IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case no: 83550/16

In the matter between:

BLACK FIRST LAND FIRST MOVEMENT	Applicant
and	
MINISTER OF FINANCE	First respondent
ABSA BANK LIMITED	Second respondent
FIRST NATIONAL BANK LTD	Third respondent
STANDARD BANK OF SOUTH AFRICA	Fourth respondent
NEDBANK LIMITED	Fifth respondent
GOVERNOR OF THE SOUTH AFRICAN RESERVE BANK	Sixth respondent

FIRST RESPONDENT'S ANSWERING AFFIDAVIT

I, the undersigned,

PRAVIN JAMNADAS GORDHAN

solemnly affirm that:

1. I am the Minister of Finance, cited as the first respondent. I was reappointed to this position on 14 December 2015, while serving as Minister of Cooperative Governance and Traditional Affairs. I have previously served as Minister of Finance from 2009 to 2014, succeeding then-Minister Trevor Manuel (to whom I shall refer below). Mr Manuel held this position from 1996 to 2009.

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2. The contents of this affidavit are, save where the context indicates otherwise, within my personal knowledge or derived from records and information under my control. They are true and correct. Where I make legal submissions this is based on advice by my legal representatives.

3. I depose to this affidavit to set out the bases on which I oppose this application. It should be noted at the outset that the application rests on a factual basis not contained in the founding affidavit itself, and sought to be introduced by oral evidence. I am advised that there is no such entitlement, and that seeking such relief in motion proceedings only serves to confirm the untenability of seeking final relief on motion. The application is therefore defective. It also constitutes an abuse of motion proceedings and should therefore be dismissed with punitive costs at the outset.

4. This affidavit is structured as follows

   (a) First, an overview of the application is provided; coupled with a brief exposition of the bases of opposition.

   (b) Second, to the extent that I am advised it might remain necessary to do so, I traverse such allegations advanced in the founding affidavit as may retain some residual relevance.

   (c) Third, I conclude by asking for appropriate relief: that the application be dismissed with costs *de bonis propriis* on the scale as between attorney and client. This is because the application is a patent political ploy. It is an abuse of court proceedings with no factual or legal substance, stitched together with scandalous, vexatious and irrelevant assertion.

A. <u>Overview of the application</u>

5. This application is entirely unprecedented in its political intrigue. It seeks relief resting on a twenty-year old unsolicited document prepared by retired MI6 spies.

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6. The first prayer seeks a mandamus compelling the third respondent (First National Bank Ltd) and me to "comply with the recommendations in the CIEX report". The founding affidavit does not make out a case for any such relief. Nor why it is directed against FNB and me. Nor does it explain what CIEX is, how its report came about, what the status of its report is, or what the report recommended. Once these material facts are taken into account the legal incompetence of the first prayer speaks for itself, I am advised.

7. CIEX is a "boutique" intelligence firm. It was established in the 1990s by Michael Oatley, a former British spy. CIEX is pronounced "CX", which is the code name for secret intelligence reports sent by MI5 and MI6 to Whitehall. CIEX is staffed by former spies who have "defected" to the private sector. The founding affidavit evidently fails to explain on what basis this Court can or should order a Cabinet member to comply with recommendations by defunct British spies, now commercially engaged.

8. The CIEX Report asserts that in 1995 CIEX had identified some illegality regarding an apartheid facility (a so-called "lifeboat") extended by the Reserve Bank to Bankorp in 1985 to prevent the latter's collapse and ensuing instability. This "lifeboat" endured until two years after Absa acquired Bankorp (p 8 of annexure "E" to the founding affidavit). Some two years later, in August 1997, CIEX (apparently *clandestinely*, and evidently intent on its own financial reward) for the first time sought to bring the matter to the attention of Government (*ibid*, read with *id* p 1 and clause 7 on pp 3-4 of appendix A to annexure "E" to the founding affidavit). This is how it came about, it is now known: "CIEX approached Government" on an unsolicited basis, advancing some "propositions" of its own making (p 1 of annexure "E" to the founding affidavit). Pursuant to this unsolicited approach a confidential agreement was concluded in October 1997 between CIEX's Mr Oatley and the Republic of South Africa – represented by Billy Masethla, the then Director-General of the South African Secret Service (p 5 of appendix A to annexure "E" to the founding affidavit).

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9. In 1997 Judge Heath was "brought in", the CIEX report relates, to cloak CIEX's revelations with "a publicly recognisable framework" (p 9 of annexure "E" to the founding affidavit). In the meantime "CIEX secretly assisted his [Judge Heath's] enquiry" in many material matters (*ibid*). In other words, CIEX's secret report already formed the subject-matter of the Heath commission of enquiry into maladministration and corruption. Despite CIEX's covert role, the Heath commission did not reach the conclusion for which CIEX contended. Clearly contrary to CIEX's expectation (and evidently much to its financial disappointment), the Heath Commission did "not demand repayment" by Absa of the lifeboat extended to Bankorp (p 10 of annexure "E" to the founding affidavit).

10. Government, too, did not follow CIEX's "recommendations". To the contrary, Government indefinitely "suspended" CIEX's contract on 31 December 1998. Although CIEX claims that it had "informally" been tasked to continue "work on Absa" amongst others on the basis that the contract would be "revived", "[t]his had not happened" (p 2 of annexure "E" to the founding affidavit). Thus already during the first democratic government of Mr Mandela in 1998 the CIEX engagement was terminated and the report (at least implicitly) repudiated. Yet in 2016 the applicant seeks to compel the current Minister of Finance, i.e. myself, and FNB somehow to "comply" with CIEX's recommendations.

