

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

CASE NO: 53829/2021

In the matter between

SIPHO MILA PITYANA

Applicant

and

THE PRUDENTIAL AUTHORITY

First Respondent

ABSA GROUP LIMITED

Second Respondent

ABSA BANK LIMITED

Third Respondent

THE AUTHORITY'S ANSWERING AFFIDAVIT

bx 4

TABLE OF CONTENTS

INTRODUCTION AND OVERVIEW OF THIS AFFIDAVIT.....	4
THE ROLE OF THE AUTHORITY.....	8
THE FACTS	11
THE BA020 FORM UNDER SECTION 60 (5) OF THE BANKS ACT READ WITH THE REGULATIONS RELATING TO BANKS.....	19
THE INCOMPETENCY OF THE RELIEF SOUGHT	25
AD SERIATIM RESPONSES	27



I, the undersigned,

KUBEN NAIDOO

do hereby make oath and state that:

- 1 I am the Deputy Governor of the South African Reserve Bank and Chief Executive Officer of the Prudential Authority (**the Authority**), the first respondent in this application.
- 2 I am duly authorised to represent the Authority in this application, to depose to this affidavit on its behalf and to oppose the application.
- 3 The facts to which I depose are within my personal knowledge except where it is apparent from the context that they are not.
- 4 I have read the notice of motion and founding affidavit of the applicant in this matter, Mr Sipho Mila Pityana (**Mr Pityana**). I wish to respond to the application as set out below.
- 5 The submissions of law I make in this affidavit are made on the advice of the Authority's legal representatives. There are averments in the founding affidavit that relate to matters of law. I am advised that these aspects will be addressed in



summary in this affidavit and will be developed in more detail in argument at the hearing.

INTRODUCTION AND OVERVIEW

6 Mr Pityana's cause of action is based on section 60 of the Banks Act 94 of 1990 (the Banks Act).

7 In summary, section 60(5) of the Banks Act requires every bank such as Absa to give the Authority written notice of the nomination of any person for appointment as chief executive officer, director or executive officer by furnishing the Authority with the prescribed information in respect of the nominee. Once this happens, the section gives the Authority and the nominee certain rights.

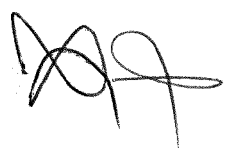
7.1 The Authority may object to the proposed appointment by means of a written notice, stating the grounds for the objection, given to the chairperson of the board of directors of the bank and to the nominee, within 20 working days of receipt of the written notice of nomination.

7.2 The bank or the nominee may dispute the Authority's objection.

7.3 In the event of the bank or the nominee disputing the Authority's objection, the provisions of section 60(6)(d) to (k) of the Banks Act apply. These provisions guarantee the nominee the right to be heard regarding the Authority's objection.



- 8 Mr Pityana contends that the Authority objected to his nomination as chairperson of the board of Absa but failed to follow the process prescribed by section 60(d) to (k) of the Banks Act. He says that the Authority denied him the right to be heard because it followed an informal process in objecting to his nomination to be the chairperson of the Absa Board, or in thwarting his nomination.
- 9 Section 60 of the Banks Act is not concerned with any alleged thwarting, which is denied, of a person's potential nomination. Mr Pityana sets out no other legal provision that addresses such alleged thwarting and affords him legal rights.
- 10 The key difficulty for Mr Pityana is that it is common cause that no written notice of his nomination as a chairperson of the Absa Board was ever submitted by Absa to the Authority as envisaged in section 60(5)(a) of the Banks Act. Instead, the facts set up by him in his founding affidavit make it clear that despite his representations to the Absa Board, the Board decided not to nominate him as chairperson and, instead, decided to nominate an external candidate, Mr Sello Moloko (**Mr Moloko**). In this regard, Mr Pityana has attached his representations to the Absa Board and other interactions with the Board, which include annexures "FA9", "FA10", "FA11" and "FA12" to his founding affidavit. He clearly exercised his right to be heard in respect of his potential nomination as chairperson by the Absa Board.
- 11 Despite these clear facts, Mr Pityana claims in support of his application at paragraph 86 of his founding affidavit that: *"I was nominated to be the*



Chairperson of the Absa Board". This is plainly untrue on Mr Pityana's own version of events.

- 12 It would appear that Mr Pityana assumed that his nomination as the chairperson of the Absa Board was a *fait accompli* even before the Absa Board had taken a final resolution on the matter. He contends that the Absa Board had in fact taken such a final decision and should have submitted a written nomination in terms of section 60(5)(a) of the Banks Act. Whether valid or not, this complaint cannot be against the Authority.
- 13 The facts are that the Absa Board chose to engage the Authority on any potential concerns that the Authority might have with its potential candidates for chairperson. This was before Absa submitted any written nominations for chairperson in terms of section 60(5)(a) of the Banks Act. These potential candidates included Mr Pityana. The Authority expressed certain concerns in respect of Mr Pityana, which Absa would have to address in a written nomination in terms of section 60(5)(a) of the Banks Act. Once such a written nomination was received, the Authority would follow the processes prescribed under section 60 of the Banks Act. The Authority made no decision at this stage, and conveyed none to Absa, to object to Mr Pityana's written nomination once it was submitted.
- 14 The interactions initiated by Absa are not unlawful. They are not precluded by section 60 of the Banks Act. As I explain below, engagements for guidance take place between the Authority and banks routinely. Mr Pityana expressly



acknowledges this fact in paragraph 61.4 of his founding affidavit. He also rightly states that they do not substitute requirements prescribed by the Banks Act. This is the reason why the Authority informed Absa to submit a written nomination in terms of section 60(5)(a) of the Banks Act if it wished to nominate Mr Pityana and to also address the Authority's concerns. It was open to Absa to undertake its own internal processes with Mr Pityana and then to submit such a written nomination if that was the ultimate decision of its Board. This clearly happened and Mr Pityana was heard by the Absa Board. The decision simply went against him. He claims no legal entitlement to a nomination by Absa for the position of chairperson.

- 15 The Authority's position as discussed above is clearly but summarily set out in its letter of 19 August 2021 addressed to Mr Pityana's attorneys. It is annexure "FA7" to Mr Pityana's founding affidavit (at p 001-48).
- 16 In the circumstances, no rights of Mr Pityana under section 60 of the Banks Act were breached. Absa never triggered the relevant provisions of section 60 of the Banks Act. In turn, the Authority did not fail to act in terms of section 60 of the Banks Act. The Authority did not act *ultra vires* its powers or breach Mr Pityana's legal right to be heard.
- 17 The application must therefore be dismissed with costs.
- 18 The rest of this answering affidavit will deal with the following issues in turn:



- 18.1 The role of the Authority.
- 18.2 The facts and the BA020 form under the Banks Act and Regulations Relating to Banks, 12 December 2012 (**the Regulations**).
- 18.3 The incompetence of the relief sought.
- 18.4 *Seriatim* responses to the founding affidavit where necessary.
- 18.5 Remedy.

THE ROLE OF THE AUTHORITY


- 19 The Authority is established in terms of section 32 of the Financial Sector Regulation Act, 9 of 2017 (**FSR**). Section 33 of the FSR states that the objective of the Authority is to:
 - 19.1 promote and enhance the safety and soundness of financial institutions that provide financial products and securities services;
 - 19.2 promote and enhance the safety and soundness of market infrastructures;
 - 19.3 protect financial customers against the risk that those financial institutions may fail to meet their obligations; and
 - 19.4 assist in maintaining financial stability.



- 20 In order to achieve its objective, the Authority must regulate and supervise financial institutions that provide financial products or securities services and market infrastructures, in accordance with the financial sector laws. The Banks Act is a financial sector law.
- 21 Financial institutions often engage with the Authority in advance of any nomination of directors or senior executives. They seek early guidance regarding any fitness or proprietary concerns. This is the norm. It is not intended to replace the requirements of section 60(5) of the Banks Act but to obtain guidance on matters that may need to be addressed in a formal nomination submitted in terms of section 60(5) of the Banks Act.
- 22 In performing its regulatory and supervisory functions, the Authority complies with international standards and guidelines on corporate governance principles. The guidelines are published from time to time by the Basel Committee on Banking Supervision. The latest version was published in July 2015.
- 23 Principle 13 of the Basel Committee Guidelines on Corporate Governance Principles for Banks states that *"supervisors should provide guidance for and supervise corporate governance at banks, including through comprehensive evaluations and regular interaction with boards and senior management, should require improvement and remedial action as necessary, and should share information on corporate governance with other supervisors"* (Basel Committee Guidelines at p 38).



