**IN THE HIGH COURT OF SOUTH AFRICA**
**GAUTENG DIVISION, PRETORIA**

**CASE NO:** 65616/17

In the matter between:

| | |
|---|---|
| **ORGANISATION UNDOING TAX ABUSE** | Applicant |
| and | |
| **THE TRUSTEE(S) FOR THE TIME BEING OF THE OPTIMUM MINE REHABILITATION TRUST** | First Respondent |
| **THE TRUSTEE(S) FOR THE TIME BEING OF THE KOORNFONTEIN MINE REHABILITATION TRUST** | Second Respondent |
| **PUSHPAVENI GOVENDER** | Third Respondent |
| **TREVOR SCOTT** | Fourth Respondent |
| **OPTIMUM COAL MINE (PTY) LTD** | Fifth Respondent |
| **KOORNFONTEIN MINE (PTY) LTD** | Sixth Respondent |
| **BANK OF BARODA** | Seventh Respondent |
| **MINISTER OF MINERAL RESOURCES** | Eighth Respondent |

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**DATED** at PRETORIA on this 20th day of September 2017.

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Ref: Mr A McConnell

**TO:**
**THE REGISTRAR OF THE HIGH COURT**
(GAUTENG DIVISION, PRETORIA)

**IN THE HIGH COURT OF SOUTH AFRICA**
**GAUTENG DIVISION, PRETORIA**

**CASE NO:** 65616/17

In the matter between:

| | |
|---|---|
| **ORGANISATION UNDOING TAX ABUSE** | Applicant |
| and | |
| **THE TRUSTEE(S) FOR THE TIME BEING OF THE OPTIMUM MINE REHABILITATION TRUST** | First Respondent |
| **THE TRUSTEE(S) FOR THE TIME BEING OF THE KOORNFONTEIN MINE REHABILITATION TRUST** | Second Respondent |
| **PUSHPAVENI GOVENDER** | Third Respondent |
| **TREVOR SCOTT** | Fourth Respondent |
| **OPTIMUM COAL MINE (PTY) LTD** | Fifth Respondent |
| **KOORNFONTEIN MINES (PTY) LTD** | Sixth Respondent |
| **BANK OF BARODA** | Seventh Respondent |
| **MINISTER OF MINERAL RESOURCES** | Eighth Respondent |

REGISTRAR OF THE HIGH COURT OF SOUTH AFRICA GAUTENG DIVISION, PRETORIA
PRETORIA 0001
2017 -09- 21
REGISTRATEUR VAN DIE HOË HOF VAN SUID-AFRIKA GAUTENG AFDELING, PRETORIA

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**NOTICE OF MOTION**

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**TAKE NOTICE THAT** the Applicant intends to make application to the Honourable Court on Tuesday 26 September 2017 at 10h00 or as soon thereafter as counsel may be heard for an order in the terms set out in **PART A** below:

**PART A**

1 Dispensing with the forms and service provided for in the Uniform Rules of Court and allowing the matter to be heard as one of urgency in terms of Rule

6(12) and granting condonation for any non-compliance with or deviation from Section 13.12 of the Practice Manual of the above Honourable Court.

2 Pending a decision on the relief sought in Part B or a further order by this Court:

2.1 Insofar as the Bank of Baroda does not consent thereto, directing the Bank of Baroda to continue to hold the Trust funds of the Optimum Mine Rehabilitation Trust (**'the Optimum Trust'**) and the Koornfontein Mine Rehabilitation Trust (**'the Koornfontein Trust'**), in an interest-bearing bank account or accounts in the name of the Trusts.

2.2 Interdicting the Trustee(s) for the time being of the Optimum Trust and any signatory on its bank account(s) or any other person who may have been authorised by the trustees to act on behalf of the Optimum Trust,

2.2.1 from directly or indirectly dealing in any way with, disposing of or removing from the Republic of South Africa any of the funds or assets of the Trust including but not limited to the Trust's funds held in any account of or at the Bank of Baroda;

2.2.2 without detracting from the generality of 2.2.1 above, from ceding, assigning, delegating, making over, diverting or diluting any present or future funds, and including further all moneys received or receivable in future owed to the Trusts.

2.3 Interdicting the Trustee(s) for the time being of the Koornfontein Trust and any signatory on its bank account(s) or any other person who may have been authorised by the Trustees to act on behalf of the Koornfontein Trust:

2.3.1 From directly or indirectly dealing in any way with, disposing of or removing from the Republic of South Africa any of the funds or assets of the Trust including but not limited to the Trust's funds held in any account of or at the Bank of Baroda;

2.3.2 Without detracting from the generality of 2.3.1 above, from ceding, assigning, delegating, making over, diverting or diluting any present or future funds, and including further all moneys received or receivable in future owed to the Trusts.

3 Within 15 days of this order, directing the Trustee(s) of the Koornfontein Trust and the Optimum Trust to file with the Registrar of this Court and serve on the parties, an affidavit setting out full details of the Trusts' property and its location, subject to any order relating to maintaining any confidentiality as the Court may deem fit.

4 Directing that any party may, upon reasonable notice and good cause shown, apply to the Court to vary this order.

5 Granting the applicant leave within 30 court days of the grant of this order to:

5.1 Amend the notice of motion;

5.2 Effect the joinder of any other interested party including the trustees of the Trusts in their personal capacities should any relief be sought against them and the Master and;

5.3 Supplement its founding affidavit in respect of the relief sought in PART B.

6 Directing that the costs of Part A be ordered against any party who opposes the relief sought in Part A and are otherwise reserved for determination in the proceedings contemplated by Part B.

7 Further and / or alternative relief.

**PART B**

**TAKE NOTICE THAT** the applicant intends to apply, on a date to be determined by the Registrar, for the relief set out below, subject to any amendments contemplated by Prayer 5 of Part A:

1 Removing the trustee(s) of the Koornfontein Trust and Optimum Trust;

2 Appointing a minimum of two independent or otherwise suitable trustees to the Koornfontein Trust and the Optimum Trust alternatively ordering the Master of the High Court to appoint such trustees within one month of the date of the Court's order.

3 In the alternative to prayer 1, appointing a minimum of one independent trustee to the Koornfontein Trust and Optimum Trust alternatively ordering the Master of the High Court to appoint such trustees within one month of the date of the Court's order.

4 Directing that the Trustees of the Trusts appointed in terms of prayers 2 or 3 above, hold a Trustees meeting within a period of one month from the date of their appointment to take a decision on the depositing and / or investment of the Trusts' funds and thereafter swiftly implement such decision.

5 Directing the Trustees for the time being of the Koornfontein and Optimum Trusts as at the date of institution of these proceedings to deliver an affidavit to the Registrar of the Court and the parties containing a full accounting relating to the Trusts' property from 30 March 2016 to the date of the Court's order in Part A.

6 In the alternative to prayers 1 to 4 above, directing that the Minister take such steps as are necessary to ensure that alternative satisfactory arrangements are in place for the financial provision for rehabilitation in respect of Koornfontein and Optimum as contemplated by NEMA.

7 Costs of suit against any party who opposes this relief.

8 Further and / or alternative relief.

**TAKE NOTICE FURTHER THAT** the accompanying affidavit of **STEFANIE FICK** together with annexures thereto, and the affidavit of **MARTIN LANGE** will be used in support of this application.

**TAKE NOTICE FURTHER THAT** the applicant has appointed **WERKSMANS ATTORNEYS C/O BRAZINGTON McCONNELL ATTORNEYS** at **2ND FLOOR, HATFIELD MALL, 424 HILDA STREET, HATFIELD** as the address at which it will accept notice and service in these proceedings.

**TAKE NOTICE FURTHER THAT** if you intend opposing **PART A** of this application you are required to:

a) Notify the applicant's attorneys of such intention by 2pm on Friday 22 September 2017; and

b) Deliver your answering affidavit, if any, by 7pm on Sunday 24 September 2017;

**KINDLY ENROL THE MATTER ACCORDINGLY**

**DATED** at PRETORIA on this 21st day of September 2017.

**WERKSMANS ATTORNEYS**
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Pretoria
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Ref: Mr A McConnell

**TO:**
**THE REGISTRAR OF THE HIGH COURT**
(GAUTENG DIVISION, PRETORIA)

**AND TO:**
**THE TRUSTEE(S) FOR THE TIME BEING OF THE OPTIMUM MINE REHABILITATION TRUST**
First Respondent
Grayston Ridge Office Park
144 Katherine Street
Sandton

Received on September 2017

for: **THE TRUSTEE(S) FOR THE TIME BEING OF THE OPTIMUM MINE REHABILITATION TRUST**

**AND TO:**
**THE TRUSTEE(S) FOR THE TIME BEING OF THE KOORNFONTEIN MINE REHABILITATION TRUST**
Second Respondent
Grayston Ridge Office Park
144 Katherine Street
Sandton

Received on September 2017

_____
for: **THE TRUSTEE(S) FOR THE TIME BEING OF THE KOORNFONTEIN MINE REHABILITATION TRUST**

**AND TO:**
**PUSHPAVENI GOVENDER**
Third Respondent
Email: ugeshnin@sahara.co.za **SERVICE BY EMAIL**

**AND TO:**
**TREVOR SCOTT**
Fourth Respondent
Email: trevor@bearingway.co.za **SERVICE BY EMAIL**

**AND TO:**
**OPTIMUM COAL MINE (PTY) LTD**
Fifth Respondent
Grayston Ridge Office Park
144 Katherine Street
Sandton

Received on September 2017

_____
for: **OPTIMUM COAL MINE (PTY) LTD**

**AND TO:**
**KOORNFONTEIN MINES (PTY) LTD**
Sixth Respondent
Grayston Ridge Office Park
144 Katherine Street
Sandton

Received on September 2017

_____
for: **KOORNFONTEIN MINE (PTY) LTD**

**AND TO:**
**BANK OF BARODA**
Seventh Respondent
2nd Floor – Atrium of 5th
Sandton

Received on September 2017

_____
for: **BANK OF BARODA**

**AND TO:**
**MINISTER OF MINERAL RESOURCESE**
Eighth Respondent
Email: mosebenziz@gmail.com **SERVICE BY EMAIL**
**C/O THE STATE ATTORNEY**
North State Building
95 Market Street
Pretoria

Received on September 2017

_____
for: **THE STATE ATTORNEY**

**IN THE HIGH COURT OF SOUTH AFRICA**
**GAUTENG DIVISION, PRETORIA**

**CASE NO:** 65616/17

In the matter between:

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| **ORGANISATION UNDOING TAX ABUSE** | Applicant |
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| **PUSHPAVENI GOVENDER** | Third Respondent |
| **TREVOR SCOTT** | Fourth Respondent |
| **OPTIMUM COAL MINE (PTY) LTD** | Fifth Respondent |
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| **BANK OF BARODA** | Seventh Respondent |
| **MINISTER OF MINERAL RESOURCES** | Eighth Respondent |

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**FOUNDING AFFIDAVIT**

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I, the undersigned,

**STEFANIE FICK**

do hereby make oath and say that:

## A. INTRODUCTION

1 I am an adult female and the Head of Legal Affairs at the Organisation Undoing Tax Abuse NPC ('**OUTA**'). OUTA is the applicant in this application.

2 The allegations in this affidavit are true and correct, and save where the context indicates to the contrary, are within my personal knowledge. Where I make legal submissions, I do so on the advice of OUTA's legal representatives.

3 Some of the information upon which OUTA relies in this application relates to, or is sourced from affidavits in urgent interdict proceedings instituted by *inter alia* the first to fourth respondents against the fifth respondent, the Bank of Baroda (**'BoB'**), in this Court. I refer to these proceedings as the **'Baroda interdict proceedings'**.

4 The applicants in the Baroda interdict proceedings sought interim relief to prevent the closure by the BoB of various bank accounts and the calling up of various loans. I refer to relevant portions of the affidavits or features of the proceedings below. To avoid burdening the papers unduly, I do not attach these papers in full but they will be available to the Court should this be required.

5 The purpose of this application is to protect the financial provision for rehabilitation required in terms of the National Environmental Management Act 107 of 1998 (**'NEMA'**) and the Mineral and Petroleum Resources Development Act 22 of 2002 (**'the MPRDA'**) in respect of certain coal mines in Mpumalanga.

5.1 The financial provision constitutes funds held by two trusts, (collectively **'the Trusts'**) in respect of two mining companies' mines, these being:

5.2 the Optimum Mine Rehabilitation Trust (Registration Number: IT/13693/07) ('**the Optimum Trust**') which holds rehabilitation funds in respect of Optimum Coal Mine (Pty) Ltd ('**Optimum**'); and

5.3 the Koornfontein Mine Rehabilitation Trust (Registration Number IT/7563/07) ('**the Koornfontein Trust**') which holds rehabilitation funds in respect of Koornfontein Mines (Pty) Ltd ('**Koornfontein**').

6 These companies in turn are wholly owned by another company known as Tegeta Exploration and Resources (Pty) Ltd ('**Tegeta**'). Tegeta, Koornfontein and Optimum are part of what is now popularly referred to as the Oakbay / Gupta group of companies, to which I refer more fully below.

7 This application is in two parts, Part A and Part B.

8 In Part A, OUTA seeks urgent relief to preserve the Trusts' funds pending the determination of the relief in Part B. The urgency flows most immediately and critically from the BoB's imminent closure at the end of September 2017 of the Trusts' bank accounts and the fact that the trustee(s) of the trusts will not be able to secure alternative banking facilities for the Trusts in South Africa due to their association with the Gupta / Oakbay group. In this regard, on 21 September 2017, the applicants in the Baroda interdict proceedings (which included the Trusts) failed in their attempt to prevent the BoB from closing their accounts. Fabricius J dismissed the applicants' application. A copy of his

judgment is Annexure **SFA**. The effect is that the BoB is free to close the Trusts' accounts as at the end of September 2017 which it intends to do. Together the Trusts' funds constitute or ought to constitute an amount in the region of R1.7 billion plus interest.

