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MINISTER OF FINANCE
JS
10 MAR 2014
FILE No: M3/15/11
MINISTER OF FINANCE
591-14


**MINISTER**
**ENERGY**
**REPUBLIC OF SOUTH AFRICA**

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**Hon. P. Gordhan, MP**
Minister of Finance
National Treasury
Private Bag X115
**PRETORIA**
0001

Dear Colleague,

**RE: THE PROPOSED ACQUISITION OF 100% OF ENGEN BY PETROSA** *(PROJECT IRENE)*

The Petroleum Oil and Gas Corporation of South Africa (SOC) Limited (**"PetroSA"**) is South Africa's National Oil Company (**"NOC"**), a wholly-owned subsidiary of the Central Energy Fund (SOC) Ltd (**"CEF"**).

As South Africa's NOC, PetroSA's strategic intent is to become a fully integrated and commercially competitive NOC with, *inter alia*, a targeted South African liquid fuels market share of at least 25% by 2020.

PetroSA is currently engaged in on-going negotiations with Petroliam Nasional Berhad (**"PETRONAS"**) to acquire a 100% shareholding of Engen Limited (**"Engen"**), for an total enterprise value of R18.67bn. The PETRONAS Board accepted PetroSA's binding offer, subject to, *inter alia*,:-

*a)* a letter of guarantee being for 100% of the offer price; and

*b)* a fully committed funding plan being in place prior to executing definitive transaction agreements by Monday, 31 March 2014.

Section 66(2)(a) of the Public Finance Management Act, 1 of 1999 ("**PFMA**"), read with section 70 of the PFMA, states that Government may only issue a guarantee for an entity through the Cabinet Member / Executive Authority *(i.e. Minister)* responsible for that entity, acting in concurrence with the Minister of Finance.

Accordingly, I have resolved that it is the best interests of PetroSA and the Country as a whole for the required funding guarantee to be issued. Consequently, and in satisfaction of the prescripts of section 66(2)(a) of the PFMA, I hereby request your concurrence to provide PetroSA with a funding guarantee of R13.42bn.

In support of this request, and in partial satisfaction of the vendor's requirements for this transaction, PetroSA's current funding plan for Project Irene has been duly completed and is attached hereto, marked annexures **"A and B"**, respectively.

Sincerely,

**MR DIKOBE BEN MARTINS, MP**
**MINISTER OF ENERGY**
**DATE:** 10·03·2014

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**MINISTER: FINANCE**
**REPUBLIC OF SOUTH AFRICA**

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**Ref. M3/15/11 (591/14)**

**Mr DB Martins, MP**
**Minister of Energy**
**Private Bag X19**
**ARCADIA**
**0007**

Dear Colleague

**ACQUISITION OF 100% OF ENGEN BY PETROSA**

I confirm that we have met this morning to discuss the above acquisition.

The National Treasury understands that the acquisition of Engen by PetroSA, appropriately structured, offers immense strategic potential to South Africa.

From our discussion at the meeting of 1 April 2014, I am now aware of the various steps that are being urgently taken to put together a financing package including equity participation, bank loans and a capital contribution from PetroSA. I am also aware that negotiations on some, if not all of the aspects of the financing package are at an advanced stage.

As it transpired at our meeting, it would assist us a great deal if all or some of these were to be concluded before we take a view on the actual support that PetroSA would need to conclude the transaction. In the meantime I am applying my mind to the application for a guarantee.

I would encourage continuous and intense engagement between our teams on all outstanding issues so that as the negotiations on each of the potential sources of funding are concluded, we can evaluate the implications of each for the support that PetroSA needs from government. The process will be assisted considerably if the National Treasury is kept fully informed of all relevant developments on the matter.

I assure you that the National Treasury is seized with this matter. Once the necessary governance processes have been concluded, I will get back to you.

Kind regards

**PRAVIN J GORDHAN**
**MINISTER OF FINANCE**
**Date:** 01 - 04 - 2014

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MINISTER: FINANCE
REPUBLIC OF SOUTH AFRICA

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**Ref. M3/15/11 (591/14)**

Mr D B Martins, MP
Minister of Energy
Private Bag X 96
**PRETORIA**
0001

Dear colleague

**RE: THE PROPOSED ACQUISITION OF 100% OF ENGEN SOUTH AFRICA (PTY) LTD (ENGEN) BY PETROSA.**

I refer to your letter of 11 March 2014 wherein you requested a letter of comfort and support for the Engen acquisition on behalf of the South African Government through the Minister of Finance and of Energy.

Officials from the National Treasury met with representatives from PetroSA and the Department of Energy on 28 March 2014; 7 April 2014 and 22 April 2014 to discuss and clarify issues relating to the proposed transaction. Moreover, my department has reviewed all the supporting information that has been submitted relating to this transaction.

In terms of Sections 66 (2) (a) and 70 of the Public Finance Management Act of 1999 (PFMA), I am willing to concur to your issuance of a Government guarantee for the maximum sum of R9.5 billion subject to all of following conditions being fully met:

1. PetroSA pays R5.6 billion in respect of the Consideration and any Adjustment Amount as defined in the Sale Agreement by the due dates on which these amounts become payable;

2. Pembani Group (Pty) Ltd. provide an irrevocable commitment that their stake be converted into a loan equivalent to 20% of the Consideration with a tenor of at least 6 months after the Completion Date;

3. By the Completion Date as defined in the Sale Agreement, Strategic Equity Partner provide an irrevocable commitment to purchase a minority stake valued at least R5.4 billion without the support of a government guarantee;

4. By the Completion Date as defined in the Sale Agreement, lenders approved by the PetroSA board provide an irrevocable commitment to provide financing of at least R4.1 billion without the support of a government guarantee;

5. The guarantee remains in force until the Completion Date as defined in the Sale Agreement, if not all the suspensive conditions have been fulfilled or waived until the Long Stop Date as defined in the Sale Agreement; and

6. The guaranteed amount reduces as irrevocable financing commitments are received by the amount of the commitments received.

From the documentation, it is evident that the potential equity investors and financiers have indicated that, as a precondition to providing an irrevocable commitment, a comprehensive due diligence will need to be undertaken. It will be necessary for Petronas to make available the necessary documentation and provide access to key personnel as well as to allow adequate time for these investors and financiers to undertake the due diligence they require.

One of the issues where I would like to get a deeper understanding is the exclusion of the lubricants business from the purchase. Could you please provide me with some insight into the reasons for the exclusion.

In addition, PetroSA will be required to report monthly to the National Treasury and the Department of Energy and a Monitoring Task Team will be established to oversee the performance of PetroSA. Please note that PetroSA will be required to pay a guarantee fee on the full amount of the facility for the period whilst the guarantee is in force.

I will send you additional correspondence relating to how we can jointly facilitate this matter further.

I trust you will find the above to be in order.

Kind regards

**PRAVIN J GORDHAN**
**MINISTER OF FINANCE**
**Date:** 25-4-2014

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**MINISTER: FINANCE**
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**Ref. M4/1/19 (1055/15)**

Ms DC Myeni
Chairperson of the Board
South African Airways
Private Bag X13
**OR TAMBO INTERNATIONAL AIRPORT**
1627

Dear Ms Myeni

**APPLICATION BY SOUTH AFRICAN AIRWAYS' (SAA) TO ENTER INTO AN A320 SWAP DEAL WITH AIRBUS**

SAA has applied for approval to cancel the purchase contract for the delivery of the remaining ten A320 aircraft and to replace it with an operating lease of 5 A330-300 aircraft. The objective of the transaction is to address the onerous contractual conditions arising from the acquisition of the A320 fleet with Airbus, which was entered into by SAA in 2002. The transaction has contributed to the deterioration of the financial performance of the entity, as SAA has recognised impairment losses in excess of R1 billion to date due to the acquisition price of the A320 fleet exceeding the market values. There will also be negative liquidity and solvency implications of continuing with the acquisition of the remaining 10 A320 aircraft, these arise from the outstanding pre-delivery payments (PDPs) that will be due and further impairments that will have to be recognised.

However, the evaluation done by SAA with regards to this transaction was not comprehensive. In the application there was no consideration of the commercial implications of the transaction outlining how the A330-300s were to be used or how the A320s which were required to operate SAA's domestic and regional network would be secured. From a financial perspective only the cash implications of the PDPs and the Buyer Furnished Equipment (BFE) was provided. No consideration was given to the cash outflows arising from the leases as well as any incremental operational inflows or outflows. Moreover, these cash flow benefits were only analysed over the next 3 years rather than over the life-time of the transaction. Similarly, the profitability analysis focused exclusively on the impairment losses that would be recognised.

In addition, SAA only identified one risk: the potential penalty that would be payable for BFE ordered for the remaining 10 A320 fleet which amounts to $20 million. However, amongst others, there are also risks relating to SAA's ability to acquire additional A320 aircraft following the acquisition contract being cancelled as well as the risk of more cost efficient aircraft becoming available which could lead to an erosion of SAA's competitive position. I require that SAA provide a comprehensive risk assessment together with the mitigating actions that will be taken.

Based on the information that I have been provided which has been supplemented by the analysis my team has conducted, I approve the proposed A320 swap deal. This is subject to a comprehensive, corrected net present value (NPV) analysis being provided which demonstrates that the NPV arising from SAA entering into a 12 year lease for 5 A330-300 aircraft exceeds that of continuing with the A320 acquisition. In addition, I require SAA to provide and implement a comprehensive mitigation strategy to source the additional A320 aircraft required by SAA as per the network and fleet plan.

In the submission received it is not clear when SAA would be liable for the BFE penalty for the A320 fleet acquisition that would be cancelled. It is also not clear how SAA intends to settle this penalty should the penalty not be waived by Airbus. I therefore, request SAA to provide clarity on this matter.

In future, to enable the National Treasury to conduct a comprehensive and detailed analysis and also make an informed decision, I request SAA to provide the following information when submitting Section 54 applications which relate to any fleet transactions:

1. A net present value analysis comparing the options being evaluated over the full term of the contract, which support the decision being recommended as providing the greatest benefit for SAA over the long-term;

2. An analysis demonstrating the commercial implications of the fleet being secured;

3. Supporting schedules for assumptions made, if any, by SAA in support of the application being evaluated; and

4. A detailed risk analysis outlining the impact of risks associated with the proposed transaction and possible mitigation strategies for the risks identified.

I trust that the above is in order.

