

**STATE CAPTURE INQUIRY**  
**PARKTOWN, JOHANNESBURG**

**18 SEPTEMBER 2018**

**SESSION 1 – 2.**

**DAY 14.**

**FINAL**

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**Session 1**

**CHAIRPERSON**: Good morning Mr Pretorius, good morning everybody.

**ADV PAUL PRETORIUS SC**: Morning. Chair, today, the banks will continue to give evidence. First, to give evidence will be Mr Johan Burger of First Rand. He will be led by Refiloe Molefe and ABSA will testify too, through Yasmin Masithela and Zinhle Buthelezi will lead her. Tomorrow, just a reminder, we have agreed, by your leave Chair, to start at 9:30 with Mike Brown of Nedbank who will be led by Kate Hofmeyer.

**CHAIRPERSON**: Thank you very much Mr Pretorius.

**ADV REFILOE MOLEFE**: Good morning Chair.

10 **CHAIRPERSON**: Good morning.

**ADV REFILOE MOLEFE**: We will be continuing with term of reference 1.7 relating to the closure of bank accounts and the witness to be heard today is from FNB. The term I have noted in bundle H1, that no notices were served to implicated parties, as the legal team was of the view that no parties have been implicated.

**CHAIRPERSON**: okay.

**ADV REFILOE MOLEFE**: Well, on the face of the statement.

**CHAIRPERSON**: yes.

20 **ADV REFILOE MOLEFE**: However, of course if any party does become implicated during the course of evidence then they are afforded recourse as provided for in the rules, but I also indicate to the Chair, that bundle H1, has been supplemented with bundle H3 and that was to incorporate the supporting affidavit that was filed by the FNB in the Minister's application for reasons that will become clear during evidence and I will beg leave to hand up bundle H3?

**CHAIRPERSON**: Hang on, I've got 2 bundles here, the one is Exhibit H1 which we, which I admitted yesterday. Then I've got another one here Exhibit H3. You are saying?

**ADV REFILOE MOLEFE**: Thank you Chair, Exhibit H3, is the supplementary supporting affidavit which supplements bundle H1.

**CHAIRPERSON**: That's what I'm coming to. If it supplements Exhibit H1, why must it be marked Exhibit H3, because if it supplements, it should just be a continuation of H3, just the page numbers should extend to include it?

**ADV REFILOE MOLEFE**: Well Chair there was a separate index that was prepared and there is already H2 in the bundle relating to H.

10 **CHAIRPERSON**: If it's marked Exhibit H3 or Exhibit H2, it means it's a separate exhibit, so if the intention is that it should be part of Exhibit H1, then it should not be Exhibit H3 and if yesterday we, I admitted an exhibit marked Exhibit H2, it probably wasn't said to me that it was meant to be, meant to supplement H1, so if H3 is meant to supplement H1, then it should not be marked a separate exhibit. If it stands on its own, then it can be marked Exhibit 3.

**ADV REFILOE MOLEFE**: Indeed Chair.

**CHAIRPERSON**: So what is the position?

**ADV REFILOE MOLEFE**: It will stand on its own and there will be reference to it separately.

20 **CHAIRPERSON**: Okay alright.

**ADV REFILOE MOLEFE**: Thank you Chair. Chair might I request that the witness be sworn in?

**CHAIRPERSON**: Yes thank you.

**REGISTRAR**: Please state your full names for the record?

**MR JOHAN BURGER**: Johan Petrus Burger.

**REGISTRAR**: Do you have any objection to taking the prescribed oath?

**MR JOHAN BURGER**: No.

**REGISTRAR**: Do you consider the oath to be binding on your conscience.

**MR JOHAN BURGER**: Yes I do.

**REGISTRAR**: Do you swear that the evidence you will give today, shall be the truth, the whole truth and nothing but the truth? If so, please raise your right hand and say so help me God?

10

**MR JOHAN BURGER**: So help me God.

**CHAIRPERSON**: Thank you.

**ADV REFILOE MOLEFE**: Thank you Chair. Mr Burger, please refer to the bundle marked H1 before you? In this bundle, we will be dealing with the documents from Page 166 to 170. Please turn to Page 166. Is that your statement to the Commission?

**MR JOHAN BURGER**: Yes that is my statement to the Commission.

**ADV REFILOE MOLEFE**: Please turn to Page 170? Is that your signature appearing on that page?

**MR JOHAN BURGER**: That is my signature.

20

**ADV REFILOE MOLEFE**: And do you confirm the correctness of the contents of the statement?

**MR JOHAN BURGER:** I confirm the correctness of the statement.

**ADV REFILOE MOLEFE:** Thank you. Mr Burger, at the time of deposing to this affidavit, what was, your role at FNB?

**MR JOHAN BURGER:** At the time, I was the Chief Executive of First Rand Group of which FNB is a division of, as many of the other brands within the broader group.

**ADV REFILOE MOLEFE:** And is this the current position you hold?

**MR JOHAN BURGER:** I have recently stepped down as CEO of the group at the end of August.

**ADV REFILOE MOLEFE:** And do you hold any current position in first Rand?

10 **MR JOHAN BURGER:** I now hold a non-executive role in First Rand.

**ADV REFILOE MOLEFE:** Okay and what is your experience in the banking sector?

**MR JOHAN BURGER:** My experience started with the First Rand Group, although it was a much smaller institution, 32 years ago in 1986 in the finance division as CFO of one of the larger divisions. I progressed from being the CFO to running certain risk divisions within the group, progressed to running certain business units within the group, ultimately becoming the financial director of the group, progressed to being the Deputy Chief Executive and in the beginning of 2015, the Chief Executive of the group.

**ADV REFILOE MOLEFE:** And are you legally qualified?

**MR JOHAN BURGER:** Legally qualified, or are you asking me what my professional-

20 **ADV REFILOE MOLEFE:** What are your professional credentials, yes?

**MR JOHAN BURGER:** So I'm a chartered accountant by profession.

**ADV REFILOE MOLEFE**: So the answers that you would be giving, would they be from a business operations point of view?

**MR JOHAN BURGER**: Yes I think it's very important that the answer to that is yes. As the Chief Executive Officer, we don't get involved in a lot of the detail, so a lot of my answers would be from the perspective of a CEO being responsible for the overall strategy and risk management of the group.

**ADV REFILOE MOLEFE**: Now you spoke of risk management. Would this entail mitigation of risk?

**MR JOHAN BURGER**: Absolutely. Absolutely.

10 **ADV REFILOE MOLEFE**: In the testimony that was given by Standard Bank yesterday, the regulatory framework that was said to apply to Standard Bank, was to mention a few, the Bank's Act, PRECCA and FICA. Now in addition to, if at all, what is the governing legislative framework within which FNB operates?

**MR JOHAN BURGER**: I think it's obviously those 3 that you refer to being the Bank's Act, the Financial Intelligence Centre Act and the Prevention and Combatting of Organised Crime are the main ones that we are responsible to comply with. Obviously also what is very important, as a South African bank, we also operate in other jurisdictions and we also have transactions and interactions with financial institutions in other countries where we don't necessarily operate, so it's important that we also comply  
20 with the rules of those jurisdictions, because we are exposed to – to the extent that we do not comply, we expose ourselves to regulatory fines in those jurisdictions, but also, I think also very critically important, to the extent that if you deal with an institution in another country and they believe that we are not complying with the appropriate legislation in South Africa, we would cut ourselves off from the international financial markets, for an

example, if we raise funding in international markets, those funders would ask us the question and we would in fact have to certify that we comply with the legislation in terms of the Bank's Act, the FICA Act and the Prevention of Organised Crime Act, otherwise they will not provide funding to the country and I think also very importantly, is that access to forex flows. South Africa to the extent that we trade with other countries, we need to pay and receive in foreign currency. Now if we don't comply with legislation in South Africa and in those countries, we will be cut off from our ability to trade in the international finance markets. Obviously, that will have dire consequences for both us as an institution, our customers and for South Africa, so complying with the legislation in SA  
10 home, or in host countries, it is critically important in managing the business and the business risk of the institution.

**ADV REFILOE MOLEFE:** Okay so if I understand you correctly then, the sanctions that the banks would face, are also inclusive of prejudice, not only to the bank itself, but a greater effect would result on the South African economy?

**MR JOHAN BURGER:** Absolutely I think it's absolutely critically important that we comply with this legislation, because we can as a country be cut off from the international markets. As I said, both from a funding perspective and from our ability to access forex markets for imports and exports, so it is absolutely critical that we comply.

**ADV REFILOE MOLEFE:** Thank you, can I refer you to bundle H3? On Page 1 of that  
20 bundle, there are several respondents that are cited there. Now from this list of respondents, which accounts were closed by FNB?

**MR JOHAN BURGER:** Advocate they were all closed. If you go to Page 4, they were all closed, other than certain mortgage accounts. The reason for not closing mortgage accounts is because those are long-term agreements and the customers can't

necessarily repay a mortgage loan. Now a mortgage loan, in what the average person would understand, is if you finance against your house and there is a mortgage over that house, so those are long-term contracts and to the extent that the customer sticks with those long-term arrangements, the long-term arrangements just run down, but we do not allow additional activity on those accounts, but the account is not closed, because it is not practically possible and legally possible to close a bond because it's a long-term agreement.

**ADV REFILOE MOLEFE**: Now, in Paragraph 10 on Page 4, you refer to the twelfth respondent whose account was not closed. The explanation that you have just given, 10 would that be what a mortgage redemption account is?

**MR JOHAN BURGER**: Absolutely, it would be a loan secured by a mortgage over a property.

**ADV REFILOE MOLEFE**: Now on Paragraph 9, there are 5 accounts which are listed there. Do you confirm that the evidence that you have just given in so far as the accounts that were closed, relates to those entities?

**MR JOHAN BURGER**: Ja they were all closed.

**ADV REFILOE MOLEFE**: For the sake of the record, Chair, I am on H3, Page 4 Paragraph 9.

**CHAIRPERSON**: Yes.

20 **ADV REFILOE MOLEFE**: Thank you, Mr Burger of the accounts that were closed, do you confirm that the accounts listed in Paragraph 9, are the accounts that were closed?

