IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case Number: 46255/17

In the matter between:

MINISTER OF FINANCE — First Applicant

NATIONAL TREASURY — Second Applicant

and

PUBLIC PROTECTOR — First Respondent

SOUTH AFRICAN RESERVE BANK — Second Respondent

SPEAKER OF PARLIAMENT — Third Respondent

SPECIAL INVESTIGATING UNIT — Fourth Respondent

ABSA BANK LIMITED — Fifth Respondent

NOTICE OF MOTION

TAKE NOTICE THAT the applicants shall, on a date and time to be decided by the registrar of the above Honourable Court, ask for an order in the following terms:

1 Reviewing, correcting and/or setting aside the conclusions, findings and remedial action taken by the Public Protector in her report number 8 of

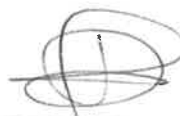
2017/2018 entitled "*Alleged Failure to Recover Misappropriated Funds*", dated 19 June 2017.

2 There shall be no order as to costs.

3 Further and/or alternative relief.

TAKE NOTICE FURTHER THAT the respondents are directed to file their notices of intention to oppose within five days of the receipt of this application, and their answering affidavits within fifteen days of filing of the notice of intention to oppose.

TAKE FURTHER NOTICE THAT in the event that no notice of opposition is filed or alternatively no answering affidavit is filed, the applicants shall seek the enrolment of the application on an unopposed basis.



STATE ATTORNEY PRETORIA
Applicants' Attorneys
SALU Building
255 Francis Baard Street
PRETORIA
Tel: 012 309 1575
Fax: 012 309 1649
Email: TNhlanzi@justice.gov.za
Ref: 3335/16/Z32

TO: **The Registrar**
of the above Honourable Court

AND TO:

PUBLIC PROTECTOR

175 LUNNON STREET, HILLCREST OFFICE

PARK, PRETORIA

AND TO:

SOUTH AFRICAN RESERVE BANK

370 HELEN JOSEPH STREET, PRETORIA

AND TO:

SPEAKER OF PARLIAMENT

PARLIAMENT BUILDING, PARLIAMENT STREET, CAPE TOWN

AND TO:

SPECIAL INVESTIGATING UNIT

2ND FLOOR, RENTMEESTER BUILDING,
74 WATERMEYER STREET,
WATERMEYER PARK SILVERTON

AND TO:

ABSA BANK LIMITED

7TH FLOOR, BARCLAYS TOWERS WEST, 15 TROYE STREET,
JOHANNESBURG

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case Number:

In the matter between:

MINISTER OF FINANCE	First Applicant
NATIONAL TREASURY	Second Applicant

And

PUBLIC PROTECTOR	First Respondent
SOUTH AFRICAN RESERVE BANK	Second Respondent
SPEAKER OF PARLIAMENT	Third Respondent
SPECIAL INVESTIGATING UNIT	Fourth Respondent
ABSA BANK LIMITED	Fifth Respondent

FOUNDING AFFIDAVIT

I, the undersigned,

MALUSI KNOWLEDGE NKANYEZI GIGABA

Do hereby state under oath that:

KMN [initials]

1 I am an adult male and serve as the Minister of Finance. The allegations contained in this affidavit are true and correct. They also fall within my personal knowledge and belief, except where the context clearly indicates to the contrary.

2 I bring these proceedings in my capacity as the Member of the Executive responsible for the National Treasury and as the Minister as defined in the South African Reserve Bank Act, 90 of 1989. The South African Reserve Bank is also bound in terms of section 224(2) of the Constitution to maintain regular consultation with me.

3 In these proceedings, I challenge two aspects of the Report of the Public Protector.

3.1 The first is that the findings, conclusions and remedial action breaches the principle of legality, which is contained in section 1(c) of the Constitution.

3.2 The second is that the findings and remedial action bear no rational connection to the information contained in the Public Protector Report, which presumably was before her at the time she prepared her Report.

THE PARTIES

4 I am the Minister of Finance, the First Applicant.

5 The second applicant is the National Treasury. As Minister of Finance, I am responsible for National Treasury. Service to the National Treasury should be

 KMN

effected at the following address40 Church Square, Old Reserve Bank Building, Pretoria.

6 The first respondent is the Public Protector.

6.1 The Public Protector is established in terms of sections 181 and 182 of the Constitution.

6.2 Its further powers are set out in the Public Protector Act, 23 of 1994. The address of the Public Protector is: 175 Lunnon Street, Hillcrest Office Park, Pretoria

7 The second respondent is the South African Reserve Bank ("the Reserve Bank"). No relief is sought against the Reserve Bank.

7.1 The Reserve Bank is established in terms of section 223 of the Constitution.

7.2 Its powers are set out under the South African Reserve Bank Act, 90 of 1989 ("the Reserve Bank Act"). That Act defines "*Minister*" as being the Minister of Finance. Further powers of the Minister in relation to the Reserve Bank are contained in sections 16, 19, 30, 31, 32, 36 and 37 of the Reserve Bank Act.

7.3 Section 37 specifically states that:

> *"If at any time the Minister is of the opinion that the Bank has failed to comply with any provision of this Act or of a regulation made thereunder, he may by notice in writing require the Board to make good or remedy the default within a specified time."*

The address of the Reserve Bank is 370 Helen Joseph Street, Pretoria.

KMN

 PM

8 The third respondent is the Speaker of Parliament. No relief is sought against the Speaker. She is cited nominally as the representative of the National Assembly. Her address is: Parliament Building, Room E118, Parliament Street, Cape Town.

9 The fourth respondent is the Special Investigating Unit. It is cited because of an interest that it may have in these proceedings by virtue of the remedial action taken against it by the Public Protector. No relief is sought against the SIU. The address of the Special Investigating Unit is: 2nd Floor, Rentmeester Building, 74 Watermeyer Street, Watermeyer, Pretoria.

10 The fifth respondent is ABSA Bank Limited ("ABSA"). It is cited because of any interest that it may hold. No relief is sought against ABSA. Its address for purposes of service is: 7th Floor, Barclays Towers West, 15 Troye Street, Johannesburg.

CONSOLIDATION

11 I am advised that the Reserve Bank has instituted proceedings for the setting aside of the remedial action of the Public Protector under case number 43769/17. Pursuant to that application, ABSA has sought an order permitting it to be an applicant, despite it being cited as a respondent by the Reserve Bank.

12 It is not clear if the position adopted by ABSA is consistent with the Rules of this Court. Be that as it may, for avoidance of doubt, I have been advised to bring a separate application for specific relief which can be heard simultaneously or consolidated with the application of the Reserve Bank. The submissions

KMN
AM

contained in this application must also be taken to be an answer to the application of the Reserve Bank.

13 Moreover, the Head of Treasury, being the Minister of Finance, is not cited in the application by the Reserve Bank. In bringing this application separately, I intend to make abundantly clear what the position of the National Executive is on the legality, standing and findings of the Public Protector.

THE PUBLIC PROTECTOR REPORT AND GROUNDS FOR REVIEW

14 I was appointed as Minister of Finance on 31 March 2017. At the time of my appointment, the Public Protector was seized with the investigation into what the Report refers to as "*an investigation into allegations of maladministration, corruption, misappropriation of public funds, and failure by the South African Government to implement the CIEX Report and to recover public funds from ABSA Bank*". I have been advised, from the period since I assumed office, that the investigation has been ongoing since 2013..

15 On 20 December 2016, the current Public Protector issued a provisional Report into the matter. A copy of the provisional Report is annexed to the application by the Reserve Bank and accordingly to avoid prolixity, I do not attach it here. The former Minister of Finance, Minister Pravin Gordhan responded to the provisional Report. A copy of the response filed on behalf of the former Minister of Finance is annexed hereto marked "**MG1**". As it is apparent from the response of the former Minister, the National Treasury submitted a full response to the provisional findings of the Public Protector.

KMN

16 From a comparison of the provisional and final Reports, it is apparent that the representations of the National Treasury have not been taken into consideration. I am advised that this is an irregularity that could justify the review of the final Report of the Public Protector.

17 The Public Protector delivered her final Report on 19 June 2017. It is annexed to the application by the Reserve Bank, and is accordingly not included in the proceedings herein. The findings are contained in paragraph 6 of that Report. The important findings, for purposes of this application, are the following:

17.1 In paragraph 6.1 (inclusive of 6.1.1 to 6.1.6) the Public Protector concluded that the South African Government improperly failed to implement the CIEX Report which dealt with alleged stolen State funds after commissioning and duly paying for the production of that Report. She concluded that CIEX Ltd was paid GBP 600 000 for services "*which were never used by the South African Government*". She further found that there was no evidence that any action was taken in pursuit of the CIEX Report. Those conclusions led her to rule that the Government breached sections 195, 231, and 182(1) of the Constitution.

17.2 The second finding appears in paragraph 6.2 of the Report. In that paragraph, the Public Protector concluded that the correct amount of what she referred to as "*the illegal gift*" granted to ABSA is in the amount of R1.25 billion, which was irregular. She concluded that the money should have been recovered by the South African Government. In this regard, she specifically criticised the former Minister of Finance for not

KMN
PM

complying with section 37 of the Reserve Bank Act to the extent that there was a failure to ensure compliance by the Reserve Bank.

17.3 The third finding was that the South African public was prejudiced by the alleged failure of the South African Government and the Reserve Bank as referred to above. The failure, which was prejudicial to the South African Government, is two-fold. First, public funds in the amount of GBP 600 000 were paid to CIEX Ltd. Second, the failure to recover "*the illegal gift*" from ABSA has caused prejudice since these were "*public funds*" that could have benefited broader society "*instead of a handful of shareholders*" of ABSA.

18 I am advised that each of the above findings were fully answered during the investigation of the Public Protector. She failed to have regard to the answers provided to her. In the submissions made by National Treasury to the Public Protector, the circumstances under which CIEX were contracted by the Government were specifically set out.

18.1 In the first place, CIEX was not contracted by National Treasury, but by the South African Security Services ("SASS"), at the time its Director-General was Mr Billy Masetlha. CIEX approached the Government, not the other way round.

18.2 When its report was finalised, it was submitted to the counter party, the SASS, not to the Ministry of Finance, or the National Treasury.

18.3 As noted in the original submissions, matters relating to the suspension and termination of the Memorandum of Agreement "*fall within the*

KMN

preserve of the parties who signed the Memorandum of Agreement". It was also specifically stated that no payment was made to CIEX by the National Treasury.

18.4 The Memorandum of Agreement between SASS and CIEX did not suggest that any findings, conclusions or recommendations of CIEX will be binding on the National Executive. In fact, clause 4.2 of the Memorandum of Agreement specifically stated that "*it is foreseeable that the RSAs priorities in relation to these and related matters may fluctuate according to circumstances*".

18.5 It is apparent that these submissions made by National Treasury have been disregarded, for reasons that do not appear to withstand the test of rationality.

19 The submissions of the National Treasury also dealt with the obligation to recover the "illicit funds". The evidence of the National Treasury was the following.

19.1 Any recommendation made by CIEX to SASS did not relate to any domestic investigation as the statutory mandate of the SASS was external.

19.2 The notes recorded in the CIEX document did not constitute firm or binding recommendations to the Government to instruct the National Treasury to recover funds either from ABSA or any institution.

19.3 Former Minister Trevor Manuel gave evidence to the Public Protector where he stated that between the years 1997 to 2002 the National

KMN

Treasury was focused on building an economy in a democracy. This included clearing the reserves of the Reserve Bank which at that point stood at -USD24 billion. This was achieved by 1997 by giving the Reserve Bank the platform to build up a new net open forward position of +USD27 billion.

