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CONTINUE FROM FILE 3/5

IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, PRETORIA

CASE NO: 65616/17

In the matter between:

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

First Applicant

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

Second Applicant

And

**ORGANISATION UNDOING TAX ABUSE**

Applicant

In re:

**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

**RONICA RAGAVAN**

Ninth Respondent

**THE MASTER OF THE HIGH COURT, PRETORIA**

Tenth Respondent

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**AFFIDAVIT**

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I the undersigned


**STEFANIE FICK**

do hereby state under oath

- 1 I am an adult female and the head of legal affairs at the Organisation Undoing Tax Abuse NPC ('OUTA'), the applicant in the above application ('the main 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.
- 3 The purpose of this affidavit is to respond, on behalf of OUTA, to the mining respondents' application in terms of Rule 30 of the Uniform Rules of Court filed on 23 November 2017. I am duly authorised to do so.
- 4 The purpose of the Rule 30 application is to set aside as an irregular step, the Rule 7 notice filed on behalf of OUTA on 31 October 2017. In its Rule 7 notice, OUTA disputes the authority of Pushpaveni Govender ('Govender') and in

consequence De Oliveira Inc ('DOI') to act on behalf of the Optimum Mine Rehabilitation Trust ('the Optimum Trust') and the Koornfontein Mine Rehabilitation Trust ('the Koornfontein Trust') (collectively, 'the Trusts'). The Trusts are the applicants in the Rule 30 application. Govender purports to act on behalf of the Trusts in opposing these proceedings in circumstances where the Trusts are not quorate and could not have taken a valid decision to oppose the proceedings.

- 5 OUTA opposes the application on the grounds set out below and requests that it be dismissed with costs on an appropriate punitive scale.
  
- 6 Rule 7(1) creates a procedure for disputing the authority of a person acting on behalf of another person in litigation. It is well established that the scope of the Rule covers not only the authority of an attorney to act on behalf of a party but the authority of the person representing a party before a court. The Rule covers the instant case where Govender has purported to act on behalf of the Trusts in opposing OUTA's application where she cannot lawfully do so. She cannot lawfully do so because the Trusts are inquorate. The quorum for both Trusts is two persons. Since the resignation of Trevor Scott ('Scott') on 31 August 2017 as trustee of both Trusts, Govender has been the sole trustee and no replacement is in office.
  
- 7 The quorum provisions prescribing a quorum of two appears from the Trust Deeds.



- 7.1 A copy of the Koornfontein Trust Deed is attached as Annexure 'A'. I refer to clause 5.4 and clause 9.1.
- 7.2 A copy of the Optimum Trust Deed is attached as Annexure 'B'. I refer to clause 5.3 and clause 9.1.
- 8 OUTA obtained a copy of the Koornfontein Trust Deed only on 23 November 2017. OUTA obtained a copy of the Optimum Trust Deed shortly before OUTA filed its replying affidavit.
- 9 Rule 7(1) confers a right on a party in litigation to dispute the authority of a person acting on behalf of a party within ten days after it has come to the notice of a party that such person is so acting. In this regard:
- 9.1 It came to OUTA's notice that Govender was purporting to act on behalf of the Trusts only when the mining respondents' answering affidavits were served on its attorneys on 19 October 2017. Until that time it was not possible to know who was acting on behalf of the Trusts. Govender only took a decision to oppose the proceedings and to act on behalf of the Trusts in doing so on 18 October 2017 the day before the answering affidavit was served. I attach as Annexures "C" and "D" the relevant 'resolutions' which were attached to the answering affidavit as "PG6" (R661) and "PG7" (R662).
- 9.2 The Rule 7 notice was filed and served on the mining respondents within ten days thereof, on 31 October 2017.



- 10 The Rule 7 notice was accordingly timeously filed and served for purposes of asserting the right conferred in the rule. The consequence is that since that date Govender (and in consequence DOI) may no longer act unless they satisfy the court that they are authorised so to act.
- 11 OUTA was in no position to know who was acting on behalf of the Trusts until the mining respondents' answering affidavit was filed. Indeed, no decision was taken by Govender to do so until 18 October 2017 as set out above.
- 12 I point out that in related proceedings between *inter alia* the Trusts and the Bank of Baroda that commenced prior to the institution of the main application on 21 September 2017, the ninth respondent Ronica Ragavan ('Ragavan') purported to represent the Trusts. In doing so, she did not name the trustees in her founding affidavit nor did she attach any confirmatory affidavits or resolution from the trustees to institute the proceedings. It was apparent to OUTA prior to the institution of proceedings that Ragavan plays a very active role in the Trusts' affairs and this is one of the circumstances in which OUTA has sought to impugn the trustees' conduct. Indeed one ground on which OUTA impugned the trustees' conduct was that they had allowed Ragavan to conduct Trust affairs or at least done so without their adequate involvement or supervision. (See founding affidavit, para 154.11, R71)
- 13 It also bears emphasis that OUTA was unable to confirm with certainty who the trustees were prior to the institution of the proceedings on 21 September 2017.

This too was only confirmed when the answering affidavit was filed. This was notwithstanding the fact that prior to instituting the proceedings, OUTA had taken steps to ascertain who the trustees were.

- 13.1 On 25 August 2017, Scott telephonically advised OUTA's Ms Soretha Venter that the trustees were himself and Govender but that Ragavan should be copied on all correspondence.
- 13.2 On the same day, OUTA addressed correspondence to the trustees for the time being and requested *inter alia* confirmation regarding the identities of the trustees. After no response was received follow up correspondence dated 12 September 2017 was sent. Copies of these letters are attached to the founding affidavit as SF10 (R222 esp at R226, para 20.2) and SF20 (R300 esp at R303 para 9.) For ease of reference they are attached as Annexures "E" and "F" hereto.
- 13.3 Ragavan responded in her capacity as Acting Group CEO on a letterhead of Oakbay Investments (Pty) Ltd ('Oakbay'). (See founding affidavit, R245 and Annexure "G" hereto) Oakbay is one of the shareholders of Tegeta Exploration and Resources (Pty) Ltd ('Tegeta'). Tegeta is the holding company of the fifth and sixth respondents. Ragavan's response was as follows: *'We fail to see on what basis you are entitled to address the long list of interrogatories to us and we accordingly decline to engage with you.'*

- 13.4 Govender did not respond at all and indeed, considered herself under no obligation to do so. In her answering affidavit, and in respect of the letter of 25 August 2017, Govender says on behalf of the trusts: *'OUTA was plainly not entitled to any of the information sought. There was in the circumstances no need to favour OUTA with a favourable response.'* (See answering affidavit, para 78 at R533 and see too para 105, R547).
- 13.5 On 15 September 2017, Ms Venter received an e-mail (dated 1 September 2017) from Scott in which Scott advised her that he had now resigned as a trustee, that OUTA's queries should rather be directed to the remaining trustee and Group CEO and that he has passed OUTA's correspondence to the remaining trustee and Group CEO for a response. He had indicated that he had recommended that they respond to OUTA. A copy of this e-mail correspondence is attached for ease of reference as Annexure 'H'. Mr Scott referred to the remaining trustee as a Ms Naidu, but Venter confirmed with Scott telephonically that this was a reference to Govender as Naidu is Govender's maiden name.
- 13.6 OUTA cited Scott as a respondent as OUTA was mindful that notwithstanding his resignation it was not clear whether he was or had to serve out a notice period, whether his resignation was immediately effective and whether he was still a signatory on the bank account. (See founding affidavit, para 21, R17)

13.7 This information was set out in OUTA's founding affidavit. Again, OUTA invited the relevant respondents to confirm the identities of the current trustees and advised that any consequential procedures would be attended to pursuant to the Rules of Court upon being informed of the correct position. I refer to paragraph 23 of the founding affidavit at R18.

14 Prior to the institution of proceedings, OUTA was unable to access copies of the Trusts' Deeds: its attorneys Werksmans had sought access from the Master's office without success. After proceedings were instituted, Werksmans requested copies of the Trusts' deeds from DOI, who refused to supply them. In the founding papers, OUTA accordingly relied on what it contended were standard terms of the deeds of trusts as required by the governing legislation.

15 It was only when the answering affidavit was filed that OUTA obtained confirmation that the sole trustee was Govender. In this regard, Govender had apparently accepted Scott's resignation with immediate effect on 31 August 2017 and no additional trustee had been appointed. It was also in the answering affidavit that Govender contended that she was duly authorised to act on behalf of the Trusts and attached the resolutions dated 18 October 2017 referred to above.

16 Against this background OUTA asserted its right to dispute the authority of Govender (and in consequence DOI) to act on behalf of the Trusts.

- 17 However, even if OUTA is incorrect in this regard, OUTA had just cause for raising the dispute when it did. The circumstances in which this contention is made are set out above. It is of vital importance and in the public interest that Govender's authority to oppose the litigation for the trusts is determined. The Trusts should not be drawn into opposing litigation of this sort where a trustee – whose own conduct is in issue – acts alone in breach of the Trusts' deeds.
- 18 Furthermore, the case raises important matters of substance in respect of which OUTA has made out a *prima facie* case regarding the unlawful conduct of Govender in her role as trustee of the Trusts. This case is set out in the affidavits exchanged between the parties and reference will be made thereto to the extent necessary.
- 19 Where a party wishes to dispute the authority of a person in terms of Rule 7 after 10 days of it coming to their notice that such person is so acting, then the leave of the Court is required to do so. Good cause must be shown and leave can be sought any time before judgment. OUTA contends that in light of the circumstances set out below, there can be no question that the dispute was raised within the 10 day period, and thus raised as of right. However, out of an abundance of caution, and only in the event that the Court finds that the dispute was not timeously raised, OUTA seeks the leave of the Court to do so and contends that it has shown good cause.
- 20 I now respond to the specific allegations in the affidavit. I do not deal with each and every allegation but my failure to do so should not be construed as an

admission thereof. Rather, where I do not deal expressly with an allegation, it should be taken to be denied.

**21 Ad paragraph 1**

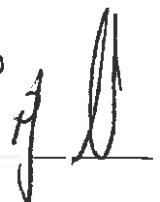
21.1 These allegations are admitted.

21.2 I point out that Govender contends in her answering affidavit that she has no interest in the application in her personal capacity despite the relief sought.

**22 Ad paragraph 2**

22.1 I admit that Govender is at present the sole trustee of the Trusts being the first and second respondents in the main application. It is for this reason that she cannot act alone in representing the trusts.

22.2 Save as aforesaid these allegations are denied. Govender is not able to act for the trusts in circumstances where the trusts are inquorate. Insofar as is necessary, OUTA again disputes her authority to do so in terms of Rule 7 of the Rules of Court and a punitive costs order is sought against her in her personal capacity as she has continued to act for the trusts when she has no power to do so.

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**23 Ad paragraph 3 and 4**

23.1 These allegations are noted.

23.2 OUTA disputes the truth and correctness thereof as set out herein.

**24 Ad paragraphs 5 to 14**

24.1 I have set out material background facts above.

24.2 I admit that:

24.2.1 OUTA's application was launched on 21 September 2017;

24.2.2 The mining respondents' attorneys served and filed a notice of intention to oppose the matter on their behalf on 22 September 2017.

24.2.3 The matter was enrolled on the urgent court roll for 26 September 2017 and the order attached as 'A' to the founding affidavit was agreed upon.

24.2.4 OUTA delivered its amended notice of motion and supplementary founding affidavit on 5 October 2017.

24.2.5 The mining respondents delivered their answering affidavit on 19 October 2017.

- 24.2.6 The Rule 7 notice was served on the first to sixth and ninth respondents on 31 October 2017. The seventh, eighth and tenth respondents were served shortly thereafter.
- 24.2.7 OUTA's attorneys received a copy of the letter marked 'C' to the founding affidavit of this application on 1 November 2017. The terms of the letter speak for themselves.
- 24.2.8 Werksmans addressed the letter annexed as 'D' to the founding affidavit in this application to DOI on 2 November 2017.
- 24.2.9 DOI served a Rule 30 notice on Werksmans (annexure 'E') to the founding affidavit in this application on 6 November 2017.
- 24.2.10 OUTA did not withdraw the Rule 7 notice.
- 24.3 Save as aforesaid these allegations are denied.
- 24.4 OUTA was under no obligation to withdraw the Rule 7 notice which was timeously served and raises a legitimate dispute about authority. Although OUTA was aware that DOI acted for the Trusts, OUTA's dispute is with Govender's conduct. DOI's authority to act is only challenged insofar as it is incidental thereto. If Govender has no authority to act for the Trusts, it follows that DOI does not either.



24.5 Until the time that OUTA received the mining respondents' answering affidavit, OUTA did not have confirmation who the Trustees were nor did OUTA know who was purporting to take decisions for the Trusts.

**25 Ad paragraphs 15 to 17**

25.1 Save to admit the content of the Rule 7 notice and Rule 7(1) insofar as they are correctly quoted, these allegations are denied.

25.2 Without derogating from the generality of the aforesaid denial, OUTA denies that Govender has acted in good faith. The Trusts have not acted as they are iniquate and cannot act as Govender is aware.

25.3 I have dealt above with the contentions that the Rule 7 notice was out of time and the scope of Rule 7. Govender's contentions are incorrect and denied.

**26 Ad paragraph 18**

26.1 OUTA denies that the first and second respondents are prejudiced. The Rules of Court are designed to and serve to ensure that only persons who are authorised to act on behalf of a party do so. The prejudice results where this does not happen and enures to the prejudice of the party raising the dispute. In this case OUTA's interests are prejudiced as are those that OUTA serves including *inter alia* the public interest.

26.2 The state of uncertainty flows from Govender's failure to satisfy the Court that she is authorised to act. She is personally responsible for drawing the Trusts into far-reaching litigation without authority. OUTA submits that she should be held personally responsible for the resultant costs.

27 In the premises, OUTA opposes the application in terms of Rule 30 and prays that it be dismissed with costs on an appropriate punitive scale.

  
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DEPONENT

The Deponent has acknowledged that she knows and understands the contents of this affidavit, which was signed and sworn to or solemnly affirmed before me at KNOSBURG on this the 1st day of DECEMBER 2017, the regulations contained in Government Notice No. R1258 of 21 July 1972, as amended, and Government Notice No. R1648 of 19 August 1977, as amended, having been complied with.

COMMISSIONER OF OATHS  
Dirk Jacobus van den Berg  
CA (S.A)  
SAICA REF:00282847  
Commissioner of Oaths (RSA)  
8 Francis Drake Place  
Constantia Kloof , 1709

  
\_\_\_\_\_  
COMMISSIONER OF OATHS

FullNames:

Capacity:

Designation:

Address:

'A'

**DEED OF TRUST**

Made and entered into by and between

**Main Street 432 (Proprietary) Limited**  
(hereinafter referred to as the "Founder")

and

**Samuel Nkhumeleni Nematswerani**

and

**Hein Teessen**

and

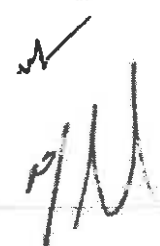
**Viktor Erich Cogho**

(the name(s) of the Trustee(s))

**1. DEFINITIONS**

In this Agreement, the following expressions have the meaning respectively set opposite them unless it appears otherwise from the context:

- 1.1. "the Acts and Regulations" means all the relevant laws of the Republic of South Africa and the regulations thereunder, being *inter alia*, the Minerals Act, No. 50 of 1991, the Mineral and Petroleum Resources Development Act, No. 28 of 2002, the Atmospheric Pollution Prevention Act, No. 45 of 1965, the National Water Act, No. 36 of 1998, the National Environmental Management Act, No. 107 of 1998, and any legislation and regulations which may be imposed from time to time to control the management of all the impacts of mining activities.
- 1.2. "the Authorised Official" means the Minister or the Director General of the Department of Minerals and Energy as required by the MPRDA, or such other official,



irrespective of designation who may, from time to time, be authorised to exercise or discharge their functions;

- 1.3. "Beneficiary's Account" mean the account in the accounting records of the Trust to be maintained and administered by the Trustees in respect of the Beneficiary which are required by this Deed;
- 1.4. "the Beneficiary" means Main Street 432 (Proprietary) Limited, a private company registered and incorporated in the Republic of South Africa under registration number 2006/013073/07 in respect of Koomfontein Mines situated at Blinkpan, Mpumalanga;
- 1.5. "the Commissioner" means the Commissioner for the South African Revenue Service as referred to in the Income Tax Act No 58 of 1962 as amended ("the IT Act")
- 1.6. "the/this Deed" means this deed of trust together with all annexes and schedules thereto;
- 1.7. "the Founder" means Main Street 432 (Proprietary) Limited a private company registered and incorporated in the Republic of South Africa under registration number 2006/013073/07, who is engaged in mining or similar operations in respect of Koomfontein Mines situated at Blinkpan, Mpumalanga;
- 1.8. "the Funds" means cash amounts paid to the Trust by a taxpayer within the meaning of section 37A of the IT Act, and approved by the Authorised Official, to be held and applied by the Trust to discharge the Statutory Obligations;
- 1.9. "the Koomfontein Rehabilitation Trust" means a Trust created in terms of the Provisions of clause 3 hereof;
- 1.10. "the Minister" means the Minister of Minerals and Energy;
- 1.11. "Statutory Obligations" mean the obligations imposed on the Beneficiary in terms of the Acts and Regulations, in respect of rehabilitation upon premature closure, decommissioning and final closure, and post closure coverage latent and residual environmental impacts on the areas covered by the mines described in clause 1.7 to restore those areas to their natural or predetermined state, or to a land use which confirms to the generally accepted principle of sustainable development, as envisaged in section 37A(1)(a) of the IT Act;

- 1.12. "the Trustees" means Samuel Nkhumeleni Nematswerani, Hein Teessen and Viktor Erich Cogho jointly, who have agreed to be the first trustees of the KOORNFONTEIN REHABILITATION TRUST.

## 2. RECORDAL

- 2.1. The Founder is engaged, in mining activities consisting of the mining of coal.
- 2.2. The Beneficiary is legally obliged to carry out rehabilitation and to prevent and control pollution at their respective mining operations in terms of the Acts and Regulations and as a result, is subject to the Statutory Obligations.
- 2.3. The Founder wishes to constitute the Trust to receive, hold and apply the Funds which the Trust may receive in order to discharge the Statutory Obligations imposed on the Beneficiary.
- 2.4. For this purpose, the Founder wishes to donate R100, 00 (one hundred rand) to the Trustees of the Trust.

## 3. THE TRUST AND ITS OBJECTS

- 3.1. There is hereby created with the approval of the Commissioner in accordance with section 37A of the IT Act, a trust called the KOORNFONTEIN REHABILITATION TRUST.
- 3.2. The sole object of the Trust is to apply its funds solely to discharge the Statutory Obligations.
- 3.3. The Trust shall hold assets and make distributions solely for the purposes contemplated in clause 3.2.
- 3.4. The Trust shall be a body corporate having perpetual succession and be capable of acquiring and disposing of and owning property and assets and contracting in its own name and suing and being sued in its own name. The rights and obligations of the

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Trust shall vest in it independently of its Beneficiary and/or any other person or contributing company.

**4. DONATION**

- 4.1. The Founder hereby irrevocably donates the sum of R100, 00 (one hundred rand) to the Trustees in trust, who in their capacity as such, hereby accepts such donation for the purpose and subject to the conditions of this Deed.
- 4.2. The donation made in terms of clause 4.1 hereof shall immediately vest in the Trustees but always subject to the terms of this Deed.

**5. ADMINISTRATION OF THE TRUST**

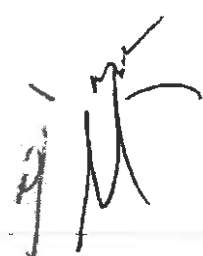
- 5.1. The Trustees (as defined) are hereby appointed as the first Trustees of the Trust.
- 5.2. The Trustees have accepted the appointment in terms of clause 5.1.
- 5.3. The Trustees shall not receive any remuneration from the Trust for their services, but shall be reimbursed for any personal expenditure reasonably incurred in the proper discharge of their duties as Trustees.
- 5.4. The number of Trustees will, at all times, be not less than two nor more than five. In terms of a sale of business agreement entered into between the Founder and BHP Billiton Energy Coal South Africa Limited, formerly known as Ingwe Collieries Limited, ("the Seller") dated 14 July 2006, the Founder has agreed that the Seller is entitled to nominate itself and be appointed as a trustee or to nominate and have appointed one Trustee to the Trust ("the Seller's Trustee").
- 5.5. The first Trustees as well as those subsequently appointed, shall hold office until they resign or are deemed to have vacated their offices in terms of clause 6.
- 5.6. Any vacancy in the office of Trustee shall be filled by a person approved by the Founder to the extent permitted under clause 5.3, except for the vacancy in the office of the Seller's Trustee which shall be filled by a person approved by the Seller and the Founder.

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- 5.7. The Trustees shall control and administer the Trust, and shall perform and discharge the duties incumbent on them hereunder, and shall have the power to delegate in writing, from time to time, any of their powers and functions to any one of their number as they may deem expedient in the discharge of their duties.

**6. RESIGNATION AND REMOVAL OF TRUSTEES**

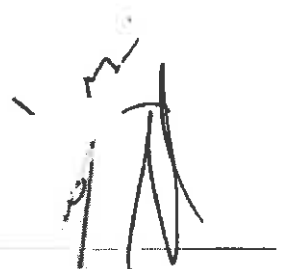
- 6.1. Should a Trustee resign, then, if the number of Trustees remaining is still two or more, the remaining Trustees shall, in consultation with the Beneficiary, decide whether or not to fill the vacancy in which case they shall have the power to do so by assumption.
- 6.2. If only one Trustee remains, he or she must appoint a second Trustee within three months of the vacancy/ies occurring.
- 6.3. If the number of Trustees falls to one and that one fails to appoint a co-Trustee within three months, the Beneficiary shall be entitled to do so; so also if for any reason no Trustee remains in office, then the Beneficiary shall be entitled to appoint two Trustees to constitute the necessary quorum and the provisions of clause 6.1 will then apply.
- 6.4. Notwithstanding the provisions of this clause 6, the Beneficiary shall have the right, at any time and in its own discretion, to appoint any additional Trustees to the number of Trustees from time to time, subject only to the provision that the total number of Trustees shall not exceed five at any time.
- 6.5. A Trustee may resign at any time on giving notice in writing to the remaining Trustees of his intention to do so and shall in any case be deemed to have vacated his office if he is no longer employed by the Founder or any of its subsidiaries.
- 6.6. In the event that the Trustees or the Beneficiary, as the case may be, wish to appoint a non employee as a Trustee, then, the relevant party shall first obtain the Commissioner's written approval thereto, prior to appointing such a non-employee as a Trustee.
- 6.7. A Trustee shall be automatically removed from office if:
- 6.7.1. his/her estate is sequestered;
  - 6.7.2. he/she becomes of unsound mind; or
  - 6.7.3. he/she is convicted of any offence involving dishonesty.



- 6.8. Notwithstanding the provisions of this clause 6, the Beneficiary shall be entitled, at any time, to remove a Trustee from its office should, in its opinion, reasonable grounds exist to do so.
- 6.9. A Trustee may resign at anytime on giving notice in writing to the remaining Trustees of his intention to do so. A Trustee shall be deemed to have vacated his office if:
- 6.9.1. he in the event of the Seller's appointed Trustee, is no longer employed by the Seller or any of its subsidiaries;
  - 6.9.2. he in the event of the Purchaser's appointed Trustees is no longer employed by the Purchaser or any of its subsidiaries; and
  - 6.9.3. the Founder resolves in writing that he should be removed from office, provided that this clause shall only be applicable to the Purchaser's appointed Trustees.
- 6.10. However the Commissioner, in consultation with the Authorised Official, may upon application by the Trustees grant approval for a non-employee of the Purchaser and Seller respectively, to be appointed as a trustee.

## 7. CHAIRMAN AND VOTING

- 7.1. The Trustees shall from time to time nominate one of their numbers to be Chairman of the Trust and he shall continue to be Chairman until he resigns from that office or ceases to be a Trustee.
- 7.2. Should the Chairman be absent at any meeting of the Trustees, the Trustees present shall appoint one of their number as Chairman to preside at that meeting.
- 7.3. Questions arising at meeting of Trustees shall be decided by unanimous vote each Trustee personally present having one vote.

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**8. SECRETARY**

The Trustees shall appoint a Secretary (which may be a company), who shall not be remunerated with monies from the Trust. The Secretary shall, whenever required to do so by any one Trustee, convene a meeting of the Trustees and be responsible for the minutes to be kept of all meetings and decisions of the Trustees.

**9. MEETINGS AND QUORUM**

9.1. The Trustees shall meet from time to time and not less than twice a year to transact the business of the Trust and the necessary quorum for any such meeting shall be two Trustees personally present. Reasonable notice of every such meeting shall be given to each Trustee and all meetings of the Trustees shall, unless otherwise decided by the Trustees, be held at:


12<sup>th</sup> Floor  
Nedbank Building  
81 Main Street,  
Johannesburg

9.2. A resolution signed by all the Trustees shall have the same effect as if it had been passed at a duly constituted meeting.

**10. TRUSTEES' LIABILITY**

10.1. Subject to any liability imposed by law and not capable of being waived, the Trustees shall not be answerable or accountable for any loss arising out of their administration of the Trust, or in respect of any depreciation of any investment of the Trust, unless such loss or depreciation shall occur through their wilful misconduct or gross negligence in which event only the Trustees concerned and not all the Trustees shall be jointly and severally liable.

10.2. The Trustees shall have no responsibility or liability for the efficacy of the measures taken by it in terms of clause 16 of this Deed or for the sufficiency of contributions and amounts paid by the Beneficiary of the Trust in terms of clause 14 of this Deed.



- 10.3. The Trustees do not by assumption or the exercise of office herein incur any of the Statutory Obligations of the Beneficiary or become liable directly or indirectly for any breach of the Statutory Obligations or failure of compliance therewith.
- 10.4. The Beneficiary indemnifies the Trustees from claims made against the Trustees or any of them arising from the loss or depreciation referred to in this clause 10 in respect of its monies (other than as a result of wilful misconduct or gross negligence on the part of the Trustees) or arising as a result of the measures taken on its behalf proving to be ineffective and/or the contributions and/or amounts obtained from it proving to be insufficient.


#### 11. SECURITY BY THE TRUSTEES

The Trustees shall not be required to lodge security with the Master of the High Court or any other official or authority in terms of the Trust Property Control Act No. 57 of 1988 or any other law requiring that security be lodged with any official or authority for the due performance of their duties hereunder.

#### 12. TRUSTEES' POWERS

- 12.1. The Trustees shall have general control over the Funds of the Trust and shall strive to attain the sole object which the Trust is established.
- 12.2. The Trustees shall have plenary powers to enable them to achieve the sole object of the Trust.
- 12.3. The Trustees shall receive, hold, apply the Funds contributed to the Trust, together with the net income of the Trust, as approved by the Authorised Official from time to time, solely in terms of this Deed.
- 12.4. The Trustees will not permit any conflict of interest to arise between themselves and the Trust in any aspect of its business and affairs, nor provide any financial assistance or services or facilities other than such as required in terms of clause 12.3.
- 12.5. The management of the affairs and all the powers of the Trust shall vest in the Trustees and without derogating from the generality of the foregoing, the Trustees shall have full legal power:

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- 12.5.1. to invest, realise and re-invest the contributions made to the Trust by the Beneficiary and the net income accrued thereon on such terms and at such rates of interest as the Trustees shall decide provided that, except as otherwise agreed in writing by the Authorised Official prior to the making of such investment, they shall be limited to making investments in institutions and investment vehicles as referred to in section 37A(2)(A), (b) and (c) of the IT Act;
- 12.5.2. to appropriate and to utilise firstly the net income defined in 13.6 and secondly the Funds in order to discharge the Statutory Obligations of the Beneficiary;
- 12.5.3. to institute any legal action including arbitration proceedings for the recovery of monies owing to the Trust, or to assert or protect the rights of the Trust and to prosecute, compromise, settle or withdraw any such action;
- 12.5.4. to execute against the corporeal, incorporeal, movable and immovable property of any of the Trust's judgement debtors;
- 12.5.5. to execute all documents for and on behalf of the Trust and in this regard to delegate their authority so to execute to two of the Trustees or to one of the Trustees and the secretary of the Trust; and
- 12.5.6. generally to perform all acts connected with any of the Trust's affairs.

### 13. TRUST'S BOOKS OF ACCOUNT AND ACCOUNTING PROCEDURES

- 13.1. The Trustees shall cause proper books of account to be kept for the Trust and shall appoint independent auditors to report on the financial statements for each financial year of the Trust.
- 13.2. The financial statements of the Trust for each financial year (which shall be reckoned from 1 July to 30 June) shall be forwarded by the Trustees to the Beneficiary of the Trust and to the Commissioner within six calendar months after the end of each financial year of the Trust.



- 13.3. The Trustees shall open a banking account in the name of the Trust, which shall be operated upon by the joint signatures of one of the Trustees and the secretary, or any other duly appointed authorised joint signatory.
- 13.4. All documents required to be signed or executed on behalf of the Trust shall be so signed or executed by the person or persons authorised thereto by resolution of the Trustees.
- 13.5. All costs charges and expenses of administering the Trust shall be chargeable to and be borne by the Trust. Such costs charges and expense shall be paid out of income of the Trust.
- 13.6. The balance of the gross income remaining in any financial year of the Trust after deducting such costs, charges and expenses shall be net income for the financial year, but if such costs, charges and expenses exceed the income, then the excess shall be the net loss for that financial year.
- 13.7. Such net income or net loss, as the case may be, shall be transferred (credited/debited) to the account of the Beneficiary.
- 13.8. The Trustees shall not be permitted to distribute, except as may otherwise be provided herein, the Funds of the Trust to any person and shall utilise the Trusts solely for the objects for which the Trust has been established.
- 13.9. No surplus Funds will be refunded to the Founder or any other person (natural or juristic) but will be dealt with in accordance with clauses 17.2 and 19.2.
- 14. ESTIMATES OF COST OF COMPLIANCE WITH THE STATUTORY OBLIGATIONS AND CONTRIBUTIONS TO THE TRUST**
- 14.1. Annually the Beneficiary shall apply to the Commissioner for approval of the proposed cash contribution to the Trust, as envisaged in section 37A(d)(II) of the IT Act.
- 14.2. The Beneficiary shall, before the end of the financial year concerned, pay into the bank account of the Trust the contribution approved by the Commissioner. If for any reason such contribution has not yet been considered and approved by the Commissioner by the time such payment must be made, then such payment shall be made conditionally on obtaining such approval.

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**15. COMPLIANCE WITH THE STATUTORY OBLIGATIONS**

- 15.1. The Trustees undertake to ensure that the Funds are utilised to discharge the Statutory Obligations in accordance with the requirements laid down by the Authorised Official and that the Funds be placed at the disposal the Beneficiary to carry out the Statutory Obligations as and when so required.. This undertaking shall be a stipulation in favour of the Authorised Official and be enforceable by him.
- 15.2. In fulfilling the aforementioned undertaking the amount made so available by the Trustees will be limited to the amount which stands to the credit of the Beneficiary in the books of the Trust.
- 15.3. Any withdrawals of amounts from the Fund shall be endorsed by the Authorised Official.
- 15.4. Should there be a balance standing to the credit of the Beneficiary after all the measures required to be taken in order to comply with its Statutory Obligations as set out in clauses 2.2 and 2.3 have been executed to the satisfaction of the Authorised Official, the said balance shall be dealt with in accordance with clause 17.2 or clause 19.2.

**16. CESSATION OF MINING ACTIVITIES AND SHORTFALL**

- 16.1. Should the Beneficiary decide to terminate its mining operations (other than a temporary cessation of such operations) and/or should the Beneficiary go into liquidation prior to it having complied with all of the Statutory Obligations as set out in clause 2.2 and 2.3 to which it may be subject, it shall, not earlier than three months and not later than one month prior to taking any steps for the winding up of such mining operations or going into liquidation, as the case may be, have final estimates prepared of the probable cost of compliance with such outstanding Statutory Obligations which shall be certified by the Beneficiary and approved by the Authorised Official.
- 16.2. On the date of termination of mining activities, should the total amount of the final estimates as so approved exceed the total amounts standing to the credit of the Beneficiary's account, the Founder or the Beneficiary shall forthwith pay to the Trust the shortfall, and conversely in the event of the account of the Beneficiary remaining in credit, such surplus shall, subject to the consent of the Commissioner, be used to defray the cost of compliance by the Beneficiary with any Statutory Obligations imposed in respect of other mining operations conducted by the Beneficiary, or the surplus shall be dealt with in accordance with clause 19.2 below.



**17. WITHDRAWAL FROM THE FUND**

- 17.1. The Founder may withdraw from the Trust giving to the Trustees 3 (three) months written notice of the intention to do so, provided that the permission of the Authorised Official for such withdrawal is first obtained. In such case, the Trustees undertake to pay the Authorised Official on demand the amounts available in the Beneficiary's account, which are required to fulfil the Beneficiary's Statutory Obligations as defined in clauses 2.2 and 2.3.
- 17.2. Should, at the time of the withdrawal, it be that all its Statutory Obligations as set out in clause 2.2 and 2.3 have not been met to the satisfaction of the relevant authorities, any funds standing to the credit of the withdrawing Beneficiary will (subject to clause 13.8) be dealt with in a manner agreed to in writing between the Beneficiary and the Authorised Official.

**18. TERMINATION OF THE TRUST AND TRANSFER OF ASSETS**

- 18.1. The Trust may only be terminated after all the Beneficiary's obligations including any post closure obligation set out in terms of clause 2.2 and 2.3 have been met to the satisfaction and approval of the Authorised Official or the appropriate official that is charged with administering the relevant environmental legislation.
- 18.2. To the extent that the Minister is satisfied that all of the areas of the mines described in clause 1.7 have been rehabilitated as contemplated in clause 1.10, the Trust shall be wound-up and its assets remaining after the satisfaction of its liabilities shall be transferred to another company or trust contemplated in section 37A(3)(a) or (b) of the IT Act.
- 18.3. If the Minister is satisfied that the Trust will be able to satisfy all its liabilities and that it has sufficient assets to rehabilitate and restore (as contemplated in clause 1.10) all the areas of the mines described in clause 1.7, the Trust may transfer its surplus assets to another trust or company contemplated in section 37A(4) of the IT Act.

**19. VARIATION OF THIS DEED**

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19.1. The provisions of this Deed may from time to time be amended by written agreement between the Founder and the Trustees with the concurrence of the Beneficiary and after the approval of the Commissioner thereto.

19.2. Notwithstanding the provisions of clause 19.1, the provisions of this Deed shall not be amended without the prior written consent of the Seller (in the event that it is a trustee) or the Seller's Trustee, which consent shall not be unreasonably withheld or delayed.

19.3. All amendments to section 37A of the IT Act shall be reflected in appropriate amendments to the provisions of this Deed.

**20. CONSEQUENCES FOR NON COMPLIANCE WITH THIS DEED AND THE PROVISIONS OF SECTION 37A**

The Commissioner will apply the provisions of section 37(6), (7) and (8) of the IT Act in the case of non-compliance.

THUS done and signed in JHB on the 26th day of June 2007

AS WITNESSES:

1. \_\_\_\_\_

2. \_\_\_\_\_

  
For and on behalf of the Founder

THUS done and signed in DE VRIES TOWN on the 26th day of JUNE 2007

AS WITNESSES:

1. \_\_\_\_\_

2. \_\_\_\_\_

  
For and on behalf of the Trustee Samuel Nkhumeleni  
Nematswerani



THUS done and signed in 5576 on the 27th day of JUNE 2007

AS WITNESSES  
1. [Signature]

2. [Signature]

[Signature]

For and on behalf of the Trustee, Hein Teessen

THUS done and signed in WITSEN on the 27th day of JUNE 2007

AS WITNESSES  
1. [Signature]

2. [Signature]

[Signature]

For and on behalf of the Trustee, Viktor Erich Cogho

[Signature]  
W. RA  
[Signature]



'B'



MEMORANDUM  
PRIVATE  
2007-11-30  
MASTER OF THE HIGH COURT

# OPTIMUM MINE REHABILITATION TRUST

## Contents

1. Optimum Mine Rehabilitation Trust Deed
2. Founder & requisite resolutions
3. Trustees & requisite resolutions
4. Secretary
5. Beneficiary

## Correspondence

Any queries or correspondence to please be addressed to:

Jan Brookhorst  
Secretary  
Optimum Mine Rehabilitation Trust

1st Floor, Marlborough Gate  
Hyde Park Lane  
Hyde Park  
Sandton  
2198  
South Africa

Phone: +27 11 325 0701  
Mobile: +27 82 566 1918

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**DEED OF TRUST FOR THE ESTABLISHMENT OF THE OPTIMUM MINE  
REHABILITATION TRUST FUND**

Made and entered into by and between

Optimum Coal Investments (Proprietary) Limited  
(Registration Number 2006/007799/07)  
(hereinafter referred to as the "Founder")

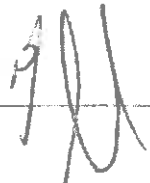
**AND**

Michael Solomon Teke	(Identification Number 6408155713083)
Elphus Oki Monkoe	(Identification Number 5910106288082)
Thomas Ignatius Borman	(Identification Number 6703255179080)
Viktor Erich Cogho	(Identification Number 5501285024081)

**1 DEFINITIONS AND INTERPRETATION**

In this Agreement, the following expressions have the meaning respectively set opposite them unless it appears otherwise from the context:

- 1.1 "the Acts and Regulations" means all the relevant laws of the Republic of South Africa and the regulations there under which do now or may hereafter regulate mining operations, being *inter alia*, the Minerals Act, 1991, the Atmospheric Pollution Prevention Act, 1965, the National Water Act 1998, the Mineral and Petroleum Resources Development Act, 2002, and which impose the statutory obligations as defined herein.
- 1.2 "beneficiary Accounts" means the separate accounts in the accounting records of the Trust to be maintained and administered by the Trustees in respect of



the beneficiaries or each of the beneficiaries as the case may be which are required by this document.

- 1.3 "the beneficiary" or "beneficiaries" mean/s. Optimum Coal Mine (Proprietary) Limited (Registration Number 2007/005308/07), as well as such other parties as may be constituted as beneficiaries hereafter by amendment of this Deed.
- 1.4 "the Commissioner" means the Commissioner for the South African Revenue Service as referred to in the Income Tax Act No 58 of 1962 as amended ("the IT Act").
- 1.5 "the Founder" means Optimum Coal Investments (Proprietary) Limited; (Registration Number 2006/007799/07) being a company incorporated in terms of the laws of the Republic of South Africa with limited liability and which is the owner of 100% of the entire issued share capital of the beneficiary (being a controlling interest in the beneficiary) and the beneficiary is engaged in coal mining and prospecting operations in the Mpumalanga Province in South Africa.
- 1.6 "funds" mean the cash amounts paid to the Trust within the meaning of sec 11(hA) and s37A of the IT Act by a taxpayer as identified therein and does not include costs which are required in terms of any law to be incurred on an ongoing basis during the life of a mine or part of a mine, but does cover obligations discharged at the time of or after discontinuation of the operations in a mine or part of a mine.
- 1.7 "the Optimum Mine Rehabilitation Trust", means the Trust created in terms of the Provisions of clause 3 hereof.
- 1.8 "the RM" means the Regional Manager: Mineral Development for the Mpumalanga Region of the Department of Minerals and Energy or such other official, irrespective of designation, who may hereafter be required to exercise those powers and discharge those functions.
- 1.9 "statutory obligations", mean the obligations imposed on the beneficiary/ies in terms of any law which regulates mining operations, and which obligations

include the rehabilitation upon premature closure, decommissioning and final closure and post closure coverage of any latent and residual environmental impacts on the area covered in terms of any permit, right, reservation or permission; to restore one or more areas to their natural or predetermined state; or to a land use which conforms to the generally accepted principle of sustainable development as envisaged by section 37A of the IT Act.

- 1.10 "the Trustees" mean Michael Solomon Teke, Elphus Okl Monkoe, Thomas Ignatius Borman jointly, who have agreed to be the first Trustees of the Optimum Mine Rehabilitation Trust.
- 1.11 In interpreting this Deed, and subject to a contrary intention evidenced by the context,
- 1.11.1 A reference to the singular includes the plural and vice versa;
- 1.11.2 A reference to the masculine includes reference to the feminine and neuter and vice versa;
- 1.11.3 A reference to a natural person includes a reference to any juristic persona and vice versa.

## 2 RECORDAL

- 2.1 The Founder is engaged, through its shareholding (100%) in the beneficiary, in coal mining and prospecting activities.
- 2.2 The beneficiary is subject to the statutory obligations.
- 2.3 The Founder wishes to constitute a Rehabilitation Trust to receive, hold and apply the funds which the Trust may receive in order to discharge the statutory obligations of the beneficiary/ies.
- 2.4 The Founder wishes to create the Trust for the benefit of the beneficiary/ies and for this purpose wishes to donate R100, 00 (one hundred rand) to the Trustees of the Trust.

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### 3 THE TRUST AND ITS OBJECTS

- 3.1 There is hereby created subject to the approval of the Commissioner, a Trust called the **OPTIMUM MINE REHABILITATION TRUST**.
- 3.2 The sole object of the Trust is to apply its property solely for rehabilitation upon premature closure, decommissioning and final closure and post closure coverage of any latent and residual environmental impacts on the area covered in terms of any permit, right, reservation or permission; to restore one or more areas to their natural or predetermined state; or to a land use which conforms to the generally accepted principle of sustainable development and apply the funds received by it in accordance with section 11(hA) and s37A of the IT Act, in order to discharge the statutory obligations of the beneficiary/ies.
- 3.3 The Trust shall be a body corporate having perpetual succession and be capable of acquiring and disposing of and owning property and assets and contracting in its own name and suing and being sued in its own name. The rights and obligations of the Fund shall vest in it independently of its beneficiary/ies, Founder or contributing company.
- 3.4 If the Trust contravenes any provision of section 37A (2) (financial instruments that may be held) by holding property other than property contemplated in that subsection, an amount of taxable income is deemed to accrue equal to the market value of that other property on the first date that the trust held that other property and the deemed amount shall be included in the income of the person that made the contribution to the Trust.

### 4 DONATION

- 4.1 The Founder hereby irrevocably donates the sum of R100, 00 (one hundred rand) to the Trust, and its Trustees hereby accept such donation for the purpose and subject to the conditions of this Trust.
- 4.2 The donation made in terms of clause 4.1 hereof shall immediately vest in the Trustees but always subject to the terms of this Deed.

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## 5 ADMINISTRATION OF THE TRUST

- K 5.1 The first Trustees will be appointed by the Founder to administer the Trust.
- 5.2 The Trustees shall not receive any remuneration from the Trust for their services, but shall be reimbursed for any personal expenditure reasonably incurred in the proper discharge of their duties as Trustees.
- ( Y 5.3 The number of Trustees will be not less than two nor more than four.
- 5.4 The first Trustees as well as those subsequently appointed shall hold office until they resign or are deemed to have vacated their offices in terms of clause 6.
- 5.5 The Trustees shall control and administer the Trust, and shall perform and discharge the duties incumbent on them hereunder, and shall have the power to delegate from time to time any of their powers and functions to any one or more of their number as they may deem expedient in the discharge of their duties.

## 6 RESIGNATION AND REMOVAL OF TRUSTEES

- 6.1 Should a trustee resign and the number of Trustees remaining is still two or more the remaining Trustees shall decide whether or not to fill the vacancy in which case they shall have the power to do so by assumption.
- 6.2 If only one trustee remains he or she must appoint a second trustee within three months of the vacancy/ies occurring.
- 6.3 If the number of Trustees falls to one and that one fails to appoint a co-trustee within three months, the Founder shall be entitled to do so; so also if for any reason no trustee remains in office, then the Founder shall be entitled to appoint two Trustees to constitute the necessary quorum and the provisions of clause 6.1 will then apply.
- 6.4 A trustee may resign at any time on giving notice in writing to the remaining Trustees of his intention to do so and shall in any case be deemed to have

vacated his office if he is no longer employed by the Founder or any of its subsidiaries.

6.5 A trustee shall be automatically removed from office:

6.5.1 If his/her estate is sequestrated;

6.5.2 If he/she becomes of unsound mind;

6.5.3 If he/she is convicted of any offence involving dishonesty.

## 7 CHAIRMAN AND VOTING

7.1 The Trustees shall from time to time nominate one of their numbers to be Chairman of the Trust and he shall continue to be Chairman until he resigns from that office or ceases to be a trustee.

7.2 Should the Chairman be absent at any meeting of the Trustees, the Trustees present shall appoint one of their number as Chairman to preside at that meeting.

7.3 Questions arising at meeting of Trustees shall be decided by a simple majority of votes each trustee personally present having one vote, and in the case of equality of votes the Chairman of such meeting shall have a casting vote.

7.4 Notwithstanding the foregoing it shall be competent for the Trustees to decide any matter by way of a round robin procedure viz. in the form of a written resolution signed by each one of them which resolution shall be deemed to constitute a minute of a meeting of Trustees.

## 8 SECRETARY

The Trustees shall appoint a Secretary (which may be a company), who shall not be remunerated with monies from the Trust. The Secretary shall, whenever required to do so by any one trustee, convene a meeting of the Trustees and be responsible for the minutes to be kept of all meetings and decisions of the Trustees.



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## 9 MEETINGS AND QUORUM

- 9.1 The Trustees shall meet from time to time and not less than twice a year to transact the business of the Trust and the necessary quorum for any such meeting shall be two Trustees personally present. Reasonable notice of every such meeting shall be given to each trustee and all meetings of the Trustees shall, unless otherwise decided by the Trustees, be held at the registered office of the beneficiary.
- 9.2 A resolution signed by all the Trustees shall have the same effect as if it had been passed at a duly constituted meeting.

## 10 TRUSTEES' LIABILITY

- 10.1 Subject to any liability imposed by law and not capable of being waived, the Trustees shall not be answerable or accountable for any loss arising out of their administration of the Trust, or in respect of any depreciation of any investment of the Trust, unless such loss or depreciation shall occur through their wilful misconduct or gross negligence in which event only the Trustees concerned and not all the Trustees shall be jointly and severally liable.
- 10.2 The Trustees shall have no responsibility or liability for the efficacy of the measures taken in terms of clause 16 hereof or for the sufficiency of contributions and amounts paid by the beneficiaries of the Trust in terms of clause 14.
- 10.3 The Trustees do not by the assumption or the exercise of office herein incur any of the statutory obligations of the beneficiaries or become liable directly or indirectly for any breach of the statutory obligations or failure of compliance therewith.
- 10.4 The beneficiaries indemnify the Trustees against claims made against the Trustees arising from loss or damage of whatsoever nature in the course of their administration of the Trust (other than as a result of wilful misconduct or gross negligence on the part of the Trustees).



**11 SECURITY BY THE TRUSTEES**

X The Trustees shall not be required to lodge security with the Master of the High Court or any other official or authority in terms of the Trust Property Control Act No. 57 of 1988 or any other law requiring that security be lodged with any official or authority for the due performance of their duties hereunder.

**12 TRUSTEES' POWERS AND DUTIES**

- 12.1 The Trustees shall have general control over the funds of the Trust and shall strive to attain the sole object for which the Trust is established.
- 12.2 The Trustees shall have plenary powers to enable them to achieve the sole object of the Trust, and any matters necessarily incidental thereto.
- 12.3 The Trustees shall receive, hold, and apply funds contributed to the Trust in terms of this agreement by the beneficiaries, which amounts have been approved by the RM, together with the net income thereon. Except as may be otherwise provided herein, the Trustees shall not distribute any of its profits or gains to any person and shall use the funds solely for the objects for which the Trust has been established.
- 12.4 The Trustees will not permit any conflict of interest to arise between themselves and the Trust in any aspect of its business and affairs, nor provide any financial assistance or services or facilities other than such as required in terms of clause 12.3.
- 12.5 The management of the affairs and all the powers of the Trust shall vest in the Trustees and without derogating from the generality of the foregoing, the Trustees shall have full legal power:
- 12.5.1 to invest, realise and re-invest the contributions made to the Trust by the beneficiaries and the net income accrued thereon, on such terms and at such rates of interest as the Trustees shall decide provided that, they shall be limited to making investments in institutions and investment vehicles as referred to in section 37A of the IT Act;



- 12.5.2 to appropriate and utilize firstly the net income defined in 13.6 and secondly the contributions and/or amounts paid in terms of clause 14 for the measures taken for compliance with the statutory obligations of the beneficiary;
- 12.5.3 to institute any legal action including arbitration proceedings for the recovery of monies owing to the Trust, or to assert or protect the rights of the Trust and to prosecute, compromise, settle or withdraw any such action;
- 12.5.4 to execute against the corporeal, incorporeal, movable and immovable property of any of the Trust's judgment debtors;
- 12.5.5 to execute all documents for and on behalf of the Trust and in this regard to delegate their authority so to execute to two of the Trustees or to one of the Trustees and the Secretary of the Trust;
- 12.5.6 to employ professional advisers and representatives;
- 12.5.7 to effect such insurances as deemed necessary on behalf of the Trust or in its interests; and
- 12.5.8 generally to perform all acts connected with any of the Trust's affairs, or necessary to discharge its business and functions.

### 13 TRUST'S BOOKS OF ACCOUNT AND ACCOUNTING PROCEDURES

- 13.1 The Trustees shall cause proper books of account to be kept for the Trust and shall appoint independent auditors to report on the financial statements for each financial year of the Trust.
- 13.2 The financial statements of the Trust for each financial year (which shall be reckoned from 1 March to 28 February) shall be forwarded by the Trustees to the Founder and beneficiary of the Trust and to the Commissioner and the RM within six calendar months after the end of each financial year of the Trust.

- 13.3 The Trustees shall open a banking account in the name of the Trust, which shall be operated upon by the joint signatures of one of the Trustees and the secretary, or another duly appointed authorised joint signatory.
- 13.4 All documents required to be signed or executed on behalf of the Trust shall be so signed or executed by the person or persons authorised thereto by resolution of the Trustees.
- 13.5 All costs, charges and expenses of administering the Trust shall be chargeable to and be borne by the Trust. Such costs, charges and expenses shall be paid out of income of the Trust.
- 13.6 The balance of the gross income remaining in any financial year of the Trust after deducting such costs, charges and expenses shall be the net income for the financial year, but if such costs, charges and expenses exceed the income, then the excess shall be the net loss for that financial year.
- 13.7 Such net income or net loss, as the case may be, shall be transferred (credited/debited) to the account of the beneficiaries on a monthly basis. Should there be more than one beneficiary, the net income or net loss shall be allocated to the respective accounts on a proportionate basis.
- 13.8 The Trustees shall not be permitted to distribute, except as may otherwise be provided herein, any of the funds of the Trust to any person and shall utilize the funds solely for investment or the objects for which the Trust has been established.
- 13.9 No surplus funds will be refunded to the Founder or any other person (natural or juristic) but will be dealt with in accordance with clause 16.4 below if applicable and otherwise in accordance with 19.2 below.
- 14 ESTIMATES OF COST OF COMPLIANCE WITH THE STATUTORY OBLIGATIONS AND CONTRIBUTIONS TO THE TRUST**
- 14.1 Annually but at least ninety days before the end of its financial year, the beneficiary shall cause written estimates to be prepared, by suitably qualified persons, of the probable cost of measures to discharging the statutory

obligations, other than costs which are required in terms of any law to be incurred on an ongoing basis during the life of a mine or part of a mine. The estimates may be made separately in respect of each duty, requirement or function of each group of duties, requirements, or functions as may be necessary or convenient. The estimates shall be certified as being fair by the beneficiary and shall thereafter be forwarded together with the calculations for approval to the RM, on an annual basis.

- 14.2 The beneficiary shall, before the end of the financial year concerned pay into the bank account of the Trust the approved contribution towards the estimated cost of implementing the measures so approved. The contributions shall be made in terms of section 11(hA) for contributions made prior to 2 November 2006 and if for any reason such contribution has not yet been considered and approved by the RM by the time such payment were made, then such payment shall be made conditionally on obtaining such approval. The contributions shall be made in terms of section 37A of the IT Act in terms of contributions made after 2 November 2006.
- 14.3 Provided the RM shall give his prior approval in each case it shall be competent for the beneficiaries and Trustees to revise estimates of the cost of measures to discharge the statutory obligations required in the event of changed circumstances and on adjusted payment, certified in terms of clause 14.1, may be made in accordance with clause 14.2 above.

## 15 APPLICATION FOR AN ANNUAL CONTRIBUTION WITH THE RM

### 15.1 Contribution made prior to 2 November 2006

It is envisaged that the RM will, upon approval of the contributions, issue a certificate confirming his satisfaction with the contributions and forward it to the beneficiary. The beneficiary shall forward the certificate to the Commissioner together with the income tax return for that particular year of assessment. The certificate will reflect the following:

- 15.1.1 That the contribution has been approved and complies with the provisions of clauses 14.2 and 14.3;

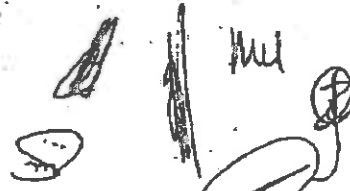
- 15.1.2 The year of assessment to which the contribution relates;
- 15.1.3 The specific amount which has been approved, which should be broken down separately for each mine;
- 15.1.4 That the taxpayer has complied with all the requirements of sections 11(hA).

15.2 **Contribution made after 2 November 2006**

The Commissioner will allow a deduction of the amount of the contribution made in terms of section 37A.

**16 COMPLIANCE WITH THE STATUTORY OBLIGATIONS**

- 16.1 The Trustees undertake to ensure that the funds are utilised to discharge the statutory obligations in accordance with the requirements laid down by the RM. The funds will be placed at the disposal of such beneficiary to carry out the statutory obligations as and when so required. This undertaking shall be a stipulation in favour of the RM and be enforceable by him.
- 16.2 In fulfilling the before mentioned undertaking, the amount made so available by the Trustees will be limited to the amount which stands to the credit of the beneficiaries concerned in the books of the Trust.
- 16.3 Any withdrawals of amounts from the Fund shall be endorsed by the RM.
- 16.4 Should there be a balance standing to the credit of any beneficiary/ies after all the measures required to be taken in order to comply with its statutory obligations have been executed to the satisfaction of the RM, the said balance shall be credited to the remaining beneficiary/ies' accounts *pro rata* to the balance of each of such remaining beneficiary/ies' accounts as at the end of the month in which all the said measures were so executed, unless the beneficiary/ies responsible for generating the credit balance has/have elected that the balance be paid to a body referred to in clause 9.



## 17 CESSATION OF MINING ACTIVITIES AND SHORTFALL

- 17.1 Should a beneficiary decide to terminate its mining operations (other than a temporary cessation of such operations) and/or should the beneficiary/ies go into liquidation prior to it having complied with all of the statutory obligations, which it may have, it shall, not earlier than three months and not later than one month prior to taking any steps for the winding up of such mining operations or going into liquidation, as the case may be, have final estimates prepared of the probable cost of compliance with such outstanding statutory obligations which shall be certified and approved as provided in clause 14.1.
- 17.2 On or after the date of termination of the mining activities, should the total amount of the final estimates as so approved exceed the total amounts standing to the credit of a beneficiary's account, the Founder or the beneficiary shall forthwith pay to the Trust the shortfall, and conversely in the event of the account remaining in credit such surplus shall be used to defray the cost of compliance by that beneficiary with any statutory obligations imposed in respect of other mining operations conducted by that beneficiary, failing which the surplus shall be credited to the remaining beneficiaries' accounts as the Trustees may determine and failing that shall be transferred in terms of clause 19.2 below.

## 18 WITHDRAWAL FROM THE FUND BY THE BENEFICIARY

- Subject to previous written permission obtained from the RM and compliance with such conditions or terms as the RM may require concerning the discharge of any beneficiary/ies' statutory obligations or any other matter including disposal of funds standing to the credit of any particular beneficiary in the Trust accounts any one or more beneficiary/ies may cease to be beneficiary/ies of the Fund.

## 19 TERMINATION OF THE TRUST

- 19.1 The Trust may only be terminated after all the beneficiary's/ies' statutory obligations including any post closure obligation have been met or provided for to the satisfaction and approval of the RM.

19.2 Should any amount and/or other assets remain after the statutory obligations have been met or provided for to the satisfaction of the RM, that amount and other assets may be transferred only to another company or a trust which fulfils the requirements of section 37A of the IT Act and as approved by the Commissioner ; and further if no such company or trust has been established, to an account or trust prescribed by the Minister of Minerals and Energy and as approved by the Commissioner if the Commissioner is satisfied that such company or trust satisfies the objects of section 37A(1)(a).

**20 AMENDMENT OF THIS DEED**

The provisions of this Deed may from time to time be amended by written agreement between the Founder and the Trustees with the concurrence of the beneficiary/ies and after the prior approval of the Commissioner thereto.

**21 ADAPTATION TO LEGISLATIVE CHANGES**

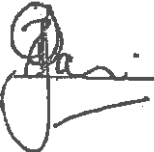
Provided the sole object of the Trust can still be lawfully attained, no change to any relevant legislation regulating or relating to this Trust, its object or its provisions shall have the effect of preventing the Trust from continuing to operate, but insofar as necessary the Trust Deed shall be read and interpreted as if it had incorporated such changes *mutatis mutandis*.

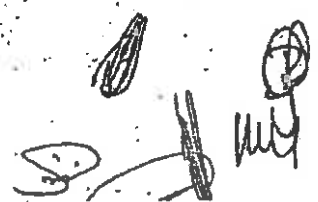
**22 CONSEQUENCES FOR NON-COMPLIANCE WITH THE TRUST DEED AND THE PROVISIONS OF SECTION 37A**

The Commissioner will apply the provisions of section 37A of the IT Act in the case of non-compliance.

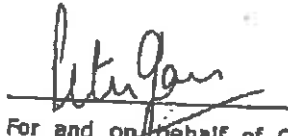
THIS done and signed in Hyde Park on the 7<sup>th</sup> day of November 2007 by the Founder.

AS WITNESSES:

1. 



2. \_\_\_\_\_

  
For and on behalf of Optimum Coal  
Investments (Pty) Ltd

THIS done and signed in HYDE PARK on the 7<sup>th</sup> day of  
NOVEMBER 2007 by the Trustee.

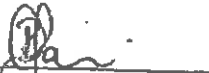

AS WITNESSES:


1.   
2. 

  
Mike Solomon Teke

THIS done and signed in HYDE PARK on the 7<sup>th</sup> day of  
NOVEMBER by the Trustee.

AS WITNESSES:

1.   
2. 


  
Elphus Oki Monkoe

THIS done and signed in HYDE PARK on the 7<sup>th</sup> day of  
NOVEMBER 2007 by the Trustee.

AS WITNESSES:

1.   
2. 

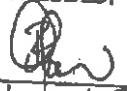

  
Thomas Ignatius Borman




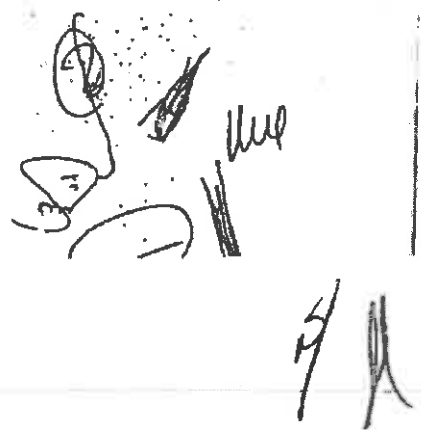


THUS done and signed in HYDE PARK on the 7th day of NOVEMBER 2007 by the Trustee.

AS WITNESSES:

1. 
2. 

  
Viktor Erich Cogho





REPUBLIC OF SOUTH AFRICA

# MAGTIGINGSBRIEF LETTERS OF AUTHORITY

Ingevolge Artikel 6(1) van die Wet op Beheer oor Trustgoed, 1988 (Wet 57 van 1988)  
In terms of Section 6(1) of the Trust Property Control Act, 1988 (Act 57 of 1988)

No: IT 13693/07 (T)

Hiernaas word gesertifiseer dat /

This is to certify that

.....  
PUSHPAVENI UGESHNI GOVENDER - 750424 0157 08 5

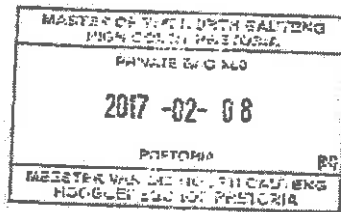
TREVOR WILLIAM SCOTT - 781231 5130 08 9  
.....  
.....  
.....  
.....

gemagtig word om op te tree as trustee(s) van die /  
is/are hereby authorized to act as trustee(s) of the  
OPTIMUM MINE REHABILITATION TRUST

GEGEE onder my hand te ..... op hede die ..... dag van .....  
GIVEN under my hand at Pretoria ..... this ..... day of ..... year .....

  
Signature

ASSISTENT MEESTER  
ASSISTANT MASTER





661

'C'

"PG6"

**RESOLUTION OF THE TRUSTEES OF THE OPTIMUM MINE REHABILITATION TRUST**

**MASTER'S REFERENCE: IT13693/07**

**DATE: 18 OCTOBER 2017**

**IT IS HEREBY RESOLVED THAT:**

1. Ms. Pushpaveni Ugeshni Govender, in her capacity as a trustee is hereby authorized to sign all affidavits and other documents as may be necessary in connection with and relating to such litigation proceedings commenced on behalf of the Optimum Mine Rehabilitation Trust or to oppose any litigation proceedings launched against Optimum Mine Rehabilitation Trust.

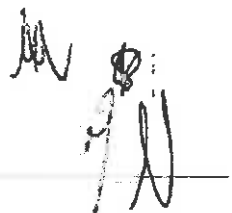
It is agreed that the contents hereof are not precluded by any provision of the Deed of Trust.

**THIS SIGNED AND RESOLVED AT SANDTON ON 18 OCTOBER 2017.**



**PUSHPAVENI UGESHNI GOVENDER**

**TRUSTEE**



662

'D' "PG 1"

RESOLUTION OF THE TRUSTEES OF THE KOORNFONTEIN REHABILITATION TRUST

MASTER'S REFERENCE: IT7563/07

DATE: 18 OCTOBER 2017

IT IS HEREBY RESOLVED THAT:

1. Ms. Pushpaveni Ugeshni Govender, in her capacity as a trustee is hereby authorized to sign all affidavits and other documents as may be necessary in connection with and relating to such litigation proceedings commenced on behalf of the Koornfontein Rehabilitation Trust or to oppose any litigation proceedings launched against Koornfontein Rehabilitation Trust.

It is agreed that the contents hereof are not precluded by any provision of the Deed of Trust.

THIS SIGNED AND RESOLVED AT SANDTON ON 18 OCTOBER 2017.

  
\_\_\_\_\_  
PUSHPAVENI UGESHNI GOVENDER  
TRUSTEE



'E' 222 "SFO"

Tracy Erasmus

**From:** Soretha Venter <soretha.venter@outa.co.za>  
**Sent:** 25 August 2017 20:39  
**To:** ronicar@oakbay.co.za; ugeshnin@sahara.co.za; althafe@spoonet.co.za; trevor@bearingway.co.za  
**Cc:** ben.theron@outa.co.za  
**Subject:** IMPLICATIONS FOR REHABILITATION FUNDS IN CONNECTION WITH MINES RELATED TO OPTIMUM COAL MINE HOLDING (PTY) LTD AND TEGETA EXPLORATION AND RESOURCES (PTY) LTD  
**Attachments:** Annexures A to C2.pdf; Letter to Trustees.pdf

Dear Sir,

**CLOSING OF GUPTA OWNED BANK ACCOUNTS BY BANK OF BARODA AND IMPLICATIONS FOR REHABILITATION FUNDS IN CONNECTION WITH MINES RELATED TO OPTIMUM COAL MINE HOLDING (PTY) LTD AND TEGETA EXPLORATION AND RESOURCES (PTY) LTD**

**OUR REF: SP/ZUMA01/TEGETA**  
**OUR REF: UNKNOWN**

1. Please find attached correspondence for your urgent attention.
2. For any media queries kindly contact Mr Ben Theron, OUTA Chief Operating Officer, on 082 941 8444.

Regards,



**Soretha Venter**  
 Senior Legal Advisor  
[soretha.venter@outa.co.za](mailto:soretha.venter@outa.co.za)  
 Office: 0871700639  
 Cell: 0718691959  
 OUTA - Organisation Undoing Tax Abuse  
[www.outa.co.za](http://www.outa.co.za)

223



Hillev Building, 318 Oak Avenue, Randburg  
PO Box 2627, Northridge, 2162  
+27 (87) 170 0639 • info@outa.co.za  
www.outa.co.za

25 August 2017

To: The Trustees of the Optimum Mine Rehabilitation Trust  
(Registration No IT/13693/07)  
The Trustees of the Koomfontein Mine Rehabilitation Trust  
(No IT/7563/07.)  
Ronica Ragavan  
Acting CEO Oakbay Investments (Pty) Ltd

Per: E-mail

Dear Sirs / Madam

**CLOSING OF GUPTA OWNED BANK ACCOUNTS BY BANK OF BARODA AND IMPLICATIONS FOR REHABILITATION FUNDS IN CONNECTION WITH MINES RELATED TO OPTIMUM COAL MINE HOLDING (PTY) LTD AND TEGETA EXPLORATION AND RESOURCES (PTY) LTD**

OUR REF: SP/ZUMA01/TEGETA  
YOUR REF: UNKNOWN

**INTRODUCTION**

1. OUTA is a non-profit civil action organisation, funded by tens of thousands of individuals and businesses, whose main aim is to hold government accountable for the abuse of power, corruption and maladministration. In doing our work, we ensure that more tax revenues are made available and protected to benefit of all in South Africa, especially the poor and vulnerable.
2. We write in connection with the rehabilitation funds held for the rehabilitation of coal mines in which Tegeta Exploration and Resources (Pty) Ltd ('Tegeta') have an interest. The mines are coal mines in Mpumalanga.
3. According to recent reports, the Gupta controlled Oakbay Investment (Pty) Ltd has concluded a sale agreement of Tegeta and will be disposing of its interests therein to Swiss based company, Charles King SA. Tegeta recently took control of Optimum Holdings (Pty) Ltd in April 2016 following a business rescue process.
4. We wish to raise concerns in respect of the rehabilitation funds in light thereof and in light of further recent reports regarding the closure of Gupta linked bank accounts by the Bank of Baroda. As set out below, we request information and prompt assurances in connection with the financial provision for rehabilitation funds.

ORGANISATION UNDOING TAX ABUSE (OUTA)  
Co Reg: 2012/084215/08 NPO #: 124381NPO  
DIRECTORS: Wayne L Duvenage (Chairman), Robert N Hutchinson, Leopold JJ Pauwen,  
NON EXECUTIVE DIRECTORS: Phumlani M Majazi, Ms Ferriat Adam

# OUTA

- 5. As you are aware, all mining rights holders are obliged to comply with the requirements of the Mineral and Petroleum Resources Development Act 28 of 2002 ('the MPRDA') and the National Environmental Management Act 107 of 1998 as amended ('NEMA'). A critical provision is what is now contained in section 24P of NEMA the effect of which is that a mining rights holder must comply with the prescribed financial provision for the rehabilitation, closure and ongoing post decommissioning management of negative environmental impacts. Furthermore, holders must annually assess their liability in a prescribed manner and must increase their financial provision to the satisfaction of the Minister and also submit an audit report to the Minister on the adequacy of the financial provision from an independent auditor. It is furthermore a material obligation of any rights holder to ensure, on an ongoing basis, that there is adequate financial provision for rehabilitation in line with any approved environmental management programme and mining right.
- 6. These protections are vital to ensure that at the time of mine closure, there is adequate provision for environmental rehabilitation. Environmental rehabilitation is critical to protect the right of all South Africans to an environment that is not harmful to their health and well-being and to ensure that the environment is protected for the benefit of present and future generations. (Section 24 of the Constitution)
- 7. These provisions are also critical to ensure that the costs of remedying pollution, environmental degradation and consequent adverse health effects and of preventing, controlling or minimising further pollution, environmental damage or adverse health effects must be paid for by those responsible for harming the environment as contemplated by section 2(4)(p) of NEMA.
- 8. Ultimately, if the financial provision for environmental protection is not properly and duly secured, there is a real and material risk that the need to effect and pay for remediation rests with the State and the tax-payer. (Section 28(7) and (8) of NEMA and section 45(2) of the MPRDA) The financial provision for rehabilitation is designed to ensure that the fiscus and the tax payer do not carry these costs and the burden of rehabilitation does not fall on the State.

