IN THE HIGH COURT OF SOUTH AFRICA (GAUTENG DIVISION, PRETORIA)

Case No.

In the matter between:

ABSA BANK LIMITED - Applicant

and

PUBLIC PROTECTOR - 1st Respondent

SPECIAL INVESTIGATING UNIT - 2nd Respondent

PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA - 3rd Respondent

SOUTH AFRICAN RESERVE BANK - 4th Respondent

MINISTER OF FINANCE - 5th Respondent

NATIONAL TREASURY - 6th Respondent

FOUNDING AFFIDAVIT

1 INTRODUCTION: OVERVIEW OF APPLICANT'S CASE Deponent and authority

1.1. I, the undersigned,

MARIA DA CONCEICAO DAS NEVES CALHA RAMOS

do hereby make oath and state:

1.1.1. I am the Chief Executive Officer of ABSA Bank Limited ("**ABSA**"), the applicant herein;

1.1.2. I am duly authorised to represent ABSA in this Application and to depose to this affidavit on its behalf;

1.1.3. Save where appears from the context, the facts contained in this affidavit are within my own personal knowledge and are to the best of my knowledge, both true and correct;

1.1.4. Where I make submissions of law, I do so on the advice of my legal advisors.

Purpose of this application

1.2. The purpose of this application is to review the remedial action in paragraphs 7.1.1, 7.1.1.1 and 7.1.2 read with paragraph 8.1 of the Public Protector's Report 8 of 2017/2018 into the **"Alleged Failure to Recover Misappropriated Funds"** issued on 19 June 2017 ("**the Final Report**"). A copy of the Final Report is annexed hereto marked **"MR1"**.

1.3. The relevant part of the remedial action in the Final Report which is the subject of this review is as follows:

"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)(ii) 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:

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; and

7.1.1.2 …

7.1.2 The South African Reserve Bank must co- operate fully with the Special Investigating Unit and also assist the Special Investigating Unit in the recovery of misappropriated public funds mentioned in 7.1.1.1 …

…

8. MONITORING

8.1 The Special Investigating Unit, the South African Reserve Bank … must submit an action plan within 60 days of this Report on the initiatives taken in regard to the remedial action above."

1.4. The background facts will be set out in detail below. In summary:

1.4.1. In the mid-80s Bankorp Limited ("**Bankorp**") found itself in financial difficulties. It entered into a series of transactions between 1985 and 1990 with the South African Reserve Bank ("**SARB**") in order to obtain financial assistance.

1.4.2. With effect from 1 April 1992 ABSA acquired Bankorp. The acquisition was conditional upon the financial assistance to Bankorp from SARB, and the price paid by ABSA took into account such assistance.

Consequently, an agreement with SARB was entered into with effect from 1 April 1992.

1.4.3. In early 1995, the parties amended the structure of the assistance as further detailed in paragraph 2.27 below. . The agreement terminated on 23 October 1995, when the capital on the loan was repaid in full, as well as all interest due to the SARB. ABSA had no further obligations in relation to the financial assistance.

1.4.4. ABSA acquired Bankorp for fair value and therefore is not liable for Bankorp's debt to SARB.

1.4.5. In 1997 and unbeknown to ABSA, an organisation known as Ciex approached the South African Government ("**the Government**") with several propositions entailing the investigation of, *inter alia,* certain allegedly suspect deals within the financial and other

sectors. On 6 October 1997 Ciex and the Government concluded a memorandum of agreement. Part of this agreement entailed the provision of advice on how the Government ought to go about obtaining restitution for amounts allegedly due by ABSA to SARB. Ciex produced a document in which it concluded, *inter alia*, that the Government could recover the money from ABSA. But this document by Ciex does not provide any evidence and/or advance any legal basis for such recovery.

1.4.6. In 1998, the Special Investigating Unit ("**SIU**") (under Judge Heath) investigated the loan agreement to ABSA in terms of Proclamation R47 of 1998. It issued a Report on 1 November 1999. It concluded that there were compelling reasons not to proceed with litigation to recover any amounts allegedly due to SARB.

1.4.7. On 15 June 2000, the Governor of SARB appointed a panel of experts to investigate SARB's role with regard to the financial assistance package to Bankorp. This panel was chaired by the Honourable Justice Dennis Davis. The panel concluded, *inter alia*, that:

1.4.7.1. ABSA did not benefit from the assistance to Bankorp;

1.4.7.2. ABSA paid fair value for its acquisition of Bankorp and could not be regarded as a beneficiary of any assistance by SARB to Bankorp;

1.4.7.3. The real beneficiaries of the Bankorp assistance were Sanlam policy holders and pension fund beneficiaries. (Sanlam was the majority shareholder of Bankorp);

1.4.7.4. Any attempts at legal recovery were not warranted.

1.4.8. On 10 November 2010 a complaint was submitted to the Public Protector by Mr Paul Hoffmann. The basis of the complaint was the alleged failure by the Government to implement the findings of Ciex.

1.4.9. On 21 December 2016, the Public Protector issued a provisional report to ABSA (which report was signed on 20 December 2016) titled **"Alleged failure by Government to recover funds borrowed to ABSA"** ("**the Provisional Report**").

1.4.10. Written representations were made by ABSA to the Public Protector pursuant to the Provisional Report. In those representations, ABSA, *inter alia*:

1.4.10.1. demonstrated that the Provisional Report rested upon a series of incorrect facts;

1.4.10.2. submitted that the Public Protector had no jurisdiction to conduct the investigation; and

1.4.10.3. established that any debt allegedly due had prescribed and was accordingly not recoverable.

1.4.11. The Final Report by the Public Protector was issued on 19 June 2017.

1.5. I am advised and submit that the remedial action prescribed by the Public Protector constitutes **"administrative action"** for purposes of the Promotion of Administrative Justice

Act 3 of 2000 ("**PAJA**"). Accordingly, this review is brought in terms of PAJA, alternatively, the constitutional principle of legality.

1.6. As will be elaborated more fully below, it will be submitted that the remedial action falls to be set aside on one or more of the following bases:

1.6.1. the remedial action rests upon material errors of fact, in that the Public Protector failed to appreciate the consequences of the manner in which the transaction was structured and that, as a matter of fact, ABSA paid for the "lifeboat" when it acquired Bankorp;

1.6.2. the remedial action was imposed without procedural fairness, in that ABSA, despite request, was never shown critical documents which formed the basis of the Public Protector's findings. Not even the complaint was made available to ABSA;

1.6.3. any debt allegedly due to SARB by ABSA has prescribed, in that the transactions in question occurred more than 20 years ago. No basis for recovery of any debt, assuming it to be due, is set out in the Final Report;

1.6.4. the Public Protector does not have jurisdiction to investigate matters which occurred before the coming into operation of the Public Protector Act or the establishment of the office of the Public Protector;

1.6.5. the remedial action is substantively unlawful, in that it imposes obligations on the SIU and the President which strips them of their discretionary powers and requires them to act under dictation.

The parties

1.7. The applicant is ABSA Bank Limited, a public company with Registration No.1986/004794/06 which is duly incorporated in accordance with the laws of the Republic of South Africa and which carries on business as a registered bank with its head office at 15 Troye Street, Johannesburg.

1.8. The first respondent is the Public Protector, an institution recognised by Chapter 9 of the Constitution read with the Public Protector Act 23 of 1994. The Public Protector's principal place of business is 175 Lunnon Street, Hillcrest Office Park, Pretoria.

1.9. The second respondent is The Special Investigating Unit, which is established in terms of section 2 of the Special Investigating Units and Special Tribunals Act 74 of 1996 with its head office at 74 Watermeyer Street, Watermeyer Park, Pretoria. The SIU has an interest in this review because the remedial action prescribed by the Public Protector requires the re-opening of a closed investigation in order to recover funds which have allegedly been misappropriated. The remedial action also requires the SIU to submit an action plan to the Public Protector.

1.10. The third respondent is the President of the Republic of South Africa who holds office as the Head of State in terms of section 83 of the Constitution. The President is cited because the remedial action prescribed by the Public Protector ultimately requires the President to amend Proclamation R47 of 1998 in order to permit a further investigation by the SIU. The President's principal place of business is the Union Buildings, Government Avenue, Pretoria.

1.11. The fourth respondent is The South African Reserve Bank, established in terms of section 9(1) of the Currency and Banking (Further Amendment) Act 31 of 1920 and recognised by section 223 of the Constitution. The SARB is governed by the South African Reserve Bank Act 90 of 1989. Its head office is 370 Helen Joseph Street, Pretoria. SARB is cited because the remedial action requires SARB to co-operate in any investigation aimed at the recovery of funds allegedly misappropriated and to submit an action plan to the Public Protector.

1.12. The fifth respondent is the Minister of Finance, care of the State Attorney, Office Pretoria, Salu Building, 255 Francis Baard Street, Pretoria. The Minister is cited as the Minister responsible for the National Treasury and the Minister as defined in the South African Reserve Bank Act 90 of 1989.

1.13. The sixth respondent is the National Treasury created in terms of section 216(1) of the Constitution and which is established in terms of section 5 of the Public Finance Management Act 1 of 1999 and situated at 40 Church Square, Pretoria Central, Pretoria and care of the State Attorney, Office Pretoria, Salu Building, 255 Francis Baard Street, Pretoria.

1.14. The main relief sought is against the Public Protector. The relief sought against the other respondents is purely consequential upon the main relief being granted. No order of costs will be sought against any respondent except a respondent who opposes this application.

1.15. This review is brought in terms of rule 53 of the Uniform Rules of Court. After the Public Protector has produced the record giving rise to the Final Report, ABSA reserves the right to amend the notice of motion and to supplement the founding affidavit.

2 THE FACTS

Chronology of Events 1985 - 2017

2.1. I set out below the key events that are relevant to this matter. I briefly deal with the financial assistance provided by the SARB to Bankorp and ABSA's involvement with Bankorp, the various investigations into the assistance provided to Bankorp that have taken place, as well as the Public Protector's investigation eventually resulting in the Final Report.