Kind regards

**NHLANHLA M NENE, MP**
**MINISTER OF FINANCE**
**Date:** 30/7/2015

0000159

SOUTH AFRICAN AIRWAYS

**South African Airways**
**Chairperson**
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Minister Nhlanhla Nene, MP
National Treasury
40 Church Square
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By email: minreg@treasury.gov.za

Honourable Minister,

**RE: REQUEST FOR MINISTER TO AMEND HIS APPROVAL IN TERMS OF SECTION 54 OF THE PUBLIC FINANCE MANAGEMENT ACT, 1 OF 1999 ("PFMA")**

Reference is made to Minister's letter received on 24 November 2015 on the abovementioned matter. In the said letter, Minister requested to be furnished with certain information by 27 November 2015. On behalf of the Board, I sincerely apologise that we missed the stipulated date. The information requested was prepared by Management by 27 November; however we as the Board required time to review and approve it before submitting same to Minister.

In response to Minister's queries I advise as follows:

1. On the 14th of October 2015 I received a communication from Airbus stipulating that *"At full execution of this amendment an additional PDP in the amount of 100m$ will be required, any received A320 PDP's will be transferred to the A330 contract and additional PDP's will be required at later dates until the A330 last delivery"*
   We acknowledge the fact that SAA is not in a financial position to afford this PDP of USD 100million and other future PDP's but the strategy that we have is to recoup this money from the selected local leasing company. The plan is to have a back to back cover of this USD 100 million with the local leasing company. Meaning on our RFQ we will stipulate that the selected local leasing company would have to pay the USD 100 million to SAA at the contract signature date between SAA and Airbus. Detailed due diligences will be performed on the shortlisted local leasing companies to ensure that the company will be financially viable to accommodate this PDP's

2. The envisaged procurement process as outlined in our Supply Chain Management Policy, in identifying the local financial institution that would act as a lessor in summary would be as follows:
   - Create the scope (Business case and need identification);
   - Create the RFP and weighting criteria;
   - Advertise the tender;



DCM

Lease rental: R16,000,000 per month and R192,000,000 per year
Term: 144 months (12 years)
Interest rate: 9.1%*
No of aircrafts: 5
And the Net present value is R6, 893 million meaning using the **ZAR deal the NPV is R6.9 billion**

** - The current interest rate is 10% and because of the magnitude of the transaction we believe that we can negotiate a better interest rate hence 9.1% is used for ZAR lease.*

*Versus*

***Net present value calculation for the USD Lease***
Input for the NPV calculation:
Monthly lease rental: USD 885,000 per month which is USD 10,620,000 per annum
Terms: 144 months (12 years)
Interest rate: 9.1%**
No of Aircrafts: 5
And the Net present value using the average exchange rate to convert to ZAR is R5,067 million which is **the NPV using USD Deal is R5 billion**

*** - 9.1% is the contractual interest rate that was agreed, it was also used in the initial S54 proposal that was approved*

It should be noted that an average exchange rate is used to convert the USD Currency to ZAR. Comparing these two deals at face value one would say ZAR lease rental is expensive by R1.9 billion, actually ZAR deal is cheaper and is a lucrative because of the following:

- Based on the analysis that was performed by Nedbank and was also attached in our submission on the 16th of November 2015, it showed significant adverse consequences if SAA enters into USD lease as SAA would have to enter into a currency hedge or swap and these costs would be avoided if ZAR lease deal is approved. Currency hedge would costs between R2.4billion to R2.8 billion.
- The negative currency impact on SAA if it were to conclude the aircraft acquisition through the USD lease is that, if one benchmark the past 10 years with the next 10 years, the USD spikes during 2008/9 mortgage housing turmoil, and the 2015 USD spike as a result of the Chinese economy turmoil and other factors (as was detailed in the Nedbank analysis that was attached), reflects that the USD:ZAR has gone one way and USD has substantially strengthened against the ZAR. An example is as recent as 2010-2012, when the USD:ZAR exchange rate was USD 1: ZAR6/7 and in 2015 the exchange rate is USD 1: ZAR14.40.

**Therefore based on the above discussion and comparison of NPV's the ZAR lease deal will yield to costs savings of approximately R500 million (R2.4m-R1.9m)**

8. As indicated earlier in the document converting the lease from USD to ZAR brings more certainty into forecasting the cash flow requirements of SAA going forward, and also saving R2.6 billion from currency hedging. These would be significant steps in turning the financial situation of SAA around and also be in a better position to forecasts our expenses. The main focus of this change is to remove as much fluctuations in the SAA's expenses as a result of exchange rate movements.



DCM

- Evaluate; and
- Award the tender after obtaining the necessary approvals at various levels in terms of the delegation of authority

3. Should SAA be successful in transferring the lease from a USD lease into a ZAR lease, the costs inclusive of maintenance reserves, insurance and return compensation will be exactly the same as is currently negotiated in the USD lease. SAA will not incur any costs with regards to the buyer furnished equipment (BFE) as this cost has been carried by Airbus as the current lessor. This is in line with the original swap transaction that has been approved by the Minister.

4. The purchase price for an outright purchase of the aircrafts from airbus has been negotiated and is approximately USD 503 million. And regarding the sale and lease back, once the negotiations commence SAA will ensure that the company is not in a worse off in terms of financial position. We would sell the aircrafts to the leasing company at the market related price at the delivery date of the aircrafts, in order to ensure that there are no significant price differences.

5. The trading of aircraft in the international market has brought about companies that are specializing in forecasting values of the aircrafts. These companies include Avitas, Ascend, IBA, and AVAC to name a few. Based on the analysis of these companies it would seem that the forecast value for an A330-300 with date of manufacture 2017 in full life return condition (Residual value) would have a value of between USD 52 million – USD 58 million. These forecast values are available from the subscription SAA has with some of these valuation companies (Avitas, Ascend etc.)

6. The impairment loss according to IAS 36 is the amount by which the carrying amount of an asset exceeds its recoverable amount. Based on the analysis above of the cost structure, the aircrafts will be sold and leased back to the local leasing company at the market price at the date of delivery and not at transaction date so that there will not be a significant difference in price because of currency movement, we therefore do not foresee any potential impairments on these aircrafts.

7. The ZAR lease rental that we are proposing is a better option for SAA as the cash flows are fixed over the period of the lease, which brings certainty around cash flows and forecasting. Should the lease remain in a USD lease, the monthly payments would have to be converted into a ZAR amount which can create extra liabilities and unforeseen cash flow implications for SAA.

   As an example we note on our recent transaction that on the first A320 deliveries; the lease transaction was concluded in USD at a monthly lease rental of USD320, 000. When the transaction was concluded and the aircrafts were delivered the ZAR/USD exchange rate was ZAR 8.00 to USD. This translates into a lease rental of ZAR 2,560,000 per month. The same lease transaction today at the current exchange rate of ZAR 14.40 to USD would be ZAR 4,608,000 per month, which is an amount that is almost double what we paid. This is just an indication of huge currency fluctuation that SAA is exposed to. I would also like to highlight that we have reviewed the trend of our currency for the past 5 years and it is worth mentioning that year in and year out it is declining/deteriorating.

**Analysis of Net Present Values for both deals**

***Net present value calculation for the ZAR Lease***
Input for the NPV calculation:

DCM

9. SAA in conjunction with the financial institutions participating in this transaction will perform the required due diligence to identify the most suitable company for the lease. This will ensure that due and proper care is taken and a transparent process is being followed. SAA also envisages that the company will have to conform to the required technical skills and financial acumen in order to ensure that the lease is managed in a professional and robust manner which will not disrupt the operations.

10. Regarding the RFQ process to identify the financial institution, we have not started with the process and the Nedbank letter that was attached was unsolicited bidding which indicated that the market has an appetite for this transaction. While we are waiting for the S54 approval we are proposing that we commence with the process of a Request for Information (RFI) so that we can be in a better position to satisfy this query.

11. Legal documents as requested will be provided once the request has been approved and the transaction is concluded

I hope the Minister will find this in order.

Yours sincerely,

**Ms. Duduzile Myeni**
**SAA Board of Directors Chairperson**
**Date:** 2015/11/30

SOUTH AFRICAN AIRWAYS

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Minister Pravin J Gordhan, MP
National Treasury
40 Church Square
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By email: minreg@treasury.gov.za

Honourable Minister,

**Re: APPLICATION IN TERMS OF SECTION 54(2)(e) OF THE PUBLIC FINANCE MANAGEMENT ACT 1 OF 1999 (PFMA) FOR THE AMMENDMENT OF THE AIRBUS TRANSACTION**

We respectfully want to bring the above-mentioned matter to the attention of the Minister.

Reference is made to the section 54 application that was submitted to the previous Minister of Finance to enter into and conclude the cancellation of the 10 (ten) A320 aircraft purchased from Airbus and replace these with 5(five) A330 aircraft to be leased from Airbus (the Swap Transaction).

Whilst the transaction approved by the Minister in terms of the section 54 of the PFMA of 30 July 2015, was conditionally supported by the Board, further analysis indicated that this transaction was not in the best interest of SAA. Subsequently a revised Section 54 PFMA application (as per the copy attached) was submitted to the Minister for his consideration. On 03 December 2015, a response was received from the Minister declining the Board's proposal and instructing the Board to adhere to the previously approved structure as per the attached letter.

Minister, for ease of reference we show below the main differences between the National Treasury approved transaction structure and the Board's revised proposal.

| National Treasury Approved Transaction Structure | SAA Revised Transaction Structure |
|---|---|
| Transaction USD based | Transaction ZAR based |
| Total of $644 million + an estimated R2.6 billion currency hedging likely to be incurred | $644 million Rand equivalent + 0 hedging risk resulting in at least a saving of an estimated R2.6 billion on day 1 |
| Operating lease for 12 years at the end of which SAA would not have an asset on its balance sheet, but will have right of first refusal to purchase the aircraft at the ruling | Financing Lease for 12 years at the end of which SAA will have right of first refusal to purchase the aircraft in Rands without foreign currency exposure, at a much |

| | |
|---|---|
| market price in USD. | reduced price as the debt would be serviced throughout the lease. |
| Foreign Leasing Company acquired by Airbus:<br>• Unknown leasing company;<br>• No due diligence performed by SAA;<br>• No local benefit to the country. | Local leasing company to be procured in line with SAA's procurement processes:<br>• Unsolicited bid received from a local Bank to lead the sourcing of funding;<br>• Proceeds from the transaction to remain in the country. |
| No immediate PDPs payable | Possible \$100 million PDPs payable immediately but to be recouped from the selected local leasing company. |

Also attached, is a schedule showing SAA's current aircraft lease liability which is all US Dollar denominated, and therefore susceptible to currency fluctuations.

Given the above, the Board humbly requests the Minister to conduct a comprehensive review of the SWAP transaction to enable SAA to acquire 5 A330 aircraft which has since been made a condition to granting the R5 billion Government guarantee;

The Board is hereby seeking the Minister's guidance on this transaction which we are unable to execute in its current form as we are bound by our fiduciary duties to act in the best interest of SAA, its 11 000 employees as well as other stakeholders such as Banks and other creditors.