- 24 Mr Pityana is aware of this principle, or at the very least ought to be.
- 25 Members of boards of banks and senior executives regularly have *ad-hoc* exchanges with the Authority. The purpose of such interactions, as clearly outlined in the Basel Committee guideline, *"is to support timely and open dialogue between the bank and supervisors on a range of issues, including the bank's strategies, business model and risks, the effectiveness of corporate governance at the bank, the bank's culture, management issues and succession planning, compensation and incentives and other supervisory findings or expectations that supervisors believe should be particularly important to board members"* (Basel Committee Guidelines at para 164). For ease of reference, I attach the first page of the Basel Committee Guidelines and Principle 13 marked "KN1".
- 26 Principle 13 of the Guidelines on Corporate Governance also encourages authorities to interact with banks on, among other factors, succession planning issues (Basel Committee Guidelines at p 38). These interactions are part of the regulatory process and do not prevent or preclude banks from following the statutory processes and requirements prescribed in the Banks Act for the nomination of a director. They in fact facilitate compliance with the statutory requirements by banks.
- 27 The nomination process for directors and in this case the chairperson of a systemically important financial institution entails an assessment of the fitness and propriety of the candidate. The ultimate responsibility for ensuring the fitness



and propriety of directors (and senior managers) resides with the banks regardless of the role that the supervisory authority may play in the formal approval process.

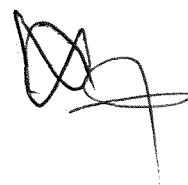
28 It is for this reason that banks and other financial institutions engage with the Authority as encouraged in principle 13 as discussed above. This is to establish whether the Authority may have any concerns regarding the possible nomination of a particular candidate, which would then have to be addressed to avoid protracted processes that may occur at a later stage. Effective and timely resolution of corporate governance issues is imperative for the sake of safety and soundness, as well as financial stability.

29 Mr Pityana's complaint that the Authority adopted an informal process in considering his nomination as chairperson of the Absa Board in breach of section 60(5) of the Banks Act is simply wrong. He clearly makes this complaint to suggest that the Authority circumvented the procedures set out in the Banks Act when Absa in fact never triggered those procedures.

30 I proceed to set out the facts.

THE FACTS

31 In or about August 2020, the current chairperson of the Absa Board, Ms Wendy Lucas-Bull, informed the Authority that she intended taking up the position of



chairperson of the Board of Shoprite-Checkers. She required the Authority's approval for this appointment, taking into account her position as chairperson of the Absa Board and the fact that her term of office as a Director on the Absa Board was due to come to an end in March 2022. The Authority then engaged with Ms Lucas-Bull to understand where Absa was in relation to succession planning. In light of her additional role at Shoprite-Checkers, the Authority was of the view that her successor should be appointed as soon as possible and preferably before March 2022.


- 32 Ms Lucas-Bull also advised the Authority that the Absa Board had appointed a sub-committee with the specific aim of finding a replacement for Ms Lucas-Bull. The sub-committee was led by Mr Alex Darko, a member of the Absa Board.
- 33 Mr Darko engaged with me and confirmed that a succession sub-committee of the Absa Board had commenced the process of identifying a possible successor to Ms Lucas-Bull.
- 34 On 21 April 2021, Absa's Group Company Secretary requested a meeting on behalf of Mr Darko with Mr Denzel Bostander, Head of the Financial Conglomerate Supervision Department at the Authority tasked with overall responsibility for the supervision of Absa, and me to discuss the preliminary thoughts of the Succession Committee on the appointment of a new Chairperson. The meeting was held on 28 April 2021 with Mr Darko and Ms Nadine Drutman

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representing Absa. Mr Bostander's confirmatory affidavit is attached and marked "KN2".

35 At the meeting held on 28 April 2021, Mr Darko indicated that the sub-committee had two potential candidates, one internal and one external, who could potentially succeed Ms Lucas-Bull as Chairperson. Mr Darko explained that the preferred internal candidate was Mr Pityana and that the preferred external candidate was Mr Moloko. Both these candidates were well known to the Authority as Mr Pityana was on the Board of Absa, and Mr Moloko was the chairperson of Momentum Metropolitan Holdings Limited Insurance Group, which is an entity regulated by the Authority. Mr Darko requested the Authority, as is the norm, to look into the fitness and propriety of these two candidates in order to give the sub-committee an early steer on whether the Authority had any major concerns about the suitability of either candidate to serve as chairperson of the Absa Board.

36 As I have already indicated above, it is common practice for regulated entities to ask supervisors to give their initial views to the entity on any concerns that the supervisors may have about a candidate. This common practice in no way replaces either the right of the regulated entity to submit a BA020 application (pursuant to the requirements of section 60 (5) of the Banks Act) or to use the various legal steps available to an entity under the provisions of the Banks Act and the FSR. This fact is acknowledged by Mr Pityana himself (FA 001-20 to 001-21 at para 61. See also "FA9" at pp 001-52 to 001-57).



- 37 Given the request made by the sub-committee of the Absa Board, the Authority commenced with a preliminary assessment of the two candidates to see whether there were any obvious concerns that may arise. As is common practice for very senior posts in important institutions, as CEO of the Authority, I asked the Governor and the other two Deputy Governors for their input on the candidates. It was suggested to me that the Authority should look at the circumstances surrounding Mr Pityana's resignation as chairperson of the AngloGold Ashanti Board, as he resigned with immediate effect, something that is unusual and warrants consideration. On 06 December 2020, AngloGold Ashanti issued a media statement announcing Mr Pityana's resignation as chairperson of the Board with immediate effect ("FA4" at p 001-40).
- 38 I contacted Ms Maria Ramos (**Ms Ramos**), chairperson of the Board of AngloGold Ashanti who succeeded Mr Pityana in that position. Ms Ramos indicated that there were issues relating to the resignation of Mr Pityana from the AngloGold Ashanti board, and there was an investigation report but that she could not discuss these with me. She requested that I write to her and formally request information regarding Mr Pityana and the investigation report. This would then be referred to the legal team of AngloGold Ashanti.
- 39 I chose not to write to AngloGold Ashanti but instead called Ms Lucas-Bull and advised her that there were concerns regarding the immediate resignation of Mr Pityana as chairman of the AngloGold Ashanti Board. I also advised her that the Authority understood that there was an investigation report into Mr Pityana from



when he was chairperson of AngloGold Ashanti, which it has not seen, and that it was incumbent on the Absa Board to investigate the matter and consider the circumstances surrounding Mr Pityana's abrupt resignation as chairman of the AngloGold Ashanti Board.

40 In or about the middle of July 2021, Ms Lucas-Bull called me to say that she understood that the reasons for Mr Pityana's resignation from the AngloGold Ashanti Board had to do with two issues. Firstly, there was a dispute about a bonus awarded to the previous CEO. Secondly, there was an allegation of sexual harassment against Mr Pityana and in relation to which there was an investigation and an investigation report. Ms Lucas-Bull advised that in relation to the sexual harassment allegation and the investigation report, Absa had asked an external legal practitioner, Mr Peter Harris, to review the investigation report and that he found several flaws in the report. Ms Lucas-Bull then affirmed that Mr Pityana was one of the two preferred candidates of the Absa Board to take over as chairperson.

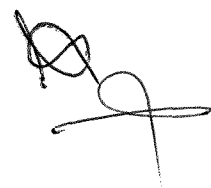
41 Mr Darko and Ms Lucas-Bull then requested a further meeting with the Authority which was held on 23 July 2021 with Mr Bostander and me. The purpose of the meeting was to provide feedback on the progress made by the succession sub-committee in the recruitment process as well as the issues that emanated from Mr Pityana's departure from AngloGold Ashanti. In this meeting, the Authority also provided feedback on its initial assessment of both candidates, Mr Pityana



and Mr Moloko. I expressed concerns regarding the issues surrounding Mr Pityana and the impact that this may have on Absa.