9 As I explain below, these funds are imminently at risk. This application has been instituted as soon as possible after the judgment of Fabricius J was handed down and its implications considered. The judgment was handed down at 10 am. It is a lengthily judgment. Due to the logistical difficulties in finalising this application and affidavit between 10 am and noon on 21 September 2017, the applicant's legal representatives were able to issue the Notice of Motion in time, but were unable to cause this accompanying affidavit to be delivered prior to noon on 21 September 2017. I respectfully submit that this affidavit will be delivered at the earliest opportunity practicably possible after noon on 21 September 2017. Condonation is sought insofar as is necessary.

10 In Part B, OUTA seeks to ensure that satisfactory arrangements are soon put in place for the long-term protection of the Trusts' property, as contemplated by NEMA and the MPRDA. The relief to be sought in Part B will include an accounting to the Court in respect of trust monies and the removal of the current trustees and their replacement with independent or otherwise suitable trustees. As alternative relief, the applicant will seek a mandamus against the Minister to ensure that alternative satisfactory arrangements are put in place for the financial provision for rehabilitation for Optimum and Koornfontein.

11 As I explain more fully below, the Trusts' property is at risk not only due to the imminent closure of the Trusts' accounts at the BoB and the inability of the current trustee(s) to secure alternative banking facilities in South Africa but also because of the ongoing failures on the part of the Trustee(s) properly to perform their fiduciary and statutory duties in respect of the Trusts' and the Trusts' property. The Trusts' property is held by the Trusts in the public interest and to ensure that the Koornfontein and Optimum mines are rehabilitated in a manner that protects the environment for present and future generations and without burdening the public purse.

1. I deal with the following issues in turn:

11.1 The parties;

11.2 Legal provisions governing financial provision for rehabilitation and the Trusts;

11.3 The factual background; and

11.4 The need for urgent relief to protect the funds pending Part B.

12 OUTA has, for purposes of these proceedings, obtained a preliminary report from accountant and auditor Martin Lange, a technical accounting specialist and expert consultant to Howath Forensics. An affidavit from Lange attaching his CV and preliminary report is supplied herewith. I refer to some of his specific

findings below but request that the Court have regard to its general content insofar as it relates to the Trusts and the conduct of the Trustees.

## B. THE PARTIES

### The applicant and its standing

13 The applicant is the Organisation Undoing Tax Abuse. OUTA is a non-profit company with limited liability, with registration number 2012/0642/1308 and NPC number 124-38, duly registered in accordance with company laws of the Republic of South Africa, and with its principal place of business situated at 10th Floor, O'Keefe & Swartz Building, 318 Oak Avenue, Randburg, Gauteng.

14 OUTA's main aim is to hold government accountable for the abuse of power, corruption and maladministration. In doing its work, OUTA ensures that more tax revenues are made available and protected to the benefit of all in South Africa especially the poor and the vulnerable. One of OUTA's focus areas is the protection of the environment. South Africa faces immense challenges and threats to the environment arising from mining activities including coal-mining activities in Mpumalanga. The environmental degradation that can ensue from mining activities is notorious with devastating impact for affected people. Failure to comply with the statutory duties governing the protection of financial provision for rehabilitation, results in the burden and cost of rehabilitation falling on the state and the taxpayer.

15 OUTA is funded by tens of thousands of individuals and businesses across South Africa. This includes people who live and work in Mpumalanga and who will be directly affected by any failure to rehabilitate the Koornfontein and Optimum mines. Ultimately the burden on the fiscus affects the South African population at large and the environment.

16 OUTA has duly resolved to institute these proceedings and has authorised me to depose to this affidavit on its behalf. It institutes these proceedings in the public interest, its own interests, in the interests of those who live in Mpumalanga and who are directly affected by the mining activities in question and in the interests of protecting the environment. OUTA has standing to do so in terms of section 32 of NEMA and section 38 of the Constitution.

**The first and second respondents – the trustee(s) of the Optimum and Koornfontein Trusts**

17 The first respondent is the trustee for the time being of the Optimum Trust, or should there be more than one, the trustees. The Optimum Trust is a trust duly registered in terms of the Trust Property Control Act 57 of 1988 with registration number IT13693/17. Its principal place of business is at 144 Katherine Street, Grayston Ridge Office Park, Sandown, Sandton.

18 The second respondent is the trustee for the time being of the Koornfontein Trust, or if there is more than one, the trustees. The Koornfontein Trust is a trust registered in terms of the Trust Property Control Act with registration

number IT7563/07. Its principal place of business is at 144 Katherine Street, Grayston Ridge Office Park, Sandown, Sandton.

2. Both the Koornfontein Trust and the Optimum Trust are trusts constituted in terms of the MPRDA and NEMA for the purposes of mining land rehabilitation.

19 Until recently, the trustees of both of the Trusts were Pushpaveni Govender ('**Govender**') and Trevor Scott ('**Scott**'). Govender and Scott were both trustees as at 25 August 2017. This was confirmed by Scott during a telephone conversation on 25 August 2017 with OUTA's Ms Soretha Venter ('**Venter**'). I refer to her affidavit.

20 Scott also informed Venter that a Ms Ronica Ragavan ('**Ragavan**') should be copied on any correspondence. OUTA understands that Ragavan does not have any formal legal role and that she is not a signatory on the Trusts' BoB accounts.

21 On 15 September 2017, Venter learnt that Scott has now resigned as a trustee of the Trusts. However, OUTA is mindful that it is likely that he is or was serving out a notice period and that his resignation may not automatically be effective. Furthermore, he may remain a signatory on the Trusts' banks accounts at the BoB. Venter explains the circumstances in which she learnt this in her affidavit. On 15 September 2017, he refers to the remaining trustee as a Ms Naidu. Venter has since confirmed with him telephonically that this was a reference to Mrs Govender and that Naidu is Govender's maiden surname.

22 Against this background, OUTA has taken steps to ensure that the application comes to the attention of all of these individuals (Govender, Scott and Ragavan) and will also serve it on the Trusts' principal place of business referred to above, this being the address cited by Ragavan in the Baroda interdict proceedings as the Trusts' address.

23 On 25 August 2017 and 12 September 2017, OUTA requested Ragavan and the Trustees to confirm the current trusteeships and contact details but save for the e-mail correspondence from Scott referred to by Venter, they have declined and/ or failed to do so. I refer to this below. Against this background, OUTA invites the relevant respondents to confirm with the Court the identities of the current trustees and account signatories and with effect from what dates. Upon being informed of the correct position, OUTA will ensure that any necessary consequential procedures are attended to pursuant to the Rules of Court. OUTA has complied with the Rules of Court as far as possible in the circumstances.

**The third and fourth respondents – Govender and Scott**

24 The third and fourth respondents are Govender and Scott who are cited not only insofar as they are trustees of the Trusts but in their personal capacities. This is due to the nature of the allegations made regarding the conduct of the trustees and because they have an interest in the relief sought in their individual capacities.

25 The application will be served on Govender and Scott both at the Trusts' principal place of business and via such e-mail contact details as OUTA has to hand. In this regard, Venter confirmed current e-mail addresses with Scott on 25 August 2017.

**The fifth and sixth respondents – the mining rights holders, Optimum and Koornfontein**

26 The fifth respondent is Optimum Coal Mine (Pty) Ltd, (defined above as **Optimum**), a private company duly registered and incorporated in accordance with the company laws of South Africa with registration number 2007/005308/07. Optimum's registered address is Grayston Ridge Office Park, 144 Katherine Street, Sandton. Optimum is a company incorporated for the purposes of coal mining and exploration. It holds the mining rights in the mines to which the Optimum Trust financial provision for rehabilitation relates.

27 The sixth respondent is Koornfontein Mines (Pty) Ltd, (defined above as **Koornfontein**) a private company duly registered and incorporated in accordance with the company laws of South Africa with registration number 2006/013073/07. Koornfontein's registered address is 144 Katherine Street, Grayston Ridge Office Park, Sandown, Sandton. Koornfontein is a company incorporated for the purposes of coal mining and exploration. It holds the mining rights in the mines to which the Koornfontein Trust financial provision for rehabilitation relates.

28 The Trusts' property that is sought to be protected in these proceedings vests in the Trusts not the mining companies. However, the fifth and sixth respondents are cited because they have an ongoing residual statutory obligation to maintain and retain adequate financial provision for rehabilitation under the MPRDA and NEMA. They accordingly have an interest in the relief sought. OUTA understands that they are probably also the beneficiaries of the Trusts albeit that the Trust property must be used exclusively for its designated statutory purpose which relates to rehabilitation upon closure of the mines, and in the public interest. It may not be used for other purposes of the companies or related entities such as discharging debt or concurrent rehabilitation.

**The seventh respondent – the Bank of Baroda**

29 The seventh respondent is the Bank of Baroda a duly registered and incorporated bank with registration number 1997/012717/10. The BoB's South African principal place of business is situated at 2nd Floor – Atrium on 5th, Sandton, Johannesburg, Gauteng. The BoB is an Indian bank and was incorporated in the Republic of India on 20 July 1908. The Bank's majority shareholder is the Government of India.

30 The BoB operates as a 'foreign institution' in South Africa as defined in the Banks Act 94 of 1990. It has a relatively small operation in South Africa consisting of only two branches one in Durban and one in Johannesburg together with a regional office which is attached to the Johannesburg branch.

31 The BoB is cited because it is directly affected by the relief sought in this application. The BoB (understandably) wishes to terminate its banking relationship with the Trusts due *inter alia* to the reputational and other risks associated with doing business with those in the Gupta / Oakbay fold. OUTA is seeking to preserve the Trusts' funds pending the relief sought in Part B in the Trusts' accounts held at BoB subject to necessary protections. OUTA has invited the BoB to consent to holding the funds in order to ensure that the applicable legislation is not breached and to protect the rights in section 24 of the Constitution. In doing so, and as appears below, it invites the BoB to indicate the basis upon which it may be willing to do so, whether under an order of court or otherwise. Only to the extent that no suitable arrangements can be arrived at by consensus, OUTA requests relief against the BoB to require it to continue to hold the funds.

**The eighth respondent - the Minister of Mineral Resources**

32 The eighth respondent is the Minister of Mineral Resources in his official capacity as the member of the executive responsible for the administration of the MPRDA and the relevant portions of NEMA ('**the Minister**'). The office is currently held by Minister Mosebenzi Joseph Zwane. The Minister's address is Trevenna Campus, Building 2C, c/o Meintjies and Francis Baard Street, Sunnyside, Pretoria. He will be served both by e-mail (as his personal mail address is to hand) and c/o the State Attorney.

33 OUTA has sought assurances from the Minister that urgent steps will be taken by him to ensure that there are satisfactory arrangements in place for the protection of the Trusts' funds in view of the imminent closure of the BoB accounts. These requests were made in view of the Minister's powers in terms of NEMA and the MPRDA. The Minister has declined and/or failed to respond to OUTA. The Minister is cited as alternative relief is sought against him in Part B of this application and he may have an interest in Part A of the application.

## C. LEGAL PROVISIONS GOVERNING FINANCIAL PROVISION FOR REHABILITATION AND THE TRUSTS

34 I now briefly explain the legal framework governing financial provision for rehabilitation and the Trusts. The provisions are all designed to promote, protect, respect and fulfil the rights in section 24 of the Constitution of everyone to:

34.1 An environment that is not harmful to their health and well being; and

34.2 To have the environment protected for the benefit of present, and future generations, through reasonable legislative and other measures that –

34.2.1 Prevent pollution and ecological degradation;

34.2.2 Promote conservation;

34.2.3 Secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

35 These rights are centrally protected in the provisions of NEMA and the MPRDA in context of mining activities. The Constitution and legislation confers not only rights but imposes duties on the State as well as private bodies to realise these rights in accordance with their detailed provisions.

**The MPRDA and NEMA – the primary statutory duties**

36 Until 2013, financial provision for rehabilitation was governed by section 41 of the MPRDA. Section 41 imposed an obligation on applicants for mining rights (before the Minister approved an environmental management plan or environmental management programme) to '*make the prescribed financial provision for the rehabilitation or management or negative environmental impacts.*' The requirement on the applicant '*to maintain and retain*' the financial provision remains intact throughout the duration of mining activities.

37 The required financial provision was prescribed by the Regulations made under the MPRDA (the Mineral and Petroleum Resources Development Regulations GNR527 of 2004) and more particularly Regulations 53 and 54. Regulation 53 provided that such financial provision had to be provided by one or more of the following methods, namely:

37.1 A contribution to a trust fund as required in terms of section 10(1)(cH) (later substituted by section 37A) of the Income Tax Act 58 of 1962 and which must be in the format as approved by the Director General from time to time;

37.2 A financial guarantee from a South African registered bank;

37.3 A deposit into the account specified by the Director General in the format as approved by the Director-General from time to time; or

37.4 Any other method as the Director-General may determine.

37.5 OUTA respectfully submits that if Regulation 53 and the Income Tax Act are properly construed, funds held by a trust may not be used for purposes of concurrent rehabilitation.

38 Section 41 was repealed with effect from 7 June 2013 by the Mineral and Petroleum Resources Development Amendment Act 2008. It was replaced by section 24P of NEMA. Section 24P similarly requires applicants for mining environmental authorisations to comply with prescribed financial provision for rehabilitation. It also requires holders of mining rights to assess their liability annually in the prescribed manner to the satisfaction of the Minister upon the submission of an audit report.

39 In turn, the MPRDA Regulations were replaced by Regulations made in terms of NEMA although these were gazetted and took effect only on 20 November 2015 (*'the NEMA Regulations'*). Similar to Regulation 53, the NEMA Regulations require the use of financial guarantees, deposits into an account administered by the Minister or a contribution to a trust fund for purposes of retaining and maintaining financial provision. However, under NEMA, a trust fund can only be used for purposes of remediation of latent or residual environmental impacts which may become known post closure including the pumping and treatment of polluted or extraneous water, as reflected in an environmental risk assessment report. The trust fund, if used, must be established by a deed of trust in the format set out in Appendix 2 to the Regulations, a copy of which is supplied as **SF1C**.

