TRANSNET BUNDLE 10

EXHIBIT BB 24.1

MKN GIGABA

CROSS-CUTTING

(Continued)

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

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Tel: (010) 214 to 0651
Email: inquiries@sastatecapture.org.za
Website: www.sastatecapture.org.za

INDEX: TRANSNET BUNDLE 10

#	Description	Bundle Pages	Exhibit Pages
1.	Exhibit BB 24.1: Gigaba, MKN – Cross-Cutting	001 to 967	2071 to 3037

EXHIBIT BB 24.1

MALUSI KNOWLEDGE NKANYEZI GIGABA

CROSS-CUTTING

(Continue)

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INDEX: EXHIBIT BB 24.1

SECTION	DESCRIPTION	BUNDLE
A	Rule 3.3 Notices issued with a Rule 3.4 Application response	08, 09, 10
B	Rule 3.3 Notices issued with a Statement of Response	11
C	Rule 3.3 Notices issued with no response	11
D	Public Protector Reports	11
E	Other documentation	11

#	Description	Transnet Bundle	Bundle Pages	Exhibit Pages
SECTION A		**08 to 10**		
1	**Coetzee, S**	**08**	**002 to 240**	**002 to 240**
	01.1 Email	08	003	003
	01.2 Rule 3.3 Notice	08	004 to 007	004 to 007
	01.3 Annexure 'A'	08	008 to 017	008 to 017
	01.4 Annexure 'B'	08	018 to 020	018 to 020
	01.5 SEQ 32/2019	08	021 to 240	021 to 240

#	Description	Transnet Bundle	Bundle Pages	Exhibit Pages
2	**Mzimela, S**	**08**	**241 to 754**	**241 to 754**
	02.1 Email	08	242	242
	02.2 Rule 3.3 Notice	08	243 to 246	243 to 246
	02.3 Annexure 'A'	08	247 to 283	247 to 283
	02.4 Annexure 'B'	08	284 to 530	284 to 530
	02.5 SEQ 33/2019	08	531 to 754	531 to 754
3	**Tsotsi, Z**	**08**	**755 to 896**	**755 to 896**
	03.1 Email	08	756	756
	03.2 Rule 3.3 Notice	08	757 to 759	757 to 759
	03.3 Annexure 'A'	08	760 to 787	760 to 787
	03.5 SEQ 31/2020	08	788 to 896	788 to 896
4	**Mahlangu, S (N&E)**	**08**	**897 to 941**	**897 to 941**
	04.1 Email	08	898 to 899	898 to 899
	04.2 Rule 3.3 Notice	08	900 to 902	900 to 902
	04.3 Annexures 'A'	08	903 to 919	903 to 919
	04.4 Annexures 'B'	08	920 to 924	920 to 924
	04.5 SEQ 37/2020	08	925 to 941	925 to 941
5	**Mahlangu, S (Transnet)**	**08**	**942 to 991**	**942 to 991**
	05.1 Email	08	943	943
	05.2 Rule 3.3 Notice	08	944 to 946	944 to 946
	05.3 Annexure 'A'	08	947 to 949	947 to 949
	05.4 Annexure 'B'	08	950 to 954	950 to 954
	05.5 SEQ 38/2020	08	955 to 991	955 to 991
6	**Craythorne, G**	**09**	**001 to 1079**	**992 to 2070**
	06.1 Email	09	002	993
	06.2 Rule 3.3 Notice	09	003 to 006	994 to 997
	06.3 Annexure 'A'	09	007 to 099	998 to 1090

#	Description	Transnet Bundle	Bundle Pages	Exhibit Pages
	06.4 Annexure 'B'	09	100 to 274	1091 to 1225
	06.5 SEQ 46/2020	09	275 to 1079	1226 to 2070
7	**Bishop, PH**	**10**	**001 to 260**	**2071 to 2330**
	07.1 Email	10	002	2072
	07.2 Rule 3.3 Notice	10	003 to 005	2073 to 2075
	07.3 Annexure 'A'	10	006 to 072	2076 to 2142
	07.4 Annexure 'B'	10	073 to 089	2143 to 2159
	07.5 SEQ 05/2021	10	090 to 242	2160 to 2312
	07.6 Responding Affidavit PH Bishop	10	243 to 250	2313 to 2320
	07.7 Responding Affidavit Gigaba to Bishop	10	251 to 260	2321 to 2330
8	**Witness 3**	**10**	**261 to 376**	**2331 to 2446**
	08.1 Email	10	262	2332
	08.2 Rule 3.3 Notice	10	263 to 265	2333 to 2335
	08.3 Annexure 'A'	10	266 to 281	2336 to 2351
	08.4 Annexure 'B'	10	282	2352
	08.5 SEQ 05/2021	10	283 to 376	2353 to 2446
9	**Gigaba, N**	**10**	**377 to 484**	**2447 to 2554**
	09.1 Email	10	378	2448
	09.2 Rule 3.3 Notice	10	379 to 384	2449 to 2454
	09.3 Annexure 'A'	10	385 to 402	2455 to 2472
	09.4 Annexure 'B'	10	403 to 406	2473 to 2476
	09.5 SEQ 18/2021	10	407 to 484	2477 to 2554
10	**Momoniat, I**	**10**	**485 to 967**	**2555 to 3037**
	10.1 Email	10	486 to 489	2556 to 2559
	10.2 Rule 3.3 Notice	10	490 to 493	2560 to 2563
	10.3 Annexure 'A'	10	494 to 644	2564 to 2714
	10.4 Annexure 'B'	10	645 to 956	2715 to 3026

#	Description	Transnet Bundle	Bundle Pages	Exhibit Pages
	10.5 SEQ 19/2021	10	957 to 967	3027 to 3037
SECTION B		**11**	**1 to 801**	**3038 to 3838**
11	**Pretorius, P**	**11**	**002 to 775**	**3039 to 3812**
	11.1 Email	11	003	3040
	11.2 Rule 3.3 Notice	11	004 to 006	3041 to 3043
	11.3 Annexure 'A'	11	007 to 036	3044 to 3073
	11.4 Annexure 'B'	11	37 to 757	3074 to 3794
	11.5 G01286 Statement of response dated 18 October 2019	11	758 to 775	3795 to 3812
12	**Mkwanazi, M**	**11**	**776 to 801**	**3813 to 3838**
	12.1 Email	11	777	3814
	12.2 Rule 3.3 Notice	11	778 to 780	3815 to 3817
	12.3 Annexure 'A'	11	781 to 782	3818 to 3819
	12.5 G01287 Statement of response dated 18 October 2019	11	783 to 801	3820 to 3838
SECTION C		**11**	**802 to 942**	**3839 to 3979**
13	**Carolous, C**	**11**	**803 to 837**	**3840 to 3874**
	13.1 Email	11	804	3841
	13.2 Rule 3.3 Notice	11	805 to 808	3842 to 3845
	13.3 Annexure 'A'	11	809 to 837	3846 to 3874
14	**Salojee, R**	**11**	**838 to 847**	**3875 to 3884**
	14.1 Email	11	839	3876
	14.2 Rule 3.3 Notice	11	840 to 842	3877 to 3879
	14.3 Annexure 'A'	11	843 to 847	3880 to 3884
15	**Nekhavhambei, E**	**11**	**848 to 942**	**3885 to 3979**
	15.1 Email	11	849	3886
	15.2 Rule 3.3 Notice	11	850 to 852	3887 to 3889

#	Description	Transnet Bundle	Bundle Pages	Exhibit Pages
	15.3 Annexure 'A'	11	853 to 866	3890 to 3903
	15.4 Annexure 'B'	11	867 to 942	3904 to 3979

SECTION D		**11**	**943 to 1024**	**3980 to 4061**
16	**Public Protector Reports**	**11**	**944 to 1024**	**3980 to 4061**
	16.1 Gigaba PP 1 - Report No 21 of 2018/19	11	944 to 970	3981 to 4007
	16.2 Gigaba PP 2 - Report No 18 of 2020/21	11	971 to 1024	4008 to 4061

SECTION E		**11**	**1025 to 1027**	**4062 to 4064**
17	**Other Documentation**	**11**	**1025 to 1027**	4062 to 4064
	17.1 Gigaba M - brown bag	11	1026 to 1027	4063 to 4064

07. BISHOP, PH

Derick de Beer

From: Secretary
Sent: 03 January 2021 13:50
To: Reginald Tshabalala; nkanyezi.gigaba@gmail.com
Cc: Secretary
Subject: Bishop//Rule 3.3//Gigaba M
Attachments: Bishop Rule 3.3 Gigaba Mr Malusi.pdf

Dear Sir/Madam

Please find the attached Rule 3.3 Notice in respect of Mr Bishop's evidence for your attention.

Annexure A and B referred to in the Rule 3.3 Notice will be available to download via the secure WeTransfer link https://we.tl/t-yBdLoQQB3y .Please email a selected cell number to the Secretary (Secretary@commissionsc.org.za) to which the WeTransfer link password will be SMS'ed to you. The WeTransfer link expires 31 January 2021.

Please note that the Commission is required to comply with all COVID-19 Regulations. Please advise the Secretariat 48 hours in advance at Secretary@commissionsc.org.za if you elect to attend. Protocols, procedures and arrangements in place at the hearing venue will then be communicated to you.

Kindly acknowledge receipt hereof and contact the Secretariat regarding any queries that you may have.

Yours faithfully,

Secretariat
COMMISSION OF INQUIRY INTO STATE CAPTURE
Hillside House, 2nd Floor, 17 Empire Road, Parktown,
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JUDICIAL COMMISSION OF INQUIRY INTO ALLEGATIONS OF STATE CAPTURE, CORRUPTION AND FRAUD IN THE PUBLIC SECTOR INCLUDING ORGANS OF STATE

NOTICE IN TERMS OF RULE 3.3

TO : MR MALUSI GIGABA

C/O : TSHABALALA ATTORNEYS

TEL : 011 783 5677

EMAIL : reginald@tshabalala.com
nkanyezi.gigaba@gmail.com

IN TERMS OF RULE 3.3 OF THE RULES OF THE JUDICIAL COMMISSION OF INQUIRY INTO ALLEGATIONS OF STATE CAPTURE, CORRUPTION AND FRAUD IN THE PUBLIC SECTOR INCLUDING ORGANS OF STATE ("THE COMMISSION"), YOU ARE HEREBY GIVEN NOTICE THAT:

1 The Commission's Legal Team intends to present the evidence of **MR PETER HENRY BISHOP** ("**Mr Bishop**") at its hearing to be held at the Old Council Chamber of the Municipality of the City of Johannesburg, 158 Civic Boulevard Braamfontein, Johannesburg. The presentation of Mr Bishop's evidence will commence on **8 January 2021** or so soon thereafter as the evidence may be heard. The evidence in question implicates or may implicate you in unlawful, illegal or improper conduct in the respects set out below.

2 The allegations set out in the evidence of Mr Bishop implicate or may implicate you in, *inter alia*, allegedly participating in various acts of corruption, bribery, fraud, money laundering and/or tax evasion.

3 The statement of Mr Bishop which implicates or may implicate you in the above allegations is annexed hereto marked "**A**". Your attention is drawn to **paragraphs 22 to 25, 27 to 28, 34 to 36, 38, 41, 44 to 46 and 57**.

4 **Annexures PHB12 and PHB13** to the statement of Mr Bishop which implicate or may implicate you in the above allegations are annexed hereto marked "**B**".

5 Due to the fact that you are implicated or may be implicated by the evidence of Mr Bishop, you are entitled to attend the hearing at which that evidence is being presented. You are also entitled to be assisted by a legal representative of your choice when that evidence is presented. The full statement of Mr Bishop will be uploaded on the Commission's website as soon as he concludes his evidence. The transcript will be uploaded daily.

6 If you wish to:

6.1 give evidence yourself;

6.2 call any witness to give evidence on your behalf; or

6.3 cross-examine the witness

then you must apply, within fourteen (14) calendar days of this notice, in writing to the Commission for leave to do so.

7 An application referred to in paragraph 6 above must be submitted to the Secretary of the Commission. The application must be submitted with an affidavit from you in which you respond to the witness's statement insofar as it implicates you. The affidavit must identify what parts of the witness's statement are disputed or denied and the grounds on which they are disputed or denied.

8 If you wish to apply to cross-examine the witness, your application must follow the requirements of Rule 11.3. In other words, it must be a substantive application on affidavit accompanied by a notice of motion.

9 In the event that you believe that you have not been given a reasonable time from the issuance of this notice to the date on which the witness is to give evidence as set out

above and you are prejudiced thereby, you may apply to the Commission in writing for such order as will ensure that you are not seriously prejudiced.

10 Please take note that even if you do not make an application under Rule 3.4:

10.1 in terms of Rule 3.10, the Chairperson may, at any time, direct you to respond in writing to the allegations against you or to answer (in writing) questions arising from the statement; and

10.2 in terms of Regulation 10(6) of the Regulations of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State GN 105 of 9 February 2018 published in Government Gazette 41436, as amended, the Chairperson may direct you to appear before the Commission to give evidence which has a bearing on a matter being investigated.

11 The witness statement and annexures provided to you are confidential. Your attention is drawn to Regulations 11(3) and 12(2)(c) governing the Commission, which make it a criminal offence for anyone to disseminate or publish, without the written permission of the Chairperson, any document (which includes witnesses' statements) submitted to the Commission by any person in connection with the Commission's inquiry.

12 Any response to or application in regard to this notice must be sent to Advocate André Lamprecht, Ms Shannon van Vuuren and Ms Rachel Niewenhuis at secretary@commissionsc.org.za.

DATED AT PARKTOWN ON THIS 2nd DAY OF JANUARY 2021

PROF ITUMELENG MOSALA
Secretary
Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State

AFFIDAVIT OF PETER HENRY BISHOP

I the undersigned

PETER HENRY BISHOP

declare under oath as follows:

1. I am an adult male and a senior investigator at the Judicial Commission of Inquiry into State Capture, ("**Commission**") proclaimed by the President of the Republic of South Africa.

2. I am duly authorised to depose to this affidavit by virtue of the position held by me at the Commission.

3. The facts deposed to herein are within my personal knowledge, unless the contrary appears, and are to the best of my knowledge and belief, both true and correct.

4. I will attempt to keep my submission brief in order to avoid prolixity and to unnecessarily burden the Commission. I will seek to highlight key aspects and events which demonstrate that there has been state capture of the assets of Alexkor SOC Ltd ("**Alexkor**") and the Alexkor Richtersveld Mining Company Pooling and Sharing Joint Venture ("**PSJV**") by Gupta related entities and persons. In so doing, I will demonstrate that the facts contained in the submission made by a whistle-blower, Mr Gavin Craythorne ("**Craythorne**") fall within the Terms of Reference ("**ToR**") of the Commission.

5. During 2019, Craythorne reached out to the Commission and requested that it use its powers to investigate the allegations of state capture of Alexcor and the

PSJV as set out in ToR 1.1 and 1.6 respectively as follows:

5.1. *"whether, and to what extent and by whom attempts were made through any form of inducement or for any gain of whatsoever nature to influence members of the National Executive (including Deputy Ministers), office bearers and /or functionaries employed by or office bearers of any state institution or organ of state or directors of the boards of SOE's…"*; and

5.2. *"whether there were any irregularities, undue enrichment, corruption and undue influence in the awarding of contracts, mining licenses, government advertising in the New Age Newspaper and any other governmental services in the business dealings of the Gupta family with government departments and SOE's."*

6. Based on the information received from Craythorne, the Commission authorised an investigation into the averments made by him. Craythorne prepared a detailed affidavit **(Annexure PHB 1)** as part of his submission, which has been further refined in consultation with the investigators and evidence leaders at the Commission to ensure that it was within the terms of reference of the Commission. This further submission has been separately made available to the Chairperson of the Commission.

7. Craythorne's submission is supported by:

7.1. a forensic investigation conducted by Gobodo Forensic Investigating Audit (Pty) Ltd ("**Gobodo**") that was authorised by the Department of Public Enterprises ("**DPE**"), whose report **(Annexure PHB 2)** was finalised in October 2019;

7.2. an affidavit of Mr George Travis Nicolaai (**"Nicolaai"**), who is a marine

diamond contractor (Diver) and became a whistle-blower with Craythorne, **(Annexure PHB 3)**;

7.3. an affidavit by Mr Martinus Mamphenyane Mononela (**"Mononela"), (Annexure PHB 4)**, who is a General Manager Legal Services at the South African Diamond and Precious Metals Regulator ("**SADPMR**"); and

7.4. an affidavit by Mr Jakob Jan Dekker (**"Dekker"**), **(Annexure PHB 5)**, who is employed by the Commission as a Forensic Accountant. He is a qualified Chartered Accountant registered with SAICA, a Registered Auditor registered with IRBA and an associate member of the Institute of Certified Fraud Practitioners ("**ICFP**"). As part of the Commission's investigating team, Dekker was requested to perform an analysis of the business and trading activities of Alexkor, the PSJV between Alexkor and the Richtersveld Mining Company (Pty) Ltd, ("**RMC**"), and Scarlet Sky Investments 60 (Pty) Ltd ("**SSI**"), who in 2018 changed its name to Alexander Bay Diamond Company (Pty) Ltd ("**ABDC**").

8. The DPE also Commissioned Fundunzi Forensics ("**Fundunzi**") to conduct an investigation in 2018 into numerous allegations levelled against the DPE **(Annexure PHB 6)**. One of the allegations investigated was the appointment of Mr Trevern Haasbroek ("**Haasbroek**") as a non-executive director to the Alexkor Board by former Minister Lynn Brown ("**Brown**").

9. The Chief Executive Officer of the PSJV, Mr Mervyn Cartstens ("**Carstens**"), requested and contracted James Allan ("**Allan**") to conduct an independent review and audit of the process from sourcing (mining) the diamonds through to the sale point. This report, **(Annexure PHB 7)**, which was finalised on 29 May 2019, was apparently requested as a result of:

9.1. *"negative press publicity regarding the awarding of the tender process to a Tender House [Scarlett Sky Investments 60 (Pty) Ltd] that had a politically connected individual [Kuben Moodley] as the BEE partner. This individual was linked to the Minister of Mineral Resources [Mr Mosebenzi Joseph Zwane] and an associate in the Gupta State Capture Project;"*

9.2. *"Ongoing negative publicity on the prices achieved for diamonds sold on the tender by the Alexcor/RMC PSJV";*

9.3. *"A desire by management to find improvements in the process in order to improve the sustainability for the benefit of Alexcor/RMC PSJV and contractors alike".*

10. These reports will be placed separately before the Commission.

THE JOINT SHARING AND POOLING JOINT VENTURE BETWEEN THE RICHTERSVELD COMMUNITY AND ALEXKOR.

11. Alexkor is a Schedule 2 public entity, incorporated in 1992 in terms of the Alexkor Limited Act No.116 of 1992 [Assented to 2 July 1992] [Date of Commencement: 2 November 1992] and trading as Alexkor Limited. The government of South Africa, through the Minister of Public Enterprises, is the sole shareholder of Alexcor.

12. The Department of Public Enterprises is the shareholder representative of Alexkor and exercises oversight on behalf of the South African Government.

13. The PSJV is an unincorporated company acting on behalf of the Alexkor and RMC which manages the mining operations which exploit the pooled land and

marine diamond mining rights of Richtersveld Mining Company ("**RMC**") (a company formed to represent the interests of the Richtersveld community and Alexkor.

14. The PSJV was established in April 2011 pursuant to a Deed of Settlement concluded with the Richtersveld community in 2007, following a successful land claim instituted by them. According to the 2010 Annual report, in terms of the Deed of Settlement entered into between Alexkor, the Richtersveld Community and the Government of the Republic of South Africa on 22 April 2007 ("**Deed of Settlement**"), the land mining rights were transferred to the Richtersveld Community, with Alexkor retaining its marine mining rights. In terms of the Deed of Settlement:

    14.1. Alexkor's marine mining rights and RMC's land mining rights have been pooled to form the Alexkor-RMC Pooling and Sharing Joint Venture ("**PSJV**"), which commenced operations on 7 April 2011; and

    14.2. Alexcor acquired a 51% interest in the PSJV and RMC acquired the remaining 49% in the PSJV.

15. The PSJV has its own board, but the chair is always the chair of Alexkor. The CEO of the PSJV reports to the CEO of Alexkor.

16. The PSJV concludes marine mining contracts on behalf of Alexkor and land mining contracts on behalf of RMC. The PSJV's mining operations are sub-contracted to a number of private contractors who operate in the region.

17. Craythorne is a founding member and office bearer of the Equitable Access Campaign ("**EAC**"), being an association of small-scale black-owned and black empowered marine mining companies ("**the Emerging BEE Marine Diamond**

Miners"), who are or were subcontracted to the PSJV to exploit its marine diamond rights.

18. Following the introduction of Scarlett Sky Investments 60 (Pty)Ltd ("**SSI**"), a hitherto dormant company with no diamond licence or track record in the diamond industry, to exclusively market and sell all of the diamonds produced by the PSJV, complaints have been made by the contractors, including Craythorne, about the flawed tender process pursuant to which SSI was appointed and the steadily reducing prices achieved by SSI for the diamonds mined by them. Complaints have also be raised by Craythorne about the proposed plans of Alexkor to diversify into the coal industry for the purpose of supplying coal to Eskom. This would obviously exclude the Richtersveld community from the business of Alexkor as its joint venture with Alexkor is only limited to its diamond assets.

THE STATE CAPTURE OF ALEXKOR

19. Allegations have been made by Craythorne that Alexkor has always been captured through the sales/marketing of the its diamonds and that this has occurred long before 1994, **(Annexure PHB 1).** However, for purposes of this affidavit, I will only focus on allegations relating to the state capture of Alexkor by Gupta associated entities, persons and networks, with the assistance of the directors of Alexkor, in keeping with the ToR of the Commission.

20. The Commission's investigating team has conducted its own investigations into the links between the role players alleged to have been part of the Alexkor state capture project and the Guptas and/or their associates. The results of these investigations reveal that there was an orchestrated plan of state capture of Alexkor and the PSJV, which I will attempt to set out chronologically below.

21. From our analysis and investigations, it is apparent that the aim was to both:

    21.1. implement a plan to diversify its mining operations to include coal and lime mining in order to supply coal to Eskom pursuant to contracts from which Gupta entities and associates could benefit; and

    21.2. take control of the proceeds of the sale of its diamonds.

22. We found that the same *repurposing modus operandi* described by the State Capacity Research Project in its analysis of the capture and exploitation of State Owned Enterprises ("**SOEs**") which was used by the Guptas and their associates to capture SOE's, was employed by them, with the assistance of appointed Ministers of Public Enterprises, including former Minister Malusi Gigaba ("**Gigaba**") and former Minister, Lynn Brown ("**Brown**") and others, to capture Alexkor.

23. In their report, *Betrayal of the Promise[1]: How the Nation is Being Stolen, May 2017,* the researchers explain that the *modus operandi* adopted entails four steps described below:

    23.1. *"A new minister changes the board composition of a SOE."* In the case of Alexkor, former Ministers Gigaba and Brown changed the board when they took office;

    23.2. *"The SOE announces a major new acquisition or build project."* Minister Gigaba announced the new strategic direction for Alexkor, a diamond mining concern, to diversify into the production of coal and lime to supply Eskom;

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1 Bhorat, H., Buthelezi, M., Chipkin, I., Duma, S., Mondi, L., Peter, C. and Swilling, M., 2017. Betrayal of the Promise: How South Africa is Being Stolen. State Capacity Research Project.

23.3. *"People are brought on to the board who are either strongly in favour of radical economic transformation and/or have close personal links to some of the bidders."*; and

23.4. *"The tender is awarded in circumstances where there is a clear conflict of interest."* This was evident in the appointment of Regiments Capital (Pty Ltd ("**Regiments**") to deal with the coal and lime strategy and SSI to control the valuation, sale, beneficiation and marketing of the diamonds of Alexkor".

24. I now deal with the key persons and entities involved and process that unfolded at Alexkor.

KEY PERSONS AND ENTITIES

25. The Commission's investigation into activities of state capture at Alexkor has identified the following key persons, who had/have links to the Guptas and/or their associates, who were complicit in implementing the aforementioned steps and setting the wheels of state capture in motion:

25.1. Gigaba, in his capacity as Minister of the DPE;

25.2. Brown, in her role as Minister of the DPE;

25.3. The former Executive Personal Assistant to Brown, Ms Kim Davids ("**Davids**");

25.4. The Chairperson of the Alexkor and PSJV Board, Mr Rafique Bagus ("**Bagus**");

25.5. The Chairperson of the Alexkor and PSJV Board, Ms Hantsi Matseke

("**Matseke**");

25.6. The Non-Executive Director of the Alexcor Board, Trevern Haasbroek ("**Haasbroek**");

25.7. The Chief Executive Officer of Alexkor, Mr Percy Khoza ("**Khoza**");

25.8. The Chief Executive Officer of the PSJV Board, Mr Mervyn Carstens ("**Cartsens**");

25.9. The Chief Legal Officer of Alexkor, Ms Zarina Kellerman ("**Kellerman**");

25.10. Duncan Korabie ("**Korabie**"), who in 2014, was accepted by Alexkor as one of the independent RMC directors representing the community on the board of the joint-venture and a member of the Technical Committee of Alexcor that evaluated and scored the respective bidders in the exclusive marketing and sales contract to SSI;

25.11. Daniel Mark Nathan ("**Nathan**") and Kubentheran Moodley ("**Moodley**"). According to the Confidential Tender Proposal No RFP 03/14, **(Annexure PHB 8)** submitted by SSI, the Directors of SSI, according to enclosed CIPC documents, were Nathan and Moodley. The Group structure organogram for SSI indicated that:

25.11.1. Daniel Nathan Trading CC ("**DNT**"), whose sole shareholder and director is Nathan, performed the function of Executive Management of SSI;

25.11.2. Kimomode (Pty) Ltd ("**Kimomode**"), whose sole shareholder and director is Moodley, was the majority Broad Based Economic Empowerment (BBEE) partner (60%); and

25.11.3. Integrated Capital Management ("**ICM**") whose purported directors are Mark Chipkin ("**Chipkin**"), Stanley Shane ("**Shane**"), Mark Angel ("**Angel**") and Selwyn Nathan (Nathan's father), was responsible for the Administration and Finance of SSI. Selwyn Nathan does not appear as a director from the CIPC documents relating to ICM. He is, however, reflected as a director in ICM's letterheads **(Annexure PHB 9)** and on a lease agreement between ICM and Trillian Capital (**"Trillian"**), **(Annexure PHB 10)**; and

25.12. Mr Erick Wood ("**Wood**"), who was the Executive Director of Regiments for nearly 12 years, after which he joined Trillian as its Chief Executive Officer.

26. The entities utilised and/or involved are/were:

26.1. SSI, which has changed its name to ABDC;

26.2. DNT;

26.3. ICM; and

26.4. Regiments.

THE TIME LINE OF EVENTS WHICH CONTRIBUTED TO THE STATE CAPTURE OF ALEXCOR

2010

The Appointment of Minister Malusi Gigaba as Minister of the Department of Public Enterprises

27. President Jacob Zuma ("**the former President**") appointed Gigaba as Minister of Public Enterprises on 1 November 2010. He served in this position until 2014, when he was appointed Minister of Home Affairs. In the report, *Betrayal of the Promise: How the Nation is Being Stolen, May 2017*[2], the authors state that throughout his tenure as public enterprises Minister until 2014, Gigaba was engaged in the restructuring of SOE boards, which became broadly representative of 'Gupta-Zuma' interests.

28. In an article by Kyle Cowan, Graeme Hosken, Sikonathi Mantshantsha and Genevieve Quinta[3], it stated that:

> "*Finance Minister Malusi Gigaba, while he was public enterprises minister, and his successor, Lynne Brown, peppered state-owned companies with Gupta family associates, leaked e-mails show. The e-mails have trained the spotlight on Gigaba's role — whether witting or unwitting — in the capture of the state during his tenure at the Department of Public Enterprises. They also appear to add credence to a report by the Public Affairs Research Institute (Pari), released before the e-mail leaks, that painted Gigaba as a central player in state capture…*"

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2 Bhorat, H., Buthelezi, M., Chipkin, I., Duma, S., Mondi, L., Peter, C. and Swilling, M., 2017. Betrayal of the Promise: How South Africa is Being Stolen. State Capacity Research Project

3 Kyle Cowan, Graeme Hosken, Sikonathi Mantshantsha and Genevieve Quinta I published on 06 June 2017 - 20:52

"A regular presence in the Gupta linkages to the directors was their associate Salim Essa…"

2012

Carstens appointed as the CEO of the Alexkor PSJV: August 2012

29. According to the Alexkor audited Annual Financial Report, 2012, it was announced that Carstens was appointed by the PSJV Board in August 2012 as Managing Director of the PSJV, following a recruitment process for the position Chief Executive Officer.

30. In a Question for Written Reply (Question No: 1200) to the DPE, Republic of South Africa National Assembly, it was stated that Carstens was a seasoned Mining Executive with over 30 years' experience in the mining industry, which included working for De Beers, Anglo American and Trans Hex, the relevance of which has been dealt with by Craythorne.

31. Carstens played an important part in the irregular appointment of SSI as the sole marketing and sales agent for the PSJV dealt with below.

32. On examining the cell phone records for Carstens, we noted at least 107 calls made by him to Gupta associates:

    32.1. Moodley - Carstens was in contact with Moodley approximately 97 times between the periods 2015/09/12 to 2017/05/10. It must be noted that Moodley resigned as a director of SSI on 04 November 2015; and

    32.2. Shane – Carstens was in contact with Shane approximately 10 times between the periods 2016/02/16 to 2016/07/10.

Suspicious Vehicle Payments

33. Analysis of Carstens bank statements by Dekker, **(Annexure PHB 11 (1-4))** revealed that he had made settlements on two Land Rover Discovery 4 vehicles and one Range Rover, which totalled R3.3m over three years. These payments did not come from the bank accounts the Commission has for him. It would appear as if settlements were made during the following periods: August/Sept 2014, Oct 2015 and August 2016. It is also not clear if the settlement amounts were cash transfers or cash payments. The Commission is still awaiting further bank records that have been requested via summons.

Gigaba announces new Alexkor Board and Chairperson: 7 September 2012

34. In the Government Media statement dated 7 September 2012; *"Media Address by Mr. Malusi Gigaba MP, Minister of Public Enterprises, on the occasion of the Annual General Meeting (AGM) of the Board of Directors of ALEXKOR in Tshwane,"* it is stated that.

> *"…Our annual review of the Board has necessitated that we rotate the Board and include new skills' sets and expertise to give impetus to the new strategic direction that the Shareholder wants ALEXKOR to take…"*
>
> *"In this regard, I have appointed, Mr Rafique Bagus as Chairperson of the new Board who will be assisted by Ms Gillian Nonhlanhla Jiyane, Dr Yvonne Nono Mohutsioa-Mathabathe, Ms Zukiswa Ntlangula, and Mr Mohammed Bhabha. I have given the new Board the responsibility to fill the vacancies of CEO and CFO forthwith, by no later than the next 3 months."*

Bagus appointed as new Chairperson of the Board of Alexkor: 7 September 2012

35. Key to these appointments was Bagus, the new Chairperson of the Board of Alexkor. Bagus was previously the Chief Executive of Trade and Investment

South Africa, Deputy Director-General of the Department of Trade and Industry and special adviser to Alec Erwin when he was the Public Enterprises Minister.

36. Bagus did not waste any time commencing with the new strategic direction (diversification into coal mining) announced by Gigaba. Below is an excerpt from Bagus' foreword to Alexkor's 2013 Annual report appearing, **(Annexure PHB 12)**

> *"Halfway through the 2012/13 financial year the new Alexkor board took office, facing challenging circumstances. We were confronted with some stark realities from a business with significant economic challenges. Our new strategy is a radical departure from the past to transform Alexkor into a diversified mining company that will ensure the long-term sustainability of our mining operations. The strategy embraces four key elements, namely:*
>
> - *Unlocking value from the PSJV;*
> - *Extract value from African diamond mining opportunities;*
> - *Utilise Alexkor's core mining capability to supply coal to Eskom and reduce their coal supply risk; and*
> - *Develop lime resources to supply Eskom.*
>
> *The Alexkor board has been given the mandate to qualify and quantify mining opportunities for investment consideration. An immediate and urgent opportunity exists to focus on securing thermal coal supply for power generation.*
>
> *Eskom faces a critical and significant shortfall in strategic coal supply that will jeopardise efforts to ensure energy supply to our industries.*
>
> *We can significantly contribute to the development of new coal supply sources by utilising mining methods, processes, technologies and skills that are well within our current core capability.*
>
> *Eskom will have to ensure that new mines are opened with a preference to*

procure coal from emerging black miners.

Alexkor's diversification strategy supports these initiatives that will broaden economic participation, secure employment, stimulate local investment, and unlock underutilised resources. We will provide market access and mining expertise to emerging black miners that will create significant economic value for local communities.

Various emerging black miners expressed interest to partner with Alexkor in developing coal opportunities. We believe that these opportunities will create a viable second tier mining industry in South Africa.

High grade limestone supply to Eskom is critical for flue gas desulphurisation operations. We are in the process of developing a strategic lime business case to supply Eskom and will report on this progress shortly.

During the next financial year, we will focus on building and expanding strategic relationships with sister state-owned corporations and in particular Eskom and Transnet.

We will also engage the Department of Mineral Resources (DMR) and the state-owned mining company to coordinate coal mining efforts and secure their support of our strategy.

We are also in the process of negotiating better prices for our rough diamonds, which will have a positive impact on future revenues.

We have appointed Mr Percival Khoza, one of the leading mining executives in South Africa, to champion the future growth of Alexkor. His vast knowledge and experience in gold, diamond and coal mining is of immense benefit to the executive team.

The credibility of our current management team provides Alexkor with the ability to attract the best skills from the mining industry to fill critical positions. We have finalised the team which will add more than 60 years of mining experience to the executive.

A special word of thanks to Honourable Minister Malusi Gigaba, whose powerful vision of the future and insightful guidance and support is *of huge value to Alexkor."*

37. On examining the cell phone records for Bagus, we noted that he made telephonic contact with the Gupta brothers and their associates as follows:

    37.1. Iqbal Sharma ("**Sharma**") approximately 60 times between the periods 2008/04/28 to 2013/02/20. Sharma - according to #GuptaLeaks dated 23 Mar 2018: "*The great train robbery Part 2 - The choo-choo switcheroo*" then previous "*chair of Transnet's Board Acquisition and Disposal Committee. Sharma, readily admits a previous friendship with Gupta lieutenant Salim Essa and a range of business ties with the Guptas before they fell out, has denied wrongdoing*";

    37.2. Ashu Chawla ("**Ashu**") approximately 8 times between the periods 2008/04/28 to 2013/03/18;

    37.3. Ajay Gupta ("**Ajay**") approximately 26 times between the periods 2015/07/18 to 2016/03/18; and

    37.4. Rajesh (Tony) Gupta ("**Tony**") approximately 7 times between the periods 2015/05/27 to 2016/03/17.

38. Bagus attended the Sun City Gupta wedding and stayed in room 1205 from 30/4/2013 to 2/5/2013 (departed 3/5/2013) with another adult. This was at the same time he was Chairman of the Alexkor Board appointed by former Minister Gigaba.

39. According to an Amabhungane article, **(Annexure PHB 13)**, Bagus came to public attention in 2011 when he was linked to making political introductions for

Uruguayan businessman, Gaston Savoi, who is still battling corruption charges relating to government tender awards, which have been dealt in the evidence of Mr. Trevor White and Colonel Piet Du Plooy before the Commission. Bagus has also featured during evidence led at the Commission in relation to the South African Airways (SAA) and in numerous media articles concerning state capture and corruption.

40. He was also instrumental in his capacity as Chairman of the Alexkor and the Alexkor PSJV Board in awarding the tender to SSI, granting it the exclusive rights to market and sell the diamonds produced by the PSJV.

2013

Khoza appointed CEO of Alexkor: 4 March 2013

41. On 7 September 2012, at a Special General Meeting with the newly appointed Board, Gigaba mandated the newly appointed Board to prioritise the recruitment of a new CEO and ensure that the matter was finalised within three months. Within two months, on 15 November 2012, the Board provided the Deputy Minister with a submission on recruitment of a new CEO. The Department confirmed that the submission met the requirements of the CEO Appointment Guidelines.

42. On 4 March 2013, Khoza was appointed as Chief Executive Officer of Alexkor. Prior to this, he was a General Manager at Optimum Colliery, and was clearly recruited in order to pursue Gigaba's agenda to diversify into coal.

43. It is important to note that Tegeta's purchase of the Optimum Coal Mine was the subject matter of the Public Protector's State of Capture Report.

44. In an Amabhungane article dated 13 December 2017, **(Annexure PHB13)**, it stated that:

> *"The chief executive of Alexkor was Percy Khoza, a seasoned mining executive with both diamond and coal experience. He was hired, in part, to pursue the "coal strategy" approved by Gigaba."*

New strategy announced to diversify into coal mining: 13 September 2013

45. During a media announcement it was stated that the Minister of Public Enterprises, Gigaba, would unveil Alexkor's new strategy on 13 September 2013 at the Sheraton Hotel in Pretoria. This announcement related to the re-positioning of Alexkor's business into the coal mining business in order to supply Eskom with coal and lime.

46. However, the announcement[4] was made by the Deputy Minister, Bulelani Magwanishe ("**Magwanishe**"), who stated the following:

> *"...I'm pleased to announce today, that the board has responded with a game changing strategy that has a well-crafted compelling value proposition that puts/positions Alexkor as a world-class mining company with aspirations to respond to the immediate needs of the country.*
>
> *Our own analysis shows that Eskom will start experiencing coal supply shortages by 2018. The state has to move fast to avert an energy crisis. Electing to enter coal mining, will fundamentally change the value proposition of Alexkor to the people of South Africa.*
>
> *Alexkor's new strategy provides the state with a significant lever in engaging with coal majors, who are mainly multinationals, with a narrow responsibility to the country's economy. Alexkor is expected to be a vanguard for transformation*

4 Address by Deputy Minister Bulelani Magwanishe, MP, on the occasion of the Alexkor Post Annual General Meeting media briefing in Tshwane 13 Sep 2013

in the coal mining sector, as the government's call for transformation in the sector has effectively gone unheeded.

Black emerging miners are still battling to gain a footing in the sector. Alexkor will partner emerging black, women, youth-owned miners through offering the necessary technical and business expertise to enable graduation of these miners from emerging to established, realising the objectives of the Eskom Emerging Miners Strategy, which as a department we have championed.

The repositioning of Alexkor satisfies another policy imperative. The Minister of Public Enterprises mentioned during his 2013 Budget Vote speech: the push for SOC-to-SOC collaborations. A year ago an Alexkor-Eskom collaboration at such a strategic level was inconceivable.

Now we are at the threshold of shaping the future of this country; and Alexkor is on the verge of finding its place into South Africa's future sustainable growth story.

Alexkor is also looking at high grade limestone supply to assist Eskom with its flue gas desulphurisation plants, and transportation cost is a major component of the price of burnt lime and leveraging SOC infrastructure will provide a cost advantage. The company's diversification strategy will ensure that it explore mining opportunities on the African continent. Let me hasten to state that the new strategy is not going to be liked by all, in particular, by those in the private sector.

We must expect opposition, challenges and pushback by those who will see the strategy as a threat to their long entrenched positions. We must not be fazed by such; our agenda is bigger than those forces.

Ours is not to reinforce Alexkor's commercial bottom-line, but to secure the future of this country and to ensure that the sector is finally transformed. I want to urge the Board to ensure that all governance processes to drive this strategy are put in place and are followed through. We will ensure that legally, we are on solid ground by soliciting opinions of relevant authorities. There will be a plan that executive management will follow in rolling out the strategy..."

47. In an article in the Cape Times dated 16 September 2013, it was stated that:

> *"...in a separate submission to the Portfolio Committee on Mineral Resources Meeting on Friday, Eskom's Kannan Lakmeeharan proposed that the state-owned African Exploration Mining and Finance Corporation ("AEMFC") and Alexkor could contribute to the long-term security of low-cost coal supplies,"*

to which Magwanishe agreed.

48. The Business Day reported on 16 September 2013 that Alexkor, which does not yet have any coal prospecting or mining properties, appears to be duplicating the mandate of state-owned coal mining company, AEMFC, which is producing coal for Eskom from the Vlakfontein mine near Witbank, and plans expansions.

49. Answering questions at a press briefing after Alexkor's Annual General Meeting in Pretoria, Magwanishe said there was no potential conflict between Alexkor and African Exploration.

50. In the audited Annual Financial Reports for 2013, **(Annexure PHB 12)**, it was confirmed that Alexkor's new coal strategy was a radical departure from the past to transform Alexkor into a diversified mining company that would ensure the long-term sustainability of mining operations. The strategy outlined embraced four key elements, namely:

    50.1. *Unlocking value from the PSJV;*

    50.2. *Extracting value from African diamond mining opportunities;*

    50.3. *Utilising Alexkor's core mining capability to supply coal to Eskom and reduce their coal supply risk; and*

    50.4. *Developing lime resources to supply Eskom.*

Kellerman appointed Chief Legal Officer of Alexkor 1 October 2013

51. Kellerman was appointed on 1 October 2013 as the Chief Legal Officer of Alexcor. Kellerman resigned from Alexkor in 2 November 2015.

52. Whilst Kellerman was the Chief Legal Officer of Alexkor, SSI won a contract to be the sole agent to sell and market Alexkor's diamond production. SSI had no diamond license and Moodley, the majority 60% shareholder in SSI, had no diamond industry background.

53. On examining Kellersman's cell phone records related to her time at Alexkor, the following was noted:

    53.1. 479 calls to Moodley with a total call duration of 24,112 minutes for the period 2015/08/08 to 2018/04/13;

    53.2. 23 calls to Zwane with a total call duration of 1 492 minutes for the period 2015/12/09 to 2016/04/25. Noteworthy is that Kellerman was in contact with the Minister shortly after she resigned from Alexkor on 2 November 2015.

54. When Bagus departed and the new board was appointed by Brown in August 2015, Kellerman resigned from Alexkor, and was appointed as the secretary to Zwane's inter-ministerial committee inquiry into banks' withdrawal of services to the Gupta group.

55. After Kellerman resigned from Alexcor on 2 November 2015, she was appointed as an adviser to the Minister of Mineral Resources, Mosebenzi Zwane ("**Zwane**") from April 2016 to March 2018. She later emerged as the secretary to Zwane's so-called Inter-Ministerial Committee Inquiry into the closure of the Gupta bank accounts.

56. Kellerman told Amabhungane:

> *"After my resignation [from Alexkor], I met with the new chairperson who asked me to reconsider. Whilst I was giving thought to this request, late in September 2015, I received a call from Kuben Moodley, who I had met through the [Scarlet Sky] negotiations, who asked if I would be interested in interviewing for a position as an advisor to the newly appointed minister of mineral resources [Zwane]... However, I only officially joined the minister's team in April 2016. "As the minister's advisor, with company secretarial and corporate governance experience, I assisted as the secretary to the [interministerial committee]. There is nothing sinister about this."*

57. Significantly, shortly after the announcement by Gigaba that Alexkor would be expanding into the coal business to supply Eskom, well documented Gupta linked entities and persons, Regiments and Wood, started engaging with Alexkor. This is evident in the email exchanges between Kellerman), Khoza, Regiments directors and Wood discovered during the course of our investigations dealt with below.

Wood and Regiments

58. According the State of Capture Report No 6 of 2016/17 by the Public Protector, Wood was an executive director of Regiments for nearly 12 years until February 2016 when he joined Trillian as its Chief Operating Officer.

59. According to the founding affidavit of Wood, Regiments was registered and incorporated in 2004, at which time, Regiments had six directors. While it is itself an operator in the financial-services sector, Regiments' functioned primarily as a holding company; it holds shares in a considerable number of both trading entities and investment companies.

60. On 28 February 2016, Wood left Regiments and was appointed as a director for all Trillian companies and subsidiaries on 1 March 2016. Essa, a close associate of the Gupta family, was appointed as a director of Trillian Holdings (Pty) Ltd on 28 August 2015 and became the controlling shareholder in September 2015.

61. In a document by Organisation Undoing Tax Abuse ("**OUTA**"), "*No room to hide: A President caught in the act*", it was reported that the advisory services company, Regiments–whose executive director, and 32% shareholder, Wood, a business associate of the Guptas and Essa, earned hundreds of millions of Rands in service fees from Transnet. It was stated further that Trillian Capital Partners – a company in which Essa holds a 60% stake and Wood a 25% stake, and to which Wood took the financial advisory business he had previously conducted in the name of Regiments, has since late 2015, earned more than a hundred million rand in service fees from Transnet.

62. It thus came of no surprise when Regiments was requested by Alexcor to assist it in preparing the Alexkor Financial Services Panel Request for Proposal (RFP), Evaluation sheet and a sample advert for a RFP for appointment to the panel of financial services providers for Alexkor. When Alexkor advertised the tender, Regiments prepared and then submitted their own proposal, which was totally irregular. According to **(Annexure PHB 14)**, "*The appointment of Alexkor SOC Ltd Legal and Financial Panel of Advisers. Presentation to the Tender Committee 17 June 2014*", it seems Regiments could have been successfully nominated with a number of other bidders to the financial adviser's panel. However, it is not clear from the said presentation document if they were in fact appointed. According to the Alexkor Board minutes dated 21 August 2014 **(Annexure PHB 15)**, it was decided and agreed to place a moratorium on tenders for the legal and finical panel of advisers, i.e. *"Resolution Number 04/11/14 - Tender Committee/2 RESOLVED that: The Tender Committee approved the delay of the*

tenders for the Legal and Financial Panels, subject to the Board approval and "prospective interested" tenders must be advised accordingly."

63. Unfortunately, there is no further information available from Alexkor in the above regard.

64. In the counter application against Capitec heard in the High Court of South Africa, Gauteng Local Division, Johannesburg, Case Number 24805/2017, the Court stated that the value to the Guptas of having a party like the Regiments advising organs of state was self-evident; because Regiments was beholden to the Guptas, they could be depended upon to furnish whatever advice the Guptas wanted them to furnish to organs of state. A good example was the Guptas' purchase of the Optimum Coal Mine through Tegeta resources and Exploration (Pty) Ltd, with the assistance of Eskom.

65. The Court further found that in turn, Regiments would launder hundreds of millions of rands of public funds for the Gupta family, by paying the bulk of the fees that they were paid from public funds to Gupta front companies which, in turn, would launder them through other entities until the funds finally made their way into offshore Gupta accounts. The money laundering payments made by Regiments were euphemistically described in Regiments' records and books of accounts as "*business development*" fees.

Non-Disclosure Agreement between Regiments and Alexkor : 3 October 2013

65.1. On 1 October 2013, a few weeks after the announcement by the Deputy Minister of DPE of the new strategy for Alexkor to supply Eskom with coal, Khoza, the CEO of Alexkor, received an email, (CN-023039483 Email from Mr Jonathan Loeb (**"Loeb"**) to Khoza **(Annexure PHB 16)**, with subject line-"*Alexkor Regiments NDA, from Mr Jonathan Loeb of*

Regiments Capital (Pty) Ltd (Loeb) and Head of Corporate Finance", which was copied to Wood of Regiments and Tewodros Gebreselasie ("**Gebreselasie**"), the Senior Economic Adviser at Regiments.

> *"Hi Percy*
>
> *It was good to meet you earlier. Please see attached for your review a draft NDA [Non-Disclosure Agreement] between Regiments and Alexkor. Please distribute to your team as I did not receive email addresses. If you're comfortable with the document as is, please fill in the blank spaces, sign and scan back to me for counter-signature. Should you have any comments or proposed edits, please mark these up on the document. Once finalised, we would be in a position to receive and review the master coal supply agreement.*
>
> *Thanks and kind regards*
>
> *Jonathan."*

65.2. On the same day, Khoza forwarded the email with the attached NDA to Kellerman.

65.3. On 3 October 2013, Kellerman sent an email, (CN-023039483 Email from Kellerman to Loeb **(Annexure PHB 16),** which was copied to Wood, Khoza and Gebreselasie, relating to the same email in which she wrote the following:

> "*Hi Jonathan,*
>
> *Any news on the amended NDA? I would like to send you the Eskom Master Supply in advance, on your word of course that you would keep its contents confidential.*
>
> *Thanks*

Zarina."

65.4. Kellerman emailed the Eskom Master Coal Agreement between Alexkor and Eskom to Woods, Loeb, and Gebreselasie and copied Khoza.

65.5. On the same date, 3 October 2013, Loeb responded to Kellerman via email, **(Annexure PHB 16)**[5] copying the same persons copied earlier, stating:

"*Hello Zarina*

Thanks for the email and amended NDA. I'm comfortable with the edits – please see attached a signed PDF copy. Please sign and return a copy to us. Thanks also for the Master Supply Agreement; which will of course be treated as confidential.

Kind regards

Jonathan."

65.6. On 3 October 2013, the NDA was signed by both parties **(Annexure PHB 17)**[6]. Importantly, the NDA states in paragraph 2 sub- paragraph 2.1 on page 3 that:

"The parties are in discussion regarding the potential provision of financial and advisory and other services to Alexkor by Regiments."

Legal opinion sought regarding competition issues arising from proposed co-operation agreement between Alexkor and Eskom

66. On 11 October 2013, Mr D Walker of Werksmans Attorneys ("**Walker**"), sent a

5 CN-023039483 e mail from Loeb to Kellerman

6 CN-023039484, signed NDA between Regiments and Alexkor

letter to Kellerman **(Annexure PHB 18)**[7]. Werksmans had been asked to provide an initial high level view on any key procurement and competition issues that should be considered by Alexkor and Eskom when finalising their Co-operation Agreement. When considering such issues, Werksmans were requested to take into account the fact that Alexkor's ultimate objective was to secure the ability to supply to Eskom approximately 20% of its new coal supply requirements and to structure all coal supply agreements between Alexkor (or entities in which it holds an interest) and Eskom on a "*cost plus*" basis. Werksmans stated that, based on their initial analysis, they were not aware of any law that prohibits the implementation of such arrangements.

Tender published to provide financial services to Alexkor: October 2013

67. The following email exchange discovered by the Commission outlines what transpired between Kellerman (Alexkor), Khoza (Alexkor), Neo Mohohlo (Regiments), Indheran Pillay ("**Pillay**") (Regiments), Wood (Regiments and Tewodros Gebreselasie ("**Gebreselasie**") (Regiments) and other personnel of either Alexkor and/ or Regiments surrounding the tender to provide financial services to Alexkor:

67.1. On 7 October 2013, Gebreselasie sent an email **(Annexure PHB 19)**[8], to Kellerman, copied to Khoza, Wood, and Loeb with subject: "*Info on the RFP document*" as follows:

> *"Good afternoon,*
>
> *As promised, we are in the process of preparing the RFP document for the panel of financial services providers. We will be able to send it to you before close of business today. Can you please forward me your*

7 CN-026629431, Werksmans Attorneys letter to Alexkor dated 11 October 2013

8 TRL-000497681 (1) (Email)

standard adjudication template and standard scorecard, if you have any? Your prompt response is highly appreciated.

Regards

Tewodros Gebreselasie..”

67.2. On the same date, 7 October 2013, Kellerman responded to all via email **(Annexure PHB 20)**[9], as follows:

“Hi all,

Only just seen the mail, apologies. Attached is our, which should include everything you are looking for. Let me know if you require anything else last RFP, (CN-023039349 LAND REHABILITATION PLAN- **(Annexure PHB 21)**.

Sincerely

Zarina”

67.3. On 9 October 2013, Gebreselasie wrote an email **(Annexure PHB 22)**[10], to Kellerman, copied to Khoza, Neo Mohohlo (Regiments), Pillay (Regiments), and Wood (Regiments) with subject: “*RFP for appointment to the panel of financial services providers for Alexkor*”

“Hi Zarina,

Please find attached, the RFP document, bid evaluation form and advert on the captioned. **(Annexure PHB 23)**. [11]

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9 CN-023039348 (Email)

10 CN-023039188 (Email exchange)

11 CN-023039191 (RFP Draft REQUEST FOR PROPOSAL (RFP). RFP NUMBER: 2013 /10/23/FINANCIAL SERVICES PANEL); and CN-023039192 (Evaluation sheet); CN-023039193

Kind regards

Tewodros Gebreselasie"

68. On the same day, 9 October 2013, Kellerman responded to all the above persons in the mail, but also copied Bianca Gasela [bsjgas@yahoo.com] in the email as follows:

"Thanks Tewodros.

Will peruse tonight and give you feedback tomorrow.

Sincerely

Zarina"

2014

Regiments' Fee Proposal to Alexkor: January 2014

69. On 15 January 2014, Loeb sent an email **(Annexure PHB 24)**[12], which he copied to Pillay and Gebreselasie with the subject line, *"Alexkor Fee Proposal:"*

"Hi Eric

Please see below our Alexkor fee proposal:

Transactions of this nature typically include four main work streams:

1 Valuations

(Sample advert))

12 CN-023034649, Email from Loeb to Wood

2. Due diligence

3.Transaction advisory

4. Capital raising

Valuations and due diligence

The majority of consultancies charge for valuations and due diligence work on a time and materials basis. An hourly rate per resource coupled with pre-agreed rates for travel, communications, accommodation, etc. is agreed upon by the parties and the number of hours expected is generally agreed upon upfront. This fee is not a success based payment and is charged monthly in arrears.

Transaction advisory

Transaction advisory is a bit more complex. For transactions between R100M and R1bn, a corporate finance fee of 2%-3.5% of transaction size is charged as a success fee. This percentage reduces slightly as the transaction size increases over R1bn. A monthly retainer is charged to cover costs and is typically offset against the final success fee charged.

For smaller transactions (i.e. R10M – R100M) a fixed fee is generally negotiated between the parties. This fee would typically not be reliant on success and large investment banks would not often engage in these mandates.

Capital raising

Capital raising fees are usually success based, based on a percentage of funding raised:

Senior debt: 1%

Mezzanine: 1.5%-2.5%

Equity: 2.5%-3.5%

Alexkor fee proposal:

Due to the nature of the transactions and for the sake of simplicity and transparency, we propose the following hybrid approach:

All work done is charged on a time and materials basis, based on our standard rates table below. These rates will be charged monthly in arrears. In order to incentivise the successful and timely completion of transactions, we propose a small success fee of 1% (of the transaction size) over and above the time and materials fees charged.

Capital raising fees are to be charged separately on a success fee basis at the rates shown above.

Kind regards

Jonathan

Regiments Capital - fee table	
Resource	***Regiments Standard Rates***
Analyst	*3 333*
Senior Analyst	*4 167*
Corporate Financier	*3 333*
Senior Corporate Financier	*4 167*

Due Diligence Analyst	*3 000*
Senior Due Diligence Analyst	*4 167*
Mining Expert	*5 000*

69.1. Wood on Wednesday 15 Jan 2014 sent an email **(Annexure PHB 25)**,[13] to Kellerman on copy to Humphrey at Alexkor, Gebreselasie and Loeb, with Subject: "*FW: Alexkor fee proposal*"

> *"Hi Zarina*
>
> *Post our meeting with Humphrey and the team yesterday, we have put forward our thoughts on the fee structuring as detailed below. It does appear difficult to fit this approach into the consulting agreement you sent me yesterday, but would be happy to discuss and expedite in the most efficient manner.*
>
> *Regards*
>
> *Eric Wood"*

69.2. Wood emailed Essa on 15 January 2014 with subject line: *Alexkor Fee Proposal* **(Annexure PHB 26)**.[14]

> *"Hi Salim*
>
> *Fee proposal as discussed, please give me a ring once you have gone*

13 CN-023267669 Email from Wood to Kellerman

14 CN-023121273 Email from Wood to Essa

through the contents

Regards

Erick Wood

Executive Director"

69.3. Kellerman sent an email, on 16 January 2014 **(Annexure PHB 25),**[15] on copy to Humphrey, Gebreselasie; Loeb Bianca Ilunga; Mxolisi Dludla with Subject: *Re: Alexkor fee proposal Importance: High*

"Hi Eric.

Thank you for your email and our discussion yesterday. We have now had an internal meeting on this and from our side, we would like to engage you on the valuation and DD [Due Diligence] at this time only. This will give us time to work through the tender and will assist in curbing Board approvals. In this regard, we can then look at a general consultancy agreement. I would just need to get an indication from you on anticipated man hours. If you are happy with this, could someone from your legal team send a marked-up consultancy agreement for consideration and finalisation? Looking forward to your urgent response on this.

Sincerely

Zarina."

69.4. On 16 January 2014, Wood responded to Kellerman via email **(Annexure PHB 25)**[16] on copy to Humphrey, Gebreselasie, Loeb, Bianca Ilunga, Mxolisi Dludla Subject: *RE: Alexkor fee proposal*

15 CN-023267669 from Kellerman to Wood

16 CN-023267669 Email from Wood to Kellerman

"Happy to proceed on this basis, will get the team to mark-up the consultancy agreement asap.

Regards

Eric Wood"

70. With regard to the rates structure proposed in the e-mail correspondence between Jonathan Loeb (**"Loeb"**) and Woods above the Commission's investigating team noted the following:

70.1. Alexkor is a state owned entity and listed in Schedule 2 of the Public Finance Management Act (PFMA) as a Major Public Entity;

70.2. The Board of Alexkor is the Accounting Officer in terms of section 49(2)(a) of the PFMA.

70.3. In terms of the PFMA, the Accounting Officer and other officials of Alexkor have a duty to act in the best interests of Alexkor. This includes:

70.3.1. the management of expenditure and the prevention of irregular and fruitless and wasteful expenditure; and

70.3.2. ensuring a procurement process is followed that is fair, equitable, transparent, competitive and cost-effective.

70.4. The Regiments pricing proposal was that:

"All work done is charged on a time and materials basis, based on our standard rates table below. These rates will be charged monthly in arrears."

70.5. For a consultant to charge for time and materials is acceptable and

widely used.

70.6. The Department of Public Service and Administration (DPSA) issues guidance on hourly fee rates to be used when contracting contractors.

70.7. The hourly DPSA rates recommended for consultants, with effect from 1 April 2013 until 31 March 2014 **(Annexure PHB 27)** at the time of the e-mail correspondence prescribed a maximum fee of R3 156.00 per hour.

70.8. It was noted that the minimum hourly rate proposed by Regiments for a due diligence consultant, was R3 000.00, which was at the maximum rate as per the DPSA schedule. I would, however, expect an analyst to be charged at approximately R679.00 – R1 218.00 per hour as per the DPSA schedule.

70.9. The maximum hourly rates proposed by Regiments was R5 000.00 for a mining expert. This exceeded the maximum rate for consultants recommended in the DPSA schedule, which was R3 156.00.

70.10. Based on the above, all rates proposed by Regiments, except that of a due diligence consultant, exceeded the maximum DPSA rates. Based on the DPSA schedule and the rates proposed by Regiments, the Regiments rates were excessive.

70.11. Regiments also proposed that:

> *"In order to incentivise the successful and timely completion of transactions, we propose a small success fee of 1% (of the transaction size) over and above the time and materials fees charged."*

70.12. If in addition to their fees, Regiments were to receive an additional

success fee of 1%, although seemingly small, this would be excessive and totally out of proportion with the services rendered by it: If it was a R1bn deal, Regiments would receive R10 000 000.00 as a bonus/success fee, which would not add any value to the work already performed.

70.13. Regiments proposed that:

> *"Capital raising fees are to be charged separately on a success fee basis at the rates shown above."*

70.14. The capital raising fees indicated were for senior debt – 1%, mezzanine 1.5% -2.5% and for Equity 2.5% - 3.5%.

70.15. A fee for raising equity is unfathomable as the State is a 100% shareholder of Alexkor.

70.16. Therefore, if more equity is injected into Alexkor by the South African Government, then an additional 2.5% - 3.5% is paid for no reason at all to Regiments.

70.17. Furthermore, paying Regiments a percentage of debt incurred by Alexkor would also not be beneficial as Regiments would be in a position to motivate higher debt levels than required, which would only serve to benefit Regiments.

70.18. Securing debt is not a function that Alexkor should outsource as this function should be performed by the staff of Alexkor. The South African Government would in any case be responsible for providing security for such transactions.

70.19. It is readily apparent from this analysis that the proposal put forward to Alexcor was designed solely to benefit Regiments, who would benefit if Alexkor was indebted; this would certainly not have been in the best interests of Alexkor.

71. On 14/01/2014, Kellerman wrote an email to Wood and Loeb of Regiments, copied to "*Humphry*" of Alexkor and Bianca Ilunga, stating the following: **(Annexure PHB 28)**.[17]

> *"Dear Eric and Jonathan,*
>
> *I trust that you are well and that 2014 will be a blessed year for you. I have left a message for you at the office. We will be putting out the tender shortly for financial advisors but for now, I am advised that we require your assistance on something specific. As a result, I attach a standard consulting agreement. Have a look at it and we can hopefully finalise this by email. But you are welcome to contact me on my mobile. We will require you to tender in the normal course and if you are successful, a more detailed agreement will follow. Let me have your comments.*
>
> *Sincerely*
>
> *Zarina"*

72. On 16 January 2014, Loeb sent an email **(Annexure PHB 28)**[18] to Kellerman, copied to Humphrey (Alexkor), Wood, Gebreselasie, and Pillay with subject: "*Alexkor Regiments consultancy agreement_edit1 Alexkor Regiments*

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17 TRL-000491467 (email) and TRL-000491468 (Copy of standard consultancy agreement)

18 TRL-000491309

consultancy agreement_edit1.docx" as follows: **(Annexure PHB 29)**[19]

> *"Hi Zarina*
>
> *Please see attached our mark-up to the consultancy agreement including our best estimates of fees per transaction. Please note that our internal legal is still reviewing the agreement and will revert with comments during the course of tomorrow. In the interim, we can proceed based on the attached.*
>
> *Thanks and kind regards*
>
> *Jonathan"*

73. On 24 January 2014 Neo Mohohlo (Regiments) sent an email **(Annexure PHB 28)**[20] to Gebreselasie, Brandon Subrayan (Regiments) and Niel Wyma (Regiments), copied to Wood, Pillay, with subject: "*Alexkor Proposal Financial services panel draft Alexkor Proposal Financial services panel_draft.docx*", stating: **(Annexure PHB 30)**.

> *"Hi all,*
>
> *Please see attached the first consolidated draft of the RFP. Please review and send me comments and input by cob Monday. Do not worry about the formatting, I will send the doc to Natalie for formatting once the content is finalised.*
>
> *Regards,*

---

19 TRL-000491310 Alexkor and Regiments Consultancy Agreement

20 TRL-000510309 (Email))

Neo".

73.1. On 31 January 2014 there was an unsigned letter addressed to Kellerman, but for signature by Wood, as Regiments Capital Executive Director, with subject line: "*RE: APPOINTMENT TO THE FINANCIAL SERVICES PANEL OF ALEXKOR (2014/01/06/FINANCIAL SERVICES PANEL)*" **(Annexure PHB 31)**,[21] in which it was stated that:

> *"Regiments Capital ("Regiments") is pleased to submit the accompanying proposal for the above mentioned tender.*
>
> *... This proposal covers a description, methodology, experience and project plan for all the services that Regiments is bidding for as well as a brief profile on Regiments. In submitting this proposal, Regiments hereby complies and agrees to be bound by the rules of the RFP submission as contained in the request for proposals..."*

The appointment of SSI to provide exclusive diamond marketing and sales services to the PSJV: 17 December 2014

74. On 25 November 2014, SSI submitted a tender to the PSJV to provide exclusive diamond marketing and sales services to it. At this stage, SSI was a shelf company with no diamond marketing or sales experience.

75. On 4 December 2014, Moodley and Nathan became directors of SSI.

76. On 17 December 2014, the tender was conditionally awarded to SSI.

2015

21 TRL-000597132

77. On 27 February 2015, the PSJV Board approved the awarding of the tender to SSI. SSI were informed that their bid was successful on 1 March 2015.

78. SSI, which changed its name to ABDC, had no diamond license or experience in the industry, but still won the tender submitted in 2014 to be the sole agent to value, sell and market Alexkor's entire diamond production (**Annexure PHB 2)** Alexkor's chief legal officer at the time, was Kellerman. Moodley, the purported 60% BEE shareholder of SSI through is company, Kimomode, had no diamond industry background.

79. The two directors of SSI, appointed after SSI's bid was submitted, were Nathan and Moodley.

Nathan and Daniel Nathan Trading

80. SSI is 40% owned by DNT, represented by Nathan.

81. The business address of SSI is the physical address of Nathan's company, DNT and Knox Titanium Vault Company ("**Knox**"). Moodley and his wife had personal safety deposit boxes at Knox, which were subject to search and seizure orders by the Commission in 2019.

82. The Commission has received confirmation from the South African Diamond and Precious Metals Regulator (SADPMR) that SSI has never applied for a diamond trading house licence. SSI was using the licence of Daniel Nathan Trading CC to trade Alexkor diamonds from inception of the contract being awarded to SSI, which is unlawful and in contravention of the Diamonds Act. The consequence of trading with no authorised diamond licence is that SSI was and still is unlawfully in possession of rough diamonds and each sale may be unlawful as this constitutes a contravention of the Diamonds Act.

83. Evidence of a further misrepresentation that was made by Daniel Nathan Trading CC to the SADPMR to acquire a back dated licence in the name of ABDC purportedly on the basis that DNT had changed its name to ABDC is dealt with by Mr Jan Dekker ("**Dekker**") **(Annexure PHB 5)**, a forensic investigator employed by the Commission, in a separate affidavit. In this affidavit he also deals extensively with the under-valuation of diamonds by DNT and corroborates the findings of Gobodo and the submission made by Gavin Craythorne.

84. On 16 September 2020, the Commission forwarded a RFI to the SADPMR requesting information concerning transfer of diamond licence from Daniel Nathan Trading CC to Alexander Bay Diamond Company (Pty) Ltd**, (Annexure PHB 32 (1),(2),(3),(4),(5))**

85. A statement by the SADPMR General Manager Legal Services Mr Mononela, (**Annexure PHB 33**), confirms that Daniel Mark Nathan submission for a name change as mentioned in Dekker's affidavit (**Annexure PHB 5**), constitutes a deliberate gross misrepresentation of fact, as the incorrect documentation was used to request a name change.

Moodley and Kimomode

86. Kimomode is the 60% shareholder of SSI.

87. Moodley is known for his company, Albatime, his involvement with Regiments and Trillian Capital Management and being a "*fixer*" for the Guptas. Moodley was also the subject of investigation by the Public Protector as stated in her State Capture Report.

88. Moodley resigned from SSI on 5 November 2015, shortly after Zwane was appointed as Minister. However, he retained his 60% shareholding in SSI through Kimomode until April 2017, after SSI was reappointed for five (5) years

in a new PSJV tender in 2016.

89. Kellerman was appointed as adviser to Zwane from April 2016 to March 2018 after Moodley called and asked if she would be interested in an interview for the position. She was also instrumental in the negotiations between Alexkor and Regiments to appoint Regiments as consultants to assist with the new Alexkor coal mandate to supply Eskom with coal and lime.

90. Zwane appointed three (3) advisors when he was Minister of Mineral Resources:

    90.1. Moodley (1 October 2015 to 31 March 2016);

    90.2. Mabaso (1 October 2015 to 31 March 2018); and

    90.3. Kellerman, at the behest of Moodley (1 April 2016 to 31 March 2018). From her cell phone records, Kellerman was in contact with Zwane for several months before she was appointed.

91. From examining the cell phone records of Moodley, it is evident that:

    91.1. He had contact with the CEO of the PSJV, Carstens 97 times, with a call duration of 1 485 minutes from 2015/09/12 to 2017/05/10.

    91.2. He had contact with Kellerman, no less than 479 times with a call duration of 24 112 minutes from 2015/08/08 to 2018/04/13.

    91.3. He had contact with Chipkin 27 times with a call duration of 1 590 from 2014/11/04 to 2017/03/27.

    91.4. He had contact with Nathan 306 times, with a call duration of 15 345 minutes from as early as 2008/05/09 to 2017/11/14.

91.5. He had contact with Selwyn Nathan 232 times, with a call duration of 10 239 minutes from 2010/09/01 to 2016/11/07.

91.6. He had contact with Angel a director of ICM, 20 times with a call duration of 1 303 minutes from 2015/06/10 to 2017/03/27.

92. Evidence flowing from recent matter in Kuben Moodley vs Sunday times,[22] "*Moodley complains about a report in the Sunday Times of 14 August 2016, headlined- 'Gupta pal' in R380m SABC licence-fee deal – Contract awarded without tender, extended without authority and not delivered on, say sources…*" and the #Guptaleaks and former public protector Madonsela's State of Capture report portray Moodley as closely linked to Essa and the Gupta family.

93. During March 2015 – the same month SSI was awarded the Alexkor contract – Moodley was entangled in what appears to be a R122m simulated transaction with the Guptas' Sahara Computers.

94. Moodley previously told the Sunday Times that the payments would have been for "*the procurement of IT equipment and services*", but the #Guptaleaks suggest otherwise.

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22 This was a defamation matter brought by Moodley concerning a report in the Sunday Times on 14 August 2016, headlined 'Gupta pal' in R380m SABC licence-fee deal – Contract awarded without tender, extended without authority and not delivered on, say sources.

The gist of his complaint was that both the article and the headline left the reader with the false impression that Moodley had benefitted from corruption.

In particular, he complained that the text falsely said or implied that:

- he had relations with the Gupta family; and
- the contract between Lorna Vision and the SABC was suspect

Ruling by the Press Ombud, Johan Retief, and a Panel of Adjudicators (Peter Mann, public representative, and Mahmood Sanglay, representing the press.) The panel convened meetings on February 6, March 16 and March 27, 2017 before concluding the matter.

95. Leaked emails show that on 27 June 2015[23], Sahara chief executive and the Gupta associated, Ashu Chawla, sent an email to Moodley with a single line, stating: "*Hi Kuben here is the invoice for your reference*".

96. The invoice attached to the e mail to Moodley's company, Albatime, simply stated it was for "*Admin IT services... contract 2012-2014*" - but the figures were simply too large and got cut off, so the R122m was reflected as R22m.

97. Moodley wrote back, saying, "*Please call me, your invoice does not make sense to me.*"

98. Eventually, on 3 July 2015, the invoice was sorted out to reflect R122m, plus R17m VAT, "*payable quarterly*" for a supposed contract due to run March 2015 to February 2017.

99. It has been reported that according to Saharah's bank records, Moodley paid over R52 155 000 the same day.

100. Only on 8 July 2015 did Sahara director Ronica Ragavan create an underlying contract.

101. On that day she emailed a document titled "*Service Level Agreement – Albatime – March 2015*" for everyone to sign.

102. This contract was merely a drafted to disguise the Commission payment. A spreadsheet tracking gross profit in the Sahara business shows that the R122m was reflected as income at zero cost to the business.

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23 Ruling by the Press Ombud, Johan Retief, and a Panel of Adjudicators (Peter Mann, public representative, and Mahmood Sanglay, representing the press.) The panel convened meetings on February 6, March 16 and March 27, 2017before concluding the matter.

103. The timing of this transaction, the alleged mention of a R 50 million guarantee on the award of the tender to SSI and the subsequent award of the PSJV marketing contract to SSI, is suspicious.

Chipkin and Integrated Capital Management

104. SSI's corporate advisor was Chipkin of Integrated Capital Management (**"ICM"**), which was involved with Essa. According to the Gupta leaks in November 2014, when SSI responded to the diamond marketing tender, their expression of interest noted that all communication should flow through their "*corporate advisors*", addressed to Chipkin of ICM. ICM was later intimately involved with Essa and the establishment of the Trillian Group of Companies, which was used to capture consulting work from Transnet and Eskom from the end of 2015.

105. ICM Chairman at the time was Selwyn Nathan, who is the father of Daniel Nathan. When the PSJV Chief Executive, Carstens, demanded that SSI provide a R50m funding guarantee, it was ICM's Chairman, Selwyn Nathan, who submitted a letter of comfort, committing ICM to secure the guarantee, should SSI win the bid.

106. The Commission has subsequently established that Investec has no record of any guarantee that was applied for and provided **(Annexure PHB 34)**.

Duncan Korabie

107. Korabie was the Chairman of the Technical Committee that awarded the sole marketing and sales contract to SSI.

108. Korabie scored SSI 100%, for a bid by a company which was hitherto dormant and had no diamond trading licence or experience in the diamond industry.

109. On 11 September 2015, Korabie sent a letter, **(Annexure PHB 35)**, of complaint to then Public Protector, Thuli Madonsela, about the award process. He copied it to Alexkor's management and the Department of Public Enterprises.

110. In this complaint Korabie alleged that Bagus had influenced the process, stating that:

> *"On the 11th of December [2014] the chief legal officer [Kellerman] and chairperson at the time [Bagus] took Korabie and Dr. Roger Paul, an Alexkor representative, into his office and discussed what he viewed as the new direction the PSJV must take in appointing the service provider. He mentioned that only one candidate that will be interviewed met the new direction he proposes. He then mentioned SSI."*

111. Korabie told the amaBhungane Centre for Investigative Journalism, and Scorpio, also a team of investigative journalists, that during a separate private conversation, Bagus told him that the instruction to appoint Scarlet Sky came "*right from the top*" **(Annexure PHB 13)**.

112. In Korabie's 2015 complaint, he further alleged that the award to SSI was supposed to have been subject to the completion of a due diligence. He wrote:

> "*The CEO [Carstens] never reported to the tender committee on the due diligence he was directed to conduct... It is clear to us that [Scarlet Sky] was created specifically for this tender. We do not know who the shareholders are of [Scarlet Sky] and their relationship, if any, with any of the... board members."*

113. Korabie's complaint was not pursued by the Public Protector's office, ostensibly due to doubts about its jurisdiction and a commitment from Alexkor that the matter would be investigated. However, the complaint was withdrawn by Korabie **(Annexure PHB 36)** subsequent to a meeting between DPE and the Alexkor-

CPA during November 2015, to allow the Department to investigate the matter internally. The investigation was done by the ARC Committee of the PSJV and the outcomes have been communicated with the Department. However, Korabie's 100% score for a company with no diamond licence and no track record is consistent with the averred instruction given to him by Bagus that SSI had to be appointed.

114. One unknown source close to Bagus (who tells a story that supports Korabie's version), who asked not to be identified, apparently told amaBhungane:

> *"Look, [Gupta business partner Salim Essa] went to Bagus and said [Scarlet Sky] must get the tender... They said, this comes from the very top... He said, no ways. So they said, then you must go."*

115. A former close associate of the Guptas also apparently told the aforementioned journalists that the family tried to capture Alexkor in order to take their money out in diamonds: "*They wanted the sole marketing rights for [Alexkor] diamonds... They wanted the mobility of diamonds.*"

Haasbroek's Appointment to Alexkor's Board: July 2015

116. Following a forensic investigation into various allegations at DPE conducted by Fundudzi Forensics in 2018 with regard to Alexkor Board appointments, **(Annexure PHB 6)**, they determined that on 16 July 2015, Ms Kim Davids ("**Davids**"), the executive assistant to Brown, sent an email to infoportal1@zoho.com from her private e-mail address, anckimwc@gmail.com. The title of the e-mail was "*Trevern's CV*". In the email, Davids stated the following:

> *"Dear Saleem*

Herewith cv for Alexkor board as discussed".

117. Fundunzi also noted that Haasbroek's CV and a motivation letter purportedly prepared by Haasbroek dated 15 July 2015 was attached to this said email.

118. The e-mail above is an indication that Davids was communicating with "*Saleem*", who it can safely be assumed was Saleem Essa.

119. It is evident from the Fundunzi report that the email address infopportal1@zoho.com has been extensively used in communications between the Gupta family and members of SOE's.

120. It is evident that great care was taken during these communications to the said email address, not to identify the owner of the said email; the email address is an anonymous email address with no trace.

121. Fududzi further determined that on 20 July 2015, Davids forwarded Haasbroek's CV from her private e-mail address (anckimwc@gmail.com) to her DPE e-mail address, Kim.Davids@dpe.gov.za.

122. On 27 July 2015, 11 days after the email from infoportal1@zoho.com to Davids, Makobe issued a memorandum to Brown to advise the Minister on the rotation and re-appointment of Non-Executive Directors to the Alexkor board.

123. The said memorandum, *inter alia*, recommended the appointment of Haasbroek to the Alexkor board with effect from 14 August 2015 for a period of three years, subject to annual review by the Minister of Public Enterprises.

124. Haasbroek accepted his appointment as non-executive director to the Board of Alexkor on 13 August 2015.

Matseke appointed by Brown as the Chairperson of the Alexkor Board: August 2015

125. Matseke, the Independent Non-Executive Director and Chairperson of Alexkor, was appointed in August 2015 by Brown.

126. She was also a member of the Free State Development Corporation Board at the time that she was appointed to the Board of Alexkor. According to an article in News24wire **(Annexure PHB 37)** on 31 January 2018, Matseke, the FDC's chairperson is allegedly a long-time ally of ANC Secretary-General, Mr Ace Magashule(**"Magashule"**). Matseke is also the business partner of Ms Thoko Alice Malembe, Magashule's estranged daughter, with whom he was allegedly reunited in 2011, scored a contentious property deal with the FDC, when Matseke was the chairperson. Malembe's and Matseke's respective companies have both greatly benefited from government contracts in the Free State and have worked together on some of these projects.

Brown appoints the Audit and Risk Committee to conduct an investigation into the tender awarded to SSI: 28 October 2015

127. On Wednesday, 28 October 2015 it was resolved by the Minister of Public Enterprises, Brown, that the Audit and Risk Committee would conduct an investigation in respect of the awarding of the tender, Tender No RFP 03/2014, by the PSJV to SSI. This was as a result of complaints submitted to the Minister by RMC, Alexkor's joint venture partner in the PSJV. The matter had been raised at the meeting between the RMC, Alexkor and the DPE.

128. The following persons were members of the Audit and Risk Committee:

128.1. Ms M Lehobye (Chairperson);

128.2. Haasbroek; and

128.3. Mr T Matona, who apologised for not being available to serve on the Committee, who was replaced by Mr V Bansi.

2016

129. On 26 February 2016, a report back was provided on the investigation carried out by the Audit and Risk Committee of the Alexcor Board ("**the Audit and Risk Committee**") **(Annexure PHB 38)**.

130. Following its review of the matter, the Audit and Risk Committee concluded as follows:

> *"Based on the affidavit and collaborative evidence reviewed by the committee, we could not find any fundamental breach of procurement procedures adopted by PSJV other than manner housekeeping that we have alerted the management of the PSJV to correct.*
>
> *Furthermore, we are of the view that some of the challenges that have been raised could be mitigated if the PSJV board pack is enhanced to include all committee minutes for noting at each board meeting. This will enhance transparency and information sharing. To that end, we have recommended to the chairperson of the PSJV to consider a resolution of the board to include the minutes as part of the board pack".*

131. These findings are totally contrary to the numerous and consistent complaints lodged by Craythorne about the irregular appointment of SSI and the subsequent findings and recommendations made by Gobodo, who prepared a report pursuant to a mandate from the DPE that such appointment was irregular.

The Gobodo Findings and Recommendations

132. Following and in depth forensic investigation by Gobodo, during October 2019,

they recommended that the PSJV Board / Department of Public Enterprises consider terminating the ABDC, formerly known as SSI contract with the PSJV based on the following:

132.1. That tender 03/14 was irregularly awarded to SSI by the PSJV Board in or about 2014. The procurement process was fatally flawed;

132.2. That the procurement process for tender 02/2016 was flawed and irregularly awarded by the PSJV Board;

132.3. That there was no compliance with the terms of the contract by SSI. SSI failed to ensure that the rough diamonds sold for beneficiation purposes to the State Diamond Trader (SDT) and Joe Gaddies was 10% and 5% respectively, *which was in accordance with the contract;*

132.4. That the contract placed the PSJV at risk by not ensuring that 15% in value *of the rough diamonds are sold for beneficiation purposes in order* to allow the PSJV to be exempted from the export levy in terms of Section 8 of the Export Levy Act;

132.5. That SSI failed to disclose information relating to the buyers of the rough diamonds to the PSJV and misrepresented SSI as the buyer; and

132.6. For selling the rough diamonds at a price that is ostensibly lower than the market price.

133. Gobodo also recommended:

133.1. That the contract for the reclamation of the stockpile tailings awarded to Ambicor be investigated;

133.2. That further investigation be conducted to identify the buyers of the 85% rough diamonds and the related prices for the rough diamonds and ensure that the buyers have the required licences and that the sales have been registered with the relevant authorities;

133.3. That the Tender Committee not be considered as a sub-committee of the Board and that Board members should not be involved in the adjudication and evaluation tenders as this is a breach of the Unanimous Resolution. Board members should only be involved in the approval of the tenders;

133.4. That the PSJV Board should consider appointing an independent valuator to conduct a proper Valuation of the rough diamonds before it is delivered for marketing and selling; and

133.5. That the PSJV Board DPE consider disciplinary action against Mervyn Carstens, the CEO for misrepresenting that a due diligence had been conducted before the award of tender 03/2014 to SSI.

2017

The proposed establishment of Alexcoal to pursue the coal business with Alexkor

134. A Non-Binding Memorandum of Understanding ("**MOU**") between IPC Beneficiation (Pty) Ltd ("**IPC**") and Alexkor SOC Limited was signed in Witbank on 8 May 2017 **(Annexure PHB 39)**.

135. On 20 October 2017, Matseke wrote a letter with heading, "*PRE-NOTIFICATION ON THE PROPOSED ESTABLISHMENT OF ALEXCOAL*" **(Annexure PHB 40),** to Brown acknowledging the Minister's letter dated 20 September 2017 and in

particular, to acknowledge the Minister's conditional approval to proceed with the negotiations with IPC Beneficiation.

136. Significantly, the MOU states that a new company ("**Newco**") will be established and that the shareholding will be Alexkor- 55% and IPC- 45%. It was provided that Newco would enter into logistics and supply agreements with WecCoal and Nungu Mining, for the supply of washed coal to Eskom.

137. The Commission's investigating team have established that the entire coal deal was part of a Gupta linked and associated network of companies, positioning themselves to control Alexkor coal business, which consisted of IPC, WesCoal and Nungu. Should the deal have gone through, the entire coal business for Alexkor would be to the benefit of the Guptas and their associates. The following Centaur News Bulletin, date 27 Jan 2015, supports these assertions **(Annexure PHB 41)**:

> *"Centaur Holdings Announces Funding Package for 'Nungu Colliery' Coal Project in South Africa- NEWS PROVIDED BY: Centaur Holdings Ltd 27 Jan, 2015, 04:00 GMT (DUBAI, January 27, 2015 /PRNewswire/ --). According to this bulletin the following was announced:*
>
> *Centaur Holdings Ltd ("Centaur"), a global investment holding company with interests and investments ranging from asset management, wealth management, private equity, venture capital, mining and natural resources and agricultural investments is pleased to announce that it has completed a funding package through a wholly owned subsidiary (the "Company") for IPC Coal (Pty) Ltd and IPC Mining (Pty) Ltd (collectively "IPC").*
>
> *Under the terms of a recently executed Cooperation Agreement, the Company has agreed to provide secured capital to expand IPC's existing opencast mining operations at its Nungu Colliery, which will allow IPC to begin mining the underground reserves in February 2015.*

The remaining extent of Portions 4 and 23 and Portions 67, 68 and 69 of the farm Elandspruit 291 JS form the Nungu Colliery which measures roughly 3 258 hectares. The Nungu Colliery lies 5km West of Middelburg Town, Mpumalanga Province, Republic of South Africa and benefits from well-established logistics infrastructure.

The Nungu Colliery coal reserves are located beneath the surface on the remaining extent of Portion 23 and access to the underground coal reserves is also located on Portion 23 in the high wall of the previously mined out Nungu West Opencast pit. All the opencast reserves on Portions 67, 68 and 69 have previously been mined and the pits have been rehabilitated and the surface levelled. Only the remaining underground coal reserves are available to be mined.

The Company previously funded IPC to mine the Nungu opencast reserves and based on IPC's track record, has now agreed to fund an undisclosed sum to allow IPC to successfully mine the underground reserves of circa 7m tons of thermal coal.

Centaur and IPC have agreed an option to allow Centaur to increase the funding package and simultaneously acquire an equity stake in IPC as a secondary stage to the transaction.

On the funding package, Centaur Group CEO, Daniel McGowan, said

> *"The recently completed funding package for IPC is part of Centaur's strategic plan for its mining division, with a specific focus on high quality export thermal coal and established logistics infrastructure. Centaur and IPC have a strong working relationship, which has been built on IPC successfully mining the Nungu opencast reserves. The funding package further demonstrates Centaur's selective expansion plans in the natural resources sector in South Africa. Centaur will begin work on the secondary stage of the transaction during Q1."*

Webber Wentzel acted as Legal Counsel for Centaur for the security provisions of the Cooperation Agreement and Centaur Asset Management, a wholly owned subsidiary of Centaur, acted as financial advisor for the transaction.

Ecca Project Services (Pty) Ltd acted as mining advisor to Centaur and will maintain a supervisory role throughout the underground mining 'life of mine'. The 'Private Equity' division of the Centaur Group was responsible for sourcing and managing the IPC transaction."

138. According to an email the Commissions investigating team has in its possession from attorney Henk Smith, who has also been assisting the Commission with information related to Alexkor**(Annexure PHB 42)**, Centaur Holdings is based in Dubai in the United Arab Emirates (UAE) and has Daniel McGowan as its CEO. The company states on its website that it has interest in developing coal properties in South Africa. (http://www.miningmx.com/top-story/28353-firm-behind-r500m-de-roodepoort-coal-project-gupta-linked/) **(Annexure PHB 43)**, (confirmed in the above quoted article). The firm's key shareholders are Aakash Garg Jahajgarhia, who is married to the daughter of Anil Gupta, one of the Gupta brothers, according to the state capture report. Other shareholders include Simon Hoy, McGowan and David Silver. The reason for Centaur Holdings' mention in the state capture report is that the company signed a $100m (R1.4bn) revolving credit facility with an anonymous UAE-based family to expand its natural resources projects in South Africa. Centaur is also one of the entities that contributed towards the R2.15bn purchase price of Optimum Coal Holdings by Tegeta Exploration & Resources, a subsidiary of Gupta company, Oakbay Investments.

139. In a corporate presentation, **(Annexure PHB 44)**, *"Gupta Family - The Inconvenient Truth,"* that was prepared by Aslam Kamal and Nazeem Howa for Oakbay Investments (Pty) Ltd dated 27/01/2016, on slide 16 it confirmed that *"M&A Team worked on three deals - Optimum, Wescoal and Universal. Lost bids for Wescoal and Universal. So much for all-powerful!"*

139.1. An email in possession of the Commission indicates that plans

were already afoot in August 2014 to acquire the Nungu concessions. In relation to the Nungu mine that would form part of the Alexkor Newco, the following email (**Annexure PHB 45**), was sent to Tony Gupta[tony@sahara.co.za] from: Ravindra Nath of Oakbay on Thur 8/28/2014 5:43:25 PM (UTC)with Subject: "*Information required:*"

"Dear Tony ji,

We need following information:

a. CPR of Mining right (Nungu);

b. Is there any other mining right?

c. Mining works programme for Mining Right;

d. Copy of all the 7 prospecting rights.

e. CPR or geological report of the prospecting right;

f. Mining status at MR site;

g. Approval of wash-plant;

h. Any contract with other coal mines for washing of their coal;

i. Coal supply agreement with Eskom?

j. Off-take agreement of coal with any other party.

k. Latest financials of the Company.

Regards,

R. Nath"

2018

Moratorium placed on the acquisition of Alexcoal

140. The Commission formally requested information from Alexkor in relation to it coal strategy it had announced, **(Annexure PHB 46)**. The Commission was provided with several documents related to Alexkor's new coal strategy expansion programme.

141. From a letter by Matseke dated 26 April 2018 to Minister Gordhan with heading "*PFMA section 54 (2)(b) Notification on the Proposed Establishment of Alexcoal and Feedback on Alexkor's 2017/18 Third Quarter Report for the Period Ended 31 December 2017*" **(Annexure PHB 47),** it is evident that Minister Gordhan had placed a moratorium on the acquisition plans of SOC's. Matseke advises in the letter that the Board of Alexkor will take no further action on the coal project until instructed to so.

142. It thus seems that after Minister Gordhan placed the moratorium on the coal acquisition plans the Alexkor proposed coal strategy came to an abrupt halt.

143. According to a due diligence document, **(Annexure PHB 48)** that was provided by Matseke to Minister Pravin Gordhan (**"Gordhan"**) on 26 April 2018, the Introduction to the Presentation bulleted the following points:

- *"The current core business of Alexkor SOC Limited ("Alexkor") is mining of diamonds*
- *Alexkor's Board and management has been directed to look into other business opportunities to diversify and grow the business*
- *Alexkor goal is to adopt a twofold initiative to their coal strategy which entails primarily the partnership with emerging coal companies to facilitate the supply of feedstock to Eskom Power Stations from road to rail agencies*

- *Alexkor has identified a business opportunity to invest in a privately owned Company whose owners have experience in coal beneficiation and who are currently operating a coal beneficiation toll-wash facility in Middleburg which is in close proximity to a number of coal fired Power Stations*

- *The Run of Mine (ROM) processing capacity is 140 000 tons per month which can yield a product in excess of 100 000 tons per month*

- *Alexkor has expressed an interest in taking up an equity stake in the company and has undertaken a due-diligence exercise on the opportunity and the outcome of this exercise has indicated that the opportunity is financially viable and the team went ahead to progress the business opportunity to the development of a Business Case*

- *The presentation summarises the proposed Business Case for Alexkor to pursue the opportunity."*

144. According to this presentation to Gordhan, the Newco was to be called Alexcoal (Pty) Ltd ("**Alexcoal**").

2019

The Administration of Alexkor

145. On 12 September 2019 an Administrator of Alexkor, Mr Lloyd McPatie ("**McPatie**") was appointed for a period of six months, **(Annexure PHB 49)**. The Administrator held the positions of:

145.1. Executive Chairperson of Alexkor;

145.2. Chairperson of the Pooling and Sharing Joint Venture (PSJV); and

145.3. Chairperson of the Rehabilitation Trust.

146. The Administrator's terms of reference were to:

146.1. Undertake an extensive review and analysis of the contract mining and revenue sharing models between the Alexkor Richtersveld Mining Company (RMC) PSJV and the contractors and provide proposed solutions;

146.2. Review the Alexkor and the Alexkor RMC PSJV cost structure to ensure that procurement of goods and services is at fair value and warranted;

146.3. Remove the duplicate functions at Alexkor Head Office and Alexkor RMC PSJV with a particular focus on executive and overhead expenses as well as to identify and implement other remedial and cost reduction intervention plans and/or initiatives;

146.4. Launch an investigation into any contractual impropriety and if need be, terminate marketing and sales contract with Scarlet Sky Investments (SSI) and propose solutions/options for the establishment of own or State Diamond Trader related diamond marketing and sales channel;

146.5. Develop a revenue enhancing plan with emphasis on contracting for mid and deep-water mining operations;

146.6. Propose a right sizing model for Alexkor and Alexkor RMC PSJV in line with the income streams;

146.7. Manage the rooting out of corruption and State capture related practices and individuals at Alexkor and Alexkor RMC PSJV;

146.8. Determine the optimal shareholding structure of the state's marine diamond resources;

146.9. Incorporate the Alexkor RMC PSJV to ensure adherence to the Act and

proper Corporate Governance provisions;

146.10. Obtain in collaboration with the Department the support of the Richtersveld Communities and their appropriate entities into implementation of the Alexkor RMC PSJV restructuring interventions; and

146.11. Develop in collaboration with the Department a Key Stakeholder Engagement Plan to ensure support for the implementation of the above plans.

146.12. The Administrator records that it launched an investigation into the impropriety of the contract concluded with SSI. This revealed that:

146.12.1. the appointment of SSI to do the marketing and selling of the diamonds is questionable from a governance perspective as SSI does not have a diamond trading license; and

146.12.2. the sales and marketing contract concluded with SSI was irregular.

147. It is recorded that Alexkor has applied to the South African Diamond and Precious Metals Regulator(SADPMR) for a diamond-trading license to enable the company to market and sell its own diamonds on various platforms and thus being able to cancel the SSI contract. It was anticipated that the license would be issued by end of February 2020.

148. It is also recorded that a legal firm was engaged to formulate charges against all implicated individuals and/or companies emanating from the Gobodo report.

149. The fact that Alexkor has been stripped of all its assets is evidenced by the

Administrator's statement that it only has funds which would last it until the end of March 2020 and thus, should be liquidated. It is furthermore stated that the PSJV is technically insolvent and cannot trade itself out of its current financial situation. In this respect it is recorded that:

149.1. Alexkor impaired a R200m loan in the 2018/19 financial year that was provided to the PSJV;

149.2. The PSJV currently has outstanding debts of approximately R100m which includes statutory payments such as PAYE, VAT and Pension Fund Contributions;

149.3. This will be reduced to R45m by the financial year end but the PSJV will not be able to meet its financial obligations during the winter months when carat production is low.

149.4. After the liquidation process, the Administrator suggests that a new corporatized and adequately recapitalised entity could be established.

149.5. As an alternative to liquidation, it is proposed that the joint venture be recapitalised on the basis that:

149.6. The budget required to do the exploration is approximately R400m;

149.7. The debt excluding the loan to Alexkor is around R100m; and

149.8. Further funding will be required to adequately staff the mine with the correct levels of technical skills.

150. If a decision is taken to recapitalise the PSJV, it is recommended that the Deed of Settlement (DoS) and the Unanimous Resolution (UR) must be set aside by a

court of law and a Partnership Agreement between Alexkor and the PSJV must be entered into.

151. A further alternative proposal put forward by the Administrator is that the marine mining rights be sold to the private sector to partner with the community. However, it is said that these rights will be a hard sell as the exploration has not been done and there is no tangible value in the mining right without understanding the resource. According to Craythorne, this simply is not true; Alexkor's diamond rights are extremely valuable and their value is readily ascertainable as he has demonstrated in this affidavit.

Disciplinary charges proffered against Carstens: 31 January 2020

152. On 31 January 2020, Carstens was suspended by the Administrator McPatie for Gross Negligence, Gross Misconduct and for Failure to Demonstrate Acceptable Conduct related to the irregular SSI contract awards, failure to act against SSI who failed to ensure that the rough diamonds sold for beneficiation purposes to SDT and Joe Gaddies was 10% and 5% respectively, which was in accordance with the contract, and matters related to not paying over monies to the Pension Fund Administrator, failure to monitor the contract between the PSJV and SSI and allowing for the underselling of rough diamonds for beneficiation in contravention of section 8 of the Diamond Export Levy Act. His charges further related to the fact that he failed without proper cause to perform his fiduciary duties with proper care and thus placed the PSJV at risk by not ensuring that 15% in value of the rough diamonds were sold for beneficiation. He also expressed bias in his failure to disclose information of buyers and misrepresenting SSI as a buyer. **(Annexure PHB 50).**

153. The acting CEO, Mr Gerone Cloete ("**Cloete**"), has since reported his suspension to the CCMA and a disciplinary hearing will be scheduled after the

CCMA process to ensure that the CEO does not continue to benefit from the PSJV while on suspension.

Administrator Briefs Parliament: 27 May 2020

154. On 27 May 2020, the Portfolio Committee on Public Enterprises and the Select Committee on Public Enterprises and Communication were briefed by the Alexkor Administrator, **(Annexure PHB 51)**, on the outcomes of the forensic investigation and the turnaround plan. The Deputy Minister of the Department of Public Enterprises was in attendance. Some of the relevant excerpts from the transcript are as follows:

> *"The sales and marketing contract awarded to Scarlett Sky Investments was found to be irregular and in order to overcome this, an application for a diamond-trading license was made so that the contract can be cancelled. It's anticipated that the license will be issued in mid-June of this year. The Department fell short in providing the Administrator with all available information and data and in rendering assistance without unreasonable delay…."*
>
> *"Members asked whether there are prosecutions against the executive members of Scarlett Sky Investments…"*
>
> *"It was also asked why the irregular appointment of Scarlett Sky Investments was not referred to the Public Protector, how far the application process is for a trading license, feedback on the disciplinary action case against the Chief Executive Officer…."*
>
> *"Mr McPatie said the Sales and Marketing contract awarded to Scarlett Sky Investments (SSI) was found to be irregular. The difficulty with cancelling the contract immediately is because of the financial situation. SSI is selling diamonds on a monthly basis and if the PSJV doesn't sell diamonds, it will have no money to pay its contractors or to pay for water and electricity. It provides electricity for the entire town. The community is poverty-stricken and there will no money to pay salaries if the contract is cancelled immediately. An*

application for a diamond-trading license has been made and it's anticipated by the CEO that the license will be issued by mid-June of this year. Once issued, the contract can be cancelled and diamonds can be sold on any platform…"

"Mr Tlhakudi explained that matters of state capture are referred to the Zondo Commission. In the past, the Administrator provided very concerning responses when asked why irregular contracts were not terminated. The power to affect such a decision lies with the Administrator as the accounting officer. Miners raised concerns that diamonds were getting sold through SSI and an analysis showed they were getting paid 40% below index. The contract was found to be irregular. The Department will step in to make sure diamonds are sold through the proper channels. On the obligations under the Companies Act given the reckless trading, the Department has developed options to ensure the situation is addressed. The Administrator was brought in as a temporary measure. On the difference in performance between the south and north side of the river, the criticism is linked to the quality of management. It was apparent that the suspended CEO of Alexkor was not suited to this particular task. The Board that was overlooking the business decided to proceed with him even though he had Human Relations (HR) qualifications and not mining qualifications. The diamonds tend to drift north as a result of the currents in the ocean. The resources have not been fully exploited in the past and this will be addressed going forward. The municipality needs to start taking responsibility over Alexander Bay town. On the issue of using the company instead of outsourcing mining contractors, this is something that needs to be looked at but it essentially boils down to management. If there is a proper team in place, this ideal can be realised…"

"Mr M Nhanha (DA; Eastern Cape) …. On matters referred to the Zondo Commission, in the fourth and fifth administration, there were 3 ministers reporting to the Gupta family. To what extent has the Gupta family been involved in engaging in the Alexkor business and the diamonds in Alexander Bay?"

"Ms C Labuschagne (DA; Western Cape) said she has been part of the Select Committee on Public Enterprises and Communication dealing with the Alexkor issues since 2014. The previous Committee called for the appointment of an

Administrator and an investigation into the supply chain management. For the first time in 7 years, members are receiving reports and getting an indication of what is going wrong in Alexkor. Since 2014, members have been very worried that the community is not benefitting from the land claim and the contracts being done. The community can only benefit if there are economic options and if the mining is going to be viable. There needs to be some kind of income for the community. The Department must look into all of the options. The reporting of the state capture and corruptive activities to the Zondo Commission can take years. The Administrator's report contains a lot of information and the Department should follow through in laying criminal charges and doing the correct thing. She and the previous Chairperson of the Committee in the previous term received warnings to stay out of these issues. In the last meeting of the Fifth Parliament, the Committee called for the Department to refer these issues to the Zondo Commission. She said she's very glad to hear today that it's been done. The Department must take this further and do the right thing. That community is destroyed as it is and people are going to be further destroyed. She agreed with Mr Cachalia's suggestion for members to do an oversight visit."

Lemogang Pitsoe

155. Pitsoe was appointed as the Alexkor CEO on 1 December 2017 by Brown. Mr Vimal Bansi, was Alexkor Acting CEO at the time.

156. The Commission has information in its possession that indicated that Pitsoe was also an invited guest at the Gupta wedding in 2013, (**Annexure PHB 52**). He stayed in room 0315 from 1/05/2013 in and on 3/05/2013 out at Sun City with a partner.

157. The response to the Parliament Question, (**Annexure PHB 53**) that was received from the CEO of Alexkor, Pitsoe, is that he attended the said weddings while he was in the employ of Hernic Ferrochrome (Pty) Ltd ("Hernic"). Mr Pitsoe was representing Mr Johan Swanepoel ("Swanepoel"), who is the CEO of Hernic, who

could not attend due to unforeseen circumstances.

158. Based on the information on the database of the Commission, it is evident that the intention was to invite them both to the wedding at the same time. They both appeared on the same schedule of guests (**Annexure PHB 54 and Annexure PHB 55**)

159. The Commission has established from it database of information that Gupta mining concern reported that, Westdawn Investments (Pty) Limited T/A JIC Mining Services ("JIC") was the largest contract mining company in South Africa with almost 10,000 employees. It is/was doing contract mining for companies such as Anglo Plats, Impala Platinum, AngloGold Ashanti, Harmony Gold and Hernic Ferrochrome (**Annexure PHB 56**).

160. According to Pitsoe's CV, (**Annexure PHB 57**), he was the General Manager for Hernic Ferrochrome from 04/2011 to 02/2017.

Alexkor terminates the contract with SSI: 11 August 2020

161. On 11 August 2020 the Alexkor CEO, Pitsoe terminated the contact with SSI. SSI has, however, disputed the cancellation of its contract and seeks to hold Alexkor to it (**Annexure PHB 58**).

PETER HENRY BISHOP

I hereby certify that on 9 ~~September~~ October 2020, in my presence at PRETORIA, the DEPONENT signed this Affidavit and swore and acknowledged to me that he knew and understood the contents thereof, had no objection to taking this oath and that he considered this oath to be binding on his conscience.

RANK: BRIGADIER

NAME: JOHAN ALBERTUS PETRUS BURGER

ADDRESS: INVESTIGATING DIRECTORATE
NATIONAL PROSECUTING AUTHORITY
WEST LAKE AVE
WEAVIND PARK
SILVERTON

J.A.P. Burger

Commissioner of oath

Investigating Directorate: Corruption
Private Bag X752
- 9 OCT 2020
Pretoria 0001
National Prosecuting Authority

Annexure "PHB 12"

SOUTH AFRICA (HTTPS://WWW.DAILYMAVERICK.CO.ZA/SECTION/SOUTH-AFRICA/)

amaBhungane and Scorpio #GuptaLeaks: A tale of two captures – Alexkor, Gupta Inc and 'WMC'

By amaBhungane & Scorpio • 13 December 2017

877 Reactions

The legendary Grootslang of the Richtersveld is a primordial cross between an elephant and a snake. Now the Richtersveld seems beset by the massive dominance, on the one hand, of the Alexkor elephant and, on the other, by a shelf-company whose corporate coils seem to lead back inexorably to the Guptas. And in the background lurks the presence of a Grootslang that survived: Trans Hex, the company controlled by that old giant of White Monopoly Capital, Christo Wiese. By AMABHUNGANE and SCORPIO.

Follow Save

There's a legendary creature that inhabits the Richtersveld, the land of deserts and diamonds along South Africa's north-west coast.

The Grootslang, a primordial cross between an elephant and a snake, is both wily and deadly and guards a cave filled with gems, dispatching unwary treasure-hunters either with guile or overwhelming power.

The myth might be a metaphor for Alexkor and the "resource curse" that the state-owned diamond company presides over.

In 2007, the Land Claims Court awarded the Richtersvelders land and mining rights expropriated by the state during the colonial era – including the diamond-rich area controlled by Alexkor.

Under a settlement agreement with the state, the assets were consolidated in a community trust structure for the Richtersveld Sida !Hub Communal Property Association (CPA).

The community acquired rights to mine diamonds on the land while Alexkor retained its rights to diamonds on the seabed. Both onshore and offshore rights were pooled in a joint venture company owned 51% by Alexkor and 49% by the Richtersveld Mining Company (RMC). [7]

In the Grootslang legend, the Gods realised the beast was too powerful and split it in two to create the elephant and the snake.

Now the Richtersveld seems still beset by the massive dominance, on the one hand, of the Alexkor elephant and, on the other, by a shelf-company whose corporate coils seem to lead back inexorably to the Guptas.

And in the background lurks the presence of a Grootslang that survived: Trans Hex, the company controlled by that old giant of White Monopoly Capital, Christo Wiese (the billionaire currently embroiled in the Steinhof saga).

The set-up – primed for capture

Our story begins in October 2014, when the Alexkor RMC joint venture issued a tender to sell Alexkor's diamonds.

While the joint venture is supposed to balance the interests of Alexkor with those of the Richtersveld community, the reality is that the community is fractured and dominated by its big corporate brother. Alexkor is effectively the biggest employer in the Richtersveld.

The promise of access to jobs and influence in poor communities ensures that such structures remain beset by competition and strife: at best easy to manipulate, at worst dysfunctional.

The Richtersveld Mining Company, through which the community exercises its interest in the joint venture with Alexkor, was no exception.

Indeed, in September 2014, a month before the diamond marketing tender was issued, the Western Cape High Court issued a judgment removing all the RMC directors who purported to act on its behalf, though the ruling was suspended by the lodging of an appeal.

Although structures like the RMC were supposed to be answerable to the CPA, in practice they served their own interests or were satellites of Alexkor.

In May 2016, citing the infighting, Alexkor applied successfully to have a court appoint three temporary RMC directors – chosen by Alexkor – to represent the community.

As recently as November 2017, a report to Parliament by the office of the chief land claims commissioner noted:

"It is also clear that Alexkor continues to play a major role in the continuous infighting between the community members and the CPA leadership."

The Alexkor side of the joint venture with the RMC was also somewhat bizarre, given that the joint venture agreement assigned the Alexkor chair to also be the chair of the joint venture, while denying any Alexkor executive director a seat on the board.

In effect, the chief executive of Alexkor was accountable for the 51% held joint venture, but had no formal influence over its operations, worth R758-million in the 2016/17 financial year.

In part, this stems from the legacy of the 2007 land restitution settlement, which provides for Alexkor to exit its 51% holding in the joint venture at some future point should the community exercise its "call option" to purchase Alexkor's share.

This has led Alexkor to cast around for some reason to justify its continued existence – and the ludicrous situation whereby it maintains an expensive corporate headquarters in Johannesburg, 1,400 kilometres away from its only operating division at the mouth of the Orange river.

One option was for Alexkor to explore branching out into coal, potentially via a sweetheart deal with Eskom – a decision that necessitated expanding the Johannesburg office and drafting in a chief executive with coal experience.

Around this fat beast, hobbled by its tangled governance, circled at least two predators: Trans Hex and Gupta Inc.

Dramatis Personae

Before we get to the Guptas and their associates, it is worth taking a moment to introduce the key players involved at the time the diamond marketing contract was put up for grabs at the end of 2014.

The chair of Alexkor – and of the Alexkor RMC joint venture – was Rafique Bagus.

Bagus is an accomplished corporate operator, a devout Muslim and a serious surfer.

He was previously the chief executive of Trade and Investment South Africa, deputy director-general of the Department of Trade and Industry, and special adviser to Alec Erwin when he was public enterprises minister.

Bagus came to public attention in 2011 when he was linked to making political introductions for Uruguayan businessman Gaston Savoi (http://amabhungane.co.za/article/2011-01-21-fraud-suspect-gave-anc-r36million), who is still battling corruption charges relating to government tender awards.

Bagus was appointed chair of Alexkor by Malusi Gigaba in September 2012. He was central to the events, but his role is shrouded in contradictions.

At his side was advocate Zarina Kellerman, Alexkor's chief legal officer, of whom also more later.

The chief executive of Alexkor was Percy Khoza, a seasoned mining executive with both diamond and coal experience. He was hired, in part, to pursue the "coal strategy" approved by Gigaba.

All three would depart amid changes to the board made by a new minister, Lynne Brown, in August 2015 – but by that time, round one of the diamond marketing contract was sealed.

The Alexkor-RMC joint venture had its own chief executive, Mervyn Carstens, a 16-year veteran of Trans Hex, where he rose to serve as executive director of land operations until his departure in April 2012. In August 2012 he was appointed to manage the joint venture, reporting to Bagus.

Of perceptions raised by his long association with Trans Hex, Carstens says:

"I deny that I am aligned with Trans Hex or Mr Christo Wiese. I have never met Mr Wiese nor had any dealings with him. Since my departure from Trans Hex, I have had no further business connections or dealings with that company."

One more figure is key: Duncan Korabie, an attorney based in Wellington in the Western Cape and a feisty combatant in the factional battles that have plagued the community.

During 2014, Korabie was accepted by Alexkor as one of the independent RMC directors representing the community on the board of the joint venture.

Since then, he has fallen out with Alexkor. The joint venture board now rubbishes his credibility, claiming he "only represents a few members" of the Richtersveld community and pointing to a recent High Court judgment that criticised Korabie's conduct, saying it was "opportunistic... borders on unethical" and "unbecoming of an officer of court".

The contract factory

Alexkor is a small operation that in some ways exists to award and manage contracts.

Its shallow ocean concessions (up to 30 metres in depth) are mined by about 60 small-scale marine contractors, who use divers to manhandle large vacuum hoses to suck up the diamond-baring gravel and sand for processing. The companies bare the costs and risks – and for that they get a 50% share of the diamond revenue.

The more shy bearing onshore excavations are handled by another, much smaller group of contractors, while the deeper ocean excavation is handled by a specialised company, International Mining and Dredging South Africa (IMDSA).

IMDSA is responsible for the major portion of diamond recoveries. In the last financial year 112,047 carats came from deep-sea operations, whereas 50,125 carats were produced from the other concession areas.

The deep ocean mining requires expensive, specialised vessels, and because of the atrocious sea conditions on the Richtersveld coast, sea days can be severely limited. IMDSA keeps about 85% of the diamond revenue.

From 2000 until 2006 Alexkor's production was sold via the De Beers company Diamdel. Unhappiness about the prices fetched was reportedly behind the termination of this arrangement.

Then the sales were handled by Diamond Marketing Consultants, whose principal, Menachem Pelleg, was a diamond valuator for the South African government. In January 2014 Pelleg's contract was abruptly terminated – and is still subject to his legal claim for compensation.

A new marketing company called Diamond Realisations was appointed on a temporary basis, and by all accounts performed well. Marketers generally take a 1.5% commission on sales, but the prices they get also determine what the contract miners get, so in theory everyone wins.

Then, in October 2014, came the formal marketing tender.

Enter the Guptas – or do they?

Circumstantial evidence suggests that in 2014 the Guptas opened up a new front in their State Capture project via Alexkor. The fingerprints of the family and their fellow-travellers are faint, but visible.

There is almost nothing about Alexkor in the #GuptaLeaks, bar one strange email from March 2013.

The email to Gupta factotum Ashu Chawla is from a Gupta associate in Saharanpur, who is purporting to relay a message from one Deepak Mittal.

He asks that Chawla forward the mail to "the Chairman".

It states:

"Hi Mr. Bagus... as I had words with you before (to bid in Diamond tender auction of your company) we are a global company from India, I gave you an introduction about ourselves and the work we do."

Bagus does not recall ever receiving such a mail or the alleged contact.

In response to the allegation that he knew the Guptas and had been a frequent visitor to their Saxonwold home, Bagus stated:

"During my time as CEO of Trade and Investment SA and DDG of DTI, I served on the International Marketing Council (IMC) where I met Mr Ajay Gupta."

Evidence of the Gupta connection to the diamond marketing contract has emerged slowly, but the award of the contract was controversial, almost from day one.

Bagus himself says the award was above board, but his assurances are undermined both by documentary evidence and by some sources close to the process, including the activist lawyer Korabie.

Alexkor points to an investigation carried out in 2015 by the Alexkor audit and risk committee at the behest of minister Brown which could not find "any fundamental breach of procurement procedures".

But the report to Brown, which was made public by Alexkor for the first time in response to our questions, itself discloses red flags about the process – and the company that won the contract: Scarlet Sky Investments 60, which is now the sole agent to sell Alexkor's diamond production.

First, Carstens, the chief executive of the joint venture, outsourced the shortlisting of bids.

Given that there were only seven bids, this seems unnecessary – and some of the scoring for the short-listing appears inconsistent.

Carstens told us:

"A company called Gamiro Advisory Services was appointed to conduct an evaluation of the proposals and to do the shortlisting. They shortlisted three companies, namely [Scarlet Sky], CS Diamonds and Diamond Realisations, who were all invited to make further presentations to the tender committee."

Gamiro is part of the Gamiro group, controlled by Heather Sonn.

Sonn is a director in Steinhof with Wiese, although there was no apparent conflict of interest in 2014 because Wiese took control of Trans Hex only in August 2016.

Trans Hex bid for the Alexkor marketing contract in 2014, but was not short-listed, mainly because of scoring zero in the category: Richtersveld community economic development, which was worth 30 points out of 100, for which they rather carelessly made no commitment at all, according to Gamiro.

On the shortlist, Diamond Realisations – the company that held the interim contract – scored the highest with 75 points, Scarlet Sky came in second with 71.5 and CS third with 67.

But there were already red flags for Scarlet Sky, for anyone who cared to look more closely.

The company sent an expression of interest on 6 November 2014 on a letterhead that indicated the directors were Daniel Nathan and Kuben Moodley.

At that date, however, the directors were actually still shelf company stand-ins.

Online company records reflect that Nathan and Moodley only became directors on 4 December, while Scarlet Sky's own share register, obtained by amaBhungane, shows that they became shareholders on 20 November (through their respective companies Daniel Nathan Trading and Kimomode).

Scarlet Sky also held no diamond licence, though one of Nathan's companies did. Moodley, the purported 60% BEE shareholder, had no diamond industry background at all.

When it came to the final selection on 11 December 2014, only three people sat on the panel at Alexkor's Rosebank, Johannesburg head office: Bagus, Korabie and a veteran Alexkor director, Dr Roger Paul.

The scoring should also have raised red flags, given that Korabie awarded Scarlet Sky a full 100% mark, which is normally regarded as an attempt to skew a panel score in favour of one bidder.

That 100% score gained greater significance when Korabie later turned on Alexkor – as we shall see.

Despite all three adjudicators awarding Scarlet Sky the highest points, it appears there was a significant lack of clarity about their proposal.

After significant to-ing and fro-ing about what exactly Scarlet Sky had committed to in terms of funding, pricing, beneficiation and community investment, the final award was made at the end of February 2015.

Korabie's unguided missile

By March 2015, there was already some consternation among the Contractors Representative Body, representing the small miners whose returns would be based on the prices achieved by Scarlet Sky.

By September 2015 Korabie had sent a letter of complaint to then public protector Thuli Madonsela about the award process. He copied it to Alexkor management and the Department of Public Enterprises.

It made a clear allegation that Bagus had influenced the process, noting:

"On the 11th of December [2014] the chief legal officer [Kellerman] and chairperson at the time [Bagus] took Korabie and Dr. Roger Paul, an Alexkor representative, into his office and discussed what he viewed as the new direction the [joint venture] must take in appointing the service provider. He mentioned that only one candidate that will be interviewed met the new direction he proposes. He then mentioned [Scarlet Sky]."

The committee reporting to minister Brown said Bagus told them "that he has no recollection of the meeting taking place".

Korabie has expanded on this allegation, telling amaBhungane that during a separate private conversation, Bagus told him that the instruction to appoint Scarlet Sky came "right from the top".

Bagus told us:

"I have never had a conversation with Mr Korabie regarding the appointment of [Scarlet Sky] as the marketing company... The appointment of all service providers is done via a tender committee, which is a subcommittee of the board. This committee has both community representatives and Alexkor board representatives."

Bagus did confirm to us that the tender committee had been given "guidelines".

He noted:

"Historically the relationship with the marketing companies and the [joint venture] was purely transactional. They sold the diamonds... and paid the company less the commission. Neither the [joint venture] nor the community derived any other benefit from this relationship. The board requested the tender committee explore the opportunity to ensure the training and upskilling of young community members in the art of diamond cutting... The company selected complied with all these objectives."

Nevertheless, Korabie's 100% score is consistent with an understanding, misguided or not, that Scarlet Sky had to be appointed.

And there is one source close to Bagus who tells a story that supports Korabie's version.

The source, who asked not to be identified, told amaBhungane:

"Look, [Gupta business partner Salim Essa] went to Bagus and said [Scarlet Sky] must get the tender... They said, this comes from the very top... He said, no ways. So they said, then you must go."

Bagus did go.

He told us:

"For the record, I resigned from my position, chairman of the Alexkor board... I was requested to stay on and extend my tenure but declined."

Kellerman, the legal adviser, told us:

"I recall a [joint venture] tender committee meeting, which took place late in 2014. I was present at the meeting as an Alexkor management observer. I recall completing a score card, but this score card was not included in the scoring of the candidates... I did not score the candidates and I was not involved in the discussion or recommendation of any of the candidates... I did not have a private meeting with Dr Paul, Mr Korabie and Mr Bagus."

Paul did not respond independently except to identify himself with Alexkor's response, which disclosed the audit and risk committee report compiled after a "detailed investigation" and which found no irregularities in the tender award.

Carstens, the joint venture chief executive, noted:

"Ironically, Mr Korabie, who is now raising objections to [Scarlet Sky's] appointment, allocated the highest score (100%) to [Scarlet Sky]."

Korabie's 2015 complaint further alleged that the award to Scarlet Sky was supposed to have been subject to the completion of due diligence.

He wrote:

"The CEO [Carstens] never reported to the tender committee on the due diligence he was directed to conduct... It is clear to us that [Scarlet Sky] was created specifically for this tender. We do not know who the shareholders are of [Scarlet Sky] and their relationship, if any, with any of the... board members."

Korabie's complaint was turned away by the public protector's office, ostensibly due to a combination of doubts about its jurisdiction and a commitment from Alexkor that the matter would be investigated.

Korabie fell from grace and the matter sank from view – until the #GuptaLeaks.

The fingerprints of Gupta Inc.

In November 2014, when Scarlet Sky responded to the diamond marketing tender, their expression of interest noted that all communication should flow through their "corporate advisers", addressed to one Marc Chipkin of Integrated Capital Management.

Alexkor was not to know it then, but Integrated Capital was later intimately involved with Essa, the Gupta lieutenant, and the establishment of Trillian, the consulting firm used to capture consulting work from Transnet and Eskom from the end of 2015.

When joint venture chief executive Carstens demanded that Scarlet Sky provide a R50-million funding guarantee, it was Integrated Capital chairman Selwyn Nathan who submitted a letter of comfort, committing Integrated Capital to secure the guarantee, should Scarlet Sky win the bid.

Daniel Nathan, the 40% shareholder of Scarlet Sky, is the son of Selwyn Nathan.

Daniel told us:

"I have no personal involvement in Integrated Capital, only utilising them for admin assistance at the time of the tender submission. This included a letter signed by my father, which agreed to source the necessary funding, if required. The funds were never required."

"I am not connected to either Integrated Capital Management or Salim Essa. I have never met with him and he played no role in setting up Scarlet Sky. Mr Moodley's 60% shareholding was disclosed in the 2014 tender."

Moodley was supposedly the majority shareholder via a company called Kimomode, though Daniel Nathan told amaBhungane that Moodley never contributed a cent to the business, nor derived any benefit whatsoever, suggesting he was merely a place-holder.

Daniel told us:

"Mr Moodley was not a front. He genuinely intended to be involved in Scarlet Sky, but left when he realised that he could not contribute in a meaningful way to it... Scarlet Sky has never had any relationship to the Guptas."

Moodley, though, is deeply enmeshed in the Gupta scandal.

Moodley refused to engage with us about his role at Scarlet Sky, but evidence flowing from recent litigation, the #GuptaLeaks and former public protector Madonsela's State of Capture report all portray him as a cat's-paw of Gupta lieutenant Essa and the Gupta family.

Moodley was a business associate and sometime golfing partner of Essa.

Neither Essa nor the Guptas responded to requests for comment.

By March 2015 – the same month Scarlet Sky was awarded the Alexkor contract – Moodley was entangled in what appears to be a R122-million simulated transaction with the Guptas' Sahara Computers.

Moodley previously told the *Sunday Times* that the payments would have been for "the procurement of IT equipment and services", but the #GuptaLeaks suggest otherwise.

Leaked emails show that on 27 June 2015, Sahara chief executive and the Gupta factotum Ashu Chawla sent an email to Moodley with a single line, stating: "Hi Kuben here is the invoice for your reference".

The attached invoice to Moodley's company Albatime simply stated it was for "Admin IT services... contract 2012-2014" – but the figures were simply too large and got cut off, so the R122-million was reflected as R22-million.

Moodley wrote back, saying, "Please call me, your invoice does not make sense to me."

Eventually, on 3 July, the invoice was sorted out to reflect R122-million, plus R17-million VAT, "payable quarterly" for a supposed contract due to run from March 2015 to February 2017.

Moodley paid over R52,155 000 the same day, Sahara's bank records show.

Only on 8 July did Sahara director Ronica Ragavan think to create an underlying contract.

On that day she emailed a document titled "Service Level Agreement – Albatime – March 2015" for everyone to sign.

That this contract was merely a fig leaf to disguise a commission payment is suggested by another leaked document, a spreadsheet tracking gross profit in the Sahara business, which booked the R122-million as income at zero cost to the business.

There is nothing to show this transaction relates to the award of the Alexkor marketing contract to Scarlet Sky, but the timing is intriguing.

Moodley resigned as a director of Scarlet Sky when he was appointed as a special adviser to Mineral Resources Minister Mosebenzi Zwane in October 2015, but he retained his shareholding until April 2017 – long enough for Scarlet Sky to be reappointed for five years in a new Alexkor-RMC tender in 2016.

Kellerman also joined Zwane's office.

When Bagus departed and the new board was appointed by minister Brown in August 2015, Kellerman resigned from Alexkor, emerging this year as the secretary to Zwane's so-called inter-ministerial committee inquiry into banks' withdrawal of services to the Gupta group.

Kellerman told us:

"After my resignation [from Alexkor], I met with the new chairperson who asked me to reconsider. Whilst I was giving thought to this request, late in September 2015, I received a call from Kuben Moodley, who I had met through the [Scarlet Sky] negotiations, who asked if I would be interested in interviewing for a position as an adviser to the newly appointed minister of mineral resources [Zwane]... However, I only officially joined the minister's team in April 2016.

"As the minister's adviser, with company secretarial and corporate governance experience, I assisted as the secretary to the [inter-ministerial committee]. There is nothing sinister about this."

Carstens, on behalf of the Alexkor-RMC joint venture, told us:

"The [joint venture] is not aware of any connection between Kuben Moodley and/or [Scarlet Sky] on the one hand and the Gupta family on the other."

Continuity and consolidation

A former close associate of the Guptas told us the family tried to capture Alexkor in order to take their money out in diamonds: "They wanted the sole marketing rights for [Alexkor] diamonds... They wanted the mobility of diamonds."

(A suggestive hint of this came when amaBhungane reported (http://amabhungane.co.za/article/2017-02-19-exposed-the-guptas-and-the-box-of-gems) that shortly after the Gupta family infamously "fled" South Africa in 2016, a second Gupta plane tried to leave with a box believed to have been full of diamonds. The Gupta family later claimed the items were "nuts".)

The former associate said Bagus fell from favour and was pushed out.

Brown appointed Hantsi Matseke as the new Alexkor chair. Matseke also became chair of the Alexkor-RMC joint venture.

Like other boards appointed under Brown, the August 2015 Alexkor board added to an emerging impression of an approach of cynical accommodation.

Matseke is married to K.O.P. (Peter) Matseke, an Essa associate who was going to be part of Moxisign, an Essa-linked company that was going to sell drugs to the department of health. The company never got off the ground.

She is also the chair of the Free State Development Corporation. She is regarded as close to Ace Magashule, and through him to a Free State axis that includes mining minister Zwane and public enterprises director-general Richard Seleke.

Magashule, Zwane and Seleke have all been linked to the Guptas, who also reportedly put forward Matseke's name when they sought (unsuccessfully) to restructure the boards falling under then transport minister Ben Martins.

Matseke told us:

"To my knowledge Dr Matseke does not have any existing business relationship with Mr Essa; I am a board member of the Free State Development Corporation and thus have various associations with various individuals in the Free State and South Africa in general; I am not aware of any board nominations made by the Guptas."

Through her spokesperson, Brown defended her board appointments and told us:

"The present climate of allegations and contentiousness surrounding the boards has a negative effect on business and public confidence, and the economy."

A former Alexkor director, who asked not to be named, said the new board seemed to have a mandate to remove the Alexkor chief executive, Percy Khoza:

"They made it clear they were not prepared to work with Percy although he was an experienced mining engineer."

Alexkor says Khoza took a voluntary retrenchment package and the parting was amicable.

Khoza has declined to comment, though it is known that he raised concerns about the appointment of Scarlet Sky and had delivered a detailed memorandum to minister Brown's adviser, Annelize van Wyk.

But, significantly, he was also seen as an impediment to the plans of other powerful interests.

It is an open secret that a consortium led by Wiese wanted to consolidate the west coast mining industry. Wiese said so himself when he bought into Trans Hex in 2016.

Marine miner Gavin Craythorne, who is something of a spokesman for the Alexkor contractors, believes Khoza was an obstacle to Wiese's plans.

In a recent memorandum to Parliament setting out his concerns, Craythorne wrote:

"The audacious ambitions of this [Wiese] consortium were set out in a presentation dated 8 August 2014, prepared by Questco, a corporate advisory firm based in Johannesburg, wherein a bold plan was unveiled to monopolise the entire Namaqualand Diamond Industry under the control of white monopoly capital..."

Craythorne said an incident in February 2016 seemed to confirm his suspicions. At a meeting with Khoza and others, Khoza informed them that he would be leaving Alexkor soon.

Craythorne wrote:

"He [Khoza] then offered that the Richtersveld community has some very powerful partners and as the community has a first option to purchase the whole of Alexkor, these powerful partners are trying to drive Alexkor's value down in order that they can purchase Alexkor for a bargain through the community.

"He further said that he has not allowed this and has opposed the efforts of these very powerful partners and that he was leaving 'before things get very difficult or nasty'."

Khoza confirmed the meeting but said he could not recall the exact conversation.

Wiese did not respond to questions.

Although the Steinhoff collapse might have put paid to Wiese's Trans Hex ambitions, it's notable that as recently as October, Trans Hex increased its stake in West Coast Resources, a diamond mining company with operations adjacent to Alexkor.

It seems even the Guptas perceived the threat.

In June this year, the then Gupta-owned *ANN7* television channel (the Guptas financed a buy-out by spin-doctor Mzwanele Manyi in August) broadcast a surprisingly solid piece of reportage, headlined: "Namaqualand: A coastline 'raped'".

The accompanying print story (http://www.thenewage.co.za/namaqualand-a-coastline-raped/) noted: "A mining company operating along the ecologically sensitive west coast started building massive sea walls before the environmental impact assessment had been approved, an *ANN7* investigation has found.

"Trans Hex... along with its mining partner West Coast Resources, started the process of building the walls in the Hondeklipbaai area in 2016... The area, which has the highest unemployment figures for South Africa, has pitifully few job opportunities, mainly in diamond mining, fishing and a small tourism business. The sea walls, or cofferdams as they are technically known, will destroy opportunities in all of these sectors, community activists said..."

AmaBhungane has also reported on the environmental battle over cofferdam mining (https://www.dailymaverick.co.za/article/2017-12-06-amabhungane-shortcomings-of-sa-legislation-exposed-through-controversial-shoreline-mining-of-alexkor-and-west-coast-resources/#.WjBFwbT1XOQ), a technique which Alexkor pursues with equal vigour.

The bite of the Grootslang

Meanwhile the triple coils of Alexkor, Trans Hex and Scarlet Sky have allegedly been squeezing the life out of small Richtersveld mining business, to the extent that, on 19 November 2017, Craythorne sent an impassioned email to Carstens and the Alexkor-RMC joint venture.

In the email, Craythorne states:

"Since November last year, I have been trying in vain to engage meaningfully with Alexkor... to raise awareness regarding legitimate concerns that many [in] the local marine miner community...

"The members of the local community who provide the courage, skill, experience, investment, risk tolerance, determination and exceptional hard work that constitutes Alexkor's most valuable operating segment are now in a de facto state of servitude as the triple challenges of climate change, resource depletion and a lack of equitable access destroy the business case for the industry.

"Wedged between an apparent State Capture project depriving us of fair diamond prices on one side, and an apparent white monopoly capital project depriving us of equitable access on the other, we feel we are being exploited in the most cynical way under your stewardship.

"Having lived in this special town for almost 20 years and [being] quite intimate with the spiritual, social, economic and infrastructural character, I can say that this community is at an all-time low at this point.

"This state of affairs has led me into a desktop study into the State Capture phenomenon and what I have uncovered has given me much reason to be deeply troubled. It is now clear to me that Scarlet Sky and Daniel Nathan are the Alexkor equivalent of Trillian Capital Partners and Mr Eric Wood...

"As before, in the case of Diamdel, I have conducted a thorough analysis of the price data and the results are clearly indicative of a criminal racket set up to deprive Alexkor and the small-scale marine miners of a fair diamond price.

"In the circumstances, I strongly advise you to suspend the agreement with Scarlet Sky with immediate effect pending a thorough forensic investigation."

Attached to this email was an analysis by Craythorne which shows that, since transferring the sales to Scarlet Sky, the value returned to Alexkor and the miners has deteriorated.

He also attached an anonymous poll of 39 of the local marine mining contractors who reported overwhelmingly their dissatisfaction with the transparency, prices and fairness of Alexkor's diamond marketing and sales process.

Craythorne argued that, relative to global diamond prices, "Alexkor's prices... now in 2017... are back where they were 2006 when Diamdel were ripping us off."

Scarlet Sky's Nathan told us:

"I deny that the appointment of Scarlet Sky has been negative for Alexkor and the local mining community. The quotes attributed to Mr Craythorne are incorrect and do not apply to the diamond industry in general. His comments are misplaced and limited to only one particular size of diamonds."

In response to questions about prices, Cartens noted:

"Diamond prices are influenced by numerous factors including but not limited to supply and demand, quality and size of production. The [joint venture] production is sold on a tender basis eight times a year [via] a competitive bidding system which is attended by an average of 60 to 80 potential buyers at each sale cycle... The diamonds are at all times sold to the highest bidder. We are price takers and the tender process cannot be manipulated by anyone."

He said onshore production had increased substantially since 2013. These diamonds were smaller and of a lesser quality than those produced from the sea, influencing the price of diamonds in all categories.

In response to Craythorne himself, his company received the following notification 10 days later:

"We regret to inform you that the board of the Alexkor/ RMC joint venture has decided that your contract with the joint venture will not be renewed."

At least four other companies seen as "trouble-makers" have received similar notifications.

The Grootslang may be an imaginary beast, but for Craythorne – and the broader Richtersveld community – the bite is real. **DM**

NB: In the initial draft of this story we said: "By November 2014, Chipkin was already a co-director with Essa in another company, Antares Capital." Chipkin has pointed out that he resigned as a director on 26 March 2015, some three months before Essa became a director. We apologise for the error.

Photo: Alexander Bay, Northern Cape, South Africa. March 2, 2012. (Greg Marinovich)

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DAILY MAVERICK

ANALYSIS

Don't Panic about Zuma's Second Coming

By Stephen Grootes

(https://www.dailymaverick.co.za/article/2018-09-14-dont-panic-about-zumas-second-coming/?utm_source=homepagify)

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14 SEP

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SOUTH AFRICA

Trauma and distress after parliamentary officer takes his own life in

14 SEP

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AFP • 14 SEP

(https://www.dailymaverick.co.za/article/2018-09-14-pussy-riot-activist-poisoned-with-large-dose-of-medical-drugs-report/?utm_source=homepagify)

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(https://www.dailymaverick.co.za/article/2018-09-14-spacex-announces-new-plan-to-send-tourist-around-moon/?utm_source=homepagify)

LAND REFORM

'As in 1994, we will build our own consensus' Ramaphosa tells diplomats

(https://www.dailymaverick.co.za/article/2018-09-14-as-in-1994-we-will-build-our-own-consensus-ramaphosa-tells-diplomats/?utm_source=homepagify)

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(https://www.dailymaverick.co.za/article/2018-09-14-as-in-1994-we-will-build-our-own-consensus-ramaphosa-tells-diplomats/?utm_source=homepagify)

Genuine Leather does not denote authentlcity but rather a grade. It is the second worst type of leather on the market.

LIFESTYLE

Khayelitsha Fashion Week: Young designers turn heads with afrocentric flair

Hlumela Dyantyi • 14 SEP

(https://www.dailymaverick.co.za/article/2018-09-14-khayelitsha-fashion-week-young-designers-turn-heads-with-afrocentric-flair/?utm_source=homepagify)

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Queer Eye, redux: The Fab Five

(https://www.dailymaverick.co.za/article/2018-09-14-queer-eye-redux-the-fab-five-deliver-some-knockout-blows-to-bigots/?utm_source=homepagify)

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THE GUPTAS & HOME AFFAIRS

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Rebecca Davis

14 SEP

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A toxic mix of job scarcity, fake goods and

(https://www.dailymaverick.co.za/article/2018-09-14-a-toxic-mix-of-job-scarcity-fake-goods-and-xenophobia-fuel-anger-against-foreign-traders/?utm_source=homepagify)

Nkateko Mabasa

14 SEP

GROUNDUP

Did Cape Town lose millions on Foreshore land sale?

(https://www.dailymaverick.co.za/article/2018-09-14-did-cape-town-lose-millions-on-foreshore-land-sale/?utm_source=homepagify)

groundup

14 SEP

LOAD MORE

Annexure "PHB 13"

"We say to one another: I cannot be without you, without you this South African community is an incomplete community, without one single person, without one single group, without the region or the continent, we are not the best that we can be..."

National Development Plan - 2030

realities from a business with significant economic challenges.

The team identified the following critical problem areas that required immediate intervention and action:

- The Pooling and Sharing Joint Venture (PSJV) profitability is severely eroded due to a loss-making position for more than ten years;
- A breakdown in management structures and procedures that compromised corporate governance;
- Significant decline in production and employment; and
- A hostile environment driven by a significant loss of trust in community structures.

Many of these issues were created by the practicalities of managing an unincorporated joint venture structure, without the assigned authority to directly influence management direction.

Our ultimate goal is to support the PSJV management team to improve profitability and reduce operational cost. This will enhance the community's sustainability and secure economic growth and job creation. To achieve this we will focus on substantially increasing diamond production. We are working effortlessly to restore management structures and operational procedures to ensure good corporate governance; this is a critical priority to restore trust in the community structures that oversee our partnership.

We have extensively engaged all four towns in the Richtersveld community with valuable and unequivocal support from our Deputy Minister at the Department of Public Enterprises (DPE). Many bridges with the community were rebuilt and relationships based on mutual trust and respect were established. Many constructive community projects were revived as a result of this.

ALEXKOR'S FUTURE STRATEGY

Our new strategy is a radical departure from the past to transform Alexkor into a diversified mining company that will ensure the long-term sustainability of our mining operations. The strategy embraces four key elements, namely:

- Unlocking value from the PSJV;
- Extract value from African diamond mining opportunities;
- Utilise Alexkor's core mining capability to supply coal to Eskom and reduce their coal supply risk; and
- Develop lime resources to supply Eskom.

UNLOCKING VALUE OF THE PSJV

As a key priority we have provided dedicated and direct management support to the PSJV in order to improve operational efficiency and profitability with the aim to secure the community's long-term economic viability and sustainability.

We have invested significant effort to change business mindsets to reduce costs and increase profitability. The optimisation of critical business processes was fundamental to ensure sound corporate governance and to instil prudent commercial practices within the PSJV.

Our goal is to increase production output to 70 000 carats per annum by the end of the next financial year. To achieve this the board has taken a decision to be firmer in dealing with poor performing contractors; whilst rewarding achievers with more opportunities to unlock value.

Increased production is also underpinned by the monitoring of sea-days versus production throughput, stone size distribution analysis, security upgrades, and the introduction of middle-water mining. We are also implementing a deep-sea mining agreement with International Mining and Dredging South Africa (Pty) Ltd (IMDSA), one of two companies in the world with deep-sea mining capability. Deep-sea mining will commence in 2014 and we will unlock significant value.

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

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INDEX: SEQ 05/2021

No.	Description	Pages
Malusi Knowledge Nkanyeza Gigaba application for leave to cross-examine **Peter Henry Bishop**		
1.	Notice of Motion dated January 2021	001 to 002
2.	Affidavit of MKN Gigaba response incorporating an application to cross-examine PH Bishop	003 to 062
3.	Annexures “FA1” to Annexure “FA15”	063 to 134
4.	Answering Affidavit of Peter Bishop dated 19 March 2021	135 to 142
5.	Replying Affidavit of Malusi Gigaba dated 16 April 2021	143 to 152

IN THE JUDICIAL COMMISSION OF INQUIRY INTO THE ALLEGATIONS OF STATE CAPTURE, CORRUPTION AND FRAUD IN THE PUBLIC SECTOR INCLUDING ORGANS OF STATE, HELD AT BRAAMFONTEIN, JOHANNESBURG ("the Commission")

GIGABA, MALUSI KNOWLEDGE NKANYEZI — Applicant

STATEMENT OF REPONSE INCORPORATING AN APPLICATION FOR LEAVE TO CROSS EXAMINE MR PETER HENRY BISHOP

KINDLY TAKE NOTICE that Mr Gigaba, the applicant herein hereby files his statement of response to the affidavit of Mr Peter Henry Bishop ("Mr Bishop") dated Friday, 9 October 2020 ("Mr Bishop's statement") and simultaneously hereby gives notice of his intention to apply to the Commission on date and at the time determined by the Chairperson of the Commission, for Directions in the following terms:

1. That the statement of response annexed hereto marked "A" be admitted to the Commission as evidence in response to and rebuttal of Mr Bishop's statement;

2. That the applicant be granted leave to cross examine Mr Bishop on such terms as the Chairperson of the Commission may deem fit; and

3. That the applicant be granted such further and alternative relief as the Chairperson of the Commission may deem fit.

DATED at Sandton, Johannesburg on Sunday, 17 January 2021.

Reginald Tshabalala

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TO:
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REF: Ms Rachel Niewenhuis

Filed with the Secretary of the Commission by e-mail at secretary@commissionsc.org.za
on Sunday, 17 January 2021

SEQ 05/2021-003

"A"

IN THE JUDICIAL COMMISSION OF INQUIRY INTO THE ALLEGATIONS OF STATE CAPTURE, CORRUPTION AND FRAUD IN THE PUBLIC SECTOR INCLUDING ORGANS OF STATE, HELD AT BRAAMFONTEIN, JOHANNESBURG ("the Commission")

GIGABA, MALUSI KNOWLEDGE NKANYEZI — Applicant

STATEMENT OF RESPONSE INCORPORATING AN AFFIDAVIT IN SUPPORT OF AN APPLICATION TO CROSS EXAMINE MR PETER HENRY BISHOP IN TERMS OF RULE 3.3 READ WITH RULE 8.2

I, the undersigned,

MALUSI KNOWLEDGE NKANYEZI GIGABA

do hereby make oath and say:

THE DEPONENT

1. I am:

   1.1 an adult male; and

   1.2 the Former Minister of *inter alia*, Public Enterprises.

2. The contents of this statement are within my personal knowledge and belief, save where the context indicates otherwise and are both true and correct.

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PURPOSE OF THIS STATEMENT

3. The purpose of this statement is two-fold, namely to serve as:-

3.1 a response to the allegations made by Mr Peter Henry Bishop ("Mr Bishop") in his affidavit dated Friday, 9 October 2020 ("Mr Bishop's statement"); and

3.2 a basis for an application for leave to cross examine Mr Bishop as contemplated in Rule 3.3 read with Rule 8.2 of the Rules of the Commission into allegations of State Capture ("the Commission").

SERVICE OF THE RULE 3.3 NOTICE BY THE COMMISSION

4. On Wednesday, 30 December 2020, the Commission sent to me and my attorney, Mr Reginald Tshabalala ("Mr Tshabalala"), whose confirmatory affidavit is annexed hereto as "FA1", an e-mail annexed hereto as "FA2":-

4.1 indicating that the Commission had previously sent to Mr Tshabalala, a notice in terms of Rule 3.3 relating to the evidence of Mr GJ Craythorne, Mr J Dekker and Mr Bishop; and

4.2 informing me and Mr Tshabalala that the evidence of Mr GJ Craythorne, Mr J Dekker and Mr Bishop would commence on 8 January 2020 (which was meant to be 8 January 2021) or soon thereafter.

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5. On the same day being, Wednesday, 30 December 2020, Mr Tshabalala responded to the Commission in an e-mail annexed hereto as "FA3" informing the Commission that he had:-

5.1 only received the notice in terms of Rule 3.3 in respect of the evidence of Mr GJ Craythorne and that he responded to the said notice in terms of Rule 3.3 on Tuesday, 24 November 2020; and

5.2 not received any notice in terms of Rule 3.3 relating to the intended evidence of Mr J Dekker and Mr Bishop and that in view thereof, he was not expecting Mr J Dekker and Mr Bishop to give evidence relating to or which may implicate me.

6. On Sunday, 3 January 2021 and in reaction to Mr Tshabalala's e-mail (FA3), the Commission sent a notice in terms of Rule 3.3 with Mr Bishop's statement to Mr Tshabalala for receipt on my behalf and drew my attention to paragraphs 22 to 25, 27 to 28, 34 to 36, 38, 41, 44 to 46 and 57.

INTRODUCTION

7. In his statement, Mr Bishop seeks to report on the outcome of an investigation conducted by the Commission pursuant to the allegations made by Mr GJ Craythorne in his statement dated Friday, 17 July 2020 ("Mr Craythorne's statement") and in doing so, he seeks to implicate me in the paragraphs mentioned in paragraph 6 above.

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8. On Thursday, 12 November 2020, the Commission had sent to Mr Tshabalala a notice in terms of Rule 3.3 in respect of the evidence of Mr Craythorne.

9. On Tuesday, 24 November 2020, I responded to Mr Craythorne's statement with my version and also sought leave to cross examine him. My response to Mr Craythorne's statement is about 746 pages and as such, I have not annexed my said response as it is already in the possession of the Commission. For same reasons, I have also not annexed the notice in terms of Rule 3.3 relating to the evidence of Mr Craythorne. Thus, I also do not want to burden this response with the said documents, but should a need arise for me to refer to the said documents during the hearing of this application or my evidence before the Chairperson, I will seek the Chairperson's indulgence to do so.

10. It seems to me that Mr Bishop supports Mr Craythorne and seeks to implicate me under five topics which I respond to in this statement, namely:-

10.1 The alleged capture of Alexkor SOC Limited ("Alexkor");

10.2 My appointment as the Minister of Public Enterprises;

10.3 The appointment of non-executive directors to Alexkor in September 2012 (including the appointment of Mr Bagus) and in June 2013;

10.4 The appointment of Mr Khoza as Chief Executive Officer; and

10.5 Alexkor's new strategy.

11. I have had regard to Mr Bishop's statement and the allegations contained therein are serious and he serves to confirm the allegations of Mr Craythorne in so far as he seeks to implicate me. To a large extent I have repeated the contents of my response to Mr Craythorne's statement.

12. Subsequent to submitting my statement of response to Mr Craythorne's statement as aforesaid, which statement included the topic relating to the appointment of Board members to Alexkor, I have since located some of the Department of Public Enterprise ("the DPE")'s documents relating to the appointment of non-executive directors to Alexkor during my tenure. I deal with the said documents below. I will therefore submit a supplementary affidavit to my statement of response to Mr Craythorne's statement in order to cover this topic.

13. In this statement, I have endeavoured as much as possible to identify the specific allegations in Mr Bishop's statement which I place in issue. To the extent that I may have omitted to deal with any specific allegation contained therein which seeks to implicate me, such should be regarded as having been denied. I have also at the same time, set out my version in response to a specific allegation being responded to.

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THE ALLEGED CAPTURE OF ALEXKOR

14. I need to make it clear that I was not aware that Alexkor had been captured. According to Mr Craythorne, there was state capture in Alexkor by Diamdel between the years 2000 to 2006[1]. I was certainly not aware of the alleged capture of Alexkor before or during my tenure.

15. During my tenure, I have at all times acted *bona fide* with the intention of meeting the objectives of (a) the deed of settlement which was made an Order of Court pursuant to a successful land claim by the Ritchersveld Community ("the 2007 Court Order") and (b) Government's various goals such as *inter alia*, socio-economic plans. My decisions were never motivated by any ulterior motive and I explain the reasons for my relevant decisions below.

16. In paragraphs 22 to 23.4 of Mr Bishop's statement, he concludes that I assisted the Guptas and their associates to capture Alexkor[2]. In doing so, he relies on four factors which he says are contained in the report described as *Betrayal of the Promise: How the Nation is Being Stolen.* Mr Bishop says that these factors are the following:-

    16.1 That I changed the Board after being appointed as the Minister of Public Enterprises[3];

[1] Paragraph 192 of Mr Craythorne's statement
[2] Paragraph 22 of Mr Bishop's statement
[3] Paragraph 23.1 of Mr Bishop's statement

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16.2 That I announced the new strategic direction for Alexkor to diversify into the production of coal and lime to supply Eskom[4];

16.3 That I brought people onto the Board who are either strongly in favour of radical economic transformation and/or have close personal links to some of the bidders[5]; and

16.4 The award of the tender by Alexkor to Scarlet Sky Investments 60 (Pty) Limited ("SSI") to control the valuation, sale, beneficiation and marketing of the diamonds of Alexkor and the appointment of Regiments Capital (Pty) Limited ("Regiments Capital") by Alexkor to deal with the coal and lime strategy.

17. I respond below to each of the said four factors in order to demonstrate that the relevant conclusion made by Mr Bishop is false and unsustainable.

MY APPOINTMENT AS THE MINISTER OF PUBLIC ENTERPRISES

18. I was appointed as the Minister of Public Enterprises on 1 November 2010 and remained in such position until May 2014.

19. After being appointed the Minister of Public Enterprises, I was briefed by the DPE on its overall mission and also by each unit of the DPE. After these

[4] Paragraph 23.2 of Mr Bishop's statement
[5] Paragraph 23.3 of Mr Bishop's statement

briefings, I then received extensive briefings from each State-Owned Company in my portfolio, including Alexkor.

20. In paragraphs 27 and 28 of Mr Bishop's statement, he makes a statement that following my appointment, I *"was engaged in the restructuring of SOE Boards, which became broadly representative of 'Gupta-Zuma' interests*". This statement is vague, made recklessly and without more, I am unable to respond thereto. In my view, the said statement, without more, is of no assistance to the work of the Commission. The Commission should not countenance bald statements recklessly made with no evidence.

21. Mr Bishop is required to place evidence before the Commission indicating, with reference to each SOE that fell under my portfolio during my tenure, the names of the Board members (non-executive directors) which I and the Cabinet appointed which were representative of "*Gupta-Zuma interests*". In addition thereto and with reference to each SOE, I need to know from Mr Bishop, who each of those Board members are or were and how each such Board member is said to have served "*Gupta-Zuma interests*". Mr Bishop should further provide evidence that at the time the Board members who were allegedly appointed to serve the ""*Gupta-Zuma interests*", we (the DPE team, myself and Cabinet) were aware that their appointments were to serve the "*Gupta-Zuma interests*" so that I can respond thereto.

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22. I have mentioned this in my affidavit filed with the Commission on Monday, 4 January 2021[6] in response to a Regulation 10(6) directive issued by the Chairperson of the Commission, that the Commission should look at what we (the DPE, myself and Cabinet) knew or could have known at the time when recommending and making appointments. If people we appointed went on to do wrong things later, we cannot be held accountable/responsible unless there is something about their profile which could have been detected at the time we considered their profiles, vetted and appointed them, which showed that they were likely to do wrong things. This statement also applies to all State-Owned Companies under my tenure, including Alexkor in this instance.

23. In recommending the appointment of any Board member (non-executive director) to any SOE to Cabinet, including the Board members (non-executive directors) of Alexkor, there was nothing in the profile of such Board members which showed that these members were likely to do wrong things.

THE APPOINTMENT OF BOARD MEMBERS (NON-EXECUTIVE DIRECTORS) OF ALEXKOR

24. As it appears in the DPE decision memorandum referred to in paragraph 25 below, when I was appointed the Minister of Public Enterprises, the Board of Alexkor consisted of the following members[7]:-

[6] Paragraph 21.16 of my statement of response to the Regulation 10(6) Directive
[7] Table 1 of Page 7 of the first decision memorandum

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24.1 Mr Reginald Tafara Muzariri who served as the chairperson and non-executive director and had been appointed on 1 June 2007 ("Mr Muzariri");

24.2 Dr Roger Leslie Paul who served as the non-executive director and had been appointed on 1 June 2007 ("Dr Paul");

24.3 Ms Sibongiseni Ngoma who served as the non-executive director and had been appointed on 1 September 2008 ("Ms Ngoma");

24.4 Prof Viola Makin who served as the non-executive director and had been appointed on 1 June 2007 ("Prof Makin"); and

24.5 Mr Claude Llewellyn Towell who served as the non-executive director and had been appointed on 1 September 2008 ("Mr Towell").

25. If my memory serves me correctly, the above mentioned non-executive directors were each appointed for a period of 3 (three) years, subject to annual review and confirmation at each subsequent annual general meeting. The terms of their appointments were due to expire at the 2011 annual general meeting. Having regard to the decision memorandum, the terms of appointment of the non-executive directors were extended subject to the finalisation of a Board review by me and the DPE[8]. It seems to me that the term of re-

[8] Paragraph 2.1 of the first decision memorandum

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appointments of the said non-executive directors was until the next annual general meeting being the 2012 annual general meeting.

26. During 2012 and leading up to Alexkor's 2012 annual general meeting, I received a decision memorandum dated 6 June 2012 annexed hereto as "FA4" from the DPE's Deputy Director General: Legal and Governance, Ms Matsietsi Mokholo ("the first decision memorandum").

27. The first decision memorandum served as the Board review by the DPE team as had been envisaged by the outcome of the 2011 annual general meeting. The said decision memorandum was: -

27.1 Prepared and signed by (a) Deputy Director, Ms Martha Ntho and (b) Chief Director: Governance, Ms Orcilla Ruthnam on 4 June 2012;

27.2 Reviewed and supported by (a) the Acting Deputy Director-General: Alexkor and Denel, Mr Weekend Bangane and (b) the Deputy Director-General: Legal and Governance, Ms Matsietsi Mokholo on 4 June 2012; and

27.3 Recommended by the Director-General of DPE, Mr Tshediso Matona on 12 June 2012.

28. The first decision memorandum briefed me on the composition of the Alexkor Board at the time, it also provided an analysis of the said Board, made findings and recommended *inter alia* that I:-

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28.1 retire 4 (four) non-executive directors being Mr Muzariri, Dr Makin, Mr Towell and Ms Ngoma;

28.2 appoint six (6) new non-executive directors being Mr Rafique Bagus, Adv Jacinto Rocha, Dr Nono Yvonne Mohutsioa-Mathabathe, Ms Gillian Nonhlanhla Jiyane, Ms Zukiswa Ntlangula and Mr Mohammed Bhabha;

28.3 re-appoint Dr Paul; and

28.4 recommend the above appointments of the said new non-executive directors to Cabinet.

29. The aforesaid recommendations were based on the analysis and findings of the DPE team which included *inter alia*, the following:-

29.1 That at the time, the redirection of Alexkor's strategy was as follows:-

29.1.1 Its key role was the exploitation of diamond resources on a commercially viable basis and to contribute towards the socio-economic upliftment of the regions in which it operates[9];

29.1.2 Alexkor would endeavor to seek opportunities to procure new mining ventures to secure new revenue streams and ensure

[9] Paragraph 3.1(i) of the first decision memorandum

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its future growth and in this regard, it was encouraged to seek to enter into beneficial joint venture arrangements[10];

29.1.3 Alexkor would explore opportunities for downstream beneficiation to contribute to the creation of new jobs, development of requisite skills, investment in research and development, economic growth, sustainable development and cost-effective support for the broader policies of government[11]; and

29.1.4 Alexkor would pursue financial recovery and stability based on achieving profitability targets and reducing costs whilst exploring strategies that would ensure its long-term viability, enabling it to effectively address its environmental rehabilitation and other liabilities whilst contributing to the socio- economic development of the region[12].

29.2 That in exploring new mining ventures and exploring opportunities for downstream beneficiation that Alexkor would require assessments based on detailed business and mining plans[13].

[10] Paragraph 3.1(ii) of the first decision memorandum
[11] Paragraph 3.1(iii) of the first decision memorandum
[12] Paragraph 3.1(iv) of the first decision memorandum
[13] Paragraph 3.3 of the first decision memorandum

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29.3 That the skills which were required for the Alexkor Board, included (a) Geology (Mineral Exploration) (b) Mine Management (Mining and Mine Project Development) (c) Engineering (d) Economics (e) Corporate Finance (f) Business Administration (Business Strategy) (g) Natural Resource and Environmental Regulatory Compliance (h) Legal (i) Risk Management and (j) Human Resource Management and Labour Relations.

29.4 That the DPE had undertaken a review of the Board with the view of identifying skills gaps existing at the time to bring the Board to its full complement in terms of Alexkor's Memorandum of incorporation.

29.5 That at the time, there were critical matters which a new Board needed to address in the immediate to short – term period, which included *inter alia*, the following:-

29.5.1 The recruitment and appointment of the new Chief Executive Officer[14]. At the time, the contract of the former Chief Executive Officer, Ms Khetiwe Maseko-McClain ("Ms Maseko-McClain") had expired and she had taken the matter to the CCMA on the basis that she had expected that her contract of employment would be renewed and the arbitration proceedings were pending;

[14] Paragraph 3.7.1 of the first decision memorandum

29.5.2 Ensuring that the approved allocation of R350 million Rand from the fiscus was used in accordance with the conditions of approval including, *inter alia*:-

29.5.2.1 That the allocation is used to settle all outstanding liabilities[15], including the Environmental Rehabilitation Liability[16] and that Alexkor presents to the DPE and National Treasury, a disbursement schedule related to the liabilities that had to be settled; and

29.5.2.2 The allocation is not used for investment in new opportunities in that there had been no allocation for new projects outside Alexander Bay[17].

29.5.3 That because (a) Alexkor's only source of revenue to fund its obligations and liabilities was revenue from the 51% interest in profits of the operations of the Pooling and Sharing Joint Venture between Alexkor and the Richtersveld Community (PSJV) (b) no such profits or

[15] Paragraph 3.7.3.1 of the first decision memorandum
[16] Paragraph 3.7.3.3 of the first decision memorandum
[17] Paragraph 3.7.3.2 of the first decision memorandum

revenues were anticipated for at least 3 (three) years (c) Alexkor's financial resources at the time were insufficient to meet its obligations and liabilities, the Board was required to optimise Alexkor's strategy and to seek opportunities to procure new mining ventures to secure new revenue streams for future growth and sustainability[18].

29.6 That having consulted the offices of the Director-General, Deputy Minister and Ministry at the DPE, the persons below be recommended to Cabinet for appointment as non-executive directors of Alexkor[19]:-

29.6.1 Mr Rafique Bagus ("Mr Bagus");

29.6.2 Adv Jacinto Rocha ("Adv Rocha");

29.6.3 Dr Nono Yvonne Mohutsioa-Mathabathe ("Dr Mathabathe");

29.6.4 Ms Gillian Nonhlanhla Jiyane ("Ms Jiyane");

29.6.5 Ms Zukiswa Ntlangula ("Ms Ntlangula"); and

29.6.6 Mr Mohammed Bhabha ("Mr Bhabha").

29.7 That the skills profiles of the proposed candidates in paragraph 29.6.1 to 29.6.6 above and Dr Paul who had been re-appointed, spoke particularly to the skills gaps that existed in the Alexkor Board and that these non-executive directors would strengthen the skills complement and

[18] Paragraph 3.8 of the first decision memorandum
[19] Paragraph 3.13 of the first decision memorandum

effectiveness of the Board, in particular Alexkor's strategy to actively seek new opportunities for revenue streams beyond the Alexander Bay and independent of the PSJV operations.

30. The DPE team recommended the appointment of the said new non-executive directors and the re-appointment of Dr Paul after having considered their profiles which were recorded in the decision memorandum as being the following:-

30.1 Mr Bagus

Mr Bagus had obtained his Masters Degree in Economics at the University of Cape Town in 1994 and amongst others, had undertaken research into Investment Strategies for emerging democracies at the Bradford University (UK) in 1994. At the time, he was the Chief Executive Officer of Morning Tide Investments. Prior to that, he was the Chief Executive Officer of Ehlobo Group. He had a combination of public and private sector leadership experience, focussed on driving the development of economic growth and investment in South Africa. He held a directorship at Aspen Pharmacare. His experience in economics, investment and Business Leadership was expected to add value to the Board and it was recommended that he be appointed as non-executive director and Chairperson of the Board. I might add that Mr Bagus had served as the Chief Executive Officer of Investment South Africa for a

period, having also been a senior official in the Department of Trade and Industry.

30.2 Adv Rocha

Adv Rocha had obtained BA (Hons) in Political Science and BSc (Hons) in Geology from Gustavus Adolphus College in the USA. He also had a Graduate Diploma in Engineering (Mining) from Wits University, MBA from University of Cape Town and LLB (Law) from Unisa. Adv Rocha was an independent mineral law and policy consultant. He had 18 years experience in policy and legal research, policy and law development and implementation. He was admitted as an Advocate of the high court in South Africa in 2010 and held 9 (nine) directorships. Although when undertaking the credit and directorship verification, the DPE discovered that he had had two judgments and one default in payment against his Name, his experience in mineral law was expected to strengthen the Board.

30.3 Dr Mathabathe

Dr Mathabathe had obtained a PhD in Education and Counselling Psychology at Southern Illinois University-Carbondale, USA in 1989. She also held a Masters Degree in Science Education and Counselling Psychology, Diploma Programme in Labour Relations, from School of Business Leadership - Unisa. She was a Senior Manager: Human

Resources/ Affirmative Action at Telkom SA. She held directorships in Nono Makhudu & Associates (Pty) Ltd, Nono's Travel, Tourism and Events, Kelebogile-ka-Kgomotso Construction and Developers, Dyondisani Investment Holdings and Champion Diamonds (Pty) Ltd. Her experience in the human resource strategy was expected to add value to the Board.

30.4 Ms Jiyane

Ms Gillian Jiyane had obtained her BCom (Accounting) from the University of Zululand, Post Graduate Diploma Accounting from the University of Natal and Masters Degree in Accountancy and Taxation from the University of Natal. Ms Jiyane had experience in cost accounting, general auditing, business consulting and taxation. She was a Chartered Accountant and specialised in business consulting and taxation. She held directorships in PetroSA, PAMDC, Thebe Investment Corporation as the Chairperson of the Audit Committee. She was also an Audit Committee Member of the Council for Geosciences/Thebe Tourism Group. Her experience in cost accounting and business consulting was expected to add value to the Board.

30.5 Ms Ntlangula

Ms Ntlangula had obtained her B Juris in 1991 from Walter Sisulu University and her LLB in 1993 from the University of Kwa-Zulu Natal.