20 The allegation that no steps were taken after the issuing of the Report by CIEX was also answered.

20.1 The South African Government commissioned two independent investigations pertaining to the financial packages that were advanced to the erstwhile Bankorp Limited by the Reserve Bank.

20.2 The first investigation, by Judge Willem Heath, upon which the Public Protector appears to place great store, noted that the validity of the transaction between the Reserve Bank and Bankorp "*could be challenged in civil proceedings*". He also concluded that while there is a legal basis to challenge the validity of the contract, "*there are other compelling reasons not to proceed with litigation in this matter*". No reasons are advanced by the Public Protector why it was inappropriate or irrational for the National Treasury to accept the conclusions reached by Judge Heath.

21 The second independent panel was that appointed by Mr Tito Mboweni, in his capacity as the Governor of the Reserve Bank. He appointed Judge Dennis Davis.

KMN
AM

22 Judge Davis concluded that the assistance given to Bankorp by the Reserve Bank was unlawful and not aligned to its statutory mandate, but despite that, "*ABSA paid for the continued assistance of Bankorp by the Reserve Bank and could not be regarded as beneficiaries of the Reserve Bank assistance package. ABSA paid fair value for Bankorp*".

23 Again, no factual basis has been laid out by the Public Protector why the conclusions reached by Judge Davis should be rejected by the Government.

24 As such, the Public Protector's Report is based on flawed premises. She did not properly assess the submissions made by the National Treasury. She has reached conclusions which are not rationally related to the evidentiary material that was before her.

25 A consideration of the Report in any event, illustrates that the conclusions reached do not flow from the information contained in the Report.

26 On this ground, the Report of the Public Protector breaches the principle of legality, at the heart of which is the requirement that decisions must be rationally related to the material before the decision-maker and the purposes of the statutory powers granted.

PROPOSED CONSTITUTIONAL AMENDMENT

27 It is notable that the Public Protector exercising her remedial action under section 182(1)(c) of the Constitution has directed a process for the amendment of section

KMN

224 of the Constitution. She has suggested the following change, as being the new section 224:

> *"(1) The primary object of the South African Reserve Bank is to promote balanced and sustainable economic growth in the Republic, while ensuring that the socio-economic well-being of the citizens are protected.*
>
> *(2) The South African Reserve Bank, in pursuit of its primary object, must perform its functions independently and without fear, favour or prejudice, while ensuring that there must be regular consultation between the Bank and Parliament to achieve meaningful socio-economic transformation."*

28 This violates several provisions of the Constitution.

28.1 The proposed amendment breaches the principle of separation of powers. The legislative function resides with Parliament, as provided for in sections 43 and 44 of the Constitution.

28.2 The Public Protector has no power to initiate legislative changes. More so, she has no power to instruct the National Assembly or any of its committees to initiate legislative or constitutional changes.

28.3 Section 73(2) of the Constitution states that: "*Only a Cabinet member or a Deputy Minister, or a member or committee of the National Assembly may introduce a bill in the Assembly*". The Public Protector is not mentioned by section 73(2). Consequently, she lacks the necessary constitutional authority to initiate constitutional amendments.

29 The powers of the Public Protector are those contained in sections 182(1)(a)-(c) of the Constitution. These are: the power to investigate conduct in State affairs or in the public administration that is alleged or suspected to be improper or to

KMN PM

result in any impropriety or prejudice; the power to report on that conduct; and the power to take appropriate remedial action.

30 The "*remedial action*" necessarily flows from the investigations of maladministration or impropriety. The recommendation for a constitutional amendment has no foundation in any finding of impropriety or maladministration. For that reason alone, it is an irrational conclusion.

31 But there are fundamental grounds why the proposed constitutional amendment is irrational.

31.1 There is no basis to the conclusion that the Reserve Bank should not play the role of protecting the value of the currency. Insofar as the Public Protector argues that in her view that aspect of the mandate of the Reserve Bank should be reconsidered, she is not entitled to direct a policy change. The formulation of policy is pre-eminently an executive function.

31.2 In any event, section 224(1) does not require the Reserve Bank to protect the value of the currency for its own sake. It requires that function to be carried out "*in the interest of balanced and sustainable economic growth in the Republic*". As such, there is no rational foundation to the recommendation to remove the "currency protection" mandate of the Reserve Bank. It is not as if there is a contradiction between the protection of the currency and the necessity to address socio-economic challenges facing the economy. The two objectives contained in section

 KMN PM

224(1) should not be read disjunctively or in opposition to one another – they are mutually reinforcing and supportive.

31.3 The Public Protector has also removed the Minister of Finance from the provisions of section 224(2). She has not explained why, in her view, the Minister of Finance should not be consulted by the Reserve Bank on a "*regular*" basis as envisaged in section 224(2).

31.4 There are sound policy reasons why the Reserve Bank must operate in consultation with the Minister of Finance, and not Parliament. The Reserve Bank is ultimately accountable to Parliament, but its primary object, namely the protection of the value of the currency in the interest of balanced and sustainable economic growth in the Republic, touches upon questions of economic policy of the Republic. Those are matters that are at the heartland of executive power. They cannot simply be parcelled out to the legislative branch.

32 In any event, the powers of the Minister are set out in the Reserve Bank Act. While the Public Protector seeks to cut out the Minister from the consultative functions in section 224(2), the statute remains binding and applicable. It is accordingly irrational to call for an amendment to the Constitution, when the statute that gives effect to the Constitution remains binding and operative. According to the principle of subsidiarity, the first port of call for any revision of the mandate of the Reserve Bank ought to be the legislation.

KMN [initials]

CONCLUSION

33 In the above circumstances, it is submitted that the findings, conclusions and remedial action of the Public Protector should be set aside in their entirety. I do not seek a costs order, regardless of the outcome of the application.

DEPONENT

I hereby certify that the deponent knows and understands the contents of this affidavit and that it is to the best of the deponent's knowledge both true and correct. This affidavit was signed and sworn to before me at PRETORIA on this the 5th day of JULY 2017, and that the Regulations contained in Government Notice R.1258 of 21 July 1972, as amended by R1648 of 19 August 1977, and as further amended by R1428 of 11 July 1989, having been complied with.

COMMISSIONER OF OATHS

NAME: PATIENCE MNISI

ADDRESS: 255 PAUL KRUGER ST PRETORIA

DESIGNATION: MAJOR GENERAL SAPS

AREA: LEGAL SERVICES HEAD OFFICE PRETORIA

MG1

RESPONSE OF THE MINISTER OF FINANCE AND THE NATIONAL TREASURY TO THE NOTICE ISSUED IN TERMS OF SECTION 7(9) OF THE PUBLIC PROTECTOR ACT, 1994.

KMN

Table of Contents

A. **INTRODUCTION** 3

B. **BACKGROUND** 6

NATIONAL TREASURY 8

THE SARB 8

C. **PROCEDURAL ISSUES** 10

INFORMATION IN REBUTTAL OF THE EVIDENCE RELIED ON BY THE PUBLIC PROTECTOR 10

THE SELECTION OF IMPLICATED PERSONS 12

INCONSISTENCY IN THE USE OF TERMINOLOGY 15

D. **THE MERITS – THE COMPLAINT LODGED WITH THE PUBLIC PROTECTOR** 17

E. **THE PUBLIC PROTECTOR'S METHODOLOGY** 19

F. **THE PUBLIC PROTECTOR'S VIEW OF WHAT WAS COMMON CAUSE** 21

G. **THE FINDINGS OF THE PUBLIC PROTECTOR** 23

H **THE RESPONSE OF THE NATIONAL TREASURY TO THE VERACITY OF THE COMPLAINT** 27

I. **THE NATIONAL TREASURY'S RESPONSE WITH RESPECT TO THE ISSUES IDENTIFIED BY THE PUBLIC PROTECTOR AS NOT BEING IN DISPUTE** 30

J. **THE RESPONSE OF THE NATIONAL TREASURY WITH RESPECT TO THE FINDINGS IN THE PROVISIONAL REPORT** 35

REPORTING RESPONSIBILITIES ON THE ISSUANCE OF PUBLIC DEBT 37

GOVERNMENT BONDS 38

REMEDIAL ACTION 40

K. **CONCLUSION** 41

THE CIEX "report" 41

THE FINANCIAL ASSISTANCE PACKAGE 42

THE CONSTITUTIONAL OBLIGATIONS OF THE GOVERNMENT 43

REMEDIAL ACTION 44

 KMN PM

IN RE: PROVISIONAL REPORT OF THE PUBLIC PROTECTOR IN TERMS OF SECTION 182(1)(b) OF THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 1996 AND SECTION 8(1) OF THE PUBLIC PROTECTOR ACT 1994 – ALLEGED FAILURE BY GOVERNMENT TO RECOVER FUNDS "BORROWED TO" ABSA

RESPONSE OF THE MINISTER OF FINANCE AND THE NATIONAL TREASURY TO THE NOTICE ISSUED IN TERMS OF SECTION 7(9) OF THE PUBLIC PROTECTOR ACT, 1994.

A. INTRODUCTION

1. The conduct of the Government of the Republic of South Africa ("the Government"), the Minister of Finance ("the Minister"), and the National Treasury has been brought in issue by the investigation that the Public Protector embarked on in the period 2013 to 2016[1]. In her Provisional Report the Public Protector makes the following statement:

> "*This report relates to an investigation into allegations of maladministration, corruption, misappropriation of public funds and failure (sic) by the South African Government and SARB to implement or process the CIEX report*[2] *and to recover public funds from ABSA bank.*"[3]

2. This investigation was triggered by a complaint made to the Public Protector on 10 November 2011[4] and has a constitutional and statutory platform, in that, section 182(1) of the Constitution mandates the Public Protector, "*as regulated by national legislation –*

---

[1] For ease of reference, all references to the National Treasury should be read to interchangeably include references to the Minister of Finance.

[2] The status of the document prepared by CIEX has been challenged by Minister Manuel who correctly observed that CIEX itself does not call it a "report". The document is entitled "**Ciex – Operations on behalf of the South African Government August 1997 – December 1999**"

[3] Provisional Report of the Public Protector p. 20-21

[4] Provisional Report of the Public Protector, p. 55 para 7.1.1.3

KMN
pm

a) *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;*

b) *To report on that conduct; and*

c) *To take appropriate remedial action.*"

3. The above mandate is regulated by the Public Protector Act 23 of 1994 ("the Public Protector Act") which provides in section 6(4)(a)(i) that the Public Protector shall, *inter alia*, be competent:

   a) *"to investigate, on his or her own initiative or on receipt of a complaint, any alleged –*

      (i) maladministration in connection with the affairs of government at any level;

      (ii) abuse or unjustifiable exercise of power or unfair, capricious, discourteous or other improper conduct or undue delay by a person performing a public function;

      (iii) ... "

4. After initially rejecting the complaint that was lodged in 2011, but thereafter receiving additional submissions from the complainant[5], the Public Protector decided to investigate these "*allegations of maladministration, corruption, misappropriation of public funds and failure (sic) by the South African Government to implement the CIEX Report and to recover public funds from ABSA bank*".

