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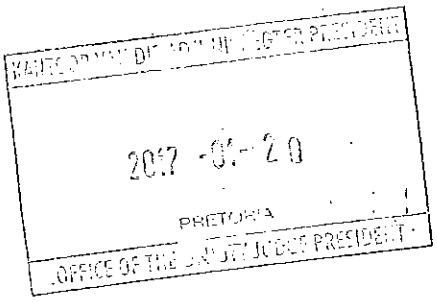
IN THE HIGH COURT OF SOUTH AFRICA
[GAUTENG DIVISION, PRETORIA]

CASE NUMBER: 80978/16



In the matter between:

MINISTER OF FINANCE	APPLICANT
and	
OAKBAY INVESTMENTS (PTY) LTD	1ST RESPONDENT
OAKBAY RESOURCES AND ENERGY LTD	2ND RESPONDENT
SHIVA URANIUM (PTY) LTD	3RD RESPONDENT
TEGETA EXPLORATION AND RESOURCES (PTY) LTD	4TH RESPONDENT
JIC MINING SERVICES (PTY) LTD	5TH RESPONDENT
BLACKEDGE EXPLORATION (PTY) LTD	6TH RESPONDENT
TNA MEDIA (PTY) LTD	7TH RESPONDENT
THE NEW AGE	8TH RESPONDENT
AFRICA NEWS NETWORK (PTY) LTD	9TH RESPONDENT
VR LASER SERVICES (PTY) LTD	10TH RESPONDENT
ISLANDSITE INVESTMENTS ONE HUNDRED AND EIGHTY (PTY) LTD	11TH RESPONDENT
CONFIDENT CONCEPT (PTY) LTD	12TH RESPONDENT
JET AIRWAYS (INDIA) LTD (INCORPORATED IN INDIA)	13TH RESPONDENT
SAHARA COMPUTERS (PTY) LTD	14TH RESPONDENT
ABSA BANK LTD	15TH RESPONDENT

FIRST NATIONAL BANK LTD	16TH RESPONDENT
STANDARD BANK OF SOUTH AFRICA LIMITED	17TH RESPONDENT
NEDBANK LIMITED	18TH RESPONDENT
GOVERNOR OF THE SOUTH AFRICAN RESERVE BANK	19TH RESPONDENT
REGISTRAR OF BANKS	20TH RESPONDENT
DIRECTOR OF THE FINANCIAL INTELLIGENCE CENTRE	21ST RESPONDENT

FILING NOTICE

DOCUMENTS FILED : THE 1ST, 2ND, 3RD, 4TH, 6TH, 7TH, 11TH, 12TH, AND 14TH RESPONDENTS' ANSWERING AFFIDAVIT

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AND TO:

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THE 10th RESPONDENT
pieterm@vrlaser.co.za

[BY EMAIL]

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MH

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REGISTRAR OF BANKS	19TH RESPONDENT
DIRECTOR OF THE FINANCIAL INTELLIGENCE CENTRE	20TH RESPONDENT
GOVERNOR OF THE SOUTH AFRICAN RESERVE BANK	21ST RESPONDENT

1ST, 2ND,3RD, 4TH, 6TH, 7TH, 10TH, 11TH, 12TH, AND 14TH RESPONDENTS' AFFIDAVIT

I, the undersigned,

RONICA RAGAVAN

hereby declare under oath and say:

1.

I am the acting Chief Executive Officer of Oakbay Investments (Pty) Ltd, the First Respondent herein. Prior to taking this position, I served as the Chief Financial Officer and have been with the company for over 15 years I am duly authorised to depose to this affidavit on behalf of the First, Second, Third, Fourth, Sixth, Seventh, Tenth, Eleventh, Twelfth and Fourteenth Respondents in this application. I am also the acting Group CEO. A resolution authorising me to do so is attached hereto and marked **Annexure "OB1"**.

MH

2.

The facts in this affidavit fall within my personal knowledge, except where otherwise expressly stated or indicated by the context. Where I refer to allegations or factual circumstances not within my personal knowledge I will ensure that confirmatory affidavits of those who have personal knowledge of the allegations so levelled are filed.

3.

In this regard, I refer to the confirmatory affidavits annexed hereto and marked as **Annexures "OB2.1"** to **"OB2.5"** of:

3.1. Mr Nazeem Howa, the former CEO of the Oakbay Group up until his resignation on 15 October 2016 on account of ill-health;

3.2. Mr Ajay Gupta, a member of the Gupta family;

3.3. Mr Noel Lindsay, a forensic auditor and founder and Managing Director of Nardello & Co LLP;

3.4. Mr Andre Oldknow, the Group Human Resources Director for Oakbay;

3.5. Mr Pieter Johannes van der Merwe, Chief Executive Officer of VR Laser Services (Pty) Ltd;

3.6. Mr Stephan Jacobus Daniel Nel, Chief Executive Officer of Sahara Computers (Pty) Ltd.

MH

Where legal submissions are made, I do so on the advice of counsel and the attorneys acting on behalf of the Oakbay Group.

5.

For the convenience of the Court, I will use the following abbreviations in this affidavit:

5.1. I will refer to the Minister of Finance of the Republic of South Africa, Mr Pravin Gordhan, as "*the Minister*";

5.2. I will refer to the First, Second, Third, Fourth, Sixth, Seventh, Tenth, Eleventh, Twelfth and Fourteenth Respondents collectively as "*Oakbay Group*";

5.3. I will refer to Absa Bank Ltd, Standard Bank Ltd, First National Bank Ltd and Nedbank Ltd collectively as "*the Banks*";

5.4. I will refer to the South African Reserve Bank as "*Reserve Bank*";

5.5. I will refer to the Financial Intelligence Centre as "*FIC*";

5.6. I will refer to Ajay Gupta, Atul Gupta and Rajesh Gupta as the "*Gupta Brothers*" or "*Gupta Family*";

5.7. I will refer to the Financial Intelligence Centre Act, 38 of 2001 as "*FIC Act*";

5.8. I will refer to the Promotion of Administrative Justice Act 3 of 2000 as "*PAJA*"; and

5.9. I will refer to the application by the Oakbay Group for further information from the Financial Intelligence Centre as the "*FIC application*".

6.

In what follows, I set out the relevant parties to the dispute, and the relevant roleplayers within the Oakbay Group which I represent. Thereafter, I deal with the impermissibility of the declaratory relief sought by the Minister which is both abstract and academic. As will become apparent, the Minister has been aware that there is no dispute between the parties regarding his powers since 24 May 2016. This was confirmed on 25 July 2016. The Minister's application is not an application to address a contested legal point regarding a justiciable issue. Certainly, the Minister has not offered any legally cogent explanation for what is so unique about the current situation so as to compel him to do so, months after it became clear that there was no legal issue between the Minister and the Respondents. I cannot imagine that the Oakbay Group is the first company or person in South Africa to write to the Minister to seek his help in respect of whatever malady they were facing. On the Minister's own version, there is nothing in the Oakbay Group's situation that justifies this application and on this ground alone, the Court should decline to entertain the application.

7.

Moreover, the application is riddled with factual and legal errors. For example, there are other relevant roleplayers who may have an interest in the relief sought who have not been joined, including not least the Gupta Brothers themselves, the President of the Republic of South Africa, the Bank of China, Optimum Coal Mine (Pty) Ltd, the Trustees of the Optimum Mine Rehabilitation Trust, Koornfontein Mines (Pty) Ltd as well as the Koornfontein Mines Rehabilitation Trust. Factually, the Minister's reliance on the list of 72 purported "*suspicious transaction reports*" is misplaced and the Minister's flawed application is supported by a flawed analysis and a faulty factual record.

MH

8.

As such, I am advised that the only appropriate decision by this Court is to confirm that there is no dispute between the parties and to dismiss this application. I am advised that if this Court were to rule otherwise, it would be addressing both matters and potentially affecting parties not before this Court and who have been given no opportunity to address the issues at hand. This would create unnecessary collateral issues. The Court should therefore decline to grant the relief sought.

9.

As a final procedural point, I deal with the application to strike out material in the Minister's affidavit that is irrelevant and / or vexatious – in particular annexure "**P**" to the Minister's affidavit which is a certificate issued by the Financial Intelligence Centre purportedly in terms of section 39 of the FIC Act. Annexure **"P"** allegedly details 72 transactions involving certain of the Respondents (and certain persons who are not respondents in this application, including the Gupta Brothers, Optimum Coal Mine (Pty) Ltd as well as the Trustees of the Optimum Mine Rehabilitation Trust) which have allegedly been reported to the Financial Intelligence Centre as "*suspicious transaction reports*". As I demonstrate below, the certificate is entirely irrelevant to the issues in the declaratory application and ought to be struck out. As just one example of the lack of relevance of the certificate, three-quarters of the 72 allegedly suspicious transactions occurred after the time when the banks described below had already decided to terminate their relationship with the Respondents and could never have justified the Banks' decision to do so.

MH

10.

To the extent that the Court deems the information contained in the certificate relevant and declines to strike out the certificate on the ground of irrelevance, I am informed that I have both a right and duty to respond thereto. In this regard, I demonstrate that the acquisition of the certificate was improper and unlawful and that the certificate holds no evidential value. I also deal with the FIC Application which was launched by the Oakbay Group to compel the FIC to disclose missing information pertaining to the 72 transactions so that the Oakbay Group can address the allegations made against them.

11.

However, in good faith, and in order to provide the most complete answer possible to the allegations therein, the Oakbay Group has engaged a firm of forensic accountants to exhaust all efforts to identify and explain (where it is possible to do so) each of the 72 "*suspicious transaction reports*". The report filed by the forensic firm demonstrates that the information on the 72 transactions is inadequate even to connect them with the Oakbay Group and is, in many instances, financially inexplicable on its face, e.g., describing single transactions greater than the relevant Respondent's annual revenues. To the extent that the transactions can be identified, these transactions were entirely appropriate and lawful.

12.

Finally, I deal with certain red herrings i.e. extraneous matters which have been raised in the affidavits of the Minister and the Banks and the appropriate relief to be granted in this application.

MH

PARTIES TO THE DISPUTE

13.

The application has as its target three businessmen namely Mr Ajay Gupta, Mr Atul Gupta and Mr Rajesh Gupta, referred to in the popular press as the Gupta Brothers. Originally from India, Gupta Brothers are an entrepreneurial family who have lived in South Africa since 1993. Shortly after their arrival they founded their first business – a shoe business that operated out of a small garage in Johannesburg. The Gupta Brothers then founded Sahara Computers (Pty) Ltd, the 14th Respondent herein, an IT hardware distribution business. Sahara eventually launched their own brand of notebook computers and the business grew to become one of the most well-known consumer brands in South Africa.

14.

Since the formation of their initial business, the Gupta Brothers have created many additional businesses and employ many thousands of employees throughout South Africa. In the process, the Gupta Brothers have cooperated with other business partners to develop new lines of business and create broad commercial conglomerates composed of private companies and public companies. Contrary to some media claims, the substantial portion of these companies' revenues are derived from private commercial transactions and not government contracts.

15.

The Gupta Brothers are the founders of **Oakbay Investments (Pty) Ltd**, the First Respondent herein, an investment holding company with business interests in a number of industries including IT, media, property & leisure, mining and engineering.

16.

Between February 2016 and April 2016, the Gupta Brothers resigned from all the positions that they had previously held in the Oakbay Group, both as Board Members and in a management capacity. In addition, the Gupta Brothers considered selling their shares or disposing of them to third parties.

17.

Some of the current Oakbay Group companies have been operating successfully in South Africa for 20 years, contrary to some misperceptions that it only consists of new entities. The Oakbay Group has a track record of strong business performance in a number of sectors. From Oakbay's beginnings in the IT sector, it has diversified into mining, media and engineering. This diversification began with the acquisition of Westdawn Investments from JIC Mining Services (1979) (Pty) Ltd, a mining services company, in 2006, and the establishment in 2006 of Tegeta, a mining exploration company. In 2010, the Oakbay Group acquired another mining asset in Klerksdorp which is now known as Shiva Uranium.