2.2. In relation to the assistance to Bankorp I rely on the facts set out in the submissions made by ABSA in respect of the Provisional Report of the Public Protector as well as the annexures to those submissions. They are annexed as **"MR2"**. These submissions are to be regarded as incorporated into this affidavit in their entirety ("**the Submissions**"). In particular I refer to the document titled **"Understanding to the provision of assistance by the South African Reserve Bank to Bankorp Limited in the mid-1980s, as well as ABSA Bank Limited's involvement with that assistance from 1992 to 1995 following ABSA's acquisition of Bankorp"** ("**Illustrative Reconstruction**") which was provided to the Public Protector with ABSA's submissions on 24 June 2016 and 28 February 2017. This document is annexure B1 to the Submissions.

Financial assistance by the South African Reserve Bank to Bankorp

2.3. In 1985, South Africa's banking system had been suffering the effects of adjusting to international anti-apartheid sanctions.

2.4. Bankorp Limited had grown fast, partly by absorbing a number of weak banks, and had identified potential solvency problems as a result of loans advanced to customers who were unlikely to be able to repay those loans. Bankorp approached the SARB in 1985 for assistance, which was provided.

2.5. SARB's assistance, which was restructured over the years, is divided into three packages. I refer to these as Package A, Package B and Package C.

Package A: Financial assistance of R300 million

2.6. In April 1985, Bankorp approach the SARB to request financial assistance in order to assist it with difficulties encountered pursuant to certain bad investments and other non-performing assets which it had acquired with the takeover of Trust Bank in 1977 and Mercabank in 1984.

2.7. In a letter dated 30 May 1985, SARB granted Banbol Proprietary Limited ("**Banbol**") financial assistance in the amount of R200 million at an interest rate of 3% per annum. Banbol was owned 50% by Bankorp and 50% by Boland Bank.

2.8. At the time, South African National Life Assurance Company Limited ("**Sanlam**") was the majority shareholder in Bankorp. As security for the loan, Sanlam had to cede government bonds to the SARB. Repayment of the loan was to commence as soon as possible and was to be completed by 31 May 1990.

2.9. On 18 April 1986 the SARB increased the financial assistance provided to Banbol by a further R100 million, structured on substantially the same terms and conditions as the 1985 assistance. The full amount of R300 million would be repayable from 1 July 1988 in three equal instalments of R100 million. The date for full and final repayment remained 31 May 1990.

2.10. During 1987, the SARB amended the terms and conditions of the financial assistance provided to Bankorp in order to support a rationalisation programme Bankorp was undertaking. The R300 million became repayable in five equal annual instalments of R60 million, commencing on 1 April 1990. The remainder of the terms and conditions of the financial assistance remained unchanged.

2.11. In November 1989, Sankorp Limited (a 100% held subsidiary of Sanlam, in which Sanlam consolidated its strategic investments) underwrote a rights issue of R350 million by Bankorp, of which it subscribed R299 million.

2.12. In March 1990 the SARB and Bankorp agreed that the date for repayment of the first instalment of the financial assistance by Bankorp would be extended from 1 April 1990 to 1 August 1990.

Package B: Financial assistance of R700 million

2.13. The financial position of Bankorp continued to deteriorate. On 3 August 1990 the parties entered into a new agreement in terms of which the SARB provided a package of financial assistance to Bankorp, again via Banbol ("**the August 1990 Assistance**").

2.14. In terms of the August 1990 Assistance, the SARB would provide a further R700 million to Bankorp. Of the total amount of R1 000 million the SARB had provided to Bankorp, R400 million was to be deposited with the SARB, the remaining R600 million was to be used to purchase government bonds. The period for which each element of this transaction would last was 5 years.

2.15. The loan of R1 000 million from SARB to Bankorp would accrue interest at 1% per annum which was payable to the SARB. Interest on both the deposit with SARB and the yield on the bonds purchased from National Treasury would be at 16% per annum. The 1% interest on the loan to Bankorp was immediately set off by the SARB.

2.16. A margin of 15% would therefore accrue to Bankorp. Bankorp was required to use this only to set off specifically identified and bad debts owed by its customers over a period of five years.

2.17. On 5 September 1991 the terms and conditions of the August 1990 Assistance were amended again. At that stage, it had become apparent that Bankorp's bad debts amounted to R1 635 million.

2.18. In terms of the amended agreement a further amount of R500 million (bringing the total advance to R1 500 million) was to be provided and advanced by the SARB to Bankorp (via Banbol). This amount would be utilised to buy additional government bonds in the amount of R500 million. In terms of this further agreement, Bankorp was to cede all its rights and title in these additional bonds as security for the further capital amount the SARB had loaned to it, over and above the security for the earlier assistance. The effect was that the SARB would advance a further R500 million to Bankorp via Banbol ("**the 1991 Agreement**"). A copy of the 1991 Agreement is attached hereto marked **"MR3"**. We note that a copy of the English translation of the 1991 Agreement can be found at annexure "E1" to the Submissions (Annexure B to the 1991 Agreement has been redacted to protect client confidentiality).

2.19. The net margin of 15% which accrued to Bankorp would generate an amount of R225 million per year, and by the end of the five year period would amount to R1 125 million which would be used to set off the bad-debts of Bankorp's customers over that period. The bad debts of Bankorp were estimated at R1 635 million. The difference between the bad debts and the assistance was to be covered by Bankorp's majority shareholder - Sankorp (a subsidiary of Sanlam which operated as a holding company for Sanlam's investments).

2.20. The SARB imposed various conditions on Bankorp as part of the assistance, including that Bankorp's cash dividends were limited so that they were payable only to minority shareholders for as long as the facility continued. In addition Sankorp was required to invest its share of the dividends in new capital in Bankorp. Bankorp had to close 70 branches by 31 December 1990 and reduce its staff by approximately 3,000 by the same deadline. The Managing Director of Bankorp was also required to meet every quarter with the Bank Supervision Department of the SARB.

Package C: ABSA's acquisition of Bankorp

2.21. ABSA acquired Bankorp with effect from 1 April 1992. The acquisition price was at fair value taking into account the financial assistance SARB had provided to Bankorp. Absa would have paid a significantly lower amount, or not acquired Bankorp at all, had the fair value of the financial assistance not been included in the acquisition price. This is the usual commercial approach adopted by any reasonable diligent purchaser.

2.22. ABSA's acquisition of Bankorp, effective from 1 April 1992, was conditional upon the financial assistance from the SARB remaining in place. This was because, included in what ABSA purchased, were the bad debts which had caused Bankorp's financial distress and for which SARB's assistance was required. In other words, ABSA purchased approximately R1 635 million in bad debt as part of the acquisition of Bankorp, and assistance amounting to total of R1 125 million to be set off against these debts over the full five year period of the assistance).

2.23. A due diligence process was undertaken by Bankorp and KPMG Limited. The Results of the Due Diligence Negotiations are attached marked "C" to annexure **"MR16"** below. I also attach the Bankorp and KPMG Limited Due Diligence Reports, with the confidential information identifying the Bankorp debtors and customers redacted in order to preserve bank-customer confidentiality, as **"MR4"** and **"MR5"**.

2.24. The eventual price paid for Bankorp by ABSA was R1 230 million and the net asset value of Bankorp was R1 222 million (calculated including the total net yield payable under the financial assistance programme to Bankorp). Consquently, ABSA paid more than the net asset value of Bankorp.

2.25. Further, as disclosed in ABSA's 1993 Annual Report, attached marked "F" to **"MR16"** below, following the acquisition of Bankorp, ABSA had to write-off in excess of R288 million given the lower than expected value of Bankorp's assets. The following statement to this effect was recorded in the financial statements: **"The application of ABSA's more conservative accounting and provisioning policies and practices to Bankorp resulted in the price paid exceeding the value of the net assets of that group by R288.8 million. Subject to approval of the shareholders by special resolution at the forthcoming annual general meeting of the Company and the confirmation of the Supreme Court, it is proposed to write-off the amount against the share premium account. The proposed write-off has been given effect in the financial statements for the year ended 31 March 1993."** (at pages 2 to 3)

2.26. The agreement in terms of which ABSA took over the financial assistance to be used to write off the debts of Bankorp's customer was concluded on 29 April 1994 (with retroactive effect to 1 April 1992). In terms of this agreement ABSA replaced Bankorp as the beneficiary of the financial assistance ("**the 1994 Agreement**"). Effectively ABSA took over the existing Package B financial assistance in the 1994 Agreement. A copy of the 1994 Agreement is attached hereto marked **"MR6"**. I note that a copy of the English translation of the 1994 Agreement can be found at annexure "E2" to the Submissions.

2.27. Since the bonds would mature (and had to be repurchased) prior to the expiry of the 1991 Agreement (at annexure "E1" to the Submissions), the parties amended the structure of the assistance in early 1995. They agreed that the SARB would repurchase the bonds and that ABSA would cede to the SARB the full amount of the proceeds (R1 100 million), which were already deposited with the SARB. The balance of the R400 million remained deposited

with SARB. In place of the yield on the bonds, the yield on this deposit at the same net rate of 15% would be payable to ABSA for the same specified purpose of setting off the bad debts which ABSA had acquired as a result of the acquisition of Bankorp. These terms were encapsulated in an agreement signed on 20 June 1995 ("**the 1995 Agreement**"). A copy of the 1995 Agreement is attached hereto marked **"MR7"**. We note that a copy of the English translation of the 1995 Agreement can be found at annexure "E3" to the Submissions.

2.28. The 1995 Agreement terminated on 23 October 1995 when the accumulated total of financial assistance generated in terms of Packages B and C amounted to R1 125 million. ABSA repaid the loan of R1 500 million and, as at October 1995, ABSA had no further loans from the SARB, no further investment in government bonds, and no further deposits with the SARB in relation to Bankorp.

