OUTA
ORGANISATION UNDOING TAX ABUSE

13 September 2019

To: The National Assembly
Speaker of National Assembly
Hon T R Modise, MP
c/o: The Secretary of Parliament
Per: E-mail (lclaasen@parliament.gov.za)

And To: The Justice and Correctional Services Portfolio Committee
The Chairperson
Mr G B Magwanishe
c/o: The Secretary of Committee
Per: E-mail: (eforbes@parliament.gov.za)
(vramaano@parliament.gov.za)
(smthonjeni@parliament.gov.za)

Dear Mr Magwanishe

INQUIRY INTO THE PUBLIC PROTECTOR SOUTH AFRICA IN TERMS OF SECTION 194 OF THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 1996
OUR REF: L/PPSA01/001
YOUR REF: UNKNOWN

1. Correspondence received from the Speaker dated 26 July 2019 as well as our correspondence to your good self on 2 August 2019 refers.

2. The purpose of this correspondence is to supplement our petition submitted to Parliament on 10 June 2019 (our initial petition).

3. In recent months there have been several reports and court judgements handed down which relate to Adv. Mkhwebane and her office. OUTA has taken the time to consider these and has found that some substantially relate and/ or support our arguments raised in our initial petition to the National Assembly.

4. We believe that the supplementary arguments and evidence, as set out below, contribute to those set out in our initial petition and should be included in the

National Assembly’s consideration of same. Failure to do so may result in unnecessary and duplicated petitions of the same nature.

5. It may also result in undue prejudice to OUTA as the supplementary arguments and evidence transpired after we submitted our petition and did not form part of the initial petition, which was not due to failure or negligence on our part.

6. In light of the above we respectfully submit that the supplementary arguments and evidence, as set out below, should be accepted and included as part of our initial petition.

7. We hereby thus supplement our initial petition considering the numerous recent developments and as highlighted below -

7.1. **The Constitutional Court Judgement in *Public Protector v South African Reserve Bank*[1] (Reserve/ ABSA Bank matter)**

7.1.1. On 22 July 2019 the Constitutional Court handed down its judgement on Adv. Mkhwebane’s appeal against the personal costs order granted against her in the Reserve Bank matter.

7.1.2. On appeal Adv. Mkhwebane advanced several grounds for her appeal, all which were rejected by the majority of the judges on the bench.

7.1.3. The Concourt answered Adv. Mkhwebane’s argument that a personal cost order, granted against her, would compromise her office’s independence as “*unwarranted*”. The court held that: “[p]*ersonal costs orders are not granted against public officials who conduct themselves appropriately. They are granted when public officials fall egregiously short of what is required of them.”*[2]

7.1.4. The Court further confirmed the High Court’s finding that Adv. Mkhwebane acted in bad faith during the *“…exercise of her investigating powers, her conduct during the investigation, or the litigation associated with the final report*” and thus the immunity afforded to her by section 5(3)[3] did not apply in the instance.[4]

[1] [2019] *ZACC* 29
[2] Supra at par 159
[3] Public Protector Act, 23 of 1994
[4] Supra at par 162

7.1.5. Adv. Mkhwebane further argued that the High Court had misdirected itself on the facts when finding that she "*…had acted in bad faith; did not fully understand her constitutional duty to be impartial and perform her functions without fear, favour or prejudice; had failed to produce a full and complete record of the proceedings under rule 53 of the Uniform Rules of Court; and had failed to fulfill her obligation to be frank and candid when dealing with the court.*"[5]

7.1.6. In particular she challenged the findings made by the High Court regarding her meetings with the Presidency and the State Security Agency and submitted that the High Court misdirected itself on the representations she made in her pleadings regarding her ostensible reliance on expert economic advice in producing the final report.