She was admitted as an Attorney and Conveyancer in 1995 and 1997 respectively by the Cape Law Society. She had also obtained her Masters Diploma in Human Resource in 2000 and a Bachelor of Science Degree, majoring in Geology, from the University of Cape Town in 1980 and BSc. Honours - Economic Geology from the University of Cape Town in 1984. She was working as an Independent Consultant providing Kimberlite exploration services. She held directorships in Akacia Healthcare Holdings (Pty) Ltd, Alliance Investment Holdings (Pty) Ltd, Batsumi Airport Ventures (Pty) Ltd and Emanzini Leisure Resorts (Pty) Ltd. Her skills and experience in Corporate Law and Legal Compliance was expected to add value to the Board.

30.6 Mr Bhabha

Mr Bhabha had obtained B. Proc in 1983 at UNISA and he was a qualified Attorney at Law. He also had obtained training on Public Finance Management Act and oversight. In 2009 Mr Bhabha was seconded to the Department of Co-operative Governance and Traditional Affairs as an Advisor on legislation and policy. He held directorships in South African Forestry Company Limited (SAFCOL), Evraz Highveld Steel and Vanadium Ltd - Vanchem, Ingenuity Consulting Services (Pty) Ltd, Libradox (Pty) Ltd, Tekset Community Development and Yammin Hammond Inc. His experience and skills in corporate law, policy and legislation was expected to add value to the

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Board. I might add that Mr Bhabha has been a member of Parliament since 1994.

30.7 Dr Paul

Dr Paul had been appointed to the Board on 1 June 2007 and had a Bachelor of Science and Masters Degree in Business Administration. He was the Acting Chief Executive Officer of Strategic Fuel Fund and his skills in legal, mining regulatory and policy developments fields were expected to add value to the Board. He was also re-appointed for institutional memory and continuity. He was expected to assist and guide the new Board in dealing with the arbitration dispute which was pending at the time with Ms Maseko-McClain.

31. According to the first decision memorandum, with the appointments of the above non-executive directors and the re-appointment of Dr Paul, the Board was to consist of 50% African, 25% White and 13% Asian with 62% being male and 38% being female. The first decision memorandum further indicated that in the mining sector, at Board level, the industry was highly male dominated and it had been difficult to obtain interested females with the right skills and experience and availability in their schedules to serve on the Board. It was indicated that should the Board recommend suitable female candidates for the position of Chief Executive Officer and/or Chief Financial Officer, such would

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serve to balance the gender composition of the Board. The Board was to be directed to aim for the said balance.

32. I accepted the recommendations of the first decision memorandum and approved it on 7 June 2012. I signed the Cabinet memorandum recommending the appointment of the new Board on 11 June 2012. Cabinet approved the appointment of the new non-executive directors on 17 July 2012. I issued the letters of appointment to the new non-executive directors on 3 September 2012 effective 7 September 2012 for a period of 3 (three) years, subject to annual review and confirmation at each subsequent annual general meeting. I issued the letters of retirements and gratitude to the outgoing non-executive directors on 5 September 2012.

33. In (a) accepting the recommendations from the DPE team (b) making the recommendations to Cabinet and (c) issuing letters of appointments for the new Board, I acted in good faith and was not motivated by anything untoward or state capture as it is alleged. I also believe that the DPE team and Cabinet acted in good faith in recommending the appointments and approving the appointments of the non-executive directors, respectively. The non-executive directors were appointed on merit based on their respective profiles. There was no information made available to me and I would like to believe, the DPE team and Cabinet, which suggested that the Board would act unlawfully or with ulterior motive or for nefarious reasons in executing its fiduciary duties.

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THE APPOINTMENT OF MR BAGUS AS THE CHAIRPERSON OF ALEXKOR

34. I have already indicated above that Mr Bagus was appointed:-

34.1 pursuant to an analysis, findings, recommendations and Board review of the then Alexkor Board by the DPE team in 2012, which review process was done as envisaged by the resolution of the 2011 annual general meeting and the recommendations thereof were accepted by me and also approved by Cabinet;

34.2 on merit because of his qualifications and experience and the expectation was that he would add value to the Board.

35. It bears repeating that in (a) accepting the recommendations from the DPE team (b) making the recommendation to Cabinet and (c) issuing the letter of appointment for *inter alia*, Mr Bagus, I acted in good faith and was not motivated by anything untoward or state capture as alleged. I also believe that the DPE team and Cabinet acted in good faith in recommending the appointment and approving the appointment of Mr Bagus, respectively.

THE APPOINTMENT OF MR PERCY KHOZA AS CEO OF ALEXKOR

36. It is correct that I mandated the new Board to prioritize the appointment of a new Chief Executive Officer. This mandate was in line with the recommendation which was made in the first decision memorandum and which was described

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as one of the critical matters which the new Board was required to attend to[20]. At the time, Mr Berno Lategan who was the Chief Financial Officer of Alexkor was acting as its Chief Executive Officer. We could not leave key executive positions such as that of the Chief Executive Officer vacant indefinitely for good governance. Thus, a permanent Chief Executive Officer was required and the new Board needed to identify and recommend a candidate for appointment as the Chief Executive Officer who would lead Alexkor in fulfilling its objective to become a viable mining company as soon as possible. At the same time, the permanent Chief Executive Officer was needed to ensure *inter alia*, that the allocated funds of R350 million Rand would be used in accordance with the conditions of the allocation.

37. Mr Percy Khoza ("Mr Khoza") was independently recruited and recommended by the Board for appointment as the Chief Executive Officer. As far as I can recall, the DPE team processed the Board recommendation, accepted it and recommended to me that Mr Khoza be recommended to Cabinet for appointment as the Chief Executive Officer. The recommendation for Mr Khoza's appointed was approved by Cabinet and he was appointed as the CEO during or about April 2013.

38. Mr Khoza was appointed on merit based on his qualifications and profile. I believe that the Board and the DPE team acted in good faith in recommending

[20] Paragraph 3.7.1 of the first decision memorandum

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Mr Khoza for appointment as the Chief Executive Officer. I also believe that Cabinet acted in good faith in approving the appointment of Mr Khoza as the Chief Executive Officer. I am unable to expand further in responding to the circumstances and reasons relating to the appointment of Mr Khoza as the Chief Executive Officer because in order to do so, I require the following documents, which I also believe will be important for the Commission to have regard thereto:-

38.1 the recommendation by the Board to me and the DPE for the appointment of Mr Khoza as the Chief Executive Officer;

38.2 the decision memorandum of the relevant DPE team recommending the appointment of Mr Khoza as the Chief Executive Officer; and

38.3 the Cabinet memorandum approving the appointment of Mr Khoza as the Chief Executive Officer.

39. Once the documents referred to in paragraphs 38.1 to 38.3 which are required by me are furnished by the Commission, I will file a supplementary affidavit to expand further on this aspect of my affidavit.

40. I might add that the appointment of Mr Khoza was only made in April 2013, more than 3 (three) years after I had been appointed Minister of Public Enterprises and the need for the recruitment and appointment of a new Chief Executive Officer of Alexkor existed before the 2012 changes to the Board were

made. Mr Khoza's appointment was based on the recommendation of the Board which was informed by the needs and strategy of Alexkor. It was also wise for the new Board to undertake the process of recruitment and recommendation of a new Chief Executive Officer so that a candidate that it had recommended was appointed. Unlike a situation where the new Board could have been placed in a situation where it would have been impelled to work with a new Chief Executive Officer who would have been appointed prior to the appointment of the new Board (which would have been the case in this instance had the previous Board been mandated to recruit and recommend a candidate for the position of the Chief Executive Officer when its term was ending at the 2012 annual general meeting).

41. In the premises, the allegation that Mr Khoza's appointment as the Chief Executive Officer of Alexkor was meant to serve the alleged capture of Alexkor or the "*Gupta-Zuma interests*" is non-sensical. Mr Khoza was appointed based on merit and his profile. There was no information made available to me or Cabinent or could have been known to me or Cabinet which could have suggested that the Board's recommendation for the appointment of Mr Khoza was not *bona fide*.

THE APPOINTMENT OF MR BRIAN GROBBELAAR, MS SINDI ZILWA AND MR DONALD MKHWANAZI AS NON – EXECUTIVE DIRECTORS OF ALEXKOR AND THE PROPOSED ROTATION OF DR MATHABATHE

42. In order to complete picture relating to the appointments of various Board members to Alexkor during my tenure, it is important to also mention the appointments of Mr Brian Grobbelaar, Ms Sindi Zilwa and Mr Donald Mkhwanazi as non-executive directors of Alexkor and the proposed rotation of Dr Mathabathe in May 2013. This will enable the Commission to have a complete picture and assess whether any information relating thereto is relevant for the purposes of its work.

43. As far as I can recall, Ms Jiyane who had been appointed in September 2012 resigned as a director of Alexkor in December 2012. This meant that there were three vacancies on the Board because the Memorandum of incorporation provided for a minimum of 6 (six) and a maximum of 10 (ten) directors. One of the issues which has been raised in the decision memorandum (FA4) was that the Board needed to be representative of the demographics of the country.

44. During May 2013, I received a decision memorandum annexed hereto as "FA5" from the Acting Deputy Director – General: Legal and Governance, Mr Phahlani Mkhombo ("the second decision memorandum").

45. The purpose of the second decision memorandum was to, *inter alia*:-

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45.1 inform me that the DPE team had undertaken an exercise and identified three suitable candidates, namely Mr Brian Grobbelaar ("Mr Grobbelaar"), Ms Sindi Zilwa ("Ms Zilwa") and Mr Donald Mkhwanazi ("Mr Mkhwanazi") for appointment as non-executive directors to the Board;

45.2 recommend Mr Grobbelaar, Ms Zilwa and Mr Mkhwanazi for appointment as non-executive directors to the Board;

45.3 inform me that there was a vacancy relating to the position of the Chief Financial Officer.

46. Mr Grobbelaar, Ms Zilwa and Mr Mkhwanazi were all recommended based on their profiles. Mr Grobbelaar was described as a senior principal mining engineer at Anglo American and was said to have skills in Mining, Human Resources, Safety Health and Environment which he was expected to use for his duties in the Board. The second decision memorandum also indicated that Mr Grobberlaar was coloured. As such, his appointment would mean that the Board would be endeavouring towards representing the demographics of the country.

47. Ms Zilwa was the Chief Executive Officer of Nkonki Inc, an audit firm. Ms Zilwa's skills in auditing and financial management were expected to contribute to the Board. Ms Zilwa was a black female professional and her appointment was a further endeavour towards having a Board which was representative of the demographics of the country.

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48. Mr Mkhwanazi had served as a non-executive director of Transnet. He was a former President of Black Management Forum and a champion of black economic empowerment. His profile and skills were expected to add value to the Alexkor Board.

49. The second decision memorandum was: -

49.1 prepared and signed by (a) Acting Senior Director: Governance, Mr Willie Mseleki and (b) Chief Director: Governance, Ms Orcilla Ruthnam on 16 May 2013;

49.2 reviewed and supported by (a) the Acting Deputy Director-General: Legal and Governance, Mr Phahlani Mkhombo and (b) the Deputy Director-General: Manufacturing, Ms Kgathatso Tlhakudi on 17 May 2013 and 20 May 2013, respectively;

49.3 recommended by the Director-General of DPE, Mr Tshediso Matona on 24 May 2013; and

49.4 approved by me on 27 May 2013 and noted by the Deputy Minister, Mr Bulelani Magwanishe on 28 May 2013.

50. The recommendation for the appointment of Mr Grobbelaar, Ms Zilwa and Mr Mkhwanazi was approved by Cabinet. I am in not in possession of either the

Cabinet memorandum or approval and it may be apposite for these documents to be obtained by the Commission from the DPE.

51. Pursuant to the Cabinet approval of Mr Grobbelaar, Ms Zilwa and Mr Mkhwanazi, I issued letters of their appointments annexed hereto as "FA6", "FA7" and "FA8", respectively. Their appointments were for a period of 3 (three) years effective from 1 June 2013, subject to annual review and confirmation at each subsequent annual general meeting.

52. The changes to the Alexkor Board were only made in September 2012 and June 2013, more than 2 (two) and 3 (three) years respectively, after I had been appointed Minister of Public Enterprises, when the terms of most of the non-executive directors were due to expire (in respect of the 2012 appointments) and there had been vacancies in 2013. These 2012 and 2013 appointments were based on the review, analysis and recommendations in the first decision memorandum and the second decision memorandum, respectively.

53. During October 2013, I received a decision memorandum annexed hereto as "FA8.1" from the Deputy Director – General: Legal and Governance, Ms Matsietsi Mokholo ("the third decision memorandum").

54. The purpose of the third decision memorandum was to, *inter alia*:-

54.1 brief me about the contents of the letter and 2012/2013 Board Evaluation Report which had been received from the Chairperson of Alexkor about

the matters relating to performance issues and ratings of Dr Mathabathe vis-à-vis other Board members and her relationship with other Board members; and

54.2 recommend that I remove Dr Mathabathe as a non-executive director of the Board.

55. The third decision memorandum was: -

55.1 prepared and signed by (a) Intern: Governance, Ms Sibongile Mhlongo and (b) Chief Director: Governance, Ms Orcilla Ruthnam on 10 October 2013 and 15 October 2013;

55.2 reviewed and supported by (a) the Deputy Director-General: Legal and Governance, Ms Matsietsi Mokholo and (b) the Deputy Director-General: Manufacturing, Ms Kgathatso Tlhakudi on 24 October 2013 and 20 October 2013, respectively;

55.3 recommended with comments by the Director-General, Mr Tshediso Matona on 1 November 2013; and

55.4 not approved by me.

56. I did not approve the third decision memorandum because I indicated that it would only be fair if I first heard the side of Dr Mathabathe before making a decision.

57. As far as I am concerned and from my point of view, there was an honest process of engagement in the decisions by the DPE team. Recommendations were not made as a matter of formality, but these were made in good faith. Similarly the acceptances or rejections of the recommendations were done in good faith.

58. In the premises, the allegation that any of the changes to the Alexkor Board, be it the 2012 or 2013 appointments, was meant to serve the alleged capture of Alexkor or the "*Gupta-Zuma interests*" is non-sensical.

THE DIVERSIFICATION STRATEGY

59. In my response to Mr Craythorne's statement, I extensively demonstrated that the allegation made that the diversification strategy was a means to capture Alexkor was false. It is apposite to once again respond to this allegation which Mr Bishop has adopted into his affidavit. In doing so, I will largely repeat what I have already said in my response to Mr Craythorne's statement. I believe that it is important for my response to Mr Bishop's statement to be recorded in a separate affidavit even though it may to a large extent, be a repeat of the contents of my statement of response to Mr Craythorne's statement.

60. Alexkor is a State-owned mining company established in terms of Alexkor Limited Act 116 of 1992 ("Alexkor Act") and is governed through its memorandum of incorporation ("the MOI").

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61. Although the operations of the PSJV were and remained at Alexandra Bay, Alexkor's head office was based in Johannesburg as at date of my appointment and remained there as at the date of the end of my tenure. This is demonstrated by page 52 of Alexkor's annual report annexed hereto as "FA9" and page 116 of Alexkor's annual report annexed hereto as "FA10".

62. In the MOI which was applicable in 2012, the main business and objective of Alexkor was defined as "*to carry on alluvial diggings, mining, agriculture, trade, industrial establishment, town development, and economic and socio-economic development*". I do not have a copy of the said MOI, it should be with the DPE or Alexkor should the Commission wish to have regard to it.

63. I represented the State as a shareholder in Alexkor and the relationship between the Minister of Public Enterprises (by implication the DPE as well) and Alexkor was regulated by a written shareholder's compact, in addition to the Alexkor Act and other statutes such as the Companies Act and Public Finance Management Act.

The 2007 Court Order and the new business model

64. Over the years, Alexkor became the lifeline of the Alexander Bay community and the Namaqualand area as it provides (or provided) economic opportunities through access to labour market, educational and health care facilities.

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65. In 2007, a deed of settlement was made an Order of Court pursuant to a successful land claim by the Ritchersveld Community ("the 2007 Court Order"). The said land claim was regarded as one of the biggest land claims in the country at the time.

66. Between the years 2010 to 2011 and as result of the 2007 Court Order, Alexkor's structure and business model underwent a fundamental change. In terms of the 2007 Court Order, Alexkor was directed to transfer significant assets to the community, such as lucrative agricultural businesses and land mining rights. In giving effect to the 2007 Court Order, Alexkor had to pool its marine mining rights with those of the community to form the PSJV (which was one of the most complicated exercises for Alexkor). Effectively, Alexkor was left with no operations of its own and was directed to provide expertise for the success of PSJV in which it held 51% interest.

67. In terms of the 2007 Court Order, Alexkor was further directed to upgrade the township, hospitals, school and other amenities. Although the 2007 Court Order and the decision to form a joint venture occurred before my tenure, the actual formation of the PSJV occurred in April 2011 during my tenure. The consideration by the Board of the consequential change in the business model of Alexkor (the long-term sustainable strategy) also commenced during the first year of my tenure.

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68. As a result of the formation of the PSJV, the said joint venture took charge of the land and marine mining activities in the Alexander Bay area which meant that Alexkor had to explore other opportunities outside of Alexander Bay, in addition to its role in the PSJV but independent to the joint venture.

69. The consequence of implementing the 2007 Court Order which resulted in the formation of the PSJV and the need for Alexkor to explore other business opportunities, occurred at an opportune time.

My first address at the 2012 annual general meeting

70. On 7 September 2012, I attended the annual general meeting of Alexkor ("the 2012 annual general meeting") and had to address both the Board of Alexkor in office at the time and the new Board consisting of some of the new non-executive directors who were appointed by me after a process of the DPE and Cabinet had been completed. I have already dealt with the appointment of the non-executive directors in 2012 and 2013 above.

71. I had prepared two separate addresses, one for the Board in office at the time and the other for the new Board consisting of some of the new members who were joining the Board.

72. In my first address to the Board in office at the time, I highlighted a number of issues such as, *inter alia*:-

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72.1 That Deputy Minister Magwanishe who was attending his first annual general meeting of Alexkor had been delegated Alexkor by me as part of his responsibilities, and that he had hit the ground running and the Board had co-operated with him to discharge his responsibilities;

72.2 That the unrest (at the time) in the platinum and gold mining sectors was a major concern and would certainly harm the growth of the industry as it could have far reaching implications for the local mining industry, including the diamond sector and that should the said disruptions be prolonged and widespread, the first casualty could be the investment appetite in the mining sector and jobs;

72.3 That the year 2011/2012 was a challenging year for Alexkor as it had to manage the transitional period because of the implementation of the 2007 Court Order and the formation of the PSJV, which proved to be one of the most complicated exercised undertaken by Alexkor;

72.4 That the establishment of the PSJV has left Alexkor with no operations of its own and this has effectively rendered it to play an agency role providing expertise for the success of the PSJV and to offer socio-economic services to the community of Ritchersveld and despite that, Alexkor had done commendable work in executing some of its obligations under the 2007 Court Order;

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72.5 That Alexkor's support for the community of Namaqualand was (and I hope it still is) an integral part of Government strategy for the region;

72.6 My concern that for a while, Alexkor had been operating without a permanent executive management structure, including Chief Executive Officer and Chief Financial Officer, which implied that institutional memory and knowledge management would inevitably be considerably eroded over the past few years;

72.7 That problem with not having a permanent executive management structure manifested itself in the quality of the reports from Alexkor to the Department which had left much to be desired, reflecting to a large extent, the capacity challenges which Alexkor was facing at the time and that the closing of the gaps in the reports needed to be prioritised;

72.8 To note the report from Alexkor that the dispute it had with its previous Chief Executive Officer, Ms Maseko-McClain had been resolved without any further financial implications for Alexkor. I have already dealt with the matter relating to Ms Maseko-McClain earlier in my affidavit.

72.9 That the Board had failed in its oversight role over the Alexkor Development Foundation which resulted in unpleasant allegations of mismanagement of resources which were destined to assist the underprivileged in the Namaqualand region. This had resulted in the matter serving before the Portfolio Committee on Mineral Resources and

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the DPE approaching the Master of the High Court for assistance. I do not recall the nature of the assistance which the Department had sought from the Master of the High Court;

72.10 Although the establishment of the PSJV would have the effect of nullifying the role of the Alexkor Development Foundation ("the Foundation"), as it would also be focusing on the socio-economic objectives, the Board should consider the matter once the response from the Master of the High Court is received;

72.11 That the upgrading of the Alexander Township and its facilities had seen numerous slippages, that it was imperative that the upgrading work be completed before November 2012 or else we were all running the risk of losing credibility with the beneficiaries of the project. That as a shareholder, the DPE would be setting up a monitoring mechanism to track developments;

72.12 That I had indicated to the Board that it should explore different funding mechanisms and resources for the new mining ventures so as not to depend entirely on the fiscus to fund Alexkor's growth opportunities and that the allocation of R350 million from fiscus was the last of its kind for Alexkor;

72.13 That the Board had taken 6 (six) months to revise the corporate plan without any valid explanations, the conditions attached to the previous

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funding had not been met and the DPE, regrettably, could not make any disbursements until all conditions were met and that the National Treasury frowns upon situations where allocated resources are not distributed because of non-fulfilment of set conditions;

72.14 That the DPE was of the view that the future of Alexkor as a stand-alone diamond company lied beyond the area of Alexandra Bay, however, there was a need to develop a long-term strategy for Alexkor which had to look at Government's position on mining and exploitation of strategic minerals. I further indicated that robust engagements would need to take place with all stakeholders in order to better define the future role of Alexkor in mining;

72.15 That the concerns raised by the auditors of Alexkor, mainly against its long-term prospects as a going concern needed to be addressed;

72.16 That although PSJV had posted a higher than budgeted for profit in its first financial year, I remained concerned about Alexkor's performance against set targets in the shareholder's compact as it had failed to achieve 34% of the set targets, particularly those relating to the social and labour plans as well as skills development;

72.17 That the 2007 Court Order expects Alexkor to deliver on the socio-economic aspects and that we (Alexkor with the assistance of the

Department including myself) should not flinch from our commitment and obligation to support the people of Namaqualand; and

72.18 That despite (a) the slump in the global economy which had placed pressure on the diamond industry (b) lack of new discoveries limiting supply, the fundamentals of the diamond mining industry remained strong, with demand growing strongly. I encouraged the Board and PSJV to continue with the work of ensuring that the profits realised are sustainable and should be ploughed back to further fund further explorations for the benefit of PSJV because I highlighted that it was all of our legal and moral obligation to ensure that the PSJV was (and is) sustainable into the future and can stand on its own; and

72.19 That we (the DPE, Alexkor and PSJV) must not renege on our responsibility of ensuring that the Government and the community of Ritchersveld have an asset they both can benefit from.

73. A copy of my first address at the 2012 annual general meeting is annexed hereto as "FA11".

My second address at the 2012 annual general meeting

74. My second address was on the same occasion and directed to the new reconstituted Board of Alexkor. In my second address I highlighted a number of issues, such as *inter alia*:-

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74.1 That Alexkor was not a conventional mining company. It had a dual mandate and the dualistic nature of it is reflected in its business ethos and the relationship with the community and that as a new Board, it would be expected to sustain this practice;

74.2 That the legislative framework that established Alexkor did not restrict it to diamond mining, but a prudent decision was taken then to focus only on diamond mining;

74.3 The objective of Alexkor as contained in the MOI and its history with the community (as previously stated in my first address);

74.4 The establishment of the PSJV and the effect it had on Alexkor being that it had effectively been left with no operations of its own and that it would be providing the expertise necessary for the success of the PSJV;

74.5 That Alexkor was being directed to upgrade the township, hospital, school and other amenities and that to that end, it had done well in that the school and hospital had already been handed over to the relevant Government departments of the Province of the Northern Cape;

74.6 That Alexkor's support for the community of Namaqualand remained an integral part of Government's socio-economic development strategy for the region and that Alexkor's commitment to the Ritchersveld community had not ceased with the 2007 Court Order;

74.7 The Government's position on the mining industry and prospects, *inter alia*, as follows:-

74.7.1 That South Africa's economy has been built on the backfoot of extractive industry which is coal, diamond, gold, platinum etc and that according to an independent valuation of South Africa's mineral wealth, it is estimated at US$2.5 trillion, making the country the wealthiest mining jurisdiction amongst the emerging markets;

74.7.2 That as a country, we were simply not exploring our pre-eminent position since a considerable amount of our mineral resources are exported as raw material or only partially processed, which makes our economy a global price taker with no influence on the global prices;

74.7.3 That in response, Government was taking decisive steps to ensure that the mineral resources were fully exploited to the benefit of the people of our country;

74.7.4 That the following mineral resources were deemed strategic for our country, namely:-

74.7.4.1 Coal, in order to secure our energy needs into the future;

74.7.4.2 Uranium, for our future nuclear energy needs into the future;

74.7.4.3 Iron Ore, for our steel requirements as we expand our infrastructure requirements; and

74.7.4.4 Platinum, to expand our beneficiation of the resource and Manganese.

74.7.5 That Government was putting in place mechanisms to support the mining sector to enhance growth. That the Department of Mineral Resources had published the country's mineral beneficiation strategy in 2011 which sought to advance development through the optimisation of linkages in the mineral value chain, facilitation of economic diversification, job creation and industrialization. That to boost the mining sector, Transnet would be spending over R100 billion to upgrade commodity rail and port infrastructure as part of its overall R300 billion seven year infrastructure programme and that the investment in infrastructure created an opportunity for the development of minerals process centre;

74.7.6 That as result of the Government's plans, I challenged the Board to undertake a rigorous exercise to explore opportunities beyond diamond mining, in line with the grand plan of Government to further grow the mining sector;

74.7.7 That one of the immediate prioritises of the new Board should be to *inter alia*:-

74.7.7.1 capacitate the executive management structure of Alexkor with the first priority being to attend to the process of recruitment and appointment of a new Chief Executive Officer;

74.7.7.2 ensure that the reporting to the shareholder Minister is in full adherence to all applicable legislation and guidelines, thus to improve on the quality of the reports in order to promote transparency and proper monitoring in line with accepted practice;

74.7.7.3 consolidate Alexkor's representation on the Board of PSJV to ensure the success of PSJV and that the momentum is sustained

after PSJV had made profit in its first financial year of operation in 2012;

74.7.7.4 ensure that the business model applied in PSJV, particularly the mining component of the business was in support of the objective of the joint venture and to also pay more attention to the Foundation as oversight on the Foundation had previously been unsatisfactorily;

74.7.7.5 investigate the possibility of renegotiating the terms and conditions of Alexkor's obligations to the Foundation as the formation of PSJV had fundamentally changed the structure and size of Alexkor and thus its obligations needed to be reviewed to take into account the said factors. I highlighted that the view of the DPE was that the joint existence of the PSJV and the Foundation was duplication and poor allocation of resources and that the Board had to deal with this matter and report back to me;

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74.7.7.6 ensure the fulfilment of the remaining obligations linked to the 2007 Court Order, including (a) completing and handing over of the Alexander Bay Township and its facilities before end of November 2012 and (b) the acceleration of the rehabilitation obligations of mined areas as funding had been made available to Alexkor; and

74.7.7.7 play an increasing role in the pursuance of socio-economic objectives such as employment creation, skills development, youth participation, transformation and poverty alleviation as envisaged in the New Growth Path and meet the targets informed by the Social and Labour Plan developed by the Department of Mineral Resources.

74.7.8 I expressed that the long-term view of the new Board should be to *inter alia*:-

74.7.8.1 ensure that proper due diligence and care is exercised in Alexkor's process of exploring the option of acquiring new mining assets

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outside of Alexander Bay and that Deputy Minister Magwanishe and I be kept abreast of potential and feasibility of the said acquisitions; and

74.7.8.2 develop a long-term sustainable strategy, guided by the Government's position on mining and exploitation of strategic minerals and that the said process would require robust engagements with key stakeholders in order to properly define the future role of Alexkor. I indicated to the new Board that it must not shy away from formulating its own views in regard to the long-term sustainable strategy.

74.8 I concluded my second address at the 2012 annual general meeting by repeating what I had stated in my first address at the 2012 annual general meeting that I had delegated my oversight responsibilities of Alexkor to Deputy Minister Magwanishe.

75. A copy of my second address at the 2012 annual general meeting is annexed hereto as "FA12".

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76. The reason that I personally addressed the old Board and the new Board was that when I joined the DPE, one of the things that I introduced was to personally attend annual general meetings of State-Owned Companies falling within my portfolio so that I could obtain first hand briefings and hear for myself on the annual reporting and performance of these companies. This also gave me the opportunity to address the various Boards on a number of issues relating to these companies on an annual basis.

The Eskom coal strategy

77. On 29 November 2012, Eskom briefed me on its coal strategy aimed at junior black owned mining companies ("the Eskom coal strategy").

78. In terms of the Eskom coal strategy, Eskom indicated *inter alia*, that:-

78.1 It generated 95% of electricity in the country and 45% of the electricity used in the rest of Africa;

78.2 South Africa produced about 250mt (metric ton) of coal per annum which Eskom purchased and also managed about 130mt (metric ton) per annum for its 13 power stations with 30mt (metric ton) being transported through rail and transport;

78.3 Eskom had large influence with about 6 (six) mining companies supplying about 60mt (metric ton) of coal per annum to it;

78.4 About 35mt (metric ton) per annum was supplied primarily by junior miners;

78.5 The construction of Medupi and Kusile power stations was expected to increase Eskom's coal requirements by about 33mt (metric ton) per annum;

78.6 For the next 40 years, Eskom's overall coal requirements would be about 4 100mt (metric ton) of which only about 2 000mt (metric ton) was secured thus leaving a gap of about 2 100mt (metric ton) and that shortages of about 15mt (metric ton) per annum were expected from 2015; and

78.7 Because of coal shortages existing at the time and in the future, Eskom had proposed a number of interventions such as (a) the consolidation of the coal market into four established miners (b) development of the Waterberg Coalfield and (c) an increased drive towards transforming the industry by increasing the number of black owned junior miners through a number of interventions contained in the strategy.

79. A copy of the Eskom coal strategy is annexed hereto as "FA13". Although as far as I am aware, no secrecy or classification has been attached to the Eskom coal strategy and it may well have been overtaken by events, I believe that the said strategy may contain Eskom's confidential information which may be harmful to it if made public and thus I believe that it would be prudent for the

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Commission to first confirm with Eskom that the Eskom coal strategy may be made public by the Commission.

80. As the DPE, we were of the view that Alexkor should explore the possibility of benefiting from the Eskom coal strategy in order to diversify its business operations as opposed to only focusing on diamond mining whilst this had proven to be unsuccessful since Alexkor had reported its first net operating profit in the amount of R84.2 million since 2006 [being the first in 5 (five) years] in the financial year ended March 2011. The future of Alexkor as a diamond mining company was also not looking good and the auditors had expressed their concern abouts its prospects as a going concern.

81. In page 8 of its annual report of 2011 annexed hereto as "FA14" ("the 2011 Alexkor's annual report") besides reporting the net operating profit in the amount of R84.2 million Rand as aforesaid, the chairperson of Alexkor, Mr RT Muzariri stated the following regarding Alexkor's future outlook:

> *"The Alexkor Board in the past year reviewed its strategic position and decided to pursue a new growth path through prospective acquisitions as well as potential joint ventures in new and brownfields diamond mining initiatives. This will be done independently of the PSJV.*

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These changes in strategic direction as well as the establishment of the PSJV have both required Alexkor to significantly restructure its management structures which should result in increased focus on the respective business units. Alexkor with the advent of the PSJV has become a "new business" and requires significant funding from the shareholder and commercial sources in order to viably pursue the opportunities for expansion being presented to it. Alexkor will explore these new business opportunities independently of the RMC and the Alexkor RMC JV. This will enable the Alexkor RMC JV to focus on returning Alexkor's former land and marine mining operations to sustainable profitability over the estimated life of mine of at least the next 20 years.

As part of its new mandate Alexkor will be able to explore opportunities outside the Alexander Bay area, and indeed will be able to explore opportunities in the rest of South Africa and beyond the borders of South Africa. The aim of the new strategic intent is to establish sustainable new mining activities under Alexkor that will enable Alexkor to extinguish its

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historical liabilities and more importantly to enable Alexkor to contribute significantly to South Africa's economic growth and job creation objectives. With the actions taken by the Board in the past few years, I am confident that Alexkor is strong to face the challenges and take advantage of the opportunities that lie ahead. Similarly, I strongly believe that our prudent actions since 2007 have provided a platform that will allow the RVC to gain economic advantage from the PSJV operations in the years ahead.

The Board and Management welcome this challenge to establish Alexkor as a significant role player in the diamond mining industry in Southern Africa. The challenges ahead will require decisive leadership to establish Alexkor as a nimble and sustainable industry player. Our shareholder has been most supportive and responsive in this formative period and this augurs well for Alexkor's future success.

I wish to thank the Board for their continued support and critical thinking in guiding Alexkor on

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its new path.

A special word of thanks goes to former Minister of Public Enterprises Barbara Hogan for her support during her tenure and warm welcome to the Honourable Minister Malusi Gigaba and Honourable Deputy Minister Benedict Martins. I express deep gratitude to them and their team at the Department of Public Enterprises for their guidance and support.

82. The process undertaken by the new Board of Alexkor to develop a long-term sustainable strategy was informed by:-

82.1 the Government's position on mining, as stated above;

82.2 the Eskom coal strategy in mind, as stated above; and

82.3 a need for Alexkor to diversify for its future prospects.

83. The long-term sustainable strategy was also aimed at supporting the decision of the ruling party, African National Congress and Government to establish a new state-owned mining company. Our intention as the DPE was both to support this Government policy, with the aim eventually of allowing Alexkor to be merged with the new state-owned mining company, as well as in the

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meantime to diversify the operations of Alexkor, given the difficult capital investments required in oceanic diamond mining and the dwindling operations and revenues of Alexkor at the time. Alexkor was competing with De Beers, which had large capital investments and advanced equipment to mine diamonds in the sea even during windy days. Alexkor was unable to operate on windy days, when the ocean was turbulent, and some of its land was under land-claims. It was thus necessary to repurpose the Alexkor and try to improve its operations and revenues.

84. Alexkor's source of revenue was only its interest of 51% in the profits of PSJV. As already stated, its annual report indicated that its future outlook did not look good. It had to diversify and look at other new business opportunities and not only the 51% profits in the PSJV.

85. As already indicated, the intention of the sustainable long-term strategy was for Alexkor to diversify its business operations, explore coal mining and benefit from the Eskom coal strategy. The vision was for Alexkor to eventually be one of the biggest suppliers of coal to Eskom either before or after merging with the envisaged state mining company. If I was "*a Gupta associate*" as alleged by Mr Craythorne and supported by Mr Bishop, I would not have supported the sustainable long-term strategy because one of the Gupta companies is said to have supplied coal to Eskom. Why would I support the long-term sustainable strategy if one of its consequence would be to make Alexkor a competitor to

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coal miners and suppliers to Eskom, including the Gupta company which is said to have supplied coal to Eskom?

86. In my second address at the 2012 annual general meeting, I had indicated to the new Board *inter alia*, that the long-term sustainable strategy would require robust engagement with key stakeholders in order to properly define the future role of Alexkor.

87. It is apposite to mention that as the DPE, we had worked hard on supporting Alexkor with a view to see it succeed beyond diamond mining, this strategy was brilliant in my view and it is sad that Alexkor had not implemented it as envisaged. Having the 51% interest in the PSJV as the sole source of revenue for Alexkor was simply not working and was unsustainable. The Eskom coal strategy which was brilliant in my view and was expected to create the much needed additional source of revenue for Alexkor.

88. On 7 December 2012 and in order to demonstrate my support and belief in the Eskom coal strategy, I addressed a dinner session with the established coal mining houses in Johannesburg about the Eskom coal strategy with a view to explore possibilities of forging partnerships in order to leverage Eskom's future coal requirements, while fulfilling the need to meet sustainable development imperatives. I highlighted amongst others, the support for the Eskom coal strategy and the transformation of the industry through increased black ownership of coal miners.

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89. A copy of my aforementioned address is annexed hereto as "FA15".

90. The diversification and the Eskom coal strategy had nothing to do with the Guptas and I reject any allegation that these were made for the purposes of the alleged capture of Alexkor or "*Gupta-Zuma interests*". The said strategies were not based on any ulterior motive or for nefarious reasons. These strategies were recommended in good faith and were made public. The fact that certain people such as the people who are said to be associated with the Guptas engaged Alexkor relating to these strategies after I had made them public cannot be my fault or that of the DPE team for having recommended these strategies and thereafter made them public.

THE APPOINTMENTS OF SSI AND REGIMENTS CAPITAL

91. I have already dealt with the three factors which Mr Bishop says he used in concluding that I assisted in the capture of Alexkor. The remaining factor is the award of a tender in circumstances where there is a clear conflict of interest and he says that this was evident in the appointment of Regiments Capital and SSI[21]. I now proceed to deal with the appointments of SSI and Regiments Capital in order to demonstrate that there is no merit to Mr Bishop's allegations in so far as he seeks to implicate me or use this as a factor in the conclusion that he made.

[21] Paragraph 23.4 of Mr Bishop's statement

92. According to Mr Bishop's statement, certain correspondence was exchanged during 2013 and 2014 between Alexkor and Regiments Capital relating to the appointment of Regiments Capital by Alexkor.

93. I was not a party to the said correspondence and was not aware of it. I was not aware that Regiments Capital was seeking to be appointed as a service provider. I also did not play any role in the appointment of Regiments Capital by Alexkor. This whole process was attended to by Alexkor without reference to me.

94. According to Mr Bishop, SSI submitted a tender to the PSJV on 25 November 2014[22]. Mr Bishop further states that the said tender was conditionally awarded to SSI on 17 December 2014[23] and approved by the Board on 27 February 2015[24]. All of this occurred after my tenure and I played no role in the award of the tender by Alexkor to SSI. In any event, that process fell within the exclusive remit of management of the PSJV and Alexkor.

95. As a Minister, I was far away from the tenders in my own Department being the DPE, and even much more in the State-Owned Companies. I cannot be held liable for people pursuing tenders in the State-Owned Companies, regardless of the fact that I had or may have appointed the Chairman of the Board or the Chief Executive Officer of the said State-Owned Company. This is deeply

[22] Paragraph 74 of Mr Bishop's statement
[23] Paragraph 76 of Mr Bishop's statement
[24] Paragraph 77 of Mr Bishop's statement

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flawed as it flouts all legal procedures for pursuing tenders in Government or State-Owned Companies, and places responsibility on executive authorities who are not part of the tender or procurement processes.

96. I knew nothing about the SSI tender and did not play any role in it. As already mentioned, I had left the Ministry when the SSI tender was adjudicated and awarded.

CONCLUSION

97. Although I have already said this point in my response to the statement of Mr Craythorne's statement, it bears repeating that the current state of Alexkor as read from the evidence of Mr Craythorne and Mr Bishop is sad for Alexkor and the people of Namaqualand. The 2007 Court Order was aimed at benefiting the people of Namaqualand and some of the obligations of Alexkor were being fulfilled before and during my tenure. For example, the school and hospital had already been handed over to the relevant departments of the province of the Northern Cape.

98. Throughout my tenure, myself and the DPE team took various decisions relating to Alexkor and I stand by these decisions. These decisions were taken in good faith with no ulterior motive. It may be that some of the decision were not executed by Alexkor as had been envisaged (e.g The investigation into and the implementation of the diversification and the Eskom coal strategy) but the point of the matter is that these were good decisions and intended to create additional

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revenue for Alexkor which did not have a good future positive outlook at the time, as had been stated in the various reports which been received by the DPE, including the annual reports as already mentioned.

99. The fact that Alexkor, after my tenure, failed to properly implement these decisions, such as the diversification and the Eskom strategy, cannot be attributed to me. It was made clear to Alexkor that the diversification strategy required (a) assessments and investigation based on detailed business and mining plans and (b) robust engagements with key stakeholders. This was not a strategy that was expected to be implemented overnight but after through investigation and consultations with stakeholders.

100. Mr Bishop has supported Mr Craythorne in making serious but baseless allegations against me. These allegations are spurious and not based on facts. Mr Bishop has also labelled me as one of the Gupta associates responsible for the state capture. These are serious allegations which not only I should be afforded an opportunity to respond to through this statement but I also believe that it would be in the interest of the Commission for me to be granted leave to cross examine Mr Bishop.

101. I therefore humbly apply for leave to cross examine Mr Bishop at a time convenient to the Commission.

102. In the premises, I dispute that I assisted in the alleged capture of Alexkor.

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103. To the extent that there may be any information which I may have omitted from this statement, I am happy to furnish such information as may be required by the Commission through a supplementary affidavit. I am also happy to attend at the Commission in order to answer questions which the Commission and/or the Chairperson may have for me relating to Alexkor.

DEPONENT

THUS SIGNED AND SWORN TO before me at MORNINGSIDE on this the 17th day of JANUARY 2020 by the deponent who acknowledges that the deponent knows and understands the contents of this affidavit; that it is the truth to the best of the deponent's knowledge and belief and that the deponent has no objection to taking the prescribed oath and regards the same as binding on the deponent's conscience and the administration of the oath complied with the Regulations contained in Government Gazette No. R1258 of 21 July 1972, as amended.

COMMISSIONER OF OATHS

EX OFFICIO:
FULL NAMES:
PHYSICAL ADDRESS:
DESIGNATION:

Mthunzi Mashaba
Commissioner Of Oaths
(Ex Officio)
Practising Attorney
4 Costwold Hill, Woodburn Road, Morningside
PO Box 653243, Benmore 2010
Tel: 011 073 1777 Fax: 086 519 5961

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SEQ 05/2021-063

"FA1"

IN THE JUDICIAL COMMISSION OF INQUIRY INTO THE ALLEGATIONS OF STATE CAPTURE, CORRUPTION AND FRAUD IN THE PUBLIC SECTOR INCLUDING ORGANS OF STATE, HELD AT BRAAMFONTEIN, JOHANNESBURG ("the Commission")

GIGABA, MALUSI KNOWLEDGE NKANYEZI — Applicant

CONFIRMATORY AFFIDAVIT

I, the undersigned,

TIRHANI REGINALD TSHABALALA

do hereby declare under oath as follows:

1. THE DEPONENT

I am:

1.1 a male duly enrolled legal practitioner, practising as an attorney, conveyancer and notary public of the High Court of South Africa, practicing for my own account under name and style, Tshabalala Attorneys, Notaries and Conveyancers at First Floor, 3 Gwen Lane, Sandton, Johannesburg; and

1.2 the attorney of record for Mr Malusi Gigaba in this matter.

2. KNOWLEDGE OF FACTS

The facts herein contained, unless indicated to the contrary, fall within my own personal knowledge, and are both true and correct.

3. CONFIRMATION OF THE STATEMENT OF RESPONSE

I have read the statement of response of Mr Malusi Gigaba to which this affidavit is annexed and confirm the contents therein in so far as reference is made to me.

DEPONENT

THUS SIGNED AND SWORN TO before me at MORNINGSIDE on this the 17TH day of JANUARY 2021 by the deponent who acknowledges that he knows and understands the contents of this affidavit; that it is the truth to the best of his knowledge and belief and that he has no objection to taking the prescribed oath and regards the same as binding on his conscience and the administration of the oath complied with the Regulations contained in Government Gazette No. R1258 of 21 July 1972, as amended.

COMMISSIONER OF OATHS

EX OFFICIO:
FULL NAMES:
PHYSICAL ADDRESS:
DESIGNATION:

Mthunzi Mashaba
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(Ex Officio)
Practising Attorney
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PO Box 653243, Benmore 2010
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"FA2"

Reginald Tshabalala

From: Secretary <Secretary@commissionsc.org.za> on behalf of Secretary
Sent: Sunday, 03 January 2021 13:50
To: Reginald Tshabalala; nkanyezi.gigaba@gmail.com
Cc: Secretary
Subject: Bishop//Rule 3.3//Gigaba M
Attachments: Bishop Rule 3.3 Gigaba Mr Malusi.pdf

Dear Sir/Madam

Please find the attached Rule 3.3 Notice in respect of Mr Bishop's evidence for your attention.

Annexure A and B referred to in the Rule 3.3 Notice will be available to download via the secure WeTransfer link https://we.tl/t-yBdLoQQB3y .Please email a selected cell number to the Secretary (Secretary@commissionsc.org.za) to which the WeTransfer link password will be SMS'ed to you. The WeTransfer link expires 31 January 2021.

Please note that the Commission is required to comply with all COVID-19 Regulations. Please advise the Secretariat 48 hours in advance at Secretary@commissionsc.org.za if you elect to attend. Protocols, procedures and arrangements in place at the hearing venue will then be communicated to you.

Kindly acknowledge receipt hereof and contact the Secretariat regarding any queries that you may have.

Yours faithfully,

Secretariat
COMMISSION OF INQUIRY INTO STATE CAPTURE
Hillside House, 2nd Floor, 17 Empire Road, Parktown,
Johannesburg, 2193, Gauteng South Africa,
Email: Secretary@commissionsc.org.za
Website: www.sastatecapture.org.za

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"FA3"

Kim Slaffa

From: Reginald Tshabalala
Sent: Wednesday, 30 December 2020 19:37
To: 'Secretary'
Cc: 'Secretary'; 'Yolanda Silindane'; 'Kim Slaffa'
Subject: RE: Notice of Hearing date : Craythorne, J Dekker, P Bishop

Dear Sir/Madam,

I acknowledge receipt of your e-mail below.

I have only received a rule 3.3 notice in respect of the allegations of Mr. Craythorne in so far as he seeks to implicate my client, former Minister Gigaba and have responded to the said rule 3.3 notice on Tuesday, 24 November 2020. Your notice of the date of the hearing refers to the evidence by Mr. Craythorne, Mr. J Dekker and Mr. P Bishop. I have not received any rule 3.3 notice relating to the intended evidence of Mr. J Bekker and Mr. P Bishop.

I take it that Mr. J Bekker and Mr. P Bishop are not expected to give evidence relating to or which may implicate my client?

Yours Faithfully,

TSHABALALA

Reginald Tshabalala
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Kindly be advised that our offices will close on Friday, 18 December 2020 and reopen on Monday, 11 January 2021.

Important Notice: Please note that we will never change our bank account details by email. We urge you to contact our office to verify banking details prior to making any payments or deposits.

This e-mail is being sent from Tshabalala Attorneys, Notaries & Conveyancers, and is intended for the addressee named above. Any unauthorised use or inception of this e-mail is illegal. The e-mail message or its attachments may contain confidential or privileged information and may not be copied, forwarded or disclosed to any unauthorised person. If you are not the named addressee (or person responsible for forwarding the e-mail to the addressee) please notify us immediately via return e-mail and destroy the copy you have received. Save for *bona fide* law firm matters, Tshabalala Attorneys, Notaries & Conveyancers accept no responsibility for the opinions of the content in this e-mail or its attachments.

From: Secretary <Secretary@commissionsc.org.za>
Sent: Wednesday, 30 December 2020 14:12
To: Reginald Tshabalala <reginald@tshabalala.com>

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SEQ 05/2021-067

"FA4"

public enterprises
Department:
Public Enterprises
REPUBLIC OF SOUTH AFRICA

DECISION MEMORANDUM

TO : MR. MALUSI GIGABA

MINISTER

FROM : MS. MATSIETSI MOKHOLO

DDG: LEGAL AND GOVERNANCE

FILE REF : 18/1/15

IDMS REF : 144774

SUBJECT : APPOINTMENT OF NON-EXECUTIVE DIRECTORS TO THE ALEXKOR BOARD

DATE : 06 JUNE 2012

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1. PURPOSE

The memorandum seeks to:

1.1 Brief the Minister on the current composition of the Alexkor Board of Directors;

1.2 Request the Minister to retire four (4) Alexkor Board members;

1.3 Request Minister to approve the appointment of the proposed list of candidates as Non-Executive Directors to the Alexkor Board; and

1.4 If in agreement with the proposed candidates, Minister is requested to sign the attached Cabinet Memorandum requesting Cabinet to approve the appointment of seven (7) new Non-executive Directors, one of whom will be the new Chairperson of the Board. The memorandum will be submitted to Cabinet's Economic Sector, Employment and Infrastructure Development Committee (ESEID), scheduled for 20 June 2012, with anticipated approval by Cabinet on 27 June 2012.

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APPOINTMENT OF NON-EXECUTIVE DIRECTORS TO THE ALEXKOR BOARD

2. SUMMARY

2.1 The current Alexkor Board consists of six (6) Directors. These include one (1) Executive Director namely Mr Berno Lategan (Acting Chief Executive Officer), who is *ex officio* member and five (5) Non-Executive Directors. Alexkor's Memorandum of Incorporation ("MOI") provide for a minimum of six (6) Directors and a maximum of ten (10) on the Board. At the 2011 Alexkor AGM, the current Non-Executive Directors were re-appointed to the Board of Alexkor subject to finalisation of the Board review by the Minister.

2.2 Should the Minister concur with the Department's recommendations, the Department has prepared the enclosed Cabinet Memorandum requesting Cabinet's approval for the appointment of seven (7) new Non- Executive Directors with the re-appointment of one Non-Executive Director. There is one Executive Director, namely the Acting Chief Executive Officer, in an ex officio capacity. The new board will be mandated to fill vacant position of the Chief Executive Officer as soon as the board is appointed.

3. ANALYSIS AND FINDINGS

3.1 **Alexkor's Strategic Intent** as formulated and shared with the Board at the 2011 Annual General Meeting is mainly geared towards ensuring that Alexkor operates on a commercially viable basis, enabling it to address its obligations and liabilities, and to contribute towards the socio-economic upliftment of the regions in which it operates. The redirection of Alexkor's strategy is as follows:

i. Alexkor's key role is the exploitation of diamond resources on a commercially viable basis and to contribute towards the socio-economic upliftment of the regions in which it operates;

ii. Alexkor shall endeavor to seek opportunities to procure new mining ventures to secure new revenue streams and ensure its future growth. Alexkor is encouraged in this regard to seek to enter into beneficial joint venture arrangements;

iii. Alexkor shall explore opportunities for downstream beneficiation to contribute to the creation of new jobs, development of requisite skills, investment in research and development, economic growth, sustainable development and cost-effective support for the broader policies of government; and

iv. Alexkor must pursue financial recovery and stability based on achieving profitability targets and reducing costs whilst exploring strategies that will ensure the company's long term viability, enabling it to effectively address its environmental rehabilitation and other liabilities whilst contributing to the socio- economic development of the region.

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APPOINTMENT OF NON-EXECUTIVE DIRECTORS TO THE ALEXKOR BOARD

3.2 Alexkor has the following **obligations and liabilities**:

i. Environmental rehabilitation liability at Alexander Bay mine: **R256.7m** [part of Deed of Settlement obligations (clause 9.3)];
ii. Payment to Richtersveld Property Holding Company to secure Alexkor's right of occupation of the transferred residential properties for a period of 10 years: **R45m** [part of Deed of Settlement obligations (clause 7.7)];
iii. Post retirement medical aid liability: **R58.4m**

3.3 Procuring new mining ventures and exploring opportunities for downstream beneficiation will require assessments based on detailed business and mining plans. Mineral exploration and development typically goes through the following stages:

i. **Prospecting and Exploration**. Prospecting and exploration for minerals begins with research to select target areas for exploration and taking samples from areas that look like they might have minerals.
ii. **Discovery and Advanced Exploration**. Discovery and advanced exploration happens when something of value is actually found. At this stage, higher impact activities such as further ground geophysics, channel sampling, trenching and drilling, generally take place. This work is usually conducted on a mineral claim or lease.
iii. **Development/Construction**. Development/construction is next if, based on economics (is an area or deposit worth mining), and if shareholders approve, a company decides to go ahead with the project. During this stage the company raises money in order to begin construction and develop a mine. This is the most expensive phase of the mining cycle.
iv. **Operation and Production**. Operation and production is the actual mining, milling, and processing of the mineral. The length of time a mine is in production (the mine life) depends on the amount (reserves) and quality (grade) of the mineral and whether the operation is still profitable.
v. **Reclamation**. Reclamation of a site and protection of the environment starts at the beginning of the project. All existing and new mines must have closure and reclamation plans and are required to set aside in a trust, the total estimated reclamation costs. The goal is to protect the environment right from the beginning, to make sure the site is as productive as possible and safe when the mine closes.

3.4 Mine development is based on making rapid evaluation decisions at different stages of projects based on limited and uncertain data. The challenge is exacerbated by having to distil technical complexity into a financial model that is usually designed to produce only one or two key indicators, e.g. net present value (NPV), internal rate of return (IRR). Mining is a complex

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environment with many sources of uncertainty ranging from sampling to economics. In order to optimise investment decision-making, an appropriately structured evaluation framework must be utilised. Valuation across the whole lifecycle of a mine from exploration and discovery, through development, to operation and closure to put an accurate value on a mining project will be required. An evaluation framework should be designed to encapsulate and integrate the complexity across the evaluation cycle, ie sampling, resource estimation, mine planning and treatment, and financial and economic modelling. This complexity is diverse and ranges from sampling support, scale effects to understanding the impact of variability, uncertainty and flexibility on operational efficiency and economic viability, time and capital constraints, to arrive at the investment decision. As these opportunities will invariably require funding, it will be important to explore different funding mechanisms and sources available for the new mining ventures so as not to depend entirely on the fiscus to fund Alexkor's growth opportunities.

3.5 Pertinent to the above, **skills required** on the Alexkor Board include:

i. Geology
   - Mineral Exploration

ii. Mine Management
   - Mining
   - Mine Project Development

iii. Engineering

iv. Economics

v. Corporate Finance

vi. Business Administration
   - Business Strategy

vii. Natural Resource and Environmental Regulatory Compliance

viii. Legal

ix. Risk Management

x. Human Resource Management and Labour Relations

3.6 In so far as the Board's ability to achieve the objectives of the Strategic Intent, the Department has undertaken a review of the current Alexkor Board with the view of identifying existing skills gaps to bring the Board to its full complement in terms of the Company's MOI.

APPOINTMENT OF NON-EXECUTIVE DIRECTORS TO THE ALEXKOR BOARD

OTHER CRITICAL MATTERS FOR THE NEW BOARD:

3.7 There are several critical matters that the new Board will need to address in the immediate to short-term period:

3.7.1 The **recruitment and appointment of the new Chief Executive Officer** (CEO) has been suspended so that the new Board, once in place, can commence and complete the process. In the interim, the current Chief Financial Officer, Mr Berno Lategan has been appointed as Acting CEO. It is important to induct the new Board soon after appointment so that they can familiarise themselves with the CEO Appointment Guidelines and begin the process immediately.

3.7.2 Due to the alleged legitimate expectation that her contract will be renewed upon expiry, the former CEO, Ms Khetiwe McClain, has taken the matter to the CCMA. The matter was set down for hearing but the parties agreed to a postponement to a mutually agreed date. The Alexkor Board has proposed that the matter be dealt with in one complete hearing on consecutive days and is awaiting report from the CCMA thereon. It is therefore critical that institutional memory of the Board be maintained so as to oversee the **arbitration process with the former CEO**. The Department is of the view that Dr Roger Paul be retained for this purpose, amongst others.

3.7.3 Alexkor applied for R505 million and received an **allocation of R350 million** from the fiscus. The Department met with National Treasury to discuss the funding allocation and monitoring process thereof. The letter to Acting CEO on the allocation and conditions thereof has been prepared for approval and will be dealt with in more detail in a separate memorandum. The approved allocation includes inter alia, the following conditions:

3.7.3.1 The allocation must be used to settle ALL outstanding liabilities. Alexkor must present, to the Department and National Treasury, a disbursement schedule related to the liabilities that have to be settled. The plan is to have the disbursement done in two tranches;

3.7.3.2 The allocation is not intended for investment in new opportunities, therefore there has been no allocation for new projects outside Alexander Bay;

3.7.3.3 Environmental Rehabilitation Liability is to be included in the allocation; and

3.7.3.4 Alexkor has been requested to withdraw its litigation against the Department of Rural Development and Land Restitution;

3.8 Implementation of the Deed of Settlement has seen the establishment of the Pooling and Sharing Joint Venture (PSJV) between Alexkor and the Richtersveld Community. Currently, Alexkor's only source of revenue to fund its obligations and liabilities is revenue from the 51% interest in the

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profits of the PSJV operations. No such profits or revenues are anticipated for at least 3 years. Alexkor's financial resources are currently insufficient to meet its obligations and liabilities. Hence, the Board must optimise Alexkor's strategy is to seek opportunities to procure **new mining ventures** to secure new revenue streams for future growth and sustainability..

3.9 It should be noted that Alexkor, as founder of the **Alexkor Development Fund Trust**, has failed to exercise oversight of the Trust and this has resulted in the mismanaged of the Trust by Trustees. To highlight a few concerns; the Trustees have failed to provide financial statements or recover monies owed to the Trust; certain Trustees have engaged in irregular conduct by granting themselves loans from the Trust and not repaying these loans. The new Board will need to engage with the Trustees immediately and report on the status. The Department has in the meantime intervened reported the matter to the Master of the High Court. The implication of such reporting is that if the Master is satisfied that the current Trustees are failing to perform their duties, the Master will have them removed and replaced.

3.10 While the current MOI is silent on the Chief Financial Officer ("CFO") being ex officio to the Board, the Department is of the view that the Board should consist of eight (8) Non-Executive Directors and at least two (2) Executive Directors. Efforts are underway to **amend the MOI** to include this provision as proposed in the Department's standard template MOI. However, the Department recommends that the appointment of Non-Executive Directors be prioritised as a separate matter, while discussions on the MOI are in progress.

THE NEW PROPOSED BOARD

3.11 From the current Alexkor Board, the Department is of the view that one (1) of the five (5) non-executive directors be retained as Board Member, namely Dr Roger Paul. This is to ensure continuity, institutional memory and stability to the Board. It is anticipated that Dr Roger Paul will assist the Board in dealing with the historical Deed of Settlement and other legacy issues with urgency. In addition, his skills in mining and research will assist in ensuring that the Board will continue with its fiduciary duty of, amongst other, finalising the Annual Financial Statements and the Annual Report in time for the Annual General Meeting to be held in September 2012. Dr Roger Paul was appointed in 2007 as a Non-Executive Board member and will be serving the second year of his second (3-year) term. The resume of Dr Paul is attached as **Annexure "B"**

3.12 The table below sets out the current Alexkor Board of Directors, highlighting one Non-Executive Director recommended for re-appointment.

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APPOINTMENT OF NON-EXECUTIVE DIRECTORS TO THE ALEXKOR BOARD

Table 1: Current Alexkor Board of Directors (attached as Annexure "C")

	Name	Date of first appointment	Gender	Race	Current position	Skills for Board
1.	Mr Reginald Muzariri	01 June 2007	Male	African	MD – Utho Consulting	Financial Leadership
2.	Dr Roger Paul	01 June 2007	Male	White	General Manager - Mintek	Mining Research
3.	Ms Sibongiseni Ngoma	01 September 2008	Female	African	Head of Internal Audit – IDC	Internal audit and business analysis
4.	Prof Viola Makin	01 June 2007	Female	White	Strategic Consultant	Corporate Governance and Legal
5.	Mr Claude Llwellyn Towell	01 September 2008	Male	Coloured	Attorney, Conveyance and Notary	Legal and community development
6.	Mr Berno Lategan (Acting CEO)	N/A	Male	White	CFO at Alexkor	Accountant (CA)

3.13 To strengthen the Board, the Department has identified the following candidates with the relevant skills and experience and proposes that they be appointed as new Non-Executive Directors to the Alexkor Board. All potential candidates listed hereunder were identified in consultation with the Offices of Director-General, Deputy Minister and Ministry.

- **Mr Rafique Bagus**

  Mr Bagus obtained his Masters Degree in Economics at the University of Cape Town in 1994 and amongst others, undertook research into Investment Strategies for emerging democracies at the Bradford University (UK) in 1994. He is currently the CEO of Morning Tide Investments. Prior to that, Mr Bagus was the CEO of Ehlobo Group. He has a combination of public and private sector leadership experience, focussed on driving the development of economic growth and investment in South Africa. He currently holds a directorship at Aspen Pharmacare. His experience in economics, investment and Business Leadership will add value to the Board. The Department recommends Mr Bagus as the new Non-Executive Director and Chairperson of the Alexkor Board. His resume is attached as **Annexure "D"**.

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APPOINTMENT OF NON-EXECUTIVE DIRECTORS TO THE ALEXKOR BOARD

- **Adv Jacinto Rocha**

Adv Rocha obtained BA (Hons) in Political Science and BSc (Hons) in Geology from Gustavus Adolphus College in the USA. He also holds a Graduate Diploma in Engineering (Mining) from Wits University, MBA from University of Cape Town and LLB (Law) from Unisa. Adv Rocha is an independent mineral law and policy consultant. He has 18 years experience in policy and legal research, policy and law development and implementation. Mr Rocha was admitted as an Advocate of the high court in South Africa in 2010. He currently holds nine (9) directorships. When undertaking the credit and directorship verification, the Department discovered that Adv Rocha has had two judgements and one default in payment against his name. However, his experience in mineral law will serve to strengthen the Board. His resume is attached as **Annexure "E"**.

- **Dr Nono Mohutsioa-Mathabathe**

Dr Mathabathe obtained a PhD in Education and Counseling Psychology at Southern Illinios University-Carbondale, USA in 1989. She also holds Masters in Science Education and Counseling Psychology, Diploma Programme in Labour Relations, from School of Business Leadership – Unisa. She is currently Senior Manager: Human Resources/ Affirmative Action at Telkom SA. She is currently holds directorship in Nono Makhudu & Associates (Pty) Ltd, Nono's Travel, Tourism and Events, Kelebogile-ka-Kgomotso Construction and Developers, Dyondisani Investment Holdings and Champion Diamonds (Pty) Ltd. Her experience in the human resource strategy will add value to the board. Her resume is attached as **Annexure "F"**.

- **Ms Gillian Nonhlanhla Jiyane (Chili)**

Ms Gillian Jiyane obtained her BCom (Accounting) from the University of Zululand, Post Graduate Diploma Accounting from the University of Natal and Masters in Accountancy and Taxation from the University of Natal. Ms Jiyane has experience in cost accounting, general auditing, business consulting and taxation. Ms Jiyane is a Chartered Accountant and specialises in business consulting and taxation. She currently holds directorships in PetroSA, PAMDC, Thebe Investment Corporation as the Chairperson of the Audit Committee. She is also an Audit Committee Member of the Council for Geosciences/Thebe

Tourism Group. Her experience in cost accounting and business consulting will add value to the Board. Her resume is attached as **Annexure "G"**.

- **Ms Zukiswa Ntlangula**

Ms Ntlangula obtained her B Juris in 1991 from Walter Sisulu University and her **LLB** in 1993 from the University of Kwa-Zulu Natal. She was admitted as an Attorney and Conveyancer in 1995 and 1997 respectively by Cape Law Society. She also obtained her Masters Diploma in Human Resource in 2000 and a Bachelor of Science Degree, majoring in Geology, from the University of Cape Town in 1980 and BSc. Honours – Economic Geology from the University of Cape Town in 1984. She is currently working as an Independent Consultant providing Kimberlite exploration services. Ms Ntlangula currently hold directorship in Akacia Healthcare Holdings (Pty) Ltd, Alliance Investment Holdings (Pty) Ltd, Batsumi Airport Ventures (Pty) Ltd and Emanzini Leisure Resorts (Pty) Ltd. Her skills and experience in Corporate Law and Legal Compliance will add value to the Board. Her resume is attached as **Annexure "H"**.

- **Mr Mohammed Bhabha**

Mr Bhabha obtained B. Proc in 1983 at UNISA and he is a qualified Attorney at Law. He also obtained training on Public Finance Management Act and oversight. In 2009 Mr Bhabha was seconded to the Department of Co-operative Governance and Traditional as an Advisor on legislation and policy. He currently hold directorship in South African Forestry Company Limited (SAFCOL), Evraz Highveld Steel and Vanadium Ltd – Vanchem, Ingenuity Consulting Services (Pty) Ltd, Libradox (Pty) Ltd, South African Forestry Company Ltd (SAFCOL), Tekset Community Development and Yammin Hammond Inc. His experience and skills in corporate law, policy and legislation will give strong support to the Board. His resume is attached as **Annexure "I"**.

Table 2: New nominations for appointment to the Alexkor Board

	NAME	GENDER	RACE	CURRENT EXECUTIVE POSITION	SKILL FOR BOARD
1.	Mr Rafique Bagus (Chairperson)	Male	Asian	CEO Morning Tide Investments	Economic, Investment and Business Leadership
2.	Adv Jacinto Rocha	Male	African	Mineral law and policy consultant	Mineral law and policy
3.	Ms Gillian	Female	African	Managing Partner	Accounting

APPOINTMENT OF NON-EXECUTIVE DIRECTORS TO THE ALEXKOR BOARD

NAME		GENDER	RACE	CURRENT EXECUTIVE POSITION	SKILL FOR BOARD
	Nonhlanhla Jiyane			– Chili & Co	
4.	Dr Roger Paul	Male	White	Acting CEO of Strategic Fuel Fund	Legal, mining, regulatory, policy development
5	Dr Nono Mohutsioa-Mathabathe	Female	African	Human Manager	Human Resource Strategy
6.	Ms Zukiswa Ntlangula	Female	African	Head of Risk : Absa Bank	Risk and Auditing
7.	Mr Mohammed Bhabha	Male	Asian	Advisor - DBSA	Legal

3.13 The skills profiles of the proposed candidates speak particularly to the skills gaps that currently exist within Alexkor Board. The Department is of the view that the additional Board members will strengthen the skills complement and effectiveness of the Board, and in particular Alexkor's strategy to actively seek new opportunities for revenue streams beyond the Alexander Bay and independent of the PSJV operations. The Department has already approached the proposed candidates and they have confirmed their availability to serve on the Alexkor Board. The relevant directorship and credit checks have been conducted and are attached as **Annexure "J"**.

Table 3: Full composition of the new Alexkor Board (attached as **Annexure "K"**)

NAME		GENDER	RACE	CURRENT POSITION	SKILL FOR BOARD
1.	Mr Rafique Bagus (Chairperson)	Male	Asian	CEO Morning Tide Investments	Economic, Investment and Business Leadership
2.	Mr Berno Lategan (Acting CEO)	Male	White	CFO at Alexkor	CA, Financial accounting
3.	Adv Jacinto Rocha	Male	African	Mineral law and policy consultant	Mineral law and policy
4.	Ms Gillian Nonhlanhla Jiyane	Female	African	Managing Partner – Chili & Co.	Accounting
5.	Dr Roger Paul	Male	White	Acting CEO of Strategic Fuel Fund	Legal, mining, regulatory, policy development
6	Dr Nono Mohutsioa-Mathabathe	Female	African	Human Manager	Human Resource Strategy
7.	Ms Zukiswa Ntlangula	Female	African	Head of Risk : Absa Bank	Risk and Auditing
8.	Mr Mohammed Bhabha	Male	Asian	Advisor - DBSA	Legal
9.	CFO		Vacant		

KNN

APPOINTMENT OF NON-EXECUTIVE DIRECTORS TO THE ALEXKOR BOARD

The appointment of all Non-Executive Directors will be for a period of three years, subject to annual confirmation by the Minister at the Alexkor AGM.

3.14 With these appointments, the Alexkor Board composition will consist of 50% African, 25% White, 13% Asian and 0% Coloured with 62% being male and 38% being female. It should be noted that the sector, at Board level, is highly male dominated and it has been difficult to obtain interested females with the right skills and experience and availability in their schedules to serve on the Board. However, should the new Board recommend suitable female candidates for the position of CEO and/or the CFO; it will serve to balance the gender composition on the Board. The Board will be directed to aim for this balance.

3.15 Normally, the appointment of new Board members is effective at the Alexkor AGM. However, noting that the AGM will only be in September 2012, it is proposed that the effective date for the appointments be 01 July 2012. This will allow sufficient time for the Department to prepare for the induction process of the new Board while ensuring that the current Board is able to deal with all fiduciary duties linked to the finalisation of the Annual Report and other business requirements.

4. FINANCIAL IMPLICATIONS

None for the Department, the remuneration of the Non-Executive Directors will be at the cost of Alexkor in line with the DPE Remuneration Guidelines.

5. CONSULTATION/PROJECT TEAM

Legal and Governance / Manufacturing team / Siyabonga Mahlangu

6. RECOMMENDATION

It is recommended that the Minister:

6.1 Approves the re-appointment of Dr Roger Paul for a period of three years, subject to annual confirmation by the Minister at the Annual General Meeting.

6.2 Approves the appointment of Mr Rafique Bagus as Non-Executive Director and Chairperson of the Alexkor Board for the period of three years, subject to annual confirmation by the Minister at the Annual General Meeting.

KNN

APPOINTMENT OF NON-EXECUTIVE DIRECTORS TO THE ALEXKOR BOARD

6.3 Approves the appointment of Dr Mohutsioa-Mathabathe, Ms Zukiswa Ntlangula, Ms Gillian Jiyane, Messrs Jacinto Rocha and Mohammed Bhabha as Non-Executive Directors for a period of three years, subject to annual confirmation by the Minister at the Annual General Meeting.

6.4 Approves and signs the Cabinet Memorandum for submission to the Cabinet Committee ESEID of 20 June 2012 attached hereto as **Annexure "L"**.

KNN

APPOINTMENT OF NON-EXECUTIVE DIRECTORS TO THE ALEXKOR BOARD

Memorandum prepared by:

MARTHA NTHO
DEPUTY DIRECTOR
DATE: 04/06/2012

ORCILLA RUTHNAM
CD: GOVERNANCE
DATE: 04/06/2012

REVIEWED AND SUPPORTED:

WEEKEND BANGANE
ACTING DDG:
ALEXKOR AND DENEL
DATE: 04/06/2012

MATSIETSI MOKHOLO
DDG: LEGAL AND
GOVERNANCE
DATE: 04/06/2012

MR.TSHEDISO MATONA
DIRECTOR GENERAL
DATE: 5/6/2012

RECOMMENDED / NOT RECOMMENDED / COMMENTS

MR. DIKOBE BEN MARTINS, MP
DEPUTY MINISTER
DATE: 12.06.2012

RECOMMENDED / NOT RECOMMENDED / COMMENTS

MR. MALUSI GIGABA, MP
MINISTER
DATE: 2012/06/07

APPROVED / NOT APPROVED / COMMENTS

KNN

"FA5"

public enterprises

Department:
Public Enterprises
REPUBLIC OF SOUTH AFRICA

DECISION MEMORANDUM

DEPARTMENT OF PUBLIC ENTERPRISES
SUIT 401, INFOTECH BUILDING
ARCADIA STR 1090, HATFIELD 0083
2013 -05- 27
PRIVATE BAG X15
HATFIELD 0028
DEPARTMENT OF PUBLIC ENTERPRISES

TO : **MR. MALUSI GIGABA, MP**

MINISTER

FROM : **MR. PHAHLANI MKHOMBO**

ACTING DEPUTY DIRECTOR-GENERAL: L and G

FILE REF : **10/1/2**

IDMS REF : **158038**

SUBJECT : **APPOINTMENT LETTERS OF THE ALEXKOR BOARD MEMBERS**

DATE : **16 MAY 2013**

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1. The Department has identified three (3) suitable candidates whose names were submitted through a Cabinet Memorandum to the Economic Sector, Employment and Infrastructure Development Cabinet Committee (ESEID) on 08 May 2013, seeking approval for the appointments with final approval by Cabinet of 15 May 2013. The Cabinet approved the appointment of the three (3) proposed candidates.

2. Mr Brian Grobbelaar, Ms Sindi Zilwa and Mr Donald Mkhwanazi are recommended for appointment as Non-Executive Directors to the Alexkor Board with effect from 1 June 2013. The appointment is for a period of three years, subject to annual confirmation by the Minister at the Alexkor Annual General Meeting. The Alexkor Memorandum of Incorporation (MOI) provides for a minimum of six (6) and a maximum of ten (10) Directors. The Board has a total complement of eight (8) Non-Executive Directors and one (1) Executive Director, which is the Chief Executive Officer. One vacancy remains to be filled by the appointment of the Chief Financial Officer. The new Board is herewith attached as **Annexure "A"**.

3. Accordingly, the Department has prepared the following letters for Minister's approval:

22/05/13 12hrs 22/05/13 10:28 KNN

APPOINTMENT LETTERS OF THE ALEXKOR BOARD MEMBERS

a. appointment of the new Non-Executive Directors with effect from 01 June 2013, informing them of their appointment to the Alexkor Board and requesting them to sign the acceptance forms if in agreement thereof. The letters are attached as **Annexure "B"**.

b. letter to the Chairperson of the Alexkor Board informing him of the new Board appointments. These appointments will be ratified at the AGM in September 2013. The letter is attached as **Annexure "C"**.

4. It is recommended that the Minister approves and signs the letters, if in agreement with the contents thereof.

APPOINTMENT LETTERS OF THE ALEXKOR BOARD MEMBERS

Memorandum prepared by:

MSEKELI WILLIE
ASD: GOVERNANCE
DATE: 16/05/2013

ORCILLA RUTHNAM
CD: GOVERNANCE
DATE: 16/05/2013

REVIEWED AND SUPPORTED:

PHAHLANI MKHOMBO
ACTING DDG: LG
DATE: 17/05/2013

KGATHATSO TLHAKUDI
DDG: MANUFACTURING
DATE: 20/05/2013

MR.TSHEDISO MATONA
DIRECTOR-GENERAL
DATE: 24/5/2013

RECOMMENDED / NOT RECOMMENDED / COMMENTS

MR. MALUSI GIGABA, MP
MINISTER
DATE: 2013/05/27

APPROVED / NOT APPROVED / COMMENTS

MR. BULELANI GRATITUDE MAGWANISHE, MP
DEPUTY MINISTER
DATE: 2013/05/28

NOTED / COMMENTS

KNN

NEW ALEXKOR BOARD

	NAME	GENDER	RACE	CURRENT POSITION	SKILL FOR BOARD	DATE OF APPOINTMENT
1.	Mr Rafique Bagus (Chairperson)	Male	Asian	CEO: Morning Tide Investments	Economics, Investment and Business Leadership	07 Sept 2012
2.	Mr Percy Khoza (CEO)	Male	African	CEO at Alexkor	Business operations and management, Exploration Project Management (Greenfields to Brownfields) and Mineral Resources Management	April 2013
3.	CFO **(vacant)** Mr Berno Lategan (consultant)	Male	White	CFO at Alexkor	Financial accounting	N/A
4.	Dr Yvonne Kelebogile Nono Mohutsioa-Mathabathe	Female	African	Consultant: Nono Makhudu and Associates: Change Management; Leadership and Human Resource Development	Organisational development, business strategy, HR and labour relations	07 Sept 2012
5.	Ms Zukiswa Ntlangula	Female	African	Head of Risk Management: ABSA Bank	Risk Management	07 Sept 2012
6.	Mr Mohammed Bhabha	Male	Asian	Consultant: DBSA	Legal, regulatory compliance and policy development	07 Sept 2012
7.	Dr Roger Paul	Male	White	Acting CEO: Strategic Fuel Fund	Mining, Research & Development	07 Sept 2012
8.	Brian Michael Grobbelaar	Male	Coloured	Senior Principal Mining Engineer: Anglo American Platinum	Mining, HR, Safety Health & Environment	TBC

TRANSNET-10-173
BB24.1-MKNG-CROSS-CUT-2243
SEQ 05/2021-083

9.	Mr Donald Bongani Mkhwanazi	Male	African	Strategy implementation, reputational risk, corporate governance, stakeholder management	Strategy implementation, reputational risk, corporate governance, stakeholder management	TBC
10.	Ms Sindiswa Zilwa	Female	African	CEO: Nkonki Inc	Auditing and financial management	TBC

TRANSNET-10-174

BB24.1-MKNG-CROSS-CUT-2244

SEQ 05/2021-084

"FA6"

MINISTRY
PUBLIC ENTERPRISES
REPUBLIC OF SOUTH AFRICA

Private Bag X15, Hatfield, 0028 Tel: (012) 431 1115/1150 Fax: (012) 431 1039
Private Bag X6070, CAPE TOWN, 8000 Tel: (021) 461 6376/7/469 6700 Fax: (021) 465 2981/461 1761

Mr. Brian Michael Grobbelaar
Postnet Suite 397
Private Bag X8
Northriding
2162

Tel:+27 110 701 729
Cell: +27 83 2929 031
Email: Brian.grobbelaar@angloamerican.com

Dear Mr Grobbelaar

Appointment as Non-Executive Director: Alexkor SOC Limited

I am pleased to inform you of your appointment to the Alexkor Board of Directors ("Alexkor Board") as a Non-Executive Director, with effect from 1 June 2013.

The term of appointment is three years, subject to annual review and confirmation at the Alexkor Annual General Meeting. This review will be supported by the annual evaluation of the performance of the Alexkor Board and its Committees. By accepting this appointment, you confirm that you are able to allocate sufficient time to meet the requirements of serving on the Board. An appropriate induction to Directors will be provided as soon as possible, which will include, amongst others, clarification of roles and the Shareholder's expectations.

Your fee structure will be based on the DPE-approved Remuneration Guidelines for State-Owned Companies. The fee is on a retainer basis. Additional fees will be payable for participation in other sub-committees of the Alexkor Board. These fees will be paid monthly in arrears and are subjected to an annual review.

Directors and Officers' liability insurance is maintained by Alexkor, full details of which will be made available to you by Alexkor.

KMN

Your appointment is regulated by the provisions of the Companies Act No. 71 of 2008, the Public Finance Management Act No. 1 of 1999, the Protocol on Corporate Governance in the Public Sector (currently under review) as well as the Shareholder's Compact entered into between Alexkor and Government.

I trust that the above is clear. If, however, you have any concerns regarding this appointment as outlined above, please do not hesitate to raise them with myself.

Please accept my sincere appreciation in anticipation of your commitment and contribution in steering Alexkor towards its future success.

Please confirm your acceptance hereof by signing the attached statement and returning a copy to myself.

Yours sincerely

MR. MALUSI GIGABA, MP
MINISTER OF PUBLIC ENTERPRISES
DATE: 2013/05/27

KNN

SEQ 05/2021-087

public enterprises
Department:
Public Enterprises
REPUBLIC OF SOUTH AFRICA

I, Brian Michael Grobbelaar, hereby accept the appointment as Non-Executive Director to the Board of Alexkor. I undertake to observe and comply with the principles and provisions of all legislation relevant to Alexkor, the Protocol on Corporate Governance (currently under review) and the provisions of the Shareholder's Compact to be entered into between Alexkor and Government, to devote sufficient time for the execution of my responsibilities, to utilize my skills to the best of my ability, to initiate, develop and implement systems or mechanisms for the effective and efficient management of Alexkor, and to maintain and observe the highest standards of integrity and probity in the execution of my responsibilities.

Mr. Brian Michael Grobbelaar

28/05/2013
Date:

KMN

"FA7"

MINISTRY
PUBLIC ENTERPRISES
REPUBLIC OF SOUTH AFRICA

Private Bag X15, Hatfield, 0028 Tel: (012) 431 1118/1150 Fax: (012) 431 1039
Private Bag X9079, CAPE TOWN, 8000 Tel: (021) 461 6378/7/488 8780 Fax: (021) 465 2361/461 1741

Ms. Sindiswa Zilwa
P.O. Box 1503
Saxonwold
2132

Tel: 011 517 3034
Fax: 086 618 5319
Email: sindiz@nkonki.com

Dear Ms Zilwa

Appointment as Non-Executive Director: Alexkor SOC Limited

I am pleased to inform you of your appointment to the Alexkor Board of Directors ("Alexkor Board") as a Non-Executive Director, with effect from 1 June 2013.

The term of appointment is three years, subject to annual review and confirmation at the Alexkor Annual General Meeting. This review will be supported by the annual evaluation of the performance of the Alexkor Board and its Committees. By accepting this appointment, you confirm that you are able to allocate sufficient time to meet the requirements of serving on the Board. An appropriate induction to Directors will be provided as soon as possible, which will include, amongst others, clarification of roles and the Shareholder's expectations.

Your fee structure will be based on the DPE-approved Remuneration Guidelines for State-Owned Companies. The fee is on a retainer basis. Additional fees will be payable for participation in other sub-committees of the Alexkor Board. These fees will be paid monthly in arrears and are subjected to an annual review.

Directors and Officers' liability insurance is maintained by Alexkor, full details of which will be made available to you by Alexkor.

Your appointment is regulated by the provisions of the Companies Act No. 71 of 2008, the Public Finance Management Act No. 1 of 1999, the Protocol on Corporate Governance in the Public Sector (currently under review) as well as the Shareholder's Compact entered into between Alexkor and Government.

I trust that the above is clear. If, however, you have any concerns regarding this appointment as outlined above, please do not hesitate to raise them with myself.

Please accept my sincere appreciation in anticipation of your commitment and contribution in steering Alexkor towards its future success.

Please confirm your acceptance hereof by signing the attached statement and returning a copy to myself.

Yours sincerely

MR. MALUSI GIGABA, MP
MINISTER OF PUBLIC ENTERPRISES
DATE: 2013/05/27

KMN

public enterprises
Department:
Public Enterprises
REPUBLIC OF SOUTH AFRICA

I, _____, hereby accept the appointment as Non-Executive Director to the Board of Alexkor. I undertake to observe and comply with the principles and provisions of all legislation relevant to Alexkor, the Protocol on Corporate Governance (currently under review) and the provisions of the Shareholder Compact to be entered into between Alexkor and Government, to devote sufficient time for the execution of my responsibilities, to utilize my skills to the best of my ability, to initiate, develop and implement systems or mechanisms for the effective and efficient management of Alexkor, and to maintain and observe the highest standards of integrity and probity in the execution of my responsibilities.

Ms. Sindiswa Zilwa

Date:

KNW

"FA8"

MINISTRY
PUBLIC ENTERPRISES
REPUBLIC OF SOUTH AFRICA

Private Bag X16, Hatfield, 0028 Tel: (012) 431 1118/1150 Fax: (012) 431 1039
Private Bag X9078, CAPE TOWN, 8000 Tel: (021) 461 6378/7/469 6780 Fax: (021) 465 2381/461 1741

Mr. Donald Mkhwanazi
9 Lindsay Drive
Glen Ashley
Durban North
4051

Tel: 031 266 9937
Fax: 031 266 6054
Email: ddbm@mweb.co.za

Dear Mr Mkhwanazi

Appointment as Non-Executive Director: Alexkor SOC Limited

I am pleased to inform you of your appointment to the Alexkor Board of Directors ("Alexkor Board") as a Non-Executive Director, with effect from 1 June 2013.

The term of appointment is three years, subject to annual review and confirmation at the Alexkor Annual General Meeting. This review will be supported by the annual evaluation of the performance of the Alexkor Board and its Committees. By accepting this appointment, you confirm that you are able to allocate sufficient time to meet the requirements of serving on the Board. An appropriate induction to Directors will be provided as soon as possible, which will include, amongst others, clarification of roles and the Shareholder's expectations.

Your fee structure will be based on the DPE-approved Remuneration Guidelines for State-Owned Companies. The fee is on a retainer basis. Additional fees will be payable for participation in other sub-committees of the Alexkor Board. These fees will be paid monthly in arrears and are subjected to an annual review.
Directors and Officers' liability insurance is maintained by Alexkor, full details of which will be made available to you by Alexkor.

KMN

Your appointment is regulated by the provisions of the Companies Act No. 71 of 2008, the Public Finance Management Act No. 1 of 1999, the Protocol on Corporate Governance in the Public Sector (currently under review) as well as the Shareholder's Compact entered into between Alexkor and Government.

I trust that the above is clear. If, however, you have any concerns regarding this appointment as outlined above, please do not hesitate to raise them with myself.

Please accept my sincere appreciation in anticipation of your commitment and contribution in steering Alexkor towards its future success.

Please confirm your acceptance hereof by signing the attached statement and returning a copy to myself.

Yours sincerely

MR. MALUSI GIGABA, MP
MINISTER OF PUBLIC ENTERPRISES
DATE: 2013/05/27

SEQ 05/2021-093

public enterprises
Department:
Public Enterprises
REPUBLIC OF SOUTH AFRICA

I, _____, hereby accept the appointment as Non-Executive Director to the Board of Alexkor. I undertake to observe and comply with the principles and provisions of all legislation relevant to Alexkor, the Protocol on Corporate Governance (currently under review) and the provisions of the Shareholder Compact to be entered into between Alexkor and Government, to devote sufficient time for the execution of my responsibilities, to utilize my skills to the best of my ability, to initiate, develop and implement systems or mechanisms for the effective and efficient management of Alexkor, and to maintain and observe the highest standards of integrity and probity in the execution of my responsibilities.

_____ _____

Mr. Donald Mkhwanazi **Date:**

"FA8.1"

public enterprises

Department:
Public Enterprises
REPUBLIC OF SOUTH AFRICA

DECISION MEMORANDUM

DEPARTMENT OF PUBLIC ENTERPRISES
SUIT 401, INFOTECH BUILDING
ARCADIA STR 1090, HATFIELD 0083
2013 -11- 05
PRIVATE BAG X15
HATFIELD 0028
DEPARTMENT OF PUBLIC ENTERPRISES

TO : MR. MALUSI GIGABA, MP

MINISTER

FROM : MS MATSIETSI MOKHOLO

DEPUTY DIRECTOR GENERAL: L & G

FILE REF : 15/2/5/2

IDMS REF : 162462

SUBJECT : ROTATION OF THE NON-EXECUTIVE DIRECTOR OF ALEXKOR SOC LIMITED

DATE : 15 OCTOBER 2013

---

1. PURPOSE

1.1 To brief the Minister about the contents of the letter and 2012/13 Board Evaluation Report received from the Chairperson of Alexkor SOC Limited (Alexkor) requesting assistance on matters concerning the Board of Directors of Alexkor attached herewith as **Annexure "A"**.

1.2 To request the Minister to approve the Notice of a Shareholder's Meeting and the resolution for the rotation of Dr Mohutsioa-Mathabathe as Non-Executive Director of Alexkor Board. In this regard a letter to the Chairperson with the notice and the letter to Dr Mohutsioa-Mathabathe are attached herewith as **Annexure "B"**.

2. SUMMARY

2.1 On 06 August 2013, the Department received a letter from the Chairperson of Alexkor calling for Minister's guidance with regard to concerns raised around the performance

30/10/13
10:52
KNN

of one Non-Executive Director (NED), Dr Mohutsioa-Mathabathe. The letter indicates that said NED's attitude and behaviour towards various members of the Board is confrontational and not in the spirit of cooperation in the achievement of Alexkor's mandate. It is noted that the Chairperson and other structures of the Board have separately tried to resolve the issue but the behaviour continues.

2.2 The 2012/13 Board Evaluation Report (the Report) was attached to the Chairperson's letter as evidence that there is a serious concern with regard to Dr Mohutsioa-Mathabathe's performance and relationship with other Directors on the Board. The Report, in particular, the peer review section, further highlight the behavioural challenges of the NED and that it negatively impacts on the focus of both the Board and Management to the business of the company.

2.3 In considering the matter, the Department recommends that the Minister intervene by rotating Dr Mohutsioa-Mathabathe as Non-Executive Director of Alexkor Board in terms of clause 13.10.1 of Alexkor's Memorandum of Incorporation (MOI) and section 71(1)(2) of the Companies Act No 71 of 2008 ("Companies Act"). The MOI entitles Minister, within the prescripts of the Companies Act, to remove any Director of the company by way of an Ordinary Resolution adopted at a Shareholder's Meeting.

2.4 Section 71 of the Act provides that the Shareholder must give notice of the meeting and the resolution to the Director and allow the Director an opportunity to make a presentation in the meeting where the resolution will be adopted.

3. ANALYSIS AND FINDINGS

3.1. Principle 2.22 of the King III Report states that "the evaluation of the Board, its Committees and individual directors should be performed every year". An effective Board evaluation exercise helps the Board, committees and individual directors to perform to their optimum capabilities.

3.2. Board evaluations should have a strategic focus linked to the Board development strategy and the company against predetermined targets in the Shareholder's Compact. This alignment allows the Board to maximise its contribution in ensuring the future success of the State Owned Company ("SOC").

3.3. The Alexkor 2013 Report consists of an evaluation against the Compact and the Board Charter, structured questionnaires, an evaluation of the Chairperson as well as a peer

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evaluation. The Board's ability to understand and deliver on the business strategy was also assessed.

3.4. Given that the Alexkor Board is completely new with the exception of the Dr Roger Paul, the overall ratings and assessment of the Board was positive. In brief, the Report highlights the following:

3.4.1. Board members confirmed that fully understands the business strategy, have meaningfully contributed to its design and have provided leadership in its implementation.

3.4.2. The Board is happy with the support of the Shareholder with respect to driving the implementation of the strategy.

3.4.3. In terms of role clarity, the Board members agree that the role of the Board is clear and that they provide sufficient leadership to Management as articulated in the Compact, the Board Charter as well as the Board Sub-Committee Charters.

3.4.4. The Board is effectively managing the financial health of the company to ensure growth and sustainability.

3.4.5. Board and committee structures have clearly defined scope and mandate to ensure effective decision-making to achieve objectives and targets that have been set.

3.4.6. In terms of Board effectiveness and delivery, the Board needs to continually look at ways to strengthen team cohesion and interpersonal relations through the services of an external facilitator.

3.4.7. Key issues that the Board is focussed on include succession planning, business performance, corporate governance and strategic planning.

3.4.8. Overall, the Chairperson received over 90% positive feedback from peers. He is seen as having a commendable tenure at Alexkor in turning the PSJV operations business around and improving relations with the communities. Board members are overall, happy with the leadership of the Chairperson in maintaining ethics, sound values and stringent commitment to the achievement of Alexkor's objectives.

3.5. With particular reference to the peer evaluation section of the Report, individual Directors were assessed on four dimensions, namely; dedication, preparedness, team work and contribution. The consolidated scores indicate the following of each Board member:

3.5.1. Mr Percy Khoza was rated at 85% positive rating

KNN

3.5.2. Dr Nono Mohutsioa-Mathabathe was rated at 45% positive rating.

3.5.3. Ms Zuki Ntlangula was rated at 95% positive rating.

3.5.4. Mr Mohammed Bhabha was rated at 95% positive rating.

3.5.5. Dr Roger Paul was rated at 100% positive rating

3.6. In terms of the main concerns raised in the peer evaluation, the majority of the Board members have indicated that Dr Mohutsioa-Mathabathe is not familiar with the overall short- and long-term objectives of the company, does not communicate appropriately and positively, and does not demonstrate a willingness to forego individual opinion for the team.

3.7. The Board members are also of the view that Dr Mohutsioa-Mathabathe does not actively contribute to the discussions through thoughtful observations and opinions and industry relevant knowledge and experiences.

3.8. The Chairperson as well as individual members of the Board have attempted to address the challenges but the behaviour continues. Individual members of the Board have expressed concern about her destructive behaviour and inflammatory language, as a result, two separate meetings have been held with Dr Mohutsioa-Mathabathe, one with the Chairperson of the Board and another with two members of the Social & Ethics and Human Resource Committee.

3.9. On 6 August 2013 the Board also submitted additional information where Mr Mohammed Bhabha (Mr Bhabha), a member of the Social, Ethics and Human Resource Committee and Ms Zuki Ntlangula (in her capacity as the Chairperson of SE&HR Committee) met with Dr Mohutsioa Mathabathe to discuss communication protocols. In this meeting, it was pointed out to Dr Mohutsioa Mathabathe that, whilst her right to express an alternative view was not in question, the form, content and processes she adopted were a concern. The notes of the meeting held on 5 August 2013 are attached herewith as **Annexure "C"**.

3.10. Section 71 of the Companies Act deals with the removal of directors. It states that despite anything to the contrary in the Memorandum of Incorporation (MOI) or any agreement between the company and director, a director may be removed by an ordinary resolution adopted at a Shareholders meeting. Before considering the resolution, the Shareholder must do the following:

ROTATION OF THE NON-EXECUTIVE DIRECTOR OF ALEXKOR SOC LIMITED

- Give the director a notice of the meeting and the proposed resolution. The notice and the resolution must be equivalent to that which is Shareholder is entitled to receive; and
- Afford the director the opportunity to make a presentation in person or through a representative, to the meeting before a resolution is voted upon.

3.11. Clause 13.10.1 of the Alexkor MOI empowers the Shareholder to remove any Director of the company by way of an Ordinary Resolution adopted at a Shareholder's Meeting. The Department advises that in order to comply with section 71 of the Companies Act; the process as outlined below be followed in rotating Dr Mohutsioa Mathabathe as the Non-Executive Director of Alexkor.

- The Minister, as Shareholder Representative of Government, convenes a Shareholders' meeting to rotate Dr Mohutsioa Mathabathe as the Non-Executive Director of the Board.
- The Minister gives Dr Mohutsioa Mathabathe a notice of the meeting and the proposed resolution to rotate her as the Non-Executive Director.
- In the same notice, inform Dr Mohutsioa Mathabathe that she will be afforded an opportunity to make presentations in the meeting,
- At the Shareholder's Meeting, the Minister affords Dr Mohutsioa Mathabathe an opportunity to make representations and then advise her of the final resolution taken by the Shareholder.

3.12. The Department has prepared the notice and resolution for the Shareholder's Meeting, including a letter to the Chairperson of the Board informing the Board of the matter to be voted on. It is important that the notice be given in terms of the required 15 business days in terms of Clause 13.10.2.1 of the MOI.

3.13. It must be noted that section 71(9) of the Companies Act provides that nothing in section 71 deprives a director removed from office in terms of that section of any right that such person may have at common law or otherwise to claim damages or other compensation for:

- Loss of office as a director; or
- Loss of any other office as a consequence of being removed as a director.

3.14. Accordingly, to succeed in a claim for damages or compensation as contemplated in section 71(9), a director aggrieved by the decision to remove him or her from office must show that:

KNN

- She was removed in terms of section 71;
- That her removal from office was wrongful; and
- That she suffered damages or stands to be compensated for the wrongful removal.

3.15. Should the Minister agree to rotate Dr Mohutsioa Mathabathe as Non-Executive Director of Alexkor, the new Board will consist of seven (7) NEDs and two (2) EDs. The Alexkor Board has a vacancy of one (1) director which will be filled at a later stage with a black female with finance skills in the mining sector. The new proposed Board is attached herewith as **Annexure "D".**

3.16. The Department is satisfied with the recommended approach and assures the Minister that in the event Dr Mohutsioa Mathabathe challenges the validity of the rotation, the Department will be able to defend the Minister's decision successfully.

4. FINANCIAL IMPLICATIONS

There is no financial implication emanating from this memorandum.

5. CONSULTATION/PROJECT TEAM

None

6. RECOMMENDATIONS

It is recommended that the Minister:

6.1. Notes the content of this memorandum.

6.2. Signs the letter to the Chairperson of Alexkor; and

6.3. Signs the Notice of a Shareholder's Meeting to Dr Mohutsioa Mathabathe.

ROTATION OF THE NON-EXECUTIVE DIRECTOR OF ALEXKOR SOC LIMITED

Memorandum prepared by:

SIBONGILE MHLONGO	ORCILLA RUTHNAM
INTERN:GOVERNANCE	CD: GOVERNANCE
DATE: 10/10/2013	DATE: 15/10/2013

REVIEWED AND SUPPORTED:

MATSIETSI MOKHOLO	KGATHATSO TLHAKUDI
DDG: L & G	DDG: MANUFACTURING
DATE: 24/10/2013	DATE: 28/10/2013

MR.TSHEDISO MATONA DIRECTOR-GENERAL DATE: 1/11/2013	RECOMMENDED / NOT RECOMMENDED / COMMENTS I note there's no suggestion of the option of engaging the Director in a talk to get her to resign voluntarily, like it was done before, eg Transnet ?
MR. MALUSI GIGABA, MP MINISTER DATE: 2013/11/27	APPROVED / NOT APPROVED / COMMENTS I think I need to hear Dr. Mathabathe's side of the story before I take this step. It's only fair.
MR. BULELANI GRATITUDE MAGWANISHE, MP DEPUTY MINISTER DATE: 2013/11/27	NOTED / COMMENTS

KNN

"FA9"

APPLICABLE ACTS

Alexkor is regulated by the following principal Acts, ordinances and various other legislation:

- Alexkor Limited Act (No. 116 of 1992)
- Basic Conditions of Employment Act (No. 75 of 1997)
- Companies Act (No. 61 of 1973)
- Constitution of SA Act (No. 108 of 1996)
- Diamond Act (No. 56 of 1986)
- Environmental Laws Rationalisation Act (No. 51 of 1997)
- Labour Relations Act (No. 66 of 1995)
- Mine Health and Safety Act (No. 29 of 1996)
- Minerals Act (No. 50 of 1991)
- Minerals and Petroleum Resources Development Act (No. 28 of 2002)
- National Environmental Management Act (No. 107 of 1998)
- Occupational Health and Safety Act (No. 85 of 1993)
- Public Audit Act (No. 24 of 2004)
- Public Finance Management Act (No. 1 of 1999)
- Restitution of Land Rights Act (No. 22 of 1994)
- Value Added Tax Act (No. 89 of 1991)

STATEMENT OF COMMITMENT

Alexkor is fully committed and makes every endeavour to observe and comply with all legislation, regulations and policies pertaining to it.

CORPORATE INFORMATION

Alexkor Limited Head office

160 Jan Smuts Avenue
2nd Floor
South Wing
Rosebank
2121
Tel: 011 788 8809/19/22
Fax: 011 788 8869

Alexkor Limited
Private Bag X5
Oranje Road
Alexander Bay 8290
Tel: 027 831 1330
Fax: 027 831 1194

Company Secretary

Thapelo Kgari
http://www.alexkor.co.za
160 Jan Smuts Avenue
2nd Floor, South Wing
Rosebank
Tel: 011 788 8809
Fax: 011 788 8869

External Auditors

PricewaterhouseCoopers Inc.
2 Eglin Road
Sunninghill 2157
Tel: 011 797 4000
http://www.pwc.com/za
Contact: Michal Kotze

Internal Auditors

Sizwe Ntsaluba
PO Box 68272
Highveld Park
Centurion
0169

or

Highgrove Office Park
50 Cnr Oak Road and Tegel Avenue
Highveld
Techno Park
Centurion
0157
Tel: 012 665 9540
Fax: 012 665 5460
Contact: Samuel Kabushi

"FA10"

SECTION SEVEN

ADMINISTRATION INFORMATION

REGISTERED NAME:
Alexkor SOC Limited

REGISTRATION NUMBER:
1992/006368/30

WEBSITE ADDRESS:
http://www.alexkor.co.za

EXTERNAL AUDITORS:

Nexia SAB&T

119 Witch-Hazel Avenue
Highveld Technopark
Centurion
0157
Tel: 012 682 8800
Contact: Sophy Kleovoulou

INTERNAL AUDITORS:

Outsourced Risk and Compliance Assessment

Wanderers Office Park
42 Corlett drive
Illovo
2196
Tel: 010 590 7977
Contact: Maryka Oosthuizen

BANKERS:

Investec Bank Limited
Grayston Drive
Sandton

First Rand Bank Limited
(First National and Rand
Merchant Bank Limited)
Fredman Drive
Sandton

Nedbank Limited
Main Street
Johannesburg

COMPANY SECRETARY:
Adv Zarina Kellerman;
FA ARB; ACI ARB (UK); CEDR Acc (UK)

ALEXKOR SOC LTD HEAD OFFICE

PHYSICAL AND POSTAL ADDRESS:
No 8A Jellicoe Avenue,
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Johannesburg

CONTACT DETAILS:
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Fax number:
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leratos@alexkor.co.za

ALEXKOR RMC JV OPERATIONAL OFFICE

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Fax Number:
027 831 1910
Email Address:
marianak@alexkor.co.za

"FA11"

Shareholder's Address by Mr. Malusi Gigaba MP, Minister of Public Enterprises, on the occasion of the AGM of the Board of Directors of ALEXKOR in Johannesburg on 07th September 2012

I would like to take the opportunity to welcome the Honourable Deputy Minister BG Magwanishe on the occasion of his first ALEXKOR AGM.

I have taken the liberty to delegate ALEXKOR to him as part of his delegations and I am pleased that he has hit the ground running, acquainting himself with its business, and am happy that the Board itself has cooperated with him in the discharge of his responsibilities.

The recent unrest in the platinum and gold mining sectors albeit still sporadic is a major concern and will certainly harm the growth of the industry as it could have far reaching implications for the local mining industry, particularly the diamond sector.

Should these disruptions be prolonged and widespread, the first casualty could be the investment appetite in the mining sector and therefore jobs.

Government is working hard to return the sector to normality.

Chairperson, the year 2011/12 was a challenging year for ALEXKOR as the company had to manage the transitional period leading to the implementation of 2007 Deed of Settlement which stipulated the establishment of the Pooling and Sharing Joint Venture ("PSJV"), which proved to one of the most complicated exercises for the company.

The challenges were also compounded by lack of coherent thinking at the level of the community whilst the Board had to contend with losing the assert base of the company and manage the new stakeholder in the business.

The establishment of PSJV has left ALEXKOR with no operations of its own and the company has effectively been rendered to play an agency role providing the expertise necessary for the success of the PSJV and to offer socio-economic services to the community of Ritchersveld.

Even under those circumstances, the company has done commendable work in executing its obligations under the Deed of Settlement.

ALEXKOR's support for the community of Namaqualand is an integral part of Government strategy for the region.

However I remain concerned that for a while, the company has been operating without a permanent executive management structure, including the CEO and CFO, which implied that institutional memory and knowledge management have considerably been eroded over the past few years.

This problem manifests itself in the quality of reports from ALEXKOR to the Department which have left much to be desired, reflecting, to a large extent, the capacity challenges confronting the company to which I have alluded.

KNW

The closing of the reporting gaps needs to be prioritised.

I am pleased to note that the dispute between the company and the previous CEO was resolved without any further financial implications on the company which allows the company to proceed with the process of recruiting the new CEO without any further delay.

Chairperson, the Board 'took its eyes off the ball' in its oversight role over the ALEXKOR Development Foundation which resulted in unpleasant allegations of mismanagement of resources which were destined to assist the underprivileged in the Namaqualand region..

The oversight over the Foundation has been sloppy for some time and this matter is now in front of the Portfolio Committee on Mineral Resources.

At the same time, the Department has approached the Master of the High Court for assistance to enforce compliance.

We all have an obligation to ensure that the Foundation sticks to its original mandate which is to bring the much needed development for the people of Namaqualand.

The existence of the PSJV nullifies the role of the Foundation because they will both be focusing on socio-economic objectives.

Accordingly, the Board should consider this matter once the response from the Master of High Court has been received.

The upgrading of the Alexander Bay Township and its facilities has seen numerous slippages.

Whilst acknowledging the geological and water licence challenges that the project was faced with, however I insist that it is imperative that the upgrading work is completed before November 2012 or else we will all run the risk of losing credibility with the beneficiaries of the project.

As the Shareholder we are going to set up a monitoring mechanism to track the developments.

Chairperson, I had also indicated that the Board should explore different funding mechanisms and sources available for the new mining ventures so as not to depend entirely on the fiscus to fund ALEXKOR's growth opportunities.

The allocation of R350 million from the fiscus is the last of its kind for ALEXKOR.

The board should not focus on the fact that the company had initially applied for R550 million but only received R350 million; rather it should have focused on ensuring that the conditions attached to the funds were met and that the Board provided the Shareholder with its proposal on how you intended to navigate the company through this challenge.

It has taken this Board 6 months to revise the Corporate Plan without a valid explanation.

KNW

Whilst it is understandable that the company has capacity challenges, the Department has been placed in an unenviable position as it could not make any disbursements until all conditions were met.

The National Treasury frowns at such situations where allocated resources are not distributed because of non-fulfilment of set conditions.

It was disappointing to learn that the last act of duty of the previous Deputy Minister, the Honourable Ben Martins MP, was to respond to a letter from this Board making allegations and threats on matters that were outside of his control, the Department's control and the Board's mandate.

The communication could have been handled differently and better.

Chairperson, the Department is of the view that the future of ALEXKOR as a stand-alone diamond mining company lies beyond the area of Alexander Bay.

However, there is a need to develop a long-term strategy for this company which has to look at the Government's position on mining and exploitation of strategic minerals.

Robust engagements will need to take place with all stakeholders in order properly and the better to define the future role of ALEXKOR in mining.

Chairperson, I do acknowledge the external auditors' report and concerns raised mainly on the long-term going concern issues.

However, I am also concerned with ALEXKOR's performance against set targets in the Shareholder's Compact as the company failed to achieve 34% of the set targets, particularly those relating to the social and labour plans and skills development.

The Deed of Settlement expects ALEXKOR to deliver on the socio-economic aspects and we must not flinch from our commitment and obligation to support the people of Namaqualand.

Chairperson, notwithstanding the above, I note that the PSJV posted a higher than budgeted for profit despite the unfavourable market conditions.

The slump in the global economy has placed pressure on the diamond industry, forcing sellers to grapple with sliding demand, rising costs and declining prices.

Despite all these, including the lack of new discoveries limiting supply, the fundamentals for the diamond industry remain strong, with demand growing strongly.

I would like to encourage the PSJV and ALEXKOR to continue with the fine work and to ensure that these profits are sustainable and should be ploughed back to fund further explorations for the benefit of the PSJV.

KNW

The relationship between the Board of ALEXKOR and that of the PSJV should be improved further.

It is our legal and moral obligation to ensure that the PSJV is sustainable into the future and can stand on its own.

We must not renege on our responsibility of ensuring that the Government of South Africa and the Community of Richtersveld have an asset they both can benefit from.

Chairperson, the positive performance of the PSJV in its debut year is a good omen for the future of the venture.

We must keep this momentum.

I thank you.

"FA12"

Address by Mr. Malusi Gigaba MP, Minister of Public Enterprises, to the New Board of Directors of ALEXKOR in Tshwane on 07th September 2012

Ladies and gentlemen,

I would like to take this opportunity to extend my congratulations on your appointment as the new Non-Executive Board of Directors of ALEXKOR, the State diamond mining company.

ALEXKOR is not a conventional mining company, it has a dual mandate and the dualistic nature of the company is reflected in its business ethos and the relationship with the community.

As the new Board you will be expected to sustain this business practise.

Legislative Framework

The legislative framework that establishes the company does not restrict the company to diamond mining. But a prudent strategic decision that was taken then was focusing only on diamond mining.

The Memorandum of Incorporation ("the MOI"), flowing from the ALEXKOR Act of 1992, describes the main business and object of Alexkor as "***The main business of the company is to carry on alluvial diggings, mining, agriculture, trade, industrial establishment, town development, and economic and socio-economic development***".. Over the years Alexkor has became the lifeline of Alexander Bay community. It provided the economic opportunities through access to labour market, educational and health care facilities. As such there was an integrated human settlement and economic development, through Alexkor and normally this type of development is often drive or under the auspices of local government.

The successful land claim instituted by the Ritchersveld Community and the subsequent Deed of Settlement, which was made an Order of Court in 2007, saw Alexkor's structure and business model undergoing a fundamental change. The company was ordered to transfer significant assets to the community, such as the lucrative agricultural businesses and land mining rights.

The company had to pool its marine mining rights with those of the community to form a joint venture, the Pooling and Sharing Joint Venture ("PSJV"). Effectively, the company was left with no operations of its own and was instructed to provide the expertise necessary for the success of the Joint Venture.

The company was also ordered to upgrade the township, hospitals, school and other amenities. To this end, the company has done a well in executing these obligations. The school and hospital have already been handed over to the relevant Northern Cape Government departments. Alexkor's support for the community of Namaqualand remains an integral part of Government socio-economic development strategy for the region.

Alexkor's commitment to the Ritchersveld Community has not ceased with the 2007 Deed of Settlement order. The court order requires Alexkor to lease back some of the buildings it has been ordered to upgrade, to do rehabilitation of the mined areas and continue to offer some socio-economic support to the community. The later is expected to take more than 10years.

The above synopsis gives you a glimpse of state of affairs as well implicitly indicating to you the quality of leadership that will be expected from you as the new Board.

South Africa Mining Industry and Prospects

South African economy has been built on the backfoot of extractive industry which is coal, diamond, gold, platinum etc. According to independent evaluation of South Africa's mineral wealth is estimated at US$2.5 trillion, making the country the wealthiest mining jurisdiction amongst the emerging markets. However, we are simply not exploiting our pre-eminent position. A considerable amount of our mineral resources are exported as raw material or only partially processed. This makes our economy a global price taker with no influence on the global prices.

As response to Government is taking decisive steps to ensure that the mineral resources are fully exploited to the benefit of the people of this country. The following mineral resources are deemed strategic for the country, namely:

- Coal in order to secure our energy needs into the future
- Uranium for our future nuclear energy needs into the future
- Iron ore for our steel requirements as we expand our infrastructure requirements
- Platinum to expand our beneficiation of the resource and Manganese

Government is putting in place mechanisms in place to support the mining sector to enhance growth. The Department of Mineral Resources in 2011 published the country's mineral beneficiation strategy. The strategy seeks to advance development through the optimisation of linkages in the mineral value chain, facilitation of economic diversification, job creation and industrialisation. To boost the mining sector further, Transnet will be spending over R100 billion to upgrade commodity rail and port infrastructure as part of its overall R300 billion seven-year infrastructure programme. The investment in infrastructure creates an opportunity for the development of minerals process centre.

I therefore wish to challenge the Board to undertake a rigorous exercise to explore opportunities beyond diamond mining, in line with the grand plan of Government to further grow the mining sector.

I would also like to draw your attention to the current unrest in the platinum and gold mining sectors albeit still sporadic. These incidences could have far reaching implications for the local mining industry. Government is working hard to return the sector to normality and to re-establish both investor and public confidence.

Immediate Priorities

You will realise that there is a lot of expectation that the Shareholder, the people of Namaqualand and the industry in general has from you. In due course, the Department will undertake a board induction and orientation to provide a more detailed view of the challenges facing Alexkor.

One of the immediate tasks of the Board includes:

1. To put in earnest a process to capacitate the executive management structure of the company. For a while now, the company has been operating without a permanent executive management. The first priority is for the Board to attend to the recruitment and appointment of a new CEO. The Department has issued guidelines for the appointment the details of which will be shared with you. I expect the Board to consider appropriate skills and qualification, demographic representation and gender balance when providing me with a recommendation of three appointable candidates. To ensure stability, the Board must put in place appropriate human resource initiatives to minimise turnover at the executive management level. It is a concern that the company is managed by consultants, albeit, through the leadership and dedication of the Acting CEO, who is also the CFO. Capacity must be strengthened to protect the institutional memory, compliance to governance principles and sustainability of the company.

2. Linked to this, the Board has to ensure that reporting to the Shareholder is in full adherence of all applicable legislation and guidelines. It is essential to ensure that compliance is not compromised. The quality of reports from Alexkor must be improved on to promote transparency and proper monitoring in line with accepted practice.

3. Consolidate your representation on the Board of the PSJV. As mentioned earlier on, your leadership is vital to the success of the PSJV. The Deputy Minister and I undertake to provide support in developing a positive relationship with the Community in order to make sure that the management of the PSJV is strong enough to develop the joint venture into a long term sustainable one. The Community has had its own challenges; however, I would like the Board to maintain open communications between yourself and the members of the CPA representation on the joint board. The PSJV has made profit in its maiden year of operation in 2012. I urge you to assist in sustaining this momentum.

4. In your interaction with the Board of PSJV, I would like you to scrutinise the business model that is currently applied in the PSJV, particular the mining component of the business, so as to ensure that it supports the objectives of the joint venture.

Pay more attention to Alexkor Development Foundation. The oversight of this Foundation has been less than satisfactory. This has resulted in unpleasant allegations of mismanagement of resources which were destined to assist the underprivileged in the Namaqualand region. This matter is now in before the Portfolio Committee on Mineral Resources. The Department has referred the matter to the Master of the High Court. This means the matter is now of public interest.

5. The Board is responsible for the original mandate of the Foundation which was intended to bring much needed development for the people of Namaqualand. Furthermore, I wish to request the Board to investigate the possibility of renegotiating the terms and conditions of Alexkor's obligations to the Foundation. The Deed of Settlement and the formation of the PSJV altered fundamentally the structure and size of Alexkor and therefore the company's obligations need to be reviewed to take into account these factors.
6. Our view as the Department is that the existence of PSJV and the Development Foundation is duplication and poor allocation of resources. I would like the Board to dispense with this matter and report back to me.

7. As the Board, you are going to have to ensure the fulfilment of all outstanding obligations linked to the 2007 Deed of Settlement, even though a number of conditions have been met. However, the Board must ensure that the upgrading of the Alexander Bay Township and its facilities is completed and handed over to the relevant authorities before end of November 2012 . The delays in the finalisation of the township upgrade work is becoming unacceptable. The rehabilitation obligations of the mined areas have to be accelerated. Funding for this purpose has been made available.

8. Alexkor, is expected to play a increasing role in the pursuance of socio-economic objectives such as employment creation, skills development, youth participation, transformation and poverty alleviation as envisaged in the New Growth Path. In addition, you will note that the socio-economic targets are currently informed by the Social and Labour Plan developed by the Department of Mineral Resources.

Long term view

The company has been exploring the option of acquiring new mining assets outside of Alexander Bay. The Board should ensure proper due diligence and care is exercised in this process and that the Deputy Minister and I are kept abreast of potential and feasibility of these acquisitions

The Department is of view that the future of Alexkor, as an independent mining company lies beyond the Alexander Bay region. However, there is a need to develop a longer term sustainable strategy for the Company The strategy has to be guided by Government's position on mining and exploitation of strategic minerals. This will require robust engagements with key stakeholders in

KNN

order to properly define the future role of Alexkor. As a collective, the Board must not shy away of formulating your own views in this regard.

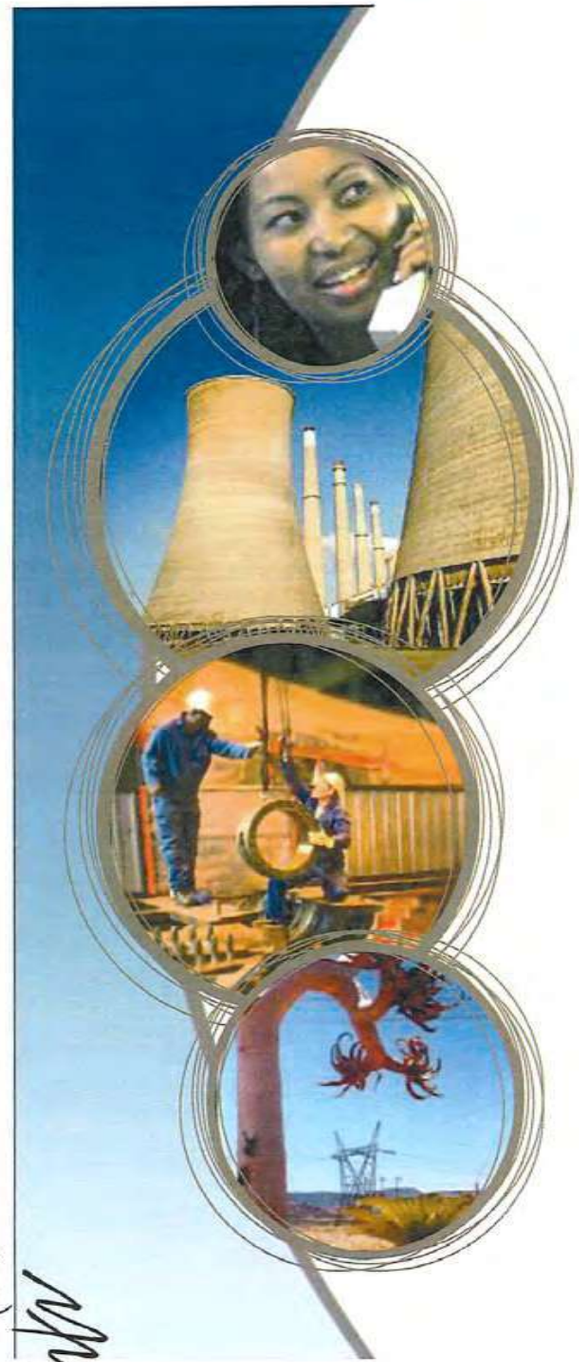
In conclusion

I am confident that the new Board will be up to the task to execute its fiduciary duties and to support the PSJV. I wish to assure you Chairperson that the Deputy Minister and I will assist you and the Board in any way possible to execute your duties. I have delegated my oversight responsibilities of Alexkor to the Deputy Minister, Mr. Magwanishe. He will play a critical role in relationship building with the communities, the Northern Cape provincial government and local authorities.

Finally, I wish you well in your new assignment in our quest to keep South Africa working, moving and growing.

I thank you

"FA13"



Briefing to the Minister on the Black Junior Mining Strategy

29 November 2012

TRANSNET-10-202

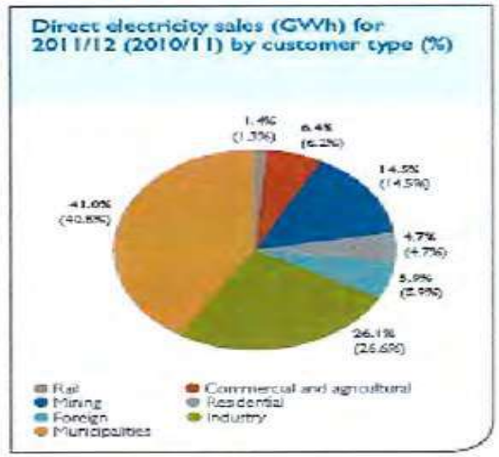
BB24.1-MKNG-CROSS-CUT-2272

SEQ 05/2021-112

Eskom is a leading utility in Africa

Fast Facts

- Eskom is South Africa's primary electricity supplier
- The company which, is wholly owned by the South African government, generates, transmits and distributes electricity



- Generates ~ 95% of the electricity used in South Africa and ~45% of the electricity used in Africa
- Annual revenue of R 114.8 Bn in FY 2012

Source: Eskom Integrated Report 2012

Eskom is currently in the midst of a capacity expansion programme

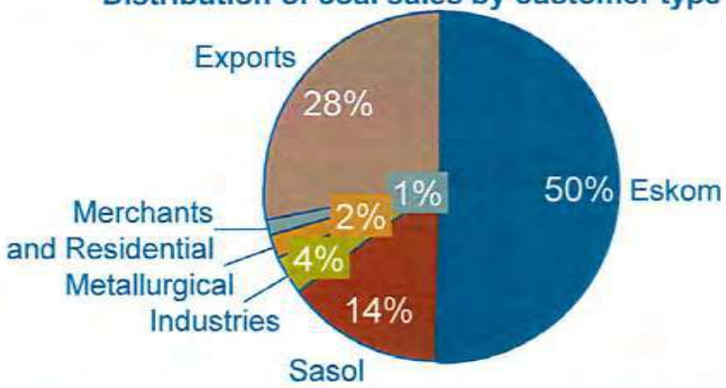
- Two coal fired power stations (Medupi & Kusile) & 1 pumped storage station (Ingula) are currently being constructed:
  - Will add 10 896 MW to the power system
  - Kusile & Medupi will be the 3rd and 4th largest coal fired plants in the world respectively
- Various clean technologies are currently being investigated to reduce emissions:
  - Flue-gas desulphurisation (FGD)
  - Underground coal gasification (UCG), which offers lower emissions than traditional coal fired plants
  - Renewables (wind, concentrated solar) will also feature in Eskom's plant mix over the next 10 years
  - Non-emitting technologies such as nuclear are also under consideration

TRANSNET-10-203
BB24.1-MKNG-CROSS-CUT-2273
SEQ 05/2021-113

Eskom's Primary Energy Division is one of South Africa's largest entities in the area of coal supply

- South Africa **produces ~ 250 Mt** of coal per annum of which Eskom **purchases and manages the supply of ~130Mt** of coal per annum for its 13 power stations

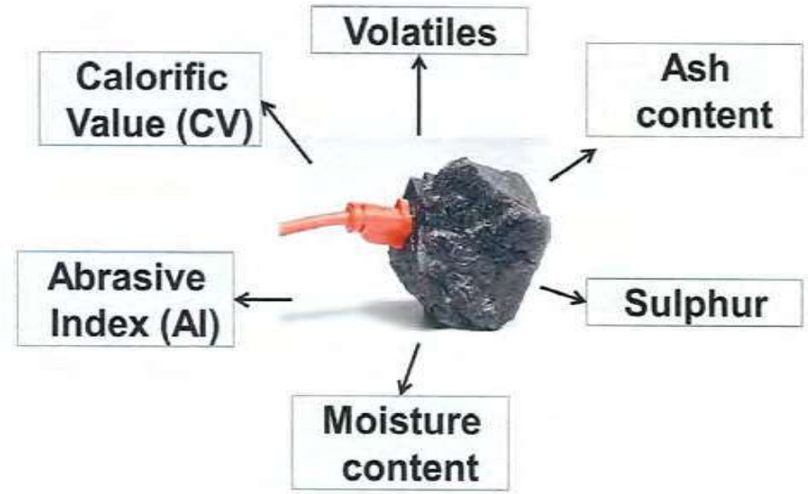
Distribution of coal sales by customer type



- Eskom exercises **influence on the cost** and operational performance at **6 cost plus mines (~60Mtpa)**
- Sources and contracts **~35Mtpa of short/medium** term coal supplies **primarily from junior miners**
- The construction of **Medupi and Kusile** will **increase** Eskom's coal requirements by **~33 Mtpa**

Source: Creamer Media's Coal Report – May 2012

- Eskom considers **six key quality parameters when purchasing coal**



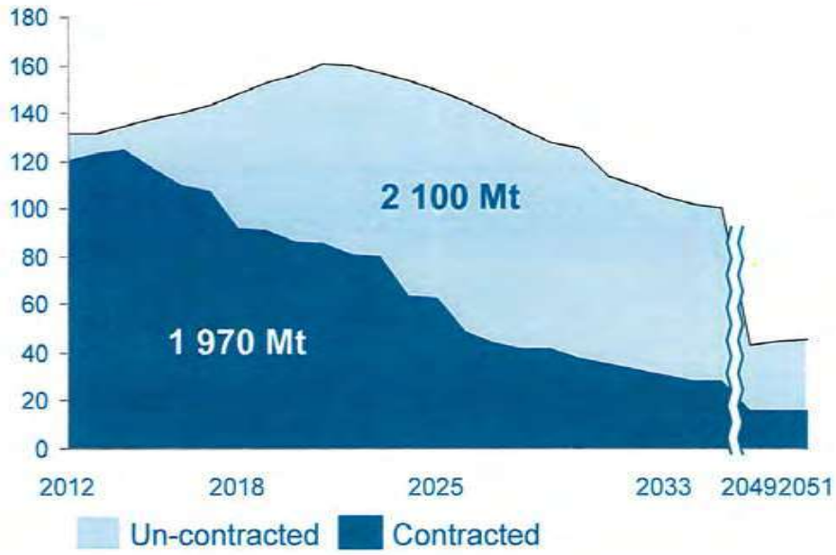
- Eskom procures and manages the logistics contracts for **~30Mtpa of coal transported by rail and road**

TRANSNET-10-204
BB24.1-MKNG-CROSS-CUT-2274
SEQ 05/2021-114

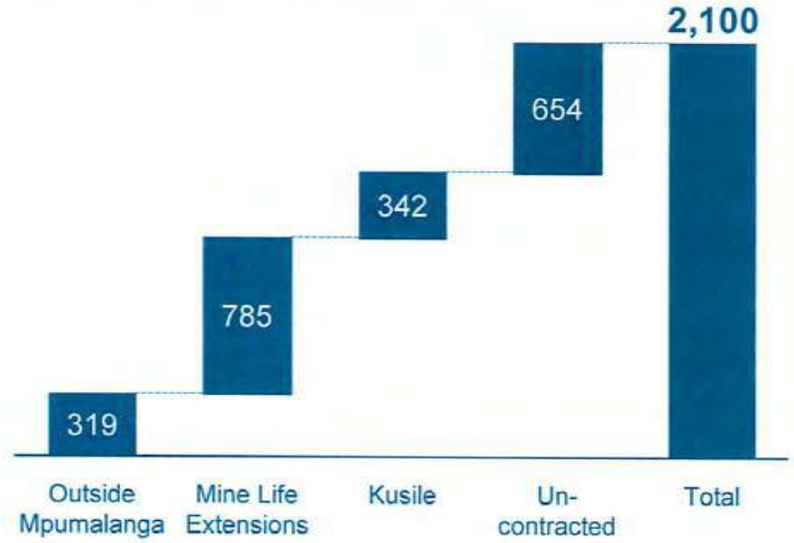
Eskom's overall requirement for coal is 4 100 Mt of which only 2 000 Mt is secured

Eskom

Eskom Coal Supply for the next 40 years



2 100 Mt un-contracted demand includes:



- Until 2051 Eskom is facing an un-contracted demand of ~ 2 100 Mt
- Shortages of >15 Mtpa already expected in 2015
- Some alternatives are being considered

Risks associated with the supply of coal

- Emerging environmental trends such as no mining allowed in wetlands
- Potential RB3 export risk
- Coal quality: Low CV and High Ash content

Any Eskom initiatives undertaken to develop the coal industry will not be at the expense of the Domestic and Export markets

TRANSNET-10-205
BB24.1-MKNG-CROSS-CUT-2275
SEQ 05/2021-115

Changes in the Coal industry through time

Eskom

	1960 – mid 1980's	Mid 1980's – 2004's	2008 - Onwards
	"Development of the electricity infrastructure"	**"Over-capacity and promotion of coal exports"**	**"Electricity and coal supply shortage"**
South African Coal Industry	• Coal production began in 1870 to supply energy to the Kimberly diamond fields; this coal was exploited from the Molteno-Indwe Coalfield in the Eastern Cape • Sanctions and limited foreign investment	• Export steam coal producers suffered a serious setback as coal prices began sliding steadily as a result plans for expansion were put on hold and some small producers had to close their mines • This resulted in excess coal in the market	• Consolidation of the coal market into 4 Established Miners • Increased demand from India and China • Increased drive towards transforming the industry • Development of the Waterberg Coalfield
Eskom's Role in Coal Industry	• Cost plus contracts were put in place to assist the development of : – Rand Coal mines – Anglo Coal mines • Eskom was the primary user of coal due to the sanctions and limited foreign investment	• Eyesizwe formation – Arnot and Matla contracts were ceded to Eyesizwe to assist with the development of black empowered entities • Conversion of 2 cost plus contracts to fixed price due to increasing international demand for coal • Development of Junior Miners: Kuyasa Mining, Mafube, Liketh Investments, Umcebo	• Increased demand for electricity led to more coal being purchased from smaller miners – resulted in 20 new contracts with junior miners • Need to increase Black ownership participation leads to the creation of a Black Junior Mining strategy • Signing of MoUs with junior miners to support development

Source: 2008– Overview Coal Supply Strategic Study; Mineral and Petroleum Resources Development Act

TRANSNET-10-206
BB24.1-MKNG-CROSS-CUT-2276
SEQ 05/2021-116

Several challenges are being encountered in coal supply in South Africa

Eskom

Mpumalanga

- Declining in situ coal qualities
  - Eskom is currently investigating various beneficiation options to address quality issues
- There are several challenges to coal mining in SA:
  - logistical constraints
  - depleting coal deposits
  - difficult mining and geological conditions
- Emerging environmental trends such as no mining allowed in wetlands could sterilise large portions of reserves
- Major investment is required to extend the lives of resources
- SA steam coal exports continue to favour the Asian market, with major demand originating from India for Eskom grade coal
- Consolidation of the coal supplier market into 4 main suppliers supplying up to 70% of Eskom's coal requirement

Waterberg

Water constraints

- Coal mines require water for mining and coal beneficiation
- Current water supplies are not sufficient to meet water requirements for new coal mines

Logistics constraints

- Adequate rail infrastructure needs to be in place to transport coal to Mpumalanga
- Current rail infrastructure only caters for 4 Mt per annum whereas Eskom's future requirement is for 20 Mt per annum

Technical constraints

- Coal extraction in the Waterberg is difficult and will require more input costs
- The inherent coal quality in the Waterberg is lower than that from Mpumalanga and therefore requires additional beneficiation
- The Waterberg has been declared an environmentally pristine area

TRANSNET-10-207
BB24.1-MKNG-CROSS-CUT-2277
SEQ 05/2021-117

Junior Mining companies face many challenges when developing mines

Funding

Junior mining companies often require capital or the capacity to raise funding to develop mines at the early exploration stage

Resource Allocation

Many junior mining companies' assets comprise of relatively small resources or previously exploited reserves with challenges such as marginal remaining reserves, old mine workings and environmental risks

Skills

Junior mining companies often struggle to secure services of competent engineers, geologists, artisans etc. This is even more so for start-up companies with little or no experience and lacking any track record. Skilled employees tend to be as risk averse as funders

Contract

Even with promising reserves, without any certainty or commitment in the form of an off take agreement, many emerging Junior Miners will perceive the risk of not obtaining a contract as too high a risk to invest in project development

TRANSNET-10-208
BB24.1-MKNG-CROSS-CUT-2278
SEQ 05/2021-118

Eskom's Approach to transforming Black Ownership in Coal Supply

Eskom

Creating an Eskom led Mine Development Fund	• Eskom to partner with various DFIs or private sector funders for the
	  • Funding and Development of Pre-feasibility studies
	  • Consolidation of resources and infrastructure
	• Eskom to establish the fund by initially working on items on a project-by-project basis and then progress funds to develop Black Junior Mining resources

Use coal trading as an option to secure coal resources and enhance transformation	• Coal trading, subject to terms and conditions, can be used to develop Black Owned companies in coal beneficiation and processing • Coal trading can also be used to assist black mining right holders to acquire the capital to establish mines
Increase Black Ownership as a means to transform the industry	• Eskom to use its purchasing leverage to empower Black Owned suppliers and increase equity stakes to 50% + 1share • Eskom to develop Black Junior Miners throughout the Waterberg by entering into MoUs with suppliers to assist with accessing funding
Utilise commercially acceptable levers to increase Black ownership	• Enter into discussions to increase Black Ownership participation by utilising various commercially acceptable levers • Enter into partnerships with Established Miners to participate in skills development of the Black Junior Miners
Consolidation of smaller Black Owned mining resources for development	• Identify Black Owned mining resources that could be consolidated into larger entities for development • Investigate synergies for the establishment of coal processing plants

TRANSNET-10-209
BB24.1-MKNG-CROSS-CUT-2279
SEQ 05/2021-119

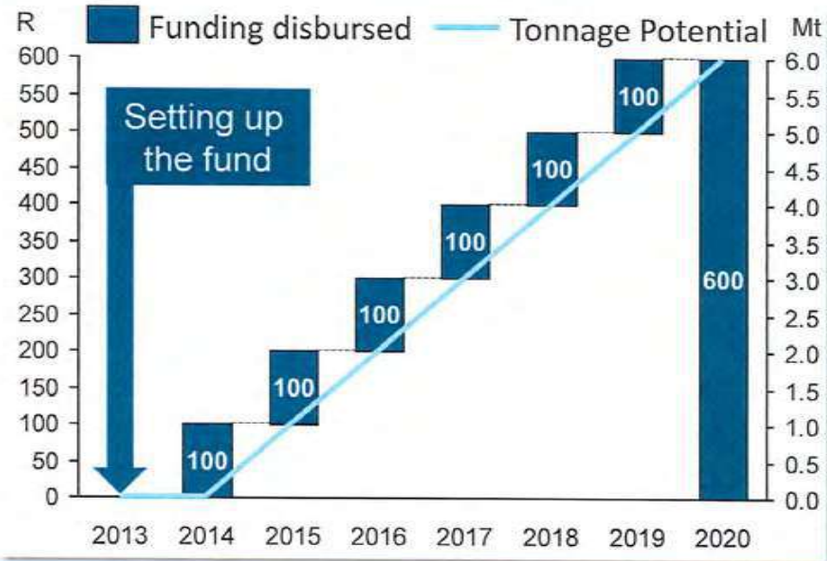
Creating an Eskom Led Mine Development Fund

Through engagement with Black Junior Miners, Funding Institutions and relevant industry stakeholders, a fund will be created to assist Black Junior Miners to develop their resources.

Develop a fund with Eskom Treasury

- Engagement with various funding institutions on relevant and accessible funding models for Black Junior Miners
- Engagement with Black Junior Miners, through a commercial process to ascertain and assess funding requirements
- Resourcing of the fund (financial and human capital)
- Implementation of the fund by end of 2013

Schematic view of the required funding



- The fund will be utilised to finance the development of resources for Eskom supply. The benefits of which may potentially commence in year two, depending on the results of the exploration programmes funded
- The start up capital requirements will be determined after the exploration results and feasibility studies are completed. This funding may be provided by DFIs, commercial banks if the projects are bankable or the Mine Development Fund, for strategic projects

TRANSNET-10-210
BB24.1-MKNG-CROSS-CUT-2280
SEQ 05/2021-120

Consolidation of Black Owned mining resources and participation of Black coal traders

Eskom

Eskom to investigate the consolidation of smaller Black Owned mining resources for development

Eskom to consider commercially viable options for the coal traders

Consolidation of Black Junior Miners

- Identify resources through direct engagement with Department of Mineral Resources and the Black Junior Mining industry
- Investigate the viability of a coal pantry, Black Owned coal processing plants and integrated logistics to enhance consolidation
- Commercial process to unfold the utilisation of Eskom's South Dunes Coal Terminal allocation at RBCT to benefit Black Owned Junior Miners. Collaboration with TFR will be pursued

Coal Traders as an option to secure coal resources and enhance transformation

- Develop a commercially acceptable mechanism to engage with coal traders as a mechanism to develop Black Owned entities who meaningfully participate in the coal supply value chain

KW

TRANSNET-10-211
BB24.1-MKNG-CROSS-CUT-2281
SEQ 05/2021-121

Increase in Black Ownership as a mechanism to transform the industry

Eskom

Enter into discussions with relevant industry participants to assist with increasing Black Ownership participation

Increase Black Ownership

- Discussions underway with the industry on commercially acceptable mechanisms to transform the industry
- Enter into discussions to transform ownership from the minimum requirements as per the Mining Charter of 26% to 50%+1 share
- Enter into partnerships with Established Miners to participate in skills development of the Black Junior Miners

Increase Black Ownership in the Waterberg

- Develop Black Junior Miners through the Waterberg by entering into MoUs with suppliers. This will assist to:
  - Address the coal shortfalls for compatible power stations in Mpumalanga
  - Create opportunities for developing the industrial sector and job creation
  - Diversify coal suppliers beyond the Established Miners

In order to secure Waterberg coal:

- Eskom will sign MoUs with Black Owned Junior Miners for the supply of coal to Mpumalanga and;
- Liaise with DWA and Transnet for the construction of a water pipeline and a rail expansion line for first priority access for Eskom

TRANSNET-10-212
BB24.1-MKNG-CROSS-CUT-2282
SEQ 05/2021-122

In Conclusion

Note: 1) Traders do not own the resources they supply from

TRANSNET-10-213
BB24.1-MKNG-CROSS-CUT-2283
SEQ 05/2021-123

Message from the Minister to the Established Miners

- Eskom has played an integral part in the progression and development of the coal industry in South Africa and specifically the advancement of the Established Miners
- Eskom aided with the development of the Established Miners in the form of cost plus contracts where Eskom took on most of the risk
- Eskom has the responsibility and wants to transform the industry by assisting Black Junior Miners with the establishment of their mines
- In order to achieve this aspiration, the DPE invites the Established Miners to collaborate and give suggestions on how they could contribute towards the achievement of Eskom and DPE's objectives
- Contribution could be in the form of financial resources, credible coal resources, skills development

TRANSNET-10-214
BB24.1-MKNG-CROSS-CUT-2284
SEQ 05/2021-124

Message from the Minister to the Junior Miners

Eskom

- Eskom wants to develop the Juniors Miners to transform the coal and limestone industries
- Junior miners face many challenges and Eskom wants to assist them to overcome these by providing opportunities in the form of development funding, technical expertise, and through advocating for policy interventions to encourage increased Black Ownership
- The DPE and Eskom will not limit intervention to only coal suitable for Eskom
  - The Eskom allocation at the SDCT will be reserved for Black Junior Miners and further collaboration with TFR will be pursued to maximise this
  - Collaboration with the Council for Geoscience will endeavour to find alternative uses for coal that is unsuitable for Eskom through this strategy
- The launch will be followed by an RFI to gather industry data, which will be used in order to determine the most appropriate intervention methods for the current industry circumstances
- The Established Miners have already been engaged, and have given their perspective and suggestions on how to take the strategy further, and how they intend to participate

TRANSNET-10-215
BB24.1-MKNG-CROSS-CUT-2285
SEQ 05/2021-125

Eskom

"FA14"

MESSAGE FROM THE NON-EXECUTIVE CHAIRMAN CONTINUED

pursue new expansion opportunities to ensure long-term sustainability.

REPORTING AND CORPORATE GOVERNANCE

Alexkor's overall reporting has improved dramatically since the last reporting period as reflected in the Auditor's report.

In addition, Alexkor has sought to adopt the recommendations of the King III Report on Corporate Governance. Much progress has been made in this regard and the Board will continue to review areas where improvement can be made in this regard.

FUTURE OUTLOOK

The Alexkor Board in the past year reviewed its strategic position and decided to pursue a new growth path through prospective acquisitions as well as potential joint ventures in new and brownfields diamond mining initiatives. This will be done independently of the PSJV.

These changes in strategic direction as well as the establishment of the PSJV have both required Alexkor to significantly restructure its management structures which should result in increased focus on the respective business units. Alexkor with the advent of the PSJV has become a "new business" and requires significant funding from the shareholder and commercial sources in order to viably pursue the opportunities for expansion being presented to it. Alexkor will explore these new business opportunities independently of the RMC and the Alexkor RMC JV. This will enable the Alexkor RMC JV to focus on returning Alexkor's former land and marine mining operations to sustainable profitability over the estimated life of mine of at least the next 20 years.

As part of its new mandate Alexkor will be able to explore opportunities outside the Alexander Bay area, and indeed will be able to explore opportunities in the rest of South Africa and beyond the borders of South Africa. The aim of the new strategic intent is to establish sustainable new mining activities under Alexkor that will enable Alexkor to extinguish its historical liabilities and more importantly to enable Alexkor to contribute significantly to South Africa's economic growth and job creation objectives. With the actions taken by the Board in the past few years, I am confident that Alexkor is strong to face the challenges and take advantage of the opportunities that lie ahead. Similarly I strongly believe that our prudent actions since 2007 have provided a platform that will allow the RVC to gain economic advantage from the PSJV operations in the years ahead.

The Board and Management welcome this challenge to establish Alexkor as a significant role player in the diamond mining industry in Southern Africa. The challenges ahead will require decisive leadership to establish Alexkor as a nimble and sustainable industry player. Our shareholder has been most supportive and responsive in this formative period and this augurs well for Alexkor's future success.

I wish to thank the Board for their continued support and critical thinking in guiding Alexkor on its new path.

A special word of thanks goes to former Minister of Public Enterprises Barbara Hogan for her support during her tenure and warm welcome to the Honourable Minister Malusi Gigaba and Honourable Deputy Minister Benedict Martins. I express deep gratitude to them and their team at the Department of Public Enterprises for their guidance and support.

R T Muzariri
Chairman

"FA15"

Remarks by Mr. Malusi Gigaba MP, Minister of Public Enterprises, at a closed dinner with established coal mining houses at Saxon Hotel in Johannesburg on the 07th December 2012

The overarching message for the conversation with the established coal mining house: will focus on the journey of collaborations and opportunities that collectively have been undertaken to tackle the challenges that continue to confront various stakeholders in the mining industry.

The objective of the conversation is to inform the coal mining house of the Eskom's Emerging Miners strategy and its elements, Explore possibilities for forging partnership, in order to leverage Eskom's future coal requirements while fulfilling the need to meet sustainable development imperatives because mining is the critical economic sector.

South Africa owes its industrialisation and economic diversification to the mining sector.

The South African mining industry has transformed significantly since the early 1990's when a handful of corporations dominated mining activities in the country.

At that time, the industry was still in the clutch of political sanctions imposed on the country by the global community, which had forced the industry to pursue growth opportunities within the domestic economy.

Not so many years ago, the mining industry was characterised by the dual ownership of mineral rights system, which enabled the dominant companies to possess substantial mineral assets, restricting access of new players to participate in the industry.

This contributed to marginalisation of potential new entrants into the industry.

By the mid-1990s, however, a new democratic order paved the way for the transformation of the industry.

Consequently, major mining companies began re-assessing their priorities and activities.

Policy Regime

The most important piece of legislation that heralded transformation of all mining and mineral industry is the Mineral and Petroleum Resources Development Act (MPRDA) of 2002, promulgated on 1st of May 2004.

The critical aspect of the new law was that mineral resources should be vested in the State.

Furthermore, the new law embedded the principles of security of tenure, environmental stewardship and social responsibility.

The other main principle is the requirement that the industry undergoes transformation and provides opportunity for the previously disadvantaged.

The promulgation of the MPRDA introduced an important document essential to the transformation process, namely, the Broad Based Socio-Economic Empowerment Charter, or the Mining Charter as it is widely known.

As government, we have come a long way since the implementation of the Act and the Charter and we are still facing major challenges, which of course are insurmountable given that we all want this industry to succeed.

It is for these reasons that the Department of Public Enterprises (DPE) and Eskom have embarked on a ground-breaking initiative to substantially transform the South African coal mining industry for Eskom's long-term security of coal supply.

This initiative is envisaged to mark an important turning point in the mining and electricity production sectors in South Africa in the next few years.

To ensure the success of this initiative, the Board of Eskom has approved a Coal Supply Strategy as a guiding principle of this transformative agenda in the sector, which will be later shared with the industry to broaden the participation and ensure that the design is responsive.

The current patterns of ownership according to the Department of Mineral Resources' report dated 2012, there are currently 30 BEE coal mines in South Africa.

In this case, BEE is defined by the DMR as 26% Black Ownership.

However, if measured in terms of 50% plus 1 share Black Ownership, this number becomes significantly lower.

Currently, Emerging Miners account for approximately 17% of total coal spend of Eskom which is R35 billion.

Emerging Miners include both majority Black Owned Emerging Miners and Emerging Miners not owned by blacks.

Black Emerging Miners as defined per Codes of Good Practice accounts for approximately 4.7% of Eskom total coal spend.

Opportunities for Emerging Miners will largely be in the short to medium term supplies.

For instance, within the short to medium term supplies there are opportunities with regards to the empowerment initiatives employed during procurement processes; beneficiation of low quality reserves (washing, de-stoning, etc.) to Eskom specifications; reclaiming of dumps (blending of material from discard dumps) and environmental rehabilitation.

There are several challenges facing Black Emerging Miners:

- **Funding** - Emerging mining companies often lack funding, especially at the early

exploration stage when funding is typically in the form of equity finance;

- **Sizeable Reserves -** Many Emerging mining companies' assets comprise of previously exploited reserves with challenges such as marginal remaining reserves, old mine workings and legacy environmental risks;

- **Technical expertise** - Emerging mining companies often struggle to secure services of competent engineers, geologists, artisans etc. This is even more so for start-up companies with little or no experience and lacking any track record. Employees tend to be as risk averse as funders; and

- **Contract** - Even with promising reserves, but without any certainty or commitment in the form of an off-take agreement, many Emerging Miners will perceive the risk of not achieving a contract as too high a risk to invest in project development.

There are five pillars underpinning our Black Emerging Mining Coal Strategy:

- **Creating a Mine Development Fund:** Eskom will partner with the likes of IDC, NEF, DBSA or private sector funding for pre-feasibility studies and consolidation of resources and infrastructure. A fund will be established by initially working on items on a project-by-project basis and then progress fund to manage larger projects;

- **Use coal trading as an option to secure coal resources and enhance transformation:** Coal trading can be used to develop Black Owned companies in coal beneficiation and processing. We will ensure quality and environmental compliance. Coal trading can also be used to assist black mining right holders to acquire the capital initially to establish mines;

- **Increase Black Ownership as a means to transform the industry:** Eskom to use its purchasing leverage to empower Black Owned suppliers and increase equity stakes to 50% + 1share. Most importantly, we will have to develop Black Emerging Miners by entering into MoUs with suppliers to assist with acquiring funding;

- **Utilise commercially acceptable levers to increase Black ownership:** This will require that we enter into discussions with to increase Black Ownership participation by utilising various commercially acceptable levers. We intend to enter into partnerships with Established Miners to participate in skills development of the Black Emerging Miner; and

- **Consolidation of smaller Black Owned mining resources for development:** This will require identifying Black Owned mining resources that could be consolidated into larger entities for development, as well as investigating synergies for establishment of coal processing plants.

Partnerships between emerging miners will be to be underpinned by the following principles:

- Strong support and alignment with the role Eskom plays as part of a National strategic

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asset;

- Ethics and integrity of supplier - alignment with Eskom values and objectives;
- Relationship based on trust, openness and transparency - willingness to share information / partner with Eskom;
- Business sustainability and supplier stability over long term relations - pricing based on efficient costs plus a fair risk adjusted return;
- Operational performance - willingness of supplier to commit to continuous improvement with a shared benefit to both parties;
- B-BBEE compliance and strong ability to promote transformation; and
- Legislative compliance.

Eskom as a matter of principle, will not contract with suppliers who operate illegally.

Secondly, Eskom would only contract with owners of mining resources or value adding agents.

Eskom would also be entitled to conduct audits to assess compliance with all the legislative requirements.

Eskom will continue to share its coal supply requirements and purchasing plans with suppliers at appropriate forums.

There is need for innovation to harness available and previously mined resources using viable technologies to fulfil Eskom's requirements.

What are expectations of established suppliers?

Established miners have a key role to play in entrenching the vision of a deep seated economic and empowerment transformation in the coal mining industry that will be underpinned by a level of co-operation and commitment to amongst other things:

- Increasing levels of black ownership beyond the Mining Charter to comply with the Codes of Good B-BBEE Practice;
- Supporting junior miners with skilled resources through providing training and development opportunities;
- Exploring opportunities to create economies of scale in the consolidation of resources into more sustainable mining resources;
- Creating partnerships that will promote development of Black emerging miners into

entities that can transform into large sustainable mining companies;

- Providing development and funding support where possible; and
- Deepening the participation of employees in the sector in the wealth created from coal mining.

Eskom's long term coal supply requirements create a ground-breaking initiative to transform the coal mining sector.

The coal strategy is anchored on an optimal portfolio of long, medium and short term strategic supply partnerships.

It focuses coal supply which will provide **security of supply** at the **lowest total cost of ownership** whilst ensuring **consistent quality,** and **continuous improvement** opportunities throughout the life of the coal supply contracts.

Supply and Pricing of Coal Issues

The current generation capacity expansion imposed the need to develop new coal resources and Eskom acknowledges the anticipated challenges of coal availability for power generation beyond 2018.

Therefore, it is tactically important to understand the common future challenges, weaknesses, threats and opportunities shared by Eskom and mining companies to ensure that common efforts are mobilised to respond to these immediate and future imperatives, to ensure security of supply.

One of the challenges is that, while the country has abundant coal reserves, the most economically viable reserves, particularly in Mpumalanga are increasingly being depleted and qualities are dropping significantly.

We need to bear in mind that Eskom does not own mining rights and it is therefore reliant on the industry to supply it with appropriate quality coal.

Secondly over the years we have seen assert consolidated in the industry and the large resources that are suitable for Eskom supply are owned by a few players and that makes it difficult for emerging miners to penetrate, let alone even to start participating meaningfully.

The structural barriers of entry are not desirable if we are to eradicate social inequality in South Africa.

Thirdly, logistics is an integral part of coal supply and requires a long term investment to be cost effective.

Logistics costs contribute significantly to the total cost of ownership and sub-optimal logistics

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solutions have detrimental economic and social impacts.

Currently, the preferred logistics solutions involve conveyor, followed by rail and then road. Most importantly, contracts should be flexible enough to move between rail and road and between Free On Trucks & delivered.

Transnet is making advances to ensure the fast-tracking of our coal from road to rail.

Forward and backward linkages may potentially unlock significant value in transporting coal from the source to various power stations.

Fourthly, uncertainties in the mining sector have led to insufficient investment in the coal mining industry hence the spill-over shortage of coal for Eskom's envisaged projects..

Finally, coal supply for domestic energy use will become a national problem that will require a national solution through collective thinking.

Furthermore, Eskom increasingly has to compete with exports and this could worsen as India seeks to import lower quality coals from South Africa.

This situation is likely to worsen post 2018 as the Mpumalanga basin becomes depleted and coal qualities deteriorate.

In the same vain Eskom would be engaging the major coal producers with the concerted view of ensuring the establishment of a national pact on coal to ensure the security of electricity supply through the purchasing of affordable coal.

The proposed pact will help to keep electricity tariffs at inflation levels.

We really need to work together for mutual benefits in both coal mining and electricity sectors.

Notwithstanding these challenges, coal will remain a strategic resource to Eskom for the continuity of operations requiring strategic partnerships with suppliers and off takers.

However there are several critical questions that need to be addressed:

- What does it take to transform and sustain South Africa's mining industry today?
- Is it keeping the industry in private hands or is it the state intervention in the mineral sector as others have called? Is it changing the tax regime to introduce super taxes against the mines or is it its contribution to the positive development of the country?
- Is it about intensive capital spending on input costs and infrastructure development of mines or is it about profits and dividends derived by very few shareholders?
- Or is it all about foreign confidence in the political and economic stability of the country

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or the country's enhancement of the developmental impact on the extraction of mineral assets?

A balance between domestic coal requirements and exports needs to be created.

I thank you.

AFFIDAVIT OF PETER HENRY BISHOP

I the undersigned,

PETER HENRY BISHOP

declare under oath as follows:

1. I am an adult male and senior investigator at the Judicial Commission of Inquiry Into Allegations of State Capture ("the Commission") as was proclaimed by the President of the Republic of South Africa.

2. The facts deposed to in this affidavit are within my personal knowledge, unless the contrary appears from the context, in which case I disclose the source of those facts. The facts are, to the best of my belief, both true and correct.

3. I depose to this affidavit in response to an application that was made by Mr Malusi Gigaba ("Gigaba"), former Minister of the Department of Public Enterprise ("DPE"), wherein he has applied to the Commission to cross examine me. His application is in relation to the affidavit I deposed to as part of the investigation and subsequent findings relating to aspects of alleged state capture at Alexkor SOC (Pty) Ltd, and the Alexkor RMC Pooling and Sharing Joint Venture ("PSJV"), dated 9 October 2020. Mr Gigaba and his legal team are already in possession of my initial affidavit and supporting annexures and will thus not attach it as part of this response.

4. I will seek to respond to some of the aspects raised by Mr Gigaba in his application, wherein he attempts a rebuttal of my findings. As a general proposition, I stand by the conclusions I have drawn and the evidence on which I relied in reaching such conclusions. Any failure to respond to a specific allegation must not be seen as my acceptance of the version of Mr Gigaba, but a denial.

JJM.

5. For ease of reference, it is prudent that I again provide some background relating to key aspects of the investigation the Commission had conducted, some of which was led at the Commission's hearing on 8 and 11 January 2021.

6. In 2019, Mr Gavin Craythorne, a founding member and office bearer of the Equitable Access Campaign (EAC), being an association of small-scale black-owned and black empowered marine mining companies ("the Emerging BEE Marine Diamond Miners") who are or were subcontracted to the Alexkor PSJV. The PSJV manages the mining operations of the pooled land and marine mining rights of the Richtersveld Mining Company ("RMC") and Alexkor, a state owned entity. Mr Craythorne reached out to the Judicial Commission of Inquiry into State Capture ("The Commission") and requested that the Commission use its powers to investigate the said allegations, which it did, as set out in its Term of Reference (TOR) 1.1 and 1.6, as follows:

   6.1.1. *TOR 1.1 "whether, and to what extent and by whom attempts were made through any form of inducement or for any gain of whatsoever nature to influence members of the National Executive (including Deputy Ministers), office bearers and /or functionaries employed by or office bearers of any state institution or organ of state or directors of the boards of SOE's…"*

   6.1.2. *TOR 1.6 "whether there were any irregularities, undue enrichment, corruption and undue influence in the awarding of contracts, mining licenses, government advertising in the New Age Newspaper and any other governmental services in the business dealings of the Gupta family with government departments and SOE's;"*

7. Based on the information received from Mr Craythorne, the Commission authorised an investigation into the allegations as reported. Mr Craythorne prepared a detailed

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affidavit with supporting documentation as part of his submission. Mr Craythorne was subsequently called as the second witness to testify at the Commission of Inquiry on 8 January 2021 and 11 January 2021 in Johannesburg.

8. The allegations in Mr Craythorne's submission were further supported by a forensic investigation that was authorised by the Department of Public Enterprises ("DPE") mandating Gobodo Forensic Investigating Audit (Pty) Ltd ("Gobodo"). Gobodo finalised their report with findings and recommendations in October 2019. Mr Albert Torres, the investigator and author of the report submitted by Gobodo, was also subsequently called as a witness and testified at the Commission on 8 January 2021.

9. The DPE also commissioned Fundudzi Forensics to conduct an investigation into numerous allegations levelled against the DPE. One of the allegations investigated by Fundudzi was the appointment of Mr Trevern Haasbroek as a non-executive director to the Alexkor Board by former Minister Lynn Brown.

10. The Commission investigating team, of which I was the lead investigator, subsequently conducted its own investigations into the allegations of wrongdoing. All evidence found during the investigation was properly documented and forms part of the evidence files currently before the Commission.

11. At the postponement of the Commission hearing of the evidence related to Alexkor and the PSJV on 11 January 2021, the Chairperson, Deputy Chief Justice Raymond Zondo ("Chairperson") requested to hear further evidence form Mr Jan Dekker, Ms Mamoroke Lehobye, a former non-executive director to the Board of Directors and Chairperson of the Audit and Risk Committee at Alexkor and myself. A date has not been allocated as yet, to hear further evidence in relation to the matter.

JJM.

In Response to Mr Gigaba's Application

12. I now respond to some of the aspects in relation to Mr Gigaba's application to cross examine me in order to rebut my findings in relation to him.

Ad Paragraph 16 (16.1-16 16.4)

13. I have taken note of Mr Gigaba's statement in support of his application to cross examine me, and wish to state that I do not intend to change the averments made in my affidavit, as they are based on evidence. Given the readiness of the Gupta's and/ or their associates, Regiments Capital to engage Alexkor as soon as Mr Gigaba announced the coal strategy for Alexkor SOC (Pty) Ltd, followed by the appointment of Scarlet Sky Investment 60 (Pty) Ltd (SSI) to take control of the marketing, selling and beneficiation of the diamonds for the Alexkor PSJV, I still maintain that Mr Gigaba's announcement put the wheels in motion for state capture at Alexkor.

    13.1. In paragraphs 22 to 23.4, I illustrated, by drawing a parallel of what was happening at Alexkor during Mr Gigaba's tenure as Minister of DPE, that was followed by the appointment of Ms Lynne Brown. In drawing this parallel, I referred to the research of the capture and exploitation of State Owned Enterprises (SOEs), that was done by the State Capacity Research Project ("SCRP"). The SCRP, is an interdisciplinary inter-University research partnership that aims to contribute to the public debate about 'state capture' in South Africa. The SCRP described in their *"repurposing modus operandi"* the *modus operandi* that had been employed by the Guptas and their associates, with the assistance of appointed Ministers of Public Enterprises, former Minister Malusi Gigaba and former Minister Lynn

JJM.

Brown. In the SCRP report, *Betrayal of the Promise[1]: How the Nation is Being Stolen, May 2017,* they describe that the modus operandi entailed four steps as indicated in my previous affidavit, paragraph 23 to 23.4. In the case of Alexkor, we found a direct correlation with what was suggested by the said authors of the report and what had taking place at Alexkor.

13.2. In gathered information, we identified the respective persons and entities that were complicit in the acts of state capture at Alexkor as alleged. These persons and entities were clearly mentioned throughout my previous affidavit.

Ad Paragraph 20 and 21

14. I disagree with Mr Gigaba's view. I once again drew a parallel in my averment of what was being said by the authors of *Betrayal of the Promise[2]: How the Nation is Being Stolen, May 2017* and what we established during our investigation as mentioned in my para 13.1 herein above.

Ad Paragraph 35, 40, and 58

15. I confirm the averments made in my previous affidavit involving Mr Rafique Bagus ("Bagus") as Chairman of the Board of Alexkor and Mr Percy Khoza ("Khoza") CEO of Alexkor. Amongst others, after the announcement of the new board and the appointment of Mr Khoza, both were either as Chairman of the Board and/or CEO of Alexkor, instrumental in one way or another in the roll-out of the coal strategy announced by Mr Gigaba, the entering into a Non-Disclosure Agreement with

1 Bhorat, H., Buthelezi, M., Chipkin, I., Duma, S., Mondi, L., Peter, C. and Swilling, M., 2017. Betrayal of the Promise: How South Africa is Being Stolen. State Capacity Research Project.

2 Bhorat, H., Buthelezi, M., Chipkin, I., Duma, S., Mondi, L., Peter, C. and Swilling, M., 2017. Betrayal of the Promise: How South Africa is Being Stolen. State Capacity Research Project.

JJM

Regiments Capital who were involved with Alexkor in preparing a Master Coal Supply Agreement, to be entered into between Alexkor and Eskom, and in particular having Regiments prepare a Request for Proposal ("RFP") for a legal and financial services panel, then allowing Regiments to submit their proposal for said services panel and then Mr Bagus's role as part of the tender committee in appointment of SSI.

15.1. Mr Bagus also attended the Sun City Gupta wedding and stayed in room 1205 from 30/4/2013 to 2/5/2013 (departed 3/5/2013) with another adult, i.e. they were listed as 2 adults being present. This period was the same time he was Chairman of the Alexkor board appointed by former Minister Gigaba.

Ad Paragraph 85 and 90

16. As I have stated in my paragraph 13 of this responding affidavit, I do not intend to change the averments made in my affidavit, as they are based on evidence; and that given the readiness of the Gupta's and/ or their associates, Regiments Capital to engage Alexkor as soon as Mr Gigaba announced the coal strategy for Alexkor SOC (Pty) Ltd.

16.1. For ease of reference, in my previous affidavit paragraph 137, Centaur Holdings Ltd, a global investment holding company and a known Gupta linked entity made a public announcement on "*....27 January 2015 that it has completed a funding package through a wholly owned subsidiary (the "Company") for IPC Coal (Pty) Ltd and IPC Mining (Pty) Ltd (collectively "IPC"). Under the terms of a recently executed Cooperation Agreement, the Company has agreed to provide secured capital to expand IPC's existing opencast mining operations at its Nungu Colliery, which will allow IPC to begin mining the underground reserves in February 2015....*"

JJM

16.2. The directors of Centaur are known Gupta associates and/or family to the Gupta's.

16.3. Nungu Collier at that time was also closely linked to Mr Tony Gupta, see my annexure to my previous affidavit PHB 45 related to an email sent to Tony Gupta dated 28/08/2014.