## RECENT EVENTS

- 9. According to the Public Protector's State of Capture report dated 14 October 2016 (report 6 of 2016/2017), there are at least two rehabilitation funds relevant to the Tegeta mines, these being:
  - 9.1 Optimum Mine Rehabilitation Fund
  - 9.2 Koomfontein Rehabilitation Fund

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ORGANISATION UNDOING TAX ABUSE (OUTA)  
 Co Reg: 2012/064213/08 NPO #: 124381NPO  
 DIRECTORS: Wayne L Duvenage (Chairman), Robert N Hutchinson, Leopold JJ Pauwen,  
 NON EXECUTIVE DIRECTORS: Phumlani M Majod, Ms Ferriat Adam

# OUTA

10. According to the report (paragraph 5.344):
  - 10.1 As at 23 May 2016 the value of the Koorfontein Rehabilitation Fund was apparently R280 million.
  - 10.2 As at 21 June 2016, the value of the Optimum Mine Rehabilitation Fund was R1. 469 916. 933.63.
11. The report states that as part of the Tegeta take-over these funds were transferred to the Bank of Baroda on 23 May 2016 and 21 June 2016 respectively.
12. OUTA understands that these funds are held by two Trusts, known as the Optimum Mine Rehabilitation Trust (Registration No IT/13693/07) and the Koorfontein Mine Rehabilitation Trust (Registration No IT/7563/07).
13. OUTA has to hand a letter dated 5 October 2016 from the Bank of Baroda addressed to 'whom it may concern' certifying that Optimum Mine Rehabilitation Trust (Registration No IT/13693/07) is maintaining four accounts with them which are operative and active. The total outstanding balance on these accounts as at 5 October 2016 was R1 470 338 316,18.
14. There have been recent media reports relating to the imminent closure by the Bank of Baroda of accounts of companies controlled by the Gupta family. The Bank of Baroda reportedly took on the Gupta accounts after South Africa's banks closed their accounts in 2016. According to the reports, the Baroda accounts will be closed by the end of September 2017. It is also reported that the Gupta accounts will be moved to an undisclosed 'new bank'.
15. On the information to hand, OUTA is concerned that the Baroda accounts for the two Trusts will be amongst the accounts that Baroda Bank will be closing and that the monies apparently held by Baroda for the Trusts as statutorily required financial provision for rehabilitation will be in jeopardy as a result.
16. This concern is exacerbated by the recently publicised sale by Oakbay Investments (Pty) Ltd of its Tegeta business comprising Optimum, Koorfontein and the Optimum Coal Terminal to Charles King SA. According to the Oakbay media release, Charles King SA is a Special Purpose Vehicle acquired by a Mr Zarooni to facilitate further investments like the Tegeta acquisition. It apparently has no financial track record.
17. Against the background of the likely imminent closure of the Baroda accounts in September 2017 and the intended sale of Tegeta to a SPV with no financial record, OUTA is concerned about whether the trustees of the Trusts have, in the exercise of their fiduciary duties, made satisfactory arrangements to secure the trust funds as these events unfold. OUTA is further concerned about whether these funds are and will be in tact in circumstances where according to OUTA's investigations, the Guptas

**ORGANISATION UNDOING TAX ABUSE (OUTA)**

Co Reg: 2012/084213/08 NPO #: 124981NPO  
 DIRECTORS: Wayne L Duvenage (Chairman), Robert N Hutchinson, Leopold J J Pauwan,  
 NON EXECUTIVE DIRECTORS: Phumani M Majazi, Ms Ferrial Adam





# OUTA

are in debt to Baroda in material amounts, currently estimated at approximately R811 million.

## THE TRUSTEE'S FIDUCIARY DUTIES AND OUTA'S REQUESTS

- 18. The Trustees are, of course, vested with onerous fiduciary duties in respect of the property of the Trust which includes the trust funds which are held in the public interest and for purposes of statutory compliance. The trustees' responsibilities are ultimately directed at ensuring the protection of vital constitutional rights and the performance of statutory obligations. Failure to adhere to these duties attracts legal sanction.
- 19. In view of OUTA's role as a civil society organisation seeking to protect the public interest as set out above, OUTA requests various information from you for purposes of assuring OUTA and the people it serves that the financial provision for rehabilitation will not be compromised by recent events.
- 20. OUTA hereby requests the following information from the addressees in their capacity as Trustees of the Trusts and the Oakbay CEO:
  - 20.1 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.
  - 20.2 Confirmation of the identity and current contact details of the relevant Trustees and auditors.
  - 20.3 Confirmation that the Koomfontein and the Optimum Mine Rehabilitation Trust Funds and any other relevant Trust funds remain fully in tact;
  - 20.4 Confirmation that no monies have been transferred out of the Trusts' accounts from the time that they were transferred to Baroda until the present time.
  - 20.5 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.
  - 20.6 Precisely what amounts are currently in each Trusts' account/s.
  - 20.7 What arrangements have the Trustees put in place to ensure that the funds are not placed in jeopardy by and the rights holder will remain compliant with the relevant legislation in light of:
    - 20.7.1 the imminent closure of the Baroda accounts;
    - 20.7.2 the imminent sale of Tegeta.

ORGANISATION UNDOING TAX ABUSE (OUTA)  
 Co Reg: 201208421308 NPO #: 124381NPO  
 DIRECTORS: Wayne L Duvenage (Chairman), Robert N Hutchinson, Leopold JJ Pauwen,  
 NON EXECUTIVE DIRECTORS: Phumlani M Majod, Ms Ferral Adam

# OUTA

20.8 Without derogation of the generality of the above request, please advise:

20.8.1 Whether or not each of the account/s will continue to be held at Baroda Bank.

20.8.2 Whether the financial provision for rehabilitation will be retained under the current trust arrangements, and if so, at what bank or banks will the Trusts' accounts be held and under what arrangements.

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

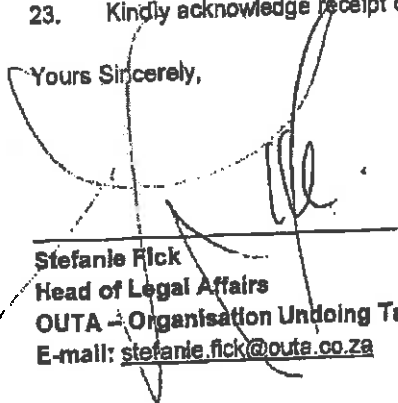
20.9 Has any Tegeta related entity lodged a request for consent in terms of section 11 of the MPRDA to approve the transfer or similar transaction in respect of the sale of Tegeta to Charles King SA? If so, kindly supply all relevant information.

21. Kindly contact our legal advisor Ms. S Venter at [soretha.venter@outa.co.za](mailto:soretha.venter@outa.co.za) in the event of any queries.

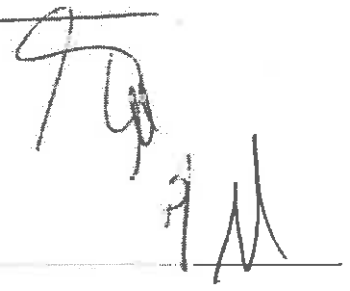
22. We trust that you find the above in order and look forward to receiving your response on or before close of business on 1 September 2017.

23. Kindly acknowledge receipt of this letter.

Yours Sincerely,



Stefanie Fick  
 Head of Legal Affairs  
 OUTA – Organisation Undoing Tax Abuse  
 E-mail: [stefanie.fick@outa.co.za](mailto:stefanie.fick@outa.co.za)



'F' 300  
"SF20"

Tracy Erasmus

**From:** Soretha Venter <soretha.venter@outa.co.za>  
**Sent:** 12 September 2017 11:06  
**To:** ugeshnin@sahara.co.za; althafe@spoonet.co.za; trevor@bearingway.co.za;  
althafe@spoonet.co.za; althaf@telkomsa.net; althafe@ce-commerce.biz;  
althaf@commerce.co.za; aemmamally@gmail.com  
**Cc:** ben.theron@outa.co.za; ronicar@oakbay.co.za  
**Subject:** RE: IMPLICATIONS FOR REHABILITATION FUNDS IN CONNECTION WITH MINES  
RELATED TO OPTIMUM COAL MINE HOLDING (PTY) LTD AND TEGETA  
EXPLORATION AND RESOURCES (PTY) LTD  
**Attachments:** 12\_09\_2017 2nd Letter to Trustees.pdf  
**Importance:** High

Dear Sirs,

**CLOSING OF GUPTA OWNED BANK ACCOUNTS BY BANK OF BARODA AND IMPLICATIONS FOR REHABILITATION  
FUNDS IN CONNECTION WITH MINES RELATED TO OPTIMUM COAL MINE HOLDING (PTY) LTD AND TEGETA  
EXPLORATION AND RESOURCES (PTY) LTD  
OUR REF: SP/ZUMA01/TEGETA  
YOUR REF: UNKNOWN**

1. Please find attached correspondence for your urgent attention.
2. For any media queries kindly contact Mr Ben Theron, OUTA Chief Operating Officer, on 082 941 8444.

Regards,



**Soretha Venter**  
Legal Manager  
[soretha.venter@outa.co.za](mailto:soretha.venter@outa.co.za)  
Office: 0871700639  
Cell: 0718891959  
OUTA - Organisation Undoing Tax Abuse  
[www.outa.co.za](http://www.outa.co.za)

**From:** Soretha Venter [mailto:soretha.venter@outa.co.za]  
**Sent:** Friday, 25 August 2017 8:39 PM  
**To:** 'ronicar@oakbay.co.za' <ronicar@oakbay.co.za>; 'ugeshnin@sahara.co.za' <ugeshnin@sahara.co.za>;  
'althafe@spoonet.co.za' <althafe@spoonet.co.za>; 'trevor@bearingway.co.za' <trevor@bearingway.co.za>  
**Cc:** ben.theron@outa.co.za  
**Subject:** IMPLICATIONS FOR REHABILITATION FUNDS IN CONNECTION WITH MINES RELATED TO OPTIMUM COAL  
MINE HOLDING (PTY) LTD AND TEGETA EXPLORATION AND RESOURCES (PTY) LTD

Dear Sir,

**CLOSING OF GUPTA OWNED BANK ACCOUNTS BY BANK OF BARODA AND IMPLICATIONS FOR REHABILITATION  
FUNDS IN CONNECTION WITH MINES RELATED TO OPTIMUM COAL MINE HOLDING (PTY) LTD AND TEGETA  
EXPLORATION AND RESOURCES (PTY) LTD  
OUR REF: SP/ZUMA01/TEGETA  
YOUR REF: UNKNOWN**

1. Please find attached correspondence for your urgent attention.

Handwritten signature and initials.

2. For any media queries kindly contact Mr Ben Theron, OUTA Chief Operating Officer, on 082 941 8444.

301

Regards,

**OUTA**



**Soretha Venter**  
Senior Legal Advisor  
[soretha.venter@outa.co.za](mailto:soretha.venter@outa.co.za)  
Office: 0871700639  
Cell: 0718691959  
OUTA - Organisation Undoing Tax Abuse  
[www.outa.co.za](http://www.outa.co.za)

*[Handwritten signature]*

*[Handwritten signature]*

12 September 2017

To: The Trustees of the Optimum Mine Rehabilitation Trust  
(Registration No IT/13693/07)  
The Trustees of the Koorfontein Mine Rehabilitation Trust  
(Registration No IT/7563/07)

Per: E-mail ([ugeshtnin@sahara.co.za](mailto:ugeshtnin@sahara.co.za))  
([althafe@spoomet.co.za](mailto:althafe@spoomet.co.za))  
([althaf@telkomsa.net](mailto:althaf@telkomsa.net))  
([althafe@ce-commerce.biz](mailto:althafe@ce-commerce.biz))  
([althaf@commerce.co.za](mailto:althaf@commerce.co.za))  
([aemmamally@gmail.com](mailto:aemmamally@gmail.com))  
([trevor@bearingway.co.za](mailto:trevor@bearingway.co.za))

Dear Sirs / Madam

**CLOSING OF GUPTA OWNED BANK ACCOUNTS BY BANK OF BARODA AND  
IMPLICATIONS FOR REHABILITATION FUNDS IN CONNECTION WITH MINES  
RELATED TO OPTIMUM COAL MINE HOLDING (PTY) LTD AND TEGETA  
EXPLORATION AND RESOURCES (PTY) LTD**

**OUR REF: SP/ZUMA01/TEGETA  
YOUR REF: UNKNOWN**

1. Our letter dated 25 August 2017 refers.
2. A copy of the letter is attached for your ease of reference. We have to date received no response from you nor any acknowledgement of receipt.
3. We did receive a letter from Ms Ronica Ragavan, the acting CEO of Oakbay Investments (Pty) Ltd on 1 September 2017, indicating in effect that she did not intend to engage with us. However, as far as we are aware, Ms Ragavan is not a trustee. We addressed you in your capacity as trustees and request a response from you as such.
4. As you know, in our letter of 25 August 2017, we wrote in connection with the rehabilitation funds held for the rehabilitation of coal mines in which Tegeta Exploration and Resources (Pty) Ltd has an interest. The mines are coal mines located in Mpumalanga.

ORGANISATION UNDOING TAX ABUSE (OUTA)

Co Reg: 2012/064213/08 NPO # 124351NPO

DIRECTORS: Wayne L Duvenage (Chairman), Robert N Hutchinson, Leopold J J Pauwen,

NON EXECUTIVE DIRECTORS: Phumlani M Majola, Ms Ferrial Adam

# OUTA

5. More particularly, we wrote in connection with the funds held in the Optimum Mine Rehabilitation Trust<sup>1</sup> and the Koomfontein Mine Rehabilitation Trust<sup>2</sup> (*the Trusts*). As you must be aware, OUTA has a direct interest in the safety and integrity of the Trusts' property, as contemplated by section 32 of the National Environmental Management Act 107 of 1998.
6. Since we sent our letter, we have become apprised of information supplied to the Pretoria High Court in interdict proceedings instituted by *inter alia* the Trusts against the Bank of Baroda ("BOB"). The proceedings proceeded on Friday 8 September 2017 (*the BOB proceedings*). In the BOB proceedings, it was confirmed that the BOB will, unless interdicted, close the Trusts' accounts at the end of September 2017. We understand that the Court will deliver its judgment in the BOB proceedings (in which interim relief was sought)<sup>3</sup> on Thursday 14 September 2017. If no interim interdict is granted the accounts will be closed very shortly and on the applicants' version, irreparable harm will be suffered in respect of the Trusts.
7. Other information has come to light as a result of the BOB proceedings. This includes, *i.e.*:
  - 7.1. Confirmation that the Trusts' funds are currently being used for concurrent rehabilitation purposes.
  - 7.2. Evidence that the Koomfontein Trust's funds were used in 2016 to secure (and possibly) pay loans of Koomfontein Mines (Pty) Ltd.
8. This is unlawful and demonstrates that the Trusts' funds are not only already compromised but such funds as remain are clearly at risk.
9. We now request an urgent response to our letter of 25 August 2017.
10. In addition to the queries in that letter:
  - 10.1. 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.
  - 10.2. 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.

<sup>1</sup> Registration No IT/13693/07

<sup>2</sup> Registration No IT/7563/07

<sup>3</sup> Indeed, we understand they were cast as 'interim' interim proceedings.

**OUTA**

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- 10.3. 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.
- 10.4. Kindly advise precisely what amounts of Trust funds have been and are being used for purposes of concurrent rehabilitation.
- 10.5. 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.
- 10.6. Provide us with a complete breakdown of the funds withdrawn and the type of rehabilitation it was utilised for.
11. Kindly contact our legal advisor Ms. S Venter at [soretha.venter@outa.co.za](mailto:soretha.venter@outa.co.za) in the event of any queries.
12. We trust that you find the above in order and look forward to receiving your response on or before 10:00am on Thursday, 14 September 2017.
13. Should you fail to respond and to provide the requested information and assurances, OUTA may have no choice but to approach a court for relief to protect the Trust funds.
14. Kindly acknowledge receipt of this letter.

Yours Sincerely,



---

**Stefanie Fick**  
Head of Legal Affairs  
OUTA – Organisation Undoing Tax Abuse  
E-mail: [stefanie.fick@outa.co.za](mailto:stefanie.fick@outa.co.za)

---

ORGANISATION UNDOING TAX ABUSE (OUTA)

Co Reg: 2012/084213/08 NPO #: 124581NPO

DIRECTORS: Wayne L Duvenage (Chairman), Robert N Hutchinson, Leopold J J Pauwen,

NON EXECUTIVE DIRECTORS: Phumlani M Majoz, Ms Ferriai Adam



'G' 245

**OAKBAY**  
INVESTMENTS (PTY) LTD.

Date: 31/08/2017

Stefanie Fick  
Head of Legal Affairs  
OUTA- Organization Undoing Tax Abuse

Per Email

Dear Sir

**Re: Closing of Gupta Bank Accounts by Bank of Baroda and Implications for  
Rehabilitation Funds in connection with Mines Related to Optimum Coal Mine  
(Pty) Ltd**

We refer to your letter dated 25/08/2017

We fail to see on what basis you are entitled to address the long list of interrogatories to us and we accordingly decline to engage with you.

Yours Faithfully

  
Ronick Ragavan  
Acting Group CEO

DIRECTORS : A CHAWLA R RAGAVAN

144 Katherine Street, Crayston Ridge Office Park  
Block A Lower Ground Floor, Johannesburg, South Africa  
Tel.: +27 11 262 3870 www.oakbay.co.za







From: Trevor Scott [mailto:trevor@bearingway.co.za]

Sent: Friday, 15 September 2017 5:33 AM

To: soretha.venter@outa.co.za

Subject: Fwd: IMPLICATIONS FOR REHABILITATION FUNDS IN CONNECTION WITH MINES RELATED TO OPTIMUM COAL MINE HOLDING (PTY) LTD AND TEGETA EXPLORATION AND RESOURCES (PTY) LTD

Sent from my iPhone

Begin forwarded message:

From: Trevor Scott <trevor@bearingway.co.za>

Date: 15 September 2017 at 1:38:28 AM SAST

To: Soretha Venter <soretha.venter@outa.co.za>

Subject: Fwd: RE: IMPLICATIONS FOR REHABILITATION FUNDS IN CONNECTION WITH MINES RELATED TO OPTIMUM COAL MINE HOLDING (PTY) LTD AND TEGETA EXPLORATION AND RESOURCES (PTY) LTD

----- Forwarded Message -----

From: Trevor Scott <trevor@bearingway.co.za>

To: Soretha Venter <soretha.venter@outa.co.za>

Sent: Fri, 15 Sep 2017 00:15:08 +0200 (SAST)

Subject: RE: IMPLICATIONS FOR REHABILITATION FUNDS IN CONNECTION WITH MINES RELATED TO OPTIMUM COAL MINE HOLDING (PTY) LTD AND TEGETA EXPLORATION AND RESOURCES (PTY) LTD

Dear Ms. Venter,

Your letter of 12 September 2017 refers.

As indicated in my emailed response (of 1 September 2017; which I have attached to this email) to your previous correspondence of 25 August 2017, I am no longer a trustee of the Optimum Mine Rehabilitation Trust and the Koornfontein Rehabilitation Trust. Accordingly, the remaining trustee, Ms Naidu, would be better placed to provide you with information as to the status of the trust.

Regards,

T. Scott

From: Trevor Scott <trevor@bearingway.co.za>  
To: Soretha Venter <soretha.venter@outa.co.za>  
Sent: Fri, 01 Sep 2017 09:30:02 +0200 (SAST)  
Subject: Re: IMPLICATIONS FOR REHABILITATION FUNDS IN CONNECTION WITH MINES RELATED TO OPTIMUM COAL MINE HOLDING (PTY) LTD AND TEGETA EXPLORATION AND RESOURCES (PTY) LTD

Dear Ms Venter,

Please note that I have resigned as a trustee of the Optimum Mine Rehabilitation Trust and the Koorfontein Rehabilitation Trust. Accordingly, I'm not in a position to respond to your queries; which should rather be directed to the remaining trustee, Ms Naidu and the group CEO, Ms Ragavan. I have passed your correspondence of 25 October 2017 onto them and I did recommend that they respond to you.

Regards,  
T. Scott

----- Original Message -----

From: Soretha Venter <soretha.venter@outa.co.za>  
To: ronicar@oakbay.co.za, ugheshnin@sahara.co.za, althafe@spoonet.co.za, trevor@bearingway.co.za  
Cc: ben theron <ben.theron@outa.co.za>  
Sent: Fri, 25 Aug 2017 20:38:36 +0200 (SAST)  
Subject: IMPLICATIONS FOR REHABILITATION FUNDS IN CONNECTION WITH MINES RELATED TO OPTIMUM COAL MINE HOLDING (PTY) LTD AND TEGETA EXPLORATION AND RESOURCES (PTY) LTD

Dear Sir,

CLOSING OF GUPTA OWNED BANK ACCOUNTS BY BANK OF BARODA AND IMPLICATIONS FOR REHABILITATION FUNDS IN CONNECTION WITH MINES RELATED TO OPTIMUM COAL MINE HOLDING (PTY) LTD AND TEGETA EXPLORATION AND RESOURCES (PTY) LTD

OUR REF: SP/ZUMA01/TEGETA

YOUR REF: UNKNOWN

1.

Please find attached correspondence for your urgent attention.

2.

For any media queries kindly contact Mr Ben Theron, OUTA Chief Operating Officer, on 082 941 8444.

Regards,

<<http://www.outa.co.za/>>

<https://twitter.com/OUTASA> <http://www.oua.co.za/signs/spacer.gif>  
<https://www.facebook.com/outasa> <http://www.oua.co.za/signs/spacer.gif>

Soretha Venter

Senior Legal Advisor

<mailto:soretha.venter@oua.co.za> soretha.venter@oua.co.za

Office: 0871700639

Cell: 0718691959

OUTA - Organisation Undoing Tax Abuse

<http://www.oua.co.za/> [www.oua.co.za](http://www.oua.co.za)

7 N

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

**Case No. 65616/17**

In the matter between:

<b>ORGANISATION UNDOING TAX ABUSE</b>	<b>Applicant</b>
<b>and</b>	
<b>THE TRUSTEE(S) FOR THE TIME BEING OF THE OPTIMUM MINE REHABILITATION TRUST</b>	<b>First Respondent</b>
<b>THE TRUSTEE(S) FOR THE TIME BEING OF THE KOORNFONTEIN MINE REHABILITATION TRUST</b>	<b>Second Respondent</b>
<b>PUSHPAVENI GOVENDER</b>	<b>Third Respondent</b>
<b>TREVOR SCOTT</b>	<b>Fourth Respondent</b>
<b>OPTIMUM COAL MINE (PTY) LIMITED</b>	<b>Fifth Respondent</b>
<b>KOORNFONTEIN MINE (PTY) LIMITED</b>	<b>Sixth Respondent</b>
<b>BANK OF BARODA</b>	<b>Seventh Respondent</b>
<b>MINISTER OF MINERAL RESOURCES</b>	<b>Eighth Respondent</b>
<b>RONICA RAGAVAN</b>	<b>Ninth Respondent</b>
<b>THE MASTER OF THE HIGH COURT, PRETORIA</b>	<b>Tenth Respondent</b>

---

**FILING SHEET**

---

**HEREWITH FILED FOR PRESENTATION:**

1. The first to third and fifth to sixth respondents' replying affidavit in the Rule 30 Application.

**DATED AT SANDTON THIS 11<sup>TH</sup> DAY OF DECEMBER 2017.**



**VASCO DE OLIVEIRA INC.**

Attorneys for the First to Third, Fifth and Sixth Respondents

23C Sandton View Office Park

Conduit street

Lyme Park

Sandton

Tel: 011 326 2505

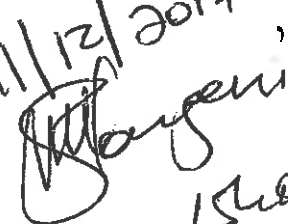
Fax: 086 650 5798

Email: [vasco@oliveira.co.za](mailto:vasco@oliveira.co.za)

Ref: V de Oliveira/M Govender

**TO: THE REGISTRAR OF THE COURT  
PRETORIA**

**AND TO: WERKSMANS ATTORNEYS**  
Attorneys for the Applicant  
155 – 5th Street,  
Sandown,  
Sandton  
2196  
Tel: 011 535 8106/8445  
Fax: 011 535 8545

11/12/2017  
  
15400

Ref: Mr B Hotz/Mr J Gobetz/ORG36432.2

**C/O BRAZINGTON &McCONNELL**

424 Hilda Street

2nd Floor, Hatfield Plaza, North Tower

Hatfield

Pretoria

Tel: (012) 430 4303

Email: [andrew@bsmlaw.co.za](mailto:andrew@bsmlaw.co.za)

Ref: Mr A McConnell

**Received a copy hereof on this**

**the 11<sup>th</sup> day of December 2017**

---

**For: Attorneys for the Applicant**

**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) LIMITED** **Fifth Respondent**

**KOORNFONTEIN MINE (PTY) LIMITED** **Sixth Respondent**

**BANK OF BARODA** **Seventh Respondent**

**MINISTER OF MINERAL RESOURCES** **Eighth Respondent**

**RONICA RAGAVAN** **Ninth Respondent**

**THE MASTER OF THE HIGH COURT, PRETORIA** **Tenth Respondent**

**REPLYING AFFIDAVIT FILED ON BEHALF OF THE FIRST TO THIRD AND FIFTH  
TO SIXTH RESPONDENTS IN THE RULE 30 APPLICATION**

I, the undersigned,

**PUSHPAVENI UGESHNI GOVENDER**

do hereby make oath and state as follows:



1. I am an adult female cited in my personal capacity as the third respondent and having my place of business at no. 144, Katherine Street, Sandown, Sandton.
2. The facts herein contained are within my personal knowledge, save where otherwise stated or the contrary appears from the context, and are to the best of my knowledge and belief both true and correct.
3. I am the sole trustee of both the Optimum Mine Rehabilitation Trust ("*the Optimum Trust*") and the Koornfontein Rehabilitation Trust ("*the Koornfontein Trust*"), cited as the first and second respondents in the main application. I am duly authorised to depose to this affidavit on behalf of the first and second respondents.
4. I have read the answering affidavit deposed to by Stefanie Fick ("*Fick*") filed on behalf of the applicant in the main application (hereinafter simply referred to as "*the applicant*" for ease of reference) and respond thereto to the extent required.
5. I will not deal with each and every allegation made in the applicant's answering affidavit for a large portion thereof is irrelevant, baldly stated, devoid of substance and unsubstantiated by supporting documents. Such matter falls to be struck out from the answering affidavit, alternatively disregarded or ignored. To the extent that I fail to deal with any of the content in such affidavit, such

A handwritten signature in black ink, consisting of a large, stylized loop followed by a smaller, more complex scribble.



failure is not to be regarded or construed as a concession or admission as to the correctness or accuracy thereof. Such content is denied.

6. The high watermark of the applicant's case is that my decision to oppose the main application on behalf of the Trusts in circumstances where there was only one trustee for both trusts is allegedly invalid because the trusts were not quorate. The applicant also contends that my subsequent decision to appoint Vasco de Oliveira Incorporated ("*VDO Inc*") as the legal representatives of the Trusts is also invalid.
7. I must hasten to state that the applicant is deliberately conflating separate and distinct issues in order to cause confusion. I am advised that an issue whether an individual trustee may act on behalf of the trust is a separate and distinct issue from whether that trustee may or may not appoint legal representatives to act on behalf of the trust. I am advised further that the type of authority contemplated by Uniform Rule 7 is the power which is given by a client to his or her attorney to authorise him or her to institute or defend legal proceedings on the client's behalf.
8. The rule is aimed at *institution or defending legal proceedings*, not the authority of the person who instructed the attorney to institute or defend legal proceedings. OUTA's Rule 7 notice constitutes an irregular step. Further legal argument will be presented at the hearing of this matter.

A handwritten signature in black ink, consisting of a large, stylized loop followed by a smaller, more complex scribble.

9. In any event, and following Scott's resignation on 31 August 2017, I was entitled to act as the only trustee pending the appointment of a new trustee. As appears from clause 6.2 of the trust deeds which are identical (see annexes "A" and "B" to the answering affidavit), the position of one trustee remaining in office is specifically provided for in the trust deeds.

10. Clause 6.2 provides that where one trustee remains, he or she must appoint a second trustee within three months. I have since done so with the issue of letters of authority awaited from the Master's Office. Properly construed, I submit that clause 6.2 makes provision for me to continue to act as the only trustee pending the appointment of a new trustee. My authority to represent the Trusts, which incidentally, do not enjoy a separate legal existence, remains unaffected by the fact that I am the only trustee. I therefore deny that the Trusts are not quorate or were not quorate at the time when the decision was taken to oppose the main application.

11. I now deal with the allegations made in the answering affidavit *ad seriatim*.

12. **Ad paragraph 1**

I admit that Fick is an adult female and that OUTA is the applicant in the main application. I have no knowledge of the position occupied by her which is not admitted and the applicant is put to the proof thereof.

A large, stylized handwritten signature, possibly 'P', is written in black ink. To its right, there are smaller, less distinct handwritten initials or a mark.

13. **Ad paragraphs 2 to 3**

I deny that the allegations made are true and correct and fall within Stephanie Fick's personal knowledge. It is denied that Fick is duly authorised to respond on behalf of the applicant.

14. **Ad paragraphs 4 and 5**

14.1. These allegations are denied.

14.2. I took a valid decision to appoint VDO Inc. as the legal representatives of the Trusts as empowered by clauses 12.5.3 of both the Optimum and the Koornfontein Trust deeds.

14.3. Clauses 12.5.3 of both trusts deeds provide that *"the management of the affairs and all the powers of the trust shall vest in the trustees and without derogating from the generality of the foregoing, the trustees shall have full legal power to institute any legal action including arbitration proceedings for the recovery of monies owing to the trust, or to assert or protect the rights of the trust and to prosecute, compromise, settle or withdraw any such action..."*

A handwritten signature consisting of a large, stylized loop followed by a smaller, more complex scribble.

14.4. Under circumstances where the other trustee viz. Scott had resigned, I was entitled to give instructions to attorneys to oppose the application. This is further consistent with clause 6.2.

15. **Ad paragraph 6**

Save to note the legal conclusion that Rule 7(1) creates a procedure for disputing the authority of a person acting on behalf of another person in litigation, these allegations are denied. I do not "*act on behalf of another person in litigation*" and therefore Rule 7 is not available to the applicant for purposes of disputing my authority. It is VDO Inc. which is *acting on behalf of* the Trusts and it follows that if anybody's *authority to act on behalf of the Trusts* is to be questioned, it would be the authority of VDO Inc. I was further entitled to instruct VDO Inc. to act on my behalf *qua* trustee in opposing the main application.

16. **Ad paragraphs 7 and 8**

Save to deny any suggestion that the Trusts are not quorate, I take note of these allegations.

17. **Ad paragraphs 9, 10 and 11**

A handwritten signature in black ink, consisting of a large, stylized loop followed by a smaller, more complex mark.

- 17.1. Save for noting the legal submissions made, these allegations are denied. Having filed a notice of intention to oppose on 22 September 2017 and following counsel having attended Court on my behalf of Tuesday 26 September 2017 already, it would have been obvious to the applicant from that date already that I was intent on opposing the application.
- 17.2. This is further evidenced from the fact that an agreement was specifically reached at the time regularizing the further conduct of the main application. The applicant could not have been under any illusion that I was intent on opposing the main application on behalf of the Trusts.
- 17.3. Any notice contemplated by Rule 7(1) ought in the circumstances to have been delivered within ten days from 22 September 2017 or 26 September 2017 by the latest.
- 17.4. To the extent that the applicant now seeks an indulgence from this Court for not having delivered the notice in a timely manner, it was incumbent upon the applicant to first seek this Court's leave through a properly motivated condonation application. Only thereafter, and on the assumption that condonation would have been granted, would the delivery of a notice in terms of Rule 7(1) have been competent.

A handwritten signature in black ink, consisting of a large, stylized loop followed by a smaller, more complex scribble.

**18. Ad paragraph 12**

These allegations are denied. The allegations made about Ragavan at paragraph 154.11 of the founding affidavit in the main application have been answered in the mining respondent's response to the supplementary founding affidavit in the main application (see paragraph 121). Ragavan performs administrative tasks in relation to both trusts from time to time subject to my control and supervision. There is nothing untoward about this.

**19. Ad paragraph 13**

These allegations are only admitted to the extent that Fick has correctly recorded the salient parts of the correspondence exchanged. Save as aforesaid they are denied. I have already indicated that Ragavan has performed administrative duties in relation to both trusts from time to time subject to my control and supervision.

**20. Ad paragraph 14**

Save to state that I was under no obligation to furnish the applicant with copies of the trust deeds, I deny the allegations contained in this paragraph.

**21. Ad paragraphs 15 and 16**

A handwritten signature consisting of a large, stylized loop followed by a smaller, more complex mark.

Save for admitting that Scott resigned with immediate effect on 31 August 2017, these allegations are denied.

**22. Ad paragraph 17**

These allegations are denied. I confirm that the applicant is incorrect and had no just cause for raising the dispute when it did. I have already dealt with the rest of the allegations made.

**23. Ad paragraph 18**

These allegations are denied. There is no prima facie case of unlawful conduct against me personally or as a trustee of the Trusts.

**24. Ad paragraph 19**

Save for admitting that a party wishing to dispute the authority of a person in terms of Rule 7 must do so within 10 days of knowing that the *attorney* is so acting, these allegations are denied. The applicant has known that VDO Inc is acting on behalf of the trusts since 22 September 2017 and only served a Rule 7 notice on 31 October 2017.

**25. Ad paragraphs 20 and 21**

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These allegations are noted. I reiterate that I have no personal interest in the main application.

**26. Ad paragraph 22**

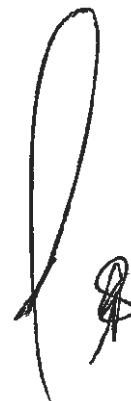
26.1. These allegations are denied. I have in any event already addressed them elsewhere in this affidavit. The main application was launched on 21 September 2017 and Scott, resigned on 31 August 2017.

26.2. Clauses 6.2 of both the Optimum and Koornfontein Trust deeds provide that *"if only one trustee remains, he or she must appoint a second trustee within three months of the vacancy/ies occurring"*. I am advised that a resignation by one of the trustees does not take away my responsibilities and duties as a trustee and does not render my position inquorate. I was therefore entitled to oppose the main application even if the other trustee has resigned.

**27. Ad paragraphs 23 and 24**

Not having filed the Rule 7 notice in a timely manner, the applicant was obliged to withdraw same. Save as aforesaid these allegations are denied.

**28. Ad paragraph 25**

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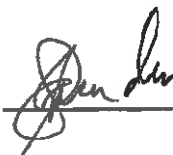


I deny the allegations in paragraphs 25.2 and 25.3. Save as aforesaid these allegations are admitted.

29. Ad paragraph 26

These allegations are denied.

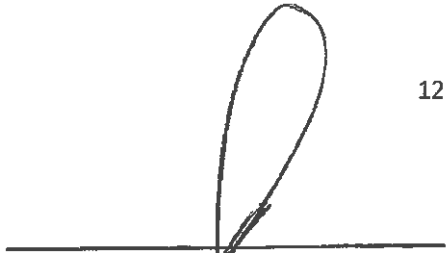
30. In conclusion, I pray for an order in terms of the notice of motion.



DEPONENT

THUS SIGNED AND SWORN TO at Sandton on this 11<sup>th</sup> day of December 2017 the deponent having acknowledged that the deponent knows and understands the contents of this affidavit, that the deponent has no objection to taking the prescribed oath, that the oath which the deponent has taken in respect thereof is binding on the deponent's conscience, and that the contents of this affidavit are both true and correct.



A large, stylized handwritten signature in black ink, consisting of a large loop at the top and a vertical stroke extending downwards.

**COMMISSIONER OF OATHS**

**ABRIE DU PLESSIS  
COMMISSIONER OF OATHS  
X OFFICIO PRACTICING ATTORNEY R.S.A.  
91 4 FLOOR, 209 SMIT STREET  
BRANDFONTEIN JHB 2001  
TEL. (011) 400-5171**

A smaller handwritten signature in black ink, similar in style to the one above, with a large loop and a vertical stroke.

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NUMBER: 14775 /2018

In the ex parte application of:

**THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS**

Applicant

in re:

The positive balance and any interest accrued in all accounts held by the Bank of Baroda Bank (currently under "freeze") in respect of the

**A Optimum Mine Rehabilitation Trust:**

- |   |                         |                     |
|---|-------------------------|---------------------|
| 1 | Current account:        | 920 202 000 00 524  |
| 2 | Fixed deposit accounts: | 920 203 000 00 653; |
|   |                         | 920 203 000 00 654; |
|   |                         | 920 203 000 00 654; |
|   |                         | 920 203 000 00 655  |

**B Koornfontein Mine Rehabilitation Trust:**

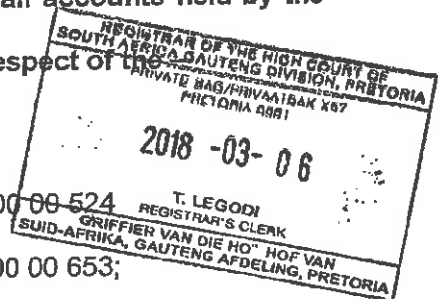
- |   |                        |                    |
|---|------------------------|--------------------|
| 1 | Current account:       | 920 202 000 00 519 |
| 2 | Fixed deposit account: | 920 203 000 00 649 |

IN THE APPLICATION FOR A PRESERVATION ORDER IN TERMS OF S 38(1)  
OF THE PREVENTION OF ORGANISED CRIME ACT, 121 OF 1998

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INDEX

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4	Founding affidavit: MOTLALEKHOTSO KNORX MOLELLE	16 – 70
5	Annexure MKM 1	71 – 80
5	Annexure MKM 2	81
6	Confirmatory affidavit: JOHANN PHILLIP WILLEMSE	82 – 84

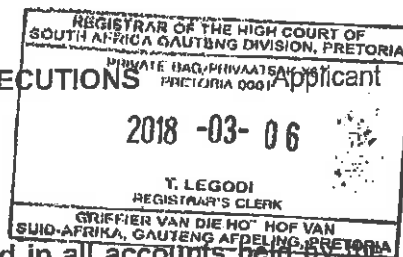
IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NUMBER: 14775 /2018

In the ex parte application of:

THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS



In re:

The positive balance and any interest accrued in all accounts held by

Bank of Baroda Bank (currently under 'freeze') in respect of the –

A Optimum Mine Rehabilitation Trust:

- 1 Current account: 920 202 000 00 524
- 2 Fixed deposit accounts: 920 203 000 00 653; 920 203 000 00 654;  
920 203 000 00 654; 920 203 000 00 655

B Koorfontein Mine Rehabilitation Trust:

- 1 Current account: 920 202 000 00 519
- 2 Fixed deposit account: 920 203 000 00 649

IN THE APPLICATION FOR A PRESERVATION ORDER IN TERMS OF S 38(1) OF THE PREVENTION OF ORGANISED CRIME ACT, 121 OF 1998

NOTICE OF MOTION

PLEASE TAKE NOTICE that an application, on an ex parte basis and to be heard in chambers, will be made on behalf of the applicant, on the 08 day of March 2018, on a time as soon as counsel may be heard, for:

1. The granting an order in terms of the annexed draft order, brought in terms of s 38(1) read with s 74(1)(a) of the Prevention of Organised Crime Act 121 of 1998; and
2. Any such further and/or alternative relief, or both, as may be appropriate.

TAKE FURTHER NOTICE that the affidavits of MOTLALEKHOTSO KNORX MOLELLE and JOHANN PHILLIP WILLEMSE will be used in support of this application.

TAKE FURTHER NOTICE that the applicant has appointed the office of the State Attorney, at the address mentioned below as the address at which he will accept notice and service of all process in these proceedings.

DATED AT PRETORIA ON THIS 08 DAY OF March 2018

  
THE STATE ATTORNEY

SALU Building

316 Thabo Sehume street,

Private Bag X91

PRETORIA

0001

Ref: Mr Mathega /2018/Z56

Tel: 012 309 1677  
Fax: 012 309 164/50  
Cell: 073 434 1293  
Email: [RMathaga@justice.gov.za](mailto:RMathaga@justice.gov.za)  
DX: 298 PRETORIA  
Enquiries: **R MATHAGA**

**TO: The Registrar of the High Court  
GAUTENG DIVISION, PRETORIA**

## IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NUMBER: 14775 /2018

In the ex parte application of:

THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS Applicant

IN RE: THE APPLICATION FOR A PRESERVATION ORDER IN TERMS OF SECTION 38(1) OF THE PREVENTION OF ORGANISED CRIME ACT, 121 OF 1998 CONCERNING PROPERTY REFERRED TO IN ANNEXURE "A" TO THE NOTICE OF MOTION

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## FOUNDING AFFIDAVIT

I, the undersigned

**MOTLALEKHOTSO KNORX MOLELLE**

do hereby make an oath and say that:

- 1 I am an adult male advocate appointed as an Acting Special Director of Public Prosecutions of the Republic of South Africa in terms of the National Prosecuting Authority Act, 32 of 1998 (the NPA Act) and the Head of Operations in the Asset Forfeiture Unit (AFU).
- 2 I have been duly appointed as such in terms of the NPA Act read with Section 179 of the Constitution of the Republic of South Africa Act, 1996.

MKM  




- 3 I am a functionary in terms of Section 1 of the NPA Act which is under the control of the applicant. I have been duly authorised by the applicant to bring this application on his behalf.
- 4 The facts contained herein are within my personal knowledge unless the contrary is stated or the context indicates otherwise. These facts are, to the best of my knowledge and belief, both true and correct.

#### THE APPLICANT

- 5 The applicant in this matter is the **NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS**, appointed in terms of Section 179(1)(a) of the Constitution of the Republic of South Africa, 1996 read together with s 10 of the NPA Act.
- 6 The applicant has offices at 123 Westlake Avenue, Weavind Park, Silverton, Pretoria.

#### THE PROPERTY

- 7 The application relates to certain property, namely the amount R1 469 916 933.63 including any interest accruing thereon in respect of the Optimum Coal Holdings (OCH) Mining Rehabilitation Trust fund and R280 000 000.00 including the interest accruing thereon in respect of the Koornfontein Mining Rehabilitation Trust Funds, which property is referred to more fully in Annexure "A" of the Notice of Motion (hereinafter referred to as *the property*).

MTH



- 8 The *property* is established and held pursuant to the National Environmental Management Act, Act 107 of 1998 (**NEMA**), read together with the Mineral and Petroleum Resources Development Act, 28 of 2002 (**MPRDA**) and section 37A of the Income Tax Act, 58 of 196 (**ITA**).
- 9 The primary purpose of the *property* is to make financial provisioning for the purpose of the environmental rehabilitation of a mining area upon the decommissioning of the closure of mining activities. The **NEMA** provides that where a holder of a mining Right fails to rehabilitate or to manage the impact on environment, or is unable to undertake such rehabilitation, the Minister of Minerals Resources may use all or part of the said provisioning for the Environmental Rehabilitation in question.
- 10 The *property* is currently held by the Bank of Baroda and is currently the subject of an interdict granted by this Court under Court Case Number 65616/2017 in the matter of *Organisation Undoing Tax Abuse (OUTA) vs Trustees for the Time being of Optimum Mine Rehabilitation Trust & 7 Others (hereinafter referred to as the OUTA application)*. I attach hereto marked **MKM1** a copy of the Notice of Motion including the interim order granted by this Court on 26 September 2017 in the said OUTA application.
- 11 Furthermore, it appears from a recent newspapers articles in the Sowetan Live, of 28 February 2018, that the Bank of Baroda intends transferring all unclaimed funds, including these Mine Rehabilitation Trust funds held in preservation, to a trust account held in the name of Tabacks Attorneys. This article appears at: [https://www.sowetanlive.co.za/news/2018-02-28-bank-of-baroda-to-set-up-trust-account-for-frozen-gupta-linked-funds/trust\\_funds/](https://www.sowetanlive.co.za/news/2018-02-28-bank-of-baroda-to-set-up-trust-account-for-frozen-gupta-linked-funds/trust_funds/)

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and a copy of same will be made available to this Court at the hearing of this application.

#### THE PURPOSE OF THIS APPLICATION

- 12 Applicant seeks the preservation of the *property* order in terms of Section 38 of the Prevention of Organised Crime Act, 121 of 1998 (POCA).
- 13 The purpose of this application is to prohibit any persons, subject to such conditions and exceptions as may be specified in the order, from dealing in any manner with any of the *property*. The order that is sought from this Court, inter alia, seeks:
  - 13.1 to prohibit any other persons from dealing in any manner with any of the *property*, whether such *property* is held directly or indirectly by them;
  - 13.2 to compel the surrender of the *property* to the *Curator Bonis*.
  - 13.3 to compel full and *proper* disclosure of information and documents pertaining to the *property*, to the *Curator Bonis*; and
  - 13.4 to ensure that the *property* is preserved pending the determination when an application for a forfeiture order would be made in terms of Section 48 of POCA.

  
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**JURISDICTION**

- 14 In so far as it has been identified, as listed in "*Annexure A*", the *property* is located within the area of jurisdiction of this Court and I submit that this Court has jurisdiction to hear this application.
- 15 With regard to any such further *property* as may be identified elsewhere and beyond the physical boundaries of this Court's jurisdiction, I submit that this Court does have the jurisdiction over such *property* for the following reasons:
- 15.1 the cause of action giving rise to this application arose out of this Court's jurisdiction; and
- 15.2 the balance of convenience favours this Court to have jurisdiction over any such further *property* as may be identified beyond the physical boundaries of its area of jurisdiction.
- 16 I accordingly submit that this Court does have jurisdiction to here such application.

**APPLICATION FOR PRESERVATION OF PROPERTY ORDER IN TERMS OF SECTION 38(1) OF POCA**

- 17 In terms of Section 38(1) of *POCA*, the National Director may by way of *ex parte* application apply to a High Court for an order prohibiting any person, subject to such conditions and exceptions as may be specified in the order, from dealing in any manner with any *property*.

  
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18 In terms of Section 38(2) the High Court shall make an order referred to in subsection 1 if there are reasonable grounds to believe that the *property* concerned;

18.1 is an instrumentality of an offence referred to in Schedule 1; or

18.2 is the proceeds of unlawful activities.

19 In terms of Section 38(3) a High Court making a preservation order of *property* shall at the same time make an order authorizing the seizure of the *property* concerned by a police official, and any other ancillary orders that the court considers appropriate for the proper, fair and effective execution of the order.

#### THE APPLICANT'S CASE

20 The Applicant's case is that the *property* is the *proceeds* and the *instrumentality* of unlawful activities; namely fraud, theft and contravened the provisions of the National Environmental Management Act, 107 of 1998 (NEMA), the Minerals and Petroleum Resources Development Act, 28 of 2002 MPRDA and the Income Tax Act, 58 of 1962 (ITA).

#### INTRODUCTION

21 Before dealing with the factual and legal basis upon which this application is brought, I shall provide a brief background to a series of events leading up to and giving rise to this application.

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22 On or about 14 October 2016 the office of the Public Protector (PP) released a report titled "***State of Capture***" Report Ref No. 6 of 2016/2017 (hereinafter referred to as the "***State of Capture***").

23 The said report was made pursuant to the investigation of several allegations of maladministration and irregularities in several State Owned entities (SOEs) such as Eskom, PRASA, Transnet and the involvement of other related government departments such as the Department of Minerals and Resources.

24 The *State of Capture of Capture report* has since become a public document and is readily available from the Public Protector's website: [http://www.pprotect.org/sites/default/files/legislation\\_report/State\\_Capture\\_14October2016.pdf](http://www.pprotect.org/sites/default/files/legislation_report/State_Capture_14October2016.pdf).

Due to its voluminous nature and in order not to unduly burden the Court bundle, the said report has not been attached to the papers. A copy of the report will however be made available to this Court at the hearing of the application.

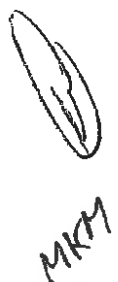
25 Amongst other specific allegations investigated by the Public Protector were alleged irregularities relating to the circumstances under which Tegeta Exploration & Resources (***Tegeta***) acquired all shares in the Optimum Coal Holdings (***OCH***) by the acquisition of the all shares in Optimum Coal Mine (***OCM***) and the Koorfontein Mines including the usage of the related ***OCM*** and Koorfontein Mining Rehabilitation Trust Funds.

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- 26 Pursuant to the release of the **State Capture Report** and based on amongst others, the findings of the Public Protector's investigations, OUTA lodged an urgent interdict seeking an urgent interim relief, before this Court, against the Bank of Baroda and the Trustees for the time being of the OCM and Koorfontein Mine Rehabilitation Trust Funds, for the "preservation" of all Mine Rehabilitation Trust funds of OCM and Koorfontein, which funds were held at Bank of Baroda.
- 27 OUTA was granted relief directing amongst *others*, that the said funds be held in trust pending the finalisation of the application. The said application is currently pending before this Honourable Court Case Number: 65616/2017 (*the OUTA Application*).
- 28 I have read and had regard to the contents of "*the State of Capture Report*". The Public Protector's report partly forms the factual and legal basis upon which this application is being sought. I shall accordingly be making reference to the contents of the said report and the *OUTA Application* respectively.

#### THE MINING REHABILITATION TRUST FUNDS (MRTF)

- 29 Mine Rehabilitation Trust Funds are governed by the following pieces of Legislation;
- 29.1 the Mineral and Petroleum Resources Development Act, 28 of 2002 (MPRD);
- 29.2 National Environmental Management Act, 107 of 1998 ("NEMA");  
and



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- 29.3 the Income Act 58 of 1962 (**Income Tax Act**).
- 30 Section 41 of the **MPRD Act** read with regulations 53 and 54 of the MPRD Regulations, previously regulated the obligation of a Holder of, amongst others, a mining right or permit, to make the prescribed *financial* provision for the rehabilitation or management of negative impacts ("**Financial Provision**") associated with mining operations and for the remediation of environmental damage.
- 31 As part of the introduction of the "One Environment System" Section 41 of the **MPRD Act** was repealed with effect from 7 June 2014 and the **Financial Provision** for environmental Rehabilitation is now regulated by the **NEMA**.
- 32 The Financial Provision Regulations further expressly provides that Rehabilitation Trusts Funds may not be used for *Annual Rehabilitation* and *Mine Closure Rehabilitation* and may only be used for purposes of *Future Rehabilitation*. A Holder of a Mining Right is therefore prohibited from accessing or "drawing down" from the funds that have been placed in the Rehabilitation Trust for Environmental Rehabilitation.
- 33 On 20 November 2015, the Regulations pertaining to the Financial Provision for prospecting, exploration, mining or production operations were published in order to give effect to the requisite provisions of **NEMA**.
- 34 The financial Provision Regulations outline the manner in which the financial provision is to be determined as at 20 November 2015.
- 35 The Primary Shareholder in Mining Rehabilitation Trust Funds is the Minister of Mineral Resources and he/she is empowered to perform statutory



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functions linked to the management of the Mine Rehabilitation Trust Funds. The responsibility to manage the Mine Rehabilitation Trust Funds is critical to ensuring that environmental rehabilitation is conducted after the closure of a mine and that adequate funding has been capitalised and is available to conduct environmental rehabilitation

#### THE ENVIRONMENTAL MANAGEMENT ACT 107 OF 1998 ("NEMA")

36 Section 24P deals with *Financial provision for remediation of environmental damage*. The term "*financial provision*" is defined as *the insurance, bank guarantee, trust fund or cash* that Applicants for an environmental authorisation must provide in terms of this Act guaranteeing the availability of sufficient funds to undertake the—

- (a) rehabilitation of the adverse environmental impacts of the listed or specified activities;
- (b) rehabilitation of the impacts of the prospecting, exploration, mining or production activities, including the pumping and treatment of polluted or extraneous water;
- (c) decommissioning and closure of the operations;
- (d) remediation of latent or residual environmental impacts which become known in the future;
- (e) removal of building structures and other objects; or
- (f) remediation of any other negative environmental impacts



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37 I highlight further hereunder some of the relevant definitions:

37.1 The term "*financial year*" is defined as a period commencing on 1 April of any year and ending 31 March of the next year.

37.2 The term "*review*" (in Chapter 5) is defined as the process of determining whether an assessment has been carried out correctly or whether the resulting information is adequate in order to make a decision; and

37.3 The term "*assessment*" (in Chapter 5) is defined as the process of collecting, organising, analysing, interpreting.

38 Section 24P(1) (*substituted by section 7(a) of Act 25 of 2014*), states "An applicant for an environmental *authorization relating to prospecting, exploration, mining or production must, before the Minister responsible for mineral resources issues the environmental authorization, comply with the prescribed financial provision for the rehabilitation, closure and ongoing post decommissioning management of negative environmental impacts.*"

39 Section 24P (2) provides that if the Holder of, *inter alia*, a mining right fails to rehabilitate or manage any impact on the environment, or is unable to undertake such rehabilitation, the Minister of Mineral Resources and Energy may use all or part of the financial provisioning contemplated in subsection (1) to rehabilitate or manage the environmental impact in question.

40 Section 9(5) provides that any interest earned on the Rehabilitation Trust Funds must first be applied to settle any bank charges after which it must be reinvested as part of the capital amount of the Rehabilitation Trust funds.



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- 41 Section 24P(3) provides that provides that "Every holder must annually;
- (a) *assess his or her environmental liability in a prescribed manner and must increase his or her financial provision to the satisfaction of the Minister responsible for mineral resources; and*
  - (b) *submit an audit report to the Minister responsible for mineral resources on the adequacy of the financial provision from an independent auditor.*
- 42 **Section 24P(4)(a)** states that *"If the Minister responsible for mineral resources is not satisfied with the assessment and financial provision contemplated in this section, the Minister responsible for mineral resources may appoint an independent assessor to conduct the assessment and determine the financial provision"*.
- 43 **Section 24P(4)(b)** states that *"any cost in respect of such assessment must be borne by the holder in question"*
- 44 **Section 24P(5)** states that *"the requirement to maintain and retain the financial provision contemplated in this section remains in force notwithstanding the issuing of a closure certificate by the Minister responsible for mineral resources in terms of the Mineral and Petroleum Resources Development Act, 2002 to the holder or owner concerned and the Minister responsible for mineral resources may retain such portion of the financial provision as may be required to rehabilitate the closed mining or prospecting operation in respect of latent, residual or any other environmental impacts, including the pumping of polluted or extraneous water, for a prescribed period."*



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- 45 **Section 24P(6)** states *"the Insolvency Act, 1936 (Act No. 24 of 1936), does not apply to any form of financial provision contemplated in subsection (1) and all amounts arising from that provision; and*
- 46 **Section 24 P(7)** state that " the Minister, or an MEC in concurrence with the Minister, may in writing make subsections (1) to (6) with the changes required by the context applicable to any other application in terms of this Act."

### NEMA REGULATIONS

- 47 I highlight hereunder, some of the NEMA regulations relevant for the purpose of this application;

#### Regulation 1 (Definitions):

- 47.1 **"annual rehabilitation plan"** means a plan contemplated in regulations 6(a) and 11(a) of the regulations.
- 47.2 **"holder of a right permit"** means the holder of a prospecting right, mining permit, mining right, exploration right or production right in terms of the MPRDA, which right or permit is issued after the date of the coming into effect of these regulations.
- 47.3 **Regulation 2 (Purpose of the regulations)** is to regulate and determine the making of financial provision for the costs associated with the undertaking of management, rehabilitation and remediation of environmental impacts from mining or production operations through the lifespan of such operations and latent or residual environmental impacts that may become known in the future.



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- 47.4 Regulation 3 (Application of regulations) applies to a holder to the extent contemplated in Chapters 4 and 5 of these regulations.
- 47.5 Regulation 4 (Determination of financial provision) an applicant or holder of a right or permit must determine and make financial provision to guarantee the availability of sufficient funds to undertake rehabilitation and remediation of the adverse environmental impacts of mining or production operations to the satisfaction of the Minister responsible for mineral resources.
- 47.6 Regulation 5 (Scope of financial provision) an applicant or holder of right or permit must make financial provision for—
- (a) rehabilitation and remediation;
  - (b) decommissioning and closure activities at the end of mining or production operations; and
  - (c) remediation and management of latent or residual environmental impacts which may become known in future, including the pumping and treatment of polluted or extraneous water.
- 47.7 Regulation 6 (Method for determining financial provision) an applicant must determine the financial provision through a detailed itemisation of all activities and costs, calculated based on the actual costs of implementation of the measures required for—

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- (a) annual rehabilitation, as reflected in an annual rehabilitation plan;
- (b) final rehabilitation, decommissioning and closure of the mining or production operations at the end of the life of operations, as reflected in a final rehabilitation, decommissioning and mine closure plan; and
- (c) remediation of latent or residual environmental impacts which may become known in the future, including the pumping and treatment of polluted or extraneous water, as reflected in an environmental risk assessment report.

47.8 Regulation 8 (Financial vehicles used for financial provision)(1) an applicant or holder of a right or permit must make financial provision by one or a combination of a—

- (a) financial guarantee from a bank registered in terms of the Banks Act, 1990 or from a financial institution registered by the Financial Services Board as an insurer or underwriter;
- (b) deposit into an account administered by the Minister responsible for mineral resources; or
- (c) contribution to a trust fund established in terms of applicable legislation, on condition that—



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- (i) this may not be used for the financial provision required in terms of regulations 6(a) or (b) or regulation 11(1)(a) or (b); and
- (ii) this may not be used by an applicant for, or holder of, a mining permit in terms of the Mineral and Petroleum Resources Development Act, 2002. (Own emphasis)

47.9 Regulation 11 (Review, assessment and adjustment of financial provision by the holder of a right or permit)(1) The holder of a right or permit must ensure that a review is undertaken of the requirements for —

- (a) annual rehabilitation, as reflected in an annual rehabilitation plan;
- (b) final rehabilitation, decommissioning and closure of the mining or production operations at the end of the life of operations as reflected in a final rehabilitation, decommissioning and mine closure plan; and
- (c) remediation of latent or residual environmental impacts which may become known in the future, including the pumping and treatment of polluted or extraneous water, as reflected in an environmental risk assessment report.

Reference is only made to the relevant portion of this regulation and that the regulation is not discussed in full.

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- 47.10 Regulation 17 (Transitional arrangements) (1) Any actions undertaken in terms of regulations 53 and 54 relating to financial provision in the MPRD regulations which can be undertaken in terms of a provision of these regulations must be regarded as having been undertaken in terms of the provision of these regulations.
- 47.11 Sub-regulations (2) & (3) hereof deal with financial provision submitted in terms of regulations 53 and 54 of the MPRD regulations for which approval is pending or where such approved financial provision is under review in terms of the MPRD regulations.
- 47.12 Regulation 18 (Offences) (2) a holder commits an offence if that person contravenes or fails to comply with regulation 17(5), 17(11), 17(12), 17(14), 17(16), 17(17) or 17(19) of these Regulations.
- 47.13 Regulation 19 (Penalties) a holder convicted of an offence in terms of regulation 18(2) is liable to a fine not exceeding R10 million or to imprisonment for a period not exceeding 10 years, or to both such fine or such imprisonment.

A copy of the regulations will be filed simultaneously with this application.

#### **INCOME TAX ACT 58 OF 1962 (INCOME TAX ACT)**

- 48 The Income Tax Act places an obligation on companies to perform rehabilitation of mining sites upon the decommissioning or termination of mining activities. Section In this regard section 37A of the Income Tax Act regulates the mining Rehabilitation funds from a tax perspective by granting



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certain tax deductions to mining companies that pay cash into the rehabilitation fund.

- 49 The said tax deductions are granted under certain strict rules and conditions. Amongst others, the rehabilitation fund may only apply its assets for prescribed rehabilitation purposes once the rehabilitation has been completed to the satisfaction of the Minister of Mineral Resources, thereafter the rehabilitation fund is obliged to transfer its assets to a similar company or trust, or to an account of a company or trust prescribed by the Minister and approved by the Commissioner for the South African Revenue Services (the Commissioner); and should the rehabilitation fund meet all its liabilities and have sufficient assets to perform the required rehabilitation, it may transfer any surplus assets to another company or trust approved by the Commissioner.
- 50 Section 37A carries and imposes certain penalties on mining companies and/or the rehabilitation funds for non-compliance with the Income tax Act. Section 37 A(7) provides that if the rehabilitation funds distributes its property for purposes other than the prescribed rehabilitation, an amount equal to the market value of the property that was so distributed, shall be deemed to be taxable income of the rehabilitation fund for that year of assessment.
- 51 Lastly, Section 37A (8) provides that where Section 37A has been contravened in any manner, the Commissioner of the South African Revenue Services (SARS) may include as part of his assessment of the rehabilitation fund and mining company's taxable income;



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51.1 an amount equal to twice the market value of all property held in the rehabilitation fund on the date of the contravention; and

51.2 the amount that the mining company contributed to the rehabilitation fund (and claimed as tax deduction);

to the extent that the property in the rehabilitation fund was directly or indirectly derived from cash paid to the rehabilitation fund.

## BACKGROUND

52 Glencore International PLC (*Glencore*) was the majority shareholder of *OCH*, which in turn held 100% shareholding in *OCM*.

53 On or about 4 January 1993 Optimum Collieries was contracted by Eskom to provide coal to Eskom' Hendrina Power station.

54 The said contract was entered into the parties in terms of a certain Coal Supply Agreement (*CSA*).

55 On or about 8 April 2008 the said contract was ceded to *OCM* resulting in *OCH*, *OCM* and Eskom concluding a further *CSA for the supply of coal* to Eskom. On about April 2011 *OCM* experienced some operational difficulties in supplying Eskom with coal in line with the agreed *CSA*. This resulted in a dispute arising between Eskom and *OCM*.

56 In this regard *OCM* had pointed out to Eskom that they were unable to continue their operations in terms of the said *CSA* because in terms of the said *CSA* they were supplying coal to Eskom at a loss. They had thus indicated the need to renegotiate the existing *CSA*. Eskom and *OCM*

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embarked in protracted engagements with the view of resolving the disputes. In this regard several draft addendums were discussed and negotiated without any success.

- 57 On or about 31 July 2015 when it became clear that the issues in dispute were not likely to be resolved, the board of Directors in *OCH* decided to place *OCM* in Voluntary Business Rescue and Business Rescue Practitioners (*BRPs*) were appointed for both *OCH* and *OCM*.
- 58 During the period August 2015 and October 2015 the *BRPs* attempted to negotiate amended terms of the CSA with Eskom in order to avoid the entities being liquidated. The said negotiations did not bear any results as Eskom was insisting on performance in terms of the existing CSA. This resulted in the *OCH* and *OCM* being placed in the market.
- 59 On or about 10 December 2015 Oakbay Investments (Pty) Ltd, (*Oakbay*) and *Tegeta* entered into a *Sale of Shares and Claims Agreement* with Glencore for the acquisition of shares in *OCH* and its subsidiaries, namely *OCM* and the Koorfontein Mines.
- 60 As part of the said agreement, *Tegeta* was required to assume control over the *OCH* Mine Rehabilitation Funds. As at 23 May 2016 the value of the *OCM* Rehabilitation Trust Funds was R1 469 916 933,63 and as at 23 May 2016 the value of the Koorfontein Mine Rehabilitation Trust Fund was R280 000 000,00. The said Rehabilitation Trust Funds were held in a Standard Bank account.



- 61 On or about 23 May 2016 Tegeta transferred the full amount of R280 000,000.63 held in the Koorfontein Rehabilitation Trust Fund to Bank of Baroda's Main Account Number 1454095326 held at Nedbank (Bank of Baroda Main Account). On 21 June 2016, Tegeta further transferred the full amount of R1,469,916,933.63 in OCM Rehabilitation Trust Fund to the Bank of Baroda's aforesaid Main Account.
- 62 The combined interests earned and accruing in respect of the said Trust funds (at 7%) was determined at approximately R122 500 000.00 per annum. The said transfer of the Mine Rehabilitation Trust funds was purportedly authorised by the Department of Minerals and Resources ("DMR").
- 63 I shall now deal with the factual findings of the Public Protector's report in so far as it relates to Tegeta's acquisition of all shares in OCH including its related subsidiaries and its utilisation of the Optimum Mine Rehabilitation Trust Funds (*ORTF*) and the Koorfontein Mine Rehabilitation Mine Trusts funds (*KRTF*). Part of the submissions in support of this application, are based on the facts and submissions set out in the OUTA Application.

#### **Transactional analysis of the Optimum Coal Mine Rehabilitation Trust Fund (ORTF)**

- 63.1 On 21 June 2016, the amount of R 1 469 916 933.63 was transferred from The Optimum Mine Rehabilitation Trust account held at Standard Bank of SA to the Baroda Main Account.

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- 63.2 On 22 June 2016, the amount of R 1 480 000 000 was transferred from the Baroda Main Account to a Baroda Domestic Treasury Call, Account No. 037881044497-359. Prior to the said transfer the balance in the Call Account was R201 000 000.00. The total as at the date of transfer was thus R1, 681 000 000.00.
- 63.3 Analysis of bank statements performed by the Public Protector indicates a number of large debits and credits (i.e. inflows and outflows) after the funds were transferred to the bank of Baroda accounts. In this regard the analysis indicates, amongst others, that between 22 June 2016 and 16 September 2016, the balance in the Call Account fluctuated drastically with 19 credits to the value of R 2 109 000 000 and 35 debits to the value of R 1 574 500 000.00. As at 16 September 2016, the balance in the Call Account was R 293 500 000 with a shortfall of R 1 186 500 000 in respect of the Optimum Mine Rehabilitation Trust.
- 63.4 The main reason for the decrease in fund value in the Call Account is due to transfers to the Baroda Main Account and then further transfers of portions of the funds into several other accounts and other related accounts held in the name of Baroda accounts as follows;
- 63.4.1 On 22 June 2016, the Optimum Mine Rehabilitation Trust funds of R1 480 000 000 was received into the Baroda Call Account 03- 7881044497-359.



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63.4.2 On 24 June 2016, the amounts of R 750 000 000 and R500 000 000 (totalling R 1 250 000 000) of this Trust Fund, was transferred to the Baroda Main Account.

63.4.3 On the same date a further transfer of R 500 000 000 was made from this said Baroda Main Account to the Bank of Baroda Durban Branch Account 1314035746.

The said transaction was referenced "***Interbranch Borrowing Repayment***". However, an analysis of the Bank of Baroda Durban *Branch* does not show any loan or borrowing ever took place between the two Baroda accounts.

63.5 On 24 June 2016, the remainder of the funds were transferred to the following Baroda Call Accounts as follows:

63.5.1 R 500 000 000 to a Call Account 037881044487 and on the same day R 250 000 000 to Call Account 037881044497-361; and

63.5.2 On 27 June 2016, a further amount of R 200 000 000 was transferred to a Call Account 03-7881044497-362.

63.6 Based on the above transaction analysis the following submissions and conclusion can be drawn;

63.6.1 A total of R1 250 000 000 of the R1 480 000 000 was distributed to at least one Bank of Baroda account and three

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separate Call accounts. The interest on these investments was also transferred to the Bank of Baroda Main account;

63.6.2 It is clear that the funds were not secured and ring fenced for the purposes of investment and capital growth as envisaged of Mine Rehabilitation Trust Funds. The interest payments on all investments accounts were not and recapitalised but were transferred to the Baroda Main account.

63.6.3 The of payment of R500 million referenced as alleged borrowing repayment between Bank of Baroda Main account and the Bank of Baroda Durban Branch account since 2012 to September 2016 was not only irregular but also appear to have been non existent.

63.6.4 The conduct and subsequent transfers of the said R500 million to the Baroda Durban Branch account further clearly indicated that the said funds were not ring fenced for investment purposes as the said amount was transferred into another Call Account Number: 03-7314502498-1069.

63.6.5 The above practise by Bank of Baroda, of the splitting of funds into several call accounts significantly reduced the investment potential on the lump sum that was to be invested if the funds were deemed to be for investment purposes. *(Pages 280 to 283, paragraphs 5.349 to 5.358 of the report)*

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**Transactional analysis of the Koornfontein Mine Rehabilitation Trust Funds (KRTF)**

- 63.7 On 24 May 2016, the amount of R 280 000 000 was transferred from the Koornfontein Mine Rehabilitation Trust account held at FNB to the Baroda Main Account 145095326 and thereafter to a Baroda Domestic Treasury Call Account 03-7881044497.
- 63.8 Prior to the said transfer of the KRTF the balance in the Call account was R62 000 000.00 thus the total amount in the Call Account after the transfer of these trust funds was R 344 000 000.
- 63.9 Between 23 May 2016 and 22 June 2016, the balance in the Call Account fluctuated drastically with five (5) credits to the value of R407 000 000 and ten (10) debits amounting to R 268 000 000. As at 22 May 2016 the balance in the Call account was R201 000 000 thus the shortfall of R81 000 000 on the KRTF fund investment value.
- 63.10 It seems as if this Baroda Call Account 03-7881044497 was selected by the new owners of the fund and or Baroda to receive and invest the KRTF funds at a preferential interest rate of 6.75%. However, the funds were not ring fenced for the purposes of investment and capital growth. The interest payments on the investments were also not reinvested and recapitalised but were transferred to the Baroda Main Account and utilised. *(Pages 279 to 280, paragraphs 5.346 to 5.348 of the report)*



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## UNLAWFUL ACTIVITIES

64 The findings of investigations by the Public Protector clearly demonstrates that Tegeta used the **ORTF** funds and the **KRTF** funds for purposes other than for intended purposes in contravention with **MPRDA**, **NEMA**, and the **Income Tax Act**.