40 The Department of Mineral Resources (**'the Department'**) takes the view that Regulation 53 and Regulation 54 remain relevant to the use of the funds of trusts formed prior to the gazetting of the NEMA Regulations on 20 November 2015. This is apparent from a 'Clarification note' published in 2016 by the Department and will be supplied by OUTA's legal representatives to the Court at the hearing of the matter if required.

41 As far as OUTA is aware, the financial provision for rehabilitation that is held by the Trusts was approved in terms of section 41 of the MPRDA. Whether and to the extent that either Regulation 53 and 54 or the NEMA Regulations now apply to the Trusts, they both impose strict legal requirements concerning the use and trusteeship of the Trust property.

42 The rights holders in respect of the mines for which the Trusts were established are third and fourth respondents, Optimum and Koornfontein. Optimum and Koornfontein thus have ongoing obligations to maintain and retain the financial provision for rehabilitation throughout the life of the mines.

**The Trusts**

43 OUTA has been unable to source copies of the Trust Deeds of either the Optimum Trust or the Koornfontein Trust. OUTA's legal representatives, Werksmans Attorneys, have requested the deeds from the office of the Master. However, to date there has been no response. In these circumstances, OUTA relies on what are standard trust terms applicable to these trusts. I point out that on 25 August 2017, Scott informed Venter that the trusts are indeed standard trusts as contemplated by the applicable legislation. The relevant respondents are invited to supply copies of the trust deeds to the Court and to OUTA.

44 In terms of Regulation 53 of the MPRDA referred to above, the Trusts must comply with:

44.1 Section 37A of the Income Tax Act; and

44.2 Be in a format as approved by the Director-General from time to time.

45 OUTA has, through its attorneys, managed to source two documents that reflect a format as previously approved by the Director General (circa 2012). These are **SF1A** and **SF1B. SF1A** is a standard trust deed used by the Department of Mineral Resources (**'the Department'**) attached to a report of the World Wildlife Fund dated 2012 sourced on the internet and **SF1B** is a *pro forma* trust deed for an individual holder obtained from the applicant's attorneys. They are substantially similar.

46 For present purposes OUTA assumes and contends that the Trusts' deeds are, in material respects, the same as **SF1A** and **SF1B**. The relevant respondents will presumably clarify whether the trust deeds have been amended to date so as to conform with Appendix 2 of the NEMA regulations and thus **SF1C**.

47 Section 37A(5)(a) of the Income Tax Act requires that the instrument establishing a trust contemplated in the section must incorporate the provisions of the section. Accordingly, OUTA assumes that the provisions of the section are in fact incorporated into the relevant deeds of the Trusts. This includes restrictions on the purposes for which the funds can be used as well as restrictions on the investments that may be made by trustees of trust properties.

48 In light of the above OUTA contends that at least the following material requirements must govern the Trusts:

48.1 Subject to transitional arrangements where a second trustee vacates office, there must at all times be not less than two Trustees (See **Clause**

**5.3 of SF1A and SF1B**). This in turn is consistent with the NEMA Regulations.

48.2 A trustee when resigning must give notice of the intention to do so to the remaining trustees (**Clause 6.1.2 of SF1A and 6.2 of SF1B)**

48.3 The quorum for a meeting is two trustees (**Clause 9.1 of SF1A and SF1B**)

48.4 The Trust funds are expressly to be used for purposes of covering rehabilitation obligations discharged at the time of or after the discontinuation of operations of the mines and not concurrent rehabilitation costs. (See **Clauses 1.2, 1.3, 3.1, 3.2, 12.3 and 13.8 of SF1A** and **Clause 1.6, 3.2, 12.1 and 12.3 of SF1B** and section 37A(1) of the Income Tax Act.) The NEMA Regulations are even stricter on this score.

48.5 The trustees are only entitled to make such investments in institutions and investment vehicles as referred to in section 37 of the Income Tax Act. **(Clause 12.5.1 of SF1A and SF1B)**

48.6 The Trustees are obliged to open a bank account in the name of the trust which shall be operated upon by the joint signatories of one of the Trustees and the secretary, or another duly appointed authorised joint signatory. (**Clause 13.3 of SF1A and SF1B**)

49 Should OUTA be materially incorrect about any provision of the Trust deeds once the deeds are supplied or further material provisions come to light, OUTA may seek leave to supplement these papers as necessary.

50 The Trustees are bound by the common law relating to Trusts and by the Trust Property Control Act. They have very high fiduciary duties in respect of the protection of trust property to which I return below. They also have a duty to avoid conflicts of interests including with the associated mining company or their own interests.

51 In order to discharge their statutory and common law duties as trustees, a trustee of a mining trust must be able to secure banking facilities. If a trustee cannot secure such facilities, the duties of the trustee cannot be fulfilled.

52 The trustees also have strict duties to comply with the provisions of NEMA and the MPRDA in respect of the legal provisions governing financial provision for rehabilitation held in trusts.

**The Minister's duties**

53 Under the MPRDA and NEMA it is ultimately the Minister who is responsible to ensure that satisfactory arrangements are in place for the prescribed financial provision for rehabilitation for a mining rights holder. This is so both as regards the vehicle through which financial provision is retained and the amount that is

retained. There are strict procedures in place that govern how any adjustments to financial provision are made year to year and over time. These processes are subject to the approval of the Minister and the Department.

**A bank's duties**

54 I refer below to what OUTA contends regarding the bank's duties in this context.

## D. FACTUAL BACKGROUND

**Tegeta's acquisition of Optimum and Koornfontein and control over the Trusts**

55 Tegeta acquired its interests in Optimum and Koornfontein with effect from 30 March 2016. They did so in circumstances where the company that had held the interests (known as Optimum Coal Holdings (Pty) Ltd) was in business rescue. As part of the agreement for the acquisition of that company, Tegeta acquired control over the Optimum Trust and the Koornfontein Trust.

56 Tegeta's acquisition of Koornfontein and Optimum is mired in controversy. It is one of the themes of the Public Protector's State of Capture report published in October 2016 and in respect of which the Public Protector directed that a judicial commission of enquiry be established. One of the issues that is dealt with in the report is the manner in which the acquisition was funded, which included an advance payment by Eskom for coal in an amount of nearly R600 million which constituted the approximate amount of a shortfall in the purchase

price the purchasers suffered at the time the transaction had to be finalised and in respect of which they were unable to secure a loan.

57 The value of the Trusts' funds at the time of the Tegeta acquisition of Optimum Holdings was substantial. According to the State of Capture report, the combined available amounts of the Trusts' funds as at 31 January 2016 was R 1,750,000,000.00 (1 billion and seven hundred and fifty million).

58 After the Tegeta acquisition, the Trusts' funds were transferred to BoB with the approval of the Department. In respect of the Koornfontein Trust this appears from **SF2A** which Werksmans sourced from the internet. Werksmans has also sourced from the internet a draft letter in respect of the Optimum Trust to similar effect albeit that the letter reflects a different trust registration number to that referred to above and cited in the Baroda interdict proceedings. (I refer to **SF2B**.)

59 According to the State of Capture report, during May 2016 and June 2016, the full value of these trust funds was transferred to the BoB, the fifth respondent, whose main account is at Nedbank. The value of the Optimum Trust as at 21 June 2016 was R 1,469,916,933.63 and the value of the Koornfontein Trust as at 23 May 2016 was R280,000,000.00. In the intervening period, substantial interest ought to have accrued to and in respect of both funds. The Public Protector calculated that at an annual rate of interest of 7%, R122 500 000.00 would be earned on these amounts annually.

60 The timing of the transfer of the Trusts' funds to BoB is significant. It occurred in the wake of a decision by South Africa's four largest banks (Nedbank, Standard Bank, Absa Bank and First National Bank) to close the bank accounts of entities in the Oakbay / Gupta group. When accepting responsibility for the Trusts' accounts, the BoB was aware that the accounts involved politically exposed and high-risk individuals and entities.

**The Trusts and the Gupta/Oakbay group**

61 At the time that the Trusts applied to open the Trusts' accounts with the Bank of Baroda in mid 2016, the trustees of both Trusts were:

61.1 Govender;

61.2 Scott; and

61.3 Althaf Emmamally ('**Emmamally**').

62 On 25 August 2017, OUTA's Venter spoke to Emmamally who advised her that he had resigned as a trustee of the Trusts shortly after his appointment and that he had only served as such for a brief transitional period. On the same day, Venter learnt telephonically from Scott that the then extant trustees of both Trusts were Govender and Scott. Scott also requested that she direct any correspondence to the Trusts to both the Trustees and to a Ronica Ragavan ('**Ragavan**').

63 In view of the obligation of any trustee to avoid conflicts of interest in the exercise of their fiduciary duties as trustees, OUTA has scrutinised the relationship between the trustees and related companies. In this regard, OUTA has gleaned important information from the answering affidavit deposed to by the Acting Chief Executive of the BoB, Mr Manoj Kuma Jha in the Baroda interdict proceedings. In those proceedings, the BoB supplied the Court with information about the relationship between various companies in what is known as the Oakbay or Gupta group of companies and their shareholdings and directorships.

64 By way of background, the reference to the 'Gupta' group is a reference to a family who immigrated to South Africa from India in the early 1990s and which is led by three brothers, Messrs Ajay, Atul and Rajesh 'Tony' Gupta. Other members of the family are also involved in the businesses. One of the family's first business ventures in South Africa was Sahara Computers (Pty) Ltd. The family has since diversified their business interests substantially including in the mining sector amongst others (such as print and news media and defence.)

65 The family's business interests are now consolidated in the form of the Oakbay group of companies and its affiliates in which the Gupta family and their close associates hold substantial shares, as Mr Jha explained.

66 All of the companies whose bank accounts the BoB intends to close are part of the Oakbay group or affiliated to the group closely. They are all owned and

controlled, directly or indirectly, by members of the Gupta family and their associates. Mr Jha explained this to the court *inter alia* through the use of three documents containing information obtained by BoB '*as part of the standard customer identification and verification procedures that are prescribed under the (Financial Intelligence Centre Act 38 of 2001 ('**FICA**'))*'. Two of these documents are attached hereto as follows:

66.1 An organogram marked **SF3** which illustrates the connections between various companies in the group. The document was marked 8.1 in Jha's affidavit in the Baroda interdict proceedings and is entitled 'Oakbay Group - shareholding';

66.2 A table marked **SF4** which shows the list of current and former directors of various companies. The document was marked Annexure 9 in Jha's affidavit in the Baroda interdict proceedings and is entitled 'Group-Companies' Directorships.

67 This information demonstrates the following.

67.1 First, this information confirms what OUTA has understood to be the case, namely that Optimum and Koornfontein are both owned by Tegeta (100%). Ragavan is a director of Tegeta. Govender is a director of Optimum. Ragavan and Scott are referred to as two of three directors of Koornfontein. (It may be that Scott has since resigned.)

67.2 Secondly, Tegeta is owned by Oakbay Investments (Pty) Ltd (34%) ('**Oakbay**') and Mabengela Investments (Pty) Ltd (29%) ('**Mabengela'**). BoB does not identify the remaining 37% shareholder(s). In turn:

67.2.1 Oakbay is 100% owned, either directly or indirectly, by members of the Gupta family. Ragavan is a director of Oakbay.

67.2.2 Mabengela is owned *inter alia* by Duduzane Zuma (45%), Rajesh Gupta (25%), Aerohaven Trading (Pty) Ltd ('**Aerohaven**') (15%) and Mfazi Investments (Pty) Ltd ('**Mfazi**') (3%). Aerohaven in turn is 100% owned by Ragavan and Mfazi is owned 15% by Govender.

68 Accordingly, the persons who were the trustees of the Trusts until recently were directors of related companies in the Gupta-Oakbay group and indeed the mining companies in question, and Govender has an indirect interest in *inter alia* Tegeta. Insofar as Ragavan may have any formal role *vis á vis* the trusts, she too is firmly part of the Gupta / Oakbay stable, holding several directorships in related undertakings including the affected mines, and having an indirect interest in *inter alia* Tegeta.

68.1 Importantly, there are express duties on the trustees to avoid conflicts of interests which may readily present themselves where a person is associated directly with the mining company and related / interrelated undertakings. Notably, under the NEMA Regulations, where the

trustees are natural persons no more than one may be in the employ of the mine / beneficiary or any related or interrelated person save with special approval.

69 I attach as **SF5** a copy of the Koornfontein Trust's application to the Bank of Baroda to open an account with them. (Ragavan supplied this document to the Court as an attachment to her founding affidavit in the Baroda interdict proceedings.) The document confirms that the original trustees of the Koornfontein trust are as set out above: Emmamally, Govender and Scott. It appears from this document that the signatories to the account when it was opened are only Govender and Scott. There is nothing on the papers in the Baroda interdict proceedings to suggest that that is no longer the case. Scott's position is unclear in light of his apparent resignation. The relevant respondents are invited to clarify the position to the Court.

70 Lange refers to this application in item 12 of his report and I refer to what he says. He points out that the Trustees do not name the Trust correctly in the application. He points out further that the Trustees were dishonest in the application form in stating that the Trust's holding company is Tegeta.

**Attempts to access the Trust's funds**

71 OUTA has to hand an exchange of correspondence dated 4 and 5 May 2016 between Tegeta and the Department on the internet. Copies of the letters are

**SF6A** and **SF6B**. These documents are also referred to in an AmaBhungane media report dated 11 April 2016, a copy of which is **SF7.**

72 **SF6A** is a letter from Tegeta (whose directors include Ragavan) to the Regional Manager of the Department, Mpumalanga in respect of the Koornfontein Trust.