5. In essence, the Provisional Report of the Public Protector ("the Provisional Report"), has found various parties, including the Government, the Minister and National Treasury guilty of, *inter alia*, improper conduct as envisaged in section 182(1) of the

[5] Provisional Report of the Public Protector, Executive Summary p. 6 – the following is noted by the Public Protector – "*When the Complaint was initially lodged, I had initial (sic) rejected to investigate the matter due to lack of evidence and unavailability of resources, (sic) after further submission (sic) from the Complainant suggesting that ABSA had made a provision for payment in R100K tranches but Government failed to follow up, I was persuaded that the matter deserves to be looked at.*"

KMN
PM

Constitution and maladministration[6] and of fruitless and wasteful expenditure, as defined in section 1 of the Public Finance Management Act, No. 1 of 1999 ("the PFMA")[7].

6. It has also found that the Government[8] failed to implement what it refers to as the CIEX report in violation of sections 96(2), 195, and 237, of the Constitution and section 63(2) of the PFMA[9]. In the Public Protector's view, this conduct amounted to "*improper conduct and maladministration as envisaged in terms of section 6 of the Public Protector Act*" as the "*Presidency, National Treasury and SARB had an obligation to process the CIEX report*".[10]

7. The Public Protector's investigation and the context of this response of the National Treasury to the findings and the proposed remedial action of the Public Protector, as recorded in her Provisional Report 12 of 2016/2017 and dated December 2016, is premised, in particular, on the prescription in section 195(1) of the Constitution which provides, *inter alia*, that:

> "*(f)* *Public administration must be accountable;*
>
> *(g)* *Transparency must be fostered by providing the public with timely, accessible and accurate information*".

8. The matters addressed in this response pertinently place on record the way in which the National Treasury has at all times complied with its constitutional and statutory obligations, thereby promoting the principle of accountable, responsive and open government.

---

[6] Provisional Report of the Public Protector p. 59 para 7.1.3.9

[7] Provisional Report of the Public Protector p. 61 paras 7.1.6.3

[8] The allegation noted by the Public Protector includes the Presidency, National Treasury and the SARB as the "Government".

[9] Provisional Report of the Public Protector p. 58 para 7.1.3.7

[10] Provisional Report of the Public Protector p. 58 para 7.1.3.7

KMN
PM

B. BACKGROUND

9. On 20 December 2016, the Public Protector sent a notice as provided for in terms of section 7(9) of the Public Protector Act, to the Minister of Finance. In terms of section 1 read with section 5(1)(a) and 5(2) of the PFMA the Minister is the political head of the National Treasury. The National Treasury is the national department responsible for financial and fiscal matters.

10. In the said notice the Public Protector advised the Minister that she had concluded the investigation into the complaint pertaining to "*the alleged maladministration, corruption, misappropriation of public funds and failure of the South African Government to implement the Ciex report and recover public funds from Absa*". [11]

11. A copy of the Provisional Report was attached to the notice for the Minister's consideration. In the section 7(9) notice the Public Protector indicated that she was "*in a position to issue the final report*".

12. The Public Protector brought to the Minister's attention the provisions of section 7(9) of the Public Protector Act which provides that:

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

13. She indicated that her Provisional Report "*encapsulates findings against Government*" and that in light thereof, she was affording the Minister and the National Treasury, the opportunity to respond to the content of the report and provide reasons why she should not issue the report as a final one.

14. For the Public Protector to conclude and issue her final report, the Minister was requested to respond, preferably no later than Monday 16 January 2017, alternatively

[11] It should be noted that all underlining is for purposes of emphasis

KMN
PM

engage with the team and the Public Protector on the Provisional Report in the period 20 December 2016 and 16 January 2017.

15. Finally, the Public Protector made it clear in the section 7(9) notice that should the Minister agree with the findings in the report, she would issue a report that simply indicated Government's intention to remedy the maladministration and prejudice suffered by the public due to Government's conduct. Alternatively, she requested that the Minister forward to her office any evidence contradicting what she has found in her report.

16. In context, paragraph 8 of the Provisional Report the Public Protector sets out the remedial action she intends to take in accordance with section 182(1)(c) of the Constitution. Therein she intends to instruct the National Treasury and the South African Reserve Bank ("SARB"):

    16.1. "*To ensure that systems, regulations and policies are put in place within 90 days to prevent this anomaly in providing loans/ lifeboat (sic) to banks in future*";

    16.2. "*South African Reserve Bank should consider reviewing its lending policies in order to avoid similar situation (sic) in future*";

    16.3. "*…To institute legal action against ABSA in order to recover 16% interest accumulated over a period of five years amounting to R1 125 billion plus interest, further ensure that the interest is not more than the capital value of the loan and the in duplum rule which states that unpaid interest on a money debt owing ceases to accumulate once it reaches the amount of the capital sum*".

17. The National Treasury and the SARB are regulated by statute. It is therefore appropriate to briefly set out those provisions that impact on the way in which they discharge their functions and responsibilities.

KMN
DM

NATIONAL TREASURY

18. The National Treasury is established in terms of section 216(1)[12] of the Constitution.

19. The provisions of the PFMA emphasise accountability, transparency and responsibility in enforcing compliance with section 216(1) of the Constitution. Section 5 of the PFMA is the legislative provision that establishes a National Treasury within the sphere of national government, as the department responsible for financial and fiscal matters[13]. The functions of the National Treasury are provided for in section 6 of the PFMA.

THE SARB

20. Unlike the National Treasury, and though the SARB is not outside government, the PFMA does not define it as a national department, a national government component, a national government business enterprise, a public entity listed in Schedule 2 or 3, or a constitutional institution in the PFMA. Accordingly, the PFMA does not apply to the SARB.

21. The SARB was established in terms of section 9 of the Currency and Banking Act, No 31 of 1920. Prior to the Constitution coming into effect, the SARB was regulated by statute, i.e. the South African Reserve Bank Act 29 of 1944 and later Act 90 of 1989, ("the SARB Act") read with the Exchequer and Audit Act No. 66 of 1975 ("the Exchequer Act"). Its powers and functions were provided for by statute, and it was bound to act within the confines of the provisions of the empowering statute.

22. The Constitution recognises the SARB as the central bank of the Republic of South Africa and specifically provides that it is regulated in terms of an Act of Parliament.

23. Section 224(1) of the Constitution states that the primary objective of the SARB is to "*protect the value of the currency in the interest of balanced and sustainable economic growth in the Republic*".

---

[12] We make the correction that National Treasury is established in terms of section 216(1) of the Constitution read with section 5 of the PFMA and not section 239 of the Constitution as stated in the Public Protector's Provisional Report at p. 28 paragraph 3.5.

[13] Prior to 1996 this was called the Department of Finance

KMN
PM

24. Section 224(2) of the Constitution provides that the SARB "*in pursuit of its primary object must perform its functions independently without fear, favour or prejudice, but there must be regular consultation between the Bank and the Cabinet member responsible for national financial matters*."

25. The Act of Parliament that regulates the SARB is the SARB Act, as amended. In giving effect to sections 223 – 225 of the Constitution, the SARB Act secures the SARB's independence.

26. Section 2 of the SARB Act provides that it shall be a juristic person. Echoing section 224(1) of the Constitution, section 3 of the Act provides that its primary objective "*shall be to protect the value of the currency of the Republic in the interest of balanced and sustainable economic growth in the Republic*".

27. The powers and duties of the SARB are set out in section 10 of the SARB Act. These include the power to "*perform such other functions of bankers and financial agents as central banks customarily may perform*"[14]. This provision essentially mirrors the provisions of section 225 of the Constitution.

28. With respect to the Minister, section 31 of the SARB Act provides that the "*Governor shall annually submit to the Minister a report relating to the implementation by the Bank of <u>monetary policy</u>*".

29. Section 32 makes provision for:

    29.1. information such as the section 31 Report and the statement of the assets and liabilities of the bank;

    29.2. the financial statements signed by the Governor; and

    29.3. details of the bank's shareholders,

    to be tabled in Parliament by the Minister for scrutiny by Parliament in the exercise of its oversight function.

---

[14] section 10(1)(s) of the SARB Act

KMN
PM

C. PROCEDURAL ISSUES

INFORMATION IN REBUTTAL OF THE EVIDENCE RELIED ON BY THE PUBLIC PROTECTOR

30. In the section 7(9) notice the Public Protector identifies two sources of information that may be placed before her. She refers to an "*opportunity to respond to the issues contained in the report and provide reasons why I should not issue this report as final (sic) report*". Further on she states "*Should you have evidence contradicting what I have, kindly forward same to my Office*".

31. Since the findings of an investigation by the Public Protector "*may be to the detriment*" of an implicated person or that "*an adverse finding pertaining to that person may result*" the notice issued in terms of section 7(9) of the Public Protector Act requires the Public Protector to afford such implicated person "*an opportunity to respond in connection therewith, in any manner that may be expedient under the circumstances*"[15].

32. The National Treasury had understood that the inclusive formulation of the invitation to respond to the Public Protector as formulated in section 7(9), i.e. "*in any manner that may be expedient under the circumstances*" conferred a right on the implicated party to seek access to the evidence on which the Public Protector relied to reach her provisional findings.

33. This view is supported by the invitation to forward "*contradicting evidence*" to the Office of the Public Protector. The relevant evidence that the National Treasury would wish to present is within the preserve of the Office of the Public Protector in the form of the transcriptions of evidence taken during the hearings. Access to these transcriptions would enable the National Treasury to consider and test the allegations of the complainant and the consequential findings in the Provisional Report, which by all accounts appear to be speculative and unsubstantiated in the light of the totality of evidence that is before the Public Protector.

---

[15] The expediency referred to relates to the implicated persons

KMN
PM

34. The process envisaged in terms of section 7(9) (a) and (b) requires that the *audi alteram* principle be applied in substance and not only in form. Though the Minister is an implicated party in relation to both the findings and the proposed remedial action, not only has the Public Protector denied the National Treasury access to the transcriptions of evidence on which she has relied in making findings adverse to these parties, but, contrary to the principles of a fair hearing, she has also failed to afford the Minister the opportunity to be heard about the evidence submitted to her, by way of giving evidence.

35. The Minister has noted the reference made to him in paragraph 6.3.4.2 of the Provisional Report, where the following appears:

> *"Minister Pravin Gordhan stated that he had nothing to do with the Ciex report but when interviewed as Minister of Justice he expressed a view that there was systemic threat then and a systemic threat now if shareholders of Barclays had to be asked to pay for a concealed debt. He argued that the shareholders who had benefitted had long cashed out and new shareholders would be punished for a debt or risk that was never disclosed or apparent at time (sic) of investing."*[16]

36. This extract from the report is patently erroneous. The Minister has not at any time been appointed to the portfolio of Minister of Justice. It is correct that the incumbent Minister of Finance had nothing to do with the CIEX "report". The evidence clearly identifies the notes prepared by CIEX as being relevant to the agreement CIEX had with the SASS. This aspect is addressed below.

37. It is also important to place the following procedural matters on record in the context of the recommended remedial action that litigation be embarked on by the National Treasury and the SARB:

    37.1. in terms of legal process, the SARB is a statutory body distinct from the National Treasury, with specific constitutional obligations. The Minister cannot compel the SARB to embark on litigation.

[16] Provisional Report of the Public Protector p. 53 para 6.3.4.2

KMN
PM

37.2. a large proportion of the key sources of information[17] to which the Public Protector had regard in conducting the investigation and in making findings and considering appropriate remedial action, have not been furnished to the National Treasury.

37.3. the final version of the CIEX Report, if it exists, has not been furnished, nor have the earlier reports of CIEX dated 29 November 1997 and 8 January 1998 and December 1999[18] been made available to the National Treasury.

