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IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO 52883/2017

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

FILING SHEET

PRESENTED HEREWITH FOR FILING:

South African Reserve Bank's Replying Affidavit

DATED at SANDTON on this 27TH day of NOVEMBER 2017

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650

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REPLYING 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. I deposed to the founding and supplementary founding affidavits in this matter.

3 The facts to which I depose are within my personal knowledge except where it is apparent from the context that they are not.

4 I have read the answering affidavit of the Public Protector, Ms Mkhwebane. I wish to respond to it as set out below.

5 The submissions of law I make in this affidavit are made on the advice of the Reserve Bank's lawyers. There are numerous averments in the answering affidavit that relate to matters of law. I am advised that these aspects will be addressed in summary in this affidavit and will be developed in more detail in argument at the hearing.

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Introduction

6 This affidavit has been prepared under extreme time constraints. It is a response to a ninety-six page answering affidavit that was filed at midday on Friday 24 November 2017. This replying affidavit will have to be filed on Monday 27 November 2017. The Reserve Bank has effectively had a weekend to produce this affidavit. In the time available, it has not been possible to address the averments in the answering affidavit in sequence. Any averment in the answering affidavit that is inconsistent with what is said in the Reserve Bank's founding affidavits and here is denied.

7 This greatly truncated time period is a result of the Public Protector having taken almost four months, from the date on which this application was launched and more than two and a half months from receipt of the Reserve Bank's supplementary founding affidavit, to prepare her answering affidavit.

8 The answering affidavit is an abuse of process. It breaks virtually every rule that applies to an organ of state when its decision is taken on review.

8.1 It is an ex post facto justification of the Report that relies on new reasons that were not the Public Protector's reasons when she published the Report.

8.2 It attaches documents that were not included in the record of proceedings that the Public Protector was required to file in accordance with Rule 53.

8.3 It contains false statements. For example, in the second paragraph of the affidavit, Ms Mkhwebane says that where she makes averments relating to economics in

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her affidavit, she does so "on the basis of advice received from economic experts *during* the investigation of the complaint referred to below" (emphasis added). The averments in the affidavit about economics are not based on advice received during the Public Protector's investigation. There is no reference to these in the record of proceedings filed in accordance with Rule 53. They are clearly based on the views of Dr Mokoka, who did not advise the Public Protector during the investigation. There is no reference to Dr Mokoka or his views in the Report. On The Public Protector's own version, Dr Mokoka was engaged "following receipt of the three review applications ... to consider the true nature of the Lifeboat schemes." (AA para 126).

8.4 It is not candid or forthright. As an organ of state, the Public Protector has heightened obligations in litigation. She is required to be frank and candid with the court and to explain her conduct in a transparent and accountable manner. Ms Mkhwebane has not done so. She has failed meaningfully to address the very serious accusations against her that she is biased against the Reserve Bank and pursued an ulterior purpose in her investigation. This failure means that the common cause facts on which this review should be decided are the following:

8.4.1 The Public Protector met with the State Security Agency and the former Minister of State Security on 3 May 2017 and discussed amongst other things, the vulnerability of the Reserve Bank.

8.4.2 The Public Protector had not one, but two, meetings with the Presidency after receiving comments on her preliminary report and in

circumstances where she had no other meetings with the parties most affected by the new remedial action in her report.

8.4.3 The Public Protector failed to disclose that she had had these meetings with the Presidency when she issued her Report.

8.4.4 The Public Protector failed to keep a transcript of these meetings when it is routine practice within her office to record her interviews.

8.4.5 The Public Protector evidently discussed amending the Constitution with the Presidency to take away the Reserve Bank's primary function – a topic that bore no relation to her investigation and which a court has already set aside as unconstitutional.

9 This conduct is unbecoming of the important office that Ms Mkhwebane occupies. It amounts to an abuse of her office. The Reserve Bank will therefore seek a *de bonis propriis* costs order against Ms Mkhwebane and a declaratory order from this Court that she has abused her office. The request for the declaratory order should not come as a surprise to the Public Protector.

10 When the Reserve Bank filed its supplementary founding affidavit, it set out in scrupulous detail its serious concerns about the Public Protector's dealings with the State Security Agency and the Presidency. The affidavit specifically called on the Public Protector to "deal with each and every averment set out [in the affidavit] when she files her answering affidavit" (paginated page 610 para 35 of the SARB application). It called on her to produce a transcript of the meeting she had with the Presidency on 7 June 2017 and if

none existed, to explain why no recording had been made of that meeting (paginated page 610 paras 36 and 37 of the SARB application). The Public Protector's answering affidavit does not even address the meeting of 7 June 2017 with the Presidency. Instead, it refers to yet another, previously undisclosed, meeting that she had with the President on 25 April 2017 but does not disclose what was discussed at that meeting nor why a transcript of it is not available.

11 Section 181 of the Constitution requires the Public Protector to conduct her investigations independently and impartially. These are the foundation stones of her office. She is required to be a check on the misuse of state power; not a vehicle for it. She has failed in this investigation to be impartial and independent. This court ought, accordingly, to declare that she has abused her office during this investigation.

12 In addition, and on the facts summarised above, there is a compelling basis not to remit this investigation to the Public Protector. The Public Protector argues for a remittal of this investigation in the event that the court upholds the review (AA para 185). This would not be a just and equitable order in the circumstances of this case. The Public Protector has conducted an investigation tainted by numerous procedural irregularities, evidence of bias and improper motives. This is not a matter that should be left to her to investigate again.

13 This affidavit is structured as follows:

13.1 First, I address the Public Protector's ex post facto manufactured reasons for her Report.

13.2 Secondly, I deal with her submissions on procedural fairness.

13.3 Thirdly, I address her in limine points about the characterisation of the Report and an alleged delay in bringing the application.

13.4 Fourthly, I set out a response to the incorrect and ill-informed views of Dr Mokoka. This section of the affidavit is presented only out of an abundance of caution. The Reserve Bank's primary submission in relation to this new economic analysis in the answering affidavit is that it should be ignored by the court because the law does not allow decision-makers to make up reasons after the fact for their decisions. It is only if the court finds against the Reserve Bank on this score and determines that the Public Protector is somehow allowed to make up reasons for her Report after it is published, and then, in part, relying on ex post expert testimony procured by the Public Protector for this litigation, that the Reserve Bank's responses to these new reasons should be considered.

13.5 Finally, I draw the conclusions of the preceding sections together.

After the fact reasons

14 The Public Protector's answering affidavit is a reinvented justification of her Report.

New economic analysis

15 It relies on the analysis of the financial assistance given to Bankorp by an economist who was appointed *after* the Report was published (AA para 126).

16 The law does not allow decision-makers to produce new reasons, after the event, to justify their decisions. Their decisions must be tested against the genuine and real reasons for the decision *at the time it was taken*. Dr Mokoka's report and affidavit ought on that basis to be rejected in its entirety. Dr Mokoka did not advise the Public Protector during the investigation. His analysis of the Bankorp assistance therefore could not have informed her remedial action.

17 The Public Protector's affidavit also seeks to present new and invented reasons to justify her jurisdiction and in response to prescription. These too should be ignored by this Court.

Jurisdiction

18 On jurisdiction, the Public Protector now says that she had "special circumstances" for investigating a matter that was reported to her more than two years after the event because of the "possibilities of criminal prospection" or former employees of the Reserve Bank (AA para 46.3). This possibility of criminal prospection of Reserve Bank former employees appears nowhere in her Report. This is a new and invented basis for jurisdiction and should be rejected by the court.