11. CIEX's recommendations have no legal status. They are, moreover, in their own terms expressly advanced to be pursued under certain "conditions". These are (i) "if Government decides that it '[a]ccepts Judge Heath's ruling that the 'lifeboat' was an illegal gift liable to repayment'"; and (ii) if Government "[w]ishes to obtain recovery" – and "if this can be managed without endangering either the institution, Absa, or the banking system" (p 11 of annexure "E" to the founding affidavit). In such circumstances, CIEX contemplated, "[r]ecovery can proceed without further recourse to law" (*ibid*). These conditions have not been satisfied. They depend on policy assessments by Government, based on special expertise in respect of the banking system. Nor does the extra-judicial execution, which is integral to the recommendation, comply

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with the rule of law.

12. CIEX's recommendation involves the following extracurial "method". Acting on "Government's wishes and support" (of which the Governor of the Reserve Bank must first be "assured unequivocally" by Government), the Governor should "summon" directors of *inter alia* Absa. Once summoned the Governor should effectively coerce them. This through "very powerful" "leverage": the "threat" of "entirely discredit[ing]" Absa; pressing "criminal charges"; and "personal retribution". Through these methods the Governor should engineer that Absa "volunteer" to pay.

13. Coercion was the recommended "method", because otherwise Absa would defend itself before Courts – so CIEX expressly anticipated. Hence an extrajudicial "method" was recommended in order to "defeat" the "possibility" of Absa "defend[ing] itself "endlessly, with litigation" (p 14 of annexure "E" to the founding affidavit).

14. It is clear that a coerced, extracurial and covert operation through the intervention of agents which "could continue to be deniable" did not comply with constitutional values. Government clearly could not pursue this course, and correctly whomsoever was approached by CIEX repudiated this egregious form of bounty-hunting.

15. The relevant authorities did not, however, respond with inertia. In 2000 a panel of experts under the chairmanship of Judge D.M. Davis was appointed by then-Governor Tito Mboweni. Its terms of reference were to investigate the legality and potential remedy of SARB's assistance to Bankorp and Absa. The panel produced a comprehensive report. It reached the conclusion that although the Reserve Bank acted beyond its powers in 1985, restitution was impractical. It stated its conclusion as follows:

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"The conclusion that the Reserve Bank acted *ultra vires* leads to a consideration of restitution, in which it is the view of the Panel that in principle restitution from the beneficiaries may be sought but that it is impractical to do so.

Noting the flaws in the Bankorp/ABSA assistance also informs a consideration of the Reserve Bank's current principles and practice. Today, the Reserve Bank's principles and practice relating to distressed banks and to reform in related areas of the financial architecture are comparable to the highest current international standards.

...

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. The fact that the calculated net asset value and the value of the Reserve Bank assistance package are equivalent, is coincidental. ABSA therefore paid fair value for Bankorp.

...

To conclude, the Panel believes that this Report has brought to light all the material discoverable facts concerning Reserve Bank assistance to Bankorp/ABSA, and that public knowledge of them should end the uncertainty and misinterpretation that have been fuelled by the absence of previous thorough investigations in the public domain."

16. The Davis panel found that the then prevailing perception was false. The perception was that the major beneficiaries of the SARB assistance to Bankorp and Absa were shareholders of Absa. Thus already in 2000 an expert panel dispelled a popular misconception. The correct facts confirmed that Absa could not be regarded as a beneficiary of SARB's assistance.

17. The report is attached, marked "PG1". In short, what it demonstrates is that openness and public scrutiny of the actual facts contradicted suspicions sowed by unsolicited espionage. By the time the secret 50-page CIEX report was leaked in 2010, the 150-page Davis panel's report had long since been considered by the relevant Government authority, SARB.

18. Furthermore, by the time the current court application was lodged, the Public Protector had already for the previous five years been prodded to blow new life into the 1997 CIEX report. The last such attempt was made by the applicant itself shortly before lodging this application (as annexure "I" to the founding affidavit reveals). It led to an eviction order against the applicant, granted in favour of the owner of the premises in which the Public Protector's Pretoria offices are situated.

19. That the CIEX report has not been considered appropriate for implementation by any of the relevant authorities since the dawn of democracy, or by either the Heath commission or the Davis panel, is significant. There has therefore been consistent decisions not to implement (or recommend the implementation of) the report. None of these decisions has been reviewed. Instead, I am now – nineteen years after the report was issued – sought to be compelled to implement it. This is, I am further advised, legally incompetent.

20. This is *inter alia* because of the long delay. Indeed, the then-Public Protector herself initially declined to investigate the matter on the basis of the long delay from 1997 to 2011, when she was requested to initiate an investigation. Yet Ms Madonsela reinstituted an investigation. Whether this is lawful is not the subject-matter of this litigation. What is significant for present purposes is that Ms Madonsela's latter-day investigation does not inquire into my conduct. I was not the Minister of Finance at the relevant time. Although the transaction itself of course precedes his term of office, the aftermath of the transaction is a matter Ms Madonsela's preliminary investigation confines to the thirteen-year term of office of Mr Manuel. This term of office commenced, as mentioned, in 1996.

21. Mr Manuel's position on the CIEX's report and its recommendations is no secret, least of all to Treasury officials. It is essentially that:

(i) almost half of the document comprises ideas on how to reconstruct a new spy unit, a

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competency entirely outside the responsibility of the Minister of Finance;

(ii) as regards recovery of money from Absa, this was not recommended by Judge Heath or the Davis panel; and the UK spies recommending this *modus operandi* were not in a position to assess systemically risks – as CIEX purported to do in its report;

(iii) the so-called CIEX report was simply not as a matter of form or substance something on which a responsible Government of the day could act (indeed, the document *inter alia* purports to advise on international relations and how e.g. Germany and Switzerland should be threatened with embarrassment by South Africa);

(iv) the document did not serve before Cabinet, and National Treasury was never requested by Government or the Secret Services to act on it;

(v) CIEX's investigations leading to its unsolicited "scoop" on the Absa lifeboat issue was commissioned by a fugitive from justice, whom Advocate Jules Browde SC in a statutory insolvency inquiry had recommended be extradited to the United Kingdom; in short, the CIEX investigation itself is intertwined with and tainted by nefarious controversy;

(vi) the document and its conclusions and recommendations are not supported by any evidence.