**MR JOHAN BURGER**: Yes they were closed.

**ADV REFILOE MOLEFE**: Could you please state the names of the accounts that were closed?

**MR JOHAN BURGER**: In Paragraph 9, we refer to Tegeta, TNA Media, Islandsite and Sahara Computers.

**ADV REFILOE MOLEFE**: Thank you, now the account, the mortgage redemption-

**CHAIRPERSON**: I'm sorry so I was earlier on trying to see which Paragraph 9 has got accounts. Do you actually mean account holders?

**ADV REFILOE MOLEFE**: Account holders thank you Chair indeed.

**CHAIRPERSON**: Yes.

10 **ADV REFILOE MOLEFE**: Mr Burger, the twelfth respondent, is the respondent who holds a mortgage redemption account with FNB, is this account still active with FNB?

**MR JOHAN BURGER**: It is still active.

**ADV REFILOE MOLEFE**: And is it for the reasons that you have cited?

**MR JOHAN BURGER**: For the reasons I have cited, those are long-term agreements.

**ADV REFILOE MOLEFE**: Now in so far as the closure of the accounts, what process was followed by FNB prior to the closure of the accounts?

20 **MR JOHAN BURGER**: I think it's, think it's very important that I spell out the process that leads up to the closing of accounts. In terms of the legislation under which a bank operates, we have an obligation firstly, to do proper, as they refer to in the legislation, know your customer vetting, i.e. there is a proper process that you have to go through to allow a customer to begin a client of the bank and secondly, there are required processes to monitor customers on an ongoing basis to ensure that you are still comfortable in

having that relationship with the customer. Now those ongoing monitoring, there are two bases of doing it. Firstly, there is external monitoring. External monitoring for example means we look for adverse media coverage and internal monitoring would be, we would look for an activity on the account that raises a level of suspicion. So those are the two processes we follow in identifying whether we want to exit a relationship with the customer. Those two processes are prescribed also by the regulatory frameworks.

**ADV REFILOE MOLEFE**: Now, was there any written communication to the affected account holders whose accounts were closed by FNB?

**MR JOHAN BURGER**: Yes, we did, we give them formal notice of our intention to close, the, relationship and we would have consulted with our legal team on whether we obviously have the right to and giving proper notice to closing the accounts.

**ADV REFILOE MOLEFE**: Yes if I can refer you to Page 15, Page 15 Annexure FNB1, Page 17 Annexure FNB2, Page 19 Annexure FNB3 and Page 21 Annexure FNB4? Were those the letters that were sent to the account holders whose accounts were closed?

**MR JOHAN BURGER**: Correct.

**ADV REFILOE MOLEFE**: Can I also refer you to Page 35 of the bundle? Can you explain to the Chair what that document is?

**MR JOHAN BURGER**: This is a document that I specifically prepared for the purposes of this testimony and to explain the process that we follow in deciding whether to exit a client or not exit a client from the institution, so you will see what the first column talks to origination and that refers to events external or internal that lead us to question whether we should deliberate whether the client relationship be maintained or exited. So that is the first thing, there is an origination process, i.e. what are the type of things we would look at to decide whether we want to deliberate the continued relations with the clients, so

an example that we use there, would be our client due diligence, which is required by regulations to do with an on-boarding, things like transactional monitoring, is there any activity on the account that leads us to think that there are suspicious transactions on the account and the other one is adverse media, so we would look at external media, whether there is adverse media on a specific client, etcetera, etcetera, so we would get, so those would be trigger things that we would look at to decide let's deliberate that specific account, which then goes from origination to deliberation.

If it is escalated to deliberation, there is a specific, what we use internally, a POI forum it is called a person of interest forum, where these debates get held. Now this person of  
10 interest forum is an independent committee set up by the board to review specific clients, whether we want to continue, or just monitor a relationship or exit a relationship. Me personally, I am not even a member of the POI. It is specifically set up as an independent body that can apply their mind to that specific question. But, do we monitor, do we continue, or do we exit that relationship. You will then see the remediation talks to what do we do? Do we just monitor that account, or do we, does the POI recommend that the bank exit that relationship? So that's the process we follow internally to come to the decision. There are trigger events, specific deliberations and then a remediation action on that specific customer.

**ADV REFILOE MOLEFE:** Yes. Now this flowchart, does this chart reflect the process  
20 that was pursued in closing the accounts of the Gupta related entities?

**MR JOHAN BURGER:** Absolutely, that was the process. That is the process that gets followed in with any customer.

**ADV REFILOE MOLEFE:** I am going to refer you back to Page 15, this is one of the letters that was sent to the account holders of FNB. Throughout all the letters that were

sent to the affected account holders, on Paragraph 2 of these letters, is a standard line which FNB used through its legal representative. Can you please read that line for us?

**MR JOHAN BURGER**: This is obviously written by the lawyers referring to us as,

*“Our client is entitled to terminate its relationship with you by giving you reasonable notice and our client hereby gives you such notice.”*

**ADV REFILOE MOLEFE**: Now in consideration of this letter in its entirety and this specific paragraph, is there anywhere on these letters, where the reasons for the termination of the accounts is set out?

**MR JOHAN BURGER**: No, not specifically.

10 **ADV REFILOE MOLEFE**: So did FNB have a legal basis for closing these accounts?

**MR JOHAN BURGER**: Absolutely. We relied on the Standard Bank case, which is also referred to in my affidavit and also, what is important, that case was referred to the constitutional court and that was confirmed to be the legal basis on which the banks are allowed to exit their relationship with clients.

**ADV REFILOE MOLEFE**: Now the reference to the case that you are making is that what is entailed in Paragraph 12 on Page 5 of the bundle, H3?

**MR JOHAN BURGER**: Correct that’s the basis of Breedenkamp and Others versus Standard Bank.

20 **ADV REFILOE MOLEFE**: Now, on Page 23, still on H3, Annexure FNB5, do you know what that document is?

**MR JOHAN BURGER**: Yes that’s the ruling from the Constitutional Court confirming – let me read rather the last sentence.

*“The constitutional court has considered the application for leave to appeal and has concluded that the application should be dismissed with costs, as it bears no prospect of success.”*

**ADV REFILOE MOLEFE**: And this is a judgement by the Constitutional Court in respect of the application for appeal in the Breedenkamp case?

**MR JOHAN BURGER**: Correct.

**ADV REFILOE MOLEFE**: And this, is this consistent with what you have set out in Paragraph 12 on Page 5 of your supporting affidavit?

**MR JOHAN BURGER**: Correct.

10 **ADV REFILOE MOLEFE**: Now, again, going back to the letters, you can choose anyone of the letters as I am going to refer to a standard paragraph in the letter, Paragraph 6 of that letter, speaks to communication with FNB in relation to either the closure of the accounts or any operational issue relating to the accounts - issue relating to the accounts rather and that any such party, must direct all such correspondence directly to the writer. Did FNB receive any written correspondence from any of the entities whose accounts were closed?

**MR JOHAN BURGER**: Yes we did, which is again – it is in the pack, it's on 25, Page 25.

**ADV REFILOE MOLEFE**: Page 25.

**MR JOHAN BURGER**: where we did receive a letter from Nazeem Howa, the CEO of  
20 Oakbay Investments, asking for reasons for the termination of the accounts.

**ADV REFILOE MOLEFE**: Now on this letter, is there any contention in so far as the basis for closing the account?

**MR JOHAN BURGER**: Not at all, they just asked for reasons.

**ADV REFILOE MOLEFE**: And did FNB provide these reasons?

**MR JOHAN BURGER**: Yes we did. We responded and again, if you can guide me to the page number?

**ADV REFILOE MOLEFE**: I have the following letter on Page 26 marked Annexure FNB7.

**MR JOHAN BURGER**: Correct and if you read the Paragraph 3, let me find the right one. So, if you read Paragraph 3, *our client took a careful and considerate decision to close bank accounts on various entities due to associated reputational and business risks*. Those were the reasons provided to the client.

10 **ADV REFILOE MOLEFE**: Did FNB receive any further response to this letter?

**MR JOHAN BURGER**: We did not get any response to this specific letter.

**ADV REFILOE MOLEFE**: Was there any further correspondence of any kind from Mr Howa?

**MR JOHAN BURGER**: Yes there was, which is if I'm correct Advocate, on Page 27, there was at the time of the Minister's application, there was an additional letter which was directed by the lawyer of the client, but that was subsequent, it was not as part of our correspondence to him giving reasons for the closure of the account.

**ADV REFILOE MOLEFE**: The Minister's application you are referring to, would that be the supporting affidavit you deposed to in support of the application?

20 **MR JOHAN BURGER**: Correct.

**ADV REFILOE MOLEFE**: And did FNB respond to this letter on Page 27?

**MR JOHAN BURGER**: Yes we did and if I am correct, on Page 30 FNB9, where we indicated that we have provided reasons yet which is again highlighted in Paragraph 4, decision to close the bank accounts due to the associated reputational and business risk and I think more specifically important, the request that they made regarding reporting of suspicious transactions to the FIC. We made it clear under Paragraph 6, that that information we are not entitled to provide to any third party. We are only allowed to provide that to the FIC, not to any third party.

**ADV REFILOE MOLEFE**: When you say information related to suspicious transactions,

**MR JOHAN BURGER**: yes

- 10 **ADV REFILOE MOLEFE**: could you elaborate for the Chair on that? Was there certain information that was requested from FNB?

**MR JOHAN BURGER**: No, banks have an obligation to report suspicious transactions to the FIC.

**ADV REFILOE MOLEFE**: Yes, now was this information requested from FNB?

**MR JOHAN BURGER**: In the letter previously, they asked, the client asked us to supply this information which we responded by saying we are not legally entitled to provide him with the information that we provided to the FIC.

**ADV REFILOE MOLEFE**: And this request was made on the letter on FNB8 Page 27?

**MR JOHAN BURGER**: Correct.

- 20 **ADV REFILOE MOLEFE**: Now there was repeated mention by FNB of reputational and business risk. Can I turn you to Page 31 all the way to Page 34? Firstly, can you explain what, are, those documents?

**MR JOHAN BURGER**: These are documents that I prepared as part of my preparation for this testimony, just to give more clarity on these two specific topics.

**ADV REFILOE MOLEFE**: Which two specific topics?

**MR JOHAN BURGER**: Of reputational and business risks, I think I specifically prepared those to give a bit more colour and explanation as to what do we mean by reputational risk and business risk.

**ADV REFILOE MOLEFE**: Now without reading word for word from these documents, can you please explain to the Chair what, FNB's understanding or stance is in so far as reputational and business risk?

