THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

Case Number: 24805/2017

In the matter between:

ERIC ANTHONY WOOD N.O.	Applicant
TRUSTEGIC (PTY) LTD	Second Applicant

And

LITHA MVELISO NYHONYHA	First Respondent
MAGHANDHERAN PILLAY	Second Respondent
REGIMENTS CAPITAL (PTY) LTD	Third Respondent
REGIMENTS FUND MANAGERS (PTY) LTD	Fourth Respondent
REGIMENTS SECURITIES LIMITED	Fifth Respondent
CORAL LAGOON INVESTMENTS 194 (PTY) LTD	Sixth Respondent
TRANSNET SECOND DEFINED BENEFIT FUND	Seventh Respondent
CAPITEC BANK LIMITED	Eighth Respondent
ASH BROOK INVESTMENTS 15 (PTY) LTD	Ninth Respondent
LITTLE RIVER TRADING 191 (PTY) LTD	Tenth Respondent
KGORO CONSORTIUM (PTY) LTD	Eleventh Respondent
LITHA MVELISO NYHONYHA N.O.	Twelfth Respondent
MAGDELINE SEKGOPI NYHONYHA N.O.	Thirteenth Respondent
RAMOTHEO MOSES MASHINI N.O.	Fourteenth Respondent
GARY DAVID HARLOW N.O.	Fifteenth Respondent
MAGANDHERAN PILLAY N.O.	Sixteenth Respondent

STANDARD EXECUTORS AND TRUSTEES LIMITED N.O.	Seventeenth Respondent
REGIMENTS ADVISORY (PTY) LTD	Eighteenth Respondent
REGIMENTS ENGINEERING (PTY) LTD	Nineteenth Respondent
REGIMENTS HEALTHCARE (PTY) LTD	Twentieth Respondent
REGIMENTS PRIVATE EQUITY (PTY) LTD	Twenty First Respondent
REGIMENTS SHARED SERVICES (PTY) LTD	Twenty Second Respondent
REGIMENTS NOMINEES (PTY) LTD	Twenty Third Respondent
REGIMENTS TELECOMMUNICATIONS (PTY) LTD	Twenty Fourth Respondent
REGIMENTS BROLL CONSORTIUM (PTY) LTD	Twenty Fifth Respondent

FILING NOTICE

KINDLY TAKE NOTICE THAT the seventh respondent hereby files the following:

DOCUMENT: Answering Affidavit to Part A

DATE ON ROLL: 16 September 2019

DATED AT JOHANNESBURG ON THIS THE 2nd DAY OF SEPTEMBER 2019.

MOETI KANYANE INCORPORATED
Attorneys for the 7th Respondent
First Floor, Block D
Corporate 66 Office Park
269 Von Willich Avenue
Die Hoewes, Centurion
Tel: 012 003 6471 / 087 352 2751
Fax: 086 416 2255

Ref: M Kanyane/BC/M00085
Email: moeti@kanyane.co.za / mashudu@kanyane.co.za
c/o **RAMS INCORPORATED**
9th Floor, Fredman Towers
13 Fredman Drive
Sandton
Tel: 011 883 2234/6
Ref: Mr W Moeketsane

To: **THE REGISTRAR OF THE HIGH COURT JOHANNESBURG**

AND TO: **LOUIS & ASSOCIATES**
Attorneys for the Applicants
Ground Floor, Block 3, Fountain Grove
Number 5 – Second Road
cnr William Nicol
Hyde Park
Tel: 011 023 9690
Fax: 011 447 4621
Email: kevinl@louisattorneys.com
Ref: Kevin Louis/36298

PER ELECTRONIC MAIL

AND TO: **VANDERSPUY CAPE TOWN.**
Attorneys for the 8th Respondent
Ref: Mr Y Cariem/CAP2/0333
Email: yaseenc@vdslaw.co.za / samanthah@vdslaw.co.za
c/o **RAMSAY WEBBER ATTORNEYS**
2nd Floor, The Reserve
54 Mellville Road
Illovo
Sandton

PER ELECTRONIC MAIL

AND TO: **SMIT SEWGOOLAM INC.**
Attorneys for the 1st – 6th & 9th – 25th Respondents
12 Avonwold Road
Saxonwold, Johannesburg
Tel: 011 646 0446
Email: tiaan@smitsew.co.za / chantelle@smitsew.co.za
Ref: MAT29181OCJ/SC

PER ELECTRONIC MAIL

THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

Case Number: 24805/2017

In the matter between:

ERIC ANTHONY WOOD N.O.	Applicant
TRUSTEGIC (PTY) LTD	Second Applicant

And

LITHA MVELISO NYHONYHA	First Respondent
MAGHANDHERAN PILLAY	Second Respondent
REGIMENTS CAPITAL (PTY) LTD	Third Respondent
REGIMENTS FUND MANAGERS (PTY) LTD	Fourth Respondent
REGIMENTS SECURITIES LIMITED	Fifth Respondent
CORAL LAGOON INVESTMENTS 194 (PTY) LTD	Sixth Respondent
TRANSNET SECOND DEFINED BENEFIT FUND	Seventh Respondent
CAPITEC BANK LIMITED	Eighth Respondent
ASH BROOK INVESTMENTS 15 (PTY) LTD	Ninth Respondent
LITTLE RIVER TRADING 191 (PTY) LTD	Tenth Respondent
KGORO CONSORTIUM (PTY) LTD	Eleventh Respondent
LITHA MVELISO NYHONYHA N.O.	Twelfth Respondent
MAGDELINE SEKGOPI NYHONYHA N.O.	Thirteenth Respondent
RAMOTHEO MOSES MASHINI N.O.	Fourteenth Respondent
GARY DAVID HARLOW N.O.	Fifteenth Respondent

MAGANDHERAN PILLAY N.O.	Sixteenth Respondent
STANDARD EXECUTORS AND TRUSTEES LIMITED N.O.	Seventeenth Respondent
REGIMENTS ADVISORY (PTY) LTD	Eighteenth Respondent
REGIMENTS ENGINEERING (PTY) LTD	Nineteenth Respondent
REGIMENTS HEALTHCARE (PTY) LTD	Twentieth Respondent
REGIMENTS PRIVATE EQUITY (PTY) LTD	Twenty First Respondent
REGIMENTS SHARED SERVICES (PTY) LTD	Twenty Second Respondent
REGIMENTS NOMINEES (PTY) LTD	Twenty Third Respondent
REGIMENTS TELECOMMUNICATIONS (PTY) LTD	Twenty Fourth Respondent
REGIMENTS BROLL CONSORTIUM (PTY) LTD	Twenty Fifth Respondent

SEVENTH RESPONDENT'S ANSWERING AFFIDAVIT IN PART A AND FOUNDING AFFIDAVIT IN ITS COUNTERAPPLICATION AGAINST CAPITEC

TABLE OF CONTENTS

INTRODUCTION	6
WOOD'S SELF-CREATED URGENCY	13
THE GUPTA, WOOD, REGIMENTS STATE CAPTURE PROJECT	20
Introduction	20
The Use to the Guptas of Having Regiments Advising Organs of State	22
The Eskom Pre-purchase to Fund the Gupta's Acquisition of the Optimum Coal Mine	22
The Locomotives Procurement by Transnet	23
The Features of the Wood, Regiments, Gupta Money Laundering Scheme	26
The Evidence of the Wood, Regiments, Gupta Money Laundering Scheme	32
The Navigator Documents	32
Wood's Commission Arrangement with Albatime and the Guptas	38
The Evidence Disclosed to the State Capture Commission by Standard Bank	43
The Detail of Money Laundering Payments on the Transnet GFB Contract	47
The Criminality of the Wood, Regiments, Gupta Money Laundering Scheme	49
How the Fund became a Victim of the Wood, Regiments, Gupta Money Laundering Scheme	50
The Money Laundering Payments Taken out of the Fund	61
THE FUND'S CLAIMS IN ITS ACTION	67
THE STRUCTURE OF THE SETTLEMENT AGREEMENT	73
WOOD'S ABUSES OF PROCESS	78
The Abusive Urgent Proceedings	78
The Abuse Inherent in the Part A Relief Sought Against the Fund	78
The Capitec Consent	79
WOOD HAS MADE OUT NO DEFENCE TO THE FUND'S CLAIMS AGAINST REGIMENTS CAPITAL AND REGIMENTS FUND MANAGERS	81
Claim AA: the Restitution Claim	83
Claim D: the Delictual Claim in respect of the Conspiracy to Misappropriate R229 million from the Fund	88

Claim I: the Disgorgement Claim in Relation to the Denel Debt Commission 93
Claim J: the Bond Churning Transactions 97

WOOD'S FLIMSY COMPANY LAW CHALLENGES TO THE VALIDITY OF THE SETTLEMENT AGREEMENT 99
The Financial Assistance Complaint 99
The Notice Complaints 105

THE BALANCE OF CONVENIENCE 106
The Fund's Limited Opposition to the Anti-Dissipation Relief 106
The Risk of Irreparable Harm Faced by the Fund if the Settlement Agreement is Interdicted 107
The Absence of any Risk of Irreparable Harm Faced by Wood 111
The Public Interest 113

AD SERIATIM RESPONSE TO THE ALLEGATIONS OF WOOD 113

CONCLUSION ON WOOD'S APPLICATION 119

THE FUND'S COUNTERAPPLICATION AGAINST CAPITEC 119
The Parties 119
The Purpose of the Counterapplication and Urgency 120
The Chronology Relevant to the Counterapplication 122
The Letter from Ms Botha to the Fund on 30 August 2019 128
Capitec's Threats Are Legally Unfounded 138
Conclusion on the Counterapplication 142

I, the undersigned,

PETRUS JOHANNES JAKOBUS MARITZ

do hereby make oath and say:

1. I am the principal officer of the Transnet Second Defined Benefit Fund ("the Fund"). The Fund is the seventh respondent in this matter. I am duly authorised by the Fund to depose to this answering affidavit

   1.1. in answer and opposition to the relief claimed by the applicants; and

   1.2. to serve as my founding affidavit in the Fund's counterapplication against the eighth respondent ("Capitec") to prevent it from interfering with the Fund's settlement agreement with the first to sixth respondents, which agreement has been attached as Annexure X3.3 to the founding affidavit ("the settlement agreement");

   1.3. in relation to the latter, I point out that the applicants have cited Capitec incorrectly – the Capitec entity relevant to the settlement agreement (see clause 1.1.5 thereof) is not Capitec Bank Limited but Capitec Bank Holdings Limited, the public company registered and incorporated in South Africa with registration number 1999/025903/06 and having its principal address, like Capitec Bank Limited, at 1 Quantum Street, Techno Park, Stellenbosch.

2. The facts set out below are, to the best of my knowledge and belief, both true and correct. Save where the contrary is expressed or appears from the context, they lie within my personal knowledge.

3. Where I make legal submissions, I do so on the basis of advice received and accepted by the Fund.

4. I have read the notice of motion and the founding affidavit deposed to by Eric Antony Wood ("Wood"), and answer thereto as set out in this affidavit.

INTRODUCTION

5. The Fund is a closed pension fund with no contributing members. The latest actuarial valuation of the Fund was performed as of 31 March 2019. It is attached as Annexure **"PM1"**.

6. The Fund has 46 955 pensioners comprising the following (see paragraphs 4.1 and 6.15 of Annexure "PM1"):

   6.1. 13 375 male former employees with an average age of 79.4 years;

   6.2. 623 female former employees with an average age of 78.3 years;

   6.3. 71 male spouses of deceased former employees with an average age of 65.7 years;

6.4. 32 760 female spouses of deceased former employees with an average age of 76.7 years; and

6.5. 126 children of deceased former employees.

7. The average annual pension paid by the Fund is R32,198.00 which equates to R2,683.17 per month (para 4.1 of "PM1"). Most of the Fund's beneficiaries are entirely dependent on their pensions to survive.

8. Because of the advanced age of the Fund's beneficiaries, mortality rates are high (see para 4.1 of "PM1"). Thousands of the Fund's beneficiaries are unlikely to be alive in a year's time.

9. The Fund has been a victim of State Capture related crimes perpetrated by Wood and the first to fifth respondents ("the Regiments respondents"). Wood is the deponent to the founding affidavit and the person in whose primary interest this application has been brought. State capture related crimes in which Wood has been centrally involved have caused the Fund to suffer damages running into hundreds of millions of rands. The settlement agreement which Wood seeks to interdict is an agreement in terms of which the Fund is to be compensated to the tune of R500 million plus interest at prime plus 2% from 15 July 2019, plus a 10% discount on the market value of 810 230 Capitec shares for the State Capture losses which he and the Regiments respondents caused the Fund to suffer.

10. Performance of the settlement agreement will make a fundamental difference to the lives of the Fund's pensioners. By way of illustration, if R500 million were distributed

in the form of bonus pensions to each of the Fund's current 46 955 beneficiaries, they would each receive the equivalent of 4 months' bonus pensions. For elderly people accustomed to living on less than R3,000.00 per month, the value of four months' bonus pensions speaks for itself.

11. Wood's application is designed to prevent the pensioners of the Fund receiving the compensation to which they are entitled as a result of his State Capture activities. It is also an abuse of process. As I show below:

    11.1. Any urgency in relation to the relief Wood seeks in Part A of his application is entirely self-created;

    11.2. Wood has gratuitously brought the eighth respondent into the present application and sought superfluous relief against it in a bad faith attempt to cause the settlement agreement to fail merely by instituting this application. In this regard, Wood has deliberately chosen a set down date (10 September 2019) for his interdictory relief against Capitec which falls after the suspensive condition deadline (6 September 2019) in the settlement agreement for Capitec to furnish the consent which he seeks to interdict (see clauses 3.1.4 and 3.2 of the settlement agreement);

    11.3. Wood is alert to the irreparable harm which his interim relief application threatens to the Fund and its pensioners. Yet he has pertinently refused an invitation from the Fund to put up security for any proven losses that the Fund

may turn out to suffer in the event that his interim relief is granted but when Part B is finally heard, the relief he claims in prayer 5 is dismissed.