7.1.7. The Concourt rejected Adv. Mkhwebane's arguments on the High Court's alleged misdirection on her meetings held with the Presidency and State Security Agency, again confirming that she acted in bad faith and in a grossly unreasonable manner. The Court further stated that her entire model of investigation was flawed, she was dishonest about her engagement during the investigation and failed to engage with the other affected parties. This conduct, the court held, fell short of the high standard required of her office.[6]

7.1.8. The Concourt further rejected Adv. Mkhwebane's argument that the High Court misdirected itself regarding her representations regarding her reliance on expert economic advice. The Concourt held that Adv. Mkhwebane failed to properly explain when she consulted with said expert, one Dr Mokoka, and when she consulted another person who cannot be deemed to be an expert, Mr Goodson. The court found that Adv. Mkhwebane consulted with Dr Mokoka only after the release of her final report and in preparation of her High Court matter, and that she consulted Mr Goodson during her investigation.[7]

7.1.9. The Concourt found Adv. Mkhwebane to have been *"…misleading because* [the report] *conveyed that the economic analysis that underpinned the report was based on expert economic advice, which it was not.*"[8]

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[5] Supra at par 172
[6] Supra at par 205 & 207
[7] Supra at par 209 - 214
[8] Supra at par 215

7.1.10. Finally, the Concourt found the costs order as well as the putative/ personal cost order as granted by the High Court to be justified. The High Court found that the same arguments supported both a costs order against the Office of the Public Protector as well as Adv. Mkhwebane in person. These reasons cited by the court were:

"(a) the Public Protector's failure to fully understand her constitutional duty to be impartial and perform her functions without fear, favour or prejudice;

(b) the Public Protector's failure to disclose in the final report that she had meetings with the Presidency on 25 April 2017 and 7 June 2017;

(c) the Public Protector's silence in the High Court about her meeting with the Presidency on 7 June 2017;

(d) the Public Protector's failure to meet with the reviewing parties;

(e) the Public Protector's failure to realise the importance of, and failure to make, full disclosure; and

(f) the Public Protector having pretended that she had acted on advice from economic experts in compiling the final report."[9]

7.1.11. The Concourt further found that Adv. Mkhwebane should be "*punished*" for the fact that she did not comply with the higher standard of conduct expected from public officials and the number of "*falsehoods*" put forward by her during the course of the litigation.[10]

7.2. ***Democratic Alliance v Public Protector; Council for the Advancement of the South African Constitution v Public Protector***[11] **(Estina matter)**

7.2.1. On 15 August 2019 the North Gauteng High Court handed down judgement on costs in the renowned Estina matter.

7.2.2. We addressed the scathing remarks and findings made by the court regarding Adv. Mkhwebane's misconduct and incapacity during its judgement on the facts in our initial petition.[12]

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[9] Supra at par 219

[10] Supra at par 237: *"…This conduct included the numerous "misstatements", like misrepresenting, under oath, her reliance on evidence of economic experts in drawing up the report, failing to provide a complete record, ordered and indexed, so that the contents thereof could be determined, failing to disclose material meetings and then obfuscating the reasons for them and the reasons why they had not been previously disclosed, and generally failing to provide the court with a frank and candid account of her conduct in preparing the report. The punitive aspect of the costs order therefore stands.*"

[11] (11311/2018; 13394/2018) [2019] ZAGPPHC 132; [2019] 3 All SA 127 (GP); 2019 (7) BCLR 882 (GP) (15 August 2019)

[12] OUTA Petition to the National Assembly dated 10 June 2019 at par 18 - 24

7.2.3. In its most recent judgement, the court again reiterated the principles laid down by the Concourt in the Reserve/ ABSA Bank matter in respect of personal cost orders.[13]

7.2.4. In adjudicating on the application for a personal cost order the court held that Adv. Mkhwebane should be liable for at least a percentage (7.5 per cent) of each Applicants' costs in her personal capacity and the Office of the Public Protector should bear 85 per cent of both Applicants' costs and the remainder should be borne by the Applicants themselves.[14]

7.2.5. The personal costs order was founded according to the court as it found that Adv. Mkhwebane's "*… failures and dereliction of duty... are manifold…*" and *"… they speak to her failure to execute her duties in terms of the Constitution and the Public Protector Act. In* [the court's] *view* [Adv. Mkhwebane's] ***conduct*** *in this matter is far worse, and more lamentable, than that set out in the Reserve Bank matter*". The court stated that, in the matter before the court, Adv. Mkhwebane's *"… dereliction of her duty impacted on the rights of the poor and vulnerable in society, the very people, for whom her office was essentially created.*" [15] (Own emphasis added)