We trust the Minister will find the above in order.

Yours sincerely,

**Ms. Duduzile Myeni**
**SAA Board of Directors Chairperson**
**Date:** 17/10/2015

(ADDITIONAL INFO)

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SOUTH AFRICAN AIRWAYS

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Minister Pravin J Gordhan, MP
National Treasury
40 Church Square
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0002
By email: *minreg@treasury.gov.za*

Honourable Minister,

**Resignation of Mrs Y. Kwinana from SAA Board.**

I would like to bring to the attention of the Minister, formally, that Ms Kwinana has resigned from the Board of South African Airways with effect from 23 August 2016.

She has served as the Chairperson of the Audit and Risk Committee, as well as the Chairperson of SAA Technical.

She submitted the letter for the Honourable Ministers' attention, and believe that the reasons of her departure are contained in the letter.

Yours sincerely

DC Myeni

**Ms. Duduzile Myeni**
**SAA Chairperson**
**Date:** 26/08/2016

SOUTH AFRICAN AIRWAYS

22 August 2016

The Minister of Finance : Mr Pravin Gordhan

CC: Chairperson of SAA Board :Ms Dudu Myeni

Dear Minister

**Resignation from South African Airways (SAA) Board**

It is with regret that I have to tender my resignation from SAA, my last day being tomorrow, 23 August 2016, to attend the board meeting to communicate the resolutions of the Audit Committee meeting that was held today (if necessary).

As the Chairperson of Audit and Risk Committee, it has come to a stage where I had to weigh the risks of staying under the circumstances, the impact my stay would have, not only on SAA employees, but on South Africa as a whole. I hope that my departure will save SAA so that it can continue to fly the National Flag, bringing the world to Africa and taking Africa to the world.

SAA is in dire need of a Government Guarantee and it is not forthcoming, the reason being that the Minister will issue the Guarantee when a new board is in place. My interpretation of this is therefore that a Guarantee can only be issued if the current Board resigns. I am duty bound to bow out in dignity, in an effort to get this Guarantee unlocked. I choose to resign than to see SAA folding, under my watch, 9000 jobs being lost, because of my holding on to the position as a board member.

Non-issuance of the Guarantee results in non-issuance of the audited financial statements which are required by many parties that SAA is doing business with. This also leads to financial distress which, in terms of the Companies Act, requires the company to file for business rescue.

a. Hong Kong Revenue Services issued an ultimatum of the 6th of September 2016 that they required audited financial statements, failing which SAA aircraft flying to Hong Kong will be grounded.
b. Ghana expects all airlines flying to them to comply by 31 December 2016.
c. Standard Bank requires either a guarantee or a loan repayment of R250m by 31 August 2016, which SAA will not be able to pay.
d. SAA loans that are maturing within 6 months may not be rolled over by the banks as they will require audited financial statements.

Let me take this opportunity to thank the Minister for affording me an opportunity to serve on this prestigious board and wish all SAA stakeholders the best.

Yakhe Kwinana (CA)SA

SAA Board Member, Chairperson of SAA Technical, Chairperson of the Audit Committee.

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MINISTER OF FINANCE
JS
2016 -07- 15
FILE No: M3 | 15 | 26
MINISTER OF FINANCE
2215 | 16


MINISTER
SOCIAL DEVELOPMENT
REPUBLIC OF SOUTH AFRICA

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Mr P Gordhan, MP
Minister of Finance
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**PRETORIA**
0001

Dear Colleague

**INTERFERENCE OF THE NATIONAL TREASURY ON MATTERS OF THE SOUTH AFRICAN SOCIAL SECURITY AGENCY (SASSA)**

My previous discussions with you on the aforementioned matter refers. I am writing to bring to formally bring this urgent matter to your urgent attention because I strongly believe that there are concerted efforts by some officials in the National Treasury who seek to deliberately undermine all the good work that we are doing at SASSA. I am concerned that the Agency will not be able to deliver on the important task at hand unless there is an urgent political intervention to resolve the way in which the Treasury seeks to undermine and interfere in the affairs of SASSA, thus undermining the oversight responsibility that myself and the Department of Social Development exercise over the Agency.

This interference is driven mainly by greed and private business interests of some of the officials in the National Treasury who want to determine service providers the Agency must appoint. A case in point is a matter which relates to a tender regarding the appointment of a service providers to implement the recommendations of the Ministerial Committee on the Future Payment System and the work streams. Another one relates to a security company which took long time due to the fact that SASSA officials had to conduct a loco inspection in various security companies. The mistakes and reports that we received from management showed a lot of interest by two people who are not the employees of the Department or the National Treasury.

They alleged that big companies with huge experience did not have the capacity to render the required services. To me this looked similar to the report we received from the Accountant General about the procurement of a forensic investigation service provider which left us with egg on or faces. We had to ensure that history does not repeat itself. This came after SASSA awarded a tender to a service provider who was deemed as the best out of all other companies that bid for the service. Another matter that clearly demonstrates the interference I am talking about relates to the appointment of the University of KwaZulu-Natal to assist us with the training of cooperatives as part of our response to President Jacob Zuma's call that 30 percent of Government procurement must go to the small, medium and micro enterprises.

Cooperatives are an important element of the South African business landscape to transform and promote local economic development. While government supports its citizens with social grant income; a large portion of this income finds its way back into the hands of large corporates and even foreign businesses. As a sector, we have been actively working towards promoting the establishment and support of cooperatives, particularly in rural communities, in an attempt to boost development in these areas and multiply the effects of the social grants money. We recognised the good work done by the University of KwaZulu-Natal with regards to providing training and support to cooperatives; and we wanted to partner with them to scale up this work.

The Department managed to identify some savings that could be used to support the University; however when we requested the National Treasury to approve the transfer, we were asked a litany of questions and told to rather procure the services from a university in Gauteng, despite the fact that when we launched Project Mikondzo we invited a number of universities to partner with us but none showed interest, with the exception of the University of KwaZulu-Natal. When we questioned why the National Treasury wants to determine which university we must work with, we were told that we are blowing the whole issue out of proportion.

To this day, the money earmarked for this purpose has not been transferred as the officials of the National Treasury claim that many other departments conduct training of cooperatives. Over and above that we have been given a mandate to take the poor out of the cycle of poverty and to start ensuring that caregivers have some work to complement and support their families.

The main aim of the envisaged training was to identify cooperatives that will develop and implement initiatives targeting the 19-59 age cohort that is currently not covered by the social assistance programme, in line with our mandate.

As far as the security services tender is concerned, we were informed that it if we did not sign the outcome of the tender document, the National Treasury will stop the monthly renewals and instruct SASSA to contract another company that will render services for a period of six months, which Treasury did. This information came from the people that are not even officials of SASSA or Social Development and I can furnish you with their names, if you wish me to do so.

My concern is that the National Treasury officials are conniving with disgruntled SASSA officials and outsiders against the Agency. What is strange is that the Treasury instructed SASSA to exclude the companies that were already providing security services to departments and I fail to understand the basis of this decision. We were informed that Xhobani, a company that had challenges like other companies was closely linked to the company that was given the six months contract at the instruction of the National Treasury. The same Treasury officials have been putting SASSA officials under pressure about the appointment of a service provider for security services.

What I have gathered here is that there are officials in the National Treasury who are driven by greed and personal interest. Recently, SASSA has received a letter from Treasury alleging that proper processes were not followed in the appointment of service providers for the SASSA work streams. The Treasury officials are well aware that SASSA must take over the payment of social grants next year and they are deliberately stalling this process. This creates a very difficult situation where officials of the Treasury takes unilateral decisions and another entity has to account for decisions which they were not consulted on. We have not even completed the appointment of the service providers for the works streams but the Treasury officials already want to interfere with the process.

The very same person that informed us about the 6 months security tender was part of the Ministerial Task Team. SASSA requested the same person to make a proposal on the work streams to implement the recommendations of the Ministerial Task Team. He quoted exorbitant amount of money and he was adamant that the price was reasonable and insisted both Home Affairs and SARS paid the same price for their turnaround strategies. This is the same person whom I was informed that was admitted for drug abuse but did not previously disclose this when he served on the Ministerial Task Team. This project is very huge and needs responsibility and someone who will be sober at all given times. The officials of the Department of Social Development and SASSA are always at loggerheads with officials in the National Treasury because of private business interests in our work.

I am seriously concerned about the interference of the Treasury and the unilateral manner in which they take decisions on key issues and undermine departments and entities. I have noticed over the past few years that many of the pressing Social Development matters seem to be deliberately undermined by the Treasury. All these matters make me wonder if the Treasury with its consultants are running government departments driven by private business interests.

I therefore request your intervention on this matters which if left unattended will hinder implementation of the key deliverables for the Department of Social Development and SASSA.

Yours sincerely

**MS BO DLAMINI, MP**
**MINISTER OF SOCIAL DEVELOPMENT**
**DATE:** 15\07\2016

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sassa

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**The Director General**
**Department: National Treasury**
**Private Bag x115**
**Pretoria**

**Per: Hand Delivered**

**CC Chief Procurement Officer**

**Attention: Mr L Fuzile**

**REQUEST FOR APPROVAL OF DEVIATION FROM COMPETITIVE BID PROCESS IN TERMS OF TREASURY REGULATION 16A6.4, READ WITH PARAGRAPH 8.5 OF NATIONAL TREASURY INSTRUCTION SCM INSTRUCTION NOTE 3 OF 2016/17 ("THE NATIONAL TREASURY INSTRUCTION")**

**PROCUREMENT OF SOCIAL GRANTS PAYMENT SERVICES BEYOND 31 MARCH 2017**

## 1. INTRODUCTION

1.1 This letter serves to request the National Treasury's urgent, prior written approval for a deviation from inviting competitive bids before the South African Social Security Agency (SASSA) enters into negotiations with Cash Paymaster Services (CPS) aimed at concluding a new, interim contract for the payment of social assistance benefits as contemplated in section 4(2)(a) of the South African Social Security Agency Act 9 of 2004 ("the SASSA Act").

1.2 On 7 February 2017 the CEO of SASSA wrote to the National Treasury seeking its support to extend the existing contract with CPS to enable a negotiation to appoint CPS for a period of 12 to 18 months after 1 April 2017, and included a motivation for that request. The National Treasury declined to support that request for reasons set out in a letter dated the following day, 8 February 2017, in which it stated that it would only support the extension of the invalid contract if the Constitutional Court (the Court) would further extend the suspension of invalidity of the contract. SASSA accepts this response to the request, and agrees that it is not appropriate to seek to extend a contract which the Court has declared invalid beyond the date (31 March 2017) of the lapsing of the order of the Court suspending its declaration of invalidity. On reconsidering the matter, SASSA further accepts the Court cannot extend the existing contract beyond the completion of the five-year period for which the contract was initially awarded (i.e. beyond 31 March 2017).