18.

In 2010, the Oakbay Group launched The New Age national newspaper and followed this with the launch of ANN7 news network in 2013. Most recently, in 2014 the Oakbay Group acquired an indirect minority stake in an engineering company VR Laser, a company which specialises in the design and manufacturing of various steel products used in the defence, mining, rail and transport industry.

MH

19.

The diversification of Oakbay has enabled consistent growth and job creation throughout times of both economic boom and bust. In 1997, Sahara was launched, with just a few employees. Today, the entities which make up the Oakbay Group employ some 8 300 persons.

20.

The First, Second, Third, Fourth, Sixth, Seventh, Tenth, Eleventh, Twelfth and Fourteenth Respondents form part of the Oakbay Group. The Fifth, Eighth, Ninth and Thirteenth Respondents do not form part of the Group and the Gupta Brothers have no interest in these entities. I am not aware of the basis on which these entities are joined in this application and I am advised that their joinder in this application constitutes a material misjoinder as a matter of law. The consequences of this misjoinder is that the Court cannot properly render a decision until the correct parties are before it.

21.

As I have set out above, the First Respondent, **Oakbay Investments (Pty) Ltd** is the holding company for most of the entities in the Oakbay Group. All the companies within the Oakbay Group report weekly or periodically to the Executive Committee of Oakbay Investments (Pty) Ltd, which I chair. I now turn to describe the business of these entities in more detail.

MH

The Mining Companies

22.

Oakbay Resources and Energy Limited, the Second Respondent, is a Johannesburg Stock Exchange-listed energy and natural resource focused mining company that owns a controlling stake in Shiva Uranium (Pty) Limited.

23.

Shiva Uranium (Pty) Ltd, the Third Respondent, currently has significant gold, uranium and coal mining operations in the Republic of South Africa. Its uranium processing plant is situated in the Hartbeesfontein District of North West province of South Africa. Shiva Uranium (Pty) Ltd also acquired a coal mine from Tegeta Exploration and Resources (Pty) Ltd in February 2016.

24.

Tegeta Exploration and Resources (Pty) Ltd, the Fourth Respondent, is the owner and operator of the Optimum and Koornfontein coal mines. Tegeta Exploration and Resources (Pty) Ltd mines and explores coal in South Africa. The company was founded in 2006 and is based in Johannesburg, South Africa. Oakbay Investments has a 29% stake in Tegeta.

25.

The Fifth Respondent is JIC Mining Services 1979 (Pty) Ltd. JIC Mining Services 1979 (Pty) Ltd is not in any way related to the Oakbay Group or the Gupta family. I speculate that the Minister meant to join Westdawn Investments (Pty) Ltd instead of JIC Mining Services 1979 (Pty) Ltd.

MH

26.

Westdawn Investments (Pty) Ltd t/a JIC Mining (*"JIC"*) has been a provider of mining services to a number of major mining companies in South Africa for over 25 years. The nature of demand for JIC's services changes with the commodities cycle and historically has been heavily focused on gold mining. Currently, demand is particularly strong from platinum producers. JIC, which is the largest business unit within the mining division, has no revenue at all from any government source. Oakbay Investments acquired JIC in 2006 when the company was unprofitable, losing approximately 100 million Rand per year. JIC is now profitable.

27.

I am advised that the joinder of JIC Mining Services 1979 (Pty) Ltd is a misjoinder and the failure to join Westdawn Investments (Pty) Ltd t/a JIC Mining is a material non-joinder. Again, this non-joinder and misjoinder means that the court cannot properly determine the issues at stake in this application as it does not have the correct parties before it.

28.

In the financial year 1 March 2015 to 29 February 2016, the Group's mining businesses reported total revenues of 1.88 billion Rand. This contributed approximately 58% of Oakbay Investments' revenues in the period.

Media

29.

The Oakbay Group includes a successful and growing media business which includes

The New Age national newspaper and the ANN7 news network. Its Editor-in-Chief is Moegsien Williams.

30.

The New Age national newspaper (*"TNA"*) is owned and operated by **TNA Media (Pty) Ltd**, the Seventh Respondent herein. Since its launch in 2010, TNA Media (Pty) Ltd's business model has been to seek to generate advertising revenue from a broad range of private sector and public sector contingencies. TNA is sold and distributed in all nine of South Africa's provinces with six daily regional editions and a bureau in every province. As such, TNA is South Africa's only truly national, broadsheet daily while at the same time also maintaining an element of regional focus.

31.

The ANN7 news network is owned and operated by Infinity Media Networks (Pty) Ltd. Infinity Media Networks (Pty) Ltd is not a respondent to this application. I assume that the entity cited as *"Africa News Network (Pty) Ltd"*, the 9th Respondent, was intended to refer to Infinity Media (Pty) Ltd, but this is mere speculation as I have no personal knowledge of this fact. I am advised that the non-joinder of Infinity Media (Pty) Ltd is a material non-joinder in this application.

32.

As with other Oakbay Group companies, ANN7 is intently focused on skills development and job creation. ANN7 and TNA currently have offices in six provinces in South Africa. ANN7 (in conjunction with TNA) has an existing Cadet Academy which has launched the careers of many South African journalists since its inception, both at ANN7/TNA and other media outlets. The Academy offers an apprenticeship to groups of talented youngsters, some of whom are offered permanent roles with the

businesses once the formal schooling period ends. Since 2012, the Cadet Academy has produced, on average, 40 young journalists per year.

33.

Since their inception, TNA and ANN7 have together created 783 jobs for South Africans. In the financial year 1 March 2015 to 29 February 2016, the combined media businesses reported revenues of 419 million Rand, representing 12.9% of Oakbay's revenues.

Strategic Investments

34.

The Tenth Respondent, **VR Laser Services (Pty) Ltd**, forms part of the Oakbay Group's strategic investments portfolio. Oakbay Investments (Pty) Ltd has an indirect minority shareholding (17%) in VR Laser Services (Pty) Ltd, a leading manufacturer of steel products for global, blue-chip customers in a range of industries including: defence, mining, rail and transport. Its services include: laser cutting, plasma cutting, bending, fabricating and various machining services. I record that the neither the Oakbay Group nor the Gupta Family has shareholding in VR Laser Asia.

Property and Equipment Leasing

35.

The Group also has additional, associated but un-consolidated strategic investments in Islandsite Investments **One Hundred and Eighty (Pty) Ltd** and **Confident Concepts (Pty) Ltd**, the Eleventh and Twelfth Respondents herein. These entities are involved in the property and equipment leasing sectors. They generate total

revenues of 189 million Rand, of which zero is generated from Government sources.

Sahara Computers

36.

The Fourteenth Respondent is Sahara Computers (Pty) Ltd. As explained above, Sahara was established in 1997 and was the Oakbay Group's first business in South Africa. Since inception, Sahara's focus has always been IT hardware. In 2005, the Sahara notebook was the number one South African-branded notebook. Sahara also revolutionised the traditional dealer channel in South Africa by changing the standard dynamics of how distribution was handled, via: the best prices, a Tier One product, easy access and unique distribution country-wide.

37.

Sahara has always moved with the times and anticipated future customer demand. In 2010, the division made a strategic shift and embraced increasing levels of connectivity by becoming more retail and technology focused by embracing tablets and smart phones. In the financial year 1 March 2015 to 29 February 2016, Sahara reported revenues of 1.1 billion Rand. This contributed approximately 31% of Oakbay Investments' revenues in the period. However, as I set out below, Sahara's businesses are now facing challenges in terms of suppliers and bank accounts which threaten these gains.

38.

Having dealt with the parties to the application, I now turn to examine the Minister's application in more detail and the factual and legal difficulties precluding the granting of the relief sought.

MH

NATURE OF THE MINISTER'S APPLICATION

39.

In this application the Minister seeks declaratory relief that *"he is not by law empowered or obliged to intervene in the relationship between the 1st to 14th Respondents and the 15th to 18th Respondents, as regards to the closing of the bank accounts held by the former with the latter."*[1]

40.

I agree with this statement and therefore this Court need not proceed any further. The Minister states a general legal proposition from which no consequential relief flows. There is also, as I set out further below, no *lis* between the parties which justifies the need for a declaratory order of this nature. The order which the Minister seeks is therefore entirely unnecessary and of academic interest only.

41.

Moreover, as noted above, as a number of necessary parties affected by this application have not been joined as respondents by the Minister in his application, any action by this Court may affect parties who have had no opportunity to present their views or have their day in court.

42.

To the extent that there was any lack of clarity or confusion between the parties (including the Minister) as to the Minister's powers, this was settled in the two opinions which the Minister received from his legal counsel. The conclusions of these legal

[1] Notice of Motion, page 2 of the paginated papers.

opinions were accepted by the Oakbay Group on 24 May 2016 and 25 July 2016. Accordingly, the declaratory relief sought by the Minister is moot. Going forward with this application for declaratory relief is a waste of the Court's time and amounts to an abuse of this Court's process and the application should be dismissed on this basis.

43.

Moreover, I am advised that the Minister is essentially asking the Court to insert itself into the functioning of the executive branch in a manner that raises a significant question of the separation of powers (under the Constitution). In this regard, even if the Minister correctly concluded that the Oakbay Group asked him to intervene in support of its dispute with its banks (which I strongly deny), I see no reason why the Minister felt compelled to act at all. Surely it is wholly within the normal exercise of his powers and his discretion to ignore or reject a citizen's request. Governments function in this manner across the world every day, deciding to reject or ignore citizen requests. Ordinarily a citizen's redress is the courts if the executive branch exercises - or fails to exercise - its powers in a reasonable manner consistent with applicable law and the rights of its citizens. If this court were to countenance the Minister's application for guidance here, it would open the floodgate for other weak-kneed political officials who are too scared to take positions on sensitive political and policy matters, as they could (and would) simply retreat to the judiciary for advisory rulings on any issue they did not want to have to decide.

44.

Responding (or deciding not to respond) to the pleas of citizens for government action is primarily the job of the executive and legislative branches, not the judiciary, as the former were democratically elected and must answer to the people. The minister's application - at its very heart - seeks to overturn this fundamental

constitutional norm by thrusting the court into the functioning and political judgments of a cabinet level branch of government and by asking the court to render an opinion on a matter that properly belongs with the decision-making of that other branch of government. If this Court were to "take the bait", the court would be setting itself and the country down a dangerous path, where the judiciary will become a maker of political judgments, rather than the arbiter of the judgments made by the political branches of government. On this ground alone the application should be dismissed.

The Court should decline the relief sought

45.

I am advised that the application for declaratory relief brought by the Minister is an application in terms of section 21 of the Superior Courts Act in terms of which a court may, in its discretion, and at the instance of any interested person, "*enquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination*".

46.

The Court, in determining whether to make the declaratory order, has a discretion which it must exercise taking into account the particular circumstances of the case. I am furthermore advised that an applicant for declaratory relief is required to establish that he or she is a person interested in an "*existing, future or contingent right or obligation*" and, if the court is so satisfied, the Court will then determine whether the case is a proper one for the exercise of the discretion and to make the declaratory order sought.

MH

47.

In this application, the Minister fails at both hurdles. In the first instance, there is no "*existing, future or contingent right or obligation*" of the Minister which is challenged by any of the parties in this application. There is no case or controversy that requires this court to take any action. To justify this application, the Minister contends that Mr Nazeem Howa (*"Mr Howa"*), the previous CEO of Oakbay Investments (Pty) Ltd and CEO of the Group of Companies, made "*demands*" that the Minister exercise his governmental authority to intervene and reverse the action taken by the banks. A reading of the correspondence in question reveals that this was not the case. Mr Howa never disputed the Minister's legal advice that he had no legal right to interfere with the decision made by the banks.

48.

