"ANNEXURE" C"

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CCT No. 107/18

Court *a quo* Case No. 52883/2017

In the matter between:

PUBLIC PROTECTOR Applicant

and

SOUTH AFRICAN RESERVE BANK Respondent

APPLICANT'S REPLY TO THE ANSWERING AFFIDAVIT DATED 15 MAY 2018

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I, the undersigned,

BUSISIWE MKHWEBANE

do hereby make oath and state that:

1. I am the Public Protector, appointed as such in terms of section 1A of the Public Protector Act, 23 of 1994 (***"the Public Protector Act"***).

2. The facts to which I depose herein are within my own personal knowledge and are, except where the context indicates otherwise or I expressly say so, to the best of my knowledge and belief both true and correct.

3. Where I make legal submissions, I do so on the advice of my legal representatives and I believe them to be correct.

4. I have read the answering affidavit of Johannes Jurgens De Jager ("Mr De Jager") filed in response to my affidavit dated 30 April 2018 which I filed in support of my application for direct access alternatively direct leave to appeal to this Court ("my founding affidavit"). I respond to Mr De Jager's affidavit only to the extent necessary. 10

5. AD PARAGRAPHS 3 AND 5 [V9 - P696]

5.1 I deny that all the facts to which Mr De Jager deposes to are true and correct.

5.2 I deny, too, the correctness of submissions of law made by Mr De Jager in his affidavit and these will be addressed at the appropriate stage of these proceedings.

6. AD PARAGRAPHS 6 TO 9 [V9 - P697 to 698]

6.1. I deny that my application for direct access is "a contrivance" "rehashed" [V9 - P697] from my application for leave to appeal. Different considerations apply in direct access applications than in leave to appeal applications and these are set out in my founding affidavit.

6.2. The application for direct access alternatively direct leave to appeal raises important questions concerning the adverse and direct impact a personal costs order has on the exercise of my constitutional powers, obligations and functions without fear, favour or prejudice as the Public Protector.

6.3. I respectfully submit that it is therefore in the interests of justice that direct access alternatively direct leave to appeal be granted. Important constitutional issues are raised that require a final determination.

7. AD PARAGRAPHS 11 AND 12 [V9 - P698 to 699]

7.1. For the reasons that will be demonstrated in detail below, I deny that I have made *"false statements under* oath" [V9 - P698], that I have *"intentionally misrepresented the facts"* [V9 - P698] and that I have *"fail*[ed] *to provide any basis at all to question the most damning findings against* [me]" [V9 - P699].

7.2. The further disclosure of documents in this application became necessary when I, in preparation for this application, was asked by my new legal representatives what the purpose of each of the two meetings (25 April 2017 and 7 June 2017) was and why I did not disclose them in my answering affidavit. This was the first time when I became aware of the error in my answering affidavit.

8. AD PARAGRAPHS 14 to 17 [V9 - P699 to 700]

8.1. The SARB brought an application to review and set aside the Public Protector's remedial actions.

8.2. In terms of section 181(1)(a) of the Constitution, the Public Protector (a Chapter 9 Institution) was established as a *State Institution* aimed at strengthening constitutional democracy in the Republic. The remedial action reviewed and set aside was that of the Public Protector, as an institution, and not mine in my personal capacity.

8.3. I therefore did not and do not seek to vindicate my own interests, but those of the institution.

8.4. The Public Protector's remedial action was taken on judicial review and therefore the Public Protector, as an institution, was before the court. The

court a quo therefore erred because the person against whom the personal cost order was sought (namely, I in my personal capacity) was not part of the proceedings as I had not been joined in my personal capacity.

8.5. In any event, it can hardly be said that I, in my capacity as the Public Protector, acted unreasonably in opposing the applications to set aside my remedial action in light of the fact that both the Special Investigating Unit (under Justice Heath) and a panel of experts established by the then Governor of the South African Reserve Bank (under the leadership of Justice Dennis Davis), independently of each other, concluded that the "Bankorp lifeboat" transaction was unlawful. 10

8.6. I wish to remind this Court of the genesis of this case.

8.6.1. In the mid-1980s and through the creation of what became known as the "Bankorp lifeboat" the SARB, in exercise of its *lender* of last resort function, came to the rescue of Bankorp that was then experiencing financial crisis.

8.6.2. A series of back-to-back Lending Agreements was concluded between the SARB and Bankorp (later ABSA), with specific dates for the repayments of several loan amounts extended over almost a decade.