Prescription

19 On prescription, in the Report, the Public Protector justified her remedial action to recover R1.125 billion from ABSA on the basis of the South African Law Commission Discussion Paper on 2011 (paragraph 5.2.46 of the Report). The Public Protector referred to this Discussion Paper and declared that "it would not be just and equitable to exclude such a claim based on prescription as it would deprive society in the improvement of living standards" (paragraph 5.2.47 of the Report). Her justification for

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remedial action directing the SIU to recover a debt (if it was ever owed) that had prescribed was that the law of prescription should not be applied.

20 In her answering affidavit, the Public Protector has a completely new and different rationale for overcoming prescription. She now says that her remedial action does not require or effect the recovery of the debt from ABSA or other parties. She claims that all it does is to "advise and inform the state of the available remedies at law" (AA para 151). She then says that prescription does not arise yet because it is a defence that can be mounted in due course during the SIU investigation (AA para 152).

21 This is a new reason for imposing the remedial action. At the time of her Report, the Public Protector justified her remedial action on the basis that the law of prescription could be overlooked on the basis of justice and equity considerations. That was a legally flawed rationale. No one is above the law. The Public Protector, like any other organ of state, is required to work within the law. She is not empowered to impose remedial action that is inconsistent with the law. Her remedial action should be set aside on that basis alone.

22 The new reason is, in any event, incorrect. The Public Protector's remedial action does not merely "advise" and "inform". It directs the SIU to approach the President to reopen and amend the Heath Proclamation "in order to recover misappropriate funds unlawfully given to ABSA bank in the amount of R1.125 billion" (paragraph 7.1.1.1 of the Report). This paragraph of the Report must be interpreted against what is provided in paragraph 7.1.1.2 of the Report. The second sub-paragraph directs the SIU to approach the President to re-open and amend the Heath Proclamation "in order to investigate alleged

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misappropriated public funds given to various institutions as mentioned in the CIEX report" (paragraph 7.1.1.2 of the Report).

23 The second sub-paragraph directs an investigation to be conducted. The first sub-paragraph does not. It says that the Heath Proclamation must be re-opened and amended "to recover misappropriated public funds unlawfully given to ABSA Bank in the amount of R1.125 billion". There is no room left for investigating whether the amount should be recovered. Recovery is directed. The Public Protector's new reason for overcoming prescription is therefore based on a false construction of her remedial action. Her remedial action directs the SIU to recover R 1.125 billion that was purportedly unlawfully given to ABSA. The prescription defence is that even if an amount was unlawfully given to ABSA (which is denied), that debt has prescribed. It is irrational, in the circumstances, to deploy state resources to mandate the SIU to recover a prescribed debt. The Public Protector is therefore additionally incorrect when she says all that her remedial action does is advises the state of "available remedies at law". The point of the prescription defence is that there is no available remedy at law. The Public Protector compels a remedy that is unavailable. In doing so, the Public Protector's newfound answer to prescription is itself irrational.

Summation

24 As a matter of law, the Public Protector may not manufacture new reasons for her remedial action. She has breached this principle by presenting an entirely new justification of her Report in her answering affidavit.

25 The court ought, accordingly, to ignore all of these new reasons and assess her remedial action against what is said in the Report itself and anything in the answering affidavit that

is consistent with those reasons. This means that the new economic analysis of Dr Mokoka should be ignored (and struck out), as well as the new grounds on which her jurisdiction and response to prescription are explained.

Procedural unfairness

26 The Public Protector denies the charge that her Report is the product of a procedurally unfair process. She says that the requirements of fair process were observed because the affected parties were given an opportunity to comment on her preliminary report (AA para 160). She contends further that there was no substantive change to the findings of her preliminary report and therefore the affected parties were not required to be heard again (AA para 165.1 (a) to (d)).

27 Analysing the fairness of the Public Protector's investigation requires an assessment of who was heard and when:

27.1 ABSA, the Reserve Bank, National Treasury and the President were afforded an opportunity to be heard in relation to the preliminary report. The preliminary report was issued in December 2016 and these parties were given until the end of February 2017 to respond to the preliminary report. All of the parties responded by this deadline.

27.2 Their comments related to the remedial action proposed in the preliminary report. The remedial action then envisaged was threefold:

27.2.1 directing National Treasury and the Reserve Bank to adopt regulations and policies to prevent the Reserve Bank, in future, acting as lender of last resort;

27.2.2 directing the Reserve Bank and National Treasury to institute legal action to recover R1.125 billion from ABSA plus interest; and

27.2.3 requiring the President to consider appointing a commission of inquiry to investigate apartheid era corruption.

28 The President's representations on this remedial action were provided on 28 February 2017. His response recognised that the proposed remedial action left it to him to exercise his discretion whether to appoint a commission of inquiry (see annexure PP8 paras 4.1 and 4.2).

29 After receiving these representations, the Public Protector had a series of further meetings with parties other than ABSA, the Reserve Bank and National Treasury.

29.1 She met with the President on 25 April 2017.

29.1.1 The first point about this meeting, on the basis of her own version for not affording the other parties a further opportunity to be heard, is that there was clearly no valid reason for the Public Protector meeting with the President. According to the Public Protector, after comments were received on her preliminary report, there was no further need to hear from the affected parties because her final report did not differ

substantially from the preliminary report. But if that is so, then there was no good reason to meet with the President on 25 April 2017 because he had already been heard on the preliminary report. His written comments were submitted on 28 February 2017.

29.1.2 No transcript of the meeting is provided. It is standard practice for the Public Protector's office to record meetings during her investigations. The meetings with the Reserve Bank's representatives were, for example, recorded.

29.1.3 The only explanation that the Public Protector gives about the subject matter of the meeting is not credible. Ms Mkhwebane says that "*from the discussion during our meeting*, I became concerned that my draft remedial action to direct the President to establish a Judicial Commission may face similar difficulties as currently faced in the State of Capture report" (emphasis added). But the Public Protector's draft remedial action did not direct the President to establish a commission of inquiry. It did no more than require him to *consider* whether to establish a commission of inquiry. The Public Protector had therefore already taken account of the litigation pending on the State of Capture report (or had independently come to appreciate this legal issue) when she issued her preliminary report for comment in December 2016. It therefore could not have been "from the discussion during a meeting" with the President on 25 April 2017 that she became concerned about directing the President to appoint a commission of inquiry. By the time she met with the President in April

2017, she had already ensured that her remedial action did not direct the President to appoint a commission of inquiry but rather to consider whether to do so.

29.1.4 The Public Protector therefore never actually discloses to this court what the reasons were for and what was discussed at the meeting with the President on 25 April 2017. All that she does say about that meeting is that it was requested by the President (AA para 171).

29.1.5 The Public Protector also failed to disclose the fact of this meeting when she issued her Report. The Report has an important section detailing all the interviews and meetings that were held during the course of the investigation (paragraph 4.4.3 of the Report). No mention is made there of the meeting in April with the President.

29.1.6 The documents now attached to the answering affidavit as annexure PP9 about this meeting were never disclosed in the record of proceedings despite being pertinent to the impugned Report.

29.2 She met with the State Security Agency on 3 May 2017.

29.2.1 The Public Protector says that this meeting was required in order to follow up on whether the CIEX was ever implemented by government (AA para 175). But this meeting also discussed how the Reserve Bank was vulnerable (see paginated page 609 paras 30 to 34). A discussion with the SSA about the vulnerability of the Reserve Bank

was not only outside the scope of the Public Protector's investigation but also clearly warranted a response from the Reserve Bank itself. No opportunity to make representations on this issue was afforded to the Reserve Bank.

