation by banks of effective preventive safeguards, and cooperation with law enforcement agencies.

## II. Customer identification

With a view to ensuring that the financial system is not used as a channel for criminal funds, banks should make reasonable efforts to determine the true identity of all customers requesting the institution's services. Particular care should be taken to identify the ownership of all accounts and those using safe-custody facilities. All banks should institute effective procedures for obtaining identification from new customers. It should be an explicit policy that significant business transactions will not be conducted with customers who fail to provide evidence of their identity.

## III. Compliance with laws

Banks' management should ensure that business is conducted in conformity with high ethical standards and that laws and regulations pertaining to financial transactions are adhered to. As regards transactions executed on behalf of customers, it is accepted that banks may have no means of knowing whether the transaction stems from or forms part of criminal activity. Similarly, in an international context it may be difficult to ensure that cross-border transactions on behalf of customers are in compliance with the regulations of another country. Nevertheless, banks should not set out to offer services or provide active assistance in transactions which they have good reason to suppose are associated with money-laundering activities.

Mr &

# IV. Cooperation with law enforcement authorities

Banks should cooperate fully with national law enforcement authorities to the extent permitted by specific local regulations relating to customer confidentiality. Care should be taken to avoid providing support or assistance to customers seeking to deceive law enforcement agencies through the provision of altered, incomplete or misleading information. Where banks become aware of facts which lead to the reasonable presumption that money held on deposit derives from criminal activity or that transactions entered into are themselves criminal in purpose, appropriate measures, consistent with the law, should be taken, for example, to deny assistance, sever relations with the customer and close or freeze accounts.

## V. Adherence to the Statement

All banks should formally adopt policies consistent with the principles set out in this Statement and should ensure that all members of their staff concerned, wherever located, are informed of the bank's policy in this regard. Attention should be given to staff training in matters covered by the Statement. To promote adherence to these principles, banks should implement specific procedures for customer identification and for retaining internal records of transactions. Arrangements for internal audit may need to be extended in order to establish an effective means of testing for general compliance with the Statement.

A and

Money-loundering

Men Association

"SB5"



G08-034360-A

I Am



# FINANCIAL INTELLIGENCE CENTRE REPUBLIC OF SOUTH AFRICA Private Bag X115, Pretoria, 0001 Tel: + 27 12 309 9200, Fax +27 12 315 5770 Web address: www.fic.gov.za

E-mail address: fic\_feedback@fic.gov.za

# Financial Intelligence Centre Guidance Note 4 on Suspicious Transaction Reporting

## PREFACE

Money laundering has been criminalised in section 4 of the Prevention of Organised Crime Act, 1998. A money laundering offence may be described as the performing of any act that may result in concealing the nature of the proceeds of crime or of enabling a person to avoid prosecution or in the diminishing of the proceeds of crime.

Apart from criminalising the activities constituting money laundering, South African law also contains a number of control measures aimed at facilitating the detection and investigation of money laundering. These control measures, as contained in the Financial intelligence Centre Act, 38 of 2001, ("the FIC Act") are based on three basic principles of money laundering detection and investigation, i.e. that:

intermediaries in the financial system must know with whom they are doing business;

Pan D

- the paper trail of transactions through the financial system must be preserved;
- possible money laundering transactions must be brought to the attention of the Financial Intelligence Centre ("the Centre") and the Investigating authorities.

The control measures introduced by the FIC Act include requirements for institutions to establish and verify the identities of their customers, to keep certain records, to report certain information and to implement measures that will assist them in complying with the Act.

The FIC Act also established the Financial Intelligence Centre which is South Africa's financial intelligence unit, a government agency created to collect, analyse and interpret information disclosed to it and obtained by it. The Centre is an integral part of our country's fight against the global crime of money laundering. In addition, section 4 (c) of the FIC Act empowers the Centre to provide guidance in relation to a number of matters concerning compliance with the obligations of the Act. This Guidance Note is published by the Centre in terms of section 4(c) of the FIC Act.

## Application of this Guidance Note

The Centre has prepared this Guidance Note to assist accountable institutions, reporting institutions and any other person as described in section 29 of the FIC Act in meeting their reporting obligations under the Act. It provides general guidance on the nature of reporting under section 29 and explains reporting timelines, how reports have to be sent to the Centre, what information has to be included in these reports and how to use the electronic reporting mechanism.

Guidance provided by the Centre is the only form of guidance formally recognised in terms of the FIC Act and the Money Laundering and Terrorist Financing Control Regulations ("the Regulations") Issued under the FIC Act.



Guidance emanating from industry associations or other organisation, therefore, in the Centre's view, does not have a bearing on assessing compliance with the obligations imposed by the FIC Act or the Interpretation of its provisions.

The guidance provided by the Centre in this Guidance Note, although authoritative, is provided as general information only. The Guidance Note does not provide legal advice and is not intended to replace the FIC Act or the Regulations issued under the FIC Act. However, failure to forward suspicious transaction reports through to the Centre is an offence in terms of section 52 of the FIC Act.



#### **GLOSSARY**

"The Centre" means the Financial Intelligence Centre established in terms of section 2 of the FIC Act.

"FIC Act" refers to the Financial Intelligence Centre Act, 2001 (Act No 38 of 2001), as amended.

"POCA" refers to the Prevention of Organised Crime Act, 1998 (Act No 121 of 1998), as amended.

"Regulations" refer to the Money Laundering and Terror Financing Centrol Regulations made in terms of section 77 of the FIC Act and promulgated in Government Notice 1595 of 20 December 2002 as amended by Government Notice R456 of 20 May 2005.

"Reporter" refers to the person or entity making the report.

"STR" refers to a suspicious or unusual transaction report submitted in terms of Section 29 of the FIC Act.

I am

#### INTRODUCTION

The FIC Act provides for the reporting of suspicious and unusual transactions. The FIC Act repealed section 7 of the POCA and from 3 February 2003 the duty to report suspicious and unusual transactions is governed by section 29 of the FIC Act.

Accountable institutions, reporting institutions and any other person as described in section 29 of the FIC Act have a role to play in South Africa's efforts to prevent money laundering and terrorist financing. It is imperative that accountable institutions, reporting institutions and any other person that comes into contact with a financial transaction that is potentially linked to money laundering or terrorist financing, report his or her suspicion to the Centre.

The reporting of suspicious and unusual transactions is regarded as an essential element of the anti-money laundering programme for every country. The international standard on measures to combat money laundering and terrorist financing, in the form of the Forty Recommendations of the Financial Action Task Force ("the FATF") on Money Laundering, provides the following concerning the reporting of suspicious transactions:

#### "Recommendation 13

If financial institutions suspect that funds stem from criminal activity, they should be required to report promptly their suspicions to the competent authorities."

The FATF is an inter-governmental body that engages in the development and promotion of national and international policies and standards to combat money laundering and terrorist financing. It works to generate the necessary political will to bring about legislative and regulatory reforms in these areas. The FATF has developed internationally recognised standards for measures to combat money laundering and terror financing



This means that any person associated with a commercial undertaking as an owner, manager or employee of that undertaking, can become subject to the obligation to report suspicious or unusual transactions.

# PART 2 - WHAT GIVES RISE TO THE OBLIGATION TO REPORT?

- 2.1 The obligation under section 29 of the FIC Act to report a transaction arises when a person knows of certain facts, on the one hand, or in circumstances in which a person ought reasonably to have known or suspected that certain facts exist, on the other. This means that a person associated with a business, as described above, must report his or her knowledge or suspicion to the Centre whenever:
  - he or she becomes aware of something, or
  - circumstances arise in which a person can reasonably be expected to be aware of something, or
  - circumstances arise in which a person can reasonably be expected to suspect something.
- 2.2 Section 29(1) of the FIC Act describes the "something" referred to above. This can relate to situations concerning the business itself or concerning transactions to which the business is a party. Situations relating to the business itself are that the business:
  - has received the proceeds of unlawful activities, or it is about to receive such proceeds,
  - has received property which is connected to an offence relating to the financing of terrorist activities, or it is about to receive such property.
  - has been used in some way for money laundering purposes, or it is about to be used for money laundering purposes, or
  - has been used in some way to facilitate an offence relating to the financing of terrorist activities, or it is about to be used for this purpose.
- 2.3 These do not have to relate to any particular transactions involving the business. Instead they relate more to the way in which the affairs of a business are conducted. These include, for example, instances where the

fan

business is used as a front to disguise the movement of proceeds of unlawful activities, or where the facilities of a business (such as its bank accounts) are being used to facilitate the transfer of proceeds of unlawful activities.

- 2.4 The situations concerning transactions to which the business is a party relate to transactions between the business in question and its customers and the customers' motives for engaging in those transactions. These can relate to a particular transaction or to a series of transactions. These are situations where a person is aware or suspects that a transaction or series of transactions with the business:
  - facilitated the transfer of the proceeds of unlawful activity or is likely to do so,
  - facilitated the transfer of property which is connected to an offence relating to the financing of terrorist activities or is likely to do so,
  - does not appear to have a business purpose,
  - does-not appear to have a lawful purpose,
  - may be relevant to the investigation of the evasion of any tax administered by the South African Revenue Service, or
  - somehow relates to an offence relating to the financing of terrorist activities.
- 2.5 The FIC Act defines "proceeds of unlawful activity" and "unlawful activity" by reference to the definitions of the same terms in the POCA. Thus the term "proceeds of unlawful activity" for the purposes of the FIC Act means:
  - any property or any service, advantage, benefit or reward;
  - which was derived, received or retained:
    - o directly or indirectly,
    - o In South Africa or elsewhere,
    - o at any time before or after the commencement of POCA,
  - in connection with or as a result of any unlawful activity carried on by any person.

Mun

- 2.6 The term "unlawful activity" means any conduct, which constitutes a crime or which contravenes any law whether such conduct occurred in the Republic or elsewhere.
- It is important to note that Section 29 of the FIC Act refers to reports being made in connection with the *proceeds* of unlawful activities and *money laundering* or *terror financing* offences as opposed to criminal activity in general. The FIC Act therefore does not require reports to be made on suspected crimes or unlawful conduct by a person (apart from money laundering and terror financing activities).

This may best be explained by means of an example:

A stolen or fraudulent cheque is presented for payment to a bank. This action constitutes an element of a fraud, namely a misrepresentation that the person presenting the cheque is the legitimate holder of the cheque and is entitled to receive the amount reflected on the cheque. The presentation of the cheque is therefore part of an action to commit an offence, namely fraud. As a result this transaction should be reported to the appropriate investigating authorities as a fraud or attempted fraud. However, if the stolen or fraudulent cheque is honoured, the funds collected as a result would constitute the proceeds of the fraud. Any subsequent transaction involving those funds would be a transaction relating to the proceeds of unlawful activities and possibly a money laundering transaction which would fall within the scope of section 29 of the FIC Act.

# PART 3 - WHAT IS THE NATURE OF A SUSPICION?

In addition to circumstances where a person has actual knowledge, the reporting obligation under section 29 of the FIC Act also applies in circumstances where a mere suspicion may exist. The FIC Act does not define what constitutes a suspicion. The ordinary meaning of this term includes state of mind of someone who has an impression of the existence or

Man

presence of something or who believes something without adequate proof, or the notion of a feeling that something is possible or probable. This implies an absence of proof that a fact exists.

This interpretation of the term "suspicion" was also applied in South African case law: In Powell NO and others v Van der Merwe NO and Others 2005 (5) South Africa 62 (SCA) the Supreme Court of Appeal confirmed that South African courts have endorsed the following interpretation of the term used by Lord Develin in the English case of Shabaan Bin Husseln and Others v Chong Fook Kam and Another [1970] AC 942 (PC) ([1969] 3 All ER 1627) at 948B:

Suspicion in its ordinary meaning is a state of conjecture or surmise where proof is lacking; "I suspect but I cannot prove".

- 3.3 With this in mind the starting point to considering whether circumstances give rise to a suspicion would be when those circumstances raise questions or gives rise to discomfort, apprehension or mistrust.
- A suspicious state of mind is subjective, which means that a court would have to draw inferences concerning a person's state of mind in relation to a particular set of circumstances from the evidence at its disposal concerning those circumstances. However, the FIC Act adds an element of objectivity to this with the phrase "ought reasonably to have known or suspected" in section 29(1). The application of this phrase is explained in section 1(3) of the FIC Act. Section 1(3) of the POCA provides that a person ought reasonably to have known or suspected a fact if a reasonably diligent and vigilant person with the same knowledge, skill, training and experience, as well as the knowledge, skill, training and experience that may reasonably be expected of a person in the same position, would have known or suspected that fact. This expands the scope of the obligation to identify circumstances which may indicate that a set of circumstances concerning a business, or the transactions involving the business, is of a suspicious nature.

and

- 3.5 When considering whether there is reason to be suspicious of a particular situation one should assess all the known circumstances relating to that situation. This includes the normal business practices and systems within the industry where the situation arises.
- A suspicious situation may involve several factors that may on their own seem insignificant, but, taken together, may raise suspicion concerning that situation. The context, in which a situation arises, therefore, is a significant factor in assessing suspicion. This will vary from business to business and from one customer to another.
- A person to whom section 29 of the FIC Act applies, should evaluate matters concerning the business in question and transactions involving the business, in relation to what seems appropriate and is within normal practices in the particular line of business of that person, and bring to bear on these factors such as the knowledge the person may have of the customer. This should involve an application of person's knowledge of the customer's business, financial history, background and behaviour.
- A particular category of transactions that are reportable under section 29(1) of the FIC Act is transactions which a person knows or suspects to have no apparent business or lawful purpose. This refers to situations where customers enter into transactions that appear unusual in a business context or where it is not clear that purpose of the transaction(s) is lawful. In order to identify situations where customers wish to engage in these unusual transactions a person would have to have some background information as to the purpose of a transaction and evaluate this against several factors such as the size and complexity of the transaction as well as the person's knowledge of the customer's business, financial history, background and behaviour.
- 3.9 In Part 4 of this Guidance Note more information is given as to factors that may indicate that a transaction is suspicious in a money laundering and terrorist financing context, respectively. These are indicators as to

Am B

circumstances that may give rise to a suspicious state of mind or may be indicative of the fact that a reasonably diligent and vigilant person may have become suspicious of a particular transaction or series of transactions.

# PART 4 - INDICATORS OF SUSPICIOUS AND UNUSUAL TRANSACTIONS

4.1 The indicators discussed in this Part apply specifically to those situations where a suspicion may relate to a fransaction between a business and its customer. These indicators are offered in order to assist persons involved in business to identify those situations where transactions should raise questions or give rise to the sense of discomfort, apprehension or mistrust which was referred to in the previous Part. These indicators are therefore merely examples of factors that may be helpful when evaluating transactions. The list is not exhaustive and does not intend to cover every possible situation. The indicators suggested here should not to be viewed in isolation and should always be taken into consideration in conjunction with all other circumstances pertaining to a particular transaction.

#### Unusual business

- Deposits of funds with a request for their immediate transfer elsewhere;
- Unwarranted and unexplained international transfers;
- The payment of commissions or fees that appear excessive in relation to those normally payable;
- Lack of concern about high commissions, fees, penalties etc. incurred as a result of a particular type of transaction or particular method of transacting;
- Transactions do not appear to be in keeping with normal industry practices;
- Purchase of commodities at prices significantly above or below market prices;
- Unnecessarily complex transactions;



- Unwarranted involvement of structures such as trusts and corporate vehicles in transactions;
- A transaction seems to be unusually large or otherwise inconsistent with the customer's financial standing or usual pattern of activities;
- Buying or selling securities with no apparent concern for making a profit or avoiding a loss;
- Unwarranted desire to involve entitles in foreign jurisdictions in transactions.

# Knowledge of Reporting or Record Keeping Requirements

- A customer attempts to convince employee not to complete any documentation required for the transaction;
- A customer makes inquiries that would indicate a desire to avoid reporting;
- A customer has unusual knowledge of the law in relation to suspicious transaction reporting;
- A customer seems very conversant with money laundering or terrorist activity financing issues;
- A customer is quick to volunteer that funds are clean or not being laundered.

#### Identification

- The use of a seemingly false identity in connection with any transaction, including the use of aliases and a variety of similar but different addresses and, in particular, the opening or operating of a false name account;
- Opening accounts using false or fictitious documents;
- A customer provides doubtful or vague identification information;
- A customer refuses to produce personal identification documents;
- A customer changes a transaction after learning that he must provide a form of identification;
- A customer only submits copies of personal identification documents;

Mur

- A customer wants to establish Identity using something other than his or her personal Identification documents;
- A customer's supporting documentation lacks important details such as contact particulars;
- A customer inordinately delays presenting corporate documents; or
- All identification presented is foreign or cannot be checked for some reason.

#### General

- A customer provides insufficient vague or suspicious information concerning a transaction;
- Accounts that show unexpectedly large cash deposits and immediate withdrawals;
- A frequent exchange of small denomination notes for larger denomination notes;
- Involvement of significant amounts of cash in circumstances that are difficult to explain.

# Suspicious Transaction Reports - threshold

- 4.2 It is important to make it clear that there is no monetary threshold which applies to the reporting of suspicious or unusual transactions. Once the conclusion is reached that a situation exits which should give rise to a suspicion that a transaction relates to proceeds of unlawful activities, money laundering or terror financing, as explained above, the transaction must be reported irrespective of the amount involved.
- 4.3 This must not be confused with a situation where the amount involved in a transaction, or series of transactions, is the basis of a suspicion or forms part of the circumstances which gives rise to a suspicion pertaining to the transaction or series of transactions.

## Should the closing of an account be regarded as suspicious?

The closing of an account with an institution is a transaction which forms part of the business relationship which will be terminated by the account closure.



In these circumstances institutions should consider factors such as the history of the account, the circumstances that led to the customer's decision to close the account and the reasons given by the customer for the closure of the account. For example, where a customer's instruction to close an account was preceded by a request by the institution for additional or updated information pertaining to the customer, the decision to rather close the account than to provide the requested information may be regarded as suspicious.

# PART 5 - WHAT ARE THE IMPLICATIONS OF MAKING A STR?

Can an institution continue transacting with a customer after a STR has been made?

- 5.1 Section 33 of the FIC Act provides that a reporter may continue with and carry out a transaction in respect of which a report is required to be made unless the Centre directs the reporter not to proceed with the transaction in terms of section 34.
- The Centre may issue a directive ("an Intervention order") in writing not to proceed with a transaction after consultation with the institution or person concerned. The Centre must have reasonable grounds to suspect that a transaction may involve the proceeds of unlawful activities or property which is connected to an offence relating to terrorist financing, or may in some other way constitute money laundering terrorist financing. The intervention order may require the institution or person not to proceed with the transaction which gave rise to the Centre's belief or any other transaction in respect of funds that are affected by the particular transaction. The intervention order is valid for a period not exceeding five days excluding weekends and public holidays.
- One of the main purposes of an intervention order is to prevent the dissipation of funds or property which may be the proceeds of unlawful activity. A typical example of where this may be the case is where funds or assets are due to be transferred from one location to another or from one person to another,

My



# "SB6"

Case No: U20150854

# IN THE CROWN COURT AT SOUTHWARK IN THE MATTER OF 8. 45 OF THE CRIME AND COURTS ACT 2013

Royal Courts of Justice Strand, London, WC2A 2LL

Date: 30 November 2015

Before:

# THE PRESIDENT OF THE OUEEN'S BENCH DIVISION (THE RT. HON. SIR BRIAN LEVESON)

Between:

SERIOUS FRAUD OFFICE

**Applicant** 

- and -STANDARD BANK PLC

Respondent

STANDARD BANK PLC
(Now known as ICBC Standard Bank plc)

-----

Sir Edward Garnier Q.C., Crispin Aylett Q.C. and Allison Clare (instructed by the Serious Fraud Office) for the Applicant
Nicholas Purnell Q.C. (instructed by Herbert Smith Freehills LLP, London) for the Respondent

Hearing date: 4 November 2015

**Approved Judgment** 

and

#### Sir Brian Leveson P

- 1. The traditional approach to the resolution of alleged criminal conduct is for a prosecution authority to commence proceedings by summons or charge which then proceeds in court to trial and, if a conviction follows, to the imposition of a sentence determined by the court. By s. 45 and Schedule 17 of the Crime and Courts Act 2013 ("the 2013 Act"), a new mechanism of deferred prosecution agreement ("DPA") was introduced into the law whereby an agreement may be reached between a designated prosecutor and an organisation facing prosecution for certain economic or financial offences. The effect of such an agreement is that proceedings are instituted by preferring a bill of indictment, but then deferred on terms: these terms can include the payment of a financial penalty, compensation, payment to charity and disgorgement of profit along with implementation of a compliance programme, co-operation with the investigation and payment of costs. If, within the specified time, the terms of the agreement are met, proceedings are discontinued; a breach of the terms of the agreement can lead to the suspension being lifted and the prosecution pursued.
- 2. By para. 7-8 of Schedule 17 to the 2013 Act, after negotiations have commenced between a prosecutor and relevant organisation, the prosecutor must apply to the court, in private, for a declaration that entering into a DPA in the circumstances which obtain is likely to be in the interests of justice and that the proposed terms are "fair, reasonable and proportionate". Reasons must be given for the conclusion expressed by the court and in the event of such a declaration (either initially or following further negotiation and review), formal agreement can then be reached between the parties. In that event, a further hearing is necessary for the court to declare that the agreement is, in fact, in the interests of justice and that the terms (no longer proposed, but agreed) are fair, reasonable and proportionate.
- 3. If a DPA is reached and finally approved, the relevant declaration, with reasons, must be pronounced in public. Thereafter, the prosecutor must also publish the agreement and the initial or provisional positive declaration (along with any earlier refusal to grant the declaration) in each case with the reasons provided. In that way, the entirety of the process, albeit then resolved, becomes open to public scrutiny.
- 4. On 24 February 2014, s. 45 and Schedule 17 of the 2013 Act came into force: see the Crime and Courts Act 2013 (Commencement No 8) Order 2014 (SI 2014/258). The application now before the court is the first example of its use and, having had the opportunity of studying the papers (with the background material) and hearing Sir Edward Garnier Q.C. for the Serious Fraud Office ("SFO") and Mr Nicholas Purnell Q.C. for Standard Bank Plc ("Standard Bank"), I made it clear that I was prepared to grant a declaration pursuant to para. 7(1) of Schedule 17 although I reserved my reasons in order to reduce them into writing and provide an analysis both of the requirements of the scheme and its application to this case. This judgment (which contains the reasons for my decision) will remain private unless and until agreement is reached and a further declaration made under para. 8 of Schedule 17.
- 5. Schedule 17 to the 2013 Act and Part 11 of The Criminal Procedure Rules 2015 ("the 2015 Rules") prescribe the terms and conditions of this scheme in considerable detail. In short, by a DPA, the organisation (a body corporate, a partnership or an unincorporated association, but not an individual) may reach an agreement with a designated prosecutor such as the Director of Public Prosecutions or the Director of

m

the SFO, who, in each case, must act personally. Until approved by the court, that agreement is inevitably provisional.

- 6. Every agreement must contain a statement of facts relating to the alleged offence which may include admissions made by the organisation and must specify an expiry date upon which it will cease to have effect if not already terminated by breach: see para. 5 of Schedule 17. A non-exhaustive list of potential terms and conditions is provided at para. 5(3) with provision for time limits for compliance with specific terms.
- The designated prosecutor and any corporate entity considering entering into a DPA are assisted by the Code of Practice issued by the SFO and the Crown Prosecution Service in relation to the general principles to be applied along with the disclosure and use of information as required: see the requirements of para. 6 of Schedule 17. At this stage, neither it nor Part 11 of the 2015 Rules (which sets out the mechanics of the various applications that can be made in relation to DPAs) need further elaboration.

#### The Facts

- 8. Standard Bank Group Ltd is a publicly owned company registered in South Africa of which, at the relevant time, Standard Bank (a UK regulated bank) was a subsidiary. The Group was also the ultimate parent of Stanbic Bank Tanzania Ltd, a Tanzanian company based in Dar es Salaam ("Stanbic") which, significantly, was not licensed to deal with non-local foreign investors in the debt capital markets. That role had to be performed, if the work was to be undertaken, by Standard Bank.
- 9. In 2012, the Government of Tanzania needed to raise public funds in order to support Tanzania's ongoing "Five Year Development Plan" and to meet key infrastructure requirements within the country. Standard Bank and Stanbic put forward a proposal by which they would be mandated to raise those funds for the Government of Tanzania by way of a sovereign note private placement. The transaction was a significant one in terms of revenue for Standard Bank and Stanbic, and also in terms of reputation and future business opportunities in Tanzania. On the other hand, the potential for corrupt practices to affect this type of business was well known.
- 10. Negotiations began in February 2012 when Standard Bank and Stanbic quoted a combined fee of 1.4% of gross proceeds raised. The matter did not, however, progress until September 2012, when Stanble increased the proposed fee to be paid by the Government of Tanzania to 2.4%. It transpired that 1% of that fee would be paid to a "local partner", a Tanzanian company called Enterprise Growth Market Advisors Limited ("EGMA"). EGMA's chairman and one of its three shareholders and directors, Mr. Harry Kitilya, was at all relevant times Commissioner of the Tanzania Revenue Authority and, as such, a serving member of the Government of Tanzania. EGMA's Managing Director, Dr. Fratern Mboya had been CEO of the Tanzanian Capital Markets and Securities Authority ("CMSA") between 1995 and 2011. The room for conflict and risk was evident but this issue was never addressed by Stanbic.
- In the period which thereafter elapsed, there is no evidence that EGMA provided any services in relation to this transaction: no paperwork or notes of meetings were found. Further, the proposed involvement of a local partner (along with the increased fee) was only disclosed to Standard Bank sometime after it had been proposed to the

An

Government of Tanzania. The only inference is that both the Chief Executive Officer of Stanbic, Bashir Awale, and its Head of Corporate and Investment Banking, Shose Sinare, intended the 1% fee promised to EGMA to induce Harry Kitilya, and perhaps other members of the Government of Tanzania to show favour to Stanbic and Standard Bank's proposal.

- 12. At the end of September 2012, EGMA opened a bank account with Stanbic which obliged Stanbic to undertake regulatory checks ("Know Your Customer" or "KYC"); in the event, these consisted of an account opening form, bank checklist, company search identifying the directors, the provision of limited company and personal identification documents and a reference. The checklist acknowledged that the account was "high risk" (without making plain the basis for that conclusion). No documents have been provided which record or discuss the role of Mr Kitilya within the Government of Tanzania or the role in CMSA of Mr Mboya and, hence, any consideration of its connection with politically exposed persons ("PEPs"). These KYC checks do not appear to have been conducted in the same level of detail as would have been the case had Standard Bank conducted its own KYC and/or due diligence on EGMA. Further, the transaction was within Mr Kitilya's jurisdiction and, according to Stanbic's regulator, should have inhibited him from taking part as external consultant.
- 13. What is undeniable, however, is that after the addition of EGMA, the proposal proceeded quickly. In November, mandate and fee letters were signed, the former being between Standard Bank, Stanbic and the Ministry of Finance for the Government of Tanzania. This mandate did not mention any partner or third party and referred to a "total facilitation" fee of 2.4% which is said to constitute "total advisory, arranging coordinator participation and bookrunner fees" and to include "disbursement costs and agency costs". The fee letter refers to Standard Bank and Stanbic agreeing to act as lead manager and acting as lead "... in collaboration with its partner". Also important was the way in which the arrangement was structured: it allowed Tanzanian public funds to be paid to EGMA via Stanbic, without the payment having to be made directly by the Government of Tanzania.
- 14. Turning to the position of Standard Bank, despite the fact that it acted jointly with Stanbic on the transaction, the team at the Bank (led by its then Head of Global Debt Capital Markets, Florian Von Hartig), did not believe Standard Bank was required to conduct KYC and due diligence. In that regard, it is common ground that the applicable policies at Standard Bank were unclear and did not provide sufficient specific guidance. In this uncertainty, Florian Von Hartig interpreted them as not requiring Standard Bank to conduct any enquiry at all into EGMA. Further, despite the obvious red flags for bribery risk being present, Standard Bank's deal team do not appear to have raised any questions or concerns about the arrangement being corrupt and did not make any enquiry about EGMA or its role. Instead, it relied entirely on Stanbic to conduct KYC checks and raise any concerns as regards EGMA.
- 15. In November 2012, the Government of Tanzania formally granted Stanbic and Standard Bank the mandate to raise the funds. By completion of the financing in March 2013, the amount to be raised stood at US \$600 million. In March 2013, EGMA's 1% fee of US \$6 million was paid by Stanbic into an additional collection account opened with Stanbic earlier that month. Within 10 days of Stanbic's payment, the vast majority had been withdrawn in large cash amounts by Fratern Mboya, with

pu de

#### Anomyed Judgment

the consent and assistance of both Bashir Awale and Shose Sinarc. The remaining balance was shortly after transferred to the account EGMA opened in September 2012 with the authorisation of Shose Sinare.

- 16. Staff at Stanbic raised their concerns about these withdrawals from 26 March 2013 onwards. These concerns were immediately escalated and referred to Standard Bank Group head office in South Africa. On 2 April, Standard Bank Group began an internal investigation. Between 2 and 17 April, Standard Bank in London was informed because, on 17 April, without yet having carried out their own internal investigation, Standard Bank instructed the law firm Jones Day immediately to report the matter to the authorities. On 18 April, Jones Day reported to the Serious and Organised Crime Agency and on 24 April to the SFO.
- 17. Jones Day was also instructed to commence an investigation on behalf of Standard Bank and to disclose its findings to the SFO on its behalf. This is exactly what transpired: its report was sent on 21 July 2014 after which the SFO reviewed the material obtained and conducted its own interviews. On this basis, the Director of the SFO was satisfied that there was a reasonable suspicion, based upon some admissible evidence, that Standard Bank had failed to prevent bribery contrary to section 7 of the Bribery Act 2010 ("the 2010 Act"), and there were reasonable grounds for believing that a continued investigation would provide further admissible evidence within a reasonable period of time, so that all the evidence together would be capable of establishing a realistic prospect of conviction in accordance with the full code test for prosecutions as set out in para. 1.2(i)(b) of the DPA Code of Practice.
- 18. The offence of failing to prevent bribery contrary to s. 7(1) of the 2010 Act is in these terms:

"A relevant commercial organisation... is guilty of an offence under this section if a person... associated with [the organisation] bribes another person intending—

- (a) to obtain or retain business for [the organisation], or
- (b) to obtain or retain an advantage in the conduct of business for [the organisation]."
- 19. In this light, the particulars of the offence of what would be the draft indictment have been identified by the SFO as follows:

"Standard Bank PLC, now known as ICBC Standard Bank PLC, between 1st day of June 2012 and the 31st day of March 2013, failed to prevent a person or persons associated with Standard Bank PLC, namely Stanbic Bank Tanzania Limited and / or Bashir Awale and/or Shose Sinare, from committing bribery in circumstances which they intended to obtain or retain business or an advantage in the conduct of business for Standard Bank PLC, namely by:

Men Bo

- (i) Promising and/or giving EGMA Limited 1% of the monies raised or to be raised by Standard Bank PLC and Standard Bank Tanzania Limited for the Government of Tanzania, where EGMA Limited was not providing any or any reasonable consideration for this payment; and
- (ii) Intending thereby to induce a representative or representatives of the Government of Tanzania to perform a relevant function or activity improperly, namely, showing favour to Standard Bank PLC and Stanbic Bank Tanzania in the process of appointing or retaining them in order to raise the said monies."
- 20. Section 7(2) of the 2010 Act provides that it is a defence for a commercial organisation to have had in place adequate procedures designed to prevent persons associated with the commercial organisation from undertaking the bribery. On the basis of the material disclosed, the Director of the SFO has concluded that Standard Bank did not have a realistic prospect of raising this defence. The applicable policy was unclear and was not reinforced effectively to the Standard Bank deal team through communication and/or training. In particular, Standard Bank's training did not provide sufficient guidance about relevant obligations and procedures where two entities within the Standard Bank Group were involved in a transaction and the other Standard Bank entity engaged an introducer or a consultant.
- 21. In the event, Standard Bank engaged as joint lead manager with Stanbic in a transaction with the government of a high risk country in which a third party received US \$6 million with the protection of only KYC checks relevant to opening a bank account. The checks in relation to that third party were conducted by Stanbic, a sister company in respect of which Standard Bank had no interest, oversight, control or involvement. It did not undertake enhanced due diligence processes to deal with the presence of any corruption red flags regarding the involvement of a third party in a government transaction, relating to a high risk country. There were also failings in terms in not identifying the presence of politically exposed persons and not addressing the arrival of a third party charging a substantial fee. In essence, an anti-corruption culture was not effectively demonstrated within Standard Bank as regards the transaction at issue.
- 22. As a result, it was concluded that the evidential test contained in para 1.2(i)(b) of the DPA Code of Practice was satisfied. Moreover, having regard to all the circumstances, the Director of the SFO considered that the public interest would likely be met by a DPA with Standard Bank and negotiations were commenced accordingly.
- 23. Thereafter, the SFO and Standard Bank reached a provisional agreement as to the terms of a DPA and the SFO now seeks a declaration under para. 7(1) of Schedule 17 of the 2013 Act to the effect that entering into a DPA with the organisation is likely to be in the interests of justice, and the proposed terms of the DPA are fair, reasonable and proportionate. The assessment of the overall merits of the agreement must obviously be taken in the round, but given the fact that this is the first provisionally agreed DPA, I will analyse them individually and in some detail.

per la

#### The Interests of Justice

- 24. Irrespective of the terms of the DPA, it must be in the interests of justice to proceed in this manner as opposed to prosecution and 11.3(3)(i)(i) of the 2015 Rules requires the application for a DPA to explain the way in which the interests of justice are served. The Director of the SFO has accordingly submitted a number of factors that led him to conclude that a DPA with Standard Bank is appropriate.
- 25. The first consideration must be the seriousness of the conduct for the more serious the offence, the more likely it is that prosecution will be required in the public interest and the less likely it is that a DPA will be in the interests of justice. This is a topic to which I shall return when considering the terms of the proposed DPA but it is right, at this stage, to recognise that although the predicate bribery offence was allegedly committed by two senior executives of Stanbic, and involved the intention to bribe a foreign public official, using public funds such as to make the intended bribe payment, such as could have compromised the integrity of a financial market, that is not the conduct in respect of which Standard Bank falls to be judged.
- 26. The criminality which Standard Bank potentially faces is the failure to prevent the intended bribery committed by senior officials of Stanbic (a sister company the management of which is unconnected to the Bank) arising out of the inadequacy of its own compliance procedures and its own failure to recognise the risks inherent in the proposal. The SFO has reached the conclusion that there is insufficient evidence to suggest that any of Standard Bank's employees committed an offence: whilst a payment of US \$6 million was made available to EGMA, the evidence does not demonstrate with the appropriate cogency that anyone within Standard Bank knew that two senior executives of Stanbic intended the payment to constitute a bribe, or so intended it themselves.
- 27. The second feature to which considerable weight must be attached is the fact that Standard Bank immediately reported itself to the authorities and adopted a genuinely proactive approach to the matter; see para. 2.8.2(i) of the DPA Code of Practice and Joint Prosecution Guidance to the Bribery Act 2010 (page 7). In this regard, the promptness of the self-report and the extent to which the prosecutor has been involved are to be taken into account; see para. 2.9.2 of the DPA Code of Practice. In this case, the disclosure was within days of the suspicions coming to the Bank's attention, and before its solicitors had commenced (let alone completed) its own investigation.
- 28. Credit must also be given for self-reporting which might otherwise have remained unknown to the prosecutor: see para. 2.8.2(i) of the DPA Code of Practice. In this regard, the trigger for the disclosure was incidents that occurred overseas which were reported by Stanbic's employees to Standard Bank Group. Were it not for the internal escalation and proactive approach of Standard Bank and Standard Bank Group that led to self-disclosure, the conduct at issue may not otherwise have come to the attention of the SFO.
- 29. The weight given to an organisation's self-report depends on the totality of information that an organisation provides to the prosecutor: see para. 2.9.1 of the DPA Code of Practice. Specifically, the organisation must ensure in its provision of

sur (2)

material as part of the self-report that it does not withhold material that would jeopardise an effective investigation and, where appropriate, prosecution of individuals involved. In this regard, Standard Bank conducted a detailed internal investigation that had been sanctioned by the SFO and reported its findings; the Statement of Facts in the present DPA proceedings is substantially reliant upon the evidence voluntarily disclosed by Standard Bank.

- 30. Furthermore, co-operation includes identifying relevant witnesses, disclosing their accounts and the documents shown to them: see para. 2.8.2 (i) of the DPA Code of Practice. Where practicable it will involve making witnesses available for interview when requested. In this regard, Standard Bank fully cooperated with the SFO from the earliest possible date by, among other things, providing a summary of first accounts of interviewees, facilitating the interviews of current employees, providing timely and complete responses to requests for information and material and providing access to its document review platform. The Bank has agreed to continue to cooperate fully and truthfully with the SFO and any other agency or authority, domestic or foreign, as directed by the SFO, in any and all matters relating to the conduct which is the subject matter of the present DPA. Suffice to say, this self-reporting and cooperation militates very much in favour of finding that a DPA is likely to be in the interests of justice.
- 31. The third element relevant to the interests of justice test concerns the extent of any history of similar conduct involving prior criminal, civil and regulatory enforcement actions against the organisation: see para. 2.8.2 (ii) of the DPA Code of Practice. Standard Bank has no previous convictions for bribery and corruption nor has it been the subject of any other criminal investigations by the SFO. It has, however, been subject to regulatory enforcement action by the Financial Conduct Authority ("FCA") in respect of its failing in its anti-money laundering procedures. In the instant case failings arose in policy, procedure and training, specifically in respect of anti-bribery and corruption. Although there are features of similarity relating to compliance, they related to different processes and are not connected.
- 32. Weight is to be given to any corporate compliance programme in place at the time of the offence, at the time of reporting, and any improvement that has occurred (para. 2.8.2 (iii) of the DPA Code of Practice). In this regard, against this backdrop of Standard Bank's failings in its anti-money laundering and anti-corruption procedures, the SFO accept that the Bank has made significant enhancements to its compliance policies, procedures and processes since the risk and supervisory review conducted by the FCA in 2011.
- 33. In particular, after the FCA proceedings, Standard Bank was required to follow a "risk mitigation programme" and undertake significant actions in order to offer effective remedies to the deficiencies that were identified during the investigation. Consequently, the FCA commissioned a review of the effectiveness of Standard Bank's remedial actions under s166 of the Financial Services and Markets Act and, in April 2014, PricewaterhouseCoopers LLP ("PwC") submitted its Skilled Person Review. Although PwC still expressed significant concerns, it highlighted how Standard Bank had taken extensive steps in regard to recruitment, risk classification and due diligence on customers, and a very clear "tone from the top" to remediate the pre-existing failures. A DPA allows the court to oblige Standard Bank to enhance its anti-bribery and corruption policies and procedures and how they are practically



implemented and the Bank has agreed to an independent review of its anti-corruption policies, procedures and training.

- 34. Finally, relevant but by no means a necessary requirement for a DPA, the fact that the organisation in its current form is effectively a different entity from that which committed the offence weighs in favour of a proposed DPA being in the interests of justice: see para. 2.8.2 (v) of the DPA Code of Practice. On 1 February 2015, ICBC acquired a 60% majority shareholding in Standard Bank and, following the majority share acquisition, a new Board has been appointed the majority of whom are new appointments from outside of the pre-acquisition Standard Bank. Further, on the same date, the business group involved in the conduct which is the subject of the present DPA was transferred out of Standard Bank to a new entity, Standard Advisory London Limited, which remains a wholly owned subsidiary of Standard Bank Group (i.e. the South African parent). Standard Bank is therefore a substantially different entity to the one that failed to prevent the bribery.
- 35. For all these reasons, subject to the terms being fair, reasonable and proportionate, I am satisfied that it is in the interests of justice that the conduct of Standard Bank be resolved through the mechanism of a DPA. It is to these terms that I now turn.

#### The Terms

- 36. An application for a DPA is covered by paras. 11.3(f) and (g)(i) and (ii) of the 2015 Rules and requires a description of the proposed terms, an exposition of its compliance with the DPA Code of Practice and sentencing guidelines and an analysis of how they are fair, reasonable and proportionate. The essential basis of this DPA is that effective from the date of a declaration under paras. 8(1) and (3) of Schedule 17 to the 2013 Act for a period of three years, the SFO will agree, having preferred the indictment, to suspend it and, subject to compliance with the terms of the DPA, after three years, discontinue the proceedings. Conditions include the absence of any protection against prosecution of any present or former officer, employee or agent or against Standard Bank for conduct not disclosed by it prior to the date of the agreement (or any future criminal conduct) and provisions if the Bank provided information to the SFO which it knew or ought to have known was inaccurate, misleading or incomplete.
- 37. Taken together, the requirements falling upon Standard Bank are as follows:
  - i) Payment of compensation of US \$6 million plus interest in US \$1,153,125;
  - ii) Disgorgement of profit on the transaction of US \$8.4 million;
  - iii) Payment of a financial penalty of US \$16.8 million;
  - Past and future co-operation with the relevant authorities (as further described)
    in all matters relating to the conduct arising out of the circumstances of the
    draft indictment;
  - At its own expense, commissioning and submitting to an independent review of its existing internal anti-bribery and corruption controls, policies and

un &

#### Annroyed Judgment

procedures regarding compliance with the Bribery Act 2010 and other applicable anti-corruption laws (as further described); and

vi) Payment of the costs incurred by the SFO.

It is also acknowledged that no tax reduction shall be sought in relation to the payments (i) to (iii) and (vi) above.

38. As to duration, the DPA must be of sufficient length that the proposed terms are effective and their aims accomplished; this is obviously dependant on the individual circumstances of the case. Given that Standard Bank has cooperated fully and from an early stage allowing for a thorough investigation to be carried out, and that there have already been improvements in its bribery and anti-corruption policies and procedures, three years appears to be sufficiently long successfully to implement the terms of the proposed DPA. I shall consider the remaining terms separately.

#### Compensation

- 39. A DPA may impose on an organisation the requirement to compensate victims of the alleged offence and to disgorge profits made from the alleged offence: see para. 5(3)(b) of Schedule 17. Further, the DPA Code of Practice states (at para. 7.2) that it "is particularly desirable that a measure should be included that achieves redress for victims, such as payment of compensation". This also reflects s. 130(12) of the Powers of Criminal Courts Act 2000 and the Definitive Guideline issued by the Sentencing Council in respect of Fraud, Bribery and Money Laundering Offences ("the Guideline"): in relation to corporate offenders, the first step requires priority to be given to the payment of compensation to victims over fines.
- 40. In the present DPA, Standard Bank would be required to pay the Government of Tanzania the amount of US \$6 million plus interest of US \$1,153,125. This sum represents the additional fee of 1% of the proceeds of the private placement, paid to EGMA the local partner engaged by Stanbic and very swiftly withdrawn in cash. The fee was paid from the US \$600 million capital raised by the placement and the consequence was that the Government of Tanzania received US \$6 million less than it would have received but for that payment. The interest figure of US \$1,153,125 is calculated by reference to interest paid on the loan and, by the time of repayment, will amount to US \$1,153,125.
- 41. Given that statute favours compensation and the policy considerations in its favour, and that the proposed compensation is commensurate with the loss suffered by the Government of Tanzania, without necessarily embarking on an analysis of the way in which interest has been calculated, this payment is a necessary starting point for any DPA. There is no suggestion that Standard Bank does not have the means and ability to pay compensation and interest in the amount proposed.

#### Disgorgement

42. The legislation specifically identifies disgorgement of profit as a legitimate requirement of a DPA: see para 5(3)(d) of Schedule 17 restated at para. 7.9 of the DPA Code of Practice. The provision is clearly underpinned by public policy which properly favours the removal of benefit in such circumstances. In this case, no

Me &

allowance has been made for the costs incurred by Standard Bank (to such extent as they can be put into money terms) and the proposal is that it should disgorge the fee which Standard Bank and Stanbic received as joint lead managers in relation to this transaction, namely 1.4% or US \$8.4 million. Again, there is no suggestion that Standard Bank does not have the means and ability to disgorge this sum.

#### Financial Penalty

43. A DPA may impose on an organisation the requirement to pay a financial penalty: see para. 5(3)(a) of Schedule 17. Significantly, para. 5(4) provides:

"The amount of any financial penalty agreed between the prosecutor and [the organisation] must be broadly comparable to the fine that a court would have imposed on [the organisation] on conviction for the alleged offence following a guilty plea".

- 44. Thus, although there is no question of a conviction, the legislation requires any financial penalty to demonstrate broad comparability with a fine following conviction. That exercise can only be undertaken by analysing and applying the approach adopted by the Sentencing Council Guideline; this follows that mandated by s. 143 of the Criminal Justice Act 2003 to the effect that when considering the seriousness of any offence, the court must consider the offender's culpability in committing the offence and any harm which the offence caused, was intended to cause or might foreseeably have caused. In connection with corporate offenders in relation to this type of offence, that then translates into a non-exhaustive hierarchy of culpability characteristics with harm represented by a financial sum related (in the case of offences under the Bribery Act 2010) to the gross profit from the contract obtained, retained or sought.
- 45. Dealing first with culpability (Step 3 of the Guideline), a relevant characteristic that militates in favour of placing an offence in the category of high culpability is that it involves the corruption of local or national government officials or ministers. The UK has committed to abide by the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Article 3(1) of which obliges contracting parties to punish bribery of foreign public officials with effective, proportionate and dissuasive criminal penalties. Moreover, in R v Innospec Ltd (Southwark Crown Court, 26 March 2010, unreported), a case concerning the bribery of public officials in Iraq and Indonesia, Thomas LJ (as he then was) observed that:
  - "30. There can be no doubt that corruption of foreign government officials or foreign government ministers is at the top end of serious corporate offending both in terms of culpability and harm... In the foreword to the 2004 UN Convention against Corruption Kofi Annan, the Secretary General described its effects:

'Corruption is an insidious plague that has a wide range of corrosive effects on societies. It undermines democracy and the rule of law, leads to violations of human rights, distorts markets, erodes the quality of life and allows organised

sur Co

crime, terrorism and other threats to human security to flourish. This evil phenomenon is found in all countries — big and small, rich and poor — but it is in the developing world that its effects are most destructive. Corruption hurts the poor disproportionately by diverting funds intended for development, undermining a government's ability to provide basic services, feeding inequality and injustice and discouraging foreign aid and investment. Corruption is a key element in economic underperformance and a major obstacle to poverty alleviation and development.'

- It is no mitigation to say others do it or it is a way of doing business."
- 46. Although the facts in this case involve corruption, the specific allegation concerns a breach of s. 7 of the Bribery Act 2010 and is the failure to put in place appropriate mechanisms to prevent bribery of local or national government officials or ministers, namely member(s) of the Government of Tanzania. The Joint Prosecution Guidance in relation to the Bribery Act makes it clear (at page 11) that the s. 7 offence "is not a substantive bribery offence". Further, I repeat: the evidence does not reveal that executives or employees of Standard Bank intended or knew of an intention to bribe.
- 47. Having said that, the significant albeit not intentional role that Standard Bank played in the bribery suggests at least medium culpability within the Sentencing Council Guideline. Standard Bank was the joint lead manager in a transaction in respect of which US \$6 million was paid by the associated (sister) entity (Stanbic) to a local partner from the sum raised on behalf of the Government of Tanzania. The inference is that it was well understood (at least by two senior executives of Stanbic and, thus, Stanbic) that it would induce public officials to act improperly. Further, the deal team at Standard Bank was fully aware that a significant payment was to be made to a local third party in circumstances where there were different understandings amongst the team as to what the precise role in the transaction of that third party was.
- 48. Although there were bribery prevention measures in place, these measures did not prevent the suggested predicate offence. Standard Bank's employees involved in the transaction did not express adequate awareness about the bribery risks in the transaction. Further, given that Standard Bank and its former sister company, Stanbic, were advising on a transaction involving the government of a country which international bodies have identified as having a high bribery risk, and given Standard Bank's experience in emerging markets, the risk of corruption of local and national government officials or ministers should have been anticipated in this transaction, including through Standard Bank's bribery prevention measures.
- 49. The culpability characteristics present in the conduct at issue therefore indicate that the correct culpability starting point should either be high culpability, which is later adjusted to the lower or middle part of that category range by the appropriate harm figure multiplier, or medium culpability, which is later adjusted to the higher part of that category range by the appropriate harm figure multiplier. The SFO have opted for the latter and, given that these categories are not intended to constitute watertight compartments but rather a continuum to be used by the court properly to assess culpability, that approach is entirely reasonable.

Au &

- 50. Turning to harm, as I have indicated, for offences of bribery, the appropriate figure will normally be the gross profit from the contract obtained, retained or sought as a result of the offending. As has been discussed in regard to appropriate disgorgement of profits, in this case, it has been taken as the total fee retained in respect of the transaction by Standard Bank and Stanbic as the Joint Lead Managers, that is to say, the sum of US \$8.4 million. The Sentencing Council Guideline indentifies the starting point for a medium level of culpability as 200% of the 'harm' i.e. gross profit, with a range of 100% to 300% (cf. a starting point of 300% with a category range of 250-400% for high culpability).
- 51. It is then necessary to fix the level by reference to factors which increase and reduce the seriousness of the offending. As regards aggravation, although not an offence of bribery, there were serious failings on the part of Standard Bank in regard to the conduct at issue at a time when the Bank was well aware that further regulatory enforcement measures were in train: these led to a fine by the FCA for failings in internal controls relating to anti-money laundering. Further, in this context, it must be underlined that the predicate offending by Stanbic resulted in substantial harm to the public and, in particular, the loss of US\$ 6m. from the money being borrowed by the Government of Tanzania for much needed public infrastructure projects.
- 52. On the other side of the coin, the mitigating features include the fact that Standard Bank (a company without previous convictions) volunteered to self-report promptly and both facilitated and fully cooperated with the investigation which the SFO conducted. Further, there is no evidence that the failure to raise concerns about anti-bribery and corruption risks (as opposed to money laundering concerns which led to the FCA regulatory action) was more widespread within the organisation. Finally, the transaction took place when the Bank was differently owned and, additionally, the business unit that carried it out is no longer owned by Standard Bank.
- 53. In the circumstances, I consider it appropriate that the provisional agreement is to take a multiplier of 300% which is the upper end of medium culpability and the starting point of higher culpability. This leads to a figure of US \$25.2 million before the court must (following Step 5 of the Sentencing Council Guideline) 'step back' and consider the overall effect of its orders such that the combination achieves "removal of all gain, appropriate additional punishment and deterrence". Bearing in mind, inter alia, the value, worth or available means of the offender and the impact of the financial penalties including on employment of staff, service users, customers and local economy (but not shareholders), the guideline is clear that:

"The fine must be substantial enough "to have a real economic impact which will bring home to both management and shareholders the need to operate within the law".

What should be the effect of 'stepping back' in this case, also bearing in mind the provisions of ss. 142 and 164 of the Criminal Justice Act 2003 (dealing with the need to have regard to the principles of sentencing, the seriousness of the offence and, when imposing a fine, the means of the offender)? In R v Thames Water Utilities Ltd [2015] EWCA Crim 960, the court (Lord Thomas of Cwmgiedd CJ, Mitting and Lewis JJ) considered whether the level of fine set by the Crown Court achieved these objectives and the principles set out in the Definitive Guideline issued by the Sentencing Council in respect of Environmental Offences which (like the Guideline in

sun &

was operating at a trading loss of US \$60.8 million for the half year period. In the circumstances, having stepped back, I accept that the approach of 300% of the value of the transaction to Standard Bank represents a reasonable penalty.

- Having reached a conclusion as to the appropriate financial penalty based on the 57. Guideline, para. 5(4) of Schedule 17 of the 2013 Act mandates that the financial penalty must be broadly comparable to the fine that a court would have imposed for the alleged offence following a guilty plea: this is Step 7 in the Guideline and follows the exercise of 'stepping back'. It is necessary, therefore, to take into account the appropriate reduction following a plea of guilty in accordance with s. 144 of the Criminal Justice Act 2003 and the relevant guideline (which was issued by the Sentencing Guidelines Council). In particular, under s. 144(1)(a) and (b) of the Act, a court must take into account the stage in the proceedings the offender indicated his intention to plead guilty and the circumstances in which the indication was given. In the present case, Standard Bank promptly reported its own conduct and cooperated with the SFO's subsequent investigation: a full reduction of one third is therefore entirely justified and appropriate. Having accepted that the assessment of a financial penalty is reasonable prior to this discount, the sum, as discounted for the admission to US\$ 16.8 million must also be reasonable.
- 58. Bearing in mind the observations of Thomas LJ in Innospec Ltd, a useful check is to be obtained by considering the approach that would have been adopted by the US authorities had the Department of Justice taken the lead in the investigation and pursuit of this wrongdoing. Suffice to say that the American authorities have been concerned with the circumstances and have been conducting an inquiry in connection with possible violations of the Foreign Corrupt Practices Act, 15 USC para. 78dd-1. Noting the co-operation of Standard Bank and Stanbic with them, the Department of Justice has confirmed that the financial penalty is comparable to the penalty that would have been imposed had the matter been dealt with in the United States and has intimated that if the matter is resolved in the UK, it will close its inquiry. In the circumstances, there is nothing to cast doubt on the extent to which these aspects of the proposed approach are fair, reasonable and proportionate.

# Co-operation and Corporate Compliance

The DPA also covers co-operation with the authorities and future compliance. As to 59. the former, the proposed DPA provides that Standard Bank shall continue to cooperate fully and honestly with the SFO and, as directed by the SFO, any other agency or authority, domestic or foreign, and Multilateral Development Banks, in any and all matters relating to the conduct arising out of the circumstances at issue in the present DPA. In particular, Standard Bank shall disclose all information and material in its possession, custody or control, which is not protected by a valid claim of legal professional privilege or any other applicable legal protection against disclosure, in respect of its activities and those of its present and former directors, employees, agents, consultants, contractors and sub-contractors, concerning all matters relating to the conduct at issue in the present DPA. This type of co-operation, and in particular, disclosure of this nature, is envisaged by para. 7.8 (iii) of the DPA Code of Practice and footnote thereto: it is obviously in the public interest that individuals involved in the conduct at issue are investigated and prosecuted and this term will obviously be critical to this (and any) DPA.

Alex Son

this case) require the level of fine to have regard to s. 164 and (i) achieve the removal of all gain, (ii) meet the objective of punishment, and (iii) meet the objective of deterrence. That guideline approaches the level of fine by reference to turnover; the court identified turnover as the starting point but went on to consider all the circumstances, including profitability (see para 41 (i) per Mitting J). In the same way that turnover cannot be the single denominator, neither, in this type of case, can profit (or, as here, fee).

- 55. That point is reinforced by a consideration of the observations of Thomas, LJ in *Innospec Ltd* to which I have already referred. He said:
  - "31. The courts have a duty to impose penalties appropriate to the serious level of criminality that are characteristic of this offence. For example, one of its many effects is to distort competition; the level of fines in cartel cases is now very substantial and measured in tens of millions. It is self evident that corruption is much more serious in terms both of culpability and harm caused. Similarly a fine in tens of millions has been imposed by a Regulator for deception of the Regulator. As is well known and evident from the facts of this case, fines in the US are substantial; the penalty that the US District Court could have imposed in this case for the Iraq corruption (which in my view was no more serious than the Indonesian corruption) would have been a range where the minimum would be \$101.5m; on top of that there would have been a disgorgement of profits. Although there may be reason to differentiate the custodial penalties imposed for corruption between the US and England and Wales, no-one was able to suggest any reason for differentiating in financial penalties. Indeed there is every reason for states to adopt a uniform approach to financial penalties for corruption of foreign government officials so that the penalties in each country do not discriminate either favourably or unfavourably against a company in a particular state. If the penalties in one state are lower than in another, businesses in the state with lower penalties will not be deterred so effectively from engaging in corruption in foreign states, whilst businesses in states where the penalties are higher may complain that they are disadvantaged in foreign states.
  - 32. As fines in cases of corruption of foreign government officials must be effective, proportionate and be dissuasive in the sense of having a deterrent element, I approach sentencing on the basis in this case that a fine comparable to that imposed in the US would have been the starting point, such a fine being quite separate from and in addition to depriving Innospec Ltd of the benefits it had obtained through its criminality."

56. Considering the financial position of Standard Bank, its interim accounts for the half year ending 30 June 2015 state that as of that date Standard Bank has equity of US \$1.25 billion and total income of US \$133.1 million. However, at that date, the Bank

An An

- 60. Turning to corporate compliance, Para. 5(3)(e) of Schedule 17 states that a DPA may impose on an organisation the requirement to implement a compliance programme or make changes to an existing compliance programme relating to the organisation's policies or to the training of the organisation's employees or both. In this regard, para. 7.9 of the DPA Code of Practice specifically draws the prosecutor's attention to the fact that putting in place a robust compliance and/or monitoring programme may be a term of a DPA.
- 61. In order to reduce the risk of future failings, the proposed DPA provides that Standard Bank should review existing internal anti-bribery and corruption controls, policies, and procedures regarding compliance with the Bribery Act 2010 and other applicable anti-corruption laws, enhance in particular its policies and processes in respect of third parties and improve its training in respect of anti-bribery and corruption policies. It also provides that in doing so, Standard Bank should engage the assistance of a qualified, agreed and independent specialist at its own expense to report on their findings and where appropriate advise and make recommendations which should be implemented. Once again, this term is clearly appropriate for a DPA in these circumstances.

# Costs and Ancillary Provisions

- 62. The legislation provides that a DPA may impose on an organisation the requirement to pay any reasonable costs of the prosecutor in relation to the investigation and the subsequent resolution of the DPA: see para. 5(3)(g) of Schedule 17. Similarly, para 7.2 of the DPA Code of Practice provides that costs should ordinarily be sought. In this case, the proposed DPA provides that Standard Bank is to pay the costs incurred by the SFO in the investigation and resolution of this matter: at 30 September, those costs stood in the order of £290,000 although that figure will have increased to encompass this hearing and any future hearing. Once again, it is obviously reasonable and appropriate.
- 63. In relation to ancillary matters, the proposed DPA requires Standard Bank to pay the compensation, disgorgement of profits, financial penalty and costs within 7 days of the Court's final declaration under sections 8(1) and (3) of Schedule 17. The DPA also sets a variety of time limits in regard implementation of the proposed corporate compliance programme. Further, the DPA puts in place a procedure in the event of breach of the proposed DPA. This is entirely in accordance with the requirements of para. 5(3) and (5) of Schedule 17 to the 2013 Act and, bearing in mind that there is no suggestion that Standard Bank is not able to meet all the financial liabilities set out in the DPA and comply with its terms within the time frames imposed, it is also obviously reasonable and appropriate.

## Conclusion

In this jurisdiction, a DPA requires the informed, independent opinion of a judge before it can be effected; the agreement of the parties is not enough. Thus, it has fallen to me to consider the proposal by the SFO and Standard Bank of a DPA and its prospective terms, both individually and collectively, in order to determine whether to grant a declaration pursuant to para. 7 of Schedule 13 of the 2013 Act that entering into it is likely to be in the interests of justice and that its proposed terms are fair, reasonable and proportionate. Having regard to all the circumstances

Am

comprehensively set out in the material placed before me (which I have done no more than summarise in this judgment), I had no hesitation in making the declaration sought for the reasons which I have now endeavoured to elaborate.

- 65. If the agreement is finalised, I shall further consider the matter pursuant to para. 8. Having considered the matter following argument, I am also satisfied that the Statement of Facts which would then enter the public domain should identify those who are named in the proposed indictment, those said to be the recipients of the US \$6 million paid to EGMA and the head of the corporate team responsible in the Bank, that is to say, the Head of Global Debt Capital Markets, (although, in his case, I emphasise that it is not suggested that there is sufficient evidence to justify his prosecution and nothing I have said should be read as implying the contrary). That is the policy I have followed in this judgment. Further than that, it is not necessary to go.
- I add only this. It is obviously in the interests of justice that the SFO has been able to 66. investigate the circumstances in which a UK registered bank acquiesced in an arrangement (however unwittingly) which had many hallmarks of bribery on a large scale and which both could and should have been prevented. Neither should it be thought that, in the hope of getting away with it, Standard Bank would have been better served by taking a course which did not involve self report, investigation and provisional agreement to a DPA with the substantial compliance requirements and financial implications that follow. For my part, I have no doubt that Standard Bank has far better served its shareholders, its customers and its employees (as well as all those with whom it deals) by demonstrating its recognition of its serious failings and its determination in the future to adhere to the highest standards of banking. Such an approach can itself go a long way to repairing and, ultimately, enhancing its reputation and, in consequence, its business. It can also serve to underline the enormous importance which is rightly attached to the culture of compliance with the highest ethical standards that is so essential to banking in this country.

an S



"SB7"

Case No. U20150854

IN THE CROWN COURT AT SOUTHWARK IN THE MATTER OF EASOF THE CRIME AND COURTS ACT 2015

Royal Counts of Justice, Strand, London, WGZA-2L-L

Date: 30 November 2015

Before:

# THE PRESIDENT OF THE OUTEN'S BENCH DIVISION THE RT. HON. SIR BRIAN LEVESON

Benven:

SERIOUS FRAUD OFFICE
- andSTANDARD BANK PLC
(Now known as ICEC Standard Bank plc)

Annlicant

Respondent

Sir Edward Garmer Q.C., Orispin Aylett Q.C. and Allison Clare (instructed by the Serious Fraud Office) for the Applicant
Nicholas Purnell Q.C. (instructed by Herbert Smith Freehills LLP, London) for the Respondent

أواعده حاد فأم إمري مسيؤه فأماع المتاد بريورياس

Hearing date: 30 November 2015

**Approved Judgment** 

Men Men

## Sir Brian Leveson P:

- The concept of a deferred prosecution agreement ("DPA") was introduced in the United States of America and, by s. 45 and Schedule 1.7 of the Crime and Courts Act 2013 ("the 2013 Act), albeit in a very different form, it has since been adapted for this jurisdiction. Its purpose is to provide a mechanism whereby an organisation (being a body corporate; a partnership or an unincorporated association, but not an individual) can avoid prosecution for certain economic or financial offences by entering into an agreement on negotiated terms with a prosecutor designated by the 2013 Act.
- 2. In contra-distinction to the United States, a critical feature of the statutory scheme in the UK is the requirement that the court examine the proposed agreement in detail, decide whether the statutory conditions are satisfied and, if appropriate, approve the DPA. Thus, following the commencement of friegotiations, the scheme mandates that a hearing must be held in private for the purposes of ascertaining whether the court will declare that the proposed DPA is "likely" to be in the interests of justice and its proposed terms are fair, teasonable and proportionate; see paras, 7(1) and (4) of Schedule 17 of the 2013 Act. Reasons must be given and, if a declaration is declined, a further application is permitted (paras, 7(2) and (3) total). In that way, the court retains control of the ultimate outcome and, if the agreement is not approved, the possibility of prosecution is not jeopardised as a consequence of any publicity that would follow if these proceedings had not been held in private.
- If a declaration has been granted pursuant to para, 7(1) of Schedule 17 and the DPA is finalised on the terms previously identified, para, 8 of Schedule 17 comes into play. This provides:
  - "(1) Where a prosecutor and P have agreed the terms of a DPA, the prosecutor must apply to the Grown Court for a declaration that
    - (a) the DPA is in the interests of justice, and
    - (b) the terms of the DPA are fair, reasonable and proportionate.
  - (2) But the prosecutor may not make an application under subparagraph 1 unless the court has made a declaration under paragraph 7(1) (declaration on preliminary hearing).
  - (3) A DPA only comes into force when it is approved by the Crown Court making a declaration under sub-paragraph (1).
  - (4) The court must give reasons for its decision on whether or not to make a declaration under sub-paragraph (1).
  - (5) A hearing at which an application under this paragraph is determined may be held in private.

An A

#### Apprented Judgment

- (6) But if the court decides to approve the DPA and make a declaration under sub-paragraph (1) it must do so, and give its reasons. in open court.
- (7) Upon approval of the DPA by the court, the prosecutor must publish --
  - (a) the DPA
  - (b) the declaration of the court under paragraph 7 and the reasons for its decision to make the declaration,
  - (c) in a case where the court, initially declined to make a declaration under paragraph 7, the court's reason for that decision, and
  - (d) the court's declaration under this paragraph and the reasons for its decision to make the declaration,

unless the prosecutor is prevented from doing so by an enactment or by an order of the court under paragraph 12 (postponement of publication to avoid prejudicing proceedings)."

- Thus, even having agreed that a DPA is likely to be in the interests of justice and that its proposed terms are fair, reasonable and proportionate, the court continues to retain control and can decline to conclude that it is, in fact, in the interests of justice or that its terms are fair, reasonable and proportionate. To that end, it remains open to continue the argument in private, again on the basis that if a declaration under para. 8(1) is not forthcoming, a prosecution is not jeopardised. Once the court is minded to approve, however, the declaration, along with the reasons for it, must be provided in open court. The engagement of the parties with the court then becomes open to public scrutiny, consistent with the principles of open justice. Thus, the DPA (containing an expiry date and a statement of facts; see para. 5 of Schedule 17) must be published along with the declarations provided under both para. 7 and para. 8 and, in each case, the reasons provided by the court for doing so. The only exception is where publication is prevented by statute or must be postponed to avoid a substantial risk of serious prejudice to the administration of justice in any other legal proceedings.
- 5. On 4 November 2015, an application was made by the Director of the Serious Fraud Office ("the SFO") pursuant to para. 7(1) of Schedule 17 of the 2013 Act in relation to a proposed DPA between the Director of the Serious Fraud Office and Standard Bank pla (now known as ICBC Standard Bank pla) ("Standard Bank"). A considerable body of material was put before the court and, having heard Sir Edward Garnier Q.C. for the SFO and Nicholas Purnell Q.C. for Standard Bank, I declared that entering into the DPA was likely to be in the interests of justice and that its proposed terms were fair, reasonable and proportionate; my reasons for doing so were subsequently reduced into writing. The DPA now having been agreed, the Director of the SFO applies for a declaration under para, 8 that it is in the interests of justice and that its terms are fair, reasonable and proportionate. In other words, I am asked definitively to approve that which I previously approved provisionally, Having regard

fun &

to my conclusion that I would grant the appropriate declaration. I ordered that the proceedings should be field in public and gave leave for an appropriate stock market announcement to be published pursuant to the Johannesburg Stock Exchange Rules governing Standard Bank Group Ltd, the shareholder upon which the financial impact of the DPA will fall.

- 6. The facts are extensively set out in the Statement of Facts and analysed in the judgment that I gave following the hearing under para. 7 of Schedule 13: see [8] [21]. As I have said, both will fall to be published along with the DPA. In short, the Government of Tanzania wished to raise funds by way of a sovereign note private placement. Stanbic Bank Tanzania Ltd ("Stanbio"), which is a subsidiary of Standard Bank Group Ltd (a publicly owned company registered in South Africa), was not licensed to deal with non-local foreign investors in the debt capital market and so Stanbic involved Standard Bank, another subsidiary of the same group that was licensed, and together they sought to obtain instructions to raise the funds. Negotiations did not progress until Stanbic entered into an agreement with a Tanzanian company called Enterprise Growth Market Advisors Limited ("EGMA").
- 7. Two of the three directors and shareholders of EGMA were the Commissioner of the Tanzania Revenue Authority (and, thus, a member of the Government of Tanzania) and the former Chief Executive Officer of Tanzanian Capital Markets and Securities Authority ("GMSA"). EGMA's fee was agreed at 1% of the funds raised and in order to meet the cost of that agreement, the fee for the placement was increased from 1.4% to 2.4%. In the event, although the potential for corrupt practices to affect this type of business were well known, Standard Bank, which did not have adequate measures in place to guard against such risks, felled on Standard to conduct appropriate due diligence in relation to EGMA; Standard Bank made no enquiry about EGMA or its role.
- 8. The mandate to raise the funds was placed with Standard Bank and Stanbic and US \$600 million was raised but there is no evidence that EGMA provided any services in relation to the transaction. Meanwhile, EGMA find opened a bank account with Stanbic and its fee of US \$6 million was paid (as agreed) via Stanbic into the account. Very shortly thereafter the vast majority of the sum had been withdrawn in each. The withdrawas excited the concern of staff at Stanbic who referred the matter to the head office of Standard Bank Group Ltd; Standard Bank were alerted and very quickly thereafter a law firm was appointed to investigate the matter and, within three weeks of the first report, both the Serious and Organised Crime Agency and the SFO were informed.
- 9. The SFO was thereafter fully appraised of the results of the internal investigation the result of which is that the view was formed that there was a reasonable suspicion, based upon admissible evidence, that Standard Bank had falled to prevent bribery contrary to s. 7 of the Bilbery Act 2010. Further, there were reasonable grounds for believing that a continued investigation would provide further admissible evidence within a reasonable period of time, so that all the evidence together would be capable of establishing a realistic prospect of convictions see the full code test for prosecutions as set out in para. 1.2(1)(b) of the DPA Code of Practice.
- 10. The particulars of the offence contrary to s. 7 of the Bribery Act 2010 in the indictment which it is intended to prefer (subject to the consent of the court following)

Men De

the approval of the DPA: see para, 2(1) of Schedule 17 of the 2013 Act) are as follows:

"Standard Bank PLC, now known as ICBC Standard Bank PLC, between I" day of June 2012 and the 31st day of March 2013, failed to prevent a person or persons associated with Standard Bank PLC, namely Standic Bank Tanzania Limited and / or Bashir Awale and / or Shose Sinare, from committing bribery in circumstances which they intended to obtain or retain business or an advantage in the conduct of business for Standard Bank PLC, namely by:

- (i) Promising and/or giving EGMA Limited 1% of the montes raised or to be raised by Standard Bank PLC and Standard Bank Tanzania Llimited for the Government of Tanzania, where EGMA Limited was not providing any or any reasonable consideration for this payment; and
- (ii) Intending thereby to linduce a representative or representatives of the Government of Tanzania to perform a relevant function or activity improperly, namely, showing favour to Standard Bank PLC and Stanbio Bank Tanzania in the process of appointing or retaining them in order to raise the said montes."
- It is important to underline that no allegation of knowing participation in an offence of bribery is afleged either against Standard Bank of any of its employees: the offence is limited to an allegation of inadequate systems to prevent associated persons from committing an offence of bribery. This is specifically put by the SFO on the basis that the material disclosed was insufficient to enable Standard Bank to rely on the defence set out in s. 7(2) of the Bribery Act 2010 by demonstrating that there were adequate procedures in place designed to prevent persons associated with the commercial organisation from undertaking the bribery. Thus, the applicable policy was unclear and was not reinforced effectively to the Standard Bank deal team through communication. Further, Standard Bank's training did not provide sufficient guidance about relevant obligations and procedures where two entities within the Standard Bank Group were involved in a transaction and the other Standard Bank entity engaged an introducer or a consultant.

## The Terms of the DPA

12. The essential basis of this DPA is that effective from the date of the declaration under paras. 8(1) and (3) of Schedule-17 to the 2013 Act for a period of three years, the SFO will agree, having preferred the indictment, to suspend it and, subject to compliance with the terms of the DPA, after three years, discontinue the proceedings. Conditions include the absence of any protection against prosecution of any present or former officer, employee or agent or against Standard Bank for conduct not disclosed by it prior to the date of the agreement (or any future criminal conduct) and provisions if the Bank were to have provided information to the SFO which it knew or ought to have known was inaccurate, misleading or incomplete.

an las

- 13. Taken together, the requirements falling upon Standard Bank which the court declared were likely to be in the interests of justice and were fair, reasonable and proportionate are as follows:
  - i. Payment of compensation of US 56 million plus interest in US \$1,046,196.58;
  - ii. Disgorgement of profit on the transaction of US \$3.4 million;
  - iii. Payment of a financial penalty of US \$16.8 million;
  - iv. Past and future og-pperation with the relevant authorities (as further described) in all matters relating to the conduct trising out of the circumstances of the graft indictment;
  - v. At its own expense, commissioning and submitting to an independent review of its existing internal anti-bribery and corruption controls, policies and procedures regarding compliance with the Bidbery Act 2010 and other applicable anti-corruption laws (as further described); and
  - vi. Payment of the costs incurred by the SFO.

It is also acknowledged that no this reduction shall be sought in relation to the payments (i) to (iii) and (vi) above.

- 14. In the judgment which followed the application under para. 7(1) of Schedule [7 of the 2013 Act, I extensively analysed the interests of justice (at [24]-[35]). In short, as to the seriousness of the conduct, although the predicate offence of bribery involved public officials and utilised public funds, the criminality potentially facing Standard Bank arose out of the inadequacy of its compliance procedures and its failure to recognise the risks inherent in the proposal. Of particular significance was the promptness of the self-report, the fully disclosed internal investigation and cooperation of Standard Bank. Finally, also relevant were the agreement for an independent review of anti-corruption policies and the fact that Standard Bank is now differently owned, a majority shareholding having been acquired by ICBC.
- 15. As for the terms of the DPA, its proposed duration (discussed at [38]) was sufficient to implement the co-operation and corporate compliance obligations (see [59] to [61] of my judgment); these are critical to the agreement. The only amendment relates to the identification of the independent reviewer. The financial terms required compensation to the Operament of Tanzania of the total fee paid to EGMA plus interest calculated at the rate to be paid for the loan notes ([39] [41]), how calculated to 30 November 2016 rather than to a future date in March 2016, along with disgorgement of US \$8.4 million being the total sum carried by Standard Bank as a consequence of its involvement in the sovereign note private placement.
- 16. The most difficult assessment was as to the appropriate financial penalty which para. 5(4) of Schedule 17 mandates must be "broadly comparable to the fine that a court would have imposed" following conviction after a guilty plea. This has required

m &

detailed consideration of the Definitive Guideline for corporate offenders issued by the Sentencing Council in respect of Fraud, Bribery and Money Laundering Offences. Assessment of culpability and harm led to a conclusion that the appropriate penalty should be 300% of the total fee reduced by one third to represent the carriest admission of responsibility i.e. US \$16.8 million. A detailed analysis of the reasoning is set out at [43] – [58] of my earlier judgment.

- 17. The DPA also properly reflects the fact that costs incurred by the SFQ in the investigation and negotiation of the DPA must also be met (see [62]); these are now put at £330,000 in place of the sum assessed to an earlier date. As for ancillary matters, bearing in mind that there is no suggestion that Standard Bank is not able to meet all the financial liabilities within 7 days and comply with the remaining terms within three years, these are also theory or are distorted into the agreement; [63].
- 18. At the hearing brought pursuant to para, 7 of Schedule 17, I concluded that this DPA was likely to be in the interests of justice and that its terms were fair, reasonable and proportionate. At that time, I was aware that the appropriate authorities in Tanzania (the Prevention and Combatting Corruption Bureau) had been informed of this investigation. I have now been told that the Bureau has opened its own investigation into Stanbie and, having been informed of the proposed resolution of this matter, including the payment of compensation to the Government of Tanzania, does not object to it. In addition, I have also been told that the proposed resolution of the matter has been brought to the attention of the Securities and Exchange Commission in the United States which has concluded its own investigation into potential violations of s. 17(a)(2) of the Securities Act 1933 and aware of the proposed disgorgement of profit of US \$8.4 million, is today to announce that it has accepted a civil money penalty of US \$4.2 million pursuant to s. 8A of that Act.
- 19. The attitude of the Tanzanian authorities and the settlement with the Securities and Exchange Commission are supportive of (and do nothing to undermine) the conclusion that I have reached. Furthermore, I am assured both by the SFO and by Standard Bank that nothing else has happened in the period since 4 November to which my attention should be drawn as a potential justification for now reaching a different conclusion either as to these issues or as 10 any of the terms of the DPA. I have also reviewed the circumstances affects and remain of the same view that I then expressed. Therefore, pursuant to para 8(1) of Schedule 17 of the 2013 Act, I declare that the DPA is in the interests of justice and that its terms are fair, reasonable and proportionate.
- 20. I consent to the preferring of a bill of indictment charging Standard Bank with one offence contrary to s. 7 of the Bribery Act 2010 in the terms set out in this judgment (see s. 2(2)(b) of the Administration of lustice (Miscellaneous Provisions) Act 1933) and note that, pursuant to pure 2(2) of Schedule 17, these proceedings are automatically suspended. The terms of the DPA now fall to be enforced in default of which an application can be made under para. 9(1) of Schedule 17. The DPA, the Statement of Facts and both my rulings must now enter the public domain.

## Concluding Remarks

Although these proceedings have been required to validate a proposal and, then, a concluded agreement in relation to the investigation by the SFO into the role played

an S

by Standard Bank in respect of the raising in 2012-13 of US \$600 million by the Covernment of Tarizania, it is important to emphasise that the court has assumed a pivotal role in the assessment of its terms. That has required a detailed analysis of the circumstances of the investigated offence, and an assessment of the financial penalties that would have been imposed had the Bank been convicted of an offence. In that way, there is no question of the parties having reached a private compromise without appropriate independent judicial consideration of the public interest: furthermore, publication of the relevant material now serves to permit public scrutiny of the circumstances and the agreement. Suffice to say that I am satisfied that the DPA fully reflects the interests of the public in the prevention and deterrence of this type of crime

22. Having said that, the concluding remarks in my judgment in relation to the application under para. 7(1) of Schedule 17 are sufficiently important to bear repetition (at [66]):

"It is obviously in the interests of Justice that the SFO has been able to investigate the circumstances in which a UK registered bank acquiesced in an arrangement (however unwittingly) which had many hallmarks of bribery on a large scale and which both could and should have been prevented. Neither should it be thought that, in the hope of getting away with it, Standard Bank would have been better served by taking a course which did not involve self report, investigation and provisional agreement to a DPA with the substantial compliance requirements and financial implications that follow. For my part, I have no doubt that Standard Bank has far better served its shareholders, its customers and its employees (us well as all those with whom it deals) by demonstrating its recognition of its serious failings and its determination in the future to adhere to the highest standards of banking. Such an approach can itself go a long way to repairing and, ultimately, enhancing its reputation and, in consequence, its business.

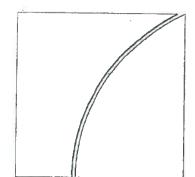
23. It only remains for me to express my appreciation to counsel and those who instruct them on both sides for the very great care that they have taken in the presentation of this case, the first example of a DPA in this country. This attention to detail and to ensuring that all sides of the argument are properly reflected should create the benchmark against which future such applications may fall to be assessed.

Aw I

# "SB8"

Committee on Payments and Market Infrastructures





Correspondent banking

July 2016



BANK FOR INTERNATIONAL SETTLEMENTS



# Executive summary

Through correspondent banking relationships, banks can access financial services in different jurisdictions and provide cross-border payment services to their customers, supporting international trade and financial inclusion.

In view of the importance of correspondent banking, the keen interest of central banks in this activity and any threats to its safe and efficient functioning, the Governors of the BIS Economic Consultative Committee (ECC) have mandated the CPMI to produce a report on this issue. In response, the CPMI Working Group on Correspondent Banking has prepared this technical report describing current trends and analysing measures that might alleviate some of the concerns and cost issues related to correspondent banking.

Banks have traditionally maintained broad networks of correspondent banking relationships, but there are growing indications that this situation might be changing. In particular, some banks providing these services are reducing the number of relationships they maintain and are establishing few new ones. The impact of this trend is uneven across jurisdictions and banks. As a result, some respondent banks are likely to maintain relationships, whereas others might risk being cut off from international payment networks. This implies a threat that cross-border payment networks might fragment and that the range of available options for these transactions could narrow.

In addition, an analysis using SWIFT data shows that there seems to be a trend towards concentration in correspondent banking activities.

Rising costs and uncertainty about how far customer due diligence should go in order to ensure regulatory compliance (le to what extent banks need to know their customers' customers — the so-called KYCC) are cited by banks as among the main reasons for cutting back their correspondent relationships. To avoid penalties and related reputational damage, correspondent banks have developed an increased sensitivity to the risks associated with correspondent banking. As a consequence, they have cut back services for respondent banks that (i) do not generate sufficient volumes to overcome compliance costs; (ii) are located in jurisdictions perceived as too risky; (iii) provide payment services to customers about which the necessary information for an adequate risk assessment is not available; or (iv) offer products or services or have customers that pose a higher risk for anti-money laundering/combating the financing of terrorism (AML/CFT) and are therefore more difficult to mahage.

The regulatory framework is taken as given in this report, as are in particular the AML/CFT requirements and the related implementing legislation and regulations in different jurisdictions. It is acknowledged that these requirements, as agreed by the competent authorities, along with strict implementation, are necessary to prevent and detect criminal activities and ensure a healthy financial system.

The working group limited its analysis to measures that could help improve the efficiency of procedures, reduce compliance costs and help address perceived uncertainty, without altering the applicable rules and the basic channels for correspondent banking services between correspondent and respondent banks. The group analysed in detail some potential measures and translated them into five recommendations,

An earlier version of this report was issued for consultation in October 2015. This final version of the report has been revised in the light of public comments received during the consultation, which are published on the BIS website<sup>1</sup>, and further interactions with relevant stakeholders. The major changes in this final report relative to the consultative report include the following:

www.bis.org/cpmi/publ/comments/d136/overview.htm.

CPMI - Correspondent banking - July 2016

# 2. Developments in correspondent banking

## 2.1 Concept of correspondent banking

Correspondent banking can be defined, in general terms as "an arrangement under which one bank (correspondent) holds deposits owned by other banks (respondents) and provides payment and other services to those respondent banks". The ECB uses a similar basic definition in its correspondent banking survey, referring to "agreements or contractual relationships between banks to provide payment services for each other". A more detailed definition by the Wolfsberg Group establishes that "[c]orrespondent Banking is the provision of a current or other liability account, and related services, to another financial institution, including affiliates, used for the execution of third-party payments and trade finance, as well as its own cash clearing, liquidity management and short-term borrowing or investment needs in a particular currency". At the most basic level, correspondent banking requires the opening of accounts by respondent banks in the correspondent banks' books and the exchange of messages to settle transactions by crediting and debiting those accounts.

All these definitions highlight the main components of correspondent banking: a bilateral agreement between two banks by which one of them provides services to the other, the opening of accounts (by the respondent in the books of the correspondent) for the provision of services and the importance of payment services as a core function of correspondent banking. As the ECB definition highlights, these relationships are frequently reciprocal, in that each institution provides services to the other, normally in different currencles. Correspondent banking is especially important for cross-border transactions, as its importance for domestic payments within a single jurisdiction has diminished greatly due to the use of financial market infrastructures. On a cross-border level, however, correspondent banking is essential for customer payments and for the access of banks themselves to foreign financial systems for services and products that may not be available in the banks' own jurisdictions. This report analyses only cross-border correspondent banking activities<sup>6</sup> with a focus on payment aspects.

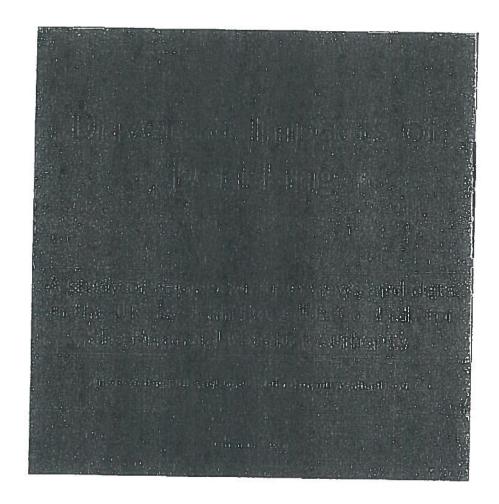
Figure 1 sketches out the main flows involved in correspondent banking payments and the interplay between correspondent banking services and payment systems. It shows the settlement of a payment from bank A to bank C via a correspondent bank. As banks A and C do not hold accounts with each other, they use the services of bank B as intermediary. In one case, bank B transfers the payment to C using correspondent banking only, whereas in the other, bank B uses a payment system in which both B and C participate for transferring the payment. A, B and C would normally be located in two or more

- <sup>2</sup> CPMI, A glossary of terms used in payments and settlement systems, March 2003 (updated June 2015), www.bls.org/cpml/publ/d00b.htm?m=397C1697C266.
- ECB, Ninth survey on correspondent banking in euro, February 2015, www.ecb.europa.eu/pub/pdf/other/surveycorrespondentbankinglneuro201502.en.pdf.
- The Wolfsberg Group is an association of 13 global banks which aims to develop guidance and frameworks for the management of financial crime risks with respect to KYC, AML and CFT policies.
- The Wolfsberg Group, "Wolfsberg Anti-Money Laundering Principles for Correspondent Banking", 2014, www.wolfsberg-principles.com/pdf/home/Wolfsberg-Correspondent-Banking-Principles-2014.pdf.
- Some innovative payment service providers, including non-banks, offer services that could be an alternative to correspondent banking for specific types of retail payment. These types of service and provider have been analysed in previous CPMI reports (Innovations in retail payments (2012) and Non-banks in retail payments (2014)). The recent CPMI report on Digital currencies (2015) mentions that a decentralised payment mechanism based on the use of a distributed ledger has the potential to facilitate certain cross-border transactions, and possibly make them faster and less expensive for end users such as consumers and merchants, by in part eliminating the Intermediary banks in the payment chain. In addition, the CPMI intends to analyse the technical and infrastructure aspects of distributed ledger technology and related digital innovations in view of their potential impact on payment services and systems. This analysis may include their potential relevance and implications for international payments.

CPMI - Correspondent banking - July 2016



"SB9"



Page 1 of 73

John Howell & Co. Ltd.
Firs House, Firs Lane
Shamley Green, Surrey GU5 OliU (UK)
Tel +44 (0)1483 890212 Fax +44 (0)1483 890213 contact@jh-co.com

Company No. 4500106 England and Wales

a



# Table of Contents

T	able of	Acro	nyms	4
1	Intr	oduc	tion	5
2	Sun	nmar	y and Overview	7
	2.1	Driv	ers of Derisking (See Sections 3 & 4)	7
	2.2	The	Exclusion Costs of Derisking (See Section 5)	10
	2.3	The	Costs of Triage (see Section 6)	13
	2.4	Miti	gation of Derisking Programmes (see Section 7)	15
	2.5		cluding Remarks	
3	Driv	vers o	of Derisking	17
	3.1	Conf	text	17
	3.2	Deri	sking – Policy or Consequence of RBA?	19
	3.2.	1	Assessing customer risks	19
	3.2.	2	Risk appetites	22
	3.2.	3	Policies leading to derisking	24
	3.2.		Decisions to derisk	
	3.3		es of Customers Affected	
4	Acc		Closure Data from Banks	
	4.1		ge UK Bank 1 - Account Turnover	
	4.2		ge UK Bank 2 – Account Turnover	
	4.3		ge UK Bank 3 – Account Turnover	
	4.4	Glob	pal Bank	37
	4.5		er Banks – General Remarks	
5	The	Excl	usion Costs of Derisking	39
	5.1	Issu	e of Definition and Data Collection	39
	5.2	Inte	rbank Relationships	
	5.2.	1	Compounding derisking via the bank cascade	
	5.2.	.2	Impact of cost of compliance	
	5.2.	3	Impact on small and medium-sized banks and their clients	
	5.2.	4	Data from large banks on correspondent banking relationships	
	5.2	5	Example data from branches or subsidiaries of foreign banks	42
	5.3	Pers	sonal Account Holders	
	5.3.	.1	Issues with personal accounts	43
	5.3	.2	Ombudsman Service	
	5.3.3		Citizens Advice	44
	5.3	-	Other incidences	
	5-4		Fech Sector	
	5.5	Mor	ney Service Businesses	48

Page 2 of 73

John Howell & Co. Ltd.







	5.6	Fin	ancial Services for the Unbanked	. 5
	5.	6.1	Issues with personal credit	. 50
	5.	6.2	Pawnbroking	5
	5.	6.3	Consumer (Home) credit	5
	5-	6.4	Issues around alternative banking services	-5
	5.7	Def	ence and Security	56
	5.	7.1	Background	56
	5-	7.2	UK experience	-57
	5.8	Çha	rities,	58
	5.9	Oth	er Sectors Possibly Affected	60
	5.9	9.1	Diplomatic and other government staff	.6:
	5.9	9.2	Students	.6:
	5.10	Clos	sing Observations	62
6	Th	e Cos	ts of Triage	63
	6.1	For	Banks	63
	6.1	.1	Background on cost increases	63
	6.1	.2	Top-down data	64
	6.1	-3	Limited granular data	64
	6.3	-4	Example data	66
	6.1	-5	Headcount as a proxy	67
	6.1	6	Impact on profitability and debanking	68
	6.1	·7	Mitigating compliance costs	68
	6.2	For	Customers	69
7	Mi	tigatio	on of Derisking Programmes	70
8	Me	thodo	ology	72

John Howell & Co. Ltd.

Page 3 of 73



# TABLE OF ACRONYMS

4MLD	European Union 4th Money Laundering Directive
ACAMS	Association of Certified Anti-Money Laundering Specialists
AML	Anti-Money Laundering
ATM	Automated Teller Machine
BBA	British Bankers' Association
BIS	Department of Business, Innovation & Skills
CA	Citizens' Advice (Bureau)
CAAT	Campaign Against Arms Trade
CAF	Charities Aid Foundation
CDD	Customer Due Diligence
CFG	Charities Finance Group
CFT	Combating the Financing of Terrorism
CMA	Competition and Markets Authority
DCA.	Digital Currency Association
DPA	Deferred Prosecution Agreement
EDD	Enhanced Due Diligence
EMA	E-Money Association
EMI	Electronic Money Institution
FATF	Financial Action Task Force
FCA.	Financial Conduct Authority
FinTech	Financial Technology
FIU	Financial Intelligence Unit
FOS	Financial Ombudsman Service
HMT	Her Majesty's Treasury
ID	Identification
JH&Co	John Howell & Co Ltd
JMLSG	Joint Money Laundering Steering Group
KYC	Know Your Customer
ML	Money Laundering
MOD	Ministry of Defence
MSB	Money Service Business
MTO	Money Transfer Operators
NPA	National Pawnbrokers Association
NRA	National Risk Assessment
PCA	Personal Current Account
PEP	Politically Exposed Person
PI	Payment Institution
POA	Proof of Address
POCA	Proceeds of Crime Act
POI	Proof of Identity
POS	Point of Sale
PSD	Payment Services Directive
RBA	Risk Based Approach
SAR	Suspicious Activity Report
SME	Small and Medium-sized Enterprise
TF	Terrorist Finance
UKEF/ECGD	United Kingdom Export Finance/Export Credit Guarantee

John Howell & Co. Ltd.

Page 4 of 73



## 1 INTRODUCTION

The Financial Conduct Authority (FCA) is aware that over recent years some banks have removed bank accounts/services from customers or other relationships which they associate with higher money laundering risk. This process has been termed 'derisking' and it has been attributed to the increasing overall cost of complying with regulatory requirements. These include prudential and conduct obligations and, standards as well as the threat of enforcement action for failing to meet such obligations, particularly in relation to anti-money laundering/combating financing of terrorism (AML/CFT). However, there appear to be other factors at play too, including ethical, reputational and commercial considerations.

The FCA commissioned John Howell & Co. Ltd. (JH&Co) to undertake a short study to produce reliable evidence of the reasons underpinning derisking, the nature, scale and impact of those activities and the extent to which AML/CFT considerations are part of these reasons. While 'derisking' as a term might have grown to have possibly unfair negative connotations, including suggesting poor practice by banks, it is adopted in this report simply as convenient shorthand.

The study looked at questions posed by the FCA in four broad areas — the drivers of derisking, the exclusion costs of derisking; the costs of triage (i.e. the costs for banks of onboarding customers and costs to customers of meeting AML obligations); and mitigations of derisking programmes.

Sectors at risk from derisking highlighted by the FCA for the purposes of this study include Money Service Businesses (MSBs), charities and Financial Technology (FinTech) companies. There has also been a contraction of correspondent banking relationships. Given the role these sectors play in supporting developing economies, UK communities and businesses, derisking could be having a significant socio-economic impact.

The FCA's strategic objective is to ensure that financial markets work well so that consumers get a fair deal.

This is supported by three operational objectives1:

- Securing an appropriate degree of protection for consumers,
- Protecting and enhancing the integrity of the UK financial system,
- Promoting effective competition for the benefit of consumers (in markets for financial services).

In the context of financial crime, the FCA requires all authorised firms to have systems and controls in place to mitigate the risk that they might be used to commit financial crime.<sup>2</sup>

The FCA is the anti-money laundering supervisor of authorised firms under the Money Laundering Regulations 2007 and can take action where it finds evidence of financial crime, or a risk of it, in the sectors and markets it regulates.

<sup>1</sup> See FCA website, 'What we do', http://www.fca.org.uk/about/what

<sup>2</sup> See FCA website, 'Enforcing our rules and fighting financial crime', http://www.fca.org.uk/about/what/enforcing

John Howell & Co. Ltd.

Page 5 of 73



The Financial Action Task Force (FATF), the international standard setter in the antimoney laundering/combating terrorist finance (AML/CFT) field, states that Effective action against money laundering and terrorist financing, including both preventive and law enforcement measures, is essential for securing a more transparent and stable international financial system. Effective systems and controls in firms can help them to detect, prevent and deter financial crime. Again according to the FATF, Supervisors should also ensure that financial institutions are taking a risk-based approach to implementing AML/CFT measures, without prejudice to rules-based measures such as targeted financial sanctions. Implementation by financial institutions should be aimed at managing (not avoiding) risks, 3

In this short study, the project team from JH&Co have interviewed an appropriate range of banks, customers and other third parties involved in order to seek evidence of the derisking phenomenon which may help shed light on the FCA's questions. A more detailed methodology is set out in Section 8 of this report.

FATF statement on derisking, 23 October 2015: <a href="http://www.fatf-gafi.org/publications/fatfrecommendations/documents/fatf-action-to-tackle-derisking.html">http://www.fatf-gafi.org/publications/fatfrecommendations/documents/fatf-action-to-tackle-derisking.html</a>
Page 6 of 73

John Howell & Co. Ltd.

Sken



# 2 SUMMARY AND OVERVIEW

The FCA is interested in the circumstances around banks closing customers' accounts, or restricting access for new customers, over the last few years. It wishes to know more about what is driving account closure and how many customers, of which type, are affected. The FCA is also concerned as to whether 'wholesale' derisking and financial exclusion from the withdrawal of banking services is occurring, and if due consideration is being given to the merits of individual cases before a decision is made to terminate an existing account or not to grant a new account.

The FCA wishes to understand which impacted customers have faced difficulties, delays and account closures. The FCA believes these to include Small and Medium-sized Enterprises (SMEs), the FinTech and defence sectors, personal account holders (including minorities and vulnerable groups), and those who are discouraged from using the banking system.

# 2.1 Drivers of Derisking (See Sections 3 & 4)

Many banks told us that they needed to lower their overall risk profile, to realign their businesses and that they are paying closer attention to compliance since the global financial crisis. Further, we heard that derisking is partly a result of the higher costs of compliance and the increased amount of regulatory capital now required, and partly a response to criminal, civil and regulatory actions. These include regulatory settlements, including Deferred Prosecution Agreements (DPAs), especially those reached in response to AML/CFT failings.

There is also no doubt that banks are trying to do what they believe is expected of them under the risk based approach (RBA) to AML/CFT, in reducing the extent to which their services are abused for financial crime purposes, by on occasion exiting relationships that present too high a perceived risk of such abuse, regardless of the costs of compliance. These perceptions of risk stem from their own judgments, in part reflecting the signals emitted (or judged to be emitted) from the range of regulators and prosecutors who are salient to their institutions, and also the global rankings from the commercial agencies involved in risk judgments.

Higher compliance costs may also be reducing incentives for larger banks to maintain many interbank relationships, which previously were seen as providing extra cover or transactional options: a majority of the small and medium-sized banks surveyed reported difficulties, which in some cases have led to them cutting services to customers and to other banks.

We assess that other factors have combined with regulatory actions, higher compliance costs and perceived pressure from correspondent banks, to create a 'perfect storm' of changes which have struck banks during this decade. These include much higher capital requirements; higher liquidity thresholds and ultimately a tougher environment in which to achieve profitable relationships.

For the majority of our bank interviewees, this has resulted in a strategic review of business and functions, often in parallel with an over-arching review of compliance risk processes. In turn this has sometimes resulted in slimming down of business, resulting in many exits being driven by the assessment that relationships are 'non-core'. So we are describing a compound situation in which a range of factors may be involved in many of the exits. Ultimately, banks may feel themselves entitled to do business or not

Page 7 of 73

John Howell & Co. Ltd.

an D



do business with whomever they like, subject to legal (including regulatory) requirements.

Achieving the perception of legitimacy and fairness of the regulatory system requires consistency and transparency when dealing with each type of customer. Established risk-based approaches to financial crime identify the risk associated with various factors such as sector, occupation, types of business; geography and jurisdiction risk; political risk; distribution channels; and product or services that customer requires or uses. However, by contrast to some other banking risks like consumer credit loss and fraud risks, there is not yet a generally agreed quantitative assessment methodology for assessing financial crime risk and it is difficult to determine to what extent the data are sufficient for this purpose, other than to make a broad subjective assessment.

Banks vary in their ability to 'score' particular customers, depending on the bank's size, resources, geographic coverage and other factors. Decisions on what financial crime residual risks fall within acceptable parameters for a particular bank may be taken through an expression of financial crime risk appetite and/or as an output from customer risk assessment tools, using the broad risk factor categories.

Risk appetite statements often contain broad definitions of acceptable risk, such as 'minimal tolerance for residual Financial Crime risk', but we have also found examples where particular sectors are specifically mentioned. If this amounted to a complete prohibition it could be classified as 'wholesale derisking', but we have found few examples relating solely to AML/CFT issues. Reputational risk, bribery and corruption concerns and strategic business reasons also factor in to some banks ruling out the banking of certain sectors, for example the defence industry.

Outputs from customer risk assessment tools will group customers into risk categories (e.g., at the simplest level, High, Medium, Low). De-risking can also come about by setting scores from these tools above which the customer is defined to be beyond financial crime risk appetite, or to require special consideration. Although this would be regarded as 'case-by-case' derisking by the banks, it almost inevitably means that the customers identified share common characteristics, such as sector, business type and country affiliations. From the point of view of those affected by derisking, this would give the impression of a wholesale process.

However, those interviewed from banks were adament that their institutions were doing their best to treat each customer in a fair and consistent manner. Such consistency itself is likely to produce derisking, even if it is not intended to: it is an unintended outcome of common judgments using shared criteria.

Banks have processes in place to consider keeping or exiting customer relationships on a case-by-case basis. Once a customer has been identified as being outside a bank's risk appetite, any decision to retain must be based on solid information showing that, although falling within the 'too high' risk cohort, this particular customer in fact poses a lower risk. In a sense it is an attempt to prove a negative and it is difficult to establish clear criteria for how this might be done.

Banks have developed techniques to differentiate risk within one particular class of customer they are obliged by law to treat as high risk, namely non-domestic Politically Exposed Persons (PEPs). Perhaps similar approaches could be applied to other commonly accepted money laundering/terrorist finance (ML/TF) high or higher risk sectors — for example, if certain types of MSBs operating in certain markets are

Page 8 of 73

John Howell & Co. Ltd.

an and



regarded as high risk, what characteristics, if any, might identify the 'good' from the 'bad' within that category?

Triggers for exclusion of existing or new customers usually come from reviews (which may be routine); or as a result of interpretations of general regulatory guidance, including statements from international bodies; or from particular events, including intended or unintended 'signals' during supervisory visits. A minority of such reviews identify customers suspected to be involved in financial crime, although the immediate reason for account closure or restriction can be such issues as failed background checks; failure to supply adequate and verifiable identification; fraud markers (e.g. adverse Cifast traces); general credit/operational risk reasons; dormant or non-profitable accounts; and accounts not being used for the originally declared purposes (particularly when outside the bank's core business). Such events may be proxies for financial crime — criminals may fail to provide adequate identification, for example but they are not explicit or unique ones (other, non-criminal, potential customers may also have issues with identification documentation), nor do they need to be to have that effect.

In some cases, however, banks may over-ride customer risk ratings, or apply them only to new relationships, if changes in a particular factor, for example country risk, have a significant effect on many of their customers. In others, larger banks may supply lists to smaller banks of customer types they don't wish to handle, which, irrespective of regulators' abstract statements about their not needing to know your customer's customers, may cause a 'cascade effect' of excessive caution based around a reasonable fear by the smaller banks that their own relationships with larger ones will be imperilled should they bank these sectors.

Our sections on account turnover of non-banks and of interbank relationships provide evidence, in broad terms, of clients being exited in the last 2-3 years at an accelerated rate. The single largest reason, numerically, is culling of dormant accounts, but 'higher ML/TF risk' customers have also typically been disproportionately impacted through a mixture of the focus of strategic reviews, thinly stretched compliance capacity and reduced risk appetite. For example, two large UK banks are together closing around 1,000 personal and 600 business/corporate accounts per month for 'risk appetite'-type reasons. Such closures are not readily apparent because they are dwarfed by the mass ebb and flow of accounts, and in general these banks have carried on growing numbers of accounts and customers.

Our findings are that the most consistent impacts have been in correspondent banking, where all banks report a net reduction and among MSBs (at some banks). This confirms the narrative found in much of the literature on de-risking, which has tended to focus on correspondent banking, MSBs and charities as sectors at risk<sup>5</sup>. We have also

(http://www.globalcenter.org/publications/understanding-bank-de-risking-and-its-effects-on-financial-inclusion-2/). The G2O has asked for reports on both the remittance market by the World Bank

Page 9 of 73

John Howell & Co. Ltd.

Aga Aga

<sup>&</sup>lt;sup>4</sup> Cifas is a not-for-profit company working to protect businesses, charities, public bodies and individuals from financial crime. No longer an acrohym, formerly the Credit Industry Fraud Avoidance Service.

<sup>&</sup>lt;sup>5</sup> Summaries can be found in, for example, Unintended Consequences of Anti-Money Laundering Policies for Poor Countries: A CGD Working Group Report, Centre for Global Development, June 2015 (http://www.cgdev.org/publication/unintended-consequences-anti-money-laundering-policies-poor-countries) and Understanding Bank De-risking and its Effects on Financial Inclusion, Global Center on Cooperative Security/Oxfam, November 2015



found, via the 'bank cascade', customers of small and medium-sized banks have had difficulties. In particular at those banks with foreign parents we sometimes found a large net reduction in client numbers. The outcome is an increased difficulty for foreign nationals and foreign businesses to retain UK-based accounts, or to carry out a full range of banking across currencies and jurisdictions. Some of our interviewee banks mentioned specific challenges in cross border transactions, including trade-related finance.

Responses received indicate that SMEs are more likely to be derisked than larger firms in the same sector; that the lists and methods used by smaller institutions to assess country risk may be sub-optimal; and that relationships which involve cash handling or value transfers (particularly cross-border) are seen as problematic, because of the lack of visibility of the underlying transactions to banks, including potential sanctions issues, and the perception of the inadequate quality of risk management by those offering value transfer services.

Specific sectoral concerns, which may highlight types of cutomers vulnerable to derisking, include the transfer of riskier customers, who lack bank accounts, to the Money Service Business (MSB) sector, which may have less ability to manage risk; start-ups in the FinTech sector with poorly understood business models and still-evolving systems of regulation; and the impact of the new 4th European Directive on AML/CFT (4MLD) on costs. Examples given include potentially stricter requirements on law firms' client accounts and the number of interbank relationships that need to be monitored.

## 2.2 The Exclusion Costs of Derisking (See Section 5)

Derisking is not generally a widespread phenomenon, but in sectors where it occurs it tends to be frequent. While this does pick up some customers with genuine financial crime issues, and perhaps others whose financial crime risks are real but undetected, all companies or individuals caught in its dragnet may suffer significant expense and inefficiency. This may lead to reduced supply and/or increase costs of goods and services that can be obtained by banks and provided by the derisked.

## Defence

The defence sector has a difficult position. Financing for legitimate defence needs and legitimate defence contractors has often been overshadowed by controversies over controversial contracts and countries, creating an environment where banks fear to be conspicuous. A recent survey carried out for the industry found that banks appear unwilling to provide banking services, including letters of credit, to defence sector SMEs, particularly those involved in munitions. In the past, this had caused some SMEs to relocate overseas. Further, some cases of account closure were attributed to derisking. Dialogue between the industry and the British Bankers' Association (BBA) is now said to be improving access, and the situation is being kept under review by the defence industry via one of its leading associations.

(http://documents.worldbank.org/curated/en/2015/11/25478384/report-g20-survey-de-risking-activities-remittance-market) and correspondent banking/trade finance by the Financial Stability Board (http://www.fsb.org/2015/11/fsb-releases-report-to-g20-on-the-decline-in-correspondent-banking/)

Page 10 of 73

John Howell & Co. Ltd.

All



## Charities

Charities, which received £10.6bn donations in the UK in 2014, are dependent on banking facilities to collect and manage this money. A non-trivial number of charities have a religious focus or operate in geographic areas with at least some money laundering/terrorist finance (ML/TF) issues, and the recently published National Risk Assessment of Money Laundering and Terrorist Financing's (NRA) stated that, despite proven abuse being rare, the terrorist financing risks within the charitable sector are medium-high. Charities surveyed highlighted the impact of derisking on smaller charities, particularly those with activities in problematic countries, some of which now have to operate on a cash only basis, which increases their operational risks and costs.

The Charities Aid Foundation (CAF) – which helps 1,250 charities – and the Charities Finance Group (CFG) – with 2,300 members – are both concerned that there may soon be an 'avalanche' of derisking affecting smaller institutions. Although larger charitable organisations are not at risk of losing accounts, one famous name charity reported a need for advice worth at least £40k about sanction regimes, and more on complex requests for information from banks. As with businesses we contacted, charities have reported that a refusal/derisking by one bank compromises the success of approaches to other banks.

## Diplomats and Foreign Students

We encountered crown and civil servants, including members of the UK diplomatic service who had served abroad (who in UK legislation are not defined as PEPs, ex officio) and foreign diplomats moving to the UK (defined in UK law as PEPs, ex officio), who had had problems obtaining bank accounts by virtue of their positions. Lack of credit history and history of recent abode also impeded access to financial services on the same terms as home-based staff.

Foreign students seeking to open accounts reported many difficulties over identification (ID) documentation and high (to them) costs of satisfying verification and Customer Due Diligence (CDD); an example being aked by banks for original documents, which had to be obtained from home countries, where the necessity of the UK requirements was questioned.

## Financial Technology (FinTech)

The UK accounts for around half of European FinTech start-ups, and a 2014 report estimates the FinTech market for which companies in the UK compete to be worth £20bn. Customers turn to FinTech partly because of challenges in accessing or dissatisfaction with traditional banking services and existing bank technology. However, like all payment systems, novel payment systems are a potential vector for illegal activity and thus liable to trigger derisking decisions.

The E-Money Association (EMA) represents 44 FinTech companies, including famous names like Google and Facebook as well as start-ups. In 2012 its members had 85m customers and processed 1.3bn transactions worth €43.6bn. EMA has previously made submissions to the FCA including that its members have seen a decline of ease of access

Page 11 of 73

John Howell & Co. Ltd.

M. D

<sup>&</sup>lt;sup>6</sup> UK National Risk Assessment of Money Laundering and Terrorist Financing (HMT, HO) 2015 https://www.gov.uk/government/uploads/system/uploads/attachment\_data/file/468210/UK\_NRA\_Oct ober\_2015\_final\_web.pdf



to accounts, partly attributed to derisking policy. EMA has suggested that whilst Electronic Money Institutions and/or Payment Institutions (EMI/PIs) may be viewed as particularly risky clients by banks, refusals are often by letter with no explanation or remedial action being offered, reducing the scope for discussion. The NRA rated new payments methods (e-money) as a 'Medium' risk and digital currencies as a 'Low' risk for money laundering.

EMI/PIs include money remittance companies serving migrant workers, debit/prepaid card issuers, automated teller machine (ATM) and point of sale (POS) acquirers, and companies dealing with gambling services. These services can be seen as providing some financial solutions to underbanked groups. EMA provided three case studies where EMIs and online payment processors had been refused accounts or had accounts closed by a number of first and second tier banks. A further company which seeks to provide alternative bank services for SMEs reported difficulties obtaining assistance from one particular bank and believed that there was a blanket ban on assisting with blockchain operations. The Digital Currency Association (DCA) echoed similar concerns, which it says it has brought to government attention.

## Money Transfer Operators (MTOs)

The well-publicised decision by certain banks to close a significant proportion of their Money Transfer Operator (MTO), among other MSBs, accounts in 2012-13, and subsequent legal action taken by Dahabshiil and others, brought derisking to escalating public and political attention, and highlighted concerns about a potential humanitarian catastrophe precipitated by global restrictions on remittances.

Many small MTOs (and other MSBs) now see their situation as precarious, and are being pressurised to become part of larger groups even though some believe they are more effective as independents. Some regard this as a commercial decision by banks, with AML/CFT control issues used as an excuse. A case study which explores this issue is provided in the body of report.

The NRA rates MSBs (in all guises, not just MTOs) as a 'Medium' risk for money laundering, but 'High' for terrorist finance. However, transfer of criminal funds overseas and third party payments (used by some MTOs) are highlighted as specific money laundering threats and vulnerabilities to the sector.

## Financial services for the unbanked

Personal credit plays an important role in supporting those, typically on low incomes, who have difficulty managing their finances and who are unable or unwilling to access mainstream credit sources. A number of pawnbrokers and other personal credit suppliers we talked to said that small businesses and the self-employed have increasingly turned to personal credit following the 2008/9 crash and increased difficulty in accessing normal bank credit. UNITE/European Commission figures for April 2015 suggest that nine million adults in the UK do not have a bank account and one of the few options these people have to access financial services is from personal credit providers.

Pawnbrokers and home credit businesses have historically provided one alternative to those loan sharks and unscrupulous doorstep lenders whose recovery practices and

Page 12 of 73

John Howell & Co. Ltd.



high interest rates can be catastrophic for those already vulnerable. Taken together, pawnbrokers and MSBs provide up to £5bn finance in the UK, and around 10% of their outlets are in rural locations. If many of these closed, the industry argues, it could have a major effect on communities affecting around one million people, in particular by removing credit and cheque-cashing provision for many lower income groups. Wales, Northern Ireland, parts of Scotland and Cornwall would be worst affected.

A survey carried out by the National Pawnbrokers Association (NPA) in September 2015 showed that over 40% of members had had an account closed. After one bank was the first to exit relationships in the sector, two others followed. The resulting concentration has reduced competition and the NPA also believes there is a risk of independent members being forced out of the market, thus reducing consumer choice. Case studies of viable home credit businesses, with long and trouble-free banking histories, highlight sudden termination of banking facilities with no explanation or discussion. They suggest that at least part of the personal credit sector is being impacted adversely by derisking.

## **Quantitative Estimates of Impact**

One source of data on the impact of derisking is provided by the Financial Ombudsman Service (Ombudsman Service), which reports a current case load of 20-30 complaints about account closures due to AML or personal current account (PCA) issues per week. Subject to margins of error this would imply roughly a thousand cases annually. Obtaining meaningful wider conclusions from Ombudsman Service data would require work beyond the scope of this study.

Citizens Advice (CA) assisted 3,936 clients with bank or post-office account opening from 1st October 2014 to 8th November 2015, and it has observed issues over proof of identity and lack of formal accommodation. Generally, quantification based on complaints or survey responses has been beyond the resources of this study given the need to take account under-reporting by SMEs (because of concern over reputation and lack of formal compliance cost estimation), and practical obstacles to contacting the discouraged and vulnerable groups.

## 2.3 The Costs of Triage (see Section 6)

Almost all the banks we have spoken to have increased spending on AML/CFT compliance, including on-boarding, monitoring and second line functions. Shortage of staff has been a consistent restraint, though numbers of compliance employees have recently risen steeply, by 30-100% over 2-3 years in cases of which we have knowledge. In one foreign bank, headcount tripled, and with a parallel fall in customers this resulted in the annual compliance cost per customer rising from £60-70 to over £300 (our estimate) over less than two years.

Several banks, at both ends of the size spectrum, acknowledged that there was an element of 'catch-up' in their AML/CFT processes, contributing to the step change in

Page 13 of 73

John Howell & Co. Ltd.

see <u>www.gov.uk</u> 'Report a Loan Shark'

This was one of the few banks that gave us clear figures for headcount changes and numbers of customers so we cannot be sure how much this raffects the broader picture, though the increases in headcounts we were told of, multiplied by the increase in per-capita staff costs, adjusted, in some (especially smaller) banks, for fewer customers, suggests a 2-3 fold increase would be a reasonable estimate.



numbers of compliance staff, and in one case a recognition that temporary staff were effectively carrying out remediation. This 'catch-up' component has added to the upward pressure on compliance staff salaries and consultant fees.

One large UK bank has provided detailed back office costs in relation to on-boarding, client and transaction reviews and escalation. The majority of those retail customers (individuals and small businesses) who don't merit an escalation cost the back office £1-2 for individuals and £6-7 for small businesses in compliance costs to on-board. This would materially understate the total on-boarding costs, as many/most of such costs would be met by the frontline. However, enhanced due diligence costs are mostly met by the back office: if an alert is triggered the per-customer cost rises to £10-40, and if escalated for senior expert oversight to over £100. Further details, including for larger corporate customers, are described in Section 6.1 below.

Separately, we have also been given a range of costs of £7-20k for an external intelligence report from a compliance/investigation consultant. This would materially impact the profitability of most accounts.

Top-down estimates of regulatory costs suggest these have risen steeply in recent years. For example, figures relating to global banks in the public domain suggest huge rises in headcount and spend on compliance globally. Although these banks may be seen to be responding to extreme situations, including significant fines for AML/CFT shortcomings, the order of magnitude of cost and headcount changes is not unusual among our interviewees. Indeed one of the large UK banks (with data described in Section 4) also provided some indicative cost figures for one team managing financial crime risk including higher risk customers. In 2012, this team had a budget of c. £100k, which has now grown to over £5m.

In the UK, the BBA estimates that its members are spending at least £5bn annually collectively on core financial crime compliance including enhanced systems and controls and recruitment of staff (not including the direct costs from fines for AML/CFT breaches).

Most banks had difficulty in providing estimates for on-boarding and monitoring costs relating solely to AML/CFT. This is in part understandable since it may be difficult to distinguish between these and the parts of these processes which are necessary from an ordinary banking perspective (basic record-keeping, knowledge for future marketing, etc.). Further, compliance costs are split across various teams, e.g. front-line, administration/record-keeping and financial crime. In terms of the change in costs, the banks did not indicate that the commercial non-compliance components have changed materially, so we are comfortable ascribing the majority of cost increases to compliance-related issues.

We found little appetite within banks to share increased compliance costs for bank accounts with customers on the basis of their ML/TF risk rating, either collectively or (especially) individually. Importantly this was even if such costs could be calculated and the customer might have been willing to pay more to keep their accounts. We would identify this as a form of market failure, where a more efficient allocation of costs and resources against actual, rather than perceived, ML/TF risk could result in less derisking (with the caveat that criminals would no doubt be willing to pay for access to banking, provided that they were confident of non-detection or long delayed detection). However, there are some situations where banks believe that the underlying ML/TF risks are too great and not susceptible to mitigation by their clients. In these

Page 14 of 73

John Howell & Co. Ltd.

Man Sh



cases, no amount of extra spend by the bank, however funded, would offset either the risk of criminal activity or the banks perceived regulatory responsibility for preventing

# 2.4 Mitigation of Derisking Programmes (see Section 7)

Generally, banks have told us that they are seeking much more specific guidance on managing high-risk relationships of the types that have led to account exit or refusal, if there is a criticism from regulators and government that they are behaving improperly. The revised Joint Money Laundering Steering Group (JMLSG) guidance relating to MSBs is regarded as helpful by some, whilst others believe it adds nothing to their current practices and it certainly falls well short of a safe harbour, despite some (predominantly US) literature suggesting that it provides one.

Mitigation attempts using public statements such as those made by FATF, FCA and US regulators are regarded by banks as somewhat missing the mark, focusing as they do on 'wholesale v case-by-case' derisking, rather than addressing the underlying issues.

Recent fines for egregious AML/CFT breaches have clearly led to a more risk-averse attitude to ML and (particularly) TF risks. Attempts have been made by regulators to mitigate bankers' fears by pointing out that fines have not been levied for banking MSBs or for failure in controls in a bank's customer, but rather for serious failures in controls in the banks themselves.

However, there is no evidence that this reassurance has had any particular effect (including no effect) on derisking behaviour. Indeed, given bankers' perception that the global jurisdiction claimed by the US regulators and courts can place their conduct anywhere under sanction, it is not clear what reliance should rationally be placed on such reassurances from their local supervisors by non-US institutions who rely on access to the US markets: although US Federal authorities have joined in the reassurance, and might be expected to apply this to their own decisions on penalties, concerns were still expressed about the possibilities of future actions against firms and individuals by US supervisors.

## 2.5 Concluding Remarks

In conclusion, we have found that banks take the derisking issue seriously and are mindful of their obligations to treat customers fairly and of the financial inclusion agenda. They believe they are attempting to apply the RBA to financial crime in an even-handed and objective fashion, given inherent uncertainties about how customers will behave and how supervisors/courts will construe and react to their own blameworthiness in relation to misconduct in the accounts they hold.

It is clear to us that over recent years banks have developed (and are still developing) policies and procedures in this area, to set risk appetites, identify and manage high-risk relationships and to attempt to deal equitably with those found to be outside appetite. In some circumstances banks are prepared to enter into dialogue with customers when they are thinking of exiting the relationship (and in some cases to have a formal appeals process once such a decision has been communicated); to attempt to assist them remediate issues (such as poor financial crime controls); and to facilitate access to banking at another institution (for example, by extending notice periods).

Page 15 of 73

John Howell & Co. Ltd.

Man Sold



Inevitably, there will always be occasions when banks will wish to exit a relationship without consultation and as rapidly as possible, particularly where there are crystallised financial crime issues involved. In such instances they will also not be comfortable with explaining the underlying reasons to customers, not least for legal reasons.

However what is also clear is that bankers' perception of their fair treatment is not shared by many victims of derisking. Each individual case can result in great distress, disruption and cost. In some cases it will also result in the closure of long-standing, historically problem-free and (from their owners' perspective at least) low risk businesses. These feelings are exacerbated when a long-standing relationship with a bank is terminated not with the forms of dialogue and appeal mentioned above, but rather with 'no discussion'.

We have found enormous frustration at the actions of banks, even amongst those customers fully supportive of the risk-based approach to financial crime, particularly at the lack of, or contradictory, communications from their bank other than a form letter mentioning unspecified risk appetite and at the banks' unwillingness to identify what, if any, remediation could reverse the decision to derisk. This may contrast with previously good relations with relationship managers or indeed with no contact from the bank at all over a long period prior to termination.

A summary of the paradox may come from one of the large UK banks, which, during a period of staff turnover and subsequent expansion, simply felt it did not have the compliance resources to monitor its entire client base. In order to fulfil its regulatory requirements it had to make tough decisions about clients it could retain without overstretching its resources. Essentially, there was a major reduction in its risk appetite across the board. To a 'victim' of this process, who may have been with a bank for many years, such a decision would seem inherently unreasonable and unfair.

There appears to be no 'silver bullet' for the derisking issue. Potential solutions may lie in balancing of costs and risks between banks and high risk sectors (which may partly occur through market mechanisms) and a better developed understanding of how to measure ML/TF risk on a 'case by case' basis. Current risk assessment tools may identify as high risk the 'good' customers within a particular sector, as well as the 'bad' (those intent on abusing the financial system for criminal purposes) and the 'negligent' (those who take insufficient care to safeguard the financial system from abuse by their own customers). In the absence of an understanding, shared by supervisors and banks, of how risk can reasonably be judged at a detailed level, and the acceptance of this understanding as legitimate by businesses and other customers, dissatisfaction over derisking will continue.

Page 16 of 73

John Howell & Co. Ltd.

... AND CONTE liawal of Banking e Jonships: Maje Jusy Action William Langevi The Charlettakes-Saad Alighten and which are the Copy and Emilianuel Weither with which the control of th

My For



Correspondent banking relationships (CBRs), which enable the provision of domestic and cross-border payments, have been terminated in some jurisdictions following the global financial crisis. In recent years, several countries have reported a reduction in CBRs by global banks. Pressure on CBRs has been associated with restricted access to financial services by certain categories of customers, business lines, jurisdictions or regions. Survey and other available evidence indicates that smaller emerging markets and developing economies in Africa, the Caribbean, Central Asia, Europe and the Pacific as well as countries under sanctions may be the most affected.

**Endividual banks may decide to withdraw CBRs based on a number of considerations.** Generally, such decisions reflect banks' cost-benefit analysis, shaped by the re-evaluation of business models in the new macroeconomic environment and changes in the regulatory and enforcement landscape, notably with respect to more rigorous prudential requirements, economic and trade sanctions, antimoney laundering and combating the financing of terrorism (AML/CFT) and tax transparency. These factors inform banks' risk and reputational cost perceptions. Further pressures to withdraw CBRs may arise where regulatory expectations are unclear, risks cannot be mitigated, or there are legal impediments to cross-border information sharing. These factors operate concurrently, although their relative significance varies case-by-case.

While the withdrawal of CBRs has reached a critical level in some affected countries, which can have a systemic impact if unaddressed, macroeconomic consequences have not been identified so far at a global level. Pressure on CBRs could disrupt financial services and cross-border flows, including trade finance and remittances, potentially undermining financial stability, inclusion, growth, and development goals. The current limited economic consequences partly reflect the ability of affected banks to rely on other CBRs, find replacements, or use alternative means to transfer funds. Still, in a few jurisdictions, pressure on CBRs can become systemic in nature if unaddressed.

Coordinated efforts by the public and private sectors are called for to mitigate the risk of financial exclusion and the potential negative impact on financial stability. An enhanced understanding of the phenomenon, improved data collection, and continued dialogue among stakeholders are imperative to developing appropriate responses tailored to individual country circumstances. Timely implementation of the Financial Stability Board's 2015 action plan endorsed by the G20 Summit will be critical. Home authorities of global banks should communicate their regulatory expectations and affected countries should continue strengthening their regulatory and supervisory frameworks to meet relevant international standards, with the help of technical assistance where needed. Clarifying these standards, including on AML/CFT, could help promote a baseline for regulatory expectations. Industry initiatives could be pursued to facilitate customer due diligence and help reduce compliance costs. In countries facing a severe loss of CBRs and diminishing access to the global financial system, the public sector may consider the feasibility of temporary mechanisms ranging from regional arrangements to public-backed vehicles to provide payment clearing services. The IMF staff has been supporting member countries in addressing the CBR withdrawal to promote financial inclusion and ensure financial stability.

INTERNATIONAL MONETARY FUND

5

# **B.** Country Developments

- In some parts of the world (Figures 1 and 2). Surveys by the World Bank (2015a, 2015b), the IMF with the Union of Arab Banks (UAB) (2015), and the Association of Supervisors of Banks of the Americas (ASBA) (2015) indicate that smaller jurisdictions in Africa, the Caribbean, Central Asia, and Europe have been most affected. Authorities in several Caribbean jurisdictions have reported particular pressures on their CBRs (Box 2). In Asia and the Pacific, Pacific islands appear to have been most affected, with the decline in CBRs potentially undermining progress on financial inclusion (Box 3). In Africa, CBR withdrawal has occurred, for example in Liberia, while problems with banknote supply have surfaced in Angola (Box 4). In Botswana, concern about compliance with AML/CFT regulations has led some correspondent banks to close their accounts at the central bank, limiting the range of counterparties available for foreign exchange transactions and investment operations. To a lesser extent, pressure on CBRs is also seen in some larger economies in Latin America and Asia (including Mexico and the Philippines). In the Middle East and North Africa, countries under economic and trade sanctions are most affected by the withdrawal of CBRs (IMF and UAB 2015) (Box 5).
- 8. Although pressure on CBRs has reached a critical level in a few jurisdictions, so far the economic or financial stability impact has been limited, partly because financial institutions in affected countries have been able to find alternative arrangements. In many cases where CBRs have been lost, financial institutions have been able to find alternative arrangements including by relying on their remaining CBRs, finding replacement CBRs or using other means of transferring funds across borders. However, the ability of financial institutions to find replacement CBRs has varied. Authorities have reported that maintaining existing CBRs has come at a price, including (i) newly imposed minimum activity thresholds below which the account is closed, (ii) higher costs (often associated with due diligence) passed on to the consumer when establishing a new CBR, and (iii) pressure on the respondent banks to limit their exposure to certain categories of customers in order to maintain a CBR (for example, small banks have reported severing ties with Money or Value Transfer Services to maintain CBRs) (World Bank 2015a).
- 9. The withdrawal of CBRs also appears to have affected certain categories of customers and business lines. According to the results of the surveys undertaken by the IMF and UAB and ASBA, Money or Value Transfer Services, small and medium-sized exporters, and small and medium-sized domestic banks have been the most affected categories of customers. In addition, international wire transfers, clearing and settlement services and trade finance appear to have been particularly affected (World Bank 2015b). In Latin America, the reduction of CBRs is believed to have inhibited further financial integration, raised the cost of finance for small and medium-sized enterprises, and, in some cases, led to firms losing access to credit from U.S. exporters (IMF 2016). Moreover, in

INTERNATIONAL MONETARY FUND

M

<sup>&</sup>lt;sup>3</sup> These surveys are generally perception-based, and response rates vary. As with any survey-based evidence, the usual caveats of self-selection, non-response, and cognitive response biases apply.

<sup>&</sup>lt;sup>4</sup> The countries discussed in the various boxes on regional implications are not intended to represent a comprehensive sample of affected countries, but rather to highlight a few specific case studies developed through bilateral staff engagements with country authorities.

## Box 4. Correspondent Banking Relationships in Africa: The Cases of Liberia, Angola, and Guinea

Certain countries in Africa have experienced the withdrawal of CBRs. The cases of Liberia, Angola and Guinea are described below.

Liberia has experienced significant loss of CBRs. Global banks have terminated 36 out of 75 CBRs in Liberia between 2013 and mid-2016, citing the country's risk rating, AML/CFT concerns, low volumes of transactions, and their lack of physical presence in the country. All Liberian banks have lost at least one CBR, with the most affected bank losing 78 percent of these relationships. With CBRs accounting for one-third of interbank activity in the country and about 60 percent of banks' income being sourced from non-Interest revenue, loss of CBRs is affecting margins, particularly through lower trade financing. Seeking alternatives in other jurisdictions is costly, depressing profits further, and could affect transparency and efficiency, and limit the central bank's oversight of the transactions. As a result, processing U.S. dollar checks is now lengthler and costlier, with one major bank indicating a cost of US\$150 per check. In addition, a major Western bank severed its euro CBR with the Central Bank of Liberia In March 2014.

Angola has also been adversely affected by the loss of U.S. dollar CBRs. In December 2015, the only supplier of U.S. dollar bank notes to Angola discontinued this service. Another large global bank withdrew U.S. dollar CBRs with Angolan banks, while retaining clearing of the U.S. dollar payments for the central bank of Angola (BNA), as well as local kwanza business. A European bank stopped clearing customer payments in U.S. dollar two months later, but continued to provide letters of credit. As a result, a single European bank is now the sole provider of U.S. dollar CBRs to Angolan banks. Furthermore, only two Angolan banks have direct access to U.S. dollar CBRs. Other Angolan banks are offering U.S. dollar service payments through European banks, resulting in higher costs. BNA Interventions in the foreign exchange market are now primarily in euros with many external trade transactions increasingly invoiced in euros. Bank customers have experienced increase in transaction costs as a result. The loss of U.S. dollar CBRs could further weaken the financial system in a country already struggling with the macroeconomic impact of lower oil prices, weak profitability and high levels of non-performing loans. Large firms that need access to U.S. dollars are migrating to the two remaining Angolan banks with U.S. dollar CBRs, putting pressure on the incomes of small and medium-sized Angolan banks. Settlement of international credit and debit cards, and cash management have been particularly affected. However, two banks with a specific investment banking, trade finance and credit card business model have sufficient scale in these activities to transact in U.S. dollars separately with European banks and other global counterparties without resorting to U.S. dollar CBRs.

Guinea has likewise experienced a loss of CBRs. Some 20 accounts of the central bank with seven foreign banks have been closed since 2009, with most of the closings concentrated during 2013-15. A survey conducted by the country's central bank indicates that all major banks in the country have suffered closures of CBRs with banks in the U.S., Europe, and South Africa. As a result of these closures, some banks, including the central bank, have reported a slowdown in their international trade operations. In response to the closures, banks envision using the services of their parent companies and branches abroad to conduct international financial transactions.

Source: IMF country desks.

INTERNATIONAL MONETARY FUND (25)

m I

THE WITHDRAWAL OF CORRESPONDENT BANKING RELATIONSHIPS

specific risk profile of individual customers, and the inherent risk associated with specific business lines and financial products. In their profitability considerations, they also take into account the size of the market, scale of operations, and connectivity. There is pressure to cut costs and deliver greater shareholder returns, which may drive global banks to reconsider certain CBRs.

#### B. Regulatory Obligations and Enhanced Enforcement

**Evolving Risks and Regulatory Requirements** 

- 19. Banks are required to comply with economic and trade sanctions, AML/CFT requirements, and anti-bribary and tax evasion regulations applicable in the jurisdiction(s) in which they operate, as well as with those in their home jurisdictions. Compliance with regulatory requirements in these areas involves the implementation of Internal controls, Including customer due diligence, transaction monitoring, record keeping, and reporting of suspicious transactions. The effective implementation of these procedures may be leading banks to terminate CBRs to comply with targeted financial sanctions, or if there is a reason to believe that the respondent bank is involved in money laundering, terronist financing, or other fraudulent activities.
- 20. Complying with an expanding sanctions regime may also be leading banks to reconsider or terminate CBRs. Since the late 1990s, the UN Security Council has been adopting an increasing number of targeted financial sanctions. Sanctions involving targeted asset freezes mostly relate to counter-terrorism and non-proliferation of weapons of mass destruction. Other objectives include conflict resolution and the protection of dvillans and human rights (Security Council Report 2013). UN sanctions establish lists of natural and legal persons, organizations, networks, or regions, whose funds or other assets must be frozen and banks are required to ensure that they are not providing any financial services to those listed. In addition, the use of bilateral economic sanctions as a tool for foreign policy and national security has increased. For example, in the United States, the Office of Foreign Asset Control has authority to prohibit payments and approve licenses to perform limited transactions to sanctioned countries, and designated persons or entities, and the European Union has the authority to impose restrictive measures, including financial sanctions, autonomously in accordance with the principles of Common Foreign and Security Policy.
- 21. The international approach to AML/CFT has shifted from a mostly rules-based approach to a risk-based approach with the adoption of the 2012 FATF standard. This risk-based approach is intended to assist in the prioritization and efficient allocation of resources in the long term, by allowing greater flexibility in adopting mitigating measures commensurate with the money laundering and terrorist financing risks identified. In practice, this translates into the implementation of additional preventive measures to mitigate higher risks (for example, enhanced due diligence),

22 INTERNATIONAL MONETARY FUND

M

<sup>&</sup>lt;sup>7</sup> For example, UN Security Council Resolution 1267 (1999) and successor resolutions provide for targeted sanctions against the Taliban and Al-Qalda and later extended to the Islamic State of Iraq and the Levant (ISIL) as well (2015).

<sup>8</sup> See European External Action Service, "Sanction Policy" (http://eeas.europa.eu/cfsp/sanctions/index\_en.htm).

<sup>&</sup>lt;sup>9</sup> Regulated sectors include financial institutions and designated non-financial businesses and professions.

while allowing for simplified preventive measures where the risk is proven to be low.<sup>10</sup> Under the FATF standard, banks are required to conduct ongoing customer due diligence on their respondent banks, which includes gathering sufficient information on the nature of the respondents' business, their reputation and the quality of supervision in the jurisdiction in which they operate, and assess the respondent banks' AML/CFT controls. Customer due diligence should be applied in line with a risk-based approach and enhanced due diligence measures are required with respect to "payable-through accounts" or where higher risks are identified through a risk-based approach.

- 22. Proper implementation of the risk-based approach may also lead to instances of withdrawal of CBRs. On a case-by-case basis, where a correspondent bank is unable to conduct the required level of customer due diligence to mitigate the risks identified, or where it has reason to believe that the respondent bank is involved in money laundering or terrorist financing activity, it may be required to terminate the CBR with the respondent bank. In addition, depending on the regulatory requirements of the correspondent bank's jurisdiction, suspicion of fraudulent activity by the respondent bank or its customers (for example, tax evasion, fraud, corruption) may also call for the termination of CBRs.
- **23. Several International and bilateral Initiatives on tax transparency and AML/CFT may weigh on a bank's risk assessment of its CBRs.** Initiatives to "black list" countries for regulatory or supervisory deficiencies or for lack of cooperation have been adopted at a multilateral level, for instance by the FATF<sup>11</sup> and the Organisation for Economic Co-operation and Development's Global Forum on Transparency and Exchange of Information for Tax Purposes (the Global Forum). <sup>12</sup> In addition, bilateral initiatives have been introduced in the last decade to increase exchange of tax information and transparency of legal entities, and to fight tax crimes (for example, the U.S. Foreign Account Tax Compliance Act, the EU savings tax directive, and France's blacklist of tax havens). Increasingly, the business model of competition through secrecy and favorable tax regimes is being eroded, pushing banks to exit some jurisdictions (KPMG 2014).

#### **Enforcement Landscape**

24. The increasing number of high-profile enforcement actions across the financial services industry may also be a driver of the withdrawal of CBRs. The actions by the United States, and, to

INTERNATIONAL MONETARY FUND 23

Men

<sup>&</sup>lt;sup>10</sup> According to the FATF standard, enhanced due diligence measures include (i) obtaining additional information on the customer, intended nature of the business relationship, source of funds, and reasons for intended or performed transaction, (ii) obtaining approval of senior management to commence or continue the business relationship, and (iii) conducting enhanced monitoring (FATF 2012).

<sup>&</sup>lt;sup>11</sup> The FATF issues two public documents three times a year identifying jurisdictions with weak AMI/CFT measures. The first document calls for counter-measures to be applied to jurisdictions identified as having serious strategic deficiencies and identifies jurisdictions for which FATF members should apply enhanced due diligence measures proportionate to the risks arising from deficiencies associated with the jurisdiction. The second identifies jurisdictions with strategic AMI/CFT weaknesses and encourages FATF members to consider the deficiencies identified.

<sup>&</sup>lt;sup>12</sup> The Global Forum on Transparency and Exchange of Information for Tax Purposes is the international body for ensuring the implementation of the internationally agreed-upon standards of transparency and exchange of information in the tax area (http://www.oecd.org/tax/transparency/). Jurisdictions blacklisted by the Global Forum, through its monitoring and peer raview process, may be considered higher risk by financial institutions, particularly in light of the risk of tax evasion.

# "SB 11 "

contemplated by any Transaction Document, or (ii) could reasonably be expected to have a Material Adverse Effect.

- (i) Compliance with Law: Corrupt Practices. Anti-Money Lanndering
- (i) The Borrower is conducting its business in compliance with its Charter Documents and with all Consents necessary for the performance of its obligations becameler and under the other Transaction Documents and in material compliance with all other Consents and with all Applicable Laws. Schedule 4.05 sets tonh each Consent necessary for the implantentation of the Facility, or that is afterwise described in Section 4.03 and each such Consent has been obtained by the Borrower and is in full force and effect.
- (ii) Without limbing the effect of clause (i), the Borrower and its officers, directors, employees, and agents have complied with applicable Corrupt Practices Laws to obtaining all Consents in respect of the Borrower's business (including the Facility) and are otherwise conducting the Borrower's business in compliance with applicable Corrupt Practices Laws. The Borrower's integral management and accounting practices and countries are sufficient to provide reasonable assurances of compliance with applicable Corrupt Practices Laws and the prevention of Prohibited Payments. Neither the Borrower nor any Person acting an helpility in [Improver has made any Prohibited Payment relating to the Eacility.
- tills— The Borrawer is in compliance with the applicable requirements of (A) the Anti-Mondy Laundering Laus. (BLOFAC Regulations, and (C) all other applicable export control, anti-boycon and economic sanctions have of the U.S. and other jurisdictions relating to its business and facilities.
- (ii) None of (A) the Borower, its directors, or members of senior management, or 4B) to the best of the Borower's knowledge after due finally, any of his shareholders is a Person Included in any OFAC List or otherwise subject to sangitions under OFAC Regulations.
- (i) Chief Title, Property Interests, Etc. The Borrower owns and his good, legal and marketable title to, and, in respect of real property, a lawful and valid conversity interest in all property that it purports to own, free aidd cheft of all biens, cother than Permitted Liens). Other than the rights referred to in the preceding scaterious, no property rights of the Barrower are required or can reasonably be expected to be necessary for the flagging of implementation of the facility in accordance with Applicable Law and the Transaction Documents. No material Because, trademarks, patents, or other similar agreements are necessary for the implementation of the Facility, except such as are held by the Burrower.
  - (k) Environmental, Health mitt Sefety Maners,
- (i) The Borrower has duly complied, and its hijsiness, operations, and assets, and the Facility, are in majorial compliance, with all Applicable Laws regarding the environment, health and safety and Social Performance. With respect to nir emissions, discharges to surface water or ground water, noise emissions, solid or liquid waste disposal, the use, generation storage, transportation, or disposal of rook or hazardous substances or wastes, or wher environment, health and safety, and Social Performance matters, the Burrower (A) has been issued and will maintain all required Consents, (B) has received to material complaint or material negative order, directive, claim, citation, or notice by any Crivernmental Authority with respect to its operations, and (C) has received no material complaint or claim from any Person speking damages, contribution, indemnification, cost recovery, compensation, or injunctive relief with respect to its environmental and social operations.

n of

ıj

# "SB|7\_"

Basel Committee on Banking Supervision

Consultative Document

### Guidelines

Revised annex on correspondent banking

Issued for comment by 22 February 2017

November 2016



BANK FOR INTERNATIONAL SETTLEMENTS

a post

This publication is available on the BIS website (www.bis.org).

© Bank for International Settlements 2016. All rights reserved. Brief excerpts may be reproduced or translated provided the source is stated.

ISBN 978-92-9259-009-3 (online)

An of

#### Contents

Revised annex on correspondent banking	1
Background	_1
Annex 2: Correspondent banking	. 2
Annex 4: General guide to account opening	11

Revised annex on correspondent banking



## Revised annex on correspondent banking

Correspondent banking – revisions to the Basel Committee guidelines on the Sound management of risks related to money laundering and financing of terrorism

#### Background

The text below includes proposed revisions to Annexes 2 ("Correspondent banking") and 4 ("General guide to account opening") of the Basel Committee on Banking Supervision (the Committee) guidelines on the Sound management of risks related to money laundering and financing of terrorism first issued in January 2014 and revised in February 2016. The purpose of the proposed revisions is to ensure that banks conduct correspondent banking business with the best possible understanding of the applicable requirements regarding anti-money laundering and countering the financing of terrorism. The clarifications are proposed as the international community has been increasingly concerned about de-risking in correspondent banking, since a decline in the number of correspondent banking relationships may affect the ability to send and receive international payments, or drive some payment flows underground.

The proposed revisions to the Committee's existing guidance follows the publication by the Financial Action Task Force (FATF) of its guidance on *Correspondent banking services*, issued in October 2016. The Committee seeks to clarify concrete regulatory expectations from banking supervisors' point of view consistent with the FATF standards and guidance. In preparing their publications on correspondent banking, the FATF and the Committee worked closely with the FSB, which is coordinating work to assess the extent and address the causes of banks' withdrawal from correspondent banking, through the implementation of a four-point action plan (data collection and analysis, clarifications of regulatory expectations, domestic capacity-building and strengthening the tools for due diligence).

The proposed revisions develop the application of the risk-based approach for correspondent banking relationships, recognising that not all correspondent banking relationships bear the same level of risk. The risk indicators provided should help banks conduct their risk assessment (see in particular paragraphs 7 and 14 in Annex 2). The proposed revisions also clarify supervisors' expectations regarding the quality of payment messages (see added Section VI, paragraphs 31–5) as well as conditions for using "know your customer" (KYC) utilities as recommended in the Committee on Payments and Market Infrastructures (CPMI) report on correspondent banking 1 (see paragraph 18 in Annex 2 and added paragraphs 6bis and 6ter in Annex 4). Annex 4 has not been modified except for these two added paragraphs. Respondents are invited to comment on the content of Annex 2, including on questions raised in boxes, and on proposed paragraphs 6bis and 6ter in Annex 4.

See Committee on Payments and Market Infrastructures, Correspondent banking, www.bis.org/cpml/publ/d147.htm, July 2016,

Revised annex on correspondent banking

#### Annex 2

#### Correspondent banking

#### I. General considerations on cross-border correspondent banking

- 1. According to the FATF glossary, "correspondent banking is the provision of banking services by one bank (the 'correspondent bank') to another bank (the 'respondent bank'). For the purpose of its guidance on correspondent banking (hereafter "the FATF guidance"), the FATF does not include one-off transactions but rather states that correspondent banking is characterised by its ongoing, repetitive nature. Like the FATF guidance, this Annex focuses on higher-risk correspondent banking relationships, especially cross-border correspondent banking.
- 2. Used by banks throughout the world, correspondent banking services enable respondent banks to conduct business and provide services<sup>3</sup> that they cannot offer otherwise (owing to the lack of an international presence and cross-border payment systems). As mentioned by the Financial Stability Board, the ability to make and receive International payments via correspondent banking is vital for businesses and individuals, and for the G20's goal of strong, sustainable, balanced growth.<sup>4</sup>
- 3. Correspondent banks execute and/or process transactions for customers of respondent banks. Correspondent banks generally do not have direct business relationships with these customers, which may be individuals, corporations or financial services firms, established in jurisdictions other than that of the correspondent bank. Thus the customers of the correspondent bank are the respondent banks.
- 4. Because of the structure of this activity and the limited information available regarding the nature or purposes of the underlying transactions, correspondent banks may be exposed to money laundering and financing of terrorism (ML/FT) risks.

# II. Risk-based approach in the context of providing correspondent banking services

5. The FATF guidance clarifies that, while correspondent banking in general is considered higher-risk, not all correspondent banking services carry the same level of ML/FT risks. The FATF guidance focuses on cross-border correspondent banking relationships involving the execution of third-party payments that are higher-risk. This section provides factors that banks should take into account when assessing the level of risk of a particular correspondent banking relationship.

FATF, Guidance on correspondent banking services, October 2016, www.fatf-gafi.org/publications/fatfrecommendations/documents/correspondent-banking-services.html.

<sup>3</sup> Such as "cash management (eg interest-bearing accounts in a variety of currencies), international wire transfers, cheque clearing, payable-through accounts and foreign exchange services".

See FSB, Progress report to G20 on the FSB action plan to assess and address the decline in correspondent banking, August 2016, www.fsb.org/2016/08/progress-report-to-g20-on-the-fsb-action-plan-to-assess-and-address-the-decline-in-correspondent-banking/.

5 See FATF, Guidance on correspondent banking services, October 2016, paragraph 13a.

Revised annex on correspondent banking

Am



2

- A. Risk indicators and risk assessment
- Banks that undertake correspondent banking activities should assess the ML/FT risks associated 6. with correspondent banking activities.
- Risk indicators that correspondent banks should consider in their risk assessment include: 7.
- the inherent risk resulting from the nature of services provided, in particular: (1)
  - the purpose of the services provided to the respondent bank (eg foreign exchange services for respondents' proprietary trading, securities trading on recognised exchanges or payments between a respondent's group within the same jurisdiction may constitute indicators of lower risk);
  - whether different entities of the group to which the respondent bank belongs would (b) have access to the account;
  - the ability of other third parties to have access to the correspondent account, such as (c) payable through accounts or "nested" relationships (see paragraph 10 below).
- (2)the characteristics of the respondent bank, in particular:
  - the respondent bank's major business activities including target markets and overall types of customers served in key business lines;6
  - the respondent bank's management and ownership (including the beneficial owners) (e) and whether they represent specific ML/FT risks (eg politically exposed persons (PEPs));
  - the respondent bank's money laundering prevention and detection policies and (f) procedures, including a description of the customer due diligence (CDD) measures applied by the respondent bank to its customers and the correspondent bank's ability to obtain information on a particular transaction as specified in paragraphs 32-3 of the FATF guidance:7
  - whether any civil, administrative or criminal actions or sanctions, including public (g) reprimands, have been applied by any court or supervisory authority to the respondent
- the environment in which the respondent bank operates, in particular: (3)
  - the jurisdiction in which the respondent bank (and its parent company when the (h) respondent bank is an affiliate) is located;
  - the Jurisdictions in which subsidiaries and branches of the group may be located, (i) possibly using the group structure available in the Legal Entity Identifier (LEI) system, 8

The correspondent bank should have a broad knowledge of the products and services offered and types of customers served by the respondent bank (see FATF guidance, paragraph 22).

The ability to obtain this information may depend on legal or technical permissibility.

Information on ultimate parents of legal entities and international branches is expected to be available in the LEI System in the course of 2017 (see LEI ROC, Collecting data on direct and ultimate parents of legal entities in the Global LEI System – Phase 1, 10 March 2016, and Including data on International/foreign branches in the Global LEI System, 11 July 2016). The LEI system may be used for that purpose provided that the group's ultimate accounting consolidating parent and all group entities in the accounting consolidation perimeter and eligible branches have an LEI, and that the ultimate parent relationship is reported for all subsidiaries. In addition, the relevant LEI should have an "issued" status (for active entities), which means that the associated reference data are kept current under the conditions required by the LEI System. An Sh

Revised annex on correspondent banking

- as well as the jurisdictions in which third parties having access to the correspondent account may be located;
- (i) the quality and effectiveness of banking regulation and supervision in the respondent's country (especially AML/CFT laws and regulations) and the respondent's parent company country when the respondent is an affiliate.
- 8. Correspondent banks should take a holistic view of the above indicators and other available information, to first determine the Inherent risk of each respondent bank relationship, and then to consider risk mitigation factors to determine the residual risk and whether it can manage this residual risk level (see FATF guidance, paragraph 16). In general, factors that could reduce ML/FT risks would include the effectiveness of respondent bank's risk management policies and procedures as well as the specific measures put in place by the correspondent bank.
- 9. In some instances, Inherently higher-risk relationships, products or services may be mitigated by strong risk management practices and other factual circumstances, resulting in adequately manageable residual risk. For example, a correspondent banking relationship with a foreign respondent bank located in a higher-risk foreign jurisdiction could pose an inherently higher risk that may be mitigated in part because of effective group-wide AML/CFT controls in place in both the correspondent and respondent banks.
- B. Nested (downstream) correspondent banking
- 10. Nested correspondent banking refers to the use of a bank's correspondent relationship by a number of respondent banks through their relationships with the bank's direct respondent bank to conduct transactions and obtain access to other financial services.
- 11. Nested, or downstream, correspondent banking relationships are an integral and generally legitimate part of correspondent banking. Nesting may be a way for regional banks to help small local banks within the respondent's region obtain access to the international financial system or to facilitate transactions where no direct relationship exists between banks.
- 12. Providing access to third-party foreign financial institutions that are not the customer of the correspondent bank, and so not necessarily known, can obscure financial transparency and increase ML/FT risks. As a result, correspondent banks should require that respondent banks disclose the existence of nested relationships as part of account opening and ongoing risk profile reviews.
- 13. Correspondent banks should assess the ML/TF risk associated with customers which are respondent banks with nested relationships on an individual case by case basis, consistent with the risk-based approach. The level of risk may vary depending on the nature of nested foreign financial institutions served by respondent banks, including size and geographical location, products and services offered, markets and customers served, and the degree of transparency provided by the respondent bank (eg in formatting payment transactions).
- 14. In order to assess the ML/FT risks associated with a nested relationship, correspondent banks should understand the purpose of the nested relationship. To this end, they may consider the following factors, among others:
- (a) the number and type of financial institutions a respondent bank serves;
- (b) whether the nested banks are located in the same jurisdiction as the respondent (considering the knowledge a respondent bank might have of its own jurisdiction) or a different country;
- (c) whether the country of the nested bank and the areas the nested bank serves and if the jurisdictions have adequate AML/CFT policies according to available public information (eg FATF information);

Revised annex on correspondent banking

My

# "SB13"



## **Consumer Information Note 14**

# Ciosure of Bank Accounts – Circumstances under which banks close customers accounts

Distribution;

Members of the Banking Association of South Africa

Other Financial services Ombudsmen

Consumer NGO's

**Government Consumer Bodies** 

The Media

1 26.10.2016 CP/KvR CN14 Closure of Bank Accounts h

#### DISCLAIMER

Please note that the Information provided does not constitute expert legal or financial advice. You should consult a legal professional or financial adviser for expert advice.

We have only mentioned sections of the various Acts where they are applicable to the complaints we receive. These Acts however contain many other sections and detail that may not have been mentioned. There may also be other legislation that is applicable. For more information and detail on the Acts and other applicable legislation you should consult a legal professional. The purpose of the document is to provide you with practical information based on our experience. Each case we investigate is however assessed on its own merits.

#### 1. Introduction

It needs to be stressed that the office of the Banking Ombudsman is impartial and independent. This article is not in defence, nor criticism of the business practices of any company or the conduct of any individual or action by any bank.

it is intended solely to expound upon the sallent principles that ought to be adhered to, to ensure that South African institutions are compliant with both local and international laws and conventions, to effectively combat financial crime.

2 26.10.2016 CP/KvR CN14 Closure of Bank Accounts

R

#### 2. Background

Earlier this year, several banks closed the accounts of a certain investment company. Whilst the confidential nature of the bank/customer relationship precluded the banks from furnishing reasons for the closures, it is widely speculated that a possible reason is that the owners of the company allegedly exercise considerable influence over the South African President and use that influence to secure favours.

An intimation as to the reason for the action by the banks appears in a statement attributed to the Banking Association, where it is reported as stating that banks have to comply with regulations relating to the Financial Intelligence Centre Act (FICA) and Money Laundering.

With the reported reference by the Banking Association to FICA and money laundering, we think it apposite to touch on some of the relevant legislation and conventions with which financial institutions have to comply.

#### 3. The Mischief - Money laundering

#### 3.1 What is money laundering?

Criminal activity generates substantial profits to the individual or group that carries out the act. Money laundering is the processing of these criminal proceeds to disguise their illegal origin. This process is of critical importance, as it enables the criminal to enjoy these profits without jeopardising their source.

3 26.10.2016 CP/KvR CN14 Closure of Bank Accounts he of

#### 3.2 How much money is laundered per year?

The United Nations Office on Drugs and Crime (UNODC) estimates that the sum of money laundered globally in one year is 2% - 5% of global GDP, or USD 800 billion to USD 2 trillion.

#### 4. Laws and Conventions

Some features of the more immediate laws and conventions that financial institutions have to comply with are highlighted.

4.1 United Nations Convention against Corruption –
Article 68(1) of United Nations Resolution 58/4 of 31
October 2003

South Africa is a signatory to the United Nations Convention against Corruption, which came into effect on the 14<sup>th</sup> December 2005. It is a globally legally binding international anti-corruption instrument which requires States to implement several anti-corruption measures which may affect their laws, institutions and practices. These measures are almed at preventing corruption, including domestic and foreign bribery, embezzlement, trading in influence and money laundering.

28.10.2016 CP/KvR CN14 Closure of Bank Accounts

# 4.2 The Financial Action Task Force (FATF) on money laundering

In response to mounting concerns over money laundering and recognising the threat posed to the banking system and to financial institutions, the FATF, which is an inter-governmental body was established in 1989 by the ministers of it's various member jurisdictions. It is a policy making body and has no investigative authority.

The objectives of the FATF are to set standards and promote effective implementation of legal, regulatory and operational measures for combating money laundering, terrorist financing and other related threats to the integrity of the international financial system.

In April 1990, the FATF issued a report containing a set of Forty Recommendations, intended to provide a comprehensive plan of action needed to fight money laundering and terrorist financing.

These recommendations were revised in 1996, 2001, 2003, 2012 and 2014 to ensure the further strengthening of the agreed international standards for combating money laundering and terrorist financing.

5 26.10.2016 CP/KvR CN14 Closure of Bank Accounts

My

#### 4.3 The Financial Intelligence Centre Act

Pressure from the FATF and the international environment to implement effective money laundering control legislation led to the development of the Financial Intelligence Centre Act (FICA). South Africa's commitment to the implementation of the FATF recommendations codified in FICA meant South Africa became the first African country to become a fully-fledged member of FATF.

South Africa was accepted as a member of the FATF in June 2003 after it was evaluated and found to have developed a comprehensive legal structure to combat money laundering activities.

The Financial Intelligence Centre Act (38 of 2001) (FiCA) came into effect on the 1st July 2003 and was introduced to fight financial crime, such as money laundering, tax evasion, and terrorist financing activities.

#### 4.4 A Politically Exposed Person (PEP)

In financial regulation, a PEP is a term describing someone who has been entrusted with a prominent public function. A PEP generally presents a higher risk for potential involvement in bribery and corruption by virtue of their position and the influence that they may hold.

8 26.10.2016 CP/KvR CN14 Closure of Bank Accounts

Sh



4.5 The Financial Intelligence Centre Amendment Bill (33B - 2015)

Section 21G of the Bill Introduces the concept of a domestic prominent Influential person (PIP). Section 21G(c) obliges a bank to conduct enhanced ongoing monitoring of any business relationship with a PIP.

Parliament has already passed the Amendment Bill and it is with the President for signature.

If the President does not sign the Amendment Bill, South Africa will be non-compliant with the FATF recommendations. FATF will then issue its public statement identifying the Republic as a jurisdiction with strategic deficiencies in the anti-money laundering / countering the financing of terrorism measures.

4.6 Prevention and Combatting of Corrupt Activities Act (Act 12 of 2004).

The Prevention and Combatting of Corrupt Activities Act (Act 12 of 2004), imposes a duty on banks to report knowledge of corrupt activities.

In terms of Chapter 7, Section 34 (1)(b) of the Act, any person who holds a position of authority and knows or ought to reasonably have known or suspected that any other person has committed an act of corruption involving an amount of R 100 000-00 or more, must report such knowledge or suspicion or cause such knowledge or suspicion to be reported to any police official.

7 26.10.2016 CP/KvR CN14 Closure of Bank Accounts

My

Naturally, failure to comply with the provisions of this Act, could result in a fine and/or a term of imprisonment and/or a further fine equal to 5 times the value of the gratification involved in the offence.

#### 4.7 The Banks Act (94/1990)

In terms of the Section 6(2) of the Banks Act (the Act), as amended by Section 3(b) of the Banks Amendment Act (19/2003), Banks are obliged to submit to the supervision and control of the Registrar of Banks and must meet and maintain various standards Imposed upon it by the Act including details of the funds held and their business practices.

Failure on the part of a bank to meet these standards may result in a bank being liable for losses and even criminal sanction.

#### 4.8 The Inspection of Financial Institutions Act (80/1998)

In terms of Section 5 of The Inspection of Financial Institutions Act (80/1998), banks are subject to the investigation and inspection of their affairs. Failure to cooperate on the part of banks could render them liable to the payment of a fine or to imprisonment or both such fine and imprisonment.

28.10.2016 CP/KvR CN14 Closure of Bank Accounts

#### The Prevention of Organised Crime Act (POCA) 4.9 (121/1998)

Banks have to comply with the measures spelt out in POCA, especially Sections 4-6, to combat money laundering.

Failure to comply with these measures could attract a fine of R 100 million or 30 years imprisonment.

#### 4.10 Code of Banking Practice

The Code of Banking Practice states that a bank will not close an account without giving reasonable prior notice. A bank however reserves the right to protect its interests in it's discretion, and this might include closing an account without giving prior notice. If a bank is compelled to do so by law (or by international best practice); if an account has not been used for a significant period of time; or the bank has reason to believe that an account is being used for any illegal purposes.

#### A bank's contractual right

Our courts have upheld a bank's right to close accounts on the basis that the agreement that establishes the banker / customer relationship constitutes a contract like any other and that the general rules of contractual interpretation apply.

26.10.2016 CP/KvR CN14 Closure of Bank Accounts

A term within that contract which allows the bank at will, subject only to giving reasonable notice to terminate the contract, provided the termination is procedurally fair and does not offend constitutional values, is not unusual, onerous or unconscionable.

#### 7. Conclusion

So, not only are banks entitled to close an account in terms of the contract that establishes the banker / customer relationship, subject to certain conditions, they are indeed obliged to do so in terms of domestic and international law and international convention.

Banks must take care to ensure that they comply with their statutory and common law obligations, since a failure to do so could attract huge monetary penalties.

Recent examples of penalties imposed on banks for alleged money laundering offences include:

- 7.1 In December 2012 HSBC Bank was fined the sum of USD 1,9 billion following a US Senate Sub-committee investigation.
- 7.2 In March 2012, a record fine of £ 8,75 million was Imposed on Coutts Bank by the Financial Services Authority.

10 26.10.2016 CP/KvR CN14 Closure of Bank Accounts In

7.3 On the 12th October 2016 Swiss Federal Prosecutors opened criminal proceedings against Falcon Private Bank for alleged money laundering offences.

Clive Pillay Ombudsman for Banking Services Johannesburg, South Africa October 2016

26.10.2016 CP/KvR CN14 Closure of Bank Accounts



96 April 2016

Elock A Greyston Ridge Office Park 144 Kathering Street Sandton 2146

Delivery, By Hand

Dear Ms R Regaven.

SUBJECT: TERMINATION OF THE BANKING RELATIONSHIP BETWEEN STANDARD BANK AND VARIOUS ENTITIES

We refer to the telephonic discussion between David Pike and yourself earlier this afternoon, 6 April 2016.

As advised The Standard Bank of South Africa Limited (Standard Bank) is terminating its banking relationship to take effect on 6 June 2016 with various antities including, but not limited to, the following:

OAKBAY INVESTIVENTS (P EY) LTD TNA MEDIA (PTY) LTD

SLANDSITE INVESTMENTS ONE HUNDRED (PTY) LTD BLACKEDGE EXPLORATION (PTY) LTD CONFIDENT CONCEPTS (PTY) LTD

SAHARA-COMPUTERS (PTY) LID

SHIVA UKUSHIMA EMATER

Standard Bath Control Trinor & Simmonds Street Johannesburg 2001 / PO Box \$1090 (Asthallown 2107 South Africa
Tel. SWitchburd: 227 (0)11.836 9112 - 227 (0)11-8568299 Sex -27 (0)11.836 6299 (Hernallumamergetandschbenk.co.ze/standardbenk.co.ze

The Sirvery Bern or Board, June Lumbelfton in Philadelise of Comment Secretar bertiter and regioned credit plouder Inchances

Desire To Contagne Statement Di Machinin-Craf Emphasis and resident Contagnes of Professional Action of Profession

Company Security, 2 Septem

6101/2016

-

Standard Bank: Moving Forward™

Mer of

Please note that the above is not an exhaustive list, and will be supplemented in the event that Standard Bank becomes aware of any further accounts and/or facilities which necessitates termination.

Standard Bank is cognisent of the number of accounts and facilities held by the aforementioned entities, and will be communicating the relevant notice periods and termination processes in relation to each entity during the course of the next few days.

We trust that this letter will be brought to the attention of the relevant directors and/or board of directors as the case may be

Yours specially

Mr Brian Busse

Head, Commercial Banking Channel Personal and Business Banking

Standard Bank of South Africa

Standard Bank Moving Forward™

"SRIS"

14-Agril 2015

Dear Sit

) o\*

re; standard bank and the threat of 9,500 retential job losses at qakbay investments & dur porificies companies

Following the unexplained and unprecedented decision of Standard Bank, a number of other hanks and an auditing firm torcease working with us, it has become virtually impossible to continue to decipy iness in South Africa.

who have sectived no justification who spever to explain who standard Bank, ABSA, ENB, Sashin Medibank have decided to alose our business accounts. KRMG themselves soid that there was no audit reason to and their work with us.

Oakbay her a 23 year track record of strong business performance and turnaround skills in an uniber of sectors. Our ability to be a discuptor in new sectors, challenging the dominant businesses and global players in South Africa, is the source of our success.

Between 2012 and 2015, 47,000 jobs have been lost in South Africa's mining sector. In Fact, single 2015, the top three mining companies in South Africa have made more than 10,000 people redundant. In contrast, we have created 3,500 jobs in mining. Our acquisition of Optimum from

Giencore also prevented a liquidation that would have seen more than 5,000 South. African mining jobs lost, if Standard Bank shuts this account as well, all of these jobs will be at risk.

With our back accounts closed, we are turned will be unable to pay many of the saturation and the saturation of their aspects we find it totally unacceptable that the tensial thousands of their dependents would have to suffer as a result of the control of their dependents would have to suffer as a result of the control of their dependents.

We can only surmise that the reason for the animal the banks is related to the Gupto family and the sen of Polyadeni Incob Zuma. Dublicate, who are the man shoreholders and partner in Opkbay.

A lot of unitue, unitested and sourcitous journalism has been published about the Gupta Family and Mr Zuma that could have inflident of Standard Bank's decision, possibly based an a replicational risk assessment, toxancel Oakbay's banking facilities.



in the interest the company's thousands of workers, the Guptes and Wr Zuina have come to the conclusion than was best to relinguish control of Clarbay investments and have stepped down from all executive and non-executive positions and pay involvement in the day, to day running of the Dosliness.

, By Coing so: They hope to and the political campaign against Dakbay and Mr Zuma and remove the reputational risk concerns the bank may have.

As you may have peen. Organisations like Cosatil, representing the country's working class the Alicential structures of the Alicenti

We humbly submit that this could cause much more regulational damage to Standard Bank and Its future prospects in this country. I hope, sir, that you appreciate my candour and can see that we are doing everything we can to save thousands of South African jobs.

You help in resolving in this matter, even in a facilitation manner, would be greatly applied at the work of the properties of the propert

Yours sincerely

Nezeem Howa

Stilling

CFO, Qakbay Investments

An A

#### Nazaem Howa

Sidijecti

ennafe avoiding - the secretainess disperentationally artitledicinobolise and Large Lychell sector secretainess in fundably artitledicinobolise and

South African Communist Party

Press Alert. 11 April 2016

AN LANGUAR AN HERITARIA AND ANTERNATION OF A SECOND AND AND ASSESSED OF THE SECOND AND AND ASSESSED AND ASSESSED OF A SECOND AND ASSESSED ASSESSEDANCE ASSESSEDANCE ASSESSED ASSESSED A

The SACA his notice decisions are notice and examine of infinitely offices ABSA, visible composition in this birth are and auditing security in the fine of the property of the fine of the property of the fine of the property of the fine of the fi

The SALT has been in the forestent of the companying continues amastermation of the finitestal scenar. The sector's dominated by handful stip spolies A185A. Firstland. Standard Bank, Bechank and some their private monopoly and passe shows of collection market conduct. Acting together with an imperialist immorphy EPME, the private bank me monopoly, has shown its dangers and circlusive market conduct against one of their private mould, the Copia objective, with which they have established imperialist pushings or of their private mould, the Copia objective, with which they have established imperianting business relations. What did they see all along in their felacionship with the Copias that they compared until pressure from the struggle significal arguments that they compared until pressure from the struggle significant arguments that any constant they are as guilty, and contain the includes against information of them benefited from sparthed to this was declared by the United Mations assistince against humanity. They continue to benefit from financially exploitating our people.

There XIP references the importance of developing public ownership and denoteration or relicions to the importance of developing public ownership and denoteration of the indicate capture and maripulation by private capturing the quital accumulation interests not unity in the balaking sector but the importance of sector as a whole. The importance of state, as operative and worker owned hards and other timescal centurishments trading in the nonclair services commit be overcomplicated. The dangers demonstrated by private objectable similarity of an eleasty private made for all made. The Sector spands on the safe of the workers, and will light for fights and livelificates as opposed to the greedy below into a their explainers the Ouptus included.

Estical by the SACP

FOR GENERAL ENGOINES ON SAEP STATEMEN'S

CONTACT:

evlerrakrave "Jonai Laeskova Corumpai", dabía merrile szőr: zatényi vá palus 192 – eg 184 radule szőre gi 184 zekde kívéhil dága víral kívéhil dága útráfogiahefíláraták mýzintő natraku 2000-241 krón hevő de Corumpungvidus útráfogiahefíláraták mýzintő natraku 2000-241 krón hevő de Corumpungvidus útráfogiahefíláraták mýzintő natraku 2000-241 krón hevő de Corumpungvidus

An S

4:14:21:14

Unions to meet to save Bunta Burthayees. Soworant IVE













Rufes for continenting on developed Livi; Wallow recovery feedback from our readers, and heave; your views or others for coics.

# Unions to meet to save Gupta employees

Trade union federation Cosstu has embarked on a drive to save workers employed by companies bixned by the Gubia Family.