37.4. the final version of the report of the Special Investigating Unit (SIU) prepared by Judge W Heath has not been furnished. What has been furnished is the comprehensive media statement that was published by Judge W Heath.

37.5. there are various opinions prepared by counsel that the National Treasury has not been favoured with. There are reports regarding the assistance provided by the SARB to Bankorp Limited ("Bankorp") that the National Treasury has not had sight of. The list goes on.

38. The National Treasury hereby forwards to the Public Protector submissions relating to both the procedural and substantive issues that the findings and proposed remedial action recommended in the Provisional Report address.

THE SELECTION OF IMPLICATED PERSONS

39. These preliminary points seek to set out some of the difficulties that arise from the perspective adopted by the Public Protector in respect of who the implicated parties are and to what information she is prepared to give them access.

40. The issuance of the section 7(9) notice to the Minister identifies the Minister as an implicated party. The remedial action proposed to be taken is directed at the National Treasury and the SARB.

---

[17] Provisional Report of the Public Protector – p. 31-35 para 4.4.1 -4.4.4.8

[18] Provisional Report of the Public Protector p. 25 para 2.4.2; Transcription of the evidence of former Minister T Manuel p. 10

KMN
PM

41. In light of the Public Protector's reliance on section 7(9) of the Public Protector Act, and given the findings made, and the proposed remedial action recorded in the Provisional Report, it is extraordinary that the Public Protector regards the Minister, and the National Treasury, as implicated persons.

42. The SASS that entered into the agreement of 6 October 1997 with CIEX Ltd was a department within the national sphere of government. The terms on which CIEX Ltd was engaged to provide services falls within the exclusive competence of the intelligence services. SASS's political head was the Minister for Intelligence and the client of SASS was the President of the Republic of south Africa. Neither the President, the Minister for Intelligence nor Mr. Masetlha are implicated persons.

43. The mandate of the Secret Service of South Africa was external, and not domestic. It dealt with "foreign intelligence" and not "domestic intelligence" and made use of moneys made available from the Secret Services Account for which the Director-General of the Secret Service was accountable.[19]

44. It was the mandate of the National Intelligence Agency, (which was not involved with CIEX), to deal with "domestic intelligence".[20]

45. Consequently, the finding in paragraph 7.1.2.2 of the Provisional Report that the South African Government, through the South African **National Intelligence Agency**, entered into an agreement with CIEX is incorrect and not supported by oral and documentary evidence. So is the finding in para 7.1.2.3 with reference to the evidence of former President Mbeki to this effect. The National Treasury has not been favoured with the transcript of Rev Chikane's submission, but it is doubtful that Rev Chikane could have confirmed something that was objectively incorrect.

46. It is not clear whether the Minister has been selected as an implicated person in his capacity as a representative of the Government of the Republic of South Africa

[19] See: The Secret Services Act 56 of 1978, the Intelligence Services Act 38 of 1994, the National Strategic Intelligence Act 39 of 1994 and the Intelligence Services Control Act 40 of 1994, which were in operation at the time, (that is, 1994 -2002).

[20] Section 2(2) of the National Strategic Intelligence Act, 39 0f 1994, which, *inter alia*, makes it clear that the mandate of SASS is to "*gather, correlate, evaluate and analyse* ***foreign intelligence*****.....**" as contrasted with that of the NIA, whose mandate was to do the same with regard to "***domestic intelligence***" [Section 2(1) thereof].

KMN
pm

against whom certain findings have been made or in his capacity as the political head of the National Treasury. If the former is the case, then the testimony of former President TM Mbeki concerning the decision by former President NR Mandela to establish an investigation in terms of Proclamation No. R. 47, 1998[21] explains the action taken by the Government of the Republic of South Africa.

47. It follows that it is to the President as head of the National Executive that the Public Protector should refer any allegations directed specifically at the Government of the Republic of South Africa, save that any matter relating to the agreement between CIEX Ltd and Mr. B Masetlha, the Director-General of SASS[22], should be directed to the Minister for Intelligence and/or the President as explained by former President TM Mbeki.

48. If the Minister is implicated because he is the political head of the National Treasury, then the testimony of former Minister T Manuel is a complete answer to the allegations, i.e. neither the Minister of Finance nor the National Treasury were party to the agreement[23], operations, or termination of services of CIEX. They also did not participate in any decision regarding the "recovery" of funds allegedly lent to Bankorp/ABSA bank by the SARB. If any "recovery" was due, this would have been within the exclusive competence of the SARB.

49. Alternatively, if the Minister is an implicated party because of the constitutional obligation to have regular consultations with the SARB *"in pursuit of its primary*

---

[21] Transcription of the evidence of former President TM Mbeki p. 38

[22] Mr. Masetlha, the Director-General of SASS, was responsible for entering into the agreement with CIEX. The statutory and constitutional obligations of the intelligence services are distinct from those of the National Treasury. Minister Manuel explained it thus at p. 9 of the transcription of his evidence:

"You know the financial arrangements of Government are covered by legislation. The current situation is described by the Public Finance Management Act, Act 1 of 1999, which was operational from 2000 and in the previous period it would have been the (indistinct[(Exchequer)] Act. The similarities are that Government Departments can enter into contracts and commit resources. There is oversight exercised by Parliament and I think with the Intelligence Services the oversight is managed in a way that is actually different to other departments, because I think there is much closer examination of spending. It has always been there, certainly even before the post of an Inspector General for Intelligence was created. It was not something that the Finance Manager got into the nitty-gritty of, but ditto, you know if the Department of Transport put out a contract for a construction of a bridge or roads, the Minister of Finance wouldn't know about what is in that contract".

[23] Provisional Report of the Public Protector p.37 – 41 Memorandum of Agreement

KMN
AM

object" as provided for in section 224(2) of the Constitution, then the testimony of former Minister T Manuel has relevance.

50. Former Minister T Manuel stated that in an informal discussion with former Governor T Mboweni, the latter mentioned that he would seek to "*investigate in detail some of the financial transactions that had taken place before democracy was established*."[24] Consequently, the Governor's Panel of Experts that investigated the SARB's role regarding the financial assistance package to Bankorp, led by Judge D Davis, was appointed on 15 June 2000. The findings and recommendations of this panel of experts records the steps taken by the SARB in investigating the allegations that surfaced in or about 1997 concerning the financial assistance given to Bankorp. The findings and recommendations of this report are conclusive.

51. In the result, by selecting the Minister as an implicated person, the Provisional Report appears to confuse the responsibilities of the Minister for Intelligence and the authority of his Director General, Mr. B Masetlha[25], with those of the Minister of Finance. The findings in the report also appear to impute to the Minister responsibilities discharged by the President as head of the National Executive.

INCONSISTENCY IN THE USE OF TERMINOLOGY

52. In addition, the inconsistent use of the term "Government" not only infers that the National Treasury is responsible for the way Government dealt with the CIEX "report" but also creates the impression that Government could be any of three parties, i.e. the President, the National Treasury, or the President, National Treasury and SARB as a collective.

53. This inconsistency in who exactly Government might be is illustrated in the following references from the Provisional Report:

[24]Transcription of the evidence of former Minister T Manuel p. 14

[25] Mr. B Masetlha was responsible for entering into an agreement with CIEX. As will be indicated below, his mandate as Director General of SASS extended to offshore matters only, and not to matters that occurred within the borders of South Africa.

KMN
AM

53.1. the Presidency;[26]

53.2. the National Executive (Cabinet and Deputy Ministers[27]);

53.3. the payee of "*an amount of 600 000 pounds for a period of 6 months to CIEX Ltd to conduct the investigation*"[28];

53.4. the "*Presidency and National Treasury*"[29].

54. The authority conferred on one Minister cannot be imputed to another unless the President has assigned the power or function to a particular Minister in terms of section 97 or 98 of the Constitution. The Minister on whom a power is conferred is responsible for tabling relevant reports on the "*matters under their control*". Thus, in this matter, the Minister of Finance cannot respond to matters that concern the Minister for Intelligence in respect of the payment by the South African Security Services ("SASS") of £600 000 to CIEX Ltd.

55. In the context of the mandate to the National Executive, it is also patent that the Public Protector fails to consider the constitutionally mandated role of the National Treasury and that of the SARB, certainly in the period 1997 to 2002. She has also misunderstood the statutory character of the SARB as a distinct statutory entity from the Government of the Republic of South Africa. This substantive issue is addressed later in this submission.

56. More significantly, and in context, the findings in the Provisional Report conflate the concepts of executive action and administrative action in the discharge of the constitutional mandate that arises from the provisions in section 85(2) of the Constitution. This aspect is addressed in greater detail below.

57. In the circumstances, the National Treasury's intention is to give the Public Protector as comprehensive an answer as may be possible in response to the invitation in her letter dated 20 December 2016, to "*respond to the issues contained in the report and*

[26] Provisional Report of the Public Protector p. 53 para 6.4.1; p. 54 para 6.4.2; p. 58 paras 7.1.3.7, 7.1.3.8

[27] Provisional Report of the Public Protector, p. 58 para 7.1.3.6

[28] Provisional Report of the Public Protector, p. 57 para 7.1.3.4

[29] Provisional Report of the Public Protector, p. 54 para 6.4.2

KMN
PM

provide reasons why I should not issue this report as final (sic) report", and considering the invitation to furnish evidence contradicting what she has[30].

D. THE MERITS – THE COMPLAINT LODGED WITH THE PUBLIC PROTECTOR

58. In her report the Public Protector identifies the starting point of her investigation as a complaint lodged by Adv. Paul Hoffman ("Adv. P Hoffman") of the Accountability Institute of Southern Africa.

59. In the heading to the section 7(9) notice issued under the Public Protector Act[31], the two primary issues that comprise the complaint that was investigated by the Public Protector are those identified in paragraph 10, above.[32].

60. The National Treasury's understanding is that the primary documentation on which the complaint rests is:

    60.1. The Memorandum of Agreement that was signed on 6 October 1997 by Mr. Billy Masetlha ("Mr. Masetlha"), in his capacity as the Director-General of SASS, "*for and on behalf of the Republic of South Africa*" and Mr Michael Oatley ("Oatley") "*for and on behalf of CIEX*", and

    60.2. The CIEX notes referred to earlier herein, which the Public Protector appears to regard as a report.

61. In her report, the Public Protector notes that the allegations made are "*levelled against the Government of the Republic of South Africa, National Treasury, and (sic) South African Reserve Bank*"[33].