8.6.3. Justice Heath and Justice Davis, who later investigated the "Bankorp lifeboat" saga independently of each other, concluded that the "Bankorp lifeboat" transaction was, in many respects, unlawful.

8.6.4. Despite this, the amount owing to the fiscus remained outstanding.

8.6.5. This has remained a concern to the public and the matter was referred to the Public Protector for investigation.

8.6.6. The matter was duly investigated, reported on and appropriate remedial action was taken, in accordance with section 182(1) of the Constitution. In sum, the following findings were made:

8.6.6.1. The allegation whether the South African Government improperly failed to implement the CIEX report, dealing with alleged stolen state funds, after commissioning and duly paying for same is substantiated;

8.6.6.2. The allegation whether the South African Government and the South African Reserve Bank improperly failed to recover from Bankorp Limited/ABSA Bank an

amount of R1.125 billion, owed as a result of an illegal gift given to Bankorp Limited/ABSA Bank between 1986 and 1995 is substantiated;

8.6.6.3. The South African Reserve Bank in granting the financial aid failed to comply with section 10(1)(f) and (s) of the South African Reserve Bank Act of 1989. The Ministry of Finance had a duty as obligated by section 37 of the South African Reserve Bank Act of 1989 to ensure compliance with the Act by the South African Reserve Bank. The Ministry failed to comply with the obligation; 10

8.6.6.4. The South African Government failed to adhere to section 195 of the Constitution by failing to promote efficient and effective public administration;

8.6.6.5. The conduct of the South African Government and the South African Reserve Bank constitutes improper conduct as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6 of the Public Protector Act;

8.6.6.6. The allegations whether the South African public was prejudiced by the conduct of the Government of South Africa and the South African Reserve Bank is substantiated; and

8.6.6.7. The amount given to Bankorp Limited/ABSA Bank belonged to the people of South Africa. Failure to recover the illegal gift from Bankorp Limited/ABSA Bank resulted in prejudice to the people of South Africa as the public funds could have benefitted the broader society instead of a handful of shareholders of Bankorp Limited/ABSA Bank. 10

8.6.7. The findings were also corroborated by an independent expert, Dr Mokoka, whose evidence was never disputed in court, hence the findings in the Report could not be set aside by the court.

8.6.8. I respectfully submit that appropriate remedial action was taken in accordance with section 182(1)(c) of the Constitution. But even if I were wrong in the remedial action, that is no basis for a costs *de bonis propriis* against me.

8.6.9. The findings in the Report have not been set aside by a court of law. It is only the remedial action that has been set aside.

8.7. I re-iterate that with a cost order *de bonis propriis* hanging over my head as a result of a court order at the instance of an institution which I may well in future have occasion to investigate and make remedial action affecting it, inevitably comes the potential for my independence and impartiality to be affected in any future investigation by my office involving the SARB.

8.8. Such an attack by the SARB against a cash-strapped state institution is unfair and violates the constitutional obligation of the SARB to support the Public Protector and the principles of intergovernmental relations as provided for in section 181(3) and 41 of the Constitution respectively. I find it very hard not to conclude that the persistent opposition of my appeal against legal costs order made against me by the court *a quo* is not in the interest of the SARB, as an institution, but in the interest of Mr De Jager. This conduct also violates section 181(4) of the constitution, as it constitutes an interference with the functioning of the Public Protector.

8.9. Furthermore, the adverse impact has a continuing effect as it is an ever-present threat to my independence, impartiality and ability to act without fear, favour or prejudice in my investigations as the Public Protector.

8.10. The adverse impact and threat to my independence is undesirable and reflects negatively on my work and inevitably on the work of the Office.

8.11. The remedial action was taken in the public interest and I had no direct personal benefit to derive therefrom. The allegations that I am vindicating my personal interest is therefore unfounded and not justifiable.

9. AD PARAGRAPHS 18-20 [V9 - P700 to 701]

9.1. The allegations contained herein are not an entirely fair summary of the remedial action in the provisional report.

9.2. Paragraph 8.2.1 [V6 - P474] of the provisional report identified the "lifeboat" as an "anomaly" and directed that National Treasury and SARB must ensure that the *anomaly* **identified in the report** regarding the exercise of Lender of Last Resort function must be prevented in future through the development of the systems, regulations and policies.