12. Quite apart from the inherent abuses in this application, the balance of convenience overwhelmingly favours the Fund:

12.1. As a shareholder, Wood's trust has no claim to share in the assets of Regiments Capital until creditors, like the Fund, have been paid in full. The Fund's claims against Regiments Capital are being pursued in its action against Wood and the Regiments respondents ("the Fund's action").

12.1.1. A schedule of the Fund's claims in its action against Wood and the Regiments respondents ("the Fund's action") is attached as Annexure **"PM2"**.

12.1.2. As appears from this schedule, the Fund's claims against Regiments Capital, including interest, will, by 13 September 2019, the anticipated date of performance of the agreement, aggregate to R817 million, far more than the settlement amount of R500 million plus interest from 15 July 2019. The aggregate claims of the Fund against the fourth respondent ("Regiments Fund Managers") which is a subsidiary of Regiments Capital, include an additional R11.4 million and aggregate to over R825 million.

12.1.3. So, for the purposes of the balance of convenience between Wood and the Fund in relation to interdicting the settlement agreement, if

Wood is to show that the settlement agreement may cause him harm, he must show that the Fund's claims against Regiments Capital in the action are unfounded. He makes out no *prima facie* case whatsoever to this effect.

12.2. Even if Wood had made out a case that Regiments Capital and Regiments Fund Managers have paid too much in the settlement agreement (which he has not begun to do), if Wood's Part B claims are good, the third respondent ("Regiments Capital") will have the common law remedies available to a party to a void agreement and will have the remedies conferred by the Companies Act (section 45(6) and section 77(3)(e)(vi)) against directors that are party to unauthorised financial assistance. If Regiments Capital does not pursue those remedies, his trust will have the normal company law remedies against Regiments Capital and the first and second respondents ("Nyhonyha" and "Pillay" respectively) who are its directors. If Wood is successful in his winding-up application of Regiments Capital, its liquidator could pursue those remedies.

12.3. By way of contrast, the Fund's pensioners who are currently living on average amounts of less than R3,000.00 per month and who are approaching the end of their lives,

12.3.1. will inevitably be delayed and in many cases permanently deprived of, the benefit of the four months' bonus pensions which the settlement agreement will enable them to be paid; and

12.3.2. may lose this benefit entirely if the sixth respondent ("Coral Lagoon") is subsequently unable to perform on the settlement agreement.

12.4. Moreover, the Fund will sit for a lengthy period with the risk that Regiments Capital, Regiments Fund Managers and Coral Lagoon will no longer be able to perform on the agreement by the time that the Part B relief is finally decided. Over that period, the Fund will also carry the downside volatility risk in relation to 810 230 Capitec shares, at the same time that it is deprived of its right to maximise its benefit under the settlement agreement by dealing in the 810 230 Capitec shares if the price increases.

12.5. Finally, the public at large, will have to wait for that same lengthy period before it is able to witness what is possibly the most significant instance yet of compensation to victims of State Capture.

13. This application accordingly falls to be dismissed with costs. In view of the abusive nature of the application, the Fund seeks costs on a punitive scale.

14. I have structured this affidavit as follows:

14.1. First I describe the chronology of Wood's disputes with Nyhonyha and Pillay and highlight the self-created urgency of Wood's application;

14.2. I then describe in considerable detail the involvement of Wood, Regiments Capital and Regiments Fund Managers in State Capture – I have been

advised in this regard that as part of the Fund's defence to this application involves allegations of serious criminal conduct against Wood while he was a director of Regiments Capital and Regiments Fund Managers, it is incumbent on me fully to support these allegations with evidence;

14.3. I detail the Fund's claims against the Regiments respondents, the settlement of which Wood seeks to frustrate. I show how these claims flow from the criminal activities of Wood while he was a director of Regiments Capital and Regiments Fund Managers;

14.4. I describe the structure of the settlement agreement;

14.5. I emphasize the abuses of process inherent in the present application;

14.6. I show that, as against the Fund, Wood has not made out any *prima facie* case that he will suffer harm if the settlement agreement proceeds because Regiments Capital and Regiments Securities do not have any *bona fide* defences to the claims of the Fund which they are settling at a discount in the settlement agreement;

14.7. I respond briefly to the contentions advanced by Wood in his attempt to make out a prima facie challenge to the validity of the settlement agreement and show that these are of no substance;

14.8. I address the balance of convenience as between Wood and the Fund and show that this overwhelmingly favours the Fund;

14.9. I then respond *ad seriatim* to those of the allegations in the founding affidavit calling for a response from the Fund.

14.10. Finally, I address the Fund's counterapplication against Capitec.

WOOD'S SELF-CREATED URGENCY

15. The urgent relief sought by Wood in part A has three components:

15.1. Claims in prayers 1 and 2 relating to the entitlement of Wood's Trust (the first applicant) to financial statements from Regiments Capital;

15.2. Interdictory relief in prayer 3, to prevent implementation of the settlement agreement pending finalisation of Part B of Wood's application;

15.3. Anti-dissipatory relief in prayer 4, to operate pending finalisation of Wood's application against the first to third, and twelfth to seventeenth respondents under case no 24805/2017 ("Wood's main application").

16. Wood's main application was launched more than two years ago on 17 July 2017. A copy of the notice of motion in that application is attached as annexure **"PM3"**. In Wood's main application he seeks, as primary relief, to sever his relationship with the Regiments group and to be paid the value of his trust's shareholding in Regiments Capital which is the holding company of the Regiments group.

17. Had Wood pursued his main application with any diligence, it would long since have been finalised. Unless Wood's main application is an abuse of process, Wood must

believe that it will succeed. If the main application is destined to succeed, but for Wood's unconscionable delay in pursuing that application, he would long since ceased to have any interest in Regiments Capital and would have no reason (or standing) to bring this application to frustrate the settlement agreement, or, indeed, to claim any of the other urgent relief he seeks in Part A. So, any urgency of the relief now claimed by Wood in Part A is entirely self-created.

18. Wood's self-created urgency is not confined to his unconscionable delay in relation to his main application.

18.1. On his own version, he has long been in dispute with the Regiments respondents over his demand for financial statements for the Regiments companies. Wood avoids specifying just how long this dispute has raged, but it appears to be a dispute that is now more than two years old (see paragraphs 2 and 3 of Wood's attorney's letter of 9 May 2019 which is attached as Annexure A1 to Annexure X8.6 to the founding affidavit). According to prayer 2 to Part A in the notice of motion the financial statements to which Wood seeks access are for the financial years ended February 2017, 2018 and 2019. Ordinarily the financial statements are produced within three to four months after the end of the financial year. This means that Wood would have known as far back as mid 2017 that there was a problem. In fact, his erstwhile attorneys demanded the 2017 financial statements as far back as 25 July 2017 (see paragraph 2 of Wood's attorney's letter of 9 May 2019 which is attached as Annexure A1 to Annexure X8.6 to the founding affidavit).

18.2. Wood states in paragraph 31.18 of his founding affidavit that -

> *"[the board of Regiments Capital] has consistently fobbed off the Zara Trust's demands for copies of Regiments Capital's financial statements, and repeatedly claimed that those statements "have not yet been finalized". It has now been nearly three years since the Zara Trust has had any real insight into Regiments Capital's financial position."*

18.3. Having apparently been fobbed off for more than two years in relation to his demand for financial statements without approaching this Court to enforce his demand in the ordinary course, Wood, with his penchant for self-created urgency, now expects this Court immediately to attend to his demand on an urgent basis.

18.4. Similarly, since at least as far back as July 2017, Wood has been demanding undertakings from the Regiments respondents that they would not dispose of assets of the Regiments companies without his consent. His request for such an undertaking was rejected more than two years ago (see paragraph 7 of his attorneys' letter of 9 May 2019 in Annexure X9.4 to the founding affidavit).

18.5. Wood has known since at least 11 March 2019 that the Fund and the Regiments respondents have been engaged in negotiations to settle the Fund's claims against the Regiments respondents and that any settlement might involve substantial payments from assets of Regiments Capital (see

his attorneys' letter of 11 March 2019 in Annexure X9.3 to the founding affidavit).

18.6. On 9 May 2019 he renewed his demand for an undertaking that the Regiments respondents would not dispose of any of the assets of the Regiments companies without his consent, and did so specifically in relation to the ongoing settlement negotiations between the Regiments respondents and the Fund. This time he demanded the undertaking by 16 May 2019 (see paragraph 14 of his attorneys' letter Annexure X9.4).

18.7. That undertaking was not forthcoming from the Regiments respondents. Moreover, in a letter of 31 May 2019, the Fund made clear to Wood that it would not be engaging with him over his stated objections to any settlement with the Regiments respondents. A copy of the letter of the Fund's attorneys in this regard is attached as **"PM4"**. The 9 May 2019 letter of Wood's attorneys to which this letter responded is attached as **"PM5"**.

18.8. So by 31 May 2019 at the latest Wood knew that he was facing an imminent threat of the "harm" that he seeks to prevent in prayer 3 of Part A of the notice of motion read with prayer 5 of Part B. Yet he delayed another two and a half months before launching this application to frustrate the settlement agreement amidst all of the other urgent relief that he claims on the basis of self-created urgency.

19. I respectfully submit that Wood should not be allowed to rely on his self-created urgency to bypass the ordinary processes of this Court and have his application heard on an urgent basis.

20. His attempt to have this application heard on an urgent basis is abusive of this Court which is now called upon to consider an application running into thousands of pages on an attenuated timetable.

21. His attempt to fast track his case on the basis of self-created urgency is insulting to ordinary litigants who dutifully follow the rules of this Court only to see one of the principal architects of State Capture attempting to jump the queue ahead of them in the belief that the judiciary should bend to his needs just like organs of state in the executive branch of government were inclined to bend to his needs in recent times.

22. Most importantly, his conduct of this litigation is prejudicial to the Fund:

    22.1. The Fund and its pensioners will suffer far reaching prejudice if implementation of their settlement agreement is frustrated.

    22.2. The Fund should be entitled to a full hearing on the complex issues of fact and law that are raised by Wood's attempt to frustrate its settlement agreement. They include -

        22.2.1. The detailed structure of the settlement agreement;

22.2.2. The various company law issues relevant to Wood's alleged cause of action for prayer 5 in Part B of the application;

22.2.3. The complicated State Capture context to the Fund's various claims against Wood and the Regiments respondents;

22.2.4. The legal and factual basis for the Fund's various claims against Wood and the Regiments respondents and the absence of any *bona fide* defence to these claims – issues that show that Wood faces no risk of irreparable harm from performance of the settlement agreement because, absent the settlement agreement, he and the Regiments respondents are liable to the Fund in even greater amounts than the amount provided for in the settlement agreement;

22.2.5. The factual issues showing that the Fund will suffer far reaching irreparable loss if interim relief is granted against it.

22.3. The attenuated timetable imposed on the Fund by Wood has deprived it of the time that it would ordinarily have under the Rules to address these issues. This has inevitably affected the quality of the papers that the Fund has been able to produce in opposition to Wood's application. In particular, it has deprived the Fund of time for substantive editing of its answering affidavit. This is particularly prejudicial in the context of a dispute that covers a range of complex factual issues as wide ranging as those raised by the present

application. The Fund has had to strike a balance between making sure that all of the essential allegations have been included in its answering affidavit, and preventing a necessarily lengthy answering affidavit from being so voluminous that the case of the Fund is lost in the detail of its papers.

22.4. Quite apart from the quality of the answering affidavits that it can produce, the Fund will have inadequate time to prepare heads of argument and its counsel may well have to finalise the Fund's heads before it has received a replying affidavit. This is a major disadvantage in an application for interim relief where the replying affidavit assumes a greater importance than in ordinary applications.

22.5. The urgent process is likely to affect the quality of the hearing that the Fund will have on the issues raised in its opposition to Wood:

22.5.1. Ordinarily, the hearing of an application involving these issues would require a special allocation over at least two days with adequate time for the presiding judge to read the papers and the heads of argument well in advance of the hearing.

22.5.2. The present application is likely to be forced into a much shorter hearing and will be heard by His Lordship Mr Justice Vally in circumstances where he will have far less time to prepare for the hearing than would ordinarily be the case.

22.6. Moreover, the presiding judge will not be able to focus exclusively on the issues raised by the Fund's disputes with Wood. Those issues may well be lost within the mass of other issues concerning relief that Wood seeks against the Regiments respondents and in which the Fund has no direct interest. These include -

22.6.1. a multiplicity of company law issues relevant to the internal affairs of the Regiments companies,

22.6.2. complex factual issues relating to the disputes between Wood and the Regiments respondents, and

22.6.3. issues of law and fact relating to the anti-dissipatory relief claimed by Wood against the Regiments respondents.

23. All of these problems are the product of Wood's self-created urgency. I accordingly submit that this application should be struck from the roll with a punitive costs order.

THE GUPTA, WOOD, REGIMENTS STATE CAPTURE PROJECT

Introduction

24. The Fund's claims against Wood and the Regiments respondents arise out of facts fitting into a broader context, namely a sustained project by Wood and the Regiments respondents to profit by assisting the Gupta family and their associates in State

Capture related activities. This broader context, which was fraudulently concealed from the Fund, involved the following elements:

24.1. The Gupta family, through their influence over organs of state and public sector pension funds, like the Fund, would procure the appointment of Regiments Capital and its associated companies as advisors or fund managers to organs of state, state owned enterprises and public sector pension funds;

24.2. In turn, the Regiments companies would launder hundreds of millions of rands of public funds for the Gupta family by paying the bulk of the fees that they were paid from public funds to Gupta front companies which, in turn, would launder them on to other laundry entities until the funds finally made their way into offshore Gupta accounts. The money laundering payments made by Regiments were euphemistically described in the Regiments records and books of accounts as "business development" fees;

24.3. The Regiments companies could afford to hand over the bulk of their earnings from public funds in this way because, on their own version, the "fees" that they charged state owned entities like Transnet were 400% more than they would ordinarily have charged. They were also able to abuse the appointment of Regiments Fund Managers to manage assets of organs of state and public pension funds by processing unnecessary transactions in respect of those assets through Regiment Securities and charging millions of rands in unnecessary transaction fees in the process;

24.4. The Regiments companies also served a second important purpose for the Gupta family and their associates – as "advisors" to state owned enterprises, they were perfectly placed to give advice designed to advance the interests of the Gupta family and their associates rather than the state-owned enterprises who had engaged them.