62. The content of the complaint, as noted in the Provisional Report of the Public Protector relates to:

---

[30] Section 7(9) notice from the Public Protector dated 20 December 2016

[31] Section 7(9) notice from the Public Protector dated 20 December 2016

[32] Provisional Report of the Public Protector p. 28 para 3.5

[33] Provisional Report of the Public Protector p. 21 para 2.1

KMN
PM

62.1. The agreement between Mr. B Masetlha and Mr M Oatley, in particular, its suspension and termination;

62.2. Why the issues raised in the "*CIEX report*" have not been addressed by the Government;

62.3. The "*illegal gift*" by the SARB to Bankorp in the period 1986 to 1995;

62.4. The alleged contingent provision that ABSA bank is said to have made in expectation that it would be required to account to and repay the post-apartheid government;

62.5. The fact that the post-apartheid government was advised on how it could legally recover approximately "*R10 billion from ABSA bank and its shareholders and that criminal charges could be brought against the principal individuals concerned for major acts of inside trading and false accounting*"[34];

62.6. The allegation that "*a provisional agreement was reached that recovery should be pursued; the Complainant further alleges that despite this commitment, the Government of the Republic of South Africa failed to implement the Ciex report and to recover the above-mentioned amount of money from ABSA bank without providing any reasons thereof*" (sic);[35]

63. Regarding the complaint, the Public Protector identified the issues considered and investigated as being, *inter alia*:

63.1. whether "*the South African Government and the SARB improperly failed to implement a "Project Spear" report by CIEX, dealing with alleged stolen state monies, after commissioning and duly paying for same*"[36];

[34] Provisional Report of the Public Protector p. 22 para 2.1.9

[35] Provisional Report of the Public Protector p. 23 para 2.1.10

[36] Provisional Report of the Public Protector p. 31 para 4.3.3

KMN
PM

63.2. whether "*the South African Government and the SARB improperly failed to recover from ABSA an amount of R3.2 billion owed as a result of a pseudo "Lifeboat" given to Bankorp Bank later ABSA between 1986 and 1995*"[37];

63.3. whether the "*South African public was prejudiced by the conduct of the Government of South Africa and SARB and if so what would it take (sic) to ensure justice*"[38].

64. In the view of the Public Protector, her decision to investigate the complaint "*took into account the interests of the public, government, banking sector and the allegation that Absa bank had made provision for the repayment of the loan*"[39].

65. The legislative prescripts on which the Public Protector states she relied in processing the complaint include the Constitution, the PFMA, and the Promotion of Administrative Justice Act 3 of 2000 (PAJA).

E. THE PUBLIC PROTECTOR'S METHODOLOGY

66. The Public Protector made it clear when interviewing former Minister Manuel that this part of her investigation related to "*what happened between 1997 and 2002*" and what the democratic government "*did or didn't do*"[40] about the recommendations of the "CIEX Report".

67. In one of the excerpts from the transcription of Former Minister T Manuel's testimony, the Public Protector makes the point thus:

> "*We are saying the information we have is that* <u>*the Reserve Bank would be acting on behalf of Government and Government would have been represented by Treasury*</u>*. We are not putting words into your mouth. We just wanted to know were you involved in any way ... were you advised that there is a loan? Were you involved in deciding what happened to it,*

[37] Provisional Report of the Public Protector p. 31 para 4.3.4

[38] Provisional Report of the Public Protector p. 31 para 4.3.5

[39] Provisional Report of the Public Protector p. 49 para 5.5 – 5.5.5

[40] Transcription of the evidence of former Minister T Manuel p. 1

KMN
PM

because as we see at the moment we don't know whether this loan was ever written off, and if it was written off, who did?"[41] (Own emphasis)

68. In referring to her approach to the investigation, the Public Protector states, *inter alia*, that:

68.1. the factual enquiry undertaken "*focused on whether the South African Government, National Treasury and the South African Reserve Bank failed to recover public funds owed to Government by ABSA bank*"[42];

68.2. "*the enquiry regarding what should have happened, focuses on the law and rules that regulate the standard that should have been met by the Government or organ of state to prevent maladministration and prejudice*"[43];

68.3. in referring to the prejudice suffered, that the intention is to place "*the Complainant and/or the Public as close as possible to where they would have been had the Government, National Treasury and South African Reserve Bank or organ of state complied with the regulatory framework setting the applicable standard for good governance and administration*"[44];

68.4. the "*substantive scope of the investigation focused on compliance with the concluded contract between SARB and ABSA bank, laws and prescripts regarding a decision to not (sic) recover an alleged amount of R3.2 billion and Government bonds used as security in respect of loans made to ABSA bank, allegedly owed to the Government of the Republic of South Africa*"[45].

69. In addition, the Public Protector noted that she considered it appropriate to investigate whether "*the South African public was prejudiced by the conduct of the*

---

[41] Transcription of the evidence of former Minister T Manuel p. 33

[42] Provisional Report of the Public Protector p. 30 para 4.2.2

[43] Provisional Report of the Public Protector p. 30 para 4.2.3

[44] Provisional Report of the Public Protector p. 30 para 4.2.4

[45] Provisional Report of the Public Protector p. 30 para 4.2.5

KMN
[illegible]

Government of South Africa and SARB and if so what would it take to ensure justice".[46]

F. THE PUBLIC PROTECTOR'S VIEW OF WHAT WAS COMMON CAUSE

70. Prior to noting her findings, the Public Protector identified what she considered to be issues that were not in dispute. These were:

70.1. that an agreement had been concluded between the Government and CIEX Ltd on 6 November 1997;

70.2. that Government failed to recover "*public funds amounting to 16% interest on the loan offered to Bankorp later Absa bank owed by Bankorp now part of Absa after it was informed of possibility (sic) of recovery by CIEX Ltd in a report titled "**Project Spear**"*"[47];

70.3. that CIEX submitted a report to Government in August 1998 which report Government did not implement;

70.4. ABSA bank repaid the capital sum but did not pay interest[48];

70.5. the SARB and the Government "*failed to discharge its (sic) legal obligations of pursuing this recovery from Bankorp now Absa despite or notwithstanding declaration (sic) to the effect that the lifeboat was an unlawful gift liable for repayment*";[49]

70.6. that it was not in dispute that "*Government was advised by the CIEX report on how it could lawfully recover sum (sic) of approximately R3.2 billion from Absa which is a successor in title of Bankorp and that if recovered periodically the process of recovery will not have caused any systemic impact*";[50]

[46] Provisional Report of the Public Protector p. 31 para 4.3.5

[47] Provisional Report of the Public Protector p. 42 para 5.3.1.1

[48] Provisional Report of the Public Protector p. 43 para 5.3.1.7

[49] Provisional Report of the Public Protector p.45 para 5.4.1.2

[50] Provisional Report of the Public Protector p. 45 para 5.4.1.3

KMN
PM

70.7. that the Heath Commission "*conducted its investigation without knowing that CIEX had investigated the same matter on behalf of government and ruled that the loan or lifeboat is recoverable*";[51]

70.8. that "*the monies and Government bonds belongs (sic) to the people of South Africa particularly taxpayers and were under the stewardship of National Treasury and SARB and that both the bonds and the monies with interest were never recovered*";[52]

70.9. that it is not in dispute that "*the decision not to recover had a serious (sic) prejudice on the people of South Africa particularly the poor who would have benefitted out of this monies (sic) through social development programs and that this money would have been repaid to the Government*".[53]

71. The Public Protector also expressed the view that:

71.1. regarding section 195 of the Constitution and section 63(2) of the PFMA, that former Minister T Manuel, as the former executive authority of the National Treasury, was "*obliged to act in compliance with the above provisions of the Constitution and the PFMA and consider processing the Ciex report*".[54]

71.2. that "*Government had an obligation to ensure that the report is processed through formal structures within government and take a decision to either accept or reject the findings. Nothing suggest (sic) that the above was done by Government and (sic) SARB*"[55].

and concluded that the failure by "*Government (Presidency), SARB and National Treasury*" to process the CIEX "report" required the adjudication of the question

[51] Provisional Report of the Public Protector p. 46 para 5.4.1.8

[52] Provisional Report of the Public Protector p. 49 para 5.5.1

[53] Provisional Report of the Public Protector p. 49 para 5.5.2

[54] Provisional Report of the Public Protector, p53 para 6.3.4

[55] Provisional Report of the Public Protector, p53 para 6.4.1

KMN
PM

"whether or not the Government and SARB acted in violation of the Constitution, the SARB Act, PFMA, and other legal prescripts".[56]

72. Almost immediately after posing this question, and prior to noting her findings, the Public Protector then made the definitive statement that:

> *"It is our considered view that by failing to process the Ciex report, Government (Presidency and National Treasury) and (sic) SARB acted in contravention of section 195 of the Constitution and (sic) PFMA as stipulated above"*.

G. THE FINDINGS OF THE PUBLIC PROTECTOR

73. The Public Protector made specific findings against the "*Government of the Republic of South Africa*" and the National Treasury. For present purposes, and until advised differently, the National Treasury will explain its position in response to these findings, and where it has relevant information, give an overview on how the National Treasury approaches certain matters raised in the findings recorded in the Provisional Report.

74. The Provisional Report records the following findings against the Government, the National Treasury and the Minister:

 74.1. That the South African Government did enter into an agreement to investigate alleged apartheid corruption with CIEX Ltd[57];

 74.2. That the South African Government failed to implement a 'Project Spear' report by CIEX[58] which was "*about tracking public funds allegedly stolen, which included R3.2 billion offered to Bankorp in the disguise (sic) as a distressed bank "Lifeboat", R100 million given to Nedbank and several billions (sic) siphoned to offshore illicit deals*"[59];

[56] Provisional Report of the Public Protector, p53 para 6.4.1

[57] Provisional Report of the Public Protector, p56 para 7.1.2, 7.1.2.1 to 7.1.2.3

[58] Provisional Report of the Public Protector, p56 para 7.1.3, 7.1.3.1 to 7.1.3.9

[59] Provisional Report of the Public Protector, p56 para 7.1.3.3

KMN
PM

74.3. The remaining material findings read as follows:

"7.1.3.1 The allegation that South African Government, NationalTreasury and the SARB improperly failed to implement a "Project Spear" report by CIEX dealing with alleged stolen state monies, after commissioning and duly paying for the same is proven;

7.1.3.4 No evidence could be found that any action was taken specifically in pursuit of the ClEX report for which by then at least Government had paid an amount of 600 000 pounds for a period of 6 months to CIEX Ltd to conduct the investigation; [60]

7.1.3.5 No evidence could be found showing that the CIEX Report was properly deliberated on by either a Cabinet Committee, SARB Board or any other legitimate structure and that the said structures took a decision not to proceed or implement the report with rational reasons recorded for such decision, therefore no evidence could be found supporting a view that a decision was taken to implement the report;

7.1.3.6 The failure to implement the CIEX report by the South African Government and the South African Reserve Bank was inconsistent with the duties of Government as set out in section 195 of the Constitution requiring a high standard of professional ethics to be promoted and maintained and section 237 of the same requiring that all Constitutional obligations must be performed diligently and without delay and section 96 (1) (b) of the same requiring members of the Cabinet and Deputy Ministers not to act in any way that is inconsistent with their office, read together with the Executive Members' Ethics Act, 1998; and Public Financial Management Act requiring Government Departments to prevent wasteful and fruitless expenditure.

[60] Provisional Report of the Public Protector, p. 57 para 7.1.3.4

KMN
PM

7.1.3.7 The conduct of the Presidency, National Treasury and South African Reserve Bank for failing to process the CIEX report is therefore in violation of sections 195, 237, 96{2) of the Constitution and section 63(2) of the Public Finance Management Act 1 of 1999, and thus amounts to improper conduct and maladministration as envisaged in terms of section 6 of the Public Protector Act. The Presidency, National Treasury and SARB had an obligation to process the CIEX report.

7.1.3.8 The conduct of the Presidency, National Treasury and South African Reserve Bank is also inconsistent with Section 4 (1) of the Promotion of Administrative Justice Act which state (sic) that "in cases where an administrative action materially and adversely affects the rights of the public, an administrator, in order to give effect to the right to procedurally fair administrative action, must decide whether (a) to hold a public inquiry (b) to follow a notice and comment procedure."

7.1.3.9 The conduct or failure of the Presidency, National Treasury and South African Reserve Bank to process the CIEX report after it was informed in the CIEX report of possible recovery of monies owed to Government constitutes improper conduct as envisaged in section 182 (1) of the Constitution and maladministration as envisaged in section 6 of the Public Protector Act."