### Contravention of the **NEMA**

65 The aforementioned transactional analysis clearly indicates that the said trust funds were not ring fenced for their intended purpose. Instead, they were used for purposes other than mine rehabilitation in contravention of *Section 24P(1), 24P(3) and 24P(5) of (substituted by Sections 7,(a) (b) and (c) of Act 25 of 2014) of NEMA* and its related financial Regulations.

66 The said funds were never ring fenced for purposes of investment and capital growth as contemplated by **NEMA**. Instead they were used to funds cash flow Tegeta's operations as and when required.

67 Consequently Tegeta and/or the Trustees of **ORTF** and the **KRTF** have committed fraud and/or theft.

### Contravention of the **Income Tax Act**

68 Section 37A of the Income Tax Act grants a tax deduction to mining companies that pay cash into the rehabilitation funds. One of the strict requirement is that the rehabilitation funds must be ring fenced and only used for its intended purpose.




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- 69 Section 37(A)7 provides that if the rehabilitation fund distributes its property for purposes other than the prescribed rehabilitation, an amount equal to the market value of the property that was so distributed, is deemed to be taxable income of the rehabilitation fund for that year of assessment period.
- 70 The analysis of the transactions clearly shows that Tegeta used the rehabilitation trust funds for purposes other than rehabilitation in contravention of the Income tax Act.
- 71 Not only did they receive a benefit from the undue tax deduction offered in terms of Section 37A but they are also liable to pay tax of an amount equal to the funds that were used for purposes other than rehabilitation.

#### THE OUTA APPLICATION

- 72 On 20 September 2017 and pursuant to the release of the 'State of Capture' report by the Public Protector, which pointed out to amongst other, the misappropriation and misuse of the **ORTF** funds and **KRTF** funds respectively, OUTA launched an urgent application against the intended foreclosure of the Bank of Baroda of on several Gupta related bank accounts, The said accounts included that of the **ORTF** and the **KRTF**.
- 73 The relief sought in this regard was in two parts and included amongst others, the following;
- 73.1 Directing Baroda to continue to hold the **ORTF** and the **KRTF** in an interest bearing bank account in the name of the Trusts; until alternative satisfactory arrangements are in place for the safe custody of the Trusts' assets;

  
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- 73.2 Interdicting the Trustee(s) for the time being of the respective Trusts and any signatory on its bank account(s) from disposing of or the funds and or removing the funds from South Africa; and
- 73.3 Directing the removal the trustee(s) of the *ORTF* and *KRTF* and requesting the Master to exercise his powers to remove and replace the said trustees;
- 74 The background to the said litigation can be briefly summarised as follows;
- 74.1 The Bank of Baroda is an Indian Bank with its majority shareholder being the Government of the Republic of India. The entity operates as a 'foreign institution' in terms of the Banks Act, 94 of 1990, of South Africa, and is defined as an institution which :-
- 74.1.1 has been lawfully established in a country other than South Africa; and
- 74.1.2 lawfully conducts in such other country a business similar to a business of a bank and is not registered as a bank in terms of the Banks Act.
- 74.2 Baroda, as a 'foreign institution', makes use of the facilities or banking 'platform' of Nedbank Limited (**Nedbank**) for transactional purposes and to operate as a 'banking' institution in terms of the South African context.
- 74.3 The transfer of the trusts funds to Baroda was preceded by a decision by South Africa's four major banks to foreclose the bank

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accounts of entities in Oakbay and related companies to which the Gupta family have an interest in. Upon accepting the said funds, Baroda ought to have known and was obliged to continue ring fencing the said funds for mine rehabilitation in compliance with Section 37A.

74.4 On or about 2016, the Financial Intelligence Centre (FIC), fined Baroda, an amount of R11 000 000, for its unlawful conduct and involvement in facilitating the transaction for the purchasing of OCM.

74.5 Baroda subsequently issued a notice of its intention to seize its operations in South Africa and consequently the foreclosure of the accounts held in respect of the Gupta related entities. OUTA sought the urgent relief on the basis that Baroda intended to close all Gupta family related/affiliated bank accounts including that of Tegeta. These accounts included the ORTF and the KRTF funds.

#### **Attempts to unlawfully access the Trust funds**

74.6 On 25 April 2015, Ragavan [supposedly acting on behalf of Tegeta] attempted to transact with Standard Bank in respect of the *ORTF funds (Paragraph 81 of OUTAs founding papers)*.

74.7 On 4 May 2016, a letter was directed by Tegeta to the Regional Manager of the Department of Mineral Resources, Mpumalanga, for the release of undisclosed funds held in the *KRTF*. The request for the release of these undisclosed funds appears to be unclear as –

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74.7.1 firstly, the Department is informed that – “... *the big 4 Banks and Insurance Companies seizing 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*”;

74.7.2 the Department is then informed that – “[A]s a result, *TER (ie Tegeta) herby requests that the DMR grants it approval to use the above mentioned funds for mining rehabilitation purposes.*”

74.8 On 5 May 2016, the Deputy Director General of the Department of Mineral Resources approves the request in ‘principle’ subject to certain conditions. *[Paragraphs 71 – 73 of OUTAs founding papers]*.

74.9 On 23 August 2016, Baroda confirmed, in writing, discussions between Koorfontein Mines (Pty) Ltd and Baroda India Ltd, that a loan of Koorfontein Mines for R 150 000 000 would be fully settled by 30 September 2016 and that an amount of R 170 000 000, held in the Koorfontein Mine Rehabilitation Trust account, is security for this loan. *[Paragraphs 114 – 116 of OUTAs founding papers]*.

A copy of OUTAs founding papers will be filed separately with this application.



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### Martin Lange's Preliminary Report

74.10 OUTA had appointed Martin Lange, an expert consultant and qualified chartered accountant, to prepare a report relating to any points of concern with regards to the conduct of the Trustees of both Optimum and Koorfontein Mine Rehabilitation Trust. The findings of Lange's report can be briefly summarised as follows;

74.10.1 The ORTF and KRTF funds were not held in proper interest bearing accounts. As a result of this the Mine Rehabilitation Trusts has lost over R 28 000 000 in interest income which cannot be recovered;

74.10.2 Tegeta's request of 4 May 2016, for the release of undisclosed funds from the KRTF was not done in terms of the legal framework of accessing such rehabilitation funds. Furthermore, the request was not supported by any documentation;

74.10.3 From a financial and accounting perspective the subsequent approval 'in principle' of the above request, by the Department of Mineral Resources, is considered to be irregular.

74.10.4 The R 150 000 000 loan of the Koorfontein Mines (Pty) Ltd and the security put forward by the KRTF funds was not only irregular as the legal framework of accessing such

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rehabilitation funds does not provide for this but it was evidently unlawful; and

74.10.5 Further, it appears that the loan was not reported to the South African Reserve Bank or disclosed to Deloitte (acting on instructions of the South African Reserve Bank to prepare a § 7 report on Baroda in terms of the Banks Act).

A copy of Lange's affidavit and report appears from *pages 325 -345 of the OUTA application.*

#### **Respondents' Answer and Martin Lange's Reply**

74.11 The first to third and fifth to sixth respondents filed an answer to the OUTA applicant. I highlight the most important aspects hereof as far as it relates to this application by the NDPP as follows;

74.11.1 *NEMA* and the regulations thereto makes provision/allows for actual concurrent mine rehabilitation;

74.11.2 Section 24P of *NEMA* itself does not bar concurrent rehabilitation and does not seek to prescribe the regulatory framework within which financial provision needs to be furnished; [*Paragraph 21 of the answer*];

74.11.3 Concurrent rehabilitation is not excluded in terms of the 'Regulations Pertaining to the Financial Provision for Prospecting, Exploration, Mining or Production Operations'



of 20 November 2015 of NEMA. *[Paragraphs 22 – 23 of the answer];*

74.11.4 The trustees of the **ORTF** and **KRTF** have not employed the capital reserves of the funds reserved for financial provision in terms of s 29P for concurrent rehabilitation. The funds have further not been put to use for any operation reasons and are housed with Baroda in line with their statutory purpose. *[Paragraph 26 of the answer];*

74.11.5 The following amounts were however accessed from the Mine Rehabilitation Trusts:

Optimum Mine Rehabilitation Trusts account

- i) On 23 May 2016, the amount of R 7 882 389.04, being interest, was earned on an **ORTF** Call account and credited to the **ORTF** current account;
- ii) Hereafter, an amount of R 7 500 000 (representing part of the interest earned) was transferred from the **ORTF** Current account to the **OCM** current account;
- iii) This transfer, out of the **ORTF** current account to the **OCM** Current account, was to "... cover the immediate rehabilitation requirements of the mine' as rehabilitation had been severely neglected during the business rescue process".

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- iv) The *ORTF* has surplus funds available for rehabilitation purposes. (*Paragraph 28 of the answer*).

Koorfontein Mine Rehabilitation Trust account

- v) The amount of R 150 000 000 was 'sanctioned' [authorised] by Baroda to Koorfontein Mine against security of a deposit by the *KRTF* and this loan was intended to be used to effect rehabilitation work at the mine.
- vi) Koorfontein Mine was not satisfied with the work assigned to the rehabilitation contractor at the mine and the funds were returned by Koorfontein Mine to Baroda, with interest.
- vii) The above resulted in no cost or loss to the Koorfontein Mine Rehabilitation Trust as the trust was required to keep no more than R 128 000 000 for financial provision purposes whereas the trust was in fact holding a deposit of R 305 000 000.
- viii) Authorisation for access to these funds, for the purpose of performing rehabilitation work, was specifically requested from the Department of Minerals & Energy. The Department granted approval in this regard subject to certain conditions. [Paragraphs 31 – 33 of the answer]

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74.11.6 Measures taken by each of the trustees are both adequate and satisfactory to ensure the long-term protection of the trust property as contemplated in the applicable legislation.

74.11.7 Both trusts are aware of the legal obligation to make adequate pecuniary provision at all material times during the mining project for rehabilitation.

74.11.8 Both MPRDA and NEMA impose obligations on the trusts and trustees concerning the financial provisions for mine rehabilitation.

A copy of the respondents' answering papers will be filed separately with this application.

**Martin Lange's Reply in respect of the Koornfontein Mine loan of R150 000 000 against the Mine Rehabilitation Trust:**

74.12 In reply to the aforementioned points Lange replies as follows;

74.12.1 In the absence documentary evidence to the contrary there exists a strong likelihood, that this loan may have been designated, or even used, for another purpose;

74.12.2 In order to embark on the rehabilitation that was suggested, the following aspects would have, at least had to be present:

- i) There are statutory prerequisites with which a mine is required to strictly comply in order to avoid being



deemed non-compliant with the relevant laws and regulations. This would require the management of the mine to commit senior resources to implement any changes that may impact on that compliance.

- ii) To address these prerequisites, the mine will be required to plan and prepare for the revised rehabilitation, which had not been part of the business' initial strategic planning, the strategic plan of the business would also then need to be revised.
- iii) Any rehabilitation would be linked to the closure of sections of the mine, which are usually not required again by the mining company.
- iv) The revised environmental liability assessment report should have been compiled by an independent auditor, along with a revised rehabilitation program accompanied by a revised implementation plan detailing the revised timeframes for each revised rehabilitation phase, as well as a calculation of the provision for the rehabilitation work.

74.12.3 The correspondence with the Minister of 4 and 5 May 2016 suggests these aspects had not been provided for and / or embarked upon at that stage and the loan was shortly granted thereafter.



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74.12.4 A more probable reason for obtaining the loan funding would be that the funds were used to address temporary cash flow problems in one of the group companies. This allowed the funds to be repaid once the cash flow issues in the group had been alleviated. This is borne out by the content of Tegeta's letter to the Minister.

A copy of Lange's unsigned reply will be filed separately with this application.

#### THE UNDISPUTED FACTS OF THE OUTA APPLICATION

75 I draw the attention of this Court to the following salient undisputed points;

75.1 On the trustees' own version, the funds in the Mine Rehabilitation Trusts of both *ORTF* and *KRTF* were purportedly accessed for rehabilitation purposes. The said funds are kept on behalf of the Trust Beneficiaries in separate Trust Accounts at Baroda.

75.2 The Mining Beneficiaries only made use of trusts as the financial vehicle to invest the mining rehabilitation funds for the rehabilitation of Optimum and Koornfontein Coal Mines/Mining Beneficiaries. The Mining Beneficiaries continued with making use of these trusts, as financial vehicles, until the subsequent freezing of the trusts, held by Baroda, by this Court.

75.3 On 23 May 2016, the amount of R7 500 000 was withdrawn from the *ORTF* Trust account, in favour of the Mine/Trust beneficiary, for apparent 'immediate rehabilitation requirements'. This withdrawal



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from the Trust was made less than 1 month after the appointment of the new trustees.

75.4 Trustees and/or the Mine attached no proof to the satisfaction of this Court that the actual rehabilitation was conducted and/or what the outcome of such rehabilitation was. They further do not inform this Court of their reasons/s for failing to attach such proof.

75.5 Trustees does not inform this Court of the existence of any Annual Rehabilitation Plan in respect of the Mine Rehabilitation Trusts.

75.6 They do not inform this Court of the existence of any Final Rehabilitation, Decommissioning and Mine Closure Plan in respect of each of the Mine Rehabilitation Trust.

#### The KRTF

75.7 On 4 May 2016, a letter was directed by Tegeta to the Regional Manager of the Department of Mineral Resources, Mpumalanga, for the release/withdrawal of undisclosed funds held in the Koornfontein Mine Rehabilitation Trust. The request for this withdrawal was apparently to:

75.7.1 keep the business of Koornfontein Mine and its related jobs 'afloat.'; and

75.7.2 for mining rehabilitation purposes.

75.8 On 5 May 2016, the Deputy Director General of the Department of Mineral Resources approves the request in 'principle' subject to

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certain conditions. This request for the withdrawal from the Trust was made less than 1 month after the appointment of the new trustees.

75.9 Trustees and/or the Mines attached no proof to the satisfaction of this Court in respect of the supposed rehabilitation work that was needed. Trustees and/or Mines does further not inform this Court of their reasons/s for failing to attach such proof. The amount of R150 000 000 was 'sanctioned' to the Trust Beneficiary by Baroda against security of the same value deposited by the KRTF.

75.10 On the trustees' own version:

75.10.1 this 'loan' was intended 'to be used to effect rehabilitation work at the mine;

75.10.2 the Trust Beneficiary/Mine was not satisfied with the 'work assigned to the rehabilitation contractor';

75.10.3 the funds were returned by the Trust Beneficiary/Mine to Baroda with interest; and the KRTF funds were released as security.

75.11 Trustees and/or the Mines attached no proof to the satisfaction of this Court in respect of the material terms of the loan agreement and/or the rehabilitation that was to be conducted and/or the reasons as to why the Mine was dissatisfied with the 'work assigned to the rehabilitation contractor'.



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75.12 Trustees and/or Mine further do not inform this Court of their reasons/s for failing to attach such proof and they do not inform this Court of the existence of any Annual Rehabilitation Plan in respect of the Mine Rehabilitation Trusts. They further does not inform this Court of the existence of any a Final Rehabilitation, Decommissioning and Mine Closure Plan in respect of each of the Mine Rehabilitation Trusts.

#### **Legal duty on trustees**

- 76 At the core of the existence of trusts and trustees is the separation of ownership (control) from enjoyment. Though a trustee can also be a beneficiary, a trustee is a person entrusted to exercise control over the trust property in the interest and for the benefit of others.
- 77 The trustee is appointed and accepts office to exercise fiduciary responsibility over property on behalf of and in the interests of another. The essential notion of trust law, is that enjoyment and control should be functionally separate. The duties imposed on trustees, and the standard of care expected of them, is derived from this principle.
- 78 It is the aforementioned separation that is intended to secure care and diligence on the part of the trustees in order to protect the intended beneficial values of the beneficiaries. The same separation tends to ensure independence of judgment on the part of the trustee, which is an indispensable requisite of the position of trustees.



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- 79 The Courts will themselves in appropriate cases ensure that the duty of care placed on the trustees is kept sacrosanct and that it is not abused. In this regard the court have the power and the duty to apply the law to jealously safeguard the trust beneficiaries from any conduct by trustees that falls short of the expected standard.
- 80 This power may have to be invoked to ensure that trusts function in accordance with principles of business efficacy, sound commercial accountability and the reasonable expectations of outsiders who deal with them.

#### **APPLICANT'S CASE REGARDING THE UNLAWFUL USE OF THE MINING REHABILITATION FUNDS**

- 81 The evidence presented in the OUTA application clearly demonstrates that the respective mine rehabilitation trust funds were not ring fenced for their intended purpose and further that they were applied to fund Tegeta's cash flow operations.
- 82 Amongst the glaring misuse or misappropriation of the aforesaid funds was the utilisation of the KRTF funds as security for the Koornfontein mine loan of R150 000 000. The effect of utilising the said funds as security had the effect of diminishing the funds required to be secured in the rehabilitation funds, thus unlawfully placing a potential burden on the State to make funds available for the rehabilitation of the mine should it have become necessary.

  
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- 83 The splitting of the payments into several accounts further diminished the rehabilitation investment earning potential of the lump sum that was meant to be preserved in the rehabilitation trust funds.
- 84 Consequently, the keeping of the said funds in and out of the various accounts and its utilisation for other purposes than mine rehabilitation is/were unlawful in that the related transactions is/were clearly a contravention of the *MPRDA*, *NEMA* and its related regulations as well as the *Income Tax*. The said transactions further constitute fraud and theft of trust funds.

#### THE ACTIONS OF THE TRUSTEES

- 85 I submit if due regard is taken of the totality of the evidence, including the undisputed facts, then it is apparent that the conduct of the trustees can be directly attributed to the aforesaid unlawful activities, namely the misappropriation of *ORTF* and *KRTF* funds.
- 86 The trustees utilised and further attempted to continue unlawfully utilising the said trust funds in contravention with its intended purposes for ulterior purposes, in that:
- 86.1 On the trustees' own version, they withdrew and/or accessed significant funds from the *ORTF* and *KRTF*;
- 86.2 In presenting their justification/reasons for this withdrawal and/or access of these funds, in the OUTA application to this Court, the Mines and/or trustees merely informs this Court of their actions. They do not present any documentary proof to the satisfaction of this Court to substantiate the actual rehabilitation;



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86.3 The trustees in mine rehabilitation trust do not only serve and protect the interests of the trust beneficiaries but that of the broader South African public as well. Their actions should always be above reproach and the trusts should function in accordance with principles of business efficacy, sound commercial accountability and the reasonable expectations of outsiders who deal with it.

87 From the undisputed facts of the matter and the documentation at my disposal I submit that the trustees' actions were not only unlawful but also detrimental to fiscus in one or more of the following ways;

87.1 The unlawful utilisation of the respective trust funds intended for mine rehabilitation exposed the South African Government to the unwarranted financial burden of potentially having to fund mine rehabilitation at the expense of tax payers.

87.2 From their actions and the secretive nature of the supposed rehabilitation work carried out it appears that these trustees either unlawfully appropriated and/or misrepresented to the South African public as to the actual reasons for the withdrawal and/or access of the trusts funds.

88 I attach hereto as annexure **MKM 2** a copy of an email received by the applicant (AFU) from the South African Reserve Bank stating that the Reserve Bank was informed by management of Baroda that **KRTF** funds were "*provided as collateral for the R150 million facility*".



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- 89 I also attach hereto a confirmatory affidavit of **JOHANN PHILLIP WILLEMSE**, a Chief Financial Investigator of the AFU, setting out the detail in respect of how the above email from the Reserve Bank was obtained. The applicant has requested the Reserve Bank to furnish it with an affidavit confirming the above as well as the details of any meeting/s between the Reserve Bank and Baroda in this regard. A copy of this affidavit is will be made available to this Court and all interested parties as soon as same is received.
- 90 Applicant therefore concludes that there are reasonable grounds to believe that the Mines and/or the Trustees of the Optimum Mine Rehabilitation Trust and the Koorfontein Mine Rehabilitation Trust, through their actions:
- 90.1 Contravened and/or failed to comply with the regulations of NEMA and therefore may be liable, in terms of regulation 18(2), read with regulation 19, of NEMA, to a fine (not exceeding R10 million) or imprisonment (not exceeding 10 years) or both; and/or
- 90.2 Committed the offence of fraud; and/or
- 90.3 Committed the offence of theft.



**THE PROPERTY AS THE PROCEEDS OF UNLAWFUL ACTIVITIES AND/OR  
AN INSTRUMENTALITY OF AN OFFENCE**

**Proceeds of unlawful Activities**

- 91 It is the Applicant's case that reasonable grounds to believe exists that the Mines and/or the Trustees of the **ORTF** and the **KRTF**, through their actions Committed the offences of fraud; and/or theft.
- 92 Through the unlawful actions of the trustees utilised the **ORTF and KRTF** in contravention of, amongst others, regulations 8 and 17 (read with regulations 18 and 19) of the **NEMA** regulations.
- 93 As is evident from the undisputed facts, the trustees after 20 February 2017, failed to proceed with a review, assessment and adjustment of the previous trust funds. Instead they continued utilising the said funds purportedly for annual and/or concurrent mining rehabilitation.
- 94 These actions of the trustees are in direct violation of the provisions of regulation 8 read with regulation 17(5) of the NEMA regulations.

**The property as an instrumentality of an offence as referred to in Schedule 1  
of the Act**

- 95 I submit, in the circumstances, that the respective rehabilitation trust funds played a central role in the commission of the alleged unlawful activities by the trustees.
- 96 Through the actions of the trustees the property was concerned in the commission of the above mentioned offences, of fraud and/or theft, as it was



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utilised for unlawful purposes and not for the specific purpose it was intended.

- 97 I submit that the *ORTF* and *KRTF*, by virtue of their misappropriation (theft and fraud), lent themselves to the commission of the unlawful activities, namely contravention of *NEMA* and its related regulations as well as the Income Tax Act amongst others, as contemplated in Schedule 1 to the Act.
- 98 Accordingly, these Mine Rehabilitation Trust accounts were used as instrumentalities in the commissioning of offences as provided for in Schedule 1 and/or the property represents the proceeds of unlawful activities.
- 99 From a reading of the *NEMA* regulation it is apparent that the 'Transitional arrangements' regulation/s were introduced to accommodate Mining establishments, with existing rehabilitation instruments provided for under the repealed *MPRDA* regulations, and afford such Mining establishments adequate time to align and adjust their rehabilitation structure with the provisions of the current regulations.
- 100 Regulation 17(5)(ii) provides an 'either/or' situation in that the holders (Mining Beneficiaries/Optimum & Koornfontein Coal Mines) may choose the most suitable time frame for compliance that fits its specific purposes.
- 101 In the present matter, the time frames for compliance with the requirements of regulation 17(5) was 20 June 2016 for compliance in terms of regulation 17(5)(i) and 20 February 2017 for compliance in terms of regulation 17(5)(ii).

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102 The specific compliance required in terms of regulation 17 (17(4) read with 17(5)) ultimately imposed as duty on such holders to:

102.1 At the latest and on/or before 20 February 2017, ensure that a review, assessment and adjustment of the financial provision is conducted in accordance with regulation 11; and that such an updated financial provision is submitted to the Minister responsible for mineral resources.

103 Regulation 11 requires from a holder to ensure that a detailed review, assessment and adjustment of the financial provision in respect of the following is undertaken:

103.1 Annual rehabilitation;

103.2 Final rehabilitation, decommissioning and closure; and

103.3 Remediation of latent environmental impacts, which may become known in future.

104 Regulation 8 is further specific on the different financial vehicles that may be used for the financial provision. These financial vehicles are, one or a combination of the following:

104.1 A financial guarantee from a bank or financial institution;

104.2 A deposit into an account administered by the Minister responsible for mineral resources; or



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104.3 A contribution to a trust fund. It is to be noted however that holders may not make use of these trust fund contributions for annual and/or final rehabilitation (Regulation 8(1) (c) (i) – (ii)).

105 I furthermore direct the attention of this Court to the provisions of Appendix 3 to the NEMA regulations that deals with the minimum contents prescribe for an annual rehabilitation, the essence of which is that an annual rehabilitation plan must contain:

105.1 Information that defines concurrent rehabilitation and remediation activities for the forthcoming 12 months remedial (paragraph 3 of Appendix 3);

105.2 Details of the timeframes of implementation of the current, and review of the previous rehabilitation activities (paragraph 3(a) (iii) of Appendix 3);

105.3 An identification of shortcomings experienced in the preceding 12 months (paragraph 3(d) of Appendix 3);

105.4 Details of the planned annual rehabilitation and remediation activities or measures for the forthcoming 12 month, including those which will address the shortcomings contemplated or identified for monitoring in paragraph 3(d) of Appendix (paragraph 3(e) of Appendix 3); and

105.5 Motivations should no areas be available for annual rehabilitation and remediation concurrent with mining (paragraph 3(e) (i) of Appendix 3).



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106 Based on the above, and in particular, the undisputed facts of the OUTA application, I make the following observations and submissions;

106.1 During the period 20 June 2016 to 20 February 2017, the Mines and/or trustees did not proceed with the review, assessment and adjustment of the previous financial vehicle of the *ORTF* and *KRTF*.

106.2 *Instead, they continued to make* use of trust funds as their financial vehicle for annual and/or concurrent mining rehabilitation in direct violation of the provisions of regulation 8 of the NEMA regulations.

106.3 The Mines and/or the trustees did not attach and/or discuss the contents of any supposed annual or final rehabilitation plans as alleged in the OUTA application. They failed to do so as would have been expected of them in compliance with *NEMA*.

106.4 As is further evident from the OUTA application, the Mines and or Trustees further refused to address the detail on how they would rectify the rehabilitation shortcoming by them in the preceding year 12 months (2016).

106.5 On the trustees' own version and in 2016, funds in the *ORTF* and *KRTF* were drawn to perform current rehabilitation work, in the case of Koorfontein, and immediate rehabilitation work that has been neglected, in the case of Optimum.

106.6 It is further evident from the said trustees' version that the current rehabilitation work at Koorfontein was stopped as the mine '... *was not satisfied with the work assigned to the rehabilitation*

  
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*contractor ...*. Accordingly, there is no certainty whether the alleged rehabilitation was ever concluded.

#### **PRESERVATION OF PROPERTY ORDER**

- 107 The purpose of the preservation order sought is to ensure that the property is preserved pending the outcome of an application for a forfeiture order in terms of Section 48 of POCA..
- 108 In terms of Section 40 of POCA, such an application must be brought within 90 days of the publication of a notice of the making of the preservation of property order in the Government Gazette, failing which it lapses.
- 109 Further, Nedbank, in their capacity as transaction bank or platform for Baroda transactions, has agreed that it will handle all administration regarding the property should same be preserved in terms of POCA.
- 110 Applicant therefore seek the following relief in terms of the preservation order:
- 110.1 In terms of Section 38(1) of POCA, to prohibit any person with knowledge of the order from dealing in any manner with the property; and
- 110.2 The property is to be transferred to and then remain under the control of Nedbank Limited pending the finalisation of forfeiture proceedings under the Act.
- 110.3 In terms of Section 38(2) of POCA, the High Court must grant the order referred to in Section 38(1) if there are reasonable grounds to



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believe that the specified property is an instrumentality of an offence referred to in schedule 1, or is the proceeds of unlawful activities as defined in Section 1(1) of POCA or both.

#### APPOINTMENT OF A CURATOR BONIS

- 111 In terms of Section 42 of POCA, this Court is authorised to appoint a curator bonis to take control over the property placed under a preservation order.
- 112 As stated above, Nedbank, in their capacity as transaction bank or platform for Baroda transactions, has agreed that it will handle all administration regarding the property should same be preserved in terms of POCA.
- 113 It is therefore unnecessary, in the present circumstance, for this Court to order the appointment of a curator bonis to perform the functions as set out in Section 42(a) of POCA, as no likelihood exists of the dissipation of the property by any third parties once an order as sought has been granted and the relevant banking institution informed of the order by the applicant.
- 114 Accordingly, the property can be transferred to and then remain under the effective control of Nedbank Limited pending the finalisation of forfeiture proceedings under POCA.
- 115 The applicant reserves the right to approach this Court on an urgent ex parte basis, and in chambers, with an application for the appointment of a curator bonis should the need arise.

**PROVISION FOR AUDI ALTERAM PARTEM**

- 116 For reasons already dealt with, the granting of a preservation order ex parte will not deprive persons who have a legal interest in the property concerned of the opportunity to have their opposition heard and from safeguarding their interests during the operation of the order.
- 117 During the operation of a preservation and seizure order, any person with an interest in the property concerned may apply to this Court for the rescission or variation of the preservation and seizure order in terms of Section 47 of POCA.
- 118 The order sought makes provision for any interested party to apply to this Court for their reasonable living and legal expenses in terms of Sections 44 to 46 of POCA.
- 119 In addition to the specific provisions of POCA, this Court also has a wide discretion in regulating its own process and to ensure that any interested party who wishes to contest the granting of the preservation order, can do so.
- 120 In the present matter, in order to provide any interested party with the opportunity to challenge the preservation order, a prayer for reconsideration is included in the draft order to the notice of motion.

**NOTICE AND PUBLICATION OF PRESERVATION ORDER**

- 121 In terms of Section 39(1) of POCA, the applicant is obliged, as soon as practicable after the granting of the order, to give notice of the order to any



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person known to him to have an interest in the property. The order, which the applicant seeks in the present application, contains the names of the persons who are known to me as possibly having an interest in the property that will be affected by the order.

122 To the best of my knowledge the persons and juristic person mentioned below are the only persons who may claim to have an interest in the property and affected bank accounts and must, in terms of Section 39(1) of the Act, be served with notice of the order sought from this Court:

122.1 Bank of Baroda.

122.2 Trustees of Optimum Mine Rehabilitation Trust.

122.3 Trustees of Koornfontein Mine Rehabilitation.

122.4 The Minister responsible for Mineral Resources.

122.5 The Director General of the Department of Mineral Resources.

122.6 The Master of the High Court of South Africa.

122.7 OUTA.

122.8 Tabacks attorneys

123 Applicant has also learnt from newspaper articles in the electronic and print media that Optimum Mine has been placed under Business Rescue. The details of the Business Rescue Practitioners are however not known to the application presently. Applicant will however cause a copy of the order



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sought to be served on such Business Rescue Practitioners as soon as their details become available.

124 In terms of the order sought, the applicant is also directed to cause publication of the notice in the Government Gazette. A copy of the notice is annexed to the order sought, marked 'Annexure A'. The terms of the notice are intended to draw the attention of any person who receives or reads it to the position regarding the order and what he/she should do to safeguard any interests they may have in the property.

**CONCLUSION**

125 In conclusion, I respectfully submit that the factual and legal requirements for the granting of an order under Section 38 of POCA Act have been satisfied and I therefore request this Court to grant the order in terms of the draft order attached.

  
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DEPONENT

I hereby certify that the deponent has acknowledged that he/she knows and understands the contents of this affidavit, which was signed and sworn to before me, Commissioner of Oaths, at Pretoria on this the 05 day of MARCH 2018 the regulations contained in Government Notice No R1258 of 21 July 1972, as amended, and Government Notice No R1648 of 19 August 1977, as amended, having been complied with.



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~~DIWYO W.F. Oliver~~  
~~20049848-B~~

COMMISSIONER OF OATHS

FULL NAMES: Weymond Oliver

ADDRESS: No 16 Diagonal Str JHS

EX OFFICIO: Warrant Officer

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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
RONICA RAGAVAN	Ninth Respondent
THE MASTER OF THE HIGH COURT, PRETORIA	Tenth Respondent

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AMENDED NOTICE OF MOTION – PART B

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TAKE NOTICE THAT the Applicant intends to make application to the Honourable Court on 7 December 2017 at 10 am or so soon thereafter as the matter may be heard for an order in the terms set out below:

  
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- 1 Removing the trustee(s) of the Koorfontein Mine Rehabilitation Trust ('the Koorfontein Trust') and the Optimum Mine Rehabilitation Trust ('the Optimum Trust').
  
- 2 Appointing, alternatively requesting the Master to exercise his power within one month of the date of this order to appoint, a minimum of two independent or otherwise suitable trustees to the Koorfontein Trust and the Optimum Trust.
  
- 3 In the alternative to prayer 1, appointing a minimum of one independent or otherwise suitable trustee to the Koorfontein Trust and Optimum Trust alternatively requesting the Master to exercise his power to appoint such trustee(s) 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:
  - 4.1 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;
  - 4.2 Thereafter swiftly implement such decision; and
  - 4.3 File with the court and serve on the parties an affidavit reporting on the decision taken and its implementation.

  
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- 5 Directing the Trustee(s) for the time being of the Koorfontein and Optimum Trusts as at the date of institution of these proceedings, being 21 September 2017, 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 26 September 2017 being the date of the Court's order for interim relief ("the 26 September 2017 order").
  
- 6 In the alternative to prayers 1 to 4 above, directing that the Minister take such steps in terms of applicable legislation as are necessary to ensure that alternative satisfactory arrangements are in place for the financial provision for rehabilitation in respect of the fifth and sixth respondents.
  
- 7 Insofar as is necessary, directing the seventh respondent to continue to hold the Trusts' funds in an interest-bearing account or accounts until alternative satisfactory arrangements are in place for the safe custody of the Trusts' assets as contemplated by the court's order.
  
- 8 Costs of suit against any party who opposes the application.
  
- 9 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.

  
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TAKE NOTICE FURTHER THAT if you intend opposing the relief sought in the notice of motion you are required to notify the applicant's attorneys of such intention and deliver your answering affidavit, if any, by 18 October 2017.

KINDLY ENROL THE MATTER ACCORDINGLY

DATED at PRETORIA on this 4th day of OCTOBER 2017.

WERKSMANS ATTORNEYS

Applicant's Attorneys

155 - 5th Street

Sandown, Sandton,

2196

Johannesburg

T: +27 (0)11 535 8106 / +27 (0)11 535 8445

F +27 (0)11 535 8545

Email: [bhotz@werksmans.com](mailto:bhotz@werksmans.com) / [jgobetz@werksmans.com](mailto:jgobetz@werksmans.com)

Ref: Mr B Hotz/Mr J Gobetz/ORGA36432.2

C/O BRAZINGTON & McCONNELL

424 Hilda Street

2<sup>nd</sup> Floor, Hatfield Plaza, North Tower

Hatfield

Pretoria

Tel: (012) 430 4303

e-mail: [andrew@bsmlaw.co.za](mailto:andrew@bsmlaw.co.za)

Ref: Mr A McConnell

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

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410.5

AND TO:  
**VASCO DE OLIVEIRA ATTORNEYS**  
 First, Second, Third, Fifth, and Sixth Respondents' Attorneys  
 23C Sandton View Office Park  
 Conduit Street  
 Lyme Park  
 Sandton  
 2196  
 Tel: 011 326 2507  
 Fax: 011 326 2507  
 E-mail: [vasco@oliveira.co.za](mailto:vasco@oliveira.co.za)  
**C/O DE OLIVEIRA SERRAO ATTORNEYS**  
 22 Knox Shaw Street  
 Sterrewag  
 Pretoria  
 Tel: 012 460 4321  
 Fax: 012 346 8909  
 Ref: Mrs L Serrao

RECEIVED A COPY HEREOF  
 ON THIS THE \_\_\_\_ DAY OF  
 OCTOBER 2017.  
 NAME: \_\_\_\_\_  
 TIME: \_\_\_\_\_  
 \_\_\_\_\_  
 SIGNATURE

AND TO  
**TREVOR SCOTT**  
 Fourth Respondent  
 E-mail: [trevor@bearingway.co.za](mailto:trevor@bearingway.co.za)

Service Per E-mail

AND TO  
**TABACKS ATTORNEYS**  
 Seventh Respondent's Attorneys  
 13 Eton Road  
 Parktown  
 2193  
 Tel: 011 358 7700  
 Fax: 011 358 7800  
 E-mail: [tvs@laacks.com](mailto:tvs@laacks.com)

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 OCTOBER 2017.  
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AND TO  
 STATE ATTORNEY PRETORIA  
 Eight Respondent's Attorneys  
 316 Salu Building  
 Corner Francis Baard and Thabo Sehume Street  
 Ground Floor  
 Pretoria  
 0001  
 Tel: 012 309 1635  
 Fax: 012 309 1649/50  
 E-mail: [mratubatuba@justice.gov.za](mailto:mratubatuba@justice.gov.za)  
 Ref: 7096/2017/Z74/PM

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 ON THIS THE \_\_\_ DAY OF  
 OCTOBER 2017.  
 NAME: \_\_\_\_\_  
 TIME: \_\_\_\_\_  
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 SIGNATURE

AND TO:  
 RONICA RAGAVAN  
 Ninth Respondent  
 C/O  
 Gert Van Der Merwe Attorneys  
 62 Rigel Avenue  
 Waterkloof  
 Pretoria  
 Tel: 087 654 0209  
 Fax: 012 343 5435  
 E-mail: [simone@vdmass.co.za](mailto:simone@vdmass.co.za)  
 Mr GT Van Der Merwe

RECEIVED A COPY HEREOF  
 ON THIS THE \_\_\_ DAY OF  
 OCTOBER 2017.  
 NAME: \_\_\_\_\_  
 TIME: \_\_\_\_\_  
 \_\_\_\_\_  
 SIGNATURE

AND TO:  
 MASTER OF THE HIGH COURT, PRETORIA  
 Tenth Respondent  
 316 Salu Building  
 Corner Francis Baard and Thabo Sehume Street  
 Ground Floor  
 Pretoria  
 0001

RECEIVED A COPY HEREOF  
 ON THIS THE \_\_\_ DAY OF  
 OCTOBER 2017.  
 NAME: \_\_\_\_\_  
 TIME: \_\_\_\_\_  
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 SIGNATURE

  
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IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, PRETORIA

CASE NO: 65616/17.

Before the Honourable Justice Msimeki  
On 26 September 2017

In the matter between:

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

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DRAFT ORDER

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Having read the papers filed of record and heard relevant submissions, the following order is made by agreement between the applicant and the first, second, third, fifth, sixth, seventh and eighth respondents:

  
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1 Under reservation of all rights by all respondents and without any concessions in respect of any of the issues as they appear from the papers, and pending a decision on the relief sought in the notice of motion or a further order by this Court:

1.1 The Bank of Baroda is directed to continue to hold the Trust funds of the Optimum Mine Rehabilitation Trust ("the Optimum Trust") and the Koorfontein Mine Rehabilitation Trust ("the Koorfontein Trust"), in an interest-bearing bank account or accounts in the name of the Trusts.

1.2 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 are interdicted,

1.2.1 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;

1.2.2 without detracting from the generality of 1.2.1 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.

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- 1.3 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 are interdicted:
- 1.3.1 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;
- 1.3.2 Without detracting from the generality of 1.3.1 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.
- 2 Any party may, upon reasonable notice and good cause shown, apply to the Court to vary the order in paragraph 1 above.
- 3 The matter is postponed for hearing on 7 and 8 December 2017 and the matter will proceed as follows:
- 3.1 The applicant will amend its notice of motion, effect any necessary Joinder (including amongst others of Ronica Ragavan) and supplement its founding affidavit by 4 October 2017

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3.2 The respondents will file their answering affidavits on or before 18 October 2017;

3.3 The applicant will file its replying affidavit on or before 30 October 2017;


3.4 The applicant will file its heads of argument, chronology and practice note on 6 November 2017;

3.5 The respondents will file their heads of argument, chronology and practice note on 10 November 2017.

4 The costs of this application are reserved.

BY ORDER

THE REGISTRAR

  
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Pieter PT. Bezuidenhout

**From:** Denzel Bostander <denzel.bostander@resbank.co.za>  
**Sent:** 13 December 2017 05:00 PM  
**To:** JP Willemse  
**Cc:** Kuben Naidoo; Johann DeJager  
**Subject:** RE: Request for information

Dear Mr Willemse

I trust you are well.

I wish to refer to your request for access to the Deloitte section 7 report relating to the treatment of the mining rehabilitation trust funds, as well as our brief discussion on the matter at the SARB AML/CFT conference.

We thought it was important to inform you of the developments as outlined below. During a meeting with the acting CEO of Bank of Baroda Johannesburg Branch, Mr Anthony Jha, on 17 October 2017 the SARB was provided with the following feedback:

1. The R1.46 billion Optimum Coal Mine Rehabilitation Fund and the R280 million Koorfontein Mining Rehabilitation Trust Fund are held as per OUTA court order at Baroda;
2. The funds are unencumbered and not used as collateral;
3. The trust funds are treated in accordance with the applicable legislation;
4. Funds were held separate or independent from other Oakbay Group accounts;
5. Interest did accrue for the benefit of the trust and was capitalised;

The acting CEO did however informed us that just after the new management team arrived in SA they did discover that a facility of R150 million was granted to the Oakbay Group by Bank of Baroda of which R100 million was utilised. The Koorfontein Mining Rehabilitation Trust Fund was provided as collateral for the R150 million facility. When the new management team discovered this in 2016, they requested that the loan be repaid (not exactly sure but I think the loan was repaid within 15 days of request by Bank of Baroda and the situation was rectified according to Mr Jha).

I thought it was important to bring this to your attention.

Regards

Denzel Bostander  
 Deputy Registrar of Banks  
 Bank Supervision Department

P O Box 427 Pretoria 0001 South Africa  
 370 Helen Joseph Street (formerly Church Street) Pretoria 0002  
 Tel. +27 12 313 4488 Fax +27 12 313 3758 Cell +27 83 285 8475  
 E-mail: [Denzel.Bostander@resbank.co.za](mailto:Denzel.Bostander@resbank.co.za) [www.resbank.co.za](http://www.resbank.co.za)



South African Reserve Bank

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 (Handwritten initials and a circled '2')

## IN THE HIGH COURT OF SOUTH AFRICA

## GAUTENG DIVISION, PRETORIA

CASE NUMBER: \_\_\_\_\_/2018

In the ex parte application of:

THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS Applicant

In re:

The positive balance and any interest accrued in accounts held by the Bank of Baroda (currently under 'freeze') in respect of the –

- 1 Optimum Mine Rehabilitation Trust; and
- 2 Koornfontein Mine Rehabilitation Trust account

the full detail of the accounts appearing from Annexure A to the Notice of Motion

IN THE APPLICATION FOR A PRESERVATION ORDER IN TERMS OF S 38(1)  
OF THE PREVENTION OF ORGANISED CRIME ACT, 121 OF 1998

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**CONFIRMATORY AFFIDAVIT**

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I, the undersigned

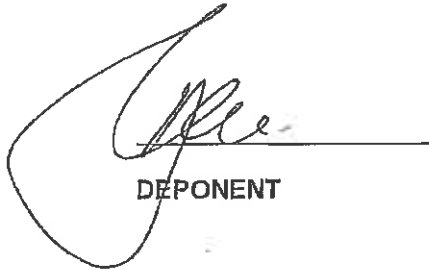
**JOHANN PHILLIP WILLEMSE**

do hereby make an oath and say that:

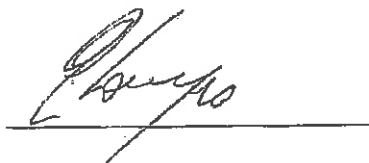


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3.6 I have subsequently requested an affidavit from Mr Bostander setting out the interaction the SARB had with the acting CEO of Baroda, on 17 October 2017, as well as the details of any other engagements or correspondence between themselves.

  
DEPONENT

I hereby certify that the deponent has acknowledged that he/she knows and understands the contents of this affidavit, which was signed and sworn to before me, Commissioner of Oaths, at PRETORIA on this the 5<sup>th</sup> day of March, 2018 the regulations contained in Government Notice No R1258 of 21 July 1972, as amended, and Government Notice No R1648 of 19 August 1977, as amended, having been complied with.



COMMISSIONER OF OATHS

FULL NAMES: Gabriel Ernst Luyts

ADDRESS: ORTJA ORTJA Kenypton Park

EX OFFICIO: SARS



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NUMBER: 14775 /2018

Handwritten marks: 'X', '4', and a signature.

In the ex parte application of:

THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS Applicant

In re:

The positive balance and any interest accrued in all accounts held by the Bank of Baroda Bank (currently under 'freeze') in respect of the -

A Optimum Mine Rehabilitation Trust:

1 Current account:

920 202 000 00 524

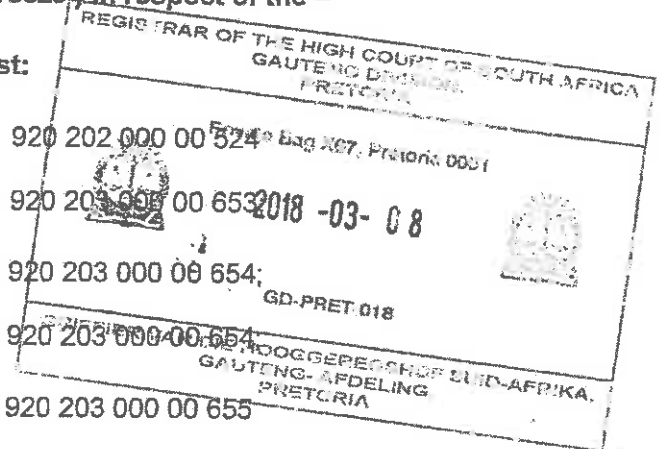
2 Fixed deposit accounts:

920 203 000 00 653

920 203 000 00 654;

920 203 000 00 654

920 203 000 00 655



B Koornfontein Mine Rehabilitation Trust:

1 Current account:

920 202 000 00 519

2 Fixed deposit account:

920 203 000 00 649

IN THE APPLICATION FOR A PRESERVATION ORDER IN TERMS OF S 38(1) OF THE PREVENTION OF ORGANISED CRIME ACT, 121 OF 1998

~~DRAFT ORDER~~

On 8 March, 2018.

Before Justice RABIE, in chambers.

Having read the notice of motion, the founding affidavit and annexures, and having heard counsel for the applicant

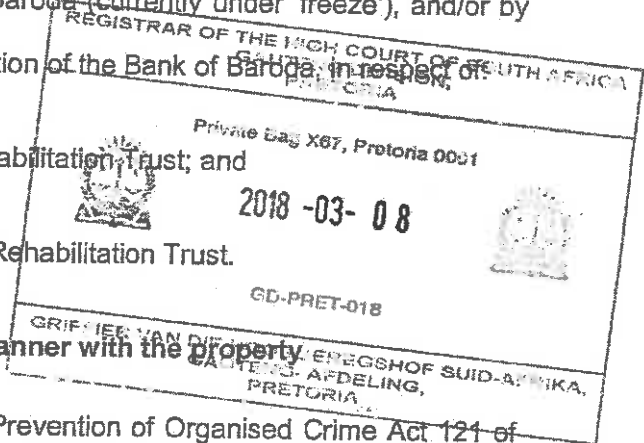
**IT IS HEREBY ORDERED THAT:**

**The Property**

1 This order relates the positive balance and any interest accrued in all accounts, held by the Bank of Baroda (currently under 'freeze'), and/or by any other party on behalf/instruction of the Bank of Baroda, in respect of:

1.1 The Optimum Mine Rehabilitation Trust; and

1.2 The Koomfontein Mine Rehabilitation Trust.



**Prohibition against dealing in any manner with the property**

2 In terms of section 38(2) of the Prevention of Organised Crime Act 121 of 1998 (the Act), all persons with knowledge of this order, are, other than as required and permitted by this order, prohibited from removing, taking possession of or control over, dissipating, interfering with, diminishing the value of or dealing in any other manner with any of the movable property to which this order relates.

3 The property is to be immediately transferred from the Bank of Baroda (Baroda), or by any other party holding the property on behalf/instruction of,

Baroda, to Nedbank Group Limited (Nedbank) and then remain under the effective control of Nedbank pending the finalisation of forfeiture proceedings under the Act.

4 Nedbank is authorised to:

4.1 Assume control of the property/trust accounts and to open and transfer these funds to similar optimal interest bearing trust accounts;

4.2 Administer the property/trusts accounts and do anything necessary to preserve the property/trusts while the order is in force;

4.3 Accept any payments into these trust accounts;

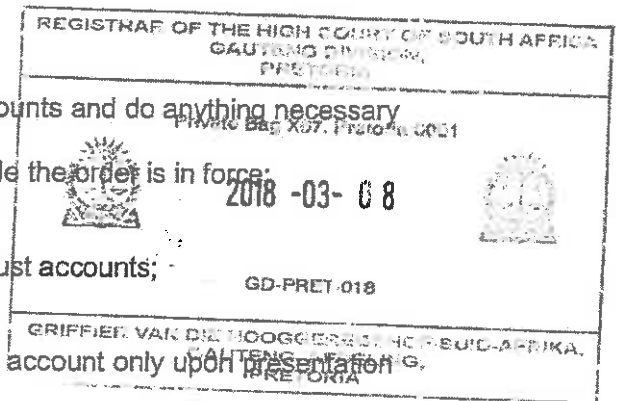
4.4 Release funds held in these trusts account only upon presentation of a court order authorising such release; and

4.5 Deduct reasonable banking charges in accordance with the banking laws, regulations and practices for the administration of these Mine Rehabilitation Trust accounts.

5 Applicant and the Director General of the Department of Mineral Resources is to be served with all applications for access to these funds, urgent or otherwise.

6 Baroda is to furnish applicant and the Director General of the Department of Mineral Resources, within 30 days of service of this order, with copies of all:

6.1 Agreements and/or documentation relating to the determination of the interest rate/s agreed to for both trust accounts;



- 6.2 The full transactional history of the trust accounts;
- 6.3 All instructions, be it written and/or oral, relating to all transactions and/or transfers of funds held in both trust accounts; and
- 6.4 Any other relevant documentation.

in order for the parties to verify the accuracy of the funds preserved.

**Service and publication**

7 The applicant must in terms of section 39 of the Act:

7.1 Cause notice of this order to be served, by the Sheriff, in the form set out in 'Annexure A', together with electronic copies of the documents supporting the application, on:

7.1.1 **The Bank of Baroda, 2<sup>nd</sup> Floor, Atrium on 5th, Sandton City, Sandton.**

7.1.2 **The Trustees of Optimum Mine Rehabilitation Trust, c/o Pushpaveni Ugeshni Govender (in her capacity as the trustee of the Optimum Mine Rehabilitation Trust and director of Optimum Coal Mine (Pty) Ltd): Grayston Ridge Office Park, No. 144, Katherine Street, Sandown, Sandton.**

7.1.3 **The Trustees of Koornfontein Mine Rehabilitation Trust:**

c/o Pushpaveni Ugeshni Govender (in her capacity as the trustee of Koornfontein Mine Rehabilitation Trust, and



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c/o Ronica Ragavan (in her capacity as sole director of Koorfontein Mine (Pty) Ltd): 144 Katherine Street, Sandown, Sandton.

7.1.4 The Minister responsible for Mineral Resources, Trevenna Campus, 70 Meintjes Street, Sunnyside, Pretoria.

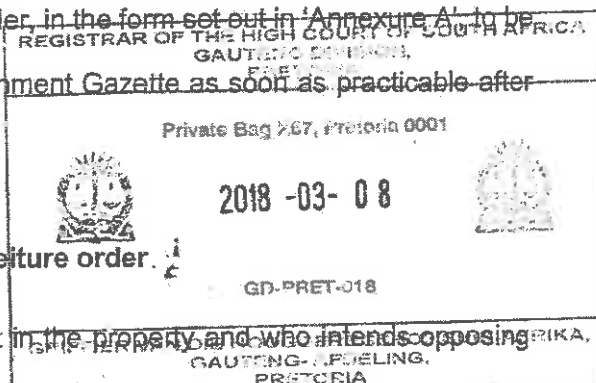
7.1.5 The Director General: Department of Mineral Resources, Trevenna Campus, Building 2 C, c/o Meintjes and Francis Baard Streets, Sunnyside, Pretoria.

7.1.6 The Master of the High Court: Pretoria, c/o The Acting Chief Master: SALU Building, 316 Thabo Sehume Street, Pretoria, Gauteng.

7.1.7 NEDBANK Group Limited, 135 Rivonia Road, Sandton.

7.1.8 The Organisation Undoing Tax Abuse, 18 Oak avenue, Randburg.

7.2 Cause notice of this order, in the form set out in 'Annexure A' to be published in the Government Gazette as soon as practicable after the order is granted.



**Entry of appearance to oppose forfeiture order.**

8 Any person who has an interest in the property and who intends opposing the application for an order forfeiting the property to the State or applying for an order excluding his or her interest from a forfeiture order in respect of the property, must enter an appearance giving notice of his or her intention in terms of section 39(3) of the Act.



9

9 Such notice must be delivered to the applicant:

9.1 In the case of any person specifically identified for service in terms of this order, within 14 calendar days of service; and

9.2 In the case of any other person, 14 calendar days after the date when a notice of the order was published in the Government Gazette.

10 A notice in terms of section 39 must contain full particulars of the chosen address for the delivery of documents concerning further proceedings in this matter and must be accompanied by an affidavit setting out:

10.1 The full particulars of the identity of the person giving the notice;

10.2 The nature and extent of his/her interest in the property concerned;

10.3 Whether he/she intends opposing the making of the forfeiture order, or whether he or she intends applying for an order excluding his or her interest in that property from the operation of the order;

10.4 Whether he/she admits or denies that the property concerned is an instrumentality of an offence referred to in schedule 1 of the Act, or is the proceeds of unlawful activities and the basis for such defence;

10.5 If he/she intends applying for the exclusion of his or her interests from the operation of the forfeiture order, the basis for such an application.

11 Any person who is affected by the order may on good cause shown, apply for reconsideration. Such application shall be made:

REGISTRAR OF THE HIGH COURT OF SOUTH AFRICA  
 Private Bag X67, Pretoria 0001

2018 -03- 08

GD-PRET-018


GRIFFIER VAN DIE HOOGGERECHTSHOF SUID-AFRIKA,  
 GAUTENG-REDELIING,  
 PRETORIA

11.1 In instances where the person is able to justify the application on grounds of urgency, upon 3 days notice (or such shorter period as the court may determine on good cause shown).

11.2 In other instances, upon at least 7 days notice to the applicant and all other persons identified in this order as being persons who may have an interest in the property.

12 Such an application must be made not later than 8 days after the person applying for reconsideration becomes aware of the existence of the order, or within such further period as the court may consider reasonable, bearing in mind the underlying objectives of Chapter 6 of the Act.

BY ORDER OF COURT  
REGISTRAR OF THE HIGH COURT  
DATE

REGISTRAR OF THE HIGH COURT OF SOUTH AFRICA GAUTENG DIVISION, PRETORIA	
Private Bag X67, Pretoria 001	
	2018 -03- 08
CD-PRET-018	
GRIFFIER VAN DIE HOOGGEREGTE VAN SUID-AFRIKA GAUTENG-DEELSTREEK, PRETORIA	

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**ANNEXURE 'A'**

**IN THE HIGH COURT OF SOUTH AFRICA**

**GAUTENG DIVISION, PRETORIA**

CASE NUMBER: 14775/2018

In the ex parte application of:

**THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS**

Applicant

In re:

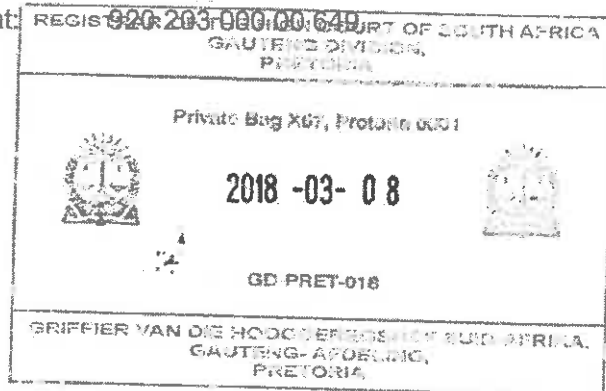
The positive balance and any interest accrued in all accounts held by the Bank of Baroda Bank (currently under 'freeze') in respect of the –

**A Optimum Mine Rehabilitation Trust:**

- 1 Current account: 920 202 000 00 524
- 2 Fixed deposit accounts: 920 203 000 00 653;  
920 203 000 00 654;  
920 203 000 00 654;  
920 203 000 00 655

**B Koornfontein Mine Rehabilitation Trust:**

- 1 Current account: 920 202 000 00 519
- 2 Fixed deposit account: 920 203 000 00 649



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# ANNEXURE 'A'

IN THE APPLICATION FOR A PRESERVATION ORDER IN TERMS OF SECTION 38(1) OF THE PREVENTION OF ORGANISED CRIME ACT, 121 OF 1998

NOTICE IN TERMS OF S 39 OF THE PREVENTION OF ORGANISED CRIME ACT, 121 OF 1998

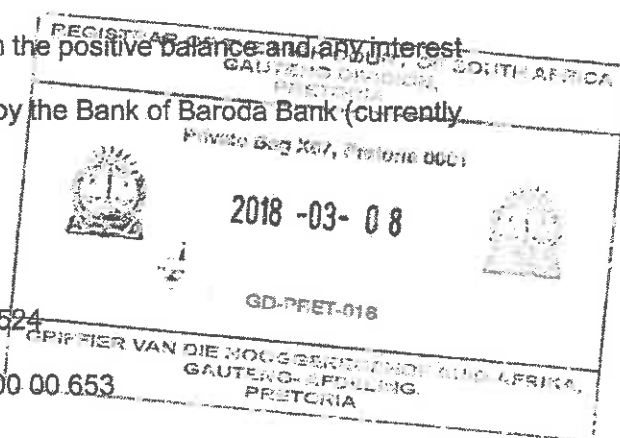
This notice is addressed to:

- 1 The Bank of Baroda: South Africa,
- 2 The Trustees of Optimum Mine Rehabilitation Trust,
- 3 The Trustees of Koornfontein Mine Rehabilitation,
- 4 The Minister for Mineral Resources, South Africa,
- 5 The Director General of the Department of Mineral Resources,
- 6 The Master of the High Court: Pretoria,
- 7 NEDBANK Group Limited,
- 8 The Organisation Undoing Tax Abuse

and all other persons who have an interest in the positive balance and any interest accrued in all accounts (the property) held by the Bank of Baroda Bank (currently under 'freeze') in respect of the:

**Optimum Mine Rehabilitation Trust:**

- 1) Current account: 920 202 000 00 524
- 2) Fixed deposit account: 920 203 000 00 653
- 3) Fixed deposit account: 920 203 000 00 654
- 4) Fixed deposit account: 920 203 000 00 654



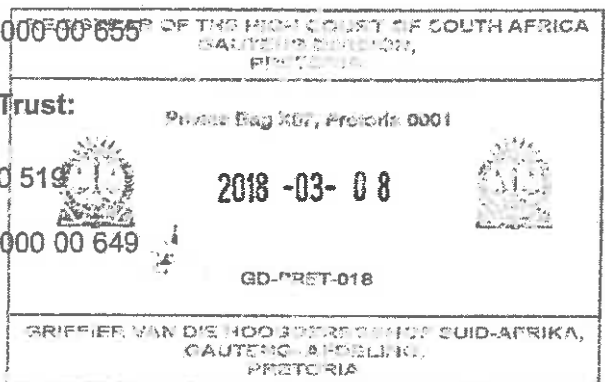
**ANNEXURE 'A'**

5) Fixed deposit account: 920 203 000 00 655

**Koorfontein Mine Rehabilitation Trust:**

1) Current account: 920 202 000 00 519

2) Fixed deposit account: 920 203 000 00 649



**Take notice that:**

- 1 The National Director of Public Prosecutions (**National Director**) has obtained a preservation of property order (**the order**), a copy of which is attached to this notice, in terms of s 38(2) of the Prevention of Organised Crime Act (**Act**) in respect of the property;
- 2 If you have an interest in the property, you should understand that it is now at risk. You are advised to obtain legal advice on whether your interest can be protected and, if so, on how to protect it;
- 3 You are notified that the National Director will, within 90 days of publication of this notice, apply to the High Court under s 48 of the Act for an order declaring the property forfeit to the state. The order will remain in force until the application for a forfeiture order is finalised, and until any forfeiture order that is made is satisfied;
- 4 If you intend to oppose the application for a forfeiture order, or you intend to apply for an order excluding your interest from a forfeiture order in respect of the property, you must enter an appearance in terms of the order. The requirements for such an appearance are set out in the order and are also dealt with in ss 39(3), (4) and (5) of the Act. An appearance must comply with these requirements;

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## ANNEXURE 'A'

- 5 Your attention is specifically drawn to the 14 day time limit prescribed in s 39(4) for the entry of an appearance referred to in paragraph 4 above;
- 6 If you enter an appearance in terms of the order you will be entitled to be given 14 days notice of the application by the applicant for a forfeiture order in respect of the property;
- 7 If you fail to enter an appearance in terms of the order or to comply with the above requirements, you will not be given notice of the application for a forfeiture order and you will not be entitled to appear at the hearing of the application. In such a case, the court may grant a default order forfeiting the property to the state under s 53 of the Act;
- 8 You may, on good cause shown (including the non-availability of any other suitable remedy to protect your legitimate rights or interests), on 3 days notice in urgent instances and at least 7 days notice in other instances to the applicant, and within 8 days of becoming aware of the order, apply for reconsideration of the order;
- 9 You are specifically advised that even if you intend to apply for reconsideration of the preservation order in this case, you must, in addition, comply with paragraphs 4 and 5 above if you intend to oppose the forfeiture application at a later date. Failure to do so can result in a forfeiture order being granted against the property by default and without further notice to you.

REGISTRAR OF THE HIGH COURT OF SOUTH AFRICA Pretoria	
2018 -03- 08	
CD-PRET-018	
SNIJFER VAN DIE HOOGGEREGTE VAN SUID-AFRIKA, GAUTENG- AFDIELING, PRETORIA	

CS 15

## ANNEXURE 'A'

- 10 Whenever this order states that you must deliver or serve any notice, affidavit or other process document on the applicant, you must deliver or serve them on the applicant at the following address:

### THE STATE ATTORNEY

SALU Building

316 Thabo Sehume street,

Private Bag X91

PRETORIA

0001

Ref: \_\_\_\_\_/2018/Z56

Tel: 012 309 1677

Fax: 012 309 164/50



Cell: 073 434 1293

Email: [RMathaga@justice.gov.za](mailto:RMathaga@justice.gov.za)

DX: 298 PRETORIA

Enquiries:

R MATHAGA

REGISTRAR OF THE HIGH COURT OF SOUTH AFRICA GAUTENG PROVINCE, PRETORIA	
Private Bag X67, Pretoria 0001	
	2018 -03- 08
	
CO-PRET-018	
BUREAU VAN DIE HOOGGEREGTING VAN OORWAAL, GAUTENG-PROVINSIE, PRETORIA	

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

**CASE NUMBER: 14775/2018**

In the matter between:

**PUSHPAVENI UGESHNI GOVENDER N.O.** First Applicant  
*(in her capacity as Trustee of Optimum Mine  
Rehabilitation Trust)*

**RESHMA MOOPANAR N.O.** Second Applicant  
*(in her capacity as Trustee of Optimum Mine  
Rehabilitation Trust)*

**PUSHPAVENI UGESHNI GOVENDER N.O.** Third Applicant  
*(in her capacity as Trustee of Koomfontein  
Rehabilitation Trust)*

**RESHMA MOOPANAR N.O.** Fourth Applicant  
*(in her capacity as Trustee of Koomfontein  
Rehabilitation Trust)*

and

**THE NATIONAL DIRECTOR OF PUBLIC  
PROSECUTIONS** Respondent

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**NOTICE OF MOTION**

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**PLEASE TAKE NOTICE** that the applicants intend to make application to the above Honourable Court on Tuesday, **17 April 2016** at 10h00 or as soon thereafter as counsel may be heard alternatively at a date and at a time to be arranged with the Registrar for an order:



1. Dispensing with the forms, time periods and service prescribed by the Uniform Rules of this Honourable Court and directing that the matter be heard and dealt with as one of urgency in terms of Uniform Rule 6(12);
2. Setting down the *ex parte* preservation of property order granted by Rabie J on 8 March 2018 in terms of section 38 of the Prevention of Organised Crime Act 121 of 1998 ("the Order") for reconsideration in accordance with Uniform Rule 6(12)(c) as well as paragraphs 11.2 and 12 of the Order;
3. Setting aside the Order;
4. Ordering Mr Molelle, personally, to pay the costs of this application *de bonis propriis*, alternatively jointly and severally together with all persons in the respondent who authorised and/or instructed the institution of the preservation proceedings;
5. Granting such further and/or alternative relief as may be necessary.

**TAKE NOTICE FURTHER** that the affidavit of **PUSHPAVENI UGESHNI GOVENDER** together with the annexures to the affidavit will be used in support of this application.

**KINDLY TAKE FURTHER NOTICE** that the applicants hereby appoint the address for service of all process and documents in this action, the address of the attorneys as set out hereunder.

**TAKE FURTHER NOTICE** that, should you oppose this application:

- a. The applicant's attorneys are to be informed thereof by written notice no later than Friday, 6 April 2018;
- b. That an answering affidavit, if any, be filed by no later than 10h00 on Monday, 9 April 2018.

AND FURTHER that you appoint an address provided for in terms of Rule 6 (5)(b) where notices and service of all other documents for this proceedings be accepted.

DATED at PRETORIA on this the 4<sup>TH</sup> day of APRIL 2018.

  
VAN DER MERWE & VAN DER MERWE ATTORNEYS  
ATTORNEYS FOR THE 1<sup>ST</sup> - 4<sup>TH</sup> APPLICANTS  
1<sup>ST</sup> FLOOR, 308 BROOKS STREET  
MENLO PARK, PRETORIA  
TEL: (012) 941 9930  
FAX: (086)603 9496  
E-mail: pieter@vdmattorney.co.za  
REF: PVDIM/CL/PK0002

TO:

REGISTRAR OF THE HIGH COURT  
PRETORIA

AND TO:

STATE ATTORNEY  
SALU BUILDING  
316 THABO SEHUME STREET  
PRIVATE BAG X91  
PRETORIA  
0001  
TEL: (012) 309 1677  
FAX: (012) 309 164/50

CELL: 073 434 1293  
E-MAIL: [RMathaga@justice.gov.za](mailto:RMathaga@justice.gov.za)  
REF: M MATHAGA/2018/Z56

**AND TO:**  
BANK OF BARODA

**AND TO:**  
MINISTER OF MINERAL RESOURCES

**AND TO:**  
DIRECTOR GENERAL  
DEPARTMENT OF MINERAL RESOURCES

**AND TO:**  
NEDBANK GROUP

**AND TO:**  
ORGANISATION UNDOING TAX ABUSE

**AND TO:**  
THE BUSINESS RESCUE PRACTITIONERS  
OF OPTIMUM COAL MINE (PTY) LTD

**AND TO:**  
THE BUSINESS RESCUE PRACTITIONERS  
OF KOORNFONTEIN MINES (PTY) LTD

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

**CASE NUMBER: 14775/2018**

In the matter between:

**PUSHPAVENI UGESHNI GOVENDER N.O.**  
*(in her capacity as Trustee of Optimum Mine  
Rehabilitation Trust)*

First Applicant

**RESHMA MOOPANAR N.O.**  
*(in her capacity as Trustee of Optimum Mine  
Rehabilitation Trust)*

Second Applicant

**PUSHPAVENI UGESHNI GOVENDER N.O.**  
*(in her capacity as Trustee of Koorfontein  
Rehabilitation Trust)*

Third Applicant

**RESHMA MOOPANAR N.O.**  
*(in her capacity as Trustee of Koorfontein  
Rehabilitation Trust)*

Fourth Applicant

and

**THE NATIONAL DIRECTOR OF PUBLIC  
PROSECUTIONS**

Respondent

---

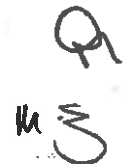
**CONFIRMATORY AFFIDAVIT**

---

I, the undersigned,

**RONICA RAGAVAN**

hereby make oath and state:



1. I am an adult female businesswoman and acting group CEO of Oakbay Investments (Pty) Ltd, situated at 144 Katherine Street, Sandton, Johannesburg.
2. The facts herein contained fall within my own personal knowledge and belief, unless otherwise stated or indicated, and are both true and correct
3. I have read the founding affidavit of PUSHPAVENI UGESHNI GOVENDER and confirm the contents thereof insofar as it relates to me.
4. I know and understand the contents of the above declaration. I have no objection in taking the prescribed oath. I consider the prescribed oath to be binding on my conscience.