29.3 She met again with the Presidency on 7 June 2017.

29.3.1 The Public Protector's ninety-six page affidavit is totally silent on this meeting. This is the meeting that I dealt with in great detail in the Reserve Bank's supplementary founding affidavit. This is the meeting for which hand written notes appeared in the record of proceedings. This was a meeting at which the Public Protector discussed not only her new remedial action involving the SIU with the Presidency but must, in all probability, also have included her plans to have the Constitution amended to remove the primary function of the Reserve Bank.

29.3.2 The meeting exposes the Public Protector's justification for not affording the Reserve Bank (or, indeed, ABSA and the National Treasury) an opportunity to be heard after her preliminary report to be demonstrably not in accordance with the true facts of the matter. She says that she did not need to afford the affected parties a further opportunity to comment because nothing substantial changed between her preliminary and final reports. But there was indeed a substantial change. She was now envisaging remedial action to re-open a completed SIU investigation. As the Reserve Bank set out in

its founding affidavit in this review, it would have wanted an opportunity to comment on that remedial action because it is unlawful. The President has no power under the SIU Act to order a re-opening of a completed investigation.

29.3.3 The remedial action was also now designed to strip the Reserve Bank of its primary function. This change, beyond any reasonable doubt, necessitated a response from the Reserve Bank. And yet, no opportunity to comment on it was provided. Instead, the Public Protector met with the Presidency, and no one else, about this momentous constitutional change that had a devastating and immediate effect on the financial stability of the country.

30 In the light of what is set out above, I respectfully submit that the Public Protector's protestations that she followed a fair process in this investigation are *male fide* and not true. She adopted the antithesis of a fair process. She did not afford those parties most affected by the new remedial action in her final report an opportunity to comment on the remedial action, whilst affording parties who had no legitimate right to be heard an audience. This grave want of fairness exposes the bias of the Public Protector in relation to the Reserve Bank, and renders her entirely incapable of treating the Reserve Bank in a fair manner – a further reason why there should not be a remittal of the matter to the Public Protector.

In limine points

31 The Public Protector advances two in limine points. She says that her remedial action does not constitute administrative action and that there has, in any event, been an unreasonable delay in bringing the reviews (AA paras 12 to 42).

32 These two in limine points are mutually destructive. On the one hand, the Public Protector maintains that the remedial action did not constitute administrative action under PAJA because it did not adversely affect the rights of the reviewing parties (AA para 22). On the other hand, the Public Protector says that the review was out of time because it should have been brought back in 2012 when the review parties were aware that she was investigating the matter (AA para 36). But these two propositions are contradictory. If the remedial action chosen after the investigation is not administrative action under PAJA then it cannot possibly be that the investigation itself ought to have been reviewed under PAJA at some point prior to the remedial action.

33 In any event, the Public Protector is wrong.

33.1 Her remedial action does constitute administrative action. It not only has the capacity to affect legal rights of the Reserve Bank; it directly affects its rights because, amongst other things, it requires the Reserve Bank to submit an action plan to the Public Protector about the steps taken to implement the remedial action. The Report traverses issues and requires remedial action that go to the heart of the mandate of the Reserve Bank and would circumscribe the exercise of that mandate in the future. This is most especially so in respect of the powers of the Reserve Bank to act as a lender of last resort.

33.2 Even if the remedial action is not administrative action, the Reserve Bank has brought its review on the basis of the principle of legality and every one of the review grounds pursued under PAJA also applies under the principle of legality.

33.3 The law does not countenance piecemeal reviews that seek to set aside conduct of an administrator during the course of an investigation. The law generally requires parties to wait for the outcome of processes against them before approaching the court for purposes of reviewing the exercise of public power. There is accordingly no merit in the contention that this review was brought out of time. The review attacks the remedial action. The action was published on 17 June 2017 and this review was instituted within two months of that date.

33.4 Finally, the Public Protector's suggestion that the Reserve Bank ought to have acted swiftly after discovering that she was investigating the IDSA complaint is belied by the fact that after the Public Protector met with the Reserve Bank for the first time in September 2013, the Reserve Bank raised the issue of her jurisdiction and called for an explanation from the Public Protector about the basis for her asserted jurisdiction in the matter. The Public Protector failed to respond to this challenge for three years. These facts were already set out in the Reserve Bank's response to the preliminary report at paginated pages 578 to 580 paras 20 to 36 of the SARB's application. The letter addressed by the Reserve Bank to the Public Protector in September 2013 is attached as "**RA1**".

Economic analysis

34 In the Reserve Bank's supplementary founding affidavit, I set out the respects in which the Report breached the separation of powers (paginated pages 611 to 612).

35 I explained there that throughout its interactions with the Public Protector during this investigation, the Reserve Bank has been at pains to explain the role that central banks play as the lender of last resort. This is a constitutionally derived discretionary power. It must be exercised with skill and care by people with expertise in banking and financial matters. It is also a wide power, to step in as lender of last resort when, in the expert opinion of the Bank, the situation demands it.

36 The discretionary nature of the power given to the Reserve Bank means that other organs of state, such as the Public Protector, ought not readily to interfere with its exercise. The Public Protector's mandate is not to second-guess the expert determinations of the Reserve Bank. Her mandate is to pursue maladministration in the functioning of organs of state.

37 The Public Protector did not heed this limitation to her powers during the course of her investigation. She has never previously addressed what, if any, economic analysis she undertook in preparing the Report. From her Report it is clear that no real economic analysis was undertaken. She has now ventured even further and employed the analysis of an economist who has no expertise or experience in central banking. I, by contrast, have extensive experience and expertise in banking matters and more particularly in the role played by central banks as lenders of last resort, as my curriculum vitae, attached as "**RA2**", shows.

38 In this section of the affidavit, I therefore address Dr Mokoka's analysis and show that, far from being credible, it is based on a number of fundamental misunderstandings of the nature of the financial assistance given to Bankorp, as well as the role of central banks when they act as lenders of last resort.

39 Before doing so, however, I must highlight that the inclusion of Dr Mokoka's analysis in the answering affidavit is further evidence of the on-going procedural unfairness in the Public Protector's processes. Until midday on Friday 24 November 2017, the Reserve Bank had never been given an opportunity to comment on the extensive report prepared by Mr Mokoka. It has now been given a weekend in which to do so. This is not the proper manner in which to conduct an investigation into the exercise of the Reserve Bank's powers as lender of last resort, nor indeed a proper way to litigate. To the extent that the Public Protector regarded it as part of her functions to investigate the exercise of such a power by the Reserve Bank, she was, at a minimum, required to give the Reserve Bank a proper opportunity to comment on the basis for her findings.

Fundamentals

40 In this section, I refer to "lender of last resort" assistance as "LOLR" assistance.

41 LOLR assistance is generally described as the mechanism by means of which a central bank, which has the ability to produce high powered money (being the introduction of additional liquidity into the market), supports banks facing liquidity difficulties to create enough base money to off-set public desire to switch into cash during a crisis. It aims to restore confidence, thereby re-establishing credibility in a bank, banks or the market and endeavours to prevent legal insolvency, fire sales and the calling up of loans. LOLR assistance is normally provided when central banks fear that a loss of confidence in the

system could prompt a systemic failure. It is entirely at the discretion of the central bank and whenever the failure is deemed isolated or may be easily contained, central banks may elect not to provide any assistance.