10 **MR JOHAN BURGER**: Chair if I can put it into three buckets, when we talk about reputational risk, if one does not comply with the regulatory framework of the country in which you operate, there will be reputational risk associated with non-compliance. There will also be reputational risk if a bank conducts in activities which are regarded by stakeholders as immoral illegal or unethical, or an institution will suffer reputational risk if its client base, are involved in activities that introduce reputational risk onto the institution. Those are the three broad definitions. I think it is absolutely critical that the reputation and trust of a financial institution is sacrosanct. A financial institution will not survive if its reputation and trust is not absolutely intact and that's why it is so critical that a bank, even the legislation prescribes banks to make sure that they manage reputational risk because  
20 the negative consequences of negative reputational risk on the institution, has direct consequences on the business and the ability of the business to survive in the future.

Remember the moment you have an institution where there are negative perceptions or negative reputational issues attached to that institution, many stakeholders no longer want to deal with that institution and I think we have many examples of what happened in

this country of our institutions that have negative reputations. Customers don't want to deal with it anymore, funders don't want to provide funding to it, regulators impose sanctions on it, foreign funders don't want to provide funding to the institution. There are many big negative business risks associated with negative reputational risk, so that is why, to us, we cannot afford as an institution, to have negative reputational and the consequential business risks. We have to manage that and the moment we believe that there is any activity, direct or indirect that implicates or affects the reputation of the institution, we have to deal with that and make sure that we manage that risk away and that's why it was so critical in this example that the moment we, the risks became too  
10 high for First Rand or FNB to continue this relationship because it introduced negative reputational and negative consequential business risk on the institution, we thought it appropriate to act in the manner that we acted and exit those relationships.

**CHAIRPERSON**: So the activities which give rise to risk to reputational damage to a bank such as yours, would not be limited to criminal activities?

**MR JOHAN BURGER**: Absolutely not, I think sometimes it is just perceived,

**CHAIRPERSON**: yes.

**MR JOHAN BURGER**: so a lot of times it is just perceived negative rather than actual. In the public opinion, it is most of the time perceived and if you don't manage those perceived risks, you are going to suffer negative consequences in your business, so that  
20 is why it is absolutely sacrosanct for us an institution that the number one thing we manage, is reputation and trust, because without those two things, I think the financial institution finds it very difficult to do business and because we are dealing with - we have a fiduciary responsibility to depositors and we look after savers' money, trust is absolutely

sacrosanct and our reputation is absolutely sacrosanct. Without those intact, it is very difficult to operate, domestically and internationally.

**ADV REFILOE MOLEFE**: Thank you Chair. Now on Page 31, the second bullet point, you state there that the reputational risk arises if people form a negative perception. Now I haven't heard what you have said. Am I correct to say that the idea behind the negative perception would be in the ordinary meaning of something being perceived whether it is, actual or not?

**MR JOHAN BURGER**: Absolutely, sometimes the perceived risks or perceived negative reputations are sometimes more dangerous than the real ones, because people make up  
10 their own, they create their own view of the facts.

**ADV REFILOE MOLEFE**: Okay is reputational risk concerned only with illegal activities?

**MR JOHAN BURGER**: It can be, it is sometimes perceived as being illegal, not actually illegal. I think it's very important that sometimes that the stakeholders that an institution like First Rand has to manage the moment there is a perceived negative reputation, you cannot tolerate that and it has to be dealt with.

**CHAIRPERSON**: Can I ask this question, seeing that the activities that a bank would look at, include activities that are not necessarily criminal, if for example, there was say a political party or an association or organisation that took a certain view on the politics in the country and advocated for certain things, would that be a good enough reason for a  
20 bank if it thought that association with that political party could damage it's risk, would that be a good enough reason for it to close, to refuse to open any accounts for that organisation?

**MR JOHAN BURGER**: Chair I think not per definition it would be, but I think any institution would take very due care before it takes such a decision whether it would bank

or wouldn't bank, but the fact that you are a political party, doesn't disqualify you immediately, but I think there would be proper deliberation as I described in the institution and what is the policy when it comes to providing bank accounts or banking facilities to political parties. Those would be, would form part of an internal deliberation, but it can't merely disqualify you.

**CHAIRPERSON:** Well, but as a principle, would it be correct that what you have said means that there could be a political party or organisation with whom a bank would refuse to have an association because of its views politically if the bank thought that its views would cause reputational damage?

10 **MR JOHAN BURGER:** If we believe an account could lead to reputational risk for the institution, we wouldn't open that relationship. If we believed that that could have negative reputational impact on the institution, we would not open that relationship. But I think it is just important Chair that being a political party doesn't immediately disqualify you.

**CHAIRPERSON:** No obviously I accept that, because I am sure the political parties that operate in South Africa have got banking accounts with different banks in the country, but I am emphasising the views or objectives of a political party that what you have said, it looks like one could find a situation where a bank says this political party or this organisation, stands for certain things with which we can't associate as a bank, because  
20 it will pose reputational risk to us, therefore we refuse to have any association with them, in principle that is possible.

**MR JOHAN BURGER:** We will have the debate internally of whether we believe there is such a risk.

**CHAIRPERSON:** No I mean if you believe, if you believe there is a risk, you wouldn't.

**MR JOHAN BURGER**: But that would apply to any account holder, not specifically to a political party, any account holder.

**CHAIRPERSON**: Because what I am trying to establish, is the principle you follow.

**MR JOHAN BURGER**: The principle of, we cannot afford negative reputational risk on the institution.

**CHAIRPERSON**: Would you be able to say whether for example, individuals or organisations that might be perceived to be racists, would fall within the category of-

**MR JOHAN BURGER**: I think Chair I wouldn't like to speculate on how we would deal with every type of account, I really wouldn't.

10 **CHAIRPERSON**: Yes, but isn't racism one of those things that a bank such as your bank, would not want to be associated with?

**MR JOHAN BURGER**: Agreed.

**CHAIRPERSON**: And then I would have thought that internationally and nationally, if you as a bank, were seen to be associated with say a racist organisation, that should pose reputational damage and therefore, in terms of the principle that you have told us, the bank should be looking at terminating any relationship with such people?

**MR JOHAN BURGER**: Chair I think that's important, can we stick to the principles rather than the specifics.

20 **CHAIRPERSON**: No, no Mr Burger, you can't get off the hook just like that. The way to test the soundness or validity of principles is precisely to put up facts, to see how they are applied, if they are applied consistently or not.

**MR JOHAN BURGER**: Chair let me respond that way. We will always apply these principles consistently in whichever situation we get faced with. We will apply the same principles to every new account or an existing account that we need to monitor. We apply our principles consistently.

**CHAIRPERSON**: But I would have thought that it must be a very easy answer to give to say any organisation or individual that espouses racism, the bank would not want to have any association with that person because a lot of people would not want to interact or associate with us if we are seen to be associating with racists and so on.

**MR JOHAN BURGER**: Agreed.

10 **CHAIRPERSON**: Okay. Alright thank you.

**ADV REFILOE MOLEFE**: Thank you Chair, Mr Burger staying on Page 31, on the 4<sup>th</sup> bullet point on Page 31 of your document, there are three entities that are listed there and following that and before that, are two bullet points. Can you please explain what the relevance of this information is?

**MR JOHAN BURGER**: Chair what we were trying to and again, I prepared this for my own purposes, we showed examples of what can happen to businesses that have a negative reputational risk associated with them and in dealing with specific clients. Now, the KPMG Bank of McKinsey are examples of what happened, negative reputational risk associated with that entity and what negative business consequences followed that  
20 reputational risk. A lot of clients no longer did business with these entities.

**ADV REFILOE MOLEFE**: So those were examples that you were providing?

**MR JOHAN BURGER**: Those are just examples.

**ADV REFILOE MOLEFE**: Thank you, we now move on to an invitation that FNB received. Can you turn with me to Page 169 to 170 of bundle H1?

**CHAIRPERSON**: I know you prefer to call them bundles and many of us do, but if we want to be consistent and not confuse anybody who might read the transcript later, maybe we should just say Exhibit H1,

**ADV REFILOE MOLEFE**: Exhibit

**CHAIRPERSON**: Exhibit H3, so it's consistent that we are talking about the same thing.

**ADV REFILOE MOLEFE**: Indeed Chair, thank you very much. Exhibit H1 Mr Burger from Pages 169 to 170. On Paragraph 14 to 19 of your statement, you narrate events  
10 relative to an invitation to a meeting by members of a political party, is that correct?

**MR JOHAN BURGER**: Correct.

**ADV REFILOE MOLEFE**: Who invited you to this meeting?

**MR JOHAN BURGER**: I received a phone call from Mr Enoch Godongwana the head of the then economic cluster of the ANC to attend a meeting with the Secretary General of the ANC at Luthuli House. When I received it, I must say it was an unexpected call, when I received the call from him, I indicated to him that I was out of town and would only be available for such meeting later that week and he should make contact with me rather – because I think that was the Monday, Tuesday, he should rather make contact again with me by the Wednesday to discuss the meeting and when I made contact with him again  
20 on the Wednesday, I asked him, please can he just give me information on who would be attending the meeting and the purpose for the meeting in a request to properly prepare myself for the discussion. I don't go to any meeting unless I understand who is attending,

what is the agenda and what is the purpose of the meeting, so I asked him please can he supply that information to me.

I asked him again through – in fact, I supplied a series of SMSES between myself and Mr Enoch Godongwana on that, I sent him an SMS requesting him to confirm to me, whether the meeting was still going ahead on the Thursday morning if I am correct. I asked him again and he later that evening, confirmed to me that there was no longer a requirement for me to meet the Secretary General of the ANC in Luthuli House, so I got the request for discussion, as I said, unexpectedly, I didn't quite understand why I got the invitation. Asked for, I couldn't immediately make myself available, I was only available from the  
10 Thursday and I asked him to please provide me with the attendees, the agenda so that I can properly prepare myself. I asked for confirmation whether I was still required to meet the SG the next morning on the Thursday morning and he confirmed back to me that the meeting was off.

I SMSed him back to say that I hereby confirm that the meeting is off and I am no longer required to appear at a meeting with the SG in Luthuli House and that was the extent of my interaction with the political party through the SG of the ANC in Luthuli House.

**ADV REFILOE MOLEFE**: Okay Mr Burger I am going to take you back a bit. On your initial contact, what was the communicated purpose of the meeting?

