"ANNEXURE A"

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case no: **48123/17**
52883/17
46255/17
(Consolidated applications)

In the matters between:

ABSA BANK LIMITED	Applicant (*Under case: 48123/17*)
SOUTH AFRICAN RESERVE BANK	Applicant (*Under case: 52883/17*)
MINISTER OF FINANCE	First Applicant (*Under case:* 46255/17)
NATIONAL TREASURY	Second Applicant (*Under case:* 46255/17)

and

PUBLIC PROTECTOR	First Respondent
SPECIAL INVESTIGATING UNIT	Second Respondent
THE PRESIDENT OF THE REPUBLIC OF	

OR 1

ANSWERING AFFIDAVIT

I, the undersigned,

BUSISIWE MKHWEBANE

do hereby make oath and state as follows:

1. I am the Public Protector, appointed in terms of section 1A of the Public Protector Act, 23 of 1994. I am duly authorised to depose to this affidavit.

2. The contents of this affidavit fall within my personal knowledge, unless the context indicates otherwise, and are to the best of my knowledge and belief both true and correct. Where I make legal submissions I do so on the basis of legal advice received from my legal representatives, which advice I accept as correct. Where I make averments relating to economics I do so on the basis of advice received from economic experts during the investigation of the complaint referred to below, which advice I accept as correct.

INTRODUCTION

3. I was appointed the Public Protector on 15 October 2016 and assumed my duties on 17 October 2016. When I assumed my duties as the Public Protector, the matter under review had been under investigation for more than five years (the complaint having been lodged in 2010) and there was a provisional report that had already been drafted by the investigator, who left the Office of the Public Protector in December 2016.

4. On 19 June 2017, I released Report No: 8 of 2017/18 that dealt with *"allegations of maladministration, corruption, misappropriation of public funds and failure by the South African Government to implement the CIEX Report and to recover public funds from ABSA Bank"* (hereinafter referred to as "*the Report*"). A copy of the Report is attached marked "*MR1*" to ABSA Bank Limited's ("ABSA's") founding affidavit.

4.1.1. The issues that the former investigator initially investigated remained the same, however, the proposed remedial action in the draft provisional report was changed, although not significantly.

4.1.2. The remedial action about the need to investigate alleged apartheid corruption, as outlined in the Ciex report, and taking necessary measures was highlighted in the initial draft provisional report and this remedial action to investigate alleged

apartheid corruption, as outlined in the Ciex report, does form part of my final report, in paragraph 7.1.1.2 of the Report.

4.1.3. The issue about ABSA paying back the misappropriated funds to the South African public purse was canvased in the initial draft provisional report, however, I changed the recovery mode of the misappropriated funds in my final report.

4.1.4. Therefore, there is no significant change to the initial draft provisional report and my final report, except paragraph 7.2 of the final report.

5. Following the release of the Report, the South African Reserve Bank ("SARB") instituted an urgent application, under case number 43769/17, to review and set aside the remedial action set out at paragraph 7.2 of the Report. ABSA and National Treasury ("Treasury"), who also represented the Speaker of Parliament, both supported the urgent application.

6. After considering the various submissions raised in the urgent application I elected to file an answering affidavit in which I consented to have the remedial action at paragraph 7.2 reviewed and set aside.

7. SARB, ABSA, the Minister of Finance ("the Minister") and Treasury (hereinafter collectively referred to as "the Applicants") have since brought separate review applications against the Report.

7.1. ABSA's review application, under case number 48123/17, seeks to review and set aside the remedial action that appears at paragraphs 7.1.1; 7.1.1.1; 7.2 and paragraph 8.1 of the Report.

7.2. SARB's review application, under case number 52883/17, seeks to review and set aside the whole of paragraph 7.1 and paragraph 8.1 of the Report.

7.3. The Minister and Treasury's review application, under case number 46255/17, seeks to review, correct and/or set aside the conclusions, findings and remedial action of the Report.

8. Therefore while ABSA and SARB seek to review and set aside some of the remedial action in the Report, the Minister and Treasury seek effectively to review, correct and/or set aside the entire Report.

9. On 24 July 2017, the legal representatives of the Applicants and my office met before the Deputy Judge President Ledwaba where they reached certain agreements regarding the further conduct of the three review applications. One of these agreements was that the three review applications would be consolidated and heard together.

9.1. The parties also agreed to various timelines for the filling of a record and affidavits. However, because of a change in legal representatives, the new legal team was not able to meet the agreed timelines.

10. Given that the three applications have been consolidated and that they largely rely on the same facts and, in some instances, raise similar legal arguments or issues I will in this affidavit provide a comprehensive response to all the issues raised in the three applications. In doing so, I intend to address the various issues raised and the Applicants' grounds of review. Therefore, this affidavit serves an answer to all the founding and supplementary affidavits filed by the Applicants.

11. The approach in this affidavit is as follows:

11.1. First, I raise two alternative points *in limine*.

11.2. Second, I deal with the allegation that I did not have jurisdiction to have conducted an investigation into the "Lifeboat" scheme.

11.3. Third, I give a summary of my investigation and the complaint that gave rise to it.

11.4. Fourth, I deal with the lawfulness of the "Lifeboat" scheme.

11.5. Fifth, I respond to the alleged "Errors of Fact".

11.6. Sixth, I deal with the basis and reasons for the remedial action.

11.7. Seventh, I respond to the various arguments of prescription raised by the Applicants.

11.8. Eighth, I demonstrate that I had the necessary jurisdiction to have conducted the investigation.

11.9. Ninth, I deal with the allegations by ABSA and SARB of procedural unfairness – in particular the allegations that I did not afford them sufficient opportunity to make representations before finalising the report and that I allegedly failed to provide or disclose documents.

11.10. Tenth, I give context and background to my meetings with the Presidency, the SIU and members of the Black First Land First ("BLF") and respond to the allegations that these meetings were improper.

11.11. Eleventh, I deal with the various forms of relief sought by the Applicants.

11.12. Lastly, I deal *ad seriatim* to the allegations in the various affidavit filed by the applicants (but only to the extent that those issues have not already been dealt with in the earlier sections of my affidavit).

POINTS IN LIMINE

First Point in Limine: the Decision on Remedial Action does not Constitute Administrative Action

12. The Applicants, collectively and on separate grounds, challenge the remedial action, which is set out in paragraph 7.1 of the Report.

13. For ease of reference, during the reading of this affidavit, the relevant part of the remedial action is reproduced hereunder:

7.1 The Special Investigating Unit

7.1.1 The Public Protector refers the matter to the Special Investigating Unit in terms of section 6(4)(c)(i) of the Public Protector Act to approach the President in terms of section 2 of the Special Investigating Units and Special Tribunals Act No 74 of 1996 to: 10

7.1.1.1 Re-open and amend Proclamation R47 of 1998 published in the Government Gazette dated 7 May 1998 in order to recover misappropriated public funds unlawfully given to ABSA Bank in the amount of R1.125 billion.

7.1.1.2 Re-open and amend Proclamation R47 of 1998 published in the Government Gazette dated 7 May 1998 in order to investigate alleged misappropriated public funds given to various institutions as mentioned in the CIEX report

7.1.2 The South African Reserve Bank must cooperate fully with the Special Investigating Unit and also assist the Special Investigating Unit in the recovery of the misappropriated public funds mentioned (above).

14. The various institutions mentioned in the CIEX report are the following-

14.1. SANLAM;

14.2. Rembrandt;

14.3. Aerospatiale/Daimler Chrysler;

14.4. Armscor;

14.5. Nedbank;

14.6. Trustbank;

14.7. Volkskas.

15. Volkskas merged with United Building Society, Allied Building Society and Trust Bank to form ABSA Bank.

16. The challenge mounted by the Applicants to this remedial action, is based on alleged grounds of review under the Promotion of Administrative Justice Act 03 of 2000 ("PAJA") (being legislation to give effect to the right to administrative justice guaranteed by section 33 of the Constitution), alternatively the constitutional requirement of legality..

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17. Before I address the grounds for review advanced by the Applicants, I wish to raise an issue around the application of PAJA and the Applicants' standing *in judicio* to pursue the review relief under the provisions of PAJA.

18. Incidental to the foregoing, and in the *alternative*, and in response to the jurisdiction issue raised by the Applicants, I wish to raise non-compliance with the requirement that review proceedings must be brought within a reasonable time from the date on which the aggrieved party becomes aware of the impugned decision.

19. PAJA provides for the judicial review of administrative action. It defines administrative action, for purposes of these proceedings, as the exercise of power in terms of the Constitution, or any other legislation, which adversely affects the rights of any person and which has a direct, external legal effect.

20. I do not contest that the impugned remedial action involves the exercise of public power, conferred by the Constitution and/or the Public Protector Act 23 of 1994.

21. However, I contend that the Applicants have not established that the remedial action set out in paragraph 7.1 of the *Final Report*:

> *adversely affects their rights and that the action has a direct, external legal effect upon their rights*.

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22. A party seeking to review an administrative action must, under the provisions of PAJA, demonstrate that the impugned action adversely affects the rights, and that such an action has a direct and external legal effect on the rights, of such party.

23. The Applicants must identify a substantive right, which they contend is adversely affected by the impugned remedial action set out in paragraph 7.1 of the *Final Report*.

24. Put differently, the Reserve Bank, ABSA and National Treasury must identify a substantive right that is adversely affected by a request that an investigation of the Special Investigations Unit be re-opened.

25. The President still has to consider and apply himself to the request, which is yet to be made by the SIU. It does not follow, on the ordinary reading of the remedial action, that the President will necessarily grant the request for the re-opening of investigation.

26. As things stand, and on all forms of interpretation sanctioned by settled jurisprudence, the remedial action places a duty upon the SIU to approach the President in the prescribed manner and <u>*request*</u> the President to amend the relevant Proclamation with a view to reopening an investigation.

27. ABSA, SARB and National Treasury, as litigants acting in their own interests, cannot be entitled to object to the SIU approaching the President with a

request that the President should authorise the re-opening of an investigation.

28. A request for the re-opening of an investigation and/or an investigation of the nature contemplated by the remedial action, cannot be said to be determinative of rights or adversely affect their rights (or even have an external legal effect on such rights) within the construct of PAJA.

29. The Applicants will retain all of their rights, in their current form, during and after the completion of such investigations, and all defences of prescription, and the like, would still be available even after completion of any such investigation.

17 In any event, it is difficult to comprehend that the Reserve Bank could direct its energy towards an end that would effectively permit it not to co-operate with an investigation of allegations relating to the misappropriation of public funds which have already been found (by Judges Heath and Davis) to be unlawful.