The Use to the Guptas of Having Regiments Advising Organs of State

25. The value to the Guptas of having a party like the Regiments companies advising organs of state is self-evident. Because Regiments were beholden to the Guptas, they could be depended upon to furnish whatever advice the Guptas wanted them to furnish to organs of state. By way of illustration, I refer to two of the best-known examples of State Capture:

25.1. The Guptas' purchase of the Optimum Coal Mine through Tegeta Resources and Exploration (Pty) Ltd ("Tegeta") with the assistance of Eskom; and

25.2. The Transnet locomotive contract with South China Rail which benefited the Guptas to the tune of billions of rands.

<u>The Eskom Pre-purchase to Fund the Gupta's Acquisition of the Optimum Coal Mine</u>

26. Tegeta's purchase of the Optimum Coal Mine was the subject matter of the Public Protector's State of Capture Report. It was made possible only by a R659 million "prepayment" by Eskom to Tegeta when it became clear in April 2016 that Tegeta

was R600 million short of the amount that it needed to raise to pay the purchase price for the mine.

27. In fact, the Guptas had long been looking for an injection of capital from Eskom to pay for their purchase of the Optimum Coal Mine. In December 2015, two of the senior Eskom executives beholden to the Guptas, Matsela Koko and Anoj Singh, made a submission to the Eskom board urging a prepayment of R1.68 billion to Tegeta. In order to sanitise the indefensible economic case they advanced for this pre-payment, they recommended in paragraph 3.7 of their submission of 8 December 2012, that the matter be referred to Regiments Capital for "independent verification". A copy of their submission is attached as Annexure **"PM6"**

The Locomotives Procurement by Transnet

28. Salim Essa ("Essa") is one of the parties whom the Fund alleges to be a co-conspirator with Wood and the Regiments respondents in relation to the misappropriation of R229 million of Fund monies which is the subject matter of Claims C and D of the Fund's action.

    28.1. Essa has been a director of the following Gupta family companies:

        28.1.1. VR Laser Services (Pty) Ltd, registration number 2007/031329/07;

        28.1.2. National Agricultural Development Project (Pty) Ltd, registration number 2006/010137/07;

28.1.3. Elgasolve (Pty) Ltd, registration number 2010/017836/07; and

28.1.4. Tequesta Group Limited, Hong Kong registration number 156268 ("Tequesta").

28.2. Essa was described by Pillay and Nyhonyha in affidavits they filed in the Fund's asset restraint as a "Gupta lieutenant" and,

28.3. Essa was the sole shareholder of Trillian Holdings (Pty) Ltd, the 60% owner of Trillian Capital (Pty) Ltd where Wood moved when he left Regiments Capital.

29. The Guptas procured a multi-billion rand bribe from China South Railways to facilitate their appointment as one of the four contractors to provide Transnet with locomotives. A copy of the bribe contract concluded by Essa, on behalf of Tequesta and China South Railways is attached as Annexure **"PM7"**. The annexure to the contract purported to describe certain services which Tequesta would ostensibly perform for China South Railways, but the true nature of the contract as a corrupt agreement was shown by the last paragraph of the annexure which stated:

> *"It is hereby noted and agreed between the parties that the above services are provided as a pre-Project service and will conclude on the Company signing the Contract for the Project with the Client. The Company will not require any proof of delivery of the above services since it is understood that the Project would not have materialized without the active efforts of TEQUESTA to provide the Services listed above."*

30. As appears from the contract:

    30.1. The total bribe paid to Tequesta ran into billions of rands (clause 6.1.1); and

    30.2. Tequesta would be entitled to 19% of every payment made by Transnet to China South Railways, as and when the payment was received (clause 6.1.2).

31. So Tequesta and the Guptas had a 19% interest in any increase of the contract price payable by Transnet to China South Railways. With the aid of Regiments Capital's advice to Transnet, they were able to increase that price by R16 billion.

32. The Treasury has commissioned a report into this increase of the locomotive procurement price. It is attached as Annexure **"PM8"**. The relevant passages of the report state the following:

> *"5.9.12.35.* ***We conducted an analysis of the escalation of ETC from R38.6 billion to R54.6 billion and determined that the increase of ETC was overstated by R9.2 billion****. A detailed calculation on the increase in ETC is discussed below. We determined that McKinsey had already withdrawn their services to Transnet relating to the 1064 locomotives advisory services when Transnet increased the ETC from R38.6 billion to R54.5 billion.*
>
> *5.9.12.36. McKinsey stated that Regiments were part of the Consortium that provided advisory services, including the calculations of the ETC of R38.6 billion.*

5.9.12.37. McKinsey was therefore adamant that Regiments were aware that the ETC of R38.6 billion included all the related costs and excluded only the contingencies.

5.9.12.38. ***We determined that Regiments were part of the team that assisted Transnet in the calculation of the increased ETC of R54.5 billion. Regiments did so knowing that the costs were already included in the ETC of R38.6 billion****."* (emphasis added).

33. In paragraph 5.10.15.27.4 the report recommends that the Transnet Board report Regiments Capital to the Hawks for criminal investigation under section 34(1) of the Prevention and Combating of Corrupt Activities Act.

34. I have been informed that Wood led the Regiments team that was responsible for overstating the escalated price by R9 billion. I invite him to confirm or deny whether this was the case.

The Features of the Wood, Regiments, Gupta Money Laundering Scheme

35. The broad features of the money laundering scheme perpetrated by Wood, the Regiments respondents, the Gupta family and its associates ("the Wood, Regiments, Gupta money laundering scheme") are pleaded in paragraph 17B of the Fund's amended particulars of claim. The particulars of claim which Wood attached to his founding affidavit are out of date and do not include the amendments introduced by the Fund to plead its "bond churning" claims against him and the Regiments respondents. An up to date copy of the particulars of claim as amended

(but without annexures) is attached as Annexure **"PM9"**. In paragraph 17B, the Fund pleads the following:

> *"The essential features of the money laundering scheme were known to Wood, Pillay and Nyhonyha and were the following:*
>
> *17B.1 Essa, Ashok Narayan ("Narayan") and other persons associated with the Gupta family, would use their influence, alternatively their influence and the influence of the Gupta family, over state owned enterprises, organs of state and pension funds for employees of organs of state ("public sector pension funds") improperly to procure contracts for Regiments Capital or Regiments Fund Managers with those state owned enterprises, organs of state or public sector pension funds.*
>
> *17B.2 Regiments Capital alternatively, Regiments Capital and Regiments Fund Managers would conclude contracts ("covering agreements") with front companies for the Gupta family ("Gupta front companies") in terms of which the relevant Regiments company would purport to engage the Gupta front company "as a strategic technical service provider in various specialist advisory roles" in relation to "business opportunities" in return for a fee or share of the revenue to be agreed between the parties if the business opportunity materialized.*
>
> *17B.3 Specific remuneration agreements in respect of each "business opportunity" ("the remuneration agreements") would be concluded as annexures to the covering agreements to fix the particular fee or revenue share which the Regiments Company would pay the Gupta front company in respect of the "business opportunity" concerned.*
>
> *17B.4 The "business opportunities" were appointments by state owned enterprises, organs of state or public sector pension funds that*

provided the opportunity for the diversion of public funds and the pursuit of the money laundering scheme.

17B.5 The Gupta front companies with which the Regiments Companies purported to conclude covering agreements and remuneration agreements were:

17B.5.1 Gateway Limited ("Gateway"), a United Arab Emirates based company with registration number A47/04/11/3313;

17B.5.2 Homix (Pty) Ltd, a company incorporated in South Africa with registration number 2012/176951/07;

17B.5.3 Chivita Trading (Pty) Ltd, a company incorporated in South Africa with registration number 2010/001905/07;

17B.5.4 Forsure Consultants (Pty) Ltd ("Forsure"), a company incorporated in South Africa with registration number 2014/271324/07;

17B.5.5 Fortime Consultants (Pty) Ltd, a company incorporated in South Africa with registration number 2015/187428/07;

17B.5.6 Hastauf (Pty) Ltd, a company incorporated in South Africa with registration number 2014/271102/07; and

17B.5.7 Medjoul (Pty) Ltd ("Medjoul"), a company incorporated in South Africa with registration number 2015/187454/07.

*17B.6 Copies of the covering agreements concluded by Regiments Capital with Gateway and Forsure are attached as "**POC12A**" and **"POC12B"** respectively. The Fund is not in possession of copies of any of the other covering agreements.*

17B.7 Alongside the arrangements between the Regiments Companies and the Gupta front companies, Regiments Capital, represented by Wood alternatively Pillay, concluded an agreement with Albatime in terms of which Regiments Capital would pay to Albatime a percentage of all amounts paid to Regiments Capital or Regiments Fund Managers by a state owned enterprise, an organ of state or public sector pension fund with whom Regiments Capital or Regiments Fund Managers had procured an appointment in terms of the money laundering scheme.

17B.7.1 The percentage paid to Albatime would be paid by Regiments Capital and would be in addition to the amount that was required to be paid to the Gupta front company as its share in terms of the applicable remuneration agreement;

17B7.2 The percentage paid to Albatime by Regiments Capital would depend on the percentage due to the Gupta front company in terms of the applicable remuneration agreement;

17B7.2.1 If the applicable remuneration agreement provided for the Gupta front company to be paid 95% of the amounts paid by the state owned enterprise, organ of state or public sector pension fund, Albatime would be paid 1% by Regiments Capital and the Regiments company would retain only 4%;

17B7.2.2 If the applicable remuneration agreement provided for the Gupta front company to be paid 80% of the amounts paid by the state owned enterprise, organ of state or public sector pension fund, Albatime would be

paid 2.5% by Regiments Capital and the Regiments company would retain only 17.5%;

17B7.2.3 *If the applicable remuneration agreement provided for the Gupta front company to be paid 75% of the amounts paid by the state-owned enterprise, organ of state or public sector pension fund, Albatime would be paid 3% by Regiments Capital and the Regiments company would retain only 22%;*

17B7.2.4 *If the applicable remuneration agreement provided for the Gupta front company to be paid 70% of the amounts paid by the state-owned enterprise, organ of state or public sector pension fund, Albatime would be paid 3.5% by Regiments Capital and the Regiments company would retain only 26.5%;*

17B7.2.5 *If the applicable remuneration agreement provided for the Gupta front company to be paid 60% of the amounts paid by the state-owned enterprise, organ of state or public sector pension fund, Albatime would be paid 4.5% by Regiments Capital and the Regiments company would retain only 35.5%; and*

17B7.2.6 *If the applicable remuneration agreement provided for the Gupta front company to be paid 50% of the amounts paid by the state-owned enterprise, organ of state or public sector pension fund, Albatime would be paid 5% by Regiments Capital and the Regiments company would retain only 45%.*

36. I point out that Albatime is the company of Moodley, the associate of Wood and Pillay to whom Wood refers extensively in his founding affidavit.

37. I believe all the allegations in paragraph 17B to be correct and will provide evidence in support of these allegations in the present affidavit. The allegations are, however, allegations relating to matters peculiarly within the knowledge of Wood, Pillay and Nyhonyha, the three principals of the Regiments companies at the time.

38. In his letter of demand that preceded the present application (Annexure X9.1 to the founding affidavit), Wood states that, as between the three principals, *"it is common cause [that he - ie Wood] has the most factual insights into the material aspects of the [Fund's] claim."* I accept that this is the case. While Pillay and Nyhonyha were clearly co-conspirators with Wood in the arrangements between the Regiments companies and the Gupta family and its associates, Wood appears to have been the Regiments principal most actively involved in effecting these arrangements.

39. As Wood is the person with the greatest knowledge of the money laundering allegations made in paragraph 17B of the Fund's particulars, and as he contends that he should be granted his relief, *inter alia* because the Regiments companies should have defended the Fund's claims, I invite him -

    39.1. to respond paragraph by paragraph to the allegations in paragraph 17B of the Fund's particulars indicating whether he admits or denies the allegation in question; and

    39.2. in all cases where he denies the allegation, I invite him to put up his contrary version, if any, together with any plausible evidence to support it.

The Evidence of the Wood, Regiments, Gupta Money Laundering Scheme

The Navigator Documents

40. In his founding affidavit, Wood alludes to the acrimonious split between Nyhonyha and Pillay on the one side, and Wood on the other side after he decided to part ways from the Regiments companies. For present purposes, what is relevant is that Wood's departure from the Regiments companies to the Trillian group of companies required Wood, Pillay and Nyhonyha to negotiate a value split based on their respective direct and indirect shareholdings, and it was agreed at an early stage that Wood would be taking the advisory business unit of Regiments Capital with him to the Trillian group.

41. The negotiations over the departure of Wood are described by Wood, Pillay and Nyhonyha in the delinquency proceedings between the parties as the "Navigator Agreement" negotiations and the description of those negotiations in the paragraphs that follow is taken from the affidavits of Wood and Nyhonyha in those delinquency proceedings. The Navigator negotiations never came to fruition and the proposed Navigator Agreement was never concluded although advanced drafts of the agreement were exchanged by the parties, and the parties had in fact started with the implementation even before the negotiations of the Navigator Agreement has been finalised. A copy of the 2 April 2016 draft of the Navigator Agreement is Annexure "POC10" to the amended particulars of claim. It will be made available at the hearing of this application should the Court, or any party, want to consider it.