**MR JOHAN BURGER**: It was about the closure of accounts.

20 **ADV REFILOE MOLEFE**: And this would be what is reflected on Paragraph 14 on Page 169 of your statement?

**MR JOHAN BURGER**: Correct, he informed me that he was setting up meetings with the CEO of the banks to discuss the closure of the accounts.

**ADV REFILOE MOLEFE**: Was it specified which accounts?

**MR JOHAN BURGER**: Well it was the Gupta accounts it was referred to as the Gupta accounts.

**ADV REFILOE MOLEFE**: In your communication?

**MR JOHAN BURGER**: In my telephone communication, not on the SMS, when I spoke to him the first time, because, the SMS's only start subsequent to my telephone discussion on the 18<sup>th</sup> or the 19<sup>th</sup>.

**ADV REFILOE MOLEFE**: Now did you know who would be in attendance at the meeting?

10 **MR JOHAN BURGER**: No, Not at all, hence me asking him please can he provide the information as to who would be in the meeting.

**ADV REFILOE MOLEFE**: And what was the purpose of you seeking to know who would be in the meeting?

**MR JOHAN BURGER**: As I said earlier, I think that I don't attend any meetings if I don't know who the attendees are and what the agenda and purpose of the meeting is, because I need to prepare myself, otherwise I come to a meeting unprepared.

**ADV REFILOE MOLEFE**: Now Mr Burger, there is screenshots of SMS's between yourself and Mr Godongwana. Chair I would beg leave to hand up these screenshots as H1 (A).

20 **CHAIRPERSON**: Okay thank you.

**ADV REFILOE MOLEFE**: Thank you Chair.

**CHAIRPERSON**: Did you say you are asking that the document containing the SMS's be marked H1(A)?

**ADV REFILOE MOLEFE**: Yes Chair.

**CHAIRPERSON**: Okay then this document will be marked as Exhibit H1(A).

**ADV REFILOE MOLEFE**: Thank you Chair. Mr Burger, from your statement on paragraph 20, Paragraph 18 rather, pardon me, you indicated there, that the meeting did not take place?

**MR JOHAN BURGER**: Correct.

**ADV REFILOE MOLEFE**: What was the reason for this meeting not taking place?

10 **MR JOHAN BURGER**: I have no idea I requested that Mr Godongwana confirm that the meeting was still on and he came back to me and said that the meeting was off.

**ADV REFILOE MOLEFE**: And this was following from your enquiry as to who would be attending the meeting, as well as the agenda of the meeting?

**MR JOHAN BURGER**: Correct.

**ADV REFILOE MOLEFE**: And this is what reflected on Paragraph 17 on Page 4 of your statement?

**MR JOHAN BURGER**: Correct, so that I could be able to prepare myself for the meeting.

**ADV REFILOE MOLEFE**: Having received communication that the meeting was off, did you communicate any further with Mr Godongwana?

20 **MR JOHAN BURGER**: Not at all. As I said, I confirmed back to him saying that I confirm that I received your message that the meeting is off.

**ADV REFILOE MOLEFE**: And this would be the last message on the screenshot?

**MR JOHAN BURGER:** That's the last message on the screenshot, the message from me back to him.

**ADV REFILOE MOLEFE:** Thank you very much. Now is that normal for a bank to receive such an invite from a political party?

**MR JOHAN BURGER:** As I said earlier on, unexpected, so I wouldn't expect to get a call from a political party to ask questions about a bank and client's relationship, so yes, it was, unexpected and in my 32 years as a banker, the first call I ever got, one from any political party asking questions about the bank client relationship.

**ADV REFILOE MOLEFE:** Thank you, now moving onto the next meeting invite, can we  
10 turn to Page 167 to 169 still on Exhibit H1? Again, there you set out events relative to an invitation for a meeting by the pardon me, IMC. Now who did you receive this meeting invite from?

**MR JOHAN BURGER:** From the Acting Secretary of the IMC, a, Ms Kellerman, sent me the invite to attend a meeting. I got the request on the 22<sup>nd</sup> of April for a meeting to be held on the 25<sup>th</sup> of April.

**ADV REFILOE MOLEFE:** Now can you turn with me to Page 171, Annexure FNB1? Would that be the meeting invite you received?

**MR JOHAN BURGER:** That was the first invite I received. You can see it is also  
20 directed at FNB who had the relationship with the client, but because these matters are dealt with at an institutional level, did I redirect it to them that I would be the responsible person to deal with the matter.

**ADV REFILOE MOLEFE:** Now, what was the communicated purpose of this meeting?

**MR JOHAN BURGER:** Again, the meeting, the request was referring to certain media allegations against FNB on client closures, that was, the request for the meeting. I did respond back and asking well, first of all, similar to what I have done with the previous request from the ANC is, please can I understand who would be attending the meeting, what allegations are you referring to, are there specific allegations against FNB and what is the scope and purpose of the meeting. Again without that information, it is very difficult to prepare for any interaction with anybody.

**ADV REFILOE MOLEFE:** Okay we will deal with your response shortly. I still want to deal with the invitation itself. On the second paragraph, the email is not numbered in  
10 paragraphs, but on the second paragraph starting with “as explained”, can you please read that entire paragraph?

**MR JOHAN BURGER:**

*“As explained, as the Acting Secretary of the inter-ministerial committee set up by cabinet to look into certain allegations made against certain financial institutions, I have been requested to make contact with yourself, alternatively, a suitable alternative with requisite authority and request that you please make yourself available for a discussion with the IMC on Monday 25<sup>th</sup> of April 2016 between 10:30 and 11:00. There is no set agenda for the discussion, but I am advised that it is anticipated to be a discussion to gain clarity on the current media reports. Should you be unable to attend in person, a tele-conference  
20 could be arranged.”*

**ADV REFILOE MOLEFE:** Thank you, now as the email invite indicates that there was no set agenda I would assume that you did not receive any agenda as it was specifically said?

**MR JOHAN BURGER:** I did not receive any agenda.

**ADV REFILOE MOLEFE**: Thank you, what was FNB's response to this letter? You have briefly set out the information that was sought by FNB from Advocate Kellerman.

**MR JOHAN BURGER**: Yes, so our response is set out on Page 173 FNB 2.2-

**CHAIRPERSON**: I'm sorry before you go to your response, I see that in the paragraph that you have read in the letter at Page 171 of Exhibit H1, it is said that the inter-ministerial committee had been set up by the cabinet and I see that the author of that email, indicates that she is advisor to the Minister of Mineral Resources. Am I correct that you would have understood that the inter-ministerial committee that sought to meet with you was a creation of the Cabinet?

10 **MR JOHAN BURGER**: Correct Chair, in fact, in my response, I refer to we have noted that the inter-ministerial committee which has been set up by Cabinet.

**CHAIRPERSON**: Thank you.

**ADV REFILOE MOLEFE**: Thank you Chair. Now briefly in your response to this request as it appears on Page 173 Annexure FNB22, there is certain information that you sought from Advocate Kellerman in respect of the meeting invite. Now you have just set out that you sought information on who would be attending the allegations that the IMC is looking into the specific allegations against FNB and you further mention of the nature and scope of the process. Now for what purpose did you seek this information or find it necessary?

20 **MR JOHAN BURGER**: Again Chair, it was important for me to – as I explained previously, when you attend meetings, it is always important to understand who would be attending, what is the purpose for the meeting, what is the agenda for the meeting, so that you can properly prepare yourself, otherwise you don't have a productive discussion. That was the critical thing for me, to make sure that I go into a discussion properly prepared to make a productive discussion, so that both parties can benefit from the

interaction rather than go into a discussion unprepared without understanding the purpose.

**CHAIRPERSON**: I guess also it's important so that if some of the people who attend, are people that you really don't want to meet with, you can make up your mind whether you are going there or not?

**MR JOHAN BURGER**: Absolutely and again, if for an example, if I got a list and there were people on there that was not part of the IMC, or people that should be part of the IMC and weren't there, that I can make up my mind whether I am going to attend or not attend.

10 **ADV REFILOE MOLEFE**: I thank you Chair. Now did FNB receive a response to this letter?

**MR JOHAN BURGER**: The only response we got, was from the Acting Secretary again saying she has no mandate to respond to my request, which I again found very strange.

**ADV REFILOE MOLEFE**: Is this response what appears on Page 174 as Annexure FNB3?

**MR JOHAN BURGER**: Correct, it clearly says as the Acting Secretary of the committee, I am not mandated to respond to the questions raised in your email. And the reply, suffice to note the following; which is a repeat of things previously said. It said, I am [Inaudible] by Cabinet and it is looking at allegations of client closures. Nothing new.

20 **ADV REFILOE MOLEFE**: Now under Paragraph B on Page 174, there is reference to information that would be shared during the session and that same will stem from media reports only and it must of course be relayed to cabinet for it to be properly considered. Now were you aware what media reports were being referred to?

**MR JOHAN BURGER**: Not at all, in fact, in my first response, I asked them which allegations are they referring to and are there any specific allegations levelled at FNB, but we asked for that clarity and it wasn't provided.

**ADV REFILOE MOLEFE**: And you responded to this letter? Is that the response you are referring to?

**MR JOHAN BURGER**: Yes I responded, my response again is attached in 176.

**ADV REFILOE MOLEFE**: Annexure FNB4.2?

**MR JOHAN BURGER**: 4.2 yes.

**ADV REFILOE MOLEFE**: Yes and in that letter, what are you seeking?

10 **MR JOHAN BURGER**: Again I say thanks for her email we had anticipated that we would be given the requested information in order to allow us to meaningfully prepare for the meeting with the IMC. In light of the fact that we do not have the clarity and given the current unavailability, we respectfully at this time, decline the invitation for the meeting on the 25<sup>th</sup> of April 2016.

**ADV REFILOE MOLEFE**: And this information is the information that you set out in your letter on Page 173?

**MR JOHAN BURGER**: Correct.

**ADV REFILOE MOLEFE**: Where you seek information as to who would attend, allegations-

20 **MR JOHAN BURGER**: Yes, allegations, agenda, etcetera.

**ADV REFILOE MOLEFE**: Did you receive any response to this letter?

**MR JOHAN BURGER**: No I received no response, other than a further request later on for a meeting.

**ADV REFILOE MOLEFE**: And what was different from in the further request from the first request?

**MR JOHAN BURGER**: That's on Page 177 FNB5, where an invitation was extended, it is holding further sessions and I have been mandated to extend a further invitation to FNB to meet the IMC on Thursday the 5<sup>th</sup> of May at 12:30, I am now mandated to further advise as follows: the IMC consists of the Minister of Labour and Communications, Mineral Resources and Finance. The engagement will take the form of a discussion with  
10 the bank representatives. The scope of the discussion will centre around the public comments made by FNB. We did not make any public comments, let me just make that point very clear.