DEPONENT

THUS SIGNED AND SWORN TO AT SANDTON ON THIS 4<sup>th</sup> DAY OF APRIL 2018, THE DEPONENT HAVING ACKNOWLEDGED THAT SHE KNOWS AND UNDERSTANDS THE CONTENTS OF THIS AFFIDAVIT, HAS NO OBJECTION TO TAKING THE OATH AND HAVING SWORN THAT THE CONTENTS THEREOF ARE TRUE AND CORRECT AND, THAT SHE CONSIDERS THE OATH TO BE BINDING ON HER CONSCIENCE.



COMMISSIONER OF OATHS

MICHELLE ZIBANE  
Commissioner of Oaths  
Practising Attorney R.S.A.  
90 Rivonia Road  
Sandton  
2196

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

**CASE NUMBER: 14775/2018**

In the matter between:

**PUSHPAVENI UGESHNI GOVENDER N.O.** First Applicant  
*(in her capacity as Trustee of Optimum Mine  
Rehabilitation Trust)*

**RESHMA MOOPANAR N.O.** Second Applicant  
*(in her capacity as Trustee of Optimum Mine  
Rehabilitation Trust)*

**PUSHPAVENI UGESHNI GOVENDER N.O.** Third Applicant  
*(in her capacity as Trustee of Koorfontein  
Rehabilitation Trust)*

**RESHMA MOOPANAR N.O.** Fourth Applicant  
*(in her capacity as Trustee of Koorfontein  
Rehabilitation Trust)*

and

**THE NATIONAL DIRECTOR OF PUBLIC  
PROSECUTIONS** Respondent

---

**CONFIRMATORY AFFIDAVIT**

---

I, the undersigned,

**RESHMA MOOPANAR**

hereby make oath and state:

  
M.S.

1. I am an adult female business woman and co-trustee, with PUSHPAVENI UGESHNI GOVENDER, of the Koornfontein Rehabilitation Trust and the Optimum Mine Rehabilitation Trust.
2. The facts herein contained fall within my own personal knowledge and belief, unless otherwise stated or indicated, and are both true and correct
3. I have read the founding affidavit of PUSHPAVENI UGESHNI GOVENDER and confirm the contents thereof insofar as it relates to me.
4. I know and understand the contents of the above declaration. I have no objection in taking the prescribed oath. I consider the prescribed oath to be binding on my conscience.



DEPONENT

THUS SIGNED AND SWORN TO AT SANDTON ON THIS 4<sup>th</sup> DAY OF APRIL 2018, THE DEPONENT HAVING ACKNOWLEDGED THAT HE KNOWS AND UNDERSTANDS THE CONTENTS OF THIS AFFIDAVIT, HAS NO OBJECTION TO TAKING THE OATH AND HAVING SWORN THAT THE CONTENTS THEREOF ARE TRUE AND CORRECT AND, THAT HE CONSIDERS THE OATH TO BE BINDING ON HIS CONSCIENCE.



COMMISSIONER OF OATHS

MICHELLE ZIBANE  
Commissioner of Oaths  
Practising Attorney R.S.A.  
90 Rivonia Road  
Sandton  
2196

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

**CASE NUMBER: 14775/2018**

In the matter between:

**PUSHPAVENI UGESHNI GOVENDER N.O.**  
*(in her capacity as Trustee of Optimum Mine  
Rehabilitation Trust)*

First Applicant

**RESHMA MOOPANAR N.O.**  
*(in her capacity as Trustee of Optimum Mine  
Rehabilitation Trust)*

Second Applicant

**PUSHPAVENI UGESHNI GOVENDER N.O.**  
*(in her capacity as Trustee of Koorfontein  
Rehabilitation Trust)*

Third Applicant

**RESHMA MOOPANAR N.O.**  
*(in her capacity as Trustee of Koorfontein  
Rehabilitation Trust)*

Fourth Applicant

and

**THE NATIONAL DIRECTOR OF PUBLIC  
PROSECUTIONS**

Respondent

---

**AFFIDAVIT IN SUPPORT OF AN APPLICATION IN TERMS OF RULE  
6(12)(C) TO RECONSIDER PRESERVATION ORDER**

---

I, the undersigned,

**PUSHPAVENI UGESHNI GOVENDER**

do hereby make oath and say that:



1. I am an adult businesswoman and I am the first and third applicants in this matter, in my capacity as a co-trustee of the Optimum Mine Rehabilitation Trust and the Koorfontein Rehabilitation Trust. My place of business is situated at Grayston Ridge Office Park, no. 144, Katherine Street, Sandown, Sandton.
2. Letters of authority issued by the Master of the High Court for the Optimum and Koorfontein Trusts are annexed hereto marked "PG1" and "PG2".
3. I am duly authorised to institute these proceedings and to depose to this affidavit on behalf of the trustees of both of the Trusts. I attach marked annexures "PG3" and "PG4", resolutions of the trustees of each of the Trusts to this effect. A confirmatory affidavit deposed to by Moopanar will also be filed with this affidavit.
4. I am also the sole director of Optimum Coal Mine (Pty) Ltd, currently under business rescue.
5. The facts herein contained are within my personal knowledge, save where otherwise stated or the contrary appears from the context, and are, to the best of my knowledge and belief, both true and correct.
6. Where I make submissions of a legal nature I do so on the advice of the applicants' legal representatives, which advice I believe to be correct.

## **PARTIES**

7. I am the first applicant in my capacity as a co-trustee for the time being of the **OPTIMUM MINE REHABILITATION TRUST** ("Optimum Trust"). The Optimum Trust is a trust duly registered in terms of the Trust Property Control Act 57 of 1988, with its principal place of business situated at 144 Katherine Street, Grayston Ridge Office Park, Sandown, Sandton.
8. The second applicant is **RESHMA MOOPANAR**, in her capacity as co-trustee for the time being of the Optimum Trust, with her place of business situated at 144 Katherine Street, Grayston Ridge Office Park, Sandown, Sandton.
9. I am the third applicant, in my capacity as co-trustee for the time being of the **KOORNFONTEIN REHABILITATION TRUST** ("Koorfontein Trust"). The Koorfontein Trust is a trust duly registered in terms of the Trust Property Control Act 57 of 1988, with its principal place of business situated at 144 Katherine Street, Grayston Ridge Office Park, Sandown, Sandton.
10. The fourth applicant is **RESHMA MOOPANAR**, in her capacity as co-trustee for the time being of the Koorfontein Trust, with her place of business situated at 144 Katherine Street, Grayston Ridge Office Park, Sandown, Sandton.
11. References to "*the trustees*" in this affidavit should be taken as a general reference to the trustees, past and present, at the relevant time, as the context indicates. I will also refer to the two mining rehabilitation trusts collectively as "*the Trusts*".

12. The respondent is **THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS ("NDPP")** duly appointed in terms of section 179(1)(a) of the Constitution of the Republic of South Africa, 1996, with its principal place of business situated at no. 123 Westlake Avenue, corner of Westlake and Hartley Streets, Weavind Park, Silverton, Pretoria. The respondent is represented by the State Attorney with address at SALU Building, 316 Thabo Sehume Street, Pretoria.

### **NATURE OF THE APPLICATION**

13. This is an application for the reconsideration of a preservation of property order granted *ex parte* and urgently in favour of the NDPP in terms of section 38(1), (2) and (3) of the Prevention of Organised Crime Act 121 of 1998 ("**POCA**") by his Lordship Mr Justice Rable on 8 March 2018 ("**the Order**").
14. The Order, in essence, seeks to preserve the positive bank balances and any interest accrued thereon in all of the Optimum and Koorfontein Trusts' accounts, held by the Bank of Baroda, and/or by any other party on behalf or on the instructions of the Bank of Baroda ("**the Property**"), pending the finalisation of forfeiture proceedings to be instituted in due course by the NDPP in terms of POCA.
15. I attach a copy of the Order, marked annexure "**PG5**".
16. This application is brought in accordance with the provisions of paragraph 11.2 of the Order, read with Rule 6(12)(c) of this Court's

Rules. I will address the applicants' compliance with paragraphs 11 and 12 of the Order in bringing this application below.

17. The applicants, as trustees for the time being of the Trusts, are plainly interested persons. This application for reconsideration of the Order is brought on the basis, *inter alia*, that the Property is not susceptible to preservation or forfeiture, for at least the following reasons:

17.1. First, the nature of the Property is such that it cannot be forfeited to the State, and so any preservation order that has been granted has no purpose and falls outside of the scheme envisaged by POCA.

17.2. Second, the Property does not constitute an instrumentality of an offence.

17.3. Third, the Property does not constitute the proceeds of unlawful activity.

18. Accordingly, the jurisdictional prerequisites for a preservation order under section 38 of POCA have not been met. In any event, it bears emphasising that the Property is already "frozen" under an interim interdict granted by this Court under case number 65616/2017 ("the **OUTA interdict**"). The OUTA interdict requires that the Property be held in trust pending the finalisation of the main application, which is currently pending before this Court, and has been set down for hearing by special allocation on 31 May and 1 June 2018 ("the **OUTA main application**"). A copy of the OUTA interdict order is attached as annexure "PG6". In

light of the OUTA interdict, there was absolutely no risk that the funds would be dissipated without a preservation order having been granted, and so the NDPP's preservation application was manifestly not urgent, nor did the NDPP have any right to approach the Court *ex parte*.

19. It also bears mentioning that this is the second vexatious and unmeritorious preservation order that has been sought by the NDPP in relation to companies and/or individuals associated with the Oakbay Group. I will address in greater detail below the circumstances surrounding the first preservation order, which was reconsidered and set aside on 9 March 2018 (the day after this Order was granted), but in respect of which the reconsideration application had already been argued (from which the vexatiousness of the NDPP's conduct and the application had been made apparent to the court during argument). For now, I wish to give notice that the Trusts intend seeking a punitive costs order against:

19.1. Mr Molelle (the deponent to the NDPP's founding affidavit in these preservation proceedings) in his personal capacity; and

19.2. Jointly and severally with the persons within the NDPP's office who instructed and authorised the bringing of this application.

20. Before addressing the allegations made in the NDPP's founding affidavit *ad seriatim*, I will provide an overview of the NDPP's deeply flawed case which served before His Lordship Mr Justice Raby, two points *in limine* which are destructive of the NDPP's case, as well as the reasons why the Trusts' funds are not susceptible to preservation and/or forfeiture.

## THE PRESERVATION OF PROPERTY APPLICATION

21. The preservation application was launched by the NDPP on 6 March 2018, and was set down for hearing on an *ex parte* basis two days later, on 8 March 2018.
22. That which is evident from the NDPP's case, as set out in its founding affidavit, is that the legal and factual foundation of its preservation application rests on the Public Protector's State of Capture Report ("the Report"), as well as the allegations made in the OUTA main application.
  - 22.1. However, absolutely no attempt at independent verification or investigation of those allegations has been demonstrated by the NDPP, which has instead simply relied on highly contested allegations, thus founding its application on unreliable hearsay.
  - 22.2. Insofar as the deponent to the NDPP's affidavit incorporates allegations made by third parties into its affidavit, without confirming that the deponent has personally investigated or caused those allegations to be investigated, I am advised that its affidavit is further impermissible and constitutes inadmissible hearsay evidence.
  - 22.3. Moreover, the NDPP's reliance on the allegations contained in the OUTA application and the manner in which this evidence is presented is disingenuous. The NDPP does not disclose that the OUTA application has not yet been heard or determined by this Court, nor does the NDPP fully disclose the extent to which

the allegations contained therein are disputed by the respondents in that case (including the trustees of the Trusts). The OUTA interim order was made by agreement between the parties pending the determination of the main application.

23. The sum total of the NDPP's case as regards the unlawful use of the mining rehabilitation funds is the following:
- 23.1. The "*evidence*" contained in the OUTA main application demonstrates that the trust funds were **not ring-fenced** for their intended purpose and were applied to fund Tegeta Exploration and Resources (Pty) Ltd's cash flow operations.
  - 23.2. One of the most glaring misuses/misappropriations was the use of Koorfontein's Trust funds as security for the loan to Koorfontein Mines in an amount of R150 million. This had the effect of diminishing the funds required to be secured for rehabilitation, exposing the State to a "*potential*" liability in having to make funds available for rehabilitation, should there be a shortfall.
  - 23.3. The splitting of payments into several different accounts by Bank of Baroda diminished the funds' investment earning potential.
  - 23.4. "*The keeping of those funds in and out of various accounts*" and their utilisation for other purposes is unlawful.

- 23.5. The Public Protector's Report points to various withdrawals from the Trusts' funds.
- 23.6. This was a contravention of the Minerals and Petroleum Resources Development Act 28 of 2002 ("MPRDA"), the National Environmental Management Act 107 of 1998 ("NEMA") and the Income Tax Act 58 of 1962 ("ITA").
- 23.7. These transactions constitute fraud or theft of the trust funds.
24. As regards the Public Protector's Report in particular, I emphasise that the Public Protector made no "findings" as the NDPP's deponent implies. It is well-known that the Public Protector made certain preliminary observations, but required the President to establish a commission of inquiry to investigate all of the allegations and complaints made.
- 24.1. I also wish to point out that neither myself, nor any of the other trustees of the Trusts at the time were ever subpoenaed or invited to provide evidence before the Public Protector.
- 24.2. The Public Protector could never have been in a position to make findings against the trustees or the Trusts in circumstances in which she had not adhered to the basic requirements of procedural fairness as required by the Public Protector Act 34 of 1994, or the rules of natural justice and the principle of *audi alteram partem*.
25. As regards the OUTA main application, what the NDPP fails to take into account (and indeed failed to disclose to the judge hearing the *ex parte*



application) is the fact that the applicants, as well as the mining companies, deny these allegations, and have put up comprehensive defences in their answering affidavits. The matter has not yet been heard or determined by this Court. The NDPP makes no attempt to engage critically with the allegations made, or to consider fairly the defences raised by, *inter alia*, the applicants.

26. The NDPP goes on to state that the actions of the trustees are directly attributable to these supposedly 'unlawful activities'. According to the NDPP, on the trustees' own version in the OUTA main application, they "*withdrew and/or accessed significant funds*" from the Trusts and, in opposing the OUTA main application, simply inform the court of their actions and "*do not present any documentary proof to the satisfaction of the Court to substantiate the actual rehabilitation*".

26.1. The papers in the OUTA main application are voluminous and to avoid prolixity, I do not attach them to this affidavit. However, a full set of the papers will be made available to the Court at the hearing of this application. I do for convenience attach the trustees' answering affidavit, without the annexures, marked annexure "PG7".

26.2. On the papers in the OUTA main application, and as the NDPP is well aware, the trustees make no such admission. In fact, in the trustees' answering affidavit, which I deposed to, I make it very clear that only one withdrawal of funds occurred.

26.3. That withdrawal, in the amount of R7,5 million, was made on 23 May 2016, from the Optimum Trust's Standard Bank current account, from interest earned on the investment of the capital reserves of the Trust, and was transferred to the Optimum Coal Mine's current account.

26.3.1. The money was required for the business rescue practitioners, who were then operating Optimum Coal Mine (and did so until August 2016), to make payment to the rehabilitation contractor for rehabilitation work carried out at the mine.

26.3.2. In addition, I wish to draw to this Court's attention the fact that the trustees brought this withdrawal to the attention of the South African Revenue Services by declaring it in the Trust's 2017 tax return. In this regard, I attach a copy of a letter correspondence exchanged between the trustees and SARS as annexures "PG8" and "PG9". They acted in a transparent and *bona fide* manner, and explained the error.

26.3.3. Since then, there have been no attempts to access the Optimum Trust's funds, either the capital reserves or the interest accrued.

26.4. Moreover, the court has made no such finding as to the sufficiency or otherwise of the applicants' defence or the evidence placed before the court to sustain it. As I have pointed out above, the OUTA main application has not yet been heard or determined by this court.

26.5. In respect of the Koornfontein Trust, I wish to emphasise the following:

26.5.1. During the 2017 tax year, Koornfontein Mines requested approval from the DMR to access funds from the Koornfontein Trust in order to perform certain rehabilitation work at the mine. The DMR approved this request, subject to certain conditions.

26.5.2. However, none of these funds were ultimately accessed or utilised, either for concurrent rehabilitation or for any other purpose.

26.5.3. Instead, Koornfontein Mines obtained a loan from the Bank of Baroda, to be used to effect rehabilitation work, for an approximate amount of R150 million, which was sanctioned against the provision of security in the form of part of the deposit held by the Bank on behalf of the Koornfontein Trust. In the end, only R100 million was disbursed by the Bank of Baroda.

26.5.4. In this regard, I attach a copy of the sanction letter received from Bank of Baroda, setting out the terms and conditions of the loan, as annexure "PG10". This sanction letter makes it very clear that the loan was for purposes of rehabilitation only.

26.5.5. As Koorfontein Mines was not satisfied with the work assigned to the rehabilitation contractor, the funds were not ultimately utilised and were instead returned to the Bank of Baroda, together with interest. As a result, the loan was repaid in full and the security held against the Trust's funds was released.

26.5.6. The amount used as security was in any event from the surplus funds held – being those funds in excess of what the Koorfontein Mines was obliged by the provisions of NEMA and the MPRDA to hold as security for its rehabilitation obligations.

26.5.7. The Trustees and the Mines are of the view that surplus funds may be utilised for concurrent rehabilitation, and so there was no contravention of the requirements of NEMA in this regard. This is the issue which is currently *sub judice* before this Court in the OUTA main application. In any event, there was no crime committed nor any unlawful activity.



- 26.6. In respect of both Trusts, therefore, the trustees have been fully forthcoming about the one withdrawal that has occurred, and the use of the Koornfontein funds as security for the loan from the Bank of Baroda. The regulator and SARS were fully aware of this and did not contend that any crime had been committed.
27. The NDPP states further that the actions of the trustees were not only unlawful but also "*detrimental to the fiscus*" in that:
- 27.1. The South African government was exposed to the "*unwarranted financial burden of potentially having to fund mine rehabilitation at the expense of taxpayers*"; and
- 27.2. The trustees either "*unlawfully appropriated and/or misrepresented to the South African public as to the actual reasons for the withdrawal and/or access*" of the funds.
28. In light of the above, the NDPP concludes that the mines and/or trustees, through their actions:
- 28.1. Contravened or failed to comply with the regulations of NEMA and may therefore be liable to a fine or imprisonment in terms of regulation 18(2) read with regulation 19 of NEMA;
- 28.2. Committed the offence of fraud; and/or
- 28.3. Committed the offence of theft.

29. Turning to the very crux of the preservation order application, the NDPP states that it has brought this application, in accordance with the requirements of section 38(2) of POCA, on the basis that the Property:

29.1. is the proceeds of unlawful activities in that:

29.1.1. there are reasonable grounds to believe that the trustees of the Trusts have committed fraud and/or theft;

29.1.2. the trustees have used the trust funds in contravention of the regulations of NEMA, particularly regulations 8 and 17; and

29.1.3. the trustees failed to review, assess and adjust the trust funds and continued utilising the said funds for annual and/or concurrent mining rehabilitation in circumstances in which they could not do so.

29.2. is an instrumentality of an offence referred to in Schedule 1 of POCA, in that:

29.2.1. the rehabilitation trust funds *"played a central role in the commissioning of the alleged unlawful activities by the trustees"*;

29.2.2. the Property was *"concerned in the commission"* of the offences of fraud and theft as it was used *"for*

*m. zj*

*unlawful purposes and not for the specific purpose it was intended*"; and

29.2.3. the Trusts, *"by virtue of their misappropriation (theft and fraud), lent themselves to the commission of unlawful activities"* and thereby contravened NEMA and its regulations, as well as the ITA and other legislation.

30. But the NDPP's case does not establish that the funds held in trust in accordance with the requirements of NEMA and its regulations, as well as the MPRDA, are in fact the instrumentalities of any offences, nor that they are the proceeds of any unlawful activities, let alone that there was fraud or theft.

31. Before addressing the applicants' case on reconsideration, I am advised that there are two points *in limine* which demonstrate the defects in the NDPP's application.

#### **POINTS IN LIMINE**

32. I am advised that the first point *in limine* concerns the fact that the NDPP cited no respondents in its preservation application. I am advised that whilst the application was brought *ex parte*, the NDPP was still required to cite interested parties as respondents, but was only then entitled to seek the Order in their absence.

33. A further defect is the fact that the NDPP has made no provision in the Order for service of the Order on the Optimum and Koornfontein Mines, being the beneficiaries of the two Trusts (or on the business rescue practitioners currently operating the two companies), nor on Tegeta, which is the holding company of the two Mines.
34. I am advised that as a result, the NDPP's application is defective and ought not to have been granted in these circumstances.

**APPLICANTS' CASE: PROPERTY NOT SUSCEPTIBLE TO PRESERVATION OR FORFEITURE**

35. I am advised and submit that the Property is not susceptible to preservation or forfeiture as a result of its nature as specifically earmarked and statutorily mandated trust money. I will briefly set out the legislative scheme in terms of which the Property is held, in order to demonstrate this to the Court.
36. The Property is held in trust as security for the mines' compliance with the provisions of NEMA and the MPRDA in relation to rehabilitation.
- 36.1. Section 24P(1) of NEMA requires applicants for mining environmental authorisations to comply with the prescribed financial provision for rehabilitation.
- 36.2. Section 24P(2) provides that if the holder of a mining right fails to rehabilitate or manage any impact on the environment, or is unable to undertake such rehabilitation, the Minister of Mineral



Resources ("Minister") may use all or part of the financial provisioning to rehabilitate or manage the environmental impact in question.

36.3. The NEMA Regulations require the use of financial guarantees, deposits into accounts administered by the Minister or contributions to a trust fund for the purposes of retaining and maintaining financial provision for environmental rehabilitation.

36.4. The Trusts are also required by the MPRDA Regulations to comply with section 37A of the ITA.

37. It should be noted that the Minister, together with the Department of Mineral Resources ("DMR"), is the ultimate custodian of all of the rehabilitation trust funds established in terms of the legislative scheme set out above. The Minister has a fleet of oversight and management obligations with regard to the Trusts. No action can be taken as regards the amounts held in those Trusts without the consent of the DMR. Strictly speaking, therefore, the Trusts are under state control and their funds cannot easily or regularly be accessed at the will of the trustees.

38. Notwithstanding any change in control over or ownership of the Mines to which the Trusts are attached (and which are the beneficiaries of the Trusts), the Trusts continue to exist. This is precisely what occurred when Tegeta acquired the Optimum and Koornfontein Mines with effect from 16 April 2016.

- 38.1. As a part of that acquisition agreement, Tegeta was required to assume control over the Trusts, which had been established in terms of the requisite legislation to make financial provision for the rehabilitation and remediation of environmental impacts at the two mines.
- 38.2. The same is applicable in the event that Tegeta sells its shareholding in Optimum and Koornfontein Mines. Control over the Trusts must be passed on to the new owners.
- 38.3. This cannot happen if the Trusts cease to exist as a result of a forfeiture of the Property to the State. In that case, the State will be exposed to a massive liability in that it will then be required to fund any rehabilitation or remediation work that may be required on the Optimum and Koornfontein Mines. The mines themselves will then also be in breach of NEMA and the MPRDA as no financial provision will then be in place for environmental rehabilitation and remediation.
- 38.4. Forfeiture of the funds held in trust is not contemplated as an adequate vehicle for the purposes of financial provisioning in terms of the NEMA regulations.
39. Turning back to Tegeta's purchase of Optimum and Koornfontein Mines, and the associated assumption of the Trusts, with regards to the Optimum Trust:

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- 39.1. I, together with Mr Trevor Scott and Mr Althaff Emmamally, became trustees of the Optimum Trust on 26 April 2016, following the resignation of the previous trustees who had been appointed by Glencore International plc, the former owner of Optimum Coal Holdings, which held the shares in Optimum and Koorfontein Mines. This was a natural result of the sale of Optimum and Koorfontein Mines to Tegeta.
- 39.2. Shortly thereafter, the funds held on behalf of the Trust in the Trust's Standard Bank account were transferred, with the approval of the DMR, to the Trust's new bank accounts, which were opened by the Bank of Baroda. In this regard, I attach as annexure "PG11.1" a copy of the letter sent by Tegeta to the Minister notifying him of the necessity to transfer the Trust funds held with Standard Bank to the Bank of Baroda and, as annexure "PG11.2", a copy of the letter received from the DMR approving the transfer of the funds.
- 39.3. As at the end of June 2016 when the transfer was effected, the value of the Optimum Trust was R1,469,916,933.63.
- 39.4. Since inception of Tegeta's ownership of Optimum Coal Mine, and my appointment as a trustee of the Optimum Trust, there have been no withdrawals of funds held by the Trust – with the one exception of the R7,5 million withdrawal from the interest accrued on the funds held in trust with Standard Bank, which I have explained fully above.

- 39.5. Moopanar was appointed as a trustee of the Optimum Trust on 1 December 2017, following the resignations of Emmamally and Scott during 2017.
- 39.6. To date, the full R1,469,916,933.63 remains in the Optimum Trust, together with interest accrued thereon. This is evident from the most recent statement of account received by the trustees, dated 31 March 2018, a copy of which is attached as annexure "PG12".
40. With regards to the Koornfontein Trust:
- 40.1. Scott, Emmamally and I became trustees of the Koornfontein Trust on 26 April 2016, following the resignation of the previous trustees who were appointed by Glencore. This was once again the logical conclusion following the acquisition of the Koornfontein Mines by Tegeta.
- 40.2. Shortly thereafter, the funds held by the Koornfontein Trust in accordance with the requirements of NEMA, the MPRDA and the ITA were transferred, with the DMR's approval, from Rand Merchant Bank into the new accounts held by the Trust with the Bank of Baroda. In this regard, I attach copies of the letter sent to the DMR notifying it of the proposed transfer, and the DMR's response approving it, as annexures "PG13.1" and "PG13.2".
- 40.3. As at the time of the transfer, on 23 May 2016, the value of the Koornfontein Trust was R280,000,000.00.

- 40.4. Since the inception of my term as a trustee of the Trust, no amount has been withdrawn from the Trust's funds.
- 40.5. Moopanar was appointed as a trustee of the Koorfontein Trust on 1 December 2017, following the resignations of Emmamally and Scott during 2017.
- 40.6. To date, the full R280 million remains in the Koorfontein Trust, together with interest accrued thereon. This is evident from the most recent statement of account received by the trustees, dated 31 March 2018, a copy of which is attached as annexure "PG14".
41. In light of this explanation of the legislative scheme as well as the background as to how I became a trustee of the Trusts and how the Property came to be in Baroda's accounts, it should be apparent that the Property has a very distinctive nature. It is not freely accessible to the trustees and, in fact, the Property remains within the Trusts, in their accounts held at the Bank of Baroda.
42. As a result of its distinctive nature as security for a mine's rehabilitation and remediation obligations, as well as its continuing existence notwithstanding any changes in control or ownership of the mine to which it is associated, it should also be evident that it cannot be forfeited to the State in terms of POCA as that would obliterate its existence and purpose as security. The result is that the Optimum and Koorfontein Mines will immediately be in breach of the relevant legislation and ultimately, the State, through the Minister, will be exposed to

considerable liability for the long-term rehabilitation and remediation obligations.

***Dispute removed from object and purpose of POCA***

43. I am advised that in light of the objects and purpose of POCA, it is evident that the preservation and/or forfeiture of the Property fall outside of the scheme of the Act.
44. I am advised further that the Supreme Court of Appeal has recently emphasised that the main purpose of POCA is, in compliance with South Africa's international law obligations, to ensure that criminals do not benefit from their crimes, by ensuring that property derived from crime or used in the commission of a crime is forfeited and paid over to the Criminal Assets Recovery Account, to be used in the fight against crime.
45. The NDPP applied urgently to this Court *ex parte* for a preservation order against the Property, and clearly envisages that a forfeiture application will be brought in due course. The NDPP did so almost solely on the strength of the allegations made by OUTA in its application to this Court, which is currently *sub judice*.
- 45.1. What is immediately apparent from the OUTA papers, the summary of which I have set out above, and the NDPP's preservation application, is that the dispute between the parties revolves around the proper administration of the Trusts, not the commission of a crime.

45.2. The crux of OUTA's case is that the trustees were not entitled to access the rehabilitation funds or any surplus of those funds, even for the purposes of concurrent rehabilitation.

46. The applicants, however, say *inter alia* that this is not so. Their case is briefly the following:

46.1. Section 24P of NEMA does not bar concurrent rehabilitation, nor does it seek to prescribe the regulatory framework within which financial provision for rehabilitation is to be furnished.

46.2. Regulation 2 sets out the purpose of the NEMA regulations as follows:

*"The purpose of these Regulations is to regulate the determin[ation] and making of financial provision as contemplated in the Act for the costs associated with the undertaking of management, rehabilitation and remediation of environmental impacts from prospecting, exploration, mining or production operations through the lifespan of such operations and latent or residual environmental impacts that may become known in the future." [Emphasis added]*

46.3. The obligation to make financial provision for rehabilitation and remediation of environmental impacts is therefore not only relevant at the end of the mine's life, but it is also a positive obligation that remains operative throughout the lifespan of the mine's operations. The applicants are therefore of the view that concurrent rehabilitation is not excluded.

46.4. This interpretation is further supported by the wording of Regulation 5, which describes the scope of financial provision

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and provides that an applicant or holder of a right or permit must make financial provision for –

46.4.1. Rehabilitation and remediation;

46.4.2. Decommissioning and closure activities at the end of mining or production operations; and

46.4.3. Remediation and management of latent or residual environmental impacts which may become known in future, including the pumping and treatment of extraneous water.

46.5. Whilst Regulation 8(1)(c) permits an applicant or holder of a right obliged to make financial provision to make use of a trust fund established in terms of the applicable legislation, a trust may not be used for annual rehabilitation (Regulation 6(a) and Regulation 11(a)) or for final rehabilitation, decommissioning and closure of the mining operations at the end of the life of the operations as reflected in a final rehabilitation and mine closure plan (Regulation 6(b) and Regulation 11(1)(b)).

46.6. Regulation 8(1)(c), however, does not preclude the employment of trust funds to address concurrent rehabilitation where the need to do so arises in circumstances outside of an annual rehabilitation plan. This is consistent with, and gives effect to, section 24 of the Constitution.



47. Contrary to what OUTA speculates to have been the case, the trustees of the Trusts have never employed the capital reserves of the funds reserved for financial provision in terms of section 24P of NEMA for concurrent rehabilitation. The funds have further never been put to use for any operational reason, and are housed with the Bank of Baroda in line with their statutory purposes.
48. The only funds that have been utilised (and I submit lawfully so) form part of the surplus funds held in trust – i.e. the amounts that exceed what the Trusts are obliged by statute to hold in trust in accordance with section 24P of NEMA.
49. This Court will be called to pronounce upon the trustees' interpretation of the legislative regime which I have set out above, in the context of a dispute between the trustees (and the mines) and OUTA. This it will be called upon to do in the context of a dispute concerning the proper administration of the Trusts (and in circumstances in which the trustees also dispute that OUTA has any interest in or standing to challenge that administration).
50. To the NDPP's knowledge and as is evident from the OUTA papers, there are real factual and legal disputes between OUTA and the trustees as to whether and to what extent funds have been used, for what purpose and whether or not there was an entitlement to use the surplus funds.
51. I am advised that the purpose and objects of Chapter 6 of POCA, in which applications for preservation orders fall, include the removal of

incentives for crime, deterrence of the use or allowance of the use of property in a crime, elimination or incapacitation of the means by which a crime may be committed, and advancement of the ends of justice by depriving those involved in the crime of the property concerned.

52. It would appear that no decision has been made to institute criminal proceedings against myself or Moopanar, or any of the other trustees. There is an on-going dispute between OUTA and the applicants as to the proper administration of the Trusts, which has yet to be determined by this Court.

53. In this context, the granting of a preservation order plainly does not accord with the objects and purpose of Chapter 6 of POCA. Moreover, a forfeiture order in these circumstances would cause the Trusts and the Mines to be in immediate, and irrevocable, breach of NEMA and its regulations, as well as the MPRDA.

54. Moreover, I am advised that the NDPP has failed to meet either of the threshold requirements to engage section 38(1) and (2) of POCA, since the NDPP has not established that the Property constitutes an "instrumentality of offence" nor that it is the "proceeds of unlawful activity". I will deal with each in turn.

***Property does not constitute "instrumentality of offence"***

55. I am advised that "instrumentality of offence" is defined in POCA as "*any property concerned in the commission or suspected commission of an offence*" which is contained in Schedule 1.

56. At the outset, it bears emphasis that the offence contained in the NEMA regulations does not appear in Schedule 1, nor does Schedule 1 refer to any broader category of "unlawful activities" or "contravention of legislation". Accordingly, I am advised that for the NDPP could only have asserted and endeavoured to establish that the Property was an "instrumentality" of the offences of theft and fraud.
57. I am advised that the Supreme Court of Appeal has recently confirmed that for property to constitute an instrumentality, there must be a reasonably direct link between the crime committed and the property and "*[I]n a real or substantial sense the property must facilitate or make possible the commission of the offence*".<sup>1</sup>
58. The NDPP has not established a direct link between the Property and the supposed crimes.
59. The entirety of the NDPP's case is that one payment was made out of interest accrued on the Optimum Trust funds to the Optimum Coal Mine for concurrent rehabilitation purposes and a portion of the Koornfontein Trust's funds were used as security for a loan granted to the Koornfontein Mine by the Bank of Baroda for concurrent rehabilitation, but the loan amount was thereafter repaid and the security released.
60. I am advised that the kinds of property which the courts have held were instrumentalities of offences include the following: a house adapted and

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<sup>1</sup> **National Director of Public Prosecutions v RO Cook Properties (Pty) Ltd; National Director of Public Prosecutions v 37 Gillespie Street Durban (Pty) Ltd and Another; National Director of Public Prosecutions v Seevnarayan 2004 (2) SACR 208 (SCA) fn para 31.**

equipped to manufacture or sell drugs; a ski-boat and the diving equipment used to harvest perlemoen; and a house used to sell liquor unlawfully.

61. The Property in this case is not of a similar nature. It was not the instrumentality of the offence in the sense that the funds held in trust were not the means by which the alleged theft or the alleged fraud were perpetrated, nor did the money held in trust facilitate the alleged commission of those crimes.
62. I respectfully submit it would amount to an absurdity if it were found that all of the money held in trust in the accounts, in accordance with the statutory regime described above, is the instrumentality of an offence (and thus subject to forfeiture). This would be tantamount to saying that where money is stolen or misappropriated from a pension fund or from a bank account, the entire contents of the pension fund or bank account, even the funds that were not stolen, would be subject to forfeiture as the funds were an instrumentality of the offence.
63. Accordingly, I am advised and respectfully submit that the NDPP has not established the jurisdictional requirement of section 38(2)(a) and so the NDPP was not entitled to obtain a preservation order on this basis.

***Property does not constitute "proceeds of unlawful activity"***

64. I am advised that POCA defines "proceeds of unlawful activity" as follows:

"any property or any service, advantage, benefit or reward which was derived, received or retained, directly or indirectly, in the Republic or elsewhere, at any time before or after the commencement of this Act, in connection with or as a result of any unlawful activity carried on by any person, and includes any property representing property so derived." [Emphasis added]

65. I understand that "unlawful activity" is defined as "*conduct which constitutes a crime or which contravenes any law*".
66. It bears emphasising again that there is a real dispute between the trustees of the Trusts and OUTA as to whether or not there has been any contravention of NEMA, the MPRDA or the ITA. But even accepting for present purposes that there was such a contravention or an offence committed (which I deny and which I will address in greater detail below), the NDPP would still be required to establish that the money held in trust in the Trusts is the 'proceeds' of such activities.
67. I am advised that these two definitions require the NDPP to establish that the Property is "derived, received or retained" as a result of or in connection with the unlawful activity. This means that the receipt of the property or benefit must flow, either directly or indirectly, from that unlawful activity in some way.
68. That is plainly not the case here. The Property is the entire content of the Trusts' funds. As I set out earlier, control over the Trusts was handed over from Glencore, following the acquisition of the Optimum and Koornfontein Mines by Tegeta. Thereafter, the contents of the Trusts' accounts were transferred from Standard Bank and Rand Merchant



Bank into the new accounts opened for each of the Trusts with the Bank of Baroda.

69. The basic capital reserves of the Trusts, which form the bulk of the Property, have always been trust property and have always existed. The capital reserves earn interest as a result of their investment in the various accounts. The Property comprises those capital reserves, any surpluses and the interest earned.
70. No part of the Property can be said to have been derived, received or retained as a result of or in connection with any unlawful activity alleged by the NDPP – that is, the commission of a fraud or theft, and the contravention of NEMA, the MPRDA or the ITA. The Property pre-existed any such allegations, and will continue to exist, regardless of who is in control of the Trusts.
71. Accordingly, I am advised and submit that the NDPP has failed to meet the second jurisdictional requirement for a preservation order in terms of section 38(2)(b).

### ***Summation***

72. I am advised that the NDPP has, accordingly, failed to establish on balance of probabilities that any crimes have been committed and has also not met either of the jurisdictional prerequisites for obtaining a preservation order. If the NDPP cannot meet those prerequisites now, it will also not be able to meet the prerequisites for a forfeiture order.

73. In any event, the Property by its very nature is not susceptible to preservation or forfeiture. The Property does not belong to the mining companies or to the trustees – the Property is held in trust, and managed by the trustees, on behalf of the Minister and the DMR, as security for a mine's rehabilitation and remediation obligations.
74. Its preservation and/or forfeiture will not promote the objects and purpose of POCA in circumstances in which the essence of the dispute between OUTA and the applicants, which is the foundation for the NDPP's application, is one of the proper administration of the Trusts. It is not a criminal matter – it is a commercial dispute.
75. As I mentioned above, even if there is a real or genuine concern about the administration or possible dissipation of the Property (which I deny), that is already fully addressed by the OUTA interdict.
- 75.1. In terms of the OUTA interdict, the Trusts' funds are to be maintained in interest-bearing accounts held with the Bank of Baroda, and no person, including the trustees of the Trust may access those funds.
- 75.2. The Property is essentially already "frozen". If the NDPP or any other person with a sufficient interest is dissatisfied with the Order, then that person should approach this Court to have it discharged or varied.

**COMPLIANCE WITH PARAGRAPHS 11 AND 12 OF ORDER**

76. I respectfully submit that the applicants have complied with paragraphs 11 and 12 of the Order.

77. Paragraph 11 of the order makes provision for the present application. It stipulates that –

*“Any person who is affected by the order may on good cause shown, apply for reconsideration. Such application shall be made:*

*11.1 ...;*

*11.2 in other instances, upon at least 7 days notice to the Applicant and all other persons identified in this order as being persons who may have an interest in the property”.*

78. Paragraph 12 of the Order provides that –

*“Such an application must be made not later than 8 days after the person applying for reconsideration becomes aware of the existence of the order, or within such further period as the court may consider reasonable, bearing in mind the underlying objectives of Chapter 6 of the Act.”*

79. The application has been brought on at least seven days' notice to the NDPP and other interested parties.

80. The Order was granted on 8 March 2018. The applicants became aware of its grant, (but not the full extent of the papers) around 12 March 2018. The papers were only served by the sheriff much later, on the trustees' attorneys of record in the OUTA matter (Mr Vasco de Oliveira), on Monday, 26 March 2018. As Mr de Oliveira was away from the office, this was only brought to the attention of our current attorneys of record in this matter, Mr Pieter van der Merwe, telephonically, on Tuesday, 3



April 2018. In this regard, I attach hereto confirmatory affidavits of Mr De Oliveira and Mr van der Merwe, as annexures "PG15.1" and "PG15.2".

81. I am advised that section 39(1) of POCA requires the NDPP to give notice of the grant of a preservation order to all interested parties "as soon as practicable after the making of the order".
82. Section 39(2) stipulates that such notice must be served by the Sheriff of this Court, in the same way in which a High Court summons is served.
83. Accordingly, I am advised and respectfully submit that the eight days within which this application was required to be brought in terms of the Order only commence running from the date on which the Order is served on the applicants by the Sheriff, as required by section 39(1) and (2) of POCA. Since service by sheriff was only effected on 26 March 2018, I respectfully submit that this application has been brought well within the eight days provided in paragraph 12 of the Order.
84. However, if this is not the case (which I deny), paragraph 12 of the Order provides in the alternative for the application to be launched within such reasonable time period as this Court may determine. I respectfully submit that this application has been launched within a reasonable time.
  - 84.1. The Order was granted on 8 March 2018.
  - 84.2. The applicants were first alerted to the existence of the Order on or about 12 March 2018 as a result of a letter received from Tabacks Attorneys, who act on behalf of the Bank of Baroda, a copy of which is attached as annexure "PG16". Mr De Oliveira

responded on behalf of the applicants the following day, alerting the NDPP to the fact that the applicants had not received the Order or the papers, and requesting that same be provided by 14 March 2018. A copy of that letter is attached as annexure "PG17".

84.3. It was only on 16 March 2018, over a week after the grant of the preservation Order, that the NPA, presumably acting on behalf of the NDPP, provided Mr De Oliveira with a copy of the Order, unknowingly whether it was a full set of the papers. In this regard, I attach a copy of the email from the NPA, marked annexure "PG18".

84.4. As soon as the applicants became aware of the Order, we took legal advice on it and what steps could be taken. The applicants then briefed our current attorneys and counsel who would act in this matter.

84.5. As I mentioned above, it would appear that the Order and the papers were served by the sheriff on Mr De Oliveira's offices on 26 March 2018. On 22 March 2018, Mr De Oliveira wrote to the National Director of Public Prosecution, confirming that he no longer acts for the trustees of the Trusts and furnished them with the attorney of record contact details. In order not to duplicate the annexures, I refer the honourable court to Annexure "PG31" attached hereto which is a letter received from Tabacks, dated 2 April 2018. Mr De Oliveira's letter dated

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22 March 2018 is an annexure to this letter. The NDPP was therefore aware that Mr De Oliveira did not act on behalf of the trustees of the Trust in this matter yet they nevertheless served the Order by sheriff at Mr De Oliveira's offices.

84.6. Before the applicants and their legal team became aware of service on Mr De Oliveira's office, Mr van der Merwe sent a letter to the NDPP on 2 April 2018 requesting service of the papers via email. I attach a copy of that letter as annexure "PG19". Notwithstanding this request, to date, the papers have not been provided to Mr van der Merwe.

84.7. On the basis of the requirements of section 39(1) and (2) of POCA, as well as the NPA's email which indicated that formal service of the Order would be effected by Sheriff, this reconsideration application was not finalised until we became aware that the Order had in fact been served. This was only confirmed on Tuesday, 3 April 2018 and this application was instituted without delay.

84.8. If it is the case that the time period commenced running before 26 March 2018, I respectfully submit that there has been no unreasonable delay from when the applicants first became aware of the Order and this application has been brought within a reasonable time.

84.9. Accordingly, to the extent that it may be necessary, the applicants ask this Court to condone any non-compliance that

there may have been with the provisions of paragraphs 11 and 12 of the Order.

85. In any event, the terms of the Order cannot override the provisions of Rule 6(12)(c) which allow parties to seek reconsideration of orders obtained *ex parte*.

#### GENERAL PRINCIPLES FOR RECONSIDERATION

86. I have been advised that, in reconsidering an order granted in the circumstances of the present case, this Court enjoys a wide discretion. The determination is made mindful of the purpose of a reconsideration, which is to afford an aggrieved party a mechanism designed to redress imbalances in, and injustices and oppression flowing from, an order granted in its absence.

87. I am further advised that the principles regulating the reconsideration of an *ex parte* application by a person affected by the order are well established and include the following:

87.1. All material facts which might influence a court in coming to a decision must have been disclosed in the *ex parte* application;

87.2. The non-disclosure or suppression of facts need not be wilful or *mala fide* to incur the penalty of rescission;

87.3. A court, apprised of the true facts, has a discretion to set aside the order or to preserve it.

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87.4. Unless there are very cogent, practical reasons why an order should not be rescinded, the court will frown upon an order obtained *ex parte* on incomplete information and will set it aside, even if relief could be obtained on a subsequent application by the same applicant.

87.5. *Ex parte* applications must be brought in good faith.

88. Having regard to all the circumstances of the application brought by the NDPP, it is apparent that the preservation proceedings are vexatious and baseless. The conclusion is irresistible that *mala fides* is involved and the application amounts to an abuse of the process of court.

88.1. The NDPP's function is not merely to accept allegations levelled against parties in civil proceedings as the truth, but is expected to do its own independent investigations to come to a conclusion. All of the independently established facts then need to be presented to a court required to make a finding. As I have described above, the NDPP simply failed to do this.

88.2. The Order ought to be considered also in its underlying context. The application was launched on 6 March 2018, and set down for hearing on 8 March 2018.

88.3. Earlier this year, the NDPP brought an urgent *ex parte* application for a preservation order against certain immovable property and funds allegedly held by various companies and individuals associated with the Oakbay Group (in which Tegeta

and thus the Optimum and Koomfontein Coal Mines fall), as well as the Bank of Baroda.

88.4. This order was granted on 18 January 2018 by his Lordship Mr Justice Jordaan ("**the Estina Order**").

88.5. After service of the Estina Order, certain of the companies and individuals concerned (as well as the Bank of Baroda) brought reconsideration applications, which were heard on 1 and 2 March 2018.

88.6. The applicants in those matters argued that the NDPP had failed to disclose substantial and primary facts, had referred to files of documents evidencing the unlawful activities but had failed to place those files (or any other relevant documents) into evidence, the NDPP did not provide any evidence that the averments made were correct, and, once again, the NDPP referred to documents and accepted their correctness without attempting to conduct any investigation into the veracity thereof, thereby ignoring the basic principles of civil procedure.

88.7. Judgment was reserved until 9 March 2018.

88.8. In the interim, the NDPP sought and obtained the present preservation order on 8 March 2018.

88.9. On 9 March 2018, his Lordship Mr Justice Jordaan granted all of the reconsideration applications and set aside the

preservation order he had granted, and the NDPP was ordered to pay the costs of the application.

- 88.10. I attach as annexure "PG20" a copy of Jordaan J's order.
89. The NDPP was well aware that judgment on the reconsideration of the Estina Order would be handed down on 9 March 2018. Notwithstanding that fact, the NDPP launched the preservation proceedings in respect of the Trusts in a similar manner and even went so far as to ensure that the preservation order was set down and determined one day before judgment was handed down. It was clear to those arguing the Estina matter that the judgment in all likelihood was to go against the NDPP. It would appear that the rushed launch of the present application was a political manoeuvre with a vexatious intent, and was intended to obtain an order the day before judgment and the day before it appeared likely that the Estina Order would be set aside.
90. Having regard to the Estina matter as well as this application, I am advised that this Court ought to exercise its discretion in favour of reconsidering and setting aside the preservation order, and that the NDPP's actions should be sanctioned with an appropriate punitive costs order. The NDPP is specifically required to state in any affidavit filed in opposition to this application the names of each and every one of the senior officials who authorised the launch of the preservation application and who were a party to that application. Should it fail to do so, the applicants will seek a punitive costs order against Mr Molelle, *de bonis propriis*.

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**AD SERIATIM RESPONSE TO NDPP'S AFFIDAVIT IN THE  
PRESERVATION APPLICATION**

91. I do not intend to address each and every allegation made and, to the extent that I do not do so, they should be taken to be denied.

92. **Ad paragraphs 1 to 5**

92.1. I note that Mr Molelle states that he is duly authorised by the NDPP to bring the preservation application on his behalf.

92.2. As I have indicated above, the applicants intend to ask this Court for a punitive costs order against Mr Molelle in his personal capacity, and/or jointly and severally with all persons in the office of the NDPP who instructed and authorised the bringing of this application.

92.3. I refer to what is set out above and call upon Mr Molelle to state who at the NDPP instructed and authorised the bringing of the application and to put up the necessary authority authorising the bringing of the application. Should he fail to do so, it will be argued that Mr Molelle was acting vexatiously, on a frolic of his own, and costs *de bonis propriis* will be sought against him personally.

92.4. I deny that the facts contained in the affidavit fall within Mr Molelle's personal knowledge and that they are true and correct.



93. **Ad paragraphs 5 and 6**

- 93.1. I note these allegations.
- 93.2. However, I also point out that the NDPP did not see fit to cite any respondents in the preservation proceedings.
- 93.3. I am advised that notwithstanding the fact that the proceedings were brought *ex parte*, it is irregular for the NDPP not to have cited a respondent.
- 93.4. Moreover, there was no basis at all to proceed *ex parte*. This was simply a stratagem to obtain an order on impermissible evidence behind the backs of those affected by it.
- 93.5. I say this for the reason that there was absolutely no possibility of the funds being dissipated if notice was given to, *inter alia*, the trustees of the two Trusts of the bringing of the application. This is clearly because the funds in issue are the subject of an interim court order and cannot be accessed, let alone dissipated.
- 93.6. There was no risk of dissipation of the assets and the only reason that the NDPP proceeded to bring the application *ex parte* was because it knew that if the proper facts were put before the Court by way of opposition, it would not succeed in obtaining the Order.

94. **Ad paragraphs 7 to 9**

M. [Signature]

94.1. The primary purpose of the Property is not only to make financial provision upon decommissioning of mining activities, but also for rehabilitation upon premature closure and post closure coverage of latent or residual environmental impacts.

94.2. Save as aforesaid, I take no issue with these paragraphs.

95. **Ad paragraphs 10 and 11**

95.1. I admit these paragraphs.

95.2. I refer this Court to annexure "PG6" attached above, which is a copy of the OUTA interim interdict order.

96. **Ad paragraph 13**

96.1. I note the contents of this paragraph.

96.2. However, I also note that the NDPP states that the Order also seeks to compel the surrender of the Property to the *curator bonis* and to compel the full and proper disclosure of information and documents pertaining to the Property to that *curator bonis*. A slavish adherence to some copied precedent appears at work here, belying any real thought or responsibility to the court on the part of the deponent.

96.3. However, this is contradicted by the very terms of the Order as well as allegations made later on in the NDPP's founding affidavit where the NDPP specifically states that it will not seek the appointment of a *curator bonis*.



**97. Ad paragraphs 14 to 16**

I take no issue with these paragraphs.

**98. Ad paragraphs 17 to 19**

98.1. I admit these paragraphs to the extent that they accurately set out the legislative framework of POCA.

98.2. For the reasons set out elsewhere in this affidavit, I deny that the NDPP has met the threshold requirements of section 38(2) or any of the other requirements for purposes of section 38 of POCA.

98.3. Save as aforesaid, I deny these paragraphs.

**99. Ad paragraph 20**

99.1. I deny that the applicant has satisfied either of the threshold requirements for purposes of section 38(2).

99.2. I also deny that the NDPP has established any of the elements of the crimes of fraud and theft.

99.3. I deny further that the NDPP has established that a contravention of any of the relevant legislation has occurred, nor that any contravention that may have occurred (which is denied) rises to the level of a criminal offence for purposes of POCA.

**100. Ad paragraphs 21 to 28**



100.1. I note that the foundation of the NDPP's application rests on allegations made in the Public Protector's State Capture Report, as well as the allegations made in the OUTA main application.

100.2. For the reasons set out elsewhere in this affidavit, I deny that the NDPP is entitled to rely on the Public Protector's Report in the circumstances of this case.

**101. Ad paragraphs 29 to 51**

101.1. To the extent that these paragraphs accurately set out the legislative framework contained in the MPRDA, NEMA and its regulations as well as the ITA, I admit them.

101.2. However, there are several aspects of the legislative regime that I wish to draw to this Court's attention, and which have been omitted from the NDPP's description:

101.2.1. First, under the previous legislative regime in terms of section 41 of the MPRDA and regulations 53 and 54 of the MRPDA regulations, no provision was required to be made for annual rehabilitation and the whole amount of financial provisioning required could be held in a trust fund. Once the regime changed and became governed by NEMA and its financial regulations, the scope of the financial provisioning

was extended to include 'concurrent' rehabilitation costs.

101.2.2. Second, with effect from 20 November 2015, the financial provisioning required of the holders of mining rights became regulated by the NEMA regulations.

101.2.3. Third, for purposes of the NEMA regulations, the two mining companies which are the respective beneficiaries of the Trusts constitute "*holders*".

101.2.4. Fourth, and most importantly, the bulk of the new dispensation for financial provisioning is not applicable to those defined as "*holders*" – namely, those who already held mining rights on 20 November 2015 (which includes the two mining companies). Regulation 3 makes it clear that only Chapter 4 (which consists of the transitional arrangements contained in regulation 17) and Chapter 5 (which sets out the offences and penalties for non-compliance in regulations 18 and 19) apply to holders such as the Optimum and Koornfontein Mines.

101.2.5. Regulation 17(4) provides that any financial provision which has approved under the previous regime must be regarded as approved under the new regime, provided that it is reviewed and aligned with the

provisions of the regulations in accordance with regulation 17(5) and (10) and annually thereafter.

101.2.6. Regulation 17(5) set out a timeframe within which that review was to take place. However, that subregulation was subsequently repealed on 26 October 2016. The new regulation provided a holder, such as the Optimum and Koorfontein Coal Mines, with a period of 39 months within which to comply with the regulations (as amended). This means that the Mines have until 19 February 2019 to review and adjust their current financial provisioning.

101.2.7. There can thus have been no offence committed in terms of regulation 18(2) in circumstances in which the mining companies and/or the trustees are not yet obliged to carry out the review and adjustment required.

101.3. With regard to section 37A of the ITA, I wish to draw to this Court's attention the fact that the obligation to conduct a trust in accordance with its provisions only affects the question of whether cash paid to the trust can be deducted from the company and/or trust's income for tax purposes. It does not create a self-standing obligation nor does non-compliance create an offence.

101.4. The only offence which is created by section 37A read with section 234 of the Tax Administration Act 28 of 2011 is non-compliance with the provisions of section 37A(10), to the extent that there is a failure to a report to the Director-General of the National Treasury. This is not the realm in which the applicants find themselves.

101.5. Accordingly, I deny any implication that the applicants have breached any of these provisions or that any offence has been committed.

101.6. I also wish to emphasise that the contents of this legislative regime and the question of whether the applicants have contravened it in any way are the very issues which this Court will be called upon to determine in the OUTA main application.

**102. Ad paragraphs 52 to 59**

102.1. I deny that these paragraphs are at all relevant to the NDPP's preservation application.

102.2. In any event, all of these events occurred prior to Tegeta's purchase of the Optimum and Koornfontein mines.

102.3. The NDPP here appears to ask this Court to unscramble the transaction by which Tegeta purchased the Optimum and Koornfontein Coal Mines and thus gained control of the Trusts, which this Court is not permitted to do.



**103. Ad paragraphs 60 to 62**

103.1. Save to state that the Koorfontein Trust's funds were held by Rand Merchant Bank before they were transferred to the Trust's Bank of Baroda account, I admit these paragraphs.

103.2. I confirm that the transfers of the funds to the Bank of Baroda accounts were authorised by the DMR. I refer this Court to annexures "PG11.1", "PG11.2", "PG13.1" and "PG13.2" attached above.

**104. Ad paragraph 63**

104.1. I repeat what I said above regarding the NDPP's reliance on the State Capture Report.

104.2. To the extent that these paragraphs accurately report what was said by the Public Protector, I admit them.

104.3. However, I deny that the Public Protector is correct in her interpretations in the Report. The Public Protector makes reference to various movements, transfers and withdrawals of amounts from the various Baroda accounts, but the Public Protector fundamentally misconstrues what these transactions mean.

104.4. The applicants have absolutely no control over any of the transactions that occurred, did not authorise any of them and,

Mr. [Signature]



in fact, those transactions referred to had no impact on the Trusts' funds.

- 104.5. I say so for the following reasons.
- 104.6. As I have set out in detail above, the Optimum Trust's funds were transferred, with DMR approval, from the Trust's Standard Bank account/s to the Trust's new account/s opened with Baroda. The Koornfontein funds were similarly transferred from Rand Merchant Bank to Baroda.
- 104.7. Baroda was required to invest those funds, and it was negotiated and agreed that the funds would be held on fixed deposit and would earn interest at the rate of 8% per annum. In this regard, I attach as annexure "PG21" a copy of an email from the Bank of Baroda to Ms Ragavan, confirming this interest rate. Ms Ragavan has also deposed to a confirmatory affidavit which will be filed with this affidavit.
- 104.8. I understand that this was a more favourable interest rate than those generally paid by other banks. For example, whilst the Optimum Trust's funds were held with Standard Bank (while under the control of the previous owners of the Mine), they earned interest at the rate of between 5.8% and 6.6% during 2016, as is evident from the schedule attached as annexure "PG22".

104.9. I understand, from my own experience, and from discussions with Ms Ragavan, that Baroda does not operate as a clearing bank in South Africa, but rather operates through Nedbank.

104.9.1. This means that Baroda does not operate physically separate accounts for each of its clients, but rather essentially lumps all of the money together in its various accounts, and then allocates the money to each client via the reflection of credits and/or debits against the client's 'account' with Baroda. This is largely a function of journal entries and book-keeping.

104.9.2. Baroda operates one main current account with Nedbank, into which it receives all payments to any of its clients.

104.9.3. All amounts to be paid over to Baroda are paid into this main current account, and Baroda then allocates the payments to its respective clients' 'accounts' as a credit in the client's favour. I annex a copy of an affidavit filed by the Bank of Baroda in the Estina matter to show how the pool account operated, marked annexure "PG23".

104.9.4. I understand that the same would occur in respect of Baroda's investment accounts.

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104.9.5. Once the full amount of the Trusts' funds was paid over into the Baroda main current account (the approximately R1,4 billion and R280 million respectively), the applicants have no control over internal movements of those funds within and between the various Baroda accounts that Baroda operates for itself with Nedbank.

104.9.6. Notwithstanding any such movements, fluctuations or withdrawals made by Baroda and reflected in Baroda's Nedbank accounts, the Trusts' accounts remained the same – that is, every month, the applicants received bank statements reflecting the full capital reserve of the Trust funds transferred in 2016 as a credit in the Trust's favour, which amount would accrue interest annually at a rate of 8% per annum.

104.9.7. In this regard, I attach copies of the Trusts' bank statements as annexures "PG24" and "PG25". This plainly demonstrate that no withdrawals from the Trusts' accounts occurred.

104.9.8. In June 2017, the investments matured and the interest payable on each of the Trusts' funds accrued. Thereafter, the amount contained in each of the Trusts (and reflected as a credit in the Trusts' favour)

was the original capital reserve transferred plus the interest accrued.

104.9.9. I also wish to point out that the amounts invested on behalf of the Trusts with the Bank of Baroda matured at the end of June 2017. However, on 6 July 2017, Baroda purported to give notice to *inter alia* the applicants that their accounts would be terminated on 17 July 2017. In this regard, I attach copies of the termination notices addressed to each of the Trusts, marked annexures "PG26.1" and "PG26.2".

104.9.10. The applicants (amongst other companies) instituted urgent interdict proceedings against the Bank of Baroda to keep their accounts open and operational, pending the determination of a main application in which the applicants would seek to have the termination notices declared unlawful. That interim interdict was eventually granted on 9 October 2017 by Makgoka J.

104.9.11. In the interim, it came to the trustee's attention that the Trusts' funds had not been reinvested by the Bank of Baroda, but were instead credited to the Trusts' current accounts. At that stage, we were of the view that the funds would be automatically reinvested by Baroda. However, when we became aware that they

had not been, I drew this to the Bank's attention in letters on behalf of each of the Trusts on 4 October 2017, copies of which are attached as annexures "PG27.1" and "PG27.2". However, the trustees then realised that the terms of the OUTA interdict prohibited them from dealing with the funds in any manner, and so those instructions to Baroda were subsequently withdrawn, as is recorded in annexure "PG27.3".

104.10. Accordingly, I respectfully submit that the Public Protector, and the NDPP, fundamentally misconstrue the facts. Whilst there may have been any number of internal transactions between the various Baroda accounts held with Nedbank, these are not transactions that occurred within the Trusts' accounts held with Baroda. This is manifest from the Trusts' bank statements. It means that there was no depletion of the trust funds.

104.11. At no stage, therefore, since the funds have been held with Baroda, have the trustees accessed, withdrawn or transacted in respect of the funds held in trust on behalf of the Optimum and Koornfontein Trusts (barring the Koornfontein loan and security transaction which I have addressed elsewhere).

104.12. On a proper understanding of the facts which I have set out above, I submit that no conclusion of wrongdoing can be drawn from the Public Protector's Report. Had the NDPP investigated

these allegations fully, it would have realised that this was the case.

104.13. Save as aforesaid, I deny the contents of these paragraphs, and particularly the implications, submissions or conclusions that the NDPP seeks to draw therefrom.

105. **Ad paragraph 64**

For the reasons set out elsewhere in this affidavit, I deny that the Public Protector's report "*clearly demonstrates*" any such thing and I also deny that they constitute "*findings*".

106. **Ad paragraphs 65 to 67**

106.1. For the reasons set out elsewhere in this affidavit, I deny that the trustees have contravened NEMA and/or its related financial regulations.

106.2. In particular, based on what I have set out above, I deny that the funds were not ring-fenced for purposes of investment and capital growth. I further deny that the funds were used for Tegeta's operations.

106.3. I further deny the NDPP's quantum leap from possible contraventions of the legislative regime to the offences of fraud and/or theft. The actus reus of the offences is not described. A mere criminal and pejorative label is employed, in the air.



106.4. I am advised and submit that the NDPP has made out no case for fraud or theft, as the NDPP has failed to establish or provide any evidence that the funds were used or diminished in any way. Furthermore, the NDPP is required to establish, at least *prima facie*, that each element of these crimes has occurred. The NDPP has entirely failed to do this.

**107. Ad paragraphs 68 to 71**

107.1. As I have already stated, the (mistaken) use of the R7.5 million of the interest accrued on the Optimum Trust fund has been declared to SARS and is being addressed.

107.2. I deny that this amounts to a contravention of legislation such that the tax deduction could be considered to constitute the "*proceeds of unlawful activity*". This is particularly so since sections 37A(7) and (8) provide a mechanism to recover such amounts.

107.3. Save as aforesaid, I deny these paragraphs.

**108. Ad paragraphs 72 to 74**

108.1. I have already addressed the NDPP's misplaced reliance on the OUTA main application as the basis for its preservation application.

108.2. The NDPP failed to take this Court completely into its confidence concerning the extent to which the allegations relied

*M. J.*

upon in the OUTA main application are disputed by the applicants and also failed to bring to this Court's attention the fact that the OUTA main application remains *sub judice*, having been set down for hearing only on 31 May and 1 June 2018.

108.3. I am advised and respectfully submit that the NDPP's material and deliberate non-disclosure in this regard should taint the entire preservation application, and must result in the discharge of the Order.

**109. Ad paragraph 74.6**

109.1. I have fully addressed the circumstances under which a portion of the interest accrued on the Optimum Trust funds held with Standard Bank was mistakenly accessed and used to pay a rehabilitation contractor.

109.2. Ms Ragavan was duly authorised to transact on the accounts as she was a duly appointed signatory on the accounts and was also authorised to do so on behalf of the Trusts. In this regard, I attach as annexures "PG28" and "PG29" various correspondence with Standard Bank confirming this, as well as the authority provided to Ms Ragavan by the Trust.

109.3. Save as aforesaid, I deny this paragraph.

**110. Ad paragraphs 74.7 and 74.8**

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110.1. I admit that Tegeta sought consent from the DMR to release certain of the funds held by Koornfontein Trust for purposes of rehabilitation.

110.1.1. I attach a copy of the letter to the DMR dated 4 May 2016 as annexure "PG30.1".

110.1.2. I deny expressly that the request is in any way unclear.

110.1.3. I also deny, for the reasons set out elsewhere, that the request to access the funds was unlawful.

110.1.4. On 5 May 2016, the DMR responded, giving consent subject to certain conditions. A copy of the DMR's response is attached as annexure "PG30.2".

110.2. After approval from the DMR had been obtained, the Koornfontein Mine elected not to access the funds, and instead sought a loan from the Bank of Baroda to cover the costs of rehabilitation.

110.3. Save as aforesaid, I deny these paragraphs and I particularly deny any of the implications or conclusions of unlawfulness which the NDPP seeks to draw therein.

**111. Ad paragraph 74.9**

111.1. I admit the contents of this paragraph as a matter of fact, but I deny any implications or inferences of unlawfulness which the

NDPP seeks to draw therefrom for the reasons set out elsewhere in this affidavit.

111.2. I also draw to this Court's attention the copy of the loan sanction letter, attached above as annexure "PG10".

**112. Ad paragraphs 74.10 to 74.12**

112.1. It is notable that this is the first time that the NDPP indicates to this Court that the allegations in the OUTA main application are disputed. But it does so disingenuously.

112.2. It is evident from these paragraphs that the NDPP has not attempted to investigate any of these allegations.

112.3. The NDPP bemoans the fact that no evidence was placed before this Court in the OUTA main application to establish what the funds were used for and whether rehabilitation was undertaken. However, the NDPP has never asked the applicants or the mines whether that was the case nor has it ever asked the mines or the applicants for such documentation, which could easily have been provided – and has in fact been provided in this application.

112.4. I have also addressed in detail elsewhere in this affidavit why the reasoning of the Public Protector's report is flawed. The same flaws are replicated throughout Lange's report.

112.5. For the avoidance of doubt, I repeat that the funds were held in ring-fenced, interest-bearing accounts, as is evident from the bank statements I have attached above. The funds remain ringfenced even if the bank uses the funds for its own purposes, as banks do- it is the essence of banking- as long as the funds continue to stand to the credit of the trusts as they do.

112.6. To the extent that these paragraphs accurately reflect the applicants' defences in the OUTA application, I admit them. However, I deny any implications of wrongdoing and I respectfully submit that the NDPP has been disingenuous in its presentation of the nature and extent of the applicants' defences.

112.7. Save as aforesaid, I deny the contents of these paragraphs.

**113. Ad paragraph 75**

113.1. For the reasons set out above, I deny that all of the allegations in these paragraphs are undisputed.

113.2. In particular, I deny that the applicants attached no proof to the satisfaction of the Court that actual rehabilitation was conducted or as to the terms of the loan agreement and rehabilitation work to be carried out. I have addressed this aspect fully, but I emphasise again that the Court has not considered or determined the OUTA main application, and has made no such finding.

113.3. I have already provided a full explanation regarding the mistaken access to R7,5 million of the interest accrued on the funds held with Standard Bank.

113.4. With regards to the Koornfontein Trust funds, I have provided a full explanation as to the reasons for seeking access to the funds and the loan, and I have emphasised a number of times that the loan was not ultimately utilised, was repaid with interest and the security held over a portion of the Trust's funds was released.

113.5. Save as aforesaid, I deny this paragraph and its subparagraphs.

**114. Ad paragraphs 76 to 80**

114.1. I am not a lawyer and so I cannot confirm the legal principles set out in these paragraphs. However, I do not take issue with the legal duty as set out.

114.2. I deny that the trustees have failed to act in accordance with these principles.

**115. Ad paragraphs 81 to 84**

115.1. I have addressed these paragraphs fully elsewhere in this affidavit.

115.2. Save as aforesaid, they are denied. In particular, I deny that there has been a contravention of the legislation and I deny that

M. S.

the transactions referred to amount to fraud or theft of trust funds.

115.3. The NDPP has entirely failed to establish that these alleged crimes have occurred.

**116. Ad paragraphs 85 to 90**

116.1. In light of all the facts that I have set out in this affidavit and the explanations provided, I submit that no inference of unlawful conduct on the part of the applicants has been, or can be, established by the NDPP.

116.2. The NDPP has not established that there has been any misappropriation of the Property, and any such assertion is plainly controverted by the bank statements put up by the applicants.

116.3. I deny in particular that:

116.3.1. Significant funds have been withdrawn or accessed – as I have set out elsewhere, interest accrued on the Optimum Trust's funds was mistakenly accessed and used to pay a rehabilitation contractor. No other withdrawals have occurred from either of the Trusts.

116.3.2. The NDPP cannot conclude that evidence "*to the satisfaction of the Court*" has not been provided in the OUTA application.

m. 31

116.4. I accordingly deny that the trustees' actions were unlawful or detrimental to the fiscus in any way. The Trusts' funds remain fully in tact.

116.5. In fact, it is the impact of this preservation order and any possible forfeiture proceedings that will be hugely detrimental to the fiscus and which would amount to a direct contravention of the relevant legislative provisions.

116.6. I specifically deny that the NDPP has established reasonable, or any, grounds for believing that the trustees have contravened the provisions of NEMA or its regulations or that they have committed fraud and/or theft.

116.7. Save as aforesaid, I deny these paragraphs.

**117. Ad paragraphs 91 to 94**

For the reasons set out above, I deny that the Property constitutes the proceeds of unlawful activities.

