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**THE SOUTH AFRICAN RESERVE BANK's
RESPONSE TO
THE PUBLIC PROTECTOR's
PRELIMINARY REPORT 12 OF 2016/2017**

PRU J.

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INTRODUCTION

- 1 On 21 December 2016, the Reserve Bank was afforded an opportunity to comment on the Public Protector's preliminary report 12 of 2016/2017 entitled "Alleged failure by Government to recover funds borrowed to ABSA".
- 2 The Preliminary Report is fundamentally flawed. It is beyond the jurisdiction of the Public Protector; it is based on incorrect facts; it confuses the roles of government and the Reserve Bank; and the remedial action it proposes is constitutionally invalid.
- 3 As a result, the preliminary report should not be finalised in its current form. The errors in the report are so serious that if they remain in the final report, they will likely bring instability to the South African financial markets and will require the Reserve Bank to take immediate urgent action in the courts to prevent the implementation of the remedial action pending a review of the final report.
- 4 The Reserve Bank therefore welcomes the opportunity to comment on the preliminary report so that these errors can be properly identified and not repeated in the final report. It also appreciates the extension until 28 February 2017 to provide these comments.
- 5 The submissions are structured in six parts.
 - 5.1 First, the factual background to the report and interactions with the Public Protector are set out.
 - 5.2 Secondly, the scope of the investigation is analysed.

- 5.3 Thirdly, the Public Protector's jurisdiction is addressed.
- 5.4 Fourthly, the incorrect factual foundation of the report is exposed.

- 5.5 Fifthly, the roles of government and the Reserve Bank are delineated.
- 5.6 Finally, the unconstitutionality of the remedial action is addressed.

FACTUAL BACKGROUND

- 6 Starting in 1985, the Reserve Bank provided three assistance packages to Bankorp and then later to ABSA. The assistance was provided as part of the Reserve Bank's duty to act as lender of last resort. The concept of "lender of last resort" was explained when the Reserve Bank first engaged with the Public Protector concerning this investigation in 2011. In a letter to the Public Protector on 30 August 2011, the Reserve Bank explained its role as follows.
- 7 The Reserve Bank was first established as South Africa's central bank in 1921 in terms of the Currency and Banking Act 31 of 1920. 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 100 years ago.

- 8 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 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 banking system.
- 9 It was in this capacity as lender of last resort that the Reserve Bank provided financial assistance to Bankorp and then later ABSA. The assistance took the form of three agreements. These agreements were described in detail to the Public Protector:
- 9.1 in the interview with Dr Stals, the former Governor of the Reserve Bank on 8 September 2016;
- 9.2 in Dr Stals's own submission during the section 417 Commission of Enquiry into the affairs of Tollgate Holdings Limited that was provided to the Public Protector after the interview; and
- 9.3 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.
- 10 Copies of the agreements, as well as entries in the Reserve Bank's books of account, were also given to the Public Protector after the interview on 8 September 2016.
- 11 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. A crisis in the banking system therefore needed to be averted. The solvency problems that prompted Bankorp to approach the Reserve Bank in 1985 worsened during the course of the assistance being given.

- 12 Each of the three agreements and their salient terms were described in detail in Mr Terblanche's affidavit. He said the following about the agreements:

"6. Salient features of [the first agreement] were that it confirmed that the SARB had loaned an amount of R1 billion to Banbol/Bankorp of which R600 million had been utilised to purchase government bonds and R400 million invested with the SARB at an interest rate of 16 per cent per annum. An additional amount of R500 million was also loaned by the SARB to Bankorp, which amount was to be utilised to further purchase government bonds in the name of Bankorp. All the rights of Bankorp/Banbol to all the government bonds and the deposit with the SARB were ceded to the SARB as collateral for the loans. The loans provided by the SARB were at an interest rate of 1 per cent per year and Bankorp, as owner of the government bonds, was entitled to the interest earned on the bonds and on the deposit (which would not be more or less than R225 million per annum – being some 15% interest on R1, 5 billion). The total amount of the interest to be earned by Bankorp was however capped at R1125 million.

7. In terms of the [second agreement], ABSA, with effect from 1 April 1992, legally replaced Bankorp as a party and proverbially stepped into its shoes as a

counterparty to the SARB in the stead of Bankorp. It was again confirmed that the total amount of the assistance provided by the SARB ... would be limited to R1125 million and that the agreement would terminate once that amount had been reached. On termination of the assistance, [the second agreement provided that] ABSA needed to repay the amount of the loan and this would occur by applying set-off in respect of its R400 million deposit held with the SARB and by selling its government bonds and paying the proceeds over to the SARB. In the event that the proceeds of the government bonds exceeded R1100 million, the excess would be for the benefit of the SARB.

8. The [third agreement] provided for the SARB, with effect from 1 June 1995, by means of set-off, to acquire all the rights to the R400 million deposit from ABSA and for the SARB (also by means of set-off) to purchase all the ABSA/Bankorp government bonds held by the SARB as security, at a purchase price of R1,1 billion. The amount of R1,1 billion was henceforth to be held on deposit with the SARB at an interest rate of 16per cent payable to ABSA, until the overall financial assistance limit of R1125 million was reached.

...

11. Once the SARB had become the owner of the government bonds, after they had been acquired by the SARB from ABSA as envisaged in [the third agreement], they formed part of the Bank's [the SARB's] own bond portfolio and were dealt with in the normal course of business together with other bonds owned by the SARB. Calculations done at the time showed that a profit of R124 381 872 had been realised on these bonds and this was reflected in the SARB's 1995/6 financial

results. The terms of the agreement specified that any such excess amount was to be retained by the SARB and was not payable to ABSA. The deposit of R400 million constituting a claim in favour of ABSA, was also by means of set-off expunged. Thus, the total loan amount of R1.5 billion provided by the Bank ... realised a profit of R124 381 872 on the bonds, effectively recouping some of the cost of the assistance in the form of the interest provided."

- 13 The upshot of these three agreements was that because Bankorp, and later ABSA, was obliged to repay the loan and the 1% interest, the financial assistance from the Reserve Bank actually came in the form of the differential between the 16% interest Bankorp/ABSA earned on the government bonds, as compared with the 1% interest it was required to repay to the SARB for the loan. The differential in the interest was the "lifeboat" and it was used to discharge Bankorp's bad book.
- 14 The books of account provided together with Mr Terblanche's affidavit showed that the total amount of the loan of R1,5 billion, plus the interest of 1%, was repaid to the Reserve Bank and the Reserve Bank realised a profit on the bonds of R124 381 872 which effectively enabled it to recoup some of the costs of the assistance.
- 15 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.
- 16 In or about 1997, the government commissioned the Ciex report. The Reserve Bank had no knowledge of the report at the time and no hand in procuring it. It has only fairly recently, in fact, seen a copy of the report.

- 17 In the early 2000s, members of the public raised concerns about the ABSA lifeboat. The 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 Kgosa, 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. It found the following:
- 17.1 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.
- 17.2 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 Heath Special Investigative Unit that the major beneficiaries of the assistance were shareholders of ABSA.
- 17.3 Difficulties pertaining to the quantification of the enrichment and the identity of the beneficiaries rendered the enforcement of an enrichment claim problematic.
- 17.4 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.

- 17.5 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.
- 17.6 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.
- 18 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.
- 19 There was no further engagement with the panel's report or the lifeboat 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/ABSA.
- 20 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 then Governor of the Reserve Bank, Ms Gill Marcus, therefore requested an urgent meeting with the Public Protector.
- 21 The Governor's attempts to convene a meeting with the Public Protector were unsuccessful and so in the place of a meeting, 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.

- 22 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 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.
- 23 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, 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.
- 24 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.

- 25 The preliminary report was not, however, provided to the Reserve Bank in October 2013. Instead, the matter went cold for almost three years.
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- 26 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 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.
- 27 Dr Stals 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/ ABSA 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.
- 28 The Reserve Bank provided this information shortly after the meeting. The information included a copy of the 1995 agreement with ABSA, Mr Terblanche's affidavit and copies from the financial records of the Reserve Bank at the time. These records showed that the full capital amount plus 1% interest on the loan had been repaid to the Reserve Bank.
- 29 On 14 October 2016, the Public Protector informed the Reserve Bank that her preliminary report would be released on that day for the Bank's comments. This did not,

however, happen. After writing to the Public Protector to enquire on the status of the preliminary report, it was then provided to the Reserve Bank for comment on 21 December 2016.

SCOPE OF THE INVESTIGATION

- 30 The scope of the Public Protector's investigation is unclear from the preliminary report. In some places, the report speaks of an investigation into the failure to implement the Ciex report. At other places, the report refers to unrecovered funds that were payable to the Reserve Bank.
- 31 The content of the preliminary report also differs markedly from the assurances that the Reserve Bank was given in its dealings with the Public Protector since mid-2013. In mid-2013, the Public Protector said to the Reserve Bank that the investigation concerned the propriety of government's actions regarding the decision not to implement the Ciex report.
- 32 When the Reserve Bank later met with the Public Protector in September 2013, it was again told that the Public Protector was not investigating the ABSA lifeboat as this had occurred before the establishment of the Public Protector's office in October 1995.

- 33 Despite this clear indication that the investigation was not concerned with the ABSA lifeboat, the preliminary report makes findings in relation to the lifeboat and imposes remedial action designed to recover what is allegedly still owing on the lifeboat.¹
- 34 However, it appears that material submissions in relation to the Lifeboat were not obtained from ABSA. For example, although the Public Protector indicates that she was told that ABSA had made provision for the repayment of the loan in tranches, she does not indicate that she ever put this question to ABSA. The answer, in any event, would have been easy to establish because ABSA's financial statements are a matter of public record. The report makes no reference to these financial statements. Further, it is clear that the Public Protector failed properly to consider the submissions from the Reserve Bank after the meeting with Dr Stals in September 2016. The report draws the incorrect factual conclusion from these documents that money was still owed to the Reserve Bank as a result of the Lifeboat.
- 35 The Public Protector therefore failed properly to investigate the Lifeboat. This is unsurprising because it never properly formed part of her investigation. As she assured the Reserve Bank on a number of occasions, her investigation concerned the Ciex report.
- 36 The scope of the Public Protector's investigation determines the scope of her remedial powers. The Public Protector's power to make findings and recommendations under section 8(1) of the Public Protector Act 23 of 1994 is limited to matters that she has investigated. Through-out her engagements with the Reserve Bank, the Public Protector

¹ Preliminary report page 63 para 8.2.3

made it clear that she was not investigating the ABSA lifeboat. It is clear from the preliminary report itself that no proper investigation was conducted into the Lifeboat. No competent remedial action concerning the Lifeboat can therefore follow from this inadequate and incomplete investigation.²

THE INCORRECT FACTUAL FOUNDATION

- 37 The preliminary report records that it is the first duty of the Public Protector to establish "what happened".³ The report failed at this preliminary step because of a misunderstanding of the terms of the assistance packages.
- 38 In a section of the preliminary report entitled "issues not in dispute",⁴ the Public Protector records that it was the evidence of the Reserve Bank that although the capital amount of the loan was repaid, the interest on the loan was not.⁵ This is incorrect. The evidence of the Reserve Bank was the opposite. It told the Public Protector, at the interview with Dr Stals and in the affidavit of Mr Terblanche, that the capital amount of the loan and the interest due on the loan was repaid. It also explained that the interest of 16% earned on the government bonds was never due and owing to the Reserve Bank. The 16% was the

² In the remaining sections of these submissions the factual errors in the preliminary report about the ABSA lifeboat are addressed. However, the Reserve Bank's engagement with this aspect of the report should not be understood to be a waiver of the point addressed in paragraphs 30 to 34 above, that the investigation into the ABSA lifeboat was beyond the ambit of the Public Protector's investigation, and, as we set out in more detail below, beyond her jurisdiction.

³ Preliminary report page 8 para xxiv

⁴ Preliminary report page 42 para 5.3.1

⁵ Preliminary report page 43 paras 5.3.1.7 and 5.3.1.10

interest earned on the bonds that Bankorp purchased with the loan amount. It did not have any obligation to repay this to the Reserve Bank or the government.

- 39 The preliminary report is therefore flawed when it concludes that there is a debt that is still owed to the Reserve Bank.⁶ No such debt exists.

JURISDICTION

- 40 The investigation in this matter has its origins in a complaint submitted to the Public Protector on 11 November 2011 by Mr Paul Hoffman, the Director of the Institute for Accountability in Southern Africa.⁷ The complaint included allegations that the Ciex report had not been implemented by the government, that there were outstanding amounts owed to the Reserve Bank flowing from the assistance provided to Bankorp and that ABSA had made contingent provision to repay this amount.
- 41 Section 6(9) of the Public Protector Act 23 of 1994 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."

⁶ Preliminary report page 9 para xxviii

⁷ Preliminary report page 3 para ii

- 42 The preliminary report deals with the jurisdiction question by confusing the subject matter of the report. On the one hand, the report records that the Public Protector had jurisdiction to investigate the complaint because the failure to recover the loan "happened a few years after the Public Protector Office was established".⁸ This is incorrect. The Public Protector's office was established in October 1995. The loan (plus interest) was fully repaid by October 1995.
- 43 On the other hand, the preliminary report records that the investigation by Ciex was commissioned on 16 October 1997 after the Public Protector's office was already established.⁹ This is correct. However, it is not enough to give the Public Protector jurisdiction over the complaint because the complaint related to matters that occurred more than two years before November 2011. In order for the Public Protector to investigate a matter that occurred more than two years before a complaint was lodged with the office, there must be special circumstances present. The preliminary report records that the Public Protector determined that these special circumstances were present because of "the interests of the public, government, banking sector and the allegation that ABSA bank had made provision for the repayment of the loan".¹⁰ Later, the report records that the Public Protector decided that the matter ought to be investigated "with finality as the uncertainty it cast on the integrity of government, SARB and financial services sector regulation was not good for the country".¹¹

⁸ Preliminary report page 10 para 1(b)

⁹ Preliminary report page 11 para 1(b)

¹⁰ Preliminary report page 11 para 1(g)

¹¹ Preliminary report page 55 para 7.1.1.4

- 44 None of these stated reasons justifies an investigation into matters that occurred fourteen years before Mr Hoffman's complaint. There was no need for the Public Protector to bring matters to finality in relation to the ABSA lifeboat. This finality had already been achieved in 2001 when the Davis panel fully investigated the issues and found that there was no legal basis on which the Reserve Bank could recover any amounts related to the financial assistance provided. The interests of the public, government and the banking sector are not promoted by the investigation. The investigation proceeds on a flawed factual premise, namely, that there is money that is still owed by ABSA to the Reserve Bank. No money is owed to the Reserve Bank. This has been made clear by the Bank's own former officials in their evidence before the Public Protector and in the Bank's books of account.
- 45 Finally, the notion that ABSA would have made provision for what was owed to the Reserve Bank is unsustainable in the light of the fact that all ABSA's obligations to the Reserve Bank were discharged before the Public Protector's office was established. The alleged provision does not, therefore, qualify as a special circumstance.
- 46 The Public Protector therefore did not have jurisdiction to investigate this complaint. The special circumstances, which the preliminary report lists as justifying the investigation, have no foundation.

ROLES OF GOVERNMENT AND RESERVE BANK

- 47 In terms of section 223 of the Constitution, the Reserve Bank is the central bank of South Africa. Section 224(2) of the Constitution provides that the Reserve Bank must perform its functions independently and without fear, favour or prejudice. The Bank is therefore neither part of government nor the National Treasury. This division between the Reserve Bank and government was explained to the Public Protector as far back as 2013 when she met with representatives of the Bank, including the then Governor Marcus and former Governor Mboweni.
- 48 Despite this constitutionally entrenched separation, the preliminary report regularly confuses government and the Reserve Bank. For example, the report finds that the Reserve Bank and the government had an obligation to implement the Ciex report.¹² There is no basis for this finding. The Reserve Bank had nothing to do with the Ciex report and had no obligations arising from it. The report also criticises the Board of the Reserve Bank for not having deliberated on the Ciex report.¹³ But this is unjustified because, as was explained to the Public Protector, the Reserve Bank played no role in procuring the report and only received a copy of the report recently. The report concludes that the Reserve Bank's failure to implement the Ciex report was in breach of numerous statutory obligations including sections 195, 237, 96(1)(b) of the Constitution, section 63(2) of the Public Finance Management Act 1 of 1999 and the Executives Ethics Code. Many of these instruments do not even apply to the Reserve Bank and in respect

¹² Preliminary report page 56 para 7.1.3.1

¹³ Preliminary report page 58 para 7.1.3.5

of those that do, they have not been breached because the Reserve Bank had no knowledge of, or duties arising from, the Clex report.

REMEDIAL ACTION

49 The remedial action proposed in the preliminary report against the Reserve Bank is in three parts.

49.1 The Reserve Bank is required to "ensure systems, regulations and policies are put in place within 90 days to prevent this anomaly in providing loans/lifeboat to banks in future".¹⁴

49.2 The Reserve Bank should consider reviewing its lending policies to avoid a similar situation in the future.¹⁵

49.3 The National Treasury and the Reserve Bank must institute legal action against ABSA to recover 16% interest accumulated over period of five years amounting to R1,125 billion plus interest.¹⁶

50 This proposed remedial action is flawed in fact and in law.

¹⁴ Preliminary report page 63 para 8.2.1

¹⁵ Preliminary report page 63 para 8.2.2

¹⁶ Preliminary report page 63 para 8.2.3

- 51 At the level of fact, there is no basis for the recovery of any amounts allegedly owing to the Reserve Bank because all the amounts due and payable under the lifeboat have already been paid.
- 52 At the level of law, the remedial action is unconstitutional and in conflict with the Reserve Bank's duties under the South African Reserve Bank Act 90 of 1989.
- 53 The Reserve Bank is constitutionally mandated to protect the value of the currency in the interest of balanced and sustainable growth in the country. It is empowered under sections 10(1)(f) and 10(1)(s) of the SARB Act to grant loans and advances as well as perform such other functions of bankers and financial agents as central banks customarily may perform respectively.
- 54 Acting in terms of these powers, the Reserve Bank has stepped in to provide financial assistance to distressed banks where their liquidity concerns threaten to undermine stability in the financial sector. It is both constitutionally mandated to perform this function in order to protect the currency and statutorily empowered to do so under the SARB Act. When it acts to provide discretionary liquidity to banks in distress, the Reserve Bank is performing a common function of central banks around the world.
- 55 The Public Protector's proposed remedial action that would require the Reserve Bank to put in place regulations that would prevent "this anomaly" from recurring is unfounded. Central bank assistance to failing institutions is not an anomaly; it is a core function of their stabilising role in society. The remedial action is therefore unlawful. It is in conflict with the Reserve Bank's constitutional obligation to protect the currency and it is at odds with the Reserve Bank's role in maintaining financial stability in the country.

- 56 The Reserve Bank cannot be required to take steps to remove the powers and duties that have been conferred on it under the Constitution and the SARB Act.
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- 57 It is also legally untenable to require the Reserve Bank to take steps to avoid this type of situation in the future. The Reserve Bank must respond swiftly to concerns about bank liquidity as and when they arise. It did so as recently as 2014/2015 in relation to African Bank when material liquidity constraints in the bank threatened to impact on the bank itself, its creditors, staff members and the wider banking and financial services sector in South Africa.
- 58 Remedial action, which is designed to remove these powers from the Reserve Bank to respond swiftly and decisively in the event of a crisis, would be unlawful. If remedial action of this sort is to be retained in the final report, the Reserve Bank requests that the Public Protector give it fair warning, before the publication of the final report, so that it may take steps to obtain urgent interdictory relief from the courts to prevent the implementation of the remedial action pending a review.
- 59 The Reserve Bank requires this forewarning because it cannot risk being placed in a situation where it is duty bound to act to save a failing institution, while at the same time being bound to comply with the Public Protector's remedial action which strips it of this power.

CONCLUSION

60 In the light of what is set out above, the Reserve Bank respectfully submits that the preliminary report needs to be substantially revised. Its scope ought to be limited to the scope of the Public Protector's investigation into the Ciex report. It ought to find that the Reserve Bank had no knowledge of, or duties arising from, the Ciex report. The final report also ought not to traverse issues relating to the ABSA lifeboat because there were no special circumstances justifying an investigation into this issue. In any event, there is nothing to investigate in relation to the ABSA lifeboat because Bankorp and ABSA's liabilities to the Reserve Bank under the various agreements were fully discharged. Finally, the remedial action against the Reserve Bank must be removed. There is no factual or legal basis for the proposed action. If it is retained in the final report, it will be in conflict with the Reserve Bank's constitutional and statutory duties. The Reserve Bank will be left with no option but to seek the immediate assistance of the courts to prevent its implementation.

FURTHER AD SERIATIM

61 In this section, the Reserve Bank responds to specific findings in the preliminary report that have not been addressed above but which require a factual response. Any finding in the preliminary report that is inconsistent with what is stated above or in the section that follows is disputed.

62 Ad para (e) on page 15

62.1 It is a generally accepted principle that disclosure by a central bank to the general public of information regarding lender of last resort assistance has the potential of adversely affecting public confidence in that institution. It could result on a run on that bank which would exacerbate any existing liquidity problems that the bank may be experiencing. Central banks therefore do not, as a rule, report in the public domain on specific lender of last resort support provided to banks. Moreover, section 33 of the South African Reserve Bank Act, 1989 (Act No. 90 of 1989), a preservation of secrecy provision, prohibits the disclosure of information of the nature to the general public. Section 20 of the South African Reserve Bank Act, 1944 (Act No. 29 of 1944), the Act that initially applied when the loan was extended to Bankorp, also constitutes a similar provision of secrecy clause. Against this background the statement in para (e) that the agreement between SARB and Bankorp and later ABSA was kept secret for no reason is without merit.

63 Ad "general observations" page 17

63.1 It is incorrect that Dr Stals delayed the finalisation of the Public Protector's investigation. The investigation began in 2011 and was delayed, at the hands of the Public Protector, periodically, for a period of four and a half years. The first time that an interview with Dr Stals was requested was in September 2016. Dr Stals immediately obliged and provided the information that he could. Dr Stals did not, as the preliminary report indicates, leave the Reserve Bank with "original information". Dr Stals assisted the Public Protector by providing her with, *inter alia*, the loan agreements with Bankorp and ABSA, his evidence to the Tollgate Enquiry and the public statement of Judge Heath. These are all either public documents or

were documents used by Dr Stals for purposes of his evidence to the Tollgate Enquiry. There is no basis on which to allege that these were "original" documents or that there was anything untoward in this regard.

64 Ad page 49 para 5.5.2

64.1 In this paragraph, the Public Protector records that "the decision not to recover" seriously prejudiced the people of South Africa. However, the South African public were not prejudiced in any way because no additional amount was due by ABSA to the Reserve Bank. Government (including the South African public) got the benefit of the finance provided through the sale of its bonds and paid the market related interest due and payable on the bonds. Moreover, the general public enjoyed the benefits of a stable banking system as a result of the lifeboat.

28 February 2017