10. AD PARAGRAPHS 21-27 [V9 - P701 to 702]

10.1. I deny that I have made false claims as alleged or at all.

[V9 - P666]

10.2. At paragraph 43 of my founding affidavit, I state that:

[V9 - P666]

"I did not disclose the meeting in the report because it is covered by the Presidency's response to the provisional report (the response annexed as "PP8" to my answering affidavit), which requested a meeting in order to clarify their response"

10.3. Indeed, the request for a meeting does not appear from the response. What I meant by this statement is that I did not disclose the meeting in the report because

[V6 - P478]

10.3.1. The Presidency requested a meeting and this appears at "PP9"

[V6 - P476]

(not "PP8" as I erroneously indicated in the answering affidavit); 10

10.3.2. The request was made to clarify the Presidency's response; and

10.3.3. What was discussed at the meeting on 7 June 2017 was the content of the Presidency's response to the provisional report.

10.4. The Presidency's written response together with the subsequent meeting held on 7th June 2017, altogether constitute section 7(9) response by the Presidency.

10.5. The purpose for my meeting with the Presidency and SSA were explained in my answering affidavit.

10.6. As stated in my founding affidavit, the meeting for April 2017 had nothing to do with the CIEX investigation, as it was a meet and greet meeting and the meeting for June 2017 had nothing to do with the substance of the content of my report. I therefore did not intentionally fail to disclose the meeting in my report hence the disclosure (in the rule 53 record) of the notes taken in the aforesaid meeting.

10.7. I did not discuss the final report/new remedial action with the Presidency or anyone before the publication of the report. As already stated in my founding affidavit, the meeting with the Presidency was to discuss the Presidency's response to the provisional report/section 7(9) notice and not the final remedial action. The final remedial actions were only taken after having taken into account the responses from ABSA, the SARB, the Presidency and the Minister of Finance. I accordingly deny that the final remedial action was discussed with the Presidency during the June 2017 meeting.

10.8. Naturally, the findings and remedial actions of the Public Protector will in all likelihood change once the Public Protector has, in terms of section 7(9) of the Public Protector Act, received and considered responses from

the implicated parties. It is therefore common sense that the responses are not themselves an end but rather a means to an end in that the remedial actions are solely based on the Public Protector's analysis of all responses and evidence presented to her. The responses by any implicated party to the matter under investigation are not in their nature directive to the Public Protector's findings and intended remedial actions but rather a tool to afford an opportunity to those implicated to respond to the allegation and findings.

10.9. It is not a right of the implicated person to receive and comment on the intended remedial action, as section 7(9) notice is only applicable if it appears to the Public Protector during the course of an investigation:

10.9.1. That any person is being implicated in the matter being investigated;

10.9.2. That such implication may be to the detriment of that person; or

10.9.3. That an adverse finding pertaining to that person may result.

10.10. The process of fairness is legislated in the Public Protector Act, specifically section 7(9) thereof and this section does not regulate how meetings should be conducted. However, in terms of section 7(1)(b)(i) of

the Public Protector Act, the Public Protector has wide discretion to determine the format and the procedure to be followed in conducting any investigation with due regard to the circumstances of each case.

10.11. Recordings of the meetings can be in different forms. In this instance, the only recordings of the meeting with the SSA and the Presidency were handwritten notes. These notes were disclosed in the rule 53 record. I have already indicated above that the meeting for April 2017 was not part of the matter investigated and, therefore, disclosure was not necessary.

10.12. The fact that the SARB does not believe me and those who were present at the meeting cannot give rise to reasonable apprehension of bias by a reasonable person. 10

10.13. In any event, I am advised that this relates more to the fairness of my approach as regard the *audi* principle rather than to bias

11. AD PARAGRAPHS 28-29 [V9 - P703]

11.1. The process of fairness is legislated in the Public Protector Act, specifically section 7(9) thereof and this section does not regulate how meetings should be conducted. However, in terms of section 7(1)(b)(i) of the said Act, the Public Protector has wide discretion to determine the

format and the procedure to be followed in conducting any investigation with due regard to the circumstances of each case.

11.2. Recording of the meeting can be in different forms and in this instances, notes with regard to the meeting with the SSA and the Presidency were taken and disclosed in the rule 53 records. I have already indicated above that the meeting for April 2017 was not part of the matter investigated. Accordingly, the meeting with SSA and the Presidency was not electronically recorded, but manually in the form of the notes taken by the senior investigator who assisted me during the investigation of the matter in question.

11.3. What was discussed at the meeting of 7 June 2017 is clear from the handwritten notes taken during the meeting by Mr Tebogo Kekana, Senior Investigator who assisted me during the investigation. The handwritten note was disclosed as part of the rule 53 record and is annexed hereto as **"RA1"** [V2 - P130] which formed part of the record. Confirmatory affidavits by Mr Kekana and Mr Nemasisi [V10 - P829 and 827] are filed herewith.