42 LOLR assistance is distinct from, and should not be confused with, the normal operations of a central bank through its general discount and accommodation window. The latter central bank operations entail the refinancing of the operational liquidity requirements of banks through repurchase agreements and other facilities such as the averaging of cash. Discount and accommodation window operations involving central banks constitute important mechanisms by means of which banks manage their day-to-day liquidity requirements in the normal course of business.

43 Dr Mokoka's analysis is predominantly based on a very theoretical view of LOLR and other related issues, with much emphasis placed on the principles set by Thornton and Bagehot[1], as if these principles constitute strict rules in terms of which of LOLR should be provided and its validity determined. As indicated below, this is not the case in practice.

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1 The classic theoretical foundation of the LOLR doctrine can be traced back to Henry Thornton, who in 1802 was responsible for defining its principles. He suggested that the provision of liquidity to the market was the best way of containing a panic. These principles were later elaborated upon and refined by Walther Bagehot. Both Thornton and Bagehot contended that the LOLR responsibility was owed to the market and the entire financial system and not to specific institutions. It was aimed at restoring confidence and re-establishing credibility in a bank or banks. Accordingly, LOLR assistance should be provided in circumstances where a central bank feared that the loss of confidence in the system could prompt even solvent institutions to fail. Thornton addressed LOLR in a paper published in 1802 titled "An enquiry into the nature and effects of the paper credit of Great Britian". Bagehot addressed LOLR in a paper published in 1873 titled "Lombard Street. A description of the money market": Humphrey "The classical concept of the Lender of Last Resort" 1975 61(1) Federal Reserve Bank of Richmond Economic Review 2. See also Lastra *Legal Foundations of International Monetary Stability* (2006) 114.

44 Banks lie at the centre of modern economies and therefore policies and measures applied to them by the relevant authorities may have far reaching implications, both politically and economically. Often measures implemented by such authorities must be decided on the spur of the moment, at the height of a crisis. Arm chair critics, in their endeavours to dissect, second-guess and question the decisions of the regulatory authorities, tend to overlook the reality that decisions taken in respect of a failed bank are often taken mid-crisis and/or during a stormy period of financial crisis and turmoil[2].

45 LOLR assistance to banks normally involves the balancing of short-term concerns such as the avoidance of bank runs and the redressing of liquidity crunches, with longer term concerns, such as the limitation of moral hazard and the fostering of a robust banking system with well-functioning banks[3]. Against this background, the classical doctrine is in general considered as the ideal in respect of the rendering of LOLR assistance to banks in circumstances of inordinate liquidity stress[4]. Banks however, unfortunately do not always function in ideal circumstances and a number of factors may complicate the strict implementation of the principles of LOLR assistance as embraced in the classic doctrine. Some of the important complications experienced relate to the requirements that LOLR assistance should be –

45.1 *afforded to solvent banks only* - Owing to the imperfect nature of financial information, the solvency of a bank may be virtually impossible to determine, in the

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2 BIS *Bank Restructuring in Practice* (1999) 7.

3 Davis "The lender of last resort and liquidity provision – How much of a departure is the sub-prime crisis?" Paper presented at a Conference entitled "Regulatory Response to the Financial Crisis", London School of Economics, 19 Jan 2009 5vis 3.

4 Lastra op cit note 1 at 114; Bamber, Falkena, Llewellyn & Store *Financial Regulation in South Africa* (2001) 107.

midst of a crisis, with certainty. In times of crisis, the value of bank assets may be subject to sudden and drastic downward adjustments and it is normally difficult to assess their true value in the limited time available. It is therefore usually difficult to distinguish illiquid and insolvent banks from the rest. This unfortunate situation is further complicated by the fact that a bank that may initially be solvent but illiquid can rapidly become insolvent[5]. Accordingly, central banks have in the past displayed a tendency of providing LOLR assistance even to potentially insolvent banks with liquidity problems whenever such banks are regarded as systemically important enough to pose a risk to the financial system if they should fail. It is known as the "too big to fail" concept. Moreover, in times of a systemic crisis, a central bank may need to provide uniform support to all banks short of liquidity, even if they are suspected to be insolvent, in order to protect the payment system and macro-economy[6]. In such times, judgment on the systemic importance of banks may even be suspended and liquidity assistance could form part of an overall crisis management strategy involving the central bank, the supervisors and the fiscal authorities[7]

45.2 *at a high interest rate* - the imposition of penalty rates by central banks on banks may impact negatively on the solvency of such banks, impact negatively on their

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5 Goodhart regards the suggestion that it is possible to distinguish between illiquidity and insolvency as a myth: Goodhart "Myths about the lender of last resort" (1999) 2(3) International Finance 339. See also Lastra op cit note 11 at 116; Brealey, Clark, Goodhart, Healy, Hoggarth, Llewellyn, Shu, Sinclair & Soussa *Financial Stability and Central Banks: A Global Perspective* (2001) 172; Davis op cit note 3 at 7; Bamber et al op cit note 4 at 108.

6 Davis op cit note 5 at 7; Bamber et al op cit note 4 at 108; Lastra op cit note 11 at 116; Brealey et al op cit note 5 at 172.

7 Davis op cit note 3 at 9.

already critical financial situation, and precipitate their collapse[8]. Furthermore, a stigma may be associated with banks accessing penalty rate facilities which may increase the risk of runs on them. Large scale interventions by central banks in markets at penalty rates may worsen inter-bank market tensions, resulting in a negative impact on the liquidity of the bank receiving central bank assistance[9]. (Material difficulties in this regard are acknowledged by the authorities quoted by Dr Mokaka in paras 2.2.5 and 2.2.6 of his report).

45.3 *against good collateral* - Central bank assistance is normally considered after banks were unsuccessful in gaining liquidity support and all market sources of funds were exhausted. Accordingly, when the stage of LOLR assistance is reached, a bank may already have encumbered, or disposed of, all its most marketable assets[10]. This, coupled with the difficulty in a crisis to determine the true value of assets, may result in an absence of good collateral being available to cover the exposure of a central bank loan with complete certainty. Under similar circumstances, central banks respond to a loss of market liquidity by easing and reducing collateral standards and accepting virtually any available assets of the banks as security[11]. In a systemic market crisis, solvency and collateral requirements may even be relaxed by means of a guarantee in favour of the central bank issued by government[12].

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8 Brealey et al op cit note 5 at 170; Bamber et op cit note 4 at 108.

9 Davis op cit note 3 at 18.

10 Davis op cit note 3 at 8.; Kindleberger & Aliber *Manias, Panics and Crashes: A History of Financial Crisis* (5ed) (2005) 8

11 Davis op cit note 3 at 8

12 Davis op cit note 3 at 9

45.4 *short-term* - Practice has shown that banks normally find it difficult to redeem LOLR loans, which could inevitably lead to an extension of their repayment terms[13]. In times of financial crisis, the funding of risks interacts with market liquidity risk and LOLR assistance needs to be extended for longer maturities. For example, when liquidity problems were being experienced during the US sub-prime crisis, the LOLR policies of central banks were adapted to not merely fund the liquidity requirement of banks but also market liquidity[14]. Moreover, in the event of a bank failing despite LOLR assistance, the subsequent unwinding and possible restructuring of the institution, with the intervention of the regulatory authorities, could last a considerable period of time. Depending on the nature of the exit strategy followed in respect of the bank, it could result in the relevant central bank's loan not being repaid, either in part or in full; or being repaid over an extended period of time. In times of a serious market crisis, fiscal authorities may need to bear the cost of bank recapitalisation[15].