2.29. At the conclusion of the financial assistance the cumulative Bankorp debts which had been written off by Bankorp and then ABSA once it had purchased Bankorp amounted to R1 900 million, against the assistance provided which totalled R1 125 million covering a portion of those debts. In effect, even with the assistance provided by the SARB, Bankorp and then ABSA suffered losses of approximately R775 million (R1 900 million less R1 125 million) during the relevant period when Packages B and C were in place. It is important to note that the portion of the R1 125 million in assistance was provided and expended through being set-off against the bad debts of Bankorp customers before ABSA purchased Bankorp.

Establishment of the office of the Public Protector

2.30. The office of the Public Protector was established in terms of the Public Protector Act 23 of 1994, which commenced on 25 November 1994. The office of the Public Protector came into being on 1 October 1995.

The Tollgate inquiry

2.31. On 26 February 1996, Dr Chris Stals, Governor of the SARB at the time, made submissions to a Section 417 Commission of Inquiry into the affairs of Tollgate Holdings Limited following its liquidation. Tollgate, a customer of Bankorp, could not afford to repay its loans to Bankorp/ABSA. Tollgate's debt to Bankorp was one of those bad debts to be set off by the SARB assistance.

2.32. In his submissions, Dr Stals detailed the structure of the financial assistance from the SARB to Bankorp, and also indicated that by 23 October 1995, Bankorp/ABSA had repaid its debt to the SARB in full. A copy of Dr Stals' submissions is annexure "F" to the Submissions.

Ciex

2.33. In 1997, CIEX Limited, a London-based covert asset recovery agency, approached the South African government in order to propose that Ciex investigate and recover money that the apartheid government had improperly paid to various persons. Ciex proposed that it would receive a commission for funds it recovered.

2.34. According to the Public Protector's Provisional Report, a memorandum of agreement was signed between the South African Government and Mr Michael Oatley, the head of Ciex,

on 6 October 1997 which authorised Ciex to investigate and recover funds on behalf of the South African Government.

2.35. Ciex's mandate included the investigation of the **"lifeboat"** transaction, the financial assistance provided to Bankorp.

2.36. Ciex presented a document reflecting its conclusions titled **"Ciex: Operations on behalf of the South African Government, August 1997 - December 1999"** ("**the Ciex Document**"). A copy of the Ciex Document is attached as **"MR8"**.

2.37. The Ciex Document is replete with inaccuracies and unsubstantiated allegations. The most glaring inaccuracy is Ciex's advice that **"Government might safely and legally seek recovery of sums up to 10 billion Rand from Absa and its shareholders"**.

2.38. The Ciex Document references earlier reports of 29 November 1997 and 8 January 1998. These reports were never provided to ABSA.

2.39. Ciex did not consult with ABSA in the process of compiling the Ciex Document. Whilst I was aware generally of the existence of an investigation by Ciex from publicity in recent years, the first time I was presented with the Ciex Document was during the course of the Public Protector's investigation when I read it in preparation for my interview with then Public Protector Advocate Madonsela.

2.40. The method for recovery suggested in the Ciex Document is summed up on page 14 as follows:

"Absa and its shareholders might be offered a choice: volunteer restitution over a convenient period or face personal retribution including personal liability for damages to defrauded shareholders".

2.41. The Ciex Document accordingly does not include a legal basis for recovery, but suggests that the government should simply seek to intimidate the directors into ensuring ABSA pays some amount of money to the government. No explanation at all is provided of how such amount would be calculated or what the legal basis of such payment would be.

2.42. On 26 January 2017, the former Minister of Finance, Mr Pravin Gordhan, filed an answering affidavit in High Court of South Africa, Gauteng Division in the matter between **Black First Land First Movement v Minister of Finance and Others** case number 83550/2016 ("**the BLF matter**"). This affidavit is annexure C to the Submissions.

2.43. The BLF matter also concerns the government's alleged failure to implement the Ciex Document. In his answering affidavit Mr Gordhan describes Ciex's recommendations to the government – for recovery of the alleged misappropriated funds from ABSA – as "coercion" (at paragraphs 12 to 14 of this affidavit).

2.44. Mr Gordhan further indicated that, as a result of this proposed method of recovery, the Government elected not to follow Ciex's recommendations. Mr Gordhan concludes that Ciex's recommendations have no legal status.

The Heath Enquiry

2.45. In 1998, Judge Willem Heath, the then head of the SIU, was authorised to conduct an investigation into the financial assistance provided by the SARB to Bankorp's ("**the Heath inquiry**"). The President issued Proclamation R47 of 1998 formally directing the SIU to investigate the Bankorp assistance on 7 May 1998. A copy of Proclamation R47 is attached as **"MR9"**.

2.46. The SIU proceeded with its enquiry, in which ABSA participated, and on 1 November 1999 issued its report, titled the **"Special Investigating Unit: Official Statement on the 'Lifeboat' Case"** ("**The Heath Report**").

2.47. The relevant findings of the Heath Report include:

2.47.1. The lifeboat transaction was unlawful and that it could be challenged in civil proceedings. (p.6)

2.47.2. If the lifeboat transaction was to be set aside, "the obligation to repay the benefit [R1 125 million] would rest with Sanlam, who as major shareholder in Bankorp Limited was taken over by ABSA. Alternatively, then ABSA would be liable as the final recipient of the 'Lifeboat'. Further alternatively if the 'Lifeboat' was found to be a valid contract, such portion of the 'Lifeboat' that was not used to write off relevant bad debts had to be repaid." (p.7)

2.47.3. However, should the SIU institute legal proceedings against ABSA, the process would be lengthy and there was a real risk that this would result in losses to the public. A concern was that it would cause a **"run on the banks"** (p.8). Other concerns were the negative impact on domestic and foreign investors (p.9) and the risk to other banks' interests (p.10).

2.47.4. Accordingly, although there was a legal basis to attack the validity of the "lifeboat" contract, there were compelling reasons of public interest not to proceed with litigation for recovery (p.8, p.11).

2.48. I note that in finding that ABSA could be held liable to repay the "lifeboat" if the claim against Sanlam failed, the Heath Report does not purport to have considered the agreement of sale in terms of which ABSA acquired Bankorp for fair value and whether or not the sale provided for the purchase of that debt.

2.49. A copy of the Heath Report is attached as **"MR10"**.

Investigation by the Governor's Panel of Experts led by Judge Davis

2.50. The Governor of the SARB announced on 15 June 2000 that a panel of experts, chaired by Judge DM Davis, had been appointed to investigate the SARB's role in the provision of the financial assistance package to Bankorp ("**the Davis Panel**"). The Davis Panel was independent and was made up of local and international independent legal, financial, accounting and banking experts. The members of the Davis Panel were, in addition to Judge Davis,

- Prof L Harris, Director: Centre for Financial Management Studies at SOAS, University of London;

- Mr PC Hayward, Financial Sector Advisor at the Monetary and Exchange Affairs Department, International Monetary Fund, who served on the Panel in his private capacity;

- Mr RM Kgosana, Chairperson of KMMT Chartered Accountants;

- Mr RK Store, Chairperson of Deloitte and Touche Chartered Accountants; and

- Mr S Zilwa, Chairperson of Nkonki Sizwe Ntsaluba Chartered Accountants.

2.51. The Davis Panel engaged in extensive investigations and interviews of persons involved in assistance to Bankorp over the course of 1985 to 1992. ABSA was consulted in this process. The Davis Panel met seven times during the period 1 September 2000 to 29 July 2001 in Pretoria, Cape Town and London. The report of the Davis Panel was published on 26 February 2002.

2.52. The Davis Panel considered, *inter alia*, whether the SARB acted *ultra vires* in granting the R1 500 million financial assistance to Bankorp/ABSA. It found, *inter alia*, that:

2.52.1. Although Package A was structured on the basis of a low interest loan, the SARB acted within the scope of its powers when granting the financial assistance, as it was not precluded from charging interest at a rate lower than the market rate **(**p.43**)**.

2.52.2. Packages B and C constituted simulated transactions, the true nature of which were donations of money. There existed no legal basis upon which the SARB could have granted such financial assistance, and accordingly it acted *ultra vires* in the further aid provided to Bankorp/ABSA under Packages B and C **(**p. 46**)**.

2.53. With regard to the possible legal basis for reclaiming the unlawful payments, the Davis Panel found that:

2.53.1. A claim for unjustified enrichment would be the only basis on which to institute any action. Central to such a claim would be proving the existence of a beneficiary of the enrichment **(**p. 78**)**.

2.53.2. The SARB assistance provided to Bankorp conferred benefits on Sanlam's policyholders and pension fund beneficiaries. Although it would in principle be possible to claim restitution from these beneficiaries, it could not be recommended to institute action against them as such litigation would be time consuming and costly.

2.53.3. ABSA paid fair value for Bankorp and did not benefit from the assistance to Bankorp. ABSA paid for the continued assistance of Bankorp by the SARB and ABSA in its acquisition of Bankorp in 1992, and therefore could not be regarded as the beneficiary of the SARB assistance package. The critical passages in this regard are as follows:

2.53.3.1. “The Panel is of the view that ABSA paid for the continued assistance of Bankorp by the Reserve Bank and could not be regarded as beneficiaries of Reserve Bank assistance package. ABSA paid fair value for Bankorp” (p.10).

2.53.3.2. The outcome of the SARB's assistance was to "benefit [Sanlam] shareholders, for the net asset value of Bankorp and the price they received when taken over by ABSA was raised by the amount of the assistance" (p.10).

2.53.3.3. The details of the Panel's quantification of the benefits derived from the SARB's assistance appear at paragraph 7.2, pp.79 –

81. The Panel "established that if the assistance package had been terminated at the time of the takeover, either ABSA would have paid a lower price for Bankorp, or there would have been no transaction" (p.80).

2.54. A copy of the Davis Panel report is attached as annexure **"MR11".**

The Public Protector's Investigation

2.55. On 10 November 2010 the Public Protector received a complaint from Mr Paul Hoffman, the Director of the Institute for Accountability in Southern Africa, alleging that Ciex had been contracted by the South African Government to investigate and recover public funds and assets misappropriated during the apartheid era ("**the Hoffman Complaint**"), and that the South African government had failed to act on the Ciex Document.