73 In paragraph 2 of the letter, the following request is made:

*'The current situation with our group and the big 4 Banks and Insurance Companies seizing (sic) to provide services to all our Group companies as is widely mentioned in the media, has led to a critical situation hampering our ability to keep the business and its related jobs afloat. As a result, TER (ie Tegeta) hereby requests that the DMR grants it approval to use the ubove (sic) mentioned funds for mining rehabilitation purposes.'*

74 The request is apparently made in terms of Regulation 7 and Regulation 11 of the NEMA Regulations which govern the process of annual review to ensure that there is always adequate financial provision as prescribed. They do not entail access to the funds as contemplated above. Nor is such access contemplated by the Trust deed.

75 In his report, Lange has commented on this letter (being item 2) and I refer to what he says. As Lange notes, the reasons Ragavan provided for accessing the funds did not have relevance to the rehabilitation of the mine. Lange also refers to how financial provision must be dealt with in the legislation in terms of itemised costs and annual reviews. He points out that any amount by which the provision can be reduced must be supported by a revised program which does not appear to have been done. As Lange notes, Ragavan is not a trustee

but purports to act in the role of a trustee and furthermore, she was not acting in the best interests of the Trust as the Trust could be left with insufficient funds to pay for rehabilitation.

76 Quite extraordinarily, the very next day, on 5 May 2016, the Deputy Director of the Department granted 'approval in principle access the funds held in the account of (the Koornfontein Trust) for concurrent rehabilitation of the mine.' This appears from **SF6B.**

77 Quite apart from the fact that the application could not possibly have been effected overnight at the highest level in terms of the process of annual review contemplated by Regulation 11, neither the application nor the '*in principle*' approval are contemplated by the regulation. Indeed, it is probable that, at best, the funds were intended and – if accessed pursuant to the approval – in fact used for the purpose foreshadowed by **SF6A** i.e. to assist Tegeta with the '*critical situation hampering* [its] *ability to keep the business and its related jobs afloat.*' I emphasise that Tegeta is the holding company and not the mining rights holder, nor can it lawfully act in the stead of the Koornfontein Trustees. There is no reference at all to the trustees on the correspondence.

78 Lange comments on this letter in item 3 of his report and I refer to what he says. For example, he comments from a financial and accounting perspective that the overnight approval is unusually swift given the nature of what had to be considered.

79 Unless Ragavan / Tegeta was acting without even informing the trustees, which is highly improbable, then the trustees have acted in dereliction of their duties by enabling this process to proceed. The trustees would or should have known that such resort is unlawful as it is outside of the purposes for which they are holding the Trusts' funds. In any event, the trustees ought not to be allowing such requests to be made without their active involvement.

80 The AmaBhungane report of 11 April 2016 (**SF7**) recorded similar concerns to the contentions I make above. However, I point out that the Department reportedly denied granting any approvals to access the Trusts' funds. This denial is difficult to understand in the face of Annexure **SF6B** which refers expressly to an *'in principle approval'* and I point out that the Departmental spokesman apparently simply refused to comment on the correspondence. In these circumstances OUTA contends that absent an explanation from the relevant respondents these documents can be treated as what they purport to be.

81 However, the AmaBhungane report also referred to a separate attempt by Ragavan to access the Optimum Trust funds in the hands of Standard Bank. The relevant information is sourced from the State of Capture report, which in turn refers to a letter dated 24 April 2015 (ie after the transaction with Optimum Holdings took effect) from the business rescue practitioners of *Optimum* to Tegeta. I quote the content of the letter as reported in the State of Capture report at pp181 to 182, which I respectfully contend can be accepted as an accurate report of the content of portions of the letter.

*"Optimum Coal Mine Proprietary Limited (In Business Rescue) letter dated 24 April 2016*
*This letter is sent by Werksmans on behalf of the BRP's to Tegeta on 24 April 2016. The contents of the letter is inter alia:*
*a) The letter reiterates to Tegeta that all actions taken by the OCM board must be done with the written consent of the BRP's failing which such actions will be deemed void in terms of section 137(4) of the Companies Act.*
*b) All decisions with regards to the environmental trust and the investment thereof should be taken with the consent of the BRP's.*
*c) The letter states that Ms Ragavan, attempted to transact with Standard Bank with regards to the environmental trust. The BRP's further state that Ms Ragavan has no authority to transact on behalf of the trust as this power is vested in the trustees of the trust and subject to their fiduciary obligations to the trust.*
*d) The BRP's expressly stated in the letter that consent is needed from them before transactions of such a nature can be concluded.*
*e) The letter further states that "OCM is under a legislative obligation to maintain sufficient funds in the trusts account to meet rehabilitation obligations of the company under regulation 53 and 54 of the Mineral and Petroleum Resources Development Act 28 of 2002 ("MRPDA") and under section 24P of the National Environmental Management Act 107 of 1998 ("NEMA") as read with the regulations promulgated under NEMA on 20 November 2015 dealing with financial provisions for rehabilitation and to ensure that the funds are held or invested into account and/or instruments which meet the requirements of section 37A of the Income Tax Act 58 of 1962 ("Income Tax Act")"*
*f) The letter concludes in saying that "any contravention of the sections of the MPRDA and NEMA described above is a criminal offence under section 98 of the MPRDA and in terms of regulation 18 of the NEMA regulations promulgated on 20 November 2015 and may result in a fine and/or imprisonment in addition to any civil remedies that may be available to the business rescue practitioners, OCM and/or its affected persons."*

82 A copy of the relevant pages of the State of Capture report is supplied as **SF8**. Although it appears that the attempt by Ragavan to access the Optimum Trust funds was not successful, the fact that Ragavan has sought twice to access the Trusts' funds without the involvement of the trustees demonstrates that the current trustees either have insufficient control over the trusts' affairs or are allowing an unauthorised person to control the trusts' affairs and to take steps to access its funds. If Ragavan was acting without their knowledge or authorisation, they are invited to inform the Court accordingly. In all the

circumstances, it is more probable that Ragavan was acting at least with their knowledge. But if not, then the trustees are simply not in control of the trusts' affairs.

**The BoB letter of 5 October 2016**

83 A copy of a letter dated 5 October 2016 from the BoB addressed to '*Whom it may concern*' and issued at the request of Optimum Mine Rehabilitation Trust, is attached as **SF9.** In this letter, the BoB certifies that the Optimum Trust is maintaining four accounts with them which are operative and active. The total balance on these accounts as at 5 October 2016 was R 1 470 338 316.18 constituted by:

83.1 R9 338 318.18 in a current account number: 92020200000524;

83.2 R500 000 000.00 in a fixed deposit account number: 92020300000653;

83.3 R500 000 000.00 in a fixed deposit account number: 92020300000654; and

83.4 R461 000 000.00 in a fixed deposit account number: 92020300000655.

84 It is not clear why the document refers to '*outstanding*' amounts. OUTA assumes that the reference is probably meant to refer to a credit balance in favour of the Optimum trustees' account. In item 6 of Lange's report, he points

out that the letter confirms that the Optimum funds were held by the Bank of Baroda at that date.

**Bank of Baroda account closures**

Reports of account closures and OUTA's response

85 During August 2017, there were media reports relating to the imminent closure by the BoB of accounts of companies controlled by the Gupta family. According to the reports, the accounts would be closed by the end of September 2017. It was also reported that interdict proceedings were being pursued against the BoB and that the Gupta accounts would be moved to an undisclosed '*new bank*'.

86 As pointed out above, South Africa's four biggest lenders and providers of banking services (being Standard Bank, Absa Bank (Barclays Africa Group), Nedbank and FNB) had, in 2016, closed their accounts for the Gupta or Oakbay group.

87 In the face of the August 2017 reports, OUTA took steps to ascertain whether the Trusts' funds were protected. To this end on 25 August 2017, OUTA sent two letters to various persons as follows:

87.1 A letter was addressed to the Trustees of the Trusts, a copy of which is **SF10.** It was sent by Venter by e-mail to *inter alia* Ragavan

(ronicar@oakbay.co.za) Scott (trevor@bearingway.co.za) and Govender (ugeshnin@sahara.co.za). These addresses were confirmed by Scott to be the correct e-mail addresses and Scott confirmed that he and Govender were trustees.

87.2 A letter was addressed to the Minister, a copy of which is **SF11.** It was sent by Venter by e-mail.

88 Copies of the relevant news reports of 15 and 17 August 2017 in Fin24 sourced on the internet are attached to **SF11** as **B1** and **B2**. I point out that there had been reports earlier in the year in the media that the BoB would be closing accounts but these were unconfirmed and even in August 2017 it remained unclear to OUTA whether the Trusts' accounts would be affected too.

89 I wish to draw certain portions of the letters to the attention of the Court.

The letter to the Trustees: **SF10**

90 The letter to the Trustees was addressed to the Trustees and to Ragavan. In this regard as mentioned above, Scott had informed Venter that Ragavan should be provided with any correspondence. Various information was requested from the Trustees including the following:

90.1 Full details of all Trusts or other entities responsible for funds relating to the financial provision for rehabilitation in connection with any Tegeta mining interest.

90.2 Confirmation of the identity and current contact details of the relevant Trustees and auditors.

90.3 Confirmation that the Koornfontein and Optimum Trust funds and other relevant Trust funds remain fully intact.

90.4 Confirmation that no monies have been transferred out of the Trusts' accounts from the time that they were transferred to BoB until the present time.

90.5 If no such confirmation can be provided, full details are required relating to what payments have been made, when, to whom, for what purpose and upon whose authority.

90.6 Precisely what amounts are currently in each Trusts' account/s.

90.7 What arrangements have the Trustees put in place to ensure that the funds are not placed in jeopardy by the imminent closure of the BoB accounts (and to ensure that the rights holder will remain compliant with the relevant legislation in light thereof).

90.8 Whether or not each of the account/s will continue to be held at the BoB;

90.9 Whether the financial provision for rehabilitation will be retained under the current trust arrangements and if so at what bank or banks;

90.10 If the financial provision will not be so retained, what new arrangements will be put in place.

91 A response was requested on or before close of business on 1 September 2017.

The letter to the Minister: **SF11**

92 In the letter to the Minister, OUTA drew the Minister's attention to the recent events including *inter alia* the imminent closure of the BoB accounts and the related statutory duties on the Minister and the rights holders. OUTA requested various information and assurances.

93 OUTA sought the following information:

93.1 Confirmation that the Trusts' funds remain fully in tact;

93.2 Confirmation that no monies have been transferred out of the Trusts' accounts from the time that they were transferred to the BoB until the present time;

93.3 If no such confirmation could be provided, details relating to any payments.

93.4 The amounts in the accounts;

93.5 What arrangements are in place or are being made to the satisfaction of the Minister to ensure that the funds are not placed in jeopardy by the imminent closure of the BoB accounts;

93.6 Whether the financial provision for rehabilitation will be retained under the current trust arrangements and if so at what bank or banks and under what arrangements and if not what new arrangements would be in place.

94 OUTA sought an assurance from the Minister (amongst others) that 'the Minister will as a priority take steps to ensure that the financial provision for rehabilitation is protected and secured in view of the imminent closure of the Baroda accounts and will keep OUTA informed of such steps.'

95 OUTA requested a response by close of business on 1 September 2017.

No response

96 Save for the response from Scott referred to in Venter's affidavit, there was no response to OUTA from either the Trustees or the Minister to these letters.

97 On 28 August 2017, a news report appeared in the Sunday Times relating to the matter and OUTA's requests. The report referred to certain comments made by the Department. More particularly the Department referred to the duty on the part of the bank and the rights holder to notify it when there are any changes in a rehabilitation fund account registered in the records of the department and advised that: '*Such notification has not yet been received by the department. The rehabilitation funds are still intact and subject to annual review.*' I respectfully contend that this is not an adequate response quite apart from the fact that no response was addressed to OUTA. The Minister has a duty to ensure that financial provision for rehabilitation is secure in circumstances where there is an imminent threat that it may not be, such as the imminent closure of the BoB accounts when drawn to its attention. A copy of the report is annexure **SF12.**

98 Ragavan did respond to OUTA. She did so on a letter head for Oakbay Investments (Pty) Ltd. A copy of her response dated 31 August 2017 (sent 1 September 2017) is **SF13** from which it is apparent that she declined outright to engage with OUTA.

**The Baroda interdict proceedings**

99 On Friday 08 September 2017, this court heard the Baroda interdict application. It was an urgent application launched by 18 Gupta controlled companies and the two Trusts, against the BoB. The application sought to interdict the BoB

from closing certain accounts and calling up certain sums owed to the respondents in terms of loan agreements pending a final determination *inter alia* on whether the bank is entitled to sever ties with the applicants.

100 OUTA learnt that the matter was to be heard on 8 September 2017 on 6 September 2017 when we sourced copies of the papers through our attorneys. After hearing argument Judge Fabricius reserved judgment until Thursday 21 September 2017.

101 The founding affidavit in those proceedings was deposed to by Ragavan. She deposed to the affidavit on behalf of both of the Trusts. Notably, the trustees were not named in the affidavit and no confirmatory affidavits were filed by the trustees. The only express reference to the trustees in the founding affidavit was in paragraphs 23 and 24 where Ragavan alleged simply that the Trusts were 'duly represented by the trustees' of the respective trusts. The only mention of any trustees by name is Annexure **SF5** referred to above (the application to open the Koornfontein Trust account.)

102 As mentioned above, the deponent to the Bank of Baroda's answering affidavit was a Mr Jha. He too does not refer to the trustees.

103 Very little indeed is said about the Trusts in the application. However, what is said confirms that the Trusts' property is at risk both in the hands of the current trustee(s) and given the imminent closure of the BoB accounts.