**118. Ad paragraphs 95 to 106**

118.1. For the reasons set out elsewhere in this affidavit, I deny that the Property constitutes an instrumentality of the offences enumerated or any other offence.

118.2. Moreover, I wish to emphasise again that the NDPP is quite simply unaware of the actual legislative regime in place (or has failed to disclose its true position to the Court).

m. 3

118.3. Regulation 17(5) of the NEMA regulations was repealed and replaced as long ago as October 2016. The replacement regulation 3 provides a considerably longer time period for compliance – namely 39 months – which means that the mining companies in this case (and thus the trustees) are only required to comply by February 2019.

118.4. For this reason, as well as the detailed explanations set out in this affidavit, I deny each and every one of the observations and/or submissions made by the NDPP in paragraph 106.

**119. Ad paragraphs 107 to 110**

119.1. I note the contents of these paragraphs.

119.2. For the reasons set out above, I deny that the Property is susceptible to forfeiture.

**120. Ad paragraphs 111 to 115**

120.1. I am advised and submit that it is irregular, impermissible and *ultra vires* POCA for the NDPP not to have sought the appointment of a curator *bonis* to operate and manage the Property in the interim.

120.2. I deny in particular that it was open to the NDPP and to Nedbank to reach the agreement that has been reached – particularly in circumstances in which the NDPP does not take the Court fully into its confidence as to the terms of that

agreement, its statutory basis and how such an agreement ensures the adequate protection of the trust Property.

120.3. Accordingly, I deny that the NDPP was entitled to conclude such an agreement with Nedbank. I also deny that the NDPP is entitled not to seek the appointment of a curator in these circumstances.

**121. Ad paragraphs 116 to 120**

121.1. I note the contents of this paragraph.

121.2. This application is brought in terms of Rule 6(12)(c) of this Court's rules, read with paragraphs 11.2 and 12 of the Order.

**122. Ad paragraphs 121 to 124**

122.1. For the reasons set out above, I deny that the Order contains all of the names of the interested persons. To the NDPP's knowledge, both the Optimum and Koornfontein Mines, as the beneficiaries of the Trusts (and their respective business rescue practitioners), plainly have an interest in these proceedings as they will immediately be placed in breach of the legislative regime in the event that the Property is forfeited to the State.

122.2. In addition, Tegeta, as the holding company of the Mines plainly also has an interest in these proceedings.



122.3. I further deny that the NDPP has complied with the requirements of section 39(1) and (2) of POCA. The Order was only served on the applicants' former attorney of record on 26 March 2018, more than two weeks after the Order was granted. In these circumstances, it cannot be said that the NDPP caused the Order to be served "as soon as practicable" after the Order was made.

122.4. Save as aforesaid, I deny the contents of these paragraphs.

123. **Ad paragraph 125**

For the reasons set out throughout this affidavit, I deny that the NDPP was entitled to relief sought and granted.

**URGENCY**

124. The Order was obtained *ex parte*, and on an urgent basis. *A fortiori*, and in terms of the Rules, the applicants are entitled, as a matter of urgency to have the Order<sup>1</sup> obtained set aside.

125. The NDPP's application was manifestly not urgent. The entire application is premised on so-called 'findings' made by the Public Protector – in her Report which was published in November 2016 – and allegations contained in the OUTA application – which was launched during September 2017. The NDPP has thus been aware of these allegations for a considerable number of months.

MJS

126. The NDPP was also plainly not entitled to approach this Court *ex parte*. As I have set out above, there is no risk and can be no genuine fear of dissipation of the Property since it is currently frozen under the OUTA interdict (and has been since September 2017).
127. The preservation order is now in place, in circumstances in which it ought not to have been granted, and is causing direct and immediate conflict with the OUTA interim interdict. Forfeiture proceedings are imminent.
128. Moreover, it has come to the applicants' attention that the Bank of Baroda has undertaken to pay the Trusts' funds over to Nedbank on Friday, 13 April 2018. This was only brought to our attention on 2 April 2018. A copy of the letter from Tabacks Attorneys confirming this is attached as annexure "PG31". The applicants will therefore, simultaneously with the launch of this application, request an undertaking from the Bank of Baroda that the funds will not be transferred until this reconsideration application has been heard and determined.
129. I am advised that this reconsideration application is manifestly urgent, and the applicants need not do more to establish urgency than to point out the fact that the preservation application was, in the NDPP's opinion, so urgent that it was launched, *ex parte*, and then argued and determined two days later.
130. There is no more clear case for urgency than the present, which is evident from the full factual circumstances I have been at pains to demonstrate in this affidavit.

m. 31

131. I am advised that further legal argument in this regard will be addressed at the hearing of this reconsideration application.

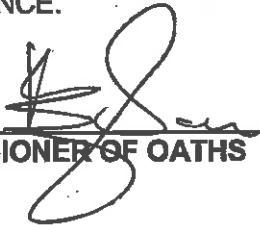
**CONCLUSION**

132. In all the circumstances, I respectfully submit that a proper case has been made out for the relief sought in the notice of motion and the applicants pray for an order in those terms.



**DEPONENT**

THUS SIGNED AND SWORN TO AT SANDTON ON THIS 4<sup>th</sup> DAY OF APRIL 2018, THE DEPONENT HAVING ACKNOWLEDGED THAT SHE KNOWS AND UNDERSTANDS THE CONTENTS OF THIS AFFIDAVIT, HAS NO OBJECTION TO TAKING THE OATH AND HAVING SWORN THAT THE CONTENTS THEREOF ARE TRUE AND CORRECT AND, THAT SHE CONSIDERS THE OATH TO BE BINDING ON HER CONSCIENCE.



**COMMISSIONER OF OATHS**

**MICHELLE ZIBANE**  
Commissioner of Oaths  
Practising Attorney R.S.A.  
90 Rivonia Road  
Sandton  
2196



REPUBLIC OF SOUTH AFRICA

# MAGTIGINGSBRIEF LETTERS OF AUTHORITY

Ingevolge Artikel 6(1) van die Wet op Beheer oor Trustgoed, 1988 (Wet 57 van 1988)  
In terms of Section 6(1) of the Trust Property Control Act, 1988 (Act 57 of 1988)

No: IT 13693/07(T)


Hiermee word gesertifiseer dat /  
This is to certify that

.....  
PUSHPAVENI UGESHNI GOVENDER - 750424 0157 08 5

RESHMA MOOPANAR - 720801 0118 08 3  
.....  
.....  
.....

gemagtig word om op te tree as trustee(s) van die /  
is/are hereby authorized to act as trustee(s) of the  
OPTIMUM MINE REHABILITATION TRUST  
.....  
.....

GEGEE onder my hand te ..... op hede die ..... dag van .....  
GIVEN under my hand at ..... this ..... day of ..... year .....

  
Signature

**ASSISTENT MEESTER  
ASSISTANT MASTER**

MASTER OF THE NORTH GAUTENG  
HIGH COURT PRETORIA  
PRIVATE BAKKRIVAATSAK 123  
  
2017-12-01  
  
PRETORIA 001  
MEESTER VAN DIE NOORD-GAUTENG  
HOOGGEREGSGOF PRETORIA (100)

MJ 



REPUBLIC OF SOUTH AFRICA

# MAGTIGINGSBRIEF LETTERS OF AUTHORITY

Ingevolge Artikel 6(1) van die Wet op Beheer oor Trustgoed, 1988 (Wet 57 van 1988)  
In terms of Section 6(1) of the Trust Property Control Act, 1988 (Act 57 of 1988)

No: IT 7563/07(T)

Hiermee word gesertifiseer dat /

This is to certify that

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PUSHPAVENI UGESHNI GOVENDER - 750424 0157 08 5

RESHMA MOOPANAR - 720801 0118 08 3  
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.....  
.....

GEGEE onder my hand te

op hede die dag van

GIVEN under my hand at

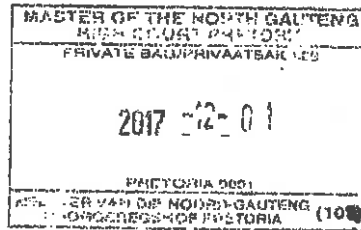
this

day of

year

  
Signature

ASSISTENT MEESTER  
ASSISTANT MASTER





**OPTIMUM MINE REHABILITATION TRUST****IT 13693/07(T)****("the Trust")****RESOLUTION OF TRUSTEES PASSED ON 03 APRIL 2018.****Whereas:**

1. The Trustees, on behalf of the Trust, intends opposing and/or applying for a reconsideration application of an application issued by the Director of Public Prosecutions in the High Court of South Africa, Gauteng Division, Pretoria, under Case number 14775/2018 ("the application");

**It was accordingly now resolved that:**

2. Pushpaveni Ugeshni Govender or Reshma Moopnar ("they") be and is hereby authorised with the power of substitution to undertake all such acts, things and deeds as are necessary or proper to act on behalf of the Trust in the above mentioned application.
3. They are further authorised to sign, conclude, execute and deliver all documents of whatsoever nature, as required on behalf of the Trust, to properly oppose or settle the application;
4. That Pieter van der Merwe of the firm Van der Merwe and Van der Merwe Attorneys in Pretoria be instructed to attend to the application as attorney of record and to act on behalf of the Trust;

**Pushpaveni Ugeshni Govender****Trustee****Reshma Moopnar****Trustee**

**KOORNFONTEIN REHABILITATION TRUST**

**IT 7563/07(T)**

**("the Trust")**

**RESOLUTION OF TRUSTEES PASSED ON 03 APRIL 2018.**

**Whereas:**

1. The Trustees, on behalf of the Trust, intends opposing and/or applying for a reconsideration application of an application issued by the Director of Public Prosecutions in the High Court of South Africa, Gauteng Division, Pretoria, under Case number 14775/2018 ("the application");

**It was accordingly now resolved that:**

2. Pushpaveni Ugeshni Govender or Reshma Moopanar ("they") be and is hereby authorised with the power of substitution to undertake all such acts, things and deeds as are necessary or proper to act on behalf of the Trust in the above mentioned application.
3. They are further authorised to sign, conclude, execute and deliver all documents of whatsoever nature, as required on behalf of the Trust, to properly oppose or settle the application;
4. That Pieter van der Merwe of the firm Van der Merwe and Van der Merwe Attorneys in Pretoria be instructed to attend to the application as attorney of record and to act on behalf of the Trust;



**Pushpaveni Ugeshni Govender**

**Trustee**



**Reshma Moopanar**

**Trustee**



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NUMBER: 14775 /2018

PG 5  
Handwritten marks and signature

In the ex parte application of:

THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

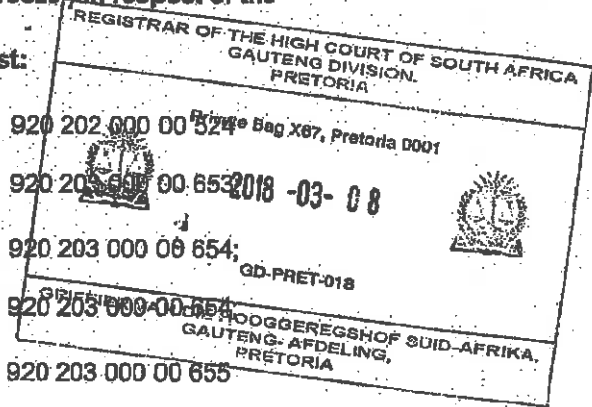
Applicant

In re:

The positive balance and any interest accrued in all accounts held by the Bank of Baroda Bank (currently under 'freeze') in respect of the -

A Optimum Mine Rehabilitation Trust:

- 1 Current account:
- 2 Fixed deposit accounts:



B Koorfontein Mine Rehabilitation Trust:

- 1 Current account: 920 202 000 00 519
- 2 Fixed deposit account: 920 203 000 00 649

IN THE APPLICATION FOR A PRESERVATION ORDER IN TERMS OF S 38(1) OF THE PREVENTION OF ORGANISED CRIME ACT, 121 OF 1998

~~DRAFT ORDER~~

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*S*

On 8 March, 2018.

Before Justice RABIE, in chambers.

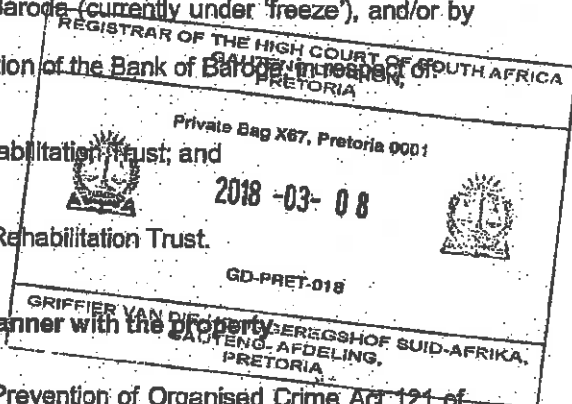
Having read the notice of motion, the founding affidavit and annexures, and having heard counsel for the applicant

**IT IS HEREBY ORDERED THAT:**

**The Property**

1 This order relates the positive balance and any interest accrued in all accounts, held by the Bank of Baroda (currently under 'freeze'), and/or by any other party on behalf/instruction of the Bank of Baroda in respect of

- 1.1 The Optimum Mine Rehabilitation Trust; and
- 1.2 The Koomfontein Mine Rehabilitation Trust.



**Prohibition against dealing in any manner with the property**

2 In terms of section 38(2) of the Prevention of Organised Crime Act 121 of 1998 (the Act), all persons with knowledge of this order, are, other than as required and permitted by this order, prohibited from removing, taking possession of or control over, dissipating, interfering with, diminishing the value of or dealing in any other manner with any of the movable property to which this order relates.

3 The property is to be immediately transferred from the Bank of Baroda (Baroda), or by any other party holding the property on behalf/instruction of,

*M. [Signature]*

6

Baroda, to Nedbank Group Limited (Nedbank) and then remain under the effective control of Nedbank pending the finalisation of forfeiture proceedings under the Act.

4 Nedbank is authorised to:

4.1 Assume control of the property/trust accounts and to open and transfer these funds to similar optimal interest bearing trust accounts;

4.2 Administer the property/trusts accounts and do anything necessary to preserve the property/trusts while the order is in force;

4.3 Accept any payments into these trust accounts;

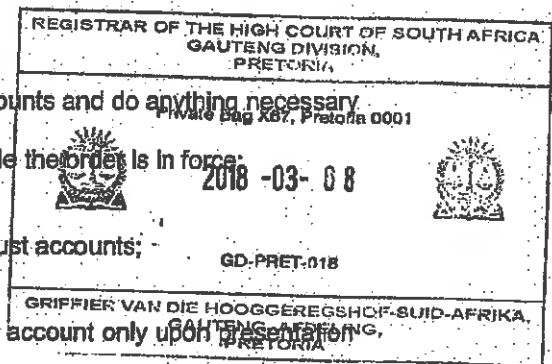
4.4 Release funds held in these trusts account only upon presentation of a court order authorising such release; and

4.5 Deduct reasonable banking charges in accordance with the banking laws, regulations and practices for the administration of these Mine Rehabilitation Trust accounts.

5 Applicant and the Director General of the Department of Mineral Resources is to be served with all applications for access to these funds, urgent or otherwise.

6 Baroda is to furnish applicant and the Director General of the Department of Mineral Resources, within 30 days of service of this order, with copies of all:

6.1 Agreements and/or documentation relating to the determination of the interest rate/s agreed to for both trust accounts;



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- 6.2 The full transactional history of the trust accounts;
- 6.3 All instructions, be it written and/or oral, relating to all transactions and/or transfers of funds held in both trust accounts; and
- 6.4 Any other relevant documentation.

in order for the parties to verify the accuracy of the funds preserved.

**Service and publication**

7 The applicant must in terms of section 39 of the Act:

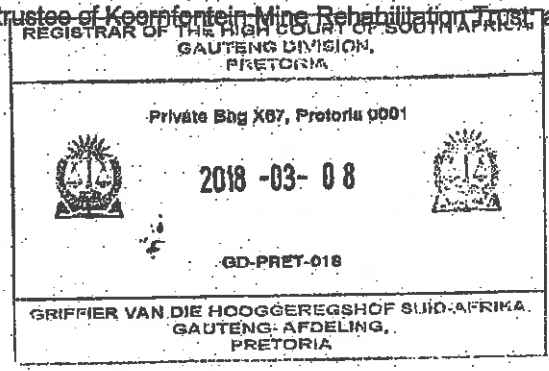
7.1 Cause notice of this order to be served, by the Sheriff, in the form set out in 'Annexure A', together with electronic copies of the documents supporting the application, on:

7.1.1 The Bank of Baroda, 2<sup>nd</sup> Floor, Atrium on 5th, Sandton City, Sandton.

7.1.2 The Trustees of Optimum Mine Rehabilitation Trust, c/o Pushpaveni Ugeshni Govender (in her capacity as the trustee of the Optimum Mine Rehabilitation Trust and director of Optimum Coal Mine (Pty) Ltd): Grayston Ridge Office Park, No. 144, Katherine Street, Sandown, Sandton.

7.1.3 The Trustees of Koomfontein Mine Rehabilitation Trust:

c/o Pushpaveni Ugeshni Govender (in her capacity as the trustee of Koomfontein Mine Rehabilitation Trust, and



m. j. [Signature]

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c/o Ronica Ragavan (in her capacity as sole director of Koorrifontein Mine (Pty) Ltd): 144 Katherine Street, Sandown, Sandton.

7.1.4 The Minister responsible for Mineral Resources, Trevenna Campus, 70 Meintjes Street, Sunnyside, Pretoria.

7.1.5 The Director General: Department of Mineral Resources, Trevenna Campus, Building 2 C, c/o Meintjes and Francis Baard Streets, Sunnyside, Pretoria.

7.1.6 The Master of the High Court: Pretoria, c/o The Acting Chief Master: SALU Building, 316 Thabo Sehume Street, Pretoria, Gauteng.

7.1.7 NEDBANK Group Limited, 135 Rivonia Road, Sandton.

7.1.8 The Organisation Undoing Tax Abuse, 18 Oak avenue, Randburg.

7.2 Cause notice of this order, in the form set out in Annexure A, to be published in the Government Gazette as soon as practicable after the order is granted.

REGISTRAR OF THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION,  
PRETORIA  
Private Bag X67, Pretoria 0001

2018 -03- 0 8

GD-PRET-018

REGISTRAR OF THE HIGH COURT OF SOUTH AFRICA,  
GAUTENG - AFDELING,  
PRETORIA.

Entry of appearance to oppose forfeiture order.

8 Any person who has an interest in the property and who intends opposing the application for an order forfeiting the property to the State or applying for an order excluding his or her interest from a forfeiture order in respect of the property, must enter an appearance giving notice of his or her intention in terms of section 39(3) of the Act.

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9 Such notice must be delivered to the applicant:

9.1 In the case of any person specifically identified for service in terms of this order, within 14 calendar days of service; and

9.2 In the case of any other person, 14 calendar days after the date when a notice of the order was published in the Government Gazette.

10 A notice in terms of section 39 must contain full particulars of the chosen address for the delivery of documents concerning further proceedings in this matter and must be accompanied by an affidavit setting out:

10.1 The full particulars of the identity of the person giving the notice;

10.2 The nature and extent of his/her interest in the property concerned;

10.3 Whether he/she intends opposing the making of the forfeiture order, or whether he or she intends applying for an order excluding his or her interest in that property from the operation of the order;

10.4 Whether he/she admits or denies that the property concerned is an instrumentality of an offence referred to in schedule 1 of the Act, or is the proceeds of unlawful activities and the basis for such defence;

10.5 If he/she intends applying for the exclusion of his or her interests from the operation of the forfeiture order, the basis for such an application.

11 Any person who is affected by the order may on good cause shown, apply for reconsideration. Such application shall be made:

REGISTRAR OF THE HIGH COURT OF SOUTH AFRICA  
 GAUTENG DIVISION  
 PRETORIA  
 Private Bag X67, Pretoria 0001

2018 -03- 08

GD-PRET-018

GRIFFIER VAN DIE HOOGGEREGSHOF BLINDERSRIKA,  
 GAUTENG, AFDELING,  
 PRETORIA



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11.1 In instances where the person is able to justify the application on grounds of urgency, upon 3 days notice (or such shorter period as the court may determine on good cause shown).

11.2 In other instances, upon at least 7 days notice to the applicant and all other persons identified in this order as being persons who may have an interest in the property.

12 Such an application must be made not later than 8 days after the person applying for reconsideration becomes aware of the existence of the order, or within such further period as the court may consider reasonable, bearing in mind the underlying objectives of Chapter 6 of the Act.

BY ORDER OF COURT  
REGISTRAR OF THE HIGH COURT  
DATE

REGISTRAR OF THE HIGH COURT OF SOUTH AFRICA GAUTENG DIVISION, PRETORIA		
Private Bag X87, Pretoria 0001		
	2018 -03- 08	
GD-PRET-018		
GRIFFIER VAN DIE HOOGGEREGENHOUD SUID-APRIKA, GAUTENG-AFDELING, PRETORIA		

*[Handwritten signature]*

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IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, PRETORIA

CASE NO: 85616/17

Before the Honourable Justice Maimela  
On 26 September 2017

In the matter between:

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

**DRAFT ORDER**

Having read the papers filed of record and heard relevant submissions, the following order is made by agreement between the applicant and the first, second, third, fifth, sixth, seventh and eighth respondents:

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1 Under reservation of all rights by all respondents and without any concessions in respect of any of the issues as they appear from the papers, and pending a decision on the relief sought in the notice of motion or a further order by this Court:

1.1 The Bank of Baroda is directed to continue to hold the Trust funds of the Optimum Mine Rehabilitation Trust ('the Optimum Trust') and the Koorfontein Mine Rehabilitation Trust ('the Koorfontein Trust'), in an interest-bearing bank account or accounts in the name of the Trusts.

1.2 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 are interdicted,

1.2.1 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;

1.2.2 without detracting from the generality of 1.2.1 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.



1.3 The Trustee(s) for the time being of the Koomfontein 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 Koomfontein Trust are interdicted:

1.3.1 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;

1.3.2 Without detracting from the generality of 1.3.1 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.

2 Any party may, upon reasonable notice and good cause shown, apply to the Court to vary the order in paragraph 1 above.

3 The matter is postponed for hearing on 7 and 8 December 2017 and the matter will proceed as follows:

3.1 The applicant will amend its notice of motion, effect any necessary joinder (including amongst others of Fonica Ragavan) and supplement its founding affidavit by 4 October 2017

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3.2 The respondents will file their answering affidavits on or before 18 October 2017;

3.3 The applicant will file its replying affidavit on or before 30 October 2017;

3.4 The applicant will file its heads of argument, chronology and practice note on 8 November 2017;

3.5 The respondents will file their heads of argument, chronology and practice note on 10 November 2017.

4 The costs of this application are reserved.

**BY ORDER**

**THE REGISTRAR**

S.S.

  
m/s

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**ANNEXURE 'A'**

**IN THE HIGH COURT OF SOUTH AFRICA**

**GAUTENG DIVISION, PRETORIA**

CASE NUMBER: 14775/2018

In the ex parte application of:

**THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS** Applicant

In re:

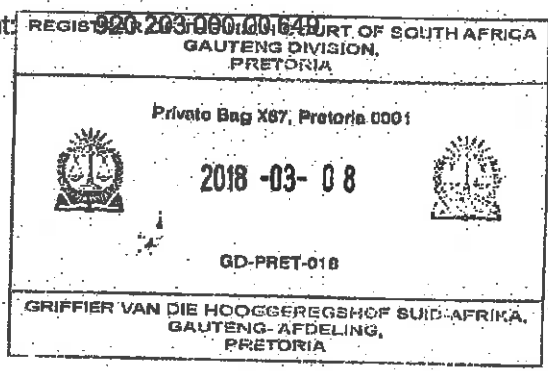
**The positive balance and any interest accrued in all accounts held by the Bank of Baroda Bank (currently under 'freeze') in respect of the -**

**A Optimum Mine Rehabilitation Trust:**

- 1 Current account: 920 202 000 00 524
- 2 Fixed deposit accounts: 920 203 000 00 653;
- 920 203 000 00 654;
- 920 203 000 00 654;
- 920 203 000 00 655

**B Koornfontein Mine Rehabilitation Trust:**

- 1 Current account: 920 202 000 00 519
- 2 Fixed deposit account: 920 203 000 00 640



M.S.

## ANNEXURE 'A'

IN THE APPLICATION FOR A PRESERVATION ORDER IN TERMS OF  
SECTION 38(1) OF THE PREVENTION OF ORGANISED CRIME ACT, 121 OF  
1998

NOTICE IN TERMS OF S 39 OF THE PREVENTION OF ORGANISED CRIME  
ACT, 121 OF 1998

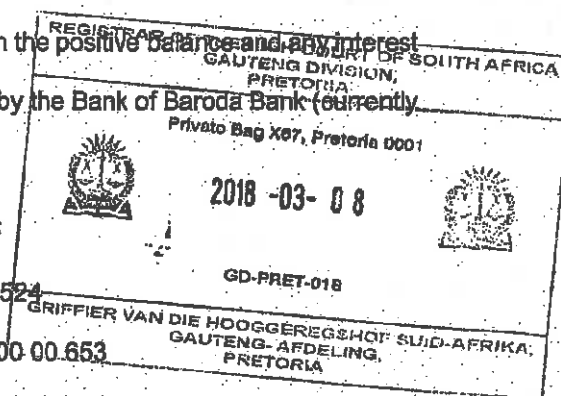
This notice is addressed to:

1. The Bank of Baroda: South Africa,
2. The Trustees of Optimum Mine Rehabilitation Trust,
3. The Trustees of Koornfontein Mine Rehabilitation,
4. The Minister for Mineral Resources, South Africa,
5. The Director General of the Department of Mineral Resources,
6. The Master of the High Court: Pretoria,
7. NEDBANK Group Limited,
8. The Organisation Undoing Tax Abuse

and all other persons who have an interest in the positive balance and any interest  
accrued in all accounts (the property) held by the Bank of Baroda Bank (currently  
under 'freeze') in respect of the:

Optimum Mine Rehabilitation Trust:

- 1) Current account: 920 202 000 00 524
- 2) Fixed deposit account: 920 203 000 00 653
- 3) Fixed deposit account: 920 203 000 00 654
- 4) Fixed deposit account: 920 203 000 00 654



M. Z.



## ANNEXURE 'A'

5) Fixed deposit account: 920 203 000 00 655

**Koornfontein Mine Rehabilitation Trust:**

1) Current account: 920 202 000 00 519

2) Fixed deposit account: 920 203 000 00 649

OFFICER OF THE HIGH COURT OF SOUTH AFRICA GAUTENG DIVISION, PRETORIA	
Private Bag X97, Pretoria 0001	
	2018 -03- 08 
GD-PRET-018	
GRIFPIER VAN DIE HOOGGEREGSHOF SUID-AFRIKA, GAUTENG-AFDELING, PRETORIA	

**Take notice that:**



- 1 The National Director of Public Prosecutions (National Director) has obtained a preservation of property order (the order), a copy of which is attached to this notice, in terms of s 38(2) of the Prevention of Organised Crime Act (Act) in respect of the property;
- 2 If you have an interest in the property, you should understand that it is now at risk. You are advised to obtain legal advice on whether your interest can be protected and, if so, on how to protect it;
- 3 You are notified that the National Director will, within 90 days of publication of this notice, apply to the High Court under s 48 of the Act for an order declaring the property forfeit to the state. The order will remain in force until the application for a forfeiture order is finalised, and until any forfeiture order that is made is satisfied;
- 4 If you intend to oppose the application for a forfeiture order, or you intend to apply for an order excluding your interest from a forfeiture order in respect of the property, you must enter an appearance in terms of the order. The requirements for such an appearance are set out in the order and are also dealt with in ss 39(3), (4) and (5) of the Act. An appearance must comply with these requirements;

*M. S.*

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## ANNEXURE 'A'

- 5 Your attention is specifically drawn to the 14 day time limit prescribed in s 39(4) for the entry of an appearance referred to in paragraph 4 above;
- 6 If you enter an appearance in terms of the order you will be entitled to be given 14 days notice of the application by the applicant for a forfeiture order in respect of the property;
- 7 If you fail to enter an appearance in terms of the order or to comply with the above requirements, you will not be given notice of the application for a forfeiture order and you will not be entitled to appear at the hearing of the application. In such a case, the court may grant a default order forfeiting the property to the state under s 53 of the Act;
- 8 You may, on good cause shown (including the non-availability of any other suitable remedy to protect your legitimate rights or interests), on 3 days notice in urgent instances and at least 7 days notice in other instances to the applicant, and within 8 days of becoming aware of the order, apply for reconsideration of the order;
- 9 You are specifically advised that even if you intend to apply for reconsideration of the preservation order in this case, you must, in addition, comply with paragraphs 4 and 5 above if you intend to oppose the forfeiture application at a later date. Failure to do so can result in a forfeiture order being granted against the property by default and without further notice to you.

REGISTRAR OF THE HIGH COURT OF SOUTH AFRICA PRETORIA		
	2018 -03- 08	
GD-PRET-018		
GRIFFIER VAN DIE HOOGGEREGSGHOF SUID-AFRIKA, GAUTENG-AFDELING, PRETORIA		

*[Handwritten signature]*

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**ANNEXURE 'A'**

10 Whenever this order states that you must deliver or serve any notice, affidavit or other process document on the applicant, you must deliver or serve them on the applicant at the following address:

**THE STATE ATTORNEY**

SALU Building

316 Thabo Sehume street,

Private Bag X91

PRETORIA

0001

Ref: /2018/256

Tel: 012 309 1677

Fax: 012 309 164/50



Cell: 073 434 1293

Email: [RMathaga@justice.gov.za](mailto:RMathaga@justice.gov.za)

DX: 298 PRETORIA

Enquiries:

R MATHAGA

REGISTRAR OF THE HIGH COURT OF SOUTH AFRICA GAUTENG DIVISION, PRETORIA		
Private Bag X67, Pretoria 0001		
	2018 -03- 08	
GD-PRET-018		
GRIFFIER VAN DIE HOOGGEREGSHOF SUID-AFRIKA, GAUTENG-AFDELING, PRETORIA		

M. J. S.

**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) LIMITED**

**Fifth Respondent**

**KOORNFONTEIN MINE (PTY) LIMITED**

**Sixth Respondent**

**BANK OF BARODA**

**Seventh Respondent**

**MINISTER OF MINERAL RESOURCES**

**Eighth Respondent**

**RONICA RAGAVAN**

**Ninth Respondent**

**THE MASTER OF THE HIGH COURT, PRETORIA**

**Tenth Respondent**

---

**ANSWERING AFFIDAVIT FILED ON BEHALF OF THE FIRST TO THIRD AND FIFTH  
TO SIXTH RESPONDENTS**

---

I, the undersigned,

**PUSHPAVENI UGESHNI GOVENDER**

do hereby make oath and state as follows:

*Handwritten signature*

*Handwritten initials*



**DEPONENT AND AUTHORITY**

1. I am an adult female cited in my personal capacity as the third respondent and having my place of business at Grayston Ridge Office Park, no. 144, Katherine Street, Sandown, Sandton.
2. The facts herein contained are within my personal knowledge, save where otherwise stated or the contrary appears from the context, and are to the best of my knowledge and belief both true and correct.
3. I am the director of the fifth respondent ("*Optimum Coal*") and the trustee of both the Optimum Mine Rehabilitation Trust ("*the Optimum Trust*") and the Koornfontein Rehabilitation Trust ("*the Koornfontein Trust*"), cited as the first and second respondents respectively with reference to their trustees for the time being.
4. Letters of authority issued by the Master of the High Court ("*the Master*") for the Optimum and Koornfontein Trusts are annexed hereto marked "PG1" and "PG2" respectively. As appears therefrom the remaining trustees are listed as Althaf Emmamally and Trevor Scott; both of whom have resigned. In the case of Emmamally his resignation was with effect from 15 July 2016. Scott resigned on 31 August 2017.
5. I annex as "PG3" a printout from the records of the Companies and Intellectual Property Commission ("*the CIPC*") in confirmation of my status as director of



Optimum Coal. The sole director of the sixth respondent ("*Koornfontein Mine*") is Ronica Ragavan who is cited as the ninth respondent. A printout from the records of the CIPC in confirmation of her status as director is annexed marked "PG4". Ragavan's confirmatory affidavit is annexed hereto as "PG5".

6. I am duly authorised to represent the Optimum and Koornfontein Trusts as well as Optimum Coal and Koornfontein Mine in opposing this application and to depose to this affidavit on their behalf. I annex hereto marked "PG6" to "PG9" respectively resolutions from which my authority appears more fully. Where I rely on information furnished to me by others, the necessary confirmatory affidavits are annexed.
7. For ease of reference I refer to each of these respondents including myself collectively as "*the mining respondents*". Where I refer to the Optimum and Koornfontein Trusts jointly I simply describe them as "*the Trusts*".

#### THE STRUCTURE ADOPTED IN THIS AFFIDAVIT

8. I have read the notice of motion, founding and supplementary founding affidavit deposed to by Stefanie Fick ("*Fick*") filed on behalf of the applicant ("*OUTA*") together with the annexes thereto. I answer thereto below.
9. Before I address the allegations contained therein *ad seriatim*, it is convenient to make a number of observations of a general nature so as to set out our summary position in answer to the case advanced against us which for the most

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part, is characterised by vague generalisations that not only fail to provide the type of particularity one would ordinarily expect from a litigant desirous of vindicating matters of high principle, but which is based on aimless conjecture that does little to address the true facts. This is a wholly unsatisfactory approach to litigation in motion proceedings which has left OUTA straining to find a basis for the relief which is aimed at impugning the integrity of the mining respondents.

10. OUTA seemingly has no difficulty in confusing the position of "the Gupta family" with that of the mining respondents, this despite the fact that no factual foundation for any alleged wrongdoing on the part of the mining respondents having been established.
11. Setting out the summary position of the mining respondents is necessary in order to place matters in their proper context and to demonstrate that the application is without foundation in a number of fundamental respects, all of which show that OUTA has misconceived its legal position.
12. As a matter of convenience, I therefore propose at the outset of this affidavit to set out the main themes that will be advanced on behalf of the mining respondents that underpin our opposition to the merits of the relief sought. I then deal with the allegations in the founding affidavit and supplementary founding affidavit *ad seriatim*.

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13. To the extent necessary I also address the allegations made by Mr Martin Lange ("*Lange*") insofar as they warrant a specific response.

#### THE SUMMARY POSITION OF THE MINING RESPONDENTS

14. Firstly, and as a primary submission, the mining respondents challenge OUTA's standing to institute these proceedings and procure the relief sought in the amended notice of motion. While it is accepted that section 38 grants anyone acting in the public interest the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, the papers filed by OUTA do not make out a proper case for the violation or threatened violation of any right contained in the Bill of Rights. Its concerns rather relate to the proper administration of the Trusts, a subject not addressed in the Bill of Rights and which does not implicate any of the rights protected by the Bill of Rights.
15. The provisions of section 32(1) of the National Environmental Management Act 32 of 1998 ("*NEMA*") are equally of no application in that the section is only of relevance where a person or group of persons seek appropriate relief in respect of any breach or threatened breach of any provision of NEMA, any provision of a specific environmental management Act, or of any other statutory provision concerned with the protection of the environment or the use of natural resources.

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16. The relief is not aimed at addressing a breach or threatened breach of NEMA or any other statutory instrument concerned with environmental management, the protection of the environment or use of natural resources. When properly characterised, and as is evident from the amended notice of motion, the relief sought instead has a threefold objective in mind, namely to:
- 16.1. remove the trustees of the Optimum and Koomfontein Trusts;
  - 16.2. secure the appointment of independent trustees;
  - 16.3. direct that the trustees render a full accounting relating to the property of each Trust.
17. I respectfully submit that none of these heads of relief fall within the ambit of section 32 of NEMA or section 38 of the Constitution. Reliance on NEMA and the Constitution in order to find a basis for OUTA's standing is accordingly bad in law with the result that the application should be dismissed on this basis alone.
18. Secondly, I submit that OUTA cannot show that my removal will be in the interests of the Trusts or their beneficiaries being Optimum Coal and Koomfontein Mine as required by section 20 of the Trust Property Control Act 57 of 1988 (*"the Trust Property Control Act"*). My removal is instead sought on the basis that it will serve the greater public interest which is with respect not

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the test under section 20. Equally, OUTA does not satisfy the requirements under section 20 to bring the present application as it is neither a trustee, beneficiary, nor truly a person having an interest in the trust property in question.

19. Thirdly, OUTA is not entitled to demand an accounting in relation to the two Trusts. Only a trust beneficiary or co-trustee is entitled to demand an accounting. OUTA does not fit into either category. It has not referred to any principle of law that entitles it to demand an extension or relaxation of this principle. While the Master may further call upon a trustee to account in terms of section 16 of the Trust Property Control Act, the section is of no application in these proceedings as OUTA is not entitled to usurp the statutory powers of the Master.
20. Fourthly, the mining respondents take issue with OUTA's construction of section 24P of NEMA read with the applicable Regulations thereto and referred to below. Section 24P provides that an applicant for an environmental authorisation relating to prospecting, exploration, mining or production must, before the Minister responsible for mineral resources issues the environmental authorisation, comply with the prescribed financial provision for the rehabilitation, closure and ongoing post decommissioning management of negative environmental impacts.
21. Section 24P itself does not bar concurrent rehabilitation and does not seek to prescribe the regulatory framework within which financial provision to be

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furnished. One must instead turn to the Regulations promulgated under NEMA that pertain to financial provision for prospecting, exploration, mining or production operations. (Government Gazette No R1147 of 20 November 2015).

22. The purpose of the Regulations is instructive as set out in Regulation 2:

*"The purpose of these Regulations is to regulate the determine [sic] and making of financial provision as contemplated in the Act for the costs associated with the undertaking of management, rehabilitation and remediation of environmental impacts from prospecting, exploration, mining or production operations through the lifespan of such operations and latent or residual environmental impacts that may become known in the future."*

*(my emphasis)*

23. The obligation to make financial provision for rehabilitation and remediation of environmental impacts is therefore not only relevant at the time of the mine's life but a positive obligation is imposed that remains operative throughout the lifespan of the mine's operations. Concurrent rehabilitation is therefore not excluded.

24. While Regulation 8(1)(c) permits an applicant or holder of a right obliged to make financial provision to make use of a financial vehicle in the form of a trust fund established in terms of the applicable legislation, a trust may not be used for annual rehabilitation (Regulation 6(a) and Regulation 11(1)(a)) or final rehabilitation, decommissioning and closure of the mining operations at the end of the life of the operations as reflected in a final rehabilitation and mine closure plan (Regulation 6(b) and Regulation 11(1)(b)).

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25. Regulation 8(1)(c) however does not preclude the employment of trust funds to address concurrent rehabilitation where the need to do so arises in circumstances outside an annual rehabilitation plan. This is consistent with and gives effect to section 24 of the Constitution. Regulation 5 which in addressing the scope of financial provision, provides that an applicant or holder of a right or permit must make financial provision for "*rehabilitation and remediation*" which clearly carries a meaning broader than annual or end-of-life rehabilitation.
26. Contrary to the approach adopted by OUTA which amounts to no more than baseless speculation, the trustees of the Optimum and the Koorfontein Trusts have not employed the capital reserves of the funds reserved for financial provision in terms of section 24P for concurrent rehabilitation. The funds have further not been put to use for any operational reason and are housed with the Bank of Baroda in line with their statutory purpose.
27. With regards to the affairs of the Optimum Trust, Scott, Emmamally and I only assumed the office of trustee on 26 April 2016 following the resignation of the previous trustees who had been appointed by Glencore. Their resignation was the result of Tegeta Exploration and Resources (Pty) Limited's ("*Tegeta*") acquisition of the business of Optimum Coal as a going concern. Optimum Coal's holding company, Optimum Coal Holdings (Pty) Limited was in business rescue at the time.

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28. Since inception there has been no withdrawal of the funds held by the Optimum Trust save for one withdrawal of R7.5 million on 23 May 2016 which was transferred from the current account of the Trust to the mine current account of Optimum Coal. The Trust current account was credited with R7 882 389.04, being the interest on the Trust call deposit account. Thereafter, R7.5 million representing a part of the interest earned was transferred from the current account of the Trust to the mine current account of Optimum Coal, which at the time was being operated by the Business Rescue Practitioner. These funds were transferred to cover the immediate rehabilitation requirements of the mine. Cash flow was extremely constrained due to the mine's holding company having been in business rescue. Rehabilitation had been severely neglected during the business rescue process and during the tenure of the mine's previous management. Incidentally, the Business Rescue Practitioner was represented by the same firm of attorneys who now act for OUTA.
29. The amount so transferred represented R7.5 million of the approximately R7.9 million earned in interest for the month of April 2016. For the 2017 tax year an amount of R115 million was earned in interest on the funds of the Optimum Trust held with the Bank of Baroda. While Optimum Coal should have provision for R1.298 billion according to the assessment report conducted by Cabanga Environment Concepts, the Optimum Trust in fact has an amount of R1.470 billion invested with the Bank of Baroda with the result that it has surplus funds available for rehabilitation purposes as required by section 24P of NEMA read

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with the applicable Regulations. A copy of Cabanga's assessment report is annexed hereto marked "PG10".

30. In the case of the Koorfontein Trust, Scott, Emmamally and I assumed the office of trustee on 26 April 2018 following the resignation of the previous trustees who had been appointed by Glencore. Their resignation was the result of Tegeta's acquisition of Koorfontein Mine's business as a going concern. Since inception of our take-over of the affairs of the Trust, no amount has been withdrawn from the Trust's funds held in terms of section 24P of NEMA.
31. As dealt with below in more detail, and during the 2017 tax year the Koorfontein Mine specifically requested approval from the Department to access funds from the Trust for purposes of performing rehabilitation work at the mine. The Department granted approval pursuant to this request subject to certain conditions.
32. None of the Koorfontein Trust's funds were ultimately used for concurrent rehabilitation or put to any other purpose but an amount of R150 million was sanctioned by the Bank of Baroda to Koorfontein Mine against security of a deposit by the Koorfontein Trust. The loan was intended to be used to effect rehabilitation work at the mine. As Koorfontein Mine was not satisfied with the work assigned to the rehabilitation contractor, the funds were returned by Koorfontein Mine to the Bank of Baroda with interest. The Koorfontein Trust's

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funds were released as security as there was no continued need for this loan to persist.

33. In the process there was no cost or loss to the Koorfontein Trust. By having put up the funds of the Trust as security, there was also no risk to the Trust or any contravention of the law in that as at 28 February 2017, the Koorfontein Trust was required to keep no more than R128 million for financial provision purposes whereas the Trust was in fact holding a deposit of R305 million at the time in its current account with the Bank of Baroda. This translates into a net surplus of R177 million. I refer the Court to Cabanga's assessment report annexed hereto marked "PG11" dated March 2017. The funds employed for collateral purposes were sourced from this surplus with the result that no amount of money statutorily earmarked for rehabilitation was placed at any risk.

34. I now deal with the allegations in the founding affidavit *ad seriatim*. Allegations not specifically dealt with should be taken as having been denied.

#### AD SERIATIM RESPONSE TO FOUNDING AFFIDAVIT

35. Ad paragraphs 1 to 2

I admit that Fick is an adult female and that OUTA is the applicant. I have no knowledge of the position occupied by her. I deny that all of the allegations are all true and correct and within Fick's personal knowledge. Such inaccuracies as may be found in the founding papers are dealt with elsewhere in this affidavit.

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36. Ad paragraphs 3 to 4

I take note of the allegations contained in paragraph 3. On Fick's own version she does not have personal knowledge of these matters with OUTA left to rely on the evidence presented before the Court in unrelated proceedings. I admit the allegations in paragraph 4. As already advised, the necessary interim relief was secured in the Baroda interdict proceedings pending the final determination of an application for such appropriate relief as the applicants in those proceedings deem fit concerning the validity of the termination notices issued by the Bank of Baroda on 6 July 2017. The applicants in the Baroda interdict proceedings are currently preparing papers for the necessary final relief which will be launched within the fifteen day time period stipulated in the order of Makgoka J dated 9 October 2017.

37. Ad paragraphs 5 to 6

I take note of the stated purpose of the application. As is demonstrated elsewhere in this affidavit, the concerns expressed by OUTA are putative at best and not based on a correct understanding of the facts. The rehabilitation funds for both Optimum and Koorfontein are not at risk. The relief sought is a needless attempt at grandstanding by OUTA. Albeit that the companies listed in paragraph 6 are part of the Oakbay group of companies, each of the companies in question enjoy a discrete existence from the members of the

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Gupta family. To refer to them as being part of the Gupta group of companies is inaccurate. Save as aforesaid these allegations are admitted.

38. Ad paragraphs 7 to 9.

38.1. I admit the allegations in paragraph 7. The relief in Part A is of academic importance only for three reasons. Firstly, the parties agreed to a draft consent order which was made an order of Court by Msimaki J on 28 September 2017 so as to put in place a practical arrangement pending the outcome of Part B. A copy of the order is annexed hereto marked "PG12". As appears therefrom the order was agreed upon with reservation of all rights by all respondents and without any concessions in respect of any of the issues as they appear from the papers.

38.2. Secondly, any urgency as there may have been (which is denied) through the closure of the accounts by the Bank of Baroda was effectively sterilized through the order of Makgoka J of 9 October 2017. The effect of this order was to supersede the judgment of Fabricius J handed down on 21 September 2017.

38.3. Thirdly, and most importantly, the funds held by each of the Trusts are segregated and maintained for their specific statutory purpose. The funds are in the circumstances not subject to imminent risk as alleged by Flick.

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39. **Ad paragraph 10**

I take note of the stated purpose of Part B of the application. As should be evident from what is stated elsewhere in this affidavit, the measures taken by each of the Trusts are both adequate and satisfactory to ensure the long-term protection of the trust property as contemplated by the applicable legislation. I deny that OUTA is entitled to an order removing me as a trustee or entitled to demand an accounting. The relief sought against the Minister is similarly unnecessary as sufficient arrangements are in place for the financial provision for rehabilitation of both the mines. Save as aforesaid these allegations are denied.

40. **Ad paragraph 11**

There is no risk of the imminent closure of the accounts of the Trusts as is evident from the order of Makgoka J dated 9 October 2017. A copy of the judgment is annexed hereto marked "PG13". The Trusts do not require alternative facilities in South Africa at this stage. I deny any breach of my fiduciary or statutory duties as alleged. As I explain elsewhere in this affidavit my conduct as trustee has at all times been beyond reproach. I am fully cognisant of the rehabilitation obligations of each mine. There is no risk of burdening the public purse as the funds earmarked for rehabilitation are sufficient to meet this purpose. Save as aforesaid these allegations are denied.

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## 41. Ad paragraph 12

I deal below with the preliminary report of Lange whose observations for the most part constitute a matter of speculation which do little to address the true facts.

## 42. Ad paragraphs 13 to 14

42.1. Save to admit that the applicant is cited as OUTA, I have no knowledge of the balance of the allegations contained in paragraph 13 which are not admitted and OUTA is put to the proof thereof. OUTA's mission statement found at <https://www.oua.co.za/about-oua/our-vision-and-mission/> only speaks of:

42.1.1. *"Challenging the taxation policy and the regulatory environment (as a whole or part), as and when deemed as being irrational, unfit or ineffective for their intended purpose"; and*

42.1.2. *"Questioning and challenging the squandering, maladministration and corrupt use of taxes, using our clear and effective methodology, and then to hold those responsible for the maladministration and /or corruption, to account for their behaviour and actions."*

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42.2. While its mission statement states that its values are "Integrity and accountability" as well as "Responsible stewardship of our resources", OUTA does not appear to have a direct focus on the protection of the environment with its core activities instead channelled towards holding state owned enterprises to account as appears from the numerous press releases found on its website. It is denied that environmental protection constitutes a focus area of OUTA. For ease of reference I annex a copy of the mission statement hereto marked "PG14".

42.3. OUTA is invited to take this Court into its confidence by furnishing full particulars of all other environmental protection work previously and currently undertaken by it, and more specifically whether it has demonstrated the same kind of enthusiasm in holding other more established mining companies to account. Save as aforesaid the allegations in paragraph 14 are admitted.

43. Ad paragraphs 15 to 16

I have no knowledge of who funds OUTA, the composition of its funders or whether some of its funders live and work in Mpumalanga. These allegations are denied and OUTA is put to the proof thereof. There is no risk of rehabilitation failures in the case of the two mines. The funds earmarked for this purpose have been adequately segregated for this very purpose in line with the applicable legislation. Save to deny the standing of OUTA to bring these proceedings, I

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take note of the allegations in paragraph 16. Not only is the institution of these proceedings unnecessary but they have been brought with an ulterior objective altogether in light of the fact that the funds earmarked for rehabilitation have not been misused with the result that there is no legitimate reason to conclude that there is a risk of failure to undertake rehabilitation activities. The only reasonable conclusion to be drawn is that OUTA has brought this misconceived application to drive its own agenda or that of its funders with little true concern for the environment.

44. **Ad paragraphs 17 to 18**

44.1. I am at present the trustee for the Optimum Trust and the Koornfontein Trust following the resignation of Emmamally and most recently Scott. The Optimum Trust's registration number is as indicated in paragraph 5.2 of the founding affidavit as IT/13693/07.

44.2. Save as aforesaid, I admit the allegations in these paragraphs.

44.3. As Fick correctly points out, both Trusts are duly constituted in terms of the provisions of the Mineral and Petroleum Resources Development Act 28 of 2002 ("~~the~~ MPRDA") and NEMA for purposes of mining land rehabilitation and have at all times been contacted in line with this statutory objective.

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45. **Ad paragraphs 19 to 20.**

I have no knowledge of the contents of the telephonic discussion between Scott and Ms Soretha Venter ("Venter"). Although Ragavan is not a trustee or a signatory on the accounts of the Trusts with the Bank of Baroda, she is specifically tasked with certain administrative tasks which she performs on behalf of both Trusts subject to my control and supervision. All decisions are taken by me acting *quā* trustee. During the tenure of Scott and Emmamally this was also the case. She enjoys personal knowledge of the affairs of the Trusts. Save as aforesaid I admit the allegations in these paragraphs.

46. **Ad paragraph 21**

I admit the resignation of Scott. While he remains a signatory of the bank accounts for the Trusts, he no longer plays any role concerning the administration of the Trusts. I admit the balance of the allegations in this paragraph insofar as they pertain to me. Save as aforesaid I have no knowledge of the allegations in this paragraph concerning the investigations of Venter.

47. **Ad paragraphs 22 to 24**

I take note of the allegations in paragraphs 22 and 23. I am at present the trustee. I deny that I have a personal interest in the outcome of the application.

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My interest if any arises only by virtue of the office of trustee which I hold. Fick appears to disregard the distinction which I submit is legally impermissible.

48. **Ad paragraphs 25 to 27**

I take note of the allegations in paragraph 25. I admit the allegations in paragraphs 26 to 27.

49. **Ad paragraph 28.**

49.1. I admit the first sentence of this paragraph. Both Optimum Coal and Koomfontein Mine are cognisant of the legal obligation to make adequate pecuniary provision at all material times during the mining project for rehabilitation. Optimum Coal is the beneficiary of the Optimum Trust while Koomfontein Mine is the beneficiary of the Koomfontein Trust.

49.2. As dealt with elsewhere in this affidavit, the statutory matrix in terms of which the two Trusts and mining companies operate do not preclude concurrent rehabilitation, but the difference of interpretation is of no moment in the context of these proceedings since neither Trust has employed its capital reserve funds to service any concurrent rehabilitation obligation. Save as aforesaid, I admit the allegations contained in this paragraph.

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## 50. Ad paragraphs 29 to 33

50.1. I admit the allegations in paragraphs 29 and 30. I take note of the allegations in paragraph 31 but point out that the basis for the Bank of Baroda's decision to terminate its banking relationship with the Trusts is questionable to say the least. Having consented to an order of this Court on 26 September 2017 requiring the Bank of Baroda to keep open the accounts of the Trusts, any reputational harm to the bank was clearly more speculative than real as was correctly found by Makgoka J in paragraph 82 of his judgment of 9 October 2017.

50.2. The learned Judge correctly held that given that the purpose of reasonable notice in the closure of bank accounts was aimed to provide the banking client with sufficient opportunity to regulate its affairs, the period of six days given by the Bank of Baroda did not "*by any stretch of imagination, constitute reasonable notice.*" The Court is referred to paragraph 76 of the judgment. These remarks are particularly apposite in the context of the Trusts which are statutory vehicles required to hold funds for mining rehabilitation purposes.

50.3. I admit the citation of the Minister as described in paragraph 32. For the reasons dealt with elsewhere in this affidavit, I submit that the Minister is under no obligation to come to the assistance of OUTA. Adequate measures are in place to safeguard the funds of each Trust

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with the result that there is no basis for the Minister to intervene through the exercise of such legislative powers as may be entrusted to him.

**51. Ad paragraphs 34 to 35**

I admit the allegations in paragraph 34. The mining respondents do not take issue with Fick's characterisation of the legislative purpose behind the legal framework governing financial provision for rehabilitation of mines. The allegations in paragraph 35 are admitted.

**52. Ad paragraphs 36 to 37.5**

52.1. I take note of the allegations in these paragraphs which more appropriately constitute a matter for legal argument. The Mineral and Petroleum Resources Development Regulations of 2004 as promulgated under the MPRDA are however no longer of primary importance in view of the Regulations referred to above as promulgated under NEMA which came into effect on 20 November 2015.

52.2. While the mining respondents disagree with paragraph 37.5 to the effect that concurrent rehabilitation is excluded, this is of no moment in the context of these proceedings since the funds have not been employed to service concurrent rehabilitation requirement save for the

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instance referred to above involving the Business Rescue Practitioner which was limited to interest only in relation to Optimum Coal.

53. **Ad paragraphs 38 to 39**

I admit the allegations in paragraph 38. The allegations in paragraph 39 are only admitted insofar as they are consistent with the interpretation advanced by the mining respondents in the introductory portion of this affidavit. Save as aforesaid these allegations are denied.

54. **Ad paragraph 40**

I submit that the exercise of interpretation is objective with the result that no weight can be attached to the interpretation of any particular person including the Department of Mineral Resources (*the Department*). OUTA is nevertheless invited to make available the Clarification Note. Save as aforesaid these allegations are denied.

55. **Ad paragraph 41**

Having been created in 2007, each of the Trusts procured approval in terms of what was then section 41 of the MPRDA which was subsequently repealed by the Mineral and Petroleum Resources Development Amendment Act 49 of 2008

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which came into effect on 7 June 2013. Save as aforesaid I admit the allegations in this paragraph.

56. Ad paragraph 42

I deny the correctness of these paragraphs. As the third and fourth respondents Scott and I are not the rights holders. These are Optimum Coal and Koorfontein Mine who are cited as the fifth and sixth respondents. I admit the final sentence of this paragraph insofar as it relates to Optimum Coal and Koorfontein Mine.

57. Ad paragraph 43

57.1. I have no knowledge of the steps taken by OUTA to procure such copies. I am not surprised that the Master's Office has not furnished OUTA with copies since the documents described by the applicant are, by their very nature not public documents or made available for public inspection.

57.2. I have no knowledge of the discussions between Scott and Verter but confirm the correctness of his advice to her as set out in paragraph 43. There is no obligation to provide OUTA with the documents sought by it. OUTA's standing under section 38 of the Constitution and section 32.

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of NEMA to vindicate environmental matters does not entitle it to meddle in the affairs of the Trusts.

58. **Ad paragraphs 44 to 46**

I admit the allegations in paragraph 44 insofar as Fick has correctly recorded the salient portions of Regulation 53. Save as aforesaid the allegations are denied. I admit the allegations in paragraph 45 and that there has been compliance with the Regulations promulgated under NEMA.

59. **Ad paragraphs 47 to 49**

I admit the allegations in paragraph 47 insofar as Fick has correctly set out the applicable statutory provisions. Both Trusts are conducted in compliance with section 37A(5)(a) of the Income Tax Act 58 of 1962 (*the Income Tax Act*). Save to deny that concurrent rehabilitation is not permitted, I do not take issue with the allegations in paragraph 48. There is no obligation on the mining respondents to furnish OUTA with the trust deeds. Save as aforesaid I take note of the allegations in paragraph 49.

60. **Ad paragraphs 50 to 52**

60.1. I admit that trustees are enjoined by the applicable common law provisions relating to Trusts and the provisions of the Trust Property

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Control Act. It goes without saying that insofar as trust property is held in bank accounts, the necessary banking facilities must be secured and maintained. Fick ignores the fact that sufficient pecuniary provision for rehabilitation can be held through a variety of vehicles such as a deposit with the DMR or another appropriate secured investment vehicle permitted by the Regulations under NEMA.

60.2. I admit that the MPRDA and NEMA impose obligations concerning the financial provision for mine rehabilitation. Save as aforesaid these allegations are denied.

61. **Ad paragraphs 53 to 54**

I admit the allegations in paragraph 53 insofar as they constitute an accurate recordal of the Minister's obligations. Save as aforesaid the allegations in paragraph 53 are denied. I take note of the allegations in paragraph 54.

62. **Ad paragraphs 55 to 56**

Tegeta acquired its interest in Optimum Coal and Koomfontein Mine with effect from 15 April 2016. Save as aforesaid I admit the allegations in paragraph 55. I deny the correctness of the allegations in paragraph 56 insofar as it seeks to cast the transaction in a negative light. Eskom was not a party to the transaction. Optimum Coal had an existing coal supply agreement with Eskom

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which was already in place, which collectively were acquired as part of the business. The Public Protector's Report is in any event *sub judice* in that it is the subject of judicial review and not germane to these proceedings.

63. Ad paragraphs 57 to 60

The combined value of the Trust funds at the time of the transaction referred to in paragraph 57 was R1 737 497 831.97. The funds of the Trusts were previously held with Standard Bank but were transferred to the Bank of Baroda on 21 June 2016 with approval from the Department. I admit the values of the Optimum Trust and the Koorfontein Trust as at 23 May 2016 and 21 June 2016. The collective interest that has accrued since comprises the amount of R170 317 698.22. Save as aforesaid I take note of these allegations.

64. Ad paragraphs 61 and 62

I admit the allegations in paragraph 61. Emmamally resigned on 15 July 2016. I have no knowledge of the discussion between Scott and Venter. I can accordingly not comment thereon save to point out that Scott would have been correct to direct any queries to me and Ragavan who as I have already indicated, plays an important role in the administration of the Trusts which she conducts under my direct control and supervision. Save as aforesaid these allegations are denied.

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65. Ad paragraphs 63 to 65

I deny the existence of any conflict of interest either as alleged or at all. I take note of the allegations in paragraph 63 but point out that they do little to come to terms with the true issues in dispute between the parties. I admit the allegations in paragraphs 64 and 65 which are irrelevant to these proceedings.

66. Ad paragraph 66

I admit the first sentence of paragraph 66. Mr Jha relied in the Baroda interdict proceedings upon a list of shareholders and an organogram. His suggestion that each of the applicants in those proceedings is *"owned and controlled by members of the Gupta family, either directly or indirectly"* belies the fact that no member of that family is currently a director of any of the applicants and there is no evidence anywhere in the answer affidavit filed by the Bank of Baroda at the time of control by any member of the Gupta family, whether direct or otherwise. The alleged control complained of has a decidedly hollow ring that is unsubstantiated by the facts. OUTA is warned not to rely on these unsubstantiated allegations. Save as aforesaid these allegations are denied.

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67. **Ad paragraph 67**

I admit that both Optimum Coal and Koorfontein Mine are owned by Tegeta of which Ragavan is a director. Scott resigned as a director of Koorfontein Mine on 31 August 2017. I admit the allegations in paragraph 67.2.

68. **Ad paragraph 68**

I deny holding an interest in Tegeta. Ragavan's role has been explained elsewhere in this affidavit. I dispute the alleged conflict of interest which Fick seeks to create. It is not uncommon for persons with an interest or association with the mine or beneficiary to be appointed as trustee. While the Regulations promulgated under NEMA provide that no more than one trustee may be in the employ of the mine, I confirm that I am not in the employ of Koorfontein Mine although I am a trustee of the Koorfontein Trust. I hold the office of director of Optimum Coal and am in the employ of Oakbay Investments (Pty) Limited. The required threshold stipulated by NEMA is not exceeded.

69. **Ad paragraphs 69 to 70**

69.1. I take note of the allegations in paragraph 69. Albeit that Scott has resigned as trustee, he remains a signatory on the Koorfontein Trust's account with the Bank of Baroda. In view of the litigation with the bank which only produced a favourable outcome on 9 October 2017, it was

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deemed best to adopt a wait and see approach in light of the fact that the applicants in the Baroda interdict proceedings still faced the risk of the closure of the accounts held with the bank. Until some semblance of certainty was established, there was little point in effecting a change to the signatories.

- 69.2. In light of Scott's resignation, a second trustee who is not in the employ of either Optimum Mine or Koornfontein Mine, is in the process of being appointed to the Trusts. The appointment and revised letters of authority is awaited from the Master of the High Court.
- 69.3. With reference to the allegations by Lange, the incorrect description of the Trust was an oversight and nothing turns on it. The same holds true for the erroneous description of the Trust's holding company as Tegeta.
- 69.4. I accept that a Trust is not a separate juristic entity but a collection of assets held by the trustees in their official capacity with the result that a Trust cannot have a holding company.
- 69.5. The error was entirely *bona fide* and not the result of any attempt at dishonesty or to defraud the Bank of Baroda who no doubt, and in view of the fact that it does business in South Africa, would have been alive to the fact that Tegeta cannot be the holding company of the Trust.

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70. **Ad paragraphs 71 to 73**

I admit the allegations in paragraph 71. I admit the contents of SF6A. I admit the allegations in paragraph 73 insofar as Fick has accurately recorded the contents of the letter.

71. **Ad paragraphs 74 to 75**

71.1. The request was made with a view to secure Departmental approval to make use of the funds for concurrent rehabilitation purposes which was deemed necessary at the time following Tegeta's acquisition of the Koorfontein Mine from Glencore. The letter had neglected its ongoing rehabilitation obligations. As highlighted elsewhere in this affidavit the funds were not used for this purpose and a loan was instead secured from the Bank of Baroda.

71.2. While Ragavan is not a trustee, she was duly authorised to address the letter annexed as SF6A to the Regional Manager. Since the Koorfontein Trust was required to keep no more than R128 million for financial provision purposes but was in fact holding a deposit R305 million at the time in its current account with the Bank of Baroda, there was a surplus available to use as security for the loan. Because the funds employed for collateral purposes were sourced from this surplus

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no funds statutorily earmarked for rehabilitation were placed at any risk.

Save as aforesaid these allegations are denied.

72. Ad paragraph 76

I fail to see the relevance of these allegations. There is nothing untoward in the expeditious conduct by an organ of state. To the extent that OUTA is of the view that the approval was unlawful, it must approach the High Court to have same set aside by way of judicial review or exhaust an internal appeal as envisaged by section 96 of the MPRDA insofar as OUTA qualifies for protection under the section. I submit that there is no point in treating the approval as unlawful since it remains presumptively valid until set aside. OUTA like everyone else in a constitutional state, cannot be selective in its treatment of decisions which it considers lawful and binding.

73. Ad paragraphs 77 to 78

The fact that the trustees were not mentioned is of no moment. The tenor of the letter was clear. Ragavan was duly authorised to represent the trustees insofar as may have been necessary. I emphasise the point that even though Departmental approval was secured, the funds were not used for concurrent rehabilitation purposes but a loan was instead procured from the Bank of Baroda for this purpose. Save as aforesaid these allegations are denied.

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74. **Ad paragraph 79**

Ragavan acted with full authority from the trustees. Her conduct is not unlawful as NEMA does not exclude the use of the funds for concurrent rehabilitation purposes. Save as aforesaid these allegations are denied.

75. **Ad paragraphs 80 to 82**

I have no knowledge of the AmaBhungane report and cannot account for how it reported on the Department's conduct. I fail to see the relevance of the allegations in paragraph 81. Optimum Coal at the time required access to the funds to undertake concurrent rehabilitation work. The business rescue practitioner was not inclined to permit such work to be undertaken from the funds under his control which necessitated Ragavan seeking to access the funds of the Optimum Trust. Ragavan was acting under the direction and supervision of the trustees. Save as aforesaid these allegations are denied.

76. **Ad paragraphs 83 to 85**

76.1. I admit the allegations in paragraphs 83 and 84. The reference to "outstanding" amounts is a reference to a credit balance. With reference to paragraph 85, I do not know which media reports Fick purports to be referring to.

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76.2. I am therefore unable to address these allegations meaningfully save to point out that the Bank of Baroda issued termination notices on 6 July 2017 which culminated in the launching of urgent proceedings to interdict the bank from terminating the applicants' bank accounts held with it pending the determination of an application to be launched in which the applicants would challenge the validity of the notices given by the bank to close their accounts. Save as aforesaid the allegations in paragraph 85 are denied.

77. **Ad paragraphs 86 to 89**

I admit the allegations in paragraph 86. I admit the transmission of the letter to Scott, Ragavan and me on 25 August 2017. I have no knowledge of the correspondence addressed to the Minister. Save to note that Fick has sought to rely on various news reports, I am unable to comment on OUTA's state of knowledge at the time. I take note of the allegations in paragraph 89.

78. **Ad paragraphs 90 to 91**

I take note of the allegations in paragraph 90 insofar as Fick has correctly summarised the salient part of the letter. OUTA was plainly not entitled to any of the information sought. There was in the circumstances no need to favour OUTA with a favourable response.

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## 79. Ad paragraphs 92 to 96

I have no knowledge of the contents of the letter addressed to the Minister. I admit the allegations in paragraphs 92 to 93 to the extent that Fick has correctly summarised the key demands contained therein. There would have been no reason to respond to OUTA as its concerns were not only ill-founded and lacking if any justification, but it was furthermore not entitled to any of the information sought.

## 80. Ad paragraphs 97 to 98

80.1. I admit the publication of the Sunday Times article. I would not be surprised if OUTA was the source to the newspaper since it appears to thrive on publicity of this kind so as to aid it in its fundraising activities. I confirm that the Department advised that the rehabilitation funds remained intact.

80.2. On reflection it appears that OUTA has overreacted having regard to the effect of the judgment of Makgoka J which has preserved the status quo pending final determination of the dispute with the Bank of Baroda. I admit Ragavan's response to OUTA. She was under no obligation to come to OUTA's assistance. Save as aforesaid these allegations are denied.

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**81. Ad paragraphs 99 to 100**

Save to deny the allegation in paragraph 99 that the 18 companies are Gupta controlled, I admit the allegations in these paragraphs. The motivation behind the application stemmed from the fact that the Bank of Baroda refused to keep the accounts of the applicants open until the set down date of 7 and 8 December 2017. The application having been set down for 7 and 8 December 2017 by the directive of the Deputy Judge President, the bank refused to furnish an undertaking that pending the determination of that application, they would not proceed to close the applicants' accounts. This was found by Makgoka J to have been unreasonable.

**82. Ad paragraphs 101 to 102**

I admit the allegations in paragraph 101. The extreme urgency of the situation did not allow for confirmatory affidavits to be filed on behalf of all twenty applicants in those proceedings which would have presented a huge administrative burden that would only have served to delay the hearing of the application. This the applicants could ill afford given the Bank of Baroda's stated desire to close the accounts by Saturday 30 September 2017. I admit the allegations in paragraph 102.

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83. **Ad paragraphs 103**

I deny the correctness of these allegations. The Trusts were two of twenty of the applicants in the Baroda interdict proceedings. Reference was made to them as was required in the context of procuring the necessary relief which I point out, is of specific application to them as appears from the order of Makgoka J dated 9 October 2017. I deny the risks contended for in this paragraph. The only risk to which the Trust was exposed was the risk of the closure of its bank account. That risk is adequately ameliorated at least on a temporary basis.

84. **Ad paragraphs 104 to 104.3**

I admit these paragraphs. Not only were the letters of termination unlawful in that the Bank of Baroda sought to terminate the accounts for spurious reasons, but the notice period of six days was hopelessly inadequate.

85. **Ad paragraph 105**

The account numbers reflected in paragraphs 104.1.1 and 104.1.2 are the accounts of the Trusts held with the Bank of Baroda. The funds standing to the credit of the Trusts were previously invested in fixed deposit accounts which matured on 6 June 2017 in respect of Koomfontein Trust and 24 June 2017 in respect of Optimum Trust. In view of the litigation which subsequently ensued

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with the Bank of Baroda, and the uncertainty which this brought about insofar as the continued banking relationship with the bank was concerned, no reinvestment instruction could legitimately have been given to the bank. The blame for the failure to employ fixed deposit accounts after this date can therefore not be laid at the door of the trustees.

86. **Ad paragraph 106**

I admit the contents of paragraph 106. This was the precise motivation for the launching of the application. The allegations in paragraph 106.1 to 106.3 are admitted insofar as Fick has correctly recorded the contents of Ragavan's founding affidavit. Save as aforesaid the allegations in these subparagraphs are denied.