1.3 In this letter, for the reasons which follow, SASSA submits that there are exceptional circumstances of the kind contemplated in paragraph 8.5 of the National Treasury Instruction for a deviation from inviting competitive bids before SASSA enters into negotiations with CPS aimed at concluding a new, interim contract for the payment of social assistance benefits.

2. **BACKGROUND**

2.1 SASSA awarded a five year contract to Cash Paymaster Services (CPS) for the payment of social grants nationwide from 1 April 2012 to 31 March 2017 (i.e. the existing contract referred to above). The validity of the existing contract was challenged by some of the unsuccessful bidders, and after protracted litigation the Court upheld the challenge.

2.2 In its judgment on the just and equitable remedy[1] the Court ordered, amongst other things, that SASSA should run a new tender process and that SASSA must file a report with the Court setting out "all the relevant information on whether and when it will be ready to assume the duty to pay grants itself should it not award a contract/tender."

2.3 The declaration of invalidity of the existing contract was suspended pending SASSA's decision to award a new tender after completion of the tender process.

2.4 In the event of SASSA not awarding a new tender, the declaration of invalidity was further suspended until the expiry of the five-year period for which the contract was initially awarded (i.e. until 31 March 2017).

2.5 SASSA did initiate a new competitive tender process, but it did not receive any compliant bids. On 15 October 2015, SASSA decided not to award a new contract. It reported its decision to

[1] Allpay Consolidated Investment Holdings v CEO, SASSA 2014 (4) SA 179 (CC)



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the Court on 5 November 2015 by filing the required report with the Court (the Progress Report). A copy of the Progress Report is enclosed marked **'Annexure A'**.

2.6 The Progress Report set out the steps in terms of which SASSA proposed to assume the duty to take over the payment function itself after 31 March 2017. The Progress Report details seven system deliverables required for SASSA to do so and the projected time frames, which were dependant on the outcome of various consultations.

2.7 Following delivery of the Progress Report, the Court issued an order on 25 November 2015 in terms of which it discharged its supervisory jurisdiction over SASSA.

2.8 As explained in a Follow-up Report to the Court by SASSA and the Minister dated 2 March 2017 (the Follow-up Report), SASSA has not implemented the system deliverables set out in the Progress Report and is not in a position to take over the payment of social grants after 31 March 2017 as contemplated in the Progress Report. A copy of the Follow-up Report, excluding its annexure, is enclosed marked **'Annexure B'**.

2.9 As also explained in the Follow-up Report, at the time when the Progress Report was filed with the Court, SASSA believed the plan was ambitious but capable of implementation. SASSA and the Minister have however since been advised that the plan was overly optimistic, unrealistic and underpinned by insufficient research. SASSA was so advised between August and October 2016 by technical advisors appointed in mid-July 2016 who are responsible for developing information, business systems and banking services mechanisms to implement the plan in the Progress Report. The Minister appreciated the position in October 2016. Both SASSA and the Minister accept they ought to have been so aware earlier.

2.10 What happened in the period between November 2015 and February 2016, was that modelling and simulation of the change implications for SASSA using the seven system deliverables was undertaken. While it appears from minutes of a special meeting of SASSA's executive committee (EXCO) on 25 and 26 January 2016 that members of EXCO felt that establishing an in-house payment system "*in one year may seem impossible*", it was considered to be possible if it involved partners like banks to support the payment process. A copy of the minute is enclosed marked **'Annexure C'**. As appears further from the minute, the EXCO identified several areas of work which needed to be done, assigned people responsible in respect of each and provided for timeframes. None of the timeframes went beyond 31 March 2017 except for one related to a query system which it was felt ought to be established.



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2.11 In the period between March and May 2016 a detailed gap analysis was undertaken to establish the extent of the budget adjustments required for the seven system deliverables and the capacity and capability challenges they presented. This process is reflected in the minutes of an EXCO meeting on 11 and 12 April 2016, a copy of which is enclosed marked '**Annexure D**'. It also appears from the minute that although there had been challenges in appointing work stream leaders, they were expected to start work on 25 April 2016.

2.12 By 19 April 2016 the SASSA considered that based on the progress at that stage, SASSA would not be ready to realise its objective of taking over fully from CPS the functions associated with the payment of social grants. The Agency considered the services of CPS would need to be utilised for a further transitional period between 1 April 2017 and 31 March 2019. This appears from a letter dated 19 April 2016 from the General Manager: Legal Services of SASSA to the Office of the State Attorney in which the former requested that Advv. Nazeer Cassim SC and Mias Mostert be briefed to advise on, amongst other things, whether SASSA would be in contempt of the Court's order if it did not take over the full payment of social grants upon the expiry of the CPS contract on 31 March 2017 or if it extended that contract until it took over all the payment functions, and whether SASSA could approach the Court to extend the contract until a date in 2019. A copy of the letter is enclosed marked '**Annexure E**'.

2.13 According to Ms Mvulane, on 20 April 2016 she emailed a copy of this letter to the then CEO of SASSA Ms Petersen.

2.14 By mid-May the SASSA officials working on the project, including Ms Mvulane, considered that, in respect of Deliverables 4 (Payment reconciliation – real time reconciliation) and 5 (Payment infrastructure) SASSA would require a further period of two years from 31 March 2017 to build up the necessary infrastructure and it would need to engage a banking partner; and, in respect of Deliverable 7 (Card issuance and special bank accounts), the migration of the bank identification numbers (BIN numbers) might impact negatively on the proposed timeframes relating to delivery. (This appears from the opinion from counsel referred to in 2.16 below.)

2.15 On 24 May 2016 CPS's holding company, Net1 UEPS Technologies ("Net1"), wrote to SASSA about various issues relating to the transition from the current CPS contract to the new dispensation. In this letter, Net1 suggested, amongst other things, that in order to prevent disruption in the payment process and to protect beneficiaries, it may be better for SASSA to extend the current CPS contract for at least 12 months, during which SASSA could refine its strategy and implement a "phase-out and phase-in plan".

2.16 On 31 May 2016 Advv. Cassim SC and Mostert delivered their opinion, advising that SASSA would not be in contempt of court if it extended CPS's tenure for a period during which SASSA's payment functions were phased in and CPS's functions were phased out. Counsel further advised that, following a meeting between SASSA and the South African Reserve Bank ("the SARB") in respect of an issue concerning the BIN numbers on the SASSA cards issued to social grant beneficiaries (i.e. the first six numbers on the cards), the Court should be informed of the change in status pertaining to the project deliverables as well as the possibility of CPS's tenure being extended and the Court should be requested for directions as to whether it wished to resume its supervisory jurisdiction. A copy of this opinion is enclosed marked **'Annexure F'**.

2.17 According to Ms Mvulane, on 10 June 2016 the opinion of Advv. Cassim SC and Mostert was forwarded to herself and the acting CEO of SASSA Ms Ramokgopa.

2.18 In mid-July 2016 SASSA appointed the technical advisors referred to above. Following the appointment of these workstream advisors and subject matter experts in the banking and payments sector in both the business and technology domains, they have assisted SASSA in formulating the best options in terms of the right way forward.

2.19 By late September 2016 the technical advisors confirmed that SASSA would have to enter into an interim arrangement with CPS for a transitional period of two to three years because: SASSA itself could not take over the payment function from CPS with effect from 1 April 2017; there was not enough time to run a competitive bidding process for the appointment of a new contractor in time to take over from that date; nobody other than CPS had the necessary infrastructure in place to perform the payments function or the core components of it by April 2017; and it would not be feasible for anybody else to create their own infrastructure without a long term contract to recover the cost of that infrastructure.

2.20 SASSA consequently sought the advice of counsel (Adv. Wim Trengove SC, Susannah Cowen, Mkhululi Stubbs and Hannine Drake) on whether such an interim arrangement would be lawful.

2.21 In an opinion dated 27 October 2016 Counsel advised the interim arrangement would be unlawful because (counsel considered it prudent to assume) the reasons for SASSA's inability to make the deadline were either that its decision of October 2015 to go it alone after March 2017 was over-optimistic or since October 2015 SASSA had not been sufficiently vigorous in the implementation of its decision. However, given that the interruption of the payment of social grants was not an option, counsel advised SASSA should minimise the extent to which it might be necessary to enter into an unlawful arrangement with CPS both in duration and scope; and SASSA should apply for National Treasury approval in terms of paragraph 8.5 of the National Treasury Instruction, which says that Treasury will only allow deviations from normal bidding processes based on grounds other than emergency or sole supplier status in exceptional cases. Counsel further advised that SASSA should also, without delay, report to the National Treasury, the Auditor-General, the Court and all the parties to the AllPay litigation that it intended to enter into the interim arrangement with CPS without a competitive bidding process, and allow sufficient time for objections and alternative suggestions before it committed itself to CPS. Counsel further advised that SASSA should speak to CPS to find out, amongst other things, whether and on what terms it would prepared to agree to an interim arrangement that it continue to pay social grants after 31 March 2017. Finally, counsel advised that any interim arrangement with CPS should be carefully tailored to allow SASSA sufficient time to put an alternative solution in place but not to run any longer than that. A copy of this opinion is enclosed marked '**Annexure G**'.

2.22 On 24 October 2016 I attended a meeting of the SASSA EXCO, which was chaired by the then acting CEO Ms Ramokgopa. As appears from a copy of the minute of the meeting which is enclosed as '**Annexure H**', the introductory part of the meeting included an explanation from Mr Sukazi that:

"A non-competitive agreement for CPS to provide some of the services would need to be drawn up by the legal team. This would be on the basis of obtaining court permission for a deviation contract in the interim to ensure grant payouts continue uninterrupted. SASSA would need to perform some of the functions and CPS would perform those that they could not do yet. It would not be an extension of the contract. There are functions that only CPS can provide. A transitioning plan would also have to be provided."