4

Tife enterged alter Cusato yearerday ninty in the comparada associated with President deceb Zumps Lamby Hiterias and the virus position to pay workers splayer after many Hiterias after many fainter is suited notices to out feet with them

Condui spokerman Sizwi. Panito salo atler meeling with Howatting the wade tinken Indonation had respired in meet all rations organishing at Gupta Vusinesses

'Agiet that votali then make a measing request will elimists from successionicy independ franking and the nanou-bunks." He apis.

To some more are actively applicable a specific political fig. freeze and all

ESECP NOW

Designable to the property of the

Banha: Cupun kadan d Darawy Angan da Cupun kadan d Angan di Cupun kaga husi ost donid proto ana



axinamoti-ro. who was the ecompanies, expelient for New Age Metha wells mirricle employers and Cosalirs officia to improprio thousened mailler were enty meant to save the workers.

A Beundylessin Aliveliber, Coward labelled the Gugainytes produced about as the voice adultage in the country

The also take National the Quotes are not made in bystanders in this content and their specific national vertices by not giving boths. The foreign Services Board and Composition Commission on the content and the Commission of the Composition of the Commission of t

sen americhnist of a देवतार्तिमाने हम, ज्यान भागिताके त्वान सेमा एक संग्रहकृत संग्रह ने तृत्वाच्याक्ष्म एक्ष्मात्रमा द्वातिम द्वातिमाक्ष्माहरू स्व्यान व्याप्तानीक्ष्य द्वाराव्यक्ष्य द्वारा

plenter angerenselt unter unter for comment

mpth in Gapties
whermaliques
Guptes and Zaron eres
testing Visua Gapties
Armyoung

Mburo dentes wisit to heaven' Facebook post

Pasior Papelia Mipora intragment has outvised GRL commission than Tream Militarian Application of using the impression themself and the application of using the impression approximation approximation approximation of the control appendix of the c

R D

कर्या अली पार्ट विकास को काल्यु संस्कृत स्वेत्र में के अधिक क्षेत्र मुख्य क्षेत्र के काल्या कर कि वाहर को के ungraphic trees the green like trained to pull a contribution maken maken maken beng the pull and the contributions the green states the contribution of the contribut maritier their morney to

"The Guples also have an ordina of transferring than cost directly into their company ph. Unichlashid speaker

"However: this option would be distingly to engage because for Guerra's company Dakhay investments communicated not have a Johannesburg Glock Endagage sponsor no an author. haseld

Anding tim KPAC and Johannesburg Stock Exchange sported Studies editor and a semidolemnia negligible with USE and lated coordinates also recently announced by necession picht ges Augt he edoja prajusse subble

The experience the Supposition of the entering and provide the second transfer the total transfer the provide the second transfer transfer the second transfer trans infor a closure account and with the Garrier would not be able to use in transactions

#### More from Sowetan LIVE

Berker feels future's same AmaZulu illu ut

Sex on the back seat with an Woman boate husbandlor .... mfusing to have sex with her

Jan HIV positive, former soccer player mycals torat.

Kuma under proseure as Eskomex-boss alleges Gupta inflirance

Petindrol the day. Who work is held with mind. Daniel is Amber Buse 2 Teacher Ried after systems with price arrives

Charle Chales chapteren Meyerstrander

Pilatolifer shine some sklu a 68 Inchan West

- 3. The Zidolik Christian Citilium is above pointed
- 4) Honizamo Musikasto gis node on streen

gunazud taluncaupperere partielle

Riphip geoup actions a ainful

wentertust Tribe-pleyes him compagn

- It Pickup of the day delice Materia and way Minimo register to vinta.
- Sereins Willeams grown us a lesson in working . 20050
- boolinks and an indah, alog shirted
- The My arthogon implicational to an interest in the control of the
- E BRENKING Zeine inteligine
- 10 fattarible Norie Fas'is new job. toxics ust at





#### More from the web

5 Tips for Forex Trading that Every

Latest Golobilly Homes For Bale Today i Verecis Golding Dre inorns

FNB Property Barometer -- House Prices by Size FNER or

Active Defencer's Steps to Keeping. the Cytor Criminals of Bay 10 than

21 Women 50 Secutiful They Put 

1750

TO CLICATENT



GOSTIU IR UKBICED

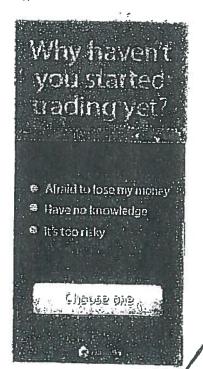
HE FIRST SHEAT

THE CONTROL PROBLEM



given on true after the right time for COSALU to samp the Jouseen

REPUBLI BUSH





"SB17"

Attorneys • Notaries • Conveyancers • Prokureurs • Notarisse • Aktevervaardigers

Director / Direkteur: Gert van der Merwe (BLC, LLB)

Associate/Assosiaat
Ilanie Loots (LLB)

Assisted by / Bygestaan deur:
Ilze van der Merwe (LLB)
\*Stephan Deetlefs (LLB)
Ilze Mattheus (B.Com, LLB,
LLM)

Reg No: 2006/015908/21 VAT/BTW No: 4630239152

<u>Fretoria</u>
<u>Street Address / Straatadres:</u>
62 Rigel Avenue, Waterkloof
Ridge, Pretoria

Postal Address / Posadres: Posbus / P.O. Box 27756 Sunnyside 0132

Tel: 087 654 0209 Fax/Faks: 012 343 5435 Email/Epos; simone@vdmass.co,za

Street Address / Straatadres:
Plack A, Graystone Ridge Office
Park, 144 Katherine Street,
Sandton

Tel: 011 542 2000 Fax/Faks: 086 603 4356 Our Ref: N

MR GT VD MERWE/st/074

Your Ref.

MR BRIAN BUSSE

05-12-2016

**URGENT** 

Standard Bank of SA

By Fax: 011 636 6299
Brian.Busse@standardbank.co.za
David.Pike@standardbank.co.za

Dear Sirs,

# URGENT APPLICATION: OAKBAY GROUP OF COMPANIES / STANDARD BANK OF SA

We refer to the abovementioned matter and wish to confirm that we act on behalf of the Oakbay group of companies.

It is common cause that Standard Bank (amongst others) decided to terminate their relationship with our clients.

We are of the considered view that the relationship between a bank and its client is contractually regulated and your bank is no stranger to litigation in this regard with specific reference to a recent matter in which you foreclosed on the account of a one Mr Bredenkamp.

In the aforesaid matter heard in the Appellate Division of the High Court, two specific issues were, *Inter alia*, highlighted i.e. the fact that the bank had to properly consider its decision and, secondly, give reasonable notice of the closure of bank accounts.

The aforesaid must be read in context with very recent Constitutional Court authority on an obligation to negotiate in good faith and, of course, the obligation of the court's to promote the principles entrenched in the Constitution of our dear land.

It is no secret that the closure of bank accounts will have severe consequences for the business of companies within the Oakbay group and there has been a certain public outcry to persuade the bank to reconsider.

Our clients' representatives exhausted all efforts to meet with the bank in order to maintain Standard Bank as the primary banker on most of their accounts and, at least, the secondary banker on many others.

We got the impression that there seems to be uncertainty with Standard Bank as to the road ahead given the factual history of the correspondence and the meetings held thus far.

If necessary we will of course deal with the aforesald in papers to be presented to court if necessary.

The purpose of this letter is to indicate that our firm instructions are:

- Standard bank did not negotiate with our clients in good faith regarding closure of the accounts and did not exercise its discretion in an open, fair or reasonable manner. The aforesaid can be diluted to the fact that the bank did not properly consider closure of the accounts as alleged in the various notices.
- 2. Even if the bank duly considered the closure of the accounts our instruction is that the notice afforded to our client in order to obtain alternative banking facilities is insufficient and unreasonable given the context and circumstances. We will of course deal with this in the papers but we submit that the closure of the bank accounts on 6 June 2016 is totally unreasonable.

As a result of the aforesaid our instruction is to request you to, firstly, consent to keeping our clients' accounts open and active pending the finalisation of an action and/or application to be issued from the High Court of Pretoria (alternatively the Competition

An f

Commission determining a formal complaint in this regard) same to be issued/lodged within 60(sixty) days from date of this letter.

Our clients' request is not unreasonable given the circumstances. Some of our clients maintained a relationship with Standard Bank for more than 15(fifteen) years and in light thereof we submit that the sudden and unwarranted action to which our clients are subjected remains unreasonable.

We must, unfortunately, request you to ensure that we receive your formal feedback by 12h00 on 24 May 2016 in absence whereof we hold instruction to proceed with an urgent application to interdict Standard Bank from closing our clients' accounts until the dispute has been resolved.

We have mentioned and we now repeat the fact that the closure of accounts will have disastrous effects for our clients, the suppliers, contractors and of course their employees. There is no reason why you should not consider the severe adverse consequences when taking a decision on this reasonable request.

Kindest regards.

Gert van der Merwe VAN DER MERWE & ASSOCIATES

Au Co



#### DELIVERED BY EMAIL AND FACSIMILE

Van Der Merwe & Associates Incorporated Attention: Mr G van der Merwe Per e-mail: simone@vdmass.co.za Facsimile No. 086 603 4356

Johannesburg Office 155 5th Street Sandton 2196 South Africa Private Bag 10015 Sandton 2146 Docex 111 Sandton Tel +27 11 535 8000 Fax +27 11 535 8600 www.werksmans.com enquiries@werksmans.com

YOUR REFERENCE: Mr GT VD Merwe/s/074

OUR REFERENCE: Ms B Mabasa/Ms A Khumalo/ak/STAN1527.5967/#4313529v1

DIRECT PHONE:

+27 11 535 8309/+27 11 535 8198 +27 11 535 8709/+27 11 535 8714

DIRECT FAX:

EMAIL ADDRESS: bmabasa@werksmans.com/akhumalo@werksmans.com

25 May 2016

Dear Sirs

#### URGENT APPLICATION: OAKBAY GROUP OF COMPANIES / THE STANDARD BANK OF **SOUTH AFRICA**

- We refer to the above matter and to your letter dated 24 May 2016 addressed to Mr Busse of The Standard Bank of South Africa Limited ("your letter").
- We confirm that we act on behalf of The Standard Bank of South Africa Limited ("our client") and that a copy of your letter has been provided to us in order for us to respond on behalf of
- We assume that your reference to the "Oakbay group of companies" refers only to those entitles to whom our client issued notices to terminate the banking relationship and that your letter is written on behalf of those entities only. Accordingly where in this letter we refer to "your clients", we refer to those entitles.
- We do not intend in this response to deal with each and every allegation contained in your letter and our fallure to do so should not be construed as an admission of any such allegation. Our client reserves the right to deal more fully with the allegations made in your letter at the appropriate time and in the appropriate forum.
- Our client maintains that it has acted lawfully, in good faith and in a contractually appropriate manner in its dealings with your clients and in particular in giving notice of its intention to terminate its banking relationship with them. Our client denies your clients' allegations to the contrary and denies that your clients are entitled to the relief which they apparently intend seeking from the courts.

Werksmans Inc. Reg. No. 1990/007215/21 Registered Office ISS 5th Streat Sendton 2196 South Africa
Directors D Nertz (Chairman) Al Armstrong BA Arcord DA Arteiro T Bots LN Becker JD Barr AR Berman MMN Bhengu Z Biledan HGB Boshoff GT Boss T D Sowell HC Brinn W Brown FF Burger FG Caland JG Coets PPJ Costser G Cole-Morgan JM de Villers R Drimen LJ du Preez S Fodor EJ Gerdiner D Gewer LA Gobetz R Gootion ID Gouws GF Griessel J Holleson MGH Honblad VR Hollsolsky BB Hott HC Jacobs TL Janse van Rensturg N Haroth G Johnsones S July J Kalimeyer SLG Kayana A Kenry BM Kew R Kilioran N Kirby HA Kotta S Kirige PJ Krische P is Roux MM Lessing E Levenstein JS Lociner K Low JS Lubbe BS Habess PH Mabaso N HOP Chariske H Hasando SM Moerane C Horalts PM Hosebox KO Hodo J Nickiga JJ Niermand BPP Citiver W G Costhutzen S Padisyacity M Pansegrouw CP Pauw AV Pilley D Pizzahl T Potter BC Price AA Pyzikowski U Rath A Ramchin L Rood BR Rochman W Rosenberg NI. Scott TA Sibidia LK Silberman JA Smit JS Smit BM Sono C Stevens P O Stevy J Stockyrol S R Stations JG Theora JT Inter K I Trudgeon DN van den Berg AA van Ger Hernes HA van Nielerk FJ van Tonder JP van Wyk A Vetalidis RN Wakafield DC Walker L Watson D Weglersid G Wickins M Withhard C Willans

JOHANNESBURG - CAPE TOWN - STELLENBOSCH - TYGER VALLEY

STAN1527.5967/#4313529v1 25052016



- 6 In the circumstances our client will not accede to your clients' demands.
- You are also advised to transmit any letters and/or legal processes to the writer of this letter at the address contained in the covering e-mail. Needless to say, we hold instructions to oppose any applications and/or actions on behalf of our client.
- 8 All of our client's rights remain strictly reserved.

Yours faithfully

Werksmans Attorneys THIS FAX/EMAIL HAS BEEN ELECTRONICALLY TRANSMITTED WITH NO SIGNATURE.

Am A S

"SB19"

1879

27 May 2016

Brian Busse Standard Bank Rosebank

Dear Brian

Our telephonic conversation today refers. It is clear from the conversation that much of the cordiality which existed hitherto seems to have been lost. I gather that our notice of intention to undertake legal action may have altered your stance.

I wish to place on record that our primary objective has always been to continue our banking relationships with yourself.

The notice of legal proceedings was sent in error, and it was never our intention to open a legal channel until our commercial discussions had been exhausted. It remains my view that we have some way to go to exhaust those discussions.

I apologise for this letter being sent and urge you to reconsider your position so that we may work towards finding a solution that leads to the continued banking partnership as well as the most important issue of saving the 7500 jobs.

In this regard, we would like to advise that we unconditionally retract the notice of legal proceedings served on yourself, and welcome the consensus view that we continue speaking on Monday.

Yours sincerely

Nazeem Howa Chief Executive Oakbay Investments

An I So



1 June 2016

Mr. Nazeem Howa Oakbay investments Pty Limited Per email

Dear Nazeem

PRIVATE AND CONFIDENTIAL

#### SUBJECT: TERMINATION OF BANKING RELATIONSHIPS

I refer to the teleconference of 15h30 on 1 June 2016 in which you requested that we (a) give reasons for our decision to terminate our banking relationships with members of the Oakbay group ("the Oakbay entities") and (b) give renewed consideration to the effect that the decision may have on the employees of the affected entities.

Without walving our right not to furnish reasons for our decisions and without inviting any debate about the correctness of our decisions, I point out that the law, inclusive of South Africa's Companies Act (regulation 43), Prevention of Organised Crime Act, Prevention and Combatting of Corrupt Activities Act and Financial Intelligence Centre Act as well as the USA's Foreign Corrupt Practices Act and the UK's Bribery Act, prevents us from having dealings with any person or entity where a reasonably diligent and vigilant person would suspect that such dealings could, directly or indirectly, make us a party to, or accessory to, contraventions of such law.

We have conducted enhanced due diligence on the Oakbay entities as required by the Financial Intelligence Centre Act and have concluded that continuing with any banker / customer relationship with them would increase our risk of exposure to contravention of the mentioned law to an unacceptable level.

Moreover, an Indispensable requirement of a relationship between a banker and a customer is that of mutual trust. The campaign on behalf of the Oakbay entitles (to coerce Standard Bank into maintaining all banker / customer relationships) has faisely and publicly accused Standard Bank of illegal collusion with our competitors and creating the perception that it is intentionally excluding black South Africans from the economy. Such accusations are wholly destructive of that trust and prevent any banker/customer relationship from being maintained.

Standard Bank Centre 1<sup>st</sup> Floor 5 Simmonds Streat Johannesburg 2001 / PO Box 61890 Marshalitown 2107 South Africa Tel. Switchboard: +27 (0)11 636 9112 Fax +27 (0)11 636 4207 / Name-Surname@standardbank.co.za / standardbank.co.za

The Standard Bank of South Africa Linsted (Reg. No. 1882/old/Jalindy Authorised Snahelel nerrines and registered credit provides (NCRCP-LI)

Directors; TB Cleshasho (Chairman): SK Tababalair (Chair Esecutivs): Or. A Desholatir RAMY Davnel.

BJ Kruger\* Adv. KD Morelot: Dr. Mt. Odess-Otensill: AC Parker: ANA Palamida coulisis. MAD Rank: PD Bulleranktiis BS Tababalai EM Woods

Company Secretary: Z Stophen

01/08/2018

Essentive Circular Shriftsh Shriveyen Stationards

Standard Bank Moving Forward M

160

If, as you contend, employees of the affected entities will be negatively affected by our termination of the banking relationships then it would naturally be of grave concern to us but regretably unavoidable; non-compliance with the law and/or assuming the risk of contravention of the law as summarised above, in order to mitigate a possible indirect negative effect on employees, is not an option available to us.

Our decision to terminate our banking relationships with the Oakbay entities stands on the terms communicated in the respective termination notices.

Yours sincerely,

lan Sinton General Counsel

Complimentary close,

Name Surname
Title, Designation

Standard Bank Moving Forward™ /

# "SB21"

# South African Opposition Says Glencore 'Forced' to Sell Mine

by Franz Wild

@wildfranzMore stories by Franz WildFebruary 3, 2016 — 5:57 AM EST February 3, 2016 — 8:33 AM EST

DA says minister and Eskom pushed sale to Gupta family

Mines minister met Glencore ahead of the sale of the mine

South Africa's biggest opposition party said the country's mines minister and state power utility "forced" Glencore Plc to sell its Optimum coal operation to a company controlled by the Gupta family, friends of President Jacob Zuma.

Mines Minister Mosebenzi Zwane met Glencore officials in Switzerland ahead of the sale of Optimum to the Gupta's Tegeta Exploration & Resources in December, the ministry said in a Feb. 1 statement. Johannesburg's Sunday Times newspaper reported that a delegation representing the Gupta family was there at the same time.

Optimum was placed in business rescue proceedings, a form of bankruptcy, in August after Glencore said its contract to supply coal to power company Eskom Holdings SOC Ltd. was unviable, leading to the operation's sale to Tegeta for 2.15 billion rand (\$133 million). Eskom had refused to renegotiate the contract and says it will hold Tegeta to the same arrangement. It also fined Optimum 2 billion rand over the quality of the coal it was supplying.

"The evidence currently suggests that Zwane and Eskom contrived to make Optimum unviable for Glencore to operate," Democratic Alliance Shadow Minister for Mineral Resources James Lorimer said in a Tuesday statement. "Once Glencore was forced to sell the mine to the Guptas, it was then arranged that the path for Tegeta would be eased to get supply contracts with Eskom and get let off a considerable fine."

The most important business stories of the day.

m /

Get Bloomberg's daily newslatter.

Sign Up

Zwane participated in the sale in the interest of saving jobs at Optimum, his ministry said on Feb. 1. Eskom didn't participate in the sale of Optimum and is only interested in the continuation of its contract at the same price, volume and quality, spokesman Khulu Phasiwe said by phone on Wednesday. Glencore referred to a Jan. 31 statement, in which it said it was "pleased with the terms of the transaction."

Glencore has also said that it engaged with the South African government over the sale and didn't answer a question as to whether its Chief Executive Officer Ivan Glasenberg met Zwane. The business rescue practitioners considered the Tegeta bid as offering the "most compelling value for stakeholders," they said in a statement.

Optimum is now supplying coal to Eskom's Arnot power plant at a cost of 150 rand a metric ton, Nazeem Howa, the chief executive officer of the Gupta family's Oakbay Investments, said in an interview with the South African Broadcasting Corp. Glencore had sought 530 rand per ton from Eskom for coal from Optimum, Eskom has said.

"How is it that what was an unviable operation all of a sudden viable? Is it really possible to turn it around like that?," Lorimer said in an interview. "We need to know exactly how Zwane became involved in the deal with Glencore. Who approached who? What did he offer to whom? What did he bring to the table?"

A spokesman for Zwane declined to comment further.

Before his here, it's on the Dipomberg Terminal.

LEARN MORE

# Trending Now

- 1. Family Claims \$29 Billion Fortune as India Hunts Tax Evaders
- 2. Rouhani Urges Obama to Block Iran Sanctions Law Extension
- 3. Trump Takes on China in Tweets on Currency, South China Sea
- 4. Renzi Quits as Italy Referendum Defeat Deepens Europe's Turmoil
- 5. Europe's Populists Target Landmark Victories in Italy, Austria

б.

Terms of Service Trademarks Privacy Policy ©2018 Bloomberg L.P. All Rights Reserved Careers Made in NYC Advertise Ad Choices Website Feedback Help

An I

- Tuesday, October 25 2016
- · Business Sites
- Subscribe
- Register
- Login



WHEREVER SOUTH AFRICANS ROAM, THBY FEEL AT HOME

South Africans get the best total ideal on POREX with American Express.

Call us nam on 03500 FOREX



# Financial Mail

Search keywords



HOME FM FOX FEATURES MONEY & INVESTING MEDIA & ADVERTISING OPINION LIFE

SPECIAL REPORTS PAST ISSUES

FM Fox



Mining: Minister's Gupta trip

by Charlotte Mathews, 28 January 2016, 07:42

. Tweet
. Share
. Share {1k
. G+1 {1
. W Kindle}

E HARRING

m &

http://www.financialmail.co.za/fmfox/2016/01/28/mining-ministers-gupta-trip



Mosebenzi Zwane travelled to Switzerland with Gupta delegates. Picture: GCIS

### Related Articles



Musonite: Mysterious move



Lonmin: Courage or foolishness?





Zambin: From pick to plough



Platinum jewellery: Looking for love

Feature

### Mentioned in this Article

#### Organisations:

- Eskom
- Glencore Xstrata

People:

M

http://www.financialmail.co.za/fmfox/2016/01/28/mining-ministers-gupta-trip

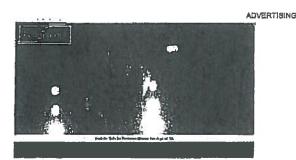
- · Jacob Zuma
- Mosebenzi Zwane

#### FM Edition:

January 28 - 2016

MINERAL resources minister Mosebenzi Zwane travelled with a delegation from Gupte-owned Tegeta Exploration & Resources to visit Glencore in Switzerland to negotiate the purchase of Optimum Colliery, his spokesman confirmed last week.

But the minister derived no personal benefit, he said.



inRead invented by Teads

Ahr R

Optimum Colliery was placed in business rescue last year after closing down its export operations because they were no longer aconomically viable. It was also slapped with a R2.5bn penalty by Eskom for delivering sub-specification coal.

The mine was sold to Tegeta in December for about R2.15bn. Glencore agreed to advance R400m so that the mine's R2.55bn of bank debt could be repaid. Eskom has said it will pursue its rights to penalties.

Tegeta is one of the interests of the Gupta family, who are close friends of president Jacob Zuma. The Guptas also have stakes in Sahara Computers, a major supplier to government; The New Age newspaper, which takes a pro-government stance; and various mining services and coal mining operations, including JSE-listed Oakbay Resources & Energy, the owner of a gold and uranium mine near Klerksdorp.

Asked if the minister had joined the Tegeta delegation to Switzerland, Tegeta director Nazeem Howa said it was "absolute rubbish". Asked if the minister was part of the buying consortium, he again said it was "absolute rubbish".

Asked the same questions, minister Zwane's spokesman said the minister had a policy of engaging directly with industry stakeholders to avert crises, specifically to avoid job losses.

"Minister Zwane has committed himself to ensuring that his office has an open-door policy. This, in part, requires travelling to meet with all stakeholders to represent government's position on these pertinent matters. He will continue to do so.

"No personal benefit is accrued from these. The minister and department remain committed to delivering on, and upholding, the Batho Pele principles."

Both Glencore and Optimum's business rescue practitioner, Piers Marsden, declined to comment.

James Lorimer, Democratic Alliance spokesman on mineral resources, said the minister's visit with the Gupta family played into people's fears that this minister had been put in place because he was in the pockets of the Guptas. He added that instead of involving himself in this matter, the minister could take various other actions to protect jobs, such as making his department operate efficiently and honestly and changing the mining framework so it was conductive to investment.

Lorimer said Zwane's intervention in commercial negotiations was not unusual as trade & industry minister Rob Devies did so frequently.

"When government picks winners it has a low success rate and it opens itself up to accusations of cronyism. Someone in this position has to be sensitive to that perception and should be more cautious in his actions."

http://www.financialmail.co.za/fmfox/2016/01/28/mining-ministers-gupta-trip

#### More in this section

- · Trustco: How far will trust go?
- Sars by the numbers
- Consumer protection: Comply or else, warns ombudsman

- R6.8bn reasons for banks to come clean on Guptas
  Trending: Fear and loathing on the US campaign trail
  Entrepreheur: Properly Fox founders Crispin inglis and Ashley James

#### Top Stories

- · Editorial: Cyril Remaphosa shaken out of slumber at last
- Thuil Madonsela's last battle: How SA's heroine stuck it to Zuma (again)
- Analysis: Gordhan's R6.8bn Gupta masterstroke
- · Editor's Note: Day that will live in Infamy
- · SA's Game of Thrones
- · Bruce's List: Zuma's damned if he fires Gordhan and damned if he doesn't

#### PROMOTED STORIES



Stephen Hawking Sees "Biggest Event In Human History\* THE MOTLEY FOOL



3 signs you will be able to retire comfortably PRUDENTIAL.CO.ZA



Queen Bee Syndroma, Dethroned THEFINANCIALIST BY CREDIT BUISSE



US Election: Status Quo vs. Who Knows? THEFINANCIALIST BY CREDIT SUISSE



Demi Moore's San Remo Penthouse is Now Available for a \$16 Millian Discount MANSION GLOBAL

#### MORE FROM FINANCIAL MAIL

Bruce's List: I crossed the line, Mr Molefe OPINION

The man breaking Sars COVER STORIES

MBA rankings research: How we did it COVER STORIES

Entrepreneur: Washirika Holdings' Romeo Kumalo FM FOX

Coal IPPs by the numbers FM FOX

#### MORE PROMOTED STORIES

How 3 Lottery Winners Blew Their Fortune THELOTTER

Market Impact of a Trump Presidential Win THEFINANCIALIST BY CREDIT SUISSE

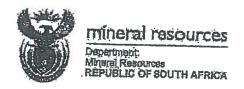
The Best Bang For Your Home Improvement Money BUSINESS NEWS AND WIRE

World's Biggest Ponzi Schemers in History BUSINESS

Unshakeable Europe THEFINANCIALIST BY CREDIT SUISSE

Recommended by

# "SB23"



Media Statement

1 February 2016

To all media

### Minister Zwane's engagements with the mining sector

South Africa's mining industry is facing a multitude of challenges following the global commodity melitown, and our priority must be to save as many jobs as possible. In the past few months an increasing number of mining companies have begun issuing section 189 notices in terms of the Labour Relations Act to retrench workers.

Since my appointment, I have adopted a single-minded approach to these challenges and have endeavoured to meet with all the relevant stakeholders, including the major mine owners and unions, to ensure that as many jobs as possible are saved and that as little damage as possible is done to our economy.

In addition to broader stakeholder meetings, I have also adopted an approach of direct engagement with individual right-holders, and have thus met with CEOs of companies, such as Anglo, Exxaro, Harmony, Rio Tinto, Glencore and Tegeta, on a one-on-one basis to discuss strategies we can jointly implement to reverse the challenges that face our industry.

These meetings are generally of a confidential nature.

The decision to take Optimum Coal Holdings into business rescue had naturally escalated the risk of liquidation and the loss of 3000 jobs.

The meeting with Giencore in Switzerland forms part of my mandate as the Minister of Mineral Resources and is in keeping with the undertakings made in August 2015 as the mining retreat of leadership around the issue of avoiding job losses and indeed reversing the damage done to our industry.

As part of government's move to develop black industrialists and broaden economic empowerment, the Tegeta Optimum deal is to be welcomed as it is a significant step towards resolving our socio-economic challenges while also opening opportunities for black-owned entities and changing the status quo. I would like to emphasise my open-door policy approach, and look forward to other black-owned operators such as Tegeta contributing towards transforming the industry.

I will continue to take extraordinary steps to intervene to avoid the catastrophic step of mine closures and job losses. I will not hesitate should similar circumstances arise involving other players. I see such interventions as critical to revitatising our industry as is the swift resolution of

m S

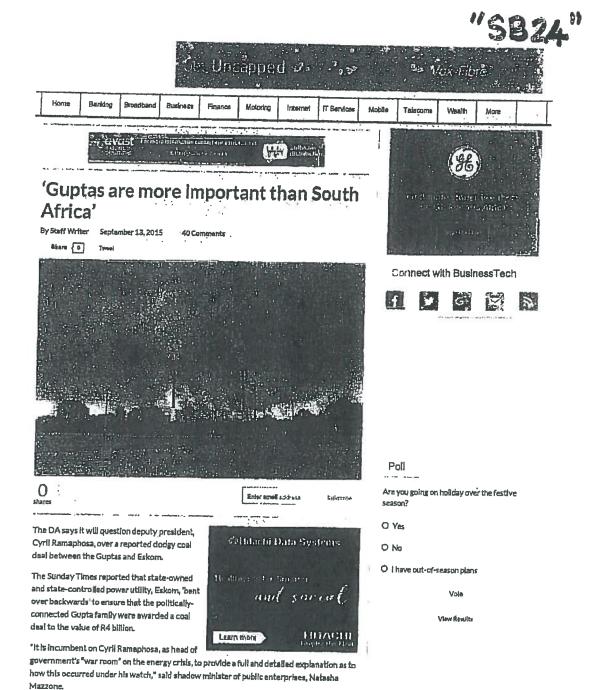
Section 11 applications, a concern raised by many mine owners during my various engagements with them.

I remain committed to ensuring we swiftly address the challenges facing the industry presently, which will allow us to better take advantage of the next upswing in mining when it occurs.

Ends -

Issued by the Department of Mineral Resources





"Gupta-owned company, Tegeta Exploration and Resources, astonishingly landed a R4-billion deal to supply Majuba power station in Mpumalanga with coal for the next 10 years, despite having been rejected since 2011, due to their poor standard of coal.

The company was awarded the deal on its fifth attempt, after falling a coal quality test four times – at a cost of R100,000 per test to Eskom. After the deal was concluded, four senior employees were controversially suspended after they questioned the quality of the Gupta coal," Mazzone said.

and

The analysis reports following the tests showed the coal to be supplied was 'marginal', raising questions as to why the coal was chosen over other options, the DA said.

"It is a well-known fact that the Gupta family has strong ties to the ANC, and President Jacob Zuma in particular. From the chartering of Gupta-owned aircrafts and the infamous 'Guptagate', to inflated expenditure by government on advertisements in the Gupta-owned newspaper The New Age, one thing is clear – the Guptas come first, and South Africa comes second," Mazzone said.

The DA said it will be requesting answers to the following questions from Ramaphosa:

- How many contracts does Gupta-owned Company, Tegeta Exploration and Resources, have with Eskom:
- What is the nature, value and details of such contracts:
- Have all said contracts followed the prescribed tender process;
- If not, what are the reasons for deviation from the prescribed tender process;
- What other financial interests, directly and indirectly, do the Guptes have in Eskom.

"South Africa has a right to be assured that every cent of public funds is spent to further the lives of every citizen," It said.

On Sunday, Oakbay Investments CEO Nazeem Howa, told the Citizen, that the article in the Times was "poorly researched, factually bankrupt story and aditor's comment".

"It claims we are supplying Eskom with sub-standard coal – again, the daily testing at Eskomcontrolled labs will prove this to be untrue. The discrepancy in quality only came up in August 2015, despite daily testing," he said.

He said that Oakbay Investments, the family's (Gupta) primary vehicle, holds less than 50% of the shareholding in Tegeta.

More on Eskom

Gupta family scores R4-billion coal supply deal with Eskom

Eskom falls performance targets, pays bonuses anyway: DA

Eskom has no backup plan after pulling coal supply deal



Staff Writer

Busines (Tech's Staff Writer's directly plugged into the South African Internet backbone, and splis out press released and other news as they receive it. They are balleved to be cl...





#### Related News



Govt paid for Van





Incide the Gauteng tion for a starting price of RF million



The thirt stort STC and





Theusensta at exto need by Docket. Anayen's department



South Africa is on a blow thing can still got us there



Wits to bike University



is it cheaper to own a car

Join the Conversation



Related News



DA in bid to force Zuma to institute state capture inquiry



This one graph shows the spectacular fallure of e-tolls



This map says South Africa is 'best at' death - but it's wrong



South Africa gets Its first Baskin-Robbins ice cream parlour



Comment period extended for new SA booze bill

Mr Dy

https://businesstech.co.za/news/energy/98251/guptas-are-more-important-than-south-...



"5825"

#### MEDIA STATEMENT

### STATEMENT BY DEPUTY MINISTER OF FINANCE MR. MCEBISI JONAS (MP)

- I have decided to respond to and clarify certain questions that have been in the
  public domain recently. I do so in accordance with my conscience, my political values
  and the best traditions of my organisation, the ANC, of which I have been a member
  since my early teens.
- I regard our Constitution as being sacrosanct and it embraces the values that South Africans struggled for, and what we live by. I was appointed Deputy Minister in terms of the Constitution by the President of the Republic. Any practice that conflicts with the prescripts of the constitution must be challenged in the interest of our democracy and the accountability we have to our people. The ANC that we have been and continue to be proud members of, has offered us the opportunity to serve our country, an honour that I do not take for granted. My historical commitment to the liberation of our people has not waned.
- 3. My daily decisions and actions are informed by the understanding that true political freedom will be achieved through del iberate and active management of a transformed yet inclusive growing economy. The current economic climate presents many risks for our country, which requires responsible leadership to avoid a full-blown crisis. We have to unite on the key issues relating to managing the macroeconomic risks, while urgently unlocking new sources of growth and job creation. South Africa requires "all hands on deck".
- The extent to which we are able to navigate the current macro-economic challenges, restore investor confidence and rapidly stimulate growth, will depend on heightened levels of political leadership.
- 5. The narrative that has grown around the issue of "state capture" should be of concern to all responsible and caring South Africans, particularly those of us who have accepted the task to lead our people. We cannot afford to ignore the obvious impact these sentiments may have on our country and the resultant potential of undermining our moral authority. Neither can we afford to allow the attempts to capture the state to divert us from dealing with the challenges that our country faces.

Enquiries: Communications Unit Email: media@treasury.gov.za Tel: (012) 315 5944





History will judge us on the extent to which we have stayed true to the commitments we have made to our people through our public pronouncements and private conduct.

- 6. Therefore let me state the facts on the matter of whether I was approached by nongovernmental individuals in respect of the position of Minister of Finance. Members
  of the Gupta family offered me the position of Minister of Finance to replace thenMinister Nene. I rejected this out of hand. The basis of my rejection of their offer is
  that it makes a mockery of our hard earned de mocracy, the trust of our people and
  no one apart from the President of the Republic appoints ministers. Let me also place
  it on record that there was no discussion between the Deputy Secretary General of
  the ANC Ms Jessie Duarte and myself on this matter.
- 7. I have hesitated to speak out publicly on this matter until now, but I feel it is no longer possible to remain quiet. Of primary concern to me is that this issue has a real danger of diverting attention away from the real and urgent challenges we face as a country.
- 8. I am committed to good governance, abilding by the constitution of our country and being accountable to our people who repeatedly express their confidence and trust in us, election after election. It is this constant state of awareness and consciousness drummed into most of us throughout our service in the national democratic revolution led by the ANC, that has provided us with the moral capital and tools to apply sound judgement to navigate challenges that emerge in the natural course of so cletal leadership. It is only through these values and moral covenants that I serve my organisation, my fellow country men and women, my beloved South Africa.
- 9. Finally, I remain confident that the challenges that we face as a nation will be overcome if we collectively use our efforts for the benefit of all. I am resolute in playing my part in preserving the integrity of National Treasury as an institution in my capacity as Deputy Minister. I'm also committed to in making my contribution towards building a prosperous South Africa led by the glorious movement of our people, the African National Congress.

Issued on behalf of the Ministry of Finance

Date: 16 March 2016

Enquiries: Communications Unit Email: media@treasury.gov.za Tel: (012) 315 5944



"5B26

- Home (http://www.dailymaverick.co.za/)
- Sections
  - Wired World (http://www.dailymaverick.co.za/section/wired-world/)
  - South Africa (http://www.dallymaverick.co.za/section/south-africa/)
  - Africa (http://www.dailymaverick.co.za/section/africa/)
  - World (http://www.dailymaverick.co.za/section/world/)
  - Business (http://www.dailymaverick.co.za/section/business/)
  - Ufe, Etc (http://www.dailymaverick.co.za/section/life-etc/)
    Sport (http://www.dailymaverick.co.za/section/sport/)
- · Opinionistas (http://www.dallymaverick.co.za/opinionistas)
- · Special Features
  - Coughing Up For Gold (http://www.dailymaverick.co.za/specialarticle/2014-03-14-coughing-up-for-gold/)
  - Until Julius Comes (http://www.dallymaverick.co.za/specialarticle/2014-07-22-until-julius-comes/)
  - Brain Porn (http://www.dailymaverick.co.za/specialarticle/2014-10-07-brain-porn-best-of-daily-maverick/)
  - Daily Maverick Podcasts (http://www.dailymaverick.co.za/specialarticle/2016-05-30-daily-maverick-podcasts/)
- Podcasts (http://www.dailymaverick.co.za/specialarticle/2018-05-30-daily-maverick-podcasts/)
- Newsletter (http://www.dailymaverick.co.za/page/Subscribe-to-First-Thing)
- Search ()
- About
  - About Us (http://www.dailymaverick.co.za/paga/sbout-us/)
  - · Contact Us (http://www.dallymaverick.co.za/page/contact-us/)

Search

Social currency, Accepted everywhere, 5 December 2018 06:40 (South Africa)



Y MAVERICK

(http://www.dailymaverick.co.za/)
South Africa

# State capture: Former MP publicly reveals Guptas offered her Ministry

Macanna Thamm



Marlanne Thamm

- · South Africa (http://www.dailymaverick.co.za/section/south-africa/)
- · 15 Mar 2016 03:52 (South Africa)

A I



(http://www.dailymaverick.co.za/article/2016-03-15-state-capture-former-mp-publicity-reveale-guptas-offered-her-ministry/)

Veteran ANC MP and former chair of the portfolio committee on public works, Vytile Mentor, is the first senior member of the party to publicly reveal that the Gupta family offered her the Ministry of Public Works after President Zuma had fired Barbara Hogan in 2010, ultimately replacing her with Malusi Gigaba. Mentor said the Guptas had offered her the job provided she would "drop the SAA flight route to India and give it to them". But wait, there's more, Mentor also says President Zuma was in another room in the Gupta compound in Saxonwold when she was offered the job. By MARIANNE THAMM.

In December last year, former Minister of Public Enterprises, Barbara Hogan, was one of the first senior ANC members to speak out against President Jacob Zuma's surprise sacking of Finance Minister Nhlanhla Nene, calling on "any ANC member worth his or her salt to speak out".

On Monday Vytjie Mentor did just that in an explosive Facebook post on DA member Johann Abrie's timeline. Mentor told Abrie that in 2010 the Gupta family had offered her the job as Minister of Public Enterprises while President Zuma sat in another room at the family's Saxonwold home.

Mentor wrote that the Gupta family had "previously asked me to become Minister of Public Enterprises when Barbara Hogan got the chop, provided that I would drop the SAA flight-route to India and give to them. I refused and so I was never made a Minister. The President was in another room when they offered me this in Saxonworld."

DA Shadow Minister of Public Enterprises, Natasha Mazzone, has called on the Chairperson Portfolio Committee on Public Enterprises Dipuo Bertha Letsatsi-Duba "to accede to my request to summon the Guptas to appear before the Committee to allow them to answer to the mounting questions over their capture of state entities,"

Mentor, who is currently on holiday in Kathu in Thailand, made the admission only days after claims that the Gupta family had offered Deputy Minster of Finance Meebisi Jonas the Ministry of Finance before Nkhlanla Nene was fired. The claims have been denied by the Gupta family which has lodged a complaint against the Sunday Times with the Press Ombudsman.

The influential London-based *Financial Times* first broke the story just as Minister of Finance Pravin Gordhan kicked off his investor road show in London last week. The FT wrote that sources had revealed to it that Jonas had been offered the job by the Guptas but had turned it down.

In February Mentor wrote an open letter which she posted on Facebook to "Dali Mpofu and Julius Malema of the EFF" thanking them for raising "the issue of the Guptas" and requesting them to "urgently research about the ways in law how our citizenship was granted to them so that it can be withdrawn as they have ABUSED such from day one, as well as how they can be declared Personanon-Grata in our country and be given the shortest possible time to leave this country. In addition to look into how the law in their corruptly acquired wealth and assets can be frozen and be given to the State to fund Student Debt and Higher Education as well as Health in our country please."

m of

In December, Hogan, in a hard-hitting statement

(http://www.news24.com/SouthAfrica/News/zumas-axing-of-nene-the-final-straw-hogan-20151211) said "I certainly believe that if ANC members are worth their salt, they have to start looking very carefully and introspectively... about our roles in this organisation and what we are giving consent to by allowing this president to operate as though he is completely unaccountable."

"They [the ANC] need to hold this president, who has become a law unto himself, [to account]. If they do not want to recall him, then they must hold him accountable...Luthuli House needs to hear loud and clear that this man has to be held to account and we need people, men and women of good standing and stature, to do that job." DM

Photo: Vytjie Mentor (Facebook)

- Marianne Thamm



Marlanne Thamm

South Africa (http://www.dailymaverick.co.za/section/south-africa/)

## Get overnight news and latest Daily Maverick articles

Email Address

☑ First Thing (Mon - Sun 06:15, SAST)

☑ Afternoon Thing Mon - Fri 15:00, SAST)

☑ Info Thing (Special Events/Notices/Offers)

#### Subscribe

Do Not Miss



Editorial: IRENECEPTION - a dream within a dream within a dream. Within a dream.

(http://www.dailymaverick.co.za/article/29450-ancs-post-truth-brutal-nec-11-29-editorial-ireneception-a-dream- gambit-initiates-zumes-slow-messywithin-a-dream-within-adream.-within-a-dream.)

Delly Maverlok



ANC's post-truth: Brutal NEC gambit initiates Zuma's slow, ritessy demise

demise)



Fidel Castro and America - a mutually assured obsession (http://www.dailymaverick.co.za/article/@itjs-i/www.dailymaverick.co.za/article/2016-11-29-fidei-castro-and-america-amutually-assured-obsession)

Daily Maverick



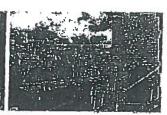
Riah Phiyega finally on the ropes what about the others? (http://www.dailymaverick.co.za/article 12-05-riah-phiyega-finally-on-theropes-what-about-the-others)

Dally Masorick



Boxed in: Can Zuma do the Shuffle? (http://www.deilymavarick.co.za/article/2016mber 2016 12946-boxed-in-can-zuma-do-theshuffle)

Daily Meverido



While you were sleeping: 2 (http://www.dallymaverick.co.za/article/2016-12-02-while-you-were-sleeping-2-

decamber-2016)





# 45B27"

E MARCH 17, 2016 In NEWS (HTTPS://WWW.DA.ORG.ZA/CATEGORY/NEWS/)

# DA lays criminal charges against Guptas

About this Article

- Mmusi Maimaine

  Federal Leader of the Democratic Alliance | Parliamentary Leader of the Democratic Alliance
- News (https://www.da.org.za/category/news/)
- Guptas (https://www.da.org.za/tag/guptas/), Jackob Zuma (https://www.da.org.za/tag/jackob-zuma/), State Capture (https://www.da.org.za/tag/state-capture/)
- Print this item

The Democratic Alliance (DA) has today laid criminal charges against members of the Gupta family in terms of Section 4 of the *Prevention and Combating of Corrupt Activities Act, 2004 (Act No. 12 of 2004)* following revelations this week that members of the ANC-aligned Gupta family had offered cabinet positions to *at least* two ANC members in exchange for executive decisions favourable and beneficial to Guptas' narrow business interests.

Both current Deputy Minister of Finance, Mcebisi Jonas, and ex-Chairperson of the Portfolio Committee on rublic Enterprises, Vytjie Mentor, this week publically disclosed that they were offered cabinet positions by members of the Gupta family. These revelations of undue executive influence by the Guptas amount to a prima facle case of corruption under the Prevention and Combating of Corcupt Activities Act.

After years of allegations over state favours; murky business relationships and clear cut nepotism between the Gupta family and President Jacob Zuma – ranging from cabinet appointments to business deals benefiting the Zuma family directly – there is finally *prima facle* evidence of such illicit activity, and the Sout African Police Service (SAPS) is now called upon to conduct a thorough criminal investigation into this matter.

In addition to such charges, the DA strongly believes that there should be an investigation into President Jacob Zuma and his involvement in such corrupt and unethical behaviour.

https://www.de.orgze/2016/03/de-lays-criminal-charges-againsi-guptas/#

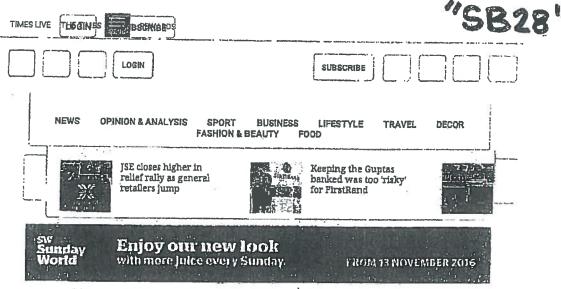
Man 1 172

Furthermore, we urge members of cabinet and other ANC members to do the honourable thing and speak out against such revelations, and put forward any evidence of further examples they have knowledge of.

ANC-sponsored corruption is a cancer that robs South Africans of Jobs, service delivery, and ultimately the hope of a better life. Under Jacob Zuma's ANC, this has spiralled out of control, and with members of his own cabinet now coming forward with such disclosure, its high time the President finally does the honourable thing and step down from the highest office in the land.

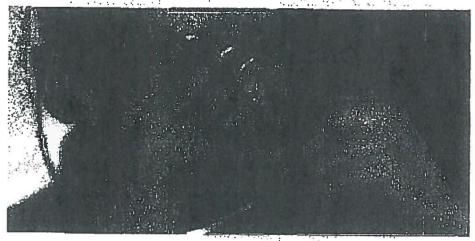
Guptas (https://www.da.org.za/tag/guptas/), Jackob Zuma (https://www.da.org.za/tag/jackob-zuma/), State Capture (https://www.da.org.za/tag/state-capture/)

An Jon



SUNDAY TIMES NEWS BY QAANITAH HUNTER AND SIBONGAKONKE SHOBA, 2016-03-20

### 'Zuma told me to help Guptas'



President Jacob Zuma shows the strain on Friday at Orlando Stadium in Soweto Image: KEVIN SUTHERLAND

former cabinet spokesman has directly implicated President Jacob Zuma in a push to give government business to the Gupta family.

Themba Maseko, former CEO of the Government Communications and Information System, has told of how Zuma personally called him to ensure that he met the Gupta brothers at their Saxonwold compound in Johannesburg.

an W

http://www.timeslive.co.za/sundaytimes/stnews/2016/03/20/Zuma-told-me-to-help-G...

TIMES LIVE



that the Guptas solicited government favours without his knowledge, come at the end of a week of high drama for the president and the ANC.

Deputy Finance Minister Mcehisi Jones publicly confirmed reports that the Guptas had offered him the finance ministry late last year while Nhlanhia Nene still held the post.



Vytjie Mentor tearfully opens up about Guptas Jonas immediately received backing from ANC grandees while former party MP Vytjle Mentor also stated that the too was once approached by the Guptas with a cabinet job offer.

Maseko said that in late 2010, he received numerous requests from the Guptas for a meeting ,

On the day he finally agreed to meet them at their Saxonwold home, he received a call from the highest office in the land.

"As I am driving out of the GCIS building [in Pretorial, I got a call from a PA from Mahlamba Ndlopfu, saying: 'Ubaba ufuna ukukhuluma nawe [The president wants to talk to you]," said Maseko.

"He came on the line. He greeted me [and] said: 'Kuna labalana bakwaGupta badinga uncedo lwakho. Ngicela ubancede [The Gupta brothers need your help, Please help them]." he said.

With this account, Maseko is the first top official to directly link Zuma to lobbying for the Guptas to get business from the state.

Maseko said he told Zuma he was already on his way to Saxonwold and Zuma responded: "Kulungile ke haba [it's fine then]."

"I was so pissed off and a bit unsettled," said Maseko.

Maseko met Ajay Gupta and one of his brothers - whose name he could not recall.

"After niceties, Ajay said: "We are setting up a newspaper called The New Age. I want government advertising channelled to the newspaper," recalled Maseko.

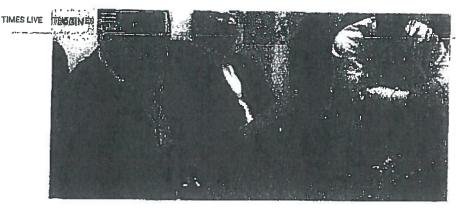
As GCIS CEO, Maseko was in charge of a media-buying budget of just over R240-million a year.

"I told them we do market research and look at the client's target market and select the right medium. Secondly, GCIS doesn't sit with the advertising budget but we deal with line departments."





http://www.timeslive.co.za/sundaytimes/stnews/2016/03/20/Zuma-told-me-to-help-G...



Indian businessmen Ajay and Atul Gupta, and Sahara director, Duduzaria Zuma at the New Age Newspaper's offices in Midrand, Johannesburg, South Africa on 4 March 2011. Image: Sallo Images/City Press/Muntu Vilakazi

But Ajay, according to Maseko, said this was not a problem as the Guptas would instruct line departments to advertise in the newspaper.

"[He said]: 'Don't worry ... tell us where the money is and tell departments to give you money and if they refuse we will deal with them. If you have a problem with any department, we will summon ministers here.'

"I said to them: Those are my leaders, I am concerned if you give them instructions.' He said that's none of my business," said Maseko,

"At that time I got really pissed off. Ordinarily, if confronted with a situation like this, you drive straight to the office of the president of the ruling party but the president of the ruling party had just instructed me to help these guys. I didn't do anything but just spoke to close friends about it."

He [Ajay] said if the ministers were not co-operating, they [the Guptas] have a way of dealing with them

Maseko said he was rattled by Ajay's comments that his family would deal with uncooperative ministers.

"I was extremely perturbed. He [A]ay] said if the ministers were not co-operating, they [the Guptas] have a way of dealing with them. [He said] they have regular weekly meetings with the president."

A few weeks later, Maseko said he received a call from a senior staffer at The New Age newspaper who demanded a meeting with him. It was a Priday and Maseko was on his way to North West for a family getaway. He said he told the newspaper employee to make an appointment with his office on Monday.

"He said: Tm not asking you. I am telling you. The meeting has to happen. It is urgent because of the launch of the TNA."

This was followed by a call from Ajay an hour later, said Maseko.

"He said: We are not asking you and actually, I want to meet you tomorrow [Saturday].' I kept on saying I am on my way to Sun City for a golf tournament and we can arrange the meeting on Monday.

"He said: 'I am ordering you to meet tomorrow.' I said he must go and f\*\*k himself. I told him that there were ANC leaders who owned media companies and they never behaved like that or gave me such instructions. He said: 'I will talk to your seniors in government and you will be sorted out.'

an

TIMES LIVE



A year later Maseko was removed from his position. "My removal was in 2011 and I am not sure if I could directly link it to this," he said.

Gupta family spokesman Gary Naidoo rejected Maseko's allegations, saying: "We are amazed by Mr Maseko's six-year-old allegations which he has chosen to share at this particular time with a receptive media



Themba Massko Image: SYDNEY SESHIBEDI

keen to continue the denigration of the Gupta family."

Naidoo asked if Maseko had reported the matter to his political principals and if he did, he challenged him to produce proof.

"Much like Vytlie Mentor, we believe the 2010 allegations to be unfounded and part of an ongoing campaign to fuel an already vicious politically-driven attack on president Zuma, using the Gupta family as a proxy," said Naidoo.

Presidency spokesman Bongani Majola had not responded to the Sunday Times' questions at the time of going to press,

Zuma backers insist he is not to blame for the Guptas' approaches.

huntera@sundaytimes.co.za, shobas@sundaytimes.co.za

#### YOU MIGHT ALSO LIKE



Cash-strapped PetroSA awards million in bonuses despite missed targets



Murder accused multimillionaire fights top property firm's bid to dump him



Dynasty beefs with Gigaba as airport spat takes nasty turn



⊕School's out for 'Idols' winner



Keeping th banked v 'risky' for F

© 2016 Times Media Group. All rights reserved.

Use of this site constitutes acceptance of our <u>Terms & Conditions</u> and <u>Privacy Policy</u>.

http://www.timeslive.co.za/sundaytimes/stnews/2016/03/20/Zuma-told-me-to-help-G...

SA INVESTING / April 5, 2016

# Two more big SA businesses join KPMG, sever all links with Gupta companies

**FACEBOOK** 

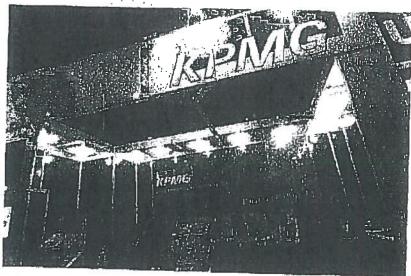
TWITTER

journalists possess an advantage of being able to slot information from diverse sources into a broad canvass. But we usually lack the Inside track, access to hidden links which only emerge during associations between business partners. That's why the leak of 11.5m documents from within stinky Panama-headquartered law firm Moszack Fonseca is so important in exposing how the rich and powerful secretly hide ill-gatten gains from the public. Similarly, we are able to draw some rather damning conclusions from news that two more leading SA businesses – Barciays Africa and Sasfin – have joined global services firm KPMG by severing all ties with companies owned by the controversial Gupta family. We are all judged by the company we keep - in the corporate world, quite literally. Client confidentiality preciudes KPMG and now Barcloys Africa and Sasfin from fully disclosing why they have dumped the Guptas. But with much revenue at stake, you can be sure their reputation management experts had something to do with it. - Alec Hogg

#### By Ed Cropley and Tilsetso Motsoeneng

JOHANNESBURG, April 4 (Reuters) - Three South African companies, Including KPMG and Barclays Africa, have severed ties with a firm owned by the Guptas, a family of Indian-born businessmen, due to concerns over their relationship with President Jacob Zuma.

The third was investment bank Sasfin, which said it had decided to cut links with Gupta mining firm Oakbay Resources and Energy in March, two days after a newspaper suggested they may have had a hand in Zuma's sacking of finance minister Nhlanhia Nene in December.



Sessiris relationship with Oakbay will formally end on June 1, a Sassin spokeswoman said. The decision had not previously been made public

folioto biznews.com Rand (Dolla) 11/1D;1M33M 13.78 Rand/Pound Kand/Euro 14.80 1.27

#### **BIZNEWS PREM**



物色性的 WELFE HELDER

a rad carpet aw entrepreneurs



WORLDVIEW - I Index shows SA hits reputation: after propaganda onslaug

WORLDVIEW: E unexpected as Malama to get



WORLDVIEW: T QE - a global po revolution

#### GET THE DAILY IN The Best of Biznews in Your !

Email Address

Signup Free

http://www.biznews.com/sa-investing/2016/04/05/two-more-big-sa-businesses-join-k...

Zuma has denied numerous allegations of the Guptas wielding undue influence. The Guptas have also routinely dismissed reports of their influence, saying they are pawns in a political plot to get Zuma out of office.

After the newspaper report last month, Deputy Finance Minister Moebisl Jonas said the Guptas had offered him the top Job at the Treesury before Zuma fired Nene. The Guptas also donled that allegation.

In an email to KPMG staff seen by Reuters, local chief executive Trevor Hoole said he had decided to stop auditing Oakbay after consulting regulators, clients and KPMG's Internal risk departments.

"I can assure you that this decision was not taken lightly but in our view the association risk is too great for us to continue." Hoole said in the email.

"There will clearly be financial and potentially other consequences to this, but we view them as justifiable."

Oakbay confirmed the end of the 15-year, relationship and said it understood it had been a "very reluctant decision" for kPMG. A KPMG spokesman declined to comment.

Barclays Africa, which runs South Africa's biggest retail bank, Absa, also confirmed it no longer had a relationship with Oakbay, which is valued at 16 billion rand (\$1.09 billion) on the Johannesburg stock market.

in an annual report from last August Oakbay listed Absa as its bank. An Absa spokesman declined to comment any further.

The three Gupta brothers moved to South Africa from India at the end of apartheid in the early 1990s and went on to build a business empire that stretches from technology to the media to mining.

They have also forged a close personal relationship with Zuma, whose son, Duduzane, sits on the board of at least six Gupta-owned companies, according to company registration papers.

Parliament will on Tuesday debete a motion to impeach 2uma after a top court ruled the president had violated the constitution by ignoring orders from the public protector that he repay some of the \$16 million in state funds spent to renovate his private residence at Niandia:

Zuma says he never knowingly or deliberately set out to violate the constitution.

The Africa National Congress majority in parliament will almost certainly give Zuma political cover against the attempt to impeach him. But the judicial rebuke may embolden anti-Zuma factions within the ruling party to mount a challenge.



#### ALEC HOSE

arel 5, 2016 | Dads, arc, Barclays Africa, Brits, Duduzave zuma, Gupta, Gupta Family, Guptas, Mona, Iacob zuma, Kpajg, McErisi, Donas, Khlayikla Neye, Nkaydila, Oarbay resources and Energy, Bashin, Slider

For a deeper understanding of the world of money and greater financial control, upgrade to <u>BizNews Premium</u>.

#### **Sponsored Content**



CopyFunds Are Going Viral in The Fintech World - Read New



5 Tips for Forex Trading that Every Investor Should Know Brendia



The Wolves Of real life: online trading millionalres live like kings



Baltimore Firm Has Scary Record of Predicting World Events... MoneyWas 411



ZA Truck Driver Buys The Truck Company With Money Mede From Shary 24 Bushess News



A Guide for investors Ready to jump into FOREX Trading



This 25 Y/O South African is one of Dubal's richest men, and his way to get 24 Business News



i Tip That Finally Turned Yellow Teeth White Health & Seawy



Olyde Rossouw: Turbs wages of QE - how are money mountain oher politics, investment BIZNEWS.COM

141

0:00

JI 6/
Gyde Rassouw Yeshaled using how stelling individual to public the prostructs
Support Chally How to galant



Trending

SA billionaire John reveals: How Gur

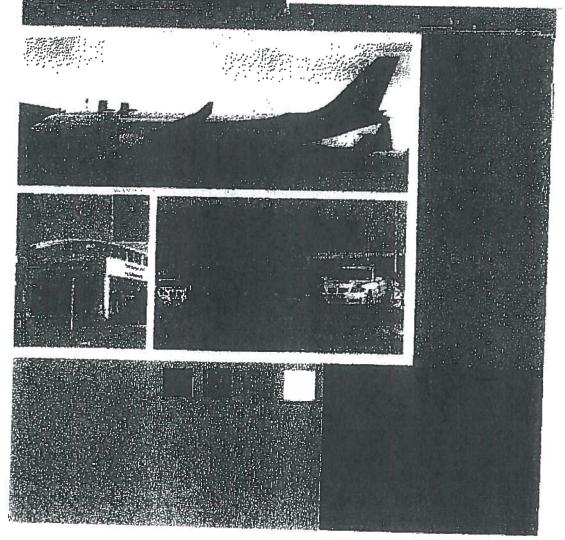
http://www.biznews.com/sa-investing/2016/04/05/two-more-big-sa-businesses-join-k...



# JCPS CLUSTER REPORT

## LANDING OF A CHARTERED COMMERCIAL AIRCRAFT AT AIR FORCE BASE WATERKLOOF

17 May 2013





The reference to an invitation from the Free State Provincial Government was opaque, as no member of this party travelled to the Free State for any such meeting. However, an Indian State Minister was received by the Free State MEC for Agriculture three days prior to the arrival of the Gupta wedding party; this Indian Minister therefore arrived and departed from South Africa completely separate from the Gupta wedding party, despite attending the wedding at Sun City.

The Indian High Commission then stated that the seven Ministers visited Cape Town prior to departing from the Republic on an Emirates flight from there. This raises a question as to compliance with the visa conditions and adherence to the provisions of the immigration Act. This matter is work in progress.

#### 3.4 Exit Phase

During the exit phase, procedures that would normally apply, and those instructed by the extended NiCOC Principals Meeting of 1 May 2013, were partially complied with. Not all those who arrived with the flight departed on the outgoing flight; and SARS had not acted against the pilot for falling to comply within three hours of landing with the requirement that he inform SARS of the same in line with Section 7(1A) of the Customs and Excise Act of 1964. Jet Airways must be familiar with these conditions as they operated in South Africa until 2012.

#### 4. CHAPTER 4: FINDINGS

The findings of the investigating Team are the following:

In February 2013 the Gupta family approached the Airports Company South Africa and 4.1 requested landing rights and an elaborate reception for the wedding party. This would have disrupted the functioning of O.R. Tambo International Airport at the time of landing, particularly the operations of the National immigration Branch at the airport. As a result, this was turned down. In March 2013 the Minister of Defence and Military Veterans and her advisor were approached by the Gupta family on different occasions. On 3 April 2013 this request was also turned down. The Gupta family then resorted to the use of the diplomatic channel with the support of an Individual in the Indian High Commission who re-designated the wedding entourage as an official delegation to enable them to use the Air Force Base Waterkloof under the cover of diplomatic privilege. It is an undisputed fact that there was no official Note Verbale from the Indian High Commission to the Department of International Relations and Cooperation, and therefore due process was not followed. An individual in the Indian High Commission communicated directly with Individuals at the Air Force Command Post. The collusion of officials resulted in the irregular approval of the flight clearance.

24

- 4.2 Members of the National Executive were not required to issue any instructions, did not issue any instructions, and did not create the impression that they ought to have issued any instructions. This is evident in information at our disposal.
- 4.3 The aircraft in question was cleared for landing and the correct clearance procedures were followed, but based on false pretences as a result of the manipulation of the process by the Gupta family, individuals in the Indian High Commission, Chief of State Protocol Ambassador V.B. Koloane, and Officer Commanding Movement Control at the base, Lieutenant-Colonel C. Anderson, who shared a common purpose and acted in concert. This had the potential of damaging the good diplomatic and deep historical relations South Africa enjoys with India on the bilateral, multilateral, international and BRICS levels.
- 4.4 There are seven functions of the Air Force Base Waterkloof. They are operations; training flights; VVIP flights; foreign heads of state, envoys and dignitaries; registered military aircraft; diversion airfield for commercial aircraft; and conducting air shows.
- 4.5 As a result of the nature of these functions, the Air Force Base Waterkloof handles both civilian and military aircraft. This notwithstanding, the landing of the flight was a direct result of manipulation of processes and was undesirable.
- 4.6 The Air Force Base Waterkloof is a strategic military base that resorts under the Defence Act, Act 44 of 1957. The Air Force Base Waterkloof is not a National Key Point and is not governed by the National Key Points Act, Act 102 of 1980, which is managed by the SAPS. This being a strategic military base, which also serves as an entry point into South Africa, it has even more stringent security measures.
- 4.7 The landing of Flight JAI 9900 following the exercise of undue influence had the potential to compromise the credibility of the Government of the Republic, and could have caused severe reputational damage to the state liself. The exercise of this undue influence undermined good governance, legislative stipulations, regulations, departmental protocols and standard operating procedures.
- 4.8 The activities of Ambassador Koloane and Lieutenant-Colonel Anderson were a serious dereliction of duty in that they were advancing the objectives of this project to the detriment of their official responsibilities. Their activities also indicate the bringing to bear of undue influence on state officials, systems, equipment and infrastructure. This influence happened despite the denial of the exercise of undue influence by the legal representative of the Gupta family. The roles of the two individuals had a similar effect in

atol

Sec. 1

12

# "SB31"

# North of Lady of House backed by Guptas News

Sussin Comrie © 2018-04-17 05:30

> Guptas' own share registers auggest they have iled about Bongi Ngema-Zuma's home loan

With a price tag of R5.2 million, the sprawling yellow house is right at home in Waterkloof Ridge, one of Pretoria's most exclusive suburbs.

The sprawling residence, bought in 2010, belongs to the Singumo Trust, which is said to have been named after one of President Jacob Zuma's sons. The only disclosed trustee of the trust is First Lady Bong! Ngeme-Zuma.

When questions were raised in 2012 about whether the Guptas had helped Ngerna-Zuma secure a R3.84 million home loan from the Bank of Baroda, an Indian state-owned banking and flancial services company, their spokesperson emphatically denied this,

But now it appears he may not have been truthful.

Two weeks ago, City Press was granted access to the share registers of various Gupta companies, including Westdawn Investments, which trades as JIC Mining Services.



long Ngema-Zuma. Picture: Laon Sadid

Westdawn is majority owned by Oakbay investments, the Gupta family's private investment vehicle, with smaller stakes being indirectly owned by Atul Gupta and Duduzane Zuma.

Inside the register, City Press found excerpts from minutes of a board meeting held in Midrand on February 10 2010 in which JIC clearly agreed to bankroll the purchase of the Waterkloof house by the First Ledy's trust.

\*Bank of Baroda Johannesburg has agreed to sanction certain credit facility to Singumo Trust aggregating R3 840 000, \*read the minutes pasted into the register.

The bank has asked for the corporate guarantee of the company to secure the loan."

The register also indicates that JIC's board agreed that the company would agree to guarantee "all amounts which may be of become owing by [Sinquino Trust] to the bank under and by virtue [of] the above credit facility".

At the time the board resolution was taken, Zuma had just married Tobaka Madiba, but it was widely reported that he and Ngeme-Zuma were engaged.

A few months later, Ngema-Zuma landed a job as JIC's head of communications and marketing. However, her Linkedin profile indicates that when JIC agreed to guarantee her home loan, she was still employed by computer company IBM.

This appears to contradict claims made by the Guptas' former spokesperson Gary Natidoo in 2012.

#### MOST READ

- » Shour Abrahams: What was his actual role and metivation?
- There are not enough eatline for all of us' -EFF yows to deal with recists
- Mpumelanga's R7m publishing deal: "Mabuza is paying back the Guptas"
- » I don't need Zuma for top post Dudu Myeni
- p Muthembi concedes: Hisudia position was not advertised

#### **FEATURED**

- a Sorry writtes, I can't help you
- » How will America change?
- # The evolution of black art
- b Trevor Manuel says BEE only favours small elite
- » Rabada 'in It for long run'

#### FOLLOWING @CITY\_PRESS

@City\_Press: RT @SthembtleCel: #ANC Jackson Mthembu is suing Hisudi Motsoenang for R1 000 000 https://t.co/GyNdX6j5cw

@City\_Press: MT @AndiMakinena: In his oour papers,Mthembu wants Court to order Hisudi to pay R1-million & Issue public apology i

@City\_Press: MT @AndiMakinena:Just in:ANC whip Jackson Mithembu has taid charges against Motspeneng for "malicious and defamatory alle

@City\_Press; Is Zuma upset that Abrahams decided to withdraw the charges against Gordhan? Is he throwing him under the bus?... https://

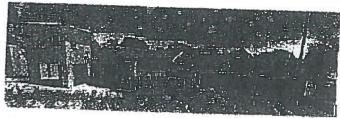
@City\_Presa: MT@And3Makinana:IFPs@MkinulekoHtengwa reminds MPs of late salary payment lest yr&tension in House that day.Imagine h

@City\_Press: RT @AndiMakInana; The Centre for Constitutional Rights says provisions of the Rictous Assemblies Act imay withstand cons

and 1

News 2.128. Purple is the household of the bond for Ms Ngamapersonal dealings with any institution. Therefore, there should be no confusion that we contributed in any way to the releting or paying of the bond for Ms Ngama-Zuma," Naidoo told the Mall & Guardian.

in addition, publicly available records indicate that JIC agreed to guarantee a very ambitious bond. While most home losns are paid off over 20 years, the R3.84 million toan from Bank of Baroda would be paid off over the years through hefty monthly instalments of R79 715.



First Lady Bongi Ngema-Zume's house in the up-market suburb of Waterkloof Ridge in Pretoria

City Press approached both Ngema-Zuma and JIC on Wednesday for comment about whether JIC's guarantee had resulted in the mining company paying any portion of the bond, or whether Ngema-Zuma or the Singumo Trust were required to provide any service to JIC in exchange for the company's financial backing...

Neither responded to several requests for comment by phone and sent via small. JIC referred all queries to Gupta company Oakbay Investments, which also did not respond.

Very little is known about the Sinquino Trust, except that it is registered to the address of a small housing complex in Midrand called Sunset Close. The source of its funding, its beneficiaries and its purpose remain mysteries.

The financing of Ngema-Zuma's house is not the only unwilling disclosure the Gupta family has been forced to make to City Press about their relationship with South Africa's first family.

Share registers show how Duduzane Zuma was couried with gifts of shares and directorships in several Gupta companies.

Starting in 2008, shortly after Zuma's victory at the ANC's elective conference in Polokwane, Duduzane was appointed a director to 12 different companies in the Gupta empire.

Last Friday, Duduzane announced that he would step down from several directorships in these companies in an attempt to "depoliticise" his business dealings.

#### **NOVEMBER 13 2016**



#### NEWSLETTERS

SA's best political analysis into your inbox

Enter your email...

GO



Read more on: oakbay Investment | gilpts

24.00m

©2016 24.com. All rights reserved. Legal hotics Advertise on 24.com: About Us

iab.

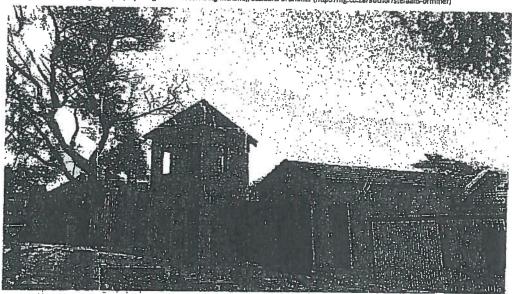
and



NATIONAL (HTTP://MG.CO.ZA/SECTION/NEWS-NATIONAL)

## Guptas 'bankroll' Mrs Zuma's bond

30 Nov 2012 O0:00Craig Mckune (http://mg.co.za/author/craig-mckune), Stefaans Brümmer (http://mg.co.za/author/stefaans-brummer)



Huge monthly re-payments on Bongi Ngema-Zuma's Pretoria house raises questions. (Déhyn Verasamy, M&G)

(http://mg.co.za/art/cle/2017 11-30-00-guptas-bankroll-mrs-zumas-bond)



(article/2016-11-23-00-time-to-causesome-havoc-the-weird-web-of-guptalinked-misinformation)

Although the Guptas deny being involved, the circumstances around the bond's initiation and billing - and the very large monthly repayments - suggest their helping hand. This should raise new concern about the Guptas' close relationship with Zuma and his family.

Set on the exclusive Waterdoof Ridge that overlooks Pretoria and the Union Buildings, the property was bought in April 2010 for R5.2-million.

Before the purchase, said a person with first-hand knowledge, the president personally inspected the sprawling property. According to a neighbour, he visits regularly.

The purchase was completed in August 2010, when the property was transferred to the Singumo Trust and the R3.8-million bond registered. The trust is controlled by Ngema-Zuma and named after the couple's son.

Public bond records show that the trust was to pay off the bond over five years, a remarkably short period for a home loan of this value. To do so, it committed to paying about R80 000 every month.

#### Fingerprints

There are three sets of Gupta fingerprints on the transaction:

- The first print is that the bond was granted by India's Bank of Baroda, which has a known relationship with the Guptas.
- The Bank of Baroda also holds the bond on another house closely linked to both the Guptas and the Zuma family, one of which the president's son Duduzane, calls home. Situated in Saxonwold, Johannesburg, the property

property

Is formally owned by Mabengela Investments, controlled Jointly by Duduzane Zuma and Tony Gupta.

- And in January 2011, at a high profile South Africa-India cricket event partsponsored by Gupta-owned newspaper The New Age, President Zuma handed the bank's managing director an award, apparently for fostering bilateral relations.
- The second, clearer fingerprint is a witness signature on the bond documents by a trusted Gupta lieutenant, Ronica Govender. Govender is something of a factorum to the Gupta Family. Company records reflect her as a director in more than a dozen family companies. She is financial director at the family's flagship IT company, Sahara, a receptionist said this week. She is also listed as special-projects director at JIC Mining Services, a company majority-owned by the Guptas and Duduzane Zuma. Govender this week said her signature on the bond was "Irrelevant as anyone can witness this type of document in their personal capacity".
- Fingerprint number three is the freshest on inquiry this week, a bank employee gave Govender's JIC Mining email address when asked where the bank dispatched the Sinqumo Trust bond statements to. Govender responded that this was "absolute rubbish and even if it was being sent to me, that's not a crime".

Last year, when the *Mail & Guardian* exposed how JIC Mining had employed Ngema, then still the president's flancée, as head of communications and marketing, the newspaper asked Gupta family spokesperson Gary Naidoo whether the family had "in any way assisted

Ngema or her family in acquiring [the property] by helping to pay the purchase price, facilitating financing, or meeting or assisting with bond repayments".

Naidoo's written denial was an emphatic "no to all your questions", flying in the face of the choice of financial institution and evidence of Govender's facilitating role.

Naidoo and JIC Mining this week repeated the denials, saying: "The Gupta family or its businesses deny any involvement in any employee's personal dealings with any institution. Therefore, there should be no confusion that we contributed in any way to the raising or paying of the bond for Ms Ngema-Zuma."

#### Affordable?

However, the question remains how either the president or Ngema-Zuma could afford to pay off the bond at the stipulated rate.

Usually, prospective homeowners cannot secure bonds in Which repayments exceed 30% of their gross income.

In other words, to afford the R80 000 monthly instalments, Ngema-Zuma would need to earn about R3.2-million a year, which is unlikely. Even the presidential salary falls far short of this.

In 2010, Zuma was paid only R2.4-million and the higher than average size of his immediate family and his ostensible financial commitments at Nkandia suggest that even the standard bond payment-to-income ratio would be too high for him to afford.

His history of relying on others to support his family is well known.

His loans from arms-deal convict Schabir Shalk and Durban businessman Vivien Reddy provide well-known examples. In another, after media exposure, Zuma disclosed in his 2009 Cabinet interest declaration that a businessperson provided, for free, a luxury home for the use of another of his wives in Durban, Time to cause some havoc':
The weird web of Guptalinked misinformation
(article/2016-11-23-00-time-tocause-some-havoc-the-weirdweb-of-gupta-linkedmisinformation)
Polmic VSECTION/NEWS-POLITICS |
2016-11-23 0000000

(article/2016-11-25-00-eskoms-trillianlinks-exposed)

Eskom's ties to Gupta-linked Trillian exposed (article/2016-11-25-00eskoms-trillian-linksexposed) Antional (SECTION/NEWS-NATIONAL) | 2016-11-25 0000000

(article/2016-11-25-oakbay-asks-courtto-compel-fic-to-provide-details-on-72suspidous-transactions)

Oakbay asks court to compel FIC to provide details on 72 'suspicious' transactions (article/2016-11-25-oakbayasks-court-to-compel-fic-toprovide-details-on-72suspicious-transactions) NATIONAL (SECTION/NEWS-NATIONAL)

(article/2016-11-11-00-unions-couldforce-zuma-showdown)
Unions could force Zuma showdown (article/2016-11-11-00-unions-could-forcezume-showdown)
NATIONAL (SECTION/NEWS-NATIONAL) |
2016-11-11 0000000

(article/2016-11-11-00-madibas-ourtrump-card)

Madiba will be our Trump card when the Donald's orange flood reaches our shores (article/2016-11-11-00madibas-our-trump-card) word (SECTION-NEWS-WORLD) | 2016-11-11 0000000

#### MOST READ

#SABCInquiry; SABC delegation walks out of Parliament Inquiry (http://mg.co.za/articia/2016-12-07-sabc-delegation-walks-out-ofparliament-inquiry/)

SABC walkout 'disgusting' – Jackson Mthembu (http://mg.co.za/article/2016-12-07-sabc-walkout-disgustingjackson-mthembu/)

Crime harms matric pass rates (http://mg.co.za/article/2016-12-09-00-crime-harms-matric-passrates/) Aus 1

The impression that the Guptas are assisting the Zumas with the Waterkloof Ridge bond was tacitiy confirmed to the M&G by an insider to the relationship between the families. He cannot be named as the conversation was off the record.

#### No declaration

Although neighbours confirmed that Zuma had visited the house regularly during 2012, the president declared neither the home nor a third-party benefit in the open part of his last two Cabinet declarations.

Cabinet ministers are allowed to declare spousal benefits confidentially. However, any assistance received in securing this bond and facilitating repayment could arguably be construed as a direct benefit to Zuma.

Neither the presidency nor Ngema-Zuma replied to questions.

# And so began the winter of their content

April 2010, when Bongi Ngema went home-shopping in Waterkloof Ridge, was a time of biossoming relationships.

Only four months earlier the future Mrs Ngema-Zuma had presented umbondo – traditional wedding gifts – to President Jacob Zuma at his Nkandla estate, and now she was next in line to marry him.

On another front, the Gupta family and Zuma's son, Duduzane, seemed poised to consummate large-scale commercial success. The events of that time would also lead to great controversy regarding the cosy relationship between the Gupta and Zuma families.

In March 2010, Gupta Ileutenant Jagdish Parekh acquired a 50% stake in Imperial Crown Trading 289, which soon became a household name as news emerged that it had grabbed the right to prospect at the Sishen iron ore mine from under the noses of corporate glants Kumba Iron Ore and ArcelorMittal.

Imperial Crown's "squatting" at Sishen, fully supported by the government despite evidence offraud in the awarding of the right, put the Guptas and Zuma Jr in the position to negotiate an empowerment deal with ArcelorMittal, announced in August 2010. From this Parekh was to score shares and cash with a face value of over R2billion, with Zuma Jr pocketing more than R900-million and a Gupta family investment company R450-million-plus.

That deal eventually fell apart, but there were other Gupta-Zuma pokers in the fire: April 2010 also saw a consortium led by the Guptas and Duduzane Zuma buy Toronto-listed Uranium One's South African assets in a R300-million deal, placing them well to tap into South Africa's expected expansion of nuclear power generation.

Zuma Jr, who had completed an internship at the Gupta family's Sahara computer business, seems to have entered a formal business relationship with the family in mid-2008, when he and Tony Gupta formed investment company Mabengela Investments.

In a 2010 interview, Zuma Jr called Tony Gupta his "exclusive" partner who advised him financially and legally.

Mabengela and a Gupta family company are the controlling shareholders of JIC Mining Services. Bongl Ngema-Zuma has been employed in marketing and communications at JIC since mid-2010.

Ace Magashule to ministers who called for Zuma's removal: Step down or get axed (http://mg.co.za/article/2016-11-28-president-jacob-zumas-backers-rush-to-the-presidents-defence-at-ancrec/)

A new centre of power through mass mobilisation is needed in South Africa (http://mg.co.za/article/2016-11-29-a-new-centre-of-power-through-mass-mobilisation-is-needed-in-south-africa/)

#### CLIENT MEDIA RELEASES

Press Offices

MTM 61TH://WRESSOFRCE.MC.CO.LAMIN/FREE STUREDS-272251) MTM SCOOPS COVETED INTERNATIONS (http://pressoffice.mg.co.ze/mtm/P Story/ID-272251)

SAIRAL (NITY-SPIESSOPICLAS, CO.ZASAIRAL STORED-27228) Total Toad in good shape (http://pressoffica.mg.co.za/sanra StoryID=272238)

ROSEBANK COLLEGE OHTPWHESSOFFICEMC.O.ZANOSERAMICOL Skills that will help you get ahead Outp://pressoffice.mg.co.za/roseb Story/D-272237)

ROSERANK COLLEGE OKTIFIFE ESSORIEL MG.CO.ZAPOSEBANKCOLL Why holiday jobs are vital (http://pressoffice.mg.co.za/foseb StoryID=272205)

ich trave folutions http://www.docume.oza/chieave.sou FCM wins top sward http://pressoffice.mg.co.za/fcmtr Story/D=272204)





(http://pressoffice.mg/shpa//pl@lsoffice.mg.co.za/sanral)

COLUMN FCM LANGE (http://pressoffice.mg/bit2//05856/RESIPE-60.22/fcmtrav

WANT TO PUBLISH YOUR MEDIA RELEASES HERE? BHTTP://S.MIG.CO.ZMI GISSINFI

an l

The Guptas have consistently denied impropriety in their friendship with the president and their business relationship with members of his family. - Stefaans Brümmer & Craig McKune

### Living in the lap of luxury

Of all the mansions on Grus Street in Waterkloof Ridge, Bongi Ngema-Zuma's is the most distinctly African. A pair of earthenware pots the size of grown men flanks the front door and the walls are a rich, bright yellow.

Ngema-Zuma is also one of the few environmentally conscious homeowners on this street, with two large solar panels perched on her roof.

A neighbour who had been inside the property before Ngema-Zuma moved in described it as "big and luxurious". He added that it had "a massive swimming pool with a fish tank inside".

But small piles of bricks, cement and plastic sheeting inside the property suggest it is undergoing some renovations.

A security watchtower decked out with CCTV cameras looks out over the street, but no guards were manning it when the *Mail & Guardian* visited this week, and the mansion had an unoccupied feel.

The neighbour said Jacob Zuma had visited at least 10 times in the past nine months, but "at most" spent the night twice. When he visits, Zuma is accompanied by up to 12 black SUVs, which disgorge a number of bodyguards who line the street, keeping a watchful eye.

"They're not that invasive, and tend to let us go about our own business," said the neighbour. – Sally Evans & Lionel Faull

\* Got a tip-off for us about this story? Email amabhungane@mg.co.za (mailto:amabhungane@mg.co.za)



(http://www.amabhungane.co.za)

The M&G Centre for Investigative Journalism (amaBhungane)
produced this story. All views are ours. See www.amabhungane.co.za

(http://www.amabhungane.co.za) for our stories, activities and funding sources.





#### Craig McKune

Read more from Craig McKune

• (http://mg.co.za/author/craig-mckune)

Stefaans Brümmer

and 1



Breaking News: PetroSA workers protest against boruses ... Thursday, 08 Dec 2015 11:24 AM

Nurse: Nothing will change if Ramachose ...

Home Publications , Minute Taking Press Releases Contact

#### TODAY'S LABOUR NEWS



This news aggregator ste highlights South African labour newsfrom a wide range of internet and print sources, Each posting has at synopsis of the source article, together with a link or reference to the original. Postings cover the range of labour related matters from inclusfield relations to generalist human resources.

Cosatu goes to Nedlac with concerns about banks ditching Gupta businesses

TUESDAY, 03 MAY 2015 15:45



- BOLIve reports that Cosstu on Tuesday said it would table before the National Economic Development and Labour Council (Neclac) the decision by SA's four major banks to terminate banking services for companies owned by the politically

Cosatu prastient Solume Dismini said the labour federation remained concerned at the possible negative effect on the amployees of these companies, but investigations into the tarrily should continue. The Cupta family is in the middle of "state capture" claims that it exerts undue influence on critical government decisions due to its proximity to President Jacob Zuma. The family's business vehicle. Oakbay Investments, maintains that 7,500 jobs are at risk following the decision by financial institutions in SA to cut all ties with the fam. A report by a ministerial team appointed to discuss the issue with the banks is expected to be handed to the Cabinet early in May.

Read this report by Karl Gemetzky in full at BDLIve

Get other news reports at the SA Labour News home page

. Share 0

٥, LATEST ON TWITTER

Tweets by @labourretweets

LABOUR NEWS ARCHIVES

- March, 2016
- · February, 2016
- January, 2016
- December, 2016
  November, 2015
- October, 2016
- September, 2015
- August 2015
- July. 2016

ADVERTISE ON SA LABOUR NEWS

. Click here to enquire

SA Lirbour News@2018 All Rights Resi

http://salabournews.co.za/31195-cosatu-goes-to-nedlac-with-concerns-about-banks-ditching-gupta-busine... 08/12/2016

Subject:

FW: Inter-Ministerial Committee

"SB34"

From: Tshabalala, Sim S (CEO) Sent: 04 May 2016 06:07 PM To: 'Zafina.Kellerman@drin.gov.za' Cc: Kruget, Ben B Subject: FW: Inter-Ministerial Committee

Dear Ms Kellerman

Ben Kruger Is in London this week and therefore has referred your invitation to meet with the IMC to me. In my capacity as CEO of The Standard Bank of South Africa Limited I am in any event qualified to engage with the Ministers on the matters that you mention. I am available, together with one of our subject matter experts, to meet with the Ministers at 11h30 tomortow subject of course to the venue being identified and accessible. As a minor correction, please note that Standard Bank has made no public statements with regards to the closing of bank accounts and/or termination of relationships beyond acknowledging receipt of a memorandum from workers last week.

I trust that this is in order.

Yours sincerely

Sim Tshabalala | Chief Executive Officer: Standard Bank Group | 9th Floor, Executive Entrance: SSimmonds Street, Johannesburg, 2001 | Tel +27 11 636 1810 | sim: Ishabalala@standardbank.co.za

From: Zarina Kelletman < Zarina Kelletman@dmr.gov.za>
Dafe: 04 May 2016 at 11:11:16 AM 5AST
To: Nicoll, Susan 5R < Susan Nicoll@standardbank.co.za>, Knuger, Ben B
<Ben.kruger@standardbank.co.za>
Subject: Inter-Ministerial Committee

Dear Sir

I write to you on behalf of the Inter-Ministerial Committee set up by Cabinet to look into certain allegations made against certain financial institutions ("the IMC"). The IMC consists of the Ministers of Mineral Resources, Finance, Labour and Communications.

I have been requested to make contact with Mr Kruger alternatively a suitable alternative with requisite authority, and request that he please make himself available for a discussion with the IMC on Thursday, 95 May 2016 at 11h30-12h00. There is no set agenda for the discussion but, I am advised, is anticipated to be a discussion to gain clarity on the current media reports and public statements made by Standard Bank with regards to the closing of bank accounst and/or termination of relationships. Should Mr Kruger not be available in person, a teleconference call could certainly be accommodated.

Mr /

Should the allotted time not be suitable, we will attempt to accommodate you accordingly. Given the nature of the matter and the sensitivities involved, the IMC apologises for the late notice but would certainly appreciate the engagement.

Should Mr Kruger not be willing to participate, please advise me accordingly so that I may indicate same to the IMC.

I look forward to your response.

Sincerely

Zarina Kellerman

083 960 9188

012 444 3400

Secretary to the IMC

her 1



"SB35"

Dear all,

I wanted to take the time to update you all on some important decisions that were made yesterday. Decisions that were made with your best interests at heart.

To this end, it is with deep regret, that following a period of sustained political attack on the Eupta family and our businesses, and by extension, you our employees, we have come to the condusion that it is time for the Gupta family to step down from all executive and non-executive positions. In doing this, the family hope to end the campaign against Cakbay and save all of our jobs.

This follows the unexplained decisions by several of our banking partners and bill suditors to cease working with us, and the continued press coverage of false allegations.

Oakbay's current executive committee and the CEOs of each of the businesses will continue to exercise the day to day management and running of the business and all particulo companies going forward.

The closure of our bank accounts has made it virtually impossible to continue to do business in South Africa. Without bank accounts we may find ourselves in a position where we are unable to pay you, our valued employees. We are doing everything in our power to ensure this does not happen. We find it totally unacceptable that you, our employees, and your families could potentially have to suffer as a result of the political campaign against us.

To this end we have been in direct contact with the Ministries of Labour, Finance, Ministral Resources and the Office of the President to express deep disappointment byer the decisions of our banking partners and to make it very clear that livelihoods are at risk if we are unable to restore these important banking relationships.

We are confident that through the family's decision to distance themselves from the business banking relationships will soon be restored, salaries will be paid and business will continue as normal.

The soccess of our business is down to all of your hard work. We need to remain strong as a team during this difficult time. We have every confidence that normally will soon be restored.

Nazeem Howar

CEO, Oakbay Investments

In 1

"SB3G

- Rewards (http://www.timeslive.co.ze)
- Sunday Times (http://www.timeslive.co.za/sundaytimes) The Times (http://www.times(lve.eo.zn/metimes) LIVE Sites 199

Search JOBS (http://www.timesitys.po.za/incoming/2016/06/23/John)

· m.timesilve.co.za /http://m.timesilve.co.za)

#### Times LIVE (http://www.timeslive.co.za)



nikwww.iimasiiwa.co.za.noikicat20161120214E2500538Rasport-Parliamani5E254005245E75265499-anya-Zuma-effer-8ABQ-chair-blaguwha-5E25450598-no-anowi

Restand Parliament any Zuma after SABC chair Macryle's no-snow Into://www.timestve.co.ze/holitica/2016/12/01/NE2X80X8Respect-ParliamentSEX80X9AXE2X80X9E. FEVE-CHIEF-SABC-chair-Manustin N. E2% 80% 994-no-anow)



p://www.timesiive.co.ze/loos/2016/12/07/Celling-sit-matrics-cleim-your-fame-and-you-could-win-Reconts

Calling all matrics; claim your fame and you could win R8,000 (http://www.timestiva.co.za/local/201/Calling-sit-matrics-claim-your-fame-and-you-could-win-R80001)

Sinday Tince PLAJINGKOP.

(http://www.timesive.co.za/eundaytimes/?fiter=upprade) SUBSCRIBE (http://www.llmeskva.co.za/sondaytimes/? filter=upprade)

- AM
- News throughwardinestive.co.se) Politics (note://www.timestive.co.se) politics (note://www.timestive.co.se)
- Entertalnment (http://www.limesitve.co.za/onterfalmment).fie & Style (http://www.limesitve.co.za/illestyle) · Consumer Live (http://www.fimeslive.so.co/sonsumerlive/tik/otorista (http://www.timeslive.co.co/motoring)
- Sci-Tech (http://www.timeshie.og.ze/schech/SUNDAY TIMES + ILIVE (http://www.timeshie.og.ze/files) PM

the principal of the state of t ibita: firma timicaliva oo adaabitirisbiyibi 61212WATCH-Did-Capa-Town-farantekshi mekilik biqosbbra Manasasin-Challenar-orti (52 (hitzaliwa direkshi mekilika po paliocali2018/1 Emali traditional-healer-said-to-be-emong-em SUBSCRIBE ATN-bombara1)

- Home thits://www.timestive.co.za)
- · Politica (http://www.timesitye.co.go/politics/)
- Article



http://www.timestivis.co.ga/betimes/2016/12/07/Give-a-Hawk-a-beti-name)

Give a Hawk a bad name (http://www.times)ive.co.za/thetimes/2018/12/07/Give-a-Hawk-a-bad-name)

(http://www.timeslive.op.pa/politica/2018/04/06/EXCLUSIVE-Gebbev-calle-on-Zuma-and-Cabinet-ministers-for-help-in-leaked-letter1)

EXCLUSIVE: Oakbay calls on Zuma and Çabinet ministers for help in leaked letter

TMG Digital | 2016-04-08 14:40:42.0



Nazsem Howa and Atul Gupta. File photo. Image by: Gallo Images / City Press / Lucky Nixumsio

President Jacob Zuma as well as three Cabinet ministers have been contacted by the Oakbay company over the closure of its bank accounts.

Save & Share

Tweel [http://witter.com/share]

0

Reportment

**B**4

auborR.

#### Email (?filter=email)

#### Print (?service=print)

This follows reports of the company being shandened by Absa and FNE banks and the withdrawal of its auditors, KPMG, and its stock exchange sponsor, Sastin.

ADVERTISING

Repley

Learn mare

inReed strates by Teads

On Friday, Oakbay Resources and Energy announced in a statement to the Stock Exchange News Service that non-executive chairman Atul Gupta and chief executive officer Varun Gupta have resigned "with immediate effect".

President Zuma's son, Duduzane Zuma, has also quit as non-executive director of Shive Uranium, a major subsidiary of the company.

With state capture is a regressive step for any society into the still constitute to set and thing to the capture is a regressive step for any society into the state of the s

Cathey is at the centre of the "Guptagate" storm over the president's close association with the Gupta family, who have been exposed for "interviewing" for positions in Zuma's cabinet. Oakbay investments is the holding company for several Gupta-related subsidieries.

in a letter to staff, teaked to the media on Friday, Oakbay Investmenta CEO Nezeam Howa states: "It is with deep regrat, that following a parted of sustained political stack on the Gupta family and our businesses, and by extension, you our employees, we have done to the condustant that it is time for the Gupta family to step down from all executive and non-executive positions. In cloing this, the family hope to end the campaign against Oakbay and seve all of our jobs."

He wrote: "The closure of our bank accounts has made it virtually impossible to continue to do business in South Africa.

"Without ben's accounts we may find ourselves in a position where we are unable to pay you, our valued employees. We are doing everything in our power to ensure this does not happen. We find it totally unacceptable that you, our employees, and your families could potentially have to suffer as a result of the political campaign egainst us.

"To this and we have been in direct contact with the ministries of jabour, finance, mineral resources and the Office of the President to express deep disappointment over the decisions of our banking partners and to make it very clear that fivelihoods are at risk if we are unable to restore these important banking relationships.

"We are confident that through the family's decision to distance themselves from the business banking relationships will soon be restored, salaries will be paid and business will continue as normal."

How a self Cakbey's current executive committee and the CEOs of each of the businesses would continue to oversee the day-to-day management and running of the business and all portfolio companies.

"We need to remain strong as a learn during this difficult time. We have every confidence that normally will soon be restored."

READ THE FULL LETTER HERE (http://mpages.times)live.go.za/pdffsTDialls/VOakbayLetter.pdf)

- Share
- · (?filter=email)
- · (?service=print)
- Oliveran
- Indicativities com/share





Private Bag X115, Pretoria, 0001, Tel; +27 12 323 8911, Fax: +27 12 323 3262 PO Box 29, Cape Town, 8000, Tel; +27 21 464 6100; Fax: +27 21 461 2834

Mr MJ Zwane Minister of Mineral Resources Private Bag X59 PRETORIA 0001

Dear Minister Zwane

1

## INTER-MINISTERIAL COMMITTEE IN RESPECT OF ALLEGATIONS LEVELLED AGAINST FINANCIAL INSTITUTIONS

i refer to your letter dated 20 April 2016, emailed to my office at 11h48am on 22 April 2016.

As you are aware, I was not present at the Cabinet meeting you refer to but I have consulted the Cabinet Secretariat on the matter.

#### The following emerges:

- The Cabinet meeting was on the 13<sup>th</sup> April 2016 not 16<sup>th</sup> April 2016 which was a Saturday;
- 2. No Inter-Ministerial Committee was established.
- 3. Three Ministers were nominated; Finance, Labour and Mineral Resources.
- 4. No one Minister was designated as convenor.
- The financial services sector is not "already distressed" as your letter indicates, and care must be taken not to compromise financial stability.

Whilst I appreciate the urgency of the matter for some, I must emphasise that the legal and regulatory environment has both global (BASEL III, Financial Action Task Force) and local (SA Reserve Bank; Financial Services Board; Financial Intelligence Centre; Mational Consumer Commission; etc) regulators and regulations.

I am currently seeking legal advice on what could be done in the present circumstances, given the intensive legislative framework we have governing the financial sector.

In the circumstances, it will be advisable for the three Ministers to first consult on the framework for any discussion with financial institutions. I prefer that this takes place on the

m (

margins of the Cabinet meeting of the  $26^{th}$  April 2016. You might also be aware that discussions of the nature envisaged have already taken place elsewhere.

Accordingly, J look forward to discussing the way forward next Tuesday.

Kind regards

PRAVIN J GORDHAN, MP MINISTER OF FINANCE Date: 22 - 4-2016

cc. Ms MN Oliphant, MP Minister of Labour

An I



"SB38"

Media Statement
To all media
1 September 2016

STATEMENT OF THE CHAIRPERSON OF THE INTER-MINISTERIAL COMMITTEE SET UP BY CABINET TO CONSIDER THE IMPLICATIONS OF THE DECISIONS OF CERTAIN BANKS AND AUDIT FIRMS TO CLOSE THE ACCOUNTS OF AND/OR WITHDRAW AUDITING SERVICES FROM OAKBAY INVESTMENTS

On 13 April 2016, Cabinet established an Inter-Ministerial Committee (IMC) to consider allegations that certain banks and other financial institutions acted unilaterally and allegedly in collusion, when they closed bank accounts and/or terminated contractual relationships with Oakbay Investments. The IMC was chaired by myself as the Minister of Mineral Resources.

The situation warranted close scrutiny by Government because of the impact that the actions would have, not only on job losses for 7500 South Africans but also the impact that it would have on investor confidence.

The IMC conducted a number of meetings with various banks, financial institutions and insurance companies as well as with representatives of Oakbay Investments. Although the Minister of Finance was a member of the constituted IMC, he did not participate in its meetings.

A Report of recommendations was tabled at Cabinet. After discussion of the Report, Cabinet has now resolved as follows:

- a. To recommend to the President that given the nature of the allegations and the responses received, that the President consider establishing a Judicial Enquiry in terms of section 84(2)(f) of the Constitution;
- b. To consider the current mandates of the Banking Tribunal and the Banking Ombudsman. Evidence presented to the IMC indicated that all of the actions taken by the banks and financial institutions were as a result of innuendo and potentially reckless media statements, and as a South African company. Oakbay had very little recourse to the law. Looking into these mandates and strengthening them would go a long way in ensuring that should any other South African company.

find itself in a similar situation, it could enjoy equal protection of the law, through urgent and immediate processes being available to it as it required by the Constitution;

- c. To consider the current Financial Intelligence Centre Act and the Prevention of Combatting of Corrupt Activities Act regarding the relevant reporting structures set out therein as evidence presented to the IMC was unclear on whether the various banks and financial institutions as well as the Reserve Bank and Treasury complied with these and other pieces of legislation. The IMC was also briefly ceased with the implications of legal action against any of these entities and the potential impact that would have on the volatility of the Rand as well as the measures that could be put in place to protect the economy. This was not something that fell within the mandate of the IMC and should therefore be considered by the Judicial Enquiry;
- d. To re-consider South Africa's clearing bank provisions to allow for new banking licences to be issued and insodoing, to create a free market economy. The IMC was presented with evidence suggesting that the South African banking system is controlled by a handful of clearing banks which ensured that every other local or international bank participating in the South African banking sector would need to go through these clearing banks in order to have their transactions cleared, thereby creating an oligopoly. Evidence was also presented that these institutions may have placed undue pressure on banks that sought to assist the company by subjecting them to unwarranted auditing processes. It is unclear why the Reserve Bank will not issue new banking licences to other banks and this would need to be given careful attention by the Judicial Enquiry as it did not fall within the purview of the IMC; and
- e. The establishment of a State Bank of South Africa with the possible corporatisation of the Post Bank being considered as an option. Evidence presented to the IMC suggested that all of South Africa's economic power vests in the hands of very specific institutions, institutions who have shown that their ability to act unilaterally is within their mandate and is protected. These institutions are owned by private shareholders and report to National Treasury who in turn do not need to act on information provided to it.

It was further agreed that the IMC would monitor the process of finalising these matters and would reportback to Cabinet on their progress.

For further media enquiries, kindly contact Mr Martin Madiala on 0635054199 Martin.Madiala@dmr.gov.za

Ends-

issued by the Department of Mineral Resources

am

#### Hansa, Ayesha A

Subject: Attachments: FW: Standard Bank and IMC meeting 05 May 2016 IMG\_1487.jpg; Adv Kellerman IMC May 2015.pdf

" SB39"

From: Tshabalala, Sim S (CEO)
Sent: 06 May 2016 04:36 PM.
To: zarina.kellerman@dmr.gov.za
Subject: Standard Bank and IMC meeting 05 May 2016

Afternoon Advocate Kellerman

Please find the attached documentation for the attention of Minsters Zwane and Oliphant.

Regards

Sim

Sum Tshabatata, Chile! Executive - Standard Bank Group | 5 Slaunonds Street, 9th floor | Johannosbury | Rel 4 7 5 1 | 536.
1810 | Fex: 0862027296 | Slav Tshabatata@standardbank.co.zg

Ah.



Office of the Group CEO

The Inter-Ministerial Committee c/o Advocate Zarlna Kellerman Secretariat to the IMC

Per e-mail: Zarina Kellerman@dmr.gov.za

6 May 2016

Dear Ministers

Re: Standard Bank and IMC meeting: 05 May 2016

On behalf of Standard Bank I convey our sincere appreciation to Ministers Zwarte and Oliphant for our cordial and constructive meeting with them and their advisers on 5 May 2016 in the DMR offices. Whilst we observed the secretary taking notes during the meeting we consider that it could be helpful, because of the technical nature of the information orally presented, if we set out below a summary of the submissions made and responses given by Standard bank during the meeting.

I confirm that on behalf of the IMC it was made clear that the meeting was requested by the IMC not for the purpose of discussing Standard Bank's relationship with any particular customer(s) or to further the interests of the Oakbay/Supta entitles but rather to enable the IMC to obtain from Standard Bank.

- (a) a better understanding of the processes and criteria applied by Standard Bank in entering into and terminating banking relationships with its customers, especially when politically exposed persons ("PEPs") are involved:
- (b) Its response to the perception that banks are not treating customers fairly by closing bank accounts without giving any reasons and/or apparently without regard to the negative consequences for the employees of the oustomers concerned.
- (c) its response to the perception that the four large banks are colluding / acting in concert in withdrawing banking services from a common customer;
- (d) most importantly, an indication as to whether anything could be done to save the jobs of 15,000 employees plus 60,000 dependents of the Oakbay / Gupta group that are claimed ("claimed" because the number does not accord with the attached advertisement by Oakbay that sets the

Standard Bark Chalus 9" Fidor 5 Sampundr Street Johannenburg 2011 / PC Box 7726 Johannenburg 2011 Boxen Arka [d birkistand -27 (6) 17 65/2011 2 r.F.nx (27 10) 1 15/5-4207 Latindard birkingan

Consideration of employees of the contribution of the contribution

Standard Bank Moving Forward \* /

Mer

number of employees plus dependants at 7 590) to be at risk due to the four banks having withdrawn transactional banking services to that group.

The IMC also assured us that we could speak freely in the meeting because nothing said would be repeated outside of the meeting except in Cabinet to whom the IMC must report.

Standard Bank's submissions and responses can, in no particular order of importance, be summarised as follows:

- (a) The relationship between a bank and its customer is typically established by an indefinite contract and, as is typically the case in all indefinite contracts, can be unliaterally terminated by either party on notice. As was confirmed in the Bredenkamp v Standard Bank Appeal Court judgement, a bank is not obliged to give any reasons should it be the terminating party. In terms of the Financial intelligence Centre Act a bank is prohibited from giving any reason at all if termination results from suspicious transaction reporting as more fully explained below.
- (b) The law imposes the requirement of reciprocal trust between banker and customer, one manifestation being the legal obligation on banks to keep secret the private information of their customers that comes into the banks' possession through the banking relationship. When that trust is lost the relationship cannot be maintained.
- (c) The Code of Banking Practice states that banks: will treat all your [the client's] personal information as private, and confidential, and, as a general rule, we will not disclose any personal information about you or your accounts' except when required to do so by law, or with your consent, or when we are pursuing our right to the repayment of debt. In obedience to this principle, Standard Bank has at no time confirmed or denied in the media that we have ever operated or closed accounts belonging to Oakbay/the Guptas. Over the period from 6 April 2016 to 5 May 2016, 2766 media items were published in South Africa on the Oakbay's complaints about banks. Of these, Standard Bank was mentioned in 511 items. Our stance throughout has been completely consistent with our original statement on this matter, which I quote: 'Standard Bank does not comment on its relationship with customers or potential customers to protect blient confidentiality. As such Standard Bank can neither confirm nor deny that it has business relationships and dealings with Oakbay.'
- (d) To the extent that the details of any relationship between Standard Bank and Oakbay have become public, this is entirely because representatives of Dakbay have chosen to comment in the media about this matter. Before discussing elements of the relationship between Standard Bank and Oakbay, we were constrained to assume that duly authorised representatives of Oakbay/the Guptas had consented to your discussing Oakbay/Gupta related banking matters with Standard Bank.
- (e) Banking is governed by at least 210 different statutes and is highly regulated. This is not a comptaint but rather an affirmation that Standard Bank is aware of its legal responsibilities and regards the existence and application of such laws as a major contributor to the soundness of South Africe's financial sector.
- The statutes most relevant to the commencement and termination of banking relationships are the Financial intelligence Centre Act ("FICA"), Prevention and Combatting of Corrupt Activities Act ("POCAA") and Prevention or Organised Crime Act ("POCAA").
- (g) FICA obliges all financial institutions to (i) undertake KYC ("Know Your Client") procedures before establishing any new relationship with a customer, (ii) undertake enhanced due diligence if the

Standard Bank Moving Forward 4

M

KYC indicates that any PEPs ("Politically Exposed Persons") have influence over the customer, (iii) monitor every customer's transactions to understand the source and application of all funds and (iv) report any suspicious transactions by customers to the Financial Intelligence Centre ("FIC").

- (h) Failure to report a suspicious transaction to the FIG is a criminal offence subject to a R10 million fine or 15 years' imprisonment.
- (i) Disclosure to any person that a suspicious transaction report has been made to the FIC is itself a criminal offence subject to a R10 million fine or 15 years' imprisonment.
- (i) As regards the PCCAA, you will see that it contains multiple categories of corruption and in Section 20 creates the offence of dealing in property or using property known or suspected to be part of any "gratification" which is the subject of a corruption offence.
- (k) The best and most logical way for a bank to evoid criminal prosecution under FICA (for failing to report any suspicious transaction and/or criminal prosecution under PCCAA or POCA for dealing in property that the bank ought to suspect is tainted by a corrupt activity) is to simply not have any dealings with persons who foreseeably could be or become involved in suspicious transactions generally and corrupt activities in particular.
- (I) Standard Bank expends in excess of R500 million per annum and employs in excess of 400 compliance officers in order to ensure that it has the systems and controls necessary to comply with its statutory obligations under FICA to detect and report transactions suspected to be related to criminality including money-laundering, terrorism financing, economic sanctions and corruption.
- (m) To Illustrate the gravity of the risks that it faces Standard Bank referred to the fact that its group had been investigated by the USA's Department of Justice (for possible contravention of the USA's Foreign Corrupt Practices Act) and by the UK's Belieus Fraud Office (for possible contravention of the UK's Bribery Act) adding from Standard Bank's Tanzania subsidiary having engaged a local company parity owned by REPs to assist in securing government business. After a 3-year struggle Standard Bank settled those investigations by paying fines and penalties of USS38 million to the governments of Tanzania; USA and UK whilst acknowledging that the settlement could be set aside and prosecutions could follow should evidence amerge of any other possible involvement in corrupt activities within the Standard Bank group.
- (n) Standard Bank pointed out that the definitions of corruption contained in the PCCAA are not materially different to those used in the USA and UK and therefore Standard Bank has, in essence, been put on probation by the USA and UK governments and is compelled to be extra vigilant in its dealings with existing and potential customers who might expose Standard Bank to the risk of being associated with corrupt activities. In this regard Standard Bank opined that, hypothetically, an offer to a public officer to sepure his/her promotion in exchange for favours would be an act of corruption in the USA, UK and SA (as defined in the POCAA).
- (c) South Africa has a relatively small but open economy that is retain for its survival upon international capital and currency flows. If the government of the UK or USA were to conclude that economic sanctions would be a more effective deterrent than criminal prosecution for perceived repeat offending on Standard Bank's part that could be catastrophic for Standard Bank, its 35,000 employees and the South African economy. Standard Bank for its own sake, that of its shareholders and

Standard Bank Moving Forward "

employees and that of our country simply cannot risk any exposure, direct or indirect, to comput activities.

- (p) Standard Bank is committed to treating all customers fairly and subjects all existing and prospective customers to the same objective standards for KYC and enhanced due diligence purposes. Standard Bank does not lightly decide to terminate a relationship as evidenced by the fact that so far in 2016 it has terminated just 52 out of its -1.1 million customer relationships; the decision was in each case taken by a competent committee applying objective criteria.
- (q) It is not feasible for a bank to assume a customer to be innocent of wrongdoing until it/he/she is convicted in a court of law. Both PCCAA and POCA have created the offences of dealing in money or property where the accused should have suspected that it was tainted by or the proceeds of corruption or money-laundering; the offence is not dependent upon the accused knowing that the money or property comes from a person who has already been convicted.
- (f) Standard Bank does not decline a customer relationship simply on the grounds that a PEP is involved; for an adverse decision by Standard Bank it must be satisfied that the PEP is in a position to facilitate suspicious transactions and there is a possibility that he/she could do so.
- (s) We mentioned that there are many categories of terminations. Given our domnitment to customer confidentiality, we cannot provide detail about which customers' accounts we have chosen to close but; speaking in general terms, we have closed the accounts of customers who have been demonstrably dishonest, who have been racial or otherwise seriously abusive towards our staff, or whose activities or reputation have been such that they are likely to damage the reputation of Standard Bank by association. Further, the perception that we discriminate in account closings on the basis of race is false. In recent years, for instance, we have closed the accounts of several very prominent white individuals, including a prominent lawyer who is now a fugitive from justice and two very high-profile businessmen. It is also noteworthy that we closed the accounts of a well-known white mining magnate and the associated companies.
- (t) Standard Bank gave an assurance that it has not colluded of acted in concert with any other bank or banks in its decision to terminate any customer relationship; such would be both unethical and unlawful (in terms of the Competition Act).
- (u) Standard Bank does consider the effects of any decision to terminate a banking relationship upon the employees of the effected customer but cannot, where the reason for the termination is compliance with FICA, PGCAA or PGCA, seek to mitigate those consequences by not complying with those statutes; non-compliance with the law to save jobs is simply not an option.
- (v) Standard Bank declined to say whether or not it had terminated a banking relationship with any construction company that had been fined by the Compelition Tribunal for contravening the Compelition Act but did opine that an administrative fine for anti-competitive behaviour would be regarded as less significant than a suspicion of compilion, money-bundering or terrorism financing and that the second leg of the test, namely whether the construction company has related persons likely to expose the bank to corruption or money-faundering etc., would still need to be considered.
- (w) In response to a closing query as to whether there is any possibility of Standard Bank reversing any decisions that could help save the jobs of the employees of Dakbaythe Guptas, Standard Bank indicated that it applies the known facts (and suspicions as envisaged by PCCAA and

Standard Bank Moving Forward"

POCA) to the law to reach its decisions and therefore if the facts should change there could be a resultant review of the decisions reached. Consequently the IMC requested, and Standard Bank review and Standard Bank give consideration to informing the IMC, in due course, of indicated a willingness, that Standard Bank give consideration to informing the IMC, in due course, of what changes in the ownership and/or control of the Oakbay/Gupta group of companies could be required for Standard Bank to review any decisions it may have made to terminate banking relationships with them and thereby save jobs claimed to be at risk.

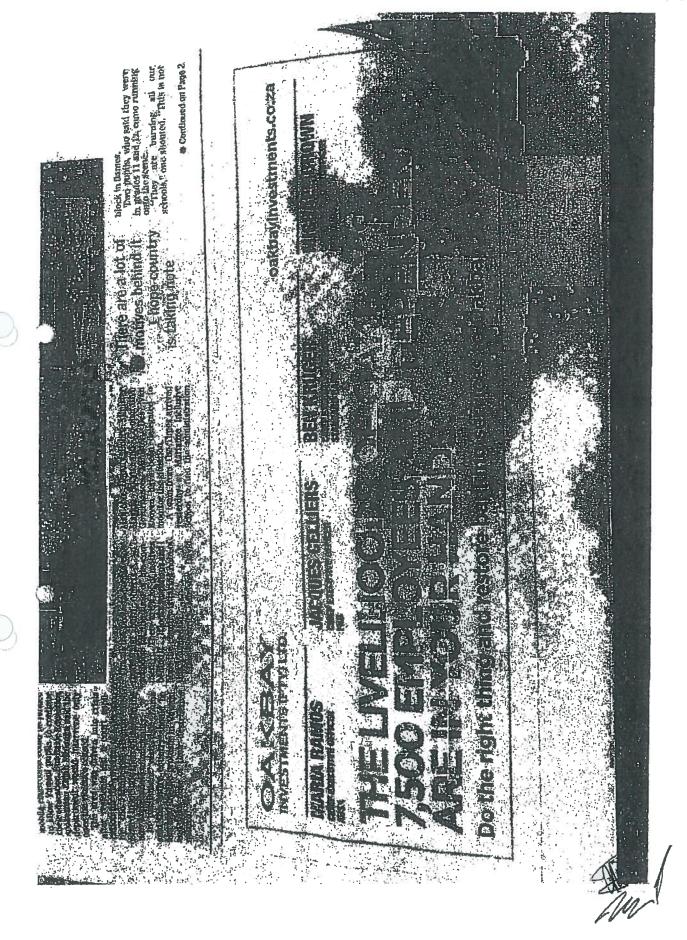
The above summary does not purport to be a complete summary of all that was discussed; it is intended only to summarise those submissions and responses that Standard Bank believes should be most relevant to the IMC's mandate. If I have not summarized the submissions and responses as are set out above correctly (according to the secretariat's notes) please let me know.

Yours sincerely

Sim Tshabalala

Bell

Standard Bank Moving Forward"



#### Hansa, Ayesha A

Subject:

FW: Standard Bank and IMC meeting 05 May 2016

"5840"

From: Zarina Kellerman [mailto:Zarina.Kellerman@dmr.gov.za]

Sent: 09 May 2016 12;59 PM To: Tshabalala, Sim S (CEO)

Subject: Re: Standard Bank and IMC meeting 05 May 2016

Dear Simphiwe

Ministers have asked me to thank you for this input.

Sincerely Zarina

On 06 May 2016, at 4:36 PM, Tshabalala, Sim S (CEO) < Sim. Tshabalala@standardbank.co.zn> wrote;

Afternoon Advocate Kellerman

Please find the attached documentation for the attention of Minsters Zwane and Oliphant.

Regards

Şim

Sim Tshabalala, Chief Executive - Standard Bank Group | 5 Simmonds Street, 9 Tloor | Johannes Burg. | Tel +27, 11 536, 1810 | Fax: 0862027286 | Sim Tshabalala@stantlardbank.co.za

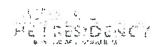
Diameter Bank email disclaimes and confidentiality note riogs for to bitte discussion and confidentiality note bitte discussion indicated the bitte mode. The bitte discussion indicated the bitte mode. The bitte discussion indicated the bitte mode. The bitte discussion in the content or captest bitte mode. The content of captest bitte mode.

<Adv Kellerman IMC May 2016.pdf><fMG\_1487.jpg>

and

The Presidency | Print Article | Statement of Minister of Mineral Resources is not Gov... Page 1 of 1







#### Statement of Minister of Mineral Resources is not Government position

02 September 2016

The Presidency wishes to assure the public, the banking sector as well as domestic and international investors of Government's unwavering commitment to the letter and spirit of the country's Constitution as well as in the sound fiscal and economic fundamentals that underpin our economy.

The statement issued by the Minister of Mineral Resources, Mr Mosebenzi Zwane yesterday on 1 September 2016, on the work of the task team established to consider the implications of the decisions of certain banks and audit firms to close down the accounts and withdraw audit services from the company named Oakbay Investments, was issued in his personal capacity and not on behalf of the task team or Cabinet.

Minister Zwane is a member of the task team, He does not speak on behalf of Cabinet and the contents of his statement do not reflect the position or views of Cabinet, the Presidency or Government. The unfortunate contents of the statement and the inconvenience and confusion caused by the issuing thereof, are deeply regretted.

The Presidency wishes to assure the public, the banking sector as well as domestic and international investors of Government's unwavering commitment to the letter and spirit of the country's Constitution as well as in the sound fiscal and economic fundamentals that underpin our economy.

Enquiries: Dr Bongani Ngquiunga on 082 308 9373 or bongani@presidency.gov.za

issued by: The Presidency

Pretoria

m D

News24.com | OLX | Property24 | Carears24 | Spres |

Follow City Press:

Home | News | Business | Sport | Personal Finance | Trending | Cereora | Voices

Gordhan contradicts Zwane on call for banking inquiry

Andishwe Makinana Ø 2018-09-08 06:43

> Finance Minister Pravin Gordhan has contradicted his Cabinet colleague, Mineral Resources Minister Mosebenzi Zwane, who is calling for a judicial commission of inquiry into hanks.

> Gordhan said if there was anything wrong with South Africa's banks, there were strong regulatory bodies that could deal with such problems and that our regulations were among the best in the world.

> He reminded MPs that this country had a banking ombudsman among others, who had powers, and if there were people with complaints about the banks, those powers could be reviewed.

Zwane came under fire in Parliament yesterday but still refused to expand on or explain why he issued a press statement last week in which he announced "a Cabinet resolution" for a judicial inquiry into South Africa's banking system following the decision

by the banks to terminate their relationships with Oakbay Investments, a company owned by the politically-connected Gupta family.

The Presidency distanced itself from Zwahe's statement, saying he had issued it in his personal capacity and that the contents of the statement were not the government's position.

DA MP David Maynier asked Zwane whether he would resign from the Cabinet and when he would do so.

Zwane would not answer the question directly.

He said in terms of the principle of separation of powers, the matter belonged to Cabinet and not to Parliament, adding that Maynier had no jurisdiction to sak him . whether he would resign.

"As I stated during my interview with the SABC ... I stated that the matter of inquiry which Maynier seems to be problematising can only be decided by the president once he has sufficiently applied his mind to the matter.

"We have been on record on this matter. It is indeed unprecedented that banks could unliaterally close accounts. This matter can therefore not be left hanging," said Zwane.



Mosebenzi Zwana, Picture: Lebo Maretala

#### RELATED LINKS

- 9 Guptas: Avoid them, IDC's tirged; Zwane denies Switzerland trip
- Absa snubs mine minister and won't meet
- » Who is Mosabanzi Zwane?

# MOST READ

Enter text here...

- > Sure falls in bid to blook bumdle of docu in Adrian Lactory case
- sympathy for Maniesbe following This job kill me' quip
- Pat downs', locked vermes over exam security at Photo
- » IDC to give R4.5bs to baset youth
- 3 Sundowns fens' singing brings Motsepe to

#### **FEATURED**

- » How we can decolonise science
- We need an emotional settlement to #FeesMustFall
- » Zuma doubles security detail
- b Lest we forget 2012
- > Land reform goes private

#### FOLLOWING @CITY\_PRESS

@City\_Press; RT @shendumul: #Brasminorisin Police just entered Noswal Hall. We think they suspect those who torched car are inside htt

@City\_Press: RT @shandumul: Protesters threw rocks at police who were in the car. Cops ran off at which point a guy opened

@City\_Press: RT @shandursul: Jan Smutz street right now, Police are shooting into a res building, #Brasmfortein https://l.co/Kev5PZ7x

City\_Press; RT @shandumul; Police clearing up Bertha Street in #Brasmfontein. put rocks on the road to block

@City\_Prese: MT @the\_pixelat0r: #Wits Police watch as their van burns. A firetruck has just enrived https://l.co/voCOih/SFe

@City\_Press: RT @the\_pixelatior, #Wits A MENTALINE GETTOPRESS

"PAT DOWNS", LOCKED VENUES: STUDENTS FUME **OVER EXAM SECURITY AT** 

RHODES

@ October 25, 2015

OUT

http://city-press.news24.com/News/gordhan-contradicts-zwane-on-call-for-banking-in...

News 214- Bill meny of her pengin had snown for wast legiteting that they have suffered at the hands of banks.

"It is important therefore to understand the importance of this matter as Parliament," he added.

Zwane said the people of South Africa were crying over these issues and the opposition should allow the due processes to unfold.

\*... And during these processes we can prove once and for all that the people of South Africa have issues with banks," he said.

Maynier said Zwane had allowed himself to become a hired gun for the Guptas, but he misfired when he issued the statement and the damage was already done by the time the Presidency rejected his statement.

A number of DA MPs followed up, pushing for Zwane to answer the question as to why he issued the statement. But with the "protection" of National Assembly Speaker Baleka Mbete, he got away without answering the question.

Things got heated with DA MPs accusing Mbets of undermining the Constitution in protecting Zwane – DA chief whip John Steenhulsen told her "she was worse than the minister [Zwane]"

"You are trampling on the Constitution. You are a disgrace as a Speaker. You are an embarrassment to this House and you are a bigger embarrassment than the minister." he said.

When Gordhan was asked by the EFF's Floyd Shivambu whether he supported the inquiry into the banks, he pointed out that banking regulation was part of the brief that his ministry has.

"As far as we are concerned, we are compliant as South Africa and amongst the most compliant. We have international requirements which emerged from the crisis and financial stability bodies and other bodies. Our standards of regulation are best as they can be.

"We also have the banking ombud which has certain powers that perhaps can be reviewed if there are customers that have problems with the banks," said Gordhan to loud applause from the opposition benches and blank stares from his ANC commades.

He said as far as financial institutions were concerned, there was a difficult balancing act between ensuring that there is stability in the sector, that it is well-regulated and that it doesn't constitute a risk to the country's economy and fiscus as learnt from 2008/08 financial crisis.

"On the other hand, we need to be equally aware that the banking sector can run away with itself, its charges might be excessive, its service might be poor, its market conduct might be questionable as far as that is concerned. Let's have a debate whether the powers need to be tightened," said Gordhan.

Read more on: mosebenzi zwene | pravin gordnen | guptas

24.00m 62018 24.com. All rights reserved.
Legal notice Advertise on 24.com. About Us

#### OCTOBER 23 2016



#### NEWSLETTERS

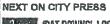
SA's best political analysis into your inbox

Enter your empil...

20









PAT DOWNS', LOCKED VENUES: STUDENT'S FUME OVER EXAM SECURITY AT

RHODES

@ October 25, 2015



1

http://city-press.news24.com/News/gordhan-contradicts-zwane-on-call-for-banking-in...

# Real Time Transcriptions TRANSCRIPTION OF THE "S\$43"

### PART PROCEEDINGS IN PARLIAMENT

## PRESIDENT'S Q & A

**HELD ON** 

**23 NOVEMBER 2016** 

PAGES 1 TO 7

**HELD AT** 

PARLIAMENT IN CAPE TOWN



© REALTIME TRANSCRIPTIONS

64 10th Avenue, Highlands North, Johannesburg P O Box 721, Highlands North, 2037 Tel: 011-440-3647 Fax: 011-440-9119 Celi: 083 273-5335

E-mail: realtime@mweb.co.za

Web Address: http://www.realtimesa.co.za



25

#### PART PROCEEDINGS IN PARLIAMENT - PRESIDENT'S Q & A

#### [PROCEEDINGS ON 23 NOVEMBER 2016] 2 [38:20 to 51:38] 3 PRESIDENT ZUMA: Thank you, Madam Speaker. 4 5 MS MBETE: We now come to question number 20, raised by the Honourable Holomisa. The Honourable, the б President? 7 PRESIDENT ZUMA: Honourable Speaker, as a cabinet and the presidency have publicly stated on numerous 9 occasions before cabinet appointed the ministers of 10 finance, labour and mineral resources to open a 11 constructive engagement with the banks on the matter of the 12 closure of bank accounts the team reported back to cabinet, 13 14 no other mandate was given to this team of ministers as we have stated before, the statement released by Minister 15 Zwane does not represent the views of government and 16 cabinet. I reprimanded the minister for the remarks and he apologised. You will remember that when I was answering 18 questions here on this matter, I said I was going to engage 19 the minister and I did and this matter is now closed. 20 21 minister has apologised. Thank you very much. 22 MS MBETE: The Honourable Holomisa. MR HOLOMISA: Madam Speaker. Thank you, 23 Mr President. On the 2nd of September this year you told 24

RealTime Transcriptions

the nation, I agree with what you have just said, you told

Tel: 011-440-3647 Cell: 083 273-5335





23™ November 2016

#### PART PROCEEDINGS IN PARLIAMENT - PRESIDENT'S Q & A

the nation that the statement made by Minister Zwane was 1 not representing the presidency, cabinet or government and 2 it is unfortunate, however, five days later on the 7th of 3 September, Minister Zwane said in this house, I quote, "the 4 inter-ministerial committee made five recommendations to 5 the cabinet. Four of the recommendations were approved and 6 one was referred to the president for further consideration 7 as it was not within the purview of cabinet to take a 9 decision on that matter." The question, what is the status 10 of this recommendation which was referred to you as reported by honourable minister? 11 12 MS MBETE: The Honourable, the President. PRESIDENT ZUMA: Thank you, Madam 13 14 Speaker. That recommendation is under considerations by the president. Thank you, Madam Speaker. 15 16 MS MBETE: The Honourable Esterhuizen. MR ESTERHUIZEN: 17 Thank you, Madam Speaker. Honourable President, the President, I heard what 18 you said the matter is now closed and thing but Sir, 19 banking will always remain a voluntary and a private 20 relationship between the bank and the client and it can only be addressed by the parties concerned. Madam Speaker, 22 neither Oakbay, nor the family that runs that companies have made public the real reasons the bank's foreclosed on 24 their account and they were Informed, they were definitely

RealTime Transcriptions

Tel: 011-440-3647

21

23

25

Cell: 083 273-5335





1

2

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

3

#### PART PROCEEDINGS IN PARLIAMENT -- PRESIDENT'S Q & A

informed under the bank, confidential bank-client relationship act, they were informed. Honourable President, banks are subject to supervision by the South African Reserve Bank and as a service provider, also to the national consumer's commission and if any client feels that they were treated unfairly in any way, then they can report them to these bodies, which never happened. The simple fact is that Oakbay never complained or reported any irregularities or any nature to this commission to the reserve bank and they did not want the reasons made public. MS MBETE: Do you have a question Honourable Member? Your minute is over now. MR ESTERHUIZEN: Honourable President, won't you agree then and with respect to your position Sir, that is not yours neither the minister of mineral resources' place to break this confidentiality act unless you were party to the original contract. Thank you. MS MBETE: Honourable, the President. PRESIDENT ZUMA: Thank you, Madam Speaker. I don't think there is anyone who questions the confidentiality between the client and the bank. many of us here deal with the banks under general and there's nothing that becomes a national concern. I think the difference that you must make, if a number of banks act in the same way simultaneously, not one bank, not two

RealTime Transcriptions

Tel: 011-440-3647

Cell: 083 273-5335

Fax: 011-440-9119



23rd November 2016

2

3

4

5

7

9

10

T

1.

13

14

16

17

19

20

21

22.

23

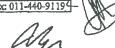
25

#### PART PROCEEDINGS IN PARLIAMENT - PRESIDENT'S O & A

banks, including some financial institutions. To any ordinary person, that is not an ordinary act. It suggests that there is something, the banks can't act together on the same manner in the same way. It gives a feeling that there is something going on here. Now if you are a government, as government intervenes in many things if it believes it is putting the image of the country into some problems, bear in mind that the government has always continued to ask for private sector to invest including the investors from outside of South Africa. If you are sitting at the level of government and you see an action of this nature highly publicised you have to say what will the investors out there think of coming to invest in South Africa if they think the banks can willy-nilly and act in a manner that suggest collusion about the economy of your country. As a government you can't sit and say I'm doing nothing. It was therefore absolutely correct because if the investors don't come here because they fear the actions of the banks, the country will say what is the government doing. We therefore needed to know what is happening, as a government, there's no law that says you cannot do so. You are talking about the bank and individual, here there was an action by a number of banks at the same time, it suggested there is something untoward here and as government, we wanted constructively to interact with the

RealTime Transcriptions

Cell: 083 273-5335 Tel: 011-440-3647



#### 23rd November 2016

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

#### PART PROCEEDINGS IN PARLIAMENT - PRESIDENT'S Q & A

banks to find out what is this, what are they doing, where has this come from, that was the reason. There's no government than can just sit because any other company that would want to come to South Africa will say sorry, I'm not going there because if the banks are angry with me, they will collude and act together. We want to look into that matter and get to the bottom of it because we can't say any other time, any business person will be dealt with and the government just stand and look. It is not, we're not dealing with the company, we're dealing with the actions of the bank, that is what we're dealing with and we'll continue to do so. We are responsible because we are a government of this country. There is nothing that sounds very suspicious that we are going to look at and do nothing, that is the reason why we acted on this one. Thank you, Madam Speaker.

MS MBETE:

The Honourable Maynier.

MR MAYNIER: Mr President, now if there is one minister who should be sprayed with Doom, it is the minister of mineral resources, Mosebenzi Zwane, for issuing a midnight statement on behalf of the Guptas in his personal capacity calling for an enquiry into the Banks and so my question is why was the minister simply reprimanded and not fired and why was the letter of reprimand not tabled in this parliament?

RealTime Transcriptions

Tel: 011-440-3647

Cell; 083 273-5335



23<sup>rd</sup> November 2016

6

#### PART PROCEEDINGS IN PARLIAMENT - PRESIDENT'S Q & A

MS MBETE:

The Honourable, the President.

2

PRESIDENT ZUMA:

Well, any president in

the world looked at the gravity of the matter and the conclusion would not produce the same kind of action, there's nothing abnormal here. Ministers are reprimanded and at times ministers could be taken out of their jobs, it depends on the thing that has been done. So we did the right thing, reprimanded the minister, the minister apologised, what else do you need? Thank you very much.

MS MBETE:

The Honourable Shaik Imam.

10

12

13

14

15

16

17

18

19

20

21

22

23

25

11

MR SHAIK IMAM:

Thank you, Honourable

Speaker. Mr President, I think you have actually responded to a previous question but let me just say Mr President, do you believe that the closure of the bank account by several financial institution was premature given the fact that Oakbay Investments have not been proven to have violated any banking regulation to date, mindful of the fact that millions of rands are flowing into this country into local bank accounts by political parties to destabilise this country? Is there not, Mr President, is there not an attempt by these imperialists to dictate and control the financial sector that they have done pre-apartheid days? Thank you.

MS MBETE:

The Honourable, the President.

PRESIDENT ZUMA:

Thank you, Madam

RealTime Transcriptions

Tel: 011-440-3647

Cell: 083 273-5335

Emr. 011\_440\_0110

23rd November 2016

#### PART PROCEEDINGS IN PARLIAMENT - PRESIDENT'S Q & A

Speaker. That is precisely the reason why government cannot ignore such an action. The action looks suspicious and as government responsible to govern this country, we'll certainly have to investigate what is this and we started very politely by sending a team to meet the banks to say what is happening. The banks did not say look, there's are the faults that this company has done or what led to our actions, so up to now we don't know. We have laws in this country, if let us say any company violate the laws, there are enforcement institutions that you would report to.

Just to stand willy-nilly and close simultaneously a number of banks as well as other financial institutions, it does not look innocent and that's a problem, that's the problem we have. Thank you, Madam Speaker.

[Up to 51:38]

RealTime Transcriptions

Tel: 011-440-3647 Cell: 083 273-5335 Fax: 011-440-9119



#### **MEDIA ARTICLE**

# CO-OPERATING FULLY WITH LAW ENFORCEMENT AND OTHER COMPETENT AUTHORITY PARTNERS

11 November 2016 - The Financial Intelligence Centre (FIC) strongly rejects the suggestion created in the media that it is not co-operating fully with its law enforcement and other competent authority partners.

Ordinarily, the FIC prefers to deal with operational matters such as the distribution of information directly with its partners. However, this matter has recently been brought into the public domain and along with it, the allegation that the FIC is not sharing information as per its mandate. It is in the media also, that because of the lack of co-operation from the FIC, an investigation by the Hawks has had 'to grind to a halt'. This claim is clearly nefarious, mischievous and totally without basis.

As per its mandate, the FIC responds to requests for information from law enforcement authorities and other competent authorities, including the Hawks. In doing so, the FIC follows legislative processes compelling it to co-operate with law enforcement and other competent authorities, and has processed thousands of requests for information since its establishment in 2003. In the past year alone, the FIC has responded to close to 2 000 requests for information in support of investigations.

The supposed lack of co-operation by the FIC is in relation to reports on transactions mentioned in a certificate attached to a founding affidavit filed by the Minister of Finance in a High Court Application on 14 October 2016.

Since the Minister's application there have been several questions directed at the FIC about the Financial Intelligence Centre Act, 2001 (No 38 of 2001) and there has been a growing narrative about the organisation being unco-operative in allowing people access to the reports in question.

And I

We suspect that this is because there is a general misunderstanding of a report on a transaction, which a reporter deems suspicious or unusual and our role in protecting the reported information. We also want to explain the FIC's role and responsibility as the custodians of this information and the role and responsibility of those who are entitled to access such information.

A report on a suspicious or unusual transaction contains information about a person's identity as well as the person's most private information such as bank account details, signatories on accounts, balances in accounts, and so on.

It also contains information about financial transactions the parties involved, amounts involved, etc. This is non-public, private and confidential information about a person that is protected under the Protection of Private Information Act and the Constitution of the Republic of South Africa.

We can categorically state that the FIC has never, since its inception, given copies of reports on suspicious or unusual transactions to investigators, politicians (including the Minister of Finance who is the Executive Authority responsible for the FIC) or any other person, or allowed any such person to access to such reports. Any suggestion of such allegations is incorrect. The Minister's application contained a certificate from the FIC and not the actual, confidential suspicious and unusual transaction reports.

Unlawful access to such sensitive information has serious ramifications, including possible criminal liability. In addition to private information of individuals, a report on a suspicious or unusual transaction also contains other highly sensitive information such as details about who reported the transaction and the reasons why the reporter considered the relevant transactions to be suspicious or unusual and therefore submitting it to the FIC.

The FIC is entrusted to protect the confidentiality of this information and to ensure no person's rights are unlawfully and unfairly prejudiced through illegitimate access, be it the reporter of the suspicious or unusual transaction, the reported person or third parties mentioned in the report.

The FIC is therefore the gatekeeper of this information and the FIC's job is to protect and preserve citizen's rights. If we fail in our duty citizens' rights as enshrined in the Constitution will be unfairly prejudiced. Access to the information reported to the FIC is regulated in the FIC Act and the requirements to access this information are also defined in the Act. These safeguards were put in place by Parliament and not the FIC. These laws were put in place to protect citizens' rights and prevent abuse of their information. If we deviate from the standards set in law we undermine

Ange & di

the very safety net built by Parliament to balance the interests in having access to private information for lawful purposes in the application of the criminal justice system with protection of our citizens.

One of the requirements to access this information includes the need for the requestor of the information to have a national mandate to investigate an unlawful activity. Another requirement is the need for the investigating authority, at the very least, to indicate what unlawful activity is being investigated. These are very low standards for access to such privileged information, far lower than the test used by our courts to grant warrants to access similar information for evidentiary purposes. These are the factors that would confirm that information reported to the FIC is required for a legitimate reason and once these criteria have been met the FIC has no discretion to refuse a request for the sharing of information.

If the FIC refuses access to this information which it is obliged to protect it is because the requestor did not meet the legal threshold set by the legislator to access such information. We also want to point out that private persons are not entitled to access information reported to the FIC and, in particular, not the content of reports on suspicious or unusual transactions. These checks and balances are inherent in the provisions of the FIC Act.

It is very unfortunate that, in this instance, failure by the requestor of this information to meet the legislative standard, has been interpreted as the FIC being unco-operative. However, the FIC cannot become party to arbitrary violation of citizens' rights and the legislative standard designed to protect our citizens. Instead, where requests from competent authorities, such as law enforcement agencies, are defective, the FIC assists by indicating what is required from the requestor to lay a proper legal basis for the sharing of requested information.

We also want to point out that the contents of a report on a suspicious or unusual transaction is hearsay, by nature, and is based on a reporter's suspicions and therefore will not meet evidentiary standards set by our judiciary for use in certain legal proceedings. The FIC Act provides that any person making such a report may not be compelled to testify in criminal proceedings that may follow the report and that their identity may not be revealed without their consent. Thus it is domestic and international practice that the actual content of a report on a suspicious or unusual transaction cannot be used, in and of itself, to support a conviction in a criminal prosecution.

The reports we refer for investigation do not contain the actual suspicious or unusual transaction reports made to us. Instead it contains a substantial amount of information relating to descriptions

Page 3 et al.

of the transactions or activities relating to the financial conduct of reported person(s) and how those transactions or activities are linked with the person(s) mentioned in the FIC's referral. The FIC extracts this information from the reports which persons make to the FIC. In addition to these factual descriptions, a referral from the FIC also contains the FIC's analysis of the events mentioned in the referral and their potential links to unlawful activity, as well as the FIC's advice on the potential unlawful activity which the recipient of the referral may wish to pursue in an investigation. However, any suggestion that the FIC refers mere reports for investigation is technically and factually incorrect.

The FIC wants to assure South Africans that we will continue protecting citizens' rights despite an onslaught of negative and disparaging remarks regarding co-operation. Our records reflect numerous citations from law enforcement agencies for outstanding co-operation. Lastly, we want to assure all law enforcement agencies and victims of crime that the FIC will lawfully co-operate as we have done over the past 14 years to make our information available in order to combat unlawful activity in the Republic of South Africa.

--- ends ----

# ISSUED BY THE FINANCIAL INTELLIGENCE CENTRE FOR MORE INFORMATION PLEASE E-MAIL: communications@fic.gov.za

Note to editors: The Financial Intelligence Centre (FIC) is South Africa's national centre for the gathering, analysis and dissemination of financial intelligence. The FIC was established in 2003 through the promulgation of the Financial intelligence Centre Act 2001 (38 of 2001) FIC Act) to identify proceeds of crime, combat money laundering and the financing of terrorism. The FIC reports to the Minister of Finance and to Parliament.

In protecting the financial system, the FIC's primary activities as set out in its founding legislation, are to: process, analyse, interpret and retain information disclosed to and obtained by the FIC; inform, advise, co-operate with and make its financial intelligence products available to investigating authorities supervisory bodies, intelligence services and SARS to facilitate the country's admiristration and enforcement of law; supervise and enforce compliance with the FIC Act in affected institutions and by individuals not regulated or supervised by a supervisory body, or where the supervisory body is unable to act; exchange information with similar bodies in other countries; monitor and give guidance to accountable and reporting institutions, supervisory bodies and individuals regarding their compliance with the FIC Act; implement a registration system for all affected institutions and individuals; annually review the implementation of the FIC Act and report on this to the Minister of Finance.

The FIC Act establishes a regulatory framework of compliance control measures, which requires certain categories of business (defined as schedule 1 in the FIC Act) to take steps regarding; registration with the FIC; olient identification, verification and record-keeping; appointment of compliance officers; training employees on compliance; reflecting their organisation's compliance structures and filing statutory reports with the FIC. The Act also requires all businesses to report suspicious and unusual financial transactions.

Statutory reports submitted to the FIC are the basis upon which the FIC's financial intelligence is developed. This is important for law enforcement, revenue agencies, police and others to support their investigations and forfeiture processes.

Page 4 of

#### KEY STATISTICS FOR 2015/16

Number of suspicious transaction reports
received
Number of cash threshold reports received
Number of Institutions registered with the FIC
Blocked as suspected proceeds of crime

Page 5 of 5

# Guptas, Oakbay delighted with Gordhan's affidavit

October 18, 2016



Oakbay rejects susggestion that Eskom payments is part of fund for the acquisition of shares. Picture: Thapelo Morebudi

Gupta Family lawyer, Van Der Merwe Associates, releases a statement on behalf of Ajay Gupta and Oakbay Investments in response to the affidavit from Pravin Gordhan.

#### Highlights include:

- The Gupta Family (as majority shareholders) and Oakbay Investments are delighted to have been cited as respondents to the application from the Finance Minister. At last, the Gupta Family and Oakbay can begin to formally clear their names. They thank him for this opportunity
- The Finance Minister's application is being considered by lawyers for the Gupta Family and Oakbay and will be dealt with in full each and every entry

M

- · The application's detail is fundamentally flawed as of the 72 transactions flagged, our initial analysis shows:
- Six transactions (totalling R4,096 billion) refer to the Optimum mine before it was under Oakbay's control and so were not transacted by Oakbay or the Family
- 24 transactions (totalling R325 million) are perfectly legitimate, are in the normal course of business and are not suspicious in any way
- Five transactions (totalling R1,698 billion) relate to Oakbay Resources and Energy, the listed entity. These are perfectly legitimate and all information is being supplied to its auditor, SizweNtsalubaGobodo, for review
- Another 20 vaguely refer to 'multiple transactions' that makes any further analysis impossible without further detail from the Finance Minister
- The remaining 17 transactions (totalling R719 million) were also all for legitimate purposes and are absolutely not suspicious. We will disclose these transactions in full, once the full analysis has been completed
- · All of the 72 transactions were approved and cleared by the respective banks processing the transactions
- The fact that all transactions were approved is acknowledged in the attachment to Minister Gordhan's application, in the form of a signed letter from the Deputy Governor of the Reserve Bank
- · None of the transactions related to Oakbay or the Family, which are over a five year period, were flagged to the FIC as suspicious. To put this in context, the FIC's own 2015-16 Annual Report showed that 98,054 transactions in that year alone were flagged as suspicious by the banks (i.e. STRs).
- One of the largest transactions flagged in Minister Gordhan's application was the transfer of the Optimum Rehabilitation Trust's Account (over R1.3 billion) from Standard Bank to the Bank of Baroda. Yesterday, we proved this was bona fide and approved by all relevant authorities (pdf attached). The transfer occurred because all of Oakbay's accounts were being closed.

 $\cdot$  Whilst we thoroughly welcome this application, it is undiluted nonsense and appears to be little more than the usual political games.

To reiterate, we are delighted to have received this application. The truth always comes out in the end and we look forward to clearing our name in court.

Issued by Oakbay.

For more information, please contact:

For Family: contact@guptafamily.co.za

For Oakbay: corpcomm@oakbay.co.za

m (

# "SB46"

From: Ronica Ragavan <<u>ronica@oakbay.co.za</u>>
Sent: Thursday 21 April 2016 18:27
To: Ramlah, Geraldine G
Cc: Naidoo, Venorthy V; Ugeshni Naidu
Subject: Movement of Deposits

#### Dear Geraldine

WE have presently a R1.456 billion in account 494262 we would like to move this funds to another bank,

Please advise if I may send through the instruction on this account.

#### Regards

Ronica Ragavan Group Finance +27 83 402 1388 | ronica@oekbey.co.za

Physical Address: 144 Katherine Street Grayston Ridge Block A | Sandton | 2031





Au (

# "SB47"

From: Ramiah, Geraldine G Sent: 22 April 2016 10:39 AM

To: Ronica Ragavan

Cc: Naidoo, Venorthy V; Ugeshni Naidu; pmarsden@matusonassociates.co.za; peter@v2rescue.co.za

Subject: RE: Movement of Deposits

Dear Ronica

Thanks for the feedback, we will await the change in Trustees supported by the relevant Resolutions and KYC documents for us to amend our records.

Regards Geraldine

From: Ronica Ragavan [mailto:ronica@oakbav.co.za]

Sent: 22 April 2016 10:18 AM To: Ramiah, Geraldine G

Cc: Naidoo, Venorthy V; Ugeshni Naidu; pmarsden@matusonassociates.co.za; beter@v2rescue.co.za

Subject: RE: Movement of Deposits

Dear Geraldine

We do understand that this is a process. Meanwhile signatures on the account have not been changed yet as I understand from eth email below. The new trustees are in process of being changed.

Thanks Ronica

From: Ramiah, Geraldine G [mailto: <u>Geraldine.Ramiah@standardbank.co.za</u>]

Sent: Friday, 22 April 2016 10:13 AM

To: Ronica Ragavan < <u>ronica@oakbav.co.za</u>>

Cc: Naidoo, Venorthy V < <u>Venorthy.Naidoo@standardbank.co.za</u>>; Ugeshni Naidu

< <u>Ugeshnin@sahara.co.za</u>; <u>pmarsden@matusonassociates.co.za</u>; <u>peter@v2rescue.co.za</u>

Subject: KE: Movement of Deposits

#### Dear Ronica

We are not able to process any instructions on this account without a request from the authorised signatories given strictly in accordance with the terms of the Trust Deed.

The account holder is the Optimum Mine Rehabilitation Trust and the authorised signatories are those appointed by resolution of the Trustees. Such resolution states that any change in the office or powers of any of the persons authorised by such resolution or in the event of any such person being replaced will be certified by the Trustees in writing.

Please note that I have also coded the Business Rescue Practitioners on this email as I understand that the Trust is still under the control of the BRP.

Regards

fun l

#### Geraldine



#### Geraldine Ramiah

FXMM: Corporate and Public Sector Tel +27 (0)114.15 8245/ Mobils +27 (0)84 506 7889/ <u>Geraldine.ramiah@standardbank.co.za./www.standardbank.com</u>

Standard Bank Moving Forward

**多野草面面**类

From: Ronica Ragavan [mailto:ronica@oakbav;co.za]
Sent: 21 April 2016 06:27 PM
To: Ramlah, Geraldine G
Cc: Naldoo, Venorthy V; Ugeshni Naldu
Subject: Movement of Deposits

#### Dear Geraldine

WE have presently a R1.456 billion in account 494262 we would like to move this funds to another bank,
Please advise if I may send through the instruction on this account.

## Regards

Ronica Ragavan Group Finance +27 83 402 1388 | ronica@oakbav.co.za

Physical Address 144 Katherine Street Grayston Ridge Block A. Sandton | 2031 OAKBAY

The principal of the state of t

Standard Bank email disclaimer and confidentiality note
Please go to
http://www.standardbank.co.za/site/homepage/emaildisclaimer.html to read
our email disclaimer and confidentiality note. Kindly email
disclaimer@standardbank.co.za (no content or subject line necessary) if you
cannot view that page and we will email our email disclaimer and
confidentiality note to you.

and

होते व्हे व्यक्तिमानह



"5843"

# MAGTIGINGSBRIEF LETTERS OF AUTHORITY

Ingevolge Artikel 6(1) van die Wet op Beheer oor Trustgoed, 1968 (Wet 57 van 1988) In terms of Section 6(1) of the Trust Property Control Act, 1988 (Act 57 of 1988)

(1) the first are so the second section of the second section of the section of t					
Hiermen word gesertifiseer This is to certify that ALTHAF EMMAMALLY - 690 PUSHPAVENI UGESHINI GO	7145142089 VENDER - 750424015788	15		***************************************	
TREVOR WILLIAM SCOTT -	7812315130089	i mamarita de se il est	*************	#	ern fort is wall ore . s. day :
\$ \$7 \$70 \$20 \$10 \$2 \$70 \$10 \$10 \$10 \$10 \$10 \$10 \$10 \$10 \$10 \$1					
********************************	######################################	19149911911119 <sub>99</sub> 149446	p4 42 - 1 4 - 1		**************************************
0 P 0 F 0 F 1 7 1 7 1 7 1 7 1 7 1 7 1 7 1 7 1 7 1	tida harre eshandi in ha serba an canasa ag dada ;		le salbri a laduas appq.	\$\$2000 ar \$ \$40\$ \$ \$44 may represent \$ 2.24	#166##################################
		terrakanstri Kiriltere		***************************************	0-+5 <i>e</i> -f4pmp35111+2mpp
genagtig word om op te tre islare hereby authorized to OPTIMUM MINE REHABILITA	act as trustee(s) of the		31.0700000000000000000000000000000000000		***************************************
GEGEE onder my hand te		op hede die	•.		
GIVEN under my hand at		this .	day	of	year
Dance					
Signature ASSISTENT MEESTER ASSISTANT MASTER	HASTER OF THE HORT HIGH COURT PRE AIRALS BUT AIRALS BUT AIRALS BUT AIRALS BUT AIRALS HORT	2 6			

entition of the property throats been opposed

m /





First Floor, Saveways Crescent Centre, Mandela Drive, Witbank, 1035 Private Bag X7279, Emalahleni, 1035, Tel (013) 653 0500, Fax (013) 690 3288 Enquiries: Mr. N.A Tshivhandekano Ref: MP 30/5/12/3 (267) MR

The Directors
Tegeta Exploration and Resources (Pty) Ltd
Postnet Suit 458
Private Bag X9
Johannesburg
2010

Dear Sit/Madam

RE: NOTIFICATION IN TERMS OF REGULATION 8 OF THE FINANCIAL REGULATIONS PROVISIONS OF THE NATIONAL ENVIRONMENTAL MANAGEMENT ACT 107 OF 1998 ("NEMA") OPTIMUM COAL MINES (PTY) LTD.

Reference is hereby made to your letter dated 29 April 2016. In this regard the Department acknowledges the moving of the funds for financial provision held in a Trust Account with Standard Bank to the Bank of Baroda, Johannesburg, provided that such bank is registered with Reserve Bank of South Africa.

In this regard please ensure that the funds shall remain in the present Trust created under section 8(1)(c) i.e. Trust Deed No IT 3696/07

For further enquiries, please contact the Regional Manager on the above contact details.

Yours faithfully

REGIONAL MANAGER: MPUMALANGA

and /



27 May 2016

The Trustees Optimum Mine Rehabilitation Trust. Lower Ground Floor, Block A Grayston Ridge Office Park 144 Katherine Street Sandton 2196

.

And to

Mr Piers Marsden and Mr Peter van den Steen Joint Business Partner Rescue Practitioners V-Squared Business Rescue Services (Pty) Ltd 916 Wexford Drive Dainfern Golf and Residential Estate Dainfern 2055

Dear Sir

TERMINATION OF THE BANKING RELATIONSHIP BETWEEN STANDARD BANK AND OPTIMUM MINE REHABILITATION TRUST (IT 3693/07)

We refer to the notification to us of the change in Trustees for the Optimum Mine Rehabilitation Trust and the request to us that we substitute the authorised signatories for the account's currently held in the name of Optimum Mine Rehabilitation Trust (\*OMRT\*), pursuant to the sale of shares agreement between Optimum Coal Holdings Proprietary Limited and Tegeta Exploration and Resources (\*Tegeta\*)("the Purchase and Sale").

After due consideration, SBSA has decided not to establish a business relationship with Tegeta and consequently will be terminating its relationships with all companies acquired by Tegeta in terms of the Purchase and Sale.

The effect of this decision is that SBSA will need to terminate its existing banking relationship with Optimum Mine Rehabilitation Trust on reasonable notice.

In accordance with the terms of the Trust Deed governing the management and disposal of the funds held in the Optimum Rehabilitation Trust account and that is set aside as a rehabilitation fund for the Optimum Coal Mine, we hereby request the trustees of the Trust and the Business Rescue Practitioners for Optimum Coal Holdings and its former subsidiaries to make arrangements for the transfer of the funds standing to the

Standard Bank Centre 1st Picor 5 Strontonds Street Johannesburg 2001 / PO Box 61890 Matchiathown 2107 South Africa Tel. Switchboard: +27 (0)11 555 6112 Fex +27 (0)11 555 4207 / Nante Stronghe@standardbank.co.ze/standardbank.co.ze

Spiritura. Establicatio Camanoni. Al Lauralium (Chol Espainus, O. A Grobaus. Andri Senius and Berstandah). Bil Lauralium (Chol Espainus and Robusta and Andria. Andreas and An

\$1/85C016

Militaria /Militaria

Corporate and Investment Banking

Standard Bank Moving Forward " /

In

credit of the OMRT account/s with Standard Bank to another Institution subject to the prior written approval of the Department of Mineral Resources being obtained.

Yours sincerely

Kenny Fihla

Franchise Head: Corporate and Investment Banking, SA

....

cc David Munro, Chief Executive, Corporate and Investment Banking

Standard Bank Moving Forward' /

m /





#### EXTRACT FROM THE MINUTES OF THE MEETING OF THE TRUSTEES OF

## OPTIMUM MINE REHABILITATION TRUST (REGISTRATION NUMBER: IT 3696/07)

## ("THE TRUST")

## HELD AT SANDTON ON THE 13TH JUNE 2016

The Trustees have received a notice from the present bankers of the Trust (Standard Bank of South Africa) for closure of the trust account maintained with them.

#### IT WAS RESOLVED THAT:

- 1. the Trust request Bank of Baroda, Johannesburg to open the account of the Trust with them.
- 2. the Trust funds presently field with Standard Bank should be transferred to the account with Bank of Baroda, Johannesburg once the account is opened.
- 3. P U Govender in her capacity as the Trustee of the Trust be and is hereby authorised to sign all the documents required to give effect to the resolution.

CERTIFIED A TRUE COPY

Chairman of the Meeting.

Optimum Mine Rehabilitation Trust
(Trust No.: 1713693/07)

144 Katherine Street, Grayston Ridge Office Park, Block A Lower Ground Floor, Johannesburg, South Africa
Tel.: +27 11 542 2200 Fax: 085 605 1814

Trustees: PU Govender | TW Scott | A Emmamally

mol



21 June 2016

The Honourable Minister Department of Environmental Affairs Environment House 473 Steve Biko Road Arcadia Pretoria 0083

Dear Minister,

RE: NOTIPIGATION IN TERMS OF REGULATION B OF THE FINANCIAL REGULATIONS OF THE NATIONAL ENVIRONMENTAL MANAGEMENT ACT 107 OF 1988 ("NEMA") ("THE REGULATIONS") : INSTRUCTION TO TRANSFER FUNDS HELD FOR OPTIMUM COAL MINES REHABILITATION TRUST

Pursuant to the sale of 100% of the shares of Oplimum Goal Mine (Pby) Ltd by Optimum Coal Holdings (Pty) Ltd to Tegeta Exploration and Resources (Pty) Ltd ('Tegeta'), we advise:

- 1. In terms of Regulation 8(1)(c) of the Regulations, Optimum Coal Mines Rehabilitation Trust ("OCMT) has deposited "R1A billion as the financial provision for rehabilitation with the Standard Bank of South Africa Limited
- 2. The funds are held in the name of OCMT that is registered under Trust Deed No. IT 13693/07 ("the Trust").
- 3. We have received an instruction from the trustees of OCMT (all appointed by Tegeta) to transfer the funds referred to in 1 above to the Bank of Baroda, Johannesburg, with immediate effect.
- 4. We have also received a letter from the office of the Regional Manager: Mpumalanga Mineral Regulation (addressed to Tegeta) stating that he has no objection to the transfer of the funds to the Bank of Baroda, Johannesburg.

in terms of the Frust, the funds are earmerked for the rehabilitation of the rome owned by Optimum Coal Mines (Pty) Ltd and therefore we believe that your Ministry has an interest in the application of the funds.

Stundard Bink Cegics 14 Floor 5-Simmonds Skryst Johnsneiburg 2001 / PO Box 61890 "Waishelikwir 2107 Bouth Africa Teb Switchboards +27 (0):11 635 91 (2 Fex +27 (0):11 636 4207 / Hen-Synton @alandardbank.co.zet abandardbank.co.ze

CONTROL TO PROPERTY MANUSCRIPTION FOR ANNALY SELECTED BOOK OF THE SECURITIES OF THE SECURITIES AND ASSESSED TO THE PROPERTY OF El Block, Lift and Romes & De Demochande, Roharm Volg befords conser Noblem 125 ancompas, be excellent Selfen Bedand, Le Collecte Coloured To Tringules, long froduction on a Democks, law Demock B105/6016

investion believe project reprinting

Standard Bank Moving F

We therefore hereby give you notice that the funds held with us for the financial provision for the rehabilitation of the mine owned by Optimum Goal Mine (Pty) Ltd have been transferred to the Bank of Baroda, Johannesburg.

Yours faithfully

IHS SINTON

GROUP GENERAL COUNSEL

Standard Bank Moving Forward

the HA stabank. 1500

1961

# IN THE HIGH COURT OF SOUTH AFRICA. (GAUTENG DIVISION, PRETORIA)

CASE NO: 80978/16

In the matter between:

**MINISTER OF FINANCE** 

**Plaintiff** 

And

OAKBAY INVESTMENTS (PTY) LTD	1 <sup>st</sup> Respondent
OAKBAY RESOURCES AND ENERGY LTD	2 <sup>nd</sup> Respondent
SHIVA URANIUM (PTY) LTD	3 <sup>rd</sup> Respondent
TEGETA EXPLORATION AND RESOURCES (PTY) LTD	4 <sup>th</sup> Respondent
JIC MINING SERVICE (PTY) LTD	5 <sup>th</sup> Respondent
BLACKEDGE EXPLORATION (PTY) LTD	6 <sup>th</sup> Respondent
TNA MEDIA (PTY) LTD	7 <sup>th</sup> Respondent
THE NEW AGE	8 <sup>th</sup> Respondent
AFRICA NEWS NETWORK (PTY) LTD	9 <sup>th</sup> Respondent
VR LASER SERVICES (PTY) LTD	10 <sup>th</sup> Respondent
ISLANDSITE INVESTMENTS ONE HUNDRED AND EIGHTY (PTY) LTD	11 <sup>th</sup> Respondent
CONFIDENT CONCEPT (PTY) LTD	12 <sup>th</sup> Respondent
JET AIRWAYS (INDIA) LTD (INCORPORATED IN INDIA)	13 <sup>th</sup> Respondent
SARAHA COMPUTERS (PTY) LTD	14 <sup>th</sup> Respondent
ABSA BANK LTD	15 <sup>th</sup> Respondent





FIRST NATIONAL BANK LTD	16 <sup>th</sup> Respondent	
STANDARD BANK OF SOUTH AFRICA LIMITED	17 <sup>th</sup> Respondent	
NEDBANK LIMITED	18 <sup>th</sup> Respondent	
GOVERNOR OF THE SOUTH AFRICAN RESERVE BANK	19 <sup>th</sup> Respondent	
REGISTRAR OF BANKS	20 <sup>th</sup> Respondent	
DIRECTOR OF THE FINACIAL INTELLEGENCE CENTRE	21 <sup>st</sup> Respondent	
And		
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	Interested Party	
AFFIDAVIT		

I, the undersigned,

## **KGOSI GUSTAV LEKABE**

Do hereby make oath and say that:

 I am an adult male, appointed as a The State Attorney in terms of the State Attorneys Act 56 as amended within the Johannesburg office with its principal place of business situated at Kruis and Main Street, Northstate Building, Gauteng.

CM.



- 2. I am duly authorised to depose this affidavit on behalf of the interest party.
- 3. The facts contained in this affidavit are, to the best of my knowledge, true and correct and are, save where the context otherwise indicates. within my personal knowledge.

## THE PARTIES

- 4. The parties to the main application are described in the founding affidavit of the Minister of Finance who is the applicant in the main application.
- 5. The interested party is the President of the Republic of South Africa ("the President"). The President is one of the parties who will be directly affected by the declaratory order that is sought by the seventeenth respondent ("Standard Bank").

## THE PURPOSE OF THIS AFFIDAVIT

- 6. The purpose of this affidavit is
  - 6.1 to take issue with the irregular attempt on the part of Standard Bank to seek relief directly affecting the President and other Members of the Cabinet without properly joining them as parties in the proceedings, and



1503

6.2 to place before this Court correspondence relating to my 1964 attempts on behalf of the interested parties, to avoid this collateral issue wasting the time of this Court when it hears the principal application.

## THE RELIEF IRREGULARLY CLAIMED BY STANDARD BANK

- 7. Attached as Annexure "SB1" to the answering affidavit of Standard Bank is a document describing itself as a "Notice of Motion". It states that Standard Bank seeks an order in the following terms:
  - \*1. It is declared that no member of the National Executive of Government, including the President and all Members of the Cabinet, acting of their own accord or for and or on behalf of Cabinet, is empowered to intervene in any manner whatsoever in any decision taken by the 17<sup>th</sup> Respondent to terminate its banking relationships with Oakbay Investments Proprietary Limited and its associated entities.
  - 2. Further and/or alternative relief.
  - 3. Costs in the event of opposition"
- 8. In its answering affidavit, Standard Bank makes clear that it proposes to seek the relief set out in Annexure "SB1" at the hearing of the main application.

CH!

1965



- 9. The relief set out in Annexure "SB1" directly affects the President and the other Members of the Cabinet in their official capacities. In effect, it is an attempt to engage the power of this Court to order the President and the other Members of the Cabinet not to exercise their executive powers in a manner that Standard Bank would not want them to exercise those powers.
- 10. Neither the President, nor any of the other Members of Cabinet are before this Court as parties to the application launched by the Minister of Finance. In the circumstances, if Standard Bank wanted to pursue its proposed relief and to do so at the hearing of the application launched by the Minister of Finance, it was obliged to take steps to have the President and all Members of the Cabinet other than the Minister of Finance joined as parties in those proceedings.
- 11. However, Standard Bank elected not to attempt to have the President and the other Members of the Cabinet joined as parties in the application of the Minister of Finance. Instead, it has attempted to avoid the inevitable delays and possible difficulties it may have encountered in this regard by simply notifying the office of the President that it intended to seek the relief set out in Annexure "SB1" and effectively inviting the President to apply to intervene in the application of the Minister of Finance.

C.H.



- 12. The President has no desire to intervene in the application of the Minister of Finance and cannot be compelled to do so because Standard Bank refuses to follow the ordinary processes for bringing parties before this Court. Nor can the President be bound by court orders sought in proceedings in which he is not a party.
- 13. The President has pointed these facts out to the attorneys of Standard Bank in correspondence, but Standard Bank persists in its attitude that it does not intend taking any steps to join the President as a party in the proceedings brought by the Minister of Finance but nevertheless maintains a right to seek relief against the President in those proceedings.
- 14. The President has accordingly been advised to place this affidavit before the Court to register his objection to the procedure adopted by Standard Bank and to make the relevant correspondence available to this Court.

## THE CHRONOLOGY AND THE CORRESPONDENCE

15. On 15 December 2016, the attorneys of Standard Bank addressed a letter to the Office of the President attaching a copy of the answering affidavit of Standard Bank and indicating that it would be seeking relief against the President at the hearing of the application brought by the Minister of Finance. In their letter, the attorneys of Standard Bank noted that the President had not been joined in the main action and stated that

Q. M.



the affidavit was being furnished to the President "to avoid any contentions of non-joinder". A copy of the letter of 15 December 2016 is attached as "KGL1".

- 16. The Office of the President addressed a holding letter to the attorneys of Standard Bank on 21 December 2016. A copy of this letter is attached as "KGL2". The attorneys of Standard Bank addressed a further letter to the Office of the President on 18 January 2017 attaching a copy of the directive of the Deputy Judge President of 22 December 2016 and a copy of the notice of motion in case no 92027/2016 which had been set down for hearing together with the application of the Minister of Finance. A copy of the letter of Standard Bank's attorneys of 18 January 2017 is attached as "KGL3".
- 17. On 7 February 2017, on behalf of the President, I addressed a letter to the attorneys of Standard Bank pointing out the irregularity of the course of conduct they had pursued and indicating that the President would not be seeking to intervene in the proceedings. I concluded by pointing out that if Standard Bank wished to bring an application against the President, it should do so properly and in terms of the processes contemplated in the rules of court. A copy of my letter of 7 February 2017 is attached as "KGL4".

Q. H.



- 18. Standard Bank did not respond to my letter of 7 February 2017.

  Accordingly on 7 March 2017 I addressed a follow up letter to their attorneys. A copy of my letter of 7 March 2017 is attached as "KGL5".
- 19. On 8 March 2017, the attorneys of Standard Bank addressed a letter to my offices in which they noted the position of the President and confirmed that Standard Bank did not intend to introduce the President as a party in the proceedings. A copy of this letter is attached as "KGL6".
- 20. The letter of 8 March 2017 was ambiguous in that it did not indicate whether Standard Bank still intended to seek the relief in "SB1" in proceedings to which the President was not a party. So, on 10 March 2017, I addressed a letter to the attorneys of Standard Bank seeking clarification in this regard. A copy of my letter of 10 March 2017 is attached as "KGL7".
- 21. On 15 March 2017, the attorneys of Standard Bank wrote to my offices indicating that Standard Bank would persist with its attempt to seek the relief in "SB1". A copy of this letter is attached as "KGL8".
- 22. Following my receipt of the letter of 15 March 2017 counsel briefed to represent the President spoke to counsel for Standard Bank who confirmed that he had instructions to persist with the prayer for relief in "SB1" even if the President was not a party to the proceedings.





23. On 20 March 2017, counsel for the President advised that this affidavit and the practice note to which it is attached should be filed at Court as

## CONCLUSION

soon as possible.

- 24. For the reasons set out above, I respectfully submit that
  - 24.1 Standard Bank may not seek the relief set out in "SB1" in the present proceedings because the President has not been joined as a party to the present proceedings.
  - 24.2 The application of Standard Bank for the relief set out in its "notice of motion", "SB1", should accordingly be struck from the roll, and
  - 24.3 Standard Banks should be directed to pay the costs of the President occasioned by its irregular attempt to seek relief against the President in proceedings to which he is not a party, such costs to include the costs of two counsel.

WHEREFORE I pray for the striking off the roll of the application of Standard Bank with costs, such costs to include the costs of two counsel.

CH.