74.4. That it is "*partially proven*" that the South African Government, the National Treasury as the custodian of taxpayers' money failed to recover from ABSA bank an amount R3.2 billion owed as a result of the lifeboat granted to Bankorp between 1986 and 1995[61].

[61] Provisional Report of the Public Protector, p59 para 7.1.4, 7.1.4.1 to 7.1.4.5

KMN
PM

74.5. Further, as a result of the South African Government, the National Treasury's failure to act on section 195 of the Constitution, the general public of South Africa has been prejudiced[62].

74.6. In addition, the Public Protector found that the failure "*to recover the interest on the capital loan amount (sic) to a loss to the public and Government but as well benefitted few individuals who are shareholders of Absa*";[63]

74.7. That in commissioning the CIEX Report, the conduct of the South African Government, the National Treasury amounted to fruitless and wasteful expenditure[64].

"...

7.1.6.3 It further amount to fruitless and wasteful expenditure, as defined in section 1 of the Public Finance Management Act (PFMA), 1999 (Act No. 1 of 1999) in that the expenditure to pay for the commission of the investigation was made in vain and would have been avoided had reasonable care been exercised ..."

75. The last finding was that:

"*No attempt were (sic) made to test the Ciex proposal that if recovered periodically, they (sic) would be no systemic impact, Government had an option to recover the interest on the loan periodically and no evidence could be found suggesting (sic) if Ciex's proposal was followed it could have collapsed the economy*".[65]

76. The above findings form the basis on which the Public Protector has proposed to take the remedial action noted in paragraph 8 of the Provisional Report.

---

[62] Provisional Report of the Public Protector, p60 para 7.1.5, 7.1.5.1 to 7.1.5.5

[63] Provisional Report of the Public Protector, p. 61 para 7.1.6.2

[64] Provisional Report of the Public Protector, p. 61 para 7.1.6, 7.1.6.1 to 7.1.6.6

[65] Provisional Report of the Public Protector, p. 62 para 7.1.6.6

KMN
PM

H THE RESPONSE OF THE NATIONAL TREASURY TO THE VERACITY OF THE COMPLAINT

77. The National Treasury places in issue the veracity and authenticity of the allegations in the complaint that the Public Protector appears to accept as verified undisputed facts.

78. By way of example, the Public Protector's acceptance of the "notes" prepared by CIEX as a "CIEX Report" is misguided. Though the Public Protector has referred to other reports furnished to Government[66] by CIEX, in the transcription of evidence relating to former Minister T Manuel, the CIEX "report" referred to appears to be the one that former Minister T Manuel refers to as "*a collection of thoughts*". It is this "*collection of thoughts*" that the Public Protector appears to have relied on in proceeding with the investigation into the complaint lodged by Advocate P Hoffman.

79. Another example of the failure to probe and verify the information placed before the Public Protector is her investigation of "maladministration" and "corruption" on the part of Government or organ of state. These allegations are premised on unsubstantiated propositions such as the allegation by the complainant that he had established that the money to repay the financial assistance advanced to Bankorp was available, and all that was a required was for Government to ask for it as ABSA bank had made arrangements for it to be paid.

80. The National Treasury has no knowledge of the veracity of this allegation. It was never approached by ABSA bank with a proposal to repay the funds allegedly advanced to Bankorp. It has never been advised that ABSA bank has made provision for the repayment of those funds.

81. In any event, from the evidence available to the National Treasury, ABSA bank has denied the claim that it has made provision to repay the funds allegedly advanced to Bankorp. This brings into question the evaluation by the Public Protector of the unsubstantiated allegations of the complainant and the evidence that emerged from a reading of the reports of the Special Investigating Unit ("SIU"), the SARB panel of experts, and that of the parties who gave oral testimony before the Public Protector.

[66] Transcription of the evidence of former Minister T Manuel p1 -2

KAN
AM

82. The National Treasury also takes issue with the Public Protector's interpretation of the constitutional obligations of the President and the National Executive in deciding on how to exercise the executive authority conferred on them, including deciding on which reports to table in Cabinet. These decisions are executive decisions. They are excluded from the ambit of administrative action by section 1 of PAJA.

83. The Public Protector ought therefore not to have tested the exercise of powers conferred under section 85(2)(b), (c), (d) and (e) of the Constitution against the concept what constitutes "*maladministration*" or against the provisions of PAJA. This aspect is addressed in greater detail later in this submission.

84. In any event, maladministration by its very nature connotes inefficient or dishonest administration [67]. It relates to the mismanagement of a portfolio including an unwarranted deviation from the provision of legislation that seeks to give effect to the polices of government. In this instance, there were no relevant or material facts before the Public Protector that supported the charge of maladministration, as the core issue under investigation concerned what executive action was taken in response to the allegations concerning the financial assistance given to Bankorp.

85. In context, it is relevant that the Public Protector herself:

85.1. characterises CIEX as "*a covert UK asset recovery agency headed by Mr. Michael Oatley*" [68]

85.2. had information that Mr. M Oatley was a former MI6 spy and was in the business of, *inter alia*, "*investigating financial misconduct as a Bounty Hunter*"[69].

[67] Section 33(3) (c) of the Constitution refers to the promotion of an efficient administration. Section 195 of the Constitution provides for basic values and principles that govern public administration, which principles apply to "*(a) administration in every sphere of government; (b) organs of state; and (c) public enterprises*". Section 6(5) of the Public Protector Act refers to "*maladministration*" but does not define it. In ***United Democratic Movement and Others v Tlakula and Another*** 2015 (5) BCLR 597 at [72] and [79] – [83] the Court gives guidance on the question of accountability and responsibility in light of the Constitution and the public administration.

[68] Provisional Report of the Public Protector p. 21 para 2.1.1

[69] Transcription of the evidence of former Minister T Manuel – p. 7

KMN
PM

86. In any event, as explained by Former Minister T Manuel when he gave his testimony before the Public Protector, prior to the adoption of the Constitution,

> "*...the Reserve Bank operated in terms of its own law, in terms of its own mandate, understanding that it had no original powers, that in many way (sic) even the reserves that it has in its custody, along with bonds...I was trying to explain how in the previous era, until we established certain norms and standards for the issuing of public debt, the Reserve Bank was the primary issuer of debt.*
>
> ...
>
> *...And so I have said that the Treasury would not be aware of these kinds of issues...*[70]"

87. In his submission, former President TM Mbeki confirmed that the approach by CIEX to recover funds illicitly exported during the period leading up to the elections of 1994 was unsolicited[71], that its mandate was narrow and specific, and that CIEX did not recover any of the assets it had contracted to recover.

88. Finally, and with respect to how an investigation by the Public Protector should be conducted, the Supreme Court of Appeal[72] observed as follows:

> "*[21] ...But I think that there is nonetheless at least one feature of an investigation that must always exist – because it is one that is universal and indispensable to an investigation of any kind – which is that the investigation must have been conducted with an open and enquiring mind. An investigation that is not conducted with an open and enquiring mind is no investigation at all. That is the bench-mark against which I have assessed the investigation in this case*".

89. In his appearance before the Public Protector, former President TM Mbeki made a similar point[73] regarding the imperative of consulting experts in the field of finance and keeping an open mind.

---

[70] Transcription of the evidence of former Minister T Manuel p. 25 - 26

[71] Transcription of the evidence of former President TM Mbeki p. 6 - 9

[72] **Public Protector v Mail and Guardian** 2011 (4) SA 420 (SCA) at para [19], [21], [22]

KMN
AM

90. The investigation by the Public Protector was deficient in material respects. The Public Protector admitted that the issues that became apparent as she investigated the complaint were more technical and complex than she had anticipated.

91. The National Treasury agrees with the view that the matters under investigation were and continue to be complex and highly technical in character. A summary of the systems, regulations and polices that regulate the banking environment in circumstances where a bank finds itself in distress, is annexed hereto marked "**NT 1**".

92. To set the record straight, the National Treasury is not aware of any "maladministration" or "corruption" on the its part or on the part of the National Executive in relation to the assistance by the SARB to Bankorp Limited and/or ABSA that required investigation by the Public Protector.

93. It is submitted that the weight of *prima facie* evidence available to the Public Protector, even after the complainant alleged that ABSA bank had made provision for the repayment of the funds advanced to Bankorp, did not merit an investigation. The original decision of the Public Protector to dismiss the allegations was the correct one. The evidence gathered during the investigation has now confirmed that view.

94. For these reasons the National Treasury submits that the complaint was without substance, and as will be demonstrated when the findings of the Public protector are analysed below, those findings have no basis in fact or in law.

I. THE NATIONAL TREASURY'S RESPONSE WITH RESPECT TO THE ISSUES IDENTIFIED BY THE PUBLIC PROTECTOR AS NOT BEING IN DISPUTE

95. The Public Protector noted that on 6 October 1997 an agreement was concluded between the Government and CIEX Ltd. The National Treasury agrees with this statement insofar as it recognises that the government department that entered into that agreement was the SASS, representing the intelligence services.

---

[73] Transcription of the evidence of former President TM Mbeki p. 41

KMN
PM

96. Regarding CIEX, the National Treasury is aware that CIEX is an intelligence firm, operated by former British intelligence agents, who market their services for commercial gain. It was not a government agency. It was simply an entity which "*investigated financial misconduct as a Bounty Hunter*", in the words of the former Public Protector. It bears mentioning that it was CIEX that approached "Government" with specific propositions relating to the services it offered.

97. The CIEX document itself records that CIEX was instructed to work through SASS.[74] In terms of the assignment of functions to Ministers, a project agreed to by SASS ought not to have extended beyond the recovery of funds from abroad.

98. More significantly, the SASS is the department within government that engaged the services of CIEX, paid them for the services they rendered, and terminated the contract that produced the so called "*CIEX Report*" that the Public Protector says "*Government*" failed to implement[75]. Matters relating to the suspension and termination of the Memorandum of Agreement fall within the preserve of the parties who signed the Memorandum of Agreement of 6 October 1997. There is further evidence that this secret assignment was embarked on by CIEX with the knowledge of former President NR Mandela, who, constitutionally was the client of the SASS at the time.[76]

99. With regard to the Memorandum of Agreement signed on 6 October 1997, the Minister and the National Treasury have no direct knowledge of whether and when the first payment to CIEX was made, thus triggering the commencement of the agreement between the contracting parties, or when and on what terms the agreement was finally terminated, or what the outcome of the agreement was[77]. The information available to the Minister and the National Treasury has been gleaned from the broad information emanating from the investigation of the Public Protector.

---

[74] CIEX document p. 2

[75] Transcription of the evidence of former President TM Mbeki p. 8 - 10

[77] Transcription of the evidence of former Minister T Manuel p. 14

KMN
PM

100. No payment was made to CIEX by the National Treasury. No interim or final report from CIEX was received by the then Minister of Finance or the National Treasury.

101. The Memorandum of Agreement of 6 October 1997 did not bind the SASS or the National Executive to accepting and implementing the findings and/or recommendations of CIEX. On the contrary, clause 4.2 of the agreement specifically notes that it "*is foreseeable that the RSA's priorities in relation to these and related matters may fluctuate according to circumstances*".

102. The second set of issues identified by the Public protector relate to the recovery of the funds advanced to Bankorp. The National Treasury does not make common cause with the Public Protector on the allegations related to the possibility that approximately R3.2 billion could and ought to have been recovered from ABSA bank, on the strength of the information submitted by CIEX in its "report".