7.2.6. The court further criticised Adv. Mkhwebane for turning a "*blind eye*" and for not giving the people a voice, effectively depriving "*… them of their one chance to create a better life for themselves*" and summarised her action as constituting "*gross negligence*" and a failure *"… to execute her constitutional duties in the ways illustrated in the judgement on the merits."*[16]

7.2.7. The court stated that "[Adv. Mkhwebane's] *inability to comprehend and accept the inappropriateness of her proposed remedial action constitutes ineptitude… The Public Protector failed the people of this country in the way she dealt with the investigation of the Estina dairy project."*[17]

7.2.8. The court further emphasised the Public Protector's responsibility and required high standard of professionalism by stating that: "*The Public Protector has immense power, but with that power comes great*

[13] Supra at par 1 - 21
[14] Supra at par 30 - 31
[15] Supra at par 25
[16] Ibid
[17] Supra at 27

responsibility. If she fails, as she did in this case, (to execute her duties), she must take full responsibility."[18]

7.2.9. The court finally criticised Adv. Mkhwebane for her extravagant appointment of her legal team which "*… must have caused an enormous escalation of legal costs for her office… This decision by the Public Protector unfortunately shows a total disregard for the taxpayers, who will have to foot the bill and flies in the face of her complaint about how financial constraints limit her ability to properly investigate the complaints.*"[19]

7.2.10. The court awarded a punitive costs order against Adv. Mkhwebane as a form of chastisement.

7.3. ***Pravin J. Gordhan v The Public Protector and 9 Others***[20] **(Rogue unit matter)**

7.3.1. On 29 July 2019, the Honourable Potterill J handed down judgement, in the abovementioned matter, relating to an interim application by Minister Gordhan (Gordhan) to have the Public Protector's report suspended pending review proceedings.

7.3.2. The High Court of South Africa (Gauteng Division, Pretoria) stated that it would seem as if it is common practice for the Public Protector *not* to oppose interim relief sought pending the outcome of a review application in respect of her report and/ or remedial action. This point was conceded by the Public Protector's counsel.[21]

7.3.3. The latter was further strengthened by the correspondence exchanged between the President and the Public Protector in which there was a clear dispute on whether the President had the authority to comply with the Remedial Action proposed by the Public Protector in her report.[22]

7.3.4. A ground on which Gordhan based his interim relief sought was that the Public Protector did not have the necessary jurisdiction to entertain the complaint and conduct her investigation.[23]

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18 Supra at par 28
19 Supra at par 29
20 Unreported case under case number 48521/2019 judgement handed down on 29 July 2019
21 Supra at par 9
22 Supra at par 9 - 12
23 Supra at par 14 - 21

7.3.5. In particular it was contended that s6(9) of the Public Protector Act[24] requires special circumstances for the Public Protector to investigate conduct which occurred more than two years before the complaint was lodged.

7.3.6. The Public Protector did not advance any special circumstances in her report which relate the specific set of facts, nor did she deal with the averment in her response to Gordhan's application.

7.3.7. To add insult to injury the Public Protector neglected to respond to Gordhan's objection to her having jurisdiction when he raised the same issue *via* correspondence during March 2019. During April 2019 Adv. Mkhwebane justified her investigation by stating that "*…public funds were still being used for illegal purposes*".[25]

7.3.8. This was not raised as a "*special circumstance*" in the Public Protector's final report or in her opposing papers and was in any event rejected by the court as being such.

7.3.9. The Court further considered the "[i]*rreparable harm"*[26] which may befall Gordhan should the interim suspension order not be granted.

7.3.10. The Court found that the imminent harm (*inter alia* discipline by the President, appearance before the Parliamentary Ethics Committee, criminal investigations by the Commissioner of Police) would amount to serious consequences for him and that the report makes Gordhan out to be "*untruthful*", "*a spy*" and "*would impact his political career and his personal circumstance*".[27]

7.3.11. The Court weighed up the above-mentioned harm, the misgivings and errors contained in the Public Protector's Remedial Action and orders[28]