THUS SIGNED AND SWORN to before me at JOHANNESBURG on this the Z3rd. day of MARCH 2017 by the deponent he having acknowledged that he knows and understands the contents of this affidavit and considers the same to be true and correct, that he has no objection to taking the prescribed oath and considers

the same to be binding on his conscience.

COMMISSIONER OF OATHS

107 Matel sheet. Elephanthouse Johannesbry.





- 1971

BOWMAN GILFILLAN
165 West Street, Sondion, Johannesburg
PO Box 765812, Sandion, 2145, South Africa
T +27 fl 569 9000 } F +27 fl 569 9001
Doces: 6 Johannesburg
E Info-sa@bowmandaw.com

mer weller terrord were

Our Reference:

C Mklva / A Keep / 6164672

Your Reference:

Direct Line; Empli Address: 011 669 9206 / 9348

Dote:

15 December 2016

clement\_mit/ro@bowmonslow.com / olon.keep@bowmonslow.com

The President of the Republic of South Africa President Jacob Gedleythlekisa Zuma

Union Buildings Private Bag X1000, Preforia, 0001

E-mail: president@presidency.gov.za

Dear President Zuma,

## MINISTER OF FINANCE / OAKBAY INVESTMENTS (PTY) LID & OTHERS CASE NO.: 80978/2016

- During October 2016, the Minister of Finance, Mr. Pravin Jamnadas Gordhan, instituted an
  application in the High Court wherein he seeks that the Court grant him declaratory relief ("the
  Application"). The relief sought by the Minister of Finance is set out in his notice of motion in the
  Application, a copy is annexed hereto marked "A".
- The Standard Bank of South Africa Limited ("our client") is cited as the Seventeenth Respondent in the Application.
- 3. We are instructed to bring to your attention, as the Head of the National Executive and Cabinet, that our client has now filed an Explanatory Supporting Affidavit ("the Affidavit") and in terms of the Affidavit seeks that the court widens the ambit of the relief sought by the Minister of Finance. The extended relief sought by our client is as follows:

"It is declared that no member of the National Executive of Government, including the President and all Members of the Cabinet, acting of their own accord or for and/or on behalf of Cabinet, is empowered to intervene in any manner whatsoever in any decision taken by the 17th Respondent to terminate its banking relationships with Oakbay Investments Proprietary Limited and its associated entities."

4. To avoid any contentions of non-joinder in the Application, please find enclosed hereto marked "B", a copy of the Affidavit for your records and perusal. We draw your attention to paragraph 5 of the Affidavit wherein our client states that it will ensure that the Affidavit is provided to you so

Botenzan Gilfilian Inc. Reg. No. 1998/021409/21 Attorneys Notaries Conveyencors

Directors: Als, Light, CChairmann ( Ph.) Producer (Deptity Chairman) | Al Fave Plantaging Parlant ( All Auditrizes) | DP Antistion ) | LI Auditrizes | LI Audi

KENYA MADAGASCAR SOUTH AFRICA LIGANDA







<del>-</del> 1972

that you or any other authorised member of the National Executive may participate in the Application should you elect or be advised to do so.

Please contact us should you have any queries.

4014

per Clement Mkiva / Alan Keep



# THE PRESIDENCY: REPUBLIC OF SOUTH AFRICA Private Bag X1000, Pretoria, 0001

Your Ref; C Midva / A Keep./ 6164672 Our Ref; SS/2016/1843

BOWMANS GILFILLAN INC PO BOX 785812 SANDTON 2148

BY E-MAIL: clement.mkiva@bowmanslaw.com / atan.keep@bowmanslaw.com

**Dear Sirs** 

RE: MINISTER OF FINANCE / OAKBAY INVESTMENTS (PTY) LTD & OTHERS CASE NO: 80978/2016

We refer you to the above and hereby wish to acknowledge receipt of your letter dated 15 December 2016 pertaining thereto, the contents of which have been noted by the Legal and Executive Services Unit.

We will need to take further instructions internally and will revert to you in the new year.

Kindly take note that any further correspondence pertaining to this matter should be addressed to the Legal and Executive Services Unit.

Yours faithfully

ADV SIBONGILE SIGODI

PRINCIPAL STATE LAW ADVISOR

21/12/2016

Adv Sibongile Sigodi Tel: 012 300 5435 E-mail: <u>Sibongile & ore: dency gov.za</u>



1974



BOWNAN GILPILLAN \_\_

165 West Street, Sandton, Johannesburg PO Box 785812, Bandton, 2148, South Africa T 427 H 669 9000 | F 427 H 668 9001 Dogak & Johannesburg

Our Reference: Direct Line:

C Mklva / A Keep / 6164672

Your Reference:

SS/2016/1843 18 January 2017

Email Address:

011 669 9206 / 9348 clement.midva@bawmonsiaw.com / alan.kaep@bawmonslow.com

Date:

Legal & Executive Services Unit: The Presidency Adv Sbonglie Sigodi Email: Sibonglie@presidency.govza

Dear Sirs

MINISTER OF FINANCE / OAKBAY INVESTMENTS (PTY) LTD & OTHERS CASE NO .: 80978/2016

1. We refer to your letter dated 21 December 2016.

- 2. We enclose hereto, as annexure "A", a directive from the Office of the Deputy Judge President (Gauteng Provincial Division, Pretoria) which sets out the dates for the filing of further documents in and the date of the hearing of this matter. Please note the contents of the directive, in particular the date of the hearing, for purposes of taking instructions internally.
- 3. You will note that the directive refers to an application under case number 92027/16. For your information, we enclose hereto, as annexure "B", the notice of motion under case number
- Please contact us should you have any queries

Bowman Gillian

per: Clement Mktva / Alan Keep

mn griffitan inc. Firg. No. 1998/021409/21 Atterneys Holaries Conveyance

HODARY | Decision | File | Decision | Public |

KENYA MADAGASCAR BOBIH AFRICA UGANDA





### OFFICE OF THE STATE ATTORNEY: JOHANNESBURG

Private Bag X9, JOHANNESBURG, 2000 10<sup>TH</sup> Floor, North State Building, 95 Albertina Sisulu Street (cnr Kruis), JOHANNESBURG, 2001

Docex 688, Johannesburg Tei (011) 330 7600 /7602 Fax 086 587 1152

My ref : 0576/17/P1

Your ref: C Mkivs / A Keep / 6164672

Eng :

: MR. K. G. LEKABE

E-mail: klekabe@justice.gov.za

Date: 07 February 2017

**MESSRS BOWMAN GILFILLAN ATTORNEYS** 

**165 WEST STREET** 

SANDTON:

**JOHANNESBURG** 

PER EMAIL: clement. mkiva@bowmanslaw.com

RE: MINISTER OF FINANCE / OAKBAY INVESTMENTS (PTY) LTD & OTHERS

CASE NO: 80978/2016

**OUR CLIENT: PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA** 

 Your letter of the 15 December 2016 accompanied by a full set of papers in the aforesaid matter addressed to our client has been handed over to us for the necessary attention and reply.

Our client aforesaid has not been cited as a party in the proceedings that are pending before the High Court in Pretoria under the said case number. Contrary to the rules of court and quite inappropriately if not opportunistically, your client, Standard Bank of South Africa Limited ('Standard Bank'), has sought to introduce our client as a party to the litigation. Our client is disheartened by the fact that your client, Standard Bank would resort to such a

(Always quote my reference number)

STATE ATTORNEY: K G Leisabe (B Proc, LLB, LLM) DEPUTY STATE ATTORNEYS: T Pilisy (B Proc, LLM) Law); ; Z N S O Nitisyisi (B Proc); V Ditutam (B Proc, LLM) SENIOR ASSISTANT STATE ATTORNEYS: B Du Preze (B. luris, B Proc); M C Engelsman (BA, LLB); A H Fouche (B Proc, LLB); D D Govender (B Proc); W R I Mabitasia (B Proc, LLB); S L Mekenna (B Proc); S J Mashintana (B Proc); L Fixtela (B Proc); LLM); Maharbe (B luris)(LLB) M E Smith (B Proc); C R Knoza (B Proc); V Menamela (B Proc); F Patell BA1LB); R T Proce (B Proc); J H Van Schallowyk (LLB); H R Jaskolka (B Proc, LLB) S Neidoo (BA Law, LLB); ASSISTANT STATE ATTORNEYS: H T Higa (B Proc); N T Horago (BA Economics and Accounting, LLB); D Lebenya (B Proc); H S Linda (BA, LLB); I T Matape (LLB); LLB); M H Maponya (B Proc); E L Matiou (B luris, LLB); H T Ngoberi (B luris, LLB); B P N Nicona (LLB); M J Sethurnya (LLB); C T Sethatiole (B Proc, LLB); R R Nematonde (LLB, LLM); D Mphephu (B Proc); K Thever (B. luris, LLB); M L Makebate(LLB); A Netahifnethe (LLB); L Maiounga (LLB); C S Magita (LLB); Z Sahib (Bsoc; LLB); S Shalk (Bsoc; LLB); S Magcaldri (LLB); K A Pholowane (LLB); C LLB); C LLB); S Magcaldri (LLB); K A Pholowane (LLB); C LLB); C LLB); S Magcaldri (LLB); K A Pholowane (LLB); C LLB); C LLB); S Magcaldri (LLB); K A Pholowane (LLB); C LLB); C LLB); C LLB); S Magcaldri (LLB); K A Pholowane (LLB); C LLB); C

OFFICE MANAGER:

TT Mithimunye (Dipl Public Admin; B-Tech Business Admin)



process which not only undermines the rules of court, but is unfair and unjust in relation to our client's rights.

- 3. Our client has been advised not to take any steps in reaction to your client's irregular processes and will resist the temptation to become involved at all. Should Standard Bank wish to bring an application against our client, it should do so properly and in terms of the processes contemplated in the rules of court and the law.
- 4. A copy of this letter will be presented to the presiding judge should the need arise.

Yours faithfully

KG. LEKABE STATE ATTORNEY JOHANNESBURG

(Always quote my reference number)

STATE ATTORNEY: K G Leksbe (B Proc, LLB) DEPUTY STATE ATTORNEYS: T Pilisy (B Proc; LLM); Lsw); ; Z N S O Nhlayisi (B Proc); V Dhuham (B Proc, LLM) SENIOR ASSISTANT STATE ATTORNEYS: B Du Preez (B. luris, B Proc); M C Engelsman (BA, LLB); A H Fouchs (B Proc, LLB); D D Govender (B Proc); W R I Mabitaela (B Proc, LLB); S L Makanna (B Proc); S J Manitahana (B Proc); L Fisiala (B Proc, LLM); ) Matherba (B luris)(LLB); M E Smith (B Proc); C R Khoza (B Proc); V Manameta (B Proc); F Paint (BA;LLB); R T Pooe (B Proc); J H Van Schallowyk (LLB); H R Jaskotka (B Proc); LLB); S Naidoo (BA Law; LLB) ASSISTANT STATE ATTORNEYS: H T Hige (B Proc); N T Hongo (BA Economics and Accounting, LLB); D Lebenya (B Proc); H S Linda (BA, LLB); I T Malage (LLB); LLB); M H Maponya (B Proc); E L Matiou (B luris, LLB); H T Ngobeni (B luris, LLB); B P N Nicoana (LLB); M J Sethunya (LLB); C T Sethatiole (B Proc, LLB); R R Nemakonde (LLB, LLM); D Myhaphu (B Proc); K Thaver (B.Luris, LLB); M L Makabate(LLB); A Netshithefha (LLB); L Makanga (LLB); C S Matjila (LLB); Z Sahib (Bsoc; LLB); S Shak (Beoc; LLB); S Magcalini (LLB); C G Jossie (LLB); N Sanda (LLB); O Puso (LLB); N Zibani N (LLB); S R Mogapi (LLB); K A Pholosope (LLB)

OFFICE MANAGER

TT Minimumye (Dipl Public Admin; B-Tech Business Admin)



### OFFICE OF THE STATE ATTORNEY: JOHANNESBURG

Private Bag X9, JOHANNESBURG, 2000 10TH Floor, North State Building, 95 Albertina Sisulu Street (cnr Kruis), JOHANNESBURG, 2001

Docex 688, Johannesburg Tel 011 330 7800

My ref :

Mr KG Lekabe

Your ref: C Mikiva/A Keep/6164672

Eng

MR KG Lekabe

E-mail:

KLekabe@justice.gov.za

Fax

088 587 1152

Date: 07 March 2017

**MESSRS BOWMAN GILFILLAN ATTORNEYS 165 WEST STREET** SANDTON **JOHANNESBURG** 

Per email.: clement.mkiva@bowmanslaw.com

Sir

RE:

MINISTER OF FINANCE/ OAKBAY INVESTMENTS (PTY) LTD & OTHERS

CASE NO.: 80978/2016

OUR CLIENT: PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA

We refer to our letter of the 7th February 2017 regarding the aforesaid matter and wonder as to whether circumstances do not permit of a reply.

Yours faithfully

**JOHANNESBURG** 

(Always quote my reference number)

STATE ATTORNEY: KG Lekabe (B Proc, LLB, LLM) DEPUTY STATE ATTORNEYS: T Pillay (B Proc; LLM)! Law); ; Z N S O Nitervial (B Proc); STATE ATTORNEY: K G Lekabe (B Proc, LLB), LLM) DEPUTY STATE ATTORNEYS: T Piliay (B Proc; LLM)! Law); ; Z N S O Nhleyial (B Proc.); V Dhulam (B Proc, LLM) SENHOR ASSISTANT STATE ATTORNEYS: B Du Prez (B. luris, B Proc); M C Engelsman (BA, LLB); A H Fouche (B Proc, LLB); D D Govender (B Proc); W R I Mabitsela (B Proc, LLB); S L Makenna (B Proc); S J Manlitahana (B Proc); L Fistela (B Proc, LLM); ) Metherbe (B iuris)(LLB) M E Smith (B Proc); C R Khoza (B Proc); V Manamela (B Proc); F Patel (BA;LLB); R T Poce (B Proc); J H Van Schallowyk (LLB); H R Jinskolke (B Proc, LLB); S Naidoo (BA Law; LLB) ASSISTANT STATE ATTORNEYS: H T Higa (B Proc); N T Hongo (BA Economics and Accounting, LLB); D Lebenya (B Proc); H S Linds (BA, LLB); I T Malaps (LLB); LLB); M H Maponya (B Proc); E Matiou (B Luris, LLB); H T Ngoberi (B luris, LLB); B P N Nicona (LLB); M J Sethunya (LLB); C T Sethaficle (B Proc, LLB); R R Nemakonde (LLB, LLM); D Mphephu (B Proc); K Thever (B.Luris, LLB) M L Makabate(LLB); N Nethilletine (LLB); J Mekunga (LLB); C S Metjila (LLB); Z Sahib (Beoc; LLB); S Shalik (Beoc; LLB); S Nagcakini (LLB); C G Jossie (LLB); N Sanda (LLB); O Puso (LLB); N Zibani N (LLB); S R Mogapi (LLB); K A Pholosyme (LLB); C S Magcakini (LLB); C G Jossie (LLB); N Sanda (LLB); O Puso (LLB); N Zibani N (LLB); S R Mogapi (LLB); K A Pholosyme (LLB)

OFFICE MANAGER:

TT Mithimunya (Dipl Public Admin; B-Tech Business Admin)

e o v





#### BOWHAR GILFILLAN

165 West Street, Sancton, Johannesburg PO Box 785812, Sandton, 214E, Smith Addes T +27 11 669 9000 | F +27 11 669 9001 Dicex 5 Johannesburg E Info-saffibowmenstaw.com

Our Reference: Direct Une:

C Mklvq/A Keep/6164672

Your Reference:

Q576/17/P1

(011) 669 9206

08 March 2017

Email Address:

Date: clement.midva@bowmorslow.com; clan,keep@bowmorslow.com

OFFICE OF THE STATE ATTORNEY: JOHANNESBURG Affection; Air KG Lekabe E-mail: Kiekabe@justice.gov.za

Dear Sirs,

MINISTER OF FINANCE / OAKBAY INVESTMENTS (PTY) LTD & OTHERS CASE NO.: 80978/2016

- We refer to your letters dated 7 February and 7 March 2017, respectively. 1.
- Your letter dated 7 February 2017 did not request a response from us and indicated that your 2 client does not wish to become involved at all in the matter. Accordingly, in our view a response was not necessary.
- Our client does not seek to introduce your client as a party to the aforesaid matter. The basis upon which our client's explanatory supporting affidavit was provided to your client is recorded in the affidavit itself and in our letter dated 15 December 2016 to your client.
- We thank you for advising us of your client's stance. 4.

Giffion

per: Clement Mkiva/Alan Keep

Militan Inc. Reg. No. 1998/021409/21 Attorneys Notaties Conveye

NA Look (Chairman) | Pri Hadisse (Deputy Chairman) | A.) Koso (Nieseging Budner) | A.G. Anderson |
-Niesba | Tr. Basto | J. of Solice | A.G. Instrance | F. Binger | Col. Rocker | E. Brist | ERW Burmen | L.D. Campbe |
- P. R.A. Deney | J. of Solice | Deputy | Deputy | Deputy | Col. Rocker | E. Brist | ERW Burmen | L.D. Campbe |
- P. R.A. Deney | J. of Solice | Deputy | Deputy | Deputy | Deputy |
- T. Boston-Grant | C.B. Geses | S. Giftmood | A. Spic | W. Hastel | As Istrat | P. Har-Durcke | P. A. Harch |
- J. J. S. Krissen | J. J. B. Foruger | S. Labuschingen | T. Labuschingen | Deputy |
- L. J. S. Krissen | J. J. B. Foruger | S. Labuschingen | T. Labuschingen | Deputy |
- L. J. H. Fright | J. B. Foruger | S. C. Motta | J. B. Hopotho | T. H. Herselt | M.J. Oppetholm | J. Plac | P. I.
- L. F. H. P. F. Solice | G. Russen | J.W. Stall | Deputy | J. Georgian | Deputy | Deputy |
- L. S. Company | G. Burcken | J. W. Stall | Deputy | Deputy | J. C. Solice | Deputy | Deputy |
- L. S. Company | Deputy | Deputy | Deputy | Deputy | Deputy |
- L. S. Company | Deputy | Deputy | Deputy | Deputy | Deputy |
- L. S. Company | Deputy | Deputy | Deputy | Deputy | Deputy |
- L. S. Company | Deputy | Deputy | Deputy | Deputy | Deputy |
- L. S. Company | Deputy | Deputy | Deputy | Deputy | Deputy |
- L. S. Company | Deputy | Deputy | Deputy | Deputy | Deputy | Deputy |
- L. S. Company | Deputy | Deputy | Deputy | Deputy | Deputy | Deputy |
- L. S. Company | Deputy | Deputy | Deputy | Deputy | Deputy | Deputy |
- Deputy | Deputy |
- Deputy | Deputy

KENYA MADAGASCAR SOUTH AFRICA YANZANIA UGANDA





1979

## OFFICE OF THE STATE ATTORNEY: JOHANNESBURG

Private Bag X9, JOHANNESBURG, 2000 10<sup>TH</sup> Floor, North State Building, 95 Albertina Sisulu Street (cnr Kruis), JOHANNESBURG, 2001

Docex 688, Johannesburg Tel (011) 330 7600 /7602 Fax 086 587 1152

My ref : 0576/17/P1

Your ref: C Mkiva / A Keep / 6164672

Eng : 1

: MR. K. G. LEKABE

E-mail: kieksbe@kustice.gov.za

Date: 10 March 2017

MESSRS BOWMAN GILFILLAN ATTORNEYS 165 WEST STREET SANDTON:

JOHANNESBURG

Per email: clement. mklva@bowmanslaw.com

Dear Sir

RE: MINISTER OF FINANCE / OAKBAY INVESTMENTS (PTY) LTD & OTHERS

CASE NO: 80978/2016

**OUR CLIENT: PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA** 

1. We acknowledge receipt of your letter of the 8th ultimo, contents whereof we have noted with thanks.

With respect, your letter still begs the question as to whether your client, notwithstanding the tenor of your letter under reply still intends seeking an order in the terms advised when the matter serves before court later this month.

(Always quote my reference number)

STATE ATTORNIEY: K G Lekebe (B Proc, LLB, LLM) DEPUTY STATE ATTORNIEYS: T Pillay (B Proc; LLM) Lear); ; Z N S O Nitayisi (B Proc); V Dhulam (B Proc, LLM) SENIOR ASSISTANT STATE ATTORNIEYS: B Du Preuz (B, burls, B Proc); M C Engelsman (BA, LLB); A H Fouche (B Proc, LLB); D D Govender (B Proc); W R I Mabitsele (B Proc, LLB); S L Matema (B Proc); S J Mathshama (B Proc); L Fistela (B Proc, LLM); Mainemele (B Proc); S J Mathshama (B Proc); L Fistela (B Proc, LLM); Mainemele (B Proc); F Patel (BA; LLB); R T Proce (B Proc); J H Van Schallwyk (LLB); H R Jaskolte (B Proc, LLB) S Naldoo (BA Leav; LLB) ASSISTANT STATE ATTORNEYS: H T Hige (B Proc); N T Hongo (BA Economics and Accounting, LLB); D Lebenya (B Proc); H S Linda (BA, LLB); I T Melape (LLB); LLB); M H Maponya (B Proc); E Matiou (B turls, LLB); H T Ngoberl (B turls, LLB); B P N Nicana (LLB); M J Sethunya (LLB); C T Sethatiole (B Proc, LLB); R R Nemekonde (LLB, LLM); D Mphephu (B Proc); K Thever (B.lurls, LLB); M L Makabate(LLB); A Netshithethe (LLB); L Melkunga (LLB); O S Medite (LLB); Z Sehib (Beoc; LLB); S Shalk (Beoc; LLB); S R Mogapi (LLB); K A Pholosana (LLB); C LLB); S R Mogapi (LLB); K A Pholosana (LLB); C LLB); S R Mogapi (LLB); K A Pholosana (LLB); C LLB); S R Mogapi (LLB); K A Pholosana (LLB); C LLB); S R Mogapi (LLB); K A Pholosana (LLB); C LLB); S R Mogapi (LLB); K A Pholosana (LLB); C LLB); S R Mogapi (LLB); K A Pholosana (LLB); C LLB); S R Mogapi (LLB); K A Pholosana (LLB); C LLB); S R Mogapi (LLB); K A Pholosana (LLB); C LLB); S R Mogapi (LLB); K A Pholosana (LLB); C LLB); S R Mogapi (LLB); K A Pholosana (LLB); C LLB); S R Mogapi (LLB); K A Pholosana (LLB); C LLB); S R Mogapi (LLB); C LLB); C LLB); C LLB); C LLB); C LLB); C LLB); C R Mogapi (LLB); C LLB); C LLB); C LLB); C R Mogapi (LLB); C LLB); C LLB); C LLB); C R Mogapi (LLB); C LLB); C LLB); C LLB); C R Mogapi (LLB); C LLB); C LLB); C LLB); C R Mogapi (LLB); C LLB); C LLB); C R Mogapi (LLB); C LLB); C LLB); C LLB); C R Mogapi (LLB); C LLB); C LLB); C R Mogapi (LLB); C LLB); C LLB); C R Mogapi (L

OFFICE HANAGER

T T Mithimunye (Dipl Public Admin; B-Tech Business Admin)

- 1980

 We will appreciate a definitive answer to the question aforesaid at this early stage for obvious reasons.

Yours faithfully

K.G. LEKABE, STATE ATTORNEY JOHANNESBURG

(Always quote my reference number)

STATE ATTORNEY: K G Leisabe (B Proc, LLB, LLM) DEPUTY STATE ATTORNEYS: T Pillary (B Proc; LLM) Law); ; Z N S O Nhieyisi (B Proc); V Dhulam (B Proc, LLM) SENIOR ASSISTANT STATE ATTORNEYS: B Du Preez (B. Lunis, B Proc); M C Engelsman (BA, LLB); A H Fouchs (B Proc, LLB); D D Govender (B Proc); W R I Mabitisele (B Proc, LLB); S L Mahamma (B Proc); S J Mentishama (B Proc); L Fistela (B Proc, LLM); ) Mahambe (B Lunis) M E Smith (B Proc); C R Khoza (B Proc); V Mensamela (B Proc); F Puthl (BA;LLB); R T Proce (B Proc); J H Vann Schallowyk (LLB); H R Jeskolten (B Proc, LLB); S Naktoo (BA Law; LLB) ASSISTANT STATE ATTORNEYS: H T Higa (B Proc); N T Hongo (BA Economics and Accounting, LLB); D Lebenrya (B Proc); H S Linda (BA, LLB); I T Malape (LLB); LLB); M H Maponrya (B Proc); E Matiou (B Lunis); LLB); H T Ngobeni (B Lunis, LLB); B P N Niconna (LLB); M J Sethunya (LLB); C T Setheticle (B Proc, LLB); R R Nematonde (LLB, LLM); D Mphephu (B Proc); K Thever (B.Luris, LLB); M L Makabata(LLB); A Netshilhetha (LLB); L Melunga (LLB); O S Metjita (LLB); Z Sahib (Beoc; LLB); S Sheik (Baoc; LLB); S Magcakini (LLB); C G Jossie (LLB); N Sanda (LLB); O Puso (LLB); N Zbani N (LLB); S R Mogapi (LLB); K A Pholontane (LLB)

OFFICE MANAGER: TT Minimunye (Dipl Public Admin; B-Tech Business Admin)





BOWMAN GILFILLAN

1981

165 West Street, Sendton, Johnstonesburg PO Box 785812, Sendton, 2145, South Africa 7 +27 TI 569 9000 ( F +27 TI 669 900) Discor & Johannesburg E Info-saffbowmansiaur.com

warts/hourneantless/coro

Our Reference: Direct Line:

C Mktva/A Keep/6164672

Your Reference:

0576/17/P1

Email Address:

Date: (011) 669 9206

15 March 2017

ciement.midya@bowmansiow.com; alan.keep@bowmansiaw.com

OFFICE OF THE STATE ATTORNEY: JOHANNESBURG Attention: Mr KG Lekabe

E-mail: KLekabe@justics.gov.za

Dear Sirs.

MINISTER OF FINANCE / OAKBAY INVESTMENTS (PTY) LTD & OTHERS CASE NO.: 80978/2016

- We refer to your letter dated 10 March 2017. 1.
- Your letter under repty indicates that our letter dated 8 March 2017 still begs the question of 2. whether our client intends seeding relief in this matter. We had not understood your previous letters or any of the letters from the Presidency as seeking an indication from our client on whether it still seeks an order in this matter. We had never given an indication that our client is no longer seeking the extended relief.
- We confirm that our client still seeks the extended relief. 3.
- It appears from the lost paragraph of your letter under reply that in light of our client's answer to your question, your client may take some form of action in this matter. We would appreciate it if you could advise us what that action may be.

nen Giffilen

er. Ciement Mkiva/Alan Keep

COLLINE INC. Reg. No. 1995/031408/21 Alcorous Metables Conveyancers

ers: RA Lagh (Chairmed) ( 9H Madure (Chapta) Chairmed) ( AJ Kenz Okhanging Pertret) ( E. A. Henz Okhanging Pertret) ( E. Berick) ( R. W. Garren) ( D. Chadad ( D. G. Bauger) ( R. Berick) ( R. Beri

KENYA SOUTH AFRICA TANZANIA UGÁNDA



NATIONAL TREASURY RECEIVED

2017 -08- 1 8

**LEGAL SERVICES** 

# THE HIGH COURT OF SOUTH AFRICA **GAUTENG DIVISION, PRETORIA**

**REPORTABLE: YES** 

OF INTEREST TO OTHER JUDGES: YES (2)

18 AUGUST 2017

**CASE NUMBER: 80978/2016** 

In the matter between:

MINISTER OF FINANCE

**APPLICANT** 

and

OAKBAY INVESTMENTS (PTY) LTD

1<sup>ST</sup> RESPONDENT

**OAKBAY RESOURES AND ENERGY LTD** 

2<sup>ND</sup>RESPONDENT

SIVA URANIUM (PTY) LTD

3<sup>RD</sup> RESPONDENT

TEGETA EXPLORATION & RESOURCES (PTY) LTD 4TH RESPONDENT

WESTDOWN INVESTMENTS (PTY) LTD

5<sup>TH</sup> RESPONDENT

**BLACKEDGE EXPLORATION (PTY) LTD** 

6<sup>TH</sup> RESPONDENT

TNA MEDIA (PTY) LTD

**7<sup>TH</sup> RESPONDENT** 

And in the matter between:	
CASE N	IUMBER: 92027/2016
CENTRE	
DIRECTOR OF FINANCIAL INTELLIGENCE	21 <sup>TH</sup> RESPONDENT
REGISTRAR OF BANKS	20 <sup>TH</sup> RESPONDENT
RESERVE BANK	19 <sup>TH</sup> RESPONDENT
GOVERNOR OF THE SOUTH AFRICAN	
NEDBANK LIMITED	18 <sup>TH</sup> RESPONDENT
THE STANDARD BANK OF SOUTH AFRICA LIMITED	17 <sup>TH</sup> RESPONDENT
FIRST NATIONAL BANK LTD	16 <sup>TH</sup> RESPONDENT
ABSA BANK LTD	15 <sup>TH</sup> RESPONDENT
SAHARA COMPUTERS (PTY) LTD	14 <sup>TH</sup> RESPONDENT
CONFIDENT CONCEPTS (PTY) LTD	12 <sup>TH</sup> RESPONDENT
AND EIGHTY (PTY) LTD	
ISLANDSITE INVESTMENTS ONE HUNDRED	11 <sup>TH</sup> RESPONDENT
VR LASER SERVICES (PTY) LTD	10 <sup>TH</sup> RESPONDENT
INFINIY MEDIA (PTY) LTD	9 <sup>TH</sup> RESPONDENT

1<sup>ST</sup> APPLICANT

2<sup>ND</sup> APPLICANT

OAKBAY INVESTMENTS (PTY) LTD

OAKBAY RESOURES AND ENERGY LTD

JUDGMENT						
THE DIRECTOR OF THE FINANCIAL  INTELLINGENCE CENTRE	RESPONDENT					
AND						
SAHARA COMPUTERS (PTY) LTD	10 <sup>™</sup> APPLICANT					
CONFIDENT CONCEPTS (PTY) LTD	9 <sup>TH</sup> APPLICANT					
ISLANDSITE INVESTMENTS ONE HUNDRED AND EIGHTY (PTY) LTD	8 <sup>TH</sup> APPLICANT					
VR LASER SERVICES (PTY) LTD	7 <sup>TH</sup> APPLICANT					
TNA MEDIA (PTY) LTD	6TH APPLICANT					
BLACKEDGE EXPLORATION (PTY) LTD	5 <sup>TH</sup> APPLICANT					
TEGETA EXPLORATION & RESOURCES (PTY) LTD	4 <sup>TH</sup> APPLICANT					
SIVA URANIUM (PTY) LTD	3 <sup>RD</sup> APPLICANT	~•	1984			

## THE COURT

## INTRODUCTION

[1] Before this court are two main applications and a parallel application. One judgment is prepared in respect of all the applications. After this court heard

argument, it made rulings in respect of several interlocutory issues that arose between the parties and reserved costs in respect thereof. Reasons for these rulings are also set out in this judgment.

- [2] The first main application (the application for declaratory relief) is brought by the Minister of Finance ('the Minister') in the public Interest, against Oakbay Investments (Pty) Ltd and its associated entities, (collectively referred to as the 'Oakbay Group'). The Minister seeks declaratory relief that he is not by law empowered or obliged to intervene in the relationship between the first to seventh, ninth to twelfth and fourteenth respondents on the one hand and the fifteenth to eighteenth respondents respectively on the other hand, regarding the closing of the bank accounts held by the former with the latter.
- [3] The seventeenth respondent, Standard Bank South Africa Limited ('Standard Bank') seeks, in a parallel application brought in the application for declaratory relief, declaratory relief couched in broader terms. The latter application is referred to as the application for extended relief.
- [4] The second main application, brought by several entities who are part of the Oakbay Group against the Director of the Financial Intelligence Centre ('the Director of the FIC'), is for an order compelling the Director of the FIC to disclose to the applicants certain information relating to reports made to the FIC by the applicants' erstwhile bankers. This application is premised on section 40 (1) (e) of the Financial

Intelligence Centre Act 38 of 2001('FIC Act')<sup>1</sup>. This application is referred to as the FIC application.

[5] The judgment is structured as follows: firstly, a detailed description of the parties is set out, followed by a brief exposition of background facts. Then the reasons for the rulings made in respect of the interlocutory issues are set out. Thereafter, the FIC application, the application for declaratory relief and the application for extended relief are dealt with sequentially.

### THE PARTIES

[6] Pravin Jamnadas Gordhan ('Mr. Gordhan') was the incumbent Minister of Finance and the head of the National Treasury of South Africa at the time of launching and hearing of the applications. He was appointed into that position in December 2015, having previously served in the same position from 2009 to 2014. This court takes judicial notice of the fact that on or about 30 March 2017, the day after the court reserved judgment, the President of the Republic of South Africa, the Honourable Mr. Jacob Gedleyihlekisa Zuma ('the President'), announced changes in the National Executive, and as consequence of these, Mr. Gordhan ceased to be the Minister of Finance. He was replaced in that portfolio by the Honourable Mr. Malusi Gigaba. Mr. Gordhan had brought the application for declaratory relief in his official capacity.

<sup>&</sup>lt;sup>1</sup> 40 Access to information held by Centre

<sup>(1)</sup> No person is entitled to information held by the Centre, except-

<sup>(</sup>e) in terms of an order of a court;

Initially, there were twenty-one respondents in the application for declaratory [7] relief. They fall into the following categories: fourteen entities that are part of the Oakbay Group, four major South African banks and three banking regulatory bodies. Initially, the respondents in the Oakbay Group were: Oakbay Investments (Pty) Ltd, Oakbay Resources and Energy (Pty) Ltd, Shiva Uranium (Pty) Ltd, Tegeta Exploration and Resources (Pty) Ltd, Westdown Investments (Pty) Ltd (initially cited as JIC Mining Services (Pty) Ltd), Blackedge Exploration (Pty) Ltd, TNA Media (Pty) Ltd, The New Age, Infinity Media (Pty) Ltd (initially cited as Africa News Agency Network (Pty) Ltd), VR Laser Services (Pty) Ltd, Islandsite Investments One Hundred and Eighty (Pty) Ltd, Confident Concepts (Pty) Ltd, Jet Airways (India) Ltd (Incorporated in India) and Sahara Computers (Pty) Ltd. Individual reference to these ears by their names. After the Oakbay Group objected to their misjoinder in its answering affidavit, the Minister deleted the citation of The New Age and Jet Airways and all subsequent references to these parties in his papers. As a result, nineteen remain in the application. Twelve respondents remain in the Oakbay respon Group. Going forward, reference to the Oakbay Group is to these twelve respondents. They initially collectively opposed the application for declaratory relief. Subsequently, VR Laser and Sahara Computers severed themselves from the opposition by the Oakbay Group and respectively filed supplementary opposing papers. Collectively the ten respondents in the Oakbay Group excluding VR Laser and Sahara Computers are referred to as the Oakbay respondents.

[8] The bank respondents are ABSA Bank Limited, First National Bank Limited, Standard Bank and Nedbank Limited. They are collectively referred to as 'the banks'. Individual reference to these respondents is by their names. They all support the

relief sought by the Minister. They have all filed affidavits placing additional material before the Court relating to the international banking regulatory framework, its domestication into South African law as well the risk that the banks face if they fail to act within the relevant international regulations and South African law. They also set out reasons why they support the relief that the Minister seeks. Counsel for the banks stated upfront that the banks do not seek a cost order against any party. They undertook to pay their own legal costs.

- [9] The banking regulatory respondents are the Governor of the South African Reserve Bank ('the Governor'), the Registrar of Banks ('the Registrar') and the Director of the FIC. They too filed answering affidavits to the application for declaratory relief, placing additional material before the Court which they consider relevant to the determination of the relief sought by the Minister. Although they state that they will abide by the decision of the Court, the material they have placed before the Court supports the relief sought by the Minister. They did not answer to the application for extended relief.
- [10] In the FIC application, the applicants are all the companies in the Oakbay Group with the exception of Westdown Investments (Pty) Ltd and Infinity Media (Pty) Ltd. Collectively, these entities are referred to as the Oakbay applicants. The only respondent is the Director of the FIC. The Minister, the banks as well as the two other banking regulatory respondents, namely the Governor and the Registrar are not party to the FIC application.

#### **BACKGROUND FACTS**

[11] In most cases, an application for declaratory relief involves the determination of a question of law. Facts bear relevance only to the extent that they assist the court to exercise its discretion judiciously to grant or refuse the application. The facts as set out in the papers filed between the parties are quiet prolixus; as a result, the papers filed are voluminous. They fall slightly short of 2000 folios. Given the succinct question of law that stands to be determined, as well as the rulings that this Court made in respect of the interlocutory issues that arose, no purpose would be served by delving deeply into the facts as set out in the papers.

[12] The pertinent background facts are largely common cause. In December 2015, ABSA gave notice to entitles in the Oakbay Group to whom it provided banking services, to terminate their contractual relationship and to close their bank accounts. At the time, the relevant entitles accepted this decision without any contestation. Subsequently, the other three banks took similar decisions, effectively unbanking the Oakbay Group. All the banks gave the Oakbay Group notice of termination of their banking relationship prior to closing their bank accounts. The Oakbay Group has not challenged the appropriateness or legality of the closure of its accounts by the banks.

[13] In April 2016, Mr. Howa, the then Chief Executive Officer of Oakbay Investments addressed a letter to Mr. Gordhan regarding the closure of the bank accounts of various entities in the Oakbay Group and the crisis it was thrust into as a result. In the letter, the Oakbay Group brought to Mr. Gordhan's attention the dire

implications of the actions of the banks to its continued business operations in South Africa, and the job losses that would result if the Oakbay Group was not able to continue to conduct business operations in South Africa. The Oakbay Group appealed to the Minister for 'any assistance that he might give' to prevent job losses. Mr. Howa estimated the job losses at 4,000 to 8,000 affecting over 50,000 individuals. Mr. Howa addressed similar letters to the Governor and the Registrar.

[14] Subsequently, Mr. Gordhan met with Mr. Howa and several executives of the Oakbay Group. They also exchanged several correspondence. Mr. Gordhan informed Mr. Howa that there is no legal basis for his intervention in the dispute between the banks and the Oakbay Group. The Governor responded in similar terms to Mr. Howa, informing him that he and the Registrar lack the legal authority to instruct a bank to serve or not to serve a particular client. All these officials advised Mr. Howa to seek recourse to the Banking Ombud or the Courts. Mr. Howa did not heed this advice. Instead, he addressed further correspondence to these officials pleading for their assistance. The Minister launched the declaratory application in October 2016.

It should be noted that before the hearing of the application, the Deputy Judge President convened a judicial case management meeting with the parties' legal representatives to discuss a time schedule for the filing of further affidavits, the heads of argument and to arrange a suitable date of hearing of the applications. A formal directive dated 22 December 2016 was sent to the parties, setting out timeframes for the filing of further papers. Some of the parties filed supplementary affidavits and supplementary heads of argument even though the Deputy Judge

President's directive did not authorize the filing of the said documents. This Court considered it expedient to accept the supplementary affidavits and supplementary heads of argument being satisfied that none of the parties would be prejudiced by the Court's acceptance of the said documents.

#### **INTERLOCUTORY ISSUES**

- [16] When the proceedings commenced on 28 March 2017 this Court dealt with four interlocutory issues and gave rulings in respect thereof, namely:
- 16.1 the position of the interested party, President Zuma;
- 16.2 an application by Sahara Computers for condonation for the late filling of a notice in terms of rule 7 of the Uniform Rules of Court and an application to compel the Minister to comply with the notice in terms of rule 7:
- 16.3 two applications by the Oakbay Group to strike out certain material from the Minister's founding and replying affidavits and an application by the Minister to strike out certain material from the Oakbay respondents' answering affidavits.
- [17] The Court refused to hear submissions from counsel for the interested party on the basis that President Zuma is not a party to these proceedings. It dismissed the two applications by Sahara Computers and granted all the applications to strike out. Reasons for these rulings are set out below.

#### THE POSITION OF THE INTERESTED PARTY

[18] When Standard Bank filed its answering affidavit to the application for declaratory relief it attached a notice of motion for the extended relief. Anticipating that the Zuma, who was not cited as a party in the application for declaratory relief may be interested in participating in these proceedings because of the extended relief that Standard Bank seeks, after filing its answering affidavit, Standard Bank caused its answering affidavit and the Minister's notice of motion to be delivered to the office of the President. Standard Bank did not apply for the President to be joined as a party to these proceedings. In its letter to the President, Standard Bank brought the application for extended relief to the attention of the President and invited him to join the proceedings if he had an interest in participating. Subsequently, Standard Bank also sent to the President the directives issued by the Deputy Judge President on 22 December 2016. To that letter, Standard Bank also attached the notice of motion in the FIC application.

[19] On 7 February 2017, the State Attorney addressed a letter to the attorneys for Standard Bank, objecting to the irregular procedure pursued by Standard Bank to invite the President to participate in these proceedings. The State Attorney also advised Standard Bank's attorneys that the President would not intervene in proceedings in which he is not joined as a party, on invitation by Standard Bank contrary to the Court rules. On 16 February 2017, Standard Bank filed a supplementary affidavit, apprising the Court of its interactions with the office of the President regarding the invitation it extended to him to join the application for declaratory relief. On 8 March 2017, Standard Bank informed the State Attorney that

it did not intend to introduce the President as a party to these proceedings. In subsequent correspondence exchanged between these parties, Standard Bank informed the State Attorney that it was persisting with the application for extended relief notwithstanding, that the President had not been joined.

[20] A day before the applications were heard, the State Attorney filed an affidavit entitled "Affidavit on behalf of interested party (President of the Republic of South Africa)", objecting to the irregular manner in which Standard Bank sought to invite him to participate in these proceedings. Pre-empting an argument by Standard Bank that because the President did not join the proceedings due to lack of interest, his non-participation in the application for extended relief should not be a bar to the granting of that application, the State Attorney also briefed senior and junior counsel to appear on behalf of the President at the hearing. The State Attorney sought costs against Standard Bank, including the costs of two counsel, occasioned by the irregular step it took against the President as described above. The State Attorney also sought the striking from the roll of Standard Bank's application with costs due to the non-joinder of the President.

[21] The Court had no legal basis to hear the President's counsel under these circumstances. As a non-party to the proceedings, the Court considered that the President had no standing before the Court. Therefore legally, he lacked any basis to file papers or to address the Court. It was on this basis that this Court informed the President's counsel that it cannot entertain his submissions.

[22] Standard Bank's contention that the President has communicated his disinterest in joining the proceedings is dealt more fully further below in the context of the application for extended relief.

THE APPLICATION FOR CONDONATION FOR THE LATE FILING OF THE NOTICE IN TERMS OF RULE 7 AND THE APPLICATION TO COMPEL COMPLIANCE WITH RULE 7

[23] On 17 March 2017, Sahara Computers served the Minister with a notice in terms of rule 7, calling on the Minister to satisfy the Court that the State Attorney is properly authorized to act for the Minister in the application for declaratory relief.

[24] The rule 7 notice was foreshadowed by a notice of substitution of attorneys for Sahara Computers, filed on 16 March 2017. Until then, Sahara Computers was represented in these proceedings by Van der Merwe Attorneys, who represented all the respondents in the Oakbay Group. The Minister responded with a rule 30 notice and a letter served on Sahara Computers objecting to, amongst others, the late filing of the rule 7 notice and the late filing of supplementary heads of argument by Sahara Computers. On 27 March 2017, Sahara Computers filed a condonation application for the late filing of the rule 7 notice. It also sought an application compelling the Minister to comply with the rule 7 notice. In the event that it succeeds in this application, Sahara Computers sought a personal order for costs against the Minister on a punitive scale. In the event of these applications being dismissed, the Minister sought a cost order against Sahara Computers on a punitive scale.

[25] The nub of Sahara Computers' reason for filing the rule 7 notice is that when organs of state instruct private attorneys to act on their behalf, or request the State Attorney to act in their interest, the organ of state takes a decision authorizing the private attorney or State Attorney as the case may be, to act on its behalf. Sahara Computers' contention further goes, if the Minister took such a decision in this case, then the Minister ought to file it. If it was not taken, then the State Attorney is acting mero motu and therefore unauthorized to act for the Minister.

[26] The Court records that in terms of rule 7(5), where the State Attorney is acting under his authority in terms of the State Attorney Act 56 of 1957, he shall not be required to file a power of attorney in terms of rule 7(1). The scope of authority of the State Attorney is set out in section 3 of the State Attorney Act. This section provides that the State Attorney performs on behalf of the government, work that is by law, practice or custom performed by attorneys. The Minister brought this application in his official capacity. He personally deposed to the founding and replying affidavits. There can be no doubt as to his participation in his official capacity in these proceedings. It was in any event in that official capacity that the Oakbay Group had sought his intervention in its dispute with the banks. Therefore his initiation of this litigation could not have been in any other capacity.

[27] It therefore follows that in these proceedings, the State Attorney is acting for the Minister within its scope of his duties in terms of section 3 of the State Attorney Act. Sahara Computers' request, flies in the face of rule 7(5). Any suggestion that the State Attorney is acting *mero motu* and that he is not authorized to act for the Minister is misconceived and is devoid of any legal basis.

[28] Sahara Computers has been party to these proceedings from the beginning. The notice of motion in respect of the declaratory application was served on Sahara Computers in October 2016. Van der Merwe Attorneys filed an answering affidavit on behalf of the Oakbay Group in January 2017. At that stage, the Oakbay Group mounted a collective opposition to the application for declaratory relief. This is evidenced by round robin resolutions pre-dating the answering affidavit, signed by the directors of various entities in the Oakbay Group including Sahara Computers.

[29] In terms of a directive issued on 22 December 2016 by the Deputy Judge President, the filing of affidavits closed on 27 January 2017, the date by which the Minister had to file his replying affidavit. All parties were due to file their practice notes and heads of argument by 24 February 2017. Until then, Sahara Computers had no difficulty with the State Attorney's representation of the Minister. The late substitution of its attorneys is not a good reason for the late filing of the rule 7 notice, which in any case, as demonstrated above, is in the circumstances of this case, incompetent.

[30] The rule 7 notice is clearly vexatious. It was filed extremely late, approximately five months after the application was launched and less than ten days before the application was to be heard. Sahara Computers failed to give a reasonable explanation for its late filing. The rule 7 notice took this Court completely by surprise. This Court found it extremely inconvenient to be unjustifiably burdened with further papers adding to the already voluminous papers filed in these proceedings. The dismissal of Sahara Computers' condonation application is

confirmed. The Minister is awarded costs on a punitive scale, against Sahara Computers in respect of the condonation application and the application to compel compliance with the rule 7 notice.

# APPLICATIONS TO STRIKE OUT BY THE OAKBAY GROUP AND THE MINISTER

[31] The first application to strike out brought by the Oakbay respondents and Sahara Computers, sought paragraphs 19 and 27 as well as Annexures P1 and P2 to the Minister's founding affidavit struck out. Paragraph 19 deals with the adverse impact persistent requests by the Oakbay Group to the Minister to intervene in the dispute between the Oakbay Group and the banks will have on the banking regulatory environment. Paragraph 27 introduces Annexures P1 and P2 into evidence. Annexure P1 is a letter the Director of the FIC addressed to the Minister dated 4 August 2016, under cover of which he sent the Minister Annexure P2. Annexure P2 is a certificate Issued at the Minister's request by the Director of FIC in terms of section 39<sup>2</sup> of the FIC Act, setting out 72 suspicious transactions reports (STRs)<sup>3</sup> reported to the FIC by the banks against several entities in the Oakbay Group and several associated individuals. In paragraph 27, the Minister draws an adverse inference from Annexure P2 against the Oakbay Group, using one

<sup>&</sup>lt;sup>2</sup> 39 Admissibility as evidence of reports made to the Centre
A certificate issued by an official of the Centre that information specified in the
certificate was reported or sent to the Centre in terms of section 28, 29, 30(2) or 31 is,
subject to section 38(3), on its mere production in a matter before a court admissible
as evidence of any fact contained in it of which direct oral evidence would be
admissible.

admissible.

This is a report made to the FIC in terms of section 29 of the FIC Act by an accountable institution, reporting institution and/or any other person in respect of a financial transaction they have encountered that is potentially linked to money laundering or terrorist financing.

transaction for R1, 3 billion set out in Annexure P2 as a suspicious transaction, to justify drawing such an inference.

[32] The Oakbay respondents and Sahara Computers filed a second application to strike out paragraphs 18, 24 and 27 of the Minister's replying affidavit. In paragraph 18, the Minister reiterates his views on the adverse impact persistent requests by the Oakbay Group to the Minister to intervene in the dispute between the Oakbay Group and the banks will have on the banking regulatory environment. He also reiterates his concerns regarding the R1, 3 billion transaction, allegedly earmarked for mining rehabilitation and the potential adverse impact on the fiscus if these funds are not utilized appropriately. He draws support from statements the Public Protector made in the State of Capture Report<sup>4</sup> in respect of this transaction. This report hardly requires any further description. The report was the subject of extensive media attention after the Public Protector released it in November 2016. The subtitle of the report, describes the report as:

"Report on an investigation into alleged improper and unethical conduct by the President and other state functionaries relating to alleged improper relationships and involvement of the Gupta family in the removal and appointment of Ministers and Directors of State-Owned Enterprises result in improper and possibly corrupt award of state contracts and benefits to the Gupta family's businesses."

[33] The Minister annexed the relevant excerpt from the State of Capture Report to his replying affidavit. He also defended his bona fides in seeking and filing Annexures P1 and P2. Paragraphs 24 and 27 deal with a finding contained in the State of Capture Report that the Oakbay Group and certain individuals associated to it influence the appointment of members of Cabinet.

<sup>&</sup>lt;sup>4</sup> Report No: 6 of 2016/2017

[34] The Minister also applied for the striking out of several words and phrases from the affidavits filed by the Oakbay respondents, deposed to by its incumbent Chief Executive Officer, Ronica Ragavan, and Ajay Kumar Gupta, one of the individuals presented in the papers filed in these proceedings as associated to the Oakbay Group. The relevant words and phrases are clearly set out in the Minister's Notice of Opposition and Strike Out dated 16 February 2017. To avoid prolixity they are not set out in this judgment. The relevant words and/or phrases accuse the Minister of dishonesty and of using material from the State of Capture Report to cloud issues, provoke media interest and to perpetuate an ongoing political benefit from the State of Capture Report.

[35] The interlocutory applications to strike out were all brought on the basis that the material sought to be struck out is scandalous, vexatious or irrelevant. In relation to some of the allegations contained in the State of Capture Report, the Oakbay respondents and Sahara Computers further contend that this material constitutes hearsay evidence. Rule 23(2) regulate applications to strike out. In terms of this rule, a party may apply for striking out where a pleading contains averments which are scandalous, vexatious or irrelevant. This rule allows the Court to strike out the said allegations if it is satisfied that the applicant will be prejudiced in the conduct of his/her claim or defense.

[36] The Interlocutory applications to strike out were precipitated by the approach the Minister opted to follow in respect of the application for declaratory relief. He states in his founding affidavit, and reiterates in his replying affidavit, that after he became aware from media reports of the dispute between the Oakbay Group and

the banks, and after he received direct representations from Mr. Howa asking him to intervene in that dispute, he became concerned about the Oakbay Group's allegations of impropriety by the banks and its potential impact on South Africa's financial stability. He was also concerned about the many job losses which the Oakbay Group presented as eminent. He considered these allegations to be in the public interest. For that reason, he explored legal means of addressing these issues. He sought legal advice twice and was informed in unequivocal terms, that there is no legal basis for him to intervene in what is a contractual dispute between private entities. He was also alerted of the risk that his involvement might attract from a banking regulatory perspective.

[37] He requested the Director of FIC to furnish him with a certificate in terms of section 39 of FIC Act relating to the reports made against Oakbay Group and associated individuals.

[38] The section 39 certificate lists 72 STRs sent to the FIC by the banks in terms of section 29 of the FIC Act against several companies who are part of the Oakbay Group and associated individuals. The suspicious transaction reports cast a cloud of impropriety on the part of Oakbay Group and associated individuals. They are prejudicial to them because they are not privy to the information that form the basis of those reports and as such, do not have the information they require to rebut the allegations that arise from these reports or to repel the cloud of impropriety the reports cast on them. The Oakbay applicants launched the FIC application in a bid to secure this information.

[39] Whether the allegations of impropriety on the part of the Oakbay Group are founded or unfounded has no place in these proceedings given the succinct legal question to be determined. By filing the section 39 certificate, the Minister forced the Oakbay Group to its defense. In defending itself, the Oakbay Group set out in its answering and subsequent affidavits that it filed, background facts to its woes with the banks and the Minister, questioned the Minister's bona fides and cast political aspersions on him. They commissioned a forensic analysis of the STRs. The forensic report finds that most STRs are inadequate to match them to the Oakbay Group and that those that can be matched are appropriate and lawful. As a result, a dispute of fact which is incapable of resolution on the papers arose on issues that bear no relevance to the application for declaratory relief.

[40] Furthermore, allegations contained in the State of Capture Report are irrelevant to the legal question to be determined and threaten to derail these proceedings. It was also inappropriate to introduce such allegations in these proceedings because the State of Capture Report is *sub judice*.

[41] To the extent that allegations and counter allegations of impropriety made by the parties against each other are irrelevant to the crisp legal issue to be determined, this Court granted all the applications to strike out, being satisfied that none of the parties would suffer any prejudice as a result of the granting of the applications.

[42] Based on the reasons for granting both applications, it is appropriate that the Minister pays the costs of the Oakbay Group in respect of the three applications to strike out.

#### THE FIC APPLICATION

[43] In their replying affidavit to the FIC application, the Oakbay applicants conditioned that application on the granting of their applications to strike out, and tendered to withdraw the application in the event that the Court grants the applications to strike out.

[44] Upon the granting of the applications to strike out, counsel for the Oakbay applicants consequently withdrew the application. Save for the issue of legal costs consequent upon the withdrawal of the FIC application, the Director of the FIC consented to the withdrawal of the application.

[45] On the question of costs, the FIC application presents a unique set of facts. The general principle, set out in Rule 41<sup>5</sup> of the Uniform Rules of Court is that a party who withdraws an application should tender costs. However, justice would not be served by ordering the Oakbay applicants to pay the costs of the Director of the FIC. The Minister put the Oakbay applicants in a precarious position when he filed the section 39 FIC Act certificate in the application for declaratory relief. This is what rendered the FIC application necessary from the perspective of the Oakbay applicants.

<sup>&</sup>lt;sup>5</sup> 41 Withdrawal, settlement, discontinuance, postponement and abandonment (1) (a) A person instituting any proceedings may at any time before the matter has been set down and thereafter by consent of the parties or leave of the court withdraw such proceedings, in any of which events he shall deliver a notice of withdrawal and may embody in such notice a consent to pay costs; and the taxing master shall tax such costs on the request of the other party.

[46] The Oakbay applicants were not unreasonable in launching the FIC application as contended by the Director of the FIC. Section 41(1) (e) of the FIC Act, on which the FIC application is premised, provides the scope for the FIC to make available to any person information held by the FIC in terms of a Court order. When they succeeded in purging the relevant material from the papers, the Oakbay applicants resorted not to persist with the FIC application because they no longer considered it necessary to present evidence in these proceedings to dispel the cloud of impropriety placed over them by the filing of the section 39 certificate by the Minister.

[47] The Oakbay applicants did not join the Minister to the FiC application.

Therefore there is no basis for granting a cost order against him.

[48] The circumstances under which the FIC application was brought falls within the scope of the principles set out in *Biowatch Trust v Registrar*, *Genetic Resources and Others*<sup>6</sup>, the seminal Constitutional Court judgment on costs where an organ of state is sued for constitutional or statutory obligations. There was a live dispute between the Director of the FIC and the Oakbay applicants in respect of information the latter sought to access from the former. The FIC contended that the Oakbay applicants were not entitled to it. Hence it did not agree to their request. The Oakbay applicants contended that they were entitled to the information. Under these circumstances, section 41(1) (e) of the FIC Act provides the only mechanism by which the Oakbay applicants may obtain the information. For that reason, the

<sup>&</sup>lt;sup>6</sup> 2009 (6) SA 232 (CC).

Oakbay applicants did not bring the FIC application to vex the FIC. There is also no suggestion that the application was driven by malice.

[49] Although the FIC application is based on the FIC Act and not on the Constitution, to the extent that the application relates to access to information, it is intended to enforce an entrenched constitutional right, namely, the right of access to information. The application also relates to the exercise of statutory duties by an organ of state. The conduct of the Oakbay applicants in bringing the FIC application was therefore not unreasonable. On the authority of *Biowatch*, departure from the general principle in rule 41 is justified in the circumstances of this case, especially when regard is had to the reasonableness of the conduct of the Oakbay applicants in launching the FIC application.

[50] This Court finds that fairness and justice will be better served by not granting a cost order in respect of the FIC application.

#### THE APPLICATION FOR DECLARATORY RELIEF

[51] The basis for the relief that the Minister seeks is section 21(1) (c) of the Superior Courts Act 10 of 2013. It provides:

"Persons over whom and matters in relation to which Divisions have jurisdiction

21. (1) A Division has jurisdiction over all persons residing in or being in, and in relation to all causes arising and all offences triable within, its area of jurisdiction and all other matters of which it may according to law take cognizance, and has the power—

(c) in its discretion, and at the instances of any interested person to enquire into and determine any existing future or contingent right or obligation notwithstanding that such person cannot claim any relief consequential upon the determination." [Emphasis added]

[52] The exercise of the Court's jurisdiction in terms of section 21(1) (c) follows a two-legged enquiry. (See Durban City Council v Association of Building Societies7 and confirmed in Cordiant Trading CC v Daimler Chrysler Financial Services (Ptv) Ltd<sup>8</sup>):

[52.1] the Court must first be satisfied that the applicant is a person interested in an existing, future or contingent right or obligation; and if **SO**,

[52.2] the Court must decide whether the case is a proper one for the exercise of its discretion.

The first leg of the enquiry involves establishing the existence of the necessary condition precedent for the exercise of the Court's discretion. An applicant for the declaratory relief satisfies this requirement if he succeeds in establishing that he has an interest in an existing, future or contingent right or obligation. Only if the Court is satisfied accordingly, does it proceed to the second leg of the enquiry.

In casu, the first stage of the enquiry relates to whether the Minister is [54] authorized or obliged by law to intervene in the dispute between the Oakbay Group and the banks. This legal question has been previously determined by the Courts. The first answer to this question lies in the constitutional principle of legality. In Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others9, the Constitutional Court espoused the principle that organs and officials of state are creatures of statute. Unlike natural persons who

<sup>&</sup>lt;sup>7</sup> 1942 AD 27 at 32. <sup>8</sup> 2005 (6) SA 205 (SCA) at para 15 to 17. <sup>9</sup> 1999 (1) SA 374 (CC).

may commit any act, the only requirement being that the act ought to be legal, organs and officials of state are not empowered to commit any act. They are only empowered to act to the extent that their powers are defined and conferred by the constitution and/ or by statute. Any conduct by an organ or official of state beyond their constitutional and/ or statutory powers violates the principle of legality.

[55] There is no statute that empowers a member of the National Executive such as the Minister, to intervene in a private bank-client dispute. Neither does the Constitution confer such powers.

[56] The second answer to this question finds expression in the dictum by the Supreme Court of Appeal in *Bredenkamp and another v Standard Bank of SA Ltd*<sup>10</sup> where the Court found that the relationship between the bank and its client is contractual in nature. The bank may terminate the relationship in its discretion, on reasonable notice to the client, provided the reasons for terminating the account do not violate public policy or constitutional values.

[57] The legal question before this Court is as stipulated above. To that extent no controversy lies between the parties. None of the parties have requested this Court to determine the propriety or impropriety of the decision by the respondent banks to terminate their bank-client relationship with entities in the Oakbay Group. In the premises, the applicant has successfully established the existence of the necessary condition precedent for the exercise of the Court's discretion.

 $<sup>^{10}</sup>$  2010 (4) SA 468 (SCA). See also Hiongwane and Others v ABSA Bank Limited and Another (75782/13) [ZAGPPHC] 928 (10 November 2016).

- [58] The parties have advanced opposing contentions in respect of the second leg of the enquiry. The applicant and the banks contend for an exercise of the Court's discretion in favour of the Minister. The Oakbay Group contends otherwise.
- [59] Herbstein and van Winsen<sup>11</sup> extrapolate from decided cases factors Courts have taken into account to determine whether judicial discretion should be exercised positively or negatively in an application for declaratory relief. These include:
- [59.1] the existence or absence of a dispute;
- [59.2] the utility of the declaratory relief and whether if granted, it will settle the question in issue between the parties;
- [59.3] whether a tangible and justifiable advantage in relation to the applicant's position appears to flow from the grant of the order sought;
- [59.4] considerations of public policy, justice and convenience;
- [59.5] the practical significance of the order; 12 and
- [59.6] the availability of other remedies.
- [60] The above factors are considered below in no particular order. When applying the above factors to the present application, this Court is not persuaded that the circumstances of the present application warrant the granting of the declaratory relief sought.
- [61] Ex Parte Nell<sup>13</sup> settled the law regarding the existence of a live dispute as a requirement for the granting of a declaratory order by abrogating this requirement.

<sup>&</sup>lt;sup>11</sup> See Herbstein and Van Winsen: The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa Volumes 1 5<sup>th</sup> Ed, 2009 Ch43-p1438-1440.

<sup>12</sup> See Shobe v OC, Temporary Police Camp, Wagendrift Dam 1995 (4) SA 1 (A) 14F-G.

However, Ex Parte Nell did not render declaratory orders justified in all cases where there is no live dispute. The dictum on this requirement in Ex Parte Nell is not without qualification. There the Court went further and stated that '... though the absence of a dispute may, depending on the circumstances cause the court to refuse to exercise its jurisdiction in a particular case.' The following extract from that Judgment reflects the reason why the Court granted the declaratory relief even though there was no live dispute between the parties:

"The need for such an order can pre-eminently arise where the person concerned wished to arrange his affairs in a manner which could affect other interested parties and where an uncertain legal position could be contested by all or one of them. It is more practical, and the interests of all are better served, if the legal question can be laid before a court even without there being an already existing dispute." [Emphasis added].

[62] Therefore post Ex Parte Nell, the absence of a live dispute remains a factor to be considered where the legal position to be determined is uncertain. As stated previously, the legal position regarding the question the Minister seeks determined has been decided previously. The Oakbay Group does not contest this. Unlike the scenario in Ex Parte Nell, there is no uncertainty between the parties regarding its terms or its application. To the extent that in Ex Parte Nell the Court dealt with 'an uncertain legal position which could be contested', that case is distinguishable from the present one.

[63] The absence of a controversy in casu, regarding the relevant legal position cannot be ignored. In the circumstances of this case, the Court considers the absence of legal uncertainty to be a significant factor in determining the direction in which the Court ought to exercise its discretion. This factor carries other

<sup>&</sup>lt;sup>13</sup> 1963 (1) SA 754 (A).

<sup>14</sup> At 759H-760B

ramifications that have a bearing on the exercise of the Court's discretion. The Court does not provide legal advice to the parties. Courts therefore, consider it inappropriate for any party to come to Court for the confirmation of a legal question which is common cause between the parties.

[64] Lack of controversy on the legal question the Minister sought determined also brings into question the utility of the declaratory relief, its practical effect and the advantage the applicant will enjoy if the declaratory relief is granted.<sup>15</sup>

[65] Given the legal constraints the Minister faced in respect of the Oakbay Group's dispute with the banks, a stem response to Mr. Howa and his company, which he seemed to have communicated during the meeting of 24 May 2016, should have marked the end of his involvement. Even the Oakbay Group's allegations of impropriety by the banks or allegations of eminent job losses should not have spurred him to further action as he clearly lacked the legal basis to get involved.

[66] Despite the legal advice that his counsel gave him, the Minister embarked on a number of steps. Together with a number of senior officials in the National Treasury, he met with Mr. Howa on 24 May 2016. During that meeting, the Minister informed Mr. Howa that he lacked the legal basis to intervene and that there were legal impediments to banks discussing client-related matters with him or any third party. He directed Mr. Howa to seek a resolution of the Oakbay Group's dispute with the banks through the Courts. Despite the position that the Minister took, Mr. Howa

<sup>15</sup> See Shoba v OC, Temporary Police Camp, Wagendrift Dam 1995 (4) SA (A) 14F-G.

persisted in his request to the Minister to intervene, appealing to him to serve the national purpose to save jobs.

[67] On 26 July 2016, the Minister wrote to the Director of the FIC (copying the Governor of the Reserve Bank and the Registrar of Banks), seeking to be advised whether the banks had reported any suspicious transactions against any entity in the Oakbay Group and associated individuals. It was in response to this letter that the Director of the FIC issued the certificate referred to in paragraph 31 above. The Minister stated in his letter to the Director of the FIC that at that point he was considering the merits of obtaining a definite ruling on whether:

[68] When he finally launched the declaratory application, the Minister decided not to pursue the question set out in (b). He fails to take this Court into his confidence regarding why he only elected to pursue an order that addresses the question set out in paragraph (a) of his letter to the Director of the FIC. Notwithstanding that he remained constrained by the law to intervene, the FIC certificate would have been more relevant for the question in (b), which he, for undisclosed reasons, opted not to pursue.

[69] The dispute between the Oakbay Group and the banks remained private regardless of the implications it held for the Oakbay Group, the banks or the South African economy. His resort to address the letter - referred to above - to the Director

<sup>\*(</sup>a) the Minister of Finance (or the Governor of the Reserve Bank or Registrar of Banks) has the power in law to intervene with the banks concerned regarding their closure of the Oakbay accounts held with them, and

<sup>&</sup>quot;(b) a basis exist in fact for the contention that the relevant banks terminated the accounts in question for a reason unrelated to their statutory duties not to have any dealings with any entity if a reasonable diligent and vigilant person would suspect that such dealings could directly or indirectly make that bank a party or accessory to contraventions of the relevant laws..."

of the FIC is incongruent with the legal advice he had received and accepted. The question set out in (a) above, had already been answered by his counsel when he gave him legal advice. The question in (b) should have been the concern of the Oakbay Group or the banks and/ or the banking regulatory bodies and not him.

[70] In addition, there is incongruence between the relief the Minister seeks, the reasons for seeking it, as well as the evidence he advanced to support the granting of the declaratory order. That the Minister opted to abandon his intention to enquire into the propriety of the banks and opted for the declaratory order without laying bare his reasons for doing so, leaves the question about the utility of the declaratory relief hanging.

[71] The Minister, the banking regulatory respondents and the banks cite public interest considerations because of what they allege is the risk any political interference, actual or perceived, with the operation of the banks would pose to South Africa's financial stability. On the version of the Minister, the response by the regulatory respondents and the banks to Mr. Howa is one that avoids any inference of actual or perceived complicity in political interference with the operation of the banks. They were firm in their response to Mr. Howa. Despite initially entertaining Mr. Howa's requests out of concern for job losses and possible improper conduct by the banks, the Minister eventually took a firm stance and resisted Mr. Howa's invitation to intervene. The banks also resisted whatever pressure they faced to reverse their decision to terminate their relationship with the Oakbay Group.

[72] The banks do not complain of any actual or perceived interference by the Minister, with their operations. In their answering papers, they defended their decision to close the bank accounts of entities in the Oakbay Group, alleging that they did so in compliance with their obligations in terms of the FIC Act. They explained the prejudice they would suffer if they failed to adhere to international best practice and standards and if they did not protect their reputation. They also asserted their right to choose the clients with whom to have a relationship. They were prudent to disassociate from any conduct that would disturb the financial stability of the country. Their conduct ought to boost rather than harm confidence in the South African banking system.

[73] Perhaps the only issue that could have been of concern to the Minister and to the banks, regarding possible uncertainty on the legal question the Minister sought answered in the application, relates to the alleged establishment of the Inter-Ministerial Committee (IMC) comprising of the Minister of Labour and the Minister of Mineral Resources and its attempts to, contrary to the law, interfere in the dispute between the banks and the Oakbay Group.

[74] Counsel for VR Laser objected to this evidence in respect of the IMC being considered because it was not introduced by the Minister. There is no legal basis to this objection. The authorities relied on by VR Laser are not of assistance to it. On the authority in *Mogale City Municipality v Fidelity Security Services (Pty) Ltd*<sup>16</sup>, the Oakbay Group did not object to this evidence in terms of rule 30. In two applications to strike out that it brought, it did not request that this evidence be struck out. Having

<sup>&</sup>lt;sup>16</sup> 2015 (5) SA 590 (SCA).

filed its answering affidavit after the banks filed theirs; it had an opportunity to answer thereto. Therefore it does not stand to suffer prejudice if the Court considers it.

[75] It is not necessary to dwell deep into the alleged activities of the so called IMC as nothing turns on this aspect of the case. The Minister contends that the IMC was not approved by Cabinet at its meeting of 13 April 2016; and he never attended any of its meetings. The banks allege that they individually received requests to meet with the IMC. Two of the banks, FNB and ABSA declined an invitation to meet with the IMC whilst Nedbank and Standard Bank accepted such invitations and met with the IMC. At their respective meetings with the IMC, the closure of the bank accounts of the affected entities was discussed. Any prospect of political interference in the client—bank relationship between the banks and the Oakbay Group was dispelled, when, according to Nedbank, the Presidency distanced itself from a press statement issued by the Minister of Mineral Resources in respect of the activities of the IMC and recommendations made by Cabinet to the President pursuant thereto.

[76] The Minister remained certain of the legal position regarding his powers; hence he refused to participate in the IMC. His version is that he did not recognize it and was steadfast in his refusal to participate in the IMC. The banks were also firm in their refusal to entertain any request by the IMC to review their decision to close the Oakbay Group's bank accounts. If they were concerned about the inappropriate inroads, if any, that the IMC was trying to make into their private relationship with the Oakbay Group, they could have approached the Court to interdict that conduct against the Ministers comprising the IMC.

[77] The absence of uncertainty regarding the legal question to be answered by way of declaratory relief does not detract from the fact that declaratory relief is a discretionary remedy. The Court is not obliged to grant it, particularly because there is no uncertainty on the relevant legal question.

[78] In JT Publishing (Pty) Ltd & Another v Minister of Safety & Security<sup>17</sup> the Constitutional Court held as follows:

"I interpose that enquiry because a declaratory order is a discretionary remedy, in the sense that the claim lodged by an interested party for such an order does not in itself oblige the Court handling the matter to respond to the question which it poses, even when that looks like being capable of a ready answer. A corollary is the judicial policy governing the discretion thus vested in the Courts, a well-established and uniformly observed policy which directs them not to exercise it in favour of deciding points that are merely abstract, academic or hypothetical ones. I see no reason why this new Court of ours should not adhere in turn to a rule that sounds so sensible. Its provenance lies in the intrinsic character and object of the remedy, after all, rather than some jurisdictional concept peculiar to the work of the Supreme Court or otherwise foreign to that performed here."

[79] The public policy considerations that the Minister, the banks and the banking regulatory respondents contend are relevant to persuade this Court to grant the declaratory relief sought, were in the circumstances of this case, abated by the steadfast refusal by the Minister and the banking regulatory respondents to intervene in the dispute between the Oakbay Group and the banks and by the refusal of the banks to review their decision to close the bank accounts of the Oakbay Group.

[80] It is therefore unclear what advantage the Minister, as the only applicant in the application for declaratory relief will enjoy from the declaratory relief if granted. Its

<sup>&</sup>lt;sup>17</sup> 1997 (3) SA 514 CC. Approved in *Director- General Department of Home Affairs and Another v Mukhamadiva* 2014 (3) BCLR 306 (CC).

practical effect is also unclear. If granted, the declaratory relief will only serve to confirm what all the parties are aware of and in agreement with, in so far as the law is concerned.

- [81] The Oakbay Group conceded both in its papers and in argument by its counsel to the legal position that the Minister sought confirmed by way of a declaratory order. We note with concern, though, that while the Oakbay Group knows and has conceded the legal position regarding the powers and functions of the Minister, they not only persisted in their requests to him for assistance, Mr. Puckrin, counsel for the Oakbay respondents, in argument submitted that he would not consider similar requests to the Minister in the future to be impermissible.
- [82] It is the duty of the Minister, as a member of the National Executive to obey, respect and uphold the law in the exercise of his executive functions. It is not appropriate for a member of the National Executive to draw the judiciary into the exercise of his executive functions as evinced in this application. To grant the Minister the declaratory relief would allow the judiciary to stray into the exercise of executive functions where the circumstances do not warrant its involvement.
- [83] We hold the strong view that this application was clearly unnecessary in the circumstances of this case. Such circumstances do not warrant that the Court exercises its discretion to grant the declaratory relief by pronouncing itself on an undisputed legal question, which has previously been confirmed in judgments.
- [84] In the premises, the application for declaratory relief stands to be dismissed.

[85] This Court finds no reason why costs should not follow the course in favour of all the respondents who are part of the Oakbay Group. As already mentioned the banks supported the Minister and undertook to carry their own legal costs. The banking regulatory respondents decided to abide by the decision of the Court and did not request costs against the Minister. Therefore no cost order is made in respect of these respondents.

#### **EXTENDED RELIEF SOUGHT BY STANDARD BANK**

[86] Standard Bank stands in a peculiar position in these proceedings. Although it was cited as a respondent and filed an answering affidavit in support of the relief sought by the Minister, it went further by seeking extended relief. To its answering affidavit, Standard Bank attached a notice of motion seeking an order in the following terms:

"It is declared that no member of the National Executive of Government, including the President and all Members of the Cabinet, acting of their own accord or for and/or on behalf of Cabinet, is empowered to intervene in any manner whatsoever in any decision taken by the 17<sup>th</sup> Respondent to terminate its banking relationships with Oakbay Investments Proprietary Limited and its associated entities."

[87] Standard Bank's notice of motion is defective for failure to comply with Rule 6(2) and (5).<sup>18</sup> It is unclear who the respondents to this application are as the application fails to cite them. It was served on all the parties to the application for the declaratory relief. This Court has doubt as to whether a parallel application may be brought in this manner. However, this Court does not deem it necessary to rule on

<sup>&</sup>lt;sup>18</sup> Rule 6 (2) When relief is claimed against any person, or where it is necessary or proper to give any person notice of such application, the notice of motion must be addressed to both the registrar and such person, otherwise it must be addressed to the registrar only. Rule 6(5) deals with *inter alia*, the timeframes within which the respondent ought to file opposing papers.

the procedural impediments set out above. Firstly because the Oakbay Group assumed the position of respondents and filed an answer to this application, thereby waiving their right to object to it in terms of rule 30 of the Uniform Rules of Court. Secondly, none of the other parties objected to Standard Bank's notice of motion. This approach is consistent to that followed by the SCA in *Mogale City Municipality* where the SCA held that procedural defects are not fatal to an application when not objected to in terms of the Court rules.

[88] The Minister did not oppose this application. Neither did the other respondents.

[89] Given the extent of the relief it seeks, Standard Bank faces a more serious and fatal impediment in its failure to join the President and members of the National Executive. Mr. Maleka, counsel for Standard Bank, argued on the one hand that the non-joinder of the President should not be an impediment to the granting of the extended relief because he - the President - expressed disinterest in the proceedings. On the other hand Mr. Maleka also argued that the application for extended relief should be granted because it will only be binding on the Oakbay Group and not the President and members of National Executive. He may have introduced the latter contention to overcome the non-joinder impediment. The latter contention, not only begs the question why Standard Bank saw it fit to bring these proceedings to the President's attention; the two contentions advanced in the same application render Standard Bank's case incongruent.

<sup>19</sup> See fn. 14 above.

[90] Mr. Maleka sought to rely on the SCA decision in *Gordon v Department of Health: KwaZulu-Natal*<sup>20</sup> where the SCA held that non-joinder of an applicant for a job is not fatal in an application where the person who was not appointed did not seek to challenge the employer's decision. In *Gordon*, the SCA per Mlambo JA (as he then was) stated:

"The Issue in our matter, as it is in any non-joinder dispute, is whether the party sought to be joined has a direct and substantial interest in the matter. The test is whether a party that is alleged to be a necessary party, has a legal interest in the subject matter, which may be affected prejudicially by the judgement of the court in the proceedings concerned...<sup>21</sup>

[91] The SCA further found that the order or judgment of the Court is relevant to the question whether a party has a direct and substantial interest in the subject matter of the proceedings citing the following dictum from Amalgamated Engineering Union v Minister of Labour<sup>22</sup>: [Emphasis added]

"the question of joinder should ... not depend on the nature of the subject matter... but ... on the manner in which, and the extent to which, the court's order may affect the interests of third parties..." This has been found to mean that if the order or "judgment sought cannot be sustained and carried into effect without necessarily prejudicing the interests" of a party or parties not joined in the proceedings, then that party or parties have a legal interest in the matter and must be joined."<sup>23</sup>

[92] When applying the above principle to the facts in *Gordon*, the SCA found that the non-joinder of the successful job applicant was not fatal to the proceedings. It is not that finding as contended by Mr. Maleka that has to be tested against the facts of this case, but the legal principle on which the SCA relied to reach that finding. When applied to the facts of this case, the legal principle applied in *Gordon* leads to a different finding. In *Gordon*, the relief sought did not interfere with the interests of the

<sup>&</sup>lt;sup>20</sup> 2008 (6) SA 522 (SCA).

<sup>&</sup>lt;sup>21</sup> At paragraph 9.

<sup>&</sup>lt;sup>22</sup> 1949 (3) SA 637 (A).

<sup>&</sup>lt;sup>21</sup> At paragraph 11.

party who was not joined. The converse is applicable in casu. Therefore, Gordon does not lend assistance to Standard Bank.

[93] A declaratory order is never granted in the abstract. If couched in abstract terms, an application for a declaration order never succeeds. A declaratory order determines an existing, future or contingent right. Inherent in the concept of a right is the responsibility to act or not to act in a particular manner, and the corresponding obligation to promote, respect or fulfill the right in question. Rights do not exist in the abstract. Also inherent in the concept of a right, is a bearer of a right and a person against whom it avails.<sup>24</sup>

[94] The manner in which the prayer for extended relief is formulated, will, if that relief is granted, subject the President and members of the National Executive to the right Standard Bank seeks determined. It is against them that, if granted, the extended relief will prevail. No other comprehension arises from the formulation of the prayer for extended relief. On that formulation, the extended relief will not bind the Oakbay Group as contended on behalf of Standard Bank. Section 84 and 85 of the Constitution enumerates the powers and functions of the President and members of the National Executive. The use of the words 'in any manner whatsoever' may potentially cause the extended relief to collide with their constitutional functions and powers. To the extent that the extended relief may impinge on these constitutional powers and functions it cannot be sustained and carried into effect without necessarily causing prejudice to the interests of the President and members of the National Executive.

<sup>&</sup>lt;sup>24</sup> See Family Benefit Friendly Society v Commissioner for Inland Revenue 1995 (4) SA 120 (T) at 125-126. Also see Ex Parte Nell 1963 (1) SA 754 (A) at 760.

[95] This Court finds that the President and members of the National Executive are necessary parties with a substantial interest in the outcome of the application for extended relief. Therefore, their non-joinder is fatal to Standard Bank's application.

[96] In the premises, Standard Bank's application stands to be dismissed. This Court finds no reason why in respect of this application, costs should not follow the result in favour of the Oakbay Group.

[97] The position of the President is peculiar in that he is not party to the proceedings. As alluded earlier, argument on his behalf was not permitted. In the papers filed on the President's behalf, the State Attorney sought costs against Standard Bank, occasioned by the irregular procedure it took against him. Since the President did not apply to be joined as a party, there is no legal basis to award costs in favour of a non-party.

[98] In the circumstances the following order is made:

#### ORDER

### A. APPLICATIONS TO STRIKE OUT BY THE OAKBAY GROUP AND THE MINISTER

- The applications to strike out by the Oakbay Group (the first to the seventh, the ninth to the twelfth and the fourteenth respondent) and the Minister of Finance are granted.
- The Minister of Finance shall bear the costs of the parties to these applications. Such costs shall include the costs of two counsel where so employed.
- B. THE APPLICATION TO COMPEL COMPLIANCE WITH RULE 7 OF THE UNIFORM RULES OF COURT AND THE APPLICATION FOR CONDONATION FOR THE LATE FILING OF THE NOTICE IN TERMS OF RULE 7
- The application by the 14<sup>th</sup> respondent, Sahara Computers (Pty) Ltd, for condonation for the late filing of the notice in terms of rule 7 and the application to compel compliance with rule 7 and is dismissed.
- 4. Sahara Computers (Pty) Ltd is ordered to pay the costs of the Minister of Finance in respect of these applications on the attorney client scale. Such costs shall include the costs of two counsel where so employed.
- C. THE APPLICATION BY OAKBAY INVESTMENTS AND 11 OTHERS V THE DIRECTOR OF THE FINANCE INTELIGENCE CENTRE
- 5. No costs order is granted in relation to this application.

# D. APPLICATION FOR DECLARATORY RELIEF MINISTER OF FINANCE V OAKBAY INVESTMENTS LTD AND 19 OTHERS

- 6. The application by the Minister of Finance for declaratory relief is dismissed.
- 7. The Minister of Finance shall bear the costs of the Oakbay Group. Such costs to include the costs of two counsel, where so employed.
- 8. All the other respondents shall bear their own costs.

## E. APPLICATION FOR EXTENDED RELIEF MINISTER OF FINANCE V OAKBAY INVESTMENTS LTD AND 19 OTHERS

- The application for extended relief by Standard Bank of South Africa Limited
  is dismissed with costs in favour of the Oakbay Group. Such costs shall
  include the costs of two counsel where so employed.
- 10. The Minister, ABSA Bank (Pty) Ltd, First National Bank (Pty) Ltd, Nedbank (Pty) Ltd, the Governor of the Reserve Bank, the Registrar of the Reserve Bank and the Director of the Financial Intelligence Centre shall each bear their own costs.

D MLAMBO

JUDGE PRESIDENT.

GAUTENG DIVISION OF THE HIGH COURT

l agree

A LEDWABA

**DEPUTY JUDGE PRESIDENT.** 

GAUTENG DIVISION OF THE HIGH COURT

I agree

L T MODIBA

JUDGE OF THE HIGH COURT

**APPEARENCES:** 

**CASE NUMBER 80978/2016** 

in the matter between:

MINISTER OF FINANCE V OAKBAY INVESTMENTS (PTY) LTD AND 20 OTHERS

Counsel for the applicant:

JJ Gauntlett SC

FB Pelser

Instructed by:

The State Attorney

Counsel for the 1st to 9th and

11<sup>th</sup> to 13<sup>th</sup> respondent:

C Puckrin SC

S Pudifin-Jones

F Van der Merwe

Instructed by:

Van Der Merwe & Associates

Counsel for the 10<sup>th</sup> respondent:

J Blou SC

S Stein SC

L Zikalala

Instructed by:

Stein Scop Attorneys Inc.

Counsel for the 14th respondent:

AR Bhana SC

KW Luderittz SC

K Prehimid

Instructed by:

Stein Scop Attorneys Inc.

Counsel for the 15<sup>th</sup> respondent:

D Unterhalter SC

S Budlender

N Ferreira

A Msimang

Instructed by:

**Edward Nathan Sonnerberg** 

Counsel for the 16<sup>th</sup> respondent:

**AE Bham SC** 

L Sisilana

Instructed by:

Norton Rose Fulbright South Africa Inc.

Counsel for the 17th respondent:

V Maleka SC

T Ngcukaitobi

Instructed by:

Bowman Gilfillan

Counsel for the 18th respondent:

APH Cockrell SC

M Stubbs

Instructed by:

Baker Mackenzie

Counsel for the 19th & 20th respondents:

W Trengove SC

K Hofmeyer

L Luthuli

Instructed by:

Werksmans Attorneys

Counsel for the 21th respondent:

MM le Roux

Instructed by:

**MacRobert Attorneys** 

**CASE NUMBER 92027/2016** 

And in the matter between:

OAKBAY INVESTMENTS (PTY) LTD AND 11 OTHERS V THE DIRECTOR

OF

THE FINANCIAL INTELLIGENCE CENTRE

Counsel for the 1st to 6th and

8<sup>th</sup> to 9<sup>th</sup> applicant:

C Puckrin SC

S Pudifin-Jones

F Van der Merwe

Instructed by:

Van Der Merwe & Associates

Counsel for the 7<sup>th</sup> Applicant:

J Blou SC

S Stein SC

L Zikalala

Instructed by:

Stein Scop Attorneys Inc.

Counsel for the 10th Applicant:

AR Bana SC

**KW Luderittz SC** 

K Prehimid

Instructed by:

Stein Scop Attorneys Inc.

Counsel for the respondent:

MM le Roux

Instructed by:

MacRobert Inc.

Date of hearing:

28 and 29 March 2017

Date of judgement:

18 August 2017

**VAN DER MERWE & ASSOCIATES** 

長 012 343 5435 ☑ 62 RIGEL AVENUE WATERKLOOF RIDGE GT VD MERWE/st

# [GAUTENG DIVISION, PRETORIA]

**CASE NUMBER: 80978/16** 

_			
-In	tha	mattar	between:
1111	TI IC	HILALICI	DCLVVCCII.

IN INDIA)

SAHARA COMPUTERS (PTY) LTD

MINISTER OF FINANCE

Ī	NATIONAL TREASURY
Ì	RECEIVED
ĺ	

2018 -10- 26

**APPLICANT** 

14TH RESPONDENT

and	LEGAL SERVICES	
OAKBAY INVESTMENTS (PT)		1 <sup>ST</sup> RESPONDENT
OAKBAY RESOURCES AND I	ENERGY LTD	2 <sup>ND</sup> RESPONDENT
SHIVA URANIUM (PTY) LTD		3 <sup>RD</sup> RESPONDENT
TEGETA EXPLORATION AND (PTY) LTD	RESOURCES	4 <sup>TH</sup> RESPONDENT
JIC MINING SERVICES (PTY)	LTD	5 <sup>TH</sup> RESPONDENT
BLACKEDGE EXPLORATION	(PTY) LTD	6 <sup>TH</sup> RESPONDENT
TNA MEDIA (PTY) LTD		7 <sup>TH</sup> RESPONDENT
THE NEW AGE		8 <sup>TH</sup> RESPONDENT
AFRICA NEWS NETWORK (P	TY) LTD	9 <sup>TH</sup> RESPONDENT
VR LASER SERVICES (PTY) L	_TD	10 <sup>TH</sup> RESPONDENT
ISLANDSITE INVESTMENTS ( AND EIGHTY (PTY) LTD	ONE HUNDRED	11TH RESPONDENT
CONFIDENT CONCEPT (PTY)	LTD	12 <sup>TH</sup> RESPONDENT
JET AIRWAYS (INDIA) LTD (IN	NCORPORATED	13 <sup>TH</sup> RESPONDENT

ABSA BANK LTD	15 <sup>TH</sup> RESPONDENT
FIRST NATIONAL BANK LTD	16 <sup>TH</sup> RESPONDENT
STANDARD BANK OF SOUTH AFRICA LIMITED	17 <sup>TH</sup> RESPONDENT
NEDBANK LIMITED	18 <sup>TH</sup> RESPONDENT
GOVERNOR OF THE SOUTH AFRICAN RESERVE BANK	19 <sup>TH</sup> RESPONDENT
REGISTRAR OF BANKS	20 <sup>TH</sup> RESPONDENT
DIRECTOR OF THE FINANCIAL INTELLIGENCE CENTRE	21 <sup>ST</sup> RESPONDENT

# **NOTICE IN TERMS OF RULE 35(12)**

KINDLY TAKE NOTE that the APPLICANT is hereby required to make available for inspection by the FIRST, SECOND, THIRD, FOURTH, SIXTH, SEVENTH, TENTH, ELEVENTH, TWELFTH, AND FOURTEENTH RESPONDENTS the following documentation referred to in the founding papers of the Applicant:

- The records and information under the control of the deponent envisaged and referred to in paragraph 2 of the Applicant's founding affidavit;
- The documentation indicating that the Fifth, Eighth, Ninth and Thirteenth Respondents are "registered companies in the Oakbay group of companies" referred to in paragraph 4 of the Applicant's;
- 3. The "two open letters" referred to in paragraph 11 of the founding affidavit;

- 4. Copies of any "concerns regarding the Banking Sector" relevant to the banking affairs of any of the Respondents "within the Oakbay group of companies" envisaged in paragraph 13 of the founding papers disclosed to the Applicant;
- Any reply by the Applicant to the letter received from the Governor of the Reserve Bank dated 26 April 2016 and/or further communication and/or correspondence following the thread of correspondence;
- A copy of the Applicant's notice and motivation under Section 40 of the Financial Intelligence Centre Act, No. 38 of 2001, resulting in a Certificate issued by the Director; FIC on 4 August 2016;
- Copies of the correspondence between the Minister of Mineral Resources and the Minister of Finance envisaged and referred to in paragraph 4 of Annexure "C" to the founding affidavit;
- 8. The circular by the Ombudsman for Banking Services on the closure of bank accounts referred to and envisaged in paragraph 4 of Annexure "C" to the founding affidavit;
- The "2011 National Treasury Policy document titled "A safer Financial Sector
  to serve South Africa better" referred to in paragraph 4 of Annexure "C" to the
  founding papers;
- 10.Any further and/or other documentation received from the Financial Intelligence Centre pursuant to paragraph 16 of the letter dated 28 July 2016 appended as Annexure "H" to the founding papers;

- 11. Any and all further documentation received from the Registrar of Banks pursuant to paragraph 15 of the letter dated 28 July 2016 appended as Annexure "I" to the founding papers;
- 12. Any and all documentation pertaining to "a particular foreign exchange transaction involving VR Laser Asia, an associated company of Oakbay which could form the basis of an exchange control related investigation by that department" as per the letter dated 12 August 2016 signed by K Naidoo on behalf of the South African Reserve Bank and appended as Annexure "K" to the founding affidavit;

KINDLY FURTHER NOTE that should the APPLICANT fail to comply with this notice within 5(Five) days from date hereof the FIRST, SECOND, THIRD, FOURTH, SIXTH, SEVENTH, TENTH, ELEVENTH, TWELFTH, AND FOURTEENTH RESPONDENT will apply to court, at the cost of the APPLICANT, to order the APPLICANT to comply with this notice.

SIGNED AT PRETORIA ON THIS THE \_\_\_\_\_ DAY OF OCTOBER 2016.

VAN DER MERWE & ASSOCIATES
ATTORNEYS FOR THE 1ST, 2ND, 3RD, 4TH, 6TH,
7TH, 10TH, 11TH, 12TH,
AND 14TH RESPONDENT
62 RIGEL AVENUE NORTH
WATERKLOOF
PRETORIA

REF: N

MR GT VD MERWE/st/O78

TEL:

012 343 5432 012 343 5435

FAX:

EMAIL: simone@vdmass.co.za

TO:

THE REGISTRAR OF THE HIGH COURT PRETORIA

#### AND TO:

STATE ATTORNEY
ATTORNEY FOR THE APPLICANT
SALU BUILDING
255 FRANCIS BAARD STREET
PRETORIA

TEL: 012 309 1575 FAX: 012 309 1649

EMAIL: TNhlanzi@justice.gov.za

REF: MS T NHLANZI



# IN THE HIGH COURT OF SOUTH AFRICA GAUTENG DIVISION, PRETORIA

Case no:.80978/2016

In the matter between:

MINISTER OF FINANCE

Applicant

and

OAKBAY INVESTMENTS (PTY) LTD

OAKBAY RESOURCES AND ENERGY LTD

SHIVA URANIUM (PTY) LTD

TEGETA EXPLORATION AND RESOURCES (PTY) LTD

JIC MINING SERVICES (1979) (PTY) LTD

BLACKEDGE EXPLORATION (PTY) LTD

TNA MEDIA (PTY) LTD

THE NEW AGE

AFRICA NEWS NETWORK (PTY) POID -11- 0:

VR LASER SERVICES (PT)

ISLANDSITE INVESTMENTS ONE HUNDRED AND EIGHTY (PTY) LTD

CONFIDENT CONCEPT (PTY) LTD

JET AIRWAYS (INDIA) LTD (INCORPORATED IN INDIA)

SAHARA COMPUTERS (PTY) LTD

ABSA BANK LTD

FIRST NATIONAL BANK LTD

STANDARD BANK OF SOUTH AFRICA LIMITED

NEDBANK LIMTED

First respondent

Second respondent

Third respondent

Fourth respondent

Fifth respondent

Sixth respondent

Seventh respondent

Eighth respondent

Ninth respondent

Tenth respondent

Eleventh respondent

Twelfth respondent

Thirteenth respondent

Fourteenth respondent

Fifteenth respondent

Sixteenth respondent

Seventeenth respondent

Eighteenth respondent

REGISTRAR OF BANKS

Nineteenth respondent

DIRECTOR OF THE FINANCIAL INTELLIGENCE **CENTRE** 

Twentieth respondent

GOVERNOR OF THE SOUTH AFRICAN RESERVE BANK

Twenty-first respondent

#### FILING SHEET

KINDLY TAKE NOTICE THAT the applicant hereby files his response to Rule 35(12).

DATED at PRETORIA on this 1st day of NOVEMBER 2016.

STATE ATTORNEY

Attorney for the applicants

SALU Building

255 Francis Baard Street

Pretoria

Tel: 012 309 1575

Fax: 012 309 1649

Fax to Email: 086 6293 073

Email: TNhlanzi@justice.gov.za

Ref: 2427/16/Z32. Ms T Nhlanzi

TO:

THE REGISTRAR OF THE ABOVE HONOURABLE COURT

GAUTENG DIVISION, PRETORIA

AND

TO:

VAN DER MERWE & ASSOCIATES Attorney for 1st, 2nd, 3rd, 4th, 6th, 7th, 10th,

11th,12th and 14th Respondents

62 Rigel Avenue North

Waterkloof

Pretoria

Ref: Mr GT VD Merwe/st/078

Tel: 012 343 5432

E-mail: simone@vdmass.co.za

VAN DER MERWE EN ASS

RIGEL LAAN 62 WATERKLOOF RIDGE - PRETORIA

TEL: 012 343 5432 / 087 654 0209 FAKS: 012,843)5435 / 086 500 7587

AND

TO:

EDWARD NATHAN SONNENBERGS

Attorneys for 15th Respondent

150 West Street

Sandton

Email: dlambert@ensafrica.com Ref: M Katz/ D Lambert/0416998

C/O GERHARD BOTHA & PARTNERS INC

First Floor, Erasmus Forum Building B Cnr Rigel Avenue & Stokkiesdrrai

Erasmusrand Tel: 012 347 0480

Email: brendon@bothapartners.co.za

Ref: Mr B Swart/ Mr H Botha

**GERHARD BOTHA** 

& PARTNERS INC. Erasmus Forum Building "B" Cnr. Rigel Avenue & Stokkiesdraai Erasmusrand 0181

AND TO:

NORTON ROSE FULBRIGHT SOUTH AFRICA INC

Attorneys for 16th Respondent 34 Fredman Drive, Sandton

Email: aslam.moosajee@nortonrosefulbright.com

Ref: Mr Moosajee/FNB 13954

c/o MONTLE JOOMA SABDIA INC

Ground Floor, Duncan Manor Cnr Jan Shoba and Brooks Streets

Brooklyn

Tel: 012 362 3137

MOTHLE JOOMA SABDIA HIC

1st Foor West Wing, Luncan Range Cnr. Duncan & Brook Street, Brooklyn

Pretoria

AND TO:

**BAKER & MACKENZIE** 

Attorneys for the 18th Respondent

Tel: 011 911 4300

Email: Gerhard.Rudolph@bakermckenzie.com

Widaad, Ebrahim@bakermckenzie.com Callum.Oconnor@bakermckenzie.com

Ref: G Rudolph/CO C/O ADAMS & ADAMS Adams & Adams Place

Lynwood Bridge 4 Daventry Street Lynwood Manor Tel: 012 432 6000 Ref: Adele Jordaan benadeling van mate

2016 -11- 0.3

AND

TO:

MACROBERT ATTORNEYS

Attorneys for the 21st Respondent

MacRobert Building Cnr Jan Shoba & Justice Mahomed Street

Tel: 012 425 3436

Email: ghay@macrobert.co.za

Ref: G K Hay

2016 -11- 0 1

MacRobert

Altorneys

AND TO:

Without prejudice of clients rights Sonder benadeling van klient se regte WERKSMANS ATTORNEYS Sign / Geteken

19th and 20th Respondent's Attorneys

155-5th Street

Sandton

Tel: +27 11 535 8000 | F: +27 11 535 8600

Ref: Mr C Manaka / Mr C Moraitis Email: cmanaka@werksmans.com cmoraitis@werksmans.com

Ref: SOUT 3267.63

C/O MABUELA INCORPORATED Charter House, 179 Bosman Street

Pretoria Central Tel: 012 325 3966

Email: mabuela@tiscali.co.za

# IN THE HIGH COURT OF SOUTH AFRICA GAUTENG DIVISION, PRETORIA

Case no:.80978 /2016

In the matter between:

MINISTER OF FINANCE

First applicant

GOVERNOR OF THE SOUTH AFRICAN RESERVE BANK

Second applicant

and

OAKBAY INVESTMENTS (PTY) LTD

First respondent

OAKBAY RESOURCES AND ENERGY LTD

Second respondent

SHIVA URANIUM (PTY) LTD

Third respondent

TEGETA EXPLORATION AND RESOURCES (PTY) LTD

Fourth respondent

JIC MINING SERVICES (PTY) LTD

Fifth respondent

BLACK EDGE EXPLORATION (PTY) LTD

Sixth respondent

TNA MEDIA (PTY) LTD

Seventh respondent

THE NEW AGE

Eighth respondent

**AFRICA NEWS NETWORK 7** 

Ninth respondent

VR LASER SERVICES (PTY) LTD

Tenth respondent

ISLANDSITE INVESTMENTS 180 (PTY) LTD

Eleventh respondent

CONFIDENT CONCEPTS (PTY) LTD

Twelfth respondent

JET AIRWAYS (INDIA) LTD

Thirteenth respondent

SAHARA COMPUTERS (PTY) LTD

Fourteenth respondent

ABSA BANK LTD

Fifteenth respondent

FIRST NATIONAL BANK LTD

Sixteenth respondent

STANDARD BANK OF SOUTH AFRICA LIMITED

Seventeenth respondent

NEDBANK LIMTED

Eighteenth respondent

# REGISTRAR OF BANKS

Nineteenth respondent

DIRECTOR OF THE FINANCIAL INTELLIGENCE CENTRE

Twentieth respondent

# APPLICANT'S RESPONSE TO OAKBAYS' RULE 35(12) NOTICE

# AD PARAGRAPH 1

- 1. The request for the "records and information" to which the introductory paragraph in the Minister's founding affidavit is declined on the following bases:
  - (a) The records to which paragraph 2 of the founding affidavit refers are those identified in the rest of the affidavit, which are already attached to it.
  - (b) A reference to information within a deponent's field of institutional experience is not encompassed by Rule 35(12) and therefore not a bona fide basis for a Rule 35(12) request.

The request is frivolous.

#### AD PARAGRAPH 2

2. The request for documentation regarding the company registration Oakbay companies is declined. Paragraph 4 of the Minister's affidavit does not refer to a document or tape-recording other than the Minister's notice of motion. Rule 35(12) only permits a request in respect a document or tape-recording to which reference is made in a pleading or affidavit. The request is frivolous.

#### **AD PARAGRAPH 3**

 The open letter to the Banks CEOs and the e-mail forwarded to the Minister of Finance containing the open letter are attached, marked "A1" and "A2" respectively. The reference to "two open letters" was by error. The only open letter in the Minister's possession is the one to the Banks CEOs which was forwarded to him. An affidavit recording this will be filed in due course.

#### AD PARAGRAPH 4

4. The request for "[c]opies of any 'concerns regarding the [b]anking [s]ector" is declined. No reference is made here to any document or tape-recording. The reference is explicitly to what the Minister "was further advised" is the law. Rule 35(12) only permits a request in respect a document or tape-recording to which reference is made in a pleading or affidavit.

## **AD PARAGRAPH 5**

5. The request is declined. The applicant has not referred in paragraph 20 to "[a]ny reply ... to the letter from the Governor of the Reserve Bank". Rule 35(12) only permits a request in respect a document or tape-recording to which reference is made in a pleading or affidavit.

#### **AD PARAGRAPH 6**

6. The document requested has already been provided. It is annexure "H" to the founding affidavit.

#### AD PARAGRAPH 7

7. A copy of a letter dated 22 April 2016 from the Minister of Finance to the Minister of Mineral Resources and a copy of a letter dated 24 May 2016 are attached, marked "B" and "C".

#### **AD PARAGRAPH 8**

8. A copy of the circular by the Ombudsman for Banking Services on the closure of banks is attached, marked "D".

#### **AD PARAGRAPH 9**

 A copy of the 2011 National Treasury Policy document titled "A safer Financial Sector to serve South Africa better" is attached, marked "E".

#### AD PARAGRAPH 10

10. The request for "[a]ny and all further documentation" (emphasis added) in addition to annexure "K" is declined. Rule 35(12) authorises only the production of documentation referred to in pleadings or affidavits.

## AD PARAGRAPH 11

11. See paragraph 10 above.

# AD PARAGRAPH 12

12. See paragraph 10 above. No documentation is referred to, and none is in the applicant's possession.

65219/16133

# THE HIGH COURT OF SOUTH AFRICA (GAUTENG DIVISION, PRETORIA)

2039

Case Number: 80978/16

Sixteenth Respondent

Seventeenth Respondent

Eighteenth Respondent

In the matter between:

THE MINISTER OF FINANCE

FIRST NATIONAL BANK LTD

**NEDBANK LIMITED** 

STANDARD BANK OF SOUTH AFRICA LIMITED

**Applicant** 

And

OAKBAY INVESTMENTS (PTY) LTD First Respondent **OAKBAY RESOURCES AND ENERGY LTD** Second Respondent SHIVA URANIUM (PTY) LTD Third Respondent TEGETA EXPLORATION AND RESOURCES (PTY) LTD Fourth Respondent JIC MINING SERVICES (PTY) LTD Fifth Respondent **BLACKEDGE EXPLORATION (PTY) LTD** Sixth Respondent TNA MEDIA (PTY) LTD Seventh Respondent THE NEW AGE Eighth Respondent AFRICA NEWS NETWORK (PTY) LTD Ninth Respondent **VR LASER SERVICES (PTY) LTD** Tenth Respondent ISLANDSITE INVESTMENTS ONE HUNDRED AND EIGHTY (PTY) LTD Eleventh Respondent **CONFIDENT CONCET (PTY) LTD** Twelfth Respondent JET AIRWAYS (INDIA) LTD (INCORPORATED IN INDIA) Thirteenth Respondent SAHARA COMPUTERS (PTY) LTD' Fourteenth Respondent **ABSA BANK LTD** Fifteenth Respondent

GOVERNOR OF THE SOUTH AFRICAN RESERVE BANK

Nineteenth Respondent

**REGISTRAR OF BANKS** 

Twentieth Respondent

DIRECTOR OF THE FINANCIAL INTELLIGENCE CENTRE

Twenty-First Respondent

#### NOTICE OF INTENTION TO ABIDE

TAKE NOTICE THAT the Twenty-First Respondent does not intent opposing the relief sought by the Applicant and abides by the decision of the above Honourable Court.

**TAKE NOTICE FURTHER** that the Twenty-First Respondent reserves its rights to file an explanatory affidavit bringing certain facts to the above Honourable Court's attention.

DATED at PRETORIA this 24th day of October 2016

(SGD) A. Du Toit

CLIFFE DEKKER HOFMEYR
C/O GILDENHUYS MALATJI
ATTORNEYS
GLMI House
Harlequins Office Park
164 Totius Street

Groenkloof PRETORIA

Tel: 012 428-8600 Fax: 012 428-8601

Ref: S ELOFF/ ADT/01792610

TO: THE REGISTRAR OF THE ABOVE HONOURABLE COURT PRETORIA

#### AND TO:

#### STATE ATTORNEY

Attorneys for Applicant SALU Building 255 Francis Baard Street Pretoria

Tel: 012 309 1575 Fax: 012 309 1649

Email: TNhlanzi@justice.gov.za

Ref: Ms T Nhlanzi

> Received copy hereof on this the \_\_\_\_\_ Day of OCTOBER 2016

#### IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: 80978/16

In the matter between:

MINISTER OF FINANCE

Applicant

and

OAKBAY INVESTMENTS (PTY) LTD	First Respondent
OAKBAY RESOURCES AND ENERGY LTD	Second Respondent
SHIVA URANIUM (PTY) LTD	Third Respondent
TEGETA EXPLORATION AND RESOURCES (PTY) LTD	Fourth Respondent
JIC MINING SERVICES (PTY) LTD	Fifth Respondent
BLACKEDGE EXPLORATION (PTY) LTD	Sixth Respondent
TNA MEDIA (PTY) LTD	Seventh Respondent
THE NEW AGE	Eight Respondent
AFRICA NEWS NETWORK (PTY) LTD	Ninth Respondent
VR LASER SERVICES (PTY) LTD	Tenth Respondent
ISLANDSITE INVESTMENTS ONE HUNDRED AND EIGHTY (PTY) LTD	Eleventh Respondent
CONFIDENT CONCEPT (PTY) LTD	Twelfth Respondent
JET AIRWAYS (INDIA) LTD (INCORPORATED IN INDIA)	Thirteenth Respondent
SAHARA COMPUTERS (PTY) LTD	Fourteenth Respondent

Twenty-First Respondent

ABSA BANK LTD

Fifteenth Respondent

Sixteenth Respondent

STANDARD BANK OF SOUTH AFRICA
LIMITED

NEDBANK LIMITED

Eighteenth Respondent

RESERVE BANK

REGISTRAR OF BANKS

Fifteenth Respondent

Sixteenth Respondent

Seventeenth Respondent

Nineteenth Respondent

Nineteenth Respondent

#### NOTICE OF APPOINTMENT AS ATTORNEYS OF RECORD

TAKE NOTICE THAT the Eighteenth Respondent supports the relief sought by the applicant.

TAKE NOTICE FURTHER THAT the Eighteenth Respondent will accept electronic service of all documents in this application by email at -

Gerhard.Rudolph@bakermckenzie.com

DIRECTOR OF THE FINANCIAL

INTELLIGENCE CENTRE

Widaad.Ebrahim@bakermckenzie.com

Callum.OConnor@bakermckenzie.com

TAKE NOTICE FURTHER THAT the Eighteenth Respondent may file an affidavit within the timeframes prescribed for the filing of answering affidavits and reserves the right to seek further relief in this application, should the need arise.

BAKER & McKENZIE

Attorneys for the Eighteenth Respondent

Tel: (011) 911 4300

Email: Gerhard.Rudolph@bakermckenzie.com

Widaad.Ebrahim@bakermckenzie.com Callum.OConnor@bakermckenzie.com

Ref: G Rudolph/CO

c/o ADAMS & ADAMS

Adams & Adams Place

Lynnwood Bridge

4 Daventry Street

Lynnwood Manor

Pretoria

Tel: (012) 432 6000

Ref: Adele Jordaan

TO:

THE REGISTRAR
THE ABOVE HONOURABLE COURT
PRETORIA

#### STATE ATTORNEY

Attorneys for the Applicant SALU Building 255 Francis Baard Street Pretoria

Tel: 012 309 1575 Fax: 012 309 1649

Email: TNhlanzi@justice.gov.za

(Ref: Ms T Nhlanzi)

#### AND TO:

#### **VAN DER MERWE & ASSOCIATES**

Attorneys for the 1st, 2nd, 3rd, 4th, 6th, 7th, 10th, 11th, 12th & 14th Respondents Waterkloof Ridge PRETORIA

TILLIONA

email: legal2@vdmass.co.za

#### AND TO:

JIC MINING SERVICES (PTY) LTD

Fifth Respondent JIC House 16th Road Midrand

AND TO:

THE NEW AGE

Eighth Respondent 52 Lechwe Street Corporate Park South Old Pretoria Main Road Midrand 1685 Tel: 011 542 1222

Tel: 011 542 1222 Fax: 086 733 7000

#### AND TO:

AFRICA NEWS NETWORK (PTY) LTD

Ninth Respondent Fourth Floor, Sandown Mews 88 Stella Street, Sandown Johannesburg Tel: 011 542 1222

Fax: 086 733 7000

#### AND TO:

JET AIRWAYS (INDIA) LIMITED (INCORPORATED IN INDIA)

Thirteenth Respondent
5th Floor, Bedford Centre Office Tower
Smith Road
Bedford Gardens
2008
Johannesburg

#### AND TO:

**EDWARD NATHAN SONNENBERGS** 

Attorneys for the Fifteenth Respondent 150 West Street, Sandton dlambert@ensafrica.com

#### AND TO:

NORTON ROSE FULBRIGHT FIRST NATIONAL BANK LTD

Attorneys for the Sixteenth Respondent 34 Fredman Drive, Sandton aslam.moosajee@nortonrosefulbright.com

#### AND TO:

**BOWMAN GILFILLAN INC** 

Attorneys for the Seventeenth Respondent
165 West Street, Sandton
clement.mkiva@bowmanslaw.com / alan.keep@bowmanslaw.com

#### AND TO:

THE GOVERNOR OF THE SOUTH AFRICAN RESERVE BANK

Nineteenth Respondent 370 Helen Joseph Street Pretoria AND TO:

THE REGISTRAR OF BANKS
Twentieth Respondent
370 Helen Joseph Street
Pretoria

AND TO:

DIRECTOR OF THE FINANCIAL INTELLIGENCE CENTRE
Twenty-First Respondent
Woodhill Centre
St Bernard Drive
1 Garsfontein
Pretoria

Sahara Rule 7

# IN THE HIGH COURT OF SOUTH AFRICA GAUTENG DIVISION, PRETORIA

2047

Case No: 80978/2016

Sixteenth Respondent

In the matter	between:
---------------	----------

FIRST NATIONAL BANK LTD

in the matter between:	
MINISTER OF FINANCE	Applicant
And	
OAKBAY INVESTMENTS (PTY) LTD	First Respondent
OAKBAY RESOURCES AND ENERGY LTD	Second Respondent
SIVA URANIUM (PTY) LTD	Third Respondent
TEGETA EXPLORATION AND RESOURCES (PTY) LTD	Fourth Respondent
JIC MINING SERVICES (PTY) LTD	Fifth Respondent
BLACKEDGE EXPLORATION (PTY) LTD	Sixth Respondent
TNA MEDIA (PTY) LTD	Seventh Respondent
THE NEW AGE	Eighth Respondent
AFRICA NEWS NETWORK (PTY) LTD	Ninth Respondent
VR LASER SERVICES (PTY) LTD	Tenth Respondent
ISLANDSITE INVESTMENTS ONE HUNDRED AND EIGHTY (PTY) LTD	Eleventh Respondent
CONFIDENT CONCEPTS (PTY) LTD	Twelfth Respondent
JET AIRWAYS (INDIA) LIMITED (INCORPORATED IN INDIA)	Thirteenth Respondent
SAHARA COMPUTERS (PTY) LTD	Fourteenth Respondent
ABSA BANK LTD	Fifteenth Respondent

THE STANDARD BANK OF SOUTH AFRICA

**NEDBANK LIMITED** 

**GOVERNOR OF THE RESERVE BANK** 

**REGISTRAR OF BANKS** 

DIRECTOR OF FINANCIAL INTELLIGENCE CENTRE

Seventeenth Respondent

Eighteenth Respondent

Nineteenth Respondent

Twentieth Respondent

Twenty-first Respondent

## FOURTEENTH RESPONDENT (SAHARA COMPUTERS (PTY) LTD) **RULE 7 NOTICE**

TAKE NOTICE THAT the Fourteenth Respondent, Sahara Computers (Pty) Ltd, disputes the authority of the State Attorney to represent the Applicant, the Minister of Finance, and calls upon the State Attorney to establish its authority to act.

Signed at PRETORIA on this the 17th day of MARCH 2017

Stein Scop Attorneys Inc.

Attorneys for Fourteenth Respondents Ground Floor, 18 Melrose Boulevard Melrose Arch, Johannesburg

Tel: (011) 380 8080 Direct: (011) 380 8070 Mobile: 071 606 2313

Email: bradley@steinscop.com

sian@steinscop.com Our REF: B Scop C/O Brooklyn Place Cnr Bronkhorst and Dey Street, Brooklyn, Pretoria, South Africa, 0001 PO Box 499, Pretoria 0001 Docex 110, Pretoria

T: +27 012 4521300 F: +27 086 6233886

Reference: Bridget Moatshe

To:
The Registrar
Gauteng Division,
Pretoria

And to:
The State Attorney
Attorney for the Applicant
SALU Building
255 Francis Baard Street
Pretoria
Tel: (012) 309 1575

Fax: (012) 309 1575

Fax to Email: 086 629 3073 Email: TNhlanzi@justice.gov.za Ref: 2427/16/232.Ms T Nhlanzi

Received on:	2017
For:	

And to:

Van Der Merwe & Associates

Attorneys for the first, second, third, fourth, sixth, seventh, eleventh and twelfth
Respondents
62 Rigel Avenue North
Watekloof, Pretoria
Ref: Mr G VD Merwe/st/078

Tel: (012) 343 5432

Email: simone@vdmass.co.za

Received on:	2017
For:	

And to: Edward Nathan Sonnenberg Attorneys for the Fifteenth Respondent 159 West Street, Sandton Email: dlambert@ensafrica.com Ref: M Katz/D Lambert/0416998 c/o Gerhard Botha & Partners Inc First Floor, Erasmus Forum Building B Cnr Rigel avenue & Stokkiesdraai Erasmundrand Tel: (012) 347 0480 Email: brendon@bothapartners.co.za Ref: Mr B Swart / Mr H Botha		
	Received on:	_ 2017
	For:	
And to: Norton Rose Fulbright South Africa Inc Attorneys for the Sixteenth Respondent 32 Fredman Drice, Sandton Email: aslam.moosajee@nortonrosefulbright.com Ref: M Moosajee/FNB13954 c/o Montle Jooma Sabdia Inc Ground Floor, Duncan Manor Cnr Jan Schoba and Brooks Streets Brooklyn Tel: (012) 362 3137	25 27 28 28 28 28 28 28 28 28 28 28 28 28 28	

For:

Received on: \_\_\_\_\_\_2017

And to:  Baker Mackenzie  Attorneys for the Eighteenth Respondent Tel: (011) 911 4300  Email: gerhard.rudolph@bakermckenzie.com; widaad.ebrahim@bakermckenzie.com and callum.oconnor@bakermckenzie.com Ref: G Rudolph/CO c/o Adams & Adams Adams & Adams Adams & Adams Adams & Place Lynwood Bridge 4 Daventry Street Lynwood Manor Tel: (012) 432 6000 Ref: Adelle Jordaan	Received on:	2017
	For:	
And to:  Werksmans Attorneys Attorneys for the Nineteenth and Twentieth Respondents 155 5th Street, Sandton Tel: (011) 535 8000 Fax: (011) 535 8600 Ref: Mr C Manaka / Mr C Moaitis Email: cmanaka@werksmans.com and cmoraitis@werksmans.com Ref: SOUT 3267.63 c/o Mabuela Incorporated Charter House 179 Bosman Street Pretoria Central Tel: (012) 324 3966 Email: mabuela@tiscall.co.za	Received on:	_ 2017

For:

			, , ,
And to:  Bowman Gilfillan  Attorneys for the Seventeenth Respondent 165 West Street  Sandton, 2146  Tel: (011) 669 9000  Email: clement.mkiva@bowmanslaw.com c/o Boshoff Attorneys  Ground Floor  Hazelwood Gate Office Park  14 Oaktree Avenue  Cnr Oaktree Avenue and Dely Road  Hazelwood	t		
	Received on: _		2017
	For:		
And to:  MacRobert Attorneys Attorneys for the Twenty-First Respondent MacRobert Building Cnr Jan Schoba & Justice Mohamed Street Tel: (012) 425 3436 Email: ghay@macrobert.co.za Ref: G K Hay	Description	e	
	Received on:		_ 2017

For:

K7 Condenation Saharon.

2053

### IN THE HIGH COURT OF SOUTH AFRICA GAUTENG DIVISION, PRETORIA

Case No.: 80978/2016

In the matter between:

SAHARA COMPUTERS (PTY) LTD

**Applicant** 

and

MINISTER OF FINANCE

Respondent

In re the matter between:

MINISTER OF FINANCE

**Applicant** 

and

**OAKBAY INVESTMENTS (PTY) LTD** 

First Respondent

**OAKBAY RESOURCES AND ENERGY LTD** 

Second Respondent

SIVA URANIUM (PTY) LTD

Third Respondent

TEGETA EXPLORATION AND RESOURCES

(PTY) LTD

Fourth Respondent

JIC MINING SERVICES (PTY) LTD

Fifth Respondent

**BLACKEDGE EXPLORATION (PTY) LTD** 

Sixth Respondent

TNA MEDIA (PTY) LTD

Seventh Respondent

THE NEW AGE

Eighth Respondent

AFRICA NEWS NETWORK (PTY) LTD

Ninth Respondent

**VR LASER SERVICES (PTY) LTD** 

Tenth Respondent

ISLANDSITE INVESTMENTS ONE HUNDRED AND EIGHTY (PTY) LTD

Eleventh Respondent

.

Twelfth Respondent

JET AIRWAYS (INDIA) LIMITED

CONFIDENT CONCEPTS (PTY) LTD

total and the Phases

(INCORPORATED IN INDIA)

Thirteenth Respondent

SAHARA COMPUTERS (PTY) LTD

Fourteenth Respondent

ABSA BANK LTD

Fifteenth Respondent

Sixteenth Respondent

THE STANDARD BANK OF SOUTH AFRICA

NEDBANK LIMITED

GOVERNOR OF THE RESERVE BANK

REGISTRAR OF BANKS

DIRECTOR OF FINANCIAL INTELLIGENCE
CENTRE

Fifteenth Respondent

Sixteenth Respondent

Eighteenth Respondent

Nineteenth Respondent

Twentieth Respondent

#### NOTICE OF APPLICATION: SAHARA'S CONDONATION OF RULE 7 NOTICE

**TAKE NOTICE THAT** the fourteenth respondent, Sahara Computers (Pty) Ltd ("Sahara") intends to make application to this Court at 10h00 on 28 March 2017 for the following orders:

- Sahara be granted leave of the Court condoning the delivery of its rule 7 notice to the respondent, the Minister, served on 17 March 2017.
- Directing the respondent, the Minister, to comply with the provisions of rule 7 and to satisfy the Court that the State Attorney is properly authorised to act.
- 3. That the costs of this application to be paid by the Minister in his personal capacity on an attorney-and-client scale.

 Granting such further or alternative relief as may be appropriate.

TAKE NOTICE THAT the accompanying founding affidavit of STEPHANUS JACOBUS DANIEL NEL together with annexures thereto will be used in support of this application.

TAKE FURTHER NOTICE that the applicant has appointed the offices of STEIN SCOP ATTORNEYS, as set out below, as the address in terms of rule 6(5)(b) at which it will accept service of all notices and process in these proceedings.

**TAKE NOTICE FURTHER** that the relevant time periods in respect of this application <u>have been shortened</u>. In the event that you wish to oppose the relief sought, you are required –

- (a) by 16h00 on Monday, 27 March 2017, to notify the applicant's attorneys in writing of your intention to do so and in such notice to appoint an address referred to in rule 6(5)(b) at which you will accept notice and service of all documents in these proceedings;
- (b) by 16h00 on Monday, 27 March 2017, to file your answering affidavits, if any.

TAKE FURTHER NOTICE that if no notice of intention to oppose and/or answering papers are received, application will be made after the expiry of the time periods set out above, on 28 March 2017, for an order as set out above.

TAKE FURTHER NOTICE THAT the applicant hereby consents, in terms of Rule 4A(1) to service of all further pleadings by electronic mail at the following

addresses: sian@steinscop.com and bradley@steinscop.com subject to the following restrictions:

- Service may only take place to the abovementioned electronic e-mail addresses;
- Attachments to such e-mails must be in Portable Document Format (PDF) only;
- Messages and the attachments thereto may not be larger than
   25MB; and
- 4. Service must be confirmed within 24 hours after transmission.

Any service of documents herein which does not comply with these restrictions will not be accepted and will not be regarded as having been served.

# Signed at JOHANNESBURG on this the 26th day of March 2017.

Stein Scop Attorneys inc. Attorneys for the Applicant **Ground Floor** 18 Melrose Boulevard Arch, Melrose Johannesburg Tel: (011) 380 8080 Direct: (011) 380 8070 Mobile: 071 606 2313 Email: bradley@steinscop.com sian@steinscop.com Our REF: B Scop C/O Brooklyn Place Cnr Bronkhorst and Dey Street, Brooklyn, Pretoria, South Africa, 0001 PO Box 499, Pretoria 0001 Docex 110, Pretoria T: +27 012 4521300 F: +27 086 6233886 Reference: Bridget Moatshe

To:
The Registrar
Gauteng Division,
Pretoria

And to:
The State Attorney
Attorney for the Applicant
SALU Building
255 Francis Baard Street
Pretoria

Tel: (012) 309 1575 Fax: (012) 309 1649

Fax to Email: 086 629 3073 Email: TNhlanzi@justice.gov.za Ref: 2427/16/232.Ms T Nhlanzi

Received		on:
	2017	

•	For:		*
And to: Van Der Merwe & Associates Attorneys for the first, second, third, fourth, sixth, seventh, eleventh and twelfth Respondents 62 Rigel Avenue North Watekloof, Pretoria Ref: Mr G VD Merwe/st/078 Tel: (012) 343 5432 Email: simone@vdmass.co.za	Received	_2017	on:
And to: Edward Nathan Sonnenberg Attorneys for the Fifteenth Respondent 159 West Street, Sandton Email: dlambert@ensafrica.com Ref: M Katz/D Lambert/0416998 c/o Gerhard Botha & Partners Inc First Floor, Erasmus Forum Building B Cnr Rigel avenue & Stokklesdraai Erasmundrand Tel: (012) 347 0480 Email: brendon@bothapartners.co.za Ref: Mr B Swart / Mr H Botha	For:		
	Received	2017	on:
	For:		***************************************

And to: Norton Rose Fulbright South Africa Inc Attorneys for the Sixteenth Respondent 32 Fredman Drice, Sandton Email: aslam.moosajee@nortonrosefulbright.com Ref: M Moosajee/FNB13954 c/o Montie Jooma Sabdia Inc Ground Floor, Duncan Manor Cnr Jan Schoba and Brooks Streets Brooklyn Tel: (012) 362 3137	Received	2017	on:
	For:		
And to:  Baker Mackenzie Attorneys for the Eighteenth Respondent Tel: (011) 911 4300 Email: gerhard.rudolph@bakermckenzie.com; widaad.ebrahim@bakermckenzie.com and callum.oconnor@bakermckenzie.com Ref: G Rudolph/CO c/o Adams & Adams Adams & Adams Place Lynwood Bridge 4 Daventry Street Lynwood Manor Tel: (012) 432 6000 Ref: Adelle Jordaan	Parajust		on
	Received	2017	on

	Form
	For:
And to:  Werksmans Attorneys Attorneys for the Nineteenth and Twentieth Respondents 155 5th Street, Sandton Tel: (011) 535 8000 Fax: (011) 535 8600 Ref: Mr C Manaka / Mr C Moaitis Email: cmanaka@werksmans.com and cmoraitis@werksmans.com Ref: SOUT 3267.63 c/o Mabuela incorporated Charter House 179 Bosman Street Pretoria Central Tel: (012) 324 3966	
Email: mabuela@tiscall.co.za	Received On:
	Received on:
	For:
And to:  Bowman Gliffilan  Attorneys for the Seventeenth Respondent 165 West Street Sandton, 2146 Tel: (011) 669 9000 Email: clement.mkiva@bowmanslaw.com c/o Boshoff Attorneys Ground Floor Hazelwood Gate Office Park 14 Oaktree Avenue Cnr Oaktree Avenue and Dely Road	

Received	on:	
	2017	
		_

	For:		
And to:  MacRobert Attorneys  Attorneys for the Twenty-First Respondent  MacRobert Building  Chr Jan Schoba & Justice Mohamed Street  Tel: (012) 425 3436  Email: ghay@macrobert.co.za  Ref: G K Hay	Received	2017	on:
	For:		

## IN THE HIGH COURT OF SOUTH AFRICA GAUTENG DIVISION, PRETORIA

Case No.: 80978/2016

In the matter between:

SAHARA COMPUTERS (PTY) LTD

**Applicant** 

and

MINISTER OF FINANCE

Respondent

In re the matter between:

MINISTER OF FINANCE

**Applicant** 

and

**OAKBAY INVESTMENTS (PTY) LTD** 

First Respondent

**OAKBAY RESOURCES AND ENERGY LTD** 

Second Respondent

SIVA URANIUM (PTY) LTD

Third Respondent

TEGETA EXPLORATION AND RESOURCES

(PTY) LTD

Fourth Respondent

**JIC MINING SERVICES (PTY) LTD** 

Fifth Respondent

**BLACKEDGE EXPLORATION (PTY) LTD** 

Sixth Respondent

TNA MEDIA (PTY) LTD

Seventh Respondent

THE NEW AGE

Eighth Respondent

**AFRICA NEWS NETWORK (PTY) LTD** 

Ninth Respondent

**VR LASER SERVICES (PTY) LTD** 

Tenth Respondent

ISLANDSITE INVESTMENTS ONE HUNDRED AND

EIGHTY (PTY) LTD

Eleventh Respondent

CONFIDENT CONCEPTS (PTY) LTD

Twelfth Respondent

JET AIRWAYS (INDIA) LIMITED (INCORPORATED IN INDIA)

Thirteenth Respondent

Fourteenth Respondent SAHARA COMPUTERS (PTY) LTD Fifteenth Respondent **ABSA BANK LTD** Sixteenth Respondent FIRST NATIONAL BANK LTD Seventeenth Respondent THE STANDARD BANK OF SOUTH AFRICA Eighteenth Respondent **NEDBANK LIMITED** Nineteenth Respondent **GOVERNOR OF THE RESERVE BANK** Twentieth Respondent **REGISTRAR OF BANKS** DIRECTOR OF FINANCIAL INTELLIGENCE Twenty First Respondent

### **FOUNDING AFFIDAVIT**

I, the undersigned,

### STEPHANUS JACOBUS DANIEL NEL

do hereby make oath and state as follows.

I am the Chief Executive Officer of the applicant, Sahara Computers (Pty)
 Ltd ("Sahara"), of 89 Gazelle Avenue, Corporate Park South, Old Pretoria
 Road, Midrand, Gauteng. I am duly authorised to depose to this affidavit
 and to bring this application on behalf of the applicant.

- 2. The allegations herein are, save where otherwise stated, within my personal knowledge and are true and correct.
- 3. The respondent, the Minister of Finance ("the Minister"), is the applicant in proceedings before this Court in which he seeks declaratory relief to the effect that he cannot intervene in the private banking relationship between a bank and its customer where the bank chooses to close its customer's account, for whatever reason. Sahara is the fourteenth respondent in those proceedings and opposes the grant of that relief as being academic, without merit, and being an abuse of court process. I shall refer to that application as the "main proceedings".
- 4. This application is brought to condone the serving of the rule 7 notice on the Minister and to compel him to satisfy this Court that the State Attorney is duly authorised to act on his behalf in the main proceedings in terms of rule 7 of the Uniform Rules of Court.
- On 17 March 2017, Stein Scop, on behalf of Sahara, issued the Minister
  a rule 7 notice. A copy of the rule 7 notice is attached as Annexure
  "FAC1".
- 6. Also on 17 March 2017, Stein Scop, again on behalf of Sahara, simultaneously served a letter on the State Attorney, for the Minister's

attention, calling upon the Minister to show reasons as to why he should not be the subject of a personal costs order. Stein Scop set out various reasons as to why the Minister should pay costs in his personal capacity. As an aside, these reasons were subsequently expanded upon in Sahara's Supplementary Heads of Argument (served on 22 March 2017).

- 7. On 24 March 2017, being one week later, the State Attorney, on behalf of the Minister, simultaneously filed a rule 30 notice and served a letter on Sahara. Copies of the rule 30 notice and the letter are respectively attached as Annexure "FAC2" and Annexure "FAC3". The content of the rule 30 notice and the letter are largely similar in that:
  - 7.1 The State Attorney pointed to an alleged contradiction in Sahara having caused a rule 7 notice and letter for the attention of the Minister being served upon the State Attorney. The State Attorney alleged this was a mutually destructive approach. I am advised that the State Attorney is incorrect: the purpose of the rule 7 is to establish for the Court that the State Attorney does have the requisite authority to act and that he could receive letters for the Minister pending his proof of same. In any event, I am further advised that any supposed contradiction by Sahara cannot establish authority for the State Attorney if same is lacking.

- 7.2 The State Attorney alleged that rule 7, read with the State Attorney Act, Act 56 of 1957 ("the Act), exempts the State Attorney from proving that they are authorised to act for an organ of State. I am advised that this is incorrect for two reasons, inter alia that rule 7 may create a presumption in favour the State Attorney but that such presumption cannot itself be relied on as proof of authority where such authority is explicitly challenged; and that the authority, if it was so given, would be easy to prove and that the Minister would prove no prejudice in proving same.
- 7.3 The State Attorney claims that the rule 7 was issued significantly out of time. I am advised that the State Attorney is mistaken in this assertion insofar as it overlooks the fact that on 16 March 2017, Sahara filed a notice of withdrawal and substitution, a copy of which is attached as Annexure "FAC4". I am advised that this brings us within the 10 days of the rule. In any event, I am further advised that the relief prayed for in this application cures any such defect to the extent that the rule permits the authority of any attorney said to be acting on behalf of a party in a matter prior to judgment.
- 7.4 The State Attorney also included in the rule 30 notice a complaint regarding Sahara's Supplementary Heads of Argument. This, I am advised, is irregular in light of the fact that the rule 30 notice, a copy of which is attached as Annexure "FAC2", is ostensibly targeted at the rule 7 notice, as appears from the title.

- 7.5 Neither the State Attorney, nor the Minister, has responded to the 17 March letter. As such, no reasons have yet been advanced as to why the Minister should not be the subject of a personal costs order.
- 8. On 25 March 2017, Stein Scop, on behalf of Sahara, wrote two letters to the Minister. One letter pertained to the rule 7, a copy of which is attached as Annexure "FAC5". The other letter pertained to Sahara's rights to file Supplementary Heads of Argument, a copy of which is attached as Annexure "FAC6". In these letters, Stein Scop addressed inter alia:
  - 8.1 The lack of contradiction in sending the letter of 17 March to, and serving a rule 7 notice on the State Attorney.
  - 8.2 The impermissibly obstructionist approach taken by the Minister and the State Attorney to prove the latter's authority to act. It stood to reason that if the State Attorney was properly authorised, a decision to authorise them must have been taken to do so. If that was the case, rather than taking an unnecessarily obstructionist approach, the proof should be submitted to Sahara. Otherwise, a failure to do so could legitimately be criticised as the State Attorney acting without proper authority which is a fatal defect in the Minister's application.
  - 8.3 The Minister and/or the State Attorney was specifically asked to respond by 16h00 on 26 March 2017 as to: (1) whether it was the State Attorney's instructions to not respond to the rule 7 notice;

and (2) to record in writing what prejudice the Minister allegedly suffered in being asked to satisfy rule 7. With respect to the former, the State Attorney and the Minister was put on terms that a failure to respond satisfactorily would result in this application being brought with costs being recovered against the Minister personally.

- 8.4 With respect to Sahara's rights to file Supplementary Heads of Argument, Stein Scop, on behalf of Sahara, reminded the State Attorney that Sahara had a change in legal representation that precipitated the filling of same.
- 8.5 Additionally Stein Scop, on behalf of Sahara, highlighted that the Minister could not be prejudiced in circumstances where the Minister could not deny that Sahara is a party properly before the Court, and thus able to advance oral argument to it, and where the filling of its Supplementary Heads alerted the Court and all the parties, including the Minister, as to what those arguments would be.
- 8.6 The Minister was further reminded that Sahara's written and oral argument pertained to the papers in the matter as they stood and as such no prejudice could be claimed in circumstances where the Minister was fully appraised of the papers and their contents since the launch of the main proceedings.

- Stein Scop's letters called for the Minister and the State Attorney to respond by 16h00 on Sunday, 26th March 2017.
- 10. On 26<sup>th</sup> March 2017, at approximately 13h30, some 2.5 hours before the deadline, the State Attorney responded to both these letters in a single consolidated letter, a copy of which is attached as Annexure "FAC7".
  From this consolidated letter, the following is evident:
  - 10.1 The State Attorney self-servingly complains about Stein Scop's imposition of deadlines. This is without merit given that the State Attorney themselves responded by means of a 2 page consolidated letter well before the deadline. In any event, the State Attorney was asked for Information that was readily available to it (namely whether it was instructed to not satisfy the rule 7 notice by the Minister and what prejudice the Minister suffered in being asked to prove same). The State Attorney's complaint must be seen for what it is: part of the Minister's deliberately obstructionist strategy.
  - 10.2 The State Attorney attempts to defend the mistaken inclusion of the Supplementary Heads in their rule 30 notice. This is without merit as described above: even if the State Attorney was under pressure, no facts are put up as to why a second notice could not be produced. This is especially the case when regard is had to

the fact that the State Attorney is able to produce long-winded letters attacking Sahara for serving rule 7 notice but has up until this point been able to produce a power of attorney or similar that the Minister authorised the State Attorney to act on his behalf.

- 10.3 The State Attorney introduces a new attack that the right to be heard is not absolute and that Sahara's non-compliance with the December 2016 directions limits its ability to file Supplementary Heads of Argument. But that is already addressed above: the State Attorney cannot go so far as to say that Sahara is not a party before the Court (with the right to advance oral argument at the hearing). Its opposition, then, to Supplementary Heads must be seen for what it is: an attempt to exclude Sahara's Supplementary Heads for some other reason. No prejudice can be claimed where the Supplementary Heads serve to give the parties, including the Minister, and the Court, advance notice of what Sahara shall be orally arguing at the hearing. The State Attorney merely makes a bald claim of prejudice but evinces nothing further to support that allegation. That is quite simply because any claim to prejudice is fanciful and self-serving.
- 10.4 The State Attorney rejects that the Minister was under any obligation to explain why he should not be subject to a personal costs order. The State Attorney goes so far as to say that same would be inappropriate. This further evidences the Minister's obstructionism: the Minister has been given an opportunity to

explain his conduct, like he was invited to withdraw his application in the main proceedings, but has chosen to forge ahead despite the lack of merit in doing so. The Minister's failure to provide reasons is at his own peril.

- 10.5 The State Attorney then extraordinarily suggests that they have no instructions insofar as the Rule 30 is concerned. The State Attorney states that "specific Instructions to file a notice of irregular step are therefore not required". In circumstances where the "(authority of the State Attorney) to do all things necessary in the conduct of the matter" is itself being disputed, this is impermissible. This is apparently because "the notice if irregular step filed in response to Sahara's rule 7 notice clearly identifies the statutory source of the State Attorney's inherent authority to act".
- Notwithstanding that same constitutes an admission that the State Attorney has no instructions to file and proceed with a rule 30 notice, and is thus acting mero motu, or under the aegis of another, the State Attorney seems to interpret their powers as being able a blank cheque to conduct litigation as they choose to, and in circumstances where the organ of state that they represent has not instructed them act in a particular way and may want to act differently. This broad and presumptive interpretation is patently incorrect.

- 11. Also on 26 March 2017, at approximately 16h30, Stein Scop, on behalf of Sahara, responded to the State Attorney's letters of earlier that day, a copy of which is attached as Annexure "FAC8". In that letter, Stein Scop inter alia:
  - 11.1 Recorded that it did not wish to address every allegation made by the State Attorney;
  - 11.2 Recorded that the State Attorney and/or the Minister had failed to respond to both letters of 26 March 2017, especially the specific requests for information.
  - 11.3 Recorded that no proof had yet been supplied to satisfy the Court that the State Attorney was so authorised to act on behalf of the Minister;
  - 11.4 Recorded that the objection to the Supplementary Heads of Argument was without merit;
  - 11.5 Disputed the interpretation of the State Attorney's powers to act mero motu or under the aegis of another. Stein Scop emphasised that this especially cannot be permitted in circumstances where any "inherent authority to act", assuming such a thing exists, was itself being challenged.

- 12. Later on 26 March 2017, this application was launched.
- 13. Sahara caused its correspondence to be written to the State Attorney, on behalf of the Minister, for the following reasons:
  - 13.1 The Minister's rule 30 notice is without merit.
  - 13.2 The Minister's rule 30 notice "in response to the fourteenth respondent's <u>purported rule 7 notice</u>". In same purported Rule 30 notice, however, the Minister "<u>further</u> (objects) to the purported <u>filling of 'supplementary' heads of argument</u> as in conflict with the directions of the DJP of 22 December 2016".
- 14. Thus, the Minister's objection to the rule 7 notice, and the inclusion of any objection with respect to Sahara's ability to file Supplementary Heads of Argument, is patently irregular and obstructionist. I have included the State Attorney's objections regarding the Supplementary Heads of Argument in this affidavit for the sake of completeness. I regret that even though this is not the subject of this application such references have had to be made given the attitude of the State Attorney on behalf of the Minister and the continued assertion that the rule 30 notice against the rule 7 notice is also valid and effective against Sahara's Supplementary

Heads of Argument. This conflation is entirely the State Attorney and the Minister's doing.

- 15. Notwithstanding the Minister's inability to show any prejudice with regard to either the rule 7 or the Supplementary Heads of Argument, the conflation of both those steps has rendered the Minister's rule 30 notice defective. In any event, the Court cannot be satisfied that the State Attorney is properly authorised to act because no evidence has been tendered at all that such is the case.
- 16. I point out that this application could have been avoided had the Minister simply provided Sahara with such proof that the State Attorney was authorised to act on his behalf. As I state above, in circumstances where the Minister is an organ of state, and, thus, constitutionally obliged to conduct himself in a transparent way, a power of attorney or similar must have been executed in order to give effect to the Minister's instructions. Should no such evidence exist, it is less that the State Attorney and/or the Minister can rely on any alleged inherent powers of the State Attorney to act, but, rather, that the State Attorney has not been acting with proper instructions in circumstances where, as Sahara does in the main proceedings, it is alleged that the Minister's conduct in his ex officio capacity is actually for his personal political benefit.

- 17. Moreover, the need to establish that proper authorisation has been given is, thus, further underscored by the fact that the Minister's conduct in the main proceedings is potentially subject to a personal costs order. If no proper authority has been given, then it stands to reason that the justifications of Sahara in the main proceedings are enhanced and that the wasteful and unnecessary expenditure which underlies the main proceedings should be paid by the Minister in his personal capacity and not by the State.
- 18. The entirely meritless approach taken by the Minister is illustrated by his characterisation of Sahara's simultaneous serving of the rule 7 notice on and delivering the letter addressed to the Minister to the State Attorney. If that were so, and, Indeed, Sahara's conduct in that regard is mutually destructive, and the Minister is correct, it would mean that the rule 7 notice itself could not be served on the State Attorney's offices until such time that they demonstrated their authority to act. That is, respectfully, absurd.
- 19. As with the Minister's conduct in the main proceedings, the Minister has chosen to take a formalistic and obstructive attitude towards Sahara's rule 7 notice, necessitating this application. Why the Minister, who is equally persistent that the State Attorney was authorised to act, does nothing to prove such authority, where it would be easy for him to do so, is inexplicable. This Court would not be unfair in drawing the negative

inference that the reason for the Minister's strained opposition in this regard is because the State Attorney may be acting without such authority having been properly given.

- 20. In order for the State Attorney to act on behalf of the Minister a decision would have had to be taken by the Minister authorising them to do so. This is also the case when organs of state, such as the South African Revenue Service ('SARS'), instructs privately employed attorneys to act on their behalf or engages the services of the State Attorney itself to act in its interests.
- 21. If no such decision was taken, then the State Attorney is acting mero motu, or under the aegis of another, without being duly authorised to do so on behalf of the Minister. If the decision was taken, then the State Attorney is acting with authority which can be produced very easily.
- 22. If the former is true, then the main proceedings must be struck from the roll with a personal costs order being granted against the Minister. No interpretation of rule 7 or the State Attorney Act, Act 56 of 1956, can support the argument that the State Attorney has an automatic right to act on behalf of an organ of state in the absence of that organ of state making a decision authorising them to do so.

- 23. If the latter is true, then the rule 30 notice, and/or any objection of the Minister to the rule 7 notice being served on him must be seen for what it is: technicist, obstructionist, and meritless. It, too, must then be dismissed with costs.
- 24. It bears worth repeating that the reason the Minister attacks Sahara's rule
  7 notice and its filling of Supplementary Heads of Argument is entirely overlooked by the Minister.
- 25. Sometime early in March, Sahara took a decision to obtain new legal representation.
- 26. On 16 March 2017, Sahara filed a notice of withdrawal and substitution and appointed new attorneys of record with its own team of counsel.
- 27. In the course of discussing instructions to Sahara's legal team to obtain a personal costs order against the Minister for his unnecessary relief in the main proceedings, it was brought to Sahara's attention that given the pretence of the Minister to litigate in his ex officio capacity, but which litigation is actually for the personal political benefit of the Minister, that the authority of the State Attorney to act was open to dispute.

- 28. Sahara at that point, and within a day of its new legal team having been appointed, gave its legal representatives instructions to dispute the authority of the State Attorney to act. Sahara's new legal representatives served the rule 7 notice within a day of being appointed. The Minister only raised the objection to the rule 7 on 24 March 2017, i.e. over a week after it was served on him.
- 29. It is important to note that the Minister cannot claim he has been prejudiced by the filing of the rule 7 notice. In fact, he has not yet done so. The absence of prejudice makes the Minister's attitude even more concerning. This is also applicable with respect to Sahara's filing of Supplementary Heads of Argument.
- 30. Sahara has shown good cause as to why it should have its rule 7 notice condoned. Its previous legal representatives did not bring the possibility of disputing authority to its attention. However, it did dispute the authority of the Minister within one day of its new legal representatives being appointed. It has also continuously sought to afford the Minister every opportunity to satisfy the Court that the State Attorney is authorised to act. Instead of taking the Court into his confidence, the Minister has, or, if the State Attorney's letter of 26 March 2017 is to be believed, the State Attorney has, instead opted to unnecessarily object and put up meritless

grounds of resistance to something that could have easily been disposed of if the Minister, or the State Attorney, had chosen to be transparent with the Court, and Sahara in particular.

- 31. The course of action taken by the Minister, to object on spurious grounds where there is no legal merit to do so, merely underscores that Sahara is justified in doubting that authority was properly given in this instance.
- 32. For these reasons Sahara seeks costs against the Minister in his personal capacity. As with the Minister's conduct in the main proceedings, the Minister and the State Attorney have chosen to conduct themselves in a contemptible way in this Court. Rather than answer the rule 7 notice, they have necessitated the bringing of this application. The State should not be burdened with the costs of the application in such circumstances where either they are not duly authorised to act or where the Minister, as the organ of state, has conducted himself in a way that is unreasonable, impermissible, and still unable to provide sufficient answer to the rule 7 notice as served.

#### CONCLUSION

33. In the circumstances, Sahara's application should be granted, compelling the Minister to satisfy the Court that the State Attorney is properly

authorised to act; the Minister being personally made to pay the costs of the application being the costs of two counsel.

> STEPHANUS JACOBUS DANIEL NEL

**COMMISSIONER OF OATHS** 







### IN THE HIGH COURT OF SOUTH AFRICA **GAUTENG DIVISION, PRETORIA**

Case No: 80978/2016

In the matter between:

MINISTER OF FINANCE

Applicant

And

**OAKBAY INVESTMENTS (PT** 

First Respondent

OAKBAY RESOURCES AND EN

econd Respondent

SIVA URANIUM (PTY) LTD

Third Respondent

**TEGETA EXPLORATION AND RESOURCES** 

(PTY) LTD

Fourth Respondent

**JIC MINING SERVICES (PTY) LTD** 

Fifth Respondent

**BLACKEDGE EXPLORATION (PTY) LTD** 

Sixth Respondent

TNA MEDIA (PTY) LTD

Seventh Respondent

THE NEW AGE

Eighth Respondent

AFRICA NEWS NETWORK (PTY) LTD-

Ninth Respondent

VR LASER SERVICES (PTY) LTD

Tenth Respondent

ISLANDSITE INVESTMENTS ONE HUNDRED AND EIGHTY (PTY) LTD

Eleventh Respondent

Twelfth Respondent

JET AIRWAYS (INDIA) LIMITED

CONFIDENT CONCEPTS (PTY) LTD

Thirteenth Respondent

(INCORPORATED IN INDIA)

Fourteenth Respondent

SAHARA COMPUTERS (PTY) LTD

Fifteenth Respondent

**FIRST NATIONAL BANK LTD** 

**ABSA BANK LTD** 

Sixteenth Respondent

THE STANDARD BANK OF SOUTH AFRICA

**NEDBANK LIMITED** 

**GOVERNOR OF THE RESERVE BANK** 

**REGISTRAR OF BANKS** 

DIRECTOR OF FINANCIAL INTELLIGENCE CENTRE

Seventeenth Respondent

Eighteenth Respondent

Nineteenth Respondent

Twentieth Respondent

Twenty-first Respondent

### FOURTEENTH RESPONDENT (SAHARA COMPUTERS (PTY) LTD) RULE 7 NOTICE

TAKE NOTICE THAT the Fourteenth Respondent, Sahara Computers (Pty) Ltd, disputes the authority of the State Attorney to represent the Applicant, the Minister of Finance, and calls upon the State Attorney to establish its authority to act.

Signed at PRETORIA on this the 17th day of MARCH 2017

Stein Scop Attorneys Inc.

Attorneys for Fourteenth Respondents Ground Floor, 18 Melrose Boulevard

Melrose Arch, Johannesburg Tel: (011) 380 8080 Direct: (011) 380 8070

Mobile: 071 606 2313

Email: bradley@steinscop.com

sian@steinscop.com Our REF: B Scop C/O Brooklyn Place

Cnr Bronkhorst and Dey Street,

Brooklyn, Pretoria, South Africa, 0001

PO Box 499, Pretoria 0001

Docex 110, Pretoria T: +27 012 4521300 F: +27 086 6233886

Reference: Bridget Moatshe

To: The Registrar Gauteng Division, Pretoria

And to: The State Attorney Attorney for the Applicant **SALU Building** 255 Francis Baard Street Pretoria Tel: (012) 309 1575 Fax: (012) 309 1649 Fax to Email: 086 629 3073 Email: TNhlanzi@justice.gov.za

Ref. 2427/16/232.Ms T Nhlanzi

8	TATE ATTORNE	Y	•
PRI\	ATE BAG/PRIVAATSA	K XB1	-01
<b>6</b>	2017 -03- 1 7	101	المكادا
• .	PRETORIA 0001		
81	AATSPROKURI	EUR-	ļ

Received on: 2017 For:

And to: Van Der Merwe & Associates Attorneys for the first, second, third, fourth, sixth, seventh, eleventh and twelfth Respondents 62 Rigel Avenue North Watekloof, Pretoria Ref: Mr G VD Merwe/st/078 Tel: (012) 343 5432

Email: simone@vdmass.co.za

VAN DER MERWE EN ASS

RIGEL LAAN 62
WATERIOOF RIDGE - PRETORIA
TEL: 012 343 5432 / 087 654 0209 FAKS: 012 343 5435 / 086 500 7587

Received on: 17 March 2017

15:46 For:

And to: **Edward Nathan Sonnenberg** Attorneys for the Fifteenth Respondent 159 West Street, Sandton Email: dlambert@ensafrica.com Ref: M Katz/D Lambert/0416998

c/o Gerhard Botha & Partners inc First Floor, Erasmus Forum Building B Cnr Rigel avenue & Stokkiesdraal

Erasmundrand Tel: (012) 347 0480

9 99 L s

Email: brendon@bothapartners.co.za

Ref. Mr B Swart / Mr H Botha

Received on:

GERHARD BOTHA & PARTNERS INC Erasmus Forum Building "B" Cpr. Rigel Avenue & Stokkiesdraal Erasmusrand 0181

And to:

Norton Rose Fulbright South Africa Inc Attorneys for the Sixteenth Respondent . 32 Fredman Drice, Sandton Email:

aslam.moosajee@nortonrosefulbright.com Ref: M Moosajee/FNB13954

c/o Montie Jooma Sabdia Inc Ground Floor, Duncan Manor Cnr Jan Schoba and Brooks Streets Brooklyn

Tel: (012) 362 3137

MIJ S Inc

Mothle Jooma Sabdia

1 7 MAR 2017

Pretoria Branch Tei : 812 362 3137 > Fax : 012 362 4159 Received without Prejudice

Received on:

2017

For:

And to: Baker Mackenzie Attorneys for the Eighteenth Respondent Tel: (011) 911 4300 Email: gerhard.rudolph@bakermckenzie.com; widaad.ebrahim@bakermckenzie.com and callum.oconnor@bakermckenzie.com Ref: G Rudolph/CO c/o Adams & Adams Adams & Adams Place Lynwood Bridge 4 Daventry Street Lynwood Manor Tel: (012) 432 6000 Ref: Adelle Jordaan

. . .



Received on:	2017
For.	

And to:
Werksmans Attorneys
Attorneys for the Nineteenth and Twentieth
Respondents
155 5th Street, Sandton
Tel: (011) 535 8000
Fax: (011) 535 8600

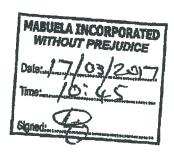
Ref: Mr C Manaka / Mr C Moaitis Email: cmanaka@werksmans.com and

cmoraitis@werksmans.com

Ref: SOUT 3267.63 c/o Mabuela Incorporated

Charter House 179 Bosman Street Pretoria Central Tel: (012) 324 3966

Email: mabuela@tiscall.co.za



Received on:	2017
For	

And to:
Bowman Gilfilian
Attorneys for the Savanteenth Respondent
165 West Street
Sandton, 2146
Tel: (011) 669 9000
Email: clement.mkiva@bowmanslaw.com
c/o Boshoff Attorneys
Ground Floor
Hazelwood Gate Office Park
14 Oaktree Avenue
Cnr Oaktree Avenue and Dely Road
Hazelwood

4 4, 20

BOSHOP INTERPORTURE - Received without project.

2017 -03- 17

Received on: \_\_\_\_\_2017

For:

And to:
MacRobert Attorneys
Attorneys for the Twenty-First Respondent
MacRobert Building
Cnr Jan Schoba & Justice Mohamed Street
Tel: (012) 425 3436
Email: ghay@macrobert.co.za
Ref: G K Hay

MacRobert

Attorneys

Without prejudice of slients rights Sonder benadeling warklient se regte

der benaussig

14:05

Received on: 2017

For:

PG R7 repuse.
FAC 2

2087

### IN THE HIGH COURT OF SOUTH AFRICA GAUTENG DIVISION, PRETORIA

Case no: .80978/2016

In the matter between:

MINISTER OF FINANCE

**Applicant** 

and

**OAKBAY INVESTMENTS (PTY) LTD** 

First respondent

OAKBAY RESOURCES AND ENERGY LTD

Second respondent

SHIVA URANIUM (PTY) LTD

Third respondent

TEGETA EXPLORATION AND RESOURCES (PTY) LTD

Fourth respondent

JIC MINING SERVICES (1979) (PTY) LTD

Fifth respondent

BLACKEDGE EXPLORATION (PTY) LTD

Sixth respondent

TNA MEDIA (PTY) LTD

Seventh respondent

THE NEW AGE

Eighth respondent

AFRICA NEWS NETWORK (PTY) LTD

Ninth respondent

VR LASER SERVICES (PTY) LTD

Tenth respondent

ISLANDSITE INVESTMENTS ONE HUNDRED AND

EIGHTY (PTY) LTD

Eleventh respondent

CONFIDENT CONCEPT (PTY) LTD

Twelfth respondent

JET AIRWAYS (INDIA) LTD (INCORPORATED IN INDIA)

Thirteenth respondent

SAHARA COMPUTERS (PTY) LTD

Fourteenth respondent

ABSA BANK LTD

Fifteenth respondent

FIRST NATIONAL BANK LTD

Sixteenth respondent

STANDARD BANK OF SOUTH AFRICA LIMITED

Seventeenth respondent

NEDBANK LIMTED

Eighteenth respondent

GOVERNOR OF THE SOUTH AFRICAN RESERVE BANK

Nineteenth respondent

**REGISTRAR OF BANKS** 

Twentieth respondent

DIRECTOR OF THE FINANCIAL INTELLIGENCE CENTRE

Twenty-first respondent

#### FILING SHEET

KINDLY TAKE NOTICE THAT the Applicant hereby files a Rule 30 Notice.

DATED AT PRETORIA ON THIS 24 DAY OF MARCH 2017

STATE ATTORNEY
Attorney for the Applicant
SALU Building

255 Francis Baard Street

Pretoria

Tel: 012 309 1575 Fax: 012 309 1649

Fax to Email: 086 6293 073 Email: TNhlanzi@justice.gov.za

Ref: 2427/16/Z32. Ms T Nhlanzi

TO:

THE REGISTRAR OF THE ABOVE HONOURABLE COURT GAUTENG DIVISION, PRETORIA

AND

TO:

STEIN SCOP ATTORNEYS INC. Attorneys for 10<sup>th</sup> & 14<sup>th</sup> Respondent Ground Floor

Ground Floor 18 Melrose Boulevard Melrose Arch, Johannesburg Tel: (011) 380 8080

Email: glenn@steinscop.com sian@steinscop.com

Ref: G Stein

C/O BROOKLYN PLACE

Cnr Bronkhorst and Dey Street

Brooklyn, Pretoria Ref: Bridget Moatshe RC 13:11

2017 -03- 7 4

VDT ATTORNEYS INC Cnr Bronkhorst & Day Street, Brooklyn Docex 110, Pretoria Tel: (012) 452 1300 ," i

Fax: 086 433 1178

AND TO:

**VAN DER MERWE & ASSOCIATES** Attorney for 1st, 2sd, 3sd, 4th, 6th, 7th, 11th, 12th and 14th Respondents 62 Rigel Avenue North

Waterkloof Pretoria

Ref: Mr GT VD Merwe/st/078

Tel: 012 343 5432

E-mail: simone@wdmass.co.za

AND TO:

**EDWARD NATHAN SONNENBERGS** 

Attorneys for 15th Respondent

150 West Street Sandton

Email: dlambert@ensafrica.com Ref. M Katz/ D Lambert/0416998

C/O GERHARD BOTHA & PARTNERS INC First Floor, Erasmus Forum Building B

Cnr Rigel Avenue & Stokkiesdrrai Erasmuscand Tel: 012 347 0480

Email: brendon@bothapartners.co.za Ref: Mr B Swart/ Mr H Botha

AND

NORTON ROSE FULBRIGHT SOUTH AFRICA INC OT:

Attorneys for 16th Respondent 34 Fredman Drive, Sandton

Email: aslam.moosajee@uortonrosefulbright.com

Ref: Mr Moosajee/FNB 13954

c/o MONTLE JOOMA SABDIA INC

Ground Floor, Duncan Manor Cnr Jan Shoba and Brooks Streets

Brooklyn Tel: 012 362 313

AND

**BOWMAN GILFILLAN INCORPORATED** TO:

> Aftorneys for the 17th Respondent Email: clement.mkiya@bowmanslaw.co.za Alan.keep@bowmanslaw.co.za

Ref. C Mkiva/6162672

C/O BOSHOFF ATTORNEYS

Ground Floor, Hazelwood Gate Office Park

14 Oaktree Avenue Cnr Oaktree Avenue and Dely Road Hazwlwood Pretoria Ref: Natasha Nortje/NN1564

AND TO:

BAKER & MACKENZIE

Attorneys for the 18th Respondent

Tel: 011 911 4300

Email: Gerhard.Rudolph@bakermckenzie.com

Wichard. Ebrahim@bakermckenzie.com Callum.Oconnor@bakermckenzie.com

Ref: G Rudolph/CO C/O ADAMS & ADAMS Adams & Adams Place Lynwood Bridge 4 Daventry Street Lynwood Manor Tel: 012 432 6000 Ref: Adele Jordaan

AND TO:

**MACROBERT ATTORNEYS** Attorneys for the 21st Respondent

MacRobert Building Cnr Jan Shoba & Justice Mahomed Street Tel: 012 425 3436

Email: ghay@macrobert.co.za Ref: G K Hay

AND TO:

**WERKSMANS ATTORNEYS** 

19th and 20th Respondent's Attorneys

155-5th Street Sandton

Tel: +27 11 535 8000 | F: +27 11 535 8600

Ref. Mr C Manaka / Mr C Moraitis Email: emanaka@werksmans.com emoraitis@werksmans.com

Ref: SOUT 3267.63

C/O MABUELA INCORPORATED

Charter House, 179 Bosman Street

Pretoria Central Tel: 012 325 3966

Email: mabuela@tiscali.co.za

MacRo:

Without prejudice of offents rights
Sonder benedeling van klants ee reg: 13-02 Sign / Geleken

# IN THE HIGH COURT OF SOUTH AFRICA (GAUTENG DIVISION, PRETORIA)

Case no. 80978/2016

In the matter between:

MINISTER OF FINANCE

**Applicant** 

And

**OAKBAY INVESTMENTS (PTY) LTD** 

First Respondent

**OAKBAY RESOURCES AND ENERGY LTD** 

Second Respondent

SHIVA URANIUM (PTY) LTD

Third Respondent

TEGETA EXPLORATION AND RESOURCES (PTY)

LTD

Fourth Respondent

WESTDAWN INVESTMENTS (PTY) LTD

Fifth Respondent

BLACKEDGE EXPLORATION (PTY) LTD

Sixth Respondent

TNA MEDIA (PTY) LTD

Seventh Respondent

INFINITY MEDIA (PTY) LTD

Ninth Respondent

**VR LASER SERVICES (PTY) LTD** 

Tenth Respondent

ISLANDSITE INVESTMENTS ONE HUNDRED AND

EIGHTY (PTY) LTD

Eleventh Respondent

CONFIDENT CONCEPT (PTY) LTD

Twelfth Respondent

SAHARA COMPUTERS (PTY) LTD

Fourteenth Respondent

**ABSA BANK LTD** 

Fifteenth Respondent

Sixteenth Respondent FIRST NATIONAL BANK LTD STANDARD BANK OF SOUTH AFRICA LIMITED Seventeenth Respondent Eighteenth Respondent **NEDBANK LIMITED GOVERNOR OF THE SOUTH AFRICAN** Nineteenth Respondent RESERVE BANK Twentieth Respondent REGISTRAR OF BANKS Twenty-First DIRECTOR OF THE FINANCIAL INTELLIGENCE Respondent

### APPLICANT'S RULE 30 NOTICE IN RESPONSE TO THE FOURTEENTH RESPONDENT'S **PURPORTED RULE 7 NOTICE**

CENTRE

TAKE NOTICE that the applicant objects to the fourteenth respondent's purported Rule 7 notice, dated 17 March 2017, and contends that it constitutes an irregular step.

TAKE NOTICE FURTHER that the grounds on which the applicant objects to the fourteenth respondent's purported Rule 7 are the following

- 1. Rule 7(1) requires that the authority of an attorney be disputed within ten days after it has come to the notice of a contesting party that its opponent is represented by a particular person.
- 2. The fourteenth respondent was served on 14 October 2016 with the notice of motion. The notice of motion records that the State Attorney is representing the applicant in this matter. Accordingly it came to the notice of the fourteenth

respondent that the applicant is being represented by the State Attorney on 14 October 2016.

- 3. Therefore the purported Rule 7 notice is significantly out of time.
- 4. No cause has been shown for filing the purported Rule 7 notice a mere five court days before the hearing.
- 5. Nor has the fourteenth respondent sought leave from the Court to file the belated notice.
- 6. Should the Rule 7 notice be persisted in at this late stage, this will prejudice the applicant, the other parties and the hearing date (arranged per special allocation by the Deputy Judge President, setting the matter down before a Full Bench); undermine the interests of justice; and infringe the applicant's right of access to court.
- 7. The Rule 7 notice is also otherwise incompetent for being inconsistent with Rule 7(5) and section 3 of the State Attorney Act 56 of 1957. Pursuant to these provisions the State Attorney is vested with inherent statutory authority to represent an organ of State. The applicant is an organ of State, and litigates in this capacity. Consequently a Rule 7 notice disputing the State Attorney's authority to represent the applicant in this matter is legally incompetent.

TAKE FURTHER NOTICE that the applicant further objects to the purported filing of "supplementary" heads of argument as in conflict with the directions of the DJP of 22 December 2016.

TAKE FURTHER NOTICE that the applicant affords the fourteenth respondent until the first day of the hearing of the matter to remove the Irregular step by withdrawing the purported Rule 7 notice. The belated filing of the purported Rule 7 notice does not permit the time periods contemplated by Rule 30.

TAKE NOTICE FURTHER that if the purported Rule 7 is not withdrawn, the applicant shall apply at the hearing that it be set aside with costs on a punitive scale, including the costs of two counsel.

SIGNED AT PRETORIA ON 24 MARCH 2017

STATE ATTORNEY

Attorney for the applicant SALU Building 255 Francis Baard Street

Pretoria

Tel: 012 309 1575 Fax: 012 309 1649

Email: TNhlanzi@justice.gov.za

Ref: Ms T. Nhlanzi

TO:

THE REGISTRAR

High Court, Pretoria

AND TO:

**OAKBAY INVESTMENTS (PTY) LTD** 

First Respondent

Grayston Ridge Office Park, Block A

Lower Ground Floor,

144 Katherine street, Sandown

Sandton

Telephone: +27(0)11 430 7640 FAX: +1 0123-4567-8900 E-mail: info@oakbay.co.za

AND TO: OAKBAY RESOURCES AND ENERGY LTD

Second Respondent 89 Gazelle Avenue Corporate Park South

Midrand

AND TO: SHIVA URANIUM (PTY) LTD

Third Respondent 1A BERG STREET Hartebeesfontein North West. 2600 Tel: 0184679000 Fax: 018 467 9040

AND TO: TEGETA EXPLORATION AND RESOURCES (PTY) LTD

Fourth Respondent

Grayston Ridge Office Park, Block A

Lower Ground Floor,

144 Katherine Street, Sandown

Sandton

Tel: 011 542 1000 Fax: 011 262 3868

AND TO: WESTDAWN INVESTMENTS (PTY) LTD

Fifth Respondent
JIC House, 106A
18<sup>th</sup> Road
MIDRAND

AND TO: BLACKEDGE EXPLORATION (PTY) LTD

Sixth Respondent 89 Gazelle Avenue Corporate Park South MIDRAND

AND TO: TNA MEDIA (PTY) LTD

Seventh Respondent 52 Lechwe Street Corporate Park South Old Pretoria Main Road

MIDRAND 1685

TEL: 011 542 1222 FAX: 086 733 7000 AND TO: INFINITY MEDIA (PTY) LTD

Ninth Respondent 52 Lechwe Street Corporate Park South Old Pretoria Main Road

Midrand

AND TO: VR LASER SERVICES (PTY) LTD

**Tenth Respondent** 

Grayston Ridge Office Park, Block A

Lower Ground Floor,

144 Katherine Street, Sandown

Sandton

AND TO: ISLANDSITE INVESTMENTS ONE HUNDRED AND EIGHTY (PTY)

LTD

Eleventh Respondent 89 Gazelle Avenue Corporate Park South Old Johannesburg Road

Midrand 1685

AND TO: CONFIDENT CONCEPT (PTY) LTD

Twelfth Respondent 89 Gazelle Avenue Corporate Park South Old Johannesburg Road

Midrand 1685

AND TO: SAHARA COMPUTERS (PTY) LTD

Fourteenth Respondent 89 Gazelle Avenue Corporate Park South Old Johannesburg Road

Midrand 1685

AND TO: ABSA BANK LTD

Fifteenth Respondent

7<sup>th</sup> Floor

**Barclays Towers West** 

15 Troy Street Johannesburg AND TO:

FIRST NATIONAL BANK LTD

Sixteenth Respondent 6<sup>th</sup> Floor, 1 First Place FNB Bank City Simmonds Street Johannesburg

AND TO:

STANDARD BANK OF SOUTH AFRICA

Seventeenth Respondent

9<sup>th</sup> Floor

Standard Bank Centre 5 Simmonds Street Johannesburg

AND TO:

**NEDBANK LIMITED** 

Eighteenth Respondent

G Block 3<sup>rd</sup> Floor Desk 135 Rivonia Rd Sandown Sandton

AND TO:

THE GOVERNOR OF THE SOUTH AFRICAN RESERVE BANK

Nineteenth Respondent 370 Helen Joseph Street

Pretoria

AND TO:

THE REGISTRAR OF BANKS

Twentieth Respondent 370 Helen Joseph Street

Pretoria

AND TO:

DIRECTOR OF THE FINANCIAL INTELLIGENCE

CENTRE

**Twenty First Respondent** 

Woodhill Centre St. Bernard Drive Garsfontein Pretoria

2098



# Office of the State Attorney Pretoria

PRIVATE BAG X 91 PRETORIA 0001 SALU BUILDING 255 FRANCIS BAARD (SCHOEMAN) STREET CNR THABO SEHUME (ANDRIES) STREET [ENTRANCE IN THABO SEHUME (ANDRIES)

EL: (SWITCHBOARD): (012) 308 1500 (DIRECT LINE): (012) 309 1575 (SECRETARY): (012) 309 1504 FAX: (012) 309 1649/50 DOCEC: 298

24 MARCH 2017

ENG:

T. NHLANZI

EMAIL:

TNhianzi@justice.gov.za

My Ref; 2427/18/232

YOUR REF. TRI15/ B SCOP

#### STEIN SCOP ATTORNEYS

Per e mail: Bradley@steinscop.com

RE: MINISTER OF FINANCE // OAKBAY INVESTMENTS (PTY) LTD AND OTHERS

Dear Sir

Your letter dated 17 March 2017, and now the "supplementary" heads of argument received on 22 March refer.