2.56. The Public Protector began investigating the Hoffman Complaint in 2012. A copy of a news article to this effect is attached as **"MR12"**.

2.57. On 21 April 2016, I received a letter from the Public Protector informing me of an investigation her office was conducting based on the Hoffman Complaint. This letter said that the Public Protector's office was investigating alleged maladministration, corruption and misappropriation of public funds by the apartheid government and the failure by the South African government to implement the Ciex Document. A copy of this letter is attached as **"MR13"**.

2.58. On 27 May 2016 ABSA wrote to the Public Protector, requesting her to provide ABSA with a list of documents her office requires to assist with the investigative process. A copy of this letter is attached as **"MR14".**

2.59. On 1 June 2016 the Public Protector again wrote to me, requesting **"information regarding investigation into allegations of maladministration, corruption, misappropriation of public funds and failure by the South African Government to implement the Ciex Report"**. A copy of this letter is attached as **"MR15"**.

2.60. On 24 June 2016, ABSA wrote to the Public Protector providing detailed submissions as well as supporting documents.

2.61. In particular ABSA provided the Public Protector with copies of, *inter alia*, the following:

2.61.1. the Illustrative Reconstruction, which set out ABSA's understanding of the financial assistance provided to Bankorp, and ABSA's involvement with the financial assistance from 1992 to 1995 attached as annexure "B1 to annexure **"MR2"** hereto; and

2.61.2. submissions prepared by Advocates Gilbert Marcus SC and Musatondwa Musandiwa in which they considered the jurisdiction of the Public Protector to investigate ABSA's alleged involvement in the wrongdoing that took place some 30 years ago. The memorandum from the advocates is annexure "B" to the Submissions.

2.62. ABSA offered the Public Protector the opportunity to inspect relevant documents, which contained confidential client information, at the offices of ABSA's attorneys.

2.63. A copy of the covering letter to these submissions is attached hereto marked **"MR16"**. I include with the covering letter those annexures to the Illustrative Reconstruction not elsewhere attached to this affidavit to avoid duplicating those annexures. The annexures which are elsewhere attached to this affidavit are the Davis Panel Report (**"MR11"**), the Heath Report (**"MR10"**), the ABSA Annual Report for the Year Ended 31 March 1993 ("F" to **"MR2**") and the Ciex Document (**"MR8"**).

2.64. On 7 July 2016, the Public Protector again wrote to ABSA. In this letter the Public Protector indicated that she considered that her office did in fact have jurisdiction to investigate the matter, as section 6(9) of the Public Protector Act gave her the discretion to decide to do so. A copy of the letter is attached as **"MR17"**.

2.65. On 10 August 2016, ABSA wrote to the Public Protector, again disputing her office's jurisdiction to investigate the matter. A copy of this letter is attached as **"MR18"**.

2.66. Advocate Busisiwe Mkhwebane replaced Advocate Thuli Madonsela as the Public Protector with effect from 15 October 2016.

2.67. On 20 December 2016 the Public Protector signed the Provisional Report. A copy of this report was furnished to ABSA on 21 December 2016. A copy of the Provisional Report is attached as **"MR19"**.

2.68. The Provisional Report considered *inter alia* the following issues raised in the Hoffman Complaint:

2.68.1. the uncertainty surrounding the termination of the contract between Ciex and the South African Government;

2.68.2. the South African Government's failure to address the issues raised in the Ciex Document, including its failure to recover R3 200 million from ABSA; and

2.68.3. the alleged **"illegal gift"** the SARB gave Bankorp by way of a **"lifeboat"** in 1991.

2.69. In the Provisional Report, the Public Protector makes the following findings based on the above issues:

2.69.1. the South African Government, National Treasury and the SARB failed to implement the Ciex Document;

2.69.2. Bankorp/ABSA had repaid the capital portion of the loan received from the SARB, amounting to R1 500 million, but still owed 16% interest on a loan to the South African

Government, amounting to R1 125 million, and legal action should be instituted against ABSA to recover this amount; and

2.69.3. the South African Government's failure to implement the Ciex Document was improper based on section 195 of the Constitution and the Public Finance Management Act 1 of 1999;

2.69.4. ABSA had made provision in its accounts reflecting that a debt was owing to SARB.

2.70. On 22 December 2016, ABSA provided the Public Protector with an interim response to the Provisional Report ("**the Interim Response**"). The Interim Response identified manifest defects in the Provisional Report and requested specific documents on which the Public Protector relied in preparing the Provisional Report.

2.71. ABSA also noted that, despite ABSA's invitation to the Public Protector to inspect certain relevant documents in ABSA's letter of 24 June 2016, she had not done so before issuing the Provisional Report.

2.72. Given the time of year (21 December) at which ABSA received the Provisional Report, ABSA requested an extension for the period within which to provide the Public Protector with their detailed response. The extension requested was for a period of one month from the date on which the Public Protector would provide ABSA with the requested further information and documentation. A copy of the Interim Response is attached as **"MR20"**. The annexures to this Interim Response have already been attached.

2.73. On 9 January 2017, ABSA sent a follow-up letter to the Public Protector, as no reply to the Interim Response had been received from the Public Protector's office. A copy of this letter is attached as **"MR21"**.

2.74. On 10 January 2017, the Public Protector granted an extension for ABSA's detailed response to the Provisional Report until 28 February 2017, but failed to provide ABSA with the requested further information and documentation. A copy of this letter is attached as **"MR22"**.

2.75. On or about 13 January 2017, the Provisional Report was leaked to the public. On 13 January 2017, a number of news outlets published articles relating to the Provisional Report. An example of such an article is attached as **"MR23"**.

2.76. The leak of the Provisional Report led to protests and marches against ABSA, including by the ANC Youth League and Black First Land First. A copy of a news article reporting on these protests is attached as **"MR24"**.

2.77. On 16 February 2017, representatives of the Public Protector conducted an inspection of the confidential documents at the offices of Webber Wentzel, attorneys to ABSA.

2.78. On 28 February 2017, ABSA provided the Public Protector with a response to the Provisional Report. This is what I have referred to as "the Submissions" and is annexed as annexure **"MR2"**. The Submissions are incorporated in their entirety in this affidavit.

2.79. The Submissions addressed the numerous factual and legal errors contained in the Provisional Report, including the materially incorrect factual findings made by the Public Protector as follows:

2.79.1. ABSA did not make provision for the payment of R100 000 tranches to the SARB. In this regard, ABSA provided the financial statements for the period 1992 to 1998.

2.79.2. ABSA did not benefit from the "lifeboat" afforded by the SARB to Bankorp, as the acquisition price paid by ABSA for Bankorp included approximately R1 635 million in bad debts. ABSA therefore paid fair value for Bankorp, as the acquisition price was increased to account for the SARB assistance.

2.79.3. The Public Protector misunderstood the structure of the "lifeboat" provided by the SARB to Bankorp.

2.79.4. ABSA had in fact repaid paid fair value for Bankorp, and that the purchase price included payment for the "lifeboat".

2.80. Without further communication with ABSA, on 19 June 2017 the Public Protector held a media briefing in which she announced her findings in a Final Report into the matter. The media briefing was held with no prior notice to ABSA, and before a copy of the Report was made available to ABSA. A copy of the press statement released at this media briefing is attached as **"MR25"**.

2.81. After the media briefing, the Public Protector furnished ABSA with a copy her Final Report. A copy of the Final Report is attached above as **"MR1"**.

3 THE STATUTORY FRAMEWORK

3.1. The office of the Public Protector is one of the institutions recognised in Chapter 9 of the Constitution which were established to strengthen constitutional democracy in South Africa.

3.2. Section 181(2) of the Constitution enshrines the independence of, *inter alia*, the Public Protector and makes it clear that these institutions are **"subject only to the Constitution and the law and they must be impartial"**.

3.3. Section 182 of the Constitution vests the Public Protector with the power **"as regulated by national legislation"** to investigate **"any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice"**.

3.4. In terms of section 182(2) of the Constitution the Public Protector has **"the additional powers and functions prescribed by national legislation"**. One of the pieces of national legislation directly relevant is the Public Protector Act 23 of 1994 which came into operation on 23 November 1994.

3.5. Investigations by the Public Protector are triggered by the mechanisms set out in section 6 of the Public Protector Act. This section gives the Public Protector the power to investigate, *inter alia*, complaints of any alleged maladministration in connection with the

affairs of government at any level and the abuse or unjustifiable exercise of power by a person performing a public function.

3.6. Section 6(9) of the Public Protector Act imposes an important limitation on the powers of the Public Protector. It provides:

"6(9) 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."

3.7. In terms of section 7(9) of the Public Protector Act, the Public Protector is obliged to afford a person who is implicated in the matter being investigated in a detrimental manner **"an opportunity to respond in connection therewith"**.

3.8. The manner in which the Public Protector exercises the powers conferred upon her, whether by the Constitution or the Public Protector Act, is subject to the requirements of the Constitution and the PAJA. This means, I am advised, that:

3.8.1. any investigation must be conducted fairly and consistently with the requirements stipulated in PAJA and any other prescribed legislation, including the Public Protector Act;

3.8.2. any findings must meet the minimum requirement of rationality which is required for the exercise of any public power;

3.8.3. any conclusions reached by the Public Protector must be based on accurate findings of fact and a correct application of the law.

3.9. In her Report, the Public Protector repeatedly refers to section 195 of the Constitution. See, for example, paragraphs 5.1.11; 5.1.14 and 5.2.40. I have been advised and I respectfully submit that the Public Protector misconceives the role of section 195 of the Constitution. That section, I am advised, has been held by the Constitutional Court not to create justiciable rights.

3.10. The legal framework and applicable principles which govern the office of the Public Protector will be addressed in argument.

4 MATERIAL ERRORS OF FACT

4.1. The material errors of fact in the Final Report fall into three main categories:

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

4.1.2. Secondly, that the SARB's financial assistance did not benefit the South African public; and

4.1.3. Thirdly, the Public Protector records certain erroneous statements of third parties, but never clarifies that they are in fact erroneous.

I address each in turn.