16.4. The public statement by Centaur and the email linking Nungu Colliery to Mr Tony Gupta was in the time period when Mr Gigaba was still the Minister of the DPE. This eventually culminated into the signing on 8 May 2017 in Witbank, of a Non-Binding Memorandum of Understanding ("MOU") between IPC Beneficiation (Pty) Ltd ("IPC") and Alexkor SOC Limited. The NEWCO was going to be known as "Alexcoal (Pty) Ltd". See Annexure PHB 39 to my previous affidavit. The signing of the MOU was in the time when Ms Brown was the Minister of DPE.

16.5. Significantly, the Memorandum of Understanding ("MOU") states that a new company ("Newco") will be established and that the shareholding will be Alexkor 55% and IPC 45%. Newco shall enter into logistics and supply agreements with WesCoal and Nungu Mining, for the supply of washed coal to Eskom. WesCoal was also an asset the Gupta's were trying to acquire at the time but failed in such acquisition.

16.6. In a corporate presentation, Annexure PHB 44 to my previous affidavit, *"Gupta Family - The Inconvenient Truth"* that was prepared by Aslam Kamal and Nazeem Howa for Oakbay Investments (Pty) Ltd, dated 27/01/2016 on slide 16, it confirmed that, *"M&A Team worked on three deals - Optimum, Wescoal and Universal. Lost bids for Wescoal and Universal. So much for all-powerful!"*

JJM.

Ad Paragraph 91 to 96

17. I do not intend to change the averments made in my affidavit as already stated, as they are based on evidence; and that given the readiness of the Gupta's and/ or their associates, Regiments Capital to engage Alexkor as soon as Mr Gigaba announced the coal strategy for Alexkor SOC (Pty) Ltd, followed by the appointment of SSI to take control of the marketing, selling and beneficiation of the diamonds for the Alexkor PSJV. I still maintain that Mr Gigaba's announcement put the wheels in motion for state capture at Alexkor.

PETER HENRY BISHOP

I hereby certify that on 19 March 2021, in my presence at GARSFONTEIN the DEPONENT signed this Affidavit and swore and acknowledged to me that he knew and understood the contents thereof, had no objection to taking this oath and that he considered this oath to be binding on his conscience.

2139259-1.

Commissioner of oaths

SOUTH AFRICAN POLICE SERVICE
GARSFONTEIN
2021 -03- 19
COMMUNITY SERVICE CENTRE
SUID-AFRIKAANSE POLISIEDIENS

IN THE JUDICIAL COMMISSION OF INQUIRY INTO THE ALLEGATIONS OF STATE CAPTURE, CORRUPTION AND FRAUD IN THE PUBLIC SECTOR INCLUDING ORGANS OF STATE, HELD AT BRAAMFONTEIN, JOHANNESBURG ("the Commission")

GIGABA, MALUSI KNOWLEDGE NKANYEZI Applicant

STATEMENT OF RESPONSE TO PETER BISHOP'S ANSWERING AFFIDAVIT IN THE APPLICANT'S RULE 3.3.6 APPLICATION

I, the undersigned,

MALUSI KNOWLEDGE NKANYEZI GIGABA

do hereby make oath and say:

THE DEPONENT

1. I am:

   1.1. an adult male; and

   1.2. the Former Minister of *inter alia*, the Department of Public Enterprises.

2. The contents of this statement are within my personal knowledge and belief, save where the context indicates otherwise and are both true and correct.

PURPOSE OF THIS STATEMENT

3. On 1 April 2021, the Commission sent to my attorney, Isaac Chowe, an answering affidavit, in respect of Peter Bishop ("***Mr Bishop***").

4. The purpose of this statement is to provide a response to those paragraphs which may possibly implicate me in alleged unlawful, illegal, or improper conduct ("***the implicating paragraphs***").

INTRODUCTION

5. The implicating paragraphs contain Mr Bishop's opinions and theories which in an improper manner have the effect of pre-empting the findings that the Commission may or may not make.

6. This Commission should accordingly resist the temptation to make any findings against me based on the pure speculative nature of Mr Bishop's allegations of and concerning me.

7. I respond *seriatim* to the implicating paragraphs.

MY RESPONSE TO THE ALLEGATIONS OF PETER BISHOP

8. **Ad paragraph 13**

8.1 Mr Bishop's statements in this regard contain conclusions and opinions rather than factual statements, besides which his insinuations:

8.1.1 are drawn from events which took place when I was no longer the Minister of Public Enterprises;

8.1.2 are based on broad conjectures drawn from reports that were not tested and were done with clear political motives; and

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R.R

8.1.3 relied upon media and other reports, which are untested.

8.2 In my affidavit submitted to the Commission on 17 January 2021, I elaborated extensively upon the rationale for the strategic redirection of Alexkor SOC (Pty) Ltd and for the proposed diversification.

8.3 I backed my submission up with policy documents which included my speeches as Minister of Public Enterprises, Alexkor's Annual Reports which detailed the Company's financial position and others.

8.4 In my submission, I drew the attention of the Commission to substantive issues which had to do with Alexkor's financial performance, as well as the existing ANC and Government policy for the establishment of the State-Owned Mining Company (SOMCO), which would also take over Alexkor's operations and mine and trade in strategic minerals.

8.5 I wish further to draw the attention of the Commission to pages 169 and 181 of Presidential Review Commission (PRC) (Vol. 2: 2012) which addressed the following namely that:

8.5.1 a detailed analysis of the financial statements of Schedule 2 institutions up to 2010, which included Alexkor, conducted by the PRC indicated that Alexkor had made an annual average net profit margin of negative 31 percent (-31%) for the five years between 1996 and 2010; and

8.5.2 Alexkor was one of the SOEs that were dependent on Government support and "*growing concern with regard to their ability to meet future funding requirements*" was expressed.

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8.6 At the time when I was Minister of Public Enterprises, it was evident that Alexkor as a company was unviable and needed a new strategy if it was to survive. This is extensively elaborated in my affidavit of 17 January 2021.

8.7 I fail to see how anyone could, without talking to the role players who were involved, including myself and without referring to the Company's financial position at the time, arrive at a contrary conclusion, inferring corrupt motives. I also fail to understand, on what basis and as a result of what expertise, Mr Bishop, who was not involved in Alexkor at any time, and has never managed or been a shareholder of an institution of the size and mandate of Alexkor, is qualified to opine that those involved should have folded their arms and done nothing in the face of the existing reality that the Company was evidently a "going concern".

8.8 A failure to have pursued diversification as part of a rescue strategy would have amounted to a dereliction of duty. After all, as I stated it in my affidavit, the change in strategy was proposed by the management and Board of Alexkor, as they must. This is normal practice in the corporate world when a company is experiencing financial distress, it must either restructure or diversify in order to return to profit.

8.9 The Board and management of Alexkor would also have been derelict had they not made proposals to the Shareholder as to how the company had to be returned to profit and viability in the face of difficult challenges which had weakened its balance sheet.

8.10 Furthermore, in the same affidavit, I drew the attention of the Commission to the Eskom Coal Strategy ("***FA13***"). This Strategy had originated from Eskom itself in 2012. The purpose of this Strategy was to break the monopoly in long-term coal contracts of white-owned mining companies and increase the participation of junior black-owned mining companies. Again, to infer that this Strategy was inspired by ulterior motives is plainly contemptuous of the

transformation strategy which is one of cornerstones of the South African Constitution.

8.11 In our consultations on this Strategy, we convened between two (2) to three (3) meetings with black coal miners where we outlined this Strategy and its purposes, including how it would be implemented. I also met with the CEO of Anglo-American Corporation (plc), Mark Cutifani, at the Saxon Hotel in Sandhurst, where we discussed this Strategy together with the top management of the Department of Public Enterprises (DPE) and Eskom. In that meeting, we clarified to the Mr Cutifani the rationale for this Strategy and assured him that Eskom would still honour all of its existing contracts. However, new contracts would be subjected to the Strategy.

8.12 It should be noted that Mr Bishop has no substantive response to all of these submissions except merely to insist that his averments constitute "evidence". He does not provide any such evidence, neither in his original affidavit nor his complementary statement.

8.13 I reiterate that I do not know, nor have I ever met, Regiments Capital and / or Scarlet Sky Investment 60 (Pty) Ltd (SSI). Policy pronouncements are made all the time by Ministers, and that has nothing to do with private entrepreneurs and how they will position themselves upon these pronouncements.

8.14 Mr Bishop is being disingenuous in arguing that my announcements "***put the wheels in motion for state capture at Alexkor***". This is based on no evidence whatsoever and is in utter disregard of all the facts, including the Company's Annual Reports and the PRC Report on SOEs which was eventually adopted by Cabinet and is the basis upon which President CM Ramaphosa established an SOE Council in 2019, which are supportive of our arguments justifying the policy shift. I reject this with contempt.

9 **Ad paragraph 13.1 - 13.2**

9.1 These sub-paragraphs again refer to an untested report which, itself, relied on malicious disregard for the personal rights of the persons mentioned / implicated in it (the Report). This report made baseless inferences about many individuals, including myself without regard to official documents which provided an alternate justification for the steps taken.

9.2 It seems to me the report and its authors had a preconceived hypothesis that they had to justify by producing the report, regardless of how blatantly lacking it was in fact and truth. The SCRP Report remains a document of inferences rather than a document of fact based on solid evidence.

9.3 It cannot be correct, and should not be allowed, that anyone or group of people should be allowed to tarnish others' integrity and impugn their dignity. The mere fact that certain people were "*clearly mentioned throughout*" his previous affidavit does not and cannot in the slightest degree make his affidavit valid. The test of any allegation is in the provision of solid evidence, not inferences. The burden of proof lies with the person making the allegation.

10 **Ad Paragraph 14**

10.1 In my previous statement I had challenged Mr Bishop to place evidence before the Commission by way of a supplementary affidavit indicating, with reference to each SOE that fell under my portfolio during my tenure, the names of the Board members (non-executive directors) which I and the Cabinet appointed which were representative of "*Gupta-Zuma interests*". In addition, thereto and with reference to each SOE, I challenge Mr Bishop, to disclose who each of those Board members are or were and how each such Board member was said to have served "*Gupta-Zuma interests*".

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10.2 Despite this challenge Mr Bishop, in his further affidavit, once again provides no evidence except to insist that his opinions, based on an untested report that had also relied on broad conjectures, should be accepted by the Commission.

11 **Ad Paragraph 15**

11.1 As stated in my affidavit of 17 January 2021, the Eskom Coal Strategy was proposed to me as the Shareholder by Eskom. Given the discussions we had been having with Alexkor, based on the Company's financial performance, it was necessary that Alexkor took advantage of this opportunity to position itself to also supply coal to Eskom. This would be an SOC-to-SOC commercial deal.

11.2 Naturally, the Chairman and CEO of Alexkor would be the drivers of this process.

11.3 However, in so far as entering into a Non-Disclosure Agreement with Regiments Capital, I was no longer the Minister of Public Enterprises and neither was I involved in those deal processes and contract negotiations.

11.4 I fail to see how I am being associated with this because in announcing the policy direction, I had not stated that there was a preferred facilitator or advisor for the implementation of the strategy.

11.5 In so far as attending the Gupta wedding in April / May 2013 (**Ad paragraph 15.1**), I fail to understand what exactly this proves. The coincidence of Mr Bagus being appointed Chairman of Alexkor by myself and his attendance at a wedding attended by many people, including various Ministers, does not in itself provide proof of any wrongdoing. Once more, this is an improper use of conjecture to try prove a point without providing any concrete evidence.

12 **Ad Paragraph 16**

12.1 By Mr Bishop's own admission, Regiments Capital started engaging Alexkor in February 2015, almost a whole year after my departure from the Department of Public Enterprises and appointment as Minister of Home Affairs.

12.2 I do not know Centaur Holdings Ltd, IPC Coal (Pty) Ltd or Nungu Colliery. I first heard of these companies from Mr Bishop's desperate attempts to link them with the policy announcement I had made as Minister of Public Enterprises.

12.3 I do not know the so-called Gupta-associates and / or family of the Gupta's referred to in regard to the above-mentioned issues.

12.4 The mere fact that two people sent each other emails based on the policy announcement I had made as a Minister of Public Enterprises, with no reference to me in the said e-mails, leading to the signing of an MOU in May 2017, cannot on any reasonable basis provide evidence of my involvement in what Mr Bishop perceives to be a nefarious scheme. This was three years after I had left the Department of Public Enterprises and when I was already the Minister of Finance.

13 **Ad Paragraph 17**

13.1 This averment and entire statement by Mr Bishop, in so far as it seeks to implicate me in any wrongdoing, is baseless and amounts to a desperate attempt to tarnish my good name.

13.2 Mr Bishop tries with no concrete evidence whatsoever to link what was a necessary announcement on my part, as Minister of Public Enterprises, based on the financial results and going concern status of Alexkor during the time, to events that happened independently of my knowledge and involvement.

13.3 These events were, by his own admission, concluded when I was no longer Minister of Public Enterprises. However, to give credence to his claim, he concludes his affidavit by claiming that I "*put the wheels in motion for state capture at Alexkor.*"

13.4 Should the same absurdity be taken to its logical conclusion, Mr Bishop could just as well argue that my very birth decades before I even became Minister of Public Enterprises, my election as an MP in 2004, my appointment as Deputy Minister of Home Affairs, and subsequently my appointment as Minister of Public Enterprises also "*put the wheels in motion for state capture at Alexkor*".

13.5 I would request the Commission not to accept such blatant blemishing of the character and integrity of individuals, founded on baseless and unsubstantiated conjectures drawn by some.

CONCLUSION

14 It is submitted that a perusal of Mr Bishop's affidavit does not on any cognisable basis support a finding of unlawful or improper conduct on my part. I would accordingly request that the Commission not rely thereon or make any adverse findings against me. I stand by the relief sought by me in my initial application.

DEPONENT

THUS SIGNED AND SWORN TO before me at SAPS BROOKLYN on this the 16TH day of APRIL 2021 by the deponent who acknowledges that the deponent knows and understands the contents of this affidavit; that it is the truth to the best of the deponent's knowledge and belief and that the deponent has no objection to taking the prescribed oath and regards the same as binding on the deponent's conscience and the administration of the oath complied with the Regulations contained in Government Gazette No. R1258 of 21 July 1972, as amended.

7166719 Sgt

COMMISSIONER OF OATHS

EX OFFICIO: Sgt

FULL NAMES: Mcandiwa Rothiwe

PHYSICAL ADDRESS: SAPS Brooklyn Hillcrest

DESIGNATION:

SOUTH AFRICAN POLICE SERVICE
2021 -04- 16
SUID-AFRIKAANSE POLISIEDIENS

KNN

AFFIDAVIT OF PETER HENRY BISHOP

I the undersigned,

PETER HENRY BISHOP

declare under oath as follows:

1. I am an adult male and senior investigator at the Judicial Commission of Inquiry Into Allegations of State Capture ("the Commission") as was proclaimed by the President of the Republic of South Africa.

2. The facts deposed to in this affidavit are within my personal knowledge, unless the contrary appears from the context, in which case I disclose the source of those facts. The facts are, to the best of my belief, both true and correct.

3. I depose to this affidavit in response to an application that was made by Mr Malusi Gigaba ("Gigaba"), former Minister of the Department of Public Enterprise ("DPE"), wherein he has applied to the Commission to cross examine me. His application is in relation to the affidavit I deposed to as part of the investigation and subsequent findings relating to aspects of alleged state capture at Alexkor SOC (Pty) Ltd, and the Alexkor RMC Pooling and Sharing Joint Venture ("PSJV"), dated 9 October 2020. Mr Gigaba and his legal team are already in possession of my initial affidavit and supporting annexures and will thus not attach it as part of this response.

4. I will seek to respond to some of the aspects raised by Mr Gigaba in his application, wherein he attempts a rebuttal of my findings. As a general proposition, I stand by the conclusions I have drawn and the evidence on which I relied in reaching such conclusions. Any failure to respond to a specific allegation must not be seen as my acceptance of the version of Mr Gigaba, but a denial.

JJM.

5. For ease of reference, it is prudent that I again provide some background relating to key aspects of the investigation the Commission had conducted, some of which was led at the Commission's hearing on 8 and 11 January 2021.

6. In 2019, Mr Gavin Craythorne, a founding member and office bearer of the Equitable Access Campaign (EAC), being an association of small-scale black-owned and black empowered marine mining companies ("the Emerging BEE Marine Diamond Miners") who are or were subcontracted to the Alexkor PSJV. The PSJV manages the mining operations of the pooled land and marine mining rights of the Richtersveld Mining Company ("RMC") and Alexkor, a state owned entity. Mr Craythorne reached out to the Judicial Commission of Inquiry into State Capture ("The Commission") and requested that the Commission use its powers to investigate the said allegations, which it did, as set out in its Term of Reference (TOR) 1.1 and 1.6, as follows:

   6.1.1. *TOR 1.1 "whether, and to what extent and by whom attempts were made through any form of inducement or for any gain of whatsoever nature to influence members of the National Executive (including Deputy Ministers), office bearers and /or functionaries employed by or office bearers of any state institution or organ of state or directors of the boards of SOE's…"*

   6.1.2. *TOR 1.6 "whether there were any irregularities, undue enrichment, corruption and undue influence in the awarding of contracts, mining licenses, government advertising in the New Age Newspaper and any other governmental services in the business dealings of the Gupta family with government departments and SOE's;"*

7. Based on the information received from Mr Craythorne, the Commission authorised an investigation into the allegations as reported. Mr Craythorne prepared a detailed

JJM.

affidavit with supporting documentation as part of his submission. Mr Craythorne was subsequently called as the second witness to testify at the Commission of Inquiry on 8 January 2021 and 11 January 2021 in Johannesburg.

8. The allegations in Mr Craythorne's submission were further supported by a forensic investigation that was authorised by the Department of Public Enterprises ("DPE") mandating Gobodo Forensic Investigating Audit (Pty) Ltd ("Gobodo"). Gobodo finalised their report with findings and recommendations in October 2019. Mr Albert Torres, the investigator and author of the report submitted by Gobodo, was also subsequently called as a witness and testified at the Commission on 8 January 2021.

9. The DPE also commissioned Fundudzi Forensics to conduct an investigation into numerous allegations levelled against the DPE. One of the allegations investigated by Fundudzi was the appointment of Mr Trevern Haasbroek as a non-executive director to the Alexkor Board by former Minister Lynn Brown.

10. The Commission investigating team, of which I was the lead investigator, subsequently conducted its own investigations into the allegations of wrongdoing. All evidence found during the investigation was properly documented and forms part of the evidence files currently before the Commission.

11. At the postponement of the Commission hearing of the evidence related to Alexkor and the PSJV on 11 January 2021, the Chairperson, Deputy Chief Justice Raymond Zondo ("Chairperson") requested to hear further evidence form Mr Jan Dekker, Ms Mamoroke Lehobye, a former non-executive director to the Board of Directors and Chairperson of the Audit and Risk Committee at Alexkor and myself. A date has not been allocated as yet, to hear further evidence in relation to the matter.

JJM.

In Response to Mr Gigaba's Application

12. I now respond to some of the aspects in relation to Mr Gigaba's application to cross examine me in order to rebut my findings in relation to him.

Ad Paragraph 16 (16.1-16 16.4)

13. I have taken note of Mr Gigaba's statement in support of his application to cross examine me, and wish to state that I do not intend to change the averments made in my affidavit, as they are based on evidence. Given the readiness of the Gupta's and/ or their associates, Regiments Capital to engage Alexkor as soon as Mr Gigaba announced the coal strategy for Alexkor SOC (Pty) Ltd, followed by the appointment of Scarlet Sky Investment 60 (Pty) Ltd (SSI) to take control of the marketing, selling and beneficiation of the diamonds for the Alexkor PSJV, I still maintain that Mr Gigaba's announcement put the wheels in motion for state capture at Alexkor.

    13.1. In paragraphs 22 to 23.4, I illustrated, by drawing a parallel of what was happening at Alexkor during Mr Gigaba's tenure as Minister of DPE, that was followed by the appointment of Ms Lynne Brown. In drawing this parallel, I referred to the research of the capture and exploitation of State Owned Enterprises (SOEs), that was done by the State Capacity Research Project ("SCRP"). The SCRP, is an interdisciplinary inter-University research partnership that aims to contribute to the public debate about 'state capture' in South Africa. The SCRP described in their *"repurposing modus operandi"* the *modus operandi* that had been employed by the Guptas and their associates, with the assistance of appointed Ministers of Public Enterprises, former Minister Malusi Gigaba and former Minister Lynn

JJM.

Brown. In the SCRP report, *Betrayal of the Promise[1]: How the Nation is Being Stolen, May 2017,* they describe that the modus operandi entailed four steps as indicated in my previous affidavit, paragraph 23 to 23.4. In the case of Alexkor, we found a direct correlation with what was suggested by the said authors of the report and what had taking place at Alexkor.

13.2. In gathered information, we identified the respective persons and entities that were complicit in the acts of state capture at Alexkor as alleged. These persons and entities were clearly mentioned throughout my previous affidavit.

Ad Paragraph 20 and 21

14. I disagree with Mr Gigaba's view. I once again drew a parallel in my averment of what was being said by the authors of *Betrayal of the Promise[2]: How the Nation is Being Stolen, May 2017* and what we established during our investigation as mentioned in my para 13.1 herein above.

Ad Paragraph 35, 40, and 58

15. I confirm the averments made in my previous affidavit involving Mr Rafique Bagus ("Bagus") as Chairman of the Board of Alexkor and Mr Percy Khoza ("Khoza") CEO of Alexkor. Amongst others, after the announcement of the new board and the appointment of Mr Khoza, both were either as Chairman of the Board and/or CEO of Alexkor, instrumental in one way or another in the roll-out of the coal strategy announced by Mr Gigaba, the entering into a Non-Disclosure Agreement with

1 Bhorat, H., Buthelezi, M., Chipkin, I., Duma, S., Mondi, L., Peter, C. and Swilling, M., 2017. Betrayal of the Promise: How South Africa is Being Stolen. State Capacity Research Project.

2 Bhorat, H., Buthelezi, M., Chipkin, I., Duma, S., Mondi, L., Peter, C. and Swilling, M., 2017. Betrayal of the Promise: How South Africa is Being Stolen. State Capacity Research Project.

JJM

Regiments Capital who were involved with Alexkor in preparing a Master Coal Supply Agreement, to be entered into between Alexkor and Eskom, and in particular having Regiments prepare a Request for Proposal ("RFP") for a legal and financial services panel, then allowing Regiments to submit their proposal for said services panel and then Mr Bagus's role as part of the tender committee in appointment of SSI.

15.1. Mr Bagus also attended the Sun City Gupta wedding and stayed in room 1205 from 30/4/2013 to 2/5/2013 (departed 3/5/2013) with another adult, i.e. they were listed as 2 adults being present. This period was the same time he was Chairman of the Alexkor board appointed by former Minister Gigaba.

Ad Paragraph 85 and 90

16. As I have stated in my paragraph 13 of this responding affidavit, I do not intend to change the averments made in my affidavit, as they are based on evidence; and that given the readiness of the Gupta's and/ or their associates, Regiments Capital to engage Alexkor as soon as Mr Gigaba announced the coal strategy for Alexkor SOC (Pty) Ltd.

16.1. For ease of reference, in my previous affidavit paragraph 137, Centaur Holdings Ltd, a global investment holding company and a known Gupta linked entity made a public announcement on "*....27 January 2015 that it has completed a funding package through a wholly owned subsidiary (the "Company") for IPC Coal (Pty) Ltd and IPC Mining (Pty) Ltd (collectively "IPC"). Under the terms of a recently executed Cooperation Agreement, the Company has agreed to provide secured capital to expand IPC's existing opencast mining operations at its Nungu Colliery, which will allow IPC to begin mining the underground reserves in February 2015....*"

JJM

16.2. The directors of Centaur are known Gupta associates and/or family to the Gupta's.

16.3. Nungu Collier at that time was also closely linked to Mr Tony Gupta, see my annexure to my previous affidavit PHB 45 related to an email sent to Tony Gupta dated 28/08/2014.

16.4. The public statement by Centaur and the email linking Nungu Colliery to Mr Tony Gupta was in the time period when Mr Gigaba was still the Minister of the DPE. This eventually culminated into the signing on 8 May 2017 in Witbank, of a Non-Binding Memorandum of Understanding ("MOU") between IPC Beneficiation (Pty) Ltd ("IPC") and Alexkor SOC Limited. The NEWCO was going to be known as "Alexcoal (Pty) Ltd". See Annexure PHB 39 to my previous affidavit. The signing of the MOU was in the time when Ms Brown was the Minister of DPE.

16.5. Significantly, the Memorandum of Understanding ("MOU") states that a new company ("Newco") will be established and that the shareholding will be Alexkor 55% and IPC 45%. Newco shall enter into logistics and supply agreements with WesCoal and Nungu Mining, for the supply of washed coal to Eskom. WesCoal was also an asset the Gupta's were trying to acquire at the time but failed in such acquisition.

16.6. In a corporate presentation, Annexure PHB 44 to my previous affidavit, *"Gupta Family - The Inconvenient Truth"* that was prepared by Aslam Kamal and Nazeem Howa for Oakbay Investments (Pty) Ltd, dated 27/01/2016 on slide 16, it confirmed that, *"M&A Team worked on three deals - Optimum, Wescoal and Universal. Lost bids for Wescoal and Universal. So much for all-powerful!"*

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Ad Paragraph 91 to 96

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PETER HENRY BISHOP

I hereby certify that on 19 March 2021, in my presence at GARSFONTEIN the DEPONENT signed this Affidavit and swore and acknowledged to me that he knew and understood the contents thereof, had no objection to taking this oath and that he considered this oath to be binding on his conscience.

2139259-1.

Commissioner of oaths

SOUTH AFRICAN POLICE SERVICE
GARSFONTEIN
2021 -03- 19
COMMUNITY SERVICE CENTRE
SUID-AFRIKAANSE POLISIEDIENS

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GIGABA, MALUSI KNOWLEDGE NKANYEZI Applicant

STATEMENT OF RESPONSE TO PETER BISHOP'S ANSWERING AFFIDAVIT IN THE APPLICANT'S RULE 3.3.6 APPLICATION

I, the undersigned,

MALUSI KNOWLEDGE NKANYEZI GIGABA

do hereby make oath and say:

THE DEPONENT

1. I am:

   1.1. an adult male; and

   1.2. the Former Minister of *inter alia*, the Department of Public Enterprises.

2. The contents of this statement are within my personal knowledge and belief, save where the context indicates otherwise and are both true and correct.

PURPOSE OF THIS STATEMENT

3. On 1 April 2021, the Commission sent to my attorney, Isaac Chowe, an answering affidavit, in respect of Peter Bishop ("***Mr Bishop***").

4. The purpose of this statement is to provide a response to those paragraphs which may possibly implicate me in alleged unlawful, illegal, or improper conduct ("***the implicating paragraphs***").

INTRODUCTION

5. The implicating paragraphs contain Mr Bishop's opinions and theories which in an improper manner have the effect of pre-empting the findings that the Commission may or may not make.

6. This Commission should accordingly resist the temptation to make any findings against me based on the pure speculative nature of Mr Bishop's allegations of and concerning me.

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MY RESPONSE TO THE ALLEGATIONS OF PETER BISHOP

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8.1.1 are drawn from events which took place when I was no longer the Minister of Public Enterprises;

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8.4 In my submission, I drew the attention of the Commission to substantive issues which had to do with Alexkor's financial performance, as well as the existing ANC and Government policy for the establishment of the State-Owned Mining Company (SOMCO), which would also take over Alexkor's operations and mine and trade in strategic minerals.

8.5 I wish further to draw the attention of the Commission to pages 169 and 181 of Presidential Review Commission (PRC) (Vol. 2: 2012) which addressed the following namely that:

8.5.1 a detailed analysis of the financial statements of Schedule 2 institutions up to 2010, which included Alexkor, conducted by the PRC indicated that Alexkor had made an annual average net profit margin of negative 31 percent (-31%) for the five years between 1996 and 2010; and

8.5.2 Alexkor was one of the SOEs that were dependent on Government support and "*growing concern with regard to their ability to meet future funding requirements*" was expressed.

KMN

8.6 At the time when I was Minister of Public Enterprises, it was evident that Alexkor as a company was unviable and needed a new strategy if it was to survive. This is extensively elaborated in my affidavit of 17 January 2021.

8.7 I fail to see how anyone could, without talking to the role players who were involved, including myself and without referring to the Company's financial position at the time, arrive at a contrary conclusion, inferring corrupt motives. I also fail to understand, on what basis and as a result of what expertise, Mr Bishop, who was not involved in Alexkor at any time, and has never managed or been a shareholder of an institution of the size and mandate of Alexkor, is qualified to opine that those involved should have folded their arms and done nothing in the face of the existing reality that the Company was evidently a "going concern".

8.8 A failure to have pursued diversification as part of a rescue strategy would have amounted to a dereliction of duty. After all, as I stated it in my affidavit, the change in strategy was proposed by the management and Board of Alexkor, as they must. This is normal practice in the corporate world when a company is experiencing financial distress, it must either restructure or diversify in order to return to profit.

8.9 The Board and management of Alexkor would also have been derelict had they not made proposals to the Shareholder as to how the company had to be returned to profit and viability in the face of difficult challenges which had weakened its balance sheet.

8.10 Furthermore, in the same affidavit, I drew the attention of the Commission to the Eskom Coal Strategy ("***FA13***"). This Strategy had originated from Eskom itself in 2012. The purpose of this Strategy was to break the monopoly in long-term coal contracts of white-owned mining companies and increase the participation of junior black-owned mining companies. Again, to infer that this Strategy was inspired by ulterior motives is plainly contemptuous of the

transformation strategy which is one of cornerstones of the South African Constitution.

8.11 In our consultations on this Strategy, we convened between two (2) to three (3) meetings with black coal miners where we outlined this Strategy and its purposes, including how it would be implemented. I also met with the CEO of Anglo-American Corporation (plc), Mark Cutifani, at the Saxon Hotel in Sandhurst, where we discussed this Strategy together with the top management of the Department of Public Enterprises (DPE) and Eskom. In that meeting, we clarified to the Mr Cutifani the rationale for this Strategy and assured him that Eskom would still honour all of its existing contracts. However, new contracts would be subjected to the Strategy.

8.12 It should be noted that Mr Bishop has no substantive response to all of these submissions except merely to insist that his averments constitute "evidence". He does not provide any such evidence, neither in his original affidavit nor his complementary statement.

8.13 I reiterate that I do not know, nor have I ever met, Regiments Capital and / or Scarlet Sky Investment 60 (Pty) Ltd (SSI). Policy pronouncements are made all the time by Ministers, and that has nothing to do with private entrepreneurs and how they will position themselves upon these pronouncements.

8.14 Mr Bishop is being disingenuous in arguing that my announcements "***put the wheels in motion for state capture at Alexkor***". This is based on no evidence whatsoever and is in utter disregard of all the facts, including the Company's Annual Reports and the PRC Report on SOEs which was eventually adopted by Cabinet and is the basis upon which President CM Ramaphosa established an SOE Council in 2019, which are supportive of our arguments justifying the policy shift. I reject this with contempt.

KNN

9 **Ad paragraph 13.1 - 13.2**

9.1 These sub-paragraphs again refer to an untested report which, itself, relied on malicious disregard for the personal rights of the persons mentioned / implicated in it (the Report). This report made baseless inferences about many individuals, including myself without regard to official documents which provided an alternate justification for the steps taken.

9.2 It seems to me the report and its authors had a preconceived hypothesis that they had to justify by producing the report, regardless of how blatantly lacking it was in fact and truth. The SCRP Report remains a document of inferences rather than a document of fact based on solid evidence.

9.3 It cannot be correct, and should not be allowed, that anyone or group of people should be allowed to tarnish others' integrity and impugn their dignity. The mere fact that certain people were "*clearly mentioned throughout*" his previous affidavit does not and cannot in the slightest degree make his affidavit valid. The test of any allegation is in the provision of solid evidence, not inferences. The burden of proof lies with the person making the allegation.

10 **Ad Paragraph 14**

10.1 In my previous statement I had challenged Mr Bishop to place evidence before the Commission by way of a supplementary affidavit indicating, with reference to each SOE that fell under my portfolio during my tenure, the names of the Board members (non-executive directors) which I and the Cabinet appointed which were representative of "*Gupta-Zuma interests*". In addition, thereto and with reference to each SOE, I challenge Mr Bishop, to disclose who each of those Board members are or were and how each such Board member was said to have served "*Gupta-Zuma interests*".

KNN

10.2 Despite this challenge Mr Bishop, in his further affidavit, once again provides no evidence except to insist that his opinions, based on an untested report that had also relied on broad conjectures, should be accepted by the Commission.

11 **Ad Paragraph 15**

11.1 As stated in my affidavit of 17 January 2021, the Eskom Coal Strategy was proposed to me as the Shareholder by Eskom. Given the discussions we had been having with Alexkor, based on the Company's financial performance, it was necessary that Alexkor took advantage of this opportunity to position itself to also supply coal to Eskom. This would be an SOC-to-SOC commercial deal.

11.2 Naturally, the Chairman and CEO of Alexkor would be the drivers of this process.

11.3 However, in so far as entering into a Non-Disclosure Agreement with Regiments Capital, I was no longer the Minister of Public Enterprises and neither was I involved in those deal processes and contract negotiations.

11.4 I fail to see how I am being associated with this because in announcing the policy direction, I had not stated that there was a preferred facilitator or advisor for the implementation of the strategy.

11.5 In so far as attending the Gupta wedding in April / May 2013 (**Ad paragraph 15.1**), I fail to understand what exactly this proves. The coincidence of Mr Bagus being appointed Chairman of Alexkor by myself and his attendance at a wedding attended by many people, including various Ministers, does not in itself provide proof of any wrongdoing. Once more, this is an improper use of conjecture to try prove a point without providing any concrete evidence.

12 **Ad Paragraph 16**

12.1 By Mr Bishop's own admission, Regiments Capital started engaging Alexkor in February 2015, almost a whole year after my departure from the Department of Public Enterprises and appointment as Minister of Home Affairs.

12.2 I do not know Centaur Holdings Ltd, IPC Coal (Pty) Ltd or Nungu Colliery. I first heard of these companies from Mr Bishop's desperate attempts to link them with the policy announcement I had made as Minister of Public Enterprises.

12.3 I do not know the so-called Gupta-associates and / or family of the Gupta's referred to in regard to the above-mentioned issues.

12.4 The mere fact that two people sent each other emails based on the policy announcement I had made as a Minister of Public Enterprises, with no reference to me in the said e-mails, leading to the signing of an MOU in May 2017, cannot on any reasonable basis provide evidence of my involvement in what Mr Bishop perceives to be a nefarious scheme. This was three years after I had left the Department of Public Enterprises and when I was already the Minister of Finance.

13 **Ad Paragraph 17**

13.1 This averment and entire statement by Mr Bishop, in so far as it seeks to implicate me in any wrongdoing, is baseless and amounts to a desperate attempt to tarnish my good name.

13.2 Mr Bishop tries with no concrete evidence whatsoever to link what was a necessary announcement on my part, as Minister of Public Enterprises, based on the financial results and going concern status of Alexkor during the time, to events that happened independently of my knowledge and involvement.

13.3 These events were, by his own admission, concluded when I was no longer Minister of Public Enterprises. However, to give credence to his claim, he concludes his affidavit by claiming that I "*put the wheels in motion for state capture at Alexkor.*"

13.4 Should the same absurdity be taken to its logical conclusion, Mr Bishop could just as well argue that my very birth decades before I even became Minister of Public Enterprises, my election as an MP in 2004, my appointment as Deputy Minister of Home Affairs, and subsequently my appointment as Minister of Public Enterprises also "*put the wheels in motion for state capture at Alexkor*".

13.5 I would request the Commission not to accept such blatant blemishing of the character and integrity of individuals, founded on baseless and unsubstantiated conjectures drawn by some.

CONCLUSION

14 It is submitted that a perusal of Mr Bishop's affidavit does not on any cognisable basis support a finding of unlawful or improper conduct on my part. I would accordingly request that the Commission not rely thereon or make any adverse findings against me. I stand by the relief sought by me in my initial application.

DEPONENT

THUS SIGNED AND SWORN TO before me at SAPS BROOKLYN on this the 16TH day of APRIL 2021 by the deponent who acknowledges that the deponent knows and understands the contents of this affidavit; that it is the truth to the best of the deponent's knowledge and belief and that the deponent has no objection to taking the prescribed oath and regards the same as binding on the deponent's conscience and the administration of the oath complied with the Regulations contained in Government Gazette No. R1258 of 21 July 1972, as amended.

7166171-9 Sgt
Msandiwa RJK

COMMISSIONER OF OATHS

EX OFFICIO: Sgt
FULL NAMES: Msandiwa Rothiwe
PHYSICAL ADDRESS: SAPS Brooklyn Hillwest
DESIGNATION:

SOUTH AFRICAN POLICE SERVICE
2021 -04- 16
SUID-AFRIKAANSE POLISIEDIENS

KMN

08. WITNESS 3

Derick de Beer

From: Secretary
Sent: 17 September 2020 16:27
To: Reginald Tshabalala
Cc: Secretary
Subject: Witness 3//Rule 3.3//Gigaba, G
Attachments: Annexure 'A'.pdf; Witness 3 Rule 3.3 Gigaba Mr Malusi.pdf

Dear Sir/Madam

Please find the attached Rule 3.3 Notice in respect of Witness 3' s evidence for your attention.

As referred to in the Rule 3.3 Notice, please also find Annexure A attached hereto.

Please note that the Commission is required to comply with all COVID-19 Regulations. Please advise the Secretariat 48 hours in advance at Secretary@commissionsc.org.za if you elect to attend. Protocols, procedures and arrangements in place at the hearing venue will then be communicated to you.

Kindly acknowledge receipt hereof and contact the Secretariat regarding any queries that you may have.

Yours faithfully,

SECRETARIAT
COMMISSION OF INQUIRY INTO STATE CAPTURE
Hillside House, 2nd Floor, 17 Empire Road, Parktown,
Johannesburg, 2193, Gauteng South Africa,
Email: Secretary@commissionsc.org.za
Website: www.sastatecapture.org.za

2nd floor, Hillside House
17 Empire Road,
Parktown
Johannesburg
2193
Tel (International): +27 (10) 214-0651
Tel (Tollfree): 0800 222 097
Email: inquiries@sastatecapture.org.za
Web: www.sastatecapture.org.za

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

NOTICE IN RE: TRANSNET EVIDENCE

TO : MR MALUSI GIGABA

C/O : TSHABALALA ATTORNEYS

TEL : 011 783 5677

EMAIL : reginald@tshabalala.com

IN TERMS OF THE ORDER GRANTED BY THE CHAIRPERSON OF THE JUDICIAL COMMISSION OF INQUIRY INTO ALLEGATIONS OF STATE CAPTURE, CORRUPTION AND FRAUD IN THE PUBLIC SECTOR INCLUDING ORGANS OF STATE ("THE COMMISSION"), YOU ARE HEREBY GIVEN NOTICE THAT:

1 Our previous notice, attaching the Order granted by the Chairperson on 13 August 2020 ("**the Order**") and a transcript of the evidence presented at the hearing, refers.

2 On Thursday, 13 August 2020, the Commission's Legal Team presented the evidence of a witness referred to as **Witness 3** at its hearing held at the Old Council Chamber of the Municipality of the City of Johannesburg, 158 Civic Boulevard Braamfontein, Johannesburg.

3 The evidence in question implicates or may implicate you in matters relating to the Terms of Reference of the Commission.

4 The further redacted statement of Witness 3, as per the Order, which implicates or may implicate you is annexed hereto marked "**A**". Your attention is drawn to **paragraphs 9**

to 28, 67 to 70 and 72.3. The annexures to such statement are annexed hereto marked "**B**".

5 In accordance with the provisions of Rule 3.4 of the published Rules of the Commission, if you wish to:

5.1 give evidence yourself;

5.2 call any witness to give evidence on your behalf; or

5.3 cross-examine the witness

then you must apply, within fourteen (14) calendar days of this notice, in writing to the Commission for leave to do so.

6 An application referred to in paragraph 5 above must be submitted to the Secretary of the Commission. The application must be submitted with an affidavit from you in which you respond to the witness's evidence insofar as it implicates you. The affidavit must identify what parts of the witness's evidence are disputed or denied and the grounds on which they are disputed or denied.

7 If you wish to apply to cross-examine the witness, your application must follow the requirements of Rule 11.3. In other words, it must be a substantive application on affidavit accompanied by a notice of motion.

8 In the event that you believe that you have been prejudiced, you may apply to the Commission in writing for such order as will ensure that you are not seriously prejudiced.

9 Please take note that even if you do not make an application under Rule 3.4:

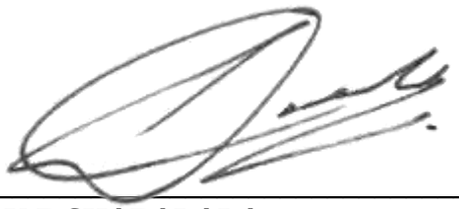
9.1 in terms of Rule 3.10, the Chairperson may, at any time, direct you to respond in writing to the allegations against you or to answer (in writing) questions arising from the evidence; and

9.2 in terms of Regulation 10(6) of the Regulations of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State GN 105 of 9 February 2018 published in Government Gazette 41436, as amended, the Chairperson may direct you to

appear before the Commission to give evidence which has a bearing on a matter being investigated.

10 Any response or affidavit in regard to this notice must be sent to Advocate André Lamprecht, Ms Shannon van Vuuren and Ms Rachel Niewenhuis at secretary@commissionsc.org.za.

DATED AT PARKTOWN ON THIS 17th DAY OF SEPTEMBER 2020

pp 

MS K B SHABALALA
Acting Secretary
Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State

AFFIDAVIT

I, the undersigned,

WITNESS 3

do hereby state under oath that:

1. I am employed in a senior security position in the Transnet Group. I have been employed in my current position since 2019.

2. The facts contained in this affidavit are both true and correct and within my personal knowledge, unless the context provides otherwise. Where facts have been provided to me by third parties, I verily believe that such facts are true and correct and, in my considered opinion, I have no reason to believe otherwise.

INTRODUCTION

3. I joined the South African Police Service ("**SAPS**") during June 2002. Thereafter, I was deployed at the Pretoria Central Police Station for a period of two years.

4. During 2004, I joined the VIP protection unit of the SAPS and in that period I completed a six months VIP protection training course to become a close protection officer ("**CPO**").

5. The duties of a CPO include the following:

5.1 Performing advanced planning and venue assessments;

5.2 Performing operational route planning and review;

5.3 Performing site security risk assessments; and

5.4 Provide secure driving services for principals.

6. During 2005, I was assigned, together with a colleague as a CPO to protect the then Deputy Minister of Home Affairs, Malusi Gigaba ("**Gigaba**" or "**Minister**").

7. During the period of providing CPO services for Gigaba (in his position as Deputy Minister), I accompanied him on a number of occasions on visits to the Sahara Computers business address in Midrand. At the time I was not aware that Sahara Computers was owned by the Gupta family or, in fact, who the Guptas are.

8. I resigned from the SAPS and as CPO for Gigaba during 2008 to join a private group of companies where I performed VIP protection duties until December 2010.

APPOINTMENT AT TRANSNET AND SECONDMENT TO DPE

9. Around April 2013, I received a call from an official from the Department of Public Enterprises ("**DPE**") who enquired if I would be interested to meet with the Minister regarding VIP protection services required by the minister. At that time, Gigaba was the Minister for DPE.

10. I subsequently attended a meeting with Gigaba and a manager in his office, in Pretoria. During the meeting, the manager discussed Gigaba's security profile and the reasons for additional protection services required by the Minister. He indicated that I would be required to provide close protection and vehicle backup duties to the Minister, together with VIP SAPS officers already assigned to protect the Minister. I indicated to the Minister and the manager that I would be interested to work for the Minister.

11. Sometime in May 2013, I received a call from an official from Transnet who invited me for an interview with General Rodney Toka ("**Toka**") the general manager for security at Transnet. I attended the interview and was offered the position of CPO for executive directors of Transnet. A few days later I received an offer of employment and I accepted the appointment with effect from 1 June 2013.

12. During the first month of my employment at Transnet, a colleague and I attended a security training course at the Transnet training campus in Esselenpark.

13. In July 2013, shortly after completing the course, my colleague and I were informed by Toka that we were seconded to the DPE in order to perform CPO duties for Gigaba and vehicle backup support for Gigaba's SAPS VIP protection officers.

14. During December 2013, two additional SAPS officials were assigned to assist with the VIP protection of Gigaba. As a consequence, our services were no longer required and our secondment to DPE came to an end at the end of December 2013.

CPO SERVICES TO MINISTER GIGABA

15. In order to provide the close protection and vehicle backup support for Gigaba, my colleague and I were each issued with a Chevrolet Aveo rental vehicle from Transnet.

15.1 The registration number of the Chevrolet Aveo motor vehicle issued to me was CN 22 PL GP.

15.2 My colleague and I were required to keep logbooks of our travels with the vehicles. Used logbooks were given to our manager, Witness 1, for safekeeping.

16. As part of our vehicle backup duties, my colleague and I would be following the Minister's official BMW vehicle at close range to scheduled destinations in one of our Chevrolet vehicles. The Minister's two SAPS VIP officers would be travelling with him in the official vehicle.

17. Usually on a Friday afternoon, Gigaba's personal assistant ("PA") would provide either my colleague or myself with a printout of the Minister's diary for the following week. The diary would inform us of the Minister's meetings and movements for the next week. If meetings or venues changed, the PA would provide us with an updated diary printout or she would inform us verbally of new meeting destinations.

18. It sometimes happened that the Minister would inform us on short notice that he will be going to unscheduled destinations and/or unofficial meetings. Some instances that I can recall are discussed later in the statement.

19. As part of the CPO and vehicle backup duties, my colleague and I usually did reconnaissance at the venues where meetings were to be held, prior to the Minister's arrival, in order to ensure that his safety was not compromised. In instances where the Minister attend unscheduled meetings, prior reconnaissance would not have been possible.

GIGABA'S VISITS TO THE GUPTA RESIDENCE

20. I can recall that during the period July to December 2013, I escorted the Minister as part of his convoy on unscheduled visits to the Gupta residence in Saxonwold Drive, Johannesburg in approximately six or seven instances. During the visits, I drove the backup vehicle and followed Gigaba's official vehicle into the residence. On one occasion however I drove the Minister personally to the Gupta residence without his convoy.

20.1 None of these visits were recorded in the Minister's diary.

20.2 By instruction of the Minister, I did not record the trips to the Gupta residence in the logbook of my allocated vehicle, as those were unofficial trips.

21. On such occasions I would be waiting in my vehicle in the parking area inside the premises while Gigaba attended meetings inside the house.

22. Whilst waiting in my vehicle for Gigaba to return from meetings inside the Gupta residence, I noticed, on different occasions, people arriving or leaving the premises that I recognised. Individuals in this regard include:

22.1 Brian Molefe (**"Molefe"**), Group Chief Executive Officer (**"GCEO"**) of Transnet and later GCEO of Eskom;

22.2 Matsjila Koko, CEO of Eskom;

22.3 Ben Ngubane, former minister and chairperson of ESKOM; and

22.4 Linda Mabaso, former chairperson of Transnet.

23. On one such occasion I saw former President Jacob Zuma's convoy leaving the Gupta residence.

24. During visits to the Gupta residence, I could sense that Gigaba was nervous, as on arrival at the venue, he would get out of the official vehicle very quickly and almost run towards the door of the residence.

CASH CARRIED BY GIGABA

25. During the same period that I worked for Gigaba, I noticed that he used to carry large amounts of cash with him. I wish to highlight the following instances in this regard:

26. One day I was present when Gigaba opened the boot of the official vehicle to take out money to buy lunch for us (the SAPS officials and CPOs). Inside the boot was a travel bag which he opened and I could clearly see that the bag was stacked with bundles of

R200 notes tied with rubber bands. I was shocked to see that Gigaba was travelling with that much cash in the boot of the vehicle.

27. On more than one occasion I was present when Gigaba bought expensive tailored suits from the Fabiani clothing store in Sandton City. Gigaba paid in cash for the suits, which he produced from a bag that he used to carry with him.

28. On a number of occasions (approximately 3 times), Gigaba met with Molefe at the Bukhara Restaurant in Sandton City where he paid for meals and drinks in cash.

CPO SERVICES TO ANOJ SINGH

29. During January 2014, I was deployed as security manager to provide security services at the Transnet offices in the Carlton Centre.

30. After some time, I received a call from Witness 1 who informed me that Toka had assigned me to the office of the Group Chief Financial Officer ("**GCFO**") to perform driver and CPO duties for Anoj Singh ("**Singh**"). I occupied this position during July 2014.

31. On a normal working day, I used to pick Singh up at his home in the morning at around 06:30 in Wendywood and from there drive him to the Carlton Centre. After work I would drop him off at his home again.

32. During the course of the day I would drive him to meetings or to whichever destination he would instruct me to. Singh's Personal Assistant would usually provide me with his meeting schedule for the following week on a Friday afternoon.

33. It sometimes happened that his meetings lasted until late in the evening which caused me to arrive home after 22:00 or even later.

34. During the period for which I was assigned as CPO for Singh, I can recall that I used the following two Transnet vehicles to transport him on official duties, namely:

34.1 White Mercedes Benz C220 with registration number DT 77 MM GP; and

34.2 White Mercedes Benz E350 with registration number DN 87 KF GP.

35. I kept logbooks of trips undertaken with the abovementioned two vehicles. Used logbooks were given to Witness 1 for safekeeping.

35.1. I have subsequently attempted to obtain the logbooks for these vehicles in order to substantiate the trips undertaken for Singh, but was informed that the logbooks could not be located.

36. In instances Singh would drive to the office with his private vehicle, a blue BMW M3, on Monday mornings and on Friday afternoons, he would travel home with his vehicle. The vehicle would be parked in the basement of the Carlton Centre during the week.

SINGH'S VISITS TO THE GUPTA RESIDENCE AND KNOX VAULT

37. During the period of performing CPO duties for Singh, I transported him to the Gupta residence in Saxonwold Drive in Johannesburg on more than ten occasions. None of these meetings were prior scheduled or recorded in his diary.

38. Upon arrival at the Gupta residence, I would park the vehicle in the parking area inside the premises and I would wait in the vehicle for him to return. The meetings usually did not last longer than 20 to 30 minutes.

39. After each of the meetings, Singh would usually appear from the residence with a sports bag which appeared to be full. I suspected that the bags contained money. Singh would

knock on the boot of the vehicle and I would open it from the inside. He would then put the bag in the boot.

40. My suspicion that the bags that Singh collected from the Gupta residence contained money was confirmed, when, on one occasion, he opened the bag which he had earlier collected from the Gupta residence inside the boot of our vehicle to give me some money to buy lunch. When he opened the bag I could clearly see that the bag was stacked with R100 and R200 notes.

41. In a few instances, after visits to the Gupta residence, Singh would instruct me to drive to Knox Vault at the corner of Riviera and River streets, across the road from the Killarney Mall. Singh would then take the full bag from the boot of our vehicle and go into the Knox Vault building, whilst I would wait for him in the vehicle in the parking area. After a few minutes he would return to the vehicle and I could see that the bag that he carried was now empty. I suspect that Singh had deposited the contents in a safe at Knox Vault.

42. To the best of my recollection, I had taken Singh to the Knox Vault on six or seven occasions after visits to the Gupta residence.

43. It should be noted that we never discussed what happened at the Gupta residence, or what the bags that he collected from the residence contained or the reasons for the visits to the Knox Vault.

44. I furthermore recall a day some time in 2015 when I was driving Singh to a scheduled meeting. On the way he received a call on his cellular phone. After he had finished the call, he instructed me to divert from our route and immediately drive to the Gupta residence. I could hear that there was some panic in his voice. We consequently rushed

to the Gupta residence and on our arrival Singh got out in a hurry. I waited in the parking area for approximately an hour and a half for him to return from the meeting.

45. When Singh returned from the meeting at approximately 17:30, he appeared to be nervous and stressed. When he got into the vehicle, he said "*Fuck this thing*". He then instructed me to drive him home and to turn off the radio. Shortly thereafter he fell asleep. This was unusual behaviour from him.

BAGS RECEIVED FROM MEN OF ASIAN DESCENT AT THREE RIVERS LODGE

46. During July 2014, the Transnet Executive Management attended a week long strategy session at the Three Rivers Lodge in Vereeniging.

47. I dropped Singh off at the venue early in the week and picked him up on the Friday afternoon again.

48. While I waited for Singh on the Friday afternoon to finish at the session, I noticed four men who appeared to be from Asian descent (they looked like Chinese men to me) standing around a Hyundai H1 vehicle in the parking area. Two of the men appeared to be busy with a conversation on a cellular phone.

49. The next thing I noticed how the two men (who spoke on the cellular phone) took two luggage bags from the vehicle, one black and the other one maroon, and went inside the lodge area where the Executive Management meeting was held.

50. At around 15:00 I received a sms from Singh requesting me to come to the conference room where the meeting was held. As I entered the room, the two men who took the luggage bags into the lodge were in the room together with Molefe and Singh. Singh pointed to the maroon luggage bag and requested me to take the bag to our vehicle. I took the bag and put it in the boot of the vehicle.

50.1. I need to mention that the bag was really heavy. I however I did not know what it contained at the time.

50.2. I recognised that bag as one of the luggage bags that the Chinese men had earlier taken into the meeting room.

51. While I was seated in our vehicle, waiting for Singh after putting the maroon luggage bag in the boot of the vehicle, I saw Molefe's driver (I cannot clearly recall if it was Witness 1 or a colleague) pulling a black luggage bag from the same lodge venue to the vehicle that was used to transport Molefe.

51.1. I recognised this bag as the other bag which the Chinese men had earlier taken into the meeting room.

52. The next Monday, Singh drove to the Carlton Centre with his BMW M3. He left the vehicle in the basement for the week. That Friday afternoon, I was about to take Singh's vehicle to the car wash. As usual, I checked that there were no valuables in the boot that could go missing. As I opened the boot, I saw the maroon bag that I had collected at the Three Rivers Lodge the previous Friday. When I picked the bag up, I realised that it weighed less than before. I opened the bag to see what was inside and I noticed a couple of rolls of R200 notes. I sms'ed Singh and informed him that the bag was still in the car. He immediately came down to the basement and collected the bag from me.

VISITS TO SAHARA COMPUTER'S OFFICES

53. During the period that I provided CPO services to Singh, I took him to the Sahara Computer offices in Midrand on a number of occasions to attend meetings. I do not know with whom he met, as I always waited for him in the vehicle in the parking area.

54. On a few occasions Singh would instruct me to drive to Sahara Computers' offices after hours where we would pick up his close friend. I would usually drop them off at his close friend's residence in Midrand.

55. Singh's close friend initially worked for Transnet but she was later employed at Sahara Computers.

CPO SERVICES TO GARRY PITA

56. During April 2015, Singh was seconded to Eskom. He requested that I join him at Eskom, but I decided to stay on at Transnet.

57. As I was already assigned to the office of GCFO I continued with my duties as driver and CPO for the newly appointed CFO, Garry Pita ("**Pita**"). I serviced Pita until the year of 2018 when he resigned from Transnet.

58. I used the same two Mercedes Benz vehicles to transport Pita as I had used to transport Singh. As indicated in paragraph 35.1 above, the logbooks for these two vehicles could not be located.

VISITS TO THE GUPTA RESIDENCE AND KNOX VAULT

59. To the best of my recollection I transported Pita to the Gupta residence on two occasions only.

60. I recall that the first occasion that I transported Pita to the Gupta residence was on the Friday in the week immediately preceding the week in which he was appointed as the Transnet GCFO. I stayed in the vehicle while Pita went inside the Gupta residence. The meeting took about one hour.

61. The second time that I transported Pita to the Gupta residence was some time during 2017. He was very upset when he returned from the meeting. He was red in his face and he swore a lot. He mentioned something about a R600 million payment and some timelines, but I didn't understand what it was all about.

62. I did not see Pita returning from these meetings carrying any bags.

63. I did however transport Pita to the Knox Vault opposite the Killarney Mall on approximately six occasions. This would usually be some time during the week on the way to the office. In these instances, I would pick Pita up at his house, but instead of driving to the Carlton Centre, we would first stop at the Knox Vault where Pita would take a sports bag from the boot of the vehicle and go into the building. He would return a few minutes later with the same bag which now appeared to be empty. I would wait for him in the vehicle in the parking area. From Knox Vault we would usually proceed to the office.

MEETINGS WITH SALIM ESSA

64. During the period 2016 to 2018, I transported Pita on approximately 15 occasions to the Parreirinha restaurant in Turffontein for meetings with Salim Essa ("**Essa**"). They would have extended lunches and would drink a lot of alcohol. We would usually arrive at the restaurant at around 13:00 on Friday afternoons and only leave at around 19:00. Usually when we left the restaurant, Pita would be quite under the influence of alcohol and he would fall asleep in the vehicle on the way back to his house.

SUBSEQUENT DUTIES AND RESPONSIBILITIES

65. After Pita's departure from Transnet during 2018, I performed CPO duties for the then acting GCFO (current acting GCEO), Mohammed Mahomedy until the end of February 2019.

66. I am still employed in security functions in the Transnet Group.

SECURITY MATTERS

67. In this statement I have discussed in detail my personal experience and knowledge of, what in my view, are inappropriate interactions of former Minister Gigaba, Singh and Pita with the controversial Gupta family and Essa.

68. As appears from my statement, I have provided driver and CPO services to these individuals and I was in a trust relationship with each one of them. In the course of performing CPO duties to them I was privy to confidential personal and business related information (DPE and Transnet) and it was expected of me to treat this information with the utmost confidentiality.

69. Since I came to know more about the whereabouts of the Guptas and Essa through media reports, I realised that the visits of Gigaba, Singh and Pita to the Gupta residence and collection of money from the Guptas may form part of a bigger scheme of fraud and corruption and that I could no longer keep the information to myself. I felt that I was also no longer bound by any confidentiality towards them.

70. The opportunity to share the information of Gigaba, Singh and Pita's inappropriate dealings with the Guptas and Essa came when I was invited for an interview by Investigators of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State (**"the Commission"**) on 29 April 2019. During that interview and various subsequent interviews, I shared everything I considered to be of relevance with the Investigators in that regard.

71. I wish to state that I am fully committed to present my version of events, as set out in this affidavit, at the Commission hearings.

72. I do however have certain concerns to give testimony in public at the Commission hearings, should I be requested to do so. My concerns are as follows:

72.1. I am concerned about my own and my family's safety and security, specifically during and after my testimony. I am aware that Witness 1 had received certain communications from unknown cellular numbers, *inter alia* indicating that he should watch his back and that he should not co-operate with the Zondo Commission. I do not know to what extent my interaction with Investigators of the Commission are being followed by the same person(s) and/or potentially implicated persons.

It should be stated that I have not received any threats or other unsolicited communications thus far.

72.2. Apart from physical protection, other critical features of a CPO are trust and loyalty towards a principal and to treat all information, private and business related, gained in the course of performing close protection duties with utmost confidentiality. In my testimony I will disclose confidential information about Gigaba, Singh and Pita gained in my capacity as CPO for them. Although the information which I am about to share in respect of each of them is of an inappropriate and possible criminal nature, my intensions may not be viewed in the same way by Transnet executives and other senior personnel whose own inappropriate actions have not yet been exposed. By disclosing this information at the Commission hearings may be seen as a breach of trust and confidentiality. I may also be seen as not being trustworthy or loyal towards my principals and by other colleagues in the security industry. This could have a potential negative impact on my current and future career as a security professional.

72.3. In my current position as a senior security official in the Transnet Group, I am in regular contact with executives of Transnet. Many of these executives were in those positions or other senior management positions within the Transnet Group during the same period which Singh and Pita were the GCFOs and Gigaba the Minister of DPE. To the best of my knowledge, the 1064 locomotive supply contract was concluded under the watch of Gigaba and Singh. Large parts of the locomotive contract, such as the building and maintenance of the diesel locomotives are performed at Transnet in Koedoespoort. As stated, Gigaba and Singh will specifically be implicated in my evidence at the Commission. I do not know to what extent they may still have contact with Transnet executives and other personnel within the Transnet Group. I am consequently concerned that my future employment at Transnet may be at risk.

72.4. In my role as senior security official, I am currently not preforming any close protection duties. However, during specific events such as visits by international delegations or board and/or Group Exco events within the Transnet Group, I may be required or instructed to act as CPO for VIP guests, board members or members of Group Exco. In doing so, I may compromise the safety and security of those persons, due to the fact that my identity will be known, should I be required to give evidence in public.

73. I hereby request that, should I be requested to give evidence at the Commission hearings, my identity be protected as far as possible, taking into consideration my concerns set out above.

Signature redacted
Witness 3

I certify that the deponent who acknowledges that he knows and understands the contents of this affidavit; that it is the truth to the best of his knowledge and belief and that he has no objection to taking the prescribed oath and regards the same as binding on the deponent's conscience and the administration of the oath complied with the Regulations contained in Government Gazette No. R1258 of 21 July 1972, as amended. This affidavit is signed and sworn to before me at Pretoria on this the 14 th day of September 2020 at 10:14.

COMMISSIONER OF OATHS

EX OFFICIO:

FULL NAMES:

CHOEU PROMISE

PHYSICAL ADDRESS:

16 eland street

koedoespoort

DESIGNATION:

Constable

SUID-AFRIKAANSE POLISIEDIENS
CLIENT SERVICE CENTRE
2020 -09- 14
VILJOERIA
SOUTH AFRICAN POLICE SERVICE

ANNEXURE "B"

ALTHOUGH MENTIONED IN THE RULE 3.3 NOTICE,

NO ANNEXURE "B" WAS ISSUED

ON THE RULE 3.3 NOTICE ISSUED

IN RESPECT OF THE AFFIDAVIT OF

WITNESS 3

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

2nd floor, Hillside House
17 Empire Road,
Parktown
Johannesburg
2193
Tel: (010) 214-0651
Email: inquiries@sastatecapture.org.za
Website: www.sastatecapture.org.za

INDEX: SEQ 07/2021

No.	Description	Pages
Malusi Knowledge Nkanyeza Gigaba application to cross-examine **Witness 3**		
1.	Notice of Motion dated 09 September 2020	01 to 02
2.	Annexure 'A': Preliminary Affidavit by Mr Gigaba dated 09 September 2020	03 to 10
	2.1 Annexure "FA1"	11 to 12
	2.2 Annexure "FA2"	13 to 15
	2.3 Annexure "FA3"	16
3.	Regulation 10(6) Directive dated 30 November 2020	17 to 24
4.	Relevant excerpt of Mr Gigaba's affidavit dated 04 January 2021	25 to 31
5.	Affidavit of response of Witness 3 dated 03 March 2021	32 to 37
6.	The Chairperson's Order dated 02 March 2021	38

No.	Description	Pages
7.	Excerpt of the transcript of Day 250 (13 August 2020) of the Commission containing the evidence of Witness 3	39 to 88
8.	The Chairperson's Order dated 13 August 2020	89 to 92

IN THE JUDICIAL COMMISSION OF INQUIRY INTO THE ALLEGATIONS OF STATE CAPTURE, CORRUPTION AND FRAUD IN THE PUBLIC SECTOR INCLUDING ORGANS OF STATE, HELD AT BRAAMFONTEIN, JOHANNESBURG ("the Commission")

GIGABA, MALUSI KNOWLEDGE NKANYEZI Applicant

PRELIMINARY STATEMENT OF REPONSE/APPLICATION FOR LEAVE TO CROSS EXAMINE WITNESS 3

KINDLY TAKE NOTICE that the applicant hereby files his preliminary statement of response to the allegations made by Witness 3 during the hearing on Thursday, 13 August 2020 ("Witness 3's allegations") and simultaneously hereby gives notice of his intention to apply to the Commission on date and at the time determined by the Chairperson of the Commission, for Directions in the following terms:

1. That the statement of response annexed hereto marked "A" be admitted to the Commission as a preliminary response to Witness 3's allegations;

2. That the applicant be granted leave to cross examine Witness 3 on such terms as the Chairperson of the Commission may deem fit;

3. That the applicant be granted leave to supplement his preliminary response (being annexure A hereto) within a period of 14 (fourteen) calendar days from receipt of the redacted affidavit/statement of Witness 3 from the Commission; and

4. That the applicant be granted such further and alternative relief as the Chairperson of the Commission may deem fit.

DATED at Sandton, Johannesburg on Wednesday, 9 September 2020.

Reginald Tshabalala

TSHABALALA ATTORNEYS, NOTARIES AND CONVEYANCERS
Attorneys for the applicant
1st Floor, 3 Gwen Lane
Sandton, Johannesburg
TEL: 011 783 5677
E-MAIL: reginald@tshabalala.com
jazmin@tshabalala.com/
kim@tshabalala.com
REF: Mr TR Tshabalala/ /Miss K Slaffa/jp/G01422

TO:
THE SECRETARY OF THE COMMISSION
2nd Floor, Hillside House
17 Empire Road
Parktown, Johannesburg
TEL: 010 214 0651
E-MAIL: secretary@commissionsc.org.za
REF: Adv Shannon van Vuuren

Filed with the Secretary of the Commission by e-mail
secretary@commissionsc.org.za
/BoipeloR@commissionsc.org.za
on Wednesday, 9 September 2020

"A"

IN THE JUDICIAL COMMISSION OF INQUIRY INTO THE ALLEGATIONS OF STATE CAPTURE, CORRUPTION AND FRAUD IN THE PUBLIC SECTOR INCLUDING ORGANS OF STATE, HELD AT BRAAMFONTEIN, JOHANNESBURG ("the Commission")

GIGABA, MALUSI KNOWLEDGE NKANYEZI Applicant

PRELIMINARY STATEMENT OF RESPONSE INCORPORATING AN AFFIDAVIT IN SUPPORT OF AN APPLICATION TO CROSS EXAMINE WITNESS 3 IN TERMS OF RULE 3.3 READ WITH RULE 8.2

I, the undersigned,

MALUSI KNOWLEDGE NKANYEZI GIGABA

do hereby make oath and say:

THE DEPONENT

1. I am:

   1.1 an adult male; and

   1.2 the Former Minister of *inter alia*, the Department of Public Enterprises.

KMN

2. The contents of this statement are within my personal knowledge and belief, save where the context indicates otherwise and are both true and correct.

PURPOSE OF THIS STATEMENT

3. The purpose of this statement is two-fold, namely to serve as:-

3.1 a preliminary response to the allegations made by an unidentified witness described as witness 3 ("Witness 3") heard by the Commission on Thursday, 13 August 2020 ("Witness 3's allegations"); and

3.2 a basis for an application for leave to cross examine Witness 3 as contemplated in Rule 3.3 read with Rule 8.2 of the Rules of the Commission into allegations of State Capture ("the Commission").

INTRODUCTION

4. On Wednesday, 26 August 2020, the Commission sent to my attorney, Mr. Reginald Tshabalala, whose confirmatory affidavit is annexed hereto as **"FA1"** the notice in terms of Rule 3.3 annexed hereto as **"FA2"** together with the transcript of the evidence of Witness 3.

5. In paragraph 4 of the notice in terms of Rule 3.3, the Commission had indicated that it would send me as soon as possible, the redacted affidavit of Witness 3 as per paragraph 2.2 of the Order of the Chairperson dated Wednesday, 26 August 2020.

KMN

6. On Tuesday, 8 September 2020, prior to the preparation of this preliminary response and application, my attorneys wrote to the Commission in an e-mail annexed hereto as **"FA3"** requesting a copy of the redacted affidavit of Witness 3.

7. At the time of deposing to this affidavit, I had not received the redacted affidavit from the Commission. Due to the fact that according to the Rules of the Commission, an implicated person has 14 (fourteen days) to react to a notice in terms of Rule 3.3, I have as a matter of caution, elected to file this preliminary response and application. It may be that once I receive the redacted affidavit of Witness 3, I may need to supplement my response. In this regard, I have applied for leave to be granted such opportunity by the Chairperson.

MY RESPONSE TO THE ALLEGATIONS OF WITNESS 3

8. I was appointed as the Deputy Minister of Home Affairs from 2004 until 2009. In 2009 I was re-appointed as the Deputy Minister of Home Affairs after the general elections in 2009, until October 2010. On 1 November 2010, I was appointed as the Minister of Public Enterprises and remained in such position until May 2014.

9. I have had regard to the evidence of Witness 3 as contained in the transcript furnished with the notice in terms of Rule 3.3. I confirm that Witness 3 served

KMN

as my close protection officer between 2005 to 2007. At the time, Witness 3 was a member of the South African Police Services.

10. During 2007, Witness 3 resigned as a member of the South African Police Service to work in the private sector. Witness 3 was then withdrawn as my close protection officer.

11. The Chief of staff for the Ministry of Public Enterprises at the time, Mr. Thami Msomi, was responsible for liaising with the South African Police Service on matters relating to my protection. I would not have known of the meetings Mr. Msomi had arranged with Witness 3.

12. As far as I am aware, Witness 3 was part of the officers appointed at Transnet. Transnet had a large security structure to protect its Very Important People (VIPs) and my understanding is that the Department of Public Enterprises requested Transnet to assign security personnel to protect me, whilst waiting for the South African Police Services to assign additional protectors to me. This was based on the security assessment which had been conducted on me at the time.

13. It is under the circumstances in paragraph 12 above that Witness 3 ended up being seconded to serve as my additional protector. Witness 3 was part of the security personnel in the backup motor vehicle and these were not members of the South African Police Services. They did not have access to the principal motor vehicle which transported me.

KMN

14. In paragraph 20 of page 111 of the transcript, Witness 3 has alleged that in April 2013, he attended a meeting with me and an official of the Department of Public Enterprises. I deny that I met with Witness 3 as alleged. In any event, the processes of appointing protection officers were attended to by the Chief of staff of the Ministry of Public Enterprises. I did not get involved in the process.

15. Witness 3 served as my back up protector from July 2013 to December 2013, a period of 6 months.

16. I have noted that Witness 3 has alleged in paragraphs 10 – 20 of page 115 of the transcript that he accompanied me to the Gupta residence in Saxonwold six to seven times. He has alleged that on these occasions, he drove me alone. I deny this. The protocol has always been that as a minister, I would have the protection of the officers in the main motor vehicle and those officers in the back up motor vehicle. Witness 3 was a back up protector and could not have driven with me alone, more so that Witness 3 was not at that time, a member of the South African Police Services.

17. In my recollection, I must have visited the Gupta residence once or twice during the period of July 2013 to December 2013. During this time, I was very busy as the head of the ANC's elections campaign preparing for the 2014 general elections. I would not have had the time to visit the Gupta residence on such alleged occasions.

KNJ

18. In paragraph 10 – 20 of page 116 of the transcript, Witness 3 has alleged that I had instructed him not to record the trips to the Gupta residence in the logbook. I deny this. The issue of recording trips in the logbooks is a matter that fell within the authority of the officers in their capacities as members of the South African Police Services. I did not instruct Witness 3 or any of the other officers not to record any trip in the logbook, it was not my business to do so and I had no authority to do so.

19. In paragraph 20 of page 116 of the transcript, Witness 3 has alleged that I would carry a large backpack and that on one occasion I opened the boot of my motor vehicle and took cash to pay for lunch. Witness 3 has also alleged that the alleged money came from the Gupta residence. I deny that I have carried a large sum of money in a backpack. In the event that I would carry cash, I would use my man bag which does not look like a backpack and is way smaller than a backpack. I have never received money from the Gupta residence or the Guptas.

20. In instances where I had lunch meetings, I would always offer the officers lunch and settle their bills. The officers would sit at their own table and not sit with me or my colleagues. I would request to settle their bills from my table. The officers would not know how I settle their bills, whether in cash or through a bank card or whether the people I had lunch with, settled the bill.

KMN

21. Witness 3 has also alleged that I paid for some of my suits using the alleged cash from the alleged backpack. I deny this. Most of my suits were made for me by a number of designers/stores who had asked me to wear their suits to assist in getting their works to obtain exposure. In the event that I did buy suits, I would pay for them over time and in certain instances, at discounted prices from stores in Sandton City. In those instances where I purchased new suits, Witness 3 would not be near me when I pay. Protection officers would as a norm, stand outside of the store.

22. It is apposite to mention that in 2013, I needed to alter most of my suits as I had lost a lot of weight. These suits were altered at the same stores in Sandton City.

CONCLUSION

23. Witness 3 has made serious allegations and insinuations against me. These allegations are spurious and manufactured. Witness 3 has portrayed me as someone who received money in an unlawful manner and that in doing so, he has alleged that I instructed him not to record trips in his logbook. These are serious allegations which not only I should be afforded an opportunity to respond to through this preliminary statement but I also believe that it would be in the interest of the Commission for me to be granted leave to cross examine Witness 3.

KMN

24. I therefore humbly apply for leave to cross examine Witness 3 at a time convenient to the Commission.

DEPONENT

THUS SIGNED AND SWORN TO before me at Sandton on this the 9th day of September 2020 by the deponent who acknowledges that the deponent knows and understands the contents of this affidavit; that it is the truth to the best of the deponent's knowledge and belief and that the deponent has no objection to taking the prescribed oath and regards the same as binding on the deponent's conscience and the administration of the oath complied with the Regulations contained in Government Gazette No. R1258 of 21 July 1972, as amended.

COMMISSIONER OF OATHS

EX OFFICIO:
FULL NAMES:
PHYSICAL ADDRESS:
DESIGNATION:

ASHLEY JOY ADAMS
COMMISSIONER OF OATHS
EX OFFICIO
PRACTISING ATTORNEY - RSA
1ST FLOOR, 3 GWEN LANE
SANDTON

KMN

"FA1"

IN THE JUDICIAL COMMISSION OF INQUIRY INTO THE ALLEGATIONS OF STATE CAPTURE, CORRUPTION AND FRAUD IN THE PUBLIC SECTOR INCLUDING ORGANS OF STATE, HELD AT BRAAMFONTEIN, JOHANNESBURG ("the Commission")

GIGABA, MALUSI KNOWLEDGE NKANYEZI Applicant

CONFIRMATORY AFFIDAVIT

I, the undersigned,

TIRHANI REGINALD TSHABALALA

do hereby declare under oath as follows:

1. THE DEPONENT

I am:

1.1 a male duly enrolled legal practitioner, practising as an attorney, conveyancer and notary public of the High Court of South Africa, practicing for my own account under name and style, Tshabalala Attorneys, Notaries and Conveyancers at First Floor, 3 Gwen Lane, Sandton, Johannesburg; and

1.2 the attorney of record for the Applicant in this matter.

2. KNOWLEDGE OF FACTS

The facts herein contained, unless indicated to the contrary, fall within my own personal knowledge, and are both true and correct.

3. CONFIRMATION OF THE STATEMENT OF RESPONSE

I have read the statement of response of the Applicant, MALUSI KNOWLEDGE NKANYEZI GIGABA to which this affidavit is annexed and confirm the contents therein in so far as reference is made to me.

DEPONENT

THUS SIGNED AND SWORN TO before me at Sandton on this the 4th day of September 2020 by the deponent who acknowledges that he knows and understands the contents of this affidavit; that it is the truth to the best of his knowledge and belief and that he has no objection to taking the prescribed oath and regards the same as binding on his conscience and the administration of the oath complied with the Regulations contained in Government Gazette No. R1258 of 21 July 1972, as amended.

COMMISSIONER OF OATHS

EX OFFICIO:
FULL NAMES:
PHYSICAL ADDRESS:
DESIGNATION:

ASHLEY JOY ADAMS
COMMISSIONER OF OATHS
EX OFFICIO
PRACTISING ATTORNEY - RSA
1ST FLOOR, 3 GWEN LANE
SANDTON

KNN

"FA2"

2nd floor, Hillside House
17 Empire Road,
Parktown
Johannesburg
2193
Tel (International): +27 (10) 214-0651
Tel (Tollfree): 0800 222 097
Email: inquiries@sastatecapture.org.za
Web: www.sastatecapture.org.za

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

NOTICE IN RE: TRANSNET EVIDENCE

TO	:	**MR MALUSI GIGABA**
C/O	:	**TSHABALALA ATTORNEYS**
TEL	:	**011 783 5677**
EMAIL	:	**reginald@tshabalala.com**

IN TERMS OF THE ORDER GRANTED BY THE CHAIRPERSON OF THE JUDICIAL COMMISSION OF INQUIRY INTO ALLEGATIONS OF STATE CAPTURE, CORRUPTION AND FRAUD IN THE PUBLIC SECTOR INCLUDING ORGANS OF STATE ("THE COMMISSION"), YOU ARE HEREBY GIVEN NOTICE THAT:

1 On Thursday, 13 August 2020, the Commission's Legal Team presented the evidence of a witness referred to as **Witness 3** at its hearing held at the Old Council Chamber of the Municipality of the City of Johannesburg, 158 Civic Boulevard Braamfontein, Johannesburg.

2 The evidence in question implicates or may implicate you in unlawful, illegal or improper conduct.

3 Please find attached:

3.1 **Annexure A:** The Order granted by the Chairperson which records the terms upon which the evidence of the witness was permitted to be heard.

3.2 **Annexure B:** A transcript of the evidence of the witness presented at the hearing.

KNN

4 The relevant redacted affidavit, as per order 2.2 of Annexure A, will be sent to you as soon as possible.

5 In accordance with the provisions of Rule 3.4 of the published Rules of the Commission, if you wish to:

5.1 give evidence yourself;

5.2 call any witness to give evidence on your behalf; or

5.3 cross-examine the witness

then you must apply, within fourteen (14) calendar days of this notice, in writing to the Commission for leave to do so.

6 An application referred to in paragraph 5 above must be submitted to the Secretary of the Commission. The application must be submitted with an affidavit from you in which you respond to the witness's evidence insofar as it implicates you. The affidavit must identify what parts of the witness's evidence are disputed or denied and the grounds on which they are disputed or denied.

7 If you wish to apply to cross-examine the witness, your application must follow the requirements of Rule 11.3. In other words, it must be a substantive application on affidavit accompanied by a notice of motion.

8 In the event that you believe that you have been prejudiced, you may apply to the Commission in writing for such order as will ensure that you are not seriously prejudiced.

9 Please take note that even if you do not make an application under Rule 3.4:

9.1 in terms of Rule 3.10, the Chairperson may, at any time, direct you to respond in writing to the allegations against you or to answer (in writing) questions arising from the evidence; and

9.2 in terms of Regulation 10(6) of the Regulations of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State GN 105 of 9 February 2018 published in Government Gazette 41436, as amended, the Chairperson may direct you to

appear before the Commission to give evidence which has a bearing on a matter being investigated.

10 Any response or affidavit in regard to this notice must be sent to Advocate André Lamprecht and Ms Shannon van Vuuren at secretary@commissionsc.org.za.

DATED AT PARKTOWN ON THIS 26th DAY OF AUGUST 2020

MS K B SHABALALA
Acting Secretary
Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State

KMN

"FA3"

Kim Slaffa

From: Reginald Tshabalala
Sent: Tuesday, 08 September 2020 15:34
To: 'Secretary'
Cc: 'Kim Slaffa'
Subject: RE: In Camera Witness 3//Notice// Gigaba

Dear Sirs/Mesdames,

I refer to your letter dated Wednesday, 26 August 2020 transmitted to me through the e-mail below.

I have scheduled a meeting with my client for tomorrow morning with a view to respond to the allegations of witness 3. I have since realised that I have not yet received the redacted affidavit of witness 3 from you. Can you be kind enough to urgently let me have the redacted affidavit of witness 3 to enable my client to react to the evidence of witness 3 by tomorrow, being the due date.

Yours Faithfully,

TSHABALALA
ATTORNEYS, NOTARIES & CONVEYANCERS

Reginald Tshabalala
Attorney, Conveyancer and Notary Public
T: +27117835677
E: reginald@tshabalala.com
www.tshabalala.com

1st Floor, 3 Gwen Lane
Sandton, Gauteng
P O Box 67900
Bryanston 2021
Tel +27 (0) 11 783 5677

Important Notice: Please note that we will never change our bank account details by email. We urge you to contact our office to verify banking details prior to making any payments or deposits.

This e-mail is being sent from Tshabalala Attorneys, Notaries & Conveyancers, and is intended for the addressee named above. Any unauthorised use or inception of this e-mail is illegal. The e-mail message or its attachments may contain confidential or privileged information and may not be copied, forwarded or disclosed to any unauthorised person. If you are not the named addressee (or person responsible for forwarding the e-mail to the addressee) please notify us immediately via return e-mail and destroy the copy you have received. Save for *bona fide* law firm matters, Tshabalala Attorneys, Notaries & Conveyancers accept no responsibility for the opinions of the content in this e-mail or its attachments.

From: Secretary <Secretary@commissionsc.org.za>
Sent: 26 August 2020 03:26 PM
To: reginald@tshabalala.com
Subject: In Camera Witness 3//Notice// Gigaba

Dear Sir/Madam

KMN

2nd Floor, Hillside House
17 Empire Road
Parktown
Johannesburg
2193
Tel: (010) 214-0651
Email:
inquiries@sastatecapture.org.za
Website:
www.sastatecapture.org.za

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

CHAIRPERSON'S DIRECTIVE IN TERMS OF REGULATION 10(6) OF THE REGULATIONS OF THE COMMISSION

TO	:	**MR MALUSI GIGABA**
ADDRESS	:	**308 Derrick Avenue** **Waterkloof Ridge** **Pretoria**
TEL	:	**082 888 8617**
EMAIL	:	**nkanyezi.gigaba@gmail.com**

By virtue of the powers vested in me in my capacity as Chairperson of the abovementioned Commission by Regulation 10(6)* of the Regulations of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State, I hereby direct you, **Mr Malusi Gigaba**, to:

* Regulation 10(6) of the Regulations of the Commission reads: "For the purposes of conducting an investigation the Chairperson may direct any person to submit an affidavit or affirmed declaration or to appear before the Commission to give evidence or to produce any document in his or her possession or under his or her control which has a bearing on the matter being investigated, and may examine such person."

1. Deliver by **4 January 2021** to the Secretary or Acting Secretary of the Commission at the address given above an affidavit or affirmed declaration in which:

1.1 you state whether you admit or deny the allegations made about, or, against, you in the attached affidavit (including annexures) of **Witness 3 dated 14 September 2020** which was submitted to the Commission for the purpose of its investigations. Your attention is drawn to paragraphs 9 to 26, 67 to 70 and 72.3 of the affidavit;

1.2 you state, if you deny or dispute any allegation or statement made about, or, against, you in the affidavit, the grounds on which you base your denial and give your full version in regard to the allegation(s) or statement(s) or issue(s) or matters or incidents covered in this affidavit which refer, or, relate, to you.

1.3 you specifically address, in addition to the allegations in the aforementioned affidavit (and annexures), your involvement in the following:

1.3.1 findings made in the **Fundudzi Report** that you compromised the procurement process of the 95 locomotives by signing the Locomotive Supply Agreement between Transnet and China South Rail ("CSR") on 22 October 2012 as a witness. Your attention is drawn in particular to paragraphs 1.1.12 and 5.5.18.92 of the report;

1.3.2 findings made in the **Fundudzi Report** on Transnet's acquisition of 100 locomotives that you approved the application by the Transnet Board to increase the ETC of the contract with CSR from R3.8 billion to R4.8 billion, in terms of section 54 of the PFMA, knowing that you were relying on incomplete documentation

submitted by the Chairman of the Board, Mr Mafika Mkwanazi. Your attention is drawn in particular to paragraph 5.6.19 of the report;

1.3.3 findings made in the **Fundudzi Report** and the **MNS Report** on Transnet's acquisition of 1064 locomotives, *inter alia:*

(a) that you acted outside of your authority in advising Transnet to continue to procure the locomotives as if the exemption of the Preferential Procurement Policy Framework Act (PPPFA) was in place before the Finance Minister granted full exemption. Your attention is drawn in particular to paragraph 1.3.3 and paragraph 5.9.7.14 to 5.9.7.20 of the Fundudzi Report;

(b) on 23 July 2012, Transnet issued a RFP in respect of the 1064 locomotives. The RFP criteria deviated from the minimum thresholds for local content production as prescribed by Treasury. According to the MNS Report, on 7 December 2012 you advised Transnet that you will engage the Minister of Finance about this Treasury Instruction and instructed Transnet to proceed as if Transnet could decide its own criteria as per the PPPFA exemption. However, MNS found that you did not have the authority to override the Treasury Instruction, and thus that the deviation in the RFP was unlawful. Your attention is drawn in particular to section 2.1 of the MNS Report.

1.3.4 allegations by **Ms Barbara Hogan** ("Ms Hogan") that when you became Minister of Public Enterprises, you declined any handover meetings with Ms Hogan;

1.3.5 allegations that when you became Minister of Public Enterprises, you overhauled **Transnet's Board of Directors**, which *inter alia:*

(a) was in disregard of a decision taken at the Transnet AGM in July 2010 to reappoint all non-executive directors;

(b) was to place Gupta associates in strategic positions. This in circumstances where you played a role in appointing Mr Iqbal Sharma and Mr Mafika Mkwanazi who have been implicated in State Capture; and

(c) resulted in the removal of the only railway specialist, Mr Vijay Raman, who would have sat on the Transnet Board.

1.3.6 allegations of your involvement in irregularities relating to the appointment of **Mr Brian Molefe** as GCE of Transnet in February 2011, including your lack of engagement with Board members who demonstrated their dissatisfaction;

1.3.7 allegations that you attempted to remove **Mr Mafika Mkwanazi** as Chairperson of the Board in May and June 2011, in order to appoint Mr Iqbal Sharma as Chairperson, despite knowledge of his close ties to the Gupta family;

1.3.8 the details of **international trips** that coincided with trips by members of the Gupta family and their associates, *inter alia*:

(a) a return trip to Hong Kong between 25 July to 7 August 2010. The following individuals were in Hong Kong during the same period: Ayanda Dlodlo, Baleka Mbete, Bathabile Olive Dlamini, Siphiwe Nyanda, Vusi Vivian Mvelase, Nosiviwe Noluthando Mapisa Nqakula, Arti Gupta, Rajesh Kumar Gupta, Khulubuse Clive Zuma, Michael Andrew Thomas Hulley, and Edward Muziwoxolo Zuma;

(b) a return trip to Dubai, UAE between 23 and 31 October 2014. The following individuals were in Dubai during the same period: Akash Garg, Ashok Narayan, Sanjay Grover, Gezinhliziyo Vincent Zuma, Salim Aziz Essa, Iqbal Meer Sharma, Mohamed Noor Kapdi, and Rajesh Naithani;

(c) a return trip to Dubai, UAE between 28 and 30 November 2015. The following individuals were in Dubai during the same period: Xenia Verbeek, Hamza Farooqui, Soo Young Jeon, Ashok Narayan, Rajesh Naithani, Aidan Essa, Zeenat Osmany, Surya Kant Singhala, Angelo Agrizzi, Gavin Joseph Watson, Stefan Nell, Erika Lamprecht, Aman Kant Singhala, Arti Gupta, Kamal Kant Singhala, Maleatlana Joel Raphela, Ronica Ragavan / Govender, Shubhangi Gupta, Varun Gupta, and Mosebenzi Joseph Zwane; and

(d) a return trip to Beijing, China between 1 to 6 September 2017. The following individuals were in Beijing during the same period: Jianbao Chen, Zhong Ying Potgieter, Nomvula Paula Mokonyane, Sheila Glodinah Mazibuko, Elias Sekgobelo Magashule, Sphilile Malcolm Mabaso, Mbana Peter Thabethe, and Michael Andrew Thomas Hulley.

2. If you would like assistance from the Commission in order to prepare the affidavit or affirmed declaration, you must, within five days (excluding weekends and public holidays) of receipt of this directive, contact, or, communicate with, the Secretary or Acting Secretary of the Commission and indicate that you would like such assistance in which case the Commission will provide someone to assist you with the preparation of the affidavit or affirmed declaration. In such a case you will not pay anything for such assistance. In this regard, please contact Mr Clarence Benjamin (clarenceb@commissionsc.org.za).

3. If, in order to prepare the affidavit or affirmed declaration, you do not need any assistance from the Commission, you must, with or without the assistance of a lawyer of your own choice, prepare the affidavit or affirmed declaration and have it delivered to the Secretary or Acting Secretary of the Commission on or before the date given above for the delivery of the affidavit. If you make use of a lawyer of your own choice to assist you to prepare such affidavit or affirmed declaration, the Commission will not be responsible for the payment of your lawyer's fees or costs.

4. This directive is issued for the purpose of pursuing the investigation of the Commission.

5. Your attention is drawn to Regulations 8(2), 11(3)(a) and (b) and 12(2)(c), (d) and (e) of the Regulations of the Commission, as amended. Regulation 8(2) reads:

"8 (1) . . .

(2) A self-incriminating answer or a statement given by a witness before the Commission shall not be admissible as evidence against that person in any criminal proceedings brought against that person instituted in any court, except in criminal proceedings where the person concerned is charged with an offence in terms of section 6 of the Commissions Act, 1947 (Act No. 8 of 1947)."

Regulation 11(3)(a) and (b) reads:

"11 (1) . . .

(2) . . .

(3) No person shall without the written permission of the Chairperson–

(a) disseminate any document submitted to the Commission by any person in connection with the inquiry or publish the contents or any portion of the contents of such document; or

(b) peruse any document, including any statement, which is destined to be submitted to the Chairperson or intercept such document while it is being taken or forwarded to the Chairperson."

Regulation 12(2)(c), (d) and (e) reads:

"12 (1) . . .

(2) Any person who

(a) . . .

(b) . . .

(c) . . . wilfully hinders, resists or obstructs the Chairperson or any officer in the exercise of any power contemplated in regulation 10(1) or (2);

(d) refuses or fails, without sufficient cause, to submit, within a period fixed by the Chairperson or at all, an affidavit or affirmed declaration pursuant to a directive issued by the Chairperson under regulation 10(6); or

(e) contravenes a provision of regulation 11, is guilty of an offence and liable on conviction -

(i) in the case of an offence referred to in paragraph (a), (c), (d) or (e), to a fine, or to imprisonment for a period not exceeding 12 months; or

(ii) in the case of an offence referred to in paragraph (b), to a fine, or to imprisonment for a period not exceeding six months."

SIGNED IN JOHANNESBURG ON THIS 30th DAY OF NOVEMBER 2020.

JUSTICE RMM ZONDO
DEPUTY CHIEF JUSTICE OF THE REPUBLIC OF SOUTH AFRICA

and

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

"A"

IN THE JUDICIAL COMMISSION OF INQUIRY INTO THE ALLEGATIONS OF STATE CAPTURE, CORRUPTION AND FRAUD IN THE PUBLIC SECTOR INCLUDING ORGANS OF STATE, HELD AT BRAAMFONTEIN, JOHANNESBURG ("the Commission")

GIGABA, MALUSI KNOWLEDGE NKANYEZI — Applicant

PRELIMINARY STATEMENT OF REPONSE TO THE REGULATION 10(6) DIRECTIVE WHICH ALSO SERVES AS A STATEMENT IN SUPPORT OF APPLICATION FOR PROCUREMEMT OF DOCUMENTS

I, the undersigned,

MALUSI KNOWLEDGE NKANYEZI GIGABA

do hereby make oath and say:

THE DEPONENT

1. I am:

   1.1 an adult male; and

   1.2 the Former Minister of Public Enterprises.

2. The contents of this statement are within my personal knowledge and belief, save where the context indicates otherwise and are both true and correct.

PURPOSE OF THIS STATEMENT

3. The purpose of this statement is two-fold, namely to serve as: -

3.1 a preliminary response to the Regulation 10(6) Directive dated 30 November 2020 ("the regulation 10(6) directive"); and

3.2 an application to the Commission to obtain through its powers of subpoena *duces tecum* certain relevant documents identified in this statement and in the notice of application to which statement is annexed, which documents and information are required by me for the purposes of comprehensively responding to the regulation 10(6) directive.

INTRODUCTION

4. On 4 December 2020, the regulation 10(6) directive was served on me in person at the offices of my attorney, Mr Reginald Tshabalala ("Mr. Tshabalala") by Mr Clarence Benjamin of the Commission.

5. On the same day, the Commission sent an e-mail to Mr Tshabalala with a *We Transfer* link containing the annexures to the regulation 10(6) directive. A copy of the said e-mail is annexed hereto as "MG1".

6. The annexures to the regulation 10(6) directive consisted of the following:-

6.1 The redacted affidavit of Witness 3 dated 14 September 2020 ("Witness 3's affidavit");

6.2 The Fundudzi report dated November 2018, without the annexures thereto ("the Fundudzi report");

6.3 The Mncedisi Ndlovu & Sedumedi Attorneys (MNS) report dated October 2018, without the annexures (exhibits) thereto ("the MNS report"); and

6.4 The transcript of the evidence of former Minister Barbara Hogan heard by the Commission on 13 November 2018 ("the transcript of the evidence of former Minister Hogan").

7. On 11 December 2020, Mr Tshabalala addressed an e-mail annexed hereto as "MG2" on my behalf to the Commission, requesting the following annexures in the Fundudzi report and MNS report which relate to the matters that I have been requested to respond to:-

7.1 <u>The Fundudzi report:-</u>

7.1.1 A8, being the section 54 Public Finance Management Act ("PFMA") application by Mr Mafika Mkwanazi ("Mr. Mkwanazi") to the Department of Public Enterprises ("DPE") signed on 24 October 2011;

7.1.2 A9, being the copy of the section 54 PFMA approval by the DPE signed on 21 December 2011;

Commission to assist in the process of procuring the required documents from the Commission through its powers of subpoena *duces tecum*.

13. When one has regard to the regulation 10(6) directive, it makes reference to certain events and documents some of which dates back to about 9 years ago. As already indicated, in order to comprehensively respond to the regulation 10(6) directive, I will need to do so by referencing the required documents from the Commission.

14. I have endeavored as much as possible to identify the specific allegations in the regulation 10(6) directive which I place in issue and to the extent that I may have omitted to deal with any specific allegation, such should not be construed as being admitted. I have also at the same time, set out my version in response to the allegations I have been directed to respond to.

15. In my assessment, the regulation 10(6) directive deals with seven topics which I will respond to *seriatim*, namely:-

    15.1 Witness 3's allegations;

    15.2 Allegations in the Fundudzi and MNS reports;

    15.3 The handover with former Minister Barbara Hogan;

    15.4 The appointment of Board members (non-executive directors) to Transnet;

KMN

15.5 The appointment of Mr Brian Molefe as the Group Chief Executive of Transnet;

15.6 The alleged attempted removal of Mr Mafika Mkwanazi as chairperson of the Transnet Board in May and June 2011; and

15.7 The international trips.

16. In responding to the allegations in the Fundudzi and MNS reports relating to Transnet's locomotives projects, in addition to responding to the specific allegations therein, I have set out the background to Transnet's 1064 locomotives project and the related Section 54(2) PFMA processes as I understood them in paragraph 19 below.

17. WITNESS 3'S ALLEGATIONS

17.1 Prior to the hearing of the evidence of Witness 3 and on 13 August 2020, the Chairperson of the Commission granted an Order to the effect that the names of *inter alia*, Witness 3 are not to be made known to the public and furthermore, once the evidence of the three witnesses, including Witness 3 had been given, a transcript of the evidence together with the relevant redacted and corrected affidavit of the Witness (which formed the basis of his evidence) should be made available to the implicated parties. I am one of the implicated parties.

17.2 On 26 August 2020, the Commission sent to Mr Tshabalala a notice in terms of Rule 3.3 annexed hereto as "MG6" with (a) the

KNN

Order of the Chairperson dated 26 August 2020 and (b) the transcript of the evidence of Witness 3 which was heard by the Commission on 13 August 2020.

17.3 On 9 September 2020, I submitted a preliminary response to the allegations made by Witness 3 without having received the redacted affidavit of Witness 3 as ordered by the Chairperson. I simultaneously applied for leave to cross examine Witness 3. A copy of my preliminary response to the allegations made by Witness 3 and my application for leave to cross examine him is annexed hereto as "MG7".

17.4 I have had regard to the redacted affidavit of Witness 3 dated 14 September 2020 ("the Witness 3's redacted affidavit dated 14 September 2020").

17.5 The preliminary statement dated 9 September 2020 being MG7 hereto serves as my response to the Witness 3's redacted affidavit dated 14 September 2020 and I hereby pray that the contents of my aforementioned said preliminary statement be incorporated herein by reference with the changes required by the context and serve as a rebuttal of the Witness 3's redacted affidavit dated 14 September 2020.

30. I therefore humbly pray for the relief in the notice of application to which this statement is annexed.

DEPONENT

THUS SIGNED AND SWORN TO before me at SANDTON on this the 4TH day of JANUARY 2021 by the deponent who acknowledges that the deponent knows and understands the contents of this affidavit; that it is the truth to the best of the deponent's knowledge and belief and that the deponent has no objection to taking the prescribed oath and regards the same as binding on the deponent's conscience and the administration of the oath complied with the Regulations contained in Government Gazette No. R1258 of 21 July 1972, as amended.

COMMISSIONER OF OATHS

EX OFFICIO:
FULL NAMES:
PHYSICAL ADDRESS:
DESIGNATION:

Mthunzi Mashaba
Commissioner Of Oaths
(Ex Officio)
Practising Attorney
4 Costwold Hill. Woodburn Road. Morningside
PO Box 653243. Benmore 2010
Tel: 011 073 1777 Fax: 086 519 5961

IN THE COMMISSION OF INQUIRY INTO ALLEGATIONS OF STATE CAPTURE

BEFORE THE CHAIRMAN, DEPUTY CHIEF JUSTICE RAYMOND ZONDO

STATEMENT OF WITNESS 3 IN RESPONSE TO PRELIMINARY STATEMENT BY MALUSI KNOWLEDGE NKANYEZI GIGABA - APPLICATION FOR LEAVE TO CROSS EXAMINE WITNESS 3

I, the undersigned,

WITNESS 3

do hereby state under oath that:

1. I am employed in a senior security position in the Transnet Group. I have been employed in my current position since 2019.

2. The facts contained in this affidavit are both true and correct and within my personal knowledge, unless the context provides otherwise. Where facts have been provided to me by third parties, I verily believe that such facts are true and correct and, in my considered opinion, I have no reason to believe otherwise.

3. I have read the preliminary statement of response and affidavit submitted by former Minister Malusi Gigaba, the Applicant, wherein he responds to my evidence and the first affidavit I have submitted before this Honourable Commission. This affidavit is accordingly delivered in response to the allegations in the Applicant's affidavit.

4. To the extent that I may omit to deal with any particular allegation contained in the Applicant's affidavit; and/or any allegation made by the Applicant which is inconsistent with what I have stated in my first affidavit, I deny same as if specifically traversed.

AD APPLICANT'S AFFIDAVIT

5. **AD PARAGRAPHS 1 TO 7**

Save to deny that the contents of the Applicant's statement are both true and correct, the contents of these paragraphs are noted.

6. **AD PARAGRAPHS 8 TO 10**

The contents of these paragraphs are noted.

7. **AD PARAGRAPH 11**

7.1. Save to admit that the Chief of staff for the Ministry of Public Enterprises at the time, Mr Thami Msomi, was responsible for liaising with the South African Police Service, the contents of this paragraph are denied.

7.2. On the day I met with Mr Thami Msomi, and at the end of our meeting, I was instructed not to leave as the Applicant was making his way to the venue from the airport. Thereafter, I waited and met with the Applicant. Upon his arrival, the Applicant enquired as to whether Mr Msomi and I had concluded our discussion and thereafter wished me luck.

8. **AD PARAGRAPH 12 TO 13**

8.1. My appointment at Transnet came about pursuant to my meeting with Mr Msomi who worked for the Applicant at the time. At the conclusion

of our meeting with Mr Msomi, and based on our discussion, it was clear to me that I would join Transnet and thereafter be seconded to the Applicant as a protection officer. This is also in line with the discussion I had with the Applicant where he enquired about my conversation with Mr Msomi and wished me luck.

8.2. Whilst I admit that I was part of the security personnel in the backup motor vehicle, I submit that it is incorrect to state that I did not have access to the principal motor vehicle.

9. **AD PARAGRAPH 14**

9.1. The contents of this paragraph are denied as already elucidated above.

10. **AD PARAGRAPH 15**

10.1. The contents of this paragraph are admitted.

11. **AD PARAGRAPH 16**

11.1. The contents of this paragraph are denied.

11.2. My evidence is correctly captured and reflected in the transcript. My evidence was that there were six or seven occasions where I was part of a convoy that escorted the Applicant to the Gupta residence in Saxonwold. On one of these occasions, I drove the Applicant by myself to the Gupta residence in Saxonwold and it was just the two of us.

11.3. The Applicant has incorrectly recorded the content of the transcript in this regard.

12. AD PARAGRAPH 17

12.1. The contents of this paragraph are denied and I stand by the averments as set out in my first affidavit and the evidence as recorded in the transcript.

13. AD PARAGRAPH 18

13.1. The contents of this paragraph are denied and I stand by the averments as set out in my first affidavit and the evidence as recorded in the transcript.

14. AD PARAGRAPHS 19 TO 20

14.1. I note that the evidence the Applicant is referring to in this paragraph appears at page 118 and 119 of the transcript and not page 116. Despite this, I stand by the averments as set out in my first affidavit and the evidence as recorded in the transcript.

14.2. It is untrue that we would not see how the Applicant pays for food. As protection officers, we are required to have sight of the subject and to keep a look out at all times in respect of the activities pertaining to the subject whom we are assigned to protect. We were therefore able to see the Applicant making payments using cash and not his bank card.

15. AD PARAGRAPH 21

15.1. The contents of this paragraph are denied insofar as the Applicant seeks to create an impression that I could not have seen him using cash to pay for suits purchased at stores in Sandton City. Albeit I was not in close proximity to the Applicant when he purchased his suits from stores at Sandton City, I always had sight of him and was aware of his activities at any given moment. I am therefore able to confirm, as I do, that the

Applicant used cash to pay for the suits he purchased at stores in Sandton City.

16. AD PARAGRAPH 23

16.1. I deny manufacturing allegations and insinuations against the Applicant. I have nothing to gain from fabricating evidence against the Applicant. The evidence I have provided before this Honourable Commission is a true reflection of what transpired during my tenure as a VIP protection officer to the Applicant.

16.2. Further, I confirm that the Applicant instructed all the protection officers not to record trips to the Gupta residence in Saxonwold in the logbooks.

[redacted]

WITNESS 3

I certify that the deponent acknowledges that he knows and understands the contents of this affidavit; that it is the truth to the best of his knowledge and belief and that he has no objection to taking the prescribed oath and regards the same as binding on the deponent's conscience and the administration of the oath complied with the Regulations contained in Government Gazette No. R1258 of 21 July 1972, as amended. This affidavit is signed and sworn to before me at SANDTON SAPS on this the 2nd day of **MARCH 2021**.

SOUTH AFRICAN POLICE SERVICE
CLIENT SERVICE CENTRE
SANDTON
2021 -03- 02
KLIENTE DIENSSENTRUM
SANDTON
SUID-AFRIKAANSE POLISIEDIENS

SEQ 07/2021-37

SOUTH AFRICAN POLICE SERVICE
CLIENT SERVICE CENTRE
SANDTON
2021 -03- 02
KLIENTE DIENSSENTRUM
SANDTON
SUID-AFRIKAANSE POLISIEDIENS

[redacted]

COMMISSIONER OF OATHS

EX OFFICIO:

FULL NAMES:

[redacted]

PHYSICAL ADDRESS:

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

2 March 2021

To: Reginald Tshabalala Attorneys
Attention: Reginald Tshabalala
Per email: reginald@tshabalala.com

Dear Mr Tshabalala,

Re: Mr Malusi Gigaba – rule 3.3.6 application for leave to cross-examine Witness 3 (SEQ 07/2021)

Having considered the above-mentioned application, the Chairperson granted the following order:

1. The Applicant's statement of response (in the form of an affidavit) dated 9 September 2020 is admitted into evidence;

2. The Applicant is granted leave to cross-examine Witness 3;

3. The duration of the cross-examination will be determined by the Chairperson at the hearing of the matter;

Yours faithfully

PROF. ITUMELENG MOSALA
Secretary
Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State

COMMISSION OF INQUIRY INTO STATE CAPTURE

HELD AT

CITY OF JOHANNESBURG OLD COUNCIL CHAMBER

158 CIVIC BOULEVARD, BRAAMFONTEIN

13 AUGUST 2020

DAY 250

Gauteng Transcribers
Recording & Transcriptions

22 Woodlands Drive
Irene Woods, Centurion
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MOBILE: 066 513 1757
info@gautengtranscribers.co.za

CERTIFICATE OF VERACITY

I, the undersigned, hereby certify that, ***in as far as it is audible***, the aforegoing is a ***VERBATIM*** transcription from the soundtrack of proceedings, as was ordered to be transcribed by Gauteng Transcribers and which had been recorded by the client

COMMISSION OF INQUIRY INTO STATE CAPTURE

HELD AT

CITY OF JOHANNESBURG OLD COUNCIL CHAMBER

158 CIVIC BOULEVARD, BRAAMFONTEIN

DATE OF HEARING:	13 AUGUST 2020
TRANSCRIBERS:	B KLINE; Y KLIEM; V FAASEN; D STANIFORTH

Gauteng Transcribers
Recording & Transcriptions

much for coming to give evidence, we appreciate it. Thank you very much and you are excused.

WITNESS 2: Thank you, Chair.

CHAIRPERSON: You are ready for the third witness, witness 3?

ADV PRETORIUS SC: Yes, Chair.

CHAIRPERSON: Ja, let us go ahead.

ADV PRETORIUS SC: May I assume that we are going to finish witness 3?

CHAIRPERSON: Yes, I think we ...[intervenes]

ADV PRETORIUS SC: I would ask that we do.

CHAIRPERSON: Ja, I think we should finish, ja.

ADV PRETORIUS SC: Thank you, if we might just take two minutes to make the arrangements for one witness to be moved out and the other to be moved in.

CHAIRPERSON: Ja, no that's five minutes adjournment.

ADV PRETORIUS SC: Thank you Chair.

CHAIRPERSON: We adjourn.

REGISTRAR: All rise.

INQUIRY ADJOURNS

INQUIRY RESUMES

CHAIRPERSON: Are we ready?

ADV PRETORIUS SC: Yes Chair, thank you. May we call witness number 3?

CHAIRPERSON: Yes.

ADV PRETORIUS SC: Witness number 3 can you hear me? Hello witness number 3, can you hear me?

WITNESS 3: Yes, loud and clear.

ADV PRETORIUS SC: Good, you have a bundle of documents before you, marked Exhibit BB14C, am I correct?

WITNESS 3: That's correct.

ADV PRETORIUS SC: Would you go to page 115, I'm referring to the black numbers in the top left-hand corner of the document.

WITNESS 3: Okay.

ADV PRETORIUS SC: Do you recognise that document?

WITNESS 3: Yes I do.

ADV PRETORIUS SC: Is it an affidavit?

WITNESS 3: Yes, it is.

ADV PRETORIUS SC: Is it your affidavit?

WITNESS 3: Yes Chair.

ADV PRETORIUS SC: Please go to page 132, there's a space for a signature at the bottom of that page which has been redacted, do you recall signing this affidavit? Witness number 3?

WITNESS 3: Yes, I recall signing it.

ADV PRETORIUS SC: You recall signing this affidavit?

WITNESS 3: That's correct.

ADV PRETORIUS SC: As far as you are aware, and

subject to any corrections we might have to make and subject to any further redactions that we might have to make, are the contents of this affidavit true and correct?

WITNESS 3: Yes, they are a true reflection.

ADV PRETORIUS SC: Right, Chair, may this Exhibit be entered onto the record?

CHAIRPERSON: The affidavit of witness number 3 appearing at page 115 of Bundle Transnet 1 will be admitted and marked as Exhibit BB14C.

ADV PRETORIUS SC: Thank you Chair. Witness number 3 are you employed in a senior security position in the Transnet Group?

WITNESS 3: That's correct Chair.

ADV PRETORIUS SC: Right, on page 116 and 117 there's a table which shows your previous employment, I don't want to go into any detail there for reasons which we have made clear to the Chair but if we can go to paragraph 4, did you have some experience as an employee of South African Police Service?

WITNESS 3: That's correct Chair.

ADV PRETORIUS SC: And, were you, in fact, during 2004 a member of the VIP Protection Unit of the South African Police Service?

WITNESS 3: That's correct Chair.

ADV PRETORIUS SC: And you describe, in paragraph 6

the duties of a Close Protection Officer, were you trained as a Close Protection Officer?

WITNESS 3: That's correct Chair.

ADV PRETORIUS SC: Briefly what are the duties of a Close Protection Officer?

WITNESS 3: Normally, I will be assigned to an Executive or a Minister in this regard for driving and making sure that he's personally safe.

ADV PRETORIUS SC: Yes, during 2005 were you assigned as a Close Protection Officer to any particular Minister or Deputy Minister?

WITNESS 3: Yes, I was Chair.

ADV PRETORIUS SC: To whom were you assigned?

WITNESS 3: Then, Deputy Minister Gigaba.

ADV PRETORIUS SC: Right, during the period – well first, during which period were you assigned as a Close Protection Officer to Deputy Minister Gigaba?

WITNESS 3: Late 2004 until 2007, late.

ADV PRETORIUS SC: Okay, and did you ever have occasion to accompany Deputy Minister Gigaba to any entity related to the Gupta family?

WITNESS 3: Yes, back then I accompanied him to the Sahara Business residence in Midrand.

ADV PRETORIUS SC: Right, when did you resign from the South African Police Services and as Close Protection

Officer for Deputy Minister Gigaba?

WITNESS 3: 2008, as a VIP Protector.

ADV PRETORIUS SC: Right, how did you come to be involved with Deputy Minister Gigaba, could you just relate it please, you deal with that at paragraph 10 of your statement and following, you deal with your appointment at Transnet and your secondment to the Department of Public Enterprises?

WITNESS 3: In 2013, I was called by a Major from the DPE at the Minister's office to come and have a meeting with him, the Manager and the Minister, regarding some position to – backup position at the Minister's entourage.

ADV PRETORIUS SC: Right, did you attend the meeting?

WITNESS 3: Yes, I did Chair.

ADV PRETORIUS SC: And what did you learn at that meeting?

WITNESS 3: I was told about the third level on the Minister's side and that we would be required to have – give support on a backup, on the main cover of the Minister.

ADV PRETORIUS SC: Right, so you were required – it wasn't very clear, do I understand you correctly, you say, you would be required to provide close protection and vehicle backup duties?

WITNESS 3: That's correct Chair.

ADV PRETORIUS SC: What does vehicle backup mean?

WITNESS 3: It means we would drive behind the main car.

ADV PRETORIUS SC: Okay, at that time, who were you employed by?

WITNESS 3: At that time, I was not employed.

ADV PRETORIUS SC: I'm sorry that didn't come through, just speak slowly please, you were employed by whom?

WITNESS 3: At that time of the meeting I was not employed Chair.

ADV PRETORIUS SC: But, as I understand it, you were seconded after that meeting that you've just told the Chair about, to the Department of Public Enterprises, am I correct?

WITNESS 3: That's correct.

ADV PRETORIUS SC: And your duties were to perform close protection duties for Deputy Minister Gigaba and vehicle backup support, am I correct?

WITNESS 3: Ja but for the backup he was now a full Minister for DPE.

CHAIRPERSON: I just want to clear up something, I thought Mr Pretorius asked whether you were seconded, and I thought you said yes but I thought you said you were not employed at the time of that meeting, is that correct? If you were seconded you would have been employed

somewhere and then you were asked to go and work elsewhere but if you were unemployed at the time you would not be seconded. Were you employed at the time you received that call?

WITNESS 3: Chair when I received the call to come and have a meeting for this backup position, I was not employed.

CHAIRPERSON: Okay, alright.

ADV PRETORIUS SC: Alright, so let's just summarise to get it clear, perhaps the dates are not clear. When Mr Gigaba was the Deputy Minister of Home Affairs and you were assigned to act as his Close Protection Officer, I understand that to be during 2005, is that correct?

WITNESS 3: That's correct Chair.

ADV PRETORIUS SC: And it was after that and before our resignation from SAPS in 2008 that you, together with Deputy Minister Gigaba visited Sahara Computers in Midrand on a number of occasions, is that correct?

WITNESS 3: That's correct Chair.

ADV PRETORIUS SC: And then, you say in April 2013 you received a call from an official in the Department of Public Enterprises and you had the meeting with Mr Gigaba, who was then Minister for Public Enterprises, am I correct?

WITNESS 3: That's correct Chair.

ADV PRETORIUS SC: Alright and you took up that

position as a backup driver as well as a Close Protection Officer, correct?

WITNESS 3: That's correct.

ADV PRETORIUS SC: And after July 2013 in serving Minister Gigaba as he was at that time, you were employed by the Department of Public Enterprises, is that correct?

WITNESS 3: I was at Transnet.

ADV PRETORIUS SC: Sorry, you say you were in Transnet at that time?

WITNESS 3: Yes, June 2013 I was employed by Transnet and July the 1st 2013 I was seconded then to the Minister of DPE.

ADV PRETORIUS SC: Alright, so in July 2013 you were employed by Transnet or at that time you were employed by Transnet, is that correct?

WITNESS 3: That's correct Chair.

ADV PRETORIUS SC: And then from the 1st of July you were employed by the Department of Public Enterprises in order to serve Minister Gigaba?

WITNESS 3: Yes, Chair I was employed for the services of Minister Gigaba.

CHAIRPERSON: There may be some confusion, as I understand you witness 3, you are saying as at the end of June you were employed by Transnet but with effect from the beginning of July you went to DPE, is that correct, or

did I misunderstand you?

WITNESS 3: That's correct Chair.

CHAIRPERSON: Did you go to DPE on a secondment or did you end your employment with Transnet and started a new employment at DPE or are you not sure?

WITNESS 3: Thanks Chair, I was employed by Transnet and July 1st, I was seconded to DPE.

CHAIRPERSON: Okay, alright.

ADV PRETORIUS SC: Yes, well it's clearly put in the table that we didn't deal with, because it details your employment in a way that, perhaps, could identify you but let's look at page 116, witness number 3 there you see part of the table of your employment history. Could you go to item 3 on page 116 please, are you there witness number 3?

WITNESS 3: Yes Chair.

ADV PRETORIUS SC: It says there,

> "Transnet, May 2013, security training course during first month,

Does that indicate that you were employed by Transnet in May 2013 and underwent a security training course?

WITNESS 3: Thank you Chair, it's 2013 June I was employed 2013, June by Transnet.

ADV PRETORIUS SC: Oh, so should May read June

then?

WITNESS 3: Thanks Chair.

ADV PRETORIUS SC: Okay...[intervenes].

CHAIRPERSON: Oh, I'm sorry, or is the position that, during May you received training for purposes – in preparation for you taking up employment at Transnet in June?

WITNESS 3: Chair, I was employed June 1st, and I underwent training for the whole duration of June, then July 1st, I was then seconded to DPE.

CHAIRPERSON: And in May 2013, that is now the month before June, were you employed, were you not employed by Transnet?

WITNESS 3: No May 2013 I was not yet employed by Transnet.

CHAIRPERSON: And you did not undergo the training that, that table reflect you underwent in May 2013, is that right?

WITNESS 3: It should be June 2013, the training.

CHAIRPERSON: Oh, so where it says May it should be June 2013?

WITNESS 3: That's correct Chair.

CHAIRPERSON: Okay, thank you.

ADV PRETORIUS SC: And how long, witness number 3, did your secondment to the Department of Public

Enterprise last, when did it come to an end?

WITNESS 3: 2013, December.

ADV PRETORIUS SC: So, during the period, July to December 2013 you were serving Minister Gigaba, is that correct?

WITNESS 3: That's correct.

ADV PRETORIUS SC: In paragraph 21 of your affidavit, witness number 3, you relate certain visits that took place, would you tell the Chair about those please?

WITNESS 3: Thank you Chair, from July to December I can recall I escorted the Minister as part of his convoy to a scheduled visit to the Gupta residence in Saxonwold.

ADV PRETORIUS SC: On, approximately how many occasions did you do that?

WITNESS 3: Six to seven times.

ADV PRETORIUS SC: Right and on those occasions did you drive a backup vehicle or did you drive with Minister Gigaba?

WITNESS 3: The six times I was on the backup and only once to make it seven, I drove the Minister himself, I was just alone.

ADV PRETORIUS SC: Were any of these visits recorded in the Minister's diary?

WITNESS 3: Yes, they were Chair, they were handed over to witness 1.

ADV PRETORIUS SC: Alright...[intervenes].

WITNESS 3: Sorry, Chair, and on this particular day where I drove him alone, he said I shouldn't record the journey on the log book so I didn't record that event.

ADV PRETORIUS SC: Did you have access to the Minister's diary as a Close Protection Officer?

WITNESS 3: Yes, we do.

ADV PRETORIUS SC: Yes, and paragraph 21.1 you say, and I don't understand your evidence, now, to be this, that none of these visits were recorded in the Ministers diary. So, what was the position?

WITNESS 3: Okay, normally he will just inform us as and when he wants us to go, he will inform us to go there.

ADV PRETORIUS SC: So, were they, or were they not recorded in the Minister's diary?

WITNESS 3: They were not recorded at all.

ADV PRETORIUS SC: And did you record these trips in the log book of your vehicle?

WITNESS 3: He informed us, we shouldn't record this information on the log book, so we didn't.

ADV PRETORIUS SC: Did he give a reason for telling you not to record them in his log book in your vehicle log book?

WITNESS 3: No reason was given to us.

ADV PRETORIUS SC: Right.

CHAIRPERSON: What types of trips did he say you

should not record in the log book, was it trips to particular destinations or only trips to a particular destination, one destination?

WITNESS 3: Only for the – that is in question now, he would say we shouldn't record that.

CHAIRPERSON: Which address is that, is that the Gupta residence?

WITNESS 3: Yes Chair.

CHAIRPERSON: That was the only – those are the only trips he said you must not record?

WITNESS 3: That's correct Chair.

CHAIRPERSON: Okay. Did he say that from the beginning before you could even record the first one or you did record some but you had to stop after he told you not to record them?

WITNESS 3: Can you repeat Chair, repeat that?

CHAIRPERSON: When he told you not to record those trips to the Gupta residence was it at a time when you had already recorded some but then you did not record others because of the instruction or did he tell you not to record them before you could even record the first one?

WITNESS 3: I was told that trip that we should not record so then as and when we go the second time I should not record because I was instructed not to.

CHAIRPERSON: Okay, alright.

ADV PRETORIUS SC: When you were part of the convey which visited the Saxonwold residence of the Gupta's what did you do? Did you – when Minister Gigaba visited where were you during those visits?

WITNESS 3: Normally as in when we arrive, I would wait in the car then he will jump out quickly and get into the premises.

ADV PRETORIUS SC: Right were you able to observe whether there were any other people present outside the residence?

WITNESS 3: In normal [indistinct 00:01:44] I saw Mr Brian Molefe and later I saw Matsela Koko of Eskom, Mr Ben Ngubane, Linda Mabaso our chair then within the premises as well.

ADV PRETORIUS SC: Alright. Did you see any other convoy at that time or around that time?

WITNESS 3: There was the convoy of the President of the Republic leaving the premises as we enter in one occasion.

ADV PRETORIUS SC: Who was he President at the time?

WITNESS 3: Mr Jacob Zuma.

ADV PRETORIUS SC: Alright. In paragraph 2 you talk of certain incidents involving Minister Gigaba. Would you tell the Chair about those incidents please?

WITNESS 3: At some point the Minister would carry a large sum of cash with him and I wish to highlight the following

instances in this regard. One day I was present with the Minister and when he opened the boot of the car of the official vehicle to take out money to buy lunch for us.

ADV PRETORIUS SC: Who is us?

WITNESS 3: The convey, the backup guys and the two of SAPS officials with him.

ADV PRETORIUS SC: Right.

WITNESS 3: Inside the boot it was a bag which he opened and there was some stack of bundles of money inside.

ADV PRETORIUS SC: Right.

WITNESS 3: With R200.00 notes.

ADV PRETORIUS SC: Are you able to say where that money came from?

WITNESS 3: I could not tell that time but as – as we make some visits then I could connect the dots to say the money came from the Saxonwold residence.

ADV PRETORIUS SC: How can you say that?

WITNESS 3: Because at some point as we went to the premises he would go to the Gupta's and we will go to Sandton he would use to pay cash for his tailored suits.

CHAIRPERSON: Let us go back to the money you saw in the bag. Was it just loose cash or was it tied in any way?

WITNESS 3: It was 200 bundles stacked in rubber bands full in there. Only R200.00 notes.

CHAIRPERSON: Yes. And about how much space did it

take in the bag if you are able to say about half, about a quarter or was it full?

WITNESS 3: It was quarter.

CHAIRPERSON: About a quarter of the bag?

WITNESS 3: Yes Chair.

CHAIRPERSON: Okay.

ADV PRETORIUS SC: What type of bag was it?

WITNESS 3: It was a sports bag.

ADV PRETORIUS SC: On that particular occasion where had you been on that day? Can you recall? Witness 3 did you hear my question?

WITNESS 3: Not clearly Chair.

ADV PRETORIUS SC: Alright. You have just told the Chair of an occasion where you saw a bag in the boot of Mr Gigaba's official vehicle and you say Minister Gigaba opened that bag and you could see stack of R200.00 notes in that bag right?

WITNESS 3: Yes.

ADV PRETORIUS SC: Correct?

WITNESS 3: That is correct.

ADV PRETORIUS SC: Right now I asked you earlier because your statement says nothing in relation to where that bag came from. Are you able to say where that money came from through any observation that you made not any opinion that you might have but through any observation

from what you saw? Did you see where that bag came from?

WITNESS 3: No I cannot say where it came from Chair.

ADV PRETORIUS SC: I am sorry.

WITNESS 3: I cannot tell you where it came from Chair.

ADV PRETORIUS SC: Okay.

CHAIRPERSON: That is because you do not know how it came to the car not because you do not want to tell us? You do not know how the bag that had money came into the car, is that right?

WITNESS 3: Yes that is correct Chair.

CHAIRPERSON: Yes.

WITNESS 3: That is correct Chair I do not know.

CHAIRPERSON: Yes okay.

ADV PRETORIUS SC: And nor does your statement say where it came from. You have expressed an opinion earlier in your evidence but I just wanted to establish that according to your statement and what you say now you do not know the history of that bag and how that money came to be in the bag and the bag came to be in the boot of the Minister, we are correct?

WITNESS 3: That is correct Chair.

ADV PRETORIUS SC: Okay. You say that you were present when Mr Gigaba went shopping in Sandton City for tailored suits. Do you recall that incident or those incidents?

WITNESS 3: Yes I do recall Chair.

ADV PRETORIUS SC: Did Mr Gigaba buy suits and pay for them?

WITNESS 3: Yes he did buy a couple of suits and paid cash.

ADV PRETORIUS SC: He paid cash right?

WITNESS 3: That is correct Chair.

ADV PRETORIUS SC: Right. And when he ate at restaurants where you were able to observe how did he pay for meals and drinks?

WITNESS 3: He paid cash Chair.

ADV PRETORIUS SC: Right. You move on in...

CHAIRPERSON: I am sorry. Do you – are you able to say roughly about how many times you may have seen him pay cash at restaurants because obviously somebody may pay cash on a particular day. Is it something that appeared to be common that whenever he was at a restaurant, he paid cash or you saw him once or twice pay cash at a restaurant?

WITNESS 3: Certain times he will pay cash.

CHAIRPERSON: And other times?

WITNESS 3: I would not have seen how he paid.

CHAIRPERSON: You said certain times so I thought maybe you know of other times when he did not pay cash, he did not use cash, is that right?

WITNESS 3: Chair around the times if I can recall well three times that I saw him paying cash.

CHAIRPERSON: Yes. And altogether do you have an idea

about how many times you might have taken him to a restaurant or you do not know?

WITNESS 3: It is a couple of times but only three times I saw him paying cash.

CHAIRPERSON: Yes and on other times you did not see how he paid?

WITNESS 3: That is correct Chair.

CHAIRPERSON: Okay alright. Yes Mr Pretorius.

ADV PRETORIUS SC: Thank you Chair. Where were you employed during January 2014?

WITNESS 3: I was employed by Transnet in the Carlton Centre.

ADV PRETORIUS SC: And in July 2014 were you given certain duties to perform?

WITNESS 3: Yes I was the CPO for the CFO Mr Anoj Singh then.

ADV PRETORIUS SC: The Chief Financial Officer Mr Anoj Singh?

WITNESS 3: That is correct.

ADV PRETORIUS SC: Were you a driver as well?

WITNESS 3: That is correct Chair.

ADV PRETORIUS SC: Right. And what was you practice in relation to Mr Singh were you his personal driver? In other words how did you operate with him as his driver?

WITNESS 3: Yes I was his close protector. I would drive

him around. I will run his diary as well.

ADV PRETORIUS SC: What vehicles did you drive for Mr Singh? I am on page 123 of your affidavit paragraph 35.

WITNESS 3: The white Mercedes C220 and the white Mercedes as well E350.

ADV PRETORIUS SC: Sorry you broke up there. A white Mercedes?

WITNESS 3: The white Mercedes the C220.

ADV PRETORIUS SC: Yes.

WITNESS 3: And the white Mercedes E350.

ADV PRETORIUS SC: Okay white Mercedes C220 and a white Mercedes E350.

WITNESS 3: That is correct.

ADV PRETORIUS SC: Can you remember the registration numbers?

WITNESS 3: Yes the C220 it was DT77MMGP.

ADV PRETORIUS SC: And the 350 can you recall that registration number?

WITNESS 3: It was DN87KFGP.

ADV PRETORIUS SC: Did you say KFGP?

WITNESS 3: KF that is correct.

ADV PRETORIUS SC: Right. Did you keep logbooks of trips undertaken in these vehicles?

WITNESS 3: Yes I did Chair. I would hand them over to Witness 1.

ADV PRETORIUS SC: Right. Have you subsequently attempted to obtain these logbooks in order to substantiate the trips undertaken for Mr Singh?

WITNESS 3: That is correct Chair.

ADV PRETORIUS SC: And what was the result of your efforts?

WITNESS 3: I was told that the logbooks could not be located.

ADV PRETORIUS SC: Did you ever drive Mr – or sorry not – did you ever drive him but did Mr Singh ever use a private vehicle?

WITNESS 3: Yes he did with his blue BMW M3.

ADV PRETORIUS SC: Right and when would he use that vehicle as you recall?

WITNESS 3: Normally on [indistinct 00:13:45] and on Monday morning he will bring it at the Carlton Centre and the Monday afternoon I will drive him with the Mercedes back home.

ADV PRETORIUS SC: Okay. Right in paragraph 38 you relate some incidents in relation to your duties serving Mr Singh. Tell the Chair about what you say in paragraph 38 and following please?

WITNESS 3: At some point I transported Mr Singh to the Gupta residence in Saxonwold.

ADV PRETORIUS SC: On approximately how many

occasions do you think you did that?

WITNESS 3: More than ten times Chair.

ADV PRETORIUS SC: And upon arrival at the Gupta residence what would happen?

WITNESS 3: I would park the parking and Mr Singh would jump out of the car into the premises.

ADV PRETORIUS SC: And how long did he remain in the premises?

WITNESS 3: But mostly it would...

ADV PRETORIUS SC: I am sorry I interrupted you.

WITNESS 3: Sorry, Chair. Mostly it will take 20-minutes to 30-minutes.

ADV PRETORIUS SC: Alright. And during that time, Mr Sing would be inside the Gupta Residence, I presume?

WITNESS 3: That is correct Chair.

CHAIRPERSON: I just note that Witness 1 also said, I think, Mr Brian Molefe used to stay inside the Gupta residence 20-minutes to 30-minutes if I am not mistaken. And I see here, it is also 20-minutes to 30-minutes.

I do not know if I am mistaken about the time that Witness 1 said Mr Molefe used to stay there. Whether...I do not think he went before that.

I think he also said, maybe 20-minutes to 30-minutes or something.

ADV PRETORIUS SC: It was slightly different but in any

event, the record will show.

CHAIRPERSON: Ja. Yes. I think the 20-minutes seems to be common.

ADV PRETORIUS SC: Yes.

CHAIRPERSON: Yes, okay.

ADV PRETORIUS SC: And do you have any recollection of incidents that happened after the meetings, when Mr Sing emerged from the residence?

WITNESS 3: At some point, he would leave the residence into the car with a bag full and would it put into the boot of the car.

ADV PRETORIUS SC: H'm.

WITNESS 3: A sports bag.

ADV PRETORIUS SC: Did you ever have an occasion to see what was contained in a bag that Mr Singh brought out of the residence of the Gupta's?

WITNESS 3: I have seen that Chair later on, not on the day.

ADV PRETORIUS SC: Alright. What happened? Please tell the Chair.

WITNESS 3: As ...[intervenes]

ADV PRETORIUS SC: I am sorry. We are at paragraph 41 of your statement.

WITNESS 3: That is correct Chair. He would come with a sports bag into the car from the Gupta residence and he would open the bag which he had collected earlier at the

Gupta residence inside the boot of his vehicle to give me some money to buy some lunch and I saw some ...[indistinct] [distortion present] of money of hundred notes and two hundred notes inside the bag.

ADV PRETORIUS SC: Right. How often did this happen?

WITNESS 3: [No audible reply]

ADV PRETORIUS SC: Did it happen once, several times?

WITNESS 3: More than once Chair.

CHAIRPERSON: More than once, can be two times. It can be five times. It can be twenty times. Are you able to give a much closer estimate?

WITNESS 3: Plus-minus, ...[indistinct] [distortion present] Chair.

CHAIRPERSON: Plus-minus six times?

WITNESS 3: Yes, Chair.

ADV PRETORIUS SC: Alright. I may have confused you with my question where you may not have been following my question Witness 3. How many times did he emerge from the Gupta residence with a sports bag that looked as if there was material or something inside the bag?

WITNESS 3: It is more than once, like I said Chair.

ADV PRETORIUS SC: Right. How many times did you see money, actually observed money, in the bag?

WITNESS 3: Okay, that is six to seven times Chair.

ADV PRETORIUS SC: How many?

WITNESS 3: Six to seven times.

ADV PRETORIUS SC: You saw money six to seven times?

WITNESS 3: That is correct Chair.

ADV PRETORIUS SC: Well, look at paragraph 41 of your statement. Please have a look at that.

WITNESS 3: [No audible reply]

ADV PRETORIUS SC: Your evidence now does not seem to accord with what you say in paragraph 41 because in paragraph 41 you say:

> "My suspicion that the bags contained money was confirmed when on one occasion he opened the bag which he had earlier collected from the Gupta residence inside the boot of our vehicle to give me some money to buy lunch.
>
> When he opened the bag, I could clearly see that the bag was stacked with one hundred and two hundred rand notes..."

Now, you are saying, as I understand ...[intervenes]

WITNESS 3: That is correct.

ADV PRETORIUS SC: ...that that happened six times.

WITNESS 3: No, that is correct Chair. I might have missed it. That is correct Chair.

ADV PRETORIUS SC: So what is the position? How many times did you see Mr Singh emerged from the residence with a bag?

WITNESS 3: [Indistinct] [distortion present] occasion Chair.

ADV PRETORIUS SC: I am sorry?

WITNESS 3: In... one occasion Chair.

CHAIRPERSON: Did you see him only once emerging from the Gupta residence with a bag? Let us forget about what was in the bag. Just imagine from the Gupta residence with a bag. Was it only once that you saw him or was it more than once?

WITNESS 3: It was once(?) [distortion present] Chair.

CHAIRPERSON: H'm?

WITNESS 3: [No audible reply]

CHAIRPERSON: What is the answer?

WITNESS 3: Chair, I only ...[indistinct] [distortion present] the money that we collected from the Gupta residence. That is once that I saw the money.

CHAIRPERSON: Okay.

WITNESS 3: But in two instances, we have collected the bag from the Gupta residence.

ADV PRETORIUS SC: Alright.

CHAIRPERSON: Okay, let us take it step-by-step. Just listen to my question. How many times, if you are able to tell me, did you take Mr Singh to the Gupta residence? Just taking him there.

Do not think about whether you saw a bag with or without money. Just, how many time, do you think, you took

him there if you are able to estimate?

WITNESS 3: It is more than ten occasions Chair.

CHAIRPERSON: More than ten occasions. Alright. Of those more than ten occasions, how many times do you see him come out of the Gupta residence with a bag? And at this stage, forget about whether the bag had money or not, just with a bag.

WITNESS 3: More than ten occasions Chair.

CHAIRPERSON: More than ten occasions?

WITNESS 3: That is correct.

CHAIRPERSON: Does that mean that most of the time whenever you took him, he would emerged from the Gupta residence with a bag?

WITNESS 3: That is correct Chair.

CHAIRPERSON: Okay alright. Of those more than ten occasions when he emerged from the Gupta residence with a bag, on how many occasions did you see what was in the bag?

WITNESS 3: [No audible reply]

CHAIRPERSON: Witness 3?

WITNESS 3: Yes, Chair it was on one occasion that I saw the money... the bag with the money inside.

CHAIRPERSON: It was only on one occasion that you saw that there was money in the bag.

WITNESS 3: That is correct Chair.

CHAIRPERSON: Was there any other occasion when you saw what was in the bag, even though it was not money or may it have not been money?

WITNESS 3: Only one occasion money ...[indistinct] [distortion present]

CHAIRPERSON: You never saw anything else inside the bag, you only saw money and it was only once?

WITNESS 3: That is correct Chair.

CHAIRPERSON: Okay alright. Mr Pretorius.

ADV PRETORIUS SC: Alright. You say in... I think that is now clarified that. Thank you, Witness 3. You say that in paragraph 42 or you say in paragraph 42 that:

> "On certain occasions, you would go somewhere with Mr Singh after a visit to the Gupta residence..."

What happened on these occasions?

WITNESS 3: Okay. Normally, we would leave the residence and drive to the ...[indistinct] next to Killarney Mall.

ADV PRETORIUS SC: Alright. What is Knox Vault. K-n-o-x Vault? What is it? Do you know?

WITNESS 3: Honestly, I know the premises. I do not know exactly what are you doing there but I know that address because I have been there on many occasions.

ADV PRETORIUS SC: Right. Alright. So on your way you would take Mr Sing to Knox Vault after a visit to the Gupta residence? Did you go there out of your own accord or did

Mr Singh instruct you to go there?

WITNESS 3: He instructed me to go there.

ADV PRETORIUS SC: Alright. And what would happen when you arrived at Knox Vault?

WITNESS 3: I would park the car and he would jump out and instruct me to open the boot, take out the bag into the premises and he would come with the bag empty.

ADV PRETORIUS SC: Alright. So you say he would instruct you to open the boot.

WITNESS 3: Yes?

ADV PRETORIUS SC: And the bag, was it empty or was it full? Could you see?

WITNESS 3: Upon our arrival, the bag would be full and we would... he would go inside with the full bag and come back with the bag empty.

ADV PRETORIUS SC: Alright. So you would go to the Gupta residence. After visiting the residence, you would go to Knox Vault with Mr Sing. He would take a full bag into Knox Vault and emerge from Knox Vault with an empty bag. Do I understand that correctly?

WITNESS 3: That is correct Chair.

ADV PRETORIUS SC: Alright.

CHAIRPERSON: When you say, he would come out of Knox Vault with an empty bag, did you have an occasion to open the bag and look inside or you are only able to say that

because of how the bag looked like when he came back with it?

WITNESS 3: Chair, a full bag will look bigger.

CHAIRPERSON: Yes.

WITNESS 3: And as he come out, he will have packed(?) [distortion present] in his hand. There will be... you could see, there is nothing in there.

CHAIRPERSON: Yes. So even if there may have been something, it would have been far less than what had been there before he went into Knox Vault?

ADV PRETORIUS SC: That is correct Chair.

CHAIRPERSON: H'm. You would not be able to say for sure there was completely nothing inside but it looked very different from the bag that he had taken in?

WITNESS 3: That is correct Chair.

CHAIRPERSON: Okay. Mr Pretorius.

ADV PRETORIUS SC: The incident that you have just described, coming from the Gupta residence and taking a bag into Knox Vault after that visit to the Gupta residence, on more or less how many occasions did this occur?

WITNESS 3: Six to seven times Chair.

ADV PRETORIUS SC: You recall an incident in 2015 when you were driving Mr Singh to a scheduled meeting and something happened to interrupt your trip to that scheduled meeting. Do you recall that incident?

WITNESS 3: Yes, on the day [distortion present]

"Sometime in 2015 when I was driving Mr Singh to a scheduled meeting and he received a call on the cellular cell phone.

After he had finished the call, he instructed me to divert from our route and immediately drive to the Gupta residence.

And I could hear there was some panic in his voice. He, subsequently, into... as we arrive, he jumped out, rushing inside the premises..."

ADV PRETORIUS SC: What happened then?

WITNESS 3: I then waited in the car and waited approximately an hour-and-a half for him to come out.

ADV PRETORIUS SC: Did he come out eventually?

WITNESS 3: Yes, he did and he appeared to be very nervous(?) [distortion present] and stressed. When he got into the vehicle he said, "Fuck this thing!" He then instructed me to drive him home and turn off the radio. Shortly thereafter he fell asleep.

ADV PRETORIUS SC: Right.

WITNESS 3: And this was an unusual behaviour(?) [distortion present] from him.

ADV PRETORIUS SC: Alright. Did you ever find out what led to his distress on that day?

WITNESS 3: No, Chair I cannot tell.

ADV PRETORIUS SC: Alright. In paragraph 47 and following, you relate an incident that occurred at the Three Rivers Lodge. When was this incident... when did this incident occur?

WITNESS 3: Sometime in July 2014.

ADV PRETORIUS SC: And what happened?

WITNESS 3: It was an executive strategy meeting for that whole week and I dropped Mr Singh. And on Monday and... I came to collect him on Friday.

ADV PRETORIUS SC: Right.

WITNESS 3: So ...[intervenes]

ADV PRETORIUS SC: And it was an executive management meeting of which company?

WITNESS 3: For Transnet.

ADV PRETORIUS SC: Right and it was taking place at the Three Rivers Lodge you say in Vereeniging?

WITNESS 3: Yes, in Vereeniging, Chair.

ADV PRETORIUS SC: And you tell the Chair that you dropped Mr Singh off early in the week and you came to collect him on the Friday afternoon?

WITNESS 3: That is correct.

ADV PRETORIUS SC: When you arrived at the Three Rivers Lodge on the afternoon of the Friday, what did you observe?

WITNESS 3: I noticed four men who appeared to be from

Asian descent, they looked like Chinese to me, standing around a Hyundai H1 kombi, the parking area. Two of the mean appeared to be busy with a conversation on cellular phones.

ADV PRETORIUS SC: And what happened next?

WITNESS 3: The next thing the two men who were speaking on their cellular phones took two luggage bags from the H1 kombi, one black bag and one maroon bag and went inside the lodge area where the executive meeting was held.

ADV PRETORIUS SC: And then continue, what happened after that?

WITNESS 3: Yes, at around 3 p.m. I received an SMS from Mr Singh requesting me to come to the conference room where the meeting was held. As I entered the room the two men who took the luggage bag into the lodge were in the room together with Mr Molefe and Mr Singh. Then Mr Singh pointed to me, the maroon luggage that I should take to the car.

ADV PRETORIUS SC: Did you do that?

WITNESS 3: I took the bag and put in the boot of our vehicle.

ADV PRETORIUS SC: Right. Was the bag light, heavy, full, empty? What did you notice?

WITNESS 3: It was a travelling bag, very heavy.

ADV PRETORIUS SC: Right and are you able to say whether the bag – you had seen the bag earlier?

WITNESS 3: I have seen the bag earlier (indistinct – recording distorted) inside the conference room.

CHAIRPERSON: I think you will have to repeat that answer, witness 3, because there was ...[intervenes]

ADV PRETORIUS SC: Witness 3, please speak slowly and say that again.

WITNESS 3: Yes, Chair, I have seen the bag before because I have seen the bag with the two Chinese as they were taking it into the conference facility.

CHAIRPERSON: Okay.

ADV PRETORIUS SC: Right, did you then take the bag and what did you do with it?

WITNESS 3: I took the bag to our vehicle.

ADV PRETORIUS SC: Right and did you see anybody else at that time in relation to these events that you are telling us about?

WITNESS 3: As I was putting the bag in the car, I saw one of our – Mr Brian Molefe's driver putting the black bag into Mr Molefe's car.

ADV PRETORIUS SC: Right, this black bag, had you seen it before?

WITNESS 3: Yes, I have seen it before when the Chinese were pulling it from their kombi into the conference facility.

ADV PRETORIUS SC: Right.

WITNESS 3: So is the position that at a certain stage you had seen two persons that appeared to you to be Chinese and they had two bags. They went into the hotel with the bags and later on you were asked by Mr Singh to take the one bag and put it into his car and later on you saw Mr Molefe's driver carrying the other bag that you have seen been carrying by the Chinese men into Mr Brian Molefe's car. Is that the position?

WITNESS 3: That is correct, Chair.

CHAIRPERSON: Witness 3, is that the position?

WITNESS 3: That is correct, Chair.

CHAIRPERSON: Did you hear me?

WITNESS 3: That is correct, Chair.

CHAIRPERSON: Okay, alright. Thank you.

ADV PRETORIUS SC: Alright. On that occasion, on that day, we are talking about a Friday. Did you have occasion to see what was in the bag? Now I am talking about the Friday now.

CHAIRPERSON: Witness 3.

WITNESS 3: Yes, Chair?

ADV PRETORIUS SC: Can you hear me, witness 3?

CHAIRPERSON: Are you struggling to hear us, witness 3?

WITNESS 3: It was not clear, can you just repeat, Chair?

CHAIRPERSON: Are you struggling to hear us at the

moment?

WITNESS 3: I could hear clearly now.

CHAIRPERSON: Okay.

ADV PRETORIUS SC: Alright, you can hear us. The question I am putting to you is, you are talking about an incident that happened at the Three Rivers Lodge in Vereeniging on a Friday in July 2014, am I correct?

WITNESS 3: That is correct, Char.

ADV PRETORIUS SC: On that Friday, not the next Monday but on that Friday did you see what was in the bag that you put into the boot of Mr Singh's vehicle?

WITNESS 3: No, I did not see anything, Chair.

ADV PRETORIUS SC: Right. What happened the next Monday?

WITNESS 3: Okay, the Monday Mr Singh came with his blue M3 and normally I would take it to a car wash on Mondays and as – normally I will check the car because I can hand it to the car wash, so I saw the very same maroon bag at the boot and it was quarter empty. As I opened it there was a lot of money inside and I informed him about the money and at the basement he came down from the 49th floor to come and take the bag.

ADV PRETORIUS SC: Right, now was this bag – you say it was the same bag? The same bag as what?

WITNESS 3: The same maroon bag that I saw on Friday.

ADV PRETORIUS SC: Right, on the Friday at the Three Rivers Lodge, right?

WITNESS 3: That is correct, Chair.

ADV PRETORIUS SC: Were you able to recall the weight of the bag on the Friday as compared to the weight of the bag on the Monday?

WITNESS 3: Yes, on Monday the bag was lighter.

ADV PRETORIUS SC: Right and you say you opened the bag to see what was inside the bag and what did you see inside the bag?

WITNESS 3: I saw stashed R200 notes in rubber bands.

ADV PRETORIUS SC: And how did you communicate with Mr Singh?

WITNESS 3: I sent him an SMS informing him about the [indistinct] **38.17** and he came downstairs to come and fetch it. I told him – I sent him an SMS to inform him about the money in the back. He said he is coming downstairs. Then he took the bag up and I left for car wash.

ADV PRETORIUS SC: When you went to collect Mr Singh at Three Rivers Lodge on that Friday in July 2014 what vehicle were you driving?

WITNESS 3: It was the E220.

ADV PRETORIUS SC: Okay, so it was a Mercedes Benz.

WITNESS 3: Yes.

ADV PRETORIUS SC: So you saw the bag in a different

vehicle on the Monday, do I understand you correctly?

WITNESS 3: Yes, it was in his private vehicle on Monday.

CHAIRPERSON: Had you – were you present or were you not present when the bag would have been taken from the E220 to his private vehicle or is that something that happened when you were not there?

WITNESS 3: Okay, from the Three Rivers we drove to the Carlton Centre where his blue private vehicle was and we exchanged – I took the bag from the Mercedes to his private vehicle.

CHAIRPERSON: Okay, alright.

WITNESS 3: And he drove off the Friday on his private vehicle with the bag.

CHAIRPERSON: Okay, alright.

ADV PRETORIUS SC: Did you ever have occasion to go with Mr Singh to the business of Sahara Computers?

WITNESS 3: Yes, Chair, I did.

ADV PRETORIUS SC: Can you recall on how many occasions you did that?

WITNESS 3: It was a number of occasions, Chair, I cannot give you the number but we went there many a times.

ADV PRETORIUS SC: Alright. And do you know who he visited at Sahara Computers?

WITNESS 3: No, Chair.

ADV PRETORIUS SC: Not sure that the next two paragraphs really are of any relevance to what we are saying but did you ever pick up an associate or a person who was a friend of Mr Singh at Sahara Computers?

WITNESS 3: Yes, I did, Chair.

ADV PRETORIUS SC: And this person, who did she work for?

WITNESS 3: As we collect her from Sahara, she was working for the Sahara business.

ADV PRETORIUS SC: And previous to that?

WITNESS 3: Working for Transnet.

ADV PRETORIUS SC: You go on in paragraph 57 to talk of close protection officer services to a Mr Gary Pita. Is that P-i-t-a?

WITNESS 3: That is correct, Chair.

ADV PRETORIUS SC: When was that?

WITNESS 3: From late 2016 to 2018.

ADV PRETORIUS SC: Alright, 2016 to 2018 you say you served Mr Gary Pita. Was this in a capacity as driver and close protection officer?

WITNESS 3: That is correct Chair.

ADV PRETORIUS SC: Was Mr Gary Pita the newly appointed Chief Financial Officer of Transnet?

WITNESS 3: That is correct.

ADV PRETORIUS SC: And what vehicles did you use to

transport Mr Pita?

WITNESS 3: The white Mercedes C-Class, the white Mercedes E-Class.

ADV PRETORIUS SC: The same vehicles that Mr Singh used?

WITNESS 3: That is correct.

ADV PRETORIUS SC: And the logbooks for those vehicles, for that period could you find them?

WITNESS 3: All I have submitted to this one.

ADV PRETORIUS SC: Yes but since then did you attempt to find them?

WITNESS 3: They could not locate them Chair.

ADV PRETORIUS SC: Yes, alright. Did you ever have occasion to drive Mr Pita to the Gupta residence?

WITNESS 3: Yes Chair.

ADV PRETORIUS SC: On how many occasions?

WITNESS 3: Only two occasions.

ADV PRETORIUS SC: Right. On the first occasions what occurred?

WITNESS 3: It was on a Friday.

ADV PRETORIUS SC: Did anything happen other than a visit to the Gupta residence?

WITNESS 3: I think on that Friday as I took him to the Gupta residence, he was the acting CFO and the week after he was appointed as the Group CFO.

CHAIRPERSON: So the week before he was appointed Group CFO, he had visited the Gupta residence.

WITNESS 3: Yes Chair order of the day.

ADV PRETORIUS SC: How long did he spend inside the residence?

WITNESS 3: About an hour Chair.

ADV PRETORIUS SC: Alright.

CHAIRPERSON: Well it is – well I see that here I am hearing about somebody who visited the Gupta residence the week before getting appointed as Group CFO.

ADV PRETORIUS SC: Yes.

CHAIRPERSON: The day before yesterday I heard evidence of Mr van Rooyen that he was at the Gupta residence during the day on which he was later informed by the former President that he was to be appointed as Minister of Finance.

ADV PRETORIUS SC: Right.

CHAIRPERSON: Yes, continue.

ADV PRETORIUS SC: The second occasion was when witness number 3?

WITNESS 3: The second occasion was in 2017

ADV PRETORIUS SC: Right, did he go into the residence on that occasion?

WITNESS 3: Yes he did Chair.

ADV PRETORIUS SC: When he came out what did you

notice about him?

WITNESS 3: He was very loud and he was red-faced and he was mentioning something like 600million payment and some timelines, but I couldn't understand what he was talking about.

ADV PRETORIUS SC: Alright.

CHAIRPERSON: I am sorry, Mr Pretorius can we just – can the witness just repeat that evidence, I missed something, what about – what was the occasion and what about 600million. In this Commission I have heard a lot of 600million Rand figures.

ADV PRETORIUS SC: We will have to collate that evidence with other evidence Chair. Just tell the Chair again please Witness number three what happened on the second occasion when Mr Pita returned from – as he was coming out.

WITNESS 3: Okay, as he was coming, as he was coming to the door, he was red-faced and he swear a lot and he mentioned something like 600million and some timelines but I did not understand what he was talking about.

CHAIRPERSON: Was he talking on the phone or was he just speaking alone?

WITNESS 3: He was speaking alone; he hit the seat of the car.

CHAIRPERSON: Oh, okay.

ADV PRETORIUS SC: Right you mentioned earlier in your evidence in relation to Mr Singh transporting Mr Singh to Knox Vault, did that ever occur with Mr Pita?

WITNESS 3: Yes it did Chair.

ADV PRETORIUS SC: Tell the Chair please what happened in relation to these visits?

WITNESS 3: I did transport Mr Pita to the Knox Vault six times. This would usually be some time during the week on a day to the office, so I will pick him up at his house and he would come out from the house with a bag, into our car. We drive then as we drive, he would instruct me to go to that Knox Vault. He would go there and I will park, he will jump out with the bag into the premises of the Knox and he would come with an empty bag, we would drive to the office thereafter.

ADV PRETORIUS SC: That evidence will be collated with other evidence I regard to Knox Vault's records Chair. In paragraph 65 you deal with visits by Mr Pita to Mr Saliem Essa, do you know Mr Saliem Essa by site?

WITNESS 3: Yes I know Mr Saliem Essa as to see him; we used to see him in Berea in a restaurant.

ADV PRETORIUS SC: Right what restaurant was this, it is an unpronounceable name but let's try.

WITNESS 3: It is a Portuguese restaurant it is called Parreirinha restaurant

ADV PRETORIUS SC: Right.

CHAIRPERSON: Maybe you can spell it for the benefit of the transcribers.

ADV PRETORIUS SC: Well he does much better than I do when I tried to pronounce Parreirinha.

CHAIRPERSON: Witness 3 do you want to spell the name of that restaurant for the benefit of the transcribers?

WITNESS 3: Yes Chair, it is P-a-r-r-e-i-r-i-n-h-a.

CHAIRPERSON: Thank you.

ADV PRETORIUS SC: Right is that a restaurant in Turffontein?

WITNESS 3: That is correct Chair.

ADV PRETORIUS SC: On how many occasions did you drive Mr Pita to meet Mr Essa at this restaurant?

WITNESS 3: Fifteen occasions.

ADV PRETORIUS SC: Right, and were these meetings, short meetings?

WITNESS 3: Long meetings Chair.

CHAIRPERSON: Fifteen occasions of exactly or approximately?

WITNESS 3: Normally he would arrive around one and we would leave in the evening, seven o'clock.

CHAIRPERSON: Yes, but what I am asking is whether when you say fifteen occasions is that because you are sure that you took him there on fifteen or occasions or you

are not sure about fifteen and you mean approximately or about fifteen occasions.

WITNESS 3: Approximately fifteen occasions Chair.

CHAIRPERSON: Okay.

ADV PRETORIUS SC: After Mr Pita's departure from Transnet did you continue to perform duties as a close protection officer in Transnet?

WITNESS 3: Yes I did Chair, within the CFO's office with acting CFO Mr Mohammed Mohamedy.

ADV PRETORIUS SC: Right. You deal on page 129 with some aspects of your career after working for Mr Mohamedy but I don't think it's necessary for us to go there, you continued to work in a security function do I understand you correctly?

WITNESS 3: That is correct Chair.

ADV PRETORIUS SC: Alright if you go to page 130 you deal there with security matters, just briefly tell the Chair how did you and do you regard the circumstances of your personal security after you had become involved with the Commission? Do you understand the question?

WITNESS 3: Not clearly, can you just repeat again.

ADV PRETORIUS SC: Your personal security in the time leading up to your giving evidence today how do you regard your personal security? Your personal safety.

WITNESS 3: I feel scared from here going forward Chair.

ADV PRETORIUS SC: Right. And you explain those circumstances fully you have explained them in a supplementary affidavit which has been part of the application but you also explain them to a degree at least on page 130 to 132. Is there anything you would like to add to your statement that I haven't mentioned?

WITNESS 3: No Chair.

ADV PRETORIUS SC: Thank you very much Witness number 3.

WITNESS 3: Thank you Chair.

CHAIRPERSON: Witness 3 you remember you told me that you took Mr Singh to Knox Vault, I think you said about six times, is that correct.

WITNESS 3: That is correct Chair.

CHAIRPERSON: Are you able to indicate roundabout when that would have been, would it have been during a particular year, was it 2015 or when was it or can you not remember? You were with him only for six months or was it more?

WITNESS 3: More than a year Chair.

CHAIRPERSON: About a year

WITNESS 3: More than a year yes.

CHAIRPERSON: Would that have been 2014, or 2015 or another year?

WITNESS 3: 2014 and 2015.

CHAIRPERSON: So those six times when you took him to Knox Vault some of those times would have been in 2014 and others would have been in 2015, is that right?

WITNESS 3: That is correct.

CHAIRPERSON: Okay, alright, thank you. Thank you very much witness 3 for coming to assist the Commission and to share with the Commission what you know about what happened when you were performing these duties or some of the people that you have mentioned we appreciate it very much, we understand your concerns about your safety and the safety of your family, but we are very grateful that you were able to come and give evidence. Thank you very much, the Commission will do what it can, all that it can to assist with regard to having your issues of safety addressed. Thank you very much and you are excused now.

WITNESS 3: Thank you Chair.

ADV PRETORIUS SC: Thank you witness number 3.

CHAIRPERSON: That was your last witness?

ADV PRETORIUS SC: Correct. I hoped there were more but ...

CHAIRPERSON: Do you feel some more energy? We are going to adjourn for the day, tomorrow I am supposed to hear the evidence of a former Chief Financial Officer in the Free State Provincial Government, Ms Bati Dlamini, so we

will start at normal time, ten o'clock, but for now we are going to adjourn.

We adjourn.

REGISTRAR: All rise.

INQUIRY ADJOURNS TO 14 AUGUST 2020

IN THE JUDICIAL COMMISSION OF INQUIRY INTO ALLEGATIONS OF STATE CAPTURE, CORRUPTION AND FRAUD IN THE PUBLIC SECTOR INCLUDING ORGANS OF STATE ("THE COMMISSION")

In the *Ex Parte application* of:

ESAIAS PETRUS LEONARD on behalf of
those persons listed in Annexure 'A'
to the application Applicant

ORDER made by Deputy Chief Justice Zondo, the Chairperson of the Commission, on 13 August 2020.

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1. It is recorded that this application was heard without prior notice to affected parties and failure to give notice is hereby condoned.

1.1 It is recorded that leave was previously granted for the hearing of the application in private whereafter the application on behalf of the person referred to in these proceedings as Witness 3 was postponed pending the delivery of a supplementary affidavit and judgment in respect of the application on behalf of Witness 1 and Witness 2 was reserved.

1.2 It is recorded that the supplementary affidavit in respect of Witness 3 has now been delivered.

2. Having previously heard argument on behalf of the applicant and considered the papers, the following order is made.

2.1 Condonation is hereby granted that there has been no compliance with Rule 3 of the Rules of the Commission with regard to furnishing statements or affidavits to any person implicated by the evidence of the witnesses to be referred to as Witness 1, Witness 2 and Witness 3. (The three witnesses in Annexure A to the application.)

2.2 The Commission's Legal Team must, as soon as possible after the evidence of the three witnesses has been heard, take necessary steps to ensure that the Acting Secretary of the Commission, furnishes all implicated persons with the appropriately redacted affidavits and the transcript of the evidence that will be heard from these three witnesses.

3. The three witnesses are permitted to give evidence to the Commission in accordance with the following directives:

3.1 The three witnesses will not be present in the hearing room at any time.

3.2 For the purpose of the three witnesses [giving evidence], a separate location ("*the protected witness location*") will be provided.

3.3 The three witnesses will each give their evidence from the protected witness location.

3.4 No camera will be permitted in the protected witness location.

3.5 An audio link from the protected witness location will be provided so that the evidence can be heard in the hearing room when the evidence is given.

3.6 No persons other than the Chairperson (if and when he considers it appropriate), the relevant evidence leaders, those necessary to assist or protect each of the three witnesses when they give evidence or any other person permitted specifically by the Chairperson will be permitted to enter the protected witness location.

3.7 The Commission's Safety and Security Advisor who is the Head of Security for the Commission, or, in his absence, another person specifically designated by the Chairperson will have the responsibility of controlling access to the protected witness location in terms of this order and of

ensuring that only the three witnesses and other persons permitted in terms of paragraph 3.6 above enter it.

3.8 Subject to the usual rules applicable to the conduct of the Commission's proceedings:

(a) members of the public, including the media, may be present in the hearing room in such numbers as may be directed by the Chairperson.

(b) sound reaching the hearing room via the audio link from the protected witness location may be broadcast and the proceedings in the hearing room may be filmed and broadcast.

3.9 No photograph or video or other image of the three witnesses may be taken, published or broadcast.

3.10 No person may photograph or publish any photograph or other image of any person engaged in and/or responsible for the protection of the three witnesses when they give evidence.

3.11 It is recorded that in the presence of the Chairperson, the oath was administered to each one of the three witnesses earlier today.

4. To protect the identities of the three witnesses, the three witnesses shall be respectively referred to as:

4.1 Witness 1.

4.2 Witness 2.

4.3 Witness 3.

5. The names and initials of the three witnesses shall be redacted from all affidavits and documentation presented in evidence.

6. Further redactions and corrections, when necessary, shall be made to the affidavits of the three witnesses, which will serve to prevent members of the public from readily identifying the witnesses.

7. During the course of the testimony of each of the three witnesses, their voices may be electronically distorted so that they would not be ordinarily recognisable.

8. Nobody shall directly or indirectly disclose the identity of the three witnesses.

9. Annexure 'A' to the application shall be removed from the application papers and shall be placed in a sealed envelope and kept in safekeeping by the Commission and not be made available for public disclosure at all.

10. Once the evidence of the three witnesses has been given, a transcript of the evidence together with the relevant redacted and corrected affidavit of the witness, as contemplated in 5 above, will be made available to the implicated parties. To the extent that I have made an order covering this earlier on, this will fall away.

11. This order may be amended or supplemented by the Chairperson at any time if, in his opinion, that is necessary to ensure the protection of the three witnesses or any other person in connection of the evidence of the three witnesses or to ensure fairness to any implicated person.

DATED AT PARKTOWN ON THIS 26th DAY OF August 2020.