87. **Ad paragraph 107**

I admit the allegations contained in this paragraph insofar as they accord with what is stated in Ragavan's founding affidavit in the Baroda Interdict proceedings. Having succeeded with interim relief the position of the applicants in those proceedings are secured for the foreseeable future. I point out that under the umbrella of a restructuring which I address elsewhere in this affidavit, there ought to be no basis why the Trusts will not secure suitable alternative banking facilities of their choice.

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88. Ad paragraphs 107.1 to 107.7

The allegations in paragraph 107.1 to 107.7 are admitted insofar as Fick has correctly recorded the contents of Mr Jha's affidavit. The reasons advanced by the Bank of Baroda were bad in law and in fact. Contrary to what Fick contends, the bank's attitude was not understandable and, as Makgoka J found, the reputational harm to the bank was of a speculative nature only. Save as aforesaid the allegations in these subparagraphs are denied.

89. Ad paragraph 108

Mr Jha was in no position to take a stance on the veracity of the allegations as he had no personal knowledge on the matters in respect to which he purported to testify. These allegations by Mr Jha are in any event irrelevant to this application and introduced for no other reason but to sully my reputation as trustee even though I have not been complicit in any wrongdoing. I take strong exception thereto. To the extent that they are relevant at all, which I deny, I refer the Court to "PG15" hereto being an extract from Ragavan's replying affidavit in the Baroda interdict proceedings where she deals specifically with paragraphs 149 to 241 of Mr Jha's answering affidavit. Clearly these allegations were not persuasive as Makgoka J was still minded to grant the applicants interim relief, this despite the Bank of Baroda's attempt to tarnish their reputations so as to bolster what otherwise amounted to poor reasons for the issue of the termination notices.

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90. **Ad paragraphs 109 to 110**

I deny these allegations. It is notable that at no stage did the Bank of Baroda advise that it would consider keeping open the accounts for the Trusts if new trustees are appointed. The decision to terminate had nothing to do with the trustees and was not informed by our conduct. These allegations therefore smack of opportunism. As the order of Makgoka J demonstrated, the Bank of Baroda is obliged to hold the funds. The learned judge made no finding against me or the Trusts per se with the result that there is no causal connection between my role as trustee and the bank's continued obligation to hold the funds on behalf of the Trusts. Lange's views are of no probative value and are certainly at odds with the view of expressed by this Court on 9 October 2017.

91. **Ad paragraphs 111 to 112**

91.1. I admit the allegations in paragraph 111. The bank's decision to terminate the transactional and loan facilities of the applicants in the Baroda interdict proceedings had little if anything to do with the array of negative publicity or reputational risk upon which the bank sought to rely and everything to do with the commitment given by the bank's Mr Eric Tucker to the Chief Executive of the Bank's South African Branch on 1 July 2017. A copy is annexure "PG16" to the answering affidavit.

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91.2. In paragraph 3 of that letter, its author states that the "*Loan/Overdraft facilities granted to the group and its subsidiaries should be settled by 30<sup>th</sup> September 2017, as per commitment given to the Regulator*" (my underlining). Despite having had an opportunity to do so, Mr Jha never took the Court into his confidence by explaining who "*the Regulator*" is.

91.3. It is apparent from this letter that the proximate cause of the Bank's decision to terminate the transactional and loan facilities was that commitment. I have already dealt with the allegations in paragraph 112 and the circumstances around the loan from the Bank of Baroda. I refer the Court to what is stated elsewhere in this affidavit.

92. Ad paragraphs 113 to 115

I admit the allegations in paragraphs 113 and 115 only to the extent that Fick has accurately summarised the relevant portion of Mr Jha's answering affidavit read with the annexes thereto. There was not a shred of evidence that any of the securities which the Bank held (and which Mr Jha failed entirely to address) were at risk, whether "*legally*" or for any other reason. Despite having had these alleged concerns in 2016 already, Mr Jha provided no explanation for why it was not until July 2017 (following a commitment around 1 July 2017 to an unnamed "*regulator*") that the Bank decided to terminate the transactional and loan facilities. The loan made to Koornfontein Mine was repaid in short order but importantly, not on account of any desire by Baroda to bring its relationship

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with the applicants to an end but because there was ultimately no need for the loan to persist. Save as aforesaid these allegations are denied.

93. **Ad paragraphs 116 to 117**

I admit receipt of the letter referred to in paragraph 116. I have already dealt with the circumstances around the loan to Koomfontein Mine. The collateral put forward by the Koomfontein Trust was limited to surplus funds held in the account over and above the funds held to meet the requirements for financial provision. As I have already indicated, the reserves of the Koomfontein Trust were not used to meet the liability as it was repaid directly by Koomfontein Mine.

94. **Ad paragraphs 118 to 119**

I deny the correctness of the allegations contained in paragraph 118. The legal restriction imposed on the use of trust funds pertains to funds specifically earmarked for rehabilitation purposes in terms of section 24P of NEMA and not to any surplus funds over and above that which is held for financial provision as determined from time to time by way of assessment reports. Lange's views are inconsequential. He does not have an understanding of the true facts and like Fick, has had to resort to suppositions. No conflict of interest arose since the funds kept for rehabilitation purposes and ring fenced to meet this liability remained untouched.

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95. **Ad paragraphs 120 to 121**

I admit the allegations in paragraph 120. Paragraph 121 is admitted insofar as Fick has correctly quoted from Ragavan's founding affidavit. Save as aforesaid the allegations in paragraph 121 are denied.

96. **Ad paragraph 122**

96.1. I fail to understand how Fick comes to the conclusion that Trust funds are being used for rehabilitation purposes. Ragavan does not say that. The point made by her in paragraph 43.9 of the founding affidavit was simply that upon closure of the bank accounts for the Trusts, the Trusts would be deprived of banking facilities which are essential tools for purposes of making financial provision as required in terms of section 24P of NEMA.

96.2. The keeping of funds for purposes of making financial provision would be rendered exceedingly difficult in that event which would expose the beneficiaries (i.e. Optimum Coal and Koorfontein Mine) as the respective mining rights holders to the risk of possible sanction under the MPRDA.

96.3. Save for the one instance involving the Business Rescue Practitioner referred to above that pertained to Optimum Coal, no trust funds are or

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have been used for rehabilitation with the mines budgeting therefor from their respective operational budgets. Importantly, no capital reserves were employed by him. Save as aforesaid these allegations are denied.

97. Ad paragraph 123

97.1. The inference sought to be drawn by Fick in this paragraph is demonstrably false. While it is so that government resources may have to be allocated to continue with rehabilitation where provision has not been made, Ragavan's remarks here were made within the context of the practical difficulties that would follow in managing rehabilitation funds over the long-term if the Trusts are left without a bank account.

97.2. As should be evident from what is stated elsewhere in this affidavit that risk has been ameliorated for the time being following the judgment of Makgoka J while alternative investment vehicles are also being explored in line with the Regulations promulgated under NEMA.

97.3. I deny that funds belonging to the Trusts have been used for rehabilitation purposes save for the instance referred to above involving the Business Rescue Practitioner which was limited in its use to interest only. Save as aforesaid these allegations are denied.

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98. Ad paragraph 124

OUTA is not entitled to an accounting for the reasons dealt with elsewhere in this affidavit. Save as aforesaid these allegations are denied.

99. Ad paragraph 125

Ragavan was making submissions in general terms and not specifically with reference to the Trusts. At no stage did she attempt to elevate the risk of losing the mining rights above the mines' environmental statutory obligations. The two go hand in hand and are truly co-extensive in that sustainable mining is not possible in today's regulatory régime without regard to a variety of other considerations including environmental and social factors.

100. Ad paragraph 126

These allegations speak for themselves and go to the root of the irreparable harm which Makgoka J identified in his judgment of 9 October 2017.

101. Ad paragraph 127 to 129

I have no knowledge of the circumstances that led to the preparation of a report by Deloitte. Fick herself clearly does not have personal knowledge either and is left with having to build OUTA's case on the basis of newspaper articles.

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Save as aforesaid I do not have personal knowledge of the report, its delivery date or the instructions said to have been issued by the South African Reserve Bank to the Bank of Baroda. It is notable that having regard to SF19, Mr Shipp made it clear in no uncertain terms that the report should not be used, reproduced or circulated for any other purpose without the prior written consent of Deloitte as it was provided solely for the purpose of meeting the Bank of Baroda's responsibility to report to the Registrar of Banks (see page 275 of the record). Fick is invited to state whether Deloitte consented to the use of the report in these proceedings before they were launched.

102. **Ad paragraphs 129.1 to paragraph 130**

102.1. I admit the allegations in paragraph 129. With reference to the allegations in paragraph 130, I point out that despite OUTA's reliance on the report by Deloitte, it seeks to place selective evidence before this Court. Fick has chosen to ignore the fact that the report concluded in Appendix 1 (see page 291 of the record) that no transfer or withdrawals of funds relating to Trust monies were made out of the Bank of Baroda's accounts other than the investment of the funds into internal fixed deposit investments.

102.2. The fact that the Bank of Baroda may not have an internal policy regarding mine rehabilitation trust funds is not the responsibility of the

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Trusts. QUTA is invited to address the matter further with the Bank itself. Save as aforesaid these allegations are denied.

**103. Ad paragraphs 131 to 137**

103.1. I admit the allegations contained in these paragraphs to the extent that they represent an accurate recordal of the Deloitte report read with the annexes thereto. As can be gleaned from these allegations, Fick is left with no basis to impugn the conduct of the trustees. What Fick seemingly does not acknowledge despite the Deloitte report constituting objective evidence in confirmation thereof, is that no capital reserves have been used for rehabilitation purposes.

103.2. Despite the evidence annexed to its own founding affidavit confirming this, QUTA has deemed fit to make unsubstantiated allegations that seek to discredit the trustees in their administration of the Trusts. At no stage did the Optimum Trust allow any fixed deposits to be used as collateral or security of any kind. Save as aforesaid these allegations are denied.

**104. Ad paragraphs 138 to 144**

104.1. I admit the allegations contained in these paragraphs to the extent that they represent an accurate recordal of the Deloitte report read with the

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annexes thereto. Fick is yet again left with no basis to discredit the trustee in their administration of the Trusts.

104.2. I have already dealt with the circumstances around the loan to Koorfontein Mine by the Bank of Baroda. The collateral put forward by the Koorfontein Trust was limited to surplus funds held in the account over and above the funds held to meet the requirements for financial provision. None of the funds standing to the credit of the Koorfontein Trust have been used for concurrent rehabilitation. Save as aforesaid these allegations are denied.

105. **Ad paragraphs 145 to 148**

I admit the receipt of the correspondence addressed by OUTA dated 12 September 2017. As OUTA is not entitled to the information set out in paragraph 145.1 to 145.6, there was no corresponding obligation to respond to OUTA. I have no knowledge of the correspondence directed at the Minister referred to in paragraph 147. Save as aforesaid I admit the allegations in these paragraphs.

106. **Ad paragraphs 149 to 150**

I have no knowledge of the correspondence directed by OUTA to the Bank of Baroda. It is instructive to note that the bank confirmed in unequivocal terms to

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OUTA that the funds held by it and standing to the credit of the two Trusts "are not encumbered in any way". It begs the question why OUTA deemed fit to continue with the prosecution of this application. It has elected to do so for reasons that are clearly self-serving. I have already addressed the factual allegations relative to paragraph 150 elsewhere in this affidavit.

**107. Ad paragraphs 151 to 152**

I admit the allegations contained in these paragraphs to the extent that Fick has correctly set out the correspondence exchanged between Werkmans and Tabacks. Save as aforesaid these allegations are denied.

**108. Ad paragraph 153**

I admit that Fabricius J handed down judgment on 21 September 2017. The findings made by the learned Judge are of academic importance only in that it has been superseded by the judgment of Makgoka J of 9 October 2017. No purpose will therefore be achieved by dissecting those findings.

**109. Ad paragraph 154 to 155**

109.1. I deny that the Trust funds are at risk. The judgment of Makgoka J makes it clear that there is no risk of imminent closure of the accounts of the Trusts held with the Bank of Baroda. There is accordingly no

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need to secure alternative banking facilities here and now and no risk of flight of the funds which is an opportunistic allegation made without a proper factual basis. Steps have been taken to explore all options with regard to the opening of new accounts.

109.2. A new bank, known as "Post Bank", will soon commence offering full banking services. It is hoped that since it will be unbiased it will consider requests for opening accounts in the name of the Trusts favourably. I deny any conflict of interest either as alleged or at all. I deny that the capital of the Trust funds have been used for concurrent rehabilitation. Ragavan has at all times acted under the control and supervision of the trustees. Fick is simply not in a position to counter this and has been left to make bald sweeping allegations not borne out by the facts. I point out that I explored alternative investment vehicles for the trust funds at a much better interest rate. The Department has consented to this new investment vehicle which can unfortunately not be implemented as long as the current Court order remains in place. Save as aforesaid these allegations are denied.

110. Ad paragraphs 156 to 157

I reiterate that the Bank of Baroda had no good reason to terminate its contractual relationship with the Trusts. A final determination of the issue will be made in due course. I take note of the admission that the Bank of Baroda

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appears to be sympathetic towards OUTA. This is consistent with the order to which it consented to so as to keep the Trust accounts open, this notwithstanding the alleged reputational harm it complained of which Makgoka J found to have been of a speculative nature only. I admit the allegations in paragraphs 157 and 158 insofar as they constitute an accurate record of the relevant provisions of the applicable legislation relied upon. Save as aforesaid these allegations are denied.

111. Ad paragraphs 159 to 160

I admit the allegations in paragraph 159. For the very reasons advanced by Fick in this paragraph, the Bank of Baroda's summary decision to terminate the accounts of the Trust was unlawful. No basis exists to remove me as trustee. I discharge my duties as trustee in accordance with the prescripts of the common law and obligations imposed on me by the Trust Property Control Act. As already highlighted, OUTA is not entitled to demand an accounting. Save as aforesaid the allegations in paragraph 160 are denied.

112. Ad paragraphs 161 to 163

I deny that OUTA has made out a prima facie case. I do not deem it necessary to respond to paragraph 162 in view of the consent order made an order of Court by Msimeki J on 26 September 2017 which effectively addressed Part A of the relief. I deny that the allegations in paragraph 163 sets out adequate

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grounds for urgency. The hearing before Fabricius J took place as early as 8 September 2017 with the Bank of Baroda having advised as far back as 8 July 2017 of its intention to close the accounts. No explanation is furnished for why OUTA did not bring this application earlier if it truly had legitimate concerns.

113. **Ad paragraphs 164 to 165**

The time period afforded to the mining respondents within which to respond was hopelessly inadequate. No basis exists for the Minister to intervene. Save as aforesaid these allegations are denied.

114. **Ad paragraphs 166 to 167**

In view of the fact that the relief sought in Part A is of academic importance only, I do not deem it necessary to respond to these allegations save to point out that the Trusts have never disputed the very specific statutory purpose for which the funds are held.

115. **Ad paragraphs 168 to 169**

I take note of the allegations contained in paragraph 168. OUTA ought to have joined the Master from Inception who has an interest in any proceedings that have a direct bearing on the administration of the Trusts. I deny that OUTA is entitled to the relief set out in the notice of motion.

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116. I now deal with the allegations contained in Fick's supplementary founding affidavit. Allegations not specifically dealt with should be taken as having been denied.

**AD SERIATIM RESPONSE TO SUPPLEMENTARY FOUNDING AFFIDAVIT**

117. Ad paragraphs 1 to 5

I admit that Fick is an adult female and that OUTA is the applicant. I have no knowledge of the position occupied by her. I deny that all of the allegations are all true and correct and within Fick's personal knowledge. I admit the allegations in paragraph 3 insofar as they are consistent with the order of Msimeki J dated 26 September 2017. Save as aforesaid the allegations in paragraph 3 are denied. I admit the allegations in paragraphs 4 to 5.

118. Ad paragraph 6 to 7

I take note of the allegations contained in these paragraphs.

119. Ad paragraphs 8 to 11

I take note of the allegations in paragraph 8. I admit that Scott tendered his resignation on 31 August 2017. I take note of the fact that Scott did not supply OUTA with copies of the documents OUTA is on a fishing expedition for. It would have been inappropriate for him to do so given his resignation as trustee

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of the Trusts. Scott's resignation was effective immediately. Save as aforesaid I admit the allegations contained in these paragraphs:

120. **Ad paragraphs 12 to 14**

I admit the exchange of correspondence between Werksmans and de Oliveira whose letter of 3 October 2017 speaks for itself. I cannot speak for why OJTA has not secured copies of the documents referred to by it from the Master, but do not find this unusual as trust deeds by their very nature are not public documents like a memorandum of incorporation. Flick has not disclosed what further steps have been taken to procure the trust deeds.

121. **Ad paragraphs 15 to 18**

I admit the allegations in paragraph 15. The Master ought to have been joined from inception. I confirm that I am at present the sole trustee. I admit the allegations in paragraphs 17 and 18 insofar as they concern the joinder of Ragavan who performs administrative tasks in relation to both Trusts from time to time but subject to my control and supervision. Ragavan is only a director of Koorfontein Mine and not Optimum Coal. Save as aforesaid these allegations are denied.

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122. **Ad paragraphs 19 to 21**

I admit the allegations in paragraph 19 relating to the circumstances which led to Ragavan expressing an interest in becoming joined as a party to these proceedings. Save as aforesaid the allegations in paragraph 19 are denied. It is not for the Court to appoint trustees. As appears from section 7(1) of the Trust Property Control Act, the power is specifically entrusted to the Master who is entitled to exercise the power where the office of trustee cannot be filled or becomes vacant but subject to qualification. I admit the allegations in paragraph 21.

123. **Ad paragraphs 22 to 24**

123.1. I admit the launch of a further urgent application and the filing of a replying affidavit which was not possible nor necessary at the time of the hearing of the application for interim relief before Fabricius J on 8 September 2017 which sought to preserve the status quo insofar as the relationship with the Bank of Baroda was concerned pending the hearing of an application for an interim Interdict that was specifically enrolled for 7 and 8 December 2017.

123.2. Following the application for interim relief having been set down for 7 and 8 December 2017 by the directive of the Deputy Judge President, the Bank of Baroda refused to furnish an undertaking that pending the

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determination of that application, they would not proceed to close the applicants' accounts. As Makgoka J correctly found, this was a particularly unreasonable stance on the part of the Bank of Baroda and justified the proceedings heard before the learned judge on 28 and 29 September 2017.

123.3. I admit that OUTA was not advised of the further urgent application. The insinuation that there may have been an obligation to do so is startling to say the least. Save as aforesaid these allegations are admitted.

124. Ad paragraphs 25 to 26.

I take note of the allegations in paragraph 25. I admit that no confirmatory affidavits were filed on behalf of the Trusts. The extreme urgency of the situation did not allow for confirmatory affidavits to be filed on behalf of all twenty applicants in those proceedings which would have presented a huge administrative burden that would only have served to delay the hearing of the application. This the applicants could ill afford given the Bank of Baroda's stated desire to close the accounts by Saturday 30 September 2017. It hardly bears mentioning that the bank was particularly fortified in its views and entitlement to adopt this particular course of action following the judgment of Fabricius J handed down on 21 September 2017. Ragavan has personal knowledge of the affairs of the Trusts as I have already demonstrated.

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125. **Ad paragraphs 27 to 32**

I admit the allegations in paragraphs 27.1 to 27.2 insofar as they represent an accurate record of the contents of Ragavan's replying affidavit. I deny any suggestion of unlawfulness. OUTA ignores the fact that the collateral was put forward in respect of surplus funds available to the Koorfontein Trust which were in excess of funds required to be kept for financial provision purposes. I have already addressed this theme elsewhere in this affidavit. No funds statutorily earmarked for rehabilitation were placed at any risk. Koorfontein Mine repaid the loan in November 2016. The Trusts owe OUTA no explanation of any kind on the basis sought in paragraph 32. Save as aforesaid these allegations are denied.

126. **Ad paragraphs 33 to 34**

I fail to understand the allegations in paragraph 33. Koorfontein Mine paid the loan back to the Bank of Baroda without delay. I deny that the trustees were reckless as funds maintained for rehabilitation were at no stage subjected to any risk. The security pertained only to the surplus funds kept by the Koorfontein Trusts. Contrary to the suggestion in paragraph 35, Trust funds were never utilised for any other purpose. This is in fact borne by the Deloitte report which Fick referred to in her founding affidavit. I fail to understand why OUTA persists with this line in the face of the evidence annexed to its founding affidavit. Save as aforesaid these allegations are denied.

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127. Ad paragraphs 35 to 36

I admit the allegations in paragraph 35. The replying affidavit speaks for itself in this regard. I deny the allegations in paragraph 36 insofar as it is suggested that the Trusts cannot operate under my control and supervision in the manner required of a trustee.

128. Ad paragraphs 37 to 39

I admit the allegations in paragraph 37. I admit the first sentence of paragraph 38 but point out that this is not the sum total of the restructuring taking place. While the transaction with Charles King SA has been concluded, the parties are in the process of applying for regulatory approvals. I admit the allegations in paragraph 39.

129. Ad paragraph 40

I have no knowledge of Charles King SA's trading history or experience in the mining industry. OUTA should welcome the fact that the transaction represents an opportunity to secure much needed foreign direct investment for South Africa. I do not know why OUTA treats the transaction with suspicion but suspect its motives are not *bona fide*.

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130. **Ad paragraphs 41 and 42**

There was no obligation on the trustees to favour OUTA with an explanation of any kind. Regardless of who the party is that acquires a South African mining asset, it must adhere to the South African regulatory framework within which mines operate as set out in the MPRDA and NEMA. The Trusts will therefore continue to serve their purpose should the transaction with Charles King SA secure regulatory approval. Save to admit the allegations in paragraph 42, I deny the balance of the allegations in these paragraphs.

131. **Ad paragraphs 43 to 44**

The transaction is awaiting regulatory approvals as advised elsewhere in this affidavit. Save as aforesaid I admit the balance of the allegations in paragraph 43 which are uncontroversial to say the least. In my capacity as trustee I am and have never been under any illusion as to the statutory purpose for which the funds are being kept. I take note of the allegations in paragraph 44.

132. **Ad paragraphs 45 to 46**

I do not specifically deal with the allegations in paragraph 45 since they have been overtaken by the judgment handed down by Makgoka J on 9 October 2017. I take issue with the suggestion in paragraph 46 that the Trusts cannot

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readily retain banking and other services while under their existing control. The judgment of Makgoka J is destructive of an inability to retain banking services.

133. **Ad paragraph 47**

I deny the allegations in this paragraph. The conclusion drawn here is simply not borne by the objective facts. The affairs of the Trusts are segregated and dealt with separately on the basis of a clear distinction drawn between trust property and property vesting in other companies within the group of companies falling within the Oakbay stable. The fact that it was convenient for the Trusts to be co-applicants in the Baroda interdict proceedings given that they too faced the prospect of the imminent unlawful closure of their accounts does not give rise to any inference that the affairs of the Trusts are dealt with on the basis suggested in this paragraph.

134. **Ad paragraphs 48 to 49**

I admit the allegations in paragraph 48. I admit the decision of ABSA to terminate its relationship companies within the Oakbay Group. This has no bearing on these proceedings since the Trusts never held accounts with ABSA with the result that I fail to see the relevance of these allegations in the context of these proceedings. Save as aforesaid these allegations are denied.

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**135. Ad paragraphs 50 to 55**

135.1. I admit KPMG's decision to terminate its relationship with the companies within the Oakbay Group. Following ABSA's decision, I admit that the remaining large banks followed suit. Although the Bank of Baroda had rendered banking services to companies within the group, previously, it was following the decision of the major banks to close the accounts of these companies that the role of the Bank of Baroda became more central as a banker to the Oakbay stable as a whole.

135.2. The Bank of Baroda for instance opened new accounts for Tegeta and advanced some R1.25bn in capital in April 2016. The last accounts which opened with the Bank of Baroda were for the Koomfontein Trust and the Optimum Trust which were opened on 21 May 2016 and 21 June 2016 respectively.

135.3. This was following Standard Bank having given notice of its intention to close the accounts of all clients falling in the Oakbay stable. Whatever the reasons advanced by the four banks at the time, they are of no relevance to these proceedings. Save as aforesaid these allegations are denied.

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136. **Ad paragraphs 56 to 57**

While it is correct that Sizwe Ntsaluba and Gobodo ("SNG") have resigned as the auditors of the Trusts, they remain in position at least until such time as the latest financial statements as at 28 February 2017 have been prepared which it is expected will be available in November 2017.

137. **Ad paragraphs 58 to 59**

I admit the allegations in paragraph 58 insofar as they represent an accurate recordal of the contents of Ragavan's replying affidavit. It was never stated that there is no prospect of finding alternative banking facilities, but rather that time will be required to do so. As I have set out elsewhere in this affidavit steps towards the achievement of this objective are already underway. It is noteworthy that Fick does not accuse the Trusts of having a poor reputation. Save as aforesaid these allegations are denied.

138. **Ad paragraphs 60 to 62**

Save to state that the conclusions drawn by Lange are not correct, I take note of the allegations in paragraph 60. I deal with Lange's report separately insofar as it is necessary to do so.

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139. Ad paragraph 63

I take note of the terms of the amended notice of motion. I deny that OUTA is entitled to the relief sought.

140. Ad paragraphs 64 to 66

140.1. I deny that OUTA has made out an adequate case for my removal from the office of trustee. OUTA cannot show that my removal will be in the interests of the Trusts or their beneficiaries being Optimum Coal and Koorfontein Mine as required by section 20 of the Trust Property Control Act. My removal is instead sought on the basis that it will serve the greater public interest which is with respect not the test under section 20. I, in any event, deny that the public interest is relevant in the context of the Court determining whether grounds for my removal have been established.

140.2. OUTA has no interest in the administration of the Trusts. It is not a beneficiary and enjoys no right or interest in the property of each Trust. I deny that my removal will be in the interests of the Trusts. There is no reason to conclude that my removal will enable the Trusts to act differently since the trustees have at all times acted in accordance with their statutory obligations.

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140.3. I fail to see how my holding office imperils the property of the Trusts or their continued administration. The funds are held for rehabilitation purposes and have at all times been dealt with in accordance with the applicable statutory provisions. Save as aforesaid I deny the allegations in paragraph 66.

141. Ad paragraph 67

I deny that I have breached my fiduciary or statutory duties. At no stage has there been a violation by the trustees of the obligations imposed by the MPRDA, NEMA or the Income Tax Act. The conflict of interest complained of is putative at best. The MPRDA does not prescribe who can be appointed trustees of mine rehabilitation trusts with the result that it does not follow that because I am also a director of Optimum Coal that I am thereby disqualified from holding the office of trustee. Save as aforesaid these allegations are denied.

142. Ad paragraph 68

142.1. I deny these allegations. The order of Makgoka J has shown that the Bank of Baroda has a case to answer with regards to its sudden decision to terminate the bank accounts of the various entities in the Oakbay Group.

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- 142.2. While it is so that the four large commercial banks are not prepared to conduct business with *inter alia* the Optimum Trust and Koorfontein Trust, earnest attempts have been made to explore all options with regard to the opening of new accounts. As highlighted by Ragavan in the founding affidavit in the Bank of Baroda interdict proceedings, various measures have been taken to engage with various local and international financial institutions to explore the possibility of obtaining a viable operational solution to put in place, even temporarily.
- 142.3. Whilst all reasonable endeavours to open new accounts are being made, the termination of the banker-customer relationship in the event that final relief against the Bank of Baroda is not secured, will leave the Trusts like other parties to those proceedings unbanked in South Africa. To this end, contingency measures have been put in place aimed at brokering a restructuring of Optimum Coal and Koorfontein Mine.
- 142.4. That process has, in fact, already begun and as discussed elsewhere in this affidavit, we are in the process of applying for regulatory approvals to the transaction with Charles King SA. The intended closing date of the transaction is 31 August 2018.
- 142.5. Should the transaction materialise there ought to be no reason why the Trusts will not secure suitable alternative banking facilities of their

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choice. It is only intended as a last resort in the event that final relief is not granted against the Bank of Baroda.

142.6: I submit there are reasonably good prospects that final relief will be granted against the bank.

143. **Ad paragraphs 69 to 70**

I deny that the Court is empowered to appoint trustees. The power to do so lies with the Master but I deny that there is any basis to do so. I deny that OUTA is entitled to an order on the basis outline in prayer three of the notice of motion.

144. **Ad paragraph 71**

I take note of the relief sought in prayer 4 but submit that no basis exists for an order to this effect for the reasons already dealt with elsewhere in this affidavit.

145. **Ad paragraphs 72 to 73**

Save to note that an accounting in respect of the Trusts is sought in prayer five on the notice of motion, I deny that OUTA is entitled to an accounting. Only a trust beneficiary or co-trustee is entitled to demand an accounting or any information of and concerning the state of the investments and a trustee's dealings with the trust property. OUTA plainly does not fall into either category.

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I deny any suggestion that the funds of the two Trusts have been utilised for an unlawful purposes either as alleged or at all. The allegation is not consistent with the objective facts.

**146. Ad paragraphs 74 to 76**

As these allegations do not specifically concern the mining respondents, I deem it unnecessary to respond thereto specifically save to point out that no basis exists for the Minister to exercise his statutory powers as adequate arrangements are in place for the financial provision for rehabilitation in respect of both Koomfontein Mine and Optimum Coal.

**147. Ad paragraphs 77 to 79**

I submit that the relief sought against the Bank of Baroda has been rendered nugatory by the order of Makgoka J dated 9 October 2017 since the final determination of the dispute with the bank will invariably only take place well after the finalisation of Part B of these proceedings. In the interim period the Bank of Baroda is interdicted from deactivating and/or closing the bank accounts of the Trusts held with the bank and/or from terminating the banker-customer relationship that currently subsists on the basis of the reasons advanced in its termination notices dated 6 July 2017. This order constitutes a satisfactory arrangement with there being no basis for this Court to pronounce

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on the issue again by means of a further order. Save as aforesaid I take note of the allegations.

148. I now briefly deal with the allegations made by Lange to the extent that it is necessary to do so. Allegations not specifically dealt with should be taken as denied.

149. **Ad paragraph 1 of Lange's affidavit deposed to on 21 September 2017**

I have no knowledge of these allegations which are denied.

150. **Ad paragraphs 2 to 3**

I deny that the allegations are true and correct or fall within Lange's personal knowledge. As should be evident from what is stated elsewhere in this affidavit Lange has relied on assumptions which are not consistent with the true facts. Save to note that Lange claims to describe himself as a chartered accountant, I have no knowledge of these allegations which are denied.

151. **Ad paragraphs 4 to 6**

Save to note that Werksmans requested Lange to prepare a report annexed as "ML2" to his affidavit, I have no knowledge of these allegations.

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152. I now deal his report insofar as is necessary. For ease of reference I employ the item numbers used by him in the first column. At the outset, it is important to note that Lange on his own version only made preliminary findings.

153. **Item 2: Ragavan's letter of 4 May 2016**

153.1. Lange appears to lose sight of the fact that the need for concurrent rehabilitation was identified which informed the letter to the Regional Manager. Approval was necessary as the funds could not be used without such approval.

153.2. The letter speaks for itself insofar as the reasons advanced. If he is indeed a chartered accountant, Lange has no business relying on the provisions of section 54 of the MPRDA or making legal submissions of any kind. Matters of law are beyond the scope of his claimed expertise. The Trust had a surplus of funds available. The suggestion that she was not acting in the best interests of the Trust is demonstrably false.

154. **Item 3: letter from the DMR dated 5 May 2016**

I have already dealt with the interpretation contended for by the mining respondents as to why concurrent rehabilitation is permitted. Given his lack of legal expertise, it is remarkable that Lange has taken it upon himself to express legal views here. If OUTA feels so strongly about the matter, it must challenge

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the decision by the Regional Manager in Court. Lange's attempt to cast aspersions on the Regional Manager given the swift response is unhelpful. OUTA is the first to complain when state functionaries are tardy. It cannot have it both ways.

155. Item 9

I have already dealt with the circumstances of the loan to Koornfontein Mine and so as to avoid unnecessary repetition, do not repeat those allegations. The collateral put forward was in respect of surplus funds with the result that no capital reserves held under the auspices of section 24P of NEMA read with the Regulations were employed.

156. Item 12

I deny the suggestion that we were dishonest. The error referred to here was entirely *bona fide* and not the result of any attempt at dishonesty or to defraud the Bank of Baroda who no doubt, and in view of the fact that it does business in South Africa, would have been alive to the fact that Tegeta cannot be the holding company of the Trust. Nothing turns on this. Lange's emphasis of this point shows that OUTA would go to extreme levels to cast the mining respondents in a negative light and to his end, appear to have no difficulty in finding fault with what is really a minor error.

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## 157. Item 14

The funds of the Koorfontein Trust was held at Rand Merchant Bank and was transferred to the Bank of Baroda on 23 May 2016 and the funds of Optimum Mine Trust was previously held with Standard Bank but was transferred to the Bank of Baroda on 21 June 2016 with approval from the Department. I admit the allegations herein insofar as Lange has correctly recorded the conclusions drawn in the report by Deloitte. Save as aforesaid these allegations are denied.

158. I do not address the supplementary affidavit deposed to by Lange. I have already dealt with the matters set out therein in the context of the answer to Fick's supplementary affidavit. The balance of the issue raised by him pertain for the most part to matters which are before the Court in the Bank of Baroda interdict proceedings. The evidence which Lange claims he has not had sight of is in any event not matter to which he is entitled to. OUTA is also not entitled to seek discovery from the mining respondents. The failure to furnish any of the documents mentioned by Lange should therefore not give rise to any inferences of wrongdoing. As trustee I have not asked him to express any views on matters pertaining to the Trusts which is in any event not qualified to do.

159. Wherefore I pray that the application be dismissed with the costs including the costs occasioned by the employment of two counsel.

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*Brenda*

DEPONENT

THIS SIGNED AND SWORN TO at SANDTON on this 18 day of OCTOBER 2017 the deponent having acknowledged that the deponent knows and understands the contents of this affidavit, that the deponent has no objection to taking the prescribed oath, that the oath which the deponent has taken in respect thereof is binding on the deponent's conscience, and that the contents of this affidavit are both true and correct.

*Margo Ann Palani*

COMMISSIONER OF OATHS

MARGO ANN PALANI  
COMMISSIONER OF OATHS  
PRACTISING ATTORNEY, RSA  
FASKEN MARTINEAU  
INANDA GREENS  
84 WIERDA ROAD WEST  
SANDTON

*M. Ann Palani*



**OPTIMUM MINE  
REHABILITATION TRUST**

South African Revenue Services  
299 Bronkhorst Street  
Brooklyn  
Pretoria

Attention: Nico Alberts  
Per email: [nalberts@sars.gov.za](mailto:nalberts@sars.gov.za)

Dear Nico,

**Optimum Mine Rehabilitation Trust – Tax Reference No. 0283494169**

Your letter dated 30 October 2017 and our meeting on 14 November 2017 refers.

We advise that the audit for the year ended 28<sup>th</sup> Feb 2017 is under process and is likely to be complete shortly.

We shall be submitting the required income tax returns as required under the law.

Although we have submitted Bank Statements to SARS as requested with regard to 2017, we would like to seek your directives/guidance in respect of the following matter.

- (i) For 2017 tax year, amount of approximately R115 Million was earned in interest on account as contemplated by S 37A(2), which include an interest amount of R7.9 Million for the month of April 2016, out of which R7.5 Million was transferred to mine current account.
- (ii) This amount of interest does not form part of a deduction from taxable income as contemplated by S37A (a). In fact, during the 2017 tax year Optimum Trust will declare such interest income as part of its gross income for the 2017 tax year;
- (iii) A fundamental principle attaching to the tax law applicable to a trust is the conduit principle. It is hopefully accepted that this fundamental principle, which is entrenched in reported and unreported case law, does not require to be explained to SARS. Case law in support of this principle is to be found in inter alia Secretary for Inland Revenue vs. Rosen ([1971],[32STC249]);
- (iv) It follows, that the accrual of such interest income by a taxpayer can be applied in furtherance of a taxpayer's enterprise and that the interest income in itself does not form part of the subject matter as envisaged by S37(2);
- (v) During the 2017 tax year, a portion of the interest income which accrued to Optimum Trust was applied toward work done at the mine, including rehabilitation work.

**Optimum Mine Rehabilitation Trust**  
(Trust No.: IT13693/07)

144 Katherine Street, Grayston Ridge Office Park, Block A Lower Ground Floor, Johannesburg, South Africa  
Tel.: +27 11 542 2200 Fax: 086 685 1814

Trustees: PU Govender

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**OPTIMUM MINE  
REHABILITATION TRUST**


We enclose the following for your kind consideration:

1. Trust Bank Account Statement;
2. Invoice from Contractor

We therefore request a directive/guidance from SARS on the income earned on the Trust that was used for rehabilitation as we believe that there was no contravention of Sec 37 (a) of Income Tax Act

We look forward to hearing from you.

Yours faithfully,

 16/11/2011

**PU Govender**  
Trustee

**Optimum Mine Rehabilitation Trust**  
(Trust No.: IT13693/07)

144 Katherine Street, Grayston Ridge Office Park, Block A Lower Ground Floor, Johannesburg, South Africa  
Tel.: +27 11 542 2200 Fax: 086 685 1814

Trustees: PU Govender

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**Legal Counsel**  
Office of the Chief Officer



South African Revenue Service

Office  
Head Office

Enquiries  
NHE Alberts

Telephone  
(012) 422 4954

Room  
Khanyisa Building

Reference  
Optimum Mine Rehabilitation  
Trust

Date  
28 January 2018

Pretoria Head Office  
299 Bronkhorst Street,  
Nieuw Muckleneuk, 0181  
Private Bag X923, Pretoria, 0001  
SARS online: [www.sars.gov.za](http://www.sars.gov.za)  
Switchboard: (012) 422-4000

The Trustees  
Optimum Mine Rehabilitation Trust  
144 Katherine Street  
Grayston Ridge Office Park  
Sandton

(By Hand)

Dear Trustees

**OPTIMUM MINE REHABILITATION TRUST**

I write in reference to your letter dated 16 November 2017.

Section 37A makes provision for a trust or a company that has as its sole object is to apply its property for the purpose of –

- (a) rehabilitation upon premature closure;
- (b) decommissioning and final closure; and
- (c) post closure coverage of any latent or residual environmental impacts.

The trust or company may not apply its funds for any other purpose. Monies in the trust or company may further only be invested in specified approved instruments issued by specified institutions. Any income that is derived as a result of these investments accrues to the trust and becomes part of the property of the trust which again may only be utilised towards its sole object.

You seem to rely on the general common law principle that income that accrues to a trust flows through to the beneficiary. This is only true in respect of a beneficiary that has a vested interest in terms of the trust deed or a named beneficiary if a trustee has discretion and exercises such discretion in favour of a named beneficiary. In looking at the specific trust deed that established the Optimum Mine Rehabilitation Trust ("the Trust") paragraph 12.3 specifically prohibits the trustees from distributing any profits or gains to any person and makes it clear that all funds must be used for its sole purpose.

The Trust is obligated to establish separate accounting records for each beneficiary and must deposit any profits to the account of the beneficiary that is so established. These accounts must remain the property of the Trust until such time it is required by the respective beneficiaries to fulfil its statutory obligations in respect of the rehabilitation of the land upon closure or decommissioning of the mine.

It seems clear that in transferring the R7 500 000 from the trust it was not in accordance with the requirements of the trust. The monies, even if it was used for rehabilitation purposes, would not be allowable as the rehabilitation would have been in the ordinary course of the mining activities and not due to rehabilitation upon premature closure or the decommissioning and final closure of the mine.

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I emphasise that no audit has been done and this reply is based on the information contained in your letter and the application of the specific requirements of section 37A.

Section 37A(7) may find application if it is found that the Trust contravened the requirements of section 37A(1)(a) by applying any property of the Trust for purposes of rehabilitation upon premature closure, decommissioning and final closure, post-closure coverage of any latent or residual environmental impacts or transfer to another company, trust or account established for the specified purposes. Should section 37A(7) find application, an amount equal to the market value of the property distributed will be deemed to be taxable income which accrued to the Trust. The Commissioner does not have any discretion in this regard. Should this be the case the Trust is obligated to declare it in the relevant tax return and make it subject to tax. All other provisions that apply will similarly be applicable. In the event that the amount is not declared as such the Tax Administration Act would require that understatement penalties be levied.

Your attention is further drawn to the amendments introduced by the Taxation Laws Amendment Act, 2017. These amendments are effective 18 December 2017.

Should you wish to discuss the content of this letter please feel free to contact the writer.

Sincerely



NEIL ALBERTS

PRINCIPAL SPECIALIST: LEGAL COUNSEL

for COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE



**OAKBAY**  
INVESTMENT SERVICES (PTY) LTD.

Reshma Moopanar <reshmam@oakbay.co.za>

---

**Fwd: LETTERS AS REQUESTED**

1 message

---

Ronica Ragavan <ronica@oakbay.co.za>

Thu, Nov 16, 2017 at 5:00 PM

To: Nico Alberts <nalberts@sars.gov.za>, MMakola@sars.gov.za, UGESHNI <ugeshni@sahara.co.za>, Reshma Moopanar <reshmam@oakbay.co.za>, Desrae Lawrence <DLawrence@sars.gov.za>

Dear Mr Alberts

Trust you are well.

Kindly find attached the letters and necessary docs as discussed for your attention for both OCM Trust and KFN Trust.

Regards

Ronica Ragavan

---

**2 attachments**

 **KFN REHAB TRUST LETTER.pdf**  
93K

 **OCM REHAB TRUST LETTER.pdf**  
144K

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**KOORNFONTEIN  
REHABILITATION TRUST**

**EXTRACT FROM THE MINUTES OF THE MEETING OF THE TRUSTEE OF  
KOORNFONTEIN REHABILITATION TRUST  
(REGISTRATION NUMBER: IT7563/07)  
("THE TRUST")**

**HELD AT SANDTON ON THE 06<sup>TH</sup> JUNE 2016**


The Trustees have been requested by the Beneficiary (Koornfontein Mines (Pty) Ltd) for funds to carry out the concurrent rehabilitation work at the mine. In this regard an approval has also been obtained by the sole shareholder of the Beneficiary i.e. Tegeta Exploration & Resources (Pty) Ltd from Department of Mineral Resources (DMR). The copy of DMR's approval has been placed before the trustees.

The Beneficiary has requested to the Trust to allow them to get a lien marked on the fixed deposit of the Trust for R170,000,000 (Rand one hundred and seventy million) held with Bank of Baroda, Johannesburg and to take a loan against it for R150 000 000 (ONE HUNDRED AND FIFTY MILLION RAND). The funds shall be utilized for the purposes of rehabilitation only. A progress report of rehabilitation shall be submitted to DMR on yearly basis.

**IT WAS RESOLVED THAT:**

1. the Trust allows Bank of Baroda, Johannesburg to sanction to the Beneficiary a loan of R150 000 000.00 against the fixed deposit of the trust held by Bank of Baroda for R170,000,000 (one hundred and seventy million rand). The loan funds shall be utilized for the purposes of rehabilitation of the mine only;
2. the trust consents to Bank of Baroda to take the said fixed deposit as security for the above loan (LABOD/DL) facility granted to Koornfontein Mines (Pty) Ltd and hereby pledges same with the Bank.
3. the Trust signs all the required loan documents for availing the above loan facility and pledging the fixed deposit;
4. the Trust undertakes to ensure that Koornfontein Mines (Pty) Ltd shall use the loan solely for the concurrent rehabilitation of the mines and for no other purposes.
5. Further resolved that PU Govender in her capacity as the Trustee be and is hereby authorised to sign all the documents required to give effect to the resolution.


**CERTIFIED A TRUE COPY**

  
\_\_\_\_\_  
Chairman of the Meeting  
Date: 06.06.2016

**Koornfontein Rehabilitation Trust  
(Trust No. IT 7563/07)**

144 Katherine Street, Grayston Ridge Office Park, Block A Lower Ground Floor, Johannesburg, South Africa  
Tel.: +27 11 542 2200 Fax: 086 685 1814

Trustees: PU Govender | Trevor William Scott | Athfal Ebrahimally

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बैंक ऑफ बड़ौदा Bank of Baroda

JHB: ADV:16-17

06.06.2016

M/S. Koornfontein Mines Pty. Ltd.  
Grayston Ridge Office Park,  
144, Katherine Street,  
Sandton-2196

Dear Sirs,

Re: Sanction of credit facilities

We are pleased to inform you that on your request under mentioned credit facility have been sanctioned to the company for a period of 12 months.

(Amt. in ZAR)

Nature of facility	Limit sanctioned
Fund Based	
LABOD/DL	150,000,000.00
Non-Fund Based	NIL
Total	150,000,000.00

Terms & Conditions:

1	Applicant	M/S. Koornfontein Mines Pty. Ltd.
2	Nature of facility	LABOD/DL
3	LIMIT	ZAR 150,000,000.00 (ZAR One Hundred Fifty Million Only)
4	Period	12 Months subject to annual renewal
5	MARGIN	10%
6	Purpose	For rehabilitation of Koornfontein Mines
7	ROI	9.00% P.A.
8	Security	As per Annexure-D enclosed
9	PROVISO	Interest to be serviced ON MONTHLY BASIS as and when

Johannesburg Branch, Sandton City Twin Towers, East Wing, 2<sup>nd</sup> Floor, Sandton, Johannesburg, Republic of South Africa  
Phone +27 11 7940710/23, Fax +27 11 7240759, Email: joburg@bankofbaroda.com, www.bankofbaroda.com

Page 1 of 4

*(Signature)*

m3 *(Signature)*



बैंक ऑफ बड़ोदा Bank of Baroda

		charged in the account.
10	Security Documents	As per Annexure-D enclosed

Yours faithfully,

(Shaikh Rauf)

Senior Branch Manager (Act.)

All the Terms & conditions are Accepted-

Authorized Trustee/Signatory (Borrower)

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बैंक ऑफ बड़ोदा Bank of Baroda

TERMS AND CONDITIONS:

ANNEXURE - D

Adv. A/c: M/S. Koornfontein Mines Pty, Ltd. at Johannesburg branch.

Nature of Facility	LABOD/DL	
Limit	Existing NIL	Proposed ZAR 150,000,000.00
Rate of Interest	9.00% (1% Over Deposit Rate at present @ 8.00%)	
Margin	10 %	
Purpose	For rehabilitation of Koornfontein Mine/s	
Penal Interest	2% additional interest to be charged for delay in payment of Interest / instalments as also for non compliance of any of the terms and conditions of sanction contained herein.	
Repayment	In 12 months (One time bullet payment)	
Prepayment penalty	NIL	
Processing charges	NIL	
Documentation Charges	Actual to be borne by the company	
Insurance	N.A.	
Security	<p>a. Pledge/Lien of Fixed Deposit with Bank worth ZAR 170,000,000.00 Dated 06.06.2018 in the name of M/s "Koornfontein Rehabilitation Trust" (Trust No. IT 7563/07) - LDOC 16(A).</p> <p>b. A Written undertaking from M/S. Koornfontein Mines Pty. Ltd that the funds are to be used for rehabilitation of mine/s.</p> <p>c. A Written undertaking from sole shareholder M/s Tegeta Exploration &amp; Resources Pty. Ltd. that the funds are going to be used for rehabilitation of Mine/s.</p> <p>d. A resolution from "Koornfontein Rehabilitation Trust" (Trust No. IT 7563/07) consenting to the Bank granting a loan to M/S. Koornfontein Mines Pty. Ltd. (KM) against the security of the funds, KM is entitled to use and confirming that KM will be using the funds for rehabilitation of mine/s.</p> <p>e. A resolution from M/S. Koornfontein Mines Pty. Ltd. (KM) authorizing them to apply for a loan against the fund of "Koornfontein Rehabilitation Trust" (Trust No. IT 7563/07) and confirmation that the funds are going to be used for rehabilitation of the mine/s.</p>	

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*[Handwritten signature]*

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बैंक ऑफ बरोडा Bank of Baroda

	<b>f. Loan Facility Agreement</b>
Proviso:	Interest to be serviced ON MONTHLY BASIS as and when charged in the account.

All the Terms & Conditions are accepted-

Authorized Trustee/Signatory (Borrower)-

Authorized Signatory (Depositor/Guarantor)-

**Tegeta Exploration & Resources Pty Ltd.**

Registration No.: 2006/014492/07

Lower Ground Floor,  
Grayston Ridge Block A,  
144 Katherine Street, Sandown,  
Sandton, 2148, South Africa.  
www.tegeta.com

Postal Address: Postnet Suite 458,  
Private Bag X9, Benmore, 2010

Tel: +27 11 262 3870  
Email: info@tegeta.com



COAL, COPPER & PGM

The Minister  
Department of Mineral Resources  
Head Office  
Pretoria

Date: 29<sup>th</sup> April 2016

Dear Sir,

**RE: NOTIFICATION IN TERMS OF REGULATION 8 OF THE FINANCIAL REGULATIONS  
PROVISIONS OF THE NATIONAL ENVIRONMENTAL MANAGEMENT ACT 107 OF 1998  
("NEMA")**

This to advise that after the necessary approval from Department of Mineral Resources Tegeta Exploration & Resources has acquired 100% shares of the Optimum Coal Mines (Pty) Ltd from Optimum Coal Holdings (Pty) Ltd. Now as the owners of the mine we request as under:

1. Optimum Coal Mine ("OCM") currently holds its financial provision for rehabilitation at Standard Bank of South Africa (Standard Bank) under Trust Deed No IT 3696/07. The financial provision is held in accordance with Regulation 8(1)(c) of the Financial Provisioning Regulations of the NEMA.
2. As you might be aware that all four major banks have given us the notice to close our accounts. We have been left with no option but to move the funds to other bank. We therefore hereby notify the Department of Mineral Resources (DMR) as it is required to do, to move the funds for financial provision held in Trust Account from Standard Bank to Bank of Baroda, Johannesburg.
3. The aforesaid funds will continue to be held in a section 8(1)(c) vehicle i.e. Trust Deed No IT 3696/07, administered by independent trustees.
4. We trust that the Minister finds this in order.

Yours faithfully,

  
Authorised Signatory

Directors:  
Ronica Ragavan  
Ravindra Nath  
Ashu Chawla  
Nazam Howa

011 262 3870

on 3. 11



**mineral resources**

Department:  
Mineral Resources  
REPUBLIC OF SOUTH AFRICA

**COPY**

DMR 10

First Floor, Saveways Crescent Centre, Mandela Drive, Witbank, 1035  
Private Bag X7279, Emalahleni, 1035, Tel (013) 653 0500, Fax (013) 690 3288  
Enquiries: Mr. N.A Tshivhandekano Ref: MP 30/5/12/3 (267) MR

The Directors  
**Tegeta Exploration and Resources (Pty) Ltd**  
Postnet Suit 458  
Private Bag X9  
Johannesburg  
2010

Dear Sir/Madam

**RE: NOTIFICATION IN TERMS OF REGULATION 8 OF THE FINANCIAL REGULATIONS PROVISIONS OF THE NATIONAL ENVIRONMENTAL MANAGEMENT ACT 107 OF 1998 ("NEMA") OPTIMUM COAL MINES (PTY) LTD.**

Reference is hereby made to your letter dated 29 April 2016. In this regard the Department acknowledges the moving of the funds for financial provision held in a Trust Account with Standard Bank to the Bank of Baroda, Johannesburg, provided that such bank is registered with Reserve Bank of South Africa.

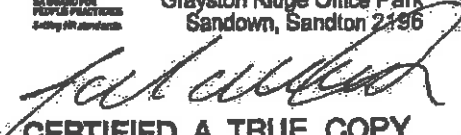
In this regard please ensure that the funds shall remain in the present Trust created under section 8(1)(c) i.e. Trust Deed No IT 13693/07


For further enquiries, please contact the Regional Manager on the above contact details.

Yours faithfully

  
.....  
**REGIONAL MANAGER: MPUMALANGA  
MINERAL REGULATION  
DATE: 15/06/2016**

**JACQUELEINE VAN DER MERWE**  
Commissioner of Oaths  
HR Associate (HRA)  
Member number: 10575  
144 Kathrine Street  
Grayston Ridge Office Park  
Sandown, Sandton 2196

  
**CERTIFIED A TRUE COPY  
OF THE ORIGINAL**

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**बैंक ऑफ़ बड़ौदा**  
**Bank of Baroda**  
India's International Bank

BRANCH DETAILS		CUSTOMER DETAILS	
NAME	: JOHANNESBURG	NAME	: OPTIMUM MINE REHABILITATION TRUST
ADDRESS	: 2ND FLOOR, ATRIUM ON 5TH SANDTON CITY EAST TOWERS JOHANNESBURG JOHANNESBURG, SOUTH AFRICA	ADDRESS	: 144 KATHERINE STREET JOHANNESBURG JOHANNESBURG GAITHERG 2146
PHONE	: 27 11 7840715	PHONE	: 0114307640
FAX	: 7840759	A/C NO	: 92020200000524 CURRENCY: ZAR

Statement of A/C from 01-03-2018 to 31-03-2018

DATE	DETAILS	DEBIT	CREDIT	BALANCE
	OPENING BALANCE :		1,624,751,887.63	1,624,751,887.63 Cr
29-03-2018	92020200000524: Int. Pd: 01-03-2018 to 31-03-2018		2,759,852.52	1,627,511,740.15 Cr

Unless the constituent notifies the bank immediately of any discrepancy found by him/her in this statement of Account, it will be taken that he/she has found the account correct.

This is a system generated output and requires no signature.

Please note that as a policy, BANK OF BARODA does not ask you to part with/disclose/revalidate your Internet Banking password, login id and debit card number through emails OR phone calls OR Fax OR in-person. You are therefore advised NOT to respond to such emails OR phone calls and never disclose your personal security details to anyone including Bank staff.

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Tegeta Exploration & Resources (Pty) Ltd  
Registration No: 2008 014402/07

Lower Ground Floor,  
Grayston Ridge Block A,  
144 Katherine Street, Sandown,  
Sandton, 2146, South Africa.  
www.tegeta.com

Postal Address: Posinet Suite 458,  
Private Bag X9, Banmore, 2010  
Tel: +27 11 262 3870  
Email: info@tegeta.com



COAL, COPPER & PGM

The Regional Manager  
Department of Mineral Resources  
Mpumalanga,  
Witbank-1035

Letter No. 2016/001KFN

Date: 29<sup>th</sup> April 2016

Dear Sir,

**NOTIFICATION IN TERMS OF REGULATION 8 OF THE FINANCIAL REGULATIONS PROVISIONS OF THE NATIONAL ENVIRONMENTAL MANAGEMENT ACT 107 OF 1998 ("NEMA")**

This to advise that after necessary approval from Department of Mineral Resources, Tegeta Exploration & Resources has acquired 100% shares of the Koorfontein Mines (Pty) Ltd from Optimum Coal Holdings (Pty) Ltd. Now as the owners of the mine we request as under: Koorfontein Mines ("KFN") currently holds its financial provision for rehabilitation at FNB (First National Bank) under Trust Deed No IT 7563/2007, the financial provision is held in accordance with Regulation 8(1)(c) of the Financial Provisioning Regulations of the NEMA.

1. As you might be aware that all four major banks have given us the notice to close our accounts. We have been left with no option but to move the funds to other bank. We therefore hereby notify the Department of Mineral Resources (DMR) as it is required to do, to move the funds for financial provision held in Trust Account from First National Bank to the Bank of Baroda, Johannesburg.
2. The aforesaid funds will continue to be held in a section 8(1)(c) vehicle i.e. Trust Deed No IT 7563/2007, administered by independent trustees.
3. We trust that the DMR finds this in order.

Yours faithfully,

sd.

Authorised Signatory

Copy forwarded to The Minister, Department of Mineral Resources, Head Office, Pretoria for information.

Authorised Signatory

Directors:  
Ronica Rajgavan  
Ravindra Nath  
Ashu Chawla  
Nozam Hova

u-3

P.G 13.2

✓



mineral resources

Department  
Mineral Resources  
REPUBLIC OF SOUTH AFRICA

DMR 10

First Floor, Saveways Crescent Centre, Mandela Drive, Witbank, 1035  
Private Bag X7279, Emalahleni, 1035, Tel (013) 653 0500, Fax (013) 690 3288

Enquiries: Mr. N.A Tshivhandekano

Ref: 04/05/2016

The Director/s  
Tegeta Exploration and Resources (Pty) Ltd  
Postnet Suit 458  
Private Bag X9  
Johannesburg  
2010

Dear Sir/Madam

**RE: NOTIFICATION IN TERMS OF REGULATION 8 OF THE FINANCIAL REGULATIONS PROVISIONS OF THE NATIONAL ENVIRONMENTAL MANAGEMENT ACT 107 OF 1998 ("NEMA") KOORNFONTEIN MINES (PTY) LTD**

Kindly refer to your letter No. 2016/001KFN dated 29 April 2016. In this regard the Department acknowledge the move of the funds for financial provision held in the Trust Account with First National Bank to the Bank of Baroda, Johannesburg, provided that such bank is registered with the Financial Services Board –South Africa.

In this regard please ensure that the funds shall remain in the present Trust created under section 8(1)(c) i.e. Trust Deed No IT 7563/2007

For further enquiries, please contact the Regional Manager on the above contact details

Yours faithfully

*M. M. M. M. M.*  
.....  
THE REGIONAL MANAGER  
DEPARTMENT OF MINERAL RESOURCES  
DATE: 05/05/2016.....

n.3



**बैंक ऑफ बड़ौदा**  
**Bank of Baroda**  
India's International Bank

BRANCH DETAILS		CUSTOMER DETAILS	
NAME	: JOHANNESBURG	NAME	: KOORNFOOTREIN REHABILITATION TRUST
ADDRESS	: 2ND FLOOR, AERIUM ON 5TH SANDTON CITY EAST TOWERS JOHANNESBURG JOHANNESBURG, SOUTH AFRICA	ADDRESS	: 144 KATHERINE STREET GRAYSTON RIDGE OFFICE BLOCK A LOWER GROUND FLOOR SANDTON JOHANNESBURG GAUTENG 2146
PHONE	: 27 11 7640715	PHONE	: 0114397640/0828586089
FAX	: 7640759	A/C NO	: 92020200000519 CURRENCY: ZAR

Statement of A/C from 01-03-2018 to 31-03-2018

DATE	DETAILS	DEBIT	CREDIT	BALANCE
	OPENING BALANCE :		310,994,148.24	310,994,148.24 Cr
29-03-2018	92020200000519: Int.Pd:01-03-2018 to 31-03-2018		528,264.04	311,522,412.28 Cr

Unless the constituent notifies the bank immediately of any discrepancy found by him/her in this statement of Account, it will be taken that he/she has found the account correct.

This is a system generated output and requires no signature.

Please note that as a policy, BANK OF BARODA does not ask you to part with/disclose/revalidate your Internet Banking password, login id and debit card number through emails OR phone calls OR Fax OR in-person. You are therefore advised NOT to respond to such emails OR phone calls and never disclose your personal security details to anyone including Bank staff.

4-3

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

**CASE NUMBER: 14775/2018**

In the matter between:

**PUSHPAVENI UGESHNI GOVENDER N.O.** First Applicant  
*(in her capacity as Trustee of Optimum Mine Rehabilitation Trust)*

**RESHMA MOOPANAR N.O.** Second Applicant  
*(in her capacity as Trustee of Optimum Mine Rehabilitation Trust)*

**PUSHPAVENI UGESHNI GOVENDER N.O.** Third Applicant  
*(in her capacity as Trustee of Koornfontein Rehabilitation Trust)*

**RESHMA MOOPANAR N.O.** Fourth Applicant  
*(in her capacity as Trustee of Koornfontein Rehabilitation Trust)*

and

**THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS** Respondent

---

**CONFIRMATORY AFFIDAVIT**

---

I, the undersigned,


**VASCO DE OLIVEIRA**

hereby make oath and state:





1. I am an adult male practicing attorney and director of the firm Vasco de Oliveira Incorporated, situated at 23C Sandton View Office Park, Conduit Street, Lyme Park, Sandton.
2. The facts herein contained fall within my own personal knowledge and belief, unless otherwise stated or indicated, and are both true and correct
3. I have read the founding affidavit of PUSHPAVENI UGESHNI GOVENDER and confirm the contents thereof insofar as it relates to me.
4. I know and understand the contents of the above declaration. I have no objection in taking the prescribed oath. I consider the prescribed oath to be binding on my conscience.



\_\_\_\_\_  
DEPONENT

THIS SIGNED AND SWORN TO AT Sandton ON THIS 4<sup>th</sup> DAY OF APRIL 2018, THE DEPONENT HAVING ACKNOWLEDGED THAT HE KNOWS AND UNDERSTANDS THE CONTENTS OF THIS AFFIDAVIT, HAS NO OBJECTION TO TAKING THE OATH AND HAVING SWORN THAT THE CONTENTS THEREOF ARE TRUE AND CORRECT AND, THAT HE CONSIDERS THE OATH TO BE BINDING ON HIS CONSCIENCE.

✓  
M<sup>2</sup>



**COMMISSIONER OF OATHS**

**Willem Hendrik Le Roux C.A. (S.A.)**

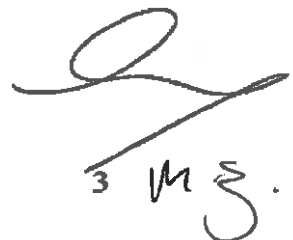
Commissioner of Oaths, Ex Office

834 Sandton View

Conduit Street

Lynne Park, Sandton

Tel: (011) 326-4727 Fax: (011) 781-8336



3 M.S.

IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, PRETORIA

CASE NUMBER: 14775/2018

In the matter between:

**PUSHPAVENI UGESHNI GOVENDER N.O.**  
*(in her capacity as Trustee of Optimum Mine  
Rehabilitation Trust)*

First Applicant

**RESHMA MOOPANAR N.O.**  
*(in her capacity as Trustee of Optimum Mine  
Rehabilitation Trust)*

Second Applicant

**PUSHPAVENI UGESHNI GOVENDER N.O.**  
*(in her capacity as Trustee of Koomfontein  
Rehabilitation Trust)*

Third Applicant

**RESHMA MOOPANAR N.O.**  
*(in her capacity as Trustee of Koomfontein  
Rehabilitation Trust)*

Fourth Applicant

and

**THE NATIONAL DIRECTOR OF PUBLIC  
PROSECUTIONS**

Respondent

---

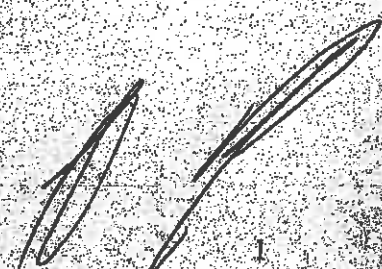
**CONFIRMATORY AFFIDAVIT**

---

I, the undersigned,

**PIETER JOHANNES VAN DER MERWE**

hereby make oath and state



1. I am an adult male practicing attorney working at VAN DER MERWE AND VAN DER MERWE ATTORNEYS, situated at 308 Brooks Street, Menlo Park, Pretoria.
2. The facts herein contained fall within my own personal knowledge and belief, unless otherwise stated or indicated, and are both true and correct.
3. I have read the founding affidavit of PUSHPAVENI UGESHNI GOVENDER and confirm the contents thereof insofar as it relates to me.
4. I know and understand the contents of the above declaration. I have no objection in taking the prescribed oath. I consider the prescribed oath to be binding on my conscience.

\_\_\_\_\_  
DEPONENT

THUS SIGNED AND SWORN TO AT Mossel Bay ON THIS 4th DAY OF APRIL 2018, THE DEPONENT HAVING ACKNOWLEDGED THAT HE KNOWS AND UNDERSTANDS THE CONTENTS OF THIS AFFIDAVIT, HAS NO OBJECTION TO TAKING THE OATH AND HAVING SWORN THAT THE CONTENTS THEREOF ARE TRUE AND CORRECT AND THAT HE CONSIDERS THE OATH TO BE BINDING ON HIS CONSCIENCE.

\_\_\_\_\_  
COMMISSIONER OF OATHS **JOHANNES CHRISTIAAN ELLIS**  
COMMISSIONER OF OATH  
PRACTISING ATTORNEY  
SVERDING COURT MEDICROSS MEDICAL CENTRE  
C/O LOUIS ROURIE AND MELKHOUT STREET  
HEIDERAND MOSSEL BAY

u.s.g.

# TABACKS ATTORNEYS

Your Ref **CASE NO 14775/2018**  
Our Ref **BANK2-LV6**  
Email **lvs@tabacks.com/nl@tabacks.com**  
Date **12 March 2018**

**TO:**

The National Director of Public Prosecutions  
Attention: State Attorney  
Email address: [rmathaga@justice.gov.za](mailto:rmathaga@justice.gov.za)

The Trustees of Optimum Mine Rehabilitation Trust  
Attention: Pushpaveni Ugeshini Govender  
Email address: [ugeshnin@sahara.co.za](mailto:ugeshnin@sahara.co.za)

The Trustees of Koomfontein Mine Rehabilitation Trust  
Attention: Pushpaveni Ugeshini Govender  
Email address: [ugeshnin@sahara.co.za](mailto:ugeshnin@sahara.co.za)

The Minister: Mineral Resources  
Trevenna Campus, 70 Meintjies Street, Sunnyside, Pretoria  
Per hand

The Director General: Department of Mineral Resources  
Trevenna Campus, Building 2 C. c/o Meintjies and Francis Baard Streets, Sunnyside,  
Pretoria  
Per hand

The Master of the High Court: Pretoria c/o the Acting Chief Master  
SALU Building, 316 Thabo Sehume Street, Pretoria, Gautent  
Per hand

Nedbank Group Limited  
Attention: Mr E Anderson  
Email address: [eltona@nedbank.co.za](mailto:eltona@nedbank.co.za)

The Organisation Undoing Tax Abuse c/o Werksmans Attorneys  
Attention: Ms S Venter  
Attention: Mr B Hotz  
Email address: [soretha.venter@outa.co.za](mailto:soretha.venter@outa.co.za)  
Email address: [bhotz@werksmans.com](mailto:bhotz@werksmans.com)

Mervyn Taback Incorporated Reg No 2000/024541/21  
13 Eton Road Parktown 2193 Johannesburg South Africa PO Box 5334 Houghton 2041 Johannesburg South Africa  
Tel +27 (0)11 368-7700 Fax +27 (0)11 368-7800 Fax +27(0)86 771 2626 Website [www.tabacks.com](http://www.tabacks.com)  
Directors D Cihri TJ Cross M Grobbelaar DA Kaufmann CM Keene BD Masuku N Mather  
E Serfootein BD Tate L van Staden D Woodhouse  
Associates MG Davis NE Labuschagne D Lemmen MJA Mabaso J Mankoe  
MF Schepers MG Thomas SM Tumber  
Consultant M Taback

u.s. 

Dear Sirs

**THE ORDER UNDER CASE 14775/2018 DATED 8 MARCH 2018 ("The NDPP Order")/ THE ORDER UNDER CASE NUMBER 85616/17 DATED 26 SEPTEMBER 2017 ("The OUTA Order").**


1. We act on behalf of the Bank of Baroda.
2. Our client has continuously maintained accounts for the Optimum and Koornfontein Mine Rehabilitation Trusts respectively.
3. Our client has, since 26 September 2017 maintained the accounts strictly in accordance with and subject to the terms of the OUTA Order.
4. It is now faced with two mutually exclusive orders;
  - 4.1 In terms of the OUTA Order, our client is directed to continue to hold the trust funds in accounts maintained by it, for the credit of the trusts (as directed in terms of paragraph 1.2 and 1.3 of the OUTA Order);
  - 4.2 In terms of the NDPP Order, our client is directed immediately to transfer the funds to Nedbank (as provided for in terms of paragraph 3 and 4 of the NDPP Order);
  - 4.3 Our client has no proprietary interest in the matter and will either continue to comply with the OUTA Order, or will in breach thereof, comply with the NDPP Order. It is obvious that our client is unable to comply with both;
5. It is a matter of public knowledge that our client, as a non-clearing bank is able to provide banking services only because of a sponsorship-arrangement with Nedbank. Nedbank has given notice of the termination of all arrangements of any kind with our client with effect from 30 April 2018 and has directed our client to provide banking particulars at another institution to which Nedbank will transfer all credit balances held by it on behalf of our client, as at 30 April 2018.