103. The first observation to make in response to this issue is that any recommendation made by CIEX to SASS could not possibly have pertained to a domestic investigation, as SASS's statutory mandate was external, not domestic.[78]

104. The assistance that was offered to Bankorp is a matter that was to be dealt with by affected parties within the borders of South Africa. CIEX therefore had no remit to look into or recover for a fee, any funds relating to the Bankorp/ABSA/SARB financial aid package.

105. In any event, the notes recorded in the CIEX document[79] refer to various matters, including conditions for recovering the mooted R3.2 billion[80] from ABSA bank and a method for so doing. As indicated by former Minister T Manuel, there is nothing in those notes that can be regarded as a firm recommendation to Government, to instruct the National Treasury to recover funds from ABSA bank.

106. The evidence tendered by former Minister T Manuel was precisely that in the period 1997 to 2002 as identified by the Public Protector, the National Treasury was

---

[78] See: Hence, the misdirections in paragraphs 7.1.2.2 and 7.1.2.3 of the Provisional Report. The agreement was not entered into with the south African National Intelligence Agency, but the South African Secret Service.

[79] In fact, CIEX itself describes the content of its document as "these notes…" – see p. 11 of the CIEX notes

[80] CIEX notes p. 8 under the heading "Discovery of the fraud".

focused, *inter alia*, on "*building an economy in a democracy*". This endeavour included clearing the SARB reserves which stood at minus US$24 billion. This objective was achieved by 1997, giving the SARB the platform to build up a new Net Open Forward Position of plus US$ 27 billion[81]. The scale of what government had to achieve could not be compared to the issues emanating from the issuance by the SARB of "*a few hundred million bonds this way or that.*"[82]

107. It is also undisputed that the Minister of Finance could not be expected to "*keep track or account of what happens in respect of the various liabilities issued on behalf of the State*"[83], including the issuance of government bonds or take responsibility for the £600 000 or 10% commission offered to CIEX Ltd.

108. There are also no grounds, based on objectively established facts, to support the recommendation that the SARB take steps to recover the mooted R3.2 billion or R1 125 billion from ABSA bank.

109. The third set of issues identified by the Public Protector relate to the stewardship of the funds advanced to Bankorp and the issuance of government bonds. The view of the Public Protector[84] is that the money and Government bonds belong to taxpayers and that the decision not to recover the money prejudiced the people of South Africa.

110. Related to this matter is the observation by the Public Protector at paragraph 6.3.1 and 6.3.4 that former Minister T Manuel had an obligation to act in terms of section 195 of the Constitution and process the CIEX "report", and that Government, including the National Treasury, had an obligation to process this report and take a decision thereon.

111. At the core of the above issues is the proposition that despite being given a roadmap to recover the funds advanced to Bankorp, Government, including the National Treasury, failed to take such steps without justification. The National Treasury does

---

[81] Transcription of the evidence of former Minister T Manuel p. 26

[82] Transcription of the evidence of former Minister T Manuel p. 26

[83] Transcription of the evidence of former Minister T Manuel p. 17

[84] Provisional Report of the Public Protector p. 17 para (a) – (d); p. 53 – 54 para 6.4.1 – 6.6

KMN
PM

not make common cause with the Public Protector on these issues for several reasons.

112. The complete answer to the question regarding what the National Executive did about the allegations that CIEX had made, is demonstrated by the two independently commissioned reports on the financial packages that were advanced to Bankorp Limited by the SARB. The question of initiating litigation and restitution was traversed during both investigations.

113. On 7 May 1998, acting in terms of the Special Investigation Units and Special Tribunals Act 74 of 1996, ("the SIU Act"), former President Mandela referred the matter relating to "*the granting, the terms and conditions and the repayment of the loan or loans or any other assistance by the South African Reserve Bank to rescue Bankorp from bankruptcy*" to the SIU.

114. A copy of the relevant Proclamation is attached hereto marked "**NT 2**". It is manifest from the wide and far reaching terms of reference of said Proclamation that the SIU was required to investigate the genesis of the matters that form the basis of the investigation conducted by the Public Protector.

115. After due investigation, Judge Willem Heath, as the head of the SIU, formed the view that "*in terms of South African Law this particular transaction could be challenged in civil proceedings*"[85].

116. Despite this the finding of the SIU that "*there is a legal basis to attack the validity of the 'Lifeboat' contract*" he went on to conclude that "*there are other compelling reasons not to proceed with litigation in this matter*"[86]. These reasons are discussed in the Official Statement on the "Lifeboat case" released by the SIU. The National Treasury's view is that these reasons present compelling arguments.

117. National Treasury therefore submits that no culpability can validly be placed at the door of the National Executive or National Treasury for not pursuing the matter against ABSA bank or anyone else.

---

[85] Special Investigating Unit – Official Statement on the "Lifeboat case" Monday 1 November 1999 p. p.6 Copy whereof is attached as Annexure "**NT 3**"

[86] p.6 of Annexure "**NT 3**".

KMN
PM

118. A useful discussion of the SIU and its powers is found in the matter of ***South African Association of Personal Injury Lawyers v Heath***[87].

119. The second report that the National Treasury has had regard to is that of the Panel appointed by the SARB and chaired by Judge Dennis Davis. It notes the finding of this Panel that, though the assistance given to Bankorp by the SARB was flawed and not aligned to its statutory mandate, "*ABSA paid for the continued assistance of Bankorp by the Reserve Bank and could not be regarded as beneficiaries of the Reserve Bank assistance package. ABSA paid fair value for Bankorp.*"[88]

120. For the reasons advanced in this Report, the National Treasury understands why identifying the ultimate beneficiaries of the financial transaction to demand restitution would present an intractable challenge.

121. The National Treasury reiterates that, to the extent that the Public Protector characterises the conduct of Government and/or the Minister of Finance as falling within the ambit of administrative action, that premise is disputed. The *locus classicus* on the distinction between executive and administrative action is the judgment of the Constitutional Court in ***President of the Republic of South Africa v South African Rugby Football Union*** 2000 (1) SA 1 (CC) especially at paragraphs 141 and 143.

122. Executive decisions are tested against the standard of the principle of legality. There is no suggestion in the Provisional Report that in taking the action that was taken or not taken, the Government or the National Treasury breached the principle of legality.

J. THE RESPONSE OF THE NATIONAL TREASURY WITH RESPECT TO THE FINDINGS IN THE PROVISIONAL REPORT

123. The National Treasury denies all charges of corruption, financial impropriety and maladministration that have, directly and inferentially, been levelled at the "*Government of the Republic of South Africa*", and/or the National Treasury.

---

[87] 2001 (1) SA 883 (CC).

[88] Report of the Governor's Panel of Experts to investigate the SA Reserve Bank's role with regard to the financial assistance package to Bankorp Limited p. 10

KMN
PM

124. This is because there is no direct evidence of corruption, financial impropriety or maladministration as alleged. Regarding the inferences that the Public Protector seeks to draw, these are not consistent with all the proven facts, nor is the inference she seeks to draw from the material on which she has relied the most plausible inference.

125. The National Treasury also denies that there was a legal duty on "Government" and/or the National Treasury to consider, accept and implement the "recommendations" of the "CIEX Report". It aligns itself with the views expressed by Former Minister T Manuel that "*nothing in this collection of thoughts prepares it for decisions in Cabinet*"[89].

126. The Minister asks that the Public Protector accept that this document could not have, and did not, serve before Cabinet[90] as the matters it sought to deal with could be addressed by other mechanisms at the disposal of the President or the National Executive. In this instance, an appropriate investigation by the SIU was proclaimed in terms of the applicable law.

127. The National Treasury also finds support for its stance in the submissions made by former President TM Mbeki who explained how CIEX Ltd came to be assigned the task of recovering illicit funds that had been spirited out of the country prior to the advent of democracy, how it was that SASS was the appropriate department of government that entered concluded an agreement with CIEX Ltd[91], and why the agreement with CIEX Ltd was terminated.

128. The National Treasury asks that the Public Protector accept the direct and indirect evidence by these two members of the National Executive at the relevant time on this aspect as its cogency surpasses the unsubstantiated allegations of the complainant.

129. Regarding the National Treasury, it is patent from the evidence tendered that it had nothing to do with CIEX Ltd or with the "recovery" or "writing off" of the "loan" to

---

[89] Transcription of the evidence of former Minister T Manuel p. 8 - 13, 53 – 54 – 55, 65

[90] Transcription of the evidence of former Minister T Manuel p. 13 – 15 – it bears noting that the SIU and SARB Governor's Panel of Experts report also were not discussed in Cabinet or at a Cabinet subcommittee – p. 24

[91] See also - Transcription of the evidence of former Minister T Manuel p. 45

KMN
AM

Bankorp[92]. The direct evidence of former Minister T Manuel is a complete answer to the charge that as "*a reasonable custodian of public funds*[93]" there was an obligation on the part of the National Treasury to "implement" the "CIEX Report".

130. With regard the SARB Act, the relationship between the SARB and the Minister of Finance, even <u>prior</u> to the adoption of the 1996 Constitution, was one where each one made decisions within their independent spheres of responsibility. The SARB was at that time driven by the primary objective of section 3 of the SARB Act.

131. After the adoption and final certification of the Constitution in 1996, Government would not have been represented by the National Treasury when:

131.1. discussions with CIEX Ltd took place in or about 1997; or

131.2. when the CIEX contract was terminated;[94] or

131.3. when the SIU was appointed by proclamation to look into the allegations concerning the financial assistance advanced to Bankorp[95];

131.4. when the final arrangements for the payment of the capital amount and 1% interest were made between the SARB and ABSA bank in or about 1992.

132. Similarly, the SARB would <u>not</u> have been acting on behalf of Government. In the period 1997 to 2002, the SARB would have been expected to discharge its constitutional mandate, as would (and did) the National Executive and the National Treasury.

REPORTING RESPONSIBILITIES ON THE ISSUANCE OF PUBLIC DEBT

133. It is submitted that the failure by the Public Protector to take into consideration the changed status of the SARB and its accounting and reporting responsibilities under

[92] Transcription of the evidence of former Minister T Manuel p. 14, 39

[93] Transcription of the evidence of former Minister T Manuel p. 63 - 65

[94] CIEX document p. 2

[95] These are matters that the intelligence services and the President would have been seized with. In the event that the reference to "representing Government" refers to the period prior to 1996, this view would also be erroneous, as explained later in these submissions.

KMN PM

sections 223 to 225 of the Constitution, which circumstances applied in the period under investigation, i.e. 1997 to 2002, constitutes a serious misdirection.

134. As indicated by former Minister T Manuel, prior to the Constitution taking effect and until legislation established certain norms and standards for the issuing of public debt, the SARB was the primary issuer of debt[96]. In giving evidence he highlighted that at the time, in or about 1989, when Dr C Stals was the Governor of the SARB, there was a close interaction between the SARB and the Department of Finance, but "*it didn't mean that there was an exchange of information*"[97] between the two.

135. A keen appreciation of the role of the SARB as the primary issuer of debt is particularly relevant to the question raised by the Public Protector regarding "*who was then supposed to investigate the Government Bonds part, because the Reserve Bank investigation focused on the loan by the Reserve Bank. We are trying to find out did Treasury do anything about the Government Bonds?*"[98]

136. It cannot be disputed that, largely due to the financial crises that the country was experiencing in the period 1983 - 1989, the reporting systems of the SARB at that time were inadequate. What is referred to as the "*shock of adjusting to international anti-apartheid sanctions*" and the government's "*total strategy*" against anti-apartheid forces, was a material factor that influenced the grant by the SARB of financial assistance to Bankorp. This factor, coupled with the overt political overtones that informed the relationship between the government of the day and Bankorp, forms part of the background that gives context to the arrangements and transactions that the SARB and Bankorp made in the period 1985 to 1990.[99]

GOVERNMENT BONDS

137. Historically and institutionally, government bonds are sold on the open market. Up to 1997, the SARB has acted as an agent for government to sell government bonds.