Acting Secretary
Chairperson of the Commission

09. GIGABA, N

Derick de Beer

From: Secretary
Sent: 12 March 2021 11:18
To: Chowe Isaac
Cc: Secretary
Subject: Gigaba N // Rule 3.3 // Gigaba KM
Attachments: Gigaba Rule 3.3 Gigaba Mr Knowledge Malusi.pdf; Annexure 'A'.pdf; Annexure 'B'.pdf

Dear Sir/Madam,

Please find the attached Rule 3.3 Notice in respect of Ms Gigaba's evidence for your attention.

As referred to in the Rule 3.3 Notice, please also find Annexures A and B attached hereto.

Please note that the Commission is required to comply with all COVID-19 Regulations. Please advise the Secretariat 48 hours in advance at Secretary@commissionsc.org.za if you elect to attend. Protocols, procedures and arrangements in place at the hearing venue will then be communicated to you.

Kindly acknowledge receipt hereof and contact the Secretariat regarding any queries that you may have.

Yours faithfully,

Secretariat
COMMISSION OF INQUIRY INTO STATE CAPTURE
Hillside House, 2nd Floor, 17 Empire Road, Parktown,
Johannesburg, 2193, Gauteng South Africa,
Email: Secretary@commissionsc.org.za
Website: www.sastatecapture.org.za

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

NOTICE IN TERMS OF RULE 3.3

TO : MR KNOWLEDGE MALUSI GIGABA

C/O : STATE ATTORNEY

EMAIL : ichowe@justice.gov.za

IN TERMS OF RULE 3.3 OF THE RULES OF THE JUDICIAL COMMISSION OF INQUIRY INTO ALLEGATIONS OF STATE CAPTURE, CORRUPTION AND FRAUD IN THE PUBLIC SECTOR INCLUDING ORGANS OF STATE ("THE COMMISSION"), YOU ARE HEREBY GIVEN NOTICE THAT:

1 The Commission's Legal Team intends to present the evidence of **MRS NOMACHULE GIGABA (formerly Mngoma)** ["***the witness***"] at its hearing held at Old Council Chamber of the Municipality of the City of Johannesburg, 158 Civic Boulevard Braamfontein, Johannesburg. The presentation of the witness's evidence will commence on a date and at a time to be confirmed with you at a later stage.

2 The allegations set out in the evidence of the witness implicate or may implicate you in the manner set out in the summary below. They include, amongst others, the following:

2.1 From about 2009 when you were appointed as Deputy Minister of the Department of Home Affairs, you sought advice from your "advisors" to discuss work related matters which instructed your decisions on matters impacting government operations and official appointments. Your "advisors" were subsequently identified as the Guptas and in particular Mr Ajay Gupta. Your action to frequently meet and seek the advice of the Guptas, and in particular Mr Ajay

Gupta, persisted during your terms of office as Minister of the Department of Public Enterprises ("***DPE***"), Minister of the Department of Home Affairs and Minister of the Department of Finance.

2.2 About 2 to 3 months before you were appointed as Minister of the DPE, Mr Ajay Gupta told you about your move from the Department of Home Affairs to the DPE. Such prior knowledge and warning preceded your official appointment during November 2010.

2.3 You attended the Gupta residence in Johannesburg, Saxonwold ("***the Gupta residence***") frequently during the years of 2009 to 2018. On the days that you attended meetings at the Gupta residence, Mr Ajay Gupta would brief you on the intended topic(s) of discussion before you both entered the meeting held in a private meeting room. Mr Siyabonga Mahlangu would be present more often than Mr Thami Msomi who would also join you in the meeting. The intended topics of discussion, which were confidential and sensitive in nature, included matters relating to Cabinet, the African National Congress, the NEC, the DPE, tenders and contract extensions at Transnet, the need to change certain executives and officials at Eskom, cancellation of a South African Airways flight route between South Africa and Mumbai so that a Gupta airline could deliver the route. On one or two occasions, it is alleged that you reported to Mr Ajay Gupta some of the responses that you received from Ms Dudu Myeni relating to South African Airways.

2.4 During your term as Deputy Minister of the Department of Home Affairs in 2010, you created an official visit to Mumbai and New Delhi, India, so that you could meet the Indian nationals that Mr Ajay Gupta instructed you to meet in relation to cancellation of the South Africa/Mumbai flight route so that an airline to be introduced by the Guptas could service the route.

2.5 During 2013 and whilst you held the position of the Minister of the DPE, Mr Ajay Gupta allegedly met at most twice with you at your official residence in Pretoria to privately discuss matters relating to Transnet tenders and the signing of contracts on the one occasion and to discuss an Eskom project that was giving you "a headache" on the other occasion.

2.6 During 2013 and about one or two days before the Gupta wedding held at Sun City, you assisted the Guptas to welcome and fetch some of their guests at the Waterkloof Airforce Base who were arriving from India. On the day of the Gupta wedding, you attended at Waterkloof Airforce base to receive the Gupta aircraft.

2.7 During your term of office as Minister of the DPE, you received prior knowledge from the Guptas about the appointment of Mr Brian Molefe and Mr Siyabonga Gama into executive positions within Transnet before such appointments were official. You were aware that the Guptas knew who would be moved from and appointed to state owned enterprises.

2.8 You were believed you were obligated to meet the Guptas, meet their demands, and report back to them on matters concerning confidential and sensitive government affairs.

2.9 The Guptas pressurised you to take certain decisions regarding the removal Mr Brian Dames, the former Chief Executive Officer of Eskom because Mr Dames was not doing what the Guptas wanted him to do for them at Eskom; and Mr Monwabisi Kalawa, the former South African Airways Chief Executive Officer, whom the Guptas did not like.

2.10 When you refused to follow the instructions of Ms Dudu Myeni or Mr Ajay Gupta, one or the other would phone Former President Mr J.G. Zuma ("***Mr Zuma***") to complain about you which resulted in your observance of an instruction from Mr Zuma via Ms Myeni to whom you did not report.

2.11 You were improperly involved in the Guptas' application(s) for early naturalisation during your term of office as Minister of the Department of Home Affairs.

2.12 You improperly, unlawfully and/or illegally received and benefitted from the Guptas in at least the following ways: (a) wedding gifts of cash for payment towards the cost of the wedding, estimated between R4million and R5million, and the cost of a honeymoon in Dubai; (b) a gold jewellery necklace for your son; (c) a white 3-series BMW motor vehicle; (d) bags of cash monies collected on several occasions at the Gupta residence; (e) Mr Ajay Gupta agreed to give you

R850 000,00 to settle the debt of your sister, Ms Nozipho Gigaba, who also benefitted from employment in a marketing position at Sahara Computers; and (f) Mr Ajay Gupta funded the building renovation of your flat situated on your family's plot in Mandeni, KwaZulu Natal, which expanded from a two bedroom flat to a three bedroom, two bathroom and lounge area structure.

2.13 You were present on or about Wednesday, 24 June 2020, when certain law enforcement officials confiscated certain electronic devices in the possession of the witness. When the confiscated gadgets were returned to the witness, it is alleged that information on them was deleted including all photographs and emails relating to her overseas trips, and visits with the Guptas.

3 In the court papers referred to in paragraph 66.5 of the affidavit, the witness implicates you in what she alleges was her unlawful arrest and detention during the month of July 2020. In the same court papers, the witness alleges that you were involved in the unlawful confiscation of certain electronic devices in the possession of the witness and the deletion of the information contained thereon.

4 The entire affidavit of the witness which implicates or may implicate you in the above allegations are annexed hereto marked "**A**". The relevant annexures thereto are attached and marked "**B**". Your attention is drawn to all the contents of the affidavit.

5 Due to the fact that you are implicated or may be implicated by the evidence of the witness, you are entitled to attend the hearing at which that evidence is being presented. You are also entitled to be assisted by a legal representative of your choice when that evidence is presented. The full affidavit will be uploaded on the Commission's website (www.sastatecapture.org.za) as soon as she concludes her evidence. The transcript will be uploaded daily.

6 If you wish to:

6.1 give evidence yourself;

6.2 call any witness to give evidence on your behalf; or

6.3 cross-examine the witness

then you must apply, within fourteen (14) calendar days of this notice, in writing to the Commission for leave to do so.

7 An application referred to in paragraph 6 above must be submitted to the Secretary of the Commission. The application must be submitted with a statement from you in which you respond to the witness' statement insofar as it implicates you. The statement must identify what parts of the witness statement are disputed or denied and the grounds on which they are disputed or denied.

8 In the event that you believe that you have not been given a reasonable time from the issuance of this notice to the date on which the witness is to give evidence as set out above and you are prejudiced thereby, you may apply to the Commission in writing for such order as will ensure that you are not seriously prejudiced.

9 Please take note that even if you do not make an application under Rule 3.4:

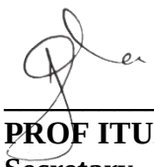
9.1 in terms of Rule 3.10, the Chairperson may, at any time, direct you to respond in writing to the allegations against you or to answer (in writing) questions arising from the statement; and

9.2 in terms of Regulation 10(6) of the Regulations of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State GN 105 of 9 February 2018 published in Government Gazette 41436, as amended, the Chairperson may direct you to appear before the Commission to give evidence which has a bearing on a matter being investigated.

10 The extracts of the witness affidavit and annexures thereto, if any, provided to you are confidential. Your attention is drawn to Regulations 11(3) and 12(2)(c) governing the Commission, which make it a criminal offence for anyone to disseminate or publish, without the written permission of the Chairperson, any document (which includes witnesses' statements) submitted to the Commission by any person in connection with the Commission's inquiry.

11 Any response to or application in regard to this notice must be sent to Advocate André Lamprecht, Ms Shannon van Vuuren and Ms Rachel Niewenhuis at secretary@commissionsc.org.za.

DATED AT PARKTOWN ON THIS 12th DAY OF MARCH 2021



PROF ITUMELENG MOSALA
Secretary
Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State

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

AFFIDAVIT

I, the undersigned,

NOMACHULE GIGABA (formerly: **MNGOMA**)

do hereby state under oath that:

1. I am an adult female businessperson residing in Pretoria, Gauteng. I married Mr Knowledge Malusi Gigaba (*"Mr Gigaba"*) on 30 August 2014. Our marriage relationship subsists but we are in the process of getting divorced.

2. All the facts stated in this affidavit are, unless the context indicates otherwise, within my personal knowledge. They are to the best of my knowledge and belief both true and correct.

3. I freely and voluntarily give this affidavit to the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State ("*the Commission*") regarding my knowledge about Mr Gigaba's involvement and activities on matters that fall within the Commission's Terms of Reference and areas of investigation. In particular, I deal with my experience and knowledge of Mr Gigaba's relationship with members of the Gupta family during the time that I have known him. I set out my observations during our visits to the Gupta family home in Saxonwold, Johannesburg ("*the Gupta residence*"), from 2011 to 2018, in which latter year I last met any member of the Gupta family.

4. On 21 and 22 January 2021, the Commission interviewed me.

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5. I am also assisted and advised in this matter by my counsel. My attorneys are Ramushu Mashile Twala (RMT), Attorneys.

THE GOVERNMENT POSITIONS HELD BY MALUSI OVER THE PERIOD FROM 2009 TO 2018

6. Mr Gigaba held the positions tabled below over the years from 2004 to 2018:

No.	Period	Position held
1.	29 April 2004 - 31 October 2010	Deputy Minister: The Department of Home Affairs
2.	1 November 2010 - 25 May 2014	Minister: The Department of Public Enterprises ("*DPE*")
3.	26 May 2014 - 31 March 2017	Minister: The Department of Home Affairs
4.	31 March 2017 - 27 February 2018	Minister: The Department of Finance

7. Mr Gigaba told me that he was active in the planning and coordination of election activities for the African National Congress ("*ANC*"). As I recall, he was at one time the Head of ANC Elections, nationally.

MY RELATIONSHIP WITH MR GIGABA AND THE GIGABA FAMILY

8. I met Mr Gigaba during 2009 when he was the Deputy Minister of the Department of Home Affairs. During 2010, I moved in with him, to his Pretoria home, when we were expecting our first child. Mr Gigaba gave me a credit card for my use, and to be able to buy household items, which was linked to his money market bank account. We married on 30 August 2014.

9. Mr Gigaba's family home is situated in Mandeni in KwaZulu-Natal.

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10. To the best of my knowledge, Mr. Gigaba's sister, Ms Gugu Gigaba, has been employed at Transnet SOC Limited ("*Transnet*") since February 2017 and she is currently a Manager in the Project Management Office.

11. Ms Nozipho Gigaba, Mr Gigaba's sister, at some stage after Mr Gigaba and I were married, lived in our home while she was working at Sahara Computers, a company owned by the Gupta family. Over time, my relationship with Nozipho deteriorated, for reasons which are not relevant for the purposes of this affidavit.

MEETING THE GUPTAS AND VISITS TO THE GUPTA RESIDENCE

12. From the time that I met Mr Gigaba during 2009, when he was the Deputy Minister of the Department of Home Affairs, he would regularly visit persons whom he described as "my advisors" in Johannesburg. According to Mr. Gigaba, he visited "his advisors" to discuss work related matters. At that time, I did not know the identity of "his advisors". I presumed that he was referring to Mr Thami Msomi ("*Mr Msomi*"), whom I understood to be his advisor and Chief of Staff. I had met Mr Msomi before through Mr Gigaba. I am since informed that Mr Msomi was his then Head of the Deputy Minister's Office at the Department of Home Affairs.

13. About 2 to 3 months *before* he took up the position of Minister of the DPE, Mr Gigaba told me when he arrived at home after visiting the Gupta residence that Mr Ajay Gupta (whom he mentioned by name) had told him that he would move from the Department of Home Affairs to the DPE. He was so excited and told me about the portfolio of the DPE. Mr Gigaba was indeed appointed as Minister of the DPE about 2 months later during November 2010. I had not yet personally met Mr Ajay Gupta at the time.

14. Mr Gigaba's visits to his "advisors" became more regular when he became the Minister of the DPE, often more than once per week. When I questioned him as to whether these were his official advisors, he then told me that the Guptas were his unofficial advisors who would advise him in respect of decisions to be made at work and in return he assisted them on certain things.

15. In 2011, during his tenure as Minister of the DPE, I became unhappy with the little time that Mr Gigaba was spending with our children because of his frequent evening visits to his "advisors". Mr Gigaba told me that it was important for him that I meet

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"his advisors". He told me that he would need to take work decisions on the day after his visits to them. He told me that they are responsible for the decisions made at work. He explained to me that as things were happening at work, he needed to report on it to his "advisors".

16. During the time of sittings of Parliament, Mr Gigaba would usually fly down to Cape Town on a Monday evening or Tuesday morning to attend Parliament and return home on the Thursday evening or Friday morning. During this time, he would inform me of his visits to the Guptas on the Mondays (preceding his trip to Parliament) and on the Friday evenings or sometimes on Saturdays (following his return from Parliament). When Parliament was in recess, the meetings took place on any day of the week following receipt of a telephone call. I understand that it was usually Mr Ajay Gupta who would telephone him.

17. I first met his "advisors" and learnt of their identity during 2011, when Mr Gigaba still held the position of Minister of DPE.

17.1. During late 2011, Mr Gigaba told me that "his advisors" wanted to meet me and our eldest son - who was born during June 2011. Initially, I did not want to go. Mr Gigaba told me that they are his long-time friends and he wanted me to know where he goes when he says that he is going to his "advisors". I agreed and the meeting took place at the Gupta residence. This was the first time that I met the Guptas. From the meeting I learnt that his "advisors" were the Guptas. At the Gupta residence, I met Mr Ajay Gupta, his wife and their son. There was no formal meeting that took place. Mr Ajay Gupta gifted our son a gold jewellery necklace. I have not seen the necklace since then. According to what Mr. Gigaba would tell me, he would frequently visit the Gupta residence on his own during that year.

17.2. On several occasions during 2012, I would visit the Gupta residence in Saxonwold, Johannesburg, together with Mr Gigaba.

17.3. After I met the Guptas, Mr. Gigaba would tell me that he is either going to meet "my advisors" or "Ajay".

18. A few months after my second son was born (in December 2012), I visited the Guptas in their residence, upon the invitation of Mr Gigaba, who informed me that the Guptas would like to meet our second child.

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19. In 2013, I met persons that Mr Gigaba identified as members of the Gupta family from India one or two days before the Gupta wedding that was held at Sun City. Mr Gigaba told me that he needed to assist the Guptas to welcome and fetch some of their guests at the Waterkloof Airforce base ("*Waterkloof*") who were arriving from India, which I did. Mr Gigaba left me to sit inside the building while he met with the Guptas.

20. On the day of the Gupta wedding, Mr Gigaba called to tell me that he was asked to attend the wedding. I do not know when he received the invitation to the wedding. We packed and were escorted to attend at Waterkloof to receive the Gupta aircraft. When we left Waterkloof, there were many blue light vehicles and metro police. Mr Gigaba and I attended the wedding at Sun City where I briefly met more members of the Gupta family. While at the wedding, I posted on my Facebook a photo of the henna pattern designed on my hand. Mr. Gigaba asked me to remove it from my Facebook postings, as it was generating negative media reporting.

21. I have since been to the Gupta residence on many other occasions in the company of Mr. Gigaba.

22. The procedure each time we attended the Gupta residence was generally the same. We would arrive at the main gate. Mr Gigaba's driver would announce our arrival to the security guard. The driver would be directed where to park. One of the security personnel would escort us into the house and take us to the lounge area before asking us to hand over our cellular phones. Our refreshment, and sometimes meal orders would be taken. Mr Ajay Gupta would arrive to greet me, and after some small talk, he would brief Mr. Gigaba on the meeting that they were about to hold in an adjacent private meeting room. We would often find either Mr Siyabonga Mahlangu ("*Mr Mahlangu*"), Mr Gigaba's former Legal Advisor at the DPE, or Mr Msomi, Mr Gigaba's Chief of Staff at the DPE, or both, at the Gupta residence. Mr Mahlangu would be present more often than Mr Msomi. Mr Gigaba, together with either Mr Mahlangu or Mr Msomi or both if they were present, would enter the adjacent private meeting room.

23. I was often left alone whilst Mr Gigaba attended the private meetings with Mr Ajay Gupta and others in the adjacent private room. I asked Mr Gigaba why I needed to hand over my cellular phone and he told me that it was because the matters that he and others were discussing were confidential as they related to Cabinet, the ANC,

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the NEC, and other sensitive matters. It did not make sense to me that I had to hand over my phone because most of the time I was alone while they attended their meetings. Sometimes, I would get bored and fetch my cellular phone to communicate via social media platforms.

24. Apart from Mr Ajay Gupta, Mr Mahlangu and Mr Msomi, I did not see any other attendees of these meetings that Mr Gigaba attended in the adjacent private meeting room. At best, I often heard voices from that room and presumed that there were other attendees present, especially since Mr Ajay Gupta would brief Mr. Gigaba on the meeting that they were about to enter in the adjacent private meeting room. Often, there would be a number of vehicles already parked at the Gupta residence by the time that we arrived, some of which appeared to be official government vehicles with blue lights.

25. As already mentioned, Mr Ajay Gupta would brief Mr. Gigaba in my presence about the meeting that they were about to join. I recall that the topics included a variety of issues including tenders and contract extensions at Transnet; the need to change certain executives and officials at Eskom; matters relating to the cancellation of a South African Airways ("*SAA*") flight route; and certain people that Mr Gigaba needed to meet prior to a trip to India. I also recall Mr Ajay Gupta talking to a paper dealing with DPE matters to Mr Gigaba that he needed to discuss at the meeting. On one or two occasions, Mr Gigaba reported to Mr Ajay Gupta some of the responses that he had received from Ms Dudu Myeni ("*Ms Myeni*") relating to SAA. I also recall overhearing Mr Ajay Gupta briefing Mr Gigaba about the cancellation of a SAA route between South Africa and Mumbai so that a Gupta airline could deliver the route.

26. At some stage, Mr Gigaba told me that Mr Ajay Gupta wanted him to get rid of Mr Brian Dames ("*Mr Dames*"). Having met Mr Dames, I asked Mr Gigaba why and he said that the Guptas do not like Mr Dames because there are things that Mr Dames was supposed to do but did not do.

27. Our visits to the Gupta residence would usually last about one to one and a half hour from the time that we arrived.

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Meetings held at our home

Meeting with the Guptas

28. During 2013, Mr Ajay Gupta met with Mr. Gigaba at our then official state residence at 266 Auriga Street in Waterkloof, Pretoria. I recall seeing Mr Ajay Gupta at our home at most twice. The meetings took place in an underground room or bunker at our home.

29. Mr Gigaba told me that Mr Ajay Gupta was meeting with him to discuss matters relating to Transnet tenders and the signing of contracts on the one occasion and on the other occasion it concerned an Eskom project that was giving Mr Gigaba 'a headache'.

Meeting with Mr Gigaba's staff

30. Mr Gigaba invited staff from his office at the Department of Home Affairs to our residence prior to a trip to Mumbai and New Delhi, India.

30.1. During the last period of Mr Gigaba's tenure as Deputy Minister of Home Affairs, Mr Gigaba complained to me that the Guptas were demanding that he finalise his trip to Mumbai and New Delhi, India.

30.2. During or about 2010, I accompanied Mr Gigaba and other government officials on the trip to Mumbai and New Delhi, India. Before the trip, I overheard Mr Gigaba complaining to Mr Ajay Gupta that he could not go on the trip to India because he was still at the Department of Home Affairs; therefore he could not justify a trip to discuss a new flight route between South Africa and India which was a matter that fell under DPE. At a later stage, Mr Gigaba mentioned that he would create an official state visit to India whilst at the Department of Home Affairs so that he could meet the Indian nationals that Mr Ajay Gupta wanted him to meet in relation to the South Africa/Mumbai route.

30.3. In India, Mr Gigaba and Mr Msomi attended various meetings. I did not see with whom they met as I was out shopping when they attended the meetings.

30.4. Mr Gigaba later told me in 2010 that the Guptas wanted to introduce their own airline to service the Johannesburg/Mumbai flight route and that the Guptas

were demanding that he compel SAA to cancel their Johannesburg/Mumbai route. Mr Gigaba did not support that demand.

PRIOR KNOWELDGE OF APPOINTMENTS IN STATE OWNED ENTERPRISES

31. Mr Gigaba would often tell me that the Guptas wanted certain individuals to be appointed into senior positions at state owned enterprises.

31.1. After one of the 'The New Age Breakfast sessions', Mr Gigaba told me that Mr Brian Molefe ("*Mr Molefe*") was going to be moved from Transnet to Eskom Holdings SOC Limited ("*Eskom*"). I was told this before Mr Molefe was officially appointed to Eskom. He told me that the Guptas wanted Mr Molefe at Eskom and not Mr Brian Dames ("*Mr Dames*").

31.2. Mr Gigaba also told me that Mr Siyabonga Gama ("*Mr Gama*") would be appointed the Chief Executive Officer of Transnet before the appointment was made.

31.3. Mr Gigaba also told me that he intended to speak to Mr Gama to appoint his sister, Ms Gugu Gigaba, to Transnet. To the best of my knowledge, Ms Gugu Gigaba was appointed and remains in the employ of Transnet.

31.4. On many occasions, Mr Gigaba informed me that the Guptas knew and had told him about who would be moved from and appointed to SOE's

TENSIONS RISING

32. As Mr Gigaba's tenure as Minister of the DPE progressed, he often told me that the Guptas were putting pressure on him to take certain decisions with which he did not agree. I recall Mr Gigaba mentioning to me that the Guptas did not like Mr Monwabisi Kalawa, the then SAA Chief Executive Officer, or Mr Dames, the then Eskom Chief Executive Officer. Mr Gigaba enjoyed working with both of them. When I asked Mr Gigaba why he did not stop using the Guptas as his advisors, he told me that he could not. There were several times when Mr Gigaba would get upset and tell me that he did not want to but needed to go meet the Guptas as he needed to 'report back' to them on certain matters. He was also upset that they were making unreasonable demands on him.

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33. During early 2014, Mr. Gigaba's relationship with the Guptas began to appear strained. The Guptas wanted Mr Gigaba to get rid of Mr Dames as the Chief Executive Officer of Eskom because Mr Dames was not doing what the Guptas wanted him to do for them at Eskom. However, Mr Gigaba did not agree with the Guptas' instruction. Mr Gigaba then started avoiding phone calls from the Guptas. When Mr Gigaba ignored the phone calls, the Guptas would send Mr Msomi to speak to him and Mr Gigaba would then agree to meet with them. Mr Ajay Gupta would regularly call Mr Gigaba and demand that he attend the Gupta residence to meet certain people. This upset Mr Gigaba because he would have to cancel his planned official appointments in order to do so. Mr Gigaba also told me that Mr Ajay Gupta told him that if he wanted to run the DPE as he wished, he would be moved back to the Department of Home Affairs. I understand that Mr Ajay Gupta would often tell Mr Gigaba that he should remember why he was appointed at the DPE.

Mr Gigaba's relationship with Ms Dudu Myeni ("*Ms Myeni*")

34. When Mr Gigaba was appointed as the Minister of the DPE, he had a close working relationship with Ms Myeni. Ms Myeni facilitated our honeymoon trip to Mauritius. He would often meet her at the Sheraton Hotel for lunch and thereafter he would go to the Gupta residence.

35. At a later stage, Mr Gigaba informed me that there was some disagreement between him and Ms Myeni about certain decisions pertaining to the direction of SAA, which resulted in tensions between them.

36. Mr Gigaba and Ms Myeni began to disagree on many aspects relating to matters concerning SAA, including the issues regarding the cancellation of the SAA Johannesburg/Mumbai flight route.

37. On Sundays, Mr Gigaba and I would regularly have lunch in Sandton. While driving to return home, I would overhear Mr Gigaba's telephone discussions with Ms Myeni. He would sometimes share the detail of such discussions with me which would include that:

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37.1. he did not understand why Ms Myeni had been appointed as the Chair of SAA because he did not believe her to be competent for that position;

37.2. Ms Myeni would feed information to the former President without telling him about it;

37.3. when Mr Gigaba did not want to follow the instructions of Mr Ajay Gupta or Ms Myeni, one or other would phone the former President to complain about him. Ms Myeni would then pass on instructions from President Zuma to Mr Gigaba which would upset him. Mr Gigaba believed that he should have had a direct line of communication to the former President and not receive instructions via Ms Myeni because he did not report to her.

38. Ms Myeni told Mr Gigaba that if he did not do as he was told, he would go back to the Department of Home Affairs.

Mr GIGABA'S RETURN TO THE DEPARTMENT OF HOME AFFAIRS

39. On 26 May 2014, Mr Gigaba was transferred back to the Department of Home Affairs as Minister.

40. Mr Gigaba did not believe that the former President would transfer him back to the Department of Home Affairs because he believed that they shared a very close relationship.

41. Mr Gigaba therefore appeared very shocked and hurt when his transfer was announced after the 2014 elections. The former President told Mr Gigaba, in front of the ANC Top Six leaders, that the reason he was being moved back to Department of Home Affairs concerned the strengthening of border controls. But Mr Gigaba knew that that was not the reason. Mr Gigaba told me this when he came back from his meeting with the President at which he was notified of his redeployment to the Department of Home Affairs. Mr Gigaba did not say anything in response in front of the others who were present at the meeting.

THE GUPTAS' APPLICATIONS FOR SOUTH AFRICAN CITIZENSHIP

42. During Mr Gigaba's term of office as Minister of the Department of Home Affairs, he informed me that he was assisting some of the Gupta family members to obtain citizenship in South Africa. He said that the Guptas were conducting business in South Africa and that they needed their family then living in India to be in South Africa.

43. One day in 2015, Mr Gigaba came home with blank official documents in a brown envelope that he informed me the Guptas needed to sign. I went with him to the Gupta residence and on arrival Mr Ajay Gupta greeted us. Mr Gigaba went with Mr Ajay Gupta into a separate room carrying the same brown envelope. When we left the Gupta residence to go home, Mr Gigaba carried the same brown envelope with him. The next morning, Mr Gigaba called me to ask about the whereabouts of the brown envelope. He asked me to look for the brown envelope at home. Later that same day, he called again to inform me that he had found the brown envelope in the boot of his official car.

44. It is publicly known that Mr Gigaba, during his term as Minister of the Department of Home Affairs, had approved the early naturalisation of members of the Gupta family.

MALUSI GIGABA'S TRANSFER FROM THE DEPARTMENT OF HOME AFFAIRS TO THE DEPARTMENT OF FINANCE

45. On or about 30 March 2017, whilst Mr Gigaba and I were attending a fashion show and gala dinner in Cape Town, he received a telephone call on his cellular phone. He left the venue to take the call. When Mr Gigaba returned, he told me that we needed to leave the function immediately. In the car, he informed me that the call that he had received was from the former President. The former President had informed him that he had decided to reshuffle his Cabinet and that Mr Gigaba would be appointed as the Minister of Finance.

46. This change in Mr Gigaba's portfolio appeared to upset him very much. He informed me that the former President told him that he initially wanted to appoint Mr Molefe as the Minister of Finance but finally decided to appoint him (Mr Gigaba) at the request of the other NEC members.

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47. By the time that Mr Gigaba moved to the Department of Finance, his relationship with the Guptas had deteriorated and the visits to the Gupta residence had become infrequent.

GIFTS, CASH AND BENEFITS RECEIVED FROM THE GUPTAS

48. Over the years, Mr Gigaba had received cash and various gifts and benefits, discussed below, from the Guptas. This is apart from the gold jewellery necklace that Mr Ajay Gupta gave to our eldest son on the first occasion that I met him during 2012. I do not know if Mr Gigaba ever declared the jewellery gift to the DPE.

Gifts

The white 3-series BMW motor vehicle ("the BMW")

49. A few months before Mr Gigaba took office as Minister of the DPE, Mr Ajay Gupta gave Mr Gigaba the BMW. Mr Ajay Gupta handed over the BMW to Mr Gigaba, in my presence, at the offices of Sahara Computers in Midrand. I later used the BMW as my private vehicle. The registration of the BMW was eventually transferred into my name from a name unfamiliar to me. Mr Gigaba informed me that he had given the car to one of his friends for repairs to one of the lights, but the car was never returned.

Cash and benefits

Wedding gifts of cash

50. Mr Gigaba and I married on 30 August 2014. I did most of our wedding planning. We invited both the former President and the Guptas but none of them attended. Mr Molefe was invited and did attend.

51. Mr Gigaba informed me that, as a wedding gift, the Guptas gave him a cash donation towards the cost of the wedding in addition to paying for the cost of a honeymoon in Dubai. I do not know how much money the Guptas in fact gave.

52. I estimate that our wedding cost between R4 million to R5 million. I paid all the wedding expenses, including caterers and other suppliers, in cash from the bundles of cash that I received from Mr Gigaba

Cash collected from the Gupta residence

53. Mr Gigaba had two Close Protection Officers ("*CPO*") who accompanied him in the same vehicle. I knew his lead CPO named Lawrence (I think his surname was 'Mahlaele') ("*Lawrence*") very well.

54. On several occasions that we attended the Gupta residence, I personally observed Mr Gigaba leaving the adjacent private meeting room, where the meetings were held, to request that his cellular phone be brought to him. He would call one of his CPOs to bring his leather bag, kept in the boot of his official vehicle, to the front door of the residence, where he would collect the leather bag. Mr Gigaba would carry the bag into the private meeting room and, a short while later, he would emerge with the bag to carry it out of the residence for the CPO to place it in the boot of his official vehicle. I recall that Mr Gigaba had two of those leather bags. I attach similar examples of these bags obtained via an Internet search as **Annexures "A" and "B".**

55. I subsequently learnt that the leather bags contained bundles of cash notes.

55.1. There were several occasions when Mr Gigaba and I would go to Sandton City immediately after visiting the Gupta residence. At Sandton City and in my full view, Mr Gigaba would take bundles of cash notes out of the same leather bag that he had brought out of the Gupta residence and which had been placed in the boot of his official vehicle, for handing to Lawrence to pay for his suits purchased at HTK Sartoriale ("*the HTK store*").

(a) When Mr Gigaba purchased suits from the HTK store, suits would be kept aside for him from which he would make a selection. He would leave the HTK store with the suits and inform the sales person that one of his protectors would return to pay for it.

(b) Mr Gigaba sometimes shopped at the Fabianni store in Sandton City when I was with him. He paid in cash for clothing that he bought there.

55.2. On several occasions, I had also personally observed Mr Gigaba transferring money from his brown and black leather bags into his brown leather personal carry bag. I attach a similar example of the personal carry bags obtained via an Internet search as **Annexure "C"** and **"D"**. He would later use the cash from his personal carry bag to pay for our meals at restaurants.

55.3. Apart from a Louis Vuitton handbag bought in Sandton City which Mr Gigaba paid in cash, he did not typically buy gifts for me with the cash collected at the Gupta residence. He told me to use the credit card, up to no more than a R100,000 monthly credit limit, that he gave to me years before. This card was linked to his money market bank account. He did, however give me cash of between R100,000 to R150,000 for shopping when I holidayed overseas.

56. About one week after the Gupta wedding held at Sun City during 2013, Mr Gigaba and I visited the Gupta residence. On our return home, the CPOs took the bags from the boot of his official vehicle and placed them in the lounge, as usual, including the leather sports bag (**Annexure A**) that Mr Gigaba had brought out of the Gupta residence during our visit there. Mr Gigaba took the sports bag to his study and I went to check on our children. On learning that our second child was very ill, I rushed to Mr Gigaba in the study to tell him that we needed to take our child to hospital immediately. On opening the door of the study without knocking, I found Mr Gigaba unpacking bundles of cash, in denominations of R100 and R200 notes, and placing them in his safe. I was shocked to see all the money and asked him what the money was for. He told me that Mr Ajay Gupta gave the money to him and that it was to assist the ANC in its upcoming 2014 Election Campaign. I knew that Mr Gigaba was involved in the planning and coordination of ANC election activities, being deployed at least once to Mpumalanga, and that he was involved in the purchase of campaign T-shirts and posters.

Ms Nozipho Gigaba: Payment of her bad debt and employment at Sahara Computers

57. During 2013, Mr Gigaba's father called us to a meeting at their family home in Mandeni in KwaZulu Natal. Following a private discussion that Mr Gigaba had held with his father, he told me that his father had asked him to assist his sister, Ms Nozipho Gigaba, to settle a R850,000 bad debt in her name. Mr Gigaba told me that when we returned home, he would ask Mr Ajay Gupta for the money.

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58. At a later stage, Mr Gigaba told me that Mr Ajay Gupta had agreed to give him the R850,000 and that Mr Mahlangu would collect the initial amount of R425,000 for payment towards the debt. He also told me that Mr Mahlangu would assist the family with the process to have his sister's name removed from an adverse listing by credit bureaus. I was informed that the name was removed from credit listing.

59. The Guptas had also employed Ms Nozipho Gigaba in a marketing position at Sahara Computers. As far as I know, she did not work there for very long before leaving their employ.

Cash for renovations to Mr Gigaba's home on the family plot

60. During Mr Gigaba's tenure as Minister of the DPE, he told me that he wanted to extend his two bedroom flat situated in front of the main house on his family's plot in Mandeni, KwaZulu Natal. A bigger house would better accommodate our family and manage family politics.

61. Mr Gigaba contracted his brother-in-law, ("*the builder*"), to do the building renovations. I learnt that Mr Ajay Gupta funded the building renovation when one day Mr Gigaba told me that he was going to get the money from Mr Ajay Gupta to pay the builder. He later called that same day to tell me that he was flying to KwaZulu Natal immediately to pay the builder. I do not know the cost of the building renovations but the completed structure, which took a few months to build, consisted of three bedrooms, two bathrooms and a lounge area.

62. I was present on at least three occasions when Mr Gigaba paid the builder in bundles of cash for the tiling and plumbing. I do not know how much money was given.

63. Despite assurances that Mr Gigaba gave to me, I do not know if he officially declared any of the gifts, cash or benefits to the ANC and to the relevant government authorities.

THE GUPTA MONEY COUNTER

64. In one of the visits to the Gupta residence, when Mr Gigaba was still Minister of DPE, we attended a function at the Gupta residence, Mr Ajay Gupta took us on a tour of one of the newly renovated houses in the Gupta compound. We were part of a small group of people who were unknown to me. He showed us a room that had been converted into a small cinema and in another area, I saw a sauna.

65. At one area, I saw a device which looked like a small version of an Automated Teller Machine ("*ATM*"). Mr Ajay Gupta demonstrated how it operated by punching an amount on the keyboard of the machine, which was R10,000 if I recall correctly, and it dispensed the cash notes in denominations of R100 and R200.

CONFISCATING MY DEVICES TO DESTROY POSSIBLE EVIDENCE

66. During February 2020, I asked Mr Gigaba for a divorce. Without expanding on the details surrounding the personal circumstances of my request for a divorce, I bring the following to the attention of the Commission:

66.1. Mr Gigaba asked me to delay the divorce proceedings until after he appears before the Commission.

66.2. Around June 2020, Mr Gigaba asked me for all of my electronic devices because he had brought someone to our home, whom he introduced as an IT expert, to delete certain information from all of my phones, iPad and laptop ("*my devices*"). I refused to hand over my devices. This made him visibly upset. On querying what information needed to be deleted, Mr Gigaba stated that certain pictures and information on my gadgets could be used to prove that he had visited the Guptas regularly which would contradict his answers in Parliament to the questions put to him by the Economic Freedom Fighters Members of Parliament. He said that he did not want the same to happen to him as had happened to Mr Molefe during the Public Protector investigation - which had used his cellphone records to prove that he had visited the Gupta residence. He was also particularly concerned to delete any photographs that I had taken on our trip to Mumbai and New Delhi in India, photographs of our honeymoon

trips to Mauritius and Dubai and my private trips to Dubai. I did not hand over my devices.

66.3. Mr Gigaba also asked me not to speak to the Commission nor the law enforcement agencies about Gupta visits, the cash and the gifts.

66.4. On Thursday, 18 June 2020, a domestic incident occurred at our home. On or about Wednesday, 24 June 2020, Mr Gigaba called me into the living area where I met Captain Mavuso and Sergeant Ntabambi of the HAWKS. They demanded my two iPhones, my old Huawei phone, my iPad and my MacBook and knew exactly where to locate each gadget in various parts of our home. They refused my right to legal representation. They demanded all the usernames and passwords for the devices, all details of my email and social media accounts, making me test each one in their presence. When the confiscated gadgets were later returned to me, all photographs and emails relating to my trips overseas, visits with the Guptas, and other information were deleted from the devices.

66.5. The events of 18 June 2020 and subsequent are contained in court papers, under the case Gigaba v Minister of Police and Others (43469/2020) whose judgment appears under [2021] ZAGPPHC 55 (11 February 2021). The papers can be made available if required.

LOSS OF PERSONAL PASSPORTS

66. On my return from Durban on 1 March 2021, I discovered that mine and my children's personal passports are missing, and not where I had left them. I found only an empty passport cover for my passport. I also discovered that copies of my passport that I had made earlier and kept them in my drawer were also missing.

67. I confronted Mr Gigaba about the whereabouts of my children's passports and mine later that day, and he denied having seen them. I believe that the theft of my children's passport and mine was to conceal evidence of a trip that we took to Mauritius.

N.G Som

DEPONENT

I certify that the deponent who acknowledges that she knows and understands the contents of this affidavit; that it is the truth to the best of her knowledge and belief and that she has no objection to taking the prescribed oath and regards same as binding on her conscience; and the administration of the oath complies with the Regulations published under Government Notice R1258 in Government Gazette 3619 of 21 July 1972, as amended. This affidavit is signed and sworn to before me at SANDTON on this 06th day of **MARCH 2021.**

COMMISSIONER OF OATHS

EX OFFICIO:

FULL NAMES:

GUGULETHU OSCAR MADLANGA

PHYSICAL ADDRESS:

PRACTISING ATTORNEY
COMMISSIONER OF OATHS
MADLANGA & PARTNERS INC
ATTORNEYS
THE OFFICES OF HYDE PARK
1ST FLOOR BLOCK ON STROUTHOS PLACE
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DESIGNATION:

A

B

Gom
N.g

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N.G

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

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INDEX: SEQ 18/2021

No.	Description	Pages
	Rule 11 and 3.4 Application filed by **Mr Malusi Knoweldge Nkanyezi Gigaba** for leave to: 1. in terms of Rule 11.1 of the Rules of the Commission into Allegations of State Capture ("the Commission") to declare the evidence of Nomachule Gigaba (Mngoma) to be inadmissible alternatively for her evidence to be otherwise struck out from the Commission's records; ***alternatively:*** 2.1. for an order in terms of Rules 4.2 and 11.1 that the hearing of Nomachule Gigaba's testimony, together with any questions put to Mr Malusi Gigaba in relation to her evidence and his answers thereto, shall be heard *in camera*; and further that Nomachule Gigaba's evidence and Malusi Gigaba's responses thereto shall not be disclosed to the public other than to the extent which the Commission itself refers to it in its final report(s); and 2.2 for leave to cross examine Nomachule Gigaba as contemplated in Rule 3.3 as read with Rule 8.2 of the Rules; and 2.3 Malusi Gigaba's supporting affidavit hereto be admitted into evidence as Malusi Gigaba's preliminary response to Nomachule Gigaba's allegations.	

No.	Description	Pages
1.	Notice of Application dated 26 March 2021	001 to 003
2.	Preliminary affidavit and annexures Malusi Gigaba dated 29 March 2021	004 to 076
	2.1 Preliminary affidavit of Malusi Gigaba	004 to 044
	2.2 Annexures “KMG1” to Annexures “KMG4”	045 to 076

IN THE JUDICIAL COMMISSION OF INQUIRY INTO THE ALLEGATIONS OF STATE CAPTURE, CORRUPTION AND FRAUD IN THE PUBLIC SECTOR INCLUDING ORGANS OF STATE, HELD AT BRAAMFONTEIN, JOHANNESBURG ("the Commission")

GIGABA, MALUSI KNOWLEDGE NKANYEZI Applicant

NOTICE OF APPLICATION

IN TERMS OF RULES 11.1; 4.2 AND 3.3 & 3.4 AS READ WITH 8.2

KINDLY TAKE NOTICE that the Applicant hereby files his preliminary statement of response to the allegations made by **NOMACHULE GIGABA** in her affidavit dated 6 March 2021.

KINDLY TAKE NOTICE FURTHER that the Applicant simultaneously hereby applies to the Chairperson of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State ("***the Commission***") for an order that:

1. The affidavit filed by before the Commission by Ms Nomachule Gigaba and dated 6 March 2021 is found to be inadmissible.

2. In the *alternative* to (1) above:

   (a) The statement of response annexed hereto and marked as

Annexure "*A*" is admitted to the Commission as a preliminary response by Mr Knowledge Malusi Gigaba to Ms Nomachule Gigaba's allegations.

(b) The hearing of Ms Nomachule Gigaba's testimony and any questions put to Mr Knowledge Malusi Gigaba and his responses thereto which relate to Ms Nomachule Gigaba's evidence shall be heard *in camera*.

(c) The contents of Ms Nomachule Gigaba's evidence and Mr Knowledge Malusi Gigaba's responses thereto shall not be disclosed to the public other than to the extent which the Commission itself refers to it in its final report(s).

(d) The applicant is granted leave to cross examine Ms Nomachule Gigaba on such terms as the Chairperson of the Commission may deem fit.

(e) The applicant is granted such further and alternative relief as the Chairperson of the Commission may deem fit.

DATED at Pretoria on this 26 day of March 2021.

STATE ATTORNEY
Attorneys for the applicant

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TO:
THE SECRETARY OF THE COMMISSION
2nd Floor, Hillside House
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TEL: 010 214 0651
E-MAIL: secretary@commissionsc.org.za
REF: Adv Shannon van Vuuren

Filed with the Secretary of the Commission by e-mail secretary@commissionsc.org.za /BoipeloR@commissionsc.org.za
On _____

IN THE JUDICIAL COMMISSION OF INQUIRY INTO THE ALLEGATIONS OF STATE CAPTURE, CORRUPTION AND FRAUD IN THE PUBLIC SECTOR INCLUDING ORGANS OF STATE, HELD AT BRAAMFONTEIN, JOHANNESBURG ("the Commission")

GIGABA, MALUSI KNOWLEDGE NKANYEZI Applicant

PRELIMINARY STATEMENT OF RESPONSE

INCORPORATING AN AFFIDAVIT IN SUPPORT OF AN APPLICATION IN TERMS OF RULES 11.1; 4.2 AND 3.3 READ WITH 8.2

I, the undersigned,

MALUSI KNOWLEDGE NKANYEZI GIGABA

do hereby make oath and say:

THE DEPONENT

1. I am:

   1.1. an adult male; and

   1.2. the Former Minister of *inter alia*, the Department of Public Enterprises.

2. The contents of this statement are within my personal knowledge and belief, save where the context indicates otherwise and are both true and correct.

PURPOSE OF THIS STATEMENT

3. On 12 March 2021, the Commission sent to my attorney, Isaac Choke, the notice in terms of Rule 3.3, which notice is annexed hereto as "***KMG1***" together with the affidavit and annexures of Nomachule Gigaba ("***Nomachule***").

4. The purpose of this statement is two-fold. *First*, I substantiate an application:

   4.1. in terms of Rule 11.1 of the Rules of the Commission into Allegations of State Capture ("***the Commission***") to declare the evidence of Nomachule to be inadmissible *alternatively* for her evidence to be otherwise struck out from the Commission's records;

   4.2. *alternatively*:

      4.2.1. for an order in terms of Rules 4.2 and 11.1 that the hearing of Nomachule's testimony, together with any questions put to me in relation to her evidence and my answers thereto, shall be heard *in camera;* and further that Nomachule's evidence and my responsee thereto shall not be disclosed to the public other than to the extent which the Commission itself refers to it in its final report(s); and

      4.2.2. for leave to cross examine Nomachule as contemplated in Rule 3.3 as read with Rule 8.2 of the Rules.

5. *Second*, I provide a response to the allegations made in Nomachule's affidavit.

INTRODUCTION

6. Nomachule and I were married in 2014 and are currently undergoing an acrimonious divorce process.

7. Nomachule's affidavit is predominantly based on alleged communications between her and I as romantic partners and, thereafter, as husband and wife. Several of her allegations are not based on any manner of personal observation, others are irrelevant. Her allegations and insinuations of improper conduct against me are fabricated and untrue.

8. At the present time we are still living together as husband and wife, and any testimony at the Commission may hamper any chance of a reconciliation. A reconciliation would obviously be in the best interests of our children. It is unlikely that if her testimony is made public, there will be any chance of reconciliation.

9. I address the following five issues in turn to follow:

   9.1. *First*, I explain the context of Nomachule's and my current relationship and ongoing divorce proceedings. I submit that Nomachule is trying to embarrass me through these proceedings in an effort to advance her interests in the divorce settlement. I substantiate that, in this context, there is a high propensity for evidence to be fabricated, to be highly subjective, emotive, and vindictive. Accordingly, Nomachule's evidence cannot fairly be admitted unless it is tested through cross-examination.

   9.2. I explain that Nomachule's affidavit brings into the public domain several matters relating to our marital relationship and moreover issues concerning our children. To meaningfully test the evidence and Nomachule's credibility as a witness means that matters relating to our family and personal lives will be publicised on a significant scale. This threatens my minor children's and my rights to privacy and dignity.

   9.3. I explain that in this context, to fairly and properly subject the evidence to scrutiny further necessitates that the Commission delves into collateral issues which will be of little probative value to the issues to be determined within the Commission's mandate.

9.4. ***Second***, I detail why the admission of Nomachule's evidence in this context will have a significant prejudicial effect on me.

9.5. ***Third***, I demonstrate that Nomachule's evidence is in any case of little probative value in that it is largely speculative and not drawn from personal knowledge. On the face of it, and as presented in her affidavit, it is not evidence which tends to prove or disprove the various allegations made against me. The prejudicial effect of admitting her evidence outweighs its probative value to the Commission.

9.6. ***Fourth***, I humbly aver that, in the result, the Commission should refuse to admit Nomachule's evidence or otherwise strike the affidavit from the Commission's records. ***Alternatively***, I ask that the Commission permit me to cross-examine Nomachule and that her testimony and any questions put to me in relation to her evidence be heard *in camera* in order to preserve, both my children's and my (as well as the Commission's) dignity.

9.7. ***Fifth***, I provide an *ad seriatim* response to Nomachule's allegations.

NOMACHULE'S AFFIDAVIT SEEKS TO PUBLICISE PRIVATE MATTERS

10. Nomachule and I are currently involved in acrimonious and highly contested divorce proceedings. Contrary to her apparent claim to have initiated the divorce proceedings and her claim that I asked her to delay divorce proceedings (at paragraphs 66 to 66.1 of her affidavit), it was me who filed for divorce by issuing summons in August 2020. I attach hereto the summons in our divorce proceedings at "***KMG2***".

11. Nomachule and I were married out of community of property and without the accrual system. I note that I do not attach our antenuptial agreement here as I consider this to be a private matter. Suffice it to say that, in the result, Nomachule has little legal claim in the divorce proceedings to my estate by virtue of our elected marital regime.

12. While I am at pains to preserve the without-prejudice basis of our ongoing settlement negotiations in the divorce, I must disclose certain information to the Commission in order to substantiate my applications and defence to her allegations. In the process of our settlement negotiations, Nomachule has on occasion used the threat of publicly embarrassing me in forums such as the Commission in an effort to gain leverage in the divorce settlement. Accordingly, I believe that her approach to the Commission is in an improper effort to advance her agenda in our divorce proceedings.

13. Nomachule's affidavit is also characterised by and reliant on allegations relating to our intimate affairs, our marital relationship, family life and our children.

14. *First*, the bulk of her allegations relate to alleged personal communications between her and I at various points during our romantic relationship – initially as romantic partners, then as co-parents and later as husband and wife. In this respect she makes allegations about information which she alleged that I told her (paragraphs 13, 14, 15, 16, 17.1, 17.3, 20, 23, 26, 29, 30.1, 30.4, 31, 31.1-31.4, 32, 33, 35, 37, 41, 42, 43, 45-46, 51, 56, 57, 58, 61, 66.1, 66.2, and 66.3).

15. *Second*, Nomachule makes frequent mention of our relationship as romantic partners, as spouses and of our family life:

    15.1. She describes her unhappiness in our relationship at paragraph 15.

    15.2. She refers to time we spent together sharing meals as romantic partners (paragraph 37).

    15.3. She makes various claims as to our financial arrangements as a couple (paragraph 55.3).

    15.4. She describes building plans for the renovation of my extended family's home (paragraph 60).

15.5. She makes claims regarding family meetings with my extended family (paragraph 57).

15.6. She makes allegations relating to our wedding and its financing (paragraphs 50 to 52).

15.7. She discusses our honeymoon and makes allegations regarding trips we took together (paragraph 66.2).

15.8. She describes an alleged "*domestic incident*" which occurred at our home on 18 June 2018 (paragraph 66.4).

15.9. She makes allegations regarding our divorce proceedings (paragraphs 66 to 66.1).

15.10. She describes alleged confrontations she sought to initiate with me (paragraph 66).

16. *Third*, and most disturbingly, Nomachule makes several references to our children:

16.1. She makes allegations relating to my interaction with my children as a father (paragraph 15).

16.2. She claims that Mr Ajay Gupta gave our son a gold jewellery necklace (paragraph 17.1).

16.3. She refers to our eldest son (paragraph 17.1) and our youngest child (paragraph 18).

16.4. She describes her own conduct as a mother when "*checking on*" our children (paragraph 56).

16.5. She describes our youngest child being very ill and that she needed to take our child to hospital (paragraph 56).

16.6. She makes claims relating to our children's passports (paragraph 66).

17. This deeply personalised nature of Nomachule's evidence demonstrates four issues which I submit should be of concern to the Commission:

17.1. *First*, it demonstrates Nomachule's true intention in these proceedings – to use the Commission as a forum to advance her interests in the divorce settlement negotiations – and the inherently unreliable nature of her testimony.

17.2. *Second*, it demonstrates that the inevitable and intended outcome of her evidence before the Commission will be to denigrate the proceedings into a forum for the airing of intimate grievances, for mudslinging, to embarrass me on personal matters, and to compromise my and my children's rights to privacy and dignity.

17.3. *Third*, it demonstrates the necessity that, should the Commission admit the evidence, then I should at least be permitted to test Nomachule's evidence through cross-examination. The context of our present relationship is an objective indication of the prospect that Nomachule's evidence is unreliable, vindictive, subjective, emotive and fabricated. It would be unfair if she were permitted to advance these allegations, least of all in the public domain, without the Commission affording me an opportunity to cross-examine her, to test the veracity of he claims, and to determine her credibility as a witness.

17.4. *Fourth*, and related to the above, the inevitable result of any meaningful cross-examination of Nomachule in this context means that I will be compelled to place into the public domain and before the Commission deeply private matters regarding my marriage and family life much, as much as I would be loath to do so.

J KNW

17.4.1. I will be forced into a position in which I may have to disclose sensitive matters relating to without-prejudice settlement negotiations in divorce proceedings which are *sub judice*.

17.4.2. I will be compelled to test my wife's credibility as a witness. This perforce will require enquiry into her character, motives and her relationship with me and, accordingly, the revelation of the underlying causes of the dissolution of our marriage.

17.4.3. In testing my wife's evidence, I will have to advance the revelation of further detail regarding our minor children's home lives and our parenting. My eldest son is only nine years' old and my youngest son is eight years' old. To thrust their names and the details of their private family lives into the public domain and to have to raise these issues in this forum would embarrass the children, and undermine their rights to privacy and dignity. This cannot be in our children's best interests.

18. By virtue of the above, I am concerned that the admission of Nomachule's evidence will force the Commission into delving into collateral issues that will undermine my children's and my constitutional rights to privacy and dignity. The harm that will be occasioned to them is immeasurable and will remain indelible in their minds long after these proceedings are concluded.

19. I note that these are not ordinary court proceedings. The Commission's process is streamed live on television and online, it is highly scrutinised by the press and subject to intense public interest. This will exacerbate the indignity to which my family will be exposed.

J KNN

THE ADMISSION OF NOMACHULE'S EVIDENCE IS PREJUDICIAL TO ME

20. The admission of Nomachule's evidence will further cause procedural prejudice to me as an implicated person, even if the Commission permits me to cross-examine her.

21. I am advised that Nomachule enjoys marital communications privilege in regard to her and my communications as spouses during the course of our marriage but that she may waive that privilege as she has clearly done in respect of the allegations she advances in her affidavit. I understand, nonetheless, that she may assert marital communications privilege in regard to any particular question relating to our marital communications which she decides not to answer.

22. The result of this is that I will be prejudiced in the admission of Nomachule's evidence in that, in the event I am permitted to cross-examine her, she will be able to avoid answering any questions on our marital communications which would otherwise implicate her improper motives and dishonesty in advancing her evidence.

23. I am advised that under the Commission's Rules, I have no right to lead *alternative* evidence to test her evidence and credibility. Even if the Commission grants me leave to lead such evidence, I would, in so doing, inevitably be compelled to expand the scope of our personal affairs being placed on display for public consumption. This is prejudicial to me.

24. I am furthermore aware that I am due to testify before the Commission. In doing so (and should Nomachule's evidence be admitted) I will surely be questioned on Nomachule's allegations. I have sought in my alternative prayers to the Commission that Nomachule's evidence and any questions put to me and my answers in relation to her evidence be heard *in camera* and protected from public disclosure. This is necessary, in my submission, to protect my and my children's personal affairs from obscene public disclosure.

J KWP

25. It is, however, unclear to me how my testimony would be heard in such a piecemeal fashion if some of my testimony will be publicised and others heard *in camera*. Such a hearing (which would be necessary if Nomachule's evidence is admitted) will prejudice me to the extent that it creates a false impression of an incoherent or fragmented narrative at least in the mind of the public and possibly that a similar impression will be left with the Commission.

26. I submit that this is a further reason why the admission of Nomachule's evidence will prejudice me unfairly. I persist in my submissions, nonetheless, that if her evidence is admitted, it will be necessary for it to be heard (and my responses thereto) *in camera* to preserve my and my children's privacy and dignity.

THE NATURE OF NOMACHULE'S EVIDENCE

27. The affidavit which Nomachule has filed before the Commission offers very little in the way of relevant evidence of any probative value to the Commission. As I demonstrate in the *ad seriatim* response below, her allegations are largely fabricated and can only have been pieced together in an effort to purport knowledge of allegations which have been made against me in the public domain.

28. In any event, on its face Nomachule's "evidence" is predominantly drawn from alleged conversations we had in the course of our romantic relationship, and the remainder are either speculative and irrelevant or seeking to draw tenuous inferences based on alleged observations which she made. This is not evidence which tends to prove or disprove the various allegations which she makes against me.

    28.1. As I stated above, the bulk of her allegations relate to claimed <u>personal communications</u> between her and me as spouses or romantic partners.

    28.2. Some of Nomachule's allegations are untethered to any personal knowledge at all. In respect to these allegations, she makes no claim that her assertions

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are based on information which I told her, nor that they are based on events which she herself experienced or observed. She gives no basis or source for these allegations – they are at best hearsay or speculation, and at worst vexatious efforts to mislead the Commission into creating a spectacle of her and my difficulties as husband and wife. These **speculative allegations** include the following:

28.2.1. Nomachule states that I met with "*the Guptas*" habitually at various times including following the receipt of telephone calls and that it was usually Mr Ajay Gupta who phoned me (paragraph 16).

28.2.2. Nomachule states that I met with Mr Ajay Gupta in an underground bunker in my Waterkloof state residence (paragraph 28).

28.2.3. Nomachule states that Mr Msomi and I attended various meetings in India which she admits she did not see because she was shopping (paragraph 30.3).

28.2.4. Nomachule claims that in 2014 my relationship with "*the Guptas*" began to take strain, that "*the Guptas*" wanted certain things with which I did not agree and that I avoided phone calls from the Guptas (paragraph 33).

28.2.5. Nomachule states that she "*understands*" that Mr Ajay Gupta would often tell me that I should remember why I was appointed at the Department of Public Enterprises ("*DPE*") (paragraph 33).

28.2.6. Nomachule claims that I would go to the "*Gupta residence*" after meeting with Ms Myeni (paragraph 34).

28.2.7. Nomachule states that Ms Myeni and I disagreed on certain matters (paragraph 36).

28.2.8. Nomachule claims that Ms Myeni told me that if I did not do as I was told that I would "*go back to the Department of Home Affairs*" (paragraph 38).

28.2.9. Nomachule claims that I did not believe that former President Zuma would transfer me to the Department of Home Affairs because I believed we shared a "*very close bond*" (paragraph 40).

28.2.10. Nomachule claims to know what former President Zuma told "*the ANC Top Six leaders*" regarding my transfer to Home Affairs and that I did not respond to this in the meeting (paragraph 41).

28.2.11. Nomachule claims that by the time I moved to the Department of Finance, my relationship with "*the Guptas*" had deteriorated and my visits to the "*Gupta residence*" had become infrequent (paragraph 47).

28.2.12. Nomachule claims that I received "*cash and various gifts and benefits*" from the Guptas (paragraph 48).

28.3. Further to this, some of Nomachule's allegations have no relevance at all but for a spurious effort to draw the Commission into making unspecified inferences into my conduct or motives. This includes the following:

28.3.1. Nomachule makes allegations that I described myself to be visiting "*my advisors*" (paragraphs 12) and that I consulted with my "*advisors*" (at paragraph 15).

28.3.2. Nomachule makes an allegation that I asked her to remove a Facebook photo of a henna pattern on her hand (at paragraph 20).

7 KNN

28.3.3. Nomachule claims that there were certain procedures when visiting "*the Gupta residence*" such as being told where to park or being served refreshments or meals (paragraph 22). She also describes certain facilities that she allegedly saw in the "*Gupta residence*" including a cinema, sauna and ATM machine (paragraph 64 to 65).

28.3.4. Nomachule claims that she thought she was not allowed to have her phone with her while visiting the "*Gupta residence*" but that she would sometimes get bored and fetch her cellphone and communicate on social media (paragraph 23).

28.3.5. Nomachule claims that I often met with Ms Myeni and at lunch with her at the Sheraton hotel (paragraph 34).

28.3.6. Nomachule claims that she paid for our wedding in "*cash bundles*" which she received by me (paragraph 52).

28.3.7. Nomachule claims that I kept my cellphone in a leather bag in which I sometimes also carried cash (paragraph 54).

28.3.8. Nomachule claims that I paid for certain clothing purchases in cash (paragraph 55.1).

28.3.9. Nomachule describes certain building and renovations on my family's home and my payment of builders for the work (paragraphs 61 to 62).

28.3.10. Nomachule describes certain events relating to criminal matters in which she is involved (paragraph 66.4).

28.3.11. Nomachule describes having lost her and our children's passports (paragraph 66).

28.4. Finally, a minority of Nomachule's allegations are alleged to be based on her personal knowledge and experience. I dispute the truth of these to follow.

28.5. In the result, I am advised and submit that Nomachule's evidence is of little probative value and is in several respects founded in hearsay and irrelevant allegations.

MY APPLICATIONS

29. By virtue of the above, I pray that the Commission exercise its discretion in terms of Rule 11.1 to declare Nomachule's evidence inadmissible *alternatively* to otherwise strike her evidence from the Commission's record because:

29.1. the procedural prejudice occasioned to me outweighs the minimal probative value (if any) which the evidence offers;

29.2. the context of my and Nomachule's relationship indicates a high likelihood that the evidence is unreliable, fabricated, highly subjective, emotive and vindictively-motivated;

29.3. the admission of the evidence will compel an excursion into collateral issues which will not advance the Commission's mandate; and

29.4. the admission of evidence of this nature makes inroads on my and my children's rights to dignity and privacy.

30. In the *alternative*, I ask that the Commission order (in terms of Rules 4.2 and 11.1) that Nomachule's testimony, together with any questions which are put to me in relation to her evidence and my answers thereto, shall be heard *in camera*; and that the contents of her evidence and my responses thereto shall not be disclosed to the public other than to the extent which the Commission shall itself refer to it in its final report(s). I

further ask for leave to cross examine Nomachule as contemplated in Rule 3.3 read with Rule 8.2 of the Rules.

31. The *alternative* order will to some extent allow Nomachule's evidence to be tested fairly while insulating my family and I, as well as the Commission, from the indignity of the inevitable airing of our personal affairs in such a public forum.

MY RESPONSE TO THE ALLEGATIONS OF NOMACHULE

32. I answer to Nomachule's allegations below only insofar as is necessary.

AD PARAGRAPH 8

33. I point out that the card that I had furnished to Nomachule was a debit card linked to my cheque account. It was in my name. I refer to what is set out below in paragraph 119 in this regard.

MEETING THE GUPTAS AND VISITS TO THE GUPTA RESIDENCE

AD PARAGRAPH 12

34. It is denied that I had an advisor or chief of staff during this period of time. Deputy Ministers are not entitled to have advisors. Mr Msomi became head (manager) of the Deputy Minister's office in 2009.

AD PARAGRAPH 13

35. The contents of this paragraph are pure unsubstantiated speculation and are inserted to embarrass and prejudice me. The circumstances surrounding my appointment as Minister of DPE were as follows.

36. I had landed back from Durban on the mid-morning of 31 October 2010 when I was contacted telephonically by the then Head of the President's private office, Ms. Lakela Kaunda to inform me that the President wanted to immediately see me in Pretoria.

37. I met with the President during the day at the President's official residence in Pretoria. It was at this meeting that the President informed me that he was appointing me as the Minister of Public Enterprises and that I would be sworn in the following day on 1 November 2010. At the time, I was the Deputy Minister of Home Affairs.

38. I was sworn in as the Minister of Public Enterprises on 1 November 2010. Before the meeting with the President on 31 October 2010, I was not aware that I would be appointed as the Minister of Public Enterprises.

39. I accordingly deny the unsubstantiated allegation that I had received two month's advance notice in the circumstances suggested. In fact, I was quite taken aback when the President informed me of my new appointment on 31 October 2010. I advised him that I had programmes planned for Monday 1 November 2010, but the President informed me that I should not concern myself therewith as he had appointed a new Deputy Minister for Home Affairs.

AD PARAGRAPH 14

40. The contents hereof are again a deliberate fabrication not based on fact. At this point in time, I had known Nomachule for approximately a year. We were not even living together, and she would only on occasion come and visit me at my home and we would go out socially.

F RAIN

41. It is absurd to think that in these circumstances I would have treated Nomachule almost as an advisor of mine keeping her abreast of my movements as a Minister. To even suggest that I would have told her that I considered the Gupta's as my unofficial advisors is absurd.

42. As a Minister DPE I was entitled to two special advisors. I also had the top management of the department to advise me on matters. In these circumstances why on earth would I have required the Gupta's to be my special advisors.

AD PARAGRAPH 15

43. Once again, I must raise the strongest objection to Nomachule making reference to our minor children before this Commission in circumstances where there are divorce proceedings pending and where the evidence might be untruthful, hurtful and embarrassing to our children when they reach adulthood – leaving indelible scars. I have set out above why her evidence in totality should be disregarded.

44. I am however compelled to unfortunately deal with these allegations to demonstrate their falsity – which is the main reason why I object to her evidence in the first place. Some of these allegations are the subject-matter of our divorce proceedings and are clearly *sub judice*. It is totally improper for me to be obliged to counter these half-truths and untruths, when they have no place before this Commission. Furthermore, I will be obliged to resort to disclosures of our various without prejudice discussions in order to demonstrate their untruthfulness.

45. In 2011 we only had one child together, a boy who had been born in June 2011. To suggest that Nomachule became "*unhappy with the little time that Mr Gigaba was spending with our children because of his frequent evening visits to his "advisors"*", when we only had one child who was a new born demonstrates the lengths she is prepared to go to mislead. I also pose the question how she would have knowledge of these alleged visits?

46. As stated above, I had no need to call upon the services of the Gupta's as advisors to me. I was a newly appointed Minister in a department which dealt with specialised sectors (energy, freight logistics, broadband, airways, specialised ocean-based diamond mining, forestry, pebble-bed modular reactor etc) which required and had specialised experts on all these sectors. To suggest that I would even contemplate going outside of the Department to receive advise from consultants who were not *au fait* with these sectors and government / ANC policy in so far as these sectors were concerned, and not employees of the Department, is non-sensical.

47. It also demonstrates Nomachule's scant understanding of the workings of Government yet is prepared to comment as an expert in order to peddle her lie.

AD PARAGRAPH 16

48. This is a total fabrication and is not based on any personal knowledge on the part of Nomachule. It beggar's belief that every time I went to Parliament I would first rush off to meet the Gupta's and then on my return report back to them.

AD PARAGRAPHS 17, 18, 21 & 27

49. This a total untruth. Why would the Guptas insist on meeting a new born child? I do however recall that our eldest son after his birth received a gold necklace as a gift from Mr Ajay Gupta.

50. The insinuation of our eldest child into Nomachule's evidence demonstrates the inappropriateness of allowing her evidence to be placed before the commission as I have referred to above.

51. I do not believe that Nomachule met the Gupta's on more than four occasions when we attended social functions, such as the Sun City wedding, the Diwali celebrations

and a cultural luncheon at their invitation. Any other suggestion on her part are total untruths.

52. On other occasions that I interacted with the Gupta's such as the TNA breakfast programmes or State dinners, she was only present at most at one State dinner.

53. On all of these occasions there were many other people present. We did not sit at the same table as the Gupta's and did not interact with them, in the sense that Nomachule wishes to.

54. I deny frequent visits with the Gupta's or indeed discussing such visits with Nomachule.

AD PARAGRAPH 19

55. The contents hereof are denied. Nomachule is deliberately trying to link me to the infamous Waterkloof base landing. Not a single person or report has linked me with the Waterkloof base landing. I had nothing to do with the landing at the Waterkloof base. I had no knowledge of these visitors from India who were attending the wedding. I also had no authority over Waterkloof Air Base. The suggestion is simply outrageous and demonstrates the lengths to which Nomachule is prepared to go.

AD PARAGRAPH 20

56. This is complete nonsense. We saw the arrival of the Gupta aircraft on television like most others. Nomachule and I drove to Sun City on the evening of the wedding and returned that evening. I refused the invitation to stay over at Sun City.

57. There was no formal introduction to the Gupta's at the wedding. We met certain of the family members and other guests like everyone else. We arrived in time for the reception and left immediately after dinner.

58. I deny that I asked her to remove the photo of the henna pattern on her hand off Facebook. Why would I have asked her to remove it when our attendance at the wedding was all over television and social media? The fact that I attended there would have been documented.

AD PARAGRAPHS 22 - 24

59. What is described in paragraph 22 is what I believe to be the normal procedure that is followed when one attends functions at a private home.

60. I deny that we were requested to hand over cell phones. It is absurd to suggest that one would be requested to hand over cell phones when attending a private event and even more absurd that Nomachule's cell phone was simply returned to her when she got bored.

61. There is nothing unusual about Mr. Ajay Gupta when hosting these events greeting one on arrival. It is a total fabrication to suggest that I was then ushered into a private meeting room after being briefed by Mr. Ajay Gupta.

62. I deny that on these occasions Mr Mahlangu and Mr Msomi were present and would attend meetings with me.

AD PARAGRAPH 25

63. The contents hereof are emphatically denied. Her version that on the one hand there were these clandestine meetings where cell phones had to be handed over and yet on the other prior to the meeting commencing Nomachule was privy to an entire briefing session where the purpose of the meeting was disclosed in her presence is so improbable as to warrant outright rejection.

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64. I must emphasise that in my capacity as Minister DPE I had no authority to deal with tenders or extensions of contracts at Transnet so that any discussion with me in such regard would have been pointless.

65. A lot of what is described here are matters that have been in the media for a number of years and would account for Nomachule's knowledge thereof. I deny that during my tenure as Minister of DPE I ever intended nor indeed travelled to India. Accordingly, any discussion with regards to any people that I would be meeting in India is simply a deliberate untruth.

66. I emphatically deny the allegation that Mr. Ajay Gupta allegedly discussed with me "*a paper dealing with DPE matters*" which he wished to raise at the meeting. There was no such thing.

67. Furthermore, her allegation that on one or two occasions, I reported to Mr Ajay Gupta some of the responses that I had received from Ms Dudu Myeni ("***Ms Myeni***") relating to SAA is again so improbable as to be rejected. Why would something which related clearly to government business be discussed with me in her presence. And besides, the issue of the Johannesburg / Mumbai route was a subject of bilateral discussions between SAA and Jet Airways as I had directed them to do in my meetings with them on 10 January 2011 and 14 April 2011. For the record, Jet Airways was not owned by the Guptas, nor were they shareholders in it.

68. In regard to the allegation that Nomachule recalls "*overhearing Mr Ajay Gupta briefing Mr Gigaba about the cancellation of a SAA route between South Africa and Mumbai so that a Gupta airline could deliver the route.*", this is once again a total fabrication. I am unaware of a Gupta airline and accordingly could not have had a discussion in this regard. I have previously submitted to the commission evidence concerning the cancellation of the SAA route between South Africa and Mumbai.

69. The decision to cancel the Mumbai route was taken by the SAA Board in 2015, at a time when I was not longer the Minister of Public Enterprises. I believe that this decision owed to the fact that SAA was bleeding on the route. This was not the only route SAA has had to abandon because of loss of revenue on the route, this would include the Beijing route and many European routes (long hauls), and all of these decisions were based on objective reasons.

AD PARAGRAPH 26

70. This is once again a total fabrication. I deny the discussion which Nomachule alleges that I had with her concerning Mr Dames' employment. I emphasise that I did not discuss government business with her. Furthermore, her version cannot be accepted as true. I never had any discussion with Mr Ajay Gupta concerning Mr Dames, who at a point in time was the CE of Eskom. I have made a submission in this regard to the commission.

71. I am on record as wanting Mr Dames to remain as the CE of Eskom and in fact had a meeting with him and the Chairman prior to his resignation where I expressed my firm belief that it was in the best interests of Eskom that he remained employed there. In the event he of his own volition decided to resign, based on an agreement with the board of directors, which had nothing to do with me.

Meetings held at our home

Meeting with the Guptas

AD PARAGRAPH 28

72. I emphatically deny that Mr Ajay Gupta ever attended at our official residence in Pretoria. I deny that there was any bunker or underground room at my official residence. This is vindictive speculation.

AD PARAGRAPH 29

73. The contents hereof are again a total fabrication. I have stated above that I had absolutely nothing to do with tenders in the SOE's. Ministers are far removed from procurement and supply chain processes in their own Departments, let alone in the SOEs. I therefore deny any discussion about "*a headache*" concerning an Eskom project with Nomachule.

Meeting with Mr Gigaba's staff

AD PARAGRAPH 30

74. I deny that I invited staff from my office at the Department of Home Affairs to our residence prior to a trip to Mumbai and New Delhi, India. I do not know where the Nomachule has this notion from.

75. In 2010 I did not go to India as alleged. This is once again a total fabrication. My first visit to India was on an official visit whilst I was still Deputy Minister of Home Affairs during the Mbeki administration. I cannot recall precisely when this was but certainly long before I had met Nomachule.

76. The second time I went to India, was in or during 2015 at the request of both the Minister of Home Affairs in India and the South African High Commissioner in India over concerns about systemic delays in the issuing of visas to Indian businesspeople and other travellers desirous of visiting South Africa.

77. During that trip I officially opened the visa facilitation centre in New Delhi and reached an agreement with the Minister to open more visa facilitation centres in order to expedite visa applications. I also visited the e-passport factory in Mumbai and held other bilateral discussions with the Minister of Home Affairs, at the same

time meeting with the South African Tourism Board operating in India. I had no discussions with Mr AJ Gupta about this trip. I also did not complain to Nomachule about any demands concerning finalising the trip.

78. The suggestion that Nomachule overheard me complaining to Mr Ajay Gupta that I could not go on the trip to India because I was still at the Department of Home Affairs is non-sensical. As stated above I did go on my second trip to India whilst I was Minister of Home Affairs, this had absolutely nothing to do with the South Africa Mumbai route. It is ludicrous to suggest that I could not justify a trip to discuss a new flight route between South Africa and India which was a matter that fell outside my jurisdiction as Minister of Home Affairs but was under DPE.

79. It is again a fabrication to suggest that I mentioned that I would create an official state visit to India whilst at the Department of Home Affairs so that I could meet the Indian nationals that Mr Ajay Gupta wanted me to meet in relation to the South Africa/Mumbai route. Clearly, Nomachule's fabrications and gross lack of knowledge of government protocol is demonstrated by her little knowledge that "*official state visits*" are the preserve of ***only*** the Head of State, and not ministers.

80. I deny discussing with Nomachule that the Guptas wanted to introduce their own airline to service the Johannesburg/Mumbai flight route and that the Guptas were demanding that I compel SAA to cancel their Johannesburg/Mumbai route.

PRIOR KNOWELDGE OF APPOINTMENTS IN STATE OWNED ENTERPRISES

AD PARAGRAPH 31

81. This is a total fabrication. At the time when Mr. Molefe became CEO of Eskom and Mr. Gama became Group CEO of Transnet I had left DPE so accordingly I could have had no influence or prior knowledge of these appointments. I accordingly emphatically deny these discussions.

82. It is unfortunate that Nomachule has decided to involve not only our minor children, but other members of my family, including my deceased father and brother-in-law (who obviously are unable to defend themselves against these allegations), in her proposed evidence before the Commission. It is scandalous that she should be allowed to do so and again indicates why her evidence should be struck from the record.

83. Given that I am constrained to deal with these allegations, I must immediately deny that I told Nomachule that I intended to speak to Mr Gama to appoint my sister, Ms Gugu Gigaba, to Transnet. My sister was appointed at Transnet long after I had left DPE after following due process and remains in the employ of Transnet to this day.

84. I deny that on many occasions, I informed Nomachule that the Guptas knew and had told me about who would be moved from and appointed to SOE's.

TENSIONS RISING

AD PARAGRAPH 32

85. This is once again a total fabrication. I deny ever discussing being put under pressure by anyone concerning appointments. As the Minister of DPE it was my duty to defend the appointments that Cabinet had made. There was no one that could tell me who to appoint and who to dismiss.

86. I again deny the allegation that the Gupta's were my "*advisors*" and accordingly Nomachule is lying if she says that she raised this issue with me.

AD PARAGRAPH 33

87. This is once again a total fabrication.

Mr Gigaba's relationship with Ms Myeni

AD PARAGRAPH 34

88. I had known Ms Myeni for some time before I was appointed as Minister DPE. By the time I was appointed she was already appointed by my predecessor, Ms Barbara Hogan, as a board member of SAA.

89. I only had one meeting with Ms. Myeni at the Sheraton Hotel which was an official meeting. The rest of the time, we would meet at the offices of SAA at Airways Park next to OR Tambo International Airport. The remainder of the allegations are denied.

AD PARAGRAPH 35

90. This is a total fabrication. However, this was public information at the time.

AD PARAGRAPH 36

91. This is misinformed speculation on her part. Which demonstrates that she has no real knowledge of the matters which she deigns to comment on. The issue of the SAA Mumbai route had nothing to do with the strategic issues I was raising with Ms Myeni.

AD PARAGRAPH 37

92. The contents hereof are once again a total fabrication.

93. I did not have any such discussions with Nomachule as stated in paragraph 37.1. In any event why would I question Ms Myeni's appointment as Chairperson of the Board of SAA, when it was I in my capacity as the Minister DPE, who recommended her appointment to Cabinet?

94. Insofar as paragraph 37.2 and 37.3 are concerned these allegations are so far-fetched as not to warrant serious consideration.

AD PARAGRAPH 38

95. There was a rumour to this effect, and this is presumably Nomachule's source of information. I deny having discussed any of this with her.

MR GIGABA'S RETURN TO THE DEPARTMENT OF HOME AFFAIRS

AD PARAGRAPH 39

96. Although I was appointed Minister of Home Affairs on 26 May 2014 I wonder where Nomachule obtained this date from as she would not have known this from her own knowledge. Also, the notion that I as transferred back to Home Affairs is a misnomer. When a new administration comes into office, the President it makes appointments as he it sees fit, and one is then appointed according to the State Presidents prerogative.

AD PARAGRAPH 40

97. I do not even know how to respond to this. It is just simply ludicrous.

AD PARAGRAPH 41

98. This is again a total fabrication and pure unfounded speculation. I do not know when it is that I appeared shocked. Furthermore, one is never appointed in front of the ANC top six – this has never happened. This goes to show the extent to which she is prepared to sink in order to perpetuate a false narrative.

THE GUPTAS' APPLICATIONS FOR SOUTH AFRICAN CITIZENSHIP

AD PARAGRAPH 42

99. This is once again a total fabrication. This like all of the other contents of the affidavit seem to have been stitched together by Nomachule from various media reports over the years concerning myself. So, for example this whole question of the Gupta's citizenship was all over the news a while ago during the parliamentary Portfolio Committee hearings into the question. She is simply tapping into this trove of information.

AD PARAGRAPH 43

100. I emphatically deny the contents hereof. The suggestion of the brown envelope is a figment of her imagination.

AD PARAGRAPH 44

101. In Nomachule's own words one finds the source of the information by her reference to it has being "*publicly known*". The findings of the parliamentary enquiry disprove this allegation that she is now repeating as "*fact*".

MALUSI GIGABA'S TRANSFER FROM THE DEPARTMENT OF HOME AFFAIRS TO THE DEPARTMENT OF FINANCE

AD PARAGRAPH 45

102. It is correct that I was informed telephonically by the former President on 30 March 2017 that I would be appointed as Minister of Finance.

AD PARAGRAPH 46

103. This is again a total fabrication. Why would one be upset on being appointed the Minister of Finance? After all Minister's serve at the pleasure of the siting President and cabinet reshuffles are his/her prerogative and occur regularly. I never mentioned Mr Molefe's name to her. This notion would have been obtained by her from the media as it was the subject-matter of public speculation.

AD PARAGRAPH 47

104. I had no relationship with the Gupta's as stated above. I certainly never discussed my alleged relationship with them with Nomachule. It did so happen that from around 2013 my relations with them had started to cool.

GIFTS, CASH AND BENEFITS RECEIVED FROM THE GUPTAS

AD PARAGRAPH 48

105. Save for the gift to my eldest son the contents hereof are denied. I do not believe that there was any obligation to declare my son's gift to DPE. On my child's birth he received a large number of gifts from various people, does Nomachule suggest that all of these gifts should have been declared to DPE? This again demonstrates

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the vengeful nature of her allegations. My staff kept a very up to date register of member's interests of gifts to me. Gifts to one's children were not required to be declared.

Gifts

The white 3-series BMW motor vehicle ("the BMW")

AD PARAGRAPH 49

106. The contents hereof are denied.

Cash and benefits

Wedding gifts of cash

AD PARAGRAPH 50

107. The wedding planning was done by Nomachule, I was not party to the final guest list. I furnished names of certain people I wished to invite including Cabinet Ministers and the like. I do not recall the names of all the people invited, nor those that chose not to attend.

AD PARAGRAPH 51

108. I deny that there was any wedding gift of cash from the Gupta's or payment towards a honeymoon in Dubai.

AD PARAGRAPH 52

Cash collected from the Gupta residence

AD PARAGRAPH 53

109. Lawrence was one of my close protectors, but he was simply one of a number that were employed over a period of time.

AD PARAGRAPH 54

110. This is a blatant untruth.

111. I refer to a transcript of an ENCA interview given by Nomachule on 17 December 2020, a copy of which is attached as "***KMG3***".

112. As appears therefrom, she stated that she had never seen me receive any cash physically and further that she had no evidence of me having received such cash. However, she now claims she saw me with a "*sports bag*" or some "*leather bags*" the evidence of which is drawn from internet sources.

113. The photographic "*evidence*" that she now tenders was on her own version obtained from an internet site. The bags that I carry are used to house personal effects, such as hand sanitizer, wallet, power bank, cell phone, pens, hand lotion, tissues etc. There would be no room for bundles of cash to be placed therein. I annex hereto a photograph of the man bag that I currently have as "***KMG4***".

AD PARAGRAPH 55

114. The contents hereof are denied.

115. In the event that I bought suits, I would pay for them over time and in certain instances, at discounted prices from stores in Sandton City. In many instances, such suits would be sponsored by local designers wishing me to advertise for them given my public profile. I deny that I paid with cash from the boot of my official vehicle. This has been inserted to provide some type of support for the discredited witness number 3.

116. Insofar as HTK Sartoriale is concerned:

116.1 I have been and remain personal friends with the owners of HTK Sartoriale;

116.2 It is true that I have bought a few suits at HTK Sartoriale, on discount and with payment done over time; and

116.3 Due to them also having relations with tailors, I would on occasion send my suits to them and ask them to send them to the tailors, especially during 2012 – 13, when I had lost weight and needed to tailor my suits as I could not afford buying new ones to refurbish my wardrobe;

116.4 Save as aforesaid I deny these allegations.

117. Paragraph 55.2 is a blatant untruth.

118. In regard to paragraph 55.3 the Louis Vuitton handbag was paid from money which I had saved myself.

119. When I met Nomachule I only had a Nedbank Visa card this had a R3 000.00 cash withdrawal limit and a debit card linked to the Visa card. The debit card I gave to Nomachule when she moved in with me, only for her to buy household necessities as she was unemployed. At this time, I did not have a credit card as I had destroyed it long ago. I only had a credit card again when I opened an FNB account. I never

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gave the FNB credit card to Nomachule, as she had her own as she was working at the time.

120. My Visa card is linked to my money market account which is only used for me to save money. R10 000.00 gets debited off the visa card that goes into the money market account in case I have something urgent to pay.

121. Being in possession of the debit card Nomachule would have no access to the money market account.

122. My credit card does not have a R100 000.00 monthly credit limit, it never has and still does not have.

123. I deny that I ever gave her cash amounts of between R100 000.00 to R150 000.00 for shopping when on overseas holidays.

AD PARAGRAPH 56

124. Once again Nomachule is referencing improperly and prejudicially matters concerning our minor children. It is impermissible for her to ignore the privacy and dignity of minor children in this way and the Commission should set its face against such inappropriate conduct on her part. Long after the Commission's work has been completed the impairment to our minor children's privacy and dignity will remain. I refer to what I have stated above in regard to these prejudicial allegations.

125. I emphatically deny the contents hereof. If Mr Ajay Gupta wanted to donate money to the ANC towards the election campaign, why would he give it to me for my private possession instead of giving it to the ANC directly? The head of the ANC election campaign do not store money for the ANC or accept donations on their behalf.

126. I deny being involved in the purchasing of campaign t-shirts and posters. That is done by the ANC directly.

Ms Nozipho Gigaba: Payment of her bad debt and employment at Sahara Computers

AD PARAGRAPH 57 - 58

127. I again repeat what I have stated above concerning Nomachule dragging my family members into these proceedings.

128. I do not know who my sister was indebted to, but I do know that she disposed of her assets that she had in order to discharge her liabilities. I admit that my sister's debts were discussed with me by my father and sister, but to the extent that I assisted anyhow, it was with basic things such as grocery, petrol (until her car was finally repossessed) that could be catered for from my own salary. My parents also contributed the same. The allegation that I said I would ask Mr Ajay Gupta for money is denied as scurrilous and sounds like a convenient untruth.

129. There was therefore no money collected by Mr Mahlangu from Mr Ajay Gupta as claimed. This is a lie.

AD PARAGRAPH 59

130. My sister worked at Sahara Computers for a period of no more than four months, an employment she got herself without my assistance.

Cash for renovations to Mr Gigaba's home on the family plot

AD PARAGRAPH 60

131. I again repeat the inappropriateness of Nomachule's repeated reference to members of my family and in particular my deceased father.

132. The Mandeni property belonged entirely to my late father. Any extensions and renovations that have been done at the property were funded by my late father, particularly as the family expanded. It was not to accommodate any "*family politics*" as we have had no such problems as a family.

AD PARAGRAPH 61

133. Once again, I reference the inappropriate evidence concerning a family member of mine.

134. It is a blatant lie that "*Mr Ajay Gupta funded the building renovation*".

135. It is noteworthy that Nomachule does not indicate in what circumstances she allegedly obtained this knowledge.

136. I deny ever calling Nomachule to tell her I was flying to KZN immediately to pay the builder from money obtained from Mr Ajay Gupta.

AD PARAGRAPH 62

137. This is a blatant untruth. It is extremely convenient that Nomachule just happened to be there on three occasions when I allegedly paid the tiling and plumbing.

AD PARAGRAPH 63

138. I am unclear (as I am with many of her allegations as referred to above) as to what 'assurances' Nomachule is referring to. Disclosures that were made were attended

to by my professional assistant, as stated above. They had nothing to do with Nomachule and I never discussed it with her. Nomachule has lied about all the gifts she claims I received from the Guptas.

139. In this paragraph and in the preceding two paragraphs under reply Nomachule uses the expression "*I do not know*" on three occasions. Despite this lack of knowledge, she has no compunction about inserting such allegations and inviting the Commission to join her in outright speculation in this regard. I refer to what is stated at the forefront of this affidavit in such regard.

THE GUPTA MONEY COUNTER

AD PARAGRAPHS 64 & 65

140. I do not recall being part of a "*small group*" that toured a newly renovated house in the Gupta compound. Neither have I been shown any "*Automated Teller Machine*". It seems bizarre to me that Nomachule would be shown an ATM at a private residence that could "*dispense an entire R10 000.00*". I emphatically deny that she witnessed this.

CONFISCATING MY DEVICES TO DESTROY POSSIBLE EVIDENCE

AD PARAGRAPHS 66 & 66.1

141. Unfortunately, the pending divorce proceedings between Nomachule and myself looms large and demonstrates why her affidavit should not be admitted into evidence. I refer to what I have stated above in this regard.

142. Once again this is a blatant untruth. I refer to annexure "***KMG2***" hereto. Unfortunately, I have to reference matters concerning divorce settlement discussions, in order to lay bare, the true facts and Nomachule's ulterior motives.

143. In this regard in or during January 2021, when Nomachule returned from home, she approached me in the study, advising me as follows:

143.1 I should request my divorce attorneys to contact her attorneys and engage in settlement discussions (which would involve paying her a considerable settlement fee);

143.2 I must immediately withdraw the criminal complaint that had been opened in July 2020 against her for malicious damage to property; and

143.3 she had been approached by the Commission to testify against me following upon her ENCA interview, but would refuse to testify if I complied with conditions in paragraph 142.1 and 142.2;

143.4 in support of what she had advised in me paragraph 142.3 above, she showed me whatsapp communications between herself and the Commission representatives pertaining to her giving evidence against me. She also said to me that Adv Ngcukaitobi SC was very excited about this opportunity for her to testify against me and had offered to assist her. She further told me that Adv Ngcukaitobi SC is part of the Commission and was extremely close to the Chairperson through his assistance of the Chairperson in another matter. Actually, prior to this, she had repeatedly informed me that she was being lured by several high-ranking officials in the State Security Department, within the ANC and other opposition parties to assist them in destroying me politically on the promise of money, house and vehicle incentives. As we speak, she currently is driving a car bought for her as part of that scheme, probably as a reward for her having dragged my name in the media and having come forward to testify against me in the Commission.

143.5 Around September 2020, she had a meltdown as she again mentioned the names of some of those people, who were involved, all politicians, and said she would not want to be involved in their political ploy against me, and that she would let them know. In return, she asked me to find her an apartment in Johannesburg, pay for her studies which she subsequently abandoned and assist her with some allowance until she found a job.

143.6 Whilst I was busy with that, she changed her mind and told me she did not want a divorce.

144. I viewed this discussion with her as an attempt to smoke me out and force me into a divorce settlement which I would not ordinarily have agreed to.

145. I resisted these unpleasant and unlawful attempts to strong arm me into agreeing to the settlement agreement as aforestated, I advised her that she was within her rights to do as she pleases.

146. She was extremely agitated and annoyed at my response and stated that I would pay dearly for my recalcitrance. It is now clear that had I agreed to her proposed settlement agreement she would not have gone to the Commission. On this basis alone her evidence should be struck from the record.

147. Thereafter right up to the present time Nomachule has repeatedly stated that if I offered her my house at Blue Valley or a cash equivalent, she would drop the whole Commission issue, and pretend that the divorce proceedings had been withdrawn and we intended to remain married until the Commission wrapped up its business. Knowing that she is a pathological liar and has the tendency to keep changing her versions, I advised her I would rather persist with the divorce proceedings through the Courts.

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148. I contacted my attorneys the following day to advise them of what had occurred. They subsequently contacted her attorneys. That evening, she was extremely upset that I had told my attorneys that it was she who had made this offer to me and said I should have said it was our agreement.

149. A few days later, she told the City Press the same lie she has now repeated to the Commission, except that in the City Press article she claimed that I had offered to withdraw the criminal case against her in exchange of her not testifying at the Commission. I will attempt to obtain a copy of the article should the Commission so require.

AD PARAGRAPHS 66.2 – 66.5

150. This is emphatically denied, and I challenge Nomachule to prove the veracity of her claims. I challenge her to name the IT expert and provide proof.

151. The incident which she describes at our home happened on 20 July 2020, and not on 18 June 2020. Captain Mavuso only came to our home the following day on 21 July to take statements, bringing with him a Police photographer to take photos of the damage to the vehicle and my study and to inspect evidence items.

152. It is not true that they demanded her gadgets, as these were collected on the day the police came to arrest her on 31 July 2020. The police were at the time also investigating Nomachule for allegations she was involved in a plot to kill me.

153. The incidents of 20 July 2020 could thus not be treated separately from those allegations / investigations. It is perturbing that Nomachule would be prepared to lie under oath, implicating the police, on matters that she knows she has no evidence of, and the police can prove the contrary. If the police took any evidence against her, she must demonstrate it, or the police must be called upon to submit that evidence. I deny this to be the case.

LOSS OF PERSONAL PASSPORTS

AD PARAGRAPHS 66 & 67

154. What has the disappearance of the passports got to do with me? Since she is the one who was keeping the copies of the passports, and must explain where she took them. Nomachule is prepared to keep on perpetuating falsehoods in order to sustain her narrative.

155. Once again Nomachule continues to advance allegations in a terse fashion without any attempt being made to corroborate same.

CONCLUSION

156. I therefore humbly pray that the relief sought in the notice attached hereto be granted.

DEPONENT

THUS SIGNED AND SWORN TO before me at Sandton on this the 29 day of March 2021 by the deponent who acknowledges that the deponent knows and understands the contents of this affidavit; that it is the truth to the best of the deponent's knowledge and belief and that the deponent has no objection to taking the prescribed oath and regards the same as binding on the deponent's conscience and the administration of the oath complied with the Regulations contained in Government Gazette No. R1258 of 21 July 1972, as amended.

COMMISSIONER OF OATHS

EX OFFICIO:

FULL NAMES:

PHYSICAL ADDRESS:

DESIGNATION:

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

NOTICE IN TERMS OF RULE 3.3

TO : **MR KNOWLEDGE MALUSI GIGABA**

C/O : **STATE ATTORNEY**

EMAIL : **ichowe@justice.gov.za**

IN TERMS OF RULE 3.3 OF THE RULES OF THE JUDICIAL COMMISSION OF INQUIRY INTO ALLEGATIONS OF STATE CAPTURE, CORRUPTION AND FRAUD IN THE PUBLIC SECTOR INCLUDING ORGANS OF STATE ("THE COMMISSION"), YOU ARE HEREBY GIVEN NOTICE THAT:

1 The Commission's Legal Team intends to present the evidence of **MRS NOMACHULE GIGABA (formerly Mngoma)** ["***the witness***"] at its hearing held at Old Council Chamber of the Municipality of the City of Johannesburg, 158 Civic Boulevard Braamfontein, Johannesburg. The presentation of the witness's evidence will commence on a date and at a time to be confirmed with you at a later stage.

2 The allegations set out in the evidence of the witness implicate or may implicate you in the manner set out in the summary below. They include, amongst others, the following:

2.1 From about 2009 when you were appointed as Deputy Minister of the Department of Home Affairs, you sought advice from your "advisors" to discuss work related matters which instructed your decisions on matters impacting government operations and official appointments. Your "advisors" were subsequently identified as the Guptas and in particular Mr Ajay Gupta. Your action to frequently meet and seek the advice of the Guptas, and in particular Mr Ajay

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Gupta, persisted during your terms of office as Minister of the Department of Public Enterprises ("***DPE***"), Minister of the Department of Home Affairs and Minister of the Department of Finance.

2.2 About 2 to 3 months before you were appointed as Minister of the DPE, Mr Ajay Gupta told you about your move from the Department of Home Affairs to the DPE. Such prior knowledge and warning preceded your official appointment during November 2010.

2.3 You attended the Gupta residence in Johannesburg, Saxonwold ("***the Gupta residence***") frequently during the years of 2009 to 2018. On the days that you attended meetings at the Gupta residence, Mr Ajay Gupta would brief you on the intended topic(s) of discussion before you both entered the meeting held in a private meeting room. Mr Siyabonga Mahlangu would be present more often than Mr Thami Msomi who would also join you in the meeting. The intended topics of discussion, which were confidential and sensitive in nature, included matters relating to Cabinet, the African National Congress, the NEC, the DPE, tenders and contract extensions at Transnet, the need to change certain executives and officials at Eskom, cancellation of a South African Airways flight route between South Africa and Mumbai so that a Gupta airline could deliver the route. On one or two occasions, it is alleged that you reported to Mr Ajay Gupta some of the responses that you received from Ms Dudu Myeni relating to South African Airways.

2.4 During your term as Deputy Minister of the Department of Home Affairs in 2010, you created an official visit to Mumbai and New Delhi, India, so that you could meet the Indian nationals that Mr Ajay Gupta instructed you to meet in relation to cancellation of the South Africa/Mumbai flight route so that an airline to be introduced by the Guptas could service the route.

2.5 During 2013 and whilst you held the position of the Minister of the DPE, Mr Ajay Gupta allegedly met at most twice with you at your official residence in Pretoria to privately discuss matters relating to Transnet tenders and the signing of contracts on the one occasion and to discuss an Eskom project that was giving you "a headache" on the other occasion.

DNN

2.6 During 2013 and about one or two days before the Gupta wedding held at Sun City, you assisted the Guptas to welcome and fetch some of their guests at the Waterkloof Airforce Base who were arriving from India. On the day of the Gupta wedding, you attended at Waterkloof Airforce base to receive the Gupta aircraft.

2.7 During your term of office as Minister of the DPE, you received prior knowledge from the Guptas about the appointment of Mr Brian Molefe and Mr Siyabonga Gama into executive positions within Transnet before such appointments were official. You were aware that the Guptas knew who would be moved from and appointed to state owned enterprises.

2.8 You were believed you were obligated to meet the Guptas, meet their demands, and report back to them on matters concerning confidential and sensitive government affairs.

2.9 The Guptas pressurised you to take certain decisions regarding the removal Mr Brian Dames, the former Chief Executive Officer of Eskom because Mr Dames was not doing what the Guptas wanted him to do for them at Eskom; and Mr Monwabisi Kalawa, the former South African Airways Chief Executive Officer, whom the Guptas did not like.

2.10 When you refused to follow the instructions of Ms Dudu Myeni or Mr Ajay Gupta, one or the other would phone Former President Mr J.G. Zuma ("***Mr Zuma***") to complain about you which resulted in your observance of an instruction from Mr Zuma via Ms Myeni to whom you did not report.

2.11 You were improperly involved in the Guptas' application(s) for early naturalisation during your term of office as Minister of the Department of Home Affairs.

2.12 You improperly, unlawfully and/or illegally received and benefitted from the Guptas in at least the following ways: (a) wedding gifts of cash for payment towards the cost of the wedding, estimated between R4million and R5million, and the cost of a honeymoon in Dubai; (b) a gold jewellery necklace for your son; (c) a white 3-series BMW motor vehicle; (d) bags of cash monies collected on several occasions at the Gupta residence; (e) Mr Ajay Gupta agreed to give you

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R850 000,00 to settle the debt of your sister, Ms Nozipho Gigaba, who also benefitted from employment in a marketing position at Sahara Computers; and (f) Mr Ajay Gupta funded the building renovation of your flat situated on your family's plot in Mandeni, KwaZulu Natal, which expanded from a two bedroom flat to a three bedroom, two bathroom and lounge area structure.

2.13 You were present on or about Wednesday, 24 June 2020, when certain law enforcement officials confiscated certain electronic devices in the possession of the witness. When the confiscated gadgets were returned to the witness, it is alleged that information on them was deleted including all photographs and emails relating to her overseas trips, and visits with the Guptas.

3 In the court papers referred to in paragraph 66.5 of the affidavit, the witness implicates you in what she alleges was her unlawful arrest and detention during the month of July 2020. In the same court papers, the witness alleges that you were involved in the unlawful confiscation of certain electronic devices in the possession of the witness and the deletion of the information contained thereon.

4 The entire affidavit of the witness which implicates or may implicate you in the above allegations are annexed hereto marked "A". The relevant annexures thereto are attached and marked "B". Your attention is drawn to all the contents of the affidavit.

5 Due to the fact that you are implicated or may be implicated by the evidence of the witness, you are entitled to attend the hearing at which that evidence is being presented. You are also entitled to be assisted by a legal representative of your choice when that evidence is presented. The full affidavit will be uploaded on the Commission's website (www.sastatecapture.org.za) as soon as she concludes her evidence. The transcript will be uploaded daily.

6 If you wish to:

6.1 give evidence yourself;

6.2 call any witness to give evidence on your behalf; or

6.3 cross-examine the witness

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then you must apply, within fourteen (14) calendar days of this notice, in writing to the Commission for leave to do so.

7 An application referred to in paragraph 6 above must be submitted to the Secretary of the Commission. The application must be submitted with a statement from you in which you respond to the witness' statement insofar as it implicates you. The statement must identify what parts of the witness statement are disputed or denied and the grounds on which they are disputed or denied.

8 In the event that you believe that you have not been given a reasonable time from the issuance of this notice to the date on which the witness is to give evidence as set out above and you are prejudiced thereby, you may apply to the Commission in writing for such order as will ensure that you are not seriously prejudiced.

9 Please take note that even if you do not make an application under Rule 3.4:

9.1 in terms of Rule 3.10, the Chairperson may, at any time, direct you to respond in writing to the allegations against you or to answer (in writing) questions arising from the statement; and

9.2 in terms of Regulation 10(6) of the Regulations of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State GN 105 of 9 February 2018 published in Government Gazette 41436, as amended, the Chairperson may direct you to appear before the Commission to give evidence which has a bearing on a matter being investigated.

10 The extracts of the witness affidavit and annexures thereto, if any, provided to you are confidential. Your attention is drawn to Regulations 11(3) and 12(2)(c) governing the Commission, which make it a criminal offence for anyone to disseminate or publish, without the written permission of the Chairperson, any document (which includes witnesses' statements) submitted to the Commission by any person in connection with the Commission's inquiry.

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11 Any response to or application in regard to this notice must be sent to Advocate André Lamprecht, Ms Shannon van Vuuren and Ms Rachel Niewenhuis at secretary@commissionsc.org.za.

DATED AT PARKTOWN ON THIS 12th DAY OF MARCH 2021

PROF ITUMELENG MOSALA
Secretary
Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State

'KMG2'

COMBINED SUMMONS

Case No. 48986/20

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

In the matter between:

REGISTRAR OF THE HIGH COURT OF SOUTH AFRICA GAUTENG DIVISION, PRETORIA
PRIVATE BAG/PRIVAATSAK X67
PRETORIA, 0001
2020 -09- 25
E. NTSAPO
REGISTRAR'S CLERK
GRIFFIER VAN DIE HOË HOF VAN SUID-AFRIKA, GAUTENG AFDELING, PRETORIA

GIGABA, KNOWLEDGE MALUSI NKANYEZI Plaintiff
(Identity No. 7108305331088)

and

GIGABA, NOMACHULE (Born **MNGOMA**) Defendant
(Identity No. 8004100714082)

To the Sheriff or his deputy:

INFORM:
NOMACHULE GIGABA
308 Derrick Avenue
Waterkloof
Pretoria
Gauteng

(hereinafter called "the Defendant")

that

KNOWLEDGE MALUSI NKANYEZI GIGABA
308 Derrick Avenue
Waterkloof
Pretoria
Gauteng

Sheriff Pretoria South East
2020 -09- 2
RETURN IN

(hereinafter called "the Plaintiff")

F. Kan

hereby institutes action against the Defendant in which action the Plaintiff claims the relief and on the grounds set out in the particulars annexed hereto.

INFORM the Defendant further that if the Defendant disputes the claim and wishes to defend the action, the Defendant shall:-

(I) Within 10 (ten) days of the service upon the Defendant of this summons, file with the Registrar of this Court at the High Court, High Court Building, Von Brandis Street, Johannesburg, notice of intention to defend and serve a copy thereof on the Plaintiff's Attorney, which notice shall give an address (not being a post office or poste restante) within 8 kilometres of the office of the Registrar, for service upon the Defendant of all documents in the action;

(II) Thereafter and within twenty-one days after filing and serving notice of intention to defend as aforesaid, file with the Registrar and serve upon the Plaintiff a Plea, exception, notice to strike out, with or without a counterclaim.

Inform the Defendant further that if Defendant fails to serve and file notice as aforesaid, judgment as claimed may be given against the Defendant without further notice to the Defendant, or if, having filed and served such notice, the Defendant fails to plead, except, make application to strike out, or counterclaim, judgment may be given against the Defendant.

And immediately thereafter serve on the Defendant a copy of this summons and return the same to the Registrar with whatsoever you have done thereupon.

DATED at **JOHANNESBURG** on this the day of **AUGUST 2020**

REGISTRAR OF THE HIGH COURT

BILLY GUNDELFINGER ATTORNEYS
Attorney for the plaintiff
1 Melrose Boulevard
Cnr Athol Oaklands Road
Melrose Arch
Johannesburg
Tel: (011) 728-7571
Ref: Prof. Billy Gundelfinger /
Ms Wandi Steyn /
Ms Lisa Gundelfinger
e-mail: billy@gundelfinger.com
wandi@gundelfinger.com
lisa@gundelfinger.com

c/o RIETTE OOSTHUIZEN ATTORNEYS
133 Garsfontein Road
Pretoria
0081
Tel: 012 460 6359/ 0692 / 4659
Fax: 012 460 9719 / 086 585 4943
E-mail: admin@riette.co.za

PARTICULARS OF CLAIM

1. The plaintiff is **KNOWLEDGE MALUSI NKANYEZI GIGABA (Identity No. 7108305331088)**, a major male, Head of Policy, employed by the African National Congress, who resides at **308 DERRICK AVENUE, WATERKLOOF, PRETORIA.**

2. The defendant is **NOMACHULE GIGABA (born MNGOMA) (Identity No. 8004100714082)**, a major female, unemployed student, who resides at **308 DERRICK AVENUE, WATERKLOOF, PRETORIA.**

3. The plaintiff is domiciled within the area of jurisdiction of the above Honourable Court.

4. The parties were married to each other on 30 August 2014 in Durban, Kwa-Zulu Natal out of community of property in terms of an antenuptial contract, a copy of which is annexed hereto marked "A", which contract expressly excluded the accrual system provided for in Chapter 1 of the Matrimonial Property Act, 88 of 1984 ("the Act") and their marriage still subsists.

5. Two children were born of the relationship between the parties, a boy, Nkanyezi Thando Gigaba ("Nkanyezi") who was born on 3

June 2011 and a boy, Mvelo Mqundisi Gigaba ("Mvelo") who was born on 25 December 2012.

6. It is in the best interests of the minor children that the parties remain co-holders of full parental responsibilities and rights as envisaged by the provisions of section 18(2) read together with section 20 of the Children's Act, No. 38 of 2005, namely the parental responsibility and right:

6.1. to care for the children in which regard the children shall reside primarily with the plaintiff;

6.2. to maintain contact with the children in which regard the defendant shall have reasonable rights of contact to the children having regard to the children's views and wishes;

6.3. to contribute towards the maintenance of the children;

6.4. to act as guardians to the children.

7. The plaintiff has complied with the Regulations promulgated in terms of the Mediation in Certain Divorce Matters Act, No. 34 of

1987, and annexes hereto marked "B" the affidavit contemplated by Regulation 2(1) of the said Regulations.

8. The marriage relationship between the parties has reached such a state of disintegration that there is no reasonable prospect of the restoration of a normal marriage relationship between them and their marriage has accordingly irretrievably broken down, more particularly in that:-

8.1. the parties lead separate lives;

8.2. there has been a loss of love and affection between the parties required to sustain the marriage;

8.3. the defendant was moody and volatile and provoked unnecessary arguments;

WHEREFORE the plaintiff claims:

1. A decree of divorce;

2. An order that the parties remain co-holders of full parental responsibilities and rights in respect of the minor children as

provided for in terms of section 18(2) read together with section 20 of the Children's Act, No. 38 of 2005, namely the parental responsibility and right:

2.1. to care for the children in which regard the children shall reside primarily with the plaintiff;

2.2. to maintain contact to the children in which regard the defendant shall have reasonable rights of contact to the children having regard to the children's views and wishes;

2.3. to act as guardians to the children;

3. Costs of suit;

4. Further and/or alternate relief.

DATED at JOHANNESBURG this 12th day of AUGUST 2020.

WANDI STEYN
Admitted Attorney with right of appearance in terms of Section 114(5) of Act 28 of 2014

BILLY GUNDELFINGER
ATTORNEYS
Attorney for the plaintiff
1 Melrose Boulevard
Cnr Athol Oaklands Road
Melrose Arch
Johannesburg
Tel: (011) 728-7571
Ref: Prof. Billy Gundelfinger /
Ms Wandi Steyn /
Ms Lisa Gundelfinger
e-mail: billy@gundelfinger.com
wandi@gundelfinger.com
lisa@gundelfinger.com

"A"

GEREGISTREER
REGISTERED

REGISTRATEUR/REGISTRAR

2014 -09- 11

FEES

	MAJOR	APPROVED
ADVISER		R260,00
STAMP DUTY		
AMOUNT		
REASON FOR EXEMPTION	EXEMPT	CAUSE IN TRUST

2014 -09- 11

H 000003097/2014

PIETERMARITZBURG

PROTOCOL NO. 2583

ANTENUPTIAL CONTRACT

with the

Exclusion of the Accrual System

BE IT HEREBY MADE KNOWN

THAT on the 29th day of **AUGUST** 2014

before me, **BRIAN HAROLD ANTHONY DORMER,** Notary Public, practising at Durban, Kwa Zulu Natal Province, Republic of South Africa, and in the presence of the subscribed witnesses, personally appeared :-

MKNG

KNOWLEDGE MALUSI NKANYEZI GIGABA
(Identity Number 710830 5331 088)
Divorcé

and

NOMACHULE MNGOMA
(Identity Number 800410 0714 082)
Spinster

AND the intended husband and the intended wife hereby contract, in respect of their marriage shortly to take place as follows :-

1. There shall be no community of property between them;

2. There shall be no community of profit or loss between them;

3. All inheritances, legacies, gifts, donations or bequests which may devolve upon, be left to, given, donated or bequeathed to either of the spouses, shall be the sole and exclusive property of him or her or to whom the same shall devolve, be left, given, donated or bequeathed;

4. The operation of the Accrual System and its provisions as provided in Chapter 1 of the Matrimonial Property Act No. 88 of 1984 is hereby excluded from the intended marriage between the parties.

5. The parties acknowledge that the provisions of Chapter I of the Matrimonial Property Act No. 88 of 1984 has been explained to them and they understand the consequences of excluding its provision.

5. The parties acknowledge and record that they enter into this contract

BB24.1-MKNG-CROSS-CUT-2539

SEQ 18/2021-061

freely and with the full appreciation of its consequences.

5. The parties hereby irrevocably waive any right that either of them may have to challenge the validity of this contract, whether in terms of the Constitution of the Republic of South Africa of 1996, as may be amended, or any Constitution in substitution thereof.

5. Upon all of which terms and conditions the said intended Consorts declared it to be their intention to solemnise their said intended marriage and respectively promised and agreed to be bound by the same under obligation of their respective persons and property according to law.

SIGNED at **DURBAN**, on the said date, in the presence of the undersigned witnesses :

AS WITNESSES :

1.

2.

q.q. B.H.J. Barnes

QUOD ATTESTOR

NOTARY PUBLIC

RWW

"B"

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO.

In the matter between:

GIGABA, MALUSI KNOWLEDGE NKANYEZI **Plaintiff**

and

GIGABA, NOMACHULE (born MNGOMA) **Defendant**

PARTICULARS OF PLAINTIFF/APPLICANT:

POSTAL ADDRESS:

Same as residential address.

RESIDENTIAL ADDRESS:

308 Derrick Avenue, Waterkloof, Pretoria.

TELEPHONE NUMBER:

082 8888 617.

NAME AND ADDRESS OF EMPLOYER:

ANC (African National Congress)

KMN

KMN

54 Sauer Street
Johannesburg

TELEPHONE NUMBER:

011 376 1000

GROSS MONTHLY INCOME:

R151650.00

EXTENT OF MONTHLY FINANCIAL COMMITMENTS:

My monthly financial commitments vary.

PARTICULARS OF DEFENDANT / RESPONDENT:

POSTAL ADDRESS:

Same as residential address.

RESIDENTIAL ADDRESS:

308 Derrick Avenue, Waterkloof, Pretoria.

TELEPHONE NUMBER:

071 1260 084

KMN

KMN

NAME AND ADDRESS OF EMPLOYER:

The defendant presently unemployed and studying at Villiotl Fashion Institute.

TELEPHONE NUMBER:

N/A

GROSS MONTHLY INCOME, IF KNOWN:

N/A

EXTENT OF MONTHLY FINANCIAL COMMITMENTS, IF KNOWN:

Unknown.

KNW

KNW

GENERAL INFORMATION

STATE THE FULL NAME, GENDER AND DATE OF BIRTH OF EACH MINOR OR DEPENDENT CHILD OF THE MARRIAGE:

1. Nkanyezi Thando Gigaba, a boy, born on 3 June 2011.
2. Mvelo Mqundisi Gigaba, a boy, born on 25 December 2012.

STATE WITH WHOM THE CHILDREN ARE LIVING AT PRESENT:

At present, the children reside with both me and the defendant as we are still living in the same house.

STATE WHERE THE CHILDREN ARE TO LIVE, FURNISH PARTICULARS OF THE ACCOMMODATION, WHAT OTHER PERSONS (NAME THEM) ARE LIVING THERE AND WHO WILL LOOK AFTER THE CHILDREN. IF IT IS PROPOSED THAT THE CHILDREN SHOULD BE IN THE CARE OF A PERSON OTHER THAN YOURSELF, STATE WHETHER OR NOT THAT PERSON HAS AGREED TO THIS ARRANGEMENT. STATE THE RELATIONSHIP OF SUCH OTHER PERSON TO THE CHILDREN.

This has not been decided or agreed upon. I would like the children to reside primarily with me, whilst having regular and reasonable contact to the defendant.

STATE THE NAME OF THE SCHOOL OR OTHER EDUCATIONAL ESTABLISHMENT WHICH YOUR CHILDREN ARE AT PRESENT ATTENDING, OR, IF ANY OF THEM ARE ALREADY WORKING, THEIR PLACE OF EMPLOYMENT, THE NATURE OF THEIR WORK AND DETAILS OF ANY TRAINING THEY ARE RECEIVING. ATTACH COPIES OF THE MOST RECENT SCHOOL REPORTS.

The Waterkloof House Preparatory School.

KNN

KNN

IS IT ENVISAGED THAT THE CHILDREN, AFTER THE CONCLUSION OF THE ACTION / APPLICATION, WILL HAVE TO CHANGE SCHOOLS? IF SO, GIVE FULL DETAILS.

No.

DO ANY OF THE CHILDREN EXPERIENCE LEARNING PROBLEMS? ARE ANY OF THEM IN ANY RESPECT PHYSICALLY OR MENTALLY DISABLED? IF SO, GIVE FULL DETAILS AND ATTACH RECENT MEDICAL REPORTS.

No, but both boys attend occupational therapy and speech therapy at school.

STATE WHO IS SUPPORTING THE CHILDREN AT PRESENT, OR CONTRIBUTING TO THEIR SUPPORT, AND TO WHAT EXTENT.

I support the children.

WHAT ARRANGEMENTS HAVE BEEN MADE REGARDING RIGHTS OF ACCESS OF YOUR HUSBAND / WIFE? STATE THE DETAILS OF ANY SUCH ARRANGEMENT.

No arrangements have been made as at the date of deposing to this affidavit.

SET OUT ANY FURTHER DETAILS CONCERNING YOUR MINOR OR DEPENDENT CHILDREN WHICH MAY BE RELEVANT TO THE CUSTODY OF, ACCESS TO AND FINANCIAL PROVISIONS FOR SUCH CHILDREN, E.G. WHETHER ANY OF SUCH CHILDREN HAVE BEEN CONVICTED OF ANY CRIMINAL OFFENCE OR WHETHER ANY OF SUCH CHILDREN HAVE BEEN SUBJECT TO ANY ORDER IN TERMS OF THE CHILD CARE ACT, 1983 (ACT NO. 74 OF 1983):

KAIN KAIN

NA.

STATE BRIEFLY THE EXTENT TO WHICH THE ABOVE ARRANGEMENTS REGARDING YOUR MINOR OR DEPENDENT CHILDREN ARE THE RESULT OF MUTUAL AGREEMENT WITH YOUR HUSBAND / WIFE.

N/A.

ARE YOU A MEMBER OF OR IS YOUR FAMILY KNOWN TO A WELFARE ORGANISATION OR AGENCY? IF SO, STATE THE NAME OF THE ORGANISATION / AGENCY AND WHERE IT OPERATES.

No.

KNOWLEDGE MALUSI NKANYEZI GIGABA

THE DEPONENT has acknowledged that he knows and understands the contents of this Affidavit, which was signed and sworn to before me at JOHANNESBURG, on this the 11th day of AUGUST 2020, the regulations contained in Government Notice No. R1258 of 21 July 1972, as amended, and Government Notice No. R1648 of 19 August 1997, as amended, having been complied with.

COMMISSIONER OF OATHS

COMMISSIONER OF OATHS EX OFFICIO
MAGDALENA CATHARINA GREYLING
PRACTISING ATTORNEY R.S.A.
1 MELROSE BOULEVARD
SUITE 11B. FIRST FLOOR
MELROSE ARCH
TEL. 011 684 1468

KMN

"KMG3"

TRANSCRIPT

Interview between eNCA and Norma Mngoma

File name: Part 1
Audio length: 5:55
Date transcribed: 25 March 2021

PRESENTER:
In an eNCA exclusive, Norma Mngoma is spilling the beans on her marriage to former Minister Malusi Gigaba. She is in a legal battle with her estranged husband currently. Our reporter, Slindelo Masekane spoke to her about their marriage, his alleged ties with the Guptas and bags of cash.

SLINDELO MASEKANE
Norma Gigaba, or shall I say Norma Mngoma.

NORMA MNGOMA
Norma Mngoma.

SLINDELO MASEKANE
It's been a tumultuous couple of months and a tumultuous couple of years with the new marriage. But let's start with the name change, the reinvention of Norma Mngoma. Who is Norma Mngoma?

NORMA MNGOMA
Norma Mngoma.is the person who I am, that I have always been, then Norma Gigaba found Norma Mngoma on the way and when that didn't work then I decided let me go back to my surname because the surname served the purpose until it ended and I felt like it no longer served the purpose and this is who I am am and where I come from and what I am comfortable with.

SLINDELO MASEKANE
You reclaiming your surname, what does it mean? What does it mean for your marriage?

NORMA MNGOMA
I want to put that outside. I want to close that chapter. I don't want to be there anymore. So, I want to be myself and be known as who I am, by my family and my roots and to be comfortable with the surname. I don't want to be clinging or attached to people's surname.

SLINDELO MASEKANE
So is it safe to say that divorce proceedings are underway.

NORMA MNGOMA

KMN

Yes, we are on the way.

SLINDELO MASEKANE
In terms of your breakdown in your relationship, we have seen it play out a lot in the public space, allegations of extramarital affairs, from the moment you were married in 2014, these allegations started surfacing, you have come out defending him in many cases. The most recent one being a video, that was apparently for you. Did you ever receive that video?

NORMA MNGOMA
That was not my video. I don't want to lie. I have never imagined something like that. It was not for me. So I don't know it was for who. I don't even know that he knows who did he send it to because there is a lot of those. They are his videos, they are not mine.

SLINDELO MASEKANE
And in terms of how we find ourselves here, in terms of the events that have been playing out since July, since your arrest, take me back to that day, take me back to why we find ourselves here, why you find yourself in court.

NORMA MNGOMA
I can't even put it into words, but I will find time when I will put it into words when the court's proceedings are over, the thing is still in the process and I want to respect the law but I am not sure how we ended up there. But the court proceedings will unfold itself. You will find out in the trial, and that time I will say my side of the story, the whole detail. But just because everything is in the court so I have to respect the law, but in a nutshell, I think everything is to get to my gadgets. All the other is stuff is just other stuff.

SLINDELO MASEKANE
Your gadgets. What is on your gadgets that somebody would like to get their hands on your gadgets.

NORMA MNGOMA
I can't put myself in his head but what I think is just most like the stuff, is a paranoia on his side, what I know, and also because we have been travelling together. I think most of the stuff is because we visited the compound together, the Gupta house, which I think maybe he thinks I took the pictures of some meetings because most of the time when there were meetings there, I was there. Although I never joined, I would sit on the side or sit in another room. Although they used to ask us to leave our phones outside, 30 minutes later I would get bored and go fetch my phone. So I think this year when he started preparing for his state capture, which he started last year. So this year he started asking me a couple of questions: "do you still remember when we were discussing the appointing of people." I would go like no, I never sit in any meeting. So he is so paranoid what I know and also because our marriage is not there anymore and also because he saw that I want to leave but he was worried about what I know. So my phone when we travel, the trips that we took and I love taking pictures, I love taking selfies, so for me I didn't know most of the pictures were

TRANSCRIPT

Interview between eNCA and Norma Mngoma

File name: Part 2
Audio length: 9:29
Date transcribed: 25 March 2021

SLINDELO MASEKANE
So of course your estranged husband's name is coming up frequently, especially recently, in the State Capture Commission of Enquiry, and of course having been married to him for six years, you have witnessed a lot, seen a lot. What do you know about some of these allegations that have been made? Do you know anything about these allegations?

NORMA MNGOMA
I found him there with the Guptas, so I don't know how much they have known each other, I was new to this whole thing. So I don't know what was wrong and what was right. So I only knew things were wrong when the media starting putting pressure, the EFF were asking things, then I was asking what was wrong, he was like "no, it is just a campaign to destroy my name". So I did not know what exactly what was wrong because what I know, we visit, sometimes he gets gifts or sometimes they give him things, so I didn't know what was wrong about everything. But now I know, because he is so paranoid, asking don't say that, don't say this; I would say hau, but you said that you declared this, you said it was OK. All of a sudden I am aware that some of the stuff is right and some of the stuff is wrong. But he would be the one who would say at the state capture so he will explain himself, so I can't talk on his behalf.

SLINDELO MASEKANE
We are also seeing some evidence that was led by a bodyguard that used to work for Mr Gigaba. What do you know about the evidence he brought forward in terms of bags of money.

NORMA MNGOMA
He was telling the truth because they used to give him a lot of money but I don't know what they were giving money for, but sometimes he would say "No, I do favours for them, the Guptas." So then they will give him money. It was a lot cash, all the time. I don't know what it was for. But he used to use that money for different things, maybe either for his lifestyle, build his home, and also to give it to his sisters. Because at the time his sister was on credit bureau and owing like R850,000. They just paid it like that. Even for our wedding, our honeymoon. So they were always there to help financially, like all the time. Although I was not there when they give the money but I will see him when we leave. Because every time when we go there he used to carry a bag and they will give him money. And when we get home he will take that money and put it in the safe and pack it, so yes it was there. He is the one who will answer better for what it was for because I was not there when it was given.

J KNN

SLINDELO MASEKANE
You mentioned that you were at the compound many times, do you have a ballpark figure in the past six years that you were married, how many times you were at the Gupta compound?

NORMA MNGOMA
We used to go there frequently. Sometimes they used to come to our house as well. Although it was not a lot of them coming to our houses. But we used to go there a lot. Especially when he was at DPE, lesser when he was at Home Affairs, but at DPE it was a lot of times. Then there was a time when I asked him why do you say that you don't recall? Because I think there was a time in Parliament that they asked him how many times he have been there. And he was like that he didn't recall that he was just there for occasional. But he wasn't there for occasional, we were there once for Divali, we weren't there for occasions, we were there for meetings. They were working. He never consulted me for anything, but we were there.

SLINDELO MASEKANE
What impact has it had on your relationship, in terms of any strain that it has put on your relationship, how has it been?

NORMA MNGOMA
Most of the time he was so stressed, but he is the kind of person he is very good at pretending. Even when he is stressed, he won't show that much and also because he is a laid-back person, so you won't know how stressed he is, unless he will have so much of migraines. He was so into himself at the time because he doesn't talk a lot. I didn't know how he would feel, maybe he would just lash out and then I will know that maybe he is stressing. Because there were a lot of meetings happening underground and we were staying at the state house at the time and the state house has a underground. So, a lot of things happened there, which I have never been underground. Only the helpers used to go there so I don't know what was happening there. Even at the Gupta house, I don't know what was happening in most of the meetings.

SLINDELO MASEKANE
And at some point it seemed as though your estranged husband was being groomed, possibly for the highest office in the land. It seemed as though you guys were the power couple in terms of his aspirations or his ambitions of making it to the highest office in the land. What do you know about the relationships he built around possibly occupying the Presidency?

NORMA MNGOMA
All of a sudden, lately when our marriage was really on the rocks, stuff like that came up and I didn't know that he was so much in this president's thing, but he is. That was his ambition, it was never a couple thing, that that was something we wanted as a couple. It was not

something I look out for, when he was a minister just imagine what it would be like if he was president. That would be a lot. So maybe he will find himself someone else to go there.

SLINDELO MASEKANE
Did you expect him to turn on you?

NORMA MNGOMA
Not really. I won't say I feel betrayed because that is the kind of person, that is who he is. So I knew that my turn will come one day. Tough when he did that interview with CNN, I was so shocked, I even asked him after, like how can you do that to him, to former President Zuma. I think he took him like his own son, that is the kind of relationship they had. I don't know what went wrong between the two of them because he never he never said anything about him. I knew that one day, if he can do that to someone like that, he will do it to me as well. So I didn't know what exactly it will be. So when it came, it was oh, wow, it was my turn and that's it. It was not like a betrayal, but it was a shock, because I felt like he went too far with it.

SLINDELO MASEKANE
Do you know anything in terms of whether he used his power, his influence in an untoward manner?

NORMA MNGOMA
What I know now since this whole arrest happened, in the weeks before, he was like oh no, don't tell anyone that my sister has worked for the Guptas because his sister did work for the Guptas. It was 2012 or 2013, I don't remember exactly and also I know there was a lot of money coming in but to me he said it was a gift for a favour. I didn't know what the favour was. When I asked him if it was a right thing he was doing, he said they are his advisors. So for me when I came in, for most of the time he was always there. So I took them like advisors that they were advising him who to appoint, who to remove because most of the time it was more of that. They used to have a list at the start of the meeting. I would never know who they would put in a position because I would leave the house or be asked to leave the house. They would never speak in front of me. So I would never know what went down. He would know exactly. Io only found out two weeks after my arrest because it was that time when he was asking me "do you remember this, if anyone asks you that, just tell them that you don't want to talk, use spousal privilege. So I asked what was spousal privilege and he explained that. And even after my arrest he reminded me that, and why didn't it work when I was arrested? So why does spousal privilege only work on your side? I was starting to digest that there was a lot of things, when the media was saying those things and when Parliament was asking him about those things, he said it was a political campaign, and he would dismiss that. There were a lot of times I were sad for him because I used to trust what he was saying. So I only knew now that there was a lot going on, maybe that is why I was not allowed to sit in on those meetings.

END OF AUDIO

TRANSCRIPT

Interview between eNCA and Norma Mngoma

File name: Part 3
Audio length: 8:58
Date transcribed: 25 March 2021

SLINDELO MASEKANE
Your husband seems to believe that there is a conspiracy, that his life is in danger, that somehow you're involved in this conspiracy, hence the involvement of the Hawks in your case. Do you want to see your husband dead?

NORMA MNGOMA
That was an imaginary conspiracy. On a serious note, that one is a lie, he is lying. I don't think there is anyone that wants to kill him. I think it is in his head. Because if there is something like that he would never leave home without bodyguards. Even now during the lockdown he was driving himself, bodyguards were paid at Luthuli House to drive him around but they never came home. Maybe they came after my arrest, but most of the time he used to drive himself and also before then, when we go on Sundays, we would go to Sandton or to do my facial, or we go out, he used to drive just the two of us. But if your life is under threat in the way he portrays it, you would be with bodyguards 24/7. And bodyguard don't even sleep at home, they leave. So if your life is under threat, your life cannot be under threat during the day, so at night, what happens? So I think it is something that is in his head. It is imaginary. But for me to try to kill him, that is a total lie. I can put it out there. And also one thing on my side that was said just to cover up, when there was pressure from society and the media asking why the Hawks was involved in my case. So they just wanted to cover that up. It has nothing to do, and deep down in his heart he knows. You were there, you saw in court there was no something like that on the docket. It was removed. So I was never questioned in any court, so I have never seen anything. I am still waiting for him to tell me who I conspired with and who are those people and why would I do that. There is no such a thing. It's in his head. So I think sometimes he is too obsessed about being so special, and thinking that everyone wants to kill you. When he resigned, he said he was forced to resign, let me put it that way, when he was forced to resign he was very angry about the blue lights that were removed. I never knew he was so attached to power and attached to all these things. He became so paranoid, such an angry person because he wanted this blue lights. I remember the other time when we were at Mandeni, he called Minister Bheki Cele and told him that people were outside the house carrying guns and want to kill him. There was no-one outside. I didn't see those people but he said that he saw them and asked us not to come out of the house. He requested to have bodyguards and blue lights and stuff. But they didn't budge on it. I don't think there is anyone who wants to kill him. It's in his head. Sometimes when you are in power for too long and you get attached to it, you think it is a must have. So he has to face the reality that, hell no, yo are not the

minister anymore. Maybe he will become a minister in the next future because anything is possible with politics, but I don't think there is anyone who wants to kill him.

SLINDELO MASEKANE
A lot of people will say you have put up with so much for so long, what is it that was the final straw for you, what is it that said, you know what I'm done.

NORMA MNGOMA
It's a lot of things. For me it is him not wanting to take responsibility of certain actions and not want to be held accountable. Every time when he does something wrong, he will say it is a political campaign and also what I didn't like, each and every time when he does something, when he writes a statement, he will write my wife and I without coming to me. Every time I used to tell him that this was such a disrespect because you come tell me afterwards what happened. It's not like he really wants a relationship, it's just because he has a problem of a porn addiction, because he is always watching porn and for him it's a fantasy. And then he will go and sleep with that person, and people with catch feelings and Malusi's gone, like he already passed. Then they start reacting that "you used me, I am going to tell the wife." Most of the time I will never find out. The girls will send me it to me and it will start from there.

SLINDELO MASEKANE
People will say, you coming out now to speak now so candidly about the past couple of years could possibly put your own life in danger.

NORMA MNGOMA
I am not person whose a coward. I am not scared of anything. So all of us will die one day if that is my calling to die like that, then let it be. But I will never stop living my life to the fullest because I am scared of him. I am not scared of him, I am not scared of anyone. Some people say "you will disappear, you know the comrades." And even when the Hawks were involved people were so scared. Me, I am so chilled, so chilled. It is up to him. If he wants us to be civil, that is what I proposed before the whole drama. I think it was early this year, I stopped posting him last year. I think I want to focus on myself, focus on my kids, focus on my things. So when he saw I was so out of his life, that was when he started following me, being so moody, but being scared? No. They can threaten me but I know what to do, there is law out there. He thinks because he knows people in positions, he has this power over me. Even the Hawks can be held accountable and I have the best legal team. So I am not scared of anything, especially him. I am not scared of him.

SLINDELO MASEKANE
If for some reason the Commission of State Capture, the Enquiry happens to call you up, would you testify?

NORMA MNGOMA

KMN.

Why not? I am a South African citizen. I will go. I will say my part. He knows I am a very honest person. So I will say what I know. If I don't know something, I don't know it. He is that kind of a person that even if he knows it he will say "I don't recall." If I recall I will remind him.

SLINDELO MASEKANE
Where to from here?

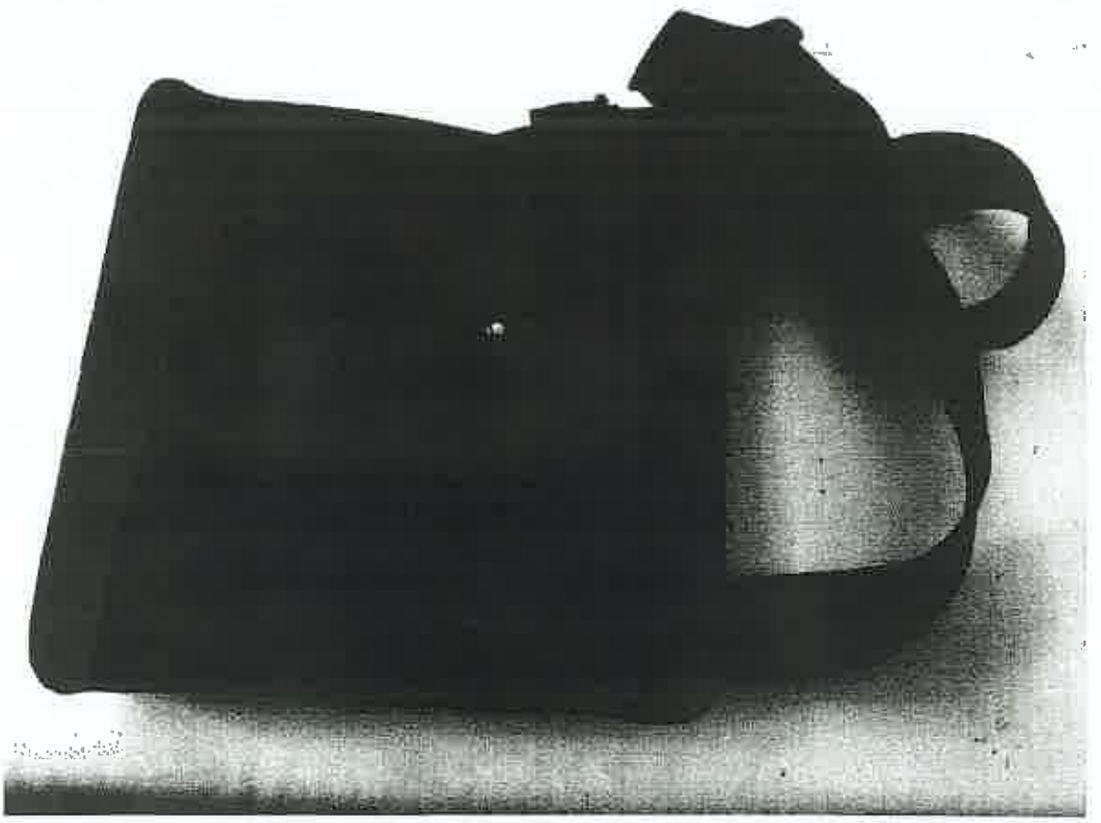
NORMA MNGOMA
I am busy with my foundation because that is something I put on hold last year, two years back and we used to fight about it. Because we were fighting a lot I put it aside. Let me go back to school, let me do this and this. For him, when he leaves home, he know what he does and he thought it was the same thing about me. It became to a point where it was so toxic. He accuses you of this and that. If someone donates it is because he wants me, if I am working with this person, so he is that kind of a person but also when you put it out there in public it would be like a vice versa and he would act like it was me. That is why I don't want to be part of that marriage anymore. I don't regret anything because I agreed to marry him, we had kids, had a lot of highs and a lot of lows. I just want to close that chapter and move on and do things that I like and focus on my career in fashion, study, focus on business and projects that I am busy with. The other side, somebody else will fit it in.

SLINDELO MASEKANE
Thank you for your time, Norma

NORMA MNGOMA
You are welcome.

END OF AUDIO

'KMG4'



10. MOMONIAT, I

Derick de Beer

From: Secretary
Sent: 24 March 2021 10:29
To: Chowe Isaac
Cc: Secretary
Subject: Momoniat//Rule 3.3//Gigaba M
Attachments: Momoniat Rule 3.3 Gigaba Mr Malusi.pdf

Dear Sir/Madam,

Please find the attached Rule 3.3 Notice in respect of Mr Momoniat 's evidence for your attention.

Annexure A and B referred to in the Rule 3.3 Notice will be available to download via the secure WeTransfer link https://we.tl/t-PhNc1a1vjL . Please email a selected cell number to the Secretariat (Secretary@commissionsc.org.za) to which the WeTransfer link password will be SMS'ed to you. The WeTransfer link expires 13 April 2021.

Please note that the Commission is required to comply with all COVID-19 Regulations. Please advise the Secretariat 48 hours in advance at Secretary@commissionsc.org.za if you elect to attend. Protocols, procedures and arrangements in place at the hearing venue will then be communicated to you.

Kindly acknowledge receipt hereof and contact the Secretariat regarding any queries that you may have.

Yours faithfully,

Secretariat
COMMISSION OF INQUIRY INTO STATE CAPTURE
Hillside House, 2nd Floor, 17 Empire Road, Parktown,
Johannesburg, 2193, Gauteng South Africa,
Email: Secretary@commissionsc.org.za
Website: www.sastatecapture.org.za

From: Chowe Isaac <IChowe@justice.gov.za>
Sent: Wednesday, 24 March 2021 07:51
To: Secretary <Secretary@commissionsc.org.za>
Subject: RE: Momoniat//Rule 3.3//Gigaba M

Dear Madam/Sir,

Please resend the notice indicated in the email hereunder.

I do apologise for the delayed response.

Regards,
Isaac Chowe

From: Secretary [mailto:Secretary@commissionsc.org.za]
Sent: Friday, 19 March 2021 18:34
To: Chowe Isaac
Cc: Secretary
Subject: Momoniat//Rule 3.3//Gigaba M

Dear Sir,

Please find the attached email from Tshabalala Attorneys.

Kindly confirm whether you have received the Rule 3.3 Notice in respect of Mr Gigaba.

Yours faithfully,

Secretariat
COMMISSION OF INQUIRY INTO STATE CAPTURE
Hillside House, 2nd Floor, 17 Empire Road, Parktown,
Johannesburg, 2193, Gauteng South Africa,
Email: Secretary@commissionsc.org.za
Website: www.sastatecapture.org.za

From: Reginald Tshabalala <reginald@tshabalala.com>
Sent: Friday, 19 March 2021 06:22
To: Secretary <Secretary@commissionsc.org.za>; Jazmin Pandy <jazmin@tshabalala.com>
Subject: RE: Momoniat//Rule 3.3//Gigaba M

Dear Sir/Madam,

As you are aware, Mr. Gigaba is represented by a new legal team and I have forwarded your e-mail and the rule 3.3 notice to them. Kindly refer to the previous correspondence appended hereto.

Yours Faithfully,

TSHABALALA
ATTORNEYS, NOTARIES & CONVEYANCERS

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From: Secretary <Secretary@commissionsc.org.za>
Sent: Thursday, 18 March 2021 20:08
To: Reginald Tshabalala <reginald@tshabalala.com>; jazmin@tshabalala.com
Cc: Secretary <Secretary@commissionsc.org.za>
Subject: Momoniat//Rule 3.3//Gigaba M

Dear Sir/Madam,

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Annexure A and B referred to in the Rule 3.3 Notice will be available to download via the secure WeTransfer link https://we.tl/t-PhNc1a1vjL . Please email a selected cell number to the Secretariat (Secretary@commissionsc.org.za) to which the WeTransfer link password will be SMS'ed to you. The WeTransfer link expires 13 April 2021.

Please note that the Commission is required to comply with all COVID-19 Regulations. Please advise the Secretariat 48 hours in advance at Secretary@commissionsc.org.za if you elect to attend. Protocols, procedures and arrangements in place at the hearing venue will then be communicated to you.

Kindly acknowledge receipt hereof and contact the Secretariat regarding any queries that you may have.

Yours faithfully

Secretariat
COMMISSION OF INQUIRY INTO STATE CAPTURE
Hillside House, 2nd Floor, 17 Empire Road, Parktown,
Johannesburg, 2193, Gauteng South Africa,
Email: Secretary@commissionsc.org.za
Website: www.sastatecapture.org.za

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

NOTICE IN TERMS OF RULE 3.3

TO : MR MALUSI GIGABA

C/O : TSHABALALA ATTORNEYS

TEL : 011 783 5677

EMAIL : reginald@tshabalala.com
jazmin@tshabalala.com

IN TERMS OF RULE 3.3 OF THE RULES OF THE JUDICIAL COMMISSION OF INQUIRY INTO ALLEGATIONS OF STATE CAPTURE, CORRUPTION AND FRAUD IN THE PUBLIC SECTOR INCLUDING ORGANS OF STATE ("THE COMMISSION"), YOU ARE HEREBY GIVEN NOTICE THAT:

1 The Commission's Legal Team intends to present the evidence of **MR ISMAIL MOMONIAT** ("**Mr Momoniat**") at its hearing to be held at the Old Council Chamber of the Municipality of the City of Johannesburg, 158 Civic Boulevard Braamfontein, Johannesburg. The presentation of Mr Momoniat's evidence will commence on a date to be confirmed at a later stage. The evidence in question implicates or may implicate you in unlawful, illegal or improper conduct in the respects set out below.

2 Specifically, it is alleged that you:

2.1 sought to replace certain officials within the National Treasury on the instruction of the Gupta family whilst you were Minister of Finance; and

2.2 sought to weaken South Africa's anti-corruption and anti-money laundering legislation and financial regulatory framework by attempting to delay the passing of the Financial Intelligence Centre Amendment Bill to serve the private interests of the Gupta family whilst you were a member of the JCPS cluster.

3 The statement of Mr Momoniat which implicates or may implicate you in the above allegations is annexed hereto marked "**A**". Your attention is drawn to **paragraphs 15 to 16, 233 to 242 and 293**.

4 **Annexures IM1 to IM54** to the statement of Mr Momoniat which implicate or may implicate you in the above allegations are annexed hereto marked "**B**".

5 Due to the fact that you are implicated or may be implicated by the evidence of Mr Momoniat, you are entitled to attend the hearing at which that evidence is being presented. You are also entitled to be assisted by a legal representative of your choice when that evidence is presented. The full statement of Mr Momoniat will be uploaded on the Commission's website (www.sastatecapture.org.za) as soon as he concludes his evidence. The transcript will be uploaded daily.

6 If you wish to:

6.1 give evidence yourself;

6.2 call any witness to give evidence on your behalf; or

6.3 cross-examine the witness

then you must apply, within fourteen (14) calendar days of this notice, in writing to the Commission for leave to do so.

7 An application referred to in paragraph 6 above must be submitted to the Secretary of the Commission. The application must be submitted with an affidavit from you in which you respond to the witness's statement insofar as it implicates you. The affidavit must identify what parts of the witness's statement are disputed or denied and the grounds on which they are disputed or denied.

8 If you wish to apply to cross-examine the witness, your application must follow the requirements of Rule 11.3. In other words, it must be a substantive application on affidavit accompanied by a notice of motion.

9 In the event that you believe that you have not been given a reasonable time from the issuance of this notice to the date on which the witness is to give evidence as set out above and you are prejudiced thereby, you may apply to the Commission in writing for such order as will ensure that you are not seriously prejudiced.

10 Please take note that even if you do not make an application under Rule 3.4:

10.1 in terms of Rule 3.10, the Chairperson may, at any time, direct you to respond in writing to the allegations against you or to answer (in writing) questions arising from the statement; and

10.2 in terms of Regulation 10(6) of the Regulations of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State GN 105 of 9 February 2018 published in Government Gazette 41436, as amended, the Chairperson may direct you to appear before the Commission to give evidence which has a bearing on a matter being investigated.

11 The witness statement and annexures provided to you are confidential. Your attention is drawn to Regulations 11(3) and 12(2)(c) governing the Commission, which make it a criminal offence for anyone to disseminate or publish, without the written permission of the Chairperson, any document (which includes witnesses' statements) submitted to the Commission by any person in connection with the Commission's inquiry.

12 Any response to or application in regard to this notice must be sent to Advocate André Lamprecht, Ms Shannon van Vuuren and Ms Rachel Niewenhuis at secretary@commissionsc.org.za.

DATED AT PARKTOWN ON THIS 18th DAY OF MARCH 2021

PROF ITUMELENG MOSALA
Secretary
Judicial Commission of Inquiry into Allegations
of State Capture, Corruption and Fraud
in the Public Sector including Organs of State

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

STATEMENT OF MR ISMAIL MOMONIAT

TABLE OF CONTENTS

ACRONYMS ***3***

INTRODUCTION ***5***

MY BACKGROUND AND WHY I MAKE THIS STATEMENT ***8***

The weakening of National Treasury as an institution 9

THE CAMPAIGN TO STOP THE FICA BILL ***15***

Background 15

Two Cabinet approvals for the FICA Bill take one year 21

Concept of politically exposed persons (PEPs) 24

FICA Bill approved by Parliament 27

THE GUPTAS SHOW THEIR HAND ***29***

Background on Gupta family activities late 2015 and early 2016 29

Closure of Gupta bank accounts 36

The Guptas approach the Minister of Finance and Government 42

Cabinet rushes to support the Guptas 48

Mr Gordhan's immediate response to the Cabinet decision 53

Actual Cabinet Decision differs significantly from Media Statement 58

Oakbay approaches the ANC and COSATU 61

Minister Gordhan finally meets Oakbay CEO 70

MR ZWANE BATS FOR THE GUPTAS ***78***

Mr Zwane continues with haste on his 'investigation' 78

Zwane Task Team report to Cabinet June-July 2016 81

Mr Zwane goes public on "IMC" investigation 87

To and fro following Mr Zwane's Press Statement 92

Role of Bell Pottinger and leaking of Zwane memorandum 98

Mr Gordhan exposes suspicious Gupta activities 100

FICA BILL ATTACKED AND REFERRED BACK TO PARLIAMENT *104*

FICA Bill: Intervention by the Black Business Council and allies 104

Meeting between National Treasury and the BBC 109

President Zuma refers the Bill back to Parliament 112

SECURITY CLUSTER INTERVENES TO AMEND FICA BILL *115*

Security Cluster submits objections to SCOF – JANUARY 2017 115

ANC Finance Study Group intervenes to stop the Security Cluster 119

Parliamentary SCOF Hearing and Revision of FICA Bill clause 123

Enter Advocate Shaun Abrahams at FATF Plenary 127

Minister Masutha and Adv Abrahams Try and Stop the FICA Act taking effect 131

FATF finally takes South Africa off its targeted list 137

GUPTA ASSOCIATES TRY TO BUY A BANK *139*

CONCLUSION *146*

ACRONYMS

ABSIP	Association of Black Securities and Investment Professionals
AGSA	Auditor-General South Africa
ANC NEC	African National Congress National Executive Committee
ANC	African National Congress
BASA	Banking Association South Africa
BBC	Black Business Council
BLF	Black First Land First
CASAC	Council for the Advancement of the South African Constitution
CEO	Chief Executive Officer
CFO	Chief Financial Officer
CMLAC	Counter-Money Laundering Advisory Council
CNN	Cable News Network
COSATU	Congress of South African Trade Unions
COVID-19	Coronavirus disease 2019
CTRs	Cash Threshold Reports
DDG	Deputy Director-General
DG	Director-General
EPIFR	Economic Policy and International Financial Relations Division of National Treasury
ESEID	Economic Sectors, Investment, Employment and Infrastructure Development Cabinet Committee
FATF	Financial Action Task Force
FIC Act	Financial Intelligence Centre Act, 2001
FIC Amendment Act	Financial Intelligence Centre Amendment Act, 2017
FIC	Financial Intelligence Centre
FICA Bill	Financial Intelligence Centre Amendment Bill, 2015
FSCA	Financial Sector Conduct Authority
FSR Act	Financial Sector Regulation Act, 2017
FSR Bill	Financial Sector Regulation Bill, 2015
G20	Group of Twenty Countries
GDP	Gross Domestic Product
ICTS	International Cooperation, Trade and Security Cabinet Committee
IFFs	Illicit Financial Flows
IMC	Inter-Ministerial Committee
IMF	International Monetary Fund
IRBA	Independent Regulatory Board of Auditors

JCPS	Justice, Crime Prevention and Security Cabinet Cluster
JSE	Johannesburg Stock Exchange
MER	Mutual Evaluation Report
MFMA	Municipal Finance Management Act, 2003
MP	Member of Parliament
NCOP	National Council of Provinces
NCR	National Credit Regulator
NDPP	National Director of Public Prosecutions
NGOs	Non-Governmental Organisations
NICOC	National Intelligence Co-ordination Committee
NPA	National Prosecuting Authority
NUM	National Union of Mineworkers
OECD	Organisation for Economic Co-operation and Development
PEPs	Politically-Exposed Persons
PFMA	Public Finance Management Act, 1999
PIPs	Prominent Influential Persons
POCA	Prevention of Organised Crime Act, 2002
POCDATARA	Protection of Constitutional Democracy Against Terrorist and Related Activities Act, 2004
PPF	Progressive Professionals Forum
PRECCCA	Prevention and Combating of Corrupt Activities Act, 2004
RI	Reportable Irregularities
SA	South Africa
SABC	South African Broadcasting Corporation
SACP	South African Communist Party
SARB	South African Reserve Bank
SARS	South African Revenue Service
SASSA	South African Social Security Authority
SC	Senior Counsel
SCOF	Parliamentary Standing Committee on Finance
SIFIs	Systemically-Important Financial Institutions
SOEs	State-Owned Entities
SONA	State of the Nation Address
SSA	State Security Agency
STRs	Suspicious Transaction Reports
UK	United Kingdom
UNCAC	United Nations Convention Against Corruption
USA	United States of America

INTRODUCTION

I, the undersigned,

ISMAIL MOMONIAT

make the following statement on oath:

1 I am the Deputy Director-General: Tax and Financial Sector Policy ("DDG") at the National Treasury in the Government of the Republic of South Africa. I have held the position of Deputy Director-General since 2001, and have been in the National Treasury (or its predecessor) for over 26 years since 1995.

2 I make this affidavit in order to assist the Commission of Inquiry into Allegations on State Capture ("the Commission") in fulfilling its mandate particularly in respect of paragraph 1.7 of the Commission's Terms of Reference.

3 The facts described in this affidavit fall within my personal knowledge, unless I state otherwise, or the context of this affidavit makes it clear that they do not. I confirm that the facts are true and correct to the best of my knowledge and belief. Where I use the pronoun 'we, it is because it is my understanding that it was an institutional view of the Treasury, and depending on the context, the view of the team at the National Treasury who were working with me and/or that of top management in National Treasury at the time, including the Director-General and Minister.

4 To the extent necessary, I rely on the documents at my disposal and information made available to me in order to support the facts that I describe in this affidavit. I believe that such information and documents are both true and correct.

5 I leave it to the Commission to determine the form of corruption or state capture that we experienced. Whilst I generally try and avoid using the term "state capture", it is difficult to have no reference to it whatsoever, and where it is used, it is not meant to pre-empt the findings of this Commission.

6 Paragraph 1.7 of the Terms of Reference states:

"whether any member of the National Executive and including Deputy Ministers, unlawfully or corruptly or improperly intervened in the matter of the closing of banking facilities for Gupta owned companies".

7 In this respect, my evidence relates to:

7.1 My background, my employment history at National Treasury, and why I believe I am well-placed to make this statement;

7.2 The weakening of National Treasury after 2015 which I only deal with briefly;

7.3 The Financial Intelligence Centre Amendment (FICA) Bill [B33-2015], its importance in strengthening our anti-corruption and anti-money laundering system and how I believe the Gupta family exerted influence to stall the passage of the Bill;

7.4 The closure of the bank accounts of Gupta-related companies, and how such action triggered a political fight back by the Gupta family who posed as victims of "white monopoly capital";

7.5 How Cabinet rushed to protect Gupta-owned businesses by launching an illegal investigation on 13 April 2016 against banks that terminated their services, by establishing a Ministerial Task Team led by Minister Mosebenzi Zwane;

7.6 How Minister Zwane used the Task Team to protect Gupta-owned businesses so that they could continue with their illicit transactions by blaming the banks, SA Reserve Bank, Financial Intelligence Centre (FIC) and the National Treasury, and prevent banks from upholding anti-money laundering and anti-corruption laws;

7.7 How the actual decision taken by Cabinet at its 6 July 2016 meeting on the report of the Ministerial Task Team was never made public, even after Mr Zwane rushed to make his own announcement and was reprimanded by President Zuma;

7.8 The attempt by the Gupta associates to buy their own bank, and force the SA Reserve Bank and the Minister of Finance to approve their application;

7.9 The attempt by the Justice, Crime Prevention and Security (JCPS) Cluster Ministers and the National Director of Public Prosecutions (NDPP) to change, delay and stop the FICA Bill; and

7.10 I conclude my evidence with by noting that Chapters 13 and 14 of the National Development Plan still offer a credible path to reverse the effects of corruption and rebuild the capability and integrity of the state and the economy. Annexure **IM1** provides a few proposals on a way forward, and possible questions to explore, for the consideration of the Commission.

MY BACKGROUND AND WHY I MAKE THIS STATEMENT

8 I began working at National Treasury (or one of its two precursors, the then Department of Finance) on 1 January 1995, following the 1994 elections. My first year of employment was a one-year contract. I was then appointed permanently a year later from 1 January 1996 as Chief Director: Intergovernmental Relations. When the Departments of Finance and State Expenditure were merged into the new National Treasury in 2001, I was promoted to Deputy Director-General ("DDG"): Intergovernmental Relations with effect from 1 January 2001. I have been employed as a DDG since then, but from 1 July 2005 I was laterally transferred to be the DDG: Economic Policy and International Financial Relations (EPIFR), and since 1 April 2008 the DDG: Tax and Financial Sector Policy.

9 Prior to working for the National Treasury and the Department of Finance, I was privileged to be employed by the ANC's Department of Economic Planning (DEP) towards the end of 1993, which was then under the leadership of Mr Trevor Manuel and Mr Tito Mboweni. We worked at the then ANC headquarters in Shell House in central Johannesburg, where we were preparing for the ANC to govern after the 1994 elections. This followed short stints of working for the ANC in its

national campaign office after its unbanning in 1990, and studying various courses in the USA and the UK in 1992-93.

10 A few years before the unbanning of the ANC, I was employed at the University of the Witwatersrand as a junior lecturer in Mathematics, and also worked for the Transvaal Indian Congress and the United Democratic Front. I became politically conscious in high school, and was involved in founding various anti-Apartheid organisations like the Black Students Society at Wits University (1975), the Transvaal Anti-South African Indian Council Committee (1981), the Transvaal Indian Congress (1983) and the United Democratic Front (1983).

11 Towards the end of 1993, I was involved in the process led by Mr Trevor Manuel within the ANC to prepare for the first post-democratic budget, which involved meeting with the outgoing government in the transition process before the 1994 elections. I formally joined the Department of Finance as soon as the recruitment of black professionals became possible after 1994.

The weakening of National Treasury as an institution

12 Having been at the National Treasury (and Department of Finance) for over 26 years, and having been part of the ANC team that shepherded the transition of the country's treasury function in 1994, I have witnessed the strengthening of National Treasury from 1994 to its height in 2008/9, reaching its lowest points after the firing of Ministers Nene and Gordhan in 2015 and 2017, and their replacement with Mr van Rooyen and Mr Gigaba respectively. The Treasury maintained its strength and stability as an institution between 2009-2016 under Ministers Gordhan and Nene, despite the increasingly hostile environment, but

remained continually on the defensive. Such pressures, including attempts to fragment it, started as soon as President Zuma took office in 2009, to shift critical functions like macroeconomic policy and performance monitoring to newly-created departments.

13 I am currently the last-remaining manager from the group of Directors-General (DGs) and DDGs that were present at National Treasury in 2009 when President Zuma took office. The Treasury was then led by Mr Lesetja Kganyago as DG, with Lungisa Fuzile, Andrew Donaldson, Kuben Naidoo, Freeman Nomvalo amongst the DDGs. Mr Fuzile replaced Mr Kganyago as Director-General in 2011 after Mr Kganyago was appointed as Deputy Governor at the SA Reserve Bank. Our current Director-General, Mr Dondo Mogajane, was a Treasury official representing South Africa in Washington DC at the Executive Board of the World Bank as a senior advisor for Africa 1 countries during 2007-2009.

14 After Mr Gigaba was appointed as Minister of Finance in 2017, DG Fuzile and DDG Donaldson left soon thereafter, followed by DDG Michael Sachs. Mr Sachs left at the end of October, a few months after the first (and only) strategic session that the Ministry convened over 19/20 July 2017 at Leriba Lodge in Centurion, which was termed "Strategic Session on Transformation and Inclusive Growth". It was attended by Minister Gigaba, Deputy Minister Buthelezi and the Minister"s advisors and senior staff, and the DG, DDGs and some chief directors. The Minister and DG were only able to attend the opening session on the first day, as the Minister was ill and the DG had other commitments. The first session after they left was very heated, after DDG Sachs raised ten critical budget risks and pressures that we faced in his presentation, and raised his concern about the

lack of support from the Ministry to deal with the fragmentation of the Budget process and weakening of the Treasury. Several of my colleagues and I also responded strongly in challenging the Ministry, pointing to the lack of trust between management and the Ministry, following the failure of the Ministry to defend the integrity of our colleagues after the Gupta-led attack against Treasury management over the Integrated Financial Management System (IFMS) project at the end of May 2016. This attack, in my view, was an orchestrated attack similar to the successful attack to weaken SARS[1],[2] over its high-risk investigation unit in 2014.

15 There was no attempt by Minister Gigaba to retain expertise and protect the Treasury's institutional capacity that had been built up for over two decades. Fortunately, National Treasury, under the leadership of DG Dondo Mogajane and a much younger and dedicated team of professionals, are working hard to rebuild the Treasury and overcome the new, and more difficult, fiscal and economic challenges we face.

16 Indeed, I too would probably not be at National Treasury today, as I could feel that I was not really wanted under Mr Gigaba. I was made aware by my colleague, DDG: Corporate Services, Mr Stadi Mngomezulu, that one of the Minister's advisors had actively enquired from our Corporate Services division about whether I had not reached retirement age. I suspect that Mr Gigaba wanted to see many of us in top management leave, to give effect to what Deputy

1 https://www.dailymaverick.co.za/article/2020-12-10-sars-rogue-unit-court-outcome-is-a-milestone-says-ivan-pillay/

2 https://www.news24.com/news24/southafrica/investigations/intelligence-watchdogs-sars-rogue-unit-report-set-aside-van-loggerenberg-calls-on-police-npa-to-act-20200609

Minister Jonas had alerted me to in the days following Mr Nene's firing in December 2015. Mr Jonas told me that he had been approached by one of the Gupta brothers in October 2015 to be Minister of Finance, and that they expected him to remove the DG, Lungisa Fuzile, DDGs Andrew Donaldson, Mr Kenneth Brown and myself, and that they would provide him with "replacements". All this is outlined in paragraph 26 of the affidavit dated 8 August 2018 submitted by Mr Jonas to the Commission, where he also states *"Mr Gupta said that they had determined that the National Treasury was a stumbling block for their growth and they wanted to 'clean up the Treasury'."*

17 It is important to note that the building of the National Treasury and the South African Revenue Service (SARS) into world-class institutions in the period 1997 to 2009, was not an accident of history, but the outcome of a deliberate and sustained policy and strategic priority driven by the ANC as the ruling party under President Mandela, which recognised the critical role of both institutions to support our emerging democracy and nationhood. The process to build these two institutions was led by Mr Trevor Manuel when he was Minister of Finance from 1997 to 2009. His approach was to appoint highly competent and dedicated professionals as DGs, SARS Commissioner and senior managers. The ANC leadership in government also had a similar approach to the South African Reserve Bank in 1994 and beyond, appointing Mr Tito Mboweni as its Governor after the retirement of Mr Chris Stals in 1999. The three institutions and their heads (Minister, Commissioner and Governor) enjoyed the strong support and backing of the President, even as the ANC continually debated the need for the most appropriate economic policy to implement the Reconstruction and Development Plan to transform the economy and the country. It should be borne

in mind that in 1994, very few of us black South Africans had the relevant experience to head state institutions, but even then, the first set of appointments in 1994-99 for departments and entities were based on relevant qualifications and experience to the extent possible.