18 In the premises, I submit that the neither ABSA nor the Reserve Bank nor the National Treasury have made out any basis to show that the remedial action for which my Report provides constitutes administrative action for purposes of PAJA. As a consequence, the Applicants have failed to establish the requisite standing *in judicio* to challenge the remedial action set-out in paragraph 7.1 of the *Final Report*.

Second Point in Limine: Unreasonable Delay

30. On the factual narrative of ABSA, the Public Protector received a complaint from a Director of the Institute for Accountability in Southern Africa ("IASA"), Adv Paul Hoffman SC, to investigate the failure of the South African government to act upon the CIEX Document, on or about 10 November 2010.

31. The Public Protector is said to have thereafter began investigating the complaint in 2012. On 21 April 2016 ABSA received a letter from the Public Protector, advising that the Public Protector was investigating the failure to implement the CIEX report.

32. The account provided by the Reserve Bank, on the commencement of the investigation, is substantially the same as that provided by ABSA, other than that the Reserve Bank knew of the investigation in 2011 through media reports, which proved to be true, in February or October 2013, when the Reserve Bank obtained confirmation from the Public Protector.

33. In terms of the Public Protector Act, section 6(4) and section 6(5) read with section 6(9), the Public Protector may investigate any matter or decline to investigate any matter that is referred to the office of the Public Protector.

34. The subject matter of these proceedings, as raised in the complaint submitted by the Director of *IASA*, was referred to the Public Protector in November 2010, and the Public Protector resolved to investigate the complaint, as far back as 2012.

35. A decision, and/or the exercise of power, on whether or not to investigate a complaint referred to the Public Protector, is separate and distinct from the power to prescribe remedial action.

36. Insofar as the Applicant contend that the remedial action falls to be reviewed, on the grounds that the Public Protector did not have jurisdiction to investigate the matter, I submit that such a challenge ought to have been brought without unreasonable delay, and not later the 180 days from the point in 2012 when the Applicants became aware of the fact that the Public Protector was investigating the complaint by the Director of *IASA*.

37. At best for the Applicants, the review application, founded on the jurisdiction point, ought have been instituted no later than July of 2013. 10

38. To the extent that the Applicants have fallen foul of section 7(1) of PAJA, the Court has no jurisdiction to entertain the review application, without the extension of the applicable time periods in terms of section 9(1) of PAJA.

39. Absent the First Respondent's consent, the Applicants are obliged, insofar as they rely on the alleged lack of jurisdiction of the Public Protector, to bring an application for the variation of the time periods, and they have not done so.

40. Apart from the foregoing, I submit that ABSA does not have a right to resist proceedings instituted against a third party for the recovery of money lawfully given to it.

41. An action that directs that proceedings should be instituted, as against a third party, to recover money unlawfully given to ABSA, cannot be said to have a direct and external legal effect on the rights of ABSA.

42. On this footing, as well, ABSA does not make out an administrative action, as such the current proceedings, to the extent that they are conceived under PAJA, are fatally defective.

THE PUBLIC PROTECTOR'S JURISDICTION TO ACT

43. I deal first with **the Public Protector's discretion to investigate a complaint or matter reported more than two years after the occurrence of the incident.**

It is alleged that the Public Protector has strayed beyond her entitlement to act in terms of the empowering legislation, in that the lifeboat transactions occurred from May 1985 to October 1995, and more than two years elapsed thereafter before the investigation was started.

44. I shall also deal with the National Treasury's contention that the Public Protector had no jurisdiction to entertain matters which came to the fore before the establishment of her office.

45. Section 6(9) of the Public Protector Act provides 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*".[emphasis added]

46. In terms of section 6(9), it is clear that the Act permits the exercise of discretion to investigate matters outside the two-year time frame. The Public Protector exercised her discretion having taken into account the following special circumstances (summarized below, and to be read together with the contents of the Report):

46.1. The manner in which the simulated agreements were entered into and public money made available to Bankorp Limited and later to ABSA contrary to the principles of assistance of last resort;

46.2. The amount involved and the manner in which recovery has been prevented without any valid reasons;

46.3. The possibilities of criminal prosecution subsequent to the investigation on the improper and unlawful conduct of then employees of the S A Reserve Bank who were involved in the illegal transaction. In terms of section 4(2) of the Special Investigating Units and Special Tribunals Act, 1996 (Act No. 74 of 1996), the Special Investigating Unit ("SIU") must, as soon as practicable after it has obtained evidence referred to in subsection (1)(d), inform the relevant prosecuting authority thereof, whereupon such evidence must be dealt with in the manner which best serves the interests of the public.

46.4. The illegal gift to Bankorp by the Reserve Bank took the form of public funds amounting to possibly billions of Rand, which money could be spent to provide social assistance such as building over 15 000 RDP houses for the benefit of poor South Africans citizen who do not have proper houses and sanitation;

46.5. It was therefore in the public interest that this matter should be properly investigated to ensure that such improper and illegal conduct should not be repeated in the future.

47. The Public Protector has the discretion in appropriate circumstances to investigate any complaint, notwithstanding that the events that form the subject matter of the complaint occurred more than 2 year prior to the lodging of the case.

48. On receipt of the complaint by the Director of IASA, the Public Protector excised her discretion to investigate the complaint, notwithstanding that more than 2 years had lapsed from the date of occurrence.

49. South Africa's policy around the crimes and atrocities that were committed prior to our democratic dispensation is that there has to be full and frank disclosure, which must be followed by reconciliation. It is in that spirit that the Public Protector resolved to conduct an investigation into the circumstances around the granting of loans to Bankorp.

50. The other factors that weighed heavily in favour of conducting the investigation, within the context of the complaint and for present purposes, were the following:

50.1. The amount of money involved was considerable - approximately, R1 500 000 000-00 (One Billion, Five Hundred Million Rand). The current value of the amount could well be over R50 000 000 000-00 (Fifty Billion Rand).

50.2. On our preliminary requests for documentation around the granting of the loans and the repayment, we were told that the documents were missing.

50.3. The role players, as at the inception stage were identified to be ABSA, the Reserve Bank and Sanlam. They are all still in existence, they

could assist in providing information necessary to get to a full and frank disclosure around the circumstances, and thereby pave the way to resolution of the issue.

50.4. There was a great national interest in the subject matter. The national interest in the matter continues and is evident from the media attention that these proceedings have received.

51. Upon the balance of the various factors at play, and on the exercise of discretion, the Public Protector resolved to conduct an investigation – lawfully, it is submitted.

52. I turn now to deal with the **Public Protector's discretion to investigate a complaint or matter which came to the fore before the establishment of the Office of the Public Protector**

52.1. With regard to the discretion which extends to matters that occurred before the Act came into operation, my submission is that the Constitution and the Public Protector Act provided the Public Protector with wide investigative powers with no limitations, except in special circumstances (section 6(9) of the Public Protector Act) and in relation to court decisions (section 182(3) of the Constitution).

52.2. The Public Protector Act, 1994 (Act No. 23 of 1994) was assented to on 16 November 1994 and its commencement date was 25 November

1994. The agreement between Bankorp and the S A Reserve Bank, dated 13th July 2015, was concluded after commencement of the Public Protector Act.

52.3. The Report under review (Report No:8 of 2017/18) relates to the allegations of:

52.3.1. maladministration, corruption, misappropriation of public funds;

52.3.2. the failure by the South African Government to implement the CIEX Report; and

52.3.3. the failure by the South African Government to recover public funds from ABSA Bank.

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52.4. The CIEX report was issued in 1999, but the agreement between CIEX and government was entered into in 1997, after the commencement of the Public Protector Act, and therefore, failure by the South African Government to implement the CIEX Report and to recover public funds from ABSA Bank arose after the establishment of the Office of the Public Protector. In any event, the office of the Public Protector was established in terms of section 110(1) of the (interim) Constitution of the Republic of South Africa, Act 200 of 1993, which provided that "there shall be a Public Protector for the Republic".

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52.5. The allegation that Public Protector has no jurisdiction to entertain the investigation of the illegal gift to Bankorp is unfounded and has no legal basis, as the office of the Public Protector was established as far back as 1993 and the illegal gift continued until 1995, more than a year after the establishment of the Office of the Public Protector.

52.6. It is my further submission that considering the nature of the illegal transactions, the amount involved in the illegal transactions and the possibility of criminal prosecution of those who may be found to have committed offence when entering into illegal transaction, special circumstances existed which justify the investigation.

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53. Apart from the foregoing, I submit that ABSA does not have the right to resist proceedings instituted against a third party for the recovery of money unlawfully given to Bankorp.

54. Any action that directs that proceedings should be instituted as against a third party, to recover money unlawfully given to ABSA, cannot be said to have a direct and external legal effect on the rights of ABSA.

55. On this footing, as well, ABSA does not make out that the action decided upon in the Report constitutes administrative action for purposes of PAJA.

SUMMARY OF INVESTIGATION AND COMPLAINT BY ADV HOFFMAN SC

56. On 10 November 2010 Adv Paul Hoffman SC, the Director of the Institute for Accountability in Southern Africa, lodged a complaint with my office in which he alleged that the Government and SARB failed to implement a report prepared by CIEX Limited ("the CIEX report") and to recover misappropriated money that had been unlawfully loaned or advanced by SARB to Bankorp Limited (which was later acquired by ABSA). The CEIX report described the misappropriated money as an "*illegal gift to Bankorp/Absa of R 3.2 billion Rand, dressed up as a lifeboat*".

57. The investigation in this matter was approached using an enquiry process that seeks to find out:

57.1. What happened?

57.2. What should have happened?

57.3. Is there a discrepancy between what happened and what should have happened and if there is deviation does that deviation amount to improper conduct or maladministration?

57.4. In the event of improper conduct or maladministration what would it take to remedy the wrong or to place the Complainant as close as possible to where they have been but for the maladministration or improper conduct?

57.5. The question regarding what happened was resolved through a factual investigation relying on the evidence provided by the parties and independently sourced during the investigation and making a determination based on balance of probabilities.

57.6. In this report under review, the factual enquiry principle focused on whether the South African Government and South African Reserve Bank failed to recover public funds owed to government by the ABSA Bank and other entities listed in the CIEX report.

58. Following receipt and analysis of the complaint my office identified and investigated *inter alia* the following issues: 10

58.1. Whether the Government improperly failed to implement the CIEX report, after commissioning and paying for it.

58.2. Whether the Government and SARB improperly failed to recover from Bankorp, or ABSA, an amount of R 3.2 billion cited in the CIEX report.

58.3. Whether the South African public was prejudiced by the conduct of the Government and SARB and if so, what steps ought to be taken to ensure justice.

59. During the course of our investigation we had various meetings, interviews and correspondence with the complainant and various other persons. These

included representatives of ABSA, SARB, Treasury and the Minister. We also considered various documents and applicable laws and policies to determine if there had been maladministration or improper conduct by the Government. I deal with all these more fully below.