ABSA's paid fair value for Bankorp

4.2. In its Submissions on the Provisional Report, ABSA showed that, in terms of the sale agreement, it had paid fair value for the acquisition of Bankorp (paragraphs 5.18 to 5.30). The Davis Panel reached the same conclusion (see paragraphs 2.50 - 2.54 above). So did the SARB and the National Treasury (paragraphs 5.2.18 and

5.2.21 of the Final Report).

4.3. Simply put, the Davis Panel found that the price ABSA paid for Bankorp took into account the value of the assistance from the SARB. As part of the purchase price, ABSA paid for the expected future interest stream from the "lifeboat". The total purchase price was slightly more than the net asset value (assets minus liabilities) of Bankorp, taking into account the assistance from the SARB. In other words, whatever the SARB provided Bankorp by way of assistance, ABSA paid slightly more as part of the purchase price. ABSA was therefore not enriched. The only beneficiaries were the sellers of the shares in Bankorp, namely, Sanlam (Davis Report, paragraph 7.2, pp. 79-81).

4.4. That is why the Davis Panel also finds that, if the assistance package had been terminated at the time of the takeover, ABSA would have paid a much lower price or would not have bought Bankorp at all (Davis Report, paragraph 7.2, p.80).

4.5. The Davis Panel's conclusions in this regard are carefully reasoned with regard to the agreement of sale between ABSA and Bankorp. In stark contrast, the Ciex investigation offers no reasoning whatsoever for its conclusion that ABSA is liable for R3 200 million. It merely advises that the government can coerce ABSA into paying. The Heath Report also advises that ABSA could be held liable to repay the "lifeboat" if the claim against Sanlam failed. However, unlike the Davis Panel, the Heath Report does not consider the agreement of sale in terms of which ABSA acquired Bankorp and whether or not the sale provided for the purchase of that debt.

4.6. The Final Report conspicuously omits to mention the conclusion of the Davis Panel. While the Public Protector purports to provide a summary of the Davis Panel findings (paragraphs 5.2.36 to 5.2.37), she does not record the Davis Panel's conclusion – that ABSA had paid fair value for Bankorp and, for this reason, was not liable for any portion of the assistance. That liability lies elsewhere, namely with Sanlam.

4.7. If anything, the Public Protector misrepresents the Davis Report in this regard. She says that **"…two investigations by the Special Investigating Unit and the [Davis] Panel into the matter established that the interest of 15% in the amount of R1.125 billion <u>accrued to Bankorp Limited/ABSA Bank</u> on the Government Stock Bonds was an unlawful gift**" (paragraph 5.2.31, p.38, emphasis added). She repeats this formulation at paragraph 5.2.63. But the Davis Panel expressly and pointedly found that the amount had accrued to Bankorp and not to ABSA, as ABSA had purchased the debt when it bought Bankorp.

4.8. The facts found by the Davis Panel concerning the acquisition of Bankorp referred to above are the correct facts. Those facts were corroborated in the evidence ABSA and SARB placed before the Public Protector. There is no evidence to contradict those facts.

4.9. Accordingly, the Public Protector picks and chooses aspects of various reports before her, deliberately ignoring facts and findings that do not suit her conclusion. The upshot is that she never explains why the Davis Panel (as well as ABSA, the SARB and the Treasury) is wrong in its analysis of the agreement of sale between ABSA and Bankorp. She never mentions the agreement of sale or offers a valid legal basis for her conclusion that ABSA (as opposed to Sanlam or Bankorp) is liable.

4.10. When asked by the media why her conclusion in respect of ABSA's liability differs from that of the Davis Panel, the Public Protector can offer no cogent explanation. For example, in an interview with Xolani Gwala on Talk Radio 702 on 20 June 2017, Mr Gwala asked the Public Protector to explain why Judge Davis was wrong is finding that the purchase price ABSA paid for Bankorp accounted for the SARB's assistance. She answered as follows:

"Err you know, because that is the argument which was raised by ABSA as well, that they paid value for money for the bank. But then remember as well they had to take over its assets and liabilities, they did benefit from the illegal gift from 1992 to 1994, because as well they signed agreement with the Reserve Bank, and the… thee misappropriated funds were never given directly to… in fact to to to … the misappropriated uhm… benefited only a few, uhm, which were the shareholders then, it never benefited the South Africans".

4.11. I attach a transcript of the interview marked "**MR26**".

4.12. Accordingly, the Public Protector does not justify her conclusion for finding that ABSA is liable to repay R1 125 million in her Report or in her subsequent explanations of her Report.

4.13. In the circumstances, the Public Protector's finding that ABSA is liable for any portion of the SARB's assistance is a material error.

Benefit to the public

4.14. The essence of the structure of the "lifeboat" provided to Bankorp, which now appears to be common cause, was the following (see annexure "A" of the Submissions annexed at **"MR2"**):

4.14.1. The SARB provided a loan to **Bankorp**.

4.14.2. Bankorp immediately used the loan to purchase government bonds to the value of R1 100 million. Bankorp deposited the remainder of the loan (R400 million) with the SARB and earned interest.

4.14.3. The yield on those bonds and the interest earned on the deposit were at a rate of 16% per annum. The interest charge on the loan was 1% per annum, and the net rate of 15% per annum which accrued to Bankorp would be used <u>only</u> to set-off certain specified bad debts owed by customers to Bankorp.

4.14.4. ABSA took over the existing financial assistance package provided for the benefit of Bankorp's customers as part of its fair value acquisition of Bankorp.

4.14.5. Dr Stals, the Governor of the SARB from 1989 to 1999, gave evidence in the Tollgate inquiry, and a copy of his submission is attached marked "F" to the Submissions, in which he confirmed that at the time Package B was initiated the South African economy was in recession and a liquidation of Bankorp would have affected other banking institutions and forced the liquidation of many of the customers of the bank. This evidence was presented to the Public Protector and not disputed.

4.15. Once the Public Protector accepts that Bankorp used the "lifeboat" for the purpose of setting-off the bad debts owed by their customers, it is illogical for her to conclude that certain individuals were enriched by the lifeboat and that the public received no benefit whatsoever (paragraph 6.3.3 of the Final Report).

4.16. The Public Protector ignores the role of central banks, including the SARB, as a "lender of last resort" in order to maintain financial stability in, and the sustainable economic growth of the economy in which they operate. The SARB is tasked with bank regulation and supervision, and where there is a need in specific circumstances to provide assistance to financial institutions in distress, the SARB is duty bound to do so as the "lender of last resort".

4.17. This role is performed for the benefit of the general public as where the failure of a bank can impact the entire financial system this can lead to severe detrimental effects throughout the economy. The role of the SARB in protecting the broader public interest is already encapsulated in the Constitution where the SARB is mandated to perform its primary object of protecting the value of the currency "*in the interest of balanced and sustainable economic growth in the Republic*".

4.18. For completeness, I note a point the Public Protector does not address: the SARB's current mandate which she originally sought to have amended, was not in fact the applicable mandate at the time of the financial assistance provided to Bankorp. The SARB's primary object was changed after the Bankorp financial assistance was concluded in 1995. Prior to its amendment to the current version by Act 2 of 1996, section 3 of the SARB Act stated the primary object of the SARB in different terms "***In the exercise of its powers and the performance of its duties the Bank shall pursue as its primary objectives monetary stability and balanced economic growth in the Republic, and in order to achieve those objectives the Bank shall influence the total monetary demand in the economy through the exercise of control over the money supply and over the availability of credit.***"

4.19. I note that in Dr Stals' submission to the Tollgate inquiry attached marked "F" to the Submissions, he provides a detailed exposition of the general role of central banks, the SARB's role at the relevant time acting in the general interest of financial stability of the economy, as well as the public benefit he saw in the SARB's intervention in the Bankorp matter specifically. This information was presented to the Public Protector and not addressed at all.

4.20. Further, the Davis Panel concluded that:

"It is important to distinguish between the justification for a central bank intervening in respect of a distressed bank and the modalities for intervention; between the validity of the ends and the means. In the case of Bankorp/ABSA the Panel finds that intervention with the objective of averting a systemic crisis of the banking sector was justified. However, by the

standards of international best practice the methods were flawed." (Davis Report, paragraph 6.5, p.75, emphasis added).

4.21. The Public Protector does not contest that Bankorp used the "lifeboat" to set-off the bad debts of its customers nor that this served to avert a systemic crisis of the banking sector. Yet she concludes that the South African public received no benefit at all.

4.22. In the circumstances, the Public Protector's statement that **"[f]ailure to recover the 'gift' resulted in prejudice to the people of South Africa as the public funds could have benefitted the broader society instead of a handful of shareholders of Bankorp Limited/ABSA Bank** (Final Report, para 3(c), pp.4-5)" is a material error of fact.

Uncorrected errors

4.23. The Public Protector summarises the more important reports and submissions she took into account when formulating her remedial actions. In doing so, she records many erroneous allegations. She never says that they are erroneous. The implication is that she accepts these allegations. For example:

4.23.1. The Final Report records that Ciex alleged that "**some directors of ABSA Bank made large personal profits from insider trading, using their knowledge of the 'lifeboat' secret subvention**" (paragraph 5.1.5.4, p.29). This allegation is false. Neither Ciex nor anyone else offers any evidence whatsoever to support it. Yet the Public Protector is silent as to the veracity of the allegation, and her conclusion that ABSA is liable for the repayment of the "lifeboat" tacitly lends the allegation credence.

4.23.2. Similarly, the Final Report records that Ciex alleged that "**the directors of ABSA Bank are personally liable to criminal charges for fraud as well as for breaches of the Companies Act**" (paragraph 5.1.5.6, p.30). Once again, this allegation is false, unsubstantiated and apparently accepted by the Public Protector.