18 In addition to the poverty, gross inequality and deprivation of basic human rights affecting the majority of citizens of our country, South Africa was also stuck in a low growth economic trap in 1994, with very low economic growth, high inflation and high unemployment. SA was forced to approach the IMF for balance of payments support in 1993, as we experienced negative real GDP growth in the early 1990s, going as low as -2,1% in 1992 before becoming positive at 1,2% in 1993. The first three democratic administrations were able to commit to policies that they implemented to improve economic growth, increasing it from 1,2% in 1993 to over 5% per year in 2005 and 2006 and around 5.4%[3] in 2007, reducing poverty and inequality to a significant extent. The debt-to-GDP ratio was reduced from around 47.6% in 1995 to around 22% in 2008[4], and our credit ratings improved from sub-investment grade in 1994 to investment grade in 2008[5]. This outcome was the result of a deliberate and considered economic policy framework that was meticulously implemented under functioning state administrations led by Presidents Mandela and Mbeki.

19 Under President Zuma, the erosion of the discipline of prudent decision-making and value-for-money spending, combined with the misdirection of funds, not only

[3] Source: Stats SA. http://www.statssa.gov.za/?p=9181

[4] Source: National Treasury. http://www.treasury.gov.za/documents/national%20budget/2020/TimeSeries/Excel/Table%2010%20-%20Total%20debt%20of%20government.xlsx

[5] Between 1995 and 2008 SA had a 4 notch (level) increase in its credit rating (Fitch and Standard&Poors), and a 5 notch decline since then. http://www.worldgovernmentbonds.com/credit-rating/south-africa/

reversed all these gains, moving us back into sub-investment grade, but also took some key economic indicators to a level far lower than that which we inherited in 1994. I cite a more objective source to corroborate my view, a concept note by the World Bank titled - "An Incomplete Transition: A World Bank Systematic Country Diagnostic for the Republic of South Africa", which describes the cycle of decline in the country[6], and attach a slide from a presentation made last year to Treasury by World Bank Staff (Annexure **IM2**).

20 The high-level corruption after 2009 has critically damaged our economy and country, with the commensurate devastating impact on the lives of our people, not least on our school education and health systems. We now have (pre-COVID-19) a public service (in all the three spheres of government) that cannot deliver even the most basic services in most parts of our country.

21 I also believe that the experience I have in overseeing the design, drafting and processing of the basic fiscal and financial laws that serve as the foundation for our democracy, and which give effect to many of the provisions in Chapter 13 of the Constitution, allows me to better appreciate how the good intentions around 1994 were undermined by events after 2009, and perhaps what we could have been done differently. These laws include financial good governance laws like the Public Finance Management Act, 1999 ("the PFMA"), the Municipal Finance Management Act, 2003 ("the MFMA"), as well as the intergovernmental fiscal system legislation like the Financial and Fiscal Commission Act, 1997, the Intergovernmental Fiscal Relations Act, 1997 and the tax and financial sector

[6] Available online at https://static.pmg.org.za/180814WBGReport.pdf

regulatory laws of our country, including the recent Financial Sector Regulation Act 9 of 2017 and the Financial Intelligence Centre Amendment Act 1 of 2017.

22 Against this backdrop, I turn to the specifics of how the Guptas tried to remove barriers to their project to take control of state funds and entities, with reference to the peculiar and inter-linked events relating to the closure of their bank accounts and the delay in the passage of the FIC Amendment Act.

THE CAMPAIGN TO STOP THE FICA BILL

Background

23 To understand the context to the closure of the Gupta banking accounts, it is necessary to understand the background to the passing of the Financial Intelligence Centre Amendment (FICA) Act. This process became closely intertwined with the Gupta fightback over the closure of their personal and business accounts, as well as their attempt to purchase their own bank. I attach a **Timeline Matrix** to my submission, which will enable the commission to contextualise the many events/activities within each process and the links between these processes - Annexure **IM3.**

24 On 27 October 2015, after lengthy governmental processes of many years (since 2011 and before), the Minister of Finance, Mr Nhlanhla Nene, tabled in Parliament two far-reaching bills to regulate the financial sector: The Financial Sector Regulation Bill (FSR Bill) and the Financial Intelligence Centre Amendment Bill (FICA Bill). Mr Nene's speech in the National Assembly when introducing these Bills, spelt out the objectives of the two bills - Annexure **IM4**.

25 The FSR Bill introduced a new and radical framework of very tough regulatory amendments for banks, and the rest of the financial sector, as part of the so-called Twin Peaks regulatory reforms, to make financial institutions safer, healthier, and for them to serve customers better, following the lessons learnt from the 2008 global financial crisis and in line with the response of most G20 member and other countries. Cabinet had approved this major regulatory framework in 2011, outlined in the policy document "A SAFER FINANCIAL SECTOR TO SERVE SOUTH AFRICA BETTER."[7]

26 The FICA Bill sought to strengthen customer due diligence measures by introducing measures on beneficial ownership and politically-exposed persons (PEPs), and enabled a more flexible risk-based approach to verify customers. It allowed for a better sharing of information to improve co-ordination and crime-fighting capabilities. Overall, as Minister Nene emphasised when introducing the Bill, it was "an important bill, to ensure that South Africa continues to meet international standards related to the combating of financial crimes like fraud, money laundering, terrorist financing and corruption".

27 The FICA Bill also sought to remedy a constitutional defect after the Constitutional Court had ruled on section 45(1B) of the Financial Intelligence Centre (FIC) Act in *Estate Agency Affairs Board v Auction Alliance*[8], which it declared to be unconstitutional, but suspended the constitutional invalidity for a period of two years to allow Parliament to remedy the defect. In the interim, the

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[7] http://www.treasury.gov.za/documents/national%20budget/2011/A%20safer%20financial%20sector%20to%20serve%20South%20Africa%20better.pdf

[8] 2014 (3) SA 106 (CC)

Court read-in a temporary provision that set out the circumstances under which warrantless searches could take place. This was to expire on 26 February 2016.

28 The new democratic government under Presidents Mandela and Mbeki moved with speed to put in place a comprehensive anti-corruption framework, starting with the Prevention of Organised Crime Act, 1998 (POCA), which is aimed at combating organised crime, money laundering, racketeering and criminal gang activities. The FIC Act was enacted in 2001, and designed to work in concert with the POCA. The FIC Act also works in concert with the Prevention and Combating of Corrupt Activities Act, 2004 (PRECCA), and the Protection of Constitutional Democracy Against Terrorist and Related Activities Act, 2004 (POCDATARA), which is geared primarily toward the prevention and combating of terrorist and related activities.

29 The fight against corruption has to be fought globally if it is to succeed in any country. This is widely recognised internationally, with the 2004 UN Convention Against Corruption noting:

> *"Convinced that corruption is no longer a local matter but a transnational phenomenon that affects all societies and economies, making international co-operation to prevent and control it essential[9]"*

30 The first democratic administration recognised this fact in 1994, and the then Ministers of Justice and Finance, Mr Dullah Omar[10] and Mr Trevor Manuel

[9] Page 5, https://www.unodc.org/documents/brussels/UN_Convention_Against_Corruption.pdf

[10] Minister of Justice Omar report to the NCOP 5 May 1998: 'The cancer of violence, corruption and poverty are difficult to eradicate. It is not a single event – it is a long and difficult process" https://static.pmg.org.za/docs/1998/980504omar.htm

respectively, initiated processes to join the various international anti-corruption and anti-money laundering initiatives. As a result, we were accepted as members of the global anti-money laundering standard-setting and monitoring body called the Financial Action Task Force (FATF) in 2003, and we were proudly one of the founder countries to ratify United Nations Convention Against Corruption (UNCAC) in 2004. We also became a signatory to the OECD's Anti-Bribery Convention[11] in 2007. I attach Annexure **IM5**, which sets out in more detail how the UNCAC and FATF set a new framework of preventive and transnational measures to deal with corruption, including the introduction of the politically-exposed person (PEP) concept. It also provides more detail on the FATF definition of PEP, and the process to deal with deficiencies identified in our anti-money laundering system in 2009.

31 President Zuma[12] also committed SA in 2010 to tougher anti-money laundering and due diligence of politically exposed persons, when he endorsed the Seoul Anti-Corruption Action Plan at the G20 meeting of Heads of States in that year, which notes:

> *"To prevent corrupt officials from accessing the global financial system and from laundering their proceeds of corruption, we call upon the G20 to … continue to identify and engage those jurisdictions with ….. deficiencies; and update and implement the FATF standards calling for transparency of cross-border wires, beneficial ownership, customer due diligence,* ***and due diligence for "politically exposed persons".*** (my emphasis)

[11] www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf
[12] http://www.g20.utoronto.ca/2010/g20seoul-anticorruption.html

All the above international conventions or initiatives commit member countries to undergo some form of monitoring and review. The anti-money laundering systems of all FATF members is peer-reviewed by members via its Mutual Evaluations approximately once every 6-10 years. South African's first two mutual evaluations were in 2003 and 2009, and we are currently in the midst of our third evaluation. The 2009 Mutual Evaluation Report (MER) found that we needed to remedy a few deficiencies which required amending the Financial Intelligence Centre Act (FIC Act), to fully comply with evolving FATF recommendations. Since we had not remedied all the deficiencies by 2014, South Africa was under strong pressure to publish and enact the FICA Bill into law in order to meet our FATF commitments, as noted in the 29 August 2014 letter of the FATF President to the Minister of Finance - Annexure **IM6**. Annexure **IM7** sets out in more detail the deficiencies identified by FATF in its 2009 MER.

32 The banking sector is regulated more intrusively and intensively than the rest of the financial sector and most other sectors in the economy (possibly second only to the nuclear and airline sectors). For prudential and financial stability reasons, banks are required by the Banks Act to follow Basel 3 capital[13] and liquidity requirements, where they have to hold capital that is readily available, to reduce the prospect of bank failures. The FSR Act also requires banks to be regulated for market conduct and to treat their customers fairly. Indeed, following the 2008 global financial crisis, the major banks are today classified by regulators as SIFIs (Systemically-Important Financial Institutions), as they pose a risk to the entire

[13] An international regulatory framework for the banking sector.

economy of a country, and even globally in some cases. There is a so-called doom loop between sovereign and banking risks.

33 Banks also have to comply with anti-corruption and anti-money laundering legislation, and are required to know their customers and do customer due diligence. They have to adhere to at least ten financial sector laws in South Africa, all of which except one, are administered by the Minister of Finance, and are supervised by five financial sector regulators (Prudential Authority and the Financial Surveillance department of the SA Reserve Bank, Financial Sector Conduct Authority (FSCA), FIC and the National Credit Regulator).

34 For South African banks operating in other countries, and requiring access to the US dollar and other foreign currency markets, they are also expected to fully comply with the anti-corruption, anti-money laundering and other financial sector regulatory requirements of those jurisdictions, over and above that of South Africa. This is not a theoretical threat, as Standard Bank was fined $12.6 million by UK regulators[14] in 2014 for lax anti-money laundering controls. Such actions have become more common after the 2008 global financial crisis, particularly since 2012, when the USA Justice Department imposed at that time a record $1.92 billion in fines against UK bank, HSBC[15], for allowing itself to be used to launder drug money flowing out of Mexico and other banking lapses. This was followed on 30 June 2014 by an even higher fine, when the USA Justice Department announced a $8.9 billion fine and other sanctions against French bank, BNP Paribas[16], for violating sanctions imposed by USA authorities. Such

[14] https://www.gibsondunn.com/serious-fraud-office-v-standard-bank-plc-deferred-prosecution-agreement/
[15] https://www.reuters.com/article/us-hsbc-probe-idUSBRE8BA05M20121211
[16] https://www.justice.gov/opa/pr/bnp-paribas-agrees-plead-guilty-and-pay-89-billion-illegally-processing-financial

high fines, if imposed on a SA bank, would pose a significant financial stability risk to SA, hence the need to ensure that our anti-money laundering regulatory system meets the highest of standards, which overseas regulators and banks can also place reliance on.

Two Cabinet approvals for the FICA Bill take one year

35 We submitted the first Cabinet memorandum to Cabinet on or after 3 October 2014, requesting Cabinet to approve the Bill for publication for public comment, and if no substantial changes were made as a result of the public comments, for introduction in Parliament. We pointed out that the FATF had placed us on its targeted follow-up process, and that we had to report to the next FATF Plenary on progress on our compliance progress. To the surprise of National Treasury management, the FIC Amendment Bill was met with great resistance from Cabinet when we first took it to the ESEID[17] (Economic Sectors, Investment, Employment and Infrastructure Development) Cabinet Committee on 15 October 2014, and it took us six months to secure the first approval to merely publish the bill for public comment, a process which should ordinarily have taken two weeks. The key objection related to the PEPs clause in the FICA Bill.

36 When a Cabinet committee raises a concern or objection to a Bill, we are normally given the week after, between the committee meeting, and the following week, before the full Cabinet meeting, to resolve such concerns or objections. This enables the full Cabinet meeting to reconsider the Bill for approval, often subject to further amendments. The Cabinet meeting of 22 October 2014

[17] https://www.gov.za/faq/guide-government/what-are-government-clusters-and-which-are-they

confirmed the decision of the ESEID Cabinet committee the previous week, to send us back to the drawing board, thereby unduly delaying the Bill, even though they knew this meant we would miss a critical FATF deadline.

37 The request to publish and introduce the Bill was rejected again at a second Cabinet meeting on 10 December 2014, with a set of new concerns related to sovereignty and abuse of personal information, but the main objection still related to the rationale for the PEPs' clause, which if it was to be included, should be applicable to both the public and private sectors. This meant that at the two FATF Plenary meetings in October 2014 and February 2015, we had to plead for more time to process the FICA Bill – Annexure **IM8**.

38 Cabinet only provided its first approval to publish the FICA Bill for public comment on 15 April 2015. This after we decided that for our third attempt to secure Cabinet approval, we would split the approval process into two, and only seek Cabinet approval to publish the Bill for public comment. We would request a second approval to introduce the Bill in Parliament, after we had taken public comments into account and revised the Bill. We also replaced the PEP concept with a broader PIP (prominent influential person) concept. A PIP is defined to include a PEP, but also includes private sector persons like the Chair of a Board of Directors, the CEO and CFO, of a company that provides goods or services to an organ of state and whose annual transactional value exceeds a threshold amount determined by the Minister of Finance (this was the principal difference between this draft and the previous draft of the Bill).

39 The press release after this Cabinet meeting (issued on 17 April 2015) noted that:

> "*7.2. Cabinet approved the publication of the draft Financial Intelligence Centre Amendment Bill, 2014 for public comment. The Amendment Bill proposes amendments to the Financial Intelligence Centre Act (Act No. 38 of 2001). This is to address threats to the stability of our financial system posed by money laundering and terrorism financing by ensuring compliance with international measures and standards, within the South African legislative framework.*"[18]

40 This statement was followed by a more detailed press release by the National Treasury when it released the Bill for public comment on its website[19] on 21 April 2015 – Annexure **IM**9. After receiving the public comments on the Bill by 31 May 2015, we revised the Bill and had to submit it for a socio-economic impact assessment, which certificate we received in September. We then submitted the Bill to Cabinet again on or around 7 September 2015, to seek its second and final approval, to table in Parliament. This time the approval was granted without any delay, on 23 September 2015, allowing the Minister to table the Bill in Parliament on 27 October 2015.

41 In summary, it took us over a year to secure Cabinet approval to introduce the Bill in Parliament, from the time we first submitted the Bill to Cabinet for its consideration. We also had to split the Cabinet approval process for the Bill into two. The Bill was first submitted to the ESEID Cabinet Committee on or around

[18] https://www.gcis.gov.za/newsroom/media-releases/statement-cabinet-meeting-15-april-2015
[19] http://www.treasury.gov.za/public%20comments/FIC2015/

3 October 2014 and rejected by it and the subsequent Cabinet meeting of 22 October 2014, and then rejected again at the 10 December 2014 Cabinet meeting, and finally only approved by Cabinet on 15 April 2015, that we could publish the Bill for public comment. Cabinet then approved the Bill for introduction in Parliament on 23 September 2015, which Minister Nene did on 27 October 2015.

42 It is important to note that JCPS Cluster Ministers would have attended all Cabinet meetings where the Bill was considered, and most of the Cabinet committee meetings. I am not aware of any questions that were raised on the constitutionality of the PEP/PIP clause or of the warrantless search clauses at any of these Cabinet meetings, nor was there any objection to the removal of chapter 2 on the Counter-Money Laundering Advisory Council. There was also no record of any discussion on the role of the FIC, nor on its reporting to a JCPS Cluster Minister rather than the Minister of Finance. All these points were only raised later by JCPS Cluster Ministers almost two years later, in January 2017, for the hearings convened by Parliament after President Zuma referred the Bill back to Parliament, as discussed later.

Concept of politically exposed persons (PEPs)

43 A politically exposed person (PEP) is an international concept with the same meaning as the term "persons with prominent public functions" from Article 52 from the United Nations Convention Against Corruption (UNCAC). Annexure **IM5** provides more detail.

44 Politically exposed persons (PEPs) are individuals who are entrusted with a prominent public position and therefore assessed by UNCAC and FATF to be more susceptible to acquiring money through illegal means, which also means that they are statistically more likely to launder money. FATF recommendation (no 12) requires financial institutions to actively monitor such customers through a risk-based approach, including identifying their sources of wealth, regular monitoring, and introducing senior management approval for establishing or continuing customer relationships.

45 FATF Recommendations differentiate between domestic and foreign PEPs. The FATF Guide on PEPs defines DOMESTIC PEPs as "individuals who are or have been entrusted domestically with prominent public functions, for example Heads of State or of government, senior politicians, senior government, judicial or military officials, senior executives of state-owned corporations, important political party officials."[20]

46 The original FICA Bill submitted to Cabinet defined a domestic PEP in accordance with the FATF guideline definition, to include an individual who holds the position of President, Deputy President, Minister, Deputy Minister, Premier or member of a provincial Executive Committee, executive mayor, leader of a political party, member of the Defence Force above the rank of major-general, DG and CFO of a national or provincial department, municipal manager, chair and CEO of public and municipal entities, and other categories of persons. In accordance with FATF guidelines, the FICA Bill requirements on customer due

[20] https://www.fatf-gafi.org/media/fatf/documents/recommendations/Guidance-PEP-Rec12-22.pdf

diligence on banks and other accountable institutions also applies to immediate family members (current and ex-spouses/partners, children, parents) and known close associates of a PEP or more accurately, a PIP.

47 Enhanced due-diligence measures apply automatically to all foreign PEPs, but not all domestic PEPs, only those who are assessed to be higher risk by their bank. Hence in relation to domestic PEPs, financial and other institutions are only required to take additional risk mitigation measures if they decide, on an individual basis, and via their objective risk profiling systems, that there are indications that a domestic PEP is assessed to be of higher financial crime risk. This means that financial institutions generally do not apply any more stringent identification requirements for the greater majority of clients who are domestic PEPs as they would for any other non-PEP client who is assessed to have a normal risk profile.

48 The FATF Guide also points out that *"These requirements are preventive (not criminal) in nature, and should not be interpreted as stigmatising PEPs as being involved in criminal activity. Refusing a business relationship with a PEP simply based on the determination that the client is a PEP is contrary to the letter and spirit of Recommendation 12"*.

49 Many Ministers had objected to the definition of politically exposed persons (PEP) in the original FICA Bill, because they felt that it discriminated against politicians, as they believed it only applied to them, and not to the private sector. We struggled to explain to Ministers that the concept was applied by banks only

as a risk-mitigation tool to conduct enhanced due diligence investigations for higher risk customers including some (but not all) PEPs.

50 Many Ministers did not seem to realise that the concept was already being implemented by most major banks in SA, who did so for sound business risk reasons, and did not need legislation (like the FICA Bill) to do so. It was often the very small banks that did not do much business in US dollars or often in the foreign currency market (and hence were not reliant on correspondent banking relationships with foreign banks) that needed to be compelled to implement the PEPs concept. As we saw later with the Gupta businesses when the SA Reserve Bank fined them, the small Johannesburg branch of the Bank of Baroda proved to be negligent in applying general anti-money laundering measures when they took on high-risk PEPs as customers, and it is such banks that need to be compelled to do so by law.

51 We as the National Treasury and FIC teams working on the Bill were initially not surprised by the resistance to the concept of PEPs because we expected that Ministers, even good and honest Ministers, would not be familiar with this concept. Their initial reaction was not dissimilar to politicians in other countries, when they were first confronted with the PEPs concept. We initially accepted that this was driven more by a lack of understanding on how banks were expected to operate, not just in South Africa, but in most G20 and other countries.

FICA Bill approved by Parliament

52 After the Minister of Finance tabled the FICA Bill in Parliament on 27 October 2015, it was approved relatively quickly, with the final Parliamentary vote by the

National Council of Provinces (NCOP) on 25 May 2016. The Standing Committee on Finance (SCOF) in the National Assembly, which was chaired by MP Yunus Carrim, adopted the FICA Bill on 26 April 2016 after meeting at least 12 times on the Bill. It was only at this last meeting that Chairperson Carrim referred to a letter that he had received from the affected employees of the Gupta companies, who were concerned about losing their jobs because the major banks had closed the accounts of their employer. The worker representatives said they were seeking the intervention of Parliament. There was a brief discussion towards the end of this meeting, after which the Chair of SCOF said that he would write a letter to express solidarity with the plight of the employees.

53 The National Assembly then passed the Bill on 18 May 2016. By early June 2016, after the National Council of Provinces also passed the Bill, Parliament sent the Bill to the Presidency, for President Zuma to consider signing it into law.

54 What remained for the implementation of the FICA Bill was for President Zuma to assent to the Bill and thereafter be published in the Government Gazette. We faced being publicly shamed by the FATF, which in turn would have exposed the country to significantly higher correspondent banking costs for the economy to trade internationally as a result of other countries having less confidence in the strength or SA's anti-money laundering regulatory framework. We therefore had every expectation that President Zuma would sign the Bill into law, as soon as possible.

55 As we do with most of our Bills, our head of legislation, Adv Empie van Schoor, followed up with the Presidency's legal unit on the status of the Bill, including

whether the Presidency required any more information. She was in regular contact in July and August 2016 via email and text messages with the Presidency's legal unit. It became apparent that even the Presidency staff were unsure as to why President Zuma was not signing the Bill given its urgency, as they had submitted it to the office of the President shortly after receiving it from Parliament.

56 In June 2016, we attended the FATF Plenary and informed members that we were waiting for the President to sign the Bill into law. The FATF Plenary then gave us until December 2016 to have the Bill gazetted into law, with the related regulations that were required for commencement. The intention was that the Bill would then be analysed in advance of the February 2017 FATF Plenary to enable us to exit the targeted follow-up process.

57 President Zuma waited until 28 November 2016 to respond on the Bill, when he decided to return the Bill to Parliament for its reconsideration over concerns he had about the constitutionality of one clause. I show below how I believe that the delay was deliberate and that the Gupta family intervened after their bank accounts were closed, to delay and stop the Bill from being enacted into law.

THE GUPTAS SHOW THEIR HAND

Background on Gupta family activities late 2015 and early 2016

58 Throughout the process of seeking approval of the FICA Bill in Cabinet, and to the passing of the Bill in Parliament up to when it was passed on 25 May 2016, I did not see any evidence of Gupta-associates interfering to stop the FICA Bill.

The only Gupta-related matter that emerged in Parliament was at the last SCOF meeting on 26 April 2016 (which I outline above) when the Chair referred to a letter he had received from affected workers of the Gupta companies.

59 This period just before and after the tabling of the FICA Bill, and its passage in Parliament in late 2015 and early 2016, was very turbulent politically, with the media reporting (at that time or later, especially as it reported on the Gupta Leak emails) on the many dubious activities and transactions related to the Gupta family that occurred during this period. These events provide the context to understand the environment during that period. It is for the Commission to determine their relevance to my evidence. These are that:

59.1 Mr Jonas was approached by one of the Gupta brothers on 23 October 2015, to replace Minister Nene as Minister of Finance;

59.2 Mr Nene was dismissed as Minister of Finance on 9 December 2015 and Mr Gordhan appointed to replace Mr Des van Rooyen a few days later on 13 December 2015;

59.3 Mr Zwane and the Eskom Board were "engaging" with the Gupta family during the period November 2015-April 2016, to enable Tegeta to buy Optimum Coal mine, with Mr Zwane flying to Switzerland[21] to meet with Glencore (the owner), and the Eskom Board hastily arranged to make a "prepayment" to Tegeta.[22];

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21 https://citizen.co.za/news/south-africa/state-capture/2092302/how-bigwig-officials-bullied-glencore-to-sell-optimum-mine/

22 https://youtu.be/Q1vQSM_OTPk
https://youtu.be/6pa9Nuwf6XU

59.4 Many top officials in Government and state-owned entities who are alleged to have assisted in processing transactions and payments to the Gupta businesses, were reported to have flown to Dubai on unofficial trips that December 2015-January 2016, often with their air flights and accommodation paid for. They included Ministers van Rooyen and Zwane, as well as Mr Siyabonga Gama (Transnet), Mr Anoj Singh and Mr Matshela Koko (Eskom), Mr Daniel Mantsha (Denel), together with Gupta associates Mr Salim Essa, Mr Duduzane Zuma, Mr Fana Hlongwane, and the sons of Free State Premier Magashule;[23] There were also formal denials[24] by some who were in Dubai at the time;

59.5 Gupta brothers and associates met with Lord Bell, the chairman of Bell Pottinger, and his team in January 2016, who flew to South Africa from the United Kingdom; and

59.6 Deputy Minister Mcebisi Jonas, made public on 16 March 2016, that he had been approached[25] by the Gupta family on 23 October 2015. Mr Jonas had alerted me of this approach and the "business" plans of the Gupta family a few days after Mr Nene was fired.

60 The reappointment of Mr Gordhan as Minister of Finance was, I believe, a big and unexpected shock to the Gupta plans, as many of their plans to do more business with state-owned entities were disrupted after Mr van Rooyen was

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[23] See https://www.timeslive.co.za/politics/2017-08-21-guptaemails-the-mystery-of-the-great-dubai-gathering/ and https://www.outa.co.za/projects/state-capture/gupta-associates/oberio-guests

[24] https://www.timeslive.co.za/politics/2017-08-03-moyane-refuses-to-explain-dubai-trip/

[25] http://www.treasury.gov.za/comm_media/press/2016/2016031601 - Statement by Deputy Minister Jonas.pdf

removed from the Finance Ministry after four days. They no longer had the pliant Minister of Finance they needed to facilitate their "business" plans. I can only speculate that the Dubai gathering was a direct result of the crisis for the Gupta businesses caused by the failure to impose Mr van Rooyen as Minister of Finance and his replacement by Mr Gordhan, and the closure of their accounts by ABSA Bank.

61 Indeed, almost immediately after Mr Gordhan was re-appointed as Minister of Finance, I had to personally engage with applications from SAA[26] and Denel[27], as I happened to be Acting Director-General on two separate occasions for a few days in December 2015 and April 2016, whilst Mr Fuzile was away. The SAA Board wanted to amend a swap transaction with Airbus in December 2016 that Mr Nene had approved, and the new Denel board wanted approval for its newly established Denel Asia joint venture with VR Laser, whose sole owner was Mr Salim Essa. I was also familiar with the pressure faced by Treasury around the nuclear deal, which I had first become aware of in August 2012 when I was approached by an official from the Department of Energy to advise her on a tax incentive related to the deal.

Not surprisingly, soon after Mr Gordhan's appointment as Minister of Finance in December 2015, there followed continual and systematic political attacks against him and the National Treasury during 2016, led by his Cabinet colleagues known to be closely associated with the Gupta family or their relationship with President

[26] http://www.treasury.gov.za/comm_media/press/2015/2015122101 - Media Statement Swap Deal.pdf

[27] http://www.treasury.gov.za/comm_media/press/2016/2016041301%20-%20Denel%20Statement.pdf

Zuma (e.g. Ms Bathabile Dlamini, Ms Nomvula Mokonyane, Mr Mike Masutha, Mr David Mahlobo and Mr Nkosinathi Nhleko). Indeed, Mr Nhleko even made a presentation[28] to the media on 2 March 2016 to announce that the South African Police Service were investigating the SARS unit. Even officials of public entities attacked Mr Gordhan, without any consequences from their Minister or from President Zuma – for example, Mr Mantsha (then chairperson of Denel) and Mr Moyane[29], the then Commissioner of SARS, who even reported to Minister Gordhan. I believe that they did so because they followed the lead from President Zuma, who consistently attacked or undermined his Minister of Finance. One of the first such instances of the public undermining of Mr Gordhan after his reappointment as Minister of Finance occurred at the launch of the Presidential Press Corp, where just two days before the Budget on 22 February 2016, President Zuma expressed regret that he had yielded to the "havoc" caused by financial markets after appointing Mr Des van Rooyen as Minister of Finance, saying he was the most qualified person to be appointed as Finance Minister.[30] He did so even as he noted that the coming Budget was *"...being presented under difficult conditions"* and that the *"...situation is a bit unstable"*. Mr Gordhan's affidavit to the Commission dated 11 October 2018 outlines many of the attacks from his Cabinet colleagues, state-entities, the Hawks and the NDPP. Such were the attacks that the Presidency[31] itself was forced on several occasions, including on 27 May 2016 when it issued a statement to condemn *"... the toxic narrative that is being promoted in the media that insinuates that*

[28] https://www.gov.za/speeches/ministers-presentation-investigation-so-called-rouge-unit-2-mar-2016-0000
[29] https://www.gov.za/speeches/revenue-service-sars-leadership-media-reports-2-dec-2016-0000
[30] https://mg.co.za/article/2016-02-22-van-rooyen-was-most-qualified-for-finance-minister-job-zuma/
[31] https://www.gov.za/speeches/presidency-condemns-toxic-narrative-27-may-2016-0000

President Jacob Zuma is engaged in a certain "war" with the Minister of Finance". There were continual rumours that Minister Gordhan was about to be fired, which also led to the Presidency[32] denying such rumours. It issued yet another statement to the media on 21 August 2016 rejecting "rumours and gossip[33]" to state that *"The Presidency and the National Treasury are working well together….".* These attacks on Mr Gordhan and Treasury were widely covered in the media, as indicated in the varous footnotes, and included as an Annexure (see Annexure **IM10**). It was clear that Minister Gordhan and Treasury were under siege during 2016, and the open attacks above attest to how dysfunctional national government had become.

62 Though not known to anybody at the National Treasury or the public at that point, the media subsequently reported around 5 September 2017[34] that Bell Pottinger and Oakbay Investments had concluded a £100,000-a-month contract in January 2016, from emails uncovered from the Gupta-leaks cache. The article noted:

> *'According to leaked documents, Duduzane said the campaign should be "along the lines of economic emancipation of whatever" with a "narrative that grabs the attention of the grassroots population who must identify with it, connect with it and feel united by it".'*

63 The role of the Gupta family and their close relationship with President Zuma and their business activities was by early 2016 a big concern even within the ANC

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[32] https://www.gov.za/speeches/presidency-rejects-cabinet-rumours-and-gossip-15-may-2016-0000

[33] https://www.businesslive.co.za/bd/companies/2016-08-22-presidency-dismisses-sunday-times-report-on-saa-as-gossip/

[34] Guardian article later revealed titled "Deal that undid Bell Pottinger: inside story of the South Africa scandal", https://www.theguardian.com/media/2017/sep/05/bell-pottingersouth-africa-pr-firm

and the ruling alliance partners like the SACP and COSATU. Indeed, COSATU[35] had raised questions as far back as 2011. Mr Solly Mapaila, the Deputy General Secretary of the SACP, confirmed to the media on 31 January 2016 that he had raised the role of the Gupta family at the ANC NEC Lekgotla, describing the family as the "elephant in the room". He was quoted in a Times media article as saying:

> *"We felt we needed to raise it in a meeting because people have been speaking about this thing hush-hush, gossiping about it, and sometimes it has been raised in order to attack the president. And because of that, people who wanted to raise the issue could not raise it because they would be [seen as] attacking the president," he said.*
>
> *"We have heard of the role of the Guptas and we wanted to tell [NEC members] that they do not account to the Guptas. They account to the liberation movement, headed by the ANC and its government, and not to individual families," said Mapaila.'*[36]

64 Indeed, the influence of the Gupta family and their suspicious business activities with government entities were not just making domestic news in early 2016, but internationally as well. A week before the statement released by Deputy Finance Minister Jonas, the highly respected Financial Times ran a major article "South Africa: The power of the family business" dated 8 March 2016, it noted:

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[35] https://www.politicsweb.co.za/opinion/cosatu-cec-on-guptas-labour-laws--other-matters

[36] https://www.timeslive.co.za/sunday-times/news/2016-01-31-zumas-allies-in-revolt-against-guptas-audio/

"The claim is that under Mr Zuma's watch, predatory networks of patronage and cronyism are effectively looting the state, with the phrase "state capture" now part of the South African lexicon"[37]

Closure of Gupta bank accounts

65 Around the 1st April 2016, Oakbay confirmed that KPMG[38] had terminated their auditing relationship with all the Gupta-owned businesses. This confirmation followed the leaking of a KPMG email from its then SA CEO to all its staff, indicating that they had "with heavy hearts" decided to terminate all their services to the Gupta business Group because of "association risk". A few days later, on 4 April 2016, media[39] reported that ABSA (Barclays) and Sasfin had also terminated their services to the Gupta-owned businesses.

66 The CEO of the Gupta-owned Oakbay Mr Nazeem Howa informed the media[40] around 6 April 2016 that FNB[41] had also terminated their account. By 8 April 2016, Mr Howa confirmed (in letters to the Presidency, Ministers, ANC and others, as outlined below), that Standard Bank and Nedbank had also decided to join ABSA, FNB and Sasfin in closing their business accounts, and that no bank had provided them with reasons, claiming it was all part of a political campaign against the Gupta-owned businesses.

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37 *https://www.ft.com/content/abd6e034-e519-11e5-a09b-1f8b0d268c39*

38 Oakbay confirms KPMG closure: https://www.biznews.com/sa-investing/2016/04/01/kpmg-cuts-all-ties-with-guptas-belated-attempt-to-end-reputational-damage

39 https://www.biznews.com/sa-investing/2016/04/05/two-more-big-sa-businesses-join-kpmg-sever-all-links-with-gupta-companies

40 https://youtu.be/9rlDiUJ6W2M

41 https://citizen.co.za/news/south-africa/1064589/fnb-cancels-guptas-business-accounts/

67 It is informative to also consider the Stock Exchange News Service (SENS) statements made at the time by the JSE-listed company Oakbay Resources and Energy Ltd. The JSE offers SENS as a service to its listed companies to make public any market-moving information. The first SENS announcement that Oakbay made on any termination of services by banks or other companies in 2015-16 was on 5 April 2016, through an update regarding the change in its auditor and sponsor, relating to KPMG and SASFIN. This announcement also indicated the general reasons by the two companies: for KPMG it was association risk, and for SASFIN, it was an alignment in its strategic objectives. This announcement was followed by two further SENS announcements on 8 April 2016 on resignations and appointments to their boards and an update on their banking relations. A further announcement on 13 April 2016 related to the Tegeta purchase of Optimum Mine and on 21 April 2016 on the appointment of SizweNtsalubaGobodo Inc as their auditors – Annexure **IM11** on SENS announcements.

68 The update announcement of 8 April 2016 on the board of their company and its subsidiaries, stated that Mr Atul Gupta, Mr Varun Gupta and Mr Duduzane Zuma had resigned from their various boards. It was noted that this decision followed "a sustained political attack on the company, and the concern that the jobs and livelihoods of nearly one thousand employees would be at immediate risk as a result of the outgoing directors' association with the company." This was followed by a SENS announcement the following day, 5 April 2016, on the termination of services by KPMG and Sasfin.

69 The update on their banking relationships also on 8 April 2016 dealt with the closure by FNB, and also dealt with the ABSA termination for the first time, and indicating it was in December 2015:

> *"...the Company confirms that Absa Bank Limited terminated its banking services to the Group in December 2015, while as of yesterday, the Group's remaining local banking service provider has given notice regarding the termination of their banking services on June 6, 2016."*[42]

70 Interestingly, it also stated that a major Asian Bank (probably Bank of Baroda) continues to service it and that the terminations would not impact on the operations of the Group:

> *"Despite the cessation of the provision of services by the major local banks, the Group continues to be serviced by a major Asian bank with a presence in South Africa, which bank has requested that the Company not communicate their name in this update. Consequently, the terminations will not impact the operations of the Group and the Company is confident that the remaining banking relationship is sufficient to fully service the operational requirements of the Group."*[43]

71 It later transpired in the evidence of ABSA in court and to this Commission, that it had informed the Gupta businesses of their intention to terminate their services on 18 December 2015, and that the accounts were then closed by 16 February

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[42] https://www.politicsweb.co.za/terms-and-conditions/atul-varun-gupta-and-duduzane-zuma-resign--oakbay-
[43] https://www.politicsweb.co.za/rss-news/atul-varun-gupta-and-duduzane-zuma-resign--oakbay-

2016.[44] Oakbay had not made any SENS announcement at the time of the closure of their ABSA accounts, until the 8 April 2016 announcement.

72 It should be noted banks are not allowed to provide reasons for the terminations to the client if they relate to suspicious transactions in terms of the FIC Act. Most banks will also not make such terminations public, as they are legally precluded from commenting publicly on bank-client relationships, unless by consent. Neither did the banks inform the Treasury or financial sector regulators, probably because of client confidentiality, and also because they are not obligated to do so in terms of our laws.

73 I have not seen any evidence on how information on any termination by any bank was leaked to the media, from some of the media reports and the statements of the banks submitted to the Commission for the November 2018 hearings, it appears to me that none of the banks issued any formal public statement on terminating services to the Gupta family. One of the banks (FNB) did confirm their termination to the media, but after it appears to me to be in response to the disclosure to the media by Mr Howa and Oakbay. The initial news of these account closures appears to have been first from their audit company rather than a bank, when the internal KPMG email to its staff was leaked to the media. Oakbay then appears to have confirmed this to the media on 1 April 2016 rather than through a formal announcement from Oakbay or any other Gupta business.[45]

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[44] . Affidavit filed by Yasmin Masithela of ABSA In the case Minister of Finance and v Oakbay Investments (Pty) Ltd and Others 2018 (3) SA 515 (GP) on 22 December 2016. A similar affidavit was filed by ABSA to Commission by Yasmin Masithela, dated 13 September 2018.

[45] https://www.enca.com/south-africa/fnb-closes-gupta-business-accounts

74 It also seems to me that none of the banks provided the real and specific reasons for their termination of services to Gupta businesses. Even today, as a Treasury official, I do not know the underlying reasons why each of the various financial institutions closed the Gupta accounts, beyond the evidence that the banks have submitted to the Commission, or that Oakbay made public or submitted to Mr Gordhan in late July 2016. To the extent that banks have provided reasons in the public domain, they are restricted to very general reasons like reputational or anti-corruption risks. The FIC Certificate of 72 suspicious (Annexure **IM12)** transactions submitted by Mr Gordhan in his founding affidavit to the High Court in the matter with Oakbay in October 2016 suggested that banks may have been concerned with anti-money laundering risks associated with the Gupta family as possible reasons for some banks closing their accounts.

75 All major banks have sophisticated risk-assessment models and are required by the FIC Act (even preceding the FICA Bill) to report suspicious transactions as well as all cash transactions above a certain amount (R25 000 in 2016) to the FIC. They are referred to as suspicious transaction reports (STRs) and cash threshold reports (CTRs). This is primarily to mitigate against money laundering. At a basic level, once a client is "flagged" internally for any reason by a bank's risk model, based on various automatic monitoring "triggers" that monitor their transactional behaviour against their business purpose, they are placed on "watch", which includes ongoing interaction between the bank and its client to understand the "flagged" anomalies. I do not believe that a bank will generally simply close accounts of any high-income customer on a whim, and not without seeking further information from the client to understand the anomalies in their transactional behaviour. A decision to close such client accounts is likely to be a

last resort measure when the client risk to the bank is deemed irreconcilably high, due to concerns related to financial crime, reputational or credit risk, and transactions that they have submitted as an STR to the FIC. Indeed, the bigger problem is when the relevant authorities do not act, or are seen not to act, upon the many STRs submitted to them, even when a bank strongly suspects they relate to serious crimes – legally-compliant banks will be likely to close such accounts as continuing to service such clients exposes them to severe consequences, including large fines and sanctions by overseas regulators and their criminal justice authorities.

76 Instead of formally challenging the banks legally or through direct representation on their decisions to close their accounts, the Guptas focused instead on lobbying the ANC, COSATU and Government to intervene on their behalf. They probably realised to their great consternation that their banks may have been monitoring their transactions to comply with anti-corruption laws, and possibly flagged them as suspicious with the FIC.

77 I believe that is why they began to focus on stopping the FICA Bill, shifting the FIC reporting to another Minister who was more loyal to the Gupta family (e.g. to the Minister of Intelligence), and to buying their own bank. It is also interesting that contrary to their SENS announcement (which I have only become aware of recently, when preparing this statement) that their operations would not be affected by the terminations, and that the Bank of Baroda would be able to fully service their operations, they wrote on the same day to the Minister of Finance and others to intervene because they would have to close their businesses and thousands of their workers would be losing their jobs.

The Guptas approach the Minister of Finance and Government

78 Mr Nazeem Howa, CEO of Oakbay Investments, wrote a letter to Minister of Finance Pravin Gordhan dated 8 April 2016, stating in his very first line that he was providing "advance warning" to the Minister that Oakbay and their related companies would soon be incurring significant job losses, because of "*..the unexplained decision of a number of banks, and of our auditors, to cease working with us, and of the continued press coverage of unsubstantiated and false allegations against the Gupta family….*". I annex the letter as Annexure **IM13**.

79 He confirmed that four of the major banks and Sasfin had closed their accounts, and had not provided any reasons: "*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*". According to Mr Howa, this *"unexplained decision of a number of banks"* was part of a "political campaign against Oakbay", even though "*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*".

80 Mr Howa projected the Gupta businesses as innocent victims of corporate bullying and anti-competitiveness, as they were challenging dominant businesses, alleging that the action of the banks "*is the result of an anti-competitive and politically-motivated campaign designed to marginalise*" their business. He claimed that Oakbay was "*a disruptor in new sectors, challenging*

the dominant businesses and global players in South Africa" and that they wanted to "*draw a line under the corporate bullying and anti-competitive practices we have faced from the banks*".

81 We regarded the tone of the letter from Mr Howa to Minister Gordhan as subtly threatening, an "advance warning" to Minister Gordhan that the Gupta-businesses held him personally responsible for the closure of their bank accounts. Given their close relationship with President Zuma, we saw their letter as implying that the closure of their businesses and loss of jobs would not only be regarded as the fault of the Minister, but if he did not intervene, President Zuma would act against him.

82 What Mr Howa did not reveal in his letter that they still had a banking account with at least one of the banks (as we do not know who anybody's banker is). As was noted in their SENS announcement and in media reports then and after, they were banking with the Johannesburg branch of the Bank of Baroda, and still continued to do business via this bank. I do not remember being aware of his letter on the day he dated it, even though I followed some of the media reports at the time on the termination of services to the Gupta businesses by KPMG and some banks. Neither was I aware of the Oakbay SENS filing in 2016 or 2017, so did not notice how their letter contradicted their SENS announcement. But we held the Gupta family in great suspicion since the firing of Mr Nene and the experience of Mr Jonas, even as we still dealt with them as professionally as we could.

83 It was Mr Howa's persistence over that week in approaching the Minister's office for a meeting, and their sudden high-profile media campaign, that attracted our attention. We also realised from Mr Howa's media interviews that he had also written letters to President Zuma, and Ministers Zwane and Oliphant around the same date.[46] But we did not know until around January 2017 (from Oakbay's filing notice affidavit by Ms Ronica Ragavan[47]) when we saw the actual letters written to the Presidency and the other Ministers, that they were identical, except for the last paragraph - whilst the letter to Minister Gordhan and President Zuma has the same last paragraph, with no reference to the office of the Minister of Finance, the last paragraph in the letters to Ministers Zwane and Oliphant has the additional sentence *"We are seeking your help as Minister of Finance with the responsibility to govern the financial sector to end the deadly stranglehold the banks have placed on our businesses".* (see Annexure **IM14**).

84 Interestingly, in her affidavit, Ms Ragavan, indicated that "similar letters and correspondence, all of which are generic in nature and not specifically directed to any one person in which Mr Howa asked for assistance…" and listed a total of 10 persons or organisations. These included (aside from the above), political parties (ANC, DA), trade unions, the Reserve Bank, and many regulators or ombuds. This is how we became aware that similar letters were also sent on the same date to the Secretary-General of the ANC, Mr Gwede Mantashe and I suspect, to COSATU. I have my doubts that Mr Howa really persisted in meeting most of those he wrote to as he did with the office of the Minister of Finance, who he also specificially mentioned in in his last paragraph in some of the letters he

[46] Annexures SB7-11 from Ian Sinton affidavit dated August 2017, submitted to the Commission.
[47] Paragraph 49, Filing Notice by Ms Ronica Ragavan, in the matter Minister of Finance and Oakbay Investments (Pty) Ltd and others, dated 20 January, 2017.

sent to others. Aside from the meetings with COSATU and the ANC which I note below, I am not aware of any public information on whether he met with President Zuma or any other Minister, before (and after) the Cabinet meeting of 13 April 2016 that I refer to below. I suspect there must have been such meetings.

85 The basic narrative propagated by Oakbay in their letters and media interviews was that the banks (and auditors) (i.e. the representatives of "white monopoly capital"), were victimising and isolating an emerging black disruptor entrepreneur like themselves, the Gupta family and its businesses. This strategy was more explicitly outlined in their extraordinary PowerPoint presentation in Oakbay's meeting with the ANC on 18 April 2016. I outline the key messages in their presentation below in my statement.

86 What we did not realise at the time was that Mr Howa's letter was the launch of a high profile political media campaign on that very day, as he went public on the closure of the accounts in both domestic and international media. He appeared on the highly-regarded CNN Quest Means Business programme where he was interviewed by its presenter, Mr Richard Quest. He was also interviewed on a few domestic media stations. In these interviews, he attacked the banks for closing their accounts, announced the resignation of their directors (i.e. the Gupta family and Mr Duduzane Zuma) and mentioned the letters he had written to President Zuma and three Ministers.

87 In his interview with CNN, Mr Howa provided even more detail:

"I did indeed write letters this morning to the Presidency, to the Minister of Finance who governs it, who governs the banking sector to the Minister of

Labour to warn of an imminent possibility of job losses. And to the Minister of Mining because I think we supply a strategic supply of coal to ESKOM, the power supplier. And that would be at risk if we were to go out of business. But our appeal really was on behalf of our staff because you know they've put heart and soul into our business and it really is not fair that an attack on us and our shareholder should affect our rank and file staff."

88 He also indicated to CNN that they only have one per cent of their turnover coming from government business, which cannot be "equated to state capture". He stated that they were "5% of to the total coal supply of the country". He stated that he believed the closure was not about the Gupta family, but about the President, and they were just been caught up in the political war about who would be future president after President Zuma:

"Well, you know, I think it's not about the Gupta family. I think it's about the President. And I think we've just been caught up in a political war around the future of the presidency. That's my own reading of it."

(Annexure **IM15** is a transcript of Mr Howa's CNN interview. The interview itself is available via the footnoted article below[48]).

89 His interview on Radio 702 and other media[49] on that day also focused on the closure of their accounts, and he confirmed that he had written his letters to Government, though some media also reported on the letters as if they had been

[48] https://businesstech.co.za/news/banking/119659/watch-gupta-company-ceo-on-cnn/
[49] https://mg.co.za/article/2016-04-08-guptas-become-too-hot-to-handle/ https://www.polity.org.za/article/guptas-quit-as-company-cant-pay-staff-without-banks-letter-2016-04-08 https://www.sowetanlive.co.za/news/2016-04-08-leaked-letter-oakbay-calls-on-president-zuma-and-cabinet-ministers-for-help/

leaked. He generally defended the integrity of the Gupta family and dismissed the "..continued press coverage of unsubstantiated and false allegations against the Gupta family", and accused the banks of corporate bullying and anti-competitive behaviour (as stated in his letter). He challenged Mr Solly Mapaila and others to produce any evidence against the Gupta family. Mr Howa continued to play the victim card, and indicated that they would be forced to close business and retrench their staff of over 4 500. It should be noted that throughout the next few months, the number of workers that Mr Howa referred to as possibly losing their jobs varied from 4 000, 4 500, 7 500 or 10 000 (after the Optimum deal) and later in court papers, the number was 16 000.

90 When Minister Gordhan went to Washington DC a week or two later to attend the IMF/World Bank meetings, he was also interviewed[50] in the same CNN programme by Richard Quest on 18 April 2016. Quest started with a question on the state of the economy, following a credit ratings downgrade after the dismissal of Minister Nene. He noted that President Zuma had faced a vote to impeach him in Parliament on 5 April 2016. Minister Gordhan was asked about the closure of the Gupta accounts, and confirmed he had received a "warning letter" from Oakbay, and explained that, like any customer of a bank, such matters are confidential and Government could not intervene in a bank-client relationship.

91 A few days later, but clearly wrongly dated 17 April 2016, Mr Gordhan received a second letter from Mr Howa, responding to the above interview with Mr Gordan "apologising" to him for any misinterpretation of his first letter. Mr Howa wrote

[50] https://edition.cnn.com/videos/tv/2016/04/18/exp-gordhanimf.cnn

that his only intention was "*to hear from you about any possible assistance you are able to offer*," stating that he was doing so because of Minister Gordhan's "*strong relationship to the captains of industry*", an insinuation, in my view, that Minister Gordhan was linked to "white monopoly capital" captains of industry. In the letter, Mr Howa accused the banks of continuing to take an "*intransigent" stance, especially because the shareholder (i.e. the Gupta family) had resigned from "all executive and non-executive roles*" in the group of companies to deal with concerns related to "association risk". I annex the letter as Annexure **IM16**.

Cabinet rushes to support the Guptas

92 Mr Howa succeeded incredibly well without the help of Minister Gordhan, as a mere 5 days after his letter on 13 April 2016, Cabinet decided to investigate why banks had closed the Gupta bank accounts. Incredibly, Cabinet did so without seeking the advice of Minister Gordhan, as the responsible Minister for regulating the banking sector. It did so when Mr Gordhan was not at the meeting, as he was out of the country attending the IMF/World Bank meetings in Washington D.C. Cabinet decided that the investigation would be done by the Ministers of Finance, Mineral Resources and Labour (Mr Gordhan, Mr Mosebenzi Zwane and Ms Mildred Oliphant respectively), coincidentally the very Ministers that Mr Howa had chosen to write letters to on 8 April 2016.[51] I will refer to this team of Ministers as the Ministerial Task Team, since it was not formally an Inter-Ministerial Committee, as Mr Gordhan later learned from the Secretary of Cabinet, DG Lubisi.

[51] Sinton statement to Commission, para 16.

93 The post-Cabinet media briefing for the 13 April 2016 Cabinet meeting was not held that week by Friday, 15 April 2016, as is the norm, but more than a week later on Thursday, 21 April 2016. This post-Cabinet statement, titled **"Statement on the Cabinet Meeting of 13 April 2016"** stated:

> *"5.2. Cabinet noted the actions by the four banks that gave notice to close the bank account of a company. Whilst Cabinet appreciate the terms and conditions of the banks, the acts may deter future potential investors who may want to do business in South Africa. Cabinet has endorsed that the Ministers of Finance, Labour and Mineral Resources should open a constructive engagement with the banks to find a lasting solution to this matter."*[52]

94 Minister Gordhan, Deputy Minister Jonas, the DG and I, together with other Treasury officials, were completely blindsided by this announcement because Mr Gordhan was not aware it was discussed at Cabinet whilst he was away. It was not on the Cabinet agenda circulated beforehand, and nobody had alerted or told him (or any of us) about this decision in the eight days after the Cabinet meeting. Though the media statement did not refer to any "investigation" (which he and I only became aware of late the following day or on Monday 25 April 2016), even the decision to "open a constructive engagement with the banks" was unprecedented. I am not aware of any other instance since 1994 where Cabinet decided to intervene in a bank-client relationship. Because Treasury is the responsible department for regulating banks (and part of my job), we were

[52] https://www.gcis.gov.za/newsroom/media-releases/statement-cabinet-meeting-13-april-2016

keenly aware of the long-established jurisprudence on bank-client confidentiality.[53] We suspected that the decision of Cabinet was not in accordance with the law.

95 We were also surprised by the speed at which Cabinet took this decision to support the Guptas, as it did so at the first possible Cabinet meeting (13 April 2016) after news broke on 1 April 2016 that the Gupta banking and auditing relationships had been terminated. We also did not anticipate this decision because there was no prior Cabinet memorandum circulated for the Cabinet meeting (normally done two weeks before), nor discussed at the ESEID Cabinet committee meeting the week before. Neither was it on the agenda of the Cabinet meeting.

96 We were not aware of the actual Cabinet decision taken at its 13 April 2016 meeting on that Thursday, 21 April 2016, or for most of the next day. Cabinet minutes are generally distributed to Ministries the Friday afternoon or Monday before the following Wednesday Cabinet meeting, together with the agenda. I am not able to confirm the exact date and time when the Cabinet minutes were provided to the Ministry of Finance, but believe it was either late Friday 22 April 2017 or early Monday 25 April 2017. We therefore only had the media statement on that Thursday and Friday morning, and tried to analyse it as much as possible, to try and understand it fully. Since this decision was covered under item 5 in the media statement headed "Cabinet's position on key issues in the environment" rather than the item "Key Cabinet Decisions" – this suggested that this matter

[53] *Bredenkamp v Standard Bank of SA Ltd 2010(4) SA 468(SCA)*

was probably raised under "general" at the Cabinet meeting, and was another indicator that there was likely no Cabinet memorandum to support this decision, not even one distributed at the meeting.

97 But, I think we were more surprised by this Cabinet decision because it was effectively dismissing the statement of Deputy Minister Mcebisi Jonas just 28 days before. In contrast to this rush to assist the Gupta family with their banking accounts, there was no rush for Cabinet to issue any media statement to support or even merely acknowledge the statement on the Gupta family by Mr Jonas. Every member of Cabinet present at that meeting of 13 April 2016 would have been fully aware of the very serious allegations made by Mr Jonas against the Gupta family.

98 The only immediate public response that I am aware of that President Zuma made to the 16 March 2016 statement by Mr Jonas, was his response to an oral question in the National Assembly from MP Mmusi Maimane the following day on 17 March 2016. President Zuma[54] stated that he appointed Mr Jonas as Deputy Minister, and Mr Maimane must ask Mr Jonas or the Guptas if Mr Jonas says he was offered the job of Minister of Finance. He responded again on or around 12 March 2016 to a further parliamentary question (No 729 of 2016) from MP Mr David Maynier, on whether he was aware of the details of such meeting and would he make a statement on this matter. President Zuma replied as follows:

[54] https://www.facebook.com/watch/?v=10154077271749617

"I am unaware of such a meeting taking place except for the public statement that was recently made by the Deputy Minister of Finance." – Annexure **IM17.**[55]

99 It was also odd to the Treasury that the post-Cabinet media statement suggested that investors would be discouraged because banks had terminated their services to the Gupta-owned businesses. We thought the opposite was in fact true, that no credible investors would want to invest in a country if its banks were ignoring money-laundering and corruption allegations, and the fact that the banks were seen to be enforcing anti-corruption laws would actually be a big positive signal for investors. Indeed, the Cabinet decision to investigate the banks would only serve to confirm the negative perception amongst many South Africans, international investors and trading partners, that President Zuma and many members of his Cabinet were so beholden to the Gupta family, that they were prepared to openly interfere in relationships between banks and the Gupta family.

100 So far-reaching was this decision that the SA Reserve Bank Governor Kganyago expressed his concern to the Minister of Finance, in a letter dated 26 April 2016, *"regarding Cabinet's proposed approach and decision on the matter pertaining to the relationship between banks and their individual customers"*. The Governor noted that *"…banks are required amongst others to adhere to the highest standards of compliance to laws which govern their relationship with customers"*, pointing out that in a given period banks do routinely close down a substantial

55 www.thepresidency.gov.za/parliamentary-qa/president-jacob-zuma's-replies-parliamentary-questions-written-reply%2C-national-0

number of accounts or have their conditions altered in order to maintain financial integrity and soundness. The Governor noted that contrary to the view that the closing of accounts may deter foreign investors, the involvement of Ministers to engage with banks *"...could introduce heightened levels of uncertainty and pose a risk to South Africa's financial stability."* – Annexure **IM18.**

Mr Gordhan's immediate response to the Cabinet decision

101 On hearing of the decision of Cabinet after the media briefing that Thursday morning 21 April 2016, Minister Gordhan wrote to the Secretary of Cabinet and Director-General in the Presidency, Dr Cassius Lubisi, requesting clarity on the Cabinet decision. Minister Gordhan also requested Treasury to seek an urgent legal opinion on whether a Minister of Finance, or any other Cabinet member, can approach a bank to discuss a client's affairs. He needed a formal external legal opinion to confirm the internal Treasury view that Cabinet did not have the power to intervene, and also that it would in fact be illegal for Cabinet to do so.

102 The following day, I became aware that the Ministry received an email from Mr Zwane's office at 11:48am that Friday, 22 April 2016, inviting Mr Gordhan to the first task team meeting, which would be banks. I attach the invite from Mr Zwane's office to Mr Gordan's office. The letter from Minister Zwane was dated two days before the date of the email, 20 April 2016. Minister Zwane's letter referred to the *"decision taken by Cabinet... to appoint an Inter-Ministerial Committee ("IMC") to consider the impact of certain allegedly unilateral actions taken by specific financial institutions against certain of its clients, which actions may have the potential to negatively affect the economy of the Republic of South Africa, with particular focus to be given to the impact of these actions on the*

already distressed mining and financial services sectors. Minister Zwane was unilaterally assuming that the three Ministers would be constituting an "IMC", and that he would be the chairperson (see Annexure **IM19**).

103 I remember that on the same day, 22 April 2016, Minister Gordhan received a reply to his letter from DG Lubisi, which clarified that no inter-ministerial committee had been established, but rather a ministerial task team, and that three ministers were appointed (finance, labour and mineral resources) and that no Minister was designated as chair or convenor.

104 Upon receiving the letter from the DG in the Presidency, Minister Gordhan responded to the invitation of Minister Zwane on the same day in a letter dated 22 April 2016, correcting the basic fact that Cabinet had not established an Inter-Ministerial Committee, and no Minister was designated as a convenor of the task team. More importantly, for the three Ministers to first meet as *"...it will be advisable for the three Ministers to first consult on the framework for any discussion with financial institutions. I prefer this takes place on the margins of the Cabinet meeting of the 26th April 2016."* Mr Gordhan noted that "*Whilst I appreciate the urgency of the matter for some, I must emphasise that the legal and regulatory environment has both global (BASEL III, Financial Action Task Force) and local (SA Reserve Bank, Financial Services Board, Financial Intelligence Centre, National Consumer Commission) regulators and regulations.*". Also, that he was *"currently seeking legal advice on what could be done"*. Refer to Annexure **IM20**[56].

[56] Annexures to letters are available in statement of Mr Gordhan to Commission dated 11 October 2018.

105 Minister Zwane responded on 24 April 2016, ignoring the regulatory imperatives, as well as the request by Minister Gordhan for a legal opinion to guide the Ministers, and went ahead with the meeting on 25 April 2016, which was scheduled from 09:00 to 17:00, in Pretoria. In addition to inviting Ministers Gordhan and Oliphant, he also invited the then Minister of Communications Faith Muthambi (who was seen to be close to President Zuma and the Gupta family, and later from media reports[57] on Gupta Leak emails). Minister Zwane stated in his letter:

> "*...the discussions arranged for 25 April 2016 will continue and I urge you to consider attending as the outcomes thereof will be relevant to us as South Africans who wish to see this country prosper.*" He also stated in his letter that *"the President mandated us to consider the inclusion of any additional Minister, whose participation may be deemed relevant"*, suggesting he had invited Minister Muthambi, even though he did not consult Mr Gordhan beforehand, - Annexure **IM21.**

106 From the affidavits submitted by the banks to the Commission, it is clear that Minister Zwane had no intention of consulting Mr Gordhan beforehand on his meeting with banks, having sent his back-dated letter of 20 April 2016 to Mr Gordhan on 22 April at 11:48 am, a few minutes AFTER his advisor (Ms Zarina Kellerman) had already invited ABSA Bank via her email of Thursday, 22 April 2016 at 11:44 am. Mr Zwane also assumed that he was the Chairperson, and decided to invite Minister Faith Muthambi to be part of the task team.

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[57] https://www.outa.co.za/projects/state-capture/faith-muthambi-treason

107 His sense of urgency was in stark contrast to the lack of urgency or concern he showed in his own portfolio for the plight of mineworkers, when, just 4 months earlier, the black-empowered mining company EXXARO had been forced to retrench 1 500 workers after Eskom failed to renew their coal contract with Arnot power station, in favour of Gupta-owned company Tegeta[58] — this certainly qualified as a distressed mining company that Mr Zwane referred to in his wrongly-dated letter of 20 April 2016. Indeed, the lack of involvement of Minister Zwane in the EXXARO matter was in my view very deliberate, as it appeared to me that he wanted to ensure that the coal contract for Eskom's Arnot power station was transferred to the Guptas' Tegeta company, which had just purchased Optimum Mine[59]. I am aware that the Commission has heard evidence relating to the purchase of this mine by Tegeta, and prepayment made to it by Eskom to enable it to buy Optimum mine from Glencore. In effect, Eskom[60] was taking away an existing contract with a black-empowered company in favour of a Gupta-owned company, at what analysts said was at a higher coal price, and which resulted in great suffering for the over 1 500 workers who lost their jobs at Arnot mine. I am not aware of Eskom or Cabinet intervening to assist the workers, or even engage with their trade union, nor why Cabinet did not issue any public statement.

108 It also appeared entirely irrational to me that the Minister of Mineral Resources would be prioritising matters falling in another Minister's portfolio, and do so by neglecting his own portfolio, to the detriment of the economy as a whole. This

[58] https://youtu.be/NFKpQwubGDM
[59] https://www.timeslive.co.za/politics/2018-02-14-lynne-brown-helped-guptas-get-coal-deal/
[60] https://www.news24.com/fin24/companies/mining/eskom-overlooked-exxaro-to-benefit-tegeta-inquiry-hears-20180215

can be seen in his failure to resolve significant uncertainties related to mining legislation like the Minerals and Petroleum Resources Development Act.

109 The sequence of events leading to this Cabinet decision suggests to me that the decision to "engage" the banks was a highly orchestrated attempt by the then President and Mr Zwane to protect the looting activities of the Gupta family, as:

109.1 The matter had not been discussed at any of the Cabinet committee meetings the previous week;

109.2 The decision was then taken at a Cabinet meeting when Minister Gordhan was overseas on duty, and the Presidency would have been fully aware beforehand that he would be absent from the Cabinet meeting;

109.3 There was no Cabinet memorandum, as is the standard practice, to support the decision;

109.4 The powers of the Minister of Finance were undermined, as the Minister of Mineral Resources was asked to intervene in a sector that fell under the executive authority of the Minister of Finance;

109.5 The Minister of Finance was never asked for any advice beforehand or after, and certainly not on the legal basis upon which banks could close customer accounts; and

109.6 There was no written legal opinion that we in National Treasury were aware of (or subsequently saw) to guide or advise Cabinet before they made such a far-reaching, and unprecedented, decision.

Actual Cabinet Decision differs significantly from Media Statement

110 I do not remember the exact day when Minister Gordhan's office received the agenda and other documentation for the Cabinet meeting to be held on Tuesday, 26 April 2016 (as Wednesday, 27th April 2016 was a public holiday). His office would have received it by that Monday, 25 April 2016, either on that day or the Friday afternoon before. I was anxiously waiting for the Ministry to alert me on the minutes of the 13 April 2016 Cabinet meeting, so I could see the actual wording of the Cabinet decision on the Gupta account closures. I also needed to advise the Minister for his preparations for the Cabinet meeting the next day. On seeing the minutes, I was surprised to see how significantly the actual wording differed from the post-cabinet media statement.

111 We realised that the actual decision in the Cabinet minute recorded that this was to be an investigation of the banks, and not merely to open a "constructive engagement" with them. We were well aware, just from our experience, that Cabinet did not have the power to investigate any regulatory or criminal transgression, and it would be illegal for it to do so. It was also to be an investigation against only one side in the dispute, and not only against the banks but also other "financial" sector companies like auditing companies for closing of the accounts of the Gupta-owned businesses, apparently from a client confidentiality perspective. There was to be no investigation against the Gupta family. The three Ministers were to also report to Cabinet on the impact of this action. There was no role outlined for the regulators or officials – this issue was so important that it was the Ministers themselves who had to do the investigation

112 We also noted that the Cabinet decision clearly did not reflect the more neutral constructive engagement the media statement referred to, and that these words were not even part of the minuted decision. Cabinet was only investigating one side of this dispute, the banks (and financial sector companies) that terminated their services to the Gupta-owned businesses. The Gupta businesses were seen as the victim, with no investigation to be conducted against them.

113 The minuted decision only referred to client confidentiality as the reason for the investigation, and made no reference to any impact on investment or investors, nor any concern about workers losing their jobs, nor any concerns related to collusion. It was also more open-ended, requiring the task team to make a briefing to Cabinet on the implications of the decision by banks to close the Gupta business accounts. It will be important for the Commission to request the minute of the actual Cabinet decision taken at the 13 April 2016 meeting, and to compare whether it was an investigation or constructive engagement, whether it refers to any concern on future investment, confidentiality or collusion. It will be noted later in my evidence how both the President and Minister Zwane later switched interchangeably between these different reasons as the rationale for the investigation or constructive engagement.

114 Treasury received the urgent legal opinion from Advocates Gauntlett SC and Pelser on that same day, 25 April 2016, in time for Mr Gordhan to consider it for the Cabinet meeting the following day. The opinion confirmed that *"save to the extent that this is authorised in law, no Cabinet member (or Cabinet collectively) has any power to intervene in the banker-client relationship. As a matter of public law any such intervention is unlawful and may be ignored by a private entity*

without seeking legal recourse. As a matter of private law any such intervention constitutes a delict, which may result in a claim for damages or other legal remedy (like an interdict)."[61] It noted that the Banks Act does not contain any provision which contemplates that any oversight responsibility or power that the Minister of Finance may have under the Act is somehow to be exercised together with the Minister of Labour and/or the Minister of Mineral Resources.[62] (see Annexure **IM22**).

115 The legal opinion also dealt with the exposure of SA banks to fines by foreign authorities, noting *"Should Government wrongfully interfere with the exercise of banks' powers and duties, Government may incur delictual liability for any penalty imposed on banks which is causally connected to Government's conduct.*"[63]

116 The legal opinion concludes that *"the contemplated meeting is not authorised by law…"*. The legal opinion more than confirmed the Treasury's view that that there was no basis for a Minister, or a member of Cabinet, nor Cabinet, to intervene in the private contractual relationship between a bank and its clients.

117 Minister Gordhan alerted Cabinet to the legal opinion at the Cabinet meeting of 26 April 2016, as he later confirmed in his follow-up letter to President Zuma on 4 May 2016 when formally submitting the opinion to the Presidency – Annexure **IM23**. Minister Gordhan requested in his letter that the Presidency and Treasury legal advisors meet with the senior counsel to advise on how to proceed within

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61 Paragraph 15 of opinion.
62 Paragraph 31 of opinion.
63 Paragraph 24 of opinion.

the regulatory laws governing the banking sector. Minister Gordhan sent a similar letter on the same date, containing the legal opinion and the regulatory provisions applying to banks, to Ministers Zwane and Oliphant. All these letters were hand-delivered.

118 To my knowledge, President Zuma did not respond to Minister Gordhan's letter, so there was no follow-up on the request for the relevant legal advisors to meet the senior counsel. Mr Zwane responded in a letter dated 9 May 2016, where he complained that the legal opinion obtained on 25 April 2016 was hand delivered to him only on 5 May 2016. He noted the contents of Mr Gordhan's letter but did not engage on the content of the legal opinion, indicating that it is "best dealt with in the appropriate forum" and so he decided to "make no other comments at this time". I am not aware if Mr Zwane ever followed up in whatever appropriate forum he was referring to. Neither he nor Ministers Oliphant and Muthambi seemed to be concerned that the decision by Cabinet to "investigate" the banks may be a serious overreach of Cabinet's powers, and worse, for the benefit of specific private interests and not the public interest (see Annexure **IM24**).

Oakbay approaches the ANC and COSATU

119 Following their letters of 8 April 2016 to many organisatons including the ANC and trade unions (as confirmed by Oakbay's Ms Ragavan, as noted above), the Gupta family (directly or via Oakbay) succeeded in securing meetings with both the ANC and COSATU leaderships around the same time as the Cabinet meeting of 13 April 2016.

120 COSATU was probably the first member of the tripartite alliance to respond positively and publicly to the Gupta request, on 11 April 2016, via comments in the media by its spokesperson Mr Sizwe Pamla[64]. He condemned KPMG and three of the banks for closing the Gupta business accounts. On 23 April 2016, COSATU President, Mr Sdumo Dlamini, confirmed in a COSATU memorial lecture that their leadership had met with the Gupta family, according to News24[65] which quoted him as saying:

> *"Our mission behind meeting the Guptas last week was about the jobs that were at stake if they [the Guptas] decided to leave the country," said Dlamini.*

The Cosatu president reiterated the labour union's stance against untoward influence of the state by private capital. "If we find that they are doing the same, we will crush them," said Dlamini.

He accused banks that had cut ties with the Gupta family of double standards, citing an instance of construction companies which had been found guilty of colluding in 2010 projects.

"When these companies were penalised at the insistence of the Competition Commission the banks continued doing business [with] them and found nothing wrong with that. What we see them [the banks] doing to the Guptas is selective punishment," he said.

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[64] https://www.enca.com/south-africa/cosatu-slams-banks-shunning-gupta-family-businesses
[65] http://www.news24.com/SouthAfrica/News/we-met-the-guptas-and-theyre-coming-back-cosatu-20160423

Mr Pamla also appeared on various media programmes, including on ANN7[66] on 19 May 2016 on a panel with well-known Gupta associate, Mr Tshepo Kgadima, where he strongly attacked both the banks and SA Reserve Bank, even raising questions on the integrity and the ownership structure of the Reserve Bank.

121 Mr Howa met with the Office of the Secretary-General of the ANC on 18 April 2016. I became aware of the meeting after Mr Enoch Godongwana contacted me soon after this meeting. He also gave me a copy of their PowerPoint presentation, which is attached to this statement as Annexure **IM25** as noted above. The presentation indicates that the date of the meeting, which was five days after the Cabinet meeting, on 18 April 2016. I will not deal with the meeting of Oakbay with the ANC (as I was not there!), and am aware that Mr Gwede Mantashe has provided evidence as to why the Office of the Secretary-General met with Oakbay and later some of the banks. I will instead deal with what Mr Howa says in his slides, which I believe is important documentary evidence for the consideration of the Commission.

122 Mr Howa's presentation is largely a narrative built around a conspiracy theory on why the banks and KPMG had terminated their relationship with the Gupta companies, not once referring to the many allegations of corruption against the Gupta family and their companies. He accused the banks of informing Oakbay of their account closures with little prior notice or reason, suggesting that they were instead motivated by "*a conspiracy between major parts of the status quo*

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[66] ANN7 video https://youtu.be/GwznubA7fVM

to isolate Oakbay". It appears to me that Mr Howa was very economical with the truth when making this point, as he was a key cog in the Gupta business syndicate, and would likely have been aware of how the Gupta companies and family conducted their business, and would surely have at least suspected the reasons for the closure of their accounts. In any case, he certainly knew two months later on 19 June 2016, when he appeared on Carte Blanche programme on MNET, and read a letter from Standard Bank to Oakbay, which stated that their concern was that *"...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",* in reference to both domestic, UK and USA anti-corruption laws.

123 Howa's PowerPoint slides described the banks' decisions as "anti-competitive, immoral and unethical", saying that there was a "deafening silence from civil society (except ANC/Alliance structures)". He obliquely invokes the "white monopoly capital" conspiracy theory by asking: *"How will our economy transform when anyone challenging that 97% is taken out through the withdrawal of essential services"*. He also perpetuates the Project Spider Web conspiracy theory saying: "*perhaps the Spider Web Theorists have been right all along. The 'elite' don't just have a lot of money, they own just about every major bank and corporation on the JSE and beyond*". In a slide titled "Conspiracy or co-incidental?", he makes reference to Johann Rupert, by posing the question: "*Is there a relationship between what is happening to Oakbay and Regime change? Central role of Johan Rupert?*" Finally, he asks the politically charged question: "*How do we have political power, but no influence over the economy?"*

124 The Oakbay meeting with the ANC was also reported on in a Business Day article dated 6 May 2016, by journalist Carol Paton, headlined "Oakbay 'conspiracy theory' claims SA's banks are controlled by Ruperts". According to the article:

> *"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."*[67]

125 As noted in the evidence to the Commission by Mr Mantashe and the 4 major banks, they were subsequently invited around 18/19 April 2016 by the ANC Secretary-General's office, to discuss the closure of the Oakbay accounts with them. The ABSA and Nedbank CEOs met with the ANC on 20 April 2016, and

[67] sa-monitor.com/oakbay-conspiracy-theory-claims-sas-banks-controlled-ruperts-bdlive-6-may-2016/

the Standard Bank CEO on 21 April 2016, and the meeting with the FirstRand CEO was called off. From their affidavits, all the banks only agreed to attend on condition they did not discuss the affairs of any client, and focused on a general discussion on the anti-money laundering and anti-corruption laws and other laws that applied to banks, and the processes they follow before closing any client accounts. Standard Bank recorded their discussion with the ANC in a detailed letter to the ANC after the meeting (Annexure **IM26**). A copy of their letter was provided to the Treasury around that time. Treasury was not involved or consulted on these meetings.

126 These behind-the-scenes lobby efforts were bulwarked by public events, such as lengthy political "analysis" and attacks against the banks and "white monopoly capital" on ANN7[68] and in the New Age, the Gupta media platforms. Alleged Oakbay employees and members of the ANC Youth League marched to ABSA, FNB and Standard Bank, around 26 or 27 April 2016.[69] An open letter to four bank CEOs from Oakbay workers, calling on banks to save their jobs by re-opening the banking accounts of their Gupta-owned company employers was emailed from an Oakbay email address to Minister Gordhan on 20 April 2016. At the time, political commentators raised questions about how these marches were organised, as media were not able to directly interview such employees on the march, to get their perspective. Media articles around 31 May 2016 reported that Oakbay instituted disciplinary action against at least 15 employees who were critical of a letter in which management pleaded with the banks to reopen its

[68] ANN7 Interview with Nazeem Howa on Oakbay bank accounts https://youtu.be/Qq3mDOdiH2w
[69] https://citizen.co.za/business/business-news/1090524/oakbay-workers-march-banks-to-save-their-jobs/

accounts. According to the reports, the company also took action against those employees who chased ANC Youth League President Collen Maine from their offices.[70] (See Annexure **IM27).**

127 I must confess that even today, I remain perplexed that the Gupta family could at that stage still be so influential within the ruling party and trade unions, and could so easily secure meetings with the ANC and COSATU leaderships, and to do so at such short notice, even after the statement on the Gupta family by Deputy Minister Mr Jonas (a month before) and what Mr Solly Mapaila said at an ANC NEC meeting (three months before). I was also aware that leaders like Mr Mantashe and Mr Godongwana played important roles in countering the influence of the Gupta family at that time, and know they were very concerned about their proximity to the ANC President. The Gupta family enjoyed the strong support of the ANC formations like the ANCYL[71], ANCWL[72] and MKMV[73], who all got actively involved in attacking Mr Jonas and the banks in March-April 2016. The ANCYL called on Mr Jonas to be disciplined for issuing his statement of 16 March 2016. The ANCWL came out strongly to attack the banks and support Oakbay on 15 April 2016. The MKMV issued a statement on 30 March 2016 accusing those in the ANC who were critical of the Guptas as being in bed with white capitalists.

128 The Gupta family and their associates were very skilful in painting the closure of their accounts as a narrative of collusion, unfair conduct and discrimination, and

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[70] https://www.news24.com/SouthAfrica/News/gupta-employees-get-disciplinary-notices-20160531
[71] https://www.timeslive.co.za/news/south-africa/2016-03-18-ancyl-wants-mcebisi-jonas-out/
[72] https://www.polity.org.za/article/anc-womens-league-slams-big-banks-comes-out-in-support-of-gupta-owned-oakbay-2016-04-15
[73] https://www.politicsweb.co.za/news-and-analysis/anc-leader-who-spoke-out-against-zuma-in-bed-with-

winning the political support of specific constituencies. Their media campaign engaged with broader political and economic debates in the country, casting their banking problems as resistance to economic transformation – their media painted them as the champions for real black transformation – a good example is one of the TNA Business Briefings[74] on 22 June 2016, where many Gupta associates posed as objective participants at a business breakfast, including the leaders of the BLF and the PPF. Indeed, the leaders of these organisations conducted vicious campaigns against all those who stood in the way of the Gupta family, and very loud praise-singers of the Gupta appointees to state-owned entities – they appeared regularly on their ANN7 channel to do so. Another such organisation was Transform RSA and its President Mr Adil Nchabeleng[75]. I cannot comprehend why such organisations would have supported the Gupta family so robustly, but suspect that they were funded to do so by the Gupta family (in spite of denials[76]). I leave it to the Commission to assess whether this was the case or not.

129 What is significant about the Gupta strategy is the amount of energy and resources that they put into rallying political support behind their campaign against the major commercial banks and the National Treasury, yet they never launched a legal challenge against the banks to test the various allegations they were making against them. It is important to bear in mind what was later revealed

[74] SABC's TNA Business Briefing in Sandton on "Transformation of the South Africa Economy". Panel of Ben Ngubane (Eskom), Mncane Mthunzi (BMF); Nazeem Howa (Oakbay); Mohale Ralebitso (BBC) and Tokyo Sexwale (former Minister).
https://youtu.be/kNRqhhOaJmE
[75] https://blackopinion.co.za/2016/11/07/open-letter-brian-molefe/
[76] Manyi's PPF: We are not funded by the Guptas
https://www.news24.com/fin24/Economy/manyis-ppf-we-are-not-funded-by-the-guptas-20170320

through the Gupta Leaks emails, that Bell Pottinger had been hired by Oakbay Investments in January 2016. I believe as a very experienced former journalist, Mr Howa would likely have been working very closely with Bell Pottinger on what was clearly a Gupta fightback campaign against the banks for closing their accounts, and as shown later, also on the Zwane cabinet memo that was presented to Cabinet at its meetings on 22 June 2016 and 6 July 2016 – I leave this to the Commission to confirm.

130 Mr Howa's Oakbay presentation was cleverly designed to distort selected facts using conspiracy theories and play on divisions in our society, similar to what we have been seeing in the politics of the USA under President Trump, and the UK over the Brexit vote. There are many half-truths and false assumptions made in the Oakbay presentation, which they skilfully exploited. There is no doubt that wealth in South Africa was concentrated in a few white families in 1994, and that such families continue to be wealthy today, together with other and newer post-1994 wealthy families, and that we continue to be a highly unequal society. Whilst such billionaires are still influential in some big businesses in South Africa, the form of capitalism has also changed over time, and these billionaire families no longer own and control JSE-listed companies as they may have once done before South Africa opened up to outside investment. Hence, no family owns any of the major banks, which like other major JSE-listed companies, are today dominated by foreign and domestic institutional investors like pension funds, collective investment funds etc. I refer the Commission to a factsheet that Treasury presented to Parliament and released for public comment in October 2017, on ownership trends on the JSE, to provide such perspective, and to deal with the underlying and deliberate distortions in the Oakbay presentation –

Annexure **IM28**. A more detailed research paper is also available on the National Treasury website[77].

131 I was approached much later to brief the ANC Secretary-General and Deputy Secretary-General on the FICA Bill, as the delay in signing attracted the news, which I did a few days after I was approached, on 23 September 2016. I was happy to be invited, as I was always ready to brief anyone (from any political party or organisation) who was interested in the Bill, and to win their support for it. My presentation focused on explaining the anti-money laundering system in SA, our commitments as a FATF member, the concept of PIPs and its origin, and why it was important to have the law enacted as soon as possible. I regarded the meeting as very helpful and constructive.

Minister Gordhan finally meets Oakbay CEO

132 It is clear from the above that the Guptas were able to put heavy pressure via Cabinet and within the ANC and COSATU, lobbying very hard and strategically, behind the scenes. Mr Gordhan had resisted meeting him, taking into account the legal opinion he had secured. The CEO of Oakbay subsidiary, SAHARA, also wrote to Mr Gordhan to intervene on 28 June 2016. - Annexure **IM29**.

133 Minister Gordhan finally met with Mr Howa on 24 May 2016 at the National Treasury, a meeting that I also attended. Also present was Mr Lungisa Fuzile, former Treasury Director-General, and a few other Treasury officials including our legal head Ms Rebecca Tee. Mr Gordhan's and Mr Fuzile's statements to

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77 http://www.treasury.gov.za/comm_media/press/2017/2017100301%20Ownership%20monitor%20-%20Sept%202017.pdf

this Commission provide sufficient detail, and I will not deal with that meeting in any detail. I recall Mr Gordhan making the point to Mr Howa (whose father was a great freedom fighter spearheading the non-racial sports movement, and whose role I admired in my youth) that we did not fight in the struggle to have state capture, and that Mr Howa should not pretend that everything was okay with his company and its owners; that there was much the Gupta family had to account for, including the statement by Deputy Minister Jonas on the approach made to him by the Gupta family.

134 Mr Howa did not make a formal presentation, and did not attempt to make the same conspiracy-type points in his presentation to the ANC. Mr Fuzile told Mr Howa to provide hard facts and evidence, and not simply repeat what was already in the media. Howa then stated that they had 20 letters of correspondence with ABSA, which he stated gave them two months' notice to close their accounts, after a meeting with them on 18 December 2015.

135 Howa claimed that ABSA did not want to meet them thereafter. He claimed that early in April 2016, Norton Rose contacted them to say that FNB was closing their account, but that FNB had refused to meet them. In the last week of that month, Nedbank closed their account/s followed by Standard Bank.

136 Howa then spoke about how their auditors and a number of businesses (such as Equestra and Barloworld) had cut off all links with them. Potential auditors were refusing to enter into business with them, including one that had agreed (via a handshake) to be their auditor but shortly after, walked away.

137 We did not engage on all the above impromptu information that he revealed, as we did not place much reliance on his statements until he provided some evidence or documentation. Mr Fuzile pointed out to him that the banking sector is highly regulated, and asked him what he expected of the Minister and Treasury, given that by law we cannot approach the banks on any matter related to any of their clients.

138 Mr Howa stated they employed 7 500 people and it would not be right for them to lose their jobs. Mr Gordhan responded by saying that he too was concerned about workers losing their jobs. Mr Fuzile asked them why they were not taking this matter to court, if they felt they were not treated fairly by the banks. He pointed out that it may be in the public interest for them to put out all their facts and evidence in the public domain. Mr Howa indicated that they had discussed this with their lawyers, and was aware of the Bredenkamp case, and they did not think it was feasible for them to do so at that stage. Mr Fuzile stated that if they had nothing to hide, they would do so, and such cases could be in the public interest.

139 Mr Howa indicated that all they were expecting is to get advice from the Minister. Minister Gordhan repeated that Oakbay should approach the courts if they had nothing to hide, as this was the only way they could get the relief they were seeking.

140 In my view, Mr Howa was clearly not very transparent with us, continuing to act as if there were no serious allegations around the Gupta family and Oakbay, stating that he was only appointed the CEO of Oakbay a few months before, and

the Guptas had resigned as directors. He claimed that their business used to only be reliant on the state for one per cent of its income, but was now five per cent (after the Optimum deal), and that Eskom had saved R2 billion compared to their previous coal contracts. He claimed that the Optimum deal was done by him in SA, and not in Switzerland. He claimed that he as an ex-unionist, his main concern was the 7 500 jobs that were at risk.

141 His key point was that their businesses were now the victims of the banks and auditors. Mr Gordhan told him that he was playing victim when he knew full well what had happened to Deputy Minister Jonas. Towards the end of the meeting, Mr Fuzile challenged Mr Howa for not demonstrating good faith when engaging with the Minister, pointing out "*that the recent attacks on the integrity of the National Treasury [were] neither helpful nor were they in the national interest*" (paragraph 188 in Lungisa Fuzile's statement to the Commission, dated 15 Feb 2019). Mr Fuzile said further that he was aware that Mr Howa had referenced the "Operation Spiderweb" intelligence "report" in their meeting with the ANC officials. He told Mr Howa that we would not meet with him if they continued to make such false allegations that Treasury officials were apartheid spies. Mr Gordhan also reprimanded Mr Howa for defaming Treasury. I also pointed out how the Treasury was under attack from the Gupta family. Mr Howa denied that he had attacked the Treasury and apologised if that was our perception. The PowerPoint presentation to the ANC speaks for itself, as to how "honest" Mr Howa really was with us.

142 Minister Gordhan ended the meeting by requesting Mr Howa to provide us with the information he claimed to have, such as his attempts to engage with their

banks. Minister Gordhan told him we would be sending him our input on the regulatory environment applying to banks.

143 There was further correspondence of letters between Mr Gordhan and Mr Howa, with both writing to each other after the meeting, on the same day, 24 May 2016, to record their understanding of the meeting and to follow-up. Mr Gordhan confirmed what we had discussed, that banks operate in a highly regulated environment, that here are legal impediments to the Minister of Finance (or any third party) to discussing bank-client matters, and that Oakbay had not exhausted all its legal remedies. He ended by reminding Mr Howa of the further relevant information he had agreed to send us, and that the recent attacks on the integrity of the National Treasury were neither helpful nor in the national interest (see Annexure **IM30**).

144 Mr Howa's letter on the same date (before he received the Minister's letter) stated that following "detailed discussion with several legal advisors, we are of the strong view that given the contractual rights the banks have, any legal approach may indeed be still-born." He also confirmed that the their "shareholder has resigned from all executive and non-executive roles in our group", in a reference to the role of the Gupta family and possibly Mr Duduzane Zuma. He still expected Minister Gordhan to "open the way" to "create a business environment which will promote job creation and growth", and that the closure of their accounts would create "a negative perception around foreign direct investment". (see Annexure **IM31**).

145 Soon after the meeting with Mr Howa, Mr Gordhan sought a second legal opinion from Adv Gauntlett and Pelser (see Annexure **IM32**). This legal opinion was provided to the Minister on 29 May 2016, and opinion confirmed that:

145.1 *"Banks are not legally obliged to provide Oakbay with reasons for closing Oakbay's accounts.*

145.2 *It would not be permissible for the Minister to approach the banks to request reasons for the closure of the accounts, and the banks would not be obliged to comply with the request by the Minister – even if Oakbay were to waive its right to confidentiality.*

145.3 *The regulatory system does not provide a mechanism through which the Minister may intervene at the instance of Oakbay."*

146 There were a few more letters between Mr Gordhan and Mr Howa, with Mr Howa failing to deliver on his promise to provide us with the information ("the full file of all the correspondence with the banks" as he later referred to it in one of his letters) promised at the meeting with Mr Gordhan. Mr Gordhan's founding affidavit in his application against Oakbay Investments on 14 October 2016 covers this in detail, so I will only make a few brief points.

147 Mr Gordhan's letter dated 14 July 2016 noted that Oakbay's reluctance to approach the courts may leave "*the distinct impression that Oakbay management is not doing all in its power to protect its staff from losing their jobs and further that Oakbay is concealing the real facts from being made public. You may also create the impression that you are trying to find a political solution to what is essentially a legal compliance matter.*" Mr Gordhan also noted the

information Mr Howa did make public in an interview with Carte Blanche screened on 19 June 2016 where he indicated a reason that was furnished, related to the various anti-corruption legislation. (See Annexure **IM33**).

148 Mr Howa emailed Minister Gordhan again on 19 July 2016, attaching a letter from Impala Platinum informing one of the Gupta companies (Westdawn Investments (Pty) Ltd) that they were no longer prepared to do business with them. Mr Howa persisted again for a meeting as "we had promised each other to try to find solutions which avoids job losses" (see Annexure **IM34**).

149 It was only in his letter of 25 July 2016 (in response to a further request from Mr Gordhan dated 14 July 2016) that he finally provided one letter from each of the four major banks (Annexure **IM35**) they had received:

149.1 Barclays (ABSA) notifying TNA Media in a letter dated 18 December 2015 of their intention to close their account by 16 February 2016;

149.2 First National Bank informing them via a letter dated 1 April 2016 from Norton Rose Fulbright informing them that their accounts would be terminated on 31 May 2016;

149.3 Nedbank informing them in a letter dated 7 April 2016 that their accounts would be terminated within 30 days (i.e. by 7 May 2016), and indicated it was due to their "…view that any continued relationship with Oakbay Investments (Pty) Ltd may create material business risks that could pose significant reputational risk to Nedbank…"; and

149.4 Standard Bank informed them in a letter dated 13 April 2026 that their accounts would be closed on 6 June 2016. (Note: An earlier letter dated 6 April 2016 from Standard Bank serving notice of termination was not included, but its existence was confirmed later by Ms Ronica Ragavan's in her filing notice[78].)

150 These four letters did not provide reasons or alert the Gupta businesses on any suspicious transaction records that they may have submitted to the relevant authorities, probably because this is forbidden in terms of the FIC Act. Most banks provided no reasons in these letters, except for Nedbank, which provided a very general reason related to reputational risk. Mr Howa had previously referred to another letter from Standard Bank in his Carte Blanche interview, which indicated compliance with general anti-corruption legislation. But Mr Howa was still not providing us with "the full file of all the correspondence with the banks" which he had promised, even in his last letter dated 9 September 2016. He continued promising he was *"very happy to share with"* us his correspondence, which *"makes for interesting reading"*, but would do so when he met the Minister again, where he would be *"...happy to ... show you my file and inform you of my various meetings and telephone calls"*.

151 This engagement with Mr Howa had reached a dead-end, and Mr Gordhan sought further legal advice, and as noted further below, launched the 14 October 2016 declaratory order court application.

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78 Ms Ronica Ragavan's filing notice affidavit dated 20 January 2017 in the matter Minister of Finance vs Oakbay Investments (Pty) Ltd and others.

MR ZWANE BATS FOR THE GUPTAS

Mr Zwane continues with haste on his 'investigation'

152 Mr Zwane moved with remarkable haste after the 21 April 2016 post-Cabinet media briefing, to proceed with his "engagement" with the banks. From the affidavits supplied by the four major banks to the Commission, it appears that Mr Zwane's advisor, Adv Zarina Kellerman, emailed the offices of the CEOs of ABSA and FirstRand Bank, on 22 April 2016 at 11:44am and 1:57pm respectively, inviting them to a meeting on 25 April 2016 with the IMC to *"look into certain allegations made against certain financial institutions"*. Since Adv Kellerman was not able to respond to their queries on the meeting, ABSA and FirstRand both declined attending the 25 April 2016 meeting.

153 Banks were puzzled by this process, and why they were contacted by Mr Zwane's office, and wanted more details from the regulators and Treasury. Some asked whether Minister Gordhan would be present at their meeting with the Ministerial Task Team. They queried why none of the regulators were involved. I was aware of some their concerns at the time, as they contacted the regulators or me directly, but only became aware of all their correspondence with the Ministerial Task Team much later in the year, when the banks filed their affidavits in the Oakbay declaratory court application that I deal with later in this statement.

154 We see from the evidence of the banks that Adv Kellerman then sent a new invitation letter again to ABSA and FirstRand on 4 May 2016, but now also to Standard Band and Nedbank, requesting them to attend a meeting of the "IMC"

the following day. The meetings appear to be set for 30 mins each, as Nedbank invitation was for 12:00, FirstRand at 12:30 and ABSA at 13:00. Both ABSA and FirstRand again declined to attend the meeting. Standard Bank attended the meeting on 5 May 2016 and Nedbank the following day 6 May 2016.

155 According to the statement of Mr Ian Sinton from Standard Bank dated 13 August 2018 submitted to the Commission, Mr Zwane sought to secure a favourable outcome for the Guptas by using political and executive power. He states further that Mr Zwane accused Standard Bank of colluding with 'white monopoly capital', and Mr Zwane's 'reminder' to Standard Bank that it was operating in terms of a banking license granted by Government. These were similar to the allegations made in the PowerPoint slides submitted to the ANC by Oakbay CEO Mr Howa. As noted and attached as an Annexure in Mr Sinton's statement, Standard Bank sent a letter to Mr Zwane and Ms Oliphant after their meeting, to formally record their response to the questions that they were asked, as they had also done after their meeting with the ANC a few weeks earlier.[79]

156 To the best of my knowledge, no report of the two meetings with banks, or any other meetings of the "IMC", nor the questions that were to be asked of banks, were provided to Mr Gordhan or Treasury by Mr Zwane or his secretariat. No list of all the meetings that took place, nor of the minutes of each such meeting, nor the documents submitted, were ever provided to Mr Gordhan. Nor did Mr Zwane, nor any of the members of his Task Team or his secretariat, ever consult with the Minister of Finance or National Treasury to analyse the interviews with the

[79] See https://www.timeslive.co.za/news/south-africa/2018-09-17-state-capture-inquiry-what-was-mzwanele-manyi-doing-at-a-standard-bank-meeting/

banks, or on the relevant laws. I would have known had Mr Zwane provided any documents to Minister Gordhan or sought to consult him, as Minister Gordhan would have requested me to comment, as the responsible official in the National Treasury.

157 It is clear from the correspondence submitted by the banks to the Commission, that Mr Zwane showed no regard, or understanding, of our anti-money laundering legislation and the compliance responsibilities of the banks in the area of financial crime. It is shocking that he even went as far as threatening to have the government remove one of the bank's licence, which in my view would constitute an act of economic sabotage given the consequences not only of a bank failure, but would have had dire consequences on the economy as a whole given that all four banks are classified as SIFIs (systemically important financial institutions) following the 2008 global financial crisis – so the failure of even one of these four banks would spread to the entire banking system, and adversely impact the economy as a whole. Fortunately, no bank seemed to have been intimidated by this threat, as they would have been keenly aware of the legal limits of Mr Zwane's power, and that only the banking regulator at the Reserve Bank could possibly withdraw their banking license. No responsible bank regulator would do so, as it would spark the systemic crisis I refer to above.

158 Curiously, at this meeting between Mr Zwane and Standard Bank, Mr Mzwanele Manyi was also present. According to Mr Sinton, in paragraph 26 of his affidavit, Mr Manyi said he was there in his capacity as a Ministerial advisor. I do not know if he was present at the meeting with Nedbank, but according to their affidavit, when they queried the names of the officials who attended their meeting with Mr

Zwane, Adv Kellerman indicated that Mr Mzwanele Manyi and Mr Sandile Nene had attended and referred to both of them as advisors to Minister Muthambi (refer to email dated 9 May 2016 in the affidavit of Mr Brown). (Mr Brown notes that contrary to the email response of Adv Kellerman, Mr Manyi and both the Ministers of Labour and Communications did not attend to the best of his knowledge). But the key point to note is that Mr Manyi's presence at IMC meetings was on the basis that he was an advisor to the Minister of Communications, but he later claimed that he had attended as a "part-time" advisor to Mr Zwane.[80] He was also a regular ANN7 political commentator where he was notable for his defence of the Gupta family and their activities. He was also actively involved with the BBC and PPF in wanting to delay the FICA Bill, as I outline below. Mr Manyi was certainly not an "independent" participant to assess the banks closing the account of the Gupta businesses – he was in fact both a player and a referee.

159 Needless to say, given our experience with the advisors of Mr van Rooyen when he came to the National Treasury, I was sceptical about the role of the advisors of Ministers Zwane and Muthambi, and suspected that they may have been placed there by the Gupta family, including to participate in the task team.

Zwane Task Team report to Cabinet June-July 2016

160 Mr Zwane attempted to present the report of his Task Team at the 22 June 2016 Cabinet meeting (as I was informed by Mr Gordhan). This surprised Mr Gordhan who was present at this meeting, as it was not on the Cabinet agenda, and again, no Cabinet memorandum was circulated beforehand via the normal two-week

[80] Confirmed in statement by Mr Sinton to the Commission, 13 August 2018, para 26.

Cabinet process. Instead, Mr Zwane distributed his report at the Cabinet meeting, once again bypassing the normal Cabinet process. Mr Gordhan therefore saw the memorandum for the first time at that Cabinet meeting, despite being a member of the Ministerial task team.

161 President Zuma was apparently not present at the meeting when Mr Zwane's report was discussed. Cabinet rejected his report, which was officially withdrawn for further refinement and consultation. Mr Zwane was directed to rework the memorandum, and to ensure agreement of all three Ministers in the Task Team first, and then to brief the Deputy President and President, before submitting to Cabinet again. There was no reference to this matter in the post-Cabinet statement published on 23 June 2016.

162 Minister Zwane ignored this Cabinet decision and proceeded to again present his memorandum at the very next Cabinet meeting on 6 July 2016, where President Zuma was present. He did so without engaging Minister Gordhan (who did not even see the report), or inviting him to any briefing with the Deputy President and President before submitting. Minister Gordhan was also not present at this Cabinet meeting. It is also noteworthy that again, this Cabinet memorandum did not go through the normal two-week process of consultation, as the Ministry did not receive the memorandum before that Cabinet meeting. I suspect it must have been circulated at the meeting only. It did not feature on the previous week's ESEID Cabinet committee either, which both Mr Gordhan and Mr Jonas apparently did not attend. I believe this matter was also not listed on the agenda circulated for the Cabinet meeting of 6 July 2016. In fact, it can be concluded that all three times that Cabinet discussed this particular matter, the

standard two-week Cabinet process was not followed, was not listed on the agenda circulated before each Cabinet meeting, and where there was a memorandum or document, it was only circulated at the Cabinet meeting itself. To this day, neither Mr Gordhan nor the Treasury has seen this memorandum. Treasury only became aware later from the Cabinet minute that there was a Cabinet memorandum circulated at the meeting, referenced as Cabinet memorandum 1 of 2016, dated 29 June 2016, file number IMC/01, Department of Mineral Resources.

163 We learned later that Cabinet approved almost all the far-reaching recommendations proposed in this Cabinet memorandum. For some reason, these recommendations were not made public at the post-Cabinet press statement released on 8 July 2016, which merely stated:

> *"Cabinet received a report from the Ministers of Mineral Resources, Labour and Finance following their constructive engagement with stakeholders in the banking industry. The outcome of this report will be communicated in due course."*[81]

164 I do not know why the media statement suggested that no Cabinet decision was made after considering the "report". Neither was the "outcome" of the report ever communicated to the public via a future Cabinet communication. This was similar to the nuclear deal decision on 9 December 2015, hours before Mr Nene was fired. That decision was also concealed from the public and kept a secret. There was no formal Cabinet press statement ever made on this Cabinet decision as

[81] https://www.gcis.gov.za/newsroom/media-releases/statement-cabinet-meeting-6-july-2016

far as I am aware – indeed, as I indicate below, President Zuma seems to have even denied there was any Cabinet decision taken, stating in reply to a parliamentary question that the Ministerial team merely reported back to Cabinet on the "constructive engagement" that they were requested to "open".

165 I recommend that the Commission requests the Cabinet memorandum (Cabinet Memorandum 1 of 2016, dated 29 June 2016: Department of Mineral Resources) be declassified and made available to the Commission, together with the withdrawn memorandum circulated at the 22 June 2016, as well as the Cabinet minutes of the 6 July 2016 and 22 June 2016 meetings. I believe that these minutes and memoranda will prove quite decisively to what extent Cabinet was manipulated to do the bidding of the Gupta family, as I suspect that at least a few members of the Cabinet probably expressed their reservations with supporting the Gupta family and their businesses. However, it is my view that President Zuma and Mr Zwane wanted to record a certain outcome from Cabinet, as recommended by Mr Zwane's report or memorandum, so they deliberately preferred an ambiguity in the Cabinet outcome, which they could use to act against those not doing the bidding of the Gupta family – it is a good example of plausible deniability when such matters were exposed in the media.

166 I recall that we expected Mr Zwane to make damning findings against the major banks who had closed the Gupta accounts, given the way he ran the task team and his role in supporting the Gupta family. However, we were still shocked when we learnt how far the Cabinet decision actually went to support the Gupta family, as it apparently even called for a judicial commission of inquiry against the Treasury and SA Reserve Bank.

167 We learned that Cabinet approved that the three Ministers intervene to further assist the workers affected by the action of the banks, which now increased to 16 000 (from 7 500 and 4 500) workers, and requested the Minister of Finance to ensure the transformation of the banking sector, and to review many aspects of the financial sector reform process, including:

167.1 *Establishing a banking tribunal system to assist aggrieved customers or expand the banking Ombud;*

167.2 *Reviewing the FICA Bill to strengthen reporting and addressing the concerns related to unreasonable practices against "Politically Exposed Persons" (PEPs);*

167.3 *Consider the existing provisions for clearing banks with a view to allowing more banks to participate;*

167.4 *Investigating possible collusion by banks in closing accounts of companies and individuals;*

167.5 *Fast tracking of the process to transform the Postbank into a state bank; and*

167.6 *Requesting the JCPS Cluster to review the separation of the function of financial intelligence from civilian intelligence.*

168 Despite Mr Zwane's memorandum apparently recommending that a judicial inquiry be established against the Treasury, SA Reserve Bank and banks that closed the Gupta accounts, Cabinet did not adopt this specific proposal, for technical reasons. Mr Zwane seemed to suggest later in his 1 September media

statement (outlined below) that though Cabinet supported such an inquiry, it could not make such a decision because the power to appoint a judicial inquiry resides solely with the President and not Cabinet.

169 The above decisions by Cabinet did not make any sense to me from a policy or supervisory perspective, and this mattered to me, given that I was the ultimate responsible official in Treasury who would have to process and prepare the legislation and implementation plans for these decisions, for the consideration of the Director-General, Minister, Cabinet and Parliament for approval. There was already an Ombud system in place for the financial sector for more than a decade. The memorandum also required us to investigate the decisions that banks took to close certain client accounts (a power Government did not have) and to review the bank licensing process, to make it easier for others to also get a bank licence. It required us to amend the PIP-related clauses yet again.

170 The Cabinet decision effectively required the Minister of Finance to reverse some of the major reforms in the very bills (FSR and FICA Bills) that were with Parliament and no longer in the domain of the executive, having been introduced in Parliament in October 2015. The FICA Bill was before President Zuma for his assent, and any review of the PIPs concept would have required a further amendment to the FIC Act. The FSR Bill could have been amended, but this was up to Parliament to approve, and the most Treasury could have done was to propose amendments to the SCOF for its consideration.

171 Cabinet was effectively prepared to weaken the more intensive regulatory framework that we had adopted after 2011 in line with international practices in

order to (as we learned later) enable the Guptas or their associates to buy their own bank (Ubank or Habib Bank), and to do so by circumventing the rigorous process that every other applicant had to comply with. I deal with the attempt by the Guptas to buy their own bank in a later section of this affidavit. It was not clear to me how Cabinet could decide to amend the law so radically, without any research or technical report to support such changes (actually reversals) in policy. It would also mean that we would be moving in a different direction to that of the G20 and other countries, and doing so at a time when we were facing punitive sanctions at FATF. It just did not make any sense to me.

172 Ominously, Cabinet also approved Mr Zwane's proposal that the JCPS cluster should review 'the separation of the function of financial intelligence from civilian intelligence', which we interpreted to confirm the rumours we were constantly hearing that the FIC should be moved away from the Minister of Finance to a more pliant JCPS cluster Minister, where they could control any suspicious transaction record reports (e.g. on the Gupta-related transactions). There were many rumours to this effect around some of the intelligence officials in the JCPS cluster, who continually questioned why the FIC was reporting to the Minister of Finance, but neither the Minister of Finance nor Treasury were ever formally approached.

Mr Zwane goes public on "IMC" investigation

173 There was no Cabinet meeting for eight weeks after the 6 July 2016 meeting, until 31 August 2016, probably because of the local government elections that took place on 3 August 2016. So, since the post-Cabinet media statement

provided no details on the actual decision of Cabinet, it appears Mr Zwane[82] became impatient to make it public. On 1 September 2016, he issued his own statement the day after the next Cabinet meeting of 31 August 2016, not even waiting for the post-cabinet meeting that was to be held the next day (Annexure **IM36**). He stated that Cabinet had approved the far-reaching findings of his task team. This Cabinet meeting would normally have confirmed the minutes of the previous Cabinet meeting, so would likely have confirmed the decisions of the 6 July 2016 Cabinet meeting.

174 Minister Zwane's statement contained the following alarming announcements:

174.1 That a 'judicial enquiry' would be established to probe the four major banks, to "consider allegations that certain banks acted unilaterally and allegedly in collusion, when they closed bank accounts and /or terminated relationships with Oakbay Investments". He announced that since only the President could establish a judicial commission, and not Cabinet, this recommendation of the task team was not approved by Cabinet, but that it left it to President Zuma to make this decision.

174.2 That, in addition to investigating the banks, the judicial commission would investigate the Reserve Bank and Treasury. He claimed that this was to understand the "implications of legal action against any of these entities and the potential impact that would have on the volatility of the Rand as well as the measures that could be put in place to protect the economy."

[82] https://www.news24.com/fin24/economy/full-statement-call-to-probe-banks-20160920

174.3 That the Judicial Commission would "re-consider South Africa's clearing bank provisions to allow for new banking licences to be issued and in so doing, to create a free market economy." He said that was because "evidence was also presented that these institutions (SARB and Treasury) may have placed undue pressure on banks that sought to assist the company (Oakbay) by subjecting them to unwarranted auditing processes. He stated that it is unclear why the Reserve Bank will not issue new banking licences to other banks and this would need to be given careful attention by the Judicial Commission as it did not fall within the purview of his task team, which he continued to call an IMC. He did not say who presented such evidence to the task team, as we were only aware of the two banks that had accepted his "invitation".

174.4 He also called for the establishment of a state bank, and noted that current banks "are owned by private shareholders and report to National Treasury who in turn do not need to act on information provided to it."

175 Minister Zwane's statement was replete with factual inaccuracies (e.g. contrary to what his statement stated, private shareholders do not report to the National Treasury) and demonstrated his complete lack of understanding of how banks are regulated, and how banks report and to whom (Treasury or SARB), how our anti-money laundering and anti-corruption legislation work, as well as the independence of the SARB, the role of the Treasury and the functioning of the financial regulatory system. His statement also displayed a lack of knowledge of all Cabinet decisions before he became the Minister, including the 2014 and 2015

Cabinet decisions on the FICA Bill, and the decisions made by Cabinet on the FSR Bill in 2013 and 2014 and on the twin peaks regulatory system since 2011. He did not indicate that the two bills were currently before Parliament (FSR Bill and FICA Bill), and no longer with the executive. He clearly was not aware of the major reforms that Cabinet approved in 2011 (under President Zuma) following the 2008 global financial crisis, where the regulatory system over banks became so much more intrusive and intensive. I am not sure if he knew, or cared, that his actions could cause financial and economic instability, and that it was in the public interest to strengthen our anti-money laundering system and to avoid sanctions from overseas regulators if we did not update our system.

176 Mr Gordhan took no part in the entire task team process, after giving advice to Minister Zwane that it was not legal for government to interfere in bank-client relationships. Indeed, he did not even get minutes or reports after task team meetings, nor receive any other documentation beyond a few invitations to meetings – Mr Zwane clearly was not unhappy that he did not attend – he did not try at all to get Mr Gordhan to attend, or to refer his non-attendance to President Zuma. Yet the 1 September 2016 media statement claimed that the task team (including Mr Gordhan) had agreed to the recommendations proposed in Mr Zwane's Cabinet memorandum, and whose recommendations he claimed were approved by Cabinet, including that a judicial inquiry be established into the closure of the bank accounts of several Gupta companies by the major commercial banks in South Africa.

177 Mr Zwane's statement was unexpectedly slapped down within 24 hours by the Presidency, which issued a statement on 2 September 2016 distancing itself and

Cabinet from Zwane's statement. The Presidency described the contents of Zwane's statement as "unfortunate", "inconvenient" and cause for "confusion", and reiterated to "domestic and international investors", Government's unwavering commitment to the letter and spirit of the country's Constitution as well as [to] the sound fiscal and economic fundamentals that underpin our economy – Annexure **IM37**[83].

178 However, the Presidency did not comment on what exactly Cabinet had decided on the report of the task team, as reflected in the Cabinet minute for the 6 July 2016 meeting. Mr Zwane[84] is reported to say that the task team report was also discussed at the 31 August 2016 Cabinet meeting and would likely have confirmed the 6 July 2016 Cabinet minute if normal practice for such meetings was followed. The Cabinet minute of the 31 August 2016 meeting does not reflect any change or correction to this decision. The Presidency therefore did not deny the content of Mr Zwane's statements on what recommendations of the task team Cabinet had in fact approved. Neither did the statement indicate that Cabinet had decided to request the State Security Agency to investigate the appearance in the media of Mr Zwane's cabinet memo earlier on that day, and to report to Cabinet on this security breach.

179 The post-Cabinet media conference on the same day as the statement of the Presidency on 2 September 2016 provided no further detail in its media statement on any decisions related to the report of the Ministerial Task Team. Indeed, to this day, I am not aware that the decisions of Cabinet on the Task

[83] www.thepresidency.gov.za/content/statement-minister-mineral-resources-not-government-position
[84] https://youtu.be/b7fb9Ys9oYI Minister Zwane interviewed on SABC News on 1 or 2 Sept 2016

Team report at the 6 July 2016 meeting were ever made public, or rescinded or corrected, and neither has there been any monitoring as to why it was not implemented if it was approved.

To and fro following Mr Zwane's Press Statement

180 In the days following the 2 September 2016 statement by the Presidency, Minister Zwane and President Zuma made many statements that even cast doubt on what decision Cabinet actually made, and even whether it made any decision at all, and why Minister Zwane contradicted President Zuma on making his statement on behalf of the Ministerial task team or not. Eventually, on 23 November 2016, President Zuma effectively confirmed in Parliament that Mr Zwane's 1 September 2016 media statement was in fact the Cabinet decision. So, in effect, the Presidency's statement of 2 September 2016 was merely saying that Mr Zwane had no mandate to speak for Cabinet, but was silent on the veracity of his statement. Indeed, I am aware that there is a formal decision, recorded in a usual Cabinet minute, that confirms that Mr Zwane's 1 September 2016 correctly reflected what Cabinet had in fact decided, as Cabinet approved 4 of the 5 recommendations of his report or memorandum. But there were a lot of statements in between these dates, as I outline below.

181 Mr Zwane's spokesperson Mr Martin Madlala was the first to respond to the two statements of 1 and 2 September 2016, admitting in a radio interview on the evening of 2 September 2016 that it was misleading to say Minister Zwane's statement comes from Cabinet, but claimed instead that it came from the task team. He did not point out that Mr Gordhan had not been part of such task team decision, so he probably meant it was the decision of Minister Zwane and

perhaps with Minister Oliphant. I am not aware of Minister Oliphant making a single public statement on her own role on the task team, or comment on any of its meetings or reports.

182 Mr Madlala went on to say in his interview with Radio 702 that the judicial inquiry into the banks was proposed because the Inter-ministerial Committee (IMC) felt the matter was important to investigate further. He is quoted in the interview as saying "The judicial commission will have some extended powers to investigate that the IMC (inter-ministerial committee) doesn't have necessarily. And to extend the investigation will produce some additional results that will be beneficial to the country."[85]

183 The following day, ANC spokesperson, Mr Zizi Kodwa, issued a statement condemning the ill-discipline of Mr Zwane, calling his behaviour *"outrageous, appalling and shocking"*. It went on *"This type of ill-discipline has brought the name of government into disrepute. We call on President Zuma to discipline Minister Zwane because [it is] this kind of reckless and careless statement that sends wrong signals about our cabinet"*. He called on President Jacob Zuma to discipline Mr Zwane. - *"The action must be a lesson that no one again must make this public statement unmandated which has got a negative impact both on the economy and the perceptions of national leadership."*[86] COSATU also called on President Zuma to discipline Mr Zwane.[87]

[85] www.702.co.za/articles/16325/it-was-imc-and-not-cabinet-pushing-for-banking-inquiry-zwane-s-spokesperson
[86] https://www.news24.com/news24/southafrica/news/zwane-statement-reckless-anc-20160903
[87] https://ewn.co.za/2016/09/03/ANC-calls-on-Jacob-Zuma-to-reprimand-Mosebenzi-Zwane

184 Yet Mr Zwane continued to defend his actions when he was forced to respond in Parliament to an oral question (no 205) on 7 September 2016 from MP David Maynier, on whether he would be resigning. I find it difficult to comprehend Mr Zwane's reasoning in his verbal response, which video is available for viewing (refer to the footnote), but media articles quote him as follows:

> *"But there is a separation of powers and this matter – whether I resign or not – the matter belongs to Cabinet. As a result, the honorouble Maynier cannot ask me whether I'll resign or not."*[88]

185 He went on to state that Cabinet was dealing with the matter between the banks and the Gupta family, and referred to such closures of bank accounts as abuse by the banks. He stated *"Since that incident (the closure of the Guptas' bank accounts), many have come forward saying they've 'suffered' at the hand of banks. Many South Africans have been subjected to this kind of abuse."*

186 The first public response from President Zuma himself that I am aware of after the Presidency's 2 September 2016 statement was on 20 September 2016, in response to a parliamentary question from Hon David Maynier on (NW1806). He stated:

> *" The statement issued by the Minister of Mineral Resources, Mr Mosebenzi Zwane on 1 September 2016, on the work of the task team established to consider the implications of the decisions of certain banks and audit firms to close down the accounts and withdraw audit services from the company*

[88] https://mg.co.za/article/2016-09-07-mosebenzi-zwane-to-parliament-i-wont-resign-as-mineral-resources-minister/

named Oakbay Investments, was issued in his personal capacity and not on behalf of the task team or Cabinet."

I reassured the public, the banking sector as well as domestic and international investors of Government's unwavering commitment to the letter and spirit of the country's Constitution as well as in the sound fiscal and economic fundamentals that underpin our economy.

I also informed parliament on 13 September that I was engaging Minister Zwane regarding his statement."

I found it interesting that President Zuma saw the need to assure investors about Government's "unwavering commitment" to both the Constitution and sound fiscal and economic policy, given that President Zuma would have known how far-reaching the actual Cabinet decision was, yet as the head of the national executive he allowed Cabinet to adopt a resolution that was blatantly unlawful and unconstitutional, and would have undermined sound fiscal and economic management and bank regulation in the country..

187 Yet the very next day 21 September 2016, Mr Zwane responded in a written reply to another parliamentary question by MP David Maynier (no 1892), contradicting President Zuma and effectively not only speaking again on behalf of Cabinet, but pointing out that it had adopted 4 of the 5 proposals of the "IMC", and that he had issued his statement on behalf of the task team. He not only confirmed that Cabinet had taken "resolutions" on this matter at its 6 July 2016 and 31 August 2016 meetings, but went even further to state:

> *" The IMC made 5 recommendations to Cabinet, 4 of the recommendations were approved by Cabinet and 1 was referred to the President for further consideration as it was not within the purview of Cabinet to take a decision on the matter."*

188 He also stated that he was *"not speaking in his personal capacity but in his capacity as Chairperson of the IMC"*. (See Annexure **IM38**). Interestingly, he also pointed out that *"On 13 April 2016, Cabinet established an IMC to consider allegations that certain banks and other financial institutions acted unilaterally and allegedly in collusion, when they closed bank accounts and/or terminated contractual relationships with Oakbay Investments."* In effect, he was saying that this process was not the "*constructive engagement*" conveyed in the post-Cabinet media statement of 21 April 2016, but "to consider allegations" against banks of acting "unilaterally" and in "collusion". It should be noted that the actual Cabinet minute does not use words like "collusion", or for that matter "unilaterally".

189 President Zuma responded again in public on 23 November 2016, to a parliamentary question from MP Bantu Holomisa. Mr Holomisa asked whether President Zuma "*has applied his mind to the proposal of the Inter-Ministerial Committee and what his decision was in this regard*". President Zuma responded by stating that Cabinet had appointed the three Ministers "*to open a constructive engagement with the banks on the matter of the closure of bank accounts."* Interestingly, he did not use the word "investigation". He went on to say that *"The team reported back to Cabinet. No other mandate was given to this team of Ministers. As we have stated before, the statement released by Minister Zwane*

does not represent the views of government and Cabinet. I reprimanded the Minister for the remarks and he apologised". This part of his response was also provided to Parliament in writing. If anything, this response suggests that perhaps there was no Cabinet decision taken, and that all Cabinet had done was get a report from the Ministerial Task Team. -Annexure **IM39**[89].

190 When pressed further by Mr Holomisa through a follow-up oral question, on the status of the five recommendations that Minister Zwane had referred to in his 21 September 2016 parliamentary reply, President Zuma effectively contradicted his initial written reply, as he confirmed (by not refuting) that four of the five recommendations of the Zwane task team were approved by Cabinet, and that the remaining recommendation on a judicial commission of inquiry was under consideration by President Zuma. In effect, President Zuma was suggesting that Mr Zwane's 1 September 2016 statement was a Cabinet decision, without explicitly saying so.

191 In response to another follow-up question from another MP, President Zuma's response was now more threatening, stating that when *"... a number of banks act in the same way simultaneously... this adversely affects the image of SA as an investment destination as investors would be afraid to invest if banks can act "willy nilly" in a manner that suggests collusion, and the country expects Government to intervene and "deal" with the banks".* I refer the Commission to his response, as provided as an Annexure in Mr Sinton's affidavit.

[89] https://pmg.org.za/files/RNW1892-160927.docx

192 I would like to point out that neither Mr Zwane nor President Zuma, when they responded to parliamentary questions on this matter, contemplated the possibility that the Gupta family may have been transgressing anti-corruption and anti-money laundering laws, and that they needed to be investigated. It seems that President Zuma and Minister Zwane did not want to acknowledge the need for banks to comply with anti-money laundering laws of the country, and were suggesting that this was instead a form of "collusion".

193 It was clear to me as the responsible official in Treasury dealing with our anti-money laundering legislation that President Zuma and Mr Zwane were determined to weaken our anti-corruption and anti-money laundering legislation, as well as our financial regulatory framework, all of which Cabinet had previously approved. All this to serve the interests of the Gupta family and their businesses.

Role of Bell Pottinger and leaking of Zwane memorandum

194 The intrigue around the Zwane memorandum started even before his 1 September 2016 statement. The very day before or so, media reports emerged on 31 August 2016 that Mr Zwane had recommended to Cabinet that the Banks Act be reviewed to amend the process to approve bank licensing (e.g. article in Business Day[90]). More detail emerged in the media on or around 22 September 2016, when Fin24 published an article headed "EXCLUSIVE: Gupta PR firm knew about bank probe weeks before Zwane dropped bomb" by Matthew le Cordeur.[91] The article indicated that Bell Pottinger was in possession of a

[90] https://youtu.be/KSlnF1lGITE

[91] Available online at https://www.news24.com/fin24/Economy/exclusive-gupta-pr-firm-knew-about-bank-probe-weeks-before-zwane-dropped-bomb-20160922

document with the findings of the Zwane task team on 15 July 2016. A photo of the page was published in the Fin 24 article - Annexure **IM40.** This appears to me to be a page from the Cabinet memorandum that Mr Zwane may have circulated to Cabinet on 6 July 2016. So, Bell Pottinger may have had a copy of the actual Cabinet memorandum nine days after the Cabinet had approved its recommendations, or had the pages with the recommendations. The article indicated that Bell Pottinger had sent the picture of the page of a confidential document to Fin24 to prove that they had a scoop for them.

195 The Cabinet meeting of 31 August 2016 had noted the leaking of Mr Zwane's cabinet memo, and requested an investigation by the State Security Agency (SSA). I am not aware of the outcome of the investigation, and whether the SSA ever reported back to Cabinet on the source of the leak. I do not know if this refers to the Bell Pottinger leaking of the memorandum, as reported by Fin24 on 22 September 2016.

196 I believe that this Commission may be able to uncover valuable evidence if it were to request Mr Zwane, Ms Oliphant and the secretary of the task team, Ms Kellerman, as well as Mr Manyi and other officials who attended the task team meetings, to indicate whether Bell Pottinger or Mr Howa were involved in the drafting of the report of the task team and all its reports (including the Cabinet memorandum of 22 June and 6 July 2016), and any meetings and correspondence with Bell Pottinger. They should also provide the minutes of all meetings of the task team, including with the banks and all others they may have interviewed or met with, including the Gupta businesses or family. In particular,

who made the various recommendations including the decision to launch a judicial inquiry against the Treasury, Reserve Bank and banks.

Mr Gordhan exposes suspicious Gupta activities

197 Before and after the Cabinet meeting of 6 July 2016 that adopted Mr Zwane's 'findings', the Treasury leadership was under siege, with constant rumours that Mr Gordhan was about to be fired. We faced continual and growing pressure from President Zuma, the JCPS Cluster Ministers, Minister Zwane and other Ministers, who were all working to actively undermine and weaken the Treasury, probably because we were (rightly) seen to be a barrier to the nefarious plans of the Gupta family. The HAWKS targeted Mr Gordhan, even after he responded to their 27 questions on 18 May 2016, requesting him to present himself at their offices on 25 August 2016 to submit a warning statement to them.

198 Key state-owned entities were 'brave' enough to openly attack Mr Gordhan and Treasury in public statements (e.g. DENEL, see Annexure **IM41**). The Office of the Chief Procurement Officer encountered significant resistance in 2016 from the SABC, TRANSNET, SASSA and ESKOM after requesting information related to preliminary investigations it wanted to conduct into certain tenders and transactions. Many Ministers responsible for these entities also used bureaucratic arguments to prevent the Treasury from receiving such information, contrary to the PFMA. When Eskom delayed for over 5 months in sending information on coal contracts, Treasury was forced to issue a media statement dated 29 August 2016 to respond to misleading statements, noting:

"media reports of Tegeta "warning" and threatening to interdict the department should it release a report into its investigation of Eskom's coal contracts[92]*.*

National Treasury has also noted with concern the statement issued by Eskom on Sunday 28 August 2016 suggesting that it has been co-operating with the process of reviews of the coal contracts. The National Treasury would like to categorically state that, its efforts have met resistance". [93]

199 After the Cabinet decision at the 6 July 2016 meeting, and the continuing correspondence with Mr Howa, Minister Gordhan sought further legal advice in early August 2016 to seek a declaratory order on the limits of his power to intervene in decisions taken by banks on the closure of the Gupta accounts. It was the sole responsibility of the Minister of Finance to protect the integrity of our financial regulatory system, given the significant financial and economic implications if our anti-money laundering system did not meet basic international standards.

200 Mr Gordhan wrote to all the regulators on 28 July 2016, requesting that they advise him, within the framework of their legal powers, on whether or not registered banks have reported to them on issues related to Mr Howa's public statements on the Oakbay group of companies. The Minister stated that he was considering seeking a definitive court ruling on whether the Minister of Finance has the power to intervene in their case - Annexure **IM42.**

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[92]www.treasury.gov.za/comm_media/press/2016/2016082901%20%20Statement%20on%20Eskom%20Contracts.pdf

[93]http://www.treasury.gov.za/comm_media/press/2016/2016082901%20-%20Statement%20on%20Eskom%20Contracts.pdf

201 Mr Murray Michell responded on 1 August 2016 that given Minister Gordhan's "intention to approach a court for a definitive ruling on certain questions of law, … I have decided to issue a certificate under section 39 of the Act, relating to possible reports that may have been made in relation to the entities mentioned in your letter - Annexure **IM43**. All these documents formed part of the documentation for the court action that Mr Gordhan later launched.

202 The hostile climate against National Treasury got even more hostile, when on 11 October 2016, the then NDPP, Adv Shaun Abrahams, announced that the NPA was issuing a formal summons[94] to Minister Gordhan (together with Mr Ivan Pillay and Mr Oupa Magashula) related to the payment of a pension to Mr Pillay. This development compounded our already tenuous fiscal position (we were fighting an investment downgrade). After a high-profile press conference to announce the pending summons for criminal charges, Adv Abrahams, in a stunning reversal, withdrew[95] the summons on 31 October 2016. I will not deal with this matter in my statement.

203 On or around 14 October 2016, Mr Gordhan served papers to launch the court application[96] seeking 'declaratory relief to confirm the limitations of his powers (and of that of any other member of Cabinet) to intervene in decisions taken by commercial banks to close the accounts of Gupta-related companies'.

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[94] https://www.reuters.com/article/us-safrica-gordhan-idUSKCN12B0QV

[95] https://www.biznews.com/leadership/2016/10/31/shaun-abrahams-gordhan

[96] http://www.treasury.gov.za/comm_media/press/2016/2016101601 - Notice of Motion and Founding Affidavit.pdf

204 As detailed in Minister Gordhan's statement to this Commission, the declaratory relief application included a certificate issued by the Financial Intelligence Centre certifying that it had received 72 Suspicious Transaction Reports, totalling R6.8 billion, from the various banks relating to suspicious account activity and transactions conducted using the Gupta bank accounts that had been closed. The list of 72 suspicious transactions was the first official and public report from any government agency that indicated that there were possibly questionable or unusual transactions related to the Gupta banking accounts. This, despite the fact that the FIC itself did not provide any detail on the Suspicious Transaction Reports (STRs) listed, and in effect was only confirming that some banks had reported transactions that they had considered to be suspicious or unusual, and for the FIC to consider for further investigation. The certificate was, undoubtedly, the first hard and official evidence confirming that there was a clear basis for the relevant authorities to investigate these transactions related to the Gupta family and their businesses.

205 Coincidentally, the former Public Protector Thuli Madonsela announced her intention to release her 'State of Capture' report on 14 October 2016, which would be her last day in office. The publication of the report was delayed due to objections by President Zuma and Minister Des van Rooyen; however, the report was finally made public on 2 November 2016.

206 Minister Gordhan's application attracted even greater hostility towards him and the National Treasury from those associated with the Gupta family. I believe this was because of the realisation that the court challenge could prompt a discovery process forcing the Guptas to provide evidence to explain their ongoing pressure

on Minister Gordhan to intervene on their behalf against the banks. A few months later, around midnight of 31 March 2017, just after the case was heard, Minister Gordhan was dismissed (together with former Deputy Minister of Finance Mcebisi Jonas).

207 I will not deal with the details of the declaratory relief application, but believe that the founding affidavit by Minister Gordhan sets out the background that I have touched on in this section of my statement. However, the affidavits submitted by Oakbay's Ronica Ragavan, and the banks, are instructive. Mr Howa did not file any substantive affidavit himself, as (probably coincidentally), he resigned from Oakbay about three days after Mr Gordhan filed his application, citing health issues and on medical advice[97]. Ms Ragavan acted in his place as CEO in the days after his resignation.

FICA BILL ATTACKED AND REFERRED BACK TO PARLIAMENT

FICA Bill: Intervention by the Black Business Council and allies

208 Whilst Oakbay and the Zwane initiative were in process, we were still awaiting the response of President Zuma to enact the FICA Bill into law. As noted above, we had heard nothing from the Presidency since the Bill was submitted to his office by Parliament at the end of May or early June 2016. We first heard from media reports in early September 2016 that President Zuma was considering objections to the FICA Bill received from the Progressive Professionals Forum (PPF) and the Black Business Council (BBC). These organisations had neither

[97] https://techcentral.co.za/gupta-boss-nazeem-howa-quits/69277/

contacted the Minister of Finance nor National Treasury before submitting their objection to President Zuma, nor did they participate in any of the parliamentary or governmental consultation processes on the FICA Bill. A Bloomberg article dated 5 September 2016 reported:

> *"South African President Jacob Zuma is considering an objection to changes to the country's laws that will compel banks to more closely scrutinise their customers and their transactions. The challenge to the Financial Intelligence Centre Amendment Bill is being brought by the Progressive Professionals Forum, which "petitioned the president not to sign the bill, saying it has constitutional defects", Zuma's spokesman, Bongani Ngqulunga, said by phone on Monday. "He is considering those objections, whether they have merit or not. There is nothing unusual about the process."* [98]

209 On the same day, the Business Report published the following:

> *"The PPF is concerned the bill violates the human rights of people who are employed by the government, or family of state employees, because this makes them a prominent or influential person that immediately renders them a "suspect", PPF Secretary General Siphile Buthelezi, said by phone. "We are not saying the whole bill is not welcomed,"* [99] he said.

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[98] https://www.iol.co.za/business-report/economy/zuma-weighs-objection-to-law-on-bank-transactions-2064475

[99] https://www.iol.co.za/business-report/economy/zuma-weighs-objection-to-law-on-bank-transactions-2064475

210 Two weeks later, we learned from media reports of a meeting between President Zuma and the BBC held on 9 September 2016.[100] According to the article, the BBC met with President Zuma to show him support after the poor showing of the ANC in the local government elections on 3 August 2016. However, they also talked of lobbying President Zuma to not sign the FICA Bill into law. This they did before and after this meeting.

211 Mr Mzwanele Manyi led the charge against the Bill for both organisations. He was the chair of the PPF and a member of the executive of the BBC at the time. He was also a regular analyst on ANN7, together with Mr Tshepo Kgadima and other supposed "political commentators". Mr Manyi was known to be a strong defender of the Gupta family, and also had, via his Decolonisation Foundation, continually laying charges during August-October 2016 with the Hawks, or complaints to the current Public Protector, against former Ministers of Finance and officials of the Treasury, like Mr Trevor Manuel[101], Mr Gordhan[102] and Mr Kenneth Brown[103].

212 It is important to note that not once did President Zuma query or express any concerns with the Bill to the Minister of Finance or seek further information from him. President Zuma did not provide Treasury with the submissions objecting to the Bill to seek our response to such objections. Adv Van Schoor inquired from the Presidency's state law advisor whether the Presidency had received any

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[100] https://www.vocfm.co.za/black-business-pleads-with-zuma-to-stay/

[101] https://businesstech.co.za/news/trending/140849/hawks-take-aim-former-finance-minister-over-r1-billion-contract-report/

[102] https://sandtonchronicle.co.za/Inn/206386/manyi-opens-case-against-manuel-nene-and-gordhan

[103] http://www.treasury.gov.za/comm_media/press/2016/20161006 MEDIA STATEMENT ALLEGATIONS AGAINST CPO.pdf

submissions to President Zuma on the Bill, and whether we could be furnished with copies if there were any. Whilst the Presidency's state law advisor informally confirmed that some submissions had been received, they were unable to provide them to Treasury, which I found odd, as they would normally have done so. It was also surprising because I expected that any objection or input into any Bill would and should be made available to the public, given the constitutional principle of transparency. The Presidency's state law advisors appeared embarrassed that they could not provide us with these submissions. We had always worked well with them, and continue to do so today.

213 Given the above reports around the FICA Bill, and the unexplained delay in signing and communicating with us about any concerns, the Director-General of the National Treasury, Lungisa Fuzile, wrote to the Director-General of the Presidency in a letter dated 22 September 2016, annexed as Annexure **IM44**, expressing his concern regarding the delay, and pointing out that the Bill needed to be signed into law as soon as possible, as we still needed to prepare to have necessary regulations in place, all by the February 2017 FATF Plenary. Although he did not say it explicitly in his letter, we were also concerned that even if President Zuma had signed the Bill in September 2016, we still needed at least two months to consult the public and then revise and finalise the necessary regulations, even if they were ready for publication on the day the President enacted the law. Hence, we were unlikely to have the necessary provisions and regulations in force by the FATF meeting in February 2017, even if President Zuma had signed the Bill into law in September 2016.

214 The delay in signing the FICA Bill into law was by now widely reported on. For example, the City Press ran an editorial on 25 September 2016 posing the question "What is the real objection to FICA bill?" It noted that the main reasons appeared to be the BBC and PPF objections. It went on *"but these concerns, which the President is taking his own time to consider, appear spurious and mysterious*", and noted that the objection was "*to a specific group of people being singled out to have their accounts monitored. If there is nothing illegal happening in those accounts, what is the problem?"* The editorial also dismissed the argument that the Bill transferred "*...judicial authority from law enforcement agencies and the independent judiciary into the hands of banking and financial institutions*". The editorial correctly noted "*But the banks only have a duty to report suspicious transactions and to satisfy themselves before authorising such transactions*", and that the "*...outcry about superpowers for the banks is overstated, as they will continue to do what they are doing anyway, except to pay more attention to a defined group of individuals. We are either committed to the fight against corruption or not.*" (City Press editorial 25 September 2016) [104]

215 In early November 2016, the media reported that the Council for the Advancement of the South African Constitution (CASAC) had served legal notice around 19 September 2016 for President Zuma to finalise his response to the FICA Bill within 30 days in terms of his powers in the Constitution. When the 30-day period expired on 31 October 2016, CASAC approached the Constitutional Court for an order declaring that President Zuma had failed to perform his constitutional obligations and ordering him to either assent to and sign the Bill,

[104] https://www.news24.com/citypress/voices/editorial-what-is-the-real-objection-to-fica-bill-20160925

or, alternatively, to refer the Bill back to the National Assembly for reconsideration.[105]

216 President Zuma was also asked to respond, via a Parliamentary question from MP David Maynier, to which he responded around 8 November 2016, stating that he was considering objections received from the BBC and PPF, Annexure **IM45**. The Presidency did not make such letters of objection available to the Treasury or to Parliament or to the public. I am also not aware of any formal legal opinion that the Presidency may have secured to assess the objections.

Meeting between National Treasury and the BBC

217 I became aware sometime in November 2016 that Mr Sello Rasethaba of the BBC had approached the South African Reserve Bank (SARB) about their objection to the FICA Bill and he was referred by the SARB to my office. Mr Rasethaba and I were then in telephonic contact, resulting in an urgent and formal meeting on 15 November 2016 between the BBC leadership and Treasury (together with SARB and FIC) in Johannesburg.

218 The BBC was represented at the meeting by its then President Ms Danisa Baloyi, its Secretary-General Mr George Sebulela, Mr Sello Rasethaba and Mr Tshepo Kgadima (who arrived late, after I had made our presentation). Representatives from the Association of Black Securities and Investment Professionals (ABSIP) and the Banking Association SA (BASA) were also present. Even though ABSIP was a member of the BBC, it differed significantly from the BBC position (as

[105] https://mybroadband.co.za/forum/threads/zuma-faces-court-action-if-he-sits-on-banks-bill.843950/

noted later in Parliament on 25 January 2017). Government officials that were present included Deputy Governor Kuben Naidoo who was responsible for banking supervision at the SARB, Pieter Smit of the FIC, and Treasury officials Olano Makhubela, Dondo Mogajane, Raymond Masoga and myself.

219 The big concern they raised was on the concept of PIP, and its potential abuse by banks. We explained the rationale for the PIP concept, the FATF recommendations and processes, as well as the legislative framework in place to deal with any abuses by banks against customers. Mr Kgadima arrogantly stated with absolute certainty that the PIP clause in the Bill was unconstitutional. When I queried how he, like me, was not a legal practitioner, could say what he was saying, and whether they had a formal legal opinion to back up his opinion, they indicated they would send us a legal opinion. We also pointed out that the BBC or PPF could not override a Bill passed by Parliament, and queried why they had also not submitted comments to the SCOF when it invited public comments.

220 It should be noted that they did not send us any such legal opinion, and we only saw their "legal opinion" when they submitted a "legal" opinion to a parliamentary hearing in January 2017, done by a non-legal political analyst.

221 They also resorted to making unsubstantiated allegations of racial discrimination by the banks against black people and businesses, using their own personal experiences with their banks. Whilst we pointed out that this had little to do with the PIP concept, we invited them to provide concrete examples so we could see how such allegations could be taken up by the regulators, even though we had

to be mindful of bank secrecy limitations. We did not accept their point that only black people would be PEPs or PIPs. We pointed out that the key point to note was that the FICA Bill had been passed by Parliament, they provided no explanation for why they thought they could bypass the democratic process in Parliament and go directly to the President, and could provide no evidence or legal opinion to justify their views.

222 The most disturbing point for me during this meeting was when Mr Tshepo Kgadima confidently declared that President Zuma had decided to send the FICA Bill back to Parliament.[106] I was surprised that someone who was not in Government or the Presidency could claim to know what President Zuma would be doing, when we in Government did not. It indicated that Mr Kgadima, as a close confidant of the Gupta family (he was a regular "political" commentator on ANN7, defending the Gupta family), had such influence over President Zuma to delay the FICA Bill. I was also concerned that Mr Kgadima enjoyed the confidence of the then BBC leadership. He was not on their executive and was posing as their expert on a legal issue, as the BBC indicated that Mr Kgadima was the author of their written opinion (which they would forward to us).

223 It should be noted that neither of these organisations nor any of their members, made any submission to Parliament during the hearings for the FICA Bill in Parliament, or when the Treasury had requested public comments in 2015 before the tabling of the Bill. They did not approach Treasury or Parliament (for example, the Speaker or the Chair of SCOF), to raise their concerns. During the

[106] It was already known that Mr Kgadima had a chequered past with serious allegations made against him: https://ewn.co.za/2014/11/27/Tshepo-Kgadima-dropped-as-Petro-SA-chair

parliamentary hearings in 2015 and 2016, there were no constitutional issues raised, and no challenge against the clauses related to PIPs or warrantless searches.

President Zuma refers the Bill back to Parliament

224 Almost two weeks later, President Zuma did exactly what Mr Kgadima had told us President Zuma would be doing when we met with the BBC. President Zuma submitted a letter dated 28 November 2016 to the Speaker of the National Assembly in Parliament, referring the FICA Bill back to Parliament in terms of section 79(1) of the Constitution - Annexure **IM46**.

225 President Zuma did not alert Minister Pravin Gordhan beforehand, or seek his opinion, and did not send a copy of his letter to the Minister after sending his letter to the Speaker of Parliament. We had to obtain a copy of the letter from Parliament itself, after learning of the decision of President Zuma.

226 President Zuma's reason for referring the FICA Bill back to Parliament related to only one clause - clause 32(b) of the Bill which amended section 45B (1C) of the FIC Act dealing with warrantless searches. Contrary to the BBC's and PPF's objections, President Zuma did not raise, as his primary objection, the PIP clauses. The Presidency also did not provide Parliament or the Treasury, with any of the letters of objection it received on the Bill, or indicated on what basis President Zuma believed any clause was possibly unconstitutional.

227 The Speaker referred the letter of President Zuma to the Standing Committee on Finance (SCOF). The SCOF briefly discussed the letter of President Zuma on

7 December 2016, one of its last meetings for the year. The Senior Parliamentary legal officer advised the Committee as to what was legally expected of Parliament when the President referred a bill back to the National Assembly. The key point made by the Senior Parliamentary Legal Advisor was that the President could refer a Bill back to Parliament only on the basis of the constitutionality of any clause of concern and nothing else. After the presentation by the Parliamentary Legal Advisor, I briefed the SCOF on the challenges we faced with the coming FATF Plenary meeting in February 2017.

228 I also pointed out that the FICA Bill had been approved by Cabinet twice, once for public comment and secondly for tabling. The substance of the contested clause was essentially the same from the original bill submitted to Cabinet as far as I could recall, and it did not get amended in any material way (if at all) during the parliamentary process at SCOF nor in the NCOP. This provision had been reviewed and the Bill certified by the State Law Advisor before it went to Cabinet, and was not raised as a concern by Cabinet, nor when it was considered by Parliament. Please refer to the Parliamentary Monitoring Group record[107].

229 Early in 2017, Parliament's SCOF convened hearings on the FICA Bill in January 2017, and made minor amendments to the clause queried by President Zuma. The revised Bill was adopted by the National Assembly on 28 February 2017.[108]

230 Although we had a legal opinion from Adv Gauntlett SC, as well as the parliamentary legal opinion, both of which advised that the clause was not

[107] https://pmg.org.za/committee-meeting/23875/

[108] Public hearings were scheduled for 25 January 2017, and the committee met on this Bill again on 1, 15 and 21 February 2017.

unconstitutional, Treasury took the concerns raised by President Zuma in good faith, and tweaked the wording to accommodate such concerns. A revised FICA Bill with only one clause, to amend section 45B in the FIC Act via clause 32, was then adopted by the National Assembly on 28 February 2017 and sent to President Zuma for his assent.

231 Needless to say, we were now in hot water at FATF. The FATF Secretariat's follow-up report for the coming February 2017 Plenary meeting noted that the FATF President had cancelled a high-level visit for June 2016 "on the expectation that the FIC Amendment Bill would be enacted shortly". Considering that this expectation was not met, the Secretariat of FATF prepared a draft public statement for the consideration of the FATF Plenary, where FATF would state that it "*is deeply concerned by South Africa's continued failure to remedy the serious deficiencies identified in its second mutual evaluation report adopted in February 2009. The deficiencies relate especially to customer due diligence and record-keeping obligations of financial institutions…*", annexure **IM47**.

232 Fortunately, the SA delegation was able to persuade the February 2017 FATF Plenary to afford us a bit more time, given that SCOF had already adopted a revised Bill by then, and that the Bill was about to be voted on by the National Assembly, before going back to the President. We expressed our hope that by the next FATF Plenary in June 2017, the Bill would be enacted.

SECURITY CLUSTER INTERVENES TO AMEND FICA BILL

Security Cluster submits objections to SCOF – JANUARY 2017

233 Days before the 25 January 2017 meeting of the SCOF, the JCPS cluster suddenly, and surprisingly, formally submitted its own submission to the SCOF for its 25 January 2017 hearing, via a letter dated 23 January 2017 in the name of the Minister of Defence and Military Veterans, Nosiviwe Noluthando Mapisa-Nqakula, in her capacity as the Chair of the JCPS Committee - Annexure **IM48**.

234 The crux of their submission was that "the Bill would be inconsistent with the Constitution if signed into law in its current form".

235 Minister Gordhan and all of us from the Treasury, SARB and FIC working on the Bill, were surprised by this submission, as none of JCPS cluster Ministers had raised their newfound concern with Cabinet, nor with the responsible Minister, Mr Gordhan, nor even alert him to their letter, or intention to submit such letter to SCOF, and acted totally contrary to the way members of Cabinet ordinarily work and are expected to work. We obtained the submission from the SCOF.

236 This was an unprecedented step for any Minister, let alone the entire cluster of the Cabinet, to object to the legislature against a Bill that was previously approved by Cabinet and passed by Parliament. I am not aware of this having happened before or since, and to do so without going back to Cabinet first. This was a Bill that had been adopted by Cabinet after a series of meetings over almost a full year. Most of the JCPS cluster Ministers had attended most, if not all, the Cabinet or its committee meetings in 2014-15, and were certainly not

passive participants on the Bill. They did not take their newfound concern to Cabinet, and were now acting unilaterally to effectively reverse a Cabinet decision of which they were part.

237 At no stage at the many Cabinet or its committee meetings where the FICA Bill was considered, did any Minister object to the constitutionality of the Bill, or raise concerns regarding warrantless searches and the phasing out of the Counter-Money Laundering Advisory Council, which had not changed much during the Parliamentary process. Indeed, the only constitutional matter that had emerged on the drafting of the Bill was the clause on warrantless searches, which was guided by the judgment of the Constitutional Court in the *Auction Alliance* case. There were no constitutional objections to the PEPs or PIPs clause as I explain above. The Bill submitted to President Zuma for assent in May 2016 did not substantially differ from the original bill first submitted to Cabinet in 2014 for the clauses related to the Counter-Money Laundering Advisory Council, unlike the PEPs/PIPs clauses.

238 The JCPS Cluster letter did not have a formal written legal opinion to support its view, but instead their letter took the form of both an informal "legal" opinion although it was more of a political opinion in my view. Their letter purported to provide more detail on the concerns of President Zuma, by stating: "*The President is further concerned of the impact...would have on the rights of persons identified as foreign prominent public officials, domestic prominent influential person and family members and known associates of the abovementioned persons*". So, they were now also raising the constitutionality of the PIPs clause, despite the fact that this concept was extensively discussed,

and amended, by Cabinet. They claimed that all these clauses are discriminatory and therefore unconstitutional. They called for removing these clauses and concepts. It was also odd to me that they appeared to know more of President Zuma's concerns than the Treasury, and I wondered whether President Zuma had in fact discussed his concerns with the JCPS Ministers, when he did not do so with the responsible Minister, the Minister of Finance.

239 A further point raised in their submission is that the Constitution and national legislation give the security cluster the sole jurisdiction over all intelligence. In my non-legal view, they effectively questioned the very basis of the original FIC Act of 2001. After 16 years of the operation of the Act, they were of the view (without raising this at Cabinet in a formal memorandum) that the approach to financial intelligence was unconstitutional all these years. I believe that they wanted to take the FIC away from the executive authority of the Minister of Finance so that they in the JCPS security cluster could take control over it. Indeed the "I" in the FIC was deliberately misunderstood to be part of state-security type intelligence, rather than recognising other objectives like preventing the abuse of the banking system and maintaining the integrity of the payment system.

240 Minister Masutha emphasized his approach on the role of intelligence in the economy very directly when he told the ANC finance study group meeting on 24 January 2017 where I was present, that the security cluster was even more important that the economic cluster, as there would be no economy if the security (i.e. JCPS) cluster was not present to protect the economy. I provide more detail on the study group meeting below.

241 Indeed, this approach was also seen in the approach of the security cluster to the Border Management Authority, where the JCPS cluster was intent on fragmenting SARS and breaking up its customs and excise function, wanting to do so without any feasibility study to support their case. This had first been confirmed by the Cabinet meeting of 6 July 2016, which approved that the JCPS cluster reviews the separation of financial intelligence from civilian intelligence, following on the recommendation by Mr Zwane from his Ministerial task team investigating the closure of the Gupta banking accounts. I believe that this decision was aimed at transferring the FIC from the executive authority of the Minister of Finance to the Minister of Justice or Intelligence, to ensure that in the future, FIC information on STRs and Cash Threshold Reports (CTRs) from banks could be under their sole and full control, and to stifle any potential investigations against the Guptas and favoured politicians.

242 Their submission was also replete with "facts" that were actually false, and a simple check could easily have shown them to be not true, and every JCPS (and other) Minister would know they were not true. As an example, (in point 46), they claim that the JCPS security cluster was not consulted on the Bill, stating "*It is hence apparent that there was no consultation with institutions or persons listed as members of the Council, especially members of the Security Cluster who are seized with the detection, investigation and prosecution of money laundering and terror financing offences*". It can be verified that the JCPS cluster committee of Ministers was also invited to the Joint ESEID, JCPS and International Cooperation, Trade and Security (ICTS) Cabinet Committee on 3 December 2014, and JCPS Ministers were present at all four Cabinet meetings when the Bill was considered during 2014-15, as outlined earlier in this statement. In

addition, the National Intelligence Co-ordination Committee (NICOC) Principals were briefed on 26 September 2014, the JCPS DG cluster on 7 October 2014 before the Bill served at Cabinet.

ANC Finance Study Group intervenes to stop the Security Cluster

243 Given the letter from the JCPS cluster Ministers, which showed that there were now open differences on the FICA Bill within Cabinet, the Chairperson of SCOF, Mr Yunus Carrim, decided to convene a study group meeting of ANC SCOF members on 24 January 2017, to resolve the differences between Cabinet Ministers before the public hearing of SCOF the following day.

244 The study group is closed to the public and is a dedicated meeting of ANC MPs who are members of SCOF, where the Minister or Deputy Minister are often invited, together with any invited guests or presenters (e.g. from the department). In this instance, the JCPS cluster Ministers were invited, together with Deputy Minister Jonas and myself.

245 Ministers Mahlobo and Masutha led the JCPS cluster delegation at the ANC Study Group meeting held on 24 January 2017, accompanied by the Secretary of Defence, Dr Sam Galube, and the advisor to the Minister of Justice, Mr Prince Maluleke. Deputy Minister Jonas was present for the start of the meeting, but could not stay to the end as this meeting started quite late because of delays in the flights of the JCPS Cluster Ministers. Mr Jonas was present to hear the two Ministers make their initial presentations.

246 Mr Mahlobo admitted that he and Minister Masutha had raised issues on the Bill at Cabinet and its committee meetings in 2014 and 2015, but not on its constitutionality, as they had focused on the PEPs and PIPs issue and other issues, and not on the inspection's clause. He claimed that this was therefore a new issue for the JCPS cluster, ignoring the fact that all the Cabinet memoranda in 2014-15 had covered this clause and referred to the Constitutional Court judgment in the *Auction Alliance* case, so he could hardly claim that they were unaware of the issues related to this clause. Mr Mahlobo also made some startling allegations, not covered in their written submission. He claimed, without providing any evidence, that banks were going into clients' bank accounts illegally and covertly. He also claimed, again without providing any evidence, that the FIC was collecting information covertly, and they (i.e. he or his department or JCPS cluster) have a list on who it was that collected such information. Again, they provided no evidence, nor did they alert the Minister of Finance of such alleged abuse of power.

247 Minister Masutha then addressed the meeting, saying that they had a legal opinion, and that this matter had only come to their attention the previous week. The essence of their submission was with respect to the Constitution and on the rule of law. He admitted that they may have been "sleeping" at the time when Cabinet was considering this bill, and that they did not realize the Bill phased out the Counter-Money Laundering Advisory Council in the FIC Act. They now had four key objections to the Bill. The first was on chapter 13 (Finance) vs Chapter 11 (Security) of the Constitution on the delineation of powers. He stated that there was also the problem of the judiciary vs legislative powers and the allocation of powers and functions to financial institutions vs security institutions.

Chapter 13 of the Constitution dealt with powers and functions to financial institutions, and chapter 11 to security institutions.

248 His second key problem related to the checks and balances required by the Constitution in terms of cooperative governance relations. He wrongly claimed that the Counter Money Laundering Advisory Council had not met since 2002, and claimed it opened the Minister of Finance to a "mandamus" order, whatever he meant by this. He claimed that the bill kills the only mechanism that enabled cooperation between the financial and JCPS security clusters, and removing the Council would end the requirement to co-operate. He said something like: "*You as an economic group can think that the economy takes priority and you are more important (than the security cluster), but there will be no economy without the security cluster.*"

249 The third problem that he articulated was that the Bill effectively turned inspectors into policemen by allowing for warrantless searches.

250 Minister Masutha's comments at the meeting, like the submission, were simply incorrect, and deliberately so in my view, to mislead. It was not correct to say that there had been no meeting of the council since 2002, or that the Bill empowered inspectors or banks to play the role of the police. It was very clear that the Minister of Justice had not really applied his mind to the Constitutional Court judgment that informed the drafting of the clause on warrantless searches by inspectors.

251 The ANC SCOF MPs present at the study group meeting were not impressed by the two Ministers, and told Minister Masutha that he was out of order, and pointed out to him that issues related to finance vs security was a matter for Cabinet and

not the portfolio committee. It was pointed out that if the banks or the FIC had acted illegally, they should have taken appropriate action, yet they had not. They also pointed out that the committee had had thorough discussions on the warrantless searches clause, and rejected Minister Masutha's objections. The Chair challenged Minister Masutha to answer two questions:

251.1 How is it that the Constitutional Court did not rule that the power is unconstitutional, but in fact guided how the clause should be crafted?

251.2 Is government going to remove this power of warrantless searches from all other legislation aside from the FIC Act?

252 The ANC Finance Study Group emphasized that they did not agree with the points on constitutionality that Minister Masutha had raised. They told him that they had properly applied their minds to the issues that he was raising when they considered the bill. They in fact pointed out that this submission made by the JCPS cluster was embarrassing, and requested it be withdrawn and not serve on the agenda the following day.

253 There was mention of a meeting that the JCPS cluster Ministers claimed was organized with the Minister of Finance for that Thursday, where they indicated that they would be raising the issues in their memo. Neither Mr Jonas or I were aware of that meeting, and neither had they formally provided their memo to us (which we obtained via Parliament). It was Mr Carrim who ended up arranging the meeting two days later, on Thursday 26 January 2017, on the sidelines of the ANC Lekgotla.

Parliamentary SCOF Hearing and Revision of FICA Bill clause

254 The SCOF meeting the following day on 25 January 2017 was (as is the norm) open to the public and was very well attended, having more people than at any of its 2016 hearings for the FICA Bill. The BBC and PPF were present, as were many NGOs like CASAC and Corruption Watch who had also made submissions, as were we as the relevant officials from Treasury and the FIC. The JCPS Cluster Ministers did not attend, but some of their officials did, and their submission was not discussed as it had been withdrawn. However, the withdrawal of their memo was not conveyed to the parliamentary staff, who had already printed copies that were available to MPs and members of the public. Those present at the start of the meeting were able to secure copies of their memo, including journalists.

255 There were at least two teams of SCs who presented, including Adv Gauntlett for Treasury, Adv Semenya and Adv Steven Budlender for the Speaker of Parliament, the Senior Parliamentary Advisor, counsel for the FIC, and legal advisors to some of the NGOs, including Adv Michelle le Roux. The PMG record provides a good summary of the discussion that day, which focused on the constitutionality of the disputed section 32 of the Financial Intelligence Centre Amendment Bill [B33B-2015] due to President Zuma's concerns about the constitutionality of warrantless searches by inspectors.

256 I will not deal with this hearing, but would recommend following the discussion as reported on the PMG website, and which I attach as a footnote.[109] The

[109] https://pmg.org.za/committee-meeting/23875/

meeting heard the submissions by the various legal counsel who had advised National Treasury, Parliament and the FIC, and heard the objections by the BBC and PPF, as well as those who supported the Bill strongly, like Corruption Watch, CASAC, Banking Association SA, as well as a member of the BBC, Association of Black Securities and Investment Professionals (ABSIP), which differed with the BBC and supported the Bill. Interestingly, both the BBC and PPF raised their concern on the unconstitutionality of the FICA Bill, but did not provide a proper legal opinion (its opinion was found to be more of a political opinion at the next[110] hearing on 1 February 2017). It raised its concern on the implications of the Bill on ordinary hardworking black business people, and its President Ms Baloyi indicated that some of the accounts of its members had also been closed by banks. Mr Manyi, representing the PPF, supported the BBC's submission, but stated that his objection was that the Bill was dealing with Chapter 11 (Constitution) issues of the security cluster, and that the investigative function was to be given to private sector banks. He also objected that the PPF and the BBC were being insulted and referred to as supporters of a criminal syndicate by a Member of Parliament. He also stated that those who fund or donate to the ANC would be implicated by the FIC as PEPs.

257 It was the behind-the-scenes ANC meetings that assisted in resolving the political objections from the JCPS cluster, and the important role played by the ANC Study Group in dealing with their objection both the day before, and then after, at the follow-up ANC meeting convened by Mr Carrim (and not the JCPS cluster of Ministers) the following day on 26 January 2017 on the sidelines of the

[110] https://pmg.org.za/committee-meeting/23907/

ANC Lekgotla at St George Hotel. The meeting was held during the lunch break, and was attended by the JCPS Ministers (Defence, Justice, Intelligence), Secretary of Defence (and other officials), the Minister and Deputy Minister of Finance, MPs Yunus Carrim, Pule Mabe, DG Fuzile and myself, and a few other officials who I do not remember. We did not have the time to discuss any substantive issues, but focused on matters of process. The Minister of Defence who chaired the JCPS cluster stated the objection of the cluster was that inspectors had wide-ranging powers, and that she had spoken to the Minister of Finance whom she said had said we should meet to discuss their proposed amendments. They also agreed that legally, they could not raise all the other issues they wanted to raise (as they now accepted that Parliament could only amend the clauses mentioned in the referral letter of President Zuma in his letter to the Speaker of Parliament). They agreed that the Bill should not be further delayed, that our legal teams should meet to sort out the wording for the warrantless searches' clause.

258 Minister Mahlobo still raised what he said were substantive issues on the powers of banks and that he was aware of abusive practices by banks (which he had raised in the Study Group meeting), but indicated that it was not for the current amendments, and that the two clusters should work jointly to resolve these issues through future amendments. Minister Masutha claimed they had 5 legal opinions, and we needed to work through the issues to prevent legal action on the signing of the Bill. To this day, I have not seen a single one of those opinions.

259 The officials were then directed to finalise the wording of the inspection clause, which I led. This was the wording that was then presented to SCOF, for its

consideration at its 1 February 2017 meeting. As we ended this meeting, Mr Fuzile noted his concern that the JCPS cluster appeared to be led on this Bill by ANN7 and Mr Manyi on behalf of the Gupta family. Incredibly, the JCPS cluster Ministers did not respond to his statement, nor told him that he was out of order.

260 We then met as officials on Friday, 27 January 2017, where we reached agreement around the Gauntlett opinion which proposed small amendments for changing the wording in the clause, to submit to SCOF for its consideration. We presented this proposal to the SCOF meeting of 1 February 2017, discussed it again on 15 February 2017 and it was finally adopted by SCOF on 21 February 2017. The National Assembly passed the Bill on 28 February 2017 and submitted it almost immediately for assent by the President.

261 After firing Mr Gordhan on 30 March 2017, President Zuma signed the Bill into law on 26 April 2017 as FIC Amendment Act 1 of 2017. We were surprised that President Zuma did not delay further on the signing. I believe he probably did so since Mr Gigaba was now the Minister of Finance.

262 To summarise, it took two-and-a-half years for the FICA Bill to be signed into law, from the first time we submitted to Cabinet around 3 October 2014 to 26 April 2017. We were lucky after such a long process after tabling, that we were able to get off the FATF targeted follow-up list at its meeting of November 2017 in Buenos Aires.

263 However, the drama around the Bill was not over even after President Zuma finally signed the Bill into law on 26 April 2017. The provisions of this new Act still required the Minister of Finance to gazette their commencement date. As I

will show below, before he could proceed with the gazetting, Mr Masutha and Adv Abrahams approached Minister Gigaba to stop him from bringing the Act into operation.

Enter Advocate Shaun Abrahams at FATF Plenary

264 Adv Shaun Abrahams started showing a sudden interest in the FIC, FATF and the FICA Bill in December 2016, when he registered his objection to a one-year extension of the contract of the FIC Director, after he was consulted via email as a member of the Counter-Money Laundering Advisory Council. He stated that he did so because the Council was not functioning. He then attended a formal meeting of the Council that was convened in January 2017, chaired by Deputy Minister Jonas, where he repeated his objection. (Please refer to Annexure **IM49**).

265 We took Adv Abrahams' objections in good faith, as we generally welcome critical comments more than praise, as it provides a good feedback mechanism, and were happy to have him actively involved in the anti-money laundering process. As the official responsible for assisting the Ministry to convene meetings of the Counter-Money Laundering Advisory Council for the Ministry, I was not aware of Adv Abrahams (or any member of the JCPS Cluster) ever calling for meetings of the Counter-Money Laundering Advisory Council previously, including after Adv Abrahams was appointed as NDPP in 2015. Neither was I aware of Adv Abrahams showing any interest in FATF or the FICA Bill before 2017. I am not aware of any engagement he may have had with National Treasury over the FICA Bill before then. He may have had some exposure to the FICA Bill as a member of the JCPS DG Cluster, when we briefed its meeting on 7 October

2014. I also do not remember receiving any written submissions on the FICA Bill from any Minister, DG or head of any agency like the NPA, SARS or Hawks in the JCPS cluster, from the time it was first circulated at Cabinet and whilst in Parliament. But better late than never, if the JCPS Cluster was now showing more interest in the FICA Bill.