42. In the course of the negotiations over the Navigator Agreement, Wood, Pillay and Nyhonyha attempted to reach agreement on the valuation of the Regiments Capital advisory business that Wood planned to take with him when he left the Regiments Group. In this context, Stephen Gorven who was co-ordinating the navigator negotiations for the parties within Regiments addressed an e-mail to Nyhonya, Wood and Pillay on 12 February 2016 (the email is attached as Annexure **"PM10"**).

43. The fourth page of Annexure "PM10" has the handwriting pagination 977 from the delinquency application papers. It is a copy of a spreadsheet entitled "Ledger Accounts Summary Regiments Capital (Pty) Ltd" ("the Regiments Capital ledger summary spreadsheet") which described the ledger movements for each of the Regiments Capital accounts over the period March 2015 to February 2017.

    43.1. The first line item on this spreadsheet relates to movements on the Regiments Securities account. All of the other line items relate to accounts of the Regiments Capital advisory unit.

    43.2. The spreadsheet suggests that with the exception of one account described as "other" and an account for Denel (to which I will return later in this affidavit), all of the active business of the Regiments Capital advisory unit was with Transnet.

    43.3. The spreadsheet shows that, apart from the "Trans FR China Dev" account discussed in the next paragraph, every Regiments Capital advisory account was subject to 55% payments to "business development" partners.

43.3.1. An aggregate amount total of R 429,044,962.01 was received by Regiments Capital from Transnet, Denel and the "other" client. (This is the total line item of R459 230 783.59 less the line item of R30 185 821.77 in respect of Regiments Securities).

43.3.2. Regiments Capital, itself, retained only the net value of R185,076,046.68 from the R429,044,962.01 paid by the state-owned enterprises.

43.3.3. Of the aggregate amount of R429,044,962.01 paid out by the state-owned enterprises, R274,164,718.11 was paid to "business development" partners. This was 64% of the amount that Regiments Capital received from the relevant state-owned enterprises.

44. On the seventh page of Annexure "PM10" (paginated p 980 from the delinquency application) Gorven attached a spreadsheet with projected revenues for the Regiments Capital business advisory unit ("the Regiments Capital projected revenue spreadsheet").

45. The Regiments Capital projected revenue spreadsheet shows that at the time of Wood's departure:

45.1. Regiments Capital was seeking to be engaged by Transnet, the Cities of Johannesburg and Tshwane, Eskom, SAA, SAX, SAFCOL (the SA Forestry

Company Limited), Denel, the Free State Government and several unnamed "other" clients;

45.2. Some, but not all, of this work was to be done in conjunction with McKinsey;

45.3. The contract values ran as high as R250 million (in the case of the Eskom mandate linked to McKinsey);

45.4. The "business development" payments were separate from the amounts which McKinsey would take, and were applied to the balance due to Regiments Capital after McKinsey took its share;

45.5. These "business development" payments ranged between 50% and 55% of the value to be generated by Regiments Capital in the case of the accounts with named state-owned enterprises.

46. The extent of the "business development" payments was confirmed in the table headed *"1. Business development split"* on the eighth page of Annexure "PM10" (paginated p 981 from the delinquency application). It shows projected "business development" payments of between 50% and 55% of the contract values that Regiments Capital hoped to obtain from organs of state.

47. It is difficult to conceive of any innocent explanation for the payment to "business development" partners of between 50% to 55% of the value of the contracts Regiments Capital actually was performing for organs of state in the 2016 financial year and those it hoped to obtain going forward. This is particularly the case given that -

47.1. the cumulative value of the contracts in question runs into hundreds of millions of rands; and

47.2. these contracts are all contracts with organs of state who are bound by statutory and constitutional obligations in relation to the procurement of these contracts on the basis of a system that is fair, equitable, transparent, competitive and cost-effective.

48. In fact, it now seems clear that under the euphemism of "business development" payments, Regiments Capital was laundering hundreds of millions of rands of public funds for the benefit of its "business development" partners who in all cases in respect of which there is evidence of their identities, were either Moodley and Albatime or front companies linked to the Gupta family.

49. If Wood suggests that there was any lawful basis for the "business development" payments, I invite him to state as much and to provide full details of

49.1. the recipients of the "business development" payments of which he was aware,

49.2. the terms of the agreements between Regiments Capital (or any other Regiments Company) and the "business development" partner, including copies of such agreements where they are available,

49.3. the services which each such "business development" partner provided in return for the payments made to them by the Regiments companies, and

49.4. the individuals who represented each "business development" partner in Wood's dealings with it on behalf of a Regiments company.

50. The nineteenth to twenty-second pages of Annexure "PM10" (paginated pages 993-996 from the delinquency application) and twenty third to twenty fourth pages of Annexure "PM10" (paginated pages 997-998 from the delinquency application) are the valuations of Regiments Securities and Regiments Fund Managers respectively. Two features of these valuations are noteworthy:

50.1. First, the business of Regiments Fund Managers (like its management of assets of the Fund) was also business involving "business development partners" (see Notes 4 and 9b on paginated page 997 from the delinquency application);

50.2. Second, Regiments Securities appears to have had no meaningful business other than business that was sent to it by Regiments Fund Managers in respect of the assets (of entities like the Fund) which Regiments Fund Managers managed. This can be inferred from the fact that the turnover of the Regiments Securities business was a direct function of the assets under management by Regiments Fund Managers (see Note 3 on paginated page 993 from the delinquency application read with the forecast trading revenue for Regiments Securities for Financial years 2017 to 2021 on paginated page 993 from the delinquency application). All of the latter were calculated as 13.89 basis points (0.1389%) of the assets under management by Regiments Fund Managers). As I point out below, in relation to the Fund's bond

churning claim against the Regiments respondents, this symbiotic relationship of Regiments Securities any Regiments Fund Managers provided opportunities for the Regiments companies improperly to profit by loading hundreds of millions of rands of unnecessary Regiments Securities transaction costs onto the clients of Regiments Fund Managers.

Wood's Commission Arrangement with Albatime and the Guptas

51. One line item on the Regiments Capital ledger summary spreadsheet (the fourth page of Annexure "PM10" with handwriting pagination 977 from the delinquency application) merits special attention. It is the line item "Trans FR China Dev". This refers to the Regiments Capital mandate from Transnet relating to the raising of the China Development Bank loan.

51.1. Regiments Capital invoiced Transnet R166 million (plus VAT) for its services in relation to the raising of the China Development Bank loan. A copy of the Regiments Capital invoice is Annexure "FA76" to the founding affidavit of Nyhonyha in the delinquency application and was made available pursuant to a request by Wood under Rule 35(12) in that matter. It has been attached as Annexure **"PM11"**.

51.2. The Regiments Capital ledger summary spreadsheet reflects that of this R166 million, R129,480,000.00 was paid to "business development" partners, and the net amount retained by Regiments Capital was only R36,520,000.00.

51.3. R36,520,000.00 is exactly 22% of R166 million. So the business development partners received 78% of the amount paid by Transnet.

52. The 78% payment is explained in an exchange of emails between Wood and the thirteenth defendant ("Moodley") on 16 June 2015 (attached as Annexure **"PM12"**).

52.1. In his email to Wood, Moodley refers to a commission contract and a series of "splits" that appear to relate to percentages of the Regiments companies' revenue that are due to him after the Guptas have received their due. I invite Wood to disclose this commission contract when he answers this affidavit. On the basis of his "Commission document", Moodley demanded 3% of the R166 million paid to Regiments Capital by Transnet in respect of the China Development Bank loan.

52.2. Wood's magnanimous response was *"Accept, a deal is a deal."*

52.3. The 78% "business development" payment from the R166 million paid by Transnet thus comprised 75% to the Guptas and 3% to Albatime.

53. The 16 June 2015 email from Moodley to Wood sets out the financial arrangements underpinning the Wood, Regiments, Gupta money laundering scheme, including the commissions owing to Moodley (or Albatime) as the agent who had been midwife to this criminal enterprise by introducing Wood and Pillay to the Guptas. The agreed arrangements which Wood confirmed were stated in Moodley's email as *"50/5, 40/4,5, 30/3,5, 20/2,5 and 5/1 percent to Albatime."* This meant that

53.1. When Regiments was left with 50% of its fee because a Gupta front company took the other 50%, Moodley was entitled to 5% of the original fee, leaving Regiments with only 45% (this was the standard arrangement reflected in the 55% business development payments on the spreadsheet circulated by Gorven);

53.2. When Regiments was left with 40% of its fee because a Gupta front company took the other 60%, Moodley was entitled to 4% of the original fee, leaving Regiments with only 36%;

53.3. When Regiments was left with 30% of its fee because a Gupta front company took the other 70%, Moodley was entitled to 3% of the original fee, leaving Regiments with only 27%;

53.4. When Regiments was left with 20% of its fee because a Gupta front company took the other 80%, Moodley was entitled to 2.5% of the original fee, leaving Regiments with only 17.5%; and

53.5. When Regiments was left with 5% of its fee because a Gupta front company took the other 95%, Moodley was entitled to 1% of the original fee, leaving Regiments with only 4%.

54. If Wood takes issue with this description of the money laundering arrangements he had with Moodley and the Guptas, I invite him -

54.1. To explain what "deal" he had in mind when he confirmed to Moodley that *"a deal is a deal"*; and

54.2. To explain how that "deal" is to be reconciled with Moodley's statement, confirmed by him, that *"the following was agreed as per splits: 50/5, 40/4,5, 30/3,5, 20/2,5 and 5/1 percent to Albatime."*

55. The 75% payment to the Guptas (R124 million) was laundered to their company, Sahara Computers (Pty) Ltd ("Sahara") through Albatime.

55.1. Annexure **"PM13"** is an email addressed by Moodley to Wood, attaching invoice no REG137 for R4.98 million, the 3% of R166 million due to Albatime from Regiments in terms of the Wood, Regiments, Gupta money laundering scheme. This invoice directed payment not to Albatime's usual ABSA account.

55.2. Annexure **"PM14"** is a copy of invoice "REG138" issued to Regiments Capital by Moodley for Albatime. The invoice is in respect of "CDB" (ie China Development Bank) and is for the amount of R124.5 million – exactly 75% of the R166 million paid to Regiments by Transnet in respect of the China Development Bank loan. It directed payment not to Albatime's ABSA account, but to Bank of Baroda Account number 145 409 5326, the Bank of Baroda holding account through which all payments for the purchase of the Optimum Coal Mine passed. It was a fraudulent invoice issued by Moodley to launder money that would end up, not with Albatime, but with the Gupta family.

55.3. Annexure **"PM15"** is an email addressed by Moodley to Wood's assistant at Regiments, Yvonne Mokone, and copied to Wood. Moodley sent this email

to make sure that the Bank of Baroda payment details for Invoice REG138 were not overlooked by Regiments.

55.4. Annexure **"PM16"** is a copy of a replacement fraudulent invoice REG138 issued to Regiments Capital by Moodley for Albatime. Like its predecessor, this invoice REG138 was for the amount of R124.5 million and directed payment not to Albatime's ABSA account, but to Bank of Baroda Account number 145 409 5326. Unlike its predecessor, it no longer referred to "CDB" but now purported to be an invoice in respect of IT Sales and Support for two years from 2012 to 2014. Albatime has never been engaged in any IT Sales or Support activities. This invoice was an out and out fraud designed to provide cover for a laundering arrangement with the Gupta family IT company Sahara Computers (Pty) Ltd ("Sahara").

55.5. Annexure **"PM17"** is an invoice dated 27 June 2015 from Sahara to Albatime services for R122 million for "Admin IT services support" for two years from 2012 to 2014. It was used to launder through to the Guptas what remained of the R124.5 million paid against Invoice REG138 after Moodley and Albatime had taken an additional R2.5 million laundry fee for themselves.

55.6. Annexure **"PM18"** is a Sahara accounting spreadsheet which was made public in the GuptaLeaks and entitled "GP_Tracking_June_2015_FINAL_". It reflects the cost to Sahara of providing the "services" to Albatime under the "agreement" as R167, leaving a gross profit of R121 999 833.

56. If Wood disputes any of these allegations, I invite him to explain -

56.1. Whether Albatime has ever provided IT services to Regiments Capital;

56.2. What services, if any, Albatime provided to Regiments Capital in relation to the China Development Bank loan;

56.3. Why these services justified the payment of more than R129 million to Albatime;

56.4. Why Albatime issued two separate invoices to Regiments Capital (an aggregate amount of more than R129 million) for the same services it had ostensibly provided to Regiments Capital in relation to the China Development Bank loan; and

56.5. Why he authorised payment to Albatime of R124.5 million of the aggregate amount invoiced by it against an invoice which falsely claimed that Albatime had provided Regiments with IT services to this value.

The Evidence Disclosed to the State Capture Commission by Standard Bank

57. The scale of the money laundering conducted when Wood was directing matters within the Regiments companies is confirmed by the evidence of Ian Hamish Scott Sinton before the State Capture Commission. I attach as **"PM19"** the relevant extracts from the statement of Sinton, which he confirmed under oath in his oral evidence before the State Capture Commission.

58. In his affidavit, Sinton describes exchanges between Standard Bank and Pillay and Nyhonyha in October 2017 after the departure of Woods from the Regiments

companies, which exchanges led to Standard Bank's closure of the accounts the Regiments companies held with it. He reports that -

58.1. Amounts aggregating to R210 million were transferred out of the Regiments Standard Bank account into the accounts of two Gupta front companies, Homix and Chivita;

58.2. Pillay explained that the amounts paid to Homix and Chivita were payments made in terms of an arrangement concluded by Wood and Essa in terms of which Regiments would have to share with his companies and Albatime the income they derived from being McKinsey's subcontractor at Transnet;

58.3. Pillay explained that Regiments could afford to make these vast payments to Essa's nominated companies because *"the consultancy rates that McKinsey had agreed with Transnet [for Regiments] were 400% more than Regiments would have been willing to agree to had it negotiated directly with Transnet."* (para 28.3); and

58.4. Pillay claimed that the original share paid to Essa was 35%, including 5% for Albatime but that Wood subsequently increased Essa's share to 50%.