6. It appears the NDPP had intended, but then failed, to have a *Curator Bonis* appointed. In the circumstances, Nedbank's customer, for purposes of it holding the deposits, will not be our client. We assume that Nedbank has agreed, in advance and without having completed any of the required AML and/or KYC procedures, to accept as its client whomsoever may eventually be declared to be entitled or authorised to bind the trusts.
7. In the circumstances our client invites the parties to reach consensus on the directions our client should comply with. Failing delivery to us, by no later than close of business on Thursday 15 March 2018, of satisfactory instructions (which much provide for our client to be relieved from the obligations imposed on it in terms of both or either of the OUTA and NDPP Orders) our client shall approach the High Court for directions. It shall in such proceeding seek an order that its costs on the scale as between attorney and own client be paid by OUTA and the NDPP jointly and severally.
8. We await your urgent response.

Yours faithfully,

  
van Staden

**MERVYN TABACK INC.**

M-3 



18:29 10/03/2018 Jenni Evans

Cape Town - The National Prosecuting Authority has secured a court order to preserve the mining rehabilitation funds of two Gupta-owned mines held by the Bank of Baroda which intends leaving South Africa.

According to the North Gauteng High Court order, dated March 8, the money in the in the Optimum Mine Rehabilitation Trust (OMRT) and the Koomfontein Mine Rehabilitation Trust (KMRT) has to be transferred from the Bank of Baroda to Nedbank for safekeeping, with interest.

The amounts involved are R1 469 916 933.63 in the OMRT and 280 000 000.00 in KMRT.

**Also read:** Business rescue may put Optimum back under Glencore ownership



The Bank of Baroda's majority shareholder is the Republic of India, and though not registered as a bank in South Africa, is allowed to use Nedbank as its banking platform in South Africa. The Bank of Baroda was also the only bank willing to transact with the Guptas after the "big four" banks in South Africa foreclosed on them.

The order was granted in terms of the Prevention of Organised Crime Act and is intended to preserve the money, and to prevent anybody from taking from the fund, or diminishing their value, if the NPA's forfeiture application relating to the funds is successful.

The money is to stay with Nedbank until a forfeiture order is granted and if anybody with the right to, needs to access the funds, it can only be done via application to the NPA and the Department of Mineral Resources (DMR).

Within 30 days of the order, the Bank of Baroda must also give the NPA and DMR documents relating to the interest rates for both trust accounts, transaction histories for the accounts, all

w-3 \$



**Also read: Bank of Baroda: Guptas can't force us to stay in SA**

The preservation order follows allegations that Tegeta, which forms part of the Guptas' Oakbay Investments, withdrew money from the accounts, and used some of it as collateral for loans, purportedly for mine rehabilitation.

The money is considered for now an "instrumentality" in an offense and the "proceeds of unlawful activities" due to alleged violations of the National Environmental Management Act, the Mineral and Petroleum Resources Development Act and the Income Tax Act.

In the application, it was contended that the money can only be used for rehabilitation once a mine is closed, and that there are tax deduction benefits when the rehabilitation fund is used for this.

However, there were allegedly drawings on the accounts and transfers to other accounts as mine business continued, allegedly used to improve Tegeta's cash flow.

There was apparently no documentary proof of the supposed mine rehabilitation that the money was purportedly used for and any permissions granted by the DMR for the withdrawals were only "in principle".

In the meantime, 19 Gupta-owned companies are seeking an urgent interdict against the Bank of Baroda to prevent it pulling out of South Africa. Judgment, in that case, is still awaited.

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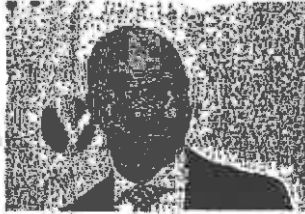
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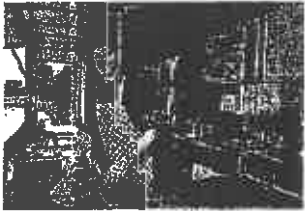
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**THE NATIONAL DIRECTOR OF PUBLIC PROSECUTION**

Attention: The State Attorney

Email: [rmathaga@justice.gov.za](mailto:rmathaga@justice.gov.za)

Our Ref: VDO/PR/MAT

Your Ref:

13 MARCH 2018

**TABACKS ATTORNEYS**

Attention: Ms N Labuschagne

Email: [nl@tabacks.com](mailto:nl@tabacks.com) / [lvs@tabacks.com](mailto:lvs@tabacks.com)

**WERKSMANS ATTORNEYS**

Attention: Mr. B Hotz

Email: [bhotz@weksmans.com](mailto:bhotz@weksmans.com)

**NEDBANK GROUP LIMITED**

Attention: Mr. E Anderson

Email: [eltona@nedbank.co.za](mailto:eltona@nedbank.co.za)

**THE MINISTER OF MINERAL RESOURCES**

Attention: Honourable Minister G Mantashe

"By Hand"

**THE DIRECTOR GENERAL OF MINERAL RESOURCES**

Attention: Mr. T Mokoena

Email: [thabo.mokoena@dmr.gov.za](mailto:thabo.mokoena@dmr.gov.za) / [mamabefu.modipa@dmr.gov.za](mailto:mamabefu.modipa@dmr.gov.za)

**RE: EX PARTE: NDPP / TRUSTEES OF OPTIMUM MINE REHABILITATION TRUST & ANOTHER - PURPORTED PRESERVATION ORDER UNDER CASE NUMBER: 14775/2018 ("THE NDPP ORDER");**

**AND: OUTA / TRUSTEES FOR THE TIME BEING OF THE OPTIMUM MINE REHABILITATION TRUST & OTHERS, CASE NUMBER: 65616/2017 AND ORDER DATED 26 SEPTEMBER 2017 ("THE OUTA ORDER")**

Dear Sirs/ Mesdames,

1. We act for the trustees of the Optimum Rehabilitation Trust and the trustees of the Koornfontein Mine Rehabilitation Trust, on whose instance this correspondence is addressed to you. Our clients have provided us with a copy of the letter of Tabacks dated 12 March 2018 to which our clients reply below.
2. Our clients do not intend to respond to the entirety of the letter under reply and reserve their rights to do so at the appropriate time and in the appropriate forum.
3. We confirm the existence of the OUTA order of 26 September 2017 as an order agreed between the parties to that litigation to maintain the *status quo* pertaining to the funds of the respective Rehabilitation Trusts.
4. Our clients have however not to date been favoured with the NDPP order and hold no knowledge thereof, save for the scant media reports available, coupled to the contents of Tabacks letter of yesterday. To the extent that Tabacks is in possession of the NDPP order, we hereby request that it provide these offices with a copy of said order forthwith and for consideration by the trustees of the Trusts in question.

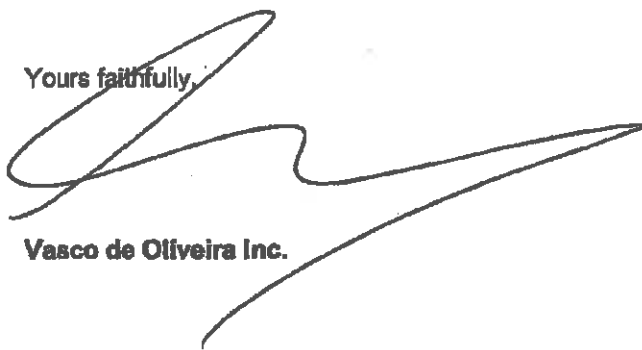
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5. Should the contents of Tabacks' letter indeed be correct- specifically that which is contained under paragraphs 4 and 6 thereof- it appears that the NDPP order is fundamentally flawed and stands to be reconsidered or set aside *in toto* for various reasons. It is simply inconceivable that the NDPP could have mounted a rational argument in the *ex parte* proceedings that statutorily regulated rehabilitation funds could ever come to be declared forfeited to the State under the Act, or that the NPA is now to act as a NEMA compliant controller of the funds in question. Similarly, it is doubtful that full and frank disclosure was made under the *ex parte* proceedings and the fact of the OUTA order, in preservation of the *status quo*, was put before the judge in question.

6. Flowing from the above and in addition to the request to Tabacks above, we call upon the NDPP to come clean and provide our clients with a full copy of the NDPP order and the *ex parte* papers by no later than the close of business tomorrow, Wednesday 14 March 2018.

7. For the sake of clarity and for the avoidance of all doubt, we further record that the Bank of Baroda is not to give effect to the purported NDPP order in any shape or form and that it is instructed to continue to comply with the existing OUTA order in all respects, failing which it may be held liable for breach of the terms of that order by the trustees of the Rehabilitation Trusts in question.

Yours faithfully,



Vasco de Oliveira Inc.

**Vasco de Oliveira**

**Subject:** FW: Preservation order: Optimum & Koornfontein Mine Rehabilitation Trust accounts

**Attachments:** 1 Preservation application 14775 2018 (Mine Rehab Trusts) 8-3-2018.pdf; 2 Preservation order - Rabie J (Optimum & Koornfontein MRT).pdf; Message from RNP002673958818

**From:** Rikhotso Serious <SeRikhotso@justice.gov.za>  
**Sent:** Monday, 19 March 2018 8:56 AM  
**To:** Info <info@oliveira.co.za>  
**Cc:** TManvako@npa.gov.za  
**Subject:** FW: Preservation order: Optimum & Koornfontein Mine Rehabilitation Trust accounts

Sir/Madam

On 8 March 2018, the National Director of Public Prosecutions obtained a preservation order in respect of all funds currently held by the Bank of Baroda relating to the Optimum & Koornfontein Mine Rehabilitation Trust funds.

Electronic copies of the application and the order granted by his Lordship Mr Justice Rabie, ex parte and in chambers, is attached hereto for your ease of reference and the content is self-explanatory.

Copies of all papers will be served on all interested parties in due course.

Please take note further that electronic copies of the application and order was forwarded to the business rescue practitioners appointed for Optimum and Koornfontein mines and their legal representative as per the attached email copy.

Yours Faithfully



**the doj & cd**  
 Department:  
 Justice and Constitutional Development  
 REPUBLIC OF SOUTH AFRICA

**SERIOUS RIKHOTSO**  
**LEGAL SECRETARY**  
**OFFICE STATE ATTORNEY: PRETORIA**  
**TEL: 012 309 1671**  
**FAX: 012 309 1649/50**  
**D/F: 086 400 8265**  
**E-mail: SeRikhotso@justice.gov.za**

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Immediately if you or your employer do not consent to e-mail messages of this kind. Opinions, conclusions and other information in this message that do not relate to the official business of the Department of Justice and Constitutional Development shall be understood as neither given nor endorsed by it. All views expressed herein are the views of the author and do not reflect the views of the Department of Justice unless specifically stated otherwise.

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Street adres / Street Address:  
1st Floor, 308 Brooks Street,  
Menlo Park, Pretoria, 0184



Telefoon / Telephone:  
(012) 941 9930

Faks / Fax:  
086 603 9496

**VAN DER MERWE & VAN DER MERWE**  
PROKUREURS / ATTORNEYS

Posadres / Postal Address:  
Posbus 628  
Cullinan, 1000

E-pos / Email:  
pieter@vdmattorney.co.za

**OUR REF: PvdM/cl/PK0002**  
**YOUR REF: Mr Mathaga/2018/Z56**

2 April 2018

**THE STATE ATTORNEY**  
**PER E-MAIL: [RMathaga@justice.gov.za](mailto:RMathaga@justice.gov.za)**

Dear sir,

**IN RE: PRESERVATION ORDER NDPP - MINING REHABILITATION FUNDS**

We confirm that we act on behalf of the Trustees in this matter.

The National Director of Public Prosecutions had to serve the court order and application on our clients as soon as practicable after the order was obtained. It has not yet done so.

We would hereby like to consent to the papers being served on our clients per e-mail at [pieter@vdmattorney.co.za](mailto:pieter@vdmattorney.co.za).

We thank you in advance and await your reply.

Yours faithfully,

**VAN DER MERWE & VAN DER MERWE**  
**PER: PIETER VAN DER MERWE**

PARTNERS: M P van der Merwe, LLB (UP) - P J van der Merwe, LLB (UP)

Handwritten initials/signature



**IN THE HIGH COURT OF SOUTH AFRICA  
FREE STATE DIVISION, BLOEMFONTEIN**

Case No: 168/2018

Before the Honourable Justice AF JORDAAN

On the 09<sup>th</sup> day of MARCH 2018

**In the ex parte application of:**

**THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS**                      Applicant

*In re:* an application in terms of section 38 of the Prevention of Organised Crime Act, Act 121 of 1998, for the preservation of certain property described in "Annexure A"

---

Having considered the notice of motion and the other documents filed of record and having heard Counsel for the parties,

**IT IS ORDERED THAT:**

1. Paragraph 1 of the order granted on 18 January 2018 is amended by deleting the word "immovable".
2. The amount in paragraph 1.2 of the order and paragraph 1 of Annexure A to the order is amended by substituting the amount of R40 360 154-98 in place of the amount of R220 202 652-00
3. Paragraph 1 of Annexure A to the order is further amended by deleting the words: "Which constitutes proceeds of crime" and adding the words: "or in any fund or account held by or on behalf of them".
4. Paragraph 12 of the order granted is amended by deleting paragraphs 12.3, 12.5, 12.8, 12.9, 12.10, 12.12, 12.13 and 12.16.
5. Annexure A to the court order is further amended by deleting paragraphs 1.4, 1.6, 1.7, 1.9, 1.10, 1.11, 1.12, and 1.13 and by adding the following at the end of paragraph 1.15: "an amount of R19 000 000-00.

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6. Paragraph 1.5 of Annexure A to the order is amended by substituting the amount of R73 277-24 in place of the amount of R 212 732 77-24.
7. Paragraph 1.14 of Annexure A to the order is amended by inserting the amount of R157 320-00 in place of the amount R6 000 000-00.
8. The paragraph numbers in paragraph 12 of the order as amended and Annexure A to the order as amended are renumbered to run consecutively.
9. The Applicant is ordered to pay the costs of the affected parties, being the applicants for reconsideration, including the costs occasioned by the employment of two counsel, where so employed.
10. The *curator bonis* is ordered, jointly and severally with the Applicant, the one paying the other to be absolved, to pay 50% of the costs occasioned by the filing of his affidavit and employment of counsel, *de bonis propriis*.
11. The amended order annexed hereto is confirmed.

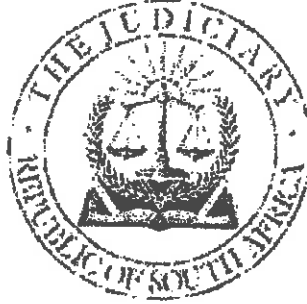
BY ORDER OF THIS COURT

  
COURT REGISTRAR

STATE ATTORNEYS

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**IN THE HIGH COURT OF SOUTH AFRICA  
FREE STATE DIVISION, BLOEMFONTEIN**

**Case No: 168/2018**

Before the Honourable Justice **AF JORDAAN**

On the 09<sup>th</sup> day of **MARCH 2018**

In the ex parte application of:

**THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS** Applicant

In re: an application in terms of section 38 of the Prevention of Organised Crime Act, Act 121 of 1998, for the preservation of certain property described in "Annexure A"

---

Having considered the notice of motion and the other documents filed of record and having heard Counsel for applicant,

**IT IS ORDERED THAT:**

1. An order is granted in terms of section 38 (2) of the Prevention of Organised Crime Act, 121 of 1998 (POCA) preserving certain property described as:
  - 1.1 The remaining extent of the farm Krynauws Lust 275, district Vrede, Free State Province, measuring: 4439,5122 (four thousand, four hundred and thirty nine comma five one two two hectares).
  - 1.2 Money not exceeding an amount of R40 360 154-98 which constitutes proceeds of crime in the following bank accounts held individually or by companies described in Annexure A to the draft order. The immovable and the movable property mentioned above are hereinafter referred to as "the property".
2. In terms of section 38 (2) of POCA and subject to the provisions of this order, all persons with knowledge thereof are prohibited from disposing of, further encumbering, dissipating, interfering with, attaching or selling in execution,

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diminishing the value of or dealing in any other manner with the property to which this order relates.

3. Notwithstanding the provisions of this order, any person who has financial obligations in respect of any of the property is ordered to fulfil such obligations, including any obligations relating to installment payments and all interest accruing in respect of such obligations, pending the finalisation of the forfeiture proceedings unless such person[s] signs a consent to judgment in favour of the applicant.
4. In terms of section 42 of POCA, Eugene Nel of Vesticraft, located as Suite 8, 2<sup>nd</sup> Floor, Block C, Town Bush Office Park, 460 Town Bush Road Montrose, Pietermaritzburg is appointed as *curator bonis* over the property (the *curator bonis*). The *curator bonis* shall have all such powers, duties and authority as provided for in POCA and in this order.
5. The *curator bonis* is authorised to assume control of the property and do any and all things necessary to preserve the property while the order is in force.
6. Any person who holds the property is directed in terms of section 42(1)(b) of POCA to surrender the property forthwith into the custody of the *curator bonis*, failing which any member of the South African Police Services or other agency if the facts render it necessary or appropriate is hereby authorised, on the instruction of the *curator bonis*, to seize the relevant property and place it in the custody of the *curator bonis*.
7. The *curator bonis* must file a report with the Registrar of this Honourable Court within 40 days of the granting of the preservation order which report shall contain an inventory of the property taken into his custody in terms of this order, in which report he shall set out the steps that have been taken by him to give effect to this order, and make any further recommendations as he may deem fit regarding any other steps he might be required to take in order to give effect to the order. The *curator bonis* must file supplementary reports containing additional relevant information as and when such reports become necessary.
8. The fees and expenditure of the *curator bonis* must, in terms of section 42(2) of POCA be paid from the forfeited property. In the event of no forfeiture order being granted, then such fees and expenditure must be paid by the State, provided further that interest on expenditure incurred by the *curator bonis* shall be paid by the State at the prime lending rate of the major financial institutions from the date of expenditure until the date of final payment.
9. The *curator bonis* shall have such powers, duties and authority as provided for or implied in POCA and such further powers as are specified or implied in this Order including but not limited to, the following:
  - 9.1 to take all reasonable and lawful steps to discover any facts relating to any of the property and to locate it with the view of achieving the

object of this order, read in the context of POCA and, in particular, section 339(1) thereof;

- 9.2 to require any interested party to make full disclosure under and in terms of this order and to provide such further and specific information as the *curator bonis* considers relevant to any fact that has been disclosed, which authority shall be exercised with the view of achieving the objects of this order, read in the context of POCA and in particular, Sections 42 and 43 of POCA;
  - 9.3 to deal with any funds in any banking accounts forming part of the property and is accordingly authorised to hold the necessary signing powers on such accounts and to give directions to banking institutions, and other persons in control of any of those funds regarding the utilisation of such funds;
  - 9.4 to inspect, copy and analyse all documents held by or on behalf of the interested parties or any data on any computer software or hardware used by the interested parties with the view of tracing and locating, as may be necessary, the property;
  - 9.5 to make enquiries from the interested parties as well as their respective accountants or auditors and pursuant to such enquiries inspect, copy and analyse all relevant documentation relating to the affairs of the interested parties and any other entities in which the interested parties have an interest, with a view of tracing the property;
10. The Registrar of Deeds is directed to endorse the title deed of the immovable property specified in paragraphs 1 *supra*, with the following restrictions, namely, that the property shall not, without the consent of this Court:-
- 10.1 be mortgaged or otherwise encumbered;
  - 10.2 be attached or sold in execution; or
  - 10.3 vest in the Master of the High Court, or the trustee or liquidator of the insolvent estate of the owner, if the estate of the owner should be sequestrated or liquidated.
11. The applicant shall in terms of section 39 of POCA, as soon as practicable after the making of the Preservation Order, cause a notice of this order including Annexure "A" hereto, to be published in the Government Gazette.
12. The applicant shall cause notice of this Preservation Order together with the copies of the papers used in support of this application, to be served on:
- 12.1 Kamal Vasram, 111 Shimbali Sands, residing at 11 Naivasha Road, Sunninghill, Johannesburg;

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- 12.2 Soo Young Jeon, residing at Sunningdale Drive, Sunningdale, Johannesburg;
- 12.3 Ronica Ragavan, residing at 129a Bishopbird Street, Rooikruiskraal, Centurion;
- 12.4 Vargafield (Pty) Ltd, 2012/101734/07 with registered place of business at 27 Voortrekker Road, Vrede, Free State;
- 12.5 Chandrama Prasad, residing at 27 Voortrekker Road, Vrede, Free State;
- 12.6 Linkway Trading (Pty) Ltd with registration number 2007/009012/07, and registered place of business at 1064 16<sup>th</sup> Road, Midrand, Gauteng;
- 12.7 Aerohaven Trading (Pty) Ltd with registration number 2008/014743/07, and registered place of business at 106A 16<sup>th</sup> Road, Midrand, Gauteng;
- 12.8 MK Investments (Pty) Ltd whose registration number and registered place of business is unknown.
- 12.9 Stanlib Bedford Gard with registration number unknown and registered place of business at 17 Melrose Boulevard, Melrose Arch, Gauteng.
- 12.10 The Registrar of Deeds, Bloemfontein, 85 Nelson Mandela Road, Free State;
- 12.11 Any other person who becomes known to the Applicant as having an interest in the property.

#### **ENTRY OF APPEARANCE TO OPPOSE FORFEITURE ORDER**

13. Any person who has an interest in the property and who intends:
  - 13.1 to oppose the application for an order forfeiting the property to the State; and
  - 13.2 to apply for an order excluding his or her interest from the forfeiture order in respect of the property;
  - 13.3 must enter an appearance giving notice of such an intention in terms of Section 39(3) of POCA.

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14. Any person under paragraph 13 above, who intends opposing an order forfeiting the property to the State shall, in terms of Section 39(4) of POCA, deliver a notice to the Applicant of such intention:
- 14.1 in the case of a person upon whom service is effected in terms of POCA, within 14 days after such service;
  - 14.2 in the case of all other persons, within 14 days after the date upon which notice of his order is published in terms of paragraph 11 above.
15. An appearance in terms of paragraph 13 above must, in terms of Section 39(5) include full particulars of the address chosen for the delivery of documents concerning further proceedings in this matter, and must be accompanied by an affidavit setting out:
- 15.1 full particulars of the opposing party's identity;
  - 15.2 the nature of extent of his or her interest in the property; and
  - 15.3 the basis of the defence upon which he or she intends to rely on in opposing the forfeiture application or in seeking to have his interest excluded from the forfeiture order;
  - 15.4 whether he or she admits or denies that the property concerned is an instrumentality of an offence referred to in Schedule 1 of POCA, and the basis for such defence.

#### APPLICATION FOR RECONSIDERATION

16. Any person who is affected by the order may on good cause shown, apply for reconsideration. Such application shall be made:
- 16.1 in instances where the person is able to justify the application on grounds of urgency, upon 3 days notice to the Applicant (or such shorter period as the Court may determine on good cause shown);
  - 16.2 in other instances, upon at least 7 days notice to the Applicant and all other persons identified in this order as being persons who may have an interest in the property;
  - 16.3 not later than 8 days after the person applying for reconsideration becomes aware of the existence of the order, or within such further period as the court may consider reasonable, bearing in mind the underlying principles of POCA.
17. Any person unsuccessfully opposing the Application shall pay the costs occasioned by such opposition.



18 The remaining extent of the farm Krynaauws Lust 275, district Vrede, Free State Province, measuring: 4439, 5122 (four thousand, four hundred and third nine comma five one two two hectares).

**BY ORDER OF THIS COURT**

**COURT REGISTRAR**

**STATE ATTORNEYS**

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**ANNEXURE A TO COURT ORDER DATED 18 JANUARY 2018**

**1. RECIPIENTS OF PAYMENTS**

1. An amount of R40 360 154-98 which was paid to Estina Pty Ltd with registration number 2008/015033/07 with the following Standard Bank of South Africa account numbers 3100664860 and First National Bank account numbers 62505753906 and further transferred into the following bank accounts held individually or by companies mentioned below or in any fund or account held by or on behalf of them.:
  - 1.1 KAMAL VASRAM – an amount of R4 023 721.28 paid into the following FNB bank account: 7906255178080 – FNB 85150687623 and FNB 85188168691;
  - 1.2 CHANDRAMA PRASAD – an amount of R465 264.16 whose bank account details are currently unknown and who is foreign national with passport number E8653817;
  - 1.3 VARGAFIELD (PTY) LTD 2012/101734/07 an amount of R16 469 526.10 and is currently under liquidation whose bank account details presently unknown;
  - 1.4 AEROHAVEN TRADING (PTY) LTD 2008/014743/07 – an amount of R73 277-24 whose bank details are currently unknown;
  - 1.5 MK INVESTMENTS (PTY) LTD – an amount R171 046.20 paid into the following FNB Bank account number 6253664362536643316 and whose registered place of business is currently unknown;
  - 1.6 LINKWAY TRADING (PTY) LTD 2007/009012/07 an amount of R157 320.00 paid into the following NEDBANK account 1469169797;
  - 1.7 STANLIB BEDFORD GARD – a property financing company whose registration and banking details are unknown an amount of R19 000 000-00

The immovable and the movable property mentioned above are referred to as "the property".

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BY ORDER OF THIS COURT



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----- Forwarded message -----

From: **Johannesburg, South Africa** <[joburg@bankofbaroda.com](mailto:joburg@bankofbaroda.com)>  
Date: Wed, May 18, 2016 at 9:43 AM  
Subject: RE: Fixed deposit  
To: Ronica Ragavan <[ronica@oakbay.co.za](mailto:ronica@oakbay.co.za)>

Good Day Ronica,

Interest for 12months is 8% p.a

As per the revised guidelines interest shall not be paid on the premature FDs as it creates Liquidity mismatch.

Kind Regards,

**Gurbax Singh**  
Senior Manager,  
<image001.jpg>  
*Bank of Baroda, Johannesburg*  
*Sandton City East Towers*  
*2<sup>nd</sup> Floor, Atrium on 5<sup>th</sup>*  
*Johannesburg, South Africa*  
*Contact : (011) 784 0715/23*  
*Fax: (011) 784 0759*  
*Email: [joburg@bankofbaroda.com](mailto:joburg@bankofbaroda.com)*

**From:** Ronica Ragavan [<mailto:ronica@oakbay.co.za>]  
**Sent:** 18 May 2016 09:27 AM  
**To:** Johannesburg, South Africa <[joburg@bankofbaroda.com](mailto:joburg@bankofbaroda.com)>  
**Subject:** Fixed deposit

Dear Rauf /Gurbax

We would like to place an amount in FD with Bob for a period of 12 months.

Kindly send us the interest rate and also the change in Premature break of FD . WE need to understand what is the SARB rule.

Regards

Ronica Ragavan  
Group Finance  
+27 83 402 1388 | [ronica@oakbay.co.za](mailto:ronica@oakbay.co.za)

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<image002.jpg>

**Disclaimer:**

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**IN THE HIGH COURT OF SOUTH AFRICA**

**FREE STATE DIVISION, BLOEMFONTEIN**

**Case No: 168/2018**

**In the matter between:**

**THE BANK OF BARODA**

**Applicant**

**THE NATIONAL DIRECTOR OF PUBLIC  
PROSECUTIONS**

**First Respondent**

**NEDBANK LIMITED**

**Second Respondent**

***IN RE: Ex parte application:***

**Case No: 168/2018**

**THE NATIONAL DIRECTOR OF PUBLIC  
PROSECUTIONS**

**Applicant**

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**NOTICE OF MOTION**

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**TAKE NOTICE THAT** the applicant intends to apply to this Court at 10h00 on **Tuesday, 13 February 2018** or so soon thereafter as counsel may be heard, for an order in the following terms:

- 1 The forms and service and ordinary time periods provided for in the rules are dispensed with and this application is dealt with as one of urgency in terms of Rule 6(12); and
- 2 Paragraph 1.11 of Annexure A (in respect of the amount of R30million held by Bank of Baroda paid into the following Nedbank bank account – NEDBANK 1454095326) of the preservation order granted by this Court (per Jordaan AJ) on 18 January 2018 is set aside; and

- 
- 3 The costs of this application are to be paid by any respondent that opposes it.

**TAKE NOTICE FURTHER** that the accompanying affidavit of **MANOJ KUMAR JHA** and accompanying annexures will be used in support of this application.

**TAKE NOTICE FURTHER** that the applicant has appointed the offices of **TABACKS ATTORNEYS, 13 Eton Road, Parktown Johannesburg, 2193 C/O Webbers Attorneys, Webbers Building, 96 Charles Street, Bloemfontein, 9301** as set out below, as the address at which it will accept service of all process in these proceedings.


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TAKE NOTICE FURTHER that if you intend opposing this application, you are required to:

- a) Notify the applicant's attorney in writing and by email [nl@tabacks.com](mailto:nl@tabacks.com) or [lvs@tabacks.com](mailto:lvs@tabacks.com) of your intention to oppose on or before 7 February 2017.
- b) Appoint an address that complies with the requirements of rule 6(5)(b) at which you will accept notice and service of all documents in these proceedings.
- c) File your answering affidavit, if any, in respect of your opposition to this application, on or before 8 February 2018.

KINDLY set the matter down for hearing accordingly.

DATED at BLOEMFONTEIN on this 2<sup>nd</sup> day of February 2018.




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MERVYN TABACK INC.  
Attorneys for the Applicant

13 Eton Road, Parkdown  
Johannesburg, 2193  
REF: BANK2-LV7/L VAN STADEN  
Tel: 011 358 7700  
Fax: 086 771 2628  
Email: [lvs@tabacks.com](mailto:lvs@tabacks.com) /  
[nl@tabacks.com](mailto:nl@tabacks.com)

C/O

WEBBERS ATTORNEYS  
Webbers Building  
96 Charles Street  
Bloemfontein, 9301

**TABACKS**  
ATTORNEYS

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Tel: 051 430 1340  
Fax: 051 430 8987  
REF: Madeleine Koller  
Email: [mk@webberslaw.com](mailto:mk@webberslaw.com)

TO:

**THE STATE ATTORNEY**  
Respondent's Attorneys  
11<sup>th</sup> Floor  
Fedsure Building  
Maitland Street  
BLOEMFONTEIN  
Tel: 051 4004300  
REF: 619/201800014/PCE  
Mr Jaco Engelbrecht  
Email: [jaengelbrecht@justice.gov.za](mailto:jaengelbrecht@justice.gov.za)

AND TO

**THE REGISTRAR OF THE ABOVE  
HONOURABLE COURT:**

HIGH COURT, BLOEMFONTEIN

AND TO

**NEDBANK LIMITED**  
Second Respondent  
3<sup>rd</sup> Floor, Block H, 135 Rivonia Campus  
135 Rivonia Road,  
Sandown, Sandton, 2196

 **Nedbank Limited**  
Reg No. 1951/000000/06  
GROUP LEGAL  
06 FEB 2018  
LITIGATION DEPT  
16 - 99 - 45

*Jaco Engelbrecht*  
15:35 pm

**WITHOUT PREJUDICE**

*mk* 

**IN THE HIGH COURT OF SOUTH AFRICA  
FREE STATE DIVISION, BLOEMFONTEIN**

**Case No: 168/2018**

**In the matter between:**

**THE BANK OF BARODA**

**Applicant**

**THE NATIONAL DIRECTOR OF PUBLIC  
PROSECUTIONS**

**First Respondent**

**NEDBANK LIMITED**

**Second Respondent**

***IN RE: Ex parte application:***

**Case No: 168/2018**

**THE NATIONAL DIRECTOR OF PUBLIC  
PROSECUTIONS**

**Applicant**

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**FOUNDING AFFIDAVIT: APPLICATION FOR RECONSIDERATION**

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I the undersigned

**MANOJ KUMAR JHA**

Do hereby make oath and say:

1. I am the Acting Chief Executive of the Bank of Baroda (South Africa) ("the Bank of Baroda" or "the Bank") and I am duly authorised to depose to this affidavit on its behalf.
2. The facts contained in this affidavit are within my personal knowledge, unless the context indicates otherwise, and are both true and correct.
3. The parties hereto are the Bank of Baroda, the National Director of Public Prosecutions and Nedbank Limited;
  - 3.1 Bank of Baroda is a bank conducting business in South Africa as a branch of a Foreign Institution in terms of the provisions of Section 18A of the Banks Act no 94 of 1990 ("the Banks Act") with its principal place of business in South Africa at Sandton City Twin Towers, East Wing, Second Floor Sandton, Johannesburg;
  - 3.2 The National Director of Public Prosecutions is as described in paragraph 2 of the founding affidavit in the ex parte application ("the NDPP");
  - 3.3 Nedbank Limited is a bank conducting business as such with its principal place of business at 3<sup>rd</sup> Floor, Block H, 135 Rivonia

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Campus, 135 Rivonia Road, Sandown, Sandton 2196.

4. This affidavit is delivered in support of an application for Reconsideration as provided for in paragraph 16 of the Court Order of the above honourable Court dated 18 January 2018 ("the Preservation Order"). A copy of the Preservation Order is attached as Annexure 1.

#### BACKGROUND

5. On 18 January 2018 the NDPP successfully applied, ex parte, to this Court for certain Preservation of Property Orders in terms of section 38(2) of the Prevention of Organised Crime Act no 121/1998 ("POCA"). Although it has been in possession of a copy of the Preservation Order since 23 January 2018, the NDPP's application was only served on the Bank of Baroda on 1 February 2018.
6. The Preservation Order (in so far as it affects Bank of Baroda) provides that an amount of R30 million deposited to the credit of its account no 1454095326 with Nedbank Limited, constitutes "property" which is "the proceeds of crime" and should accordingly be preserved as provided for in terms of Section 38 of POCA.
7. Such "preservation" prohibits Nedbank (as a person with knowledge of the Preservation Order) from dealing in any way with the "property" (i.e. the amount of R30 million deposited to Bank of Baroda's account held with Nedbank).
8. Nedbank, in terms of the Preservation Order, has now frozen an amount of R30 million standing to the credit of Bank of Baroda's account with it

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and has provided a copy of the Preservation Order to Bank of Baroda in order to explain its conduct. I attach as Annexure 2 a copy of an email from Nedbank to Bank of Baroda dated 31 January 2018 confirming this position.

9. It appears that Estina (Pty) Ltd ("Estina"), during 2013, conducted at least three current banking accounts; one at Standard Bank (account number 3100664860) ("STB"); one at First National Bank (account number 62505753906) ("FNB") and one at Bank of Baroda (account number 92020200000255). Funds totalling some R220 million appear to have been deposited to the credit of Estina's FNB and STB accounts. I do not know the source of those deposits, but I do not dispute what the NDPP has said in that regard. Thereafter it appears that Estina transferred all, or the bulk of, those funds to a range of recipients. 15 actual recipients are set out in annexure A to the Preservation Order. Bank of Baroda is identified in clause 1.11 of annexure A to the Preservation Order as an alleged "recipient" of the "property".

#### BANK OF BARODA'S CONTENTIONS IN SUMMARY

10. Bank of Baroda seeks the relief set out in the Notice of Motion to which this affidavit is attached on the following bases:
- 10.1 The Bank is a bank, conducting business as such under the supervision and control of the South African Reserve Bank ("SARB"). It is in that regards in precisely the same position as any other bank, including, in this case, STB, FNB and ABSA. Like those banks, it has received transfers and or deposits for the credit of its customer, Estina. Estina had instructed it to pay away the funds standing to the credit of its account, and the Bank had lawfully and duly executed

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those instructions. All of those funds (save for a negligible balance of some R2000) had been transferred out on the instruction of the customer, Estina. The Bank has not, for more than a year, held any funds to the credit of its customer, Estina. Accordingly, in exactly the same way as the NDPP does not seek to attach R24.5 million of ABSA's funds (should it have transferred out of the account set out in para 1.9 of annexure A to the Preservation Order), in that same way the NDPP could not possibly seek to preserve the funds of Bank of Baroda in excess of the amount available in the customer's account;

- 10.2 Bank of Baroda never received the "property" or any part thereof as the recipient. The NDPP does not suggest that the Bank of Baroda is part of the Estina scheme or a beneficiary of the Estina Dairy Farm Project. That is so because the Bank is and was never part of or a beneficiary of the Estina Dairy Farm Project ;
- 10.3 To the extent that it received "property" as the recipient (which is denied), or on behalf of Estina, the Bank is no longer (and has for some years not been) in possession of such "property";
- 10.4 The amounts now frozen by Nedbank represent the proceeds of bank deposits of innocent third parties who do not have, and never had, any relationship of any kind with Estina, and which do not, on any basis, constitute "property" as defined in the Preservation Order. The effect of the Preservation Order is that the Bank is prevented from dealing with R30million which is the property of innocent third parties.
- 10.5 The Bank of Baroda is in no way implicated in whatever misdeeds Estina and its cohorts may have committed (and the NDPP's founding papers do not suggest that it is). The founding papers and

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annexures thereto (including a very detailed forensic report by Edward Nathan and Sonnenbergs) do not even hint at the possibility however remote or speculative of any complicity by any of the banks, including Bank of Baroda, in any of those activities;

- 10.6 The NDPP has not sought to make out any basis at all for the demand, in respect of the Bank of Baroda, that the amount of R30 million (as opposed as to any other amount) should be preserved. Of course, no such basis exists.

### THE BANK OF BARODA – OPERATIONS IN SOUTH AFRICA

11. The Bank of Baroda is a global bank that operates in 24 countries. It currently has more than 5500 branches of which 106 are situated outside India. The Bank is a listed entity and its largest shareholder, controlling almost 60% of its issued shares, is the Government of India. The Bank was established in 1908. Until 1953 it operated only in India but from December 1953 it started its global expansion. It is now consistently ranked in the top 200 banks globally.
12. The Bank 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). The Bank employs only 16 people across its entire South African operations.
13. The Bank does not operate as a clearing bank in South Africa. Instead, the Bank conducts a correspondent banking relationship, primarily with Nedbank. It also holds accounts with ABSA and FNB.

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14. The difference between clearing and non-clearing banks is important for purposes of this application. Currently approximately 23 banks operate in South Africa as clearing banks, while some 8 banks are non-clearing banks.
15. Clearing banks deal directly with each other via control accounts for each bank administered and maintained by the South African Reserve Bank ("SARB"). The SARB settles (i.e. "clears") on a continuous daily basis, all transactions between clearing banks. Those include, in the final analysis, transactions between customers of the clearing banks.
16. The arrangements set out below as an example, demonstrate the transactional steps taking place in the banking system, as regulated by the SARB. That regulation takes place in terms of control and security measures designed by the Committee on Payment and Settlement Systems. That committee functions under the control of the Bank for International Settlements ("the BIS"). BIS is an international financial institution owned and controlled by the major central banks of the world, (including the SARB) which fosters international co-operation and effectively serves as a global central bank for the national central banks of the world.
17. Accordingly, for example, assume that Mr A has an account with Bank A and Mr X an account with Bank X (both banks being clearing banks) and assume further that Mr A has a credit balance of R1000 in his account at Bank A. Assume then that Mr A transfers R600 to Mr X. The actual transaction consists of an instruction by Mr A to his Bank A, to transfer R600 to Bank X for the credit of the account of Mr X. It will be clear that the primary underlying transaction is that Bank A transfers R600 to Bank

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- X. That transaction is "cleared" at SARB where the account of Bank A is debited and the account of Bank X is credited, with R600. Of course, each Bank makes the necessary entries in its accounts as between it and its client, but the actual payment transaction in fact takes place between the two clearing banks.
18. A non-clearing bank does not participate directly in that clearing process. Instead it operates through a correspondent bank (which is a clearing bank) via a so-called sponsorship arrangement.
19. That means that the non-clearing bank conducts an account with a clearing bank as if it was an ordinary commercial customer of the clearing bank. Bank of Baroda, as a non-clearing bank, conducts such an account with Nedbank via a sponsorship arrangement.
20. In this case, where Estina conducts an account with Bank of Baroda, and it intends making payment to a third party, Estina instructs Bank of Baroda to make the payment to the third party. Bank of Baroda in turn, instructs Nedbank to make such payment to the third party's bank account, say at Bank X, and that payment is then "cleared" between Nedbank (as the payor) and Bank X (as the recipient). Again, Bank of Baroda, Nedbank and Bank X will all make the necessary internal accounting entries correctly to reflect the state of the accounts maintained by each customer of each bank.
21. Precisely the reverse position applies when the third party intends making payment to a customer of Bank of Baroda. The third party instructs its bank to make payment to the customer of Bank of Baroda for the credit of an account at Nedbank. That account with Nedbank is in fact Bank of Baroda's account with Nedbank. Nedbank notifies Bank of Baroda that

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its account has been credited, and supplies a particular reference number. That reference number identifies the Bank of Baroda's customer and Bank of Baroda then in turn credits, in its internal records, the account of that particular customer with the amount of that transfer.

22. What will be clear is that Bank of Baroda never receives the proceeds of the transfer for its own benefit or credit – like any other bank it receives the credit exclusively for the benefit for its customer.
23. It is finally important to distinguish between "the business of a bank" on the one hand and "the clearing functions of banks" on the other. Most importantly, it is not required of a bank, in order to conduct the business of a bank, to be a clearing bank. Indeed, virtually every jurisdiction globally has a varying number of non-clearing banks which conducts business via sponsorship arrangements, in order for such non-clearing bank to obtain clearance of its transactions. Against that, the business of a bank consists fundamentally of canvassing the general public for deposits in order for the bank (whether clearing or non-clearing) to make loans (arising from such deposits) to the public at a premium to the deposit interest rate payable to the depositors. This position appears expressly from the definition of "the business of a bank" in section 1 of the Banks Act.

#### THE ESTINA DEPOSITS

24. Against this background, it will be clear that when Estina transferred (as per paragraph 1.9 of annexure A to the Preservation Order) R24.5 million to Oakbay, the funds were not transferred to ABSA as the recipient and for its own benefit. ABSA was never the intended beneficial recipient of that deposit. Prior to the transfer the funds were held by STB/FNB for the

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credit of Estina and not for their own benefit. When the amount of R24.5million was thereafter transferred to the Oakbay account held with ABSA, ABSA received the funds as part of the clearing function but, again, not for its own benefit or credit. It merely received those funds for, and on behalf of, and for the credit and use of Oakbay.

25. It appears that the NDPP clearly understood this. That is why it did not seek to attach R24.5 million of ABSA's funds, as if ABSA had received the "property". Instead, and correctly, the NPA sought to attach the amount of R24.5million standing to the credit of Oakbay – to the extent that the funds still remain in the Oakbay account. Of course, to the extent that Oakbay may have utilised or diminished that amount in the intervening period, there is no suggestion that ABSA has to replenish the Oakbay account.
26. Accordingly, and correctly, the NDPP did not seek to attach ABSA's own funds, should Oakbay have diminished or depleted the funds arising from that original deposit with ABSA.
27. Bank of Baroda is in exactly the same position as ABSA. The amount of R30 million was never transferred to Bank of Baroda as if it was intended to be Bank of Baroda's funds available for use by it for its own purposes as it deemed fit. Instead, the funds were transferred to the credit of Bank of Baroda's customer, Estina.
28. Put differently, during 2013 Estina conducted a current account with Bank of Baroda, at the same time as it conducted accounts with STB and FNB. After the transfer of the amount of R220 million to its STB and FNB accounts, Estina transferred the bulk of those funds out of its STB and FNB accounts to third parties. In respect of the R30million, Estina

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transferred that sum (indeed amounts in excess thereof) to its account at Bank of Baroda, via the Bank's account with Nedbank.

29. In the circumstances Bank of Baroda never received, nor was it, itself, ever in possession of the "property" as the recipient (in exactly the same way as ABSA was never "in possession" of the R24,5 million aforesaid). What, in fact, Bank of Baroda possessed at the time was a liability – a debt it owed to Estina in the sum of R30 million, matched with a corresponding asset being a claim against Nedbank for R30 million. Accordingly, Bank of Baroda was obliged to pay or transfer funds in terms of such payment instructions as Estina may have issued to Bank of Baroda. Bank of Baroda would in turn issue corresponding instructions to Nedbank. It is also clear that executing such instructions would reduce the debtor/creditor amounts to which I have referred to above.
30. I repeat that during 2013, Estina conducted an ordinary current account with Bank of Baroda. A copy of the account opening documentation is attached as Annexure 3.
31. As at 31 August 2015, Bank of Baroda only held a nominal deposit of R2 218.12 to the credit of Estina and it no longer had any relationship with or access to the "property" dealt with in the Preservation Order. The Estina account with Bank of Baroda became dormant from January 2016. From that date onwards, Bank of Baroda did not execute any transaction of any kind for or on behalf of Estina. As at 29 December 2017 the total amount held by the Bank of Baroda to the credit of Estina is R2 300.50. I attach as Annexure 4 a copy of Estina's statement of account with the Bank of Baroda for the period, from inception, on 31 July 2012 until 29 December 2017. This account reflects the totality of the movement of

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funds in Estina's account with Bank of Baroda.

**THE FUNDS IN BANK OF BARODA'S NEDBANK ACCOUNT**

32. I respectfully refer to what I have said at inception regarding Bank of Baroda's business in South Africa which it conducts as a branch of a Foreign Institution on the written authority of the Registrar of Banks in terms of Section 18A of the Banks Act, and to the sponsorship relationship between Bank of Baroda and Nedbank.
33. I repeat that the fundamental basis of the business of a bank is to canvass the general public for deposits. Bank of Baroda, in the course of conducting the business of a bank, canvasses the general public for deposits which it applies as provided for and as regulated by sub-para (c) of the definition of "the business of a bank" in Section 1(1) of the Banks Act.
34. As at 26 January 2018 the general public had made deposits aggregating some R2.4 billion with Bank of Baroda. The Bank has applied the proceeds of those deposits by (a) granting loans to members of the public who meet the bank's credit criteria and (b) holding cash deposits (mostly with Nedbank) on the best available terms as to interest rate and repayment periods.
35. Accordingly, the cash deposits currently held by Nedbank for the credit of Bank of Baroda constitute the deposits made with Bank of Baroda by its customers, being third party members of the public. Most importantly, the bulk of the aggregate deposits aforesaid arise from deposits of some R1.9 billion made with the Bank of Baroda to the credit of the Optimum

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**Mine and Koorfontein Mine Rehabilitation Funds:**

- 35.1 Those funds were previously under the control of two separate trusts which had been established for the purposes of holding those funds on deposit, to fund the eventual rehabilitation of the Optimum and Koorfontein Coal mines, at the time those mines will close down;
- 35.2 On 21 September 2017 the Organisation Undoing Tax Abuse (OUTA) successfully applied for an interim order in the High Court of South Africa, Gauteng Division, Pretoria under case number 65616/17 for an order interdicting the trustees of those trusts from dealing with those funds in any way and directing the Bank of Baroda not to execute any payment instructions in respect of those funds; and further directing that the Bank of Baroda should not allow any dealing by any third party, with the funds standing to the credit of the accounts of the Optimum and Koorfontein Rehabilitation trusts;
- 35.3 In support of the aforesaid I attach a copy of the Court Order issued by the High Court as **Annexure 5** ("the Outa Order"). We understand the OUTA matter was originally set down to heard, for a final order on 7 and 8 December 2017 but pursuant to a directive issued by the Deputy Judge President, Ledwaba the will be finally heard on 31 May 2018. A copy of the aforesaid notice of set down is attached as **Annexure 6**;
- 35.4 In compliance with the Outa Order, the Bank of Baroda has not allowed any depletion of the amounts standing to the credit of those Rehabilitation trusts. It has maintained the bulk of those deposits in the form of fixed deposits in its own name, with Nedbank. The remainder of those deposits are maintained by the Bank of Baroda across a range of other assets and investments by it, as provided for in terms of the definition of the business of a bank as per Section 1 of the Banks Act.

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36. In pursuance of the Preservation Order, Nedbank has now separated, and frozen, R30 million of those funds (held by it for the credit of Bank of Baroda) and which Bank of Baroda in turn holds for the credit of third party members of the public. I hasten to reiterate that absolutely none of those funds, originate from, are due to, or are held on behalf of Estina or have any connection with the "property". In simple terms, Nedbank has frozen funds representing the deposits of other innocent third party depositors including funds which are to be maintained sacrosanct in terms of the Outa Order.

#### THE FOUNDING AFFIDAVIT IN THE EX-PARTE APPLICATION

37. I have, at the date of 31 January 2018, received copies (without any annexures) of the founding affidavit (deposed to by Mr Mottalekhotso Knorx Molllele) in the ex parte application, together with two supporting affidavits by Messrs Samson John Schalkwyk and Nkosiphendule Mradla respectively from the State Attorney. No formal service of the ex parte application on the Bank has yet been effected by the time this affidavit was prepared in its final form. The ex-parte application, consisting of two lever arch files, was formally served on the Bank by the Sherriff on 1 February 2018. I have managed to go through that application.
38. I am advised that for purposes hereof it is not necessary to produce an ad seriatim response to those affidavits, save to say that the Bank of Baroda takes no issue with the correctness of the investigations, the contentions or conclusions, set out in those affidavits other than as set out below.
39. However, I record that I do not understand the calculations by Messrs. Molllele and Mradla, in so far as it concerns the Bank of Baroda. Mr



Mollelle contends (paragraph 11.1) that some R220.2 million, (that being "the property" had been deposited to the credit of the Estina accounts at STB and FNB. He then avers that the payments set out in paragraph 11.3 were immediately paid out of those accounts. It will be clear that the aggregate of the payments set out in paragraph 11.3.1 – 11.3.10 (mistakenly numbered "11.4.10"), total R329.8million. It is not clear to me how this discrepancy arises.

40. Paragraphs 17 to 148 of Mr Mradla's affidavit analyse the movement of funds through the Estina Standard Bank account. He records that a total of R143.95 million was transferred to that account by way of the 5 identified tranches [R34.95m in paragraph 18; R30 million in para 26; R19.05 million in para 30; R29.95m in para 39 and R30m in para 56]. I note that this figure is summarised by Mr Mollelle in paragraph 11.2.1 of the founding affidavit as being R113.95 million. It is not clear to me how the difference of R30 million is accounted for.
41. Mr Mradla then records that the following amounts, all forming part of the amount of R143.95 million aforesaid, was transferred to Bank of Baroda.

PAYMENT DATE	AMOUNT	MRADLA AFFIDAVIT PARAGRAPH
19/04/2013	R10 million	21
20/04/2013	R24.95 million	23
26/04/2013	R30 million	26
28/04/2013	R30 million (6 x 5 million)	28

*[Handwritten initials]*

*[Handwritten signature]*

20/12/2013	R10 million (2 x 5 million)	43
21/12/2013	R15 million	48
30/07/2013	R5.5 million	64
18/08/2014	R8 million	94
19/08/2014	R7 million	95
<b>TOTAL</b>	<b>R140.45 million</b>	

42. It appears that the reference to the Bank of Baroda's account ("Nedbank 1455095326") in paragraph 26 must be incorrect and that it was not intended to be alleged that Bank of Baroda received that deposit. If so, that would reduce the total deposits to the Estina account held at Bank of Baroda to R110.45 million which would then coincide with paragraph 11.3.3 of the founding affidavit of Mr Mollele.
43. Against that, it is alleged that Bank of Baroda had disbursed the following payments, all forming part of "the property", at the instance and on the instructions of Estina;

PAYMENT DATE	AMOUNT	MRADLA AFFIDAVIT PARAGRAPH REFERNCE
22/04/2013	R18 million	25

*[Handwritten signature]*

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22/04/2013	R4.5million	25
29/04/2013	R30 million	29
20/12/2013	R10 million	44
21/12/2013	R60 million	49
30/06/2014	R9.2million	66
21/08/2014	R25.5million	96
<b>TOTAL AMOUNT</b>	<b>R157million</b>	

44. In either event (i.e. whether the total deposits made to the credit of the Estina bank account held at Bank of Baroda totalled either R140.45 million or R110.45 million), the analysis can clearly not be correct because obviously it would be impossible for more money to have be transferred out of its Bank of Baroda accounts then what was credited to those accounts in the first place.
45. The Bank of Baroda did not have any interaction with the Estina FNB account and none is alleged, and accordingly I do not deal with those allegations.
46. The correct position appears from the actual statements of accounts which Bank of Baroda itself maintained in respect of the account Estina maintained with it. A copy of Estina Bank of Baroda statement of account is attached as Annexure 4.
47. It will be clear that the total component of the "property" initially transferred by Estina STB account to the Bank of Baroda account with

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Nedbank was:

- 47.1 Held by Nedbank for the credit of the Bank of Baroda;
- 47.2 In turn held by the Bank of Baroda for the credit of Estina;
- 47.3 Subsequently (but prior to January 2016) transferred out of its account by Estina to a variety of other recipients.

48. In the circumstances I respectfully submit that it is obvious, even on the applicant's own version, that Bank of Baroda does not (and for some years did not) have possession of any of the "property". The funds currently standing to the credit of Bank of Baroda in its Nedbank account represent deposits made with the Bank of Baroda its customer base that has nothing whatsoever to do with the earlier Estina deposits or the "property".

49. The only transfer of R30 million (in so far as Bank of Baroda is involved) appears from paragraph 28 of Mradla's affidavit. That receipt is expressly recorded on the Estina account with Bank of Baroda on 29 April 2013 (the period between the transfers out of the Estina STB account and in to the Estina Bank of Baroda account being a Saturday and Sunday respectively).

50. That very deposit was, on the instructions of Estina to Bank of Baroda transferred back to the Estina STB account on 4 September 2013. That "withdrawal entry" is also clearly identified in Annexure 7.

51. Two copies of extracts of Bank of Baroda's Nedbank statement are attached as Annexure 7.1 and 7.2. What will be seen from Annexure 7.1 is the credit of 6 tranches of R5 million (totalling R30 million) coming in to the account on 26 April 2013 with the reference "ESTINA BANK OF

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BARODA". What will be seen from Annexure 7.2 is the debit of R30 million flowing out of the account with the reference "ESTINA PTY LTD". This can be cross-referenced to Estina's Bank of Baroda statement of account, Annexure 7.

52. It is significant that Mradla reviewed deposits/transfer to the credit of the Estina STB account (other than those emanating from the Department of Agricultural). In paragraph 41 Mradla covers the period from 3 May 2013 to 20 December 2013 and simply records that R119million was so deposited to the credit of Estina's STB account. An analysis of that aggregate amount of R119 will reflect the return of the R30million from Estina Bank of Baroda account.
53. I should also say that it is not clear to me how the deponents arrived at the conclusion, in respect of the Bank of Baroda that R30 million is the amount to be preserved.

#### ADDITIONAL PROCEEDINGS

54. It is helpful to summarize the various proceedings and investigations currently underway in respect of the so-called Gupta controlled entities and the participation therein by the Bank of Baroda and I do so below:
- 54.1 Firstly, Bank of Baroda during mid-2017 advised all Gupta-controlled entities that it was no longer prepared to act as a banker to those entities and accordingly instructed them that it intends closing their accounts and terminate the provision of banking services. Those entities applied urgently for what became known as "interim-interim" relief to Interdict Bank of Baroda from closing the accounts and directing it to continue to provide banking services. The Bank resisted the application successfully before Mr Justice Fabricius in the High Court of North Gauteng. I attach a copy of the order dismissing the Gupta's urgent "interim-interim" application as

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**Annexure 8.**

54.2 Immediately thereafter the Gupta applicants obtained permission from the Deputy Judge President of the High Court of North Gauteng, Mr Justice Ledwaba, to institute proceedings for the same relief on an interim basis. That application was heard by Makgoka J. The Bank again opposed the relief, but unsuccessfully so. Makgoka J ordered the Bank to continue to provide banking services and to maintain the accounts of the Gupta controlled entities. The interim order is attached as **Annexure 9**. This interim order will remain of force of effect until the matter is finally heard and a final order is either granted or dismissed.

54.3 The Bank of Baroda is doing everything in its power to expedite that final hearing but a date for the final hearing has not yet been obtained.

55. The South African Police has embarked on an investigation in respect of fraud, corruption and or money laundering under case number SandtonCAS507/09/2017 and which has delivered to me two subpoenas required the production of a vast range of documentation. I attach as **Annexures 10.1 and 10.2** copies of the subpoenas together with a covering letter from the Bank's legal advisors, recording the delivery of 17 sealed files of documents extracted from the Bank's records as **Annexure 10.3**. I further attach a list of the entities and persons in respect of which information was provided to the SAPS as **Annexure 10.4**.

56. In addition the Bank has been subjected to two detailed and time consuming audits inspection by firstly Deloitte, which was completed during during 2017 and on the instruction of the SARB.

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PricewaterhouseCoopers ("PWC") has been appointed again during 2017 and on the instructions of the SARB. PWC is instructed to review the Bank's processes, governance proceedings and its entire internal accounting and operational systems and controls. The mandate further includes a forensic investigation into transactions relating to certain Gupta controlled entities. Both Deloitte and PWC have been at the Bank's offices for long periods of time and the Bank has fully co-operated at all times. At the time of deposing to this affidavit the second audit is still ongoing.

57. In addition the Bank has received request by the Helen Suzman Foundation and Freedom Under Law ("the requester") for a vast range of documentation relating to the Gupta controlled entities, in terms of the Promotion of Access to Information Act no 2 of 2000 ("PAIA"). The Bank has decided to grant access to those records to the requester but, as prescribed by PAIA it is currently following the procedures as set out in the Act.
58. Finally, and referring to the Outa Order above, the Bank has through-out adopted the attitude that it would not intervene or object to that application and undertook to abide and to fully comply with whatever order the Court may issue. This it has done.
59. I respectfully submit that it is clear that the Bank at every opportunity co-operated fully and immediately with every law enforcement agency, and or administrative and or supervisory bodies, in actions and or investigations into its own affairs in so far it relates to the entities as set out in the ex parte application and other Gupta related entities.
60. The Bank will continue to act in exactly the same fashion and will assist the NDPP in every possible manner.
61. I understand that the object of the Preservation Order is to preserve as

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much as possible of the "property" and that all persons with knowledge thereof are prohibited from disposing of, further encumbering, dissipating, interfering with or diminish the value of or dealing in any other manner with "property".

62. In this regard the Bank has a duty to disclose that the following persons and entities identified in Annexure A to the Preservation Order hold accounts with Bank of Baroda: No 1.1 (Kamal Vasram); 1.2 (Chandrama Prasad) 1.4 (Atul Kumar Gupta); 1.5 (Aerohaven Trading (Pty) Ltd); 1.7 (Uxolo Diamond Cutting Works (Pty) Ltd); 1.8 (Oakbay Investments (Pty) Ltd); 1.10 (Islandsite Investments 180 (Pty) Ltd); 1.12 (Westdawn Investments (Pty) Ltd) 1.13 (Annex Distribution (Pty) Ltd).
63. I do not know whether the aforesaid entities are the beneficiaries or recipients of the proceeds of unlawful activities. However, the Bank tenders to assist the NDPP in accordance with what is lawfully required from the Bank in relation to these accounts.

#### SPECIFIC COMMENTS ON THE FOUNDING AFFIDAVIT

64. I make the following comments on the affidavit by Mr Molllele:

65. Ad paragraph 16.3

- 65.1 I do not understand either the contents or the context hereof. I refer to Annexure 7 which confirms that all of the funds transferred by Estina from its STB account to the credit of its account at Bank of Baroda totalling R110.5 million were deposited to the credit of the Estina account with Bank of Baroda and subsequently transferred to third parties in full.

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**66. Ad paragraph 16.4 and 16.5**

- 66.1 The contents hereof are incorrect. I have set out above the history of the application by the Gupta controlled entities (not by the Bank of Baroda) for an order interdicting the closure of those accounts. No "raising suspicion" by FICA and or other commercial banks about "the legitimacy of the said transaction" played any part at all in that litigation.
- 66.2 The matter was not scheduled and was in fact not heard on 7 December 2017. I refer to what I have said above regarding this application.
- 66.3 The likelihood of the funds being "dissipated" is of course not possible – the funds have all been transferred out of Estina's account, on the instructions of Estina, by January 2016

**URGENT RELIEF**

67. I respectfully submit that the matter is one of urgency and particularly as provided for in terms of paragraph 16 of the Preservation Order. The Bank will comply with the time limits stipulated in paragraph 16.
68. Most importantly though, it is required that the amount now frozen by Nedbank be "unfrozen" and restored to the disposal of the Bank of the Baroda urgently;
- 68.1 In order to continue to comply with the Outa Order the Bank may not permit any encumbrance or the like in respect of the rehabilitation funds with the Bank of Baroda. The attachment and preservation of the sum of R30million by Nedbank constitutes such "encumbrance" and effectively puts Bank of Baroda in contempt of the Outa Order ;

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68.2 Secondly, the total deposits from customers (including the rehabilitation funds held by the Bank of Baroda aggregate some R2.4 billion. Those deposits are a liability on the part of the bank to its customers. The Bank must hold assets to the value equal to the deposits in order to satisfy solvency requirements imposed by the SARB. The effective removal of R30million from the Bank's total assets may imperil the Bank's ability to satisfy its solvency requirements which of course would have catastrophic consequences not only for the Bank for its entire customer base. In order to ensure that the Bank continues to be able to execute all such payment and or transfer instructions as may be given to it by its depositor customers, it absolutely requires free and unrestricted access to the funds it holds on deposit with Nedbank;

68.3 I point out that if the NDPP had sought to attach and to preserve only funds standing to the credit of the Bank's customers that would have no impact on the Bank's financial solvency and liquidity requirements. That would be so because, in the accounts of the Bank, an asset (being the cash deposit separated and preserved) would be removed but would be matched exactly by the reduction of a liability (being the liability the Bank owes to that customer);

**WHEREFOR I RESPECTFULLY PRAY FOR AN ORDER AS SET OUT IN THE NOTICE OF MOTION TO WHICH THIS AFFIDAVIT IS ATTACHED.**

  
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SOUTH AFRICAN POLICE SERVICE  
STATION COMMANDER  
02-02-2018  
CLIENT SERVICE CENTRE  
PARKVIEW  
SOUTH AFRICAN POLICE SERVICE


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MANOJ KUMAR JHA

The Deponent has acknowledged that he knows and understands the contents of this affidavit, which was signed and sworn to or solemnly affirmed before me at Parkview on 02-02-2018, the regulations contained in Government Notice No. R1258 of 21 July 1972, as amended, and Government Notice No. R1648 of 19 August 1977, as amended, having been complied with.

SOUTH AFRICAN POLICE SERVICE  
CLIENT SERVICE CENTRE  
PARKVIEW  
02-02-2018  
STATION COMMANDER  
SOUTH AFRICAN POLICE SERVICE

  
R. J. DUNDERK  
COMMISSIONER OF OATHS  
75 Dunderk Avenue  
Parkview SRS  
01 067 6000

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**IN THE HIGH COURT OF SOUTH AFRICA**

**FREE STATE DIVISION, BLOEMFONTEIN**

**Case No: 168/2018**

**In the matter between:**

**THE BANK OF BARODA**

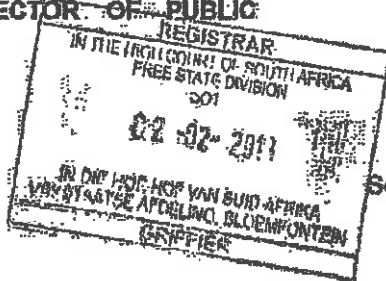
**Applicant**

**THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS**

**First Respondent**

**NEDBANK LIMITED**

**Second Respondent**



**IN RE: Ex parte application:**

**Case No: 168/2018**

**THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS**

**Applicant:**

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**INDEX TO URGENT APPLICATION FOR RECONSIDERATION**

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DATED AT JOHANNESBURG ON THIS DAY 2 February 2018

**MERVIN TABACK INC.**  
Attorneys for the Applicant

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C/O

**TABACKS**  
ATTORNEYS

**WEBBERS ATTORNEYS**

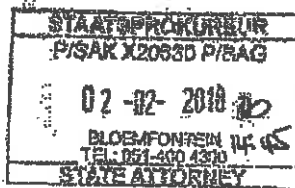
Webbers Building  
98 Charles Street  
Bloemfontein, 9301

Tel: 051 430 1340  
Fax: 051 430 8987  
REF: Madeleine Koller  
Email: [mp@webberslaw.com](mailto:mp@webberslaw.com)

TO:

**THE STATE ATTORNEY**

Respondent's Attorneys  
11<sup>th</sup> Floor  
Fedure Building  
Mailland Street  
BLOEMFONTEIN  
Tel: 051 4004300  
REF: 619/201800014/PCE  
Mr Jaco Engelbrecht  
Email: [jaengelbrecht@justice.gov.za](mailto:jaengelbrecht@justice.gov.za)



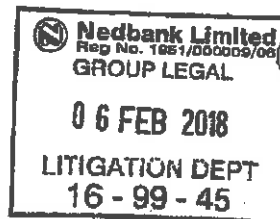
AND TO

THE REGISTRAR OF THE ABOVE  
HONOURABLE COURT:

HIGH COURT, BLOEMFONTEIN

AND TO:

**NED BANK LIMITED**  
Second Respondent  
3<sup>rd</sup> Floor, Block H,  
135 Rivonia Campus  
135 Rivonia Road  
Sandown, Sandton, 2196



*Road Jones*  
16:35 pm

**WITHOUT PREJUDICE**

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Transactions Inquiry

Transactions Inquiry



A/c. No	92020300000585	CCY / SOL ID	ZAR / 9202
Account Name	OPTIMUM MINE REHABILITATION TRUST		
Balance	461,000,000.00 Cr		
Opening Bal.	461,000,000.00 Cr	Closing Bal.	461,000,000.00 Cr
Available Amt.	461,000,000.00 Cr	Eff. Available Amt	461,000,000.00 Cr A/c. Status
Cust. Status			
APY	0.000000	APYE	0.000000

No Records Fetched

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Transactions Inquiry



A/c. No	92020300000653	CCY / SOL ID	ZAR / 9202
Account Name	OPTIMUM MINE REHABILITATION TRUST		
Balance	500,000,000.00 Cr		
Opening Bal.	500,000,000.00 Cr	Closing Bal.	500,000,000.00 Cr
Available Amt.	500,000,000.00 Cr	Eff. Available Amt	500,000,000.00 Cr A/c. Status
Cust. Status			
APY	0.000000	APYE	0.000000

No Records Fetched

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Transactions Inquiry



A/c. No	9202030000654	CCY / SOL ID	ZAR / 9202
Account Name	OPTIMUM NINE REHABILITATION TRUST		
Balance	500,000,000.00 Cr		
Opening Bal.	500,000,000.00 Cr	Closing Bal.	500,000,000.00 Cr
Available Amt.	500,000,000.00 Cr	Eff. Available Amt.	500,000,000.00 Cr A/c. Status
Cust. Status			
APY	0.000000	APYE	0.000000

No Records Fetched

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BRANCH DETAILS		CUSTOMER DETAILS	
NAME	: JOHANNESBURG	NAME	: OPTIMUM MINE REHABILITATION TRUST
ADDRESS	: 2ND FLOOR, ATRIUM ON STR SANDTON CITY EAST TOWERS JOHANNESBURG JOHANNESBURG, SOUTH AFRICA	ADDRESS	: 144 KATHERINE STREET JOHANNESBURG JOHANNESBURG GAUTENG 2146
PHONE	: 27 11 7840715	PHONE	: 0114307640
FAX	: 7840759	A/C NO	: 92020200000524 CURRENCY: ZAR

Statement of A/C from 01-05-2017 to 31-05-2017

DATE	DETAILS	DEBIT	CREDIT	BALANCE
	OPENING BALANCE :		9,557,161.52	9,557,161.52 Cr
31-05-2017	92020200000524: Int.Pd:01-05-2017 to 31-05-2017		32,468.24	9,589,649.76 Cr

Unless the constituent notifies the bank immediately of any discrepancy found by him/her in this statement of Account, it will be taken that he/she has found the account correct.