104 First, the papers confirm that the BoB intends to close the accounts of the two Trusts by 30 September 2017 (absent an interdict). In this regard, I attach as **SF14A** and **B** copies of the relevant letters from BoB to the Trusts dated 6 July 2017. These are *pro forma* letters that were sent to all of the applicants in those proceedings. I point out the following from these letters:

104.1 The account numbers referred to are current account numbers and are:

104.1.1 Koornfontein Trust: 92020200000519; and

104.1.2 Optimum Trust: 92020200000524.

104.2 Baroda advises in the letters that: 'You are aware that the firm/group, for quite some time, has been in the news and has been attracting adverse publicity in media, which in the opinion of the bank, is a potential risk and may affect the interests of the bank to its detriment. We have several times conveyed our bank's concern telephonically but to no avail.'

104.3 The letters advise that the bank has no option but to sever all of its ties with *'the firm'* and advised that deposit accounts will be deactivated in July 2017, advance accounts will be settled and non-fund based activities should be supported by 100% cash margin in the respective current account.

105 OUTA does not know precisely what accounts the Trusts have at the BoB. However, it is apparent from the papers exchanged in the application that BoB will only deactivate accounts at the end of September 2017. OUTA has established that the two accounts referred to above are current account numbers. As I explain below, it appears that the bulk of the Trusts' funds were until June 2017 in fixed deposit accounts. OUTA does not know whether the bulk of the Trusts' funds that were in such accounts are now in the current accounts, but it appears from Lange's report that they probably are as they appear to be reflected as such in the BoB's reports to the Reserve Bank. In turn, this means that the trustees are not making use of the preferential interest rates that are available on fixed deposit accounts even of a short-term nature. I refer to what Lange says in item 1 of his report.

106 Secondly, the applicants in those proceedings which includes the Trusts have confirmed with the Court that they will be without banking facilities when the accounts are closed at the end of September and that despite numerous efforts banks are not willing to transact with them. This appears from the following allegations which are made by Ragavan in the founding affidavit.

106.1 *'Since receiving BoB's termination notices, the applicants have approached other banks in South Africa and endeavoured to open or re-open accounts with them, so that the remaining balances held in the BoB accounts may be transferred and so that regular and scheduled payments may still occur. Their applications have either been unsuccessful or have gone unanswered.'* (Paragraph 43.1)

106.2 *'In the meantime, the applicants have embarked on a time-consuming and complex process of endeavouring to contact all the banks in South Africa in order to obtain alternative banking facilities. I have prepared a consolidated spreadsheet of all the individual applicants' approaches to the various South African controlled banks, foreign controlled banks and*

*branches of foreign banks which currently operate in South Africa and which could provide alternative solutions. A copy of these various spreadsheets is attached marked 'FA29'. So far, all of these efforts have come to nothing, either because the banks have refused outright to transaction with the applicants, or because they have been dilatory in their responses or have completely failed to respond.'* (Para 89)

106.3 'Despite the applicants' considerable and concerted efforts to locate an alternative banker in the time available, they have been unable to do so. ...'

107 A copy of the portion of Annexure FA29 referred to in paragraph 89 of Ragavan's affidavit which relates to the Koornfontein and Optimum Group is attached hereto as **SF15**. It indeed reveals that the applicants have gone to great lengths to find alternative banking facilities in South Africa for members of this group, to no avail. Where it appears that the applicants are still trying to get hold of some branches of foreign banks, there is no real prospect of the Trusts finding alternative banking facilities by the end of September. Ragavan made it clear that this will be the case if the applicants (including the Trusts) are not successful in the interdict proceedings as the applicants were seeking more time to achieve this. The BoB, through Mr Jha, alleged that these prospects were not going to change. Those banks who have responded have made it quite clear that they will not deal with the group.

107.1 The reasons the banks are adopting this attitude are understandable as the reputational, commercial and legal risks associated with the banking relationship are very high. In this regard, I refer the Court to the reasons advanced by the BoB as explained by Mr Jha in his answering affidavit in the BoB proceedings. He explains:

107.2 *"It goes without saying that the Gupta family and the applicants face very serious allegations of unlawful conduct, including corruption and money laundering. These allegations have been levelled by various sources, including members of Cabinet, the public protector, members of parliament, civil society groups, and investigative journalists.*(Para 13)

107.3 Since the end of May 2017, the so called 'Gupta leaks' have added fuel to these allegations. The Gupta leaks are a collection of approximately 100 000 to 200 000 e-mails which were leaked to investigative journalists and civil society groups. Over the last two months, these e-mails have been featured in countless media reports, with new allegations of unlawful conduct surfacing every day. (Para 14)

*107.4* *The controversy surrounding the applicants show no signs of abating. The President has now indicated an intention to initiate a judicial commission of enquiry in alleged 'state capture' in the wake of the Public Protector's State of Capture report. A motion is also expected to be tabled in the National Assembly for the creation of an ad hoc parliamentary committee to investigate these allegations. No doubt, these processes will result in further scrutiny of the Gupta family and the applicants. (Para 15)*

107.5 *I emphasise at the outset that the Bank of Baroda takes no position on the truth of the extensive allegations levelled against the Gupta family and the applicants.* (Para 16)

*107.6* *Irrespective of the truth of these allegations, the volume and seriousness of these allegations has already caused the bank significant prejudice and poses real risks to the bank;*

107.6.1 *The bank has suffered reputational damage as a result of the extensive media reports and public allegations against the applicants. It also has a well-founded fear that it will suffer further reputational and commercial risks if this relationship continues beyond 30 September 2017.* (Para 17.1)

107.6.2 *The bank also faces substantial legal risks and mounting costs by continuing to provide banking services to the applicants. The applicants are all classified as "High Risk" clients and "Politically Exposed Persons". This imposes onerous legal duties on the bank to monitor the applicants' transactions and to report on suspicious and unusual transactions. It also exposes the bank to severe fines and other sanctions if it should in any way fail in these duties.* (Para 17.2)

107.7 *Given these risks, the Bank of Baroda is merely one of a long line of banks and other firms that have decided to sever ties with the applicants and the Gupta family. It is also not the last to do so. Soon after the Bank of Baroda took its decision, the Bank of India and the State Bank*

*of India suspended transactions on the applicants' accounts with immediate effect.* (Para 18.)"

108 Jha provided the Court with a chronological summary of the various allegations that influenced the BoB's decision to terminate its relationship with the applicants. In doing so, he emphasised that the Bank takes no view on the truth or falsity of the allegations as irrespective of their truth the volume and severity of the allegations have caused reputational, legal and business risks for the Bank. I do not repeat this summary of allegations. However, I attach an extract from Jha's affidavit hereto as **SF16** and draw the Court's attention to paragraphs 149 to 241. I refer to this summary not for purposes of demonstrating the truth of its contents but for purposes of demonstrating the nature of the allegations that are in issue and that have led the Bank of Baroda to terminate the relationship with the applicants.

109 Against this background it is improbable that the Trusts will be able to secure banking facilities unless independent trustees are appointed. In any event, this will clearly not be possible in the near future when the Bank of Baroda wishes to terminate the banking relationship at the end of September 2017. At the very least, the Bank of Baroda cannot reasonably be expected to continue to hold the funds unless the current trustees are precluded from dealing with the accounts.

110 I point out that Lange agrees with Mr Jha that the association of the BoB with the applicants in the Baroda interdict proceedings, including the Trusts, poses real risks to the bank. I refer to item 5 of his report.

111 Thirdly, it is clear from the affidavits exchanged in the Baroda interdict proceedings that BoB is seeking to call up all of its loans advanced to the Gupta and Oakbay group of companies. These include loans advanced to the first to fourth applicants in those proceedings being Annex Distribution (Pty) Ltd, Confident Concepts (Pty) ltd, Sahara Computers (Pty) Ltd and VR Lazer Services (Pty) Ltd.

112 It is not clear from the affidavits exchanged precisely how the applicants and BoB intend to conduct themselves in respect of these loans and what the implications, if any, are for the Trusts. However, what is clear from the affidavit filed on behalf of BoB is that the trustees have concluded at least one contract that would have allowed BoB to use the Koornfontein Trust's funds (and more particularly a fixed deposit) as security against a loan to Koornfontein.

113 In this regard Mr Jha explained to the Court that the bank entertained various concerns in the wake of the release of the State of Capture report in late 2016 including its ability to be able to recover amounts then due to it which then stood at approximately R1 billion and the reputational risk of continuing a banking relationship with the applicants. Mr Jha explained that as a result and '*during the last quarter of 2016, we increased our focus on recovering the outstanding amounts as far as and as soon as possible, before finally exiting the relationship. The Bank proceeded to recover and then terminate four accounts held by the applicants during this time.*' (Paragraph 226)

114 The details of one of the closures is described as follows in paragraph 226.1 of Jha's affidavit: '*A loan facility of R150 million granted to Koornfontein Mines (Pty) Ltd was closed on 7 November 2016, after notice was given to this applicant on 23 August 2016. I attach copies of this correspondence, marked Annexure 37.*'

115 A copy of annexure 37 to Jha's affidavit is attached as **SF17** and comprises two letters dated 23 August 2016. The first is addressed to Koornfontein Mines (Pty) Ltd. It states the following:

*"Re: Your Loan of ZAR 150,00 mn against FDR no 03/649 dated 06.06.2016 for ZAR 170,00 mn of M/s "Koornfontein Rehabilitation Trust" (Trust No. IT 7563/07*

*We understand that a detailed discussion took place on 26.07.2017 with officials of our Bank's corporate office at MUMBAI with regard to adjusting the loan availed to you against fixed deposits with us, details are here under.*

| *Depositor* | *Date/Due Date* | *Amount (Face value)* | *Loan availed by & date* | *Loan limit* |
|---|---|---|---|---|
| *M/s "Koornfontein Rehabilitation Trust" (Trust No. IT 7563/07)* | *06.06.2016/ 06.06.2017* | *ZAR 170.00 mn* | *M/S Koornfontein Mines (Pty) Ltd* | *ZAR 150.00mn (availed ZAR 100.00 mn)* |

*In the meeting, it was assured that the Loan against the FDR will be gradually liquidated and fully settled by 30.09.2016.*

*We request you to ensure that the loan against the above FDR is repaid fully by 30.09.2016. In the event of failure to repay the above loan by 30.09.2016 it is notified that the above loan will be adjusted and liquidated by prematurely paying the said FDR as also mentioned in form LDOC 16(A) executed against you."*

116 The second letter is addressed to '*the Trustee*' of the Koornfontein Trust and is in substantially similar terms save that it refers to a discussion '*...with regard to your fixed deposits with us and the loan availed by (Koornfontein) against this FDR ...*'

117 OUTA does not know whether the funds in the Trusts' fixed deposits were indeed used to settle the loans owed to BoB by Koornfontein. The relevant parties are invited to clarify this to the Court.

118 However, what is clear is that a contract was concluded that permits this. This is unlawful in light of the restrictions on the use of Trust funds contemplated by both statute and the applicable trust deeds. The conclusion by the trustees of this contract means that the trustees have allowed their conflict of interests with respect to the related undertakings in the Oakbay/ Gupta group in fact to affect the manner in which they have dealt with Trust property which is in breach of their fiduciary duties.

119 Lange deals with the letters in item 9 of his report and I refer in full to what he says about what these letters show both in terms of what happened and in terms of what it shows as regards the Trustees' conduct.

120 Fourthly, a set of concerns arise from the content of Ragavan's founding affidavit insofar as it deals with the harm that Ragavan says that the Trusts will suffer should Baroda terminate the banking relationship.

121 The following is alleged specifically in respect of the Trusts:

121.1 "*Any non-compliance with the provisions of the governing legislation could endanger the mining licences that have been awarded to the mines with which those trusts are associated...*" (Para 43.9)

121.2 "*The rehabilitation work that is currently underway will have to be halted, which will affect the environment and will also mean that government resources must be allocated to continue with such rehabilitation.*" (Para 43.9)

122 These allegations alone confirm that the Trusts' funds are being used for unlawful purposes, namely concurrent rehabilitation. This is a very recent confirmation that the trustees have permitted the ongoing use of the Trusts' funds which is unlawful.

123 Furthermore, the case made out in those proceedings is that government resources will have to be allocated to continue with rehabilitation. In other words, the funds are not being used for their intended statutory purpose and it appears that state funded rehabilitation will be necessary or is at least likely to be necessary. This in turn suggests that substantial funds may have been used

to date and that there will be no prospect of recovering the cost of rehabilitation from either Koornfontein or Optimum.

124 It is clear that a full accounting of the Trusts' funds is necessary. It is also clear that there has been unlawful use of the Trusts' funds in the hands of the current trustees.

125 What is also troubling is that the apparent primary concern is the status of the mining licences. The concern ought to be the ability of the Trustees to perform their statutory duties of the rights holders to rehabilitate on closure, this being the statutorily designated purpose of the Trusts.

126 Ragavan also makes a number of general comments in respect of the harm that they say they will suffer if the Baroda accounts are closed. These are:

126.1 *"The net effect is that the applicants' businesses will grind to an irreversible halt if they become unbanked for any period of time. Once this has happened, for any period of time, there will be nothing left of the applicants' businesses that could be salvaged in the ordinary course." (Para 43.10)*

126.2 *"All of this irreparable and considerable harm will be caused as a direct result of BoB's purported termination of the applicants' banking facilities on severely truncated and patently unreasonable time periods, which appear to have been deliberately designed to cause the applicants the maximum amount of harm possible, and without any regard for the deleterious knock-on effects which will be magnified for their employees and other creditors." (Para 44)*

126.3 *"Even if BoB undertook to release the balance of what is held in the accounts, this could not assist in mitigating the harm that will be suffered by the applicants and other stakeholders since the applicants have nowhere for the funds to be released." (Para 45)*

126.4 *"The effect of BoB's purported termination will be the applicants' complete inability to satisfy these liabilities, or to continue*

*to conduct their businesses or to trade in the South African economy. The applicants will be entirely hamstrung, and the only foreseeable outcome is their imminent, if not immediate, demise as a result." (Para 32)*

**The Deloitte report**

127 During August 2017, there were news reports about a Deloitte's report into the activities of the BoB and which came about as a result of a direction given by the Reserve Bank to the BoB in November 2016 in terms of section 7(1)(b) of the Banks Act 94 of 1990. Deloitte was appointed to conduct an investigation into Baroda in connection *inter alia* with the issues that arose from the State of Capture report. Attached are two documents relating to this process via a journalist, which are attached as **SF18 and SF19.**

128 **SF18** is a copy of a letter from a Mr Naidoo of the Reserve Bank to the Chief Executive Officer of BoB dated 21 November 2016 advising of the direction. The issues for investigation included matters concerning the Trusts and more particularly the following was required:

*128.1* *"A detailed analysis of all transactions processed by BOB related to the Trusts as well as supporting documentation for these transactions."*

128.2 *"Establish whether these transactions are in compliance with the legal requirements applicable to these types of trust accounts."*

129 The Deloitte report was delivered to BoB on 24 February 2017. It was supplied to BoB under cover of a letter from a Mr Shipp of Deloitte. A copy of the letter and its annexures is **SF19. SF19** is made up of various documents and I highlight the following:

129.1 The letter from Mr Shipp of 24 February 2017;

129.1.1 An appendix 1 which summarises the Deloitte's section 7 report. I refer in particular to sections 3 and 4 on pp15 to 18.