The former is addressed to me in my capacity "as legal representative of the Minister of Finance". Yet your letter follows a Rule 7 notice purportedly filed by you on behalf of the fourteenth respondent purporting to question my authority to act in this capacity. The inconsistency is evident.

The patent irregularity of your purported Rule 7 notice is not the subject matter of this correspondence. Nor does this response to your letter constitute a further step in the proceedings. The applicant's rights as regards your purported Rule 7 notice remain reserved.

As regards the legal competence of the subject-matter of your letter under reply, this, too, is disputed. In this respect, too, the applicant's rights are reserved. Each allegation in your letter is, to the extent that this may be necessary, denied.

In respect of the purported "supplementary" heads of argument now presented, we note the following.

Firstly, the description is misleading. Sahara chose not to be separately represented. It similarly chose to file no heads of argument separate to those of the other Oakbay respondents. What are now presented are in so sense "supplementary". They entail in truth a belated argument.

Secondly, Sahara (represented, as you acknowledge, by Attorney Gert van der Merwe and senior counsel engaged by him) was represented at the directions meeting convened by the Deputy Judge President on 15 December 2016. Directions were then issued as regards dates for heads of argument.

Thirdly, if Sahara's purported decision to present heads of argument this week is unreasonably late. It has had nearly four months to review its position.

Sahara's conduct now is in breach of the Deputy Judge President's directions, and patently prejudicial to the parties which have complied therewith in their preparation for the hearing.

Yours Sincerely

Ms Themselible Nhlanzi FOR: STATE ATTORNEY PRETORIA DEPARTMENT OF JUSTICE &

CONSTITUTIONAL DEVELOPMENT

CC:

The Hon the Judge President, Deputy Judge President and Mr Justice Modiba





#### IN THE HIGH COURT OF SOUTH AFRICA **GAUTENG DIVISION, PRETORIA**

Case No: 80978/2016

In the matter between:

MINISTER OF FINANCE

Applicant

And

OAKBAY INVESTMENTS (PTY) LTD

First Respondent

OAKBAY RESOURCES AND ENERGY LTD

Second Respondent

SIVA URANIUM (PTY) LTD

Third Respondent

TEGETA EXPLORATION AND RESOURCES

(PTY) LTD

Fourth Respondent

JIC MINING SERVICES (PTY) LTD

Fifth Respondent

**BLACKEDGE EXPLORATION (PTY) LTD** 

Sixth Respondent

TNA MEDIA (PTY) LTD

Seventh Respondent

THE NEW AGE

**Eighth Respondent** 

AFRICA NEWS NETWORK (PTY) LTD

Ninth Respondent

VR LASER SERVICES (PTY) LTD

Tenth Respondent

ISLANDSITE INVESTMENTS ONE HUNDRED AND EIGHTY (PTY) LTD

Eleventh Respondent

**CONFIDENT CONCEPTS (PTY) LTD** 

Twelfth Respondent

**JET AIRWAYS (INDIA) LIMITED** 

Thirteenth Respondent

(INCORPORATED IN INDIA)

Fourteenth Respondent

SAHARA COMPUTERS (PTY) LTD

Fifteenth Respondent

**ABSA BANK LTD** 

Sixteenth Respondent

**FIRST NATIONAL BANK LTD** 

THE STANDARD BANK OF SOUTH AFRICA

**NEDBANK LIMITED** 

**GOVERNOR OF THE RESERVE BANK** 

**REGISTRAR OF BANKS** 

DIRECTOR OF FINANCIAL INTELLIGENCE CENTRE

Seventeenth Respondent

Eighteenth Respondent

Nineteenth Respondent

Twentieth Respondent

Twenty First Respondent

#### NOTICE OF SUBSTITUTION OF ATTORNEYS OF RECORD

TAKE NOTICE that VAN DER MERWE & ASSOCIATES is hereby substituted as attorneys of record for the fourteenth respondent.

TAKE NOTICE FURTHER that STEIN SCOP ATTORNEYS INCORPORATED is hereby appointed as attorneys of record for the fourteenth respondent, with the service address as set out below.

Signed at PRETORIA on this the 16th day of MARCH 2017

Stein Scop Attorneys Inc.

Attorneys for the Tenth and Fourteenth

Respondents Ground Floor

18 Melrose Boulevard

Melrose Arch, Johannesburg

Tel: (011) 380 8080 Direct: (011) 380 8070 Mobile: 071 606 2313

Email: bradley@steinscop.com

sian@steinscop.com Our REF: B Scop C/O Brooklyn Place

Cnr Bronkhorst and Dey Street, Brooklyn, Pretoria, South Africa, 0001 PO Box 499, Pretoria 0001 Docex 110, Pretorla T: +27 012 4521300

F: +27 086 6233886

Reference: Bridget Moatshe

To: The Registrar Gauteng Division, Pretoria

And to: The State Attorney Attorney for the Applicant SALU Bullding 255 Francis Baard Street Pretoria

Tel: (012) 309 1575 Fax: (012) 309 1649

Fax to Email: 086 629 3073 Email: TNhlanzi@justice.gov.za Ref: 2427/16/232.Ms T Nhlanzi

Received on:	2017
For:	

2017

And to: Van Der Merwe & Associates Attorneys for the first, second, third, fourth, sixth, seventh, eleventh and twelfth Respondents 62 Rigel Avenue North Watekloof, Pretoria Ref: Mr G VD Merwe/st/078

Tel: (012) 343 5432

Email; simone@vdmass.co.za

Received on:	2017
For:	

And to: Edward Nathan Sonnenberg Attorneys for the Fifteenth Respondent 159 West Street, Sandton Email: dlambert@ensafrica.com Ref: M Katz/D Lambert/0416998 c/o Gerhard Botha & Partners Inc First Floor, Erasmus Forum Building B Cnr Rigel avenue & Stokklesdraai Erasmundrand Tel: (012) 347 0480 Email: brendon@bothapartners.co.za Ref: Mr B Swart / Mr H Botha		
	Received on:	2017
	For:	
And to: Norton Rose Fulbright South Africa Inc Attorneys for the Sixteenth Respondent 32 Fredman Drice, Sandton Email: aslam.moosajee@nortonrosefulbright.com Ref: M Moosajee/FNB13954 c/o Montle Jooma Sabdia Inc Ground Floor, Duncan Manor Cnr Jan Schoba and Brooks Streets Brooklyn Tel: (012) 362 3137		004°
( ( / - · - / - · - · - · - · - · - · - ·	Received on:	2017

For:

Saker Mackenzie Attorneys for the Eighteenth Respondent Fel: (011) 911 4300 Email: Jerhard.rudolph@bakermckenzie.com; Vidaad.ebrahim@bakermckenzie.com and Jallum.oconnor@bakermckenzie.com Ref: G Rudolph/CO Vo Adams & Adams Adams & Adams Adams & Adams John Street Lynwood Bridge Daventry Street Lynwood Manor Fel: (012) 432 6000 Ref: Adeile Jordaan	Received on:2017	
	1,0001100 0111	
	For:	•••
And to:  Werksmans Attorneys Attorneys for the Nineteenth and Twentieth Respondents 155 5th Street, Sandton Tel: (011) 535 8000 Fax: (011) 535 8600 Ref: Mr C Manaka / Mr C Moaitis Email: cmanaka@werksmans.com and cmoraltis@werksmans.com Ref: SOUT 3267.63 c/o Mabuela incorporated Charter House 179 Bosman Street Pretoria Central Tel: (012) 324 3966 Email: mabuela@tiscall.co.za	Received on:2017	•
	For:	_

And to: **Bowman Gilfillan** Attorneys for the Seventeenth Respondent 165 West Street Sandton, 2146 Tel: (011) 669 9000 Email: clement.mkiva@bowmanslaw.com c/o Boshoff Attorneys **Ground Floor** Hazelwood Gate Office Park 14 Oaktree Avenue Cnr Oaktree Avenue and Dely Road Hazelwood

Received on: _	 	2017
For:		

And to: **MacRobert Attorneys** Attorneys for the Twenty-First Respondent MacRobert Building Cnr Jan Schoba & Justice Mohamed Street Tel: (012) 425 3436 Email: ghay@macrobert.co.za

Ref: G K Hay

Received on:	2017
For	



Co. Name: Stein Scop Attorneys Inc. Registration No: 2015/306625/21 Landline: +2711 380 8080

Email: bradley@steinscop.com

Direct: +2711 380 8070 Mobile: +2782 781 3462 Our ref: TRI16 / B Scop Your ref: MS T Nhianzi 2106

Date: 25 March 2017

The State Attorney

Attention: Ms Thembelihle Nhlanzi

By email: TNhlanzi@justice.gov.za

cc: The Judge President, Gauteng Division,

The Honourable Mr Justice Mlambo

By email: nrakgwale@justice.gov.za

cc: The Deputy Judge President, Gauteng Division (Pretoria).

The Honourable Mr Justice Ledwaba

By email: kramokoka@justice.org.za

Dear Sirs

The Minister of Finance / Oakbay Investments (Pty) Ltd & 20 others (case no: 80978/2016)
Rule 7 notice

- Your purported rule 30 notice and letter of 24 March 2017 (Annexures 3 and 4 respectively), in response to our rule 7 notice and letter of 17 March 2017 (Annexures 1 and 2 respectively), refer.
- We deny that serving a rule 7 notice and sending you our letter is contradictory. If you are correct it would mean that the rule 7 notice itself could not be served on your offices until such time that you demonstrated your authority to act. Your conclusion, in our respectful submission, is absurd.
- Our client is surprised that our request to satisfy the Court that the State Attorney Is
  properly authorised to act has resulted in the Minister resorting to such lengths of
  attempting to set aside our rule 7 notice as an irregular step. As you are aware, any

Directors: GE Stein; BA Scop; C Vientin and A Berman [ Senior Associates: N Tahatalala and 5 van der Weele

party may challenge the authority of an attorney acting for another at any time before judgment.

- 4. Please urgently advise us in writing whether it is your instructions from the Minister to not respond to our rule 7 notice unless a formal condonation application is brought. In order to do so before the hearing, please advise us by no later than 16h00 on Sunday, 26 March 2017. Should we not hear from you at that time, we will assume that you require a formal application to be brought, and will do so seeking to recover costs from your client in his personal capacity.
- 5. We record that it in order for you to act, a decision by the organ of state, in this case the Minister, would have had to take a decision to initiate process, and authorise you to act. If you are so authorised to act it would be easy for you to furnish us with such proof. The Minister, as an organ of state, is constitutionally obliged to act in a transparent manner. Your persistence in not furnishing us with such proof is thus highly irregular.
- 6. We record that your interpretation of rule 7, read together with the State Attorney Act; 58 of 1957, is tantamount to suggesting that the State Attorney has an automatic right to act on behalf of an organ of state where no decision may have been taken permitting such action. This is patently incorrect.
- 7. We further require you to urgently confirm in writing what prejudice your client has suffered in being served with a rule 7 notice. Please advise us by no later than 16h00 on Sunday, 26 March 2017.
- 8. Even if our Rule 7 was out of time, should we receive no response from you or your client, we will assume that you do not suffer any prejudice.

Yours sincerely

BA Scop Director

Sent electronically



### IN THE HIGH COURT OF SOUTH AFRICA GAUTENG DIVISION, PRETORIA

Case No: 80978/2016

in the matter between:

MINISTER OF FINANCE

**Applicant** 

And

**OAKBAY INVESTMENTS (PTY) LTD** 

First Respondent

OAKBAY RESOURCES AND ENERGY LTD

Second Respondent

SIVA URANIUM (PTY) LTD

Third Respondent

TEGETA EXPLORATION AND RESOURCES

(PTY) LTD

Fourth Respondent

JIC MINING SERVICES (PTY) LTD

Fifth Respondent

**BLACKEDGE EXPLORATION (PTY) LTD** 

Sixth Respondent

TNA MEDIA (PTY) LTD

Seventh Respondent

THE NEW AGE

**Eighth Respondent** 

AFRICA NEWS NETWORK (PTY) LTD

Ninth Respondent

**VR LASER SERVICES (PTY) LTD** 

Tenth Respondent

ISLANDSITE INVESTMENTS ONE HUNDRED

Eleventh Respondent

AND EIGHTY (PTY) LTD

CONFIDENT CONCEPTS (PTY) LTD

Twelfth Respondent

JET AIRWAYS (INDIA) LIMITED (INCORPORATED IN INDIA)

Thirteenth Respondent

SAHARA COMPUTERS (PTY) LTD

Fourteenth Respondent

ABSA BANK LTD

Fifteenth Respondent

FIRST NATIONAL BANK LTD

Sixteenth Respondent

THE STANDARD BANK OF SOUTH AFRICA

**NEDBANK LIMITED** 

**GOVERNOR OF THE RESERVE BANK** 

**REGISTRAR OF BANKS** 

DIRECTOR OF FINANCIAL INTELLIGENCE CENTRE

Seventeenth Respondent

Eighteenth Respondent

Nineteenth Respondent

Twentieth Respondent

Twenty-first Respondent

### FOURTEENTH RESPONDENT (SAHARA COMPUTERS (PTY) LTD) RULE 7 NOTICE

TAKE NOTICE THAT the Fourteenth Respondent, Sahara Computers (Pty) Ltd, disputes the authority of the State Attorney to represent the Applicant, the Minister of Finance, and calls upon the State Attorney to establish its authority to act.

Signed at PRETORIA on this the 17th day of MARCH 2017

Stein Scop Attorneys Inc.

Attorneys for Fourteenth Respondents Ground Floor, 18 Melrose Boulevard Melrose Arch, Johannesburg

Tel: (011) 380 8080 Direct: (011) 380 8070 Mobile: 071 606 2313

Email: bradley@steinscop.com

slan@steinscop.com
Our REF: B Scop
C/O Brooklyn Place
Cnr Bronkhorst and Dey Street,
Brooklyn, Pretoria,
South Africa, 0001
PO Box 499, Pretoria 0001
Docex 110, Pretoria

T: +27 012 4521300 F: +27 086 8233886

Reference: Bridget Moatshe

To:
The Registrar
Gauteng Division,
Pretoria

And to:
The State Attorney
Attorney for the Applicant
SALU Building
255 Francis Baard Street
Pretoria
Tel: (012) 309 1575

Tel: (012) 309 1575 Fax: (012) 309 1649

Fax to Email: 086 629 3073 Email: TNhlanzi@justice.gov.za Ref: 2427/16/232.Ms T Nhlanzi



Received on: \_\_\_\_\_2017

And to:

Van Der Merwe & Associates

Attorneys for the first, second, third, fourth, sixth, seventh, eleventh and twelfth Respondents
62 Rigel Avenue North
Watekloof, Pretoria
Ref; Mr G VD Merwe/st/078

Tel: (012) 343 5432

Email: simone@vdmass.co.za

VAN DER MERWE EN ASS

RIGEL LAAN 62 "WATERKLOOF RIDGE - PRETORIA TEL: 012 343 5432 / 087 654 0209 FAKS: 012 343 5435 / 086 500 7587

Received on: 17 March 2017

For: 15:46

And to:
Edward Nathan Sonnenberg
Attorneys for the Fifteenth Respondent
159 West Street, Sandton
Email: dlambert@ensafrica.com
Ref: M Katz/D Lambert/0416998
c/o Gerhard Botha & Partners Inc
First Floor, Erasmus Forum Building B
Cnr Rigel avenue & Stokkiesdraal
Erasmundrand

Tel: (012) 347 0480

Email: brendon@bothapartners.co.za

Ref. Mr B Swart / Mr H Botha

Received on:

GERHARD BOTHA
& PARTNERS INC.
Erasmus Forum Building 'B"

CRI. Rigel Avenue & Stokkiesdraal Erasmusrand 0181

And to:

Norton Rose Fulbright South Africa Inc Attorneys for the Sixteenth Respondent 32 Fredman Drice, Sandton Email: aslam.moosajee@nortonrosefulbright.com

aslam.moosajee@nortonrosefulbright.com
Ref: M Moosajee/FNB13954
c/o Montle Jooma Sabdia Inc
Ground Floor, Duncan Manor
Cnr Jan Schoba and Brooks Streets
Brooklyn

Tel: (012) 362 3137

Mothle Jooma Sabdia

17 MAR 2017

Pretoria Branch
Tel: 012 362 3137 • Fax: 012 362 4139
Received without Prejudice

Received on: \_\_\_

2017

For:

And to:
Baker Mackenzie
Attorneys for the Eighteenth Respondent
Tel: (011) 911 4300
Email:
gerhard.rudolph@bakermckenzie.com;
widaad.ebrahim@bakermckenzie.com and
callum.oconnor@bakermckenzie.com
Ref: G Rudolph/CO
c/o Adams & Adams
Adams & Adams
Adams & Adams Place
Lynwood Bridge
4 Daventry Street
Lynwood Manor
Tel: (012) 432 6000



Received on:	2017
For:	-

And to:
Werkemans Attorneys
Attorneys for the Nineteenth and Twentieth
Respondents
155 5th Street, Sandton
Tel: (011) 535 8000
Fax: (011) 535 8600
Ref: Mr C Manaka / Mr C Moaitis

Email: cmanaka@werksmans.com and

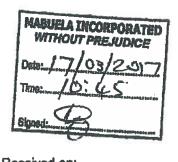
cmoraitis@werksmans.com Ref; SOUT 3267.63

c/o Mabuela Incorporated

Charter House 179 Bosman Street Pretoria Central Tel: (012) 324 3966

Ref: Adelle Jordaan

Email: mabuela@tiscall.co.za





2047

Received on.	 2017
For:	

And to: **Bowman Gilfillan** Attorneys for the Seventeenth Respondent 165 West Street Sandton, 2146 Tel: (011) 669 9000 BOSHUP INTO MAR Email: clement.mkiva@bowmanslaw.com Received without projument c/o Boshoff Attorneys **Ground Floor** 2017 -03- 17 Hazelwood Gate Office Park 14 Oaktree Avenue Cnr Oaktree Avenue and Dely Road Hazelwood Received on: For: And to: **MacRobert Attorneys** Attorneys for the Twenty-First Respondent MacRobert Building Cnr Jan Schoba & Justice Mohamed Street Tel: (012) 425 3436 Email: ghay@macrobert.co.za Ref: G K Hay Received on: \_\_\_\_\_ 2017 MacRobert For:

Without prejudice of clients rights Sonder benadeling was fillent se regle

16:05

### IN THE HIGH COURT OF SOUTH AFRICA GAUTENG DIVISION, PRETORIA

Case No: 80978/2016

Sixth Respondent

In the matter between:

MINISTER OF FINANCE Applicant

And

OAKBAY INVESTMENTS (PTY) LTD First Respondent

OAKBAY RESOURCES AND ENERGY LTD Second Respondent

SIVA URANIUM (PTY) LTD Third Respondent

TEGETA EXPLORATION AND RESOURCES
(PTY) LTD Fourth Respondent

in the state of th

JIC MINING SERVICES (PTY) LTD Fifth Respondent

• •

TNA MEDIA (PTY) LTD Seventh Respondent

THE NEW AGE Eighth Respondent

AFRICA NEWS NETWORK (PTY) LTD

Ninth Respondent

VR LASER SERVICES (PTY) LTD

Tenth Respondent

ISLANDSITE INVESTMENTS ONE HUNDRED Eleventh Respondent

AND EIGHTY (PTY) LTD

**BLACKEDGE EXPLORATION (PTY) LTD** 

CONFIDENT CONCEPTS (PTY) LTD Twelfth Respondent

JET AIRWAYS (INDIA) LIMITED Thirteenth Respondent

(INCORPORATED IN INDIA)

SAHARA COMPUTERS (PTY) LTD Fourteenth Respondent

ABSA BANK LTD Fifteenth Respondent

FIRST NATIONAL BANK LTD Sixteenth Respondent

THE STANDARD BANK OF SOUTH AFRICA

**NEDBANK LIMITED** 

**GOVERNOR OF THE RESERVE BANK** 

**REGISTRAR OF BANKS** 

**DIRECTOR OF FINANCIAL INTELLIGENCE** CENTRE

Seventeenth Respondent

Eighteenth Respondent

Nineteenth Respondent

Twentieth Respondent

Twenty-first Respondent

#### FOURTEENTH RESPONDENT (SAHARA COMPUTERS (PTY) LTD) **RULE 7 NOTICE**

TAKE NOTICE THAT the Fourteenth Respondent, Sahara Computers (Pty) Ltd, disputes the authority of the State Attorney to represent the Applicant, the Minister of Finance, and calls upon the State Attorney to establish its authority to act.

Signed at PRETORIA on this the 17th day of MARCH 2017

Stein Scop Attorneys Inc.

Attorneys for Fourteenth Respondents Ground Floor, 18 Melrose Boulevard Melrose Arch, Johannesburg

Tel: (011) 380 8080 Direct: (011) 380 8070 Mobile: 071 606 2313

Email: bradley@steinscop.com sian@steinscop.com Our REF: B Scop C/O Brooklyn Place Cnr Bronkhorst and Dev Street. Brooklyn, Pretoria. South Africa, 0001 PO Box 499, Pretoria 0001 Docex 110, Pretoria

T: +27 012 4521300 F: +27 086 6233886

Reference: Bridget Moatshe

To: The Registrar Gauteng Division, Pretoria

And to:
The State Attorney
Attorney for the Applicant
SALU Building
255 Francis Baard Street
Pretoria
Tel: (012) 309 1575

Tel: (012) 309 1575 Fax: (012) 309 1649

Fax to Email: 086 629 3073 Email: TNhlanzi@Justice.gov.za Ref: 2427/16/232.Ms T Nhlanzi



Received on: \_\_\_\_\_2017

And to:
Van Der Merwe & Associates
Attorneys for the first, second, third, fourth, sixth, seventh, eleventh and twelfth
Respondents
62 Rigel Avenue North
Watekloof, Pretoria
Ref: Mr G VD Merwe/st/078

Tel: (012) 343 5432

Email: simone@vdmass.co.za

**VAN DER MERWE EN ASS** 

RIGEL LAAN 62
\*\*\*WATERIO.OOF RIDGE - PRETORIA
TEL: 012 343 5432 / 087 654 0209
FAKS: 012 343 5435 / 086 500 7587

Received on: 17 March 2017

For. 15:46

And to:
Edward Nathan Sonnenberg
Attorneys for the Fifteenth Respondent
159 West Street, Sandton
Email: dlambert@ensafrica.com
Ref: M Katz/D Lambert/0416998
c/o Gerhard Botha & Partners Inc
First Floor, Erasmus Forum Building B
Chr Rigel avenue & Stokklesdraal
Erasmundrand
Tel: (012) 347 0480

Email: brendon@bothapartners.co.za

Ref: Mr B Swart / Mr H Botha

Received on: 17 03 2017

For:

GERHARD BOTHA & PARTNERS INC. Erasmus Forum Building "" Cnr. Rigel Avenue & Stokkiesdrasi Erasmusrand 0181

And to:
Norton Rose Fulbright South Africa Inc
Attorneys for the Sixteenth Respondent
32 Fredman Drice, Sandton
Email:
aslam.moosajee@nortonrosefulbright.com
Ref: M Moosajee/FNB13954
c/o Montle Jooma Sabdia Inc
Ground Floor, Duncan Manor
Cnr Jan Schoba and Brooks Streets
Brooklyn
Tel: (012) 362 3137

M | J | S Inc Mothle Jooma Sabdla 1 7 MAR 2017

Pretoria Branch Tel: 812 382 3137 • Fex: 812 382 4139 Received without Prejudice

Received on: \_\_\_\_\_\_2017

For:

And to: **Baker Mackenzle** Attorneys for the Eighteenth Respondent Tel: (011) 911 4300 Email: gerhard.rudolph@bakermckenzie.com; widaad.ebrahim@bakermckenzie.com and callum.oconnor@bakermckenzie.com Ref: G Rudolph/CO c/o Adams & Adams Adams & Adams Place Lynwood Bridge 4 Daventry Street Lynwood Manor Tel: (012) 432 6000 Ref: Adelle Jordaan



Received on:	2017
<b>Бог</b>	

And to: Werksmans Attorneys Attorneys for the Nineteenth and Twentieth Respondents 155 5th Street, Sandton Tel: (011) 535 8000 Fax: (011) 535 8600 Ref. Mr C Manaka / Mr C Moaitis

Email: cmanaka@werksmans.com and

cmoraitis@werksmans.com

Ref: SOUT 3267.63

c/o Mabuela Incorporated

**Charter House** 179 Bosman Street Pretoria Central Tel: (012) 324 3966

Email: mabuela@tiscall.co.za

	MABUELA INCORPORATED	ì
	WITHOUT PREJUDICE Dels: 17/03 1201	,
	Time: /0:45	
	Stoned:	
'n	red on:	2

2017

For:

And to:
Bowman Gliffilan
Attorneys for the Seventeenth Respondent
165 West Street
Sandton, 2146
Tel: (011) 669 9000
Email: clement.mkiva@bowmanslaw.com
c/o Boshoff Attorneys
Ground Floor
Hazelwood Gate Office Park
14 Oaktree Avenue
Cnr Oaktree Avenue and Dely Road
Hazelwood

BOSHOFF BICORDITATION Received without prejudice

2017 -03- 17 NULLA 5h05

Hazelwood		
	Received on:	2017
	For:	
And to: MacRobert Attorneys		
Attorneys for the Twenty-First Respondent MacRobert Building		
Cnr Jan Schoba & Justice Mohamed Street		
Tel: (012) 425 3436 Email: ghay@macrobert.co.za		
Ref: G K Hay	Received on:	2017
MacRobert		
Attorneys		
2017 03-17	For:	
Without prejunice of clients rights Sonder behavioring via Michi se regte HOG 16:05		
Sign / Getakkan		



Co. Name: Stein Scop Attorneys Inc. Registration No: 2015/306625/21 Landline: +2711 380 8080 Email: bradley@steinscop.com

Direct: +2711 380 8070 Mobile: +2782 781 3452 Our ref: TRI15 / B Scop Your ref: M8 T Nhianzi

Date: 17 March 2017

The State Attorney

Attention: Ms Thembelihle Nhlanzi

By email: TNhlanzi@justice.gov.za

#### **Dear Sirs**

The Minister of Finance / Oakbay investments (Pty) Ltd & 20 others (case no: 80978/2016)

- We act for Sahara Computers (Pty) Ltd ("Sahara"), the Fourteenth Respondent in the above application.
- 2. We write to you as the legal representatives of the Minister of Finance, Mr P. J. Gordhan, MP, and request that you bring this letter to his attention.
- We are instructed by our client to seek costs against your client, the Minister, in his personal capacity. This letter serves as notice of our client's intent.
- 4. The reasons for Sahara seeking costs against your client, the Minister, in his personal capacity, include inter alia:
- 4.1 The Minister sought, and obtained, the advice of both Senior and Junior Counsel no less than two occasions of which we are aware. That advice confirmed that the Minister was under no obligation to "intervene" as requested.
- 4.2 There is no disagreement between any of the parties that the Minister's interpretation of his powers, on the strength of such advice, preclude the Minister from intervening in the private banking relationship between any bank and its client, including seeking to get a bank to reverse its decision to close a client's account.
- 4.3 The Minister persists in the application and, as such, involves the Courts in a matter which it need not concern itself with. There is no question of law that arises, nor any triable issue, This is an abuse of Court process.

Directors: GE Stein; BA Scop; C Vicentin and A Berman | Senior Associates: N Tshebziela and 5 van der Weele

Ground Floor, 18 Metrose Boulevard, Metrose Arch, Metrose North, Gauteng, 2076, South Africa

- 5. Additionally, in our client's view, this application is being brought for an ulterior personal political purpose at the expense of the State.
- 6. As the Minister himself stated, in a different context, "those responsible for deciding how money is spent have to do so with scrupulous rigour and care". It regrettable that the Minister should persist, at public expense, where the application does not advance the public interest.
- 7. Apart from the true purpose of the litigation, whatever it may be, the Minister's conduct has put our client through unnecessary expense in seeking to vindicate itself against the Minister who has burdened the Court, and ourselves, with allegations that are irrelevant, and/or vexatious, scurrilous, and meant to harass. Such conduct is impermissible and unacceptable.
- Accordingly, for the non-exhaustive reasons above, the State and the taxpayers should not be burdened with the costs.

Yours sincerely

BA Scop Director

#### IN THE HIGH COURT OF SOUTH AFRICA GAUTENG DIVISION, PRETORIA

Case no: .80978/2016

Eighteenth respondent

In the matter between:

NEDBANK LIMTED

MINISTER OF FINANCE

**Applicant** 

and

**QAKBAY INVESTMENTS (PTY) LTD** First respondent OAKBAY RESOURCES AND ENERGY LTD Second respondent SHIVA URANIUM (PTY) LTD Third respondent TEGETA EXPLORATION AND RESOURCES (PTY) LTD Fourth respondent JIC MINING SERVICES (1979) (PTY) LTD Fifth respondent BLACKEDGE EXPLORATION (PTY) LTD Sixth respondent TNA MEDIA (PTY) LTD Seventh respondent THE NEW AGE Eighth respondent AFRICA NEWS NETWORK (PTY) LTD Ninth respondent VR LASER SERVICES (PTY) LTD Tenth respondent ISLANDSITE INVESTMENTS ONE HUNDRED AND EIGHTY (PTY) LTD Eleventh respondent CONFIDENT CONCEPT (PTY) LTD Twelfth respondent JET AIRWAYS (INDIA) LTD (INCORPORATED IN INDIA) Thirteenth respondent SAHARA COMPUTERS (PTY) LTD Fourteenth respondent **ABSA BANK LTD** Fifteenth respondent FIRST NATIONAL BANK LTD Sixteenth respondent STANDARD BANK OF SOUTH AFRICA LIMITED Seventeenth respondent

GOVERNOR OF THE SOUTH AFRICAN **RESERVE BANK** 

Nineteenth respondent

**REGISTRAR OF BANKS** 

Twentieth respondent

DIRECTOR OF THE FINANCIAL INTELLIGENCE

CENTRE

Twenty-first respondent

#### **FILING SHEET**

KINDLY TAKE NOTICE THAT the Applicant hereby files a Rule 30 Notice.

DATED AT PRETORIA ON THIS 24 DAY OF MARCH 2017

STATE ATTORNEY Attorney for the Applicant SALU Building 255 Francis Baard Street

Pretoria

Tel: 012 309 1575

Fax: 012 309 1649

Fax to Email: 086 6293 073 Email: TNhianzi@justice.gov.za Ref: 2427/16/Z32. Ms T Nhianzi

TO:

THE REGISTRAR OF THE ABOVE HONOURABLE COURT

**GAUTENG DIVISION, PRETORIA** 

AND

TO:

STEIN SCOP ATTORNEYS INC. Attorneys for 10<sup>th</sup> & 14<sup>th</sup> Respondent **Ground Floor** 

18 Melrose Boulevard

Melrose Arch, Johannesburg

Tel: (011) 380 8080

Email: glenn@steinscop.com sian@steinscop.com

Ref: G Stein

C/O BROOKLYN PLACE

Cnr Bronkhorst and Dey Street Brooklyn, Pretoria Ref: Bridget Moatshe RC 13:11

2017 -03- 24

VDT ATTORNEYS INC
Cnr Bronkhorst & Day Street, Brooklyn
Docex 110, Pretoria
Tel: (012) 452 1300
Fax: 086 433 1176

AND

TO:

VAN DER MERWE & ASSOCIATES Attorney for 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 11<sup>th</sup>,12<sup>th</sup> and 14<sup>th</sup> Respondents 62 Rigel Avenue North Waterkloof Pretoria

Ref: Mr GT VD Merwe/st/078 Tel: 012 343 5432

E-mail: simone@vdmass.co.za

AND TO:

**EDWARD NATHAN SONNENBERGS** 

Attorneys for 15th Respondent

150 West Street Sandton

Email: diambert@ensafrica.com Ref: M Katz/ D Lambert/0416998

C/O GERHARD BOTHA & PARTNERS INC

First Floor, Erasmus Forum Building B Cnr Rigel Avenue & Stokkiesdrrai

Erasmusrand Tel: 012 347 0480

Email: <u>brendom@bothapartners.co.za</u>
Ref: Mr B Swart/ Mr H Botha

AND

TO:

NORTON ROSE FULBRIGHT SOUTH AFRICA INC

Attorneys for 16th Respondent 34 Fredman Drive, Sandton

Email: aslam.moosajee@nortonrosefulbright.com

Ref: Mr Moosajee/FNB 13954
c/o MONTLE JOOMA SABDIA INC
Ground Floor, Duncan Manor

Ground Floor, Duncan Manor Car Jan Shoba and Brooks Streets

Brooklyn Tel: 012 362 313

AND TO:

**BOWMAN GILFILLAN INCORPORATED** 

Aftorneys for the 17th Respondent
Email: clement.mkiva@bowmanslaw.co.za
Alan.keep@bowmanslaw.co.za

Ref: C Mkiva/6162672

C/O BOSHOFF ATTORNEYS
Ground Floor, Hazelwood Gate Office Park

14 Oaktree Avenue Cnr Oaktree Avenue and Dely Road Hazwlwood Pretoria Ref: Natasha Nortje/NN1564

AND TO:

**BAKER & MACKENZIE** 

Attorneys for the 18th Respondent

Tel: 011 911 4300

Email: Gerhard.Rudolph@bakermckenzie.com Widaad. Ebrahim@bakermckenzie.com

Callum.Ocomor@bakermckenzie.com

Ref: G Rudolph/CO C/O ADAMS & ADAMS Adams & Adams Place Lynwood Bridge 4 Daventry Street Lynwood Manor

Tel: 012 432 6000 Ref: Adele Jordaan

AND TO:

**MACROBERT ATTORNEYS** 

Attorneys for the 21st Respondent

MacRobert Building Cnr Jan Shoba & Justice Mahomed Street Tel: 012 425 3436

Email: ghav@macrobert.co.za

Ref: G K Hay

AND TO:

**WERKSMANS ATTORNEYS** 

19th and 20th Respondent's Attorneys

155-5th Street Sandton

Tei: +27 11 535 8000 | F: +27 11 535 8600

Ref: Mr C Manaka / Mr C Moraitis Email: cmanaka@werksmans.com cmoraitis@werksmans.com

Ref: SOUT 3267.63

C/O MABUELA INCORPORATED

Charter House, 179 Bosman Street

Pretoria Central Tel: 012 325 3966

Email: mabuela@tiscali.co.za

MacRo:

2017 -03- 2 4

Without prejudice of olients nghrs Sander benedeling van kliepte se reg: 13:02 ⊻gn / Gelaken.

### IN THE HIGH COURT OF SOUTH AFRICA (GAUTENG DIVISION, PRETORIA)

Case no. 80978/2016

In the matter between:

MINISTER OF FINANCE

**Applicant** 

And

OAKBAY INVESTMENTS (PTY) LTD

First Respondent

OAKBAY RESOURCES AND ENERGY LTD

Second Respondent

SHIVA URANIUM (PTY) LTD

Third Respondent

TEGETA EXPLORATION AND RESOURCES (PTY)

Fourth Respondent

LTD

WESTDAWN INVESTMENTS (PTY) LTD

Fifth Respondent

**BLACKEDGE EXPLORATION (PTY) LTD** 

Sixth Respondent

TNA MEDIA (PTY) LTD

Seventh Respondent

INFINITY MEDIA (PTY) LTD

Ninth Respondent

YR LASER SERVICES (PTY) LTD

Tenth Respondent

ISLANDSITE INVESTMENTS ONE HUNDRED AND

EIGHTY (PTY) LTD

Eleventh Respondent

CONFIDENT CONCEPT (PTY) LTD

Twelfth Respondent

SAHARA COMPUTERS (PTY) LTD

Fourteenth Respondent

**ABSA BANK LTD** 

Fifteenth Respondent

FIRST NATIONAL BANK LTD

Sixteenth Respondent

STANDARD BANK OF SOUTH AFRICA LIMITED

Seventeenth Respondent

**NEDBANK LIMITED** 

Eighteenth Respondent

GOVERNOR OF THE SOUTH AFRICAN RESERVE BANK

Nineteenth Respondent

**REGISTRAR OF BANKS** 

Twentieth Respondent

DIRECTOR OF THE FINANCIAL INTELLIGENCE CENTRE

Twenty-First Respondent

## APPLICANT'S RULE 30 NOTICE IN RESPONSE TO THE FOURTEENTH RESPONDENT'S PURPORTED RULE 7 NOTICE

TAKE NOTICE that the applicant objects to the fourteenth respondent's purported Rule 7 notice, dated 17 March 2017, and contends that it constitutes an irregular step.

TAKE NOTICE FURTHER that the grounds on which the applicant objects to the fourteenth respondent's purported Rule 7 are the following

- Rule 7(1) requires that the authority of an attorney be disputed within ten days
  after it has come to the notice of a contesting party that its opponent is
  represented by a particular person.
- The fourteenth respondent was served on 14 October 2016 with the notice of motion. The notice of motion records that the State Attorney is representing the applicant in this matter. Accordingly it came to the notice of the fourteenth

respondent that the applicant is being represented by the State Attorney on 14 October 2016.

- 3. Therefore the purported Rule 7 notice is significantly out of time.
- 4. No cause has been shown for filing the purported Rule 7 notice a mere five court days before the hearing.
- Nor has the fourteenth respondent sought leave from the Court to file the belated notice.
- 6. Should the Rule 7 notice be persisted in at this late stage, this will prejudice the applicant, the other parties and the hearing date (arranged per special allocation by the Deputy Judge President, setting the matter down before a Full Bench); undermine the interests of justice; and infringe the applicant's right of access to court.
- 7. The Rule 7 notice is also otherwise incompetent for being inconsistent with Rule 7(5) and section 3 of the State Attorney Act 56 of 1957. Pursuant to these provisions the State Attorney is vested with inherent statutory authority to represent an organ of State. The applicant is an organ of State, and litigates in this capacity. Consequently a Rule 7 notice disputing the State Attorney's authority to represent the applicant in this matter is legally incompetent.

TAKE FURTHER NOTICE that the applicant further objects to the purported filing of "supplementary" heads of argument as in conflict with the directions of the DJP of 22 December 2016.

TAKE FURTHER NOTICE that the applicant affords the fourteenth respondent until the first day of the hearing of the matter to remove the irregular step by withdrawing

the purported Rule 7 notice. The belated filling of the purported Rule 7 notice does not permit the time periods contemplated by Rule 30.

TAKE NOTICE FURTHER that if the purported Rule 7 is not withdrawn, the applicant shall apply at the hearing that it be set aside with costs on a punitive scale, including the costs of two counsel.

SIGNED AT PRETORIA ON 24 MARCH 2017

STATE ATTORNEY

Attorney for the applicant

SALU Building

255 Francis Baard Street

Pretoria

Tel: 012 309 1575

Fax: 012 309 1649

Email: TNhlanzi@justice.gov.za

Ref: Ms T. Nhlanzi

TO:

THE REGISTRAR

High Court, Pretoria

AND TO:

**OAKBAY INVESTMENTS (PTY) LTD** 

First Respondent

Grayston Ridge Office Park, Block A

Lower Ground Floor,

144 Katherine street, Sandown

Sandton

Telephone: +27(0)11 430 7640 FAX: +1 0123-4567-8900 E-mail: info@oakbay.co.za AND TO: OAKBAY RESOURCES AND ENERGY LTD

Second Respondent 89 Gazelle Avenue Corporate Park South

Midrand

AND TO: SHIVA URANIUM (PTY) LTD

Third Respondent 1A BERG STREET Hartebeesfontein North West. 2600 Tel: 0184679000 Fax: 018 467 9040

AND TO: TEGETA EXPLORATION AND RESOURCES (PTY) LTD

Fourth Respondent

Grayston Ridge Office Park, Block A

Lower Ground Floor,

144 Katherine Street, Sandown

Sandton

Tel: 011 542 1000 Fax: 011 262 3868

AND TO: WESTDAWN INVESTMENTS (PTY) LTD

Fifth Respondent
JIC House, 106A
16<sup>th</sup> Road
MIDRAND

AND TO: BLACKEDGE EXPLORATION (PTY) LTD

Sixth Respondent 89 Gazelle Avenue Corporate Park South

MIDRAND

AND TO: TNA MEDIA (PTY) LTD

Seventh Respondent 52 Lechwe Street Corporate Park South Old Pretoria Main Road

MIDRAND 1685

TEL: 011 542 1222 FAX: 086 733 7000 AND TO: INFINITY MEDIA (PTY) LTD

Ninth Respondent 52 Lechwe Street Corporate Park South Old Pretoria Main Road

Midrand

AND TO: VR LASER SERVICES (PTY) LTD

**Tenth Respondent** 

Grayston Ridge Office Park, Block A

Lower Ground Floor,

144 Katherine Street, Sandown

Sandton

AND TO: ISLANDSITE INVESTMENTS ONE HUNDRED AND EIGHTY (PTY)

LTD

Eleventh Respondent 89 Gazelle Avenue Corporate Park South Old Johannesburg Road

Midrand 1685

AND TO: CONFIDENT CONCEPT (PTY) LTD

Twelfth Respondent 89 Gazelle Avenue Corporate Park South Old Johannesburg Road

Midrand 1685

AND TO: SAHARA COMPUTERS (PTY) LTD

Fourteenth Respondent 89 Gazelle Avenue Corporate Park South Old Johannesburg Road

Midrand 1685

AND TO: ABSA BANK LTD

Fifteenth Respondent

7<sup>th</sup> Floor

**Barclays Towers West** 

15 Troy Street Johannesburg AND TO:

FIRST NATIONAL BANK LTD

Sixteenth Respondent 6<sup>th</sup> Floor, 1 First Place FNB Bank City Simmonds Street Johannesburg

AND TO:

STANDARD BANK OF SOUTH AFRICA

Seventeenth Respondent

9th Floor

Standard Bank Centre 5 Simmonds Street Johannesburg

AND TO:

NEDBANK LIMITED

Eighteenth Respondent

G Block 3<sup>rd</sup> Floor Desk 135 Rivonia Rd Sandown Sandton

AND TO:

THE GOVERNOR OF THE SOUTH AFRICAN RESERVE BANK

Nineteenth Respondent 370 Helen Joseph Street

Pretoria

AND TO:

THE REGISTRAR OF BANKS

Twentieth Respondent 370 Helen Joseph Street

Pretoria-

AND TO:

DIRECTOR OF THE FINANCIAL INTELLIGENCE

CENTRE

**Twenty First Respondent** 

Woodhill Centre St. Bernard Drive Garsfontein Pretoria



# Office of the State Attorney Pretoria

PRIVATE BAG X 91 PRETORIA 0001 SALU BUILDING 255 FRANCIS BAARD (SCHOEMAN) STREET CNR THABO SEHUME (ANDRIES) STREET [ENTRANCE IN THABO SEHUME (ANDRIES) STREET]

EL: (SWITCHBOARD): (012) 309 1500 (DIRECT LINE): (012) 309 1575 (SECRETARY): (012) 309 1504 FAX: (012) 309 1649/50 DOCEX: 298

24 MARCH 2017

ENQ: T. NHLANZI

EMAR.: TNhianzi@justice.gov.za

MY REF: 2427/16/Z32 YOUR REF: TR(15/ B SCOP

STEIN SCOP ATTORNEYS

Per e mail: Bradley@steinscop.com

RE: MINISTER OF FINANCE // OAKBAY INVESTMENTS (PTY) LTD AND OTHERS

Dear Sir

Your letter dated 17 March 2017, and now the "supplementary" heads of argument received on 22 March refer.

The former is addressed to me in my capacity "as legal representative of the Minister of Finance". Yet your letter follows a Rule 7 notice purportedly filed by you on behalf of the fourteenth respondent purporting to question my authority to act in this capacity. The inconsistency is evident.

The patent irregularity of your purported Rule 7 notice is not the subject matter of this correspondence. Nor does this response to your letter constitute a further step in the proceedings. The applicant's rights as regards your purported Rule 7 notice remain reserved.

As regards the legal competence of the subject-matter of your letter under reply, this, too, is disputed. In this respect, too, the applicant's rights are reserved. Each allegation in your letter is, to the extent that this may be necessary, denied.

In respect of the purported "supplementary" heads of argument now presented, we note the following.

Firstly, the description is misleading. Sahara chose not to be separately represented. It similarly chose to file no heads of argument separate to those of the other Oakbay respondents. What are now presented are in so sense "supplementary". They entail in truth a belated argument.

Secondly, Sahara (represented, as you acknowledge, by Attorney Gert van der Merwe and senior counsel engaged by him) was represented at the directions meeting convened by the Deputy Judge President on 15 December 2016. Directions were then issued as regards dates for heads of argument.

Thirdly, if Sahara's purported decision to present heads of argument this week is unreasonably late. It has had nearly four months to review its position.

Sahara's conduct now is in breach of the Deputy Judge President's directions, and patently prejudicial to the parties which have complied therewith in their preparation for the hearing.

Yours Singerely

Ms Thembelible Nhlanzi

FOR: STATE ATTORNEY PRETORIA DEPARTMENT OF JUSTICE & CONSTITUTIONAL DEVELOPMENT

CC:

The Hon the Judge President, Deputy Judge President and Mr. Justice Modiba



Co. Name: Stein Scop Attorneys Inc. Registration No: 2015/306625/21 Landline: +2711 380 8080

Landline: +2711 380 8080 Email: bradley@steinscop.com Direct: +2711 380 8070

Mobile: +2782 781 3452 Our ref: TRI15 / B Scop Your ref: MS T Nhlanzi 2135

Date: 25 March 2017

The State Attorney

Attention: Ms Thembelihle Nhlanzi

By email: TNhlanzi@justice.gov.za

cc: The Judge President, Gauteng Division,

The Honourable Mr Justice Mlambo

By email: nrakgwale@justice.gov.za

cc: The Deputy Judge President, Gauteng Division (Preforia),

The Honourable Mr Justice Ledwaba

By email: kramokoka@justice.org.za

Dear Sirs

The Minister of Finance / Oakbay Investments (Pty) Ltd & 20 others (case no: 80978/2016)
Rule 7 notice

- 1. Your purported rule 30 notice and letter of 24 March 2017 (Annexures 1 and 2 respectively), in response to Sahara's Rule 7 notice, but in which you refer to Sahara's Supplementary Heads of Argument, refer.
- 2. We note that your purported Rule 30 notice is "in response to the fourteenth respondent's <u>purported rule 7 notice</u>". In same purported Rule 30 notice, however, you "<u>further object to the purported filing of 'supplementary' heads of argument</u> as in conflict with the directions of the DJP of 22 December 2016". The inclusion of your objection with respect to Sahara's Supplementary Heads of Argument in your purported Rule 30 notice thus renders same irregular, vague, and embarrassing.

Oirectors: GE Stein; BA Scop; C Visentin and A Berman | Senior Associates: N Tshababla and S van der Weela

- 3. As canvassed in Sahara's Supplementary Heads of Argument, the reason for the Supplementary Heads was a change of legal representation and new counsel being put on brief. The filing of Supplementary Heads is for the benefit of the Court and all the parties. It further gives practical application to Sahara's audi alteram partem rights.
- Your letter does not, indeed cannot, deny that Sahara is a party properly before the Court, with the concomitant ability to advance argument before it. As such, your objection to Sahara filing Supplementary Heads of Argument, served nearly a week before the hearing, is without merit and is, with respect, purely obstructionist.
- 5. The Supplementary Heads of Argument give yourself, the Court, and all the other parties in this matter, advance written notice of the arguments counsel for Sahara shall be advancing at the hearing. The Minister cannot suffer any prejudice where such notice is given to you. Indeed, we do not doubt that, you would have claimed to be ambushed, and thus prejudiced, if such arguments were advanced orally at the hearing without prior notice.
- 6. In any event, as the applicant, the Minister cannot claim any prejudice. Sahara filed Supplementary Heads as a respondent. An applicant has no right of reply to a respondent's heads other than at the hearing. Sahara's written arguments are entirely based upon the papers in this matter which the Minister, the Court, and all other parties have had the opportunity to engage with since the launch of this application. No prejudice can be claimed.
- 7. We further record that despite our invitation to the Minister to provide us with reasons as to why he should not be subject to a personal costs order, the Minister has not provided such reasons. The Minister's failure to do so is at his own peril. We once again invite the Minister to provide us with such reasons by 16h00 on Sunday, 26 March 2017.
- 8. Instead, the Minister has had time to apparently instruct you to (a) deliver a formalistic objection to our rule 7 notice; and (b) instruct you to object to our Supplementary Heads
- 9. Please confirm in writing by no later than 16h00 on Sunday, 26 March 2017, whether in fact (1) the Minister instructed you to object to our rule 7 notice rather than satisfy the Court that you are authorised to act, (b) the Minister instructed you to object to our Supplementary Heads; and (c) when you received such instructions.

Yours sincerely

BA Scop
Director

Sent electronically

#### IN THE HIGH COURT OF SOUTH AFRICA GAUTENG DIVISION, PRETORIA

Case no: 80978/2016

In the matter between:

MINISTER OF FINANCE

**Applicant** 

and

OAKBAY INVESTMENTS (PTY) LTD First respondent OAKBAY RESOURCES AND ENERGY LTD Second respondent Third respondent SHIVA URANIUM (PTY) LTD TEGETA EXPLORATION AND RESOURCES (PTY) LTD Fourth respondent Fifth respondent JIC MINING SERVICES (1979) (PTY) LTD Sixth respondent BLACKEDGE EXPLORATION (PTY) LTD Seventh respondent TNA MEDIA (PTY) LTD THE NEW AGE Eighth respondent Ninth respondent AFRICA NEWS NETWORK (PTY) LTD Tenth respondent VR LASER SERVICES (PTY) LTD ISLANDSITE INVESTMENTS ONE HUNDRED AND Eleventh respondent EIGHTY (PTY) LTD

CONFIDENT CONCEPT (PTY) LTD

Twelfth respondent

JET AIRWAYS (INDIA) LTD (INCORPORATED IN INDIA)

Thirteenth respondent

SAHARA COMPUTERS (PTY) LTD Fourteenth respondent

ABSA BANK LTD Fifteenth respondent

FIRST NATIONAL BANK LTD Sixteenth respondent

STANDARD BANK OF SOUTH AFRICA LIMITED Seventeenth respondent

NEDBANK LIMTED Eighteenth respondent

GOVERNOR OF THE SOUTH AFRICAN RESERVE BANK

Nineteenth respondent

**REGISTRAR OF BANKS** 

Twentieth respondent

DIRECTOR OF THE FINANCIAL INTELLIGENCE CENTRE

Twenty-first respondent

#### **FILING SHEET**

KINDLY TAKE NOTICE THAT the Applicant hereby files a Rule 30 Notice.

DATED AT PRETORIA ON THIS 24 DAY OF MARCH 2017

STATE ATTORNEY
Attorney for the Applicant
SALU Building
255 Francis Baard Street
Pretoria

Pretoria
Tel: 012 309 1575
Fax: 012 309 1649
Fax to Email: 086 6293 073

Email: TNhlanzi@justice.gov.za Ref: 2427/16/Z32. Ms T Nhlanzi

TO:

THE REGISTRAR OF THE ABOVE HONOURABLE COURT

**GAUTENG DIVISION, PRETORIA** 

AND

TO:

STEIN SCOP ATTORNEYS INC. Attorneys for 10<sup>th</sup> & 14<sup>th</sup> Respondent Ground Floor

Ground Floor 18 Melrose Boulevard Melrose Arch, Johannesburg Tel: (011) 380 8080

Email: glenn@steinscop.com sian@steinscop.com

Ref: G Stein

C/O BROOKLYN PLACE

Cnr Bronkhorst and Dey Street Brooklyn, Pretoria

Ref: Bridget Moatshe

RS 13:11

2817 -03- 2 4

VDT ATTORNEYS INC Cnr Bronkhorst & Dey Street, Brooklyn Docex 110, Pretoria Tel: (012) 452 1300 Fax: 086 433 1176 

AND

TO:

**VAN DER MERWE & ASSOCIATES** Attorney for 1st, 2std, 3rd, 4th, 6th, 7th. 11th, 12th and 14th Respondents 62 Rigel Avenue North Waterkloof Pretoria

Ref: Mr GT VD Merwe/st/078

Tel: 012 343 5432

E-mail: simone@vdmass.co.za

AND TO:

EDWARD NATHAN SONNENBERGS

Attorneys for 15th Respondent

150 West Street Sandton

Email: diambertidensafrica.com Rof. M Katz/ D Lambert/0416998

C/O GERHARD BOTHA & PARTNERS INC

First Floor, Erasmus Forum Building B Cnr Rigel Avenue & Stokkiesdrrai

Erasmusrand Tel: 012 347 0480

Email: brendon@bothapartners.co.za Ref: Mr B Swart/ Mr H Botha

AND

TO:

NORTON ROSE FULBRIGHT SOUTH AFRICA INC

Attorneys for 16th Respondent 34 Fredman Drive, Sandton

Email: aslam.moosajee@nortonrosefulbright.com

Ref: Mr Moosajee/FNB 13954

c/o MONTLE JOOMA SABDIA INC Ground Floor, Duncan Manor

Cnr Jan Shoba and Brooks Streets

Brooklyn Tel: 012 362 313

AND

**BOWMAN GILFILLAN INCORPORATED** TO:

Attorneys for the 17th Respondent Email: clement.mkiva@howmanslaw.co.za Alan.keep@ibowmanslaw.co.zu

Ref: C Mkiva/6162672

C/O BOSHOFF ATTORNEYS

Ground Floor, Hazelwood Gate Office Park

14 Oaktree Avenue Cnr Oaktree Avenue and Dely Road Hazwlwood Pretoria Ref: Natasha Nortje/NN1564

AND TO:

BAKER & MACKENZIE

Attorneys for the 18th Respondent

Tel: 011 911 4300

Email: Gerhard.Rudolph@bakermckenzie.com

Widaad, Ebrahim@bakermckenzie.com

Callum, Oconnor@bakermckenzie.com

Ref: G Rudolph/CO C/O ADAMS & ADAMS

Adams & Adams Place Lynwood Bridge

4 Daventry Street

Lynwood Manor

Tel: 012 432 6000

Ref: Adele Jordaan

AND TO:

**MACROBERT ATTORNEYS** 

Attorneys for the 21st Respondent

MacRobert Building Cnr Jan Shoba & Justice Mahomed Street

Tel: 012 425 3436

Email: ghay@macrobert.co.za

Ref: G K Hay

MacRo:

Without projudice of clients rights
Sander benedeling van kriente se reg:
13:02

∍iga / Geleken

AND TO:

**WERKSMANS ATTORNEYS** 

19th and 20th Respondent's Attorneys

155-5th Street

Sandton

Tel: +27 11 535 8000 | F: +27 11 535 8600

Ref: Mr C Manaka / Mr C Moraitis Email: cmanaka@werksmans.com

cmoraitis@werksmans.com

Ref: SOUT 3267.63

C/O MABUELA INCORPORATED

Charter House, 179 Bosman Street

Pretoria Central Tel: 012 325 3966

Email: mabuela@tiscali.co.za

### IN THE HIGH COURT OF SOUTH AFRICA (GAUTENG DIVISION, PRETORIA)

Case no. 80978/2016

In the matter between:

MINISTER OF FINANCE

**Applicant** 

And

**OAKBAY INVESTMENTS (PTY) LTD** 

First Respondent

**OAKBAY RESOURCES AND ENERGY LTD** 

Second Respondent

SHIVA URANIUM (PTY) LTD

Third Respondent

TEGETA EXPLORATION AND RESOURCES (PTY)

Fourth Respondent

LTD

WESTDAWN INVESTMENTS (PTY) LTD

Fifth Respondent

**BLACKEDGE EXPLORATION (PTY) LTD** 

Sixth Respondent

TNA MEDIA (PTY) LTD

Seventh Respondent

INFINITY MEDIA (PTY) LTD

Ninth Respondent

**VR LASER SERVICES (PTY) LTD** 

Tenth Respondent

ISLANDSITE INVESTMENTS ONE HUNDRED AND

EIGHTY (PTY) LTD

Eleventh Respondent

CONFIDENT CONCEPT (PTY) LTD

Twelfth Respondent

SAHARA COMPUTERS (PTY) LTD

Fourteenth Respondent

**ABSA BANK LTD** 

Fifteenth Respondent

FIRST NATIONAL BANK LTD
-------------------------

Sixteenth Respondent

STANDARD BANK OF SOUTH AFRICA LIMITED

Seventeenth Respondent

**NEDBANK LIMITED** 

Eighteenth Respondent

GOVERNOR OF THE SOUTH AFRICAN RESERVE BANK

Nineteenth Respondent

**REGISTRAR OF BANKS** 

Twentieth Respondent

DIRECTOR OF THE FINANCIAL INTELLIGENCE CENTRE

Twenty-First Respondent

## APPLICANT'S RULE 30 NOTICE IN RESPONSE TO THE FOURTEENTH RESPONDENT'S PURPORTED RULE 7 NOTICE

TAKE NOTICE that the applicant objects to the fourteenth respondent's purported Rule 7 notice, dated 17 March 2017, and contends that it constitutes an irregular step.

TAKE NOTICE FURTHER that the grounds on which the applicant objects to the fourteenth respondent's purported Rule 7 are the following

- Rule 7(1) requires that the authority of an attorney be disputed within ten days
  after it has come to the notice of a contesting party that its opponent is
  represented by a particular person.
- The fourteenth respondent was served on 14 October 2016 with the notice of motion. The notice of motion records that the State Attorney is representing the applicant in this matter. Accordingly it came to the notice of the fourteenth

respondent that the applicant is being represented by the State Attorney on 14 October 2016.

- 3. Therefore the purported Rule 7 notice is significantly out of time.
- No cause has been shown for filing the purported Rule 7 notice a mere five court days before the hearing.
- Nor has the fourteenth respondent sought leave from the Court to file the belated notice.
- 6. Should the Rule 7 notice be persisted in at this late stage, this will prejudice the applicant, the other parties and the hearing date (arranged per special allocation by the Deputy Judge President, setting the matter down before a Full Bench); undermine the interests of justice; and infringe the applicant's right of access to court.
- 7. The Rule 7 notice is also otherwise incompetent for being inconsistent with Rule 7(5) and section 3 of the State Attorney Act 56 of 1957. Pursuant to these provisions the State Attorney is vested with inherent statutory authority to represent an organ of State. The applicant is an organ of State, and litigates in this capacity. Consequently a Rule 7 notice disputing the State Attorney's authority to represent the applicant in this matter is legally incompetent.

TAKE FURTHER NOTICE that the applicant further objects to the purported filing of "supplementary" heads of argument as in conflict with the directions of the DJP of 22 December 2016.

TAKE FURTHER NOTICE that the applicant affords the fourteenth respondent until the first day of the hearing of the matter to remove the irregular step by withdrawing

4

the purported Rule 7 notice. The belated filling of the purported Rule 7 notice does not permit the time periods contemplated by Rule 30.

TAKE NOTICE FURTHER that if the purported Rule 7 is not withdrawn, the applicant shall apply at the hearing that it be set aske with costs on a punitive scale, including the costs of two counsel.

SIGNED AT PRETORIA ON 24 MARCH 2017

STATE ATTORNEY

Attorney for the applicant SALU Building 255 Francis Baard Street

Pretoria

Tel: 012 309 1575 Fax: 012 309 1649

Email: TNhlanzi@justice.gov.za

Ref. Ms T. Nhlanzi

TO:

THE REGISTRAR

High Court, Pretorla

AND TO:

OAKBAY INVESTMENTS (PTY) LTD

First Respondent

Grayston Ridge Office Park, Block A

Lower Ground Floor,

144 Katherine street, Sandown

Sandton

Telephone: +27(0)11 430 7640 FAX: +1 0123-4567-8900 E-mail: info@oakbay.co.za

AND TO: OAKBAY RESOURCES AND ENERGY LTD

Second Respondent 89 Gazelle Avenue Corporate Park South

Midrand

AND TO: SHIVA URANIUM (PTY) LTD

Third Respondent 1A BERG STREET Hartebeesfontein North West. 2600 Tel: 0184679000 Fax: 018 467 9040

AND TO: TEGETA EXPLORATION AND RESOURCES (PTY) LTD

**Fourth Respondent** 

Grayston Ridge Office Park, Block A

Lower Ground Floor,

144 Katherine Street, Sandown

Sandton

Tel: 011 542 1000 Fax: 011 262 3868

AND TO: WESTDAWN INVESTMENTS (PTY) LTD

Fifth Respondent JIC House, 108A 16<sup>th</sup> Road MIDRAND

AND TO: BLACKEDGE EXPLORATION (PTY) LTD

Sixth Respondent 89 Gazelle Avenue Corporate Park South

MIDRAND

AND TO: TNA MEDIA (PTY) LTD

Seventh Respondent 52 Lechwe Street Corporate Park South Old Pretoria Main Road

MIDRAND 1685

TEL: 011 542 1222 FAX: 086 733 7000 AND TO: INFINITY MEDIA (PTY) LTD

Ninth Respondent 52 Lechwe Street Corporate Park South Old Pretoria Main Road

Midrand

AND TO: VR LASER SERVICES (PTY) LTD

Tenth Respondent

Grayston Ridge Office Park, Block A

Lower Ground Floor,

144 Katherine Street, Sandown

Sandton

AND TO: ISLANDSITE INVESTMENTS ONE HUNDRED AND EIGHTY (PTY)

LTD

Eleventh Respondent 89 Gazelle Avenue Corporate Park South Old Johannesburg Road

Midrand 1685

AND TO: CONFIDENT CONCEPT (PTY) LTD

Twelfth Respondent 89 Gazelle Avenue Corporate Park South Old Johannesburg Road

Midrand 1685

AND TO: SAHARA COMPUTERS (PTY) LTD

Fourteenth Respondent 89 Gazelle Avenue Corporate Park South Old Johannesburg Road

Midrand 1685

AND TO: ABSA BANK LTD

Fifteenth Respondent

7<sup>th</sup> Floor

**Bardays Towers West** 

15 Troy Street Johannesburg AND TO: FIRST NATIONAL BANK LTD

Sixteenth Respondent 6th Floor, 1 First Place FNB Bank City Simmonds Street Johannesburg

AND TO: STANDARD BANK OF SOUTH AFRICA

Seventeenth Respondent

9<sup>th</sup> Floor

Standard Bank Centre 5 Simmonds Street Johannesburg

AND TO: NEDBANK LIMITED

**Eighteenth Respondent** 

G Block 3rd Floor Desk 135 Rivonia Rd Sandown Sandton

AND TO: THE GOVERNOR OF THE SOUTH AFRICAN RESERVE BANK

Nineteenth Respondent 370 Helen Joseph Street

Pretoria

AND TO: THE REGISTRAR OF BANKS

Twentieth Respondent 370 Helen Joseph Street

Pretoria

AND TO: DIRECTOR OF THE FINANCIAL INTELLIGENCE

CENTRE

Twenty First Respondent

Woodhill Centre St. Bernard Drive Garsfontein Pretoria



## Office of the State Attorney Pretoria

PRIVATE BAG X 91 PRETORIA 0001 SALU BUILDING 255 FRANCIS BAARD (SCHOEMAN) STREET CNR THABO SEHUME (ANDRIES) STREET [ENTRANCE IN THABO SEHUME (ANDRIES)

L: (SWITCHBOARD): (012) 909 1500 (DIRECT LINE): (012) 309 1575 (SECRETARY): (012) 309 1504 FAX: (012) 309 1649/50 DOCEX: 298

24 MARCH 2017

ENQ:

T. NHLANZI

EMAR:

TNhlanzi@justics.gov.za

MY REF: 2427/16/232

YOUR REF: TRI15/8 SCOP

#### STEIN SCOP ATTORNEYS

Per e mail: Bradley@steinscop.com

RE: MINISTER OF FINANCE // OAKBAY INVESTMENTS (PTY) LTD AND OTHERS

Dear Sir

Your letter dated 17 March 2017, and now the "supplementary" heads of argument received on 22 March refer.

The former is addressed to me in my capacity "as legal representative of the Minister of Finance". Yet your letter follows a Rule 7 notice purportedly filed by you on behalf of the fourteenth respondent purporting to question my authority to act in this capacity. The inconsistency is evident.

The patent irregularity of your purported Rule 7 notice is not the subject matter of this correspondence. Nor does this response to your letter constitute a further step in the proceedings. The applicant's rights as regards your purported Rule 7 notice remain reserved.

As regards the legal competence of the subject-matter of your letter under reply, this, too, is disputed. In this respect, too, the applicant's rights are reserved. Each allegation in your letter is, to the extent that this may be necessary, denied.

In respect of the purported "supplementary" heads of argument now presented, we note the following.

Firstly, the description is misleading. Sahara chose not to be separately represented. It similarly chose to file no heads of argument separate to those of the other Oakbay respondents. What are now presented are in so sense "supplementary". They entail in truth a belated argument.

Secondiy, Sahara (represented, as you acknowledge, by Attorney Gert van der Merwe and senior counsel engaged by him) was represented at the directions meeting convened by the Deputy Judge President on 15 December 2016. Directions were then issued as regards dates for heads of argument.

Thirdly, if Sahara's purported decision to present heads of argument this week is unreasonably late. It has had nearly four months to review its position.

Sahara's conduct now is in breach of the Deputy Judge President's directions. and patently prejudicial to the parties which have complied therewith in their preparation for the hearing.

Yours Sincerel

Ms Thembelihle Nhlanzi

FOR: STATE ATTORNEY PRETORIA

DEPARTMENT OF JUSTICE &

CONSTITUTIONAL DEVELOPMENT

CC:

The Hon the Judge President, Deputy Judge President and Mr Justice Modiba



2150



## Office of the State Attorney Pretoria

PRIVATE BAG X 91 PRETORIA 0001 SALU BUILDING

255 Francis Baard (Schoeman) Street CNR Thabo Sehume (Andries) Street [Entrance in Thabo Sehume (Andries)

TREET

TEL:

(SWITCHBOARD): (012) 309 1500 (Direct Line): (012) 309 1575

(SECRETARY): (012) 309 1504 FAX: (012) 309 1649/50

**DOCEX: 298** 

26 MARCH 2017

ENG:

T. NHLANZI

My Ref: 2427/16/Z32

ENAIL:

TNhlanzi@justice.gov.za

Your REF. TRI15/8 SCOP

#### STEIN SCOP ATTORNEYS

Per e mail: Bradley@steinscop.com

RE: MINISTER OF FINANCE // OAKBAY INVESTMENTS (PTY) LTD AND OTHERS

Dear Str

Your letter dated Saturday 25 March 2017, sent at 18h00 on Saturday 25 March and received by me on Sunday 26 March 2017, refers

Your letter purports to impose a deadline for a response to it by 16h00 on Sunday 26 March 2017. In the circumstances there is clearly no opportunity to respond properly to the contents of your letter. Nor is it appropriate to conduct a trial through correspondence, as you purport to do. Accordingly the applicant's rights in respect of your letter remain reserved. Suffice it to state that the contents of your letter are incorrect in every material respect.

Firstly, the Rule 30 notice is not irregular, vague or embarrassing for including the irregularity of Sahara's purported filing of heads of argument in addition to the irregularity of Sahara's purported Rule 7 notice. Both are irregular, both are significantly out of time, and the objection in respect of each is quite clear and otherwise competent.

In the circumstances (and in particular as a result of the excessive delay by your client, and therefore the limited time to respond to the multiple irregularities) a single notice specifying two irregular steps is, with respect, entirely appropriate. The contention that multiple irregular steps must each be met by its own notice will, if pressed, be addressed in argument.

Secondly, the invoking of an absolute right to be heard is equally misplaced. All litigants' right to audi alteram partem is subject to regulation by the Court. Therefore your client's non-compliance with directives issued by the Deputy Judge President cannot be excused by belatedly asserting direct reliance on this principle without requesting an indulgence to depart from binding directives. Because no case has been made out for an indulgence, the Court is not, with respect, placed in a position to grant it.

Therefore your accusation of "obstructionist" conduct on the part of this office is misdirected. It is the duty of an officer of court to ensure compliance with the Court's directives. Whereas you have had every opportunity to rectify the irregularities (whether by seeking condonation or otherwise), this has to date not occurred. Any belated attempt to seek condonation will be opposed.

The applicant and all other parties are seriously prejudiced in their preparation for the hearing by your client's eleventh-hour non-compliance with the Rules of Court and the Deputy Judge President's directives. This is particularly so in circumstances where the belated heads of argument do not comply with essential requirements for heads of argument.

Contrary to the suggestion in your letter under reply, your letter of 17 March 2017 did not provide an "Invitation" to the Minister to advance reasons why a costs order de bonis propriis should not be made against him. It was, moreover, neither necessary nor appropriate to respond through correspondence to your misconceived claim for costs. Neither Oakbay's answering affidavit, nor its heads of argument, nor its practice note seek costs de boniis propriis. The approach adopted in your letter is therefore inconsistent with the approach of the other respondents on whose affidavits Sahara seeks to rely. Sahara's approach to costs is self-evidently inappropriate, which is why it did not occur to any other party.

Finally, as regards the ultimatum contained in paragraph 9 of your letter, it, too, is untenable. The State Attorney is seized of the conduct of this litigation, and authorised to do all things necessary in the conduct of the matter. Therefore I am authorised to object to irregular steps purportedly taken against the applicant. Specific instructions to file a notice of irregular step are therefore not required. It is, furthermore, incorrect to suggest that I have not responded in a manner which serves to satisfy the Court as regards my authority to act. The notice of irregular step filed in response to Sahara's Rule 7 notice clearly identifies the statutory source of the State Attorney's inherent authority to act in this matter.

Because your letter under reply was copied to the Court, so too is this response.

Yours Sincerely

Ma Rhembelikle Phlanzi

RESTATE ATTORNEY PRETORIA

Access to Justice for All

Always quote my reference number

### DEPARTMENT OF JUSTICE & CONSTITUTIONAL DEVELOPMENT

CC: The Hon the Judge President, Deputy Judge President and Mr Justice Modiba





Co. Name: Stein Scop Attorneys Inc. Registration No: 2015/306625/21

Landline: +2711 380 8080 Email: bradley@stefnscop.com

Direct: +2711 380 8070 Mobile: +2782 781 3452 Our ref: TRI15 / B Scop Your ref: MS T Nhlanzi 2153

Date: 26 March 2017

The State Attorney

Attention: Ms Thembelihle Nhlanzi

By email: TNhlanzi@justice.gov.za

cc: The Judge President, Gauteng Division,

The Honourable Mr Justice Miambo

By email: nrakgwale@justice.gov.za

cc: The Deputy Judge President, Gauteng Division (Pretoria),

The Honourable Mr Justice Ledwaba

By email: kramokoka@justice.org.za

**Dear Sirs** 

The Minister of Finance / Oakbay Investments (Pty) Ltd & 20 others (case no: 80978/2016)

- We do not intend to respond to each of the allegations contained in your letter of 26 March 2017 (Annexure 1). Our lack of response should not be construed as a concession thereto, and we deny same.
- We record that you have failed to respond to our requests for information as contained in our previous letters of 25 March 2017 (Annexures 2 and 3 respectively).
- Notwithstanding your complaint about our imposition of deadlines, which you subsequently
  pre-empted in a 2-page response to our letters, it is clear that your failure to respond is
  deliberately obstructionist.
- 4. We record that this failure to respond has now forced us to bring an application to compel you and your client to comply with rule 7 of the Uniform Rules of Court.

Directors: GE Stein; BA Scop; C Virentin and A Berman | Senior Associates: N Yehebeiele and S van der Weele

Ground Floor, 18 Meirose Boulevard, Meirose Arch, Meirose North, Gauteng, 2076, South Africa

- We further record that we shall bring such an application and seek a punitive costs order against your client in his personal capacity.
- 6. We reiterate that if you are properly instructed to act, it would have been easy for you to prove same. Your baseless grounds of resistance to prove your authority where requested to do so, as we are entitled to, in terms of the rules of court, is unacceptable.
- We record our view that your objection to Sahara's Supplementary Heads of Argument is without merit and to the extent necessary we shall address same at the hearing of this matter.
- 8. We further record that, from the last paragraph of your letter, you intimate that the State Attorney is able to act without specific Instructions. You state that your conduct in this matter thus far is evidence enough of your authority to act.
- 9. That is patently incorrect in circumstances where your very authority to act is being disputed. In the absence of a power of attorney or similar produced by yourselves in response to our Rule 7 notice, your conduct is irrelevant as your authority to have taken such steps, or take further steps in future, is being disputed.

Yours sincerely

BA Scop Director

Sent electronically



# Office of the State Attorney Pretoria

PRIVATE BAG X 91 PRETORIA 0001

SALU BUILDING

255 FRANCIS BAARD (SCHOEMAN) STREET CNR THABO SEHUME (ANDRIES) STREET [ENTRANCE IN THABO SEHUME (ANDRIES)

STREET

EL: (SWITCHBOARD): (012) 309 1500

(DIRECT LINE): (012) 309 1575 (SECRETARY): (012) 309 1504

FAX: (012) 309 1649/50

DOCEX: 298

26 MARCH 2017

ENO:

T. NHLANZI

EMAIL:

TNhlanzi@justice.gov.za

My Ref: 2427/16/232

YOUR REF: TRI15/ B SCOP

#### STEIN SCOP ATTORNEYS

Per e mail: Bradley@steinscop.com

RE: MINISTER OF FINANCE // OAKBAY INVESTMENTS (PTY) LTD AND OTHERS

Dear Sir

Your letter dated Saturday 25 March 2017, sent at 18h00 on Saturday 25 March and received by me on Sunday 26 March 2017, refers

Your letter purports to impose a deadline for a response to it by 16h00 on Sunday 26 March 2017. In the circumstances there is clearly no opportunity to respond properly to the contents of your letter. Nor is it appropriate to conduct a trial through correspondence, as you purport to do. Accordingly the applicant's rights in respect of your letter remain reserved. Suffice it to state that the contents of your letter are incorrect in every material respect.

Firstly, the Rule 30 notice is not irregular, vague or embarrassing for including the irregularity of Sahara's purported filing of heads of argument in addition to the irregularity of Sahara's purported Rule 7 notice. Both are irregular, both are significantly out of time, and the objection in respect of each is quite clear and otherwise competent.

In the circumstances (and in particular as a result of the excessive delay by your client, and therefore the limited time to respond to the multiple irregularities) a single notice specifying two irregular steps is, with respect, entirely appropriate. The contention that multiple irregular steps must each be met by its own notice will, if pressed, be addressed in argument.

Secondly, the invoking of an absolute right to be heard is equally misplaced. All litigants' right to *audi alteram partem* is subject to regulation by the Court. Therefore your client's non-compliance with directives issued by the Deputy Judge President cannot be excused by belatedly asserting direct reliance on this principle without requesting an indulgence to depart from binding directives. Because no case has been made out for an indulgence, the Court is not, with respect, placed in a position to grant it.

Therefore your accusation of "obstructionist" conduct on the part of this office is misdirected. It is the duty of an officer of court to ensure compliance with the Court's directives. Whereas you have had every opportunity to rectify the irregularities (whether by seeking condonation or otherwise), this has to date not occurred. Any belated attempt to seek condonation will be opposed.

The applicant and all other parties are seriously prejudiced in their preparation for the hearing by your client's eleventh-hour non-compliance with the Rules of Court and the Deputy Judge President's directives. This is particularly so in circumstances where the belated heads of argument do not comply with essential requirements for heads of argument.

Contrary to the suggestion in your letter under reply, your letter of 17 March 2017 did not provide an "invitation" to the Minister to advance reasons why a costs order de bonis propriis should not be made against him. It was, moreover, neither necessary nor appropriate to respond through correspondence to your misconceived claim for costs. Neither Oakbay's answering affidavit, nor its heads of argument, nor its practice note seek costs de boniis propriis. The approach adopted in your letter is therefore inconsistent with the approach of the other respondents on whose affidavits Sahara seeks to rely. Sahara's approach to costs is self-evidently inappropriate, which is why it did not occur to any other party.

Finally, as regards the ultimatum contained in paragraph 9 of your letter, it, too, is untenable. The State Attorney is seized of the conduct of this litigation, and authorised to do all things necessary in the conduct of the matter. Therefore I am authorised to object to irregular steps purportedly taken against the applicant. Specific instructions to file a notice of irregular step are therefore not required. It is, furthermore, incorrect to suggest that I have not responded in a manner which serves to satisfy the Court as regards my authority to act. The notice of irregular step filed in response to Sahara's Rule 7 notice clearly identifies the statutory source of the State Attorney's inherent authority to act in this matter.

Because your letter under reply was copied to the Court, so too is this response.

Yours Sincerely

Ms Chembelikie Dhianzi

FOR STATE ATTORNEY PRETORIA

Access to Justice for All

Always quote my reference number

### DEPARTMENT OF JUSTICE & CONSTITUTIONAL DEVELOPMENT

The Hon the Judge President, Deputy Judge President and Mr Justice Modibe CC:





Co. Name: Stein Scop Attorneys Inc. Registration No: 2015/306625/21 Landline: +2711 380 8080 Email: bradley@steinscop.com

Direct: +2711 380 8079 Mobile: +2782 781 3462 Our ref: TRI15 / B Scop Your ref: MS T Nihlanzi

Date: 25 March 2017

The State Attorney

Attention: Ms Thembelihle Nhlanzi

By email: TNhlanzl@justice.gov.za

cc: The Judge President, Gauteng Division,
The Honourable Mr Justice Mlambo

By email: nrakgwale@justice.gov.za

cc: The Deputy Judge President, Gauteng Division (Pretoria), The Honourable Mr Justice Ledwaba

By email: kramokoka@justice.org.za

Dear Sirs

The Minister of Finance / Oakbay investments (Pty) Ltd & 20 others (case no: 80978/2016)
Rule 7 notice

- 1. Your purported rule 30 notice and letter of 24 March 2017 (Annexures 3 and 4 respectively), in response to our rule 7 notice and letter of 17 March 2017 (Annexures 1 and 2 respectively), refer.
- We deny that serving a rule 7 notice and sending you our letter is contradictory. If you are correct it would mean that the rule 7 notice itself could not be served on your offices until such time that you demonstrated your authority to act. Your conclusion, in our respectful submission, is absurd.
- Our client is surprised that our request to satisfy the Court that the State Attorney is
  properly authorised to act has resulted in the Minister resorting to such lengths of
  attempting to set aside our rule 7 notice as an irregular step. As you are aware, any

Directors: GE Stein; BA Scop; C Visentin and A Berman | Senior Associates: N Tshabalala and 6 van der Weele

Ground Floor, 18 Metrose Boulevard, Metrose Arch, Metrose North, Gauteng, 2076, South Africa

party may challenge the authority of an attorney acting for another at any time before judgment.

- 4. Please urgently advise us in writing whether it is your instructions from the Minister to not respond to our rule 7 notice unless a formal condonation application is brought. In order to do so before the hearing, please advise us by no later than 16h00 on Sunday, 26 March 2017. Should we not hear from you at that time, we will assume that you require a formal application to be brought, and will do so seeking to recover costs from your client in his personal capacity.
- 5. We record that it in order for you to act, a decision by the organ of state, in this case the Minister, would have had to take a decision to initiate process, and authorise you to act. If you are so authorised to act it would be easy for you to furnish us with such proof. The Minister, as an organ of state, is constitutionally obliged to act in a transparent manner. Your persistence in not furnishing us with such proof is thus highly irregular.
- 6. We record that your interpretation of rule 7, read together with the State Attorney Act, 56 of 1957, is tantamount to suggesting that the State Attorney has an automatic right to act on behalf of an organ of state where no decision may have been taken permitting such action. This is patently incorrect.
- 7. We further require you to urgently confirm in writing what prejudice your client has suffered in being served with a rule 7 notice. Please advise us by no later than 16h00 on Sunday, 26 March 2017.
- Even if our Rule 7 was out of time, should we receive no response from you or your client, we will assume that you do not suffer any prejudice.

Yours sincerely

BA Scop Director

Sent electronically



Co. Name: Stein Scop Attorneys inc. Registration No: 2015/306625/21 Landline: +2711 380 8080 Email: bradley@steinscop.com

Direct: +2711 350 8070 Mobile: +2782 781 3452 Our ref: TRI15 / B Scop Your ref: MS T Nhlanzi

Date: 25 March 2017

The State Attorney

Attention: Ms Thembelihle Nhlanzi

By email: TNhlanzi@justice.gov.za

cc: The Judge President, Gauteng Division, The Honourable Mr Justice Miambo

By email: nrakgwale@justice.gov.za

cc: The Deputy Judge President, Gauteng Division (Pretorla),
The Honourable Mr Justice Ledwaba

By email: kramokoka@justice.org.za

Dear Sirs

The Minister of Finance / Oakbay Investments (Pty) Ltd & 20 others (case no: 80978/2016)
Rule 7 notice

- Your purported rule 30 notice and letter of 24 March 2017 (Annexures 1 and 2 respectively), in response to Sahara's Rule 7 notice, but in which you refer to Sahara's Supplementary Heads of Argument, refer.
- 2. We note that your purported Rule 30 notice is "in response to the fourteenth respondent's <u>purported rule 7 notice</u>". In same purported Rule 30 notice, however, you "<u>further object to the purported filing of 'supplementary' heads of argument</u> as in conflict with the directions of the DJP of 22 December 2016". The inclusion of your objection with respect to Sahara's Supplementary Heads of Argument in your purported Rule 30 notice thus renders same irregular, vague, and embarrassing.

- 3. As canvassed in Sahara's Supplementary Heads of Argument, the reason for the Supplementary Heads was a change of legal representation and new counsel being put on brief. The filing of Supplementary Heads is for the benefit of the Court and all the parties. It further gives practical application to Sahara's audi alteram partem rights.
- 4. Your letter does not, indeed cannot, deny that Sahara is a party properly before the Court, with the concomitant ability to advance argument before it. As such, your objection to Sahara filing Supplementary Heads of Argument, served nearly a week before the hearing, is without merit and is, with respect, purely obstructionist.
- 5. The Supplementary Heads of Argument give yourself, the Court, and all the other parties in this matter, advance written notice of the arguments counsel for Sahara shall be advancing at the hearing. The Minister cannot suffer any prejudice where such notice is given to you. Indeed, we do not doubt that, you would have claimed to be ambushed, and thus prejudiced, if such arguments were advanced orally at the hearing without prior notice.
- 6. In any event, as the applicant, the Minister cannot claim any prejudice. Sahara filed Supplementary Heads as a respondent. An applicant has no right of reply to a respondent's heads other than at the hearing. Sahara's written arguments are entirely based upon the papers in this matter which the Minister, the Court, and all other parties have had the opportunity to engage with since the launch of this application. No prejudice can be claimed.
- 7. We further record that despite our invitation to the Minister to provide us with reasons as to why he should not be subject to a personal costs order, the Minister has not provided such reasons. The Minister's failure to do so is at his own peril. We once again invite the Minister to provide us with such reasons by 16h00 on Sunday, 26 March 2017.
- Instead, the Minister has had time to apparently instruct you to (a) deliver a formalistic objection to our rule 7 notice; and (b) Instruct you to object to our Supplementary Heads.
- 9. Please confirm in writing by no later than 16h00 on Sunday, 26 March 2017, whether in fact (1) the Minister instructed you to object to our rule 7 notice rather than satisfy the Court that you are authorised to act, (b) the Minister instructed you to object to our Supplementary Heads; and (c) when you received such instructions.

Yours sincerely

BA Scop Director

Sent electronically

35(12)

### IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA) Case no 80978/2016

in the matter between:

CAIGAY INVESTMENTS (ETY) LTD

First Respondent

**OAKBAY RESOURCES AND ENERGY LTD** 

Second Respondent

SHIVA URANIUM (PTY) LTD

Third Respondent

TEGETA EXPLORATION AND RESOURCES (PTY)

Fourth Respondent

AFRICA NEWS NETWORK (PTY) LTD

Ninth Respondent

VR LASER SERVICES (PTY) LTD

**Tenth Respondent** 

ISLANDSITE INVESTMENTS ONE HUNDRED AND

EIGHTY (PTY) LTD

**Eleventh Respondent** 

CONFIDENT CONCEPT (PTY) LTD

Twelfth Respondent

JET AIRWAYS (INDIA) LTD (INCORPORATED IN INDIA)

SAHARA COMPUTERS (PTY) LTD

**ABSA BANK LTD** 

FIRST NATIONAL BANK LTD

STANDARO BANK OF SOUTH AFRICA MILLED

NEGRANKEMIED.

gerative to Indeselli Maylow Rasawat vit

REGISTRAR OF BANKS

DIRECTOR OF THE FINANCIAL INTELLIGENCE CENTRE

Thirteenth Respondent

Fourteenth Respondent

Fifteenth Respondent

Stateenth Respondent

Seventeenth Respondent

Eggestin Bestondent

Nineteenth Respondent

Twentieth Respondent

Twenty-First Respondent

KNIPLY TAKE MOTICE that the first second, third fourth, shift seventh, eleventh, twelfth and fourteen respondents are required to make available to the Applicant the following documents as referred to in the affidavit of Mr Ajay Kumar Gupta:

 Copies of the transcribed version of the evidence and written statement to the Public Protector by the Deputy Minister of Finance. Mr Mcebisi Hubert Jonas. KINDLY TAKE NOTICE FURTHER that should the first, second, third, fourth, sixth, seventh, eleventh, twelfth and fourteen respondents fall to comply with this notice within 5 (five) days hereof, the Applicant will apply to court, at the expense cost of the first, second, third, fourth, sixth, seventh, eleventh, twelfth and fourteen respondents, to order the first, second, third, fourth, sixth, seventh, eleventh, twelfth and fourteen respondents to comply with this Notice.

SIGNED AT PRETORIA ON 20 FEBRUARY 2017

STATE ATTORNEY

Attorney for the applicant SALU-Building

Helona.

Television .

Fac 012 309 1049

Email Employed Church chow 22

FOR BEILD

TO: THE REGISTRAR

High Court, Pretoria

AND

VAN DER MERWE & ASSOCIATES
Attorney for 1st, 2nd, 3nd, 4th, 6th, 7th,
11sh, 12th and 14sh Respondents
62 Rigel Avenue North
Wateridoof
Pretoria
Ref. Mr GT VD Merwe/st/078
Tel: 012 343 5432

VAN DER MERWE EN ASS

RIGEL LAAN 62 WATERKLOOF RIDGE - PRETORIA TEL: 012 343 5432 / 087 654 0209 FAKS: 012 343 5435 / 086 500 7587

11:21

2/02/17

AND TO:

SES OF PACE SERVICES (PTM) LTD

SERVICE SERVICES

SERVICES SERVICES

Midrand

AND

AFRICA NEWS WEIGHORK (PTY) LID Aligh Blook orders Fourth Floor, Sandown Mews 88 Stella Street, Sandton

AND TO:

STEIN SCOP ATTORNEYS INC. Attorneys for 10<sup>th</sup> Respondent Ground Floor 16 Metrose Boulevard Metrose Arch, Johannesburg Tel: (014) 380 8080

Email: gienn@steinscop.com

Ref. G. Shein C/O BROOKLYN PLACE

Chr Bronkfrorst and Dey Street Cnr Bronkhorst & Dey Street, Brooklyn

Ref. Bridget Moalshe 2017 -02- 2 1

VDT ATTORNEYS INC

Docex 110, Pretoria Tel: (012) 452 1300

Fax: 086 433 1176

PROPERTY OF THE PROPERTY OF TH

dent Sente Stace Towe

AND TO:

**EDWARD NATHAN SONNENBERGS** 

Attenders in 15" Gasponden

150 West Street

Erasmus Forum Building D

Lar Rige Avenue & Stokkiesdraal Ergemusrane 8781

TØ:

MORTON ROSE FULERIGHT SOUTH AFRICA INC Attorneys for 18th Respondent

34 Fredman Dave Sandion

Email: asiam.moosajee@nortenrosefulbright.com

Ref. M. Mocsajee/FNB 3854

CO MONTLE JOOMA SABDIA INC

Ground Floor, Duncan Manor

Cor Jan Shoba and Brooks Streets

Brooklyn Tet: 012 362 313

Mothle Jooma Sabdia

2 1 FEB 2017

Pretoria Branch Tel: 012 362 3137 • Fax: 012 362 4139

Received without Prejudice

AND TO:

BOWMAN GILFILLAN INCORPORATED Attorneys for the 17" Respondent
Email: clement mkval@powmanslaw.co.za
Alan keep@powmanslaw.co.za
Ref: © Mkva/b (52672

C/C BOSEDE ANTORNIEVS
Ground Seon (Accessored Game Office Park

Received without prejudice
2017 -02- 21

AND TO:

BAKER & MACKENZIE

Attorneya for the 18<sup>th</sup> Respondent
Tiel: (1 | 9) | (4300)
Email: Gernard Rudolph@bakermckenzie.com
Vildaed Æbrahim@bakermckenzie.com Callinia - Anglia - Kampkanze com Ganget - Popular - Anglia

Received without Prejudice Ontvang sonder benadeling van regte

2017 -02- 2 1

Tel: +27 11 535 8000 | F: +27 11 535 8600

Ref. Mr. C. Manaka / Mr. C. Moraitis Email: cmanaka@werksmans.com

CHOPHIS (2) Werksmans.com Ref: SOUT 3287.65 C/O MABUEL A INCORPORATED Charter House, 179 Bosman Street **MABUELA INCORPORATED** WITHOUT PREJUDICE

Date: 21/03/3017

Signed:....

Pretoria Central Tel: 012 325 3966

AND TO:

MacRobert Attorneys

2017 -02- 2 1

Without prejudice of clients rights Sonder benadeling van kliente de regie

H:H

AND TO:

WESTBAWN INVESTMENTS (PTY) LTD Fifth Respondent JIC House, 106 A 16" Read

Midrand

3542) rop.

VAN DER MERWE & ASSOCIATES

**88A** 

■ 012 343 5432 ■ 012 343 5435 ☑ 62 RIGEL AVENUE NORTH WATERKLOOF RIDGE GT VD MERWEISE NATIONAL TREASURY RECEIVED

2169

7347 -03- 06 IN THE HIGH COURT OF SOUTH AFRICA [GAUTENG DIVISION, PRETORIA]

LEGAL SERVICES

**CASE NUMBER: 80978/16** 

In the matter between:

MINISTER OF FINANCE

and

KANTOGR VAN DIE ADJUNK REGTER PRESIDENT

2017 -03- 0 3

PRIETORIA

OFFICE OF THE DEPUTY JUDGE PRESIDENT

**APPLICANT** 

OAKBAY INVESTMENTS (PTY) LTD

OAKBAY RESOURCES AND ENERGY LTD

SHIVA URANIUM (PTY) LTD

TEGETA EXPLORATION AND RESOURCES (PTY) LTD

JIC MINING SERVICES (1979) (PTY) LTD

BLACKEDGE EXPLORATION (PTY) LTD

TNA MEDIA (PTY) LTD

THE NEW AGE

AFRICA NEWS NETWORK (PTY) LTD

VR LASER SERVICES (PTY). LTD

ISLANDSITE INVESTMENTS ONE HUNDRED AND EIGHTY (PTY) LTD

CONFIDENT CONCEPT (PTY) LTD

JET AIRWAYS (INDIA) LTD (INCORPORATED IN INDIA)

SAHARA COMPUTERS (PTY) LTD

1ST RESPONDENT

2ND RESPONDENT

3<sup>RD</sup> RESPONDENT

4<sup>TH</sup> RESPONDENT

5<sup>TH</sup> RESPONDENT

6<sup>TH</sup> RESPONDENT

7TH RESPONDENT

8<sup>TH</sup> RESPONDENT

9TH RESPONDENT

10TH RESPONDENT

11TH RESPONDENT

12TH RESPONDENT

13TH RESPONDENT

14TH RESPONDENT

ABSA BANK LTD	15 <sup>TH</sup> RESPONDENT
FIRST NATIONAL BANK LTD	16TH RESPONDENT
STANDARD BANK OF SOUTH AFRICA LIMITED	17 <sup>TH</sup> RESPONDENT
NEDBANK LIMITED	18 <sup>™</sup> RESPONDENT
REGISTRAR OF BANKS	19 <sup>TH</sup> RESPONDENT
DIRECTOR OF THE FINANCIAL INTELLIGENCE CENTRE	20 <sup>™</sup> RESPONDENT
GOVERNOR OF THE SOUTH AFRICAN RESERVE BANK	21 <sup>ST</sup> RESPONDENT

1ST; 2ND, 3RD, 4TH, 6TH, 7TH, 11TH, 12TH, AND 14TH RESPONDENTS' RESPONSE TO APPLICANT'S NOTICE IN TERMS OF RULE 35(12)

KINDLY NOTE THAT subject to the contents of the letter sent to the Office of the State Attorney on 21 February 2017, of which a copy is appended hereto as Annexure "A", the 1st, 2nd, 3rd, 4th, 6th, 7th, 11th, 12th, and 14th Respondents hereby advise that the documentation referred to in the Applicant's Rule 35(12) notice will be available for inspection on a date so arranged between the parties, within normal business hours namely between 08h00 and 16h00 as from the date of delivery hereof.

The aforesaid inspection is to be arranged within 5(Five) days from date of this reply in terms of the Applicant's notice in terms of Rule 35(12) served on 20 February 2017.

Kindly, further, note that the Applicant will be entitled to make copies of the aforesald documents against payment of the amount R3.50 plus VAT per page so identified.

SIGNED AT PRETORIA ON THIS THE 3 DAY OF MARCH 2017.

VAN DER MERWE & ASSOCIATES
ATTORNEYS FOR THE 1ST, 2ND, 3RD, 4TH,
6TH, 7TH, 11TH, 12TH, AND 14TH
RESPONDENTS
62 RIGEL AVENUE NORTH
WATERKLOOF

REF:

PRETORIA

MR GT VD MERWE/st/O78 TEL: 012 343 5432

FAX: 012 343 5435

EMAIL: simone@vdmass.co.za

TO:

THE OFFICE OF THE DEPUTY JUDGE PRESIDENT 7<sup>TH</sup> FLOOR, ROOM 7.15, HIGH COURT BUILDING EMAIL: MTroskle@judiciary.org.za

### AND TO:

STATE ATTORNEY
ATTORNEY FOR THE APPLICANT
SALU BUILDING
255 FRANCIS BAARD STREET
PRETORIA

TEL: 012 309 1575 FAX: 012 309 1649

EMAIL: TNhlanzi@justice.gov.za

REF: MS T NHLANZI 2427 16 1232

PRETORIA 0001

STAATSPROKUREUR

#### AND TO:

EDWARD NATHAN SONNENBERGS
ATTORNEYS FOR THE 15<sup>TH</sup> RESPONDENT
REF: M KATZ/D LAMBERT/0416998
EMAIL: diambert@ensafrica.com
C/O GERHARD BOTHA & PARTNERS INC
1<sup>ST</sup> FLOOR, ERASMUS FORUM BUILDING B
CNR RIGEL AVENUE & STOKKIESDRAAI
ERASMUSRANS
REF: MR B SWART/MR H BOTHA

### AND TO:

NORTON ROSE FULBRIGHT SOUTH AFRICA INCORPORATED ATTORNEYS FOR THE 16<sup>TH</sup> RESPONDENT
EMAIL: aslam.moosajee@nortonrosefulbright.com
REF: MR MOOSAJEE/FNB13954
C/O MOTLE JOOMA SABIA INCORPORATED
GROUND FLOOR, DUNCAN MANOR
CNR JAN SHOBA AND BROOKS STREETS
BROOKLYN
PRETORIA

### AND TO:

BOWMAN GILFILLAN INCORPORATED
ATTORNEYS FOR THE 17<sup>TH</sup> RESPONDENT
EMAIL: clement.mkive@bowmanslaw.co.za
Alan.keep@bowmanslaw.co.za
REF: C MKIVA/6164672
C/O BOSHOFF ATTORNEYS
GROUND FLOOR, HAZELWOOD GATE OFFICE PARK
14 OAKTREE AVENUE
CNR OAKTREE AVENUE AND DELY ROAD
HAZELWOOD
PRETORIA
REF: NATASHA NORTJE/NN1564

### AND TO:

BAKER & MACKENZIE
ATTORNEYS FOR THE 18<sup>TH</sup> RESPONDENT
EMAIL: Gerhard.rudoiph@bakermackenzie.co.za

Widaad.ebrahim@bakermackenzie.co.za
Callum.oconnor@bakermackenzie.co.za
REF: G RUDOLPH/CO
C/O ADAMS & ADAMS
ADAMS & ADAMS
ADAMS & ADAMS PLACE
LYNWOOD BRIDGE
4 DAVENTRY STREET
LYNWOOD MANOR
REF: ADELE JORDAAN

### AND TO:

MACROBERT INCORPORATED
ATTORNEYS FOR THE 21<sup>ST</sup> RESPONDENT
MACROBERT BUILDING
CNR JUSTICE MAHOMED AND JAN SHOBA STREETS
BROOKLYN
PRETORIA
EMAIL: ghay@macrobert.co.za
REF: GK HAY

### AND TO:

WERKSMANS ATTORNEYS
ATTORNEYS FOR THE 19<sup>TH</sup> AND 20<sup>TH</sup> RESPONDENTS
REF: MR C MANAKA/MR C MORAITIS
EMAIL: cmanaka@werksmans.com
cmoraitis@werksmans.com
REF: SOUT 3267.63
C/O MABUELA INCORPORATED
CHARTER HOUSE, 179 BOSMAN STREET
PRETORIA CENTRAL.
EMAIL: mabuela@tiscali.co.za

### AND TO:

STEIN SCOP ATTORNEYS INC.
ATTORNEYS FOR THE 10<sup>TH</sup> RESPONDENT
GROUND FLOOR
18 MELROSE ARCH
JOHANNESBURG
TEL: 011 380 8080
REF: G STEIN
C/O BROOKLYN PLACE
CNR BROOKLYN AND DEY STREET
BROOKLYN
PRETORIA

TEL: 012 452 1300 REF: BRIDGET MOATSHE

A

2175



Attorneys • Notaries • Conveyancers • Prokureurs • Notarisse • Aktevervaardigers

<u>Director / Direktetir</u>: Gert van der Merwe (BLC, LLB)

Associate/Associate
Ilanic Loots (LLB)

Assisted by / Bygestaan deur:
Ilze van der Merwe (LLB)
Ilze Mattheus (B.Com, LLB,
LLLM)

Consultant
\*Nico Hager (B.Juris LLB)

Reg No: 2006/015908/21 VAT/BTW No: 4630239152

Pretoria Street Address / Strastadres: 62 Rigel Avenue, Waterkloof Ridge, Pretoria

Postal Address / Postal res: Postus / P.O. Box 27756 Sunnyside 0132

Tel: 087 654 0209
Fax/Faks: 012 343 5435
Email/Epos:
simono@ydmass.co.za

\*Sandton
Tel: 011 542 2000
Fax/Paks: 086 603 4356

Our Ref: MR GT VD MERWE/st/Q78

Your Ref: MS THEMBELITHE NHLANZI

21-02-2017

**URGENT** 

The Office of the State Attorney

BY FAX: 012 309 1649 BY EMAIL: TNhlanzi@justice.gov.za

Dear Ms Nhlanzl,

APPLICATION: MINISTER OF FINANCE / OAKBAY INVESTMENTS (PTY) LTD - CASE NUMBER: 80978/16

We refer to the abovementioned matter and in particular your client's notice in terms of the Rule 35(12) served on our offices on 20 February 2017.

Kindly find appended hereto a letter directed to the Public Protector for your kind attention.

We, whilst awaiting the Public Protector's upliftment of the embargo, would be prepared to produce the document for the eyes of the legal advisors of the Applicant and Mr Jonas only on the understanding that the matter contained therein will not be disclosed to any other parties.

We trust you find the above in order and await your kind though formal response to our aforesaid proposal.

Kind regards.

Gert van der Merwe VAN DEE MERWE & ASSOCIATES

### Simone

From:

Sent:

To:

Subject: Attachments:

Simone <simone@vdmass.co.za> Tuesday, 21 February 2017 1:58 PM

'Nhlanzi Thembelihle (TNhlanzi@justice.gov.za)' O78 / MINISTER OF FINANCE / OAKBAY GROUP

O78 OFFICE OF THE STATE ATTORNEY 10.doc; 201702211249.pdf

importance:

High

Vriendelike groete/Kind regards

Olmons Tatjaard

Candidate Attorney for

Gert van der Merwe Van der Merwe & Ass Inc 0876540209 62 Rigel Ave North Waterkloof Ridge Pretoria



Van der Merwe

la Audur Nom

2177

## IN THE HIGH COURT OF SOUTH AFRICA (GAUTENG DIVISION, PRETORIA)

			Case no	80978/2016
In the matter between:	2017	17		
MINISTER OF FINANCE	DEFICE TO THE	-		Applicant
And				
OAKBAY INVESTMENTS (PTY) L	.TD		First R	espondent
OAKBAY RESOURCES AND EN	ERGY LTD		Second R	espondent
SHIVA URANIUM (PTY) LTD			Third R	espondent
TEGETA EXPLORATION AND RELITD	SOURCES (PTY	)	Fourth R	espondent
JIC MINING SERVICES (PTY) LTD			Fifth Ro	espondent
BLACKEDGE EXPLORATION (PT	Y) LTD		Sixth Re	espondent
TNA MEDIA (PTY) LTD		\$	Seventh Re	espondent
THE NEW AGE			Eighth Re	espondent
AFRICA NEWS NETWORK (PTY)	LTD		Ninth Re	espondent
VR LASER SERVICES (PTY) LTD			Tenth Re	espondent
ISLANDSITE INVESTMENTS ONE EIGHTY (PTY) LTD	HUNDRED AND	E	leventh Re	spondent
CONFIDENT CONCEPT (PTY) LTD			Twelfth Re	spondent

JET AIRWAYS (INDIA) LTD (INCORPORATED IN Thirteenth Respondent INDIA) SAHARA COMPUTERS (PTY) LTD Fourteenth Respondent **ABSA BANK LTD** Fifteenth Respondent FIRST NATIONAL BANK LTD Sixteenth Respondent STANDARD BANK OF SOUTH AFRICA LIMITED Seventeenth Respondent **NEDBANK LIMITED** Eighteenth Respondent GOVERNOR OF THE SOUTH AFRICAN RESERVE BANK Nineteenth Respondent **REGISTRAR OF BANKS** Twentieth Respondent DIRECTOR OF THE FINANCIAL INTELLIGENCE Twenty-First Respondent CENTRE

### NOTICE OF AMENDMENT

TAKE NOTICE that the applicant intends to amend the notice of motion as follows:

- By substituting for the words "JIC Mining Services (Pty) Ltd" the words "Westdawn Investments (Pty) Ltd" in the citation of the fifth respondent.
- 2. By substituting for the words "Africa News Agency Network (Pty) Ltd" the words "Infinity Media (Pty) Ltd" in the citation of the ninth respondent.
- 3. By deleting the citation of the eighth and thirteenth respondents, and ail subsequent references to them, including in prayer 1.

TAKE NOTICE FURTHER that unless written objection to the proposed amendment is delivered within ten days of receipt of this notice, the applicant will amend the notice of motion accordingly.

SIGNED AT PRETORIA ON SFEBRUARY 2017

STATE ATTORNEY

Attorney for the applicant

SALU Building

255 Francis Baard Street

Pretoria

Tel: 012 309 1575

Fax: 012 309 1649

Email: TNhlanzi@justice.gov.za

Ref: Ms T Nhlanzi

TO:

10

THE REGISTRAR

High Court, Pretoria

AND

TO:

VAN DER MERWE & ASSOCIATES Attorney for 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 11<sup>th</sup>, 12<sup>th</sup> and 14<sup>th</sup> Respondents

62 Rigel Avenue North

Waterkloof

VAN DER MERWE EN ASS

RIGEL LAAN 62 . WATERKLOOF RIDGE - PRETORIA TEL: 012 343 5432 / 087 654 0209 FAKS: 012 343 5435 / 086 600 7587 Pretoria

Ref: Mr GT VD Merwe/st/078

Tel: 012 343 5432

E-mail: simone@vdmass.co.za

AND

TO:

JIC MINING SERVICES (PTY) LTD

Fifth Respondent JIC House, 106 A 16<sup>th</sup> Road

16" Road Midrand

AND

TO:

THE NEW AGE
Eighth Respondent
52 Lechwe Street
Corporate Park South
Old Pretoria Main Road

Midrand

AND

TO:

AFRICA NEWS NETWORK (PTY) LTD

Ninth Respondent

Fourth Floor, Sandown Mews 88 Stella Street, Sandton

**AND** 

TO:

STEIN SCOP ATTORNEYS INC. Attorneys for 10<sup>th</sup> Respondent

Ground Floor

18 Melrose Boulevard

Melrose Arch, Johannesburg

Tel: (011) 380 8080

Email: glenn@steinscop.com

sian@steinscop.com

Ref: G Stein

C/O BROOKLYN PLACE

Cnr Bronkhorst and Dey Street

RC 16/03/17 15:15 - VDT ATTORNEYS INC

Cnr Bronkhorst & Dey Street, Brooklyn

Docex 110, Pretoria Tel: (012) 452 1300 Fax: 086 433 1176

Brooklyn, Pretoria Ref: Bridget Moatshe

AND TO:

JET AIRWAYS (INDIA) LIMITED (INCORPORATED IN INDIA)

Thirteen Respondent

5<sup>th</sup> Floor, Bedford Centre Office Tower

Smith Road Bedford Gardens Johannesburg

AND TO:

**EDWARD NATHAN SONNENBERGS** 

Attorneys for 15th Respondent

150 West Street

Sandton

Email: dlambert@ensafrica.com Ref: M Katz/ D Lambert/0416998

C/O GERHARD BOTHA & PARTNERS INC

First Floor, Erasmus Forum Building B

Cnr Rigel Avenue & Stokkiesdrrai

Erasmusrand Tel: 012 347 0480

Email: brendon@bothapartners.co.za

Ref: Mr B Swart/ Mr H Botha

GERHARD BOTHA & PARTNERS INC. Erasmus Forum Building "B"

Erasmus Forum Building "8"
Cnr. Rigel Avenue & Stokkiesdraai
Erasmusrand 0181

AND

TO: NORTON ROSE FULBRIGHT SOUTH AFRICA INC

Attorneys for 16<sup>th</sup> Respondent 34 Fredman Drive, Sandton

Email: aslam.moosajee@nortonrosefulbright.com

Ref: Mr Moosajee/FNB 13954

c/o MONTLE JOOMA SABDIA INC

Ground Floor, Duncan Manor Cnr Jan Shoba and Brooks Streets

Brooklyn

Tel: 012 362 313

MIJ S Inc

Mothle Jooma Sabdia

1 6 FEB 2017

Pretoria Branch
Tel: 012 362 3137 • Fex: 012 362 4139
Received without Prejudice

AND

TO:

BOWMAN GILFILLAN INCORPORATED Attorneys for the 17<sup>th</sup> Respondent

Email: clement.mkiva@bowmanslaw.co.za

Alan.keep@bowmanslaw.co.za

Ref: C Mkiva/6162672

C/O BOSHOFF ATTORNEYS

LOSHOFF INCORPORATED Received without prejudice

Ground Floor, Hazelwood Gate Office Park

14 Oaktree Avenue

Cnr Oaktree Avenue and Dely Road

Hazwlwood Pretoria

Ref: Natasha Nortje/NN1564

2017 -02- 17

AND TO:

**BAKER & MACKENZIE** 

Attorneys for the 18th Respondent

Tel: 011 911 4300

Email: Gerhard.Rudolph@bakermckenzie.com

Widaad.Ebrahim@bakermckenzie.com Callum.Oconnor@bakermckenzie.com

Ref: G Rudolph/CO C/O ADAMS & ADAMS Adams & Adams Place Lynwood Bridge 4 Daventry Street Lynwood Manor

Tel: 012 432 6000 Ref: Adele Jordaan Received without Prejudice Ontvang sonder benadeling van regte

2017 -02- 16

ADAMS & ADAMS

AND TO:

**WERKSMANS ATTORNEYS** 

19<sup>th</sup> and 20<sup>th</sup> Respondent's Attorneys 155 - 5<sup>th</sup> Street

Sandton

Tel: +27 11 535 8000 | F: +27 11 535 8600

Ref: Mr C Manaka / Mr C Moraitis Email: cmanaka@werksmans.com

cmoraitis@werksmans.com

Ref: SOUT 3267.63

C/O MABUELA INCORPORATED Charter House, 179 Bosman Street

Pretoria Central Tel: 012 325 3966 **AND** TO:

**MACROBERT ATTORNEYS** 

lacRobert Allerneys Attorneys for the 21st Respondent

MacRobert Building Cnr Jan Shoba &

Justice Mahomed Street Tel: 012 425 3436

Email: ghay@macrobert.co.za

Ref: G K Hay

2017 =02- 1 6

Without projudice of clients rights Sonder benedeling van kliente se regio

Sign / Geteken continues

15:04

AND TO:

WESTDAWN INVESTMENTS (PTY) LTD

Fifth Respondent JIC House, 106 A

16<sup>th</sup> Road Midrand

Westdawn Investments (Pty) Ltd T/a JIC Mining Services

P.O. Box 1501 Halfway House 1685 106A 16th Road, Midrand

Tel: 011 564 9400

AND TO:

**INFINITY MEDIA (PTY) LTD** 

Ninth Respondent 52 Lechwe Street Corporate Park South Old Pretoria Main Road

Midrand

# IN THE HIGH COURT OF SOUTH AFRICA [GAUTENG DIVISION, PRETORIA]

**CASE NUMBER: 80978/16** 

In the matter between:

MINISTER OF FINANCE

**APPLICANT** 

and	
OAKBAY INVESTMENTS (PTY) LTD	1 <sup>ST</sup> RESPONDENT
OAKBAY RESOURCES AND ENERGY LTD	2 <sup>ND</sup> RESPONDENT
SHIVA URANIUM (PTY) LTD	3 <sup>RD</sup> RESPONDENT
TEGETA EXPLORATION AND RESOURCES (PTY) LTD	4 <sup>TH</sup> RESPONDENT
JIC MINING SERVICES (PTY) LTD	5 <sup>TH</sup> RESPONDENT
BLACKEDGE EXPLORATION (PTY) LTD	6 <sup>TH</sup> RESPONDENT
TNA MEDIA (PTY) LTD	7 <sup>TH</sup> RESPONDENT
THE NEW AGE	8 <sup>TH</sup> RESPONDENT
AFRICA NEWS NETWORK (PTY) LTD	9 <sup>TH</sup> RESPONDENT
VR LASER SERVICES (PTY) LTD	10 <sup>TH</sup> RESPONDENT
ISLANDSITE INVESTMENTS ONE HUNDRED AND EIGHTY (PTY) LTD	11 <sup>TH</sup> RESPONDENT
CONFIDENT CONCEPT (PTY) LTD	12 <sup>TH</sup> RESPONDENT
JET AIRWAYS (INDIA) LTD (INCORPORATED IN INDIA)	13 <sup>TH</sup> RESPONDENT

SAHARA COMPUTERS (PTY) LTD	14TH RESPONDENT
ABSA BANK LTD	15 <sup>TH</sup> RESPONDENT
FIRST NATIONAL BANK LTD	16 <sup>TH</sup> RESPONDENT
STANDARD BANK OF SOUTH AFRICA LIMITED	17 <sup>™</sup> RESPONDENT
NEDBANK LIMITED	18 <sup>TH</sup> RESPONDENT
GOVERNOR OF THE SOUTH AFRICAN RESERVE BANK	19 <sup>TH</sup> RESPONDENT
REGISTRAR OF BANKS	20 <sup>TH</sup> RESPONDENT
DIRECTOR OF THE FINANCIAL INTELLIGENCE CENTRE	21 <sup>ST</sup> RESPONDENT

# NOTICES BUNDLE VOLUME 1

1.	NOTICE OF INTENTION TO OPPOSE – 1 <sup>ST</sup> , 2 <sup>ND</sup> , 3 <sup>RD</sup> , 4 <sup>TH</sup> , 7 <sup>TH</sup> , 10 <sup>TH</sup> , 11 <sup>TH</sup> , 12 <sup>TH</sup> AND 14 <sup>TH</sup> RESPONDENTS (OAKBAY GROUP OF COMPANIES)	1-2
2.	NOTICE SUPPORTING RELIEF SOUGHT BY APPLICANT – 15 <sup>1H</sup> RESPONDENT (ABSA BANK LIMITED)	3-9
3.	NOTICE OF APPOINTMENT AS ATTORNEYS OF RECORD – 16 <sup>TH</sup> RESPONDENT (FIRST NATIONAL BANK)	10 - 12
4.	NOTICE OF APPOINTMENT AS ATTORNEYS OF RECORD – 17 <sup>1H</sup> RESPONDENT (STANDARD BANK)	13 – 17
5.	NOTICE OF APPOINTMENT AS ATTORNEYS OF RECORD - 1814 RESPONDENT (NEDBANK LIMITED)	18 – 22
6.	NOTICE OF APPOINTMENT AS ATTORNEYS OF RECORD - 19 <sup>18</sup> AND 20 <sup>TH</sup> RESPONDENTS (GOVERNOR OF SA RESERVE BANK AND REGISTRAR OF BANKS)110	23 – 26
7.	NOTICE OF INTENTION TO ABIDE - 21 <sup>ST</sup> RESPONDENT (FIC)	27 – 29
8.	NOTICE OF SUBSTITUTION OF ATTORNEYS - 21 <sup>ST</sup> RESPONDENT (FIC)	30 – 33
9.	NOTICE IN TERMS OF RULE 35(12) – 1 <sup>S1</sup> , 2 <sup>ND</sup> , 3 <sup>RD</sup> , 4 <sup>1H</sup> , 7 <sup>TH</sup> , 10 <sup>TH</sup> , 11 <sup>TH</sup> , 12 <sup>TH</sup> AND 14 <sup>TH</sup> RESPONDENTS (OAKBAY GROUP OF COMPANIES)	34 – 38
10.	FILING NOTICE: APPLICANT'S REPLY TO 1 <sup>S1</sup> , 2 <sup>ND</sup> , 3 <sup>ND</sup> , 4 <sup>1H</sup> , 7 <sup>1H</sup> , 10 <sup>TH</sup> , 11 <sup>TH</sup> , 12 <sup>TH</sup> AND 14 <sup>TH</sup> RESPONDENTS' NOTICE IN TERMS OF	39 – 42

	RULE 35(12)	
11.	APPLICANT'S REPLY TO 1 <sup>S1</sup> , 2 <sup>ND</sup> , 3 <sup>RD</sup> , 4 <sup>IH</sup> , 7 <sup>TH</sup> , 10 <sup>IH</sup> , 11 <sup>IH</sup> , 12 <sup>IH</sup> AND 14 <sup>TH</sup> RESPONDENTS' NOTICE IN TERMS OF RULE 35(12)	43 – 100
	NOTICES BUNDLE	
	VOLUME 2	

12 · 4 ,

12.	APPLICANT'S REPLY TO 1 <sup>S1</sup> , 2 <sup>ND</sup> , 3 <sup>RD</sup> , 4 <sup>IH</sup> , 7 <sup>TH</sup> , 10 <sup>TH</sup> , 11 <sup>TH</sup> , 12 <sup>TH</sup> AND 14 <sup>TH</sup> RESPONDENTS' NOTICE IN TERMS OF RULE 35(12) – CONTINUED	101 – 152
13.	FILING NOTICE - 16 <sup>1H</sup> RESPONDENT'S SUPPORTING AFFIDAVIT (FIRST RAND BANK)	153 – 157
14.	FILING NOTICE – 17 <sup>TH</sup> RESPONDENT'S SUPPORTING AFFIDAVIT (STANDARD BANK)	158 – 162
15.	FILING NOTICE – 15 <sup>TH</sup> RESPONDENT'S ANSWERING AFFIDAVIT (ABSA BANK)	163 – 167
16.	FILING NOTICE - 19 <sup>TH</sup> RESPONDENT'S ANSWERING AFFIDAVIT (GOVERNOR OF THE SOUTH AFRICAN RESERVE BANK)	168 – 171
17.	FILING NOTICE - 20 <sup>1H</sup> RESPONDENT'S ANSWERING AFFIDAVIT (REGISTRAR OF BANKS)	172 – 175
18.	NOTICE OF SET DOWN	176 – 183
19.	FILING NOTICE - 1811 RESPONDENT'S ANSWERING AFFIDAVIT	184- 187
20.	NOTICE OF WITHDRAWAL AS ATTORNEYS OF RECORD BY VAN DER MERWE & ASSOCIATES	188 - 192
21.	NOTICE OF APPOINTMENT AS ATTORNEYS OF RECORD - STEIN SCOP ATTORNEYS	193 - 198

# NOTICES BUNDLE VOLUME 3

22.	FILING NOTICE- 1011 RESPONDENT'S ANSWERING AFFIDAVIT	199 - 204
23.	FILING NOTICE APPLICANT'S REPLYING AFFIDAVIT	204 - 208
24.	FILING NOTICE - 21 <sup>ST</sup> RESPONDENT'S AFFIDAVIT	209 - 215
25.	FILING NOTICE - 17 <sup>TH</sup> RESPONDENT'S AFFIDAVIT	216 - 219

### IN THE HIGH COURT OF SOUTH AFRICA GAUTENG DIVISION, PRETORIA

Case no: .80978/2016

In the matter between:

MINISTER OF FINANCE

**Applicant** 

and

OAKBAY INVESTMENTS (PTY) LTD

First respondent

OAKBAY RESOURCES AND ENERGY LTD

Second respondent

SHIVA URANIUM (PTY) LTD

Third respondent

TEGETA EXPLORATION AND RESOURCES (PTY) LTD

Fourth respondent

JIC MINING SERVICES (1979) (PTY) LTD

Fifth respondent

BLACKEDGE EXPLORATION (PTY) LTD

Sixth respondent

TNA MEDIA (PTY) LTD

Seventh respondent

THE NEW AGE

Eighth respondent

AFRICA NEWS NETWORK (PTY) LTD

Ninth respondent

VR LASER SERVICES (PTY) LTD

Tenth respondent

ISLANDSITE INVESTMENTS ONE HUNDRED AND EIGHTY (PTY) LTD

Eleventh respondent

CONFIDENT CONCEPT (PTY) LTD

Twelfth respondent

JET AIRWAYS (INDIA) LTD (INCORPORATED IN INDIA)

Thirteenth respondent

SAHARA COMPUTERS (PTY) LTD

Fourteenth respondent

ABSA BANK LTD

Fifteenth respondent

FIRST NATIONAL BANK LTD

Sixteenth respondent

STANDARD BANK OF SOUTH AFRICA LIMITED

Seventeenth respondent

NEDBANK LIMTED

Eighteenth respondent

GOVERNOR OF THE SOUTH AFRICAN RESERVE BANK

Nineteenth respondent

**REGISTRAR OF BANKS** 

Twentieth respondent

DIRECTOR OF THE FINANCIAL INTELLIGENCE CENTRE

Twenty-first respondent

### **FILING SHEET**

KINDLY TAKE NOTICE THAT the Applicant hereby file the indexed and paginated papers.

DATED AT PRETORIA ON THIS 10 TO DAY OF FEBRUARY 2017

STATE ATTORNEY
Attorney for the Applicant

SALU Building 255 Francis Baard Street

Pretoria

Tel: 012 309 1575

Fax: 012 309 1649 Fax to Email: 086 6293 073

Email: TNhlanzi@justice.gov.za Ref: 2427/16/Z32. Ms T Nhlanzi

TO:

THE REGISTRAR OF THE ABOVE HONOURABLE COURT GAUTENG DIVISION, PRETORIA

AND TO:

VAN DER MERWE & ASSOCIATES Attorney for 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 11<sup>th</sup>, 12<sup>th</sup> and 14<sup>th</sup> Respondents 62 Rigel Avenue North Waterkloof Pretoria

Ref: Mr GT VD Merwe/st/078 Tel: 012 343 5432

E-mail: simone@vdmass.co.za

VAN DER MERWE EN ASS
RIGEL LAAN 62
WATERKLOOF RIDGE - PRETORIA
WATERKLOOF RIDGE - PRETORIA
0209

WATERKLOOF RIDGE - THE COLOR OF A 0209 TEL: 012 343 5432 / 087 654 0209 FAKS: 012 343 5435 / 086 500 7587

10/02/17

AND

TO:

STEIN SCOP ATTORNEYS INC.

Attorneys for 10th Respondent

Ground Floor

18 Melrose Boulevard Melrose Arch, Johannesburg

Tel: (011) 380 8080

Email: glenn@steinscop.com

sian@steinscop.com

Ref: G Stein

C/O BROOKLYN PLACE

Cnr Bronkhorst and Dey Street

Brooklyn, Pretoria Ref: Bridget Moatshe

VDT ATTORNEYS INC Cnr Bronkhorst & Dey Street, Brooklyn

Docex 110, Pretoria Tel: (012) 452 1300 Fax: 086 433 1176

GERHARD BOTHA

& PARTNERS INC

Erasmusrand 0181

AND TO:

EDWARD NATHAN SONNENBERGS

Attorneys for 15th Respondent

150 West Street

Sandton

Email: dlamberti@ensafrica.com

Ref: M Katz/ D Lambert/0416998

Erasmus Forum Building "a" C/O GERHARD BOTHA & PARTNERS IN Rigel Avenue & Stokkiesdraal

First Floor, Erasmus Forum Building B

Cnr Rigel Avenue & Stokkiesdrrai

Erasmusrand

Tel: 012 347 0480

Email: brendon@bothapartners.co.za

Ref: Mr B Swart/ Mr H Botha

AND

TO:

NORTON ROSE FULBRIGHT SOUTH AFRICA INC

Attorneys for 16th Respondent

34 Fredman Drive, Sandton

Email: aslam.moosajee@nortonrosefulbright.com

Ref: Mr Moosajee/FNB 13954

c/o MONTLE JOOMA SABDIA INC

Ground Floor, Duncan Manor Cnr Jan Shoba and Brooks Streets

Brooklyn

Tel: 012 362 313

Mothle Jooma Sabdia

1 0 FEB 2017

Pretoria Branch

Tel: 012 3 3137 · Fax: 012 362 4139

Received without Prejudice

AND TO:

**BOWMAN GILFILLAN INCORPORATED** 

Attorneys for the 17th Respondent

Email: clement.mkiva@bowmanslaw.co.za

Alan.keep@bowmanslaw.co.za

Ref: C Mkiva/6162672

C/O BOSHOFF ATTORNEYS

Ground Floor, Hazelwood Gate Office Park

14 Oaktree Avenue

Cnr Oaktree Avenue and Dely Road

Hazwlwood Pretoria

Ref: Natasha Nortje/NN1564

AND TO:

**BAKER & MACKENZIE** 

Attorneys for the 18th Respondent

Tel: 011 911 4300

Email: Gerhard.Rudolph@bakermckenzie.com

Widaad.Ebrahim@bakermckenzie.com

Callum.Oconnor@bakermckenzie.com Ref: G Rudolph/CO C/O ADAMS & ADAMS

Adams & Adams Place

Lynwood Bridge 4 Daventry Street Lynwood Manor

Tel: 012 432 6000 Ref: Adele Jordaan Received without Prejudice Ontvang sonder benadeling van regte

2017 -02- 10

ADAMS & ADAMS

AND TO:

**MACROBERT ATTORNEYS** 

Attorneys for the 21<sup>rt</sup> Respondent

MacRobert Building Cnr Jan Shoba & Justice Mahomed Street Tel: 012 425 3436

Email: ghay@macrobert.co.za

Ref: G K Hay

MacRobert Attorneys

2017 -02- 10

Without prejudice of clients rights Sonder benadeling van kliente se regte

AND TO:

WERKSMANS ATTORNEYS

19th and 20th Respondent's Attorneys

155-5th Street Sandton

Tel: +27 11 535 8000 | F: +27 11 535 8600

Ref: Mr C Manaka / Mr C Moraitis Email: cmanaka@werksmans.com cmoraitis@werksmans.com

Ref: SOUT 3267.63

C/O MABUELA INCORPORATED

Charter House, 179 Bosman Street

Pretoria Central Tel: 012 325 3966

Email: mabuela@tiscali.co.za

12:37

## IN THE HIGH COURT OF SOUTH AFRICA GAUTENG DIVISION, PRETORIA

Case no:.80978/2016

In the matter between:

MINISTER OF FINANCE

Applicant

	- <del>-</del>
and	
OAKBAY INVESTMENTS (PTY) LTD	First respondent
OAKBAY RESOURCES AND ENERGY LTD	Second respondent
SHIVA URANIUM (PTY) LTD	Third respondent
TEGETA EXPLORATION AND RESOURCES (PTY) LTD	Fourth respondent
JIC MINING SERVICES (1979) (PTY) LTD	Fifth respondent
BLACKEDGE EXPLORATION (PTY) LTD	_
TNA MEDIA (PTY) LTD	Sixth respondent
THE NEW AGE	Seventh respondent

THE NEW AGE Eighth respondent AFRICA NEWS NETWORK (PTY) LTD Ninth respondent

VR LASER SERVICES (PTY) LTD Tenth respondent

ISLANDSITE INVESTMENTS ONE HUNDRED AND EIGHTY (PTY) LTD

Eleventh respondent

CONFIDENT CONCEPT (PTY) LTD JET AIRWAYS (INDIA) LTD (INCORPORATED IN INDIA)

Thirteenth respondent

Twelfth respondent

SAHARA COMPUTERS (PTY) LTD

Fourteenth respondent

ABSA BANK LTD

Fifteenth respondent

FIRST NATIONAL BANK LTD

Sixteenth respondent

STANDARD BANK OF SOUTH AFRICA LIMITED

Seventeenth respondent

NEDBANK LIMTED

Eighteenth respondent

GOVERNOR OF THE SOUTH AFRICAN RESERVE BANK

Nineteenth respondent

**REGISTRAR OF BANKS** 

Twentieth respondent

DIRECTOR OF THE FINANCIAL INTELLIGENCE **CENTRE** 

Twenty-first respondent

### **FILING SHEET**

DOCUMENT PRESENTED FOR FILING: INDICES

DATED AT PRETORIA ON THIS 8<sup>TH</sup> DAY OF FEBRUARY 2017

STATE ATTORNEY Attorney for the Applicant

SALU Building

255 Francis Baard Street

Pretoria

Tel: 012 309 1575

Fax: 012 309 1649

Fax to Email: 086 6293 073 Email: TNhlanzi@justice.gov.za Ref: 2427/16/Z32. Ms T Nhlanzi

THE REGISTRAR OF THE ABOVE HONOURABLE COURT TO: GAUTENG DIVISION, PRETORIA

AND

TO: VAN DER MERWE & ASSOCIATES

Attorney for 1<sup>st</sup>, 2<sup>ad</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 11<sup>th</sup>, 12<sup>th</sup> and 14<sup>th</sup> Respondents

62 Rigel Avenue North

Waterkloof

Pretoria

Ref: Mr GT VD Merwe/st/078

Tel: 012 343 5432

E-mail: simone@vdmass.co.za

AND

TO:

STEIN SCOP ATTORNEYS INC. Attorneys for 10th Respondent

VAN DER MERWE EN ASS

RIGEL LAAN 62 WATERKLOOF RIDGE - PRETORIA TEL: 012 343 5432 / 087 654 0209 FAKS: 012 946 6495 / 088 500 7597

Te 11:32 10/02/17

Ground Floor 18 Melrose Boulevard Melrose Arch, Johannesburg Tel: (011) 380 8080 Email: glenn@steinscop.com

sian@steinscop.com

Ref: G Stein

C/O BROOKLYN PLACE Cnr Bronkhorst and Dey Street

Brooklyn, Pretoria Ref: Bridget Moatshe

2017 -02- 1 0 12148

**VDT ATTORNEYS INC** 

Cnr Bronkhorst & Dey Street, Brooklyn

Docex 110, Pretoria Tel: (012) 452 1300 Fax: 086 433 1176

AND TO:

**EDWARD NATHAN SONNENBERGS** 

Attorneys for 15th Respondent

150 West Street

Sandton

Email: dlambert@ensafrica.com Ref: M Katz/ D Lambert/0416998

C/O GERHARD BOTHA & PARTNERS INC

First Floor, Erasmus Forum Building B

Cnr Rigel Avenue & Stokkiesdrrai

Erasmusrand

Tel: 012 347 0480

Email: brendon@bothapartners.co.za

Ref: Mr B Swart/ Mr H Botha

GERHARD BOTHA

& PARTNERS INC. Erasmus Forum Building "B" Cnr. Rigel Avenue & Stokkiesdraai

Erasmusrand 0181

AND TO:

NORTON ROSE FULBRIGHT SOUTH AFRICA INC

Attorneys for 16th Respondent

34 Fredman Drive, Sandton

Email: aslam.moosajee@nortonrosefulbright.com

Ref: Mr Moosajee/FNB 13954

c/o MONTLE JOOMA SABDIA INC

Ground Floor, Duncan Manor Cnr Jan Shoba and Brooks Streets

Brooklyn Tel: 012 362 313 MIJIS

Mothle Jooma Sabdia

1 0 FEB 2017

Pretoria Branch Tel: 012 35. 3137 • Fax: 012 362 4139 Received without Prejudice

AND TO:

BOWMAN GILFILLAN INCORPORATED

Attorneys for the 17th Respondent

Email: clement.mkiva@bowmanslaw.co.za

Alan.keep@bowmanslaw.co.za

Ref: C Mkiva/6162672

C/O BOSHOFF ATTORNEYS

Ground Floor, Hazelwood Gate Office Park

14 Oaktree Avenue

Cnr Oaktree Avenue and Dely Road

Hazwlwood

Pretoria

Ref: Natasha Nortje/NN1564

AND TO:

4. . . .

**BAKER & MACKENZIE** 

Attorneys for the 18th Respondent

Tel: 011 911 4300

Email: Gerhard.Rudolph@bakermckenzie.com

Widaad.Ebrahim@bakermckenzie.com Callum.Oconnor@bakermckenzie.com

Ref: G Rudolph/CO C/O ADAMS & ADAMS Adams & Adams Place Lynwood Bridge 4 Daventry Street Lynwood Manor Tel: 012 432 6000

Ref: Adele Jordaan

Received without Prejudice Ontvang sonder benadeling van regte

2017 -02- 10

ADAMS & ATAMS

1215

AND TO:

MACROBERT ATTORNEYS

Attorneys for the 21st Respondent

MacRobert Building Cnr Jan Shoba & Justice Mahomed Street Tel: 012 425 3436

Email: ghay@macrobert.co.za

Ref: G K Hay

MacRobert Attorneys

2017 -02- 10

Without prejudice of clients rights Sonder benedeking van kliente se regte

Bien / Getellen ......

12:37

AND TO:

WERKSMANS ATTORNEYS

19th and 20th Respondent's Attorneys

155-5th Street Sandton

Tel: +27 11 535 8000 | F: +27 11 535 8600

Ref: Mr C Manaka / Mr C Moraitis Email: <u>cmanaka@werksmans.com</u> <u>cmoraitis@werksmans.com</u>

Ref: SOUT 3267.63

C/O MABUELA INCORPORATED

Charter House, 179 Bosman Street

Pretoria Central Tel: 012 325 3966

Email: mabuela@tiscali.co.za

# IN THE HIGH COURT OF SOUTH AFRICA GAUTENG DIVISION, PRETORIA

Case no:.80978/2016

In the matter between:

MINISTER OF FINANCE

Applicant

and	
OAKBAY INVESTMENTS (PTY) LTD	First respondent
OAKBAY RESOURCES AND ENERGY LTD	Second respondent
SHIVA URANIUM (PTY) LTD	Third respondent
TEGETA EXPLORATION AND RESOURCES (PTY) LTD	Fourth respondent
JIC MINING SERVICES (1979) (PTY) LTD	Fifth respondent
BLACKEDGE EXPLORATION (PTY) LTD	Sixth respondent
TNA MEDIA (PTY) LTD	Seventh respondent
THE NEW AGE	Eighth respondent
AFRICA NEWS NETWORK (PTY) LTD	Ninth respondent
VR LASER SERVICES (PTY) LTD	Tenth respondent
ISLANDSITE INVESTMENTS ONE HUNDRED AND EIGHTY (PTY) LTD	Eleventh respondent
CONFIDENT CONCEPT (PTY) LTD	Tweifth respondent
JET AIRWAYS (INDIA) LTD (INCORPORATED IN INDIA)	Thirteenth respondent
SAHARA COMPUTERS (PTY) LTD	Fourteenth respondent
ABSA BANK LTD	Fifteenth respondent
FIRST NATIONAL BANK LTD	Sixteenth respondent
STANDARD BANK OF SOUTH AFRICA LIMITED	Seventeenth respondent
NEDBANK LIMTED	Eighteenth respondent

**REGISTRAR OF BANKS** 

Nineteenth respondent

GOVERNOR OF THE SOUTH AFRICAN RESERVE BANK

Twentieth respondent

DIRECTOR OF THE FINANCIAL INTELLIGENCE CENTRE

Twenty-first respondent

### **NOTICE OF SET DOWN**

KINDLY TAKE NOTICE THAT this matter is set down for hearing on the Opposed Motion Roll for 28, 29 & 30 March 2017 at 10:00 am or as soon thereafter as counsel may be heard.

DATED at PRETORIA on this 23<sup>rd</sup> day of DECEMBER 2016.

STATE ATTORNEY
Attorney for the applicants
SALU Building
255 Francis Baard Street
Pretoria

Tel: 012 309 1575 Fax: 012 309 1649

Fax to Email: 086 6293 073 Email: TNhlanzi@justice.gov.za Ref: 2427/16/Z32. Ms T Nhlanzi

TO:

THE REGISTRAR OF THE ABOVE HONOURABLE COURT GAUTENG DIVISION, PRETORIA

AND

TO:

VAN DER MERWE & ASSOCIATES Attorney for 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 10<sup>th</sup>, 11<sup>th</sup>,12<sup>th</sup> and 14<sup>th</sup> Respondents

62 Rigel Avenue North Waterkloof

Waterklooi Pretoria

Ref: Mr GT VD Merwe/st/078

Tel: 012 343 5432

E-mail: simone@vdmass.co.za

AND

TO: EDWARD NATHAN SONNENBERGS

Attorneys for 15th Respondent

150 West Street

Sandton

Email: <u>dlambert@ensafrica.com</u>
Ref: M Katz/ D Lambert/0416998

C/O GERHARD BOTHA & PARTNERS INC

First Floor, Erasmus Forum Building B Cnr Rigel Avenue & Stokkiesdrrai

Erasmusrand Tel: 012 347 0480

Email: <u>brendon@bothapartners.co.za</u>
Ref: Mr B Swart/ Mr H Botha

AND TO:

NORTON ROSE FULBRIGHT SOUTH AFRICA INC

Attorneys for 16<sup>th</sup> Respondent
34 Fredman Drive, Sandton

Email: aslam.moosajee@nortonrosefulbright.com

Ref: Mr Moosajee/FNB 13954

c/o MONTLE JOOMA SABDIA INC

Ground Floor, Duncan Manor Cnr Jan Shoba and Brooks Streets

Brooklyn

Tel: 012 362 3137

AND TO:

**BAKER & MACKENZIE** 

Attorneys for the 18th Respondent

Tel: 011 911 4300

Email: Gerhard.Rudolph@bakermckenzie.com

Widaad.Ebrahim@bakermckenzie.com Callum.Oconnor@bakermckenzie.com

Ref: G Rudolph/CO C/O ADAMS & ADAMS Adams & Adams Place Lynwood Bridge

4 Daventry Street Lynwood Manor Tel: 012 432 6000 AND

TO: MACROBERT ATTORNEYS

Attorneys for the 21st Respondent

MacRobert Building Cnr Jan Shoba & Justice Mahomed Street Tel: 012 425 3436

Email: ghay@macrobert.co.za

Ref: G K Hay

AND

TO: WERKSMANS ATTORNEYS

19th and 20th Respondent's Attorneys

155-5th Street

Sandton

Tel: +27 11 535 8000 | F: +27 11 535 8600

Ref: Mr C Manaka / Mr C Moraitis Email: <u>cmanaka@werksmans.com</u>

cmoraitis@werksmans.com

Ref: SOUT 3267.63

C/O MABUELA INCORPORATED Charter House, 179 Bosman Street

Pretoria Central Tel: 012 325 3966

Email: mabuela@tiscali.co.za



## OFFICE OF THE DEPUTY JUDGE PRESIDENT A P LEDWABA HIGH COURT OF SOUTH AFRICA, GAUTENG PROVINCIAL DIVISION, PRETORIA

22 December 2016

TO:

THE OFFICE OF THE STATE ATTORNEY

Fax No:

(012) 309 1649

EMAIL:

TNhlanzi@justice.org.za

Your Ref:

2427/16/232

Our Ref:

80978/16/DJP LEDWABA/RS

CC:

**VAN DER MERWE & ASSOCIATES** 

Attorneys for the 1st, 2nd, 3rd, 4th, 6th, 7th, 10th, 11th, 12th & 14

Respondents

simone@vdmass.co.za

**EDWARD NATHAN SONNENBERGS** 

Attorneys for the 15th Respondent

dlambert@ensafrica.com

NORTON ROSE FULBRIGHT

Attorneys for 16th Respondent

Aslam.moosaice@nortonrosefulbright.com

**BOWMANS ATTORNEYS** 

Attorneys for the 17th Respondent Clernent.mkiva@bowmanslaw.com

WERKMANS ATTORNEYS

Attorneys for the 19th and 20th Respondents

cmanaka@werksman.com

**MACROBERT ATTORNEYS** 

Attorneys for the 21<sup>st</sup> Respondent

ghay@macrobert.co.za

Dear Sirs

## RE: SPECIAL MOTION: THE MINISTER OF FINANCE / OAKBAY INVESTMENTS (PTY) LTD & 20 OTHERS, CASE NUMBER: 80978/16

- 1. I refer to the above matter and our meeting on 15 December 2016.
- 2. The matter will be heard together with the application under case no 92027/16, as discussed and arranged in the meeting.
- 3. The matters are hereby set down for hearing as special motions on 28, 29 & 30 MARCH 2017. You are directed to serve and file the notices of set down, together with a copy of this letter attached to them within 7 (seven) days after receipt hereof, failing which the allocated date(s) of hearing may lapse and the dates may be allocated to other litigants who apply for a special motion date. The notices of set down must be filed at the office of the Deputy Judge President, 7<sup>th</sup> Floor, Room 7.15, High Court Building,

### 4. I direct that:

- 4.1 The Respondent(s), (except the 1<sup>st</sup> Respondent), in the main application who have not yet filed their answering affidavits should file same by no later than 22 December 2016.
- 4.2 The 1<sup>st</sup> Respondent in the main application should file its answering affidavit to the main application by no later than 20 January 2017.
- 4.3 The Applicant in the main application should file his replying affidavits to the main application by no later than 27 January 2017.
- 4.4 The Applicant and the Respondent(s) supporting the applicant in the main application should file their heads of arguments and practice notes by no later than 10 February 2017.

# 37 4

- 4.5 The Applicant in case no 92027/16 and the remaining respondents in the main application should file the heads of arguments together with the practice notes on 24 February 2017.
- 5. For proper administration and allocation of special motions, the applicant should deliver the court-files in triplicate duly indexed and paginated to my office on 10 February 2017 and the parties should also send via email (MTroskie@judiciary.org.za) to my office a joint Practice Note by no later than 4 March 2017 containing the following:
  - Names of the parties and the case number
  - Names and telephone numbers of all counsel in the Motion
  - Nature of the motion
  - Issues to be determined in the application
  - Relief sought at the hearing by the party on whose behalf counsel is appearing
  - An estimate of the probable duration of the application
  - Number of pages in the application and whether or not all papers need to be read and if not, which portion need not be read
- 5. The aforesaid directives must be strictly adhered to, failing which the matter may be allocated to a Judge for hearing, however depending on why there was non-compliance.
- 6. All queries and/or communications concerning the hearing of this matter must be directed to my office in writing. All documents and the court file must be filed at the office of the Deputy Judge President on the 7th floor, High Court.
- 7. It remains the duty of the **all legal representatives** to ensure that the court file has been properly indexed and paginated in time and that all documents have been filed accordingly as directed at the office of the Deputy Judge President, High Court Pretoria, 7<sup>th</sup> Floor, Room 7.15.

- 8. Should it, for any reasons, transpire that this matter will not proceed on the given date, you are directed to inform the Office of the Deputy Judge President, immediately.
- None availability of counsel representing any of the parties shall simply not be allowed as a reason for the matter not to proceed on the date of hearing arranged with my office.
- 10. Should the above directive not be complied with, the matter may not be allocated to a Judge and the allocated dates may be utilized for other deserving eases.

Regards

A P/LEDWABA

DEPUTY JUDGE PRESIDENT HIGH COURT OF SOUTH AFRICA GAUTENG DIVISION, PRETORIA

PG PASTE

### IN THE HIGH COURT OF SOUTH AFRICA GAUTENG DIVISION, PRETORIA

2203

Case no:.80978/2016

In the matter between:

MINISTER OF FINANCE

Applicant

and

OAKBAY INVESTMENTS (PTY) LTD

First respondent

OAKBAY RESOURCES AND ENERGY LTD

Second respondent

SHIVA URANIUM (PTY) LTD

Third respondent

TEGETA EXPLORATION AND RESOURCES (PTY) LTD Fourth respondent

JIC MINING SERVICES (1979) (PTY) LTD Fifth respondent

BLACKEDGE EXPLORATION (PTY) LTD

Sixth respondent

TNA MEDIA (PTY) LTD

Seventh respondent

THE NEW AGE

Eighth respondent

AFRICA NEWS NETWORK (PTY) LTD

Ninth respondent

VR LASER SERVICES (PTY) LTD

Tenth respondent

ISLANDSITE INVESTMENTS ONE HUNDRED AND EIGHTY (PTY) LTD

Eleventh respondent

CONFIDENT CONCEPT (PTY) LTD

Tuzelth respondent

JET AIRWAYS (INDIA) LTD (INCORPORATED IN INDIA)

Thirteenth respondent

SAHARA COMPUTERS (PTY) LTD Fourteenth respondent

ABSA BANK LTD

Fifteenth respondent

FIRST NATIONAL BANK LTD
Sixteenth respondent

STANDARD BANK OF SOUTH AFRICA LIMITED

Seventeenth respondent

NEDBANK LIMTED Eighteenth respondent

GOVERNOR OF THE SOUTH AFRICAN RESERVE BANK

Nineteenth respondent

**REGISTRAR OF BANKS** 

Twentieth respondent

DIRECTOR OF THE FINANCIAL INTELLIGENCE **CENTRE** 

Twenty-first respondent

# **FILING SHEET**

KINDLY TAKE NOTICE THAT the Applicant hereby files his Practice Note.

DATED AT PRETORIA ON THIS DAY OF FEBRUARY 2017

STATE ATTORNEY Attorney for the Applicant

\$ALU Building 255 Francis Baard Street

Pretoria

Tel: 012 309 1575

Fax: 012 309 1649

Fax to Email: 086 6293 073 Email: TNhlanzi@justice.gov.za Ref: 2427/16/Z32. Ms T Nhlanzi

TO:

THE REGISTRAR OF THE ABOVE HONOURABLE COURT GAUTENG DIVISION, PRETORIA

AND

TO:

**VAN DER MERWE & ASSOCIATES** Attorney for 1st, 2nd, 3rd, 4th, 6th, 7th, 11th, 12th and 14th Respondents 62 Rigel Avenue North

Waterkloof Pretoria

Ref: Mr GT VD Merwe/st/078

Tel: 012 343 5432

E-mail: simone@vdmass.co.za

VAN DER MERWE EN ASS

RIGEL LAAN 62 WATERKLOOF RIDGE - PRETORIA TEL: 012 343 5432 / 087 654 0209 TEL: 012 343 5432 / 067 654 0205 FAKS: 012 343 5435 / 086 500 7587 11:32

AND TO:

STEIN SCOP ATTORNEYS INC. Attorneys for 10th Respondent

Ground Floor 18 Melrose Boulevard Melrose Arch, Johannesburg

Tel: (011) 380 8080

Email: glenn@steinscop.com

sian@steinscop.com

Ref: G Stein

C/O BROOKLYN PLACE

Cnr Bronkhorst and Dey Street

Brooklyn, Pretoria Ref: Bridget Moatshe

2017 -02- 1 0 VDT ATTORNEYS INC Cnr Bronkhorst & Dey Street, Brooklyn

Docex 110, Pretoria Tel: (012) 452 1300 Fax: 086 433 1176

AND TO:

**EDWARD NATHAN SONNENBERGS** 

Attorneys for 15th Respondent

150 West Street

Sandton

Email: dlambert@ensafrica.com Ref: M Katz/ D Lambert/0416998

C/O GERHARD BOTHA & PARTNERS INC

First Floor, Erasmus Forum Building B Cnr Rigel Avenue & Stokkiesdrrai

Erasmusrand

Tel: 012 347 0480

Email: brendon@bothapartners.co.za

Ref: Mr B Swart/ Mr H Botha

GERNARD BOTHA & PARTNERS INC

Erasmus Forum Building "B" Cnr. Rigel Avenue & Stokkiesdraai Erasmusrand 0181

AND TO:

NORTON ROSE FULBRIGHT SOUTH AFRICA INC

Attorneys for 16th Respondent 34 Fredman Drive, Sandton

Email: aslam.moosajee@nortonrosefulbright.com

Ref: Mr Moosajee/FNB 13954 c/o MONTLE JOOMA SABDIA INC

Ground Floor, Duncan Manor Cnr Jan Shoba and Brooks Streets

Brooklyn

Tel: 012 362 313

Mothle Jooma Sabdia

1 0 FEB 2017

Pretoria Branch Tel: 012 36: 3137 · Fax: 012 362 4139 Received without Prejudice

AND TO:

BOWMAN GILFILLAN INCORPORATED

Attorneys for the 17th Respondent

Email: clement.mkiva@bowmanslaw.co.za Alan.keep@bowmanslaw.co.za

Ref: C Mkiva/6162672

C/O BOSHOFF ATTORNEYS

Ground Floor, Hazelwood Gate Office Park

14 Oaktree Avenue

Cnr Oaktree Avenue and Dely Road

Hazwiwood

Pretoria

Ref: Natasha Nortje/NN1564

AND TO:

**BAKER & MACKENZIE** 

Attorneys for the 18th Respondent

Tel: 011 911 4300

Email: Gerhard.Rudolph@bakermckenzie.com

Widaad, Ebrahim@bakermckenzie.com

Callum.Oconnor@bakermckenzie.com

Ref: G Rudolph/CO C/O ADAMS & ADAMS Adams & Adams Place Lynwood Bridge 4 Daventry Street Lynwood Manor

Tel: 012 432 6000 Ref: Adele Jordaan Received without Prejudice Ontvang sonder benadeling van regte

2017 -02- 10

ADAMS/& ADAMS

17:15

AND TO:

**MACROBERT ATTORNEYS** 

Attorneys for the 21st Respondent

MacRobert Building Cnr Jan Shoba & Justice Mahomed Street Tel: 012 425 3436

Email: ghay@macrobert.co.za

Ref: GK Hay

2017 -02- 10

Without prejudice of clients rights. Sonder behadeling van klients se regte

Sign / Geteken

AND TO:

**WERKSMANS ATTORNEYS** 

19th and 20th Respondent's Attorneys

155-5th Street

Sandton

Tel: +27 11 535 8000 | F: +27 11 535 8600

Ref: Mr C Manaka / Mr C Moraitis Email: cmanaka@werksmans.com cmoraitis@werksmans.com

Ref: SOUT 3267.63

C/O MABUELA INCORPORATED

Charter House, 179 Bosman Street

Pretoria Central Tel: 012 325 3966

Email: mabuela@tiscali.co.za

# IN THE HIGH COURT OF SOUTH AFRICA (GAUTENG DIVISION, PRETORIA)

Case no 80978/16

In the matter between:

MINISTER OF FINANCE

Applicant

and

OAKBAY INVESTMENTS (PTY) LTD AND TWENTY OTHERS

First to twenty-first respondents

# MINISTER OF FINANCE'S PRACTICE NOTE

# 1. Names of parties and case number

The names of the parties and the case number appear from the heading.

### 2. Date of hearing

The matter is enrolled for hearing on 28-30 March 2017 by special allocation.

# 3. Nature of motion

The applicant, the Minister of Finance, seeks a declarator that he is not by law empowered or obliged to intervene in the relationship between the respondents.

# 4. <u>Urgency</u>

The matter is not urgent, but because of its importance was set down by the Deputy Judge President per special allocation.

# 5. Issues to be determined

### **Merits**

- (1) Whether the Minister is a person interested in an "existing, future or contingent right or obligation"; and, if so, whether the case is a proper one for the exercise of the court's discretion to grant the declaratory relief sought.

  The accuracy of the legal conclusion forming the subject-matter of the declaratory order sought is not in issue. Accordingly the content of the declarator is common cause.
- (2) Whether Oakbay's concession of the correctness of the declaratory order sought constitutes a proper basis for this Court's refusal, in its discretion, to grant the declaratory relief.
- (3) Whether Oakbay's conspiracy theory is a tenable basis for refusing to grant the declaratory relief.
- (4) Whether the doctrine of separation of powers militates against or in favour of granting the declaratory relief.

### Ancillary issues

- (5) Whether Oakbay's points on joinder or misjoinder are valid; and, if so, whether the declaratory relief should be suitably restricted to exclude the fifth, eighth, ninth and/or thirteenth respondents.
- (6) Whether Oakbay's strike-out application should be granted.
- (7) Whether the Minister of Finance's strike-out application should be granted.

### 6. Relief sought by the applicant

The Minister of Finance asks that

- (1) his application for declaratory relief be granted;
- (2) his strike-out application be granted;
- (3) Oakbay's strike out application be dismissed;
- (4) costs, including the costs of two counsel, be granted in his favour on a punitive scale.

#### 7. Duration

Two days (as per the special allocation).

### 8. The papers

For purposes of the Minister's application the essential parts of the papers are

The notice of motion

Record vol 1 pp 2-3

The Minister's founding affidavit

Oakbay's answering affidavit

The Minister's replying affidavit

Record vol 1 pp 9-20

Record vol 11 pp 995-1067

Record vol 14 pp 1320-1376

JJ. GAUNTLETT SC

F.B. PELSER

Counsel for the Minister of Finance

Chambers Cape Town

10 February 2017

rg HOA

# IN THE HIGH COURT OF SOUTH AFRICA GAUTENG DIVISION, PRETORIA

2211

Case no:.80978/2016

In the matter between:

MINISTER OF FINANCE

**Applicant** 

and

CARBAI INVESTMENTS (PTY) LTD	First respondent
OAKBAY RESOURCES AND ENERGY LTD	Second respondent

SHIVA URANIUM (PTY) LTD

Third respondent

TEGETA EXPLORATION AND RESOURCES (PTY) LTD

Fourth respondent

JIC MINING SERVICES (1979) (PTY) LTD Fifth respondent

BLACKEDGE EXPLORATION (PTY) LTD Sixth respondent

TNA MEDIA (PTY) LTD

Seventh respondent

THE NEW AGE

Eighth respondent

AFRICA NEWS NETWORK (PTY) LTD

Ninth respondent

VR LASER SERVICES (PTY) LTD

Tenth respondent

ISLANDSITE INVESTMENTS ONE HUNDRED AND
EIGHTY (PTY) LTD

Eleventh respondent

CONFIDENT CONCEPT (PTY) LTD

Twelfth respondent

JET AIRWAYS (INDIA) LTD (INCORPORATED IN INDIA)

Thirteenth respondent

SAHARA COMPUTERS (PTY) LTD Fourteenth respondent

ABSA BANK LTD Fifteenth respondent

FIRST NATIONAL BANK LTD

Sixteenth respondent

STANDARD BANK OF SOUTH AFRICA LIMITED

Seventeenth respondent

NEDBANK LIMTED Eighteenth respondent

GOVERNOR OF THE SOUTH AFRICAN RESERVE BANK

Nineteenth respondent

REGISTRAR OF BANKS

Twentieth respondent

DIRECTOR OF THE FINANCIAL INTELLIGENCE CENTRE

Twenty-first respondent

# FILING SHEET

KINDLY TAKE NOTICE THAT the Applicant hereby files his heads of argument.

DATED AT PRETORIA ON THIS 10 DAY OF FEBRUARY 2017

STATE ATTORNEY Attorney for the Applicant

SALU Building 255 Francis Baard Street

Pretoria

Tel: 012 309 1575

Fax: 012 309 1649

Fax to Email: 086 6293 073 Email: TNhlanzi@justice.gov.za

Ref: 2427/16/Z32. Ms T Nhlanzi

TO:

THE REGISTRAR OF THE ABOVE HONOURABLE COURT GAUTENG DIVISION, PRETORIA

AND

TO:

VAN DER MERWE & ASSOCIATES Attorney for 1st, 2nd, 3nd, 4th, 6th, 7th, 11th, 12th and 14th Respondents 62 Rigel Avenue North Waterkloof Pretoria Ref: Mr GT VD Merwe/st/078 Tel: 012 343 5432

E-mail: simone@vdmass.co.za

WATERKLOOF RIDGE - PRETORIA TEL: 012 343 5432 / 087 654 0209 FAKS: 012 343 5435 / 086 500 7587

VAN DER MERWE EN ASS

RIGEL LAAN 62

10/02/17

AND

TO:

STEIN SCOP ATTORNEYS INC. Attorneys for 10th Respondent

Ground Floor

18 Melrose Boulevard

Melrose Arch, Johannesburg

Tel: (011) 380 8080

Email: glenn@steinscop.com

sian@steinscop.com

Ref: G Stein

C/O BROOKLYN PLACE

Cnr Bronkhorst and Dey Street

Brooklyn, Pretoria Ref: Bridget Moatshe

2017 -02- 1 0

VDT ATTORNEYS INC

Cnr Bronkhorst & Dey Street, Brooklyn

Docex 110, Pretoria Tel: (012) 452 1300 Fax: 086 433 1176

AND TO:

EDWARD NATHAN SONNENBERGS

Attorneys for 15th Respondent

150 West Street

Sandton

Email: dlambert@ensafrica.com Ref: M Katz/ D Lambert/0416998

C/O GERHARD BOTHA & PARTNERS INC

First Floor, Erasmus Forum Building B Cnr Rigel Avenue & Stokkiesdrrai

Erasmusrand Tel: 012 347 0480

Email: brendon@bothapartners.co.za

Ref: Mr B Swart/ Mr H Botha

GERHARD BOTHA & PARTNERS INC

Erasmus Forum Building '&" Cnr. Rigel Avenue & Stokkiesdraal Erasmusrand 0181

AND TO:

NORTON ROSE FULBRIGHT SOUTH AFRICA INC

Attorneys for 16th Respondent 34 Fredman Drive, Sandton

Email: aslam.moosajee@nortonrosefulbright.com

Ref: Mr Moosajee/FNB 13954

c/o MONTLE JOOMA SABDIA INC

Ground Floor, Duncan Manor Cnr Jan Shoba and Brooks Streets

Brooklyn

Tel: 012 362 313

Mothle Jooma Sabdia

1 0 FEB 2017

Pretoria Branch Tel: 0123 3/37 • Fax: 012 362 4139 Received without Prejudice

AND TO:

BOWMAN GILFILLAN INCORPORATED

Attorneys for the 17th Respondent

Email: clement.mkiva@bowmanslaw.co.za Alan,keep@bowmanslaw.co,za

Ref: C Mkiva/6162672

C/O BOSHOFF ATTORNEYS

Ground Floor, Hazelwood Gate Office Park

14 Oaktree Avenue

Cnr Oaktree Avenue and Dely Road

Hazwlwood

Pretoria

Ref: Natasha Nortje/NN1564

AND TO:

BAKER & MACKENZIE

Attorneys for the 18th Respondent

Tel: 011 911 4300

Email: Gerhard.Rudolph@bakermckenzie.com

Widaad Ebrahim@bakermckenzie.com

Callum.Oconnor@bakermckenzie.com Ref: G Rudolph/CO

C/O ADAMS & ADAMS

Adams & Adams Place

Lynwood Bridge 4 Daventry Street

Lynwood Manor

Tel: 012 432 6000

Ref: Adele Jordaan

Received without Prejudice Ontvang sonder benadeling van regte

2017 -02- 1 U

1

ADAMS & ADAMS

<u>...</u>

AND TO:

MACROBERT ATTORNEYS

Attorneys for the 21st Respondent

MacRobert Building Cnr Jan Shoba &

Justice Mahomed Street

Tel: 012 425 3436

Email: ghay@macrobert.co.za

Ref: G K Hay

MacRobert Attorneys

2017 -02- 1 8

Without prejudice of clients rights Sonder benedeling van kliente se regte

Sign / Geleken ....

12:37

AND TO:

**WERKSMANS ATTORNEYS** 

19th and 20th Respondent's Attorneys

155-5th Street

Sandton

Tel: +27 11 535 8000 | F: +27 11 535 8600

Ref: Mr C Manaka / Mr C Moraitis

Email: cmanaka@werksmans.com

cmoraitis@werksmans.com

Ref: SOUT 3267.63

C/O MABUELA INCORPORATED

Charter House, 179 Bosman Street

Pretoria Central

Tel: 012 325 3966

Email: mabuela@tiscali.co.za

# IN THE HIGH COURT OF SOUTH AFRICA (GAUTENG DIVISION, PRETORIA)

	Case no 80978/16
In the matter between:	
MINISTER OF FINANCE	Applicant
and	
OAKBAY INVESTMENTS (PTY) LTD AND TWENTY OTHERS	First to twenty-first respondents
MINISTER OF FINANCE'S HEADS OF	F AD CHIMEN'S

### INDEX

(Enrolled for hearing on 28-30 March 2017)

Conte	nts:		Page no:	
A.	Introd	3		
B.	Overview of this application and the context in which it arises			
	(1)	Factual context	4	
	(2)	The other respondents' positions	12	
C.	C. The legal principles governing declaratory relief			
	(1)	Caselaw on section 21(1)(c) of the Superior Courts Act	18	
	(2)	Judicial policy favours declaratory relief	22	
	(3)	The English approach confirms a general trend favouring		
		declaratory relief	26	

	(4)	Southern African approach to declaratory relief	2
D.	Oakl	bay's bases of opposition	3
	(1)	First ground of opposition: Declaratory relief is "impermissible"	3.
	(2)	Second ground of opposition: Separation of powers	3:
	(3)	Third ground of opposition: Political conspiracy	3:
E.	Appl	ication of the governing legal principles to the Minister's application	36
F.	The f	formulation of the declaratory order	39
G.	Ancil	lary procedural issues: Joinder and strike out	43
	(1)	Oakbay's first procedural point: Joinder	43
	(2)	Oakbay's "final procedural point": Strike out	46
	(3)	The Minister's strike-out application	48
H.	Concl	usion: Appropriate relief and costs	40

#### A. Introduction

- 1. This case concerns a pure legal question: is the Minister of Finance authorised or obliged to intervene in banker-client relationships if bank accounts are closed?
- 2. The bank accounts concerned in this matter are those of the Oakbay group of companies, in which the Gupta family hold a controlling interest. The banks concerned are four major commercial banks in South Africa, Absa, FNB, Standard Bank and Nedbank. Each of the parties (including the Governor of the Reserve Bank, the Registrar of Banks, and the Financial Intelligence Centre) accepts that the legal question concerned is to be answered as proposed by the Minister of Finance.
- 3. The only question that remains is whether the Court should grant the declaratory relief.
  The relief is only opposed by the Oakbay respondents, cited as first to fourteenth respondents. All other respondents either support the relief or abide it.
- 4. The Oakbay respondents' opposition rests on a political conspiracy theory. They contend that
  - this application is the culmination of a grand conspiracy by the Minister spanning many months (despite Oakbay itself engaging with the Minister frequently during this period for assistance);
  - the application is not serious (despite the Governor of the Reserve Bank formally
    expressing his concern regarding political intervention in the banking sector); and

- that the relief should not be granted this after Oakbay has conceded the legal question (despite Oakbay strenuously opposing the application itself, refusing to withdraw its opposition, and publicly announcing its desire to meet in court the Minister's application).
- None of Oakbay's contentions is tenable, as we shall show in addressing in what follows.
  For the reasons provided, we submit that the interests of justice and the public interest strongly militate in favour of granting the declaratory relief.
- 6. Our submissions follow the scheme set out in the above index.

# B. Overview of this application and the context in which it arises

7. This application seeks narrow declaratory relief. It arises in unprecedented circumstances with far-reaching consequences for the national economy, the banking sector, and the national executive authority's commitment to the rule of law.

### (1) Factual context

8. The essential facts are set out in the Minister's founding affidavit, and are not the subject-matter of any bona fide dispute. Indeed, the founding affidavit has not even been traversed in either of the two substantial affidavits filed on behalf of the Oakbay respondents.

- 9. It is therefore common cause that there has indeed been "a dispute relating to powers of intervention by Government in relations to the closing of private clients' accounts by registered banks." (Oakbay merely asserts that it has conceded the correct legal position.) The circumstances in which this dispute has arisen, it is likewise common cause, "have considerable importance for the operation of the banking sector of the South African economy, and its regulation by Government." It is also common cause that a controversy relating the closing of the Oakbay accounts and government intervention indeed arose. This controversy received both national and international attention. In the Minister's assessment the situation renders it "clearly in the public interest, the interest of the affected clients and the relevant banks, and the employees of both that it be authoritatively resolved". This is in the context of extensive public statements by Oakbay attacking the integrity of the banks concerned, which represent a significant part of the South African banking sector, with the latter a vital organ in the national economy.
- 10. Oakbay repeatedly approached the Minister.<sup>7</sup> Indeed, it both importuned and badgered him. The Minister describes these approaches as "representations and demands".<sup>8</sup> His founding affidavit sums up the engagements thus: "Oakbay demanded that on behalf of Government I intervene with the banks to achieve a reversal of their [the banks'] decision [to close the Oakbay respondents' accounts]." There can be no serious suggestion that the

<sup>&</sup>lt;sup>1</sup> Record vol 1 p 10 para 3.

<sup>&</sup>lt;sup>2</sup> Record vol 1 p 10 para 3.

<sup>&</sup>lt;sup>3</sup> Record vol 1 p 10 para 3.

<sup>&</sup>lt;sup>4</sup> Record vol 1 p 10 para 3.

<sup>&</sup>lt;sup>5</sup> Record vol 1 p 10 para 3.

Record vol 1 p 11 para 8.

<sup>&</sup>lt;sup>7</sup> Record vol 1 p 11 para 9.

Record vol 1 p 11 para 9.

<sup>9</sup> Record vol 1 p 11 para 9.

Minister was not subjected to pressure both unprecedented and outside the law by the Gupta-controlled Oakbay companies to intervene.

- 11. Yet Oakbay now attempts to create the impression in its answering papers that it did not "demand" "or even ask" that the Minister reverse the closures. <sup>10</sup> It alleges that it never did any of this, and that "since 24 May 2016" "the Minister has been aware that there is no dispute between the parties regarding his powers". <sup>11</sup> This is untrue.
- 12. The truth is recorded in Oakbay's own correspondence. On 17 April 2016 Oakbay explicitly seeks to "reverse the ... stance taken by the [financial] institutions" (i.e. the banks, whose "stance taken" was to close the Oakbay respondents' accounts). 12 It persisted in this attempt well beyond May 2016. For instance, in a letter to the Minister dated 28 June 2016, 13 one of the Oakbay respondents explicitly "appeals to you [the Minister] regarding the reopening of Oakbay's bank accounts". 14
- 13. A particularly important pressure point brought to bear by Oakbay's engagements with the Minister was the threat of job losses.<sup>15</sup> Oakbay stated that job losses were imminent, and that the bank accounts had to be reopened to prevent this result.<sup>16</sup> This threat was taken

<sup>&</sup>lt;sup>10</sup> Record vol 11 p 1015 para 54.