22. Whether Government should have acted on the dubious CIEX report is, nonetheless, a matter currently being reinvestigated by the Public Protector – after previously terminating an investigation, as mentioned. I understand that were Ms Madonsela to have concluded that Mr Manuel had acted unreasonably by not acting on the CIEX report, he would have afforded her the opportunity to defend the legality of any such conclusion in High Court review proceedings. The document is, Mr Manuel maintains, deeply flawed.

23. I have studied the document. So have my legal representatives. We respectfully agree with Mr Manuel.

24. It has now become public knowledge that the pending Public Protector investigation has borne a provisional report. This provisional report has apparently been leaked unlawfully, leading to the current Public Protector referring the issue to the South African Polices Service. Extracts from the leaked provisional report has been published in the *Mail&Guardian* on 13 January 2017. A copy of *Mail&Guardian* article is attached, marked "PG2". I am not at liberty to disclose more than the contents of the provisional report as has been placed in the public domain by others. National Treasury will respond to the provisional report in due course. The present circumstances and forum do not permit amplifying National Treasury's position on the preliminary Public Protector report or the CIEX report any further.

25. Nonetheless, what is already in the public domain at this stage demonstrates the difficulty with the attempt to declare the CIEX report exigible. Both the CIEX report and the Public Protector's provisional report based on it have since 13 January 2017 received extensive refutation by *inter alios* the-then Governor of the Reserve Bank, Dr Chris Stals; the current Governor of the Reserve Bank, Mr Lesetja Kganyago; an eminent historian and expert in the area concerned, Prof Hermann Giliomee; and Absa. I attach copies of news reports reflecting this, marked "PG3", "PG4" and "PG5" – comprising respectively extracts from the LegalBrief of 17 and 18 January 2017, and an op-ed piece published on Politicsweb on 18 January 2017. A further highly critical analysis is to be found in South Africa's leading financial daily, *Business Day*, 18 January 2017, by its Editor-at-Large and regarded columnist, Hillary Joffe. A copy is attached, marked "PG6".

26. Significantly the *Mail&Guardian* itself reported at the outset that the current Public Protector (who signed off on the provisional report by her predecessor without further discussions with her on the matter) confirmed that the provisional report was only preliminary. She stated that "feedback from implicated parties … might change the final report drastically".

27. The preliminary report was prepared, the *previous* Public Protector disclosed subsequently at a

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Cape Town Press Club meeting (on Monday 16 January), almost single-handedly by Ms Madonsela herself. This is *inter alia* because (so a News24 article, attached as "PG7", reporting on the Press Club meeting states) her staff considered the investigation out of time, and unsupportable. Ms Madonsela also disclosed that she considers it quite possible that the provisional report "will be used for nefarious purposes". She herself "described the man behind the report, Michael Oatley, as 'a blonde blue-eyed' spy who once worked for Britain's MI5". It was, she said, Mr Oatley's "demand for large payment" which "had been the sticking point in the matter". According to her, this is why "the government of President Nelson Mandela at the time" rejected Mr Oatley's unsolicited bid, and his extraordinary recommendations.

28. The demerits of the recommendations apart, it is significant that it has never been suggested that I should somehow have acted on the CIEX report. And despite the publicity regarding the Absa lifeboat, to this day it has never been seriously suggested that I or anyone else with a disclosed shareholding in Absa (or one or more of South Africa's other registered banks) is disqualified from serving as Minister of Finance.

29. Yet the third prayer in the notice of motion seeks a declarator to this effect. It asks this Court to declare that "there is conflict of interest between the first respondent [sic] official role as minister and his role as shareholder in the major banks in South Africa." As I shall show in the traversal, there is no factual basis for this allegation. My financial interests have been disclosed duly pursuant to the applicable legal regime. It has correctly not been suggested that I have failed to comply with this regime or that Parliament has failed to exercise its constitutional duties in this respect. Any implicit allegation to this effect renders this allegation a matter in respect of which the Constitutional Court has exclusive jurisdiction, I am advised.

30. The shares held in my name are part of my savings managed by my bank with an open-ended mandate. The bank decides which shares are bought or sold to optimise my savings. I do not buy or sell shares. Nor do I direct or influence the choice of shares

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31. Accordingly the allegation is both factually and legally untenable.

32. Returning to the second prayer in the notice of motion, it seeks that I be ordered to "provide information under paragraph 26 of the applicant's founding affidavit". Not only has there been no attempt at compliance with the Promotion of Access to Information Act 2 of 2000 ("PAIA"), the information sought is also not liable to disclosure. Mandatory statutory provisions preclude disclosure. Therefore the relief is legally incompetent.

33. The fourth prayer seeks an order "[t]hat the 1st to 6th respondents be ordered to provide answers to the people of the Republic of South Africa about the billions of rands found to have been misappropriated and stolen by the second respondent as per CIEX report [sic]". It accordingly seeks consequential relief based on the first prayer. It therefore stands and falls with the first prayer. It also falls to be rejected for the simple reason that the founding affidavit fails entirely to make out any case for this relief. The defects in this prayer are manifold, and to be addressed in legal argument. One of these is that answering to the nation is a political function performed before Parliament. The relief therefore violates the doctrine of separation of powers. It also anticipates the outcome of the pending investigation by the Public Protector, and any remedial relief potentially to be imposed.