60. In summary, our investigation established that Bankorp received an illegal and irregular gift or donation from SARB, in the amount of R 1.125 billion, and that both the Government and SARB have failed to take steps recover the amount.

UNLAWFULNESS OF THE LIFEBOAT SCHEME

Background to the Lifeboat given to ABSA

61. The events around the advancing of the loans have been characterized, in the affidavit of ABSA, as three packages of financial assistance, which occurred within the remit of the Reserve Bank's competence as a lender of last resort.

62. As at the commencement of the meetings that occurred over time, the officials representing both the Reserve Bank and ABSA confirmed, to the Public Protector, that it was true, as was suggested in the CIEX report, that the Reserve Bank had loaned some R1 500 000 000-00 (One Billion, Five Hundred Million Rand), by the year 1991, from public funds.

63. The year 1991, in the timeline of our country's history, is characterized by uncertainty around what would become of the envisaged democratic State, which was being conceived. The uncertainty that existed was reported, in various media reports, to have induced the looting of State resources, by those that were entrusted with the administration of the State affairs.

64. South Africa's policy around the crimes and atrocities that were committed prior to our democratic dispensation is that there has to be full and frank disclosure, which must be followed by reconciliation. It is in that spirit, that the Public Protector resolved to conduct an investigation into the circumstances around the granting of loans to Bankorp.

65. Other factors that weighed heavily in favour of conducting the investigation were the following:

65.1. In 1985 Bankorp experienced financial difficulties and approached SARB for financial aid. SARB granted a loan of R200 million at an interest rate of 3% to Bankorp, the loan being repayable on or before 31 May 1990.

65.2. The loan was extended by SARB on 18 April 1988, by R100 million on the same terms and conditions. The sum of R300 million was to be repaid in three equal instalments of R100 million per annum, but this was also later amended to create five equal instalments of R60 million commencing on 1 April 1990 and terminating on 1 April 1994.

65.3. On our preliminary requests for documentation around the granting of the loans and the repayment, we were told that the documents were missing.

65.4. The role players, as at the inception stage were identified to be ABSA, the Reserve Bank and Sanlam. They are all still in existence, so they could assist in providing information necessary to obtain a full and frank disclosure around the circumstances, and thereby pave way to reconciliation on the issue.

65.5. There was a great national interest in the subject matter. This national interest in the matter continues and is evident from the media attention that these proceedings have received.

66. Upon the balance of the various factors at play, and on the exercise of discretion, the Public Protector resolved to conduct an investigation.

What the investigation revealed

67. The Reserve Bank and ABSA both suggest that the need for financial assistance to Bankorp arose as a result of the overall effect of the international anti-apartheid sanctions. This is plainly untrue. There is absolutely no evidence of any other bank receiving loans of the nature given to Bankorp, around the same period of time.

68. The truth of the matter is that Bankorp had set itself, through management decisions, on an aggressive growth path, which principally focused on absorbing smaller and weaker banks, as it strove towards monopolizing the financial sector.

69. The management decision to pursue an aggressive growth path and its resultant aggressive acquisition of smaller and weaker banks brought with it the acquisition of a larger debt book, which eventually brought Bankorp into difficulty.

70. In April 1985 Bankorp asked for assistance from the Reserve Bank. The assistance was meant to address the bad debts of Bankorp. The Reserve Bank approved the request and advanced an amount of R200 million with yearly interest of 3%, to Bankorp.

71. The transaction was supposedly authorised under the concept of lender of last resort, which is allegedly a function and role played by all Central Banks.

72. Bankorp did not put up any collateral for the loan. There was also no agreement as to the terms of repayment, save that Bankorp and the Reserve Bank merely agreed that the loan would be repaid, 5 (Five) years later, by 31 May 1990.

73. The absence of repayment terms, which is unusual, particularly given the magnitude of the transaction, remains unexplained even in the affidavits of both ABSA and the Reserve Bank.

74. A year later, in April 1986, Bankorp had not paid a single cent towards the R200 Million loan. Instead, Bankorp approached the Reserve Bank again, seeking yet more financial assistance.

75. The Reserve Bank provided Bankorp with a further R100 Million, with a yearly interest rate of 3%.

76. Just as with the 1985 loan, for R200 Million, Bankorp did not put up any collateral for the loan, and there was also no agreement as to the precise terms of repayment, save that Bankorp and the Reserve Bank merely agreed that the R300 Million would be repaid, in three equal instalments from 1 July 1988 until the amount was paid in full by 31 May 1990.

77. In 1987, a year before the first instalment was due and payable, the Reserve Bank and Bankorp amended the vague repayment terms of the agreement of April 1986, and agreed as follows

    77.1. The agreed instalment amount of R100 Million was reduced to R60 Million; and

OR

77.2. The commencement date of the repayment was extended to 1 April 1990.

78. In March 1990, just a month before Bankorp was due to pay the first instalment on a loan that was granted as far back as 1985, the Reserve Bank further extended the commencement date of the instalments repayments to 1 August 1990.

79. When the first instalment became due and payable, on 01 August 1990, Bankorp was unable to effect payment. Bankorp could not pay R60 million, which was due and owing in terms of an agreement concluded for the first time in 1985.

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80. On 03 August 1990, after Bankorp had received more than three extension in relation to the repayment date, it was evidently clear that Bankorp was unable to repay the R300 million, with the 3% annual interest, and/or the R60 million instalment, the Reserve Bank advanced yet a further loan to Bankorp.

81. This time, the Reserve Bank more than doubled the loan. Bankorp received this further "*assistance*" in the amount of R700 million. Just as with the other loans, Bankorp received this "*assistance*" without having o put up any collateral.

82. The terms of the agreement essentially involved investing the loan granted to Bankorp, by way of a deposit with the Reserve Bank and purchase of domestic government bonds, for an annual return of 16%.

83. On receipt of the 16% yield, on the investment of R1 Billion, the Reserve Bank was to retain R10 Million, leaving Bankorp to retain R150 Million, which was then to be used to service the bad debts of Bankorp. The foregoing arrangement was to ensue for a period of 5 years.

84. R1 Billion was apparently not enough to solve the problem of Bankorp. On September 1991, the Reserve Bank extended yet a further loan in the amount of R500 Million, to Bankorp. The total amount advanced to Bankorp then stood at R1`5 Billion.

85. The ordinary features of the prior agreements still found their way into the 1991 agreement. For example, Bankorp did not put up any collateral for the loan.

86. In relation to the concept of "lender of last resort", the following information was obtained during the investigations:

86.1. There are different expert views on the definition of the concept. One view stresses that lender of last resort action should be limited to market operations that provide liquidity to the system as a whole.

86.2. A contrasting view argues that support for an individual institution should be allowed in view of:

86.2.1. the difficulty of distinguishing between insolvency and illiquidity;

86.2.2. the need for speed of action; and

86.2.3. the likelihood that the event of (large) bank failures may itself shift the demand functions for liquidity in ways that may be difficult to predict.

86.3. A common view seems to be that the lender of last resort function of central banks should not be used to subsidize errors of judgment, since this could give rise to moral hazard, which in turn leads to reckless lending, which reflects misallocation of resources by banking institutions.

87. On assessment it became apparent that the Reserve Bank could have been guided and/or informed by one of the views, as such the losing view could well have characterized the decision, to fund Bankorp negatively. So a further investigation was called for. This further investigation entails the sale of Bankorp, which was eventually acquired by ABSA.

88. This investigation leads to April 1992. At the time of the acquisition, according to ABSA, Bankorp was worth R1'222 Billion. At that time Bankorp owed the Reserve Bank R1'5 Billion.

89. When ABSA acquired Bankorp, the primary condition was the *"assistance"* which the Reserve Bank advanced to Bankorp must remain as such until the agreed period of 5 years.

90. This meant that ABSA would receive R225 Million annually from the 15% interest yield, over a period of five years.

91. After the acquisition of Bankorp, ABSA received R1'125 Billion from the Reserve Bank, in terms of the loan agreement of 1991. This is confirmed by both ABSA and the Reserve Bank.

92. The amount was generated, as I have said earlier, from a 16% interest yield on the R1'5 Billion, of public funds invested by deposit with the Reserve Bank and held in government bonds.

93. In the very same investment, of the very same amount, which would have yielded the same result of 16%, the Reserve Bank accepted and contented itself with a yield of a mere 1% and forfeited the entire 15% (R1'125 Million) to ABSA.

94. Bankorp/ABSA never paid a single cent to the Reserve Bank.

95. In fact, I challenge ABSA to demonstrate, in the replying affidavit, to show a single payment to the Reserve Bank.

96. A loan stands to be repaid. Anything other than a loan is a gift or donation. The Reserve Bank is not authorised to grant loans.

97. Either way, the loan must be repaid. If the R1'125 Billion was not a loan, then it was a gift or donation, which the Reserve Bank was not authorised to give.

98. ABSA and the Reserve Bank make the contention that Bankorp was acquired at fair value. This is untenable, even on the version of both ABSA and the Reserve Bank, for the following reasons:

    98.1. At the time of its acquisition, Bankorp had financial difficulties such that it had to borrow money from the Reserve Bank.

    98.2. Bankorp owed the Reserve Bank R1'5 Billion.

    98.3. ABSA paid R1'230 Billion to the shareholders of Bankorp (a topic to which I shall revert)

99. On the version of both ABSA and the Reserve Bank, ABSA acquired and paid for Bankorp by paying enough to reduce the known liability to the Reserve Bank to R270 Million.

100. If the version of ABSA and the Reserve Bank is understood in its proper context of the fair value, then it must be accepted that Bankorp was insolvent.

101. If that is so, then there arise numerous other issues, such as the lending of huge amounts to an insolvent private company, particularly by the lender of last resort.

102. Reverting to the shareholders of Bankorp, I must mention the Sanlam Group, which now owns shares in ABSA.

103. Sanlam Group acquired shares in ABSA by way of a swop. ABSA merely gave to Sanlam Group shares to the value of the acquisition amount, and business went on as usual.

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The CIEX report

104. CIEX is a covert UK based recovery agency headed by Mr Michael Oatley, which was contracted by the South African Government ("the Government") to assist in investigating and recovering misappropriated public funds and assets allegedly misappropriated during the apartheid regime. A copy of the CIEX report is attached as "*MR8*" to ABSA's founding affidavit. (p. 1168)

105. Although the CIEX investigation focused mainly on the unlawful aid to ABSA, the report also deals with other unlawful transactions that caused financial loss against the Government.

106. In its report, CIEX records that it discovered "*the existence of the illegal gift to Bankorp/ Absa of R 3.2 billion Rand, dressed as a Lifeboat*". (p. 1173)

107. The CIEX report suggested various ways in which the illegal gift could be recovered from ABSA, outside of pursuing a civil claim. This is because there were concerns at the time that a civil claim against ABSA could have a negative impact on the South African financial markets and currency.