12. AD PARAGRAPHS 30-32 [V9 - P703 to 704]

12.1 I conceded to the relief sought by SARB in its urgent application and a draft court order was communicated to all the parties and the court.

However, the *court a quo* decided to hear the matter as an opposed motion despite the fact that it was unopposed and all the relief sought had been conceded.

12.2 I deny that the record and/or my answering affidavit [V9 - P704] *"evidenced a gross disregard for the obligations of* [my] *office"*, gave rise to [V9 - P704] *"a reasonable apprehension of bias"* and *"showed that* [I] *had not conducted the investigation impartially"*. I further deny that I did not approach the review application with [V9 - P704] *"the candour required of organs of State"*.

12.3 I deny that the SARB or any other party established a reasonable apprehension of bias.

12.4 The basis for the court *a quo*'s conclusion that [V8 - P603 to 604] *"it has been proven that the Public Protector is reasonably suspected of bias . . ."* is that I did not disclose in my report that I had meetings with the Presidency on 25 April 2017 and again on 7 June 2017, that I only disclosed the first meeting in my answering affidavit, that I did not afford the reviewing parties a similar opportunity as I did the Presidency, and that I gave no explanation for this omission when I had the opportunity to do so.[1]

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1 Paras 100 to 101 of the main judgment [V8 - P603 to 604]

12.5 For the reasons already advanced in my founding affidavit, the court *a quo* appears to have conflated the principles of fairness in my approach as regards the *audi* principle, on the one hand, and bias on the other. I respectfully submit that the court *a quo* erred in this regard.

13 AD PARAGRAPHS 33-38 [V9 - P704 to 705]

13.1 I filed the entire record as I was bound to do to ensure that no criticism could be levelled against me in withholding any information. I did not intentionally file documents in a *"haphazard"* [V9 - P704] manner in the court *a quo*. I was responding to three substantial review applications brought by ABSA, the SARB and National Treasury.

13.2 I deny that the notes

13.2.1 *"appeared to indicate"* [V9 - P704] that I had discussed the new remedial action of my final report with the Presidency and the vulnerability of the SARB with the SSA. The vulnerability aspect as entailed on the notes related to the meeting with SSA, wherein Judge Heath's media statement relating to his fear of "run on the banks" was discussed to mean SARB's vulnerability with regard to its mandate;

[V9 - P704]

13.2.2 *"also indicated"* that I was discussing the new remedial action of my final report with the Presidency and the SSA without affording the SARB the same opportunity. As indicated above, I never discussed the new remedial action with the Presidency or any implicated party. The focus of the meeting with the Presidency was only on the Presidency's response to the section 7(9) notice in respect of the provisional report to which all implicated parties were also given an opportunity to respond.

13.2.3 Accordingly, had SARB or any other implicated person requested a meeting in accordance with section 7(9) of the Public Protector Act, as the Presidency did, I would have given them an opportunity to explain their response.

13.2.4 Accordingly, the court *a quo* erred in its finding of reasonable apprehension of bias on the basis that the SARB and any other implicated party were not given an opportunity, as given to the Presidency or SSA.

13.2.5 In any event, the responses from the SARB and all other implicated parties were taken into account when finalising the investigation and report, hence the provisional remedial action

[V6 - P474]

contained in paragraph 8.1 of the provisional report was removed in the final remedial action.

13.3 For the reasons already advanced elsewhere in this affidavit and in my founding affidavit, I deny that what was discussed at the meetings related to the substance of my report, especially the final remedial action. The final report / remedial action was never discussed with any of the parties implicated in the investigation.

13.4 It is clear that the SARB seeks to project that the meetings with the Presidency and SSA were scandalous and not supposed to have taken place and thus were intended to undermine the SARB. Mr de Jager's submission is strictly in disregard of the fact that SSA is the signatory to the CIEX agreement, which agreement was a subject of my investigation and that the President signed a Proclamation which was also subject to the matter under investigation. Accordingly, the meetings with the Presidency and SSA were normal meetings which the Public Protector would normally have in any investigation, as the institutions are key stakeholders in the matter under investigation.

13.5 I deny that I failed to explain the meetings in my answering affidavit. I made a simple error as regards the date of the meeting. That error has now been properly explained to this court with supporting evidence.

[V6 - P476]

13.6 I also made a mistake in citing "PP8" as the letter from the Presidency requesting a meeting. The reference should have been to "PP9" to my [V6 - P478] answering affidavit in the main application.