34. The final substantive prayer in the notice of motion seeks leave "for the applicant to submit oral evidence at the hearing of this application". It does not disclose the identity of the proposed witness or witnesses. Nor does it or the founding affidavit suggest on what basis any such witness failed to depose to the founding or any supporting affidavit. It is also incurably vague: the proposed order does not define the limits or even ambit of the proposed evidence. All that the fifth prayer does is to concede by implication that the founding papers indeed fail to provide a sufficient factual basis for the relief sought. Significantly prayer 5 does not seek the referral for oral evidence of any factual dispute which might arise. Nor does it seek to cross-examine

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any of the respondents or their deponents. It seeks the antithesis of motion proceedings: that the applicant be permitted to make out a case for the substantive prayers in its notice of motion by adducing "oral evidence". This is, I am advised, impermissible – particularly in circumstances where the founding affidavit nowhere makes out a case for this extraordinary approach.

35. The grounds of opposition are, I am advised, matter to be addressed more fully in legal argument. I nonetheless amplify the above exposition, to the limited extent that I am advised is required or appropriate at this stage, in the traversal which follows.

B. Traversal of founding affidavit

36. The founding affidavit contains extensive accusations against me in particular, but also serious allegations against third parties who are not even cited. Yet, as prayer 5 of the notice of motion effectively concedes, the founding affidavit provides no evidence in support of these accusations and allegations. Evidence is (on the applicant's approach) yet to be adduced through "oral evidence" to be "submit[ted]" by "the applicant" (prayer 5 of the notice of motion). I do not accept the validity of this approach. It nonetheless presupposes that the allegations advanced in the founding affidavit do not satisfy what I am advised is the well-established two-fold function of affidavits: serving as both pleadings and evidence.

37. Therefore, I am advised, only a limited traversal is required. Save to the extent otherwise stated, I deny the unsubstantiated allegations contained in the founding affidavit.

Ad paragraph 2: The deponent's claim of "personal knowledge"

38. I deny that the deponent has personal knowledge of the allegations he purports to advance, and deny that the facts are true and correct to the extent that the founding affidavit (bare as it is) is

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inconsistent with the contents of this affidavit or the founding papers filed in the *Oakbay* application, to which I shall refer below.

39. If, however, the deponent to the founding affidavit *did* have the necessary knowledge of the facts he seeks to advance, then he was required to place those facts before Court in his founding affidavit. Instead, this application rests on evidence yet to be introduced through oral evidence. As mentioned, and for reasons to be provided in legal argument, this approach is fundamentally flawed. It renders the application liable to being dismissed for being an abuse of motion proceedings.

Ad paragraph 3: The applicant's *locus standi* and the deponent's authority

40. In this case standing is not claimed on any extended basis for standing. The application is not brought in the public interest, and it is correctly not even alleged that the public interest is served by this contrived application.

41. Instead, this application is brought on the basis of the deponent to the founding affidavit's own *locus standi* to institute these proceedings. He does not, however, claim that the applicant has *locus standi*.

42. The rest of the founding papers equally fails to make out a case to sustain that which the applicant's founding affidavit correctly does not even assert: the applicant's own *locus standi*. The applicant's constitution is, for instance, not even attached to the founding affidavit; it is not alleged that it has any constitutive document; it is not explained in the founding papers who or what the applicant is; and the applicant's authority to litigate (whether at all, or in respect of the subject-matter of this application) is not even averred.

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43. It is also denied that (even if any *locus standi* on the part of the applicant is established) the deponent has authority to institute this application for the relief it seeks on behalf of the applicant. Given the circumstances of the application outlined above, it is pertinently disputed that the applicant is a voluntary association with an own identity, perpetual succession and the right to sue or be sued. It is also disputed that, if the applicant indeed is properly constituted in law, and indeed has the aforesaid essential legal attributes, the applicant's objects authorise it to institute proceedings of the present nature.

44. I am advised that in these circumstances the applicant's standing has not been established. It is denied that the applicant has any standing in these proceedings.

Ad paragraph 3*bis*: The respondents

45. Having failed to describe the applicant and establish its *locus standi*, the founding affidavit goes on to describe the respondents. Paragraph 3.1 raises no issue. Paragraphs 3.2 and 3.3 do not exist. Paragraph 3.4 is denied. It is not correct that "[t]he twentieth respondent is the Governor of the South African Reserve Bank (SARB)." The Governor is cited as the sixth respondent. The Governor is the nineteenth respondent in the application instituted in this Court by myself against the Gupta-controlled stable of companies under case no. 80978/16 s.v. *Minister of Finance v Oakbay Investments (Pty) Ltd and 20 others*. It appears that paragraph 3.4 of the founding affidavit is an inaccurate partial exercise in copying-and-pasting from my affidavit in the *Oakbay* application. This is a matter of some significance: it shows that the present application has been prompted by the application in *Oakbay*, and that the applicant seeks by separate tactical intervention to align itself with interests resisting that application.

46. The description of the respondents in the founding affidavit does not refer to the second to fifth respondents at all. Therefore the founding affidavit fails to explain the citation of these parties. They are only affected by prayer 4 in the notice of motion. The founding affidavit does not,

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however, explain on what legal basis these private entities have a legal duty "to provide answers to the people of the Republic of South Africa". Were any right to seek or duty to provide the information sought to exist, then this right must, I am advised, be exercised pursuant to PAIA. This has not been done. Therefore the application is legally misconceived also for this reason.