108. On 06 October 1997, the Government, represented by Mr Billy Masetlha (from the South African Security Service) and CEIX, represented by Mr Michael Oatley, concluded a memorandum of agreement in which they agreed that CIEX would use its best endeavors to provide intelligence and advice in relation to *inter alia* "*Obtaining such restitution as is practicable for illegal subventions provided by the SARB to ABSA and other institutions*". A copy of the memorandum is attached as "Appendix A" to the ABSA's founding affidavit (p. 1218)

109. Despite the recommendations in the CEIX report and the concluded memorandum of agreement, SARB and the South African Government have not taken steps to recover the amounts that were unlawfully obtained by ABSA.

Judge Heath's SIU investigation

110. On 07 March 1998, President Mandela issued Proclamation No. R. 47, 1998 in which he appointed Judge Willem Heath, as head of the SIU, to conduct an investigation into the Lifeboat or donation given by SARB to ABSA.

111. Since I do not have a final report by Judge Heath, I am uncertain whether a final report was prepared or whether the investigation was finally or officially closed. The Presidency, in response to my request for a copy of the final report, indicated that they could not find such a copy and I have not been otherwise able to find it. However, on 1 November 1999, Judge Heath issued a media release that contained a summary of his findings. A copy of the media release is attached to ABSA's founding affidavit, marked "MR10". (p. 1228) 10

112. The media release *inter alia* stated that:

112.1. "*The Special Investigating Unit formed the view that in terms of South African Law, this particular transaction could be challenged in civil proceedings.*" (p. 1234)

112.2. "Although it seems clear that "Lifeboats" are internationally accepted, the circumstances, mechanics and lack of safeguards to ensure saving the ailing bank of this particular "Lifeboat" amounted to an ***act not customarily performed by central banks and was therefore not authorised by the Reserve Bank Act****. The Unit formed the view that the transaction amounted to a donation of R 1 125 Million, which* ***donation was simulated to appear to be a loan and that such transaction was not authorised by the Reserve Bank Act****, as Section 10 empowered the Reserve Bank to make loans but not donations."* (p. 1235) [emphasis added]

113. Although Judge Heath found that there was a legal basis to pursue a claim for the recovery of the illegal 'donation', he was concerned that pursuing such a claim would lead to uncertainty amongst local and international investors and depositors and result in a run on the banks. For this reason, the SIU decided not to pursue the claim for the illegal donation.

Report of the Davis Panel

114. SARB appointed a panel of experts chaired by Judge Denis Davis ("the Davis Panel"), to conduct an investigation into the donation by SARB. Amongst the panel's terms of reference was establishing whether SARB in providing financial assistance to Bankorp contravened the SARB Act and whether the provision of financial assistance was in accordance with internationally accepted principles of best practice and SARB's financial policies and

procedures. A copy of this report is attached to ABSA's founding affidavit, marked "MR11". (p. 1245)

115. The Davis Panel found that overall, the financial assistance to Bankorp was flawed and that there was a simulated transaction to disguise SARB's financial assistance as a loan, when it was in fact a donation. (p. 1358)

116. The Davis Panel also found that **SARB's flaws were serious and that it acted outside its statutory powers**. (p. 1360)

The transaction was unlawful

117. Therefore the reports by CIEX, Judge Heath and Judge Davis all found that SARB acted irregular and/or unlawfully. The CIEX report determined that Lifeboat to Bankorp amounted to an illegal act. Judge Heath found that the financial assistance was not authorised by the SARB Act and was subject to a civil claim. Judge Davis found that the financial assistance to Bankorp was in violation of the SARB Act and constituted a simulated transaction.

118. Our investigation and the Report also determined that SARB had given Bankorp an illegal and unlawful donation that contravened section 10(1)(f) the SARB Act. This is illustrated by the Report.

119. The Lender of Last Resort ("LLR") function requires that the bank that is to be assisted must put up some good collateral in order to ensure that the LLR

function does not support mismanagement. This is a requirement which is obviously prudent and responsible. There is no evidence that SARB acquired good collateral from Bankorp. The loan granted by the SARB at the time was therefore unsecured and not in line with the ordinary requirements and practice in relation to the LLR function.

120. Furthermore, the 3% interest rate in respect of **the mid-1980 transaction** was too low compared to the rate that was prevailing in the market. The 10 year government bond yield, at the time, was on average 16%. Therefore 3% was far too low to qualify as a penalty rate. Furthermore, the inflation rate at the time was also around 16%, which means, that in real terms, SARB allocated real capital that was 13% of the loan advanced. All this while Bankorp was 'earning' interest at no cost or risk to itself.

121. Given the lack of collateral and the negative real interest rate that was not protecting the assets of SARB, which were held by Bankorp, there was fertile ground for moral hazard to emerge. The SARB officials, being economists, were aware or ought to be aware of the theory of moral hazard, but they did not take measures to mitigate it. It was therefore not surprising that, despite having been given the status of "too big to fail", Bankorp failed to repay the funds to SARB in the stipulated period.

122. There is also no evidence that there was a management shake-up, and that the shareholders of Bankorp suffered financial loss. Instead the assistance seems to have not affected the management and the

shareholders of Bankorp. Bankorp continued to be managed without being put under the curatorship of the SARB.

123. In an interview conducted by my predecessor, Adv. Madonsela (p.28 of the transcript), Dr Stals claimed that Bankorp was not insolvent, as its assets exceeded its liabilities, but it could no longer comply with the minimum capital requirements of the Banks Act.

124. The above argument by Dr Stals that Bankorp was solvent begs the question: if Bankorp did not have solvency problems, then why could it not put down good collateral either through a good asset of its own or equity to the public?

125. The ceding of "assets" in the form of the government bonds which the SARB had acquired on behalf of Bankorp is not equivalent to putting up good collateral in the sense contemplated in the literature. The bonds which were held on behalf of Bankorp by SARB were not generated through Bankorp's own operations, they were a result of the loan, a liability, which the SARB had extended to Bankorp. It is for this very loan that Bankorp was supposed to put down its own collateral in order to access assistance from the South African Reserve Bank.

126. Lastly, following receipt of the three review applications, we engaged the services of Dr Tshepo Mokoka, an economist and lecturer at Wits, to consider the true nature of the Lifeboat scheme. He has similarly concluded that there was an **unlawful simulated transaction that resulted in a misappropriation of monies**. His report, together with his curriculam vitae

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(which I submit respectfully shows that he is qualified as an expert to express his opinion on such matters) and confirmatory affidavit, are attached marked [V3 - P238, V4 - P241 and V4 - P285] **"PP1", "PP2" and "PP3"** respectively. I respectfully refer to those annexures, and pray that their contents be read as if incorporated herein.

ALLEGED ERRORS OF FACT

127. ABSA alleges that I relied on various of erroneous facts that can be placed into three main categories:

127.1. First, that ABSA (as opposed to Sanlam/ Bankorp) benefited from the SARB's financial assistance;

127.2. Second, that SARB's financial assistance did not benefit the South African public; 10

127.3. Third, that I record certain erroneous statements of third parties, but never clarifies that they are in fact erroneous.

Absa's benefit from the donation

128. I deny that ABSA did not receive any benefit from SARB's financial assistance.

129. The financial assistance to Bankorp included an agreement that Bankorp would receive an annual 15% interest yield (amounting to R 225 million per year) from the loan funds received from SARB and invested into SARB/ government bonds. This was an irregular agreement that allowed Bankorp to receive R 225 million interest per month that rightly should have accrued to SARB. This irregular agreement was in place between the period 1991 and 1995

130. After acquiring Bankorp in 1992, ABSA continued to receive the annual 15% interest yield or annual R 225 million until the irregular agreement came to an end. There was thus a direct benefit.

131. Furthermore, I deny that ABSA paid fair value. ABSA did not pay any money in that there was no transfer of funds. There was in fact a share swop in terms of which Bankorp and ABSA exchanged 100 shares for every 390 shares of Bankorp shares to the value of R1 230 million. This gave ABSA the opportunity to own Bankorp and for Sanlam to own 22.7% of ABSA due to the share swop. Therefore, the ownership of ABSA shares by Sanlam was solely as a result of the merger with ABSA.

132. The share swop was based on an evaluation to the effect that Bankorp's Net Asset Value was R1 222 million, which amount was exclusively made up of or attributable to the SARB loan or assistance.

133. In so doing, ABSA, at a minimum, enabled Bankorp shareholders (Sanlam and other smaller shareholders) who, given the true value of Bankorp, (that is, without the SARB funds, Bankorp was without value and in fact, insolvent) were allowed to receive a benefit in the sum of R1 230 million to which they were not lawfully entitled - at the expense of the public.

134. It cannot seriously be disputed that Bankorp shareholders, who became ABSA shareholders, received a benefit in circumstances where all the evidence indicates that Bankorp was, but for the assistance, worthless.

The alleged benefit to the South African public

135. Although it was open to SARB to adopt measures to avoid the financial collapse of Bankorp and protect the deposits in the bank, it needed to act lawfully and in a financially sound manner.

136. In my view it cannot be open to SARB and ABSA to contend that they acted to the benefit of the South African public when the financial assistance provided by SARB was reckless and *ultra vires*.

137. In addition, as mentioned above, Bankorp and ABSA irregularly received payments of R 225 million per month for five years. It cannot be to the benefit of the South African public to have forfeited or given away this substantial sum of public money.

138. The financial aid given to ABSA was in the form of funds which belonged to the people of South Africa and SARB's failure to recover it has prejudiced the nation as the misappropriated money should have benefited the broader society, instead of a handful of Bankorp and/or ABSA shareholders.

139. The average cost of building a decent RDP house in South Africa is an estimated amount of R100 000.00 and an amount or R1125 million due and payable to the South African Government could be used for the construction of over 11 000 RDP houses for the benefit of the poor South Africans.

Erroneous statements of third parties

140. The alleged personal profits made, or fraud, on the part of some of ABSA's directors was not the focus of my investigation. My investigation and report did not interrogate the veracity of these claims and I do not make any findings in this regard.

141. However it cannot, without further investigation, be discounted that there are officials from ABSA or SARB who may have unduly directly benefited from what was in truth an unlawful loan or donation. It is for this reason that my remedial action is not limited to the recovery of money from ABSA. The SIU can, in its investigation, consider and investigate whether there were any officials who directly benefited from unlawful loan, and possibly seek to recover funds from them. If the SIU obtained evidence regarding or which points to the commission of an offence, the SIU shall, in terms of section 4(2)

of the Special Investigating Units and Special Tribunals Act, 1996 (Act No. 74 of 1996), inform the relevant prosecuting authority thereof, whereupon such evidence must be dealt with in the manner which best serves the interests of the public.