266 At this January 2017 meeting of the Council, we discussed the upcoming FATF Plenary in February 2017, where we faced a tough hurdle after the further delay in enacting the Bill, due to President Zuma referring the Bill back to Parliament. By now, the FATF was exasperated by SA continuing to fail to address the 2009 deficiencies, and on our promises that the FICA Bill would have taken effect by February 2017. We had reported great progress at the June 2016 FATF Plenary, given that the Bill had been passed by both Houses of Parliament, and were only awaiting the assent of the President.

267 The referral of the Bill by President Zuma back to Parliament on 28 November 2016 now put SA in real danger of being named and shamed for continuing to delay on enacting the Bill. The FATF Secretariat had circulated a draft public statement to all member countries and jurisdictions, for consideration at the Plenary. The draft statement expressed the FATF Plenary's deep concern by *"South Africa's continued failure to remedy the serious deficiencies identified in its second mutual evaluation report adopted in February 2009. The deficiencies relate especially to customer due diligence and record-keeping obligations of financial institutions…".*

268 Adv Abrahams indicated at this Council meeting that he would be personally attending the coming FATF Plenary to support us, together with the NPA's regular representative, Adv Malini Govender. Treasury and FIC were pleased that the NPA was stepping up its involvement to support us at the coming FATF Plenary.

269 After landing in Paris, I accompanied Adv Abrahams to a courtesy visit to the SA Ambassador in Paris the night before we were to defend SA at FATF. We were working together to defend SA at FATF. But I was then surprised when Adv Abrahams expressed his opposition to the PEPs concept in the FIC Amendment Bill, soon after we started chatting to the Ambassador. He explained that he felt that the Bill was unfairly targeting politicians by introducing the concept of PEPs, which he also claimed was unconstitutional. I could not believe that a member of our delegation to FATF was now raising such a fundamental objection, knowing that it was an international FATF standard we were expected to implement. He had never expressed this view to the Treasury before, and even if he had, there was not much we could do about it, as it was a FATF standard.

270 I was also surprised because I had expected that as a crime-fighter, he would have instead welcomed this new power to deal with corruption. I responded to his comment immediately, saying that we had very clear legal opinions from top constitutional senior counsel (as was just discussed exhaustively with the SCOF in Parliament on 25 January 2017) on the constitutionality of the FICA Bill.

271 The following day, Mr Pieter Smit and I represented SA, and successfully managed to postpone the sanction and secure a further extension from FATF,

given the progress we had made at SCOF on the FICA Bill. Our delegation was in a celebratory mood after securing this further extension.

272 Advocate Abrahams and I then met for about an hour after the meeting, outside the conference room. I wanted to talk to him about the Public Protector's recently released State of Capture report and the reports that Treasury had on suspicious Eskom coal contracts, but Adv Abrahams indicated to me that he had not read the Public Protector's Report, and that Adv Govender was going to brief him the following week on the report. I offered to arrange a meeting for Treasury to brief him on the reports we had. Instead of welcoming evidence of possible corruption at Eskom, Adv Abrahams was more interested in speaking about Minister Pravin Gordhan and that he thought he still had a case to answer, and why he thought the Minister did not like him. I told him I was not interested in discussing his issues with Mr Gordhan. After much effort to get him to focus on corruption and state capture, he promised to follow up with Treasury after he was briefed on the State of Capture report.

273 By the time I left Paris that night, I had a sense that Adv Abrahams was not really interested in supporting the FICA Bill nor in complying with FATF standards. And that he had no real interest in following up on the many allegations of serious corruption at our state-owned entities. I began to realise that perhaps he was only beginning to show an interest in the FICA Bill after Mr Gordhan had made public the FIC Certificate outlining the 72 Gupta suspicious transactions when he sought a declaratory order at the Gauteng High Court after the closure of Oakbay's bank accounts.

Minister Masutha and Adv Abrahams Try and Stop the FICA Act taking effect

274 Soon after, Mr Gordhan was fired as Minister of Finance, and after President Zuma had signed the FICA Bill into law on 26 April 2017, I was requested to attend a meeting on the FIC Act on 29 May 2017 between Minister Gigaba and Minister Masutha. Minister Gigaba had been briefed on the FICA Bill process on the very first Monday, 3 April 2017, after his appointment and again on 9 May 2017.

275 I understood this meeting was requested by Minister Masutha, and the meeting was held at the Treasury offices. Minister Gigaba was supported at the meeting by his own staff, as well as Adv Empie van Schoor and I from Treasury, and Mr Pieter Smit from the FIC. Minister Masutha was accompanied by Adv Abrahams only. I wondered why he had not brought his Director-General or another official from his department, since it is the department and not the NPA that is responsible for policy and legislation.

276 The Minister of Justice started by stating that his concern about the lack of progress on illicit financial flows. He claimed he had raised this with the previous Minister of Finance Mr Gordhan at both the August 2016 and January 2017 Cabinet lekgotlas. He repeated his concerns with the FIC Amendment Act, including:

276.1 the constitutionality of the PIPs provision;

276.2 the role of the banks and his belief that their prerogative in drawing up lists of PEPs could undermine individual rights; and

276.3 the need for greater co-ordination within the JCPS cluster given that the FIC would now be playing a law enforcement role.

277 He did not explain why he thought the FIC would be playing a law enforcement role, given that the FIC Amendment Act did not give them this power. He suggested that the new Act failed to deal with illicit financial flows and the billions leaving our shores as a result of financial crime activity. He elaborated on the need for better collaboration between the JCPS cluster and the economic clusters, and that this should be done by reviving the Counter Money-Laundering Advisory Council through an amendment to the FIC Act. They therefore wanted to delay the commencement of the FIC Amendment Act until it was amended to restore the Counter-Money Laundering Advisory Council.

278 It was surprising that he was now trying to stop or delay implementation of the new FIC Amendment Act. This was despite the agreement at the meeting held on the sidelines of the ANC Lekgotla on 31 January 2017 (outlined earlier), which he had attended, and where it was agreed that the issues raised by the JCPS cluster should be dealt with through a different process including going to Cabinet first.

279 I was also skeptical about the new interest that the JCPS cluster was now showing about illicit financial flows, as they had showed no real interest in participating actively in the many public hearings on illicit flows convened by Parliament's three parliamentary portfolio committees (SCOF, Trade and Industry, Mineral Resources) in 2015, 2016, and 2017. Both the NPA and SAPS

(Hawks) attended the 2017 hearing for the first time, and were not able to show how they were dealing with illicit flows[111].

280 We explained that the phasing out of the Counter-Money Laundering Advisory Council was because it was no longer a functional structure, as it involved both public and private sector players in one forum, so confidential enforcement matters could not be discussed between the security and financial clusters. It was pointed out that, in fact, we wanted to establish a separate and dedicated consultation forum only for government departments and agencies, and a second but separate consultation forum with the private sector.

281 Adv Abrahams followed by stating that in some countries the head of their financial intelligence units (equivalent FIC body) has a direct link to their President on critical issues, and everything must go through Cabinet. He stated that we should be sending only very senior people to FATF. He requested the Minister to appoint a chairperson for the advisory council so that it could commence its work.

282 Both Ministers Masutha and Gigaba corrected Adv Abrahams to not confuse administrative and policy issues, pointing out to him that such administrative

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[111] The Parliamentary Monitoring Group (PMG) report on this meeting notes:
"The Hawks Head of the Commercial Crimes Unit of the South African Police Service (SAPS) was not able to present on its requested brief. The Committees expressed disappointment that SAPS was unable to answer the questions on IFFs cases referred to SAPS for further investigation…. They asked SAPS to give the current status of specific investigations captured in the Minister of Finance affidavit; if it had received any complaints about cash in transit from SA to Dubai and if it had names of people that were taking money from SA to Dubai. SAPS was asked what made it difficult monitor IFFs and cash in transit at airports and what had been the role of SAPS in stopping this. Members asked SAPS to give updates on the case against the Gupta family, state its relationship with FIC in the enforcement of laws dealing with financial crime, as it seemed SAPS was ill equipped to enforce such laws".
The National Prosecuting Agency (NPA) was also not able to report on specific cases, and instead focused on "identified systemic weaknesses".

issues don't go through Cabinet. Where an administrative process or structure fails, the matter should be escalated to the responsible Ministers. Mr Masutha indicated that if the level of representation at FATF was an issue, it is for the Ministers to resolve (i.e. not Cabinet).

283 At some point in the meeting, I raised the problem of a lack of enforcement on suspicious transactions, like the 72 listed in the FIC Certificate in relation to the Gupta family, and suspicious transactions related to state-owned entities like Eskom, which were also illicit flows, and said that I was still waiting for Adv Abrahams to contact the Treasury after our discussion in Paris.

284 Minister Masutha responded that the matter of the 72 transactions, the statutory role of the FIC, the role of banks in designating PEPs and of banks closing accounts were before the courts, which I took to mean that therefore we could not discuss whether these transactions were being investigated. His response confirmed to me that he had no appetite to deal with the many illegal transactions related to the Gupta family, including the "illicit flows" by state-owned entities to Gupta-associated companies in Hong Kong and Dubai.

285 Minister Gigaba became impatient with their unconvincing request to delay the commencement of the Act, and responded by saying the issues they were raising were not difficult at all. He stated that the National Treasury would consult them on the draft gazette before its publication. I suggested that the Ministers leave us as officials, to resolve some of the technical issues related to the draft gazette.

286 Once the two Ministers left the room, we continued the meeting as officials. Treasury officials Olano Makhubela and Raymond Masoga joined Adv Empie

van Schoor, Pieter Smit and myself, and Adv Abrahams, who was on his own. I started off the meeting by saying to Adv Abrahams that with respect, the legal issues raised by his Minister were not valid, and had been rejected in Parliament, and the Bill was now enacted into law. I also asked him why they wanted to delay the commencement of the Act. I asked him why he had not come back to Treasury and followed up on our discussion on the corruption at Eskom and state capture, as he agreed in our discussion on the sidelines of the FATF Plenary meeting in Paris in February.

287 I raised my points quite strongly, because I was by now frustrated by the persistent attempts to stop, initially the Bill, and now the Amendment Act, in contrast to the lack of focus on the obvious grand scale corruption that was happening. Adv Abrahams was initially defensive, telling us that they were busy with investigating a number of cases. At some point he became irritated at my questions and he stood up, telling me that he did not like my attitude. I asked him to sit down and stop being dramatic, and focus on the job our Ministers had left us to do. He continued telling me he does not like my attitude, and walked out of the meeting, forgetting his bag, prompting one of our staff to run after him to give it to him.

288. Following his walk-out, he sent me a sms text message with his email address to send the draft gazette, which we duly did. In response to his text, I expressed my hope for an apology for his behaviour at the meeting. My text read as follows: -*"I also await any follow-up on any enforcement issues, as you indicated at the meeting on Monday. Whilst I was hoping you would have apologized in your sms that led to an abrupt ending of the meeting, rest assured we always act*

professionally at the Treasury and hope we both ensure there always mutual respect when relating to each other. I am happy to talk on any issues of concern and look forward to working with you to take matters forward." He responded by saying *"There will be no apology forthcoming from me. Your understanding of professionalism leaves me speechless and your arrogance has no bounds. This is regrettable. Fortunately, you are only a DDG. Don't forget that!". (Please refer to Annexure **IM50**).*

289 I did not respond to his sms, and waited for his comments to the draft commencement notice. Neither he nor the Minister of Justice sent us any comments, and so Minister Gigaba notified Minister Masutha in a letter dated 9 June 2017 of his intention to proceed with gazetting the commencement notice later that week, given the need to strengthen our anti-money laundering system, and to avoid any further negative steps from FATF. He noted that the agreement in the meeting of 29 May 2017 was not to unduly delay the implementation of the FIC Amendement Act, and the need to create better consultation and co-ordination mechanisms within government (via an interdepartmental AML/CFT committee) on the one hand, and a second consultation mechanism with private sector institutions. He also indicated that he had requested the Acting Director-General to convene the first interdepartmental committee without delay. (See Annexure **IM51**).

290 The commencement notice for the FIC Amendment Act was then published on 13 June 2017 in Government Gazette No 40916 Notice No 563, with some provisions taking immediate effect, some later on 2 October 2017 and thereafter. The Treasury and FIC also published a document outlining the new approach to

combat money laundering and terrorism financing, as well as a roadmap on implementation. These documents are available on our website, which I note in the footnote[112].

FATF finally takes South Africa off its targeted list

291 SA was finally taken off FATF's targeted follow-up list at its 1-3 November 2017 Plenary in Argentina, after the FIC Amendment Act came into operation, with some provisions coming into effect on 13 June 2017, and other provisions coming into effect on 2 October 2017.

292 The FATF Secretariat noted in its report (Mutual Evaluation of SA: 14th follow-up note) that: *"South Africa has made clear and substantial progress by issuing subsidiary legislation to consolidate the changes made in the FIC Amendment Bill and to address the remaining deficiencies. The Secretariat analysed these measures to determine whether removing South Africa from the targeted follow-up process is justified, and is of the view that this is a borderline case. On that basis, delegations are asked to independently review the analysis and consider the progress made to determine whether South Africa has reached a level of compliance for old R.5 that is substantially equivalent to largely compliant, or should otherwise be removed from the targeted follow-up process taking into account that it has already started preparing for its 4th round mutual evaluation which begins imminently (the TC annex is due in May 2019)."* Annexure **IM52.**

[112] http://www.treasury.gov.za/legislation/regulations/FICA/

293 Fortunately, though we were still deemed to be 'borderline' by the Secretariat, the Plenary was more generous and removed SA from the targeted follow-up process, three years from the time we first submitted the **Bill** to Cabinet. We had been needlessly delayed by President Zuma, the security cluster and other deployees of the Gupta family, who decided to stop or delay the FICA Bill.

294 It should be noted that later in the year, Mr Gigaba appeared to get cold feet, and I suspect he must have been put under further pressure from some of the JCPS Ministers, as without discussion with any of the Treasury or FIC officials involved with the FIC Act, he requested the department to amend the definition of prominent persons in 2018 to also include all businesses, when he noted in a memorandum on coming legislation:

> *"We should invoke FIC Amendments to include the advisory council, as well as the inclusion of private business not doing business with government".*
> (11 Sept 2017 memo on 2018 legislative programme) - Annexure **IM53.**

295 The cost of the long delay in enacting and the commencement of the FICA Bill not only meant that our anti-money laundering system remained weak, but also that our capability lags behind most G20 and other FATF countries. Indeed, we are currently going through our third Mutual Evaluation process. I have no doubt that after this Review, we will have to take much stronger steps to meet the minimum FATF standards we have committed to. It is in our own interests to do so.

GUPTA ASSOCIATES TRY TO BUY A BANK

296 It was reported in the media around 23 June 2016 that the CEO of Oakbay Investments, Mr Howa, had approached the General Secretary of the National Union of Mineworkers (NUM) to buy a majority share in a bank called Ubank owned by Teba Fund Trust, which is administered by the NUM and the then Chamber of Mines (now called the Mineral Council South Africa). The then General-Secretary of the NUM, David Sipunzi, confirmed this to the media:

> *"We have been approached unofficially about selling UBank to Oakbay. (Oakbay Investments CEO) Nazeem (Howa) called me and I told him what our stance is and the official channels he should follow," Sipunzi told the Star.*
>
> *"Our stance is that UBank is not for sale. We'll take all the necessary means to finance the recapitalisation; selling would be the last resort." (Business Day Article June 2016)* - Annexure **IM54**.

297 The NUM General Secretary also confirmed in the NUM statement that Oakbay had donated R1 million to the NUM to cover the costs of its central committee meeting at the time.

298 Since both the NUM and the Chamber of Mines refused to sell their shares to Oakbay, there was no formal application to purchase Ubank from Oakbay for approval to the Reserve Bank.

299 A few months later, around September or October 2016, I became aware that Vardospan, a company linked to Gupta-associate Mr Salim Essa, submitted an application to the Registrar of Banks to acquire Habib Overseas Bank Limited (Habib), after concluding a Share Purchase Agreement with the controlling shareholder Pitcairns Finance S.A. - Annexure **IM55**.

300 Vardospan was a newly incorporated company that had been established in 2016 and was jointly-owned by Pearl Capital Group Holdings (Pty) Limited (Pearl Capital) with an interest of 33.33 per cent and CINQ Holdings (Pty) Limited (CINQ) with an interest of 66.67 per cent. Pearl Capital was wholly-owned by Mr Hamza Farooqui while CINQ was wholly-owned by Mr Salim Essa. Additionally, both Mr Salim Essa and Mr Hamza Farooqui were the sole directors of their respective companies. Since they were applying for a controlling 100 per cent of the shareholding in Habib, Mr Essa's CINQ would have indirectly been the major shareholder in Habib Bank.

301 While Mr Farooqui denied any link to the Gupta family in media reports, Mr Essa was well-known as a central player in the Gupta business scheme.

302 Both Pearl Capital and CINQ themselves were only established in 2016 and had at that time not been involved in any banking or other business, other than their investment in Vardospan. Vardospan had indicated to the Registrar of Banks that both Pearl Capital and CINQ did not have any financial statements or management accounts and nothing could be ascertained about the companies' financial track-record.

303 According to the Vardospan's application, the subscription price that was to be paid by the shareholders of Vardospan was approximately R327.3 million, with a further capital injection of R150 million into Habib bank. As at December 2016, Habib Bank's total assets and liabilities amounted to about R1.13bn and R1bn respectively. The bank posted a profit of about R79 million for the same period.

304 Owning a bank requires the significant shareholders to be both fit and proper, and confirm that the source of their funds are legitimate. Banks, unlike other businesses, often need capital injections from their shareholders. Therefore, anyone owning a significant share, deemed to be more than 15% of shares in a bank, in terms of our law, must have actual capital on hand that is not borrowed or otherwise encumbered, to buy such a significant share. You cannot borrow from one bank to buy the shares of another bank, if the share is significant. For all these reasons, any ownership of equity above 15% required (and still requires) the approval of the Registrar of Banks (now the Prudential Authority), and above 75%, also of the Minister of Finance. I outline the actual legislative powers below[113].

305 The application was made in terms of section 37(2)(a)(iv) of the Banks Act 94 of 1990 (the Banks Act), read with section 37(2)(c) of the Banks Act. In terms of section 37(2), the then Registrar of Banks (now Prudential Authority) is required to first approve the application, and if it involves the acquisition of more than 49 per cent of shares in a bank or its controlling company, the consent of the Minister of Finance is also required.

[113] Section 37 (2) (a) Banks Act 94 of 1990

306 The legal requirements in terms of which the Minister must assess this application are set out in section 37 4 (a) and (b) which states that:

> *"Permission in terms of subsection (2) for the acquisition of shares or the voting rights in respect of the issued shares in a bank or controlling company shall not be granted unless the Registrar or the Minister, as the case may be, is satisfied that the proposed acquisition of shares or the voting rights in respect of the issued shares –*
>
> *(a) will not be contrary to the public interest; and*
>
> *(b) will not be contrary to the interests of the bank concerned or its depositors or of the controlling company concerned, as the case may be."*

307 In January 2017, the Minister received a letter from the Registrar of Banks on Vardospan's application to acquire a 100 per cent shareholding in Habib Bank. A slightly revised letter (with minor corrections to the above referenced letter) was received on 6 February 2017. This request to the Minister was in terms of section 37 of the Banks Act.

308 During the same month, the Competition Commission announced that it had unconditionally approved a merger between Vardospan and Habib Bank.

309 The Registrar recommended to the Minister to decline the proposed transaction by Vardospan to acquire Habib Bank. The Registrar's recommendation was made on the basis of a number of reasons that were set out in the correspondence to the Minister.

310 A meeting between Treasury officials and the Bank Supervision Department of the SA Reserve Bank to discuss the application by Vardospan was held on 8 February 2017 at the National Treasury offices.

311 Subsequent to the aforementioned meeting, Treasury wrote to the Registrar on 9 February 2017. The letter sought further clarity on a number of issues pertaining to the Registrar's submission. The Registrar responded to Treasury's letter (dated 9 February 2017) on 6 March 2017 and further on 29 March 2017.

312 While the South African Reserve Bank and the National Treasury were still busy with the processing of the application, Vardospan approached the High Court in March 2017, on an urgent basis, to force the SARB to make a decision on whether the group were authorised to make the purchase.

313 It appeared that like Mr Zwane, Vardospan assumed that they were entitled to get a quick approval, and saw no need to provide critical information on Vardospan, like its financial statements, to enable the Registrar of Banks to properly assess their financial capacity and integrity, including whether they were fit and proper and that the sources of their funding were legitimate, as is the norm for all bank applications and acquisitions.

314 The DG of National Treasury filed an affidavit to respond to the Vardospan application, as did the SARB. The Pretoria High Court struck down this urgent court application on the grounds that it lacked urgency.

315 Further correspondences were exchanged between the National Treasury and the Registrar of Banks until 29 March 2017 when the application was formally considered closed.

316 On 30 March 2017, Minister Gordhan was fired as Minister of Finance by President Zuma.

317 I would like to point out to the Commission that the attempt to buy Ubank coincided with the time when Mr Zwane first submitted a memorandum to Cabinet on 22 June 2016 to weaken the banking licensing requirements, which Cabinet adopted at its next meeting on 6 July 2016. The Vardospan application was submitted to the Reserve Bank a day before Minister Zwane's 1 September 2016 media announcement, where he announced that the SARB and Treasury should be investigated because the bank licensing process was too burdensome. I leave it to the Commission to investigate whether this was just mere coincidence or not, and whether Mr Zwane wanted to weaken our financial regulatory laws and have a judicial inquiry against the SA Reserve Bank and National Treasury to enable Gupta associates to buy a small bank so that they could continue with their suspicious transactions.

318 I suspect that by then, the Gupta family knew that they could control such a bank to NOT file suspicious transaction reports and cash threshold reports with the FIC and any other agencies that they did not control. This was already the case with the Bank of Baroda, which though they did not own it, clearly looked the other way for the many years they were the bankers for the Gupta family. The Prudential Authority of the SA Reserve Bank fined the Bank of Baroda

R400 000 as an administrative sanction for non-compliance with certain provisions of the Financial Intelligence Centre Act in August 2019, related to a five-year on-site inspection of the bank commencing in 2014.

319 This fine against the Bank of Baroda pales into insignificance when compared to the fines imposed by overseas authorities. It merely reflects the need to tighten our sanctions mechanism, so that it acts earlier, and leads to significantly higher fines and other sanctions. I believe that there is much that the Bank of Baroda has to answer for, in their role in facilitating corrupt transactions for the Gupta family and their businesses, including the possible plundering of mining rehabilitation funds which Treasury was particularly concerned about. The bank tried to break its ties with the Gupta businesses in 2017, and finally exited South Africa in 2018, probably due to pressure from the authorities in India.

320 Buying a small and privately-held bank (that is not listed on any stock exchange) was a good solution for the Gupta-businesses. Their only problem was to get the approval of the Registrar of Banks at the SA Reserve Bank and Minister of Finance. They had failed to seize control of the Ministry of Finance, so needed Mr Zwane and this task team to do so, by getting Cabinet to adopt their recommendations.

321 I would like to end this section by stating that neither the National Treasury nor the SA Reserve Bank (as confirmed to me) is aware of any formal application after the 2008 global financial crisis by any BEE consortium, Indian billionaire or Gupta-linked associates, to purchase a controlling share of Nedbank, aside

from the application by HSBC[114] to purchase the controlling share of Old Mutual in 2010. I am also not aware of any informal application to this effect.

CONCLUSION

322 The evidence that I have put forward to the Commission demonstrates how whole institutions and legal processes were demobilised in order to achieve the scale of corruption that took place during the years under review by this Commission.

323 In this regard, my evidence has focused on the following examples:

323.1 The attempts by President Zuma and Gupta associates to undermine and weaken South Africa's anti-corruption and anti-money laundering system by unduly delaying and trying to stop the enactment of a core piece of legislation called the Financial Intelligence Centre Amendment (FICA) Bill.

323.2 How President Zuma manipulated the Cabinet system (by informalising the way it makes decisions) to intervene to protect the interests of a private family (the Gupta family) after banks closed their accounts because of the associated financial crime risk.

323.3 How President Zuma and Minister Zwane used a task team of Ministers to launch targeted attacks on the SA Reserve Bank, the National

[114] https://www.ft.com/content/aebaef12-d7bd-11df-b478-00144feabdc0

Treasury, FIC and banks that terminated their services to the Gupta family.

323.4 How the Guptas, after failing to undermine the country's financial crime legislative framework, tried to purchase a bank, in order to continue and control their illicit activities, including laundering the proceeds of their corruption and moving funds offshore.

324 It is important to keep in mind that banks are amongst the most heavily regulated sectors in our economy, often driven by international standards that we choose to comply with because it is in the best interests of the country to do so. Given the nature of banks, there is a "doom-loop" between banking and sovereign risks, which poses systemic risk to the entire economy, and hence the need for very intrusive and intensive prudential supervision over banks. The Treasury and regulators are very tough on ensuring banks comply with all financial sector laws at all stages, including how banks treat their customers, and how they conduct their business. In supervising banks, it is particularly important that supervisory actions do not compromise financial stability in the economy, hence the need to work closely with all regulators, including those that do not report to the Minister of Finance, like the Competition Commission and the National Credit Regulator, which deal with market conduct transgressions related to competition or the credit market (e.g. the current investigation by the Competition Commission[115] on poor forex market practices).

[115] http://www.treasury.gov.za/comm_media/press/2017/2017021701 - Media Statement Competition Commission finding on Banks.pdf

325 I hope I have been able to also put into perspective the attacks on the National Treasury, which need to be differentiated from the normal and on-going robust debates around the work of the Treasury. Former Ministers Nene, Gordhan and DG Fuzile have dealt in their evidence on the role of the Treasury. Given the nature of our work, Treasury officials in fact welcome such continual debates around policy-related and budgeting issues, as they provide important feedback around the many decisions that Treasury has to make everyday. We argued from 1994 when reforming the budget process that it is not a mere bean-counting exercise, but a deep policy-making and priority-setting process involving difficult trade-offs, and even more so for a developing country with the Apartheid legacy that we inherited. There is a healthy tension between the National Treasury and most organs of state, particularly where they are dependent on funding for commitments from the fiscus.

326 Outside government, in the political arena, including within the ruling party and its tripartite alliance, there are those who continually critique the role of the Treasury from a political and ideological perspective. These debates are also legitimate and necessary in a vibrant and noisy democracy like ours, and Treasury is happy to engage with such debates. However, we must also be wary of opportunistic voices driven by criminal objectives like defrauding the public sector, who also know that they also need to operate in the political domain if they are to succeed in their nefarious activities – they knew that Treasury was (and still is) a barrier to their plans, and used their political influence to launch public attacks on the Treasury and Minister of Finance, and wanted to weaken it and have a pliant Minister of Finance and Treasury. They funded their many agents (both in government, and many organisations and

their leaders outside) to do their bidding, and influenced political decisions taken by Government. It is vital to our democracy that we have better disclosures in future on all political funding, not just for registered political parties, but all organised political players. We need to know as a society how the many paid agents and lobbyists, as well as PEPs, are funded.

327 It will be important to identify those who directed corruption and state capture, and are the primary beneficiaries of its proceeds, by following the money that ended up with high-profile PEPs and Gupta associates. I believe that our institutions like the FIC, SARS, HAWKS and NPA can bring them to justice quickly, if they work closely together, using as a basis the many suspicious transactions that I believe banks would have reported to them. They need to act against those who cannot explain these suspicious transactions or source of income and wealth.

328 From the evidence of this Commission, and other Commissions on SARS and PIC, there is a clear pattern that some of the really big decisions under President Zuma (e.g. the nuclear deal, appointment of the Commissioner of SARS[116] in 2014), were taken outside of Cabinet, and only brought to Cabinet (if at all) to legitimise such decisions. We must prioritise measures to protect the integrity of the Cabinet and the process by which it makes decisions, given it is the highest (and most important) executive in our land. We must put in place the highest order of accountability for members of Cabinet, including a fiduciary-type responsibility that is of an even higher standard than King-type corporate

[116] Page 35 of the report of the Commission of Inquiry into Tax Administration and Governance by SARS ("Nugent Commission"

governance practices. Similar measures must apply to all accounting officers and authorities, throughout government.

329 President Ramaphosa has identified the need to build a capable state and reverse the effects of corruption, as he announced in his two SONA addresses after the 2019 national elections. He prioritised the need to take "critical actions .... to build a capable state and place our economy on the path to recovery"[117], and "[build] an ethical State in which there is no place for corruption, patronage, rent-seeking and plundering of public money[118]". We must take decisive steps to restore the capability and integrity of the state and government, if we want to ensure that the state can and does play the role that our people expect, be it to deal with a pandemic like COVID-19 or to rid our schools of pit latrine toilets.

330 Fortunately, Chapters 13 and 14 of the 2011 National Development Plan contain recommendations that can and should be very seriously considered for immediate implementation, but must be complemented with stronger mechanisms to improve governance and accountability of all institutions. I attach as an annexure some thoughts on measures to restore the capability of the state, and to fight corruption, as well as the many questions I believe we need to get answers to if we are to learn the lessons from our recent history (Annexure **IM1**).

331 The current COVID-19 crisis has reinforced to all of us just how important and critical the role of Government and the state is in any country, and even more so in a developing country like ours where many live in poverty with high levels

[117] February 2020 State of the Nation Address by President Ramaphosa
[118] June 2019 State of the Nation Address by President Ramaphosa, following the 2019 national elections

of inequality. We must strengthen our governmental system and the developmental state to do what our people rightly expect the state to do, to rid our country of poverty, inequality and unemployment and materially improve the life of all those who live in our country.

DEPONENT

I certify that the Deponent acknowledged that he knows and understands the contents of this affidavit, that he has no objection to the making of the prescribed oath and that he considers this oath to be binding on his conscience. I also certify that this affidavit was signed in my presence at SANDTON on this 1ST day **of FEBRUARY** 2021 and that the Regulations contained in Government Notice R1258 of 21 July 1972, as amended by Government Notice R1648 of 19 August 1977, have been complied with.

COMMISSIONER OF OATHS

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

152 IM1

ANNEXURE IM1: FEW PROPOSALS TO RESTORE THE CAPABILITY AND INTEGRITY OF GOVERNMENT AND TO FIGHT CORRUPTION

(OWN SUGGESTIONS FOR THE CONSIDERATION OF THE COMMISSION)[119]

288 The first and most important challenge for our country is to restore the capability and integrity of the state and government, and to make our public service less prone to corruption and capture. The recommendations in Chapters 13 and 14 of the National Development Plan provide a credible way forward towards achieving both these objectives, and must be seriously considered for implementation, together with mechanisms to improve governance and accountability.

Ensuring the Cabinet system has integrity

289 Underlying a capable state is the Cabinet system, and its integrity, as the highest executive in the land. The country expects Cabinet to always act in the public interest, and to be seen to be doing so. Our country came close to making a fiscally disastrous decision in 2015 on the nuclear project which would have indebted the country for many years, and would have left us in a far worse fiscal situation than we find ourselves today. The Cabinet system was by-passed, and informalised, so that it could be manipulated to make key decisions on the nuclear project without the necessary supporting documents and technical feasibility studies. In the case of the Gupta bank accounts, the decision to

[119] The views expressed in this Annexure are purely my own (Ismail Momoniat), and not those of my employer (National Treasury) or Government. The proposals require further research, and are merely suggestions for the consideration of the Commission.

investigate banks was taken without any Cabinet memorandum, and subsequent legal opinions were ignored. Cabinet decisions also by-passed the budget process, undermining the very fiscal framework that Cabinet itself had approved, as decisions were made without accounting for their fiscal impact, and ignoring the constitutional role of Treasury as the protector of the fiscus.

290 We need to ensure that the Cabinet decision-making process is never again by-passed, informalised and manipulated. One way to reduce the scope for such abuse is to ensure that in future, every major decision by Cabinet is always supported by a formal Cabinet memorandum with appropriate supporting documents, like legal opinions, environmental, economic, fiscal and financial feasibility assessments, and that the decisions of Cabinet are recorded accurately.

291 The role of the Treasury needs also to recognised, in accordance with Chapter 13 of the Constitution. This can be formalised ensuring that any major spending proposal from any department that compromises its own budget, or will possibly change the approved fiscal framework, must first be certified by Treasury before serving before Cabinet. National Treasury is able to facilitate or undertake independent costing assessments for any major spending proposal. Where any major spending commitment is required, like for any major capital project or future permanent annual grants or programmes (e.g. for free higher education), such certification should be legally necessary, and must first involve compulsory consultations with specified institutions like the Financial and Fiscal Commission, and the Budget Council and Budget Forum. Any Cabinet decision on such major

spending projects programmes without such prior certification and consultation should be legislated to be legally invalid.

Political-administrative interface and professionalisation of public service

292 The second major challenge to building a capable state relates to the political-administrative interface, and the need for a skilled and professional public service, both key initiatives outlined and prioritised in Chapter 13 of the National Development Plan. The chapter recognises the different incentives that apply between politically-elected and full-time professional public officials, and hence the need to clarify the political-administrative interface

> *"to ensure a clearer separation between the roles of the political principal and the administrative head. The current emphasis on 'political deployment' needs to be replaced by a focus on building a professional public service that serves government but is sufficiently autonomous to be insulated from political patronage."*

293 Our financial governance and accountability legislation like the PFMA and MFMA are built around the roles of the accounting officer (e.g. DG) and the executive authority (e.g. Minister). The calibre (professionally and ethically) of the persons occupying these positions are critical for the effective and efficient functioning of our governmental system. The NDP recognised (in 2011) that a key source of dysfunctionality in our system of government is the lack of clarity in the political-administrative interface. It notes:

"Many of governments best-performing institutions are characterised by stability of leadership and policy approach. However, the lack of clarity about the division of roles and responsibilities between political principals and administrative heads often serves to undermine this stability. Although public servants work for elected leaders, their role is non-partisan and the potential to forge a collective professional identity as public servants requires that this distinction is kept clear. In South Africa, the current approach to appointments blurs the lines of accountability."

It goes on to say:

"Reforms are needed to simplify and clarify the lines of accountability, to ensure that directors-general are accountable to their minister on policy matters, and that departmental staff are accountable to their director-general.

.....

In many other countries, a clearer distinction is drawn between the powers and responsibilities of political principals and administrative heads. This demarcation needs to be clarified in South Africa to stabilise the political-administrative interface."

294 The recent release of a discussion paper "A National Implementation Framework towards the Professionalisation of the Public Service" published on 8 December 2020 by the Minister of Public Service is a step forward in giving effect to the professionalisation of the public service. However, it does not deal with the role

of executive authorities (President, Ministers, Premiers, MECs, mayors, members of mayoral committees) and the political-administrative interface.

295 The role of an accounting officer is central to the functioning of government and the accountability system is particularly critical. They must be trusted at all times to manage the funds they are entrusted to spend. They need to understand their role and what laws apply to them when performing their duties and responsibilities. They need to understand the importance of good financial management and robust internal control systems, and the need to create a climate and culture in their department, entity or institution that encourages staff to speak truth to power. They must be strong enough to ensure that they do not yield to illegal or undue requests from anybody, be it their Ministers or even the President. An accounting officer who cannot be trusted to manage the funds under their control should not be an accounting officer.

296 The role of the executive authority must be explicitly set out, preferably in an Act of Parliament. It should be prepared by an independent panel. It is not an accident that Ministerial handbooks have tended to be so inadequate, and raise more questions than answers. The biggest problem we have is the (implicit) assumption many executive authorities make after assuming office – a mindset that wants to assume that there are no limits to their power, and expect their officials to do what they want them to do, legal or illegal. An executive authority wanting to make dubious requests relies on making such requests verbally and very vaguely, so that they can resort to plausible deniability if and when exposed. The Act of Parliament should spell out the role and function of any elected political office-bearer, but it must set out the limits to their powers, and state what

157

they are NOT allowed to do, and will be disqualified from office if they were to transgress these limits. Examples of such limits are listed below (list is not exhaustive):

296.1 Make any decisions or issue any instructions unless it is done in writing, and supported by appropriate documentation – any verbal instruction must be ignored by any accounting officer or official, unless it is an emergency, in which case post-facto documentation must be completed within 14 days.

296.2 Interfere with the responsibilities of the accounting officer or accounting authority, except where an Act of Parliament determines otherwise.

296.3 Participate in any tender process in any away, including making any suggestions to officials on how to proceed on any tender, or who should be considered for a tender.

296.4 Limits to internal arrangements related to the functioning of the office of an executive authority, like the purchasing of a vehicle, place of residence when in office, number and role of advisors, security and other personal staff – these relatively minor issues often set the tone for the functioning of an in-coming executive authority, hence the need to set boundaries even for such operational matters.

297 The NDP also recommends strengthening the role of the Public Service Commission and how it should be independent, with commissioners who are appointed on non-political grounds, and enjoy cross-party support. This approach in fact needs to be expanded to cover the heads of all key state

agencies and heads of departments and municipal managers. President Ramaphosa embraced[120] this approach soon after taking office, as we saw with the appointment of the heads of the NPA[121] and SARS[122]. This reform now needs to be formalised in law, to ensure that the appointment process in future will continue to be transparent, depoliticised and merit-based, using mechanisms like a selection panel comprised of non-political persons of integrity to interview and recommend persons for appointment. There is a good case for Parliament also playing a role by having confirmatory hearings for specific positions. There should also be a regulated process for appointing members of boards of the major state entities with effective pre-screening. A lecture by Deputy Chief Justice Dikgang Moseneke[123] in November 2014 provides a useful perspective on the need for stronger checks and balances to prevent the future abuse of power, given the concentration in power that goes with the office of the President. We have seen how the abuse of such power in the appointment processes prepared the grounds for the capture of key state institutions.

298 The same point above on accounting officers also applies to accounting authorities, but in my view, the accounting authority role should be shifted from the boards to CEOs of public entities. Boards (where they exist) in the public sector should focus on governance, oversight and accountability. They should play no role in operational issues, and certainly no role in tender and approval processes except for a challenger role, to test the integrity and design of the

[120] https://www.news24.com/news24/analysis/why-the-appointment-of-the-npa-boss-is-so-important-20181023
[121] https://acjr.org.za/resource-centre/appoint-and-dismiss-of-ndpp-fs-7-fin.pdf
[122] http://www.treasury.gov.za/comm_media/press/2019/2019020701 Media statement - Process for appointing SARS Commissioner.pdf
[123] https://www.news24.com/news24/Archives/City-Press/Moseneke-calls-for-review-of-presidential-powers-20150429

decision-making process. We also need to reduce the number of public entities, and review (aside from the major public entities and specific organisations) whether there is a need for boards for such entities, particularly where they do not raise their own revenue, and are more akin to quasi-departments where existing PFMA regulations and regular civil servant pay structures would be sufficient to ensure governance, oversight and accountability.

Enabling Accounting Officers to make decisions and not be risk-averse

299 A further reform is the need to create a climate to re-empower accounting officers to make decisions within their ambit, to ensure that the government functions effectively. One of the consequences of the corruption in the recent past is that honest public servants have become more afraid to make decisions, because they fear how their political principals may use rigid interpretations of laws to sanction or remove them by reviewing even routine decisions they have taken.

300 This is a particularly important point, which was the approach taken when designing the PFMA back in 1998. If accounting officers believe that when they make any decisions in good faith, that they may be subjected to some form of investigation, be it from the criminal justice authorities, Auditor-General or Public Protector (as has become the tendency recently), then honest public servants will be reluctant to take decisions. Those who make decisions in good faith will inevitably make mistakes, and our accountability system must allow for this possibility, without resorting to punitive measures when mistakes are made in good faith. Only decisions made in bad faith, including with corrupt intentions,

should expose an accounting officer (or relevant official) to criminal investigations, and/or to face personal financial sanctions from the Auditor-General or Public Protector or any other authority. Our current system does not adequately protect honest accounting officers, and we are paying a price for this in terms of the efficiency and effectiveness of government.

301 The risk-aversion in the decision-making process is also a perverse outcome of the annual audit process, where there is an inordinate focus on irregular expenditure, most of which may be due to minor procedural transgressions rather than corruption. Our current system of auditing and internal controls fails to differentiate and even identify corrupt expenditure – indeed, the bigger question for me is why the external (and internal) audit processes led to unqualified audits at Eskom, Transnet, Denel and other state-owned entities right up to 2017, even when the auditors would have been aware of the many media reports on suspicious transactions. This tick-box approach is very different from the way the PFMA was initially implemented when it first took effect in 2001. Similarly, the approach taken by the Public Protector after November 2016 in acting against accounting officers for past decisions made in good faith, reinforces the risk-aversion of accounting officers in decision-making, as officials suffer great stress, reputational damage and personal costs to review and set aside the remedial measures of the Public Protector.

302 I am happy to expand more on the above points, if requested. We cannot design our system of accountability by having as the default that both the Minister and accounting officer are always corrupt. Aside from ensuring there are quick consequences when any corrupt act or transaction is identified (and that we have

good internal controls that work to do so), it is even more important that we ensure that we have accounting officers in place who are trustworthy, honest and act with integrity at all times, and are not pliant or persons who can be pressured to act inappropriately. We must reignite the original spirit behind the PFMA and MFMA, which is to uphold the highest order of governance, accountability and transparency, rather than tick-box compliance.

Specific Proposals to Fight Corruption

303 Chapter 14 of the NDP offers key recommendations to strengthen the capacity of the state to fight corruption. In addition, I believe that there is a strong case for establishing a permanent Anti-Corruption Commissioner or Commission[124], to co-ordinate anti-corruption initiatives within government, to oversee that executive authorities and accounting officers fulfil their responsibilities to act on credible allegations on corruption and that they initiate appropriate criminal, civil and administrative processes when such acts of corruption are identified, and to ensure that all cases of suspicious or corrupt transactions against PEPs are followed up by the responsible authority. There are many other functions it could fulfil, including interviewing all accounting-officers on exit, as well as providing protection to whistle-blowers.

304 Any credible anti-corruption strategy must focus on speeding up investigations against PEPs occupying high-office, without fear or favour. The capability of our criminal prosecution system needs to be strengthened as a matter of urgency. I believe that our anti-corruption strategy should focus on the four areas below:

[124] Anti-corruption commissions are present in many jurisdictions, including Chile, China, Indonesia.

304.1 **INVESTIGATIVE PROCESS**: To ensure that our criminal prosecution system acts quickly to investigate each and every suspicious or corrupt transaction they are alerted to, from whatever source, be it referred to them by the FIC, SARS, a whistle-blower or the media. We also need better oversight over when the criminal prosecution authorities decide to prosecute or not to prosecute, and the time taken to make such decision, particularly in cases involving PEPs and allegations of corruption.

304.2 **ADMINISTRATIVE PROCESSES TO RECOVER FUNDS**: Administrative and civil processes must follow, after receiving early warning alerts and reporting of suspicious transactions. The existing process to recover stolen state funds should initiated sooner and used more extensively, as well as focusing on administrative disciplinary processes against officials who cannot explain income received from suspicious transactions.

304.3 **INTERNATIONAL MEASURES**: those embarking on large-scale corruption, like the Guptas, generally try and hide their proceeds of corruption in foreign jurisdictions. The approach taken to recover funds worth $6.5 bn in the Malaysian 1MDB scandal involved the co-operation of authorities from Switzerland, Singapore, USA and (later) Malaysia, and offers a good model to consider how to bring the Gupta family to justice.

304.4 **EARLY WARNING AND PREVENTIVE SYSTEMS**: these can reduce the scope for corruption, and identify potentially corrupt transactions as

soon as possible. The role of accounting officers, CEOs, CFOs and heads of procurement must be monitored more proactively.

305 We should also focus on the tender process, as it seems to be the area that is most vulnerable to corruption. We need to restore the integrity and credibility of tender processes throughout government, by putting in place measures to reduce the scope for corruption in the tender process, by for e.g. ensuring politically-elected officials and boards play no role in the tender process, except possibly in an oversight capacity, rotating staff involved within tender processes, allowing external inspectors to observe the process, etc. We also need more clarity in BEE and localization objectives, to reduce the scope for those abusing such policies for corrupt ends, and to ensure that they do not inadvertently compromise the primary and value-for-money objectives.

306 We need similar checks and balance for all approval processes in government, which must be designed in a way to reduce the scope for corruption, and should generally avoid giving sole discretionary power to any individual, committee or process. There must be appropriate governance and transparency requirements, and most importantly, supporting documentation for all processes where there are applications for approval of any service or activity.

307 One of the big disappointments for me is that, even after more than four years, the public is not aware of whether the 72 suspicious transactions, that were disclosed in the FIC Certificate submitted to Minister Gordhan in August 2016, have been properly investigated. There can be nothing worse in the fight against corruption if suspicious transactions related to PEPs are not reviewed or

investigated in each and every case. It is really important that each and every STR filed against the Gupta family and PEPs be fully investigated, and to follow the money before, and after, it got to Gupta associates and any PEPs.

308 I believe that the Commission has the power, if it has not exercised it already, to request more information from the FIC, and from each bank, on all STRs submitted that related to the Gupta family, and members of Cabinet, Premiers and MECs closely associated with the Gupta family. Indeed, I believe it would be in the public interest for the Commission to also request the FIC to provide it with:

308.1 All STRs related to all current and former accounting officers since 2009 in all national and provincial departments, together with their CFOs and heads of procurement, and similarly for the members of the accounting authority, CEOs, CFOs and heads of procurement in major SOEs like Eskom, Transnet, Denel, SAA, PRASA and SABC.

308.2 All STRs related to all past and current members of Cabinet, Deputy Ministers, Premiers, MECs, mayors and members of their executives since 2009.

308.3 STRs of other categories of PEPs before 2009, can also be considered, if deemed necessary by the Commission.

309 We also need to find a better way to regulate confidentiality provisions that apply to many institutions, be it for SARS, FIC, the criminal justice authorities, etc. Whilst the confidentiality that applies in each case is critically important for the effective functioning of that institution, and of a different nature (e.g. taxpayer

confidentiality vs SARS confidentiality vs tender confidentiality), it is important that confidentiality provisions are never used to conceal criminality and acts of corruption. We need to find better mechanisms for making appropriate disclosures, where such confidentiality provisions do not apply when reporting acts of criminality and corruption to clearly specified authorities under appropriate conditions.

310 All politically-elected officials, as well as accounting officers and accounting authorities, and other categories of senior officials, should be required to make their tax affairs appropriately open for public scrutiny, and be subjected to regular screening and lifestyle audits.

311 The funding of political parties is a critical reform for our democracy, and the coming into effect of the political party funding law will be a big step forward. It will also assist in breaking the link between the awarding of tenders and back-door political party funding. All those awarded any tender in government must be subject to stronger disclosure and transparency measures. There is also a need for all non-registered political movements, NGOs, trade unions, etc. to also be required to make regular disclosures of their sources of income, and preferably should be required to have audited financial statements every year.

312 We should also consider preventive measures to discourage the type of behaviour we saw from many professionals and public officials who may not have benefited financially from the corruption, but turned a blind eye to it. Former Director-General Lungisa Fuzile put it well when concluding his evidence to this Commission on 22 November 2018 when he said:

"The reason these terrible things happened is because many good people kept quiet. I do not buy the excuse that is convenient that people make that they did not notice. Of course, you may not notice from the first event but the thing is that too many events were happening here". (p133, Nov 22 2018 transcript)

313 There are many auditors, accountants and legal advisors who knew what was going on, but by omission if not by commission, did not ask the hard questions or report irregularities to the Treasury, Auditor-General, IRBA or any other appropriate authority. We need to better understand the underlying incentives and disincentives that make public officials, contractors, suppliers, auditors, accountants and other professionals, to improve our anti-corruption system. All professional bodies must have quicker, better and more credible mechanisms in place to sanction members who do not meet their minimum standards, and who failed to see what they should have seen. Many such firms providing auditing, legal and other support services should also be held financially liable for their failures, including paying back the fees they received.

314 One of the most important questions to consider is why early warning systems failed in identifying the corruption in major state-owned entities between 2009-17. All the major state-owned entities where massive corruption was subsequently identified, tended to receive unqualified audits before 2017 - this spectacular failure by audit committees and external auditors of Eskom, Transnet, Denel, SAA misled shareholders, lenders and investors, and must be further investigated. It is difficult to ensure good governance in organs of the state if auditors fail to do what was expected of them.

315 The governance over state-owned entities must be addressed as a matter of priority. Such problems are not unique to South Africa, and there is much that can be learned from other countries, and research of institutions like the World Bank[125] and OECD[126]. It is also important to consider the concerns of lenders and investors related to poor governance practices in our state-owned entities, and their perspectives on how to improve governance, as was done by Futuregrowth[127] Asset Management in 2018.

316 The fight against corruption is a global one, yet we do not seem geared to use international channels to deal with both non-cooperating foreign jurisdictions (with extreme bank secrecy and low-tax regimes) and foreign-domiciled companies that benefited from the proceeds of corruption in South Africa. As a non-legal person, I believe that there is much we can learn from the way the transnational investigation into the 2015 1MDB Malaysian[128] corruption scandal was conducted. It involved more than six countries (including Switzerland, UK, USA, Singapore, Indonesia and others) working with the Malaysian authorities after its new government re-opened the investigation in 2018, to criminally charge or sanction those involved, and recover assets and funds from all over the world. Laws like the US Foreign Corrupt Practices Act (FCPA) and the UK Bribery Act 2010 (UKBA)[129] enable authorities in those countries to investigate any person or company domiciled or listed in their country if they are suspected

[125] https://openknowledge.worldbank.org/bitstream/handle/10986/20390/9781464802225.pdf

[126] http://www.oecd.org/corporate/Ownership-and-Governance-of-State-Owned-Enterprises-A-Compendium-of-National-Practices.pdf

[127] https://www.futuregrowth.co.za/media/2373/futuregrowth_soe-governance-unmasked_electronic.pdf

[128] https://www.ft.com/content/3f161eda-3306-11ea-9703-eea0cae3f0de

[129] https://www.lexology.com/library/detail.aspx?g=7db248ba-a496-4b62-9199-710cd3fe698e

to have paid bribes to foreign officials to assist in obtaining or retaining business. The USA authorities also regard their laws to apply to non-USA individuals and companies if they were party to a transaction denominated in US dollars[130], even if done outside of the USA. This provides a further mechanism to SA authorities to bring to justice those hiding in non-cooperating jurisdictions, and carry significant jail sentences, fines and penalties.

317 It is also instructive to look at the SENS announcements and annual disclosures by companies listed on the JSE equity and debt markets, like for Oakbay Resources, Eskom (for e.g. state of its business and suspension of executives[131], reportable irregularities[132]), Transnet (reportable irregularity[133] 12 July 2017), Denel and whether such reports were truthful or not. State-owned entities are also like to issue a prospectus and other notices on overseas exchanges, as Eskom has done on the Luxembourg exchange when issuing US dollar denominated bonds.

318 Similarly, it would be instructive to consider the regulatory filings and disclosures made by multinational and foreign-domiciled companies operating in SA, and who had business dealings with Gupta-linked companies – many of these foreign-domiciled companies would have been obligated to file regulatory disclosures in terms of USA and UK anti-corruption laws, to regulators like the USA Securities and Exchange Commission (SEC), as well as in their annual and

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[130] https://iclg.com/practice-areas/anti-money-laundering-laws-and-regulations/1-the-international-reach-of-the-u-s-money-laundering-statutes

[131] https://www.sharenet.co.za/free/sens/disp_news.phtml?tdate=20150312160300&seq=25&scheme=imaraco

[132] https://www.sharenet.co.za/free/sens/disp_news.phtml?tdate=20170711110500&seq=10&scheme=imaraco

[133] https://www.sharenet.co.za/free/sens/disp_news.phtml?tdate=20170712152200&seq=12&scheme=default

other disclosures and announcements on exchanges like the NYSE, NASDEC and London FTSE etc. Much information can be obtained from such filings, and the failure to have made disclosures, could lay the basis for criminal charges or civil enforcements or if their disclosures were not truthful. I believe that the following type questions should be explored:

318.1 Are there any regulatory filings on the Glencore-Optimum coal transaction in 2015-16? Was there a requirement for Glencore to file SEC or FCPA filings with the US, UK or Swiss authorities following their meeting in 2015 with Mr Zwane in Switzerland? Did Glencore or Oakbay Resources file any SENS notice on the JSE?

318.2 Did BAIN & Company Inc disclose its secret meetings with President Zuma (as revealed in Chapter 3 of the final report of the Commission of Inquiry into Tax Administration and Governance by SARS[134]) to USA authorities, SEC and other regulators? Did BAIN not transgress the US Foreign Corrupt Practices Act when planning the capture of SARS and to win business from SARS and other state-owned entities?

318.3 Did McKinsey break the US FCPA to secure work from Eskom and other state-owned entities through its "partnerships" with Regiments Capital and Trillian Partners?

318.4 What charges or complaints can be filed with US and UK authorities and their professional bodies on the role of foreign legal firms like Hogan Lovells and their role at SARS?

[134] http://www.inqcomm.co.za/Docs/media/SARS%20Commission%20Final%20Report.pdf

318.5 Can we put in place a more systematic and centralised process to identify all the multinationals, audit companies, foreign consultancies, legal firms and public relations consultants that played some role in facilitating corruption or state capture in South Africa? Can such a centralised process also work with overseas authorities to investigate transgressions and violations of both South African and foreign country laws (e.g. USA/UK)?

319 I believe the above proposals will assist us to turn around corruption, and rebuild trust in government. By fixing the systems in place for politicians and public servants, we will better enable society to hold them and ourselves to be more accountable. I do not deal with further improvements in the way legislatures function to exercise their oversight, nor on electoral reforms to make elected representative more accountable, but leave this area to political analysts and representatives to do so.

320 I would also like to leave for the consideration of the Commission, questions I believe need to be further considered if we are to understand which of our institutions failed to act on corruption, and why. We can then strengthen our institutions to reduce vulnerabilities in our anti-corruption framework for the future.

[7]

SOME QUESTIONS TO ENABLE US TO BETTER UNDERSTAND INSTITUTIONAL WEAKNESSES

Anti-Corruption Policy and Operational Weaknesses and Failures

320.1 Are our anti-corruption and anti-money laundering laws worth the paper they are written on? Why did our internal and external control systems (including auditors) not identify potentially corrupt transactions sooner and before 2017? Why did the accounting officers and accounting authorities and their CEOs and CFOs not identify potentially corrupt transactions earlier and fail to act to alert the responsible authorities? Why did our criminal prosecuting agencies (Hawks, NPA) not investigate and charge those responsible for the Gupta looting and corruption? Was there any political interference that influenced officials and agencies not to act, and why did such officials and agencies not resist such interference?

320.2 What did Ministers, Boards, CEOs, DGs, MPs, SAPS, Hawks, NPA, FIC, SARS, Treasury, Public Service Commission, parliamentary committees and everyone heading all key institutions, do when serious allegations of the theft or misuse of state funds were first made? Did they act to at least try and confirm that the allegations or media reports were not true? Did they meet with their relevant staff (e.g. internal auditors) or audit committees to discuss such allegations? Did they ask the hard questions they should have been asking? Why were they not curious to know the facts?

172

Specific Questions on role of Cabinet Involvement

320.3 Did President Zuma and Cabinet in 2016 ever engage with, or discuss, Deputy Minister Jonas' allegations against the Gupta family? Why did Cabinet instead not believe that the relevant authorities should investigate the activities of the Gupta family after Mr Jonas' statement in March 2016?

320.4 Did Cabinet check whether the criminal prosecution authorities were investigating the very serious allegations against the Gupta family? Why did Cabinet show no concern about the 72 suspicious transactions related to the Gupta businesses?

320.5 Why did Cabinet rush to intervene in a business relationship between two private parties in April 2016? Why did it intervene so hastily, without a Cabinet memorandum and without first seeking any legal advice? How was this proposal initiated for Cabinet discussion at the 13 April 2016 Cabinet meeting?

320.6 Can each member of Cabinet during 2009-18 be requested to file an affidavit on all meetings they may have had with the Gupta family? Also, all visits to the Gupta family home or offices? Did the Gupta family or any of its businesses ever approach them for any business transaction?

320.7 Why did Mr Zwane intervene to assist Oakbay and other Gupta businesses in April 2016, but not intervene when workers at EXARRO lost their jobs just four months earlier in December 2015 because of a

state entity (Eskom) terminating its ARNOT coal contract? Why was Mr Zwane so keen to defend the Gupta interests at all times whilst he was Minister? What approvals did the Minister or Department of Mineral Resources grant Tegeta over mining rehabilitation funds? Can we see all the correspondence related to such approvals?

320.8 Did Bell Pottinger assist Mr Zwane in drafting his Cabinet memorandum submitted to Cabinet for its 22 June and 6 July 2016 meetings? Why and how did they have a copy by 15 July 2016 and try and leak it to the press? Who advised Minister Zwane on the recommendations in his Cabinet memorandum?

320.9 Is there a report from the Zwane task team on its meetings and recommendations? Is there any expert legal or financial regulatory advice? Who else aside from the two banks did the task team receive submissions from?

320.10 Why did the President wait for 6 months to decide to refer the FICA Bill back to Parliament, knowing the FATF deadlines we faced? What made the JCPS security cluster Ministers decide to object to the FICA Bill more than a year after it was passed twice by Cabinet? Why did the JCPS security cluster write a submission to the SCOF in January 2017, and not first alert the Minister of Finance or Cabinet of their concerns? Why were Minister Masutha and Adv Abrahams so persistent in trying to stop the FIC Amendment Act from commencing in 2017?

320.11 What was the role of the Gupta media like ANN7 and The New Age in preparing the ground for the capture of the state? What was their role

in preparing the ground to weaken institutions like the National Treasury and SARS, and to defame those standing up against corruption? Why did MultiChoice[135] take ANN7 on its platform by effectively subsidizing it? Was there any political pressure on MultiChoice to support ANN7?

STR follow-up Failures by State Institutions

320.12 Why did the Hawks and NPA (and JCPS cluster) ignore the 72 suspicious transactions that were exposed in the certificate of the FIC Director when Minister Gordhan sought a court declaration on whether Government could intervene in a bank-client matter? Why did they not ensure that these transactions were investigated?

320.13 Why did our key institutions fail to investigate the looting of the state, even after the banks reported suspicious transactions related to the Gupta family? Which of our institutions were aware of the STRs filed, and what did they do when they received them? Why did the heads of these institutions not do more to ensure their institutions investigated the STRs?

320.14 When did the FIC first receive STRs related to the Gupta family, and what did they do about them and when? To whom or which institution in the policing and criminal prosecution system did the FIC report the

[135] https://www.biznews.com/global-citizen/2017/12/01/naspers-ann7-multichoice-fiasco

STRs and when? Who else did the FIC report the Gupta-related STRs to, and when?

320.15 Can the FIC provide a report on all suspicious transactions related to the Guptas or their businesses reported to them by banks in SA since 2009 (or earlier), per year? How many of these STRs were reported to the police or prosecuting authorities? Could the FIC have done more to alert the country to Gupta-related transactions?

320.16 Has the FIC reported on any suspicious transactions related to members of the Cabinet since 2003? Were these reported to the policing and prosecuting authorities? Can they provide a detailed list to the Commission? Were there any direct transactions that the banks noticed to politically-exposed persons, especially any member of Cabinet and members of their families or persons connected to them?

320.17 Has the FIC provided any suspicious transaction and cash transaction records against any person associated with Eskom, Transnet, SAA, Denel, PetroSA, SARS and any other major public entity, since 2009? These should include all members of their boards or accounting authority, CEOs, CFOs and heads of procurement.

320.18 Has the FIC provided suspicious transaction reports and cash threshold reports after 2009 filed by banks against any other senior PEP aside from members of Cabinet, like Deputy Ministers, Premiers and MECs, mayors and members of their mayoral or executive committees, accounting officers, CEOs, CFOs and heads of procurement, in the public sector?

320.19 Can the police (Hawks) and the NPA indicate all the reports they received from the FIC since 2009? How did they follow up and were there any investigations, and any charges, against transgressors? Could the Hawks and the NPA have done more to investigate and take appropriate action on the Gupta-related transactions that were reported to them or in the media?

320.20 What STRs related to the Gupta family, associates or businesses, or to any senior PEPs, did the FIC refer to SARS? Can SARS confirm the STRs related to the above that they received from the FIC? Did SARS indicate which STRs they acted on, and which were not acted on, particularly when Mr Moyane became Commissioner?

320.21 Did the FIC refer for further investigation any Gupta-related STRs involving Eskom, Transnet, SAA, Denel or any other major public entities, to the AGSA or IRBA?

Banks and STRs

320.22 Why did the banks take so long to act on the Guptas and their businesses? When did each bank first report an STR against any Gupta family member, associate and business? Can each bank indicate all STRs against senior PEPs reported to the FIC since 2009? Was there any request for further information from the FIC, the Hawks or the NPA on any suspicious transactions linked to the Gupta family or related businesses that they reported to the FIC since 2009? Were there any material STRs against the Gupta family, associates or businesses, or any PEP, before 2009 that the bank reported to the FIC?

320.23 Can banks identify suspicious foreign transfers out of SA, and into SA, by the Gupta family, associates or their businesses, or any senior PEP or their family, that they deemed as suspicious and reported to the FIC? Was this recognized at the time of the transaction or soon after, or with the benefit of more information that is available today?

320.24 Can each bank indicate whether it was ever approached more directly by the Gupta family members, associates or their businesses or any members of Cabinet or by any influential political office-bearers or senior officials and pressurized to facilitate or conceal any suspicious activities (as identified then or now, with the benefit of more information)?

320.25 How often did the FIC respond to STRs by requesting further information, from banks particularly for STRs related to the Guptas and senior PEPs? Did the bank approach any other authority in Government aside from the FIC, to express any concern with the lack of response to the STRs they were submitting to the FIC, or any other authority, when they alerted them to any significant STRs?

Auditing and Internal Control Weaknesses

320.26 Why did the internal and external auditors, including audit committees and internal audit units, of major SOEs (Eskom, Transnet, SAA, Denel) and other public entities fail to identify corrupt tenders and other transactions before 2017?

320.27 What Reportable Irregularities (RIs) were filed with IRBA (Independent Regulatory Board of Auditors) by auditing companies or auditors against state-owned entities?

320.28 Did IRBA refer any RIs to the Auditor-General of SA (AGSA) or to criminal prosecuting authorities? Did the AGSA or IRBA receive any STRs from the FIC for further investigation?

320.29 Did the AGSA monitor the performance of external auditors and audit committees of the major state-owned entities sufficiently before 2017? Did AGSA raise any concerns as to why the audit process was not taking into account various media and other reports on potentially corrupt transactions?

320.30 Are the professional bodies for auditors and internal auditors investigating any failures by any of its members related to the state-owned entities, particularly transactions related to the Gupta family or businesses?

Public Protector and State Capture

320.31 Why did so many close associates of the Gupta family resort to serially making complaints against Treasury and the SA Reserve Bank after November 2016?

320.32 Why did the Public Protector initially not disclose her interviews with the Presidency, SA Secret Service and advisor of the then Minister of

Finance[136], when preparing her final report on ABSA CIEX matter? Why were inputs from Treasury and SA Reserve Bank in January-February 2017 totally ignored when finalizing her report?

Political System Weaknesses and Failures

320.33 Why did our political system fail to act earlier on the many Gupta allegations, on Estina Dairy and the Waterkloof landings after they first became public? How can our system of accountability be strengthened so that decisive action can be taken as soon as possible problems are identified from early warning systems, whistle-blowers or media reports?

320.34 Why did so many Ministers, DGs, CEOs not speak truth to power? Why were Parliamentary committees not more vigorous in having hearings on the various allegations against the Gupta and Zuma families before 2017? Do we need better checks and balances on the President and Ministers when they exercise their powers? Do we need electoral reforms to make MPs more likely to challenge the executive? Does the pure proportional voting system make political parties relatively too powerful in relation to MPs? How do we regulate the funding of political parties and reduce the scope for patronage and corruption in our tender processes?

136 https://www.businesslive.co.za/bd/national/2018-01-11-protector-consulted-radical-expert-chris-malikane-on-bankorp-report/
https://www.news24.com/news24/SouthAfrica/News/busi-and-the-blf-coverup-20170924-2

The democratic miracle of 1994 was followed by 15 years of significant progress, then 10 years of institutional and socio-economic decline, perpetuating the apartheid legacy of socio-economic exclusion

The 1994 Democratic South Africa had to undo the heritage of a racially divided society and structurally flawed economy built on the mining and minerals industry and an import-substitution model, achieving low growth

This was done through:

- **Building a democracy and achieving political stability:** Adopting a uniting, non-racial, human rights-based Constitution and regular peaceful and fair elections at all levels of government
- **Ensuring strong and efficient government delivering** based on an agreed social contract among political parties, labor unions and business alliance premised on wealth creation, growing economy & transformation

The first 15 years till 2008 achieved:

- Strong macroeconomic management framework, supported by favorable global economic conditions led to macroeconomic stability and higher growth
- Access to basic services for millions previously denied their basic rights (housing, education, health care, infrastructure services, public transfers)
- The growth of a larger black middle class and poverty reduction (until 2011)
- Normalized international and Africa relations
- But... **sustained socio-economic gains were premised on 2nd generation reforms, climate change considerations, as well as sustained racial, gender and spatial inclusivity**

Instead, after 2009, the country entered a cycle of decline, failing to sustain previous achievements:

- Loss of confidence in government, parliament, economy, institutions except the judiciary and the Reserve Bank
- Lack of a common vision, with self-serving alliance and political parties and ideological rifts even within the ruling party
- Weakened institutions through corruption and state capture, and crisis in major SOEs
- Increase in crime levels and expressions of community and labor discontent

The socio-economic transition has become further out of reach as a result of declining economic growth and commodity prices, a reversal of the post-1995 reduction of poverty trend and increased unemployment and inequality, compounded by climate change effects

WORLD BANK GROUP

180

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181 IM3

ANNEXURE IM3: TIMELINE MATRIXOF EVENTS

Cabinet and Government decisions	FICA Bill	Gupta bank closure and related events/reports	Other political or relevant events
	June 2014 – FATF Plenary adopts more intensive "targeted follow-up" on SA. SA expected table Bill to amend FIC Act by October 2014 Plenary. Minister Nene commits SA to securing Cabinet approval in Oct 2014 to table Bill in Parliament. 29 August 2014 – FATF President writes to Minister Nene about delay in tabling of FICA Bill, and states SA must report back on progress at Oct 2014 FATF Plenary 17 Sept 2014 – Minister Nene responds to FATF President, informing him that he expects Cabinet approval for the FICA Bill in Oct 2014		
	26 September 2014 – NICOC principals consulted on FICA Bill **7 October 2014** -JCPS cluster of DGs consulted on FICA Bill		

182

Cabinet and Government decisions	FICA Bill	Gupta bank closure and related events/reports	Other political or relevant events
22 October 2014 – Cabinet refers Bill back to all DG clusters over PEPs concept. Revises decision on 5 Nov 2014 that referral is to Joint JCPS, ESEID and ICTS Cabinet committees.	**October 2014 -FATF Plenary** extends deadline for adoption of FICA Bill by 27 Nov 2015		
	Feb 2015 - FATF Plenary notes delay in Cabinet approval, SA requested to report back to June 2015 Plenary on final (draft) Amendment Bill to the FIC Act. SA faces possible step of a high-level visit.		
15 April 2015 – FIRST Cabinet APPROVAL to publish FICA Bill for public comment			
23 September 2015 – SECOND Cabinet APPROVAL to table FICA Bill in Parliament			
	27 October 2015 – FICA Bill introduced in the National Assembly (FSR Bill also introduced)	**23 Oct 2015** – Guptas offer Dep Minister Mcebisi Jonas position of Min of Finance	
	Oct 2015 – FATF Plenary welcomes positive development to table FICA Bill. Indicates high-level visit planned in week of 7 March 2016.		
	November 2015 - Standing Committee of Finance (SCOF) in National		

Cabinet and Government decisions	FICA Bill	Gupta bank closure and related events/reports	Other political or relevant events
	Assembly has first set of hearings on FICA Bill		
9 Dec 2015 – Mr Nene fired as Min of Finance, on day Cabinet considers nuclear project, replaced by Mr Des van Rooyen **13 Dec 2015 –** Mr Gordhan appointed Min of Finance		**Nov/Dec 2015 –** Mr Zwane flies to Switzerland to facilitate purchase of Optimum Mine for TEGETA	**Dec 2015 -** DENEL and SAA approval requests to Min of Finance **16 Dec 2015 –** Moody's revises outlook to negative
		Dec 2015 - Jan 2016: Gupta gathering in DUBAI with Ministers, Eskom and Denel officials and other PEPs	
		Jan 2016 - Bell Pottinger's Lord Bell meets Gupta family and Duduzane Zuma in SA, secures agreement with Oakbay	**31 January 2016 –** SACP's Dep Sec General Mr Solly Mapaila raises role of Gupta family at ANC NEC lekgotla, the "elephant in the room".
16 March 2016 - Deputy Minister Mcebisi Jonas makes public that he was approached by the Gupta family on 23 October 2015 to be MoF		**8 March 2016 -** Financial Times runs a major article on Gupta family "South Africa: The power of the family business"	

184

Cabinet and Government decisions	FICA Bill	Gupta bank closure and related events/reports	Other political or relevant events
		1 April 2016 – Guptas confirm KPMG have terminated their services to Gupta-owned companies. **1 April 2016** – FNB informs Gupta businesses that their accounts will be terminated on 31 May 2016 **4 April 2016 –** Media reports that ABSA and SASFIN have closed Gupta accounts **5 April 2016** – Oakbay confirms KPMG and Sasfin terminations on SENS	
		6 April 2016 – Oakbay CEO Mr Howa confirms FNB to terminate their accounts. FNB also confirms on 7 April 2016. **6 April 2016** – Std Bank informs Gupta companies of its intention to close their accounts by 6 June 2016 (Ian Sinton evidence)	

185

Cabinet and Government decisions	FICA Bill	Gupta bank closure and related events/reports	Other political or relevant events
		7 April 2016 – Nedbank informs Oakbay of intention to terminate services within 30 days **8 April 2016** – Oakbay SENS announcement on Guptas' resignations as directors. Second SENS announcement on FNB termination and indicates all major banks terminating. Say operations not impacted, and will continue to do business via an Asian Bank (i.e. Bank of Baroda)	
		8 April 2016 – Mr Howa writes letter to Presidency, Ministers Gordhan, Zwane and Oliphant and to ANC Sec-General. Indicates all major banks have terminated their services. Request intervention by Govt/ANC. Major Gupta media campaign starts against banks, including international media like CNN.	**8 April 2016** – Oakbay CEO Mr Howa writes to ANC Secretary General, to intervene with banks.
		11 April 2016 – COSATU condemns KPMG and banks for closing Gupta accounts	

186

Cabinet and Government decisions	FICA Bill	Gupta bank closure and related events/reports	Other political or relevant events
13 April 2016 – Cabinet establishes Ministerial Task Team to investigate termination of services to Gupta companies by banks, KPMG. Minister Gordhan not present at meeting as in Washington DC for IMF/WB meetings.		**2nd/3rd week April 2016 -** COSATU leadership meets Gupta family **18 April 2016 –** Mr Howa meets the ANC SGO, submits a Powerpoint presentation **20 April 2016 –** ANC SGO meets with ABSA and Nedbank **21 April 2016 –** ANC SGO meets with Std Bank **21 April 2016 –** Oakbay workers/supporters protest at JSE and banks	

187

Cabinet and Government decisions	FICA Bill	Gupta bank closure and related events/reports	Other political or relevant events
21 April 2016 – Post-Cabinet media conference announces establishment of Ministerial Task Team to open a constructive engagement with the banks to find a lasting solution over closure of Gupta banking accounts		**22 April 2016** – Minister Zwane's Advisor Adv Kellerman) emails invitations to ABSA and FirstRand to attend a meeting with the Task Team, after calling their offices by phone. ABSA email sent at 11:44am and FirstRand at 1:57pm. **22 April 2016 –** Minister Gordhan receives email at 11:48am with an attached letter (but dated two days before 20 April 2016) from Minister Zwane on the establishment of the Ministerial Task Team to inform him of Task Team and meetings with banks on 25 April 2016 **22 April 2016** – Minister Gordhan immediately responds to Minister Zwane, pointing out that the legal and regulatory imperatives that needed to be followed	

Cabinet and Government decisions	FICA Bill	Gupta bank closure and related events/reports	Other political or relevant events
24/25 April2016 – Ministry receives minutes of Cabinet meeting of 13 April 2016		**24 April 2016** – Minister Zwane responds to Minister Gordhan's letter of 22 April 2016, insisting that meeting 25 April 2016with banks will continue **24-25 April 2016** - ABSA and FirstRand decline invitation to attend meeting as no clarity provided by Adv Kellerman	
		25 April 2016 – National Treasury receives urgent legal opinion which confirmed that there is no basis for any member of Cabinet to interfere in the affairs between banks and their clients	
26 April 2016 – CABINET MEETING: Minister Gordhan alerts Cabinet of the legal opinion on intervening in bank-client relationship over Gupta businesses	**26 April 2016** – Standing Committe of Finance (SCOF) adopts FICA Bill. Agrees to a letter of solidarity with workers at Gupta businesses who fear losing their jobs.		
4 May 2016 – Min Gordhan submits legal opinion to President, Ministers Zwane and Oliphant		**4 May 2016 –** Min Zwane invites all 4 banks to meet his Task Team the following day **5 May 2016** – Std Bank **6 May 2016** - Nedbank	

189

Cabinet and Government decisions	FICA Bill	Gupta bank closure and related events/reports	Other political or relevant events
	18 May 2016 – Bill passed by the National Assembly and transmitted to the NCOP for concurrence		May 2017 – National Treasury costs Nkandla in line with Constitutional Court order
	25 May 2016 – Bill passed Parliament and sent to the President for assent	**24 May 2016** – Oakbay CEO meets with Min Gordhan and Treasury officials	
	June 2016 - FATF Plenary informed FICA Bill awaiting President's assent. FATF Plenary gives us until December 2016 to enact and commence the law, and to exit SA from its targeted follow-up process. If not done by then, FATF to consider issuing a public statement.	**19 June 2016** – Howa on Carte Blanche, reads Std Bank letter	
22 June 2016 – CABINET refers Zwane memo back for further work. Memo bypassed 2 week Cabinet process, and no consultation with Minister Gordhan		**23 June 2016** – NUM confirms that Oakbay has approached it to buy UBANK	
6 July 2016 – CABINET approves Zwane recommendations to investigate banks, SARB, NT and review approach to PEPs in FICA Bill, and weaken bank licensing process. Cabinet decision not make public		**15 July 2016** – Bell Pottinger tries to get media to report on judicial inquiry against banks, circulates page of Zwane Cab memo	

190

Cabinet and Government decisions	FICA Bill	Gupta bank closure and related events/reports	Other political or relevant events
3 AUG 2016: LOCAL GOVERNMENT ELECTIONS			**Aug 2016 –** DENEL attacks Minister Gordhan **25 Aug 2017 -** President Zuma issues statement to say no tension with Minister Gordhan
31 August 2016 – CABINET approves minutes of 6 July 2016 and also request Intelligence to investigate leaking of Zwane Cab memo	**5 Sept 2016** – Media confirms President Zuma was considering objections to the FICA Bill received from the Progressive Professionals Forum and the Black Business Council **19 Sept 2016 –** BBC objects to Bill		**25 Aug 2017** - Hawks request Minister Gordhan to present himself on 25 Aug 2016 to submit a warning statement
			15 Sept 2016 – Suspension of Jonas Makwakwa by SARS
1-2 Sept 2016 – Minister Zwane releases statement on 1 September 2016 on Cabinet decision of 6 July 2016. PRESIDENCY issues statement following day distancing Cabinet from the statement, calling it unfortunate		**Sept/Oct 2016 –** a Gupta-linked company (Vardospan), submits application to the Registrar of Banks to acquire Habib Overseas Bank Limited (Habib)	**1st week Oct 2016-** 'Decolonisation Foundation claims to lay charges against Chief Procurement Officer Kenneth Brown

Cabinet and Government decisions	FICA Bill	Gupta bank closure and related events/reports	Other political or relevant events
21 Sept 2016 – Zwane answers questions in Parliament	**22 Sept 2016** - DG Fuzile writes letter of concern to DG in Presidency, on unexplained delay in signing of FICA Bill	**14 Oct 2016** – Minister Gordhan serves papers on Oakbay and other Gupta companies for court to make a declaratory order – reveals FIC certificate of 72 transactions worth R6.8 bn STRs associated with Gupta family	**11 Oct 2016** – Adv Abrahams announces charges against Minister Gordhan, Mr Ivan Pillay and Mr Oupa Magashula **26 October 2016** – Mr Gordhan delivers Medium-Term Budget Policy Statement (MTBPS)
	Early Nov 2016 – CASAC gives President 30 days to finalise his response to FICA Bill **15 Nov 2016** – Treasury meets with BBC, told by Tshepo Kgadima that President will not be signing Bill into law		
23 Nov 2016 – President Zuma confirms in Parliament that content of Zwane statement on Cabinet decision	**28 November 2016** – President Zuma returns Bill to Parliament over concerns about constitutionality of warrantless searches clause		**2 November 2016** – Public Protector State of Capture Report made public, following its release by outgoing Public Protector on 14 October 2016.

192

Cabinet and Government decisions	FICA Bill	Gupta bank closure and related events/reports	Other political or relevant events
	Dec 2016 – Counter Money-Laundering Advisory Council contacted via email to extend contract of Murray Michell by one year.		**20 Dec 2016** – New Public Protector issues provisional draft ABSA CIEX report to Minister of Finance and SA Reserve Bank. Requested Min of Finance to respond to findings against Govt by 16 January 2017
	23 Jan 2017 – JCPS security cluster submits a memo to Parliament claiming Bill is unconstitutional on many more grounds than raised by President (no formal legal opinion submitted) **24 Jan 2017 –** ANC Study Group attended by Ministers Mahlobo and Masutha, agree to withdraw submission **25 Jan 2017** – SCOF hearing on legal opinions, including objections from BBC, PPF **26 Jan 2017** – Meeting of JCPS Ministers, Min of Finance and SCOF ANC members, on sidelines of ANC lekgotla, to agree on way forward		**6 December 2016** – FSR Bill passed by the National Assembly and transmitted to the NCOP for concurrence

193

Cabinet and Government decisions	FICA Bill	Gupta bank closure and related events/reports	Other political or relevant events
	1, 15 & 21 Feb 2017 – SCOF approves amendment to FICA Bill **Feb 2017 –** FATF Plenary notes President sent back the Bill to Parliament for reconsideration. Notes progress made by SCOF to amend Bill. Agrees to defer discussion on public statement until June 2017 Plenary. **28 February 2017 –** Bill passed and sent to the President for assent	**6 Feb 2017** – Registrar of Banks writes to MoF recommends MoF declines offer to acquire Habib Bank **March 2017** – Vardospan approaches High court to force SARB to decide on its application	
	22-24 Feb 2017 - FATF Plenary: SA delegation manages to postpone sanction and get a further extension. Adv Abrahams attends to support SA delegation, even though he rejects PEPs concept as believes it is unconstitutional		**15 Feb 2017 –** Competition Commission refers collusion case on foreign currency pairs trading to Tribunal for prosecution
	28 February 2017 – Bill passed and sent to the President for assent		**22 February 2017 –** Mr Gordhan delivers the 2017 BUDGET

194

Cabinet and Government decisions	FICA Bill	Gupta bank closure and related events/reports	Other political or relevant events
31 March 2017 – President Zuma fires Mr Pravin Gordhan and Mr Mcebisi Jonas as Minister and Dep Minister of Finance. Replaced by Mr Malusi Gigaba and Mr Sfiso Buthelezi, respectively			3 & 7 April 2017 – South Africa is downgraded to sub-investment grade ("junk") by S&P and Fitch
	26 April 2017 – FICA Bill assented to by President, and gazetted on 2 May 2017 as Act 1 of 2017		**26 May 2017 –** ANN7 airs its first IFMS "exposure" against National Treasury
	29 May 2017 – Minister Masutha and Adv Shaun Abrahams meet Min of Fin Gigaba to stop commencement of FICA Bill		**27 May 2017 –** Sunday papers reveal GUPTA LEAK EMAILS
			19 June 2017 – Public Protector issues final ABSA CIEX report, finds that mandate of SARB needs to be expanded.

Cabinet and Government decisions	FICA Bill	Gupta bank closure and related events/reports	Other political or relevant events
	13 June 2017 – Government Gazette GG40916 of 2017 published, some provisions of FIC Amendment Act take effect **2 Oct 2017 –** More provisions of FIC Amendment Act take effect		
	June 2017 – FATF Plenary informed President has signed FICA Bill into law, and MoF has announced commencement dates for majority of provisions by 13 June 2017.		**21 August 2017 –** FSR Act signed into law by President Zuma
	Nov 2017 – SA taken off targeted follow-up targeted process and threat of public statement removed		

196 IM4

MINISTRY: FINANCE

REPUBLIC OF SOUTH AFRICA

SPEECH BY MINISTER OF FINANCE MR NHLANHLA NENE

INTRODUCTORY SPEECH FOR TLAB, TALAB, NDB SPECIAL APPROPRIATION BILL

VENUE: National Assembly
DATE: 27 October 2015

Madam Speaker today, I would like to the take the opportunity to formally introduce and table the following bills in the National Assembly:

- The Taxation Laws Amendment Bill 2015;
- Tax Administration Laws Amendment Bill, 2015
- National Development Bank Special Appropriation Bill for 2015/16 Financial Year
- Finance Bill, 2015
- Financial Sector Regulation Bill, 2015; and the
- Financial Intelligence Centre Amendment Bill, 2015

(Three of these are Section 77 bills, whilst the others are Section 76 bills.)

1. Taxation Laws Amendment Bill and Tax Administration Laws Amendment Bill 2015

Honourable Speaker, the Taxation Laws Amendment Bill and Tax Administration Laws Amendment Bill, 2015 forms part of the second set of tax legislation giving effect to the tax proposals that were announced

as part of the 2015 Budget. The first Bill dealt with the rates and thresholds, and this Bill contains the more complex and substantive tax amendments from the 2015 Budget Review. An extensive consultation process has been followed to allow all stakeholders to provide inputs and comments on the draft Bills. With the help and support of the Standing Committee on Finance and other role-players, this process has proved to be very productive.

After the one-year delay recommended by the Standing Committee on Finance last year during the 2014 Taxation Laws Amendment Bill process, the reform to harmonise the tax treatment of all retirement fund contributions will be implemented as scheduled from 1 March 2016. This will ensure greater equity in our tax system, by limiting the tax deduction to a maximum of R350 000 for all taxpayers.

However, whilst there is extensive support to proceed with annuitisation of provident funds in 2016 subject to a higher *de minimis* threshold, Government is aware of the need to win the full support of all labour federations in the interest of the long-term security of their members. As a result, an urgent and short consultation process has been initiated to deal with a new amendment related to the timing of the annuitisation requirement for provident funds. Government is mindful that such a delay in the requirement to annuitise will result in a lower tax deduction for provident fund members from year two onwards.

The draft Taxation Laws Amendment Bill, 2015 includes the following key amendments:

- Closing a loophole to protect the estate duty regime;
- Replacing a tax credit for withholding taxes imposed by other countries on services provided from South Africa with a tax deduction, thereby protecting the corporate income tax base, whilst at the same

time ensuring that South Africa can increase its role as the gateway for investments and business support into Africa; and

- Adjustments to the taxation of insurance companies to be in line with the new Solvency Assessment and Management regulatory initiative.

The draft Taxation Administration Laws Amendment Bill, 2015 includes the following key amendments:

- Providing a framework for gathering financial information for automatic exchange with a growing number of countries around the world. This framework will also assist in implementing the approach to country-by-country reporting by multinational groups that was agreed by the G20 earlier this year;
- Introducing a procedure to handle taxpayers' claims of legal professional privilege and any disputes that may arise if SARS does not accept them; and
- Placing SARS and a multinational group on a more level playing field if the local member of the group does not provide information the group holds offshore.

These measures assist in creating an overall tax regime for South Africa that continues to be internationally competitive and consistent, while ensuring that tax receipts are not undermined and that the tax burden is fairly distributed. We thank all taxpayers for their support and co-operation as they continue to meet their tax obligations.

2. New Development Bank Special Appropriation Bill for 2015/16 Fin Year

Honourable members, the 6th BRICS Summit – held in Fortaleza, Brazil – marked the signing of the "the Agreement establishing the New Development Bank". The legislatures of every BRICS country ratified

this agreement and it came into force on 3 July 2015. The Bank aims to mobilise resources for infrastructure and sustainable development projects in BRICS and other emerging economies and developing countries, complementing the existing efforts of multilateral and regional financial institutions for global growth and development.

The New Development Bank (NDB) shall have an authorized capital of US$ 100 billion and subscribed capital of US$ 50 billion. The founding members shall each have an equal share in the Bank; with the result that each BRICS country will contribute US$10 billion. The subscribed capital shall have a paid-in and callable component. The callable component shall be 80 per cent of subscribed capital (amounting to US$ 8 billion), and the paid-in component shall be 20 per cent of the subscribed capital (amounting to US$ 2 billion).

Ideally the request for capital contribution for the first instalment should have been made during last year's budget process. However, ratification of the agreement – and thus its approval – had not been concluded. The agreement therefore had no legal standing to form part of the budget process, at the time of the 2013/14 MTEC process.

This Special Appropriation Bill allows us to honour the first payment on time for the operationalisation of the NDB. Future instalments shall be subjected to normal budgetary processes.

Sub-Saharan Africa is one of the world's fastest growing economic regions; however developmental bottlenecks make it increasingly difficult for the region to achieve its growth potential. Addressing these challenges is a priority for the region. To fulfil its mandate, the Bank shall:

- Support both public and private sector infrastructure and sustainable development projects;
- Support regional projects, i.e. projects supporting more than one country
- Provide technical assistance for the preparation and implementation of these projects
- Establish the Africa Regional Centre to be based in Johannesburg, strategically located to enable access by other African countries to the New Development Bank.

3. Finance Bill, 2015

This Bill is aimed at implementing the recommendations recorded in the first, second, third and fourth reports of the National Assembly's Committee on Public Accounts, dated 3 February 2015, that Parliament authorises the unauthorised expenditure and approve a funding mechanism. The recommendations were adopted by the National Assembly on 23 June 2015.

The Bill provides for the authorisation of unauthorised expenditure in the amount of R110 215 118.57, of which:

- The total amount of R46 667 900.42 referred to in Schedule 1 to the Bill, is classified as unauthorised expenditure in terms of section 34(1)*(a)* of the PFMA due to the overspending of the vote of:

  - **The Presidency** (R14 510 746.35 and R28 428 306.73) during the 2008/09 and 2010/11 financial years; and
  - **Women, Children and People with Disabilities** (R3 728 847.34) during the 2010/11 financial year.

201

The Bill proposes a direct charge against the National Revenue Fund, of R46 667 900.42, as an additional amount to be allocated to votes that previously overspent their annual appropriations.

- The amount of R63 547 218.15 referred to in Schedule 2 to the Bill, is unauthorised in terms of section 34(1)*(b)* of the PFMA due to an overspending of main divisions (programmes) in the vote of Trade and Industry (R37 379 505.54) and the vote of Social Development (R26 167 712.61), during the 2004/05 and 2007/08 financial years, respectively. These funds have been kept in a suspense account pending authorised.

4. The Financial Sector Regulation Bill – *Twin Peaks Bill*

The financial services sector touches the life of each and every South African. It enables economic growth, job creation, the building of vital infrastructure and sustainable development for South Africa and her people. It is, therefore, crucial that the sector is well-regulated and stable. South Africa can be proud of our financial regulation system. In the recent World Economic Forum's competitiveness report, South Africa scored particularly well for its financial system, and we host the continent's most efficient financial market, placing us 12th internationally in this category.

We were fortunate to have weathered the 2007/8 global financial crisis well. The recent curatorship of African Bank also showed that we have a robust system that is resilient to shocks.

But we cannot be complacent.

202

We need to take proactive steps to keep our financial regulation system up to date and advanced. We need to keep our advantage in this area. We need to do more about ensuring that consumers are treated fairly and sold appropriate products.

For this reason, in 2011 Minister Pravin Gordhan proposed a shift to a "Twin Peaks" system of financial regulation. Two new supervisory authorities will be created – a Financial Sector Conduct Authority that cares about customers of financial services; and a Prudential Authority that cares about the financial health of institutions. Additional powers will be given to the South African Reserve Bank to ensure that they can manage systemic risks and ensure financial stability.

Finally, the Bill also lays the basis for South Africa to meet with the higher regulatory standards expected of the financial sector, and to address the gaps identified in the Financial Sector Assessment Programme (FSAP) conducted on South Africa last year. This will allow our financial institutions to compete better globally. –The twin peaks system will also create more efficient and dedicated regulators, and lead to less fragmentation and greater efficiency in the funding of such regulators.

I look forward to Parliament considering this Bill, so that our financial sector can me made even safer and made to treat customers better, and compete more effectively in the world.

5. Financial Intelligence Centre Amendment Bill, 2015

Madame Speaker, the Financial Intelligence Centre Amendment Bill, 2015, is an important bill, to ensure that South Africa continues to meet with international standards related to the combating of financial crimes like fraud, money laundering, terrorist financing and corruption.

203

Combatting these crimes is one of the global priorities for countries and multilateral institutions. Financial crime, if not combatted, can severely undermine the integrity of financial systems, economies and societies.

South Africa, to its credit, has been and remains committed to being a responsible global citizen by combating financial crime. This is evidenced by the enacting of the Financial Intelligence Centre Act in 2001; being a member of the Financial Action Task Force ("FATF") since 2003; ratifying the UN Convention Against Corruption in 2004; and lastly, Cabinet reaffirming financial integrity as a policy priority in 2011.

The Bill will, therefore, enhance South Africa's ability to combat financial crimes by:

- Addressing regulatory gaps identified by the 2009 FATF Mutual Evaluation and the 2014 FSAP, thereby enabling compliance with best practice;
- Strengthening the customer due diligence measures to make the financial system more transparent through the introduction of measures such as beneficial ownership and persons in prominent positions;
- Introducing a flexible risk-based approach to identifying and verifying customers, thereby facilitating cost effectiveness and financial inclusion; and
- Enhancing sharing of information with other designated entities, thereby improving coordination and crime fighting capabilities

Thank you

204 IM5

ANNEXURE IM5

FATF, 2009 MUTUAL EVALUATION OF SA and PEPS

UNITED NATIONS ANTI-CORRUPTION CONVENTION

1 The fight against corruption and money laundering has to be fought globally for it to be effective in any one country, as those laundering large amounts of money will almost inevitably try and hide their ill-gotten gains in foreign jurisdictions with high levels of banking secrecy and safety from prosecution. This was widely recognised by many countries in the 1990s, hence the adoption of the UN Convention Against Corruption (UNCAC) adopted in 2003 and the establishment of FATF in 1989.

2 The UNCAC was championed by then UN Secretary-General Mr Kofi Annan, and is an agreement with over 170 countries, and introduced a comprehensive set of anti-corruption standards, measures and rules, and greater cooperation between countries. As Mr Annan noted in its foreword:

"The Convention introduces a comprehensive set of standards, measures and rules that all countries can apply in order to strengthen their legal and regulatory regimes to fight corruption. It calls for preventive measures and the criminalization of the most prevalent forms of corruption in both public and private sectors. And it makes a major breakthrough by requiring Member States to return assets obtained through corruption to the country from which they were stolen."

3 The Convention recognises the complexity and strong politically-connected interest groups, and the need for preventive action when dealing with corruption,

204 IM5

ANNEXURE IM5

FATF, 2009 MUTUAL EVALUATION OF SA and PEPS

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3 The Convention recognises the complexity and strong politically-connected interest groups, and the need for preventive action when dealing with corruption,

and the major breakthrough in introducing the new fundamental principle of returning the proceeds of corruption to the state from which they were stolen:

"These provisions—the first of their kind—introduce a new fundamental principle, as well as a framework for stronger cooperation between States to prevent and detect corruption and to return the proceeds. Corrupt officials will in future find fewer ways to hide their illicit gains. This is a particularly important issue for many developing countries where corrupt high officials have plundered the national wealth and where new Governments badly need resources to reconstruct and rehabilitate their societies."

"The Convention introduces a comprehensive set of standards, measures and rules that all countries can apply in order to strengthen their legal and regulatory regimes to fight corruption. It calls for preventive measures and the criminalization of the most prevalent forms of corruption in both public and private sectors. And it makes a major breakthrough by requiring Member States to return assets obtained through corruption to the country from which they were stolen."

4 The IMF defines corruption as "the abuse of public office for private gain. This implies a focus on corrupt practices *involving civil servants or elected officials that are detrimental to the public interest*. The private sector is involved in corrupt acts either by being a counterpart - for example, when it obtains a public contract by paying a bribe - or by facilitating the corrupt act (for example, by helping to hide corrupt proceeds)." (my emphasis). (IMF Fiscal Monitor, April 2019, p 46)

5 It goes on to note that "Fighting corruption requires an understanding of the multifaceted forms through which it operates, including administrative corruption, in which corrupt acts take existing laws and regulations as given; and state capture, whereby politicians or officials accept bribes in exchange for altering legislation or regulation to favor private firms or individuals." It goes on to note that "Depending on the scale of the amounts involved, one can also distinguish

between grand corruption (as in the allocation of large investment projects) and petty corruption (for example, bribes to avoid a traffic violation).

FATF AND INTERNATIONAL ANTI-MONEY LAUNDERING STANDARDS

6 The Financial Action Task Force (FATF) was established by the G-7 Summit in July 1989, initially to examine and develop measures to combat money laundering of drug-related money. It has developed into a member-based organisation with 37 member jurisdictions and 2 regional organisations, representing most major financial centres in all parts of the globe, including South Africa, which is the only African country to be a member. Most African countries are, however, members of three regional bodies that are associate members of FATF.

7 While membership of FATF is voluntary, countries that are not part of the FATF processes suffer exclusion from the global financial system to a greater or lesser degree because financial markets tend to avoid them for risk exposure reasons. South Africa had consistently followed a policy of implementing recognised international standards and best practices concerning the combating of financial crime and the regulation of the financial sector.

8 The new democratic SA Government under President Mandela recognised that importance of strengthening measures to fight corruption, and commenced work on anti-corruption and anti-money laundering legislation soon after 1994. It also recognised the need for global co-operation and standards, and took three important decisions during President Mbeki's first term. The first was our decision to be one of the initial signatories of the Palermo Convention against Organised

Crime (which requires State Parties to have measures against money laundering) in December 2000. The second was to become a member of Financial Action Task Force (FATF), which accepted our application in June 2003. (All five members of BRICS became members of FATF around the same time). The third was our decision to become a founding signatory to the United Nations Convention against Corruption ("UNCAC") in 2003, an initiative championed by the late Mr Kofi Annan, the then UN Secretary-General.

9 The FATF describes itself as the global money laundering and terrorist financing watchdog. Its objectives are to set standards and promote effective implementation of legal, regulatory and operational measures for combating money laundering, terrorist financing and other related threats to the integrity of the international financial system. It has developed the FATF Recommendations which are the international standards, to ensure a co-ordinated global response to prevent organised crime, corruption and terrorism. Currently, there are 40 FATF Recommendations.

10 "The original FATF Forty Recommendations were drawn up in 1990 as an initiative to combat the misuse of financial systems by persons laundering drug money. In 1996, the Recommendations were revised for the first time to reflect evolving money laundering trends and techniques, and to broaden their scope well beyond drug-money laundering. In October 2001, the FATF expanded its mandate to deal with the issue of the funding of terrorist acts and terrorist organisations, and took the important step of creating the Eight (later expanded to Nine) Special Recommendations on Terrorist Financing. The FATF Recommendations were revised a second time in 2003, and these, together with

the Special Recommendations, have been endorsed by over 180 countries, and are universally recognised as the international standard for anti-money laundering and countering the financing of terrorism (AML/CFT)." (page 1, "**The FATF Recommendations"** the updated October 2020 FATF document).

11 As noted on its website and many documents, "(t)he FATF Recommendations set out a comprehensive and consistent framework of measures which countries are expected to implement in order to combat money laundering and terrorist financing, as well as the financing of proliferation of weapons of mass destruction…The FATF Recommendations, therefore, set an international standard, which countries should implement through measures adapted to their particular circumstances….The FATF Standards comprise the Recommendations themselves and their Interpretive Notes, together with the applicable definitions in the Glossary."

12 To ensure that all countries enforce the minimum standards, and starting with its own members, the FATF monitors countries' progress in implementing the FATF Recommendations; reviews money laundering and terrorist financing techniques and counter-measures; and, promotes the adoption and implementation of the FATF Recommendations globally. It conducts a peer view of member and associate countries every six to ten years, called a Mutual Evaluation Review (MER), which identifies deficiencies in a country's anti-money laundering system. As noted on the FATF website https://www.fatf-gafi.org/publications/mutualevaluations/more/more-about-mutual-evaluations.html?hf=10&b=0&s=desc(fatf_releasedate)

"FATF mutual evaluations are in-depth country reports analysing the implementation and effectiveness of measures to combat money laundering and terrorist financing. Mutual evaluations are peer reviews, where members from different countries assess another country. A mutual evaluation report provides an in-depth description and analysis of a country's system for preventing criminal abuse of the financial system as well as focused recommendations to the country to further strengthen its system. Mutual evaluations are strict and a country is only deemed compliant if it can prove this to the other members. In other words, the onus is on the assessed country to demonstrate that it has an effective framework to protect the financial system from abuse".

2009 MUTUAL EVALUATION OF SA

13 FATF conducted its first mutual review of South Africa in 2003 and again in 2009. South Africa's third review started in April 2003, and is still in process.

14 The 2009 FATF Mutual Evaluation Report (MER) on South Africa dated 26 February 2009 found a number of significant shortcomings where South Africa was found to be partially compliant or non-compliant in relation to 26 of the 40 Recommendations and 9 Special Recommendations on Terrorist Financing, which South Africa had to address to maintain its status as member of good standing - Annexure **IM7** is the summary of 2009 FATF MER report on SA. We were partially compliant with two core (R.5 and R.10) and two key (R.23 and SR.III) recommendations. These dealt with customer due diligence (CDD) requirements, (including on record-keeping) and the proper application of the Risk-Based Approach (RBA) by financial institutions and designated non-

financial businesses and professions. Positively, there were no recommendations that were rated Non-Complaint among the core and key recommendations. As is the norm after such country reviews, FATF placed South Africa on a "regular follow-up process" where we were given up to three years to address most if not all the technical compliance deficiencies. We had to report annually to the FATF Plenary in February 2011, 2012 and 2013.

15 Customer Due Diligence (CDD) is the process of assessing risks posed by potential and current customers. It includes KYC (know our customer), which helps prevent people from opening accounts anonymously or under a false name. Customers (and potential customers) are risk-rated to determine the likelihood of risk their activities pose to the institution from money-laundering or terrorist financing. CDD is an ongoing control of suspicious activity related to the laundering of the proceeds of crime and/or terrorist financing, and preventing bribery and corruption. Customers are assessed as whether customer due diligence checks should remain standard, eased to simplified due diligence, or reinforced to enhanced due diligence. Enhanced due diligence (EDD) is used for high-risk customers, those who are assessed by a bank to be more likely to be involved in money laundering and terrorism financing activities due to the nature of their business or transactions.

16 We made good progress on addressing these deficiencies in the period 2011-13, particularly where they only required subordinate or no regulations, and addressed some of the key recommendations to legislative amendments to other Acts, like the Financial Advisory and Intermediary Services Act (FAIS Act) and two insurance Acts to deal with deficiencies related to fit and proper. What

remained was the deficiencies in the two core recommendations, which required amendments to the FIC Act.

17 Given that FATF was tightening some of its standards in 2012 (e.g. extending PEPs to domestic persons), we decided to amend the FIC Act only after we had greater clarity on the new international standards. National Treasury and the Financial Intelligence Centre (FIC) then began a consultation process in 2013 within Government and with other regulators, to review and amend the FIC Act, to deal with the deficiencies in the two core recommendations, as well as to comply with a Constitutional Court judgment related to warrants for inspection and search power, where we had a deadline of 27 February 2016.

18 In trying to comply with the new 2012 FATF recommendations, the Bill also contained clauses related to domestic and foreign PEPs (more on this below). The National Treasury and FIC prepared a consultation paper for public comment in April 2014, and thereafter finalized the first draft of the Financial Intelligence Centre Amendment Bill.

19 Whilst we progressively addressed most of these shortcomings by February 2013, but because FATF had started a new process to review its standards, we delayed on amending provisions of the FIC Act to avoid a situation where financial institutions would have had to adapt to two consecutive large scale amendments to their customer due diligence obligations within a short period. The FIC had started a review of the FIC Act in 2011 and engaging with National Treasury in April 2013. We had therefore not addressed two core FATF recommendations (or in FATF jargon, the old R.5 (customer due diligence) and

R.10 (record keeping) recommendations), where we had been deemed to be partially compliant in the 2009 MER, as these required changes to the 2001 FIC Act itself. We were therefore required by FATF to report on progress more frequently thereafter - Annexures **IM7** and **IM8**.

20 FATF had expected that the FICA Bill would have been ready for tabling by June 2014, and because we were not ready, the FATF President wrote to Minister Nene on 29 August 2014, annexure **IM6**, requesting SA to report on progress.

21 Minister Nene responded to the FATF President in a letter dated 17 September 2014 saying that he expected Cabinet to endorse the FICA Amendment Bill for public comment by the end of October 2014 and, in effect, confirming that we would meet the FATF deadline, annexure **IM6**. In accordance with this timeframe, in October 2014 Treasury and the FIC were ready to submit the draft FICA Bill to Cabinet. By this time, we had conducted the necessary consultations with the relevant clusters of Director-Generals (justice and crime prevention, economic) and NICOC.

22 The DGs attending these two cluster meetings were alerted to the fact that we were on the FATF targeted follow-up process, and we explained why we needed the amendments to the FIC Act. We alerted them to the PEPs concept, which was one of the key amendments in the Bill, and which we knew was politically-sensitive. PEPs cover the category of persons occupying senior political and/or Government positions, including Ministers and DGs. Both DG cluster meetings accepted the approach to Politically Exposed Persons (PEPs). I will explain the PEPS concept in more detail below.

23 We requested the DGs, and other officials attending the cluster meetings, to explain the PEPs concept to their Ministers, ahead of them receiving the Cabinet memorandum for the Bill, as we knew it would be a sensitive issue for them if not fully understood within the context of international anti-money laundering practices.

24 We submitted the Cabinet Memorandum on the FICA Bill to the Economic Sectors, Investment, Employment and Infrastructure Development (ESEID) Cabinet Committee) a week before its 15 October 2014 meeting, as per standard practice. Given the rigour that we had applied to drafting the Bill, we expected the Cabinet Committee to recommend its publication to the full Cabinet meeting the following week, either as it was proposed or with amendments. This would then have enabled us to publish the Bill for public comment, and substantially meet the October 2014 FATF deadline.

Cabinet Approval process to publish and table Bill in 2014-15

25 To our surprise, when we first took the FICA Bill to Cabinet in October 2014 in order to meet with the FATF deadline, it took us six months to secure approval merely to publish the bill for public comment, a process which should ordinarily have taken two weeks.

26 The ESEID Cabinet committee at its meeting of 15 October 2014 proposed to the Cabinet meeting of 22 October 2014, that the Bill be sent back for further work, after we encountered significant resistance to the concept of PEPs. So strong was the resistance that the ESEID not only requested us to revise the bill to modify or remove the PEPs concept, but that the revised bill be taken back to

each of three DG Clusters first (ESEID, International Cooperation, Trade and Security (ICTS), Justice, Crime Prevention and Security (JCPS)) before submission again to the ESEID Cabinet Committee. The ESEID decision meant that it would be impossible for us to make the FATF deadline on tabling the Bill in 2014, as the process they insisted on would take a few months to comply with.

27 The full Cabinet endorsed the ESEID decision on 22 October 2014. On further query from the Minister of Finance at the next Cabinet meeting of 5 November 2014, Cabinet amended its original decision and approved that the Bill did not have to go back to the DG clusters, nor to each of the Cabinet Committees separately, but that a revised Bill should rather be submitted to a joint meeting of the three Cabinet Committees. This eased the burden of the process for us, and we thought we could try and revise the Bill quickly and take back to Cabinet at its next meeting, before the end of the year.

28 On 3 December 2014, we took the Cabinet memorandum back to a Joint ESEID, JCPS and ICTS Cabinet Committee Meeting, and then to full Cabinet on 10 December 2014. The Joint Cabinet Committees remained dissatisfied with the PEPs provisions, as they felt we continued to discriminate against political office bearers, and indicated that they wanted the private sector to be included in a similar way if we were to continue with the PEPs approach. We were requested to re-submit the Bill (which had to "be strengthened and refined") to the ESEID Cabinet Committee in 2015, after amending the PEPs concept to cover both the public and private sectors. Other issues also arose with the Bill for the first time, related to state sovereignty, the status of UN Security Council resolutions, confidentiality and verification of information, including personal

information held by banks, and ensuring that such information is not used unlawfully. On 10 December 2014, the full Cabinet meeting endorsed the Joint Committees' recommendations.

29 Our failure to secure Cabinet approval in October and December 2014 just to publish the Bill for public comment meant that at both the next FATF Plenary meetings in October 2014 and February 2015, we had to plead for more time to publish the FICA Bill. FATF agreed and granted us until June 2015 to report back on progress. In its 7th follow-up report dated 11 February 2015, the FATF Secretariat recommended: "In June 2015, the FATF Plenary would consider a possible next step, i.e. a high-level mission to the country, if no progress would be made in the legislative process of the Bill at that time", annexure **IM8**.

30 On 25 March 2015, the FICA Bill was submitted to ESEID for the third time, after we revised it by expanding the definition of PEPs to the broader, and unique, concept of PIPs (prominent influential persons).

31 PIPs would include both those who the original bill deemed to be PEPs, as well as high-level managers from the private sector (this was the only principal difference between this draft and the previous draft of the Bill). The ESEID Cabinet Committee recommended to Cabinet that it approve the publishing of the Bill for comment, which Cabinet duly approved at its next meeting on 15 April 2015.

32 The press release after this cabinet meeting (issued on 17 April 2015) noted that: *"The Amendment Bill proposes amendments to the Financial Intelligence Centre Act (Act No. 38 of 2001). This is to address threats to the stability of our financial*

system posed by money laundering and terrorism financing by ensuring compliance with international measures and standards, within the South African legislative framework" [1]. This was followed by a more detailed press release by the National Treasury when it released the Bill for public comment on its website on 21 April 2015, annexure **IM9**.

33 We were able to report to FATF for its June 2015 Plenary meeting that the Bill had been published for public comment, and we outlined our timelines for tabling to Parliament. Importantly, we were able to submit the draft Bill to the FATF Secretariat in April for it to assess whether the Bill addressed the deficiencies for the two core recommendations they had previously highlighted.

34 FATF responded with their comments, noting the broader definition of foreign and domestic prominent influential persons.

35 It is important to note that the JCPS security cluster Ministers were present and active at the 3 December 2014 Cabinet committee meeting and that no Minister (or Deputy Minister) raised the issue of constitutionality of the PEP or PIP clause or of the warrantless search clauses, nor was there any objection that the Counter-money Laundering Advisory Council be abolished. There was also no discussion on the role of the FIC, nor on its reporting to a JCPS Cluster Minister rather than the Minister of Finance. Indeed, this was not done at any of the many Cabinet committee and Cabinet meetings discussing the FICA Bill in 2014 and 2015. All these points were only raised for the first time by any Minister after the President referred the Bill back to Parliament in November 2016.

[1] https://www.gcis.gov.za/newsroom/media-releases/statement-cabinet-meeting-15-april-2015

217

36 In summary, the Bill was first submitted to the ESEID Cabinet Committee on 15 October 2014 and rejected by it and the subsequent Cabinet meeting of 22 October 2014, and then rejected again at the 3 December 2014 Cabinet meeting, and finally only approved by Cabinet on 15 April 2015, that we could publish the Bill for public comment. This delay of six months forced us to plead for more time at the October 2014 and February 2015 FATF meetings, as we missed out on agreed deadlines to table the Bills in Parliament.

37 In contrast, the far more complex FSR Bill sailed through Cabinet smoothly and quickly at both times when we needed its approval. Cabinet accepted the need for tougher prudential and market conduct standards for banks and other financial institutions. I suspect it was because such a law did not affect any member of Cabinet personally, there was no resistance to it.

ORIGIN OF PEPs CLAUSE

38 The use of the PEPS concept as standard tool for anti-corruption standards can be traced to Article 52 of the United Nations Convention against Corruption ("UNCAC") in 2003.[2] In recognition of the role of political-office bearers or senior public servants with regard to acts of corruption, the United Nations (UN) has defined the concept of Politically-Exposed Persons (PEPs) to determine more effective preventive systems to deal with corruption. Whilst it did not use the words PEPs directly, it identified "individuals who are, or have been, entrusted with prominent public functions and their family members and close associates",

2 31 October 2003, by resolution 58/4.

19

and includes both domestic and foreign PEPs. The main aim of the obligations in Article 52 of UNCAC is to fight corruption by politically-connected persons.

39 This convention introduced the concept of 'trading influence'[3] by PEPs, and the need for higher anti-corruption standards to apply, primarily for the banking sector to apply to political office-holders and senior officials in the public sector.[4] Article 18 states:

"Trading in influence Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

40 Article 12(2)(e) of the UNCAC provides:

"(e) Preventing conflicts of interest by imposing restrictions, as appropriate and for a reasonable period of time, on the professional activities of former public officials or on the employment of public officials by the private sector after their resignation or retirement, where such activities or employment relate directly to the functions held or supervised by those public officials during their tenure;"

(a) The promise, offering or giving to a public official or any other person, directly or indirectly, of an undue advantage in order that the public official or the person abuse his or her real or supposed influence with a view to obtaining from an administration or public authority of the State Party an undue advantage for the original instigator of the act or for any other person;

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3 Article 18.

4 Article 40.

(b) The solicitation or acceptance by a public official or any other person, directly or indirectly, of an undue advantage for himself or herself or for another person in order that the public official or the person abuse his or her real or supposed influence with a view to obtaining from an administration or public authority of the State Party an undue advantage."

41 Article 40 concerns Bank secrecy:

"Each State Party shall ensure that, in the case of domestic criminal investigations of offences established in accordance with this Convention, there are appropriate mechanisms available within its domestic legal system to overcome obstacles that may arise out of the application of bank secrecy laws."

42 The exception to bank secrecy provisions, and the concept of PEPs, was a response to high-level officials and dictators in Africa and Asia (such as heads of state - Sani Abacha and Ferdinand Marcos) who stole public funds and then hid the money under the extreme bank secrecy provisions that applied to Swiss banks. So, this concept started with the intention of protecting the poor in developing countries, by preventing their politicians from looting their country and then hiding those funds in a foreign jurisdiction where they enjoyed total secrecy and safety from prosecution in such jurisdictions.

43 FATF Recommendations differentiate between domestic and foreign PEPs. The FATF first issued mandatory requirements in June 2003[2] covering foreign PEPs, their family members and close associates[1]. In February 2012, the FATF expanded the mandatory requirements to domestic PEPs and PEPs of international organisations. The 2012 FATF requirements extends the PEPs

concept more broadly against ML and its predicate offences (designated categories of offences), including corruption, and TF.

44 Politically exposed persons (PEPs) are individuals who are entrusted with a prominent public position and therefore may be more susceptible to acquiring money through illegal means, which also means that they are statistically more likely to launder money. FATF recommendation (no 12) requires financial institutions to actively monitor such customers through a risk-based approach, including identifying their sources of wealth, regular monitoring, and introducing senior management approval.

45 Enhanced due-diligence measures apply automatically to all foreign PEPs, but only to those domestic PEPs who are assessed to be higher risk by their bank. Hence, in relation to domestic prominent persons, financial and other institutions are only required to take additional risk mitigation measures if they decide, on an individual basis, and via their objective risk profiling systems, that there are indications that a domestic PEP is assessed to be of higher financial crime risk. This means that financial institutions generally do not apply any more stringent identification requirements for the greater majority of clients who are domestic PEPs as they would for any other non-PEP client who is assessed to be a normal risk-profile.

46 FATF guidance notes that "These requirements are preventive (not criminal) in nature, and should not be interpreted as stigmatising PEPs as such being involved in criminal activity. Refusing a business relationship with a PEP simply

based on the determination that the client is a PEP is contrary to the letter and spirit of Recommendation 12".

47 The FIC Act defines a domestic prominent influence person in Schedule 3A, in line with what Cabinet approved in March 2015, which is basically a PEP in line with the FAFT definition, but also adds private sector persons like the Chair of the Board, CEO, CFO of a company that provides goods or services to an organ of state and whose annual transactional value exceeds a threshold amount determined by the Minister of Finance.

The FIC Act therefore defines a DOMESTIC prominent influential person (D-PIP) "is an individual who holds, including in an acting position for a period exceeding six months, or has held at any time in the preceding 12 months, in the Republic— *(a)* a prominent public function including that of—

(i) the President or Deputy President;

(ii) a government minister or deputy minister;

(iii) the Premier of a province;

(iv) a member of the Executive Council of a province;

(v) an executive mayor of a municipality elected in terms of the Local Government: Municipal Structures Act, 1998 (Act No. 45 117 of 1998);

(vi) a leader of a political party registered in terms of the Electoral Commission Act, 1996 (Act No. 51 of 1996);

(vii) a member of a royal family or senior traditional leader as defined in the Traditional Leadership and Governance Frame- work Act, 2003 (Act No. 41 of 2003);

(viii) the head, accounting officer or chief financial officer of a national or provincial department or government component, 5 as defined in section 1 of the Public Service Act, 1994 (Proclamation No. 103 of 1994);

(ix) the municipal manager of a municipality appointed in terms of section 54A of the Local Government: Municipal Systems Act, 2000 (Act No. 32 of 2000), or a chief financial officer 10 designated in terms of section 80(2) of the Municipal Finance Management Act, 2003 (Act No. 56 of 2003);

(x) the chairperson of the controlling body, the chief executive officer, or a natural person who is the accounting authority, the chief financial officer or the chief investment officer of a public 15 entity listed in Schedule 2 or 3 to the Public Finance Management Act, 1999 (Act No. 1 of 1999);

(xi) the chairperson of the controlling body, chief executive officer, chief financial officer or chief investment officer of a municipal entity as defined in section 1 of the Local Government: 20 Municipal Systems Act, 2000 (Act No. 32 of 2000);

(xii) a constitutional court judge or any other judge as defined in section 1 of the Judges' Remuneration and Conditions of Employment Act, 2001 (Act No. 47 of 2001);

(xiii) an ambassador or high commissioner or other senior representative of a foreign government based in the Republic; or

(xiv) an officer of the South African National Defence Force above the rank of major-general;

(b) the position of—

(i) chairperson of the board of directors;

(ii) chairperson of the audit committee;

(iii) executive officer; or

(iv) chief financial officer,

of a company, as defined in the Companies Act, 2008 (Act No. 71 of 2008), if the company provides goods or services to an organ of state and the annual transactional value of the goods or services or both exceeds an amount determined by the Minister by notice in the *Gazette*; or

(c) the position of head, or other executive directly accountable to that head, of an international organisation based in the Republic.

224 IM6

FINANCIAL ACTION TASK FORCE
THE PRESIDENT

The Honourable Nhlanhla Musa NENE
Minister of Finance
Ministry of Finance
40 Church Square
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South Africa

29 August 2014

Our Ref. : 20140829liw03

Subject : Placement of South Africa in the new FATF targeted follow-up process

Dear Minister,

As the new FATF President, I am writing to inform you of the discussions that took place at the June 2014 FATF plenary meeting concerning the termination of the third round follow-up process, and placement of South Africa in the new targeted follow-up process adopted by the FATF in June.

The FATF has commenced its fourth round of mutual evaluations, and the assessments will focus on how effective countries are in combating money laundering and the financing of terrorism and proliferation.

Owing to the start of the fourth round, the FATF has decided to terminate its third round of assessments and follow-up processes, effective from June 2014. Under FATF procedures, FATF members can exit the follow-up processes when the FATF plenary determines that satisfactory levels of compliance have been achieved. The FATF plenary agreed in June that it is important that members that failed to exit should be subject to continued review, and encouraged to promptly rectify their deficiencies. It was noted that FATF members should demonstrate a strong commitment to achieving high levels of compliance with the FATF standards, thus setting a positive example for the eight FATF-style regional bodies.

The FATF plenary therefore decided to adopt a targeted follow-up process for dealing with those members that have not yet exited the previous process, such as South Africa, and this process will apply until a satisfactory level of compliance is achieved or the member commences its fourth round assessment. These members will be required to submit reports at every FATF plenary meeting, and will be expected to demonstrate expeditious and significant progress to address the outstanding deficiencies. Failure to achieve that progress could lead the FATF plenary to apply other more serious measures. Further details on the new targeted follow-up process are provided in the appendix to this letter.

As of June 2014, South Africa reported that it had yet to enact and bring into force legislative amendments to the FIC Act to address fundamental deficiencies in its mutual

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225

evaluation report relating to customer due diligence (CDD) requirements and the proper application of the risk-based approach, including the need for amendments to record-keeping requirements. The FATF plenary was further advised that these legislative amendments were being considered under a consultation process, after which a draft bill would need to be approved by the Cabinet before being tabled to the Parliament; and thereafter, that it would take at least six to eight months before the necessary legislation could be passed.

In accordance with the decision taken by the FATF plenary, South Africa is therefore required to report back at the October 2014 FATF plenary meeting demonstrating that a draft bill to amend the FIC Act has been tabled to the Parliament. It is also requested that South Africa provides a copy of the draft bill by October in order for the FATF plenary to consider the proposed amendments and how well they address the deficiencies identified in South Africa's mutual evaluation report.

South Africa has been an active and supportive member of the FATF, and I am hopeful that the South African authorities will expeditiously enact and bring into force these important legislative amendments.

Yours sincerely,

Roger Wilkins AO
FATF President

CC: Mr. Pieter SMIT, pieter.smit@fic.gov.za
Enclosure: Appendix

226

Appendix

The FATF targeted follow-up process

1. All members that fail to exit the third round follow-up process in June 2014 will be placed in the equivalent of enhanced follow-up (as understood by the third round procedures), and will be required to report back to the FATF plenary at every meeting, until the deficiencies in their core and key Recommendations are satisfactorily resolved.

2. The FATF plenary will adopt the graduated steps listed under the 3rd round enhanced follow-up process as a basis for dealing with these countries. However, the range of measures will be modified in order to recognise: (a) the different circumstances of these countries, specifically those whose situations are less serious, or which realistically anticipate exiting this process by no later than February 2015; and (b) the resource limitations presently experienced by the FATF.

3. The full range of measures available to the FATF plenary under the new targeted follow-up process is therefore as follows:

    a. The FATF plenary may opt to develop action plans that focus on members' outstanding deficiencies relating to all core and key Recommendations rated partially or non-compliant (PC/NC) in a member's evaluation report, and on the steps taken by these members to address their action plan items. The follow up process would therefore not address the other Recommendations rated PC/NC in the MER. Given this revised focus, members could exit the targeted follow-up process if all Recommendations, or all but one key Recommendation (Special Recommendation III), are at a level essentially equivalent to compliant or largely compliance (C or LC).

    b. The FATF plenary may opt to bring forward the timing of the 4th Round assessments of these members, where permissable under the 4th Round assessment schedule.

    c. The FATF Plenary will discontinue reporting against these action plans upon the commencement of a member's fourth round assessment (i.e. six months before that member's onsite visit). However, in cases where a member still has not satisfactorily addressed the items in its action plan, Plenary may review that member's circumstances and recommend that further measures (or a combination of further measures) be taken *in the course of that member's 4th Round assessment*. These could include:

227

i. Directing assessors and reviewers to undertake increased scrutiny during a member's fourth round assessment of those core and key Recommendations with outstanding third round deficiencies.
ii. Automatic placement in the fourth round enhanced follow-up process (or in the ICRG, in serious cases) if a member's fourth round report finds that deficiencies from the third round core and key Recommendations remain unaddressed.
iii. For members placed in the fourth round enhanced follow-up process in this way – that the FATF plenary could automatically apply the next tier of enhanced measures under the fourth round enhanced follow-up process, based on the last actions taken under third round follow-up. For example, where the last action taken in the third round was to send a letter to that member, the starting point in the fourth round could be to recommend the undertaking of a high-level mission to call on that member's ministers and senior officials.
iv. In serious cases, the FATF plenary may opt to issue a special standalone FATF statement highlighting the serious and longstanding deficiencies in that member's regime; explaining that the member has been moved into the FATF's enhanced follow-up process as a result; and calling for prompt action by that member to redress said deficiencies.
v. In serious cases, the FATF plenary may apply a targeted form of countermeasures in the context of Recommendation 19 that corresponds with the deficiencies that persist in the core and/or key Recommendations.

d. The FATF plenary may decide that a high-level mission should be arranged to the member jurisdiction to reinforce the serious concerns regarding its outstanding deficiencies. This mission would meet with Ministers and senior officials.

e. In the context of the application of Recommendation 19 by its members, the FATF plenary may decide to issue a formal FATF statement to the effect that the member jurisdiction is insufficiently in compliance with the FATF Recommendations, and recommending appropriate action, and considering whether additional counter-measures are required.

f. The FATF plenary may decide to suspend the jurisdiction's membership of the FATF until the Recommendations have been implemented.

g. The FATF plenary may deem it necessary to terminate the membership of that jurisdiction altogether.

9

228

FATF/PLEN(2014)45

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Roger Wilkins AO
President: Financial Action Task Force
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By e-mail: President@fatf-gafi.org

Dear Mr Wilkins

FATF TARGETED FOLLOW-UP PROCESS OF SOUTH AFRICA

Thank you for your letter with reference number 20140829liw03, dated 29 August 2014

I take note of the decision in the Financial Action Task Force (FATF) to place South Africa in the new targeted follow-up process adopted in June 2014

I would like to take this opportunity to confirm that South Africa has undertaken an extensive review of its legal framework against money laundering and the financing of terrorism and the proliferation of weapons of mass destruction. The results of this review process include proposals for a number of legislative amendments which will significantly enhance South Africa's requirements relating to customer due diligence

229

and the application of a risk-based approach among authorities and within the private sector

In this regard a proposed Amendment Bill was delivered to me and is currently being prepared for introduction into the legislative process. It is my hope that in the course of October 2014, Cabinet will endorse the proposed amendments and approve the Tabling in Parliament of a Bill that is substantially similar to this current draft

Let me assure you again of South Africa's commitment to, and support for the work of the FATF and the principle of protecting the integrity of the international financial system against abuse for illicit purposes

Kind regards

NHLANHLA NENE, MP
MINISTER OF FINANCE
Date:

230 IM7

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FATF/WGEI(2013)21

Financial Action Task Force
Groupe d'Action Financière

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Working Group on Evaluations and Implementation

MUTUAL EVALUATION OF SOUTH AFRICA: THIRD FOLLOW-UP REPORT

18-20 February 2013, OECD Conference Centre, Paris, France.

FATF-XXIV

Please bring this document with you to the meeting as no paper copy will be available at that time.

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231

FATF/WGEI(2013)21

MUTUAL EVALUATION OF SOUTH AFRICA: THIRD FOLLOW-UP REPORT

Note by the Secretariat

I. INTRODUCTION

1. The mutual evaluation of South Africa took place in February 2009. The country is on the regular follow-up process, and this is the third follow-up report. The dates for the mutual evaluation report (MER) and the first and the second follow-up reports are as follow:

- Mutual Evaluation Report: 26 February 2009.
- The first follow-up report (regular follow-up process): 23 February 2011.[1]
- The second follow-up report (regular follow-up process): 14 February 2012.[2]

2. The report presented by South Africa indicates its progress to bring itself into fuller compliance with the *FATF Recommendations (2003)*, while legislative amendments to the *Financial Intelligence Centre Act* (the *FIC Act*) and subordinate regulations, which would address the deficiencies on R5 and R10 in particular, are still pending. Since the country is committed to the amendments in the coming months, the Secretariat is of the view that it is reasonable for South Africa to remain on the regular follow-up process.

II. SUMMARY OF PROGRESS MADE BY SOUTH AFRICA

Findings of the MER

3. South Africa was rated partially compliant (PC) or non-compliant (NC) on 26 Recommendations as shown in **Annex 1**. Among the core Recommendations[3], two (R5 and R10) were rated at PC. As for the key Recommendations[4], another two (R23 and SRIII) were rated at PC. There were no Recommendations rated NC among the core and key Recommendations. On this basis, the Plenary decided that South Africa be placed in the regular follow-up and report back in February 2011 for its first follow-up. The country has reported its steady progress towards fuller compliance with the *FATF Recommendations (2003)* in the second follow-up. Material submitted by South Africa in support of this third follow-up report appears in **Annex 2**. The following section summarises the progress that South Africa reports in relation to the core, key and other Recommendations rated PC or NC.

Summary of the findings of the third follow-up report

Progress made regarding the core Recommendations (R5 and R10)

[1] FATF/WGEI(2011)21.

[2] FATF/WGEI(2012)15.

[3] The core Recommendations: R1, R5, R10, R13, SRII and SRIV.

[4] The key Recommendations: R3, R4, R23, R26, R35, R36, R40, SRI, SRIII and SRV.

4. On R5 and R10, South Africa is currently preparing legislative amendments to the *Financial Intelligence Centre Act* (the *FIC Act*) and subordinate regulations to strengthen the customer due diligence (CDD) requirements, and the application of the risk-based approach (RBA). The amendments include consequential amendments to the record-keeping requirements and to the exemptions in relation to some of the CDD and record keeping requirements. These amendments will be introduced into the legislative process in the course of 2012/2013 financial year (April 2012 through March 2013). The Financial Intelligence Centre (the Centre) has started reviewing the *FIC Act*. The review has entailed researching and identifying areas to be addressed to update and improve the *FIC Act* and formulating ideas on CDD and other matters.

5. In relation to R5, the Centre has strengthened the country's AML/CFT measures through production of quality financial intelligence in collaboration with the private sector and relevant agencies. The Centre has conducted compliance initiatives, supported by the expanded awareness campaigns, increased monitoring, automation of its query process and enforcement measures. Partnerships with the private sector were enhanced through interaction with supervisory bodies, and financial and other institutions. For example, as for the Centre's register of accountable institutions and reporting institutions (*i.e.* institutions covered under the *FIC Act*[5]), the number of entities on the register increased by 62 percent, to 14,054 at the end of the financial year 2011/2012 (1 April 2011 through 31 March 2012) from 8,661 of the previous year 2010/2011. This reflects continued growth in awareness among accountable and reporting institutions of the AML/CFT framework of the country and the need for affected institutions to register. The expansion of the data in the registry also improve the Centre's monitoring activities as it is now able to capture broader sets of data.

6. As for accountable institutions' submission of cash threshold reports (CTR) and suspicious transaction reports (STR), more than 5.5 million CTRs, the minimum value of which is ZAR (South African Rand) 138 billion (around USD 15.8 billion), were made to the Centre. The CTR captures cash transactions of ZAR 25,000 (around USD 2,800) and above that involve domestic and foreign notes, coins and traveller's cheques, and which must be reported to the Centre by all accountable and reporting institutions, including banks, motor vehicle dealers and casinos. The Centre's guidance on CTR (*Guidance Note 05 on section 28 of the FIC Act*) has made it clear that, as of May 2012, CTRs must be filed as soon as possible but not later than two business days after the accountable or reporting institutions become aware that a cash transaction(s) exceeds the threshold.

7. With respect to STR, 53,506 STRs were received from businesses and individuals for the year 2011/2012, which is a 45 percent increase compared to 36,990 STRs filed with the Centre for the previous year 2010/2011. The Centre evaluated around 15,000 STRs and 4 million electronic funds transfers for the year 2011/2012, and froze 482 bank accounts that were believed to be harboured the proceeds of unlawful activities.

Progress made regarding the key Recommendations (R23 and SRIII)

8. On R23, the Centre launched its inspection programme in September 2011 and conducted 220 inspections in the following seven months to the end of March 2012, including 26 joint inspections of the Centre and other supervisory body. The country's supervisory bodies collectively performed another 300 inspections under the *FIC Act* during the year 2011/2012.[6] These inspections determine whether

[5] Under the *FIC Act*, accountable institutions and reportomg institutions, which are as listed in Schedule 1 and Schedule 3 to the *FIC Act*, respectively, are obliged to make a cash threthhold report (CTR) and susupecious transaction report (STR).

[6] More information on inspections conducted by the Centre for the year 2011/2012 can be found in the *Financial Intelligence Centre Annual Report 2011/12* (available at: https://www.fic.gov.za/Default.aspx).

accountable institutions have adhered to the essential elements of compliance, which include customer identification, record-keeping, setting internal rules for compliant behaviour and appointing a compliance officer, staff training, and appropriate reporting to the Centre. Many of these inspections have resulted in remedial action and sanctions. Where sanctions are issued, those who are inspected may appeal to the FIC Act Appeal Board, the members of which were appointed by the Finance Minister in June 2011.

9. On SRIII, the substantial progress has been reported in the previous follow-ups. No additional measures were reported.

Progress made regarding other Recommendations

10. Legislative amendments to the *FIC Act* and subordinate regulations which are expected in the 2012/2013 financial year will address a range of matters, including the deficiencies identified in relation to Recommendations 6, 8, 9, 11, 12 and 15.

11. On R9, the Centre provided a Public Compliance Communication (PCC) No. 12 (PCC12) *Outsourcing of compliance activities to third parties*. According to the PCC 12, accountable institutions remain responsible for compliance with their obligations in terms of the *FIC Act* regardless of their internal arrangements relating to the manner in which those obligations are met. An accountable institution may use the services of a third party to perform activities relating to the establishing and verifying clients' identities as well as the collection of required documents to establish clients' identities and for record-keeping purposes as required under the *FIC Act* and related regulations. However, an accountable institution remains liable for compliance failures associated with and/or caused by such an outsourcing arrangement. Furthermore, another PCC 14 *Client identification and verification requirements when a person acts on the authority of another* provides that an accountable institution is to identify and verify the identity of each natural person who purports to be authorised to establish a business relationship or to enter into a single transaction with that accountable institution on behalf of a client, or where a client of the accountable institution acts on behalf of another person. The client or another person referred to in the PCC can be a legal person.

12. On R12, the Centre issued eight PCCs, clarifying the obligations of DNFBPs and enhancing supervisory bodies' understanding of the *FIC Act*. The PCCs issued for the year 2011/12 were: PCC 07 *Definition of a motor vehicle dealer*, PCC 08 *The duties of estate agents*, PCC 09 *Identification and verification of loyalty programme members in the casino industry*, PCC 10 *Definition of the client of an estate agent*, PCC 11 *Closing a client's account by an accountable institution amounts to a transaction*, PCC12 *Outsourcing of compliance activities to third parties*, PCC 13 *Scope of item 12 of schedule 1 to the FIC Act in relation to registered auditors*, and PCC 14 *Client identification and verification requirements when a person acts on the authority of another*. All these PCCs are available at the Centre's website (www.fic.gov.za).

13. On R7, the substantial progress has been reported in the second follow-up. No additional measures were reported.

14. On R16, the Centre continued to promote mutual assistance with supervisory bodies for DNFBPs on awareness of compliance, enforcement, monitoring and sharing of information. The Centre signed memoranda of understanding with the Estate Agency Affairs Board, the National Gambling Board and the Western Cape Racing and Gambling Board. In addition, in order to promote standardised compliance and enforcement among the accountable and reporting institutions, the FIC Act Enforcement Forum was established and its inaugural meeting was held in December 2011. The forum consists of the Centre and all supervisory bodies with objectives to: meet on a regular basis to discuss compliance and enforcement of the *FIC Act*; manage the relationships between the Centre and all supervisory bodies; co-ordinate the

approach to exercising their powers and performing their functions; standardise sanctions issued under the *FIC Act*; share appropriate compliance and enforcement challenges and provide guidance; and share information between supervisory bodies and the Centre to facilitate effective supervision and enforcement by supervisory bodies.

15. On R17 and R29, the remaining scope issues relating to categories of institutions which are not included as the accountable institutions under the *FIC Act* will be addressed through amendments to Schedule 1 of the *FIC Act* in the 2012/2013 financial year.

16. On R18 and R22, part of the deficiencies has already been addressed. No additional measures were reported.

17. On R33, a new Companies Act which came into force on 1 May 2011 has been reported in the second follow-up. No additional measures were reported.

18. On SRVI, the Centre initiated a project to develop an integrated approach to measuring the size of the illicit economy and illicit financial flows, which will be used to develop and amend the law enforcement, regulatory strategies, policies and procedures to maintain the stability of the country's financial sector. The objectives of the project include: developing models that quantify the size of the illicit economy and illicit financial flows in the country at a macro and microeconomic level; analysing the results of the models to provide insights into the Centre's strategic plan, a threat-assessment on the impact of the illicit economy and money flows on the stability of the financial sector, information highlighting where relevant action is required by the operational divisions of the Centre, and a baseline for monitoring and tracking the Centre's impact in addressing illicit financial flows and the proceeds of crime. The project is also expected to help in developing financial intelligence for the operational divisions of the Centre, and to highlight the areas where relevant actions are required by other government departments, such as National Treasury, South African Revenue Service (SARS), Department of Trade and Industry (DTI), Financial Service Board (FSB), South African Reserve Bank (SARB), and other enforcement arms of the government.

19. On R21, R24, R25, R32, R34, SRVII, SRVIII, and SRIX, no additional measures were reported.

III. CONCLUSION

20. While additional measures and progress are reported on several Recommendations, including R9, R12, R16, R23 and SRVI, legislative amendments to the *FIC Act* and subordinate regulations which are expected to address the remaining deficiencies on R5, R10 and other Recommendations, including R6, R8, R9, R11, R12 and R15, are still pending. Since South Africa is very much committed to the amendment of the Act and regulations in the coming months, and progress is being made, it is reasonable to conclude that South Africa should remain in regular follow-up. South Africa has committed to exiting the follow-up process in February 2014, which will be five years since the adoption of South Africa's MER, and there is an expectation that South Africa would complete the amendments to the *FIC Act*, and be ready to apply for removal from the regular follow-up process. Therefore, with a view to South Africa exiting follow-up in February 2014, it is proposed that the country provides an interim report in October 2013, indicating the progress in the country, and that it is on track for the removal from the process in February 2014.

FATF Secretariat
4 February 2013

Q35

ANNEX 1: LIST OF RECOMMENDATIONS AND SPECIAL RECOMMENDATIONS RATED PC AND NC IN THE MUTUAL EVALUATION REPORT

Partially compliant (PC)	Non-compliant (NC)
Core Recommendations[7] R.5 (Customer due diligence) R.10 (Record keeping)	**Core Recommendations**
Key Recommendations[8] R.23 (Regulation, supervision and monitoring) SR.III(Freezing and confiscation of terrorist assets)	**Key Recommendations**
Other Recommendations R.8 (New technologies & non face-to-face business R.11 (Unusual transactions) R.15 (Internal controls) R.16 (DNFBPs) R.17 (Sanctions) R.18 (Shell banks) R.24 (DNFBPs–regulation, supervision & monitoring) R.25 (Guidelines & feedback) R.29 (Supervisors) R.32 (Statistics) R.34 (Legal arrangements - beneficial owners) SR.VI (Money/value transfer services) SR.VII (Wire transfer rules) SR.VIII (Non-profit organisations) SR.IX (Cross-border declaration & disclosure)	**Other Recommendations** R.6 (PEPs) R.7 (Correspondent banking) R.9 (Third parties and introducers) R.12 (DNFBPs) R.21 (Special attention for higher risk countries) R.22 (Foreign branches & subsidiaries) R.33 (Legal persons - beneficial owners)

[7] According to the FATF mutual evaluation follow-up procedures, the core Recommendations are: R.1, R.5, R.10, R.13, SR.II and SR.IV.

[8] According to the FATF mutual evaluation follow-up procedures, the key Recommendations are: R.3, R.4, R.23, R.26, R.35, R.36, R.40, SR.I, SR.III and SR.V.

236 IM8

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FATF/PLEN(2015)4

Financial Action Task Force
Groupe d'Action Financière

11-Feb-2015

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Plenary

MUTUAL EVALUATION OF SOUTH AFRICA: SEVENTH FOLLOW-UP REPORT

25-27 February 2015, OECD Conference Centre, Paris, France

FATF-XXVI

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237

FATF/PLEN(2015)4

MUTUAL EVALUATION OF SOUTH AFRICA: SEVENTH FOLLOW-UP REPORT

Note by the Secretariat

I. INTRODUCTION

1. The mutual evaluation of South Africa took place in February 2009. The country was on the regular follow-up process. In June 2014, as the third round follow-up process was terminated, the Plenary decided to place South Africa in the targeted follow-up process. The FATF President sent a letter to the country requesting to report at the October 2014 Plenary on all the deficiencies noted in the MER on old R.5 and R.10 and to introduce the Amendment Bill to the Financial Intelligence Centre Act (the FIC Act) to Parliament by the October Plenary. The dates for the MER, follow-up reports and the letter to the country are as follow:

- Mutual Evaluation Report: 26 February 2009
- The first follow-up report: 23 February 2011[1]; the second follow-up report: 14 February 2012[2]; the third follow-up report: 20 February 2013[3]; the fourth follow-up report (an interim report): 15 October 2013[4]; the fifth follow-up report: 25 June 2014[5]; and sixth follow-up report: 22 October 2014[6]
- The FATF President letter to South Africa: 29 August 2014

2. Legislative amendments to the FIC Act are expected to address the deficiencies on R.5 and R.10. South Africa advised Secretariat that the Amendment Bill is still under consideration by the relevant Committee of Cabinet Ministers and has not yet been approved by the Cabinet to be submitted to Parliament. A draft of the Bill is not available before being approved by the Cabinet.

II. SUMMARY OF PROGRESS MADE BY SOUTH AFRICA

3. Under the targeted follow-up process, South Africa needs to address two core Recommendations, old R.5 and R.10, both were rated PC (**Annex 1**: a list of the Recommendations rated PC/NC). The material submitted by South Africa in support of this seventh follow-up report appears in **Annex 2**.

4. As reported in the sixth follow-up report, the Finance Minister of the country responded in September 2014 to the FATF President letter. The Minister's letter indicated that the draft Amendment Bill was under the process to be introduced into the legislative process, and it was hoped that the Cabinet would endorse the draft Bill to be tabled to Parliament by the end of October 2014.

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[1] FATF/WGEI(2011)21.

[2] FATF/WGEI(2012)15.

[3] FATF/WGEI(2013)21.

[4] FATF/WGEI(2013)58.

[5] FATF/PLEN(2014)32.

[6] FATF/PLEN(2014)45.

238

5. As described in the previous follow-up reports in June and October 2014, the amendments are aimed at strengthening the customer due diligence (CDD) requirements and the proper application of the risk-based approach (RBA) by financial institutions and DNFBPs. They also include consequential amendments to the record-keeping requirements and the exemptions from some of the CDD and record keeping requirements.

6. South Africa advised that the Cabinet Committee had considered the draft FIC Amendment Bill in October and December 2014 and had requested a few amendments to be made to the draft Bill. The Committee had decided that the revised draft Bill, together with that additional information to clarify its expected operation, should be re-submitted to the Committee for further consideration. It planned that the Committee will consider the revised Bill at its meeting in March 2015. Subsequent to Cabinet approval, the draft Bill will be published for public comment. A period of one month will be recommended for this. Then the draft Bill with additional changes based on the public comments, if any, would be introduced in Parliament. Once the Bill is passed by Parliament, it is submitted to the President for his signature. It will be recommended that it come into force upon signature by the President.

III. CONCLUSION

7. South Africa remains committed, as confirmed by the letter of the Finance Minister in September 2014, to submitting the Bill to Parliament as soon as possible, following approval by the Cabinet. On the other hand, the process has been delayed and the Bill is still at the stage before Cabinet's approval. In this circumstance, it is recommended that South Africa is directed to report back to the June 2015 Plenary on all the deficiencies noted in the MER on old R.5 and R.10 with the final (draft) Amendment Bill to the FIC Act, which the Secretariat will review and report to the Plenary whether it would sufficiently address the deficiencies. In June 2015, the Plenary would consider a possible next step, i.e. a high-level mission to the country, if no progress would be made in the legislative process of the Bill at that time.

FATF Secretariat
11 February 2015

ANNEX 1: LIST OF RECOMMENDATIONS AND SPECIAL RECOMMENDATIONS RATED PC AND NC IN THE MUTUAL EVALUATION REPORT

Partially compliant (PC)	Non-compliant (NC)
Core Recommendations[7] R.5 (Customer due diligence)[8] R.10 (Record keeping)	**Core Recommendations**
Key Recommendations[9] R.23 (Regulation, supervision and monitoring) SR.III(Freezing and confiscation of terrorist assets)	**Key Recommendations**
Other Recommendations R.8 (New technologies & non face-to-face business R.11 (Unusual transactions) R.15 (Internal controls) R.16 (DNFBPs) R.17 (Sanctions) R.18 (Shell banks) R.24 (DNFBPs–regulation, supervision & monitoring) R.25 (Guidelines & feedback) R.29 (Supervisors) R.32 (Statistics) R.34 (Legal arrangements - beneficial owners) SR.VI (Money/value transfer services) SR.VII (Wire transfer rules) SR.VIII (Non-profit organisations) SR.IX (Cross-border declaration & disclosure)	**Other Recommendations** R.6 (PEPs) R.7 (Correspondent banking) R.9 (Third parties and introducers) R.12 (DNFBPs) R.21 (Special attention for higher risk countries) R.22 (Foreign branches & subsidiaries) R.33 (Legal persons - beneficial owners)

[7] According to the FATF mutual evaluation follow-up procedures, the core Recommendations are: R.1, R.5, R.10, R.13, SR.II and SR.IV.

[8] R.5 and R.10 (highlight added): the Recommendations under the targeted follow-up process, the deficiencies on which South Africa needs to address.

[9] According to the FATF mutual evaluation follow-up procedures, the key Recommendations are: R.3, R.4, R.23, R.26, R.35, R.36, R.40, SR.I, SR.III and SR.V.

240 IM9

national treasury
Department:
National Treasury
REPUBLIC OF SOUTH AFRICA

financial intelligence centre
REPUBLIC OF SOUTH AFRICA

MEDIA STATEMENT

REQUEST FOR PUBLIC COMMENTS ON THE DRAFT FINANCIAL INTELLIGENCE CENTRE AMENDMENT BILL, 2015

The National Treasury ("NT") and the Financial Intelligence Centre ("FIC") today publish the draft Financial Intelligence Centre Amendment Bill, 2015 ("the Bill") as approved by Cabinet at its meeting of 15 April 2015.

Background to the Bill

South Africa has a long-standing commitment to combating money-laundering and the financing of terrorism, having ratified the United Nations Convention Against Corruption ("UNCAC") in 2004, and joining the multi-lateral Financial Action Task Force ("FATF") in 2003. As a result, South Africa enacted the Financial Intelligence Centre Act, No 38 of 2001 ("FIC Act"), and other related Acts to assist in combating financial crimes.

Financial crimes generally take the form of, *inter alia*, fraud, money laundering, terror financing and corruption. The combating of financial crimes continues to be a key policy priority internationally and domestically. In order to support the integrity of domestic financial systems and ultimately the global financial system, South Africa, in responding to the 2008 Global Financial Crisis, endorsed this policy objective in 2011 as part of its reform of the financial regulatory system, as outlined in the policy document *"A safer Financial Sector to serve South Africa better"* adopted by Cabinet.

FATF sets global standards on Anti-Money Laundering ("AML") and Combating the Financing of Terrorism ("CFT"). The United Nations and Group of Twenty ("G20") countries have also endorsed the FATF Recommendations as an effective tool to fight corruption. Every member of FATF undergoes a mutual evaluation to ensure compliance with the agreed standards on AML and CFT. South Africa was evaluated by FATF in 2009. A new round of mutual evaluation has started, and South Africa will also be evaluated again this year based on the revised FATF standards.

Failure by countries to enforce agreed international standards exposes domestic financial institutions to significant fines and penalties in overseas jurisdictions, which also poses risks to financial stability. At worst, such failure is highly likely to result in country isolation and exclusion from the global financial system, resulting in low economic growth due to trade and investments being curtailed.

Purpose and Objectives of the Bill

The Bill seeks to enhance South Africa's ability to combat financial crimes by proposing measures to address threats to the stability of South Africa's financial system posed by money laundering and terrorism financing. The Bill also addresses regulatory gaps identified from the 2009 FATF Mutual Evaluation and the 2014 IMF South Africa Financial Sector Assessment Programme Technical Note on AML/CFT.

241

The Bill enhances South Africa's AML and CFT regulatory regime by specifically:

- Providing for the implementation of the United Nations Security Council Resolutions relating to the freezing of assets;
- Enhancing the supervisory powers of the FIC and extending its functions in relation to suspicious transactions;
- Providing for the adoption of a risk-based approach to customer due diligence measures;
- Introducing the concepts of beneficial ownership, on-going due diligence, and foreign and domestic prominent influential persons;
- Enhancing the customer due diligence requirements;
- Dissolving the Counter-Money Laundering Advisory Council; and
- Enhancing certain administrative and enforcements mechanisms.

Enabling a Risk-Based Approach for Compliance

The Bill introduces a risk-based approach to customer due diligence. This approach will simplify the current complex and rules-based system of compliance, by providing financial institutions with the flexibility to determine how they verify their clients' identity, taking into account the particular circumstances pertaining to that client.

Prominent Influential Persons

As part of the FATF Recommendations and Article 52 of the UNCAC, the Bill introduces the concept of domestic and foreign Prominent Influential Persons ("PIPs"). These classifications are meant to aid financial institutions in properly identifying their clients, and thereby enabling them to apply appropriate standards of due diligence. These classifications and requirements do not entail an assumption that PIPs are more likely to be involved in any criminal activity and are, therefore, not meant to prevent financial institutions from doing business with PIPs.

Implementation of United Nations Security Council Resolutions

United Nations Security Council ("UNSC") resolutions on actions against certain persons and freezing of assets are critical in also countering human rights abuses. As a member of the UN, South Africa is also bound to domestically give effect to UN Security Council sanctions resolutions issued in terms of Chapter VII of the UN Charter. The Inter-Departmental Counter Terrorism Working Group, under the leadership of the Department of International Relations and Cooperation, has endorsed the FIC as the appropriate institution to give effect to sanctions which require freezing of assets belonging to persons on UNSC sanctions lists. The Bill empowers the FIC in this new role.

Available documents

The Bill, 2009 FATF Mutual Evaluation and 2014 IMF South Africa Financial Sector Assessment Programme Technical Note on AML/CFT are available on the NT (www.treasury.gov.za) and FIC (www.fic.gov.za) websites.

Process

Comments on the Bill are invited and should be sent to Mr Raymond Masoga, Director for Financial Integrity, at FICBill@treasury.gov.za or faxed to 012 315 5206 by **31 May 2015**.

The NT and FIC will be convening meetings with interested stakeholders.

It is anticipated that the Bill will be submitted to Cabinet by June 2015.

Issued by: National Treasury and Financial Intelligence Centre
Date: 21 April 2015

Q42 IM11

FM Cover Story

THE HAWKS VERSUS GORDHAN

Dicing with junk

It seems inevitable that Pravin Gordhan will be ousted as finance minister. Claire Bisseker and Natasha Marrian look at the implications — and the machinations inside the ANC

Rating agencies could cut SA's credit rating immediately rather than wait until their scheduled reviews later this year if finance minister Pravin Gordhan is axed following the revival of the Hawks' case against him.

The case is linked to the so-called "rogue spy unit" within the SA Revenue Service (Sars), which was formed under Gordhan's watch as tax commissioner to investigate high-profile tax dodging.

WHAT IT MEANS

CUT TO JUNK COULD BE IMMEDIATE IF FINANCE MINISTER IS SACKED

ZUMA ALLIES SAY GORDHAN USED TREASURY TO PROBE PRESIDENT AND HIS BENEFACTORS

S&P Global Ratings has confirmed to the *Financial Mail* that if Gordhan is forced out, it would not necessarily have to give his replacement time to prove his or her commitment to fiscal discipline or economic reform before acting.

"We would assess the reasons for the change and the intentions behind it and draw our own conclusions," says S&P associate director for sovereign ratings, Gardner Ruslike.

With S&P having ranked SA's foreign currency rating "BBB-" on the bottom rung of the investment grade ladder with a "negative" outlook, a further notch downgrade would cut SA to junk status.

"There is now a potential scenario in which SA's sovereign debt gets downgraded early, the rand continues to slide, inflation forecasts are revised up and the Reserve Bank resumes raising interest rates, having little choice in the absence of sufficient capital inflows," says Sanlam Investment Management economist Arthur Kamp.

"If so, it is not too many steps towards outright recession."

In fact, SA can expect to experience a recession that will last almost two years, according to studies on the economic fallout that occurred in six of SA's peer countries that have been downgraded to junk status in the past decade.

"The risk then is that a downward spiral develops, where higher borrowing costs, and rising fiscal debt ratios to GDP result in a further deterioration in government finances, leading to the extreme case of a sovereign debt default," warns Investec economist Annabel Bishop. In such a situation, she says, the rand would probably move towards a range between R30/US$ and R40/US$.

As this message has sunk in — that SA's economic future is being gambled away by shady forces bent on self-enrichment — academics, business and civil society organisations, retired judges and ANC veterans have responded with mounting distress.

"It's time for real leaders in the national executive committee, the cabinet and in the SA Communist Party and Cosatu to stand up to the tyrannical and despotic behaviour on display here because yet again we stand on the edge of an economic precipice," warned almost 60 academic economists last week in an open letter to President Jacob Zuma.

In May and June, SA pulled back from that precipice when all three main credit rating agencies affirmed the country's ratings, contrary to expectations that cuts were on the cards.

Fitch has SA on the same notch as S&P but with a "stable" outlook. Moody's has SA ranked one notch above S&P and Fitch, though its ratings outlook is "negative".

That all three agencies held their ratings

HAWKS CIRCLING PRAVIN GORDHAN

OCT 2015
The *Sunday Times* reports that the KPMG report on the rogue unit commissioned by Sars is the first to raise questions about Pravin Gordhan's role

DEC 2015
Owing to the fallout from the appointment of Des Van Rooyen as finance minister Zuma backtracks and appoints Gordhan to the post

FEB 2016
Gordhan receives 27 questions from the Hawks

MAR 2016
Police minister Nathi Nhleko and state security minister David Mahlobo defend the investigation into Gordhan and the rogue unit

MAR 2016
Gordhan replies in detail to the Hawks' questions

243

22 Francois van der Westhuizen
The whistle-blower

24 Sars & tobacco spies
The real rogues

THE BRAZEN ATTEMPT TO OUST THE FINANCE MINISTER REPRESENTS NOTHING LESS THAN A MOVE TO HOLLOW OUT THE REMAINING STATE INSTITUTIONS THAT STAND IN THE WAY OF THE 'ZANUFICATION' OF THE ANC AND SA BECOMING AN OUTRIGHT KLEPTOCRACY

steady was largely credited to Gordhan and the nascent reform movement, "Team SA", which he's cultivated in solidarity with business, selling the message that SA was reforming — even if the evidence was less than compelling.

Over the past three months, that veneer of progress has been wearing thin as Zuma has stonewalled reforms to state-owned enterprises. The SABC and SAA have lurched from one crisis to another while bleeding cash and any remaining shred of credibility.

In fact, the very real possibility that Gordhan is prepared to let SAA go to the wall (without a new government guarantee SAA's planes may be grounded this month) could explain the revival of the Hawks' apparently flimsy case against him.

Since February, the Hawks have been questioning Gordhan aggressively about the "rogue unit" which allegedly employed illegal surveillance while investigating tax fraud. When Gordhan hit back and publicly accused the Hawks, under Zuma loyalist Berning Ntlemeza, of subverting the law and acting with ulterior motives, they backed off and denied that he was a suspect in the case — until last week.

Again Gordhan took his case public, releasing his lawyers' detailed counter- arguments to these allegations, enabling the public (and rating agencies) to draw their own conclusions.

It seems inevitable that Gordhan will be charged and removed as finance minister in a cabinet reshuffle, possibly this week.

If the Hawks don't charge Gordhan now, having harassed him all year, it will suggest that they know they have no case and the charges were politically motivated all along.

The battle around Gordhan has become entwined with the fight raging within the ANC as it looks ahead to its next elective conference, in 2017.

At stake is nothing less than control of the party and the state beyond Zuma's term of office. He is expected to step down as ANC president in December next year.

Gordhan is quickly becoming a rallying point for all of those opposed to Zuma, for the brazen attempt to oust the finance minister represents nothing less than a move to hollow out the few remaining state institutions that stand in the way of the "Zanufication" of the ANC and SA becoming an outright kleptocracy.

High-ranking ANC insiders aligned to the president complain that Gordhan has used national treasury and the Reserve Bank to "investigate" Zuma and those close to him. Treasury's investigation into Eskom's coal deals with Gupta-aligned firms is cited as an example.

Zuma already has control of SA's security apparatus — the Hawks, intelligence, the police and the National Prosecuting Authority. The methods used to undermine treasury mirror events that have unfolded in the security cluster over the past decade.

Should Gordhan be removed, the Public Investment Corp as well as the Reserve Bank could easily be targeted next.

Gordhan reportedly told treasury staff on Friday that he would rather die than have the country handed

Pravin Gordhan
His removal likely to result in recession

MAY 2016
Rumours swirl of Gordhan's imminent arrest over his role in setting up the unit. Reports suggest he will be charged with espionage

AUG 3
Local government elections

AUG 22
The Hawks request Gordhan to provide them with a warning statement

AUG 24
Gordhan refuses to meet the Hawks

AUG 25
Members of the Gupta family announce that they are leaving the country and will sell off their businesses before the end of the year

FM Cover story

over to "thieves". Referring to this, ANC deputy secretary-general Jessie Duarte said in an interview with the Gupta-owned ANN7 news channel this week that if Gordhan believed people were thieves, they should be investigated and charged.

If Gordhan is innocent, she said, let him co-operate with the Hawks and answer to the probe instead of portraying himself as above the law.

Treasury was under the control of established white business, she added. This had been achieved through the appointment of ministers from its "ranks". She cited the example of former finance minister Trevor Manuel, saying he came from the Mobil oil company and was trusted by big business.

"The issue we must face is that it is incorrect for business [and] the banks to wish to determine who the minister of finance is in this country ... This is a matter which the ANC needs to clarify with the captains of industry," she said.

Duarte also took a swipe at the Reserve Bank, saying it was not doing enough to cushion the rand but that it was privately owned and that was "a difficulty".

"We presume, and hope, that this was a one-off statement rather than the start of a sustained attack on the Bank," says Rand Merchant Bank currency strategist John Cairns. He notes that the political risk premium in the rand has continued to climb this week, as evidenced in continued rand underperformance relative to other risk currencies.

Within the ANC, there are two views: those of the Zuma camp, reflected by Duarte, and that of the opposing group articulated over the weekend by the SA Communist Party (SACP).

The SACP alleges that the pursuit of Gordhan is an attempt to use judicial means to achieve political ends. Deputy general secretary Jeremy Cronin has intimated that Zuma is too powerful in the ANC's national executive committee (NEC) and in the cabinet.

Other insiders opposed to Zuma have complained that he generally has the last word in the NEC, neutering collective decision-making which the ANC has long prided itself on.

But the sudden desperation around the Gordhan matter could be an indicator that Zuma is quickly losing his grip in the ANC.

This was heightened by the party's share of the vote falling from 62% to 54% in the 2016 municipal elections.

While the faction aligned to him still holds the numerical advantage, it has become increasingly apparent that this group — which includes the ANC chairmen of the North West, Mpumalanga, Free State and KwaZulu Natal provinces — is also divided.

In addition, a large number of the party's leaders who sit on the NEC and are part of Zuma's cabinet have fallen out with his faction and are now on the fringes.

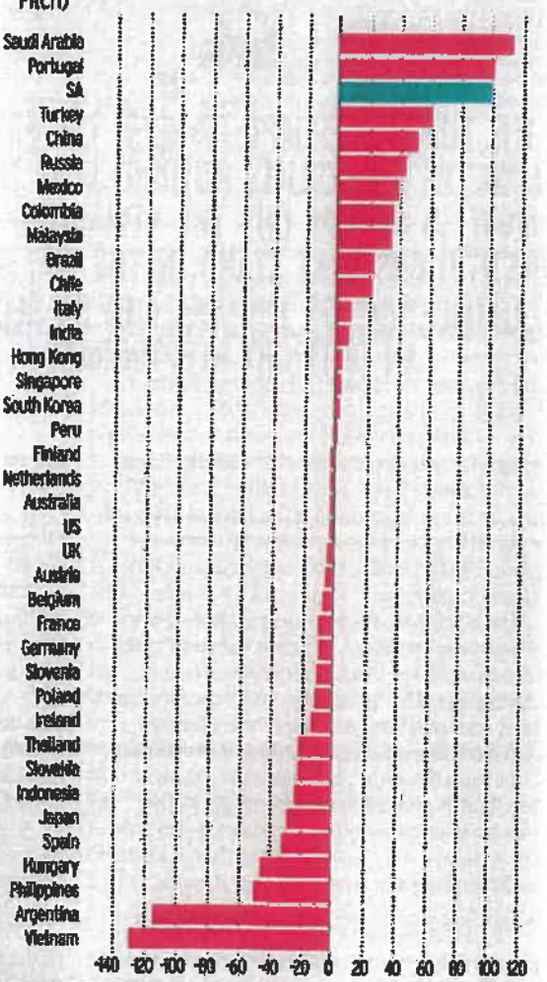
Until last week, the markets had become increasingly sanguine about SA's prospects — given the slight improvement in domestic fundamentals, a more constructive global environment as well as evidence of greater pluralism in SA politics following the local government election.