129.1.2 Annexures D and E to Appendix 1 which set out chronologies relating to the Trusts' fixed deposit accounts.

129.1.3 An appendix 3 which contains a list of relevant documentary evidence obtained directly from the BoB supporting the findings in the Deloittes report.

130 These documents contain material information relating to the status of the Trusts' funds in recent months. They are also amongst the documents considered by Lange and to which he refers in his report under item 14. I note in particular the concern he highlights in respect of the Trustees.

**Information relating to the Optimum Trust**

131 The Optimum Trust is dealt with in section 3 of Appendix 1 to the report. The first part of the section deals with the transactional history.

132 First, the report states that an amount of R1 469 917 000.00 was transferred from Standard Bank on 21 June 2016 and received into the BoB current

account 92020200000524. (This account number is referred to in Appendix 3 to the letter in item 3 as an Optimum Trust account. The same account is referred to in the letter of 5 October 2016 albeit at that stage with a lower balance.)

133 Secondly, on the 24th June 2016 the funds were invested into three fixed deposit accounts held at the Bank of Baroda with interest due on 24 June 2017. This is reflected in an Annexure D which details the receipt and investment of the funds into fixed deposit accounts as follows:

133.1 500 000 000.00 into fixed deposit account 92020300000653;

133.2 500 000 000.00 into fixed deposit account 92020300000654;

133.3 461 000 000.00 into fixed deposit account 92020300000655.

134 A residual amount being an amount of R8 916 934 remained in the current account and constituted interest. The report indicated that that was in line with the instruction as received from Optimum Mine in a letter of 23 June 2016.

135 The report notes that upon investigating the monthly statements of these fixed deposit accounts until the latest statement received dated 14 December 2016 there was no movement in and out of the accounts. The maturity date of all 3 fixed deposit investments is recorded as 24 June 2017.

136 Importantly one of the issues that Deloitte asked and answered was (in respect of a sample of transactions processed after the receipt of the trust funds) '*enquire from management if any of the accounts were collateralised by the Trust Fund accounts.*' The answer to this question is as follows: '*As per management and inspection of the* underlying account opening documentation, the sample of transactions selected relate to current accounts and thus no collateral or security is held for the accounts.'

137 Importantly, this does not address the obvious concern, namely whether trustees of the Optimum Trust allowed any of the fixed deposits of that Trust at any stage to be used for security against any loans to companies in the group as occurred with Koornfontein. The relevant respondents are invited to clarify this. Lange also deals with this concern.

**Information relating to the Koornfontein Trust**

138 The Koornfontein Trust is dealt with in section 4 of Appendix 1 to the report. The first part of the section deals with the transactional history.

139 First, the report states that an amount of R280 000 000 was transferred from Standard Bank on 23 May 2016. It was received into the BoB current account 92020200000519.

140 Secondly, on the 6th June 2016 R170 000 000 of the funds were transferred into a 12 month fixed deposit account with interest due on 6 June 2017. The

remaining portion remained in the current account ending 519. This is reflected in an Annexure E which confirms the fixed deposit account number as 92020300000649.

141 Again, Deloitte asked and answered a question relating to security in respect of a sample of transactions processed after the receipt of the trust funds as follows: '[e]*nquire from management if any of the accounts were collateralised by the Trust Fund accounts.*' The answer to this question is as follows: '*As per management and inspection of the underlying account opening documentation, the sample of transactions selected relate to current accounts and thus no collateral or security is held for the accounts.*'

142 The use of the Koornfontein Trust fund as security for a loan to Koornfontein is not mentioned. It is quite clear however that such a transaction was concluded. Lange deals with this issue.

143 Save for the concerns relating to the use of the Trusts' funds as security for loans, the Deloitte's report appears to confirm that the Trusts' funds were in a combination of current and fixed deposit accounts until June 2017 when the fixed deposits were to mature. It is not known what interest was earned on these accounts. It is also not known how much has been dipped into by the trustees for purposes of the 'concurrent rehabilitation' and when this occurred.

144 Lange deals with these issues in his report and I refer to item 7 and the comments he makes there.

**Recent correspondence**

With the Trustees

145 On 12 September 2017, OUTA wrote again to the Trustees requesting a response to the letter of 25 August 2017. Further queries were addressed in light of the information that had come to light through the affidavits in the Baroda interdict proceedings. I refer to its content and more particularly to the queries in paragraph 9 of the letter in which the following was asked:

*145.1* *"We require full details regarding precisely what will happen to the Trusts' funds should the BoB accounts be closed by the end of September 2017;*

*145.2* *Kindly confirm whether and in what amounts any Trust funds have been used to pay loans or any other liability of any related companies or entities;*

*145.3* *Kindly indicate whether and in what amounts it is intended to use Trust funds to pay loans or any liability of any related companies or entities.*

*145.4* *Kindly advise precisely what amounts of Trust funds have been and are being used for purposes of concurrent rehabilitation.*

*145.5* *Kindly advise whether the Trustees rely on any ministerial or departmental authority for the use of such funds in such manner and provide full details.*

*145.6* *Provide us with a complete breakdown of the funds withdrawn and the type of rehabilitation it was used for."*

146 A copy of this letter is **SF20.** (I have omitted the annexure to avoid unduly burdening the papers. It is **SF10** hereto). The Trustees did not respond to this letter.

With the Minister

147 On 12 September 2017, OUTA also sent a follow up letter to the Minister. A copy is attached as **SF21.** (I do not attach the annexures to avoid unnecessarily burdening the court.) As appears from paragraph 12 thereto OUTA made further queries and requests in light of the information that had come to light. OUTA required:

147.1 Full details regarding precisely what will happen to the Trusts' funds should the BoB accounts be closed by the end of September 2017 and more particularly what arrangements have been made to your satisfaction to ensure their safety and integrity.

147.2 Confirmation that you will take urgent steps to prevent the use of any further Trust funds to secure or pay loans or other liability of a related company or entity.

147.3 Confirmation that you will take such steps as are necessary immediately to prevent the further unlawful use of trust funds for concurrent rehabilitation.

148 There was no response to this letter.

With BoB

149 On 12 September 2017, OUTA wrote to BoB regarding any use of Trusts' funds for security of any loans. A copy is **SF22**. BoB responded on 14 September 2017 through its attorneys Tabacks, a copy of which is **SF23**. For present purposes I draw to the court's attention the following advice in paragraph 4: '*In addition, we confirm that such amounts as standing to the credit of the Koornfontein and Optimum Rehabilitation trust funds according to our client's records are not encumbered in any way, whether as security for any loan facilities or otherwise.*' In the face of this advice OUTA accepts that the BoB does not intend to use the Trusts' funds as security for any of the loans that it is currently calling up.

150 However, the extent to which the trustees have caused the Trusts' funds to be encumbered over time remains unclear: what is clear is that this has happened in the past at least once. This alone is a serious breach of the trustees' duties.

151 On 18 September 2017, OUTA's attorneys Werksmans wrote to Tabacks regarding the unfolding events. A copy of the letter is **SF24**. The letter referred to the history of the events and advised Tabacks that in the event that the Court rules in the BoB's favour in the Baroda interdict proceedings OUTA intends to institute proceedings to freeze and preserve the Trusts' funds whether in the Trusts' existing accounts or in another account as may be agreed or directed by the Court. OUTA noted that BoB will, if it is to continue holding the Trusts' funds, reasonably require the protection of a court order. Against that background, Werksmans sought confirmation and an undertaking from the BoB

that it would continue to hold the Trusts' monies pending the outcome of the urgent application should it obtain a ruling in its favour.

152 On 19 September 2017, Tabacks responded. A copy of the response is **SF25.** In the letter Tabacks advises as follows:

'2. It is required of us to respond only to paragraph 11 of that letter. We accept that you appreciate that our client is not in a position to deal with funds standing to the credit of any customer's account (or prevent any such dealing) otherwise than in accordance with either the proper instructions of the customer, or any binding legal or statutory directive.

3. Our client will obviously take notice of the urgent application referred to by your client, should it be issued. It will likely abide the outcome thereof without opposition, depending on the relief then actually sought.

4. Our client will also do whatever could reasonably and lawfully done to prevent any frustration of such order as your client might seek to obtain.

5. Save as aforesaid, our client is unfortunately unable to extend the undertaking sought in paragraph 11 of your letter.'

**The judgment**

153 On 21 September 2017, Judge Fabricius delivered his judgment. A copy attached as **SFA**. The Court's findings appear from the judgment and the applicant may refer to various portions during the course of arguments. For present purposes, I highlight certain findings. Legal submissions will be advanced at the hearing regarding the materiality of these to the relief sought. In sum, OUTA contends that the judgments and the findings below amongst others support the case advanced by the applicant.

2.1. *'The bank does not need to establish the truth of allegations relating to 'State capture by the Guptas' or the 'Oakbay group' or allegations in the media that the 'Gupta group' has made itself guilty, with the knowledge and assistance of highly placed officials, of corruption, money-laundering and other such like criminal activities. It is sufficient that it relies on damage to its reputation in that context as the banker of the applicants.'* (p13, para 7)

2.2. *'The deponent to the founding affidavits stated that there were no realistic prospects that other alternative banking facilities will be secured. The applicants therefore have no other remedy. Again, if this is so, there will be no point in any of the relief that applicants seek.'* (P 30, para 17)

2.3. *';The context of the reasonable apprehension of irreparable harm for purposes of the immediate relief sought the following was said:*

1. *If the applicant's bank accounts are closed, they are left effectively unbanked, it will be impossible for them to conduct their businesses in the ordinary course. No commercial entity can exist and transact in the South African economy without banking facilities.'*
2. *Any interruption to the applicant's banking services, without an alternative banker being in place, (which was doubtful in the 'current climate' would result in immeasurable financial consequences for the applicants, and will have significant direct and material knock on effects to thousands of people including employees, customers, suppliers, partners and affiliates of the applicants;*
3. *All of the harm that the applicants and their employees and other creditors stand to suffer will be irreversible and permanent; …*
4. *This irreparable prejudice will occur despite the fact that the Court would not yet have had an opportunity consider the applicant's case in support of the grant of an urgent interim interdict under Part A or the main relief under Part B. I do not agree with this argument at all. An application for an interim interdict is now fairly before me …* (p33-34, para 18)
5. *The fact that the client may have difficulty finding another bank does not impose any obligation on the bank to retain the client: (p39, para 22.7)*
6. *Mr D Fine also pointed out that on the applicant's own version there was little prospect that they would ever find alternative banking facilities inasmuch as they alleged in the founding affidavit that no other banks were prepared to do business with them. Therefore, on the applicants own version whether they are afforded an additional three months' notice or a further two years notice, the prospects of finding alternative banking facilities are not likely to improve. It is therefore not reasonable for the applicants to insist that the bank must forced against its will and irrespective of its resources to provide transactional facilities until December 2017 and then for the further period of two years. The applicants have therefore failed to demonstrate that the notice period was not reasonable and on their own version the longer period proposed will likely not place them in a more favourable position than they would be in by 30 September 2017. In my view this reasoning is sound and almost of its own would defeat the purpose of a December 2017 order. I say*

*'almost' because Mr Marcus' argument is in fact wholly destructive of applicants' case.* (para 31, p 51)

7. *In (context of irreparable harm) ... applicants will not likely find another bank with whom to do business (p52, para 32)*

8. *On p 61, para 39 the court made findings regarding the reputational risks that the BoB would suffer. See in full items 1.1 to 1.16 (pp 61 to 69)*

9. *On p 70, para 40 the court held: 'The bank can obviously not rely on the truth of such allegations and neither does it have to. I am obviously also not in a position to comment save to say the following: when reading details of the various allegations in the answering affidavit I could not help to wonder whether unbeknown to me democracy and the rule of law and somehow been suspended pro tanto? Could it be possible that the future so bright in 1994 was now only history? ...'*

10. *On balance of convenience, the Court held (at para 41, pp71-72): 'There is in my view another important factor: as I have set out in some detail the Respondent is subject to a number of statutory provisions which in the main seek to uphold the integrity of the financial system in the country. It seeks to uphold such integrity with honest transparency. On the other hand, there is the well-founded suspicion, having regard to the uncontested events that I have referred to, that the applicants subverted the integrity of the financial system, to put it gently. I am aware of the fact that I am unable to make conclusive findings in this regard, but it is in any event not necessary'. Respondent does not rely on the accuracy of all the allegations made against the applicants. It need not do so, and a reasonable suspicion is sufficient for it to enable it to exercise its rights. Where a contractual party, subject to specific regulatory provisions seeks to act honestly and openly to safeguard its rights and to uphold the integrity of the relevant financial order and the other party on the face of it seeks to undermine and subvert it to its own benefit, the balance of convenience in my view clearly favours the former.'*

## E. URGENT RELIEF AND PART A

154 I respectfully submit that against the background set out above, OUTA has demonstrated that it has a reasonable apprehension that the Trusts' funds are at risk both in circumstances where its bank accounts are very imminently to be closed by the BoB and in the hands of the current trustee or trustees in view *inter alia* of the following considerations:

154.1 The imminent closure of the BoB accounts at the end of September 2017;

154.2 The fact that the current trustee (or trustees) will be unable to secure alternative banking facilities for the Trusts as contemplated by the Banks Act not least in the time available given that they are part of the Gupta / Oakbay stable;

154.3 The requirement in the Trust deed that a Trust maintain a bank account and the importance of being able to invest the Trusts' funds in a bank under the Banks Act read together with the requirements of the Trust Property Control Act.