2.23 On 31 October 2016 and 1 November 2016 SASSA held an in-house conference in Pretoria. A copy of the minute of the conference is enclosed marked '**Annexure I**'. The following things appear from the minute:

2.23.1 SASSA had a meeting with CPS at which the technicalities of ensuring payment beyond 31 March 2017 had been discussed;

2.23.2 A written submission from CPS was required for consideration by SASSA and a high level meeting would need to be scheduled with stakeholders such as the SARB, the Treasury and the Payments Association of South Africa;

2.23.3 The development of a report to the Court had not commenced "as the report had to include tangible deliverables, specific plans and cogent reasons as to why the contract with CPS was to be renewed albeit through a new contract, which would only be possible once the EXCO endorsed the CPS written plan/commitment and budget";

2.23.4 An overview of a meeting with the SARB was provided and it was noted that the meeting had been held in response to a letter from SARB requesting clarity on the business plan to ensure continuity of the payment of social grants;

2.23.5 It was agreed that a response be sent to the SARB thanking it for its input and support and ensuring it of ongoing engagement on the proposed plan;

2.23.6 After various options had been considered it was agreed that the option to be followed (option 1) entailed: negotiating a new contract with CPS to facilitate the payment of grants post 31 March 2017 (although still with a view to SASSA ultimately taking full control of the grant payment system); and the advertisement of certain functions to be performed by other service providers including a banking partner.

2.24 On 10 November 2016 SASSA obtained a further opinion from senior counsel (Adv. Muzi Sikhakhane SC) on, amongst other things, various possible options to ensure that it continued to meet its constitutional obligation to pay social security grants after the expiry of the CPS contract on 31 March 2017. These possible options included using section 238 of the Constitution of the Republic of South Africa, 1996 (the Constitution) to contract with another state institution for the provision of social grant payment services. The opinion also dealt with the issue whether the Court was the correct forum to approach to seek leave for SASSA's intended solution, in view of the fact that it had discharged its supervisory function in November 2015. Counsel advised that if SASSA itself could not pay the social grants, the best option was a delegation to another organ of state in terms of section 238 of the Constitution. Counsel further advised that SASSA could not seek the services from CPS alone, more specifically it could not validly seek a deviation from the normal competitive bidding processes required by the Treasury Regulations because it was highly unlikely that CPS was the only available supplier and SASSA had had sufficient time to know whether or not it could take over the social grants payment function fully after 31 March 2017. Counsel further advised SASSA may approach the Court to seek an extension of the suspension of the declaration of invalidity of the CPS contract so as to allow SASSA more time to procure the necessary services from a service provider. Finally, counsel advised SASSA should report to the Court and all the parties in the AllPay litigation once it had decided on a solution for the payment of social grants. A copy of this opinion is enclosed marked '**Annexure J**'.

2.25 Returning to the Follow-up Report, as explained there, during and after November 2016, and at the instance of the Minister, SASSA engaged with stakeholders, including the SARB and Mastercard, regarding the options to deal with the problem of ensuring the uninterrupted payment of social grants after 31 March 2017.

2.26 Initially, SASSA engaged with the SARB both to explore available options and their feasibility within the national payment system.

2.27 On 30 November 2016 the Portfolio Committee on Social Development ("the Committee") called the Department of Social Development and the Minister to explain what their plan is to ensure grants are paid after 31 March 2017. Copies of the presentation which SASSA made to the Committee and of report on the meeting prepared by the Parliamentary Monitoring Group are annexures "LM7" and "LM8" to the affidavit of the Black Sash Trust in its application. As appears from the meeting report, while SASSA did not disclose its prior instructions to counsel, it did disclose the basis for those instructions, namely that SASSA would not be able to take over the payment function itself by 31 March 2017 (see for example on paginated page 137 where Ms Mvulane of SASSA stated that the biometric system would only be ready in October 2017). The over-arching feedback communicated by SASSA at that meeting was that certain deliverables had not been met within the available timeframes and that it had been overly ambitious in prescribing timeframes that were not practical. This meant that SASSA would have to consider alternative options but that it was confident that grants would be paid beyond 31 March 2017 regardless of the mechanism in place for implementation.

2.28 On 9 December 2016 Net1 wrote to SASSA again saying, amongst other things, CPS had considered a range of emergency and contingency plans and conducted a number of tests to establish how the lifespan of the SASSA cards could be prolonged for 18 to 24 months to allow

SASSA to take over the grant payment system including the issuing of new cards to existing beneficiaries. Net1 requested SASSA to inform it without delay if its emergency and contingency plans were in line with SASSA's transition plan. Net1 said it was highly likely that its assistance would be required beyond 1 April 2017 with any transitional arrangements devised by SASSA and that any new agreement would probably require a departure from the terms of its current contract with SASSA to cater for issues such as inflation, additional risks, new work to be performed and the duration of the new agreement.

2.29 Also on 9 December 2016 SASSA issued a public request for information (RFI) aimed at assisting it to formulate a public request for proposals (RFP). The RFI invited interested service providers who want to participate in the provision of banking services, payment management and reconciliation of social grants to SASSA to provide information. The information sought related to an integrated grant administration and payment framework, card body production and distribution, social grant payment card service provision and account management, cash distribution and pay-point management, biometric proof of life and integrated management and cyber assurance. The RFI requested responses providing indicative costing and/or models with cost forecasting for both a 3 year contract and a 5 year contract. Following the RFI a compulsory briefing session was held on 13 January 2017. Submissions closed on 10 February 2017. There were 18 responses which are currently being evaluated.

2.30 SASSA's and the Minister's thinking is the RFP that will result from the RFI process should lead, as soon as reasonably practicable, to the appointment, via a competitive bidding process, of a contractor or contractors to perform the grant administration and payment functions that are currently the subject of the CPS contract until such time as SASSA is ready to implement its ultimate vision of providing all of those functions itself.

2.31 On 12 December 2016 two of the junior counsel in Adv. Trengove SC's team, Advv. Susannah Cowen and Hannine Drake, prepared a memorandum for SASSA dealing with a request by SASSA that they assist it to prepare a report to the Court. The memorandum records that counsel's instructions that there had been informal discussions with CPS about a proposed interim arrangement after 31 March 2017, but there was no clarity about the nature, duration and procurement implications of the proposed arrangement. Counsel consequently said they were unable to provide the requested assistance at that stage. The memorandum goes on to record the information counsel received at a consultation that day with the Minister, the then Director-General of the Department of Social Development Mr Zain Dangor, Ms Mvulane of

SASSA and the CEO of SASSA Mr Magwaza. As appears from the copy of this opinion enclosed marked **'Annexure K'**, counsel had several serious concerns arising from this consultation, including the following:

2.31.1 "Timing: There appears to be no unanimity between the Minister and SASSA, and indeed within SASSA itself, on when the appropriate time is to report to the Constitutional Court. The CEO of SASSA expressed the view that a report should only be filed in January 2017. Others want to file the report as soon as possible and preferably by mid-December. The reasons given for an urgent report include the advice provided in the opinion, recent parliamentary hearings and the increasing media and public attention being given to the matter. All of these reasons are in our view reasonable assuming SASSA can report responsibly. (We are currently unable to assess this in view of the comments below but it is a matter that warrants priority and attention from the relevant functionaries at the highest appropriate levels.)" (para 12)

2.31.2 "Content: It also became clear during consultation that there is no clarity within SASSA, or between SASSA and the Minister, on the content of any report to the relevant bodies including the Constitutional Court. There is agreement that the plan and associated timeframes reported to the Constitutional Court on 5 November 2015 cannot be met for various reasons. SASSA has also accepted the need to issue a wide-ranging RFI to the market, the response to which will form the basis for its Procurement Plan." (para 13)

2.31.3 "There is clearly a pressing need for SASSA to finalise its plans as soon as possible to mitigate its legal exposure in respect of the Proposed Interim Arrangement and to ensure the uninterrupted payment of social grants from 1 April 2017. We refer in this regard to the advice supplied in the opinion [dated 27 October 2016] regarding the unlawfulness of such transitional arrangement and the consequent importance of limiting any unlawful arrangement in both duration and scope." (para 18)

2.32 On 22 December 2016 Ms Mvulane of SASSA responded to the 9 December 2016 letter from Net1 described above saying that SASSA intended engaging CPS to assist in the transition towards a new service model that would be subject to a regular procurement process, outlining the topics for discussion and issues on which SASSA required technical clarification and suggesting that the parties have an initial meeting on 5 January 2017. Ms Mvulane pointed out that CPS would also be required to assist with ensuring grant payment continuity beyond 31 March 2017.

2.33 On 28 December 2016 Net1 wrote a detailed letter to SASSA which concluded by saying it was very concerned the new contract may take a substantial amount of time to negotiate and execute, specifically given that approval would need to be sought from the National Treasury and possibly the SARB and the Court.

2.34 In January 2017 the CEO of SASSA, the Director-General of the Department, the Director-General of the National Treasury and the Deputy Governor of the SARB together constituted an interim task team to assist with the transition over the short to medium term. The task team comprised technical managers from the four institutions. It evaluated the risks associated with the transitional options available to SASSA. The options it considered were continuing with an arrangement with CPS (Option 1), procuring the service from Grindrod bank, which services the majority of the social grant beneficiaries (Option 2), procuring the services of all banks wishing to comply with the SASSA requirements (Option 3), procuring the services of all banks wishing to comply with the SASSA requirements for those beneficiaries who have access to banking infrastructure and procuring the services of another service provider for grant recipients who are currently using cash pay points (Option 4), procuring the services of the South Africa Post Office (Option 5) and appointing a service provide for cash distribution to grant recipients who are currently using cash pay points and utilising existing bank accounts to distribute grants through the banking sector those beneficiaries with bank accounts (Option 6). However, there was no consensus about the feasibility of these options. There have been and remain differences of opinion within SASSA and amongst SASSA's stakeholders as to how best to proceed in a manner which prioritises the best interests of beneficiaries.

2.35 The Minister and SASSA evaluated these options and the associated risks and concluded that an interim arrangement with CPS is the option with the least risk to ensure the uninterrupted payment of social grants after 31 March 2017. That remains their view.

2.36 On 7 February 2017 the CEO of SASSA consequently wrote to the Director-General of the National Treasury the letter referred to in paragraph 1.2 above seeking approval for deviation from the normal competitive bidding process in accordance with paragraph 8.5 of the National Treasury Instruction, more specifically seeking the Treasury's support to extend the existing contract with CPS to enable a negotiation to appoint CPS for a period of 12 to 18 months after 1 April 2017. As further explained in that paragraph, on 8 February 2017 the National Treasury refused the request; and SASSA accepts this response to its request.

2.37 On 9 February 2017 SASSA wrote to CPS requesting an exploratory meeting to explore the possibility of an interim arrangement regarding the payment of social grants after 31 March 2017. Net1 responded on 9 and 16 February 2017 confirming its willingness to meet, suggesting dates for the meeting (initially by 17 February and later 1 March 2017) and outlining the matters to be discussed, and on 21 February 2017 SASSA responded suggesting that the parties meet from 1 to 3 March 2017.