THE BASIS AND REASONS FOR THE REMEDIAL ACTION

The principles and objectives of remedial action

142. Remedial action takes the form of a directive or recommendation by the Public Protector regarding any improper conduct in state affairs, or in the public administration in any sphere of Government, and it is intended to redress or correct the wrong or to revise the procedures to ensure that such complaints are less likely to occur in future.

143. In terms of section 182(1) (c) of the Constitution of the Republic of South Africa, the Public Protector has the power to take appropriate remedial action. As confirmed by the Constitutional Court, in the matter of *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others (CCT 143/15; CCT 171/15) [2016] ZACC 11; 2016 (5) BCLR 618 (CC); 2016 (3) SA 580 (CC) (31 March 2016)*, the Public Protector is empowered to take appropriate remedial actions, irrespective of how sensitive, embarrassing and far-reaching the implications of her report and findings, if it is the best attempt at curing the root cause of the complaint.

144. In the above-mentioned constitutional court case, the court defined *"appropriate remedial action"* to mean an effective, suitable, proper or fitting remedy **to redress or undo the prejudice**, impropriety, unlawful enrichment or corruption, in a particular case.

145. The constitutional court further held that *"Only when it is appropriate and practicable to effectively remedy or undo the complaint would a legally binding remedial action be taken".*

146. SARB and the Government failed to recover the lifeboat or "illegal gift" by SARB to Bankorp/ABSA. As an independent Constitutional institution, established to support and strengthen constitutional democracy, I could not ignore the serious allegations or suspected improper conduct of misappropriation of state funds. Any failure to investigate such serious allegation would have constituted a serious breach or violation of my constitution obligations.

PRESCRIPTION

147. In terms of the remedial action contained in the report I require that steps be taken to seek the re-opening or amendment of the relevant Proclamation in order that the amount of R1,25 billion be recovered by the Special Investigative Unit ("**SIU**"), which amount is comprised of 16% interest accumulated over a period of 5 years. ABSA and SARB allege that this claim has prescribed.

148. ABSA submits that the facts establish that any debt originally owed by Bankorp has since been discharged. (This is disputed.) It submits further that should it be found that the debt has not been discharged, then any debt owed has since prescribed in that:

148.1. SARB was a party to the agreements and was mandated to lawfully enter into the said agreements;

148.2. More than 21 years has elapsed since the debt was allegedly due;

148.3. SARB would have knowledge of the debt after the CIEX Report was issued at best.

148.4. More than 17 years have passed since the CIEX Report was made available at the end of 1999;

148.5. SARB is not the State for purposes of the Prescription Act;

148.6. In terms of section 11(b) of the Prescription Act, a debt prescribes after a period of fifteen years in respect of any debt owed to the State and arising out of an advance or loan of money.

148.7. The correct prescriptive period for SARB is 3 years for a contractual debt.

148.8. The debt has prescribed and a claim on this basis would be untenable.

149. SARB contends that prescription is the obstacle to any remedial action designed to recover the amount of R1,125 billion from ABSA, to the extent that it existed and that in any event the alleged debt prescribed three years after it was due.

150. My submission is that prescription is a defence that is available to the litigant during civil proceedings for the recovery of a debt.

151. I derive my powers in terms of the Act and the Constitution. I submit that it is manifestly premature to raise – let alone for this Court to decide - the defence of prescription. My report is not requiring or effecting the recovery of the debt from ABSA and other parties. What the report seeks to action is to advise and inform the state of the available remedies in law. The recovery of a debt will be the subject of a separate legal process which is instituted at the instance of the state. At that stage, prescription can be raised – and decided by the Court then, having regard to all the factual circumstances. The SIU investigation may well find additional facts not unearthed in our investigation which could have a material bearing on the issue of prescription.

152. Accordingly, the defence of prescription is not ripe for determination in this matter and will only be available to ABSA and to the SARB if and when civil proceedings to recover the misappropriated funds unlawfully given to ABSA / Bankorp in the amount R1.125 billion, may be instituted by the SIU.

153. That said, I should not be construed as dictating the process by which the SIU can recover and investigate the unlawful lifeboat. Therefore, either a **criminal process,** alternatively a **civil process** may be followed, in accordance with the proclamation.

154. An investigation by the SIU is the most reasonable and rational means to get to the bottom of the saga and achieve redress.

155. The remedial action is not directed at ABSA but to the SIU. ABSA does not have the requisite standing to even raise the issue of prescription in these review proceedings.

156. My submission, in that regard, is strengthened by the ordinary reading of the remedial action, for the following reasons:

156.1. The remedial action, insofar as ABSA is mentioned, directs that steps be taken with a view to the recovery of the public funds given to ABSA.

156.2. There is no suggestion from the wording of the remedial action, that the amount should exclusively or necessarily be recovered from ABSA.

156.3. The R1.125 Billion may well be recovered from either the shareholders of Bankorp or the other role players in the transaction. The SIU

investigation may even identify other role players who have not already been uncovered by the investigation of the Public Protector.

156.4. The issue of prescription can only arise when the SUI investigation reveals who is liable for the re-payment of the public funds unlawfully given to ABSA.

156.5. The facts necessary to found a point of prescription can only be determined at that stage. Provided that such party, as would have been identified, does raise the issue, as required in terms of the Prescription Act.

156.6. Attempts to raise the issue now, are completely unhelpful and speculative. At this point, I submit it is appropriate to wait for the SUI investigation, if it does unfold, to:

156.6.1. identify the party liable to repay the R1 125 Million; and

156.6.2. determine the process of recovering such amounts;

156.7. It is only upon the determination of the foregoing that a Court could meaningfully consider the issue of prescription.

156.8. The foregoing contentions apply similarly against SARB and National Treasury.

157. As such the issue of prescription cannot arise, at least not against the people of South Africa.

ABSA and SARB's COMPLAINTS OF PROCEDURAL UNFAIRNESS

146. ABSA contends that I have violated its right to procedural fairness in the manner in which I imposed the remedial action, in two main respects:

157.1. that I refused to provide ABSA with documents underlying the final report on which she placed material reliance; and

157.2. that I also relied on the CIEX report which in turn made adverse findings against ABSA without the CIEX affording ABSA an opportunity to be heard.

158. It is further contended by ABSA in its supplementary affidavit that there were five categories of documents that the Public Protector had failed to give ABSA timeously or at all in the course of the matter, being:

158.1. documents to which the Public Protector expressly referred in the provisional report which she did not give to ABSA before publishing the provisional report;

158.2. documents to which the Public Protector expressly referred in the provisional report which she did not produce in the record;

158.3. documents to which the Public Protector expressly refers in the final report which she did not produce as part of the record;

158.4. other documents which should have, but did not, form part of the record; and

158.5. documents that are included in the record but are incomplete.

159. In answer to the contentions made above by ABSA, I contend that

159.1. Section 7(2) of the Public Protector Act inter alia deals with investigations which are ongoing and it provides that: "*no person shall disclose to any other person the contents of any document in the possession of a member of the office of the Public Protector or the record of any evidence given before the Public Protector, the Deputy Public Protector or a person contemplated in subsection (3) (b) during an investigation, unless the Public Protector determines otherwise.*"

159.2. the only time any person appearing before me by virtue of section 7(4) of the Act, may have regard to the documents or records referred to in subsection (2) is when they are reasonably necessary to refresh the memory of the person appearing before me.

160. ABSA has been afforded the opportunity to make representations after the Interim Report was issued to all affected parties in December 2016, and also provided with the record of proceedings that the Public Protector relied on when taking the remedial action under review.

160.1. ABSA, SARB and the Minister of Finance all made representations to me, which I took cognisance of when my final report was formulated. The representations are annexed to ABSA's founding affidavit, and [V4 - P295, V4 - P345 and V5 - P347] marked **"PP4"**, **"PP5"** and **"PP6"** respectively.

160.2. Consequently, the principles of fair process have been observed.

161. My findings in the report, especially regarding the lifeboat scheme, was not based on the CIEX report, but in law. SARB did not comply with section 10 of the SARB Act and therefore, the loan was irregular and unlawful.

162. In respect of the allegation that CIEX did not afford ABSA the right to be heard when it compiled the CIEX report, I contend that whilst in law public bodies are expected to observe procedural fairness, there is no such expectation in respect to private bodies.

163. Consequently, the fact that ABSA may have not made representations to CIEX during its investigations is immaterial for the purposes of these review applications, nor can I even attempt to comment thereon on behalf of CIEX.

Whatever procedure was followed by CIEX does not, I submit, affect the procedural fairness of the process which I and my office followed.

164. The SARB contends that fair process has not been followed in that:

164.1. The remedial action in the preliminary report is not similar to the remedial action in the Final Report and none of the parties were given an opportunity to comment thereon, more so SARB was not given an opportunity to comment on the lawfulness of the remedial action;

164.2. I indicated to Dr Stals that neither I nor my predecessor were investigating the issue of interest and yet my finding is based on interest;

164.3. I conducted two interviews with the Department of State Security and Mr Goodson, and SARB was not given an opportunity to comment on the input of either of these interviewees, especially because Mr Goodson's views are reflected in the Report and have influenced the findings and remedial action:

165. I state the following in response to the contentions identified above:

165.1. **Different Remedial Action in Final Report**

a. The commission of enquiry was intended for recovery and therefore there is no substantial difference between the SIU investigating and a commission of enquiry investigating and recovering;

b. ABSA and SARB are not implicated on the remedial action, although they may be affected, but they are implicated on the findings (the illegal transaction) made, which findings remained the same.

c. Therefore the parties were not in accordance with the prescripts entitled to be given an opportunity to further comment on any amendments that were made to the remedial action as they did not extend to an amendment of my findings.

d. In any event, the remedial action proposed in the section 7(9) notice was not significantly and materially changed, as the recovery of the recovery of R1 125 billion (as contained in paragraph 8.2.3 [V6 - P474] of the section 7(9) notice) and the investigation of any monies due from institutions cited in CIOEX report [V6 - P475] (as contained in paragraph 8.3.2 of the section 7(9) notice), still form part of the final remedial action.

165.2. **Investigation was not based on Interest**

a. The issue under investigation was the misappropriation of funds and not specifically the issue of interest.

b. The meeting was held with my predecessor.

c. Therefore Mr Stals' view is not the determining factor on the basis of the investigation.

165.3. **Interviews with Mr Goodson**

a. In terms of section 7(4) *(b)* of the Public Protector Act, I may request an explanation from any person whom I reasonably suspect of having information which has a bearing on a matter being or to be investigated. 10

b. I agree that I have interviewed Mr Goodson, as he was a former board member of the SARB Board and had inherent knowledge on the workings of the SARB.