Around the discussions taken by the institution to close bank accounts of certain of its clients whilst Cabinet appreciates the terms and conditions of the banks, the act may deter potential investors who want to do business in South Africa, in fact to the contrary, to the extent that we do not comply with international and local laws, you will scare away foreign investors. Cabinet then endorsed the Minister, open a constructive engagement with the banks to find lasting solutions to the matter. I don't know what solution they were referring to, because I don't know what problem they were trying to deal with.

20 **ADV REFILOE MOLEFE**: Yes, now, still on Paragraph B, did you have an understanding or appreciation of the terms and conditions of the banks that were referred to in the IMC's letter?

**MR JOHAN BURGER**: No not at all.

**ADV REFILOE MOLEFE**: And did you have an understanding of the acts that were referred to that may defer potential investors?

**MR JOHAN BURGER**: No not at all.

**ADV REFILOE MOLEFE**: And you have just stated that there is a lasting solution that was to be adopted that it flowed from a problem that you did not know existed, or you were not familiar with or aware of?

**MR JOHAN BURGER**: I was not aware of the problem that they were trying to solve, so I didn't know what the solution was that they were trying to find for the problem.

**ADV REFILOE MOLEFE**: Thank you and did you respond to this letter?

10 **MR JOHAN BURGER**: Yes I did, I think which is the FNB6, Page 178 advocate. Chair, you will see that - shall I read from my response?

**ADV REFILOE MOLEFE**: You can paraphrase it.

**MR JOHAN BURGER**: What we then, I responded back by saying, whilst we are prepared to engage with the IMC, we could only do so on the following basis, firstly, whilst we can discuss the regulatory framework under which banks operate, we will not debate any client specific matter with the IMC, because that would actually be illegal, we can't discuss client bank relationships with any third party and the second thing we then added, secondly we would only meet with the IMC if all the IMC members are present, in particular the Minister of Finance, remember they confirm that the Minister of Finance  
20 was part of the IMC, as he is the responsible minister for the legislative framework under which banks operate, we would like written confirmation of the Minister of Finance's attendance ahead of the meeting, we look forward to your response.

**ADV REFILOE MOLEFE:** Now on your request of confirmation of the Minister of Finance's attendance, did you receive this confirmation?

**MR JOHAN BURGER:** I received no response to my request.

**ADV REFILOE MOLEFE:** No response to this letter?

**MR JOHAN BURGER:** Other than the same, I do not have any authority or mandate to answer any of your requests.

**ADV REFILOE MOLEFE:** Now can you just explain why it was important to you that the Minister of Finance be in attendance at this meeting?

**MR JOHAN BURGER:** I think Chair the Minister of Finance firstly was part of the IMC  
10 and secondly, the Minister of Finance is the ultimate custodian of the legislative framework under which financial institutions operate, so that is why we believe that it was appropriate for him to be part of that discussion, because he would have an appreciation for the regulatory framework under which we operate and we can talk about the regulatory framework but we cannot talk about client specific issues in that meeting.

**ADV REFILOE MOLEFE:** Now having deposed to the supporting affidavit in the Minister's application which is Exhibit H3, you were obviously well acquainted of the basis on which the application was made?

**MR JOHAN BURGER:** Yes.

**ADV REFILOE MOLEFE:** And now in light of this and in hindsight, do you think that you  
20 would have received such a confirmation of the Minister of Finance's attendance at the meeting?

**MR JOHAN BURGER**: So the question is, did the Minister question his authority to be at the meeting? I don't know. From our perspective, for us it was very important that because he was part of the IMC that when we meet with the IMC, that he is present.

**ADV REFILOE MOLEFE**: Thank you, now on Page F, page 179, pardon me Annexure FNB7, was that the response you earlier referred to?

**MR JOHAN BURGER**: Yes which is a similar response to all my previous requests for further information, i.e. agenda, who would be attending, etcetera, etcetera.

**ADV REFILOE MOLEFE**: Now briefly, what was this response you received, the content of the response?

10 **MR JOHAN BURGER**: Again, it says thank you for your mail, as you know, I am not mandated to respond to your queries they will be brought to the attention of the committee tomorrow.

**ADV REFILOE MOLEFE**: Now this correspondence or response from Advocate Kellerman, was the third round of correspondence that FNB had with the IMC and having set out more than once, information relating to the meeting and the basis upon which FNB would attend, what was your impression of her response of her not being mandated to respond to your queries?

**MR JOHAN BURGER**: Very unprofessional and couldn't understand why that was the only response I would get, for what we regarded as reasonable requests.

20 **ADV REFILOE MOLEFE**: Thank you and now after the correspondence on Page 179, what transpired? Was there any further correspondence from the IMC?

**MR JOHAN BURGER**: No further correspondence, so we just responded and said that because we have not received the information we have requested, we will again decline the meeting to attend.

**ADV REFILOE MOLEFE**: This response you are referring to is that what appears on Page 185 as Annexure FNB9?

**MR JOHAN BURGER**: Correct.

**ADV REFILOE MOLEFE**: Thank you, now in conclusion and what impression were you left with after receiving invites of meetings from both the ANC as well as the IMC?

**MR JOHAN BURGER**: I think that as I said earlier, in my 32 years of, in banking, this is  
10 the first time ever I have received requests from a political party or an inter-ministerial committee to want to discuss bank client relationships, so I think that to me, was the unexpected. I really didn't expect to, for any third party to want to question that relationship between bank and client.

**ADV REFILOE MOLEFE**: Now in your supporting affidavit which is Exhibit H3, on Page 13, Paragraph 32.2.7, you expressed a view, or rather made submissions to the court on the uncertainty regarding the powers of the IMC. Could you please read into the record that entire paragraph?

**MR JOHAN BURGER**:

*"There was at the time, uncertainty regarding the powers of the IMC and I believe that the  
20 declaratory order will avoid such situation in future and will encourage public officials to act in accordance with the Constitution and national legislation, particularly if one has regard to the fact that the Acting Secretary of the IMC extended a further invitation on the 4<sup>th</sup> of May 2016 to an IMC meeting which was after senior and junior counsel already on*

*the 25<sup>th</sup> of April 2016, provided an opinion that the IMC meeting was not authorised by legislation and would be unlawful.”*

**ADV REFILOE MOLEFE**: So, on that paragraph, what was the basis of the uncertainty regarding the powers of the IMC?

**MR JOHAN BURGER**: We obviously would have sought our own legal counsel on whether the IMC had legal standing.

**ADV REFILOE MOLEFE**: Okay in Standard Bank’s testimony yesterday, Standard Bank gave evidence that the ANC requested it to respond to an allegation that there was collusion of a White monopoly capital and to remind the Chair, this appears on Page 106  
10 at Paragraph 19. Did FNB collude with any banks or have any discussion with any banks in relation to the closure of the Gupta related accounts?

**MR JOHAN BURGER**: I categorically deny any collusion or interaction with any bank regarding our decision to close accounts of the Gupta’s.

**ADV REFILOE MOLEFE**: Thank you, also in Standard Bank’s statement on Page 111 to 112 of Exhibit H1, at Paragraph 31, there is reference made to certain recommendations which had been announced by the then Minister Zwane. Do you accept that these recommendations could have affected FNB and do you have any comment on the nature of these recommendations?

**MR JOHAN BURGER**: I think the mere fact that recommendations by the Minister of  
20 Mineral Resources into the operations of financial institutions, is a worrying statement to be made by Minister Zwane. I think it’s worrying that that statement could be made.

**ADV REFILOE MOLEFE**: And why is it worrying?

**MR JOHAN BURGER**: I think that because ultimately, the Minister of Finance and other regulatory bodies are the appropriate regulatory oversight institutions to deal with those matters.

**ADV REFILOE MOLEFE**: Thank you. Chair, unless there are any other further questions?

**CHAIRPERSON**: I may have missed it, but I don't seem to remember that you asked him to confirm his affidavit to which you referred to a few minutes ago. I know that you asked him about a particular paragraph, I don't know if you asked him to confirm that that is his affidavit filed in whatever matter?

10 **ADV REFILOE MOLEFE**: I believe I did, but for the sake of certainty, I can certainly request him. Mr Burger, can you refer to Page 1 of Exhibit H3 that would be your supporting affidavit?

**MR JOHAN BURGER**: Correct.

**ADV REFILOE MOLEFE**: Do you confirm that this is your affidavit?

**MR JOHAN BURGER**: I confirm that that is my affidavit.

**ADV REFILOE MOLEFE**: Can you refer to Page 14 of that affidavit?

**MR JOHAN BURGER**: I can confirm that that is my signature.

**ADV REFILOE MOLEFE**: You confirm that is your signature and you confirm the correctness of the contents of this affidavit?

20 **MR JOHAN BURGER**: I confirm the correctness of the affidavit.

**ADV REFILOE MOLEFE**: Thank you Chair.

**CHAIRPERSON**: Thank you. You were given I assume Exhibit H1(A), that is the exhibit that appears to have SMS's between yourself and Mr Godongwana, that Exhibit 1(A) has got four pages-

**MR JOHAN BURGER**: It should only be two pages Chair.

**CHAIRPERSON**: Oh I have got four pages. Was I given two extra pages? Well the two extra pages don't seem to have SMS's.

**MR JOHAN BURGER**: Chair only the first two pages have the SMS's.

**CHAIRPERSON**: Yes.

10 **ADV REFILOE MOLEFE**: Might I provide clarity on that? The SMS screenshots appear on Page 1 to 2 as correctly put by the Chair. On Page 3 to 4 of that exhibit, bundle pardon me, would be the account holders whose information was confirmed by Mr Burger, so the accounts that were closed, were listed by Mr Burger in line with Paragraph 9 of Page 4 of Exhibit H3.

**CHAIRPERSON**: Well you might just wish to get him to confirm the SMS's and to confirm what Pages 3 and 4 are about, because I don't remember that you dealt with that?