2.38 The negotiations were then held over the period 1 to 3 March 2017. Those present agreed in principle on the key elements that will inform the basis of negotiating for an interim period between SASSA and CPS, which were subject to approval by the Minister and the National Treasury. These elements included a two-year contract period during which CPS would be paid a fixed monthly fee. They also include that SASSA would get ready to and gradually take over certain of the functions currently performed by CPS; SASSA would conduct a competitive bidding process for the appointment of service providers to undertake those of CPS's current functions which will not be performed by SASSA in the medium term; and the successful bidders would get ready to and gradually take over those functions. The second year of the two-year contract period in particular would be when CPS was phased out and SASSA and the successful bidders would be phased in.

2.39 In the meantime:

2.39.1 on 28 February 2017 SASSA instituted an application in the Court requesting its assistance in ensuring that CPS could continue rendering its current grant payment services for a further period of one year from 1 April 2017. The application, though supported by an affidavit from SASSA's chief executive officer (CEO) Mr Thokozani Magwaza dated 27 February 2017, was instituted without the authorization of the then acting CEO of SASSA Ms Thamo Mzobe – Ms Mzobe had been appointed as acting CEO on 27 February 2017 because Mr Magwaza has been on sick leave from that day – and without the authorization of the Minister, both of whom should have been, but were not consulted beforehand. Once aware of the situation, the Minister instructed SASSA to withdraw the application. This was done on 1 March 2017 and, following a directive from the Chief Justice on 8 March 2017, the formalities for the withdrawal of the application were finalized on 9 March 2017;

2.39.2 also on 28 February 2017 the Black Sash Trust instituted an application in the Court for a range of relief mainly concerning the intended interim contract with CPS, and on 3 March 2017 the Chief Justice directed that this application be heard on 15 March 2017;

2.39.3 on 3 March 2017 the Democratic Alliance (DA) instituted an application in the Court for leave to intervene as an applicant in the Black Sash Trust's application so as to seek a wide range of further relief, but on 8 March 2017 the DA's application was dismissed on the ground it was not in the interests of justice to hear the application at this stage;

2.39.4 on 6 March 2017 Freedom Under Law NPC (FUL) instituted an application in the Court for leave to intervene as an applicant in the Black Sash Trust's application so as to seek further relief concerning the intended interim contract with CPS, and on 8 March 2017 the Chief Justice set FUL's application down for hearing together with the Black Sash Trust's application on 15 March 2017;

2.39.5 on 10 March 2017 Corruption Watch (NPC) RF applied for leave to intervene as an amicus curiae in the Black Sash Trust's application, but the Chief Justice has not yet given any directions in Corruption Watch's application;

2.39.6 also on 10 March 2017 the current acting CEO of SASSA delivered an affidavit on his behalf and on behalf of SASSA and the Minister indicating that they did not oppose the relief sought in the Black Sash Trust's application and did not oppose some but opposed other parts of the relief sought by FUL. A copy of the order to which SASSA and the Minister will consent at the hearing on 15 March 2017 is attached marked **"Annexure L"**.

2.40 On Wednesday 8 March 2017 a Ministerial Task Team ("MTT") was appointed to assist with ensuring the uninterrupted payment of social grants from 1 April 2017 and to oversee the response to the Directions issued by the Chief Justice that day in case 48/2013. In addition to the Minister, the MTT comprises Ministers J Radebe (Chairperson), S Cwele, M Gigaba, P Gordhan, M Mahlobo and N Pandor. At its first meeting on Thursday 9 March 2017, after considering input from, amongst others, the Acting Chief State Law Adviser, the MTT decided that the current negotiations with CPS should be terminated and fresh negotiations should start afresh only if and when the National Treasury gave its prior written approval for a deviation from the requirement that SASSA invite competitive bids as contemplated in paragraph 8.5 of the National Treasury Instruction. It was further decided that steps be taken forthwith by SASSA to seek such approval, and that the process be overseen by senior counsel (Adv. Wim Trengove SC) to ensure the process is legally sound.

2.41 Pursuant to this decision, the legal team representing the Minister and SASSA in the proceedings in the Court to be heard on 15 March 2017 prepared a draft of a request for a



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deviation, a copy of which was sent to Adv. Trengove SC for his consideration ("the draft deviation request"). A copy of the draft deviation request is '**Annexure M**'.

2.42 On 11 March 2017 Adv. Trengove SC furnished the MTT with a memorandum in which he concluded that it would be appropriate for the National Treasury to allow SASSA to deviate provided that it contracts with CPS for no longer than the time it reasonably requires to appoint a new contractor by a competitive bidding process. A copy of the memorandum is attached marked '**Annexure N**'.

2.43 Adv. Trengove SC's memorandum (para 10) summarises paragraph 8 of the Treasury Instruction as follows:

"National Treasury issued SCM Instruction Note 3 on 19 April 2016. Its purpose is "*to provide guidance on measures to prevent and combat abuse in the Supply Chain Management System*". Paragraph 8 regulates deviations from the normal requirement of a competitive bidding process. Paragraph 8.1 says that deviation is permissible only "*in cases of emergency and sole supplier status*". Paragraph 8.5 adds that deviation will only be allowed "*in exceptional cases subject to the prior written approval of the relevant treasury*"."

2.44 The Minister's and SASSA's legal team consider that if the last sentence of this paragraph is intended to mean that paragraph 8.5 of the Treasury Instruction contains additional requirements for deviations permitted by paragraph 8.1, it is incorrect. Paragraphs 8.1 to 8.4 regulate deviations from inviting competitive bids in cases of emergency and sole supplier status (though paragraph 8.4 is applicable to emergency procurement only). Paragraph 8.5 regulates "[a]ny other deviation", i.e. any deviations other than emergency procurements and sole source procurements. Its requirements for such other deviations are they will be allowed in exceptional cases only and the prior written approval of the relevant treasury must be obtained. The implication of this is that, if the present is an exceptional case and SASSA obtains the prior written consent of the National Treasury, SASSA may lawfully deviate from inviting competitive bids and instead enter into negotiations with CPS aimed at concluding a new, interim contract for the payment of social assistance benefits.

## 3. EXCEPTIONAL CIRCUMSTANCES

3.1 SASSA accepts that normally a deviation from inviting competitive bids should be permitted only in cases of emergency or where there is a sole supplier. This is an important component of the system introduced by the National Treasury to prevent and combat abuse of the supply chain management system.

3.2 SASSA also accepts that normally "self-created" urgency will not justify a deviation from the requirement of inviting competitive bids. Nor should a sole source ordinarily be relied upon where there might in fact be more suppliers who are able to meet the requirements of the institution, but where the institution has through its own conduct made it impossible or impractical for any other supplier to deliver the services.

3.3 These requirements are important to avoid in particular a situation in which a government department or official is able to effectively and deliberately place the department into a position in which a non-competitive process is necessary, by failing to take steps at appropriate times and so "creating" a situation of urgency.

3.4 The present case however is not a normal one. It is exceptional for the following reasons.

3.5 As Adv. Trengove SC's memorandum explains (paras 5 to 10):

3.5.1 SASSA has a constitutional duty to pay social grants to beneficiaries on behalf of the state. This duty is aimed at achieving achieve the progressive realisation of everyone's right to social security in terms of s 27(1)(c) of the Constitution and fulfilling the right of every child to the basic amenities of life in terms of s 28(1)(c); and

3.5.2 SASSA has a constitutional duty to contract for goods or services, it must do so "*in accordance with a system which is fair, equitable, transparent, competitive and cost-effective*".

3.6 Adv. Trengove SC's memorandum aptly sums up SASSA's current predicament as follows (paras 11-13):

"SASSA is ordinarily obliged to comply with both its payment duty and its procurement duty. It must pay social grants and, if it employs contractors to do so on its behalf, it must procure their services by a competitive bidding process.

SASSA can no longer comply with both duties for the payment of social grants from 1 April 2017 after expiry of its contract with CPS. It can contract with CPS to continue paying the social grants but it cannot do so by a competitive bidding process. CPS is moreover the only contractor capable of performing this function for some time because no other contractor has the infrastructure and resources in place to take over the payment functions overnight.

It is clear that SASSA is now in an emergency and has no other option than to contract with CPS…."

3.7 As has been acknowledged by SASSA and the Minister in the Follow-up Report, SASSA and the Minister ought to have been aware earlier that SASSA would not be in a position substantially to implement the plan set out in the November 2015 Progress Report within the timeframes that had been specified. They accept responsibility for the delays in identifying and redressing deficiencies in the plan.

3.8 SASSA also accepts that it should have acted more quickly in approaching the Court to disclose that it would be necessary to deviate materially from the timeframes that had previously been reported to it in the November 2015 Progress Report.

3.9 SASSA finds itself in the situation in which it currently does essentially because, from November 2015 onwards, it has strived to devise ways to implement – at first, fully by 1 April 2017, and more recently, in a phased, incremental way extending beyond 31 March 2017 – the plan announced in its November 2015 Progress Report, namely to take over the payment function itself.

3.10 As SASSA's technical advisers confirmed in late September 2016, however, it is not realistic to expect any competing supplier to offer to do what CPS has and can do, for the relatively short interim period required for a new competitive bidding process. Even if the competitive bidding process had started on that date, there would not have been enough time to run process and appoint a new contractor which could take over from 1 April 2017. Nobody other than CPS had the necessary infrastructure in place to perform the payments function or the core components of it by April 2017; and it would not be feasible for anybody else to create their own infrastructure without a long term contract to recover the cost of that infrastructure.

3.11 Of specific concern in assessing this request is the consideration that if SASSA fails to provide a network for cash payments approximately 40% of SASSA beneficiaries will not receive their benefits from 1 April 2017. While arrangements could be made to pay benefits into their current SASSA cards, many of these beneficiaries do not have Personal Identification Numbers (PINs), having relied on biometric authentication to withdraw their money. A process to ensure that all these beneficiaries have PINs and are made aware of where to go to withdraw money has simply not been possible to avoid widespread disruption in the period following 1 April 2017.

3.12 As Adv. Trengove SC's memorandum (para 14) puts it, SASSA's:

"higher duty and first priority is to ensure that all social grants are paid on time. It can only do so by contracting with CPS to continue paying the social grants for some time. I am accordingly of the view that SASSA is obliged to contract with CPS to continue paying the social grants for some time despite the fact that the method by which it will do so will be unlawful for want of compliance with the normal requirement of a competitive bidding process." (Adv. Trengove SC's reference to unlawfulness is addressed in 2.44 above.)