14 AD PARAGRAPHS 39-43 [V9 - P705 to 706]

14.1 Mr de Jager must make up his mind. Either I resisted the main application, and am now resisting the personal costs order against me, in my personal capacity or I did so as an organ of state. I cannot be both at the same time. In other words, in my personal capacity I am not an organ of state. As Public Protector I am. Mr de Jager seems to conflate these two roles when it suits him. This conflation of the two roles is at the centre of this case. 10

14.2 He is also not giving the complete picture of how matters unfolded. I do so below.

14.3 In terms of the directives of the DJP, the following timeframes were set:

14.3.1 **14 August 2017:** The Public Protector will file Rule 53 record in respect of the consolidated review;

14.3.2 **11 September 2017**: The applicants to file their supplementary founding affidavits, subject to caveat 3.1 below;

14.3.3 **16 October 2017**: The Public Protector to file a consolidated answering affidavit in respect of all three applications;

14.3.4 **30 October 2017**: The applicants to file their replying affidavits;

14.3.5 **13 November 2017**: The applicants to file heads of argument, together with a practice note and chronology; and

14.5.6 **27 November 2017**: The Public Protector to file heads of argument together with a practice note and chronology (if any). 10

14.5.7 The hearing was ***provisionally*** set down for 3 days, namely **5 - 7 December 2017**, before a Full Court. This date was provisional subject to all parties' availability.

14.6 On **4 August 2017** my erstwhile attorneys, Sefanyetso Attorneys ("Sefanyetso") wrote a letter to the Deputy Judge President ("the DJP") informing him that counsel who acted on my behalf was not available on the agreed provisional dates in December 2017. Sefanyetso suggested

alternative possible dates for the hearing. A copy of the letter is annexed hereto as **"RA2"**. [V10 - P805]

14.7 In a letter dated **30 August 2017**, a copy of the letter is annexed hereto as [V10 - P809] **"RA3"**, Sefenyetso stated that:

14.7.1 The parties had agreed for a hearing on **27, 28 and 29 March 2018**. However, they were advised by the office of the DJP that the matter could not be allocated but that an allocation during the second term was possible.

14.7.2 The parties' availability was then explored for a hearing for the **23, 24, 25 April 2018**. All the parties, except the SARB, agreed to those dates, subject to the DJP's allocation thereof.

14.7.3 The SARB objected, not on account of unavailability, but on the basis that the matter was urgent. A copy of their letter of **29 August 2017** addressed to the DJP is annexed hereto as **"RA4"**. [V10 - P812]

14.7.4 Without conceding the validity of the objection, the SARB's reason for its objection to an April 2018 hearing would have been equally applicable to a March hearing.

14.7.5 The SARB's objection to an April 2018 hearing had no merit.

14.7.6 Counsel whom I had briefed in the urgent application intimated at an early stage, just after the meeting of the 24th of July 2017, his unavailability on the December 2017 dates, hence the request for alternative dates in April 2018.

14.8 My previous legal team withdrew from the matter on **28 September 2017.** At the time of their withdrawal, my answering affidavit had not been drafted by the said legal team, although consultations had already taken place.

14.9 I then appointed Motsoeneng Bill Attorneys ("MBA") who filed their notice of appointment as attorneys of record on 02 October 2017 and briefed new counsel between 02 October 2017 and 05 October 2017. A copy of MBA's letter to the Deputy Judge President is annexed hereto as **"RA5".** [V10 - P815]

14.10 Following the refusal by the respondents to consent to a postponement of the matter, on **31 October 2017,** the Deputy Judge President directed that I bring an application for postponement which was to be heard in open Court.

14.11 A postponement application was accordingly brought but vehemently opposed by all the respondents. This application for postponement had to be withdrawn on 17th November 2018 (the date of the hearing), when it was clear that the Court was reluctant to postpone the matter.

14.12 It was during the preparation for the postponement application that Adv Motimela SC became unavailable and I had to appoint a new senior counsel and two additional junior counsels, i.e. Adv Francois Botes SC, Adv Manchu and Adv Manala.

14.13 Adv Botes SC was briefed on 20th November 2017 and the first consultation with him and the entire legal team took place at his chambers on 20th November 2017 at 16h00.