59. I invite Wood to confirm whether Pillay has accurately described the origins, nature and development of the relationship between Regiments and Essa and to correct any errors in this regard in Pillay's account to Standard Bank as reported by Sinton.

60. Pillay's statements merely compounded the concerns of Standard Bank. Sinton states in paragraph 30 that:

"Standard Bank's concerns arising from McKinsey's alleged request, and Regiments' agreement to that request, that Regiments pay 30% of all fees earned from Transnet to Essa when Essa was a stranger to Regiments before that agreement and would render no services to Regiments after that agreement were not allayed by the explanations provided. Accordingly, Standard Bank terminated its relationship with both Regiments and its directors"

61. Homix had also banked with Standard Bank. So Sinton was able to describe to the State Capture Commission what happened to the money laundering payments that were made by the Regiments companies to Homix. As Sinton shows, almost all of the money laundered from the Regiments companies to Homix was laundered on to another laundry entity that banked with Standard Bank, Bapu Trading CC whereafter it was laundered on to other entities which did not bank with Standard Bank. The bank statements for the Regiments companies and Homix attached by Sinton as Annexures IS6 and IS10 to his statement show that the laundry from the Regiments companies to Homix to Bapu appeared to operate on the basis that Homix kept a 1% laundry fee in respect of the payments it laundered from the Regiments companies to Bapu. By way of illustration:

61.1. On 16 and 18 July 2014 respectively, Regiments Capital paid amounts of R14,525,802.48 and R3,990,000.00 to Homix, an aggregate amount of R18,515,802.48.

61.2. Over the period 17 to 22 July 2014, Homix made aggregate payments of R18,332,477.70 to Bapu (R7,573,687.07; R1,804,328.16; R4,059,738.36; R500,000.00, R321,772.13, R622,456.93 and R3,450,495.05).

61.3. The difference between the aggregate of R18,515,802.48 paid into Homix by Regiments Capital and the aggregate amount of R18,332,477.70 paid by Homix to Bapu is R183,324.78 or exactly 1% fee of the amount laundered from Homix to Bapu.

61.4. Similarly,

61.4.1. on 22 July 2014, Regiments Capital paid R3,799,050.00 to Homix. The following day, Homix paid R3,761,435.64 to Bapu. The difference between the amount paid into Homix by Regiments Capital and the amount paid by Homix to Bapu is R37,614.36, exactly 1% of the amount laundered from Homix to Bapu;

61.4.2. on 7 August 2014, Regiments Capital paid R4,902,000.00 to Homix. The following day Homix made payments of R1,820,049.50 and R3,033,415.84 to Bapu. The aggregate payment from Homix to Bapu was R4,853,465.34. The difference between this amount and the amount paid by Regiments Capital to Homix is R48,534.66, exactly 1% of the amount laundered from Homix to Bapu.

62. As Wood appears to have been the driving force behind the payments to Homix, I invite him to explain -

62.1. why the payments to Homix were made;

62.2. whom he believed to stand behind Homix; and

62.3. where he believed the payments to Homix were likely to end up.

The Detail of Money Laundering Payments on the Transnet GFB Contract

63. One of the line items on the Regiments Capital's ledger summary spreadsheet (the fourth page of Annexure "PM10" with handwriting pagination 977 from the delinquency application) was described as "Service Income Transnet GFB". On the Regiments Capital projected revenue spreadsheet there are separate line items for "Transnet GFB Fixed" and "Transnet GFB Variable", both of which are subject to a split with McKinsey and a 55% "business development" payment on the balance that remains after the McKinsey split.

64. "GFB" refers to "general freight business". Regiments Capital had a contract with Transnet relating to the "general freight business" account. Detail of the business development payments on the GFB contract are found in a spreadsheet entitled "GFB Profitability". A copy of the electronic file of this spreadsheet is tendered as Annexure **"PM20"** and will be filed at Court together with this answering affidavit.

65. The "GFB Profitability" spreadsheet is one of the documents made public by Bianca Goodson. Ms Goodson was employed by Trillian Capital Partners (Pty) Ltd in 2016 before she resigned and became one of the public "whistle blowers" relating to Trillian. The metadata reported on the properties page of the spreadsheet records that the spreadsheet was created on 3 February 2016 by John Rossouw of Regiments Capital and last modified on 5 February 2016, also by Rossouw. A copy of a screenshot of the properties page of the spreadsheet is attached as Annexure **"PM21"**.

66. I invite Wood to confirm the authenticity of the spreadsheet. If he is unable to do so, I invite him, as the Regiments Capital partner who was responsible for the GFB contract, to indicate any errors that he is able to identify on the spreadsheet.

67. The first worksheet in the "PM20" spreadsheet has the tab "Summary". It reflects that on the financial year to January 2016, Regiments Capital had invoiced R62,434,621.00 on the GFB contract of which R34,339,042.00 (55%) was due to "business development" partners. This is consistent with the line items in respect of the GFB contract on the spreadsheet in Annexure "PM10" which show that the "business development" payment in respect of the GFB contract was 55%.

68. The third worksheet on the "PM20" spreadsheet has the tab "GL". It is a general ledger account for the contract for the financial year to January 2016. It shows that, with the exception of unattributed linked pairs of 50% and 5% payments in May, November and December 2015, the 55% payments to "business development" partners in fact comprise 50% payments to entities called "Forsure" or "Fortime" each of which has a corresponding payment of 5% to Albatime.

69. The full list of "business development" payments on the general ledger (with the Transnet invoice numbers on the general ledger to which their payments apparently relate) have been extracted into a table which I attach as Annexure **"PM22"**.

70. Annexure "PM22" reflects payments to "Fortime" and "Forsure". These names appear to be shorthand for "Forsure Consulting (Pty) Ltd" ("Forsure") and "Fortime Consultants (Pty) Ltd" ("Fortime") both of which appear to be front companies for the Gupta family as is described in more detail in the article published by the

AmaBhungane investigative reporters on 23 October 2017 and attached as Annexure **"PM23"**. Forsure were represented by Ashok Narayan in their dealings with Regiments Capital, as is evidenced by the emails between Narayan and Wood which I discuss below in relation to the appointment of Regiments Fund Managers to manage assets of the Fund.

71. Narayan is sufficiently close to the Gupta family to have been vested with power of attorney over the Dubai affairs of the mother of the Gupta brothers, Mrs Angoori Gupta. A copy of this power of attorney, which forms part of the Guptaleaks documents, is attached as Annexure **"PM24"**.

72. As has been illustrated above with reference to the GFB Profitability spreadsheet, almost invariably when Forsure was paid by Regiments Capital in respect of the Transnet GFB contract in the period covered by that spreadsheet, Albatime took its own smaller payment equalling 10% of the payment to Forsure or 5% of the payment from Transnet to Regiments.

The Criminality of the Wood, Regiments, Gupta Money Laundering Scheme

73. The criminality of the Wood, Regiments, Gupta money laundering scheme speaks for itself.

    73.1. In paragraph 17B and 17C of the particulars of claim, the Fund pleads how the scheme

73.1.1. involved contraventions of section 3 of the Prevention and Combating of Corrupt Activities Act 12 of 2004 ("the Corruption Act", and

73.1.2. amounted to the crime of money laundering under section 4of the Prevention of Organised Crime Act 121 of 1998.

73.2. Moreover, as is illustrated below in relation to the processes around the appointment of Regiments Fund Managers to manage a portfolio of the assets of the Fund, the operation of the Wood, Regiments, Gupta money laundering scheme was premised on repeated frauds perpetrated against the organs of state with whom Regiments did business and to whom it failed to disclose that the bulk of the fees paid to it would be shared with Gupta family related entities and individuals.

How the Fund became a Victim of the Wood, Regiments, Gupta Money Laundering Scheme

74. Annexure **"PM25"** is a copy of a "business development" contract concluded by Regiments Capital with Gateway in November 2012:

74.1. Gateway is the Dubai based Gupta front company through which Free State government public funds were laundered to pay for the Gupta wedding.

74.2. The contract with Gateway was signed by Wood on behalf of Regiments Capital and witnessed by Pillay.

74.3. Sanjay Grover ("Grover") signed the contract for Gateway.

74.4. In terms of the agreement, Regiments Capital would pay Gateway a bribe in the form of a fee or commission on money that was paid to Regiments Capital flowing from contracts that Regiments Capital procured as advisors (to organs of state) through the bribe paid to Gateway. The "commission" would then provide a means for public funds to be laundered through the Regiments Capital accounts before they reached the Gupta family.

74.5. The bribery and money laundering arrangement was euphemistically presented in the following terms in clause 2.1 of the agreement:

> *"The Parties record that the purpose and scope of this Agreement is the appointment of Gateway by Regiments as a strategic technical service provider in various specialist advisory roles (referred to as "business opportunities") to Regiments in return for a fee and/or equity participation on terms to be agreed between the Parties upon the realisation of each business opportunity as and when it occurs."*

74.6. Clauses 2.2 to 2.4 provided for the details of the "fees" to be paid to Gateway to be set out in a separate addendum for each "business opportunity" procured for Regiments Capital through Gateway.

75. I invite Wood to disclose -

75.1. How he was introduced to Gateway, and who he understood to be the persons with interests in Gateway;

75.2. Why he thought that it was necessary to conclude a contract with a Dubai based company for the purposes of sourcing business opportunities in South Africa;

75.3. What specific services he expected Gateway to provide to Regiments;

75.4. What services Gateway ultimately provided to Regiments; and

75.5. What remuneration arrangements were agreed by Regiments and Gateway in relation to these services.

76. It is clear that Regiments Capital attempted to use the Gateway arrangement to procure an appointment to manage assets of the Fund. Annexure **"PM26"** is a term sheet addendum to the Gateway agreement drawn up in blank on a Regiments Capital letterhead over signature lines for Pillay and Grover. It was designed to regulate the payment arrangements between Gateway and Regiments Capital in relation to a mandate that Regiment Capital hoped to procure "*to design a Liability Driven Investment ("LDI") Framework for Transnet Second Defined Benefit Pension Fund [ie the Fund].*"

77. Annexure **"PM27"** is a redacted copy of the internal Regiments Capital email under which this blank addendum was forwarded to Wood on 3 October 2013 at 10h24 am. It was apparently forwarded together with a term sheet addendum in respect of a different mandate which Regiments Capital hoped to procure from Transnet through Gateway, the "Transnet RMO" mandate.

78. I invite Wood to indicate

78.1. what the Transnet RMO mandate was;

78.2. why he thought that Gateway might assist Regiments to obtain this mandate and the mandate in respect of the Fund; and

78.3. what services he anticipated Gateway providing to Regiments in this regard.

79. The Gupta involvement in attempting to place Regiments Capital in control of assets of the Fund in 2013 is further evidenced by Annexure **"PM28"**. This is a copy of an email sent by Essa to Pillay and Wood at 1:02 pm on 20 November 2013.

79.1. Annexure "PM28" is headed "Tsdbf" [i.e. the Fund].

79.2. It asks Wood and Pillay to write a motivation on why Regiments Fund Managers should *"get fund management"*, referring to why they should be appointed to manage the assets of the Fund.

79.3. It goes on to state "*So if someone chose ldi as a strategy what makes u best/most efficient / historic performance etc*". ("ldi" refers to liability driven investment. It was on the basis of Regiments Fund Managers' ostensible expertise in relation to liability driven investment strategy that they were ultimately appointed to manage the assets of the Fund).

80. I invite Wood to indicate -

80.1. what role he understood Essa to play in relation to the Fund; and

80.2. why Essa might be able to assist Regiments to "get fund management" at the Fund.

81. As pleaded in paragraph 19 of the amended particulars of claim, Regiments Fund Managers were then appointed to manage a portfolio of assets of the Fund following a Request for Quotations issued by the Fund in July 2014. On 19 August 2014, the Board of Trustees of the Fund resolved to appoint Regiments Fund Managers to manage a portfolio on behalf of the Fund to the value of R1.3 billion, subject to satisfactory post-tender negotiations on fees, full due diligence and a mandate agreement.

82. The Regiments bid which was accepted by the Board of the Fund provided for remuneration on the basis of a fixed annual fee of 0.17% of assets under management. It did not provide for any outperformance fees. This issue was specifically confirmed by Regiments in the bid adjudication process in response to a clarification request from the Fund for Regiments to specify what their fixed fee would be if no outperformance fees were provided for. A copy of Regiments letter of 8 August 2014 in this regard is attached as Annexure **"PM29"**.

83. By December 2014, negotiations with Regiments Fund Managers had broken down because Regiments Fund Managers proposed a higher fee structure than that which had been contained in their tender and then refused to co-operate with the Fund's due diligence process or to participate in negotiations with the Fund when this higher fee structure was rejected. A copy of the minutes of the Board meeting of 2 December 2014 are attached as Annexure **"PM30"**.

84. At a meeting of the Board of the Fund on 2 December 2014, the investment committee was authorised to engage with Old Mutual as a possible alternative to Regiments Fund Managers.

85. On 11 December 2014, Stanley Shane ("Shane") was appointed as a director of Transnet and thereafter was appointed by Transnet as Chair of the Board of the Fund.

86. Shane is a person whom the Regiments respondents described in their answering affidavit in the Fund's restraint application against them as:

86.1. "alleged in media reports to be associated with Gupta interests" (para 13.6), and

86.2. "a former business associate" of Essa (para 116).

87. He was also one of the persons who was engaged by the Trillian group to set up the group when Wood left the Regiments companies to found Trillian.

88. On the same day as Shane was appointed a director of Transnet, Mokgakare Richard Seleke ("Seleke") was also appointed a director of Transnet. Seleke was thereafter appointed by Transnet to the Board of the Fund.