"Before this week's Gordhan saga, a combination of a stronger rand, strong capital inflows and tentative signs of stability in the

BAD ODDS

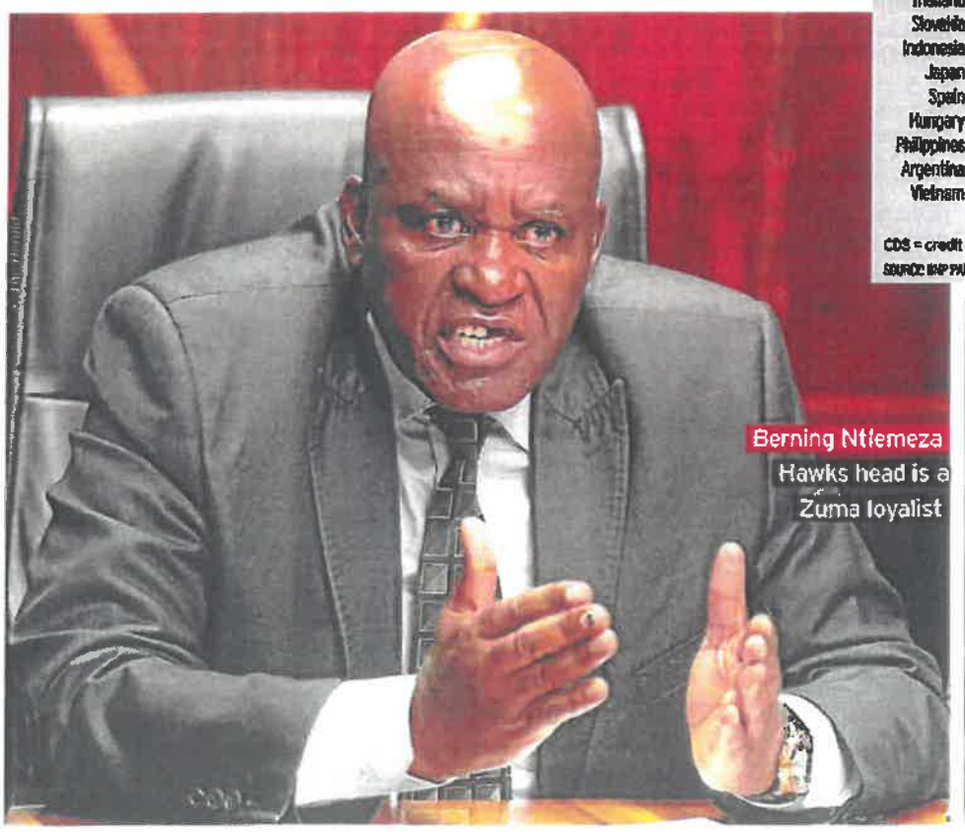
SA's odds of being cut to junk are 50/50

Five-year sovereign CDS, bp deviation from estimated implied spread (based on average of Moody's, S&P and Fitch)



CDS = credit default swap bp = basis point

SOURCE: BNP PARIBAS SECURITIES



Berning Ntlemeza
Hawks head is a Zuma loyalist

245

supply side of the economy resulted in financial markets becoming too complacent over the still significant degree of political risk in SA, which was still bubbling away in the background," says Jeff Schultz, an economist at BNP Paribas Securities.

Indeed, BNP's model shows that the market pricing of a ratings downgrade by year-end in SA had slipped to around 50% in recent weeks, from odds of 65% that prevailed in June (see graph).

Over the past week, the rand has lost around R1 against the dollar as the markets have battled to digest the Machiavellian moves against Gordhan.

However, the markets' pricing of a downgrade has hardly moved, suggesting this risk is still being underpriced and the rand could fall a lot further given the real prospect of Gordhan's axing.

"In the event of the finance minister stepping aside and/or being forced out, we think this would lay the grounds for an almost immediate downgrade of the sovereign from rating agencies," says Schultz.

"The market reaction would be severe, given perceptions of the political motivation behind the Hawks' charges," agrees Standard Chartered's chief economist Razia Khan. "It is unlikely that the ratings agencies would be able to justify holding the rating until a scheduled review."

But even if there is no immediate action against the finance minister, the damage to SA's institutional strength has begun, she adds. "Uncertainty will definitely have some impact on markets, complicating the task of economic recovery."

It is not as if the rating agencies didn't see this coming. In June, Fitch and S&P remained sceptical that the Team SA initiative would do much to accelerate growth and were concerned that political contestation would continue to undermine progress.

"In our June statement we highlighted the importance of fiscal consolidation, economic reforms and holding political tensions in check in affirming the ratings at the current investment grade levels," says Rusike.

He adds that the reform momentum is specifically associated with Gordhan and that should it slow down this would be bad for economic growth and investor confidence. The increasing political tension could also weaken the social contract with business and labour.

The agencies' stay of execution in June was really about recognising Gordhan's reform efforts and giving them time to show results. Instead, the Hawks have turned the dial back to just before 9/12 (Nhlanhla Nene's axing). Should those events be repeated, there will be no more second chances.

bisselurc@fm.co.za; MarrianN@bdlive.co.za

RALLYING ROUND GORDHAN: PLEAS AND PLEDGES

There has been an outpouring of support for finance minister Pravin Gordhan since news broke that he had once again been summoned by the Hawks in relation to the SA Revenue Service (Sars) "rogue unit", which was set up while he was commissioner. Gordhan received a letter from the Hawks last week, demanding he present himself to receive a warning statement — implying he is a suspect and could be arrested. However, he said he would not do so for legal reasons and due to other commitments. He also said he had been informed by the Hawks that he was not a suspect. He maintains that the establishment of the unit was above board and had ministerial approval. Support came from a wide variety of sources:

I pledge my total confidence in the minister of finance. I am confident in the way that he is doing his work. — **Cyril Ramaphosa,** *deputy president*

We need people to stand up and say enough is enough. No more will this be allowed to continue. — **Johann Kriegler,** *retired constitutional court judge*

My humble words would be to leave Pravin to do the people's business. South Africans should stand up against this abuse of power. The Hawks will face the same fate as the as Scorpions if they allow themselves to be politicised. — **Mathews Phosa,** *former ANC treasurer-general*

To go back to that is really to scream fire in a crowded theatre. Such action will destroy this economy. The next move is up to the head of state to say: "If you have any evidence, let's handle this in a responsible way." — **Trevor Manuel,** *former finance minister*

We are concerned about the future of justice and law in SA. Judge Kriegler and I, and many others, have fought against apartheid for many years. We are concerned that the past events are being repeated. — **George Bizos,** *human rights lawyer*

"It is overwhelming that the Hawks are targeting one particular individual despite the fact that there is no legal basis for it. — **Pierre de Vos,** *constitutional lawyer*

Leaving is not an option; we are with him until the end. If there are reasonable grounds to charge, the Hawks must do so; if not, they must leave him alone. — **Solly Mapaila,** *SA Communist Party second deputy general secretary*

While we as the DA fully respect the rule of law and due process, we are in full support of anyone who stands up to Jacob Zuma and his project of capturing the state and its machinery to further his own nefarious agenda. — **Mmusi Maimane,** *DA leader*

IM1

246

OAKBAY RESOURCES AND ENERGY LIMITED - Update regarding change in auditor and sponsor

Release Date: 05/04/2016 10:18:00 **Code(s):** ORL **PDF(s):**

Update regarding change in auditor and sponsor

Oakbay Resources and Energy Limited
(Incorporated in the Republic of South Africa)
Registration number: 2009/021537/06
Share code: ORL
ISIN: ZAE000196085
("Oakbay Resources" or "the Company")

UPDATE REGARDING CHANGE IN AUDITOR AND SPONSOR

Shareholders are advised that Oakbay Resources, in accordance with the JSE Limited ("JSE") Listings Requirements, duly notified the Issuer Regulation Division of the JSE of the following:

- the resignation by KPMG Inc. ("KPMG") from the audit of Oakbay Resources with immediate effect on 29 March 2016; and
- the termination by Sasfin Capital, a division of Sasfin Bank Limited ("Sasfin") of their services as sponsor to Oakbay Resources with effect from 1 June 2016, which notification was provided on 15 March 2016.

The reason for KPMG's resignation is solely based on their assessed association risk and KPMG have indicated that there is no audit reason for their resignation, whereas the termination of Sasfin's services follows a recent decision by Sasfin to align the strategic objectives of Sasfin's Corporate Finance Division more closely with that of the broader Sasfin group.

Oakbay Resources is in the process of identifying and appointing a new auditor and sponsor.

This announcement is provided at the request of the Issuer Regulation Division of the JSE, to provide clarity to shareholders with regard to the above.

Johannesburg
5 April 2016

Sponsor
Sasfin Capital (a division of Sasfin Bank Limited)

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Q47

---- Other Options ----

OAKBAY RESOURCES AND ENERGY LIMITED - UPDATE REGARDING BANKING RELATIONSHIPS

Release Date: 08/04/2016 16:38:00 **Code(s):** ORL **PDF(s):**

UPDATE REGARDING BANKING RELATIONSHIPS

Oakbay Resources and Energy Limited
(Incorporated in the Republic of South Africa)
Registration number: 2009/021537/06
Share code: ORL
ISIN: ZAE000196085
("Oakbay Resources" or "the Company")

UPDATE REGARDING BANKING RELATIONSHIPS

It has been reported in the media that First National Bank, a division of FirstRand Bank Limited ("FNB"), has recently terminated its service offering to the Company's holding company, Oakbay Investments Proprietary Limited ("Oakbay Investments"). Oakbay Resources wishes to confirm that FNB has not provided banking services to the Company and its subsidiaries ("the Group") since its listing on the exchange operated by JSE Limited in November 2014 and that this change in banker has occurred at holding company level.

Further to this, the Company confirms that Absa Bank Limited terminated its banking services to the Group in December 2015, while as of yesterday, the Group's remaining local banking service provider has given notice regarding the termination of their banking services on June 6, 2016.

Despite the cessation of the provision of services by the major local banks, the Group continues to be serviced by a major Asian bank with a presence in South Africa, which bank has requested that the Company not communicate their name in this update. Consequently, the terminations will not impact the operations of the Group and the Company is confident that the remaining banking relationship is sufficient to fully service the operational requirements of the Group.

Johannesburg
8 April 2016

Sponsor
Sasfin Capital (a division of Sasfin Bank Limited)

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248

- - - - Other Options - - - -

OAKBAY RESOURCES AND ENERGY LIMITED - Changes to The Board of Directors of The Company and The Board of a major subsidiary

Release Date: 08/04/2016 13:24:00 **Code(s):** ORL **PDF(s):**

Changes to The Board of Directors of The Company and The Board of a major subsidiary

Oakbay Resources and Energy Limited
(Incorporated in the Republic of South Africa)
Registration number: 2009/021537/06
Share code: ORL
ISIN: ZAE000196085
("Company" or "Oakbay Resources")

CHANGES TO THE BOARD OF DIRECTORS OF THE COMPANY AND THE BOARD OF A MAJOR SUBSIDIARY

Oakbay Resources regrets to announce the resignation, from all group companies, of both its Non-Executive Chairman, Mr. Atul Gupta, and its Chief Executive Officer, Mr. Varun Gupta, with immediate effect. Additionally, Mr. Duduzane Zuma, has resigned as a Non-Executive Director of Shiva Uranium, a major subsidiary of the Company.

This decision follows a sustained political attack on the Company, and the concern that the jobs and livelihoods of nearly one thousand employees would be at immediate risk as a result of the outgoing director's association with the Company. Accordingly, the outgoing directors are of the view that it would be in the best interests of the Company, its shareholders and employees for them to step down with immediate effect.

In line with the company's succession plan, Mr. Terence Rensen, the existing Lead Independent Non-Executive Director, will take up the role of acting Independent Non-Executive Chairman, and Mr. Trevor Scott, the Company's Financial Director, will take up the role of acting Chief Executive Officer until such time that the board and the nominations committee have identified and appointed the appropriate candidates to fill the vacant positions. The Company's operations, projects and strategic initiatives will remain unaffected by the changes to the board, and will continue as planned.

The board wishes to thank both Mr. Atul Gupta, Mr. Varun Gupta and Mr. Duduzane Zuma for their efforts over the years and wish them the best for the future.

An update regarding the Company's banking relationships will be provided shortly.

08 April 2016

Sponsor
Sasfin Capital (a division of Sasfin Bank Limited)

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249

OAKBAY RESOURCES AND ENERGY LIMITED - Clarification regarding recent Media reports

Release Date: 13/04/2016 17:10:00 **Code(s):** ORL **PDF(s):**

Clarification regarding recent Media reports

Oakbay Resources and Energy Limited
(Incorporated in the Republic of South Africa)
Registration number: 2009/021537/06
Share code: ORL
ISIN: ZAE000196085
("Oakbay Resources" or "the Company")

CLARIFICATION REGARDING RECENT MEDIA REPORTS

Further to some recent media reports, the Company wishes to reaffirm the terms of the recent acquisition by the Company of the business of Tegeta Exploration and Resources Proprietary Limited ("Tegeta") ("the Acquisition"), details of which were published on 11 December 2015 ("the Announcement").

In terms of the Acquisition, Oakbay Resources, through its 74% owned subsidiary Shiva Uranium Proprietary Limited, acquired the business carried out by Tegeta, consisting of the business assets and business liabilities detailed in paragraph 5.1 of the Announcement. The Acquisition was concluded during the course of February 2016.

Independently Tegeta, pursuant to the agreement between Tegeta, Glencore International AG and Optimum Coal Holdings Proprietary Limited, is in the process of acquiring the assets and liabilities attributable to Optimum Coal Holdings Proprietary Limited. Oakbay Resources is not party to this agreement and these assets and liabilities were not included in the Acquisition.

Accordingly, Oakbay Resources confirms that it is not a party to the acquisition of the Optimum Coal group of companies as reported by the media.

Although this has been communicated previously, the Company draws attention to the fact that the Company is Oakbay Resources and Energy Limited and must not be confused with Oakbay Investments Proprietary Limited ("Oakbay Investments"). Oakbay Investments is a shareholder in Oakbay Resources. Tegeta is a subsidiary of Oakbay Investments.

Johannesburg
13 April 2016

Sponsor
Sasfin Capital (a division of Sasfin Bank Limited)

Date: 13/04/2016 05:10:00 Produced by the JSE SENS Department. The SENS service is an information dissemination service administered by the JSE Limited ('JSE').
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Q250

- - - - Other Options - - - -

OAKBAY RESOURCES AND ENERGY LIMITED - Appointment of auditor

Release Date: 21/04/2016 09:51:00 **Code(s):** ORL **PDF(s):**

Appointment of auditor

Oakbay Resources and Energy Limited
(Incorporated in the Republic of South Africa)
Registration number: 2009/021537/06
Share code: ORL
ISIN: ZAE000196085
("Oakbay Resources" or "the Company")

APPOINTMENT OF AUDITOR

Oakbay Resources is pleased to inform shareholders that the Company has appointed SizweNtsalubaGobodo Inc. as auditors with immediate effect.

Johannesburg
21 April 2016

Sponsor Sasfin Capital (a division of Sasfin Bank Limited)

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Q51 IM 12

P2

CERTIFICATE IN TERMS OF SECTION 39 OF FINANCIAL INTELLIGENCE CENTRE ACT, 2001 (ACT NO 38 OF 2001)

I the undersigned,

MURRAY STEWART RODON MICHELL

An official of the Financial Intelligence Centre ("FIC"), hereby states that:

1. The Financial Intelligence Centre (Centre), was established in terms of section 2 of the Financial Intelligence Centre Act 38 of 2001 ("the Act")

2. Section 3 of the Act states that the principal objective of the Centre is to assist in the identification of the proceeds of unlawful activities, the combating of money laundering activities and the financing of terrorist and related activities.

3. I am appointed under section 6 of the Act as the Director of the Centre.

4. My responsibilities as the Director are defined in section 10 of the Act and includes:

   4.1 the performance by the Centre of its functions and

   4.2 taking all decision of the Centre in exercise of its powers in performance of its functions, except those decisions taken in consequence of a delegation or instruction in terms of Section 16 of the Act.

252

5. A function of the Centre is to receive suspicious transaction reports, reported / sent to the Centre as contemplated in Section 29 of the Act.

6. On 28 July 2016 I received a request for information from the Minister of Finance; the request is attached as Annexure A.

7. I studied the request and:

   7.1 was satisfied that there was legal merit and relevance in the request as it relates to the Centre's mandate, powers and functions and

   7.2 noted that the request did not contain data discriminators in relation to the persons or entities mentioned in the request.

8. The Centre used the following data discriminators to identify the information specified in this certificate relating to persons or entities associated with the persons or entities mentioned in the request:

Identity Number	Surname	Initials	Full Names	
6602056061184	GUPTA	AK	AJAY KUMAR	
6806145105080	GUPTA	AK	ATUL KUMAR	
7004042051081	GUPTA	C	CHETALI	
7005101418186	GUPTA	S	SHIVANI	
7208056345087	GUPTA	RK	RAJESH KUMAR	
7710240935087	GUPTA	A	ARTI	
8607146112184	GUPTA	V	VARUN	
9408046139081	SINGHALA	S	SRIKANT	(Minor)
9511156045087	SINGHALA	S	SASHANK	(Minor)

253

Company Name	Registration Number
Aeon Diamonds	2003/017679/07
Afripalm Managed Services	2007/026575/07
Afripalm Resources	2006/011933/07
Comair	1967/006783/06
Confident Concept	2006/023982/07
Cyret Technologies	2008/014823/07
Green Fig Trading 5	2005/021117/07
Infinity Media Networks	2011/003219/07
Islandsite Investments 254	2007/035464/07
JIC Engineering Services	2007/005004/07
JIC Mining Services Africa	2007/011186/07
JIC Mining Services Asia	2007/008414/07
Moetapele Projects	2006/021771/07
Northam Platinum	1977/003282/06
Sahara Computers	1997/015590/07
Sahara Media Holdings	2006/013459/07
Sahara Press	2006/010256/07
Shiva Uranium	1921/006955/06
Sunzi Equity Investments	2004/014322/07
Surya Crushers	2012/037510/07
Thelo Cement	2006/028825/07
Thelo Investments	2006/031859/07
Tna Media	2010/006569/07
Uni Africa Holdings	2004/015237/07
Vusizwe Media	2008/023317/07
Woodlane Consortium	2007/031952/07

9. By virtue of the powers vested in me as the Director of the Centre under section 39 of the Act, and subject to section 38(3) in respect to protecting the identity of the reporter, I hereby confirm that the

254

Information set out below was reported or sent to the Centre in terms of Section 29 of the Act:

Row No.	Date	STR Number	Subjects Reported	Value Reported
1	2012-12-10	STR/00040/20121210/I/E	Ajay Kumar Gupta	859,933
2	2013-05-17	STR/00155/20130517/I/E	Ajay Kumar Gupta	961,932
3	2013-05-17	STR/00167/20130517/I/E	Atul Kumar Gupta	961,932
4	2013-05-17	STR/00179/20130517/I/E	Rajesh Kumar Gupta Shubhangi Gupta	31,009
5	2013-05-20	STR/00061/20130520/I/E	Atul Kumar Gupta	948,150
6	2013-07-11	STR/00161/20130711/I/E	Atul Kumar Gupta	961,932
7	2014-02-06	STR/00224/20140206/I/E	Atul Kumar Gupta	38,000,000
8	2014-02-07	STR/00043/20140207/I/E	Atul Kumar Gupta	38,000,000
9	2014-04-10	STR/00102/20140410/I/E	TEGETA RESOURCES (PTY) LTD	5,000,000
10	2014-07-24	STR/00391/20140724/I/E	JNT CHAWLA-A/GUPTA-RK Rajesh Kumar Gupta	32,045
11	2014-12-12	STR/00093/20141212/I/E	OAKBAY RESOURCES AND ENERGY (PTY) LTD	2,000,000
12	2014-12-15	STR/00026/20141215/I/E	Atul Kumar Gupta	1,070,749
13	2015-02-06	STR/00441/20150206/I/E	SHIVA URANIUM LTD	6,000,000
14	2015-03-16	STR/00221/20150316/I/E	SAHARA COMPUTERS (PTY) LTD Ajay Kumar Gupta Atul Kumar Gupta Rajesh Kumar Gupta	1,550,000
15	2016-01-26	STR/00131/20160126/I/E	ANNEX DISTRIBUTION (PTY) LTD	1,242,386
16	2016-02-04	STR/00213/20160204/I/E	Atul Kumar Gupta	17,133,000
17	2016-02-05	STR/00573/20160205/I/E	SAHARA HOLDINGS (PTY) LTD Atul Kumar Gupta	Multiple Transactions
18	2016-02-05	STR/00589/20160205/I/E	SAHARA HOLDINGS (PTY) LTD Atul Kumar Gupta	Multiple Transactions
19	2016-02-07	STR/00007/20160207/I/E	SAHARA HOLDINGS (PTY) LTD	4,250,000

Q55

Row No.	Date	STR Number	Subjects Reported	Rand Value Reported
20	2016-02-07	STR/00008/20160207/I/E	SAHARA HOLDINGS (PTY) LTD	11,475,000
21	2016-02-09	STR/00009/20160209/I/E	Rajesh Kumar Gupta Atul Kumar Gupta	18,146,000
22	2016-02-26	STR/00595/20160226/I/E	SAHARA COMPUTERS (PTY) LTD Rajesh Kumar Gupta Atul Kumar Gupta Chetali Gupta	Multiple Transactions
23	2016-02-29	STR/00626/20160229/I/E	ANNEX DISTRIBUTION (PTY) LTD	Multiple Transactions
24	2016-03-04	STR/00338/20160304/I/E	ISLANDSITE INVESTMENTS ONE HUNDRED AND EIGHTY (PTY) LTD Atul Kumar Gupta	Multiple Transactions
25	2016-03-07	STR/00015/20160307/I/E	OAKBAY INVESTMENTS (PTY) LTD ISLANDSITE INVESTMENTS ONE HUNDRED AND EIGHTY (PTY) LTD Arti Gupta Atul Kumar Gupta Chetali Gupta Rajesh Kumar Gupta	Multiple Transactions
26	2016-03-17	STR/00474/20160317/I/E	SAHARA DISTRIBUTION (PTY) LTD	Multiple Transactions
27	2016-03-17	STR/00084/20160317/I/E	CORRECT MARKETING C C	5,000
28	2016-03-18	STR/00013/20160318/I/E	SAHARA HOLDINGS (PTY) LTD SAHARA COMPUTERS (PTY) LTD Atul Kumar Gupta	Multiple Transactions
29	2016-03-31	STR/00149/20160331/I/E	MABENGALA INVESTMENTS (PTY) LTD Rajesh Kumar Gupta	Multiple Transactions
30	2016-03-31	STR/00156/20160331/I/E	Atul Kumar Gupta	Multiple Transactions
31	2016-03-31	STR/00158/20160331/I/E	MABENGALA INVESTMENTS (PTY) LTD Rajesh Kumar Gupta	Multiple Transactions
32	2016-03-31	STR/00172/20160331/I/E	Atul Kumar Gupta	Multiple Transactions
33	2016-03-31	STR/00187/20160331/I/E	OAKBAY INVESTMENTS (PTY) LTD Arti Gupta Atul Kumar Gupta Chetali Gupta Rajesh Kumar Gupta	Multiple Transactions
34	2016-03-31	STR/00357/20160331/I/E	TNA MEDIA (PTY) LTD Atul Gupta	Multiple Transactions

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256

Row No.	Date	STR Number	Subjects Reported	Rand Value Reported
35	2016-03-31	STR/00367/20160331/I/E	TNA MEDIA (PTY) LTD Atul Gupta	Multiple Transactions
36	2016-03-31	STR/00365/20160331/I/E	SURYA CRUSHERS (PTY) LTD Varun Gupta	Multiple Transactions
37	2016-03-31	STR/00275/20160331/I/E	NEWSHELF 960 (PTY) LTD	Multiple Transactions
38	2016-03-31	STR/00158/20160331/I/E	MABENGALA INVESTMENTS PTY LTD	10,000,000
39	2016-03-31	STR/00187/20160331/I/E	OAKBAY INVESTMENTS(PTY) LTD	374,713,699
40	2016-04-01	STR/00338/20160401/I/E	ISLAND SITE INVESTMENTS ONE HUNDRED (PTY) LTD Arti Gupta Atul Kumar Gupta Chetali Gupta Rajesh Kumar Gupta	158,278,904
41	2016-04-05	STR/00374/20160405/I/E	BLACKEDGE EXPLORATION (PTY) LTD	Multiple Transactions
42	2016-04-06	STR/00360/20160406/I/E	CONFIDENT CONCEPTS (PTY) LTD Rajesh Kumar Gupta Varun Gupta	Multiple Transactions
43	2016-04-07	STR/00011/20160407/I/E	Varun Gupta	282,074
44	2016-04-07	STR/00166/20160407/I/E	SHIVA URANIUM LIMITED Atul Kamar Gupta Varun Gupta	125,848,620
45	2016-04-07	STR/00276/20160407/I/E	INFINITY MEDIA NETWORKS (PTY) LTD Atul Kumar Gupta Varun Gupta	24,115,385
46	2016-04-08	STR/00429/20160408/I/E	INFINITY MEDIA NETWORKS (PTY) LTD Atul Kumar Gupta Varun Gupta	6,938,305
47	2016-04-11	STR/00011/20160411/I/E	Atul K Gupta	531,570
48	2016-04-11	STR/00302/20160411/I/E	SAHARA DISTRIBUTION (PTY) LTD Atul Kumar Gupta	100,000
49	2016-04-11	STR/00314/20160411/I/E	SAHARA COMPUTERS (PTY) LTD Atul Kumar Gupta	5,018,417
50	2016-04-11	STR/00348/20160411/I/E	SAHARA SYSTEMS (PTY) LTD Atul Kumar Gupta	2,000,000

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257

Row No.	Date	STR Number	Subjects Reported	Value Reported
51	2016-04-11	STR/00503/20160411/I/E	SAHARA DISTRIBUTION (PTY) LTD Atul Kumar Gupta	4,992,558
52	2016-04-12	STR/00389/20160412/I/E	Arti Gupta	86,579
53	2016-04-12	STR/00396/20160412/I/E	Chetali Gupta Atul Kumar Gupta	119,766
54	2016-04-12	STR/00405/20160412/I/E	SAHARA CONSUMABLES (PTY) LTD Atul Kumar Gupta	4,016,374
55	2016-04-12	STR/00460/20160412/I/E	ANNEX DISTRIBUTION (PTY) LTD Atul Kumar Gupta	3,657,164
56	2016-04-13	STR/00034/20160413/I/E	SAHARA COMPUTERS (PTY) LTD Atul Kumar Gupta Chetali Gupta	41,833,304
57	2016-04-13	STR/00374/20160413/I/E	TNA MEDIA (PTY) LTD Atul Gupta	7,999,992
58	2016-04-19	STR/00432/20160419/I/E	UNI AFRIKA HOLDINGS (PTY) LTD Atul Gupta	Multiple Transactions
59	2016-04-21	STR/00090/20160421/I/E	ISLANDSITE INVESTMENTS ONE UNDRED (PTY) LTD Arti Gupta Atul Kumar Gupta Chetali Gupta Rajesh Kumar Gupta	172,464,887
60	2016-04-21	STR/00607/20160421/I/E	CONFIDENT CONCEPTS (PTY) LTD Rajesh Kumar Gupta Varun Gupta	78,859,600
61	2016-04-21	STR/00586/20160421/I/E	ANNEX DISTRIBUTION (PTY) LTD SAHARA COMPUTERS (PTY) LTD SAHARA HOLDINGS (PTY) LTD	876,001
62	2016-04-21	STR/00455/20160421/I/E	OPTIMUM COAL MINE PTY LTD	1,372,756,090
63	2016-04-21	STR/00511/20160421/I/E	KOORNFONTEIN MINES (PTY)	1,207,859,627
64	2016-04-22	STR/00908/20160422/I/E	ANNEX DISTRIBUTION (PTY) LTD SAHARA COMPUTERS (PTY) LTD SAHARA HOLDINGS (PTY) LTD	256,476
65	2016-05-06	SAR-160506-0000129	OAKBAY RESOURCES AND ENERGY (PTY) LTD	327,421,132
66	2016-05-06	SAR-160506-0000130	SHIVA URANIUM LTD	327,421,132

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258

Row No.	Date	STR Number	Subjects Reported	Value Reported
67	2016-05-11	STR-160511-0000323	OPTIMUM MINE REHABILITATION TRUST	1,341,426,552
68	2016-05-11	STR-160511-0000325	OPTIMUM VLAKFONTEIN MINING AND EXPLORATION PTY LTD	410,237
69	2016-05-11	STR-160511-0000351	OPTIMUM OVERVAAL MINING AND EXPLORATION PTY LTD	418,989
70	2016-05-11	STR-160511-0000435	OPTIMUM COAL TERMINAL PTY LTD	173,244,916
71	2016-05-16	SAR-160506-0000130	SHIVA URANIUM LTD	510,064,228
72	2016-06-03	STR-160603-0000380	OAKBAY INVESTMENTS (PTY) LTD	407,332,455
			Total Value	R6,429,874,162

10. In terms of section 39 of the Act, a certificate issued by an official of the Centre that information specified in the certificate was reported or sent to the Centre in terms of Section 28, 29 or 30(2) or 31 is (subject to Section 38(3)) on its mere production in a matter before court admissible as evidence of any fact contained in it of which direct oral evidence would be admissible.

Issued under my hand at CAPE TOWN on 04 August 2016.

MURRAY STEWART RODON MICHELL
DIRECTOR: FIC

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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.

260

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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"SB7"

OAKBAY

Office of the President
The Presidency of the Republic of South Africa
Union Buildings
Private Bag X1000.
Pretoria.
0001

Oakbay Investments
144 Katherine Street
Sandton 2031

8th April 2016

Your Excellency Mr President,

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262 129

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

Yours sincerely

Nazeem Howa
CEO, Oakbay Investments

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"S88"

OAKBAY

The Minister's Office
Department of Mineral Resources
Trevenna Campus
Building 2 C
C/o Meintjes and Francis Baard Street
(Formerly Schoeman Street)
Sunnyside

Oakbay Investments
144 Katherine Street
Sandton 2031

8th April 2016

Dear Mr. Mosebenzi Joseph Zwane,

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

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264 131

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

We are seeking your help as Minister of Finance with the political responsibility to govern the financial sector to end the deadly stranglehold the banks have placed on our businesses. If you have any questions, please do not hesitate to contact me.

Yours sincerely

Nazeem Howa
CEO, Oakbay Investments

265 134

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OAKBAY

Minister's Office
Department of Labour
Room 1207, 12th Floor,
120 Plein Street,
Cape Town

Oakbay Investments
144 Katherine Street
Sandton 2031

8th April 2016

Dear Ms. Nelisiwe Mildred Oliphant,

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

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Yours sincerely

Nazeem Howa
CEO, Oakbay Investments

QUEST: The President, his son and the wealthy and the family all lurking behind the scenes.

(BEGIN VIDEO CLIP)

QUEST: South Africa's political turmoil takes another twist in a moment.

(END VIDEO CLIP)

(COMMERCIAL BREAK)

QUEST: The web of political intrigue around President Jacob Zuma is starting to hurt the business interests of his closest allies. The South

African President has been criticized for links to the powerful Gupta family. And now the Guptas themselves are being abandoned by the wider

financial community.

(BEGIN VIDEO CLIP)

QUEST: So, let's start and explain all the links to Jacob Zuma. The Gupta family has been criticized for supposedly sounding out new finance

ministers. Today, the Guptas resigned from their own company called Oak Bay Investments and Oak Bay Resources.

One of the reasons why Oak Bay was under financial pressure because of relationships with the Guptas. Look at who's decided not to do business

with Oak Bay; KPMG, Barclays, FNB, First National Bank, and a variety of others all cut ties with Oak Bay because the Chairman and the chief exec

were the Guptas the controlling interest was the Guptas and the Guptas had a relationship with Jacob Zuma. Further complicating matters, if that were

possible, President Zuma's own son Duduzane Zuma has stepped down from an Oak Bay subsidiary.

What it's all meant if you take a look at that is that Oak Bay itself suddenly found itself unable to do any banking without financial support,

writing to its employees basically telling them that if we don't sort something out we're going out of business.

(END VIDEO CLIP)

QUEST: Joining me now exclusively from Johannesburg is Nazeem Howa, the Chief Executive of Oakbay Resources. Sir, thank you for joining us. We have

much ground to cover. First of all, what did the bank tell you when they said we're no longer doing business with you, we're closing your accounts?

NAZEEM HOWA, CEO, OAKBAY RESOURCES: Well, thank you Richard, and thanks for having me on the show. Well the banks have been very scarce in the

information to us. They have primarily told us that in terms of their terms and conditions they have the right to

cancel our banking facilities. And

they've used the reasoning of potential damage to themselves. Not one of them have come forward with anything we've done wrong or anything we may

not have done correctly in our relationships with them. So primarily have used a potential risk and then saying to us in terms of their terms and

conditions they have the right to cancel our banking facilities.

[16:25:25]

QUEST: KPMG actually used the phrase "the association risk is too great to continue." By that I assume they're talking about the association risk with

the Guptas and with the President?

HOWA: Well I think they have nothing to do with the President. They have been our auditors for 16 years. In the announcement to the staff, they say

there is no audit issue at all. And the sense I have is that they've been under a bit of pressure from their clients to not do business with us. But

certainly it was a sad day for them and a sad day for us. We've got strong relationships with KPMG.

QUEST: Have you been in touch with government to protest against this and basically now ask for help?

HOWA: Well Richard, for us, the primary concern is that we are likely you know to face major challenges paying the salaries of our staff and we have

at the moment 4,500 staff. We're in the process of closing another transaction which will double that number and our concern is for the well-

being of the staff and their families. And you know that could number up to 60 or 70,000 people.

So today yes indeed, after we announced the fact that the shareholder was stepping back, a very tough decision for the shareholder, something they've

had to step away from. I did indeed write letters this morning to the Presidency, to the Minister of Finance who governs it, who governs the

banking sector to the Minister of Labor to warn of an imminent possibility of job losses. And to the Minister of Mining because I think we supply a

strategic supply of coal to ESCOM, the power supplier. And that would be at risk if we were to go out of business. But our appeal really was on behalf

of our staff because you know they've put heart and soul into our business and it really is not fair that an attack on us and our shareholder should

affect our rank and file staff.

QUEST: Whatever the fairness of the attack and the decision by the banks, you and I and everybody watching all knows this is about the Gupta family

who you describe as your shareholder, the Gupta family and what is believed to be their relationship with the government, their alleged corrupt

relationship with the government, the state capture in many cases as seen by some. That's what this is about isn't it?

(BEGIN VIDEO CLIP)

HOWA: Well I think we've had perceptions both over a period of time primarily by our local media, and followed up a bit by the international

media. And very simply in our latest audited financials by KPMG in fact you know we show that we have 1% of our turnover coming from government

business.

(END VIDEO CLIP)

HOWA: So if 1% can be equated to state capture, I think we've failed quite fundamentally in that regard. We really are a very small player. In terms

of coal supply, it would be 5% of the total coal supply of the country --

QUEST: Right, but it's not you. Hold on. You're the - you're the -- Oak bay is the innocent victim here. This is about the Gupta family, isn't it?

HOWA: Well, you know, I think it's not about the Gupta family. I think it's about the President. And I think we've just been caught up in a political

war around the future of the presidency. That's my own reading of it.

(BEGIN VIDEO CLIP)

HOWA: Certainly I don't believe we've done anything. I don't think we've claimed to have any special relationship with the President or any of the

other politicians. Like any other business, we have relationships with businesspeople, government people, anybody else. But they are all

transparent relationships, they're arm's length relationships.

(END VIDEO CLIP)

HOWA: There's been nothing untoward in any one of those. Given our very good judiciary -- if we did do something wrong, we'd be in a court of law

right now.

QUEST: Do you -- I'm just going to take a punt here, bearing in mind the constitutional court's decision last week. Do you now think that this is

really all about from your point of view whether President Zuma survives in office?

HOWA: You know, from our point of view is we try and steer clear of politics. You know, our view is we started building our business. In fact

when -- before the fall of the (inaudible) regime we started our business. We still had F. W. de Klek as President. Our business has grown through

fits and starts through three other presidents before Jacob Zuma. It was always the dream of the shareholder that we'd grow the business beyond

President Jacob Zuma. So you know we really are businesspeople and we do not want to meddle in politics or be interfered with political processes.

QUEST: Final question sir, briefly, how long has Oakbay got, whether it's resources, money in the bank? Whatever you like. How long before you have

to shut the doors now you haven't got the banks?

NAZEEM HOWA, CEO, OAKBAY RESOURCES: We've got money. Money is our issue. Our issue is the ability to transact. And that's why we are concerned

about our 4000 or going to be 10,000 staff when we closed the optimum coal mine transaction. So our worry is being able to pay salaries and being

able to pay our service providers. The agreement with the banks is they will close our accounts at the end of May, the first week of June. And we

hope that through the very brave action from our shareholders to step away from the business. We can meet with the banks next week and employ them to

reconsider in the interest of our staff.

QUEST: Sir, we thank you for joining us tonight from Johannesburg. It's good of you to give us time, it's late there. We thank you sir. Speaking

exclusively live on QUEST MEANS BUSINESS.

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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

Nazeem Howa
Chief Executive: Oakbay Investments

272 IMR

THE PRESIDENCY: REPUBLIC OF SOUTH AFRICA

Private Bag X1000, Pretoria, 0001

NATIONAL ASSEMBLY

QUESTIONS FOR WRITTEN REPLY

QUESTION NO: Question No: 729

Date Published: March 2016

Mr D J Maynier (DA) to ask the President of the Republic:

(1) Whether any meeting took place where he (a) in line with his power to appoint Ministers and Deputy Ministers in accordance with section 91(3) of the Constitution of the Republic of South Africa, 1996 and/or (b) any (i) member, (ii) employee and/or (iii) close associate of the Gupta family allegedly offered the Deputy Minister of Finance, Mr Mcebisi H Jonas, (aa) the position of Minister of Finance and/or (bb) any financial inducements to accept the specified position offered; if not, what is the position in this regard; if so, in each specified case, (aaa) what are the names of the persons whom the Deputy Minister met, (bbb) when and (ccc) where did each such meeting take place and (ddd) what are the relevant details of each specified meeting;

(2) whether the Deputy Minister reported the (a) meeting(s) and/or (b) offer(s) of inducement; if so, in each specified case, (i) to whom and (ii) when was it reported;

273

(3) whether he will make a statement on the matter?

NW845E

REPLY

(1) I am unaware of such a meeting taking place except for the public statement that was recently made by the Deputy Minister of Finance.

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South African Reserve Bank
Office of the Governor

MINISTER OF FINANCE
JS
2016 -04- 26
FILE No: M 3 10 1
MINISTER OF FINANCE
1389 16

Honourable Mr Pravin J Gordhan, MP
Minister of Finance
40 Church Square
Pretoria
0002

Dear Min Gordhan

Cabinet's decision on engaging banks on the closure of individual bank accounts

The recent Cabinet's decision to appoint a subcommittee of three Ministers to engage banks on the closure of an individual entity bank account refers.

As you know, the South African Reserve Bank (the Bank) is responsible for the prudential supervision of commercial banks and the promotion of financial stability. The Bank pursues an approach to regulation and supervision which is forward looking, risk based and outcomes focused. It is this approach, the high level of observance of international standards, and the strong risk management in our domestic financial services firms which has been credited correctly for the emergence of the South African financial sector from the global financial crisis relatively unscathed.

The on-going health and effective functioning of the financial system is an important component of the success of any modern economy. Given its importance, the financial services sector carries the responsibility of supporting and facilitating trade, infrastructure investment, anchoring capital raising activities of both the private and public sectors and providing appropriate and adequately regulated financial services to millions of ordinary people. Importantly, the South African financial services sector is fast becoming a critical bedrock for the Pan African trade and infrastructure development, a key component of the growth and development of the sub-Saharan economies especially. It is in this context that we would like to raise with you our concerns regarding Cabinet's proposed approach and decision on the matter pertaining to the relationship between banks and their individual customers.

In terms of the Financial Intelligence Centre Act, 2001 (Act 38 of 2001) as amended, and related regulations thereto, banks are required amongst others to adhere to the highest standards of compliance to laws which govern their relationships with customers. As such, and in order to ensure their adherence to these requirements, they have to continuously assess the risk profiles of their customers. As part of these assessments, and within the normal operations of banks, they may have to close or alter conditions on customer accounts. In any given period, a substantial number of bank accounts are closed or have their conditions altered as provided for in legal

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275

contracts which govern these arrangements. This is not only critical for mainteining the integrity of the financial system, but it is also important for promoting and ensuring the on-going financial soundness of banks as prudential institutions, in accordance with the provisions of the Banks Act (Act 94 of 1990) as amended, and in the public interest.

Moreover, we note that Cabinet's resolution for certain Ministers to engage with banks was informed by concerns that the actions taken by the banks may deter potential foreign investment. We caution against the unintended consequence of this being viewed as undue political interference in banks' operations, and restricting the ability of banks to make independent operational decisions within the parameters of the existing legal and regulatory frameworks. This could introduce heightened levels of uncertainty and pose a risk to South Africa's financial stability.

It is the Bank's view that sufficient remedies and recourse for bank customers exist in the current financial regulatory framework, including statutory and voluntary ombudsmen, as well as the courts. As such, any aggrieved bank customer should seek recourse through the said established institutions and processes. This approach would enhance the credibility of our institutional and regulatory environment and restore public trust and investor confidence.

I am at your disposal to discuss this matter further if required, at your earliest convenience.

Yours sincerely

Lesetja Kganyago
Governor
Date: 26 APR 2016

276 IM19

DMR 5

MINISTRY
MINERAL RESOURCES
REPUBLIC OF SOUTH AFRICA

Private Bag X59, Arcadia, 0007, 71 Trevenna Campus, Building 2C 4th floor, Cnr Meintjies and Schoeman Street, Sunnyside. Tel: (+27 12) 444 3999, Fax: (+27 12) 444 3145
Private Bag X9111, Cape Town, 8000, 7th floor, 120 Plein Street, Cape Town. Tel: (+27 21) 462 2310, Fax: (+27 21) 461 0859

20 April 2016

The Honourable Minister of Finance: Mr Pravin Gordhan, MP
Ministry of Finance
40 Church Square
Old Reserve Building
PRETORIA
0001

Dear Honourable Minister

IN RE: INTER-MINISTERIAL COMMITTEE IN RESPECT OF ALLEGATIONS LEVELLED AGAINST FINANCIAL INSTITUTIONS

I refer to the decision taken by Cabinet on Wednesday, 16 April 2016 to appoint an Inter-Ministerial Committee ("IMC") to consider the impact of certain allegedly unilateral actions taken by specific financial institutions against certain of its clients, which actions may have the potential to negatively affect the economy of the Republic of South Africa with particular focus to be given to the impact of these actions on the already distressed mining and financial services sectors.

The IMC is to consist of the Ministers of Labour, Finance, Communications and Minister of Mineral Resources. Consultations with the financial institutions are being arranged for **Monday, 25 April 2016 from 09h00 to 17h00** in Pretoria. The venue for the day, agenda for the various consultations and Terms of Reference for the IMC will be circulated shortly.

Whilst I am aware that the timing of the meeting may not be suitable, I trust that the matter is sufficiently serious and urgent to receive your urgent attention and look forward to receiving a positive response from you of your attendance at the aforesaid consultations.

I look forward to your urgent response.

Sincerely

Mr Mosebenzi Zwane, MP
Minister of Mineral Resources

 277

RE: Inter-Ministerial Committee in Respect of Allegations Levelled Against Financial Institutions

Nwabisa Jennings [Nwabisa.Jennings@dmr.gov.za]
Sent: Friday, April 22, 2016 12:39 PM
To: Busi Sokhulu [Busi.Sokhulu@treasury.gov.za]

Dear Blessing,

As per the email below, this serves to confirm that the Inter-Ministerial Committee will convene as per details below:

Date: **Monday, 25 April 2016**
Time: **09h00-17h00**
Venue: **Department of Mineral Resources, Minister's Boardroom, 70 Trevenna Campus, Building 2C**
4th Floor, Cnr Meintjies & Francis Baard Street, Sunnyside, Pretoria

Please note that the agenda as well as the Terms of Reference will be available on Monday at the meeting.

Please confirm the number of people that will be accompanying the Minister as well as the Minister's dietary requirements. Can you also forward us the car registration, model and colour of the cars.

Kind Regards,
Nwabisa Jennings
012 444 3947

From: Nwabisa Jennings
Sent: 22 April 2016 11:48 AM
To: 'blessing.sokhulu@treasury.gov.za'
Subject: Inter-Ministerial Committee in Respect of Allegations Levelled Against Financial Institutions

Dear Blessing,

I trust that you are well. Attached please find a letter for Minister Gordhan's attention from Minister Zwane. Our driver will hand deliver the original to your offices shortly.

Kind Regards,
Nwabisa
012 44 3947

278

Inter-Ministerial Committee in respect of allegations levelled against Financial Institutions

Joanne Scott

Sent: Friday, April 22, 2016 3:47 PM
To: Nwabisa.Jennings@dmr.gov.za
Cc: pamela.salusalu@labour.gov.za
Attachments: SKMBT_C554e16042215470.pdf (405 KB)

Dear Ms Jennings
Please find attached correspondence for Minister Zwane's attention.
Please could I request that you acknowledge receipt.

Dear Ms Salusalu
Please note that Minister Gordhan has copied Minister Oliphant into this correspondence, please find attached for her attention.
Please could I request that you acknowledge receipt.

Kind regards
Joanne Scott
Ministry of Finance
40 Church Square, Old Reserve Building, PRETORIA
Private Bag X115, PRETORIA, 0001
Tel: +27 12 315 5158
Fax: +27 12 323 3262
E-mail for official correspondence: minreg@treasury.gov.za

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279

MINISTER: FINANCE
REPUBLIC OF SOUTH AFRICA

Private Bag X115, Pretoria, 0001, Tel: +27 12 323 8911, Fax: +27 12 323 3262
PO Box 29, Cape Town, 8000, Tel: +27 21 464 6100, Fax: +27 21 461 2934

Mr MJ Zwane
Minister of Mineral Resources
Private Bag X59
PRETORIA
0001

Dear Minister Zwane

INTER-MINISTERIAL COMMITTEE IN RESPECT OF ALLEGATIONS LEVELLED AGAINST FINANCIAL INSTITUTIONS

I refer to your letter dated 20 April 2016, emailed to my office at 11h48am on 22 April 2016.

As you are aware, I was not present at the Cabinet meeting you refer to but I have consulted the Cabinet Secretariat on the matter.

The following emerges:

1. The Cabinet meeting was on the 13th April 2016 – not 16th April 2016 which was a Saturday.

2. No Inter-Ministerial Committee was established.

3. Three Ministers were nominated: Finance, Labour and Mineral Resources.

4. No one Minister was designated as convenor.

5. The financial services sector is not "already distressed" as your letter indicates, and care must be taken not to compromise financial stability.

Whilst I appreciate the urgency of the matter for some, I must emphasise that the legal and regulatory environment has both global (BASEL III, Financial Action Task Force) and local (SA Reserve Bank; Financial Services Board; Financial Intelligence Centre; National Consumer Commission; etc) regulators and regulations.

I am currently seeking legal advice on what could be done in the present circumstances, given the intensive legislative framework we have governing the financial sector.

In the circumstances, it will be advisable for the three Ministers to first consult on the framework for any discussion with financial institutions. I prefer that this takes place on the

 280

margins of the Cabinet meeting of the 26th April 2016. You might also be aware that discussions of the nature envisaged have already taken place elsewhere.

Accordingly, I look forward to discussing the way forward next Tuesday.

Kind regards

PRAVIN J GORDHAN, MP
MINISTER OF FINANCE
Date: 22 - 4 - 2016

cc. Ms MN Oliphant, MP
Minister of Labour

DMR 5

MINISTRY
MINERAL RESOURCES
REPUBLIC OF SOUTH AFRICA

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Private Bag X9111, Cape Town, 8000, 7th Floor, 120 Plein Street, Cape Town. Tel. (+27 21) 462 3310, Fax: (+27 21) 461 3659

24 April 2016

The Honourable Minister of Finance: Mr Pravin Gordhan, MP
Ministry of Finance
40 Church Square
Old Reserve Building
PRETORIA
0001

Dear Honourable Minister

IN RE: INTER-MINISTERIAL COMMITTEE IN RESPECT OF ALLEGATIONS LEVELLED AGAINST FINANCIAL INSTITUTIONS

I refer to your letter to me dated 22 April 2016 and note the contents thereof. Although I do not respond to each matter, I may do so should the need arise.

I point out the following:-

a. As you correctly point out, you were not present at the Cabinet meeting where the aforementioned decision was taken. The decision, to my recollection, was for a Ministerial Committee to be set up to meet with the relevant financial institutions to discuss the current media reports. The establishment of the Committee has been confirmed by the Minister in the Presidency, Mr Radebe, in various media reports over the last few days;

b. In addition to yourself, Ms Oliphant and myself, the President mandated us to consider the inclusion of any additional Minister, whose participation may be deemed relevant;

c. Although a convenor was not elected, due to the urgency of the situation, I have taken it upon myself to convene the meeting, a fact which can be easily ratified by the Committee as its seating.

As a result, the discussions arranged for 25 April 2016 will continue and I urge you to consider attending as the outcomes thereof will be relevant to us as all as South Africans who wish to see this country prosper.

I look forward to receiving you.

Sincerely

Mr Mosebenzi Zwane, MP
Minister of Mineral Resources

Cc: Ms Oliphant, Minister of Labour

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STRICTLY CONFIDENTIAL AND LEGALLY PRIVILEGED

Ex parte: **MINISTER OF FINANCE**

In re: **INTER-MINISTERIAL COMMITTEE IN RESPECT OF ALLEGATIONS LEVELLED AGAINST FINANCIAL INSTITUTIONS**

OPINION

J.J. GAUNTLETT SC
F.B. PELSER

Chambers
Cape Town

25 April 2016

283

Introduction

1. Our consultant is the Minister of Finance ("the Minister").

2. We have been asked to provide urgent advice on the power of members of the National Executive, in particular the Minister, to intervene in banker-client relationships. This is the essential question for advice. Eight related and ancillary issues have been identified in our instructions for consideration:

   (i) the contractual rights of banks to choose their customers, particularly in the light of requirements relating to international anti-money-laundering, combatting the financing of terrorism (AML-CFT), and politically-exposed persons (PEPs);

   (ii) Government's potential exposure of South African banks to fines by the UK and USA authorities, where they are perceived to be weak on FATF standards and in the context of South African banks having previously been fined by the UK's Financial Conduct Authority and Barclays PLC in its latest results noted that ABSA had lodged suspicious transaction reports without much response from the South African prosecuting authorities; and the potential effect of a large fine against a South African bank by the US or UK authorities to undermine South Africa's financial stability objective, sparking a 2008-type economic crisis in South Africa;

   (iii) whether banks can disclose information to the Minister regarding individual clients in terms of the Protection of Personal Information Act; and whether banks can provide such information to anyone else, like the SARB or the Bank

284

Supervision Department, the Financial Services Board, the Financial Intelligence Centre, or SARS;

(iv) whether any provision in the Banks Act provides for intervention by the Minister in a specific banker-client relationship;

(v) whether the Oakbay-case fits within the remit of the Banking Ombudsman;

(vi) what a reasonable period is for banks to give to clients when terminating banker-client relationships;

(vii) how de-risking by banks may undermine Governments' (unlegislated) financial-inclusion objective (which strives to ensure that all people have access to banking services); and

(viii) how a meeting with the banks by the Minister (and Government) may undermine Government's legislation (especially the financial sector framework legislation); whether this will set a precedent for anyone else experiencing a problem with any bank; and, more importantly, whether such meeting may undermine the statement made by the Deputy Minister of Finance on the offer made to him by significant owners of Oakbay, and whether this charge should not be investigated first.

3. As appears from the above issues, the request for advice arises in the context of a recent delegation by Cabinet of three members (the Minister of Labour, the Minister of Mineral Resources, and the Minister of Finance) to engage a number of major South African commercial banks. The stated intention, as reported in the media, is to "open constructive talks to find lasting a solution" after the closure of bank accounts held by

285

Oakbay Investments, an entity owned by the Gupta family.

4. We have been briefed with correspondence between the Minister of Mineral Resources and the Minister of Finance; a circular by the Ombudsman for Banking Services on the closure of bank accounts; and a 2011 National Treasury Policy document titled "A safer financial sector to serve South Africa better". To the extent necessary we refer to some of these documents in the analysis below.

5. For the reasons set out in the analysis which follows we advise that there is no legal basis on which Government may interfere in the banker-client relationship; the banks are required to honour their confidentiality obligations to its current and former customers, and are therefore likely to respond, correctly, that they are precluded by law from answering questions the Ministers may pose; the mooted meeting is likely to cause unintended consequences and adverse perceptions regarding Government's adherence to the relevant principles governing banker-client relationships, international norms and best practice.

Analysis

6. The issues for advice turn on the correct legal framework governing banker-client relationships, and the powers of the Executive. We accordingly deal briefly with each in turn before addressing the specific questions for advice.

Banker-client relationships

286

7. It is well-established, as our instructions indeed recognise, that the banker-client relationship is governed by the private law of contract.[1] Whether the contractual nature of the relationship is unique (*sui generis*), or one of *mandatum* (mandate) – or some other specific contract – is immaterial for present purposes.[2] It suffices that the banker-client relationship is governed by the law of contract. This does not, however, mean that public law and statutory enactments do not impact on the contractual relationship. They of course do.[3] But it does mean that unless authorised to interfere with the contractual relationship, third parties who intentionally intervene in the banker-client relationship perpetrates a private law wrong (a delict), which is actionable.[4]

8. It is an implied term in the contract between a bank and its customer that the bank is under a duty not to disclose information concerning the customer's affairs.[5] This duty is not absolute, however. A banker may disclose information about the affairs of a

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[1] Mooncroft *Banking Law and Practice* (LexisNexis, Durban 2015) iss 11 at 15–1.
[2] As regards the different constructs, see e.g. Joubert *et al* (eds) *The Law of South Africa* 2nd ed (LexisNexis, Durban 2003) vol 2 part 1 at para 403; Mooncroft *Banking Law and Practice* (LexisNexis, Durban 2015) iss 11 at 15–2*ff*.
[3] See e.g. *Pinto v FNB* 2013 (1) NR 175 (HC) at para 93, in which the Namibian High Court held that the relevant provisions of the Namibian Financial Intelligence Act and Prevention of Organised Crime Act "are to be regarded as terms imposed by law on the traditional banker-client relationship and that contractual bond that exists between them."
[4] This applies also after the termination of the contractual relationship, should the interference amount to increasing (or imposing) a contractual obligation which would otherwise have expired (*cf* Neethling *et al Law of Delict* 6th ed (LexisNexis, Durban 2010) at 306).
[5] *FirstRand Bank Ltd v Chaucer Publications (Pty) Ltd* 2008 (2) SA 592 (C) at para 20; *GS George Consultants and Investments (Pty) Ltd v Datasys Ltd* 1988 (3) SA 726 (W) at 735D, not affected in this respect by *Densam (Pty) Ltd v Cyvelnat (Pty) Ltd* 1991 (1) SA 100 (A).

287

client under four circumstances.[6] First, where the bank acts under legal compulsion. Second, where the bank is under a public duty to make the disclosure. Third, where the interests of the bank require disclosure. Fourth, where the disclosure is made by the express or implied consent of the client. When a legal compulsion or public duty arises is addressed below in dealing with the third ancillary issue.

9. The contractual relationship may be terminated either by mutual agreement (between the parties to the contract), or by one party only (acting unilaterally).[7] Nonetheless, contracts generally provide expressly for a unilateral right to cancel.[8] Accordingly the reference to "certain allegedly unilateral actions"[9] is – to the extent that it implies that the *unilateral* nature of the "actions"[10] is a cause for concern or recourse – misconceived. The correct legal position, on the recent authority of the Supreme Court of Appeal (affirmed by the Constitutional Court's dismissal of an attempt to appeal the ruling) is explicitly that a bank may indeed unilaterally close a client's account.[11]

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[6] Joubert *et al* (eds) *The Law of South Africa* 2nd ed (LexisNexis, Durban 2003) vol 2 part 1 at para 345. See, too, clause 6.1 the Code of Banking Practice, which adds two more instances (an account being in default; and a cheque having been returned to drawer).
[7] Joubert *et al* (eds) *The Law of South Africa* 2nd ed (LexisNexis, Durban 2003) vol 2 part 1 at para 403.
[8] Mooncroft *Banking Law and Practice* (LexisNexis, Durban 2015) iss 11 at 15–29.
[9] In the 20 April 2016 letter by the Minister of Mineral Resources, which was delivered only two days later to the Minister of Finance.
[10] This is evidently a reference to the closure of Oakbay's bank accounts.
[11] *Bredenkamp v Standard Bank of SA Ltd* 2010 (4) SA 468 (SCA) at para 64
"This leaves for consideration the question whether the Bank had (in terms of the relief presently sought) good cause to close the accounts. The bank had a contract, which is valid, that gave it the right to cancel. It perceived that the listing created reputational and business risks. It assessed those risks at a senior level. It came to a conclusion. It exercised its right of termination in a *bona fide* manner. It gave the appellants a reasonable time to take their business elsewhere. The termination did not offend any identifiable constitutional value and was not otherwise contrary to any other public policy consideration. The bank did not publicise the closure or the reasons for its decision. It was the appellants who made these facts public by launching the proceedings and requiring the Bank to disclose the reasons."

288

10. A bank must, however, give reasonable notice of its intention to terminate a client's account.[12] But the right to terminate is not lost by failing to provide reasonable prior notice – the termination of the account is merely delayed in the event of premature purported closure.[13] This is because "a party to an ongoing contractual relationship terminable on notice should never be denied the right to cancel in terms of the contract, especially when it perceives that the future of the relationship will not be in its interests."[14]

11. Terminating the banker-client relationship does not, however, terminate the bank's duty not to reveal information of a previous client.[15]

The powers of the Executive

12. It is by now well-established that the powers and duties of the National Executive are governed by the Constitution and national legislation. Ministers, in short, are entirely "creatures of statute", as the legal principle is expressed. This means they have no inherent powers, only powers given to them by law. The principle of legality, which is a crucial component of the rule of law (which itself, in turn, is a founding value of the Constitution),[16] provides that an organ of State has no power other than that

[12] We revert to this is addressing the sixth ancillary issue.
[13] *Cf* Moorcroft *Banking Law and Practice* (LexisNexis, Durban 2015) iss 11 at 15–31.
[14] *Ibid.*
[15] Clause 6.1 the Code of Banking Practice; Joubert *et al* (eds) *The Law of South Africa* 2nd ed (LexisNexis, Durban 2003) vol 2 part 1 at para 403 fn 19.
[16] Section 1(c) of the Constitution.

conferred by law.[17] It requires that public power be exercised in good faith, and that powers not be misconstrued or used for purposes other than intended.[18]

13. Although ancillary powers not expressly provided may be inferred, this may only be done where this is necessary by implication in order to give efficacy to express powers.

14. The purported exercise of powers by a member of the executive arm of government which is not authorised by law is unlawful, and may be resisted by a private entity – even without first setting aside the purported exercise of public power.[19]

Overarching question for advice: The power of Cabinet to intervene in banker-client relationships

15. From the above the answer to the fundamental question is clear. It is that save to the extent that this is authorised by law, no Cabinet member (or Cabinet collectively) has any power to intervene in the banker-client relationship. As a matter of public law any such intervention is unlawful and may be ignored by a private entity without seeking legal recourse. As a matter of private law any such intervention constitutes a delict,[20] which may result in a claim for damages or other legal remedy (like an interdict).

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[17] *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC) at para 56.
[18] *President of the Republic of South Africa v South Africa Rugby Football Union* 2000 (1) SA 1 (CC) at para 148.
[19] See e.g. *City of Tshwane Metropolitan Municipality v Cable City (Pty) Ltd* 2010 (3) SA 589 (SCA) at para 14; *City of Cape Town v Helderberg Park Development (Pty) Ltd* 2008 (6) SA 12 (SCA) at para 50.
[20] Neethling *et al Law of Delict* 6th ed (LexisNexis, Durban 2010) at 386.

290

16. Whether a legal basis for intervention by Cabinet members exists is considered in addressing some of the additional issues identified in our instructions (particularly the fourth), to which we now turn.

First additional issue: Contractual rights of banks to choose their customers

17. Banks do not only have a contractual entitlement, but also a legal obligation to choose their customers carefully. It is a continuing duty, and banks' right to protect their own reputation has been recognised as a valid basis for terminating the banker-client relationship.[21]

18. The Basel Committee on Banking Supervision at the Bank of International Settlements considers that "the first and most important safeguard against money-laundering is the integrity of banks' own managements and their vigilant determination to prevent their institutions becoming associated with criminals or being used as a channel for money laundering".[22] The Committee recognises as an essential part of banks' risk management practices the adoption of effective know-your-customer (KYC) standards. Proper 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

[21] *Bredenkamp v Standard Bank of SA Ltd* 2010 (4) SA 468 (SCA) at paras 17-19, holding that "reputation is not necessarily based on fact, but often on perception."
[22] Prevention of criminal use of the banking system for the purpose of money-laundering (December 1988) available at http://www.bis.org/publ/bcbsc137.htm.

291

other unlawful activities."[23]

19. In practice banks give effect to their KYC obligation by adopting client-acceptances policies.[24] These include *inter alia* minimum standards for establishing and terminating banker-client relationships. These policies generally apply a risk-based approach which focuses on clients with high risk profiles, as indicated by factors like the identity and characteristics of the client; country of origin; the banking product used; and the delivery channel for the business which is being conducted.[25] Examples of factors which increases reputational risk to a bank include any business involvement on the part of the client in arms trading; human rights abuses; environmental damage or pollution; undemocratic political regimes.[26] An important high risk factor is political exposure. So-called "politically exposed persons" (PEPs)[27] are *per se* high-risk customers.[28]

20. Under South African law these principles are given effect to by the Financial Intelligence Centre Act 38 of 2001 (FICA). It imposes a duty on an accountable institution to identify and verify new and existing customers, to keep records of certain information, and to report certain transactions and situations. This reporting duty

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[23] *Ibid.*
[24] Moorcroft *Banking Law and Practice* (LexisNexis, Durban 2015) iss 11 at 9–1.
[25] *Id* at 9–3.
[26] *Ibid.*
[27] PEPs are individuals who are or who have been entrusted with prominent public functions, such as heads of state; senior politicians; senior government, judicial or military officials; senior executives of public organisations; and important political party officials (*id* fn 9).
[28] Moorcroft *Banking Law and Practice* (LexisNexis, Durban 2015) iss 11 at 9–5.

292

overrides a bank's duty of confidentiality towards its client. But the duty is to report to the Financial Intelligence Centre – not to Cabinet. Thus, the duty under FICA is for banks to know their clients (which implies an entitlement to terminate a banker-client relationship when reputational risks arise), but banks have no right or duty to keep Cabinet in the know of their clients' (or their own) affairs.

21. To this the Banks Act adds further duties to guard against banks being misused for purposes of market abuse.[29] The Banks Act imposes certain reporting duties on banks. Again the duty is not to report to the National Executive, or any Cabinet member. The Banks Act designates the Registrar of Banks as the only authority to whom information must be furnished under the Act.[30] The Registrar may under certain circumstances disclose information reported to him to third parties.[31] The Banks Act contemplates that should there be any concerns regarding the banking sector this be communicated by the Registrar to *inter alios* the Minister.[32]

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[29] Section 60A of the Banks Act.

[30] Section 7 of the Banks Act.

[31] Section 90 of the Banks Act provides

"Notwithstanding the provisions of section 33 (1) of the South African Reserve Bank Act, 1989 (Act No. 90 of 1989), the Registrar may furnish information acquired by him or her as contemplated in that section –

(a) to any person charged with the performance of a function under any law, provided the Registrar is satisfied that possession of such information by that person is essential for the proper performance of such function by that person; or

(b) to an authority in a country other than the Republic for the purpose of enabling such authority to perform functions, corresponding to those of the Registrar under this Act, in respect of a bank carrying on business in such other country:

Provided that the Registrar is satisfied that the recipient of the information so provided is willing and able to keep the information confidential within the confines of the laws applicable to the recipient."

[32] Section 90(2) provides

"The Registrar must inform the Minister and the Governor of the South African Reserve Bank of any matter that in the opinion of the Registrar may pose significant risk to the banking sector, the economy, financial stability or financial markets more generally."

293

22. It is therefore not consistent with the scheme of the Banks Act or FICA to confer a power on the Minister to extract confidential information from banks.

Second additional issue: Exposure of South African banks to fines by foreign authorities

23. Our instructions identify serious concerns regarding compliance with Financial Action Task Force (FAFT) criteria, and the consequences of non-compliance. Within the South African regulatory regime these are addressed by the Reserve Bank's Directive for Conduct within the National Payment System in respect of the Financial Action Task Force Recommendations for Electronic Fund Transfers, and other measures supported by the Reserve Bank. What these measures essentially require is compliance with KYC principles,[33] to which we have already referred.

24. It is accordingly important that South African commercial banks be permitted to apply national and international best practice in order to choose their clients, know their clients, classify the risk to which their clients expose them, and decide whether their business and reputational risks exposure justifies terminating a specific banker-client relationship. Should Government wrongfully interfere with the exercise of banks' powers and duties, Government may incur delictual liability for any penalty imposed on a banks which is causally connected to Government's conduct.

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[33] Mocrcroft *Banking Law and Practice* (LexisNexis, Durban 2015) iss 11 at 8–14.

294

25. Accordingly Government intervention may expose the financial sector and Government itself to legal risks.

Third additional issue: Whether banks can disclose information under the Protection of Personal Information Act

26. The statutory exceptions to a bank's duty of confidentiality are generally considered[34] to comprise those contained in

(i) section 236(4) of the Criminal Procedure Act 51 of 1977;[35]

(ii) section 31 of the Civil Proceedings Evidence Act 25 of 1965;[36]

(iii) section 78(13) of the Attorneys Act 53 of 1979;[37]

(iv) section 33 of the South African Reserve Bank Act 90 of 1989;[38]

(v) section 74A of the Income Tax Act 58 of 1962;[39]

(vi) section 87(2) of the Banks Act 94 of 1990;[40]

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[34] See e.g. Jones *et al An Introduction to South African Banking and Credit Law* (LexisNexis, Durban 2006) at 6 fn 32, 34; Joubert *et al* (eds) *The Law of South Africa* 2nd ed (LexisNexis, Durban 2003) vol 2 part 1 at para 345 fn 21.

[35] This provision applies to criminal proceedings. It is accordingly of no application in the present circumstances.

[36] This section provides that "[n]o bank shall be compelled to produce its ledgers, day-books, cash-books or other account books in any civil proceedings unless the person presiding at such proceedings orders that they shall be so produced." It accordingly does not apply.

[37] This provision clearly does not apply, because Oakbay is not an attorney, its account is not a trust account, and there is no request for information regarding the account by any law society.

[38] This provision deals with the preservation of secrecy in relation to the business of the Reserve Bank itself. Although an exception exists in relation to information provided to the Minister, the operation of this exception is limited to information the Reserve Bank, a shareholder of the Reserve Bank, or a client of the Reserve Bank.

[39] This provision has been repealed by the Tax Administration Act 28 of 2011.

[40] This provision deals with husbands of wives who are depositors. It is accordingly entirely irrelevant to the current situation. Section 89(2) of the Banks Act is also not relevant, because it authorises the Registrar of Banks to furnish information obtained pursuant to section 33 of the South African Reserve Bank Act to another functionary if the information is essential to the proper performance of that person's function.

(vii) section 37 of the Financial Intelligence Centre Act 38 of 2002;[41]

(viii) sections 64(1) and 65 of the Access to Information Act 2 of 2000;[42] and

(ix) section 69 of the National Credit Act 34 of 2005.[43]

27. Whether and to what extent these (and similar) provisions authorise an exception to the ordinary principle of banker-client confidentiality depends on the particular facts and circumstances in which the question arises. Save where a statutory exception properly applies, banks' common law contractual duty as amplified by the constitutional duty to observe its client's privacy protected by section 14 of the Constitution prevails.[44] Cabinet members may not approach banks to disclose information by usurping powers of other functionaries, and may not purport to use (whether directly or indirectly) powers conferred for specific purposes for extraneous purposes – however well-intended.[45]

28. The nature, purpose and scope of the Protection of Personal Information Act 4 of 2013

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[41] This provision excludes the duty of secrecy or confidentiality or any other restriction on the disclosure of information (whether imposed by legislation or arising from the common law or agreement) to the extent that such duty or restriction affects compliance by an accountable institution, supervisory body, reporting institution, the South African Revenue Service or any other person with a provision of Part 4 and Chapter 4 of this Act. The Act primarily requires that information be reported to the Centre, and only in some instances that information be reported to a person designated by the Minister.

[42] This Act does not apply in these circumstances, because there has been no request for a record.

[43] This provision imposes a duty to report details regarding a credit agreement directly to the national register, or to a credit bureau.

[44] *Cf Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motor Distributors (Pty) Ltd v Smit NO* 2001 (1) SA 545 (CC) at paras 15-18.

[45] *University of Cape Town v Ministers of Education and Culture (House of Assembly and House of Representatives)* 1988 (3) SA 203 (C) at 212; *Van Eck NO and Van Rensburg NO v Eina Stores* 1947 (2) SA 984 (A), applied in *inter alia Gauteng Gambling Board v MEC for Economic Development, Gauteng* 2013 (5) SA 24 (SCA) at para 46.

296

render it highly questionable whether a power to disseminate to the Minister of Finance information which is not otherwise liable be to dissemination to him (under legislation governing the financial sector) can be construed in the current circumstances.[46] Although certain provisions of the Act are capable of a construction which could in certain circumstances authorise the dissemination of information to the Minister, provisions like section 57 restrict such construction or operation (at least to the extent that, for instance, prior authorisation has not been obtained from the Regulator, to the extent that this may be necessary).

29. However, on the basis of the information contained in our brief it is not possible to provide any conclusive view on the application of the Promotion of Personal Information Act in the circumstances of this case or more generally. The considerations to which we next turn moreover militate considerably against any positive answer.

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[46] As section 2 records, the purpose of the Act is to

(a) give effect to the constitutional right to privacy, by safeguarding personal information when processed by a responsible party, subject to justifiable limitations that are aimed at
  (i) balancing the right to privacy against other rights, particularly the right of access to information; and
  (ii) protecting important interests, including the free flow of information within the Republic and across international borders;
(b) regulate the manner in which personal information may be processed, by establishing conditions, in harmony with international standards, that prescribe the minimum threshold requirements for the lawful processing of personal information;
(c) provide persons with rights and remedies to protect their personal information from processing that is not in accordance with this Act; and
(d) establish voluntary and compulsory measures, including the establishment of an Information Regulator, to ensure respect for and to promote, enforce and fulfil the rights protected by this Act."

297

Fourth additional issue: Whether any provision in the Banks Act provides for intervention by the Minister in a specific banker-client relationship

30. It is precisely because the overall political responsibility for the banking sector rests with the Minister,[47] and because the Banks Act is a particularly important component of the statutory scheme governing banks, that any ministerial power to obtain information would have been expected to have been provided for in the Banks Act itself. The Act does not, however contain any specific provision which empowers the Minister to obtain information directly from a bank regarding its client.

31. Unsurprisingly the Act also does not contain any provision which contemplates that any oversight responsibility or power the Minister may have under the Act is somehow to be exercised together with the Minister of Labour and the Minister of Mineral Resources. Nor does the Act contemplate that labour matters or the state of the mineral sector may justify the Minister in exercising any power conferred on him by the Act itself. Were the Minister to exercise any such power by taking into account considerations other than those relevant to the banking sector or the dictates of unauthorised third parties (which may include other Cabinet members), his conduct would be *ultra vires* the Banks Act, unlawful, and liable to be ignored by any of the banks with impunity and set aside by a court should the matter become litigious.

[47] Moorcroft *Banking Law and Practice* (LexisNexis, Durban 2015) ins 11 at 2–8.

298

Fifth additional issue: Whether the Oakbay case fits within the remit of the Banking Ombudsman

32. The Ombudsman for Banking Services has jurisdiction over complaints falling under the Code of Banking Practice.[48] This Code applies to personal and small business customers. A small business is one with a turnover of less than R10 million per year.[49] We have not been instructed as regards Oakbay's annual turnover. Should it be more than R10 000 000 per annum (as we suspect), or should any claim which might arise exceed R2 000 000, the jurisdiction of the Ombudsman is excluded on this basis alone. Other factors may also either exclude the Ombudsman's jurisdiction,[50] or render it premature to exercise any jurisdiction which the Ombudsman may otherwise have had.[51]

33. It accordingly appears to us that the remit of the Ombudsman for Banking Services does not include the Oakbay matter.

Sixth additional issue: A reasonable notice period

34. The Code of Banking Practice recognises a bank's right to close a customer's account,

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[48] Moorcroft *Banking Law and Practice* (LexisNexis, Durban 2015) iss 11 at 13–4.
[49] *Cf* the website of the Ombudsman for Banking at www.obssa.co.za, cited in Moorcroft *Banking Law and Practice* (LexisNexis, Durban 2015) iss 11 at 13–4 (which refers to a threshold amount of R5 000 000). See, however, *The Ombudsman for Banking Service Handbook* (Juta, Cape Town 2013) at 7, referring to a business turnover which exceeds R10 million per annum as factor which excludes jurisdiction. See too *id* at 8 fn 2, explaining that the R5 000 000 threshold was increased to R10 000 000 w.e.f. 31 May 2011.
[50] E.g. if the dispute concerns the exercise of the bank's commercial judgment.
[51] E.g. a failure to exhaust internal complaint processes with the particular bank concerned.

and provides that this must generally follow "reasonable prior notice".[52] The Code does not state what a reasonable period is. It does, however, recognise circumstances in which an account may be closed by a bank without any prior notice.[53]

35. The legal position is that what constitutes reasonable notice depends on the circumstances of a particular case. In the context of closing bank accounts the character of the account and any additional special facts are relevant considerations to be taken into account.[54] The Ombudsman for Banking Services has confirmed in a circulated bulletin on closing bank accounts that what constitutes a reasonable notice period will depend on the merits of each particular case. Generally, however, a period of between one and two months would be considered reasonable in respect of an individual account, and two to three months for business accounts. This depends on the nature of the accounts and the number and nature of transactions on the account.

36. The above periods are longer than the one-month period applicable under the equivalent code in the United Kingdom.[55] They have been increased to afford clients sufficient time to change banks and transfer debit orders.[56]

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[52] Clause 7.3.2 of the Code.
[53] Clause 7.3.3, which refers to instances where (i) a bank is compelled to close an account by law or international best practice; (ii) a customer have not used an account for a significant period of time; and (iii) there is reason to believe that the account is being used for any illegal purposes.
[54] *Prosperity Ltd v Lloyds Bank Ltd* (1923) 39 TLR 372.
[55] Hapgood *Paget's Law of Banking* 13th ed (LexisNexis, London 2007) at 153, referring to clause 7.3 of the UK Banking Code.
[56] Ombudsman for Banking *Bulletin no. 3* (15 August 2012) at p 4.

300

37. In the absence of specific factual instructions bearing on the issue, it accordingly appears that the default reasonable notice period is two to three months.

Seventh additional issue: Whether de-risking by banks may undermine Governments' (unlegislated) financial-inclusion objective

38. As we understand it, this question probes whether banks' duties to assess risks and guard against them (in the interest of banks, their other customers, and a sustainable financial sector) conflict with Government's goal of achieving universal inclusion in the banking system.[57]

39. We do not perceive a real tension between these duties and the stated objective. This is because unqualified and universal access to banking services cannot be a legitimate governmental objective to be pursued at the expense of vulnerable bank users. It is for this reason that the national and international legal infrastructure governing banking presupposes that the financial system indeed be protected against (and, if necessary, closed to) certain individuals, entities and their transactions. The result is that a legal obligation is imposed on banks to manage risk profiles, and banks have a legal entitlement to terminate a banker-client relationship when *in their assessment* the relationship exposes the bank to reputational and business risk.

[57] Our instructions formulate this issue as forming part of the sixth issue, but we address it separately as a seventh issue.

301

40. It is the unlegislated Government objective of an all-inclusive banking system which has no legal status. However desirable an all-inclusive system might otherwise be, a Government objective with no legal force cannot detract from pre-existing legal rights and duties which are consistent with international norms. This is because common law and statutory rights and duties are of a higher legal status than Government policies.[58]

41. There is, moreover, a binding precedent for the legal principle that a client cannot be imposed upon a bank merely because the client might otherwise be rendered without a bank.[59] In *Bredenkamp* the Supreme Court of Appeal held that any such imposition would be unfair, and was not supported by any constitutional imperative or public policy consideration.[60]

42. Accordingly the objective of achieving a banking sector which leaves no one without a bank cannot dilute banks' legal duties or divested them of vested rights. Otherwise the banking sector will be rendered unsustainable, which would be counterproductive.

Eighth additional issue: Implications of ministerial meeting

43. For the reasons set out above, the mooted ministerial meeting is not authorised by legislation governing the financial sector. To the extent it seeks to extract information or an explanation which is not permitted, it would be unlawful and unenforceable.

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[58] *Akani Garden Route (Pty) Ltd v Pinnacle Point Casino (Pty) Ltd* 2001 (4) SA 501 (SCA) at para 7.
[59] *Bredenkamp v Standard Bank of SA Ltd* 2010 (4) SA 468 (SCA).
[60] *Id* at para 60.

302

Meeting with the banks may undermine Government's or the Minister's authority if either of them is seen to make demands which cannot be enforced.

44. If the banks nonetheless yield to what they may otherwise have regarded as an abuse of public power, then it may indeed set an adverse "precedent" – as our instructions put it. We use the word in inverted commas, because an act of exceeding public power cannot create what in law constitutes a precedent. Even if *de facto* permitted, it still remains *de lege* an illegality without any precedential effect. But it may nonetheless, in the sense contemplated colloquially, set an adverse climate as regards what the financial and other sectors are expected to tolerate. Such conduct may indeed have very adverse national and international consequences. But these are not for us to identify or quantify.

45. Finally, it does appear to us that Government exposes itself to criticism of inconsistent conduct if it were to meet with banks despite the Deputy Minister of Finance's statement remaining unaddressed.[61] If it is correct that significant owners of Oakbay presented themselves as people with power to offer ministerial positions, then they qualify as PEPs. In that event Banks' perception that Oakbay presents business and

[61] The relevant part of the statement to which we understand our instructions refer is para 6 of the media statement of 16 March 2016 issued by the Ministry of Finance. It reads

"Therefore let me state the facts on the matter of whether I was approached by nongovernmental individuals in respect of the position of Minister of Finance. Members of the Gupta family offered me the position of Minister of Finance to replace then-Minister Nene. I rejected this out of hand. The basis of my rejection of their offer is that it makes a mockery of our hard earned democracy, the trust of our people and no one apart from the President of the Republic appoints ministers. Let me also place it on record that there was no discussion between the Deputy Secretary General of the ANC Ms Jessie Duarte and myself on this matter."

reputational risks to themselves and to their other customers cannot be second-guessed,[62] especially not by Government. But Government might, if it is perceived (even if wrongly so) to meet with banks at the instance of Oakbay's owners, create unintended consequences. In the current context[63] and a climate[64] perception is important.

Conclusion

46. For the reasons set out above we conclude that the contemplated meeting is not authorised by law, and that its potential adverse consequences should be seriously considered and mitigated by appropriate public statements before and after the meeting – were the meeting nevertheless to proceed (despite our advice to the contrary).

We advise accordingly.

J.J. GAUNTLETT SC
F.B. PELSER

Chambers
Cape Town
25 April 2016

[62] As the Supreme Court of Appeal held in *Bredenkamp v Standard Bank of SA Ltd* 2010 (4) SA 468 (SCA) at para 65, it is not even "for a court to assess whether or not a *bona fide* business decision, which is on the face of it reasonable and rational, was objectively 'wrong' where in the circumstances no public policy considerations are involved."
[63] *Bredenkamp v Standard Bank of SA Ltd* 2010 (4) SA 468 (SCA) at para 19.
[64] *Economic Freedom Fighters v Speaker of the National Assembly; Democratic Alliance v Speaker of the National Assembly* (CCT 143/15; CCT 171/15) [2016] ZACC 11 (31 March 2016) at para 8.

IM23

304

MINISTER: FINANCE
REPUBLIC OF SOUTH AFRICA

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Ref. M3/10/1 (1389/16)

His Excellency, JG Zuma
President of the Republic of South Africa
Private Bag X1000
PRETORIA
0001

Dear Mr President

INTER-MINISTERIAL COMMITTEE IN RESPECT OF ALLEGATIONS LEVELLED AGAINST FINANCIAL INSTITUTIONS

I refer to the Cabinet decision which requires the Ministers of Labour, Mineral Resource and Finance to brief Cabinet on the banking issues affecting a particular company.

I indicated at the Cabinet meeting of 26 April 2016 that the National Treasury had obtained a legal opinion on the approach that should be adopted in this matter. I enclose a copy of the legal opinion for your information. In addition, I enclose extracts of some of the regulatory provisions that apply in this matter. I propose that the Presidents' legal advisor meet with Ms Rebecca Tee from the National Treasury and Advocate Gauntlet to discuss the matter and provide advise on how best to proceed given the regulatory environment.

Kind regards,

PRAVIN J GORDHAN, MP
MINISTER OF FINANCE
Date: 04 - 05 - 2016

305

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Ref. M3/10/1 (1389/16)

Mr MJ Zwane, MP
Minister of Mineral Resources
Private Bag X59
PRETORIA
0001

Dear Minister Zwane

INTER-MINISTERIAL COMMITTEE IN RESPECT OF ALLEGATIONS LEVELLED AGAINST FINANCIAL INSTITUTIONS

I refer to the Cabinet decision which requires the Ministers of Labour, Mineral Resource and Finance to brief Cabinet on the banking issues affecting a particular company.

I indicated at the Cabinet meeting of 26 April 2016 that the National Treasury had obtained a legal opinion on the approach that should be adopted in this matter. I enclose a copy of the legal opinion for your attention. In addition, I enclose extracts of some of the regulatory provisions that apply in this matter. I propose that you study the legal opinion and other documents. We could then discuss the matter.

Kind regards

PRAVIN J GORDHAN, MP
MINISTER OF FINANCE
Date: 04-05-2016

306

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REPUBLIC OF SOUTH AFRICA

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Ref. M3/10/1 (1389/16)

Ms MM Oliphant, MP
Minister of Labour
Private Bag X499
PRETORIA
0001

Dear Minister Oliphant

INTER-MINISTERIAL COMMITTEE IN RESPECT OF ALLEGATIONS LEVELLED AGAINST FINANCIAL INSTITUTIONS

I refer to the Cabinet decision which requires the Ministers of Labour, Mineral Resource and Finance to brief Cabinet on the banking issues affecting a particular company.

I indicated at the Cabinet meeting of 26 April 2016 that the National Treasury had obtained a legal opinion on the approach that should be adopted in this matter. I enclose a copy of the legal opinion for your attention. In addition, I enclose extracts of some of the regulatory provisions that apply in this matter. I propose that you study the legal opinion and other documents. We could then discuss the matter.

Kind regards

PRAVIN J GORDHAN, MP
MINISTER OF FINANCE
Date: 04-05-2016

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MINISTER OF FINANCE
JS
2016 -05- 11
FILE No: M3/10/1
MINISTER OF FINANCE
1389/16

MINISTER
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09 May 2016

The Honourable Minister of Finance: Mr Pravin Gordhan, MP
Ministry of Finance
40 Church Square
Old Reserve Building
PRETORIA
0001

Dear Honourable Minister

IN RE: INTER-MINISTERIAL COMMITTEE IN RESPECT OF ALLEGATIONS LEVELLED AGAINST FINANCIAL INSTITUTIONS

I refer to your letter to me dated 04 May 2016 hand delivered to me in Parliament on the afternoon of 04 May 2016 after a further invitation was extended to you to attend the reconvened IMC meeting.

Suffice to note that your letter of 22 April 2016 states that you were seeking legal advice; that an extensive legal opinion had been obtained by 25 April 2016 and only hand delivered to myself and the two other Ministers on 05 May 2016, I note the contents of your letter and various accompanying documentation.

As this is a matter best dealt with in the appropriate forum, I make no other comments at this time.

Sincerely

Mr Mosebenzi Zwane, MP
Minister of Mineral Resources

Cc: Ms M Oliphant, Minister of Labour
Cc: Ms F Muthambi, Minister of Communications

IM25
308

Meeting with ANC

April 18, 2016

OAKBAY

309

Current situation

- Banks gave notice (Between 30 and 60 days)
- Auditors gave immediate notice
- Insurers refusing cover (immediate)
- Service providers demanding new terms
- Revenues significantly down, likely to issue S189 letters starting this week in IT sector
- 7500 jobs at risk, total affected probably closer to 50 000 thru extended families

Actions against Oakbay

- KPMG told us after 15 yrs of relationships now they have been put under pressure by their big clients - Association Risk
  - **None of the top ten auditing firms ready to take the job**
  - **As soon as close to engagement, companies get "cold feet"**
- All 4 Major Banks closure – Reason given, as per Terms & Conditions (three informed us in space of five days)
  - **Now boycott spreading to allied industries with shared ownership**
- CGIC – Withdraws all insurance covers from the Oakbay Companies
- AVIS Refuses to provide rentals
- Mutual and Federal (Old Mutual) reneges on arrangements
- Equestra cancelled all leases with 14 day notice

TRANSNET-10-804

BB24.1-MKNG-CROSS-CUT-2874

Actions against Oakbay

- On the day of Optimum deal closure – Standard Bank come to inform they will not extend bank accounts
- Now major service providers putting squeeze on us
  - Printers, paper suppliers
  - Historically major clients in several sectors (mining and heavy industry)
  - Business briefings have all but shut down, New Age making significant losses, our election project on hold due to squeeze
- All indications, confirmed in part, refers to conspiracy between major parts of status quo to isolate Oakbay
- Question on our minds: how can they do this in regulated environment, without fear of retribution?
- Anti-competitive, immoral, unethical
- Deafening silence from civil society (except ANC/Alliance structures

TRANSNET-10-805

BB24.1-MKNG-CROSS-CUT-2875

TRANSNET-10-806

Double Standards –Banks & Auditors

- Total SA charged on account of Bribery and Corruption
- Old Mutual Charged for suspect trades
- Netcare charged for breach of confidentiality
- Prudential and KPMG sued for HIV discrimination
- No resignation from KPMG for unprosecuted fraud with Kebble's JCI
- SARS case against Dave King
- HSBC Swiss leaks scandal
- Construction Collusion R30b

BB24.1-MKNG-CROSS-CUT-2876

Oakbay's response

- Shareholder withdrawal
  - Willingness to off-load shares
- Complete co-operation with ANC processes around state capture (although current status proves our lack of influence)
- Readiness to meet with banks, others in boycott mode to save jobs of staff
- Strengthening of governance processes
  - Although transparency, arm's length is hallmark

TRANSNET-10-807

BB24.1-MKNG-CROSS-CUT-2877

Oakbay's response

- Letters written to several affected ministers
- Meeting with Cosatu, SACP
- Appeal to ruling party, government
- This is not about anything, other than jobs
- Given SA's job challenge, we believe this required immediate and determined effort from all stakeholders
- Also, power to Hendriena, water to local town

TRANSNET-10-808

BB24.1-MKNG-CROSS-CUT-2878

Conspiracy or co-incidental?

This conspiracy to impose full control over our economy has been shrouded in almost total secrecy.

How will our economy transform when anyone challenging the 97% is taken out through the withdrawal of essential services

Perhaps the Spider Web Theorists have been right all along. The "elite" just don't have a lot of money. They own just about every major bank and corporation on the JSE and beyond.

How is this possible 22 years into our freedom, with so any challenges facing our country

Is there a relationship between what is happening to Oakbay and Regime change? Central role of Johan Rupert?

How do we have political power, but no influence over the economy

TRANSNET-10-809

BB24.1-MKNG-CROSS-CUT-2879

Corporate ownership of the banks

Standard Bank

Remgro Limited

Chaired by Thulani Gcabashe. Investment banker to REMGRO

MAKE THINGS HAPPEN

NEDBANK

OLDMUTUAL

54% owned by Old Mutual Group. Trevor Manuel non executive Director of Old Mutual

ABSA

BARCLAYS

Remgro Limited

Led by Maria Ramos. Previously owned by REMGRO (Johan Rupert) until Barclays acquired Remgro Stake. Maria was previously non executive director of REMGRO.

FNB

Remgro Limited

28.2% Effectively owned by Remgro . First Rand contributed R2,8 billion to REMGRO's Headline Earnings for 2015. Chaired By Laurie Dippenaar and CEO Paul Harris. Joint Financial Advisor and JSE Sponsor to REMGRO

TRANSNET-10-810

BB24.1-MKNG-CROSS-CUT-2880

Banking Influence

Approximately 262 companies are owned through direct or indirect interests by Johan Rupert via the REMGRO group structure.

Standard Bank

Johan Rupert: Direct interest in all major banks

MAKE THINGS HAPPEN NEDBANK

ABSA

BARCLAYS

Previously Non Executive Director of Remgro

FNB

Business partners and major shareholders

317

TRANSNET-10-811

BB24.1-MKNG-CROSS-CUT-2881

How is this possible?

Major confusion is how the capture of our economy is possible:

- Despite our ruling party enjoy over 62% of the vote
- Strong investment approach of PIC, mandate to broaden economy?
- Anti-competitive legislation

Funding 80% (Trillions)of the total funding who

Funders of all BEEE – Who are the real benefactors of these deals?
Mining Companies – The Big 5
Banks – The Big 4
Insurance Companies – Old Mutual/Sanlam/Mutual & Federal
Infrastructure Companies – Murray & Roberts

Is this not the real State Capture?

TRANSNET-10-812

BB24.1-MKNG-CROSS-CUT-2882

TRANSNET-10-813

SA's ongoing challenge

- Economy remains in white hands. Black ownership (boardroom control) on JSE remains at 3%
- The owners of the other 97% are leading the charge to blame government for the persistent challenges.
- But let's look at some of the issues at hand.
- Firstly, it is not in the interest of the ANC that the status quo remains 22 years after freedom
- Secondly, huge difference between direct ownership of the shares on one hand, and shares that are held indirectly by Blacks through, for instance, their pension funds.

BB24.1-MKNG-CROSS-CUT-2883

Radical Economic Transformation

- The ruling party has identified Radical Economic Transformation as the critical step change:
- According to various ANC leaders, it must mean:
  - Fundamentally reviewing productive structures
  - Placing job creation at the heart of work programmes and promoting a more inclusive job-rich pattern of growth
- Only radical change that has these characteristics will be capable of pushing back the triple challenges of unemployment, poverty and inequality

TRANSNET-10-814

BB24.1-MKNG-CROSS-CUT-2884

321

Today or Never

When the Nazis came for the communists,
I remained silent;
I was not a communist.

When they locked up the social democrats,
I remained silent;
I was not a social democrat.

When they came for the trade unionists,
I did not speak out;
I was not a trade unionist.

When they came for the Jews,
I remained silent;
I wasn't a Jew.

When they came for me,
there was no one left to speak out.

136

OAKBAY

8th April 2016

Mr Gwede Mantashe
Secretary General
African National Congress
Luthuli House
Johannesburg

Dear SG,

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

I wanted to request some time from you for Mr Macgsten Williams and myself to address the national officials on Monday to share with you our huge concerns 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 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.

137

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. We would like some times with the leadership of the ruling party to seek advice and assistance to avoid this eventuality.

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

Yours sincerely

Nazeem Howa
CEO, Oakbay Investments

324 IM26

138

"SB 12"

Standard Bank

Office of the Chief Executive

Mr Gwede Mantashe
Secretary General
African National Congress

Per e-mail: mmavata@anc.org.za

22 April 2016

Dear Mr Mantashe

Re: Standard Bank and ANC meeting : 21 April 2016

On behalf of Standard Bank I thank you and your colleagues for our cordial and constructive meeting at Luthuli House on 21 April 2016 and hope you will find this note summarizing what we conveyed to you to be useful.

I confirm that you made it clear that the meeting was requested by the ANC not for the purpose of discussing Standard Bank's relationship with any particular customer(s) but rather to enable the ANC to obtain from Standard Bank -

(a) a better understanding of the process and criteria applied by Standard Bank in entering into and terminating banking relationships with its customers, especially when politically exposed persons ("PEPs") are involved;

(b) Standard Bank's response to the perception in some quarters that the banks are using their ability to terminate banking relationships to exercise the power of "white monopoly capital" against black businesses to a degree that should concern policy makers;

(c) its response to the perception that the four large banks are colluding / acting in concert in withdrawing banking services from a common customer.

In summary, Standard Bank responded with the following answers/submissions:

(a) The relationship between a bank and its customer is typically established by an indefinite contract and, as is typically the case in all indefinite contracts, can be unilaterally terminated by either party on notice. As was confirmed in the Bredenkamp v Standard Bank Appeal Court judgement, a bank is not obliged to give any reasons should it be the terminating party. More important than the contract terms is the implicit requirement of reciprocal trust between banker and customer, one manifestation being the legal obligation on banks to keep secret the private information of their customers that comes into the banks' possession through the banking relationship. When that trust is lost the relationship needs to be terminated.

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The Standard Bank of South Africa Limited (Reg. No. 1962/000738/06) Authorised financial services provider and registered credit provider (NCRCP15).

Division: TS Sibanyoni (Chairman) SK Tshazibana* (Chief Executive) RMW Dunne* BJ Kruger* Adv KD Moroka Dr ML Oduor-Otieno# AC Parker
AMA Petersen-Cook# SP Ridley* MJD Ruck PD Sullivan#^ SG Thobakgale EM Woods
Company Secretary: Z Stephen *Executive Director #British ^Kenyan ~Belgian ##Australian 01/01/2016

Standard Bank

(b) Banking is governed by at least 210 different statutes and is highly regulated. This is not a complaint but rather an affirmation that Standard Bank is aware of its legal responsibilities and regards the existence and application of such laws as a major contributor to South Africa's financial sector being ranked within the top 10 globally for safety and soundness.

(c) The statutes most relevant to the commencement and termination of banking relationships are the Financial Intelligence Centre Act ("FICA") and the Prevention and Combatting of Corrupt Activities Act ("PCCAA").

(d) FICA obliges all financial institutions to (i) undertake KYC (Know Your Client) procedures before establishing any new relationship with a customer, (ii) undertake enhanced due diligence if the KYC indicates that any PEPs (Politically Exposed Persons) have influence over the customer, (iii) monitor every customer's transactions to understand the source and application of all funds and (iv) report any suspicious transactions by customers to the Financial Intelligence Centre ("FIC").

(e) Failure to report a suspicious transaction to the FIC is a criminal offence subject to a R10 million fine or 15 years' imprisonment.

(f) Disclosure to any person that a suspicious transaction report has been made to the FIC is a criminal offence subject to a R10 million fine or 15 years' imprisonment.

(g) As regards the PCCAA, for ease of reference I will deliver a copy of the Act with this letter. You will see that it contains multiple categories of corruption and in Section 20 creates the offence of dealing in property or using property known or suspected to be part of any "gratification" which is the subject of a corruption offence.

(h) The best and most logical way for a bank to avoid criminal prosecution under FICA for failing to report any suspicious transaction and/or criminal prosecution under PCCAA for dealing in property that the bank ought to suspect is tainted by a corrupt activity is to simply not have any dealings with persons who foreseeably could be or become involved in suspicious transactions generally and corrupt activities in particular.

(i) Standard Bank expends in excess of R500 million per annum and employs in excess of 400 compliance officers in order to ensure that it has the systems and controls necessary to comply with the law generally and its obligations under FICA to detect and report transactions suspected to be related to criminality including money-laundering, terrorism financing, economic sanctions and corruption.

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Standard Bank Group Limited (Reg. No. 1969/017128/06)

Directors: TS Gcabashe (Chairman) Sky Gu^(Deputy Chairman) RMW Dunsell BJ Kruger* (Chief Executive) Adv KD Moroka Dr. ML Oliver-Oliveira AC Parker AHA Palenstijn cssi/ss SP Ridley* MJD Ruck PD Sullivan### SS Tshabalala GK Tshabalala* (Chief Executive) Wenbin Wang** EM Woods
Group Secretary: Z Stephen *Executive Director **Chinese #British ##Kenyan ###Belgian ####Australian 01/01/2016

Standard Bank

(j) To illustrate the gravity of the risks that it faces Standard Bank disclosed that it had in recent times been cautioned by the USA government against its funding of a customer with a subsidiary in Iran because that subsidiary was associated with Iran's nuclear program and this could result in Standard Bank itself being subjected to economic sanctions.

(k) Standard Bank also referred to the fact that its group had been investigated by the USA's Department of Justice (for possible bribery of a foreign public official in contravention of the USA's Foreign Corrupt Practices Act) and by the UK's Serious Fraud Office (for possible contravention of the UK's Bribery Act in failing to prevent bribery of a foreign public official) arising from Standard Bank's Tanzania subsidiary having engaged a local company partly owned by PEPs to assist in securing government business. After a 3 year struggle Standard Bank settled those investigations by paying fines and penalties of US$38 million to the governments of Tanzania, USA and UK whilst acknowledging that the settlement could be set aside and prosecutions could follow should evidence emerge of any other possible involvement in corrupt activities within the Standard Bank group.

(l) Standard Bank pointed out that the definitions of corruption contained in the PCCAA are no different to those used in the USA and UK and therefore Standard Bank has, in essence, been put on probation by the USA and UK governments and is compelled to be extra vigilant in its dealings with existing and potential customers who might expose Standard Bank to the risk of being associated with corrupt activities. In this regard Standard Bank opined that, hypothetically, an offer to a public officer to secure his / her promotion in exchange for favours would be an act of corruption as defined in the PCCAA.

(m) South Africa has a relatively small but open economy that is reliant for its very survival upon international capital and currency flows. If the governments of the UK or USA were to conclude that economic sanctions would be a more effective deterrent than criminal prosecution for perceived repeat offending on Standard Bank's part that could be catastrophic for Standard Bank and South Africa. Standard Bank for its own sake and that of our country simply cannot risk any exposure, direct or indirect, to possibly corrupt activities.

(n) In response to a concern expressed on behalf of the ANC about a perception that race or political affiliation plays a role in Standard Bank's decisions to retain or terminate a relationship, Standard Bank responded that there is no basis for that perception. Standard Bank is committed to transformation, inclusive growth and treating all customers fairly and subjects all existing and prospective customers to the same objective standards for KYC and enhanced due diligence purposes. Standard Bank does not lightly decide to terminate a relationship as evidenced by the fact that so far in 2016 it has terminated just 52 out of its ~11 million customer relationships; the decision was in each case taken by a competent committee applying objective criteria.

(o) Standard Bank does not decline a customer relationship simply on the grounds that a PEP is involved; for an adverse decision by Standard Bank it must be satisfied that the PEP is in a position to facilitate suspicious transactions and there is a possibility that he/she could do so.

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Group Secretary: Z Stephen *Executive Director **Chinese #British ##Kenyan ###Netherlands ####Australian 01/01/2016

327
141

Standard Bank

(p) In response to a concern expressed on behalf of the ANC, Standard Bank gave an assurance that it has not colluded or acted in concert with any other bank or banks in its decision to terminate a customer relationship; such would be both unethical and unlawful (in terms of the Competition Act).

(q) In response to a concern expressed on behalf of the ANC that the stringent requirements of FICA are forcing the dishonest into cash transactions outside of the banking system, Standard Bank conceded that to be the case but opined that cash only transactions are restrictive for the parties to them and cannot occur across national borders whereas millions of new (honest) participants have benefited from entering the financial system since 1994.

In closing may I re-iterate that we are willing to share the above with a wider audience if you so request. I also should re-iterate that we readily agreed to meet with you because we believe in open and honest engagements with all participants in our economy and especially with those that have influence over the policies, laws and practices that affect us.

If I have not summarized the meeting correctly please let me know.

Yours sincerely

Sim Tshabalala
Group Chief Executive

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Group Secretary: Z Stephen *Executive Director **Chinese #British ##Kenyan ###Nigerian ####Australia 01/01/2016

328 IM 27

'A1' 840

An open letter from the employees of Oakbay to (SOS):

Maria Ramos, Chief Executive Officer, ABSA
Jacques Celliers, Chief Executive Officer, FNB
Ben Kruger, Chief Executive Officer, Standard Bank
Michael Brown, Chief Executive Officer, Nedbank

Dear Maria, Jacques, Ben and Michael

RE: IMPASSIONED PLEA FROM OAKBAY EMPLOYEES - PLEASE SAVE OUR JOBS

We are not rich people. We are not politically connected. We have not captured the state. We have never offered any politician a job.

We do not know if any of the allegations against the Gupta family or Oakbay's management are true. We do not care.

All we care about is providing for our families. If you do not open Oakbay's bank accounts we cannot be paid and Oakbay cannot pay its bills.

If by the end of May the accounts remain closed, Oakbay's businesses will close. That means that thousands of us will be without a job.

How will we pay our bills? How will we feed our families? You will not just be hurting us, but our children too. Must they go to school on an empty stomach? What happens when we cannot pay our rent or house bonds? Will our children have to live on the street?

We urge you to recognise that your actions have a human cost. Only a few weeks ago the companies we worked for were profitable and our jobs secure. We do not understand why we have become the victims in a political game.

Please reopen the bank accounts so that we do not have to suffer. We, the employees, have not done anything wrong.

We humbly ask you to hear our message.

Yours faithfully

Employee Representatives

1. P Mosomane
2. R Rasso

829 IM 28
2021/01/29

Ownership Monitor

Research Report on the ownership of JSE-listed companies

September 2017

Key themes

The structure of ownership of South African companies is linked to policy priorities on transformation and inclusive growth, macroeconomic and financial stability, and competition.

Black ownership should not be considered in isolation from other types of ownership - and their relationships with investment and economic growth.

Transformation of ownership is important for reducing inequality and promoting inclusive growth.

But the economy also needs a vibrant and inclusive equity market and an effective allocation of domestic and foreign capital towards growth-enhancing investment.

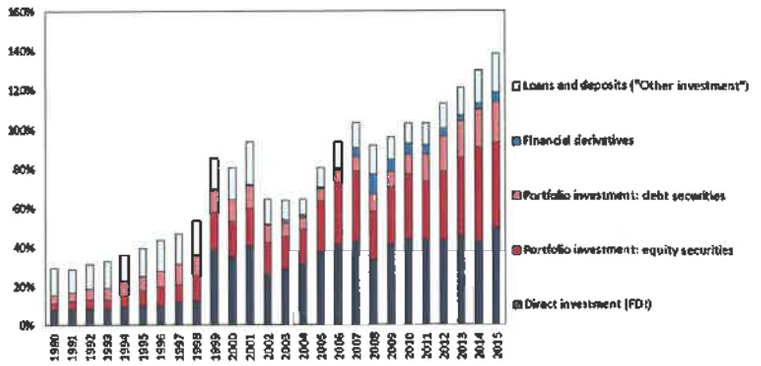
330

2021/01/29

Foreign ownership

- **South Africa needs to attract foreign capital**
  - Structural constraint of low domestic savings and high investment needs

South Africa's foreign liabilities
% of GDP



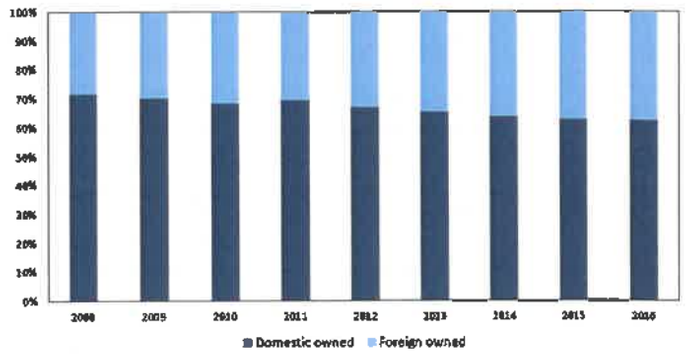
Source: South African Reserve Bank.

The step increase in direct investment in 1999 is associated with the move to the UK by Anglo American, South African Breweries and Old Mutual during that year. The existing South African operations of these major companies were reclassified as foreign-owned enterprises at this time.

Foreign ownership

Foreign investors owned 38% of JSE-listed companies at end 2016 – including both foreign direct investment and foreign institutional investment.

Domestic and foreign ownership
% of market capitalisation on Strate



Source: Calculated from data provided by JSE.

JSE-listed companies: ordinary shares, B and N ordinary shares, depositary receipts, linked units and participatory interests in property-based investments

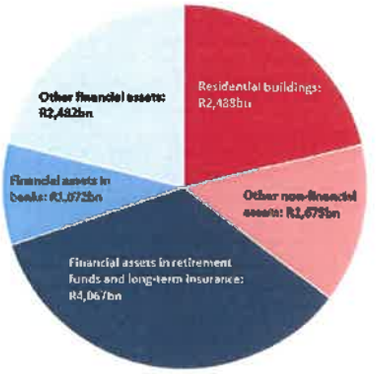
331

2021/01/29

South African institutional investors

- Institutional investors manage a substantial fraction of household wealth
- Directing long-term savings to sectors of the economy that require capital
- And forming a crucial component of a thriving equity market

Household wealth in South Africa: Total Assets
as at 2016, in billions of rand



Source: South African Reserve Bank
Chart shows total gross assets of R11 783bn; total wealth net of debt is R9 848bn

South African institutional investors

- Retirement funds, long term insurance companies and collective investment schemes held around 34% of JSE-listed companies at end 2016.
- Investment managers reported holdings amounting to a further 14%.

South African institutional investment in JSE-listed equity
At end 2016, in millions of rand

	Total retail assets	JSE-listed equities % of total assets	JSE-listed equities % of market
Retirement funds	4 103 802	40%	24.4%
Long-term insurance companies	1 207 079	26%	4.8%
Collective investment schemes	1 051 498	31%	4.9%
Investment managers	1 608 809	60%	14.3%

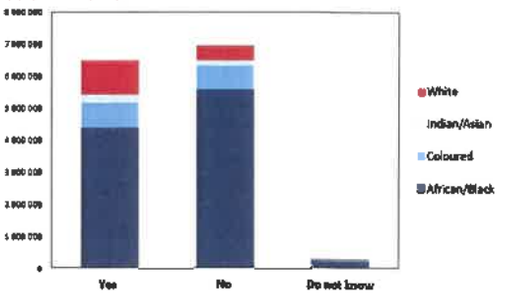
Source: Calculated from data provided by Financial Surveillance Department (South African Reserve Bank) and JSE.

332
2021/01/29

Coverage of retirement funds

- Retirement funds span wealthy South Africans with bespoke plans and millions of workers and their dependents belonging to occupational schemes
- Black participation in occupational funds (by numbers) is substantial but needs to improve
- Job creation and income-generating opportunities support saving and wealth accumulation.

Estimated coverage of occupational retirement funds by population group, Q4 2016



Source: Data from Quarterly Labour Force Survey, 4th Quarter 2016, Statistics South Africa (Stats SA). The chart shows the estimated numbers of employees by population group, based on the survey question: "Does your employer contribute to any pension/retirement fund for you?". The "Yes" column shows the estimated number of employees that are part of an occupational retirement fund.

Major shareholders

- Disclosure of major shareholders - holding 5% or more of a company's shares

Major shareholders by type: Top 25 South African companies

	Estimated value in R million[2]	% of Top 25 market capitalisation
Foreign companies, direct and indirectly via SA companies[3]	435,688	11%
GEPF and PIC[4]	429,166	11%
South African companies, excluding BEE companies	203,700	5%
South African institutional investors, excluding GEPF and PIC	49,188	1%
South African BEE companies and trusts[5]	44,719	1%
Private individuals	41,986	1%
Foreign institutional investors	37,656	1%
South African Government	27,903	1%
Total estimated value of major shareholdings	**1,270,006**	**33%**
Total market capitalisation of Top 25 companies	**3,810,608**	

Source: Annual Reports, Annual Financial Statements and corporate websites. Market capitalisation provided by JSE.

333
2021/01/29

Black ownership

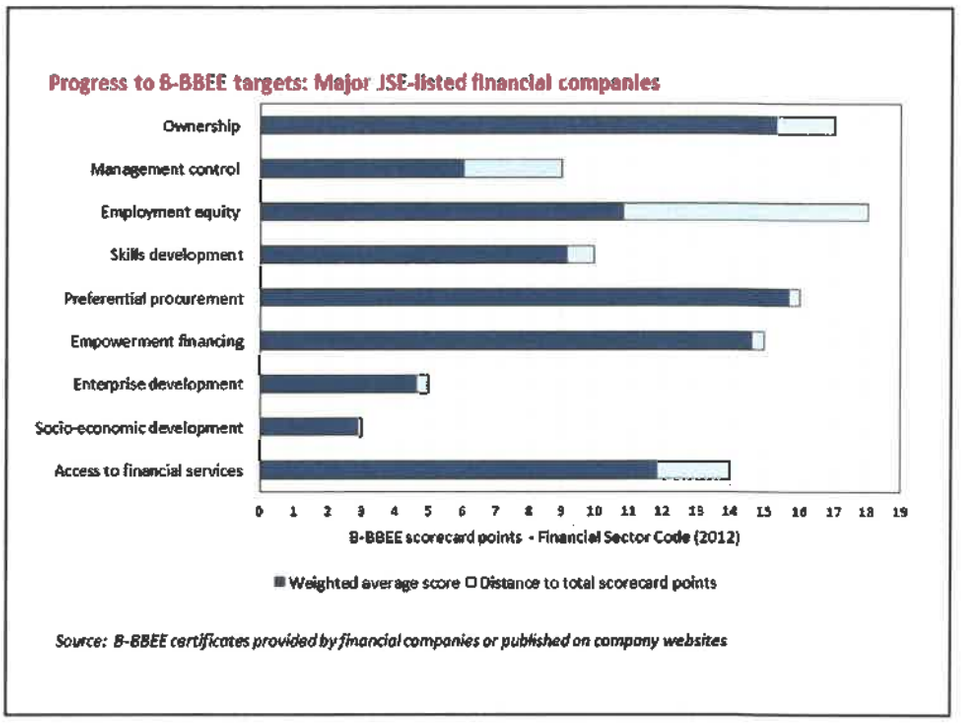
- **Most JSE-listed companies have implemented BEE deals**
  - Deals identified at 83 out of the Top 100 companies (Intellidex, 2015)
  - Deals include new strategic BEE owners, employee share ownership schemes, broad-based community schemes
  - Some deals transfer shares in the listed company; others involve the sale of assets at the subsidiary or operational level
  - Net value generated between 2000 and 2014 of R317 billion (Intellidex, 2015)
- **Measuring BEE ownership is complex**
  - Methodology set out in the B-BBEE Codes reflects the complexity of BEE deals
  - Ownership based on the Codes may look different from the actual black shareholders in a listed company

Ownership of Top 100 JSE-listed companies in 2013
Results from the Alternative Prosperity study on behalf of JSE

Direct black ownership	**10%**
Black ownership through institutional (mandated) funds	**13%**

- **Direct black ownership - based on B-BBEE Codes**
  - BEE deals at the level of listed company (Top 100)
  - BEE ownership achieved through sale of asset transactions
  - Direct black retail ownership where identified
- **Indirect black ownership through institutional (mandated) funds**
  - Retirement funds, long-term insurance policies and collective investment schemes
  - Measured on the basis of vested rights of identified black beneficiaries

334
2021/01/29



Ownership Monitor

Case Studies

September 2017

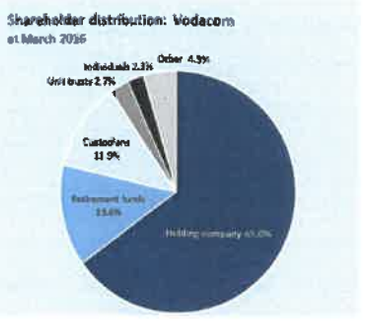
2021/01/29
335

Case Study 1: Vodacom

- **Largest shareholder is ultimately foreign-owned:** Vodacom's largest shareholder is Vodafone Investments SA (Pty) Limited, which in turn is owned by Vodafone Group plc, based in the UK.
- **GEPF is a major shareholder:** The Government Employees Pension Fund owns 12.7%.
- **BEE ownership is at the level of the SA operations of the group:** Vodacom's BEE transaction in 2008 distributed a 6.25% stake in the South African operations to employees, strategic partners and the black public. It has been reported that Vodacom is considering a new BEE transaction to replace the arrangements which expire in 2018.

Vodacom shareholders at March 2016	
Major shareholders (above 5%)	
Vodafone Investments SA (Pty) Limited*	65.0%
Government Employees Pension Fund	12.7%
All other shareholders	22.3%

* Ultimate shareholder is Vodafone Group (UK)

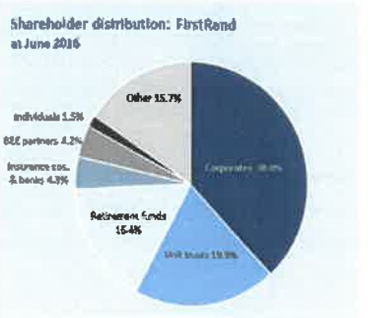


Information from Annual Financial Statements 2016 and the Vodacom website

Case Study 2: FirstRand

- **Corporate ownership is substantial:** RMB Holdings Limited (JSE-listed) holds 34.1% of shares.
- **PIC is a major shareholder:** The Public Investment Corporation holds 9.5%, mainly reflecting funds managed on behalf of the Government Employees Pension Fund.
- **BEE ownership:** FirstRand's BEE partners directly hold 4.2%. FirstRand's BEE deal implemented in 2005 is estimated to have generated around R23 billion in net value for black beneficiaries*.
- **Foreign versus domestic ownership:** South Africans hold 70% of the company, foreign investors hold 22% and the remaining 8% has unknown nationality.

FirstRand shareholders at June 2016	
Major shareholders (above 5%)	
RMB Holdings Limited	34.1%
Public Investment Corporation	9.5%
Other significant shareholders	
BEE partners	4.2%
Financial Securities Ltd (Remgro)	3.9%
All other shareholders	48.3%



Information from Annual Financial Statements 2016 and the FirstRand website

* *The Value of BEE Deals*, Intellidex Research Report, June 2015

2021/01/29

336

Case Study 3: Changing ownership - Barclays Africa Group

- **One of the largest inward investments in South Africa**: Barclays Bank plc (UK) acquired a 57% shareholding in ABSA Group in 2005. ABSA became the Barclays Africa Group in 2013 following the acquisition of the African businesses of Barclays plc, with the Barclays plc holding increasing to 62%.
- **A gradual reduction in the foreign ownership:** In 2016, Barclays plc began to reduce its shareholding in Barclays Africa, in order to lessen its global regulatory requirements. By June 2017, the Barclays plc holding stood at 23.4%. Shares have been sold to a mix of new and existing investors, both locally and internationally. The Public Investment Corporation has increased its investment in Barclays Africa and plans to further increase its holdings, with the Barclays plc stake eventually falling below 20%.
- **An opportunity for increasing black ownership:** In 2017, Barclays Africa indicated that Barclays plc will make R2.1 billion of capital available to support a new BEE transaction.

Barclays Africa - Shareholder composition

	December 2015	December 2016	June 2017
Barclays Bank plc	62.3	50.1	23.4
Public Investment Corporation	5.6	6.9	7.1
Other shareholders	32.1	43.0	69.5
South African shareholders	20.7	25.3	38.4
Foreign shareholders	79.3	74.7	61.6

Data from Barclays Africa corporate website - Annual Reports and information on major shareholders

Case Study 4: Sasol

- **BEE ownership:** BEE ownership is in the form of the Sasol Inzalo Employee Trust, Management Trust and Foundation and through public holdings of Sasol Inzalo shares, listed in the empowerment segment of the JSE. There is also a further class of Sasol BEE ordinary shares. Proposals have been announced for a new R21 billion BEE deal to replace the maturing Inzalo scheme, which is expected to mature in 2018 with no shares distributed.
- **Major shareholders:** Sasol's two major shareholders are the Government Employees Pension Fund (12.9%) and the Industrial Development Corporation (8.2%).
- **Types of shareholders:** Retirement funds and unit trusts (domestic and foreign) hold just over half of the ordinary shares. Shares backing American Depositary Receipts listed on the New York Stock Exchange account for 6.4%. South African ownership is between 60% and 70%.

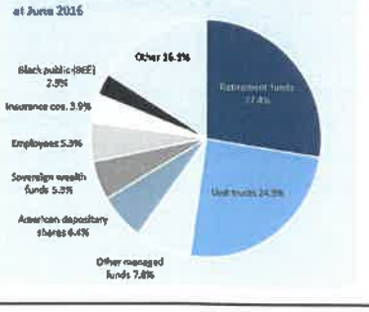
Sasol shareholders – Ordinary shares*
at June 2016

Major shareholders (above 5%)	
Government Employees Pension Fund	12.9%
Industrial Development Corporation	8.2%
Other shareholders - BEE	
Sasol Inzalo Employees Trust	3.6%
Sasol Inzalo Management Trust	0.3%
Sasol Inzalo Foundation	1.5%
All other shareholders	73.5%

* A separate class of Sasol BEE shares is also listed on the JSE

Information from Annual Financial Statements 2016 and the Sasol website

Shareholder distribution: Sasol
at June 2016



2021/01/29

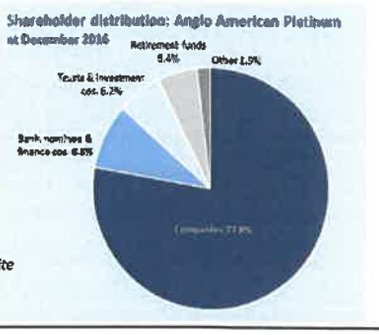
337

Case Study 5: Anglo American Platinum

- **Largest shareholder is ultimately foreign-owned:** The dominant shareholder is Anglo South Africa Capital Proprietary Limited, which in turn is owned by Anglo American plc. No other shareholder individually holds in excess of 5% of shares.
- **BEE transactions at the operational and company level:** BEE transactions have been implemented at the level of specific mining operations, creating strategic stakes in operations for BEE groups. There has also been an employee share scheme and community economic empowerment scheme at the company level.
- **Other shareholders:** Banks, nominees and financial companies account for 8.8% of shares, followed by trusts and investment companies with 6.2% and retirement funds with 5.4%.

Anglo American Platinum shareholders at December 2016	
Major shareholders (above 5%)	
Anglo South Africa Capital Pty Limited*	77.7%
All other shareholders	22.3%

* Ultimate shareholder is Anglo American (UK)



Information from Annual Report 2016 and Anglo American Platinum website

Case Study 6: Exxaro

- Exxaro was created through a BEE transaction in 2006 involving Kumba Resources, Anglo American plc, Eyesizwe Mining and the Industrial Development Corporation.
- Under the BEE transaction, a BEE vehicle (Main Street 333) - in turn owned by various BEE partners – became the controlling shareholder.
- The BEE structure matured in November 2016 and by the end of December 2016, the BEE partners held a reduced stake of 45.3%.
- In January 2017, the BEE shareholding fell further to 37.7% following a share repurchase to settle debt obligations, implemented as part of the unwinding of the BEE deal.

Exxaro Shareholders at December 2016		
Major shareholders (above 5%)		In November 2016, Exxaro announced a new BEE transaction to replace the maturing transaction with Main Street 333.
Main Street 333 – BEE partners	45.3%	
Government Employees Pension Fund	5.9%	
Other shareholders - BEE		Under the BEE transaction planned for 2017, the new BEE shareholder will hold 30% of the company.
Exxaro Employee Empowerment Share Trust	0.7%	
All other shareholders	48.1%	

Information from Annual Financial Statements 2016 and Exxaro website

2021/01/29

338

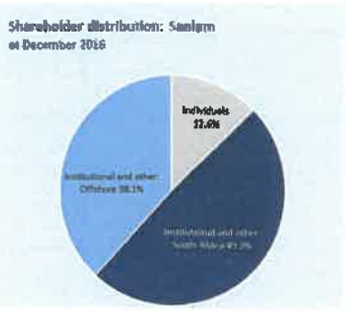
Case Study 7: Sanlam

- **Largest shareholder is the BEE partner:** The single largest shareholder is the BEE partner Ubuntu-Botho Investments (Pty) Ltd, holding 13.5% of shares. The BEE deal implemented in 2004 is estimated to have created a net value of around R14.4 billion for black beneficiaries*.
- **GEPF is a major shareholder:** The Government Employees Pension Fund owns a further 12.2%.
- **Types of shareholders:** Individuals collectively hold 12.6% of Sanlam's shares. South African institutions and other investors are the largest category with 49.3% percent of shares (including both major shareholders). Offshore institutions and other investors hold 38.1%.

Sanlam shareholders at December 2016	
Major shareholders (above 5%)	
Ubuntu-Botho Investments (Pty) Ltd	13.5%
Government Employees Pension Fund	12.2%
All other shareholders	74.3%

Information from Annual Report 2016 and the Sanlam website

* *The Value of BEE Deals*, Intellidex Research Report, June 2015



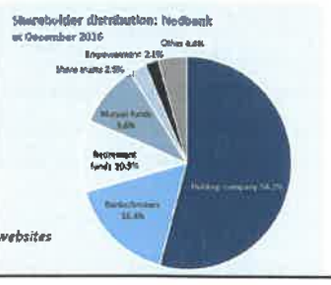
Case Study 8: Nedbank and Old Mutual

- **Largest shareholder in Nedbank is ultimately foreign-owned:** Nedbank's largest shareholder is the Old Mutual Life Assurance Company (and associates), in turn owned by the ultimate shareholder Old Mutual plc (UK).
- **GEPF is a major shareholder:** The Government Employees Pension Fund holds 6.0%
- **BEE shareholders:** Nedbank implemented a major BEE transaction in 2005, the Eyethu Share Scheme, including black business partners, employees, non-executive directors, clients and community interest groups.
- **Ownership structure will be changing:** In 2016, Old Mutual plc announced plans for a managed separation of the Group's business areas. It is expected that a strategic relationship will be maintained between Nedbank and Old Mutual Emerging Markets but that Old Mutual will reduce its stake to a minority position. The remaining shareholding in Nedbank will be distributed widely to Old Mutual shareholders Following the managed separation, Old Mutual Emerging Markets will be an independent company with a primary stock exchange listing in South Africa.

Nedbank shareholders at December 2016	
Major shareholders (above 5%)	
Old Mutual Life Assurance Company (SA) and associates*	54.2%
Government Employees Pension Fund	6.0%
All other shareholders	39.8%

* Ultimate shareholder is Old Mutual plc (UK)

Information from Annual Financial Statements 2016 and Nedbank and Old Mutual websites



DRAFT NATIONAL TREASURY NOTE FOR COMMENT ON DATA

INCLUSIVE ECONOMIC GROWTH: KEY STYLISED FACTS ON CAPITAL, INVESTMENT AND SAVINGS

A. PURPOSE

This note sets out a series of important features of the South African economy, aimed at informing the debate on inclusive economic growth, transformation and competition, by considering key trends in investment, savings and patterns of ownership. The key challenge facing South Africa is how to stimulate higher growth that can lead to increased employment creation and more competition, and whose outcome is significant empowerment and wealth creation for previously disadvantaged black South Africans.

B. STYLISED FACTS

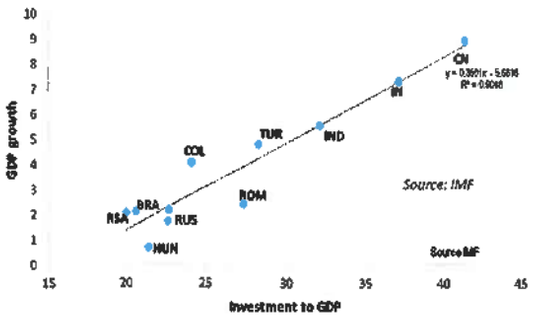
Why do we need investment?

1. **The biggest challenge facing South Africa is to grow faster and create many more jobs.** South Africa needs to grow at 5% per annum if it is to generate sufficient jobs to absorb new entrants to the job market every year. Despite reaching 5.4% growth in 2007, the South African economy has not recovered from the 2008 recession when many other economies (China, India, USA) have resumed growth, and is in fact falling into a low growth trap, with low levels of investment and increasing unemployment.

2. **Higher investment is necessary for higher growth.** The level of investment in any economy is one of the most critical factors in determining the level of growth in that economy. Whilst high-growth economies like China and India have investment levels over 30% of GDP, investment in SA is relatively low at 19.5% of GDP (see figure 1), and growth in the last 9 years has been very low (see figure 5).

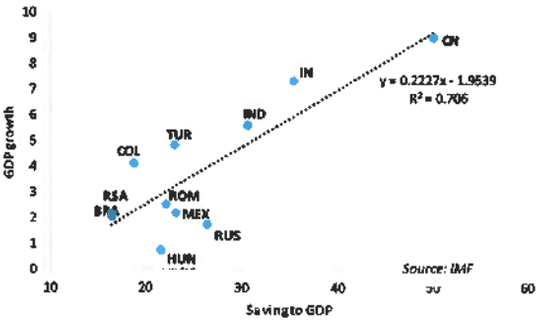
3. **SA savings rate is very low and higher investment requires higher levels of domestic saving, and foreign savings are needed to fill any gap if we are to grow faster** (see figure 2 & 3). Savings finance investment, so new savings ("the savings rate") funds new investments ("the investment rate"). Investment growth was -3.9% in 2016 and -1.6% in the first quarter of 2017, contributing to the recession. The gap between investment and

Figure 1: Investment levels vs GDP growth



BRA=Brazil; COL=Colombia; IN=India; IND=Indonesia; CN=China; HUN=Hungary; MEX=Mexico; ROM=Romania; RUS=Russia; RSA=South Africa; TUR=Turkey

Figure 2: Savings vs GDP growth



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domestic savings makes the SA economy dependent on foreign savings.

4. **Mainly households should be generating domestic savings as government runs deficits and companies invest and pay dividends.** Since Government runs a fiscal deficit, and companies should ideally be investing their savings, it is household savings that should be available to fund investment. Net savings of disposable income by households was -0.3% in the first quarter of 2017 from -0.4% in 2016 as a whole (i.e. households in aggregate have dissaved the last two years). *Reducing the government fiscal deficit can also contribute towards making more funds available for investment.*

5. **South Africa has attracted a considerable volume of foreign investment which supports economic growth by filling the domestic savings-investment gap** (see figure 6). Ownership of South African companies in the form of foreign direct investment plays an important role in the economy – both as a source of capital and as a potential driver of growth through broader economic benefits, such as the transfer of new skills and technologies and increased access to international markets. The conditions necessary for attracting such growth-enhancing investment is an important focus for policy makers.

6. **Domestic economic policy encourages both domestic and foreign investment, as SA is a capital-scarce economy.** If SA is to grow, it needs investment, both foreign and domestic. Care needs to be taken on ensuring that sectoral and other policies do not inhibit investment by foreign or domestic investors. There are always multiple objectives for government (e.g. growth and transformation), so we need to continually assess whether a set of policies to promote one objective (e.g. transformation) does not conflict with the set of policies to promote another objective (e.g. growth). In South Africa, we need to ensure that both the economic growth and transformation objectives are attained, without leading to any

Figure 3: SA Gross savings rate

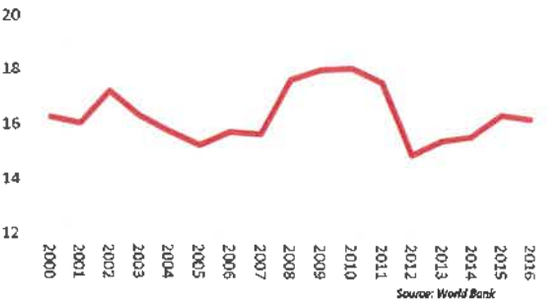


Figure 4: Net savings by sector

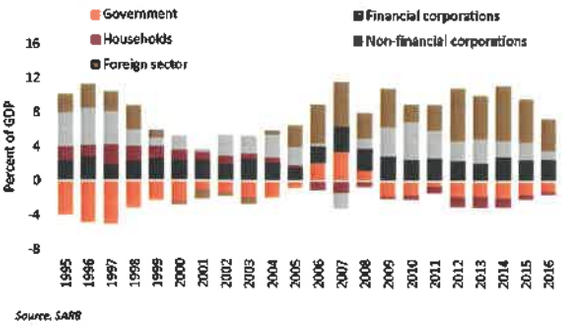


Figure 5: Real GDP

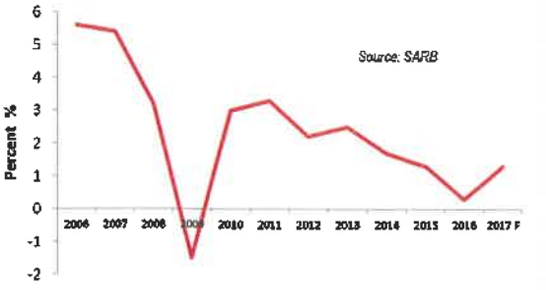
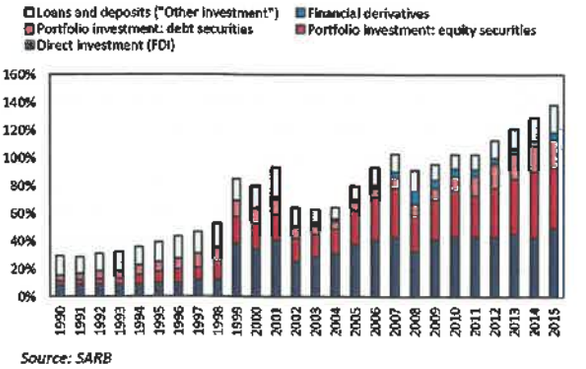


Figure 6: Stock of capital as a percentage of GDP



disinvestment, which will undermine both objectives.

7. **Most investment in the SA economy is by the large private companies, state-owned companies and government.** Aggregate investment in the SA economy is largely done by the biggest private companies (e.g. telecommunication, mining, financial services, manufacturing) including multi-national companies, state-owned companies (Eskom, Transnet, PRASA, SANRAL) and government. At 64%, private investment dominates public investment, comprising almost two-thirds of all investment and public sector a third (see figure 7), with government at 16% and public corporations at 20%. The SA economy needs more private investment, but much more can be done to increase public investment.

8. **Most funding for investment in SA economy takes place via capital and debt markets, where corporates can access domestic and foreign savings.** Both private and public companies and government get most of their funding needs for investment (and their operational expenses) from capital and debt markets (after exhausting their own revenue and retained earnings), either through a listing on a stock exchange or borrowing from debt markets (though bonds). For major corporates such funding dominates bank lending, on which medium and small companies (and households) are more dependent (see figure 8).

Who funds government debt in SA?

9. **Government and state-owned companies fund their deficits by issuing bonds in debt markets.** Government debt is held mainly in the form of treasury bonds, which currently totals R2 trillion and is expected to reach over 50 per cent of GDP. Such debt rises every year when government funds its annual budget/fiscal deficit (R160 billion in 2017), and when state-owned companies go to the markets to fund projects (e.g. Eskom funding for is major power plants like Kusile and Medupi, Transnet for commercial rail or port infrastructure).

Figure 7: Contribution to investment by sector

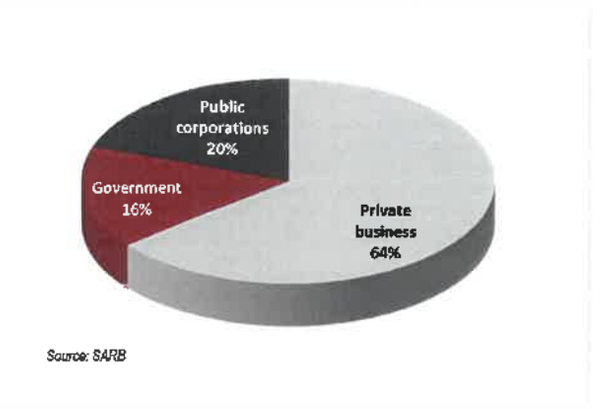


Figure 8: Recipients of bank loans and advances by sector

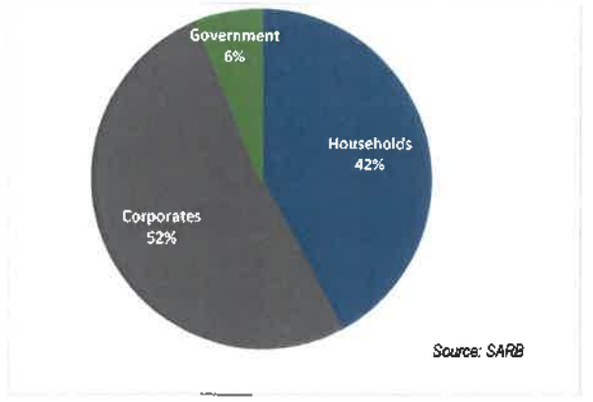
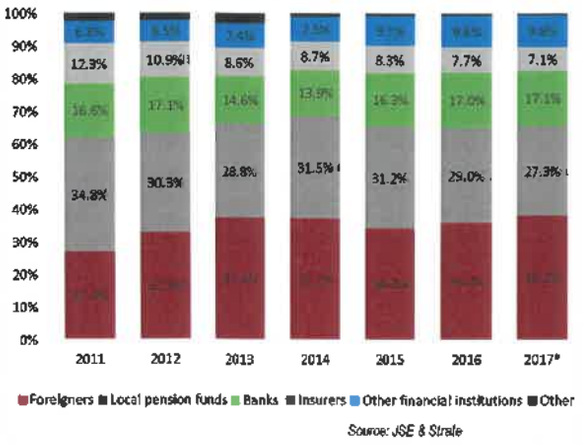


Figure 9: Government bonds holding by institution



10. **Commercial banks (domestic and foreign) are very large holders of government debt, owning about R300 billion** (17% of total debt) (see figure 9). Bank holdings of government debt and loans increased by 300% since **2008** (see figure 10). **Banks'** increasing government debt holding has been as a result of an increase in government's budget deficit over the years, which has required more funding. Non-financial corporations (e.g. Eskom, Transnet) account for the bulk of public corporations debt (see figure 11).

11. **There is a direct link between the sovereign and domestic banking risks.** There is a critical link between sovereign and banking risks, hence a sovereign downgrade leads to banking downgrades. This is because although domestic banks own a significant portion of all long-term[1] government debt (about 15%), the share is much higher for short-term[2] government debt which is about 42% (see figure 12). Hence financial stability is critical to ensure economic growth, as demonstrated by the 2008 Global Financial Crisis, and a major reason why major domestic banks are classified as **SIFIs (systemically important financial institutions)**, and hence must be regulated intrusively, intensively and effectively by banking regulators (as done under new Twin Peaks system). However, total public sector exposure on banks' balance sheet account for an aggregate figure of 6.2%.

12. **Foreign investment in South African bonds and other debt securities are a critical source of capital, especially for government**: international investors hold 38% of government's domestic (rand-denominated) bonds at the end of 2016 (see figure 9), over and above their holdings of foreign-denominated SA government bonds. Whilst domestic savings also fund government, it is not sufficient to fund all of government's funding needs.

Figure 10: Bank holding of government debt

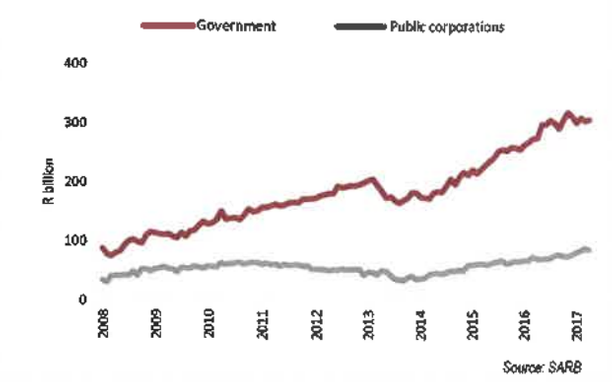


Figure 11: Bank holding of public corporation bonds

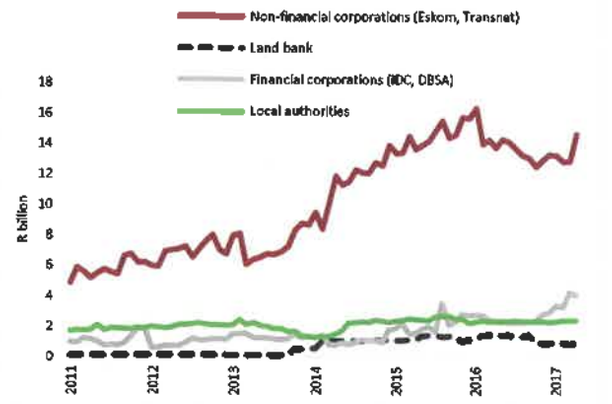
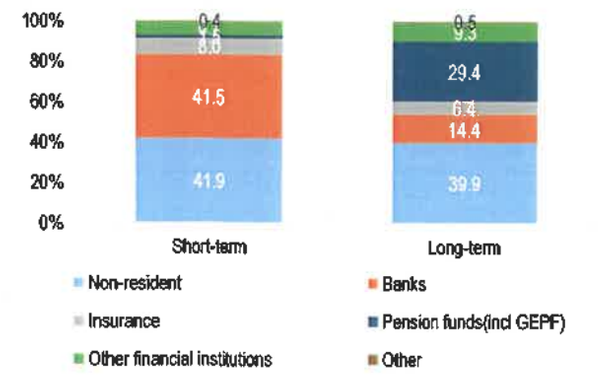


Figure 12: Banks' holding of short vs long-term government bonds



[1] These are government bonds with a tenor of exceeding three years.

[2] These are government bonds with a tenor between 1-3 years.

13. **Domestic savings are the second largest funders of government bonds.** Pension funds own R550bn worth of government bonds (27.3 per cent). Pension fund industry has an exposure of about 18% of its assets under manangement invested in public sector bonds (see figure 13).

Who funds corporates in SA?

14. **Listed companies (domestic, foreign or Multinational Companies) absorb a significant portion of capital in the economy.** Most companies seeking significant levels of capital in order to grow their company faster list on a stock exchange to secure the funding. Smaller companies (which are generally not listed) fund themselves through direct investment or loans from banks.

15. **Major listed companies are also important contributors to government revenue.** The top 325 companies (most of whom are listed) have taxable income of over R200 million, and contributed R98 billion in corporate income tax revenue in 2014, which is 57% of all revenue from the corporates. This excludes contributions to other taxes like VAT from their business transactions, and excise and fuel levies. Major listed companies are also the biggest employers.

16. **Foreign investors own a significant share of equity on the stock exchange at 38%.** The ownership of South African companies listed on the JSE is mainly spread between foreign investors and South African institutional investors. South African retirement funds represent by far the largest group of institutional investors, holding an estimated 24% of JSE-listed shares, followed by long-term insurance companies and collective investment schemes with combined holdings of 10%. Other investment managers account for an estimated 14% of listed shares. An estimated 14% is held directly by other investors, including corporates, trusts and private individuals (see figure 16).

Figure 13: Financial sector exposure to public sector bonds

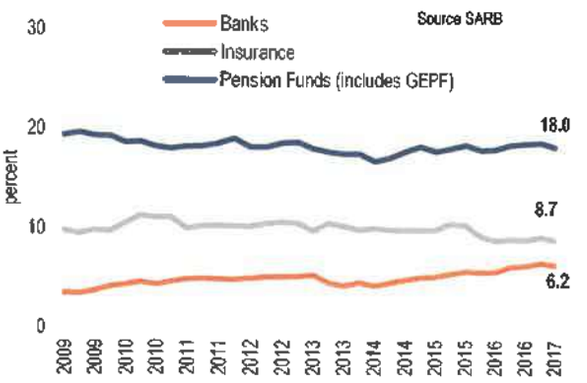
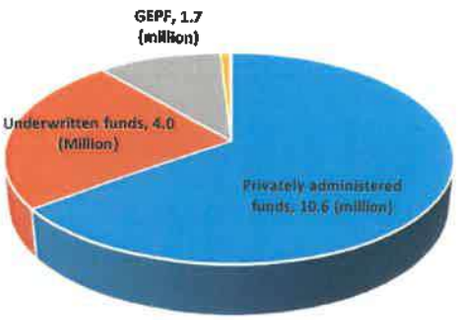
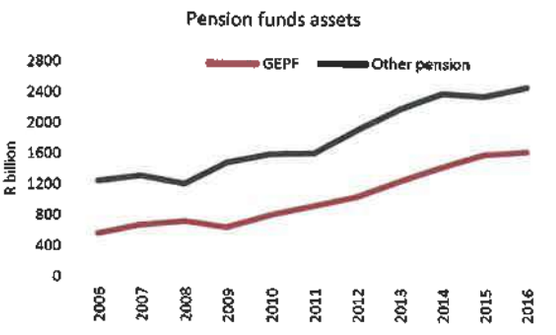


Figure 14: Pension funds membership



Source: Registrar of Pension Funds

Figure 15: Size of GEPF vs Private pension funds



Source: GEPF and SARB

Who are the major institutional investors in SA?

17. **Retirement funds comprise the biggest share of household savings, and represent a substantial fraction of household wealth in South Africa.** These institutions provide the main vehicles for millions of ordinary South Africans to save for retirement and other purposes and to manage risks to the well-being of households (see figure 14). These institutions thus represent an important channel through which long-term domestic savings are directed to sectors of the economy that require capital, including private sector companies, public corporations and government.

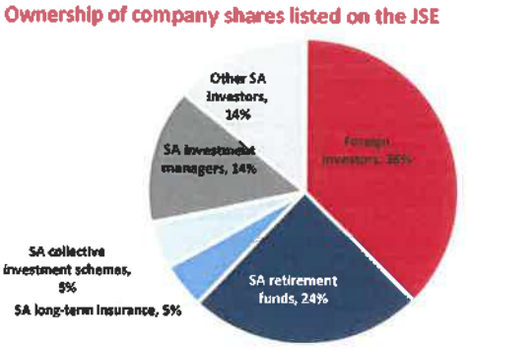
18. **The largest pension funds are government workers' funds amounting to about R1.6 trillion.** In 2015, 16.4 million people were members of a pension fund. Central and provincial government workers contribute to the GEPF, which is the largest pension fund, accounting for more than half of all pension savings). The state-owned entity employee funds are also very large. The Eskom employee fund is the second largest retirement fund, with assets of R122 billion. There are a number of very large municipal worker funds. The GEPF constitutes about 40% of the total pension funds (see figure 15).

19. **BEE deals have not benefited retirement funds, even though many of the beneficiaries are black households.** BEE deals tend to favour direct owners over indirect owners. This inadvertently undermines the objective of increasing the net asset wealth of black households. **It is strongly recommended that BEE codes must recognize indirect black ownership, and ensure that future deals do not transfer shares from indirect black owners to direct black owners.**

Who owns companies in South Africa given our dependence on foreign and institutional funds?

20. **Foreign investors own about 38% of the JSE ownership while the remainder of the shares is in the main owned by the SA institutional investors** (see figure 16).

Figure 16: Ownership of shares listed on the JSE at the end of 2015



Estimates based on data from the JSE and South African Reserve Bank

845

21. **It is difficult to measure net black or white ownership of companies in South Africa, given that ownership may be geared.** It is not possible to measure net ownership trends in companies, especially where shareholders borrow funds to purchase shares in a company. Most BEE deals are highly geared, and hence it is not possible to measure the net ownership once the debt of owners is taken into account. Note that it is only in the banking sector where significant owners (above 15%) are required to purchase their shares from unencumbered capital, hence it is not possible to secure significant ownership through borrowed funds (as one cannot borrow from one bank to buy another bank). Shares in listed companies are mostly taken up by institutional investors.

06/09/2017

National Treasury invites comments and corrections especially on data or factual information in this note. Comments and corrections may be sent to stewart.bobo@treasury.gov.za by 2 Oct 2017.

346 IM29

SAHARA
ICT SOLUTIONS PROVIDER

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

Sahara Computers(Pty)Ltd
89 Gazelle Avenue
Corporate Park
Midrand

28th June 2016

Dear Minister Pravin Gordhan,

RE: REQUEST FOR MEETING TO DISCUSS CLOSURE OF SAHARA BANK ACCOUNTS

You may recall that earlier this year (20 April) Nazeem Howa CEO of Oakbay Investments sent a letter to you, updating you on the developments at Oakbay Investments, principally the 140 redundancies that Sahara was forced to make as a direct result of the closing of our business bank accounts by FNB, ABSA, Standard Bank and Nedbank.

Writing to you today as CEO of Sahara I can confirm that vital banking services have still not been restored neither to us, nor for that matter other businesses across the Oakbay group, despite the decision by our shareholders to step away from the day to day involvement in our business.

I now find myself in a precarious position where I am forced to make a number of important strategic decisions concerning the future of our business - decisions which will inevitably lead to further redundancies.

The decisions I will be forced to make over the coming weeks will not only affect the livelihoods of the remaining 103 employees at Sahara, but their families and dependents too.

It would seem that the engagement from my colleagues and me with you on PowerFM on Sunday, 26 June) has been misconstrued in some quarters. I would like to assure you the calls related to the extremely difficult position we find ourselves in following the banking blacklisting crisis at Oakbay. Our frustrations are felt by our employees, who fear for their jobs.

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www.sahara.co.za

SAHARA COMPUTERS (PTY) LTD.
Reg. No.: 1997/015590/07 Vat No.: 4700162076
Directors G Naidoo I E Tak

347

SAHARA

As an addendum to this - following our engagement with you on Sunday evening I have also been the recipient of a threatening phone call aggressively warning against any further appeals to you regarding the reopening of Oakbay's bank accounts. I hope you would publicly condemn acts of intimidation, which are using your name, such as this?

I return to the more important issue at stake - you say you are here, in your capacity as Treasury Minister, to serve the national purpose so that 55 million South Africans can have decent jobs and a better economic future. I humbly plead that you find some way to help us make a small start with our own employees, and therefore request that you meet with me, at your earliest convenience. I can then brief the rest of my colleagues and our employees on what concrete steps are being made to secure the future of my remaining 103 employees, their families and dependents.

Yours sincerely

Stephen Nel
CEO, Sahara

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Reg. No.: 1997/015590/07 Vat No.: 4700182076
Directors: G Naidoo I E Toh

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MINISTER: FINANCE
REPUBLIC OF SOUTH AFRICA

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PO Box 29, Cape Town, 8000, Tel. +27 21 464 6100, Fax: +27 21 461 2934

Mr Nazeem Howa
Chief Executive Officer
Oakbay Investments
144 Katherine Street
SANDTON
2031

Dear Mr Howa

MEETING ON CLOSING OF OAKBAY BANK ACCOUNTS: 24 MAY 2016

Thank you for meeting with me this morning, together with some of my officials. The meeting was in response to your letters dated 8 and 17 April 2016 to discuss the recent closure of certain Oakbay bank accounts.

We informed you that banks operate in a highly-regulated environment, and a range of factors could give rise to a bank's decision to close an account. I attach an information document outlining the regulatory framework governing the banking sector and financial sector. More information is also available on our website (www.treasury.gov.za) and several international websites, like www.bis.org and www.fatf.com.

We reiterated that there are legal impediments to any registered bank discussing client-related matters with the Minister of Finance, or any third-party. Further, the Minister of Finance cannot act in any way that undermines the regulatory authorities.

It was evident that you have not, as yet, exhausted all legal remedies, including approaching the court for appropriate relief. It was also pointed out that an application to court can also be in the public interest and help to strengthen the current regulatory regime in order to serve customers better.

We agreed to continue engaging and you would provide us with any relevant information.

In conclusion, we pointed out that the recent attacks on the integrity of the National Treasury are not helpful or in the national interest and should be avoided.

Yours sincerely

PRAVIN J GORDHAN, MP
MINISTER OF FINANCE
Date: 24-05-2016

349 IM31

OAKBAY
INVESTMENTS (PTY) LTD.

24th May 2016

Minister Pravin Gordhan
Minister of Finance
Republic of South Africa

Dear Minister

RE: Meeting on closing of Oakbay Bank Accounts: 24 May 2016

Thank you very much for the cordial meeting this morning to discuss the decision by the four major banks operating in our country to close our bank accounts.

Thank you, too, for the documents outlining the regulatory environment in which the banks operate.

Given the time challenges facing us during the meeting and your suggestions around legal remedies, I thought it prudent to place on record that following detailed discussions with several legal advisors, we are of the strong view that given the contractual rights the banks have, any legal approach may indeed be still-born. The banks have each said as much to us in their correspondence to ourselves. As mentioned this morning, we have also being told by the key regulators such as the Banking Ombud and the National Consumer Council that our matter falls outside their jurisdiction.

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

We were also particularly engaged with paragraph 5 of your Aide Memoire which provided some detail with the reasons why banks would close accounts. As discussed fully with you, no bank has given us any indication of any wrongdoing on our side. I am sure you will also recall the detail shared with you today of the due diligence exercise we underwent around the proposed purchase of a bank, as well as the detail shared with you around the Reserve Bank requests for information around currency exchange. Most importantly, we have 16 years of audit reports from KPMG, one of South Africa's leading audit firms which backs our view that we have done nothing wrong.

It was good to hear this morning that you share our concern around the livelihoods of our 7500 staff, which once again confirms your strong pedigree as a liberation fighter.

350

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.

While I understand the legal impediments facing you as political head of our economy as well as the challenges presented by the current regulatory framework, I would like to believe that our detailed discussion this morning will open the way for you to consider those difficulties against the obvious requirement for South Africa to create a business environment which will promote job creation and economic growth. I would suggest what has happened to us does no such thing and in fact should be viewed as creating a negative perception around foreign direct investment.

Finally, we note your comment around recent attacks on the National Treasury. Let me state for the record, we are fiercely patriotic, and as such support all institutions of our country, including Treasury.

I look forward to hearing from you about any possible assistance you are able to offer us in these trying times. As you would have heard in our meeting and hopefully from this letter we have exhausted all options, and as a South African company – which is fully compliant to all the banking regulations - we are appealing to you to facilitate our rights in terms of Clause 5 of your Aide Memoire which talks very clearly of Government Policy as it applies to any community or individual.

As democrats, we cannot standby as 7500 livelihoods are placed at risk through decisions which seems to have been taken without any due process around compliance.

Yours sincerely

Howa

Nazeem Howa
Chief Executive
Oakbay Investments

351 IM 3

STRICTLY CONFIDENTIAL AND LEGALLY PRIVILEGED

Ex parte: **MINISTER OF FINANCE**

In re: **COMPLAINT BY OAKBAY INVESTMENTS (PTY) LTD AGAINST CERTAIN FINANCIAL INSTITUTIONS**

OPINION

J.J. GAUNTLETT SC
F.B. PELSER

Chambers
Cape Town

29 May 2016

352

A. Introduction

1. Our consultant is the Minister of Finance ("the Minister").

2. We have previously advised on issues regarding an inter-ministerial committee established to deal with allegations levelled against financial institutions by Oakbay Investments (Pty) Ltd ("Oakbay"). In an opinion dated 25 April 2016 we advised that Government has no power to interfere with the banker-client relationship, and that banks are under a legal duty to observe their confidentiality obligations to current and former customers. We are now asked to advise on three ancillary issues:

   (1) Whether banks are legally obliged to provide Oakbay with reasons for closing Oakbay's accounts.

   (2) Whether it would be permissible for the Minister to approach the banks to request reasons and whether the banks would be obliged to comply with the request by the Minister if Oakbay waives its right to confidentiality.

   (3) Whether the current regulatory system provides a mechanism through which the Minister can intervene at the instance of Oakbay.

3. We have been briefed with correspondence between the Minister and the CEO of Oakbay dated 8 April 2016, 17 April 2016, and 24 May 2016. In the analysis which follows we first set out the contents of these letters in relevant part before addressing each of the three questions.

353

B. Analysis

4. The three ancillary questions for advice arise in the context of the correspondence between the Minister and Oakbay. As will be seen, Oakbay's specific request in the last letter (and the basis on which it is advanced) bears particularly on the third question. Accordingly the relevant parts of the correspondence are shortly summarised before turning to each question for advice.

(1) The correspondence

5. In the first of the aforesaid letters, written by Oakbay's CEO to the Minister, the latter is informed of potential job losses following "the unexplained decision of a number of banks, and of our [Oakbay's] auditors, to cease working with us [Oakbay], and of continued press coverage of unsubstantiated and false allegations against the Gupta family", as a result of which "it has become virtually impossible to continue to do business in South Africa."[1] The letter attributes the banks' and auditors' decisions to "an anti-competitive and politically-motivated campaign designed to marginalise our business."[2] It states that Oakbay is "currently unable" to pay "many of the salaries of our more than 4 500 employees".[3] Oakbay envisaged that the political campaign against it would be ended by the Gupta family relinquishing control of Oakbay.[4]

[1] Second paragraph of Oakbay's CEO's letter dated 8 April 2016 to the Minister.
[2] Third paragraph of Oakbay's CEO's letter dated 8 April 2016 to the Minister.
[3] Seventh paragraph of Oakbay's CEO's letter dated 8 April 2016 to the Minister.
[4] Eighth and ninth paragraphs of Oakbay's CEO's letter dated 8 April 2016 to the Minister.

354

6. The second letter, again by Oakbay's CEO, apologises to the Minister for any adverse impression that the first letter created.[5] It explains that the first letter was addressed to the Minister in his capacity "as political head for the financial sector",[6] invokes the Minister's involvement in the democratic struggle, and refers to "our fragile economy".[7] It confirms that "the shareholder has resigned all executive and non-executive roles in [the Oakbay] group".[8] Yet Oakbay "found the response from the institutions to be intransigent".[9] On this basis the second letter implores the Minister to assert his "strong relationship with the captains of industry" to save the jobs of Oakbay's employees in the interest of the country's economy and development.[10]

7. In response to these letters a meeting was convened between the Minister and Oakbay on 24 May 2016. The Minister's letter to Oakbay's CEO on the same day recorded what was conveyed at the meeting. It is that the Minister could not intervene in the banker-client relationship or interfere with the regulatory authorities' functions,[11] and that Oakbay has not exhausted its legal remedies (which include approaching a court).[12]

8. The letter attaches an *aide memoire* which confirms the Minister's undertaking to

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[5] Para 1 of Oakbay's CEO's letter dated 17 April 2016 to the Minister.
[6] Para 2 of Oakbay's CEO's letter dated 17 April 2016 to the Minister.
[7] Para 3 of Oakbay's CEO's letter dated 17 April 2016 to the Minister.
[8] Para 4 of Oakbay's CEO's letter dated 17 April 2016 to the Minister.
[9] Para 4 of Oakbay's CEO's letter dated 17 April 2016 to the Minister.
[10] Para 5 of Oakbay's CEO's letter dated 17 April 2016 to the Minister.
[11] Para 3 of the Minister's letter dated 24 May 2016 to Oakbay's CEO.
[12] Para 4 of the Minister's letter dated 24 May 2016 to Oakbay's CEO.

355

"contribute in whatever legally permissible way possible to save the jobs of workers."[13] But the *aide memoire* also notes that a failure by South African banks to comply with international standards may lead to job losses of more than a million, as the 2008 banking crisis in the USA demonstrated.[14] The *aide memoire* further reflects that 17 locally-incorporated deposit-taking banks exist, and that Oakbay did not indicate whether it applied to any of those institutions for banking facilities.[15] The aide memoire also identifies far-reaching adverse macro-economic consequences should Government intervene in banks' business.[16] It further explains that the regulatory regime governing banks has resulted in over 100 000 accounts being closed by a single leading US bank,[17] and between 20 000 and 35 000 even in "low risk" operating environments in the EU and UK by leading banks like Deutsche Bank, Barclays and UBS.[18] This not only demonstrates reputable banks' conduct in compliance with the regulatory regime, but also the risk of their withdrawal from countries whose regulatory frameworks are perceived as insufficiently robust.[19] It could also hold adverse consequences for the South African Government's social programmes.[20] The *aide memoire* concludes by identifying recourse open to an aggrieved customer whose bank account is closed.[21] It states that "an approach to the courts remains an option" and that "[a]n aggrieved customer or company has nothing to fear from such action, as long

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[13] Item 3 s.v. "Background" on the first page of the *aide memoire*.
[14] First para s.v. "Overview" on the first page of the *aide memoire*.
[15] Last para s.v. "Overview" on the second page of the *aide memoire*.
[16] S.v. "How is compliance monitored?" on the second page of the *aide memoire*.
[17] First para s.v. "What has happened in other countries?" on the third page of the *aide memoire*.
[18] Second para s.v. "What has happened in other countries?" on the third page of the *aide memoire*.
[19] Second para s.v. "What has happened in other countries?" on the third page of the *aide memoire*.
[20] Third para s.v. "What has happened in other countries?" on the third page of the *aide memoire*.
[21] S.v. "What can affected customers do?" on the fourth page of the *aide memoire*.

356

as it has adhered to the laws of the country."[22]

9. In the final letter Oakbay's CEO thanks the Minister for the *aide memoire*.[23] It reveals that Oakbay sought advice from "several legal advisors" who are "of the strong view" that banks have acted within their contractual rights and that "any legal approach may indeed be still-born."[24] This, the letter states, is borne out by correspondence by the banks (which correspondence does not appear to have been shared with the Minister).[25] Hence Oakbay "will fail in a court of law", its letter states.[26] The letter appears to imply that the absence of a legal remedy, and the responsible regulators' responses that they could not intervene, is a basis for a political intervention by the Minister.[27] This despite "the legal impediments facing [him] as political head of [South Africa's] economy as well as the challenges presented by the current regulatory framework".[28] Yet the letter repeats the prior recordal that "the shareholder [of Oakbay] has resigned ... as a move to address the concerns of the parties about possible association risk".[29] (It will be recalled that the first letter attributed the banks' decision to close Oakbay's accounts to "an anti-competitive and politically motivated campaign"[30] waged "against the Gupta family".[31] The suggestion was that improper political pressure would have

[22] Para E s.v. "What can affected customers do?" on the fourth page of the *aide memoire*.
[23] Para 2 of Oakbay's CEO's letter dated 24 May 2016 to the Minister.
[24] Para 3 of Oakbay's CEO's letter dated 24 May 2016 to the Minister.
[25] Para 3 of Oakbay's CEO's letter dated 24 May 2016 to the Minister.
[26] Para 4 of Oakbay's CEO's letter dated 24 May 2016 to the Minister.
[27] Para 4 of Oakbay's CEO's letter dated 24 May 2016 to the Minister.
[28] Para 8 of Oakbay's CEO's letter dated 24 May 2016 to the Minister.
[29] Para 7 of Oakbay's CEO's letter dated 24 May 2016 to the Minister.
[30] Para 3 of Oakbay's CEO's letter dated 17 April 2016 to the Minister.
[31] Para 2 of Oakbay's CEO's letter dated 17 April 2016 to the Minister.

357

been remedied by the resignation of the Gupta family as shareholder; not that the remedy *is* to apply political pressure in the opposite direction.) The letter states vaguely that Oakbay has "exhausted all options",[32] but does not identify whether it had sought to open an account with any of the other financial institutions to which the *aide memoire* refers.

10. Ultimately, what the correspondence reflects is that Oakbay's request to the Minister is for him to exercise a political power pursuant to Government policy reflected in clause 5 of the *aide memoire* – there being, as Oakbay apparently acknowledges, no legal basis for the Minister to intervene. The pressure sought to be brought to bear upon the Minister is the livelihoods of now 7 500 Oakbay employees (previously the number was 4 500)[33] being "placed at risk through decisions [by the banks] which seems [sic] to have been taken without any due process around compliance".[34] Quite what is meant by the latter phrase is not made clear. It does however suggest a legal cause of action: the lack of "due process". This is not consistent with the legal advice Oakbay has disclosed it has received: that Oakbay has no legal recourse against the banks.