4.24. The remedial action under review flows directly from the material factual errors enumerated above. In the result, the remedial action of the Public Protector –

4.24.1. was based on irrelevant considerations and the failure to take relevant considerations into account contrary to section 6(2)(e)(iii) of PAJA, alternatively, the principle of legality;

4.24.2. was arbitrary, contrary to section 6(2)(e)(vi) of PAJA, alternatively, the principle of legality;

4.24.3. is not rationally connected to the information before her and the reasons given contrary to section 6(2)(f)(ii)(cc) and (dd) of PAJA, alternatively, the principle of legality;

4.24.4. is so unreasonable that no reasonable person could have so exercised the power, contrary to section 6(2)(h) of PAJA, alternatively, the principle of legality.

5 PROCEDURAL UNFAIRNESS

5.1. The Public Protector violated ABSA's right to procedural fairness in the manner in which she imposed the remedial action in two main respects:

5.1.1. First, she refused to provide ABSA with documents underlying the Final Report on which she placed material reliance;

5.1.2. Secondly, she relied heavily on the Ciex Document which in turn made adverse findings against ABSA without Ciex affording ABSA any hearing whatsoever.

I address these issues in turn.

The underlying documents

5.2. ABSA received the Public Protector's Provisional Report on 21 December 2016. ABSA wrote to the Public Protector on 22 December 2016 to inform her that, in order to prepare its response, it required access to various documents that the Preliminary Report referenced (para 4). The letter itemised some sixteen documents. These included the complaint itself, which the Public Protector had never given ABSA, various letters and memoranda on which the Preliminary Report relied, as well as transcripts of the interviews the Public Protector conducted and referenced in the Preliminary Report. A copy of the letter is attached above marked "**MR20**".

5.3. The Public Protector did not respond to ABSA's request.

5.4. ABSA sent a follow-up letter on 9 January 2017. A copy of this letter is attached marked "**MR21**". The Public Protector responded in a letter dated 10 January. The letter did not address ABSA's request for further information and documentation. A copy of this letter is attached hereto marked "**MR22**".

5.5. ABSA submitted its response to the Provisional Report on 28 February 2017. These are the Submissions referred to above and annexed marked "**MR2**".

5.6. ABSA pertinently pointed out that ABSA's "**right to invoke the statutory protections, as well as our right to procedural fairness (generally), depends on access to the information requested… Your office's apparent blanket refusal of our request denudes these rights**" ("**MR2**" para 3.7, p.7).

5.7. At various points in the response to the Provisional Report, ABSA says that it cannot properly address the Public Protector's allegations because the Final Report does not detail or attach the relevant underlying document. For example, the Provisional Report relies on an alleged agreement between ABSA and SARB of 1 April 1992. ABSA points out that the Final Report does not detail the terms of this alleged agreement and the agreement itself is not provided. "**Given this vague description, it is not possible to properly address this allegation**." ("**MR2**" para 5.13, p.21). ABSA asks the Public Protector to furnish it with the agreement "**so that we can respond meaningfully to it**" ("**MR2**" para 5.26, p.26).

5.8. The Public Protector never responded. She accordingly published the Final Report without affording ABSA (or, to my knowledge, any other affected party) the opportunity to comment on the underlying documents upon which she relied, including the complaint itself.

5.9. It is apparent from both the Provisional and the Final Reports that the underlying documents are material to the Public Protector's findings and remedial action. By refusing to allow ABSA to access them, the Public Protector denied ABSA the opportunity to properly

appreciate and respond to the case it had to meet. This violates ABSA's basic right to procedural fairness.

Ciex Document

5.10. On 21 April 2016, the Public Protector (Ms Madonsela), addressed a letter to ABSA to inform it that, in response to a complaint, her office was conducting an investigation into allegations of maladministration, corruption and misappropriation of public funds by the apartheid regime and the failure by the current South African Government to implement the Ciex Document. A copy of this letter is attached hereto marked **"MR13"**.

5.11. Accordingly, the trigger for the Public Protector's investigation is the Ciex Document.

5.12. The Final Report records the three issues that the Public Protector identified and investigated pursuant to the complaint:

5.12.1. Did the South African government improperly fail to implement the Ciex Document?

5.12.2. Did the government and the SARB fail to recover from Bankorp/ABSA an amount of R3 200 million, cited in the Ciex Document?

5.12.3. Was the public prejudiced by the conduct of the government and the SARB? (para (vii), p.1)

5.13. Accordingly, the terms of reference of the Public Protector's investigation were formulated on the basis of the Ciex Document.

5.14. The main findings of the Final Report are also based on the Ciex Document. The only material differences between the allegations contained in the Ciex Document and the findings of Public Protector are:

5.14.1. The Ciex Document said that the illegal gift amounted to R3 200 million, while the Public Protector said it amounted to R1 125 million.

5.14.2. The Ciex Document said ABSA had made provision to repay the illegal gift, while the Public Protector made no such finding in the Final Report (although there was such a finding in the Provisional Report).

5.15. Accordingly, the Public Protector's findings and remedial action that ABSA should repay the allegedly illegal gift substantively mirror those of the Ciex Document.

5.16. The Ciex "investigation" was apparently conducted in secret. Ciex certainly never invited ABSA to participate in its "investigation". Nor did it afford ABSA an opportunity to make representations and to provide any relevant evidence.

5.17. ABSA pointed this out to the Public Protector in the Submissions to her Provisional Report (para 2.12, p.16 of **"MR2"**).

5.18. Accordingly, Ciex made its findings and recommendations against ABSA with complete disregard to ABSA's basic right to a fair hearing. I am advised that this right to

procedural fairness was particularly intense as the Ciex Document made adverse findings against ABSA.

5.19. The Ciex Document triggered the Public Protector's investigation.

It determined the terms of reference of her investigation. The Final Report effectively adopts the central recommendation of the Ciex Document, namely, that ABSA should repay the allegedly illegal gift from the SARB.

5.20. In the circumstances, the Final Report is contaminated by the procedural unfairness of the Ciex investigation and report. ABSA's right to procedural fairness was violated twice: first by Ciex and then by the Public Protector. The former violation compounds and exacerbates the latter.

5.21. In the course of two investigations of which ABSA was the subject, ABSA was first denied the right to respond at all and was then denied access to the information it required to properly appreciate the case it had to meet.

5.22. I accordingly submit that the procedure of the Public Protector in proposing the remedial action presently under review violated –

5.22.1. Section 3(2)*(b)*(ii) of PAJA in that she failed to give adequate notice of the nature and purpose of the proposed administrative action;

5.22.2. Section 3(2)*(b)*(ii) of PAJA in that she failed to give ABSA a reasonable opportunity to make representations; and

5.22.3. Section 3(2)*(b)*(iii) of PAJA in that she failed to give ABSA a clear statement of the administrative action.

5.23. I accordingly submit that the Public Protector violated section 6(2)(c) of PAJA, in that the action was procedurally unfair.

5.24. In the alternative, the unfair procedure violated the principle of legality.

6 ANY DEBT ALLEGEDLY DUE HAS PRESCRIBED

6.1. The chronology relating to the loan to Bankorp has been set out above.

6.2. The facts relating to the loan establish that any debt originally owed by Bankorp has been discharged. There is accordingly nothing legally owing to the SARB (or any other party and/or government institution). If, however, it is found that the debt has not been discharged (which for the reasons set out above is denied), then any debt has in any event long since prescribed.

6.3. In the representations to the Public Protector concerning the Provisional Report, the question of prescription was pertinently raised. In paragraph 8.2.3 of the Provisional Report, it was stated that the appropriate remedial action that ought to be taken by National Treasury together with the SARB was to institute legal action against ABSA in order to recover 16% interest allegedly accumulated over a period of 5 years amounting to R1 125 million plus

interest. For present purposes, I do not address the question of the obligation to repay 16% per annum interest on the loan to Bankorp. This has been dealt with above. In relation to the question of prescription, however, the representations stated:

"7.2.4 Although the Provisional Report deals with the issue of prescription in the Executive Summary, the issue is not dealt with in the body of the report. It is therefore not clear on what basis the Provisional Report considers a claim based on the SARB assistance to Bankorp not to have prescribed.

7.2.5 SARB was a party to the agreements. The agreements and the implementation thereof was reported in SARB's accounts, and it was within SARB's mandate to lawfully enter into the agreements. SARB had full knowledge of the terms of the relevant agreement at all relevant times. More than 21 (twenty-one) years have elapsed since the debt was allegedly due. At best, on the version specified in the Provisional Report at paragraph xxviii of the Executive Summary, the SARB would have had knowledge of the debt after the Ciex Report was issued (which submission is in any event in our view untenable, as the SARB had full knowledge of, and was a party to, the relevant transactions at the time they were concluded and the Ciex Report provided no new relevant information in this regard.

7.2.6 On any of these versions, more than 17 (seventeen) years have passed since the Ciex Report was available (even assuming it was made available at the end of 1999), and therefore using the Ciex Report as the starting point for the running of prescription, any alleged debt or obligation arising from the SARB assistance to Bankorp (which is denied) has long since prescribed.

7.2.7 Under section 11(b) of the Prescription Act, a debt prescribes after a period of 'fifteen years in respect of any debt oved to the State and arising out of an advance or loan of money'.

7.2.8 Therefore, whether or not the relevant date is the date of the Ciex Report, or the conclusion of the alleged agreements referred to by Dr Chris Stals in 1995, any such alleged debt would have prescribed. A claim on this basis would be met with this unanswerable defence (even assuming, which we deny, there to be a proper legal and factual basis for such a claim)."

6.4. I point out that the assumption underlying these representations was that the prescriptive period was 15 years because any alleged debt to the SARB was then considered to be a debt to the **"State"** as envisaged by section 11(b) of the Prescription Act. I am advised that this assumption is probably wrong in law. The SARB is not the **"State"** for purposes of the Prescription Act. On the contrary, section 224 of the Constitution enshrines the independence of SARB from the State. I am accordingly advised that the correct prescriptive period for a contractual debt owed to SARB is 3 years. This is a matter which will be addressed in argument.

6.5. I am further advised that from a practical point of view nothing turns on this issue because whether the prescriptive period is 15 years of 3 years, any debt allegedly due has long since prescribed.