89. Seleke would be appointed Director General of Public Enterprises. He was subsequently implicated in the Guptaleaks emails and left the public service last year. I attach as Annexure **"PM31"** a Business Day article of 30 July 2018 describing the departure of Seleke under the headline "Another Gupta ally jumps".

90. The first meeting of the Board of the Fund attended by Shane and Seleke was the meeting of 31 March 2015. At the meeting of 31 March 2015,

90.1. Shane and Seleke were appointed to the Investment Committee of the Fund, with Shane chairing the Investment Committee; and

90.2. the Board resolved, at the suggestion of Shane, to appoint an investment consultant to advise Shane and Seleke on the proposed liability driven investment approach of the Fund before final mandates were concluded with investment managers.

A copy of the minutes of the Board meeting of 31 March 2015 is attached as Annexure **"PM32"**.

91. The investment consultant appointed to advise Shane and Seleke turned out to be Shane's partner in Integrated Capital Management (Pty) Ltd, Marc Chipkin.

92. At the meeting of the Investment Committee held on 1 July 2015, the Committee accepted a suggestion by Shane that the next meeting of the Investment Committee scheduled for 29 July 2015 should be postponed until the Board meeting of 12 August 2015 to allow Shane, the Fund's investment advisor (Willis Towers Watson), the Fund's actuary and me to investigate matters relating to liability driven investment and the appointment of the asset managers. A copy of minutes of the Investment Committee meeting of 1 July 2015 is attached as **"PM33"**.

93. While these formal processes were taking place within the Fund, a parallel unlawful process was taking place between Regiments Capital and the Guptas:

93.1. Annexure **"PM34"** is an unsigned copy of the "business development" agreement between Regiments Capital and one of the Gupta front companies, Forsure Consulting (Pty) Ltd. The agreement is dated 20 May 2015 and describes itself as the "Master Co-operation agreement signed between Regiments Capital (Pty) Ltd and Forsure Consulting (Pty) Ltd. As appears from clause 2 of this agreement, it provided for exactly the same bribery and money laundering arrangement as had been provided for by the Regiments Capital - Gateway contract.

93.2. Annexure **"PM35"** is a copy of an internal Regiments Capital email sent by Wood to Pillay on 13 July 2015 at 2:36:27 pm. It forwards an email that was sent from Narayan to Wood at 4:24:34 pm on 10 July 2015.

93.2.1. The forwarded Narayan email attached a *"deal sheet for TSDBF"* [ie the Fund]. It asked Wood to review the deal sheet and return a signed copy if it was in order.

93.2.2. The Wood email to Pillay asked Pillay to confirm that the splits (ie the "business development" fee arrangements) were *"as you agreed."*

93.3. Annexure **"PM36"** is the deal sheet that went from Narayan to Wood to Pillay. It describes itself as a "remuneration agreement as an addendum to the master co-operation agreement signed between Regiments Capital (Pty) Ltd and Forsure Consulting (Pty) Ltd". It is apparently the second addendum. It provided for Regiments to pay 50% of their revenue from any Restructure fee

paid by the Fund or monthly asset management fees paid to them by the Fund and 60% of any quarterly outperformance fees paid by TSDBF.

93.4. I invite Wood to explain -

93.4.1. whom he understood to be the individuals with an interest in Forsure,

93.4.2. what services Forsure had provided, or would provide, to Regiments Fund Managers in relation to the anticipated management of the Fund's assets,

93.4.3. why Regiments Fund Managers would have any lawful reason to enter into contract negotiations to share its fees from the Fund with Forsure or the individuals behind it when it had already won a tender to manage assets of the Fund, and

93.4.4. why Regiments Fund Managers anticipated to be remunerated by the Fund in terms of outperformance fees when its successful tender had not provided for such remuneration.

94. On 3 August 2015, the Fund formally notified Regiments Fund Managers that they had been appointed to manage a portfolio of the assets of the Fund and attached a draft investment management agreement for Regiments Fund Managers to sign. A copy of the Fund's letter is attached as Annexure **"PM37"**.

94.1. The portfolio to which the letter referred was the portfolio of approximately R1.3 billion that the Board of the Fund had approved at its meeting of 19 August 2014;

94.2. The draft agreement provided to Regiments Fund Managers did not allow for any outperformance fees payable to Regiments.

95. With their arrangements with Narayan finalised, and Shane and Seleke deployed to the Board of the Fund, Regiments Fund Managers could now rely on them to ensure that the draft portfolio management agreements would be re-drafted to suit their needs. On 7 August 2015, Regiments Fund Managers wrote back to the Fund expressing dissatisfaction with the terms of the draft portfolio management agreements. A copy of Regiments Fund Managers' letter is attached as Annexure **"PM38"**.

96. At the meeting of the Board of the Fund of 11 August 2015, Shane observed that the portfolio allocated to Regiments Fund Managers represented only a small proportion of the Fund's total assets under management and suggested that, with the approval of the Board, the portfolio managed by Regiments Fund Managers could be increased over time. A copy of the minutes of the Board meeting of 11 August 2015 are attached as Annexure **"PM39"**.

97. Following Regiments Fund Managers' letter of 7 August 2015, I attended negotiations with Regiments Fund Managers over the period August/September 2015. Shane took a leading role in representing the Fund in these negotiations.

98. On 1 October 2015, a special meeting of the Board of the Fund was convened to authorise conclusion of the portfolio management agreements in relation to the liability driven investments strategy of the Fund. At this meeting:

98.1. Shane stated that Regiments Fund Managers had "*exhibited the best expertise in the local investment environment to effectively manage a LDI mandate on an aggressive approach without incurring undue risk for the Fund*";

98.2. Shane stated that Wood would be overseeing the Fund's mandate as principal strategist for Regiments Fund Managers and that Wood was the most experienced bond and fixed interest strategist in the South African market;

98.3. Shane emphasized the black economic empowerment credentials of Regiments Fund Managers;

98.4. Shane overrode concerns expressed respectively by Board Members Messrs Fichardt and Louw, about:

98.4.1. the difficulties experienced with Regiments Fund Managers in the due diligence and negotiations process; and

98.4.2. the size of the new proposed allocation of assets to Regiments Fund Managers;

98.5. Shane overrode the advice of the Board's investment consultants, Willis Towers Watson, that the outperformance fee proposed for Regiments Fund Managers should not be assessed simply on the basis of quarterly performance (which would give Regiments Fund Managers outperformance fees that were simply the product of market volatility) but should be structured on a "high watermark" basis which measured outperformance only with reference to long term value add;

98.6. The Board resolved to approve the fee structure that had already been agreed in principle with Regiments Fund Managers, including provision for an outperformance fee structure that did not include the safeguard of a high watermark fee structure; and

98.7. The Board approved the allocation to Regiments Fund Managers of additional assets to the approximate value of R7.7 billion over and above the original allocation of approximately R1.3 billion.

A copy of the Board minutes of 1 October 2015 is attached as Annexure **"PM40"**.

The Money Laundering Payments Taken out of the Fund

99. The claims of the Fund are discussed below. Claims C and D are claims for recovery of amounts aggregating to R229 million in respect of monies misappropriated from the Fund by Regiments Fund Managers in conspiracy with the Regiments defendants, Wood and others. These monies were ostensibly taken to

pay transaction fees, not in respect of services to the Fund, but in respect of "services" to Transnet which turned out to be provided by Wood and his team, first at Regiments Capital and then at Trillian. The "advice" in question concerned 4 tranches of interest swaps concluded by Transnet, the first two with Nedbank and the second two with the Fund ("the swap transactions"). The misappropriated amounts are listed in paragraphs 43.1 to 43.5 of the particulars of claim. They were the following:

99.1. R56,719,779.00 on 4 December 2015;

99.2. R63,916,019.00 on 8 March 2016;

99.3. R1,093,115.00 on 9 March 2016;

99.4. R67,403,305.00 on 4 April 2016; and

99.5. R39,851,767.00 on 11 April 2016.

100. The Regiments respondents have never disputed that Regiments Fund Managers transferred the relevant amounts from the Fund's bank account to the bank account of Regiments Securities on the relevant dates, for onward payment to Transnet's "advisors".

101. One aspect of the theft of these monies from the Fund that the Regiments respondents have never been able to explain is why R56,719,779.00 was misappropriated from the Fund's bank account on 4 December 2015 when the only

invoices to which Regiments can point as relating to the December tranche of swap transactions were

101.1. Invoice Reg 149 issued on 7 December 2015 for R1,680,000.00 by Albatime (Annexure POC2 to the particulars of claim and attached as Annexure **"PM41"**), and

101.2. Invoice Reg 150 issued on the same date by Albatime for R42,000,000.00 (Annexure POC3 to the particulars of claim and attached as Annexure **"PM42"**).

102. The explanation for this almost certainly lies in the fact that the payments out of the misappropriated R56 million were not invoices for advisory work performed for Transnet in respect of the swap transactions. Rather, they were "business development" payments corruptly made to Albatime and a Gupta linked entity who had claims on Regiments Capital for directing Transnet work its way.

102.1. The copy of the invoice Reg 149 provided by Regiments Fund Managers to the Fund ("PM41") had a handwritten annotation 3% of R56 million. R1,680,000.00 is 3% of R56 million and appears to be the "business development" payment that went to Albatime for the R56 million taken from the Fund.

102.2. The copy of the invoice Reg 150 provided by Regiments Fund Managers to the Fund ("PM42") had a handwritten annotation 75% of R56 million. R42,000,000.00 is 75% of R56 million and appears to be the "business

development" payment that went, not to Albatime for the R56 million taken from the Fund, but rather to the Gupta family through one of their front companies. In this regard, it is significant that the payment details on Invoice Reg 150 were not the ordinary ABSA account details on all other invoices issued by Albatime (including invoice Reg 149 that was issued on the same day). Instead, Invoice Reg 150 directed payment to Bank of Baroda account number 1454095326, which was the clearing account number from which the deposit for the purchase price of the Optimum Coal Mine was paid, according to the State of Capture Report of the Public Protector.

102.3. As can be seen above, the 75% / 3% arrangement was the same arrangement demanded by Moodley in respect of the R166 million Transnet paid Regiments for assisting to raise the China Development Bank loan, an arrangement in which Moodley and Albatime fronted for the Gupta family company, Sahara Computers and falsified invoices to Regiments to cover up their money laundering.

103. Another unexplained feature of the amounts misappropriated from the Fund's bank account is that there were two consecutive misappropriations on 8 and 9 March 2016: R63,916,019.00 on 8 March 2016 and R1,093,115.00 on 9 March 2016. Once again, this curious feature may be explained with reference to "business development" payments:

103.1. The sum of R63,916,019.00 and R1,093,115.00 is R65,009,134.00;

103.2. The GFB ledger spreadsheet showed a consistent pattern of 5% payments to Albatime on any amounts paid by Transnet to Regiments Capital, alongside a 50% payment to a Gupta family front company;

103.3. 5% of R65,009,134.00 is R3,250,456.70;

103.4. The amount invoiced by Albatime on 10 March 2016 under invoice Reg 157 (Annexure POC4 to the particulars of claim and attached as Annexure **"PM43"**) was R3,250,456.72;

103.5. So Albatime received its customary 5% of the amounts misappropriated from the Fund by Regiments Fund Managers on 8 and 9 March 2016.

104. The last two invoices issued by Albatime also show clear signs of being part of the Wood, Regiments, Gupta money laundering scheme.

104.1. Invoice REG159 was issued by Albatime to Regiments Capital for the amount of R2,359,116.00 on or about 4 April 2016 ostensibly in respect of the execution of the third tranche of interest rate swaps. It is Annexure "POC5" to the particulars of claim and is attached as Annexure **"PM44"**;

104.2. Invoice REG162 issued by Albatime to Regiments Capital for the amount of R1,394,812.00 on or about 14 April 2016 ostensibly in respect of the execution of the fourth tranche of interest rate swaps. It is Annexure "POC6" to the particulars of claim and is attached as Annexure **"PM45"**.

104.3. As has been pointed out above, the amounts misappropriated by Regiments Fund Managers from Fund monies, ostensibly in respect of the third and fourth tranches of interest rate swap transaction "advisor" payments were

104.3.1. R67,403,305.00 on 4 April 2016; and

104.3.2. R39,851,767.00 on 11 April 2016.

104.4. R2,359,116.00 is exactly 3.5% of R67,403,305.00 and R1,394,812.00 is exactly 3.5% of R39,851,767.00.

104.5. So the April invoices issued by Albatime to Regiments Capital appear to have been issued pursuant to the 30% / 3.5% arrangement on the sliding commission scale governed by the contract to which Moodley and Wood referred in their email exchange of 16 June 2015 (Annexure "PM12").

105. I point out that all of the Albatime invoices referred to above, were addressed to Regiment's Capital for the attention of Wood. I invite Wood -

105.1. to provide details of the services furnished by Albatime to claim these fees from Regiments Capital,

105.2. in particular

105.2.1. to explain what services Albatime provided to Regiments Capital in respect of invoice Reg 150 it issued to Regiments Capital for R42 million and whether he can throw any light on the handwritten annotation on that invoice "75% of R56 million",

105.2.2. to explain why Albatime also issued invoice Reg 149 for what appears to be the identical services, and whether he can throw any light on the handwritten annotation on that invoice "3% of R56 million",

105.3. specifically to respond paragraph by paragraph to the allegations in paragraphs 100 to 104.5 above, indicating whether he admits or denies the allegation in question; and

105.4. in all cases where he denies the allegation, I invite him to put up his contrary version, if any, together with any plausible evidence to support it.

THE FUND'S CLAIMS IN ITS ACTION

106. As appears from Annexures "PM2" and "PM9", the Fund has brought twelve claims against the Regiments respondents, Wood and the Trillian companies, Albatime and Moodley and Regiments companies' former finance director, Tebogo Leballo, for their grand scheme to loot the Fund pursuant to the State Capture Project. Several of these claims are brought in the alternative to the primary claims of the Fund.