Ad paragraphs 4 to 7: Opening of criminal case and lodging of Public Protector complaint

47. None of the individuals or entities sought to be implicated in these paragraphs has been cited. Criminal and other proceedings against them therefore do not require a response in this affidavit, least of all by me. I am not implicated in any of these pre-existing investigations. If they are relevant and competent (as the founding affidavit must be understood to suggest), the concerns expressed in them – which underlie this application – should be allowed to be addressed by these authorities. Their investigations should be allowed to run their course. Therefore this application is a premature attempt to pursue parallel civil litigation cutting across *inter alia* pre-existing criminal complaints.

Ad paragraphs 8 to 9: Shareholding in banks

48. My financial interests are duly reported to Parliament under the applicable legal regime. This application does not allege any failure to comply with the applicable legal obligations – whether by myself or Parliament, to which Cabinet members are accountable.

49. What this application therefore short-circuits is an important jurisdictional fact for judicial intervention in parliamentary oversight over members of the Executive: an allegation that Parliament had failed its constitutional duty to hold members of the Executive accountable. This necessary averment is not only not made; had it been made the Constitutional Court would have had exclusive jurisdiction to hear this application. Therefore – whether as a matter of jurisdiction; or because it flouts the constitutional scheme of separation of powers; or as a matter

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of fact – this application is misconceived.

50. I deny that holding a share portfolio which includes shares in the banking sector constitutes in law or as a matter of fact a conflict of interests.

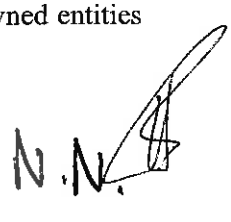
Ad paragraphs 10 to 11: Shareholding in Remgro

51. This paragraph invokes the fact that I hold shares in Remgro. It alleges that Remgro is "being investigated by the Hawks for state capture in relation to the hiring [sic] of Gordhan as Minister of Finance". It argues that "Minister Gordhan will not investigate a company in which he has shares". This unsubstantiated assertion is incorrect. It is also misdirected. I am not the head of the Hawks and I am not tasked with investigating Remgro. Criminal allegations against Remgro are to be investigated by the authorities already seized with the applicant's complaint – lodged well before this application by the applicant itself. This application was instituted in October 2016, whereas annexure "A" to the founding affidavit asserts the institution of criminal proceedings already in March 2016.

Ad paragraph 12: Anglo American and Remgro

52. I am not involved in the conclusion of any Government contracts with any company in which I hold shares. My shareholding in such companies is, moreover, properly disclosed. There is accordingly no conflict of interests. Were one to arise in the circumstances of a particular case (as opposed to abstract conflicts categorically asserted in the founding papers), then the issue of *ad hoc* recusal might only then arise in respect of a concrete case. The applicant's apparent notion of a recusal altogether from the position of Minister of Finance itself (para 20) is not tenable, I am advised.

53. In any event, holding shares in companies which could do business with state-owned entities



does not *per se* constitute a disqualification from public office or a Cabinet position. My position is, moreover, not that of Minister of Public Enterprises. Thus the applicant's argument is even on its own terms untenable.

54. It is accordingly denied that any conflict of interest or lack of impartiality is established.

Ad paragraphs 13 to 22: Oakbay, state capture and CIEX report

55. In these paragraphs the founding affidavit refers to Oakbay as a competitor of companies in which I hold shares, and alleges that this "explains why [I] cannot be impartial" (para 13). I deny the accusation of a lack of impartiality. The reasoning furthermore does not follow. No evidence sustaining this inference is advanced. Nor does the inference sought to be drawn accord, I am advised, with established rules governing the drawing of inferences.

56. Why I have not interfered in Oakbay's banker-client relationships with commercial banks is clear from my application which is already pending in this Court. In short, I have received legal advice that the rule of law does not permit this. Even Oakbay itself has at times apparently accepted this.

57. Why the then-Minister of Finance did not act on the CIEX report is a matter now being investigated by the Public Protector. It is not a matter in respect of which an inference of a lack of impartiality on my part can be drawn.

58. It is, moreover, impermissible (so I am advised) to question in parallel proceedings the motive behind my application to this Court in the Oakbay matter. I deny that it had been filed "in service of the banks" or that I am "using [my] office as Minister of Finance to serve [my] business partners." As my Oakbay application makes clear, its purpose is to establish whether

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the Executive is authorised by law to act as Oakbay requires. My Oakbay application probes precisely the question begged by the suggestion that the "Minister of Finance is expected [in law] to supervise the financial institutions (including the banks)" (para 16).

59. Therefore the proposition that shareholding creates a conflict of interests in circumstances where the legal duty to act is in fact subject to prior proceedings impermissibly anticipated my pending application. It is also inconsistent with the facts reflected in my pending application. It makes plain that it was on the basis of legal advice that I did not intervene; not on the basis of my own financial interests.

60. I deny the unsubstantiated and vexatious allegations that I am being protected by "white capitalist businesses … etc", "reduced to an agent" or "compromised and conflicted" (para 17). The accusation is vague in the extreme, offensive and devoid of any factual basis. It therefore does not contain matter which requires traversal, I am advised.

61. The bald allegations are also irrelevant. This is because the founding affidavit expressly adopts the position that my shareholding "in multiple businesses would not have been a problem if these companies that pay the Minister of Finance a dividend were not the same group of companies that are in direct competition with [sic] Oakbay group of companies" (para 18). It is accordingly quite explicitly the applicant's case that it is only because of Oakbay's predicament that I am somehow conflicted. With respect, the problem lies not with me. My conduct is supported by independent legal advice, and whether the advice is indeed correct (as I have accepted on the basis of National Treasury's own internal legal advisors' confirmation) is a matter which I have requested this Court to determine in the light of the great public interest in the matter and the contentiousness it has generated. Had I been anything other than impartial or independent I would not have invited judicial scrutiny of the legal basis for my decision not to intervene. This application nonetheless demonstrates the need for the declaratory relief sought in my Oakbay application.