<sup>11</sup> Record vol 11 p 998 para 6.

<sup>12</sup> Record vol 1 p 23 lines 19-20.

<sup>13</sup> Record vol 1 p 66.

<sup>14</sup> Record vol 11 p 67 lines 3-4.

<sup>15</sup> Record vol 1 p 12 para 10.

<sup>&</sup>lt;sup>16</sup> Record vol 1 p 12 para 12.

seriously by the Minister, who took legal advice and met with Oakbay in the presence of senior Treasury officials.<sup>17</sup>

- 14. The Minister explained to Oakbay that the national and international legal regime does not permit ministerial intervention in the closure of bank accounts least of all in the context of legal obligations imposed to protect the banking system and prevent them becoming "vehicles for money-laundering, terrorist financing and other unlawful activities". Following the Minister's meeting with Oakbay's then CEO, the Minister advised Oakbay that he (the Minister) could not act as contemplated by Oakbay. The Minister therefore encouraged Oakbay to obtain authority (is such existed) for the intervention it sought not from him but from Court. 19
- 15. Oakbay's response was to thank the Minister "very much for the cordial meeting this morning to discuss the decision by the four major banks operating in our country to close our bank accounts." Oakbay expressly repeated "our appeal to you for assistance". Oakbay's letter continued its accusation against the banks (and no-one else), describing their conduct as "intransigent". The letter does not suggest anything adverse regarding the Minister, let alone a conspiracy. Instead, Oakbay's letter commends the Minister's "concern around the livelihoods of our 7 500 staff". Oakbay's letter also records the

<sup>&</sup>lt;sup>17</sup> Record vol 1 p 12 para 12.

<sup>&</sup>lt;sup>18</sup> Record vol 1 pp 12-14 paras 13-15.

<sup>19</sup> Record vol 1 p 14.

<sup>&</sup>lt;sup>20</sup> Record vol 1 p 51 lines 7-8.

<sup>&</sup>lt;sup>21</sup> Record vol 1 p 51 lines 20-21.

<sup>22</sup> Record vol 1 p 52 line 3.

<sup>&</sup>lt;sup>23</sup> Record vol 1 p 51 lines 30-31

Minister's "strong pedigree as liberation fighter." The letter also correctly recognises the Minister's position as "political head of [South Africa's] economy".25 The letter, whose subject matter is "Meeting on closing of Oakbay Bank Accounts", 26 concludes by repeating that Oakbay is indeed "appealing" 27 to the Minister to provide "any possible assistance". 28

- Despite recording in its 24 May 2016 letter that any legal recourse by Oakbay against the 16. banks "may indeed be still-born",29 Oakbay repeated its "appeals" to the Minister. The "appeals" were clear. They explicitly contemplate "the reopening of Oakbay's bank accounts", as inter alia a 28 June 2016 letter records.30 There is accordingly no truth in the allegation that since 24 May 2016 Oakbay's stance was that ministerial intervention was neither permitted in law nor pressed by Oakbay.
- As mentioned, this flawed factual premise is the basis for Oakbay's primary opposition to 17. the Minister's application. Oakbay contends that the Minister's application is "both abstract and academic", 31 because (as Oakbay's main answering affidavit records what it intends to make "apparent") "the Minister has been aware that there is no dispute between the parties regarding his powers since 24 May 2016".32 Therefore, so Oakbay argues, "[t]he Minister's application is not an application to address a contested legal point

<sup>24</sup> Record vol 1 p 51 line 31.

<sup>&</sup>lt;sup>25</sup> Record vol 1 p 52 line 5.

<sup>26</sup> Record vol 1 p 51 line 6. Oakbay's 17 April 2016 letter similarly recognises the Minister's position "as political head for the financial sector" (Record vol 1 p 23 lines 12-13).

<sup>&</sup>lt;sup>27</sup> Record vol 1 p 52 line 18. 28 Record vol 1 p 52 line 15.

<sup>&</sup>lt;sup>29</sup> Record vol 1 p 51 line 14.

<sup>30</sup> Record vol 1 p 67 lines 2-3.

<sup>31</sup> Record vol 11 p 998 para 6.

<sup>32</sup> Record vol 11 p 998 para 6.

regarding a justiciable issue".<sup>33</sup> The argument is clearly inconsistent with the facts as they stand recorded in contemporaneous correspondence.

- 18. The Minister noted in a letter dated 10 August 2016 that it was "concerning that Oakbay still does not accept that the Minister of Finance, in law, is unable to interfere with the relations between registered banks and their clients." In its response to this letter Oakbay's Mr Howa made no attempt to suggest that it had actually accepted the correct legal position. Oakbay's silence on this issue further confirms the Minister's contemporaneous recordal of Oakbay's stance. Therefore the allegation in Oakbay's January 2017 answering affidavit deposed, significantly, by his temporary successor, Ms Ragavan (not Mr Howa, whose confirmatory affidavit is fatally defective) that the Minister was "aware" of Oakbay's position "since 24 May 2016" is false. The correct factual position is that in June 2016 and thereafter Oakbay repeatedly "appealed" to the Minister to act in his capacity as "political head of [the] economy".
- 19. The Minister's political position as head of the economy was quite explicitly the basis on which Oakbay "appealed" the Minster. Politics were indeed already invoked in Oakbay's first letter to the Minister, dated 8 April 2016. This letter refers repeatedly to a "politically motivated campaign" against Oakbay.<sup>37</sup> Yet neither this letter nor any other letter or exchange during the rest of 2016 ever attributed any involvement in any political plot to

<sup>33</sup> Record vol 11 p 998 para 6.

<sup>34</sup> Record vol 1 p 82 lines 18-29.

<sup>35</sup> Record vol 1 p 85, comprising Oakbay's 9 September 2016 eventual response to the Minister's "letter of August 10" (line 6).

<sup>&</sup>lt;sup>36</sup> Record vol 14 p 1354 para 115.

<sup>&</sup>lt;sup>37</sup> Record vol 1 p 21 lines 18-19; Record vol 1 p 21 lines 35-36; Record vol 1 p 22 line 4.

the Minister. Far less did Oakbay suggest that the Minister instigated any political plot, conspiracy or campaign. To the contrary, the Oakbay correspondence commends the Minister (inter alia for his "long history as a leader within our [South Africa's] democratic struggle"); describes Oakbay's correspondence as open and honest; and clarifies its complaint as "corporate bullying and anti-competitive practices ... from the banks" 40

- 20. It is therefore inconsistent with Oakbay's own contemporaneous correspondence now to attempt to attribute a political conspiracy to the Minster. Yet this is the basis on which Oakbay seeks to oppose the application for declaratory relief. It now seeks to contend that since January 2016 the Minister has conspired against Oakbay. As the Minister's replying affidavit further confirms,<sup>41</sup> there is no factual basis for this latter-day fabrication.
- 21. The construct is also self-defeating. Were it to have any merit, then the question whether the Minister may interfere in banker-client relations in respect of the closure of bank accounts would of course not have been capable of being criticised as "academic" by Oakbay. This is because Oakbay now contends in its January 2017 answering affidavit (which took three months to gestate) that it is actually the Minister's supposed political plot which resulted in the closure of the bank accounts. On this scenario declaratory relief to the effect that the Minister has no power to intervene in banker-client relations and the closure of bank accounts cannot be described as "abstract and academic". If the Minister had no power to intervene, but Oakbay contends he did intervene, then the question

<sup>&</sup>lt;sup>38</sup> Record vol 1 p 23 line 15.

<sup>39</sup> Record vol 1 p 22 line 8, Mr Howa (the author of the letter) recording his own "candour".

<sup>&</sup>lt;sup>40</sup> Record vol 1 p 22 lines 5-6.

<sup>&</sup>lt;sup>41</sup> Inter alia Record vol 14 pp 1355-1362 paras 118-143.

whether the Minister was empowered to intervene in the first place is self-evidently a compelling issue. Oakbay's conspiracy theory is therefore not only factually unfounded, but also inconsistent with Oakbay's own opposition.

- 22. Its self-destructiveness apart, the contention is also contrary to logic. Had the Minister conspired to close Oakbay's accounts, he would be the very last person to whom Oakbay would continuously "appeal" to assist in opening the accounts. In that event the Minister would also have been the very last person whom Oakbay would have approached (as it did) to "jointly find a way to understand the real reasons for the banks [sic] decision to unilaterally close our accounts". Also in this respect Oakbay's conspiracy construct self-destructs.
- 23. As mentioned, this theory was for the first time advanced in Oakbay's January 2017 answering papers. By then each of the four banks, the Registrar of Banks, the Governor of the Reserve Bank and the Director of the Financial Intelligence Centre had all already filed affidavits supporting the Minister's position. Some of these respondents actively support the declaratory relief sought by the Minister, and others only abide it (as is appropriate, considering their institutional independence).
- 24. In the light of the volume of the papers, a short summary of each of the other respondents' position may be of assistance.

<sup>&</sup>lt;sup>42</sup> Record vol 1 p 80 lines 11-12.

#### **(2)** The other respondents' positions

- 25. The Governor of the Reserve Bank adopts a neutral position.<sup>43</sup> He abides the Minister's application. So does the Registrar of Banks.44 As indicated, this aptly reflects their institutional autonomy. But because of the importance of the matter, both filed affidavits explaining the legal regime - which, they point out, does not permit interference in banks' closure of bank accounts.
- 26. The Governor's own concern regarding the damaging effect of Oakbay's attack on the banking sector is recorded in the founding papers.<sup>45</sup> The Governor's letter records the importance of a healthy and effective financial system for any modern economy.<sup>46</sup> It identifies the specific issue of executive interference in banker-client relations regarding the closure of accounts.<sup>47</sup> As the Governor cautions, this may be "viewed as undue political interference in banks' operations",48 and presents a "risk South Africa's financial stability".49
- The Governor confirmed the same concerns in his affidavit.<sup>50</sup> His affidavit also discloses 27. yet further attempts by Mr Howa to prevail on the Governor to intervene in the bankerclient relationship, despite the Governor previously advising Mr Howa that the Reserve

<sup>&</sup>lt;sup>43</sup> Record vol 7 p 605 para 6. <sup>44</sup> Record vol 7 p 620 para 5.

<sup>45</sup> Record vol 1 p 16 para 20.

<sup>&</sup>lt;sup>46</sup> Record vol 1 p 75 lines 18-19.

<sup>&</sup>lt;sup>47</sup> Record vol 1 p 75 lines 27-28.

<sup>48</sup> Record vol 1 p 76 line 9.

<sup>49</sup> Record vol 1 p 76 line 12.

<sup>&</sup>lt;sup>50</sup> Record vol 7 p 607 paras 17-19.

Bank had no such legal authority.<sup>51</sup> Yet Oakbay "continued to seek alternative forms of intervention and influence" (also involving the Reserve Bank), the Governor records.<sup>52</sup> These circumstances further reveal the falsity of Oakbay's attempt to deny that its importuning of the Minister to intervene with the banks amounted to extra-legal pressure.

- 28. The commercial banks all strongly support the declaratory relief sought.<sup>53</sup> Significantly they do not consider the relief as "abstract or academic". Each of them instructed its own legal team, filed separate answering papers, attended through their legal representatives the case-management meeting on 15 December 2016, and expressed the intention to present separate written and oral argument. The Deputy Judge President made directions accordingly, allocating a special hearing date, and setting the matter down for hearing by a Full Bench because of its importance.
- 29. FirstRand Bank Ltd ("FNB") was first to file its affidavit. In it FNB quotes Oakbay's 24 May 2016 letter. State It is this letter which Oakbay subsequently sought to invoke as somehow clarifying its acceptance of the correct legal position vis-à-vis the Minister (when it actually relates to legal recourse by Oakbay against the banks). FNB describes this letter as confirming "the fact that the Oakbay respondents attempted unlawfully and improperly to get the Minister to intervene in a private banking relationship." This is clearly correct.

<sup>&</sup>lt;sup>51</sup> Record vol 7 p 608 para 20.

<sup>&</sup>lt;sup>52</sup> Record vol 7 p 609 para 27.

<sup>&</sup>lt;sup>53</sup> Record vol 2 p 99 para 7 (FNB); Record vol 2 p 134 para 18 (Nedbank); Record vol 3 p 297 para 145 (Standard Bank, indeed asking the *extension* of the declaratory relief); Record vol 6 p 502 para 11 (Absa, similarly submitting that no member of cabinet is empowered or obliged to intervene in banker-client relations between Oakbay and its banks).

<sup>&</sup>lt;sup>54</sup> Record vol 2 p 102 para 15.

<sup>55</sup> Record vol 2 p 102 para 16.

Oakbay accepts this. It did not deny any part of FNB's answering affidavit.<sup>56</sup> Thus also FNB's confirmation of the importance of banks' ability to choose their clients;<sup>57</sup> comply with national and international laws and standards;<sup>58</sup> and the need for the banking sector to comply with practices preventing banks being used for money-laundering and other unlawful activities,<sup>59</sup> is common cause. So, too, FNB's uncontested submission that it is indeed in the public interest to grant the declaratory order sought.<sup>60</sup> FNB explains that the "declaratory order will avoid such situations in future and will encourage public officials to only act in accordance with the Constitution and national legislation".<sup>61</sup> In short, it sees the relief sought as needed.

30. The situations to which FNB refers relate to the purported appointment of an interministerial committee to probe banks' closing of Oakbay accounts. The President subsequently repudiated the Minister of Mineral Resources' public statements on this committee's intended modus operandi. Legal clarity therefore indeed serves the public interest and assist the finance sector, cabinet and bankers' clients to act within the law. 63

<sup>&</sup>lt;sup>56</sup> Record vol 11 p 1064 para 194.

<sup>&</sup>lt;sup>57</sup> Record vol 2 p 107 para 30.7.

<sup>58</sup> Record vol 2 p 106 para 30.4.

<sup>&</sup>lt;sup>59</sup> Record vol 2 p 106 para 30.5.

<sup>60</sup> Record vol 2 p 107 para 32.1.

<sup>&</sup>lt;sup>61</sup> Record vol 2 p 109 para 32.2.7.

<sup>&</sup>lt;sup>62</sup> Record vol 2 pp 140-141 paras 34-35, which form part of Nedbank's answering affidavit. Standard Bank also addresses this aspect (Record vol 3 p 277 paras 118ff).

<sup>&</sup>lt;sup>63</sup> We draw particular attention to Standard Bank's recordal of pertinent facts occurring after the filing of the Minister's application at Record vol 3 pp 280-281 para 125. The statement quoted by Standard Bank in its answering affidavit (filed over a month before Oakbay's answering affidavit were due) refers to the extraordinary circumstances of this case, and the perceived absence of any law on the issue of government intervention (which, so the statement suggests, implies that there is no prohibition against government intervention).

- Nedbank was second to file its affidavit. It, too, refers to the inter-ministerial committee, 31. and the significant media attention resulting from it and the Gupta/Oakbay affair. 64 Also Nedbank points out that "[a]lthough [the Oakbay respondents] accept that Nedbank and the other banks have acted lawfully when they terminated the bank accounts, [the Oakbay respondents] have nonetheless requested the Minister to intervene".65 This fact Nedbank confirms "is apparent from Annexure E to the [Minister's] founding affidavit".66 Annexure E is Oakbay's letter of 24 May 2016.67
- Nedbank also refers to annexure MB6 to its own affidavit, 68 which comprises the statement 32. by the Deputy Minister of Finance on 16 March 2016.69 Nedbank furthermore quotes its termination letter (which provides the reason for closing the bank accounts),70 and refers to a statement by the Minister of Mineral Resources (which attributes the banks' closing of Oakbay's accounts to "innuendo and ... media statements").71 Oakbay, strikingly, has made a careful choice not to traverse Nedbank's affidavit.72 Its contents are accordingly common cause. These facts do not support Oakbay's conspiracy theory.
- Nedbank also demonstrates (with reference to the governing national and international 33. legal regime)<sup>73</sup> that the declaratory relief is indeed "necessary to preserve the integrity of

<sup>64</sup> Record vol 2 p 129 para 6.

<sup>65</sup> Record vol 2 p 133 para 17.5.

<sup>66</sup> Record vol 2 p 133 para 17.5.

<sup>67</sup> Record vol 1 pp 51-52.

<sup>68</sup> Record vol 2 p 135 para 21.

<sup>&</sup>lt;sup>69</sup> Record vol 2 pp 172-173.

<sup>&</sup>lt;sup>70</sup> Record vol 2 pp 130-131 para 11; Record vol 2 p 136 para 23.

<sup>71</sup> Record vol 2 p 141 para 34.4.2.

<sup>72</sup> Record vol 11 p 1064 para 194. Oakbay does not even advance a bald denial of the banks' affidavits.

<sup>73</sup> Record vol 2 pp 143-152 paras 41-69.

South Africa's financial system."<sup>74</sup> The legal regime summarised in Nedbank's answering affidavit is clearly incompatible with a power or duty of intervention on the part of the Minister.<sup>75</sup>

- 34. Third to file its affidavit was Standard Bank. Its extensive treatment of the legal regime governing the banking sector similarly confirms the same conclusions. <sup>76</sup> Standard Bank also records a significant fact. It is that Oakbay threatened Standard with urgent court proceedings on the very same day on which Oakbay wrote its 24 May 2016 letter. <sup>77</sup> The 24 May 2016 letter is the all-important document underlying Oakbay's allegation that the declaratory relief is abstract and academic. The relief is abstract and academic, so Oakbay now contends, because Oakbay's 24 May 2016 letter accepts that any legal action against the banks is legally still-born. Yet on the same day Oakbay threatened Standard Bank with legal action. Two months later Oakbay recorded in a letter to the Minister that Oakbay "ha[s] not decided against approaching the courts." <sup>78</sup>
- 35. Standard Bank's affidavit therefore demonstrates the difficulty in relying on any of Oakbay's different factual versions: they are irreconcilable. Oakbay's equivocation between contradictory legal versions is self-defeating: it underscores the need for declaratory relief to prevent Oakbay's hedging between different versions of what it accepts to be the law. And Oakbay's repudiation of attorneys' letters sent in relation to

<sup>&</sup>lt;sup>74</sup> Record vol 2 p 142 para 37.

<sup>&</sup>lt;sup>75</sup> Record vol 2 p 153 para 70.

<sup>&</sup>lt;sup>76</sup> Record vol 2 pp 228-255 paras 7-73.

<sup>77</sup> Record vol 3 p 263 para 92.

<sup>78</sup> Record vol 1 p 80 line 25.

<sup>&</sup>lt;sup>79</sup> Standard Bank records a further instance where Oakbay's Mr Howa's "emphatically denied" facts which the Minister of Mineral Resources already officially confirmed (Record vol 3 p 267 para 97.2).

pending or impending litigation defeats any reliance by Oakbay on the selective correspondence attached to its answering affidavit.

- 36. Because Oakbay disavows formal correspondence sent on its behalf as "sent in error", <sup>80</sup> it was indeed important for the State Attorney to obtain Oakbay's confirmation that it accepted Mr Gert Van der Merwe's advice to abide the Minister's application. Not only was the State Attorney's request for confirmation ignored, Oakbay obviously repudiated its attorneys' advice to concede the application by publicly announcing its intention to use the Minister's application to salvage its reputation.
- 37. The fourth and final affidavit by the banks is Absa's. Absa similarly demonstrates the need for the declaratory relief. <sup>81</sup> It describes the imperative of legal "certainty and clarity" as "essential", <sup>82</sup> and Oakbay's conduct as "deeply concern[ing]". <sup>83</sup> As other banks' answering affidavits do, Absa explained banks' legal obligations, <sup>84</sup> and how Absa sought to comply with it in closing the Oakbay accounts. <sup>85</sup> As did Standard Bank, <sup>86</sup> Absa cites a recent judgment by this Court applying the Supreme Court of Appeal's judgment which supports the Minister's position. <sup>87</sup>

<sup>80</sup> Record vol 3 p 264 para 94.

<sup>81</sup> Record vol 6 p 502 para 10.

<sup>&</sup>lt;sup>82</sup> Record vol 6 p 502 para 10.

<sup>83</sup> Record vol 6 p 501 para 8.

<sup>84</sup> Record vol 6 pp 507-515 paras 23-33.

<sup>85</sup> Record vol 6 pp 515-518 paras 34-45.

<sup>86</sup> Record vol 6 p 514 para 32.

<sup>&</sup>lt;sup>87</sup> Hlongwane v Absa Bank Ltd (75782/13) [ZAGPPHC] 928 (10 November 2016), applying Bredenkamp v Standard Bank of SA Ltd 2010 (4) SA 468 (SCA).

38. Each of the banks expressly accept the correctness of the legal position set out in the Minister's founding papers. 88 Oakbay, too, accepts it. Indeed, as mentioned, Oakbay now resorts to its own acceptance of the legal position as rendering the declaratory relief "impermissible". This posture is inconsistent with the correct legal principles, which we now turn to summarise.

### C. The legal principles governing declaratory relief

39. Oakbay's opposition is premised on the proposition that it is "impermissible" to seek declaratory relief which is "abstract and academic" because "there is no dispute". 89 As we shall show below, it is not factually correct that the declaratory relief sought is either abstract or academic. But first we shall show that the proposition is also *legally* incorrect. In short, both the common law and section 21(1)(c) of the Superior Courts Act 10 of 2013 (which re-enacts section 19(1)(iii) of the Supreme Court Act 59 of 1959 verbatim), 90 authorise declaratory relief in the circumstances of this case. Oakbay's legal assertions are at odds with the law, as recently reiterated.

### (1) Caselaw on section 21(1)(c) of the Superior Courts Act

40. The correct approach to section 21(1)(c) has been repeatedly confirmed by the Supreme Court of Appeal.<sup>91</sup> In Cordiant Trading CC v Daimler Chrysler Financial Services (Pty)

<sup>&</sup>lt;sup>88</sup> Record vol 2 p 104 para 23 (FNB); Record vol 2 p 133 para 17.7 (Nedbank); Record vol 3 p 256 para 75 (Standard Bank); Record vol 6 p 506 para 20.

<sup>&</sup>lt;sup>89</sup> Record vol 11 p 998 para 6.

<sup>&</sup>lt;sup>90</sup> Section 19(1)(c) of the Supreme Court Act, in turn, virtually verbatim follows the wording of section 102 of Act 46 of 1935. It is the latter provision which Watermeyer JA applied in *Durban City Council v Association of Building Societies infra*, which we address below.

Societies infra, which we address below.

91 E.g. Langa v Hlophe 2009 (4) SA 382 (SCA) at para 28, citing Durban City Council v Association of Building Societies infra.

Ltd. 92 Jafta JA, writing for a unanimous court, confirmed that the existence of a dispute is not a prerequisite for the exercise of a power conferred upon the High Court by the subsection". 93 What is required, however, is that "there must be interested parties on whom the declaratory order would be binding." 94

- 41. Supreme Court of Appeal cases like Cordiant confirm the two-stage approach adopted by Watermeyer JA in Durban City Council v Association of Building Societies. 95 The two-stage approach involves that
  - (1) "the Court must be satisfied that the applicant is a person interested in an 'existing, future or contingent right or obligation'"; and then, if so satisfied,
  - (2) "the Court must decide whether the case is a proper one for the exercise of the discretion conferred on it". 96
- 42. Jafta JA explained in *Cordiant* that the first leg of the two-stage approach focuses "only upon establishing that the necessary conditions precedent for the exercise of the court's discretion exists." It is in the second leg of the enquiry that the question arises whether or not to grant the declaratory relief. If the first enquiry establishes that the applicant has an interest in an existing, future or contingent right or obligation, then the court "has to exercise the discretion by deciding either to refuse or grant the order sought."

<sup>92 2005 (6)</sup> SA 205 (SCA).

<sup>&</sup>lt;sup>93</sup> Id at para 16.

<sup>94</sup> Ibid.

<sup>95 1942</sup> AD 27 at 32.

<sup>96</sup> Ibid, quoted in Cordiant supra at para 16 with approval.

<sup>97</sup> Supra at para 18.

<sup>98</sup> Ibid.

<sup>99</sup> Ibid.

- 43. Applying Cordiant Trading, this Court has often confirmed that "an existing dispute is not a prerequisite for a court to exercise its discretion to grant a declaratory order." This is. with respect, clearly the correct legal position since at least Ex parte Nell. 101
- Ex parte Nell crossed the Rubicon on declaratory relief. 102 It clarified that "an existing or 44. concrete dispute between persons is not a prerequisite for the exercise by the Court of its jurisdiction under [section 19(1)(a)(iii) of the Supreme Court Act; now section 21(1)(c) of the Superior Courts Act]."103 It is merely the absence of such dispute which "may, depending on the circumstances, cause the Court to refuse to exercise its jurisdiction in a particular case". 104 The Appellate Division held that it is indeed more practical and in the best interests of all involved to determine a legal question without an existing dispute. 105 Steyn CJ did, however, observe that a court's competence to grant declaratory relief in the abstract does not mean that a court is not in appropriate circumstances entitled to refuse declaratory relief.  $^{106}$  (In other words: in appropriate cases, a court is – in the exercise of its discretion, which must be exercise judicially - permitted to decline declaratory relief.) The rationale is important; and so is the check on a court's discretion identified in Exparte

<sup>100</sup> Chairman of the Board of the Sanlam Pensioenfonds (Kantoorpersoneel) v Registrar of Pension Funds 2007 (3) SA 41 (T) at para 25, emphasis added.

<sup>&</sup>lt;sup>101</sup> 1963 (1) SA 754 (A).

<sup>102</sup> Van Loggerenberg Erasmus Superior Court Practice 2nd ed (Juta & Co Ltd, Cape Town Service 2 2016) vol 1 at A2-126: "Ex parte Nell reflects a marked departure" from the "view" that "the court will not... deal with, or pronounce upon, abstract or academic points of law" but require "that there must be an existing and concrete dispute between persons ... before the court will act" by granting declaratory relief.

103 Shoba v OC, Temporary Police Camp, Wagendrift Dam 1995 (4) SA 1 (A) at 14F.

<sup>&</sup>lt;sup>104</sup> Id at 14F-G.

<sup>105</sup> Ex parte Nell 1963 (1) SA 754 (A) at 759fin-760sup.

<sup>106</sup> Id at 760B.

Nell. The rationale is that it is not the function of a court to act as advisor. <sup>107</sup> To address this concern, Ex parte Nell did not require that a live dispute must exist; it required simply that there must be interested parties on which the declaratory order will be binding. <sup>108</sup> Thus the correct check on a court's discretion is whether or not interested parties will be bound by the declarator. <sup>109</sup>

45. Therefore, as recent cases confirm and contemporary legal commentators clarify, 110 for over fifty years now "the past" requirement that an applicant for declaratory relief must "establish an existing dispute as to his rights or obligations" has been passé. 111 Now the correct question is not one of competence (or whether it is "permissible to grant declaratory relief). It is whether "the judicial exercise by [a] Court of its discretion with due regard to the circumstances of the matter before it." The discretion must, moreover, be exercised in favour of granting declaratory relief where "it is only the Court that can definitively interpret the various enactments". 113

<sup>107</sup> Id at 760B/C.

<sup>108</sup> Id at 760B/C-C.

<sup>&</sup>lt;sup>109</sup> De Ville Judicial Review of Administrative Action in South Africa revised 1<sup>st</sup> ed (LexisNexis, Durban 2005) at 349: because "[c]ourts do not see themselves as advisers ... therefore there must be interested parties on whom the declaratory order will be binding", citing inter alia Ex parte Nell supra at 760B-C.

<sup>110</sup> E.g. Van Loggerenberg Erasmus Superior Court Practice 2nd ed (Juta & Co Ltd, Cape Town Service 2 2016) vol 1 at A2-126, cautioning that caselaw antedating Ex parte Nell "should be used with circumspection".

<sup>111</sup> Harms Civil Procedure in the Superior Courts (LexisNexis, Oct 2016 - SI 57) at A4.18.

<sup>112</sup> Reinecke v Incorporated General Insurance Ltd 1974 (2) SA 84 (A) at 95C.

<sup>113</sup> Myburgh Park Langebaan (Pty) Ltd v Langebaan Municipality 2001 (4) SA 1144 (C) at 1154C-F. Myburgh Park Langebaan cited Compagnie Interafricaine de Travaux v South African Transport Services 1991 (4) SA 217 (A) at 231B, where Corbett CJ held that the court was not only empowered to make the declaration, but that the court deciding the legal issue one way or the other is also imminently desirable. Myburgh Park Langebaan was cited, in turn, with approval by O'Regan J in Rail Commuters Action Group v Transnet Ltd t/a Metrorail 2005 (2) SA 359 (CC) at para 106.

46. Hence Oakbay's pleaded legal contentions are misconceived, contrary to precedent, and inconsistent with contemporary courts' approach.

### (2) Judicial policy favours declaratory relief

- 47. An overview of contemporary public law and the development of the declaratory order 114 demonstrates modern courts' approach to this type of relief: it is recognised as "an efficient and versatile remedy", popular with courts and "likely to become even more so". 115
- 48. Writing in 1981, Baxter describes "[t]he purely declaratory order" (viz an order "which does no more than declare whether actual or pending administrative action is lawful") as "a relatively recent development in both South African and English law." Declaratory relief is not, however, an innovation by the legislature, 117 as is sometimes suggested. It was developed by the South African courts. One of the key cases in this development involves the portfolio of the Minister of Finance.

<sup>114</sup> Baxter Administrative Law (Juta, Cape Town 1981).

<sup>115</sup> Id at 704. .

<sup>116</sup> Id at 698.

<sup>117</sup> Joubert The Law of South Africa 3rd ed (LexisNexis, Durban 2012) vol 4 at para 480 and cases cited in fn 3; Cilliers et al Herbstein & Van Winsen The Practice of the High Courts of South Africa 5th ed (Juta & Co Ltd, Cape Town 2009) vol 2 at 1428 confirm that under the Roman-Dutch common law declaratory orders are available, "but only when there has been an interference with the right [or obligation] sought to be declared". The statutory provisions providing for declaratory relief do not exclude a court's residual common law competence to grant declaratory relief (id at 1429). Thus, in circumstances like the present, where there clearly "has been an interference with" the Minister's right or obligation to interfere or to abstain from interfering in banker-client relations, and where Oakbay expressly and repeatedly "appealed" to the Minister to procure the reinstatement of the closed bank accounts, a common-law case for declaratory relief is established.

<sup>&</sup>lt;sup>118</sup> See e.g. Van Loggerenberg Erasmus Superior Court Practice 2<sup>nd</sup> ed (Juta & Co Ltd, Cape Town Service 2, 2016) vol 1 at A2–126.

- 49. In Minister of Finance v Baberton Municipal Council the Appellate Division granted a declaratory order against the Minister of Finance despite the absence of any authorising provision in the Union Act 1 of 1910. 119 Innes JA held that courts have a wide jurisdiction to grant also declaratory orders, despite explicit statutory authority. 120 Then, as now (but especially now), "[a] declaration of rights, in the administrative-law context, can be sought (either by an individual or a public authority) to determine the existence or scope of a statutory duty or to determine the public or private law rights of an individual vis-à-vis a public authority (or vice versa). 121
- 50. In the administrative law context many reasons exist for relaxing the defunct requirement that a "concrete" violation of rights should exist (lest courts should pronounce on "abstract, hypothetical questions"). 122 Particularly where public powers are concerned, questions of legality are a proper subject-matter for a declaratory order. 123 (This is further confirmed by this Court's Full Bench judgment in Ex parte Prokureur-Generaal, Transvaal. We address this judgment below. It clarifies the correct approach to the concern that courts should not act in advisory capacities.) As Ex parte Nell held and this Court confirmed, such concern is properly to be addressed by requiring that interested parties must exist on whom the declaratory order will be binding. 124 This simultaneously dispels any earlier suggestion (apparently advanced in some Witwatersrand Local Division decisions) that a party should simply refuse to appear before a public authority if he or she considers the

<sup>119 1914</sup> AD 335.

<sup>120</sup> Id at 355.

<sup>121</sup> De Ville Judicial Review of Administrative Action in South Africa revised 1st ed (LexisNexis, Durban 2005) at 348.

122 Baxter op cit at 699-700.

<sup>123</sup> Id at 700.

<sup>124</sup> Ex parte Prokureur-Generaal, Transvaal supra at 19D-E.

power to be exercised unlawfully. This suggestion is therefore not only "a particularly clumsy prescription for social harmony" and "somewhat cynical." It is also contrary to precedent.

- 51. The correct contemporary approach identified by academic commentators with reference to inter alia this Court's judgment in Adbro Investment Co Ltd v Minister of the Interior 126 is to give effect to a judicial policy in favour of construing a court's power to make declaratory orders liberally. 127 Ex parte Nell is an important loadstar. In essence, as inter alios Baxter confirms, "all that is required [to award declaratory orders] is that there be parties upon whom the order will be binding." 128
- 52. This Court's judgment in Ex parte Prokureur-Generaal, Transvaal further confirms a judicial policy in favour of declaratory relief. The judgment demonstrates the proper approach to an application for declaratory relief at the instance of a public office-bearer seeking clarity regarding the statutory provisions governing its office. The declaratory order was granted even in circumstances where no party was immediately affected. 129 It sufficed that the declaratory order would provide future guidance to the applicant himself, his staff and the magistracy sufficed.

<sup>125</sup> Baxter op cit at 700.

<sup>126 1961 (3)</sup> SA 283 (T) at 285.

<sup>127</sup> Baxter op cit at 701.

<sup>128</sup> *Ibid*.

<sup>129 1978 (4)</sup> SA 15 (T).

- 53. The most recent standard text on administrative law continues the post-constitutional trajectory. Hoexter refers in this regard to Constitutional Court caselaw, and describes declaratory relief as a "non-invasive", flexible remedy" which assists "in clarifying legal and constitutional obligations". The "leading case" remains Ex parte Nell. 131 Its "only requirements" remain the existence of "interested parties on whom the order will be binding".
- 54. The declaratory orders' added constitutional importance, however, is that "it clarifies the legal position rather than requiring action to be taken", which has

"advantages in a constitutional democracy ... since it allows the court to state the law while leaving it to the other arms of government to decide how the law should best be observed." 132

55. This overview of the development of declaratory relief in twentieth and twenty-first century South African law confirms what an early judgment of this Court already recognised. Ex parte Farquhar expressed a clear judicial policy favouring the encouragement of declaratory relief by South African courts (as is the case also in other jurisdictions), particularly in the context of the exercise of statutory powers by Government departments, Government officials, and public entities. 133

133 1938 TPD 213 cited by Baxter op cit at 702.

<sup>&</sup>lt;sup>130</sup> Hoexter Administrative Law in South Africa 2nd ed (Juta & Co Ltd, Cape Town 2012) at 557-558, citing Rail Commuters Action Group v Transnet Ltd t/a Metrorail 2005 (2) SA 359 (CC) at para 107.

<sup>131</sup> Hoexter op cit at 558.
132 Id at 558-559, citing Rail Commuters Action Group supra at para 108.

#### (3) The English approach confirms a general trend favouring declaratory relief

- Despite their initial reluctance, English courts now embrace declaratory relief. <sup>134</sup> It is now established as a remedy serving an important function in public law. <sup>135</sup> The operative test is whether a declaration is "just and convenient in all the circumstances of the case"; <sup>136</sup> and it is the *locus standi* requirement which serves as restricting factor. <sup>137</sup> (As shown, this is the same criterion identified in *Ex parte Nell* as check on a court's discretion.) It is recognised that declaratory relief serves a "crucial function" in contemporary public law; <sup>138</sup> serves "a useful power" which over the course of the last hundred years it has become more and more extensively used"; <sup>139</sup> and is "an innovation of a very important kind". <sup>140</sup>
- 57. Lord Woolf CJ explained the position in Governor and Company of the Bank of Scotland v A Ltd (a case concerning banks' duties in respect of suspicious transactions) thus

"The wide power of the courts to give guidance to trustees is undoubted. However the court's ability to resolve disputes which could give rise to undesirable legal consequences is no longer restricted, if it ever was, to situations involving trusts. In his first Hamlyn lecture given in 1949, 'Freedom Under the Law', Sir Alfred Denning, as he then was,

<sup>134</sup> Declaratory relief is provided for under section 31(2) of the Senior Courts Act, 1981. It provides "A declaration may be made ... in any case where an application for judicial review, seeking that relief, has been made and the High Court considers that, having regard to (a) the nature of the matters in respect of which relief may be granted by mandatory, prohibiting, or quashing orders; (b) the nature of the persons or bodies against whom relief may be granted by such orders; and (c) all the circumstances of the case, it would be just and confenient for the declaration to be made".

<sup>135</sup> Fordham Judicial Review Handbook 6th ed (Hart Publishing, Oxford 2012) at 266; Equal Opportunities Commission v Secretary of State for Employment [1994] 1 All ER 910 (HL) at 926.

<sup>136</sup> Zamir & Woolf The Declaratory Judgment 2nd ed (Sweet & Maxwell, London 1993) at 116-117.

<sup>137</sup> Equal Opportunities Commission v Secretary of State for Employment [1994] 1 All ER 910 (HL) at 926, observing that "many of the most recent developments in public law were made in such civil actions brought to obtain declaratory relief only: see, for example, Ridge v Balawin [1963] 2 All ER 66, [1964] AC 40, Anisminic Ltd v Foreign Compensation Commission [1969] 1 All ER 208, [1969] 2 AC 147".

<sup>138</sup> Governor and Company of the Bank of Scotland v A Ltd [2001] EWCA Civ 52; (2001) 1 WLR 751 at para 45.

<sup>139</sup> Gouriet v Union of Post Office Workers [1978] AC 435 at 501C-D.

<sup>140</sup> Id at 513G.

identified the challenge facing the court as being to develop 'new and up-to-date machinery' (p 116). The first element of the machinery identified in the lecture was the remedy of declaratory relief. The court's power to make a declarion (or 'declaration of right' was derived from the Court of Chancery and was originally supposed to be restricted to declaratory judgments as to existing private rights (see *Guaranty Trust Company of New York v Hannay* [1915] 1 KB 536, which sets out the early history). Sir Alfred Denning saw the need to develop its scope in order to control the abuse of executive power, and over the half-century which has elapsed since his lecture it has performed a crucial function in the emergence of the modern law of judicial review. The development of declaratory relief has not however been confined to judicial review. Doctors and hospitals have increasingly been assisted by the ability of the courts to grant advisory declarations. ...". 141

58. The Woolf Report on Access to Justice already identified the need for advisory declaratory orders in the public interest, if an issue of public importance is raised, the order sought is in sufficiently precise terms, and the appropriate parties are before court. He English courts, too, have confirmed that "there is a plain public interest in ... entertaining what has become an application for an advisory declaration"; Ha and applications for declaratory relief are regularly entertained in the public interest in circumstances. He Even in cases where courts have cautioned that so-called "advisory declarations" should not be over-used, this was to emphasised their "essential purpose" — which is "to reduce the danger of administrative activities being declared illegal retrospectively" and "to assist public authorities by giving advice on legal questions which is then binding on all".

 <sup>141</sup> Governor and Company of the Bank of Scotland v A Ltd [2001] EWCA Civ 52; (2001) 1 WLR 751 at para 45.
 142 Woolf Report Access to Justice (1996) at 252.

<sup>&</sup>lt;sup>143</sup> R (Customs and Excise Commissioners) v Canterbury Crown Court [2002] EWHC 2584 (Admin) at para 27, per Laws LJ.

<sup>&</sup>lt;sup>144</sup> See e.g. Fordham op cit at 269, citing inter alia London Borough of Islington v Camp (1999) [2004] LGR 58; and PvP (Ancillary Relief: Proceeds of Crime) [2003] EWHC 2260 (Fam), regarding declaratory relief clarifying a legal advisor's duties in respect of assets forming the proceeds of crime.

<sup>&</sup>lt;sup>145</sup> R (Campaign for Nuclear Disarmament) v Prime Minister [2002] EWHC 2759 (Admin); [2003] LRC 335 at para 46.

59. Thus, in short, the English comparative experience demonstrates that declaratory orders are important and gaining in importance - particularly in public law, as they are "in the regulatory activities of the financial institutions". 146 Therefore Lord Atkin's 1919 observation that granting declaratory relief is "one of the most valuable contributions that the courts have made to the commercial life of this country" applies more than ever before. 147 Now it occurs "[f]requently, in the public law field, [that] even where a defence is abandoned, the grant of a declaration can provide clarification as to the law which will be of value in the future and so the court may be ready to grant [declaratory] relief."148

#### (4)Southern African approach to declaratory relief

60. The highest courts in other comparable jurisdictions adopt the same approach. 149 For instance, in Ex parte Chief Immigration Officer, Zimbabwe Gubbay CJ applied inter alia English caselaw. 150 These include Lord Denning MR's judgment in Merrick v Nott-Bower (in which the court concluded that despite a delay of six-and-a-half years declaratory relief

147 Spettabile Consorzio Veneziano di Armarto v Northern Ireland Shipbuilding Co Ltd (1919) 121 LT at 635, cited in Gouriet v Union of Post Office Workers [1977] All ER 111.

150 1994 (1) SA 370 (ZSC).

<sup>146</sup> Zamir & Woolf The Declaratory Judgment 2nd ed (Sweet & Maxwell, London 1993) at 296.

<sup>148</sup> Zamir & Woolf op cit at 140, citing R v Nottingham Mental Health Review Tribunal, ex parte Secretary of State for the Home Department The Times (13 March 1987); R v Birmingham Juvenile Court, ex parte Birmingham City Council [1988] 1 WLR 337; R v Dartmoor Visitors, ex parte Smith [1987] 1 QB at 115; Grant v Knaresborough

Urban District Council [1928] Ch 310.

149 Southern Engineering v Council of the Municipality of Windhoek 2011 (2) NR 385 (SC) at para 49, approving Ex parte Nell in Namibia. The Supreme Court further demonstrates what is generally understood as the type of circumstances in which (under the established South African and Southern African caselaw) a declarator will be inappropriate. It is "[w]here an order does no more than restate general principles of law, and does not determine any existing, future or contingent right". See, too, Mahe Construction (Pty) Ltd v Seasonaire 2002 NR 398 (SC) at 410G (pointing out that section 16(d) of the Namibian High Court Act 16 of 1990 is similar to section 19(1)(iii) of the South African Supreme Court Act) and CDM (Pty) Ltd v Mineworkers Union of Namibia 1994 NR 360 (HC) at 362H-I: "Moreover, the issue in dispute is also of considerable public importance as well as being imperative to the parties for certainty and clarity to be authoritatively determined insofar as the interpretation of s 81(6) is concerned, so that applicant and respondent or any employer and employee for that matter may be able to regulate their future conduct accordingly."

nonetheless may serve a useful purpose in the public interest);<sup>151</sup> and *Grant v* Knaresborough Urban Council (where a declaratory order was granted despite the defendant withdrawing its defence).<sup>152</sup>

- Gubbay CJ also applied South African law, observing that section 14 of the High Court of Zimbabwe Act "is in virtually identical terms to the provisions of section 19(1)(c) of the South African Supreme Court Act 59 of 1959, and its precursor, section 102 of Act 46 of 1995." Thus Ex parte Nell arose for analysis. Gubbay CJ reiterated that Ex parte Nell presents "a marked departure" from the previous "long series of decisions", rendering otiose the paradigm that "in the exercise of the jurisdiction conferred [to grant declaratory relief], there must be an existing and concrete dispute between the parties, albeit as to the future or contingent rights, before the Court will act under section 102." Gubbay CJ confirmed, as the Supreme Court of Appeal itself subsequently did, that Ex parte Nell "expressly held that an existing dispute was not a prerequisite for the exercise by the Court of its discretion to make a declaratory order." 156
- 62. Gubbay CJ also cited, translated and applied a significant passage in Ex parte Nell. It reads

"The need for such an order can pre-eminently arise where the person concerned wished to arrange his affairs in a manner which could affect other interested parties and where an

<sup>151 [1964] 1</sup> All ER 717 (CA).

<sup>152 [1928]</sup> Ch 319.

<sup>153</sup> Ex parte Chief Immigration Officer, Zimbabwe supra at 376E/F.

<sup>154</sup> Id at 376E/F-F.

<sup>155</sup> In inter alia cases like West Coast Rock Lobster Association v Minister of Environmental Affairs and Tourism [2011] 1 All SA 487 (SCA) at para 45; and Cordiant Trading supra. The most recent reported SCA judgment applying Ex parte Nell is Tshwane City v Mitchell 2016 (3) SA 231 (SCA) at para 23. It upholds declaratory relief granted by this Court despite the declarator dealing with the a "historical debt".

<sup>156</sup> Ex parte Chief Immigration Officer, Zimbabwe supra at 376F/G-G.

uncertain legal position could be contested by one or all of them. It is more practical, and the interests of all are better served, if the legal question can be laid before a court even without there being an already existing dispute." <sup>157</sup>

- 63. Citing a number of judgments by this Court, Gubbay CJ added that it is not even a requirement for declaratory relief that there be an opponent.<sup>158</sup> All that is required is that there be interested parties upon whom a declaratory order is binding.<sup>159</sup> A Court may therefore determine an applicant's rights or duties without pronouncing on the respondent's rights or obligations.<sup>160</sup>
- 64. Applying these principles the Supreme Court of Zimbabwe held that the Chief Immigration

  Officer was indeed an "interested part[y] upon whom the declaratory order would be

  binding". 161 Therefore the question raised in the application for declaratory relief was "not

  purely academic but of real and practical consequence". 162 This was because the applicant

  in that matter "wants to be certain of the precise extent of the powers and obligations of his

  officers" in relation to two individuals (Mr and Mrs O'Hara). 163
- On the basis of these cases and principles the Supreme Court of Zimbabwe concluded that the declaratory relief should be granted. This answered the two questions raised in the appeal. The first was "Does it disable the applicant from obtaining relief in the form of a declaratory order because there is no longer a live dispute between him and the

<sup>157</sup> Id at 376G-H.

<sup>158</sup> Id at 376H.

<sup>159</sup> Id at 376H/I.

<sup>&</sup>lt;sup>160</sup> *Id* at 376H/I-I.

<sup>&</sup>lt;sup>161</sup> Id at 376B/C.

<sup>162</sup> *Id* at 376B/C.

<sup>163</sup> Id at 376A/B.

O'Haras?"<sup>164</sup> It clearly did not. The second was whether it was "permissible to grant a party a declaratory order whose opponent has left the arena of conflict?".<sup>165</sup> It clearly was.

- 66. In short, comparative caselaw like Ex parte Chief Immigration Officer, Zimbabwe demonstrates the correct application of Ex parte Nell. It confirms that "[w]here the matter [i]s one of public importance affecting the functioning of a department of state and the rights of a number of individuals with whom that department dealt" courts do grant declaratory orders. 166
- 67. Each of Oakbay's bases of opposition and even its dilatory joinder points is inconsistent with the correct legal position.

### D. Oakbay's bases of opposition

68. The Minister's replying affidavit addresses Oakbay's answering affidavit (which argumentatively advances its grounds of opposition), exhaustively. 167 We therefore respectfully request that the replying affidavit be read separately. It shows that Oakbay's contentions are factually unfounded. In what follows we amplify the replying affidavit with reference to the relevant legal principles and precedents, to the extent that this remains necessary.

<sup>164</sup> Id at 374G/H.

<sup>165</sup> Id at 374H.

<sup>166</sup> Cilliers et al Herbstein & Van Winsen The Practice of the High Courts of South Africa 5th ed (Juta & Co Ltd, Cape Town 2009) vol 2 at 1441.

<sup>&</sup>lt;sup>167</sup> Record vol 14 pp 1320-1376.

#### First ground of opposition: Declaratory relief is "impermissible" (1)

- 69. As mentioned, Oakbay's first ground of opposition is that the relief is impermissible. This is, Oakbay alleges, because "no dispute" between the parties exists - a fact the Minister "has been aware" of "since 24 May 2016", 168 Oakbay claims. Oakbay argues that because "the Minister has not offered any legally cogent explanation for what is so unique about the current situation", 169 therefore "[o]n the Minister's own version, there is nothing in the Oakbay Group's situation that justifies this application". 170 On this basis Oakbay asks for the dismissal of the application. 171
- 70. The first ground of opposition is legally flawed in each of its constitutive parts. Firstly, as we have shown, the existence of a dispute is not a requirement for declaratory relief. Second, as we have also shown, Oakbay itself has consistently requested the Minster to intervene well after 24 May 2016. And even after this application was lodged Oakbay failed to confirm that it would accept its attorney's advice that this application should be conceded. In the event it was and is strenuously opposed. Thirdly, the fact that the Minister's powers not unique to Oakbay does not defeat the Minister's application; instead, it confirms that it is in the public interest that legal certainty be obtained. It also shows that the issue is not abstract or academic: it is raised in the concrete and actual circumstances

<sup>168</sup> Record vol 11 p 998 para 6.

<sup>169</sup> Record vol 11 p 998 para 6. Oakbay however considers its own interests "a matter of national priority" (Record vol 11 p 1013 para 49).

170 Record vol 11 p 998 para 6.

<sup>171</sup> Record vol 11 p 998 para 6.

of the closure of real bank accounts, to which Oakbay objects openly in public discourse – announcing also its own intended litigation.

71. It is accordingly Oakbay's "own version" which is dispositive: it accepts that the Minister is indeed the executive authority responsible for the financial sector, the banking industry and the economy. The declaratory relief will indeed bind the Minister, who indeed has a direct and substantial legal interest in the legal position regarding his own powers and duties as they arise in the circumstances to which prayer 1 of the notice of motion (which formulates the declaratory relief which is sought) refers. Therefore the requirements in Ex parte Nell are met. There are, furthermore, no abstract, academic or hypothetical issue which warrants any exercise of the Court's discretion against granting the relief.

### (2) Second ground of opposition: Separation of powers

- 72. Oakbay tentatively refers to "the separation of powers (under the Constitution)" [sic]. 172 If this is to be understood as a genuine ground of opposition, then the Constitutional Court caselaw to which we have already referred is a complete answer. As mentioned, in *Rail Commuters* the Constitutional Court confirmed
  - "... A declaratory order is a flexible remedy which can assist in clarifying legal and constitutional obligations in a manner which promotes the protection and enforcement of our Constitution and its values. Declaratory orders, of course, may be accompanied by other forms of relief, such as mandatory or prohibitory orders, but they may also stand on

<sup>&</sup>lt;sup>172</sup> Record vol 11 p 1010 para 43.

their own. In considering whether it is desirable to order mandatory or prohibitory relief in addition to the declarator, a court will consider all the relevant circumstances.

It should also be borne in mind that declaratory relief is of particular value in a constitutional democracy which enables courts to declare the law, on the one hand, but leave to the other arms of government, the Executive and the Legislature, the decision as to how best the law, once stated, should be observed."<sup>173</sup>

- 73. There is accordingly no separation of powers problem. It is the role of the Court to declare the law. This is what the Minister seeks. There is accordingly no coherence in the crass adjuration that the Minister's application may precipitate "weak-kneed political officials" approaching the courts to decide for them how to exercise their powers. This application concerns whether the power or duty exists in law, not whether or how it is to be exercised. It requires a legal determination by the Court, not a "political judgment".
- 74. Appealing to the Minister for "political" intervention when the law does not permit this (and in circumstances where Oakbay now claims it has long since accepted this) only serves to demonstrate the necessity for declaratory relief. And if it is so that Oakbay perceives "political officials" as "too scared" to grant or refuse Oakbay's approaches, then the consequences are clear: the public interest, the interests of justice, the rule of law, and the separation of powers all militate strongly in favour of the judiciary performing its correct constitutional function. It is to declare the law. This will establish to what extent

<sup>&</sup>lt;sup>173</sup> Supra at paras 107-108.

<sup>174</sup> Minister of Health v Treatment Action Campaign (No 2) 2002 (5) SA 721 (CC) at para 99.

<sup>175</sup> Record vol 11 p 1010 para 43.

<sup>&</sup>lt;sup>176</sup> Record vol 11 p 1011 para 44.

<sup>177</sup> Record vol 11 p 1010 para 43.

such "appeals" may or may not be entertained - lest human "weakness" or "fear" affects "sensitive political and policy matters", as Oakbay apparently prefers.

#### (3) Third ground of opposition: Political conspiracy

- *75*. Oakbay's final defence is a fabrication. It alleges a political plot by the Minister against the Guptas.<sup>178</sup> Oakbay's answering affidavit also seeks to describe (under the heading "parties to the dispute") the Guptas as the "target" of this application, 179 but simultaneously complains that they are not cited. 180 This is unsurprising: no relief is sought against them.
- 76. What is surprising is that Oakbay now advances a conspiracy theory which finds no footing in the papers. Neither the court papers nor even the newspapers, some of which the Gupta own, provide any credible basis for this extraordinary claim. No admissible evidence supports it. 181 It is, as noted, entirely inconsistent with Oakbay's own perpetual "appeals" to the Minister and the Minister's own attempts to provide such assistance to Oakbay as he could.
- 77. Other than its effect on costs and the Minister's strike-out application (which we address separately below), nothing more needs be said about these scurrilous allegations - other than that the replying affidavit demonstrates that they are entirely untenable.

 <sup>178</sup> Record vol 11 p 1022 para 70ff.
 179 Record vol 11 p 1001 para 13.
 180 Record vol 11 p 999 para 9.

<sup>&</sup>lt;sup>181</sup> Record vol 14 p 1341 para 75.

### E. Application of the governing legal principles to the Minister's application

- 78. Having addressed what Oakbay incorrectly presents as ousters of the Court's jurisdiction to grant declaratory relief, the application of the correct principles can briefly be demonstrated with reference to what appears to be the closest analogous case. It is a Full Bench judgment by this Court, to which we have already referred: Ex parte Prokureur-Generaal, Transvaal. 182
- 79. As in *Prokureur-Generaal*, in casu the applicant is clearly an interested person. For the Minister is, as Oakbay's own correspondence pertinently pointed out, <sup>183</sup> the responsible executive authority for the financial sector and the economy. Furthermore, the declaratory relief explicitly relates to the Minister's powers and duties. <sup>184</sup> Therefore, as in *Ex parte Prokureur-Generaal*, <sup>185</sup> there cannot be any tenable contention that the Minister is not a person interested in his own rights or obligations.
- 80. Furthermore, as in Ex parte Prokureur-Generaal, this case concerns public law powers and obligations; and the closure of bank accounts is a matter which on the papers occurs frequently in comparable banking sectors throughout the world. Whether the Minister may interfere in such situations is therefore, as this Court held in Ex parte Prokureur-

<sup>&</sup>lt;sup>182</sup> Supra at 19G.

<sup>&</sup>lt;sup>183</sup> Record vol 1 p 52 line 5.

<sup>184</sup> Record vol 1 p 2 prayer 1.

<sup>185</sup> Supra at 20B.

<sup>186</sup> See e.g. Record vol 1 p 49 lines 15-23.

Generaal, of an "exceedingly actual nature". 187 It is not in the least capable of being described as hypothetical, academic or abstract.

- 81. Accordingly, as in Ex parte Prokureur-Generaal, 188 there is therefore also in this case no basis to exercise any discretion against the Minister.
- 82. But even had there been any merit in Oakbay's allegation that the declaratory relief has become academic, then the correct manner to exercise the discretion which then <u>still</u> exists is as determined by the Supreme Court of Appeal. In *Qoboshiyane v Avusa* Wallis JA set out the correct approach thus

"The court has a discretion in that regard and there are a number of cases where, notwithstanding the mootness of the issue as between the parties to the litigation, it has dealt with the merits of an appeal. With those cases must be contrasted a number where the Court has refused to deal with the merits. The broad distinction between the two classes is that in the former a discrete legal issue of public importance arose that would affect matters in the future and on which the adjudication of this court was required, whilst in the latter no such issue arose." 189

83. In Tlouamma v Speaker of the National Assembly 190 a Full Bench of the Western Cape
High Court unanimously held that the same approach applies to "mootness" in exercising
a court's discretion under section 21(1)(c) of the Superior Courts Act to grant a declaratory
order. 191 Oakbay explicitly invokes what it contend is the "moot" nature of this

<sup>187</sup> Id at 20C/D, our translation ("uiters wesenlike aard").

<sup>188</sup> Id at 20E/F.

<sup>189</sup> Qoboshiyane NO v Avusa Publishing Eastern Cape (Pty) Ltd 2013 (3) SA 315 (SCA) at para 5.

<sup>190 2016 (1)</sup> SA 534 (WCC) at paras 101-103.

<sup>&</sup>lt;sup>191</sup> Id at para 101.

application.<sup>192</sup> It contends that because it "agree[s] with the statement" set out in prayer 1 of the notice of motion, "therefore this Court need not proceed any further".<sup>193</sup> This is demonstrably inconsistent with the correct two-step approach. As mentioned, it provides that once the Court is satisfied that the applicant is a person interested in an "existing, future or contingent right or obligation", the court *must* go further and decide whether to exercise its discretion.

- 84. Applying this approach the question is whether the Minister's application for declaratory relief raises "a discrete legal issue of public importance" "that would affect matters in the future" and requires "the adjudication of this Court". 194 Clearly it does, because
  - the legal issue is, as Oakbay itself concedes, 195 "narrow" (in other words, "discrete");
  - the public importance of this case is overwhelming, as Oakbay itself asserted (in requesting the Minister to act in the "national interest") and as inter alios the Governor of the Reserve Bank confirmed;
  - future matters will indeed be affected by the declaratory relief, because if it is
    granted the Minister will not be permitted to interfere in banks' closure of accounts
    pursuant to the governing legal regime;

<sup>&</sup>lt;sup>192</sup> Record vol 11 p 1010 para 42.

<sup>&</sup>lt;sup>193</sup> Record vol 11 p 1009 para 40.

<sup>&</sup>lt;sup>194</sup> See, too, Minister of Justice and Constitutional Development v Southern Africa Litigation Centre 2016 (3) SA 317 (SCA) at para 23: "The usual ground for exercising that discretion in favour of dealing with it on the merits is that the case raises a discrete issue of public importance that will have an effect on future matters".

195 Record vol 14 p 1341 para 68.

- an authoritative pronouncement by this Court is required, because the matter is res
  nova; it generates continuous "appeals" to the Minister; and it has already resulted
  in inconsistent conduct by two other senior cabinet members.
- 85. In a public law context the Constitutional Court's approach in cases like *Tulip Diamonds*<sup>196</sup> and the Supreme Court of Appeal's approach in *Oudekraal*<sup>197</sup> must necessarily also influence this Court's exercise of its discretion whether to grant declaratory relief. So must the interests of justice criterion, which is the overriding consideration in the exercise of superior courts' powers. <sup>198</sup> The Minister's founding affidavit demonstrates that the interests of justice indeed support granting the declaratory relief. <sup>199</sup> Oakbay made no coherent attempt to traverse or deny this.
- 86. Thus, on any approach, the declaratory order should be granted.

#### F. The formulation of the declaratory order

- 87. The final aspect on the merits which remains to be addressed is the terms of the declaratory order.
- 88. None of the other parties opposes the formulation of the declaratory relief set out in the Minister's notice of motion. It is accepted by the Governor of the Reserve Bank, the

<sup>&</sup>lt;sup>196</sup> Tulip Diamonds FZE v Minister of Justice and Constitutional Development 2013 (10) BCLR 1180 (CC).

<sup>197</sup> Oudekraal Estates (Pty) Ltd v City of Cape Town 2004 (6) SA 222 (SCA).

<sup>198</sup> Section 173 of the Constitution; Mukaddam v Pioneer Foods (Pty) Ltd 2013 (5) SA 89 (CC) at para 42.

<sup>&</sup>lt;sup>199</sup> Record vol 1 p 20 para 30.

Registrar of Banks, the Director of the Financial Intelligence Centre, each of the four commercial banks, and each of the Oakbay entities that the Minister indeed has no legal power or duty to intervene in the relationship between the banks and the Oakbay respondents in respect of the closing of their accounts. This is all that the declaratory order which the Minister seeks provides.

- 89. Nothing in the Constitution, the Public Finance Management Act, the Banks Act or any other legislation, regulation or common law authority authorises ministerial intervention. The Reserve Bank itself confirms that the same applies to it: there is no legal provision which entitles the Reserve Bank to interfere in the relationship between banks and their clients. 200 The Registrar of Banks similarly confirms the same in respect of himself. 201 A fortiori, then, the same should apply to the Minister of Finance, because if the primary regulator has no power of intervention then the political head overseeing the entire financial sector will have even less legal authority to do so. 202
- 90. The application of the constitutional principle of legality in these circumstances is clear:

  absent expressed or implied authority, the Minister has no power to act.<sup>203</sup> There is no
  express authority. In order to infer a power in the absence of an express authorising
  provision, the ancillary implied power must be necessary in order to give effect to the

<sup>201</sup> Record vol 7 p 620 para 7; Record vol 7 p 627 para 32.

<sup>&</sup>lt;sup>200</sup> Record vol 7 p 605 para 9.

<sup>&</sup>lt;sup>202</sup> This is a manifestation of the principle of subsidiarity, as regards which see My Vote Counts NPC v Speaker of the National Assembly 2016 (1) SA 132 (CC), especially para 46: "Subsidiarity denotes a hierarchical ordering of institutions, of norms, of principles, or of remedies, and signifies that the central institution, or higher norm, should be invoked only where the more local institution, or concrete norm, or detailed principle or remedy, does not avail."

<sup>203</sup> Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council 1999 (1) SA 374 (CC) at para 56.

primary power expressly conferred.<sup>204</sup> Furthermore, in order to imply text into any legal provision (empowering or otherwise), the strict twofold test established in *Rennie NO v* Gordon NNO must be satisfied.<sup>205</sup> This requires that apart from being necessary, the words sought to be implied "must [also] be precise and obvious". There is no precise and obvious formulation to be read into any existing or non-existing empowering provision. Therefore nihil ex nihilo: no ancillary power can be implied where there is not even a primary power. Just as the Minister cannot procure the opening of a private bank account, he cannot procure the closing of a bank account — less still does the Minister have any power to intervene to reverse the closing of a bank account.

- 91. Furthermore, as the banks' affidavits have demonstrated, reading in any such power would conflict with the existing regulatory regime. It may expose both the banks and (indirectly) Government to very substantial penalties by foreign regulators, contradict the principles governing de-risking, and compromise banks' ability to participate in the international financial market. This could be disastrous for the economy.
- 92. Furthermore, we are not aware of any judgment anywhere in the world where a power to intervene in the closure of bank accounts has been implied. The closest a South African court has come to reading-in any provision in the Banks Act is Alpha Bank Bpk v Registrateur van Banke.<sup>206</sup> In this case the Supreme Court of Appeal considered the previous and the current Banks Act, and considered the Minister's and the Registrar's

<sup>&</sup>lt;sup>204</sup> Masetlha v President of the Republic of South Africa 2008 (1) SA 566 (CC) at para 68.

<sup>&</sup>lt;sup>205</sup> 1988 (1) SA 1 (A) at 22E-H. <sup>206</sup> 1996 (1) SA 330 (A).

powers under these statutes. The Court held that there was no basis for the reading-in proposed by the applicant, because it would depart from the rest of the statutory scheme and require a drastic word-changing construction of the legislation.<sup>207</sup> This demonstrates the correct application of the ordinary principles regarding vires and reading-in as they apply in the context of financial sector legislation.

- 93. A most recent reported Supreme Court of Appeal judgment on the exercise of public powers by National Treasury is National Treasury v Kubukeli. 208 It, too, contains nothing which even remotely supports any implied power or obligation to intervene in the closure of bank accounts.
- 94. In South African Reserve Bank v Shuttleworth<sup>209</sup> the Constitutional Court dealt with powers of the national executive to fulfil its "responsibility to secure a stable currency within a good and prospering economy". 210 What is clear from Shuttleworth is that where the legislature intends to confer powers on the national executive, it does so - in that case it conferred, the Constitutional Court held, exceptionally broad powers.<sup>211</sup> But such powers were justified, the Constitutional Court concluded, in the context of the "exceptional significance of the issue". 212 The regulation of the banking sector and compliance with national and international regulations to keep the financial system operative likewise involve an issue of exceptional significance. In these circumstances Parliament's silence

<sup>&</sup>lt;sup>207</sup> Id at 349H/I-I/J. <sup>208</sup> 2016 (2) SA 507 (SCA).

<sup>&</sup>lt;sup>209</sup> 2015 (5) SA 146 (CC).

<sup>&</sup>lt;sup>210</sup> *Id* at para 71.

<sup>211</sup> Indeed, the Constitution itself explicitly confers powers on the Minister of Finance in certain circumstances (id at para 41). <sup>212</sup> *Id* at para 70.

on any power of intervention on the part of the Minister of Finance is inconsistent with reading-in a power for which Parliament did not expressly provide.

95. In the light of these principles, the evident absence of any statutory empowering provision (or common-law source empowering the Minister), and each of the parties' confirmation that the Minister's proposed declaratory order accurately reflects the law, the Court is therefore asked to declare the legal position as formulated in prayer 1 of the Minister's notice of motion.

### G. Ancillary procedural issues: Joinder and strike out

96. Three residual issues remain: Oakbay's allegations regarding joinder; Oakbay's strike out application; and the Minister's strike-out application. We deal with each in turn.

### (1) Oakbay's first procedural point: Joinder

97. Oakbay takes the points of misjoinder and non-joinder. On the one hand, it is alleged that the Minister's citation of respondents is under-inclusive; on the other hand, Oakbay alleges that it is over-inclusive.<sup>213</sup> These points are, of course, merely dilatory.<sup>214</sup> They are correctly not taken *in limine*.

<sup>213</sup> Record vol 11 p 1003 para 20.

<sup>&</sup>lt;sup>214</sup> Amalgamated Engineering Union v Minister of Labour 1949 (3) SA 637 (A) at 663.

- 98. The Minister's declaratory relief clearly identifies only those parties in respect of whom it seeks declaratory relief regarding the closure of their bank accounts. To the extent that other entities' bank accounts have been closed, they are not bound by the relief sought. Therefore such other entities do not have a direct and substantial interest in the relief. 215 They are accordingly not necessary parties, their non-citation does not constitute nonjoinder, and Oakbay is not in a position to take this point. 216
- 99. To the extent that individuals whose bank accounts have not been closed are contended to be parties who should have been joined, this is contrary to law. After National Director of Public Prosecutions v Zuma there is no scope for any genuine suggestion that the President and anyone else who may marginally be mentioned in any of the papers or annexures should have been joined.217
- On the other hand, to the extent that any of the cited respondents have not had their bank 100. accounts closed, the answer is simply that the declaratory relief is to be restricted to the rest of the Oakbay respondents. The banks' affidavits demonstrate that the first, third, sixth, seventh, tenth, eleventh, twelfth and fourteenth respondents were banked by Standard Bank;<sup>218</sup> the fourth, eleventh and fourteenth respondents were banked by FNB;<sup>219</sup> the first, tenth, eleventh, twelfth and fourteenth respondents were banked by Nedbank;<sup>220</sup> and the first, second, third, sixth, seventh, eleventh, twelfth and fourteenth respondents were

<sup>&</sup>lt;sup>215</sup> Milani v South African Medical and Dental Council 1990 (1) SA 899 (T) at 902F-903G.

<sup>&</sup>lt;sup>216</sup> Standard Finance Corporation of South Africa Ltd (In Liquidation) v Langeberg Ko-Operasie Bpk 1967 (4) SA 686 (A) 705A/B-706A/B; *Pillay v Harry* 1966 (1) SA 801 (D) at 804A-805G. <sup>217</sup> 2009 (2) SA 277 (SCA) at paras 84-87.

<sup>&</sup>lt;sup>218</sup> Record vol 3 p 223 para 2.

<sup>&</sup>lt;sup>219</sup> Record vol 2 p 100 para 100.

<sup>&</sup>lt;sup>220</sup> Record vol 2 p 130 para 10.

banked by Absa.<sup>221</sup> None of this is disputed by the Oakbay respondents.<sup>222</sup> Accordingly it is only the fifth, eighth, ninth, and thirteenth respondents to which any point of misjoinder might apply. To meet this point, even were it to be good, the declaratory relief may simply omit any reference to these respondents.

- Investments (Pty) Ltd as the intended entity.<sup>223</sup> To the extent that this may be necessary, this is a mere matter for formal correction. The fifth respondent demonstrably suffered no prejudice, because Oakbay's main answering affidavit deals expressly with JIC Mining Services 1979 (Pty) Ltd and Westdawn Investments (Pty) Ltd.<sup>224</sup> As Oakbay itself explains, the latter's trading name is virtually identical to the former—hence the citation. There has been no confusion of the actual identity of the parties. Each of the Oakbay respondents, including "JIC" (as Oakbay itself refers to "Westdene Investments (Pty) Ltd t/a JIC Mining"), <sup>225</sup> is well aware of the identity of the fifth respondent. <sup>226</sup> It would not have filed a separate answering affidavit had it been cited differently. <sup>227</sup>
- 102. The same applies to the ninth respondent. Oakbay itself identifies its formal designation as "Africa News Network (Pty) Ltd". Should Oakbay persist in this point, it too is capable of being addressed by a formal amendment to be filed in due course.

<sup>&</sup>lt;sup>221</sup> Record vol 6 p 500 para 4.

Record vol 11 p 1003 para 20 indeed appears to restrict the allegation of "misjoinder" to these respondents.

<sup>&</sup>lt;sup>223</sup> Record vol 11 p 1004 para 25.

<sup>&</sup>lt;sup>224</sup> Record vol 11 pp 1004-1005 paras 26-27.

<sup>&</sup>lt;sup>225</sup> Record vol 11 p 1005 para 26.

<sup>&</sup>lt;sup>226</sup> Record vol 14 p 1336 para 52.

<sup>&</sup>lt;sup>227</sup> Record vol 14 p 1336 para 51.

<sup>&</sup>lt;sup>228</sup> Record vol 11 p 1006 para 31.

#### (2) Oakbay's "final procedural point": Strike out

- Oakbay's strike out application relates to two paragraphs in the Minister's founding 103. affidavit and two annexures to the founding affidavit. 229
- The first paragraph is sought to be struck out on the basis that it is "patently false" that 104. Oakbay sought the Minister's intervention regarding the banks' closure of Oakbay's bank accounts.<sup>230</sup> As we have shown, it is actually Oakbay's answering affidavit which is "patently false". It is contradicted by inter alia Sahara's CEO's letter explicitly referring to "further appeals to you [the Minister] regarding the reopening of Oakbay's bank accounts."231 This letter was introduced in the Minister's founding affidavit, which described it as a further example of Oakbay "pressing" the Minister. 232 There is accordingly no merit in the attempt to strike out paragraph 19 of the founding affidavit. The conclusion in paragraph 19 is supported by inter alia paragraph 18 of the founding affidavit - which is not traversed, denied, or itself sought to be struck out.
- The second paragraph sought to be struck out (also in toto) is the one introducing 105. annexures P1 and P2. (These annexures are themselves the separate subject matter of the purported strike out application.) Oakbay's founding affidavit does not identify on what basis paragraph 27 of the Minister's founding affidavit is sought to be struck out. 233

<sup>&</sup>lt;sup>229</sup> Record vol 11 pp 1037-1038 paras 115-115.3; Record vol 13 pp 1193-1197.

<sup>230</sup> Record vol 11 p 1037 para 115.1; referring to Record vol 1 p 15 para 19. <sup>231</sup> Record vol 1 p 67 lines 2-3.

<sup>&</sup>lt;sup>232</sup> Record vol 1 p 15 para 18.

<sup>233</sup> Record vol 11 pp 1037-1038 para 115.2.

Whereas paragraph 19 is alleged to be "patently false", it is not suggested on what basis paragraph 27 is suggested to be liable to being struck out. The contents of the paragraph are supported by its annexures; the annexures were indeed obtained from FIC, as FIC itself confirms (and Oakbay accepts);234 and the FIC Act provides that such documents suffice as proof of their content in civil proceedings. 235 There is accordingly no basis for striking out paragraph 27. Oakbay correctly suggests none. It is an undeniable fact that the certificate reflects that there had been 72 reports of suspicious transactions, some of which in the amounts of billions of rands. This indeed suggests an "increasingly serious state of affairs."

The final target of Oakbay's purported strike-out application is what its answering affidavit 106. describes as "annexure P".236 The founding affidavit describes it as "the certificate purportedly issued in terms of section 39 of the FICA Act and which purports to record 72 'suspicious transaction reports' which were reported to the Financial Intelligence Centre under the FIC Act."237 As mentioned, this certificate has a statutory status. The exercise of the statutory power to issue it has not been attacked. Nor has the certificate. Nor has the FIC Act, which authorises the certificate and provides for its evidential effect. The certificate is therefore "intact and valid". Accordingly the consequences Parliament attributed to it by national legislation must be afforded to it: the certificate is admissible as evidence of its contents. Its contents indeed demonstrate the increasingly serious state of

<sup>&</sup>lt;sup>234</sup> Record vol 11 p 1038 para 115.3.

<sup>&</sup>lt;sup>235</sup> Section 39 of the Financial Intelligence Centre Act 38 of 2001.

<sup>&</sup>lt;sup>236</sup> Record vol 11 p 1038 para 115.3.

<sup>&</sup>lt;sup>237</sup> Record vol 11 p 1038 para 115.3.

<sup>238</sup> South African Reserve Bank v Shuttleworth 2015 (5) SA 146 (CC) at para 32. See, too para 38, applying Oudekraal and Kirland in the context of financial sector legislation. The effect is that the exercise of a statutory power stands until it is successfully set aside.

affairs. The state of affairs is not abstract. The long list of suspicious transactions is quite concrete. It provides the context in which the Minister was asked to assist Oakbay to reverse the closure of its bank accounts.<sup>239</sup> Whether the Minister has any power or duty to do so is the subject-matter of the declaratory relief. Highly relevant to this relief is the context in which the accounts were closed. That further suspicious transaction reports followed yet more frequently even *after* the closure of the accounts is itself a highly significant fact. Yet Oakbay argues that the certificate is "irrelevant". (Significantly Oakbay does not allege that it is "patently false".) The contention is untenable.

107. Nonetheless, by contending that the certificate "has no bearing on the relief which is sought in this application", <sup>240</sup> Oakbay accepts that the declaratory relief may be granted even without "annexure P". On Oakbay's own approach this renders Oakbay's separate application against FIC irrelevant, <sup>241</sup> and renders the argumentative contentions regarding the regulatory instruments redundant. <sup>242</sup>

## (3) The Minister's strike-out application

108. As mentioned, Oakbay advanced unsubstantiated allegations accusing the Minister of a political conspiracy against the Guptas. Each of these allegations is liable to be struck out

<sup>&</sup>lt;sup>239</sup> Record vol 14 p 1336 para 49.

<sup>&</sup>lt;sup>240</sup> Record vol 11 p 1038 para 115.3.

Record vol 11 p 1039 para 118: "The Oakbay Group is of the view that the exposition provided by the Minister and the Banks on local and international Banking Law is irrelevant for purposes of the application."

These comprise Record vol 11 pp 1039-1061 paras 118-186.

on the basis that they are based on hearsay, and are irrelevant, vexatious and scandalous. They prejudice the Minister in the conduct of this case and are also generally defamatory.

109. There has been no attempt to make out a case that the inadmissible and scurrilous contentions somehow qualifies for inclusion in court papers under the Law of Evidence Amendment Act.<sup>243</sup> As the Constitutional Court held, burdening court papers with "hearsay, opinion, speculative, scandalous and vexatious evidence is conduct that must be discouraged".<sup>244</sup> This is to be done by striking out the offensive material, with an appropriate costs order.

## H. Conclusion: Appropriate relief and costs

- 110. Oakbay's opposition was unreasonable. By its own admission Oakbay opposed this application for extraneous purposes: to construct a conspiracy theory.
- 111. The declaratory relief is accepted by all parties as correctly formulated. Oakbay's acceptance of this now does not constitute a defence. Oakbay's twisting and hedging on the issue indeed point to the need for an end to be made to its prevarication. The issue is important, as the affidavits of the independent regulators as well as the banks confirm. A crucial organ in the international economy is affected. In the circumstances of this case the interests of justice clearly call for the definitive ruling of this Court. Therefore we ask that the application be granted.

<sup>&</sup>lt;sup>243</sup> Act 45 of 1988.

Helen Suzman Foundation v President of the Republic of South Africa 2015 (2) SA 1 (CC) at para 37.

- 112. The unreasonableness of Oakbay's conduct in this litigation justifies a punitive costs order against it.<sup>245</sup> The costs order should, furthermore, include the costs of two counsel. This is justified in the light of the importance and scope of this case for which Oakbay is entirely responsible. It rejected the Minister's invitation to withdraw its opposition.
- 113. Finally, the Minister's strike-out application should be granted with costs. These, too, should be on a punitive scale and should include the costs of two counsel. Oakbay's strike out application, on the other hand, falls to be dismissed with costs, including the costs of two counsel.

J.J. GAUNTLETT SC

F.B. PELSER

Counsel for the Minister of Finance

Chambers Cape Town

10 February 2017

<sup>&</sup>lt;sup>245</sup> In re Alluvial Creek Ltd 1929 CPD 532 at 535; Boost Sports Africa (Pty) Ltd v South African Breweries (Pty) Ltd 2015 (5) SA 38 (SCA) at para 27.

# IN THE HIGH COURT OF SOUTH AFRICA (GAUTENG DIVISION, PRETORIA)

Case no 80978/16

In the matter between:

MINISTER OF FINANCE

Applicant

and

OAKBAY INVESTMENTS (PTY) LTD AND TWENTY OTHERS

First to twenty-first respondents

## MINISTER OF FINANCE'S LIST OF AUTHORITIES

- 1. Adbro Investment Co Ltd v Minister of the Interior 1961 (3) SA 283 (T) at 285
- 2. Alpha Bank Bpk v Registrateur van Banke 1996 (1) SA 330 (A) at 349H/I-I/J
- 3. Amalgamated Engineering Union v Minister of Labour 1949 (3) SA 637 (A) at 663
- 4. Anisminic Ltd v Foreign Compensation Commission [1969] 1 All ER 208, [1969] 2 AC 147
- 5. Baxter Administrative Law (Juta, Cape Town 1981) at 698-704
- 6. Boost Sports Africa (Pty) Ltd v South African Breweries (Pty) Ltd 2015 (5) SA 38 (SCA) at para 27
- 7. Bredenkamp v Standard Bank of SA Ltd 2010 (4) SA 468 (SCA)
- 8. CDM (Pty) Ltd v Mineworkers Union of Namibia 1994 NR 360 (HC) at 362H-I
- 9. Chairman of the Board of the Sanlam Pensioenfonds (Kantoorpersoneel) v Registrar of Pension Funds 2007 (3) SA 41 (T) at para 25
- Cilliers et al Herbstein & Van Winsen The Practice of the High Courts of South Africa 5th ed (Juta & Co Ltd, Cape Town 2009) vol 2 at 1428-1429, 1441
- Compagnie Interafricaine de Travaux v South African Transport Services 1991 (4) SA 217
   (A) at 231B

- Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd 2005 (6) SA 205
   (SCA) at paras 16, 18
- 13. De Ville Judicial Review of Administrative Action in South Africa revised 1st ed (LexisNexis, Durban 2005) at 348, 349
- 14. Durban City Council v Association of Building Societies 1942 AD 27 at 32
- Equal Opportunities Commission v Secretary of State for Employment [1994] 1 All ER 910 (HL) at 926
- 16. Ex parte Chief Immigration Officer, Zimbabwe 1994 (1) SA 370 (ZSC) at 376E-I
- 17. Ex parte Farquhar 1938 TPD 213
- 18. Ex parte Nell 1963 (1) SA 754 (A) at 759-760
- 19. Ex parte Prokureur-Generaal, Transvaal 1978 (4) SA 15 (T) at 19D-E, 20C/D, 20E/F, 20E/F
- Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council
   1999 (1) SA 374 (CC) at paras 56, 68
- 21. Fordham Judicial Review Handbook 6th ed (Hart Publishing, Oxford 2012) at 266, 269
- 22. Gouriet v Union of Post Office Workers [1978] AC 435 at 501C-D, 513G
- Governor and Company of the Bank of Scotland v A Ltd [2001] EWCA Civ 52; (2001) 1
   WLR 751 at para 45
- Governor and Company of the Bank of Scotland v A Ltd [2001] EWCA Civ 52; (2001) 1
   WLR 751 at para 45
- 25. Grant v Knaresborough Urban Council [1928] Ch 319
- 26. Grant v Knaresborough Urban District Council [1928] Ch 310
- 27. Harms Civil Procedure in the Superior Courts (LexisNexis, Oct 2016 SI 57) at A4.18
- 28. Helen Suzman Foundation v President of the Republic of South Africa 2015 (2) SA 1 (CC) at para 37
- 29. Hlongwane v Absa Bank Ltd (75782/13) [ZAGPPHC] 928 (10 November 2016)
- Hoexter Administrative Law in South Africa 2<sup>nd</sup> ed (Juta & Co Ltd, Cape Town 2012) at 557-559
- 31. In re Alluvial Creek Ltd 1929 CPD 532 at 535
- 32. Joubert The Law of South Africa 3rd ed (LexisNexis, Durban 2012) vol 4 at para 480
- 33. Langa v Hlophe 2009 (4) SA 382 (SCA) at para 28
- London Borough of Islington v Camp (1999) [2004] LGR 58

- 35. Mahe Construction (Pty) Ltd v Seasonaire 2002 NR 398 (SC) at 410G
- 36. MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd t/a Eye and Lazer Institute 2014 (3) SA 481 (CC) at para 101
- 37. Merrick v Nott-Bower [1964] 1 All ER 717 (CA)
- 38. Milani v South African Medical and Dental Council 1990 (1) SA 899 (T) at 902F-903G
- 39. Minister of Finance v Baberton Municipal Council 1914 AD 335
- 40. Minister of Health v Treatment Action Campaign (No 2) 2002 (5) SA 721 (CC) at para 99
- 41. Minister of Justice and Constitutional Development v Southern Africa Litigation Centre 2016 (3) SA 317 (SCA) at para 23
- 42. Mukaddam v Pioneer Foods (Pty) Ltd 2013 (5) SA 89 (CC) at para 42
- 43. My Vote Counts NPC v Speaker of the National Assembly 2016 (1) SA 132 (CC) at para 46
- 44. Myburgh Park Langebaan (Pty) Ltd v Langebaan Municipality 2001 (4) SA 1144 (C) at 1154C-F
- 45. National Director of Public Prosecutions v Zuma 2009 (2) SA 277 (SCA) at paras 84-87
- 46. National Treasury v Kubukeli 2016 (2) SA 507 (SCA)
- 47. Oudekraal Estates (Pty) Ltd v City of Cape Town 2004 (6) SA 222 (SCA)
- 48. Oudekraal Estates (Pty) Ltd v City of Cape Town 2004 (6) SA 222 (SCA) at para 26
- 49. PvP (Ancillary Relief: Proceeds of Crime) [2003] EWHC 2260 (Fam)
- 50. Pillay v Harry 1966 (1) SA 801 (D) at 804A-805G
- 51. Qoboshiyane NO v Avusa Publishing Eastern Cape (Pty) Ltd 2013 (3) SA 315 (SCA) at para 5
- 52. R (Campaign for Nuclear Disarmament) v Prime Minister [2002] EWHC 2759 (Admin); [2003] LRC 335 at para 46
- 53. R (Customs and Excise Commissioners) v Canterbury Crown Court [2002] EWHC 2584 (Admin) at para 27
- 54. Rv Birmingham Juvenile Court, ex parte Birmingham City Council [1988] 1 WLR 337
- 55. Rv Dartmoor Visitors, ex parte Smith [1987] 1 QB at 115
- 56. R v Nottingham Mental Health Review Tribunal, ex parte Secretary of State for the Home Department The Times (13 March 1987)
- 57. Rail Commuters Action Group v Transnet Ltd t/a Metrorail 2005 (2) SA 359 (CC) at para 106

- 58. Reinecke v Incorporated General Insurance Ltd 1974 (2) SA 84 (A) at 95C
- 59. Rennie NO v Gordon NNO 1988 (1) SA 1 (A) at 22E-H
- 60. Ridge v Baldwin [1963] 2 All ER 66, [1964] AC 40
- 61. Shoba v OC, Temporary Police Camp, Wagendrift Dam 1995 (4) SA 1 (A) at 14F-G
- 62. South African Reserve Bank v Shuttleworth 2015 (5) SA 146 (CC) at paras 32, 41, 71
- 63. Southern Engineering v Council of the Municipality of Windhoek 2011 (2) NR 385 (SC) at para 49
- 64. Spettabile Consorzio Veneziano di Armarto v Northern Ireland Shipbuilding Co Ltd (1919) 121 LT at 635
- 65. Standard Finance Corporation of South Africa Ltd (In Liquidation) v Langeberg Ko-Operasie Bpk 1967 (4) SA 686 (A) 705A/B-706A/B
- 66. Tlouamma v Speaker of the National Assembly 2016 (1) SA 534 (WCC) at paras 101-103
- 67. Tshwane City v Mitchell 2016 (3) SA 231 (SCA) at para 23
- 68. Tulip Diamonds FZE v Minister of Justice and Constitutional Development 2013 (10) BCLR 1180 (CC)
- 69. Van Loggerenberg *Erasmus Superior Court Practice* 2<sup>nd</sup> ed (Juta & Co Ltd, Cape Town Service 2 2016) vol 1 at A2–126
- 70. West Coast Rock Lobster Association v Minister of Environmental Affairs and Tourism [2011] 1 All SA 487 (SCA) at para 45
- 71. Woolf Report Access to Justice (1996) at 252
- 72. Zamir & Woolf The Declaratory Judgment 2<sup>nd</sup> ed (Sweet & Maxwell, London 1993) at 116-117, 140, 296

VAN DER MERWE & ASSOCIATES

**2** 087 654 0209 ♣ 012 343 5435 ☑ 62 RIGEL **AVENUE** WATERKLOOF RIDGE GT VD MERWE/st

# IN THE HIGH COURT OF SOUTH AFRICA [GAUTENG DIVISION, PRETORIA]

**CASE NUMBER: 80978/16** 

In the matter between:

<b>MINISTER</b>	OF	FINA	NCE
**************************************	$\mathbf{v}$	1 INNA	

MINISTER OF FINANCE	APPLICANT
and	
OAKBAY INVESTMENTS (PTY) LTD	1 <sup>ST</sup> RESPONDENT
OAKBAY RESOURCES AND ENERGY LTD	2 <sup>ND</sup> RESPONDENT
SHIVA URANIUM (PTY) LTD	3 <sup>RD</sup> RESPONDENT
TEGETA EXPLORATION AND RESOURCES (PTY) LTD	4 <sup>TH</sup> RESPONDENT
JIC MINING SERVICES (PTY) LTD	5 <sup>TH</sup> RESPONDENT
BLACKEDGE EXPLORATION (PTY) LTD	6 <sup>TH</sup> RESPONDENT
TNA MEDIA (PTY) LTD	7 <sup>TH</sup> RESPONDENT
THE NEW AGE	8 <sup>TH</sup> RESPONDENT
AFRICA NEWS NETWORK (PTY) LTD	9 <sup>TH</sup> RESPONDENT
VR LASER SERVICES (PTY) LTD	10 <sup>TH</sup> RESPONDENT
ISLANDSITE INVESTMENTS ONE HUNDRED AND EIGHTY (PTY) LTD	11 <sup>TH</sup> RESPONDENT
CONFIDENT CONCEPT (PTY) LTD	12 <sup>TH</sup> RESPONDENT
JET AIRWAYS (INDIA) LTD (INCORPORATED IN INDIA)	13 <sup>TH</sup> RESPONDENT
SAHARA COMPUTERS (PTY) LTD	14 <sup>TH</sup> RESPONDENT
ABSA BANK LTD	15 <sup>TH</sup> RESPONDENT

FIRST NATIONAL BANK LTD 16TH RESPONDENT

STANDARD BANK OF SOUTH AFRICA LIMITED 17TH RESPONDENT

**NEDBANK LIMITED** 18TH RESPONDENT

**GOVERNOR OF THE SOUTH AFRICAN** 19TH RESPONDENT

**RESERVE BANK** 

**REGISTRAR OF BANKS** 20<sup>TH</sup> RESPONDENT

DIRECTOR OF THE FINANCIAL INTELLIGENCE 21<sup>ST</sup> RESPONDENT

CENTRE

### **FILING NOTICE**

**DOCUMENT FILED** : THE 1ST, 2ND, 3RD, 4TH, 6TH, 7TH, 11TH,

12TH, AND 14TH RESPONDENTS' HEADS

**OF ARGUMENT** 

FILED BY : VAN DER MERWE & ASSOCIATES

ATTORNEYS FOR THE 1ST, 2ND, 3RD, 4TH, 6TH, 7TH, 11TH, 12TH, AND 14TH

**RESPONDENTS 62 RIGEL AVENUE NORTH** 

WATERKLOOF

**PRETORIA** 

REF: MR GT VD MERWE/st/078

TEL:

012 343 5432

FAX: 012 343 5435

EMAIL: simone@vdmass.co.za

### TO:

THE OFFICE OF THE DEPUTY JUDGE PRESIDENT 7<sup>TH</sup> FLOOR, ROOM 7.15, HIGH COURT BUILDING

EMAIL: MTroskie@judiciary.org.za

### AND TO:

STATE ATTORNEY ATTORNEY FOR THE APPLICANT SALU BUILDING 255 FRANCIS BAARD STREET **PRETORIA** 

TEL: 012 309 1575 FAX: 012 309 1649

EMAIL: TNhlanzi@justice.gov.za

**REF: MS T NHLANZI** 

#### AND TO:

EDWARD NATHAN SONNENBERGS
ATTORNEYS FOR THE 15<sup>TH</sup> RESPONDENT
REF: M KATZ/D LAMBERT/0416998
EMAIL: <u>dlambert@ensafrica.com</u>
C/O GERHARD BOTHA & PARTNERS INC
1<sup>ST</sup> FLOOR, ERASMUS FORUM BUILDING B
CNR RIGEL AVENUE & STOKKIESDRAAI
ERASMUSRANS
REF: MR B SWART/MR H BOTHA

#### AND TO:

NORTON ROSE FULBRIGHT SOUTH AFRICA INCORPORATED ATTORNEYS FOR THE 16<sup>TH</sup> RESPONDENT EMAIL: aslam.moosajee@nortonrosefulbright.com
REF: MR MOOSAJEE/FNB13954
C/O MOTLE JOOMA SABIA INCORPORATED GROUND FLOOR, DUNCAN MANOR
CNR JAN SHOBA AND BROOKS STREETS
BROOKLYN
PRETORIA

#### AND TO:

BOWMAN GILFILLAN INCORPORATED
ATTORNEYS FOR THE 17<sup>TH</sup> RESPONDENT
EMAIL: clement.mkive@bowmanslaw.co.za
Alan.keep@bowmanslaw.co.za
REF: C MKIVA/6164672
C/O BOSHOFF ATTORNEYS
GROUND FLOOR, HAZELWOOD GATE OFFICE PARK
14 OAKTREE AVENUE
CNR OAKTREE AVENUE AND DELY ROAD
HAZELWOOD
PRETORIA
REF: NATASHA NORTJE/NN1564

#### AND TO:

BAKER & MACKENZIE
ATTORNEYS FOR THE 18<sup>TH</sup> RESPONDENT
EMAIL: Gerhard.rudolph@bakermackenzie.co.za
Widaad.ebrahim@bakermackenzie.co.za
Callum.oconnor@bakermackenzie.co.za
REF: G RUDOLPH/CO
C/O ADAMS & ADAMS
ADAMS & ADAMS PLACE

LYNWOOD BRIDGE 4 DAVENTRY STREET LYNWOOD MANOR REF: ADELE JORDAAN

AND TO:

MACROBERT INCORPORATED
ATTORNEYS FOR THE 21<sup>ST</sup> RESPONDENT
MACROBERT BUILDING
CNR JUSTICE MAHOMED AND JAN SHOBA STREETS
BROOKLYN
PRETORIA
EMAIL: ghay@macrobert.co.za
REF: GK HAY

AND TO:

WERKSMANS ATTORNEYS
ATTORNEYS FOR THE 19<sup>TH</sup> AND 20<sup>TH</sup> RESPONDENTS
REF: MR C MANAKA/MR C MORAITIS
EMAIL: cmanaka@werksmans.com
cmoraitis@werksmans.com
REF: SOUT 3267.63
C/O MABUELA INCORPORATED
CHARTER HOUSE, 179 BOSMAN STREET

PRETORIA CENTRAL
EMAIL: mabuela@tiscali.co.za

### AND TO:

STEIN SCOP ATTORNEYS INC.
ATTORNEYS FOR THE 10<sup>TH</sup> RESPONDENT
GROUND FLOOR
18 MELROSE ARCH
JOHANNESBURG
TEL: 011 380 8080
REF: G STEIN
C/O BROOKLYN PLACE
CNR BROOKLYN AND DEY STREET
BROOKLYN
PRETORIA
TEL: 012 452 1300

**REF: BRIDGET MOATSHE** 

**88A** 

當 087 654 0209 島,012 343 5456 図 62 RIGEL AVE WATERKLOOF GT VD MERWE/yvd

# IN THE HIGH COURT OF SOUTH AFRICA [GAUTENG DIVISION, PRETORIA]

CASE NUMBER: 80978/16

In the matter between:

MINISTER OF FINANCE

SAHARA COMPUTERS (PTY) LTD

**APPLICANT** 

14<sup>TH</sup> RESPONDENT

	APPLICANT
and	
OAKBAY INVESTMENTS (PTY) LTD	1 <sup>ST</sup> RESPONDENT
OAKBAY RESOURCES AND ENERGY LTD	2 <sup>ND</sup> RESPONDENT
SHIVA URANIUM (PTY) LTD	3 <sup>RD</sup> RESPONDENT
TEGETA EXPLORATION AND RESOURCES (PTY) LTD	4 <sup>TH</sup> RESPONDENT
JIC MINING SERVICES (1979) (PTY) LTD	5 <sup>TH</sup> RESPONDENT
BLACKEDGE EXPLORATION (PTY) LTD	6 <sup>TH</sup> RESPONDENT
TNA MEDIA (PTY) LTD	7 <sup>TH</sup> RESPONDENT
THE NEW AGE	8 <sup>TH</sup> RESPONDENT
AFRICA NEWS NETWORK (PTY) LTD	9 <sup>TH</sup> RESPONDENT
VR LASER SERVICES (PTY) LTD	10 <sup>TH</sup> RESPONDENT
ISLANDSITE INVESTMENTS ONE HUNDRED AND EIGHTY (PTY) LTD	11 <sup>TH</sup> RESPONDENT
CONFIDENT CONCEPT (PTY) LTD	12 <sup>TH</sup> RESPONDENT
JET AIRWAYS (INDIA) LTD (INCORPORATED IN INDIA)	13 <sup>TH</sup> RESPONDENT

ABSA BANK LTD

15TH RESPONDENT

FIRST NATIONAL BANK LTD

16TH RESPONDENT

STANDARD BANK OF SOUTH AFRICA LIMITED

17TH RESPONDENT

NEDBANK LIMITED

18TH RESPONDENT

REGISTRAR OF BANKS

19TH RESPONDENT

DIRECTOR OF THE FINANCIAL INTELLIGENCE CENTRE

20TH RESPONDENT

GOVERNOR OF THE SOUTH AFRICAN RESERVE BANK

21ST RESPONDENT

 $1^{\text{ST}}$ ,  $2^{\text{ND}}$ ,  $3^{\text{RD}}$ ,  $4^{\text{TH}}$ ,  $6^{\text{TH}}$ ,  $7^{\text{TH}}$ ,  $10^{\text{TH}}$ ,  $11^{\text{TH}}$ ,  $12^{\text{TH}}$ , AND  $14^{\text{TH}}$  RESPONDENTS' HEADS OF ARGUMENT - OUTLINE

### **Table of Contents**

INTRODUCTION AND SYNOPSIS	3
The real justification for this application	.10
THE DUTIES OF THE MINISTER	.34
FACTS LEADING UP TO THE APPLICATION:	.37
The termination of the Oakbay Group's bank accounts	.37
The Oakbay Group's correspondence with the Minister	.38
CONCLUSION ON THE FACTS	.48
THE OAKBAY GROUP'S APPLICATIONS TO STRIKE	49
The relevant legal principals	.49
The objectionable matter	51
THE HEARSAY EVIDENCE OF JONAS, ONLY BELATEDLY CONFIRMED	57

The FIC Certificate	******************************	5
The Jonas evidence	*************	6
THE LEGAL PRINCIPLES RELEVANT TO THE GRANTING OF DECLARATORY F	RELIEF	64
Section 21(1)(c) of the Superior Courts Act	***********	64
Conclusion on the declaratory relief	, 10060017033000173300000	67
THE STANDARD BANK RELIEF		68
CONCLUSION	514 8488 <i>06</i> 98 64 66 86 88 88	70

### **INTRODUCTION AND SYNOPSIS**

1.

This application, spawning thousands of pages, and consuming vast amounts of time and resources on the part of the parties and this honourable Court is a storm in a teacup. It is unnecessary, frivolous litigation aimed at making a political point and ought not to have been brought.

2.

The application occurs in the context of the Gupta family being and certain of their enterprises "unbanked" by the four major banks in South Africa between December 2015 and April 2016. The fact that the four major banks acted in concert by closing within a few months of each other the commercial bank accounts of multiple enterprises associated with the Gupta family in fields as diverse as computing, mining, media and investment, resulted in what can only be described as alarm on behalf of the entities which are known in these proceedings as "the Oakbay Group". The closure of the bank

accounts threatened the very existence of the businesses and placed the jobs of some 7500 employees of the Oakbay Group and the 50 000 persons who rely on the Oakbay Group for their livelihood in jeopardy.<sup>1</sup>

3.

In an effort to avoid these potentially disastrous consequences, Mr Howa (the former CEO of the Oakbay Group) directed correspondence in similar terms to every person he could think of who might be in a position to advise or assist the Oakbay Group, including the President of the Republic of South Africa, the Minister of Finance, the Governor of the Reserve Bank, the Bank Ombudsman, the Democratic Alliance, the Consumer Ombudsman, the Minister of Mining, the Department of Labour, the Financial Services Board, various trade unions and the South African Human Rights Commission.<sup>2</sup>

4.

None of the other organs of state or individuals to whom letters were addressed appeared to have any difficulty in either ignoring the requests, or indicating that they were unable or unwilling to assist.<sup>3</sup> Yet the Minister seized upon the correspondence (which was neither exceptional nor unique) as the alleged catalyst for this application. The catalyst, like the application which followed it, is a ruse.

<sup>&</sup>lt;sup>1</sup> Answering Affidavit, Paginated Bundle Vol 11, p. 1012, para 48.

Answering Affidavit, Paginated Bundle Vol 11, p. 1013, para 49.
 Answering Affidavit, Paginated Bundle Vol 11, p. 1013, para 51.

In essence, the Minister claims that as a result of a "request for intervention" from Mr Howa (which on the facts was nothing more than a plea for assistance made to a dozen officials of whom the Minister was merely one), he requires this Court to provide "clarity" as to whether or not he has the "power or obligation to intervene" in the private relationship between a bank and its customer.

6.

The Minister knows the answer to this question. He has been told so on and indicated his correct understanding of the legal position on at least fourteen occasions of which the Oakbay Group is aware, including:

- 6.1. the first opinion of Mr Gauntlett dated 25 April 2016, when the Minister was advised that no cabinet member has any power to intervene in the banker-client relationship;4
- 6.2. the letter from the Reserve Bank dated 26 April 2016 in which the Reserve Bank indicated that any aggrieved bank customer should "seek recourse through the said established institutions and processes" and highlighted that interference by

<sup>&</sup>lt;sup>4</sup> Annexure C to the Founding Affidavit, Paginated Bundle Vol 1, p. 24.

the Minister may "introduce heightened levels of uncertainty and pose a risk to South Africa's financial stability".5

- 6.3. the Minister's own letter to Mr Howa on 24 May 2016 (following a meeting between the parties) in which the Minister indicated that he cannot act in a way that undermines the regulator or the authorities, and then (perhaps surprisingly) undertook to "continue engaging" with the Oakbay Group, presumably in a manner other than intervention in the banker-client relationship;6
- 6.4. the letter by Mr Howa on 29 May 2016, in which Mr Howa accepted that there were "legal impediments" which prevented the Minister from interfering in the bankerclient relationship and that the regulatory framework presented "challenges";7
- 6.5. the second opinion of Mr Gauntlett dated 29 May 2016 in which the Minister was again advised that he has no power or obligation to "intervene";8
- 6.6. the letter from the attorney of the Oakbay Group dated 14 October 2016 in which the Oakbay Group invited the Minister to withdraw the application on the basis that "there is no dispute about the fact that your client is not by law obliged to intervene in the relationship between my clients and commercial banks":9

<sup>&</sup>lt;sup>5</sup> Annexure J to the Founding Affidavit, Paginated Bundle Vol 1, p. 75.

Annexure D to the Founding Affidavit, Paginated Bundle Vol 1, p. 46.
 Annexure E to the Founding Affidavit, Paginated Bundle Vol 1, p. 51.

<sup>8</sup> Annexure F to the Founding Affidavit, Paginated Bundle Vol 1, p. 53.

<sup>&</sup>lt;sup>9</sup> Annexure OB12 to the Answering Affidavit, Paginated Bundle Vol 12, p. 1182.

- 6.7. the clear statement in the answering affidavit in this application by the Oakbay 2279 Group that the Oakbay Group agrees with the statement in the relief sought by the Minister "and therefore this Court need not proceed any further".;10
- 6.8. the statement by the Governor of the Reserve Bank in his answering affidavit, 11
- 6.9. the confirmation of the proposition by the Registrar of Banks in his answering affidavit;12 and
- 6.10. the statement confirming the legal position by each of the four commercial banks in their answering affidavits.13

7.

In the light of this overwhelming consensus regarding the Minister's powers, the Minister's "uncertainty", and this Application, is manifestly manufactured. His attempt to get a further legal opinion from the court regarding his powers is an abuse.

<sup>&</sup>lt;sup>10</sup> Answering Affidavit, Paginated bundle Vol 11, p. 1009, para 40.

Paginated Bundle Vol 7, p. 605, para 6.Paginated Bundle Vol 7, p. 620, para 5.

<sup>13</sup> ABSA's assertion appears at Paginated Bundle Vol 6, p. 502, para 11; FNB's assertion appears at Paginated Bundle Vol 2, p. 99, para 7; Nedbank appears at Paginated Bundle Vol 2, p. 134, para 18 and Standard Bank at Paginated Bundle Vol 3, p. 297, para 145.

There is, simply put, no dispute relating to the Minister's powers of intervention and the Minister's attempts to suggest otherwise demonstrate the lengths to which he is prepared to go to justify this application. <sup>14</sup> There is no quarrel on this score, no live issue, and certainly no need to waste the Court's resources in dealing with this theoretical and abstract application.

9.

The parties are *ad idem* that the Minister is not empowered (or obliged) to intervene in the banker-customer relationship between the Oakbay Group and the Banks. More to the point there is absolutely no suggestion that the Minister ever did in the past intervene in the banker-customer relationship between the Oakbay Group and the Banks in relation to the decision to close the accounts. There is similarly no plausible suggestion that the Minister at present is being asked to do so, or that he will be asked to do so in the future, either by the Oakbay Group or any other party for that matter <sup>15</sup>.

<sup>&</sup>lt;sup>14</sup> Minister's heads of argument, para 9. The Minister's assertion that it is common cause that there has been a "dispute relating to powers of intervention by Government in relation to the closing of private clients' accounts by registered banks" is false and disingenuous.

<sup>&</sup>lt;sup>15</sup> Although the Oakbay Group has no quarrel with the proposition that the Minister has no legal (whether statutory or otherwise) jurisdiction to intervene as aforesaid, as we shall demonstrate below, the Minister's strained interpretation of the word "intervene" (in seeking to characterize Oakbay Group's correspondence as seeking "intervention") may broaden the scope of the declaratory sought so as either to render it vague, or, worse still, hamper the Minister (and other members of the Executive) in the lawful pursuit of their official duties.

The Minister attempts a further (ultimately unsuccessful) justification for this application by claiming that it arises "in unprecedented circumstances with far-reaching consequences for the national economy, the banking sector, and the national executive authority's commitment to the rule of law". 16

11.

There is, with respect, nothing "unprecedented" about individuals asking members of Cabinet for assistance when they feel that they have been treated unjustly. There is also no exceptionality in those individuals being told, without the benefit of a declaratory order from a court of law, that the "assistance" sought is beyond the scope of the official's powers.

12.

The only "unprecedented" feature of this application is the fact that the Minister saw it fit to utilise the misfortune of the Oakbay Group in having its bank accounts closed, to manufacture the need for this spurious application aimed at scoring political points against the Gupta family.

<sup>&</sup>lt;sup>16</sup> Minister's Heads of Argument, para 7.

13.

The uncontested factual premise on which the application is purportedly based gives rise to an obvious question. Given that there is no prospect at all that the Minister will seek to "intervene" in the decision of the Banks to close the Oakbay Group's accounts, (since no one is asking him to do so), and also given that even if the Minister were to be asked to intervene it is unequivocally clear that he would not consider acceding to such request – why then does the Minister bring this application? Certainly there is no suggestion that the Oakbay Group ever sought to compel the Minister to do so.

14.

In seeking to justify or explain this inexplicable state of affairs – and to convince the Court to exercise its discretion to grant declaratory relief where there is no dispute and where the relief is, in relation to its stated subject, palpably meaningless – the Minister, and the Banks, inadvertently reveal that in substance the declaratory relief that the Minister seeks is not directed towards <u>his</u> conduct (past or future) but that it is, rather, a disguised attempt to curtail the conduct of <u>other</u> members of the Executive going forward and also a means of condemning their past conduct. This, moreover, despite the fact that these other members of the Executive are not joined as parties to this Application and are thus to be condemned to have their powers curtailed *in absentia*, by an order which is clearly *in rem*.

The fact that the relief sought by the Minister is not directed towards <u>his</u> conduct (past, present or future), and that such relief is, insofar as he is concerned, completely meaningless, is evident from the justification advanced for such relief in the Minister's founding affidavit:

In paragraph 19 of his founding affidavit (p15) the Minister says:

"The continued assertions by Oakbay that, as Minister of Finance, I should intervene in, or exert pressure upon, the banks regarding their closure of the Oakbay accounts is harmful to the banking and financial sectors, to the regulatory scheme created by law, and the autonomy of both the governmental regulators and the registered banks themselves ... The proper conduct of the financial regulatory scheme is clearly in the public interest. So too are the jobs of the affected individuals ... for which I as Minister of Finance would always have a considerable concern, as well as the serious allegations detailed above contending that the banks have acted irregularly and indeed quite improperly in terminating the accounts. As I have indicated, my encouragement to Oakbay that its contentions be established in a court of law has been resisted. Oakbay indeed placed it on record that its own 'detailed' legal advice from several sources was that it had no basis to challenge the banks' decisions. (Inconsistently with this, as will become apparent, Oakbay has more recently suggested that it may well yet seek to turn to the courts, evidently at a time of its choosing). This notwithstanding, as will be apparent from the aforegoing, Oakbay has persisted

in its allegations, and the dispute regarding my capacity in particular to intervene with the banks has continued."

16.

In paragraph 29 of his founding affidavit (p19) the Minister says:

"Given the circumstances I have described, the grant of the declaratory orders is called for, in the public interest. The continued public assertions that registered banks within the regulatory environment in South Africa acted for no adequate reason, irregularly and indeed for improper reasons in closing accounts are harmful to the reputation for integrity of South Africa's financial and banking sectors. So too is the continued uncertainty arising from Oakbay's simultaneous disinclination itself to seek a court's ruling. That uncertainty is prejudicial, as stated, to the financial stability and the standing of the South African regulatory authorities, the operation of the banking and financial sectors, the South African economy at large and the employees whose interests Oakbay invokes."

17.

It is evident from these paragraphs that the first "harm" identified by the Minister is the Oakbay Group's assertions that the Minister "should intervene in [sic] ... the banks regarding their closure of the Oakbay accounts". As indicated above (and expanded below), there is no basis in fact for this perceived harm. To the extent that the Oakbay Group ever asked the Minister to "intervene" in their relationship with the Banks regarding their decision to close the bank accounts, they have stated clearly and

unequivocally that they no longer seek such "intervention" by the Minister. It also 2285 cannot be disputed that the Oakbay Group ceased requesting assistance from the Minister even prior to the institution of the application.

18.

Equally fundamentally, nothing in the declaratory relief that the Minister seeks would prevent the Oakbay Group from asserting that the Minister "should intervene in [sic] ... the banks regarding their closure of the Oakbay accounts". The legality of such relief would in any event be of dubious pedigree given that freedom of expression does not limit the content of expression to statements or appeals that are correct or justified as a matter of law, or even to statements or appeals that do not contradict one's prior position. In simple terms, therefore, the identified harm - which is an assertion by the Oakbay Group that the Minister should intervene in relation to the closing of its accounts - is not addressed by the declaratory relief sought. To the extent, therefore, that there is any legitimacy in the Minister's concern that "assertions by Oakbay that, as Minister of Finance, I should intervene in, or exert pressure upon, the banks regarding their closure of the Oakbay Group accounts is harmful to the banking and financial sectors, to the regulatory scheme created by law, and the autonomy of both the governmental regulators and the registered banks themselves ..." - the relief sought does not address this.

19.

There is also no plausible danger that the Minister might feel compelled to respond to such future assertions (on the supposition that it could even arise given the Oakbay

Group's express acceptance that the Minister is not empowered to intervene in its relationships with the Banks in respect of the closure of their accounts). After all, on the Minister's version he resisted such assertions. Further, the Minister is now more resolute in the correctness of his resistance then he was at that time. After all, at the time of his initial resistance the Minister was armed with a mere two opinions from senior and junior counsel whereas now he adds to this arsenal of legal back-up, the similar views of at least four sets of senior and junior counsel representing the different parties in this application.

20.

Similarly, the relief that the Minister seeks does not address his second purported concern that "[t]he continued public assertions that registered banks within the regulatory environment in South Africa acted for no adequate reason, irregularly and indeed for improper reasons in closing accounts are harmful to the reputation for integrity of South Africa's financial and banking sectors." The declaratory relief that the Minister seeks does not prevent the Oakbay Group from making these "public assertions". In any event, it is likely that any prayer for relief formulated to address this concern by seeking to censor the Oakbay Group's assertions of improper conduct by the Banks would fall foul of the Oakbay Group's right to freedom of expression.

21.

The relief that the Minister seeks also does not address his third professed concern arising from the purported attack by the Oakbay Group upon the integrity of the Banks' combined with its failure to seek a court ruling confirming that the Banks acted

unlawfully. Nothing in the declarator sought addresses the lawfulness (or absence 2287thereof) of the Banks' conduct. Neither does the declarator compel either the Oakbay Group, or the Banks, to approach a court to determine the question of whether the Banks acted lawfully. Again, it is likely that a prayer for relief formulated to address this concern would violate many constitutional precepts.

22.

It is apparent, therefore, that none of the "public interest issues" that the Minister identifies are in fact resolved by the declaratory relief that he seeks. On the contrary, all that the declarator is directed towards is a legal proposition with which no party to the Application cavils.

23.

The simple fact is that the Minister does not require a court to tell him that he is not empowered, or obliged, to intervene in the decision of the Banks to close the Oakbay Group's accounts. There is no uncertainty regarding his past, present or future conduct in this regard that could conceivably warrant such declaratory relief.

24.

Rather, the subtext of the Minister's application, is the past and future conduct of other members of the Executive.

In seeking declaratory relief that he was (and is) not empowered to intervene in the relationship between the Oakbay Group and the Banks and the latter's decision to close the bank accounts, the Minister is in substance seeking a declarator that other members of the Executive who engaged with certain of the Banks subsequent to the closing of the Oakbay Group's accounts did so unlawfully and, more to the point, that any future "intervention" by such other members of the Executive will be unlawful — as will any appeals to the Executive by the Oakbay Group for assistance.

26.

That it is the conduct of <u>other</u> members of the Executive that is the true target of the relief sought by the Minister is consistent with the failure of such relief to address any of the public interest concerns identified by the Minister in the founding affidavit.

27.

There are a number of references in the Minister's Founding and Replying Affidavits and in the heads of argument filed on his behalf that expose the true target of this application as being the conduct of <u>other</u> Ministers. For instance, and with reference to the Minister's founding affidavit:

- 27.1. In paragraph 3,<sup>17</sup> the Minister identifies this application as arising from a dispute "relating to powers of intervention by <u>Government</u> in relation to the closing of private clients' accounts by registered banks." (Emphasis supplied.)
- 27.2. In paragraph 12,<sup>18</sup> the Minister describes the basis upon which he engaged with the Oakbay Group pursuant to their appeals to him for assistance. He explains that he "was concerned to explore any respect in which I could properly, in terms of law, address the situation arising from Oakbay's serious allegations concerning the banks, and the job losses it predicted as imminent" and that to this end he "had taken steps to obtain independent legal advice by senior counsel in important respects relevant to the apparent issues." It is, however, apparent from such "advice", which takes the form of an opinion attached to the founding affidavit as annexure C, that what was being addressed concerned not only the Minister, but, rather an "INTER-MINISTERIAL COMMITTEE IN RESPECT OF ALLEGATIONS LEVELLED AGAINST FINANCIAL INSTITUTIONS". This is confirmed in paragraph 3 of the introductory section, which records that "the request for advice arises in the context of a recent delegation by Cabinet of three members (the Minister of Labour, the Minister of Mineral Resources, and the Minister of Finance) to engage a number of major South African commercial banks...". 19
- 27.3. In paragraph 20,<sup>20</sup> the Minister refers to the "independent concerns regarding the deleterious effect on the banking sector of the contentions made by Oakbay" raised

<sup>&</sup>lt;sup>17</sup> Paginated Bundle. Vol 1, p. 10.

<sup>&</sup>lt;sup>18</sup> Paginated Bundle. Vol 1, p. 12.

<sup>19</sup> The First Opinion, Paginated Bundle, Vol 1, p. 24.

<sup>&</sup>lt;sup>20</sup> Paginated Bundle. Vol 1, p. 16.

by the Governor of the Reserve Bank, with reference to a letter dated 26 April 2016 290 from the Governor, annexure "J" to the Founding Affidavit. The introductory sentence of this letter makes direct reference to "Cabinet's decision to appoint a subcommittee of three Ministers to engage banks on the closure of an individual entity bank account" and the concluding paragraphs similarly identify as a concern "...that Cabinet's resolution for certain Ministers to engage with banks was informed by concems that the actions taken by the banks may deter potential foreign investment. We caution against the unintended consequence of this being viewed as undue political interference in banks' operations, and restricting the ability of banks to make independent operational decisions within the parameters of the existing legal and regulatory frameworks. This could introduce heightened levels of uncertainty and pose a risk to South Africa's financial stability." (Emphasis added).

28.

Moreover, and with reference to the Minister's Replying Affidavit:

28.1. In paragraphs 10, 12 and 1321 the Minister notes Oakbay's position that he "as Minister of Finance, indeed [has] no legal authority or duty to interfere in its bankercustomer relationships" but says that Oakbay's persistence with the stance that it is being persecuted by the four major banks, aided by the Reserve Bank, and Oakbay's refrain that this requires investigation and decisive action renders the

<sup>&</sup>lt;sup>21</sup> Paginated Bundle. Vol 14, p. 1323-1324

relief that he seeks in this application not academic as: "Whether the executive may take 'decisive action' remains a vital issue. For Oakbay does not suggest that any other arm of State (either the Courts or Parliament) is the appropriate arm of State to 'investigate' or take 'decisive action'...". This appears also at paragraph 80 (p1344) of the Replying Affidavit. Of course, as will be discussed later, the Minister overlooks the fact that the nature of the "investigation" and "action" alluded to is not directed towards the banker-customer relationship between the Oakbay Group and the Banks, neither is it directed towards interfering with (or reversing) the decision of the Banks to terminate such relationships, rather, albeit having as its genesis the decision of the Banks to terminate the Oakbay Group's accounts, such "investigation" or "action", if any, is likely to be directed towards far broader issues concerning the role and power of the Banks in South Africa generally and possibly also the regime applying to the identification of and dealing with customer risks in particular.

28.2. In paragraph 31<sup>22</sup> the Minister directly identifies as a concern warranting the declaratory relief sought, the spectre of executive action by persons other than him. The Minister says in this regard that "...[c]ontinued threats of 'investigations' by and 'decisive action' against banks after they have acted pursuant to international and national obligations to counter serious crimes ... are highly prejudicial to the country's economy ...". Such threats are not related to any conduct by the Minister, but rather emanate from other members of the Executive.

<sup>&</sup>lt;sup>22</sup> Paginated Bundle Vol 14, pp1330 - 1331.

- 28.3. To similar effect, in paragraph 62 of the Replying Affidavit, 23 the Minister asserts that it is his "...duty to seek clarity on whether overt or covert political pressure should be suffered in silence by banks, or openly declared to be unlawful by the judiciary. Perceptions of political pressure ... strongly militate in favour of granting the declaratory relief, at the very least as formulated in my application." Again, the reference to "political pressure" is not a reference to past, present or future conduct of the Minister but, rather, refers to conduct of other members of the Executive.
- 28.4. In paragraph 106 of the Replying Affidavit, <sup>24</sup> the Minister describes this Application as being directed towards clarifying "whether executive interference in the banking sector is authorised in the circumstances of this case". This appears also from paragraph 110 of his Replying Affidavit<sup>25</sup> and from paragraph 117<sup>26</sup> in which the Minister identifies "any unauthorised interference in the banking sector" as justifying the relief sought. Significantly such interference is not limited to his conduct as, for the reasons stated above, it is clear that there is no concern about the Minister "interfering" in the banking sector in the future or having done so in the past. Rather, such concern pertains to the conduct of other members of the Executive.

<sup>&</sup>lt;sup>23</sup> Paginated Bundle Vol 14, p. 1339.

<sup>&</sup>lt;sup>24</sup> Paginated Bundle Vol 14, p. 1351.

<sup>&</sup>lt;sup>25</sup> Paginated Bundle Vol 14, p. 1352.

<sup>&</sup>lt;sup>26</sup> Paginated Bundle Vol 14, p. 1355.

The stance of the "supporting" and "abiding" respondents also confirms that it is this – i.e. conduct of other members of the Executive – that is the real target of the relief sought. That this is so appears from:

- 29.1. Paragraphs 10, 16, 25, 30, 34 and 35 of Absa's heads of argument;
- 29.2. Paragraphs 22 to 33, 67 and 69 of FNB's heads of argument; and
- 29.3. Paragraph 21 of the Governor of the Reserve Bank's and Registrar of Bank's heads of argument.

30.

There is, however, a very real concern with declaratory relief that is meaningless in relation to its identified subject matter but that has as its real target the conduct (both past and future) of persons other than those identified in the Notice of Motion. Such backdoor relief should not be countenanced for many reasons.

31.

Firstly, a declarator that would in substance condemn the conduct of Ministers who are not parties to the application (under the guise of relating only to the conduct of the Minister of Finance), is undesirable.

A clear premise underpinning the contention that there exists a "live" issue requiring declaratory relief and, more significantly, an "existing, future or contingent right or obligation" in which the Minister has an interest is that the establishment of the IMC was unlawful, as was the conduct of Ministers Zwane and Oliphant in connection with the IMC. Piggybacking upon this is the prospect of future unlawful conduct emanating from these or other members of the Executive that the declaratory order sought is aimed at preventing.

33.

It is, however, not permissible to determine (or review) the lawfulness of the conduct of these other Ministers or the lawfulness of the establishment of the IMC via the backdoor, and particularly without proper notice to the persons whose conduct is in fact under scrutiny. At a minimum a Court should be extremely wary of venturing into terrain that would, even implicitly, entail a determination of the lawfulness of conduct of absent members of the Executive. After all, a necessary consequence of such absence is that the Court is deprived of all the relevant facts and parties being placed before it.

34.

Secondly, a declarator at the instance of one Minister that in substance is a review or determination of the conduct of other Ministers, runs counter to the constitutional

principle of co-operative government and intergovernmental relations and particular section 41(3) that provides that where an organ of state is involved in an intergovernmental dispute it must make "every reasonable effort to settle the dispute by means of mechanisms and procedures provided for the purpose, and must exhaust all other remedies before it approaches a court to resolve the dispute".

35.

Thirdly, and most importantly, it is important to recognise that the proposed declarator, to the extent that it will relate to future conduct of such other Ministers (or the President) is premature and ill-advised.

36.

Implicit (and sometimes explicit) in the submissions that declaratory relief sought should be granted on behalf of the Minister and the "supporting" and "abiding" respondents are the following propositions:

- 36.1. any continued criticism of the Banks by the Oakbay Group is both unlawful and detrimental to the public interest;
- 36.2. any appeal by the Oakbay Group to the Executive for "assistance" or "action" would be unlawful and detrimental to the public interest, and
- 36.3. any "action" taken by the Executive in consequence of (a) and (b) would be unlawful and detrimental to the public interest.

All of these propositions are, however flawed.

38.

The propositions in (a) and (b) are related. Just as the Oakbay Group has a constitutional right to express their views regarding the conduct of the Banks, so too do they have a right to appeal for assistance to members of the Executive (of course it does not follow that the relevant member of the Executive is obliged to act in response to such appeal). The contention, however, that availing themselves of their right to criticise the Banks and their right to petition government for assistance (even if the Banks acted lawfully) is unlawful, is misguided.

39.

Similarly the proposition in (c) is also misguided. Absent knowledge of precisely what "decisive action" other members of the Executive might take precipitated in part (or even in whole) by the Oakbay Group's professions of unjust treatment and appeals for assistance, it would be dangerous (and indeed legally untenable) for this Court to venture into the question of the legality of same.<sup>27</sup>

<sup>&</sup>lt;sup>27</sup> This is particularly so where it is a matter of pure speculation that such "assistance" or "action" would comprise intervening in the relationship between the Banks and the Oakbay Group in relation to the decision to close the accounts. On the contrary, as pointed out in the tenth respondent's answering affidavit, it is most likely that any such "assistance" or "action" – if any – would leave intact the decision

Relevant in this regard is that this Court cannot responsibly find, even in relation to the Minister (not to mention other members of the Executive who are not before it), that all "assistance" or "action" consequent upon an appeal for assistance would be unlawful — certainly insofar as such "assistance" or "action" is not directed towards intervening in the relationship between bankers and their customers or seeking to reverse decisions to terminate such relationships. It may, however, be that as the Minister responsible for the well-being of the financial sector, "assistance" or "action" is required to address issues that have been highlighted by the experience of the Oakbay Group at the hands of the major Banks — including, but not limited to, the extent of the power wielded by such Banks, the manner in which they interact and engage with customers, and unintended consequences of the chosen regulatory regime for combatting terrorism, money laundering and the like.

41.

After all, the Minister is the official entrusted with the power of making regulations in terms of the Banks Act, 94 of 1990 - section 90 of which provides:

"90 Regulations

(1) The Minister may make regulations-

to terminate the said accounts and would, rather, focus on matters of substance identified in consequence of the conduct of the Banks.

(a) as to any matter which is required or permitted to be prescribed by 2298 regulation under this Act;

- (d)

(e) prescribing such further returns as the Minister may deem expedient, in addition to those contemplated in any other provision of this Act, to be furnished by banks to the Registrar;

- (g)
- (h) ...; or

(i) prescribing, generally, any matter, whether or not connected with any matter specified in paragraphs (a) to (h), inclusive, which the Minister may deem it necessary or expedient to prescribe in order that the objects and purposes of this Act may be better achieved.

…"<sup>28</sup>

42.

The Minister is also the person under whose aegis the ultimate responsibility of reviewing the Banks Act falls, in terms of section 92 of such Act.

<sup>&</sup>lt;sup>28</sup> See also sections 60A and 60B of the Banks Act. It is also significant that the manner in which banks are required to deal with identified suspicious transactions and the customers to whose accounts such transactions relate are presently a matter of regulation by the Minister.

Contrary to the stance adopted by the Minister and certain of the "supporting" and "abiding" respondents, there is, therefore a lawful place within our constitutional regime for appeals to political representatives for assistance — and for the provision of assistance (depending, of course, upon the precise form that it takes). This applies even where the appeal relates to conduct that is lawful and where the said Minister is being appealed to (or lobbied) to reconsider the prevailing regime.

. 44.

Again, and in the context of the present matter, such appeals and any "decisive action" or "assistance" that might ensue in consequence would not entail intervening in the now terminated relationship between the Oakbay Group and the Banks or attempting to reverse the Banks' decision to terminate such relationships.

45.

Relevant in this regard is section 92 of the Constitution, which stipulates the Executive's role. Section 92 provides:

- "92. Accountability and responsibilities.—(1) The Deputy President and Ministers are responsible for the powers and functions of the executive assigned to them by the President.
- (2) Members of the Cabinet are accountable collectively and individually to Parliament for the exercise of their powers and the performance of their

2300

functions.

- (3) Members of the Cabinet must-
- (a) act in accordance with the Constitution; and
- (b) provide Parliament with full and regular reports concerning matters under their control."

46.

The powers of the Executive include "implementing national legislation, developing and implementing national policy, co-ordinating functions of State departments, and preparing and initiating legislation", as well as any other executive function provided for in the Constitution or in national legislation.<sup>29</sup> In practice, the Executive's duties and functions "take the form of political and executive leadership of specified State departments".<sup>30</sup>

47.

Executive powers have been described by the Court as "in essence, high-policy or broad discretion-giving powers", of which the formulation of policy is a paradigmatic example.<sup>31</sup>

<sup>&</sup>lt;sup>29</sup> Von Abo v President of the RSA 2009 (5) SA 345 (CC) para 39

<sup>30</sup> Von Abo para 40; emphasis added

<sup>31</sup> Minister of Defence and Military Veterans v Motau and Others 2014 (5) SA 69 (CC) at para 37

In addition to the powers that are expressly conferred on them by the President or in legislation, Ministers also enjoy those powers that are necessary or incidental to the discharge of their functions.<sup>32</sup>

49.

These include the power to perform all steps necessary to <u>prepare</u> for the proper exercise of a power, including by another party.<sup>33</sup> In *Chonco*, for example, the Constitutional Court recognised that the preliminary process undertaken by the Minister of Safety and Security to enable the President to consider applications for presidential pardon by prisoners, is "auxiliary" to the President's decision-making power and can be challenged as part of the exercise thereof.<sup>34</sup>

50.

Clearly, therefore the Executive's broad, political-leadership function confers on Ministers the power to engage with members of the public who approach them, in

<sup>&</sup>lt;sup>32</sup> It is trite that a power to do that which is expressly authorised includes the power to do that which is necessary to give effect to the power expressly given: *Matatiele Municipality and Others v President of the RSA and Others* 2006 (5) SA 47 (CC) at para 50, citing *Moleah v University of Transkei and Others* 1998 (2) SA 522 (Tk) at 536H-537D; 538H-540A. See also *Masetlha v President of the Republic of South Africa and Another* 2008 (1) SA 566 (CC), finding that the President's power to dismiss the head of the National Intelligence Agency was incidental to his power to appoint.

33 *Minister for Justice and Constitutional Development v Chonco and Others* 2010 (4) SA 82 (CC) at paras 35-39

<sup>34</sup> Chonco paras 39-41

order to determine what functions – if any – they are required to perform and what powers they may be moved to exercise.

51.

Certainly, the government accepts as much. Parliament's website in fact recognises the role of lobbying in government.<sup>35</sup> It states:

"Lobbying means trying to influence parliamentary decision-making on, for example, a government policy White Paper or a bill. Drawing up a petition, writing to a committee, making a presentation to a committee, asking an MP to sponsor your proposal as a private member's bill, and trying to get MPs to support a particular cause are all examples of lobbying. Other ways of lobbying include getting public support for an issue, such as:

Run a media campaign

Produce a newsletter or website based on thorough research

Give radio and television interviews

Write articles for a newspaper - bearing in mind that the media has inflexible deadlines and will only carry material that it considers to be newsworthy

Ask experts for advice and assistance

Ask companies to donate their expertise and time to your campaign, such as, asking an advertising agency to create suitable marketing materials and asking

http://www.parliament.gov.za/live/content.php?item\_ID=66, accessed 16 February 2017.

Ask prominent people to publicly endorse your campaign

Hold press conferences

Organise pickets or marches and ensuring the media are informed in good time about these events

Collect signatures for a petition and making plans to submit it to Parliament or another relevant authority

Meet with political parties to influence their policies

Work together with other like-minded groups like non-governmental organisations (NGOs) and community-based organisations (CBOs)

Ask for a meeting with the relevant minister

Ask for a meeting with the minister's adviser

Ask for a meeting with the President."36

52.

Not only, therefore, do members of the public have a right to approach political leaders for assistance but Ministers have the power to engage with people who prevail upon them for assistance, albeit that their powers to take steps pursuant to such engagement may be limited depending on the relevant facts (and, in the relation to the present matter, would not include intervening with the Banks to reverse the decision to close the bank accounts).

<sup>36</sup> Emphasis added.

Such permitted engagement might very well, however, trigger lawful Ministerial conduct, such as investigating and, if necessary, amending the prevailing legislative regime.

54.

As the above analysis demonstrates, therefore, there is much for a court to be wary about in relation to the relief that the Minister seeks. Having regard to the fact that such relief is not required in order to delineate the ambit of the Minister's conduct – past, present or future – there exists a real concern that it is being pursued for another purpose which would have the consequence of commenting upon and curtailing governmental conduct that has not been fully canvassed in the papers and that, were it to properly be before the court, would likely be lawful.

55.

It is furthermore noteworthy that the abstract declaratory relief sought by the Minister does not – and cannot – prevent or alter the basic right of a citizen to engage with and seek the assistance of members of government, whether the executive branch or the legislative or regulators. Even if the court were to affirm the Minister's application that he has neither the power nor the ability or discretion to "intervene," the court would not be preventing the Oakbay Group or any party from their constitutional rights to petition the government in whatever form they wished on any issue.

Having set out the real justification for this application, in what follows, we set out the particular duties on the Minister as an organ of state, and the facts leading up to this application in greater detail, including the termination of the Oakbay Group's bank accounts, and the correspondence between the Oakbay Group and the Minister. Thereafter, we deal with the application by the Oakbay Group to strike out certain material in the Founding and Replying Affidavits of the Minister on the ground that the allegations therein are scandalous, vexatious and irrelevant (including the certificate "P9" which records 72 alleged "suspicious transaction reports" relating to the bank accounts of various persons, some of whom are before this court). Furthermore, certain evidence put up by the Minister is hearsay and the belated filing of a confirmatory affidavit of Mr Jonas (on 17 February 2017) is insufficient to cure the irregularities.

57.

Thereafter, we turn to discuss the principles under which this application is to be assessed and the approach that this Court is to take to disputes of fact. Next we turn to the question of the declaratory relief sought by the Minister. We show that the application is abstract, moot and manufactured and that this Court should protect its processes by exercising its discretion against granting the relief sought. We also deal with the Minister's egregious attempt to turn a purported application for a declarator delineating his authority to deal with the relationship between certain of the Respondents and their banks into a full-blown debate in relation to the so-called "State capture" series of events. Manifestly they have nothing to do whatsoever with the relief sought in this application. Finally, we deal briefly with the Standard Bank relief, and the question of costs.

## THE DUTIES OF THE MINISTER

58.

As part of the executive arm of the State, the Minister bears duty to "assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts" in terms of section 165(4) of the Constitution. The norm of accountability<sup>37</sup> further demands that the Applicant had to place sufficient evidence before the Court in its founding papers to enable this Court to make the determination which the Applicant seeks.

59.

There is a further independent basis which imposes a duty upon organs of state to act ethically and openly. Section 195 of the Constitution deals with the "basic values and principles governing public administration". These principles include:

- 59.1. "a high standard of professional ethics must be promoted and maintained" (88;
- 59.2. "public administration must be accountable'69;

<sup>&</sup>lt;sup>37</sup> On the norm of accountability generally see *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* 2005 (2) SA 359 (CC) para [83]

<sup>&</sup>lt;sup>38</sup> Section 195(1)(a). <sup>39</sup> Section 195(1)(f).

59.3. "transparency must be fostered by providing the public with timely, accessible and accurate information<sup>™0</sup>.

60.

Finally, in terms of Section 7(2) of the Constitution, the State "must respect, protect, promote and fulfil the rights in the Bill of Rights".

61.

The Oakbay Group is entitled to a fair hearing in terms of Section 34 of the Constitution. The State is obliged to respect, protect, promote and fulfil that right. There is an obligation upon it to do so by ensuring that the matter is adjudicated upon the correct facts, and that the Minister acts fairly and ethically in bringing this application.

62.

As we show in the sections which follow, the Minister has failed to comply with these constitutional ideals. The Minister has distorted the facts and attempted to create a controversy, when in fact there is none, and acted contrary to the requirements of transparency and fairness.

section 195(1)(g).

What makes the Minister's attempts to bloat the application into a controversy surrounding the alleged "State capture" issue particularly egregious is that the Minister himself in his Replying Affidavit states the following:

"My applications seeks a concise declarator. It rests on a pure questions of law.".41

and:

"The certificate (Annexure "P" to the Founding Affidavit) stands as proof of the fact that 72 STR's were indeed reported. This suffices for purposes of the relief sought in my application.".42

These statements are entirely antithetical, for instance, to the extensive report to the Public Protector's State of Capture Report such as that in paragraph 147 of the Replying Affidavit, 43 which bely the Minister's true reason for bringing the application.

<sup>43</sup> Paginated Bundle Vol 14, p1364.

Replying Affidavit, Paginated Bundle Vol 14, p1335, para 49.
 Replying Affidavit, Paginated Bundle Vol 14 p1374, para 179.

## FACTS LEADING UP TO THE APPLICATION:

The termination of the Oakbay Group's bank accounts

64.

It is common cause that between December 2015 and April 2016 the Oakbay Group was "unbanked" by the Fifteenth to Eighteenth Respondents ("the Banks").

65.

The closure of the bank accounts of various members of the Oakbay Group prompted the then CEO of Oakbay Investments (Pty) Ltd, Mr Nazeem Howa ("Mr Howa"), being fearful of potential job losses, to direct correspondence to every single person he could think of who might be in a position to assist the Oakbay Group.<sup>44</sup> It is evident from the list of people and entities whom received correspondence that the Minister was not singled out by Mr Howa. All these letters are generic in nature and not specifically directed to any one person.

66.

It is submitted that there is nothing untoward about a CEO seeking assistance to protect the jobs which would be lost if a company was forced to shut down its South African Operations.

<sup>44</sup> Paginated Bundle Vol 3, p 1099, para 49.

67.

The Minister states in his Founding Affidavit that the Oakbay Group directed representations and demands to him as the Minister of Finance. The Minister continues and states that "Oakbay demanded that on behalf of Government I intervene with the banks to achieve a reversal of their decisions". In support of this allegation the Minister attaches a letter dated 8 April 2016 written by Mr Howa and addressed to the Minister. 45

68.

The allegation by the Minister that the Oakbay Group "demanded" his "intervention" is simply not borne out by the letter of 8 April 2016. This allegation stands in stark contrast with the actual contents of the letter. Nowhere in this letter does Mr Howa demand or ask the Minister to exercise a legal right or power to intervene in the Banks' commercial decisions. The words "demand" and "intervention" (on which this application is so forcefully premised) do not even appear in this letter.

69.

Rather, the first line of the letter makes it clear that Mr Howa's intention was "to provide [the Minister] with advance warning that Oakbay Investments and [its] portfolio

<sup>&</sup>lt;sup>45</sup> Paginated Bundle Vol 1, p 21, Annexure "A".

companies may soon be incurring significant job losses". The Minister rightly concedes

that he has considerable concern for the jobs of the affected individuals.46

70.

It is submitted that the Minister's strained interpretation of this letter is untenable. This letter is clearly a plea for help from a CEO of a company whom is fearful of potential job losses.

71.

The Minister also refers to a letter dated 17 April 2016.<sup>47</sup> This letter similarly does not support the Minister's allegation that the Oakbay Group "demanded" his "intervention".

72.

In this letter Mr Howa apologised to the Minister if it might have seemed as if his previous letter portrayed anything other than a "heartfelt appeal for assistance". He states: "it was never our intention to come across with any other message than a plea to you as political head for the financial sector to assist us in avoiding this huge impact on the lives of around 50 000 people". Mr Howa indicated that the Oakbay Group wanted to find a way to reverse the hard-line stance taken by the Banks. He asks the Minister for "help to

<sup>&</sup>lt;sup>46</sup> Paginated Bundle Vol 1, p 15, para 19

<sup>&</sup>lt;sup>47</sup> Paginated Bundle Vol 1, p 23, Annexure "B".

save jobs" and to revert regarding "any possible assistance you are able to offer". Again, 23 | 2 the words "demand" and "intervention" do not appear in this letter.

73.

It is submitted that the Minister could never have inferred from the two letters (dated 8 and 17 April 2016 respectively) that the Oakbay Group demanded his intervention. It is evident that the Oakbay Group sought his assistance to stave off potential job losses.

74.

On 25 April 2016 a legal opinion from senior and junior counsel was obtained by the Minister ("the First Opinion"). As In the First Opinion Mr JJ Gauntlet SC advised the Minister that no cabinet member has any power to intervene in the banker-client relationship. As a matter of public law, Mr Gauntlet further advised that any such intervention may be ignored by a private entity without seeking legal recourse and, as a matter of private law and such intervention constitutes a delict. The First Opinion concludes that a "meeting [between the Oakbay Group and the Minister] is not authorised by law". 49

<sup>&</sup>lt;sup>48</sup> Paginated Bundle Vol 1, p 24, Annexure ""C".

<sup>&</sup>lt;sup>49</sup> Paginated Bundle Vol 1, p 45, para 46.

By this point the Minister already knows that he has no right or obligation in law to intervene in the relationship between the Oakbay Group and the Banks.

76.

Contrary to legal advice received by the Minister, a meeting was held on 24 May 2016 between the Minister, his subordinates and Mr Howa to discuss the closing of the Oakbay Group's bank accounts.50 This is confirmed in a letter written by the Minister and addressed to Mr Howa.51 By this stage, the Minister could be in no doubt as to the ambit of his power and authority. The Minister clearly states that he cannot act in any way that undermines the regulator or the authorities.52

77.

The topics discussed by the parties at this meeting are clearly set out in the Minister's letter. No allegation is made in this letter (written by the Minister) that Mr Howa or the Oakbay Group demanded his intervention in relation to the closure of the bank accounts by the Banks. Contrary to the suggestion of disagreement between the parties in relation to the purported demands made for intervention, the Minister states that "we agreed to continue engaging and you would provide us with any relevant information".

Paginated Bundle Vol 1, p 14, para 15.
 Paginated Bundle Vol 1, p 46, Annexure "D".

<sup>&</sup>lt;sup>52</sup> Paginated Bundle Vol 1, p 46, line 10.

Significantly, no allegation is made in the Minister's Founding Affidavit that it was demanded of him at the meeting on 24 May 2016 to intervene in the banking relationship between the Oakbay Group and the Banks.

79.

Having regard to the facts set out in the preceding paragraphs, the only logical inference to be drawn therefrom is that no demand for intervention was made by Mr Howa at the meeting of 24 May 2016. This is further confirmed by the contents of a letter written by Mr Howa to the Minister also dated 24 May 2016.<sup>53</sup> This letter also does not demand intervention by the Minister.

80.

In his Replying Affidavit the Minister states that "Mr Howa's intent was very clear. He indeed insisted that I intervene. The 'message' was unmistakable." <sup>54</sup> The Minister also states in his Replying Affidavit that "Not all of this was conveyed in the written correspondence".

Paginated Bundle Vol 1, p 51, Annexure "E".
 Paginated Bundle Vol 14, p 1354, para 114.

It is submitted that these allegations are clearly an afterthought. The Minister's Application is premised on the alleged persistent demands for intervention made by Mr Howa and the Oakbay Group. There can be no doubt that, on the probabilities, had Mr Howa indeed demanded intervention from the Minister at the meeting held on 24 May 2016, then the Minister would have mentioned this very important fact in his Founding Affidavit. This allegation, raised for the first time in the Replying Affidavit, could so easily have been contained in the Founding Affidavit of the Minister and confirmed by a supporting affidavit deposed to by any one of the other officials from the Minister's office who attended the meeting.

82.

It is trite that an Applicant should make out his case in his founding papers. In application proceedings the notice of motion and affidavits define the issues between the parties. If an issue is not cognisable or derivable from the sources, there is little or no scope for reliance on it.<sup>55</sup>

83.

The letter written by Mr Howa on 24 May 2016 is very significant. Mr Howa states that: "I thought it prudent to place on record that following detailed discussions with

<sup>&</sup>lt;sup>55</sup> Molusi and Others v Voges NO and Others 2016 (3) SA 370 (CC) at 27 quoting Naidoo and Another v Sunker and Others [2011] ZASCA 216 at [19].

several legal advisors, we are of the strong view that given the contractual rights the banks have, any legal approach may indeed be still-born."56

84.

Mr Howa, on behalf of the Oakbay Group, expressly concedes that the Minister has no right or obligation to intervene in the contractual relationship between the Oakbay Group and the Banks. This concession is already made on 24 May 2016, some 5 months before the Minister launched the present Application.

85.

Despite the fact that the Oakbay Group expressly concedes the legal issue on 24 May 2016, the Minister proceeded to obtain a second legal opinion from Mr Gauntlett dated 29 May 2016 ("the Second Opinion").<sup>57</sup> The Second Opinion is, in essence, a repetition of the circumstances prevailing under the First Opinion and it did not disclose any new information which the Minister did not have on receipt of the First Opinion. The Second Opinion concludes that "[t]he regulatory system does not provide a mechanism through which the Minister may intervene at the instance of Oakbay"

<sup>58</sup> Paginated Bundle, Vol 1, p 51, line 6.

<sup>&</sup>lt;sup>57</sup> Paginated Bundle, Vol 1, p 53, Annexure "F".

Accordingly, and on 29 May 2016, not only had the Minister received two legal opinions confirming that he had no right or obligation to intervene, but the Oakbay Group expressly conceded that he had no such right or obligation.

87.

The Minister further relies on a letter dated 28 June 2016, written by Mr Stephan Nel, the CEO of Sahara Computers, to the Minister, in which Mr Nel sought a meeting with the Minister so that he could "then brief the rest of my colleagues and our employees on what concrete steps are being made to secure the future of my remaining 103 employees, their families and dependants".58 Mr Nel does not request or demand that the Minister exercise any government "powers of intervention".

88.

The Minister states in his Founding Affidavit that he was pressed (by Mr Nel) to serve the national purpose.<sup>59</sup> It goes without saying that a Minister must serve the national purpose. The Minister himself states that he is acting in the public interest. 60

<sup>58</sup> Paginated Bundle, Vol 1, p 66, Annexure "G".

<sup>&</sup>lt;sup>59</sup> Paginated Bundle, Vol 1, p 15, para 18. <sup>60</sup> Paginated Bundle, Vol 1, p 19, para 29.

Mr Nel also records the following in his letter: "As an addendum to this – following our engagement with you on Sunday evening [referring to a radio interview on PowerFM] I have also been the recipient of a threatening phone call aggressively warning against any further appeals to you regarding the reopening of Oakbay's bank accounts". 61

90.

The Minister attempts to argue that this passage from Mr Nel's letter constitutes an appeal by Mr Nel to the Minister regarding the reopening of the Oakbay Group's bank accounts.<sup>62</sup> Having regard to the express contents of this paragraph there can never be any suggestion that this passage is an appeal from Mr Nel to the Minister. It is clear that Mr Nel informs the Minister of a threat received by Mr Nel. The Minister's interpretation of this passage is clearly incorrect and untenable.

91.

It is submitted that the letter of Mr Nel similarly does not support the Minister's allegations that there were demands for intervention from the Oakbay Group.

<sup>&</sup>lt;sup>e1</sup> Paginated Bundle, Vol 1, p 67, line 1-4.

<sup>&</sup>lt;sup>62</sup> Applicant's Heads of Argument, p 6, para 12; Applicant's Heads of Argument, p8, para 16, line 3 –

Further correspondence between the parties is briefly referred to by the Minister in his Founding Affidavit.<sup>63</sup> None of the letters written by Mr Howa demands intervention from the Minister.<sup>64</sup>

93.

It is clear from the correspondence between the parties that Mr Howa and the Oakbay Group never demanded intervention from the Minister. To the contrary, the Minister on his own version tenders assistance<sup>65</sup>, holds a meeting with Mr Howa<sup>66</sup> and indicates that he will schedule a further meeting with Mr Howa<sup>67</sup>.

94.

The Minister's allegation that "Oakbay demanded that on behalf of Government I intervene with the banks to achieve a reversal of their decisions" does not fit in with the factual sequence of events and the supporting correspondence between the parties.

<sup>&</sup>lt;sup>63</sup> Paginated Bundle, Vol 1, p 18, para 26.

<sup>&</sup>lt;sup>64</sup> Paginated Bundle, Vol 1, p 80, Annexure "L"; Paginated Bundle Vol 1, p 85, Annexure "O".

<sup>65</sup> Paginated Bundle, Vol 1, p 46, Annexure "D";

<sup>66</sup> Paginated Bundle, Vol 1, p 45, para 46;

<sup>&</sup>lt;sup>67</sup> Paginated Bundle, Vol 1, p 83.

95.

It is clear that Mr Howa and the Oakbay Group did not demand that the Minister intervene in the relationship between the Oakbay Group and the Banks, as alleged or at all.

96.

Moreover, the Oakbay Group expressly conceded that the Minister has no right or obligation to intervene in the contractual relationship between the Oakbay Group and the Banks as far back as 24 May 2016.

97.

It is significant that in neither of the opinions is there any suggestion that the Minister should approach the court for a declarator. Counsel are quite forthright in their opinions expressed, and it is surprising indeed that the Minister, armed with the two opinions and the knowledge of the express concession by the Oakbay Group, decided to launch this Application.

98.

We turn now to the merits of the Applications to Strike.

99.

The Oakbay Group has filed two Applications to Strike certain paragraphs in and annexures to the Founding and Replying Affidavits filed on behalf of the Minister on the grounds that they are scandalous, vexatious, irrelevant and / or amount to inadmissible hearsay evidence ("the objectionable matter").68

100.

This portion of the Heads of Argument will deal, firstly, with the relevant legal principles applicable to an Application to Strike, secondly, with the objectionable matter as set out in the First Application to Strike, and thirdly, with the objectionable matter as set out in the Second Application to Strike, and lastly, with the distinction between the Banks' decision and the relief sought by the Minister.

#### The relevant legal principles

101.

Two requirements must be satisfied before an Application to Strike out matter from any affidavit can succeed: firstly, the matter sought to be struck out must indeed be scandalous, vexatious or irrelevant; secondly, the court must be satisfied that if such

<sup>&</sup>lt;sup>58</sup> Paginated Bundle, Vol 3, p 1194; Paginated Bundle Vol 13, p 1435.

matter is not struck out the party seeking such relief would be prejudiced.<sup>69</sup> Scandalous or irrelevant matter may be defamatory of the other party and the retention of such matter will therefore be prejudicial to such party.<sup>70</sup>

102.

The meaning of the terms scandalous, vexatious and irrelevant has been stated as follows:<sup>71</sup>

- 102.1. Scandalous matter allegations which may or may not be relevant but which are so worded as to be abusive or defamatory;
- 102.2. Vexatious matter allegations which may or may not be relevant but are so worded as to convey an intention to harass or annoy;
- 102.3. Irrelevant matter allegations which do not apply to the matter in hand and do not contribute in one way or the other to a decision of such matter.

<sup>&</sup>lt;sup>69</sup> Beinash v Wixley 1997 (3) SA 721 (SCA) at 733B; Securefin Ltd v KNA Insurance and Investment Brokers (Pty) Ltd [2001] 3 All SA 15 (T); Tshabalala-Msimang v Makhanya [2008] 1 All SA 509 (W) at 516g-h; National Director of Public Prosecutions v Zuma 2009 (2) SA 277 (SCA) at 308B; Gold Fields Ltd v Motley Rice LLC 2015 (4) SA 299 (GP) at 325D – 328D.

<sup>70</sup> Vaatz v Law Society of Namibia 1991 (3) SA 563 (Nm) at 567B.

<sup>&</sup>lt;sup>71</sup> Vaatz v Law Society of Namibla 1991 (3) SA 563 (Nm) at 566C – E; Tshabalala-Msimang v Makhanya [2008] 1 All SA 509 (W) at 516e-f; Bredenkamp v Standard Bank of South Africa Ltd 2009 (5) SA 304 (GSJ) at 321C – E.

103.

The Oakbay Group has objected to the inclusion several paragraphs in and annexures to the Founding and Replying Affidavits filed on behalf of the Minister on the grounds that they are scandalous, vexatious, irrelevant and / or amount to inadmissible hearsay evidence. We will now deal with each of the Applications to Strike in turn.

#### The First Application to Strike

104.

The Oakbay Group objected to Paragraph 19 of the Minister's Founding Affidavit. It was show previously in these Heads of Argument that the Oakbay Group never demanded that the Minister intervene in the relationship between the Oakbay Group and the Banks. The allegation contained in this paragraph of "continued assertions by Oakbay that ... I should intervene in, or exert pressure upon, the banks regarding their closure of the Oakbay accounts" is accordingly false and is liable to be struck out as being scandalous and vexatious.

105.

The Oakbay Group objected to Paragraph 27 of the Minister's Founding Affidavit and Annexures "P1" and "P2" thereto. Paragraph 27 serves to introduce Annexures "P1"

<sup>&</sup>lt;sup>72</sup> Paginated Bundle Vol 1, p 15, para 19.

<sup>&</sup>lt;sup>73</sup> Paginated Bundle Vol 1, p 18, para 27.

and "P2" and attempts to justify their inclusion into the Founding Affidavit as an illustration of "the increasingly serious state of affairs which has arisen".

106.

It is conceded by the Minister that this case concerns a pure legal question:74 is the Minister authorised or obliged to intervene in banker-client relationships if bank accounts are closed? There should be no reason for the Minister to attempt to illustrate the "increasingly serious state of affairs" where this case only concerns a pure legal question as aforesaid. It is submitted that the contents of Paragraph 27 and Annexure "P1" and "P2" is irrelevant to the Minister's Application which only relates to the determination of a purely legal question.

107.

The allegations contained in this paragraph also create the impression that the Oakbay Group is dishonest in their business dealings. The "suspicious transaction reports" received by the FIC (in terms of a statutory duty imposed on the Banks) is used by the Minister to illustrate an alleged "increasingly serious state of affairs". It is not merely used to show that there was "suspicious transaction reports", it is purposefully inserted into the Minister's Founding Affidavit to cast the Oakbay Group in a bad light. This is illustrated by the media articles published shortly after the Minister's Application was filed.75

75 Paginated Bundle Vol 13, p 1257.

<sup>74</sup> Paginated Bundle Vol 14, p 1335, para 49.

It is submitted that these allegations are defamatory and irrelevant and should be struck out. The intent of the Minister is further demonstrated by his selection of the report with the biggest monetary value from Annexure "P2" (obviously to create atmosphere in the Founding Affidavit), being the amount of R1,3 billion in relation to the Optimum Mine Rehabilitation Trust. The Oakbay Group has illustrated that there is nothing untoward about the amount of R1.3 billion that was transferred from a Standard Bank account to an account held with the Bank of Baroda upon the closure of the Oakbay Group's account with Standard Bank.<sup>76</sup> These allegations are defamatory and irrelevant and are liable to be struck out.

# The Second Application to Strike

109.

The Oakbay Group objected to Paragraphs 18, 24 and 27 of the Minister's Replying Affidavit.<sup>77</sup> The Minister misleadingly refers to "detailed adverse findings by the Public Protector".<sup>78</sup>

<sup>&</sup>lt;sup>76</sup> Paginated Bundle Vol 11, p 1059 – 1061, para 178 – 183; Paginated Bundle Vol 15, p 1451 – 1453, para 19 – 25.

<sup>&</sup>lt;sup>77</sup> Paginated Bundle Vol 15, p 1435.

<sup>&</sup>lt;sup>78</sup> Paginated Bundle Vol 14, p 1326, last unnumbered bullet point.

The aforesaid remark could never be a simple misunderstanding or a misreading of the Report. There is a similar mischievous and misleading remark in paragraph 24 of the Minister's Replying Affidavit where he states that "yet it is Oakbay, the Public protector has found, that influences political appointments".

111.

In paragraph 27 of the Minister's Replying Affidavit the Minister relies on the Report to sustain a submission that it was "found" in the Report that the Deputy Minister of Finance was taken to the Saxonworld home of the Guptas where "he was offered money and promotion as Minister of Finance". 79

112.

It is common cause that the Report clearly suggests a commission of inquiry headed by a Judge. The Report did not make adverse findings as alleged and suggested by the Applicant in the aforementioned paragraphs. Apart from the fact that the Report is used by the Applicant to cloud the issues even further, the reference to the "findings" in the Report is inaccurate, misleading and mischievous at best.

<sup>79</sup> Paginated Bundle Vol 14, p 1329, para 27.

We reiterate that this case concerns a pure legal question. This was conceded by the Minister. The reference by the Minister to the Report is irrelevant to the determination of the pure legal question. The Minister insists on introducing this evidence in reply despite the fact that the Oakbay Group has expressly stated in its Answering Affidavit that this is not the correct forum to deal with allegations contained in the Report. The references to "findings" of the Report are also defamatory.

114.

Accordingly, paragraphs 18, 24 and 27 of the Minister's Founding Affidavit are liable to being struck on the grounds that they are scandalous, vexatious and irrelevant.

<u>Distinction between relief sought by the Minister and the Banks' decision to close the</u>

Oakbay Group's accounts

115.

It is important to draw a distinction between the relief sought by the Minister, that he is not by law empowered or obliged to intervene in the relationship between the Oakbay Group and the Banks on the one hand, and the legitimacy of the Banks' decisions to close the Oakbay Group's accounts on the other.

 <sup>&</sup>lt;sup>80</sup> Paginated Bundle Vol 14, p 1335, para 49.
 <sup>81</sup> Paginated Bundle Vol 11, p 1064, para 196.

The question of whether the Banks legitimately closed the bank accounts of the Oakbay Group has no bearing on the determination of a pure legal question as conceded by the Minister.<sup>82</sup> The Minister should in fact remain neutral on the question of whether the banks' legitimately closed the bank accounts of the Oakbay Group.

117.

There can be no doubt that the Minister in his Founding Affidavit creates the impression that he supports the Banks' conduct. The Minister's comments that Annexure "P1" and "P2" "reflects the increasingly serious state of affairs which has arisen" conclusively show that the Minister has indeed sided with the Banks on the question aforesaid. This partiality on behalf of the Minister is improper.

118.

The legitimacy of the Banks' closure of the Oakbay Group's accounts is not an issue in this Application. Despite this, the Minister attempts to justify his entitlement to the declarator by illustrating the "serious state of affairs". The purported "serious state of affairs" can only have a bearing on the legitimacy of Banks' closure of the Oakbay Group's accounts and not on the Minister's entitlement to the declarator. As conceded by the Minister, this Application concerns the determination of a pure legal question.

<sup>82</sup> Paginated Bundle Vol 14, p 1335, para 49.

The fact that the purported "serious state of affairs" has no bearing on the pure legal question further supports the Oakbay Group's Applications to Strike.

120.

It is submitted that the inclusion of all the aforementioned scandalous, vexatious and irrelevant matter confirms the Oakbay Group's contention that the Minister is using this Application to fight a political war

# THE HEARSAY EVIDENCE OF JONAS, ONLY BELATEDLY CONFIRMED

121.

There are two aspects of hearsay evidence which the applicants have raised in this application and which call for this Court to make a ruling on the admissibility or otherwise of the evidence in question:

- 121.1. The first relates to the certificate (P9); and
- 121.2. The second relates to the failure to file any confirmatory affidavit of Mr Jonas relating to the purported meeting between himself and Mr Ajay Gupta, (and the belated attempt to remedy this failure).

These are dealt with in turn.

122.

Section 39 of the FIC Act,<sup>83</sup> is headed "Admissibility as evidence of reports made to Centre". It states:

"A certificate issued by an official of the Centre that information specified in the certificate was reported or sent to the Centre in terms of section 28, 29, 30 (2) or 31 is, subject to section 38 (3), on its mere production in a matter before a court admissible as evidence of any fact contained in it of which direct oral evidence would be admissible." (emphasis added).

123.

In this case, the certificate is not being used as "evidence" on any issue relevant to the Minister's Application (as required by section 39 of the FIC Act) but rather to support the Minister's spurious allegations of the "increasingly serious state of affairs".84

<sup>83</sup> Financial Intelligence Centre, Act 38 of 2001.

<sup>84</sup> Minister's Founding Affidavit, Paginated Bundle Vol 1, p.15, para 19.

In these premises, the contents of the report are hearsay by nature, based as they are on a reporter's "suspicions". 85 By definition, such a report cannot prove anything about "the state of affairs" at Oakbay or any of its affiliates and the Minister's attempts to utilise the certificate to support this allegation of an "increasingly serious state of affairs" is misguided.

125.

The certificate contains no detail as to the purported "suspicious transaction reports" and the majority of transactions therein (particularly the "multiple transaction" amounts) are untraceable — being, as they are, hearsay reports. This denies the Oakbay Group of an opportunity to explain and refute the allegations levelled against them through the certificate.

126.

On this ground, too, the certificate is liable to be set aside.

<sup>85</sup> Answering Affidavit, Paginated Bundle Vol 11, p.1049, para 147.4.

When the Minister made the allegations regarding the purported meeting between Mr Ajay Gupta and Mr Mcebisi Jonas, he did so without personal knowledge of the events on which he reported, and without obtaining an affidavit confirming such events from Mr Jonas who, as was pointed out in the Supplementary Answering Affidavit filed by the Oakbay Group, was likely down the corridor from the Minister.86

128.

The principles relating to hearsay evidence and the importance of confirmatory evidence being put before the Court are well established. In *Gerhardt v State President and Others* 1989 (2) SA 499 (T), Goldstone J held:

"That interpretation of the agreement, Mr Doctor points out, has not been answered by the State President who has, for whatever reason, seen fit not to file any affidavit in this matter. He seeks to rely upon the affidavit of the second respondent, i.e. the Commissioner of Prisons. For that purpose, for what it is worth, he gave an authority to the Commissioner of Prisons which reads that:

'In my hoedanigheid as Staatspresident van die Republiek van Suid-Afrika magtig ek vir Willem Hendrik Willemse, die Kommisaris van Gevangenisse,

<sup>&</sup>lt;sup>86</sup> Replying Affidavit, Paginated Bundle Vol 15, p. 1460, para 7.

tweede respondent, om namens en ten behoewe van my 'n antwoordende 2333 eedsverklaring aft te le in die bogemelde aansoek.'

Clearly one person cannot make an affidavit on behalf of another and Mr Hattingh, who appears on behalf of the three respondents, concedes correctly that I can only take into account those portions of the second respondent's affidavit in which he refers to matters within his own knowledge. Insofar as he imputes intentions or anything else to the State President, it is clearly hearsay and inadmissible." (Emphasis added).

129.

Clearly, then, the portions of the Minister's affidavits which in any way venture beyond the events and facts which fall within the Minister's personal knowledge constitute inadmissible hearsay and fall to be rejected. Indeed, the Constitutional Court in *President of the Republic of South Africa v SARFU*, <sup>87</sup> at paragraph [105], accepted that hearsay evidence falls to be ignored, even in the absence of an objection or an Application to Strike Out, for that matter.

It is trite that an applicant must stand or fall by his founding affidavit, 88 and "back-door" introductions of new arguments in reply should be rejected.89

131.

Accordingly, the court may ignore or strike out matter in the Replying Affidavit of the Minister that should have been contained in the Founding Affidavit, and should reject entirely the "supplementary affidavit" filed by Mr Jonas in an attempt to cure the deficiencies in the Minister's evidence. As Epstein AJ held in *Union Finance Holdings Ltd v IS Mirk Office Machines II (Pty) Ltd*, 90 the purpose of the requirement that the Applicant must set out its cause of action as well as the evidence upon which it relies in its Founding Affidavit is to ensure that disputes on motion are resolved in an orderly fashion:

"The respondent is apprised in a founding affidavit of the case it has to meet and is afforded one opportunity only, save in exceptional circumstances, to deal with

<sup>88</sup> Director of Hospital Services v Mistry 1979 (1) SA 626 (A) at 635-636.

<sup>&</sup>lt;sup>89</sup> See In this regard the leading dictum in *Swissborough Diamond Mines (Pty) Ltd v Government* of the Republic of South Africa 1999 (2) SA 279 (T) where Joffe J stated:

<sup>323</sup> F-J – 324 A "It is trite law that in motion proceedings the affidavits serve not only to place evidence before the Court, but also to define the issues between the parties. In doing so the issues between the parties are identified. This is not only for the benefit of the Court but also, and primarily, for the parties. The parties must know the case that they must meet and in respect of which they must adduce evidence in the affidavits....

An applicant must accordingly raise the issues upon which it would seek to rely in the founding affidavit. It must do so by defining the relevant issues and by setting out the evidence upon which it relies to discharge the onus of proof resting on it in respect thereof."

90 2001 (4) SA 842 (W)

the applicant's cause of action and evidence in its answering affidavit. The applicant is afforded an opportunity in a replying affidavit to reply only to what the respondent has stated and may not raise new matter or new issues. Strict adherence to this rule encourages litigating parties to consult properly before launching an application, in order to establish fully the facts which in turn give rise to the cause of action. A failure to enforce this principle rigidly results in the papers ultimately becoming voluminous and being in a state of disarray, replete with cross-references. It creates additional work for Judges who are required to read affidavits dealing with matters which are later simply jettisoned. It is also wasteful of both costs and productive time. Most important of all, adherence to the principle ensures that disputes between litigants are resolved in terms of a procedure which is just, orderly and well recognised. Only in exceptional circumstances and for sound reasons should the procedure be deviated from."

132.

There are no "exceptional circumstances" and "sound reasons" which justify the belated and improper filing of the evidence by Mr Jonas – or none which have been put up by the Minister. There is no explanation why Mr Jonas' evidence was not previously procured, notwithstanding that Mr Jonas clearly works in close proximity to the Minister and the latter manifestly is unfettered access to him. On this ground, too, Mr Jonas's belated affidavit falls to be struck out.

# THE LEGAL PRINCIPLES RELEVANT TO THE GRANTING OF DECLARATORY RELIEF

Section 21(1)(c) of the Superior Courts Act

133.

The relief sought by the Minister is declaratory relief sought in terms of section 21(1)(c) of the Superior Courts Act. Section 21(c) states:

"A Division has jurisdiction over all persons residing or being in, and in relation to all causes arising and all offences triable within, its area of jurisdiction and all other matters of which it may according to law take cognisance, and has the power – in its discretion, and at the instance of any interested party, to inquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination."

134.

The requirements for the granting of declaratory relief were considered by Murphy J (for a full bench) in *Minister of Co-operative Governance and Traditional Affairs* and others v Sigcau and others.<sup>91</sup> In that matter, the Court emphasised that:<sup>92</sup>

<sup>92</sup> At para 45.

<sup>91 [2016] 3</sup> All SA 588 (GP).

"The court has a discretion whether or not to grant relief in terms of section 21(1)(c) of the Superior Courts Act. That discretion must be exercised with due regard to the circumstances and there can be no proper exercise of the discretion if the essential elements of a declarator are not fulfilled. The exercise involves a two stage inquiry: first, the court must be satisfied that the applicant has an interest in an existing, future or contingent right or obligation; and, secondly, if the court is satisfied that such an interest exists, it must be considered whether or not the order should be granted. In the exercise of its discretion, the court may decline to deal with the matter where there is no actual dispute, or where the question raised is hypothetical, abstract or academic."

135.

# In Ex parte Ginsberg<sup>93</sup> Greenberg J said:

"The Legislature must have been aware of the fact that there is no dearth of advocates and attorneys competent to advise upon legal problems and there is no reason to think that it intended to set up the Courts as consultative or advisory bodies, in competition with members of these respected professions."

A court will not grant declaratory relief when the position is clear in terms of statute.94

137.

In this Application, the Minister fails at both hurdles for the test for declaratory relief which must be established prior to the question whether the court should exercise its discretion. In the first instance, there is no "existing, future or contingent right or obligation" of the Minister which is challenged by any of the parties in this Application. There is no case or controversy that requires this Court to take any action. To justify this Application, the Minister contends that Mr Nazeem Howa ("Mr Howa"), the previous CEO of Oakbay Investments (Pty) Ltd and CEO of the Group of Companies, made "demands" that the Minister exercised his governmental authority to intervene and reverse the action taken by the Banks. A reading of the correspondence in question reveals that this was not the case. Mr Howa never disputed the Minister's legal advice that he had no legal right to interfere with the decision made by the Banks.