107. The Fund's primary claims proceed from the premise that the Fund validly rescinded the portfolio management agreements that it had signed with Regiments Fund Managers on grounds of fraudulent misrepresentation. The fraudulent misrepresentation in question related to Regiment Fund Managers' failure to disclose to the Fund its involvement in the Wood, Regiments, Gupta money laundering scheme, and, in particular, its arrangements with the Gupta front

company, Forsure, to launder more than half of its fees from the Fund to the Gupta family and its associates through Forsure.

108. Claim AA of the Fund is a primary claim that proceeds on the basis of the rescission of the portfolio management agreements. It is for restitution from Regiments Fund Managers of the amount of R10,492,674.00. This amount is the aggregate of all amounts that the Fund paid Regiments Fund Managers in the form of management fees or that Regiments Fund Managers misappropriated from the Fund as outperformance fees pursuant to the portfolio management agreements, less the going market rate for fund management services of the sort that Regiments Fund Manager was appointed to provide the Fund under the portfolio management agreements.

109. Claim A is brought in the alternative to Claim AA in the event that the Fund is not held validly to have rescinded the portfolio management agreements. It is a contractual claim for payment of R4,015,887.41 as damages for breach by Regiments Fund Managers of its duties under the portfolio management agreement 1B. Regiments Fund Managers misappropriated this amount from the Fund as payment to itself of outperformance fees.

110. Claim B is brought in the further alternative to Claim AA. It is a mirror image of Claim A, but is a delictual claim against Pillay, Nyhonyha and Regiments Capital for payment of R4,015,887.41 as damages. As against Pillay and Nyhonyha this claim is based on the individual parts they played in the misappropriation of R4,015,887.41 by Regiments Fund Managers. As against Regiments Capital the

claim is based on its vicarious liability for Pillay and Nyhonyha's acts and omissions performed in the course and scope of their duties with Regiments Capital.

111. Claim C and D have been described in paragraph 99 above.

111.1. Claim C is a contractual claim against Regiments Fund Managers for damages of R228,983,985.00, being the aggregate amount misappropriated by Regiments Fund Managers from the Fund and transferred to Regiments Securities who in turn apparently paid the amount over to one or more of the Trillian companies and/or Albatime ostensibly as transaction advisory fees due by Transnet (not the Fund) to its advisors in respect of the swap transactions ("the swap transactions"), two of which involved the Fund as Transnet's counterparty and two of which involved no direct contractual relationship between Transnet and the Fund.

111.2. When the action as originally instituted, the Fund was unaware of the Wood, Regiments, Gupta money laundering scheme and Regiments' fraudulent non-disclosure of this scheme prior to conclusion of the portfolio management agreements. So, at the time of implementation of the action, the Fund had not yet rescinded the portfolio management agreements and Claim C was a primary claim. After it subsequently learnt of Regiments' fraudulent misrepresentation and rescinded the portfolio management agreements, the Fund amended its particulars of claim to plead Claim C as an alternative claim.

111.3. Claim D, which is now a primary claim, is a delictual damages claim against Wood, the Regiments respondents, and the other defendants in the action for payment of R228,983,985.00 being the amount misappropriated by Wood, the Regiments companies, Pillay and Nyhonyha in conspiracy with the other defendants in the action from the Fund, ostensibly to pay fees owed by Transnet (not the Fund) to its advisors in relation to the swap transactions, alternatively for breach of various duties owed by the defendants to the Fund at common law, and under the Financial Institutions (Protection of Funds) Act, 2001 (Act 28 of 2001).

112. Claim E is brought in the alternative to claims C and D. It is an enrichment claim against Wood and the Trillian Companies for payment of the amount of R179,543,257.21, being the portion of R228,983,985.00 that Regiments Fund Managers misappropriated from the Fund and paid over to one or more of the Trillian companies.

113. Claim F is also brought in the alternative to claims C and D. It is an enrichment claim against Albatime and/or Moodley for payment of the amount of R50,684,384.72, being the portion of R228,983,985.00 that Regiments Fund Managers misappropriated from the Fund and paid over to Albatime and/or Moodley.

114. Claim G is for disgorgement of profits by Wood and the Trillian companies (being his vehicles) in the amount of R81,500,000.00 (excluding VAT) and other amounts unknown to the Fund which were paid by Transnet to one or more of the Trillian

Companies on dates unknown to the Fund for work performed by Wood in advising Transnet in relation to the swap transactions and the placement of the underlying debt related to the swap transactions, which work was performed in breach of Wood's fiduciary duty to the Fund while he was managing its assets. Claim G is in further alternative to claims D and E insofar as it relates to the amounts aggregating R179,543,257.21 misappropriated by Regiments Fund Managers and paid over to one or more of the Trillian companies.

115. Claim H is for disgorgement of profits by the Regiments respondents for the amounts that were paid by Transnet to Regiments Capital or any of the other Regiments companies, or that have been claimed from Transnet by Regiments Capital or any of the other Regiments companies, or that have been claimed from Wood and/or the Trillian companies in respect of or related to the advice and services provided in relation to the swap transactions and the placement of the underlying debt related to the swap transactions. Like Claim G, Claim H is in further alternative to claims D and E insofar as it relates to the amounts aggregating R179,543,257.21 misappropriated by Regiments Fund Managers and paid over to one or more of the Trillian companies;

116. Claim I is a claim against the Regiments respondents and Wood, jointly and severally, for disgorgement of the amount of R4 million Regiments Capital received from Denel in November 2015 as commission due for placing R400 million of dubious Denel SOC Limited debt with the Fund which was represented by Regiments Fund Managers who acted in breach of their fiduciary duties in taking

this dubious debt, knowing that their parent company was being paid an undisclosed R4 million commission on the transaction.

117. Claim J is for payment of the amount of R348,577,524.66 claimed as delictual damages from the Regiments respondents and Wood, jointly and severally, for their conduct in concluding the bond churning transactions (and for Regiments Capital's vicarious liability in respect of Wood, Pillay and Nyhonyha in this regard). The bond churning transactions were a number of transactions concluded by Regiments Fund Managers on behalf of the Fund to buy and/or sell R186 bonds to and from Regiments Securities on the same day for no legitimate portfolio management purpose for the Fund, and which resulted in profits for Regiments Securities at the expense of the Fund. The bond churning transactions and the Fund's losses incurred as a result are described in Annexure "POC1D" to the particulars of claim, a copy of which is attached as Annexure **"PM46"**.

118. Claim K is a mirror image of claim J, save that it is for contractual damages brought against Regiments Fund Managers in the alternative to Claim J and in the event that the Fund is held not to have validly rescinded the portfolio management agreements.

119. All of the above claims include claims for interest at the appropriate rate from the relevant date.

THE STRUCTURE OF THE SETTLEMENT AGREEMENT

120. The settlement agreement has been attached as Annexure X3.3 to the founding affidavit of Wood. The broad features of the settlement agreement are the following:

120.1. Regiments Capital and Regiments Fund Managers pay to the Fund a settlement payment of R500 million plus interest at prime plus 2% from 15 July 2019 to date of payment (clauses 1.1.23, 4.1 and 4.2);

120.2. The settlement payment will be paid on the 5th business day following fulfilment or waiver of all of the suspensive conditions (clauses 1.1.11, 1.1.24 and 4.1);

120.3. Coral Lagoon independently guarantees payment of the settlement payment and undertakes to pay it to the Fund on that date (clauses 4.3 and 4.4);

120.4. The Fund purchases 810 230 Capitec shares from Coral Lagoon which is less than 1% of the total listed shares in Capitec (clauses 1.1.21 and 5.2). (The indirect interest of Regiments Capital in Coral Lagoon corresponds to 810 230 Capitec Shares);

120.5. The purchase price for the Capitec shares will be 10% less than the 5 day volume-weighted average price of the 810 230 Capitec shares on the last trading day before the settlement payment is due (clause 1.1.17);

120.6. On the date that the settlement payment is due, Coral Lagoon will transfer the Capitec shares into a securities account nominated by the Fund (clauses 5.3.1 and 1.1.22);

120.7. Payment of the purchase price for the Capitec shares will be made against transfer of the shares (clause 5.3.2);

120.8. The obligations of Coral Lagoon to pay the settlement payment and of the Fund to pay the purchase price for the shares will be set off against one another with the net debtor paying the balance (clause 5.3.3);

120.9. Once transfer of the Capitec shares takes place, all claims that the Fund has against the Regiments defendants will be fully and finally settled (clause 5.6) and the Regiments defendants will be released from the anti-dissipation order obtained against them by the Fund (clause 5.7).

121. The agreement is subject to certain suspensive conditions. The original deadline for the fulfilment of certain of the suspensive conditions was five business days (clause 3.2) with other suspensive conditions requiring fulfilment within 20 business days. The deadline for the fulfilment of all of the suspensive conditions has now been extended by the parties to 20 business days. A copy of the addendum to the agreement effecting this amendment is attached as Annexure **"PM47"**. The 20th business day after signature is 6 September 2019. So Wood has deliberately set his matter down for hearing after the deadline for fulfilment of the suspensive conditions.

122. Some of the suspensive conditions relate to the provision of board and shareholder resolutions from Regiments Capital, Regiments Fund Managers and Coral Lagoon (clause 3.1.1 read with schedule 1.1.2).

123. Of particular significance in the context of the present case is the suspensive condition relating to the "Capitec consent" – the provision by Capitec of its consent to the agreement ("clause 3.1.4"). The context for the Capitec consent condition is the following:

123.1. Coral Lagoon is party to a subscription and shareholders agreement with Capitec and Ash Brook Investments 15 (Pty) Ltd ("Ash Brook"). (Regiments Capital holds 59.82% of the shares in Ash Brook and Ash Brook holds all the of the shares in Coral Lagoon). A copy of the subscription and shareholders agreement is attached as Annexure **"PM48"**. References in that agreement to "SPV" are references to Coral Lagoon, references to "Holdings" are references to Capitec and references to "CONS" are references to Ash Brook.

123.2. Clause 8.3 of the shareholders agreement states the following in material part:

> *"... should SPV sell, alienate, donate, exchange, encumber, or in any other manner endeavour to dispose ("sold") any of the Holdings Shares to any entity or person who, in Holdings' opinion, does not comply with the BEE Act and Codes, Holdings will determine the number of Holdings Shares sold and SPV will within 30 days after*

requested thereto by Holdings acquire an equal number of Holdings shares and cause same to be registered in SPV's name."

123.3. Although Clause 8.3 only applies if Coral Lagoon sells Capitec shares to a person who contravenes ("*does not comply with*") the BEE Act and the Codes, Coral Lagoon feared (with good cause, it transpired) that Capitec would try to construe the clause to mean what it does not mean, namely that Coral Lagoon may freely sell only to persons with particular BBBEE ratings.

123.4. I am advised that the Capitec interpretation is wholly untenable, and, even if this interpretation were correct, Capitec's conduct in the present case context would

123.4.1. violate the fundamental rights of the Fund's pensioners to social welfare, and

123.4.2. constitute an attempt to enforce a contract in a manner contrary to public policy.

123.5. I address these issues in some detail below when I motivate the relief claimed in the Fund's counterapplication against Capitec. For present purposes, I merely point out that the Capitec consent condition was inserted to protect Coral Lagoon from the risk that it correctly anticipated that Capitec would invoke clause 8.3 to attempt to threaten it with adverse consequences if it should implement the settlement agreement.

124. The overall effect on the Fund of the implementation of the settlement agreement would be that the Fund will recover R500 million (plus interest from 15 July 2019 at prime plus 2%) and will purchase 810 230 shares in Capitec at a 10% discount to their trading value (ie the 5 day volume-weighted average price referred to below).

125. The value of the settlement agreement to the Fund as of 13 September 2019, which is the anticipated payment and transfer date, being the 5th business day after the deadline for fulfilment or waiver of the suspensive conditions is R599 million calculated as set out in Annexure **"PM49"**.

125.1. This settlement value represents a discount of more than 25% for Regiments Capital and Regiments Fund Managers who, as has been pointed out above, face claims of R813.7 million and R825.2 million respectively.

125.2. The Fund has been willing to settle on this discounted amount, having regard to the alternative of facing a drawn out litigation process that could run for several years yet,

125.2.1. with the attendant risk that the Regiments respondents may not be able to satisfy a judgment that the Fund ultimately obtains against them, and

125.2.2. with the implication that, having regard to the age profile of the Fund's beneficiaries, thousands of those beneficiaries may never share in the benefit of the Fund's claims against the Regiments respondents, Wood and the other defendants in the action.

WOOD'S ABUSES OF PROCESS

The Abusive Urgent Proceedings

126. I have described above Wood's abuse of process in using his self-created urgency to bring this application on an urgent basis. I respectfully submit that this is a clear abuse of process.

The Abuse Inherent in the Part A Relief Sought Against the Fund

127. The Fund will carry two substantial risks if it is prevented from implementing the settlement agreement.

127.1. The Fund will carry the risk that Coral Lagoon might no longer be in a position to perform its obligations under the settlement agreement, when prayer 5 of Part B is finally dismissed and a further risk that when Coral Lagoon finally does perform, the value of the Capitec shares might be worthless or may have declined in value;

127.2. In terms of clauses 1.1.17 and 1.1.24 of the settlement agreement, the Fund will also carry the full volatility risk in relation to Capitec shares should implementation of the settlement agreement be suspended after the Settlement Effective Date until prayer 5 of Part B is finally dismissed. Once the agreement becomes final, the off-set value of the Capitec shares is fixed at the 5 day volume-weighted average price of the Capitec shares over the next 5 business days even if the Fund is unable to take transfer of the shares. So, if implementation of the agreement is interdicted, the Fund will not be

able to dispose of any of the Capitec shares to take advantage of increases in the share price or to avoid ongoing losses from a drop in the share price.