---

[96] Transcription of the evidence of former Minister T Manuel p. 25

[97] Transcription of the evidence of former Minister T Manuel p. 26

[98] Transcription of the evidence of former Minister T Manuel p. 25

[99] Report of the Governor's Panel of Experts to investigate the SA Reserve Bank's role with regard to the financial assistance package to Bankorp Limited p. 114 - 115

KMN

This was done by the SARB buying and selling bonds in the open markets. When the SARB had sold more bonds than they purchased they would buy these bonds from government. The cash received by government (which was equal to the face value of the bond) was then used to finance the government's borrowing requirements.

138. Government bonds can also be purchased on the secondary market, i.e. between a seller holding a government bond and a willing buyer. Irrespective of which of the two sources the SARB and/or Bankorp may have obtained government bonds from, these would have been purchased at market value. In other words, money was paid to government for any bonds purchased from them. In the circumstances, it cannot, therefore, be said that government funded the financial assistance that Bankorp received from the SARB, or that government was prejudiced by the purchase of its bonds.

139. One of the conditions of the financial assistance given to Bankorp was that it had to purchase government bonds and cede these to the SARB. The effect of this transaction was that Bankorp benefitted from the interest differential between the agreed 1% interest that the SARB required it to pay for the capital advanced to it, and the 16% interest that Bankorp received from the government bonds that it had purchased.

140. The Governor's Panel of experts accepted the explanation of Dr C Stals that a failure to give financial assistance to Bankorp would have triggered contagion with implications for other banks and indeed for the system as a whole. This judgment the Panel of experts considered to be reasonable in that they formed the view that a systemic crisis of the banking sector could have been triggered if Bankorp failed[100].

141. It had reservations with regard to, *inter alia*, whether the loan met the best practice standards that governed lending practices by central banks such as the SARB and whether the use of a simulated transaction was optimal in the circumstances.[101] The

[100] Report of the Governor's Panel of Experts to investigate the SA Reserve Bank's role with regard to the financial assistance package to Bankorp Limited p. 71 - 75

[101] Report of the Governor's Panel of Experts to investigate the SA Reserve Bank's role with regard to the financial assistance package to Bankorp Limited p. 71 - 75

KMN
PM

Panel concluded that the SARB's methods "*did not conform with internationally accepted principles for dealing with distressed banks*".[102]

142. With respect to the taking of restitution measures by the SARB, the overall conclusion of the Panel of experts was that "*the difficulties pertaining to the quantification of the enrichment and the identity of the beneficiaries (e.g. as a mutual society at the time, much of the enrichment would have been enjoyed by Sanlam's policy holders) render problematic the prosecution of an enrichment claim*"[103].

143. The National Treasury has also had regard to the views and conclusions of the Governor's Panel of experts as well as those of the SIU, as stated above. It makes common cause with the conclusion of the Panel of experts when they state that they believe that their 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.*" [104] In the circumstances, no further investigation or action was required.

144. The National Treasury suffered no financial loss as a result of the arrangement. The National Treasury was still required to pay interest on its bonds as with any other bondholder. No change to the contract occurred, and no change in the obligations of the Treasury vis-s-vis any bondholders occurred.

REMEDIAL ACTION

145. To the extent that the remedial action proposed by the Public Protector in paragraph 8.2.1 falls within the statutory and constitutional mandates of the Minister, it is submitted that these mandates have been complied with, as attested by *inter alia*:

145.1. The clear distinction that now exists between the primary objective of the SARB as provided for in section 3 of the SARB Act and the fiscal and

[102] Report of the Governor's Panel of Experts to investigate the SA Reserve Bank's role with regard to the financial assistance package to Bankorp Limited p. 76

[103] Report of the Governor's Panel of Experts to investigate the SA Reserve Bank's role with regard to the financial assistance package to Bankorp Limited p. 84

[104] Report of the Governor's Panel of Experts to investigate the SA Reserve Bank's role with regard to the financial assistance package to Bankorp Limited p. 122

KMN PM

macro-economic obligations of the National Treasury, including the debt management and funding policies of the National Treasury;

145.2. the record of international and domestic accounting and regulatory events noted in the report of the Governor's Panel of experts,

145.3. the accounting and reporting measures that have been provided to give effect to sections 223 to 225 of the Constitution, and

145.4. regulatory measures such as the Banks Act 94 of 1990 as amended, and the other measures recorded in annexure "**NT 1**" in support of his stance that the remedial action proposed in paragraph 8.2.1 of the Provisional Report of the Public Protector has already been implemented and continues to be implemented.

146. When and where appropriate and prudent, Government continues to make liquid funding instruments available to the market. In terms of section 10(1)(f)(i) read with section 10 (1)(d) of the SARB Act, the SARB continues to hold the status of the lender of last resort, which status is used to achieve the objective of protecting the value of the currency in the interest of balanced and sustainable growth. Consultation between the Minister and the Governor of the SARB continues to take place, as mandated by section 224(2) of the Constitution.

K. CONCLUSION

147. The findings of the Public Protector against the President, Government, and the National Treasury undermine their institutional integrity. The findings also adversely impact on the Government's ability to promote public confidence in the work of the National Executive and the public administration as a whole[105].

THE CIEX "report"

148. There is no basis set out in the CIEX notes, the complaint or the available evidence, for any findings to have been made against the Minister or the National Treasury.

[105] Provisional Report of the Public Protector, p. 55 para 7.1.1.4 – The Public Protector refers in this paragraph to the impact of the complaint on the integrity of Government. The submissions made herein point to the findings of the Public Protector as impugning the institutional integrity of the President, Government and National Treasury.

KMN

149. The finding of an agreement between the Government and CIEX Ltd has been addressed in full in the response to the complaint lodged. This is a disputed issue. The "CIEX Report" is not evidence of an agreement of the nature described in paragraph 5.2 of the Provisional Report. The contents of the document, read with the narrow constitutional mandate of the SASS, makes this patently clear.

150. In the result, from the available evidence, it is apparent that no constitutional obligations are implicated in the way SASS handled the "CIEX Report". More significantly, none of these matters were brought to the attention of the Minister or National Treasury at the relevant time.

151. For the same reasons, the failure by Government and or the National Treasury to implement the "CIEX Report" does not constitute the breach of any constitutional or statutory duty on the part of the "Government" or the National Treasury. In particular, there was no financial impropriety on the part of the National Treasury. The finding that the President, and the National Treasury failed in their constitutional and statutory duties has no merit, as clearly demonstrated in the evidence of former Minister T Manuel and that of former President TM Mbeki.

152. In any event, both former President NR Mandela, as head of State and head of the National Executive and the SARB independently instituted investigations into the allegations made regarding the financial assistance given to Bankorp. Despite having the legal mandate to do so, the SIU declined to institute civil proceedings to recover the funds allegedly advanced. The SARB investigation came to the same conclusion, though for different reasons. These investigations were thorough and their conclusions were sound. Both the National Executive and the SARB were satisfied with the work done by these bodies and with their conclusions.

THE FINANCIAL ASSISTANCE PACKAGE

153. In addition to the above submissions, the National Treasury holds the view that the Public Protector was wrong in accepting that when the financial aid package was given to Bankorp, the Department of Finance would have been involved in the day to day decisions of the SARB, particularly those relating to financial gearing and capitalisation of ailing banks and related practices. It has explained that the application and regulatory framework of the Exchequer Act was fundamentally

KMN
DM

different to that of the PFMA, and its supervision of the SARB cannot be analysed through the lens of the PFMA. These are material factors that the Public Protector ought to have regard to as she finalises her report.

154. The National Treasury wishes to emphasise that with respect to the current statutory mandate of the SARB, it remains the lender of last resort to banks, where appropriate. With respect to a bank that is in distress, the SARB also has the statutory power to institute alternative measures consistent with the objective of securing monetary stability and balanced economic growth in the Republic. The most recent example of the SARB complying with this constitutional and statutory mandate is attested by the measures put in place when the African Bank was placed under curatorship.

155. It is therefore evident that the necessary systems, regulatory framework and policies necessary to avoid any anomalies within the financial and banking sector, have been put in place, and continue to be instituted as attested in annexure "**NT 1**".

THE CONSTITUTIONAL OBLIGATIONS OF THE GOVERNMENT

156. With respect to the discussion of the "CIEX Report" at Cabinet, there was no legal or constitutional obligation to discuss that document at Cabinet. A decision to table material issues that required Cabinet's attention would have been within the preserve of the President.

157. There was no legal duty on the part of the "Government" or the National Treasury to "*recover from ABSA an amount of R3.2 billion*". This matter has been addressed earlier herein.

158. There is no evidence that the South African public has been prejudiced by the conduct of the "Government" or the National Treasury. The National Treasury reserves its rights to deal with such evidence should it be made available.

159. The provisions of PAJA do not arise regarding the conduct of the National Treasury or that of the "Government of the Republic of South Africa'. In relation to the contractual arrangements between SASS and CIEX, those would be governed by the law of contract, with due regard to the Intelligence laws that applied at the time,

KMN
PM

which have been mentioned above. Given the terms of the contract and the lack of performance thereon, the finding of fruitless and wasteful expenditure is vehemently disputed.

REMEDIAL ACTION

160. With respect to the remedial action proposed in paragraph 8.2.2, the Public Protector is referred to annexure "**NT 1**" which sets out in detail the systems, regulations and polices that the National Treasury has put in place.

161. With regard the remedial action proposed in paragraph 8.2.3, it is patent that the National Treasury takes a different view to that of the Public Protector on whether the National Treasury should institute legal proceedings to recover R1 125 billion, with or without interest, from ABSA bank.

162. In assessing the propriety of the proposed remedial action that requires the National Treasury to take positive steps to institute litigation against ABSA bank to recover "*16% interest accumulated over period (sic) of five years amounting to R1 125 billion plus interest*", the Public Protector has failed to have regard to the legal competence of the National Treasury to implement this remedial action. Put another way, the loan was made by the SARB. The loan was not made by the National Treasury or even by "Government". Furthermore, as stated above, the National Treasury suffered no financial loss.

163. In terms of the applicable legislation of the time[106], the reserve Bank was a body that was independent of the Treasury[107], which could grant loans and advances and buy and sell, discount or rediscount bonds.[108]

164. The view of the National Treasury, as supported by the submissions and testimony of former Minister T Manuel and former President TM Mbeki is that the remedial action proposed by the Public Protector in paragraph 8.2.3 is not legally competent. The National Treasury therefore encourages the Public Protector to reconsider this

[106] The South African Reserve Bank Act 29 of 1944.

[107] Section 2 thereof.

[108] Section 8 thereof.

KMN
[illegible]

proposed remedial action within the context of the cogent evidence from an organ of State and a credible Panel of experts (both of whom consist of judges) that there are no or very slim prospects of success. In the view of the National Treasury, litigation on this matter is not a viable option.

165. In conclusion, the findings are, in certain material aspects, wrong, the selection of implicated persons is misconceived, and the proposed remedial action incompetent.

Dated at PRETORIA this 28th day of February 2017

KMN