**ADV REFILOE MOLEFE**: Certainly Chair. I did deal with the SMS's Chair, but for the sake of certainty, I will deal with them again. Mr Burger, the first two pages-

20 **CHAIRPERSON**: I'm sorry, if I recall correctly, you may have dealt with them in terms of him simply telling us without reference to this document what SMS's he received. I think you need to direct, him, to each one and he will confirm who it came from, or who it went to, who sent it, maybe it will then be convenient for him to just read them into the record?

**ADV REFILOE MOLEFE**: Certainly Chair, so Mr Burger can you confirm, can you identify the documents that are in front of you, that start on Page 1 until Page 4?

**MR JOHAN BURGER**: Yes Chair, Page 1 and 2 is screenshots of an SMS conversation between myself and Mr Enoch Godongwana. Pages 3 and 4 are the list of accounts which have closed and also some of the accounts which are still open which we spoke about.

**ADV REFILOE MOLEFE**: Would the Chair require that they be read into the record?

**CHAIRPERSON**: Yes, the first one Mr Burger, it says, *please call Enoch Godongwana from the ANC*, is that correct? Is that the first one that you received from him, is that the  
10 first SMS you received from him?

**MR JOHAN BURGER**: Correct Chair, that's the first SMS I received from him.

**CHAIRPERSON**: Yes and then the next one, do you want to read that into the record and confirm that it was from you to him?

**MR JOHAN BURGER**: The next SMS says

*"Dear Enoch, I am about to board a flight from Cape Town to Johannesburg. Can I phone you early afternoon, Regards Johan Burger."*

**CHAIRPERSON**: Yes continue.

**MR JOHAN BURGER**: He responded by saying "yes" and I then sent him an SMS again the next morning the 21<sup>st</sup> of April

20 *"Morning Enoch, with reference to our telephone call of yesterday, please can you confirm agenda and attendees, I just want to make sure that I am properly prepared for the meeting."*

Then I did not get a response from him, I then sent him an SMS again late afternoon/early evening at 18:30

*"Evening Enoch is meeting still on as planned, Johan."*

He then responded back to me "meeting off". I then responded to him just to make sure that there is no misunderstanding

*"Thanks for coming back to me and I confirm that there is no meeting with the SG tomorrow, Regards Johan."*

**CHAIRPERSON**: Thank you. You are done?

**ADV REFILOE MOLEFE**: Yes unless there are any further questions.

10 **CHAIRPERSON**: No that's fine, thank you very much Mr Burger for your evidence. We will excuse you now, but should there be a need for you to return, the Commission's legal team will be in touch with you and request you to return.

**MR JOHAN BURGER**: Thank you Chair and thanks for the opportunity.

**CHAIRPERSON**: Thank you very much, you are excused. Mr Pretorius?

**ADV PAUL PRETORIUS SC**: Chair it may be convenient to take the long adjournment.

**CHAIRPERSON**: yes.

**ADV PAUL PRETORIUS SC**: now until quarter to two, but if you want to start with the next witness, we can now.

**CHAIRPERSON**: Do you have an idea of how long the witness might be?

20 **ADV PAUL PRETORIUS SC**: About an hour I am told.

**CHAIRPERSON**: About an hour. Well, maybe let's start with the witness and use this 10 or 15 minutes or so and then continue later on, thank you.

**ADV ZINHLE BUTHELEZI**: Thank you Chair, the next witness will be Ms Yasmin Masithela who is the representative of ABSA Bank.

**CHAIRPERSON**: Thank you.

**ADV ZINHLE BUTHELEZI**: I still need to master the microphone. Chairperson we are still continuing with term of reference 1.7. May I ask that the witness be sworn in?

**CHAIRPERSON**: Registrar, please swear the witness in?

**REGISTRAR**: Please state your full names for the record?

10 **MS YASMIN MASITHELA**: Yasmin Masithela.

**REGISTRAR**: Do you have any objection with taking the prescribed oath?

**MS YASMIN MASITHELA**: No I don't.

**REGISTRAR**: Do you consider the oath to be binding on your conscience?

**MS YASMIN MASITHELA**: I do.

**REGISTRAR**: Do you swear that the evidence you will give today, shall be the truth, the whole truth and nothing but the truth? If so, please raise your right hand and say so help me God?

**MS YASMIN MASITHELA**: So help me God.

**CHAIRPERSON**: Thank you.

20 **ADV ZINHLE BUTHELEZI**: Chairperson as a matter of housekeeping, I would like to hand up a further bundle which I will ask that it is marked H5, Exhibit H5. Can I beg leave

that it, be handed to the witness as well? I have been corrected that it should be H4?  
There is no H4, the last bundle was H3.

**CHAIRPERSON**: This document will be marked Exhibit H4.

**ADV ZINHLE BUTHELEZI**: There is another document that I would also like to hand up  
Chairperson and mark it Exhibit H5, it is one page.

**CHAIRPERSON**: This document will be marked Exhibit H5.

**ADV ZINHLE BUTHELEZI**: Thank you chair. Ms Masithela, I would like to refer you to  
Exhibit H1 which is in front of you, Page 186. There is an affidavit that goes from Page  
186 up to Page 190-

10 **CHAIRPERSON**: I'm sorry, Ms Masithela, do you see Exhibit H1 in front of you?

**MS YASMIN MASITHELA**: I do Chairperson.

**CHAIRPERSON**: Okay, all right thank you.

**ADV ZINHLE BUTHELEZI**: There is a statement that is appearing on Page 186 of that  
exhibit up to Page 193. Do you confirm that this is the statement that you made for the  
Commission?

**MS YASMIN MASITHELA**: I confirm that.

**ADV ZINHLE BUTHELEZI**: Do you confirm that the signature that appears on Page 193  
of this document is your signature?

**MS YASMIN MASITHELA**: I confirm that it's my signature.

20 **ADV ZINHLE BUTHELEZI**: Ms Masithela, would you please for the purposes of the  
record, tell us what is the position that you are currently holding at ABSA Bank?

**MS YASMIN MASITHELA**: I am currently the Chief Executive of Strategic Services at ABSA bank, responsible for strategy, people separation and digital. Prior to that, I was the Chief Compliance Officer of ABSA Bank and at the time that I deposed to the affidavit in the High Court matter, pertaining to the Minister of Finance, I was the Chief Compliance Officer of the bank.

**ADV ZINHLE BUTHELEZI**: And how long have you been at ABSA Bank?

**MS YASMIN MASITHELA**: I've been with ABSA Bank since 2011.

**ADV ZINHLE BUTHELEZI**: And what are your academic qualifications?

**MS YASMIN MASITHELA**: I'm a lawyer by training.

10 **ADV ZINHLE BUTHELEZI**: And for how long have you been in the banking industry?

**MS YASMIN MASITHELA**: Since 2011. Prior to that, I was in private practice.

**ADV ZINHLE BUTHELEZI**: Thank you, Ms Masithela, you gave us a statement in which you dealt with the issue that arose – we dealt with term of reference 1.7 of our terms of reference in which you dealt with the interference or the alleged interference by, that might have happened by any member of National Executive, including the Deputy Minister who may have corruptly or improperly intervened in the matter of closing of the Gupta related bank accounts. If I look at the timeline, your bank was the first bank to close the Gupta company related accounts. For the purposes of the record, tell us when were the Gupta related accounts that ABSA Bank held, were closed?

20 **MS YASMIN MASITHELA**: Chair if you may indulge me, I think at the backdrop, it might be prudent to set a backdrop of the legislation that [indistinct] financial crime.

**CHAIRPERSON**: Yes.

**MS YASMIN MASITHELA:** Banks in South Africa are very highly regulated and are supervised by the South African Reserve Bank. In addition to that, the Financial Sector Conduct Authority as well as the Financial Intelligence Centre monitor and regulate banks. The main pieces of legislation pertaining to customer on-boarding and transactional activity that the banks have an obligation to ensure are done properly, are the Bank's Act, the Prevention of Organised Crimes Act, the Financial Intelligence Centre Act, the Protection of Constitutional Democracy against Terrorist and Related Activities Act, which both create money laundering and compliance obligations for financial institutions.

10 We also have exchange control regulations which form a basis of our ability to transfer foreign currency in and out of South Africa. We are also bound by international legislation. In terms of international legislation, the Basel III regulations apply to banks, the Basel committee of banking supervision guidelines on sound managements of risk related to money laundering and financing of terrorism apply to banks.

At the time that these events took place, we were a subsidiary of Barclays PLC, Barclays Africa Group Limited, who is the parent company of ABSA Bank, was a subsidiary of Barclays PLC. As a result of that, we were also obliged, I'm sorry chair, we were also obliged to follow international laws pertaining to money laundering and terrorist financing. In that regard Chair, we fell squarely within the regulatory ambit of the financial conduct  
20 authority in the United Kingdom, the prudential regulatory authority in the United Kingdom, as well as the Department of justice in the United States of America and the Federal Reserve, amongst others.

We also have internal policies that guide us on how we implement risk management practices to allow us to ensure that the bank is not used for any unlawful activity, or does

not facilitate any unlawful activity. South Africa is a member of the Financial Action Task Force commonly known as FACTAF which is an inter-governmental body established by the G20 and is responsible for the development and promotion of international policy and standards to combat money laundering.

I think it's an important context to bear in mind, that as a subsidiary of an international bank, the FCPA, the Foreign Corrupt Practices Act, also was a piece of legislation that ABSA had to implement internally and create policies that would allow us to ensure that we do not fall foul of those pieces of legislation.

Chair I would like to refer you to Regulation 36 under Section 90 of the Bank's Act and in  
10 that regard, can I ask the Chairman to go to Exhibit, I'm sorry H4-

**ADV ZINHLE BUTHELEZI:** Before the witness goes to H4, can you please identify this document that is Exhibit H4?

**MS YASMIN MASITHELA:** Exhibit H4 Chair is my affidavit on behalf of ABSA Bank in the High Court matter pertaining to the Minister of Finance.

**ADV ZINHLE BUTHELEZI:** And do you confirm the signature that appears at the last page of that document which is Page 13, sorry it's the second last page, Page 12 as your signature?