<sup>&</sup>lt;sup>94</sup> Garment Workers Union, Western Province v Industrial Registrar 1967 (4) SA 316 (T) and Sex Workers Education and Advocacy Task Force v Minister of Safety and Security 2009 (6) SA 513 (WCC) at paras 43-5.

Our superior Courts have regularly expressed the view that it is not their function to furnish opinions or advice to parties, or to make rulings on abstract, academic or hypothetical questions leading to no concrete or tangible results. See Ex parte Nell 1963 (1) SA 754 (A) at 760B; South African Mutual Life Assurance Society v Anglo-Transvaal Collieries Ltd 1977 (3) SA 642 (A) at 658H; Electrical Contractors' Association (South Africa) and Another v Building Industries Federation (South Africa) (2) 1980 (2) SA 516 (T) at 519H - 520C; Family Benefit Friendly Society v Commissioner for Inland Revenue and Another 1995 (4) SA 120 (T) at 125E - G; Zantsi v Council of State, Ciskei, and Others 1995 (4) SA 615 (CC) (1995 (10) BCLR 1424) in para [7] at 619B; J T Publishing (Pty) Ltd and Another v Minister of Safety and Security and Others 1997 (3) SA 514 (CC) (1996 (12) BCLR 1599) in para [15] at 525F; Eagles Landing Body Corporate v Molewa NO and Others 2003 (1) SA 412 (T) in para [59] at 430D - G; Mohamed and Another v President of the Republic of South Africa and Others 2003 (4) SA 64 (C) in para [45] at 85I - J.

Moreover, even if the Minister is able to demonstrate the essential elements of the declarator (which is denied), in any event this Court should exercise its discretion to refuse the Minister's invitation to enter the political fray which is currently being played out in the South African media via this Court Application. A court should be slow to step into the political arena where there is no need for it to do so.

#### Conclusion on the declaratory relief

139.

On these principles, and applying the facts which have been set out as above, this Court should decline to grant the declaratory relief. In summary:

- 139.1. This Application has been brought for an improper purpose;
- 139.2. The relief sought by the Minister relates to <u>other</u> executive conduct, in respect of facts and persons who are not before the Court;
- 139.3. There is no existing or live controversy between the parties;
- 139.4. The relief is moot;
- 139.5. The Minister has failed to establish the essential elements of the declaratory relief which he seeks; and

139.6. The Minister's attempts to justify the launching of this Application are unconvincing.

# THE STANDARD BANK RELIEF

140.

Standard Bank filed an Explanatory Supporting Affidavit consisting of some 79 pages. 95 Standard Bank in essence attempts to justify its decision to close the bank accounts of the Oakbay Group, 96 an issue which is wholly irrelevant to the declaratory relief sought in the Minister's Application.

141.

Standard Bank goes further and seeks its own declarator that all members of the Executive have no power or obligation to interfere in the affairs of the Oakbay Group and its bankers.<sup>97</sup>

<sup>95</sup> Paginated Bundle Vol 3, p 220.

Paginated Bundle Vol 3, p 255, para 74.
 Paginated Bundle Vol 4, p 301, prayer 1.

Standard Bank has failed to join a number of relevant parties including the other members of the Executive and the Gupta Family, all of whom would have an interest in the relief sought by Standard Bank, 98

143.

This view is supported by the President of the Republic of South Africa. In a letter dated 7 February 2017 addressed to Bowman Gilfillan Attorneys, the State Attorney, acting on behalf of the President, states that:99

"Contrary to the rules of court and quite inappropriately if not opportunistically your client, Standard Bank of South Africa ... has sought to introduce our client as a party to the litigation. Our client is disheartened by the fact that your client ... would resort to such a process which not only undermines the rules of court, but is unfair and unjust in relation to our client's rights.

Our client has been advised not to take any steps in reaction to your client's irregular processes and will resist the temptation to become involved at all. Should Standard Bank wish to bring an application against our client, it

99 Paginated Bundle Vol 15, p 1442.

<sup>98</sup> Paginated Bundle Vol 11, p 1065, par 198.

should do so properly and in terms of the processes contemplated in the rules of court and the law"

144.

Not only have interested parties not been joined, but the purported Application by Standard bank has in no way complied with the Uniform Rules of Court, more specifically Rule 6.

145.

It is submitted that the Standard Bank Application is completely irregular and should be struck with costs.

#### CONCLUSION

146.

In the premises, this Court should decline any relief, grant costs and protect itself from abuse.

CE PUCKRIN SC S PUDIFIN-JONES JF VAN DER MERWE 24 February 2017 Chambers, Pretoria and Durban

# IN THE HIGH COURT OF SOUTH AFRICA (GAUTENG DIVISION, PRETORIA)

Case no 80978/16

In the matter between:

MINISTER OF FINANCE

and

OAKBAY INVESTMENTS (PTY) LTD AND TWENTY OTHERS



#### JOINT PRACTICE NOTE

## 1. Names of parties and case number

The names of the parties and the case number appear from the heading.

# 2. Names and telephone numbers of all counsel

Party	Counsel and Cell Phone Number
Applicant	JJ Gauntlett SC (082 413 9093)
	FB Pelser (079 582 7728)
1st to 4th, 6th, 7th, 11th, 12th	C Puckrin SC (083 250 6939)
and 14th Respondents	S Pudifin-Jones (082 578 0008)
	F van der Merwe (082 375 4628)

10th Respondent	J Blou SC (082 600 5434)
	S Stein SC (082 080 8204)
	L Zikalala (084 412 2743)
15th Respondent	D Unterhalter SC (082 569 2987)
	S Budlender (083 791 2912)
	N Ferreira (076 391 3228)
	A Msimang (076 822 2181)
16th Respondent	AE Bham SC (082 576 1485)
	L Sisilana (083 450 3338)
17th Respondent	V Maleka SC (083 260 0790)
	T Ngcukaitobi (083 401 6802)
18th Respondent	APH Cockrell SC (083 296 4270)
	M Stubbs (079 886 9520)
19th and 20th Respondents	W Trengove SC (082 337 0852)
	K Hofmeyr (082 820 2157)
1	L Luthuli (082 748 5996)
21st Respondent	NGD Maritz SC (082 453 8470)
	MM le Roux (079 527 4258)
16th Respondent  17th Respondent  18th Respondent  19th and 20th Respondents	S Budlender (083 791 2912)  N Ferreira (076 391 3228)  A Msimang (076 822 2181)  AE Bham SC (082 576 1485)  L Sisilana (083 450 3338)  V Maleka SC (083 260 0790)  T Ngcukaitobi (083 401 6802)  APH Cockrell SC (083 296 4270)  M Stubbs (079 886 9520)  W Trengove SC (082 337 0852)  K Hofmeyr (082 820 2157)  L Luthuli (082 748 5996)  NGD Maritz SC (082 453 8470)

# 3. Date of hearing

The matter is enrolled for hearing on 28-30 March 2017 by special allocation.

#### 4. Nature of motion

The applicant, the Minister of Finance, seeks a declarator that he is not by law empowered or obliged to intervene in the relationship between the Respondents.

While supporting the applicant, the 17th Respondent (Standard Bank) seeks additional relief that no member of the National Executive is empowered to intervene in any decision by Standard Bank to terminate its banking relationships with Oakbay and its associated entities.

#### 5. Urgency

The matter is not urgent, but because of its importance was set down by the Deputy Judge President per special allocation.

# 6. <u>Issues to be determined</u>

#### <u>Merits</u>

- (1) Whether the Minister is a person interested in an "existing, future or contingent right or obligation"; and, if so, whether the case is a proper one for the exercise of the court's discretion to grant the declaratory relief sought.
- (2) The accuracy of the legal conclusion forming the subject-matter of the declaratory order sought is not in issue. Accordingly the *content* of the declarator is common cause.

- (3) Whether Oakbay's concession of the correctness of the declaratory order sought constitutes a proper basis for this Court's refusal, in its discretion, to grant the declaratory relief.
- (4) Whether Oakbay's conspiracy theory is a tenable basis for refusing to grant the declaratory relief.
- (5) Whether the doctrine of separation of powers militates against or in favour of granting the declaratory relief.
- (6) Whether the extended relief sought by Standard Bank ought to be granted.
- (7) The tenth respondent opposes the relief sought by Standard Bank (as do the Oakbay respondents, who adopt the arguments of the tenth respondent in this regard), by arguing
  - 7.1. The relief sought by Standard Bank is incompetent given that there are no persons before the Court against whom the order sought by Standard Bank would be binding and those persons whom the order seeks to bind have not been cited or joined as respondents in respect of Standard Bank's relief;
  - 7.3. The "application" for extended relief by Standard Bank is fatally defective in that it has neither been issued nor served;
  - 7.4. The relief is incompetent as it is unduly vague and overbroad. There is also a concern that the relief, if granted in its terms, would implicate the separation of powers doctrine and would in substance constitute a premature and impermissible attempt to interdict the exercise by members of the National Executive of statutory powers flowing from legislation

whose constitutional validity is not challenged, including the convening of a commission of inquiry.

### Ancillary issues

- (8) Whether Oakbay's points on joinder or misjoinder are valid; and, if so, whether the declaratory relief should be suitably restricted to exclude the fifth, eighth, ninth and/or thirteenth respondents.
- (9) Whether Oakbay's strike-out application should be granted.
- (10) Whether the Minister of Finance's strike-out application should be granted.
- (11) Whether Oakbay's supplementary affidavit and the Minister of Finance's ancillary strike out application (including the further affidavit deposed to by the Deputy Minister of Finance) should be admitted.

#### 7. Relief sought by the applicant

The Minister of Finance asks that

- (1) his application for declaratory relief be granted;
- (2) his strike-out application be granted;
- (3) Oakbay's strike out application be dismissed;
- (4) costs, including the costs of two counsel, be granted in his favour on a punitive scale.

The 15th, 16th, 17th and 18th Respondents support the relief sought by the Minister of Finance. In addition to supporting the declaratory relief sought by the applicant, the 17th Respondent asks that the extended declaratory relief that it seeks be granted.

### 8. <u>Duration</u>

Three days (as per the special allocation).

### 9. The papers

The application papers (including supplementary affidavits) span 16 volumes and consist of 1492 pages. For purposes of the Minister's application the essential parts of the papers are:

The notice of motion	Record vol 1 pp 2-3
The Minister's founding affidavit	Record vol 1 pp 9-20
The 16th Respondent's (FirstRand's) supporting affidavit	Record vol 2 pp 98 - 110
The 18th Respondent's (Nedbank's) supporting affidavit	Record vol 2 pp 128 - 154
The 17th Respondent's (Standard Bank's)	
supporting affidavit	Record vol 3 pp 222 - 298
The 15th Respondent's (ABSA's) supporting affidavit	Record vol 6 pp 499 - 523
The 19th Respondent's (Governor of SARB's) affidavit	Record vol 7 pp 604 - 610
The 20th Respondent's (Registrar of Bank's) affidavit	Record vol 7 pp 619 - 627
Oakbay's answering affidavit	Record vol 11 pp 995 - 1067
The Minister's replying affidavit	Record vol 14 pp 1320 -1376
The 21st Respondent's affidavit of Pieter Smit	Record vol 15 pp 1418 - 1425

For purposes of the additional relief sought by Standard Bank, in addition to the parts of the papers mentioned above, an essential part of the papers is:

The 10<sup>th</sup> Respondent's (VR Laser) answering affidavit Record vol 10 pp 883 – 903

3 March 2017

THE STANDARD BANK OF SOUTH AFRICA

**NEDBANK LIMITED** 

**GOVERNOR OF THE RESERVE BANK** 

**REGISTRAR OF BANKS** 

**DIRECTOR OF FINANCIAL INTELLIGENCE** CENTRE

Seventeenth Respondent

Eighteenth Respondent

Nineteenth Respondent

Twentieth Respondent

Twenty First Respondent

#### **FILING NOTICE**

TAKE NOTICE THAT that the tenth respondent presents for filing herewith its heads of argument.

Signed at JOHANNESBURG on this the 24th day of FEBRUARY 2017

Stein Scop Attorneys Inc.

Attorneys for the Tenth Respondents

Ground Floor

18 Melrose Boulevard

Melrose Arch, Johannesburg

Tel: (011) 380 8080 Direct: (011) 380 8070

Mobile: 071 606 2313

Email: glenn@steinscop.com

sian@steinscop.com Our REF: G Stein

C/O Brooklyn Place

Cnr Bronkhorst and Dey Street,

Brooklyn, Pretoria, South Africa, 0001

PO Box 499, Pretoria 0001

Docex 110, Pretoria

T: +27 012 4521300

F: +27 086 6233886

Reference: Bridget Moatshe

To: The Registrar Gauteng Division, **Pretoria** 

And to: The State Attorney Attorney for the Applicant SALU Building 255 Francis Baard Street Pretoria

Tel: (012) 309 1575 Fax: (012) 309 1649

Fax to Email: 086 629 3073 Email: TNhlanzi@justice.gov.za Ref: 2427/16/232.Ms T Nhlanzi

Received on:	2017
For	

And to: Van Der Merwe & Associates

Attorneys for the first, second, third, fourth, sixth, seventh, eleventh, twelfth and fourteenth Respondents 62 Rigel Avenue North Watekloof, Pretoria

Ref: Mr G VD Merwe/st/078 Tel: (012) 343 5432

Email: simone@vdmass.co.za

Received on:	 2017
For:	

Received on:	2017
For:	
ht South Africa Inc eenth Respondent ndton tonrosefulbright.com 13954	2017
13954	

For:

And to:  Baker Mackenzie  Attorneys for the Eighteenth Respondent Tel: (011) 911 4300  Email: gerhard.rudolph@bakermckenzie.com; widaad.ebrahim@bakermckenzie.com and callum.oconnor@bakermckenzie.com Ref: G Rudolph/CO clo Adams & Adams Adams & Adams Adams & Adams Adams & Dlace Lynwood Bridge 4 Daventry Street Lynwood Manor Tel: (012) 432 6000 Ref: Adelle Jordaan		
	Received on:	_2017
	For:	
And to:  Werksmans Attorneys Attorneys for the Nineteenth and Twentieth Respondents 155 5th Street, Sandton Fel: (011) 535 8000 Fax: (011) 535 8600 Ref: Mr C Manaka / Mr C Moaitis Email: cmanaka@werksmans.com and emoraitis@werksmans.com Ref: SOUT 3267.63 E/O Mabuela Incorporated Charter House 179 Bosman Street Pretoria Central Fel: (012) 324 3966 Email: mabuela@tiscall.co.za	Received on:	. 2017
		-

For:

And to:  Bowman Gilfillan  Attorneys for the Seventeenth Respondent 165 West Street Sandton, 2146 Tel: (011) 669 9000 Email: clement.mkiva@bowmanslaw.com c/o Boshoff Attorneys Ground Floor Hazelwood Gate Office Park 14 Oaktree Avenue Cnr Oaktree Avenue and Dely Road Hazelwood		
	Received on:20	17
	For:	
And to:  MacRobert Attorneys  Attorneys for the Twenty-First Respondent MacRobert Building Cnr Jan Schoba & Justice Mohamed Street Tel: (012) 425 3436  Email: ghay@macrobert.co.za Ref: G K Hay	Received on:20	17

For:

# IN THE HIGH COURT OF SOUTH AFRICA (GAUTENG DIVISION, PRETORIA)

CASE NO: 80972/2016

In the matter between -

**MINISTER OF FINANCE** 

**Applicant** 

And

OAKBAY INVESTMENTS (PTY) LTD

First Respondent

OAKBAY RESOURCES AND ENERGY LTD

Second Respondent

SHIVA URANIUM (PTY) LTD

Third Respondent

TEGETA EXPLORATION AND RESOURCES (PTY)

Fourth Respondent

LTD

JIC MINING SERVICES (PTY) LTD

Fifth Respondent

**BLACKEDGE EXPLORATION (PTY) LTD** 

Sixth Respondent

TNA MEDIA (PTY) LTD

Seventh Respondent

THE NEW AGE

Eighth Respondent

AFRICA NEWS NETWORK (PTY) LTD

Ninth Respondent

**VR LASER SERVICES (PTY) LTD** 

Tenth Respondent

ISLANDSITE INVESTMENTS ONE HUNDRED AND Eleventh Respondent EIGHTY (PTY) LTD **CONFIDENT CONCEPTS (PTY) LTD** Twelfth Respondent JET AIRWAYS (INDIA) LIMITED (INCORPORATED Thirteenth Respondent IN INDIA) SAHARA COMPUTERS (PTY) LTD Fourteenth Respondent **ABSA BANK LTD** Fifteenth Respondent FIRST NATIONAL BANK LTD Sixteenth Respondent THE STANDARD BANK OF SOUTH AFRICA Seventeenth Respondent **NEDBANK LIMITED** Eighteenth Respondent **GOVERNOR OF THE RESERVE BANK** Nineteenth Respondent **REGISTRAR OF BANKS** Twentieth Respondent DIRECTOR OF THE FINANCIAL INTELLIGENCE Twenty First Respondent **CENTRE** 

## TENTH RESPONDENT'S HEADS OF ARGUMENT

INTRODUCTION 2356

1. The tenth respondent's heads of argument deal only with the relief sought by the seventeenth respondent, the Standard Bank of South Africa ("Standard Bank") in its "notice of motion", being an order that:

"It is declared that no member of the National Executive of Government, including the President and all Members of the Cabinet, acting on their own accord and for and/on behalf of Cabinet, is empowered to intervene, in any manner whatsoever, in any decision taken by the seventeenth respondent to terminate its banking relationship with Oakbay Investment Proprietary Limited and its associated entities."

- 2. Standard Bank refers to this variously as "extended", "expanded" or "additional" relief. Whatever the phraseology adopted, it is apparent that the relief sought by Standard Bank is sought in addition to the relief sought by the Minister of Finance ("the Minister") in his application, which latter relief Standard Bank "supports" (as do the other respondent banks).
- 3. It is clear that unlike the other respondent banks, or for that matter any of the other abiding respondents<sup>2</sup>, Standard Bank is concerned that the relief sought by the Minister is too narrow and will not achieve any real purpose, let alone

<sup>&</sup>lt;sup>1</sup> Standard Bank NOM Annexure "SB1" pp 300 - 301.

<sup>&</sup>lt;sup>2</sup> Being the Governor of the Reserve Bank, the Registrar of Banks and the Director of the Financial Intelligence Centre.

the constitutional certainty that Standard Bank seeks. This is because the Minister's statement of the legal position regarding his powers and obligations insofar as they relate to "intervention" in decisions by the respondent banks to have closed the accounts of the Oakbay respondents is not contested by any party to these proceedings and can serve no practical purpose. For this reason, Standard Bank, although purporting to "support" the Minister's application really seeks to be an applicant in its own right for different relief.

- 4. The difficulty that Standard Bank faces is that its more ambitious and broader relief flounders at many levels. We demonstrate this with reference to the following headings:
- 4.1. There is no application by Standard Bank before the Court;
- 4.2. The terms of the declaratory relief sought by Standard Bank are vague and overbroad:
- 4.3. There are no admissible facts before the Court other than as appear in the Minister's founding and replying affidavits (and to the extent that parts of these affidavits are not struck out).

#### There is no application by Standard Bank before the Court

 Standard Bank asserts that it brings its "application" to have the Court decide an issue of "constitutional significance", which will have the effect of the Court determining the ambit of the powers of the members of the National Executive of Government, including the President and all Cabinet Members in connection with any decision taken by Standard Bank to terminate its banking relationship with the Oakbay Investments (Proprietary) Limited and its associated entities. It does so by way of a "notion of motion" attached to its "explanatory supporting affidavit". In other words, Standard Bank has not issued and served its "application" on any of the persons who its order would directly effect.

- 6. The defects in this approach were pertinently brought to Standard Bank's attention in the tenth respondent's answering affidavit. More specifically it was said in paragraph 16 of the tenth respondent's answering affidavit that<sup>3</sup>:
  - "16 Standard Bank's purported application is still-born:
  - 16.1 To the extent that Standard Bank wished to institute motion proceedings for substantive relief which, it should be noted, is directed at persons who are not parties to either of the two applications referred to above, it was obliged to do so through a separate process, duly issued and served on all affected parties in accordance with the Rules. This did not occur.
  - 16.2 Such a proceeding, in compliance with the Rules, would have formally given notice to all affected parties of the

<sup>&</sup>lt;sup>3</sup> 10<sup>th</sup> Respondent AA pp 889-90 para 16.

relief sought and afforded them the ordinary time periods to file an intention to oppose and answering affidavits.

This did not occur.

- 16.3 Instead, by way of an annexure to its 'Explanatory Supporting Affidavit' ('SB1'), Standard Bank set out the terms of the relief that it seeks with no provision for service on anyone and no time periods afforded for the taking of procedural steps for affected parties to oppose the relief sought.
- 16.4 I am advised that for these reasons Standard Bank's purported application is fatally irregular and defective, incompetent and a nullity.
- 16.5 Although Standard Bank has indicated that 'to avoid possible contentions of non-joinder, Standard Bank's attorneys have been asked to ensure that a copy of this affidavit is made available to the President in his capacity as head of the National Executive and Cabinet so that he or any other member of the National Executive authorised by him may participate in these proceedings should he elect or be advised to do so', this does not suffice to overcome the problem. This is irrespective of whether

- 7. One would have thought that Standard Bank as a responsible litigant, particularly given its own statement of the apparent importance of the relief that it seeks, would have taken steps to address the obvious and fundamental irregularities that characterise its approach to the litigation.
- 8. Instead, as appears clearly from its heads of argument, it has resorted to mischaracterising the issues raised by the tenth respondent, has labelled them as being "technical" in nature and preferring "form above substance",<sup>4</sup> and has sought to diffuse them with reference to a host of irrelevant authorities<sup>5</sup> and intellectual gymnastics which according to it would have the startling outcome that because the relief sought is "merely" declaratory, parties against whom relief is sought do not have to be cited, and if they do it suffices to give those parties informal notice of the proceedings.
- 9. Standard Bank deals with the joinder problem in paragraphs 91 to 100 of its heads of argument, having spent the previous paragraphs dealing with the merits of its relief. It seeks to diffuse the obvious cogency of the tenth

<sup>4</sup> Standard Bank HOA para 97.

<sup>&</sup>lt;sup>5</sup> An illustration of such an irrelevant decision is *Judicial Service Commission v Cape Bar Council* 2013 (1) SA 170 (SCA), which concerned the failure to join a judicial appointee in circumstances in which a successful review would leave his appointment intact. This decision is irrelevant to the non-joinder raised in this case. Certainly this case cannot be used to justify Standard Bank's failure to join the members of the National Executive who are the persons that the order sought is intended to bind – such that their absence from the proceedings, with the concomitant consequence that it would not be binding upon them, would render any order granted effectively meaningless.

respondent's objections regarding non-joinder on the basis that because its relief relates to the legal proposition advanced by the Minister in his application, and because the relief is for a declaratory order and not an interdict, the President does not have a direct and substantial interest in the proceedings and that the declaratory order sought will not impugn or effect the President's powers.

- 10. Apart from Standard Bank's tendentious treatment of the matters it relies on, the simple fact of the matter is that Standard Bank seeks declaratory relief against the members of the National Executive of Government including the President. The legal basis for that relief, and whether or not that legal basis corresponds with that asserted by the Minister for his relief, has no bearing upon the need to join affected parties.
- On Standard Bank's own showing it is apparently entirely proper for a court to make findings of law that will "inform" the President of what is lawful and so dictate the parameters of his future conduct without the President being a party to the court's process and being afforded an opportunity of being heard.
- 12. The President's interest in the relief sought by Standard Bank does not only arise from the effect relief might have on the exercise of the constitutional powers conferred on the president in section 84(1)(f) to appoint a commission of inquiry. The President's interest in the relief sought also arises from section 83(a) of the Constitution which states that the President is the head of state and

the head of the national executive. Therefore, the President has a substantial interest in the relief sought as head of the national executive.

- 13. So much for the notion that the absent parties do not have a sufficient direct and substantial interest in the relief sought by Standard Bank. Standard Bank's alternative argument that even if such an interest exists it has acted appropriately by bringing the "application" to the notice of the President is similarly misconceived. <sup>6</sup>
- 14. The authorities concerning the Court's power to grant declaratory relief cited by virtually all of the parties clearly demonstrate that the issues highlighted in the tenth respondent's answering affidavit cannot be fobbed off as being anything other than substantive and substantial. For instance in paragraph 40 of his heads of argument and with reference to the decision of the Supreme Court of Appeal in Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd 2005 (6) SA 205 (SCA), and in paragraph 44 of its heads of argument and with reference to the Appellate Division decision in Ex parte Nell 1963 (1) SA 754 (A) the Minister points out that it is a pre-requisite of an order for declaratory relief in terms of section 21(1)(c) of the Superior Courts Act, 10 of 2013 that "there must be interested parties on whom the declaratory order would be binding". (Emphasis supplied.)
- That this is so appears also from the decision in Shoba v Officer Commanding,
   Temporary Police Camp, Wagendrift Dam, and Another, Maphanga v Officer

<sup>&</sup>lt;sup>6</sup> Standard Bank HOA para 95.

Commanding, South African Police Murder and Robbery Unit, Pietermaritzburg, and Others 1995 (4) SA 1 (A). In this case Corbett CJ, with reference to section 19(1)(a)(iii) of the Supreme Court Act, 59 of 1959, stated at 14F- G:

"Generally speaking, the Courts will not, in terms of s 19(1)(a)(iii), deal with or pronounce upon abstract or academic points of law. An existing or concrete dispute between persons is not a prerequisite for the exercise by the Court of its jurisdiction under this subsection, though the absence of such a dispute may, depending on the circumstances, cause the Court to refuse to exercise its jurisdiction in a particular case (see Ex parte Nell 1963 (1) SA 754 (A) at 759H-760B). But because it is not the function of the Court to act as an adviser, it is a requirement of the exercise of jurisdiction under this subsection that there should be interested parties upon whom the declaratory order would be binding (Nell's case at 760B-C)." (Emphasis supplied.)

16. The case of Family Benefit Friendly Society v CIR 1995 (4) SA 120 (T) applies.
In this case Van Dijkhorst J said, with reference to section 19(1)(a)(iii) of Supreme Court Act, 59 of 1959, at 125H – 126A that:

"The Court will not make a declaration of rights unless there are interested persons upon whom the declaration would be

the effect of the doctrine of stare decisis, but binding in the sense of res judicata. Ex parte Ginsberg (supra at 158). It is not, however, a requisite that the applicant should have an opponent. Ex parte applications have been granted which concerned the interpretation of statutes. Ex parte Ginsberg (supra); Ex parte Prokureur-Generaal, Transvaal 1978 (4) SA 15 (T) at 19. These cases do lay down the requirement that an order will have binding effect on interested parties.

It follows that the interested persons against whom or in whose favour the declaration will operate must be identifiable and must have had an opportunity of being heard in the matter. Ex parte Van Schalkwyk NO and Hay NO 1952 (2) SA 407 (A) at 411C and D; Anglo-Transvaal Collieries Ltd v South African Mutual Life Assurance Society 1977 (3) SA 631 (T) at 636C-F and see 1977 (3) SA 642 (A) at 655D." (Emphasis supplied.)<sup>7</sup>

<sup>&</sup>lt;sup>7</sup> It is a matter for comment that although Standard Bank and the other respondent banks (as well as the Minister) decry the repeated requests by the Oakbay respondents for assistance as constituting the fomenting of "political pressure" allegedly brought to bear on the banks by politicians other than the Minister, even the "extended relief" sought by Standard Bank would not curtail the Oakbay respondents' ability to continue to attempt to seek assistance from whomsoever they wish, including the Minister and other members of government. Rather, the "additional relief" has as its sole focus conduct of all "member[s] of the National Executive of Government, including the President and all Members of the Cabinet, acting on their own accord and for and/on behalf of Cabinet". Absent the joinder of these persons to Standard Bank's purported application (as opposed to mere notice of such application), there are simply no interested persons upon whom the declaratory order would be binding.

- 17. It is thus trite that parties who may be affected by declaratory relief should be joined as a matter of necessity in the relevant proceedings, and that a court will not proceed to grant such relief in the absence of such joinder, or a waiver by the person concerned or an undertaking to be bound.
- 18. The case of Ex Parte Sengol Inv (Pty) Ltd 1982 (3) SA 474 (T) is particularly apposite. In this case, Van Dikjhorst J identifies the fundamental difference between joinder of a party to proceedings, and being afforded notice of proceedings. This appears from the judgment at 478B -C:

"It follows that the State is a necessary party and should be joined in these proceedings unless I am satisfied that the State has unequivocally waived its right to be joined and undertaken to be bound by any decision the Court may make. Amalgamated Engineering Union v Minister of Labour 1949 (3) SA 637 (A); Toekies Butchery (Edms) Bpk en Andere v Stassen 1974 (4) SA 771 (T). The mere fact that the Departments and officials mentioned above have knowledge of these proceedings and have intimated that they do not intend to oppose, does not make a judgment binding on them as res iudicata, nor can such non-intervention after receipt of notice of this application short of citation necessarily be treated as a representation that the State will submit to and undertakes to be bound by

this judgment. Amalgamated Engineering Union v Minister of Labour (supra at 661 - 2)." (Emphasis supplied.)

19. The decision of Conradie JP in Van der Ploeg v Vivier 1966 (3) SA 218 (SWA) is to similar effect. In this case Conradie JP drew an important distinction between informal notice of a matter and procedurally correct (and proper) joinder by which a party becomes bound to a finding. Specifically, the learned Judge held the following at 221E-G:

"In this case there may be claims to the allotment of shares as referred to in the letter of the Secretary of Mines mentioned above. I refer to the notice of motion given to the South-West Administration and to the affidavits of Messrs. Smit (Inspector of Mines) and Venter (Assistant Commissioner for Inland Revenue). I have held that such service and notice are not due and proper.

In Amalgamated Engineering Union v Minister of Labour, referred to above, Fagan, A.J.A., sets out at pp. 661 and 662 the necessary requirements for proper service. These remarks of the learned Judge of Appeal are very applicable in this case:

'If the Council had been cited as a party, the form and contents of the notice to it and the manner and proof of service would have had to comply with clear and definite

rules of procedure, and the Council would have known that it had to defend the suit or suffer a judgment, by which it would be bound, to be given in its absence. This case is a good example of the uncertainties to which we would open the door if we were to start allowing informal notification to take place of due and proper joinder of a party.'

Applying the facts of the service of these respective notices to the requirements laid down by Fagan, A.J.A., I hold that such requirements were not conformed with in this case." (Emphasis supplied)

20. It is clear then that Standard Bank was not entitled if it wished to have its relief considered by the Court and to be binding on the President and other interested parties not before the Court, simply to content itself with an approach that entailed no more than bringing its "notice of motion" to the attention of the President. It was required to cite the President and serve its application upon him in accordance with the Rules of Court. It has not done so, and this is not cured by any response from the State Attorney on behalf of the President, because that response does not constitute a waiver of the right to be joined or an undertaking to be bound by the Court's decision. On the contrary, as Standard Bank concedes, the stance of the President is that he requires to be joined through proper process if Standard Bank intends to proceed to seek relief against him.

- 21. The tenth respondent's objection that the President and the members of Cabinet who the declaratory order purports to operate against have not been joined as respondents in Standard Bank's purported application is, therefore, one of substance and not merely of form.8
- 22. Standard Bank also misconceives the consequence of the procedural irregularity of its prayer for "additional relief".
- 23. This is not a scenario in which an applicant has validity issued and served an application and in which an issue of non-joinder (of either necessity or convenience) has been raised. It is also not a scenario in which a respondent has validly instituted a counter-application.
- 24. Rather, in this case, Standard Bank purports to bring a new application against persons who are not parties to the application instituted by the Minister. Standard Bank seeks to do this, moreover, in circumstances in which its "application" has not even been validly issued and served.
- 25. The case of Finishing Touch 163 (Pty) Ltd v BHP Billiton Energy Coal SA Ltd 2013 (2) SA 204 (SCA) is apposite. In this case, Mhlantla JA said that an application could only be considered to have been made (or initiated) once it had been issued and served. In the present matter, Standard Bank's application for "additional relief" has not been issued in accordance with Rule 6, and neither

<sup>&</sup>lt;sup>8</sup> See also Nguza v Minister of Defence 1996 (3) SA 483 (TkS) at 486D-E.

has it been served on the parties who it is sought to bind. This is a fatal defect that precludes the granting of the relief sought by Standard Bank.

# THE TERMS OF THE RELIEF SOUGHT BY STANDARD BANK ARE VAGUE AND OVERBROAD

- 26. The deficiencies in the relief sought by Standard Bank only require to be considered in the event that this Court is prepared to engage in the application for "additional relief" notwithstanding the failure to join the parties sought to be bound by the relief sought, and the concomitant disqualification in terms of section 21 of the Superior Courts Act, and notwithstanding the failure by Standard Bank to issue and serve its application.
- 27. In this event, the tenth respondent contends that a further obstacle to the order sought by Standard Bank is the vagueness that infects its purported notice of motion.
- 28. As stated by Ngoepe JP in Kaunda v President of the RSA 2004 (5) SA 191 (T) at 2071, and in the context of criticising the order sought in that case as being couched in broad and vague terms: "A Court order must be in such language that the person ordered is able to know precisely what his obligations are, as failure to carry out the order may incur criminal sanction."
- 29. As indicated above, the order sought is a declarator "that no member of the National Executive of Government ... is empowered to intervene, in any

manner whatsoever, in any decision taken by the seventeenth respondent to terminate its banking relationship with Oakbay Investment Proprietary Limited and its associated entities."

- 30. In its answering affidavit the tenth respondent points out that the use of the verb "intervene" in the purported notice of motion creates confusion as it "is not at all clear what 'intervention' is sought to be declared unlawful".9
- 31. The tenth respondent elaborates that it is similarly unclear "...whether the term 'empowered' is intended, as is the case in the Minister's Application, to be confined to the question whether such powers exist at all or whether it is intended to go further and also relate to circumstances where the power exists but its exercise would be unlawful on the particular facts".
- 32. Notwithstanding protestations in its heads of argument that the relief sought is clear<sup>10</sup>, Standard Bank's attempts to justify and at points clarify such relief evidences the very uncertainty that the tenth respondent complains of.
- 33. In its heads of argument, Standard Bank advances differing formulations of the relief that it seeks, as well as factors that it relies upon to justify such relief. Thus:

<sup>&</sup>lt;sup>9</sup> 10<sup>th</sup> Respondent AA p 891 para 21.

<sup>&</sup>lt;sup>10</sup> Standard Bank HOA paras 89 - 90.

- 33.1. In paragraph 33 of its heads of argument Standard Bank describes "the real issue in these proceedings" as being "whether the above intervention of highly politically placed and National Executive officer bearers is lawful". The said "above intervention" appears in paragraph 32, and comprises the conduct of Cabinet pursuant to Oakbay's public media campaign against the banks "who sought to intervene through discussions with senior executives of the banks"; the consideration by the President (which remains ongoing) of "the establishment of a judicial banking inquiry into allegations made by Oakbay"; approaches by Oakbay to the President and the Ministers of Mineral Resources and Labour who later formed part of the IMC; and Oakbay's repeated demand for ministerial intervention to reverse the decisions of the banks.
- 33.2. In paragraph 45 of its heads of argument Standard Bank says that "...the issue here turns on the powers of the Minister and his executive colleagues, collectively or otherwise ... a declaratory order will identify, recognise and acknowledge the harm caused to the principle of legality. It will identify, the true state of the law and provide guidance for the future. Put simply, it will make it clear what is the dividing line between what is lawful and what is unlawful. The affected parties will know what is permitted and what is not permitted in relation to their future conduct..."
- 33.3. In paragraph 54 of its heads of argument Standard Bank says that: "Standard Bank wishes to assert its rights or obligations in relation to past, present and future approaches to and from politicians relating to closing of bank accounts."

- 33.4. In paragraph 57 of its heads of argument Standard Bank says that it "has an interest in ensuring that its decision lawfully taken in terms of contractual arrangements with its customers and in compliance with its regulatory obligations are not exposed to undue and impermissible political interference or intervention aimed at reversing those decisions."
- 33.5. In paragraph 61 of its heads of argument Standard Bank asserts that the "real issue is whether Oakbay is entitled to repeatedly demand that the Minister should interfere with the banks' decisions politically or otherwise, and seek the reversal of those decisions, when in law he (and his colleagues in the National Executive) does not have such powers".
- 33.6. In paragraph 73.8 of its heads of argument Standard Bank asserts that there is uncontested evidence "that there was a manifest executive interference by the IMC in order to procure the reversal of Standard Bank's decision". In paragraphs 73.10 and 73.11 of its heads, Standard Bank refers to purported recommendations by the IMC that the President establish a judicial inquiry and reconsider mandates of the banking tribunal and the banking Ombudsman.
- 33.7. In paragraph 73.13 of its heads of argument Standard Bank asserts that it does not seek to prevent the President or any relevant constitutional structure from establishing a judicial inquiry or introducing revisions to mandates of any regulator in the financial services, and that: "At this stage the relief sought is about the declaratory order on whether the existing law permits the National

Executive to seek a reversal of decisions by the banks when the lawfulness of those decisions is not questioned."

- 33.8. In paragraphs 73.14 and 73.15 Standard Bank "points out" that "the recommendation for judicial inquiry to inquire into the closure of Oakbay's accounts is real" and submits "that there is clear evidence of contemplated State investigation on decisions that are lawful and in circumstances where the investigations concerned are not in terms of the law."
- 33.9. In paragraph 74 of its heads of argument Standard Bank asserts that the dispute at issue in these proceedings "is live and real. It is therefore necessary for this honourable Court to pronounce upon the declaratory orders sought by Standard Bank in order to ensure that executive functionaries would have regard to the decision of this Court on what is lawful, whenever they elect to proceed in whatever means to redress the complaints of Oakbay."
- 33.10. In paragraph 79 of its heads of argument Standard Bank says that "public interest requires that the public condemnation of the banks and the regulators by Oakbay, the solicitation of support for its cause from widespread public bodies of significant interference, and the continued threat of further investigation and decisive action must come to an end. The declaratory order sought is the immediate means available at the disposal of Standard Bank to define the constitutional boundaries of lawful action."

- 33.11. In paragraph 89 of its heads of argument it states: "it seeks declaratory relief that the National Executive has no legal powers to intervene on behalf of Standard Bank's customers, when it terminates banking relationships."
- 33.12. In paragraph 90 of its heads of argument it states: "The declaratory order will apply to all and sundry, inclusive, but not limited to all of the Oakbay respondents, who may seek to use political pressure to compel Standard Bank to reverse lawfully taken decisions, in their relationships with their own customers."
- 33.13. In paragraph 94 of its heads of argument it states: "The utility of the declaratory order sought is that it will inform [the President] of what is not lawful, if and when he defines the terms of reference of the judicial inquiry he contemplates."
- 34. These references to Standard Bank's heads of argument demonstrate that Standard Bank itself vacillates in its portrayal of both the impact and the purpose of the order that it seeks. In particular the reference to threatened executive action in the form of a commission of inquiry or regulatory review as warranting the relief sought justifies the tenth respondent's stated concern regarding the vagueness of the order sought. After all, it is wholly unclear, whether any commission of inquiry that encompassed (but was not limited to) an investigation into the decision to terminate the Oakbay respondents' accounts (but not with a view to reversing this decision which, in any event, is a result that a commission could not procure) would nonetheless be viewed as "intervention" in that decision, or a form of unlawful "political pressure". Certainly

it remains unclear whether such executive conduct is prohibited, and in substance "interdicted", by the relief sought by Standard Bank.

- 35. More problematic for Standard Bank in this regard is that notwithstanding its efforts in its heads of argument to suggest that the order sought does not encompass the establishment by the President of a commission of inquiry or a review of the regulatory regime pertaining to banking (and encompassing the circumstances in which accounts can be terminated by banks, informed even in part by the experience of the Oakbay respondents) it cannot un-write its affidavit. More specifically, Standard Bank cannot in its heads of argument escape the fact that it is manifest from its affidavit that such threatened future executive action in the form of a commission of inquiry or a regulatory review is the very raison d'etre for the "additional relief" that it seeks. This appears from, amongst others, paragraphs 3.2<sup>11</sup>, 4,<sup>12</sup> 116 to 127 of Standard Bank's affidavit.<sup>13</sup>
- 36. There is, therefore, substance in the tenth respondent's concern that an order in the terms sought by Standard Bank might encompass and substantively seek to interdict the exercise by members of the National Executive of Government of statutory powers flowing from legislation whose constitutional validity is not

<sup>&</sup>lt;sup>11</sup> 10<sup>th</sup> Respondent AA para 3.2 p 225.

<sup>&</sup>lt;sup>12</sup> 10<sup>th</sup> Respondent AA para 4 pp 225 – 226.

<sup>&</sup>lt;sup>13</sup> 10<sup>th</sup> Respondent AA para 116 - 127 pp 227 - 284.

challenged. This is both premature and impermissible.<sup>14</sup> It is, moreover, evident that Standard Bank has failed to make out a case for interdictory relief, and has certainly failed to satisfy the high threshold required to be met in order to traverse into the domain of the executive and prevent the future exercise of statutory or constitutionally authorised powers.<sup>15</sup>

- 37. A further concern arising from the formulation of the relief sought by Standard Bank arises from the fact that in its terms the declaratory relief extends to decisions relating to "Oakbay Investment Proprietary Limited and its associated entities", without any identification of the said "associated entities".
- 38. In its heads of argument Standard Bank seeks to address this issue by saying that "...The declaratory order will apply to all and sundry, inclusive, but not limited to all of the Oakbay respondents, who may seek to use political pressure to compel Standard Bank to reverse lawfully taken decisions, in their

<sup>&</sup>lt;sup>14</sup> The decision of the Constitutional Court in *President of The Republic of South Africa and Others v South African Rugby Football Union And Others* 2000 (1) SA 1 (CC) is relevant. In particular paragraph 44, which reads:

<sup>&</sup>quot;In law, the appointment of a commission only takes place when the President's decision is translated into an overt act, through public notification. In addition, the Constitution requires decisions by the President which will have legal effect to be in writing. Section 84(2)(f) does not prescribe the mode of public notification in the case of the appointment of a commission of inquiry, but the method usually employed, as in the present case, is by way of promulgation in the Government Gazette. The President would have been entitled to change his mind at any time prior to the promulgation of the notice and nothing which he might have said to the Minister could have deprived him of that power. Consequently, the question whether such appointment is valid, is to be adjudicated as at the time when the act takes place, namely at the time of promulgation. This the Judge failed to do. He erred, not only in treating the press statement as proof of an abdication of authority, but also in holding that the abdication, which he found as a matter of fact to have taken place, was irrevocable." (Footnotes omitted.)

<sup>&</sup>lt;sup>15</sup> National Treasury and Others v Opposition to Urban Tolling Alliance and Others 2012 (6) SA 223 (CC) at paras 47 and 71.

relationships with their own customers... In any event, Oakbay, which has filed a single affidavit on behalf of all of the Oakbay respondents, is aware of all the Oakbay entities that had a banker-customer relationship with Standard Bank. Nothing turns on the alleged non-identification of specific respondents against whom the order will operate."<sup>16</sup>

- 39. Again, Standard Bank's response demonstrates a misunderstanding of the tenth respondent's complaint. It also demonstrates a construction of the order sought that is at variance with its terms. This is apparent from the following:
- 39.1. The order sought does not "apply" to "the Oakbay respondents" or the "associated entities" of Oakbay Investment Proprietary Limited in the sense that it prohibits conduct on their part, including seeking "to use political pressure to compel Standard Bank to reverse lawfully taken decisions, in their relationships with their own customers." If granted, the order would leave unfettered, the Oakbay's respondents (and associated entities') ability to approach whomever they choose to request the application of political pressure upon Standard Bank.
- 39.2. Rather, the order sought declares any accession by a member of the National Executive of Government to a request by "the Oakbay respondents" unlawful where this would constitute "intervening, in any manner whatsoever, in any decision taken by the seventeenth respondent to terminate its banking relationship with Oakbay Investment Proprietary Limited and its associated entities."

<sup>&</sup>lt;sup>16</sup> Standard Bank HOA para 90.

- 39.3. It is, therefore, the members of the National Executive of Government to whose conduct the declaratory relief sought applies, and it is they (and not the Oakbay respondents) who are required to know precisely which entities comprise "associated entities" of Oakbay Investment Proprietary Limited in order to comply with the order sought.
- 39.4. Clearly there is absolutely no attempt by Standard Bank to explain what it means by use of the phrase "associated entities", and which "entities" this list is comprised of.
- 40. It is also significant that Standard Bank is unable, in its heads of argument, to address the concern that the vagueness in the order sought is compounded by lack of clarity regarding the term "empowered", and more specifically whether Standard Bank seeks to include circumstances where the power exists, but its exercise would be unlawful on the particular facts. This uncertainty is in large part a consequence of the focus in Standard Bank's affidavit upon what it describes as future "threats" of executive action, including the establishment by the President of a judicial commission of inquiry and a review of the regulatory regime applicable to banking.
- 41. Uncontestably, the President has the power to establish judicial commissions of inquiry, and members of the National Executive, and in particular the Minister, have powers to review the regulatory regime applicable to banking. It seems likely, therefore, that Standard Bank utilises the term "empowered" as

including circumstances where the power exists but its exercise would be unlawful on the particular facts. Standard Bank, however, fails to provide any indication as to what those particular facts or circumstances are such that the ambit of the declaratory that it seeks can be properly understood and – if granted – applied.

There are no admissible facts before the Court other than as appear in the Minister's founding and replying affidavits (and to the extent that parts of such affidavits are not struck out)

- 42. To the extent that Standard Bank's affidavit does not serve as an affidavit in support of its "application" because that application is still-born, what still requires to be addressed is whether the contents of its affidavit require consideration for the purpose of the relief sought by the Minister. If the answer to this question is in the negative this will, of course, apply equally to the "supporting" affidavits of the other respondent banks.
- In short, the tenth respondent submits that the "supporting" affidavits of the respondent banks cannot be utilised to justify the relief sought by the Minister. The Minister's case stands, or falls, on a determination of the law with reference to those facts of relevance in his founding and replying affidavits, considered together with the contents of the Oakbay respondents' answering affidavit and, where required, with reference to the approach to disputes of fact in motion proceeds as articulated in *Plascon Evans v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A).

- 44. In any event the allegations contained in Standard Bank's, and the other banks' "supporting" affidavits, are not relevant to the determination of the legal question raised by the Minister being whether he is not as a matter of law empowered or obliged to intervene in the banking relationship between the affected respondents and their bankers. In particular all of the purported "facts" advanced by the respondents banks to justify their decision to close the accounts of the Oakbay respondents and their allegations of "pressure" to reconsider such decision (none of which was at the hands of the Minister), have no bearing on the relief sought by the Minister.
- 45. More fundamentally, however, an opposing respondent is not obliged to deal with allegations made in the affidavit of a "supporting" respondent the sole purpose of which is to augment the case for the relief sought by the applicant in those proceedings. In order for it to be obliged to do so then either the applicant is required to take steps to permit it to rely on those allegations as part of the applicant's case (for example by way of a supplementary founding affidavit), or the relevant respondents are required to take steps such as becoming an applicant (whether by way of intervention or separate application) or in appropriate circumstances by employing third party procedures, so as to create a lis between themselves and another respondent. None of this has happened in this matter.
- 46. In consequence, the tenth respondent is not required to deal with the allegations in the respondent banks' affidavits and its failure to do so does not

constitute an admission of their correctness. Neither is the Court permitted to have regard to these allegations in determining whether the applicant (who has not adopted or confirmed the correctness of such allegations) has made its case.

- 47. Such affidavits should, therefore, be dealt with as if they had been struck out in their entirety.
- 48. Paragraphs 5 to 15 of the decision of the Labour Appeal Court in *Kruger and Others v Aciel Geomatic (Pty) Ltd* (Case no: JA87/2014, judgment delivered on 14 March 2016) are relevant in this regard. These paragraphs read as follows:

**"**5

In their application, the said appellants cited three respondents: Leica, Aciel, the company which purportedly was the new business and GSA the old business as contemplated by s197 of the LRA. At some point, Leica was removed as a respondent in the proceedings. There can be no doubt that GSA was cited as a respondent because it had an interest in the proceedings, no relief was sought against the GSA. Significantly, though, if the appellants fail in their application, GSA may be liable to the said appellants for payment of a severance by virtue of the fact that GSA has by reason of the cancellation of its agency agreement is no longer able to retain the said appellants as its employees.

- Notwithstanding the fact that GSA was a nominal respondent, it decided to involve itself, as it was entitled to do, in the application proceedings. However its involvement was not limited to placing evidence before the Court but it became involved as if it was an applicant in the proceedings arguing the case of the said appellants and asking for the relief sought by the said appellants.
- At the hearing of the application in the Labour Court, the respondent correctly objected to the court taking into account the affidavits filed by GSA effectively seeking its striking out on the basis that it constituted an irregularity and in violation of the accepted rules relating to motion proceedings.
- The Labour Court however, took the view that the court was entitled to depart from the rules in the interest of "justice and fairness" because (i) the exclusion of the affidavits by GSA could significantly prejudice the said appellants and (ii) the objection was raised at a very late stage in the proceedings.
- In my view, the Labour Court erred in allowing the GSA's affidavit to stand and more importantly allowing it to

present argument as if it was an applicant in the relief sought by the said appellants.

A respondent in a motion application cannot in my view simply decide to be another applicant. In this regard, the judgment of the Labour Court records the submissions made by counsel for the respondent:

'[4] Mr. Watt-Pringle SC, who appeared on behalf of Aciel, submitted that having been cited as a respondent, GSA had three options. First, it was entitled to oppose the relief sought in which event it was entitled to file an answering affidavit refuting the applicant's case. Secondly, it could have elected not to oppose the application but to abide by the relief sought. Thirdly, GSA could have decided, if it was not content to have the applicants make out a case for the application of s 197, to be joined as a second applicant in order to make out its own case. In the latter instance, Aciel would have filed an answering affidavit to deal with the case presented by GSA as an applicant. What GSA was not permitted to do in the present proceedings was to file an answering affidavit, the sole purpose of which was to build the case for the relief sought by the applicants in their notice of motion, under the guise

of a respondent which had elected not to join issue with Aciel.

[5] On this basis, Mr. Watt-Pringle submitted that the applicants are not entitled to rely in these proceedings on the untested evidence presented by GSA, since it formed no part of the founding affidavit and therefore no part of their case. Further, he submitted that GSA's counsel is not entitled to claim in argument on behalf of GSA the relief sought by the applicants in their notice of motion. In other words, GSA is not permitted to assume the role of a Trojan horse, acting in every way as if it is a co-applicant without claiming any relief in its own name, and thus seeking to avoid any liability for costs.'

In my view, the above submissions are indeed correct. I
may add that in the affidavit filed by it GSA not only did it
seek to support the said appellants' case but went on to
ask for the "relief as prayed for in the notice of motion".

Once GSA sought the relief asked for by the said
appellants it was no longer placing evidence before the
Court a quo it was making itself an applicant in the
proceedings. In allowing the affidavits filed by GSA in the
form they did the Court was, in effect allowing a further
founding affidavit. The respondent in the Labour Court

thus suddenly found itself fending itself not only against the applicants but also against a co-respondent. What is it then to do: answer the applicant's papers and answer the co-respondents papers? This clearly goes against the fundamental principle in our law that it is the founding affidavit filed in support of a motion that makes the case which the respondent must meet. Allowing a corespondent to file answering papers in which it seeks the relief sought by an applicant while not seeking to be an applicant in the proceedings cannot and is not permissible nor is it open to a court to allow such procedure on any grounds. The Court does not have a discretion to do so. Allowing the GSA affidavit not only prejudiced the respondent but placed the respondent in a position where it had to conduct a defence on two fronts; one against the applicants and one against a co-respondent. This is untenable because GSA and the applicant effectively formed a tag-team against the respondent.

12 Since the affidavits constitute pleadings and evidence in motion proceedings, Counsel for the respondent set out the principles that apply to motion proceeding, although these principles should be trite, it is worth repeating them:

- (a) An applicant in motion proceedings must make out its case in its founding affidavit, which constitutes both the particulars of claim and evidence in support of the relief claimed;
- (b) it follows from the above principle that the respondent against whom relief is sought is only obliged and entitled to deal with the case in applicant's founding affidavit;
- (c) The rule in **Plascon Evans** is that the applicant can only succeed on the basis of facts in its founding affidavit which is not disputed in the answering affidavit, read with additional facts deposed to in the respondent's answering affidavit;
- (d) There is however a qualification to the rule in (c) above, which is that the applicant cannot seek to make out a cause of action based on allegations in the answering affidavit, which did not form part of its case in the founding affidavit. A corollary to the rule that the respondent is only obliged in its answering affidavit to deal with the case made out in the founding affidavit and no other.

- (e) A fortiori, a respondent is not obliged to deal with allegations made in a co-respondent's affidavits which may happen to support the applicant's case. The reasons for this are twofold:
- (ii) firstly, there is no lis between a respondent and its co-respondent. Since the co-respondent is not entitled to claim any relief unless it enters the fray as an applicant and files a notice of motion, there is nothing for the respondent to oppose.
- (ii) secondly, the respondent is only obliged to deal with the case in applicant's founding affidavit.'
- In the circumstances, it was not open to GSA to intervene in the proceedings in the manner it did. It could have made its own application to make out a case for the section 197 relief, supported by a founding affidavit which Aciel would then be obliged to answer. There would then be a lis between GSA and Aciel. In the absence of such lis, Aciel had nothing to answer to GSA.

- 14 In the result, the affidavits filed by GSA should have been struck out." (Footnotes omitted.)<sup>17</sup>
- 49. All of the heads of argument on behalf of the respondent banks seek to persuade the Court to grant the relief sought by the Minister on the basis of factual matters and a series of events as between the banks and persons, including members of the National Executive Government, other than the Minister, and which facts and events are not relied upon by the Minister in his founding affidavit. If, as ought to occur, the Court does not have regard to these matters, the issues under consideration narrow considerably and the Court is then required only to consider whether the Minister has established a basis and a need for the particular relief sought by him.

#### CONCLUSION

50. The tenth respondent seeks that the Court not accede to the "additional relief" sought by Standard Bank in its abortive application and that Standard Bank should be required to pay the costs of the tenth respondent, including the costs of two counsel.

<sup>&</sup>lt;sup>17</sup> In Maphango and others v Aengus Lifestyle Properties (Pty) Ltd 2012 (3) SA 531 (CC) at 113, the Constitutional Court (per Cameron J) explains the rationale for observing these trite principles relating to motion proceedings: "The reasons are that: In every case pleadings play a vital role. They promote fairness in court proceedings by defining the issues for determination so that the court and the other party are informed of the nature of the case brought."

J Blou SC

S Stein SC

L Zikalala

Counsel for 10<sup>th</sup> Respondent Chambers, Sandton 24 February 2017

#### **TABLE OF AUTHORITIES**

- 1. Amalgamated Engineering Union v Minister of Labour 1949 (3) SA 637 (A);
- 2. Anglo-Transvaal Collieries Ltd v South African Mutual Life Assurance
  Society 1977 (3) SA 631 (T):
- Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd 2005 (6)
   SA 205 (SCA);
- 4. Ex parte Nell 1963 (1) SA 754 (A);
- 5. Ex parte Van Schalkwyk NO and Hay NO 1952 (2) SA 407 (A);
- 6. Family Benefit Friendly Soc v CIR 1995 (4) SA 120 (T);
- 7. Finishing Touch 163 (Pty) Ltd v BHP Billiton Energy Coal SA Ltd 2013 (2) SA 204 (SCA);
- 8. Judicial Service Commission v Cape Bar Council 2013 (1) SA 170 (SCA);
- 9. Kaunda v President of the RSA 2004 (5) SA 191 (T) 2004 (5) SA 191 (T);
- Kruger and Others v Aciel Geomatic (Pty) Ltd (LAC) (Case no: JA87/2014, judgment delivered on 14 March 2016);

- 11. Maphango and others v Aengus Lifestyle Properties (Pty) Ltd 2012 (3) SA 531(CC) at 113;
- National Treasury and Others v Opposition to Urban Tolling Alliance and Others
   2012 (6) SA 223 (CC);
- 13. Plascon- Evans v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A);
- 14. President of the Republic of South Africa and Others v South African Rugby
  Football Union and Others 2000 (1) SA 1 (CC);
- 15. Nguza v Minister of Defence 1996 (3) SA 483 (TkS);
- 16. Sengol Inv (Pty) Ltd, Ex p 1982 (3) SA 474 (T);
- 17. Shoba v Officer Commanding, Temporary Police Camp, Wagendrift Dam, and Another; Maphanga v Officer Commanding, South African Police Murder and Robbery Unit, Pietermaritzburg, and Others 1995 (4) SA 1 (A)
- 18. Toekies Butchery (Edms) Bpk en Andere v Stassen 1974 (4) SA 771 (T);
- 19. Van der Ploeg v Vivier 1966 (3) SA 218 (SWA).

4854 +TOH

# IN THE HIGH COURT OF SOUTH AFRICA (GAUTENG DIVISION, PRETORIA)

2392

CASE NO: 80978/16

Fourteenth Respondent

Fifteenth Respondent

In the matter between:

MINISTER OF FINANCE

SAHARA COMPUTERS (PTY) LTD

**ABSA BANK LTD** 

**Applicant** 

and

and	
OAKBAY INVESTMENTS (PTY) LTD	First Respondent
OAKBAY RESOURCES AND ENERGY LTD	Second Respondent
SHIVA URANIUM (PTY) LTD	Third Respondent
TEGETA EXPLORATION AND RESOURCES (PTY) LTD	Fourth Respondent
JIC MINING SERVICES (PTY) LTD	Fifth Respondent
BLACKEDGE EXPLORATION (PTY) LTD	Sixth Respondent
TNA MEDIA (PTY) LTD	Seventh Respondent
THE NEW AGE	Eight Respondent
AFRICA NEWS NETWORK (PTY) LTD	Ninth Respondent
VR LASER SERVICES (PTY) LTD	Tenth Respondent
ISLANDSITE INVESTMENTS ONE HUNDRED AND EIGHTY (PTY) LTD	Eleventh Respondent
CONFIDENT CONCEPT (PTY) LTD	Twelfth Respondent
JET AIRWAYS (INDIA) LTD (INCORPORATED IN INDIA)	Thirteenth Respondent

2393

		- 7	
FIRST NATIONAL BANK LTD	Sixteenth Respondent		
STANDARD BANK OF SOUTH AFRICA LIMITED	Seventeenth Respondent		
NEDBANK LIMITED	Eighteenth Respondent		
GOVERNOR OF THE SOUTH AFRICAN RESERVE BANK	Nineteenth Respondent		
REGISTRAR OF BANKS	Twentieth Respondent		
DIRECTOR OF THE FINANCIAL INTELLIGENCE CENTRE  Twenty-First Respondent			
FILING SHEET			
Document to be filed: Fifteenth Respondent's Heads of Argument			

FILED BY:

**EDWARD NATHAN SONNENBERGS** 

on this the 10th day of February 2017

Attorneys for Fifteenth Respondent 150 West Street

Sandton

Tel: 011 269 7600 Fax: 011 269 7899

Email: <u>dlambert@ensafrica.com</u> (Ref: M Katz/ D Lambert/0416998)

## c/o GERHARD BOTHA & PARTNERS INC.

First Floor, Erasmus Forum Building B Cnr Rigel Avenue and Stokkiesdraai Erasmusrand

Pretoria

Tel: 012 347 0480 Fax: 012 347 6839

Email: brendon@bothapartners.co.za henno@bothapartners.co.za

(Ref: Mr B Swart/Mr H Botha)

TO:

THE REGISTRAR HIGH COURT **PRETORIA** 

AND TO: STATE ATTORNEY

Attorneys for the Applicant

SALU Building

255 Francis Baard Street

Pretoria

Tel: 012 309 1575 Fax: 012 309 1649

Email: TNhlanzi@justice.gov.za

(Ref: Ms T Nhlanzi)

AND TO: VAN DER MERWE & ASSOCIATES

Attorneys for the First, Second, Third, Fourth, Sixth, Seventh, Tenth, Eleventh,

Twelfth and Fourteenth Respondents

62 Rigel Avenue North

Waterkloof Pretoria

Tel: 012 343 5432 Fax: 012 343 5435

Email: simone@vdmass.co.za (Ref: Mr GT VD Merwe/st/078)

AND TO: NORTON ROSE FULBRIGHT SOUTH AFRICA INC.

Attorneys for Sixteenth Respondent

34 Fredman Drive

Sandton

Email: aslam.moosajee@nortonrosefulbright.com

(Ref: Mr Moosajee/FNB 13954) c/o MONTLE JOOMA SABDIÁ INC.

Ground Floor, Duncan Manor

Cnr Jan Shoba and Brooks Streets

Booklyn

Tel: 012 362 3137

2394

AND TO: BOWMAN GILFILLAN Inc.

Attorneys for Seventeenth Respondent

165 West Street

Sandton

(PO Box 785812, Sandton, 2146)

Tel: 011-669-9000 Fax: 011-669-9001

E-mail: clement.mkiva@bowmanslaw.com; alan.keep@bowmanslaw.com

Ref: C Mkiva/6164672 c/o Boschoff Attorneys

Ground Floor, Hazelwood Gate Office Park

14 Oaktree Avenue

Cnr Oaktree Avenue & Dely Road

Hazelwood, Pretoria Tel: 012-424-7500 Fax: 086-228-6805 Ref: Natasha Nortje

### AND TO: BAKER MCKENZIE

Attorneys for Eighteenth Respondent

Tel: 011 911 4300

Email: Gerhard.Rudolph@bakermckenzie.com Widaad.Ebrahim@bakermckenzie.com Callum.Oconnor@bakermckenzie.com

### c/o ADAMS & ADAMS

Adams & Adams Place

Lynwood Bridge 4 Daventry Street Lynwood Manor

Pretoria

Tel: 012 432 6000 (Ref: Adele Jordaan)

## AND TO: WERKSMANS ATTORNEYS

Attorneys for Nineteenth and Twentieth Respondents

155 - 5th Street

Sandton

Tel: 011 535 8000 Fax: 011 535 8600

Email: cmanaka@werksmans.com cmoraitis@werksmans.com

(Ref: SOUT 3267.63) c/o MABUELA INC. **Charter House** 

179 Bosman Street Pretoria Central Tel: 012 325 3966

Email: mabuela@tiscali.co.za

AND TO: MACROBERT ATTORNEYS

Attorneys for Twenty First Respondent

MacRobert Building

Cnr Jan Shoba and Justice Mahomed Street, Pretoria

Tel: 012 425 3436

Email: ghay@macrobert.co.za

(Ref: G K Hay)



# IN THE HIGH COURT OF SOUTH AFRICA GAUTENG DIVISION, PRETORIA

CASE NO: 80978/16

In the matter between:

MINISTER OF FINANCE

**Applicant** 

and

**OAKBAY INVESTMENTS (PTY) LTD** 

First Respondent

OAKBAY RESOURCES AND ENERGY LTD

Second Respondent

SHIVA URANIUM (PTY) LTD

Third Respondent

TEGETA EXPLORATION AND RESOURCES (PTY) LTD

Fourth Respondent

JIC MINING SERVICES (1979) (PTY) LTD

Fifth Respondent

**BLACKEDGE EXPLORATION (PTY) LTD** 

Sixth Respondent

TNA MEDIA (PTY) LTD

Seventh Respondent

THE NEW AGE

Eighth Respondent

AFRICA NEWS NETWORK (PTY) LTD

Ninth Respondent

VR LASER SERVICES (PTY) LTD

Tenth Respondent

ISLANDSITE INVESTMENTS ONE HUNDRED AND EIGHTY (PTY) LTD

**Eleventh Respondent** 

CONFIDENT CONCEPT (PTY) LTD

Twelfth Respondent

JET AIRWAYS (INDIA) LTD (INCOPORATED IN INDIA)

Thirteenth Respondent

SAHARA COMPUTERS (PTY) LTD

Fourteenth Respondent

**ABSA BANK LTD** 

Fifteenth Respondent

FIRST NATIONAL BANK LTD

Sixteenth Respondent

STANDARD BANK OF SOUTH AFRICA LIMITED

Seventeenth Respondent

	2	
NEDBANK LIMITED	Eighteenth Respondent	
GOVERNOR OF THE SOUTH AFRICAN RESERVE BANK	smoonaritespondent	
REGISTRAR OF BANKS	Nineteenth Respondent Twentieth Respondent	
	Twenty-First Respondent	
ABSA'S HEADS OF ARGUMENT		
INTRODUCTION		
ISSUES THAT DO NOT ARISE FOR DETERMINATION	3	
	4	
THE MINISTER IS NEITHER ENTITLED NOR OBLIGED TO IN	NTERVENE 6	
No Legal Power or Obligation	7	
Nature of Banker-Client Relationship	9	
THE DISCRETION TO GRANT A DECLARATORY ORDER	·	
The contradiction in the stance of the Oakbay companies	11	
The requirements of section 21 of the Superior Courts Act are	11	
Importance of Matter and Public Interest	satisfied 12	
No prejudice	14	
	16	
CONCLUSION		

#### INTRODUCTION

- The applicant ("Minister") seeks a declaration that he is not by law empowered or obliged to intervene in the relationship between banks and their clients as regards the closing of those clients' bank accounts.<sup>1</sup>
- The first to fourteenth respondents ("Oakbay companies") agree that the Minister is not by law empowered or obliged to intervene in the relationship between the Oakbay companies and the fifteenth to eighteenth Respondents ("the Banks").<sup>2</sup> Despite this, they oppose the relief that the Minister seeks, on the ground that the order sought by the Minister is unnecessary and of academic interest only.<sup>3</sup>
- Absa supports the Minister's application. Absa contends that the Minister is entitled to the declarator that he seeks, and that this Court should exercise its discretion to grant the declaratory relief. Absa denies that the matter is merely of academic interest.
- 4 In what follows, we address the following issues:
  - 4.1 The issues that are canvassed in the Oakbay companies' affidavits but which do <u>not</u> arise for determination in this application.
  - 4.2 Absa's reasons for supporting the Minister's application.

<sup>&</sup>lt;sup>1</sup> NOM p2, prayer 1.

<sup>&</sup>lt;sup>2</sup> Oakbay Affidavit, p1009 at paras 39-40.

<sup>&</sup>lt;sup>3</sup> Oakbay Affidavit, p1009 at paras 39-40.

4.3 This Court's discretion to grant declaratory relief, and the reasons why it should be exercised in favour of the Minister in this application.

#### ISSUES THAT DO NOT ARISE FOR DETERMINATION

- The Oakbay companies accept that the Minister is not by law empowered or obliged to intervene in the relationship between the Oakbay companies and the banks.<sup>4</sup>
- Despite this, they persist in opposing the application. In doing so, they have filed an answering affidavit which contains wide-ranging speculation about the allegedly improper conduct of the banks in closing their accounts.<sup>5</sup>
- All of this evidence, however, is quite irrelevant to the only issue in the application. To avoid any clouding of that issue, we emphasise that this application does <u>not</u> raise the issue of whether the banks, and Absa in particular, acted lawfully and properly in closing the Oakbay and associated accounts. This is so for three reasons.
  - 7.1 First, that issue is entirely irrelevant to the question whether the legal issue raised by the Minister is entitled to the relief that he seeks.
  - 7.2 Second, as appears from the papers, the Oakbay companies made an election at the time not to challenge the closures of their accounts.<sup>6</sup>

    Despite the allegations now made, the Oakbay companies still do not

<sup>&</sup>lt;sup>4</sup> Oakbay Affidavit, p1009 at para 40.

<sup>&</sup>lt;sup>5</sup> See for example, Oakbay Affidavit, p1024 at para 77; Oakbay Affidavit, p1029-1030 at paras 93-97.

<sup>&</sup>lt;sup>6</sup> Oakbay's letter to Minister at Annexure E to Minister's Founding Affidavit, p51-52.

seek any relief in relation to the closures of their accounts. They must be held to these elections. As the Constitutional Court held in *Equity Aviation Services*:

"When exercising an election, the law does not allow a party to blow hot and cold. A right of election, once exercised, is irrevocable particularly when the volte face is prejudicial or is unfair to another."

The Oakbay companies do not purport to alter their election in these proceedings.

- 7.3 Third, the legal principles governing a bank's entitlement to terminate its contractual relationship with a client are now settled. They were laid down in the SCA's judgment in *Bredenkamp and Others v Standard Bank of South Africa Ltd* 2010 (4) SA 468 (SCA), following which the Constitutional Court refused an application for leave to appeal on the grounds that it bore no reasonable prospects of success.<sup>8</sup> The Oakbay companies do not suggest (nor could they do so) that these legal principles fall to be reconsidered.<sup>9</sup>
- 7.4 Fourth, Absa (and the other banks) set out the factual background and legal principles underpinning its decision to terminate the banker-client relationships with the Oakbay companies and related parties in its

<sup>&</sup>lt;sup>7</sup> Equity Aviation Services (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others 2009 (1) SA 390 (CC) (Equity Aviation Services) at para 54.

<sup>&</sup>lt;sup>8</sup> CCT 55/10. See the order at Annexure FNB5 to FirstRand Affidavit, p119-120.

<sup>&</sup>lt;sup>9</sup> Absa Affidavit, p505 at para 18; FirstRand Affidavit, p101-201 at paras 12 and 16; Standard Bank Affidavit, p256 at para 76; Nedbank Affidavit, p132-134 at para 17; VR Laser Affidavit, p899 at para 37; Oakbay Affidavit, p1009-1010 at paras 39-40 and 42; Minister Replying Affidavit, p1327 and 1335-1336 at paras 20 and 48-49.

affidavit before this Court.<sup>10</sup> They make plain that the closures fell within the test laid down in *Bredenkamp*. The Oakbay companies have placed none of this in issue.

We therefore submit that the Oakbay companies' evidence on the account closures, in addition to being speculative and unsubstantiated by any objective facts, falls to be disregarded as it is irrelevant to the issues before this Court.

#### THE MINISTER IS NEITHER ENTITLED NOR OBLIGED TO INTERVENE

- 9 All of the parties to this litigation agree that the relief sought by the Minister is premised on a single, narrow legal question:<sup>11</sup> Is the Minister as a matter of law empowered or obliged to intervene in the banking relationship between the Oakbay companies and their Banks? That is the only substantive question at issue in this application.
- 10 We submit that the Minister (and indeed any other Cabinet member) is neither empowered nor obliged to intervene in the relationship between the Oakbay companies, its related parties, and the Banks. Though none of the parties contest this, it is worth setting out the legal principles that sustain this submission.

<sup>&</sup>lt;sup>10</sup> Absa Affidavit, p506-518 at paras 21 to 45.

<sup>&</sup>lt;sup>11</sup> Absa Affidavit, p501 at para 7; Nedbank Affidavit, p132-134 at para 17; FirstRand Affidavit, p102 at para 16; VR Laser Affidavit, p901 at para 43; Oakbay Affidavit, p1009 at para 39.

- 11 First, the Minister does not have any such power or duty of intervention conferred upon him by law.
- 12 It is trite that the executive may exercise no power and perform no function beyond that conferred on them by law. This is a fundamental requirement of the rule of law and the supremacy of the Constitution. It has been a well-established part of our law since the decision of the Constitutional Court in Fedsure:

"It seems central to the conception of our constitutional order that the legislature and executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law." 12

13 The Constitutional Court re-affirmed this principle in *Pharmaceutical Manufacturers*:

"[T]he Constitution provides that in the exercise of its legislative authority Parliament 'must act in accordance with, and within the limits of, the Constitution.' The same applies to members of the Cabinet who are accountable collectively and individually to Parliament for the exercise of their powers and the performance of their functions. They too are required to act in accordance with the Constitution. The exercise of all public power must comply with the Constitution which is the supreme law, and the doctrine of legality which is part of that law." 13

<sup>&</sup>lt;sup>12</sup> Fedsure Life Assurance Ltd & Others v Greater Johannesburg Transitional Metropolitan Council & Others 1999 (1) SA 374 (CC) (Fedsure) at para 58.

<sup>&</sup>lt;sup>13</sup> Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others 2000 (2) SA 674 (CC) (Pharmaceutical Manufacturers) at paras 19-20.

- There is no provision of the Constitution, national legislation, nor any regulation, that empowers or obliges the Minister to intervene in banker-client relationships as urged by the Oakbay companies.
- Indeed, the Constitution and relevant statutes reserve the power to regulate the banking sector to specific regulators, not the Minister. These include the South African Reserve Bank ("SARB") and the Financial Intelligence Centre ("FIC"). Yet these bodies too have no power to intervene in such relationships in the way that the Oakbay companies urged the Minister to do before this application was launched.
  - 15.1 Under the Constitution, the SARB is the central bank of the Republic.<sup>14</sup>

    The primary object of the SARB is to protect the value of the currency in the interest of balanced and sustainable economic growth in the Republic.<sup>15</sup> The SARB, in pursuit of this object, must perform its functions independently and without fear or favour or prejudice its relationship with the Minister is only consultative.<sup>16</sup>
  - 15.2 The SARB has additional powers under the South African Reserve Bank Act<sup>17</sup> ("SARB Act"). These powers include determining and enforcing that banks maintain a minimum reserve<sup>18</sup> and inspecting banks to ensure compliance with banking legislation.<sup>19</sup>

<sup>&</sup>lt;sup>14</sup> Section 223 of the Constitution.

<sup>&</sup>lt;sup>15</sup> Section 224(1) of the Constitution.

<sup>&</sup>lt;sup>16</sup> Section 224(2) of the Constitution.

<sup>&</sup>lt;sup>17</sup> 90 of 1989.

<sup>&</sup>lt;sup>18</sup> Section 10A of SARB Act.

<sup>19</sup> Section 12 of SARB Act.

- 15.3 The FIC was established by the Financial Intelligence Centre Act (\*FIC Act").<sup>20</sup> FIC is responsible for monitoring accountable institutions. Accountable institutions include registered banks, such as Absa. In performing its functions, the FIC has extensive powers over banks under the FIC Act, including the power of accessing records;<sup>21</sup> requiring banks to advise it on clients;<sup>22</sup> and intervene in transactions.<sup>23</sup>
- 15.4 Despite the statutory powers specifically conferred upon the SARB and the FIC vis-à-vis banks, neither has the power to intervene in the contractual relationship between a bank and the client in the way that the Oakbay companies urged the Minister to do before this application was launched.
- The same position applies with even greater force to the position of the Minister and other members of cabinet.

Nature of Banker-Client Relationship

17 The parties all accept that the legal principles governing a bank's entitlement to terminate its contractual relationship were definitively laid down in the Bredenkamp judgment of the SCA. These principles are that:

<sup>&</sup>lt;sup>20</sup> 38 of 2001.

<sup>&</sup>lt;sup>21</sup> Section 26 of FIC Act.

<sup>&</sup>lt;sup>22</sup> Section 27 of FIC Act.

<sup>23</sup> Section 34 of FIC Act;

- 17.1 The law of contract governs the relationship between a bank and its clients. 24
- 17.2 A bank is entitled to terminate its contractual relationship with any client on reasonable notice. <sup>25</sup>
- 17.3 No person is entitled to insist that its contractual relationship with a bank should endure against the bank's will.<sup>26</sup>
- 17.4 Therefore, provided that it gives reasonable notice, a bank is entitled to terminate its banking relationship with any client, and is not obliged to give reasons for its decision to do so.<sup>27</sup>
- The Constitutional Court dismissed Mr Bredenkamp's application for leave to appeal on the ground that it lacked prospects of success. It therefore implicitly endorsed the SCA judgment. The *Bredenkamp* decision therefore constitutes an authoritative statement of the law on this question.
- There is accordingly no basis upon which the Minister could have intervened as the Oakbay companies urged him to do so. There is no executive power vested in the Minister, nor a power arising from statute that permits Ministerial intervention at the instance of a client to interfere with the contractual relationship subsisting between a bank and its client.

<sup>&</sup>lt;sup>24</sup> Bredenkamp judgment at para 64.

<sup>&</sup>lt;sup>25</sup> Bredenkamp judgment at para 64.

<sup>&</sup>lt;sup>26</sup> Bredenkamp judgment at para 57

<sup>&</sup>lt;sup>27</sup> Bredenkamp judgment at para 24

#### THE DISCRETION TO GRANT A DECLARATORY ORDER

The contradiction in the stance of the Oakbay companies

- 20 The Oakbay companies now say that they accept that the Minister is not by law empowered or obliged to intervene in the relationship between the Oakbay companies and the Banks.
- 21 Before this application was launched, the Oakbay companies repeatedly exhorted the Minister to intervene to assist them in preventing or reversing the closure of their accounts by the banks.<sup>28</sup> They sought an intervention that they now agree lacks any lawful basis.
- The Oakbay companies accordingly now submit that the order sought by the Minister is unnecessary and of academic interest only.<sup>29</sup>
- But this flies in the face of their earlier requests for ministerial intervention, as well as their call in these proceedings for precisely the kind of intervention in the banker-client relationship that they say they accept is unlawful:

"I submit that these interferences should become the subject of further investigation and decisive action. These practices by the four major banks aided by the Reserve Bank continue today."<sup>30</sup>

24 In the light of these contradictions on the part of the Oakbay companies, we submit that there is plainly a live issue for determination between the parties.

<sup>&</sup>lt;sup>28</sup> FA Annexure A, pp21-22; FA Annexure B p23; FA Annexure E pp51-52; FA Annexure G pp66-67; Annexure L pp80-81.

<sup>&</sup>lt;sup>29</sup> Oakbay Affidavit, p1009 at paras 39-40.

<sup>30</sup> Oakbay Affidavit, p1029 at para 94.

In the event that the executive may in future heed Oakbay's call for "investigation and decisive action" on this issue, a declarator from this Court will set an important constraint on the permissible options available.

The requirements of section 21 of the Superior Courts Act are satisfied

26 The relief sought by the Minister is procedurally grounded in section 21 of the Superior Courts Act,<sup>31</sup> which provides:

"[The High Court] may according to law take cognisance, and has the power in its discretion, and at the instance of any interested person, to enquire into and determine any existing, future, or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon that determination."

There is significant value and significance in declaratory relief of this kind. The Constitutional Court held in *Rail Commuters* that declaratory relief may be particularly necessary in order to clarify constitutional obligations and values. It held that:

"It is quite clear that before it makes a declaratory order a court must consider all the relevant circumstances. A declaratory order is a flexible remedy which can assist in clarifying legal and constitutional obligations in a manner which promotes the protection and enforcement of our Constitution and its values. Declaratory orders, of course, may be accompanied by other forms of relief, such as mandatory or prohibitory orders, but they may also stand on their own. In considering whether it is desirable to order mandatory or prohibitory relief in addition to the declarator, a court will consider all the relevant circumstances.

It should also be borne in mind that declaratory relief is of particular value in a constitutional democracy which enables courts to declare the law, on the one hand, but leave to the other arms of government, the executive and the legislature, the decision as to how best the law, once stated, should be observed.

<sup>31 10</sup> of 2013.

In this case, Metrorail and the Commuter Corporation denied, in error, that they bore obligations to protect the security of rail commuters. Given the importance of that obligation in the context of public rail commuter services, it is important that this court issue a declaratory order to that effect."<sup>32</sup>

- Oakbay contends that this Court should exercise its discretion against granting the declaratory order that the Minister seeks, because the relief does not call upon this court "to enquire into and determine any existing, future, or contingent right or obligation" as prescribed in section 21 of the Superior Courts Act.
- Absa disagrees. We submit that this Court is indeed empowered to grant the declaratory relief sought by the Minister, and that it ought to exercise its discretion in favour of doing so.
- 30 In this regard, we emphasise that:
  - 30.1 Absa and the other banks have an existing and future right to be free from Ministerial intervention in their decisions regarding their customers.

    They have a right to ensure that any regulatory or executive action that takes place in relation to banking relationships occurs strictly within the confines of the law.
  - 30.2 The public has a similar existing and future right to be free from Ministerial intervention in their relationships with banks. Again, they have a right to ensure that any regulatory or executive action that takes place in relation to banking relationships occurs strictly within the confines of the law.

<sup>&</sup>lt;sup>32</sup> Rail Commuters Action Group v Transnet Ltd t/a Metrorail 2005 (2) SA 359 (CC) (Rail Commuters) at paras 107 to 109.

30.3 The Minister has an existing and future legal obligation not to intervene in the relationship between the banks and their customers. In view of the repeated suggestions by Oakbay that he act contrary to this obligation, it is important that this obligation be made clear.

#### Importance of Matter and Public Interest

- The importance of this matter, and the overwhelming public interest in determining the legal question it raises, warrants a definitive pronouncement from this Court. This pronouncement will have far-ranging economic, financial and legal consequences both nationally and internationally that warrant a pronouncement by this Court.
- 32 The importance of this application to the public interest has been recognised by almost all the parties to this litigation.<sup>33</sup>
- Had the Minister acceded to the requests made by the Oakbay companies the consequences would have been grave and would extend beyond the parties to this litigation:<sup>34</sup>
  - 33.1 The Minister's conduct would have been unlawful and *ultra vires* his powers.

<sup>&</sup>lt;sup>33</sup> Minister Founding Affidavit, p10 and 19 at paras 3 and 29; Minister Replying Affidavit, p1355 at para 119; Absa Affidavit at paras 9-10; FirstRand Affidavit, p107-109 at para 32; Nedbank Affidavit, p142 and 153 at paras 37 and 70; Oakbay Affidavit, p 1013-1014 at para 49.

<sup>34</sup> Absa Affidavit, p501 at para 8.

- 33.2 The intervention would have greatly undermined confidence in the banking sector and raised the spectre of state intervention in private commercial relationships, arbitrarily and at the instance of a select group of companies or persons.
- 33.3 This would have been a dangerous precedent for the banking industry as a whole, would have been contrary to the public interest and would have created real risks for the confidentiality of the relationship between banks and clients.
- 33.4 Such intervention would also have compromised Absa's contractual relationship as a correspondent bank with its international clearing banks.
- 34 Absa and the other Banks have expressed their concern around the purported formation of an Inter-Ministerial Committee ("IMC") last year in relation to the Banks.<sup>35</sup>
- Absa respectfully submits that the declaratory order sought by the Minister in this case will be of public importance in the event that the possibility of such a commission recurs. In that event, the committee (or whatever body is dealing with the banking sector) will know one of the limits on its permissible interventions.

<sup>&</sup>lt;sup>35</sup> Absa Affidavit, p522-523 at para 58; FirstRand Affidavit, p107-109 at para 32; Nedbank Affidavit, p139-141 at paras 33-36; Standard Bank Affidavit, p273-274 and 279 at paras 110 and 121-122.

- 36 Should any future attempts arise wherein non-contracting parties seek to intervene in the bank-client relationship, this Court's pronouncement will put the matter beyond debate.
- 37 As the Constitutional Court said in *Rail Commuters*, it is critical that the Court declare the law so that "the other arms of government, the executive and the legislature" 36 may be left to determine how best the law should be observed.

#### No prejudice

- None of the parties has suggested that they will suffer any prejudice in the event that the relief that the Minister seeks is granted. Nor could they, given that they agree with the legal premise of the declarator.
- 39 Though not decisive, the absence of prejudice weighs in favour of the grant of declaratory relief.

#### CONCLUSION

- 40 We accordingly submit that the requirements for declaratory relief under section 21 of the Superior Courts Act have been satisfied.
- 41 This Court should therefore declare that the Minister is not by law empowered or obliged to intervene in the relationship between the first to fourteenth respondents, and the fifteenth to eighteenth respondents, as regards the

<sup>36</sup> Rail Commuters at para 108.

closing of the banking accounts held by the former with the latter, as sought in the notice of motion.

42 Absa seeks no order regarding costs.

**DAVID UNTERHALTER SC** 

STEVEN BUDLENDER

**NICK FERREIRA** 

**AYANDA MSIMANG** 

**Counsel for Absa** 

Chambers, Johannesburg

10 February 2017

FNB HOA

Filling sheet -16th respondent's (FNB's) heads of argument

- 2414

## IN THE HIGH COURT OF SOUTH AFRICA GAUTENG DIVISION, PRETORIA

Case No 80978/16

21st Respondent

In the matter between	en:
-----------------------	-----

Minister of Finance	Applicant
and	
Oakbay Investments (Pty) Ltd	1 <sup>st</sup> Respondent
Oakbay Resources and Energy Ltd	2 <sup>nd</sup> Respondent
Shiva Uranium (Pty) Ltd	3 <sup>rd</sup> Respondent
Tegeta Exploration and Resources (Pty) Ltd	4 <sup>th</sup> Respondent
JIC Mining Services (Pty) Ltd	5 <sup>th</sup> Respondent
Blackedge Exploration (Pty) Ltd	6 <sup>th</sup> Respondent
TNA Media (Pty) Ltd	7 <sup>th</sup> Respondent
The New Age	8 <sup>th</sup> Respondent
Africa News Network (Pty) Ltd	9 <sup>th</sup> Respondent
VR Laser Services (Pty) Ltd	10 <sup>th</sup> Respondent
Islandsite Investments One Hundred and	11 <sup>th</sup> Respondent
Eighty (Pty) Ltd	
Confident Concept (Pty) Ltd	12 <sup>th</sup> Respondent
Jet Airways (India) Ltd (incorporated in India)	13 <sup>th</sup> Respondent
Sahara Computers (Pty) Ltd	14 <sup>th</sup> Respondent
ABSA Bank Ltd	15 <sup>th</sup> Respondent
First National Bank	16 <sup>th</sup> Respondent
Standard Bank of South Africa Limited	17 <sup>th</sup> Respondent
Nedbank Limited	18 <sup>th</sup> Respondent
Governor of the South African Reserve Bank	19 <sup>th</sup> Respondent
Registrar of Banks	20 <sup>th</sup> Respondent

Director of the Financial Intelligence Centre

# FILING SHEET – 16<sup>TH</sup> RESPONDENT'S (FNB'S) HEADS OF ARGUMENT

Document presented for service and filing:

16th Respondent's (FNB's) heads of argument

Matter set down as special motion on 28, 29 and 30 March 2017.

Signed at Sandton on this 10th day of February 2017.

Norton Rose Fulbright South Africa Inc

Attorneys for 16<sup>th</sup> respondent 34 Fredman Drive, Sandton

Tel: 011 685 8860

Email: aslam.moosajee@nortonrosefulbright.com

Ref: Mr Moosajee/FNB13954 c/o **Mothle Jooma Sabdia Inc** Ground Floor, Duncan Manor

Cnr Jan Shoba and Brooks Streets

Brooklyn

Tel: 012 362 3137

Email: <u>EbrahimJ@mjs-inc.co.za</u> Ref: Mr Jooma/NOR1.0152

To:

The Registrar of the High Court

Pretoria

Email: MTroskie@judiciary.org.za

And to:

The State Attorney
Attorneys for applicant

SALU Building 255 Francis Baard Street, Pretoria

Tel: 012 309 1575

Email: TNhlanzi@justice.gov.za

Ref: Ms T Nhlanzi Ref: 2427/16/232 Service by email

And to:

Van der Merwe & Associates

1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 11<sup>th</sup>, 12<sup>th</sup> and
14<sup>th</sup> respondents' attorneys
62 Rigel Ave North
Waterkloof, Pretoria
Tel: 012 343 5432
Email: legal2@vdmass.co.za
simone@vdmass.co.za

Service by email

And to:

Stein Scop Attorneys Inc

10<sup>th</sup> respondent's attorneys
Ground Floor, 18 Melrose Boulevard
Melrose Arch, Johannesburg
Tel: 011 380 8080
Ref: G Stein
Email: glenn@steinscop.com
sian@steinscop.com
c/o Brooklyn Place
cnr Bronkhorst / Dey Streets
Brooklyn, Pretoria
Ref to: Bridget Moatshe

Service by email

And to:

Edward Nathan Sonnenbergs
15<sup>th</sup> respondent's attorneys
15 West Street, Sandton
Tel: 011 269 7600
Email: dlambert@ensafrica.com
Ref: M Katz/D Lambert/0416998
c/o Gerhard Botha & Partners Inc
1st Floor, Erasmus Forum Building B
Cnr Rigel Ave / Stokkiesdraai
Erasmusrand, Pretoria
Tel: 012 347 0480
Email: brendon@bothapartners.co.za
Ref: Mr B Swart/Mr H Botha

Service by email

And to:

#### Bowman Gilfillan

17<sup>th</sup> Respondent's attorneys 165 West Street, Sandton

Tel: 011 669 9000 Ref: C Mkiva/6164672

Email: clement.mkiva@bowmanslaw.com

alan.keep@bowmanslaw.com c/o Boshoff Attorneys

Ground Floor, Hazelwood Gate

Office Park

14 Oaktree Avenue

Cnr Oaktree Ave / Dely Road

Hazelwood, Pretoria Tel: 012 424 7500 Ref: Natasha Nortje

Email: Natasha@boshoffinc.co.za

And to:

Baker & McKenzie

18th respondent's attorneys

Tel: 011 911 4300

Email:

Gerhard.Rudolph@bakermckenzie.com Widaad.Ebrahim@bakermckenzie.com Callum.OConnor@bakermckenzie.com

c/o Adams & Adams

Adams & Adams Place

Lynnwood Bridge

4 Daventry Street, Lynnwood Manor

Pretoria

Tel: 012 432 6000 Ref: Adele Jordaan

Email: adele.jordaan@adamsadams.com

And to:

**Werksmans Attorneys** 

19th & 20th respondents' attorneys

155 - 5th Street, Sandown

Tel: 011 535 8145

Ref: Mr C Manaka / Mr C Moraitis Email: <a href="mailto:cmanaka@werksmans.com">cmanaka@werksmans.com</a>

cmoraitis@werksmans.com

c/o Mabuela Incorporated

Charter House, 179 Bosman Street

Pretoria

Tel: 012 325 3966

Email: mabuela@tiscali.co.za

Service by email

Service by email

Service by email

And to:

MacRobert Attorneys
21st respondent's attorneys
MacRobert Building
Cnr Jan Shoba / Justice Mahomed
Pretoria

Tel: 012 425 3436 Ref: G K Hay

Email: ghay@macrobert.co.za

Service by email

# IN THE HIGH COURT OF SOUTH AFRICA GAUTENG DIVISION, PRETORIA

Case No.: 80978/16

In the matter between:

#### MINISTER OF FINANCE

Applicant

and

OAKBAY INVESTMENTS (PTY) LTD	First Respondent
OAKBAY RESOURCES AND ENERGY LTD	Second Respondent
SHIVA URANIUM (PTY) LTD	Third Respondent
TEGETA EXPLORATION AND	
RESOURCES (PTY) LTD	Fourth Respondent
JIC MINING SERVICES (PTY) LTD	Fifth Respondent
BLACKEDGE EXPLORATION (PTY) LTD	Sixth Respondent
TNA MEDIA (PTY) LTD	Seventh Respondent
THE NEW AGE	Eighth Respondent
AFRICA NEWS NETWORK (PTY) LTD	Ninth Respondent
VR LASER SERVICES (PTY) LTD	Tenth Respondent
ISLANDSITE INVESTMENTS ONE	
HUNDRED AND EIGHTY (PTY) LTD	Eleventh Respondent
CONFIDENT CONCEPT (PTY) LTD	Twelfth Respondent
JET AIRWAYS (INDIA) LTD	
(INCORPORATED IN INDIA)	Thirteenth Respondent
SAHARA COMPUTERS (PTY) LTD	Fourteenth Respondent
ABSA BANK LTD	Fifteenth Respondent
FIRST NATIONAL BANK	Sixteenth Respondent
STANDARD BANK OF SOUTH AFRICA	
LIMITED	Seventeenth Respondent
NEDBANK LIMITED	Eighteenth Respondent
GOVERNOR OF THE SOUTH AFRICAN	14
RESERVE BANK	Nineteenth Respondent
REGISTRAR OF BANKS	Twentieth Respondent
DIRECTOR OF THE FINANCIAL	
INTELLIGENCE CENTRE	Twenty First Respondent

FNB'S HEADS OF ARGUMENT

### A. INTRODUCTION

- 1. Oakbay<sup>1</sup> accepts that the Minister does not have the power or obligation to intervene in the relationship between Oakbay and the banker respondents regarding the closure by the latter of Oakbay's bank accounts.<sup>2</sup> Yet, on its version, Oakbay sought the Minister's intervention for that precise purpose. But Oakbay now resists the declaratory relief sought in prayer 1 of the notice of motion on the contention that there is no *lis* between Oakbay and the Minister, and that any declarator would be academic.<sup>3</sup>
- 2. The objection is unfounded for the following reasons:
  - 2.1. <u>First</u>, there *is* a live issue between the parties of which the declarator would, if granted, be determinative.
  - 2.2. Second, if all the parties are agreed as to the content of the relief sought, then there could not be any consistent (that is, non-contradictory) opposition to its grant. The court should in that case have no difficulty granting an order that everyone agrees with.
  - 2.3. Third, even if there were no live issue between the parties,

We will refer to the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 10<sup>th</sup>, 11<sup>th</sup>, 12<sup>th</sup>, and 14<sup>th</sup> respondents compendiously as "Oakbay".

NoM prayer 1 p 2.

<sup>3</sup> Ibid.

the court has discretion, in the interests of justice, to grant a declarator.

- 2.4. <u>Fourth</u>, in exercising that discretion, the court will have regard to the fact, not contested by anyone, that the matter is of sufficient public and constitutional importance to warrant the grant by the court of a declarator, the substance of which is unopposed.
- 3. We develop these submissions below, beginning with the facts showing that there is a live dispute between the parties.

## B. THERE IS A LIVE DISPUTE BETWEEN THE PARTIES

- 4. There are two reasons Oakbay contends there is no live dispute between it and the Minister. First, it is said that Oakbay agrees with the content of the declaratory order sought by the Minister. Second, it is contended, even if it did not accept the content of the declaratory order, there would still be no live dispute between the parties because the Minister was entitled to rebuff Oakbay's approaches. 5
- 5. This approach is misguided. As to the first reason, Oakbay's own conduct is inconsistent with its belated acceptance of the content of the declarator sought. As to the second reason, the Minister is entitled, in the interests of the banking sector for which he is

<sup>4</sup> Ragavan's AA para 47 p 1012.

<sup>5</sup> Ragavan's AA para 43 p 1010.

responsible, to approach a court to prevent on-going approaches, by a politically well-connected business, seeking him to do what it is now accepted he cannot legally do, and in the process generate uncertainty in the banking sector.

- 6. Oakbay has attempted, through an analysis of its pre-litigation correspondence with the Minister, to show that it has always agreed with the relief sought by the Minister.<sup>7</sup> Any objective reading of that correspondence dispels that notion. The correspondence and interactions between the various parties leads to two conclusions.
  - 6.1. First, that Oakbay sought to get the Minister to apply political pressure on the banks to reverse their decisions to terminate Oakbay's accounts.
  - 6.2. Second, that pressure, being political, was extra-legal in the sense that the legal route for the reversal of the banks' decisions was always open but not taken by Oakbay. Oakbay considered that the legal route would not have availed it. But this simply underlines the fact that Oakbay should have stopped there. Oakbay could not seek to get the Minister to achieve that which Oakbay itself could not legally achieve, if

Oakbay's political connections are something Oakbay is frank about: see Ragavan's AA paras 123-128 pp 1041-1042.

Ragavan's AA paras 54-66 pp 1015-1020.

## (i) Pre-litigation correspondence

7. On 17 April 2016, after its bank accounts were closed, Oakbay wrote to the Minister, saying:

"Given your strong relationship with the captains of industry, I would implore you to help us to save the jobs..."

- 8. This request was in the context of the closure by the banks of Oakbay's bank accounts. "Captains of industry" was therefore a reference to the banks. In this, the second of the letters addressed by Oakbay to the Minister, Oakbay very clearly asks the Minister to use his "strong relationship" with the banks to get them to reverse their decisions to close Oakbay's accounts.
- 9. This could only have been on the basis that Oakbay thought that the Minister had the <u>legal power</u> to intervene, something that the declarator is in part about. And if Oakbay agreed with the Minister at the time that he had no legal power to intervene, then it cannot have consistently asked him lawfully to obtain the reversal of the banks' decisions. This alone leads to the conclusion that Oakbay did not agree, at the time it made the request, that the Minister had no legal power to reverse the banks' decisions. And if it did agree, it offers no explanation why it would request the Minister to do

<sup>8</sup> Oakbay accepts now that the Minister could not lawfully intervene.

<sup>9</sup> Minister's FA p 23.

something he was not legally empowered to do.

10. The next step was Oakbay's meeting with the Minister on 24 May 2016. A summary of what took place at that meeting is contained in the letter of the same date from the Minister to Oakbay. The Minister records the following as part of what was discussed at the meeting:

"We reiterated that there are <u>legal impediments</u> to any registered bank discussing client-related matters with the <u>Minister of Finance</u>, or any third party. Further, the Minister cannot act in any way that undermines the regulatory authorities.<sup>11</sup> [Emphasis added]

11. Oakbay replied by letter on the same day, attempting to justify its attitude that the Minister ought to intervene on its behalf despite that being unlawful. What Oakbay says is revealing:

"It certainly is our view that this [the closure of bank accounts] flies in the face of the banking code of good practice, yet, as case law suggests, will fail in a court of law. Given this position, as well as the decisions of the responsible regulators, we seem to have no options open to us other than our appeal to you for assistance." [Emphasis added]

12. Having been warned by the Minister that there was no legally permissible way in which he could get the banks to reverse their decisions, Oakbay replied that, because it had no legal route, it appealed to the Minister. This could only be an appeal to the

Minister's FA p 46.

<sup>11</sup> Ibid.

Minister's FA p 51.

Minister in his *political* capacity. This stance—that despite the illegality of the proposed interference, the Minister must nevertheless assist because there is no legally available option to Oakbay—shows that the Oakbay believed that the Minister could, somehow, intervene. This was a rejection by Oakbay of the very position it now assumes, namely that it has always accepted that the Minister could not lawfully intervene in client-banker relationships.

13. In another letter to the Minister (dated 25 July 2016), Oakbay, knowing full well that the Minister has no power to intervene in client-banker relationships, says:

"Hopefully, we can jointly find a way to understand the real reasons for the banks decision to unilaterally close our accounts." [Emphasis added]

- 14. In the light of the alleged acceptance that the Minister had no power lawfully to intervene in client-banker relationships, it is unclear how a Minister could "jointly" with Oakbay probe the "real reasons" for the closure of the accounts. Again, this could only have been possible, from Oakbay's perspective, if Oakbay thought that the Minister had the power lawfully to intervene. The conclusion that Oakbay thought this is inescapable: indeed, it is the only reasonable explanation for its persistence.
- 15. Later in the same letter, Oakbay tried once again to explain why it is

Minister's FA p 80.

not taking legal action against the banks:

"Once we have achieved a moderate level of stability and sustainability and when we deem our current initiatives to reverse the current position are exhausted, we will certainly consider the legal option which we understand to be a lengthy and arduous process. As you would understand, without banking facilities we won't have a business to operate well before the conclusion legal proceedings." [Emphasis added]

- 16. It is unclear how Oakbay could hope to achieve "a moderate level of stability" through what it now acknowledges would have been an unlawful intervention on the part of the Minister. Again, the only reasonable explanation is that Oakbay did not think, as it now says it did, that the Minister would, by intervening, be acting unlawfully.
- 17. In response to Oakbay's 25 July 2016 letter, the Minister wrote to Oakbay on 10 August 2016, saying:

"It is concerning that Oakbay still does not accept that the Minister of Finance, in law, is unable to interfere with relations between registered banks and their clients." 15

18. In its response to the Minister's letter, Oakbay wrote a letter on 9

September 2016. There Oakbay does not address the Minister's concern. Instead, it asks for a meeting with the Minister, at which it says it will deal with the Minister's letter. It also promised to bring to that meeting a file "of correspondence with the banks" which

<sup>14</sup> Ibid.

<sup>15</sup> Minister's FA p 82...

Minister's FA p 85.

- 19. After this, the Minister brought this application on 13 October 2016.
- 20. The following conclusions can be drawn from this correspondence:
  - 20.1. <u>First</u>, Oakbay requested the Minister to help it reverse the banks' decision to close its accounts.
  - 20.2. Second, Oakbay ought to have known (because it was told so by the Minister) that the Minister could not <u>lawfully</u> fulfil that request.
  - 20.3. Third, Oakbay persisted in its request for the Minister's unlawful assistance. This could only have been on the basis that Oakbay did not accept that the Minister could not lawfully carry out its request. This can only mean that, contrary to what Oakbay now asserts, it did not agree with the Minister's understanding of the legal position.
  - 20.4. Fourth, if, contrary to the above, Oakbay accepted the Minister's position as to the legality of what he was being asked to do by Oakbay, then Oakbay was indifferent as to whether the Minister acted unlawfully or not.

Minister's FA p 85.

- 20.5. Fifth, and following from the last point, it is clear that if the Minister was being asked to use what are now accepted as extra-legal means, he was in effect being asked to use his political influence to get the banks to reverse their decisions to close Oakbay's accounts.
- 21. The correspondence, which we have set out above, should not be viewed in isolation. It was part of other activity, involving, so far as can be made out from the papers, another Minister, the Minister of Mineral Resources, Mr Mosebenzi Zwane. To this we now turn.

## (ii) The IMC

- 22. FNB's apprehensions are if anything increased by what is contained in Nedbank's affidavit. There Nedbank sets out the facts, from which Oakbay has not distanced itself, about how, shortly after the closure of the bank accounts, an Inter-Ministerial Committee (IMC) met with Nedbank's representatives on 6 May 2016.<sup>18</sup>
- 23. It appears that the central purpose of that meeting was to find out whether the banks had acted in concert in closing Oakbay's accounts. 19
- 24. At the meeting, the Minister of Mineral Resources asked Nedbank to step in "to save jobs considering that the relevant family [the Gupta

Nedbank's affidavit para 31 p 138.

Nedbank's affidavit para 33.5 p 140.

family] had resigned from these [i.e. Oakbay] companies". 20 In the context, Nedbank could only "step in" by re-opening the bank accounts: it could play no other conceivable role.

- 25. The chronology is instructive. On 3 May 2016, three days before the meeting with Mr Zwane, Nedbank met with Oakbay's representatives. The meeting is no surprise as Oakbay was by its own account in the habit of asking Ministers for help. In fact Oakbay asked for Mr Zwane's intervention or (to put it no higher) assistance by its letter of 8 April 2016. Mr Zwane duly carried out the request and met with Nedbank, as already pointed out.
- 26. On the probabilities, therefore, Oakbay would have known of the meeting between the IMC and Nedbank: after all, it asked for the Mr Zwane's involvement by writing to him. Oakbay however fails to explain why, if it agrees with the content of the declarator, it approached Mr Zwane to do what it now acknowledges was unlawful. In the absence of an explanation, it must be accepted that, contrary to the stance it now adopts, Oakbay did not at the relevant time agree that Mr Zwane could not lawfully interfere in client-banker relationships. There is after all no suggestion that, unlike Mr Gordhan, Mr Zwane was empowered lawfully to intervene in those relationships. Yet, it would appear that Mr Zwane was prepared to

Nedbank's affidavit para 33.4 p 140.

Nedbank's affidavit para 30 p 138.

<sup>22</sup> Ragavan's AA para 49 p 1013.

<sup>&</sup>lt;sup>23</sup> Ragavan's AA para 49 p 1013 and annexure OB3.8 at p 1111.

- 27. It is accordingly clear that clarity and certainty are required in this context, certainly as to what the powers of the Executive are in this regard. If the matter is clear to Oakbay today, it appears that Oakbay's present position was not known to Mr Gordhan when he launched this application. It also appears that Mr Zwane did not know, when he made the intervention, at what appears to be Oakbay's request, that, according to Oakbay, his intervention was unlawful. Even if it is improbably supposed that Mr Zwane acted unilaterally, without Oakbay's request, and against its views as to his legal ability to intervene, the fact is that Mr Zwane did after all intervene. And Mr Gordhan did not.
- 28. From FNB's perspective, therefore, the question whether Mr Gordhan could not lawfully intervene (now apparently accepted by all) is a live dispute between the parties. It is at any rate a question on which this court's ruling would be in the public interest, about which the banking sector is concerned, and on which it is in the interests of justice for this court to rule.
- 29. As will appear below, it makes little difference as a point of law, and from the banks' perspective, whether the power or obligation to intervene is that of the Minister of Finance (as the notice of motion has it) or that of the Executive in general (President and the Cabinet).
  If the Minister of Finance (the Minister responsible) cannot at law

intervene in private client-banker relationships, then (as we submit below) neither can any member of the Executive.

30. For all the above reasons, we submit that the inconsistent stances of two Cabinet Ministers (Mr Zwane and Mr Gordhan) are, apart from anything else, a reason why there is a live dispute as to their (or at any rate Mr Gordhan's) intervention powers and obligations in relation to private client-banker relationships.

## (iii) Post-litigation conduct

- 31. It might be thought that, given the stance it has taken in its affidavit, namely that it does not oppose the content of the declarator sought, Oakbay would repudiate its conduct vis-à-vis the Ministers. Instead, Oakbay continues to hint that the banks' conduct, lawful as it was, "permits further scrutiny". 24 Oakbay says that the rules, under which the banks currently operate, which permit closure of bank accounts "may warrant further consideration through appropriate state conduct". From this, one may assume (from its conduct recorded above) that Oakbay regards Ministerial intervention in client-banker relationships as "appropriate state conduct".
- 32. On 1 September 2016, Mr Zwane issued a statement, purporting to be that of the IMC. The statement stated, incorrectly, that Cabinet had resolved to appoint a commission of inquiry *inter alia* into the

Van der Merwe's AA para 28 pp 892-893.

banks' conduct vis-à-vis Oakbay.<sup>25</sup> The President repudiated that statement as Mr Zwane, speaking in his "personal capacity". The President further regretted the "confusion" the statement caused.<sup>26</sup>

33. Despite this repudiation by the President, there is still confusion and all of this furnishes a further reason why the Minister's power or obligation to intervene in client-banker relationships should be clarified by this court. Oakbay continues to threaten further Executive action against the banks. This means, in the context of this case, that Oakbay does not accept the content of the Minister's declatrator. There is, therefore, a live dispute between the parties.

## (iv) Conclusion

34. In these circumstances, it is plainly insupportable for Oakbay now belatedly to say that it has always accepted that the Minister has no power to intervene. Had it accepted that, it would never have persisted in its requests. If, as it says, Oakbay accepted the correct legal position, then matters are worse for it. For in that case, in attempting to get the Minister to act illegally, Oakbay regarded itself as being above the law. In either event, there was disagreement between Oakbay and the Minister: Oakbay wanted the Minister, and the latter refused, to act unlawfully. This was the *lis* between the parties when this application was brought. The Minister was in

<sup>&</sup>lt;sup>25</sup> Page 182.

<sup>&</sup>lt;sup>26</sup> Page 185.

those circumstances entitled to approach the court for a declarator.

- 35. He was entitled so to act for another reason. Any deployment by the Minister of his political power, unilaterally or at the instance of others, is obviously of great concern to FNB and to the banking (or indeed any) sector in the Republic. This is why FNB supports the Minister's application. FNB's concern is that Oakbay tried to get the Minister to behave unlawfully or, to put it plainly, to use his political office to influence FNB and other banks to reverse their decisions to terminate their relationship with Oakbay. Oakbay says that the Minister should simply have resisted its political approaches, even as it continued to make them. Approaching a court to put a stop to such approaches, it is said, exposes the Minister as "weak-kneed". It lies ill in the mouth of Oakbay to exert pressure on a Minister, ask him to resist that pressure, but never to approach the courts for assistance.
- 36. In any event, it is clear from the above that Oakbay's real stance, as opposed to the one it now affects belatedly to adopt, is that it could with legal impunity apply pressure on a Minister to conduct himself illegally. Such unprecedented conduct is inimical to our constitutional order and this court is respectfully invited so to declare, by the grant of the declaratory order sought.

## C. THE LAW ON DECLARATORY ORDERS

37. Section 21(1)(c) of the Superior Courts Act 10 of 2013, under which

this court is empowered to grant the declaratory order sought by the Minister, provides that:

- "21(1) A Division has jurisdiction over all persons residing or being in, and in relation to all causes arising and all offences triable within, its area of jurisdiction and all other matters of which it may according to law take cognisance, and has the power—...
  - (c) in its discretion, and at the instance of any interested person, to enquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination." [Emphasis added]
- 38. Oakbay objects to the grant of the declaratory order in this case on the basis that there is no live issue between the parties. It buttresses this by the further contention that, if granted, the declarator sought would be merely academic. The courts' reluctance to grant declaratory orders has the same justification as that which inclines courts to refuse to adjudicate a moot case. In both cases, the court refuses to issue a declarator or to decide a moot case because, standardly, neither will have any practical effect.
- 39. It will therefore be instructive, in considering Oakbay's objection in this case, to have regard not merely to cases decided under section 21(1)(c) of the Superior Courts Act, but also to decisions of the Supreme Court of Appeal and the Constitutional Court on moot appeals. When these decisions are examined, it will be noted that they evince an advance on the rigid old case law, which was

encapsulated by Innes CJ in Geldenhuys and Neethling v Beuthin 1918 AD at 441 where the court said:

"After all, Courts of Law exist for the settlement of concrete controversies and actual infringements of rights, not to pronounce upon abstract questions, or to advise upon differing contentions, however important."

- 40. This rule no longer holds the unqualified sweep it might once have had. Already in the 1960s, the courts (notably in Ex parte Nell 1963
  (1) SA 754 (A) at 760A-C) were moving away from such rigidities.
  lt would appear that Oakbay wants to set our law back to 1918.
- 41. The modern attitude towards older cases such as Geldenhuys and

  Neethling v Beuthin is that summarised in Erasmus' Superior Court

  Practice (RS 2, 2016, at A2-126):

"The decision in the Supreme Court of Appeal in Ex parte Nell reflects a marked departure from this view. It was there held that an existing dispute is not a prerequisite to an exercise by the court of jurisdiction under the section; and it is only necessary that there should be interested parties upon whom the declaratory order will be binding. The necessity for an actual dispute is not expressly required in the section, nor is it to be implied therefrom. In view of this decision of the Supreme Court of Appeal, and of the differences in wording between the present section and s 102 of Act 46 of 1935, earlier decisions on the power of the court to grant declaratory orders should be used with circumspection." [Emphasis added]

42. As is pointed out in Erasmus, courts enjoy the section 21(1)(c) power to grant a declaratory order, *notwithstanding* that no consequential relief follows thereupon. Oakbay's contention, that no

consequential relief will follow upon the grant of the declarator sought by the Minister<sup>27</sup>, is therefore irrelevant. The Minister's application is none the worse for that. That, after all, is the express purpose of section 21(1)(c) of the Superior Courts Act. The same goes for the criticism (which in our submission amounts to the same as the above criticisms) that the relief sought by the Minister is "academic".<sup>28</sup>

43. The real question to be answered under section 21(1)(c) is not just whether the relief sought is academic. The question is a much broader one: it is whether the court should under that section exercise its discretion to grant an order, notwithstanding that no consequential relief flows from it.

## (i) Analysis of section 21(1)(c)

44. Section 21(1)(c) in terms grants the High Court what it calls "discretion". This already indicates that there is no inflexible rule, least of all that for which Oakbay contends. The discretion will naturally be exercised judicially: that is, the court will have regard (i) to the facts, (ii) to public interest, <sup>29</sup> and (iii) to general coherence of the law.

<sup>&</sup>lt;sup>27</sup> Ragavan's AA para 40 p 1009.

<sup>&</sup>lt;sup>28</sup> Ragavan's AA para 40 p 1009.

Compare a case that is not relevantly distinguishable: Minister of Justice and Constitutional Development and Others v Southern African Litigation Centre and Others 2016 (3) SA 317 (SCA) ("the Al Bashir case") at para 23.

- (a) Section 21(1)(c) does not require a dispute between parties
- 45. The foundation of Oakbay's opposition to the grant of the Minister's declarator is that there is no *lis* between the parties. So important is this to Oakbay's case that, abandoning its stance *vis-à-vis* the Minister (which throughout assumed that the Minister could lawfully interfere with client-banker relationships), Oakbay saw fit to insist that it accepts the Minister's position. On this basis, it now asserts that, thanks to its acceptance of that position, there is no *lis* between it and the Minister. Therefore, it is concluded, the declaratory order sought should not be granted.
- 46. But this all assumes that, in order for a court to exercise its section 21(1)(c) discretion, there ought to be a *lis* between the parties. But that is the exact opposite of the purpose and meaning of section 21(1)(c). Nowhere does that requirement appear anywhere in the section. In fact, the section would appear to be designed for cases in which no dispute exists between the parties. That is why the section says that the declaratory order may be granted "notwithstanding" that no consequential relief follows upon it.
- 47. This is how the courts themselves have understood the section. In Van Deventer v Ivory Sun Trading 77 (Pty) Ltd 2015 (3) SA 532 (SCA) the court said at paragraph 31:
  - [31] Although an existing dispute is not a prerequisite for the granting of a declaratory order, there are two steps that must

be investigated before a declaratory order can be granted. These are: firstly, that the applicant has an interest in any existing, future or contingent right or obligation; and secondly, if such interest exists, whether an order would be appropriate. However, if no dispute exists, a court might [not will] refuse to exercise its discretion in favour of an applicant." [Emphasis added and internal references omitted]

- 48. Nothing could be clearer. Existence of a dispute, a *lis*, between the parties is not a pre-requisite to the grant of a declaratory order under section 21(1)(c).
- 49. It would be idle, however, to disregard the fact that there is no dispute between the parties. That is certainly a factor that a court may take into account in exercising its discretion: that is what the last sentence in the quotation effectively means. But it is not the only factor. The facts of the case, public interests or interests of justice will also be taken into account; and, in the majority of cases, would if established override the fact that no dispute exists.
- 50. There is, most importantly, the textual aspect. The whole point of section 21(1)(c) is that no dispute exists between the parties. That is why that section says "notwithstanding that such person cannot claim any relief consequential upon the determination". If there is an existing dispute, it follows logically that consequential relief resolving that dispute can be claimed and granted. But because section 21(1)(c) contemplates that no consequential relief need be claimed before the section is invoked by the applicant, it also necessarily contemplates that, despite there being no live dispute

between the parties, the court may yet in its discretion grant a declaratory order.

51. This point was expressed (in slightly different terms) by Riley AJ in YB v SB And Others NNO 2016 (1) SA 47 (WCC) where he said at para 58:

"In my view the section [21(1)(c)] confers wide powers and a broad discretion on the court to grant declaratory orders. It is therefore not correct, as has been submitted on behalf of the trustees, that it is only competent to grant a declaratory order if it is necessary to do so." [Emphasis added]

- 52. "Necessary" could in this context only mean "where there is an existing dispute" or "where consequential relief can be granted".

  But any such construction of section 21(1)(c) runs into textual difficulties. The text of the section means the exact opposite. We submit, therefore that there is no requirement in section 21(1)(c) that a court should not grant declaratory relief in the absence of a dispute between the parties.
- (ii) Absence of a dispute does not mean that declaratory relief is abstract or academic
- 53. We have already showed that the correspondence between Oakbay and the Minister preceding this application illustrates that there is a "live" issue relating to the declaratory relief sought by the Minister. But even if at the time Oakbay had agreed that the Minister was not legally empowered to do what it requested of him, that does not

mean that declaratory relief would for that reason be abstract or academic. This is a fallacy that Oakbay commits.<sup>30</sup> On the structure of section 21(1)(c), a declaratory order may in the absence of a dispute be granted. But if, in addition to there being no dispute, any relief would be academic, then the court would ordinarily refuse to grant declaratory relief. But this marks the distinction section 21(1)(c) itself draws. Merely academic or abstract declaratory relief will not be granted under section 21(1)(c). But declaratory relief, which is not academic or abstract, can be granted, even in the absence of an existing dispute.

Speaker of the National Assembly and others; Democratic Alliance v

Speaker of the National Assembly and others (Corruption Watch

(RF) NPC as amicus curiae) 2016 (3) SA 580 (CC) ("the Nkandla case"). In that case, the President had conceded, before the hearing, that he will implement the Public Protector's remedial action. He had gone so far as to produce his own draft order, which, as the Constitutional Court observed at paragraph 100, was "virtually on all fours with the remedial action taken by the Public Protector". There was therefore no "dispute" between the parties (the original dispute having been that the President must implement the Public Protector's remedial action). Nevertheless, the Constitutional Court went on to decide the case and grant the order sought by the applicants.

<sup>&</sup>lt;sup>30</sup> Ragavan's AA para 40 p 1009.

- 55. In the Nkandla case there was plainly no dispute between the President and the applicants. The court nevertheless heard the matter, as it related to the President, and made declaratory and other orders, despite the President's concession of the case against him. The court obviously regarded the issue as so important that it had to opine upon it. It did not regard the matter as academic or abstract.
- 56. In other words, the absence of a live dispute does not mean that a matter is academic or abstract. The case may be so important that a court must say something upon it.
- Another example is Buthelezi and Another v Minister of Home Affairs and Others 2013 (3) SA 325 (SCA). There the court was asked to and made a declaration that the Minister of Home Affairs had unreasonably delayed her decision to grant or withhold a visa to the Dalai Lama to visit South Africa. The Dalai Lama's planned visit had been frustrated by the delay and in consequence he could not visit the Republic. The time of his planned visit and stay had long passed by the time the SCA heard the challenge to the Minister's conduct. The court (at para 20) nevertheless granted the declarator as to the legality of the Minister's conduct.
- 58. In *Buthelezi*, there was no live dispute between the parties (and in fact the court below had so held (se para 4)), but the SCA refused to

Nkandla judgment paras 14 and 100.

Buthelezi at para 20.

Metropolitan Municipality and others v Nambiti Technologies (Pty)

Ltd 2016 (2) SA 494 (SCA). There the High Court had ordered the

City of Tshwane to adjudicate a tender within two months. But the

contract period, if the tender were awarded, would have come to end

by the time the SCA could give its judgment on appeal. The

question was therefore whether the appeal was moot. In addressing
this question, the SCA held at para 6:

"The court has a discretion, notwithstanding that an appeal has become moot, to hear and dispose of it on its merits. The usual ground for exercising that discretion in favour of dealing with it on the merits is that the case raises a discrete issue of public importance that will have an effect on future matters.

60. In Executive Officer of the Financial Services Board v Dynamic

Wealth Ltd and Others 2012 (1) SA 453 (SCA) the court held at para

43 (in relation to what was argued to be a moot point which therefore should not have been entertained on appeal) that:

"For those reasons and in the light of present circumstances, I do not think that a curatorship order is desirable at the present time in respect of any of the respondents. The respondents sought to turn this to their advantage by contending that the appeal should therefore be dismissed as moot, relying on section 21A(1) of the Supreme Court Act 59 of 1959 that empowers the court to dismiss an appeal if it would not have a practical effect or result. I do not agree that the appeal will have no practical effect or result. Its determination involves the proper construction of an important provision in the regulatory armoury of the

Registrar, the test to be applied in considering an application for curatorship under section 5(1) of the FI Act and a consideration of the evidential status of an inspection report. These are all important issues that will impact upon the future conduct of the Registrar.

- 61. The same applies in this case. It is important for the banking regulatory environment that the scope of the Minister's powers and obligations be determined.
- 62. Centre for Child Law v Governing Body of Hoërskool Fochville and
  Another 2016 (2) SA 121 (SCA) is another recent example in which
  the SCA heard a matter (because of its importance) despite the fact
  that it had become moot, the parties having settled the case.
- 63. The Constitutional Court has also spoken to similar effect in Sebola and Another v Standard Bank of South Africa Ltd and Another (Socio-Economic Rights Institute of South Africa and Others as Amici Curiae) 2012 (5) SA 142 (CC) at para 32:

"The Bank correctly points out that any ruling this Court makes will not affect the Sebolas themselves. The judgment has been abandoned, together with the costs orders granted against them, and regardless of what this Court might decide about section 129, the options the provision affords will have been made available to them. Yet mootness is not an absolute bar to deciding an issue. That is axiomatic: the question is whether the interests of justice require that it be decided. One consideration is whether the Court's order will have any practical effect on either the parties or others." [Emphasis added]

64. Perhaps the best summary of the legal position in relation to mootness is that given in *Qoboshiyane NO and others v Avusa* 

Publishing Eastern Cape (Pty) Ltd and Others 2013 (3) SA 315 (SCA) at para 5:

"The disclosure of the report means that any judgment or order by this Court will have no practical effect or result as between the parties. In the circumstances this Court may dismiss the appeal on that ground alone. The Court has a discretion in that regard and there are a number of cases where, notwithstanding the mootness of the issue as between the parties to the litigation, it has dealt with the merits of an appeal. With those cases must be contrasted a number where the Court has refused to deal with the merits. The broad distinction between the two classes is that in the former a discrete legal issue of public importance arose that would affect matters in the future and on which the adjudication of this Court was required, whilst in the latter no such issue arose."

#### D. WHY THE DECLARATOR IS RIGHT IN LAW

65. Under our Constitution, the Executive (the President and Cabinet) can only do that which is empowered by law. Anything else is unlawful. This principle, immanent in the rule of law and in the Constitution, was expressed in Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others 1999 (1) SA 374 (CC), in terms equally applicable to all spheres of government, including the National Executive:

"[56] These provisions imply that a local government may only act within the powers lawfully conferred upon it. There is nothing startling in this proposition—it is a fundamental principle of the rule of law, recognised widely, that the exercise of public power is only legitimate where lawful. The rule of law—to the extent at least that it expresses this principle of legality—is generally understood to be a fundamental principle of constitutional law." [Emphasis added]

- 66. Nor, in this particular case, would it assist Oakbay to say that the Executive (President and Cabinet) is empowered intervene in client-banker relationships as a matter of governmental policy. For there is no such policy. Any such policy, had it existed, would have been embodied in some legal instrument, as Akani Garden Route (Pty) Ltd v Pinnacle Point Casino (Pty) Ltd 2001 (4) SA 501 (SCA) requires:
  - '[7]... I prefer to begin by stating the obvious, namely that laws, regulations and rules are legislative instruments, whereas policy determinations are not. As a matter of sound government, in order to bind the public, policy should normally be reflected in such instruments. Policy determinations cannot override, amend or be in conflict with laws (including subordinate legislation). [Emphasis added]
- 67. No policy (let alone law) permitting the Executive to intervene with client-banker relationships has been produced. Nor does it help to bandy about a Presidential commission of inquiry. The Presidential power to appoint a commission of inquiry (predicted by Oakbay, which is not part of the government)<sup>33</sup> into this specific matter, has not found expression in any policy legislative or executive instrument that FNB has seen. This is not surprising: banks are regulated, not directly by the Executive, but by various state agencies and regulatory bodies with circumscribed powers.
- 68. Because there is no power permitting the Executive to interfere in private banker-client relationships, the Minister's declarator has a legal basis and ought to be granted. It is also qualifies, under section

Van der Merwe's affidavit at para 44 p 901.

21(1)(1)(c), as an order as to an "existing, future or contingent right or obligation." The question submitted is whether the Minister has a power or obligation to interfere.

69. This is plainly a matter of great public interest. Two Ministers have taken two different views as to their powers. Oakbay still threatens further action which may not involve approaching the courts for relief. The banking sector seeks urgent clarity about the scope and extent of Executive powers vis-à-vis the banks. This, we submit, is a case in which it is in the interests of justice that the declaratory order sought be granted.

**AE BHAM SC** 

L SISILANA

Counsel for FNB

Chambers Sandton 10 February 2017

2447

## IN THE HIGH COURT OF SOUTH AFRICA GAUTENG DIVISION, PRETORIA

CASE NO: 80978/16

redbuctos

In the matter between:

MINISTER OF FINANCE	Applicant
and	
OAKBAY INVESTMENTS (PTY) LTD	1 <sup>ST</sup> Respondent
OAKBAY RESOURCES AND ENERGY LTD	2 <sup>ND</sup> Respondent
SHIVA URANIUM (PTY) LTD	3 <sup>RD</sup> Respondent
TEGATA EXPLORATION AND RESOURCES (PTY) LTD	4 <sup>TH</sup> Respondent
JIC MINING SERVICES (PTY) LTD	5 <sup>TH</sup> Respondent
BLACKEDGE EXPLORATION (PTY) LTD	6 <sup>TH</sup> Respondent
TNA MEDIA (PTY) LTD	7 <sup>TH</sup> Respondent
THE NEW AGE	8 <sup>TH</sup> Respondent
AFRICA NEWS NETWORK (PTY) LTD	9 <sup>TH</sup> Respondent
VR LASER SERVICES (PTY) LTD	10 <sup>™</sup> Respondent
ISLANDSITE INVESTMENTS ONE HUNDRED AND EIGHTY (PTY) LTD	11 <sup>TH</sup> Respondent
CONFIDENT CONCEPT (PTY) LTD	12 <sup>TH</sup> Respondent

JET AIRWAYS (INDIA) LTD (INCORPORATED IN INDIA)	13 <sup>TH</sup> Respondent
SAHARA COMPUTERS (PTY) LTD	14 <sup>TH</sup> Respondent
ABSA BANK LTD	15 <sup>TH</sup> Respondent
FIRST RAND NATIONAL BANK LTD	16 <sup>TH</sup> Respondent
STANDARD BANK OF SOUTH AFRICA LTD	17 <sup>TH</sup> Respondent
NEDBANK LTD	18 <sup>TH</sup> Respondent
GOVERNOR OF THE SOUTH AFRICAN RESERVE BANK	19 <sup>TH</sup> Respondent
REGISTRAR OF BANKS	20 <sup>TH</sup> Respondent
DIRECTOR OF THE FINANCIAL INTELLIGENCE CENTRE	21 <sup>ST</sup> Respondent
FILING SHEET:	
18 <sup>TH</sup> RESPONDENT'S HEADS OF ARGUMENT	

PRESENTED for service and filing on this the 10<sup>th</sup> day of FEBRUARY 2017.

BAKER MCKENZIE

Attorneys for the Applicant Tel: (011) 911 4300

Fax: (011) 784 2855

Ref: 10029728-36290469-1

Email:

Widaad.Ebrahim@bakermckenzie.com

c/o ADAMS & ADAMS Adams & Adams Place Lynnwood Bridge 4 Daventry Street Lynnwood Manor

Pretoria

Tel: (012) 432 6000 Fax: (012) 432 6543 Ref: Adele Jordaan

TO:

THE REGISTRAR
OF THE ABOVE HONOURABLE COURT
PRETORIA

AND TO:

**STATE ATTORNEY** 

Attorneys for the Applicant

SALU Building

255 Francis Baard Street

Pretoria

Fax: 012 309 1649 Tel: 012 309 1575

Email: TNhlanzi@justice.gov.za

Ref: Ms T NHLANZI Ref: 2476/16/Z32

AND TO:

**VAN DER MERWE & ASSOCIATES** 

Attorneys for 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 10th, 11th, 12th and 14th Respondents

62 Rigel Avenue North

Waterkloof Pretoria

Ref: Mr GT VD Merwe/ st./ 078

Fax: 012 343 5435 Tel: 012 343 5432

Email: simone@vdmass.co.za

AND TO:

**ENS AFRICA** 

Attorneys for the 15th respondent 150 West Street

Sandton

Tel: 011 269 7600

Email: <u>dlambert@ensafrica.com</u> Ref: M Katz/D Lambert/0416998

c/o GERHARD BOTHA & PARTNERS INC.

First Floor, Erasmus Forum Building B Cnr Rigel Avenue and Stokkiesdraai

Erasmusrand

Pretoria

Tel: 012 347 0480 Fax: 012 347 6839

Email: <u>brendon@bothapartners.co.za</u>

Ref: Mr B Swart/ Mr H Botha

SERVICE VIA EMAIL

**SERVICE VIA EMAIL** 

**SERVICE VIA EMAIL** 

AND TO:

NORTON ROSE FULBRIGHT

Attorneys for the 16th Respondent

34 Fredman Drive Sandton

Tel: 011 685 8500

Email: Aslam.moosajee@nortonrosefulbright.com

Ref: Mr Moosajee/FNB 13954

c/o MONTLE JOOMA SABDIA INC.

Ground Floor, Duncan Manor Cnr Jan Shoba and Brooks Street

Booklyn

Tel: 012 362 3137

AND TO:

**BOWMAN GILFILLAN INC.** 

Attorneys for the 17th Respondent 165 West Street

Sandton

Tel: 011 669 9000

Email: Clement.mkiva@bowmanslaw.com

Alan.keep@bowmanslaw.com

AND TO

**WERKSMANS ATTORNEYS** 

19th and 20th Respondents' Attorneys

155-5th Street

Sandown, Sandton

Tel: (011) 535 8145

Email: cmanaka@weksmans.com

cmoraitis@werksmans.com

Ref: Mr C Manaka / Mr C Moraitis

Ref; SOUT 3267.63

AND TO:

MACROBERT ATTORNEYS

Attorneys for the 21st Respondent

Macrobert Building

Corner Jan Shoba and Justice Mohamed Streets

Pretoria

Tel: 012 425 3436

Email: ghay@macrobert.co.za

Ref: G K Hay

SERVICE VIA EMAIL

SERVICE VIA EMAIL

SERVICE VIA EMAIL

SERVICE VIA EMAIL

# IN THE HIGH COURT OF SOUTH AFRICA (GAUTENG DIVISION, PRETORIA)

CASE NO: 80978/16

LIEADS OF ADOLIMENT OF THE	
AND 20 OTHERS	Second to Twenty-First Respondents
OAKBAY INVESTMENTS (PTY) LTD	First Respondent
and	
THE MINISTER OF FINANCE	Applicant
In the matter between:	

## Page 2

## **TABLE OF CONTENTS**

INTRODUCTION	3
THE DECLARATORY RELIEF IS CORRECT IN LAW	6
The principle of legality	6
It is common cause that the declaratory relief reflects the legal position	7
Conclusion	8
THE COURT SHOULD GRANT THE DECLARATORY RELIEF	9
Section 21(1)(c) of the Superior Courts Act	10
An "existing, contingent or future right or obligation"	11
Exercise of discretion The declaratory relief will have a practical effect There is no political vendetta	13 13 20
Conclusion	21
CONSEQUENCES OF ANY GOVERNMENTAL INTERFERENCE	22
The banks' rights in terms of private law	24
The banks' duties in terms of public law International law Domestic legislation	26 26 29
Conclusion	32
PRAYER	33

### INTRODUCTION

- On 7 April 2016, the eighteenth respondent ("Nedbank") gave notice to the first, eleventh, tenth, twelfth and fourteenth respondents of its intention to close their bank accounts. Those respondents did not bring a legal challenge to Nedbank's decision. Instead, they pressurised the Minister of Finance ("the Minister") to assist them in achieving a reversal of Nedbank's decision.
- This is an application by the Minister for an order declaring that he is not by law empowered or obliged to intervene in the relationship between the first to fourteenth respondents ("the Oakbay entities") on the one hand and the fifteenth to eighteenth respondents ("the banks") on the other, as regards the closing of the banking accounts held by the Oakbay entities with the banks.<sup>2</sup>
- Nedbank supports the relief sought by the Minister.<sup>3</sup> Although the Oakbay entities now say opportunistically that they have always accepted that the Minister does not have the power to intervene in the closure of their bank accounts, this is belied by the manner in which they sought the Minister's intervention.<sup>4</sup> The slip

Nedbank answering affidavit, annexure "MB3, vol 2, page 165. In the case of the tenth respondent, the letter was sent on 4 May 2016 (Nedbank answering affidavit para 10, vol 2, page 130).

Notice of motion, vol 1, page 2.

Nedbank answering affidavit, para 18, vol 2, page 134. In VR Laser's answering affidavit at paras 42 to 45, vol 10, page 901, VR Laser contends that the banks' affidavits are irrelevant and should be "dealt with as if they had been struck out in their entirety". There is no merit in this contention. Nedbank has explained in its answering affidavit why it was necessary to file an affidavit supporting the relief sought by the Minister: see, for example, paras 14 to 18, vol 2, pages 131 to 134.

Minister founding affidavit, para 19, vol 1, page 15.

shows in the answering affidavits of the Oakbay entities, where they continue to ask that "decisive action" be taken against the banks.

- 4 Our submissions will be organised as follows:
  - 4.1 We begin by indicating that it is common cause that the relief sought by the Minister is correct in law.
  - 4.2 We then address the contention of the Oakbay entities that the Court should decline to grant the declaratory relief even though it is well-founded in law. We submit that the declaratory relief would have significant practical implications and that the Court should exercise its discretion to grant the relief sought by the Minister.
  - 4.3 Finally, we deal with the detrimental consequences that would ensue if the Minister were to accede to the Oakbay entities' request to intervene in the closure of their bank accounts by exercising a power that he does not have in law. We submit that the Court should exercise its discretion to grant declaratory relief in order to avoid the possibility of those consequences ever being visited upon the financial sector by a government official who does not share the Minister's correct understanding of the law.
- Our submissions are limited to the main application brought by the Minister.

  There are two related applications before the Court:

- 5.1 The first is a counter-application brought by The Standard Bank of South Africa Limited ("Standard Bank").<sup>5</sup> The counter-application seeks an order declaring that no member of the National Executive of Government has the power in law to intervene in the decision of Standard Bank to terminate its banking relationship with the Oakbay entities. Nedbank abides the decision of the Court in relation to Standard Bank's counter-application.
- 5.2 The second is an application under case number 92027/16 brought by the Oakbay entities against the Financial Intelligence Centre in order to obtain access to documents. Nedbank has not been cited as a respondent in the FIC application.

Notice of counter-application, vol 4, page 301

#### THE DECLARATORY RELIEF IS CORRECT IN LAW

The Minister asks for an order declaring that he is not by law empowered or obliged to intervene as regards the closing of the accounts held by the Oakbay entities with the banks.<sup>6</sup>

# The principle of legality

- The default rule in our law is that private parties are at liberty to perform any act unless that act has been prohibited by law. However, the default rule in the case of organs of state is the opposite: an organ of state may not perform any act unless it has been authorised by law. The Constitutional Court made the point succinctly in *Fedsure*:8
  - "... it is a fundamental principle of the rule of law, recognised widely, that the exercise of public power is only legitimate where lawful. The rule of law to the extent at least that it expresses this principle of legality is generally understood to be a fundamental principle of constitutional law.

. . . .

It seems central to the conception of our constitutional order that the Legislature and Executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred on them by law." (our underlining)

Notice of motion, vol 1, page 2.

See Malone v Metropolitan Police Commissioner [1979] Ch 344 at 357, 372-3; Baxter Administrative Law (1984) at page 394.

Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council 1999 1 SA 374 (CC) para 56 and 58

8 This principle continues to apply under the 1996 Constitution:9

"In Fedsure this Court held that the doctrine of legality, an incident of the rule of law, was an implied provision of the interim Constitution.... Although Fedsure was decided under the interim Constitution, the decision is applicable to the exercise of public power under the 1996 Constitution, which in specific terms now declares that the rule of law is one of the foundational values of the Constitution."

- 9 It follows that the Minister could only intervene in the relationship between the Oakbay entities and the banks "if the power to do so is conferred on [him] by law".10
- There is no legislation or other law empowering the Minister to intervene when a bank closes the account of its customer. The Minister therefore has no power to do so.

## It is common cause that the declaratory relief reflects the legal position

It is common cause that the declaratory relief sought by the Minister is a correct reflection of the legal position. Nedbank, Absa Bank Ltd ("Absa"), 11 First National Bank Ltd ("First National") 12 and Standard Bank 13 have all endorsed the declaratory relief. In addition, the South African Reserve Bank, 14 the Registrar

Pharmaceutical Manufacturers Association of South Africa: In Re ex parte President of the Republic of South Africa 2000 2 SA 674 (CC) para 17

Minister of Public Works v Kyalami Ridge Environmental Association 2001 3 SA 1151 (CC) para 35

Absa notice supporting relief sought by the Minister, notices bundle, page 5; Absa affidavit, para 10, vol 6, page 502.

First Rand Bank affidavit, para 7, vol 2, page 99.

Standard Bank affidavit, para 1.3, vol 3, page 222.

South African Reserve Bank affidavit, para 6, vol 7, page 605.

of Banks<sup>15</sup> and the Director of the Financial Intelligence Centre<sup>16</sup> have confirmed that they will abide the decision of the Court.

- 12 In their answering affidavit, the Oakbay entities accept that the Minister is not by law empowered or obliged to intervene in the relationship between banks and their clients.<sup>17</sup>
- In short, all of the parties before the Court agree that the declaratory relief sought by the Minister is correct in law.

### Conclusion

14 For the reasons set out above, it is common cause that the declaratory relief sought by the Minister correctly reflects the legal position.

Registrar of Banks affidavit, para 5, vol 7, page 620.

Twenty-first respondent's notice of intention to abide, notices bundle, page 28.

Oakbay answering affidavit, para 39, vol 11, page 1009.

### THE COURT SHOULD GRANT THE DECLARATORY RELIEF

- Since there is agreement on the legal issue, the question may well be asked why this matter is before the Court at all. The answer is that, although the Oakbay entities agree that the declaratory relief sought by the Minister is correct in law, they adopt the position that the Court should nevertheless decline to grant that relief. The Oakbay entities contend that the Court should dismiss the Minister's application because there "is no *lis* between the parties" and the application therefore does not satisfy the requirements in section 21(1)(c) of the Superior Courts Act 10 of 2013 ("the Superior Courts Act").
- There is no merit in this contention because the Oakbay entities have applied the wrong test. The existence of a live dispute "is not a prerequisite to the exercise by the court of jurisdiction under section 21(1)(c) of the Superior Courts Act". 19 It is instead "only necessary [under section 21(1)(c) of the Superior Courts Act] that there should be interested parties upon whom the declaratory order would be binding". 20 For the reasons that follow, we submit that this requirement is satisfied and that the Court should exercise its discretion to grant the declaratory relief sought by the Minister.

Oakbay answering affidavit, para 40, vol 11, page 1009.

Nedbank Limited v Jones [2016] ZAWCHC 139 (12 October 2016) at para 27, applying Ex Parte Nell 1963 (3) SA 754 (A) at 760A-C.

<sup>20</sup> lbid.

### Section 21(1)(c) of the Superior Courts Act

- 17 Section 21(1)(c) of the Superior Courts Act provides that the High Court has the power "in its discretion, and at the instance of any interested person, to enquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination."
- It has been held that the wording of section 21(1)(c) is "similar to the erstwhile power conferred upon the court under section 19(1)(a)(iii) of the now repealed Supreme Court Act 59 of 1959", and that "the jurisprudence which developed under that section is accordingly applicable".<sup>21</sup>
- 19 In Durban City Council, 22 the Appellate Division held as follows:

"The question whether or not an order should be made under this section has to be examined in two stages. First the Court must be satisfied that the applicant is a person interested in an "existing, future or contingent right or obligation", and then, if satisfied on that point, the Court must decide whether the case is a proper one for the exercise of the discretion conferred on it".<sup>23</sup>

lbid at para 27.

Durban City Council v Association of Building Societies 1942 AD 27.

<sup>&</sup>lt;sup>23</sup> Ibid at 32.

The Appellate Division confirmed these principles fifty years later in Shoba.<sup>24</sup>

More recently, the Supreme Court of Appeal reiterated the requirements for declaratory relief in Cordiant Trading:<sup>25</sup>

"[T]he two-stage approach under the subsection consists of the following. During the first leg of the enquiry the court must be satisfied that the applicant has an interest in an 'existing, future or contingent right or obligation'. At this stage the focus is only upon establishing that the necessary conditions precedent for the exercise of the court's discretion exist. If the court is satisfied that the existence of such conditions has been proved, it has to exercise the discretion by deciding either to refuse or grant the order sought. The consideration of whether or not to grant the order constitutes the second leg of the enquiry".<sup>26</sup>

# An "existing, contingent or future right or obligation"

- When it comes to the first stage of the *Cordiant Trading* enquiry, an applicant "must satisfy the Court that he/she is a person interested in an 'existing, future or contingent right or obligation' and nothing more is required".<sup>27</sup>
- The declaratory relief sought by the Minister arises "from a dispute relating to powers of intervention by Government in relation to the closing of private clients' accounts by registered banks". 28 The Minister explains in his founding affidavit the origin of the dispute between himself and the Oakbay entities regarding this

Shoba v Officer Commanding, Temporary Police Camp, Wagendrif Dam 1995 4 SA 1 (A).

Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd 2005 6 SA 205 (SCA).

lbid at para 18.

Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd 2005 6 SA 205 (SCA) para 16

Minister founding affidavit, annexure "E", vol 1, page 10.

issue.<sup>29</sup> The Minister describes how the Oakbay entities, through Mr Howa, have "continuously asserted" that he "should intervene in, or exert pressure upon, the banks".<sup>30</sup>

- In their answering affidavit, the Oakbay entities purport to deny that Mr Howa made such demands. But their denial does not competently place the issue in dispute because it is not adequately confirmed by Mr Howa, the person with the requisite personal knowledge.<sup>31</sup> The Minister's version must therefore be accepted because there is no genuine dispute of fact on the papers.<sup>32</sup> But in any event, the correspondence attached to the founding affidavit makes it plain that the Minister's version is correct.
- In short, it has been a point of contestation between the Oakbay entities and the Minister whether the Minister has the power or obligation to intervene when an account is closed by the bank. That is a question of legal entitlement ("right") or legal duty ("obligation"). All of the litigants before the Court are "interested parties on whom the declaratory order would be binding". The first leg of the enquiry in *Cordiant Trading* has therefore been established.

lbid at para 3.

Minister founding affidavit para 19, vol 1, page 15. Also see Minister replying affidavit para 86, pages 1345-6.

Minister replying affidavit paras 114-116, vol 14, page 1354.

Wightman t/a JW Construction v Headfour (Pty) Ltd 2008 3 SA 371 (SCA) paras 12 and 13.

Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd 2005 6 SA 205 (SCA) para 16

#### Exercise of discretion

When it comes to the second leg of the enquiry, the Oakbay entities contend that the Court should exercise its discretion against the grant of declaratory relief because (a) the relief will have no practical effect and (b) the relief forms part of a political vendetta. For the reasons that follow, there is no merit in either of these contentions.

# The declaratory relief will have a practical effect

- 26 It is well established that a court will not grant declaratory relief in order to answer a purely abstract, academic or hypothetical question.<sup>34</sup> Where an order would have no practical effect, a court should refuse to grant that order.<sup>35</sup>
- In their answering affidavit, the Oakbay entities accept that the Minister is not by law empowered or obliged to intervene in the relationship between banks and their clients.<sup>36</sup> They contend that the Court should nevertheless exercise its discretion to decline to grant the relief sought by the Minister because there is no live dispute between the parties and the order would therefore have no practical effect.<sup>37</sup>
- 28 This contention is misconceived for two reasons.

See JT Publishing (Pty) Ltd v Minister of Safety and Security 1997 3 SA 514 (CC) at para 15.

Eagles Landing Body Corporate v Molewa NO and others 2003 1 SA 412 (T) at para 64

Oakbay answering affidavit, para 39, vol 11, page 1009.

Oakbay answering affidavit, para 6, vol 11, page 998 and para 8, vol 11, page 999

- The first reason is that the Oakbay entities have consistently sought to pressurise the Minister to do what they now say he has no power to do. The Damascene conversion of the Oakbay respondents is a transparent attempt to avoid the consequences of the unlawful requests they have addressed to the Minister in the past. The grant of declaratory relief will therefore have a practical effect by making it plain to the Oakbay entities that their requests were (and are) unlawful:
  - 29.1 The Oakbay entities seek to characterize their approaches to the Minister as a plea for help, rather than as a formal approach to exercise a legal power.<sup>38</sup> But this is a distinction without a difference. The fact of the matter is that the Minister was requested to intervene in the relationship between the Oakbay entities and the banks, and the Minister could not have acceded to this request unless he had the power to do so in law. Any intervention by the Minister would have been unlawful, irrespective of how the request was styled.
  - 29.2 The Oakbay entities say that they explicitly accepted that the Minister cannot legally intervene in their relationship with the banks.<sup>39</sup> They state that "Mr Howa never disputed the Minister's legal advice that he had no legal right to interfere with the decision made by the banks".<sup>40</sup> In support of this, they rely on a letter from Oakbay Investments (Pty) Ltd to the Minister dated 24 May 2016.<sup>41</sup> In this letter, the Oakbay entities say that,

Oakbay answering affidavit, para 55, vol 11, page 1016.

Oakbay answering affidavit, para 6, vol 11, page 998.

Oakbay answering affidavit, para 47, vol 11, page 1012

Minister founding affidavit, annexure "E", vol 1, page 51.

having received advice that they cannot legally challenge the banks' decisions, "we seem to have no options open to us other than our appeal to you for assistance." They then proceed to justify why the Minister should intervene in the circumstances. Far from acknowledging that the Minister does not have the power to intervene, this letter evidences an earnest request for him to do so.

- 29.3 A subsequent letter from Sahara Computers (Pty) Ltd, dated 28 June 2016,<sup>42</sup> implores the Minister to assist. The letter once more requests a meeting with the Minister, to determine "concrete steps" to provide assistance to Oakbay. Had the Oakbay entities accepted the correctness of the Minister's position that he had no power to intervene, it is incomprehensible why they would have repeated their request for him to do so.
- 29.4 The Oakbay entities also rely on a letter from Oakbay to the Minister dated 25 July 2016.<sup>43</sup> This letter does not, however, record any acceptance by Oakbay of the limitations on the Minister's power to intervene. On the contrary, it refers to a request to "jointly find a way to understand the real reasons for the banks [sic] decision".

Minister founding affidavit, annexure "G", pages 66 – 67.

Minister founding affidavit, annexure "L", vol 1, page 80.

29.5 The Minister recorded his discomfort in a letter to Oakbay on 10 August 2016,44 in which he stated the following:

"It is concerning that Oakbay still does not accept that the Minister of Finance, in law, is unable to interfere with the relations between registered banks and their clients".

- 29.6 The Oakbay entities also rely on a letter addressed to the Minister on 18

  October 2016,<sup>45</sup> which expresses agreement that the law does not <u>oblige</u>
  the Minister to intervene in the relationships between the Oakbay entities
  and the respondent banks. However, this does not amount to an
  acceptance that the Minister is not legally <u>empowered</u> to intervene,
  particularly in the context of repeated pleas for his assistance.
- 29.7 The Oakbay entities' slip shows on at least two occasions in their affidavits before this Court:
  - 29.7.1 Oakbay says in its answering affidavit that the conduct of the banks "should become the subject of further investigation and decisive action". Such "decisive action" could only be action by government. It is difficult to understand how Oakbay can advocate "decisive action" by government against the banks if it genuinely endorses the Minister's view that he has no power to intervene in the banker/customer relationship.

<sup>44</sup> Minister founding affidavit, annexure "M", vol 1, page 82.

Oakbay answering affidavit, annexure "OB12", vol 13, page 1182-1185.

Oakbay affidavit, para 94, vol 11, page 1029

- 29.7.2 The tenth respondent, VR Laser Services (Pty) Ltd,<sup>47</sup> has deposed to an affidavit in which it "adopts the position that there is no basis for [the Minister's] relief in fact and in law".<sup>48</sup> If there is "no basis in fact and in law" for the declaratory relief sought by the Minister, it must mean that VR Laser is of the view that the Minister has the power to intervene in the closure of its bank accounts.
- 29.8 In sum, the Oakbay entities repeatedly requested the Minister's intervention in the face of the Minister's denial that he was empowered to intervene. Even now, the Oakbay entities ask for "decisive action" to be taken against the banks. An order declaring that the Minister may not lawfully intervene would therefore have a practical effect by confining the Oakbay entities to remedies that they may lawfully seek, should they consider it fit to do so.
- 30 The second reason is that other institutions of government may not share the Minister's view that he has no power of intervention. The grant of declaratory relief would therefore have the practical effect of delineating the boundaries of lawful conduct for the assistance of other public institutions:
  - 30.1 The closure of the bank accounts of the Oakbay entities led to the appointment of an Inter-ministerial committee ("the IMC") that was tasked

The Oakbay Group is said to have "an indirect minority stake" in VR Laser: see Oakbay answering affidavit, para 18, vol 11, page 1002.

VR Laser affidavit, para 5, vol 11, page 884

to consider the issue.<sup>49</sup> The IMC was apparently made up of the Minister, the Minister of Mineral Resources (Mosebenzi Zwane) and the Minister of Labour (Mildred Oliphant).<sup>50</sup>

- Nedbank attended a meeting with the IMC. What transpired at the meeting is fully set out in Nedbank's affidavit.<sup>51</sup> Significantly, the meeting was chaired by Minister Zwane; the Finance Minister was not in attendance. At the conclusion of the meeting, Minister Zwane commented on the fact that some banks had apparently declined to appear before the IMC, and noted his surprise that they had refused to attend "a meeting with government" as they receive their licences from government.<sup>52</sup>
- 30.3 On 1 September 2016, Minister Zwane released a press statement stating that a report "of recommendations" had been tabled at Cabinet and that Cabinet had resolved to recommend inter alia:53
  - that the President consider establishing a Judicial Enquiry under 84(2)(f) of the Constitution; and
  - "to consider the current mandates of the Banking Tribunal and Ombudsman, as evidence presented to the IMC indicated that all of

Nedbank affidavit, para 6, vol 2, page 129

Nedbank affidavit, para 27, vol 2, page 137

Nedbank affidavit, para 33, vol 2, page 139

Nedbank affidavit, para 33.6, vol 2, page 140

<sup>&</sup>lt;sup>53</sup> Annexure MB12, vol 2, page 182

the actions taken by the banks and financial institutions were as a result of innuendo and potentially reckless media statements".

- 30.4 On the next day, the Presidency distanced itself from the statement of Minister Zwane.<sup>54</sup> However, the President subsequently stated in Parliament that he was indeed considering the appointment of a judicial commission of inquiry as recommended by Minister Zwane.<sup>55</sup> The President made it plain that he regarded this as a governmental function:
  - "as a government you can't sit and say I'm doing nothing";58
  - "we are responsible because we are a government of this country".57
- 30.5 These developments suggest that at least some members of government may not share the Minister's view regarding the lack of power to intervene in the banker/customer relationship. While as a matter of form the relief in the notice of motion is limited to the powers of the Minister, the grant of relief in those terms would also assist in delimiting the powers of other public institutions.
- Nedbank endorses the Minister's concern that the uncertainty around this issue is "harmful to the banking and financial sectors, to the regulatory scheme created by law, and the autonomy of both the governmental regulators and the registered

<sup>&</sup>lt;sup>54</sup> Annexure MB13(b), vol 2, page 185

<sup>55</sup> Annexure SB43, vol 5, page 474, lines 14 to 15

<sup>58</sup> Annexure SB43, vol 5, page 476, lines 16 to 17

<sup>&</sup>lt;sup>57</sup> Annexure SB43, vol 5, page 477, lines 12 to 13

banks themselves".58 We submit that the Minister's contention that the "dispute has arisen in circumstances which have considerable importance for the operation of the banking sector of the South African economy, and its regulation by Government", cannot be doubted. As such, we submit that a declaratory order would resolve a dispute that is real rather than academic.

## There is no political vendetta

- The Oakbay entities have a second string to their bow. They contend that the Court should exercise its discretion against the grant of declaratory relief because "the Minister seemingly has another agenda not appropriate for the Court to entertain". 59 Warming to their theme, the Oakbay entities say that "the application is politically motivated". 60 These portentous statements boil down to the Oakbay entities' "inference" that the "real reason" for the Minister's application was "retaliation against the Gupta Family (whom he falsely and without any basis believed to be behind his criminal investigation by the Hawks)".61
- 33 The only basis offered for this "inference" is that the Minister's application was launched "a few weeks" after the Minister had been directed to appear before the Hawks. 62 In fact, the application was launched seven weeks after those events.

Nedbank affidavit, para 71, vol 2, page 153; Minister founding affidavit, para 19, vol 1, page 15.

Oakbay affidavit, para 68, vol 11, page 1021.

<sup>60</sup> Oakbay affidavit, para 98, vol 11, page 1030

Oakbay affidavit, para 101, vol 11, page 1031

Oakbay affidavit, para 101, vol 11, page 1031

The contrived inference of the Oakbay entities that the Minister was furthering a political vendetta is not "the more natural, or plausible, conclusion from amongst several conceivable ones". 63 Indeed it is difficult to understand how the Oakbay entities can credibly draw such an inference at all in circumstances where they repeatedly requested assistance from the very person who is now said to have a vendetta against them. In any event, the Minister has denied in forthright terms that he brought this application in order to further a vendetta against the Guptas. 64

### Conclusion

For the reasons set out above, we submit that a case has been made out for the grant of declaratory relief in terms of section 21(1)(c) of the Superior Courts Act.

<sup>63</sup> Govan v Skidmore 1952 1 SA 732 (N) at 734C-D

Replying affidavit, paras 118 to 143, page 1355 and para 26, page 1329

# CONSEQUENCES OF ANY GOVERNMENTAL INTERFERENCE

- We have submitted that the Court should exercise its discretion to grant the declaratory relief sought by the Minister. In order to highlight why it is in the public interest that such relief should be granted, we turn finally to address the harm that would be caused to the financial sector if the Minister were to accede to the Oakbay entities' request to intervene in the bank/customer relationship by exercising a power that he does not have in law.
- 36 On 7 April 2016, Nedbank addressed letters to each of the relevant Oakbay entities<sup>85</sup> in which it recorded the following:

"Nedbank is of the view that any continued relationship with Oakbay Investments (Pty) Ltd may create material business risks that could pose significant reputational risk to Nedbank and as such we are unfortunately not prepared to continue our banking relationship.

We hereby terminate the banking relationship, as we are entitled to do, and provide you with 30 (thirty) days' notice to find alternative bankers. As Nedbank is not your primary banker, we believe that the notice period is reasonable and provides you with adequate time to find alternative banking facilities."<sup>66</sup>

37 Nedbank's decision followed on a series of events that had alerted Nedbank to the business risks of a continued association with the Oakbay entities. They included the following:

In the case of the tenth respondent, the letter was sent on 4 May 2016 (Nedbank answering affidavit para 10, vol 2, page 130).

Nedbank answering affidavit, annexure "MB3", vol 2, page 165.

- 37.1 On 16 March 2016, Deputy Finance Minister Jonas released a statement to the effect that he had been offered the position of Minister of Finance by Mr Ajay Gupta. It is common cause that there is a very close association between Mr Gupta and the Oakbay entities.<sup>67</sup>
- 37.2 On 4 April 2016, it emerged that KPMG and Sasfin had terminated their business relationships with the second respondent reportedly "due to a scandal over their relationship with President Jacob Zuma".68
- 37.3 On 6 April 2016 First National Bank's closure of the first respondent's bank account was announced "following a scandal over the family's relationship with President Jacob Zuma". The article announcing this refers to "allegations of the Gupta family meddling in politics" and "allegations of the Guptas wielding undue influence".89
- Against the background of these events, Nedbank perceived there to be a business and reputational risk associated with an ongoing banking relationship with the Oakbay entities. Nedbank took a decision to terminate the relationship in order to manage that risk.
- 39 On 24 May 2016, the Oakbay entities addressed a letter to the Minister recording as follows:

"following detailed discussions with several legal advisers, we are of the strong view that given the contractual rights the banks have, any legal

Nedbank answering affidavit, annexure "MB6", vol 2, page 172.

Nedbank answering affidavit, annexure "MB7", vol 2, page 174.

Nedbank answering affidavit, annexure "MB8", vol 2, pages 176 – 177.

approach may indeed be still-born. ... Given this position, as well as the decisions of the responsible regulators, we seem to have no options open to us other than our appeal to you for assistance".<sup>70</sup>

We have already submitted that, if the Minister were to accede to Oakbay's request to intervene in Nedbank's decision to close the bank accounts, he would be exercising a power that he does not have in law. In addition, any intervention by the Minister would have detrimental consequences for the legal framework in which the banks operate. We say so for the reasons that follow.

## The banks' rights in terms of private law

- The relationship between Nedbank and the relevant Oakbay entities is governed by the private law of contract.
- 42 In *Bredenkamp*,<sup>71</sup> the Supreme Court of Appeal confirmed that a bank is entitled to terminate a banking relationship with a customer unilaterally. The SCA held as follows:<sup>72</sup>

"The bank had a contract, which is valid, that gave it the right to cancel. It perceived that the listing created reputational and business risks. It assessed those risks at a senior level. It came to a conclusion. It exercised its right of termination in a bona fide manner. It gave the appellants a reasonable time to take their business elsewhere. The termination did not offend any identifiable constitutional value and was not otherwise contrary to any other public policy consideration".

Minister founding affidavit, annexure "E", vol 1, pages 51.

Bredenkamp v Standard Bank of SA Ltd 2010 4 SA 468 (SCA). See also Hlongwane v ABSA Bank Limited (ZAGPPHC 928, 10 November 2016, as yet unreported)

lbid at para 64.

- 43 The principle in *Bredenkamp* applied to Nedbank's closure of the Oakbay entities' bank accounts:
  - 43.1 Nedbank had a contractual right to terminate the banking relationship.
  - 43.2 Nedbank stated that the reason for the termination was that its continued relationship with the Oakbay entities created business and reputational risks.<sup>73</sup>
  - 43.3 Nedbank's termination of its banking relationship with the Oakbay entities was bona fide.
  - 43.4 Nedbank gave the Oakbay entities thirty days' notice of the closure of their bank accounts.
  - 43.5 The closure of the bank accounts did not offend any constitutional values or public policy considerations.
- There could therefore be no challenge to Nedbank's exercise of its contractual right to terminate the banking relationship with the Oakbay entities. That is the reason why the Oakbay entities have <u>not</u> challenged the lawfulness of Nedbank's decision.
- 45 Having accepted the lawfulness of Nedbank decision to close their bank accounts, the Oakbay entities nevertheless proceeded to request the Minister to "assist" in resolving their unhappiness with Nedbank. If the Minister had acceded

Nedbank affidavit, annexure "MB3", vol 2, page 165.

to their request, he would have driven a coach and horses through the principles of private law as stated in *Bredenkamp*. The Minister correctly declined to do so.

# The banks' duties in terms of public law

In addition to their private-law rights, the banks are burdened with a series of obligations in public law. Those obligations require the banks to validate their clients and to report any suspicious transactions so that appropriate action can be taken. We summarise those obligations below in order to show the detrimental consequences that would ensue if the Minister were to accede to the request of the Oakbay entities to interfere in the closure of their accounts.

## International law

- As members of the Bank for International Settlements, the South African Reserve
  Bank and the domestic banks in South Africa are bound by the rules and
  recommendations issued by the Basel Committee on Banking Supervision. The
  Basel Committee's guidelines on Sound Management of Risks related to Money
  Laundering and Financing of Terrorism<sup>74</sup> were issued to protect banks'
  reputations, and to protect the integrity of the global financial system.<sup>75</sup> The
  guidelines include the following features:
  - 47.1 Knowledge, surveillance and monitoring of their clients' activities, to enable them to identify any suspicious or unusual transactions. The systems in place to monitor these risks should be tailored according to

Basel Core Principles, annexure "RB3", vol 13, pages 798 to 880.

<sup>75</sup> Ibid at para 2, vol 9, page 802.

each client's risk profile, with more enhanced systems for higher-risk customers.<sup>76</sup>

- 47.2 Record-keeping and information exchange to allow appropriate action to be taken to address risks where necessary.<sup>77</sup>
- 47.3 Prompt reporting of suspicious transactions.<sup>78</sup>
- 47.4 Once a suspicious transaction has been reported, banks are required to "ensure that appropriate action is taken to adequately mitigate the risk of the bank being used for criminal activities". The document states explicitly that this may require a review of the client's risk profile, or of the entire banking relationship.<sup>78</sup>
- The Financial Action Task Force ("FATF") is as an international policy-making body that has issued recommendations in respect of money laundering. These recommendations include techniques to identify and combat money laundering, as well as mechanisms to monitor member countries' progress in doing so. The FATF recommendations include the following:

<sup>76</sup> Ibid at paras 45 – 50, page 814-816.

<sup>77</sup> Ibid at paras 51 – 55, page 816-818.

<sup>&</sup>lt;sup>78</sup> Ibid at para 56, vol 4, page 312.

<sup>&</sup>lt;sup>79</sup> Ibid at para 58, vol 4, page 312.

- 48.1 Customer due diligence, including measures to understand the true ownership and control of a customer, and conducting ongoing due diligence to verify the bank's understanding of the customer's identity.80
- 48.2 Sufficient record keeping to allow evidence for criminal prosecution where appropriate.<sup>81</sup>
- 48.3 Adopting tighter risk management measures in respect of politically-exposed persons, over and above the ordinary customer due diligence.

  This includes conducting "enhanced ongoing monitoring of the business relationship".82
- 48.4 Reporting to the relevant authorities where there are reasonable grounds to suspect that funds are the proceeds of criminal activity, or are related to terrorist financing.<sup>83</sup>
- 48.5 Providing mutual legal assistance to other countries to strengthen the efforts to combat money laundering and other crimes.<sup>84</sup>
- 49 In 2008, South Africa was rated as non-compliant in respect of the FATF's recommendations on managing the risks associated with politically-exposed persons. To remedy this non-compliance, the financial institutions in South Africa were required to increase their risk management practices in respect of

FATF Recommendation 10, vol 7, page 641.

FATF Recommendation 11, vol 7, page 642.

FATF Recommendation 12, vol 7, page 644.

FATF Recommendation 20, vol 7, page 647,

FATF Recommendation 37, vol 7, page 655.

politically-exposed persons, which must necessarily include a limitation on the banks' interaction with clients who are politically-exposed persons.

- 50 Banks play a central role in international efforts to combat money laundering and other offences. They may be used, unwittingly, to further their clients' unlawful acts. They are also in the best position to keep records of and monitor their clients' transactions so that any suspicious activity can be identified and addressed.
- 51 Compliance with this regulatory framework particularly in the light of the transnational nature of money laundering and similar offences establishes a relationship of co-operation and trust between different countries.
- 52 Failure by a South African bank to adhere to these international principles creates the risk of exclusion from the global financial and payments system, which would, in the words of the Minister, be "catastrophic, with long-term structural effects". 

  The Minister states that up to 50% of the debt that the government issued in 2016 to support government's social programmes fell outside the influence of domestic regulators and relied on relationships of trust based on these international guidelines. 

  86

### Domestic legislation

The Financial Intelligence Centre Act 38 of 2001 ("FICA") is the principal legislation governing anti-money-laundering activities. The primary objective of

Minister founding affidavit, annexure "D", vol 1, page 47.

Minister founding affidavit, annexure "D", vol 1, page 49.

FICA, as set out in section 3(1), is "to assist in the identification of the proceeds of unlawful activities and the combating of money laundering activities and the funding of terrorist and related activities".

- In advancing this objective, FICA imposes a range of obligations on the banks as accountable institutions.<sup>87</sup> They include the identification and verification of new clients,<sup>88</sup> and monitoring and record-keeping<sup>89</sup> so that banks are able to identify suspicious transactions. Once a suspicious transaction is identified, a bank must report it to the Financial Intelligence Centre in terms of section 29.
- Banks are required by FICA to report any receipt of funds or any transaction where they know or suspect that the transaction involves the proceeds of unlawful activities. This reporting obligation enables the State to conduct the necessary investigations and to initiate criminal proceedings where appropriate. It also enables a bank to exercise its contractual right to close a client's bank account where a suspicious transaction is identified and where the bank believes that it may give rise to a business or reputational risk. As we have explained above, it is within a bank's rights to terminate a banking relationship based on the business or reputational risks it perceives.
- A failure by a bank to report a suspicious transaction is, in terms of section 52 of FICA, an offence, that attracts severe penalties.90

<sup>87</sup> Schedule 1 to FICA.

<sup>88</sup> Section 21 of FICA.

<sup>89</sup> Section 22 of FICA.

<sup>90</sup> As set out in section 68 of FICA.

- 57 Similar obligations arise from other domestic laws:
  - 57.1 Section 34 of the Prevention and Combating of Corrupt Activities Act 12 of 2004 ("Anti-Corruption Act") provides that the failure by a person in a position of authority to report knowledge or suspicion of any corrupt activity is a criminal offence. In cases where a bank is obliged to file a report in terms of section 29 of FICA, it may also be under a duty to report possible corruption in terms of section 34 of the Anti-Corruption Act to avoid its own criminal liability.
  - 57.2 The Prevention of Organised Crime Act 121 of 1998 ("POCA") prohibits activities related to the proceeds of a crime, including money laundering, 91 assisting another person to benefit from the proceeds of an unlawful activity, 92 and the acquisition, possession and use of the proceeds of unlawful activities. 93 A bank that had a continuous banking relationship with a client who it suspects to be involved in any of these activities, exposes itself to the possibility of conviction of an offence under POCA.
- The obligations placed on banks in relation to money laundering are, understandably, onerous. They are required to take these obligations seriously, if necessary at the expense of their commercial relationships with their clients.

<sup>91</sup> Section 4 of POCA.

<sup>92</sup> Section 5 of POCA.

<sup>93</sup> Section 6 of POCA.

Once a bank identifies a suspicious transaction or other unlawful activity as provided for in FICA, the Anti-Corruption Act and POCA, continued interaction with that client may expose the bank to similar risks in the future. The bank will also be exposed to possible sanctions if it fails to identify a subsequent suspicious transaction or unlawful activity, and therefore does not report it as required.

### Conclusion

Neither the Minister nor any other organ of government has the power in law to intervene when a bank closes an account of a client. If the position were otherwise, it would mean that government could intervene even if a bank were to terminate its relationship with a client in order to give effect to anti-money laundering legislation and anti-bribery and corruption legislation. That would have detrimental consequences for the financial sector, since it would involve state intervention in a private commercial relationship at the instance of a select group of persons. <sup>94</sup> The grant of the declaratory relief sought by the Minister will ensure that none of these consequences are ever visited upon the financial sector by an official who does not share the Minister's correct understanding of the law.

Absa affidavit para 8.2, vol 6, page 501

## **PRAYER**

We submit that the Minister has made out a case for the declaratory relief sought.

Nedbank accordingly supports an order on the terms set out in the Minister's notice of motion.

ALFRED COCKRELL SC

MKHULULI STUBBS

Counsel for Nedbank

Chambers Sandton 10 February 2017

### TABLE OF AUTHORITIES

Bredenkamp v Standard Bank of SA Ltd 2010 4 SA 468 (SCA

Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd 2005 6 SA 205 (SCA)

Durban City Council v Association of Building Societies 1942 AD 27

Eagles Landing Body Corporate v Molewa NO and others 2003 1 SA 412 (T)

Ex Parte Nell 1963 (3) SA 754 (A)

Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council 1999 1 SA 374 (CC)

Govan v Skidmore 1952 1 SA 732 (N)

Hlongwane v ABSA Bank Limited (ZAGPPHC 928, 10 November 2016, as yet unreported)

JT Publishing (Pty) Ltd v Minister of Safety and Security 1997 3 SA 514 (CC)

Malone v Metropolitan Police Commissioner [1979] Ch

Minister of Public Works v Kyalami Ridge Environmental Association 2001 3 SA 1151 (CC)

Nedbank Limited v Jones [2016] ZAWCHC 139 (12 October 2016)

Pharmaceutical Manufacturers Association of South Africa: In Re ex parte President of the Republic of South Africa 2000 2 SA 674 (CC)

Shoba v Officer Commanding, Temporary Police Camp, Wagendrif Dam 1995 4 SA 1 (A)

Wightman t/a JW Construction v Headfour (Pty) Ltd 2008 3 SA 371 (SCA)

Keg Bauls 190A

Reg Bauls 2485

# IN THE HIGH COURT OF SOUTH AFRICA

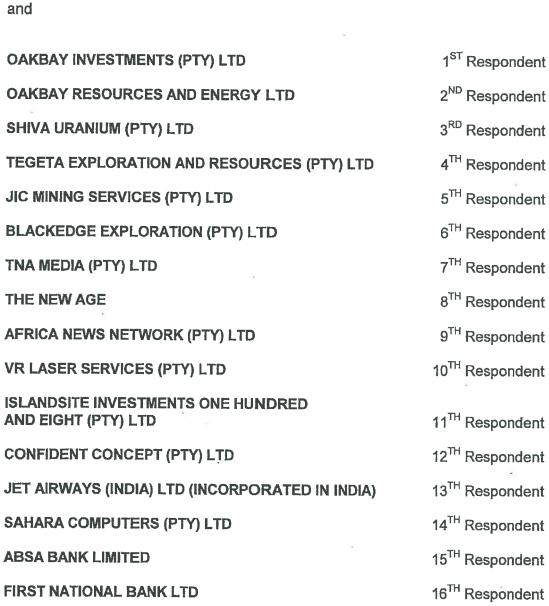
# **GAUTENG DIVISION, PRETORIA**

**CASE NO. 80978/16** 

In the matter between:

MINISTER OF FINANCE

**Applicant** 



STANDARD BANK OF SOUTH AFRICA LIMITED

17<sup>TH</sup> Respondent

18<sup>TH</sup> Respondent

GOVERNOR OF THE SOUTH AFRICAN RESERVE BANK

19<sup>TH</sup> Respondent

REGISTRAR OF BANKS

20<sup>TH</sup> Respondent

DIRECTOR OF THE FINANCIAL INTELLIGENCE CENTRE

21<sup>ST</sup> Respondent

## **FILING NOTICE**

PRESENTED FOR SERVICE AND FILING:

# 19th and 20th RESPONDENT'S HEADS OF ARGUMENT

DATED at JOHANNESBURG on this the 10th day of February 2017

WERKSMAN'S ATTORNEYS

19<sup>TH</sup> and 20<sup>TH</sup> Respondents' Attorneys

155 - 5th Street Sandown, Sandton Tel: (011) 535 8145

Email: <a href="mailto:cmanaka@werksmans.com">cmanaka@werksmans.com</a>
<a href="mailto:cmanaka@werksmans.com">cmanaka@werksmans.com</a>

Ref: Mr C Manaka / Mr C Moraitis

Ref: SOUT3267.63

C/O MABUELA INCORPORATED
Charter House, 179 Bosman Street

Pretoria Central

Pretoria

Tel: 012 3253966

Email: mabuela@tiscali.co.za

TO: THE REGISTRAR OF THE ABOVE HONOURABLE COURT PRETORIA AND TO:

STATE ATTORNEY

Attorneys for the Applicant

**SALU** Building

255 Francis Baard Street

Pretoria

Tel: 012 309 1575 Fax: 012 309 1649

Email: TNhlanzi@justice.gov.za

Ref: Ms T NHLANZI Ref: 2476/16/Z32

SERVICE BY EMAIL

AND TO:

**VAN DER MERWE & ASSOCIATES** 

Attorneys for 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 10<sup>th</sup>, 11<sup>th</sup>, 12<sup>th</sup> and 14<sup>th</sup> Respondents 62 Rigel Avenue North

WATERKLOOF

Pretoria

Ref: Mr GT VD Merwe / st / O78

Tel: 012 343 5432 Fax: 012 343 5435

Email: simone@vdmass.co.za

SERVICE BY EMAIL

AND TO:

**EDWARD NATHAN SONNENBERGS** 

Attorneys for the 15<sup>th</sup> Respondent 150 West Street Sandton

Email: dlambert@ensafrica.com

SERVICE BY EMAIL

AND TO:

1 1.1

**NORTON ROSE FULBRIGHT** 

Attorneys for the 16<sup>th</sup> Respondent

34 Fredman Drive

Sandton

Email: aslam.moosajee@nortonrosefulbright.com

SERVICE BY EMAIL

AND TO:

**BOWMAN GILFILLAN INC.** 

Attorneys for the 17<sup>th</sup> Respondent 165 West Street

Sandton

Email: <u>clement.mkiva@bowmanslaw.com</u>

alan.keep@bowmanslaw.com

SERVICE BY EMAIL

AND TO:

**BAKER & McKENZIE ATTORNEYS** 

Attorneys for the 18<sup>th</sup> Respondent

Tel: 011 911 4300

Email: <u>Gerhard.Rudolph@bakermckenzie.com</u> <u>Widaad.Ebrahim@bakermckenzie.com</u>

Callum.Oconnor@bakermckenzie.com

c/o ADAMS & ADAMS

Adams & Adams Place

Lynnwood Bridge

4 Daventry Street

Lynnwood Manor

Pretoria

Tel: 012 432 6000

Ref: Adele Jordaan

SERVICE BY EMAIL

AND TO:

**MACROBERT ATTORNEYS** 

Attorneys for the 21st Respondent

MacRobert Building

Corner Jan Shoba and Justice Mohamed Streets

PRETORIA

Tel: 012 425 3436

Email: ghay@macrobert.co.za

Ref: G K Hay

SERVICE BY EMAIL

# IN THE HIGH COURT OF SOUTH AFRICA GAUTENG DIVISION, PRETORIA

Case Number: 80978 / 16

In the matter between

**MINISTER OF FINANCE** 

**Applicant** 

And

OAKBAY INVESTMENTS (PTY) LTD AND OTHERS

Respondents

# RESERVE BANK AND REGISTRAR OF BANKS' HEADS OF ARGUMENT

### Introduction

- This is an application for a declaration that the Minister of Finance is not legally empowered or obliged to intervene in the relationship between banks and their clients when banks close their clients' accounts.
- 2 The South African Reserve Bank and the Registrar of Banks are the nineteenth and twentieth respondents. They abide the decision of the court. They have both placed

factual material before the court which is relevant to the determination it is required to make.

- The Oakbay respondents oppose the relief on the basis that it is abstract and academic and that there is no dispute between the parties. They say that they have never demanded that the Minister of Finance engage with the banks on their behalf. They say that their representative, Mr Howa, accepted that the Minister had no legal right to interfere with the decision made by the banks. And they describe their correspondence with the Minister as no more than a "plea for help".
- It is common cause between the parties that section 21 of the Superior Courts Act 10 of 2013 sets the legal test for the declaratory relief that the Minister seeks.
- The section provides that a High Court has the power "in its discretion, and at the instance of any interested person, to enquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination". The section's predecessor, section 19(1)(a)(iii) of the Supreme Court Act 59 of 1959, was in almost identical terms.
- The Supreme Court of Appeal has interpreted that section to involve a two-stage test.

  First, the court must be satisfied that the applicant is a person interested in an "existing, future or contingent right or obligation", and then, if satisfied on that point, the

Oakbay respondents' AA page 998 para 6

Oakbay respondents' AA page 1012 para 47

Oakbay respondents' AA page 1012 para 47

Oakbay respondents' AA page 1016 para 55

court must decide whether the case is a proper one for the exercise of the discretion conferred on it.<sup>5</sup> In developing the test, the SCA has made it clear that the existence of a dispute between the parties is not a prerequisite for the exercise of the power conferred upon the High Courts under this section.<sup>6</sup> However, it has cautioned that the courts will not be drawn into pronouncing on abstract propositions of law that would amount to no more than advisory opinions.<sup>7</sup>

- The key question before this court is therefore whether the Minister's relief involves an existing, future or contingent right or obligation and if so, whether it should exercise its discretion to grant the declaration.
- The Oakbay respondents contend that there is no right or obligation engaged in the case because the parties have always seen eye to eye on the fact that the Minister has no legal right to reverse the decision of the banks or intervene in their relationships. They claim that they have never sought the intervention of the Minister in relation to the banks.
- The Governor of the Reserve Bank sets out the interactions he has had with the Oakbay respondents in relation to their bank accounts. This correspondence is relevant to the issues before the court for two reasons. It demonstrates that the Minister was not the only functionary who received letters from Oakbay requesting intervention of their behalf

Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd 2005 (6) SA 205 (SCA) para 16

<sup>6</sup> Cordiant Trading para 17

Buthelezi and Another v Minister of Home Affairs and Others 2013 (3) SA 325 (SCA) para 3

Oakbay respondents' AA page 1014 para 52

Oakbay respondents' AA page 1016 para 55

with the banks. It is also relevant because the manner in which the Oakbay respondents sought to deal with the banks' closures of their accounts created risks for the financial stability of the banking sector. This is an issue over which the Reserve Bank exercises constitutional oversight.

- 10 These heads of argument therefore cover three topics:
  - 10.1 First, we deal with the constitutional independence of the Reserve Bank.
  - Secondly, we detail the requests from the Oakbay respondents to the Governor of the Reserve Bank for his intervention with the banks and the impact that this type of request can have on the stability of the financial sector.
  - 10.3 Thirdly, we set out the relevance of these facts for the test that the court must apply.

#### Constitutional independence

- The primary object of the South African Reserve Bank is to protect the value of the currency in the interest of balanced and sustainable economic growth. This is reflected in sections 224(1) of the Constitution and section 3 of the South African Reserve Bank Act 90 of 1989.
- In terms of section 224(2) of the Constitution, the Reserve Bank must, in pursuit of this object, perform its functions independently and without fear, favour or prejudice. This means the Reserve Bank must act independently, and must be seen to act independently, of all external influences, including those of private parties and the

government. The independence of the Reserve Bank is a key driver of financial stability and investor confidence in the country.<sup>10</sup>

#### Intervention

On 14 April 2016, M Howa of Oakbay Investments wrote to the Governor and complained about the closure of the Oakbay bank accounts. He concluded the letter with the following:

"We are seeking your help as Governor of the Reserve Bank with the responsibility to regulate the financial sector to end the deadly stranglehold that the banks have placed on our business"

- The letter is clear. Oakbay asked for the Governor of the Reserve Bank to intervene with the banks to have their bank accounts reinstated. There is no other tenable interpretation of the letter. It requested the Governor to put an end to the deadly stranglehold that the banks had placed on the Oakbay business. This could only be achieved with the reinstatement of their bank accounts.
- This is also how the Governor understood the letter because he wrote back to Mr Howa on 22 April 2016 and explained that he and the Registrar of Banks have no legal authority to instruct a bank to serve or not to serve a particular client. He advised Mr Howa to have recourse to the Banking Ombud or the courts. <sup>11</sup>

Governor Affidavit page 605 para 8, read with annexure SARB1 page 611

Governor affidavit page 606 para 14, read with annexure SARB2 page 613

- On 26 April 2016, the Governor also wrote to the Minister of Finance. He expressed concern about the appointment of a cabinet subcommittee to engage with the banks about the closure of the Oakbay accounts. The Governor alerted the Minister to the grave risk that any interference, or even perception of interference, with the operation of the banks, would pose to South Africa's financial stability. Only proper recourse to the courts or the Banking Ombud would restore confidence in the financial system. 12
- On 5 October 2016, the Governor received a further letter from Mr Howa of Oakbay Investments. Mr Howa referred to the previous letters of April 2016 but did not say that he understood that the Governor had no legal power to engage with the banks on behalf of Oakbay. Instead, Mr Howa again called for the Governor's intervention. This time, he raised the challenges that smaller banks were experiencing in providing banking facilities to Oakbay and requested that the Governor assist in removing the obstacles to Oakbay's business.<sup>13</sup>
- At no point between April and October 2016 did Oakbay ever approach the Banking Ombud or the courts, despite being consistently told to do so. Instead, it continued to request intervention from the Governor of the Reserve Bank and others. Oakbay's failure to have approached the very bodies that have the legal authority to deal with the closure of the Oakbay bank accounts, and its persistent requests to state functionaries for their intervention, show that Oakbay respondents believed there was a place for this intervention on their behalf. Their denials in their answering affidavit that this was ever their view or intention do not bear scrutiny.

Governor affidavit page 607 paras 17 to 19, read with annexure J to the Minister's founding affidavit page 75

Governor affidavit page 608 para 20, read with SARB3 page 614

The Reserve Bank has a constitutional duty to act independently. It cannot be influenced, or even be seen to be influenced, by private or political pressure in exercising its powers. The role that the Oakbay respondents asked the Governor to play in relation to their bank accounts is inconsistent with that independence and threatens the country's financial stability.<sup>14</sup>

#### Relevance for the test

- The facts set out above are relevant to the test that the court must apply in determining whether to grant the declaratory relief.
- They are relevant, first, to the question whether there is a legal right or obligation at issue in the case. Despite their claims to the contrary, the Oakbay respondents conducted themselves between April and October of 2016 in a manner designed to get key state functionaries to intervene with the banks to have their accounts reinstated. These dealings are relevant to the question whether there is a right or obligation requiring determination.
- The facts are also relevant to the exercise of the courts' discretion because it is not only interference, but also the perception of interference, with the banking system that can create financial instability.

Governor's affidavit page 609 para 28

## Prayer

The Governor and the Registrar do not seek any relief and abide the decision of this court.

WIM TRENGOVE SC

KATE HOFMEYR

NDUMISO LUTHULI

Counsel for the 19<sup>th</sup> and 20<sup>th</sup> Respondents

Chambers, Sandton
10 February 2017

77C HOA 2497

# IN THE HIGH COURT OF SOUTH AFRICA GAUTENG DIVISION, PRETORIA

Case No: 80978/16

In the matter between:

THE MINISTER OF FINANCE

**Applicant** 

and

**OAKBAY INVESTMENTS (PTY) LTD** 

First Respondent

**OAKBAY** 

RESOURCES AN

AND

Second Respondent

**ENERGY LTD** 

SHIVA URANIUM (PTY) LTD

Third Respondent

TEGETA

**EXPLORATION** AND

Fourth Respondent

RESOURCES (PTY) LTD

JIC MINING SERVICES (PTY) LTD

Fifth Respondent

**BLACKEDGE EXPLORATION (PTY)** 

Sixth Respondent

LTD

TNA MEDIA (PTY) LTD

Seventh Respondent

THE NEW AGE

Eighth Respondent

AFRICA NEWS NETWORK (PTY)

Ninth Respondent

LTD

Tenth Respondent **VR LASER SERVICES (PTY) LTD** ISLANDSITE INVESTMENTS ONE Eleventh Respondent **HUNDRED AND EIGHTY (PTY) LTD** Twelfth Respondent **CONFIDENT CONCET (PTY) LTD** Thirteenth Respondent **AIRWAYS** (INDIA) LTD : (INCORPORATED IN INDIA) Fourteenth Respondent SAHARA COMPUTERS (PTY) LTD Fifteenth Respondent **ABSA BANK LTD** Sixteenth Respondent FIRST NATIONAL BANK LTD STANDARD BANK OF SOUTH Seventeenth Respondent **AFRICA LTD** Eighteenth Respondent **NEDBANK LTD** Nineteenth Respondent GOVERNOR OF THE SOUTH **AFRICAN RESERVE BANK** Twentieth Respondent **REGISTRAR OF BANKS** Twenty-First Respondent DIRECTOR OF THE FINANCIAL INTELLIGENCE CENTRE

## **FILING NOTICE**

**KINDLY TAKE NOTICE** the Twenty-First Respondent hereby files its heads of argument.

DATED at PRETORIA on this the 10<sup>th</sup> day of February 2017.

#### **MACROBERT ATTORNEYS**

Attorneys for 21<sup>st</sup> Respondent MacRobert Building Cnr Jan Shoba and Justice Mahomed Streets, Pretoria

Tel: 012 425 3436

Email: ghay@macrobert.co.za

Ref: G K Hay/00020604

TO: THE REGISTRAR OF THE ABOVE HONOURABLE COURT PRETORIA

AND TO: STATE ATTORNEY

Attorneys for Applicant

SALU Building

255 Francis Baard Street

**PRETORIA** 

Tel: 012 309 1575

Email: TNhlanzi@justice.gov.za

Ref to: Ms T Nhlanzi/2427/16/Z32

#### AND TO: VAN DER MERWE & ASSOCIATES

Attorneys for 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>,

11th, 12th and 14th Respondents

62 Rigel Avenue North

Waterkloof, Pretoria

Tel: 012 343 5432

Email: simone@vdmass.co.za
Ref to: Mr GT VD Merwe/st/078

SERVICE BY EMAIL

#### AND TO: STEIN SCOP ATTORNEYS INC

Attorneys for 10<sup>th</sup> Respondent

Ground Floor, 18 Meirose Boulevard

Melrose Arch, Johannesburg

Tel: 011 380 8080

Ref: G Stein

Email: glenn@steinscop.com

sian@steinscop.com

#### c/o BROOKLYN PLACE

cnr Bronkhorst and Dey Streets

Brooklyn, Pretoria

Ref to: Bridget Moatshe

## AND TO: EDWARD NATHAN SONNENBERGS

Attorneys for 15<sup>th</sup> Respondent 150 West Street, Sandton

Ref: M Katz/D Lambert/0416998 Email: dlambert@ensafrica.com

#### c/o GERHARD BOTHA & PARTNERS INC

First Floor, Erasmus Forum Building B Cnr Rigel Avenue and Stokkiesdraai

Erasmusrand, Pretoria

Ref to: Mr B Swart/Mr H Botha

Tel: 012 347 0480

**SERVICE BY EMAIL** 

## AND TO: NORTON ROSE FULBRIGHT SOUTH AFRICA INC

Attorneys for 16<sup>th</sup> Respondent 34 Fredman Drive, Sandton

Ref: Mr Moosajee/FNB 13954

Email: aslam.moosajee@nortonrosefulbright.com

#### c/o MONTLE JOOMA SABDIA INC

Ground Floor, Duncan Manor

Cnr Jan Shoba and Brooks Streets

Brooklyn, Pretoria

AND TO: BOWMAN GILFILLAN INC

Attorneys for 17<sup>th</sup> Respondent

Ref: C Mkiva/6162672

Email: clement.mkiva@bowmanslaw.co.za

Alan.keep@bowmanslaw.co.za

c/o BOSHOFF ATTORNEYS

Ground Floor, Hazelwood Gate Office Park

14 Oaktree Avenue (cnr Dely Road)

Hazelwood, Pretoria

Ref: Natasha Nortje/NN1564

**SERVICE BY EMAIL** 

AND TO: BAKER & MCKENZIE

Attorneys for 18<sup>th</sup> Respondent

Ref: G Rudolph/CO

Email: Gerhard.rudolph@bakermckenzie.com

Widaad.ebrahim@bakermckenzie.com

Callum.oconnor@bakermckenzie.com

c/o ADAMS & ADAMS

Adams & Adams Place

Lynnwood Bridge

4 Daventry Street

Lynnwood Manor, Pretoria

## AND TO: WERKSMANS ATTORNEYS

Attorneys 19<sup>th</sup> and 20<sup>th</sup> Respondent's

155 – 5<sup>th</sup> Street

Sandton

Ref: Mr C Manaka/Mr C Moraitis

SOUT 3267.63

Email: cmanaka@werksmans.com

cmoraitis@werksmans.com

#### c/o MABUELA INC

Charter House, 179 Bosman Street

Pretoria Central

Tel: 012 325 3966

## IN THE HIGH COURT OF SOUTH AFRICA GAUTENG DIVISION, PRETORIA

Case no: 80978/2016

In the matter between:

**MINISTER OF FINANCE** 

Applicant

and

OAKBAY INVESTMENTS (PTY) LTD AND 20 FURTHER RESPONDENTS

First Respondent

HEADS OF ARGUMENT OF THE DIRECTOR OF THE FINANCIAL INTELLIGENCE CENTRE, THE 21<sup>ST</sup> RESPONDENT

## TABLE OF CONTENTS

INTRODUCTION	3
THE CIRCUMSTANCES GIVING RISE TO THE ISSUANCE OF THE CERTIFICATE	5
THE LAWFULNESS OF THE CERTIFICATE	7
Striking out application	7
Entities and individuals cited in the certificate	8
Particularity of certificate	10
Purpose of the certificate	13
Further ongoing investigations	15
No review of the administrative action	16
CONCLUSION	17

#### INTRODUCTION

- 1. The 21st respondent, the Director of the Financial Intelligence Centre ("FIC"), abides the decision of the Court in this application by the Minister of Finance ("the Minister") and, accordingly, the FIC makes no submissions on the merits of the application.1
- 2. However, the FIC does intend to address the allegations made by the 1st to 14th respondents (together, "the Oakbay respondents") that the certificate issued by the Director of the FIC and attached to the Minister's application ("the certificate")2 was issued unlawfully. This is incorrect and this allegation should be rejected. As set out below:
  - 2.1. The certificate was issued in circumstances where it was appropriate to disclose the receipt of 72 Suspicious Transaction Reports ("STRs") by the FIC to the Minister for purposes of this application;
  - 2.2. The contents of these STRs has not been disclosed and their disclosure is opposed by the FIC in the related application brought against it by certain of the Oakbay respondents<sup>3</sup>; and
  - 2.3. There was accordingly nothing unlawful about the issuance of the certificate.

<sup>&</sup>lt;sup>1</sup> Notices Bundle vol 1 p 27 <sup>2</sup> Record vol 1 p 87 Annexure P2 <sup>3</sup> Case No 92027/16

- 3. There are further necessary limitations to the scope of these submissions that must be delineated as a preliminary matter:
  - 3.1. The FIC's opposition to the application brought against it by certain of the Oakbay respondents for access to the information contained in the STRs certified in the certificate4 is addressed in separate Heads of Argument that will be filed in response to those of the applicants in that application on 24 February 2017, as per the timetable for the conduct of these applications. The overlapping allegations made in the answering affidavits of the Oakbay respondents in this application relating to their attempts to obtain this information from the FIC5 will also be addressed separately, as necessary for the determination of that application.
  - 3.2. These submissions therefore also do not address the allegations made by the Oakbay respondents regarding the contents of the certificate or its relevance to or role in the Minister's application.
  - 3.3. Finally, the application to strike out the certificate<sup>6</sup>, similarly is not a matter that the FIC intends to address in these submissions since it relates to the merits of the Minister's application and the question of relevance.

<sup>&</sup>lt;sup>4</sup> Record vol 11 p 1053 para 157 et seq.
<sup>5</sup> Record vol 11 p 1047 at para 141 et seq.
<sup>6</sup> Record vol 11 p 1039 at para 118 et seq.

#### THE CIRCUMSTANCES GIVING RISE TO THE ISSUANCE OF THE CERTIFICATE

4. The Minister wrote to the FIC on 28 July 2016<sup>7</sup> detailing the engagement between the Ministry and the Oakbay respondents regarding the closure of their bank accounts by the 15<sup>th</sup> to 18<sup>th</sup> respondents ("the banks"). In relevant part, that correspondence described the Minister's concern

"that the continued allegations of irregularity by the banks concerned, in circumstances in which Oakbay itself refuses to obtain an appropriate decaratory order for the courts, is harmful to the reputation of South Africa's financial system within the global financial system. As you are aware, domestic banks are not only regulated domestically, but also by overseas regulators, in terms of demanding international standards like Basel III and Financial Action Task Force recommendations on money-laundering and financing terrorism. Cabinet has also noted that it is in the national interest to ensure that the domestic financial sector is regulated according to international standards in order to promote economic growth and reduce risk to the fiscus.

Cabinet, since the 2008 global financial crisis, took numerous decisions to improve market conduct practices by financial institutions. This is to ensure that customers of financial institutions are treated fairly.

In the circumstances, I would be glad to be advised whether or not the registered banks have indeed reported to the [FIC] as indicated in the above public statement by Mr Howa [during a television interview referring to [Financial Intelligence Centre Act 2001 ("FICA")] reporting obligations as one of the grounds for the termination of banking services by one of the banks], or whether no such reports have been made.

<sup>&</sup>lt;sup>7</sup> Record vol 1 p 68 Annexure H at paras 11-16

In view of the above, I request you, pursuant to your powers aforementioned, read with section 29(4)(a) of the [Financial Intelligence Centre Act 38 of 2001 ("FICA")], to inform me at your very earliest convenience...

- (a) Whether FIC has indeed received from the aforementioned banks reports in terms of FICA relating to any entities in the Oakbay Group, as listed above (or otherwise);
- (b) Over what period(s);
- (c) In respect of which entities; and
- (d) In what respective amounts relating to each such entity."
- 5. In response -
  - 5.1. The Director of the FIC advised the Minister that section 40 of FICA prevented the disclosure of the information contained in STRs received by the FIC to anyone, including the Minister, but that a certificate, issued in terms of section 39, could be provided. This was because the certificate was to be used in legal proceedings and "only to confirm or refute the receipt of reports pursuant to the FIC Act. Such a certificate will not disclose any information concerning the content of any particular report which the [FIC] has received".
  - 5.2. The Director further advised the Minister that he was satisfied "that there was legal merit and relevance in the request as it relates to the Centre's mandate, powers and functions." This is because sections 10(1)(a) and (b) of FICA require the Director to ensure the lawful and effective functioning of the FIC to meet its objectives, which are contained in section 3, and with respect to its specific information-gathering functions in terms of section 4. Then, in

<sup>8</sup> Record vol 1 p 77 Annexure K

<sup>&</sup>lt;sup>9</sup> Record vol 1 p 86 Annexure P1; p 88 Annexure P2 at para 7.1

accordance with sections 29, 38(3) and 39 (as explained below), he issued the certificate.

#### THE LAWFULNESS OF THE CERTIFICATE

6. The Oakbay respondents contest the lawfulness of the certificate on several overlapping grounds, set out below. However, none of these provide a basis for a finding that the certificate was unlawfully or improperly issued.

## Striking out application

- 7. First, the Oakbay respondents' allegations relating to the certificate are aimed at seeking its striking out<sup>10</sup> on the grounds of its claimed irrelevance to the Minister's application.
- 8. All the allegations made regarding the certificate's lawfulness and the circumstances of its issuance appear to be placed before this Court as context and as the basis for this striking out application. To repeat, the FIC has no submissions regarding the merits of this striking out application (since it relates to the merits of the Minister's application and the question of what is relevant to its determination).

 $<sup>^{10}</sup>$  Record vol 11 p 1039 at para 118 et seq.

9. But the FIC addresses these allegations in order to establish that there is no basis for the allegations, let alone any finding, that the certificate was unlawfully or improperly issued.

#### Entities and individuals cited in the certificate

10. The Oakbay respondents object to the certificate because it certified the receipt of STRs regarding 13 entities and individuals by the FIC when the Minister's request to the FIC detailed 7 entities as the subjects of his inquiry as to whether any STRs were received by the FIC. Related to this are the complaints that no explanation is given as to the identification of the "data discriminators" used by the FIC in the preparation of the certificate.

#### 11. In response, the FIC submits --

- 11.1. It selected criteria to search the STRs received by it in order to locate those that relate to "persons or entities associated with the persons or entities mentioned in the [Minister's] request. 11 This was necessary since the Minister's request "did not contain data discriminators in relation to the persons or entities mentioned in the request."12
- 11.2. STRs are required to contain the particulars of persons or entities concerning whom or which they are made. This typically relates to the bank's

<sup>&</sup>lt;sup>11</sup> Record vol 1 p 88 para 8 <sup>12</sup> Record vol 1 p 88 para 7.2

customer who made the reported suspicious transaction, or other person authorised to carry out transactions on a particular bank account that were reported as suspicious.

- 11.3. But a person or entity may also be the subject of an STR if they are relevant in some way to the scope of the STR. For example, they may be the recipient of funds transferred in a reported suspicious transaction or associated with an entity implicated in a reported suspicious transaction.<sup>13</sup>
- 11.4. Therefore, the selection of a larger number of criteria for the search of the FIC's STRs than were specified in the Minister's request was necessary to correctly target the search. To do otherwise may have resulted in an incomplete list of STRs.
- 11.5. There is no evidence before the Court that the expansion of the search criteria to produce the certificate was in any way unlawful or improper.
  Allegations to the contrary should be rejected.
- 12. Related to this complaint is the Oakbay respondents' contention that the alleged non-joinder of persons or entities referred to in the certificate to these proceedings is an additional ground to find that the certificate is irrelevant to the Minister's application and unlawfully issued.<sup>14</sup>

<sup>&</sup>lt;sup>13</sup> See The FIC's Guidance Note 4 on Suspicious Transaction Reporting.Government Gazette 14 March 2008 No 30873, Notice No 301; Record of Oakbay/FIC application at Annexure MM2 p 117 et seq.

<sup>&</sup>lt;sup>14</sup> Record vol 11 p 1051 para 151

- 12.1. However, this misunderstands the purpose of the certificate. It is merely to record the fact of the listed reports, nothing more. Therefore, it does not implicate or endanger the rights of any of the persons or entities listed in it nor give rise to any claim by them that should be determined together with the Minister's application. There is, as a result, no reason for the subjects reflected in the certificate to respond in any way to it or to participate in these proceedings.
- 12.2. To repeat, the Minister's application seeks the determination of a question of law. There is no reason to respond to the factual contents of the certificate in that exercise. As a result, there is no "material non-joinder" since none of the subjects of the certificate have a claim or right to relief that depends in any way on the claim or relief of the Minister in this application.
- 12.3. This contention by the Oakbay respondents can be rejected. There is no need for the subjects of the certificate to join or be joined in these proceedings.

#### Particularity of certificate

13. The Oakbay respondents next complain that the certificate is vague and unintelligible, does not enable identification of the transaction flagged as suspicious in the STRs recorded and does not contain sufficient detail to trace the transactions reported on, thereby denying the Oakbay respondents the opportunity to explain and refute allegations made against them utilising the certificate. They

further contend that the certificate provides no evidence on any issue relevant to the Minister's application and establishes no fact about the circumstances or position of any of the Oakbay respondents.<sup>15</sup>

- 14. Seemingly for this reason, they launched the related application to compel the FIC to release the contents of the STRs reflected in the certificate and detail the limited success of a forensic review conducted by Nardello & Co. 16
- 15. Again, the details of the transactions reported on in the STRs collated and reflected in the certificate are irrelevant to the determination of the Minister's application.
  - It follows that there is no need for the Oakbay respondents to "refute 15.1. these allegations", "clear [their] name" and remove the "smokescreen to persuade the general public (and in all likelihood the International Banking Community (sic)) that the Group and the Family are involved in dubious and inappropriate transactions."17
  - 15.2. There is no need to detail the date of the reported transaction, any reference numbers attaching to the reported transaction, the value of the transaction, the details of the sending party, the originating bank, the receiving bank and any other transaction-related details which would assist in the identification and/or explanation of the transaction in question, as sought by the Oakbay respondents. 18 in order to determine the Minister's application.

Record vol 11 p 1049 para 147
 Record vol 11 p 1066 para 164 et seq.
 Record vol 11 p 1050 para 147.5, p 1054 para 161, p 1063 para 192

<sup>&</sup>lt;sup>18</sup> Record vol 11 p 1054 para 161

- 15.3. This application and these proceedings are not for the rehabilitation of the Oakbay respondents' reputations or a platform to address adverse public perception of them. It is a legal process to determine only the declaratory relief sought by the Minister.
- 16. But there is also a further good reason not to provide that information to the Oakbay respondents, even if it were relevant to this application, which it is not.
  - 16.1. The contents of reports of suspicious transactions received by the FIC in terms of the FICA legislative framework are subject to strict protection and generally prohibited from disclosure.<sup>19</sup> This prohibition is all the more important when the party seeking access to the reported information is the subject of the report. Disclosure of information reported in STRs could compromise and undermine ongoing investigations, including those regarding the 72 STRs reflected in the certificate.
  - 16.2. As explained in the further affidavit filed on behalf of the FIC

"With regard to the large number of suspicious transaction reports which form the subject matter of the application under case number 92027/2016 and which underlie the "72 transactions" referred to in the affidavits, the FIC is currently engaged in analysing the information provided in the suspicious transaction reports, with a view to the preparation of its own report in which the information and transactions are analysed. Once the FIC has completed its report it will be considered and a decision will be taken whether the information as analysed indicates a reasonable ground to believe that the information may be required to investigate suspected unlawful activity. If the FIC official or officials who prepare and consider the report form such a reasonable belief, then the report will be referred to a relevant investigating authority, which may include the Director for Priority Crimes Investigation or the

<sup>&</sup>lt;sup>19</sup> See sections 29, 36, 37, 38, 40 of FICA

South African Police Service, or an appropriate supervisory body."20

- This means that there are ongoing investigative processes that would be 16.3. compromised and undermined by the disclosure of any detail of the subject of that investigation, namely the detail of the transactions forming the contents of the STRs identified in the certificate.
- 17. For all of these reasons, no further particularity is necessary or should be provided to the Oakbay respondents.

#### Purpose of the certificate

- 18. It is further alleged that the certificate unlawfully releases information to the Minister for a purpose unrelated to law enforcement and investigation.<sup>21</sup> This contention may also be rejected since it misconstrues the purpose of the certificate.
  - As the Director of the FIC explained, he understood the purpose of the 18.1. certificate to relate to the FIC's mandate, powers and functions, including its role as the destination of STRs.<sup>22</sup>
  - Specifically, it related to "good [financial] market conduct and the 18.2. integrity of our banking (and with it financial) system"23, which the FIC is mandated to enhance through its principal objective: "to assist in the

<sup>&</sup>lt;sup>20</sup> Record vol 15 p 1423 para 2.5 <sup>21</sup> Record vol 11 p 10150 para 148 <sup>22</sup> Record vol 1 p 88 para 5, 7.1 <sup>23</sup> Record vol 1 p 69 para 5

identification of the proceeds of unlawful activities and the combating of money laundering activities and the financing of terrorist and related activities."<sup>24</sup>

- 18.3. Ensuring compliance with FICA which is all that the certificate reflects is therefore the core of the FIC's purpose. The Minister's request to the FIC was to ascertain whether or not the banks, or other entities under reporting obligations created by FICA, had in fact filed reports with the FIC.
- 18.4. This was a question because the Oakbay respondents had placed in the public domain that the banks' obligations in terms of FICA were at least one of the reasons given for the closure of their bank accounts. Specifically, Mr Howa revealed in a television interview that at least one of the banks closed accounts following

"enhanced due diligence of Oakbay entities and as required by FICA and have concluded that continuing with any bank-customer relationship with them would increase our risk of exposure to contravention of the mentioned law to an unacceptable level."<sup>25</sup>

(emphasis added)

- 18.5. Therefore, the Minister sought assurance that the FIC had received reports, required in terms of FICA, regarding the Oakbay respondents and associated persons and entities, and the certificate is the means of providing that assurance in terms of section 39 of FICA.
- 18.6. This is not an unlawful purpose.

<sup>&</sup>lt;sup>24</sup> Section 3(1); see also section 4

<sup>25</sup> Record vol 1 p 69 para 9

- 18.7. The power to issue a certificate pursuant to section 39 to certify the fact of a report made in terms of FICA in respect of specified subjects of the STRs and regarding specified amounts is a power related to the FIC's functions, objectives and monitoring. It reflects no more than the FIC's function to ensure that reporting institutions, including the banks, comply with their reporting obligations and utilise the prescribed reporting procedures, which is at issue in the Minister's application.
- 19. Accordingly, there is no unlawful purpose of the certificate and its issuance was proper and compliant with FICA.

#### Further ongoing investigations

- 20. Finally, it is contended by the Oakbay respondents that the correspondence from the National Head of the Directorate for Priority Crime Investigation ("Hawks")<sup>26</sup> confirming that no reports have been received from the FIC regarding a possible investigation of the Gupta family and Oakbay Group of companies somehow demonstrates that the transactions underpinning the 72 STRs reflected in the certificate are lawful.
  - 20.1. We do not repeat what is set out above regarding the irrelevance of the details and merits, lawfulness or unlawfulness, status and propriety of the transactions reported on in the 72 STRs summarised in the certificate.

<sup>&</sup>lt;sup>26</sup> Record vol 14 p 1312 Annexure OB25.2

20.2. But we do submit that the inference sought to be drawn from the Hawks' correspondence should be rejected. This is because, as explained at length in the further affidavit filed on behalf of the FIC<sup>27</sup> and quoted above, the FIC is still in the process of analysing the information reported to it and may still refer information to the Hawks, among other investigative authorities, if there is a reasonable ground to believe that there is suspected unlawful activity.

#### 20.3. As a result,

"Given the large number and complexity of transactions described in the relevant suspicious transaction reports, no adverse assumption can and should be made from the fact that the FIC has not yet finalised its analysis, taken a decision pursuant to such analysis and finally disseminated a referral report in terms of section 40 of FICA to an appropriate investigating authority, supervisory body or other competent authority in terms of FICA."<sup>28</sup>

20.4. Therefore, the inference sought to be drawn from the Hawks' correspondence is unsustainable.

#### No review of the administrative action

20.5. The issuance of the certificate constitutes "administrative action" as contemplated in the Promotion of Administrative Justice Act, 2000. The Oakbay respondents claim to be persons whose rights have been materially and adversely affected by the issue of the certificate, but have not sought to

<sup>&</sup>lt;sup>27</sup> Record vol 15 p 1421 para 2 et seq.

<sup>&</sup>lt;sup>28</sup> Record vol 15 p 1423 para 2.7

review and set aside the administrative action in terms of PAJA. Until an administrative act is set aside by a Court in proceedings for judicial review it has valid legal consequences which cannot simply be overlooked.<sup>29</sup> The contention that the certificate was unlawfully issued also does not constitute a permissible "collateral challenge" to the certificate in these proceedings.30

Accordingly, the Oakbay respondents are not entitled in these 20.6. proceedings to seek a determination or finding by the Court on the issue of the lawfulness of the issue of the certificate.

#### CONCLUSION

21. For the reasons set out above, each of these submissions by the Oakbay respondents regarding the lawfulness of the certificate should be rejected. The certificate was lawfully and properly issued by the FIC.

> N G D MARITZ SC MM LE ROUX Chambers, Pretoria and Sandton

> > 10 February 2017

<sup>&</sup>lt;sup>29</sup> Oudekraal Estates (Pty) Ltd v City of Cape Town and Others 2004(6) SA 222 at par [26] <sup>30</sup> Oudekraal at paras [35] –[36]

Sahara Hert. 2521

## IN THE HIGH COURT OF SOUTH AFRICA GAUTENG DIVISION, PRETORIA



Case No.: 80978/2016

In the matter between:

MINISTER OF FINANCE

Applicant

and

OAKBAY INVESTMENTS (PTY) LTD & OTHERS: First - Twenty-first Respondents

## FOURTEENTH RESPONDENT'S (SAHARA COMPUTERS (PTY) LTD)

## SUPPLEMENTARY HEADS OF ARGUMENT

	All the second s	Commence Planter
to aff cost	TA MENT	
野 ずこうべっさ	<b>=0560</b>	THE RESERVE AND THE

1 1 1 1 1 1 1 1 1 1 1 1 1 1 1 1 1 1 1	
A: THE NEED FOR THESE SUPPLEMENTARY HEADS OF ARGUMENT	atopie Ž
B: GENERAL INTRODUCTORY SUBMISSIONS	ggage <b>S</b>
C: DECLARATORY ORDERS	9
C1: Section 34 of the Constitution	9
C2: The Test for Declaratory Orders	11
C2(1): The First Leg: Locus Standi	12
C2(2): The Second Leg: Exercise of a Discretion	15
D: Factors Against the Court Exercising a Discretion	18
D1: Absence of a Lis highween the Parties	18
D2: Separation of Powers and Impact on Future Legal Challenges	19
DB: The Minister is Functus Officio	22
D4- Bradekkamp Provides Further Certainty	24
D5: Lobbying is a Legitimate Tool of Engaging with Government	25
D8: Banks Conduct can be Scrutinised	28
D7: Minister Unable to Show Harm	29
DB: Foreign Law Supports a Restrictive Approach to Declaratory Orders	30
D8(1): English Law	31
D8(2): Southern African Law	37
E: QOST8	38
the Control of the Co	8283
F: CONCLUSION	45



## A: THE NEED FOR THESE SUPPLEMENTARY HEADS OF ARGUMENT

- 1. The fourteenth respondent, Sahara Computers (Pty) Ltd ("Sahara"), was initially represented by Gert van der Merwe of Van Der Merwe & Associates until 16 March 2017, and was represented jointly with the first to ninth and eleventh to thirteenth respondents (collectively, the "Oakbay Respondents") by shared counsel.
- 2. Sahara, like the tenth respondent, VR Laser (Pty) Ltd ("VR Laser"), has recently decided to obtain separate legal advice and representation and have appointed Stein Scop Attorneys Incorporated as their attorneys of record with its own team of counsel.
- Sahara's new counsel have prepared these separate Supplementary Heads of Argument for the benefit of the Court to outline the argument that will be presented on behalf of Sahara.

## B; GENERAL INTRODUCTORY SUBMISSIONS

- 4. The applicant, the Minister of Finance ("the Minister") approaches this Court for declaratory relief in circumstances where there is no dispute ("lis") between the parties. 1 Not a single party contends that the Minister has any power that permits him to intervene in a private banking relationship where a bank decides to close the accounts of any of their clients, for whatever reason, no matter its unlawfulness.2
- 5. Despite the absence of a ils between the parties, the Minister persists in asking this Court to exercise a discretion in his favour. The guestion is why.
- Unless this Court acknowledges the political context in which the Minister's 6. application is brought,4 and recognises that this application is part of the

Record Vol 1 p.16 para 3 Record Vol 1 p.10 para 3

<sup>4</sup> Record Vol 11 p 998 para 6,

Record Vol 1 p 10 para 3.



Minister's own political stratagem to pre-empt action by the Cabinet and, in particular, the President, this Court will be in danger of hearing an application that has no business being ventilated before it.<sup>5</sup> The Minister's support for the expanded relief separately prayed for by Standard Bank, which adds onto the Minister's relief, confirms the Minister's motive.<sup>6</sup>

- 7. Despite the Minister's assertion that he approaches the Court in the public interest in order to settle a narrow legal question, the Minister's conduct before this Court evinces something entirely different. With regard to the issues the Minister has chosen to place before this Court, almost all of which are wholly irrelevant to the relief he seeks, and his continued refusal to withdraw this application, notwithstanding all the respondents accepting his interpretation of his powers, the Minister betrays his real intent.
- The Minister, in seeking impermissibly broad and undefined relief, and in actively supporting the relief of Standard Bank against the Cabinet and the President, abuses this Court's jurisdiction in order to influence political outcomes.<sup>7</sup>
- 9. The Minister seemingly believes that it will not be in South Africa's best interests if the banks are subjected to the scrutiny and accountability being contemplated by the Cabinet. The Minister would prefer that the banks enjoy a 'carve out' from executive accountability, i.e. that the banks should not be accountable to the Republic's democratically elected leadership even within the confines of the law.<sup>8</sup>

Record Vol 14 pp 1330 - 1334, 1339, 1351 - 1352, 1355, paras 10, 12 - 13, 31, 62, 106, 110, 117

Alternatively, if the Minister's relief is in fact narrow, then there is no reason to grant it heamuch as it retains specifically to the Chickey respondents' accounts in question. It is common eatise that those accounts have closed and are no longer being utilised. Accordingly, the relief is entirely academic. Again, this further demonstrates that there is no its between the parties.

Record Vol 1 p 14.

Although strictly irrelevant, the ANC's Freedom Charter (1955) speaks of the role of mospoly capital and the banks. As far back as 2010, the SACP, an ANC altistics partner and member of the governing altistics, edvocated for reform of the banking sector (see http://politicsweb.co.za/politics/inancing-development-in-sa-nzimends). The Cabinet's consideration of a commission of inquity into the banks, gaperally, was pre-emptively and improperly announced in September 20-16 (see: https://www.dailymereriek.co.ze/article/2018-08-02-cabinet-to-seek-tudicial-inquity-into-banks-moves-ecalist-file-outstate-tynoidez-19500). This application was leuriched nearly a month later in October 2016. The Cabinet was considering all matrices of intervention from as far back as April 2016 (see: http://www.enca.com/south-africes/cabinet-probe-banks-about-gupts-accounts).

- It should come as no surprise, therefore, that the Minister is eagerly and 10. enthusiastically supported by the fifteenth to twenty-first respondents, respectively ABSA Bank Limited ("ABSA"), First National Bank Limited ("FNB"), Standard Bank of South Africa Limited ("Standard Bank"), and Nedbank Limited ("Nedbank") (collectively the "bank respondents").9 The bank respondents' participation in these proceedings is self-interested, and is dressed up as being in the public interest; the authorities the bank respondents themselves rely on demonstrate that this application is unnecessary (see our discussion on Bredenkamp v Standard Bank of South Africa below). 10 The banks would obviously prefer to be subject to the authority of regulators whose mandates are significantly limited.11
- 11. This is evident in the approach taken by Standard Bank, which is so enthusiastic to support the Minister (and, thus, themselves) that it has prayed for "expanded relief" 12 notwithstanding its factual and legal defects 13 As Standard Bank says, they want the declaratory relief to operate as a "constraining factor" on the President's discretion to take that may have the effect of subjecting them to scrutiny.14
- 12. In circumstances where the President, who is not even a party to these proceedings, and where he has not yet made a decision to appoint a commission of inquiry, 15 an idea that clearly enjoys the support of some of the members of the Cabinet, 18 this Court should resist the temptations of the Minister and the bank respondents to Intervene where doing so would put it at the centre of contentious political debate in which at this early stage it has no role to play. The separation of powers, which underlies the Constitution and the rule of law, dictate that this Court must be extremely careful - if not cyrical - of answering the Minister's application affirmatively.

Record Vol 2 p 182. 11

12 Record Vol 3 p 300 - 301.

13 Record Vol 8 pp 889 – 990 para 16.

Record Vol 2 p 99 para 7 (FNB); Record Vol 2 p 134 para 18 (Nedbank); Record Vol 3 p 297 para 145 (Standard Bank); Record Vol 6 p 502 para 11. 2010 (4) SA 468 SCA ("Bredenkump").

<sup>14</sup> See Standard Bartic's Heads of Argument p 41 para 94 and footnotes.

<sup>15</sup> Record Vol 2 p 185. Record Vol 2 p 182.

- 13. This application, together with the expanded relief, is a deliberate, calculated, and pre-emptive strike that the Minister, together with the bank respondents, hope to use to secure their interests. It should be dismissed with costs. The Minister must be judged according to the same standards that an ordinary litigant would be held to quite apart from the political noise which he and the bank respondents have attempted to place before this Court in order to bolster their dismal prospects of success. <sup>17</sup> That alone is sufficient ground to dismiss the Minister's application.
- 14. Sahara will show that this Court can take two approaches to the Minister's application. Firstly, it can take the approach of strictly applying the relevant legal principles. If it does, it will see that this application does not highlight a question of law needing resolution. Secondly, if this Court is inclined to hear the Minister under its discretionary powers, 19 the Court still has sufficient reasons upon which it can rely to dismiss the Minister's application. The Minister falls to make out a case under either approach.
- 15. When assessing the merits of the Minister's application, this Court should bear the following in mind:
  - 15.1 The absence of a *lis* means that the parties accept the Minister's conduct and justification for his non-intervention. Had any of them been aggrieved by the Minister's decision, it would have been for them to approach the Court for relief to compel the Minister to discharge his alleged duty. They did not and have not done so.
  - 15.2 It is trite that when a Court considers whether to grant declaratory relief, it must consider all the relevant facts and circumstances. 20 Public interest, as defined and relied on by the Minister, is only one such consideration in the basket of factors this Court must consider. As it turns out, the public interest is, in fact, better served by the Court not granting relief as the Minister urges. It will be shown

<sup>17</sup> Record Vol 1 pp 21 – 22.

Concordist Trading CC v Daimler Chrysler Financial Services (Pty) Ltd 2005 (6) SA 205 (SCA) ("Concordist Trading").

Goncordiant Trading above, Concordiant Trading above,



that there are other considerable factors which this Court <u>must</u> rely on to dismiss the Minister's application.

- 15.3 The Minister, having Interpreted his powers and acted accordingly, effectively asks this Court for its opinion ex post facto as to whether he was correct in circumstances where not a single party to these proceedings raises any doubt that, indeed, his approach was correct. The Minister, on his own version, either wilfully or regiligently ignores the proper adjudicative role that this Court should play in hearing legal disputes. On the face of it, his need for relief is impermissible. This Court should accordingly not intervene in circumstances where doing so would be to give the Minister its academic opinion ex post facto on the validity of his (uncontested) decision.
- The nature of the relief that the Minister seeks is simultaneously under- and over-inclusive. It is imprecise and vague. The Minister either wilfully or negligently falls to define what "intervention" means. The Minister, relying on an interpretation of events that is not borne out in fact, hopes to use the declaratory order, if granted, as a form of interdict to prevent Oakbay from making repeated "representations and demands" of him, even though no, let alone repeated, representations or demands have been made since well before this litigation commenced. The Minister's choice, however, in opting for declaratory relief as opposed to an interdict demonstrates that he hopes to gain a clear political benefit to which he is not entitled because the Minister will never meet the requirements for an interdict.

21 Section 34 of the Constitution of the Republic of South Africa.

23 Record vol 1 p 11 para 9.

Record Vol 1 p 21; Record Vol 1 p 23; Record Vol 1 p 46 (Annexure D); Record Vol 1 p 51 (Annexure E).

Record. Vol. 1 p.11 para 8. The Minister emphasises the harmful conduct of the Oakbay Group but deliberately chooses to refrain from any type of reliaf that would stop it because the harm he refers to does not qualify as sufficient legal harm for such relief.

- Sahara submits that it is not desirous for this Court to hear and pronounce upon an application that evinces no question of law of fact needing resolution but which could have serious unintended consequences. It is clearly driven by political point-scoring.
- The Minister attempts to characterise Sahara's opposition (and that of VR Laser and the Oakbay respondents) (collectively the "Oakbay Group") as being contradictory. The Minister alleges that one cannot concede the legal question underlying the application but oppose the application itself.<sup>25</sup> In the Minister's misguided view, Sahara should simply abide the decision of the Court and let the Minister have free reign to score the political points that he so desperately seeks to do Sahara concedes the underlying legal question (as to the Minister's powers) but strenuously opposes the Minister's perceived entitlement to use this Court for political point-scoring. Simply put, there is no need for it: Sahara does not submit to the Minister's attempt to obtain relief that is a legal nonsense.
- The nineteenth to twenty-first respondents, respectively the Governor of the South African Reserve Bank ("the Governor" or "the SARB")), the Registrar of Banks ("the Registrar"), and the Director of the Financial Intelligence Centre ("the Director" or "the FIC") (collectively, the "regulatory respondents"), abide by the decision of this Court. 28 However, they, too, like the Minister, and the bank respondents, attempt to invite this Court to estensibly make findings about the Minister's powers but burden this Court with argument and evidence that is both irrelevant to the question they say the Court must answer and which canvasses issues not properly before this Court.
- For the same reason that the Court should reject the Minister's application, and the bank respondents' support, the Court must also reject the regulatory respondents' impermissible burdening of this Court with irrelevant argument.

<sup>25</sup> Record vol 1 p 85.

Record Vol 7 p 605 para 6; Record Vol 7 p 620 para 5.



and evidence and which pre-emptively canvasses issues not properly before this Court.

- 20 The Minister, together with the bank and regulatory respondents, set out facts opportunistically in order to create the appearance of uncertainty, urgency, and harm. Upon proper examination, it is clear they do so in an attempt to obtain relief to which they are not entitled.
- It bears repeating that the Minister has committed to taking none of the actions, allegedly at the behest of the Oakbay Group, which he characterises as being harmful. Indeed, even the feared interference by the Executive as a whole has turned out to be a damp soulb.<sup>27</sup>
- Sahara seeks a personal costs order against the Minister. The Minister's conduct in this Court, including attempting to score political points at the State's expanse, is deserving of such a sanction. The Minister has at all times, been provided with sufficient and sound legal advice from senior counsel as to what he was obliged to do. That legal advice was blunt: the Minister need not do anything.<sup>28</sup> Yet the minister embarked on this frolic of his own by bringing an unnecessary application. The Minister thereafter persisted in this Court despite the fact that the Oakbay Group on oath accepts his interpretation of his powers and offered him an opportunity to withdraw.<sup>28</sup> But, the Minister has inexplicably chosen to forge ahead. This litigation is evidently unnecessary and is pursued with an ulterior purpose. The State should not be saddled with the costs with what is, at its most, wasteful and unnecessary expenditure which ought to be recognised as political manoeutring with an ulterior purpose.
- 23 The remainder of Sahara's submissions are structured as follows:

<sup>27</sup> Record Vol 2 p 185.

Record Vet 1 p 24 (Annexure C); Record Vot 1 p 53 (Annexure F).

Record Vol 12 p 1182 (Annexure OB12)

- 23.1 We discuss the legal principles applicable to declaratory orders and, on applying the strict legal test, show that the Minister falls to meet this threshold;
- 23.2 We discuss the other factors that this Court should have regard to when exercising its discretion as to whether or not to grant the Minister relief, and show why the Minister's application should nonetheless be dismissed;
- 23.3 We then finally discuss why the Minister is liable to pay the costs of this application in his personal capacity.
- To avoid prelixity, we do not repeat any arguments made by the Oakbay respondents and VR Laser. Sahara makes common with the Oakbay respondents and VR Laser except where otherwise indicated. Equally, given the repetition between the Minister and the bank and regulatory respondents, we only reference and respond to arguments raised by the bank and/or regulatory respondents where appropriate.

# C: DECLARATORY ORDERS

### C1: SECTION 34 OF THE CONSTITUTION

Although not strictly relevant for the purpose of declaratory orders, section 34 of the Constitution is instructive as to how this Court should engage with the Minister's application. While the section generally provides the right of access to Courts, it equally limits that right of access to appropriate circumstances. Section 34 reads as follows:

"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"

(our emphasis)



- Sahara accepts that section 34 creates a broad entitlement to approach the Courts. However, as our Courts have continually emphasised, they are not a forum that resolves non-legal disputes. This is why, notwithstanding the limited practical nature of declaratory relief, as opposed to, for example, an interdict, our Courts apply strict thresholds as a procedural and substantive safeguard to limit the number of cases which it hears. *In casu*, this application has no practical effect whatsoever, nor raises any legal issue requiring resolution, and accordingly falls to be dismissed.
- As we have emphasised above, one of the main thresholds finds genesis in the Constitution itself. The very right upon which access to Courts is guaranteed limits that access to Courts to instances where the Court may resolve disputes through the application of law.
- In this application, the Court is not asked to apply any law, indeed, it is the case of the Minister, and the bank and regulatory respondents, that no such law exists. The Court is not asked to settle a legal dispute in his favour. The Court is not asked to determine rights. The Court is not asked to determine rights. The Court is instead asked to judicially endorse a historical executive decision taken by the Minister in the absence of any challenge to it. That, we submit, does not fall within the remit of "resolving a dispute by the application of law".
- Accordingly, and at the very outset, the basis upon which the Minister approaches this Court is open to significant doubt. The Minister has no entitlement to do so under the Constitution.
- 30 Should the Court, however, believe that the Minister passes the section 34 threshold, then we submit that the Minister must in any event fall. The Minister's reliance on public interest is not sufficient to sustain the relief as prayed for: the public interest is better served by this Court not



intervening and not permitting itself as a forum to score political points to settle political battles.

# **C2: THE TEST FOR DECLARATORY ORDERS** , with province application of expecting adjust over management.

Declaratory orders are permitted by, and must meet the requirements of, 31 section 21 of the Superior Courts Act, 30 which reads as follows:

> "The High Court may according to law take cognisance, and has the power in its discretion, and at the instance of any interested person, to enquire into and determine any existing, future, or confineent right or obligation, notwithstanding that such person cannot claim any railer consequential to that

(our emphasis)

- The test for declaratory orders has been set down in the locus classicus of Concordiant Trading.31 32 In Concordiant Trading, the Supreme Court of Appeal ("SCA") confirmed the two stage approach for declaratory relief. namely:
  - There must be interested parties upon whom the order would be (a) binding. This means that a pre-existing dispute is not necessary for the relief to be granted;33 and
  - Whether the Court should exercise its discretion to grant or refuse the (b) relief with respect to all the facts and circumstances before it.
- The Minister of Finance, together with the bank and regulatory respondents, emphasise the first leg of the test and practically ignore the second. Their doing so demonstrates how they misapply the test to suit their purposes -

31 Concordiant Trading above.

This entopted the rationals of the AD in Durban City Council v Association of Building

relevant factor that the Court must bear in mind when deciding to exercise its discretion to do so.

<sup>30</sup> Act 10 of 2013.

Societies (942 AD 27 at 32.

This was the case in the pre-constitutional dispensation, See Ex Parts Nell 1963 (1) SA 754 (A) ("Esc Parte Neil") with respect to the old section 19(1)(a)(iii) of the Supreme Court Act (which is identical to the new section 21 above). Post-1964, this was similarly confirmed in Shobe v OC, Temporary Police Comp. Wingendrift Dam. 1985 (4) SA 1 (A) at 14F.

Ex Parte Neil above. The discussion engaged in by the Minister is antirely irrelevant: the absence of a lis between the parties is not a prerequisite for granting declaratory relief. Rather, it is a



which is to bring an application that this Court should not hear. They also pay scant attention to the main requirement in the section which is that the purpose of the exercise of the discretion is the determination of a <u>legal</u> right of obligation. No such legal right or obligation exists here.

# C2(1): FIRST-LEG: LOCUS STANDI: LEGAL INTEREST

- 34 The first leg of the test merely establishes that there are interested parties to whom the declaratory order, if granted, will apply and upon whom it will be binding.
- 35 Notwithstanding the issues of non-joinder specifically canvassed by VR Laser, the first leg of the test is not dispositive.
- 36 It is inevitable that any person approaching the Court for declaratory relief will be interested in the relief as prayed for, if granted. That interpretation of the first leg of the test creates an undestrably low threshold for having sufficient locus stands.
- 37 But, even on this score, the Minister has not cleared the first leg of the test.
- As discussed above, there is no "existing, future, or contingent right or obligation" that requires determination by this Court. It is the Minister's case not disputed by any of the other parties that no such right or obligation exists and that, unless and until the current statutory framework is amended, no such future right or obligation can be contemplated either.
- As such, it is significant to note that the cases that the Minister relies on fall into two general categories: cases brought by private individuals against state functionaries; and cases where state functionaries act ax parts. The distinction in these cases is that a state functionary is either called upon to interpret their powers as a result of another party initiating litigation against them or where they have exercised a particular power and seek Court intervention where it could be open to prospective dispute.

- 40 The Minister's application fits Into neither of these categories: the Minister, who has the power to make any decision with respect to the powers of his office, has done so. None of the cited respondents challenge that decision. The Minister's persistence, to clarify his own powers, after making a decision that no one challenges, is inexplicable (unless one appreciates the true hidden motive).
- 41 In order to avoid the "floodgates scenario", 35 the Court must establish that the applicant has a sufficient legal interest in the relief sought as opposed to a more general interest.36
- 42 The Minister, quite simply, does not meet this threshold.
- 43 This is owing to the fact that on the Minister's version, the Oakbay Group at one point in time asserted that he had a positive obligation to intervene. 37 The Minister disagreed with this assertion and clarified his position, ultimately deciding that he had no positive obligation to do anything. In fact, the Minister interpreted his powers as a negative obligation:58 he was prohibited from doing anything due to the absence of an empowering provision. Once the Minister made the position clear, the Oakbay Group did not take issue with it.
- 44 That decision still stands and binds the Oakbay Group, which it accepts. Even if the Oakbay Group asked repeatedly, the Minister's decision is final. Any subsequent request that was made of the Minister could have legitimately been ignored. If the Oakbay Group was aggrieved, it was for them to take further steps to vindicate the rights they allegedly called upon the Minister to give effect to.
- There the matter should have ended. But, curlously, the Minister approaches this Caurt months later to opine on whether he was correct. There can be no better example of seeking the academic opinions from this Court disguised as declaratory relief. 39

See Democratic Alkance v The Acting National Director of Public Prosecutions (288/11) [2012] ZASCA 15 ("DA case").

Glant Concerts CC & Rinaldo Investments (Pty) Ltd and Others 2013 (3) BCLR 251 (CC) at pere 37 ("Giant Concerte") Record Vol. 1 pp 51 – 52.

Record Vol 1 p 82.

Ex Parte Prokureur-Generaal, Transvaal 1984 (2) 283 (T).



- Once the Winlster made his decision, it stood, and it was accepted as such. There is no triable issue that the Minister brings before this Court.
- This demonstrates this application is unnecessary, and equally that the Minister does not have the legal interest necessary to obtain declaratory relief. The Minister's application for declaratory relief after he has interpreted his powers and embarked upon a course of action amounts to asking the Court for its academic opinion as to whether the Minister was right in law. This is not the kind of legal interest necessary to seek declaratory relief.
- The Minister would only be entitled to be an applicant in this Court to test the veracily of his own decision where he sought to review his own (if it was reviewable). The Minister has no desire to bring such a review nor de any of the respondents. Therefore, the Minister cannot seek validation of his conduct from the Court: there is no need for him to do so. The Minister's decision is dispositive in the absence of any legal disagreement.
- The public statements and debate between the Minister, the Oakbay Group, and the bank and regulatory respondents is not unique to this case. Often decisions are taken, or not taken, where there is significant attention from persons within and outside of South Africa. They all subject Ministers' decisions to intense scrutiny, some of which may be damaging to perceptions of South Africa. The prevention of that reputational damage and harm alone, apart from being speculative, is also insufficient legal interest to give potential liftgants locus stand where the cause of complaint is not triable.
- In this case, the cause of complaint is not triable, and does not require Court pronouncement, inter alla because of the Minister's own conduct. The Minister does not meet the first leg of the test and for that ground alone, the application falls to be dismissed. On a plain reading of the text of the legislation, the Minister's complaint does not fall within the category of matters that the Court can consider for the purposes of declaratory relief, because the

The decision of the Government of the Republic, of which the Minister is part, to withdraw from the International Criminal Court is one such example.



Minister is not an interested person in the sense of having a legal interest.

51 This is further demonstrated when regard is had to the nature of cases that the Minister of Finance relies on to justify his application. Minister of Justice and Constitutional Development v Southern African Litigation Centre,41 Tiouamma v Speaker of the National Assembly, 42 and MEC for Education, KwaZulu-Natal, and Others v Pillay<sup>43</sup> are distinguishable. They all deal with positive obligations. As we advance below, the distinction between a positive obligation (i.e. to do something) and negative obligation (i.e. to not do something) is wholly underappreciated by the Minister and the bank and regulatory respondents. It is clear that from the authorities relied upon that the Court may - and is inclined to - intervene where clarification of the law can affect future state conduct with respect to what positive duties functionaries are under.44 A Court need not, and indeed should not, Intervene where no such obligation exists because of the impact that its intervention may have in the absence of clear legislative intent.

The Minister clearly fails to pass the first leg of the test. Although the Minister will undoubtedly be interested in the relief, the Minister's reading of the first leg cannot mean that any person who has an interest, as opposed to a legal interest, would be permitted to approach this Court for declaratory relief. Such a reading would threaten to overburden the Courts and involve it in all kinds of disputes that it may neither have the capacity nor expertise to involve itself in, or which are inappropriate for it to hear - like this one.

<sup>2016 (2) 8</sup>A 317 (SCA) ("Al Bashir").
2016 (1) SA 534 (WCC) ("Notamme").
2008 (1) SA 474 (CC) ("Pilley").
For example, Al-Bashir concerned the Government's explicit obligations under international and transitic law (respectively, the implementation of the Rome Statute of the International Griminal Court Act, 27 of 2002) to errest the President of the Republic of Sudan, Omar Al-Bashir. Trouvering dealt with the application of the National Assembly's existing Rules regarding motions of no confidence against the President, Pillay dealt with the powers of a School under the SA Schools Act to enforce an existing code of conduct which enforced certain dress codes that inadvertently discriminated against people of particular religions.

330

The second leg of the test performs a crucial disciplining function on applications for declaratory relief. A Court must exercise its discretion to decide whether to grant or refuse declaratory relief with regard to all the facts and circumstances that are put before it. 45 The discretion is not an openended one: It is limited by the purpose set out in section 21 of the Superior Courts Act. 46 That purpose is to determine rights and obligations. The Court has to consider whether to grant the Minister's application for declaratory relief within this discretionary remit, bearing in mind that in doing so it should not trespass into the terrain of another arm of state. 47 It stands to reason, therefore, that even if the Minister passes the first leg of the test, he may nonetheless fail on the second, as we submit he must, if this Court has sufficient reason to decline him the relief he seeks, as we demonstrate below.

The only factor that the Minister has emphasized, together with the bank and regulatory respondents, is the public interest. But, the Minister's, and the bank and regulatory respondents', assertion of public interest can give it no comfort, and should be regarded as insufficient by this Court. In any event, as we submit below, strong public interest reasons exist as to why this Court should not interfere. In short, the public interest actually favours the Minister's application being dismissed with costs. Courts best serve their proper constitutional function when they are made to adjudicate proper disputes of law and not political debates dressed up as such.

In the first Instance, the public interest is but one factor in the basket of considerations that the Court must have regard to when exercising its discretion to determine this application. We address each of the other countervalling considerations that this Court must consider to dismiss this application.

Rall Commutate Action Group v Transnet Ltd (/a Metrorall 2005 (2) SA 359 (CC) at para 107 to 109 ("Rall Commuters case").

<sup>46</sup> Act 10 of 2013.

Rail Commuters case above.

In the second instance, "public interest" is not the same as "interesting to the public". 48 The Minister, together with the bank and regulatory respondents, self-servingly engage in simultaneously adopting and distancing themselves from the political undertones of this application. The approach adopted by the Minister, together with bank and regulatory respondents, is clear: it is to entice the Court to wade into a wider political debate on grounds that are legally irrelevant as to whether declaratory relief should be granted. The danger in this approach is that the Court, in exercising its discretion, may inadvertently allow itself to be used as a forum to settle non-legal disputes under the auspices of "public interest," as in this application.

Sahara submits that given the irrelevance of the political noise upon which the Minister relies, it does not have to address these allegations more fully. To that end, Sahara joins issue with the rebuttals offered by the Cakbay respondents and VR Laser. Sahara emphasises, however, that rebutting those allegations does not make them relevant for the purposes of whether this Court should exercise its discretion in favour of the Minister.

Public Interest, like public perception, is always subject to a reasonableness criterion. 49 it cannot be considered reasonable for this Court to intervene in circumstances where the decision-maker in question, i.e., the Minister, has made a binding decision as to what the statutory framework means and where none of the parties who are subject to that decision challenge it.

Reasonableness, in this case, means that the public is satisfied that an issue was brought to the Minister's attention and the Minister chose to conduct himself by not intervening and the affected parties accepted that position. Public interest requires certainty and respecting the Minister's decision-making authority where it is dispositive can be no better an

See for example, National Media Limited and Others v Bogoshi 1999 (1) BCLR 1 (SCA) at 13; Financial Meil (Pty) Ltd and Others v Sage Holdings Ltd and Another [1993] 2 All SA 109 (AL)

Helen Suzman Foundation y President of the Republic of South Africa and Others 2015 (2) SA 1 (CC) at 31. Namely whether the perception of a reasonably informed member of the public sustains the relief. Similarly, public interest here cannot encompass everything asserted to be in the public interest —it, too, must be subject to a reasonableness criterion.



illustration of it. There the matter ends. It is neither necessary, nor desirable, for this Court to intervene at the Minister's invitation where doing so would be to do no more than provide an academic opinion which judicially endorses ex post facto the Minister's position.

We address the other reasons which makes this Court's intervention undesirable more fully below.

# D. FACTORS AGAINST THE COURT EXERCISING A DISCRETION

61 Should the Court consider the Minister's application to pass the first leg for declaratory relief, Sahara contends that, for the reasons addressed more fully below, the Court should nevertheless exercise its discretion to dismiss the application.

## D1: ABSENCE OF A LIS BETWEEN THE PARTIES

- As has already been addressed above, the absence of a lis between the parties cannot be ignored. It stands to reason that the presence of a lis speaks to the legal uncertainty with regard to any factual or legal question. Where a lis is absent, this demonstrates there is no uncertainty with regard to what the legal position. A Court cannot and should not intervene to grant declaratory relief where there is certainty between the parties as to what the correct legal position is inter se.
- As the Constitutional Court held with respect to the absence of a dispute, the absence of a lis "<u>may, depending on the circumstances</u>, cause the Court to refuse to exercise its jurisdiction in a particular case" (our emphasis). 50
- The Minister, together with the bank and regulatory respondents, attempts to mischaracterise the absence of a dispute, as raised by the

<sup>50</sup> Shoba at 14F-G.

Oakbay Group, as suggesting a live dispute is a prerequisite for the declaratory relief to be granted. That is without merit: if a live dispute was a prerequisite than declaratory relief, as an exceptional form of relief, would be inappropriate and the more conventional relief (such as an interdict or review) should be sought.<sup>51</sup>

- Rather, as the Oakbay Group have argued, the absence of a lis itself should be a considerable and weighty factor that the Court should consider when determining whether to intervene.
- Had this application been brought with respect to a dispute between private parties, for example, and it was clear that one of the parties was under no obligation to act in a particular way, and such a decision was not challenged by the party originally attempting to influence the applicant to act but no longer persisting with such an attempt, this Court would not be likely to grant this application. The same standard should be applied to the Minister.

# D2: IMPACT ON FUTURE LEGAL CHALLENGES

- This Court must also be careful that what it is being asked to do could impact on the separation of powers and future litigation. By creating a dispute, the Minister is, in effect, abdicating from and delegating his executive responsibilities to the Court. This is incorrect:
- As a high-ranking office bearer of State, the Minister will have many requests for all kinds of assistance made of him. Admittedly, many of those requests will require difficult decisions, the correctness of which the Minister may not be sure.
- 69 However, it is the Minister's (or functionary's) role alone to make a decision as to how to fulfil the obligations of his office.

The Minister is unable to do this, however, because although he and the bank respondents make many references to various harms arising from the conduct of the Cakbay Group, none of it could sustain stronger relief. This belies their approach: they hope that the declaratory relief will operate more strongly than it can.

- 70 The only instances of a referral for determination by a Court, in the absence of a direct challenge, is reserved for the President<sup>52</sup> and Premiers<sup>53</sup> in the context of assenting to Bills. No other office bearer, including the Minister, is entitled to ask the Courts to give effect to that kind of consultative role.54
- 71 Functionaries of State, including the Minister, must make their own Independent decisions. The pragmatic reason for this is so as to not unreasonably delay the operation of the State and in so doing, bring governance to a grinding halt.
- 72 Additionally, Courts are not entitled to usurp that power, indeed, Courts deliberately give effect to the doctrine of judicial deference when reviewing decisions made by functionaries of State whose duty it is to make such decisions. 55 The reason for this is that judicial authority does not include the ability to substitute a Court's preferred policy for what the lawfully empowered decision-maker acting rationally and reasonably has decided.
- 73 Even ignoring any ulterior purpose, the Minister's application is impermissible because it invites the Court to play the role of co-decision maker. The Minister cannot escape the burdens of Executive office by outsourcing and abdicating his decision-making to this Court. This is especially so where the decision. right or wrong, will remain valid and binding until reviewed and set aside (if it is reviewable). But given that no such challenge is being brought, the Minister has no need to approach this Court.
- 74 This is even more so where the Minister's application for declaratory relief is sought in circumstances where no error is alleged on the part of the Minister. There is accordingly no need for the declaratory relief. But, in asking this Court to grant it, the Mineter unjustifiably elides executive and judicial authority in an apparent attempt to be told by this Court whether he did the right thing.
- 75 If the Court grants the Minister's application, it runs the risk of creating a dangerous precedent whereby functionaries will either make a decision and/or

<sup>52</sup> Section 79(4) of the Constitution.

Section 121(2) of the Constitution.
It should be noted that holp sections establish a specified process for referral. It is not an unerscumbered decretion afforcied to the President and Premiers.

Buto Star Finish (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others 2004 (4) SA 490 (CC) at para 48 ("Bato Star").

actively not make a decision and pre-emptively approach the Court to judicially endorse their conduct.56

- 76 Ordinarily, the Minister would have made a decision and his decision would have been final and binding. Had the Oakbay respondents, VR Laser, or Sahara been unhappy with his decision, they bore the onus to take the Minister on review, which they have not. What the Minister hopes to achieve through declaratory relief where no party to this litigation seeks to challenge his particular interpretation of intervention - i.e. to get the Minister to get the banks to reverse their decision - is doubtful at best.
- This is not the Court's proper function. Explicitly, Courts only deal with legal disputes. They do not deat with questions of policy. 57 implicitly, as recognised by the Constitutional Court in Bate Star, 58 Court's must show deference to the policy choices made by functionaries in the conduct of their duties. The danger here is that instead of making a choice and waiting to be challenged, functionaries will dress up their choices as uncertainties of law and approach the Court to validate their decisions.
- Apart from the effect that this will have on governance, and the potential to 78 overburden our Courts, this potentially creates the situation where the review rights of persons are rendered nugatory because of the ability of a functionary to get a Court to advance an opinion as to whether their course of conduct was correct. It will pre-emptively immunise functionaries from being held to account when appropriate. This is impermissible and even less so where no actual dispute exists.
- This is also the case where the issues in question may have an impact on the ability of private persons to take steps in private law to challenge decisions. As is evident in this application, the Minister, together with the bank and regulatory respondents, all put up versions which attempt to establish the prima facie lawfulness of their conduct.

Section 172 of the Constitution.

Bato Star above.

A Court will only intervene in policy making competencies of the State as a co-decision maker or supervisor in exceptional circumstances. See SASSA case (below) at para 43 onward.

- However, that information is irrelevant to these proceedings. Why the Minister and the bank and regulatory respondents nonetheless persist in putting those issues before the Court is clear: they are impermissibly attempting to put issues before the Court which this Court cannot and should not consider. The danger in doing so illustrates the potential harm addressed above in placing all these issues before the Court, despite their irrelevance, the Court may inadvertently determine issues between the parties which may be relied on, by the bank respondents especially, in any subsequent attack that the Oakbay respondents collectively or individually may choose to take against them.
- This is no more clearly illustrated by the following example: The decision taken by the FIC to issue the cartificate to the Minister. Is already the subject of a pending review. For However, the bank respondents, and in particular the Minister, place a greater reliance on the cartificate than it deserves. Had the cartificate been conclusive proof of any wrengdoing on the part of the Cakbay respondents, the FIC would have, in accordance with its mandate, taken action against them. The FIC, however, has taken no action and are still investigating the Oakbay respondents for any wrongdoing. As such, this Court should be sceptical of the inferences drawn from, and emphasis placed by, the Minister, and the bank respondents, on the contents of the certificate being conclusive proof of wrongdoing.

#### D3: THE MINISTER IS FUNCTUS OFFICIO

69 Record Vot 1 p 87 (Annexure P2).

81 See FIC's Heads of Argument at para 16, 20.

Optimum Coal Mine (Pty) Ltd v The Director: Financial Intelligence Centre & Others (Case No. 9209/2017).

- The Minister's pleaded case is that the Oakbay Group sought to obtain his 82 intervention because, on their understanding, the Minister had some power to intervene.62
- The Minister's pleaded case is that when confronted with this request, he took 83 advice, 63 and then made a decision that he did not have the power to intervene.
- 84 Although the Oakbay respondents deal with what the Minister was exactly asked to do, 84 the point remains that the Minister took a final decision as to his powers. That decision makes the Minister functus officio.
- 85 As above, the doctrine applies where a final decision has been made. This is unlike situations where decisions are interim or preliminary. 85
- 86 Once the Minister became functus officio, the only option available to him, should he have wanted to change his mind, which he does not, would have been to seek to set aside his own decision.
- 87 Given that the Minister evinces no desire to do so, and that, a fortion, as he the 'responsible Minister' none of his Cabinet colleague would be able to do so either.
- 88 The Minister, after all, as the occupier of the decision-making office is best placed to know what limits that his office is subject to. As the Minister demonstrates in his founding affidavit, and on the strength of the advice provided to him, he is under no obligation to act. 55
- 89 In reaching that decision, the Minister needed to take no further steps, it would have been incumbent upon the Oakbay Group challenge what it would have had to allege was conduct on the Minister's part that violated its rights. It does not do so because it accepts the validity of the Minister's decision. The

Record Vol 1 p 24 (Annexure C); Record Vol 1 p 53 (Annexure F).

Record Vol 11 p 1013 para 51.

<sup>63</sup> 

Record Vol 1 p 24 (Annexure C); Record Vol 1 p 53 (Annexure F). See Oakbay Respondents' Heads of Argument p 5 para 5. Compare President of the Republic of South Africa and Others v South African Rugby Football Union and Others 2000 (1) SA 1 (CC) at para 37 – 128.



consequence is that the Minister's decision stands.<sup>57</sup> This adds further reason as to why the Court should not intervene.

The consequence of all of this is that the Minister, having made a decision to not act upon the requests made of him, became functus officio and that it was for the Oakbay Group to take further steps had they wished to do so.

### D4: BREDENKAMP PROVIDES FURTHER CLARITY

- The Minister makes much of the SCA's judgment in Bredenkamp. So, too, do the bank respondents. We submit that any reliance on Bredenkamp<sup>60</sup> with respect to the actual ments, or lack thereof, of the bank respondent's decision to shut down the Oakbay Group's bank accounts is irrelevant to the Minister's relief.
- The bank respondents' extensive and unnecessary justification of their own conduct is clearly aimed at inviting this Court to impermissibly grant declaratory relief for the Minister but which may have the effect of immunising them from subsequent relief that the Oakbay respondents may seek. This is a strategically pre-emptive strike by the bank respondents, supported by the Minister.
- 93 ABSA summarises Bredenkamp's principles as follows:70
  - 93.1 The law of contract governs the relationship between a bank and its client;
  - 93.2 A bank is entitled to terminate its contractual relationship with any client on reasonable notice;

See for example Von Abo v President of the Republic of South Africa and Others 2009 (5) SA 345 (CC)

es Bradenkamp as above.

Bradenkamp as above.

ABSA's Heads of Argument at p 10 para 17.

- 93.3 No person is entitled to insist that its contractual relation with a bank should endure against the bank's will; and
- 93.4 A bank is entitled to terminate its banking relationship with any client and is not obliged to give reasons for doing so.
- 94 If Bredenkamp<sup>71</sup> says what the bank respondents purport it to say, and, as ABSA suggests, that the Constitutional Court, in having dismissed the leave to appeal filed against the Supreme Court of Appeal's decision, implicitly accepts the rationals in Bredenkamp, <sup>72</sup> then there is even less reason for this Court to intervene.<sup>73</sup>
- Bradenkamp, then, is, as the Minister and the bank respondents suggest, the most authoritative finding on the relationship between a bank and its client. The Minister gains nothing by asking the Court to grant him declaratory relief. The relief, if granted, will be nothing more than an abstract and unnecessary opinion, in light of a binding finding by a superior Court that the relationship is strictly one that exists between the respective bank and client only, and which applies, a fortion, to third parties.

# D5: LOBBYING A LEGITIMATE TOOL OF ENGAGING WITH GOVERNMENT

- The Minister, and some of the bank and regulatory respondents, argue that Government is only able to do what it is catered for in express legislative powers, and on this basis want to build an argument that the relief is necessary to prevent the public from lebbying the Minister.
- 97 In Fedeure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council ("Fedeure"), 75 the Constitutional Court, with reference to the Interim Constitution (1993), held that the Government "may exercise no

<sup>7)</sup> Bredenkamp as above.

Bredenkanap as above.

ABSA's Heads of Argument p 10 para 18.

Nee for example Nebank's Heads of Argument at para 7 – 8.

<sup>78 1999 (1)</sup> SA 374 CC.

power and <u>perform</u> no function beyond that conferred on them by law" (our amphasis).

- This was confirmed in Pharmaceutical Manufacturers Association of South Africa: In re ex parte President of the Republic of South Africa ("Pharmaceutical Manufacturers)."
- 99 That is not disputed.
- But, the reliance placed on this restriction overlooks the express limitation that both Fedsure and Pharamaceutical Manufacturers speak to. Those cases limit actual conduct by state officials. They do not, and cannot, mean that any conduct taken in ahticipation of further conduct either where provided for in other legislation (such as commissions of inquiry) or in order to understand what weaknesses exist in the atatus quo, for example, to amend the law (such as changing the manufate of a regulator) is necessarily unlawful. Ascanvassed above, unless that conduct is itself unlawful or in contravention of some other express provision in law, no such unlawfulness can be alleged. This after all falls within the very high policy making function that one would expect the Cabinet to perform.
- It further overlooks the realities of Government: In order to engage with the process as described above, a state functionary may receive numerous requests or invitations to do or not do things as the case may be. The duty remains on the occupier of the office to know the extent and limitations of the powers of his office and what he can lawfully do or not do while occupying it.
- A request for the Minister to do or not do something by a third party is not ipso facto unlawful unless allegations are made that the request made is a direct contraveration of specific legislation or any other law enacted to combat corrupt activities such as PRECCA and POCA.7 No such allegations are made here.

<sup>76 2000 (2)</sup> SA 674 (CC) at pare 17.

Prevention and Combatting of Corrupt Activities Act, No 12 of 2004 ("PRECCA") and Prevention of Organised Crime Act, no 121 of 1998 ("POCA").

- No such allegation can be made because as the letters exchanged between Mr Howa ("Howa") and the Minister demonstrate, 78 the requests made by Howa on behalf of the Oakbay Group was for help of any kind.
- There was no suggestion that the Minister was asked to do something he was not empowered to do in law. In fact, the general nature of the request shows the extent to which Howa, on behalf of the Oakbay Group, sought the assistance of the Minister who could be assumed to know what he was empowered to do or not do.
- Accordingly, the requests made of the Minister cannot be deemed to be unlawful slimply because the persons making the request are connected to some political intrigue over which there is much speculation. Once the Minister made his decision there the matter ended.
- The danger incumbent in the Minister's argument, will be to shut down a vital means of access to State functionaries by the public at large. It will also delegitimise lawful efforts to persuade functionaries as to their existent powers and/or policies that the State should pursue and/or abandon. With respect to legal proceedings especially, it will also have the impact of further burdening the Courts because it will eliminate the ability of prospective titigants to engage with those in positions of power and influence to settle matters before legal process is initiated.
- The point remains that the occupier of a particular office bears the legal authority intendent upon it. They may only act in accordance with such authority. Should they judge any of the requests made of them to do things, or not do things, for which there is no legal authority, the request itself is not unlawful for the absence of such authority. It only becomes unlawful conduct if the functionary, after receiving such a request, chooses to act despite the absence of authority to do so. And even then, the unlawfulness potentially only attaches itself to the functionary who chose to act and not necessarily to the person who made the request.

Record Vol 1 p 21; Record Vol 1 p 23; Record Vol 1 p 48 (Annexure D); Record Vol 1 p 51 (Annexure E).

# D6: BANKS' CONDUCT CAN BE SCRUTINISED

- On the basis of the submissions we have made that as there is no lis between the Minister and the Cakbay Group (including Sahara) the application should be refused. A different point in this regard is that this Court must be careful that in granting the Minister's application it creates the potential for the bank respondents to effectively create a 'carve out' for themselves to be accountable only in a regulatory regime of their choosing. This shows the danger in this Court granting what some may argue to be innocuous relief on the face of it but which we submit is not so innocuous given all the different agendas at play.
- While strictly irrelevant to the purpose of these proceedings, we pause to mention that the conduct of the bank respondents before this Court is revealing.
- 110 The Banks pre-emptively attempt to make a case for prime facte lawfulness of their conduct and seek to elevate the request made of the Minister, as well as the conduct of certain other Ministers, as the basis for justifying some kind of prohibitory relief against any executive interference whatsoever.
- The deliberate vagueness of the Minister's relief (as far as "intervention goes"), coupled with the amplified relief as prayed for by Standard Bank, and which is fully dealt with by VR Laser, belies the danger of the declaratory order as it stands and supports our submission on this point.
- The bank respondents effectively seek to create a situation where no action of any kind can be taken against them on the grounds that it could be tantamount to "interference", and thus be unlawful in terms of this Court's order, if it is granted. Indeed, Standard Bank gives the real game away when it says that it has no objection to the President of the Republic appointing a judicial commission of inquiry into the banks but that he would have to take this Court's order into account when determining its terms of



reference. This also explains the Minister's real purpose in bringing this application – to curtail the options available to the President, and fettering his discretion, because the Minister thinks the President should not have them.

113 As Standard Bank states at paragraph 94 of their heads of argument.

"The utility of the declaratory order sought is that it will inform (the President) of what is not lawful, if and when he defines the terms of reference of the judicial inquiry he contemplates,"

- As we canvase above, that shows exactly what danger exists in this Court granting the Minister's relief and/or Standard Bank's relief, the two being interlinked. It seeks to limit, if not eliminate, the discretion afforded to the President, which the President has not yet even decided to exercise.
- The point to be remembered is that the bank respondents are subject to accountability through prescribed legislative means and any other means that are not themselves unlawful. The bank respondents attempt, in this application, to support an allegedly narrow lesue regarding the Minister's powers but which is aimed to obtain greater relief to which they would not entitled. They clearly hope to use this judgment, if granted, as a defence against any future lawful action taken against them. This is reason alone why this Court should not grant any declaratory relief sought by the Minister or Standard Bank.

# D7: MINISTER UNABLE TO SHOW HARM

- The Minister's choice for declaratory relief is also indicative that his pleaded case, insofar as the references to harm are concerned, is overstated and not convincing.
- 117 If the Minister's case was to be believed, then the Minister would not seek declaratory relief, but would rather seek more "direct" relief in the form of an

n en lan Amerika belak ili Aliya dan



interdict or similar relief (in this regard, see below our discussion on English law).

- But the Minister chooses to come to this Court estensibly to ask for declaratory relief which he hopes will be useful in getting anyone who makes a request of him to stop. Why his rejection and/or flatly ignoring such requests without the support of a Court order is not sufficient and is never explained. We submit that it cannot be explained because the Minister has to hide his real intention in bringing this application.
- The point is this: the Minister has to justify his coming to Court on some basis and has done so on the grounds that the conduct of the Oakbay Group causes huge damage to the banking sector and financial integrity of the Republic. Apart from the fact that such harm is purely flotional, the Minister's position is puzzling because the Minister was requested to intervene, and he has decided that he is anable to. The Minister cannot demonstrate what harms arise from receiving such requests, even if persistent and/or irritating to him.
- 120 But the Minister puffs up his automissions on harm, indeed he exaggerates them, in the hope that the Court will be tempted into granting broad declaratory relief that can operate prohibitively against the Oakbay Group, and potentially bind his Cabinet colleagues.
- This demonstrates the Minister's difficulty: he has attempted to show enough harm that makes declaratory relief an option to him but not such significant harm that it would be more appropriate for him to obtain interdict relief or similar from the Court. The Minister's conduct as far as this goes fails between his desired sins and in the absence of any real harm, his application should be dismissed.

D8: FOREIGN LAW FAVOURS A RESTRICTIVE APPROACH TO DECLARATORY ORDERS



- The Minister relies, in part, on English law and current practice in the Southern African region in order to demonstrate that "judicial policy favours declaratory relief". 78
- In both instances, the Minister (or his legal team) has fundamentally misread the relevant law. In fact, the practice in both England and the Southern African region favours the opposite conclusion; declaratory relief is a rare form of relief granted in limited circumstances, it is not a form of relief to which our Courts should readily turn.

### DB() PENGESH KAN

- 124 The Minister (or his legal team) has fundamentally misread section 31(2) of the Senior Courts Act, 1981. Rather than adopting a broad approach to declaratory orders, it is clear that the English Courts actually adopt a restrictive approach.
- 125 Section 31(2) reads as follows:
  - "A declaration may be made or an injunction granted under this subsection in any case where an application for judicial review, seeking that relief, has been made and the High Court considers that, having repart to-
  - (a) the nature of the matters in respect of which relief may be granted by mandatory, prohibiting or glashing orders;
  - (b) the mature of the persons and bodies abbinst whom relief may be granted by such orders; and
  - (c) all the circumstances of the case. It would be just and convenient for the declaration to be made or the injunction to be granted, as the case may be.

(our emphasis)

Minister's Heads of Argument p 26 pere 56.

At footnote 134 of the Minister's Heads of Argument.



- 126 It should immediately be apparent that an order for declaratory reliefis seemingly only available in an application for judicial review and not on a stand alone basis.
- As is clear in this case: this is not an application for judicial review. Whereas 127 It seems that South Africa may permit for a declaratory order to be granted in the absence of a dispute between the parties, English law seems to take the opposite view and limits declaratory relief to instances of judicial review, i.e. where a lis is present. No such its exists on these
- 128 The "mandatory, prohibiting, or quashing orders" resembles intentictory relief in our jurisdiction. If The point is that the Senior Courts Act does not create a general principle for stand alone favour declaratory orders over other kinds of relief. It stands to reason, therefore, that where a party has more appropriate relief available to it - such as an inlardict - that the party should accordingly make en application for that kind of relief. A
- 129 The discretion is also curtailed in another important way: the Court pays attention to "against" whom the relief is sought. This makes it clear that there has to be a lis between the parties.
- 130 This restrictive approach to declaratory relief is further evidenced by the Minister's own authorities that he relies on to make the proposition:

aliku raikkadaa kilikura yaroo u waxaan koo ka ka ka xay aa gayaka ta ca

(เสียง เสียง และสารที่สู่สู่สุดใหญ่และสารที่สู่สุดใหญ่ และสารที่สุด เพื่อเสียที่ (แล้วสาย

(Gounce for the Advancement of the South African Constitution interventing) (63) 48/20/8) (2017) ZAGPPHC 55 (a "quanting order"). A quanting order is the aguivalent of a South African order to set saids official conduct based on an error or law or fact. See R v Segretary of State for the Home Department or partie (Chancaja [1984] 1 AC 74.

The important point to bear in injud here is that the Minister does not and cannot do so. The absence of a life between the parties and the absence of harm (discussed above) demonstrates that the Minister would not be able to obtain any kind of interest against the Calibraty Group despite the Minister's strated assentants that their conduct is hugely prejudicial to him, the partie respondents, and the Republic as a whole. Alternatively, if the Minister is able to make out such a case, the question their need be asked why he did not pursue it but instead chose for the application order.

academic styled relief of a declaratory order.

The distinction in South African jaw is organized on the praciple of the effect of the cellet rather than the type. Whereas South African jaw destinguisties between reterm and final branches, these categories are not destinite it affect when applied to perfectle tapes, to "mandatory probability, or quantility orders". South African law is replete with complete of free kinds of interpory relief. See M. v. B. 2016 (1). SA 270 ((ZP)) (a mendatory interplat). Boths v. Andrease (07/2/00/2/2008) ZASCA 120 (the SCA continued on appeal a prohibitory interplat issued by a magnificate and Damescratto Affance of literature of interpational Relations and Co-operation and Others (Council for the Advancement of the South African Constitution Interventing) (83:145/2016) 2017 7 AGDDD (C. 53 (A. granture council). A passing council for the activation of a South African

- 130.1 Governor and Company of the Bank of Scotland v A Ltd. B approvingly referring to series of lectures given by Sir Alfred Denning (as he was then) regarding the development of "modern judicial review" (own emphasis). 84
- 130.2 Equal Opportunities Commission v Secretary of State for Employment, 85 R (Customs and Excise Commissioners) v Canterbury Crown Court 86 London Borough of Islington v Camp, 87 R (Campaign for Nuclear Disarmament) v Prime Minister. ("CND")8 are all cases that fall squarely within the confines of judicial review proceedings. Importantly, the Court in CND went so far as to say that declaratory orders, even in the limited context of judicial reviews, should be used sparingly.89 The English Courts are careful not to trespass into the terrain of other branches of government under the auspices of declaratory relief. 60
- 130.3 Many of the other examples cited by the Minister. 91 come from an English law textbook by Fordham called Judicial Review Handbook 6th ed (Hart Publishing, Oxford 2012) and deal with the remedy of declaratory relief in the context of judicial reviews.
- 131 It is uncontentious that such declaratory relief is useful or has a proper place among the number of options that a Court should have available to it. However, the Minister has overlooked the fact that all of the examples he refers to are in the context of judicial review and not instances where a party has approached a Court to grant declaratory relief in the absence

[26:10] EMCA Civ 892 at 13 R (on the application of T) v Secretary of State for Health [2002] EWHC 1887 (Admin) at 62. Minister's Heads of Argument footnotes 134 - 148.

<sup>[2001]</sup> EWCA CN 52; (2001) 1 WL 751 ("Governor case"). 84

Governor case at page 45.

<sup>[1994] 1</sup> All ER 910 (HL). [2062] EWHC 2564 (Admin) 87

<sup>(1999) 2004]</sup> LGR 58 [2002] EWHC 2759 (Admin); [2003] LRC 335. This should a fortion influence the Court to dismiss the Minister's application. The Court's refectance was further demonstrated in R (on the application of the Stantord Chamber of Trade and Commerce) v Secretary of State for Communications and Local Government

of a judicial review (i.e. a *lis*), or as self-standing relief where there is no *lis* between the parties.

- 132 Indeed, the Senior Courts Act has been amended to reflect the restrictive role that declaratory relief should play – this important point is overlooked in the Minister's Heads of Argument.
- In 2014, the then Lord Chancellor introduced the Criminal Justice and Courts Bill 2014-2015. This received Royal Assent in 12 February 2015 (as the Criminal Justice and Courts Act 2015, "the 2015 Act").<sup>92</sup>
- Among the measures introduced by the Act was the insertion of a new section 31(2A) (2C) to the Senior Courts Act of 1981.<sup>c)</sup> That section provides as follows:
  - "(2A) The High Court-
  - (4) mind minds to drant relief on an application for judicial raviery, and
  - (b) may not make an award under subsection (4) on such an application,
  - If it appears to the Count to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred.
  - (2B) The Court may disregard the requirements in subsection (2A)(a) and (b) if it considers that it is appropriate to do so for reasons of exceptional public interest
  - (2C) If the Court grants relief or makes an award in reliance on subsection (2B), the Court must certify that the condition in subsection (2B) is satisfied. A

(our emphasis)

- 135 The impact of this amendment is clear.
  - 135.1 A Court's discretion to grant an applicant any relief is limited. The Court has no discretion where the outcome of the application

See http://services.perliament.uk/bills/2014-15/criminalitusticeandCourts html
In ferms of eaction 95 of the 2015 Act, the Lord Chancellor could determine the date of
commencement of the section. The Lord Chancellor determined their date to be 13 April 2015 by
means of a circular (the equivalent of a South African Government Gazetta). See:
https://www.cov.uk/government/upleads/system/uploads/attachment\_data/file/428204/cjc-act-

Subsection (4) referred to deals with the question of costs.



would be the same or similar had the conduct complained of had not occurred. In these instances, and even when coupled with a judicial review, the Court must refuse the relief.

- 135.2 The Court may nonetheless proceed to grant relief to the applicant where the Court fiself is satisfied that a higher standard of public interest is met – the public interest must be exceptional.
- This high threshold (especially with regard to the consequence of the relief had the conduct complained of not occurred) and the peremptory nature of the legislation where the exception in section 31 (2B) is not established, was confirmed in the case of R (on the application of Hawke) v Secretary of State for Justice 35
- In this case, an application for judicial review of a decision by the Secretary of State to not move a prisoner closer to his wife (who was unable to visit him where he was detained) was dismissed as the outcome would not, in the Court's view, have been substantially different had the Secretary of State regarded his obligations under the 2010 Equality Act when considering the claimant's request.
- The impact of section 31(2A), as introduced in the 2015 Act, is to potentially severely limit judicial review remedies available in English Courts, and given the hierarchy of preferential remedies contained in section 31(2) of the Senior Courts Act of 1981, the possibility of obtaining declaratory relief is even further reduced by the amendment.
- 139 In the case of the Minister's application, his reliance on English law significantly weakens rather than supports it. In summary:
  - 139.1 This is not a case of judicial review.
  - 139.2 The outcome the Minister hopes to achieve in his application (ignoring the crucial fact that these are not judicial review proceedings) would be exactly the same as if the conduct

<sup>95 [2015]</sup> EWHC 4083 (Admin), [2016] A.O.D. 56.



complained of had not occurred. This is the folly of the Minister in approaching this Court to confirm a negative obligation which maintains the status quo.

139.3 The Minister has made no case that his application is of exceptional public interest. In fact, as Sahara has addressed above, even if the Minister has managed to show that his application may in some way be in the public interest, which he does not, the public interest is better served by the Court refusing to enter this political fray. This being the case, over and above the fact that other significant factors exist within the basket of considerations (above) that this Court must apply its mind to when deciding whether to grant the Minister relief – the Minister has not been able to demonstrate exceptional public interest.

- The English Courts are aceptical of being used as a forum to give advice and assistance where there is no real legal dispute between the parties. An application for judicial review in England, much like in South Africa, evinces that there is a live dispute between the parties. That is not the case before this Court.
- Although South African Courts can consider declaratory relief as a selfstanding remedy, made available to it under the Superior Courts Act, it too is subject to limitations as discussed above. The general refrain is that there must be some kind of legal question worthy of being answered, or rights and obligations that need to be determined, that make it justifiable for a Court to intervene. No such triable issue, legal question, rights, or obligation exists here.

## **D8(2): SOUTHERN AFRICAN LAW**

- The Minister mostly refers to instances of Zimbabwean case law that followed the South African trend in Ex Parte Nell, and to an extent also adopted the approach of English law above.
- 143 It seems that Zimbabwean Courts can consider declaratory relief in the absence of a judicial review application and grant such relief as a self-standing measure, <sup>35</sup> unlike English law.
- 144 However, the restraint placed on a Zimbebwean Court is similar to those applicable in South Africa, namely that it must deal with "any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon such determination" (our emphasis).\*\*
- In the examples relied on by the Minister, the cases in question dealt with an express provision which was open to debate as to how it should be interpreted and applied. Without derograting from the correctness of the Zimbabwean Courts' approach in those cases, it is notable that in those cases, unlike in this one, none of them dealt with the absence of an express provision: they all dealt with a positive obligation, and in respect of which there is debate as to interpretation and application.
- The need then, for clarity, and a Court's intervention is obvious: despite their being no its the Court needed to intervene to give appropriate guidance to the respective office bearer in light of an express provision of law that they and their successors would need to continuously interpret and apply and in respect of which clarify was required.
- In the case of Ex Parte Chief Immigration Officer, Zimbabwe, the Zimbabwean Supreme Court ("Supreme Court") was, in large part, motivated to grant the applicant the opportunity to argue for declaratory relief because of the applicant's contention that the Supreme Court had

Section 14 of the High Court of Zimbabwe Act 7 08.

Section 14 above.
 1994 (1) 370 (ZSC) ("Immigration Officer").



itself committed a material procedural error which would have to be litigated before the Supreme Court again in the near future, so arising out of the relief it granted in another case in which the applicant also had an interest.100 It is not, as the Minister suggests, a wholesale acceptance of the declaratory relief regime.

- 148 The Minister in this application is not in a comparable scenario to the parties in the immigration Officer case.
- To that end, the foreign law relied on by the Minister is distinguishable on the 149 facts.

- Sahara seals a personal cost order against the Minister, on the scale as 150 between attorney and client, including the costs for the employment of two counsel. If a costs order is not made against the Minister in his personal capacity, it should in any event be on an attorney and own client scale on the basis of decisions such as Alluvial Creek dealt with below. 101
- On 17 March 2017, Stein Scop filed a notice of substitution on behalf of Sahara 151 in terms of which they were appointed Sahara's attorneys of record.
- Also on 17 March 2017, Sahara, via Stein Scop, issued a letter to the State 152 Attorney, on behalf of the Minister, in terms of which it put the Minister on terms that Sabara would be seeking costs against the Minister in his personal capacity. A copy of this letter is annexed to these Heads of Argument as

Immigration Officer at 375.4-3768, 3770, 377E-F.

1929 CPD 532

Principal Immigration Officer and Another v O'Here and Another (SC272/92). This perfamed to Zimbebwe's Immigration laise. The respondents in this matter before the Supreme Court were a husband and wife couple who stere considered to be attend in terms of the law. The Supreme Court upheld an appeal against the High Court in which it held that the O'Flares could not remain and work in Zimbebwe without the proper residence permits.

- At the time of finalising these Heads of Argument, no response has been received from the Minister.
- Sahara is entitled to ask for costs for against the Minister in his personal capacity for the following reasons below.
- The Minister pursues this application, not for any other reason other than to gain an advantage in his political dispute with his Cabinet colleagues, and the President. It is his own personal interest rather than his ex officio interest that is the motive for this litigation.
- As the Minister's own legal advice showed before he initiated this litigation, he was under no obligation to do snything in response to the requests from the Oakbay Group. However, and in spite of the advice received, 102 the Minister has thought it necessary to bring this application in direct contradiction of the advice he received. As demonstrated above, the Minister, who enjoys no prospects of success, pursued the application as a personal indulgence. This application was not necessary for the Minister to continue his official functions there is no dispute that his official functions do not include any powers to intervene in the private banking relationship between a bank and its customer. The State should not be saddled with the cost of the Minister's ill-advised personally motivated litigation.
- The Minister was specifically asked to abandon this application in light of the fact that the Oakbay Group accepted the interpretation of the Minister's powers. 103 The fact that it occurred shows that there was no need for the Minister to proceed further after instituting the application. The Minister's conduct in pursuing this application, even though there is no legal basis to do so; shows a wanton disregard for the Rules of Court. Although the Minister justifies his persistence on the grounds of public interest this is a disguised justification and is insufficient to rescue the Minister from a personal costs order. The Minister's conduct with respect to the relief he prays for and

Record Vol 1 p 24 (Annexure C); Record Vol 1 p 53 (Annexure F).

Record Vol 12 p 1182 (Annexure OB12)



hyngs yang hilipin da siya a k

the strength of the case he has made, as pleaded, must influence the Court to award a costs order against him.

# 158 As was recently held in UFS v Afriforum ("Afriforum"):104

"... as a general rule, in constitutional litigation an unsuscessful litigant in proceedings against the State should not be ordered to pay costs. However, as pointed out by Rogers J in Democratic Alliance v President of South Africa & others; 2014 (4) SA 402 (WCC) para 107, this general rule is not concerned with the characterisation of parties, but the nature of the issues. As held by Rogers J, with reference to paras 16-25 of Blowatch, "Tithe critical question is whether the litigation has been undertaken to assert constitutional rights, whether the constitutional issues are genuine and substantive and whether there has been impropriety in the manner in which the Rigation has been undertaken."

In my year Africoum's reflence on Elowetch is mispleced. The issue in the oresent matter was mother the usement of the fall configuration of the fall configuration of the society process. The process in the process is a process of the process of the process in the process of the process of

Further, for the reasons recorded above. African has acted without circumspection in setting relief under a 15 of the Act. It purposed to act on behalf of prospective first year students, without any evidence showing that any student in the three affected faculties would suffer any diverse consequences if the judgment of the Pull Court were to be suspended pending appeal. There was simply no factual basis for believing that it was entitled to relief under a 18 of the Act." 100

(our emphasis).

jalys a mass more harpedylapanel topa

The so-called Biowatch principle, <sup>106</sup> is not a blank cheque for parties to conduct themselves in any fashion before a Court and protect themselves from an adverse costs order, simply because they label their litigation as being of constitutional importance. What the Court must concern itself with is whether the parties have conducted themselves in an acceptable fashion as any private litigant would be judged. While the Court in Biowatch was concerned with the potential chilling effect that an adverse costs order would have on litigation conducted in the public interest, it effectively held that an adverse costs order would be warranted in certain circumstances where the parties' conduct (like the Minister's in this case) would justify it:

105 Afriforum, pp 12 – 13, para 29 – 50;

<sup>104</sup> University of the Free State v Afriforum 2016 JDR 2151 (SCA).

Blowatch Trust v Registrar, Genetic Resources and Others 2009 (6) SA 232 (CC).



"Thus in Affordable Medicines this Court stated that the ability to finance the litigation was not a relevant consideration in making a costs order. It held that the general rule in constitutional litigation that an unsuccessful litigant ought not to be ordered to pay costs to the State should not be departed from simply because of a perceived ability of the unsuccessful litigant to pay. It accordingly overturned the High Court's order of costs against a relatively well-off medical practitioners' trust that had launched unsuccessful proceedings. Conversely, a party should not get a privileged status simply because it is eating in the public interest or happens to be indigent. It should be held to the same standards of conduct as any other party particularly if it has hed legal representation. This means it should not be immunused from appropriate sanctions if its conduct has been vexelous, fitvolous professionally unbecoming or in any other similar way abusive of the processes of the Court."

(our emphasis)

- It may be relevant for the Court to recognise that in Biowatch, the kind of public interest litigation referred to was for the benefit of entire sections of the population. 109 This litigation is for the sole benefit of the Minister, even though there is no basis to sustain it. Additionally, this Court should bear in mind that any reliance on Biowatch is limited: Biowatch specifically contemplated the impact of costs orders for unsuccessful litigation against the State in order to vindicate rights.
- This application is distinguishable because it is the Minister in his ex officion capacity and at direct cost to the State litigating against private parties to no practical end: all the parties agree that there is no right in question for the Minister to vindicate. The Minister should not enjoy any protection from an adverse costs order where his conduct is to allegedly clarify the proper constitutional standing but where such is not in dispute in the first place. The Minister has also burdened this Court with issues that are either wholly irrelevant to the narrow case he would have been expected to plead even if his avowed reason in bringing the application is to be believed. The inclusion of these matters is scurrious, vexatious, and intended to embarrass.

162 As was held in Alluvial Creek Ltd:

<sup>107</sup> Blowatch at 242F-H.

Affordable Medicines Trust and Others v Minteter of Health and Others 2006 (3) SA 247 CC at 2975-H ("Affordable Medicines").

<sup>109</sup> Blowatch at 242H-243C



"An order is asked for that he pay the costs as between attorney and client. Now sometimes such an order is given because of something in the conduct of a party which the Court considers should be punished, malice, misleading the Court and things like that, but I think the order may also be granted without any reflection upon the party where the proceedings are vexatious, and by vexatious I mean where they have the effect of being vexatious, although the intent may not have been that they should be verations."110

(our emphasis)

163 Alluvial Creek has since been followed in a long line of cases, 111 most notably in the Supreme Court of Appeal, 112 and the Constitutional Court, 113 where the conduct of a litigant is determinative of whether costs should be awarded against them.

The Minister has also abused his office in order to direct State resources to 164 engage in a legal dispute that aught not to have been brought. The grounds upon which costs can be awarded against someone who occupies a fiduciary role in their personal capacity has not changed since Vermaak's Executor v Vermank's Heits 114 which held that the categories for personal costs order include mala fides, negligence, and unreasonableness. 116 Sahara contends that in light of the invitations made to the Minister to withdraw the application, 118 and the advice he received from his own senior counsel on more than one occasion, 117 his persistence is, at the very best, either negligent and/or unreasonable. This is especially the case where the decision-making process ended with him and nothing further could be done against him other than taking him to Court where he then could have attempted to vindicate himself,

Alluvial Creak at 535.

112

133 Camps Bay Ratepsyers and Residents Association and Another y Harrison and Another 26:11 (4) SA 42 (GC) at pers 76.
1909 TS 679 at 68:1 114

This has been followed variously in Estate Orr v The Master 1938 AD 338; Garget v Berjoseth NO 1954 (4) SA 164 (D) at 159; Grobbelaar v Grobbelaar 1959 (4) SA 719 (A) at 725 B — C; Venter NO v Scott 1989 (3) SA 989 (D) at 983H Record Vol 12 p 1182 (Armeture OB12) Record Vol 1 p 24 (Armeture C); Record Vol 1 p 53 (Annexure F).

Alluvial Greek at 535.

See variously Ebrebium v Excelsion Shopfitters and Furnishers (Pty) Ltd (2) 1948 TPD 226; Van Dyle v Commune 1963 (2) 5A 413 (C); Ward v Subject 1973 (d) SA 791 (A); Water v Louw 1977 (3); SA 297 (C) at 394; Zedin Investments Ltd v Kemp 1983 (4) SA 488 (C) at 486; Friederich King Gribit v Continental Jewellery Manufacturers 1993 (3) SA 76 (PD); Speidel GmbH v Continental Jewellery Manufacturers 1995 (4) SA 986 (C) at 9742–9751; Page v ABSA Bank Ltd Va Volkstas Bank 2000 (2) SA 661 (E) at 667C-D; Wraypex (Pty) Ltd v Barnes 2011 (3) SA 206 (GNP) at 2051-207Cs.

Johannesburg City Council v Television & Electrical Distributors (Pty) Ltd and Another 1997 (1) SA 197 (A) at 177C-8.

<sup>117</sup> 

assuming this happened. This application is, and always was, unnecessary and the State should not have to bear the costs for the Minister's (at best) vexatious conduct. 118

As the SCA recently held, 119 where officers of State conduct themselves 165 inappropriately, our Courts should start actively considering making those persons pay personally. This is especially the case where the taxpayer and the public purse will be prejudiced in having to pay for litigation which contributes nothing significant to the public at large. This application by the Minister is one such case:

> "In the present case the best that can be said for the MEC and her department "In the present case the best first can be said for the MEC and her department is that their conduct, although veering toward fitwarting the relief sought by the bestd, cannot conclusively be said to constitute contempt of Court. However, that does not excuse their bettaviour. The MEC, in her responses to the opposition by the board, appeared indignant and played the victim. She adopted this attitude while acting in flaggant disappeard of constitutional norms. She attempted to turn turpiblide into rectificitie. The special costs order, namely, at the externey and client scale, sought by the board and Marojane is justified. However, it is the lappeare who utimeters will meet those costs, it is time for Courts to seriously consider holding officials who behave in the high-herisad manner described above, personally liable for costs incurred. This might have a sobering effect on truent public office bearers. Regrettably, in the present case, it was not prayed for and thus not addressed." the present case, it was not prayed for and thus not addressed ""

(our emphasis)

166 This dictum was most recently applied in Democratic Alliance v South African Broadcasting Corporation SOC (SABC) and Others; Democratic Alliance v Motsceneng and Others 121 where a full bench of the Western Cape High Court held office bearers of the SABC to be personally liable for costs given their unreasonable and impermissible behaviour in their running of the SABC and their conduct in the subsequent litigation brought by the Democratic Alliance. The leave to appeal in this application was also dismissed, indicating that judicial opinion is firmly against officers of State litigating where the taxpayers would be burdened with the cost and where there was no merit in doing so.

·5 18 Allervial Creek shove.

Gauteng Gambling Board and Another v MEC for Economic Development, Gauteng 2013 (5) SA 24 (SGA) ("Gauteng Gambling Board").
Gauteng Gambling Board at 40G-41A.

<sup>121</sup> (3104/2016, 18107/2016) [2017] 2 BLLR 153 WCC.

- 167 Although the Constitutional Court, in MEC for Health, Gauteng v Lushaba. 122 ultimately declined to hold an MEC and officials in her department liable for costs in her their personal capacities, it did so on technical grounds it had identified in the personal costs order granted by the Gauteng Local Division, Johannesburg, per Robinson AJ. 123 It was not an objection in principle to the increasingly utilised personal costs order granted to alleviate the burden placed on the taxpayer. 124
- 168 This is evident from the approach adopted by the Constitutional Court in Black Sash Trust v Minister of Social Development and Others (Freedom Under Law NPC Intervening) ("SASSA case") 128 The Constitutional Court, in making an order temporarily staying the payment of costs, 125 stated:
  - There is not clearly that the Minter and 19, 993, and page in their official and other or provides better where the page is a second or the page of the page in the page of the cross and the page of proceedings in their personal capacities and given an opportunity to explain their conduct in relation to each of these issues 127 (footnotes omitted, emphasis added)
- Although the SASSA case occurs in a different context, it nonetheless adds 169 further credence to this Court's power to grant a personal costs order against the Minister for contemptible conduct in his ex officio capacity. The State, and the taxpayer, should not be prejudiced as a result of the Minister's abuse of Court process. In this matter, the party affected by the costs order that is sought is the Minister himself, and there are no other potentially affected parties who are required to be joined. The Minister has been given prior notice of the intention to seek costs against him personally, and by the time of commencement of the hearing would have had sufficient

<sup>[2015]</sup> ZACC 16 ("Luchaba")

Linafiaba y MEC, Gauting (17077/2012) [2015] ZAGPHJC 13.

<sup>124</sup> 

<sup>125</sup> 

Lushaba et pera 11, 12 (CCT48/17) [20/17] ZACC B (17 March 20/17), SASSA case, para 78, paras 13 and 14 of the order. SASSA case, para 72 -72.



opportunity to put forward any explanation or supplementary affidavit as to why costs should not be awarded against him personally.

#### F: CONCLUSION

- This declaratory order, if granted, will allow the Minister to obfuscate the principle of the separation of powers and impermissibly co-opt this Court to aide him in his political fight with the President and the Cabinet. The Court must flercely guard against this and should dismiss the Minister's application for attempting to drag it into a political fight where there is no legal issue for it to adjudicate, and where its involvement would be inappropriate, and set a dangerous precedent.
- Notwithstanding the issues regarding the separation of powers and political noise, which should have never been canvassed before this Court in the first place, because they are strictly irrelevant to the declaratory relief prayed for by the Minister, the Minister fails to demonstrate that his case, as pleaded, satisfies the strict legal requirements to obtain declaratory relief and, further, fails to present sufficiently compelling factors that this Court should bear in mind in order to exercise a discretion in the Minister's favour.
- 172 Sahara, therefore, prays that the Minister's application should accordingly be dismissed with costs on the atterney-and-client scale, such costs for the employment of two counsel, and to be paid by the Minister personally.

AR BHANA, SC KW LÜDERITZ, SC K, PRENHID

Chambers, Sandton

22 March 2017





Co. Name; Stein Scop Attorneys Inc. Registration No: 2015/306625/21 Landline: +2711 380 8080 Emell: bradley@steinscop.com Direct +2711 380 8070 Mobile: +2782 781 3452 Our ref: TRI15 / B Scop Your ref: MS T Rhibinzi

Date: 17 March 2017

The State Attorney Attention: Ms Thembeline Nhlanzi

By email: TNhlarei@justice.gov.za

#### Dear Sirs

The Minister of Finance / Oakbay Investments (Pty) Ltd & 20 others (case no: 80978/2016)

- We act for Sahara Computers (Pty) Ltd ("Sahara"), the Fourteenth Respondent in the above application.
- Vve write to you as the legal representatives of the Minister of Finance, Mr P. J. Gordhan, MP, and request that you bring this letter to his attention.
- We are instructed by our client to seek costs against your client, the Minister, in his personal capacity. This latter serves as notice of our client's intent.
- The reasons for Sahara seeking costs against your client, the Minister, in his personal capacity, include biter alla;
- 4.1 The Minister sought, and obtained, the advice of both Senior and Junior Counsel no less than two occasions of which we are aware. That advice confirmed that the Minister was under no obligation to "intervene" as requested.
- 4.2 There is no disagreement between any of the parties that the Minister's interpretation of his powers, on the strength of such advice, prediude the Minister from intervening in the private banking relationship between any bank and its client, including seeking to get a bank to reverse its decision to close a client's account.
- 4.3 The Minister pensists in the application and, as such, involves the Courts in a matter which it need not concern fixelf with. There is no question of law that arises, nor any triable issue. This is an abuse of Court process.

Oirectors: SE Stein; BA Scop; C Visentin and A Berman | Senior Associates: M Tababalaia and Syan der Weele

- Additionally, in our client's view, this application is being brought for an ulterior personal
  political purpose at the expense of the State.
- 6. As the Minister himself stated, in a different context, "those responsible for deciding how money is sperit have to do so with sampulous rigour and care". It regrettable that the Minister should persist, at public expense, where the application does not advance the public interest.
- 7. Apart from the true purpose of the litigation, whatever it may be, the Minister's conduct has put our client through unnecessary expense in seeking to vindicate itself against the Minister who has burdened the Court, and ourselves, with allegations that are irrelevant, and/or vexatious, sourcitous, and meant to harass. Such conduct is impermissible and unacceptable.
- Accordingly, for the non-exhaustive reasons above, the State and the texpayers should hot be burdened with the costs.

Yours sincerely

BA Scop

Director

# IN THE HIGH COURT OF SOUTH AFRICA, (GAUTENG DIVISION, PRETORIA)

CASE NO: 80978/16

In the matter between:

MINISTER OF FINANCE F	Plaintiff
-----------------------	-----------

And

OAKBAY INVESTMENTS (PTY) LTD	1st Respondent
OAKBAY RESOURCES AND ENERGY LTD	2 <sup>ND</sup> Respondent
SHIVA URANIUM (PTY) LTD	3rd Respondent
TEGETA EXPLORATION AND RESOURCES (PTY) LTD	4th Respondent
JIC MINING SERVICE (PTY) LTD	5th Respondent
BLACKEDGE EXPLORATION (PTY) LTD	6th Respondent
TNA MEDIA (PTY) LTD	7th Respondent
THE NEW AGE	8th Respondent
AFRICA NEWS NETWORK (PTY) LTD	9th Respondent
VR LASER SERVICES (PTY) LTD	10th Respondent
ISLANDSITE INVESTMENTS ONE	
HUNDRED AND EIGHTY (PTY) LTD	11th Respondent
CONFIDENT CONCEPT (PTY) LTD	12 <sup>th</sup> Respondent
JET AIRWAYS (INDIA) LTD (INCORPORATED IN INDIA)	13th Respondent
SARAHA COMPUTERS (PTY) LTD	14th Respondent
ABSA BANK LTD	15th Respondent
FIRST NATIONAL BANK LTD	16th Respondent

STANDARD BANK OF SOUTH AFRICA LIMITED 17th Respondent

NEDBANK LIMITED 18<sup>th</sup> Respondent

GOVERNOR OF THE SOUTH AFRICAN RESERVE BANK 19th Respondent

REGISTRAR OF BANKS 20th Respondent

DIRECTOR OF THE FINACIAL INTELLEGENCE

CENTRE 21st Respondent

And

PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA

Interested Party

#### PRACTICE NOTE OF THE INTERESTED PARTY

#### 1. DATE ON ROLL AND NUMBER ON THE ROLL:

23 January 2016 number not yet known

#### 2. COUNSEL FOR THE PARTIES:

2.1 Counsel for the 17th Respondent /Applicant :

Adv V Maleka SC

Cell: 083 260 0790

Adv T Ngcukaitobi

Cell: 083 401 6802

2.2 Counsel for the Interested Party:

Adv M. Chaskalson SC

Cell: 084 400 1448

Adv. N. Nharmuravate

Cell 083 621 1810

#### 3. ATTORNEY FOR THE INTERESTED PARTIES:

The State Attorney Johannesburg

Mr Lekabe Tel: 011 330 7600

### 4. NATURE OF THE APPLICATION:

- 4.1 The Seventeenth Respondent ("Standard Bank") has filed a document styled as a notice of motion (Annexure "SB1") in which it seeks an extended declaratory order against the President and all Members of the Cabinet in circumstances where the President and no Members of the Cabinet other than the Minister of Finance are parties to the proceedings.
- 4.2 The President accordingly seeks a striking from the roll, with costs, of Standard Bank's application for the relief set out in Annexure "SB1" which it styles as a notice of motion.

#### 5. NECESSITY TO READ PAPERS:

It is necessary for the Honourable Court to read the affidavit filed by the President together with this practice note and the answering affidavit of Standard Bank in the principal application.

#### 6. **ISSUES TO BE DETERMINED:**

Whether Standard bank can seek relief against parties who are not parties to the proceedings.

#### 7. NATURE OF THE RELIEF SOUGHT:

A striking from the roll, with costs, of Standard Bank's application for the relief set out in Annexure "SB1" which it styles as a notice of motion

#### 8. **SUMMARY OF SUBMISSIONS**

- 8.1 The President is not a party to the proceedings.
- 8.2 Standard Bank has purported to bring an application under cover of a document irregularly styled as a notice of motion in which it seeks relief against the President in proceedings to which he is not a party and has deliberately elected not to take steps to have him made a party to those proceedings.
- 8.3 The procedure adopted by Standard Bank is irregular and prejudicial to the President.

8.4 Therefore the President seeks a striking from the roll of the application purportedly brought by Standard Bank for the relief set out in Annexure "SB1".

### 9. **DURATION**

It is estimated that the argument will take 20 minutes

M.Chaskalson SC N.Nharmuravate Counsel for the Interested Party Janava Jupp Hot



# IN THE HIGH COURT OF SOUTH AFRICA GAUTENG DIVISION, PRETORIA

2572

Case No; 80978/2016

In the matter between:

MINISTER OF FINANCE

Applicant

And

OAKBAY INVESTMENTS (PTY) LTD

First Respondent

OAKBAY RESOURCES AND ENERGY LTD

Second Respondent

SIVA URANIUM (PTY) LTD

Third Respondent

TEGETA EXPLORATION AND RESOURCES (PTY) LTD

(-31/21)

Fourth Respondent

JIC MINING SERVICES (PTY) LTD

Fifth Respondent

**BLACKEDGE EXPLORATION (PTY) LTD** 

Sixth Respondent

TNA MEDIA (PTY) LTD

Seventh Respondent

THE NEW AGE

Eighth Respondent

AFRICA NEWS NETWORK (PTY) LTD

Ninth Respondent

VR LASER SERVICES (PTY) LTD

Tenth Respondent

ISLANDSITE INVESTMENTS ONE HUNDRED AND EIGHTY (PTY) LTD

Eleventh Respondent

CONFIDENT CONCEPTS (PTY) LTD

Twelfth Respondent

JET AIRWAYS (INDIA) LIMITED

(INCORPORATED IN INDIA)

Thirteenth Respondent

SAHARA COMPUTERS (PTY) LTD

Fourteenth Respondent

ABSA BANK LTD

Fifteenth Respondent

FIRST NATIONAL BANK LTD

Sixteenth Respondent

THE STANDARD BANK OF SOUTH AFRICA

**NEDBANK LIMITED** 

**GOVERNOR OF THE RESERVE BANK** 

**REGISTRAR OF BANKS** 

DIRECTOR OF FINANCIAL INTELLIGENCE CENTRE

Seventeenth Respondent

Eighteenth Respondent

Nineteenth Respondent

Twentieth Respondent

Twenty First Respondent

#### **FILING NOTICE**

TAKE NOTICE THAT the Fourteenth Respondent presents for filing herewith its supplementary heads of argument.

Signed at PRETORIA on this the 22nd day of MARCH 2017

Stein Scop Attorneys Inc.

Attorneys for the Tenth and Fourteenth

Respondents Ground Floor

18 Melrose Boulevard

Melrose Arch, Johannesburg

Tel: (011) 380 8080 Direct: (011) 380 8070 Mobile: 071 606 2313

Email: bradley@steinscop.com

sian@steinscop.com Our REF: B Scop

C/O Brooklyn Place

Cnr Bronkhorst and Dey Street,

Brooklyn, Pretoria, South Africa, 0001

PO Box 499, Preforia 0001

Docex 110, Pretoria T: +27 012 4521300

F: +27 086 6233886

Reference: Bridget Moatshe

To: The Registrar Gauteng Division, Pretoria

And to:
The State Attorney
Attorney for the Applicant
SALU Building
255 Francis Baard Street
Pretoria
Tel: (012) 309 1575
Fax: (012) 309 1649
Fax to Email: 086 629 3073
Email: TNhlanzi@justice.gov.za
Ref: 2427/16/232.Ms T Nhlanzi

Received on:	2017
For	

And to:
Van Der Merwe & Associates
Attorneys for the first, second, third, fourth, sixth, seventh, eleventh and twelfth
Respondents
62 Rigel Avenue North
Watekloof, Pretoria
Ref: Mr G VD Merwe/st/078

Tel: (012) 343 5432

Email: simone@vdmass.co.za

Received on:	2017
For:	

And to: Edward Nathan Sonnenberg Attorneys for the Fifteenth Respondent 159 West Street, Sandton Email: dlambert@ensafrica.com Ref; M Katz/D Lambert/0416998 clo Gerhard Botha & Partners Inc First Floor, Erasmus Forum Building B Cnr Rigel avenue & Stokkiesdraal Erasmundrand Tel: (012) 347 0480 Email: brenden@bothapartners.oo.za Ref: Mr B Swart / Mr H Botha		
	Received on:	2017
	For:	
And to: Norton Rose Fulbright South Africa Inc Attorneys for the Sixteenth Respondent 32 Fredman Drice, Sandton Email: aslam.moosajee@nortonrosefulbright.com Ref: M Moosajee/FNB13954 c/o Montle Jooma Sabdia Inc Ground Floor, Duncan Manor Cnr Jan Schoba and Brooks Streets Brooklyn Tel: (012) 362 3137		6047

Received on: \_\_\_\_\_\_2017

For:

And to:  Baker Mackenzie  Attorneys for the Eighteenth Respondent Tel: (011) 911 4300  Email: gerhard.rudolph@bakermckenzie.com; widaad.ebrahim@bakermckenzie.com and callum.oconnor@bakermckenzie.com Ref: G Rudolph/CO c/o Adams & Adams Adams & Adams Adams & Adams Adams & Adams Place Lynwood Bridge 4 Daventry Street Lynwood Manor Tel: (012) 432 6000		
Ref: Adelle Jordaan	Received on: 20	17
	For:	
And to: Werksmans Attorneys Attorneys for the Nineteenth and Twentieth Respondents 155 5th Street, Sandton Tel: (011) 535 8000	*	
Fax: (011) 535 8600 Ref: Mr C Manaka / Mr C Moaltis Email: cmanaka@werksmans.com and cmoraltis@werksmans.com Ref: SOUT 3267.63 o/o Mabuela Incorporated Charter House 179 Bosman Street Pretoria Central Tel: (012) 324 3966 Email: mabuela@tiscall.co.za		
	Received on:20	17
	For:	

And to: Bowman Gilfillan Attorneys for the Seventeenth Respondent 165 West Street Sandton, 2146 Tel: (011) 669 9000 Email: clement.mkiva@bowmanslaw.com clo Boshoff Attorneys Ground Floor Hazelwood Gate Office Park 14 Oaktree Avenue Cnr Oaktree Avenue and Dely Road Hazelwood		
	Received on:	2017
	For:	
*		
And to: MacRobert Attorneys Attorneys for the Twenty-First Respondent MacRobert Building Cnr Jan Schoba & Justice Mohamed Street Tel: (012) 425 3436		
Email: ghay@macrobert.co.za Ref: G K Hay	Received on:	2017

For:

# IN THE HIGH COURT OF SOUTH AFRICA GAUTENG DIVISION, PRETORIA

Case No.: 80978/2016

2578

In the matter between:

MINISTER OF FINANCE

**Applicant** 

and

OAKBAY INVESTMENTS (PTY) LTD & OTHERS First - Twenty-first Respondents

# FOURTEENTH RESPONDENT'S (SAHARA COMPUTERS (PTY) LTD) SUPPLEMENTARY HEADS OF ARGUMENT

#### **TABLE OF CONTENTS**

A: THE NEED FOR THESE SUPPLEMENTARY HEADS OF ARGUMENT	2
B: GENERAL INTRODUCTORY SUBMISSIONS	2
C: DECLARATORY ORDERS	9
C1: Section 34 of the Constitution	1
D: Factors Against the Court Exercising a Discretion1	8
D1: Absence of a Lis between the Parties	92458901
E: CÖSTS 3	8
E. CONCLUSION	.5

- The fourteenth respondent, Sahara Computers (Pty) Ltd ("Sahara"), was initially represented by Gert van der Merwe of Van Der Merwe & Associates until 16 March 2017, and was represented jointly with the first to ninth and eleventh to thirteenth respondents (collectively, the "Oakhay Respondents") by shared counsel.
- Sahara, like the tenth respondent, VR Laser (Pty) Ltd ("VR Laser"), has
  recently decided to obtain separate legal advice and representation and have
  appointed Stein Scop Attorneys Incorporated as their attorneys of record with
  its own team of counsel.
- Sahara's new counsel have prepared these separate Supplementary Heads of Argument for the benefit of the Court to outline the argument that will be presented on behalf of Sahara.

#### **B: GENERAL INTRODUCTORY SUBMISSIONS**

- The applicant, the Minister of Finance ("the Minister") approaches this Court for declaratory relief in circumstances where there is no dispute ("lis") between the parties. Not a single party contends that the Minister has any power that permits him to intervene in a private banking relationship where a bank decides to close the accounts of any of their clients, for whatever reason, no matter its unlawfulness.<sup>2</sup>
- Despite the absence of a lis between the parties, the Minister persists in asking this Court to exercise a discretion in his favour.<sup>3</sup> The question is why.
- 6. Unless this Court acknowledges the political context in which the Minister's application is brought,4 and recognises that this application is part of the

Record Vol 1 p 10 para 3,

Record Vol 1 p 10 para 3.

Record Vol 11 p 998 para 6.
Record Vol 1 p 10 para 3.

Minister's own political stratagem to pre-empt action by the Cabinet and, in particular, the President, this Court will be in danger of hearing an application that has no business being ventilated before it.<sup>5</sup> The Minister's support for the expanded relief separately prayed for by Standard Bank, which adds onto the Minister's relief, confirms the Minister's motive.<sup>6</sup>

- Despite the Minister's assertion that he approaches the Court in the public interest in order to settle a narrow legal question, the Minister's conduct before this Court evinces something entirely different. With regard to the issues the Minister has chosen to place before this Court, almost all of which are wholly irrelevant to the relief he seeks, and his continued refusal to withdraw this application, notwithstanding all the respondents accepting his interpretation of his powers, the Minister betrays his real intent.
- 8. The Minister, in seeking impermissibly broad and undefined relief, and in actively supporting the relief of Standard Bank against the Cabinet and the President, abuses this Court's jurisdiction in order to influence political outcomes.<sup>7</sup>
- 9. The Minister seemingly believes that it will not be in South Africa's best interests if the banks are subjected to the scrutiny and accountability being contemplated by the Cabinet. The Minister would prefer that the banks enjoy a 'carve out' from executive accountability, i.e. that the banks should not be accountable to the Republic's democratically elected leadership even within the confines of the law.

Record Vol 14 pp 1330 -- 1334, 1339, 1351 -- 1352, 1355, paras 10, 12 -- 13, 31, 62, 106, 110,

africa/cabinet-probe-banks-about-gupta-accounts).

Alternatively, if the Minister's relief is in fact narrow, then there is no reason to grant it inasmuch as it relates specifically to the Oakbay respondents' accounts in question. It is common cause that those accounts have closed and are no longer being utilised. Accordingly, the relief is entirely academic. Again, this further demonstrates that there is no lis between the parties.

Record Vol 1 p 14.

Although strictly irrelevant, the ANC's Freedom Charter (1955) speaks of the role of monopoly capital and the banks. As far back as 2010, the SACP, am ANC alliance partner and member of the governing alliance, advocated for reform of the banking sector (see http://politicsweb.co.za/politics/financing-development-in-sa-nzimande). The Cablnet's consideration of a commission of inquiry into the banks, generally, was pre-emptively and improperly announced in September 2016 (see: <a href="https://www.dailymaverick.co.za/article/2016-09-02-cablnet-to-seek-judiclal-inquiry-into-banks-moves-against-the-guptas/#.WNGd2Pl9600">https://www.dailymaverick.co.za/article/2016-09-02-cablnet-to-seek-judiclal-inquiry-into-banks-moves-against-the-guptas/#.WNGd2Pl9600</a>). This application was launched nearly a month later in October 2016. The Cablnet was considering all manner of intervention from as far back as April 2016 (see: http://www.enca.com/south-africa/cablnet-probe-banks-about-gupta-accounts).

- 10. It should come as no surprise, therefore, that the Minister is eagerly and enthusiastically supported by the fifteenth to twenty-first respondents, respectively ABSA Bank Limited ("ABSA"), First National Bank Limited ("FNB"), Standard Bank of South Africa Limited ("Standard Bank"), and Nedbank Limited ("Nedbank") (collectively the "bank respondents"). The bank respondents participation in these proceedings is self-interested, and is dressed up as being in the public interest: the authorities the bank respondents themselves rely on demonstrate that this application is unnecessary (see our discussion on Bredenkamp v Standard Bank of South Africa below). The banks would obviously prefer to be subject to the authority of regulators whose mandates are significantly limited.
- 11. This is evident in the approach taken by Standard Bank, which is so enthusiastic to support the Minister (and, thus, themselves) that it has prayed for "expanded relief" 12 notwithstanding its factual and legal defects. 13 As Standard Bank says, they want the declaratory relief to operate as a "constraining factor" on the President's discretion to take that may have the effect of subjecting them to scrutiny. 14
- 12. In circumstances where the President, who is not even a party to these proceedings, and where he has not yet made a decision to appoint a commission of inquiry, <sup>15</sup> an idea that clearly enjoys the support of some of the members of the Cabinet, <sup>16</sup> this Court should resist the temptations of the Minister and the bank respondents to Intervene where doing so would put it at the centre of contentious political debate in which at this early stage it has no role to play. The separation of powers, which underlies the Constitution and the rule of law, dictate that this Court must be extremely careful if not cynical of answering the Minister's application affirmatively.

Record Vol 2 p 99 para 7 (FNB); Record Vol 2 p 134 para 18 (Nedbank); Record Vol 3 p 297 para 145 (Standard Bank); Record Vol 6 p 502 para 11.

<sup>&</sup>lt;sup>10</sup> 2010 (4) SA 468 SCA ("Bredenkamp").

Record Vol 2 p 182.
Record Vol 3 p 300 – 301.

<sup>13</sup> People Vol 8 pp. 880 - 800 pare 4

<sup>13</sup> Record Vol 8 pp 889 – 990 para 16.

See Standard Bank's Heads of Argument p 41 para 94 and footnotes.

<sup>15</sup> Record Vol 2 p 185.

<sup>18</sup> Record Vol 2 p 182.

- 13. This application, together with the expanded relief, is a deliberate, calculated, and pre-emptive strike that the Minister, together with the bank respondents, hope to use to secure their interests. It should be dismissed with costs. The Minister must be judged according to the same standards that an ordinary litigant would be held to quite apart from the political noise which he and the bank respondents have attempted to place before this Court in order to bolster their dismal prospects of success. That alone is sufficient ground to dismiss the Minister's application.
- 14. Sahara will show that this Court can take two approaches to the Minister's application. Firstly, it can take the approach of strictly applying the relevant legal principles. 18 If it does, it will see that this application does not highlight a question of law needing resolution. Secondly, if this Court is inclined to hear the Minister under its discretionary powers, 18 the Court still has sufficient reasons upon which it can rely to dismiss the Minister's application. The Minister fails to make out a case under either approach.
- 15. When assessing the merits of the Minister's application, this Court should bear the following in mind:
  - The absence of a *lis* means that the parties accept the Minister's conduct and justification for his non-intervention. Had any of them been aggrieved by the Minister's decision, it would have been for them to approach the Court for relief to compel the Minister to discharge his alleged duty. They did not and have not done so.
  - 15.2 It is trite that when a Court considers whether to grant declaratory relief, it must consider all the relevant facts and circumstances.<sup>20</sup>

    Public interest, as defined and relied on by the Minister, is only one such consideration in the basket of factors this Court must consider.

    As it turns out, the public interest is, in fact, better served by the Court not granting relief as the Minister urges. It will be shown

<sup>17</sup> Record Vol 1 pp 21 - 22.

Concordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd 2005 (6) SA 205 (SCA) ("Goncordiant Trading").

is Gencordiant Trading above.

<sup>20</sup> Concordiant Trading above.

- 15.3 The Minister, having interpreted his powers and acted accordingly, effectively asks this Court for its opinion ex post facto as to whether he was correct—in circumstances where not a single party to these proceedings raises any doubt that, indeed, his approach was correct. The Minister, on his own version, either wilfully or negligently ignores the proper adjudicative role that this Court should play in hearing legal disputes. On the face of it, his need for relief is impermissible. This Court should accordingly not intervene in circumstances where doing so would be to give the Minister its academic opinion ex post facto on the validity of his (uncontested) decision.
- The nature of the relief that the Minister seeks is simultaneously under- and over-inclusive. It is imprecise and vague. The Minister either wilfully or negligently fails to define what "intervention" means. The Minister, relying on an interpretation of events that is not borne out in fact, 22 hopes to use the declaratory order, if granted, as a form of interdict to prevent Oakbay from making repeated "representations and demands" of him, 23 even though no, let alone repeated, representations or demands have been made since well before this litigation commenced. The Minister's choice, however, in opting for declaratory relief as opposed to an interdict demonstrates that he hopes to gain a clear political benefit to which he is not entitled because the Minister will never meet the requirements for an interdict. 24

Section 34 of the Constitution of the Republic of South Africa.

Record Vol 1 p 21; Record Vol 1 p 23; Record Vol 1 p 46 (Annexure D); Record Vol 1 p 51 (Annexure E).

<sup>23</sup> Record vol 1 p 11 para 9.

Record. Vol 1 p 11 para 8. The Minister emphasises the harmful conduct of the Oakbay Group but deliberately chooses to retrain from any type of relief that would stop it because the harm he refers to does not qualify as sufficient legal harm for such relief.

Sahara submits that it is not desirous for this Court to hear and pronounce upon an application that evinces no question of law of fact needing resolution — but which could have serious unintended consequences. It is clearly driven by political point-scoring.

The Minister attempts to characterise Sahara's opposition (and that of VR Laser and the Oakbay respondents) (collectively the "Oakbay Group") as being contradictory. The Minister alleges that one cannot concede the legal question underlying the application but oppose the application itself. In the Minister's misguided view, Sahara should simply abide the decision of the Court and let the Minister have free reign to score the political points that he so desperately seeks to do. Sahara concedes the underlying legal question (as to the Minister's powers) but strenuously opposes the Minister's perceived entitlement to use this Court for political point-scoring. Simply put, there is no need for it: Sahara does not submit to the Minister's attempt to obtain relief that is a legal nonsense.

The nineteenth to twenty-first respondents, respectively the Governor of the South African Reserve Bank ("the Governor" or "the SARB")), the Registrar of Banks ("the Registrar"), and the Director of the Financial Intelligence Centre ("the Director" or "the FIC") (collectively, the "regulatory respondents"), abide by the decision of this Court. However, they, too, like the Minister, and the bank respondents, attempt to invite this Court to ostensibly make findings about the Minister's powers but burden this Court with argument and evidence that is both irrelevant to the question they say the Court must answer and which canvasses issues not properly before this Court.

For the same reason that the Court should reject the Minister's application, and the bank respondents' support, the Court must also reject the regulatory respondents' impermissible burdening of this Court with irrelevant argument

<sup>25</sup> Record vol 1 p 85.

<sup>28</sup> Record Vol 7 p 605 para 6; Record Vol 7 p 620 para 5.

- The Minister, together with the bank and regulatory respondents, set out facts opportunistically in order to create the appearance of uncertainty, urgency, and harm. Upon proper examination, it is clear they do so in an attempt to obtain relief to which they are not entitled.
- It bears repeating that the Minister has committed to taking none of the actions, allegedly at the behest of the Oakbay Group, which he characterises as being harmful. Indeed, even the feared interference by the Executive as a whole has turned out to be a damp squib. <sup>27</sup>
- Sahara seeks a personal costs order against the Minister. The Minister's conduct in this Court, including attempting to score political points at the State's expense, is deserving of such a sanction. The Minister has, at all times, been provided with sufficient and sound legal advice from senior counsel as to what he was obliged to do. That legal advice was blunt: the Minister need not do anything. 28 Yet the minister embarked on this frolic of his own by bringing an unnecessary application. The Minister thereafter persisted in this Court despite the fact that the Oakbay Group on oath accepts his interpretation of his powers and offered him an opportunity to withdraw. 29 But, the Minister has inexplicably chosen to forge ahead. This litigation is evidently unnecessary and is pursued with an ulterior purpose. The State should not be saddled with the costs with what is, at its most, wasteful and unnecessary expenditure which ought to be recognised as political manoeuvring with an ulterior purpose.
- 23 The remainder of Sahara's submissions are structured as follows:

<sup>27</sup> Record Vol 2 p 185.

Record Vol 1 p 24 (Annexure C); Record Vol 1 p 53 (Annexure F).

<sup>29</sup> Record Vol 12 p 1182 (Annexure OB12)

- 23.1 We discuss the legal principles applicable to declaratory orders and, on applying the strict legal test, show that the Minister falls to meet this threshold;
- 23.2 We discuss the other factors that this Court should have regard to when exercising its discretion as to whether or not to grant the Minister relief, and show why the Minister's application should nonetheless be dismissed;
- 23.3 We then finally discuss why the Minister is liable to pay the costs of this application in his personal capacity.
- To avoid prolixity, we do not repeat any arguments made by the Oakbay respondents and VR Laser. Sahara makes common with the Oakbay respondents and VR Laser except where otherwise indicated. Equally, given the repetition between the Minister and the bank and regulatory respondents, we only reference and respond to arguments raised by the bank and/or regulatory respondents where appropriate.

#### C: DECLARATORY ORDERS

#### **G1: SECTION 34 OF THE CONSTITUTION**

Although not strictly relevant for the purpose of declaratory orders, section 34 of the Constitution is instructive as to how this Court should engage with the Minister's application. While the section generally provides the right of access to Courts, it equally limits that right of access to appropriate circumstances. Section 34 reads as follows:

"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"

(our emphasis)

- Sahara accepts that section 34 creates a broad entitlement to approach the Courts. However, as our Courts have continually emphasised, they are not a forum that resolves non-legal disputes. This is why, notwithstanding the limited practical nature of declaratory relief, as opposed to, for example, an interdict, our Courts apply strict thresholds as a procedural and substantive safeguard to limit the number of cases which it hears. *In casu*, this application has no practical effect whatsoever, nor raises any legal issue requiring resolution, and accordingly falls to be dismissed.
- As we have emphasised above, one of the main thresholds finds genesis in the Constitution itself. The very right upon which access to Courts is guaranteed limits that access to Courts to instances where the Court may resolve disputes through the application of law.
- In this application, the Court is not asked to apply any law. Indeed, it is the case of the Minister, and the bank and regulatory respondents, that no such law exists. The Court is not asked to settle a legal dispute in his favour. The Court is not asked to determine rights. The Court is not asked to confirm rights. This Court is instead asked to judicially endorse a historical executive decision taken by the Minister in the absence of any challenge to it. That, we submit, does not fall within the remit of "resolving a dispute by the application of law".
- Accordingly, and at the very outset, the basis upon which the Minister approaches this Court is open to significant doubt. The Minister has no entitlement to do so under the Constitution.
- 30 Should the Court, however, believe that the Minister passes the section 34 threshold, then we submit that the Minister must in any event fall. The Minister's reliance on public interest is not sufficient to sustain the relief as prayed for: the public interest is better served by this Court not

#### **C2: THE TEST FOR DECLARATORY ORDERS**

Declaratory orders are permitted by, and must meet the requirements of, section 21 of the Superior Courts Act, 30 which reads as follows:

"[The High Court] may according to law take cognisance, and has the power in its discretion, and at the instance of any interested person, to enquire into and determine any existing, future, or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential to that determination."

(our emphasis)

- The test for declaratory orders has been set down in the *locus classicus* of **Concordiant Trading**. <sup>31 32</sup> In **Concordiant Trading**, the Supreme Court of Appeal ("SCA") confirmed the two stage approach for declaratory relief, namely:
  - (a) There must be interested parties upon whom the order would be binding. This means that a pre-existing dispute is not necessary for the relief to be granted;<sup>33</sup> and
  - (b) Whether the Court should exercise its discretion to grant or refuse the relief with respect to all the facts and circumstances before it.
- 33 The Minister of Finance, together with the bank and regulatory respondents, emphasise the first leg of the test and practically ignore the second.<sup>34</sup> Their doing so demonstrates how they misapply the test to suit their purposes –

31 Concordiant Trading above.

<sup>30</sup> Act 10 of 2013.

This adopted the rationale of the AD in Durban City Council v Association of Building Societies 1942 AD 27 at 32.

This was the case in the pre-constitutional dispensation. See Ex Parte Nell 1963 (1) SA 754 (A) ("Ex Parte Nell") with respect to the old section 19(1)(a)(iii) of the Supreme Court Act (which is identical to the new section 21 above). Post-1994, this was similarly confirmed in Shoba v OC, Temporary Police Camp, Wagendrift Dam 1995 (4) SA 1 (A) at 14F.

Ex Parte Nell above. The discussion engaged in by the Minister's entirely irrelevant; the absence of a ills between the parties is not a prerequisite for granting declaratory relief. Rather, it is a relevant factor that the Court must bear in mind when deciding to exercise its discretion to do so.

which is to bring an application that this Court should not hear. They also pay scant attention to the main requirement in the section which is that the purpose of the exercise of the discretion is the determination of a <u>legal</u> right of obligation. No such legal right or obligation exists here.

#### C2(1): FIRST-LEG: LOCUS STANDI: LEGAL INTEREST

- The first leg of the test merely establishes that there are interested parties to whom the declaratory order, if granted, will apply and upon whom it will be binding.
- Notwithstanding the issues of non-joinder specifically canvassed by VR Laser, the first leg of the test is not dispositive.
- It is inevitable that any person approaching the Court for declaratory relief will be interested in the relief as prayed for, if granted. That interpretation of the first leg of the test creates an undesirably low threshold for having sufficient locus stands.
- But, even on this score, the Minister has not cleared the first leg of the test.
- As discussed above, there is no "existing, future, or contingent right or obligation" that requires determination by this Court. It is the Minister's case not disputed by any of the other parties that no such right or obligation exists and that, unless and until the current statutory framework is amended, no such future right or obligation can be contemplated either.
- As such, it is significant to note that the cases that the Minister relies on fall into two general categories: cases brought by private individuals against state functionaries; and cases where state functionaries act ex parts. The distinction in these cases is that a state functionary is either called upon to interpret their powers as a result of another party initiating litigation against them or where they have exercised a particular power and seek Court Intervention where it could be open to prospective dispute.

- The Minister's application fits into neither of these categories: the Minister, who has the power to make any decision with respect to the powers of his office, has done so. None of the cited respondents challenge that decision. The Minister's persistence, to clarify his own powers, after making a decision that no one challenges, is inexplicable (unless one appreciates the true hidden motive).
- In order to avoid the "floodgates scenario", <sup>35</sup> the Court must establish that the applicant has a sufficient legal interest in the relief sought as opposed to a more general interest.<sup>36</sup>
- The Minister, quite simply, does not meet this threshold.
- This is owing to the fact that on the Minister's version, the Oakbay Group at one point in time asserted that he had a positive obligation to intervene. The Minister disagreed with this assertion and clarified his position, ultimately deciding that he had no positive obligation to do anything. In fact, the Minister interpreted his powers as a negative obligation: he was prohibited from doing anything due to the absence of an empowering provision. Once the Minister made the position clear, the Oakbay Group did not take issue with it.
- That decision still stands and binds the Oakbay Group, which it accepts. Even if the Oakbay Group asked repeatedly, the Minister's decision is final. Any subsequent request that was made of the Minister could have legitimately been ignored. If the Oakbay Group was aggrieved, it was for them to take further steps to vindicate the rights they allegedly called upon the Minister to give effect to.
- There the matter should have ended. But, curiously, the Minister approaches this Court months later to opine on whether he was correct. There can be no better example of seeking the academic opinions from this Court disguised as declaratory relief.<sup>39</sup>

See Democratic Alliance v The Acting National Director of Public Prosecutions (288/11) [2012] ZASCA 15 ("DA case").

Glant Concerts CC v Rinaldo Investments (Pty) Ltd and Others 2013 (3) BCLR 251 (CC) at para 37 ("Giant Concerts").

<sup>&</sup>lt;sup>37</sup> Record Vol 1 pp 51 – 52, <sup>38</sup> Record Vol 1 p 82,

Ex Parte Prokureur- Generaal, Transvaal 1984 (2) 283 (T).

- Once the Minister made his decision, it stood, and it was accepted as such. There is no triable issue that the Minister brings before this Court.
- This demonstrates this application is unnecessary, and equally that the Minister does not have the legal interest necessary to obtain declaratory relief. The Minister's application for declaratory relief after he has interpreted his powers and embarked upon a course of action amounts to asking the Court for its academic opinion as to whether the Minister was right in law. This is not the kind of legal interest necessary to seek declaratory relief.
- The Minister would only be entitled to be an applicant in this Court to test the veracity of his own decision where he sought to review his own (if it was reviewable). The Minister has no desire to bring such a review nor do any of the respondents. Therefore, the Minister cannot seek validation of his conduct from the Court: there is no need for him to do so. The Minister's decision is dispositive in the absence of any legal disagreement.
- The public statements and debate between the Minister, the Oakbay Group, and the bank and regulatory respondents is not unique to this case. Often decisions are taken, or not taken, where there is significant attention from persons within and outside of South Africa. They all subject Ministers' decisions to intense scrutiny, some of which may be damaging to perceptions of South Africa. The prevention of that reputational damage and harm alone, apart from being speculative, is also insufficient legal interest to give potential litigants *locus standi* where the cause of complaint is not triable.
- In this case, the cause of complaint is not triable, and does not require Court pronouncement, inter alla because of the Minister's own conduct. The Minister does not meet the first leg of the test and for that ground alone, the application falls to be dismissed. On a plain reading of the text of the legislation, the Minister's complaint does not fall within the category of matters that the Court can consider for the purposes of declaratory relief, because the

The decision of the Government of the Republic, of which the Minister is part, to withdraw from the International Criminal Court is one such example.

This is further demonstrated when regard is had to the nature of cases that 51 the Minister of Finance relies on to justify his application. Minister of Justice and Constitutional Development v Southern African Litigation Centre,41 Thouamma v Speaker of the National Assembly,42 and MEC for Education, KwaZulu-Natal, and Others v Pillay43 are distinguishable. They all deal with positive obligations. As we advance below, the distinction between a positive obligation (i.e. to do something) and negative obligation (i.e. to not do something) is wholly underappreciated by the Minister and the bank and regulatory respondents. It is clear that from the authorities relied upon that the Court may - and is inclined to - intervene where clarification of the law can affect future state conduct with respect to what positive duties functionaries are under.44 A Court need not, and indeed should not, intervene where no such obligation exists because of the impact that its intervention may have in the absence of clear legislative intent.

The Minister clearly fails to pass the first leg of the test. Although the Minister 52 will undoubtedly be interested in the relief, the Minister's reading of the first leg cannot mean that any person who has an interest, as opposed to a legal interest, would be permitted to approach this Court for declaratory relief. Such a reading would threaten to overburden the Courts and involve it in all kinds of disputes that it may neither have the capacity nor expertise to involve itself in, or which are inappropriate for it to hear - like this one.

## C2(2): SECOND LEG: EXERCISE OF A DISCRETION

<sup>2016 (2)</sup> SA 317 (SCA) ("Al Bashīr"); 2018 (1) SA 534 (WCC) ("Tlouamma"), 2008 (1) SA 474 (CC) ("Pillay"). 41 42

<sup>43</sup> 

For example, Al-Bashir concerned the Government's explicit obligations under international and demestic law (respectively, the implementation of the Rome Statute of the International Criminal Court Act, 27 of 2002) to arrest the President of the Republic of Sudan, Ornar Al-Bashir. Tlouamma dealt with the application of the National Assembly's existing Rules regarding motions of no confidence against the President. Pillay dealt with the powers of a School under the SA Schools Act to enforce an existing code of conduct which enforced certain dress codes that inadvertently discriminated against people of particular religions.

The second leg of the test performs a crucial disciplining function on applications for declaratory relief. A Court must exercise its discretion to decide whether to grant or refuse declaratory relief with regard to all the facts and circumstances that are put before it. 45 The discretion is not an openended one: it is limited by the purpose set out in section 21 of the Superior Courts Act. 45 That purpose is to determine rights and obligations. The Court has to consider whether to grant the Minister's application for declaratory relief within this discretionary remit, bearing in mind that in doing so it should not trespass into the terrain of another arm of state. 47 It stands to reason, therefore, that even if the Minister passes the first leg of the test, he may nonetheless fail on the second, as we submit he must, if this Court has sufficient reason to decline him the relief he seeks, as we demonstrate below.

The only factor that the Minister has emphasised, together with the bank and regulatory respondents, is the public interest. But, the Minister's, and the bank and regulatory respondents', assertion of public interest can give it no comfort, and should be regarded as insufficient by this Court. In any event, as we submit below, strong public interest reasons exist as to why this Court should not interfere. In short, the public interest actually favours the Minister's application being dismissed with costs. Courts best serve their proper constitutional function when they are made to adjudicate proper disputes of law and not political debates dressed up as such.

In the first instance, the public interest is but one factor in the basket of considerations that the Court must have regard to when exercising its discretion to determine this application. We address each of the other countervailing considerations that this Court must consider to dismiss this application.

Rail Commuters Action Group v Transnet Ltd f/a Metrorali 2005 (2) SA 359 (CC) at para 107 to 109 ("Rail Commuters case").

<sup>46</sup> Act 10 of 2013.

Rall Commuters case above.

In the second instance, "public interest" is not the same as "interesting to the public". 48 The Minister, together with the bank and regulatory respondents, self-servingly engage in simultaneously adopting and distancing themselves from the political undertones of this application. The approach adopted by the Minister, together with bank and regulatory respondents, is clear: it is to entice the Court to wade into a wider political debate on grounds that are legally irrelevant as to whether declaratory relief should be granted. The danger in this approach is that the Court, in exercising its discretion, may inadvertently allow itself to be used as a forum to settle non-legal disputes under the auspices of "public interest," as in this application.

Sahara submits that given the irrelevance of the political noise upon which the Minister relies, it does not have to address these allegations more fully. To that end, Sahara joins issue with the rebuttals offered by the Oakbay respondents and VR Laser. Sahara emphasises, however, that rebutting those allegations does not make them relevant for the purposes of whether this Court should exercise its discretion in favour of the Minister.

Public interest, like public perception, is always subject to a reasonableness criterion. 49 it cannot be considered reasonable for this Court to intervene in circumstances where the decision-maker in question, i.e., the Minister, has made a binding decision as to what the statutory framework means and where none of the parties who are subject to that decision challenge it.

Reasonableness, in this case, means that the public is satisfied that an issue was brought to the Minister's attention and the Minister chose to conduct himself by not intervening and the affected parties accepted that position. Public interest requires certainty and respecting the Minister's decision-making authority where it is dispositive can be no better an

See for example, National Media Limited and Others v Bogoshi 1999 (1) ECLR 1 (SCA) at 13; Financial Mail (Pty) Ltd and Others v Sage Holdings Ltd and Another [1993] 2 All SA 109 (A)

Helen Suzman Foundation v President of the Republic of South Africa and Others 2015 (2) SA 1 (CC) at 31. Namely whether the perception of a reasonably informed member of the public sustains the relief. Similarly, public interest here cannot encompass everything asserted to be in the public interest—if, too, must be subject to a reasonableness criterion.

illustration of it. There the matter ends. It is neither necessary, nor desirable, for this Court to intervene at the Minister's invitation where doing so would be to do no more than provide an academic opinion which judicially endorses ex post facto the Minister's position.

We address the other reasons which makes this Court's intervention undesirable more fully below.

#### D: FACTORS AGAINST THE COURT EXERCISING A DISCRETION

Should the Court consider the Minister's application to pass the first leg for declaratory relief, Sahara contends that, for the reasons addressed more fully below, the Court should nevertheless exercise its discretion to dismiss the application,

#### D1: ABSENCE OF A LIS BETWEEN THE PARTIES

- As has already been addressed above, the absence of a lis between the parties cannot be ignored. It stands to reason that the presence of a lis speaks to the legal uncertainty with regard to any factual or legal question. Where a lis is absent, this demonstrates there is no uncertainty with regard to what the legal position. A Court cannot and should not intervene to grant declaratory relief where there is certainty between the parties as to what the correct legal position is inter se.
- As the Constitutional Court held with respect to the absence of a dispute, the absence of a lis "may, depending on the circumstances, cause the Court to refuse to exercise its jurisdiction in a particular case" (our emphasis). 50
- The Minister, together with the bank and regulatory respondents, attempts to mischaracterise the absence of a dispute, as raised by the

<sup>50</sup> Shoba at 14F-G.

Oakbay Group, as suggesting a live dispute is a prerequisite for the declaratory relief to be granted. That is without merit: if a live dispute was a prerequisite than declaratory relief, as an exceptional form of relief, would be inappropriate and the more conventional relief (such as an interdict or review) should be sought.<sup>51</sup>

- Rather, as the Oakbay Group have argued, the absence of a *lis* itself should be a considerable and weighty factor that the Court should consider when determining whether to intervene.
- Had this application been brought with respect to a dispute between private parties, for example, and it was clear that one of the parties was under no obligation to act in a particular way, and such a decision was not challenged by the party originally attempting to influence the applicant to act but no longer persisting with such an attempt, this Court would not be likely to grant this application. The same standard should be applied to the Minister.

#### **D2: IMPACT ON FUTURE LEGAL CHALLENGES**

- This Court must also be careful that what it is being asked to do could impact on the separation of powers and future litigation. By creating a dispute, the Minister is, in effect, abdicating from and delegating his executive responsibilities to the Court. This is incorrect.
- As a high-ranking office bearer of State, the Minister will have many requests for all kinds of assistance made of him. Admittedly, many of those requests will require difficult decisions, the correctness of which the Minister may not be sure.
- However, it is the Minister's (or functionary's) role alone to make a decision as to how to fulfil the obligations of his office.

The Minister is unable to do this, however, because although he and the bank respondents make many references to various harms arising from the conduct of the Oakbay Group, none of it could sustain stronger relief. This belies their approach: they hope that the declaratory relief will operate more strongly than it can.

- The only instances of a referral for determination by a Court, in the absence of a direct challenge, is reserved for the President<sup>52</sup> and Premiers<sup>53</sup> in the 2597 context of assenting to Bills. No other office bearer, including the Minister, is entitled to ask the Courts to give effect to that kind of consultative role.<sup>54</sup>
- Functionaries of State, including the Minister, must make their own independent decisions. The pragmatic reason for this is so as to not unreasonably delay the operation of the State and in so doing, bring governance to a grinding halt.
- Additionally, Courts are not entitled to usurp that power. Indeed, Courts deliberately give effect to the doctrine of judicial deference when reviewing decisions made by functionaries of State whose duty it is to make such decisions. The reason for this is that judicial authority does not include the ability to substitute a Court's preferred policy for what the lawfully empowered decision-maker acting rationally and reasonably has decided.
- Even ignoring any ulterior purpose, the Minister's application is impermissible because it invites the Court to play the role of co-decision maker. The Minister cannot escape the burdens of Executive office by outsourcing and abdicating his decision-making to this Court. This is especially so where the decision, right or wrong, will remain valid and binding until reviewed and set aside (if it is reviewable). But given that no such challenge is being brought, the Minister has no need to approach this Court.
- This is even more so where the Minister's application for declaratory relief is sought in circumstances where no error is alleged on the part of the Minister. There is accordingly no need for the declaratory relief. But, in asking this Court to grant it, the Minister unjustifiably elides executive and judicial authority in an apparent attempt to be told by this Court whether he did the right thing.
- If the Court grants the Minister's application, it runs the risk of creating a dangerous precedent whereby functionaries will either make a decision and/or

53. Section 121(2) of the Constitution.

Bato Star Finish (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others 2004 (4) SA 490 (CC) at para 46 ("Bato Star").

<sup>52</sup> Section 79(4) of the Constitution.

It should be noted that both sections establish a specified process for referral, it is not an unencumbered discretion afforded to the President and Premiers.

- Ordinarily, the Minister would have made a decision and his decision would have been final and binding. Had the Oakbay respondents, VR Laser, or Sahara been unhappy with his decision, they bore the onus to take the Minister on review, which they have not. What the Minister hopes to achieve through declaratory reflief where no party to this litigation seeks to challenge his particular interpretation of intervention i.e. to get the Minister to get the banks to reverse their decision is doubtful at best.
- This is not the Court's proper function. Explicitly, Courts only deal with legal disputes. They do not deal with questions of policy.<sup>57</sup> Implicitly, as recognised by the Constitutional Court in **Bate Star**,<sup>58</sup> Court's must show deference to the policy choices made by functionaries in the conduct of their duties. The danger here is that instead of making a choice and waiting to be challenged, functionaries will dress up their choices as uncertainties of law and approach the Court to validate their decisions.
- Apart from the effect that this will have on governance, and the potential to overburden our Courts, this potentially creates the situation where the review rights of persons are rendered nugatory because of the ability of a functionary to get a Court to advance an opinion as to whether their course of conduct was correct. It will pre-emptively immunise functionaries from being held to account when appropriate. This is impermissible and even less so where no actual dispute exists.
- This is also the case where the issues in question may have an impact on the ability of private persons to take steps in private law to challenge decisions. As is evident in this application, the Minister, together with the bank and regulatory respondents, all put up versions which attempt to establish the prima facie lawfulness of their conduct.

57 Section 172 of the Constitution.

58 Bato Star above,

A Court will only intervene in policy making competencies of the State as a co-decision maker or supervisor in exceptional circumstances. See SASSA case (below) at para 43 onward.

However, that information is irrelevant to these proceedings. Why the Minister and the bank and regulatory respondents nonetheless persist in putting those issues before the Court is clear: they are impermissibly attempting to put issues before the Court which this Court cannot and should not consider. The danger in doing so illustrates the potential harm addressed above – in placing all these issues before the Court, despite their irrelevance, the Court may inadvertently determine issues between the parties which may be relied on, by the bank respondents especially, in any subsequent attack that the Oakbay respondents collectively or individually may choose to take against them.

This is no more clearly illustrated by the following example: The decision taken by the FIC to issue the certificate to the Minister<sup>59</sup> is already the subject of a pending review.<sup>60</sup> However, the bank respondents, and in particular the Minister, place a greater reliance on the certificate than it deserves. Had the certificate been conclusive proof of any wrongdoing on the part of the Oakbay respondents, the FIC would have, in accordance with its mandate, taken action against them. The FIC, however, has taken no action and are still investigating the Oakbay respondents for any wrongdoing.<sup>61</sup> As such, this Court should be sceptical of the inferences drawn from, and emphasis placed by, the Minister, and the bank-respondents, on the contents of the certificate being conclusive proof of wrongdoing.

#### D3: THE MINISTER IS FUNCTUS OFFICIO

Record Vol 1 p 87 (Annexure P2).

Optimum Coal Mine (Pty) Ltd v The Director: Financial Intelligence Centre & Others (Case No. 9209/2017).

See FIC's Heads of Argument at para 16, 20.