The facts of the matter are briefly as follows: In a period of five months, between December 2015 and April 2016, each of the four major South African banks (ABSA, First National Bank, Nedbank and Standard Bank) terminated their accounts with various members of the Oakbay Group. ABSA closed the majority of the Group's accounts in December 2015 whilst the remaining three banks all closed the majority of the Group's account during the first week of April 2016. It is almost impossible to do business in South Africa without a bank account (especially on a large scale) and the effect of the Banks' decisions to close Oakbay's accounts immediately placed at risk the 8 300 employees who are employed by the Oakbay Group and approximately 50 000 persons who rely on Oakbay Group for their livelihoods.

MH 19

The Oakbay Group was and remains fearful of the dire consequences of being "*unbanked*" by the four major South African banks. Following the Banks' decisions, Mr Howa directed correspondence to every single person he could think of who might be in a position to assist the Oakbay Group. Mr Howa believed (and continues to believe) that it is a matter of national priority that one of the largest and most successful business groups in South Africa seek the assistance of any and all stakeholders to advise and assist the Group in its difficulties. The Minister was but one on a very long list who received correspondence from the Group. In this regard, I annex marked **"OB3.1"** to **"OB3.10"** similar letters and correspondence, all of which are generic in nature and not specifically directed to any one person in which Mr Howa asked for assistance from *inter alia*:

49.1. The President of the Republic of South Africa;

49.2. The Democratic Alliance;

49.3. The African National Congress;

49.4. The Governor of the Reserve Bank;

49.5. The Bank Ombudsman;

49.6. Trade Unions;

49.7. Consumer Ombudsman;

49.8. The Minister of Mining;

49.9. The Department of Labour; and

49.10. The Financial Services Board.

50.

Other members of the Oakbay Group also took action. The Group Human Resource Director, Mr Andre Oldknow, on behalf of employees who submitted a petition, also lodged a bill of rights violation complaint with the SA Human Rights Commission. I attach hereto a copy of the complaint, the ruling, appeal and outcome of appeal as **Annexures "OB4.1"** to **"OB4.4"**. It is also worth mentioning that employees, across the entire Group, staged a peaceful march, handing over a memorandum to ABSA bank, FNB and Standard bank. A copy of the relevant correspondence and memorandum is attached hereto as **Annexure "OB5".**

51.

There was nothing untoward about Mr Howa's attempts to seek assistance to protect the business and, importantly, the 8 300 jobs which would be lost if the Oakbay Group were forced to shut down its South African operations.

52.

Companies and constituents in South Africa and indeed the world over routinely approach their governments, including the executive, legislative and regulatory authorities for assistance in a wide range of situations. Clearly, Mr Howa was not of the view that these entities and persons would have a legal right to reverse the decision of the Banks or to "*intervene*" in those decisions.

MH

53.

It would be a bizarre result if every empowered government official receiving a letter from a constituent seeking assistance or counsel could race to a court to seek a declaration of the variety that the Minister seeks in this application. Taken to its logical conclusion, every regulator or member of the government could, if this Court countenances it, inundate the Courts seeking to get declarations such as the Minister seeks. It is strange, therefore, that the Minister decided to approach the Court for an abstract declaration of rights regarding whether or not he was "*empowered or obliged*" to assist their petitioner. He needed to have done nothing at all, as members of the executive branch do routinely when their assistance is sought in matters beyond their powers or mandate.

The Oakbay Group's correspondence to the Minister

54.

In point of fact, Mr Howa did not "*demand*" (as the Minister mis-states in his Founding Affidavit) or even ask the Minister to "*intervene*". In the first letter to the Minister (of 8 April 2016),[2] Mr Howa informs the Minister that 3500 jobs created by Oakbay's mining interests were "*now at risk*" as a result of the closure of the bank accounts and that, with their bank accounts closed, the Oakbay Group is "*currently unable to pay many of the salaries of our more than 4500 employees*" which would result in "*tens of thousands of their dependents*" suffering as a result of the campaign against the Oakbay Group and the Gupta family. Mr Howa indicates that:

"we believe that this is the result of an anticompetitive and politically motivated campaign designed to marginalise our business. We have received no justification

[2] Annexure "A" to the Founding Affidavit, 21 of the paginated papers.

whatsoever to explain why ABSA, FNB, Sasfin, Standard Bank and now Nedbank have decided to close our business accounts."

He concludes: *"I hope that you appreciate my candour and can see that we are doing everything we can to save thousands of South African jobs".*

55.

It is in this context that the plea for help is made to the Minister. Nowhere in the letter of 8 April 2016 does Mr Howa demand or ask the Minister to exercise a legal right or power to intervene in the banks' commercial decisions. Rather, the first line of the letter makes it clear that Mr Howa's intention was "*to provide [the Minister] with advance warning that Oakbay Investments and our portfolio companies may soon be incurring significant job losses*". Clearly the Minister would have an interest in job losses, and the Minister admits as much at paragraph 19 of his Founding Affidavit when he states: "*So too are the jobs of the affected individuals (which Oakbay has variously estimated at 6000, 7500 or 15000) for which I as Minister of Finance would always have a considerable concern*".

56.

The following day, in an interview on 9 April 2016, Mr Howa explained to the interviewer Richard Quest of CNN that following the Banks' decisions to close the accounts, he had appealed to multiple persons "*on behalf of his staff*" in order to help stave off imminent job losses. Mr Howa explained that Oakbay's worries were whether they would be able to pay their staff and their suppliers.[3]

[3] A copy of this video interview is available at https://businesstech.co.za/news/banking/119659/watch-gupta-company-ceo-on-cnn/.

57.

In a follow-up letter dated 17 April 2016,[4] Mr Howa apologised to the Minister if it might have seemed as if his previous letter portrayed anything other than a "*heartfelt appeal for assistance*". He states: "*it was never our intention to come across with any other message than a plea to you as political head for the financial sector to assist us in avoiding this huge impact on the lives of around 50 000 people*". He asks the Minister for "*help to save the jobs*" and revert regarding "*any possible assistance you are able to offer*" in the best interest of the economy and overall development.

58.

On or about 25 April 2016, Mr JJ Gauntlett SC advised Minister Gordhan that no cabinet member has any power to intervene in the banker-client relationship ("*the First Opinion*")[5]. As a matter of public law, he further advised that any such intervention may be ignored by a private entity without seeking legal recourse and, as a matter of private law any such intervention constitutes a delict, Mr Gauntlett advised.

59.

The Minister addressed correspondence to Mr Howa on 24 May 2016, a month after he received the First Opinion and following a meeting between the parties on the same day.[6] (The meeting was held despite a conclusion in the First Opinion that "*the contemplated meeting is not authorised by law*"). By this stage, the Minister could be in no doubt as to the ambit of his power and authority. The Minister, in his letter, clearly states that he cannot act in any way that undermines the regulator or the

[4] Annexure B to the founding affidavit, page 23 of the paginated papers.
[5] Annexure C to the Founding Affidavit, page 23 of the paginated papers
[6] Annexure D to the Founding Affidavit, page 51 of the paginated papers.

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authorities.

60.

Nevertheless, the Minister indicated in this letter that *"We agreed to continue engaging and you would provide us with any relevant information"*. In other words, the Minister agreed that, notwithstanding that the Minister had no power to interfere or intervene in the relationship between the Oakbay Group and the Banks (a proposition which has at all times been accepted by the Oakbay Group and which had been confirmed in the First Opinion), he nevertheless undertook to continue to engage with the Oakbay Group and he (the Minister) asks for further relevant information from the Group..

61.

In a letter written by Mr Howa to the Minister on the same day (24 May 2016), Mr Howa clearly refers to the fact that he is "*aware of the legal impediments*" preventing intervention by the Minister.[7] He accepts (as he must) that the Minister has no power to intervene in the banker-client relationship. However, in the light of the Minister's stated commitment to continue to engage with the Oakbay Group, Mr Howa seeks from the Minister "*any possible assistance [he is] able to offer [the Oakbay Group] in these trying times*".

62.

Shortly thereafter and on 29 May 2016 Minister Gordhan received a further opinion from Mr Gauntlett SC (the "*Second Opinion*"). The Second Opinion is, in essence, a repetition of the circumstances prevailing under the First Opinion and it did not disclose any new information which the Minister did not have on receipt on the first

[7] Annexure E to the Founding Affidavit, page 46 of the paginated papers.

opinion.[8]

63.

Yet, the Minister continued to offer "*assistance*" to the Oakbay Group. In response to a telephonic question raised by Mr Stephan Nel, the CEO of Sahara Computers (Pty) Ltd in June 2016, the Minister stated:

> *"Where Treasury can assist it will go out of his way to do so. We will not stand still. There are options that are not being undertaken that can be looked at."*

I refer in this regard to a newspaper article annexed hereto and marked as **Annexure "OB6"** headed: "*Gupta's Sahara CEO claims he was intimidated after Gordhan ambush*" and in which the Minister's undertaking to assist the Oakbay Group is recorded.

64.

On 28 June 2016, Mr Stephan Nel, the CEO of Sahara Computers, addressed correspondence to the Minister in which he sought a meeting with the Minister so that he could "*then brief the rest of my colleagues and our employees on what concrete steps are being made to secure the future of my remaining 103 employees, their families and dependents*".[9] Mr Nel does not request or demand that the Minister exercise any government "powers of *intervention*".

65.

Finally, there is also no request for "*intervention*" in the last letter from Mr Howa to the

[8] Annexure F to the Founding Affidavit, page 53 of the paginated papers.
[9] Annexure "G" to the Founding Affidavit, page 66 of the paginated papers.

Minister dated 25 July 2016,[10] In this correspondence, Mr Howa again emphasises the effect of the loss of jobs at the Oakbay Group on the economy and states: "*hopefully, we can jointly find a way to understand the real reasons for the banks decision to unilaterally close our accounts*". Nowhere does Mr Howa demand or ask the Minister to intervene or attempt to persuade the banks to reverse their decision.

66.

In fact, following this letter, and despite clear advice in the First Opinion and Second Opinion that he had no authority to do so, the Minister did write to the FIC on 28 July 2016 in an effort to obtain the reasons for the banks' decisions to close the accounts and in order to "*approach the Court*". As I set out further below, the explanations sought by the Minister were not provided by the FIC.

Conclusion on the requirement for an "*existing, future or contingent right or obligation*"

67.

Accordingly, on the first leg of the test for declaratory relief, the Minister fails to pass the hurdle of establishing his interest in an existing, future or contingent right or obligation which is at stake in this application. The Minister's attempts to create the impression that he was "*forced*" to approach the Court are without merit. There was no such need and all parties have understood the legal position at all relevant times.

[10] Annexure "L" to the Founding Affidavit, page 80 of the paginated papers.

The Court's discretion regarding declaratory relief and the motivation behind this application

68.

Moreover, on the second leg of the test, this Court should exercise its discretion to refuse the Minister's invitation to enter the political fray which is currently being played out in the South African media. In this section, I deal with the political motivations for this entirely unnecessary application which has placed considerable demands on the courts and the public purse. I am advised that a court should be slow to step into the political arena where there is no need for it to do so, merely because the Minister seemingly has another agenda not appropriate for the Court to entertain. I further submit that the Court should clearly establish the precedent that the courts have no place in addressing such unnecessary applications that are an abuse of the resources and the role of an independent judiciary that should not be involved in political games.

69.

I reiterate that it is mischievous at best (and misleading at worst) for the Minister to have attempted to suggest to this court that the Oakbay Group or the Gupta Family ever demanded or implied that the Minister had a legal obligation or entitlement to intervene in the relationship between the Oakbay Group and its bankers. It is also either mischievous or misleading for the Minister to suggest that the Oakbay Group or the Gupta Family ever acted or purported to act in such a way that the Minister could have reasonably deduced therefrom that this application presents a matter that needs to be decided in our Courts. Simply put, everyone was and continues to be in accord that the Minister has no legal right or obligation to intervene and such a request was never made to the Minister. As such, the Minister's application should be dismissed and no further time and resources of the Court wasted.

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70.

Indeed, the dispute between the Gupta Family and the Minister has a long and unfortunate political history, which I now set out.

The Minister's call to *"clip the wings"* of the Gupta family

71.

Mr Pravin Gordhan was appointed Finance Minister in South Africa on 14 December 2015.

72.