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62. It is not true that I am "effectively" the "business partner" of "the aforesaid business persons" (para 19). The associated hearsay allegation of these "business persons" having "allegedly bullied the ANC leaders into appointing" me as Minister of Finance is also denied. It is, furthermore, not the ANC leaders who appoint ministers but the President himself. Therefore the tentative hearsay allegation is also irrelevant for being legally misdirected. There is no allegation that the President was "allegedly bullied" into appointing me.

63. I am also not "materially compromised" by any association with any business persons. I have no association with businesspersons inappropriate to my office as Minister of Finance. Part of my responsibility as Minister of Finance is to engender confidence among all South Africans, including labour unions, business and foreign investors in our economy so that inclusive growth and jobs can be created.

64. Therefore the correct facts make it clear that the test for recusal is not satisfied. It is correctly not suggested anywhere in the founding affidavit that any reasonable person apprised of the correct facts would reasonably have apprehended any bias on my part. Therefore the argument that I should have recused myself from the position of Minister of Finance is unfounded. It is also legally flawed, because recusal, resignation and refusal to accept an appointment are different legal concepts. The founding affidavit confuses the former with the latter. Recusal is not refusal; and shareholding requires neither. What a Cabinet member's ethical duties require is compliance with the code of ethics prescribed by constitutionally-mandated national legislation. The founding affidavit does not invoke any provision of the applicable legal regime. Nor does it make out a case that any (unidentified) provision has been violated.

65. The scurrilous allegation that non-recusal "suggests unethical and criminal conduct" is therefore unsubstantiated and rejected. Other attempts to ascribe criminality to me have collapsed spectacularly in recent weeks. The applicant's attempt to do so now in a civil court in civil

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proceedings is a political contrivance. It is also defamatory. My rights in this regard remain reserved. I do, however, ask that the allegation be struck out for being vexatious, scandalous and irrelevant. It prejudices not only my reputation, but also my litigation in this Court, as is clearly its improper purpose.

66. As regards the contents of my affidavit in the Oakbay application, this speaks for itself. To facilitate an assessment of the nature and content of that application I attach the founding papers, marked "PG8". The suggestion that I should have prioritised issues identified in the 1999 CIEX report instead of making an affidavit in the Oakbay application is denied. The CIEX issues have not occurred or been identified under my terms of office, and those tasked with investigating and advising on it recommended that restitution not be coerced as suggested by CIEX, and that payment should not otherwise be recouped. I have had no involvement in these decisions. They stand unreviewed. I therefore cannot ignore or revisit them.

67. Nor can I prosecute "apartheid leaders, bankers, and white capitalists who committed crimes of corruption in the decade leading up to 27 April 1994" (para 22). I have no prosecutorial powers. The applicants have, however, already lodged criminal complaints against such individuals with the Hawks long before instituting this application. As annexure "A" to the founding affidavit reflects, this occurred already on 31 March 2016. Therefore the fact that these individuals and entities "were never prosecuted" does not support the institution of this application. Instead, it defeats this application.

Ad paragraph 23 to 25: The applicant's "preliminary report"

68. The applicant's preliminary report is, like the CIEX report, not based on any evidence. It is not even final. Furthermore, I am not the appropriate authority vested with powers to investigate apartheid era corruption. Moreover, my empowering legislation does not operate retrospectively, I am advised. In any event penalties imposed and amnesty granted in 2003,

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2007 and 2010 are not capable of being revisited, I am further advised. The same applies to fines imposed by competition authorities – even had I been the competent executive authority in relation to the Competition Commission or Competition Tribunal, which I am not.

69. Finally, the fact that at least two investigations to date have been initiated into the R26 billion said to have been "stolen from the SARB" (para 25) takes the matter no further. That "nothing has been done to date, including by the Public Protector to whom the matter was referred to [sic] in 2011" defeats the assumption underlying the argument. The assumption being that I should somehow have acted contrary to the recommendations of the Davis panel and Heath commission and also have anticipated the outcome of the Public Protector's drawn-out and repeated investigations.

Ad paragraphs 26 to 32: Applicant's request for information from National Treasury

70. The applicant's request for information had been referred by National Treasury to the appropriate authority, the South African Revenue Service (SARS). The referral occurred already in 2015. This was necessary, because National Treasury is not authorised to provide taxpayer information. Only SARS, if anybody, is. The only information which National Treasury may provide is already public knowledge: it had been disclosed already in the 2006 Budget Review. I attach a copy of the relevant page, marked "PG9".

71. In response to this application (in which reference is made to the 2015 request for taxpayer information to National Treasury), National Treasury requested SARS' reply sent to the applicant in response to the request. The response has now been provided to National Treasury. It is attached marked "PG10". It appears to have been sent by SARS to the applicant only in response to National Treasury's follow-up, however.

72. SARS' response confirms that the information requested from National Treasury could never have been provided by National Treasury (and still cannot), because not even SARS is

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authorised to provide it under the applicable legislation. This includes section 24 of the Exchange Control Amnesty and Amendment of Taxation Laws Act 12 of 2003, section 4 of the Income Tax Act 58 of 1962, section 68 of the Tax Administration Act 28 of 2011, and section 33 of the Reserve Bank Act 90 of 1989. SARS' response identifies the legitimate governmental purpose and means through which they are pursued through this statutory regime. It is correctly not suggested that the statutory scheme is somehow to be bypassed. It is indeed not under constitutional attack. It therefore requires compliance.