MEETINGS WITH PRESIDENCY, SIU AND BLF

166. The Applicants have raised various criticism or attacks against the fact that I met with the President, SIU and members of the Black First Land First during

the course of finalising the final report. As demonstrated below, these meetings were not improper and correctly conducted during the course of our investigation.

Meeting with the President

167. Section 7(9) of the Public Protector Act, 1994 (Act No. 23 of 1994) provides that:

> *"If it appears to the Public Protector during the course of an investigation that any person is being implicated in the matter being investigated and that such implication may be to the detriment of that person or that an adverse finding pertaining to that person may result, the Public Protector shall afford such person an opportunity to respond in connection therewith, in any manner that may be expedient under the circumstances".*

168. As already mentioned, in my report I make certain findings concerning the Government and SARB's failure to recover the misappropriated funds and direct them to take remedial action to rectify this. Therefore both the President, as the primary representative of government, and the SIU are implicated as contemplated section 7(9).

169. I provided the Presidency with a notice in term of section 7(9). A copy of the notice is attached marked **"PP7"** [V6 - P410]

170. The Presidency responded to the section 7(9) notice on 28 February 2017. A copy of the response is attached marked **"PP8"**. [V6 - P476]

171. On 29 March 2017, I received an email from the Presidency in which the President called for a meeting. I agreed to have a meeting, which took place on 25 April 2017 A copy of the email requesting a meeting is attached marked **"PP9"** [V6 - P478]

172. I attended the meeting at the Presidency, together with Mr Ntsumbedzeni Nemasisi, the Public Protector's Senior Manager Legal Services and Mr Tebogo Kekana, our Senior Investigator.

173. 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. This is because there is a already a legal determination pending, in the review application of the State of Capture report, concerning whether my office can direct the President to establish a Commission of Enquiry.

174. The agreement between CIEX and the Government of the Republic of South Africa was signed by then Director General of the South African National Intelligence Agency (South African Secret Service (SASS), on behalf of the government. The South African National Intelligence Agency (South African Secret Service) has now become State Security Agency (SSA).

175. It was therefore necessary to have a follow up meeting with the entity that was the signatory to the agreement which gave rise to my investigation. The meeting with the SSA was therefore to confirm the agreement, and to confirm the payment by SSA to CIEX and also to enquire why SSA spent money but failed to follow up the matter on its implementation.

175.1. The meeting was also to establish whether the whole or parts of the CIEX report had in fact ever been implemented and was a necessary part of my investigation of the Government's failure to implement the CIEX report.

175.2. Mr Kekana also attended this meeting, together with officials of SSA and Minister Mahlobo.

Meeting with BLF

176. On 27th December 2016, Black First Land First ("BLF") requested a meeting and according to the letter from BLF, the purpose of the meeting was to discuss the-

176.1. Progress towards the finalizing of the CIEX investigation;

176.2. Progress on BLF's complaint of State Capture by white monopoly;

176.3. Progress in the investigation into the Bapo Ba Mogale matter as well

as the investigation status on a complaint lodged by Alexander Small Scale Developers. A copy of the letter requesting a meeting is attached marked **PP9A.** [V7 - P480]

177. The meeting was arranged for the 12th January 2017 and I attended the meeting together with Mr Kevin Malunga, the Deputy Public Protector, Mr Reginald Ndou, then Acting CEO, and Mr Kekana.

178. After the aforesaid meeting, and on 20 January 2017, Mr Kekana confirmed the issues discussed, including the fact that BLF was requested to make a written submission, which they submitted on 28 February 2017. A copy of the letter from BLF dated 27th December 2016, a copy of the letter from my office, dated 20th January 2017 and a submission from BLF are attached hereto marked **"PP10".** [V7 - P483]

179. It is important to note that none of the demands from BLF did not influenced my finings and remedial actions. For example, issues relating to the establishment of the commission of enquiry and tax implications on the gift to Bankorp are not part of my findings and report

180. These issues raised at the meeting had already been raised with my predecessor in a BLF submission. A copy of the BLF submission dated 06 October 2016 is attached hereto as annexure PPSA...Therefore the meeting could not have had any untoward influence because their submissions had already been received by my office [V7 - P492]

181. Furthermore the suggestion or allegation that I did not disclose my meeting with BLF is incorrect because I included a copy of BLF's submission at page 23, paragraph 4.4.2.17 of my report.

182. There was accordingly nothing untoward with my meeting with the President, SIU and BLF. Although the outcome of the meeting between the Public Protector and any person or submission of any evidence to the Public Protector may influence the direction of my investigation or remedial action to be taken, I always remain independent, impartial and I always exercise my powers and perform my functions without fear, favour or prejudice.

183. Confirmatory affidavits deposed to by Mr Nemasisi, Mr Kekana, Mr Malunga and Mr Ndou are attached hereto as annexure **"PP11"**, **"PP12"**, **"PP13"** and **"PP13"** respectively. [V7 - P501, 504 and 507] [PP14]

RELIEF SOUGHT BY THE APPLICANTS

184. In the premises I respectfully submit that there is no basis for the reviews sought, and that the applications should accordingly be dismissed, with costs.

185. In the alternative, if it is decided by this Court that there is merit in the review, it is submitted that the form of the relief claimed goes too wide, particularly when it seeks to set aside not only the corrective action which I set out in paragraph 7.1 of the Report, but also the findings that make up the Report. I

respectfully submit that even if the relief decided upon falls to be set aside, there is neither a basis or a need to set aside the entire Report. Furthermore, it would, I submit, be appropriate to remit the matter to me for further consideration and, where appropriate, revision. I am advised that legal argument will be addressed in this regard at the hearing of this matter.

AD THE APPLICANTS' AFFIDAVITS

186. I now turn to respond to various the allegations in the various affidavits filed by the applicants. I do not intend to respond to each and every allegation in these affidavits, but only to that those issues have not already been dealt with in the earlier sections of my affidavit.

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187. Any allegation that is not specifically dealt with herein, and is inconsistent with what I have said above, should be taken as being denied.

AD ABSA AFFIDAVIT

Ad founding affidavit

AD PARAGRAPHS 1.1 - 1.3

188. The contents of these paragraphs are noted.

AD PARAGRAPH 1.4.1 – 142.3

189. The allegations contained in these paragraphs are denied.

190. I specifically deny that beyond 23 October 1995 ABSA had no further obligations arising from the financial assistance initially extended to Bankorp which was subsequently acquired by ABSA.

191. The interest rate differential of 15% was part of the financial assistance provided to Bankorp and subsequently to ABSA, and therefore due for repayment.

AD PARAGRAPH 1.4.4

192. The allegations contained in this paragraph are denied.

193. I specifically deny that ABSA acquired Bankorp for fair value and that it is therefore not liable for the debt that Bankorp is owing to SARB.

194. I am advised that ABSA became debtor of SARB in terms of the 1992 "financial assistance agreement" and that ABSA then engaged in a share swap with Sanlam and did not do the same with SARB.

195. I plead in the circumstances therefore that the debt by ABSA remains outstanding and is due to SARB

AD PARAGRAPH 1.4.5

196. Save to deny that no evidence or legal basis provided the allegations contained in this paragraph are noted.

AD PARAGRAPH 1.4.6 – 1.4.11

197. The allegations contained in this paragraph are noted.

AD PARAGRAPHS 1.4.7, (1.4.7.1 - 1.4.7.3)

198. I am advised that ABSA benefited from SARB assistance to Bankorp. The financial assistance facilitated a merger between ABSA and Bankorp, as a result of which ABSA's shareholders benefitted, a fact which is admitted by ABSA Chairman Mr. Hefer in the ABSA annual report of 1992. 10

199. On the same facts that any payment, which ABSA made in its acquisition of Bankorp, was a liability and therefore could not be classified as an asset belonging to Sanlam for which ABSA paid.

200. Further the primary beneficiaries of the Bankorp assistance subsequent to the Bankorp acquisition were ABSA shareholders which shareholders included Sanlam shareholders that were absorbed into ABSA following the merger/ acquisition.

201. In consequence I submit that the findings of the report 8 of 2017/2018 under review in relation to the recovery of the funds is justified and reasonable.

AD PARAGRAPHS 1.4.8 - 1.4.9

202. The allegations contained in these paragraphs are noted.

AD PARAGRAPHS 1.4.10 – 1.4.11

203. Save for admitting that the representations were made by ABSA to the Public Protector pursuant to the provisional report, I deny that ABSA demonstrated as alleged for the reasons already dealt with above.

AD PARAGRAPH 1.5

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204. I am advised that the question raised is a matter of law and that to the extent necessary, legal submissions will be made on my behalf during argument.

AD PARAGRAPHS 1.6 - 1.6.5

205. The allegations contained in these paragraphs are denied for the reasons already dealt with above.

206. The media reports do not constitute conclusive evidence of the conclusion of the investigation. Even if they did, I submit that what is

reported in the media does not cover all the areas that needed to be covered as required by the terms of reference in the proclamation

AD PARAGRAPHS 1.7 – 1.15

207. The allegations contained in these paragraphs are noted.

AD PARAGRAPHS 2.1 – 2.2.29

208. The allegations contained in these paragraphs are denied for the reasons already dealt with above.

AD PARAGRAPHS 2.30 - 2.36

209. The allegations contained in these paragraphs are noted.

AD PARAGRAPH 2.37

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210. The allegations contained in this paragraph are denied, for the reasons already dealt with above.

AD PARAGRAPH 2.38

211. The allegations contained in this paragraph are noted.

212. I however state that the operational CIEX document for the purposes of my investigation was provided to ABSA and my conclusions and findings bear a relationship with that document and it is that document which Judges Heath and Davies considered when they reached their conclusions.

AD PARAGRAPH 2.39

213. The allegations contained in this paragraph are noted.

214. I am advised that it was in the nature of the CIEX operations and mandate it carried out that it did not consult the subject of their investigations.

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215. In the consequent I plead that the omissions of CIEX to consult do not render my investigations and report unreasonable. Further legal argument will be presented in this respect.

AD PARAGRAPH 2.40

216. The allegations contained in this paragraph are denied.

217. I specifically deny that the paragraph quoted from the CIEX document constitutes the summation of the recovery record.

218. The paragraph provides but a part of recovery strategy, this being an initial recovery option that could be employed against ABSA and its shareholders.

AD PARAGRAPH 2.41

219. The allegation contained in this paragraph is denied.

220. The Heath Proclamation detailed the legal process to be followed in prosecuting the recovery process.

221. In consequence failure to prosecute this recovery process is unjustified.

AD PARAGRAPH 2.42

222. The allegations contained in this paragraph are noted.

AD PARAGRAPHS 2.43 - 2.44

223. The allegations contained in these paragraphs are denied.

224. The Heath Commission and the Davis Panel as constituted by SARB did not find the CIEX recommendations to the government to be "coercion". They found instead that the lifeboat scheme was unlawful.