(2) <u>The questions for advice</u>

11. In our previous opinion we have dealt with banks' contractual power to terminate the

[32] Para 10 of Oakbay's CEO's letter dated 24 May 2016 to the Minister.
[33] Para 7 of Oakbay's CEO's letter dated 17 April 2016 to the Minister.
[34] Para 11 of Oakbay's CEO's letter dated 24 May 2016 to the Minister.

358

banker-client relationship; the duty of banks not to disclose information of a previous client; and the Minister's power conferred by statute. We explained that without a statutory power to do so, the Minister has no legal authority to intervene. Conversely he is under a common-law duty *not* to interfere with the banker-client relationship. We refer to the legal framework set out in the previous opinion and do not repeat it here.

(a) First question: Are banks legally obliged to provide Oakbay with reasons for closing Oakbay's accounts?

12. The duty to provide reasons for conduct is one imposed by administrative law on a public authority exercising public power.[35] A commercial bank's closing of its customer's account is not governed by administrative law.[36] Accordingly there is no legal obligation to provide reasons for closing an account.[37] Nor is any such entitlement or duty created by the Code of Banking Practice.[38] It also does not appear that any such contractual entitlement has been agreed by Oakbay with any of its erstwhile bankers, otherwise Oakbay would not have stated in its letter to the Minister that it has been advised that it has no sustainable legal cause of action.[39]

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[35] Section 33(2) of the Constitution; section 5(1) of the Promotion of Administrative Justice Act 3 of 2000.
[36] Although the Supreme Court of Appeal recorded in *Bredenkamp v Standard Bank of SA Ltd* 2010 (4) SA 468 (SCA) at para 55 the appellant's contention that "the banking industry is in the hands of few who enjoy significant market power. It is accordingly a case 'where private power approximates public power or has a wide and public impact'", it did not uphold the argument – rejecting it by implication.
[37] Significantly in *Bredenkamp v Standard Bank of SA Ltd* 2010 (4) SA 468 (SCA) at para 64 the Supreme Court of Appeal appeared to have implied that in order for any duty to exist on a bank to the effect that an account may only be closed on good cause shown, this would require a contractual term or the development of the common law.
[38] Clause 7.3.2 of the Code of Banking Practice merely provides that a bank "will not close [a customer's] account without giving [the customer] reasonable prior notice".
[39] Paras 3-4 of of Oakbay's CEO's letter dated 24 May 2016 to the Minister.

359

13. Accordingly there is no legal obligation on the banks to provide Oakbay with reasons. But even were it otherwise, the remedy is one only capable of being exercised by Oakbay itself, as the answer to the second question (to which we now turn) confirms.

(b) *Second question: May the Minister approach the banks to request reasons for closing Oakbay's accounts, and would the banks be obliged to comply with the request by the Minister if Oakbay waives its right to confidentiality?*

14. The client-banker relationship vests a duty in the bank to honour the confidentiality of the client's information, and it imposes a duty on the bank to honour this duty. Accordingly a client may indeed waive its right to confidentiality.[40]

15. The onus of proving a waiver is on the person who raises it. That party must demonstrate that the right-bearer, in this case Oakbay, with full knowledge of its right, decided to abandon it, whether expressly or by conduct plainly inconsistent with an intention to enforce it.[41] Accordingly, should the Minister rely on a waiver, he would bear the onus. A waiver is not lightly presumed. None of the letters to the Minister contains anything which is compatible with an inference of waiver.

16. Thus, at a factual level the first question cannot be resolved on a basis which

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[40] Clause 6.1 the Code of Banking Practice; Joubert *et al* (eds) *The Law of South Africa* 2nd ed (LexisNexis, Durban 2003) vol 2 part 1 at para 345.
[41] *Bornstein v Spangenberg* 1974 (3) SA 695 (A) at 704H.

360

circumvents the Minister's general duty not to interfere in the banker-client relationship, which survives any termination of the contract between Oakbay and its banks. Only were Oakbay subsequently to waive its right to confidentiality does the legal question as regards the Minister's legal authority and banks' legal entitlements arise.

17. As regards banks' legal entitlements, should Oakbay waive its right to confidentiality, a bank would not be able to invoke it at its own instance to refuse to disclose otherwise confidential information. This is because the confidentiality is that of a client, not a bank. Once the right is waived a bank has no duty to observe confidentiality, and it in any event never had any *right* to resist disclosure: only a duty to do so (for as long as confidentiality subsists).

18. But the correct question is not whether the banks can invoke a waived right to confidentiality. *It* is whether the Minister has the power to request information in the first place – whether or not the information *is* subject to confidentiality or not. This is because the Minister only has such powers as are conferred on him by law. As our previous opinion identified, it is the Banks Act which would have authorised the Minister to obtain information from banks. But this Act does not authorise this. It authorises the Registrar of Banks as the only authority to whom information must be furnished under the Act.

19. Accordingly whether or not Oakbay waives its right to confidential information (which

361

it has not yet done), the Minister is not empowered to approach the banks to obtain information regarding Oakbay. On that basis alone banks are entitled to refuse any request by the Minister to obtain information, including banks' reasons for closing Oakbay's accounts.

(c) *Third question: Does the current regulatory system provide a mechanism through which the Minister can intervene at the instance of Oakbay?*

20. For the reasons set out in our previous opinion and repeated in answering the second question, the regulatory system does not provide any mechanism through which the Minister may intervene. The Minister's powers, we repeat, are not inherent: they are limited to such powers as are conferred on him by statute. No statutory provision gives him the power to call upon a bank to provide the information which Oakbay wants. Oakbay's reliance on the reference to "government policy on banking" in paragraph of the *aide memoire* is misconceived. Policy – especially a reference such as this to policy in its broadest sense – confers no power such as Oakbay contemplates.[42] (It may further be noted that in invoking paragraph 5 of the *aide memoire*, Oakbay elides the specific qualification: "but this does not apply to non-complying customers.")

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[42] *Akani Garden Route (Pty) Ltd v Pinnacle Point Casino (Pty) Ltd* 2001 (4) SA 501 (SCA) at para 7
"The word 'policy' is inherently vague and may bear different meanings. ... I prefer to begin by stating the obvious, namely that laws, regulations and rules are legislative instruments, whereas policy determinations are not. As a matter of sound governance, in order to bind the public, policy should normally be reflected in such instruments. Policy determinations cannot override, amend or be in conflict with laws (including subordinate legislation). Otherwise the separation between Legislature and Executive will disappear. Compare *Executive Council, Western Cape Legislature v President of the Republic of South Africa* 1995 (4) SA 877 (CC) (1995 (10) BCLR 1289) in para [62] .... One thing, however, is clear: policy determinations cannot override the terms of the provincial Act for the reasons already given. ..."

362

21. In these circumstances the question arises whether in the absence of a statutory authorisation the Minister may intervene *ex necessitate*. There appears to be no successful post-constitutional invocation of the exercise of a power not conferred by law but of necessity. This is no doubt because of the importance of the rule of law and the doctrine of legality, which preclude the exercise of a power not conferred by law. While the Constitution itself contemplates National Treasury and confers certain powers on it, it significantly does not confer any power to interfere in contractual relations.

22. There is, moreover, no true factual necessity. This is because if payment to employees cannot be effected through Oakbay's closed bank accounts, it can of course be made through intermediaries – like an attorneys' trust account. More importantly, however, Oakbay did not indicate whether it has approached any of the other banks identified in the *aide memoire* and whether they have refused to open bank accounts for Oakbay. Accordingly the assertion that all available avenues have been exhausted is not borne out. In such circumstances the Minister will expose himself to a successful interdict by a bank were he to assert a power by necessity to intervene at the instance of Oakbay.

C. Conclusion

23. For the above reasons we answer the questions for advice as follows:

363

(1) Banks are not legally obliged to provide Oakbay with reasons for closing Oakbay's accounts.

(2) It would not be permissible for the Minister to approach the banks to request reasons for the closure of the accounts, and the banks would not be obliged to comply with the request by the Minister – even were Oakbay to waive its right to confidentiality.

(3) The regulatory system does not provide a mechanism through which the Minister may intervene at the instance of Oakbay.

24. We shall be glad to make ourselves available to deal with any issues for further advice or clarification, or settle any correspondence, should this be required.

We advise accordingly.

J.J. GAUNTLETT SC
F.B. PELSER

Chambers
Cape Town

29 May 2016

IM3

MINISTER: FINANCE
REPUBLIC OF SOUTH AFRICA

2016 -07- 20
FILE No: M3/10/1
1369/16

Private Bag X115, Pretoria, 0001 Tel +27 12 323 8911 Fax +27 12 323 3262
P O Box 29, Cape Town 8000 Tel +27 21 464 6100 Fax +27 21 461 2934

Mr Nazeem Howa
Chief Executive Officer
Oakbay Investments
144 Katherine Street
SANDTON
2031

Dear Mr Howa

CLOSING OF OAKBAY BANK ACCOUNTS

I would like to follow-up on the meeting on 24 May 2016 and the exchange of letters between ourselves, including the letters arising from that meeting.

I note Oakbay's evident decision not to approach the courts to seek an endorsement of its contentions. As I have conveyed, it might have been expected to be in the interest of Oakbay (and, indeed, its entire staff, to whose interests frequent reference has been made) that Oakbay do so. By not seeking the legal remedy, you may leave the distinct impression that Oakbay management is not doing all in its power to protect its staff from losing their jobs and further that Oakbay is concealing the real facts from being made public. You may also create the impression that you are trying to find a political solution to what is essentially a legal compliance matter.

I note the information that you made public during a recent interview with Carte Blanche, screened on 19 June 2016, where you indicated that one of the banks that closed your accounts cited the following (in a letter to Oakbay) as its reasons:

"Without waiving our rights not to furnish reasons for our decision without inviting any debate about the correctness of our decisions, I point out the law: inclusive of South Africa's Companies Act, Regulation 43, Prevention of Organized 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 vigilent) person would suspect that such dealings could directly or indirectly make us a party to or accessory to contraventions of that law."

Furthermore, you quoted the letter to Oakbay as stating that:

"We have (conducted) enhanced due diligence of Oakbay entities and as required by the FICA and have concluded that continuing with any bank-customer relationship with them would increase our risk of exposure to contravention of the mentioned law to an unacceptable level".

365

I would appreciate it if you could confirm this quote is correct. If it is correct, then there is even more reason for Oakbay to seek a legal remedy to demonstrate that it has not transgressed any laws. This will then enable any bank to provide services to Oakbay without putting themselves at great risk with both South African and international regulators.

During our meeting on 24 May 2016, you indicated that you would provide me with all the correspondence from banks related to the closure of your accounts. To date I still have not received any copies of these letters. It is in the national interest of South Africa that our banks fully enforce anti-money laundering and anti-corruption legislation without fear or favour. As noted in the aide memoire attached to my letter dated 24 May 2016, financial stability and integrity form part of a long-adopted policy by the Government of South Africa, and which informs recent legislative initiatives like the Financial Intelligence Amendment Bill and the Financial Sector Regulation Bill.

I am sure you will agree that Oakbay's actions should not in any way undermine financial stability of our country, and that failure by the authorities to act decisively against suspicions in terms of money laundering will undermine the fight against corruption, and adversely impact on economic growth and the capacity of our economy to generate jobs. I am always prepared to engage on how best to protect workers from losing their jobs, not only at Oakbay, Tegeta or Exarro, but in the economy as a whole. I am also concerned regarding reports of workers losing their jobs at Oakbay merely for speaking up for their rights and would like to hear your reasons for taking such action.

Yours sincerely

PRAVIN J GORDHAN, MP
MINISTER OF FINANCE
Date: 14-07-2016

2

366 IM34

OAKBAY

MINISTER OF FINANCE
JS
2016 -07- 20
FILE No. M 8/10/1
MINISTRY OF FINANCE
1389/16

18th July 2016

Minister Pravin Gordhan
Minister of Finance
Republic of South Africa

Dear Minister

RE: Probable job losses at Impala Platinum Mine due to banking situation

It is with regret that we have to advise that Impala Platinum Limited have notified that after the current main commercial agreement with JIC Mining Services comes to an end on the 31st of July 2016, it will only permit the provision of services in terms of a contractual period covered for a further three (3) months until the 31st of October 2016. Impala Platinum Limited management's decision has been based on the fact that the 4 major South African Banks, ABSA, FNB, NEDBANK & STANDARD BANK have decided to close all bank accounts of Oakbay Investments Group companies.

Impala Platinum ("Impala") is not prepared to do business with Westdawn Investments (Pty) Ltd trading as JIC Mining Services ("JIC") if the Company does not have a transactional bank account held at a South African Bank which operates as a local banking institution accountable under the Financial Intelligence Centre Act (FICA). If the situation therefore cannot be remedied or turned around before the 31st of October 2016, the commercial agreement between Impala will thus come to an end by the said date.

This situation forces the company to contemplate the termination of services of all its employees working at the mining operations of Impala Platinum Limited. Despite the circumstances JIC views its employees as its most valuable asset and we obviously intend to fully comply with extant legislation in our consultations with Organised Labour and affected parties.

As you will recall, when we met last time we discussed this eventuality and I have hoped that we would meet within the ten days we had promised each other to try to find solutions which avoids these job losses. We once again appeal to you for whatever assistance you can provide to help us find a solution to this challenge.

We will endeavor to keep you updated about the process as it unfolds.

Yours sincerely

Nazeem Howa
Chief Executive: Oakbay Investments

867 IM35

1 April 2016

By Hand
Strictly Private and Confidential

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

NORTON ROSE FULBRIGHT
Norton Rose Fulbright South Africa Inc
15 Alice Lane
Sandton 2196
South Africa

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

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

Direct line
+27 11 685 8860

Email
aslam.moosajee@nortonrosefulbright.com

Your reference

Our reference
FNB13954 / Mr A Moosajee

Dear Sirs

Termination of relationship

1 We act on behalf of First National Bank, a division of FirstRand Bank Limited (FNB).

2 Our client is entitled to terminate its relationship with you by giving you reasonable notice and our client hereby gives such notice.

3 Consequently, the accounts held with our client referred to below, will be closed on Tuesday 31 May 2016 unless an earlier closure date is requested or if any circumstances arise in the future which warrant an earlier closure of the account:

3.1 Commercial cheque account with no. 62262303321;

3.2 Money on Call account with no. 62561420482;

3.3 Business credit card with no. 4790552507968000;

3.4 Business credit card with no. 4790552607969000;

3.5 Business credit card with no. 4790552607970000; and

3.6 Business credit card with no. 6812712910109000

(collectively referred to as "the accounts")

4 Please ensure that the necessary steps are taken to ensure that o deposits are made into the accounts on or after 31 May 2016 and that no further cheques or payment instruments are drawn against the accounts on or after 31 May 2016.

5 Please also provide us with bank details into which any credit balances in the accounts as at 31 May 2016 should be transferred to once the accounts are closed.

6 FNB13954: FNB / Sahara Systems (Pty) If you need to communicate with FNB in relation to either the closure of the accounts or any operational issues relating to the accounts, please direct all such correspondence directly to the writer.

Norton Rose Fulbright South Africa Inc is a member of Norton Rose Fulbright Verein, a Swiss verein. Norton Rose Fulbright Verein helps coordinate the activities of the member firms but does not provide legal services to clients. Norton Rose Fulbright Verein and its member firms are legally separate and independent entities. Details of each entity, with certain regulatory information, are available at nortonrosefulbright.com

368

Joyline Prinsloo

From: Sinton, Ian <ian.sinton@standardbank.co.za>
Sent: 06 June 2016 12:39 PM
To: Nazeem Howa
Subject: Oakbay Group

Nazeem
We do not intend to elaborate further.
Regards
Ian

Ian Sinton
Group General Counsel
Executive Reception, 9th Floor, East Wing, 30 Baker Street, Rosebank, Johannesburg 2196
Tel +27 (0)11 721 9805 / Mobile +27 (0) 82 858 5451 / www.standardbank.com

Standard Bank Moving Forward™

From: Nazeem Howa [mailto:nazeemh@tnamedia.co.za]
Sent: 02 June 2016 02:49 PM
To: Sinton, Ian; Montjane, Funeka FZ; Kotze, Milton M
Cc: Fihla, Kenny K
Subject: <no subject>

Hi Ian

Please see my letter attached.

Nazeem

Standard Bank email disclaimer and confidentiality note
Please go to http://www.standardbank.co.za/site/homepage/emaildisclaimer.html to read our email disclaimer and confidentiality note. Kindly email disclaimer@standardbank.co.za (no content or subject line necessary) if you cannot view that page and we will email our email disclaimer and confidentiality note to you.

369

18 December 2015

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

Our ref: 2010/006569/07

Dear Sir

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

We refer to the above.

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

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

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

We urge you to make alternative arrangements in this regard.

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

BARCLAYS

370

The Director(s)
Oakbay Investments (Pty) Ltd
Private Bag X180
Halfway House
1685

BY HAND

07 April 2016

Dear Sir(s),

ACCOUNT NUMBER: 1468183381

1 We refer to the abovementioned account held with Nedbank Limited ('Nedbank')

2 Nedbank is of the view that any continued relationship with Oakbay Investments (Pty) Ltd may create material business risks that could pose significant reputational risk to Nedbank and as such we are unfortunately not prepared to continue our banking relationship.

3. We hereby terminate the banking relationship, as we are entitled to do, and provide you with 30 (thirty) days' notice to find alternative bankers. As Nedbank is not your primary banker we believe that the notice period is reasonable and provides you with adequate time to find alternative banking facilities.

Yours faithfully,

Sandile Shabalala
Managing Executive: Business Banking
Nedbank Ltd
Tel: +27(0)11 294 3166
Email: SandileS@nedbank.co.za

Business Banking
Head Office
Sandton

136 Rivonia & Kelvin Sandown Sandton Gauteng 2196
PO Box 784096 Sandton 2146 South Africa
Tel 011 294 4444 Fax 011 295 0000
www.nedbank.co.za

A member of the OLDMUTUAL

371

13 April 2016

Mr Nazeem Howa
Infinity Media Networks (Pty) Ltd
52 Lechwe Street
Corporate Park South
Midrand
1685

Dear Mr Howa

INFINITY MEDIA NETWORKS (PTY) LTD REGISTRATION NUMBER 2011/003219/07

We herewith advise that after careful consideration, the Bank is terminating its banking relationship with you on reasonable notice. We will also no longer be extending any future facilities to you. As a result we hereby inform you of the following:

Current Account Number 420967710 Credit Balance R156,458.89

This Current Account will be closed on the 6th of June 2016. Kindly provide us with the bank account details where the available funds held in the account may be transferred to. Alternatively a bank cheque(s) will be issued in your favour, which will be ready for collection on the first business day after the closure date.

Investment Account Number 728502232-001 Balance R6

We will also close this account on the 6th of June 2016. Kindly provide us with the bank account details where the available funds, if any, in the account may be transferred to. Alternatively, a bank cheque(s) will be issued in your favour which will be ready for collection on the first business day after the closure date.

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

Yours faithfully

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

Standard Bank Centre Corner of Simmonds Street Johannesburg 2001 PO Box 61344 Marshalltown 2107 South Africa
Tel Switchboard +27 11 636 9111 +27 11 636 4295 Fax +27 11 636 9948 Email Banking@standardbank.co.za standardbank.co.za

372

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OAKBAY
INVESTMENTS (PTY) LTD

25 July 2016

Minister Pravin Gordhan
Minister of Finance
Republic of South Africa

Dear Minister

Closing of Oakbay Bank Accounts

Thank you for your letter dated July 14 which I received on July 18.

My apologies for not sending you the bank letters. Unfortunately, I did not have the request in the notes I jotted down at our last meeting. I have, however, attached the notice letters from all four banks today.

Hopefully, we can jointly find a way to understand the real reasons for the banks decision to unilaterally close our accounts.

With regards to your question about the letter in the public domain, it is critical that you see the correspondence within the context of the letters that followed (attached for your ease of reference) in which we asked the writer to clarify his reference to the many pieces of legislation and whether Standard Bank had found any evidence of us transgressing any piece of legislation.

For the record, we have made the same request to each of the banks and to date we have not been provided with a single example of where we have transgressed any of the legislation mentioned in their letters. Further, we have not once had a query from any of the banks on any of our transactions. In detailing the contents of the Standard Bank letter in my TV interview with Carte Blanche, I was merely trying to illustrate that these were the allegations that were being made, but without being provided with a shred of evidence.

We have not decided against approaching the courts. Our first priority has been to move decisively to stabilize the business, ensure some level of sustainability which would safeguard the 7500 jobs across our business. Once we have achieved a moderate level of stability and sustainability and when we deem our current initiatives to reverse the current position are exhausted, we will certainly consider the legal option which we understand to be a lengthy and arduous process. As you would understand, without banking facilities we won't have a business to operate well before the conclusion legal proceedings.

Let me also clearly state our support for any and all legislation which advances the clampdown on corruption and money-laundering. As such, please be assured that despite the many unproven media articles, as a company we will not be party in any way to any steps to undermine the financial stability of our country.

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373

Finally, let me assure you of our support for all initiatives to create and sustain jobs within our economy. With reference to your comments about the recent disciplinary action against staffers at ANN7, let me assure you that they are due to transgressions of our disciplinary code and that our processes are fully compliant with the existing legislation. If you so wish, I can provide you with greater detail on this matter when we next meet.

Let me also assure you that no matter the outcome of the hearing, the number of jobs that exist at ANN7 will continue to increase as we offer young South Africans an opportunity that has remained closed for so many years. As an executive team charged with leading the business, we will continue to build our business on sound and good governance, always using our constitution as a guiding principle.

I would also like to give you an update on the ripple-effect the banks' actions have had on Oakbay and its operations when we meet hopefully in the not too distant future. I will also bring along my full file of all the correspondence with the banks so that you can understand our frustration at not getting a proper explanation for their unprecedented action.

Yours sincerely

Nazeem Howa

Chief Executive
Oakbay Investments

374 JM36 142

"SB13"

Media Statement
To all media
1 September 2016

STATEMENT OF THE CHAIRPERSON OF THE INTER-MINISTERIAL COMMITTEE SET UP BY CABINET TO CONSIDER THE IMPLICATIONS OF THE DECISIONS OF CERTAIN BANKS AND AUDIT FIRMS TO CLOSE THE ACCOUNTS OF AND/OR WITHDRAW AUDITING SERVICES FROM OAKBAY INVESTMENTS

On 13 April 2016, Cabinet established an Inter-Ministerial Committee (IMC) to consider allegations that certain banks and other financial institutions acted unilaterally and allegedly in collusion, when they closed bank accounts and/or terminated contractual relationships with Oakbay Investments. The IMC was chaired by myself as the Minister of Mineral Resources.

The situation warranted close scrutiny by Government because of the impact that the actions would have, not only on job losses for 7500 South Africans but also the impact that it would have on investor confidence.

The IMC conducted a number of meetings with various banks, financial institutions and insurance companies as well as with representatives of Oakbay Investments. Although the Minister of Finance was a member of the constituted IMC, he did not participate in its meetings.

A Report of recommendations was tabled at Cabinet. After discussion of the Report, Cabinet has now resolved as follows:-

a. To recommend to the President that given the nature of the allegations and the responses received, that the President consider establishing a Judicial Enquiry in terms of section 84(2)(f) of the Constitution;

b. To consider the current mandates of the Banking Tribunal and the Banking Ombudsman. Evidence presented to the IMC indicated that all of the actions taken by the banks and financial institutions were as a result of innuendo and potentially reckless media statements, and as a South African company, Oakbay had very little recourse to the law. Looking into these mandates and strengthening them would go a long way in ensuring that should any other South African company

find itself in a similar situation, it could enjoy equal protection of the law, through urgent and immediate processes being available to it as it required by the Constitution;

c. To consider the current Financial Intelligence Centre Act and the Prevention of Combatting of Corrupt Activities Act regarding the relevant reporting structures set out therein as evidence presented to the IMC was unclear on whether the various banks and financial institutions as well as the Reserve Bank and Treasury complied with these and other pieces of legislation. The IMC was also briefly ceased with the implications of legal action against any of these entities and the potential impact that would have on the volatility of the Rand as well as the measures that could be put in place to protect the economy. This was not something that fell within the mandate of the IMC and should therefore be considered by the Judicial Enquiry;

d. To re-consider South Africa's clearing bank provisions to allow for new banking licences to be issued and insodoing, to create a free market economy. The IMC was presented with evidence suggesting that the South African banking system is controlled by a handful of clearing banks which ensured that every other local or international bank participating in the South African banking sector would need to go through these clearing banks in order to have their transactions cleared, thereby creating an oligopoly. Evidence was also presented that these institutions may have placed undue pressure on banks that sought to assist the company by subjecting them to unwarranted auditing processes. It is unclear why the Reserve Bank will not issue new banking licences to other banks and this would need to be given careful attention by the Judicial Enquiry as it did not fall within the purview of the IMC; and

e. The establishment of a State Bank of South Africa with the possible corporatisation of the Post Bank being considered as an option. Evidence presented to the IMC suggested that all of South Africa's economic power vests in the hands of very specific institutions, institutions who have shown that their ability to act unilaterally is within their mandate and is protected. These institutions are owned by private shareholders and report to National Treasury who in turn do not need to act on information provided to it.

It was further agreed that the IMC would monitor the process of finalising these matters and would report back to Cabinet on their progress.

For further media enquiries, kindly contact Mr Martin Madiala on 0635054199 Martin.Madiala@dmr.gov.za

Ends-

Issued by the Department of Mineral Resources

376

The Cabinet has resolved to ask President Jacob Zuma to establish a judicial inquiry into the banks and their actions against the Guptas, as well as to review the legislation that governs the banking system, Mineral Resources Minister Mosebenzi Zwane says. By Carol Paton for BDLIVE.

Follow Save

First published by BDLive.

The announcement comes as investor confidence in SA is in free-fall, as a slew of decisions emerging from the Zuma administration creates growing uncertainty in the rules regulating the economy.

Zwane issued the statement on Thursday evening, following a marathon Cabinet meeting held on Wednesday.

Zuma was not at the meeting.

Among other decisions that were taken was one to replace the South African Airways (SAA) board, leaving Zuma's close friend Dudu Myeni at the helm.

Zwane, who headed an interministerial committee established by the Cabinet after the big four banks withdrew banking services to the Gupta family, drew up the Cabinet memo on the banks, which he says in his statement has now been adopted by the Cabinet.

It proposes that the judicial commission of inquiry will consider:

- the current mandates of the Banking Tribunal and the Banking Ombudsman as they had failed to protect the rights of the Guptas;
- the current Financial Intelligence Centre Act and the Prevention of Combating of Corrupt Activities Act, and whether, in taking action against the Guptas, the Reserve Bank and the Treasury had complied with these and other pieces of legislation. The inquiry should consider recommending legal action against the Treasury and the Reserve Bank in this regard;
- SA's clearing bank provisions to allow for new banking licences to be issued. The committee said there was evidence that in SA banking was controlled by a handful of clearing banks, which meant other banks had to go through these banks to be part of the payment system. This implies changing the provisions and probably authority for licensing banks; and
- the establishment of a State Bank of SA, with the possible corporatisation of the Post Bank being considered as an option.

377 IM37

Statement of Minister of Mineral Resources is not Government position

2 September 2016 - 12:00am

The statement issued by the Minister of Mineral Resources, Mr Mosebenzi Zwane yesterday on 1 September 2016, on the work of the task team established to consider the implications of the decisions of certain banks and audit firms to close down the accounts and withdraw audit services from the company named Oakbay Investments, was issued in his personal capacity and not on behalf of the task team or Cabinet.

Minister Zwane is a member of the task team. He does not speak on behalf of Cabinet and the contents of his statement do not reflect the position or views of Cabinet, the Presidency or Government. The unfortunate contents of the statement and the inconvenience and confusion caused by the issuing thereof, are deeply regretted.

The Presidency wishes to assure the public, the banking sector as well as domestic and international investors of Government's unwavering commitment to the letter and spirit of the country's Constitution as well as in the sound fiscal and economic fundamentals that underpin our economy.

Enquiries: Dr Bongani Ngqulunga on 082 308 9373 or bongani@presidency.gov.za

Issued by: The Presidency
Pretoria

378 IM38

27 September 2016 - NW1892

Maynier, Mr D to ask the Minister of Mineral Resources

(1)Whether, with reference to his media statement of 1 September 2016, the report of the recommendations (a) was tabled at and (b) approved by Cabinet; if not, in each case, why not; if so, in each case, on what date was the specified report (i) tabled at and (ii) approved by Cabinet; (2) whether he was authorised to release the specified media statement; if not, why not; if so, by whom; (3) when was an Inter-Ministerial Committee to investigate the termination of financial services to Oakbay Investments (Pty) Ltd established and (b) by whom; (4) whether he intends to pursue the recommendations of the specified report; if not, why not; if so, what are the relevant details; (5) whether he intends to pursue the recommendation of the establishment of a Judicial Commission of Inquiry into the termination of financial services to the company, since the company has recourse to the courts; if not, why not; if so, why?

Show reply

Source Link

Reply:

The Minister of Mineral Resources released a statement on 01 September 2016. This was followed by an interview on SABC news on 02 September 2016. The Minister was not speaking in his personal capacity but in his capacity as Chairperson of the IMC. On 13 April 2016, Cabinet established an IMC to consider allegations that certain banks and other financial institutions acted unilaterally and allegedly in collusion, when they closed bank accounts and/or terminated contractual relationships with Oakbay Investments. The Minister recorded recommendations made to Cabinet by the IMC as well as the related resolutions taken by Cabinet at its meetings of 06 July 2016 and 31 August 2016 respectively. The IMC made 5 recommendations to Cabinet. 4 of the recommendations were approved by Cabinet and 1 was referred to the President for further consideration as it was not within the purview of Cabinet to take a decision on the matter. The Minister is not at liberty to make any further statements on this matter.

Approved/not approved

Mr MJ Zwane, MP

Minister of Mineral Resources

Date Submitted:-...../...../2016

379 IM39

20. Mr B H Holomisa (UDM) to ask the President of the Republic:

Whether, with reference to the reply of the Minister of Mineral Resources to an urgent oral question 205 on 7 September 2016, he has applied his mind to the proposal of the Inter-Ministerial Committee, which was chaired by the Minister, to look into the closure of the accounts of Oakbay Investments (Pty) Ltd by major banks;

if not, what is the position in this regard; if so, what has been his decision in this regard?

Reply:

Honourable Speaker,

As the Cabinet and the Presidency have publicly stated on numerous occasions before, Cabinet appointed the Ministers of Finance, Labour and Mineral Resources to open a constructive engagement with the banks on the matter of the closure of bank accounts.

The team reported back to Cabinet. No other mandate was given to this team of Ministers.

As we have stated before, the statement released by Minister Zwane does not represent the views of government and Cabinet.

I reprimanded the Minister for the remarks and he apologised.

I thank you.

380

159

[PROCEEDINGS ON 23 NOVEMBER 2016]

[39:20 to 51:38]

PRESIDENT ZUMA: Thank you, Madam Speaker.

MS MBETE: We now come to question number 20, raised by the Honourable Holomisa. The Honourable, the President?

PRESIDENT ZUMA: Honourable Speaker, as a cabinet and the presidency have publicly stated on numerous occasions before cabinet appointed the ministers of finance, labour and mineral resources to open a constructive engagement with the banks on the matter of the closure of bank accounts the team reported back to cabinet, no other mandate was given to this team of ministers as we have stated before, the statement released by Minister Zwane does not represent the views of government and cabinet. I reprimanded the minister for the remarks and he apologised. You will remember that when I was answering questions here on this matter, I said I was going to engage the minister and I did and this matter is now closed. The minister has apologised. Thank you very much.

MS MBETE: The Honourable Holomisa.

MR HOLOMISA: Madam Speaker. Thank you, Mr President. On the 2nd of September this year you told the nation, I agree with what you have just said, you told

the nation that the statement made by Minister Zwane was not representing the presidency, cabinet or government and it is unfortunate, however, five days later on the 7th of September, Minister Zwane said in this house, I quote, "the inter-ministerial committee made five recommendations to the cabinet. Four of the recommendations were approved and one was referred to the president for further consideration as it was not within the purview of cabinet to take a decision on that matter." The question, what is the status of this recommendation which was referred to you as reported by honourable minister?

MS MBETE: The Honourable, the President.

PRESIDENT ZUMA: Thank you, Madam Speaker. That recommendation is under considerations by the president. Thank you, Madam Speaker.

MS MBETE: The Honourable Esterhuizen.

MR ESTERHUIZEN: Thank you, Madam Speaker. Honourable President, the Prsident, I heard what you said the matter is now closed and thing but Sir, banking will always remain a voluntary and a private relationship between the bank and the client and it can only be addressed by the parties concerned. Madam Speaker, neither Oakbay, nor the family that runs that companies have made public the real reasons the bank's foreclosed on their account and they were informed, they were definitely

382
161

informed under the bank, confidential bank-client relationship act, they were informed. Honourable President, banks are subject to supervision by the South African Reserve Bank and as a service provider, also to the national consumer's commission and if any client feels that they were treated unfairly in any way, then they can report them to these bodies, which never happened. The simple fact is that Oakbay never complained or reported any irregularities or any nature to this commission to the reserve bank and they did not want the reasons made public.

MS MBETE: Do you have a question Honourable Member? Your minute is over now.

MR ESTERHUIZEN: Honourable President, won't you agree then and with respect to your position Sir, that is not yours neither the minister of mineral resources' place to break this confidentiality act unless you were party to the original contract. Thank you.

MS MBETE: Honourable, the President.

PRESIDENT ZUMA: Thank you, Madam Speaker. I don't think there is anyone who questions the confidentiality between the client and the bank. I think many of us here deal with the banks under general and there's nothing that becomes a national concern. I think the difference that you must make, if a number of banks act in the same way simultaneously, not one bank, not two

banks, including some financial institutions. To any ordinary person, that is not an ordinary act. It suggests that there is something, the banks can't act together on the same manner in the same way. It gives a feeling that there is something going on here. Now if you are a government, as government intervenes in many things if it believes it is putting the image of the country into some problems, bear in mind that the government has always continued to ask for private sector to invest including the investors from outside of South Africa. If you are sitting at the level of government and you see an action of this nature highly publicised you have to say what will the inveators out there think of coming to invest in South Africa if they think the banks can willy-nilly and act in a manner that suggest collusion about the economy of your country. As a government you can't sit and say I'm doing nothing. It was therefore absolutely correct because if the investors don't come here because they fear the actions of the banks, the country will say what is the government doing. We therefore needed to know what is happening, as a government, there's no law that says you cannot do so. You are talking about the bank and individual, here there was an action by a number of banks at the same time, it suggested there is something untoward here and as government, we wanted constructively to interact with the

384

163

banks to find out what is this, what are they doing, where has this come from, that was the reason. There's no government than can just sit because any other company that would want to come to South Africa will say sorry, I'm not going there because if the banks are angry with me, they will collude and act together. We want to look into that matter and get to the bottom of it because we can't say any other time, any business person will be dealt with and the government just stand and look. It is not, we're not dealing with the company, we're dealing with the actions of the bank, that is what we're dealing with and we'll continue to do so. We are responsible because we are a government of this country. There is nothing that sounds very suspicious that we are going to look at and do nothing, that is the reason why we acted on this one. Thank you, Madam Speaker.

MS MBETE: The Honourable Maynier.

MR MAYNIER: Mr President, now if there is one minister who should be sprayed with Doom, it is the minister of mineral resources, Mosebenzi Zwane, for issuing a midnight statement on behalf of the Guptas in his personal capacity calling for an enquiry into the Banks and so my question is why was the minister simply reprimanded and not fired and why was the letter of reprimand not tabled in this parliament?

MS MBETE: The Honourable, the President.

PRESIDENT ZUMA: Well, any president in the world looked at the gravity of the matter and the conclusion would not produce the same kind of action, there's nothing abnormal here. Ministers are reprimanded and at times ministers could be taken out of their jobs, it depends on the thing that has been done. So we did the right thing, reprimanded the minister, the minister apologised, what else do you need? Thank you very much.

MS MBETE: The Honourable Shaik Imam.

MR SHAIK IMAM: Thank you, Honourable Speaker. Mr President, I think you have actually responded to a previous question but let me just say Mr President, do you believe that the closure of the bank account by several financial institution was premature given the fact that Oakbay Investments have not been proven to have violated any banking regulation to date, mindful of the fact that millions of rands are flowing into this country into local bank accounts by political parties to destabilise this country? Is there not, Mr President, is there not an attempt by these imperialists to dictate and control the financial sector that they have done pre-apartheid days? Thank you.

MS MBETE: The Honourable, the President.

PRESIDENT ZUMA: Thank you, Madam

Speaker. That is precisely the reason why government cannot ignore such an action. The action looks suspicious and as government responsible to govern this country, we'll certainly have to investigate what is this and we started very politely by sending a team to meet the banks to say what is happening. The banks did not say look, there's are the faults that this company has done or what led to our actions, so up to now we don't know.. We have laws in this country, if let us say any company violate the laws, there are enforcement institutions that you would report to. Just to stand willy-nilly and close simultaneously a number of banks as well as other financial institutions, it does not look innocent and that's a problem, that's the problem we have. Thank you, Madam Speaker.

[Up to 51:38]

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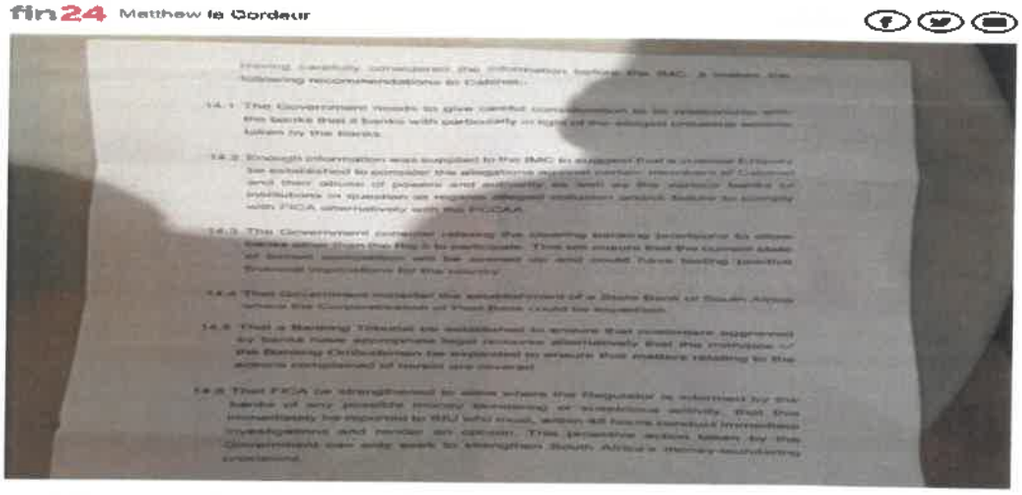
387

22 Sep 2016

EXCLUSIVE: Gupta PR firm knew about bank probe weeks before Zwane dropped bomb

fin24 Matthew le Cordeur



Cape Town - A public relations firm that represents the Gupta-owned Oakbay Investments knew about the recommendations for a judicial inquiry into South Africa's banks at least seven weeks before they were controversially published by Mineral Resources Minister Mosebenzi Zwane, Fin24 can reveal.

Zwane was severely rebuked by the ANC and the presidency after announcing on 2 September that the inter-ministerial committee set up by Cabinet to probe why South Africa's banks blacklisted Gupta-owned businesses recommended that a judicial inquiry be set up.

Fin24 can now reveal that Bell Pottinger, the Guptas' UK-based spin doctors, were in possession of Zwane's "findings" as early as July 15 when they tried to leak a copy of the document to the media. The firm further recommended that Fin24 speak directly to Zwane and provided us contact details for the minister.

This raises fresh questions about Zwane's proximity to the Gupta family and their businesses, and the origins of the controversial inter-ministerial committee statement. Shortly after his appointment, Zwane travelled to Switzerland and met Glencore CEO Ivan Glasenberg to discuss the Guptas' purchase of Glencore's Optimum coal complex.

Zwane said the purpose of the meeting was to save jobs. In December 2015, Tegeta Exploration & Resources, which is partly owned by the Guptas and President Jacob Zuma's son Duduzane, bought Optimum.

Bell Pottinger sent Fin24 a picture of a page from a confidential document containing the IMC's recommendations to Cabinet on 18 July, indicating that they had "a scoop" for us.

Spokesperson Nick Lambert said in a WhatsApp exchange over five days that his source indicated that Zwane would be happy to speak to Fin24, and provided two cellphone numbers for the minister. Fin24 reached out to the minister's spokesperson Martin Mediela.

Mediela told Fin24 in July by telephone that it was a matter for Cabinet to decide on and referred Fin24 to Zuma for comment. The spokesperson later told Fin24 that Zuma had indicated to Zwane that he should not to speak out on the matter at the time.

Lambert again recommended we speak to Zwane directly and not the spokesperson, which Fin24 decided not to do. Because there was no proof of the document's authenticity or official confirmation thereof, Fin24 decided not to run with the story.

This week Bell Pottinger confirmed that it had been in possession of the document at the time, but said the source that provided them with the document was not the Guptas and that they had never met or spoken to Zwane before.

"Its source was not the Gupta family as News24 implies and Bell Pottinger has never met with or spoken to Minister Zwane or any of his advisors," Bell Pottinger said in an emailed response to questions on Tuesday. (See the full response at the end of the story.)

Approached for comment on Wednesday, Oakbay Investments CEO Nazeem Howa told Fin24 in an email response that "any questions regarding Bell Pottinger should be directed to Bell Pottinger".

Attempts to reach Mediela for comment via email and telephonically failed on Wednesday.

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IM4
388

national treasury
Department:
National Treasury
REPUBLIC OF SOUTH AFRICA

Mr M R Seleke
Director-General
Department of Public Enterprises
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Dear DG Seleke

REPORTED DENEL REACTION TO ARTICLES THAT NATIONAL TREASURY TAKING DENEL TO COURT

Our discussion of 30 August 2016 and your letter of 9 May 2016 have reference.

On 29 August 2016, the Sunday Times Article reported in its article entitled "Treasury 'taking Denel to court' to halt Gupta deal" that National Treasury had sent letters to Denel demanding that it dissolve the Denel Asia joint venture or face legal action. Pursuant to our discussion of 30 August 2016, the National Treasury has undertaken a due diligence and there is no record of any such letter. I have written to Denel to have the company provide us with a copy of the letter, should they have such a letter in their possession, or provide an explanation for their press statement, in the event that they do not. You have been copied on this correspondence.

More fundamentally, as we agreed, it is unacceptable that any state-owned entity launch a public attack (and in this case, a vicious attack) on any Minister. Not only is such an attack out of line with the spirit of cooperative governance and good faith, but in transgression of the President's statement of 11 December 2015 that "no state-owned entity will dictate to Government how it should be assisted". All state-owned companies (SOCs) must be accountable. Moreover, they must seek to work together with other parts of government to resolve differences constructively rather than dealing with such matters legally or through the media.

Denel currently has in place a R1.85 billion government guarantee which has been fully utilised to raise debt financing. When government has issued guarantees to SOCs, conditions were attached precisely with the aim of providing government with the tools to strengthen its oversight and manage the fiscal risks that can arise from such guarantees. The way in which a number of the SOCs, including Denel, are conducting themselves, demonstrating poor governance and taking up matters in the press rather than trying to resolve these matters in mutual trust and good faith directly with government, is damaging to the SOC, government and public sector in general, undermining confidence and contributing directly to an increase in fiscal risk. In line with

389

our discussion, I would like to propose that we meet during the course of next week to look at how the entities in the Department of Public Enterprises (DPE) portfolio can be held to account in line with the legislative provisions.

I have noted that in your letter of 9 May 2016, you indicated that any information requested from the SOCs within the DPE portfolio must be channeled through your office. National Treasury strives to ensure that DPE is involved in any interactions it has with the entities for which you are the Executive Authority, as we have done in the most recent correspondence. We do so even though the National Treasury does have original powers to interact with all organs of state over fiscal and financial matters. However, from time to time, circumstances do require direct engagement with the SOCs which is also contemplated and provided for in the PFMA.

I would like to also bring you attention to the legal advice that National Treasury has received with respect to the Denel Asia transaction, as was detail in correspondence from the Minister of Finance to your Minister dated 10 June 2016 and 1 August 2016, Specifically:

- The conditions attached in terms of Section 70(1) of the PFMA to the R1.85 billion guarantee that has been issued to Denel included a requirement that "Any transactions undertaken in terms of Section 54 of the PFMA are subject to approval of the Minister [of Finance] as well as the Minister of Public Enterprises". The conditions create a distinct legal obligation on Denel to obtain both Ministers' approval prior to entering into the types of transactions envisaged in Section 54(2) of the PFMA. Moreover, the deeming provision contained in Section 54(3) of the PFMA is not imported.
- In terms of Section 51(1)(g), a reasonable period could not be assumed to be the 30-day period envisaged in Section 54 of the PFMA. and that the period that constitutes a reasonable time depends on the circumstances of each case, which in this case included, amongst others, the following:
  - On 10 December 2015, a new Minister was appointed;
  - By 13 December 2015, that Minister was replaced by another;
  - As a result thereof, the markets were affected and the Minister and National Treasury had to concentrate its efforts on restoring market confidence;
  - The National Treasury closed during the Christmas and New Year period and its staff were on holiday; and
  - January and February are the busiest months for the Minister and National Treasury because of the budget preparations.
- There is no assumption of deemed approval incorporated into Section 51 as is provided for in Section 54: a decision from the National Treasury is required prior to the formal establishment of a company.

Based on this legal advice, contrary to Denel's assertion that the approval process has been concluded as allowed for by the PFMA, decisions are still required from both Ministers. I have noted that your Minister has indicated that she has not as yet granted approval for the transaction. Similarly the Minister of Finance has also not given his approval. It would assist if you can furnish us with any correspondence from your Minister to Denel outlining that she has not approved the Denel Asia transaction.

National Treasury has proceeded with evaluating the application that had been made by Denel. Both the original submission and the supplementary information provided by Denel relating to the establishment of Denel Asia has been carefully reviewed. A number of issues have been

390

identified which have the potential to negatively impact on Denel. As I have already highlighted, Denel currently has in place a R1.85 billion government guarantee. Several rating agencies have highlighted government's contingent liability exposure to state owned companies as a risk for the sovereign credit rating. A call or an increase in the exposure could negatively impact on the sovereign rating and could have negative repercussions for government's capacity to deliver on its objectives to promote growth, development and job creation.

I trust that you will find the above in order.

Kind regards

LUNGISA FUZILE
Acting **DIRECTOR-GENERAL: NATIONAL TREASURY**
Date: 2/9/2011

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391

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MINISTER: FINANCE
REPUBLIC OF SOUTH AFRICA

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Mr Kuben Naidoo
Registrar of Banks
South African Reserve Bank
PO Box 427
PRETORIA
0001

Dear Mr Naidoo

REPORTS BY REGISTERED BANKS REGARDING ACCOUNTS OF OAKBAY GROUP

1. You will be aware from continued media statements by the CEO of Oakbay Investments and its "portfolio companies" (as the CEO has termed them) regarding approaches to me relating to the closure of accounts in the Oakbay group of companies.

2. My understanding is that the entities in the Oakbay group comprise the following:

   a) Mining interests in Oakbay Resources and Energy,Shiva Uranium,Tegeta Exploration and Resources, JIC Mining Services and Black Edge Exploration;

   b) Media interests in TNA Media (Pty) Ltd , New Age and ANN 7;

   c) Other interests in VR Laser Services, Islandsite Investments 180, Confident Concepts and Jet Airways.

3. In these approaches (culminating in a letter of 28 June 2016 following a similar letter on 24 May 2016, both of which I attach) Oakbay has asserted that Absa, FNB, Nedbank, Sasfin and Standard Bank, without justification, and as "*the result of an anti-competitive and politically-motivated campaign designed to marginalise our businesses*" (see the further letter of 8 April 2016, which I also attach), closed business accounts of Oakbay entities.

4. Oakbay contends that the consequences for it and its employees (asserted in different letters as numbering 4 500 and 7 500) of the closure of accounts are serious, following the decisions of KPMG and Sasfin, too, to terminate their relationships with the Oakbay group as auditors and JSE sponsor respectively.

5. Clearly the allegations made are inherently adverse to good market conduct practices and the integrity of our banking (and with it, financial) system. At the same time it would be my concern that no loss of jobs be caused in the South African economy by any irregularities such as those suggested by Oakbay.

6. I have pointed out to Oakbay that on the independent legal advice I had taken, there are legal impediments to any registered bank discussing client-related matters with

392

me, and furthermore that I cannot act in any way that undermines the regulatory authorities. I have however pointed out that Oakbay has legal remedies, including approaching a court. (I attach in that regard my letter of 24 May 2016, with its attached information document.) I have repeatedly encouraged Oakbay to exercise recourse to a court to establish the legal propositions and factual allegations for which it contends.

7. Oakbay however, following what it terms *"detailed discussions with several legal advisors"*, expresses *"the strong view that given the contractual rights the banks have, any legal approach may indeed be still-born"*. Oakbay also records that it has been told by *"the key regulators such as the Banking Ombud and the National Consumer Council that our matter falls outside their jurisdiction. It certainly is our view that this flies in the face of the Banking Code of Good Practice, yet, as case law suggest, will fail in a court of law. Given this position, as well as the decisions of the responsible regulators, we seem to have no option open to us other than our appeal to you for assistance."* (Oakbay letter of 24 May 2016, attached)

8. Oakbay asserts in the same letter that *"no bank has given us any indication of any wrongdoing on our side"*.

9. This letter statement is to be viewed in conjunction with an interview of Oakbay's CEO by Carte Blanche (screened on 19 June 2016), in which Mr Howa stated that one of the banks closing Oakbay's accounts gave the following as a reason.

"Without waiving our rights not to furnish reasons for our decision 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] UK's Bribery Act prevent us from having dealings with any person or entity who[m] 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.
... We have (conducted) enhanced due diligence of Oakbay entities and as required by the FICA and have concluded that continuing with any bank-customer relationship with them would increase our risk of exposure to contravention of the mentioned law to an unacceptable level."

10. Oakbay has persisted in its series of approaches directed to me. As appears from the above, acting on legal advice, it declines to seek any declaratory ruling from a court to support either its legal contentions suggesting a duty on the part of the Minister of Finance to intervene with the banks or its factual contentions that the banks' conduct has an irregular and indeed improper basis. This stance has however been accompanied by a series of radio interviews and media statements by spokespersons for Oakbay in which it continues to assert that *"the response from the institutions [is] intransigent"* (as Mr Howa put it in his letter to me of 17 April 2016), and to assert that the closure of accounts took place on an irregular basis.

11. It is my concern that the continued allegations of irregularity by the banks concerned, in circumstances in which Oakbay itself refuses to obtain an appropriate declaratory order from the courts, is harmful to the reputation of South Africa's financial system within the global financial system. As you are aware, domestic banks are not only regulated domestically, but also by oversees regulators, in terms of demanding international standards like Basel III and Financial Action Task Force recommendations on money-laundering and financing terrorism. Cabinet has also noted that it is in the national interest to ensure that the domestic financial sector is regulated according to international standards in order to promote economic growth and reduce risk to the fiscus.

393

12. Cabinet, since the 2008 global financial crisis, took numerous decisions to improve market conduct practices by financial institutions. This is to ensure that customers of financial institutions are treated fairly at all times.

13. In the circumstances, I am considering the merits of obtaining a definitive court ruling on the whether:

(a) the Minister of Finance (or Governor of the SARB, or Registrar of Banks) has the power in law to intervene with the banks concerned regarding their closure of the Oakbay accounts held with them; and

(b) a basis exists in fact for the contention that the relevant banks terminated the accounts in question for a reason unrelated to their statutory duties not to have dealings with any entity if a reasonably diligent and vigilant person would suspect that such dealings could directly or indirectly make that bank a party or accessory to contraventions of the relevant laws (identified above).

14. As noted above, it is apparent from Oakbay's own public statement to Carte Blanche on 19 June 2016 that at least one of its erstwhile banks has given as the basis for the closing of accounts that bank's statutory duty to report under Financial Intelligence Centre Act 38 of 2001 ("FICA").

15. In view of the above, I request you to inform me at your earliest convenience, if at all possible by the 04th August 2016 of the following:

(a) whether your office has indeed received from the aforementioned banks reports in terms of the applicable banking legislation relating to any entities in the Oakbay Group, as listed above (or otherwise);

(b) over what period(s);

(c) in respect of which entities; and

(d) in what respective amounts relating to each such entity.

It is not for my purposes necessary, at this stage, to request further details regarding the nature of each transaction reported, or the parties thereto, but you may hold a different view.

16. Your urgent response would be greatly appreciated.

Yours sincerely

PRAVIN J GORDHAN, MP
MINISTER OF FINANCE
Date: 28 - 07 - 2016

cc. Mr L Kganyago
Governor: South African Reserve Bank

Mr M Michell
Director: Financial Intelligence Centre

394

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MINISTER: FINANCE
REPUBLIC OF SOUTH AFRICA

Private Bag X115, Pretoria, 0001, Tel: +27 12 323 8911, Fax: +27 12 323 3262
PO Box 29, Cape Town, 8000, Tel: +27 21 464 6100, Fax: +27 21 461 2934

Mr Murray Michell
Director
Financial Intelligence Centre
Private Bag X177
PRETORIA
0001

Dear Mr Michell

REPORTS BY REGISTERED BANKS REGARDING ACCOUNTS OF OAKBAY GROUP

1. You will be aware from continued media statements by the CEO of Oakbay Investments and its "portfolio companies" (as the CEO has termed them) regarding approaches to me relating to the closure of accounts in the Oakbay group of companies.

2. My understanding is that the entities in the Oakbay group comprise the following:

   a) Mining interests in Oakbay Resources and Energy,Shiva Uranium,Tegeta Exploration and Resources, JIC Mining Services and Black Edge Exploration;

   b) Media interests in TNA Media (Pty) Ltd , New Age and ANN 7;

   c) Other interests in VR Laser Services, Islandsite Investments 180, Confident Concepts and Jet Airways.

3. In these approaches (culminating in a letter of 28 June 2016 following a similar letter on 24 May 2016, both of which I attach) Oakbay has asserted that Absa, FNB, Nedbank, Sasfin and Standard Bank, without justification, and as "the result of an anti-competitive and politically-motivated campaign designed to marginalise our businesses" (see the further letter of 8 April 2016, which I also attach), closed business accounts of Oakbay entities.

4. Oakbay contends that the consequences for it and its employees (asserted in different letters as numbering 4 500 and 7 500) of the closure of accounts are serious, following the decisions of KPMG and Sasfin, too, to terminate their relationships with the Oakbay group as auditors and JSE sponsor respectively.

395

5. Clearly the allegations made are inherently adverse to good market conduct practices and the integrity of our banking (and with it, financial) system. At the same time it would be my concern that no loss of jobs be caused in the South African economy by any irregularities such as those suggested by Oakbay.

6. I have pointed out to Oakbay that on the independent legal advice I had taken, there are legal impediments to any registered bank discussing client-related matters with me, and furthermore that I cannot act in any way that undermines the regulatory authorities. I have however pointed out that Oakbay has legal remedies, including approaching a court. (I attach in that regard my letter of 24 May 2016, with its attached information document.) I have repeatedly encouraged Oakbay to exercise recourse to a court to establish the legal propositions and factual allegations for which it contends.

7 Oakbay however, following what it terms *"detailed discussions with several legal advisors"*, expresses *"the strong view that given the contractual rights the banks have, any legal approach may indeed be still-born"*. Oakbay also records that it has been told by "the key regulators such as the Banking Ombud and the National Consumer Council that our matter falls outside their jurisdiction. It certainly is our view that this flies in the face of the Banking Code of Good Practice, yet, as case law suggest, will fail in a court of law. Given this position, as well as the decisions of the responsible regulators, we seem to have no option open to us other than our appeal to you for assistance." (Oakbay letter of 24 May 2016, attached)

8. Oakbay asserts in the same letter that *"no bank has given us any indication of any wrongdoing on our side"*.

9. This latter statement is to be viewed in conjunction with an interview of Oakbay's CEO by Carte Blanche (screened on 19 June 2016), in which Mr Howe stated that one of the banks closing Oakbay's accounts gave the following as a reason:

"Without waiving our rights not to furnish reasons for our decision 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] UK's Bribery Act prevent us from having dealings with any person or entity who[m] 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.
...We have (conducted) enhanced due diligence of Oakbay entities and as required by the FICA and have concluded that continuing with any bank-customer relationship with them would increase our risk of exposure to contravention of the mentioned law to an unacceptable level."

10. Oakbay has persisted in its series of approaches directed to me. As appears from the above, acting on legal advice, it declines to seek any declaratory ruling from a court to support either its legal contentions suggesting a duty on the part of the Minister of Finance to intervene with the banks or its factual contentions that the banks' conduct has an irregular and indeed improper basis. This stance has however been accompanied by a series of radio interviews and media statements by spokespersons for Oakbay in which it continues to assert that *"the response from the institutions [is] intransigent"* (as Mr Howe put it in his letter to me of 17 April 2016), and to assert that the closure of accounts took place on an irregular basis.

11. It is my concern that the continued allegations of irregularity by the banks concerned, in circumstances in which Oakbay itself refuses to obtain an appropriate declaratory

396

order from the courts, is harmful to the reputation of South Africa's financial system within the global financial system. As you are aware, domestic banks are not only regulated domestically, but also by overseas regulators, in terms of demanding international standards like Basel III and Financial Action Task Force recommendations on money-laundering and financing terrorism. Cabinet has also noted that it is in the national interest to ensure that the domestic financial sector is regulated according to international standards in order to promote economic growth and reduce risk to the fiscus.

12. Cabinet, since the 2008 global financial crisis, took numerous decisions to improve market conduct practices by financial institutions. This is to ensure that customers of financial institutions are treated fairly.

13. In the circumstances, I would be glad to be advised whether or not the registered banks have indeed reported to the Financial Intelligence Centre ("FIC") as indicated by the above public statement by Mr Howa, or whether no such reports have been made.

14. In the circumstances, I am considering the merits of obtaining a definitive court ruling on whether:

(a) the Minister of Finance (or Governor of the SARB, or Registrar of Banks) has the power in law to intervene with the banks concerned regarding their closure of the Oakbay accounts held with them; and

(b) a basis exists in fact for the contention that the relevant banks terminated the accounts in question for a reason unrelated to their statutory duties not to have dealings with any entity if a reasonably diligent and vigilant person would suspect that such dealings could directly or indirectly make that bank a party or accessory to contraventions of the relevant laws (identified above).

15. As noted above, it is apparent from Oakbay's own public statement to Carte Blanche on 19 June 2016 that at least one of its erstwhile banks has given as the basis for the closing of accounts that bank's statutory duty to report under Financial Intelligence Centre Act 38 of 2001 ("FICA").

16. In view of the above, I request you, pursuant to your powers aforementioned, read with section 29(4)(a) and (c) of the FICA, to inform me at your very earliest convenience (if at all possible by 4 August 2016).

(a) Whether FIC has indeed received from the aforementioned banks reports in terms of the FICA relating to any entities in the Oakbay Group, as listed above (or otherwise);

(b) over what period(s);

(c) in respect of which entities; and

(d) in what respective amounts relating to each such entity.

It is not for my purposes necessary, at this stage, to request further details regarding the nature of each transaction reported, or the parties thereto, but you may hold a different view.

397

17 I copy this letter to the Governor, given the Reserve Bank's own interest in issues of financial stability to which I have referred, and to the Registrar of Banks, given his own institutional interest (in terms of sections 4 and 7 of the Banks Act) in the matters raised.

18. Your urgent response would be greatly appreciated.

Yours sincerely

PRAVIN J GORDHAN, MP
MINISTER OF FINANCE
Date: 28 - 07 - 2016

cc. Mr L Kganyago
Governor: South African Reserve Bank

Mr K Naidoo
Registrar of Banks: South African Reserve Bank

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1 August 2016
Ref: 14/8/1 - Ministry

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Mr P J Gordhan, MP
Minister of Finance
Private Bag X115
Pretoria
0001

Dear Honourable Minister

REPORTS BY REGISTERED BANKS REGARDING ACCOUNTS OF OAKBAY GROUP

I acknowledge receipt of your letter dated 28 July 2016.

I have carefully studied the matters raised in the letter and the request for information concerning possible reports made under section 29 of the Financial Intelligence Centre Act, 2001 (the FIC Act).

The disclosure of information concerning reports under the FIC Act is strictly governed by, among others, section 40 of the Act. By virtue of these provisions the Centre is allowed to disclose such information only in limited circumstances and only to a limited group of potential recipients. The FIC Act, in section 29(4)(c), provides for an exception to these controls where such information is to be used for the purpose of legal proceedings. The mechanism provided for in the FIC Act where such information is to be tendered in evidence in legal proceedings is by means of a certificate issued under section 39 of the Act.

Given that your letter indicates your intention to approach a court for a definitive ruling on certain questions of law, and by virtue of my powers under the FIC Act, I have decided to issue a certificate under section 39 of the Act, relating to possible reports that may have been made in relation to the entities mentioned in your letter. I must emphasise that such a certificate is only to be used for the purpose of introducing evidence in legal proceedings and will only confirm or refute the receipt of reports pursuant to the FIC Act. Such a certificate will not

financial intelligence centre
REPUBLIC OF SOUTH AFRICA

899

disclose any information concerning the content of any particular report which the Centre has received.

The certificate will be issued on or before 4 August 2016.

Kind regards

MURRAY MICHELL
DIRECTOR

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national treasury
Department:
National Treasury
REPUBLIC OF SOUTH AFRICA

Private Bag X115, Pretoria, 0001 Tel: +27 12 315 5904 Fax: +27 12 328 5145

Dr Cassius Lubisi
Director-General
The Presidency
Private Bag X1000
PRETORIA
0001

Dear Dr Lubisi

FINANCIAL INTELLIGENCE CENTRE AMENDMENT BILL OF 2015

I am writing to you regarding the above-mentioned matter, and thought it prudent to formally advise and kindly enquire on the status of the Financial Intelligence Centre Amendment Bill of 2015 ("the Bill").

The Bill seeks to bring the current Act in line with the Constitution in certain respects and to improve the transparency and integrity of the South African financial system in its objectives to combat financial crimes, which includes tax evasion and money laundering. The Bill will also facilitate compliance with the latest international standards set by the Financial Action Task Force ("FATF"). As South Africa is a member of the FATF and as these standards are considered to be the international norm for measures to combat financial crime, it is necessary that South Africa implement these standards to avoid being identified as a non-complying country.

It is, therefore, critical that the Bill be signed into law as soon as possible, so that the necessary regulations can be developed in time for the amendments to take effect by early next year. The process to bring the Bill, with the implementing regulations, into force should ideally be completed before the February 2017 FATF plenary meeting, when South Africa is scheduled to report that it has fully-addressed key shortcomings in relation to the international standards, with regulations in place and in force. The effective implementation of these provisions will then be tested fully when South Africa undergoes a comprehensive peer review in 2019.

Background
As you are aware, this Bill was presented to Cabinet Committees on three occasions by the Minister of Finance before it was recommended for Cabinet's approval to publish it for public comment in April 2015. You will recall that it was during this process that Cabinet directed that the Bill should include both private and public sectors in the concept of Politically Exposed Persons, which brought about the change to replace "Politically Exposed Persons" with the

401

concept of "Prominent Influential Persons". Following publication, the public comments were processed, culminating in Cabinet approving the Bill in September 2015 for tabling in Parliament. The Bill was tabled in Parliament in October 2015, and followed an extremely rigorous public hearing process. Before tabling in the National Assembly the Bill also underwent scrutiny by the Office of the Chief State Law Adviser, in particular in relation to the constitutionality of its provisions. No material changes were made to the Bill in Parliament, especially on the issue of Prominent Influential Persons as endorsed by Cabinet, despite the objections of the banking sector.

Further, no constitutional issues were raised against the Bill, during the various public consultation processes. In fact, to the contrary, the Bill will make critical amendments to the current Act to give effect to a Constitutional Court judgment.

The Importance of the amendments

The Bill will enable South African supervisors to comply with the Constitution in the exercise of their oversight functions, and will improve the transparency and integrity of the South African financial system. This makes it harder for natural persons who are involved in illegitimate activities, tax evasion or otherwise facilitating illicit financial flows to hide behind legal entities such as shell companies and trusts. The extent of abuse of these structures to hide the identities of those involved in these illegal activities behind corporate veils, was abundantly demonstrated with the release of the so-called "Panama papers".

South Africa, as with all members of the global network of countries subscribing to the FATF's international standards, has been going through regular peer reviews to test its implementation of these standards. As a result the FATF has been monitoring South Africa's actions to align its regulatory requirements with the international standards in a targeted mutual evaluation follow-up process since its last review in 2009. As a major financial centre in the region, the International Monetary Fund (IMF, 2014) also assessed compliance by SA banks as the gateway for funds flowing from Sub-Saharan countries to the rest of the world, and made recommendations to address vulnerabilities. The amendments in the Bill are, therefore, an important step in aligning South Africa's measures to combat money laundering and the financing of terrorism with generally accepted international norms, and thereby fulfilling South Africa's obligations as a long standing and respected member of FATF.

Failure to meet such international standards, as set by FATF and other international organisations such as the United Nations and the Global Forum on Transparency and Exchange of Information for Tax Purposes, would most certainly result in South Africa being isolated from the global financial system, with major adverse repercussions on the South African economy. The practical implications of such isolation can be seen from other countries (including in the Southern and Eastern African region) which have been the subject of negative market perceptions of the quality of regulation of their financial sectors and weaknesses in the integrity of their financial systems. In those countries, banks and other financial institutions have found it near impossible to maintain access to the global financial system.

As the only African country to be a member of FATF, such a delay in attaining compliance will also damage the country's reputation in Africa, especially at a time when illicit financial flows from Africa have been highlighted as a concern.

Concerns around Politically Exposed or Influential Persons

I would like to assure you that the provisions contained in the Bill concerning prominent persons do not unfairly target politicians, members of the executive, public servants or the judiciary. On the contrary, these provisions will regulate banks to treat South African politically-exposed and

402

other prominent persons fairly by not automatically regarding them as high-risk, or by denying them financial services. The concept of politically-exposed and other prominent persons does not imply that such a person is presumed to be guilty of a financial crime, or that they cannot transact with a financial institution. The purpose of the amendments is simply to help society, Government and financial institutions to guard against abuse through money-laundering.

The FATF standards (including on politically-exposed persons) are international standards recognised by more than 190 countries (including all G20 countries and specifically all BRICS countries) and are, therefore, adopted even by countries that are not members of the FATF. These standards are used as the norm by which multilateral institutions such as the IMF and the World Bank, as well as regulatory authorities in many countries, assess a country's ability to combat financial crime and be part of the global financial system. For example, "BRICS" countries such as Brazil, Russia and China have already put measures in place to identify domestic politically exposed persons.

It is true that South Africa has gone slightly further in defining the concept of a domestic prominent person by including also prominent persons from the private sector, namely those doing business above a specified threshold value with the Government. However, this approach was specifically initiated by Cabinet after thorough consideration of the particular need to treat prominent persons in the public and private sectors even-handedly. It is submitted that this approach is correct and demonstrates leadership by South Africa that even FATF should consider following.

Conclusion

We are aware that some of the FATF standards, noble and well-intending as they are, are not easy to implement. However, other emerging countries also face the same challenges as South Africa in implementing them. It is in this regard that we have committed ourselves to phase in some of the provisions in the Bill. Further, under the Twin Peaks regulatory regime, we will also explore regulatory measures to ensure that financial institutions always treat existing and potential clients fairly when making decisions to open or close accounts, and should consider providing reasons to them for such decisions.

We have also considered the letter sent to the President by the Progressive Professionals Forum, which was sent to the National Treasury by the media. The letter clearly demonstrates a misunderstanding of the Bill, and also of the implications for South Africa should the Bill not be signed into law as soon as possible. No attempt is made in the letter to explain how the Bill may not be constitutional. Neither did the Forum provide any comments on the Bill to Cabinet or Parliament at any stage of the various consultation processes that preceded the passing of the Bill, nor were any constitutional objections raised whilst the Bill was before the two houses of Parliament.

We have also noted the meeting that the President had with the Black Business Council on 9 September 2016. According the Presidency's press statement thereafter the Council raised objections to the Bill and asked the President not to sign the Bill into law. We do not know if these include constitutional objections. The Council did not comment on the Bill during the various stages of the legislative process. As to concerns about the impact of the Bill on among others the ability to trade if accounts are frozen, we are available to meet with the Council to discuss these concerns. However, these concerns are not, we submit, a constitutional basis for referring the Bill back to Parliament.

403

We are also mindful that the reporting about the Bill in the media may result in the matter of the Bill not being law, being raised at the FATF meeting in October 2016 and risk isolating South Africa for the global financial systems.

It is my appeal and hope that you will assist in the favourable consideration of the Bill by the President. By assenting to the Bill, we as Government, industry and South Africans, will be sending a strong and positive message about our genuine effort to combat financial crime, protect the integrity of our financial system and our tax base, and remain part of the global financial system. However, should the President have a constitutional reservation about the Bill, it would be useful and appreciated if the reservation could, as soon as possible, be shared with us for discussion.

If there are any questions about the Bill, I am available anytime to further discuss them with you.

Yours sincerely

LUNGISA FUZILE
DIRECTOR-GENERAL
DATE: 22/9/2016

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404

THE PRESIDENCY: REPUBLIC OF SOUTH AFRICA
Private Bag X1000, Pretoria, 0001

NATIONAL ASSEMBLY

QUESTIONS FOR WRITTEN REPLY

QUESTION NO: 1977

Date Published: October 2016

Mr D J Maynier (DA) to ask the President of the Republic:

Whether he has received any petitions concerning the Financial Intelligence Centre Amendment Bill [B33B-2015] sent to him for assent; if so, for each specified petition so received, (a) who furnished him with the specified petition, (b) when was the specified petition furnished and (c) what was the purpose of the petition?NW2288E

Reply:

The Presidency continues with the processing of the Financial Intelligence Centre Amendment (FICA) Bill which has been passed by Parliament and referred to me for assent and signing into law.

Yes, I have received formal objections to the signing of the Bill from the Progressive Professionals Forum and the Black Business Council. When I am petitioned not to sign a bill, I have an obligation to consider the merits of such

objection focusing mainly on whether the interested parties raise valid constitutional issues.

I have also received formal correspondence in support of the Bill from Honourable Floyd Shivambu, Economic Freedom Fighters Deputy President and Chief Whip and Mr Lawson Naidoo, Executive Secretary of CASAC, the Council for the Advancement of the South African Constitution.

406 IM 46

President Zuma refers Fica Amendment Bill to the National Assembly

29 November 2016 - 12:00am

President Jacob Zuma has in terms of section 79 (1) of the Constitution referred the Financial Intelligence Centre Amendment Bill back to the National Assembly for reconsideration.

"I have given consideration to the Bill in its entirety and certain submissions regarding the constitutionality of the Bill. After consideration of the Bill and having applied my mind to it, I am of the view that certain provisions of the Bill do not pass constitutional muster. In terms of section 79 (1) of the Constitution I have therefore referred the Bill to the National Assembly for reconsideration for the reasons set out to the Speaker of the National Assembly," the President said.

The President specifically raised concern with the provisions of the Bill relating to warrantless searches, which according to him fall short of the constitutional standard required for the provision not to unjustifiably limit the right to privacy.

The President further said he was of the view that even though the purpose to be served by the Bill was very important and pressing, however all the provisions of the Bill must be in line with the Constitution.

Enquiries: Dr Bongani Ngqulunga on 082 308 9373 or bongani@presidency.gov.za

Issued by: The Presidency
Pretoria

407

28 November 2016

Dear Madam Speaker,

REFERRAL OF THE FINANCIAL INTELLIGENCE CENTRE AMENDMENT BILL (B 33B – 2015) TO THE NATIONAL ASSEMBLY

1. The above Bill was passed by Parliament and referred to me for assent and signing into law.

2. I have given consideration to the Bill in its entirety and certain submissions regarding the constitutionality of the Bill.

3. After consideration of the Bill and having applied my mind to it, I am of the view that certain provisions of the Bill do not pass constitutional muster.

4. The Constitution requires that the President must assent to and sign a Bill referred to him by the National Assembly. However, in terms of section 79(1) of the Constitution, if the President has reservations about the constitutionality of the Bill, he may refer it back to the National Assembly for reconsideration.

5. In terms of section 79(1) of the Constitution, I hereby refer the attached Bill to the National Assembly for reconsideration for the reasons set out below.

6. The following provisions of the Bill deal with searches, and I quote them for convenience:

   a. "**Powers of access by authorised representative to records in respect of reports required to be submitted to Centre** 25 **27A.**

      "27A. (1) Subject to subsection (2), an authorised representative of the Centre has access during ordinary working hours to any records kept by or

on behalf of an accountable institution in terms of section 22, 22A or 24, and may examine, make extracts from or copies of, any such records for the purposes of obtaining further information in respect of a report made or ought to be made in terms of section 28, 28A, 29, 30 (1) or 31.

(2) The authorised representative of the Centre may, except in the case of records which the public is entitled to have access to, exercise the powers mentioned in subsection (1) only by virtue of a warrant issued in chambers by a magistrate or regional magistrate or judge of an area of jurisdiction within which the records or any of them are kept, or within which the accountable institution conducts business.

(3) A warrant may only be issued if it appears to the judge, magistrate or regional magistrate from information on oath or affirmation that there are reasonable grounds to believe that the records referred to in subsection (1) may assist the Centre to identify the proceeds of unlawful activities or to combat money laundering activities or the financing of terrorist and related activities.

(4) A warrant issued in terms of this section may contain such conditions regarding access to the relevant records as the judge, magistrate or regional magistrate considers appropriate.

(5) An accountable institution must without delay give to an authorised representative of the Centre all reasonable assistance necessary to enable that representative to exercise the powers mentioned in subsection (1)."

b. **Amendment of section 45B of Act 38 of 2001, as inserted by section 16 of Act 11 of 2008**

"32. Section 45B of the principal Act is hereby amended—

(a) by the substitution for subsection (1) of the following subsection:

"(1) [For] An inspector appointed in terms of section 45A may enter the premises, excluding a private residence, of an accountable institution or reporting institution which is registered in terms of section 43B or otherwise licensed or authorised by the supervisory body and inspect the

affairs of an accountable institution or reporting institution, as the case may be, for the purposes of determining compliance with this Act or any order, determination or directive made in terms of this Act [an inspector may at any reasonable time and on reasonable notice, where appropriate, enter and inspect any premises at which the Centre or, when acting in terms of section 45(1), the supervisory body reasonably believes that the business of an accountable institution, reporting institution or other person to whom the provisions of this Act apply, is conducted].";

(b) by the insertion after subsection (1) of the following subsections:

"(1A) An inspector appointed in terms of section 45A may, for the purposes of determining compliance with this Act or any order, determination or directive made in terms of this Act, and on the authority of a warrant issued under subsection (1B), enter—

(a) a private residence; or
(b) any premises other than premises contemplated in s ubsection (1),

If the Centre or, when acting in terms of section 45(1), the supervisory body, as the case may be, reasonably believes that the residence or premises are used for a business to which the provisions of this Act apply.

(1B) A magistrate or judge may issue a warrant contemplated in subsection (1A)—[1]

(a) on written application by the Centre or a supervisory body setting out under oath or affirmation why it is necessary for an inspector to have access to the premises; and
(b) if it appears to the magistrate or judge from the information under oath or affirmation that—
(i) there are reasonable grounds for suspecting that an act of non-compliance has occurred;
(ii) entry to the residence or premises is likely to yield information pertaining to the non-compliance; and
(iii) entry to the residence or premises is reasonably necessary for the purposes of this Act.
(1C) An inspector otherwise required to obtain a warrant under

[1] The warrant contemplated in section (1A) will stipulate conditions of search and specify premises to be searched.

subsection (1B) may enter any premises without a warrant—

(a) with the consent of the owner or person apparently in physical control of the premises after that owner or person was informed that he or she is under no obligation to admit the inspector in the absence of a warrant; or

(b) if the inspector on reasonable grounds believes that—

(i) a warrant will be issued under subsection (1B) if the inspector applied for it; and

(ii) the delay in obtaining the warrant is likely to defeat the purpose for which the inspector seeks to enter the premises.

(1D) Where an inspector enters premises without a warrant, he or she must do so—

(a) at a reasonable time;

(b) on reasonable notice, where appropriate; and

(c) with strict regard to decency and good order, including to a person's right to—

(i) respect for and the protection of dignity;

(ii) freedom and security; and

(iii) personal privacy.

(1E) Subsection (1D)(c) applies with the necessary changes where an inspector enters premises on the authority of a warrant.";

(c) by the insertion after subsection (2) of the following subsection:

"(2A) When acting in terms of subsection (2)(b) or (d), an inspector of—

(a) the Centre;

(b) a supervisory body referred to in item 1 or 2 of Schedule 2; or

(c) any other supervisory body meeting the prescribed criteria, may order from an accountable institution or reporting institution under inspection, the production of a copy of a report, or the furnishing of a fact or information related to the report, contemplated in section 29.

(2B) If the inspector of a supervisory body, referred to in subsection (2A)(b) or (c), obtained a report, or a fact or information related to the report, under subsection (2A), that supervisory body must request information from the Centre under section 40(1C) relating to the report contemplated in section 29 which may be relevant to such inspection.

(2C) For purposes of subsection (2B), the Centre must provide the information to the inspector of the supervisory body in accordance with section 40.";

(d) by the substitution for subsection (4) of the following subsection: "(4) The Centre or a supervisory body may recover all expenses necessarily incurred in conducting

an inspection from an accountable institution[,] or reporting institution [or person] inspected.";

(e) by the substitution in subsection (5)(b) for subparagraph (iv) of the following subparagraph:
"(iv) except information contemplated in subsections (2A) and (2C), if the Director or supervisory body is satisfied that it is in the public interest.";

(f) by the deletion in subsection (6) of paragraph (b); and

(g) by the deletion of subsection (7)."

7. The proposed new section 45B(1C), which amends section 45B of the principal Act by the introduction of warrantless searches is likely to be unconstitutional for the following reasons:

a. A search limits the right to privacy in section 14 of the Constitution. To pass constitutional muster, the limitation must be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including those listed in section 36(1)(a) to (e) of the Constitution. The proposed section 45B(1C) may not meet this standard of justification for the reasons that follow.

b. Searches may result in criminal prosecution offer the strongest reason of the warrant requirement. In those circumstances, legislation that authorises warrantless searches, such as the proposed section 45B(1C), must provide a constitutionally adequate substitute for a warrant. The authorisation must not generally be overbroad because this would create an impermissible threat to the right to privacy. The legislative provisions must not extend the scope of permissible searches beyond the situations in which the expectations of privacy is low – potentially reaching to innocent activity in private homes. The provisions should also not give inspectors too much discretion in their searches, endangering the privacy of property owners and occupiers who are not adequately informed of the limits of the search or inspection. A warrant mitigates the effects of a statute's broad scope, as a neutral officer would weigh the State's justifications for the search and would stipulate the time, place and scope of the search. These statements come directly from judgments of the Constitutional Court in, especially, *Magajane v Chairperson, North West Gambling Board and Others* 2006 (10) BCLR 1133 (CC) at paragraphs 73 to 96 and, to some extent, *Estate Agency Affairs Board v Auction Alliance (Pty) Ltd and Others* 2014 (4) BCLR 373 (CC) (which referred to *Gaertner and Others v Minister of Finance and Others* 2014 (1) SA 442 (CC)).

c. Non-compliance with the Act may constitute a criminal offence. Sections 50 (and as proposed to be amended by section 40 of

412

the Bill) and 52 of the Act, as well as the proposed section 49A (which criminalises any contravention of the proposed section 26B, provide relevant examples.

d. Therefore, information gathered by an inspector in terms of the proposed section 45B(1C) may result in criminal prosecution. This offers a strong reason for the requirement of a search warrant before a search is conducted to determine *inter alia* compliance with the Act.

e. Notwithstanding the above, the authority to conduct searches under the proposed section 45B(1C) is impermissibly overbroad:

i. "*Any premises*" include private homes, which are a person's inner sanctum with respect to privacy. (*Magajane* paras 88)

ii. Although the premises are qualified in that the Centre or, when acting in terms of section 45(1), the supervisory body, as the case may be, must reasonably believe that the residence or premises are used for a business to which the provisions of the Act apply, there is no requirement for the Centre or supervisory body to specify to an inspector acting in terms of 45B(1C) as to what he or she may search for or require production of from the owner or person apparently in control of the premises. The proposed section 45B(1C) does not require that the Centre or supervisory body must specify that the inspector may only search for or require the production of information related to the business to which the provisions of the Act apply, let alone particular business. Although the section may be read down in this way, the absence of an appropriate qualification leaves the discretion of the inspector in conducting the search unbounded to that extent; and may potentially reach innocent activity in private homes. (*Magajane* para 94. One may contrast this provision with the provisions of section 22 of the Criminal Procedure Act, 51 of 1977, which are limited by those of section 20 thereof).

iii. The element of surprise that motivates the proposed section 45B(1C)(ii) may be met by allowing warrants to be issued without notice to other parties (*ex parte*). (*Estate Agency Affairs Board* para 39).

iv. Given the breadth of sections 21F (foreign prominent public official), 21G (domestic prominent influential person) and 21H (family members and known associates), and the risk of criminal prosecution referred to above, the authority granted under 45B(1C) needs to

443

be expressly and carefully circumscribed in order not to invade the right to privacy unreasonably and unjustifiably.

f. I am of the view that even though the purpose to be served by the Bill is very important and pressing, the proposed section 45B(1C) does not, in the respects identified, and others that the National Assembly may identify, meet all of the concerns set out in paragraphs 36 to 43 of the *Estate Agency Affairs Board* judgment referred to above.

Yours sincerely,

Mr Jacob Gedleyihlekisa Zuma
President of the Republic of South Africa

Ms B Mbete, MP
Speaker of the National Assembly
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414 Im47

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Financial Action Task Force
Groupe d'Action Financière

FATF/PLEN(2017)4/REV1

28-Feb-2017

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Plenary

MUTUAL EVALUATION OF SOUTH AFRICA: 12TH FOLLOW-UP REPORT

22-24 February 2017, OECD Conference Centre, Paris, France

FATF-XXVIII

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The new addendum to this revised version includes the report of the National Assembly's Standing Committee on Finance on the referral of the Financial Intelligence Centre Amendment Bill dated 21 February 2017, which was referred to during the Plenary discussion on 24 February. Please note that the addendum is available only in pdf.

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415

FATF/PLEN(2017)4/REV1

MUTUAL EVALUATION OF SOUTH AFRICA: 12TH FOLLOW-UP REPORT

Note by the Secretariat

I. INTRODUCTION

1. The mutual evaluation report of South Africa was adopted in February 2009. The country was on the regular follow-up process. In June 2014, as the third round follow-up process was terminated, the Plenary decided to place South Africa in the targeted follow-up process. The FATF President sent a letter to inform the country of the process. The dates for the MER, follow-up reports and the letter to the country are as follows:

- Mutual Evaluation Report: 26 February 2009.
- Follow-up reports to date: 23 February 2011; 14 February 2012; 20 February 2013; 15 October 2013 (interim report); 25 June 2014; 22 October 2014; 25 February 2015; 11 June 2015; 30 September 2015; 29 January 2016; 31 May 2016.[1]
- FATF President letter to South Africa: 29 August 2014.

2. Under the targeted follow-up process, South Africa needs to address deficiencies on two core Recommendations that were rated PC, old R.5 (customer due diligence) and R.10 (record-keeping).

II. TARGETED FOLLOW-UP PROCESS UNTIL JUNE 2016

3. A draft of the Financial Intelligence Centre (FIC) Amendment Bill was first released for public comments in April 2015. The Secretariat's analysis of the draft Bill was submitted to the Plenary in June 2015 and found that it addressed a number of deficiencies related to R.5, but insufficiently addressed deficiencies under R.10.

4. In February 2016, the Plenary noted that the Bill had been introduced in Parliament in October 2015, but not yet adopted. On that basis, the Plenary agreed in February 2016 to the President's proposal to hold a high-level visit in early June 2016.

5. Shortly before the scheduled high-level visit, in May 2016, the FIC Amendment Bill was adopted by both Houses of Parliament. Considering that the remaining steps in the legislative process were the President's assent and the Bill's publication in the Gazette and that a visit would have limited value in these circumstances, the President decided to postpone the visit.

6. Based on the expected timeline for the legislative process, the Plenary agreed in June 2016 that South Africa would submit the final version of the FIC Amendment Bill (with related regulations) to the Secretariat by December 2016. The Bill would then be analysed in advance of the Plenary meeting in February 2017.

[1] FATF/WGEI(2011)21, FATF/WGEI(2012)15, FATF/WGEI(2013)21, FATF/WGEI(2013)58, FATF/PLEN(2014)32, FATF/PLEN(2014)45, FATF/PLEN(2015)4, FATF/PLEN(2015)21, FATF/PLEN(2015)42, FATF/PLEN(2016)12, FATF/PLEN(2016)35.

III. DEVELOPMENTS SINCE JUNE 2016

7. On 28 November 2016, the President of South Africa referred the FIC Amendment Bill back to the National Assembly for reconsideration of the Bill's constitutionality. The referral was made under Section 79 of the Constitution, which allows the President to refer a Bill back to the National Assembly for reconsideration if the President has reservations about the Bill's constitutionality. In the case of the FIC Amendment Bill, the President's referral indicated that the President had specifically raised concern with the provisions of the Bill relating to warrantless searches, which, according to the view expressed in the referral, "fall short of the constitutional standard required for the provision not to unjustifiably limit the right to privacy."[2]

8. The Constitution provides that if, after reconsideration, a Bill fully accommodates the President's reservations, the President must assent to and sign the Bill. If the Bill does not accommodate the reservations, the President must either (a) assent to and sign the Bill; or (b) refer it to the Constitutional Court for a decision on its constitutionality. If the Constitutional Court then decides that the Bill is constitutional, the President must assent to and sign it.

9. At this point, the Standing Committee on Finance of the National Assembly has resumed its deliberations on the Bill. However, the National Assembly has not yet reconsidered the Bill.

III. ISSUE FOR DECISION

10. As summarised above, a high-level visit to South Africa had been scheduled for June 2016 but was cancelled on the expectation that the FIC Amendment Bill would be enacted shortly. Considering that this expectation was not met, and consistent with the approach set out in the previous follow-up report[3], the Plenary may consider whether a public statement should be issued at this stage.

11. A draft public statement for the Plenary's consideration is attached. For consistency, and considering that the deficiencies at issue relate to two core Recommendations, the draft statement mirrors the relevant language from the most recent public statement issued by the FATF in a comparable situation, i.e. the February 2016 statement on Brazil.[4] Following an alternative approach, the June 2012 public statement on Turkey had specifically referred to the possibility of discussions on Turkey's FATF membership.[5] However, considering that the FIC Amendment Bill is expected to be reconsidered shortly in South Africa's National Assembly, the recommendation is that the Plenary agree to issue a statement consistent with that of Brazil, i.e. being clear that the FATF will consider "the next steps in the follow-up process", without identifying them at this stage. This will allow the Plenary to consider a further statement if no progress were to be made by June 2017.

FATF Secretariat
1 February 2017

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[2] Media statement, 30 November 2016, http://www.gov.za/speeches/fica-amendment-bill-30-nov-2016-0000

[3] FATF/PLEN(2016)35 at para. 8 ("If the Bill is not published by that date, the Plenary may consider issuing a public statement consistent with the follow-up procedures.").

[4] http://www.fatf-gafi.org/publications/fatfgeneral/documents/outcomes-plenary-february-2016.html

[5] http://www.fatf-gafi.org//publications/fatfgeneral/documents/outcomesoftheplenarymeetingofthefatfrome20-22june2012.html

417

ANNEX

Draft Public Statement on South Africa

The Financial Action Task Force (FATF), the international standard-setter for combatting money laundering, the financing of terrorism and proliferation of weapons of mass destruction is deeply concerned by South Africa's continued failure to remedy the serious deficiencies identified in its second mutual evaluation report adopted in February 2009. The deficiencies relate especially to customer due diligence and record-keeping obligations of financial institutions, and include:

- The lack of a specific requirement for reporting institutions to identify the beneficial owners of customers or to verify their identities before or during the course of establishing a business relationship;
- The lack of an explicit requirement for ongoing due diligence;
- The lack of a requirement to maintain account files or business correspondence as part of the record-keeping obligation;
- The application of exemptions that are not based on a determination of low risk;
- The insufficient coverage of certain types of financial institutions.

The FATF now calls on South Africa to fulfil its FATF membership commitment by enacting legislation that adequately addresses these shortcomings in line with the FATF Recommendations. If adequate legislation has not been enacted by 19 June 2017, the FATF will consider the next steps in the follow-up process.

418 IM 48

23 January 2017

The Honourable Yunus I Carrim, MP
Chairperson: Standing Committee on Finance
National Assembly
Parliament of the Republic of South Africa
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Dear Mr Carrim

SUBMISSION ON THE FINANCIAL INTELLIGENCE CENTRE AMENDMENT BILL [B 33B – 2015]

1. On behalf of the Ministers constituting the Justice, Crime Prevention and Security Cluster (JCPS) I attach hereto the Cluster's submission on the Financial Intelligence Centre Amendment Bill [B33B – 2015] for consideration of the Standing Committee on Finance.

2. Kindly accept our sincerest apologies for the delay in not having communicated the Cluster's submissions on the Bill earlier. The delay, which we humbly request the Committee to condone, was occasioned by the inability to obtain the concurrence of all the Ministers in the Cluster due to their extremely busy and conflicting schedules.

419

3. We trust our request for condonation and our submissions receive the Committee's favourable consideration.

4. A member of the Cluster is available to appear before the Committee during the scheduled public hearing should the Committee extend an invitation to the Cluster to make oral submissions before it.

Yours sincerely,

Nosiviwe Mapisa-Nqakula

MS NOSIVIWE NOLUTHANDO MAPISA-NQAKULA, MP
MINISTER OF DEFENCE AND MILITARY VETERANS
CHAIRPERSON: JUSTICE, CRIME PREVENTION & SECURITY CLUSTER
DATE: 23 JAN. 2017

SUBMISSION ON THE FINANCIAL INTELLIGENCE CENTRE ACT 38 OF 2001 AND AMENDMENT BILL [B 33B – 2015]

PURPOSE

1. The submissions herein relate to the Financial Intelligence Centre Amendment Bill [B 33B – 2015] ("***the Bill***").

2. The Bill was passed by Parliament and referred to the Honourable President of the Republic for assent and to sign into law.

3. After duly considering the Bill and after applying his mind thereto, the President, in a letter dated 28 November 2016, referred the Bill back to the National Assembly in terms of section 79(1) of the Constitution as the President expressed reservation on the constitutionality of the Bill.

4. In particular, the President is concerned that the proposed section 45B(1C), in the Bill, which amends section 45B of the Financial Intelligence Centre Act, No 38 of 2001 ("***FICA***" or "***the principle Act***"), by introducing warrantless searches is unlikely to pass constitutional muster. The President is further concerned of the impact the aforementioned provisions would have on the rights of persons identified as foreign prominent public officials[1], domestic prominent influential person[2] and family members and known associates of the aforementioned persons.[3]

5. These submissions are in support of the notion that the Bill would be inconsistent with the Constitution if signed into law in its current form.

6. The Security Cluster ("***the Cluster***") departs from the premise that the Constitution is the supreme law of the Republic.[4] This supremacy, together

[1] Proposed section 21 F of the Bill
[2] Proposed section 21 G of the Bill
[3] Proposed section 21 H of the Bill
[4] Section 2 of the Constitution

421

with the rule of law, constitute some of the founding values of a sovereign and democratic Republic of South Africa.[5]

7. Any law or conduct which is inconsistent with the Constitution is invalid and any obligations imposed by the Constitution must be fulfilled.[6]

BACKGROUND

8. In response to mounting concern over money laundering, the Financial Action Task Force ("***FATF***") was established by the G-7 Summit in Paris, 1989.

9. The G-7 Heads of State, Governments and the President of the European Commission convened a Task Force from the G-7 member States, the European Commission and eight other countries after recognising the threat posed to the banking system and to financial institutions.

10. The Task Force was given the responsibility of examining money laundering techniques and trends, reviewing the action which had already been taken at a national or international level, and setting out the measures that still needed to be taken to combat money laundering.

11. In April 1990 FATF issued a report containing a set of Forty Recommendations, which were intended to provide a comprehensive plan of action needed to fight against money laundering.

12. In 2001, the development of standards in the fight against terrorist financing was added to the mission of FATF.

13. In October 2001 FATF issued Eight Special Recommendations to deal with the issue of terrorist financing.

[5] Section 1 of the Constitution
[6] Section 2 of the Constitution

422

14. That being said, the Republics primary obligation to establish a Financial Intelligence Centre ("***FIC***"), is derived from its ratification of the United Nations ("***UN***") Convention against Transnational Organized Crime and the Protocols thereto and the International Convention for the Suppression of the Financing of Terrorism.

15. Article 18 of the Terror Financing Convention requires State Parties to implement measures requiring financial institutions to identify their customers and to pay attention to unusual or suspicious transactions and for such institutions to maintain records.

16. The Terror Financing Convention further requires State Parties to establish channels of communication between their agencies to ensure that all financial information relevant to criminal activity is properly acted on.

17. Article 7 of the Transnational Organized Crime Convention requires State Parties to institute a comprehensive, domestic, regulatory and supervisory regime for financial institutions. As such, State Parties are required to establish a "*financial intelligence unit to serve as a national centre for the collection, analysis and dissemination of information regarding potential money laundering*".

18. Hence, the primary focus would be on a centre that would gather financial intelligence relevant to the financing of terrorism and money laundering.

19. FICA came into operation on 1 February 2002.

20. The primary purpose of FICA was to establish the FIC and a Money Laundering Advisory Council ("***the Council***") in order to combat money laundering activities and terrorist funding and to impose obligations on institutions which may be used for money laundering and terror financing.

21. FICA was the product of a Task Team on Money Laundering that was appointed by the Minister of Finance to, among others, review the

423

appropriateness of a draft Bill that was prepared by the South African Law Reform Commission (***"the SALRC"***) in August 1996.

22. The SALRC conducted an investigation and reported on administrative measures to combat money laundering.

23. In summary, the SALRC made the following recommendations in their Report on Money Laundering and Related Activities:

(a) The implementation of an administrative framework to facilitate the prevention, detection, investigation and prosecution of money laundering;

(b) The administrative framework should have a wide scope of application going beyond the banking sector and including among others attorneys, accountants, insurers, investment intermediaries, gambling institutions and totalisator betting services;

(c) Institutions must be required to identify their clients when business relationships are established or single transactions concluded with those clients. Institutions should also ascertain the identity of persons with whom transactions are concluded in the course of a business relationship;

(d) Institutions must keep records of the information obtained in respect of the identity of their clients and of information relating to transactions performed by their clients;

(e) Information on transactions exceeding a prescribed threshold must be reported. The amount of the threshold must be determined by the Minister responsible for the administration of the administrative framework in consultation with all interested parties. Institutions must also report information in respect of suspicious transactions;

(f) Adequate protection should be afforded to persons making reports in terms of the reporting structure. This includes protection against liability for breach of confidential relationships and protection of their identity;

(g) A statutory body called the Financial Intelligence Centre must be established to receive all reports made in terms of the reporting structure;

(h) It will be the function of the Centre to analyse, investigate and disseminate the reported information;

(i) The Centre must also supervise the enforcement of the administrative scheme by means of appropriate administrative sanctions;

(j) The administrative scheme must be administered by the appropriate Ministry in consultation with the affected institutions;

(k) The institution of a statutory body called the Money Laundering Policy Board to represent all the relevant institutions and bodies. The main function of the Board should be to assist the Minister in developing and implementing an anti-money laundering policy; [This became known as the Counter Money Laundering Advisory Council].

(l) The creation of a range of offences, in addition to the above-mentioned administrative sanctions, to enable the administrative scheme to be enforced;

24. In this regard, the Financial Intelligence Centre Bill [B1 – 2001], reflected "*…the main proposals of the Task Team, which were accepted by the Minister of Finance, subject to certain amendments requested by the South African Police Service, the South African Reserve Bank, the South African Revenue Service, the Ministry for Intelligence Services, the Department of Justice and Constitutional Development and the National Prosecuting Authority*".[7]

25. The SALRC pointed out that the establishment of a body that can record and manage the information obtained through the reporting system is an integral part of an administrative scheme to combat money laundering.

[7] See paragraphs 1.1 to 1.3 of the memorandum on the objects of the Financial Intelligence Centre Bill [B1 – 2001], attached as Annexure "A".

425

26. The FIC is hence required to be an integral part of an administrative scheme as it facilitates the communication between the persons or institutions reporting certain information and the authority whose responsibility it is to use that information in the course of the investigation of money laundering and other criminal activities.

27. The FIC should therefore be regarded as an information gathering entity which does not have any powers to investigate offences.

28. The investigating of crimes is the constitutional and legal mandate of the South African Police Service ("***SAPS***") and the gathering, correlating and analysing of intelligence falls within the constitutional and legal mandates of the various Intelligence Agencies established by the National Strategic Intelligence Act No 39 of 1994.

29. Significantly, the SALRC stated the following in its Report:[8]

> *"Emphasis should, however, be placed on fostering a culture of co-operation between the business community, the financial intelligence unit and the various law enforcement agencies. Experiences in other jurisdictions have shown that promoting such a spirit of co-operation is far more effective than strong handed enforcement in ensuring compliance with a regulatory framework."*

30. The SALRC further stated that:[9]

> *"It must, however, be remembered that this is an aid to identify transactions that are sufficiently suspicious to warrant investigation, and is not aimed at replacing the investigating authority."*

31. Section 3 of FICA deals with the objectives of the Act and, among others, requires that the Centre must inform, advise and cooperate with investigating

[8] At page 21 of the SALRC Report
[9] At page 23 of the SALRC Report

authorities, supervisory bodies, the South African Revenue Service and the intelligence services.

32. Section 36 of FICA requires that supervisory bodies or the South African Revenue Service that knows or suspects that money laundering activities are taking place to, among others, advise the Centre accordingly by providing all information and any applicable records.

33. Section 44 of FICA requires that the Centre, if the Centre has reasonable grounds to suspect that any person, has contravened or failed to comply with any provision of FICA refer the matter to a relevant investigating authority, or an appropriate supervisory body or other public body or authority affected by it.

34. South Africa only became a member of the FATF in 2003 and a member of the Eastern and Southern Africa Anti-Money Laundering Group ("***ESAAMLG***") as from August 2002.

35. The continued evolution of money laundering techniques led FATF to revise FATF standards comprehensively in June 2003.

36. In October 2004 FATF published a Ninth Special Recommendations, further strengthening the agreed international standards for combating money laundering and terrorist financing - the 40+9 Recommendations.

37. The objectives of FATF are to set standards/recommendations and promote effective implementation of legal, regulatory and operational measures for combating money laundering, terrorist financing or the financing of proliferation and other related threats to the integrity of the international financial system.

38. FATF Recommendations set out a comprehensive and consistent framework of measures which countries should implement in order to combat money laundering and terrorist financing, as well as the financing of proliferation of weapons of mass destruction.

427

39. In collaboration with other international stakeholders, FATF also works to identify national-level vulnerabilities with the aim of protecting the international financial system from misuse.

40. The FATF Recommendations set out the essential measures that countries should have in place to:

(i) identify the risks, and develop policies and domestic coordination;

(ii) pursue money laundering, terrorist financing and the financing of proliferation;

(iii) apply preventive measures for the financial sector and other designated sectors;

(iv) establish powers and responsibilities for the competent authorities (e.g., investigative, law enforcement and supervisory authorities) and other institutional measures;

(v) enhance the transparency and availability of beneficial ownership information of legal persons and arrangements; and

(vi) Facilitate international cooperation.

41. FATF calls upon all countries to implement effective measures to bring their national systems for combating money laundering, terrorist financing and the financing of proliferation into compliance with the revised FATF Recommendations.

42. South Africa, as a member, albeit voluntary, is accordingly bound to comply with the standards and recommendations of the respective bodies.

43. Recommendation 29 regarding FIC's, inter alia, recommends that:

Countries should establish a FIC that serves as a national centre for the receipt and analysis of:

(a) suspicious transaction reports; and

(b) other information relevant to money laundering, associated predicate offences and terrorist financing, and for the dissemination of the results of that analysis.

44. The Bill was introduced in 2015 with the amendments seeking to address the following areas which are of relevance for this submission:

(i) The implementation of financial sanctions and administrative measures pursuant to the Resolutions adopted by the United Nations Security Council;

(ii) To enhance customer due diligence measures with regard to beneficial ownership and persons in prominent positions;

(iii) To abolish the Counter Money Laundering Advisory Council;

(iv) To provide access to information to supervisory bodies;

(v) To provide for warrants for certain inspections in light of the Constitutional Court decision in the ***Estate Agencies Affairs Board v Auction Alliance (Pty) Ltd and others [2014] ZACC 3.*** ("***the Auction Alliance decision***"); and,

(vi) To provide for administrative sanctions and further offences.

45. A glaring observation as contained in paragraph 4 of the Memorandum on the Objectives of the Bill, 2015[10] is that consultations were conducted with organizations and individuals listed therein.

46. It is hence apparent that there was no consultation with institutions or persons listed as members of the Council, especially members of the Security Cluster

[10] See page 47 of the Memorandum

429

who are seized with the detection, investigation and prosecution of money laundering and terror financing offences.[11]

47. Consultation within this structure would have enabled the various agencies represented to assess where existing laws, policies, mandates and processes currently adhered to may have enabled the country to meet its international obligations without the need to legislate thereon.

48. FICA and the amendments have a bearing on the work on the South African Police Service ("***SAPS***"), the State Security Agency ("***SSA***") and the National Prosecuting Authority ("***NPA***").

49. The impugned provisions in the Bill empowers inspectors to enter premises of an accountable or reporting institution without a warrant and all other premises with a warrant for the purposes of determining compliance with FICA, an order, directive or determination made in terms of FICA.

50. Non-compliance with certain obligations may amount to an offence enjoying a penalty as well as an administrative sanction[12].

51. The conduct of the inspectors in these circumstances is tantamount to investigations which has the effect of discovering conduct and practices which amount to offences in terms of FICA but may also lead to the discovery of evidence related to money laundering or terror financing.

52. The amendments related hereto and the freezing of assets were not interrogated in relation to the work of the constitutional and legal mandates of the SAPS, the National Prosecuting Authorities ("***NPA***"), the State Security Agency ("SSA") and other agencies with investigative or intelligence functionaries.

CONSTITUTIONAL CONSIDERATIONS

[11] Section 19 of FICA
[12] See Clauses 41 to 50

430

53. The powers and functions provided for in FICA and the impugned proposed amendments go beyond mere policy formulation and regulation but in the form of security services which relate to financial intelligence, investigations and, the ability to impose sanctions directly or through the operations of supervisory bodies and/or accountable institutions.

54. Such sanctions are akin to that which is ordinarily meted out by courts of law.

55. Cumulatively, it is inescapable in relation to its mandate, function and operations, that the FIC can be classified as having firstly, a regulatory and policy function in relation to the financial sector and secondly, a law enforcement function in relation to its operations.

56. It is within this context that dictates of the supremacy of the Constitution and the Rule of law must be considered and due regard must be given to the constitutional mandates of the respective government entities and departments where the operations of FIC overlap.

57. Cognisance must therefore be had to the impact the impugned amendments will have on the usurping of the constitutional and legal mandates of SAPS and SSA, in particular, as well the potential impact the impugned amendments have on the rights of individuals as enshrined in the Chapter 2 of the Constitution.

58. Sight must also not be lost for the reasons advanced for the creation of the FIC and the promulgation of FICA, as outlined earlier above.

Intelligence Services

59. The FIC obtains financial intelligence from accountable and reporting institutions in order to perform its functions as it relates to the detection and investigation of money laundering, terror financing and other related offences.

60. Section 209 (1) of the Constitution solely enjoins the President as head of the national executive to establish "*any intelligence service, other than the*

431

intelligence division of the defence force or police service…and only in terms of national legislation."

61. Section 210 of the Constitution which relates to the powers, functioning and monitoring of intelligence services provides that "*National legislation must regulate the objects, powers and functions of intelligence services…and must provide for (a) the coordination of all intelligence services; and (b) civilian monitoring of those services by an inspector appointed by the President…*"

62. The National Strategic Intelligence Act, No 39 of 1994 ("***the NSI Act***") establishes the Intelligence structures for the Republic.

63. The FIC has not been included.

64. Section 3 of the NSI Act provides for the functions of other departments of State with reference to National Security Intelligence. To this end, section 3(1) reads as follows:

"If any law expressly or by implication requires any department of State, other than the agency or the service, to perform any function with regard to the security of the Republic or the combating of any threat to the security of the Republic, such law shall be deemed to empower such Department to gather departmental intelligence, and to evaluate, correlate and interpret such intelligence for the purpose of discharging such function: ***Provided that such department of State*** *…* ***shall not gather departmental intelligence within the Republic in a covert manner*** *…*" [our emphasis]

65. Financial intelligence ostensibly for the purposes of detecting and investigating terror financing would thus fall within the ambit of the NSI Act whilst such intelligence for the purposes of the detection and investigation of money laundering and other crimes would fall within the ambit of the operations of SAPS' Crime Intelligence Gathering Unit.

492

66. The FIC, unlike other departments and agencies within the intelligence community are not subject to civilian oversight as enjoined by the Constitution in sections 208 and 210(b) of the Constitution.

67. There is further no coordination as anticipated in the Constitution as such coordination would ordinarily resort within the operations of the statutory created body, namely the Counter Money Laundering Advisory Council, which the Bill abolishes in its totality.

68. In the face of this lack of co-ordination with other intelligence services, issues such as the vetting of information supplied by the FIC to foreign FIU's to assess the risk to State Security is a concern which is impacted upon by the disbandment of the Counter Money Laundering Council.

SAPS

69. Section 205(3) of the Constitution provides that "*the objects of the police service are to prevent, combat and investigate crime…to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law.*"

70. It is noteworthy that the Constitution does not empower any other government entity or body to perform such or similar services.

71. The impugned amendments proposed to section 45B as contained in Clause 32 of the Bill relates to the power of inspectors to enter premises for the purposes of monitoring compliance by an accountable or reporting institution with the provisions of FICA.

72. These provisions are akin to the search and seizure provisions as contained in the Criminal Procedure Act, No 51 of 1977 ("***the CPA***").[13]

73. The courts have over the years pronounced on regulatory authorities use of provisions to gather evidence or information which otherwise ought to have been done under the auspices of the CPA.

[13] See Chapter 2 of the CPA

74. This will however will be referred to in greater detail later herein.

75. Equally so, whilst the proposed amendment refers to monitoring compliance, offences in terms of FICA, money laundering or terror financing also find application.

76. This then is but a veiled form of investigation in light of the possibility that in the course of monitoring compliance, evidence may emerge of an offence either related to non-compliance or money laundering, terror financing or other related offences.

77. The Bill is silent on the process which is to be embarked upon should investigators happen upon evidence of a crime in the course of monitoring compliance.

SEARCH/INSPECTION PROVISIONS

78. The Constitutional Court in the case of ***Estate Agencies Affairs Board v Auction Alliance (Pty) Ltd and others***, stated that the provisions of section 45B of the FICA, which allows an inspector to at any reasonable time and on reasonable notice to enter and inspect a premises without a warrant, is unconstitutional.

79. The court ruled that where the Board suspected that a criminal offence has been or is being committed by the person who is the subject of the search or where a private residence is to be searched that a warrant issued by a magistrate or judge be obtained.

80. The impugned amendment to section 45B of FICA as set out in Clause 32 of the Bill is premised on the declaratory order made.

81. The impugned amendment proposes that entry and inspection of an accountable institution or reporting institution for the purposes of monitoring compliance with the provisions of the Act be allowed to take place without a warrant whilst entry and inspection on private premises or premises other

434

than an accountable or reporting institution be permitted under a warrant authorised by a magistrate or judge.

82. It cannot be overstated that the nature of monitoring compliance may lead to the discovery of offences in terms of FICA, money laundering, terror financing or other offences.

83. The impact on the right to privacy[14] and the right to a fair trial[15] cannot be excluded.

84. The following decisions relates to searches conducted by regulatory authorities in terms of their empowering legislation:

(i) ***Mistry v Interim Medical and Dental Council of South Africa and Others***[16]

The court was called on to decide on the constitutionality of Section 28(1) of the Medicines and Related Substances Control Act 101 of 1965, which allowed an inspector to at all reasonable times enter any premises, place, vehicle, vessel or aircraft at or in which there is or is on reasonable grounds suspected to be any medicine or Scheduled substance. Only the applicant's surgery was searched *in casu* and not his residence.

The Court noted that these provisions permitted warrantless entry into private homes and search of intimate possessions as long as there was a reasonable suspicion of any medicine including non-prescription medication found in all homes.

[14] Section 14 of the Constitution
[15] Section 35 of the Constitution
[16] 1998 (4) SA 1127 (CC)

435

The Court considered the right of privacy in relation to regulatory inspections and stated that regulated businesses possess a more attenuated right to privacy the more the business is public, closely regulated and potentially hazardous to the public.

The Court found that the impugned provision was too broad and unrestricted in its reach as to authorise inspectors to enter any person's home upon a reasonable suspicion that any medicine was contained within.

Accordingly, the Court held that the provision failed the constitutional limitation analysis.

(ii) ***Magajane v Chairperson, North West Gambling Board and Others***[17]

Section 65 of the North West Gambling Act, No 2 of 2001, inter alia, provides that an inspector shall for the purpose of this Act enter upon any licensed or unlicensed premises which are occupied or being used for the purposes of any gambling activities or any other premises on which it is suspected.

The Court concluded that section 65(1) limits the right to privacy entrenched in section 14 of the Constitution.

The Court found that the commercial property occupier's lower expectation of privacy is an important consideration for the extent of the limitation.

As recognised a person's privacy interest is more attenuated and as the individual has a lower reasonable expectation of privacy, the scope

[17] [2006] ZACC 8; 2006 (5) SA 250 (CC); 2006 (10) BCLR 1133 (CC)

of that individual's personal space shrinks and the individual's right to privacy may be limited further by the rights accruing to other citizens.

The individual's expectation of privacy will vary, based on the particular context of the statutory provision and the information obtained and premises and objects searched.

The Court found that given the potential invasion of privacy permitted by section 65(1), the breadth of the provision and the availability of a warrant as a less restrictive means to achieve the purposes of the section, section 65(1) is not reasonable and justifiable in terms of section 36 and concluded, therefore, that section 65(1) is unconstitutional.

(iii) ***Gaertner and Others v Minister of Finance and Others***[18]

Section 4(a) of the Customs and Excise Act 91 of 1964 provides that an officer may, for purposes of this Act enter a premises and make such examination and enquiry as he deems necessary. Sec 6(a) allows an officer to break open any door or window or break through any wall on the premises for the purpose of entry and search.

The Court found that the provisions are broad as to the manner of conducting the searches. Searches may be conducted in private dwellings at any time, and officials may not only break in at the dwellings but, once inside, they may even break up floors, and they do not need a warrant to do all this.

The court concluded that sections 4(4)(a)(i)-(ii), 4(4)(b), 4(5) and 4(6) do limit the right to privacy. The court confirmed the declaration of

[18] *[2013] ZAWCHC 54; 2013 (4) SA 87 (WCC); 2013 (6) BCLR 672 (WCC)*

4837

constitutional invalidity of sections 4(4)(a)(i)-(ii), 4(4)(b), 4(5) and 4(6) of the Customs and Excise Act 91 of 1964 previously made by the Western Cape High Court.

(iv) ***Minister of Police and Others v Kunjana***[19]

This matter related to a warrantless search at a private residence in terms of the Drugs and Drug Trafficking Act 140 of 1992.

The court in relying on all the previously mentioned decisions including the case which resulted in the declaration of constitutional invalidity of section 45B of FICA declared section 11(1)(a) and (g) of the Drugs and Drug Trafficking Act 140 of 1992 unconstitutional and invalid.

85. The aforementioned decisions highlight the Court's approach to warrantless searches.

86. The guiding principles are that the courts will not permit the warrantless search of a private residence and secondly that that the provisions of the CPA rather than the use of regulatory provisions where criminal conduct is suspected ought to be used.

87. The impugned amendment proposed in section to 45B(1)[20] proposes to retain the provisions related to warrantless searches by couching the provisions in a manner which indicates that the purpose is to inspect the affairs of the accountable or reporting institution or supervisory body to monitor compliance with the provisions of FICA, an order or directive.

88. The impugned amendment however fails to recognise the critical purpose for which FICA was enacted which is the combatting of money laundering and terror financing.

[19] [2016] ZACC 21
[20] See Clause 32 of the Bill.

438

89. The detection and investigation of activities related thereto is integral to a proper and effective functioning of the FIC and thus the premise for which the monitoring should occur.

90. It is respected that the amendment seek to lineate the role of FIC to regulation.

91. It however does not address the law enforcement role the FIC has which from its established purposes ordinarily means that criminal conduct may be suspected as the nature of it monitoring of compliance is linked to offences of money laundering and terror financing, nor does it effectively address a situation where in the inspection of the affairs of the entity or party that criminality is discovered.

92. The proposed impugned amendment thus, may not be effective in curing the defect in terms of the *Auction Alliance decision*.

93. Concerningly, the proposed impugned amendment does not address a situation where during the course of an inspection, evidence of a crime is discovered.

Co-operative Government

94. Chapter 3 of the Constitution provides for the principles of co-operative government and intergovernmental relations. Section 41(1) sets out the principles which are peremptory on all government departments.

95. It, inter alia, provides that all spheres of government and all organs of state within each sphere must: [our emphasis]

> *"(a) preserve the peace, national unity and the indivisibility of the Republic;*
> *(b) ...;*
> *(c) provide effective, transparent, accountable and coherent government for the republic as a whole;*
> *(d) be loyal to the Constitution, the Republic and its people;*

(e) respect the constitutional status, institutions, powers and functions of government in the other spheres;

(f) not assume any power or function except those conferred on them in terms of the Constitution;

(g) exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere; and

(h) co-operate with one another in mutual trust and good faith by –

(i) fostering friendly relations;

(ii) assisting and supporting one another;

(iii) informing one and another of, and consulting one another on matters of common interest;

(iv) co-ordinating their actions and legislation with one another:

(v) adhering to agreed procedures and

(vi) avoiding legal proceedings against one another."

96. In addition hereto, an Act of Parliament must establish or provide for structures and institutions to promote and facilitate intergovernmental relations.[21]

97. The Counter Money Laundering Advisory Council is the structure envisaged by section 41(2)(a) of the Constitution to promote and facilitate the operation of the principles set out above.

98. The long title to FICA inter alia provides for the establishment of both a FIC and a Counter-Money Laundering Advisory Council in order to combat money laundering activities and the financing of terrorist and related activities.

[21] Section 41(2)(a) of the Constitution

99. The Minister of Finance is obligated to appoint a member of the Council as Chairperson[22] whilst FICA makes it peremptory for the Council to meet often, but at least once a year.[23]

100. The Council is obligated to advise the Minister of Finance on policies and best practices in identifying the proceeds of unlawful activities and to combat money laundering of unlawful activities and on the Minister's powers entrusted to him in terms of FICA.[24] The Minister has never called on the Council to advise him on any policies and best practices in identifying the proceeds of unlawful activities and to combat money laundering of unlawful activities. Nor has the Minister called on the Council to advise him on his powers entrusted to him in terms of FICA.

101. The Council is further required to advise the FIC on the performance of its functions in terms of FICA. In this regard, the FIC is required to provide administrative and secretarial support and sufficient resources to the Council to function effectively.[25]

102. Since the commencement of FICA on 1 February 2002 the Council has never been established nor has the Minister, nor the FIC, relied on the Council as provided for by FICA. [26]

103. The failure to comply with these obligations during the consultation process regarding the Bill and the proposed disbandment of the Council flies in the face of the aforementioned constitutional obligations, is unconstitutional and should ordinarily invalidate the Bill.

104. The failure to consult with the Council on the impugned amendments is in violation of the Constitution and should result in the invalidation of the Bill.

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[22] section 19(2) of FICA
[23] section 20(2) of FICA
[24] section 18(1)(a) of FICA
[25] section 18(1)(b) of FICA
[26] We have been advised the Council has been convened to sit for the first time on 23 January 2017.

441

105. The reasons advanced in the Memorandum on the Objects of the FICA Bill for repealing Chapter 2 of FICA and thereby dissolving the Council goes against the spirit of the provisions of section 40(2), 41(1) and 41(2)(a) of the Constitution, is irrational and unconstitutional.

Right to equality

106. Everyone is equal before the law and has the right to equal protection and benefit of the law.[27]

107. The Bill introduces the concept of persons in prominent positions. Schedule 3A and 3B of the Bill stipulates who is regarded as a "domestic prominent influential figure" and "foreign prominent public official" respectively.

108. The persons identified are limited to persons within the various spheres of government and business persons who conduct business with government limited to a specific threshold.

109. The Bill arbitrarily discriminates against persons who are in the employee of the State, do business with the State or are members of the various spheres of government which amounts to a violation of the individual's right to equality before the law.

110. The Bill is noticeably silent on persons who do not do any business with government and persons who are not prominent.

111. The proposed amendments creates a serious lacuna in our law and in respect of our international obligations as related to foreign bribery in international business transactions and anti-competitive behaviour which amounts to a form of corruption, fraud or cartel behaviour in that the conduct complained of is predominantly committed in the private sector.

112. It is a recognised by the OECD's Working Group on Foreign Bribery in International Transactions that the conduct of business in foreign jurisdictions

[27] Section 9(1) of the Constitution

442

particular in vulnerable business sectors should be monitored to detect instances of foreign bribery.

113. This proposed amendment does not pass constitutional muster and is invalid.

Concluding Submissions

114. It is requested that the impugned provisions of the Bill, particularly, section 45B(1C), relating to search and seizures be removed as it not only usurps the powers of other law enforcement authorities, but is also overly broad and in effect unconstitutional.

115. The executions of searches with or without warrants impacts on persons listed as foreign prominent public officials, domestic prominent influential person, family members and known associates thereof. It is further submitted that the Bill violates the right to equality under the law, and equal benefit and equal protection of the law as envisaged by section 9(1) of the Constitution, particularly in relation to the extent of the above. These provision, too, should be removed.

116. The inability to give effect to Chapter 2 of FICA in relation to the creation and functions of the Council, both in relation to the powers of the Minister in terms of FICA, in respect of policies and best practises to identify proceeds of unlawful activities and to combat money laundering activities and in respect of advising the FIC concerning its performance and functions, renders the Bill unconstitutional and invalid.

117. The Standing Committee on Finance is requested to consider the aforementioned submissions in its deliberations.

443

4444 Inv

COUNTER MONEY LAUNDERING ADVISORY COUNCIL
WORKSHOP
DRAFT AGENDA

Date: **23 January 2017**
Time: **10:30 - 14:00**
Venue: **National Treasury, R2101 240 Madiba St, Pretoria**

1. Discussion on challenges facing the fight against money laundering and terror financing
2. Role of supervisory bodies and law enforcement authorities, and improving forums for consultation
3. FATF - key issues for SA
4. Way forward

Note: The workshop will be broader than the Council meeting, with 3 persons per member organization invited to the workshop, as it is aimed at both the leaders and practitioners on countering money laundering and financing of terrorism.

COUNTER MONEY LAUNDERING ADVISORY COUNCIL
MEETING
DRAFT AGENDA

Date: **23 January 2017**
Time: **14:30 - 16:30**
Venue: **National Treasury, 40 Church Square, Pretoria**

1. Welcome and Apologies
2. Minister's updated on Extension of Contract: Director of FIC
3. Challenges facing the fight against money laundering and terror financing, and the role of supervisory and law enforcement authorities
4. The role of the Council in the current and future legislation, and improving of forums for consultation
5. FATF – key issues for SA
6. Recommendations of the Council
7. General
8. Conclusion

445 IM 90

To: Adv Shaun Abrahams

iMessage
Mon, 29 May, 6:14 PM

Hi Momo. My email address is skabrahams@npa.gov.za. Thanks. Regards. Shaun Abrahams

Wed, 31 May, 9:26 PM

Hi Shaun. Thanks for your sms. I await your response to the draft gazette and other documents emailed to you by Raymond Masoga. I also await any follow-up on any enforcement issues, as you indicated at the

4446

To: Adv Shaun Abrahams

Whilst I was hoping you would have apologized in your sms that led to an abrupt ending of the meeting, rest assured we always act professionally at the Treasury and hope we both ensure there is always mutual respect when relating to each other. I am happy to talk about any issues of concern and look forward to working with you to take matters forward. Momo

Delivered

Thu, 01 Jun, 7:04 AM

To: Adv Shaun Abrahams

Hi Momo. I've been traveling. Will peruse same today and revert to thereon. It appears we were in different meetings. There will be no apology forthcoming from me. Your understanding of professionalism leaves me speechless and your arrogance has no bounds. This is rather regrettable. Fortunately you are only a DDG. Don't forget that! In the spirit of constitutionally enshrined cooperative governance, we look forward to enhancing

4498

To: Adv Shaun Abrahams

me speechless and your arrogance has no bounds. This is rather regrettable. Fortunately you are only a DDG. Don't forget that! In the spirit of constitutionally enshrined cooperative governance, we look forward to enhancing our relations and working closely with Treasury on matters of mutual interests, giving effect to the rule of law and for the betterment of our people and the security and interests of the Republic. Sincerely, Shaun Abrahams.

IMS1
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MINISTER: FINANCE
REPUBLIC OF SOUTH AFRICA

Private Bag X115, Pretoria, 0001, Tel: +27 12 323 8911, Fax: +27 12 323 3262
PO Box 29, Cape Town, 8000, Tel: +27 21 464 6100, Fax: +27 21 461 2934

Ref. M3/4/1/7 (1317/17)

Mr TM Masutha, MP
Minister of Justice and Correctional Services
Private Bag X276
PRETORIA
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Dear colleague,

FINANCIAL INTELLIGENCE CENTRE AMENDMENT ACT, 2017 – IMPLEMENTATION

I want to thank you for the meeting of 29 May 2017 which gave us an opportunity to discuss how we can collaborate and co-operate better to improve the combating of money laundering and terrorist financing.

I want to confirm our agreement at the meeting on the following aspect related to the Financial Intelligence Centre Amendment Act No 1 of 2017 (the Amendment Act):

- that we share the objective of ensuring South Africa has an effective system to combat money laundering and terrorist financing which serves to protect our financial system from exploitation for illicit purposes;
- that we should work together to create a lasting platform for collaboration and co-operation in implementing South Africa's measures against money laundering and terrorist financing effectively and;
- that we should not delay unduly the implementation of the Amendment Act unduly.

With this in mind, I would reiterate my intention to announce the commencement date(s) for the Amendment Act later this week so as to strengthen our ability to deal more effectively with the abuse of our financial system for illicit purposes. Failure to implement the Act without delay would risk exposing South Africa to negative steps from the Financial Action Task Force's meeting later this month, for delaying on our response to its mutual evaluation follow-up process.

There is no doubt that South Africa requires better mechanisms to support collaboration and co-operation between the departments and agencies that have a role to play in implementing the trio of legislation against money laundering and terrorist financing, namely the Prevention of Organised Crime Act, 1998, the Protection of Constitutional Democracy against Terrorism and Related Activities Act, 2004 and the Financial Intelligence Centre Act, 2001. Hence I propose that an "Inter-Departmental Money AML/CFT Committee (IDM)" be established as a permanent structure with a mandate given to it by Cabinet. The objectives of such an inter-

450

Departmental Committee should encompass the matters you had raised in the meeting of the 29th May 2017, namely the promotion of inter-departmental and inter-agency collaboration, co-operation, communication and information sharing within and amongst the relevant law enforcement agencies, government departments and regulatory authorities in order to maximise the effective implementation of the abovementioned trio of legislation.

I would also like to respond to the points raised by Advocate Abrahams and yourself, in connection with the continued existence of the Counter-Money Laundering Advisory Council (CMLAC). I am firmly of the view that the Inter-Departmental Committee will better (and more effectively) serve the objective of intra-governmental collaboration and co-operation in the combating of money laundering and terrorist financing better than the current structure of the CMLAC. This is because the CMLAC is not a suitable body structurally to achieve the objectives mentioned above as, by its very nature, cannot enable consultation with (and within) the Security Cluster as its functions in law do not provide for this type of collaboration given that its composition includes private sector bodies. Confidential matters of state cannot be discussed in such a broad forum, and instead we will also establish a separate consultation forum with private sector bodies representing various industries. The continued existence of the CMPLAC will in fact hinder the process of urgently establishing the more appropriate consultation forums that I am proposing. Further, we will open up the Executive to severe criticism that it is overriding Parliament by not giving effect to all the clauses in the law as passed by Parliament.

In addition to the above, I would also like to explore the matter of consultation at other levels. These include, most importantly, structures for consultation:

- between government departments and law enforcement agencies on the one hand, and supervisory authorities of financial and other institutions on the other hand and;
- between public sector bodies and those representing private sector institutions that have to give effect to the measures to combat money laundering and terrorist financing.

To this end, I would propose to proceed with the publication of an explanatory and consultation documents for public comment which will be take into account the establishing of the above consultation structures.

In order to give effect to this process without any delay I will instruct the Acting Director-General of the National Treasury to convene a meeting at which the process towards the establishment of a proposed Inter-Departmental AML/CFT Committee can be discussed and given effect to. The Acting Director-General has already been in contact with Adv. Abrahams and the Director-General of your department, Mr V Madonsela. I will ensure that all the departments and agencies that will form the core of such a Committee namely the Financial Intelligence Centre, the Department of Justice and Constitutional Development, the National Prosecuting Authority, the South African Police Service as well as the State Security Agency are invited to this meeting.

I trust that I can rely on your support in pursuing this initiative and in establishing an appropriate structure to strengthen South Africa's ability to combat illicit use of our financial system effectively.

Yours sincerely,

MR MKN GIGABA, MP
MINISTER OF FINANCE
DATE: 2017/06/09

451

DRAFT

TERMS OF REFERENCE FOR INTER-DEPARTMENTAL/AGENCY COMMITTEE ON COMBATING OF MONEY LAUNDERING AND TERRORIST FINANCING

Purpose

1. The purpose of establishing an inter-departmental/agency committee is to enhance intra-governmental collaboration in the combating of money laundering and terrorist financing.

Functions

2. The functions of the Committee are to-

   (a) co-ordinate South Africa's response to FATF, including preparing for the Mutual Evaluation and National Risk Assessment to facilitate compliance with international obligations;

   (b) inform discussions on potential changes to the country's measures against money laundering and terror financing, including changes to laws, regulations and other measures;

   (c) assist in the allocation and prioritisation of resources by competent authorities to combat money laundering and terror financing;

   (d) harmonise and aligning approaches to financial investigations, prosecutions, convictions and asset forfeitures in money laundering and terrorist financing matters;

   (e) assess the effectiveness of policies and practices to counter money laundering and the financing of terrorism and whether the key objectives of the South African institutional framework against these phenomena are being met in practice;

   (f) assess progress made in South Africa with implementing the legal framework against money laundering and terrorist financing against the benchmark of the international standards agreed by the FATF, and making recommendations for improvement; and

   (g) assist in preparing the relevant departments and agencies for regular country assessments, peer reviews to measure South Africa's compliance with international standards on combating money laundering and the financing of terrorism.

Composition

3. The Committee is to consist of representatives of the Department of Home Affairs, the Department of Justice and Constitutional Development, the South African Police Service, the State Security Agency and the National Prosecuting Authority, the Financial Intelligence Centre and the National Treasury.

4. The representative of a department or agency, mentioned in paragraph 3, must be its head or a senior official reporting to, and delegated by, that head.

5. The Director-General of the National Treasury or a senior official delegated by the Director-General is the chairperson of the Committee.

Meetings

6. The Committee must meet at least twice a year.

Sub-committees

7. The Committee may-

(a) establish one or more sub-committees consisting of officials of those departments and agencies which are represented in the Committee relevant for the work of the sub-committee; and

(b) determine the terms of reference of a sub-committee.

Reporting

8. The Committee must submit to the Minister of Finance a report on its activities according to the financial year of the National Treasury by 31 May.

9. The Minister of Finance must, together with the Ministers of Justice and Correctional Services, Police and State Security, submit a joint annual report to the Cabinet via the Justice, Crime Prevention and Security and Economic Sectors, Employment and Infrastructure Development Clusters on the progress made in countering money laundering and the combating of terrorist financing, including on the extent of co-operation and success in enforcement.

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453

Financial Action Task Force

FATF/PLEN(2017)49

For Official Use

English - Or. English

23 October 2017

Cancels & replaces the same document of 13 October 2017

Plenary

SOUTH AFRICA – 14th FOLLOW-UP REPORT

1-3 November, Hilton Buenos Aires Hotel, Buenos Aires, Argentina.

FATF-XXIX

This version of the document cancels and replaces the version issued on 13 October 2017. It was re-issued to offer clarification to delegations concerning the conclusion and the process for targeted follow-up (see paragraph 15).

Please bring this document with you to the meetings as no paper copies will be available at that time.

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JT03421348

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SOUTH AFRICA - 14th FOLLOW-UP REPORT

Note by the Secretariat

1. INTRODUCTION

1. The mutual evaluation report of South Africa was adopted in February 2009 and the country was placed on the regular follow-up process. In June 2014, as the third round follow-up process was terminated, the Plenary decided to place South Africa in the targeted follow-up process. The FATF President sent a letter to inform the country of the process. The dates for the MER, follow-up reports and of the letter sent to the country were as follows:

- Mutual Evaluation Report: 26 February 2009.
- Follow-up reports to date: 23 February 2011; 14 February 2012; 20 February 2013; 15 October 2013 (interim report); 25 June 2014; 22 October 2014; 25 February 2015; 11 June 2015; 30 September 2015; 29 January 2016; 31 May 2016; 1 February 2017.
- FATF President letter to South Africa: 29 August 2014.

2. Under the targeted follow-up process, South Africa needs to address deficiencies on two core Recommendations that were rated PC, former R.5 (customer due diligence) and R.10 (record-keeping).

2. TARGETED FOLLOW-UP PROCESS TO JUNE 2017

3. A draft of the Financial Intelligence Centre (FIC) Amendment Bill was first released for public comments in April 2015. The Secretariat's analysis of the draft Bill was submitted to the Plenary in June 2015 and found that it addressed a number of deficiencies related to R.5, but insufficiently addressed deficiencies under R.10.

4. In February 2016, the Plenary noted that the Bill had been introduced in Parliament in October 2015, but had not yet been adopted. In February 2016, the Plenary agreed to the President's proposal to hold a high-level visit in early June 2016, although the scheduled high-level visit was postponed as the FIC Amendment Bill was subsequently adopted by both Houses of Parliament in May 2016.

5. Based on the expected timeline for the legislative process, the Plenary agreed in June 2016 that South Africa would submit the final version of the FIC Amendment Bill with related regulations to the Secretariat by December 2016.

6. On 28 November 2016, the President of South Africa referred the FIC Amendment Bill back to the National Assembly for reconsideration of the Bill's constitutionality. The President's referral indicated that the President had specifically raised concern with the provisions of the Bill relating to warrantless searches.

7. At the February 2017 Plenary, South Africa informed delegations that the Standing Committee on Finance of South Africa's National Assembly had adopted a report proposing amendments to the FIC Amendment Bill. The Plenary decided to defer

discussion on a public statement until the Plenary meeting in June 2017, at which point it would consider what progress had been achieved with respect to its deficiencies.

8. At the June 2017 Plenary, South Africa reported that the President of South Africa had assented to the FIC Amendment Act 2017, as published in the Government Gazette on 2 May, 2017 and that the Minister of Finance had announced the commencement dates for the majority of the provisions of the Amendment Act on 13 June 2017. A copy of the publication of the FIC Amendment Act in the Government Gazette was shared with delegations in the 13th FUR and a copy of the announcement of the commencement dates can be found in Annex B. The Secretariat noted that the FIC Amendment Act seemed to rectify several deficiencies in former R.5, however, conclusions could not be made until further steps were taken to implement the Bill, including the amendment of regulations under the FIC Act.

3. PROGRESS AFTER THE JUNE 2017 PLENARY: CURRENT STATUS

9. Following the June 2017 Plenary, South Africa issued two Government Notices: "Amendments to Money Laundering and Terrorist Financing Control Regulations" and "Withdrawal of exemptions issued in terms of the Act", which addressed several of its remaining deficiencies. South Africa also issued Guidance Notes on how to comply with the amendments included in the FIC Act and the Regulations, to assist accountable institutions in implementing the new requirements. The amendments to the Money Laundering and Terrorist Financing Regulations and the withdrawal of the exemptions issued under the Act came into operation on 2 October 2017. This coincides with the commencement of a number of amendments to the FIC Act which the Minister had announced on 13 June 2017.

10. The FIC Amendment Act contains provisions which:

a) Indicate that accountable institutions should undertake CDD, when there is a doubt about the veracity or adequacy of previously obtained customer identification data (section 21D).

b) Require accountable institutions to identify beneficial owners and to verify their identities (section 21B).

c) Instruct accountable institutions to understand the ownership and control of a customer which is not a natural person without establishing a threshold (i.e. 25%) (section 21B and 21C).

d) Require accountable institutions to obtain the purpose of the business relationship and conduct ongoing due diligence (section 21A).

e) Partially complies with requiring accountable institutions to apply enhanced due diligence for higher risk categories of clients by indicating that accountable institution's Risk Management and Compliance Programme should include this element but failing to indicate in which cases would enhanced due diligence apply (section 42 (2) (m)).

11. Further details of progress against deficiencies can be found in the table presented as Annex A.

12. In addition, the Government Notice on the withdrawal of exemptions issued in terms of the Act instrument removed all existing exemptions under the FIC Act, including

to the exemptions with regard to insurance policies for which a single premium was beyond the FATF threshold of USD 1,000 (which was considered lower risk).

13. South Africa also reported some progress on former R.23 and SR.III, but this was received shortly before the publication of this paper. In these circumstances, the Secretariat has not had an opportunity to consider the progress but will report on it at the next Plenary.

14. In total, South Africa fully addressed 10 out of 15 deficiencies in Recommendations 5 and 10 and partially addressed three. Two other deficiencies remain unaddressed. With this progress, South Africa has achieved a level of compliance essentially equivalent to LC for former R.10. However, given the importance of the remaining deficiencies in R.5, South Africa's compliance with R.5 remains at PC.

4. CONCLUSION

15. South Africa has made clear and substantial progress by issuing subsidiary legislation to consolidate the changes made in the FIC Amendment Bill and to address the remaining deficiencies. The Secretariat analysed these measures to determine whether removing South Africa from the targeted follow-up process is justified, and is of the view that this is a borderline case. On that basis, delegations are asked to independently review the analysis and consider the progress made to determine whether South Africa has reached a level of compliance for old R.5 that is substantially equivalent to largely compliant, or should otherwise be removed from the targeted follow-up process taking into account that it has already started preparing for its 4th round mutual evaluation which begins imminently (the TC annex is due in May 2019). By way of background, this is a 3rd round targeted follow-up report which is based on procedures that differ significantly from the 4th round follow-up procedures in that:

a) The analysis is exclusively drafted by the FATF Secretariat without the involvement or support of technical experts from delegations.

b) No formal re-ratings are given. Instead, the judgment is whether or not sufficient progress was made to raise the level of compliance such that it is *substantially equivalent* to a partially compliant, largely compliant or compliant rating.

c) Targeted follow-up reports are not published, even where the country has made sufficient progress to exit follow-up.

457 IN 53

MINISTER: FINANCE
REPUBLIC OF SOUTH AFRICA

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Ref. M3/15/2 (1880/17)

Mr C Ramaphosa, MP
Deputy President and Leader of Government Business
Private Bag X1000
PRETORIA
0001

Dear Mr Deputy President,

LEGISLATIVE PROGRAMME FOR 2018

I refer to your letter dated 2 August 2017 regarding the Legislative Programme for 2018.

Please find attached the 2018 Legislative Programme for National Treasury. Part A of the Programme consists of budget and revenue related Bills tabled annually and Part B of other Bills envisaged to be tabled.

As to the alignment of the Bills on the Programme to the 2014 Election Manifesto, funding obtained and provided for through the general tax, division of revenue and appropriation Bills directly support the programmes envisaged in the Manifesto. Other Bills on the programme do not have a direct bearing on the Manifesto.

Yours sincerely,

MR MKN GIGABA, MP
MINISTER OF FINANCE
DATE: 2017/09/11

2018 LEGISLATIVE PROGRAMME – NATIONL TREASURY

Department's contact person: Adv E van Schoor, Chief Director: Legislation, tel 012 315 5983, cell 083 458 1706, email: empie.vanschoor@treasury.gov.za

NB Part A lists budget and revenue Bills tabled annually (pages 1- 2) and Part B lists other Bills envisaged to be tabled in 2018 (pages 3-8)

A. ANNUAL BUDGET AND REVENUE BILLS

	NAME OF BILL	NATURE OF BILL	DATE OF SUBMISSION OF BILL TO CABINET	DATE OF INTRO-DUCTION OF BILL IN PARLIA-MENT	HOW IS BILL ALIGNED TO NDP AND MTSF	IF PRIORITY FOR 2018, PROVIDE REASONS	IF STRATEGIC/ DEVELOPMENTAL IN NATURE, PROVIDE REASONS	IF BILL IS CONTENTIOUS IN NATURE, PROVIDE DETAILS	IF BILL HAS CONSTITU-TIONAL BEARING, PROVIDE DETAILS	IF SOCIO-ECONOMIC IMPACT ASSESS-MENT HAS BEEN CON-DUCTED
1	Division of Revenue Bill s76 Bill	To provide for a division of national revenue among three spheres, determining each province's equitable share and conditional allocations to provinces and municipalities for 2018/19 financial year	Feb	Feb	Divide national revenue among three spheres & provide for conditional allocations from national's share	Yes. Constitutional requirement (s214(1)) and Money Bills Amendment Procedure Related Matters Act ("Money Bills Act")	-	-	Constitu-tional requirement (s214(1))	Not required
2	Appropriation Bill s77 Bill	To provide for appropriation of money from National Revenue Fund for 2018/19 financial year	Feb (budget proposal submitted to Cabinet)	Feb	Appropriate funds for national departments and entities to implement NDP	Yes. Necessary to for functioning of national departments and entities receiving transfers through departments' votes. Constitution (s213(2)) and Money Bills Act requirements.	-	-	Constitu-tional requirement – s213(2) – need an Act to withdraw money from the National Revenue Fund	Not required
3A	Rates & Monetary Amounts & Amendment of Revenue Laws Bill s77 Bill	To fix the rates of normal tax; to amend the Income Tax Act, 1962, so as to amend rates of tax and monetary amounts; to amend the Customs and Excise Act, 1964, so as to amend rates of duty in Schedule 1 to that Act; to provide for additional relief under the voluntary disclosure programme and to provide for matters connected therewith.		Draft: Feb Final: April	Raises revenue to fund government activities	Yes. Taxation is main means by which government raises revenue to implement its programs. Bill proposes rates of tax announced in Budget.	-	-	-	Not required

TRANSNET-10-952

BB24.1-MKNG-CROSS-CUT-3022

3.	NAME OF BILL	**Financial Intelligence Centre Amendment Bill - s75 Bill**
3.1	INDICATE WHETHER BILL WAS SUBMITTED LAST YEAR AND WHAT ARE THE PLANS TO MAKE SURE IT IS PASSED THIS YEAR	No
3.2	NATURE OF BILL	It aims to- (a) reintroduce an advisory council on counter-money laundering; and (b) extend the measures applicable to prominent influential persons to key positions in private businesses in addition to those doing business with the State.
3.3	IS LEGISLATION MOST APPROPRIATE WAY TO ACHIEVE POLICY OBJECTIVES	Yes, amending existing legislation
3.4	HOW BILL IS ALIGNED TO NDP AND MTSF	Further strengthening of mechanisms to deal with money laundering and terrorist financing will support sustainable economic growth and promote South Africa as a safe investment and to protect consumers of financial products.
3.5	PROVIDE STRATEGIC IMPERATIVES OF BILL	Combatting money laundering and terrorist financing
3.6	IF BILL IS A PRIORITY TO BE SIGNED INTO EFFECT IN 2018, MOTIVATE AND PROVIDE REASONS	No
3.7	IF THE BILL IS CONTENTIOUS IN NATURE, PROVIDE DETAILS	Yes, the impact of additional measures on private businesses may be contentious
3.8	PROVIDE DETAILS ABOUT CONSULTATION WITHIN GOVERNMENT	Affected entities in Finance portfolio and the justice cluster departments and the DG economic and justice clusters will be consulted
3.9	PROVIDE DETAILS ABOUT PUBLIC CONSULTATION	Public consultation will be undertaken before seeking Cabinet's approval to table in Parliament
3.10	IF BILL HAS CONSTITUTIONAL BEARING, PROVIDE DETAILS	Additional measures applicable to private businesses have a constitutional bearing
3.11	PLEASE ATTACH SOCIO-ECONOMIC IMPACT ASSESSMENT (SEIAS) REPORT AND CERTIFICATE	It will be obtained
3.12	ESTIMATED DATE OF SUBMISSION OF BILL TO CABINET	March 2018
3.13	ESTIMATED DATE OF SUBMISSION OF BILL TO PARLIAMENT	April 2018
3.14	ESTIMATED DATE OF SUBMISSION TO STATE LAW ADVISERS	February 2018
3.15	RESOURCE IMPLICATIONS	It will be supplied for the SEISA process and indicated in the Cabinet Memorandum

TRANSNET-10-953

BB24.1-MKNG-CROSS-CUT-3023

460 Im 5

Guptas renew attempts to buy Ubank

By Aziz Jun 23, 2016

Theto Mahlakoana and Mogomotsi Magome

THE Gupta family are aggressively wooing the shareholders of Ubank in a desperate bid to buy the financial institution to ease their banking woes.

This comes two years after the Guptas' first attempt to buy Ubank failed, and months after all of South Africa's major banks stopped doing business with the controversial family and its companies.

Independent Media can reveal that bosses of Gupta-controlled Oakbay Investments have been calling and meeting leaders of the National Union of Mineworkers (NUM) for weeks in a bid to convince the union to sell. NUM controls a 50 percent stake in Ubank, with the rest held by the Chamber of Mines of SA.

Oakbay's Nazeem Howa expressed the company's interest in the bank to the individual unionists after the union rejected its offer in 2014. This suggests the company's bosses may have anticipated its subsequent troubles with the leading financial institutions.

Speculation is also rife in political and financial circles that the banks' moves were related to fears over regulatory breaches of the laws governing the movement of money in and out of the country.

NUM general secretary David Sipunzi confirmed to Independent Media that Howa had contacted him on his cellphone.

"We have been approached unofficially about the selling of Ubank to Oakbay. Nazeem called me and I told him what our stance is and the official channels he should follow," Sipunzi said.

Oakbay's decision to resuscitate its mission to acquire Ubank, in light of their current woes, has the potential to send NUM into turmoil. The divided union's leaders appeared to be at odds over the sale of the bank, despite a standing resolution by its central committee meeting this month to hold on to the bank.

The bank is in financial strain, with the Reserve Bank demanding that its shareholders come up with a recapitalisation plan that would see them channelling at least R152m into Ubank by next year.

Ubank has a balance sheet of R4.3bn and has been suffering major losses since the mining industry distress began in 2012.

461

Controversially, Oakbay made a R1 million "donation" to NUM to cover costs for its central committee meeting held earlier this month.

Independent Media has learnt this was the first time the company had made a financial contribution to the union, raising suspicion among NUM members and others in the labour movement that this was meant as a sweetener for the bank sale. This suspicion is reinforced by the timing of Howa's aggressive lobbying.

Sipunzi said the organisation had no intention to bow to pressure. "Our stance is that Ubank is not for sale. We'll make all necessary means to finance the recapitalisation and selling would be the last resort."

However, unionists who got wind of the developments feared the worst, saying that given the NUM's instability, the Guptas might just get their way.

In a strongly worded statement after its NEC meeting in February, the union appeared to be suspicious about moves to sell the bank, whose main beneficiaries are mineworkers and their families.

"It is imperative the two stakeholders meet and resolve the issue of the (management) trust, which seems to be representing its own interest.

"We also call upon the government to intervene and save the only black-owned bank in the country from falling into the hands of vultures," it said.

The transaction would have to be approved by Finance Minister Pravin Gordhan if the company aims to get more than 25 percent of the bank.

Treasury spokesperson Phumza Macanda cited section 54(1) of the Banks Act, which states that "the Minister must consent, in writing and conveyed through the Registrar, to an arrangement for the transfer of more than 25 percent of the assets or liabilities of a bank to another person".

It is, however, unclear if Oakbay would meet the Reserve Bank's requirements for it to own a bank if it has already been rejected by existing banks.

The Reserve Bank this week refused to divulge details of any transactions, but said the Registrar of Banks had a right to conduct a "fit and proper person" test on entities seeking to acquire a bank.

"The criteria for such a test includes, but is not limited to, fiduciary oversight capacity as well as the background of the acquiring entity in terms of governance, integrity and soundness," said spokesperson Jabulani Sikhakhane.

Top members of the Gupta family, including Ajay and Atul Gupta and President Jacob Zuma's son Duduzane, recently resigned as directors of Oakbay.

Howa refused to respond directly when contacted by Independent Media, and asked for questions to be e-mailed to Oakbay's PR company.

These had not been answered before the publishing deadline.

The NUM leadership is not divided on the issue of UBank

462

NUM Adminposted on 6/23/2016 1:32:00 PM

The National Union of Mineworkers (NUM) strongly refutes allegations published on The Star newspaper front page story titled "Guptas bank-capture bid" that the NUM leadership is divided on the issue of UBank or any other issue. When approached by Oakbay CEO Nazeem Howa, the NUM General Secretary David Sipunzi alluded to the fact that UBank is not for sale. However, the General Secretary stated to them that they have a right like many bidders before them to approach Teba Trust on the matter.

On the issue of Oakbay donating R1m to the NUM to cover costs of its central committee, there is no controversy in Oakbay donating to the NUM as there are other businesses that donated to the NUM towards its Central Committee.

"We also want to put it categorically clear that there are no NUM members who are suspicious of the donation from Oakbay or other business towards our central committee. It is an insult to business that when they donate to trade unions it is meant to be a sweetener," said David Sipunzi, NUM General Secretary.

"The journalist who sees instability in the NUM is dreaming. The NUM is one of the most stable unions in Cosatu and it has no splinter unions," Sipunzi added.

For further information contact

David Sipunzi: NUM General Secretary: 082 883 7293 Livhuwani Mammburu: NUM National Spokesperson: 083 809 3257

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Twitter: @Num Media
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JUDICIAL COMMISSION OF INQUIRY INTO ALLEGATIONS OF STATE CAPTURE, CORRUPTION AND FRAUD IN THE PUBLIC SECTOR INCLUDING ORGANS OF STATE

2nd floor, Hillside House
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INDEX: SEQ 19/2021

No.	Description	Pages
Rule 3.4 Application filed by **Malusi Knowledge Nkanyezi Gigaba** for leave that his preliminarily statement of response be admitted as a response to the Rule 3.3 Notice received in respect of the evidence of **Ismail Momoniat.**		
1.	Notice of Motion dated 09 April 2021	01 to 02
2.	Preliminary statement of response	03 to 10

IN THE JUDICIAL COMMISSION OF INQUIRY INTO THE ALLEGATIONS OF STATE CAPTURE, CORRUPTION AND FRAUD IN THE PUBLIC SECTOR INCLUDING ORGANS OF STATE, HELD AT BRAAMFONTEIN, JOHANNESBURG ("the Commission")

GIGABA, MALUSI KNOWLEDGE NKANYEZI — Applicant

PRELIMINARY STATEMENT OF REPONSE TO THE RULE 3.3 NOTICE

KINDLY TAKE NOTICE that the applicant hereby files his preliminary statement of response to the Rule 3.3 notice by the Chairperson of the Commission dated 18 March 2021 (***"the notice"***) and simultaneously hereby gives notice of his intention to apply to the Commission on a date and at the time determined by the Chairperson of the Commission, for Directions in the following terms:

1. That the preliminary statement of response annexed hereto marked "A" be admitted to the Commission as a preliminary response to the notice.

2. That the applicant be granted such further and *alternative* relief as the Chairperson of the Commission may deem fit.

DATED at Pretoria on 09 April 2021.

Attorneys for Mr Gigaba (the applicant)

TO:
THE SECRETARY OF THE COMMISSION
2nd Floor, Hillside House
17 Empire Road
Parktown, Johannesburg
Tel: (010) 214 0651
E-mails: secretary@commissionsc.org.za
Ref: Adv Shannon van Vuuren

Filed with the Secretary of the Commission by e-mail secretary@commissionsc.org.za
on_____

IN THE JUDICIAL COMMISSION OF INQUIRY INTO THE ALLEGATIONS OF STATE CAPTURE, CORRUPTION AND FRAUD IN THE PUBLIC SECTOR INCLUDING ORGANS OF STATE, HELD AT BRAAMFONTEIN, JOHANNESBURG ("the Commission")

GIGABA, MALUSI KNOWLEDGE NKANYEZI Applicant

PRELIMINARY STATEMENT OF RESPONSE

I, the undersigned,

MALUSI KNOWLEDGE NKANYEZI GIGABA

do hereby make oath and say:

THE DEPONENT

1. I am:

   1.1. an adult male; and

   1.2. the Former Minister of *inter alia*, the Department of Finance.

2. The contents of this statement are within my personal knowledge and belief, save where the context indicates otherwise and are both true and correct.

PURPOSE OF THIS STATEMENT

3. On 18 March 2021, the Commission sent to my erstwhile attorney, Reginald Tshabalala, the notice in terms of Rule 3.3, in respect of Ismail Momoniat ("***Momoniat***") which notice is annexed hereto as "***KMG1***" ("***the notice***").

4. The notice specifically invited me to deal with the allegations contained in paragraphs 15, 16, 233 - 242 and 293 ("***the implicating paragraphs***").

5. The purpose of this statement is to provide a response to the implicating paragraphs which have been pointed out to me by the Commission Secretariat, in the notice, which may or may not implicate me in alleged unlawful, illegal or improper conduct in the following respects:

   5.1 that I sought to replace certain officials within the National Treasury on the instruction of the Gupta Family while I was the Minister of Finance;

   5.2 sought to weaken South Africa's Anticorruption and Anti money Laundering Legislature and Financial Regulatory Framework by attempting to delay the passing of the FICA Amendment Bill to serve the private interests of the Gupta Family whilst I was a member of the JCPS Cluster.

INTRODUCTION

6. The implicating paragraphs contain Momoniat's hypothesis and theories which attempt obliquely to implicate me in some conspiracy without any attempt being made to corroborate same.

7. This Commission should accordingly resist the temptation to make any findings against me based on the pure speculative nature of Momoniat's allegations of and concerning me.

8. Because of the speculative nature of these allegations, it is extremely difficult to deal with them other than in the same generalised fashion contained in Momoniat's affidavit. I accordingly do not deal with such paragraph *seriatim*.

MY RESPONSE TO THE ALLEGATIONS OF MOMONIAT

9. I deny with contempt that I was ever under the instruction of the Gupta family to change any official at the National Treasury while I was the Minister of Finance. This narrative is not founded in fact but has as its objective the impugning my reputation and integrity.

10. It cannot be excluded that these unsubstantiated allegations against me are rooted in political motivation. This suspicion is reinforced by the fact that Momoniat was also involved in ANC politics on his own version. With respect the Commission must guard itself against being used as a battle ground to settle political scores.

11. The true facts are, that whilst I was Minister of Finance, I appointed, amongst others:

    10.1 the new Director General (DG);
    10.2 Deputy Director General (DDG) of International and Regional Economic Policy;
    10.3 Regional Economic Policy (IREP); and
    10.4 Deputy Director General (DDG) for Public Finance;

    all of whom were internal candidates with long years of service in the National Treasury and could not be seen as furthering anyone's particular agenda (let alone the Gupta's).

12. I further appointed as Head of the Financial Intelligence Centre (FIC) someone who had had long years of service as the head of the National Directorate for Public Prosecutions in the Free State.

13. I cannot believe that anyone could seriously suggest that these appointments were of Gupta candidates.

14. I am of the very firm conviction that my tenure as Minister of Finance strengthened institutions, especially the National Treasury institutions. Of course, there can be differences in opinion and one can have no quibble with that. However, it is another thing to elevate appointments with which one does not agree to the realm of a political conspiracy.

15. I proceed to provide this Commission with some examples:

15.1. I reinstituted the Budget Forum and Budget Council and made them consistent. Both meetings had somewhat become defunct prior to my appointment, and I ensured that they had a clear agenda that helped to strengthen the budget process;

15.2. I regularly briefed Cabinet during the item on Financial matters on my engagements with the Ratings Agencies, the international and domestic investor communities as well as the two sessions of the IMF / World Bank Annual meetings to apprise my Cabinet Colleagues of the issues begin raised in these platforms so that we could formulate collective responses as Cabinet.

15.3. It was my fervent view that keeping my Colleagues in the dark as to these issues created some problems regarding some of the public outbursts that would sometimes be made that contributed to weakening investor and Rating Agencies' perceptions of South Africa, particularly our management of public finances;

15.4. I reinstituted the engagements with the CEOs Forum, which had become defunct prior my appointment. In actual fact, we had many meetings with the CEOs Forum, including with various business organisations such as Business Unity South Africa (BUSA), the Black Business Council (BBC), Mining Council as well as the Business Leadership South Africa (BLSA). Some of these meetings assisted our preparations for the World Economic

Forum, the formulation of the 13-Point Action Plan ("*the Plan*") to rescue the economy from slow growth trap as well as to discuss other economic and fiscal issues I felt or that business felt we needed to;

15.5. I formulated the Plan which was aimed at assuring the (International and domestic) investors and Ratings Agencies of our commitment to implementing structural reforms to rescue the economy from slow growth. Prior to announcing the Plan, we consulted widely with business, the unions and fellow Cabinet Colleagues on this Plan. I also briefed the Ratings Agencies on this Plan and assured them of Government's commitment to the Plan. Among the items in the Plan was the speedy appointment of the new DG of the National Treasury, which deadline was met, the appointment of a new Board and Chairperson of SAA, which was accomplished after it had eluded all my predecessors, implementing structural reforms in the SOEs, which we started doing, implementing the nuclear plan in a prudent manner, on a scale and pace our economy could afford, and others. This Plan was well received by the stakeholder communities;

15.6. I met regularly with the Ratings Agencies, often at my own request in order to take them into my confidence regarding some of our interventions to stabilise the fiscal framework and grow the economy. As stated above, I took the initiative to brief the Ratings Agencies on our Plan. I introduced a culture of inviting other Ministers in the meetings with the Ratings Agencies, such as the Ministers of Trade and Industry, Transport, Energy, Mineral Resources, Public Service and Administration as well as Public Enterprises in order to ensure they understood the issues we were dealing with, the concerns of the Ratings Agencies about our economy and economic policies and to ensure there was coordinated response to the Ratings Agencies from Government. The National Treasury would coordinate the responses;

15.7. in partnership with the Johannesburg Stock Exchange (JSE), I introduced domestic investor conferences in Johannesburg and Cape Town, after the Medium-Term Budget Policy Statement (MTBPS) and the Budget, in order to take our domestic investor community on board prior to embarking on international roadshows. This was important particularly because most of South Africa's debt was held by domestic investors and was therefore Rand denominated. We needed to prioritise the domestic investors and place them on par with the international investors;

15.8. I supported the programmes to stabilise the debt by implementing fiscal consolidation and taking the unpopular decision to increase VAT;

15.9. I proposed the establishment of the SARS Commission to investigate the reasons for the severe revenue shortage in 2017 and proposed how to improve SARS operations; and I also proposed that the PIC should disclose its projects in order to eliminate the suspicions of corrupt dealings involving politically connected people. In my firm opinion, the PIC Commission grew out of this proposal by me;

15.10. following an apparent stalemate prior to my appointment as the Minister of Finance, I facilitated meetings between the Ministers of Finance, State Security, Police and Justice to resolve challenges pertaining to the Financial Intelligence Amendment Bill. Following this meeting, officials of these departments met, including SARS and FIC, to finalise the issues that resulted in the passing of the Bill during the year. I insist that it was my leadership that ensured that Cabinet finally passed that amendment Bill;

15.11. when I arrived at National Treasury, the South African Reserve Bank had revised the economic growth forecast down to 0.8%. By the time of the MTBPS, they revised it further down to 0.5%. However, business confidence subsequently grew and there was strong growth during the second, third and

final quarters of the financial year, which resulted in the Growth Domestic Product resurging to the 1.3% growth rate envisaged in the 2017 Budget. I believe that besides good rains which resulted in good crop and strong performance by the agricultural sector, and the positive performance of the mining and manufacturing sectors, my leadership played a significant role in reassuring the Investors and Ratings Agencies of prudent fiscal management by the Government, and of the continued independence of the National Treasury.

16. It therefore is not true that I had played any role, let alone and integral one, that could be categorised as leading to the delay, on any conceivable factual or legal basis in the passing of the Financial Intelligence Amendment Bill as a member of the JCPS.

17. What puts paid to any suggestion on the part of Momoniat of my involvement in some broader conspiracy of State Capture is the fact that, notwithstanding the JCPS having sought certain clarifications about the FICA Amendment Bill, when I became the Minister of Finance, I was the driver and facilitated the resolution of those concerns thereby enabling the FICA Amendment Bill to be passed, and not scrapped, (which would appear to be Momoniat's hypothesis).

CONCLUSION

18. It is submitted that a perusal of Momoniat's affidavit does not on any cognisable basis support a finding of unlawful or improper conduct on my part. I would accordingly request that the Commission does not rely thereon or any adverse finding against me.

_____

DEPONENT

THUS SIGNED AND SWORN TO before me at _____ on this

the _____ day of _____ 2021 by the deponent who acknowledges that the deponent knows and understands the contents of this affidavit; that it is the truth to the best of the deponent's knowledge and belief and that the deponent has no objection to taking the prescribed oath and regards the same as binding on the deponent's conscience and the administration of the oath complied with the Regulations contained in Government Gazette No. R1258 of 21 July 1972, as amended.

_____

COMMISSIONER OF OATHS

EX OFFICIO:

FULL NAMES:

PHYSICAL ADDRESS:

DESIGNATION: