IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO 52883/17

In the matter between:

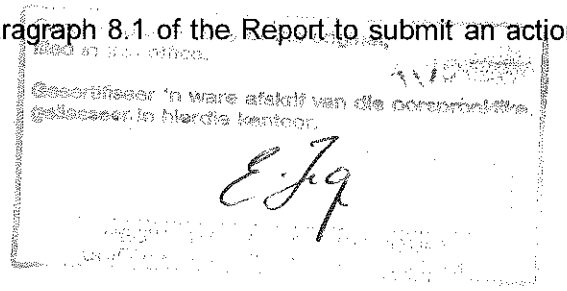
SOUTH AFRICAN RESERVE BANK	Applicant
and	
PUBLIC PROTECTOR	First Respondent
SPECIAL INVESTIGATING UNIT	Second Respondent
THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	Third Respondent
ABSA BANK LIMITED	Fourth Respondent
MINISTER OF FINANCE	Fifth Respondent
NATIONAL TREASURY	Sixth Respondent

NOTICE OF MOTION

TAKE NOTICE that the applicant shall, on a date and time to be decided by the registrar of the above Honourable Court, ask for an order in the following terms:

1 reviewing and setting aside the remedial action in the whole of paragraph 7.1 of the Public Protector's Report 8 of 2017/1018 into the Alleged Failure to Recover Misappropriated Funds (*the Report*) which was issued on 19 June 2017;

2 reviewing and setting aside the obligation placed on the Special Investigating Unit and the South African Reserve Bank under paragraph 8.1 of the Report to submit an action



plan to the Public Protector in relation to the remedial action in paragraph 7.1 of the Report;

3 directing any respondent who opposes this application to pay the costs of this application, including the costs of three counsel, jointly and severally, the one paying the other to be absolved;

4 further or alternative relief.

TAKE NOTICE further that the accompanying affidavit of **JOHANNES JURGENS DE JAGER** will be used in support hereof.

TAKE NOTICE further that the applicant has appointed the under mentioned address of **WERKSMANS ATTORNEYS**, at which it will accept notice and service of all process in these proceedings.

AND TAKE NOTICE THAT the first respondent is called upon, to despatch, within 15 days after receipt of the notice of motion, to the Registrar the record of the proceedings sought to be set aside, together with such reasons as he is by law required or desires to give or make, and to notify the applicant that he has done so.

AND TAKE NOTICE THAT the applicant reserves the right within 10 days after the Registrar has made the record available to it, to amend, add to or vary the terms of the notice of motion and supplement the founding affidavit.

TAKE NOTICE FURTHER that if any of the respondents intend to oppose the relief sought in this notice of motion, such respondents are required:

(a) within 15 days of this notice of motion or any amendment thereto as contemplated in Uniform Rule of Court 53(4) to deliver a notice to the applicant's attorneys that such respondents intend to oppose and in such notice to appoint an address within 8 kilometres of the office of the Registrar of this Honourable Court at which the respondents will accept notice and service of all process in these proceedings;

(b) within 30 days of the expiry of the time referred to in Uniform Rule of Court 53(4), to deliver any affidavits as the respondents may desire in answer to the allegations made by the applicant.

TAKE NOTICE FURTHER that in the event that no notice of opposition is filed or alternatively no answering affidavit is filed, the applicant shall seek the enrolment of the application on an unopposed basis.

DATED at PRETORIA on this 31ST day of July 2017.

WERKSMANS ATTORNEYS
Applicant's Attorneys
155 - 5th Street
Sandown, Sandton
Tel: (011) 535 8145
Email: cmanaka@werksmans.com
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TO: **THE REGISTRAR OF THE ABOVE HONOURABLE COURT, PRETORIA**

AND TO:
THE PUBLIC PROTECTOR
First Respondent
Attention: Advocate Mkhwebane
175 Lunnon Street
Hillcrest Office Park
Pretoria
0083
C/O SEFANYETSO ATTORNEYS
1064 Arcadia Street
BMMS Law Chambers
Unit G01, Metropolitan Life Building
Hatfield, Pretoria
Tel: 012 942 8710
Fax: 086 536 2387
E-mail: nomsas@sefattorneys.co.za

Received on this ____ day of _____2017

_____

AND TO:
SPECIAL INVESTIGATING UNIT
Second Respondent
Rentmeester Building, 2nd Floor
74 Watermeyer Street
Watermeyer Park
Pretoria
Fax: (012) 843 0115
E-mail: jwells@siu.org.za / Pseleka@justice.gov.za

Received on this ___ day of _____ 2017

_____

AND TO:
THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA
Third Respondent
c/o THE STATE ATTORNEY
SALU Building
255 Francis Baard Street
Pretoria
Fax: 012 309 1575 / 012 309 1504

Received on this ___ day of _____ 2017

_____

AND TO:
ABSA BANK LIMITED
Fourth Respondent
Head Office
7th Floor, Barclays Towers West
15 Troye Street
Johannesburg
2001
C/O WEBBER WENTZEL ATTORNEYS
Attention: Dario Milo
90 Rivonia Road
Sandton
Johannesburg
2196

Received on this ___ day of _____ 2017

_____

AND TO:
MINISTER OF FINANCE
Fifth Respondent
c/o THE STATE ATTORNEY
SALU Building
255 Francis Baard Street
Pretoria
Fax: 012 309 1575 / 012 309 1504
E-mail: TNhlanzi@justice.gov.za

Received on this ___ day of _____ 2017

_____

AND TO:
NATIONAL TREASURY
Sixth Respondent
c/o THE STATE ATTORNEY
SALU Building
255 Francis Baard Street
Pretoria
Fax: 012 309 1575 / 012 309 1504
E-mail: TNhlanzi@justice.gov.za

Received on this ___ day of _____ 2017

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IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO

In the matter between :

SOUTH AFRICAN RESERVE BANK	Applicant
and	
PUBLIC PROTECTOR	First Respondent
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FOUNDING AFFIDAVIT

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I, the undersigned,

JOHANNES JURGENS DE JAGER

do hereby make the following statements under oath:

1 I am an admitted advocate of the High Court of South Africa. I hold the position of General Counsel in the Legal Services Department of the South African Reserve Bank, the applicant in this application.

2 I am duly authorised to represent the Reserve Bank in this application and to depose to this affidavit on its behalf.

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 The submissions of law I make in this affidavit are made on the advice of the Reserve Bank's lawyers.

Introduction

5 This is an application to review and set aside the remedial action in paragraph 7.1 of the Public Protector's Report 8 of 2017/2018 into the Alleged Failure to Recover Misappropriated Funds (*the Report*) that was issued on 19 June 2017.

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6 The fourth respondent, ABSA Bank Limited, the fifth and sixth respondents, the Minister of Finance and National Treasury respectively, have already instituted review proceedings challenging *the Report*. I have read those review applications and confirm that the Reserve Bank associates itself with and supports the grounds on which they contend the Public Protector's remedial action should be set aside.

7 This application is, however, broader than the ABSA application because the Reserve Bank seeks to have the whole of paragraph 7.1 of *the Report* set aside, whereas ABSA seeks to have only paragraphs 7.1.1, 7.1.1.1 and 7.1.2 set aside. It is also different to the Minister of Finance and National Treasury's application which is not brought in terms of Uniform Rule 53, whilst the Reserve Bank's application is.

8 I shall not repeat or reattach the annexures that are attached to the ABSA and Minister of Finance and National Treasury applications. Where necessary, I shall refer to those attachments and request that they be read as if specifically incorporated herein.

9 This is also the Reserve Bank's second application in relation to *the Report*. Within a week of the publication of *the Report* in June 2017, the Reserve Bank brought urgent review proceedings to set aside the remedial action in paragraph 7.2 of *the Report*. This remedial action required an amendment to section 224 of the Constitution. It had immediate and drastic consequences for the economy and so the Reserve Bank had to move urgently to review and set aside that action. The Public Protector has consented to the relief sought in the urgent application.

10 The Reserve Bank made it clear in the urgent application that it reserved its right to challenge the remainder of *the Report* in later proceedings. It now does so.

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11 Although the impact of the Public Protector's constitutional amendment was swift and drastic, and therefore had to be responded to urgently, the impact of the Public Protector's other remedial action in paragraph 7.1 of *the Report* is no less serious.

12 In paragraph 7.1 of *the Report*, the Public Protector refers the matter to the Special Investigating Unit so that it may approach the President to:

12.1 re-open and amend Proclamation R47 of 1998 published in the Government Gazette dated 7 May 1998 (*the Heath Proclamation*) in order to recover misappropriated public funds unlawfully given to ABSA Bank in the amount of R1, 125 billion; and

12.2 re-open and amend *the Heath Proclamation* in order to investigate alleged misappropriated public funds given to various institutions as mentioned in the CIEX report.

13 The Public Protector also directs the Reserve Bank to co-operate fully with the *SIU* and assist the *SIU* in the recovery of misappropriated public funds.

14 This remedial action requires the *SIU* to get the President to re-open a completed investigation in order to recover misappropriated public funds unlawfully given to ABSA and other misappropriated public funds mentioned in the CIEX report.

15 The remedial action is flawed in numerous respects.

16 It is based on a fundamental misunderstanding of the public interest role that central banks play, in extraordinary circumstances as providers of liquidity to banks in financial

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distress, as lenders of last resort. It requires the President and the *SIU* to act unlawfully. It relates to recovery of a debt that ABSA does not owe and if it did, it would in any event have prescribed. It exceeds the jurisdiction of the Public Protector and it was the product of an unfair process.

17 On all these grounds, the remedial action should be set aside. I shall address the grounds of review in more detail in the third section of this affidavit.

The Parties

18 The applicant is the **SOUTH AFRICAN RESERVE BANK**, the central bank of the Republic of South Africa. It is established in terms of section 223 of the Constitution and is governed by the South African Reserve Bank Act 90 of 1989. Its head office is at 370 Helen Joseph Street, Pretoria. The Reserve Bank is responsible for, amongst other things, the protection of the value of the currency of the Republic in the interest of balanced and sustainable economic growth. It assists the South African government in the formulation and implementation of macro-economic policy and informs the South African public about South African monetary policy and the South African economic situation.

19 The first respondent is the **PUBLIC PROTECTOR**, a Chapter Nine institution established in terms of section 181(1)(a) of the Constitution read with section 1A(1) of the Public Protector Act 23 of 1994. The first respondent's principal place of business is situated at 175 Lunnon Street, Hillcrest Office Park, Pretoria.

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20 The second respondent is the **SPECIAL INVESTIGATING UNIT** (**"SIU"**) which is established in terms of section 2 of the Special Investigating Units and Special Tribunals Act No. 74 of 1996 and situated at 74 Watermeyer Street, Watermeyer Park, Pretoria. The SIU is cited because the Public Protector requires that Proclamation R47 of 1998 published in the Government Gazette dated 7 May 1998 is re-opened and amended in order to recover "misappropriated public funds unlawfully given to ABSA Bank in the amount of R1.125 billion.".

21 The third respondent is the **PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA** who holds office as the Head of State in terms of section 83 of the Constitution. The President is cited because the Public Protector's remedial action requires him to amend the Heath Proclamation to enable the SIU to conduct a further investigation. The President's place of business is the Union Buildings, Government Avenue, Pretoria.

22 The fourth respondent is **ABSA BANK LIMITED** (**"ABSA"**), a public company with registration number 1986/004794/06 and duly incorporated in accordance with the company laws of the Republic of South Africa, carrying on the business of a registered bank throughout South Africa with its head office at 15 Troye Street, Johannesburg. ABSA is cited for such interest as it may have in these proceedings.

23 The fifth respondent is the **MINISTER OF FINANCE**. The Minister is cited as the Minister responsible for the National Treasury and the Minister as defined in the South African Reserve Bank Act 90 of 1989.

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24 The sixth respondent is the **NATIONAL TREASURY** created in terms of section 216(1) of the Constitution and which is established in terms of section 5 of the Public Finance Management Act 1 of 1999 and situated at 240 Madiba Street, Pretoria Central, Pretoria.

25 The address for service fifth and sixth respondents is the care of the State Attorney at 255 Francis Baard Street, Pretoria.

26 No relief is sought against the second to sixth respondents, except an order for costs in the event that they oppose the application.

The complaint, investigation and Report

27 *The Report* is the product of an investigation that the Public Protector conducted after receiving a complaint from Mr Paul Hoffman in November 2010. The complaint alleged that the government had failed to implement the recommendations of a covert UK based asset recovery agency called CIEX. CIEX had evidently been contracted by the South African government to assist in investigating and recovering alleged misappropriated public funds. The complaint also alleged that CIEX produced a report for government in which it found that the Reserve Bank's financial assistance to Bankorp during the apartheid regime was unlawful and recommended recovery of the amount owed.

28 The financial assistance provided to Bankorp is set out in detail in ABSA's founding affidavit from paragraphs 2.3 to 2.29. It corresponds with evidence provided by the Reserve Bank to the Public Protector. I therefore do not repeat those facts here but rather confirm them and ask that they be read as if specifically incorporated herein.

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29 The important point about the assistance is twofold. First, the assistance was provided as part of the Reserve Bank's function as lender of last resort. Secondly, the three agreements that made up the assistance were described in detail to the Public Protector during her investigation:

29.1 in the interview with Dr Stals, the former Governor of the Reserve Bank, on 8 September 2016;

29.2 in Dr Stals's own submissions during the section 447 Commission of Enquiry into the affairs of Tollgate Holdings Limited that was provided to the Public Protector after the interview; and

29.3 in the affidavit of Mr Terblanche, who was the Chief Financial Officer of the Reserve Bank until August 2010, that was provided to the Public Protector after the interview with Dr Stals.

30 Copies of the transcript of the interview between Dr Stals and the Public Protector, as well as the affidavit of Mr Terblanche are attached as **JDJ1** and **JDJ2** respectively. Dr Stal's submissions in the Tollgate inquiry have already been attached to ABSA's founding affidavit as annexure F to its submissions to the Public Protector (pages 838 to 970 of the ABSA application).

31 Copies of the three agreements, as well as entries in the Reserve Bank's books of account, were also given to the Public Protector by the Reserve Bank after the interview on 8 September 2016.

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32 All this evidence showed that Bankorp had first approached the Reserve Bank in 1985/86 with a request for special assistance to enable it to cope with bad investments and other non-performing assets it had inherited when it took over Trust Bank in 1977 and Mercabank in 1984. The request came at a time when the South African banking sector was critically exposed given the international sanctions that had been imposed on South Africa in 1985. If Bankorp had failed at the time, a run on the banks was a real risk which could have had serious detrimental effects on the financial system as a whole. An example of this was the failure of Saambou Bank in the early 2000's which led to the closure of many smaller banks and the failure of BOE Bank. It also impacted the stability of the entire banking sector at the time. A crisis in the banking system therefore needed to be averted.

33 The assistance ended when ABSA repaid the last instalment on the loan plus interest in October 1995. As ABSA's affidavit also makes clear, when it purchased Bankorp in April 1992, it paid fair value for Bankorp. ABSA paid R1.230 billion for Bankorp which was just more than the assistance package. ABSA did not benefit from the assistance; it paid for it.

34 The interest differential earned by ABSA on the assistance package was used solely for purposes of discharging the liabilities of Bankorp in relation to its "bad book". These liabilities were not incurred by ABSA and had nothing to do with ABSA. They were in fact incurred prior to ABSA coming into existence and ABSA was therefore not responsible for initially acquiring the non-performing bad assets to which the liabilities related.

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35 By October 1995, when the Public Protector's office was established, all the amounts owing under the three assistance schemes had been paid to the Reserve Bank

36 In or about 1997, the government commissioned the CIEX report. The Reserve Bank had no knowledge of the report at the time and no role in procuring it. CIEX did not interview the Reserve Bank about the content of its report nor did it afford the Reserve Bank an opportunity to comment on its findings. The Reserve Bank only saw the report fairly recently. A copy of the CIEX report is annexure MR8 to ABSA's affidavit (pages 1164 to 1225 of the ABSA application).

37 The CIEX report was a bounty hunter's tender. CIEX stood to earn a substantial commission on amounts recovered. It advised the government to coerce payments from those alleged to have benefitted from various schemes under the apartheid regime. CIEX advised that recoveries could be obtained from:

37.1 Armscor;

37.2 "Gnome" which was the alias given to an unidentified former senior South African cabinet minister;

37.3 Nedbank;

37.4 Volkskas;

37.5 Trust Bank; and

37.6 the governments of Switzerland and Germany.

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38 The report lacks any methodical discipline. It makes sweeping claims about large sums of money that could be recovered from various individuals and entities. It does not set out the basis for these claims or the nature and extent of the investigations undertaken to arrive at its conclusions. It goes as far as recommending to government, *inter alia*, the development of an overt and covert rolling programme with the strategic objective of bringing the Reserve Bank under government's control and of managing the replacement of the Governor, Dr Stals. It is perfunctory and unconstitutional.

39 It seems that the Public Protector was not deterred by these patent inadequacies in the report. On the contrary, she has perpetuated them. Her remedial action requires public funds to be used to have the *SIU* investigate the wild and unsubstantiated claims made in the CIEX report.

40 It is evident that not even government regarded the report worth implementing. And yet, the Public Protector will have the *SIU* undertake an investigation into alleged misappropriated public funds by the institutions identified in the CIEX report, many of whom no longer exist, some of whom include foreign governments and all of whom, if they ever owed anything to the state, probably no longer do because their debts were extinguished 15 years after they were due. If the debts were due to the state in 1997 when CIEX completed its report, then they would certainly have prescribed now, 20 years later.

41 On 7 May 1998, the President issued the *Heath Proclamation* directing the *SIU* to investigate the Bankorp assistance. The Proclamation required the *SIU* to investigate "the granting, the terms and conditions and the repayment of the loan or loans and any other special assistance by the South African Reserve Bank to Bankorp to rescue

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Bankorp from bankruptcy". The *SIU* concluded its investigation and issued a final report on 1 November 1999. A copy of the final report is annexure MR10 to ABSA's affidavit (pages 1228 to 1244 of the ABSA application).

42 The report concluded that if the *SIU* were to institute legal proceedings against ABSA to recover the R1.125 billion Bankorp assistance, the process would be lengthy and there was a real risk that there would be losses to the public. These losses would result because of the high probability of a run on the banks.

43 The report noted that "if one major bank is in trouble, there is a real systemic risk. In a country like South Africa, the banking community is relatively small and all the major banks have major exposures in one another. Should one bank go under for whatever reason there is a real risk of a domino effect causing great danger to other banks as well". It also concluded that ABSA and Sanlam had already received adverse publicity flowing from the *SIU* investigation and if legal proceedings were instituted, this would have a seriously detrimental impact on investor confidence abroad, on the two institutions involved and on the economy as a whole. The report therefore concluded that the financial impact of any recovery would far outweigh the financial benefit arising from successful litigation and would "most definitely be against the public interest".

44 The report recognised that the systemic failure that would likely result from such recovery litigation could well require the Reserve Bank to step in again and provide a further "lifeboat" of far greater proportion than the one given to Bankorp. It said that the Reserve Bank would be "compelled to interfere to protect the national currency".

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45 The *SIU* reached these conclusions at the end of 1999. It acknowledged then that taking steps to recover the assistance given to Bankorp would endanger the stability of the South African economy. It therefore concluded not to institute litigation to recover any amounts related to the financial assistance given to Bankorp.

46 When it issued its final report to the President on 1 November 1999, the *SIU* concluded its investigation. The President has no power under the Special Investigation Units and Special Tribunals Act 74 of 1996 (*SIU Act*) to re-open a completed investigation. The Public Protector's remedial action therefore proceeds from a flawed premise. It assumes that the President has a power to re-open a concluded investigation when he does not.

47 In the early 2000s, members of the public raised concerns about the Bankorp assistance package. The former Governor at the time, Mr Tito Mboweni, therefore commissioned a panel of experts, headed by Judge Denis Davis, to investigate the matter. The other panel members were Professor L Harris a director of the Centre for Financial and Management Studies at SOAS, University of London, Mr PC Hayward, a Financial Sector Advisor at the International Monetary Fund, Mr RM Kgosana, the Chairperson of KMMT Inc, Chartered Accountants, Mr RK Store, Chairperson of Deloitte & Touche Chartered Accountants and Ms S Zilwa, Chairperson of Nkonki Sizwe Ntsaluba, Chartered Accountants. The panel prepared a report in October 2001. A copy of the report is annexure MR11 to ABSA's affidavit (pages 1245 to 1390 of the ABSA application).

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48 The Davis panel found the following:

48.1 Although the financial assistance to Bankorp was justified in the interest of protecting the stability of the domestic banking system, its form and structure had serious flaws.

48.2 The SARB's assistance conferred benefits on Sanlam policy holders and pension fund beneficiaries as well as the minority shareholders of Bankorp. This was contrary to the public perception published in the media and the conclusions of the *SIU* that the major beneficiaries of the assistance were shareholders of ABSA.

48.3 Difficulties pertaining to the quantification of the enrichment and the identity of the beneficiaries rendered the enforcement of an enrichment claim problematic.

48.4 ABSA had paid for the continued financial assistance provided by the SARB to Bankorp and so ABSA could not be regarded as the beneficiary of the SARB's assistance package. ABSA had paid fair value for Bankorp.

48.5 The panel's investigation had brought to light all the material discoverable facts concerning the SARB assistance to Bankorp/ABSA. Public disclosure of the report should put an end to the uncertainty and speculation about the true facts concerning the lifeboat.

48.6 The SARB's current principles and practice relating to distressed banks and reform in related areas of financial architecture were comparable to the highest international standards.

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49 After the panel concluded its work, the Reserve Bank regarded the matter as closed. It accepted the findings of the panel and concluded that there was no further action to be taken.

50 There was no further engagement with the panel's report or the Bankorp assistance until July 2011 when the Reserve Bank learnt through the media that the Public Protector's office intended to launch a preliminary investigation into the financial assistance provided to Bankorp.

51 The Reserve Bank was immediately concerned about the impact of speculation in the media about the historic bailout and the effect that this may have on financial stability. The Reserve Bank therefore attempted to arrange a meeting with the Public Protector. Despite various attempts in this regard, it was not successful.

52 Since the Reserve Bank's attempts to convene a meeting with the Public Protector were unsuccessful, the Reserve Bank provided the Public Protector with a full dossier of all the relevant documents in its possession at the time. These included: literature about the role of central banks as lenders of last resort and the importance of confidence in the financial system, and a full copy of the report of the Davis panel. A copy of this correspondence is attached as **JDJ3**. In order to avoid duplication I have omitted from the correspondence attached hereto, the copy of the Davis Report and which was included in that sent to the Public Protector by the Reserve Bank, but which report is also included in the ABSA application at pages 1245 to 1398.

53 Nothing more happened for a year and a half. In February 2013, however, the Public Protector called for a meeting with the Governor of the Reserve Bank. There were

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numerous attempts to schedule this meeting with the Public Protector but to no avail. By June 2013, the meeting had still not been convened and so the Governor wrote to the Public Protector to obtain further information about the scope of the investigation. The Governor also asked the Public Protector to explain on what basis she had jurisdiction to investigate the matter. A copy of that correspondence is attached as **JDJ4**.

54 The Public Protector responded to say that the investigation was concerned with the propriety of government's actions regarding the decision not to implement the CIEX report in 1999. When the Public Protector finally met with the Reserve Bank in September 2013, a meeting at which I was present, she again confirmed that the focus of the investigation was on the CIEX report, and not the ABSA lifeboat which occurred before the Office of the Public Protector was established.

55 During this interview, the Reserve Bank explained that it was not involved at all in the CIEX report. It also explained the genesis of the Davis panel and the fact that it had accepted its findings. At the conclusion of this meeting, the Public Protector indicated that her preliminary report on the issues was nearly complete and that the Reserve Bank would be afforded an opportunity to comment on it during October 2013.

56 The preliminary report was not, however, provided to the Reserve Bank in October 2013. Instead, the matter went cold for almost three years.

57 On 1 August 2016, the Reserve Bank received a request from the Public Protector's office to provide certain information relating to Bankorp and the contact details of former Reserve Bank Governor, Dr Stals. The Reserve Bank responded on behalf of Dr Stals and indicated that he was happy to meet with the Public Protector but needed to be

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adequately informed about the nature of the information required from him. On 10 August 2016, the Public Protector responded to this request by confirming, yet again, that she was not investigating the lifeboat but rather the government's failure to implement the CIEX report. The relevant correspondence is attached as **JDJ5**.

58 Dr Stals, myself and other representatives of the Reserve Bank met with the Public Protector on 8 September 2016. Dr Stals explained the financial assistance provided to Bankorp in great detail during this meeting. At the end of the meeting, the Reserve Bank undertook to provide the Public Protector with confirmation that the amounts owing to the Reserve Bank under the assistance package had been repaid.

59 The Reserve Bank provided this information shortly after the meeting. The information included a copy of the 1995 agreement with Bankorp, Mr Terblanche's affidavit and copies from the financial records of the Reserve Bank at the time. The agreements have already been attached to ABSA's affidavit and Mr Terblanche's affidavit is attached here as annexure **JDJ2**. Copies of the financial records that were provided to the Public Protector are attached to the affidavit of Mr Terblanche.

60 On 14 October 2016, Mr Livhuwani Tshiwalule of the Public Protector's office informed the Reserve Bank's attorney that the Public Protector's intention was to release "a provisional report" on that day and that if she did so he would provide the Reserve Bank with a copy. The relevant email is attached as **JDJ6**. This did not, however, happen.

61 Ms Madonsela left office on 15 October 2016 and was replaced by the current Public Protector, Ms Makhwebane.

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62 On 20 December 2016, the current Public Protector gave the Reserve Bank a copy of the preliminary report on the investigation. A copy of the preliminary report is annexure MR19 to ABSA's affidavit (pages 1576 to 1641 of the ABSA application).

63 On 28 February 2017, the Reserve Bank submitted a response to the Public Protector's preliminary report. A copy of the Reserve Bank's response is attached as annexure **JDJ7**.

64 In the Reserve Bank's response, it took issue with the Public Protector's jurisdiction to investigate the matter. It also exposed numerous factual errors underpinning the report.

65 The preliminary report called for the Reserve Bank to take steps to prevent it from acting as a lender of last resort. The Reserve Bank was extremely concerned about the impact of such remedial action on financial stability in the economy. It therefore asked the Public Protector to provide it with some advance warning in the event that she intended to publish a final report with similarly drastic and unwarranted remedial action. No undertaking was given.

66 The Public Protector conducted two further interviews after receiving the submissions from affected parties on the preliminary report. She held an interview with the Department of State Security and with Mr Stephen Mitford Goodson. Precisely why these interviews were conducted and how they were relevant to the investigation has not been disclosed in the Report. No doubt, the Public Protector will explain their relevance in due course when she answers this application.

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67 The Reserve Bank followed up on its request for an undertaking on 7 April 2017. A copy of the letter is attached as **JDJ8**. The Public Protector responded and refused to give the undertaking. A copy of the Public Protector's response is attached as **JDJ9**.

68 The Public Protector's refusal to give the requested undertaking was unfortunate. As a result of the unexpected release of the Report, the Rand lost 2.02% of its value against the USD; R1,3 billion worth of South African government bonds were sold by non-resident investors; and ratings agencies threatened further downgrades. This damage could have been avoided if the Public Protector had taken seriously the submissions made to her and had given the Bank some warning of her intended remedial action before issuing it.

69 The Public Protector did neither of these. She failed to give proper consideration to the Reserve Bank's representations to her and she failed to give the Bank any warning of the serious remedial action she was contemplating.

70 The Public Protector's *Report* was issued on 19 June 2017. It bore little resemblance to the preliminary report. It included remedial action on which none of the parties had had an opportunity to comment. It is replete with legal and factual errors.

71 In the next section, I set out the grounds on which paragraph 7.1 of *the Report* ought to be reviewed and set aside.

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Grounds of review

72 I am advised that the Public Protector's remedial action in *the Report* is administrative action and therefore any review of it must be brought in terms of the Promotion of Administrative Justice Act 3 of 2000 (*PAJA*). In the alternative, even if the remedial action is not administrative action, it is the exercise of public power and must comply with the requirements of the principle of legality.

73 This review of the impugned remedial action is therefore brought both in terms of *PAJA* and the principle of legality under section 1(c) of the Constitution.

Misunderstanding of the role of lender of last resort

74 The concept of "lender of last resort" was explained when the Reserve Bank first engaged with the Public Protector concerning the investigation in 2011. In a letter to the Public Protector on 30 August 2011, the Reserve Bank explained its role as follows.

75 Owing to their public interest nature, central banks are deeply involved in systemic risk management as a close relationship exists between monetary and financial stability. Increased market volatility often results in financial instability, which in turn results in institutional distress, increased credit risks and increased insolvencies in general. It may later result in systemic distress and ultimately in greater demands for liquidity by means of what is commonly known as lender of last resort facilities afforded by central banks to commercial banks. A central bank is often the dominant agency responsible for the

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stability of liquidity assistance to banks in addition to assisting with systemic stability in a country.

76 The Reserve Bank was first established as South Africa's central bank in 1921 in terms of the Currency and Banking Act 31 of 1921. The primary objective of the Reserve Bank was, and remains, to protect the value of the currency in the interest of balanced and sustainable economic growth in South Africa. The Reserve Bank, like other central banks around the world, is involved in systemic risk management. Increased market volatility often results in financial instability which, in turn, can result in institutional distress, increased credit risks and increased insolvencies in general. The Reserve Bank, like other central banks around the world, has therefore acted as lender of last resort on a number of occasions since its incorporation almost one hundred years ago. It does so in the public interest and for the public's benefit by ensuring, as far as is possible, that there is financial stability.

77 As lender of last resort, central banks may be required to provide assistance to support banks facing liquidity difficulties in order to create enough base money to off-set the public's desire to switch into cash in a time of financial crisis. By providing this assistance, central banks aim to restore confidence and thereby re-establish credibility in the failing bank. The assistance is generally provided when central banks fear that a loss of confidence in a particular institution could prompt systemic failure in the entire banking system.

78 A systemic event may be regarded as an adverse event that occurs involving a significant market player, which, unless duly managed, has the potential of escalating and triggering severe instability in the financial system. In a worst case scenario, such

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systemic event has the potential of causing the collapse of an entire industry, or even the entire financial system, with grave consequences to the economy and general public of the country involved. A copy of the August 2011 letter is attached as **JDJ3**.

79 *The Report* evidences little appreciation for this role of the Reserve Bank and the remedial action in paragraph 7.1.1.1 is at odds with it.

80 In that part of the remedial action, the Public Protector requires the *SIU* (after the *Heath Proclamation* is amended) to recover the alleged misappropriated funds that were given to ABSA. However, as the *SIU's* earlier 1999 report on this very topic made clear, any such recovery action would likely have dire consequences for the economy and would not be in the public interest. The *SIU* found that any such recovery action would likely require the Reserve Bank to step in again to prevent a run on the banks and may well commit it to another bailout of much greater proportion.

81 There is accordingly a contradiction at the heart of *the Report.* On the one hand, the Public Protector criticises the Reserve Bank for acting as a lender of last resort. She says that "the status of the South African Reserve Bank as the lender of last resort has commercial benefits only in respect of the financial sector market. The benefit which involves vast amounts of public money does not improve socio-economic conditions of ordinary citizens of the Republic but of a particular financial sector" (paragraph 5.3.23 of the Report). And yet, she imposes remedial action that is likely to undermine financial stability, which has the potential of requiring further central bank emergency financial assistance.

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82 The Public Protector misunderstood the concept of lender of last resort. She did so by failing to consider relevant information provided to her by the Reserve Bank and which included the letter and documentation provided to her by the Reserve Bank on 30 August 2011 (attached hereto as **JDJ3**) and that provided by Dr Stals.

83 Furthermore in relation to whether the financial assistance was repaid or not, the Reserve Bank provided the Public Protector with the information contained in **JDJ2**, which the Public Protector failed to consider.

84 The information provided by the Reserve Bank to the Public Protector demonstrates that the financial assistance was repaid. Notwithstanding this and the interview with Dr Stals on 8 September 2016, where the Public Protector indicated that if the Reserve Bank could demonstrate that the financial assistance was repaid then that would be the end of the investigation (page 87 lines 18 to 22, page 90 lines 20 to 25, page 92 lines 2 to 4 and page 93 lines 19 to 23), the Public Protector proceeded to find that an amount was owing by ABSA.

85 The remedial action is accordingly irrational and based on material errors of fact. It ought to be reviewed and set aside under section 1(c) of the Constitution and sections 6(2)(f)(ii)(aa), 6(2)(f)(ii) (cc), 6(2)(f)(ii)(dd) and 6(2)(e)(iii) of PAJA.

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Procedural unfairness

86 The remedial action ought also to be set aside because it was not the product of a procedurally fair process. Procedural fairness was undermined in at least the following respects:

86.1 The preliminary report did not contain the remedial action that appeared in the Report issued on 19 June 2017. None of the parties was therefore given an opportunity to comment on it.

86.2 The Public Protector indicated in her interview with Dr Stals on 8 September 2016 (the transcript of which is attached as **JDJ1**) that she was not investigating the issue of interest (page 94 lines 11 to 15 of the transcript), yet that is precisely what *the Report* then makes a finding on.

86.3 After parties submitted their comments on the preliminary report, the Public Protector apparently conducted two further interviews with the Department of State Security and Mr Goodson. The Reserve Bank was not given an opportunity to comment on the input from either of these interviewees. This is a material gap in the process because, at least in so far as Mr Goodson is concerned, his views on central banking and the Reserve Bank itself are maverick and ill-informed. It is therefore very concerning to the Bank to see his views reflected in *the Report*. The comments in *the Report* in paragraphs 5.3.24 to 5.3.26 about the nationalisation of monetary currency and the creation of state banks have long been Mr Goodson's hobby horses. Mr Goodson has written two books, *A history of central banking and the enslavement of mankind* and *Inside the South African Reserve Bank – Its origins and secrets exposed* respectively. In these books, Mr Goodson argues that:

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86.3.1 all central banks are in essence criminal organisations which prey on the ignorance of their subjects;

86.3.2 the anti-apartheid struggle was little more than a grotesque hoax used to seduce South Africa into the clutches of the international bankers' New World Order;

86.3.3 central banks need to be reformed and converted into government owned and controlled monopolies; and

86.3.4 sections 223 to 225 of the Constitution should be repealed and the South African Reserve Bank Act 90 of 1989 should be amended. He also proposes the implementation of the 'Monetary Reform Act'.

86.4 Relevant extracts from his books are attached as **JDJ10**.

86.5 These views appear to have substantially influenced the findings and remedial action in *the Report*. But the Reserve Bank was given no opportunity to comment on them and to explain to the Public Protector that Mr Goodson's theories have been debunked by decades of literature on sound monetary policy. It would also have taken the opportunity to explain to the Public Protector that while Mr Goodson was a director and shareholder of the Reserve Bank, he was found to have acted with a conflict of interests and in breaches of his fiduciary duties to the Reserve Bank.

86.6 The Public Protector also did not give the Reserve Bank an opportunity to comment on the lawfulness of her remedial action designed to reopen the *Heath Proclamation* and conduct a new investigation into the Bankorp assistance. If it

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had been given this opportunity, it would have explained to the Public Protector that this action was unlawful.

86.7 Under paragraph 7.1.1.2 of the Report, the Public Protector requires the *Heath Proclamation* to be re-opened and for the *SIU* to investigate the alleged misappropriation of public funds set out in the CIEX report. I deal below with the irrationality of this remedial action but for present purposes, the point is that none of the parties that would be the subject-matter of that investigation or affected by the investigation was given an opportunity to comment on this remedial action. Parties such as Armscor and Nedbank were not consulted at all, and yet they are among the targets of the CIEX report. It is no answer to this procedural complaint for the Public Protector to say that she did not need to afford these parties an opportunity to comment on the remedial action because they will have an opportunity to make representations during the *SIU* investigation. This is because, as the 1999 *SIU* report made clear, just the fact of this type of investigation being conducted into the banking sector can have seriously adverse consequences for the subjects of the investigation and investor confidence.

87 The remedial action in paragraph 7.1 of *the Report* was ill-informed and it did not follow a procedurally fair process. It ought to be set aside under section 6(2)(c) of *PAJA*. It is also procedurally irrational and therefore reviewable under section 1(c) of the Constitution.

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The Heath Proclamation

88 The remedial action in paragraph 7.1 of *the Report* requires the *SIU* to approach the President to re-open and amend the *Heath Proclamation*. However, the President has no power under the Special Investigation Units and Special Tribunals Act 74 of 1996 to re-open a completed investigation.

89 Section 2(1) of the *SIU Act* gives the President the power to establish, by proclamation, a special investigating unit or to refer a matter to an existing special investigating unit to investigate the matters set out un subsection (2). Section 2(4) of the Act says that the President may amend a proclamation issued under (1) "at any time". Although the section is broadly framed, it does not mean that the President can re-open an investigation that was concluded and a final report issued more than seventeen years before. This is because section 2(4) has to be read together with section 4(1)(g) of the Act. That section empowers the *SIU*, upon the completion of an investigation, to submit a final report to the President. Once that step is taken, the investigation that was authorised by the President is concluded. There is no power given to the President under the Act to re-open such an investigation. There is good reason for this. Once the *SIU* has conducted an investigation and finally reported on it to the President, those parties affected by the investigation are for purposes of finality and legal certainty entitled to rely on the fact that the matter is closed.

90 The President's power under section 2(4) of the *SIU* Act to amend a proclamation "at any time" is a power that can only lawfully be exercised while the investigation that was proclaimed is still running. At any time before it is concluded, the President is at liberty to

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amend its terms of reference but once it is concluded, and the *SIU* has finally reported to the President, he retains no power to re-open the investigation.

91 The Public Protector has therefore imposed remedial action on the President and the *SIU* that is unlawful. It ought to be set aside under section 1(c) of the Constitution and under sections 6(2)(a)(ii), 6(2)(d) and 6(2)(i) of *PAJA*.

92 Even if, contrary to what is set out above, the President does have the power to re-open a completed investigation under the *SIU Act*, there would have to be some new fact or evidence that justifies rehashing an already completed investigation. However, *the Report* offers no new evidence or facts which have arisen to justify the reopening of the SIU's investigation into the Bankorp assistance. In the absence of something new, it is irrational to re-open a completed investigation.

93 The remedial action therefore ought to be set aside under section 1(c) of the Constitution and under section 6(2)(f)(ii)(dd) of PAJA.

Irrational investigation of the CIEX report

94 Paragraph 7.1.1.2 of the Report requires the *SIU* to approach the President to amend the *Heath Proclamation* to investigate misappropriated funds from various institutions mentioned in the CIEX report. However, as I have set out above, the CIEX report is a bounty hunter's tender. Its claims are unsubstantiated and sweeping. It targets entities that no longer exist – Volkskas and Trust Bank. It advises recoveries from foreign states

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including Switzerland and Germany and it relates to debts that arose more than twenty years ago.

95 There is no rational basis on which public money should be used to fund an *SIU* investigation into the alleged misappropriation of funds by entities that no longer exist and foreign governments. There is even less rationality in using public money to investigate debts which, even if they were misappropriations, have been extinguished by prescription.

96 Paragraph 7.1.1.2 of the Report therefore falls to be reviewed and set aside under section 1(c) of the Constitution and section 6(2)(f)(ii)(cc) of *PAJA*.

Jurisdiction

97 The Public Protector's office was initially established under section 110 of the Interim Constitution which came into effect on 27 April 1994. It was thereafter retained in the 1996 Constitution under section 182. The Public Protector's powers are now governed by the Public Protector Act 23 of 1994.

98 Section 6(9) of the Public Protector Act sets an important limit on the jurisdiction of the Public Protector. It says that "except where the Public Protector in special circumstances, within his or her discretion, so permits, a complaint or matter referred to the Public Protector shall not be entertained unless it is reported to the Public Protector within two years from the occurrence of the incident or matter concerned."

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99 Through-out its dealings with the Public Protector since 2011 in this investigation, the Reserve Bank has queried the Public Protector's jurisdiction to investigate a matter reported to her more than two years since it occurred. This was because the CIEX report was concluded in 1997 and the Bankorp assistance was fully repaid in 1995. Mr Hoffman only made his complaint to the Public Protector in 2010, many more than two years after these two events.

100 Despite this, the Public Protector devotes one paragraph to the issue of jurisdiction in her 56 page report. She says that she enjoys a "discretion to investigate matters which occurred after 1995 more especially is the prejudice caused is still in existence and in addition the insurmountable public interest in the matter" (paragraph 3.28 of *the Report*).

101 This is not an adequate justification. In order to exercise her discretion under section 6(9) of the Act lawfully, the Public Protector was required to weigh the factors for and against the investigation. But the Public Protector never considered the factors against investigation. She failed to consider what it would do to the financial stability of the banking system to re-open an investigation into ABSA that was concluded just short of eighteen years ago. She failed to consider the reliance that the system as a whole, and ABSA in particular, would have placed on the conclusion of the 1999 *SIU* report that there would be no recovery of the R1.125 billion assistance to Bankorp. She failed to consider that there have been two independent prior investigations (the SIU and the Davis Panel) into the matter that had concluded that there was no recovery to be made. She failed to take the government seriously when it said there was no good reason to implement the CIEX report. She failed to appreciate that any public interest that there may have been in misappropriated apartheid era funds could result in no meaningful recovery when all those debts would already have prescribed.

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102 The Public Protector therefore failed to exercise her discretion under section 6(9) of the Public Protector Act lawfully. Her entire investigation therefore lacked jurisdiction and the remedial action ought to be set aside under section 1(c) of the Constitution and under section 6(2)(a)(i) of *PAJA*.

Prescription

103 Paragraph 7.1.1.1 of *the Report* requires an amount of R1.125 billion to be recovered from ABSA. ABSA has set out in detail in its affidavit why this debt, even if it existed (which is denied), has prescribed (see paragraphs 6.1 to 6.12.7 of the ABSA affidavit).

104 The Reserve Bank associates itself with those averments. It adds only the following. The Public Protector is a creature of the law; she is not above the law. It is not open to her to ignore parts of the law that do not suit her investigation. The law of prescription stands firmly in the way of any remedial action designed to recover R1.125 billion from ABSA. That debt (to the extent that it ever existed, which is denied) prescribed three years after it was due.

105 The Public Protector was well-aware of the problem that the law of prescription posed for her intended remedial action. Yet, she decided that she was entitled to ignore this part of the law because it "deprives society of the improvement of living standards" (paragraph 5.2.47 of the Report). Even if one overlooks the vagueness of her statement, the Public Protector is not empowered to impose remedial action that is inconsistent with the law.

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106 Her power to impose remedial action is confined to "appropriate remedial action". Remedial action that is inconsistent with the law could never be appropriate. It ought, accordingly, to be set aside under section 1(c) of the Constitution and section 6(2)(f)(i) of *PAJA*.

Paragraph 8.1 of the remedial action

107 Paragraph 8.1 of the Report requires the Chairman of the Portfolio Committee of Justice and Correctional Services, the *SIU* and the Reserve Bank to submit an action plan to the Public Protector within 60 days of the Report on the initiatives taken in regard to the remedial action in paragraphs 7.1 and 7.2 of *the Report*.

108 In its urgent application, the Reserve Bank has already sought to have paragraph 8.1 of *the Report* set aside in so far as it relates to paragraph 7.2. The Public Protector has consented to that relief.

109 All that remains is therefore the obligation placed on the *SIU* and the Reserve Bank to submit an action plan in relation to paragraph 7.1 of the Report. In this application, the Reserve Bank also seeks to have this part of the remedial action set aside.

110 The obligation to provide an action plan relates to the remedial action in paragraph 7.1. Given all the grounds on which that remedial action is unlawful, as set out above, it follows that if paragraph 7.1 of the Report is set aside, so too must paragraph 8.1 be set aside. There is no lawful basis for paragraph 8.1 to remain if paragraph 7.1 is set aside. Paragraph 8.1 ought, accordingly, to be set aside under section 1(c) of the Constitution and sections 6(2)(f)(ii)(dd) and 6(2)(i) of *PAJA*

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Record

111 This application is brought in terms of Uniform Rule 53. The rule requires the Public Protector to provide a record of proceedings in relation to the challenged remedial action.

112 In the light of what is set out above, the Public Protector is obliged to produce at least the following key documents as part of the record of proceedings:

112.1 Correspondence sent and received

112.2 Documents listed in *the Report*

112.3 Transcripts of interviews conducted and meetings held including a transcript of the meetings held with Mr Goodson and the Department of State Security

112.4 Notes on the inspections *in loco*

112.5 The draft of the report that was presented to Advocate Mkhwebane by Advocate Madonsela on 14 October 2016.

113 The Reserve Bank reserves the right to amend the notice of motion and supplement this affidavit upon receipt of the record.

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WHEREFORE, the Reserve Bank seeks an order in terms of the notice of motion to which this affidavit is attached.

DEPONENT

I hereby certify that the deponent has acknowledged that he knows and understands the contents of this affidavit, which was signed and sworn to before me, Commissioner of Oaths, at Sandton on this the 31 day of July 2017 the regulations contained in Government Notice No R1258 of 21 July 1972, as amended, and Government Notice No R1648 of 19 August 1977, as amended, having been complied with.

COMMISSIONER OF OATHS

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