225. There were no official or proper reasons provided by the government for its failure to implement the CIEX report and its failure to recover the monies.

AD PARAGRAPHS 2.45 -2.49

226. Save for noting the Heath's report as alleged, the content is denied.

AD PARAGRAPHS 2.50 - 2.54

227. Save for noting the Davis Panel's report as alleged, the content is denied.

AD PARAGRAPHS 2.55 - 2.78

228. The allegations contained in these paragraphs are noted. 10

229. My office is obliged to furnish information and documentation, which is still subject of investigation and before the release of the final report.

230. My office did not sanction the leak of the provisional report, and confirm that following that incident criminal charges were laid at SAPS Brooklyn and the matter is still under police investigation.

231. The protests and marches cannot conclusively be ascribed to the leaked report.

AD PARAGRAPHS 2.79

232. The allegations contained in this paragraph are denied, for the reasons already dealt with above.

AD PARAGRAPHS 2.80 – 2.81

233. Save for denying that I did not communicate further, the remainder of the allegations contained in these paragraphs are admitted.

AD PARAGRAPH 3.1 – 3.10

234. I deny that I misconceived the role of section 195 of the Constitution as alleged. I am advised this is a question of law and that to the extent necessary, legal submissions will be made on my behalf. The remainder of the allegations contained in these paragraphs are noted.

AD PARAGRAPHS 4.1 - 4.1.3

235. The allegations contained in these paragraphs are denied, for the reasons already dealt with above.

AD PARAGRAPHS 4.2 - 4.5

236. The allegations contained in the paragraph are denied.

237. ABSA also admitted that "the expected future interest stream" was an integral part of the financial assistance from the SARB (the lifeboat), which it claims to have paid.

238. I deny that the SARB's assistance to Bankorp constituted an asset item. The "income stream" from SARB to Bankorp was a liability payable to SARB at some future date by Bankorp or any successor in title to Bankorp.

AD PARAGRAPH 4.6

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239. I deny any omissions as alleged or at all.

240. I plead that the summary as selected by me was for the purpose of my findings. I am not obliged to formulate my Reports in any particular manner. Where I differ with the conclusions of any structure or person it is within my judgment to omit reciting those conclusions with which I differ.

AD PARAGRAPH 4.7

241. I deny that I misrepresented the Davis Report as alleged or at all.

242. I am advised that the benefits, which accrued to Bankorp directly, accrued to ABSA upon ABSA's take over of Bankorp.

243. I am also advised that as clearly stated the 1992 Agreement, ABSA agreed to take responsibility for all the obligations of Bankorp. This includes ABSA also thenceforth being debtor of the SARB.

AD PARAGRAPH 4.8

244. I deny the correctness of the Davis findings and I plead that my findings as contained in the Final Report under review are justified.

AD PARAGRAPH 4.9

245. I deny having deliberately ignored certain facts and findings as alleged. I have provided my analysis upon which I formulated the Report under review and I plead that my findings are justified.

246. I plead that through the 1992 Agreement, ABSA agreed to take over all obligations of Bankorp including the liability for the financial assistance.

AD PARAGRAPH 4.10 - 4.11

247. I deny that the unofficial explanation I made through the media, in particular during interview with Xolani Gwala on Talk Radio 702 on the 20 June 2017 is not cogent.

248. The interview paragraph quoted carries the core aspects of the Report and cannot be faulted in any way.

AD PARAGRAPHS 4.12 - 4.13

249. I deny the allegations contained in these paragraphs.

250. I deny that my finding that ABSA is liable for SARB's assistance is a material error, for the reasons already dealt with above.

AD PARAGRAPH 4.14 - 4.14.3

251. I deny the allegations contained in these paragraphs as if specifically traversed.

252. I reiterate the understanding I have of the structure of the lifeboat, as contained in the Report under review and as detailed under Section B and elsewhere in this Affidavit.

AD PARAGRAPH 4.14.4

253. I admit that ABSA took over the financial assistance.

254. ABSA became the successor in title to all rights and obligations of Bankorp.

AD PARAGRAPH 4.14.5

255. I deny the reasoning by Dr Stalls as provided in the Tollgate inquiry.

256. I am advised that the economic recession at the time did not only face Bankorp but all South Africans, companies and banking institutions.

257. I am advised further that there are other legally acceptable forms of assistance that were available for the SARB to employ which would not have amounted to the unjustified benefit of the few.

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258. I am also advised that a central bank exercises its lender of last resort function through Open Market Operations, which increases the general liquidity of the financial system, including the interbank market, so that liquidity is distributed in a competitive and fair manner among all the banks. That is not what was done here.

259. SARB, having opted to exercise its lender of last resort assistance to Bankrop, was bound to comply with the SARB Act and the internationally acceptable standards in exercising that function, which acceptable standards require that the design of the financial assistance to an individual institution not lead to moral hazard.

AD PARAGRAPH 4.15

260. I deny having accepted that Bankorp used the lifeboat for the purpose of setting off the bad debts owed by their customers.

261. I deny also that the reading of paragraph 6.3.3 of the Report yields interpretation of acceptance as alleged. 10

262. I have never exhaustively, or at all, interrogated how the proceeds of the lifeboat were utilized.

263. I am advised that this aspect warrants an in-depth investigation on its own and hence my remedial action requiring reopening and amendment of Proclamation R47.

264. I am advised that further that the lender of last resort function is supposed to improve the liquidity of the assisted institution. However, as has become apparent, and as ABSA itself now acknowledges, contrary to Dr. Stals, Bankorp was not solvent. Therefore, even though

ABSA may have used the financial assistance to offset bad debts of Bankrop and subsequently ABSA, the financial assistance still remained a liability to be repaid.

265. I am also advised that the use of the funds from the lender of last resort does not relieve the assisted institution of the obligation to repay the financial assistance advanced.

AD PARAGRAPH 4.16

266. I deny having ignored the role of central banks.

267. In my view in the Bankorp case, SARB did not properly perform the acceptable role of "lender of last resort" function. Instead it gave an illegal gift to Bankorp, and ultimately ABSA.

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268. I am advised further that all funds advanced through "the lender of last resort" function of the central bank have to be repaid. Failure to do so would constitute an illegal gift, would be unfair, entail moral hazard and not be in the public interest.

269. In the event an institution fails to repay the lender of last resort, such an institution should be liquidated while protecting the interests of depositors, but the managers must be held accountable and the shareholders should suffer the financial consequences.

AD PARAGRAPH 4.17

270. I admit that the role of lender of last is for the benefit of the general public. However, I maintain that this does not mean that financial assistance extended under such a role should not be repaid.

271. The role of the SARB as lender of last resort directly concerns financial stability. That is why modern central banks such as the Bank of England especially since the 2008 global financial crisis, have distinctively and explicitly identified price and financial stability as objects.

AD PARAGRAPH 4.18

272. I agree that the SARB's mandate was subsequently amended to read as quoted. 10

273. I am advised that the substantial amendments to the SARB Act related to its monetary policy function, and not to other functions, especially its role as lender of last resort.

274. The SARB mandate as it was prior to the amendment of the SARB Act in 1996 does not extricate ABSA from repaying the financial assistance to the SARB.

AD PARAGRAPH 4.19

275. I deny that the information herein was never addressed at all.

276. In reaching the conclusions as contained in the Report under review, I considered Dr. Stals' submission to the Tollgate inquiry and the interview with Adv. Thuli Madonsela. However I differ materially with the deductions made by Dr. Stals, as evidenced by my Report under review.

AD PARAGRAPH 4.20

277. I admit the allegations contained in this paragraph.

278. However, I am advised that, whether justified or not, intervention by a central bank with the objective of averting systemic crisis of the banking sector does not relieve the assisted bank from repaying the financial assistance advanced under the lender of last resort process.

AD PARAGRAPH 4.21

279. I deny that I do not contest the fact as alleged.

280. This aspect was never exhaustively investigated hence my remedial action that Proclamation R47 be reopened and amended, to allow the investigation to cover fully this aspect of the matter as well.

AD PARAGRAPH 4.22

281. The allegations contained in this paragraph are denied, for the reasons already dealt with above.

282. **AD PARAGRAPHS 4.23. - 4.24.4**

283. The allegations contained in this paragraph are denied, for the reasons already dealt with above.

AD PARAGRAPH 5

284. The allegations contained in this paragraph are denied, for the reasons already dealt with above.

AD PARAGRAPH 5.1.1

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285. I deny having refused to provide ABSA with documents underlying the Final Report. Through my then attorneys of record (who at present are no longer seized with this matter) at the time of commencement of this matter, Sefanyetso Attorneys, all the documents that were available to me prior to the release of the Final Report were, pursuant to Rule 53, made available to the parties in this matter, including ABSA.

286. I further add that my former Attorneys in fact provided more than what was required in terms of the Rule 53, in that they included information

which I never considered in reaching the decisions that crystallized into the Report.

AD PARAGRAPHS 6.1 - 6.12.7

287. The allegations contained in this paragraph are denied, for the reasons already dealt with above.

AD PARAGRAPHS 7.1 - 7.13.7

288. The allegations contained in this paragraph are denied, for the reasons already canvassed at above

AD PARAGRAPHS 8.1 - 8.6.7

289. The allegations contained in this paragraph are denied, for the reasons already dealt with above. 10

AD PARAGRAPH 9

290. The allegations contained in this paragraph are denied, for the reasons already canvassed above.

Ad supplementary affidavit

AD PARAGRAPHS 1 – 1.1.5

291. The allegations contained in these paragraphs are noted.

AD PARAGRAPH 1.2 – 1.4.4

292. The allegations contained in these paragraphs are admitted.

293. The allegations contained in this paragraph are denied, for the reasons already dealt with above.

AD PARAGRAPHS 1.5 – 1.6

294. Save for denying that the delay is entirely to be blamed on me, the remaining allegations contained in these paragraphs are noted.

AD PARAGRAPHS 2.1 – 2.6

295. Save for denying that the record strengthens the submissions as alleged, the allegations contained in these paragraphs are noted.

AD PARAGRAPHS 2.7 – 2.10

296. The allegations contained in this paragraph are denied, for the reasons already dealt with above.

AD PARAGRAPHS 2.11 – 2.19

297. The allegations contained in this paragraph are denied, for the reasons already dealt with above.

AD PARAGRAPHS 3.1 – 3.8

298. The allegations contained in this paragraph are denied, for the reasons already dealt with above.

AD PARAGRAPH 3.9

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299. I deny that I did not take the view of Judge Heath, for the reasons already canvassed above.