73. Therefore I am not authorised to provide the information listed in paragraphs 27 to 31 of the founding affidavit. There has in any event not been any request in respect of PAIA for any such records. Therefore the request and prayer 2 of the notice of motion (which now seeks to compel compliance with the request) are, I am advised, contrary to law.

Ad paragraphs 33 to 33.10: Applicant's request for information from SARB

74. These paragraphs relate to a similar request to the sixth respondent, the South African Reserve Bank (SARB). While the applicant alleges that to date no response had been received from SARB, the applicant does not suggest that to date it has ever made any follow-up request for a response by SARB.

Ad paragraph 34: The applicant's request to the Public Protector

75. In this paragraph the applicant refers to its own arduous attempts to procure the Public Protector to finalise a report relating to precisely the same issues sought to be ventilated in this application. The Public Protector's investigation is, as mentioned, not yet concluded. Despite the applicant's efforts since September 2015 to expedite the finalisation of this report, Ms Madonsela did not finalise it before her tenure expired in October 2016 – over a year later. She did, however, finalise a report in respect of state capture by the Oakbay group of companies and their

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proprietors. As regards the applicant's suggestion that I have treated state capture by the Guptas differently from allegations of state capture by white capitalists, I refer to the report (which has been published online by the Office of the Public Protector, but if required will be placed before this Honourable Court).

76. The Public Protector's own approach and prioritisation of the Gupta affair (the investigation of which she *had* finalised before leaving office) over allegations of apartheid abuses (which the applicant accepts have not been finalised despite the complaint having been instituted in 2011 and the applicant's strenuous efforts since 2015 to put pressure on the Public Protector to finalise it) suggests that the applicant's criticism of my own alleged prioritisation is unfounded. Furthermore, as mentioned, my own approach to the Gupta/Oakbay affair rests on legal advice that I am not as a matter of law authorised to act as requested by Oakbay and its proprietors. I am likewise advised that I have no power in law to give effect to the CIEX recommendations as requested by the applicant.

Ad paragraph 35: The "questions arising"

77. In this paragraph the founding affidavit lists eleven interrogatories which the applicant contends arise "in this context". They all relate to the Oakbay application. This application is pending before this Court. It is therefore not appropriate to initiate parallel proceedings to question aspects of the institution of those proceedings. Nor is it permissible to question an application about a pending application. Nor, in particular, is it permissible to comment on the application in a manner which bears on its outcome.

78. I am therefore advised that the "questions" advanced in this paragraph and its subparagraphs do not appropriately arise for traversal. The reason for my conduct is not open to question: as stated, my conduct rests on independent legal advice. The advice forms part of the founding papers in the Oakbay application. In this application the applicant does not contend that I could

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not reasonably act on that advice. Therefore the attempt to question my motives falls at the first factual hurdle.

79. The further vague allegations regarding *inter alia* acting as "part of a sinister agenda" (para 35.2) and the timing of the Oakbay application is unfounded. The criminal charges against me have been withdrawn quite independently of the lodging of the Oakbay application. It is the criminal charges, not the Oakbay application, which is, with respect, widely regarded as "suspicious", "malicious" and "sinister".

80. The applicant's associated speculation regarding the claimed successful High Court application to stall the release of the Public Protector's state capture report (para 35.4) is self-defeating. This Court actually ordered the release of the report. Litigation aimed at preventing its release therefore failed. This Court's observations regarding the appropriateness of the respective parties' conduct in those proceedings are a matter of record.

81. I deny that I am "pursuing a vendetta" (para 35.4). There is no factual basis for this inference. The purpose of the Oakbay application is to obtain legal certainty regarding an important legal issue.

82. I have not forced any institution or any individual "to dig up dirt" (para 35.5). Nor have I "pressuriz[ed] the regulator" (para 35.7). My conduct is authorised by law, inspired by my commitment to the rule of law, and consistent with my efforts to protect the national economy. The accusation of acting without good faith and premeditatively is therefore an unfortunate reflection on the applicant itself. It is denied that this criticism applies to me.

83. The validity of the further implicit and rhetorical criticisms against the institution of the Oakbay application does not arise for further traversal in these proceedings, I am advised. I deny the

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suggestion that I should have been "working" through the Inter-Ministerial Committee despite advice that the rule of law precludes this, and that I am somehow precluded from approaching the Court to clarify the legal position (paras 35.10-35.11).

Ad paragraph 36: Allegations regarding "first respondent's further silent" [sic]

84. This paragraph seeks to draw an inference against me on the basis of two events. The first is the applicant's query to National Treasury on 19 September 2015 (para 36(a)). The second is the applicant's query to SARB on 24 September 2015 (para 36(b)). I have not been the Minister of Finance at that time. Accordingly my "silent" [sic] in response to these requests cannot be a basis for any inference against me. I have already explained National Treasury's response to the September 2015 request: it was to refer the enquiry to the correct entity – SARS. It was as a result of my follow-up that SARS has now responded to that query, apologising to the applicant for the delay in responding.

Ad paragraphs 37 and 38: Inferences sought to be drawn from interests in businesses

85. The allegations advanced in these paragraphs are repetitive. They are denied. There is no factual foundation for any allegation of state capture by any entity in which I hold shares. Nor is there any factual basis for suggesting that any of the businesses "were responsible" for my appointment or the allocation of a different portfolio (the one I have previously occupied) to my immediate predecessor (who himself have not previously been a Cabinet member).

Ad paragraph 39: Applicant's letter threatening litigation in 48 hours

86. The letter to which this paragraph refers has not been attached to the founding affidavit. The factual position is that no response could be provided before the application was lodged. The letter itself already reflected the clear predetermination to lodge this application: it placed on

record its attorneys. By the time the letter could be addressed this application had already been lodged – as the 48-hour deadline already envisaged it imminently would. This is entirely unreasonable, especially in circumstances where the application was lodged in the ordinary course. There has been no attempt to expedite its adjudication, and there is correctly no suggestion that any degree of urgency exists whatsoever. I am advised that this Court recently repudiated a similar approach in litigation against the President. The inappropriateness of this course of conduct is further a matter for legal argument.