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[24] Act 23 of 1994
[25] Supra at par 19
[26] Supra at par 45 - 51
[27] Supra at par 45
[28] Supra at par 46 – 48:
"[46] Before I address the above-mentioned argument on behalf of Gordhan it would be remiss of this court not to remark on the remedial orders of the PP. This court had to study the report and remedial orders in order to ascertain whether in fact there is irreparable harm to Gordhan. Much of the orders are vague, contradictory and/or nonsensical. The President is ordered in paragraph 8.1.1 of the report to take note of the PP' s findings and to take appropriate disciplinary action against Gordhan. The expiry date attached to this order is the 4th of August 2019. In para 9.1 it is ordered that the President must within 30 days of the issuing of the report

and the Court's ability to intervene in the separation of powers. The Court ultimately found that –

"*…the harm* [to Gordhan] *would be irreparable if the interdict is not granted. Being prosecuted, disciplined and investigated most certainly constitutes harm and the harm may be irreparable and irreversible by the time the review application is heard, especially so if the review application is successful. There is no harm to the PP or her office if the remedial action is suspended pending review. This is not a final order and if the review is to be unsuccessful the remedial actions are to commence. This matter constitutes a clear case where judicial interference is warranted…*"[29]

7.3.12. Again, when it came to costs to be paid in the matter the court was adamant that the opposition to the application by the Public Protector was "baseless" and stated that Adv. Mkhwebane did not "*seriously* [attack] *the requirements necessary for an interim interdict and accordingly as unsuccessful litigants should carry the costs.*"[30]

7.3.13. Adv. Mkhwebane, The Office of the Public Protector and another party was ordered, along with two other Respondents, to jointly and severally, pay the applicant's and two other Respondents' costs.[31]

7.3.14. It was reported[32] that Adv. Mkhwebane announced that she was taking the interim order on direct review to the Concourt, however this decision was withdrawn later. This, once again, would have been an extremely expensive exercise for the Office of the Public Protector for a battle which, according the High Court, had no merits and would have been an unjustifiable risk to the Office of the Public Protector.

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submit an Implementation Plan to the PP for her approval, "indicating how the remedial action referred to in paragraph 7. I of her report will be implemented." There is no remedial order in paragraph 7.1; the order is thus nonsensical. Furthermore the order to within 30 days submit a plan for approval detailing the disciplinary action and at the same time ordering that the disciplinary action be taken within 30 days is inexplicable.

[47] The remedial action ordered against the Speaker has the same contradiction; the Speaker must within 14 days refer the findings against Gordhan to the Joint Commission on Ethics and be implemented. Paragraph 7.4 has no remedial action set out therein.

[48] In paragraph 8.5 the PP orders the Commissioner of Police to investigate the criminal conduct of Messrs Gordhan "and others" for violation of s209 of the Constitution and s3 of the NSI Act. Both sections do not create criminal offences."

29 Supra at par 51

30 Supra at par 61

31 Supra at par 62

32 https://mg.co.za/article/2019-08-20-public-protector-eff-head-straight-to-concourt-over-interdict-of-rogue-unit-report accessed on 23 August 2019

7.4. ***Phumelela Gaming and Leisure vs The Public Protector***[33]

7.4.1. On 30 July 2019, the day after the High Court handed down its interim judgement as discussed above, the same court again granted an interim order in favour of JSE-listed Phumelela Gaming and Leisure suspending Adv. Mkhwebane's remedial action against the horse racing industry from being implemented while her report is taken on judicial review.

7.4.2. Adv. Mkhwebane did not oppose the application, unlike the matter against Gordhan. The latter response rings true to the concessions made by Adv. Mkhwebane, in the Rogue Unit matter above, and is in line with the standard procedures followed by the Office of the Public Protector in the case of an interim application to suspend a report and its remedial action.

7.4.3. According to the newspaper article Phumelela accused: "*… the public protector of failing to follow a fair process and violating the separation of powers doctrine, essentially making the same legal errors she was slammed for by the courts for her investigation into the apartheid Bankorp bailout involving the SA Reserve Bank and Absa.*"[34]

7.4.4. Of interest is that Adv. Mkhwebane ordered the President to appoint a ministerial committee to establish a Thoroughbred Horse Racing Regulator, that premiers withdraw the bookmakers' levy fees paid to Phumelela and for premiers to request the President to get the Special Investigating Unit to investigate the matter.