14.14 On the following day, the 21st November 2017 at 8:25AM, my then attorneys of record received an email from Adv Botes SC, wherein he indicated that *"he was unaware of the extent of the papers, which consist of approximately 4000 pages and contained in approximately 27 lever arch files and as a result, he will be unable to study the papers, to carefully research the law and the authorities, to provide an input in respect of the approach that should be adopted in the opposing affidavits and to scrutinize the heads of argument before the deadline"*. A copy of his email is attached hereto as annexure **"RA6"**. [V10 - P822] [V10 - P821]

14.15 As a result of the above last minute withdrawal of another senior counsel, I had to appoint Adv Paul Kennedy SC, who had to go through the entire record, pleadings and settle answering affidavits within two days (22nd and 23rd November 2017).

14.16 The above withdrawal of the senior counsel and postponement application resulted in the new legal team having to work under pressure in preparing the answering affidavit, which was filed on 24 November 2017.

14.17 As indicated above, it is clear that I did not have two months to prepare the answering affidavit. I had a few days.

14.18 My then legal team also had a few days, after filing my answering affidavit, to prepare heads of argument (which was due to be filed on 27th November 2017) and in that preparation, they had to consider replying affidavits and the heads of argument of all the reviewing parties (ABSA, SARB and Minister of Finance).

14.19 I respectfully submit that I have always been candid about the facts. I only became aware of my error (in my answering affidavit) regarding the dates of the meetings held on 25 April 2017 and 7 June 2017 during preparation for this application.

14.20 In light of the three separate consolidated judicial review applications and the fact that I had to appoint new attorneys and counsel, the time period to file my answering affidavit was considerably truncated. I had to file answering affidavit to three different review applications in less than seven (7) days, from the date on which the fiercely resisted postponement application was withdrawn.

14.21 I submit that although I had indicated my readiness as alleged by the SARB elsewhere in their answering affidavit under reply, and that I had had the supplementary affidavit by the SARB [V9 - P706] *"for just over two months"* [V9 - P706] (para 41) my readiness did not mean simultaneous readiness of my legal representatives.

14.22 Further, and by comparison, since the commencement of the investigation, the SARB has had the same legal representatives. The legal representatives that represented the SARB all these years ago during the investigation are the same legal representatives in this matter. It therefore became seamless and just rehearsal of known facts and history for them when the matter became litigious. This is an advantage they had over the Public Protector. Their involvement in the matter during the investigation also afforded them an opportunity to press for unreasonable dates for the hearing of the matter.

14.23 By all this I do not seek to play victim. I am simply asking that the Court take these factors into account (together with others that I have set out in the founding affidavit and elsewhere in this affidavit) when evaluating my bona fides in the conduct of the main application.

15 AD PARAGRAPHS 43.1 TO 43.7 [V9 - P706 to 708]

15.1 With respect, the respondent misconstrues what I said in paragraphs 2 and [V3 - P143] 126 of my answering affidavit in the main application. [V3 - P181 to 182]

15.2 The two are not inconsistent with each other at all. They talk to two separate instances of consultation that are independent of each other.

15.3 Thus, the fact that I rely on Dr Mokoka's report in the answering affidavit is not, to an objective observer, indicative of my having consulted with him *"during the investigation of the complaint"*. [V9 - P708]

15.4 The fact is simply this. During the investigation of the complaint I consulted with Mr Stephen Mitford Goodson on economics issues on 23 April 2017. He is mentioned in the Report as one of the people with whom I consulted. Then following receipt of the three review applications, Dr Mokoka was engaged. Nowhere have I said that I consulted with Dr Mokoka during the investigation. Both Dr Mokoka's

and Mr Goodson's views were taken into account in the preparation of the Report. I did not *"pretend"* to act on the advice of Dr Mokoka in the preparation of the Report. This much is clear from paragraph 126 of my answering affidavit in the main application. [V9 - P708] [V3 - P181 to 182]

16 AD PARAGRAPHS 44; 45; 46; 48-63 [V9 - P708 to 713]

16.1 The contents of these paragraphs have already been dealt with elsewhere in this affidavit and in my founding affidavit at paragraphs 39 to 49. [V9 - P664 to 668]

16.2 I deny that there is any reasonable apprehension of bias in my conduct, that any such apprehension is reasonable or that the respondent is reasonable in holding such apprehension.

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16.3 In any event, the respondent seeks to re-argue the merits of the main application which is not the subject of this application. This is impermissible.

