

UNDER THE AUSPICES OF THE JUDICIAL COMMISSION OF INQUIRY INTO ALLEGATIONS OF STATE CAPTURE, CORRUPTION AND FRAUD IN THE PUBLIC SECTOR INCLUDING ORGANS OF STATE

HELD AT JOHANNESBURG

Re:

MERVYN CARSTENS	}	First Implicated Person
RAYGEN PHILLIPS Person	}	Second Implicated Person

Persons called upon to provide an explanation in terms of Rule 3.3

**SUPPLEMENTARY AFFIDAVIT – MERVYN CARSTENS
(PRELIMINARY ISSUES)**

I, the undersigned,

MERVYN CARSTENS

do hereby make oath and swear that:

1. I am an adult male miner and the former Chief Executive Officer of the Alexkor, Richtersveld Mining Company Joint Venture colloquially referred to as the Pooling and Sharing Joint Venture (hereinafter referred to as "the PSJV").
2. I reside at 13 Laurel Street, Loevenstein, Bellville. The facts herein contained are within my own personal knowledge and belief unless the context indicates otherwise and are both true and correct.
3. I am deposing to this affidavit to supplement the affidavit which I served and filed on 25 January 2021 in respect of the PSJV not being subject to the PFMA.
4. It has since come to my attention that the Complainant herein, Mr Gavin Craythorne, received the same advice from Advocate Melanchton Makobe, the Deputy Director General : SOC GAP.
5. In terms of his written advices, the PSJV is not a State-owned entity and is not subject to the PFMA.
6. I annex hereto marked "A" a copy of the letter. The letter was forwarded to me by one of the contractors of the PSJV. The letter was in turn forwarded to that contractor by Mr Craythorne.
7. I submit that on the basis of annexure "A" hereto, the PSJV is not a subsidiary of Alexkor and is not a public entity and as such is not subject to the PFMA.



MERVYN CARSTENS

I certify that the above signature is the true signature of the deponent and that he has acknowledged to me that he knows and understands the contents of this Affidavit, which Affidavit was signed and sworn to before me, in my presence at Durbanville on this 30 day of **AUGUST 2021**, in accordance with the requirements of Government Notices No. R1258 dated 21 July 1972 and as amended by Government Notices No. R1648 dated 19 August 1977 and R1428 dated 11 July 1980.


COMMISSIONER OF OATHS

<p>SOUTH AFRICAN POLICE SERVICE COMMUNITY SERVICE CENTRE</p> <p>30 AUG 2021</p> <p>P.O. BOX 22, DURBANVILLE 7551 TEL: 021 970 3831 FAX: 021 970 4472</p> <p>SOUTH AFRICAN POLICE SERVICE</p>
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public enterprises

Department:
Public Enterprises
REPUBLIC OF SOUTH AFRICA

80 Hamilton Street, Arcadia 0073 Private Bag X15 Hatfield 0028
Ref: Denzel Matjila Tel: 012- 4311131/0833274416

Mr Gavin Craythorne

gavinjohn@outlook.com

Dear Mr Craythorne

Legal Status of the PSJV

We are writing to advise you of the legal opinion we obtained from a Senior Counsel in connection with the above matter.

The legal opinion was sought by the Department on the following pertinent questions:

- a) Can the Alexkor Richtersveld Mining Company Pooling and Sharing Joint Venture (PSJV) be regarded as a subsidiary of Alexkor;
- b) Should the PSJV be listed as a Schedule 2 entity in terms of the Public Finance Management Act and be subjected to the prescripts of the said legislation; and
- c) Can Alexkor exercise ownership control over the PSJV given its 51% shareholding.

Reference and reliance was amongst others made to/and on the Deed of settlement, Unanimous Resolution of the Interim Board appointed in terms of clause 4 of the Deed of Settlement and the Memorandum of Incorporation of Alexkor in providing the required opinion.

In responding to the questions raised above, the Senior Counsel advised that:

- a) The PSJV is unincorporated and not a legal entity. Therefore, the PSJV is not capable of being owned by anyone. It was indicated that a subsidiary is a separate entity from the holding company. The PSJV is not such a body and is not capable of being the subsidiary of Alexkor.
- b) In answering this question, check was made whether the PSJV is a public entity or a national public entity. It was indicated that the PSJV does not qualify as a national public entity or a national government business enterprise based on the definition of the two by the PFMA i.e the PSJV is not juristic entity nor under the ownership control of the national executive. It was stated that given

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that the PSJV is not a public entity that it could not be listed in either Schedule 2 or 3 of the PFMA.

Section 3 of the PFMA provides that the PFMA applies to departments, public entities listed in Schedule 2 or 3, and constitutional institutions. The PSJV is none of these. It is therefore advised that the PFMA does not apply to the PSJV itself in its own name.

However, it is indicated that this does not mean that the operation of the PSJV is not subject to the accountability mechanisms, oversight and controls contained in the PFMA i.e Alexkor is a schedule 2 major public entity, the PFMA applies to it to the extent indicated by the Act. The PSJV is an activity of Alexkor. To that extent, the activities of Alexkor in the PSJV are therefore subject to the statutory accountability provisions, oversight and controls in the PFMA.

However, those measures apply not to the PSJV per se, but rather to Alexkor and to its conduct of its business, which include its participation in the PSJV.

- c) We are advised that the PSJV is not an entity capable of ownership by anyone. It is a joint activity regulated in accordance with the terms of the Deed of Settlement and the Unanimous Resolution. It is however so that Alexkor has substantial control of the activities of the PSJV. This is because the members of the Joint Board whom it appoints have a 51% vote on all matters considered by the Joint Board, except for reserved matters. Alexkor can therefore exercise significant control over the PSJV. It would not be correct to describe that as 'ownership control'. The ownership control of the assets under the control of the PSJV vests in Alexkor and the RMC in undivided shares, to the extent of their respective participation interests.

Trusting that you find the above in order.

Regards,



Adv. Melanchton Makobe
Acting Deputy Director-General: SOC GAP
Date: 19 August 2021

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