7.4.5. It would seem as if Adv. Mkhwebane has yet again misunderstood or misinterpreted her powers in respect of remedial action and overstepped by telling the President how to act and including orders that would require both national and provincial legislatures to pass new laws.

7.4.6. Allegations of procedural irregularities during the investigation were again raised, as Adv. Mkhwebane allegedly did not comply with due process and "*/*[failed] *to include any of her remedial actions in her provisional report,*" thereby "*failing to give the company or any of the many government officials involved a chance to comment before the report was released*". [35]

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[33] https://www.dailymaverick.co.za/article/2019-07-31-horse-racing-industry-wins-interdict-against-mkhwebane-as-it-pushes-to-overturn-biased-report/ accessed on 8 June 2019

[34] Ibid

[35] Ibid

7.4.7. It will be argued, which argument OUTA supports, that Adv. Mkhwebane's remedial action is unlawful and unconstitutional on three main grounds: it unlawfully interferes with parliamentary legislative authority; it unlawfully interferes with provincial legislative authority; and it requires amendments to provincial legislation. Adv. Mkhwebane's remedial action again unlawfully interferes with provincial legislative authority.

7.5. *Minister of Water and Sanitation vs the Public Protector of South Africa*[36]

7.5.1. On 31 May 2019, the High Court again had to make a judgement on an application for interim relief "…*resulting from a refusal by the* [Public Protector] *to grant the applicant an extension to respond and comment on the* [her] *report...*"[37]

7.5.2. According to the judgement the Public Protector refused to grant an extension for the Minister to respond to allegations put forward by her upon completion of her initial investigation which took approximately two years.[38]

7.5.3. The reasons for the refusal put forward by the Public Protector was that "*…it would not be in the interest of the complainant, Mr. Thomas Walters to delay the matter any further.*"[39]

7.5.4. The court had to decide whether the principles of natural justice, in particular the *audi alteram partem rule*, was followed during the Public Protector's investigation process.

7.5.5. In summary the court found that: "*… the first respondent despite the complaint also being lodged by* [sic] *the applicant, never sought it fit to engage the applicant at any stage during the preliminary or investigative process. The first respondent although clearly entitled in terms of section 7(1)(b)(i) of the Act to conduct an investigation and determine procedures relating to it at her own discretion, it is also prudent in a fact finding* [sic]

[36] Minister of Water and Sanitation v The Public Protector of the Republic of South Africa and Others (27609/2019) [2019] ZAGPPHC 193 (31 May 2019)
[37] Supra at par 1
[38] Supra at par 2 - 5
[39] Supra at par 6

investigation to inform and interact with a person whose rights may be adversely affected. In the present matter the first respondent did not at any stage of her investigation find it necessary to engage with the applicant, who was clearly implicated, until the issuing of the section 7(9) notice of the Act on 1 April 2019. This goes against the principles of natural justice and fair procedure."[40]

7.5.6. The court granted the interim application prohibiting the publishing of the report pending the review proceedings.[41]

7.6. *Criminal Complaint lodged against Adv. Mkhwebane by OUTA*

7.6.1. On or about 22 August 2019, OUTA lodged a criminal complaint supplementing an existing criminal complaint with proper and complete evidence in respect of perjury charges against Adv. Mkhwebane.

7.6.2. In our complaint we set out clear allegations where Adv. Mkhwebane not only misdirected facts but expressly and intentionally lied regarding certain facts under oath.

7.6.3. Said complaint was lodged with the Hillbrow SAPS under CAS number 436/8/2019.

7.6.4. We attach a copy of the complaint with the supporting evidence for your ease of reference.

7.7. *The Public Protector's 2019/20 Annual Performance Plan*[42]

7.7.1. During the Public Protector's 2019/20 Annual Performance Plan to the Justice and Correctional Service Committee on 10 July 2019, Adv. Mkhwebane requested a special gratuity for the Deputy Public Protector (DPP) as his term of office is coming to an end at the end of 2019.

7.7.2. Save for the valid points raised by the committee on the Public Protector's annual review and budget, OUTA is seriously concerned about Adv. Mkhwebane's request to pay a "*gratuity*" without a legal basis to the DPP.