154.4 The risk of flight of funds that attaches to the funds in the wake of the judgment of Fabricius J.

154.5 The fact that the trustee (or trustees) for the time being have a conflict of interest and do not have the independence required of them to conduct the trusts' affairs.

154.6 The fact that the trustees have through their conduct allowed their conflict of interests to influence the manner in which the trusts' affairs are conducted.

154.7 The apparent failure to deposit the Trusts' funds in a fixed deposit account since the fixed deposits matured in June 2017.

154.8 The use of Trust funds for concurrent rehabilitation and in breach of the applicable law.

154.9 The use of at least the Koornfontein Trust funds for purposes of securing a loan to Koornfontein.

154.10 The apparent absence of control over Trust affairs by the trustees and failure dutifully to manage the affairs of the trust.

154.11 The Trustees have allowed Ragavan to conduct Trust affairs or at least done so without their adequate involvement or supervision.

154.12 The Trustees' provision of incorrect information to the BoB when opening the Koornfontein Trust bank account.

155 I refer too to the comments of Lange in his report.

156 OUTA appreciates the reasons why the BoB wishes to terminate its contractual banking relationship with *inter alia* the Trusts. As appears from the correspondence referred to above, the BoB is also sympathetic to the objectives of OUTA and the concerns that OUTA is seeking to address in this application. OUTA has also noted that the BoB is seeking to ensure compliance

with the law and wishes to conduct itself transparently and lawfully. In these circumstances, OUTA invites the BoB to consent to continue holding the Trusts' funds as contemplated by prayer 2.1 of the notice of motion. In this regard the BoB is invited to indicate to the Court and to OUTA whether there are any terms and conditions upon which it is wishes or would be willing to do so, so as to ensure that it's not adversely affected. In this regard, OUTA is mindful that the BoB may, for reputational purposes, wish to request the court to issue directions or may wish to subject itself to a court order recording that it is only holding the funds for purposes of protecting the public interest and to ensure the protection of the Trusts' funds as contemplated by the MPRDA and NEMA. OUTA will inform the Court promptly should the BoB indicate the basis upon which it is willing to consent to holding such funds (whether under court order or otherwise) prior to the hearing of this matter.

157 Insofar as the BoB is not willing to consent to holding the funds (whether under court order or otherwise) OUTA contends that it is under a duty to do so which duty flows from:

157.1 Section 24 of the Constitution;

157.2 NEMA and the MPRDA read with the Income Tax Act, and more particularly the statutory duties that are placed on banks to facilitate the holding of trusts' funds in the public interest in respect of financial provision for rehabilitation especially on closure of a mine.

158 OUTA contends that these duties are independent constitutional and statutory duties.

159 However, they also inform the content of the duties of a bank when terminating any banking relationship with a client under contract. In this regard, it is contended that the bank's freedom to terminate a banking relationship on notice (under the specific terms of its contracts) is subject to an implied overriding duty to do so in a manner that does not cause or threaten to cause the breach of constitutional and statutory duties and rights protected by NEMA and the MPRDA. Where a bank contracts with a mining rehabilitation trust and provides it with a bank account, its private law right to terminate on notice is accordingly tempered by the duty to do so in a manner that will not cause the breach of the governing environmental legislation and will do nothing that will prejudice the safe deposit of the Trusts' funds into another suitable institution as contemplated by legislation at termination.

160 In Part B of the application, OUTA will seek relief *inter alia* removing any remaining trustee as the remaining trustees are Gupta / Oakbay linked and appointing independent / otherwise suitable trustees. OUTA also will seek relief requiring an accounting to the Court. Further relief is sought to ensure that new trustees swiftly assume responsibility for the Trusts' funds. In the alternative to relief altering the trusteeships to the Trust, OUTA seeks relief against the Minister to put in place satisfactory arrangements for the protection of the funds as he is entitled to do under NEMA and the MPRDA.

161 I respectfully submit that OUTA has made out a *prima facie* case for this relief in the circumstances set out above.

162 So as to preserve the funds in the meantime OUTA requests the Court to grant the orders in Part A of the notice of motion. In view of the response of Tabacks on 19 September 2017 (**SF25**), OUTA is hopeful that provided the trustees are interdicted from dealing with the funds it will not insist on closing the Trusts' accounts but will hold the funds pending the determination of the relief in Part B and that they will hold them in an interest-bearing account. As indicated above, OUTA invites the BoB to indicate whether it is so willing and whether it requires the Court to issue any further directions relating to the conditions under which it is willing to hold the money.

163 OUTA has taken such steps as it could to ensure that this application could be instituted as soon as possible after the delivery of the judgment of Fabricius J. This was because the acute urgency that attaches to this application is consequential upon the order that he has made. As previously stated, due to the logistical difficulties in finalising this application and affidavit between 10 am and noon on 21 September 2017, the applicant's legal representatives were able to issue the notice of motion in time but were unable to cause this accompanying affidavit to be delivered prior to noon of 21 September 2017. I respectfully submit that this affidavit will be delivered at the earliest opportunity practically possible after noon on 21 September 2017. Insofar as it may be necessary, OUTA seeks condonation as far as is necessary and requests the

Court to have regard to the circumstances in which the application has been filed.

164 Time frames have been determined so as to allow the parties an opportunity to file answering papers and OUTA to reply thereafter before the matter is set down on Tuesday 26 September 2017.

165 As I explain above, OUTA has sought to engage the Minister and requested him to intervene to protect the Trusts' funds. He has declined to respond. OUTA has no alternative satisfactory remedy but to seek the Court's assistance.

166 The balance of convenience favours the grant of the relief in Part A. In this regard, I emphasise that the funds are held for very specific statutory purposes in the public interest. Further there can be no prejudice to the Trusts if its funds are held under suitable arrangements as sought by OUTA pending the outcome of the relief sought in Part B.

167 The relief sought contemplates that any party may approach the Court on good cause to vary the relief sought. This in turn will ensure that the Court's order can be varied to cater for the exigencies that may arise and will cure any difficulties that emerge in due course.

168 Further OUTA intends to prosecute Part B of the application diligently. To this end, it will effect any amendments to the notice of motion, any necessary

joinders and supplement its papers within 30 days of the Court's order. As regards the necessary joinders, OUTA has refrained at this stage from citing the Master as he has no interest in Part A of the application and pending finalisation of the relief to be sought in Part B. Furthermore, OUTA anticipates that once the relevant respondents clarify who the existing trustees are, it may have to effect changes to the parties and to this end OUTA seeks leave to join any such trustee whose identity surfaces at the time of supplementing its papers.

169 In the premises, OUTA seeks the relief sought in the notice of motion.

**STEFANIE FICK**

I certify that this affidavit was signed and sworn to before me at Pretoria on this the 21 day of September 2017 by the deponent who acknowledged that she knew and understood the contents of this affidavit, had no objection to taking this oath, considered this oath to be binding on her conscience and uttered the following words: 'I swear that the contents of this affidavit are both true and correct, so help me God.'

COMMISSIONER OF OATHS

Name:

Address:

Capacity

SHAUN DAVID COLLINS
COMMISSIONER OF OATHS
EX OFFICIO
Practising Attorney R.S.A.
Hatfield Plaza, North Tower
424 Hilda Street
Hatfield, Pretoria,0083

"SFA" 77



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

Case Number: 52590/2017

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES / NO.

(2) OF INTEREST TO OTHER JUDGES: YES / NO.

(3) REVISED. ✓

21/9/17 .....
DATE

.....
SIGNATURE

In the matter between:

| | |
|---|---|
| ANNEX DISTRIBUTION (PTY) LTD | 1ST APPLICANT |
| CONFIDENT CONCEPTS (PTY) LTD | 2ND APPLICANT |
| SAHARA COMPUTERS (PTY) LTD | 3RD APPLICANT |
| VR LASER SERVICES (PTY) LTD | 4TH APPLICANT |
| SAHARA CONSUMABLES (PTY) LTD | 5TH APPLICANT |
| INFINITY MEDIA NETWORKS (PTY) LTD | 6TH APPLICANT |
| ISLANDSITE INVESTMENTS ONE HUNDRED AND EIGHTY (PTY) LTD | 7TH APPLICANT |
| KOORNFONTEIN MINES (PTY) LTD | 8TH APPLICANT |
| OAKBAY INVESTMENTS (PTY) LTD | 9TH APPLICANT |
| OAKBAY RESOURCES & ENERY (PTY) LTD | 10TH APPLICANT |
| OPTIMUM COAL MINE (PTY) LTD | 11TH APPLICANT |
| SHIVA URANIUM (PTY) LTD | 12TH APPLICANT |
| TEGETA EXPLORATION AND RESOURCES (PTY) LTD | 13TH APPLICANT |
| WESTDAWN INVESTMENTS (PTY) LTD | 14TH APPLICANT |
| IDWALA COAL (PTY) LTD | 15TH APPLICANT |

| | |
|---|---|
| **TEGETA RESOURCES (PTY) LTD** | **16TH APPLICANT** |
| **MABENGELA INVESTMENTS (PTY) LTD** | **17TH APPLICANT** |
| **MABENGELA RESOURCES AND ENERGY (PTY) LTD** | **18TH APPLICANT** |
| **KOORNFONTEIN REHABILITATION TRUST** | **19TH APPLICANT** |
| **OPTIMUM MINE REHABILITATION TRUST** | **20TH APPLICANT** |

**And**

**BANK OF BARODA** **RESPONDENT**

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**JUDGMENT**

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**Fabricius J,**

1.

In this urgent application for "interim-interim" relief, the following was sought:

2. "Pending the final determination of the action referred to in paragraph 3 of this notice of motion, the respondent is interdicted and restrained from:

2.1 De-activating and/or closing the applicants' banking accounts held at the respondent and or from terminating the banker-customer relationship between the applicants and the respondent;

2.2 Demanding that the first to fourth applicants repay the sums owed by each of these applicants to the respondent in terms of their loan agreements with the respondent;

2.3 In any way limiting the manner in which the banking accounts are operated by the applicants so as to ensure that the applicants are permitted to operate the banking accounts in the same manner as they did prior to the notices of termination date 6 July 2017;

3. Within 15 days of the granting of this order, the applicants shall institute an application against the respondent in terms of which the applicants seek the relief set out in paragraphs 3.1, 3.3, 3.4 and 3.5, and the first to fourth respondents seek the relief set out in paragraphs 3.2, 3.3, 3.4 and 3.5:

3.1 Declaring that the respondent's notices to the applicants dated 6 July 2017 to de-activate the applicants' bank accounts are invalid and

ineffective and that 31 July 2017, or such other date after 30 September 2017 as the Court may determine, is the date for the expiry of a reasonable notice period for the respondent to de-activate and/or to close the applicants' bank accounts held at the respondent and/or terminate the banker-customer relationship between the applicants and the respondent;

3.2 Declaring that the respondent's notice to each of the first to fourth applicants to repay their loans to the respondent by 30 September 2017 is invalid and ineffective and that 31 July 2018, or such other date after 30 September 2017 as the Court may determine, is the date upon which it would be reasonable for the respondent, in the exercise of its rights to do so, to demand the repayment of the sums owed by each of the first to fourth applicants to the respondent in terms of the loans between these applicants and the respondent;

3.3 Directing that discovery of documents in the application/applications to be instituted shall take place in accordance with the provisions of Rule 35 of this Court's Rules".

Costs were also sought on a punitive scale including costs of two Counsel.

2.

At the hearing a Draft Order was handed up by Applicants' Counsel in terms of which the relief sought was as follows:

1. "The application in paragraph 2 of the notice of motion under the above case number (52590/17) ("the applicant") is to be argued on 7 and 8 December 2017.

2. Pending the determination (hearing and judgment) of the application which is to be argued on 7 and 8 December 2017, the respondent is interdicted and restrained from;

2.1 De-activating and/or closing the applicants' banking accounts held at the respondent and/or from terminating the banker-customer relationship between the applicants and the respondent;

2.2 Demanding that the first to fourth applicants repay the sums owed by each of these applicants to the respondent in terms of their loan agreements with the respondent; and

2.3 In any way limiting the manner in which the banking accounts are operated by the applicants so as to ensure that the applicants are permitted to operate the banking accounts in the same manner as they did immediately prior to the notices of termination dated 6 July 2017.

3. The order in paragraph 2 above shall not preclude the respondent from taking such action as it would in law be entitled to take against any of the applicants by reason of such applicant's default in relation to the express terms applicable to such applicant's banking account or loan facility, the provision of proper and sufficient notice to remedy such breach and the resultant failure by the applicant concerned to remedy the breach timeously.