6.6. The Public Protector was alive to the problem of prescription. She acknowledges that the issue was raised by ABSA in its representations to her. Her response to these representations in her Final Report is as follows:

"5.2.46 Although ABSA Bank submitted that the matter has prescribed, the Public Protector is persuaded by the views expressed by South African Law Reform Commission Discussion Paper 126 Project 125 Prescription Periods July 2011, in that legislation dealing with prescription:

'must endeavour to include all segments of society and pay particular heed to the socially and economically disadvantaged. To the extent that it does not, this would have to be considered as a relevant factor in evaluating whether exclusion is reasonable in an open and democratic society based on human dignity, equality and freedom'.

5.2.47 Although this view was expressed in relation to prescription in a different context, it is equally relevant in the present circumstances. The question to be answered is whether in circumstances of the case, prescription is reasonable in an open and democratic society based on human dignity. In this regard the Public Protector is guided by the founding principles of the Constitution which presuppose social justice and the improvement of the quality of life of all citizens. Accordingly it would not be equitable and just to exclude such a claim based on prescription as it would deprive society in the improvement of living standards.

5.2.48 Prescription must embrace societal needs, especially of those who are impoverished or economically disadvantaged. To exclude societal needs on the basis of prescription would be unreasonable."

6.7. I respectfully submit that this is not a legal answer to the fact that any debt allegedly due to the SARB has prescribed. This is so for the following reasons:

6.7.1. First, whatever the opinion of the Public Protector regarding what the law of prescription ought to be, there is no dispute that the debt has prescribed – whether the prescriptive period is 3 or 15 years. The Public Protector implicitly accepts this but apparently thinks that the law should be different.

6.7.2. Second, the Public Protector's opinion on the law of prescription cannot alter that law. Only the legislature has the power to alter duly enacted laws subject to the requirements of the Constitution. The existing law of prescription embodied in the Prescription Act thus governs any debt allegedly due. The Public Protector simply does not have the power to change the Prescription Act even if she thinks it ought to be changed.

6.8. It follows that any debt allegedly due has prescribed. Despite the fact that the Public Protector has no legal answer to the fact that any debt allegedly due has prescribed, her remedial action simply ignores this impediment. In paragraph 7.1 of her Report she requires the SIU to approach the President 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."

6.9. The remedial action which is designed to recover money allegedly owing has long since prescribed for the reasons set out above. Were the President and the SIU to act on this remedial action, the SIU could refer the matter to the Special Tribunal established in terms of the Special Investigating Units and Special Tribunals Act in order to **"adjudicate upon any civil proceedings brought before it by a Special Investigating Unit"**. However, I have been advised and respectfully submit that ABSA would be entitled to raise a defence of prescription before the Special Tribunal, to which there is apparently no legal answer, certainly none furnished by the Public Protector.

6.10. I am constrained to submit that the Public Protector's views on prescription appear to rest on a flawed understanding of the role played by the law of prescription. While the Public Protector's views on this issue are legally irrelevant, it is appropriate to point out that I am advised that our law recognises that the law of prescription serves a variety of purposes including the following:

6.10.1. It protects individuals against claims after the lapse of defined periods of time. This protection provides a safety net against individuals having to defend claims after the lapse of potentially long periods of time. Contrary to the implication of the Public Protector's opinions, it is poor and vulnerable people who also benefit from prescription. Without a protective prescription mechanism, poor and vulnerable people who lack the resources to defend themselves, would be liable to creditors – whether private or public – for an indefinite period after the transaction giving rise to the debt.

6.10.2. Prescription provides a measure of certainty to enable people to regularise their lives and creates commercial certainty. Without this certainty, people would not be able to plan their financial futures and commercial affairs with any degree of confidence and certainty.

6.10.3. Delayed actions for the recovery of debts frequently give rise to practical and legal problems. With the effluxion of time, memories fade, evidence is lost and witnesses become unavailable. This is well illustrated by the present case. As was pointed out to the Public Protector none of the current management of ABSA was in any way involved in the Bankorp transaction. ABSA has encountered considerable difficulty in locating relevant documents because of the effluxion of time.

6.10.4. It would not be fair or equitable to visit liability on ABSA as the stakeholders in ABSA, being its employees and shareholders have changed substantially in the more than 20 years that have elapsed since the financial assistance provided came to an end. To visit such liability at this stage would impinge on all the elements of commercial certainty which are the very essence of a stable economic system.

6.10.5. In addition, the role of the SARB as lender of last resort would be materially impacted if prescription were not to apply in respect of bank bail outs by the SARB. The viability of a bailed-out bank is dependent on the stability and soundness of the bailed-out bank and if investors, customers and other banks doubt the potential future viability of the bailed-out bank due to the inapplicability of prescription, the bailed-out bank would not be sustainable. This would nullify the very purpose of a bail-out and would result in further systemic risk (the elimination of which is the very purpose of a central bank bail-out procedure).

6.11. While I respect the Public Protector's right to hold a different view, I submit that it is based upon a flawed understanding of the role served by prescription and, most importantly, her views cannot amend that law.

6.12. I accordingly submit that in prescribing remedial action aimed at the recovery of an alleged debt which has prescribed, the Public Protector –

6.12.1. was not authorised to do so by the Prescription Act or any other law and thus acted contrary to section 6(2)(a)(i) of PAJA, alternatively, the principle of legality;

6.12.2. was materially influenced by an error of law contrary to section 6(2)(d) of PAJA, alternatively, the principle of legality;

6.12.3. took action for an ulterior purpose or motive contrary to section 6(2)(e)(ii), alternatively, the principle of legality;

6.12.4. failed to take into account a relevant consideration contrary to section 6(2)(e)(iii) of PAJA, alternatively, the principle of legality;

6.12.5. acted arbitrarily contrary to section 6(2)(e)(vi) of PAJA, alternatively, the principle of legality;

6.12.6. imposed remedial action which was not rationally connected to the purpose for which it was taken or the information before the Public Protector contrary to section 6(2)(f)(ii)(aa) and (cc), alternatively, the principle of legality;

6.12.7. imposed remedial action which was so unreasonable that no reasonable person could have so exercised the power or performed the function contrary to section 6(2)(h) of PAJA, alternatively, the principle of legality.

7 THE PUBLIC PROTECTOR LACKED JURISDICTION TO UNDERTAKE THE INVESTIGATION

7.1. In her Report, the Public Protector correctly states the following:

"3.28 It should be noted that the Public Protector has no jurisdiction to investigate matters that took place before the coming into effect of the Public Protector Act or the establishment of Public Protector Office in 1995. It would be in contravention of the Public Protector Act for this office to investigate matters that took place before the coming into effect of the Public Protector Act or the establishment of this office in October 1995."

7.2. Having correctly stated the underlying legal principle, I am advised and respectfully submit that the Public Protector misapplied this principle in embarking upon an investigation and imposing remedial action which fundamentally related to events which occurred before the establishment of her office and the coming into effect of the Public Protector Act.

7.3. The issue of jurisdiction was raised in the representations in respect of the Provisional Report. Those representations attached an opinion which set out ABSA's stance. As indicated above, the representations made by ABSA are expressly incorporated in their entirety in this affidavit. I will not unnecessarily repeat what is contained therein.

7.4. The facts relating to the genesis of the office of the Public Protector are, in summary, the following (and which appear more fully from the representations):

7.4.1. The institution of the Public Protector is the product of the interim and final Constitutions;

7.4.2. The office of the Public Protector was established by section 110 of the interim Constitution;

7.4.3. At the effective date of the change from parliamentary sovereignty to constitutional democracy, namely, 27 April 1994, the powers of the Public Protector were regulated by the provisions of the interim Constitution read with the Advocate-General Act 118 of 1979 as amended by the Advocate-General Amendment Act 55 of 1983 and the Advocate-General Amendment Act

104 of 1991. This remained the position until the enactment of the Public Protector Act which came into effect on 25 November 1994.

7.4.4. The office of the Public Protector came into being on 1 October 1995.

7.5. I do not understand the Public Protector to dispute that the events giving rise to the loan to Bankorp and the contractual arrangements pursuant thereto all essentially occurred before the coming into operation of the Public Protector Act and the establishment of the office of the Public Protector. This much is evident from the chronology referred to above.

7.6. However, the Public Protector justifies exercising jurisdiction to investigate these matters on the basis of the alleged failure by the South African Government to implement the Ciex Document notwithstanding the fact that the transactions that Bankorp was involved in occurred from about 30 May 1985 to 23 October 1995. Thus, with the exception of the period from 1 October 1995 to 23 October 1995 when the final agreement between ABSA and SARB was eventually terminated, the vast majority of the transactions between SARB and ABSA or ABSA's predecessor, Bankorp, occurred before the office of the Public Protector came into being and before the Act came into force.

7.7. I have been advised and I respectfully submit that the justification for assuming jurisdiction – based upon the alleged failure by the South African Government to implement the Ciex Document – is not legally competent for the following reasons:

7.7.1. The subject-matter of the Ciex Document (relating to ABSA) concerns transactions which occurred before the coming into effect of the Public Protector Act and the establishment of the office of the Public Protector;

7.7.2. The remedial action is designed to recover from ABSA amounts allegedly due pursuant to transactions which occurred before the coming into effect of the Public Protector Act and the establishment of the office of the Public Protector.

7.7.3. The law does not permit the Public Protector to do indirectly that which she is not permitted to do directly. That is precisely what has occurred in the present case. By the device of relying upon the Ciex Document, the Public Protector is in truth imposing recovery

mechanisms in respect of debts allegedly incurred before the establishment of her office and the coming into operation of the Public Protector Act.

7.8. It appears from the Final Report that the Public Protector purported to exercise a discretion in terms of section 6(9) of the Public Protector Act. That section prohibits the Public Protector from entertaining a complaint or matter referred to her unless it is reported to her within 2 years from the occurrence of the incident or matter concerned. The Public Protector has a discretion to investigate a matter that occurred outside the 2 year timeframe but this discretion can only be exercised in special circumstances.