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[40] Supra at par 35
[41] Supra at par 37
[42] As presented to the Justice and Correctional Services Committee on 10 July 2019 - https://pmg.org.za/committee-meeting/28564/ accessed on 26 August 2019.

Such a payment is not supported in law and would amount to an irregular expenditure – something the Public Protector is expected to guard and act against.

7.7.3. Further, the astronomical amounts budgeted for by the Office of the Public Protector was rightfully labelled as "*a budget for incompetence*".

7.7.4. It would seem as if Adv. Mkhwebane is fuelling litigious feuds against political figureheads at the expense of the Office of the Public Protector and ultimately at the peril of South African citizens.

7.7.5. It is our submission that the costs orders granted jointly and severally against Adv. Mkhwebane and the Office of the Public Protector are unlikely to be paid, even partly, by herself.

7.8. ***Comments on new procedural issues raised by Adv. Mkhwebane and the Speaker's response***[43]

7.8.1. Since our initial petition there has been reported differences between the National Assembly/ Speaker and Adv. Mkhwebane on the process required in terms of section 194 of the Constitution.

7.8.2. We humbly submit that this inquiry should not be clouded by politics and call upon the administrative arm of government to execute its duties without allowing political game playing.

7.8.3. We further humbly submit in response to Adv. Mkhwebane's submission that there is no due process, that section 194 of the Constitution read with Rules[44] 150, 167, 168 and 225 and 227 alternatively with Rules 253 and 254 sets out clear rules in the establishing and powers of portfolio committees alternatively an *ad hoc* committee.

7.8.4. Although the Portfolio Committee on Justice and Correctional Services has the oversight and investigative authority to conduct the enquiry as requested by our petition, we submit that it would be in the interest of justice that an *ad hoc* committee be established by the National Assembly

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[43] https://www.timeslive.co.za/politics/2019-07-21-busisiwe-mkhwebane-to-thandi-modise-ill-take-you-to-court/ and https://www.timeslive.co.za/sunday-times/news/2019-08-25-speaker-thandi-modise-takes-aim-at-public-protector-busisiwe-mkhwebane/ accessed on 23 and 26 August 2019 respectively.

[44] Rules of the National Assembly 9th ed dated 26 May 2016 (the Rules)

to objectively investigate the matter at hand and make a recommendation to the National Assembly.

7.8.5. It is our submission that the Constitution clearly makes provision for an investigation into alleged misconduct, incompetency or incapacity of the Public Protector which may lead to her removal.

7.8.6. The Rules along with principles of natural rule law such as, but not limited to, due process, *audi alteram partem* and the rules of evidence are sufficient for the enquiry to be conducted and a comprehensive recommendation to be made.

7.8.7. Kindly take note that we hereby formally request to be included in the process as made provision for in terms of Rule 170.

7.9. ***Application to section 194 of the Constitution***[45]

7.9.1. We reiterate our stance that Adv. Mkhwebane's actions and behaviour constitute unacceptable behaviour which is unbecoming of an incumbent holding her office and/ or that her behaviour was ill informed or based on ignorant premises which shows that she lacks the skill or ability to fulfil the constitutional tasks and duties imposed on her by the Constitution.

7.9.2. It is our submission that Adv. Mkhwebane has committed several acts of misconduct and/ or incompetence as set out above.

7.9.3. In particular, her disregard and/ or ignorance of the rule of law and established legal principles, her dishonest and evasive conduct during litigation, her failure to meet her Constitutional duties and her disregard and/ or inability to ensure prudent management of the Office of the Public Protector's financial and other resources amount to misconduct alternatively incompetence.

8. Based on the above and the severity of the consequence of Adv. Mkhwebane's misconduct and incompetence we call on the National Assembly to consider exercising your power to appoint an ad hoc committee to investigate the above allegations, as well as our previous allegations, and take the appropriate action as required by the Constitution.

[45] The Constitution of the Republic of South Africa, 1996

9. We trust you find above in order and eagerly await your decision.

10. Should you have any queries or require any further information please contact writer hereof or our Legal Manager, Ms Soretha Venter, at soretha.venter@outa.co.za.

Yours Sincerely,

Stefanie Fick
Chief Legal Officer
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