In January 2016, shortly after his assumption of office, the Minister called a meeting with approximately 60 *"captains of industry"* and CEO's of large companies in South Africa. The meeting was held on 29 January 2016 at Nedbank's office in Sandton. I did not attend the meeting (nor was I invited).

73.

A media report of the meeting (which apparently lasted two and a half hours) is attached hereto and marked as **Annexure "OB7"**. At the meeting, the Minister discussed various threats facing the South African economy. I have been informed by various credible sources (who do not want to be named for obvious reasons) that, in addition to issues such as Eskom and the weakening Rand, the Minister also referred explicitly to the threat of *"a Family in South Africa"* who is involved in politics and business. The Minister apparently elaborated on this Family and eventually said that steps must be taken *"to clip the wings of this Family"*.

74.

The sources who, independently from each other, informed me of this meeting and the allegations made, said that it was clear that the Minister referred to the Gupta Family and that on no permutation could a different Family be suggested by him. I was told that the Minister made sure that everybody present knew exactly what he meant and to whom he referred. I specifically challenge the Minister to confirm or deny whether this meeting occurred and to produce the agenda of the meeting, the minutes of the meeting and a recording of what was said at the meeting.

75.

The Oakbay Group was not invited to the meeting nor were any of the members of the Gupta Family invited or present at the meeting. The result of the aforesaid is that any and all discussions at the meeting took place in the absence of any representative of the Oakbay Group or the Gupta Family. It is fairly incredible that a meeting of 60 major companies in South Africa could have been held and the Gupta Family deliberately excluded from the meeting.

76.

There is also a supreme irony in the Minister's conduct in calling and addressing the meeting in this manner. The Minister is at pains in this application to point out that he has limited constitutional and statutory powers and that he may not interfere in the private relationships of businesses. Yet, this is precisely what the Minister did in January 2016 in addressing the meeting in this fashion and in placing pressure on big business in South Africa to "*clip the wings*" of the Gupta family and their businesses.

77.

The sources who have reported to me on the Minister's comments are, for obvious reasons and fears of repercussions, not willing to provide confirmatory affidavits at this stage. Subsequent events, however, in my respectful submission, prove that the information which I received must have been correct because this statement set the ball rolling for an orchestrated effort by business in South Africa (including the banks) to close out the Oakbay Group and the Gupta Family.

Event's following the Minister's call to "*clip the wings*" of the Gupta family

78.

The Minister's statement resulted in a sudden refusal of many South African companies to conduct business with any entity who is linked to the Gupta family. I annex hereto marked as **Annexure "OB8"** a list of businesses who suddenly started to disassociate with the Oakbay Group of Companies following this meeting to which I referred. Many of these entities announced their sudden decision publicly and in concert in an effort to drum up all the support they could to execute the *"instruction"* received from the Minister and to be seen in doing so.

79.

The only entity that had disassociated with the Oakbay Group prior to this meeting was ABSA. ABSA notified the Oakbay Group of its decision to close all the accounts held with them in December 2015, shortly after the Minister's assumption of office, purportedly on the ground of "*reputational risk*".

80.

The onslaught after the Minister's address was severe and has had a significant and negative impact on the Oakbay Group which will be apparent in the 2017 year-end statements. First, the Oakbay Group's auditors, KPMG, caused their relationship with the Group to be terminated in March 2016. This notwithstanding that KPMG had given clean audits to the Oakbay Group's accounts for sixteen years with no concerns or exceptions. When they terminated their mandate, KPMG indicated that the termination was not because of any "*audit risk*" which they perceived in respect of the Oakbay Group, but arose instead from "*reputational risk*". This is, of course nonsense, because given the nature of KPMG's business, *"reputational risk"* only flows from *"audit risk"*. I must surmise that KPMG had been persuaded to disassociate themselves from the Oakbay Group for fear of falling out of favour with other clients.

81.

A number of other companies and institutions also followed the Minister's direction.

82.

First National, Nedbank and Standard Bank gave notice of their decision to close all accounts held with them from approximately April 2016 and went so far as to suggest that their closing of the accounts followed their practice to disassociate with entities which might be involved in money laundering, terrorist activities and other similar unlawful conduct.

83.

The timing of Standard Bank's decision merits further discussion. After the notice was received from ABSA in December 2015, the Oakbay Group applied for accounts with

Standard Bank in January 2016. These applications were processed and the accounts were activated on 10 February 2017. I am advised that Standard Bank would have performed due diligence on the Oakbay Group before activating the accounts. It is therefore apparent that the due diligence did not raise any red flags and that Standard Bank was satisfied to the extent that it activated the accounts.

84.

Tegeta Exploration and Resources (Pty) Ltd (the Fourth Respondent) acquired the target companies of Optimum Coal Holdings (then under business rescue), one of which was Optimum Coal Mine (*"OCM"*)(also under business rescue) from Glencore, the closing date of the transaction being 15 April 2016. The business rescue practitioners sent a notice to the creditors (including Nedbank, RMB (part of First Rand Group) and Investec), on 31 March 2016, confirming the distribution of the proceeds of the sale to creditors. The total outstanding purchase price of R2 084 210 206-10 (Two Billion, Eighty Four Million, Two Hundred and Ten Thousand, Two Hundred and Six Rand and Ten Cents) was paid on 14 April 2016. This amount was distributed to the consortium of banks, who were the primary creditors of Optimum Coal Holdings. Termination notices from the banks were received on the following dates:

84.1. First National Bank on 1 April 2016;

84.2. Standard Bank on 6 April 2016;

84.3. Nedbank on 7 April 2016 (although decision was taken also on the 6th).

85.

To put it plainly, the Banks waited to receive confirmation of the proposed payment before they gave notice of their decisions to terminate the Oakbay Groups' Accounts.

It is inconceivable that three different commercial banks could, independently from each other, within such a short space of time, come to the same conclusion to terminate their respective banking relationships with the Oakbay Group within a period of 5 days.

86.

I need to place on record that the reasons from the banks, given to various entities in the Group, differed. Nedbank and Standard Bank handed their notices of cancellation in regard to the 10th Respondent (VR Laser Services (Pty) Ltd) to the management of VR Laser in person. These discussions were recorded. The Standard Bank representative, Mr David Pike, confirmed that "*whilst that is the shareholding [i.e. whilst the Gupta Brothers own shares in the entity]... we are not comfortable*" with the situation (relationship). Mr Pike confirmed that there was nothing wrong with VR Laser's account, except for the shareholding of the Guptas. Mr Pike indicated that he was not in a position to divulge more information.

87.

The Nedbank representative, Ms Strydom, in contrast to what Nedbank allege in their affidavit and correspondence, confirmed to the management of VR Laser that they closed the account "*because of everything going on in the media as well as the things going on with the Gupta family...*" From these contradictory statements I humbly submit that the banks clearly focused on the demise of the Gupta family and their businesses. I submit this is *mala fide.* The CEO of VR Laser attended these discussions and made the recordings. His confirmatory affidavit in this regard is annexed.

88.

The sudden about-turn became so severe that even the companies supporting the main business of the Oakbay Group and its suppliers withdrew any and all involvement and support. This caused many commercial relationships strengthened over decades to be terminated and lost forever.

89.

The Minister's interference in the private business affairs of the Oakbay Group has been supported by other government entities. The Bank of Baroda, with whom the Oakbay Group presently bank, has complained of continued interference in their business by SARS and the Reserve Bank.

90.

The Bank of China opened accounts for VR Laser Services (Pty) Ltd on 8 September 2016, but closed them a few weeks later on 29 September 2016. It is noteworthy that VR Laser Services (Pty) Ltd provided the Bank of China with all due diligence documents and even stated the fact that the Guptas are indirect shareholders prior to the opening of the account. The Bank of China accepted this information and opened the account. I annex in this regard a *"Welcome Letter"* marked as **Annexure "OB9.1"**. A few days later however, after only a few transactions, the relationship was suddenly ended. A termination email confirming these events is attached hereto and marked as **Annexure "OB9.2"**.

91.

For some reason, the Bank of China (*"BOC"*), has not been cited as a Respondent and I submit that this is a further material non-joinder.

92.

Due to the fact that VR Laser played open cards from the beginning, the CEO of VR Laser contacted the Business Development department. The call was recorded. The representative was very apologetic about the closure of VR Laser's accounts but confirmed the following:

92.1. The account was closed because of the "*potential political risk*" associated with the Guptas by "*higher management*";

92.2. The South African Reserve Bank did not "*list*" the Guptas;

92.3. VR Laser would have to restructure from shareholder's side "*in order to survive banking*".

93.

This however is in contrast with other conduct of the Banks and there is no consistency in their application of their "*political risk*" policy. For example, notwithstanding that the Gupta Family has a shareholding in Richards Bay Coal Terminal (Pty) Ltd, the Banks have not (so far as I am aware) taken any steps to close the Richard Bay Coal Terminal's account. The policy is clearly selectively applied and targets the Gupta family and its businesses.

94.

I submit that these interferences should become the subject of further investigation and decisive action. These practises by the four major banks aided by the Reserve Bank continue today.

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95.

The same interference was experienced, so I was informed, in respect of the Oakbay Group's present bank, the Bank of Baroda which endures severe pressure by officials of the South African Reserve Bank.

96.

As a result of the aforesaid, I submit that First National Bank, Nedbank and Standard Bank (aided by the South African Reserve Bank and at the behest of the Minister) executed their instruction *"to clip the wings of the Family"* and that is, I submit, why this application was eventually brought in the way it was and at the time it was issued.

97.

Evenly concerning and relevant to this point is the ongoing interference and bullying tactics by the banks. I have been informed that the banks have now embarked on a further onslaught by contacting business associates like Mr Salim Essa of the Group and even employees receiving their remuneration from the group and advising them that their accounts are to be revised. These obvious scare tactics are aimed at thrusting further pressure on the Oakbay Group and anybody associated with it.

The timing of the application confirms the real reason for the application

98.

The timing of this application supports the Oakbay Group's suspicions that the application is politically motivated. The certificate from the FIC on which this application is purportedly based (and which I deal with below) was received by the Minister on 4 August 2016. However, the Minister did not launch the application

immediately. In fact, he waited some two months to issue this application, although the founding affidavit consists of a paltry 13 pages.

99.

It is, I believe, notorious that on or about 22 August 2016, the Minister was directed to report to the Hawks to issue a warning statement by 25 August 2016. The event was much-publicised and I attach marked **"OB10"** a newspaper article dealing with the Hawks' directive and the Minister's response thereto.

100.

On 25 August 2016, the Minister failed to report to the Hawks and the following day, on about 26 August 2016, he held a meeting with staff of the National Treasury. At this meeting, the Minister indicated that "*the out-of-favour Indian-South African family – the Guptas – are the brain behind the nightmare. He said he is being attacked by the influential family because of the work the National Treasury is doing*". The newspaper article which appeared in the Business Day is annexed hereto and marked as **Annexure "OB11"**.

101.

The timing of this application, launched a few weeks after these statements on 14 October 2016, coincided with the criminal proceedings instituted against the Minister and the obvious inference is that this application was his retaliation against the Gupta Family (whom he falsely and without any basis believed to be behind his criminal investigation by the Hawks). On this ground too, the application is abusive and ought to be dismissed with costs.

MH

102.

The timing further coincided with the anticipated release of the State of Capture Report. It will be recalled that the last day in office for the previous Public Protector was 14 October 2016. Several applications to prevent the State of Capture report from being released followed and those would be heard on 2 November 2016. This application was strategically issued a few days before the hearing of that matter in order to cloud the issues and further taint the Oakbay Group.

Conclusion on the request for declaratory relief

103.

On account of the circumstances I have set out above, it is clear that there was no need for the Minister to bring this application and that the declarator in the notice of motion is not seriously sought. There was no disagreement as to the Minister's obligations and no legal dispute that required the Minister to go to the Court. Rather, the Minister has used this fictitious "*dispute*" between himself and the Gupta family to charge to court in a highly-publicised fashion, and to place before this Court a range of extraneous and defamatory statements and documents (dealt with further below).