3.13 As indicated above, Adv. Trengove SC's memorandum concludes it would be appropriate for Treasury to allow SASSA to deviate provided it contracts with CPS for no longer than the time it reasonably requires to appoint a new contractor by a competitive bidding process. Adv. Trengove SC considers the period of two years which emerged from the 1 to 3 March 2017 negotiations with CPS as being too long. He reasons (paras 18-21) it would not be appropriate for SASSA to contract for a longer period which will allow it not only to make such appointment but also to allow SASSA itself to acquire the skills, resources and infrastructure necessary to take over some of the functions currently performed by CPS:

"It is now under a duty to minimise its breach of its procurement duty when it enters into a new contract with CPS without following a competitive bidding process. It may not enter into such a contract for any longer than is reasonably necessary to regularise its position by appointing a new contractor by a competitive bidding process."

3.14 SASSA accepts the correctness of this reasoning.

3.15 The exceptional circumstances are, in summary, that at present it is not possible for SASSA to ensure that there will be no disruption in the payment of social security benefits if it does not contract with CPS to continue to provide payment services. No other service provider can step in or to do what CPS is able to do in the short term, i.e. until a new contractor is appointed by a competitive bidding process and can take over the payment function. That will take a period of between 12 and 18 months.

## 4. APPLICATION FOR DEVIATION; REPORT TO THE NATIONAL TREASURY AND AUDITOR-GENERAL

4.1 In view of the fact that SASSA intends to procure CPS's services for the proposed interim arrangement, SASSA therefore hereby:



South African Social Security Agency
Gauteng Region

28 Harrison Street • Johannesburg 2000
Private Bag X120 • Marshalltown 2107
Tel +27 11 241 8323 • Fax +27 11 241 8301
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4.1.1 applies to the National Treasury for approval to deviate from inviting competitive bids and instead enter into negotiations with CPS aimed at concluding a new, interim contract for the payment of social assistance benefits; and

4.1.2 reports to the National Treasury and Auditor-General in terms of paragraph 4.3.5 of the SASSA procurement policy.

4.2 Utilisation of the services of CPS will allow SASSA to continue effecting payment of social grants to beneficiaries while undertaking a competitive bidding process aimed at the appointment of a new contractor and will allow that contractor to take over the payment function from CPS.

5. **ESTIMATED FINANCIAL IMPLICATIONS**

5.1 The financial implications of the envisaged interim contract with CPS will depend on the duration of the contract including the elements of phase-in / phase-out period which the parties negotiate. It is unlikely that the current R16.44 including VAT per beneficiary per month cost will be maintained. SASSA will seek to ensure that the agreed remuneration is reasonable. CPS is well aware that it has been performing an important public function under a special dispensation sanctioned by the Court; and that as it will continue doing so under the envisaged interim contract, the implementation of which will be supervised by the Court, it cannot legitimately strive for excessive profits from the new arrangement.

5.2 If the implementation of the interim contract will result in SASSA's budget allocation for the payment system of about R2.258 billion for each of the 2017/18 and 2018/19 financial years being exceeded, SASSA and the Minister will seek the National Treasury's written approval before the agreement is concluded.

6. It will be appreciated if our request could be urgently and positively considered.

Sincerely

**DR WISEMAN KHEHLA MAGASELA**
**ACTING CHIEF EXECUTIVE OFFICER**
**DATE:** 12/03/2017



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OAKBAY

Minister's Office
Ministry of Finance
120 Plein Street
Cape Town

Oakbay Investments
144 Katherine Street
Sandton 2031

8th April 2016

Dear Minister Pravin Gordhan,

**RE: 7,500 POTENTIAL JOB LOSSES AT OAKBAY INVESTMENTS & OUR PORTFOLIO COMPANIES**

I wanted to take this opportunity to provide you with advance warning that Oakbay Investments and our portfolio companies may soon be incurring significant job losses.

Following the unexplained decision of a number of banks, and of our 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.

We believe that this is the result of an anti-competitive and politically motivated campaign designed to marginalise our businesses. We have received no justification whatsoever to explain why ABSA, FNB, Sasfin, Standard Bank and now Nedbank have decided to close our business accounts. KPMG themselves said that there was no audit reason to end their work with us.

Oakbay has a 23 year track record of strong business performance and turnaround skills in a number of sectors. Our ability to be a disruptor 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, since 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 Glencore also prevented a liquidation that would have seen more than 3,000 South African mining jobs lost.

All of these jobs are now at risk.

With our bank accounts closed, we are currently unable to pay many of the salaries of our more than 4,500 employees. We find it totally unacceptable that the tens of thousands of their dependents would have to suffer as a result of the campaign against Oakbay and the Gupta family.

Therefore the Gupta family have come to the conclusion that it is time to relinquish control of Oakbay Investments and have stepped down from all executive and non-executive positions and any involvement in the day-to-day running of the business.

By doing so, they hope to end the political campaign against Oakbay.

As the CEO I now hope to draw a line under the corporate bullying and anti-competitive practices we have faced from the banks. The livelihoods of too many people are at risk should our bank accounts remain closed.

I hope that you appreciate my candour and can see that we are doing everything we can to save thousands of South African jobs.

If you have any questions, please do not hesitate to contact me.

Yours sincerely

Nazeem Howa
CEO, Oakbay Investments

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OAKBAY
INVESTMENTS (PTY) LTD.

17th April 2016

The Hon. Pravin Gordhan
Minister of Finance
Republic of South Africa

Dear Minister

**RE: Apology**

Let me start with our deepest apology and regret if our recent letter to you came across in any way other than a heartfelt appeal for assistance to save the 7500 jobs within our group following the decision by financial institutions to cut ties with us.

I watched your interview with Richard Quest on CNN last week Thursday and thought I should offer my sincere apologies to you as it was never our intention to come across with any other message other 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, if we include families of our employees.

With your long history as a leader within our democratic struggle, I know you hold the livelihoods of our people very dear to your heart and would hope you would accept our unequivocal apology. I am sure you would agree that our fragile economy cannot in any way afford a single unnecessary job-loss, never mind the 7500 people which would be affected should we not be able to reverse the current hardline stance taken by the institutions.

As you are aware the shareholder has resigned all executive and non-executive roles in our group as a move to address the concerns of the parties about possible association risk, yet we have found the response from the institutions to be intransigent, even in the face of the real threat of significant job losses and the concomitant impact on our economy.

Given your strong relationship with the captains of industry, I would implore you to help us to save the jobs which, in addition to the personal benefit to the affected individuals, we believe is in the best interest of our economy and more broadly our country's overall development.

I look forward to hearing from you about any possible assistance you are able to offer us in these trying times.

Yours sincerely

Howa

Nazeem Howa
Chief Executive: Oakbay Investments

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# Oakbay 'conspiracy theory' claims SA's banks are controlled by Ruperts – BDlive – 6 May 2016

Published 6 May, 2016

*[Source: Business Day Live by Carol Paton.]*

Oakbay Investments, the Gupta-owned company that has had its banking services terminated, has circulated a bizarre conspiracy theory in which it claims that South African banks are under the control of the Rupert family.

The company also suggests that Project Spider Web, which claimed a conspiracy between Treasury officials, foreign governments and white business, has "been right all along".

Some of the arguments it punts have also recently turned up in press statements by the African National Congress (ANC) Women's League and ANC Youth League. It is also believed to have been presented to the ANC.

Business Day earlier reported that the presentation had been given to the ANC top six. However, ANC secretary-general Gwede Mantashe said that it was not the top six who had received the presentation.

Project Spider Web, which claimed to be "an intelligence dossier" was circulated last August and was the precursor to various political attacks on the Treasury, including the shock dismissal of then finance minister Nhlanhla Nene.

The Oakbay document outlines the actions taken by the banks and other service providers against Oakbay, claiming that a conspiracy had been hatched against the company, with banks, auditors and insurers all withdrawing services and other companies demanding new terms in contracts.

To underline Oakbay's victimhood the presentation ends with the famous anti-Holocaust poem by German pastor Martin Niemöller: "First they came for the Communists, and I did not speak out because I was not a Communist…", implying that if action were not taken to save Oakbay, there would be other victims in its wake.

The central argument is that the 'real state capture' has not been executed by the Guptas but by the Rupert family through Remgro, which it says "has a direct interest in all major banks".

It also links Remgro to Absa by stating that former Treasury director-general Maria Ramos was once a Remgro nonexecutive director. Former finance minister Trevor Manuel is also brought into the conspiracy as he is a nonexecutive director of Old Mutual, the parent company of Nedbank.

Much of this is not accurate. Remgro owns 3.9% of FirstRand directly and another stake indirectly through RMB Holdings, but does not have shareholding in any of SA's three other top banks.

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# IN THE HIGH COURT OF SOUTH AFRICA

## (GAUTENG DIVISION, PRETORIA)

Case no /2016

In the matter between:

[illegible] SOUTH AFRICA [illegible] PRETORIA
PRIVATE BAG [illegible]
2016 -10- 14
L. P. M. BATISTA
REGISTRAR'S CLERK
GRIFFIER VAN DIE HOË HOF VAN SUID-AFRIKA, GAUTENG AFDELING, PRETORIA

| | |
|---|---|
| **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 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 |

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**FOUNDING AFFIDAVIT**

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I, the undersigned,

PRAVIN JAMNADAS GORDHAN

solemnly affirm that:

1. I am the Minister of Finance, and in that capacity also head of the National Treasury of South Africa, and the applicant in this matter. I was appointed to this position in December 2015 (having previously served in the same capacity for over five years from 2009 to 2014).

2. The contents of this affidavit are, save where the context indicates

otherwise, within my personal knowledge or derived from records and information under my control. They are true and correct. Where I make legal submissions this is based on advice by my legal representatives.

3. This is an application for declaratory relief arising from a dispute relating to powers of intervention by Government in relation to the closing of private clients' accounts by registered banks. This 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. The related controversy has received both national and international attention, and it is clearly in the public interest, the interest of the affected clients and relevant banks, and employees of both that it be authoritatively resolved.

4. The first to fourteenth respondents are registered companies in the Oakbay group of companies (collectively, "Oakbay"). Their names, registered offices and principal places of business within the jurisdiction of this Court are reflected in the notice of motion. To avoid prolixity these details are not repeated here.

5. The fifteenth to the eighteenth respondents are registered South African banks (collectively, "the banks"). Their names, registered offices and principal places of business are likewise reflected in the notice of motion.

6. The nineteenth respondent, the Governor of the South African Reserve Bank ("Reserve Bank"), is cited by virtue of any interest he may have in this application. The twentieth respondent, the Registrar of Banks, is cited by virtue of any interest he may have in this application, in particular pursuant to

the provisions of sections 4 and 7 of the Banks Act 94 of 1990. The twenty first respondent, the Director of the Financial Intelligence Centre, is similarly cited pursuant to any interest he may have in the application pursuant to the Financial Intelligence Centre Act 21 of 2001 (FICA).