**MS YASMIN MASITHELA:** I confirm that it's my signature.

**ADV ZINHLE BUTHELEZI:** Thank you. (indistinct).

20 **MS YASMIN MASITHELA:** Chair I refer you to Regulation 36 under Section 90 of the Bank's Act. Regulation 36 provides that every bank shall have in place, comprehensive risk management processes, and procedures to prevent the bank from being used for money laundering or other unlawful activity. The South Africa Reserve Bank our banking

regulator is empowered to invoke the bank's licence for failure to comply with Regulation 36. It is an important context because amongst others, the Bank's Act and various pieces of legislation, require us or provide the financial services structure within which banks operate and non-compliance with those pieces of legislation, can lead to sanction, possible revocation of our licence and by sanction, a financial sanction as well as revocation of our licence and criminal sanction including personal criminal liability which I as the compliance officer appointed in terms of Section 60 (a) of the Bank's Act, it would have applied to me too. Which meant that part of my duties, were to ensure that we had a sound risk management system to allow us to be able to ensure that the bank did not  
10 allow its itself or its system to be used for any unlawful activity.

**ADV ZINHLE BUTHELEZI:** Thank you Ms Masithela. Chair I have been informed that it's now 13:00, may we take the lunch adjournment until 14:00?

**CHAIRPERSON:** Yes we are going to take the lunch adjournment. We will resume at 14:00, we adjourn.

**REGISTRAR:** All rise.

(Session ends).

**Session 2**

**CHAIRPERSON**: Yes, Ms Buthelezi.

**ADV ZINHLE BUTHELEZI**: Thank you Chair. Ms Masithela, before the lunch break you dealt with the regulatory framework that governed your functioning at ABSA bank. I would like you to give us the reason or what informed the decision to close the Gupta-related bank account?

**CHAIRPERSON**: I am sorry, had the witness finished the legislative framework that she was dealing with? You had finished?

**ADV ZINHLE BUTHELEZI**: Yes Chair.

10 **CHAIRPERSON**: Okay, alright thank you.

**ADV ZINHLE BUTHELEZI**: Thank you Chair.

**CHAIRPERSON**: Thank you.

**ADV ZINHLE BUTHELEZI**: Yes, would you please give us what informed your decision to close the Gupta accounts. You have dealt with this issue on the affidavit that is marked here as Exhibit H4. Would you please just give us a summary of what informed your decision.

20 **MS YASMIN MASITHELA**: So Chair, against the backdrop of the legislative framework within ABSA Bank we then have internal policies that guide us on how we deal with customers on a day to day basis and how we deal with anti-money laundering and counter terrorist financing matters pertaining to transactions in our space. If I can direct the Chair to 26.5 of Exhibit H4, page 8.

**ADV ZINHLE BUTHELEZI**: Yes.

**MS YASMIN MASITHELA**: ABSA Bank as a subsidiary of Barclays PLC followed the Barclays PLC AML, Anti-Money Laundering Policy and Standards, which stated that high risk customers including politically exposed persons as defined in Guidance Note 3 (a) of the FIC Act undergo enhanced due diligence at customer on boarding and annually so in other words we took our customer base that were considered to be high risk customers and on an annual basis we would do reviews of those customers and assess them in accordance with our policies and standards and our risk management framework.

**CHAIRPERSON**: I am sorry; I don't know whether you have moved a little bit. Before lunch I could hear you quite clearly, maybe bring the mic closer to you. Okay, thank you.

10 **MS YASMIN MASITHELA**: Thank you Chair. Failure by ABSA to adhere to customer due diligence requirements and to implement adequate financial crime controls, would have exposed ABSA and its holding company at the time Barclays PLC to regulatory sanctions. Accordingly, we had quite a strict policy of doing annual reviews on a high risk customer base and our regulators, the South African Reserve Bank would, when doing on-site inspections, ensure that we adhere to our own internal policy against the backdrop of regulation. To ensure compliance with international and South African law [intervene]

**CHAIRPERSON**: Well, don't feel obliged to read. If you can give the evidence without reading, all the better

20 **MS YASMIN MASITHELA**: thank you chair.

**CHAIRPERSON**: and only go to the affidavit if you wish to refresh your memory.

**MS YASMIN MASITHELA**: Chair, in respect of the affidavit I think it is important that I read out 29 of the affidavit.

**CHAIRPERSON:** That's fine.

**MS YASMIN MASITHELA:** As part of our normal annual review process, within our corporate and investment banking business, the Oakbay companies would have been part of that review. In about November 2014, the PEP review committee or the Corporate and Investment Banking review committee took a decision that we would exit the company and related parties and the reasons behind that [intervene]

**ADV ZINHLE BUTHELEZI:** Sorry Ms Masithela. What did you say that PEP stand for?

**MS YASMIN MASITHELA:** Politically Exposed Persons.

**ADV ZINHLE BUTHELEZI:** Thank you.

10 **MS YASMIN MASITHELA:** Again, that's a segment of a high risk customer base.

**ADV ZINHLE BUTHELEZI:** You may proceed.

**MS YASMIN MASITHELA:** Okay and the reasons behind that were that the review committee was of the view that the Oakbay companies were not using ABSA as their primary or dual bank and were apparently moving their banking accounts elsewhere to other financial institutions. As a consequence, ABSA was limited in its ability to appropriately monitor and understand the transactional activity in those accounts. There was also evidence of large unexplained transfers of funds between the Oakbay companies and related parties at other banks. As already indicated, ABSA could not account for these transfers in accordance with its obligations. Furthermore, the revenue  
20 received by ABSA from the portfolio at the time had declined materially over the years and the costs of fulfilling its monitoring obligations in respect of this account had accordingly been significant and there was also adverse media that was in the public domain regarding the Oakbay companies and related parties which increased the

reputational and conduct risk arising from a continued relationship with these companies and ABSA Bank and it is on that basis that the committee having gone through a thorough risk management process and a due diligence of all those accounts, took a decision that it would terminate those accounts.

**ADV ZINHLE BUTHELEZI:** Yes, Ms Masithela, if I may refer you to Exhibit H5, could you please identify that document for the record?

**CHAIRPERSON:** I think you must also raise your voice.

**ADV ZINHLE BUTHELEZI:** If I may refer you to Exhibit H5, would you please identify that document for the record?

10 **MS YASMIN MASITHELA:** Exhibit H5 is a list of entities and account numbers that ABSA exited at the time.

**ADV ZINHLE BUTHELEZI:** Yes, I could see there are names of companies as well as individuals. What informed, what informed. You said these were the entities that held the accounts with ABSA. Were these the entities whose account were closed by ABSA?

**MS YASMIN MASITHELA:** If you look at the declarator and the list of entities that are listed in the declarator, we had at the time taken a decision to exit those companies. Our internal policies require us in accordance with international standards to look at related parties and associated parties in respect of accounts that are being exited and in that regard we would have looked at directors and shareholders of those companies to the  
20 individuals listed in that list would be individuals who either had a shareholding of 10% or above or were directors of those entities.

**ADV ZINHLE BUTHELEZI:** Thank you Ms Masithela. If I may take you back to Exhibit H1. It's page 187. That's your statement that you made for the Commission. On

paragraph 5 you deal with the concerns or you state that you were deeply concerned by the efforts by Oakbay companies to persuade the Minister of Finance to intervene and your relationship with the Oakbay companies. What gave rise to your deep concerns, if I may ask?

**MS YASMIN MASITHELA:** Our deep concerns really related to the financial services sector at the time. You will recall Chair that as a result of the Minister of Finance application, it's quite clear that the Executive may not interfere with private client relationships but even more important was that financial crime laws and financial crime regulations work on the basis of non-interference of the relationship between a banker and its client. So the confidentiality between a banker and a client is sacrosanct and any interference to that relationship or interference in the bank's ability to execute its duties as in applying the laws and interference with their risk management processes we feel would have been detrimental not only to ABSA Bank but to the financial services sector as well as South Africa as a whole.

**ADV ZINHLE BUTHELEZI:** Yes.

**MS YASMIN MASITHELA:** At the time that the declarator was in process you will recall that the FIC Amendment Act was a piece of legislation that had been passed as a bill. Concurrently the Financial Action Task Force was also doing a review of South Africa in determining whether South Africa had sound systems and controls to ensure that we wouldn't expose the South African system as well as the international banking system that uses South African Banks as correspondent banks to allow for payment of foreign currency both in South Africa and outside of South Africa to risk so as a correspondent bank ourselves, we are the subject of due diligences by clearing banks which are international banks in their determination of whether they would do business with us and

that determination also looks at whether the country has the ability to uphold its own laws and whether our own system allows us to uphold our own laws. We felt that an interference by the Executive into that space would not only be detrimental to ABSA Bank's ability to maintain its correspondent banking status but would also impact on the South African financial services system and impact on how we would be perceived in terms of controls in combatting money laundering and financial crime related matters by international countries and international laws.

**ADV ZINHLE BUTHELEZI:** Thank you. I believe that is what you have said in paragraph 6.1, 6.2 of your statement.

10 **MS YASMIN MASITHELA:** That's correct.

**ADV ZINHLE BUTHELEZI:** If, for the benefit of a layman on the street, what is a correspondent bank, what do you mean when you say, yourself as a correspondent bank?

**MS YASMIN MASITHELA:** So I think Standard Bank had also articulated that Chair but a correspondent bank is a bank which in one country is authorised to provide services on behalf of another bank in another country and those services in most terms involve payment and payment of foreign currency so in other words from a South Africa perspective, we would be a correspondent bank to a US Dollar clearing bank like JP Morgan in the US in that they don't have a presence in South Africa but customers of  
20 ABSA Bank can access foreign currency on the basis that we are a correspondent bank of JP Morgan and can therefore transact in foreign currency.

**ADV ZINHLE BUTHELEZI:** Thank you. We now know that at least two months after you closed the bank Gupta-related bank account, you were approached or you were invited to

a meeting with the ANC and the NEC. Would you please state for the record who were present in that meeting?

**MS YASMIN MASITHELA**: Thanks Chair. For the record, the persons present at that meeting were members of the ANC NEC being Mr Gwede Mantashe, the Secretary-General, Mr Enoch Godongwana, Ms Jesse Duarte and Mr Krish Naidoo who I believe attended as a legal representative at that time.

**ADV ZINHLE BUTHELEZI**: And who invited you to this meeting?

**MS YASMIN MASITHELA**: The previous day, the 19<sup>th</sup> April, I am informed that our CEO attended a meeting of BLSA, that's Business Leadership South Africa. At that meeting  
10 she was approached by Mr Gwede Mantashe to come to the meeting the next day and we list in our affidavit what the rationale for the meeting was.

**ADV ZINHLE BUTHELEZI**: Thanks, can you please for the record state what was discussed in that meeting and also tell us what was your take of this meeting?