Ad paragraph 40: Participation in Inter-Ministerial Task Team

87. I have already addressed this repetitive contention. As mentioned, I am (so I was advised and accept) as a matter of law precluded from participating in the Inter-Ministerial Task Team's proposed intervention in the banker-client relationship of the Oakbay entities. I was therefore not "unable to be impartial" in any such "work"; instead, I was unable to participate altogether – because the law precludes ministerial intervention in banker-client relations. In such circumstances a duty of disclosure cannot possibly arise, I am advised.

88. Nor, in any event, does my shareholding present a conflict of interest when the governing legal test is applied. The legal test is nowhere invoked in the founding affidavit. Indeed, the application fails entirely to establish a case complying with this test, I am advised.

Ad paragraph 41: Conclusions

89. For the reasons set out above the two conclusion for which the founding affidavit strives to contend are unsustainable. Firstly, no facts establish the "getting him hired" postulate. Therefore the conclusion of being "compromised" or subject to "a conflict of interests" does not "follow" (para 41(a)). Secondly, the correct factual position is that I have not intervened in the Oakbay fray because the rule of law precludes my intervention. Therefore it is not any supposed

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"conflict of interest" "situation" which was "impacting adversely" on "the due performance of [my] responsibilities" (para 41(b)). The law precluded intervention, and the law imposed the responsibility on me not to interfere in the banker-client relationship. There has therefore been no "dereliction of duties", as the applicant argues. It is significant that the applicant cannot identify any constitutional or statutory provision imposing the "duty" to "facilitat[e] the reversal of the bank's [sic] closure of [Oakbay's] account" (para 41(b)). This strongly suggests, with respect, that the declaratory relief sought in my Oakbay application should be granted.

90. Accordingly the conclusions for which the applicant contends have no factual or legal basis. I deny their validity.

C. Conclusion

91. I accordingly ask that the application be dismissed with costs for any one or more of the following reasons:

(i) The applicant has failed to establish its *locus standi* and the authority of its deponent to litigate.

(ii) The application rests on findings of *inter alia* criminality and misconduct by third parties not cited; this constitutes a misjoinder.

(iii) The application is premature in that it anticipates a pending investigation by the Public Prosecutor and cuts across a criminal investigation of the aforesaid third parties.

(iv) The application is an abuse of process in that it seeks to proceed on motion but requires oral evidence to bear out the first four prayers.

(v) The application is an abuse of process for seeking to pursue political campaigns through litigation.

(vi) The application violates the doctrine of separation of powers, because it seeks to impose on the Minister of Finance a duty to comply with recommendations advanced in a report in circumstances where Government has itself since 1997 ejected CIEX and rejected its

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report, at least implicitly.

(vii) The application violates the doctrine of separation of powers also for pre-empting parliamentary oversight over the Executive. Simultaneously it presupposes a failure by Parliament to comply with a constitutional duty imposed on it, which is a matter within the Constitutional Courts exclusive jurisdiction.

(viii) At the very best for the applicant, even were my shareholding to constitute a conflict of interest, then the application will still be entirely academic – because any such declarator will merely presuppose a divestiture of any shareholding found to give rise to a conflict. Therefore the self-evident political objective sought to be accomplished through this application cannot be accomplished.

(ix) Finally, for the reasons set out in sections A and B above and to be amplified in legal argument, none of the substantive prayers in the notice of motion is legally competent. In short,

- Prayer 1 is contrary to law in many respects, *inter alia* for violating the right of access to court in that it insists on extra-judicial "methods".
- Prayer 2 is contrary to PAIA and tax legislation preventing the disclosure of the information sought.
- Prayer 3 is factually unfounded, and there is also no case established which complies with the governing legal test.
- Prayer 4 is contrary to the doctrine of separation of powers because it seeks to substitute judicial intervention for parliamentary accountability.
- Prayer 5 is contrary to the principles of civil procedure because it concedes that the first four prayers require oral evidence.

92. The multiple serious and manifest defects in the application; its self-evident lack of merit; its attempt to attain political ends through litigation; and the scandalous, vexatious and irrelevant allegations advanced in the application justify a special costs order. It is not in the interests of

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justice or just and equitable that public funds be expended to defend this application. Therefore the deponent should be ordered to pay costs on the attorney-and-client scale. This will serve simultaneously to mark the Court's displeasure regarding the manner in which its process has been abused by the applicant; and to indemnify the first respondent against costs. In the event that the applicant is not properly before court, whether because it is not lawfully constituted, or its objects do not extend to this application, or no proper resolution by a validly constituted decision-making body has been taken, or the deponent himself has not been validly authorised to bring this application, costs should be ordered on a *de bonis propriis* basis against the deponent, Andile Mngxitama. Given furthermore the unreasonable and manifestly inappropriate manner in which the litigation has been conducted, there is no reason why any part of the costs should fall on the public.

93. I accordingly ask a costs order, and that it includes the costs of two counsel and be on the scale as between attorney and client.

PRAVIN JAMNADAS GORDHAN

The deponent has acknowledged that he knows and understands the contents of this affidavit, signed and solemnly confirmed before me at PRETORIA on this 26th day of January 2017, and that the regulations contained in Government Notice R1258 dated 21 July 1972 as amended by Government Notice R1648 dated 19 August 1977 and further amended by Government Notice R1428 dated 21 July 1980 and Government Notice R774 dated 23 April 1982 have been complied with.

COMMISSIONER OF OATHS

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