16.4 As indicated above, I never discussed the new remedial action with the Presidency or any implicated party. The meeting with the Presidency was only focusing on the Presidency's response to section 7(9) notice (provisional report) to which all the implicated parties were given an opportunity to respond. The Presidency responded in writing and also

[V6 - P478]
requested a meeting ("PP9" to my answering affidavit in the main application). As already indicated above, the Public Protector is empowered by section 7(9)(a) of the Public Protector Act to afford the implicated party an opportunity to respond in any manner that may be expedient under the circumstances.

16.5 After considering the responses to section 7(9) notice (provisional report), I finalised the report and issued it without discussing the final remedial actions with any of the implicated parties, including the Presidency and SSA.

16.6 The meeting of June 2017 was explained in my answering affidavit. However, it was explained under the meeting of April 2017. This error has now been clarified in the founding affidavit, paragraph 40 thereof and [V9 - P664 to 665] supported by documentary evidence. It is disingenuous of Mr De Jager to try to conflate the wording of the answering affidavit and the Provisional Report, in that the 'directing' the President to 'consider' the establishment of the Commission of Inquiry has one and the same effect. It is common sense that the remedial actions of the Public Protector are directive in nature such that they can 'direct' a party to 'consider' certain facts or intended actions. The President, as evidenced in his response to my section 7(9) notice (provisional report), had to remind me of his prerogative to appoint the commission of inquiry.

16.7 Although the provisional report required the President to consider appointing the commission of inquiry, I was the respondent in the State of Capture judicial review relating to similar remedial action regarding the appointment of the commission of inquiry by the President. During the meeting, and from the Presidency's response, I became concerned that I could not direct the President to consider the appointment of the commission, especially considering that there is a legal point pending before the court regarding the prerogative of the President to appoint the commission of inquiry.

16.8 The issue about the remedial action for amendment of the constitution is not part of the matter under appeal and therefore, the court a quo could not have used that matter which had already been dealt with by another court, as a ground of reasonable apprehension of bias.

17 AD PARAGRAPH 47 [V9 - P709]

As stated elsewhere in this affidavit, the vulnerability aspect as intimated in the notes related to the meeting with SSA, wherein Judge Heath's media statement relating to his *"fear of run on the banks"* was discussed and understood to mean SARB's vulnerability with regard to its mandate should the recovery be pursued.

18 AD PARAGRAPHS 64 & 65 [V9 - P714]

18.1 I never appeared in Parliament under oath and therefore the allegations that I lied under oath are denied. Further, I never lied to Parliament. In any event, I do not see the relevance of Mr De Jager's alleged letter to the Portfolio Committee in these proceedings, as my appearance in the Portfolio Committee (Legislative arm) only took place after my report and after the judgment under appeal. It is inconceivable how the events that is alleged to have taken place after the judgment will have a bearing on this appeal, a judicial arm of State.

18.2 I had no knowledge of the letter from Mr De Jager, dated 14 March 2018.

18.3 During the meeting with the Portfolio Committee on 6 March 2018, I indicated to the Committee that the second meeting with the Presidency was disclosed in the report through the Presidency's response to my section 7(9) notice. As already indicated in my answering affidavit in the court *a quo*, my founding affidavit and this replying affidavit, the meeting with the Presidency was a clarification of their response to my section 7(9) notice and that meeting was therefore part of the section 7(9) process.

18.4 In the last appearance before the Portfolio Committee on 17 April 2018, these issues were discussed extensively. I informed the Committee that the meeting with the Presidency was explained in my answering affidavit

in the court a quo. The meeting with the Presidency was also contained in the record I produced in terms of Rule 53.

18.5 It is difficult not to discern that it is not the SARB as an institution that has an interest in this matter but rather that of Mr De Jager. This view is compounded by the fact that Mr De Jager wrote to the Portfolio Committee in which he once again disingenuously and mala fide sought to cast aspersions on me, despite the fact that the matter was already pending in court where the same issues he brought to the attention of the Committee are before court. It is clear from this that the actions of Mr De Jager and the interest of the SARB are a world apart from each other. 10

18.6 It is disingenuous on the part of Mr De Jager that he will author a letter to another arm of State (Parliament) while knowing very well that the matter is pending before another arm of State, the Judiciary.

18.7 The meetings with the Presidency and SSA were explained in my answering affidavit, however, the June 2017 meeting with the Presidency was erroneously explained under the meeting of April 2017. This error has now been clarified in my founding affidavit, paragraph 40 thereof and supported by documentary evidence. [V9 - P664 to 665]

18.8 As already indicated in this affidavit and in my founding affidavit, the Presidency requested a meeting with me to clarify its response to the section 7(9) notice and that meeting was held on 7th June 2017. SARB never asked for a meeting to clarify its response to the section 7(9) notice.