104.

This Court should not stand for this abuse and, on account of the fact that the Minister has failed to establish that he has an "*existing, contingent or future right or obligation*" at stake in this matter and has also failed to demonstrate why this is an appropriate case for the Court to exercise its discretion in favour of the declaratory relief, the application should be dismissed with costs.

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The request for the matter to be withdrawn

105.

As set out above, the application papers were served on the Oakbay Group on 14 October 2016. On 18 October 2016, the Group's attorney directed a letter to the State Attorney acting on behalf of the Minister of Finance of which a copy is appended hereto marked **"OB12"**.

106.

In this letter, Oakbay Group's attorney states:

"The application seeks declaratory relief that the applicant is not by law empowered or obliged to intervene in the relationship between my clients and commercial banks.

In support of this application your client's representative deposed of a founding affidavit in which the deponent seeks to rely on certain facts contributing to the initiative to launch the application.

Without proper consideration (so I submit) the deponent to the founding affidavit, curiously so, implicates my clients in inappropriate and unlawful conduct which "creates an, increasingly serious state of affairs".

The insinuation that my clients would, as per the example in the papers, act with impropriety which "will expose the fiscus not only to the loss of tax revenue but also put the burden of mining rehabilitation on the fiscus" is uncalled for, malicious and vexatious."

MH

107.

The letter continues:

"By issuing the application (at a first glance merely asking for a declarator) supported by a defamatory founding affidavit causes this application to be vexatious and an abuse of court.

It therefore, in my view, justifies this letter informing you of the fact that I intend advising the Oakbay Group of companies to oppose the application, obtain all the necessary information from the relevant role players and ask for a punitive costs order against the applicant when the application is dismissed.

We are all aware of the fact that the application is launched with the financial resources of the tax payer. There is ***no dispute about the fact that your client is not by law obliged to intervene in the relationship between my clients and commercial banks****. To spend tax payers' money in a reckless and inappropriate manner will, in my view, constitute a contravention of the provisions of the Public Finance Management Act, No. 1 of 1999 warranting further action against those officials responsible for same.*

In order to ensure that we do not expose the fiscus unnecessarily to costs we propose that the application be withdrawn and your client to tender our clients' costs, same on or before close of business on 19 October 2016." (My emphasis)

108.

In conclusion the attorney wrote:

"We need to reiterate that the purpose of this letter is to afford your client the

MH

opportunity to save the tax payer's hard earned money. ***We record that our clients would like to put their formal version before court since you have chosen that forum. If the application is, therefore, not withdrawn the matter must proceed and we will gladly do the necessary in order to restore the misrepresentation created by the papers."*** (My emphasis)

109.

It is clear from the letter that the relief sought in the Applicant's application is not disputed and has never been disputed and could never be the basis of a substantive application to this Court. The role of this Court is not to satisfy the Minister's academic interest in obtaining a judicial *imprimatur* over the legal advice which he has already received from his counsel. Its role is to resolve disputes between genuine litigants.

110.

Instead of permitting taxpayer's money to be spent on senior counsel and teams of legal representatives for all the parties, the Minister was invited to withdraw the application.

111.

The Minister refused to do so. In a letter dated 19 October 2016, appended hereto as **Annexure "OB13"**, the offices of the State Attorney declined to withdraw the application and insisted that the application should proceed. This reaffirmed the Oakbay Group's concerns that the true reason for the launching of this application is not to obtain the declarator regarding this Minister's powers (or lack thereof), but part of the Minister's ongoing plan to discredit the Gupta family and to eliminate them from South African business.

MH

112.

On 7 November 2016, the attorney for the Oakbay Group forwarded a further letter to the office of the State of Attorney, and copied to all parties. In this letter, he indicated his disappointment at the approach taken by the Minister in this application and appended his previous letter of 18 October 2016 and the Bank's response. A copy of this letter is annexed marked **"OB14"**. To prevent duplication the annexures to this letter is omitted.

113.

As a result of the failure of the Minister to withdraw the application, the Oakbay Group was constrained to file a notice of intention to oppose and to answer in this affidavit the untrue, scandalous, vexatious and irrelevant allegations and insinuations in the Minister's affidavit regarding the Oakbay Group's affairs. I will later in this affidavit and under a separate heading deal with the devastating impact the Minister's application has had on the *fama* and *dignitas* of the Oakbay Group. I submit that it warrants further action to be taken by the Gupta Family and the Oakbay Group which will be done in a separate action following these proceedings. I submit that, given that there is no live issue between the parties, the implication is clear that the Minister issued this application with the intention to harm the Oakbay Group and to eliminate the Group and the Gupta Family from South African business.

114.

The Minister's application has encouraged the media to badmouth the Group and the Gupta Family by suggesting or implying that they are dishonest, corrupt and conducting their bank accounts contrary to banking regulations and legislation. Not only are these allegations false; they are utterly irrelevant to the academic issue in this

application regarding the Minister's powers. I accordingly now turn to consider the Oakbay Group's application to strike out certain portions of the Minister's affidavit and Annexure "P" thereto as irrelevant.

THE APPLICATION TO STRIKE OUT

115.

I will cause to be filed with this affidavit an application to strike out certain material which is irrelevant, scandalous and / or vexatious in terms of Rule 6(15). The application to strike is attached hereto and marked **Annexure "OB15"**. The passages and annexures in question include:

115.1. Paragraph 19 of the Founding Affidavit which states: *"the continued assertions by Oakbay that, as Minister of Finance, I should intervene in, or exert pressure upon, the banks regarding their closure of the Oakbay accounts is harmful to the banking and financial sectors, to the regulatory scheme created by law, and the autonomy of both the government regulators and the registered banks themselves"*. As I have set out above, this allegation is patently false and its inclusion in the founding affidavit is scandalous and vexatious. The Oakbay Group has never contended that the Minister of Finance has the power to intervene or exert pressure on the banks regarding their closure of the Oakbay accounts.

115.2. Paragraph 27 of the Founding Affidavit which states: *"Previously, on 4 August 2016, I had received a letter with an attached certificate from the Director of the FIC. I attach a copy, marked 'P1' and 'P2". This reflects the increasingly serious state of affairs which has arisen. This is illustrated by the number and scale of reported transactions linked to Oakbay. Just one example is the*

reporting of an amount of R1,3 billion as a suspicious transaction, in terms of the FICA, relating to Optimum Mine Rehabilitation Trust. Indeed, as appears from the further attached letter of 27 June 2016 (annexed marked 'Q') from attorneys acting for the business rescue practitioners of Optimum, 'with the written approval of the Department of Mineral Resources' R1,3 billion was intended to be transferred from the account closed by Standard Bank to the Bank of Baroda. For this the further approval of the Reserve Bank was sought. I am not aware as to whether the transfer to the Bank of Baroda was effected".

115.3. Annexure P to the Founding Affidavit – the certificate purportedly issued in terms of section 39 of the FIC Act and which purports to record 72 "*suspicious transaction reports*" which were reported to the Financial Intelligence Centre under the FIC Act - has no bearing on the relief which is sought in this application and is irrelevant. (This certificate is annexed to an affidavit of the Director of the FIC. I shall hereafter refer to Annexure "**P**" as "*the certificate*" simpliciter.)

116.

If this Court does not dismiss this application for a declarator because it does not get out of the starting blocks of section 21 of the Superior Courts Act, and if the Court is inclined to deal with the application, Oakbay Group's counsel intend making application to strike out the aforementioned passages of the Minister's founding affidavit and the certificate for being scandalous, vexatious or irrelevant.

117.

If this Court refuses to strike out these passages and annexure P, then I am advised that I have both a right and a duty to respond to these allegations, which the court (by

refusing to grant the strike out application) will axiomatically have determined to be relevant to the application. It is to this subject, and in particular the purported "*suspicious transaction reports*" set out in annexure P to the Minister's founding affidavit and the FATF Recommendations referred to in the banks' affidavit, to which I now turn.

THE FATF RECOMMENDATIONS

118.

The Oakbay Group is of the view that the exposition provided by the Minister and the Banks on local and international Banking Law is irrelevant for purposes of the application. I am advised to reply to these comments to a certain degree in the event that they become relevant in this matter.

119.

"The Financial Action Task Force ("FATF") is an inter-governmental body established in 1989 by the Ministers of its Member jurisdictions (including South Africa). The objectives of the FATF are to set standards and promote effective implementation of legal, regulatory and operational measures for combating money laundering, terrorist financing and other related threats to the integrity of the international financial system." FATF, About Us, http://www.fatf-gafi.org/about/ . There is no dispute that the FATF standards are the applicable anti-money laundering standards for government AML regulation.

120.

However, those standards do not set forth in any detail how banks design and implement their anti-money-laundering programs. While it is unclear exactly what

principles the banks followed in designing their anti-money-laundering programs, the international banking community generally follows the guidance provided by the Wolfsberg Group in implementing anti-money-laundering programs. The Wolfsberg Group began as a group of thirteen international banks in 2000, "*which aims to develop frameworks and guidance for the management of financial crime risks, particularly with respect to Know Your Customer, Anti-Money Laundering and Counter Terrorist Financing policies.*"[11]. Over the years since then, the Wolfsberg Group has issued Guidance and responses to frequently asked questions (*"FAQs"*) that essentially are international banking standards for anti-money-laundering programs.

121.

The Wolfsberg Guidance on a Risk Based Approach for Managing Money Laundering Risk (*"RBA Guidance"*), attached as **Annexure "OB16"**, states at RBA Guidance at 1-2, that there is "*no universally agreed or accepted methodology by either governments or institutions, which prescribes the nature and extent of a risk based approach.*". Accordingly, the Guidance is to be used for each institution to determine its risk based process and "*not designed to prohibit potential customers from engaging in transactions with institutions, but rather assist institutions in effectively managing potential money laundering risks.*" The Guidance recommends that risks be measured by three types of risk: Country Risk, Customer risk, and Services risk. The RBA Guidance at 3-5 sets forth specific risk variables that banks should consider in determining the level of risk posed by particular customers.

122.

In light of the RBA Guidance, I now turn to address the Customer and Services risks

[11] See in this regard http://www.wolfsberg-principles.com.

associated with Oakbay related accounts.

Customer Risk

123.

Oakbay acknowledges that the affiliation of Duduzane Zuma, a son of President Zuma, with certain of the Group businesses, results in those businesses being considered as "*close associates of a "politically exposed person*" ("PEP"), and therefore subject to Enhanced Due Diligence under the Wolfsberg Guidance, Wolfsberg Frequently Asked Questions on Politically Exposed Persons ("PEP FAQs") (2008), at 3-5 attached hereto as **Annexure "OB17"**.

124.

However, both the FATF Recommendations and Wolfsberg recognise that bank customers associated with a PEP, a family member of a PEP, or a close associate of PEP, standing alone, does not mean a bank should not be willing do business with such customers. The PEP FAQs at 2 state: "*It is however important to understand that the majority of PEPS do not abuse their position and will not represent any undue additional risk to a Financial Institution solely by virtue of that categorisation*".[12]

125.

Further, Oakbay points out how Duduzane Zuma's relationship with the Group developed from a young age. Duduzane Zuma started working for Sahara at age 24 in 2005. The Oakbay Group has had a long and strong tradition of recruiting young aspiring individuals and training them as part of the Group's commitment to the black

[12] See also the FATF Recommendations 10 and 12 (setting forth requirements for risk based customer diligence).

empowerment initiatives in the country. (For example, currently the Group's media companies train and prepare for employment over 40 graduates annually, all of who brought in with no prior training or experience.) Mr Zuma was one of many young South Africans hired by the Group. It is to be noted that Mr Zuma's father had at the time been relieved of his duties as Vice President. Under the circumstances, Mr Zuma would be hard pressed to be considered a PEP.

126.

Mr Zuma demonstrated good business sense and the fact that he is one of over twenty children of President Zuma (who subsequently became the President) was unrelated to his success at the Group businesses. As he continued his relationship with Sahara, Mr Zuma continued to develop his relations with the Gupta family and demonstrated individual capabilities in the business arena.