7.9. I have been advised and respectfully submit that the power to investigate a matter outside of the 2 year timeframe is limited to the period when her office came into being or the Act came into force. Thus, the investigation into matters that occurred prior to 1 October 1995 would be beyond her powers.

7.10. The complainant in this matter was Mr Paul Hoffmann. He lodged his complaint with the Public Protector on 10 November 2011. On a plain reading of section 6(9) of the Act and in the light of the fact that the complaint concerned matters that occurred between 1986 and 1995 the Public Protector had no authority to entertain the complaint since it was not reported to her within two years of the occurrence of the transactions in question. In this regard, I make two submissions:

7.10.1. first, section 6(9) cannot be interpreted to enable the Public Protector to exercise the discretion provided in section 6(9) to investigate matters not otherwise within her jurisdiction;

7.10.2. second, assuming that section 6(9) was of application (which is denied) the Public Protector would have to demonstrate the existence of **"special circumstances"** to justify a departure from the two year limit.

7.11. With regard to the exercise of powers under section 6(9) of the Public Protector Act, the Final Report states the following:

"3.23 Whether the matter was reported to the Public Protector on 10 November 2010 is not a jurisdictional question but one regarding whether there are compelling circumstances to warrant the Public Protector's discretionary power to investigate alleged improper conduct reported to him/her more than two (2) years after such conduct occurred.

3.24 The Public Protector applied its discretion and concluded that special circumstances do exist for necessitating a full investigation. The matter has been in the public domain for some time, and it was in the best interest of the people of the Republic that the matter be investigated and adjudicated upon."

7.12. I am advised and respectfully submit that the passages quoted from the Final Report simply do not meet the test of **"special circumstances"** on the assumption that section 6(9) is indeed of application. On the contrary, this is little more than mere assertion without facts to support the existence of any alleged special circumstances. The fact that **"the matter has been in the public domain for some time"** while true, conceals more than it reveals. The matter has indeed been the subject of two investigations headed by judges both of whom reached conclusions, after the hearing of extensive evidence, which are entirely at odds with

the findings of the Public Protector. Indeed, no factual basis has been established by the Public Protector to show the existence of "special circumstances".

7.13. I accordingly submit that in prescribing remedial action aimed at the recovery of an alleged debt which occurred prior to the coming into operation of the Public Protector Act and the establishment of the office of the Public Protector, the Public Protector –

7.13.1. was not authorised to do so by the Public Protector Act or any other law and thus acted contrary to section 6(2)(a)(i) of PAJA, alternatively, the principle of legality;

7.13.2. was materially influenced by an error of law contrary to section 6(2)(d) of PAJA, alternatively, the principle of legality;

7.13.3. took action for an ulterior purpose or motive contrary to section 6(2)(e)(ii), alternatively, the principle of legality;

7.13.4. failed to take into account a relevant consideration contrary to section 6(2)(e)(iii) of PAJA, alternatively, the principle of legality;

7.13.5. acted arbitrarily contrary to section 6(2)(e)(vi) of PAJA, alternatively, the principle of legality;

7.13.6. imposed remedial action which was not rationally connected to the purpose for which it was taken or the information before the Public Protector contrary to section 6(2)(f)(ii)(aa) and (cc), alternatively, the principle of legality;

7.13.7. imposed remedial action which was so unreasonable that no reasonable person could have so exercised the power or performed the function contrary to section 6(2)(h) of PAJA, alternatively, the principle of legality.

8 THE REMEDIAL ACTION IS SUBSTANTIVELY UNLAWFUL

8.1. The remedial action prescribed by the Public Protector is designed to ensure recovery of R1 125 million allegedly owed by ABSA to SARB. I have already explained why no such amount is owing at all. However, in order to achieve this outcome, the following steps would have to be taken:

8.1.1. First, the SIU would have to approach the President. In terms of the remedial action, such approach would be in terms of section 2 of the Special Investigating Units and Special Tribunals Act. The purpose of such an approach to the President would be to re-open and amend Proclamation R47 of 1998. The purpose of such amendment and re-opening is, in the words of the remedial action, **"in order to recover misappropriated public funds unlawfully given to ABSA Bank in the amount of R1.125 billion"**.

8.1.2. Then, the President would have to amend and re-open Proclamation R47 of 1998 for the purpose of recovering the amounts allegedly misappropriated.

8.1.3. Thereafter the SIU would presumably have to conduct some form of investigation and then refer the matter to the Special Tribunal in terms of section 8 of the Special Investigating

Units and Special Tribunals Act. Once again, the purpose of such referral would be to recover the amounts allegedly misappropriated.

8.2. I have been advised and I respectfully submit that in so directing the SIU and the President, the Public Protector has exceeded her own powers and usurped the powers of the SIU and the President.

8.3. It is quite clear that only the President has the power to establish a Special Investigating Unit. Section 2 of the Act vests this discretion in the President personally. This much is clear from section 2(1) which provides that the President **"may, whenever he or she deems it necessary on account of any of the grounds mentioned in subsection (2)" establish a Special Tribunal"**. The section does not indicate whether the President can act on an approach from the SIU itself. For purposes of argument only, I shall accept that the President can act on an approach from the SIU. The problem, however, in the context of the present case, is the following:

8.3.1. First, the SIU must have a proper legal basis to approach the President. For the reasons set out in this affidavit, no such basis exists either in law or in fact.

8.3.2. Second, to require the SIU to approach the President to re-open an investigation which has already been concluded would be unlawful because the very matter has already been investigated and the issue closed. Indeed, this occurred almost 20 years ago.

8.3.3. Third, the direction to the SIU strips it of any discretion. It is obliged to approach the President even if it considers such an approach to be wrong or fruitless.

8.4. Assuming that the President were to receive an approach from the SIU, it is equally clear that the President would have to exercise his own discretion to determine whether or not the re-opening and amendment was justified. Yet, the remedial action prescribed by the Public Protector strips the President of that discretion. The Public Protector offers no reason why the discretion should be taken away from the President. This would be patently unlawful. It is a fundamental principle of administrative law that where a discretion is vested in a particular individual, only that individual may exercise that discretion independently and may not act under the dictation of another. Here, the Public Protector has dictated to the President what to do.

8.5. If both the SIU and the President were to act as directed by the Public Protector, that would not be an end of the matter. Recovery would only be competent by means of a referral to the Special Tribunal. As I have indicated above, any debt allegedly due by ABSA to SARB has long since prescribed. Thus, there is a complete defence to any such claim. Both the SIU and the President would know this. Yet, the remedial action requires them to embark upon a process which, I respectfully submit, is entirely irrational in the circumstances.

8.6. I accordingly submit that in prescribing the remedial action in a manner that compels the SIU and the President to act as directed, the Public Protector –

8.6.1. was not authorised to do so by the Public Protector Act or any other law and thus acted contrary to section 6(2)(a)(i) of PAJA, alternatively, the principle of legality;

8.6.2. was materially influenced by an error of law contrary to section 6(2)(d) of PAJA, alternatively, the principle of legality;

8.6.3. took action for an ulterior purpose or motive contrary to section 6(2)(e)(ii), alternatively, the principle of legality;

8.6.4. would require the SIU and President to act on the unauthorised or unwarranted dictates of another person contrary to section 6(2)(e)(iv) of PAJA, alternatively, the principle of legality;

8.6.5. failed to take into account a relevant consideration contrary to section 6(2)(e)(iii) of PAJA, alternatively, the principle of legality;

8.6.6. acted arbitrarily contrary to section 6(2)(e)(vi) of PAJA, alternatively, the principle of legality;

8.6.7. imposed remedial action which was not rationally connected to the purpose for which it was taken or the information before the Public Protector contrary to section 6(2)(f)(ii)(aa) and (cc), alternatively, the principle of legality; imposed remedial action which was so unreasonable that no reasonable person could have so exercised the power or performed the function contrary to section 6(2)(h) of PAJA, alternatively, the principle of legality.

9 THE RULE 53 RECORD

9.1. This review is brought in terms of rule 53 of the Rules of Court.

The Public Protector is thus obliged to produce the record which served before her for purposes of her Report and remedial action.

9.2. In paragraph 4.4 of the Final Report, the Public Protector identifies the **"key sources of information"**. That information includes:

9.2.1. Correspondence sent and received.

9.2.2. Documents.

9.2.3. Interviews conducted and meetings held.

9.2.4. Legislation and other prescripts.

9.2.5. Case law.

9.2.6. Inspection *in loco*.

9.2.7. Websites.

9.3. The Public Protector is called upon, in terms of rule 53 to produce all the documentation referred to in paragraph 4.4 of her Report with the exception of the case law. To the extent that the inspection *in loco* generated any document, such document is also required.

9.4. It is not clear to me whether there were any other sources of information which served before the Public Protector. The use of the word **"key"** suggests that those identified in the Final Report itself were the main sources of information but not everything. To the extent that there is any further information other than that identified in the Final Report itself, the Public Protector is required to produce such information in terms of rule 53.

9.5. To the extent that the Public Protector has any reasonable claim to keep any such information confidential, the applicant tenders to enter into any reasonable agreement with the Public Protector to ensure that such confidentiality is respected. Such arrangements, I am advised, are common place in legal proceedings. To the extent necessary, the applicants undertake to ensure that any legitimate claims of confidentiality are respected both in relation to any affidavits which may be filed in these proceedings as well as in the presentation of any argument before the Court including heads of argument.

10 CONCLUSION

10.1. I submit that a proper case has been made out for the relief sought in the notice of motion. This affidavit may be supplemented and the notice of motion amended upon receipt and examination of the Rule 53 Record.

10.2. The main relief is directed against the Public Protector's remedial action requiring the SIU to approach the President to re-open and amend Proclamation R47 of 1998 in order to recover from ABSA funds which were allegedly misappropriated. Should that relief be granted, the remedial action prescribed in paragraph 7.1.2 of the Final Report (which requires the co-operation of the SIU and SARB) and the remedial action prescribed in paragraph 8.1 of the Final Report (which requires an action plan from the SIU and

SARB) would essentially follow.

10.3. Given the magnitude and importance of this matter, costs of three counsel are sought in the event of opposition.