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BRANCH DETAILS		CUSTOMER DETAILS	
NAME	: JOHANNESBURG	NAME	: OPTIMUM HIRE REHABILITATION TRUST
ADDRESS	: 2ND FLOOR, ATRIUM ON 5TH SANDTON CITY EAST TOWERS JOHANNESBURG JOHANNESBURG, SOUTH AFRICA	ADDRESS	: 144 KATHERINE STREET JOHANNESBURG JOHANNESBURG Gauteng 2146
PHONE	: 27 11 7840715	PHONE	: 0114307640
FAX	: 7840759	A/C NO	: 92020200000524
		CURRENCY:	: ZAR

Statement of A/C from 01-04-2017 to 30-04-2017

DATE	DETAILS	DEBIT	CREDIT	BALANCE
	OPENING BALANCE		9,525,863.61	9,525,863.61 Cr
28-04-2017	92020200000524: Int. Fd: 01-04-2017 to 30-04-2017		31,317.91	9,557,181.52 Cr

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BRANCH DETAILS		CUSTOMER DETAILS	
NAME	: JOHANNESBURG	NAME	: OPTIMUM MILE REDEMPTION TRUST
ADDRESS	: 2ND FLOOR, ATRIUM ON 5TH SANDTON CITY EAST TOWERS JOHANNESBURG JOHANNESBURG, SOUTH AFRICA	ADDRESS	: 114 KATHERINE STREET JOHANNESBURG JOHANNESBURG GAYLERS 2144
PHONE	: 27 11 7848719	PHONE	: 0114387640
FAX	: 7848759	A/C NO	: 9203020000524 CURRENCY: ZAR

Statement of A/C from 01-03-2017 to 31-03-2017

DATE	DETAILS	DEBIT	CREDIT	BALANCE
31-03-2017	OPENING BALANCE : 8802020000524: Int. Pd: 01-03-2017 to 31-03-2017		9,493,611.95 Cr	9,493,611.95 Cr
			32,252.36	9,525,864.31 Cr

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BRANCH DETAILS		CUSTOMER DETAILS	
NAME	: JOHANNESBURG	NAME	: OPTIMUM NINE REHABILITATION TRUST
ADDRESS	: 2ND FLOOR, ATRIUM ON 5TH SANDTON CITY EAST TOWERS JOHANNESBURG JOHANNESBURG, SOUTH AFRICA	ADDRESS	: 144 KATHERINE STREET JOHANNESBURG JOHANNESBURG Gauteng 2146
PHONE	: 27 11 7846715	PHONE	: 0114307540
FAX	: 7840759	A/C NO	: 92820200000524 CURRENCY: ZAR

Statement of A/C from 01-02-2017 to 28-02-2017

DATE	DETAILS	DEBIT	CREDIT	BALANCE
28-02-2017	OPENING BALANCE : 92820200000524; Int. Pd: 01-02-2017 to: 28-02-2017		9,464,169.37	9,464,169.36 ZAR
		29,441.97		9,434,727.39 ZAR

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BRANCH DETAILS		CUSTOMER DETAILS	
NAME	: JOHANNESBURG	NAME	: OPTIMUM MINE REHABILITATION TRUST
ADDRESS	: 2ND FLOOR, ATRION ON 5TH SANDYTON CITY EAST TOWERS JOHANNESBURG JOHANNESBURG, SOUTH AFRICA	ADDRESS	: 144 KATHERINE STREET JOHANNESBURG JOHANNESBURG GAUTENG 2146
PHONE	: 27 11 7840715	PHONE	: 0114307640
FAX	: 7840759	A/C NO	: 92020200000524 CURRENCY: ZAR

Statement of A/C from 01-01-2017 to 31-01-2017

DATE	DETAILS	DEBIT	CREDIT	BALANCE
	OPENING BALANCE :		9,432,524.64	9,432,524.64 Cr
31-01-2017	92020200000524: Int. Rd: 01-01-2017 to 31-01-2017		32,044.74	9,464,569.38 Cr

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BRANCH DETAILS		CUSTOMER DETAILS	
NAME	: JOHANNESBURG	NAME	: OPTIMIX MINE REHABILITATION TRUST
ADDRESS	: 2ND FLOOR, AERIUM ON 5TH RAMDTON CITY EAST TOWERS JOHANNESBURG JOHANNESBURG, SOUTH AFRICA	ADDRESS	: 144 KATHERINE STREET JOHANNESBURG JOHANNESBURG GAUTENG 2146
PHONE	: 27 11 7840715	PHONE	: 0114307640
FAX	: 7840759	A/C NO	: 9202020000524 CURRENCY: ZAR

Statement of A/C from 01-12-2016 to 31-12-2016

DATE	DETAILS	DEBIT	CREDIT	SALANCE
	OPENING BALANCE :		9,400,675.36	9,400,675.36 Cr
30-12-2016	9202020000524: Int. Pd: 01-12-2016 to 31-12-2016		31,849.28	9,432,524.64 Cr

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Transactions Inquiry



A/c. No            9202020000524      CCY / SOL ID            ZAR / 9202  
 Account Name      OPTIMUM MINE REHABILITATION TRUST  
 Balance            9,369,954.19 Cr  
 Opening Bal.       0.00 Cr                    Closing Bal.            9,369,954.19 Cr  
 Available Amt.     9,369,954.19 Cr        Eff. Available Amt     9,369,954.19 Cr      A/c. Status      A  
 Cust. Status  
 APY                 4.000000                APYE                    3.557198

Tran. Date	Value Date	Chq. No.	Withdrawl	Deposit	Balance	N
31-10-2016	31-10-2016			31,638.01 Cr	9,369,954.19 Cr	92020200C 10-2016 to
30-09-2016	30-09-2016			30,517.37 Cr	9,338,316.18 Cr	92020200C 09-2016 to
31-08-2016	31-08-2016			31,428.14 Cr	9,307,798.81 Cr	92020200C 08-2016 to
29-07-2016	31-07-2016			31,322.02 Cr	9,276,370.67 Cr	92020200C 07-2016 to
30-06-2016	30-06-2016			328,115.02 Cr	9,245,048.65 Cr	92020200C 06-2016 to
24-06-2016	24-06-2016		461,000,000.00 Dr		8,916,933.63 Cr	Dr. Tran f 225789
24-06-2016	24-06-2016		500,000,000.00 Dr		469,916,933.63 Cr	Dr. Tran f 225788
24-06-2016	24-06-2016		500,000,000.00 Dr		969,916,933.63 Cr	Dr. Tran f 225787
22-06-2016	22-06-2016			1,469,916,933.63 Cr	1,469,916,933.63 Cr	CREDIT II

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BRANCH DETAILS		CUSTOMER DETAILS	
NAME	: JOHANNESBURG	NAME	: OPTIMUM MINE REHABILITATION TRUST
ADDRESS	: 2ND FLOOR, AKBAYON ON 5TH SANDGON CITY EAST TOWERS JOHANNESBURG JOHANNESBURG, SOUTH AFRICA	ADDRESS	: 144 KATHERINE STREET JOHANNESBURG JOHANNESBURG GAYTERS 2146
PHONE	: 27 11 7840715	PHONE	: 0114307640
FAX	: 7840759	A/C NO	: 92020200000524 CURRENCY: ZAR

Statement of A/C from 01-02-2018 to 28-02-2018

DATE	DETAILS	DEBIT	CREDIT	BALANCE
	OPENING BALANCE :		1,622,174,186.19	1,622,174,186.19 Cr
28-02-2018	92020200000524: Int. Pd: 01-02-2018 to 28-02-2018		2,577,701.48	1,624,751,887.63 Cr

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BRANCH DETAILS		CUSTOMER DETAILS	
NAME	: JOHANNESBURG	NAME	: OPTIMUM MINE REHABILITATION TRUST
ADDRESS	: 2ND FLOOR, ATRION OF 5TH SANDTON CITY EAST TOWERS JOHANNESBURG JOHANNESBURG, SOUTH AFRICA	ADDRESS	: 144 KATHERINE STREET JOHANNESBURG JOHANNESBURG SHIFTERS 2146
PHONE	: 27 11 7840715	PHONE	: 0114307640
FAX	: 7840759	A/C NO	: 92020200000524 CURRENCY: ZAR

Statement of A/C from 01-01-2018 to 31-01-2018

DATE	DETAILS	DEBIT	CREDIT	BALANCE
	OPENING BALANCE :		1,616,681,897.00	1,616,681,897.00 Cr
31-01-2018	92020200000524; Int. Pd: 01-01-2018 to 31-01-2018		3,492,289.19	1,622,174,186.19 Cr

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BRANCH DETAILS		CUSTOMER DETAILS	
NAME	: JOHANNESBURG	NAME	: OPTIMUM MINE REHABILITATION TRUST
ADDRESS	: 2ND FLOOR, ATRIUM ON 5TH RANDON CITY EAST TOWERS JOHANNESBURG JOHANNESBURG, SOUTH AFRICA	ADDRESS	: 144 KATHERINE STREET JOHANNESBURG JOHANNESBURG GAUTENG 2146
PHONE	: 27 11 7840715	PHONE	: 0114307640
FAX	: 7840759	A/C NO	: 9202020000524 CURRENCY: ZAR

Statement of A/C from 01-12-2017 to 31-12-2017

DATE	DETAILS	DEBIT	CREDIT	BALANCE
	OPENING BALANCE :		1,611,200,203.38	1,611,200,203.38 Cr
29-12-2017	9202020000524: Int. Pd: 01-12-2017 to 31-12-2017	5,473,693.82		1,615,601,897.00 Cr

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BRANCH DETAILS		CUSTOMER DETAILS	
NAME	: JOHANNESBURG	NAME	: OPTIMUM MINE REHABILITATION TRUST
ADDRESS	: 2ND FLOOR, ATRIUM ON 5TH SANDZON CITY EAST TOWERS JOHANNESBURG JOHANNESBURG, SOUTH AFRICA	ADDRESS	: 144 KATHERINE STREET JOHANNESBURG JOHANNESBURG GAUTENG 2146
PHONE	: 27 11 7840715	PHONE	: 0114307640
FAX	: 7840759	A/C NO	: 92020200000524 CURRENCY: ZAR

Statement of A/C from 01-11-2017 to 30-11-2017

DATE	DETAILS	DEBIT	CREDIT	BALANCE
	OPENING BALANCE :		1,605,928,438.65	1,605,928,438.65 Cr
30-11-2017	92020200000524: Int. Pd: 01-11-2017 to 30-11-2017		5,279,764.73	1,611,208,203.38 Cr

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BRANCH DETAILS		CUSTOMER DETAILS	
NAME	: JOHANNESBURG	NAME	: OPTIMUM MINE REHABILITATION TRUST
ADDRESS	: 2ND FLOOR, ATRIUM ON 5TH SANDRONS CITY EAST TOWERS JOHANNESBURG JOHANNESBURG, SOUTH AFRICA	ADDRESS	: 144 KATHERINE STREET JOHANNESBURG JOHANNESBURG GAUTENG 2146
PHONE	: 27 11 7840715	PHONE	: 0114307640
FAX	: 7840759	A/C NO	: 92020200000524 CURRENCY: ZAR

Statement of A/C from 01-10-2017 to 31-10-2017

DATE	DETAILS	DEBIT	CREDIT	BALANCE
	OPENING BALANCE :		1,600,489,397.08	1,600,489,397.08 Cr
31-10-2017	92020200000524: Int. Pd: 01-10-2017 to 31-10-2017		5,439,041.97	1,605,928,438.65 Cr

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BRANCH DETAILS		CUSTOMER DETAILS	
NAME	: JOHANNESBURG	NAME	: OPTICON MINE REHABILITATION TRUST
ADDRESS	: 2ND FLOOR, ATRIUM ON 5TH SANDTON CITY EAST TOWERS JOHANNESBURG JOHANNESBURG, SOUTH AFRICA	ADDRESS	: 144 MATHERINE STREET JOHANNESBURG JOHANNESBURG GAUTENG 2146
PHONE	: 27 11 7840715	PHONE	: 0114307640
FAX	: 7840759	A/C NO	: 9202020000524 CURRENCY: ZAR

Statement of A/C from 01-09-2017 to 30-09-2017

DATE	DETAILS	DEBIT	CREDIT	BALANCE
	OPENING BALANCE :		1,595,244,756.78	1,595,244,756.78 Cr
29-09-2017	9202020000524: Int. Pd: 01-09-2017 to 30-09-2017		5,244,640.38	1,600,489,397.08 Cr

Unless the constituent notifies the Bank immediately of any discrepancy found by him/her in this statement of account, it will be taken that he/she has found the account correct.

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BRANCH DETAILS		CUSTOMER DETAILS	
NAME	: JOHANNESBURG	NAME	: OPTIMUM MINE REHABILITATION TRUST
ADDRESS	: 2ND FLOOR, ATRIUM ON 5TH SANDTON CITY EAST TOWERS JOHANNESBURG JOHANNESBURG, SOUTH AFRICA	ADDRESS	: 144 KAYBERLINE STREET JOHANNESBURG JOHANNESBURG GERMING 2146
PHONE	: 27 11 7840715	PHONE	: 0114307640
FAX	: 7840759	A/C NO	: 9202020000524 CURRENCY: ZAR

Statement of A/C from 01-08-2017 to 31-08-2017

DATE	DETAILS	DEBIT	CREDIT	BALANCE
	OPENING BALANCE :		1,589,843.64	1,589,843.64 Cr
31-08-2017	9202020000524: Int. Pd: 01-08-2017 to 31-08-2017		5,401,112.05	2,596,244.78 Cr

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BRANCH DETAILS		CUSTOMER DETAILS	
NAME	: JOHANNESBURG	NAME	: OPTIMUM MINE REHABILITATION TRUST
ADDRESS	: 2ND FLOOR, ATRIUM ON 5TH SANDTON CITY EAST TOWERS JOHANNESBURG JOHANNESBURG, SOUTH AFRICA	ADDRESS	: 144 KATHERINE STREET JOHANNESBURG JOHANNESBURG GAUTENG 2146
PHONE	: 27 11 7840715	PHONE	: 0114307640
FAX	: 7840759	A/C NO	: 8202020000524 CURRENCY: ZAR

Statement of A/C from 01-07-2017 to 31-07-2017

DATE	DETAILS	DEBIT	CREDIT	BALANCE
	OPENING BALANCE :		1,584,460,818.33	1,584,460,818.33 Cr
31-07-2017	9202020000524: Int. Pd: 01-07-2017 to 31-07-2017		5,382,825.80	1,589,843,644.13 Cr

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BRANCH DETAILS		CUSTOMER DETAILS	
NAME	: JOHANNESBURG	NAME	: OPTIMUM MINE REHABILITATION TRUST
ADDRESS	: 2ND FLOOR, ATARIUM ON 5TH SANDTON CITY EAST TOWERS JOHANNESBURG JOHANNESBURG SOUTH AFRICA	ADDRESS	: 144 KATHERINE STREET JOHANNESBURG JOHANNESBURG GAITHERS 2146
PHONE	: 27 11 7840715	PHONE	: 0114307640
FAX	: 7840759	A/C NO	: 92020200000524 CURRENCY: ZAR

Statement of A/C from 01-06-2017 to 30-06-2017

DATE	DETAILS	DEBIT	CREDIT	BALANCE
	OPENING BALANCE :		9,589,649.76	9,589,649.76 Cr
23-06-2017	[[92020300000653] :24-06-2016 to 23-06-2017		38,444,954.71	48,034,604.47 Cr
23-06-2017	[[92020300000654] :24-06-2016 to 23-06-2017		38,444,954.71	86,479,559.18 Cr
23-06-2017	[[92020300000655] :24-06-2016 to 23-06-2017		38,444,248.24	124,923,807.42 Cr
26-06-2017	92020300000653 : Closure Proceeds		210,958.90	122,136,766.32 Cr
26-06-2017	92020300000654 : Closure Proceeds		210,958.90	122,347,725.22 Cr
26-06-2017	92020300000655 : Closure Proceeds		194,504.11	122,542,229.33 Cr
26-06-2017	92020300000653 : Closure Proceeds		500,000,000.00	622,542,229.33 Cr
26-06-2017	92020300000654 : Closure Proceeds		500,000,000.00	1,122,542,229.33 Cr
26-06-2017	92020300000655 : Closure Proceeds		461,000,000.00	1,583,542,229.33 Cr
30-06-2017	92020200000524: Int. Pd: 01-06-2017 to 30-06-2017		913,589.00	1,584,460,818.33 Cr

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Date: 03-11-2016

DEPOSIT DETAILS

Depositor's Name : KOORNFontein REHABILITATION TRUST  
Depositor's Address : 144 KATHERINE STREET GRAYSTON RIDGE OFFICE  
BLOCK A LOWER GROUND FLOOR SANDTON  
JOHANNESBURG GAUTENG  
2146  
Customer ID : 920101935  
Deposit Account No. : 92020300009649  
Principal Amount : ZAR 170,000,000.00  
Currency : SOUTH AFRICAN RAND  
Amount in words : One Hundred Seventy Million only.  
Account Open Date : 06-06-2016  
Date of Deposit : 06-06-2016  
Rate of Interest : 8.0000  
Date of Maturity : 06-06-2017  
Interest Amount : ZAR 13,578,722.96

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Transactions Inquiry



A/c. No	92828300000549	CCY / SOL ID	ZAR / 9202
Account Name	KOORNFONTEIN REHABILITATION TRUST		
Balance	170,000,000.00 Cr		
Opening Bal.	170,000,000.00 Cr	Closing Bal.	170,000,000.00 Cr
Available Amt.	0.00 Cr	Eff. Available Amt	0.00 Cr
Cust. Status			A/c. Status
APY	0.000000	APYE	0.000000

No Records Fetched

**Transactions Inquiry**

A/c. No            9202020000519    CCY / SOLID            ZAR / 9202  
 Account Name    KOORNFontein REHABILITATION TRUST  
 Balance            116,450,722.76 Cr  
 Opening Bal.      0.00 Cr                    Closing Bal.            116,450,722.76 Cr  
 Available Amt.    116,450,722.76 Cr    Eff. Available Amt    116,450,722.76 Cr    A/c. Status        A  
 Cust. Status  
 APY                4.000000                APYE                    3.889019

Tran. Date	Value Date	Chq. No.	Withdrawl	Deposit	Balance	Narra
31-10-2016	31-10-2016			393,200.35 Cr	116,450,722.76 Cr	92020200005 10-2016 to 31-
30-09-2016	30-09-2016			379,272.95 Cr	116,057,522.41 Cr	92020200005 09-2016 to 30-
31-08-2016	31-08-2016			990,592.07 Cr	115,676,249.46 Cr	92020200005 08-2016 to 31-
31-07-2016	31-07-2016			389,273.21 Cr	115,287,657.39 Cr	92020200005 07-2016 to 31-
30-06-2016	30-06-2016			467,172.10 Cr	114,898,384.18 Cr	92020200005 06-2016 to 30-
06-06-2016	06-06-2016		170,000,000.00 Dr		114,431,212.08 Cr	FIXED DESRO
03-06-2016	03-06-2016			4,155,802.24 Cr	284,431,212.08 Cr	CREDIT IN NE FROM RMB ON ACCOUNT
31-05-2016	31-05-2016			275,409.84 Cr	280,275,409.84 Cr	92020200005 05-2016 to 31-
23-05-2016	23-05-2016			280,000,000.00 Cr	280,000,000.00 Cr	CREDIT IN NE

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Transactions Inquiry

A/c No            0202020000519    CCY / SOL ID            ZAR / 0202  
 Account Name    HOORNPORTER REHABILITATION TRUST  
 Balance            306,336,089.11 Cr  
 Opening Bal.     116,480,722.78 Cr    Closing Bal.            117,626,609.69 Cr  
 Available Amt.   306,336,089.11 Cr    ET. Available Amt     306,336,089.11 Cr    A/c. Status        D  
 Cust. Status  
 APY                4.000000                APYE                    5.893777

Tran. Date	Value Date	Chq. No.	Withdraw	Deposit	Balance	Narration
31-01-2017	31-01-2017			398,255.23 Cr	117,626,609.69 Cr	0202020000519: Int. Pd: 01-01-2017 to 31-01-2017
30-12-2016	31-12-2016			395,626.86 Cr	117,228,354.46 Cr	0202020000519: Int. Pd: 01-12-2016 to 31-12-2016
30-11-2016	30-11-2016			381,909.64 Cr	116,832,528.40 Cr	0202020000519: Int. Pd: 01-11-2016 to 30-11-2016

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BRANCH DETAILS		CUSTOMER DETAILS	
NAME	: JOHANNESBURG	NAME	: ROOSPOFZEIN REHABILITATION TRUST
ADDRESS	: 2ND FLOOR, ATRIUM ON 5TH SANDTON CITY EAST TOWERS JOHANNESBURG, SOUTH AFRICA	ADDRESS	: 144 KATHERINE STREET GRAYSTON RIDGE OFFICE BLOCK A LOWER GROUND FLOOR SANDTON JOHANNESBURG GAUTENG 2146
PHONE	: 27 11 7840715	PHONE	: 0114307640/0228546039
FAX	: 7840759	A/C NO	: 9202020000519 CURRENCY: ZAR

Statement of A/c from 01-01-2017 to 31-01-2017

DATE	DETAILS	DEBIT	CREDIT	BALANCE
	OPENING BALANCE		117,228,354.46	117,228,354.46 Cr
31-01-2017	92020200000519.Int.Pd:01-01-2017 to 31-01-2017		390,258.23	117,628,609.69 Cr

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BRANCH DETAILS		CUSTOMER DETAILS	
NAME	: JOHANNESBURG	NAME	: KOORNFOUWEN REHABILITATION TRUST
ADDRESS	: 2ND FLOOR, ATRIUM ON 5TH SANDTON CITY EAST TOWERS JOHANNESBURG JOHANNESBURG, SOUTH AFRICA	ADDRESS	: 144 KATHERINE STREET GRAYSTON RIDGE OFFICE BLOCK A LOWER GROUND FLOOR SANDTON JOHANNESBURG GAUTENG 2146
PHONE	: 27 11 7840715	PHONE	: 0114307660/0828586089
FAX	: 7840759	A/C NO	: 92020290000519 CURRENCY: ZAR

Statement of A/C from 01-02-2017 to 28-02-2017

DATE	DETAILS	DEBIT	CREDIT	BALANCE
	OPENING BALANCE :		117,626,608.69	117,626,608.69 Cr
28-02-2017	92020290000519: Int. Pd: 01-02-2017 to 28-02-2017		360,936.45	117,987,546.14 Cr

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BRANCH DETAILS		CUSTOMER DETAILS	
NAME	: JOHANNESBURG	NAME	: HOORNFOUNTAIN REHABILITATION TRUST
ADDRESS	: 2ND FLOOR, ATRIUM ON 5TH SANDTON CITY EAST TOWERS JOHANNESBURG JOHANNESBURG, SOUTH AFRICA	ADDRESS	: 144 KATHERINE STREET GRANSTON RIDGE OFFICE BLOCK A LOWER GROUND FLOOR SANDTON JOHANNESBURG GAPTENG 2146
PHONE	: 27 11 7840715	PHONE	: 0114307640/0628586089
FAX	: 7840759	A/C NO	: 92020200000519 CURRENCY: ZAR

Statement of A/C from 01-03-2017 to 31-03-2017

DATE	DETAILS	DEBIT	CREDIT	BALANCE
	OPENING BALANCE		117,987,546.34	117,987,546.34 Cr
31-03-2017	92020200000519: Int. Pd: 01-03-2017 to 31-03-2017		490,834.40	118,388,380.54 Cr

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BRANCH DETAILS		CUSTOMER DETAILS	
NAME	: JOHANNESBURG	NAME	: ROORHOFSTEIN REHABILITATION TRUST
ADDRESS	: 2ND FLOOR, ATRIUM ON 5TH SANDTON CITY EAST TOWERS JOHANNESBURG JOHANNESBURG, SOUTH AFRICA	ADDRESS	: 144 KATHERINE STREET GRAYSON RIDGE OFFICE BLOCK A LOWER GROUND FLOOR SANDTON JOHANNESBURG GAUTENG 2146
PHONE	: 27 11 7840715	PHONE	: 0114307640/0828566089
FAX	: 7840759	A/C NO	: 92020200006515 CURRENCY: ZAR

Statement of A/C from 01-04-2017 to 30-04-2017

DATE	DETAILS	DEBIT	CREDIT	BALANCE
	(OPENING BALANCE :		118,388,380.54	118,388,380.54 Cr
28-04-2017	92020200006519: Int. Pd: 01-04-2017 to 30-04-2017		389,222.07	118,777,602.61 Cr

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BRANCH DETAILS		CUSTOMER DETAILS	
NAME	: JOHANNESBURG	NAME	: ROOMFONTRIN REHABILITATION TRUST
ADDRESS	: 2ND FLOOR, ATRIUM ON 5TH SANDTON CITY EAST TOWERS JOHANNESBURG JOHANNESBURG, SOUTH AFRICA	ADDRESS	: 144 KATHERINE STREET GRAYSTON RIDGE OFFICE BLOCK A LOWER GROUND FLOOR SANDTON JOHANNESBURG GAUTENG 2146
PHONE	: 27 11 7840715	PHONE	: 0114307640/0828586089
FAX	: 7840759	A/C NO	: 92020200000519 CURRENCY: ZAR

Statement of A/C from 01-05-2017 to 31-05-2017

DATE	DETAILS	DEBIT	CREDIT	BALANCE
	OPENING BALANCE :		119,777,602.61	119,777,602.61 Cr
31-05-2017	92020200000519; Int. Pd: 01-05-2017 to 31-05-2017		403,518.43	119,184,121.04 Cr

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BRANCH DETAILS		CUSTOMER DETAILS	
NAME	: JOHANNESBURG	NAME	: BROOKFONTEIN REHABILITATION TRUST
ADDRESS	: 2ND FLOOR, ATRIUM ON 5TH RANDTON CITY EAST TOWERS JOHANNESBURG JOHANNESBURG, SOUTH AFRICA	ADDRESS	: 144 KATHERINE STREET GRAVESTON RIDGE OFFICE BLOCK A LOWER GROUND FLOOR SANDTON JOHANNESBURG Gauteng 2146
PHONE	: 27 11 7840715	PHONE	: 0114307640/0828586089
FAX	: 7840758	A/C NO	: 82020200006519 CURRENCY: ZAR

Statement of A/c from 01-06-2017 to 30-06-2017

DATE	DETAILS	DEBIT	CREDIT	BALANCE
	OPENING BALANCE :		119,181,121.04	119,181,121.04 Cr
06-06-2017	[92020300000649] : 06-06-2016 to 05-06-2017		13,578,722.96	132,759,844.00 Cr
26-06-2017	82620300000649 : Closure Proposed		178,000,000.00	302,759,844.00 Cr
30-06-2017	92020200000519: Int. Pd: 01-06-2017 to 30-06-2017		522,181.01	303,282,025.01 Cr

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BRANCH DETAILS		CUSTOMER DETAILS	
NAME	: JOHANNESBURG	NAME	: KUCHWORTHIN REHABILITATION TRUST
ADDRESS	: 2ND FLOOR, ATRIUM ON 5TH SANDTON CITY EAST TOWERS JOHANNESBURG JOHANNESBURG, SOUTH AFRICA	ADDRESS	: 144 KATHERINE STREET GRAYSTON RIDGE OFFICE BLOCK A LOWER GROUND FLOOR SANDTON JOHANNESBURG GAUTENG 2146
PHONE	: 27 11 7840715	PHONE	: 0114307640/0828586089
FAX	: 7840759	A/C NO	: 9202020000819 CURRENCY: ZAR

Statement of A/C from 01-07-2017 to 31-07-2017

DATE	DETAILS	DEBIT	CREDIT	BALANCE
	OPENING BALANCE :		303,282,025.01	303,282,025.01 Cr
31-07-2017	9202020000819: Int. Pd: 01-07-2017 to 31-07-2017		1,830,327.90	304,312,352.90 Cr

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ADDRESS	: 2ND FLOOR, ATRION ON 5TH SANDTON CITY EAST TOWERS JOHANNESBURG JOHANNESBURG, SOUTH AFRICA	ADDRESS	: 144 KATHERINE STREET GRAYSTON RIDGE OFFICE BLOCK A LOWER GROUND FLOOR SANDTON JOHANNESBURG GAITHERG 2146
PHONE	: 27 11 7840715	PHONE	: 0114307640/0826586089
FAX	: 7840759	A/C NO	: 92020200000519 CURRENCY: ZAR

Statement of A/C from 01-08-2017 to 31-08-2017

DATE	DETAILS	DEBIT	CREDIT	BALANCE
	OPENING BALANCE :		304,312,352.99	304,312,352.99 Cr
31-08-2017	92020200000519: Int. Pd: 01-08-2017 to 31-08-2017		1,033,828.26	305,346,181.25 Cr

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BRANCH DETAILS		CUSTOMER DETAILS	
NAME	: JOHANNESBURG	NAME	: KOORNPOWETH REHABILITATION TRUST
ADDRESS	: 2ND FLOOR, AFRIDIM ON 5TH SANDTON CITY EAST TOWERS JOHANNESBURG JOHANNESBURG, SOUTH AFRICA	ADDRESS	: 144 KATHERINE STREET GRANITE RIDGE OFFICE BLOCK A LOWER GROUND FLOOR SANDTON JOHANNESBURG GAUTENG 2146
PHONE	: 27 11 7840715	PHONE	: 0114307640/0828586089
FAX	: 7840759	A/C NO	: 92020200000519 CURRENCY: ZAR

Statement of A/C from 01-09-2017 to 30-09-2017

DATE	DETAILS	DEBIT	CREDIT	BALANCE
	OPENING BALANCE :		305,346,181.25	305,346,181.25 Cr
29-09-2017	92020200000519: Int. Pd: 01-09-2017 to 30-09-2017		1,003,877.86	306,350,059.11 Cr

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BRANCH DETAILS		CUSTOMER DETAILS	
NAME	: JOHANNESBURG	NAME	: KOORNFORZEIN REHABILITATION TRUST
ADDRESS	: 2ND FLOOR, ATRIUM ON 5TH SANDTON CITY EAST TOWERS JOHANNESBURG, SOUTH AFRICA	ADDRESS	: 144 KATSEBINK STREET GRAYSTON RIDGE OFFICE BLOCK A LOWER GROUND FLOOR SANDTON JOHANNESBURG GAUTENG 2146
PHONE	: 27 11 7840715	PHONE	: 0114307640/0828586089
FAX	: 7840759	A/C NO	: 92020200000519 CURRENCY: ZAR

Statement of A/C from 01-10-2017 to 31-10-2017

DATE	DETAILS	DEBIT	CREDIT	BALANCE
	OPENING BALANCE :		306,350,059.11	306,350,059.11 Cr
31-10-2017	92020200000519: Int. Rd: 01-10-2017 to 31-10-2017		1,041,088.25	307,391,147.36 Cr

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BRANCH DETAILS		CUSTOMER DETAILS	
NAME	: JOHANNESBURG	NAME	: ROOMPOWERIN REHABILITATION TRUST
ADDRESS	: 2ND FLOOR, ABLUM ON 5TH SANDTON CITY EAST TOWERS JOHANNESBURG JOHANNESBURG, SOUTH AFRICA	ADDRESS	: 144 KATHERINE STREET GRAYSON RIDGE OFFICE BLOCK A LOWER GROUND FLOOR SANDTON JOHANNESBURG GUYTONG 2146
PHONE	: 27 11 7840715	PHONE	: 0114307640/0828566089
FAX	: 7840759	A/C NO	: 92020200000519 CURRENCY: ZAR

Statement of A/C from 01-11-2017 to 30-11-2017

DATE	DETAILS	DEBIT	CREDIT	BALANCE
	OPENING BALANCE		307,391,147.36	307,391,147.36 Cr
30-11-2017	92020200000519; Int. Rd: 01-11-2017 to 30-11-2017		1,010,501.83	308,401,748.39 Cr

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BRANCH DETAILS		CUSTOMER DETAILS	
NAME	: JOHANNESBURG	NAME	: ROOMFONYKIN REHABILITATION TRUST
ADDRESS	: 2ND FLOOR, ATRIUM ON 5TH SANDTON CITY EAST TOWERS JOHANNESBURG JOHANNESBURG, SOUTH AFRICA	ADDRESS	: 144 KATHERINE STREET GRAYSTON RIDGE OFFICE BLOCK A LOWER GROUND FLOOR SANDTON JOHANNESBURG GAUTENG 2146
PHONE	: 27 11 7840715	PHONE	: 0114307640/0828586089
FAX	: 7840759	A/C NO	: 92020200000519 CURRENCY: ZAR

Statement of A/C from 01-12-2017 to 31-12-2017

DATE	DETAILS	DEBIT	CREDIT	BALANCE
	OPENING BALANCE :		308,401,748.38	308,401,748.38 Cr
29-12-2017	92020200000519: Int. Pd: 01-12-2017 to 31-12-2017		1,047,721.01	309,449,469.40 Cr

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BRANCH DETAILS		CUSTOMER DETAILS	
NAME	: JOHANNESBURG	NAME	: KOORNFOORTIN REHABILITATION TRUST
ADDRESS	: 2ND FLOOR, AIRIUM ON STE SANDTON CITY EAST TOWERS JOHANNESBURG JOHANNESBURG, SOUTH AFRICA	ADDRESS	: 144 KATHERINE STREET GRAYSTON RIDGE OFFICE BLOCK A LOWER GROUND FLOOR SANDTON JOHANNESBURG GAUTENG 2146
PHONE	: 27 11 7840715	PHONE	: 0114307640/0628586689
FAX	: 7840759	A/C NO	: 92020200000519 CURRENCY: ZAR

Statement of A/C from 01-01-2018 to 31-01-2018

DATE	DETAILS	DEBIT	CREDIT	BALANCE
	OPENING BALANCE :		309,449,469.40	309,449,469.40 Cr
31-01-2018	92020200000519: Int. Pd: 01-01-2018 to 31-01-2018		1,051,280.39	310,500,749.79 Cr

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Please note that as a policy, BANK OF BARODA does not ask you to part with/disclose/revalidate your Internet Banking password, login id and debit card number through emails OR phone calls OR Fax OR in-person. You are therefore advised NOT to respond to such emails OR phone calls and never disclose your personal security details to anyone including Bank staff.

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**बैंक ऑफ बड़ोदा**  
**Bank of Baroda**  
 India's International Bank

BRANCH DETAILS		CUSTOMER DETAILS	
NAME	: JOHANNESBURG	NAME	: FOURMONTAIN REHABILITATION TRUST
ADDRESS	: 2ND FLOOR, ATRIUM ON 5TH SANDTON CITY EAST TOWERS JOHANNESBURG JOHANNESBURG, SOUTH AFRICA	ADDRESS	: 144 KATHERINE STREET GRAYSTON RIDGE OFFICE BLOCK A LOWER GROUND FLOOR SANDTON JOHANNESBURG GAITHERG 2146
PHONE	: 27 11 7840715	PHONE	: 0114307640/0628506089
FAX	: 7840759	A/C NO	: 92020200000519 CURRENCY: ZAR

Statement of A/C from 01-02-2018 to 28-02-2018

DATE	DETAILS	DEBIT	CREDIT	BALANCE
	OPENING BALANCE :		310,500,749.79	310,500,749.79 Cr
28-02-2018	92020200000519: Int. Pd: 01-02-2018 to 28-02-2018		493,398.48	310,994,148.24 Cr

Unless the constituent notifies the bank immediately of any discrepancy found by him/her in this statement of Account, it will be taken that he/she has found the account correct.

This is a system generated output and requires no signatures.

Please note that as a policy, BANK OF BARODA does not ask you to part with/disclose/validate your Internet Banking password, login id and debit card number through emails OR phone calls OR Fax OR in-person. You are therefore advised NOT to respond to such emails OR phone calls and never disclose your personal security details to anyone including Bank staff.

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*Handwritten signature*



# बैंक ऑफ बड़ोदा Bank of Baroda

BOB:SA:2017-18/86

Date: 06.07.2017

**OPTIMUM MINE REHABILITATION TRUST  
GRAYSTON RIDGE OFFICE PARK  
144 KATHERINE STREET  
SANDTON, JOHANNESBURG**

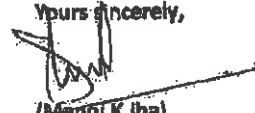
Dear Sir,

**Re: OPTIMUM MINE REHABILITATION TRUST – 92020200000524**

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.

In the circumstances, bank has no other option except to sever all its ties with the firm. Therefore, please be informed that

- o all deposit accounts such as savings, current and other deposit accounts which are in operation will be deactivated on 17<sup>th</sup> July, 2017;
- o all advance accounts, if any, be settled not later than 30<sup>th</sup> September 2017;
- o Non-fund based facilities, if any, should be supported by 100% cash margin in the respective current account.

Yours sincerely,  
  
 (Manoj K Jha)  
 Chief Executive (Act.)

**Territory Office:** Sandton Life Twin Towers, East Wing, 2nd Floor, Sandton, Johannesburg, Republic Of South Africa  
 Tel No: +27 11 784 0759 / 0759 / 0759 | 784 0759 (9) | Email: optimum@bob.co.za

**Johannesburg Branch:** Sandton City Twin Towers, East Wing, 2nd Floor, Sandton, Johannesburg, Republic Of South Africa  
 Phone: +27 11 784 0759 / 0759 / 0759 | Fax: +27 11 784 0759 | Email: johann@bob.co.za | Website: www.bankofbaroda.co.za



बैंक ऑफ बरोडा Bank of Baroda

BOB:SA:2017-18/83

Date: 06.07.2017

**KOORNFONTEIN REHABILITATION TRUST**

Grayston Ridge Office Park  
144 Katherine Street  
Sandton, Johannesburg  
Republic of South Africa

Dear Sir,


**Re: KOORNFONTEIN REHABILITATION TRUST – 92020200000519**

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.

In the circumstances, bank has no other option except to sever all its ties with the firm. Therefore, please be informed that


- o all deposit accounts such as savings, current and other deposit accounts which are in operation will be deactivated on 17<sup>th</sup> July, 2017;
- o all advance accounts, if any, be settled not later than 30<sup>th</sup> September 2017;
- o Non-fund based facilities, if any, should be supported by 100% cash margin in the respective current account.

Yours sincerely,

  
(Manoj K Jha)  
Chief Executive (Act.)

Territory Office: Sandton City Twin Towers, East Wing, 2nd Floor, Sandton, Johannesburg, Republic Of South Africa  
Tel: +27 11 784 0715 / 23. Fax: +27 11 784 0735 (D). Email: [act@bankofbaroda.co.za](mailto:act@bankofbaroda.co.za)

Johannesburg Branch: Sandton City Twin Towers, East Wing, 2nd Floor, Sandton, Johannesburg, Republic Of South Africa  
Phone: +27 11 784 0715 / 23. Fax: +27 11 784 0735. Email: [branch@bankofbaroda.co.za](mailto:branch@bankofbaroda.co.za) Website: [www.bankofbaroda.co.za](http://www.bankofbaroda.co.za)

u-2 

OPTIMUM MINE



REHABILITATION TRUST

The Chief Executive  
Bank of Baroda  
Sandton City Branch  
Sandton

Attn. Mr MK Jha

Date: 04<sup>th</sup> October 2017

Dear Sir,

**Optimum Coal Mine Rehabilitation Trust: Term Deposit Accounts**

It has been the common practice with the Bank in the past with our Group companies that Bank used to renew the term deposits automatically on maturity or Bank used to inform us on maturity seeking our instructions in this regard. Our understanding therefore was that the 3 (three) of our term deposits amounting to R1461 Mn would have been renewed automatically on maturity for the same period.

However, from the perusal of the statement of account on 03<sup>rd</sup> October 2017 we observe that these 3 (three) term deposits were not renewed after maturity and were transferred to our current account. We never gave any instructions or consent to transfer it to the current account. Further, we were never contacted by the Bank informing us about the maturity of these term deposits and seeking our instructions in this regard.

This is highly irregular and as a result of this the Trust may have suffered substantial financial loss. As you are aware that these funds are for the rehabilitation of the mine and transactions are controlled by Department of Mineral Resources.

If our understanding is correct these FDRs, in the absence of any instructions from us, should have been renewed on maturity for the same period. We therefore request you, please renew these term deposits from the last maturity date for the same period immediately under advice to us.

Yours faithfully

(Authorised Signatory)

Trust Number: IT13693/07  
144 Katherine Street, Grayston Ridge Office Park, Block A Lower Ground Floor,  
Johannesburg, South Africa  
Tel: +27 11 542 2200 Fax: +086 685 1814

Trustee: P U Govender

KOORNFONTEIN



REHABILITATION TRUST

The Chief Executive  
Bank of Baroda  
Sandton City Branch  
Sandton

Attn. Mr MK Jha

Date: 04<sup>th</sup> October 2017

Dear Sir,

**Koornfontein Rehabilitation Trust: Term Deposit Accounts**

It has been the common practice with the Bank in the past with our Group companies that Bank used to renew the term deposits automatically on maturity or Bank used to inform us on maturity seeking our instructions in this regard. Our understanding therefore was that our term deposit for R170 Million would have been renewed automatically on maturity for the same period.

However, from the perusal of the statement of account on 03<sup>rd</sup> October 2017 we observe that the term deposit was not renewed after maturity and the proceeds were transferred to our current account. We never gave any instructions or consent to transfer it to the current account. Further, we were never contacted by the Bank informing us about the maturity of this term deposit and seeking our instructions in this regard.

This is highly irregular and as a result of this the Trust may have suffered substantial financial loss. As you are aware that these funds are for the rehabilitation of the mine and transactions are controlled by Department of Mineral Resources.

If our understanding is correct these FDRs, in the absence of any instructions from us, should have been renewed on maturity for the same period. We therefore request you, please renew these term deposits from the last maturity date for the same period immediately under advice to us.

Further, we would like to bring to your notice that we sent request letter on 17<sup>th</sup> January 2017 to place R117.20 Mn in term deposit for 6 months. It appears that even that amount was never placed in term deposit. Please also place it in term deposit from the said date.

Yours faithfully

(Authorised Signatory)

Trust Number: IT7563/07  
144 Katherine Street, Grayston Ridge Office Park, Block A Lower Ground Floor,  
Johannesburg, South Africa  
Tel: +27 11 542 2200 Fax: +086 685 1814

Trustees: P U Govender



From: Pieter van der Merwe pieter@vdmattorney.co.za  
Subject: FW: Optimum Rehab Trust  
Date: 26 March 2018 at 18:11  
To: Jessica Griffiths griffiths@group621.co.za

From: Ugeshni Naidu [mailto:ugeshnin@sahara.co.za]  
Sent: 26 March 2018 04:06 PM  
To: pieter@vdmattorney.co.za  
Subject: Fwd: Optimum Rehab Trust

----- Forwarded message -----

From: Ugeshni Naidu <ugeshnin@sahara.co.za>  
Date: 10 October 2017 at 11:02  
Subject: Re: Optimum Rehab Trust  
To: "Chief Executive [South Africa]" <ce.sa@bankofbaroda.com>, "Johannesburg, South Africa" <joburg@bankofbaroda.com>  
Cc: NathR <nath@oakbay.co.za>, Reshma Moopanar <reshmam@oakbay.co.za>

Dear Sir,

Kindly ignore the instruction sent on 04 October 2017. For clarity, the instruction is withdrawn.

Regards

Ugeshni

On Wed, Oct 4, 2017 at 1:56 PM, Ugeshni Naidu <ugeshnin@sahara.co.za> wrote:

Dear Sir,  
Please find attached letter for your information and necessary action.  
Regards  
Ugeshni

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**OAKBAY**  
INVESTMENTS & FIDUCIARY LTD.

Reshma Moopanar <reshmam@oakbay.co.za>

**Fwd: : Optimum Mine Rehabilitation Trust**

1 message

Ronica Ragavan <ronica@oakbay.co.za>  
To: Reshma Moopanar <reshmam@oakbay.co.za>

Wed, Apr 4, 2018 at 2:20 PM

Ronica Ragavan

----- Forwarded message -----

From: **Ronica Ragavan** <ronica@oakbay.co.za>  
Date: Mon, Mar 26, 2018 at 3:30 PM  
Subject: Fwd: : Optimum Mine Rehabilitation Trust  
To: Pieter Van der Merwe <pieter@vdmattorney.co.za>

Ronica Ragavan

----- Forwarded message -----

From: **Meyer, Andriette A** <Andriette.Meyer2@standardbank.co.za>  
Date: Fri, May 6, 2016 at 3:46 PM  
Subject: RE: : Optimum Mine Rehabilitation Trust  
To: Ronica Ragavan <ronica@oakbay.co.za>  
Cc: "pmarsden@matusonassociates.co.za" <pmarsden@matusonassociates.co.za>, "peter@v2rescue.co.za" <peter@v2rescue.co.za>, "mscruse@matusonassociates.co.za" <mscruse@matusonassociates.co.za>, "nazeemh@tamedia.co.za" <nazeemh@tamedia.co.za>, "Naidoo, Venorthy V" <Venorthy.Naidoo@standardbank.co.za>, "Molete, Tshepo" <Tshepo.Molete@standardbank.co.za>

Good Day Ronica.

Please see attached confirmation of signatory changes on the current account for the Optimum Mine Rehabilitation Trust

Kind Regards.



Andriette Meyer

Corporate & Investment Banking / Transactional Products & Services

TPS SA – Service Advisory Manager

Tel +27 (0)11 721 9896 Mobile 082 821 9553

www.standardbank.com

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a-z \$



**From:** Ronica Ragavan [mailto:ronica@oakbay.co.za]

**Sent:** 05 May 2016 06:34 PM

**To:** Meyer, Andriette A

**Cc:** pmarsden@matusonassociates.co.za; peter@v2rescue.co.za; mscruse@matusonassociates.co.za; nazeemh@thamedia.co.za; Naidoo, Venorthy V; Molete, Tshepo

**Subject:** RE: : Optimum Mine Rehabilitation Trust

Dear Andriette

Please see my responses below in red

We require an original instruction on the respective company's letterhead instructing us to add and/or delete – Attached original will be delivered at 9am to the bank

- The instruction should be signed off in accordance to an existing resolution – Done

State the account name and account number, that we should add/delete the signatories to/ from – Attached original will be delivered at 9am to the bank

- For the addition of signatories state what the signing arrangements should be done on the forms
- List the names and ID numbers of the new signatories- Done on letter

Complete the account holder record forms which must be signed by new signatories (form attached for ease of reference) Attached original will be delivered at 9am to the bank

An originally certified copy of each new signatory's ID, this may be certified by one of the following people: an attorney, an auditor, a company secretary, a bank official or a commissioner of oaths, kindly ensure the certification is original- Attached original will be delivered at 9am to the bank

Complete the KYC form for individuals for each new signatory (form attached for ease of reference). Attached original will be delivered at 9am to the bank

Trust this will be treated as urgent.

Let me know what other documents may be needed.

Thanks

Ronica

**From:** Meyer, Andriette A [mailto:Andriette.Meyer2@standardbank.co.za]  
**Sent:** Thursday, 05 May 2016 2:55 PM  
**To:** Ronica Ragavan <ronica@oakbay.co.za>  
**Cc:** pmarsden@matusonassociates.co.za; peter@v2rescue.co.za; mscruse@matusonassociates.co.za; nazeemh@tamedia.co.za; Naidoo, Venorthy V <Venorthy.Naidoo@standardbank.co.za>; Molete, Tshepo <Tshepo.Molete@standardbank.co.za>  
**Subject:** RE: : Optimum Mine Rehabilitation Trust

Good Day Ronica

Please find documentation required to amend accounts as follows (this is for changes that needs to be done on account level / signatory level):

Adding and deleting signatories on accounts

We require an original instruction on the respective company's letterhead instructing us to add and/or delete

- The instruction should be signed off in accordance to an existing resolution
- State the account name and account number, that we should add /delete the signatories to/ from
- For the addition of signatories state what the signing arrangements should be
- List the names and ID numbers of the new signatories
- Complete the account holder record forms which must be signed by new signatories (form attached for ease of reference)
- An originally certified copy of each new signatory's ID; this may be certified by one of the following people: an attorney, an auditor, a company secretary, a bank official or a commissioner of oaths, kindly ensure the certification is original
- Complete the KYC form for individuals for each new signatory (form attached for ease of reference).

Please arrange for documents to be delivered to the following address :

GDM, CLIENT ONBOARDING

1<sup>ST</sup> FLOOR, ENTRANCE 3

6 SIMMONDS STREET

JOHANNESBURG

2001

Attention : Portia Ramunasi (011) 636-0489 / (011) 631-3800

Trust you find the above in order.

u-3 \$

Kind regards,

Kind Regards



Andriette Meyer

Corporate & Investment Banking / Transactional Products & Services

TPS SA – Service Advisory Manager

Tel +27 (0)11 721 9896 Mobile 082 821 9553

[www.standardbank.com](http://www.standardbank.com)

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**From:** Meyer, Andriette A

**Sent:** 05 May 2016 02:51 PM

**To:** 'Ronica Ragavan'

**Cc:** pmarsden@matusonassociates.co.za; peter@v2rescue.co.za; mscruse@matusonassociates.co.za; nazeemh@inamedia.co.za; Naldoo, Venorthy V; Molete, Tshepo

**Subject:** RE: : Optimum Mine Rehabilitation Trust

Good day Ronica

Kindly note that we will require the following to be completed in order to add the account to Business Online.:

- 1) Participant resolution – Directors of the company being added are required to sign
- 2) Participant agreement – Directors of the company being added are required to sign
- 3) Add an Account – Designated People of the Business Online profile to sign

Regards,

*Handwritten signature*



Andriette Meyer

Corporate & Investment Banking / Transactional Products & Services

TPS SA – Service Advisory Manager

Tel +27 (0)11 721 9896 Mobile 082 821 9553

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**From:** Ronica Ragavan [mailto:ronica@oakbay.co.za]

**Sent:** 05 May 2016 12:15 PM

**To:** Meyer, Andriette A

**Cc:** pmarsden@matusonassociates.co.za; peter@v2rescue.co.za; mscruse@matusonassociates.co.za; nazeemh@tamedia.co.za; Naidoo, Venorthy V; Molete, Tshepo

**Subject:** RE: : Optimum Mine Rehabilitation Trust

Dear Andriette

Please send us the documents that we will need to submit to get the new signatories added to the account and their respective profiles.

Regards

Ronica

**From:** Meyer, Andriette A [mailto:Andriette.Meyer2@standardbank.co.za]

**Sent:** Thursday, 05 May 2016 12:03 PM

**To:** gerhard.vandeneever@glencore.co.za

**Cc:** shaun.blankfield@glencore.com; ronica@oakbay.co.za; pmarsden@matusonassociates.co.za; peter@v2rescue.co.za; mscruse@matusonassociates.co.za; nazeemh@tamedia.co.za; Naidoo, Venorthy V <Venorthy.Naidoo@standardbank.co.za>; Molete, Tshepo <Tshepo.Molete@standardbank.co.za>

**Subject:** : Optimum Mine Rehabilitation Trust

Good Day Gerhard

Please see attached confirmation of removal of Signatories from the current account.

Our admin team is busy with the removal of the account from your OPT08 Business online profile

Kind Regards



Andriette Meyer

Corporate & Investment Banking / Transactional Products & Services

TPS SA – Service Advisory Manager

Tel +27 (0)11 721 9896 Mobile 082 821 9553

[www.standardbank.com](http://www.standardbank.com)

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**From:** gerhard.vandenheever@glencore.co.za [mailto:gerhard.vandenheever@glencore.co.za]  
**Sent:** 05 May 2016 10:56 AM  
**To:** Meyer, Andriette A; Naidoo, Venorthy V  
**Cc:** shaun.blankfield@glencore.com; ronica@oakbay.co.za; pmarsden@matusonassociates.co.za;  
peter@v2rescue.co.za; mscruse@matusonassociates.co.za; nazeemh@tamedia.co.za  
**Subject:** Optimum Mine Rehabilitation Trust

Hello Andriette,

As discussed the Letter of Authority has been updated on the Optimum Mine Rehabilitation Trust. Please find attached instructions to remove the current signatories from the account as well as removing the account from the current Standard Bank Online profile.

New signatories and online amendments will be updated by the current trustees.

I will send the original documents through shortly.

Regards

A handwritten signature in black ink, appearing to be 'u 3' with a stylized flourish above it.

Gerhard van den Heever

Glencore Operations South Africa (Pty) Ltd

Tel: +27 11 772 0712

Mobile: +27 82 307 7643

Fax: +27 11 772 0697

Email: gerhard.vandenheever@glencore.co.za

Webpage: www.glencore.com

Standard Bank email disclaimer and confidentiality note

Please go to <http://www.standardbank.co.za/site/homepage/emaildisclaimer.html> to read our email disclaimer and confidentiality note. Kindly email [disclaimer@standardbank.co.za](mailto:disclaimer@standardbank.co.za) (no content or subject line necessary) if you cannot view that page and we will email our email disclaimer and confidentiality note to you.

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2 attachments

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image002.png  
6K

 Confirmation Letter -.pdf  
177K









**Operations Shared  
Services:  
Origination**

The Directors  
Glenmore

08 May 2016

Dear Sir/Madam

**CONFIRMATION OF ACCOUNT SIGNATORY CHANGES**

We refer to your request received to amend the signatories on

**Account:**  
402264746

**Add**

- PU Govender
- R Ragavan

Kind Regards  
Veronique Barman  
Amendments Consultant

Standard Bank 1<sup>st</sup> Floor 6 Simmonds Street Johannesburg 2001  
PO Box 61690 Marshalltown 2107 South Africa [www.standardbank.co.za](http://www.standardbank.co.za)  
Tel: Switchboard: +27 (0)11 636-9112 Direct: +27 (0)11 636-5585 Fax: +27 (0)11 631-8493  
email: [veronique.barman@standardbank.co.za](mailto:veronique.barman@standardbank.co.za)

The Standard Bank of South Africa Limited (Reg. No. 1562/090738/08) Authorised financial services and registered credit provider (NCRCP15)  
Directors: TMF Phisoane (Chairman) SK Tshabalala\* (Chief Executive) DDB Bandi FMW Durnea# F du Plessis TG Gombasa BJ Kruger SJ Macozoma  
Adv KD Moroka AC Nissen AC Parker SP Ridley\* MJD Ruck Lord Smith of Kohn, KT\* PD Sullivan# BS Tshabalala EM Woods  
Secretary: Z Stephae 14/09/2014  
\*Executive Director #British #Australian

Lotho Group's Block  
Greyton Ridge Block A  
144 Coenroos Street, Sandton  
Sandton, 2145 South Africa  
Tel: +27 (11) 267 3870  
E-mail: info@tegaia.com

COAL, COPPER & PGM

The Regional Manager  
Department of Mineral Resources  
Mpumalanga,  
Witbank-1035

Letter No. 2016/002KFN

Date: 04<sup>th</sup> May 2016

Dear Sir,

**RE: NOTIFICATION IN TERMS OF REGULATION 7 READ WITH REGULATION 11 OF THE FINANCIAL REGULATIONS PROVISIONS OF THE NATIONAL ENVIRONMENTAL MANAGEMENT ACT 107 OF 1998 ("NEMA")**

1. Koomfontein Mine (Pty) Ltd ("KFN") is required in terms of Regulation 7 of NEMA to ensure that its financial provision is, at any given time, equal to the sum of the actual costs of implementing the plans and report contemplated in Regulations 6 and 11 for a period of at least 10 years forthwith.
2. The current situation with our group and the big 4 Banks and Insurance Companies seizing 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 hereby requests that the DMR grants it approval to use the above mentioned funds for mining rehabilitation purposes.
3. Should the DMR provide the necessary approval TER hereby undertakes as follows:
  - a) To get the environmental impact assessment report of KFN reviewed by an specialist twice a year;
  - b) To provide DMR access to the Trusts Bank Statement;
  - c) The results of the assessment of the adequacy of the financial provision contemplated above, and the work completed in relation to any funds that have been used by TER/KFN, must be (i) audited by an independent environment specialist/auditor; (ii) included in the environmental audit report and (iii) submitted by TER/KFN for approval to the DMR; and
  - d) Should there be a shortfall in the financial provision, TER will refill the void within 90 days to increase the financial provision to meet the reviewed, assessed and audited financial provision and will submit proof of such increase to the DMR.

Trust that you find this in order and look forward to a favorable response.

Yours faithfully,

Authorised Signatory

Copy forwarded to The Minister, Department of Mineral Resources, Head Office, Pretoria for information.

Authorised Signatory

15/05/16  
14:45:46  
15/05/16  
14:45:46



**mineral resources**

Department  
Mineral Resources  
REPUBLIC OF SOUTH AFRICA

DMR 10

First Floor, Saveways Crescent Centre, Mandela Drive, Witbank, 1035  
Private Bag X6279, Emalahleni, 1035, Tel (013) 653 0500, Fax (013) 690 3288  
Enquiries: Mr. N.A Tshibandekano Ref: MP 30/6/12/3 (156) MR

The Director/s  
Tegeta Exploration and Resources (Pty) Ltd  
Postnet Suit 458  
Private Bag X9  
Johannesburg  
2010

Dear Sir/Madam

**RE: NOTIFICATION IN TERMS OF REGULATION 7 READ WITH REGULATION 11 OF THE FINANCIAL REGULATIONS PROVISIONS OF THE NATIONAL ENVIRONMENTAL MANAGEMENT ACT 107 OF 1998 ("NEMA"): KOORNFONTEIN COAL MINES (PTY) LTD.**

Your letter dated 04<sup>th</sup> May 2016 refers and therefore this letter serves as an acknowledgement and response to the request in the aforementioned letter;

The Department grants approval in principle to access the funds held in the account of "Koorfontein Rehabilitation Trust" (Trust No. IT 7563/07) for concurrent rehabilitation of the mine, However ensure that the following are to be considered;

- a) The current environmental liability assessment report compiled by an independent auditor.
- b) The rehabilitation program accompanied by an implementation plan detailing the timeframes for each rehabilitation phase.
- c) The above plan must be supported with quantified extent to inform the quantum of financial provision in order to determine the amount

For further enquiries, please contact the Regional Manager on the above contact details

Yours faithfully,

  
 THE DEPUTY DIRECTOR GENERAL  
 DEPARTMENT OF MINERAL RESOURCES  
 DATE: 5/5/2016



JHB: ADV:16-17

03.06.2016

**M/S. Koornfontein Mines Pty. Ltd.**  
Grayston Ridge Office Park,  
144, Katherine Street,  
Sandton-2196  
Dear Sirs,

**Re: Sanction of credit facilities**

We are pleased to inform you that on your request under mentioned credit facility have been sanctioned to the company for a period of 12 months.

(Amt. in ZAR)

Nature of facility	Limit sanctioned
Fund Based	
LABOD/DL	150,000,000.00
Non-Fund Based	NIL
Total	150,000,000.00

**Terms & Conditions:**

1	Applicant	M/S. Koornfontein Mines Pty. Ltd.
2	Nature of facility	LABOD/DL
3	LIMIT	ZAR 150,000,000.00 (ZAR One Hundred Fifty Million Only)
4	Period	12 Months subject to annual renewal
5	MARGIN	10%
6	Purpose	For rehabilitation of Koornfontein Mine/s
7	ROI	9.00% P.A.
8	Security	As per Annexure-D enclosed
9	PROVISO	Interest to be serviced ON MONTHLY BASIS as and when charged in the account.



10	Security Documents	As per Annexure-D enclosed
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**Yours faithfully,**

**(Shaikh Rauf)  
Senior Branch Manager (Act.)**

**All the Terms & conditions are Accepted-**

**Authorized Trustee/Signatory (Borrower)**



## ANNEXURE - D

## TERMS AND CONDITIONS:

Adv. A/c : M/S. Koornfontein Mines Pty. Ltd. at Johannesburg branch.

Nature of Facility	LABOD/DL	
limit	Existing NIL	Proposed ZAR 150,000,000.00
Rate of Interest	9.00% (1% Over Deposit Rate at present @ 8.00%)	
Margin	10 %	
Purpose	For rehabilitation of Koornfontein Mine/s	
Penal Interest	2% additional interest to be charged for delay in payment of interest / instalments as also for non compliance of any of the terms and conditions of sanction contained herein.	
Repayment	In 12 months (One time bullet payment)	
Prepayment penalty	NIL	
Processing charges	NIL	
Documentation Charges	Actual to be borne by the company	
Insurance	N.A.	
Security	<p>a. Pledge/Lien of Fixed Deposit with Bank worth ZAR 170,000,000.00 Dated.....In the name of M/s "Koornfontein Rehabilitation Trust" (Trust No. IT 7563/07) -LDOC 16(A).</p> <p>b. A Written undertaking from M/S. Koornfontein Mines Pty. Ltd that the funds are to be used for rehabilitation of mine/s.</p> <p>c. A Written undertaking from sole shareholder M/s Tegeta Exploration &amp; Resources Pty. Ltd. that the funds are going to be used for rehabilitation of Mine/s.</p> <p>d. A resolution from "Koornfontein Rehabilitation Trust" (Trust No. IT 7563/07) consenting to the Bank granting a loan to M/S. Koornfontein Mines Pty. Ltd. (KM) against the security of the funds, KM is entitled to use and confirming that KM will be using the funds for rehabilitation of mine/s.</p> <p>e. A resolution from M/S. Koornfontein Mines Pty. Ltd. (KM) authorizing them to apply for a loan against the fund of "Koornfontein Rehabilitation Trust" (Trust No. IT 7563/07) and confirmation that the funds are going to be used for rehabilitation of the mine/s.</p> <p>f. Undertaking from M/S. Koornfontein Mines Pty. Ltd. that KM is ceding to the bank any present or future claim they have with DMR.</p> <p>g. Loan Facility Agreement</p>	

Proviso	Interest to be serviced ON MONTHLY BASIS as and when charged in the account.

**All the Terms & Conditions are accepted-**

**Authorized Trustee/Signatory (Borrower)-**

**Authorized Signatory (Depositor/Guarantor)-**

*W-31*



# TABACKS

ATTORNEYS

Your Ref CASE NO 14775/2018  
Our Ref BANK2-LV6  
Email [ivs@tabacks.com](mailto:ivs@tabacks.com)/[nl@tabacks.com](mailto:nl@tabacks.com)  
Date 12 March 2018

**TO:**

The National Director of Public Prosecutions  
Attention: State Attorney  
Email address: [mahaga@justice.gov.za](mailto:mahaga@justice.gov.za)

The Trustees of Optimum Mine Rehabilitation Trust  
Attention: Pushpaveni Ugeshini Govender  
Email address: [ugeshnin@sahara.co.za](mailto:ugeshnin@sahara.co.za)

The Trustees of Koorfontein Mine Rehabilitation Trust  
Attention: Pushpaveni Ugeshini Govender  
Email address: [ugeshnin@sahara.co.za](mailto:ugeshnin@sahara.co.za)

The Minister: Mineral Resources  
Trevenna Campus, 70 Meintjies Street, Sunnyside, Pretoria  
Per hand

The Director General: Department of Mineral Resources  
Trevenna Campus, Building 2 C. c/o Meintjies and Francis Baard Streets, Sunnyside,  
Pretoria  
Per hand

The Master of the High Court: Pretoria c/o the Acting Chief Master  
SALU Building, 316 Thabo Sehume Street, Pretoria, Gautent  
Per hand

Nedbank Group Limited  
Attention: Mr E Anderson  
Email address: [eltona@nedbank.co.za](mailto:eltona@nedbank.co.za)

The Organisation Undoing Tax Abuse c/o Werksmans Attorneys  
Attention: Ms S Venter  
Attention: Mr B Hotz  
Email address: [soretha.venter@outa.co.za](mailto:soretha.venter@outa.co.za)  
Email address: [bhotz@werksmans.com](mailto:bhotz@werksmans.com)

Mervyn Taback Incorporated Reg No 2000/024541/21  
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Tel +27 (0)11 368-7700 Fax +27 (0)11 368-7800 Fax: +27(0)86 771 2628 Website [www.tabacks.com](http://www.tabacks.com)  
Directors D Cithi TJ Cross M Grobbelaar DA Kaufmann CM Keene BD Masuku N Mather  
E Sarfontein BD Tzete L van Staden D Woodhouse  
Associates MG Davis NE Labuschagne D Lemmen MJA Mabaso J Mankoe  
MF Schepers MG Thomas SM Tumber  
Consultant M Taback

Dear Sirs

**THE ORDER UNDER CASE 14776/2018 DATED 8 MARCH 2018 ("The NDPP Order")/ THE ORDER UNDER CASE NUMBER 65616/17 DATED 26 SEPTEMBER 2017 ("The OUTA Order").**

1. We act on behalf of the Bank of Baroda.
2. Our client has continuously maintained accounts for the Optimum and Koornfontein Mine Rehabilitation Trusts respectively.
3. Our client has, since 26 September 2017 maintained the accounts strictly in accordance with and subject to the terms of the OUTA Order.
4. It is now faced with two mutually exclusive orders;
  - 4.1 In terms of the OUTA Order, our client is directed to continue to hold the trust funds in accounts maintained by it, for the credit of the trusts (as directed in terms of paragraph 1.2 and 1.3 of the OUTA Order);
  - 4.2 In terms of the NDPP Order, our client is directed immediately to transfer the funds to Nedbank (as provided for in terms of paragraph 3 and 4 of the NDPP Order);
  - 4.3 Our client has no proprietary interest in the matter and will either continue to comply with the OUTA Order, or will in breach thereof, comply with the NDPP Order. It is obvious that our client is unable to comply with both;
5. It is a matter of public knowledge that our client, as a non-clearing bank is able to provide banking services only because of a sponsorship-arrangement with Nedbank. Nedbank has given notice of the termination of all arrangements of any kind with our client with effect from 30 April 2018 and has directed our client to provide banking particulars at another institution to which Nedbank will transfer all credit balances held by it on behalf of our client, as at 30 April 2018.



6. It appears the NDPP had intended, but then failed, to have a *Curator Bonis* appointed. In the circumstances, Nedbank's customer, for purposes of it holding the deposits, will not be our client. We assume that Nedbank has agreed, in advance and without having completed any of the required AML and/or KYC procedures, to accept as its client whomsoever may eventually be declared to be entitled or authorised to bind the trusts.
7. In the circumstances our client invites the parties to reach consensus on the directions our client should comply with. Falling delivery to us, by no later than close of business on Thursday 15 March 2018, of satisfactory instructions (which much provide for our client to be relieved from the obligations imposed on it in terms of both or either of the OUTA and NDPP Orders) our client shall approach the High Court for directions. It shall in such proceeding seek an order that its costs on the scale as between attorney and own client be paid by OUTA and the NDPP jointly and severally.
8. We await your urgent response.

Yours faithfully,

  
P. van Staden

MERVYN TABACK INC.

IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, PRETORIA

ABC

*[Handwritten signature]*

26/4/18

CASE NUMBER: 65616/17

Before the Honourable Justice

*[Handwritten signature]*

On this the <sup>28<sup>th</sup></sup> day of April 2018

In the matter between:

**ORGANISATION UNDOING TAX ABUSE**

M. Lombard

25/4/17

First Applicant

and

**THE TRUSTEES FOR THE TIME BEING OF  
THE OPTIMUM MINE REHABILITATION TRUST**

First Respondent

**THE TRUSTEES FOR THE TIME BEING OF  
THE KOORNFONTEIN REHABILITATION TRUST**

Second Respondent

**PUSHPAVENI GOVENDER**

Third Respondent

**TREVOR SCOTT**

Fourth Respondent

**OPTIMUM COAL MINE (PTY) LTD  
(in business rescue)**

Fifth Respondent

**KOORNFONTEIN MINES (PTY) LTD  
(in business rescue)**

Sixth Respondent

**BANK OF BARODA**

Seventh Respondent

**MINISTER OF MINERAL RESOURCES**

Eighth Respondent

**RONICA RAGAVAN**

Ninth Respondent

**THE MASTER OF THE HIGH COURT**

Tenth Respondent

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DRAFT ORDER

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*[Handwritten signature]*

**BY AGREEMENT** between the applicant and the first, second, third, fifth, sixth and ninth respondents, the following Order is made:

1. The funds held by the Optimum Mine Rehabilitation Trust and the Koornfontein Rehabilitation Trust, as more fully described in the preservation order, shall be transferred and deposited into an account administered by the Minister responsible for mineral resources, in accordance with regulation 8(1)(b) of the Financial Provisioning Regulations, 2015, GN R1147 in *Government Gazette* 39425 of 20 November 2015. The money so transferred shall be invested at a competitive and market-related interest rate in respect of such deposit and further at a rate no lower than the rate presently offered by Nedbank to the Bank of Baroda on the said moneys presently invested with the Bank of Baroda (subject to fluctuations in the prime lending rate and the repo rate).
2. This order will not preclude any new owners of the Optimum Coal Mine (Pty) Ltd and/or the Koornfontein Mine (Pty) Ltd from making their own determination of the appropriate financial vehicle for financial provisioning in accordance with regulation 8.
3. In the interim, whilst the necessary arrangements are made with the Minister for the funds to be deposited into an account in accordance with regulation 8(1)(b):
  - 3.1. The Bank of Baroda is directed to transfer the Trust funds of the two Trusts to Nedbank;

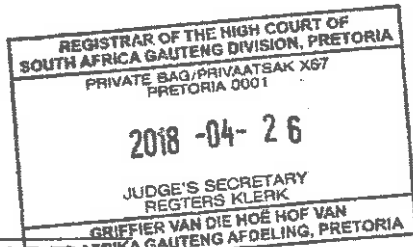
M. Lombard  
23 APR 2017  
Minister of Mineral Resources



3.2. Nedbank is directed to continue to hold the Trust funds of the two Trusts in an interest-bearing bank account or accounts in the names of the Trusts. Such money will be held by Nedbank against payment by Nedbank of a competitive and market-related interest rate in respect of such deposit and further at a rate no lower than the rate presently offered by Nedbank to the Bank of Baroda on the said moneys presently invested with the Bank of Baroda (subject to fluctuations in the prime lending rate and the repo rate).

4. Each party shall pay its own costs.

BY ORDER



THE REGISTRAR OF THE  
ABOVE HONOURABLE COURT  
PRETORIA

M. Lombard  
28 APR 2018  
11:52 AM

*ML*