45.5 *made widely known* - The banking fraternity is well known for its adherence to principles of confidentiality and secrecy. In terms thereof, subject to certain recognised exceptions, banks are under a duty to respect the financial and personal privacy of their customers and not to injure their creditworthiness or personal integrity by disclosing confidential information to third parties or in the

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13 Bamber et al op cit note 5 at 108

14 Davis op cit not 3 at 2

15 Idem at 9

public domain[16]. These principles also apply to central banks and the various entities that they serve[17]. Disclosure by a central bank to the general public of details regarding LOLR assistance afforded to a particular bank has the potential of adversely affecting public confidence in that institution (as demonstrated by the facts in the UK bank called Northern Rock, where that bank experienced a run on it following upon a BBC broadcast to the general public that Northern Rock had sought and was to be provided with LOLR assistance by the Bank of England)[18]. It could result in a run on the bank by depositors anxious to withdraw their deposits, which could either exacerbate any existing liquidity problem that the bank may be experiencing, or may rekindle a crisis of this nature that had in the past been experienced by the bank and redressed by means of earlier LOLR assistance. Moreover, management of a bank take lending decisions to maximise expected profits subject to the constraint that the probability that end-of-period asset values may fall short of its liabilities do not exceed a specified reasonable probability[19]. Once the impression is created that LOLR assistance may be readily available to all kinds of banks in distress, it may easily give rise to false assurances and unreasonable expectations. LOLR might then erroneously be regarded as a form

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16 Malan, Pretorius & Du Toit *Malan on Bills of Exchange, Cheques and Promissory Notes* (5ed) (2009) 310; Tournier v National Provincial and Union Bank of England [1924] 1 KB 461; Sasfin (Pty) Ltd v Beukes 1989 (1) SA 1 (A); Cywilnat (Pty) Ltd v Densam (Pty) Ltd 1989 (3) SA 59 (W); Faul *Grondslae van die Beskerming van die Bankgeheim* (1991) 459; Meiring "Bankgeheimenis en die bank se eie belang" 1991 3 *SA Merc LJ* 107; Scott "Can a banker cede his claims against his customers?" 1989 1 *SA Merc LJ* 248; Itzikowitz "Banker and Customer: The banker's duty of secrecy" 1989 18 Businessman's Law 255

17 See for example section 33 of the South African Reserve Bank Act, 1989 (Act No. 90 of 1989)

18 Davis op cit note 3 at 8. IMF *Containing Systemic Risks and Restoring Financial Sector Soundness* (2008) 12; SRM Global Master Fund LP; RAB Special Situations (Master) Fund Ltd and Dennis Grainger & Others v The Commissioners of Her Majesty's Treasury, an unreported judgment delivered on 28 July 2009 under the Neutral Citation Number: [2009] EWCA Civ 788, par 13

19 Herring & Wachter Real Estate Booms and Banking Busts – An International Perspective (1990) 7

of insurance against bad banking decisions, which could encourage more of the same. This could give rise to the moral hazard that the business of a bank may, by the application of irresponsible, careless or imprudent management practices be conducted in disregard of sound commercial and legal principles. It could lead to a reduction in the incentive for banks to hold adequate liquidity, thereby passing that risk on to the central bank[20]. In view of the above considerations, central banks do not as a rule report in the public domain on the potential availability of LOLR, or provide details on specific LOLR support provided to designated banks[21].

46 These Considerations give rise in practice to situations where the strict application of the classical principles of LOLR support may defeat the ends that they were designed to achieve. Therefore the proper management of a bank in a liquidity crisis may be considered as one of the most difficult and challenging tasks to confront central banks, regulatory authorities and policymakers. Depending on the nature and extent of the challenge, one or more of a diversity of approaches may need to be followed to adequately address a particular liquidity problem. Although the classical doctrine may to some extent constitute the conventional wisdom on LOLR, practice has shown that it does not serve as an absolute blue-print for all financial assistance of this nature. The nature, needs and demands of the financial system constantly change and central banks need constantly to evolve in their interaction with financial institutions and the markets within which they operate. This includes the way in which LOLR emergency liquidity assistance is provided as evidenced by the approach of central banks like the Federal

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20 Davis op cit note 3 at 7

21 Lastra op cit note 3 at 115.

Reserve and the European Central Bank. As part of LOLR, the European Central Bank has, for example, also provided liquidity to the financial markets which is neither in the format of loans nor is backed by security[22].

47 Since the central bank and other relevant national authorities of a country are, in principle, better placed to address and resolve their peculiar local needs in a liquidity crisis, the possibility of LOLR assistance (and its structure) to a bank or banks needs to be considered on a case by case basis[23]. Depending on the particular circumstances, it could involve the possible adaptation or relaxation of, or a deviation from, acknowledged principles of LOLR assistance to suit the peculiar challenges presented by the crisis.

The assistance

48 As the evidence provided to the Public Protector showed, the emergency liquidity assistance that the Reserve Bank provided to Bankorp was secured by government bonds. This was the collateral for the loan. These debt instruments qualify as Level 2 High Quality Liquid Assets in terms of the Banks Act, 1990 and the internationally recognised standards set by Basle III. Dr Mokoka is therefore incorrect to conclude that there was no good collateral for the Bankorp assistance package. The Public Protectors' reliance on this alleged absence of collateral in her answering affidavit is therefore also patently flawed.

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22 Peter Praet "The ECB and its Role as lender of Last Resort" Speech by Member of the Executive Board of the European Central Bank, at the Committee on Capital Markets Regulation Conference on the Lender of Last Resort – an international perspective, Washington DC, 10 February 2016 at 2

23 SRM Global Master Fund LP and Others op cit note 19 par 57.

49 The fact that there was collateral for the loan and further details about the assistance package were provided to the Public Protector on numerous occasions including –

49.1 in the detailed evidence provided by Dr Stals to the Public Protector on 8 September 2016 (paginated pages 42 to 142 of the SARB application)

49.2 from the statement of Gerhard Johan Terblanche and the annexures thereto and which was provided to the Public Protector on 16 September 2016. In this statement Mr Terblanche, the former head of the Financial Services Department and Chief Financial Officer of the SARB, addresses the nature of the loans and the repayment thereof to the SARB (paginated pages 143 to 185 of the SARB application);

49.3 in the response by the SARB of 28 February 2017 to the preliminary report of the Public Protector, dated 21 December 2016. These submissions are included as annexure PP5 to the Public Protector's answering affidavit.