7. In April 2016 it was publicly announced on behalf of Oakbay, controlled at the time by the Gupta family, that their banking accounts had been closed by the banks. Oakbay also announced that its auditors, KPMG, and its sponsor on the Johannesburg Stock Exchange, Sasfin, have similarly terminated their relationships with Oakbay.

8. According to a series of public statements by Oakbay, its executives thereafter engaged in urgent approaches to their bankers with a view to clarifying the basis on which they each took the individual decision to close Oakbay's accounts. At the same time Oakbay made public statements contending that the banks had acted irregularly, and indeed improperly, in closing the accounts.

9. Oakbay also proceeded to direct representations and demands to me as the Minister of Finance. In short, Oakbay demanded that on behalf of Government I intervene with the banks to achieve a reversal of their decisions. In a first letter to me dated 8 April 2016, Oakbay contended that "the unexplained decision of a number of banks, and of our auditors, to cease working with us", was

> "the result of an anti-competitive and politically-motivated campaign designed to marginalise our businesses. We have received no justification whatsoever to explain why ABSA, FNB, Sasfin, Standard Bank and now Nedbank have

decided to close our business accounts. ... As the CEO I now hope to draw a line under the corporate bullying and anti-competitive practices we have faced from the banks."

10. I attach a copy, marked "A". Naturally these serious allegations were a source of concern, particularly in view of the number of jobs (7 500) stated by Oakbay to be at risk.

11. A further letter followed on 17 April 2016 (attached, marked "B"). It offered "our deepest apology and regret" if the first letter had come across other than an appeal for assistance to save jobs. It asked to be advised "about any possible assistance you are able to offer us in these trying times". The letter was closely followed by two open letters, one to the CEOs of the banks and one in similar terms to me, on behalf of two "employee representatives".

12. In my capacity as Minister of Finance, I 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. To that end a meeting was arranged on 24 May 2016 with Oakbay representatives, senior Treasury officials and myself. Prior to the meeting, I had taken steps to obtain independent legal advice by senior counsel in important respects relevant to the apparent issues. This advice was provided in an opinion by senior and junior counsel dated 25 April 2016. I attach a copy, marked "C".

13. For brevity I do not repeat at length the contents of that legal advice. I ask that annexure C be regarded as incorporated herein. In short, counsel advised that the National Executive (comprising Cabinet and such individual

Ministers as may be appointed by the President) are governed by the Constitution and national legislation. They are accordingly entirely "creatures of statute" with only such powers as the law itself confers on them. Nothing in law, the opinion advised, authorised governmental intervention with the banker-client relationship arising by contract. The opinion also emphasised the obligations imposed by the Basel Committee on Banking Supervision at the Bank of International Settlements on South African banks. The Committee had imposed an international duty regarding know-your-customer (KYC) standards. I was further advised that required KYC policies and practices "not only contribute to a bank's overall safety and soundness", but also "protect the integrity of the banking system by reducing the likelihood of banks becoming vehicles for money-laundering, terrorist financing and other unlawful activities." (These aspects are addressed more fully in paras 17-19 of the opinion.) These principles, I was further advised, are given effect to in domestic law by the FICA. In addition, the Banks Act imposes reporting duties, requires the Registrar of Banks under certain circumstances to disclose information reported to him to third parties, and contemplates that any concerns regarding the banking sector be communicated by the Registrar to *inter alios* the Minister of Finance (paras 19-21 of the opinion).

14. South African banks not complying with their Basel or domestic duties are furthermore subject to fines by foreign and domestic authorities, and to steps being taken against them outside and inside South Africa.

15. On 24 May 2016, following my meeting with Oakbay's CEO, Mr Nazeem Howa, I wrote to him. I attach a copy of the letter, marked "D". I again ask that it and its attached *aide memoire* be regarded as incorporated herein. My officials and I sought to provide assistance by attaching an information document explaining in outline the regulatory framework governing the banking and financial sectors. I also drew attention to sources of further information, both nationally and internationally. The letter reiterated the legal impediments to any registered bank discussing client-related matters with me or any third party. I stressed that "the Minister of Finance cannot act in any way that undermines the regulatory authorities". I encouraged Oakbay to achieve a determination of its contentions by approaching a court. Finally I requested Oakbay to desist from its attacks on the integrity of National Treasury, in the public interest.

16. Also on 24 May 2016 I received a letter from Oakbay, attached marked "E". Oakbay here significantly places on record that on its own legal advice, any legal approach by it challenging the closure of the accounts or the basis on which this had been effected "may indeed be still-borne". It is further apparent that Oakbay recognised that "as case law suggests, [any legal approach] will fail in a court of law". The letter however both asserts a continued intention by Oakbay to "appeal to you for assistance", and a suggestion that the banks had closed the accounts without "any indication of any wrongdoing on our side ... we have done nothing wrong".

17. In view of Oakbay's persistence in its stance, I sought further advice from senior and junior counsel. I attach a copy of their additional opinion, dated 29 May 2016 as annexure "F".

18. On 28 June 2016, I received a further Oakbay letter, this time from the CEO of Sahara, the fourteenth respondent, again apologising for public statements made in the media but also again pressing me "to serve the national purpose". I attach a copy marked "G".

19. 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. It is well-known that the international financial environment has been extremely difficult since 2008. The proper conduct of the financial regulatory scheme is clearly in the public interest. So too are the jobs of the affected individuals (which Oakbay has variously estimated at 6 000, 7 500 or 15 000), 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 have 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.

20. Given Oakbay's failure to approach the courts, or any commitment to do so, on 28 July 2016 I wrote both to the Registrar of Banks (the twentieth respondent) and to the director of FIC (the twenty first respondent). I attach copies of these letters marked "H" and "I". I should note that I had previously received a letter from the nineteenth respondent, dated 26 April 2016, in which the Governor of the Reserve Bank raised his independent concerns regarding the deleterious effect on the banking sector of the contentions made by Oakbay. I attach a copy marked "J".

21. To my letters "H" and "I" I received the response I annex marked "K".

22. It is evident that, notwithstanding the assertion by Oakbay on 24 May 2016 that it holds the "view that we have done nothing wrong" and that "no bank has given us any indication of any wrongdoing on our side", each of the banks has considered itself under a legal duty pursuant to the international and domestic statutory instruments applying to it to report over a significant period matters regarding the conduct of Oakbay accounts such as to fall within the purview of these instruments.

23. That Oakbay itself is aware of this is apparent from the following public statement made by Mr Howa in an interview with *Carte Blanche* (an investigative television production) screened by M-Net on 19 June 2016. Mr

Howa divulged that one of the banks closing accounts had given the following reasons, when requested by Oakbay to do so:

> "Without waiving our rights not to furnish reasons for our decision [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 [sic], Prevention of Organised Crime Act, Prevention and Combating of Corrupt Activities Act and the Financial Intelligence Centre Act, as well as the USA's Foreign Corrupt Practices Act and UK's Bribery Act, prevent us from having dealings with any person or entity who 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 that law."

24. Should Oakbay challenge the proposition that any or all of the banks was indeed bound by law to report under FICA in such terms, it is open to Oakbay in terms of section 29(4)(c) or (d) of FICA to require the banks to disclose to this Court the full contents each of the reports in question. 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 dealings 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.

25. Similarly, I am advised, it is open to the banks in answering this application to disclose such reports in terms of the same provisions.

26. On 25 July 2016 my office received a further letter from Mr Howa, a copy of which I attach marked "L". I responded on 10 August 2016 in the terms apparent from annexure "M", stressing the need for a satisfactory answer from Mr Howa in writing by Friday 12 August 2016. To this Mr Howa replied on 17 August 2016 (a copy of which I attach marked "N"), simply to the effect that he was "currently out of the country", and that he would not meet this timeframe. I received no further communication, until an email dated 9 September 2016, a copy of which I attach marked "O". In this Mr Howa expressed the view that it would be "preferable" again to meet, ostensibly to consider a "full file of correspondence" (which, despite my previous request, he still had not produced). He stated that the meeting would add "considerable flavour" to the correspondence. I gave careful consideration (taking into account legal advice) to the appropriateness of another meeting, for the purpose intended by Mr Howa. There has been no such further meeting. Oakbay still has failed to produce the documentation to which Mr Howa has referred, and still has not provided the satisfactory answer (referred to above).

27. Previously, on 4 August 2016, I had received a letter with an attached certificate from the Director of the FIC. I attach a copy, marked "P1" and "P2". This reflects the increasingly serious state of affairs which has arisen. This is illustrated by the number and scale of reported transactions linked to Oakbay. Just one example is the reporting of an amount of R1,3 billion as a suspicious transaction, in terms of the FICA, relating to Optimum Mine Rehabilitation Trust. Indeed, as appears from the further attached letter of 27 June 2016 (annexed, marked "Q") from attorneys acting for the business

rescue practitioners of Optimum, "with the written approval of the Department of Mineral Resources" R1,3 billion was intended to be transferred from the account closed by Standard Bank to the Bank of Baroda. For this the further approval of the Reserve Bank was sought. I am not aware as to whether the transfer to the Bank of Baroda was effected from the closed Optimum account held by Standard Bank. This is a matter that may be clarified by the Reserve Bank and Standard Bank.

28. It is important that payment of funds to a mining rehabilitation trust in principle qualifies for a tax deduction in the hands of a taxpayer. In turn the mining rehabilitation trust is exempt from tax. If those funds from the trust were to spent on anything other than genuine mining rehabilitation, it will expose the fiscus not only to the loss of tax revenue and also put the burden of mining rehabilitation on the fiscus.

29. Given the circumstances I have described, 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.

30. I accordingly ask for an order in terms of the notice of motion. I respectfully submit that it would be both in the public interest and in the interests of justice for this application to be heard and determined on as expeditious a basis as is possible. In this regard, I understand that a request will be directed to their Lordships the Judge President and the Deputy Judge President.

PRAVIN JAMNADAS GORDHAN

I certify that this affidavit was signed before me at PRETORIA on this the 13th day of October 2016 by the deponent who acknowledged that he knew and understood the contents of this affidavit, and solemnly affirmed the truth of thereof.

COMMISSIONER OF OATHS

Name: ELEANOR DELAINE GROENEWALD

Address: COMMISSIONER OF OATHS EX OFFICIO SA POLICE SERVICE LEGAL OFFICIAL PRESIDIA BUILDING 255 PAUL KRUGER STREET PRETORIA

Capacity:

SOUTH AFRICAN POLICE SERVICE
LITIGATION & ADMINISTRATION
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