127.

Mr Zuma demonstrated excellent aptitude at Sahara being very interested in technology. Over time, Mr Zuma acquired shares in some of the Group companies, including accumulating shares that were disposed of by other persons who had been brought into shareholding participation through the black empowerment program.

128.

Accordingly, while the Oakbay Group accepts that Mr Zuma is now a PEP, and that his continued shareholding in the Oakbay Group could result in those companies being a close affiliate of a family member of a PEP, as stated above, the facts demonstrate that Mr Zuma's shareholding in the Oakbay affiliated companies is quite proper and the result of many years of hard work, business skills and the benefit of the black empowerment programs promoting share ownership and other involvement.

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129.

Moreover, the organisational structure and share ownership of the affiliated companies is not unusual for a large conglomerate and provides no basis for any suggestion that the entities were created to conceal improper transactions. There are sound business reasons for the structure of the Oakbay Group companies. While the Gupta-affiliated businesses are owned ultimately by the Gupta brothers and other family members, certain companies in the group are owned and managed by Oakbay for logical reasons of management oversight, governance and integration. Yet other companies were acquired over time by the Group so those may have a different set of ownership, including partners with equity in the companies, because of the need for additional capabilities, experience and resources. Overall, the corporate structure of the Group is logical, consistent with its business needs and similarly situated companies in South Africa.

130.

Many of the allegations raised by the Minister hint at public corruption. In evaluating the corruption risk associated with the Oakbay affiliated businesses, the first consideration should be to evaluate which businesses do any government business and second, what businesses do any government business and the extent of that business. As mentioned earlier, Sahara and JIC represent 85-90% of the Group's revenue and do no business with the government. The remaining 10-15% of revenue is attributable to media businesses, which do obtain limited business with both private and governmental organizations. As the only company which has newspapers in six provinces in the Republic, there is a reasonable amount of government media spend on the Group media companies. It is well known that governmental entities are purchasers of media advertising space, and that affiliated media businesses are in

some cases the sole outlet for government media purchases. Our affiliated media businesses receive less than one percent of the government's overall media purchases. Thus, there is minimal anti-money-laundering or corruption related risk associated with the bank accounts for these businesses.

131.

Further allegations and insinuations have also been made regarding Tegeta and coal contracts related to Eskom. In this regard, I state the following. First, the Group entered the coal business in 2006 with the formation of Tegeta. Oakbay affiliates sell less than four percent of the total coal purchased by Eskom, and that coal is provided at one of the lowest prices out of all Eskom's major suppliers.

132.

The foregoing demonstrates that the Oakbay related companies, while affiliated with a family member of a PEP, in fact present low risk for anti-money-laundering and use of the financial system to further corruption.

Services Risk

133.

The overwhelming majority of the banking services used by the Oakbay affiliated companies also are low risk. For example, the companies use banks for payroll and other business transactions that are ordinary and customary. Oakbay has no complex treasury functions such as currency trading, hedging or complex loans.

134.

As a result, Oakbay believes that a properly informed risk analysis of the accounts

related to Oakbay and its affiliates demonstrates that the accounts present low services risk for banks in South Africa.

135.

Furthermore, Oakbay and its affiliates do not engage, in the normal course of business, in US dollar or UK sterling transactions. None of the companies are organized under the laws of the United States or the United Kingdom, and the controlling individuals, primarily the Guptas and others, including myself, are not citizens, *"resident aliens"*, or residents of either the US or the UK. The relevant legal entities are organized under the laws of South Africa, and the relevant individuals are citizens of South African and India and residents of South Africa.

136.

As such, I am advised that Oakbay does not fall within the jurisdiction of the U.S. or U.K. anti-corruption laws. Further, I am informed that, after appropriate diligence, it is confirmed that neither Oakbay, its affiliates nor any related individuals are the subject of any economic sanctions programs under the laws of the US, the European Union, any other recognized country, or the United Nations. There are no red flags or other concerns about the Group or its shareholders.

137.

Accordingly, the Court should disregard all references to such matters in the various opposing affidavits.

138.

The FIC has submitted the 72 transactions as potentially "*suspicious transactions*

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reports" for money laundering or corruption related payments. As set forth above, I do not believe that any of the Wolfsberg risk factors apply in general or specifically to the 72 transactions, which are addressed in detail below.

OAKBAY GROUP'S RESPONSE TO THE 72 *"SUSPICIOUS TRANSACTIONS"*

139.

I commence this section of the affidavit with a discussion of the various attempts which the Oakbay Group has made to obtain information from the Banks pertaining to their reasons for closing the accounts and, more recently, in regard to the 72 "*suspicious transaction reports*" set out in the certificate. Thereafter, I deal with each of the transactions which the team of forensic auditors employed by the Oakbay Group has been able to identify and explain the underlying *causa* for each transaction. I demonstrate that there is nothing "*suspicious*" or untoward about these transactions – they were simply flagged in the ordinary course under the FIC Act, together with millions of other innocent transactions, and any attempt to draw conclusions of impropriety from the certificate is misplaced.

The attempts to obtain information concerning the 72 transactions

140.

In this section of the affidavit, I detail the lengths to which the Minister and the Oakbay Group of Companies and the Gupta Family have gone to obtain the information on which the Minister purportedly relies in order to sustain the relief sought and to support the scandalous, vexatious and irrelevant allegations which had devastating effects on the reputation of the Group and the Family. Indeed, even the Minister's attempt to obtain such information from the banks was unsuccessful.

The Minister's request to FIC

141.

Following the Minister's engagement with the Oakbay Group (and prior to the launching of this application) on 28 July 2016 the Minister directed correspondence to *inter alia* the Financial Intelligence Centre and the South African Reserve Bank. The letter (annexure "H" to the Minister's application)[13] advised Mr Murray Michell of the Financial Intelligence Centre that he (the Minister) was considering obtaining a court ruling on:

141.1. Whether he has the power in law to intervene with the banks concerned regarding their closure of the Oakbay accounts; and

141.2. Whether a basis exists in fact for the contention that the relevant banks terminated the accounts in question for a reason unrelated to their statutory duties not to have dealings with any entity if a reasonably diligent and vigilant person would suspect that such dealings could directly or indirectly make that bank a party or accessory to contraventions of the relevant laws.

142.

In his letter the Minister, therefore, clearly states that he will approach the Court for two declarators, the one pertaining to his own authority and the second pertaining to the conduct of the banks.

143.

It is clear that, at least as at 28 July 2016, a question existed in the Minister's mind as

[13] Annexure H to the Founding Affidavit, page 70 of the paginated papers paragraph 14.

to whether the termination of the Oakbay Group's bank accounts was lawful. And, as I set out below, no information was provided by the Financial Intelligence Centre which could persuade the Minister one way or the other, and there is no basis on which the Minister would be entitled to draw the adverse inferences which he has made in his founding affidavit.

144.

In his letter, the Minister requested that FIC sends him feedback on the four issues raised in his letter *i.e.:*

144.1. Whether FIC has indeed received reports relating to the accounts in question;

144.2. Over what periods;

144.3. In respect of which entities; and

144.4. <u>In what respective amounts relating to each such entity</u>. (My emphasis).

145.

Copies of this letter were sent to the Governor of the South African Reserve Bank and the Registrar of Banks.

146.

In response to the request for information, Mr Michell from the Financial Intelligence Centre did not deal with the specific information requested by the Minister. Instead, Mr Michell took it upon himself to issue a certificate purportedly in terms of section 39 of the FIC Act, and sent it to the Minister on 4 August 2016. The certificate, as dealt with further below in the auditor's report, is sparse in its information and indeed is the

very antithesis of the obvious purpose of such a certificate, namely to provide "*evidence*" upon which a court may arrive at a conclusion.

147.

The issuing of the certificate was unlawful for at least the following reasons:

147.1. Mr Michell was asked by the Minister to look at 7 entities, but in fact the certificate refers to some 13 entities – many of whom are not joined in this application, including the Gupta Brothers themselves. There is no indication as to how Mr Michell identified the further entities to include in the certificate;

147.2. Mr Michell does not explain how he identified the "*data discriminators*" referred to in paragraph 8 of the certificate;

147.3. The certificate is vague and unintelligible and does not permit a reasonable person in receipt of the certificate to identify the transactions which were purportedly flagged as "*suspicious*";

147.4. In this case, the certificate is not being used as "*evidence*" on any issue relevant to the Minister's application (as required by section 39 of the FIC Act) but rather to support the Minister's spurious allegations of the "*increasingly serious state of affairs*" at paragraph 19 of his affidavit. As the FIC itself has stated: "*the contents of a report on a suspicious or unusual transaction is hearsay, by nature, and is based on a reporter's suspicions and therefore will not meet evidentiary standards set by our judiciary for use in certain legal proceedings.*" See in this regard the FIC November 2016 press release annexed marked **"OB18"**. By definition, such a report cannot prove anything about "*the state of affairs*" at Oakbay or any of its affiliates and the Minister's attempts to interpret the certificate in this manner are misguided.

147.5. The certificate contains no detail as to the purported "*suspicious transaction reports*" and the majority of transactions therein (particularly the "*multiple transaction*" amounts) are untraceable. This denies the Oakbay Group of an opportunity to explain and refute the allegations levelled against them through the certificate.

148.

The FIC recognised (at paragraph 44 of its affidavit in the FIC Application) that there are *"extremely limited"* circumstances in which the FIC may share the information it holds. The subsections permitting the dissemination of the FIC's information all relate to ongoing investigations or the performance of the functions of institutions and agencies similar to the law enforcement agencies of the Republic. Yet, the FIC released information to the Minister for a stated purpose that had nothing to do with law enforcement or investigations and this release of information was itself unlawful.

149.

On these grounds alone, the certificate should be disregarded in its entirety.

150.

Moreover, a number of persons whose names appear on the certificate (the Trustees of the Optimum Mine Rehabilitation Trust and entities described as "*Annex Distribution (Pty) Ltd*", "*Mabengela Investments (Pty) Ltd*", "*Surya Crushers (Pty) Ltd*", "*Newshelf 960 (Pty) Ltd*", "*Confident Concepts (Pty) Ltd*", "*Sahara Distribution (Pty) Ltd*", "*Koornfontein Mines (Pty) Ltd*") have for reasons unknown to me been included in the certificate but have not been joined in this application. There are also references to a number of persons with the surname "*Gupta*" including "*Varun*", "*Rajesh Kumar*", "*Chetali*", "*Atul Kumar*", "*Arti*" and "*Atul K*". None of these persons have been joined

in this application.

151.

I am advised that the failure to join those persons who are named in the "*suspicious transaction reports*" is a material non-joinder as, given the reliance placed by the Minister on the certificate, those persons whose names appear on the certificate are entitled to an opportunity to refute those allegations. Indeed, the publication of the information relating to them is unlawful, and by definition could not have been included (as asserted by Mr Michell) for purposes of litigation involving them.

152.

Should this court not strike out the certificate either as irrelevant or unlawful, or at the very least postpone the application to enable all persons whose names appear on the certificate an opportunity to be joined in this application and to respond thereto, I am advised that I should deal with the information in the certificate as best I can, although I reserve the rights of the Oakbay Group to deal more fully with the transactions therein once the FIC application (dealt with below) has been finalised.

153.

Suffice to say that in response to the Minister's request for "*detail*" from the Financial Intelligence Centre as to the reasons for the closure of the Oakbay Group's accounts, the best the Financial Intelligence Centre could come up with was to issue a certificate of "*suspicious transaction reports*". Nor has the Minister produced any other evidence of wrongdoing on the part of Oakbay or its affiliates. Apart from this certificate (which says nothing at all) and an assertion by Mr Kuben Naidoo of the Reserve Bank that there is a transaction regarding VR Laser Asia which "*might*" give rise to exchange control concerns – a question which Mr Kuben Naidoo had not even been asked to

address[14] - no justification or *"dirt"* could be found by the Minister in support of the conduct of the banks who blatantly refused to give any reasons for their conduct.

154.