50 The upshot of this evidence was that –

50.1 Dr Stals was appointed Governor of the Reserve Bank on 8 August 1989, after the death of the previous Governor, Gerhard de Kock;

50.2 at the time of Dr Stals' appointment as Governor, the loan provided to Bankorp amounted to approximately R600 million;

50.3 Derek Keys, the then Chairman of Bankorp, came to see Dr Stals in the middle of 1990 and explained to him that the money they owed the Reserve Bank (R600 million at the time) and which was renegotiated every year and which they had to start repaying in the middle of 1990, could not be repaid by Bankorp. In fact, Dr Stals' evidence was that Derek Keys advised him that Bankorp were running into more serious difficulties and the bad book loans were growing all the time;

50.4 the financial assistance was then increased. We know based on the loan agreements and the evidence of Mr Terblanche, that the loan was increased to R1 billion and subsequently to R1,5 billion;

50.5 the financial assistance was the differential in interest rate between the interest charged on the loan by the Reserve Bank to Bankorp and the interest of 16% earned by Bankorp on the Government Bonds they purchased with the loan proceeds;

50.6 the collateral provided to the SARB for the loan were Government bonds and/or cash held in a SARB account which were pledged by Bankorp to the SARB as security for the loan;

50.7 the financial assistance (being the differential of the interest paid and earned) was used to pay down the bad book which had been created by Bankorp's lending practices;

50.8 when Absa acquired Bankorp, the loan was extended to Absa on the same basis as it had been provided to Bankorp. Absa then used the financial assistance to expunge Bankorp's bad book which it had inherited when it acquired Bankorp;

50.9 Absa did not benefit from the financial assistance, but by agreement with the Reserve Bank, used the financial assistance to expunge Bankorp's bad book;

50.10 In 1995, Absa repaid the loan to the Reserve Bank by transferring the Government bonds and cash which the Reserve Bank had held as collateral.

51 The Public Protector has clearly not paid due regard to this evidence. As a result of her failure to consider this relevant information, she unjustifiably claims, in her answering affidavit, that the loan was never repaid (AA paras 94 to 96). It was indeed repaid in full. The evidence of Mr Terblanche confirmed this.

52 The Public Protector has also not understood the South African Reserve Bank Act. Section 10(1)(f) of this Act expressly empowers the Reserve Bank to grant loans. And yet, the Public Protector states in her affidavit that "the Reserve Bank is not authorised to grant loans" (AA para 96).

53 The Public Protector also claims that the Reserve Bank said that "the need for financial assistance to Bankorp arose as a result of the overall effect of the international anti-apartheid sanctions" (AA para 67). At no stage did the Reserve Bank suggest that this was the case. In fact, in the response to the Public Protector's preliminary report, the Reserve Bank indicated that the assistance was provided "to enable it [Bankorp] 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" (paginated page 573 of the SARB application). The Reserve Bank went on to state that the request came at a time when the South African banking sector was critically exposed given the international sanctions that had been imposed in South Africa in 1985. If Bankorp had failed at the time, not only was a run on the banks a real risk, but it would have constituted a systemic event of a serious nature. A crisis in the banking sector therefore needed to be averted. This was Dr Stals' evidence.

Summation

54 As flawed as Dr Mokoka's analysis is, the Public Protector did not even have this analysis before her when she prepared her final report. Yet the Report requires the SIU to pursue recovery of over a billion Rand of interest that was earned by Bankorp and, later ABSA, on the financial assistance package and which was used to discharge Bankorp's bad book. What seems plain is that the Public Protector failed to understand the nature and incidence of the assistance given by the Reserve Bank to Bankorp in her Report. She consequently recommended remedial action on the basis that the Reserve Bank had exercised its powers in an irregular fashion. That is not so. And the Public Protector's efforts to now rely on the equally flawed analysis of Dr Mokoka cannot advance her case.

55 The money was advanced to Bankorp and then to ABSA as an exercise of the Reserve Bank's power to act as lender of last resort. There is nothing unusual or sinister in a central bank acting in this manner to ensure financial stability. It is a power commonly exercised by central banks around the world.

56 The Public Protector's report shows no due appreciation of this fact. On the contrary, her remedial action is premised on the fact that she has herself determined that the financial assistance was irregular. There was no basis for this finding in her Report and her after the fact attempt to justify it, is similarly flawed.

Conclusion

57 The Public Protector's Report ought to be set aside. It was the product of a procedurally unfair process and is underpinned by irrationality and errors of law and fact. There is no basis for a remittal to her to continue with the investigation. On the contrary, the evidence of her investigation shows that it pursued an ulterior purpose and was improper. A declaratory order that the investigation abused the powers of her office ought, accordingly, to be granted.

58 The Public Protector's conduct in this review application also deserves serious censure. She has failed to take this court into her confidence and to address frankly and honestly the serious accusations against her. She has failed to produce a complete record of her proceedings, and rather elected to attach pertinent documents to her answering affidavit. She has made false statements in her affidavit. She claims that during a meeting with the President in April 2017 she became concerned about remedial action that would direct him to establish a commission of inquiry but, by that stage, she had already proposed remedial action that accounted for this concern and therefore only required the President to consider appointing a commission of inquiry. She also falsely claims in her affidavit that it is based on expert economic advice obtained during her investigation when that economic analysis was procured after the investigation was completed. It is appropriate,

in the circumstances, that the court indicates its displeasure at this improper and unreasonable conduct, with an order of *de bonis propriis* costs against Ms Mkhwebane.

WHEREFORE, the Reserve Bank persists in seeking an order in terms of the notice of motion including costs of three counsel on an attorney and client scale, to be paid *de bonis propriis* by Ms Mkhwebane.

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 27TH day of NOVEMBER 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

FULL NAMES:

ADDRESS:

EX OFFICIO:

YONATAN ARYEH SHER
EX OFFICIO
COMMISSIONER OF OATHS
PRACTISING ATTORNEY
REPUBLIC OF SOUTH AFRICA
11 ALICE LANE
SANDTON

"RA1"

COPY 687

South African Reserve Bank
Office of the Governor

By HAND

27 September 2013 Ref No.: 15/3

Advocate TN Madonsela
Public Protector
175 Lunnon Street
Hillcrest Office Park
Pretoria
0083

Dear Advocate Madonsela

1 I refer to our meeting on 2 September 2013. After subsequent consultations with the legal team of the South African Reserve Bank ("SARB" or "Bank"), I wish to advise as follows.

2 At that meeting, you intimated that the subject-matter of your investigation is the Government's alleged decision not to implement the CIEX report, in 1999. It was then indicated to you that the CIEX report had nothing to do with the Bank and therefore the SARB could not have been expected to have taken any "decision" in respect thereof (which is the subject matter of your investigation into alleged maladministration by the Bank). In response, you indicated that your investigation against the Bank would therefore be concerned with the subject-matter of "the Davis report". That refers to a report which was prepared by a panel of experts appointed by the Bank on 15 June 2000 to "investigate the SA Reserve Bank's role with regard to the financial assistance package to Bankorp". I understood from our discussion on 2 September 2013, that your investigation would now be concerned with considering, having regard to the Davis report, whether or not there is money owed to the Government of South Africa which can be reclaimed from ABSA Bank. In this regard, as indicated to you at our meeting, you should bear in mind that neither the previous Governor (Mr Mboweni) nor me were

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J.B

involved in providing the financial assistance in question and we are therefore reliant on the Davis report.

3 Nevertheless, if my above understanding of the matter is correct, then the Bank is of the view that your current investigation is ultra vires because, first, it lies beyond your jurisdiction and, secondly, even if you have jurisdiction to entertain the matter, the requirements of section 6(9) of the Public Protector Act 23 of 1994 have not been satisfied. In the light of these two considerations, the SARB is of the considered opinion that your investigation into the matter is not legally justified. The basis for the contention of the Bank is set out in more detail below.

Pre-1994 jurisdiction

4 Your office was established, initially, 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 and your powers are now governed by the Public Protector Act 23 of 1994.