AD PARAGRAPH 3.10 – 3.14

300. The allegations contained in this paragraph are denied, for the reasons already dealt with above.

AD PARAGRAPHS 3.15 – 3.26

301. The allegations contained in this paragraph are denied, for the reasons already canvassed above.

AD PARAGRAPHS 4.1 – 4.3

302. The allegations contained in this paragraph are denied, for the reasons already canvassed above.

AD PARAGRAPHS 5.1 – 5.10

303. The allegations contained in this paragraph are denied, for the reasons already dealt with above.

AD PARAGRAPH 6

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304. The allegations contained in this paragraph are denied, for the reasons already canvassed above.

AD PARAGRAPH 7

305. The allegations contained in this paragraph are noted. I deny that the applicant is entitled to an order of costs on a punitive scale or at all.

AD SARB

Ad founding affidavit

AD PARAGRAPH 14 [V1 - P11]

306. I deny the contents of this paragraph are denied and I am advised that legal submissions will be made on my behalf.

AD PARAGRAPH 41 [V1 - P18 to 19]

307. Save to add that annexure MR10 of ABSA's application is a media statement issued by the SIU and not a final report, the contents of this paragraph are noted.

AD PARAGRAPH 46 [V1 - P20]

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308. I deny the contents of this paragraph to the extent that it relates to the powers of the President. I am told that legal submissions will be made on my behalf as the provisions of the SIU Act are subject to interpretation.

AD PARAGRAPH 54 [V1 - P23]

309. The contents of this paragraph are noted save to add that a distinction cannot be drawn between the CIEX report and the ABSA lifeboat as the

ABSA lifeboat is a feature of the CIEX report and therefore, by implication, cannot be excluded from any investigation.

310. Any distinction between the CIEX report and the lifeboat is therefore an artificial distinction.

AD PARAGRAPH 85 [V1 - P30]

311. I deny the contents of this paragraph and have been advised that legal submissions shall be made on my behalf in respect of the contents thereof.

AD PARAGRAPH 91 [V1 - P35]

312. I deny that the remedial action is imposed on the President and that it is unlawful.

313. The remedial action contained in paragraph 7.1.1 imposes an obligation only on the SIU to approach the President.

AD PARAGRAPH 97-102 [V1 - P36 to 38]

314. The contents of these paragraphs have been addressed extensively under the heading of jurisdiction and will thus not be addressed *ad seriatim*.

AD PARAGRAPH 103-106 [V1 - P38 to 39]

315. The contents of these paragraphs have been addressed extensively under the heading of prescription.

AD PARAGRAPH 110 [V1 - P39]

316. Save to admit that the action plan relates to the remedial action in paragraph 7.1 of the Report, the remainder of this paragraph is denied.

Ad supplementary affidavit

AD PARAGRAPHS 1- 11 [V2 - P95 to 98]

317. The contents of these paragraphs are noted and have been dealt with *ad seriatim* in response to the Minister's founding and supplementary founding papers. 10

AD PARAGRAPH 14 [V2 - P98]

318. The contents of this paragraph are noted save to add that the contents thereof are not relevant to this application as the remedial action aimed at the amendment of SARB's constitutional mandate has been set aside.

AD PARAGRAPHS 20-30 [V2 - P99 to 102]

319. The contents of these paragraphs are denied and I have been advised that legal submissions will be made on my behalf in respect thereof.

AD PARAGRAPHS 33-34 [V2 - P102]

320. The contents of these paragraphs are denied.

321. The remedial action in my report had no ulterior motives and was aimed at rectifying the injustices suffered by the South African people as a result of the unlawful financial assistance to Bankorp/ABSA.

AD PARAGRAPH 38 [V2 - P103]

322. I deny the contents of this paragraph. I have been advised that legal submissions will be made on my behalf in respect of the contents of this paragraph.

AD PARAGRAPHS 44-45 [V2 - P105]

323. I deny the contents of these paragraphs. I have been advised that legal submissions will be made on my behalf in respect of the contents of these paragraphs.

AD PARAGRAPHS 48-51 [V2 - P106 to 107]

324. The contents of these paragraphs are noted.

AD PARAGRAPH 52 [V2 - P107]

325. I deny the contents of these paragraphs and have been advised that legal submissions will be made on my behalf in respect of the contents of this paragraph.

AD MINISTER'S AFFIDAVIT

Ad founding affidavit

AD PARAGRAPHS 16 – 24

326. I deny the allegations herein contained in these paragraphs and also vehemently deny that I have not considered the representations made by National Treasury and therefore there was no irregularity with my conduct. The correspondence between the National Treasury and myself is demonstrated in paragraph 4.4.1.5 which is but some of the key sources of information which I considered. 10

327. The fact that reference is not made to the representations, one cannot conclude that I had no regard thereto. In any event the representations form part of the Record.

AD PARAGRAPHS 25 - 26

328. I deny the allegations contained in these paragraphs. The report and the documents referred to therein justify my conclusion.

AD PARAGRAPHS 27 -32

329. This Court has already dealt with the issue of the Constitutional amendment and I accordingly do not deal with these allegations.

Ad supplementary affidavit

AD PARAGRAPHS 8 -30

330. I admit the paragraphs insofar as the allegations confirm what has been stated above and in the report.

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AD PARAGRAPH 32

331. I admit that the National Treasury did not have an obligation to recover the funds from ABSA Bank, as the obligation to recover the funds from Absa and all those entities listed on CIEX report was delegations to the SIU by the late former President, Nelson Mandela, in terms of Proclamation 47 of 1998.

332. As a result of the above, I deny that recovery of the funds from ABSA and all those entities listed on CIOEX report is inappropriate and that no further investigation is required.

333. Certain of the remarks made by the Minister of Finance are, I submit, concerning.

AD PARAGRAPH 33

334. I did not make any findings that the National Treasury suffered any financial loss. My finding is that *"the allegation whether the South African Government and the South African Reserve Bank improperly failed to recover from Bankorp Limited/ABSA Bank an amount of R3.2 billion cited in the CIEX report, owed as a result of an illegal gift given to Bankorp Limited/ABSA Bank between 1986 and 1995 is substantiated"*.

AD PARAGRAPH 34

335. The decision whether the South African government has an obligation to recover is indicated in the decision of the late former president Nelson Mandela, through proclamation R47 of 1998.

336. In any event, my remedial action to re-open and amend Proclamation R47 of 1998 published in the Government Gazette dated 7 May 1998 in order to recover misappropriated public funds unlawfully given to ABSA Bank in the amount of R1.125 billion was not based on CIEX report, but based on my finding that the donation of R1.125 billion state funds to ABSA Bank was irregular and unlawful.

337. If my remedial action was simply based on CIEX, the amount to be recovered would have been the amount contained in the CIEX report. I conducted my own investigation on the lifeboat transaction and come to a legal conclusion that the lifeboat was illegal. As a result of my investigation, I determined that the actual amount due is R1 125Billion and not what is contained in the CIEX report.

AD PARAGRAPH 35 -37

338. Firstly, the Minister does not speak for Cabinet as a whole. Most of the allegations in these paragraphs are legal argument. I deny the contents of these paragraphs and that the first finding amounted to a material error of law. The obligation on government is to recover the stolen state funds, especially where an agent has been commissioned and has been paid large sums of money by government. This failure can therefore be viewed as wasteful expenditure.

AD PARAGRAPH 38 - 40

339. The Government in contracting the services of CIEX did not seek to investigate for no reason. The purpose of the investigation was to ultimately recover the money. To disregard the outcomes of that investigation without any rebutting evidence relating to its contents can only be regarded as wasteful expenditure.

AD PARAGRAPH 41 - 42

340. I deny that contents of these paragraphs. Further legal argument will be advanced in this regard.

AD PARAGRAPH 43 – 45

341. Save to deny that the finding was not related to information before me and that I did not consider that the Government had delegated the task of considering and pursuing any claims to the SIU, the remaining allegations are noted.

AD PARAGRAPH 46 - 47

342. I admit that I did not have regard to the full report of the Heath Commission. This report cannot be traced; even the Presidency has not been able to locate this report despite a diligent search.

AD PARAGRAPH 48

343. I deny that section 37 of the South African Reserve Bank Act confers a discretion and not an obligation on the Minister. The word "may" in the said section can be interpreted to mean "must", especially in view of the constitutional obligations that are imposed on him as a Minister to promote an efficient and effective public administration. Further legal argument will be made in this regard.

AD PARAGRAPH 49 – 50

344. I deny that my conduct was arbitrary, capricious and not rationally connected to the information before me. These findings were made with reference to the documents before me. The Government's acceptance of the SIU opinion that it was against the public interest to attempt to recover the funds and that this decision may have been based on rational considerations, does not mean that I could not test the reasoning for not pursuing the payment.

AD PARAGRAPH 51 - 52

345. I deny the allegations contained in these paragraphs. I had regard to the contentions made by the SIU, in the media statement, and Government's contention, however I was not in agreement therewith as the funds that were used to pay for the CIEX report and unlawful loan were also public funds and as such I must be circumspect where public funds are involved.

AD PARAGRAPH 53 -55

346. I deny the contents of these paragraphs and state that the Government did waste funds, having contracted CIEX, not having proper regard to the CIEX report and not pursuing claims for recovery.

347. The Government's acceptance of the SIU opinion that it was against the public interest to attempt to recover the funds and that this decision was based on rational considerations, does not mean that I could not test the reasoning for not pursuing the payment.

AD PARAGRAPH 56 - 58

348. Save to admit the judgment of Murphy J and the fact that the court set aside remedial action 7.2, the remaining allegations are denied. Further legal argument will be made in this regard. 10

Ad further supplementary affidavit

AD PARAGRAPH 7 - 17

349. The reports herein were preliminary reports and some or most of their contents were incorporated into the final report.

AD PARAGRAPH 18 - 19

350. I note the issues raised by the Applicants in respect of the Rule 53 record, however, between the periods of the Applicants filing their Supplementary Affidavits and Motsoeneng Bill Attorneys' appointment as attorneys of record, the deficiencies in the Rule 53 record had been to a large extent addressed by Sefanyetso Attorneys. Motsoeneng Bill Attorneys have since provided further documentation of the record, specifically requested by ABSA.

351. The Confirmatory affidavit of Mr Michael Motsoeneng Bill is annexed hereto marked **"MMB1"**. [V7 - P510]

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AD PARAGRAPH 20 – 21

352. I deny the allegations in these paragraphs.

353. My conclusions have been guided by the documentation that I had before me whilst investigating this matter. The investigation was properly conducted and had sound appreciation for all the documents before me. My conclusions were not generalized, random nor hasty.

WHEREFORE I pray that the applications be dismissed with costs.

DR

DEPONENT

SIGNED and **SWORN BEFORE** me at PRETORIA on this the 24 day of NOVEMBER 2017, the deponent having acknowledged that she knows and understands the contents of this affidavit and has no objection to taking the prescribed oath, which oath she considers binding on her conscience.

COMMISSIONER OF OATHS

Full names:

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