- The Minister's pleaded case is that the Oakbay Group sought to obtain his intervention because, on their understanding, the Minister had some power to intervene.<sup>62</sup>
- The Minister's pleaded case is that when confronted with this request, he took advice, 63 and then made a decision that he did not have the power to intervene.
- Although the Oakbay respondents deal with what the Minister was exactly asked to do,<sup>64</sup> the point remains that the Minister took a final decision as to his powers. That decision makes the Minister functus officio.
- As above, the doctrine applies where a final decision has been made. This is unlike situations where decisions are interim or preliminary. 65
- Once the Minister became functus officio, the only option available to him, should he have wanted to change his mind, which he does not, would have been to seek to set aside his own decision.
- Given that the Minister evinces no desire to do so, and that, a fortion, as he the 'responsible Minister' none of his Cabinet colleague would be able to do so either.
- The Minister, after all, as the occupier of the decision-making office is best placed to know what limits that his office is subject to. As the Minister demonstrates in his founding affidavit, and on the strength of the advice provided to him, he is under no obligation to act. 55
- In reaching that decision, the Minister needed to take no further steps. It would have been incumbent upon the Oakbay Group challenge what it would have had to allege was conduct on the Minister's part that violated its rights. It does not do so because it accepts the validity of the Minister's decision. The

Record Vol 11 p 1013 para 51.

Record Vol 1 p 24 (Annexure C); Record Vol 1 p 53 (Annexure F).

See Oakbay Respondents' Heads of Argument p 5 para 5.

Compare President of the Republic of South Africa and Others v South African Rugby Football Union and Others 2000 (1) SA 1 (CC) at para 37 – 128.

Record Vol 1 p 24 (Annexure C); Record Vol 1 p 53 (Annexure F).

consequence is that the Minister's decision stands, <sup>57</sup> This adds further reason as to why the Court should not intervene.

The consequence of all of this is that the Minister, having made a decision to not act upon the requests made of him, became functus officio and that it was for the Oakbay Group to take further steps had they wished to do so.

## D4: BREDENKAMP PROVIDES FURTHER CLARITY

- The Minister makes much of the SCA's judgment in Bredenkamp. 68 So, too, do the bank respondents. We submit that any reliance on Bredenkamp with respect to the actual merits, or lack thereof, of the bank respondent's decision to shut down the Oakbay Group's bank accounts is irrelevant to the Minister's relief.
- The bank respondents' extensive and unnecessary justification of their own conduct is clearly aimed at inviting this Court to impermissibly grant declaratory relief for the Minister but which may have the effect of immunising them from subsequent relief that the Oakbay respondents may seek. This is a strategically pre-emptive strike by the bank respondents, supported by the Minister.
- 93 ABSA summarises Bredenkamp's principles as follows:70
  - 93.1 The law of contract governs the relationship between a bank and its client;
  - 93.2 A bank is entitled to terminate its contractual relationship with any client on reasonable notice;

See for example Von Abo v President of the Republic of South Africa and Others 2009 (5) SA 345 (CC).

Bredenkamp as above.
Bredenkamp as above.

ABSA's Heads of Argument at p 10 para 17.

- 93.4 A bank is entitled to terminate its banking relationship with any client and is not obliged to give reasons for doing so.
- If Bredenkamp<sup>71</sup> says what the bank respondents purport it to say, and, as ABSA suggests, that the Constitutional Court, in having dismissed the leave to appeal filed against the Supreme Court of Appeal's decision, implicitly accepts the rationale in Bredenkamp, <sup>72</sup> then there is even less reason for this Court to intervene.<sup>73</sup>
- Bredenkamp, then, is, as the Minister and the bank respondents suggest, the most authoritative finding on the relationship between a bank and its client. The Minister gains nothing by asking the Court to grant him declaratory relief. The relief, if granted, will be nothing more than an abstract and unnecessary opinion, in light of a binding finding by a superior Court that the relationship is strictly one that exists between the respective bank and client only, and which applies, a foritiori, to third parties.

# D5: LOBBYING A LEGITIMATE TOOL OF ENGAGING WITH GOVERNMENT

- The Minister, and some of the bank and regulatory respondents, argue that Government is only able to do what it is catered for in express legislative powers, 74 and on this basis want to build an argument that the relief is necessary to prevent the public from lobbying the Minister.
- 97 In Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council ("Fedsure"), 75 the Constitutional Court, with reference to the Interim Constitution (1993), held that the Government "may exercise no

<sup>71</sup> Bredenkamp as above.

<sup>72</sup> Bredenkamp as above.

ABSA's Heads of Argument p 10 para 18.

See for example Nebank's Heads of Argument at para 7 - 8.

<sup>1999 (1)</sup> SA 374 CC.

- This was confirmed in Pharmaceutical Manufacturers Association of South Africa: In re ex parte President of the Republic of South Africa ("Pharmaceutical Manufacturers)."
- 99 That is not disputed.
- But, the reliance placed on this restriction overlooks the express limitation that both Fedsure and Pharamaceutical Manufacturers speak to. Those cases limit actual conduct by state officials. They do not, and cannot, mean that any conduct taken in anticipation of further conduct either where provided for in other legislation (such as commissions of inquiry) or in order to understand what weaknesses exist in the status quo, for example, to amend the law (such as changing the mandate of a regulator) is necessarily unlawful. As canvassed above, unless that conduct is itself unlawful or in contravention of some other express provision in law, no such unlawfulness can be alleged. This after all falls within the very high policy making function that one would expect the Cabinet to perform.
- 101 It further overlooks the realities of Government: in order to engage with the process as described above, a state functionary may receive numerous requests or invitations to do or not do things as the case may be. The duty remains on the occupier of the office to know the extent and limitations of the powers of his office and what he can lawfully do or not do while occupying it.
- A request for the Minister to do or not do something by a third party is not ipso facto unlawful unless allegations are made that the request made is a direct contravention of specific legislation or any other law enacted to combat corrupt activities such as PRECCA and POCA.<sup>77</sup> No such allegations are made here.

<sup>&</sup>lt;sup>76</sup> 2000 (2) SA 674 (CC) at para 17.

Prevention and Combatting of Corrupt Activities Act, No 12 of 2004 ("PRECCA") and Prevention of Organised Crime Act, no 121 of 1998 ("POCA")

No such allegation can be made because as the letters exchanged between Mr Howa ("Howa") and the Minister demonstrate, 78 the requests made by Howa on behalf of the Oakbay Group was for help of any kind.

2604

- There was no suggestion that the Minister was asked to do something he was not empowered to do in law. In fact, the general nature of the request shows the extent to which Howa, on behalf of the Oakbay Group, sought the assistance of the Minister who could be assumed to know what he was empowered to do or not do.
- Accordingly, the requests made of the Minister cannot be deemed to be unlawful simply because the persons making the request are connected to some political intrigue over which there is much speculation. Once the Minister made his decision there the matter ended.
- The danger incumbent in the Minister's argument, will be to shut down a vital means of access to State functionaries by the public at large. It will also delegitimise lawful efforts to persuade functionaries as to their existent powers and/or policies that the State should pursue and/or abandon. With respect to legal proceedings especially, it will also have the impact of further burdening the Courts because it will eliminate the ability of prospective litigants to engage with those in positions of power and influence to settle matters before legal process is initiated.
- The point remains that the occupier of a particular office bears the legal authority intendent upon it. They may only act in accordance with such authority. Should they judge any of the requests made of them to do things, or not do things, for which there is no legal authority, the request itself is not unlawful for the absence of such authority. It only becomes unlawful conduct if the functionary, after receiving such a request, chooses to act despite the absence of authority to do so. And even then, the unlawfulness potentially only attaches itself to the functionary who chose to act and not necessarily to the person who made the request.

Record Vol 1 p 21; Record Vol 1 p 23; Record Vol 1 p 46 (Annexure D); Record Vol 1 p 51 (Annexure E).

- On the basis of the submissions we have made that as there is no its between the Minister and the Oakbay Group (including Sahara) the application should be refused. A different point in this regard is that this Court must be careful that in granting the Minister's application it creates the potential for the bank respondents to effectively create a 'carve out' for themselves to be accountable only in a regulatory regime of their choosing. This shows the danger in this Court granting what some may argue to be innocuous relief on the face of it but which we submit is not so innocuous given all the different agendas at play.
- 109 While strictly irrelevant to the purpose of these proceedings, we pause to mention that the conduct of the bank respondents before this Court is revealing.
- The Banks pre-emptively attempt to make a case for prima facle lawfulness of their conduct and seek to elevate the request made of the Minister, as well as the conduct of certain other Ministers, as the basis for justifying some kind of prohibitory relief against any executive interference whatsoever.
- The deliberate vagueness of the Minister's relief (as far as "intervention goes"), coupled with the amplified relief as prayed for by Standard Bank, and which is fully dealt with by VR Laser, belies the danger of the declaratory order as it stands and supports our submission on this point.
- The bank respondents effectively seek to create a situation where no action of any kind can be taken against them on the grounds that it could be tantamount to "interference", and thus be unlawful in terms of this Court's order, if it is granted. Indeed, Standard Bank gives the real game away when it says that it has no objection to the President of the Republic appointing a judicial commission of inquiry into the banks but that he would have to take this Court's order into account when determining its terms of

<u>reference</u>. This also explains the Minister's real purpose in bringing this application – to curtail the options available to the President, and fettering his discretion, because the Minister thinks the President should not have them.

2606

113 As Standard Bank states at paragraph 94 of their heads of argument:

"The utility of the declaratory order sought is that it will inform (the President) of what is not lawful, if and when he defines the terms of reference of the judicial inquiry he contemplates."

- As we canvass above, that shows exactly what danger exists in this Court granting the Minister's relief and/or Standard Bank's relief, the two being interlinked. It seeks to limit, if not eliminate, the discretion afforded to the President, which the President has not yet even decided to exercise.
- The point to be remembered is that the bank respondents are subject to accountability through prescribed legislative means and any other means that are not themselves unlawful. The bank respondents attempt, in this application, to support an allegedly narrow issue regarding the Minister's powers but which is aimed to obtain greater relief to which they would not entitled. They clearly hope to use this judgment, if granted, as a defence against any future lawful action taken against them. This is reason alone why this Court should not grant any declaratory relief sought by the Minister or Standard Bank.

# D7: MINISTER UNABLE TO SHOW HARM

- The Minister's choice for declaratory relief is also indicative that his pleaded case, insofar as the references to harm are concerned, is overstated and not convincing.
- If the Minister's case was to be believed, then the Minister would not seek declaratory relief, but would rather seek more "direct" relief in the form of an

interdict or similar relief (in this regard, see below our discussion on English law).

- But the Minister chooses to come to this Court estensibly to ask for declaratory relief which he hopes will be useful in getting anyone who makes a request of him to stop. Why his rejection and/or flatly ignoring such requests without the support of a Court order is not sufficient and is never explained. We submit that it cannot be explained because the Minister has to hide his real intention in bringing this application.
- The point is this: the Minister has to justify his coming to Court on some basis and has done so on the grounds that the conduct of the Oakbay Group causes huge damage to the banking sector and financial integrity of the Republic. Apart from the fact that such harm is purely fictional, the Minister's position is puzzling because the Minister was requested to intervene, and he has decided that he is unable to. The Minister cannot demonstrate what harms arise from receiving such requests, even if persistent and/or irritating to him.
- But the Minister puffs up his submissions on harm, Indeed he exaggerates them, in the hope that the Court will be tempted into granting broad declaratory relief that can operate prohibitively against the Oakbay Group, and potentially bind his Cabinet colleagues.
- This demonstrates the Minister's difficulty: he has attempted to show enough harm that makes declaratory relief an option to him but not such significant harm that it would be more appropriate for him to obtain interdict relief or similar from the Court. The Minister's conduct as far as this goes falls between his desired aims and in the absence of any real harm, his application should be dismissed.

D8: FOREIGN LAW FAVOURS A RESTRICTIVE APPROACH TO DECLARATORY ORDERS

- The Minister relies, in part, on English law and current practice in the Southern African region in order to demonstrate that "judicial policy favours declaratory relief".79
- In both instances, the Minister (or his legal team) has fundamentally misread the relevant law. In fact, the practice in both England and the Southern African region favours the opposite conclusion: declaratory relief is a rare form of relief granted in limited circumstances, it is not a form of relief to which our Courts should readily turn.

### D8(1): ENGLISH LAW

- The Minister (or his legal team) has fundamentally misread section 31(2) of the Senior Courts Act, 1981,80 Rather than adopting a broad approach to declaratory orders, it is clear that the English Courts actually adopt a restrictive approach.
- 125 Section 31(2) reads as follows:
  - "A declaration may be made or an injunction granted under this subsection in any case where an application for judicial review, seeking that relief, has been made and the High Court considers that, having regard to-
  - (a) the nature of the matters in respect of which relief may be granted by mandatory, prohibiting or quashing orders;
  - (b) the nature of the persons and bodies against whom relief may be granted by such orders; and
  - (c) all the circumstances of the case, it would be just and convenient for the declaration to be made of the injunction to be granted, as the case may be"

(our emphasis)

Minister's Heads of Argument p 26 para 56.

At footnote 134 of the Minister's Heads of Argument.

- It should immediately be apparent that an order for declaratory reliefis seemingly only available in an application for judicial review and not on a stand alone basis.
- As is clear in this case: this is not an application for judicial review. Whereas it seems that South Africa may permit for a declaratory order to be granted in the absence of a dispute between the parties, English law seems to take the opposite view and limits declaratory relief to instances of judicial review, i.e. where a lis is present. No such lis exists on these facts.
- The "mandatory, prohibiting, or quashing orders" resembles interdictory relief in our jurisdiction.<sup>81</sup> The point is that the Senior Courts Act does not create a general principle for stand alone favour declaratory orders over other kinds of relief. It stands to reason, therefore, that where a party has more appropriate relief available to it such as an interdict that the party should accordingly make an application for that kind of relief.<sup>82</sup>
- The discretion is also curtailed in another important way: the Court pays attention to "against" whom the relief is sought. This makes it clear that there has to be a *lis* between the parties.
- This restrictive approach to declaratory relief is further evidenced by the Minister's own authorities that he relies on to make the proposition:

The important point to bear in mind here is that the Minister does not and cannot do so. The absence of a lis between the parties and the absence of harm (discussed above) demonstrates that the Minister would not be able to obtain any kind of interdict against the Oakbay Group despite the Minister's strained assertions that their conduct is hugely prejudicial to him, the bank respondents, and the Republic as a whole. Alternatively, if the Minister is able to make out such a case, the question then need be asked why he did not pursue it but instead chose for the

The distinction in South African law is organised on the principle of the effect of the relief rather than the type. Whereas South African law distinguishes between interim and final interdicts, these categories are not dissimilar in effect, when applied to particular facts, to "mandatory, prohibiting, or quashing orders". South African law is replete with examples of these kinds of interdictory relief. See M v B 2015 (1) SA 270 (KZP) (a mandatory interdict); Botha v Andrade (578/2007) [2008] ZASCA 120 (the SCA confirmed on appeal a prohibitory interdict issued by a magistrate); and Democratic Alliance v Minister of International Relations and Co-operation and Others (Council for the Advancement of the South African Constitution intervening) (83145/2016) [2017] ZAGPPHC 53 (a "quashing order"). A quashing order is the equivalent of a South African order to set aside official conduct based on an error or law or fact. See R v Secretary of State for the Home Department ex parte Khawaja [1984] 1 AC 74.

review" (own emphasis). 84

Equal Opportunities Commission v Secretary of State for Employment, B5 R (Customs and Excise Commissioners) v Canterbury Crown Court, B6 London Borough of Islington v Camp, B7 R (Campaign for Nuclear Disarmament) v Prime Minister, ("CND") B8 are all cases that fall squarely within the confines of judicial review proceedings. Importantly, the Court in CND went so far as to say that declaratory orders, even in the limited context of judicial reviews, should be used sparingly. B9 The English Courts are careful not to trespass into the terrain of other branches of government under the auspices of declaratory relief.

130.3 Many of the other examples cited by the Minister, <sup>61</sup> come from an English law textbook by Fordham called *Judicial Review Handbook* 6<sup>th</sup> ed (Hart Publishing, Oxford 2012) and deal with the remedy of declaratory relief in the context of judicial reviews.

It is uncontentious that such declaratory relief is useful or has a proper place among the number of options that a Court should have available to it. However, the Minister has overlooked the fact that all of the examples he refers to are in the context of judicial review and not instances where a party has approached a Court to grant declaratory relief in the absence

(1999) [2004] LGR 58 [2002] EWHC 2769 (Admin); [2003] LRC 335.

R (on the application of T) v Secretary of State for Health [2002] EWHC 1887 (Admin) at 62.
Minister's Heads of Argument footnotes 134 – 148.

<sup>83 [2001]</sup> EWCA CIV 52; (2001) 1 WL 751 ("Governor case").

Governor case at para 45. [1994] 1 All ER 910 (HL).

<sup>86 [2002]</sup> EWHC 2584 (Admin)

This should a fortion influence the Court to dismiss the Minister's application. The Court's reluctance was further demonstrated in R (on the application of the Stanford Chamber of Trade and Commerce) v Secretary of State for Communications and Local Government [2010] EWCA Civ 992 at 13.

- 132 Indeed, the Senior Courts Act has been amended to reflect the restrictive role that declaratory relief should play this important point is overlooked in the Minister's Heads of Argument.
- In 2014, the then Lord Chancellor introduced the Criminal Justice and Courts
  Bill 2014-2015. This received Royal Assent in 12 February 2015 (as the
  Criminal Justice and Courts Act 2015, "the 2015 Act").92
- Among the measures introduced by the Act was the **Insertion of a new** section 31(2A) (2C) to the Senior Courts Act of 1981.<sup>93</sup> That section provides as follows:
  - "(2A) The High Court-
  - (a) must refuse to grant relief on an application for judicial review, and
  - (b) may not make an award under subsection (4) on such an application,
  - if it appears to the Court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred.
  - (2B) The Court may disregard the requirements in subsection (2A)(a) and (b) if it considers that it is appropriate to do so for reasons of exceptional public interest.
  - (2C) If the Court grants relief or makes an award in reliance on subsection (2B), the Court must certify that the condition in subsection (2B) is satisfied". 84

(our emphasis)

- 135 The impact of this amendment is clear:
  - 135.1 A Court's discretion to grant an applicant any relief is limited. The Court has no discretion where the outcome of the application

See http://services.parliament.uk/bills/2014-15/criminaljusticeandCourts.html

Subsection (4) referred to deals with the question of costs.

In terms of section 95 of the 2015 Act, the Lord Chancellor could determine the date of commencement of the section. The Lord Chancellor determined that date to be 13 April 2015 by means of a circular (the equivalent of a South African Government Gazette). See: https://www.gov.uk/government/upleads/system/uploads/attachment\_data/file/428204/cjc-act-circular.pdf

would be the same or similar had the conduct complained of had not occurred. In these instances, and even when coupled with a ludicial review, the Court must refuse the relief.

- 135.2 The Court may nonetheless proceed to grant relief to the applicant where the Court itself is satisfied that a higher standard of public interest is met the public interest must be exceptional.
- This high threshold (especially with regard to the consequence of the relief had the conduct complained of not occurred) and the peremptory nature of the legislation where the exception in section 31 (2B) is not established, was confirmed in the case of R (on the application of Hawke) v Secretary of State for Justice. 95
- In this case, an application for judicial review of a decision by the Secretary of State to not move a prisoner closer to his wife (who was unable to visit him where he was detained) was dismissed as the outcome would not, in the Court's view, have been substantially different had the Secretary of State regarded his obligations under the 2010 Equality Act when considering the claimant's request.
- The impact of section 31(2A), as introduced in the 2015 Act, is to potentially severely limit judicial review remedies available in English Courts, and given the hierarchy of preferential remedies contained in section 31(2) of the Senior Courts Act of 1981, the possibility of obtaining declaratory relief is even further reduced by the amendment.
- 139 In the case of the Minister's application, his reliance on English law significantly weakens rather than supports it. In summary:
  - 139.1 This is not a case of judicial review.
  - 139.2 The outcome the Minister hopes to achieve in his application (ignoring the crucial fact that these are not judicial review proceedings) would be exactly the same as if the conduct

<sup>&</sup>lt;sup>95</sup> [2015] EWHC 4093 (Admin), [2016] A.C.D. 56.

complained of had not occurred. This is the folly of the Minister in approaching this Court to confirm a negative obligation which maintains the status quo.

- 139.3 The Minister has made no case that his application is of exceptional public interest. In fact, as Sahara has addressed above, even if the Minister has managed to show that his application may in some way be in the public interest, which he does not, the public interest is better served by the Court refusing to enter this political fray. This being the case, over and above the fact that other significant factors exist within the basket of considerations (above) that this Court must apply its mind to when deciding whether to grant the Minister relief the Minister has not been able to demonstrate exceptional public interest.
- The English Courts are sceptical of being used as a forum to give advice and assistance where there is no real legal dispute between the parties. An application for judicial review in England, much like in South Africa, evinces that there is a live dispute between the parties. That is not the case before this Court.
- Although South African Courts can consider declaratory relief as a selfstanding remedy, made available to it under the Superior Courts Act, it too is subject to limitations as discussed above. The general refrain is that there must be some kind of legal question worthy of being answered, or rights and obligations that need to be determined, that make it justifiable for a Court to intervene. No such triable issue, legal question, rights, or obligation exists here.

- The Minister mostly refers to instances of **Zimbabwean** case law that followed the South African trend in **Ex Parte Nell**, and to an extent also adopted the approach of English law above.
- 143 It seems that Zimbabwean Courts can consider declaratory relief in the absence of a judicial review application and grant such relief as a self-standing measure. 85 unlike English law.
- However, the restraint placed on a Zimbabwean Court is similar to those applicable in South Africa, namely that it must deal with "any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon such determination" (our emphasis).<sup>97</sup>
- In the examples relied on by the Minister, the cases in question dealt with an express provision which was open to debate as to how it should be interpreted and applied. Without derograting from the correctness of the Zimbabwean Courts' approach in those cases, it is notable that in those cases, unlike in this one, none of them dealt with the absence of an express provision; they all dealt with a positive obligation, and in respect of which there is debate as to interpretation and application.
- The need then, for clarity, and a Court's intervention is obvious: despite their being no lis the Court needed to intervene to give appropriate guidance to the respective office bearer in light of an express provision of law that they and their successors would need to continuously interpret and apply and in respect of which clarity was required.
- In the case of Ex Parte Chief Immigration Officer, Zimbabwe, 98 the Zimbabwean Supreme Court ("Supreme Court") was, in large part, motivated to grant the applicant the opportunity to argue for declaratory relief because of the applicant's contention that the Supreme Court had

97 Section 14 above.

Section 14 of the High Court of Zimbabwe Act 7 06.

<sup>98 1994 (1) 370 (</sup>ZSC) ("Immigration Officer").

2615

itself committed a material procedural error which would have to be litigated before the Supreme Court again in the near future, <sup>99</sup> arising out of the relief it granted in another case in which the applicant also had an interest. <sup>100</sup> It is not, as the Minister suggests, a wholesale acceptance of the declaratory relief regime.

- The Minister in this application is not in a comparable scenario to the parties in the **Immigration Officer** case.
- To that end, the foreign law relied on by the Minister is distinguishable on the facts.

## E: COSTS

- Sahara seeks a personal cost order against the Minister, on the scale as between attorney and client, including the costs for the employment of two counsel. If a costs order is not made against the Minister in his personal capacity, it should in any event be on an attorney and own client scale on the basis of decisions such as Alluvial Creek dealt with below. <sup>101</sup>
- On 17 March 2017, Stein Scop filed a notice of substitution on behalf of Sahara in terms of which they were appointed Sahara's attorneys of record.
- Also on 17 March 2017, Sahara, via Stein Scop, issued a letter to the State Attorney, on behalf of the Minister, in terms of which it put the Minister on terms that Sahara would be seeking costs against the Minister in his personal capacity. A copy of this letter is annexed to these Heads of Argument as "SH1".

mmigration Officer at 375J-376B, 377D, 377E-F.

Principal Immigration Officer and Another v O'Hara and Another (SC272/92). This pertained to Zimbabwe's immigration laws. The respondents in this matter before the Supreme Court were a husband and wife couple who were considered to be 'allens' in terms of the law. The Supreme Court upheld an appeal against the High Court in which it held that the O'Haras could not remain and work in Zimbabwe without the proper residence permits.

- Sahara is entitled to ask for costs for against the Minister in his personal capacity for the following reasons below.
- The Minister pursues this application, not for any other reason other than to gain an advantage in his political dispute with his Cabinet colleagues, and the President. It is his own personal interest rather than his ex officio interest that is the motive for this litigation.
- As the Minister's own legal advice showed before he initiated this litigation, he was under no obligation to do anything in response to the requests from the Oakbay Group. However, and in spite of the advice received, 102 the Minister has thought it necessary to bring this application in direct contradiction of the advice he received. As demonstrated above, the Minister, who enjoys no prospects of success, pursued the application as a personal indulgence. This application was not necessary for the Minister to continue his official functions there is no dispute that his official functions do not include any powers to intervene in the private banking relationship between a bank and its customer. The State should not be saddled with the cost of the Minister's III-advised personally motivated litigation.
- The Minister was specifically asked to abandon this application in light of the fact that the Oakbay Group accepted the interpretation of the Minister's powers. 103 The fact that it occurred shows that there was no need for the Minister to proceed further after instituting the application. The Minister's conduct in pursuing this application, even though there is no legal basis to do so, shows a wanton disregard for the Rules of Court. Although the Minister justifies his persistence on the grounds of public interest this is a disguised justification and is insufficient to rescue the Minister from a personal costs order. The Minister's conduct with respect to the relief he prays for and

Record Vol 1 p 24 (Annexure C); Record Vol 1 p 53 (Annexure F).

# 158 As was recently held in UFS v Afriforum ("Afriforum"): 104

"... as a general rule, in constitutional litigation an unsuccessful litigant in proceedings against the State should not be ordered to pay costs. However, as pointed out by Rogers J in Democratic Alliance v President of South Africa & others; 2014 (4) SA 402 (WCC) para 107, this general rule is not concerned with the characterisation of parties, but the nature of the Issues. As held by Rogers J, with reference to paras 16-25 of Biowatch, "The critical question is whether the litigation has been undertaken to assert constitutional rights, whether the constitutional issues are genuine and substantive and whether there has been impropriety in the manner in which the litigation has been undertaken."

In my view Afriforum's reliance on Biowatch is misplaced. The issue in the present matter was whether the judgment of the Full Court should be implemented pending the determination of the appeal process. This is a purely factual question, le whether or not the three requirements for relief in s 18 of the Act were met. That did not concern the assertion of any constitutional rights. It follows that an award of costs against Afriforum as the unsuccessful party will not have any chilling effect on other litigants who might wish to vindicate their constitutional rights, or the rights of others on whose behalf they may litigate.

Further, for the reasons recorded above, Afriforum has acted without circumspection in seeking relief under a 18 of the Act. It purported to act on behalf of prospective first-year students, without any evidence showing that any student in the three affected faculties would suffer any adverse consequences if the judgment of the Full Court were to be suspended pending appeal. There was simply no factual basis for believing that it was entitled to relief under a 18 of the Act."105

(our emphasis).

The so-called Biowatch principle, <sup>106</sup> is not a blank cheque for parties to conduct themselves in any fashion before a Court and protect themselves from an adverse costs order, simply because they label their litigation as being of constitutional importance. What the Court must concern itself with is whether the parties have conducted themselves in an acceptable fashion as any private litigant would be judged. While the Court in Blowatch was concerned with the potential chilling effect that an adverse costs order would have on litigation conducted in the public interest, it effectively held that an adverse costs order would be warranted in certain circumstances where the parties' conduct (like the Minister's in this case) would justify it:

University of the Free State v Afriforum 2016 JDR 2151 (SCA).

<sup>105</sup> Afriforum, pp 12 - 13, para 29 - 30.

Biowatch Trust v Registrar, Genetic Resources and Others 2009 (6) SA 232 (CC).

"Thus in Affordable Medicines this Court stated that the ability to finance the litigation was not a relevant consideration in making a costs order. It held that the general rule in constitutional litigation that an unsuccessful litigant ought not to be ordered to pay costs to the State should not be departed from simply because of a perceived ability of the unsuccessful litigant to pay. It accordingly overturned the High Court's order of costs against a relatively well-off medical practitioners' trust that had launched unsuccessful proceedings. Conversely, a party should not get a privileged status simply because it is acting in the public interest or happens to be indigent. It should be held to the same standards of conduct as any other party, particularly if it has had legal representation. This means it should not be immunised from appropriate sanctions if its conduct has been vexatious, frivolous, professionally unbecoming or in any other similar way abusive of the processes of the Court. 19107 108

(our emphasis)

It may be relevant for the Court to recognise that in Blowatch, the kind of public interest litigation referred to was for the benefit of entire sections of the population. This litigation is for the sole benefit of the Minister, even though there is no basis to sustain it. Additionally, this Court should bear in mind that any reliance on Blowatch is limited; Blowatch specifically contemplated the impact of costs orders for unsuccessful litigation against the State in order to vindicate rights.

This application is distinguishable because it is the Minister in his ex officio capacity and at direct cost to the State litigating against private parties to no practical end; all the parties agree that there is no right in question for the Minister to vindicate. The Minister should not enjoy any protection from an adverse costs order where his conduct is to allegedly clarify the proper constitutional standing but where such is not in dispute in the first place. The Minister has also burdened this Court with issues that are either wholly irrelevant to the narrow case he would have been expected to plead even if his avowed reason in bringing the application is to be believed. The inclusion of these matters is scurrilous, vexatious, and intended to embarrass.

162 As was held in Alluvial Creek Ltd:

109 Blowatch at 242H-243C.

<sup>107</sup> Blowatch at 242F-H.

Affordable Medicines Trust and Others v Minister of Health and Others 2006 (3) SA 247 CC at 297E-H ("Affordable Medicines").

"An order is asked for that he pay the costs as between attorney and client. Now sometimes such an order is given because of something in the conduct of a party which the Court considers should be punished, malice, misleading the Court and things like that, but I think the order may also be granted without any reflection upon the party where the proceedings are vexatious, and by vexatious I mean where they have the effect of being vexatious, although the intent may not have been that they should be vexatious."

(our emphasis)

- Alluvial Creek has since been followed in a long line of cases, <sup>111</sup> most notably in the Supreme Court of Appeal, <sup>112</sup> and the Constitutional Court, <sup>113</sup> where the conduct of a litigant is determinative of whether costs should be awarded against them.
- The Minister has also abused his office in order to direct State resources to engage in a legal dispute that ought not to have been brought. The grounds upon which costs can be awarded against someone who occupies a fiduciary role in their personal capacity has not changed since Vermaak's Executor v Vermaak's Heirs 114 which held that the categories for personal costs order include mala fides, negligence, and unreasonableness. 115 Sahara contends that in light of the invitations made to the Minister to withdraw the application, 116 and the advice he received from his own senior counsel on more than one occasion, 117 his persistence is, at the very best, either negligent and/or unreasonable. This is especially the case where the decision-making process ended with him and nothing further could be done against him other than taking him to Court where he then could have attempted to vindicate himself,

(Pty) Ltd v Barnes 2011 (3) SA 205 (GNP) at 2051-207G.

Johannesburg City Council v Television & Electrical Distributors (Pty) Ltd and Another 1997 (1) SA 157 (A) at 177C-G.

114 1909 TS 679 at 691

116 Record Vol 12 p 1182 (Annexure OB12)

<sup>110</sup> Alluvial Creek at 535.

See variously Ebrahim v Excelsior Shopfitters and Furnishers (Pty) Ltd (2) 1946 TPD 226; Van Dyk v Conradie 1963 (2) SA 413 (C); Ward v Sulzer 1973 (3) SA 791 (A); Waar v Louw 1977 (3) SA 297 (O) at 394; Zedin investments Ltd v Kemp 1983 (4) SA 483 (C) at 486; Friederich Kling GmbH v Continental Jewellery Manufacturers 1993 (3) SA 76 CPD; Speidel GmbH v Continental Jewellery Manufacturers 1995 (4) SA 966 (C) at 974G–975H; Page v ABSA Bank Ltd 1/4 Volkskas Bank 2000 (2) SA 661 (E) at 667C–D; Wraypex (Pty) Ltd v Barnes 2011 (3) SA 205 (GNP) at 2051–207G.

Camps Bay Ratepayers and Residents Association and Another v Harrison and Another 2011 (4) SA 42 (CC) at para 76.

This has been followed variously in Estate Orr v The Master 1938 AD 336; Gangat v Berjoseth NO 1954 (4) SA 154 (D) at 150; Grobbelaar v Grobbelaar 1959 (4) SA 719 (A) at 725 B - C; Venter NO v Scott 1980 (3) SA 988 (O) at 993H

<sup>117</sup> Record Vol 1 p 24 (Annexure C); Record Vol 1 p 53 (Annexure F).

2620

As the SCA recently held, 119 where officers of State conduct themselves inappropriately, our Courts should start actively considering making those persons pay personally. This is especially the case where the taxpayer and the public purse will be prejudiced in having to pay for litigation which contributes nothing significant to the public at large. This application by the Minister is one such case:

"In the present case the best that can be said for the MEC and her department is that their conduct, although veering toward thwarting the relief sought by the board, cannot conclusively be said to constitute contempt of Court. However, that does not excuse their behaviour. The MEC, in her responses to the opposition by the board, appeared indignant and played the victim. She adopted this attitude while acting in flagrant disregard of constitutional norms. She attempted to turn turpitude into rectitude. The special costs order, namely, on the attorney and client scale, sought by the board and Mafojane is justified. However, it is the taxpayer who ultimately will meet those costs. It is time for Courts to seriously consider holding officials who behave in the high-handed manner described above, personally liable for costs incurred. This might have a sobering effect on truant public office bearers. Regrettably, in the present case, it was not prayed for and thus not addressed." 120

(our emphasis)

This dictum was most recently applied in Democratic Alliance v South African Broadcasting Corporation SOC (SABC) and Others; Democratic Alliance v Motsoeneng and Others, 121 where a full bench of the Western Cape High Court held office bearers of the SABC to be personally liable for costs given their unreasonable and impermissible behaviour in their running of the SABC and their conduct in the subsequent litigation brought by the Democratic Alliance. The leave to appeal in this application was also dismissed, indicating that judicial opinion is firmly against officers of State litigating where the taxpayers would be burdened with the cost and where there was no merit in doing so.

<sup>118</sup> Alluvial Creek above.

Gauteng Gambling Board and Another v MEC for Economic Development, Gauteng 2013 (5) SA 24 (SCA) ("Gauteng Gambling Board").

<sup>120</sup> Gauteng Gambling Board at 40G-41A.

<sup>121 (3104/2016, 18107/2016) [2017] 2</sup> BLLR 153 WCC.

- Although the Constitutional Court, in MEC for Health, Gauteng v Lushaba, 122 ultimately declined to hold an MEC and officials in her department liable for costs in her their personal capacities, it did so on technical grounds it had identified in the personal costs order granted by the Gauteng Local Division, Johannesburg, per Robinson AJ. 123 It was not an objection in principle to the increasingly utilised personal costs order granted to alleviate the burden placed on the taxpayer. 124
- This is evident from the approach adopted by the Constitutional Court in Black Sash Trust v Minister of Social Development and Others (Freedom Under Law NPC Intervening) ("SASSA case"). 125 The Constitutional Court, in making an order temporarily staying the payment of costs, 126 stated:
  - "... There is little doubt that the Minister and SASSA are liable in their official capacity for the costs, but in view of the possibility that individual conduct may have played a material role in the matter, the order will also provide for further opportunity for explanation in that regard ... The office-holder ultimately responsible for the crisis and the events that led to it is the person who holds executive political office. It is the Minister who is required in terms of the Constitution to account to Parliament. That is the Minister, and the Minister alone ... All these aspects require further scrutiny, but that can only be done after the potentially affected parties are joined to the proceedings in their personal capacities and given an opportunity to explain their conduct in relation to each of these issues "127" (footnotes omitted, emphasis added)
- Although the SASSA case occurs in a different context, it nonetheless adds further credence to this Court's power to grant a personal costs order against the Minister for contemptible conduct in his ex officio capacity. The State, and the taxpayer, should not be prejudiced as a result of the Minister's abuse of Court process. In this matter, the party affected by the costs order that is sought is the Minister himself, and there are no other potentially affected parties who are required to be joined. The Minister has been given prior notice of the intention to seek costs against him personally, and by the time of commencement of the hearing would have had sufficient

<sup>122 [2015]</sup> ZACC 16 ("Lushaba").

Lushaba v MEC, Gauteng (17077/2012) [2015] ZAGPHJC 13.

<sup>124</sup> Lushaba at para 11, 12.

<sup>125 (</sup>CCT48/17) [2017] ZACC 8 (17 March 2017).

<sup>5</sup>ASSA case, para 76, paras 13 and 14 of the order.

SASSA case, para 72 -72.

# F: CONCLUSION

- This declaratory order, if granted, will allow the Minister to obfuscate the principle of the separation of powers and impermissibly co-opt this Court to aide him in his political fight with the President and the Cabinet. The Court must flercely guard against this and should dismiss the Minister's application for attempting to drag it into a political fight where there is no legal issue for it to adjudicate, and where its involvement would be inappropriate, and set a dangerous precedent.
- Notwithstanding the issues regarding the separation of powers and political noise, which should have never been canvassed before this Court in the first place, because they are strictly irrelevant to the declaratory relief prayed for by the Minister, the Minister fails to demonstrate that his case, as pleaded, satisfies the strict legal requirements to obtain declaratory relief and, further, fails to present sufficiently compelling factors that this Court should bear in mind in order to exercise a discretion in the Minister's favour.
- Sahara, therefore, prays that the Minister's application should accordingly be dismissed with costs on the attorney-and-client scale, such costs for the employment of two counsel, and to be paid by the Minister personally.

AR BHANA, SC KW LÜDERITZ, SC K, PREMHID

Chambers, Sandton

22 March 2017



Co. Name: Stein Scop Attorneys Inc. Registration No: 2015/306625/21

Landline: #2711 380 8080 Email: bradley@steinscop.com

Direct: +2711 380 8070 Mobile: +2782 781 3452 Our ref: TRI15 f B Scop Your ref: MS T Nhlanzi 2623

Date: 17 March 2017

The State Attorney

Attention: Ms Thembelinle Nhlanzi

By email: TNhlanzi@lustice.gov.za

Dear Sirs

The Minister of Finance / Oakbay Investments (Pty) Ltd & 20 others (case no: 80978/2016)

- 1. We act for Sahara Computers (Pty) Ltd ("Sahara"), the Fourteenth Respondent in the above application.
- 2. We write to you as the legal representatives of the Minister of Finance, Mr P. J. Gordhan, MP, and request that you bring this letter to his attention.
- 3. We are instructed by our client to seek costs against your client, the Minister, in his personal capacity. This letter serves as notice of our client's Intent.
- 4. The reasons for Sahara seeking costs against your client, the Minister, in his personal capacity, include inter alia:
- 4.1 The Minister sought, and obtained, the advice of both Senior and Junior Counsel no less than two occasions of which we are aware. That advice confirmed that the Minister was under no obligation to "intervene" as requested.
- There is no disagreement between any of the parties that the Minister's interpretation of his powers, on the strength of such advice, preclude the Minister from intervening in the private banking relationship between any bank and its client, including seeking to get a bank to reverse its decision to close a client's account.
- 4.3 The Minister persists in the application and, as such, involves the Courts in a matter which it need not concern itself with. There is no question of law that arises, nor any triable issue. This is an abuse of Court process.

- 5. Additionally, in our client's view, this application is being brought for an ulterior personal political purpose at the expense of the State.
- As the Minister himself stated, in a different context, "those responsible for deciding how money is spent have to do so with scrupulous rigour and care". It regrettable that the Minister should persist, at public expense, where the application does not advance the public interest.
- Apart from the true purpose of the litigation, whatever it may be, the Minister's conduct has put our client through unnecessary expense in seeking to vindicate itself against the Minister who has burdened the Court, and ourselves, with allegations that are irrelevant, and/or vexatious, scurrilous, and meant to harass. Such conduct is impermissible and unacceptable.
- 8. Accordingly, for the non-exhaustive reasons above, the State and the taxpayers should not be burdened with the costs.

Yours sincerely

BA Scop Director

# **ANNEXURE 40**

2625



2626

http://www.engineeringnews.co.za/article/no-need-for-treasury-to-finance-nuclear-molefe-2016-09-21

# No need for Treasury to finance nuclear — Molefe

21ST SEPTEMBER 2016 BY: NEWS24WIRE

nuclear build programme for South Africa doesn't need to be funded by the fiscus. There are enough potential financiers who would be willing to take the risk, said **Brian Molefe**, Eskom CEO on Wednesday.

Speaking to Fin24 on the sidelines of a parliamentary meeting, Molefe said he doesn't believe a nuclear build programme would put a significant burden on the fiscus. Molefe said he had not asked National Treasury to consider making provision for any nuclear costs for the medium term.

"It's possible for nuclear to finance itself. Asking the fiscus for money is going overboard. We should be able to arrange some kind of funding for nuclear energy."

According to Molefe, a nuclear plant has a life of 80 years – "even if it costs R1-trillion it will have the capability to repay the cost in 15 to 20 years. So you can take the revenues generated from nuclear, ring-fence it and use it for future nuclear activities."

Molefe was part of an Eskom delegation that briefed Parliament's Select Committee on Communications and Public Enterprises on the power utility's tariffincreases for 2016 and 2017, as well as the amended pricing structure for municipalities with effect from July this year.

He was asked to elaborate why he thought that nuclear energy is the best route for South Africa's power generation capacity. Molefe responded that nuclear energy in the first instance cleaner than coal-fired power stations and secondly it's ideal for base load electricity generation.

"The current renewable energy programme has a 30% availability factor. You have to wait for the sun to shine or the wind to blow if you want to make use of wind or solar power."

Molefe cited Koeberg's reliability as a base load power station as one of the reasons why nuclear is the route to follow. "The best performing power station this winter was Koeberg. It had the least breakdowns and had the best power reliability. It broke the record in South Africa - it operated non-stop for 470 days."

He reiterated calls for urgency about making decisions about nuclear energy. "At the moment we have a surplus in electricity generation and we won't need extra electricity until 2022. But we need it for 2028 and 2030.

"Remember, five to six years of a nuclear build programme is required solely for planning purposes. Another five years are required for implementation."

Phone:

+27 (0)11 622 3744

Fax:

+27 (0)11 622 9350

Email:

newsdesk@engineeringnews.co.za

Website: http://www.engineeringnews.co.za

To advertise email advertising@creamermedia.co.za or click here

# **ANNEXURE 41**

2629



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

Case No: 19529/2015

Before the Hon. Mr Justice Bozalek and the Hon. Ms Justice Baartman

Hearing: 13 December 2016; 22 – 24 February 2017 Judgment Delivered: 26 April 2017

In the review application between:

EARTHLIFE AFRICA – JOHANNESBURG	1 <sup>st</sup> Applican
SOUTHERN AFRICAN FAITH COMMUNITIES'	
ENVIRONMENT INSTITUTE	2 <sup>nd</sup> Applican

and

THE MINISTER OF ENERGY	1st Respondent
THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	2 <sup>nd</sup> Respondent
THE NATIONAL ENERGY REGULATOR OF SOUTH AFRICA	3 <sup>rd</sup> Respondent
SPEAKER OF THE NATIONAL ASSEMBLY	4th Respondent
CHAIRPERSON OF THE NATIONAL COUNCIL OF PROVINCES	5th Respondent
ESKOM HOLDINGS (SOC) LIMITED	6 <sup>th</sup> Respondent

#### **JUDGMENT**

# BOZALEK J (BAARTMAN J concurring)

[1] This application concerns challenges to various steps taken by the State between 2013 and 2016 in furtherance of its nuclear power procurement programme. The steps

challenged are two separate determinations made by the Minister of Energy in 2013 and 2016, respectively, in terms of sec 34 of the Electricity Regulation Act, 4 of 2006 ('ERA'), whilst the second main focus of the challenge is the constitutionality of the tabling by the Minister before Parliament of three intergovernmental agreements (IGA's) during 2015.

#### THE PARTIES

- [2] First applicant is Earthlife Africa Johannesburg, a non-governmental non-profit voluntary association which mobilises civil society around environmental issues. The second applicant is the Southern African Faith Communities' Environmental Institute, a registered public benefit and non-profit organisation which also concerns itself with environmental and socio economic injustices.
- [3] First respondent is the Minister of Energy ('the Minister') who issued the two sec 34 determinations in question and tabled the three IGA's relating to nuclear cooperation with other countries. The President of the Republic of South Africa ('the President') is cited as second respondent by reason of his decision in 2014 authorising the Minister's signature of an IGA concluded in 2014 with the Russian Federation. Third respondent is the National Energy Regulator of South Africa ('NERSA'), a statutory body set up in terms of the National Energy Regulator Act, 40 of 2004 ('NERA'), which body concurred in the sec 34 determinations made by the Minister. The Speaker of the National Assembly and the Chairperson of the National Council of Provinces are the fourth and fifth respondents, cited because of their interest in the question whether the IGA's were properly tabled before their respective houses. During the course of proceedings, Eskom Holdings (SOC) Limited ('Eskom') was joined as sixth respondent but it, as well as the fourth and fifth respondents, abide by the Court's decision. All the

relief sought is opposed by the Minister and the President to whom I shall refer as 'the respondents'.

### **BACKGROUND**

- [4] In late 2013, the Minister (with NERSA's concurrence), acting in terms of sec 34 of ERA determined that South Africa required 9.6GW ('gigawatts') of nuclear power and that this should be procured by the Department of Energy. The Minister purported to make the determination on or about 17 December 2013. It was, however, only gazetted on 21 December 2015 and delivered to the applicants as part of the record in this matter on or about 23 December 2015. The gazetting and production of this sec 34 determination was at least partly in response to the applicants' initial case in which, inter alia, a declarator was sought that, prior to the commencement of any procurement process for nuclear new generation capacity, the Minister and NERSA were both required in accordance with 'procedurally fair public participation processes' to have determined that new generation capacity was required and must be generated from nuclear power in terms of sec 34(1)(a) and (b) of ERA.
- [5] The applicants commenced their review application in October 2015. Prior thereto, on or about 10 June 2015, the Minister had tabled the three IGA's before Parliament which are the subject of the present constitutional challenge. In chronological order these were agreements between the Government of the Republic of South Africa and the United States of America, concluded in August 1995, the Government of the Republic of Korea, concluded in October 2010 and the Government of the Russian Federation, concluded in September 2014, all in regard to cooperation in the field of nuclear energy.

[6] On or about 8 December 2016, during these proceedings, the Minister issued a second sec 34 determination along similar lines to the previous sec 34 determination, but now identifying Eskom as the procurer of the nuclear power plants. The determination was made public at the commencement of the initial hearing in this matter on 13 December 2016, occasioning its postponement for several months, and was gazetted on 14 December 2016.

# **EVOLUTION OF THE LITIGATION**

- [7] The applicants' case has evolved through three stages. The relief initially sought was a review and setting aside of the Minister's decision to sign the Russian IGA, the President's decision authorising the Minister's signature, and the Minister's decision to table the Russian IGA before Parliament in terms of sec 231(3) of the Constitution. Certain declaratory relief was also sought in relation to how the nuclear procurement process should unfold in relation to the issuing of determinations under sec 34(1) of ERA and sec 217 of the Constitution which deals with the requirements for a fair procurement system for organs of state.
- [8] After the respondents furnished the first sec 34 determination as part of the record, the applicants filed an amended notice of motion seeking the review and setting aside of that determination and any 'Request for Proposals' issued by the Department of Energy pursuant thereto.
- [9] Finally, after postponement of the proceedings in December 2016, the Minister filed a supplementary affidavit explaining the circumstances surrounding, and the rationale for, the second sec 34 determination. The applicants were afforded an opportunity to file answering affidavits to which they attached a draft order indicating

that further relief being sought was the review and setting aside of the Minister's sec 34(1) determination gazetted on 14 December 2016, and the setting aside of any Requests for Proposals or Requests for Information issued pursuant to either determination.

[10] The hearing resumed on 22 February 2017 when the matter was fully argued.

### OUTLINE OF THE PARTIES' CASES

- In broad terms the applicants' challenge to the three IGA's is largely procedural in nature and based on the different procedures set out in sec 231(2) and 231(3) of the Constitution to render such agreements binding over the Republic. Section 231(2) provides that an IGA binds the Republic only after it has been approved by resolution in both the National Assembly ('the NA') and the National Council of Provinces ('the NCOP') 'unless it is an agreement referred to in subsection (3)'. The latter subsection provides that IGA's of a 'technical, administrative or executive nature' binds the Republic without the approval of the NA or the NCOP 'but must be tabled in the Assembly and the Council within a reasonable time'. The applicants aver that inasmuch as the US IGA was entered into more than two decades before it was tabled in terms of sec 231(3), and nearly five years previously in the case of the Korean IGA, the delay in so tabling them rendered them non-compliant with sec 231(3) and therefore non-binding. The Russian IGA was also tabled in terms of sec 231(3) but in its case the applicants aver that it was not an international agreement as envisaged in sec 231(3) and thus should have been tabled before the two houses in terms of sec 231(2) with the result that it would only become binding after it had been approved by resolution of those houses.
- [12] In regard to the challenge to all three IGA's the respondents raise various preliminary points, namely, that there has been a material non-joinder inasmuch as none

of the three countries have been joined as parties to the proceedings. In any event, the respondents contend that all three agreements, being international agreements, are not justiciable by a domestic court. As regards the Russian IGA the respondents contend in the alternative that upon a proper interpretation and construction thereof it is 'an international framework agreement for cooperation between sovereign states' (and not a procurement contract) to cooperate on an executive level in the field of nuclear energy and nuclear industry; furthermore, the respondents contend, the decision of the Minister to table the Russian IGA in terms of sec 231(3) of the Constitution was beyond reproach inasmuch as it falls within the general category of a 'technical, administrative and executive agreement, not requiring ratification or accession'. It is also contended by the respondents that, in any event, even if the Russian IGA was tabled in Parliament in terms of the incorrect procedure, the applicants have no standing to claim any relief in relation thereto, this being a matter for Parliament to take up with the Minister.

- [13] In regard to the US and Korean IGA's the respondents, for the reasons given above, again assert that the applicants have no standing to claim any relief. They assert further that there was no unreasonable delay in tabling either IGA and that what is reasonable in any particular instance must depend on the facts and circumstances pertaining to each IGA. They contend further that, even if there was an unreasonable delay in the tablings, it is only the delay itself that is unconstitutional and this does not affect the validity or effectiveness of the tabling themselves nor render the two treaties without any binding effect.
- [14] As regards to the sec 34 determinations, in broad outline, the applicants' case is that both the Minister's decision as contained in the determinations and NERSA's concurrence therein constituted administrative action but breached the requirements for

such action to be lawful, reasonable and procedurally fair. Amongst the grounds that they rely on in this regard are that neither the Minister's decision nor that of NERSA's was preceded by any public participation or consultation of any ground. Secondly, as regards the first sec 34 determination the applicants contend it was unlawful by reason of the two year delay in gazetting it; thirdly, they contend, both determinations were irrational, unreasonable and taken without regard to relevant considerations or with regard to irrelevant considerations.

- [15] The applicants rely on certain additional grounds in relation to the 2016 determination, more specifically that NERSA's decision to concur therein was unlawful in that its key reason was that it believed that it would be 'mala fide for it not to concur in the Minister's proposed determination' and was thus predicated on a material error of law or fact. It is also contended that NERSA failed to apply its mind to further relevant considerations, relating to the Minister's proposed determination, which arose after the 2015 determination.
- [16] A further specific ground upon which the 2013 and 2016 determinations is challenged is the absence therein of any specific system for the procurement of nuclear new build capacity which is said to be in violation of sec 34 of ERA, read together with sec 217 of the Constitution.
- [17] A further procedural ground of review is based on the applicants' contention that since the 2016 determination failed to withdraw or amend the 2013 sec 34 determination it resulted in the anomalous situation of two gazetted sec 34 determinations which are mutually inconsistent. As such the determinations violate the principle of legality and fall to be reviewed and set aside. The applicants contend, furthermore, that even if the

Minister's decisions as expressed in the sec 34 determination are not administrative but executive action they are nonetheless susceptible to review by virtue of the principle of legality and, even on this standard, fall to be set aside on the basis of irrationality.

[18] For their part the respondents contend that neither the decisions of the Minister nor those of NERSA in concurring with the sec 34 determinations constitute administrative action. Instead, they contend the determinations amount to 'encased policy directives' and that a ministerial determination under sec 34 of ERA amounts to 'executive policy'. They argue that no actual procurement decisions, nor a decision to grant a generation licence, were taken and the sec 34 determinations were in substance nothing more than policy decisions by the national executive binding only upon NERSA. The respondents dispute, furthermore, the specific grounds of the applicants' challenge to the sec 34 determinations and contend that there is no requirement that a determination must specify the procurement system for the nuclear new generation capacity. They contend further that neither the Minister's decision nor NERSA's decision was required to be made in accordance with a procedurally fair and public participation process. The respondents concede that the determinations are subject to review for rationality but contend that both determinations meet that standard.

[19] The respondents dispute, on various grounds, the specific bases upon which the applicants contend that NERSA's concurrence in the 2016 determination was unlawful, unreasonable or irrational. As regards the general ground advanced by the applicants that the 2013 and 2016 determinations are mutually inconsistent and stand to be struck down for this reason, the respondents' case is that, properly interpreted, the first determination was impliedly repealed by the second determination but that, in any event, even if both determinations stand separately from each other they are not mutually inconsistent.

# THE ISSUES

- [20] The following main issues fall to be determined:
  - 1. Did the Minister and NERSA breach statutory and constitutional prescripts in making the 2013 and 2016 sec 34 determinations?
  - 2. Did the President and the Minister breach the Constitution in deciding to sign the 2014 Russian IGA in relation to nuclear procurement and then in tabling it under sec 231(3) of the Constitution rather than sec 231(2)?
  - 3. Did the Minister breach the Constitution in tabling the US IGA and South Korean IGA in relation to nuclear cooperation two decades and nearly five years, respectively after they had been signed?

# CHRONOLOGY OF EVENTS

- [21] Before dealing with the issues it is useful to set out a chronology of events as they relate to the sec 34 determinations and the various IGA's concluded by the respondents relating to nuclear issues.
  - In March 2011 the Minister gazetted the Integrated Resource Plan for Electricity 2010-2030 (IRP2010) which the Department of Energy itself stated should be revised every two years, but which, as at the date of hearing, had yet to be revised.
  - 2. On 11 November 2013 the Minister signed a determination under sec 34(1) of ERA in relation to the requirement for and procurement of 9 600MW of electricity from nuclear energy which secured NERSA's concurrence on 17 December 2013.
  - On 20 September 2014 the President signed a minute approving the Russian IGA in relation to a strategic nuclear partnership and authorised the Minister to sign the agreement.
  - 4. The following day, the Minister signed the agreement on behalf of the Government.

- 5. A day later, on 22 September 2014, the Department of Energy and Russia's atomic energy agency ('Rosatom'), released identical press statements confirming their joint understanding of what the two governments had agreed, and advising that on 22 September 2014 the Russian Federation and the Republic of South Africa had signed an Intergovernmental Agreement on Strategic Partnership and Cooperation in Nuclear Energy and Industry. <sup>1</sup>
- 6. The press releases recorded inter alia that:

'The Agreement lays the foundation for the large-scale nuclear power plants (NPP) procurement and development programme of South Africa based on the construction in RSA of new nuclear power plants with Russian VVER reactors with total installed capacity of up to 9.6 GW (up to 8 NPP units). These will be the first NPPs based on the Russian technology to be built on the African continent. The signed Agreement, besides the actual joint construction of NPPs, provides for comprehensive collaboration in other areas of the nuclear power industry, including construction of a Russian-technology based multipurpose research reactor, assistance in the development of South-African nuclear infrastructure, education of South African nuclear specialists in Russian universities and other areas.'

- 7. In a subsequent press release, however, the Department of Energy described the Russian IGA as initiating 'the preparatory phase for the procurement for the new nuclear build programme' and stated that '(s)imilar agreements are foreseen with other vendor countries that have expressed an interest in supporting South Africa in this massive programme'.<sup>2</sup>
- 8. In further press releases in late 2014 and early 2015 the Department of Energy advised that it had conducted vendor parades in relation to nuclear procurement, first with Russia and then with China, France, South Korea and the United States.

<sup>&</sup>lt;sup>1</sup> Media Release "Russia and South Africa sign agreement on strategic partnership in nuclear energy" Pretoria, 22 September 2014 – record volume 1 p 131.

<sup>&</sup>lt;sup>2</sup> Media Release "Minister Joemat-Petterson concludes her visit to Vienaa, Austria" 23 September 2014 – record volume 4 p 1293.

- 9. After entering into the Russian IGA, the Government also entered into IGA's with China and France in late 2014.
- 10. On 10 June 2015 the Minister authorised the submission for tabling in Parliament of various IGA's signed with various nuclear vendor countries in accordance with sec 231(3) of the Constitution.
- 11. The following IGA's were tabled:
  - 11.1 Agreement for Cooperation between the Government of the Republic of South Africa and the United States of America concerning Peaceful Uses of Nuclear Energy ('the US IGA'), signed on 25 August 1995;
  - 11.2 Agreement between the Government of the Republic of Korea and the Government of the Republic of South Africa regarding Cooperation in the Peaceful Uses of Nuclear Energy ('the South Korean IGA'), signed on 8 October 2010;
  - 11.3 Agreement between the Government of the Republic of South Africa and the Government of the Russian Federation on Strategic Partnership and Cooperation in the fields of Nuclear Power and Industry ('the Russian IGA'), signed on 21 September 2014;
  - 11.4 Agreement between the Government of the Republic of South Africa and the Government of the French Republic on Cooperation in the Development of Peaceful Uses of Nuclear Energy, dated 14 October 2014;
  - 11.5 Agreement between the Government of the Republic of South Africa and the Government of the People's Republic of China on Cooperation in the field of Civil Nuclear Energy Projects, signed on 7 November 2014.
- 12. On 21 December 2015 the Minister's 2013 sec 34 determination was made public by publication in the government gazette.

13. On 8 December 2016 the Minister issued a further determination under sec 34(1) of ERA in relation to the requirement for and procurement of 9 600MW of electricity from nuclear energy with NERSA's concurrence, and published it in the government gazette on 14 December 2016.

### THE SECTION 34 DETERMINATIONS

- [22] Before setting out the terms of the 2013 sec 34 determination regard must be had to the relevant empowering legislation. The preamble to ERA records that its purposes were inter alia to establish a national regulation framework for the electricity supply industry and to make NERSA the custodian and enforcer of the national electricity regulatory framework. Section 2 provides that amongst the objects of ERA are to:
  - '(a) achieve the efficient, effective, sustainable and orderly development and operation of electricity supply infrastructure in South Africa;
  - (b) ensure that the interests and needs of present and future electricity customers and end users are safeguarded and met, having regard to the governance, efficiency, effectiveness and long-term sustainability of the electricity supply industry within the broader context of economic energy regulation in the Republic;
  - (g) facilitate a fair balance between the interests of customers and end users, licensees, investors in the electric supply industry and the public.'
- [23] Section 34 of ERA deals with the subject of new generation capacity and provides in part as follows:
  - '(1) The Minister may, in consultation with the Regulator
    - (a) determine that new generation capacity is needed to ensure the continued uninterrupted supply of electricity;
    - (b) determine the types of energy sources from which electricity must be generated, and the percentages of electricity that must be generated from such sources;

- (c) determine that electricity thus produced may only be sold to the persons or in the manner set out in such notice;
- (d) determine that electricity thus produced must be purchased by the persons set out in such notice;
- (e) require that new generation capacity must:
  - (i) be established through a tendering procedure which is fair, equitable, transparent, competitive and cost-effective;
  - (ii) provide for private sector participation.
- 2. ...
- 3. The Regulator, in issuing a generation licence
  - a) is bound by any determination made by the Minister in terms of subsection (1);
  - b) may facilitate the conclusion of an agreement to buy and sell power between a generator and a purchaser of that electricity.'
- [24] Section 34(1) therefore operates as the legislative framework by which any decision that new electricity generation capacity is required and any decision taken by the Minister in that regard, has no force and effect unless and until NERSA agrees with the Minister's decision.
- [25] Commenting on the role of administrative law in the field of electricity regulation Klees<sup>3</sup> states as follows:

'The significance of administrative law for environmental law is beyond dispute. Glazewski describes environmental law as "administrative law in action, as environmental conflicts frequently turn on the exercise of administrative decision-making powers". Something similar could be said of NERSA's decision-making powers under the ERA.'

<sup>&</sup>lt;sup>3</sup> A Klees *Electricity Law in South Africa* (2014) p 16 para 3.4.3.

[26] The Minister's 2013 determination read, insofar as it is relevant, as follows:

'The Minister of Energy ... in consultation with ... ("NERSA"), acting under section 34(1) of the Electricity Regulation Act 4 of 2006 ... has determined as follows:

- 1. that energy generation capacity needs to be procured to contribute towards energy security and to facilitate achievement of the greenhouse gas emission targets for the Republic of South Africa, accordingly, 9 600 megawatts (MW) should be procured to be generated from nuclear energy ("nuclear programme"), which is in accordance with the capacity allocated under the Integrated Resource Plan for Electricity 2010-2030 ...;
- 2. electricity produced from the new generation capacity ("the electricity"), shall be procured through tendering procedures which are fair, equitable, transparent, competitive and cost-effective;
- 3. the nuclear programme shall target connection to the Grid as outlined in the IRP2010-2030 (or as updated), taking into account all relevant factors including the time required for procurement;
- 4. the electricity may only be sold to the entity designated as the buyer in paragraph 7 below, and only in accordance with the power purchase agreements and other project agreements to be concluded in the course of the procurement programmes;
- 5. the procurement agency in respect of the nuclear programme will be the Department of Energy;
- 6. the role of the procurement agency will be to conduct the procurement process, including preparing any requests for qualification, request for proposals and/or all related and associated documentation, negotiating the power purchase agreements, facilitating the conclusion of the other project agreements, and facilitating the satisfaction of any conditions precedent to financial closure which are within its control;
- 7. the electricity must be purchased by Eskom Holdings SOC Limited or by any successor entity to be designated by the Minister of Energy, as buyer (off-taker); and

8. the electricity must be purchased from the special purpose vehicle(s) set up for the purpose of developing the nuclear programme.'

[27] On 11 November 2013 the Minister's predecessor wrote to the Chairperson of NERSA requesting its concurrence in the proposed determination as set out above. Some five weeks later, on 20 December 2013, the Chairperson advised the Minister's predecessor that NERSA had resolved to concur in the proposed determination. NERSA's decision was taken at a meeting of its board held on 26 November 2013, two weeks after receiving the Minister's proposed determination. Minutes of those meetings record its reasons for concurring with the Minister's proposed determination.

WERE THE SECTION 34 DETERMINATIONS ADMINISTRATIVE ACTION AND, IF SO, WERE THEY LAWFUL, REASONABLE AND PROCEDURALLY FAIR?

[28] The right to just administrative action is enshrined in sec 33 of the Constitution and provides that everyone has the right to 'administrative action that is lawful, reasonable and procedurally fair' and that national legislation must be enacted to give effect to the right. Administrative action is then defined in section 1 of the Promotion of Administrative Justice Act, 3 of 2000 ('PAJA') in part as follows:

'... any decision taken, or any failure to take a decision, by -

- (a) an organ of state, when -
  - (i) exercising a power in terms of the Constitution or a provincial constitution; or
  - (ii) exercising a public power or performing a public function in terms of any legislation; or

which adversely affects the rights of any person and which has a direct, external legal effect, but does not include -

(aa) the executive powers or functions of the National Executive, including the powers or functions referred to in ...'

[29] Amongst the excluded powers or functions is sec 85(2)(b) of the Constitution which provides that the President exercises the executive authority, together with other members of the Cabinet by,

'(b) developing and implementing national policy'.

[30] On behalf of the applicants it was contended that it was unnecessary to determine whether the 2013 sec 34 determination amounted to executive action or administrative action since even if it was the former it was subject to rationality review; therefore, the argument continued, the real question was whether the determination amounted to nothing more than policy (or as it was put on behalf of the respondents - 'an encased policy directive'). In SARFU<sup>4</sup> the Constitutional Court declared that the distinction between executive and administrative action boils down to a distinction between the implementation of legislation, which is administrative action, and the formulation of policy, which is not. The Court stated that where the line is drawn will depend primarily upon the nature of the power and the factors relevant to this consideration which are in turn, the source of the power, the nature of the power, its subject matter, whether it involves the exercise of a public duty and whether it is related to policy matters or the implementation of legislation.

[31] Woolman<sup>5</sup> cautions against the over extension of executive policy decisions so as to exclude a large range of actions from the application of the right to just administrative action. The authors contend that it is important to distinguish between policy in the narrow sense and policy in the broad sense, of which only the latter should be excluded

<sup>&</sup>lt;sup>4</sup> President of the Republic of South Africa and Others v South African Rugby Football Union and Others 2000 (1) SA 1 (CC).

<sup>&</sup>lt;sup>5</sup> S Woolman and M Bishop Constitutional Law of South Africa 2<sup>nd</sup> ed vol 4 [original service: 06-08] p 63-32.

from the ambit of administrative action. In *Ed-U-College*<sup>6</sup> O'Regan J stated on behalf of the Court:

'Policy may be formulated by the Executive outside of a legislative framework. For example, the Executive may determine a policy on road and rail transportation or on tertiary education. The formulation of such policy involves a political decision and will generally not constitute administrative action. However, policy may also be formulated in a narrower sense where a member of the Executive is implementing legislation. The formulation of policy in the exercise of such powers may often constitute administrative action.'

[32] In the present matter the source of the power exercised by the Minister was sec 34(1) of ERA and the nature of the power was one which had far reaching consequences for the public as a whole and for specific role-players in the electricity generation field. The determination also had external binding legal effect in that, at the very least, it bound or authorised NERSA to grant generation licences for nuclear energy subject to an overall limit of 9 600MW. Specific affected parties in this case would be not only those engaged in the field of nuclear energy generation but other electricity generation providers such as oil, gas or renewable energy inasmuch as their potential to contribute to the need for extra capacity would be removed. These factors all point towards the sec 34 determination constituting administrative action.

[33] Given the critical role that NERSA has in the making of a ministerial determination in terms of sec 34 of ERA, regard must also be had to its powers and the manner in which it is required to exercise these. NERSA itself was established in terms of NERA which was promulgated to establish a single regulator to regulate the electricity, piped-gas and petroleum pipeline industries.

<sup>&</sup>lt;sup>6</sup> Permanent Secretary, Department of Education and Welfare, Eastern Cape, and Another v Ed-U-College (PE) (Section 21) Inc 2001 (2) SA 1 (CC) para 18.

- [34] Section 9 of NERA sets out the duties of members of the energy regulator who must inter alia:
  - '(a) act in a justifiable and transparent manner whenever the exercise of their discretion is required;
  - (c) act independently of any undue influence or instruction;
  - (f) act in the public interest.'
- [35] Section 10 of NERA, which plays an important role in this matter, sets out the requirements for the validity of NERSA's decisions and provides as follows:
  - 1. Every decision of the Energy Regulator must be in writing and be -
    - (a) consistent with the Constitution and all applicable laws;
    - (b) in the public interest;
    - (c) ...
    - (d) taken within a procedurally fair process in which affected persons have the opportunity to submit their views and present relevant facts and evidence to the Energy Regulator;
    - (e) based on reasons, facts and evidence that must be summarised and recorded; and
    - (f) explained clearly as to its factual and legal basis and the reasons therefor.
  - 2. Any decision of the Energy Regulator and the reasons therefor must be available to the public except information that is protected in terms of the Promotion of Access to Information Act, 2000 (Act No. 2 of 2000).
  - 3. Any person may institute proceedings in the High Court for the judicial review of an administrative action by the Energy Regulator in accordance with the Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000).

4. a) Any person affected by a decision of the Energy Regulator sitting as a tribunal may appeal to the High Court against such decision.

[36] There is nothing to suggest that the decision taken by NERSA to concur in the Minister's proposed 2013 sec 34 determination was one which fell outside the ambit of sec 10 of NERA. An independent requirement for a valid decision of this nature was thus that it be taken 'within a procedurally fair process in which affected persons have the opportunity to submit their views and present relevant facts and evidence to the Energy Regulator'. Section 10(3) specifically provides for judicial review of administrative action by NERSA.

[37] Against this background, when regard is had to the definition of administrative action in PAJA it is clear that all its elements are satisfied at least as far as NERSA's role in the sec 34 determination. NERSA is undoubtedly an organ of state which, in taking the decision to concur with the Minister's proposed determination, was 'exercising a public power or performing a public function' in terms of legislation, namely, sec 34 of ERA and sec 10 of NERA. That decision had a direct, external legal effect and, at the least, adversely affected the rights of energy producers outside the stable of nuclear power producers. None of the exemptions or qualifications referred to in sec 1(b)(aa) – (ii) of PAJA are met.

[38] In regard to the requirement that the action must 'adversely affect the rights of any person' there is authority that this threshold must not be interpreted restrictively. In Grey's Marine<sup>7</sup> the Supreme Court of Appeal dealt with this requirement, Nugent JA stating as follows:

<sup>&</sup>lt;sup>7</sup> Grey's Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others 2005 (6) SA 313 (SCA).

'While PAJA's definition purports to restrict administrative action to decisions that, as a fact, "adversely affect the rights of any person", I do not think that a literal meaning could have been intended. For administrative action to be characterised by its effect in particular cases (either beneficial or adverse) seems to me to be paradoxical and also finds no support from the construction that has until now been placed on s 33 of the Constitution. Moreover, that literal construction would be inconsonant with s 3(1) [of PAJA], which envisages that administrative action might or might not affect rights adversely. The qualification, particularly when seen in conjunction with the requirement that it must have a "direct and external legal effect", was probably intended rather to convey that administrative action is action that has the capacity to affect legal rights, the two qualifications in tandem serving to emphasise that administrative action impacts directly and immediately on individuals."

[39] In Steenkamp<sup>9</sup> Moseneke DCJ held that a decision to award or refuse a tender constitutes administrative action because the decision 'materially and directly affects the legal interests or rights of tenderers concerned' giving further weight to a non-restrictive interpretation of this requirement.

[40] The power exercised by the Minister in terms of sec 34(1) of ERA is unusual in that any decision on his part is inchoate until such time as NERSA concurs therein and the sec 34 determination is thereby made. It is, however, the sec 34 determination which is challenged as unfair, unlawful and unreasonable administrative action. Having concluded that NERSA's role in concurring in the proposed determination amounts to administrative action for the reasons furnished, it is conceptually difficult to view the sec 34 determination, as a whole, as anything other than administrative action. Moreover, if NERSA's action, as a vital link in the chain which makes up the sec 34 determination, does not meet the test for fair administrative action, little point is served in scrutinizing any decision by the Minister, prior to the sec 34 determination being made, for fair

<sup>8</sup> Grey's Marine n 7 para 23.

Steenkamp NO v Provincial Tender Board, Eastern Cape 2007 (3) SA 121 (CC) para 21.

administrative action. One link, namely NERSA's action having proved to be fatally flawed from an administrative law point of view, the chain, i.e. the sec 34 determination, is broken.

- [41] On behalf of the respondents it was contended that the requirement that 'every decision' of NERSA had to comply with the requirements of sec 10 of NERA could not be taken literally. Although internal decisions of NERSA which fall outside the requirements of sec 10 can readily be imagined, its decision to concur in the Minister's proposed determination can hardly be categorised as a rote, everyday decision. Indeed the decision to formally expand the nuclear procurement programme to 9 600MW must surely rank as one of the most important decisions taken by NERSA in the recent past.
- [42] Section 3 of PAJA echoes sec 10 of NERA to the effect that administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair. It stipulates that a fair administrative procedure will depend on the circumstances of each case. Also pertinent is sec 4 of PAJA which deals with administrative action affecting the public and provides that the administrator:

'(I)n order to give effect to the right to procedurally fair administrative action, must decide whether -

- (a) to hold a public inquiry in terms of subsection (2);
- (b) to follow a notice and comment procedure in terms of subsection (3);
- (c) to follow the procedures in both subsections (2) and (3);
- (d) ... or.
- (e) to follow another appropriate procedure which gives effect to section 3.
- [43] NERSA did not oppose the application and therefore offered no explanation as to what procedure, if any, it followed to give effect to the right to procedurally fair administrative action. The minutes of the meeting of NERSA at which the decision was

taken reveal no indication of any prior process whereby 'affected persons' or the public had the opportunity to submit their views to NERSA. Nor is there any indication in the record of any such procedure having been followed. The short period of time between the Minister's request to NERSA to consider the proposed determination and its final decision, a matter of weeks, renders it most unlikely that a fair procedure could have been carried out even if NERSA had been minded to follow one.

[44] There is no serious dispute that the decision to procure 9.6GW of nuclear new generation capacity will have far reaching consequences for the South African public and will entail very substantial spending on a particular type and quantity of new infrastructure. The applicants estimated that the costs, which will ultimately be met by the public through taxes and increased electricity charges, could be approximately R1 000 000 000 000 (one trillion Rand) and this estimate was not disputed by the respondents. As the applicants point out, the allocation of such significant resources to the project will inevitably effect spending on other social programmes in the field of education, social assistance of health services and housing. They also point out that the decision embodied in the sec 34 determination has potentially far reaching implications for the environment.

[45] In my view, in light of these considerations, a rational and a fair decision-making process would have made provision for public input so as to allow both interested and potentially affected parties to submit their views and present relevant facts and evidence to NERSA before it took a decision on whether or not to concur in the Minister's proposed determination.

[46] For these reasons, I consider that NERSA's decision to concur in the Minister's proposed 2013 determination without even the most limited public participation process renders its decision procedurally unfair and in breach of the provisions of sec 10(1)(d) of NERA read together with sec 4 of PAJA.

[47] Even if I am wrong in concluding that NERSA's decision to concur (or the combined decision of the Minister and NERSA) amounted to administrative action, the decision/s still have to satisfy the test for rational decision-making, as part of the principle of legality. Applying this to the applicants' challenge on the basis of an unfair procedural process the question is whether the decision by either the Minister or NERSA (or the combined decision of the Minister and NERSA) fell short of constitutional legality for want of consultation with interested parties.

[48] Our courts have recognised that there are circumstances in which rational decision-making calls for interested persons to be heard. In *Albutt v Centre for the Study of Violence and Reconciliation, and Others*<sup>10</sup> the Court had to decide inter alia whether the President was required, before exercising a power to pardon offenders whose offences were committed with a political motive, to afford a hearing to victims of the offences. It was held that the decision to undertake the special dispensation process under which pardons were granted without affording the victims an opportunity to be heard had to be rationally related to the achievement of the objectives of the process.<sup>11</sup>

[49] In Democratic Alliance v President of the Republic of South Africa and Others<sup>12</sup> Yacoob ADCJ stated:

<sup>10 2010 (3)</sup> SA 293 (CC).

<sup>&</sup>lt;sup>11</sup> Albutt n 10 para 68-69.

<sup>12 2013 (1)</sup> SA 248 (CC) para 34.

'It follows that both the process by which the decision is made and the decision itself must be rational. Albut is authority for the same proposition.'

## He went on to state:

'The conclusion that the process must also be rational in that it must be rationally related to the achievement of the purpose for which the power is conferred, is inescapable and an inevitable consequence of the understanding that rationality review is an evaluation of the relationship between means and ends. The means for achieving the purpose for which the power was conferred must include everything that is done to achieve the purpose. Not only the decision employed to achieve the purpose, but also everything done in the process of taking that decision, constitutes means towards the attainment of the purpose for which the power was conferred.' 13

[50] In the present matter NERSA must have been aware that there were sectors of the public with either special expertise or a special interest regarding the issue of whether it was appropriate for extra generation capacity to be set aside for procurement through nuclear power. In addition, in taking the decision, NERSA was under a statutory duty to act in the public interest and in a justifiable and transparent manner whenever the exercise of their discretion was required but also to utilise a procedurally fair process giving affected persons the opportunity to submit their views and present relevant facts and evidence. These requirements were clearly not met by NERSA in taking its far reaching decision to concur in the Minister's sec 34 determination. It has failed to explain, for one, how it acted in the public interest without taking any steps to ascertain the views of the public or any interested or affected party. For these reasons I consider that NERSA's decision fails to satisfy the test for rationality based on procedural grounds alone.

<sup>13</sup> Democratic Alliance n 12 para 36.

# A FURTHER PROCEDURAL CHALLENGE BASED ON DELAY

- [51] There is another procedural challenge to the 2013 sec 34 determination which is based on the delay in gazetting the decision. The facts were that the Director-General in the Department of Energy submitted a decision memorandum to the Minister on 8 November 2013. The recommendation to the Minister was that she:
  - '7.1. approves the sec 34 determination in annexure A for promulgation in the government gazette, so that the Nuclear Procurement process can be launched; and
  - 7.2. signs the attached letter to NERSA seeking their concurrence'. 14
- [52] The Minister approved and adopted the recommendation on 11 November 2013 whilst NERSA concurred in the decision, sending a letter to this effect to the Minister on 20 December 2013.
- [53] There was no suggestion in either the decision memorandum, the Minister's approval of the recommendation or in NERSA's concurrence in the decision that it should <u>not</u> be gazetted. This last aspect is not surprising given that sec 9 of NERA provides that NERSA must act in a 'justifiable and transparent manner and in the public interest'. More pointedly sec 10 of NERA requires that any decision of NERSA and the reasons therefor 'must be available to the public'. It was, however, only on 21 December 2015, some two years after the sec 34 determination was made that it was gazetted. This was the first occasion on which the 2013 sec 34 determination was made public. The gazetting followed a further decision memorandum from the Director-General to the

<sup>&</sup>lt;sup>14</sup> Memorandum – Department of Energy "Determination in respect of the Nuclear Programme" (11 November 2013) – record volume 2 p 488 para 8.6.

Minister dated 1 December 2015<sup>15</sup> which sought to explain why the determination had not been gazetted earlier as follows:

'3.4 Although the determination process was completed in 2014 with NERSA and signed by the previous Minister of Energy, Ben Martins, the determination was not gazetted due to change in the leadership in the Ministry and to further conduct some work prior to gazetting. As a result there has been progress on the nuclear build work done by the Department and relevant stakeholders, it is therefore deemed appropriate to publish it. The determination needs to be gazetted ...'

There is, however, no indication what work had to be conducted prior to gazetting and no evidence thereof in the record.

[54] As the applicants point out, however, the sec 34 determination might never have been communicated had the present application not been launched and the record obtained from the respondents. This is borne out by the decision memorandum in which the Director-General explained to the Minister that the publishing of the determination had 'become urgent' as the Department was facing the present litigation wherein the applicants claimed that 'the Minister has not published a Section 34 determination nor conducted a public participation process and therefore any decisions to facilitate, organise, commence or proceed with the procurement of nuclear new generation capacity is unlawful'. The memorandum proceeds:

'3.6 During the meeting of 27 November 2015 to brief the legal counsel defending the Department ... (t)he legal counsel requested to include the determination when filing the record for the court papers. The legal councel (sic) advised that the inclusion of the determination in the answering affidavit will weaken the case for the applicant as it will show that their application is based on false assumption.'

<sup>16</sup> *Memorandum* n 15 p 110 para 3.5.

<sup>&</sup>lt;sup>15</sup> Memorandum – Department of Energy "Determination under Section 34 (1) of the Electricity Regulation Act No. 4 of 2006 – Nuclear Procurement Programme" (1 December 2015) – record volume 7 p 108 document no. 19.2.

[55] It requires mention that in July 2015 the applicants' attorney wrote to the Minister raising a number of questions regarding nuclear new generation capacity procurement and compliance with any related statutory or legal processes. One of the questions was whether the Minister had, in consultation with NERSA, made any determinations in terms of sec 34(1)(a) and (b) of ERA that new generation capacity was needed and must be generated from nuclear energy sources. No substantive reply was received from the Minister where after the present application was launched in October 2015.

[56] Various consequences flow from the Minister's failure to gazette the 2013 sec 34 determination after NERSA's concurrence therein. Firstly, until the gazetting in December 2015 the Minister was in breach of his/her own decision. Secondly, it is open to serious question whether the 2013 sec 34 determination could have had any legal effect until such time as it was gazetted. Although ERA does not require that a sec 34 determination be gazetted this is one of the recognised means for giving public notice of a decision. In *SARFU*<sup>17</sup> the Constitutional Court held in regard to the President's appointment of a commission of enquiry that:

In law, the appointment of a commission only takes place when the President's decision is translated into an overt act, through public notification. [...] Section 84(2)(f) does not prescribe the mode of public notification in the case of the appointment of a commission of inquiry but the method usually employed, as in the present case, is by way of promulgation in the Government Gazette. The President would have been entitled to change his mind at any time prior to the promulgation of the notice and nothing which he might have said to the Minister could have deprived him of that power. Consequently, the question whether such appointment is valid, is to be adjudicated as at the time when the act takes place, namely at the time of promulgation.'

<sup>&</sup>lt;sup>17</sup> SARFU n 4 para 44.

- [57] The inordinate delay in gazetting the 2013 sec 34 determination raises a further problem inasmuch as NERSA's consent to the gazetting in December 2015 was neither sought nor obtained. This raises the question of whether NERSA's concurrence in 2013 in the Minister's proposed determination necessarily constituted a valid concurrence in 2015. Developments in the intervening two years may well have afforded NERSA material reason to question whether nuclear new generation capacity was required, the amount required or other elements of the 2013 sec 34 determination. Furthermore, had NERSA's concurrence been sought afresh in December 2015, new factors which might have emerged from a fresh public participation process may have changed its initial views.
- [58] In these circumstances the failure to gazette or otherwise make the determination public for two years not only breached the Minister's own decision, thus rendering it irrational and unlawful, but violated the requirements of open, transparent and accountable government. Furthermore, since the sec 34 determination was in effect only made on publication, the Minister's failure to consult NERSA anew in December 2015 on her decision to gazette the determination in unaltered form constituted a breach of sec 34 of ERA, a mandatory empowering section.
- [59] These defects, in my view, rendered the Minister's 2013 sec 34 determination unconstitutional and unlawful, in the latter case by virtue of breaches of the principle of legality and thus liable to be set aside.

## SUBSTANTIVE CHALLENGES TO THE 2013 SECTION 34 DETERMINATION

[60] Apart from the grounds relating to the procedural fairness of the 2013 sec 34 determination, the applicants raise several substantive grounds of review in challenging

the 2013 determination. They contend that the decision contained in the 2013 sec 34 determination was irrational, unreasonable and taken without regard to relevant considerations, or with regard to irrelevant considerations. Commencing with the Minister's decision, the applicants contend that he irrationally relied upon the outdated IRP2010. It would appear that at the time the Minister took the decision which led to the sec 34 determination, the IRP2010-had been updated although it was still in draft form and a further ground of review is that the Minister had failed to have regard to the contents of the draft update. A further ground is that the determination contained no specific procedure for the procurement of nuclear new build capacity, the applicants contending that this was in breach of sec 34 of ERA, read with sec 217 of the Constitution. As far as NERSA's role is concerned, the applicants' substantive challenges are firstly that NERSA erroneously viewed its role as no more than a rubber stamp for the Minister's initial decision and, secondly, that it too relied on the outdated IRP2010.

[61] Given the finding that the challenges based on the procedural fairness of the 2013 determination and its delayed publication must succeed, I consider that no point is served by considering the merits of the substantive challenges to the 2013 determination based on reasonableness or rationality.

# THE 2016 DETERMINATION

[62] I turn now to deal with the challenge to the 2016 determination which was gazetted on 14 December 2016. The core of the 2016 sec 34 determination is the same as that of the 2013 determination, namely, 'that energy generation capacity needs to be procured to contribute towards energy security and to facilitate achievement' of the country's 'greenhouse gas emission targets ... accordingly, 9 600 megawatts (MW) should be procured to be generated from nuclear energy'; secondly, that the electricity so

produced is to be procured through 'fair, equitable, transparent, competitive and costeffective' tendering procedures. However, the 2016 determination provided 'that the
procurer in respect of the nuclear programme shall be the Eskom Holdings (SOC)
Limited or its subsidiaries' as opposed to 2013 determination which appointed to the
Department of Energy to this role. 18

[63] The background to the 2016 determination appears from the Minister's supplementary affidavit and the documents that form the Minister's and NERSA's record of decision which were attached thereto. During September 2016 the Minister received legal advice with regard to the development of a procurement strategy for the nuclear programme. This advice 'resulted in revisiting of the appointment and role of the DOE (Department of Energy) as the designated procurement agency in respect of the nuclear procurement programme'. Thereafter, on 29 September 2016, the Department's Director-

DETERMINATION UNDER SECTION 34(1) OF THE ELECTRICITY REGULATION ACT 4 OF 2006

#### PART A

The Minister of Energy ("the Minister"), in consultation with the National Energy Regulator of South Africa ("NERSA"), acting under section 34(1) of the Electricity Regulation Act 4 of 2006 (as amended) (the "ERA") has determined as follows:

<sup>&</sup>lt;sup>18</sup> The 2016 sec 34 determination reads in full as follows:

<sup>&#</sup>x27;NUCLEAR PROGRAMME

that energy generation capacity needs to be procured to contribute towards energy security and to facilitate
achievement of the greenhouse gas emission targets for the Republic of South Africa, accordingly, 9 600
megawatts (MW) should be procured to be generated from nuclear energy ("nuclear programme"), which is
in accordance with the capacity allocated under the Integrated Resource Plan for Electricity 2010-2030
(published as GN 400 of 06 May 2011 in Government Gazette No. 34263) ("IRP 2010-2030" or as
updated);

<sup>2.</sup> that electricity produced from the new generation capacity ("the electricity"), shall be procured through tendering procedures which are fair, equitable, transparent, competitive and cost-effective and provide for private sector participation;

<sup>3.</sup> that the nuclear programme shall target connection to the Grid as outlined in the IRP2010-2030 (or as updated), taking into account all relevant factors including the time required for procurement;

<sup>4.</sup> that the procurer in respect of the nuclear programme shall be the Eskom Holdings (SOC) Limited or its subsidiaries.'

General provided the Minister with a decision memorandum, for approval, in relation to the proposed 2016 determination.<sup>19</sup>

- [64] The rationale for the 2016 determination is contained in paras 3.1 3.4 of the decision memorandum and which read as follows:
  - '3.1 On 27 September 2016, the Minister of Energy informed the Department that it was her intention to have Eskom Holdings (SOC) Limited (hereinafter referred to as "Eskom") procure and be the owner operator of the new nuclear power plants.
  - 3.2 It appeared that one of the factors the Minister considered in her decision, was that it was indicated in a legal opinion sought from Adv Marius Oosthuizen that the Minister and/or the Department of Energy is not empowered by law to directly procure on behalf of other juristic entities, which are also organs of state (such as Eskom) unless their consent is obtained. It was indicated by an authorised representative from Eskom that Eskom would not provide consent for the Minister and/or the Department of Energy to procure on their behalf.
  - 3.3 In order effect (sic) the Minister's desired change(s) to the Determination, it is required that the existing Section 34(1) Determination be amended.
  - 3.4 Accordingly, the attached revised Section 34(1) Determination (Annexure A) makes provision for Eskom (or its subsidiaries in the event that a special purpose vehicle will be created and utilised by Eskom to procure new generation capacity from nuclear power) to be the procurement agency and be the owner operator of the new nuclear build programme.'
- [65] The Minister duly approved the 2016 decision memorandum on 18 October 2016. On 5 December 2016 a letter was sent to the Chairperson of NERSA, attaching a draft of the proposed 2016 determination and seeking its concurrence therein. The board of NERSA took its decision by way of a round robin resolution on or about 8 December

<sup>&</sup>lt;sup>19</sup> Decision Memorandum – Department of Energy "Determination under Section 34(1) of the Electricity Regulation Act 4 of 2006 – Nuclear Procurement Programme" (29 September 2016) – record volume 5A p 1546.

2016.<sup>20</sup> The resolution was approved by the acting CEO of NERSA on 5 December 2016 (the same day as the Minister's letter requesting NERSA's concurrence was sent) and subsequently by the Chairperson on 8 December 2016. On 13 December 2016, at the initial hearing of this matter the applicants, together with the public, learnt for the first time that the 2016 determination had been made and it was published in the government gazette the following day. The applicants seek to review the 2016 determination on various procedural and substantive grounds.

[66] Again, relying on sec 3 and 4 of PAJA and sec 10(1)(d) of NERA, they contend that the 2016 sec 34 determination was procedurally unfair inasmuch as it was not preceded by any public participation process or consultation, whether by way of a notice and comment procedure or otherwise.

[67] From the record it appears that NERSA gave its concurrence to the 2016 sec 34 determination within three days of being asked by the Minister and there was therefore no question of any public participation process or any form of external consultation prior to NERSA's decision. Given the elapse of two years since NERSA's concurrence in the 2013 determination and the changed format of the determination, most particularly in its designation of Eskom Holdings (SOC) Limited or its subsidiaries as the procurer in respect of the nuclear programme it was, in my view, incumbent upon NERSA to afford members of the public and/or interested and affected persons (including the applicants) an opportunity to influence the decision. My reasons for reaching this conclusion are in principle the same as those underlying the same conclusion in respect of the 2013 sec 34 determination.

<sup>&</sup>lt;sup>20</sup> Round Robin Resolution – NERSA "Confirmation of the Approval of the Round Robin Resolution: Concurrence with the Proposed Amendment of Section 34(1) of the Electricity Regulation Act, 2006 (Act No. 4 of 2006) Determination." (8 December 2016) – record volume 5A p 1566.

# CAN THE 2013 AND THE 2016 SECTION 34 DETERMINATIONS CO-EXIST?

[68] A further procedural challenge to the 2016 sec 34 determination arises from the fact that it fails to expressly withdraw or amend the 2013 determination. When the Minister wrote to NERSA requesting its concurrence in the 2016 determination she indicated that the 2013 determination had to be 'amended'. According to its resolution, NERSA similarly took the view that it was concurring in an amendment to the 2013 sec 34 determination. The recommendation which it approved was that '(c)oncurrence with the proposed amendment by the Minister ... ' and the 'amendment of the decision of the Energy Regulator of 26 November 2013'. However, the determination does not on its own terms amend, revise or withdraw the 2013 sec 34 determination and nor does it purport to do so. It makes no reference at all to the 2013 sec 34 determination which results in the anomalous situation of there being two gazetted sec 34 nuclear determinations which are mutually inconsistent. By way of example, the first designates the Department of Energy as the procuring agency in the nuclear power programme whilst the second designates Eskom.

[69] In these circumstances, contend the applicants, the 2016 determination is irrational or based on material errors of law or fact, thereby violating the principle of legality. In response, the respondents contend that this ground of review is based on no more than semantics since the 2016 determination was in substance an amendment and was intended and accepted as such by the Minister and NERSA respectively.

[70] This line of argument does not, however, take into account the consequences of this Court finding that the 2013 determination was unconstitutional and invalid. In that event, the earlier determination was valid *ab initio* i.e. a nullity from the outset and could

<sup>&</sup>lt;sup>21</sup> Round Robin Resolution n 20 p 1570 para 6.1.

not be amended.<sup>22</sup> This principle was confirmed by the Constitutional Court in *Kruger v President of the Republic of South Africa*<sup>23</sup> which dealt with a proclamation issued by the President which the High Court had held to be null and void and of no force and effect. The President issued a second proclamation in substitution for the first in order to correct a bona fide and acknowledged error in the first and was worded as *'amending'* the first proclamation.

[71] The Court found that the first proclamation was objectively irrational and therefore regarded as a nullity from the outset. It found further that whilst the President could have withdrawn it before it came into force he did not have the power to amend it inasmuch as it was void from its commencement and thus could not be amended. In so finding the Court dismissed an argument that the second proclamation should be judged on its substance and not on its form, Skweyiya J stating in this regard:

'While I support in general the principle that substance should take precedence over form, that principle must yield in appropriate cases to the rule of law'.<sup>24</sup>

Accordingly, if notwithstanding that the 2016 sec 34 determination does not purport to be an amendment of the 2013 determination, it in fact was, and given the finding that the 2013 determination was invalid and unconstitutional, the 2016 determination is also invalid as an impermissible attempt to amend a nullity.

[72] I understand the respondents to also advance the argument that the 2016 determination impliedly repealed the 2013 determination. However, as the applicants point out, it does not purport to repeal the 2013 determination and neither NERSA nor

<sup>&</sup>lt;sup>22</sup> C Hoexter Administrative Law in South Africa\_2<sup>nd</sup> ed (2012) at p 547: 'An invalid act, being a nullity, cannot be ratified, "validated" or amended'.

<sup>&</sup>lt;sup>23</sup> 2009 (1) SA 417 (CC) para 61-64.

<sup>&</sup>lt;sup>24</sup> Kruger n 23 para 62.

the Minister claim that they intended to repeal the 2013 determination, which remains gazetted.

[73] On the assumption that the 2013 and 2016 sec 34 determinations (or at least part thereof) remain valid, their co-existence is in my view, highly problematic. What is the reader or interested member of the public to make of them? Are there two procurement agencies i.e. both Eskom Holdings (SOC) Limited and the Department of Energy? To whom may the electricity generated from the 9.6 GW of nuclear energy be sold? Are there no constraints in this regard (as per the 2016 determination) or must it only be sold to Eskom Holdings (SOC) Limited (as per the 2013 determination)? What is the role of the procurer? Is it as set out in para 6 of the 2013 determination or does it remain unspecified, as per the 2016 determination?

[74] Possible answers to these questions can be advanced but the lack of certainty and the need for conjecture is inimical to the rule of law. Although vagueness is not specified in PAJA as a ground of review, under the common law such a ground appears to have been recognized under the new constitutional dispensation. This ground requires administrative action to be reasonably capable of meaningful construction for it to be valid although absolute clarity is not required. In any event the grounds of review set out in PAJA are not exhaustive, sec 6(2)(i) being a catch-all provision providing that administrative action may be reviewed on other than the listed grounds if it is 'otherwise unconstitutional or unlawful'.

[75] Given the mutual inconsistency of the 2013 and 2016 sec 34 determinations, and the failure of the latter to expressly withdraw or amend the earlier determination. I

<sup>&</sup>lt;sup>25</sup> See in this regard SARFU n 4 para 227-231.

<sup>&</sup>lt;sup>26</sup> Durban Add-Ventures Ltd v Premier, KwaZulu-Natal, and Others (No 2) 2001 (1) SA 389 (N) at 400C-D.

consider that the 2016 determination was irrational and must be set aside on this basis as an independent ground of review.

# SUBSTANTIVE CHALLENGES TO THE 2016 SECTION 34 DETERMINATION

[76] The applicants also challenge the 2016 determination on various substantive grounds, contending that the Minister's decision was irrational and/or unreasonable and taken without regard to relevant considerations or with regard to irrelevant considerations. These attacks are largely based on what the applicants contend was the Minister's and NERSA's reliance on the outdated IRP2010 and the designation of Eskom as the procurer, apparently because it refused to give its consent to allow the Department of Energy to procure on its behalf. Given the finding that the 2016 determination falls to be reviewed and set aside both by reason of NERSA's failure to hold any public participation process and for its inherent irrationality, I consider it necessary to consider only one of these substantive grounds.

[77] The ground in question is directed at NERSA's role in concurring with the 2016 determination and the basis of the challenge is that the key reason for NERSA giving its concurrence was that it believed that it would be 'mala fides' for it not to concur in the Minister's proposed determination. This contention was based on an extract from NERSA's round robin resolution approving its concurrence in the Minister's proposed determination by the acting CEO of NERSA on 8 December 2016 and reads in part as follows:<sup>27</sup>

- '2.1 Background
- 2.1.4 The Minister has proposed an amendment to the determination regarding the Department of Energy as the procuring agency and to be replaced by Eskom. The

<sup>&</sup>lt;sup>27</sup> Round Robin Resolution n 20 p 1568-1570.

amendment of the determination cannot be complete without the concurrence of the Energy Regulator therefore the Minister is requesting the Energy Regulator to concur.

- 2.2 Issues
- 2.2.1 Without a decision by the Energy Regulator on the proposed amendment, the determination will not be in compliance with the Act and can negatively impact on the nuclear procurement programme.
- 2.3 Problem Statement
- 2.3.1 Without the Energy Regulator decision to concur with the proposed amendment, the nuclear procurement programme can be negatively affected.
- 2.3.2 Considering that the proposed amendment is on a determination that the Energy Regulator has already concurred (sic), it can be viewed as mala fide for the Energy Regulator to delay or refuse to concur with the proposed amendment by the Minister.
- 2.4 Motivation
- 2.4.1 The proposed amendment is procedurally and legally valid at (sic) the Energy Regulator can concur and bring finality to the implementation of the nuclear procurement programme.
- 6 RECOMMENDATIONS

It is recommended that Electricity Subcommittee approve the:

- 6.1 Concurrence with the proposed amendment by the Minister in relation to clause 5 of the Energy Regulator decision of 26 November 2013.
- 6.2 The amendment of the decision of the Energy Regulator of 26 November 2013.

It was submitted on behalf of the applicants that the key reason for NERSA giving its concurrence was that it believed that it would be 'mala fides' for it not to concur or, put differently, on the basis that since it had previously concurred some three years earlier in the 2013 sec 34 determination, it was under an obligation to approve the amendment or be seen to be acting 'mala fides'. However, the applicants contend, there was no legal or factual basis for any understanding that it would be 'mala fides' for NERSA not to concur. The 2016 sec 34 determination was, as was the 2013 determination, a culmination of the exercise of a discretionary statutory power vested in NERSA irrespective of whether it was an amendment of the prior sec 34 determination or not. In terms of sections 9 and 10 of NERA, NERSA was required, in exercising its discretion and its duty to decide whether to concur or not, to form an independent judgment and was not bound by its past concurrence in the 2013 determination. NERSA was not required to accept that the Minister's proposed determination was correct or appropriate particularly since three years had passed since it had concurred in the 2013 determination and thus underlying circumstances may well have changed. It bears repeating that sec 9(c) of NERA provides that the members of the Energy Regulator must 'act independently of any undue influence or instruction'.

[79] In the absence of any further explanation by NERSA as to why it took its decision to concur, and bearing in mind that the terms of NERSA's resolution was clearly an attempt to comply with sec 10(1)(f) of NERA i.e. 'to explain clearly its factual and legal basis and the reasons' for its concurrence, these expressed reasons must be accepted. On its own version, NERSA's concern was that it would be seen as acting mala fides if it did not concur with the Minister's proposed determination and this was one of its prime, if not the primary reason, for its decision. In these circumstances the applicants have, in my

view, established that NERSA's concurrence was predicated on a material error of law or fact and/or that it failed to act independently, as required by NERA.

## THE IGA'S

- [80] Two further issues to be determined in this matter are:
  - 1. Whether the President and the Minister violated the Constitution when deciding to sign and then table the 2014 Russian IGA in relation to nuclear issues under sec 231(3) of the Constitution rather than sec 231(2)?
  - 2. Whether the Minister violated the Constitution in tabling the US and South Korean IGA's in relation to nuclear cooperation 20 years and almost five years respectively after they had been signed?
- [81] Against the factual background set out in para 21 above, I deal firstly with the question of whether the Russian IGA was properly tabled under sec 231(3) of the Constitution. In relation to this IGA the applicants seek an order declaring:
  - the President's decision to authorise the Minister's signature, and the Minister's decision to sign, and;
  - 2. the Minister's decision to table the IGA under sec 231(3), (rather than sec 231(2)),

unconstitutional and invalid, and reviewing and setting aside these decisions.

[82] This relief is sought on the basis that the Russian IGA contains binding commitments in relation to nuclear procurement when no similar commitments were made in the IGA's concluded with other governments in relation to nuclear cooperation and it should therefore have been tabled under sec 231(2) in order to give Parliament an opportunity to consider whether to approve the agreement. The contents of the Russian IGA will be discussed below.

- [83] As mentioned earlier in response to the applicants' case, the respondents raise a number of preliminary points, namely non-joinder of the foreign governments, the alleged non-justiciability of the IGA's and the applicants alleged lack of standing to challenge the manner of tabling the IGA's in terms of sec 231 of the Constitution. On the merits, the respondents contend that failing the upholding of any of these preliminary points the Russian IGA is, upon a proper interpretation, not a 'procurement contract' with immediate financial application and falls within the category of a 'technical, administrative or executive agreement' as envisaged by sec 231(3) of the Constitution, thus not requiring ratification or accession, and was therefore properly tabled.
- [84] Section 231 of the Constitution deals with international agreements and provides, in part, as follows:
  - '(1) The negotiating and signing of all international agreements is the responsibility of the national executive.
  - (2) An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3).
  - (3) An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time.
  - (4) Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.
  - (5) ...

#### NON-JOINDER

[85] The respondents maintain that the foreign contracting states – Russia, the United States of America and South Korea – are 'essential parties' which have a direct and substantial interest in any orders which the Court might make and which thus cannot be made or carried into effect without prejudicing such parties. They contend further that the relief sought in relation to the Russian IGA is in substance an order to invalidate it by nullifying the conduct of the South African government in entering therein. As regards the US and South Korean IGA's, the respondents contend that the order sought by the applicants declaring the manner of their tabling unconstitutional and unlawful and reviewing and setting these tabling decisions aside, is also in substance an attempt to invalidate the two treaties and thus by the same token these two governments are also necessary parties.

[86] Our law recognises a limited right to object to non-joinder, the limits of which were defined as follows by Brand JA:<sup>28</sup>

'The right to demand joinder is limited to specified categories of parties such as joint owners, joint contractors and partners, and where the other party(ies) has (have) a direct and substantial interest in the issues involved and the order which the court might make.'

# [87] A full bench of this Court has held that:

'It is well established that the test whether there has been non-joinder is whether a party has a direct and substantial interest in the subject-matter of the litigation, that is, a legal interest in the subject-matter which may be prejudicially affected by the judgment or the order.'<sup>29</sup>

[88] In the present matter, leaving aside the relief relating to the Minister's signature of the agreement, no order is sought against any foreign government, the Court being asked

<sup>&</sup>lt;sup>28</sup> Burger v Rand Water Board and Another 2007 (1) SA 30 (SCA) para 7.

<sup>&</sup>lt;sup>29</sup> Tlouamma and Others v Speaker of the National Assembly and Others 2016 (1) SA 534 (WCC) para 159.

rather to determine whether the Minister's actions in terms of sec 231 of the Constitution were lawful, as a matter of domestic law. The Minister's obligations to act constitutionally and in accordance with sec 231 are owed to the citizens of this country and not to foreign governments. Seen from this perspective none of the foreign governments that are party to the IGA's have any direct and substantial legal interest, as a matter of South African domestic law, in the constitutionality of the Minister's actions. This view is borne out by recent decisions of our courts which have never required the joinder of foreign governments even where the judicial review of the executive's exercise of its domestic powers related to affairs with a foreign government.

[89] In *President of the Republic of South Africa and Others v Quagliani*, <sup>30</sup> the Constitutional Court was required to determine the validity of the government's actions in entering into an international agreement in relation to extradition with the USA in circumstances where it had been alleged that the agreement had not been validly entered into because the President had delegated his own responsibility in that regard to members of his cabinet. The Court ultimately held that the government had acted lawfully in entering into the international agreement but it was noteworthy that the United States government was not a party to the litigation and there was no suggestion that it should be, merely because the constitutional validity of the South African government's action in entering into the international agreement was to be determined.

[90] Furthermore, our courts have never required a joinder of foreign governments in cases involving challenges to the legality of executive conduct which directly implicated

<sup>30 2009 (2)</sup> A 466 (CC).

foreign governments.<sup>31</sup> In my view, it is a misnomer on the part of the respondents to state that the applicants seek orders to 'invalidate' any international agreements. The relief sought by the applicants is, at its broadest, a declaration that the decisions by the Minister and the President in signing, approving and tabling the IGA's before Parliament were unconstitutional and invalid, this as a matter of domestic constitutional law. Section 172(1)(a) of the Constitution places an obligation on the courts to declare any law or conduct inconsistent with the Constitution invalid to the extent of its inconsistency. The Court has not been asked to determine whether the IGA's are valid as a matter of international law at the international level. In the circumstances the relevant foreign governments have, as a matter of South African law, no legal interest in the domestic constitutionality of the actions of the South African government. It is not surprising therefore that the respondents were unable to cite any direct authority for the proposition that a foreign government should be joined in a matter such as the present. Instead they rely only on the authorities relating to the validity of domestic contracts enforceable as a matter of South African law.

[91] In the circumstances of this matter I consider that there is no need to join the foreign states and therefore the joinder point has no merit.

### DO THE APPLICANTS HAVE STANDING?

[92] The respondents contend that the applicants have no standing to claim any relief in relation to the tabling of the Russian IGA since, if the incorrect tabling procedure has

<sup>&</sup>lt;sup>31</sup> See in this regard Mohamed and Another v President of the Republic of South Africa and Others (Society for the Abolition of the Death Penalty in South Africa and Another Intervening) 2001 (3) SA 893 (CC); Kaunda and Others v President of the Republic of South Africa and Others 2005 (4) SA 235 (CC); Geuking v President of the Republic of South Africa and Others 2003 (3) SA 34 (CC); National Commissioner of Police v Southern African Human Rights Litigation Centre and Another 2015 (1) SA 315 (CC); Krok and Another v Commissioner, South African Revenue Service 2015 (6) SA 317 (SCA); and Minister of Justice and Constitutional Development and Others v Southern African Litigation Centre and Others 2016 (3) SA 317 (SCA).

been utilised, this is a matter for Parliament to take up with the Minister. By implication this contention extends also to the relief sought in relation to the US and South Korean IGA's. If this proposition were correct one might expect that the Speaker of the NA and the Chairperson of the NCOP would enter these proceedings and assert that point of view but instead neither opposes the relief sought in this regard.

[93] Whilst it is correct that in terms of sec 92 of the Constitution, members of the cabinet, which includes the President, are accountable collectively and individually to Parliament for the exercise of their powers and the performance of their functions, it does not follow that the applicants lack standing in relation to these issues, either acting in their own interests or in the public interest. The first applicant, Earthlife Africa-Johannesburg, is a non-governmental, non-profit voluntary association having the power to sue and be sued in its own name. The second applicant is a registered public benefit and non-profit organisation and both brought this application in terms of sec 38 of the Constitution in their own right and in the public interest as contemplated by sec 38(d).

[94] Section 38 deals with the enforcement of rights and, insofar as it is material, reads as follows:

## '38 Enforcement of rights

Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are—

- (a) anyone acting in their own interest;
- (b) ...
- (c) anyone acting as a member of, or in the interest of, a group or class of persons;

- (d) anyone acting in the public interest; and
- (e) an association acting in the interest of its members.'

[95] It has been held that the provisions of sec 38 'introduces a radical departure from the common law in relation to standing. It expands the list of persons who may approach a court in cases where there is an allegation that a right in the Bill of Rights has been infringed or threatened ... '32

[96] Section 19 of the Bill of Rights guarantees every citizen certain political rights. Many of these rights find fulfilment in the representation of such citizens in Parliament which, in terms of sec 42(2) of the Constitution, consists of the NA and the NCOP. Section 42(3) provides that the NA 'is elected to represent the people to ensure government by the people under the Constitution'. On these grounds alone, I consider that parties other than Parliament or members of Parliament have a legitimate interest in the question of whether IGA's have been properly tabled in Parliament in terms of the Constitution.

[97] In making their argument the respondents placed reliance on *Metal and Allied Workers Union and Another v State President of the Republic of South Africa and Others*<sup>33</sup> where the court dealt with a challenge to certain emergency regulations made in terms of sec 3 of the Public Safety Act, 3 of 1953 which had been promulgated in the government gazette but not tabled in Parliament within 14 days of promulgation as required by the Act. Didcott J, on behalf of the full bench, held that the purpose of tabling was to inform members of Parliament and therefore conceived for the benefit of, and enforceable by, no one but such members. However, apart from the fact that this

<sup>32</sup> Kruger n 23 paras 20-23.

<sup>&</sup>lt;sup>33</sup> 1986 (4) SA 358 (D).

judgment obviously predates the new constitutional dispensation, the court took this view 'with some hesitation', recognising the force of the argument to the contrary.<sup>34</sup>

[98] In any event the Constitutional Court has now repeatedly confirmed the broad grounds of standing in relation to constitutional challenges, including those relating to executive action. The Furthermore, the fact that the executive is accountable to Parliament in relation to the exercise of its power does not detract from the principle that the exercise of all public powers must be constitutional, comply with the principle of legality and that these powers are subject to judicial review at the instance of the public. This was well illustrated by *Economic Freedom Fighters v Speaker, National Assembly and Others* where Parliament and the President's failure to fulfil a constitutional obligation was vindicated at the instance of a political party. As was contended on behalf of the applicants, any action by the President and the Minister in violation of the Constitution are matters of legal interest to the public and to applicants representing that interest and are not merely a concern of Parliament.

[99] Finally, as the Constitutional Court has held, it is the courts that must ultimately determine whether any branch of government has acted outside of its powers. This was made clear by the following dictum of Moseneke DCJ on behalf of the Constitutional Court in *International Trade Administration Commission v SCAW South Africa (Pty) Ltd*<sup>37</sup>:

'In our constitutional democracy all public power is subject to constitutional control. Each arm of the state must act within the boundaries set. However, in the end, courts must determine whether unauthorised trespassing by one arm of the state into the

<sup>34</sup> *Ibid* at 364C-D.

<sup>&</sup>lt;sup>35</sup> Kruger n 23 paras 20 – 23.

<sup>&</sup>lt;sup>36</sup> 2016 (3) SA 580 (CC) paras 22-24.

<sup>&</sup>lt;sup>37</sup> 2012 (4) SA 618 (CC) para 92.

terrain of another has occurred. In that narrow sense, the courts are the ultimate guardians of the Constitution. They do not only have the right to intervene in order to prevent the violation of the Constitution, they also have the duty to do so.'

[100] In short, if the challenge to the constitutionality of the procedure whereby the relevant IGA's have been placed before Parliament has merit, such conduct must be declared unconstitutional irrespective of at whose behest this relief is sought. In the circumstances, I find that the applicants have standing both in their own right and in the public interest to challenge the constitutionality of the tabling of the relevant IGA's.

# IS THE RUSSIAN IGA JUSTICIABLE?

[101] The respondents contend that the Russian IGA, being an international agreement, is not or should not be justiciable by a domestic court, which may not even interpret or construe such an agreement nor may it determine the legal consequences arising therefrom. In doing so they rely primarily on the authority of *Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa and Others*<sup>38</sup> where it was held that a domestic court may not interpret or construe an international agreement nor determine the true agreement allegedly concluded between South Africa and another sovereign state.

[102] The role of the international treaty in *Swissborough* appears to have been quite different to that in the present matter. The plaintiffs had instituted action against the defendants, the first of which was the South Africa government, arising out of an alleged interference with certain mining rights held by the plaintiffs in Lesotho. The alleged interference related to the implementation of a treaty between the South African government and Lesotho's government which provided for the Lesotho Highlands Water

<sup>38 1999 (2)</sup> SA 279 (T) at 329J-330C.

project. It became necessary for the court to decide whether the determination of the true agreement between the South Africa government and the Lesotho government, as an international law agreement between two sovereign states and not incorporated into South African municipal law, was a justiciable issue. The rationale for the court's approach was that it would have to be a very particular case, even if such a case could exist, that would justify a court interfering with a foreign Sovereign. However, the court did find that it could take cognisance of the agreements between the governments of the two countries as well as the contents thereof as facts. The court was unwilling, however, to take decisions in regard to the alleged unlawful conduct of the government of Lesotho, the control of the government of Lesotho, and its relationship with the South African government. It found, as far as the latter was concerned, that there could be little doubt that this was not an area for the judicial branch of government.

[103] The situation in the present matter is quite different inasmuch as the scope of the enquiry into the Russian IGA is limited to a determination of whether it should have been tabled in Parliament in terms of sec 231(2) or 231(3) of the Constitution. There are a number of reasons why, at least for this limited purpose, the Russian IGA cannot be regarded as non-justiciable. Firstly, the conclusion and tabling of an international agreement before Parliament in terms of either sec 231(2) or 233 of the Constitution is an exercise of public power and the Constitutional Court has made clear that all such exercises of public power are justiciable in that they must be lawful and rational. These include exercises of public power relating to foreign affairs.<sup>39</sup> Secondly, should an international agreement be tabled incorrectly under sec 231(3) rather than sec 231(2) the review of any such decision can be seen as upholding rather than undermining the

<sup>&</sup>lt;sup>39</sup> See Kaunda and Others v President of the Republic of South Africa and Others 2005 (4) SA 235 (CC) para 78.

separation of powers. The separate but interrelated roles of the executive and the legislature in relation to international agreements were clarified by Ngcobo CJ in Glenister v President of the Republic of South Africa and Others<sup>40</sup> as follows:

- '[89] The constitutional scheme of s 231 is deeply rooted in the separation of powers, in particular the checks and balances between the executive and the legislature. It contemplates three legal steps that may be taken in relation to an international agreement, with each step producing different legal consequences. First, it assigns to the national executive the authority to negotiate and sign international agreements. But an international agreement signed by the executive does not automatically bind the Republic, unless it is an agreement of a technical, administrative or executive nature. To produce that result, it requires, second, the approval by resolution of Parliament.
- [95] To summarise, in our constitutional system, the making of international agreements falls within the province of the executive, whereas the ratification and the incorporation of the international agreement into our domestic law fall within the province of Parliament. The approval of an international agreement by the resolution of Parliament does not amount to its incorporation into our domestic law. Under our Constitution, therefore, the actions of the executive in negotiating and signing an international agreement do not result in a binding agreement. Legislative action is required before an international agreement can bind the Republic.'

[104] Accepting that the constitutionality and lawfulness of the exercise of powers under sec 231(2) or (3) of the Constitution by the President and the Minister is justiciable, then clearly a review of the lawfulness and rationality of the exercise of those powers may well require a court to consider the content of the relevant international agreement. It would not be possible for a court to determine whether or not a particular IGA should have been tabled under sec 231(2) or 231(3) of the Constitution without it having regard

<sup>&</sup>lt;sup>40</sup> 2011 (3) SA 347 (CC).

to the nature and contents of that agreement. If this Court were to be precluded from having regard to the contents of the Russian IGA for the limited purposes of determining whether it should have been tabled under sec 231(2) or 231(3) of the Constitution, this would render nugatory its power to subject the executive's conduct to constitutional scrutiny. An argument to the contrary was rejected by the Constitutional Court in *Mohamed v the President of the Republic of South Africa*.<sup>41</sup>

[105] For these reasons I consider that not only is it permissible for this Court to interpret the Russian IGA to determine its proper tabling procedure and whether the Minister acted unconstitutionally or not, but it is the Court's duty to do so. I find therefore that the respondents' contention that the Russian IGA is non-justiciable is without merit.

### THE TERMS OF THE RUSSIAN IGA

[106] In broad outline the applicants' case is that the Russian IGA contains binding commitments in relation to nuclear procurement, including providing the Russian Federation with an indemnification, which takes the IGA well outside the category of those of a 'technical administrative or executive nature' requiring only tabling in the NA and the NCOP within a reasonable time to bind the country. They contend further that the terms of the Russian IGA are much more far-reaching than those in any of the comparable IGA's relating to nuclear cooperation that were either tabled before Parliament at the same time or earlier. The applicants contend that as a result it was irrational for the President to approve the signature of the Russian IGA and for the Minister to sign it. They contend further that, at the very least, the Russian IGA should

<sup>&</sup>lt;sup>41</sup>Mohamed n 32 paras 70 and 71.

have been tabled under sec 231(2) of the Constitution, thereby requiring Parliamentary approval.

[107] For their part the respondents contend that should the Court find that the Russian IGA is indeed justiciable or not, a subject for the exercise of judicial restraint, it is not a procurement contract of any sort but an 'international framework agreement for cooperation between sovereign states'. They submit that the Russian IGA makes it clear that it is a bilateral international agreement providing for cooperation between two sovereign states and is not, nor was it ever intended to be, a binding agreement in relation to the procurement of new nuclear reactor plants from a particular country; the only purpose for such cooperation being the creation of conditions in which the establishment of a self-sufficient nuclear programme can be pursued.

# [108] Turning to the contents of the Russian IGA certain key provisions stand out:

- 1. Both the overall description of the agreement and the preamble refer to the establishment of a 'strategic partnership' in the field of nuclear power and industry between the two countries;
- 2. The preamble records by way of background, furthermore 'the intentions of the Government of the Republic of South Africa for the implementation of a large-scale national plan for the power sector development, involving the construction by 2030 of new nuclear power plant (hereinafter referred to as "NPP") units in the Republic of South Africa';
- 3. The preamble concludes with a reference to the 'legal fixation' of the strategic partnership in the field of nuclear power before setting out the terms of the agreement.
- 4. Article 1 provides that the agreement 'creates the foundation for the strategic partnership in the fields of nuclear power and industry... aimed at the successful implementation of the national plan for the power sector

development of the Republic of South Africa...'. It is noteworthy that none of the other IGA's make reference to the agreements creating a 'strategic partnership'.

5. Article 3, using peremptory language, provides that:

'The Parties shall create the conditions for the development of strategic cooperation and partnership in the following areas:

- i. development of a comprehensive nuclear new build program for peaceful uses in the Republic of South Africa, including enhancement of key elements of nuclear energy infrastructure ...;
- ii. design, construction, operation and decommissioning of NPP units based on the VVER reactor technology in the Republic of South Africa, with total installed capacity of about 9.6 GW;
- iii. design, construction, operation and decommissioning of the multi-purpose research reactor in the Republic of South Africa. ...'

It is common cause that the VVER reactor technology is unique to Russia.

- 6. Article 4 of the agreement is noteworthy for its specificity and detail, providing:
  - '11. The Parties collaborate in areas as outlined in Article 3 of this Agreement which are needed for the implementation of priority joint projects of construction of two new NPP units with VVER reactors with the total capacity of up to 2,4 GW at the site selected by the South African Party (either Koeberg NPP, Thyspunt or Bantamsklip) in the Republic of South Africa and other NPP units of total capacity up to 7,2GW at other identified sites in the Republic of South Africa and construction of a multi-purpose research reactor at the research centre located at Pelindaba, Republic of South Africa. The mechanism of implementation of these priority projects will be governed by separate intergovernmental agreements, in which the Parties shall agree on the sites, parameters and installed capacity of NPP units planned to be constructed in the Republic of South Africa.' [my underlining]

7. Article 6.1 provides for the establishment of a Joint Coordination Committee 'to provide guidance, to coordinate and to control the implementation of this Agreement'.

## 8. Article 6.4 provides as follows:

'In three years of entry into force of this Agreement the co-chairs of the Joint Coordination Committee shall make comprehensive review of the progress in the implementation of this Agreement and provide appropriate recommendations to the Competent Authorities of the Parties regarding further implementation of this Agreement'.

# 9. Article 7 provides that:

'Cooperation in areas as outlined in Article 3 of this Agreement, will be governed by separate agreements between the Parties, the Competent Authorities' and goes on to state '(t)he Competent Authorities of the Parties can, by mutual consent, involve third countries' organizations for the implementation of particular cooperation areas in the framework of this Agreement.'

It was contended on behalf of the applicants that the latter part of this clause would appear to preclude, absent Russia's consent, a situation where at least some of the proposed nuclear power plants are constructed or operated by other countries in addition to Russia.

# 10. Article 9 provides as follows:

'For the purpose of implementation of this Agreement the South African Party will facilitate the provision of a special favourable regime in determining tax and non-tax payments, fees and compensations, which will be applied to the projects implemented in the Republic of South Africa within the areas of cooperation as outlined in Article 3 of this Agreement, subject to its domestic legislation'.

This commitment by the South African government to afford Russia a favourable tax regime in relation to the construction of new nuclear power plants is not to be found in any other IGA under consideration.

- 11. On behalf of the applicants it was contended that in terms of Article 15 the government of the Republic of South Africa agreed to incur liability arising out of any nuclear incident occurring in relation to any nuclear power plant to be constructed in terms of the agreement, or agreements arising therefrom, and also provides an indemnification to Russia and its entities from any ensuing liability. Insofar as it is relevant, Article 15 reads:
  - '1. The authorized organization of the South African Party at any time at all stages of the construction and operation of the NPP units and Multi-purpose Research Reactor shall be the Operator of NPP units and Multi-purpose Research Reactor in the Republic of South Africa and be fully responsible for any damage both within and outside the territory of the Republic of South Africa caused to any person and property as a result of a nuclear incident ... and also in relation with a nuclear incident during the transportation, handling or storage ... of nuclear fuel and any contaminated materials ... both within and outside the territory of the Republic of South Africa. The South African Party shall ensure that, under no circumstances shall the Russian Party or its authorized organization nor Russian organizations authorized and engaged by their suppliers be liable for such damages as to the South African Party and its Competent authorities, and in front of its authorized organizations and third parties.'

It is unnecessary to analyse in detail the structure of liability indemnification which this Article provides. Its suffices to state that it clearly has potentially farreaching financial implications for the South African government or state agencies, quite apart from any persons or instances which may be involved in a nuclear incident.

12. Article 16 provides for all disputes arising from the interpretation or implementation of the agreement to be settled 'amicably' by 'consultations or negotiations through diplomatic channels'. Significantly, it provides that '(i)n

case of any discrepancy between this Agreement and agreements (contracts), concluded under this Agreement, the provisions of this Agreement shall prevail'. This provision appears to make it clear that the Agreement is to take precedence over any subsequent agreement, underscoring the importance of its provisions.

# 13. Article 17 provides in part as follows:

'This Agreement shall enter into force on the date of the receipt through diplomatic channels of the final written notification of the completion by the Parties of internal government procedures necessary for its entry into force'.

- 14. It provides further that the agreement shall remain in force for a period of 20 years and thereafter be renewed automatically for a period of 10 years unless terminated by either party giving one year written notice thereof. Article 17.4 provides, significantly, '(t)he termination of this Agreement shall not affect the rights and obligations of the Parties which have arisen as a result of the implementation of this Agreement before its termination, unless the Parties agree otherwise' and further provides that its termination 'shall not affect the performance of any of the obligations under agreements (contracts) which arise during the validity period of this Agreement and are uncompleted at the moment of such termination, unless the Parties agree otherwise'.
- [109] Apart from the tone and content of these provisions, which speak for themselves, as a whole they illustrate that three hallmarks of the Agreement are its degree of specificity, the frequent use of peremptory language and the scope and importance of key elements which form the bedrock of the Agreement. All these factors combine to

suggest a firm legal commitment by the contracting parties to the 'strategic partnership' which the Agreement establishes between the two countries, as well as in relation to the future, steps and developments which the far-reaching Agreement clearly foreshadows. Although it is clear that the Agreement could or will be followed by further agreements, the importance and permanence of many of its provisions are, in my view, unmistakeable.

[110] It may well be difficult to delineate the precise line between an agreement relating to the procurement of new nuclear reactor plant as distinct from one dealing with cooperation towards this end. In my view, however, seen as a whole, the Russian IGA stands well outside the category of a broad nuclear cooperation agreement and, at the very least, sets the parties well on their way to a binding, exclusive agreement in relation to the procurement of new reactor plants from that particular country.

[111] It would appear that the competent authorities under the agreement, the Department of Energy and Rosatom, laboured under a similar apprehension when, the day after the Agreement was concluded, they issued a joint press statement announcing that the 'Agreement lays the foundation for the large-scale nuclear power plants (NPP) procurement and development programme of South Africa based on the construction in RSA of new nuclear power plants with Russian VVER reactors with total installed capacity of up to 9,6 GW (up to 8 NPP units)' which would be 'the first NPPs based on the Russian technology to be built on the African continent.' Be that as it may, whatever its true nature the Russian IGA is, in my view, clearly more than a mere 'framework' or non-binding agreement as contended by the respondents.

<sup>&</sup>lt;sup>42</sup> Media Release n 1 p 131.

[112] The conclusion which I have reached in this regard is reinforced by a comparison of the 2014 Russian IGA with the 2004 Russian IGA and each of the other IGA's tabled in June 2015. The 2004 Russian IGA contains no liability or indemnification clause in relation to the construction and operation of nuclear power plants indemnifying the Russian government or its agencies from any damages and placing responsibility on the South African government both within and outside the country. Nor is there firm commitment, let alone any reference, to the construction of new nuclear plants based on Russian reactor technology. Likewise there is no prohibition, save with the consent of Russia, on involving third countries' organisations in the construction, operating or decommissioning of nuclear power plants. The 2004 IGA contains no undertaking by the South African government to facilitate a special tax regime applying to the construction and operation of new nuclear power plants in South Africa. Nor is there any provision envisaging the conclusion of further 'agreements (contracts)' under the 2004 IGA or that its provisions would prevail over the terms of later contracts. The presence of the abovementioned terms in the 2014 Russian IGA begs the question why it was concluded when a general nuclear cooperation agreement, concluded in 2004, already existed.

# THE CORRECT PROCEDURE TO RENDER THE RUSSIAN IGA BINDING

[113] The structure of and rationale behind sec 231 of the Constitution has been addressed by academic writers. Professor Dugard has commented that 'the practice of the government law advisors is to treat agreements 'of a routine nature, flowing from daily activities of Government departments' as not requiring parliamentary approval. Where, however, there is any doubt the agreement is referred to Parliament'. 43 Professor Botha,

<sup>&</sup>lt;sup>43</sup> J Dugard International Law - A South African Perspective 4th ed (2011) p 417.

<sup>44</sup> noting that the Constitution is silent on the question of who makes the classification as to whether an IGA is to be tabled under sec 231(2) or (3), comments as follows:

'Current practice is that the determination of whether a treaty falls under section 231(3) and therefore does not require parliamentary approval, vests in the line-function minister within whose portfolio the subject matter of the treaty falls. This decision must be taken in conjunction with the law advisors of the Departments of Justice and Foreign Affairs.. 45 However, Professor Botha expresses his reservations about the wisdom of this practice insofar as the party negotiating the treaty also decides upon its classification for tabling purposes.

[114] I agree with the argument made on behalf the applicants that sec 231 and, in particular, the interplay between sec 231(2) and 231(3), must be interpreted in order to give best effect to fundamental constitutional values and so as to be consistent with the constitutional scheme and structure. <sup>46</sup> The tabling of an IGA under sec 231(3) permits the executive to bind South Africa to an agreement without parliamentary approval or the public participation that often accompanies any such parliamentary approval process.

<sup>&</sup>lt;sup>44</sup> N Botha 'Treaty making in South Africa: A reassessment' (2000) 25 South African Yearbook of International Law 69 p 77-78.

<sup>&</sup>lt;sup>45</sup> Professor Botha goes on to state at p 77 that: 'Ideally, this decision should lie outside of the party negotiating the treaty. Without in any way impugning the integrity of these decision-makers, one must question the wisdom of a process in terms of which the party who negotiated a treaty at the same time decides on its nature and therefore on the way in which it will be dealt with by parliament. There is, after all, a considerable difference between an agreement being subjected to parliamentary approval (with the possibility of rejection which this process holds) and the mere tabling of a provision in both houses which, although allowing an opportunity for debate and criticism, is in the final instance no more than a process of notification of a fait accompli. The provisions of sec 231(2) imply a democratisation of the treaty process unprecedented in South African law before 1993. In terms of this section, the individual citizen has, through parliamentary representation, at least as much say in what treaties will bind the Republic as he or she has in what laws will govern his or her life. It would appear that by failing to specify the instance which must decide on the nature of a treaty, section 231(3) holds the potential for the manipulation of the system and the undermining of this democratisation in a very real sense.'

<sup>&</sup>lt;sup>46</sup> See Matatiele Municipality and Others v President of the RSA and Others (No 2) 2007 (6) SA 477 (CC) para 36-37 where Ngcobo J stated, 'Our Constitution embodies the basic and fundamental objectives of our constitutional democracy. [...] Individual provisions of the Constitution cannot therefore be considered and construed in isolation. They must be construed in a manner that is compatible with those basic and fundamental principles of our democracy. Constitutional provisions must be construed purposively and in the light of the Constitution as a whole. [...] Any construction of a provision in a constitution must be consistent with the structure or scheme of the Constitution.'

Limiting those international agreements which may be tabled under sec 231(3) to a limited subset of run of the mill agreements (or as Professor Dugard puts it, agreements 'of a routine nature, flowing from daily activities of government departments') which would not generally engage or warrant the focussed attention or interest of Parliament would give optimal effect to the fundamental constitutional principles of the separation of powers, open and accountable government, and participatory democracy. For the reasons given earlier the Russian IGA is, in my view, certainly not an agreement of a routine nature.

[115] The treatment of the Russian IGA by the State Law Advisor (International Law) (and presumably the drafter or co-drafter of the IGA) also casts light on the issue of the correct procedure to be followed in laying it before Parliament. In an explanatory memorandum which served before the Minister and the President, the senior State Law Advisor concluded: 'The Agreement falls within the scope of section 231(2) of the Constitution and Parliamentary approval is required'. The Minister's decision not to act in accordance with this view but rather to table the Russian IGA under sec 231(3) of the Constitution is explained on behalf of the respondents on the basis that the State Law Advisor's view 'was and is wrong'. There is no indication in the record however that the Minister sought or obtained any alternative legal advice and her decision to proceed in terms of sec 231(3) is not explained in any documents forming part of the record.

[116] Having regard to all these factors I consider that the Russian IGA cannot be classified as falling within that category of international agreements which become binding by merely tabling them before Parliament. I am unable to accept that the Russian IGA can notionally be considered a routine agreement. The Agreement's detail and ramifications are such that it clearly required to be scrutinised and debated by the

legislature in terms of sec 231(2) of the Constitution. It follows that the Minister's decision to table the agreement in terms of sec 231(3) was, at the very least, irrational. At best the Minister appears to have either failed to apply her mind to the requirements of sec 231(2) in relation to the contents of the Russian IGA or at worst to have deliberately bypassed its provisions for an ulterior and unlawful purpose.

THE ALLEGED UNLAWFUL AUTHORISATION BY THE PRESIDENT AND SIGNATURE, BY THE MINISTER, OF THE RUSSIAN IGA

[117] The relief sought by the applicants in relation to the Russian IGA is not confined to its review and setting aside on the basis that the Minister employed the incorrect procedure in placing it before Parliament. They seek also a declaration that the Minister's decision to sign the agreement and the President's decision to authorise the Minister's signature were unconstitutional and unlawful, as well as the reviewing and setting aside of these decisions.

[118] The applicants' case in this regard is based on the argument that the Agreement violates sec 217 of the Constitution which requires that when the national sphere of government 'contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost effective'. The applicants contend that, viewed as a whole the Russian IGA contains sufficient particularity and commitment as to fall within the ambit of a contract 'for goods and services' under sec 217 although, at the time the Minister signed and the President authorised her signature, there was no procurement system in place that complied with sec 217 in relation to the procurement of nuclear new generation capacity. It will be recalled that the 2013 sec 34 determination (and the 2016 determination) merely repeated the key wording of sec 217(1) of the Constitution without specifying the tendering procedures. In the alternative,

the applicants contend that even if the Russian IGA did not fall within the meaning of a contract under sec 217, at the very least it expressly formed part of the first steps of a procurement process.

[119] In my view it is neither necessary nor desirable to address this ground of review in these proceedings. Doing so at this stage could well offend against the doctrine of the separation of powers and could be an instance of the court interpreting an international agreement when it would be appropriate for it to exercise judicial restraint. In this regard it will be recalled that the findings in relation to the nature of the Russian IGA were made solely for the purposes of determining whether the Agreement was one which should have been put before the legislature in terms of sec 231(2) or 231(3) of the Constitution.

[120] The underlying reason why the applicants' argument in this respect should not be entertained at this stage arises from the nature of the further relief they seek in relation to the Russian IGA, namely, that the decision to table it under sec 231(3) be reviewed and set aside. If such relief is granted the effect thereof will be that the Agreement will have no binding effect in domestic law. Should the executive then choose to table the Agreement before Parliament in terms of sec 231(2), a parliamentary/political process will follow in which the Agreement will be debated in both the NA and the NCOP with a view to its approval or disapproval by Parliament. It may very well also be the subject of a process of public participation conducted through Parliament. The outcome of this process cannot be foreseen nor should it be anticipated. In these circumstances it would be invidious if the Court were, at this stage, to declare that certain of its provisions are inconsistent with the Constitution and, more specifically, sec 217 thereof. This is not to suggest, however, that the Court will lack jurisdiction to deal with such a question in future if the need should arise.

[121] For these reasons I consider that the principle of separation of powers calls for the Court to exercise judicial restraint at this stage and to decline to consider the further relief sought by the applicants in relation to the Russian IGA.

WERE THE US AND SOUTH KOREAN AGREEMENTS PROPERLY TABLED IN TERMS OF SEC 231(3)?

[122] The final issue to be addressed is whether the IGA's concluded with the United States of America and South Korea relating to nuclear cooperation were properly tabled in Parliament in terms of sec 231(3) of the Constitution.

[123] The parties appeared to be in agreement that in the ordinary course the two IGA's would properly fall to be tabled in Parliament in terms of sec 231(3) in that they were treaties or agreements of a 'technical, administrative or executive nature' or not requiring either ratification or accession. Where they differed was on the consequences of the delay in tabling the agreements. It will be recalled that on or about 10 June 2015 the Minister decided to table five separate IGA's relating to nuclear matters before Parliament in accordance with sec 231(3) of the Constitution. Three of these IGA's, the Chinese, the French and the Russian, were signed or concluded in late 2014 but the remaining two, the US and the South Korean IGA's were signed on 25 August 1995 and 8 October 2010, respectively. They were, therefore, as at the date of tabling, concluded more than two decades previously and just more than four years and eight months, respectively.

[124] The applicants' challenge to the constitutionality of the tabling of the US and South Korean IGA's is based upon what they consider to be the unlawful and unconstitutional delay in tabling those agreements before Parliament. They contend that the only reasonable inference to be drawn from these delays is that the two IGA's in

question were tabled as 'mere window dressing' and to minimise the damage caused by the revelations regarding the Russian IGA and the joint press statement portraying it as a fait accompli that Russia would construct nuclear power plants in South Africa. The applicants contend that this ulterior purpose rendered the Minister's decision unlawful and unconstitutional since it was not rationally connected to the purpose for which the power was conferred and was therefore in breach of the principle of legality. In the view that I take of this matter, however, it is not necessary to determine whether the Minister acted with an ulterior motive in tabling the US and South Korean IGA's under sec 231(3) of the Constitution.

[125] The second leg of the applicants' challenge is simply that the length of the delay could not constitute a 'reasonable' period and therefore the tablings violate sec 231(3). For their part the respondents seek to justify the delays on the basis that the reasonableness thereof must be determined with regard to the relevant surrounding circumstances and, secondly, contend that the purpose of tabling under sec 231(3) is simply to notify or inform Parliament of a treaty that binds the Republic and that, at worst, it is only the delay itself that is unconstitutional.

[126] I cannot agree with this latter interpretation which seeks to remove the obvious linkage in sec 231(3) between the tabling of the agreement in Parliament, and thus it being rendered binding, and the requirement that this be done within a reasonable time. As was stated by Ngcobo CJ in *Glenister*, 'The constitutional scheme of s 231 is deeply rooted in the separation of powers, in particular the checks and balances between the executive and the legislature' Section 231(3) establishes a procedure whereby the State is bound by a particular class of international agreements without the formal approval of

<sup>&</sup>lt;sup>47</sup> Glenister n 41 para 89.

Parliament. The requirement that the tabling takes place 'within a reasonable time' and the use of the word 'must' clearly indicates that this is a prerequisite for the lawful invocation of sec 231(3) or, put differently, a jurisdictional requirement of the procedure. The interpretation contended for on behalf of the respondents would result in a situation where the executive can, as one arm of government, bind the State on the international plane whilst at the same time keeping another arm of government, the legislature, in the dark about such international agreements. Such an interpretation pays scant respect to the principles of openness and accountability which are enshrined in the Constitution. Section 41(1) requires all spheres of government and all organs of state within each sphere to 'provide effective, transparent, accountable and coherent government for the Republic as a whole' whilst sec 1 of the Constitution sets out these attributes as founding values in a multi-party system of democratic government.

[127] Seen in this light it is clear that where the national executive utilizes sec 231(3) to render the Republic bound under an international agreement, its exercise of the power is subject to the requirement that it makes such agreement public and tables it before Parliament within a reasonable time. In this sense it is a composite requirement, the power not being properly exercised unless the agreement is tabled before Parliament within a reasonable time.

[128] On behalf of the respondents the delays were explained on the basis that although the two IGA's were signed much earlier there was no need to rely on them as binding agreements until 2015 since prior thereto there was 'no practical or immediate need for nuclear cooperation'. This explanation fails to explain why, in the first place, if there was no need for nuclear cooperation at those times, the IGA's were concluded in 1995 and 2010. Nor does it offer an adequate explanation as to why, having gone to the trouble of

signing the two IGA's, they were then not simply tabled in Parliament and thereby rendered binding, against the eventuality that the 'practical need' for cooperation might arise in due course. However, even if one accepts at face value the respondents' explanation for the delays, they are in my view of such magnitude that they could never qualify as reasonable, not least because accepting such delays would render the time requirement in sec 231(3) meaningless.

[129] The respondents also contend that any alleged unreasonable delay in the tabling of the US and South Korean IGA's in Parliament is a matter for that body to deal with. However, as was pointed out on behalf of the applicants, the Speaker of the NA and the Chairperson of the NCOP are also respondents in this matter and have neither opposed the relief sought nor made any submissions regarding Parliament's disagreement with the interpretation of sec 231(3) contended for by the applicants. In any event, as stated earlier, it is the duty of the courts to determine whether the executive has failed to comply with the Constitution and declare such failure invalid and/or unconstitutional to that extent. For these reasons I conclude that the tabling of the US and South Korean agreements violated the provisions of the Constitution and fall to be set aside.

#### THE APPROPRIATE RELIEF

[130] Largely as a result of the introduction by the respondents of the two sec 34 determinations well after the commencement of the litigation, the applicants amended the relief initially sought. For the sake of convenience the applicants put up a draft order in which they set out the range of relief sought.

[131] In considering the appropriate relief to be granted the Court is guided firstly by sec 172 of the Constitution which provides that:

- '(1) When deciding a constitutional matter within its power, a court -
  - (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
  - (b) may make any order that is just and equitable, including -
  - (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.'

[132] The respondents have not suggested that any declarations of invalidity sought in this matter should be suspended or offered a justification as to why any such suspension would be just and equitable. The Constitutional Court has emphasised, moreover, that 'the Constitution, and the binding authority of this court all point to a default position that requires the consequences of invalidity to be corrected or reversed where they can no longer be prevented. It is an approach that accords with the rule of law and the principle of legality.<sup>48</sup>

[133] In the applicants' draft order there are four sections dealing respectively with the Russian IGA, the tabling of the US and South Korean IGA's, the processes to be followed by the Minister in regard to a procedurally fair public participation process prior to the commencement of any procurement process for nuclear new generation capacity and, finally, the sec 34 determinations. I shall deal with them in that order.

#### THE RUSSIAN IGA

[134] The applicants seek an order declaring unlawful and unconstitutional, and reviewing and setting aside, the Minister's decision to sign the Russian IGA, the President's decision to authorise the Minister's signature thereof, and the Minister's

<sup>&</sup>lt;sup>48</sup> Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency and Others 2014 (4) SA 179 (CC) para 30.

decision to table the Russian IGA before Parliament in terms of sec 231(3) of the Constitution.

[135] As concluded earlier, the Minister's decision to table the Russian IGA before Parliament in terms of sec 231(3) of the Constitution must be declared unlawful and unconstitutional and reviewed and set aside. However, for the reasons given relating to the separation of powers and the Court's reluctance to consider at this stage whether the Russian IGA in its present form is unconstitutional for lack of compliance with sec 217, the balance of the relief is refused.

## THE TABLING OF THE US AND SOUTH KOREAN IGA'S

[136] The applicants seek a declaration that the tabling of the US and South Korean IGA's in terms of sec 231(3) was unlawful and unconstitutional and reviewing and setting aside the Minister's decision to so table them. In this regard the respondents submitted that, on its interpretation of sec 231(3), namely that tabling within a reasonable time is not a jurisdictional requirement, the Court should, at worst for the respondents, merely declare that the Minister's delay in the tabling of the IGA's was unconstitutional. No such order is competent, however, given the finding which this Court has made, namely that tabling within the reasonable period is a jurisdictional requirement for compliance with sec 231(3).

[137] The question of what steps the respondents should or might take in consequence of our holding the Minister's tabling decision invalid is not a matter which we have been asked to consider, leaving the Minister free to take whatever steps, including steps on the international plane, may be considered necessary in the light of the Court's order. A consequence of such a finding is that the US and South Korean IGA's in their present

form cannot be tabled under sec 231(3). It is apposite to point out, however, that it may well be open to the executive to utilise the more onerous procedure set out in sec 231(2) of the Constitution with a view to rendering the US and South Korean IGA's binding. In my view that procedure is non-exclusive in the sense that the executive is not precluded from utilising its provisions in relation to treaties which fall within the ambit of sec 231(3). If I am correct in this view it serves to emphasise that the executive will not be stultified by the Court's order.

[138] In the result the applicants are entitled to the declarator which they seek and the review and setting aside of the Ministers' decisions to table the US and South Korean IGA's under sec 231(3) of the Constitution.

# THE 2013 AND 2016 SEC 34 DETERMINATIONS

[139] The applicants seek a declaration that the 2013 and 2016 sec 34 determinations are unlawful and unconstitutional and reviewing and setting them aside. For the reasons given the basis for such relief has been established and in my view it would be just and equitable to grant such relief.

[140] The applicants seek an order setting aside any 'Requests for Proposals' or 'Requests for Information' issued pursuant to the aforesaid determinations. There is limited information in the papers on the extent to which such Requests have been issued and the consequences thereof. However the 2013 sec 34 determination makes it clear that part of the procuring agency's role is to prepare, and presumably issue, Requests for Proposals. Since both sec 34 determinations fall to be set aside as unlawful and unconstitutional, it follows that identifiable steps taken pursuant to those determinations

must suffer the same fate and thus relief sought in this regard is appropriate and must be granted.

# FUTURE PUBLIC PARTICIPATION PROCESSES

[141] The applicants seek a declarator that, prior to the commencement of any procurement process for nuclear new generation capacity, which stage they define, the Minister and NERSA:

'are required in consultation, and in accordance with procedurally fair public participation processes, to have determined that:

- (a) new generation capacity is required and that the electricity must be generated from nuclear power and the percentage thereof;
- (b) the procurement of such nuclear new generation capacity must take place in terms of a procurement system which must be specified and which must be fair, equitable, transparent, competitive and cost effective.'

[142] This Court has not dealt specifically with the question of whether the Minister must follow a procedurally fair public participation process before exercising his/her powers under sec 34(1) of ERA and accordingly it would be inappropriate to make any order in this regard. It has, however, considered the question of whether NERSA, before concurring in any such decision, must follow a public participation process. The finding that it is under such a duty is central to this judgment and does not require restatement in a declarator and to that extent the declaratory relief sought in this regard is unnecessary and superfluous.

[143] Similarly, the Court has not found it necessary to address to the question of whether any sec 34 determination must specify the terms of the procurement system which must apply to nuclear new generation capacity. Given that the 2013 and 2016 sec

34 determinations fall to be set aside and that the Minister must, so to speak, start with a clean slate it would in our view be inappropriate for the court to prescribe to the Minister the form of any procurement process to be adopted. In any event it is self-evident that any large scale procurement process initiated by the state or its agencies must comply with sec 217 of the Constitution and other relevant legislative enactments and that it be specified before any procurement process commences. In my view it would be unnecessary to restate these obvious requirements and indeed, both sec 34 determinations provided that the electricity produced from such new generation capacity should be procured through a tendering procedure with the aforementioned attributes although the procedure was not specified. For these reasons the declaratory relief sought in this section is refused.

#### **COSTS**

[144] The applicants have achieved substantial success in the application and therefore it is appropriate that they are awarded their costs. The applicants sought the costs of three counsel. Given the complexity, novelty and importance of the matter there can be no quarrel with an order on such terms. Although the applicants sought a costs order against both the President and the Minister, jointly and severally, and the application was opposed by the President, no specific relief was granted against him or in relation to any conduct on his part. In the circumstances any costs order should be against the Minister alone.

[145] The applicants sought also a special order of costs in relation to that aspect of the relief in which it sought a declarator on the assumption of there being no relevant sec 34 determination in place. The Minister only revealed in the Rule 53 record that such a determination was in place, despite having been pertinently asked about the existence of

any such determination prior to the commencement of the litigation. For these reasons the applicants contend that the Minister should be held responsible for the wasted costs associated with them having to amend their relief and the delays created by having to supplement their challenge. The circumstances in which the 2013 sec 34 determination was only revealed at a comparatively advanced stage in this litigation, and apparently in order to gain some advantage, have been set out earlier. In my view it is appropriate that the Minister should have to pay the extra costs on the scale of attorney and client as a mark of this Court's displeasure at the manner in which this issue was handled on her behalf.

[146] In the result the following order is made:

#### 1. It is declared that:

- The first respondent's (the Minister's) decision on or about 10 June 2015 to table the Russian IGA before Parliament in terms of sec 231(3) of the Constitution is unconstitutional and unlawful and it is reviewed and set aside;
- 1.2. The first respondent's decisions on or about 10 June 2015 to table the following agreements before Parliament in terms of sec 231(3) of the Constitution:
  - 1.2.1 The Agreement for Cooperation between the Government of the Republic of South Africa and the United States of America concerning Peaceful Uses of Nuclear Energy; and
  - 1.2.2 the Agreement between the Government of the Republic of Korea and the Government of the Republic of South Africa regarding Cooperation in the Peaceful Uses of Nuclear Energy;

are unlawful and unconstitutional, and are reviewed and set aside.

- 1.3. the determination under sec 34(1) of the Electricity Regulation Act, gazetted on 21 December 2015 (GN 1268, GG 39541) in relation to the requirement and procurement of nuclear new generation capacity, made by the first respondent on 11 November 2013, with the concurrence of NERSA given on 17 December 2013, is unlawful and unconstitutional, and it is reviewed and set aside;
- 1.4. the determination under sec 34(1) of Electricity Regulation Act gazetted on 14 December 2016 (GNR 1557, GG 40494) in relation to the requirement and procurement of nuclear new generation capacity, signed by the first respondent on 5 December 2016, with the concurrence of NERSA given on 8 December 2016, is unlawful and unconstitutional, and it is reviewed and set aside;
- 2. Any Request for Proposals or Request for Information issued pursuant to the determinations referred to in paras 1.3 and 1.4 above are set aside;
- 3. The first respondent is to pay the costs of this application;
- 4. The first respondent is to pay those costs incurred by the applicants as a result of the late disclosure of the 2013 sec 34 determination, on an attorney and client scale.

BOZALEK J

**BAARTMAN J** 

**APPEARANCES** 

For the Applicants Adv D Unterhalter (SC)

Adv M Du Plessis Adv A Coutsoudis Adv S Magardie

Adrian Pole Attorneys Ref: A Pole As Instructed by

For the 1<sup>st</sup> & 2<sup>nd</sup> Respondents Adv MM Oosthuizen (SC)

Adv K Warner Adv RM Molea

As Instructed State Attorney: Pretoria

Ref: E Snyman

# **ANNEXURE 42**

2703

News24 | OLX | PROPERTY24 | CAREERS24 | SUPERBALIST | AUTOTRADER |

Login / SignUp

2704

© Taxiim

# eFiling Too **Complicated?**

TaxTim Will Ask You Easy Questions, Fill out Your Return & Submit to SARS in under 20 min





#### South Africa, we're okay

Watching the bitter fight in the US over Brett Kavanaugh and the vicious battle over Brexit in the UK, one can't but marvel at the levels of toxicity in world politics, writes Mondli

Cape Town

Thursday 15-18°C More sun than clouds 3 DAY FORECAST

Brought to you by:

LAST UPDATED: 2018-10-10, 17:38

News

Voices

Business

Sport

Water Crisis

Video V Lifestyle

Property

City Press

Search

# SACP statement on discussions with ANC

2017-03-30 11:04



The Augmented Central Committee last year mandated the SACP to convene a National Imbizo as part of our ongoing process to interact with motive forces for the National Democratic Revolution to deeply appreciate the challenges confronting our revolution.

We wish to announce that we will be convening the National Imbizo 22nd to 24th April, in Gauteng. We extend an invite to all progressive organisations, both political and non-political, with a vested interested in the successful execution of the second most radical phase of our National Democratic Revolution.

Alliance partners, civil society organisations like the SACC and other MDM forces have already issued with an invite to participate in the National Imbizo, including veterans of the movement, the MK MVA. We invite organisations with an interest to serve in the steering committee to make contact with our offices for necessary discussion and consideration.

#### Political Discussion between the SACP

The SACP and the ANC have been engaged in political discussion in a bilateral sessions aimed at addressing the challenges facing out revolution broadly and our movements specifically.

Since last year we have held three official bilateral discussions in various forms.

This last Monday our discussions continued.

At the core of our discussions are the strategic questions facing our revolution, the revitalisation of the National Democratic Revolution, rebuilding our connection with the key motives forces of the revolution and dealing with

subjective organisational challenges impeding our leadership role in society. It is this context that the SACP is calling the broader National Imbizo.

Whilst we are committed to creating an enabling climate for our discussions, certain unfortunate events have taken place placing the SACP in an untenable situation wherein it is called on publicly to set the record straight regarding confidential

WATCH: SACP confirms Zuma wants to fire Gordhan WATCH LIVE: SACP confirms Zuma's Intentions to fire Gordhan Zuma faces a Cabinet reshuffle conundrum

There has been selective and factional leaking of our discussions breaching the confidentiality that usually accompanies such.



Explosive report into VBS Mutual Bank reveals large-scale 'looting' Taboo nightclub's sexist shoe dress code outrages women across the country I visited the Guptas for 'social cohesion reasons' - Gigaba OVERVIEW: Mboweni is in, Nene is out - 5

things you need to know Tekkie Town supervisor suspended after

publicly humiliating PE store employee









WATCH: SACP confirms Zuma wants to fire Gordhan

Floyd Shivambu's brother received

Explosive report into VBS Mutual

Bank reveals large-scale 'looting'

2017-03-30 10:26

What To Read Next

R16m from VBS

R75 million for nothing



Related Links

The SACP is addressing the media on a possible cabinet reshuffle, with particular focus on Finance Minister Pravin Gordhan WATCH

# Hollard Vehicle Warranty

Get a Quick Quote Now. Visit Us Online Today for More Information.

hollard.co za

Cabinet reshuffle, replacing both the Minister and Deputy Minister of Finance

We recorded our objection to the intended reshuffle.

However after the meeting an unfortunate selective leak to various media houses has distorted the facts, sought to create a public impression the SACP is firstly responsible for the leaks but secondly has agreed to the intention.

The constitution of the country accords the President of the country a responsibility to appoint

The President of the country however is a deployee of the ANC and has to implement ANC mandate.

The ANC is in alliance with the SACP, COSATU and SANCO and therefore has an obligation to consult its alliance partners in exercising political power collectively struggled for.

The SACP rejects this emerging paradigm on presidential prerogative devoid of collective oversight.

The collective oversight demand of us to be frank with each other since we required to discharge out responsibilities not merely as friends and acquaintances, but as revolutionaries with a purpose to serve and change the live of our people for the better.

#### Abuse of state security organs

The SACP is gravely concerned by the growing abuse of state security organs and their meddling in daily political life of the country.

We are aware of a rogue intelligence unit that in our view gathers data illegally, produces false reports and leads them into the political and public domain to smear comrades.

We have laid a complaint with the Inspector General and the Minister of Intelligence who thus far have treated our complaint flippantly.

In this regard we have noted a rising apartheid era style intimidation and harassment of activists, SACP members and other ANC members.

A series of suspicious events have been taking place with the latest being a reported harassment of Cde Makhosi Khoza. It appears those with other motives than that detailed in our revolutionary won't

We have a responsibility not to allow ourselves to be run by gangsters nor degenerate into a gangster state wherein our public office bearers and officials cannot discharge their responsibilities without fear or favour

Issued by the SACP

#### Join the conversation!

24 com encourages commentary submitted via MyNews24. Contributions of 200 words or more will be considered for publication.

> We reserve editorial discretion to decide what will be published Read our comments policy for guidelines on contributions

#### **Paid Content**



Summer Is Back & So Are Your Ants. Here's How To Deal With Them Cleanipedia



10 Makeup Tips All Older Women Should Know [Photos] Parents Tribune





Never Underestimate Ivanka Trump Work+Money

Login / SignUp

/News

WATCH: Edenvale fire victims overwhelmed by donations after losing everything in devastating blaze







TRAFFIC ALERTS



Western Cape V

TRAFFIC

Cape Town 17:36 PM Road name: N2 Nelson Mandela Boulevard Outbound Outbound

Maitland Road name: Voortrekker Road Eastbound

More traffic reports

traffic24



PowerBall and PowerBall Plus results Tuesday, October 2 05



Click here for the full list of lottery results

JOBS IN CAPE TOWN PROPERTY

[change area] **[change area]** 



12 Best Dogs for Homes with Babies

familyminded



Most Stylish Couples at the 2018 Emmy's

www.familyminded.com



Julia Roberts' Secluded Ranch is Back on the Market Mansion Global



Be the first of your friends to like this

### **More from News24**



'She smiled at me' - dad recalls the moment he realised baby Zahnia had been shot



Gupta lieutenant Chawla wanted Parliament to pay for him to fly business class from



'Gigaba's chief of staff instructed official to help with Gupta-linked visas'



Who really owns Kokstad?



Parents leave 5-year-old at German airport after holiday



Baby dies after being forgotten inside a locked car



Other Stories in South Africa...

#### Hawks raid Nelson Mandela Bay municipality

Newly appointed mayor of Nelson Mandela Bay Mongameli Bobani, received an unexpected visit to his office from the Hawks - barely two months into his new job.

#### Man convicted of lyapha Yamile's rape, murder denied leave to appeal

The Khayelitsha man sentenced to three life terms for the rape and murder of 4-year-old lyapha Yamile and the rape of another child, has been refused leave to appeal in the Western Cape High Court.

#### 'Regulate drugs, don't prohibit them' - drug policy delegates

End prohibition and move to legal regulation of drugs. This is the call from delegates at the opening of South African Drug Policy Week in Cape Town.

INSIDE NEWS24

Marrying a foreigner? Here are four things you need to know 5 romantic African
resort escapes
Shake things up and sto

Shake things up and stoke the flames of love at these resorts

Could the Mediterranean diet reduce eractile dysfunction?
A new study says yes

WATCH: The grossest thing your kid's ever done?

Kim Kardashian West and other celeb moms tell us.

2707

News24 | OLX | PROPERTY24 | CAREERS24 | SUPERBALIST | AUTOTRADER |

Login / SignUp

SERVICES

Press Code
We subscribe to the Press
Code

E-mail Newsletters You choose what you want





24.com

RSS feeds News24Wire Search Advertise on News24 Jobs at 24.com Terms & Conditions Contact us

© 2018 24 com All rights reserved



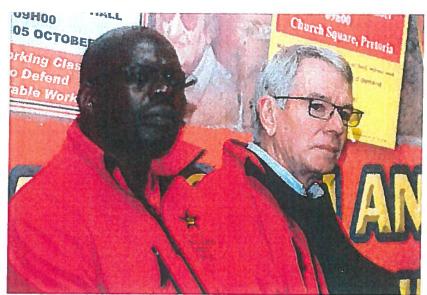
2708

(https://citizen.co.za)

south africa (https://citizen.co.za/category/news/south-africa/) 31.3.2017 09:20 pm

# FULL STATEMENT: SACP calls for Zuma's resignation

Citizen reporter



SACP 2nd General Secretary, Soliy Mapalla (L) and SACP 1st Deputy General Secretary, Jeremy Cronin briefs media at University of Johannesburg, Soweto, 10 July 2015. Picture. Nigel Sibanda

The party said Zuma's reckless decision to reshuffle his Cabinet has plunged the country into crisis.

The Political Bureau of the SACP met in Gauteng today in the context of the deep crisis into which the reckless actions of President Zuma have once more plunged our ANC-led movement, our hard-won democratic institutions, and our country in general.

The recall from an overseas trip of comrades Pravin Gordhan and Mcebisi Jonas while on a promotional tour in South Africa's interests, and now the firing of these comrades and other well-performing ministers is more than regrettable.

It is frankly outrageous, particularly while the worst performers in cabinet continue to enjoy presidential protection and even, in some cases, promotion.

This recklessness has provoked widespread concern and anger within the ANC itself, and across all sectors of our society. We have reached a decisive moment in which, in the considered view of the SACP leadership, Zuma must now resion

The coincidence of the dramatic cabinet events with the desperate application this week in the Pretoria High Court by the Gupta-linked Vardospan company should not be missed.

Vardospan brought an urgent application to force the Reserve Bank, the Registrar of Banks, and the Minister of Finance to allow it to take over ownership of the obscure Habib Bank.

The current owners had given them a deadline of today, 31 March, to settle the matter. Vardospan's desperation is clearly linked to the closure of Gupta-related bank accounts by the major South African banks, the Bank of China, and now reportedly by their last remaining banking facility, the Indian headquartered Baroda Bank.

The Reserve Bank opposed the Vardospan application on the grounds that it has a responsibility to ensure the financial sustainability of the proposed deal.

According to the Reserve Bank, Vardospan has failed to provide clarity on the source of their funding and to provide transparency on other Gupta-related companies, including the notorious Tegeta mining company involved in a dodgy deal with former Eskom CEO Brian Molefe

The timing of Zuma's cabinet reshuffling and the deepening banking troubles faced by the Guptas is not, therefore, fortuitous. Once more it lays bare a disturbing reality.

Increasingly our country is being ruled not from the Union Buildings, but from the Gupta family compound. More and more, critical ANC decisions are being decided not by elected and collective structures in Luthuli House but in

In the coming days the SACP will be meeting with our provincial structures, all our alliance partners and a wide range of social movements and formations.

It is imperative that popular anger is mobilised and organised in constructive ways that unite South Africans of all persuasions and backgrounds in the defence of our country's interests.

This is not a struggle against an individual. This is not a factional struggle. It is a struggle against a network of parasitism and patronage in defence of our hard-won democratic sovereignty.

Let us roll back corporate capture of the state! Let us call for the South African passports and residential rights of the Guptas to be revoked immediately!

Let us call for the sacking of General Ntlemeza, an ex-Transkei security policeman, who many allege tortured our own comrades. Let us demand progress on the numerous stalled prosecutions and investigations.

What has happened to the civil and criminal prosecutions recommended in regard to the Nkandla scandal? Let us ensure that the dodgy Tegeta deal is exposed.

Let us insist that those involved in the whole-sale ripping off of the public broadcaster, the SABC, and of key State Owned Corporations, including PRASA, Eskorn, DENEL, and SAA are brought to book. Mainstream corporate outfits like Allan Gray and the Ruperts' Remgro must own up to their profit-driven collusion with Cash Pay Master Services, Net1, and Grindrod in the exploitation of vulnerable social grant beneficiaries.

Politicians and officials who have benefited from back-handers in all of this must be exposed

Inevitably, SACP members who serve in executive positions in government are now being asked if they will resign. The PB's instruction to these comrades is: Remain at your posts.

This is not because there is any individual entitlement. You are serving in various capacities because of the support you enjoy across the ANC movement, because of your struggle credentials, and because of your performance in government.

You have a responsibility to serve a massive constituency and the country at large – now more than ever. If you are fired at the behest of the Gupta network because of the SACP's stand on these matters – so be it.

For more news your way, follow The Citizen (https://citizen.co.za/) on Facebook (https://www.facebook.com/TheCitizenNewsSA/) and Twitter (https://twitter.com/TheCitizen\_News).

#### **Related Stories**

Mpofu says EFF can take credit for state of SA (https://citizen.co.za/news/south-africa/2020630/mpofu-says-eff-can-take-credit-for-state-of-sa/) 10.10.2018

Ordinary people hurt by Limpopo water project flop (https://citizen.co.za/news/opinion/opinion-editorials/2020551/ordinary-people-hurt-by-limpopo-water-project-flop/) 10.10.2018

Jacob Zuma as finance minister? Not everyone is laughing (https://citizen.co.za/news/south-africa/2020177/jacob-zuma-as-finance-minister-not-everyone-is-laughing/) 9.10.2018

# n=referral&utm\_content=organic-thumbnails-a:Below Article Thumbnails 2nd:) From The Citizen

(https://citizen.co.za/news/news-cns/1809797/compromising-photo-surfaces-of-schoolteacher-and-learner-in-bedroom/)
Compromising photo surfaces of schoolteacher and learner in bedroom

(https://citizen.co.za/news/news-cns/1809797/compromising-photo-surfaces-of-schoolteacher and-learner-in-bedroom/) (http://citizen.co.za/lifestyle/1551453/somizi-says-either-hip-cancer-diabetes/)

Somizi says he has HIV, cancer or diabetes

(http://citizen.co.za/lifestyle/1551453/somizi-says-either-hiv-cancer-diabetes/)
(https://citizen.co.za/news/south-africa/1652755/ndlozi-know-that-if-i-die-eff-wilk-respect-my-wishes/)

Ndlozi: I know that if I die, EFF will respect my wishes

(https://citizen.co.za/news/south-africa/1652755/ndlozi-know-that-if-i-die-eff-will-respect-my-wishes/)



2709

# **ANNEXURE 43**

2710

2711





# A GOOD BREAKFAST?



# **#CABINETRESHUFFLE: PRESIDENT JACOB ZUMA'S STATEMENT OF CHANGE**

President Jacob Zuma has announced changes to the National Executive in a late night statement



President Jacob Zuma. Picture: Supplied

President Jacob Zuma (https://ewn.co.za/Topic/President-Jacob-Zuma) Jacob Zuma (https://ewn.co.za/Topic/Jacob-Zuma) Eyewitness News (//ewn.co.za/Contributors/eyewitness-news) | 2 years ago (559 days ago)

PRETORIA - In a late-night move on Thursday, President Jacob Zuma released a statement saying that he had decided to make changes to the National Executive in order to improve efficiency and effectiveness.

Here is that statement in the President's words:

#### PRESIDENT ZUMA APPOINTS NEW MINISTERS AND DEPUTY MINISTERS

I have decided to make changes to the National Executive in order to improve efficiency and effectiveness.

The changes bring some younger MPs and women into the National Executive in order to benefit from their energy, experience and expertise.

I have directed the new Ministers and Deputy Ministers to work tirelessly with their colleagues to bring about radical socio-economic transformation and to ensure that the promise of a better life for the poor and the working class becomes a reality.

The new members are the following;

#### MINISTERS

- 1. Minister of Energy, Ms Mmamoloko "Nkhensani" Kubayi
- 2. Minister of Transport, Mr Joe Maswanganyi
- 3. Minister of Finance, Mr Malusi Gigaba
- 4. Minister of Police, Mr Fikile Mbalula
- 5. Minister of Public Works, Mr Nathi Nhleko
- 6. Minister of Sports and Recreation, Mr Thembelani Nxesi
- 7. Minister of Tourism, Ms Tokozile Xasa
- 8. Minister of Public Service and Administration, Ms Faith Muthambi
- 9. Minister of Home Affairs, Prof Hlengiwe Mkhize
- 10. Minister of Communications, Ms Ayanda Dlodlo

#### **DEPUTY MINISTERS**

2712

- 1. Deputy Minister of Public Service and Administration, Ms Dipuo Letsatsi-Duba
- 2. Deputy Minister of Finance, Mr Sifiso Buthelezi
- 3. Deputy Minister of Public Enterprises, Mr Ben Martins
- 4. Deputy Minister of Arts and Culture, Ms Maggie Sotyu
- 5. Deputy Minister of Trade and Industry, Mr Gratitude Magwanishe
- 6. Deputy Minister of Communications, Ms Thandi Mahambehlala
- 7. Deputy Minister of Tourism, Ms Elizabeth Thabethe
- 8. Deputy Minister of Police, Mr Bongani Mkongi
- 9. Deputy Minister of Telecommunications and Postal Services, Ms Stella Ndabeni-Abrahams
- 10. Deputy Minister of Small Business Development, Ms Nomathemba November.

I wish to extend his gratitude to the outgoing ministers and deputy ministers for their service to the country. I also wish the new Ministers and Deputy Ministers the best in their new responsibilities.

COPYRIGHT 2015 ALL RIGHTS RESERVED | TERMS & CONDITIONS (/TERMSANDCONDITIONS) | PRIVACY (HTTP://PRIMEDIABROADCASTING.CO.ZA/PAGE/PRIVACY-NOTICE/) | PAIA (HTTP://PRIMEDIABROADCASTING.CO.ZA/PAGE/PAIA)