5 The office of the Public Protector is a feature of the democratic Government established by, first, the interim and, then, the 1996 Constitution. It is one of the so-called "Chapter 9" institutions which are designed to strengthen constitutional democracy in the Republic of South Africa ("RSA") (see section 181 of the 1996 Constitution). Section 181(5) of the 1996 Constitution provides that the Chapter 9 institutions are accountable to the National Assembly and must report on their activities to the National Assembly once a year. The "National Assembly" to which the Chapter 9 institutions are accountable is the democratically elected National Assembly referred to in Chapter 4 of the 1996 Constitution.

6 The powers of the Public Protector, and hence the jurisdiction of your office, was originally prescribed in section 112 of the Interim Constitution and is now set out in sections 6 and 7 of the Public Protector Act. None of these sections vests the Public Protector with power to investigate matters which preceded the establishment of the office of the Public Protector.

7 The reasons for this are clear. The Public Protector is an institution of the new constitutional dispensation in the RSA. It is an institution expressly established to support constitutional democracy in the country. It is a watchdog institution of the constitutional dispensation. The investigative powers of the Public Protector do not, therefore, apply to matters which preceded the advent of the Interim Constitution and hence the creation of the office of the Public Protector.

8 As is evident from the Davis report, the SARB provided financial assistance to Bankorp from 1985 to 1992. In terms of the agreements facilitating the provision of that assistance, the Bank gave Bankorp a grant (by way of a net interest stream which amounted to the difference in margin between the interest rate agreed with the Bank and that applicable to the bonds under the assistance scheme).

9 On 1 April 1992, ABSA acquired Bankorp for R1 230 million. Although the assistance provided to Bankorp was extended to ABSA until 1996, the extension occurred pursuant to the deal that was struck when ABSA acquired Bankorp in 1992. In terms of that deal, the net asset value of Bankorp was calculated to include the value of the total net interest stream under the assistance scheme.

10 Given that the purchase price took into account the net asset value of Bankorp at the time, ABSA paid for the impact which the existing financial assistance had had on Bankorp as well as the expected future interest stream from the financial assistance.

11 Before concluding the takeover, ABSA sought and received an assurance from the Bank that the assistance package would continue on the same central financial terms and for the same period as Bankorp had agreed with the Bank.

12 In the Davis report, the expert panel found that had it not been for the continuation of the financial assistance to ABSA on the same terms as originally concluded with Bankorp, the transaction would ostensibly not have gone ahead. The continuation of the assistance on the original terms was therefore a condition of the transaction.

13 The panel concluded that because ABSA had paid for the continued assistance, it was not a beneficiary of the Bank package. In addition, it is apparent from the Davis report that the SARB retained the underlying assets (the bonds) and all that Bankorp and thereafter ABSA benefitted from was the income stream explained in 8 and 9 above.

14 In the light of these facts, it is evident that the events which have given rise to your investigation all preceded 27 April 1994. The grant was given by the Bank and paid for by ABSA before this date and therefore your jurisdiction does not extend to investigating matters related to these transactions.

15 In the circumstances, the investigation lies beyond your jurisdiction.

Section 6(9) of the Act

16 In the alternative to what is set out above, even if you do have jurisdiction to investigate a matter which arose prior to 1994 (which is not accepted by the SARB) or if your investigation only relates to matters which arose post-1994 (yet again, the Bank does not accept this to be the case since the underlying transaction clearly arose prior to 1994), none of the matters which you are investigating occurred within two years of your office having received the complaint which gave rise to the investigation. This means that in terms of section 6(9) of the Public Protector Act, you may only entertain this complaint in the event that special circumstances exist. Although you indicated at the meeting that the investigation was decided upon "at your discretion", the SARB did request an indication from you as to what constituted the special circumstances in this matter.

17 At the meeting on 2 September 2013, you indicated that the special circumstances were threefold:

17.1 The matter dealt with Government money;

17.2 It would be easy to recover; and

17.3 ABSA had already made provision for the claim.

18 I am advised that none of these qualify as the types of special circumstances which must exist in order to legally justify an investigation into this matter, which occurred more than two years prior to the complaint being made to your office.

18.1 The fact that a case deals with Government money does not constitute a special circumstance. Many of the matters dealt with by your office most probably concern Government money.

18.2 It is unclear on what basis you concluded that the money would be easy to recover. As I set out in more detail below, this is directly contradicted by the findings of the Davis report.

18.3 You made it clear at our meeting on 2 September 2013 that you have not yet, and you do not in the future intend, to consult with ABSA in the course of your investigation. That means that at the time that you decided that there were special circumstances in the matter, you had not sought ABSA's confirmation of the allegation that it had made provision for a claim by the Bank for repayment of the assistance (without conceding that this is even a relevant consideration). As a result, you evidently made your determination on the basis of mere conjecture which was not even corroborated by the only party able to establish whether the allegation was true.

19 In the circumstances, we submit that your decision to proceed with the investigation was flawed as the requirements of section 6(9) were not met.

20 Moreover, there are compelling reasons related to the financial stability of the banking sector not to reopen matters on which reliance has been placed and which were regarded by the market as settled. These factors ought to have been taken into account when you assessed whether it was appropriate to embark on an investigation related to events which occurred more than two years before the complaint in this matter was received by your office. The relevant factors include the following.

20.1 As alluded to above, it was evidently a condition of the ABSA takeover of Bankorp that the assistance to Bankorp would continue until 1995 on the same terms and conditions as it was extended to Bankorp. What this meant in effect, is that ABSA bought the business of Bankorp on the understanding that it would be paid the net interest stream until 1995 and that there would

be no claim made by the Bank against ABSA in due course to repay the grant it hade made to Bankorp historically.

20.2 The Davis report makes it clear that but for this arrangement, the ABSA acquisition of Bankorp would ostensibly not have taken place.

20.3 The Davis report calculated the total grant provided to Bankorp (and later to ABSA) to aggregate to R 1 295 million. If the complaint which was received by your office alleged that that amount or any amount of a similar magnitude should be recovered from ABSA, the impact of such a claim on ABSA's balance sheet and overall stability in the banking sector ought to have been considered by your office.

20.4 In the intervening period Barclays acquired a significant stake in ABSA, based on what had been the accepted position in respect of Bankorp and the assistance package. This merely demonstrates the importance of market certainty which ought to have been considered by you.

20.5 The issue of the Bankorp grant has already been extensively investigated by the panel of experts appointed in 2000 by the Bank. The Davis report concluded that whilst the Bank had acted beyond its powers in extending specified assistance packages to Bankorp, the Government would have no claim for repayment of the grant monies on the basis of contract. To the extent that there may be a claim based on enrichment, the claim would likely face a defence of estoppel. Furthermore, the panel concluded that the difficulties pertaining to the quantification of the enrichment and the identity of the beneficiaries (who were likely to have been Sanlam policy holders, bearing in mind that Sanlam was a mutual society at the time) would render any prosecution of an enrichment claim problematic.

21 These factors weigh heavily against the conclusion that any genuinely special circumstances existed to warrant the current investigation.

22 In the circumstances, the SARB maintains that the requirements of section 6(9) of the Public Protector Act have not been met.