4. For purposes of the hearing on 7 and 8 December 2017:

4.1 The applicants will supplement their founding papers by 21 September 2017;

4.2 The respondent will supplement its answering affidavit by 12 October 2017;

4.3 The applicants will file their replying affidavit/s by 2 November 2017;

4.4 The applicants will file heads of argument by 14 November 2017;

4.5 The court file will be indexed and paginated by 14 November 2017;

4.6 The respondent will file heads of argument by 23 November 2017;

4.7 A joint practice note will be filed by 30 November 2017.

5. The costs of this application are reserved for the determination at the hearing on 7 and 8 December 2017."

It will be noted from the relief sought, in whichever form, that the Applicants' case is based on the allegation that insufficient or unreasonable notice of termination of the relationship with the Respondent bank was given. It will also be noticed that there is no relief sought, in whatever form, that relates to the submission made in Court by

Mr J. P. Daniels SC on behalf of First to Fourth Applicants, that the relevant written agreements between Applicants and the bank, or certain clauses thereof, are invalid for being contrary to public policy. He envisaged during argument that the Court in the main hearing sometime in the future, i.e. not the "December Court", would need to decide this alleged issue, which might well also involve the hearing of oral evidence. He conceded in that particular context, that this would mean that the parties would live in a forced relationship on uncertain terms. I may immediately say that I would not grant an order that would have this effect for an indeterminate period.

3.

The application was launched when the Respondent notified the Applicants by way of letters dated 6 July 2017, that it would sever all ties with them, close their accounts and call up all relevant loans. The Respondent subsequently extended the deadline which is now 30 September 2017.

4.

Applicants now seek this interim relief so as to make provision for the period between 1 October 2017 until the hearing of the actual interim relief on 7 and 8 December. Without this interdictory relief the first part of Applicants' case becomes moot, so it was argued.

5.

It is obvious from the wording of prayer 2 of the Notice of Motion, and prayer 2 of the Draft Order, that on 7 and 8 December 2017, the Applicants will seek interim relief pending the outcome of the application referred to in prayer 3 of the Notice of Motion, in which proceedings the Applicants seek a declaration that the deactivation of the Applicants' bank accounts are invalid and ineffective, and that the demand that they repay their loans to the bank is similarly invalid and ineffective, at least until a date upon which it would be reasonable for the Respondent, "in the exercise of its rights to do so" to demand such repayment.

The application before Court on 7 and 8 December 2017 is therefore not a review application, but one for an interim interdict. The question before me is therefore whether or not I ought to grant the Applicants' interim relief pending the decision on 7 and 8 December 2017, and that question is obviously inextricably linked to the question: what test must a Court apply when an "interim-interim" interdict was sought?

Mr Daniels SC was of the view that the traditional requirements for an interim interdict need not be shown. I merely had to find that there was a triable issue in the context of the provisions of s. 34 of the ***Constitution of South Africa***, which deals with the right to access to a Court, and to consider a "lower" threshold relating to the balance of convenience test which would involve the weighing-up of the interests of the parties. In that context I would exercise a discretion. Respondent's Counsel, Mr D. Fine SC and Mr G. Marcus SC in turn submitted that neither the ***Superior Courts Act No. 10 of 2013***, nor the ***Uniform Rules of Court***, nor the common law provided for such an "interim-interim interdict" on the basis as contended for. The application before me and the relief sought, had to be dealt with on the basis of the usual

requirements for an interim interdict. Mr Marcus in addition contended that Applicants' case had not even been properly and fully pleaded and that the Founding Affidavit did not contain a single reference to Applicants' rights, and the infringement thereof, under s. 34 of the ***Constitution.*** That is so. I will deal with his submissions hereunder.

6.

Mr Daniels referred me to the decision in ***National Treasury and Others v Opposition to Urban Tolling Alliance and Others 2012 (6) SA 223 (CC)***, where in par. [31] Moseneke DCJ cautioned that a Court granting interim relief should not prejudge the issue that would be before a Court hearing a review application. Consequently he submitted it was not necessary for me at this stage to make a finding that the Applicants have a *prima facie* right in regard to setting aside of the relevant termination notices, since these would be the very questions that would be considered in December.

*7.*

The ***National Treasury*** decision *supra* must be read in the proper context. The hearing in December will not be subject to a Rule 53 procedure which might result in the lodging of a supplemented case record which would obviously not be before me at all, and which might entail material new matters or disputes of fact which would be best dealt with by the review Court itself. Even the relief referred to in prayer 3 of the Notice of Motion would not be subject to the ***Rule 53*** procedure, but according to prayer 3.3 thereof would be subject to further discovery of documents in accordance with the provisions of ***Rule 35*** of the Rules of Court. I may add at this stage that no doubt the Applicants have the provisions of ***Rule 35 (12)*** in mind. In fact, on 25 August 2017, I received a copy of the Applicants' Notice in terms of this Rule, which required the Respondent, by no later than 17h00 on 28 August 2017, to produce for inspection all the documents referred to in its Answering Affidavit of 16 August 2017. The provisions of this ***Rule*** do not apply automatically. The ***Rule*** states clearly that although the provisions of ***Rule 35*** relating to discovery of documents applied to applications, such is subject to the proviso that the Court

direct that it be so. It is also clear that such directive is only ordered by the Court in exceptional circumstances and certainly, the nature of the Defendant's defence, the relevance of the documentation requested and the timing of such application are all factors to be considered.

See: ***Erasmus , Superior Court Practice, 2ND Edition, Vol 2 at D1/482 C.*** For the present I need not determine this question, but having considered the relevance of the documentation sought, I have serious reservations in that context, inasmuch as the Respondent in its Answering Affidavit and in its approach to the present application, does not rely on the accuracy of the various serious and disturbing allegations in the media made against the Applicants as a group.

The bank does not need to establish the truth of allegations relating to "State capture by the Guptas" or the "Oakbay group" or allegations in the media that the "Gupta group" has made itself guilty, with the knowledge and assistance of highly placed officials, of corruption, money-laundering and other such-like criminal activities. It is sufficient that it relies on damage to its reputation in that context, as the banker of the Applicants.

The decision in ***Bredenkamp and Others v Standard Bank of South Africa 2010 (4) SA 468 SCA at par. [63]***, clearly supports this approach.

8.

Having considered the context of the comments made by the learned Deputy Chief Justice in the ***National Treasury*** opinion, I am not convinced that they oblige me to hold that the Applicants do not in the proceedings before me need to establish that they have a prima facie right in regard to the setting aside of the Respondent's notices, or that they do not have to fulfil the requirements for an interim interdict at this stage. In fact, in Applicants' own Founding Affidavit they rely on the requirements for the grant of interdictory relief, and allege that they have all been met in the present case. They say that this application has been brought essentially in two parts – the first seeking merely interim relief to preserve the status quo pending the outcome of proceedings which will seek to set aside the purported termination, or at least to have a reasonable, adequate and meaningful notice period imposed in which the Applicants could endeavour to establish alternative banking

relationships, or assess the various re-structuring options. In argument, a different approach was followed, and one, as I have said, that was not pleaded at all.

9.

The proceedings before me are therefore of an "interim-interim" nature, but this does not mean that I cannot and should not have regard to the requirements for an interim interdict. If there is obviously no merit in the "main" application in December, which of course is also intended to be of an "interim nature only", there is no purpose in granting an order at this stage either, quite apart from the other requirements for an interim interdict. In my view an Applicant cannot approach the Court and allege that it has an arguable case in the future, but that the Court may not have regard to the merits of that case, but nevertheless grant an interim order preserving the status quo in the meantime, irrespective of substantive law or procedural law considerations. In my view a party that seeks interdictory relief on an interim basis, must show that it has at the very least a *prima facie* right, that such right will be unlawfully infringed, that the balance of convenience is in its favour, and

that irreparable harm will result if an interim order is not granted in the meantime which would protect that right. These requirements and all other relevant authorities dealing therewith were fully discussed by this Court in ***Afrisake NPC and Others v City of Tshwane Metropolitan Municipality and Others [2014] ZAGPPHC 191 (14 March 2014)***, and in the ***National Treasury*** case, *supra*, at par. [45].

Most applications for an interim interdict are decided on the basis of the balance of convenience, which must favour the grant of an interdict, and this is an exercise that must involve weighing the harm to be endured by an Applicant if interim relief is not granted, as against the harm that a Respondent will bear, if the interdict is granted. A Court must assess all relevant factors carefully in order to decide where the balance of convenience rests.

See: ***National Treasury*** *supra* at [par. 55]. I am also mindful of the view of that Court that the requirements for an interim interdict that have been applied since 1914 still continue to exist, subject to constitutional considerations. See par. [45].

10.

In its Founding Affidavit and the Heads of Argument on behalf of the First to Fourth Applicants, the background was described as follows: each off the first four Applicants holds a credit facility with the Respondent pursuant to a facility loan agreement. The termination letters dated 6 July 2017, notify each of the Applicants that their respective loan facilities are to be terminated on 30 September 2017. The submission to be made at the first part of the hearing would be that the termination letters result in multiple breaches of the Applicants' rights under the loan facility agreements. These are triable issues between the Applicants and the Respondent. In summary those breaches are said to be the following:

1. Firstly, the bank purported to rely upon its right to terminate for default in circumstances in which none of the respective Applicants were in default in any of their obligations;
2. Secondly, the bank purported to exercise a right to terminate upon demand, notwithstanding that that right is, at least in respect of the Second Applicant's agreement, contrary to public policy;

3. Thirdly, the bank purported to exercise its right to terminate upon demand in circumstances in which it acted either reasonably or in good faith: the exercise of this right was therefore contrary to public policy;

4. Fourthly, neither the termination letters of 6 July 2017, nor a subsequent letter of 10 August 2017, gave the Applicants reasonable notice. This represented a further breach by the bank of its contractual obligations.

However, as I have said, the relief sought relates in the main to the alleged absence of reasonable notice.

11.

It was submitted that to the extent that it was necessary for the Applicants in these proceedings to make out a prima facie right, the right at issue arose from s. 34 of the ***Constitution*** which provides the following: "Everyone has a right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a Court or, where appropriate, another independent and impartial tribunal or forum". It was said that the substance of the Applicants' rights under s. 34 of the

***Bill of Rights,*** is the right to have the disputes about the loan facility agreements and termination letters properly heard by a Court. This provision emphasizes the rights of a party to have a justiciable dispute decided by a Court of law in a fair hearing, but I must add that it obviously entails the fact that substantive and procedural law must apply to any such hearing.

There is no doubt that this right lies at the heart of the Rule of Law. I also agree that the Applicant has a right to be heard in the context of the present proceedings which obviously will be resolved by the application of law. The substantive law put very simply in the present context is: the Applicant must show that the requirements for an interim interdict are present, failing which there would be no reason in the context of a contractual dispute to preserve the status quo against the will of the one contracting party, and contrary to the express terms of their contractual relationship, and irrespective of the question where the balance of convenience lies having regard to the harm that needs to balanced. This right to be heard must also be subject to all relevant provisions of procedural law, such as the ***Uniform Rules of Court***.

12.

With reference to certain allegedly missing documentation, it was submitted in the written Heads of Argument that I am not presently in any position to adjudicate upon Applicants' contentions as to their contractual rights under the loan facility agreements, nor could I meaningfully pronounce upon the bank's contention that it was within its rights to call up the loan facilities. It was therefore not open to the bank to complain that the "interim-interim" relief might cause it to suffer prejudice since it is, at least insofar as certain missing documentary evidence is concerned, the author of its own misfortune. The Applicants' Founding Affidavit however does not support this argument inasmuch as the Applicants clearly set out the relevant contractual terms that they rely upon, and which they say have not been reasonably enforced by the bank. They in fact allege that the lawfulness of the termination notices must be decided in due course, and in the context of the transactional account they allege that reasonable notice must be given, which it has not, and in the context of the loan account agreements with the First to Fourth Applicants, they

say the bank has indeed the right to demand repayment in terms of the contracts, but that this must be done in a reasonable and on reasonable notice.

To the extent that it was necessary at this stage to demonstrate that the Affidavits disclose triable issues that merit consideration at the hearing on 7 and 8 December 2017, certain submissions were referred to that would be made on those dates and I merely summarize them hereunder:

1. The bank repudiated the loan facility agreements by purporting to terminate by reason of defaults by the Applicants, each termination letter purported to rely on two distinct bases to terminate the loan facility agreements: first, the bank's right to terminate the agreements on demand; and second, the bank's right to terminate the agreements by reasons of default by the borrower.

   It was said that the simultaneous reliance upon these two clauses results in an inconsistency. With reference to a breach of Applicants' obligations upon which the bank relied, it was said that Applicants have attracted adverse media coverage, that the bank perceives this coverage to be detrimental to its interests and that it had on several occasions raised its concerns. It was said that there

was no evidence that any of the First to Fourth Applicants have ever attracted any adverse publicity. It was also said that there was no obligation on the part of any of the Applicant companies to report on publicity affecting the other 17 Applicants. The termination letters were defective, because they purported to rely on a non-existent default by each individual Applicant.

It is however clear from Respondent's approach that "Applicants are owned and controlled by the Gupta family and close associates, either directly or indirectly. They form part of the Oakbay group of companies and are otherwise closely affiliated". The bank annexed a schedule reflecting this close alliance with reference to shareholders and directors.

2. The termination upon demand clause is contrary to public policy. Clause 10.5 of the loan facility agreement reads as follows: "The said loan facility sanctioned at the discretion of the bank and subject to the usual proviso that same is repayable on demand at any time at the sole discretion of the bank and that the terms and conditions are subject to change without notice". With reference to the termination upon demand clause in each of the first four Applicants' agreements

it was said that upon a proper construction, such was subversive to each loan agreement in that:

2.1 It allowed the bank to terminate the relationship at any time, notwithstanding the bank's knowledge both of its stated purpose and of either its periodic nature or, in the case of the Fourth Applicant, that it was a term loan;

2.2 It allowed the bank at any time to terminate, seemingly without the need for any commercially-defensible reason. With reference to a comment made Harms JA in ***Bredenkamp and Others v Standard Bank of South Africa Ltd*** ***supra*** [par. 7], it was submitted that where an abuse of the bank's rights was evident, the terms of the contract between the parties became subservient to this consideration. The termination upon demand clause purported to permit the bank to "change" the terms and conditions subject to which a loan facility was granted "without notice". This had the effect of affording the bank the power to vary the terms of that contract without the consent of the other and this was contrary to public policy, and therefore unenforceable.