**MS YASMIN MASITHELA**: Thanks Chair. At the meeting and if I may chronologically run you through what happened at the meeting, the meeting was opened by the Secretary-General of the ANC, Mr Mantashe, who indicated that the meeting was not to discuss client and customer information predominantly because our CEO started the meeting by making it explicitly clear that should the meeting involve discussing client confidential information, we would not be able to partake in it. In fact, to use our words directly,  
20 she said it would be a very short meeting if we were discussing client confidential information. On that basis Mr Mantashe reiterated that the meeting was not to discuss client information but to discuss the Bredenkamp judgment and its application and consistency of application, also to understand the effects of account closures on other companies and businesses and to also understand the regulatory framework within which the financial

services sector operates, in particular in relation to financial crime related matters and exiting of clients. During the meeting our CEO ran through the pieces of legislation that ABSA Bank follows in order to ensure that we work within a regulated framework,

**ADV ZINHLE BUTHELEZI:** yes

**MS YASMIN MASITHELA:** she also mentioned that ABSA Bank is a significantly systemic bank and if ABSA doesn't follow its laws and doesn't follow the laws of the country in managing financial crime matters, the impact would be to more than just ABSA. You know the banking system is based on trust and that trust is on the belief that legislation would prevail and that we would not as financial services companies indulge in  
10 any unlawful activity or allow our systems to be used for unlawful activities and [intervene]

**ADV ZINHLE BUTHELEZI:** I could see that the issue of collusion with other banks was also raised.

**MS YASMIN MASITHELA:** It was, in fact we spent the bulk of the meeting with our general counsel Mr Charles Wheeler discussing the merits of Bredenkamp with Mr Krish Naidoo and the meeting of collusion or rather the NEC raised the issue of alleged collusion by the banks. We were quite clear and categoric that we have our own risk management systems, we do not discuss any client with any third party including any other bank. We do not discuss any issues relating to exiting of clients or other with other banks, in fact, we have quite rich training in the bank to give guidance on what you do if  
20 you are ever in a position where you would find yourself in an industry body and somebody raises something pertaining to a client that you cannot partake in and our policies would request anyone of ABSA Bank's members to record the meeting and leave the meeting so we do not discuss any information pertaining to a client with a third party.

**ADV ZINHLE BUTHELEZI:** Thank you Ms Masithela. You were also invited to a meeting with the IMC.

**MS YASMIN MASITHELA:** I am sorry Ms Buthelezi, can I just add that we referred Mr Mantashe to regulators because it is a very serious allegation to make and we have a very clear competition law process and competition law regulation in South Africa so we referred Mr Mantashe to regulators in particular the Competition Commission or the SARB if he was concerned about that but certainly it is not something we would partake in at all, it is completely outside of any framework that we have in the bank and we would discipline any individual who partook in any discussion with a third party around a client.

10 **ADV ZINHLE BUTHELEZI:** Thank you. You were also invited to the meeting with the IMC. The letter inviting you to this meeting appears on page 194 and it appears to be similar to the letter that was sent to FNB that was dealt with earlier. I am interested at your response which appears on page 196 of this exhibit. Would you please tell us what is it that you requested from [intervene]

**CHAIRPERSON:** Sorry, you don't want her to deal with that letter first?

**ADV ZINHLE BUTHELEZI:** Maybe she should Chairperson. Okay, let's start with the letter. Would you please, for the record, read this letter that was sent to ABSA Bank inviting them to attend a meeting with the IMC. You can start on page 194 yes. You can start at paragraph [intervene]

20 **CHAIRPERSON:** She might or depending what you want, she might not need to read the whole letter but she might be able to just give the gist of what the contents say.

**ADV ZINHLE BUTHELEZI:** Yes, thank you Chair.

**MS YASMIN MASITHELA:** We received an invitation on the 22<sup>nd</sup> April, 2016 from Advocate Zarina Kellerman who from her signature in the email stated that she was the advisor to the Minister of Mineral Resources and acting Secretary of the IMC to attend a meeting on Monday the 25<sup>th</sup> April at the offices of the Minister of Mineral Resources and outlined in the request was the request to discuss or gain clarity on current media reports which we were asked to appear on.

**ADV ZINHLE BUTHELEZI:** Thank you and what was your response? It appears on page 196.

10 **MS YASMIN MASITHELA:** Our response as appears in page 196 was to request and understanding of the nature of the discussion anticipated to allow us to prepare accordingly and to determine the attendees from our side. We also wanted some insight into the attendees of the meeting. We also asked for the status of the meeting and the treatment of any information shared at meeting and the venue of the meeting and this is primarily because as I said earlier, the confidentiality between ourselves and our clients is paramount and we would not attend any meeting where any information relating to any clients, prior clients, past clients, present clients and future clients.

**ADV ZINHLE BUTHELEZI:** Thank you. There is a response to your email on page 197. Could you please give us the gist of that response?

20 **MS YASMIN MASITHELA:** The response was that Ms Kellerman indicated that she was the acting secretary for the committee and that she is not mandated to respond to the questions we have raised except to say that the committee was constituted by Cabinet and that the information during the session would be relayed to Cabinet for it to properly consider media reports.

**ADV ZINHLE BUTHELEZI:** Thank you and who was the Minister of Mineral Resources at the time for the record?

**MS YASMIN MASITHELA:** The Minister of Mineral Resources at the time was Mr Mosebenzi Zwane.

**ADV ZINHLE BUTHELEZI:** Thank you. Then there is your response that appear on page 198. Could you please tell us what was the decision then of ABSA?

**MS YASMIN MASITHELA:** ABSA respectfully declined the invitation to the meeting as we did not feel that we understood the nature of the meeting and we did not feel that our questions were adequately responded to.

10 **ADV ZINHLE BUTHELEZI:** Thank you and on the 4<sup>th</sup> May there was a further invitation to yourself inviting you to the IMC meeting. Would you please for the record tell us what is contained on page 199 to 200?

**MS YASMIN MASITHELA:** On the 4<sup>th</sup> May we were invited to another meeting which was to be held the following day on the 5<sup>th</sup> May and again the request was for ABSA or its representatives to appear in front of the IMC and the scope of the discussion would be around public media statements that would have been made by ABSA around account closures.

**ADV ZINHLE BUTHELEZI:** Yes, and your response on page 201?

20 **MS YASMIN MASITHELA:** On page 201 is quite a comprehensive response to that request and our response really just directed the IMC to the fact that ABSA does not discuss client confidential information and that to the extent that any media reports were made by ABSA they would be to confirm that we do not discuss client confidential information in the public domain or with third parties. Secondly, we thought it was

important that the IMC understand the context within which we operate as a banking sector and understand the legal regime that governs our banking system and we also indicated that they really didn't respond to our question around the details of the attendees of the meeting and in that regard we again declined to attend this meeting.

**ADV ZINHLE BUTHELEZI:** Thank you. Ms Masithela, if there was a successful interference with your relationship with the Gupta-related entities, what would have been the implications of such interference in on yourself, the country and South African economy?

**MS YASMIN MASITHELA:** Chair, I just would like to refer you back to my statement  
10 about being deeply concerned

**ADV ZINHLE BUTHELEZI:** yes.

**MS YASMIN MASITHELA:** and I think that just reiterates what the impact would have been on ABSA Bank. It would have meant that ABSA would allow their risk management processes not to be followed and allow deviations which would then result in a decision that falls outside of our risk framework to be taken and keep clients in the banking system that we would not ordinarily would have made. It would have exposed us to sanctions because it would be a clear deviation, there is no legislation in this country or international legislation that allows the Executive to interfere in private client relationships. We also felt that further to that, any decision which resulted with the banks or ABSA Bank  
20 allowing interference of its decision-making in financial crime matters would have caught the attention of the Financial Action Task Force, FATF who, as I said at the time, were evaluating whether South Africa had sound financial crime controls to ensure that we can combat money laundering and terrorism. In any event we were subsidiaries of Barclays PLC and that would have been a direct contravention of our policies which would have

been reportable not only to South African regulators in my role as Chief Compliance Officer, that is what I would have done, report it to the South African Reserve Bank. I would have reported to the Financial Conduct Authority in the UK as well as the Department of Justice in the US that this has in fact taken place because it would have been outside of the regulatory framework, both local and international.

**ADV ZINHLE BUTHELEZI:** Thank you Ms Masithela. On page 198, that is your response to Ms Kellerman's letter. On the second paragraph from the bottom you refer to appropriate authorities. You are saying: "*As a regulated bank and responsible financial institution, we are obviously more and willing to co-operate with all appropriate*  
10 *authorities*". Who are these appropriate authorities? What do you mean by that?

**MS YASMIN MASITHELA:** Appropriate authorities are authorities who are enabled by our financial regulation to make requests upon us as a bank on any matter pertaining to the banking system or ABSA Bank's relationship with its clients and so on so by appropriate authorities I refer to regulators, I refer to and in that ambit it would have been the South African Reserve Bank, it would have been the FCA, it would have been even the tax authorities or the Financial Intelligence Centre but we did not deem the committee to be an appropriate authority.

**ADV ZINHLE BUTHELEZI:** Thank you.

**MS YASMIN MASITHELA:** We did not understand the constitution of the committee and  
20 we certainly did not understand why the committee would be interested in client bank accounts.

**ADV ZINHLE BUTHELEZI:** Thank you Ms Masithela.

**ADV ZINHLE BUTHELEZI:** Chairperson, I think that would be all from me unless if there are specific questions that Chairperson wants me to address.

**CHAIRPERSON**: Thank you very much. Ms Masithela, we will excuse you for now. If you are required to come back on some future date, the legal team of the Commission will be in touch with you. Thank you very much for coming to the Commission to share your evidence. You are excused.

**MS YASMIN MASITHELA**: Thank you Chair.

**ADV ZINHLE BUTHELEZI**: Thank you Chair.

**ADV PHILLIP MOKOENA SC**: Mr Chair, that concludes today's proceedings. We had scheduled two witnesses. Tomorrow just as a reminder, we request an early start. If we may start at half past 9 in order to allow Ms Kate Hofmeyer to lead the evidence of  
10 Nedbank which will be followed by the evidence of the expert, Mr Kaufmann.

**CHAIRPERSON**: Okay, that's in order. Thank you very much. We will adjourn today's proceedings and we will resume tomorrow at half past 9. Proceedings are adjourned.

(Session Ends)