I am advised that the Minister is required to make out his case in his founding affidavit and, if he wished to rely on any purported wrongdoing by the Oakbay Group as a justification for launching this application (and an attempt to justify the relevance and non-mootness of the application), he was required to set that out in his founding affidavit. I accordingly have a right to respond to those allegations as the *numerus clausus*, or the best (or worst) that the Minister was able to come up with regarding the allegations against the Oakbay Group and the Gupta family.

155.

Reinforcing the fact that the FIC certificate provided no evidence of "*an increasingly serious state of affairs*," as alleged at paragraph 19 of his affidavit, the Minister waited more than two months until October 2016 to issue his application.

156.

For that reason, (and others I will deal with hereunder) I submit that the Minister was *misguided* in issuing his application in the way he did. I deal now with Oakbay's attempts to obtain information regarding the Banks' closure of its accounts.

[14] Annexure K, to the Founding Affidavit, page 79 of the paginated papers.]

The Oakbay Group's attempts to obtain the requisite information

157.

Since this application was issued the Oakbay Group instructed its attorneys to call on each one of the four banks to furnish reasons for their sudden and unexplained conduct by closing the bank accounts of the Group and the entire Gupta Family one by one. Copies of this correspondence is annexed hereto and marked as **Annexures "OB19.1"** to **"OB19.4"**. From what I have explained hereinabove the banks refused to give any co-operation whilst FIC vehemently opposed the FIC application to access the information purportedly used as a basis to discredit the Oakbay Group and the Gupta Family and to justify the closure of the accounts in question.

158.

On 25 November 2016, the Oakbay Group issued the FIC Application to the Financial Intelligence Centre in an effort to obtain the information concerning the factual basis of the 72 "*suspicious transaction reports*".

159.

The opposing papers to the FIC application were served on/or about 22 December 2016. Essentially, the FIC refused to provide the information which is sought.

160.

The Deputy Judge President directed on 15 December 2016 that the main application and the FIC application be heard simultaneously and this direction, unfortunately, rendered it impossible for the Oakbay Group to be in a position to gain access to the records and the information held by FIC in order to complete this affidavit with the

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necessary clarity on the transactions mentioned in the FIC certificate.

161.

The Oakbay Group submits that the relief sought in the FIC application is warranted – it would amount to a serious violation of Oakbay Group's constitutional rights to deny the Oakbay Group the information which it needs to identify the impugned transactions and to clear its name. The information which the Oakbay Group needs in respect of each transaction which is regarded as suspicious includes:

161.1. The date of the transaction;

161.2. Any reference numbers attaching to the transaction;

161.3. The value of the transaction;

161.4. The details of the sending party;

161.5. The originating bank;

161.6. The receiving bank; and

161.7. Any other transaction-related details which would assist in the identification and / or explanation of the transaction in question.

162.

The situation where the Oakbay Group had to beg their own bankers for access to the information and had to apply to Court to obtain access to the information (only to be refused by FIC) shows a *prima facie* resistance to efforts by the Oakbay Group to allow it to clear its name where the said information (so withheld) is used by the

Applicant to discredit the Family and the Group.

163.

Notwithstanding that the FIC Certificate is baseless and the fact that the Oakbay Group has still not been given reasons for the closure of their bank accounts, I am informed that I cannot leave unanswered the allegation concerning the 72 transactions which are contained in annexure "**P**" to the Minister's affidavit and must *"plead over"* in respect of those remaining allegations. Accordingly, it was decided in the first week of January 2017 to leave no stone unturned in order to deal fully with these allegations (despite the resistance of the banks and the Financial Intelligence Centre to provide details of the 72 transactions). Accordingly, the Oakbay Group appointed a team of independent forensic auditors to show that there is nothing untoward about the 72 transactions.

The forensic review

164.

Since this application was launched, and in order once and for all to put to bed any insinuations of wrongdoing made by the Minister, the banks and the media, the Oakbay Group employed a firm of forensic auditors, namely Nardello & Co.

165.

An expert affidavit deposed to by Noel Lindsay of the said forensic audit firm wherein this Honourable Court will find his report clearly indicating that, with the limited information available, no transgression of any international banking standard (obviously applicable to local banks and their practice) could be found. A copy of his unsigned expert affidavit and the audit report is annexed hereto and marked as

Annexures "OB20" and **"OB21"**. Due to logistical and time constraints it was impossible to obtain the signed expert affidavit before this answering affidavit had to be filed in terms of the directive of the Deputy Judge President. A signed copy of the expert affidavit will be provided to this Court at the hearing of this matter.

166.

Nardello & Co. LLP was instructed to review the 72 transactions that appear on the certificate purportedly issued in terms of section 39 of the FIC Act, dated 4 August 2016, which was prepared by Mr Murray Mitchell, the Director of the FIC. Those transactions that have a reported value attributed to them amount to Rand 6,839,974,102, in total. Nardello was instructed to identify the 72 transactions in the banking records of the Oakbay Group, including the personal bank statements of the members of the Gupta Family.

167.

I do not repeat all the findings herein and ask that the report be read into this affidavit.

168.

In short, of the 72 transactions on the certificate, 20 transactions were entirely unidentifiable as they were labelled "*multiple transactions*". A further 37 transactions could not be located in the bank accounts of the corporate entities and individuals concerned due to missing information and / or errors. The audit team was able to identify 15 transactions, with a combined value of R127, 230, 298, on the Corporate spreadsheets, the Corporate PDFs, the Corporate bank statements or the Personal bank statements. Those 15 transactions comprise numbers 7, 8, 11, 14, 20, 38, 43, 46, 48, 49, 50, 52, 53, 55 and 57 in the certificate.

169.

In respect of the transactions which were identifiable on the sparse information in the certificate, the auditors have identified a legitimate *causa* for each transaction and demonstrate that there is nothing unlawful or "*suspicious*" about the transaction in question.

170.

I also note that only 15 of the transactions on the certificate are dated prior to the announcement by ABSA that accounts will be terminated in December 2015. Those 15 transactions list 8 different persons' accounts and span a four-year period. This is not activity that would likely, or did in fact, cause any bank to terminate an account.

171.

In any event, once the Banks determined to close the Oakbay Group's accounts, it is not surprising that they began to flag every material transaction in those accounts -- that would be consistent with their decision but would not be evidence that any particular transaction warranted suspicion. The huge jump in "*suspicious transaction reports*" beginning in 2016 - and in particular, in late March, as the termination decisions were on the brink of announcement - confirms that assessment.

172.

Some number of the post-March 2016 transactions (and possibly the first-quarter 2016 transactions for the ABSA accounts) may in fact have been transfers related to closing accounts. There was no *"increasing"* level of concern - just regulatory filings reflecting a decision already made to close accounts.

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173.

Given that some two-thirds of the transactions in the FIC certificate occurred in connection with or after the banks' decisions to close the Oakbay Group's accounts, these transactions could not have been the justification for the closing of the accounts. That is additional evidence that the Minister's submission of the certificate - and the filing of an application as an excuse to get it into the public record - was for entirely other reasons.

174.

Finally, as the auditors' report confirms, some of the transactions listed in the certificate are incredible on their face as they exceed the total turnover in the accounts during relevant months. That raises questions about how the chart was compiled and, more importantly, the undue weight the Minister put on this list.

175.

In short, in respect of each of the 72 transactions which the Oakbay Group and its team of forensic auditors have been able to identify, it is clearly shown that the allegations of wrongdoing or "*suspicion*" in respect of those transactions are misplaced.

176.

I do not repeat all of the auditors' findings, but have been advised to deal with one of the transactions referred to by the Minister in support of his application to justify the innuendo that some of the transactions referred to in the flawed certificate may cause unnecessary risks for the fiscus.

177.

In his papers the Minister says that the transfer of an amount of R1. 461 billion secured for mining rehabilitation is of significant concern. He creates the impression that Oakbay (actually Optimum) ignored the conditions of the mining license and disposed of the amount for its benefit. After this application was launched these allegations were repeated in an article published on IOL news. A copy of the article is attached hereto and marked as **Annexure "OB22"**.

178.

As I will indicate below, the Minster had no cause for concern. Let me present the facts to refute this frivolous allegation and innuendo:

178.1. it is a condition to the mining license of Optimum Coal Mine (Pty) Ltd (OCM) that an amount of R1.461 billion be secured by an entity called Optimum Coal Rehabilitation Trust;

178.2. It is not disputed that the required amount was held at Standard Bank in accordance with the conditions whilst Optimum Coal Mine (Pty) Ltd was under business rescue;

178.3. When Standard Bank closed the accounts of the Group in April 2016 those accounts included the Optimum Coal Mine accounts subsequent to termination of the business rescue proceedings. It obviously followed that the amount of R1,461 billion had to be re-invested with an alternative bank;

178.4. The Optimum Coal Mining Rehabilitation Fund opened its investment account with Bank of Baroda in Johannesburg and with the consent of all relevant parties caused the investment to be transferred to the new account.

179.

This then is the reason that the R1,461 billion was transferred out of the Standard Bank account and there was nothing improper about the transaction.

180.

I was informed that during the interview Mr Ajay Gupta had with Adv. Madonsela on 4 October 2016 in respect of the *"State of Capture"* report, Adv. Madonsela was under a similar misguided view of the investment and requested proof of the fact that the amount is still secured for the benefit of mining rehabilitation. The Bank of Baroda was requested to issue a certificate confirming that the amount remained invested in accordance with the conditions to the mining license.

181.

A few days later and in accordance with the undertaking to Adv. Madonsela a certificate issued by the Bank of Baroda was delivered at her office and I take the liberty of appending hereto as **Annexure "OB23"** the certificate disposing of any speculation regarding the Minister's concerns.

182.

I, lastly under this heading, deal with the facts regarding the figures relating to the limited scope of all business conducted with government, directly and indirectly by the group.

183.

I append hereto as **Annexures "OB24.1" to "OB24.12"** recent audit reports received from the current auditors of the group, SNG, clearly indicating the finite extent of

business conducted with any government institutions and State owned enterprises.

Other possible *"risks"*

184.

For the sake of completeness, several other entities were contacted by the Oakbay Group in order to establish whether any other investigations were pending or had been completed in relation to the 72 transactions. These entities include the South African Revenue Service (*"SARS"*), the Hawks and international forums.

185.

The following written confirmations and/or certificates attached hereto and marked **Annexures "OB25.1"** to **"OB25.3"** were received from the aforementioned entities:

185.1. Current Tax Clearance certificates received from SARS;

185.2. Hawks letter of confirmation, confirming that there are no complaints or reports from either the banks, the FIC or the SAPS reported or pending; and

185.3. An independent certificate from Nardello & Co, who conducted a sanction list check on the Gupta Brothers.

186.

It is clear from the aforementioned documents that the 72 transactions have not attracted further investigation from the relevant authorities despite the fact that they were made public knowledge by the minister. The only reasonable conclusion that can be drawn from this state of affairs is that the 72 transactions do not warrant further investigation by the relevant authorities because they view them as lawful.

The effect of the termination of the relationships

187.

The result of the termination of these commercial relationships, purportedly on the back of the statement by the Minister urging businesses to "*clip the wings*" of the Gupta family has had devastating effects of the businesses in the Oakbay Group. I do not intend to deal fully with these consequences in this affidavit, as these effects will form part of an action to be instituted by the Oakbay Group against the Minister and such businesses for damages suffered as a result of this unlawful conduct. However, for illustrative purposes, I am advised to deal with the dire situation of at least one of the companies in the Group, Sahara Computers (Pty) Ltd.

188.

Suppliers of Sahara, entities like Sandisk, Western Digital, LG and many other international computer manufacturers conducted business with Sahara on a daily basis involving literally billions of rands over the years. These relationships took years to build and cherish.

189.

By latching on to the perception created by the banks and closure of accounts these suppliers all terminated their relationship with Sahara.

190.

As a result of the aforesaid it became impossible for Sahara to conduct its business in a lucrative way since it had no bank accounts and no suppliers.

191.