19 AD PARAGRAPHS 66 – 66.3 [V9 - P714 to 715]

19.1 The contents of these paragraphs have already been dealt with elsewhere in this affidavit and in my founding affidavit at paragraphs 39 to 49.

19.2 I deny them all to the extent that they are inconsistent with what I have already said.

19.3 I deny that I have stated that what was discussed at the meeting was my *"new remedial action"*. What was stated in paragraph 43 is that I requested clarity on the process and not how to craft the remedial action. [V9 - P666]

20 AD PARAGRAPHS 67-71 [V9 - P715 to 717]

20.1 I deny that the findings and order are justified and unassailable.

20.2 I respectfully submit that for the reasons demonstrated in my founding affidavit as well as in this affidavit, I have good prospects of success in this application.

21 AD PARAGRAPHS 72-79 [V9 - P717 to 719]

21.1 I deny that there is no public interest in this matter. I further deny that the application [V9 - P718] *"evidences a fundamental misunderstanding of the duties of chapter nine institutions and the reason and effect of a personal costs order against a public official"*.

21.2 The order of the court *a quo* impacts adversely and directly on the exercise of my constitutional power, obligations and functions without fear, favour or prejudice. 10

21.3 This Court in Black Sash Trust v Minister of Social Development and Others 2017 (9) BCLR 1089 (CC) (*"Black Sash II"*) recognised personal costs orders against representative litigants, since the advent of the Constitution, in cases of bad faith and gross negligence. I deny that I have acted in bad faith or that I have been grossly negligent.

21.4 I further deny that I have failed in my duties to be impartial and independent in conducting my investigation. I deny that I obfuscated and

frustrated any process. In any event, I respectfully submit, that nowhere in the Constitution, or any other controlling legislation of which I am aware, is there any provision that demands personal accountability by the Public Protector for failing to perform her constitutional or statutory function.

21.5 In fact, section 5(3) of the Public Protector Act provides for indemnification of the Public Protector when performing a constitutional function.

21.6 I conducted my investigation impartially and independently and have to the best of my ability provided the Court with my explanation regarding the meetings. The fact that the SARB is critical of my ability, or has scant regard for it, does not justify a personal costs order against me. 10

21.7 In any event, for the personal cost order to suffice, the act of bad faith and gross negligence should relate only to the proceedings in court, and not to my investigation. Therefore, the court *a quo* erred in punishing me with a personal cost order for any conduct during my investigation. I have already demonstrated that my conduct in the proceedings of the court *a quo* were not in bad faith as the court *a quo* incorrectly found.

21.8 I launched this application in my official capacity as I have always been cited as such in the court *a quo*. I was never cited in my personal capacity.

A. CONDONATION

22. On 15 May 2018, the SARB filed its answering affidavit in the application for direct access alternatively leave to appeal.

23. I am advised that, in terms of this Court's Rules, the due date for filing this affidavit was 29 May 2018.

24. This affidavit is therefore 5 days late.

25. Upon receiving SARB's opposing papers, I together with my legal team had to decide on whether it was necessary to file a reply. We agreed that a reply was indeed necessary.

26. After having provided my legal team with some of the information they required, I received the draft reply on Monday 28 May 2018.

27. After perusing the draft reply, additional information had to be collated and provided to the legal team.

28. On 28 May 2018 we requested the SARB if they would be amendable to us filing the papers by Monday, 4 June 2018. A copy of the request and SARB's response is annexed hereto as **"RA7"**. [V10 - P824]

29. I was only in a position to provide the additional information to my legal team on 31 May 2018 and 4 June 2018.

30. The papers were thereafter finalised and ready for service on the SARB on 5 June and filing on 6 June 2018.

31. I humbly submit that in the circumstances, the SARB is not prejudiced by the late filing of this affidavit. The delay is very short.

32. I respectfully submit that good cause has been shown for condoning the late filing of this affidavit.

WHEREFORE I pray for an order in terms of my notice of motion. [V9 - P644]

BUSISIWE MKHWEBANE

I certify that the above signature is the true signature of the deponent who has acknowledged to me that she knows and understands the contents of this affidavit, which affidavit was signed and sworn to at PRETORIA on this the 5TH day of **JUNE 2018** in accordance with the provisions of Regulation R128 dated 21 July 1972, as amended by Regulation R1648 dated 19 August 1977, R1428 dated 11 July 1980 and GNR774 of 23 April 1982.

COMMISSIONER OF OATHS

3335690v1

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