42 On the same day (23 July 2021), after the conclusion of the meeting, Ms Nadine Drutman, the Absa Company Secretary, at the request of Ms Lucas-Bull, emailed me both the investigation report into the sexual harassment allegations against Mr Pityana and the Peter Harris Opinion (**Harris Opinion**). The investigation report was prepared by Adv Heidi Barnes SC (**Barnes Report**). I read both the Barnes Report and the Harris Opinion. The Barnes Report sets out the complaint of sexual harassment and the findings, which include that there was sexual harassment on the part of Mr Pityana and that his utterances and actions were inappropriate. The Harris Opinion addresses possible procedural flaws in the investigation by Ms Barnes SC and concludes that the investigation and the Barnes Report were flawed. The Harris Opinion however specifically records that it did not pass judgement on the veracity of the versions of the complainant or Mr Pityana.

43 I have not included the Barnes Report or the Harris Opinion as appendices to this affidavit. I have done so in order to protect the confidentiality of all the parties referred to in those reports and the identity of the complainant. I am advised and submit that copies of the report and the opinion can be made available to the court in terms of a confidentiality regime agreed to between the parties if it considers either of these documents important for the determination of this application.

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- 44 Following a further discussion with the Governor and Deputy Governors, I called Ms Lucas-Bull and advised her of the concerns that the Authority had regarding any nomination of Mr Pityana to the position of chairperson of the Absa Board. These would need to be fully addressed. I also made it clear to Ms Lucas-Bull, in an email dated 6 August 2021 and attached and marked "KN3", that Absa must follow the formal nomination process and submit a BA020 application for the Authority to consider the written notice of the nomination of any candidate, as per its statutory requirements.
- 45 I understand that Ms Lucas-Bull then went back to the Absa Board to communicate concerns the Authority had with the candidacy of Mr Pityana. I do not know what Ms Lucas-Bull conveyed to the Absa Board in this regard. Mr Pityana in his founding affidavit states that Ms Lucas-Bull said that the Authority would object to his nomination (FA p 001-16, para 52.2). This is not correct. The Authority continued to assert that the allegations of sexual harassment and the findings in the Barnes Report were serious concerns that the Absa Board must deliberate on, including its potential impact on Absa's reputation (because reputational matters may impact on the safety and soundness of a bank) and that if they still wished to formally nominate Mr Pityana, the Authority would process the application through the normal processes.
- 46 In the Authority's response to Mr Pityana's letter which is attached to Mr Pityana's founding affidavit as annexure "FA7", the Authority made it clear firstly that it did not object to Mr Pityana's alleged nomination, as there was no nomination and



Absa was requested to provide a written notice for his nomination. In the same letter, the Authority advised that it indeed did raise concerns regarding the possible nomination of Mr Pityana. However, it could not object to a non-existent nomination.

- 47 Mr Pityana fully understands this process and has made it clear in annexure "FA11" (at pp 001-59 to 001-61) to his founding affidavit in a memorandum that he addressed to the Absa Board. In annexure "FA11" Mr Pityana states the following (at p 001-59):

It is my considered view that the way the Board protects the reputation of the Firm in that regard must be to want to get to the bottom of it all. Obtain reasons and indeed, should it be necessary, use the BA020 application process to get to understand what the PA has been able to uncover through their own procedures that our own could have missed. Should the final conclusion be that indeed a Director is not fit and proper the Board has an obligation to cause for the Director to be removed, let alone be denied an opportunity of chairing the Board;

Respectfully, I must submit that to not demand from the PA for its reasons for arriving at such a conclusion doesn't protect the reputation of the Firm, but exposes it. The Board must at all times be satisfied that the integrity of all its Directors is beyond reproach;

I have addressed issues pertaining to my own reputation in the memo submitted via the Company Secretary. Suffice to say considerations that a formal objection by the SARB would have far reaching consequences for me should not be good enough reason for the Board to want to submit me to the scrutiny of the Regulator. I sincerely appreciate the consideration of colleagues to protect my reputation. I nonetheless believe that this would not be the way to do it. If I have done any wrong, I must be held accountable and am prepared to submit myself to that accountability, as I did at AGA;



In the various discussions with the Chairman of the Board, I consistently urged her that the resolution of the Board should be implemented by submitting a BA020. (FA p 001-60)

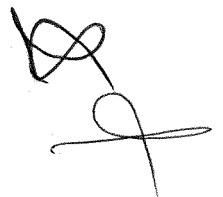
THE BA020 FORM UNDER SECTION 60 (5) OF THE BANKS ACT READ WITH THE REGULATIONS RELATING TO BANKS

48 Below I outline the relevant BA020 fit and proper assessment process and guidelines. I do this to demonstrate that the Authority can only object to a nomination after undergoing the entire process.

48.1 Section 60(5) of the Banks Act read with Regulation 42 of the Regulations Relating to Banks, 2012 prescribes the submission of the form BA020 applications for banks and bank controlling companies in respect of senior management and members of the board of directors.

48.2 Section 60(5)(a) of the Banks Act requires every bank to give the Authority written notice of the nomination of any person for appointment as a chief executive officer, director or executive officer by furnishing to the Authority with the prescribed information in respect of the nominee. Executive officer refers to a person reporting to the CEO.

48.3 Regulation 42(1)(a) of the Regulations and section 60(5)(b) of the Banks Act provide that the notice must reach the Authority at least 30 days prior to the proposed date of appointment. The Authority may object to the proposed appointment by means of a written notice stating the grounds for

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the objection, given to the chairperson of the board of directors of the bank and to the nominee, within 20 working days of receipt of the notice.

48.4 Section 7 of the Banks Act enables the Authority to call for any information that may be reasonably required to perform its functions under the Banks Act. This request for additional information, which could be in the form of documentation or meeting discussions, could require extension of the 20 working days timeline. The turnaround time of 20 working days is applicable to the processing of all form BA020 applications, irrespective of prospective, new or existing candidates, considering the internal governance processes all BA020 applications are subject to.

48.5 The application from the bank for the prospective appointment of any of the above-mentioned persons to the bank lodged in terms of section 60(5) of the Banks Act, comprising the written notice, together with the form BA020 and all supporting documentation, must be lodged with the Authority. The Authority registers the form on the electronic correspondence system and immediately provides a copy of the written notice, the form BA020 and any supporting documentation accompanying the written notice to the delegated officer. This is then followed by discussions on the completion of the form and its processing.

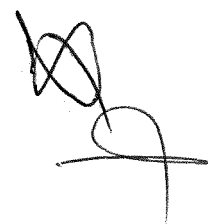
48.6 When there is outstanding documentation, or where some questions or statements, which ought to have been answered or completed remain but were left unanswered or incomplete, or when questions or statements have

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been answered or completed incorrectly, the delegated officer returns the form to the bank concerned with a request to provide the necessary answers, make the necessary completions and/or to supply the information required. The time periods in this instance are then reset and resume once an amended and fully completed form BA020 is received by the Legal Division of the Authority.

- 48.7 After the delegated officer has satisfied him- or herself as to the correctness of the form BA020, he or she provides a copy of the form BA020 of the bank concerned to the relevant analyst, manager, Divisional Head and Head of Department of the frontline supervision team of the Authority, who evaluates the fitness and propriety of the prospective incumbent within 5 days by analysing the submitted form BA020.
- 48.8 If a concern regarding the fitness or propriety of the nominee official is raised, the delegated officer or frontline team, where appropriate, notifies the bank concerned accordingly.
- 48.9 If, however, no concern regarding the fitness or propriety of the nominee is officially raised after a period of 5 days, the delegated officer provides the Secretary of the Head of Policy, Statistics and Industry Support Department (Head) with the BA020 who then circulates the notice, the form BA020 and any supporting documentation accompanying the written notice to:

48.9.1 The Governor and Deputy Governors,

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48.9.2 All Heads of Departments,

48.9.3 The Financial Sector Conduct Authority (FSCA) – where relevant, and

48.9.4 The relevant foreign regulator, where applicable.

48.10 The recipients referred to above must inform the Secretary of the Head within 5 days whether or not they have any concerns regarding the appointment of an official. Any recipient not replying within the said 5 days is deemed to have no concern with the proposed appointment.

48.11 If no concerns are raised within the period of 5 days following the submission of the relevant form BA020, the delegated officer prepares a letter for the relevant frontline supervision Head of Department or Divisional Head's signature recommending the approval of the appointment.

48.12 If a concern regarding the fitness or propriety of the nominee official is raised, the delegated officer, where appropriate, prepares a submission to the Executive Committee (or the CEO), accompanied by copies of the relevant contents of the file, for its consideration.

48.13 As soon as possible after the Executive Committee or the Authority has given its final decision, the delegated officer ensures that a letter is addressed to the chairperson of the board of directors of the controlling company making the application stating the decision reached by the Authority and also stating the reasons for the objection.

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48.14 In an instance where after receiving the letter stating the Authority's decision and reasons for the objection, the relevant bank or nominee wishes to dispute the decision and/or reasons, the dispute procedure articulated in section 60(6)(d) to (k) of the Banks Act is then proceeded with.

48.15 I note that the fitness and propriety assessment conducted by the Authority upon receipt of a BA020 nomination form is itself a detailed process.

48.16 The assessment is done in accordance with the Basel Committee Guidelines and includes but is not limited to the following:

48.16.1 The general probity of that person, which is assessed by using various tools and methods, including internet, social media platforms, professional sites, newspaper articles etc, to see whether anything adverse that may affect his or her fitness might be found.

48.16.2 The competence and soundness of judgement of that person for the fulfilment of the responsibilities of the office in question. This assessment, which is done in conjunction with the Analyst, includes checking the prospective applicant's qualifications, experience (in relation to the prospective position), exposure and understanding of the banking system, previous employment history, decisions that he or she might have taken on previous employment that could demonstrate abilities or lack thereof,

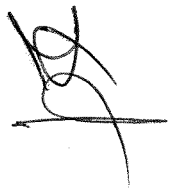


reason(s) why the applicant left his/her previous employment or was fired (if applicable) and probing reasons relating to gap periods in between employments (if any).

- 48.16.3 The diligence with which the person concerned is likely to fulfil those responsibilities. This process includes the SARB's legal division distributing a memo in respect of the Application to the analyst team responsible, to the entire department, Executive Management and the Financial Services Conduct Authority (FSCA) (where relevant) soliciting any information that may assist in assessing the prospective applicant's fitness and propriety.

48.17 Furthermore, guidelines include evidence that such person:

- 48.17.1 was convicted of the offence of fraud or any other offence of which dishonesty, or the commission of violence, was an element;
- 48.17.2 had contravened the provisions of any law appearing to the Authority to be designed for protecting members of the public against financial loss due to the dishonesty or incompetence of, or malpractices by, persons engaged in the provisions of banking insurance, investment or other financial services; or the management of juristic persons or against financial loss due to activities relating to insolvency;

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48.17.3 was a director who had been indicated, as contemplated in section 421(2) of the Companies Act, as the effective cause of a particular company having been unable to pay its debts;

48.17.4 had taken part in any business practices that, in the opinion of the Authority, were deceitful, prejudicial or otherwise improper (whether unlawful or not) or which otherwise brought discredit on that person's methods of conducting business; or

48.17.5 had taken part in or been associated with any such other business practices as would or had otherwise conducted himself or herself in such a way as to cast doubt on his or her competence and soundness of judgement.

49 On 8 September 2021, the Absa Board submitted a formal BA020 application for the nomination of Mr Moloko as the chairperson of the Absa Board to succeed Ms Lucas-Bull when her term ends in March 2022. No BA020 application form was submitted by the Absa Board in respect of Mr Pityana. It is clear in this respect that the real dispute that Mr Pityana has is not with the Authority, but with the Absa Board for refusing to nominate him for appointment as Chairperson.

THE INCOMPETENCE OF THE RELIEF SOUGHT

50 Mr Pityana seeks a declarator that the Authority acted unlawfully and beyond its powers under the Banks Act when it engaged in an "*informal process*" regarding



his nomination as chairperson of the Absa Board (NoM at p 001-1). Mr Pityana states that he wishes to secure a declarator against the Authority *"as a prelude to taking further action against it, including a potential claim for damages as a consequence of its unlawful conduct"* (FA p 001-27 at para 87).

51 I am advised and submit that the relief sought is impermissible. Where an applicant seeks a declaratory order there must be some material effect to the order or advantage obtainable from the relief sought. The court's jurisdiction cannot be exercised to decide and declare abstract, academic or hypothetical questions which have no tangible benefit to the applicant. Mr Pityana has not established any legally cognisable interest in an existing, future or contingent right or obligation for purposes of the relief sought, which is germane to the matter at hand. At best, Mr Pityana seeks a declaratory order as a prelude to and to assist him in a damages claim. But he has no damages claim against the Authority.

52 Even if the Authority had breached the relevant provisions of section 60 of the Banks Act, which is denied, no basis would exist in law for a damages claim against it flowing from its failure to comply with any of the provisions of section 60 of the Banks Act. Mr Pityana has not suggested any such basis. Even if Mr Pityana had such a damages claim, which is denied, the court must reject this piece meal litigation. He must claim his declarator and damages in the same proceedings, which he has failed to do.



53 This is therefore not an appropriate case for the exercise of the court's discretion by granting the declaratory relief sought. The application should be dismissed with costs. Further submissions will be made at the hearing of the application in this regard.

54 I now proceed to give *seriatim* responses to the allegations made in the founding affidavit. Certain of the allegations are better addressed by Absa.

SERIATIM RESPONSES

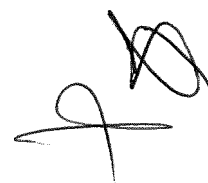
55 I now turn to address those allegations in the founding affidavit that call for a direct response. Any averments that are not dealt with are denied to the extent that they conflict with what I have set out in this affidavit.

Ad paragraphs 1-7

56 Save to deny that the allegations in the founding affidavit are both true and correct, I do not dispute the remaining allegations.

Ad paragraphs 8-9

57 I deny the allegations in these paragraphs and repeat what I have said above. The Authority always acted lawfully.

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58 The decision by Absa not to nominate Mr Pityana is a decision it took following its own internal process. It is clear from the founding affidavit that Mr Pityana was afforded a hearing prior to Absa deciding to nominate Mr Moloko in terms of section 60(5) of the Banks Act. The Authority did not at any time preclude the nomination of Mr Pityana to be chairperson of Absa. It simply pointed out the concerns that would have to be addressed by Absa in respect of such a nomination. Mr Pityana simply failed to convince Absa to nominate him. It appears from correspondence attached to the founding affidavit that Absa may have had other reasons not to nominate Mr Pityana quite apart from the concerns that the Authority raised with Absa for it to address in any written nomination in terms of section 60(5) of the Banks Act.

59 Mr Pityana has failed to make out a case for the relief that he seeks.

Ad paragraphs 10-15

60 The legal instruments cited in these paragraphs speak for themselves. Legal argument will be addressed at the hearing of the application on their proper interpretation and application to the present facts.

61 I specifically record that section 60(5)(c) of the Banks Act provides that the Authority may object to the proposed appointment (where there has been a nomination) by means of a written notice. Absa did not nominate Mr Pityana as its

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Board chairperson and there was no objection to such a nomination as envisaged in the section. I repeat what I have said above in this regard.

- 62 Save for what I have set out above, the allegations contained in these paragraphs are denied.

Ad paragraphs 17-21

- 63 I admit that the Authority did not object to Mr Pityana's appointment as a director on the Absa Board in 2019. I admit that the Authority did not object to Mr Pityana's appointment as a director on the Absa Board in 2019. There was no reason for the Authority to object to the appointment, at that time. The concerns which now exist only arose in 2021 and are addressed above. It is also correct that Mr Pityana has served as Lead Independent Director of Absa since June 2020. The Authority is not required to approve the appointment of the Lead Independent Director but is notified of the appointment.
- 64 I also admit that Ms Lucas-Bull is due to retire in March 2022, that Directive 4 of 2018 addresses the maximum period which an independent non-executive director may serve on the Board of Directors, and that Absa identified an internal and external candidate for purposes of succession to the position of chairperson of the Absa Board. I was informed that the potential internal candidate was Mr Pityana and the potential external candidate was Mr Moloko who has now been appointed.



65 Save for what I have stated above, I do not have direct knowledge of the remaining allegations but do not dispute them for purposes of this application.

Ad paragraph 22

66 I do not have direct knowledge of what Mr Darko reported to the Absa Board. There is no confirmatory affidavit by Mr Darko in respect of what Mr Pityana attributes to him. Of importance is that Mr Pityana confirms that he was not party to the interactions I had with the representatives of Absa. His allegations are hearsay. I am advised that legal argument will be addressed to this Court at the hearing of this application regarding these and many other statements in the founding affidavit which are clearly hearsay and inadmissible. I reiterate what I have stated above regarding the engagements I had with Mr Darko and Ms Lucas-Bull. I deny all allegations that contradict what I say in this affidavit.

67 Save for what I have set out above, I deny any allegations that are inconsistent with what I have said.

Ad paragraphs 23-26

68 I do not have direct knowledge of the allegations made in these paragraphs and cannot admit them. The allegation in paragraph 26 under reply appears to conflict with the contents of certain of the documents on which Mr Pityana relies, especially annexure "FA12".

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Ad paragraphs 27-28

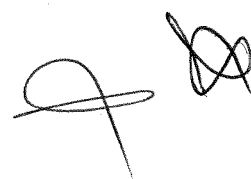
69 Again, the allegations in these paragraphs are hearsay and inadmissible. I repeat what I have stated above regarding the discussions between Ms Lucas-Bull and I in the presence of Mr Bostander. I deny the statement that Ms Ramos had given me details regarding circumstances of Mr Pityana's resignation from the AngloGold Ashanti Board. The contents of these paragraphs are accordingly denied to the extent that they are inconsistent with what I say in this affidavit.

Ad paragraphs 29-41

70 Save to admit that the annexures referred to in these paragraphs say what they say, I do not have direct knowledge of the contents of these paragraphs and cannot admit them for purposes of this application. However, they do not appear to be directly relevant to the legal issues that arise for determination.

Ad paragraphs 42-48

71 I do not have direct knowledge of the allegations in these paragraphs and cannot admit them for purposes of this application.

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Ad paragraph 49

72 I do not have direct knowledge of the allegations made in this paragraph and cannot admit them for purposes of this application. I only point out that they appear to conflict with certain of the documents on which Mr Pityana relies, including annexures "FA9", "FA10", "FA11" and "FA12" to the founding affidavit.

Ad paragraphs 50-50.3

73 The matters addressed by Mr Pityana in this paragraph are hearsay and inadmissible. I reiterate what I have stated above regarding the meeting of 23 July 2021 and the subsequent receipt of the reports referred to in these paragraphs. I deny the allegations made to the extent that they are inconsistent with what I have said.

Ad paragraph 51

74 The allegations in this paragraph are hearsay and inadmissible. I do recall enquiring why Mr Harris did not seek clarification from Ms Barnes on her reasons for not interviewing the CPOs. Save for this, I deny the remaining allegations.

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Ad paragraphs 52-52.4

75 Again, the allegations in these paragraphs are hearsay and inadmissible. I do not have direct knowledge of what Ms Lucas-Bull told Mr Pityana. I also do not have direct knowledge of the Absa Board's deliberations concerning the alleged appointment of Mr Pityana as chairperson at their meeting on 10 August 2021. I do not admit the allegations for purposes of this application.

76 I repeat what I have stated above regarding my interactions with Ms Lucas-Bull and the concerns raised regarding a possible nomination of Mr Pityana as chairperson of the Absa Board. There was no written nomination of Mr Pityana submitted at any stage. There was also no objection on the part of the Authority to his nomination for which reasons were required.

Ad paragraph 53

77 I have no knowledge of the allegations in this paragraph but do not dispute them for purposes of this application. They are irrelevant to the legal issues that arise.

Ad paragraphs 54-55

78 I admit that the Authority received the letter from Mr Pityana's attorneys referred to in paragraph 54 under reply. I do not admit the correctness of the contents of the letter.

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79 I wish to highlight that it was evident from the letter that the purpose of the letter was to request written reasons for the SARB's decision to object to Mr Pityana's appointment as the chairperson of the Group and Absa Boards. The Authority duly responded to the letter and the response, which is self-explanatory, is annexed to the founding affidavit as "FA7" (at p 001-48). The contentions in the letter from Mr Pityana's attorneys were premised on an incorrect understanding of the facts, as is the application. No written nomination of Mr Pityana as chairperson of Absa was ever submitted as required in terms of the Banks Act.

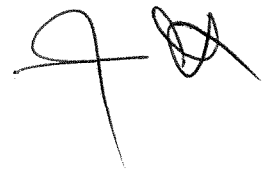
80 Save for what I have set out above, any allegations that contradict what I say in this affidavit are denied.

Ad paragraphs 56

81 I admit that I responded to Mr Pityana's attorneys' letter. I confirm the contents of "FA7" as true and correct.

Ad paragraphs 57-60

82 The contents of these paragraphs are admitted insofar as they are a true reflection of the letter referred to. I deny the contentions in the letter to the extent that they suggest that the Authority breached any provisions of the Banks Act and any of Mr Pityana's legal rights. Further submissions will be made at the hearing of the application in this regard.

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Ad paragraphs 61-61.6

- 83 I note that Mr Pityana made representations to the Absa Board for it to submit a written nomination in terms of section 60(5) for his appointment as chairperson of the Absa Board. His representations were unsuccessful, but he was heard.
- 84 The contents of the memorandum of Mr Pityana, "FA9", speak for themselves. I deny the contents to the extent that they contradict what I have explained above regarding the engagements I had with representatives of Absa and the concerns that I raised. Mr Pityana expressly acknowledges the regularity of such engagements between the Authority and Banks. It was for him to persuade the Absa Board that any concerns raised could adequately be addressed and that he was suitable for nomination in terms of section 60(5) of the Banks Act. The Authority breached no provisions of the Banks Act in expressly its concerns candidly to the Absa Board to address. The Absa Board decided for its own reasons not to submit a nomination for Mr Pityana in terms of section 60(5) of the Banks Act. This outcome does not constitute a breach of the Banks Act by the Authority, nor a breach of Mr Pityana's legal rights.
- 85 Any allegations that contradict what I say in this affidavit are denied.

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Ad paragraph 62

86 I deny the contents of this paragraph. I repeat what I have stated above. There was no "*formal objection*" of any kind to a nomination of Mr Pityana as chairperson of Absa. No nomination of Mr Pityana made under the Banks Act was withdrawn. There was therefore no denial of Mr Pityana's statutory right to defend his good name. The right to be heard under section 60 of the Banks Act applies where a written nomination is submitted and there is an objection by the Authority to the nomination, which is disputed, and representations are made by the bank or nominee.

Ad paragraph 63

87 The allegations in this paragraph and the annexure referred to also reflect a further opportunity for Mr Pityana to be heard in respect of his potential nomination under the Banks Act. Mr Pityana exercised the right to make representations.

Ad paragraphs 64-65

88 Again, the allegations in this paragraph are hearsay and inadmissible. I repeat what I have said above regarding my engagements with Ms Lucas-Bull. I deny all the allegations made that contradict what I have said above.

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Ad paragraph 66

89 Annexure "FA12" speaks for itself.

Ad paragraph 67

90 I have no knowledge of the discussions between Mr Pityana and Ms Lucas-Bull. I admit that the Authority did inform Ms Lucas-Bull that Absa needed to submit a formal BA020 application if it wished to nominate Mr Pityana as its chairperson. This would then trigger the process under section 60 of the Banks Act. Any allegations that contradict what I have said are denied.

Ad paragraph 68

91 Annexure "FA13" speaks for itself. It is difficult to understand how the outcome of this application could have impacted the Absa Board's decision to nominate Mr Pityana as chairperson or an alternative candidate. As repeatedly stated in this affidavit, the Authority never precluded Absa from nominating Mr Pityana under section 60(5) of the Banks Act. I specifically indicated to Absa that it should submit a formal BA020 application. Mr Pityana repeats this in his founding affidavit. It would be up to Absa to address the concerns that I had raised with representatives of Absa. If the BA020 application was submitted, the process under section 60 of the Banks Act would have followed. No undertakings nor threatened court applications were necessary.



Ad paragraphs 69-70

92 The allegations are admitted to the extent that they accurately reflect the contents of annexure "FA14" (at p 001-64). The Authority's response to this letter is included as annexure "FA16" (at p 001-69) to the founding affidavit. The annexures speak for themselves. There was simply no need for an undertaking by the Authority. Absa needed to proceed in accordance with the provisions of section 60(5)(a) of the Banks Act if it wished to.

93 I also note that Mr Pityana is not challenging the nomination and appointment of Mr Moloko to succeed Ms Lucas-Bull. That is a further reason why the declarator sought is academic and ought not to be granted.

Ad paragraphs 71-73

94 Annexure "FA15" speaks for itself. It appears from annexure "FA15" that the Absa Board may have preferred to nominate Mr Moloko as its chairperson for other reasons and not merely that the Authority had raised concerns to be addressed in relation to the potential nomination of Mr Pityana.

Ad paragraph 74

95 These allegations are denied. I have already addressed the process followed and the Authority's engagement with Absa and do not repeat this here. I have no

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direct knowledge of the basis on which the Absa Board resolved to nominate its chosen candidate instead of Mr Pityana. However, I can confirm that the only nomination under section 60(5)(a) of the Banks Act that the Authority received was for Mr Moloko.

Ad paragraph 75

96 I admit the contents of this paragraph. Annexure "FA16" correctly stated the factual position.

Ad paragraphs 76-77

97 The allegations in these paragraphs are denied. There is nothing unlawful with the interactions that occurred between the Authority and representatives of the Absa Board. I have fully addressed this above. I am advised that these are matters for legal argument and will be addressed as such at the hearing of the application.

Ad paragraph 78

98 The allegations are denied. They are speculative, scandalous and irrelevant. They are also mischievous. They should be struck out or ignored. I repeat what I have explained above regarding my interactions with Ms Ramos.

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99 It is the Absa Board, following the interactions I had with representatives of Absa that was meant to address the concerns that the Authority raised in any written nomination under section 60(5)(a) of the Banks Act. It is plain from Mr Pityana's affidavit that he placed all relevant material before the Absa Board and sought to persuade it to formally nominate him in terms of section 60(5)(a) of the Banks Act. For its own reasons, and as it was entitled in law to do, the Absa Board decided on an alternative candidate.

The alleged and unspecified social, political and professional relationships between Ms Ramos and unnamed "*several Governors of the SARB*", which are denied, did not feature in any considerations by the Authority in raising its concerns. They also do not seem to be given prominence in Mr Pityana's own submissions to the Absa Board, which are attached to his founding affidavit, as reasons why the Absa Board should nominate him despite any concerns raised. On the contrary, Mr Pityana says in "FA11" that he has known me for many years, and he had no reason to believe that I would deal with his matter in any other way "*than as a Regulator who knows to respect the law*". This is consistent with how I have dealt with this matter throughout. Mr Pityana puts nothing credible in the founding affidavit to gainsay his rightly held belief regarding my conduct.

Ad paragraph 79

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- 100 Ms Ramos never made any submissions to the Authority on the circumstances of Mr Pityana's departure from the AngloGold Ashanti. There is accordingly nothing to share. The circumstances are set out in the reports that Mr Pityana provided to the Absa Board and his account of what transpired. It is the same reports that Mr Pityana alleges were given to the Authority.
- 101 I have dealt with Mr Pityana's request for a meeting in my response to his attorney's letter. My response is attached to Mr Pityana's founding affidavit as annexure "FA7" (at p 001-48).
- 102 Had there been a nomination of Mr Pityana under section 60(5)(a) of the Banks Act, and if the Authority had objected to it and Mr Pityana disputed the Authority's objection, the Authority would have heard Mr Pityana as required by the Banks Act. In the absence of such a nomination, meeting Mr Pityana was at the absolute discretion of the Authority and could not have been pursuant to section 60 of the Banks Act. But Mr Pityana had clearly already preferred a litigious route.
- 103 Save for what I have set out above, the remaining allegations in this paragraph are denied to the extent that they contradict what I say in this affidavit.

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Ad paragraph 80

104 Ms Ramos did not make any submissions to the Authority on Mr Pityana's potential nomination. Mr Pityana is again speculating without any evidence. I deny Mr Pityana's unfounded speculations and repeat what I have said above regarding the process followed.

Ad paragraph 81

105 The contents of this paragraph are denied. Mr Pityana is again making unfounded speculative allegations.

Ad paragraph 82

106 I deny the contents of this paragraph. The Authority never thwarted or circumvented the procedures set out in sections 60(5)(c) and 60(6)(d) to (k) of the Banks Act. The Authority informed Absa to proceed with its nomination in accordance with the provisions of those sections of the Banks Act and also address the Authority's concerns in such a nomination. Absa Bank would follow its own internal processes in addressing these concerns. As it turns out, the Absa Board heard Mr Pityana in deciding what decisions to make in that regard.

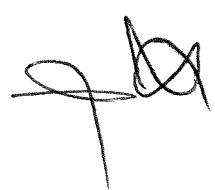
107 The fact that the Absa Board, following its own deliberations on the matter and considering Mr Pityana's submissions, i.e., "FA9" at p 001-52 and "FA11" at p

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001-59 to the founding affidavit, decided to nominate Mr Moloko as chairperson does not at all constitute a breach by the Authority of any of the provisions of the Banks Act. As I have already stated, the banks are ultimately responsible for the fitness and propriety of whoever they nominate and any consequences that flow from the decision to nominate.

Ad paragraph 83

- 108 The contents of this paragraph are denied. The Authority never took a decision to object to the appointment of Mr Pityana. Mr Pityana was never nominated for appointment to the position of chairperson of the Absa Board under the Banks Act.
- 109 The Authority was requested to consider the two potential candidates for chairperson that Absa was considering at the time. It was not Mr Pityana alone. Mr Moloko was also being considered. Absa wanted to get the Authority's advice on whether it had any concerns regarding either of the two potential candidates.
- 110 The Authority raised the concerns that it had with Mr Pityana which, as appears from the founding papers, were addressed by the Absa Board with Mr Pityana, who made detailed submissions to the Absa Board.
- 111 Following the submissions and as appears from the founding affidavit, the Absa Board resolved to nominate Mr Moloko and not Mr Pityana.



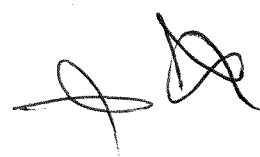
Ad paragraph 84

112 I reiterate that the Authority did not object to Mr Pityana's nomination. There was no nomination to object to as Mr Pityana was never nominated for the chairperson position of the Absa Board.

113 In this paragraph Mr Pityana expressly accepts the decision of the Absa Board not to nominate him. He cannot do otherwise. This should be the end of the matter. Given this acceptance, Mr Pityana plainly has no claim against the Absa Board, let alone the Authority.

Ad paragraph 85

114 Mr Pityana has not identified any existing, future or contingent right or obligation that entitles him to a declaratory order. Our law is clear that it is only in very limited and exceptional circumstances that a public body's failure to comply with statutory obligations may result in a liability for damages. Mr Pityana has not even begun to engage with the requirements for establishing such liability. He has no claim at all for two reasons. First, the Authority has not breached the Banks Act. Secondly, even if there was such a breach, which is denied, no case is made out that Mr Pityana would have any claim for damages against the Authority. This is the only relevant claim because Mr Pityana cannot assert a legal entitlement to a nomination by the Absa Board to be its chairperson. He

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has already admitted that Absa as an independent body was entitled to take the decision that it did.

115 The application falls to be dismissed with costs.

Ad paragraphs 86-89

116 Mr Pityana has no rights under section 60 of the Banks Act in the absence of a nomination as envisaged in section 60(5)(a) of the Banks Act. I repeat what I have stated above in this regard.

117 There is no basis for the relief that Mr Pityana seeks. Further submissions will be made at the hearing of the application in this regard.

118 Any contentions that contradict what I say in this affidavit are denied.

Ad paragraphs 90-91

119 The allegations in these paragraphs are argumentative. They are denied and will be addressed in legal argument at the hearing of the application.

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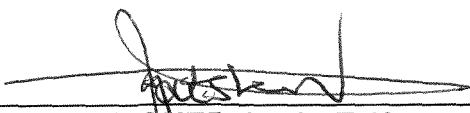
REMEDY

120 For the reasons set out above, the application must be dismissed with costs, including costs of two Counsel.

WHEREFORE the Authority prays that the application be dismissed with costs, including the costs of two counsel.


KUBEN NAIDOO

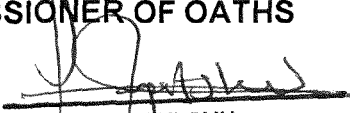
I certify that the deponent who acknowledged that he knows and understands the contents of this declaration, has no objection to making this affirmation and considers this affirmation binding on his conscious. I duly administered the oath as prescribed by Regulation No. R1268 of 21/07/72 and that thereafter the deponent in my presence signed the declaration, on the 23rd day of **November 2021**.


COMMISSIONER OF OATHS

Name:

Address:

Capacity

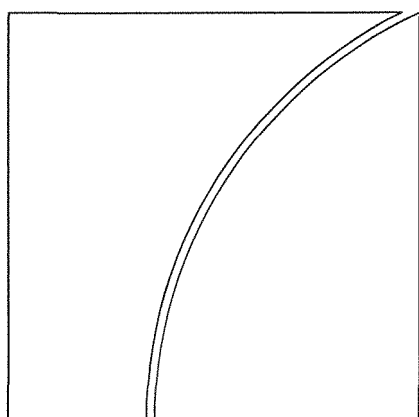

ALLIANCE NOHLOVU
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"KN1"

Basel Committee on Banking Supervision

Guidelines

Corporate governance principles for banks



July 2015



BANK FOR INTERNATIONAL SETTLEMENTS

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Principle 13: The role of supervisors

Supervisors should provide guidance for and supervise corporate governance at banks, including through comprehensive evaluations and regular interaction with boards and senior management, should require improvement and remedial action as necessary, and should share information on corporate governance with other supervisors.

157. The board and senior management are primarily responsible for the governance of the bank, and supervisors should assess their performance in this regard. This section sets forth several principles that can assist supervisors in assessing corporate governance and foster good corporate governance in banks.

Guidance on expectations for sound corporate governance

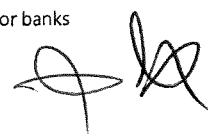
158. Supervisors should establish guidance or rules, consistent with the principles set forth in this document, requiring banks to have robust corporate governance policies and practices. Such guidance is especially important where national laws, regulations, codes or listing requirements regarding corporate governance are not sufficiently robust to address the unique corporate governance needs of banks. Regulatory guidance should address, among other things, expectations for checks and balances and a clear allocation of responsibilities, accountability and transparency among the members of the board and senior management and within the bank. In addition to guidance or rules, where appropriate, supervisors should also share industry best practices regarding corporate governance with the banks they supervise.

Comprehensive evaluations of a bank's corporate governance

159. Supervisors should have processes in place to fully evaluate a bank's corporate governance. Such evaluations may be conducted through regular reviews of written materials and reports, interviews with board members and bank personnel, examinations, self-assessments by the bank, and other types of on- and off-site monitoring. The evaluations should also include regular communication with a bank's board of directors, senior management, those responsible for the risk, compliance and internal audit functions, and external auditors.³⁹

160. Supervisors should evaluate whether the bank has in place effective mechanisms through which the board and senior management execute their respective oversight responsibilities. Supervisors should evaluate whether the board and senior management have processes in place for the oversight of the bank's strategic objectives, including risk appetite, financial performance, capital adequacy, capital planning, liquidity, risk profile and risk culture, controls, compensation practices, and the selection and evaluation of management. Supervisors should focus particular attention on the oversight of the risk management, compliance and internal audit functions. This should include assessing the extent to which the board interacts with and meets with representatives of these functions. Supervisors should determine whether internal controls are being adequately assessed and contribute to sound governance throughout the bank.

³⁹ External auditors may share information with the supervisor without contravening their duty of confidentiality (see BCBS, *External audits of banks*, 2014, paragraphs 95 and 96).



161. Supervisors should evaluate the processes and criteria used by banks in the selection of board members and senior management and, as they judge necessary, obtain information about the expertise and character of board members and senior management. The fit and proper criteria should include those discussed in Principle 2 of this document. The individual and collective suitability of board members and senior management should be subject to ongoing attention by supervisors.

162. As part of their evaluation of the overall corporate governance in a bank, supervisors should also endeavour to assess the governance effectiveness of the board and senior management, especially with respect to the risk culture of the bank. An assessment of governance effectiveness aims to determine the extent to which the board and senior management demonstrate effective behaviours that contribute to good governance. This includes consideration of the behavioural dynamic of the board and senior management, such as how the “tone at the top” and the cultural values of the bank are communicated and put into practice, how information flows to and from the board and senior management, and how potential serious problems are identified and addressed throughout the organisation. The evaluation of governance effectiveness includes review of any board and management assessments, surveys and other information often used by banks in assessing their internal culture, as well as supervisory interviews, observations and qualitative judgments. In arriving at such judgments, supervisors need to be particularly mindful of consistency of treatment across the banks they supervise. Supervisory staff should have the necessary skills to evaluate these issues and arrive at the complex judgments involved in assessing governance effectiveness.

163. In reviewing corporate governance in the context of a group structure, supervisors should take into account the corporate governance responsibilities of both the parent company and subsidiaries, in accordance with Principle 5 of this document.

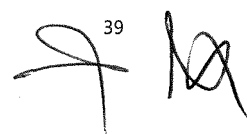
Regular interaction with directors and senior management

164. Supervisors should interact regularly with boards of directors, individual board members, senior managers and those responsible for the risk management, compliance and internal audit functions. This should include scheduled meetings and ad hoc exchanges, through a variety of communication vehicles (eg e-mail, telephone, in-person meetings). The purpose of the interactions is to support timely and open dialogue between the bank and supervisors on a range of issues, including the bank’s strategies, business model and risks, the effectiveness of corporate governance at the bank, the bank’s culture, management issues and succession planning, compensation and incentives, and other supervisory findings or expectations that supervisors believe should be particularly important to board members. Supervisors should also provide insights to the bank on its operations relative to its peers, market developments and emerging systemic risks.

165. The frequency of interactions with the above persons may vary according to the size, complexity, structure, economic significance and risk profile of the bank. On that basis, supervisors may, for example, meet with the full board of directors annually, but more frequently with the chairman or lead or senior independent director and with key committee chairs. For systemically important banks, interaction should occur more frequently, particularly with members of the board and members of senior management, and those responsible for the risk management, compliance and internal audit functions.

Requiring improvement and remedial action by a bank

166. Supervisors should have a range of tools at their disposal to address governance improvement needs and governance failures. They should be able to require steps towards improvement and remedial action, and ensure accountability for the corporate governance of a bank. These tools may include the ability to compel changes in the bank’s policies and practices, the composition of the board of directors or senior management, or other corrective actions. They should also include, where necessary, the



authority to impose sanctions or other punitive measures. The choice of tool and the time frame for any remedial action should be proportionate to the level of risk the deficiency poses to the safety and soundness of the bank or the relevant financial system(s).

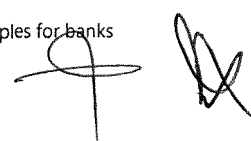
167. When a supervisor requires a bank to take remedial action, the supervisor should set a timetable for completion. Supervisors should have escalation procedures in place to require more stringent or accelerated remedial action in the event that a bank does not adequately address the deficiencies identified or the supervisor deems that further action is warranted.

Cooperation and sharing of corporate governance information with other relevant supervisors

168. Cooperation and appropriate information-sharing among relevant public authorities, including bank supervisors and conduct authorities, can significantly contribute to the effectiveness of these authorities in their respective roles. Such information-sharing is particularly important between home and host supervisors of cross-border banking entities.⁴⁰ Cooperation can occur on a bilateral basis, in the form of a supervisory college or through periodic meetings among supervisors at which corporate governance matters should be discussed.⁴¹ Such communication can help supervisors improve their assessment of the overall governance of a bank and the risks it faces, particularly in a group context, and help other authorities assess the risks posed to the broader financial system. Information shared should be relevant for supervisory purposes and be provided within the constraints of confidentiality and other applicable laws. Special arrangements, such as a memorandum of understanding, may be warranted to govern the sharing of information among supervisors or between supervisors and other authorities.

⁴⁰ See BCBS, *Core principles for effective supervision*, September 2012, www.bis.org/publ/bcbs230.pdf, Principle 13 (home-host relationships).

⁴¹ See the Committee's *Principles for effective supervisory colleges* at www.bis.org/publ/bcbs287.pdf.



"KN2"

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

CASE NO: 53829/2021

In the matter between

SIPHO MILA PITYANA

Applicant

and

THE PRUDENTIAL AUTHORITY

First Respondent

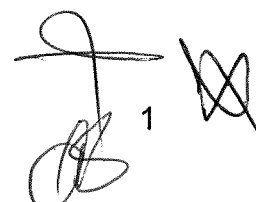
ABSA GROUP LIMITED

Second Respondent

ABSA BANK LIMITED

Third Respondent

CONFIRMATORY AFFIDAVIT

 1

I, the undersigned,

DENZEL BOSTANDER

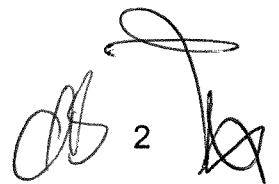
do hereby make oath and say:

- 1 I am an adult male and the Head of the Financial Conglomerate Supervision Department at the Prudential Authority tasked with overall responsibility for the supervision of Absa Bank Limited.
- 2 The facts contained herein, save where the contrary appears, are within my own personal knowledge and are to the best of my belief both true and correct.
- 3 I have read the founding affidavit deposed to by **KUBEN NAIDOO** and I confirm the truth and correctness of the contents thereof insofar as same relate to me.




DENZEL BOSTANDER

I hereby certify that the deponent knows and understands the contents of this affidavit and that it is to the best of his knowledge both true and correct. This affidavit was signed and sworn to before me at Sandton on this the 23rd day of **NOVEMBER 2021**, and that the Regulations contained in Government Notice R.1258 of 21 July 1972, as amended, have been complied with.




COMMISSIONER OF OATHS

Full names:


ALLIANCE NDLOVU
PRACTISING ATTORNEY
REPUBLIC OF SOUTH AFRICA
COMMISSIONER OF OATHS (EX OFFICIO)
32 Devonshire Avenue, Bryanston
Postnet Suite #0537 Private Bag X51, 2021

Address:

Capacity:

"KN3"

From: "Kuben Naidoo" <Kuben.Naidoo@resbank.co.za>
Subject: Re: Response to Questions from SARB
Date: 06 August 2021 12:16
To: "Wendy Lucas-Bull"
Cc: "Denzel Bostander" <denzel.bostander@resbank.co.za>

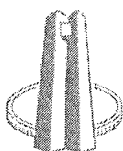
Hi Wendy

Thanks for your correspondence. I do not think that there is any merit in continuing to deal with this matter informally. Please submit a formal BA020 application, which will be processed as per the normal procedure in the SARB and we will formally communicate to ABSA the outcome of the application.

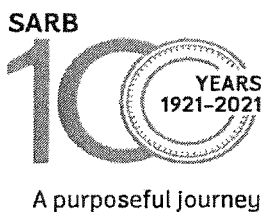
Kuben

Kuben Naidoo

Deputy Governor
Executive Management Department



SOUTH AFRICAN RESERVE BANK
Prudential Authority



P O Box 427 Pretoria 0001 South Africa
 370 Helen Joseph Street Pretoria 0001
 +27 12 399 7196 /
 Kuben.Naidoo@resbank.co.za
 www.resbank.co.za/prudentialauthority

On: 06 August 2021 11:29, "Wendy Lucas-Bull" wrote:

CAUTION: This email originates from outside of the organisation. Do not click on links or open attachments unless you recognise the sender and know that the content is safe.

Dear Kuben

I attach correspondence in relation to the issue raised in our last conversation.

Kind regards
Wendy.

Sent from my iPad

Begin forwarded message:

From: Sipho Pityana <siphopityana@gmail.com>
Date: 03 August 2021 at 14:23:03 SAST
To: Wendy Lucas-Bull
Subject: Response to Questions from SARB

A handwritten signature in black ink, appearing to be 'f-b'.

Dear Wendy

Thank you very much for your feedback on the Chairman succession process.

I wish to restate that I resigned from the Board of Anglo Gold Ashanti prior to the conclusion of the final report of an investigation into allegation of sexual harassment against me. I reject any suggestion that my resignation was in order to avoid possible adverse action by the Board of Anglo Gold Ashanti arising from the conclusions of such an investigation. I have consistently insisted on a fair and conclusive investigation of this matter. The proposal to not pursue this matter beyond Investigator's Report was that of Board of Anglo Gold Ashanti.

I would also wish to restate that my preference was always to make public the reasons for my resignation, which had nothing to do with the said allegations. Contrary to Ms Ramos's insinuation to you that there was no confidentiality agreement, there clearly was and at their instance. By mutual agreement with the board we resolved to not publicly disclose the reasons for my resignation and maintain confidentiality in the interest of the company, hence the SENS announcement previously shared with you.

Here under is a sequence of events leading to my ultimate resignation as a Director on the Board of AngloGold Ashanti. I have also included some of the correspondence between the company and I. I trust you'll find this helpful.

On 04 December 2020 I resigned as the Chairman of the Board whilst remaining as its Director following the draft report of the Investigator which I rejected. In my letter of resignation I make clear the divisions on the board that made my role as the Chairman untenable. I also make clear my intention to confront the allegations against me including considering an option of approaching our courts to clear my name. This was exactly the reason I decided to not step down as a Director. Annexure 1 attached is my letter of resignation as the Chairman of the Board.

On 05 December the Board of Directors appointed Ms Maria Ramos to succeed me as the Chairman of the Board. Under pressure to announce the above decision to the market as is required, the Board, through its legal representatives invited me to consider also resigning as a Director. As this was likely to avoid a value destructive public dispute, I in good faith agreed to do so. Annexure 2 attached is correspondence from Anglo Gold's lawyers proposing terms of my resignation.

On 07 December 2020, Anglo Gold Ashanti proposed a separation agreement and a SENS announcement. I attach (Annexure 3) letters from our respective legal representatives in that regard. It is clear from the attached correspondence from my legal representatives that my final resignation was never an act of avoidance of the investigation into allegations against me as Ms Ramos allegedly suggests.

It was after we had agreed on the above that I also resigned from the Board of Directors of Anglo Gold Ashanti on 07 December 2020. Annexure 4 attached is my letter of resignation from the Board.

It was only on 10 December 2020 that I received the final report of the investigator dated 09 December 2020. I restated my objection to its conclusions referring to the cogent reasons previously presented to the her, but ignored. In light of the agreement between the parties that no further action was contemplated regarding this matter, I demanded that my final response be attached to the investigator's final report. I'm advised that this letter was shared with you.

A handwritten signature in black ink, consisting of a stylized 'F' followed by a cursive 'h'.

I hope that this clarifies the sequence of events.

Best wishes

Sipho

Sent from my iPad

----- *** Disclaimer *** -----
Important Notice: This e-mail is subject to the e-mail disclaimer of the South African Reserve Bank,
which can be viewed at:
<http://www.resbank.co.za/Disclaimer/Pages/SARB-Disclaimer.aspx> Should you be unable to access
the link provided,
kindly send an email to BSTD-ICT-ServiceDesk@resbank.co.za
----- *** Disclaimer *** -----

fb