The onslaught on Sahara by exemplification only was severe and devastating. This all followed the meeting called by the Minister supported by his calculated application on relief not disputed but in which he left slanderous innuendos. Sahara's ability to trade has been severely hampered by this, and Sahara has had to engage in time-consuming and expensive efforts to find new suppliers, in which it has been only partially successful.

192.

And through all of this, the Minister's insinuation that there was something irregular in the conduct of the Gupta family through the Oakbay Group is without foundation. The allegations in the Minister's papers that there is anything untoward about the 72 transactions in annexure P has similarly been revealed to be false. These so-called "*suspicious transaction reports*" listed by the Minister in his application could, at best, be seen as a smokescreen to persuade the general public (and in all likelihood the International Banking Community) that the Group and the Family are involved in dubious and inappropriate transactions.

193.

I repeat that if any party wishes to draw any inferences from the certificate annexed as "P" to the founding affidavit of the Minister, then this Court must order the Financial Intelligence Centre to produce the information sought by the Oakbay Group in the FIC application within 14 days, and postpone the hearing of the Minister's application until the Oakbay Group has had a fair opportunity to respond thereto.

THE ALLEGATIONS CONTAINED IN THE BANKS' AFFIDAVITS

194.

I do not intend to deal specifically with the many irrelevant issues raised in the Banks' affidavits which purport (unsuccessfully) to justify the Banks' conduct. Insofar as there are allegations of wrongdoing in the affidavits of the Banks, and in particular Standard bank which is the only bank which attempts to provide any reasons for its decision to close the Oakbay Group's accounts, the allegations are largely hearsay or so devoid of detail that the Oakbay Group cannot deal with those allegations. However, I must say something about the notice of motion which is annexed to the Standard Bank.

195.

The Oakbay Group has been taken by surprise with the Notice of Motion and affidavit filed on behalf of Standard Bank on 14 December 2016 just one day before the meeting with the Deputy Judge President. I am advised that the manner in which Standard Bank has sought relief by way of a notice, as a respondent in this application, is completely irregular. The Standard Bank affidavit is entirely hearsay and those hearsay allegations are completely irrelevant for purposes of this application.

196.

The Oakbay Group does not wish to delay this Application but will reply to the allegations in due course and in the appropriate forum seeing as the Public Protector has recommended that there be a judicial inquiry into those allegations. Those recommendations are also now subject to a review application launched by the President. This is accordingly not the correct forum to address those allegations and I do not intend to deal with them here.

MH

197.

Furthermore, such answers would have to be provided in a forum where all interested parties, including the Gupta Family (who were not joined in this application) were joined. I record once again that the Oakbay Group denies any wrongdoing.

198.

In any event, the relief which is sought in Standard Bank's notice of motion (namely that all members of the Executive have no power or obligation to interfere in the affairs of the Oakbay Group and its bankers) is devoid of merit. Standard Bank has failed to join a number of relevant parties including the other members of the Executive and the Gupta family, all of whom would have an interest in the relief sought in that application.

199.

Moreover, the relief sought by Standard Bank is beyond the scope of this affidavit and is likely wrong in law. The word "*intervene*" is broadly defined and there may be examples where certain Ministers are given specific powers in relation to the control of banking affairs of individuals or companies. The example which springs to mind is the Minister of Mineral Affairs who is empowered and obliged to monitor the rehabilitation fund of a mine. It is exactly for this reason that in this matter the business rescue practitioners of Optimum Mine asked the Minister of Mines for his permission to transfer the R1,461 billion from the Standard Bank account to the Bank of Baroda and why the Reserve Bank also alluded to the fact that the Minister of Mines has a role to play.

MH

200.

In this limited way at least, there must be supervision, and the blanket declarator sought by Standard Bank is procedurally improper and incorrect in law.

COSTS

201.

As I have set out above, there is no *lis* underlying the application for the declarator which, in effect, amounts to an abuse of this Court by the Minister. The Oakbay Group has been constrained to answer the scandalous and irrelevant allegations in the Minister's affidavit and to deal with the related application by Standard Bank. The Oakbay Group should be awarded its costs on a punitive scale.

CONCLUSION

202.

In the premises, the Oakbay Group prays for an order in the following terms:

202.1. Dismissing the Minister's application;

202.2. Dismissing the relief sought in the notice of motion filed by Standard bank;

202.3. Granting the relief sought in the Notice of Motion in the FIC application;

202.4. Granting the respondents which form part of the Oakbay Group their costs on a punitive scale, such costs to include the costs of three counsel.

MH

DEPONENT

Signed and sworn before me at PRETORIA on this 20TH day of JANUARY 2017 after the Deponent declared that she is familiar with the contents of this statement and regards the prescribed oath as binding on her conscience and has no objection against taking the said prescribed oath.

COMMISSIONER OF OATHS:

MOHLAPAMEETSE HAPPY MAGOMA
ATTORNEY / COMMISSIONER OF OATHS
65 RIGEL AVENUE
WATERKLOOF RIDGE, PTA - EAST
PRETORIA
TEL: (012) 327 4480 / FAX: 086 619 9440

OAKBAY RESOURCES AND ENERGY LIMITED
(Registration number 2009/021537/06)
("Company")

ROUND ROBIN RESOLUTIONS ADOPTED BY THE DIRECTORS OF THE COMPANY IN TERMS OF THE COMPANIES ACT, 2008 ON 16 JANUARY 2017

RRR01/2017 – AUTHORITY TO SIGN AFFIDAVIT

IT IS RESOLVED THAT

1. The company authorises Ms Ronica Ragavan, in her capacity as authorised representative, to act on its behalf, to file an affidavit, pertaining to matters relevant to the Company, in the matter between the Minister of Finance and the Company in the High Court of South Africa;
2. Ms Ronica Ragavan is authorised to sign whatever documents and attest to affidavits as are required for the purposes of 1 above.
3. The actions of Ms Ronica Ragavan in the application launched by the Minister of Finance, case number 80978/16 in the High Court of South Africa (Gauteng Local Division, Pretoria) including the appointment of Van der Merwe & Associates Attorneys are hereby ratified and she is authorised to act on the company's behalf in this matter.

Director	Agree	Disagree	Signature
TW RENSEN	☐	☐	
MV PAMENSKY	☐	☐	
DJ NYAMANE	☑	☐	
T SCOTT	☐	☐	
J ROUX	☐	☐	

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MV PAMENSKY	☐	☐	
DJ NYAMANE	☐	☐	
T SCOTT	☐	☐	
J ROUX	☐	☐	

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Director	Agree	Disagree	Signature
TW RENSEN	☐	☐	
MV PAMENSKY	☑	☐	
DJ NYAMANE	☐	☐	
T SCOTT	☐	☐	
J ROUX	☐	☐	

OAKBAY RESOURCES AND ENERGY LIMITED
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Director	Agree	Disagree	Signature
TW RENSEN	☐	☐	
MV PAMENSKY	☐	☐	
DJ NYAMANE	☐	☐	
T SCOTT	☐	☐	
J ROUX	☐	☐	

OAKBAY RESOURCES AND ENERGY LIMITED
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2. Ms Ronica Ragavan is authorised to sign whatever documents and attest to affidavits as are required for the purposes of 1 above.
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Director	Agree	Disagree	Signature
TW RENSEN	☐	☐	
MV PAMENSKY	☐	☐	
DJ NYAMANE	☐	☐	
T SCOTT	☑	☐	
J ROUX	☐	☐	

SHIVA URANIUM PROPRIETARY LIMITED
(Registration Number 1921/006955/07)
("the Company")

ROUND ROBIN RESOLUTION PASSED BY THE DIRECTORS OF THE COMPANY ON 16 JANUARY 2017

RRR01/2017 – AUTHORITY TO SIGN AFFIDAVIT

IT IS RESOLVED THAT

1. The company authorises Ms Ronica Ragavan, in her capacity as authorised representative, to act on its behalf, to file an affidavit in the matter between the Minister of Finance and the Company in the High Court of South Africa;

2. Ms Ronica Ragavan is authorised to sign whatever documents and attest to affidavits as are required for the purposes of 1 above.

3. The actions of Ms Ronica Ragavan in the application launched by the Minister of Finance, case number 80978/16 in the High Court of South Africa (Gauteng Local Division, Pretoria) including the appointment of Van der Merwe & Associates Attorneys are hereby ratified and she is authorised to act on the company's behalf in this matter and prosecute it to its conclusion.

Director	Agree	Disagree	Signature
J ROUX	☐	☐	
MJ MTSHALI	☐	☐	

SHIVA URANIUM PROPRIETARY LIMITED
(Registration Number 1921/006955/07)
("the Company")

ROUND ROBIN RESOLUTION PASSED BY THE DIRECTORS OF THE COMPANY
ON 16 JANUARY 2017

RRR01/2017 – AUTHORITY TO SIGN AFFIDAVIT

IT IS RESOLVED THAT

1. The company authorises Ms Ronica Ragavan, in her capacity as authorised representative, to act on its behalf, to file an affidavit in the matter between the Minister of Finance and the Company in the High Court of South Africa;

2. Ms Ronica Ragavan is authorised to sign whatever documents and attest to affidavits as are required for the purposes of 1 above.

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Director	Agree	Disagree	Signature
J ROUX	☐	☐	
MJ MTSHALI	☒	☐	

MTH

"OB 1"

OAKBAY INVESTMENTS PROPRIETARY LIMITED
(Registration number 2006/017975/07)
("Company")

ROUND ROBIN RESOLUTION OF DIRECTORS PASSED IN TERMS OF SECTION 74 OF THE COMPANIES ACT OF 2008 PASSED ON 16 JANUARY 2017

RRR01/2017 – AUTHORITY TO SIGN AFFIDAVIT

IT IS RESOLVED THAT

1. The company authorises Ms. Ronica Ragavan, in her capacity as acting CEO, to act on its behalf, to file an affidavit in the matter between the Minister of Finance and the Company in the High Court of South Africa;
2. Ms. Ronica Ragavan is authorised to sign whatever documents and attest to affidavits as are required for the purposes of 1 above.
3. The actions of Ms. Ronica Ragavan in the application launched by the Minister of Finance, case number 80978/16 in the High Court of South Africa (Gauteng Local Division, Pretoria) including the appointment of Van der Merwe & Associates Attorneys are hereby ratified and she is authorised to act on the company's behalf in this matter and prosecute it to its conclusion.

Director	Agree	Disagree	Signature
A CHAWLA	☑	☐	Chawla.
R RAGAVAN	☑	☐	Ragavan

MMH

TEGETA EXPLORATION AND RESOURCES (PTY) LTD
Registration Number 2006/014492/07
(the "Company")

ROUND ROBIN RESOLUTION PASSED BY THE DIRECTORS ON 16 JANUARY 2017

RRR01/2017 – AUTHORITY TO SIGN AFFIDAVIT

IT IS RESOLVED THAT

1. The company authorises Ms. Ronica Ragavan, in her capacity as authorised representative, to act on its behalf, to file an affidavit in the matter between the Minister of Finance and the Company in the High Court of South Africa;
2. Ms. Ronica Ragavan is authorised to sign whatever documents and attest to affidavits as are required for the purposes of 1 above.
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Director	Agree	Disagree	Signature
A CHAWLA	☑	☐	
R NATH	☑	☐	
R RAGAVAN	☑	☐	

WESTDAWN INVESTMENTS PROPRIETARY LIMITED
(Reg. No. 2006/020386/07)
("the Company")

ROUND ROBIN RESOLUTION ADOPTED BY THE DIRECTORS OF THE COMPANY IN TERMS OF SECTION 73 OF THE COMPANIES ACT, 2008 ON 16 JANUARY 2017

RRR01/2017 – AUTHORITY TO SIGN AFFIDAVIT

IT IS RESOLVED THAT

1. The company authorises Ms. Ronica Ragavan, in her capacity as authorised representative, to act on its behalf, to file an affidavit in the matter between the Minister of Finance and the Company in the High Court of South Africa;
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Director	Agree	Disagree	Signature
R RAGAVAN	☑	☐	
LB LOURENS	☑	☐	