23 The Bank's rights in relation to the issues arising from your investigation are reserved.

Yours sincerely

Gill Marcus

Gill Marcus
Governor

"RA 2"

694

ABBREVIATED CURRICULUM VITAE

JOHANNES JURGENS DE JAGER

J. D

UNIVERSITIES & QUALIFICATIONS

Universities Attended:

University of South Africa ("UNISA")
Rand Afrikaans University ("RAU")
Pretoria University ("UP")
University of the Witwatersrand ("Wits")
Harvard University ("Harvard")

Diplomas, Degrees and Qualifications Attained:

Diploma Iuris (Dip-Iuris)(UNISA)
Baccalareus Iuris (B-Iuris)(UNISA)
Baccalareus Legum (LLB)(UNISA)
Magister Legum (LLM)(RAU)
Doctor Legum (LLD)(RAU)

SEP (Wits/Harvard)
Attorneys Practice School (UP)
Admitted Advocate of the High Court
Attorneys Admission Exam (Transvaal Law Society)

LLB studies included courses in the Advanced Law on Bills of Exchange and Cheques, as well as Advanced Law on Banking Practice. LLB thesis dealt with the liabilities of the collecting bank towards the real owner of a cheque in the event of the negligent collection of the real owner's cheque for the wrong person.

The Magister Legum course consisted of specialised two-year studies in Banking- and Exchange Law. Passed both the semester course in Banking Law and the semester course in Exchange Law *cum laude.* LLM thesis dealt with the cession of rights as forms of security with regard to financial agreements.

Doctoral thesis titled *The Management of Banks in South Africa: Legal and Governance Principles*. Dealt with specific governance problems facing public companies worldwide and banks in particular in South Africa. Included pro forma legislative measures in order to address the problems and provide adequate protection of the interests of depositors. Subsequently incorporated into the Banks Amendment Act, 2003 (Act No. 19 of 2003).

Central Bank and Banking related Articles Published:

"Three Rivers District Council v Governor & Company of the Bank of England: A Red Flag or a Red Herring for Bank Supervisors in South Africa?" (2001) 4 *SA Mercantile Law Journal* 531;

"Recognition of the interests of bank depositors: The corporate governance dilemma" (Part 1) (2002) 2 *Journal of South African Law* 205;

"Recognition of the interests of bank depositors: The corporate governance dilemma" (Part 2) (2002) 4 *Journal of South African Law* 713;

"Shareholder Activism in the South African Reserve Bank: A Blessing or a Curse?" (2004) *First Quarter FSB Bulletin* 16;

"Central Bank Autonomy – How Independent is the SARB" (2006) *Fourth Quarter FSB Bulletin* 16;

"Comments on the Effects of Section 40 of the Banks Amendment Act 119 of 2003 on Section 60 of the Banks Act 94 of 1990" (2005) 17 *SA Mercantile Law Journal* 170;

"The South African Reserve Bank: An Evaluation of Origin, Evolution and Status of a Central Bank (Part 1)" (2006) 18 *SA Mercantile Law Journal* 159;

"The South African Reserve Bank: An Evaluation of Origin, Evolution and Status of a Central Bank (Part 2)" (2006) 18 *SA Mercantile Law Journal* 274;

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"Central Bank, lender of last resort assistance: An elusive concept?" (2010) *De Jure* 228;

"Much ado about nothing? Legal principles on money, banks and their clients after *Joint Stock Company Varvarinskoye v ABSA Bank Ltd"* (2010) 22 *SA Mercantile Law Journal* 127;

"Central Bank Lender of Last Resort Assistance" (2012). Article published in a publication styled *Legal Aspects in a Changing Global Banking Sector* by the Association of Legal Advisors of the Financial System in Romania (2012);

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"The South African Reserve Bank: Blowing Winds of Change Part II" (2013) 25 *SA Mercantile Law Journal* 492;

"Shareholding in the South African Reserve Bank: a unique and awkward concept" (2014). Article published in publication styled *Essays in Honour of Frans Malan* edited by Coenraad Visser and JT Pretorius at 57;

"Room to Manouvre: The Concept of central bank independence and the South African Reserve Bank" (2017). Article published in publication styled *Jopie: Jurist, Mentor, Supervisor and Friend – Essays on the law of Banking, Companies and Suretyship* edited by Charl Hugo and Michelle Kelly-Louw at 79.

J.D

Courses and Training:

Attended and participated in various international courses and programmes in central bank and banking related matters at the Bank for International Settlements (BIS), Bank of England, International Monetary Fund (IMF), World Bank, Cambridge University UK, and the Association of Legal Advisors of the Financial System in Romania. Twice acted as chair of sessions at international symposiums of worldwide legal Experts in the field of Central Banking and Regulation hosted by the BIS in Basle, Switzerland.

Academic Appointments:

Held appointments in fields related to central banking and banking as Part-time Lecturer (RAU), Guest Lecturer (RAU, UJ and UP); External Examiner (UNISA), Extraordinary (honorary) member of the Department of Mercantile Law (UP) and Research Fellow of the College of Law (UNISA). Currently visiting Professor of Law (UJ).
Past Member of the Executive Committee of the Association of Banking Lawyers of Southern Africa ('ABLASA')

Appointments at South African Reserve Bank:

Manager: Legal Administration of the Bank Supervision Department of the SARB (1991);

Senior Manager: Legal Administration of the Bank Supervision Department of the SARB (1994);

Assistant General Manager: Legal Administration of the Bank Supervision Department of the SARB (1996).

Primary Responsibilities

Was responsible for managing the Legal Administration Division of the Bank Supervision Department. This Division's responsibilities included the legal administration of the Banks Act, 1990 (Act No. 94 of 1990), and the Mutual Banks Act, 1993 (Act No. 124 of 1993). It included: The establishment of representative offices, branches and subsidiaries of foreign banks, new banks and mutual banks in the RSA. The establishment of interests by RSA banks locally and cross-border. Take-overs and amalgamations of banks. Approval and registration of special resolutions of banks. The issuance by banks of shares and debt instruments. International consolidated supervision of banks and related parties. Liaison with members of the public and cross-border supervisory authorities. Legal opinions and the writing of official correspondence. Placing of distressed banks under curatorship/liquidation, which often involved some form of emergency liquidity assistance provided by the SARB. The drafting and putting into operation of legislation, regulations and legal notices.

Responsible for writing the chapters on developments relating to banking legislation in the Annual Report of the Bank Supervision Department.

J.B

Assistant General Counsel: Legal Services Department of the SARB (1998);

General Counsel SARB (1999 to present)

Primary Responsibilities

Responsible for the day to day management of the Legal Services Department (until 2014). Report directly to the Governor. Provides a comprehensive in-house legal service to the SARB, its branches and subsidiaries. Includes wide variety of legal matters such as the drafting of legislation (including the presentment thereof to Parliament), litigation, contracts (local and international), legal opinions, share transfers, matters such as SARB emergency liquidity assistance etc. Attends meetings of the Board of the SARB as well as Governors Committee meetings (the ultimate executive committee of the SARB) in an ex officio capacity.

Examples of legislation and subordinate legislation and rules directly involved in drafting and/or presenting for promulgation or adoption (as the case may be) are the South African Reserve Bank Amendment Act, 2010 (Act No. 4 of 2010); various amendments to the Banks Act, 1990 (Act No. 94 of 1990); Bills of Exchange Amendment Act 2000 (Act No. 56 of 2000), the regulations relating to the South African Reserve Bank of 13 September 2010 and the current rules relating to the Over the Counter Share Transfer Facility in respect of shares of the South African Reserve Bank. Also involved in an advisory capacity in the drafting and promulgation of Financial Sector Regulation Act, 2017. Involved also, in some form or manner, in all cases of emergency liquidity assistance provided by the SARB to banks in distress (excluding the SARB financial assistance which forms the basis of the current litigation between the SARB, the Public Protector, ABSA and Others), of which there have been quite a few (the most recent being the erstwhile African Bank Limited).

Pretoria

26 November 2017

J. D