127.3. This risk is particularly serious for the Fund, because it is a closed pension fund (ie it has no contributing members) with an aging (and dying) population. So it cannot afford to be trapped without the means to counter volatile risk.

127.4. I describe these matters in more detail below, when I address the balance of convenience.

128. Wood is acutely aware of this risk. He is an expert in financial markets. He is also aware that the Fund is a closed Fund and has knowledge of the age profile of the Fund's pensioner population. He was intimately involved in the presentation of the Regiments Fund Managers bid to manage assets of the Fund.

129. The Fund invited Wood to put up security for the risk created by his Part A relief. I refer in this regard to the Fund's attorneys' letter of 28 August 2019 which is attached as Annexure **"PM50"**. Wood pertinently declined to respond to this invitation. He knows that his Part A relief stands to cause irreparable harm to the Fund, and he is, at best, indifferent to that risk. In all likelihood, he hopes to be able to use that risk to gain a tactical advantage in his dealings with the Fund.

The Capitec Consent

130. Another obvious abuse of process perpetrated by Wood is his joinder of Capitec in the present proceedings and his prayer for interdictory relief against Capitec.

131. There can be no *bona fide* reason for Wood to seek to interdict Capitec.

131.1. First, any interdict against the implementation of the settlement agreement pending Part B makes the interdictory relief in relation to the Capitec consent superfluous. If Wood is successful in preventing the Fund and its counterparties from implementing the settlement agreement, the Capitec consent is wholly irrelevant to his interests.

131.2. Second, he knows that his application will only be heard after 6 September 2019 which is the deadline for the Capitec consent. So, by the time that the application is heard, it will be too late for Capitec to grant the Capitec consent. They will either already have done so, or the 6 September deadline will have passed without compliance with the Capitec consent condition.

132. So the most plausible explanation for Wood having joined Capitec in these proceedings and having sought his interdictory relief against them, is that he had an ulterior purpose and was hoping that Capitec may decline to grant the Capitec consent for fear of appearing to pre-empt the relief which Wood seeks against them in these proceedings. In other words, he was abusing the process of this Court in an attempt to destroy the settlement agreement by influencing Capitec to withhold the Capitec consent while the Part A relief is pending.

133. I point out that this particular abuse of process seems ultimately to have been unnecessary. Capitec appears to have had its own private purposes for attempting to destroy the settlement agreement. On 21 August 2019 Capitec's attorneys wrote

to the Fund's attorneys, copying a letter they had written to the Regiment respondents' attorneys indicating that Capitec had declined to grant the Capitec consent. A copy of the letter of Capitec's attorneys is attached as Annexure **"PM51"**.

134. Capitec's letter of 21 August 2019 is addressed in full when I set out the basis for the Fund's relief in its counterapplication against Capitec.

WOOD HAS MADE OUT NO DEFENCE TO THE FUND'S CLAIMS AGAINST REGIMENTS CAPITAL AND REGIMENTS FUND MANAGERS

135. As set out above,

135.1. The value transferred to the Fund under the settlement agreement is less than 75% of the value of the Fund's claims against Regiments Capital and Regiments Fund Managers;

135.2. So, before Wood can show any harm that can assist him on the balance of convenience, he must make out a prima facie case that Regiments Capital and Regiments Fund Managers have defences to the Fund's claims against them, or, at least 25% of the quantum of those claims.

136. Wood has made out no *prima facie* case that Regiments Capital and Regiments Fund Managers have defences to the Fund's claims against them. The high water mark of his founding affidavit in this regard is the bald assertion in paragraph 83 that

"83.1. Regiments Capital has good defences to the claims made against it in the Transnet DBF and Transnet SOC litigation;

...

83.3 the defences are indeed known to Mr Nyhonhya and Mr Pillay as is borne out by the content of the opposing papers delivered by them in the anti-dissipation proceedings heard before the Honourable Judge Tsoka, and the contempt proceedings heard before the Honourable Judge van der Linde, as summarised in their counsel's heads of argument delivered in the proceedings before the Honourable Judge van der Linde."

137. It is obvious that these bald assertions of a defence to the Fund's claims, are not *prima facie* evidence. I point out further that if there was any conclusive defence to the Fund's claims which Regiments Capital had raised *"in the anti-dissipation proceedings heard before the Honourable Judge Tsoka, and the contempt proceedings heard before the Honourable Judge van der Linde"*, the Regiments respondents would not have lost both those applications.

138. That ought really to have been the end of the issue of Wood's alleged harm if the settlement agreement is implemented, and with it, the end of his application to interdict implementation of the settlement agreement. I have been advised, however, that I ought nevertheless to show that Regiments Capital and Regiments Fund Managers do not have defences to the Fund's claims against them. I shall do so under the heading of each primary claim.

Claim AA: the Restitution Claim

139. The central issues in this claim are

139.1. The fraudulent misrepresentation by omission on the part of Regiments Fund Managers;

139.2. The existence of a legal duty on Regiments Fund Managers to make disclosure of the facts which were fraudulently non-disclosed;

139.3. The fact that the fraudulent misrepresentation by omission was material and induced the conclusion of the portfolio management agreements thus entitling the Fund to rescind;

139.4. The rescission of the Fund; and

139.5. The quantum of the claim being the difference between what Regiments Fund Managers was paid by the Fund (or misappropriated as outperformance fee from the Fund) and the market value for fund management services of the sort provided by Regiments Fund Managers;

140. The fraudulent misrepresentation by omission was the failure of Regiments Fund Managers to disclose to the Fund the fact of its involvement in the Wood, Regiments, Gupta money laundering scheme and the specific arrangements Regiments Fund managers had made to launder most of the fees it received from the Fund through to the Gupta family and its associates via the Gupta front company, Forsure.

141. The relevant facts in this regard have been set out in paragraphs 42 to 104.5 above. I invite Wood

141.1. to respond allegation by allegation to these paragraphs, indicating precisely which allegations he disputes, and

141.2. where he disputes any allegation, to provide this Court with credible evidence to support his version.

142. The facts giving rise to a legal duty to make disclosure of the facts fraudulently withheld by Regiments is pleaded in the following terms in paragraph 27C of the particulars of claim:

"27C This duty to disclose arose by virtue of:

27C.1 The heightened duties of disclosure expected of persons seeking appointment as investment managers of assets of a pension fund, appointments which will give rise to fiduciary duties to the pension fund;

27C.2 The corrupt and criminal nature of the money laundering scheme;

27C.3 The knowledge of Regiments Fund Managers that the Fund required it to furnish the warranty in clause 17.2.3 of the portfolio management agreements that Regiments Fund Managers "complies with the obligations outlined in FICA pertaining to the combating of money laundering";

27C.4 The widespread allegations published in the South African media that the Gupta family was involved in corrupt dealings to manipulate decisions taken by state owned enterprises and organs of state, and in particular, decisions by state owned enterprises and organs of state to award contracts;

27C.5 The reputational damage that would be suffered by the Fund if it became known that it had awarded a contract to a fund manager that had negotiated with persons and entities associated with the Gupta family to give a Gupta front company a share of the revenues derived from the fees payable by the Fund to it for managing assets of the Fund;

27C.6 The importance of B-BBEE concerns to the Fund, which importance was known to Regiments Fund Managers; and

27C.7 The fact that an agreement of Regiments Fund Managers to share the revenue derived from the contract with another company whose B-BBEE credentials had not been examined by the Fund would be relevant to the correct evaluation of the B-BBEE status accorded to Regiments Fund Managers for the purposes of an award of an asset management contract by the Fund."

143. I confirm the correctness of these allegations in the particulars of claim and invite Wood -

143.1. to respond allegation by allegation to these paragraphs, indicating precisely which allegations he disputes, and

143.2. where he disputes any allegation, to provide this Court with credible evidence to support his version.

144. The materiality of this fraudulent misrepresentation by omission and the fact that it induced the contract are self-evident.

144.1. The materiality of the fraudulent misrepresentation by omission, is illustrated by the fact that when Standard Bank learnt even of a watered down version of the true facts in this regard, they immediately terminated their banking relationship with the Regiments companies.

144.2. No members of the Board of the Fund other than the corrupt co-conspirators of the Regiments respondents and Wood would have approved the award of any contract to Regiments Fund Managers had the true facts of the Regiments Gupta money laundering scheme been disclosed to them.

145. The rescission of the Fund is clear. The Fund's letter of rescission of 17 October 2018 is Annexure "POC16" to the particulars of claim and is attached as Annexure **"PM52"**.

146. The quantum of the principal amount of Fund's claim AA is pleaded in paragraphs 85I to 85J.2 of the particulars of claim where the Fund alleges:

"85I The aggregate amount paid by the Fund to Regiments Fund Managers as monthly asset management fees (R15 729 338) and misappropriated as outperformance fees by Regiments Fund Managers (R4 015 887) pursuant to the portfolio management agreements was R19 745 226 as particularised in the spreadsheet attached as ***"POC17"*** *to these particulars of claim.*

85J The fair value of the services performed by Regiments Fund Managers for the Fund, which fair value the Fund tenders as restitution, was an aggregate amount of R9 252 552. 95

85J.1 As particularised in ***"POC17"****, R9 252 552 is the aggregate amount of monthly asset management fees which would have been payable by the Fund had monthly fees of 0.1% per annum (inclusive of VAT) of the market value of the Fund's assets under management by Regiments Fund Managers been payable by the Fund over the period 1 October 2015 to 30 September 2016,*

85J.2 An asset management fee of 0.1% per annum (inclusive of VAT) was a fair market value for liability driven asset management services in the period October 2015 to September 2016 for an aggregate portfolio of the size managed by Regiments Fund Managers over that period."

147. I confirm the correctness of these allegations which are within my personal knowledge as the Principal Officer of the Fund. I invite Wood -

147.1. to respond allegation by allegation to these paragraphs, indicating precisely which allegations he disputes, and

147.2. where he disputes any allegation, to provide this Court with credible evidence to support his version.

148. I point out that no defence to any of the facts alleged in relation to Claim AA is to be found in the Regiments' respondents' papers in the proceedings before Tsoka J or van der Linde J.

Claim D: the Delictual Claim in respect of the Conspiracy to Misappropriate R229 million from the Fund

149. In so far as the liability of Regiments Capital and Regiments Fund Managers is concerned, the material elements of Claim D are the following:

149.1. the misappropriation from the Fund by Regiments Fund Managers of the amounts aggregating to R228,983,985.00 as particularised in paragraph 99 above;

149.2. the fact that these misappropriations took place pursuant to the broader conspiracy involving, *inter alia,* the Regiments respondents and Wood and described in this affidavit as the Wood, Regiments, Gupta money laundering scheme; and

149.3. the fact that these misappropriations caused the Fund loss in the aggregate amount of R228,983,985.00.

150. I confirm that Regiments Fund Managers misappropriated from the Fund the amounts aggregating to R228,983,985.00 as particularised in paragraph 99 above.

151. I refer to what I have stated above and submit that the evidence is clear that

151.1. these misappropriations by Regiments Fund Managers took place pursuant to the broader conspiracy, which is described in this affidavit as the Wood, Regiments, Gupta money laundering scheme,

151.2. Wood and the Regiments respondents were party to this conspiracy.

152. Finally, I confirm that the misappropriations caused the Fund to suffer the losses in the amounts of the misappropriations.

152.1. This is self-evident.

152.2. However, I make the allegations expressly because Pillay, Nyhonyha and the Regiments defendants in the principal action have contended that the payments did not cause any loss to the Fund because they were part of the broader contractual obligations of the Fund in respect of the swap transactions themselves and, overall, the Fund has made a substantial profit on the swap transactions. Wood appears to adopt this argument in his founding affidavit.

152.3. The argument is simply wrong.

152.4. All of the contract documents relating to the four tranches of swap transactions are attached as Annexures "POC1Ca" to "POC1Cp" of the

particulars of claim. None of these contracts place any obligation on the Fund to pay Transnet's transaction fees.

152.4.1. The first two tranches of swap transactions covered the misappropriations of 4 December 2015 (R56,719,779.00), 8 March 2016 (R63,916,019.00) and 9 March 2016 (R1,093,115.00).

152.4.2. In the first two tranches of swap transactions, the Fund's counterparty was Nedbank and the Fund had no contractual relationship at all with Transnet. So it is inconceivable that the contracts could include any obligation on the Fund to pay Transnet's transaction advisor fees, and they did not.

152.4.3. A specimen set of the Fund / Nedbank swap documentation (POC1Ca to POC1Cf) is attached as Annexure **"PM53"**.

152.4.4. The third and fourth tranches of swap transactions covered the misappropriations of 4 April 2016 (R67,403,305.00) and 11 April 2016 (R39,851,767.00)

152.4.5. In the third and fourth tranches of swap transactions, the Fund's counterparty was Transnet, but these contracts included no provision obliging the Fund to pay Transnet's transaction advisor fees. On the contrary, at the specific insistence of the Fund the

swap confirmation in respect of each one of these swap transactions contained the following clause:

> *"Party A and Party B shall each bear its own costs and expenses associated with the negotiation, conclusion and implementation of Confirmation "A", Confirmation "81", Confirmation "82", Confirmation "83", the Agreement, the Credit Support Annex and any other Transaction Document and any related arrangements, including all legal fees and any advisory fees, commissions or the like."*

The relevant clause appears as the last clause on the second page of each one of the swap confirmations concluded between Transnet and the Fund (Annexures "POC1Cm" to "POC1Cp" of the particulars of claim).

152.4.6. A specimen set of the Fund / Transnet swap documentation (POC1Cj to POC1Cm) is attached as Annexure **"PM54"**.

152.5. If, as has been shown above, there was no lawful basis for the misappropriations and neither the swap contracts nor any other contracts make provision for the misappropriations, the misappropriations leave the Fund without R229 million to which it is entitled. Whether the Fund is making a profit or a loss on the swap transactions is irrelevant to its loss on the misappropriation. By way of analogy, a financial manager who steals R229 million of a clients' funds to reward himself for making good investment decisions that earn the client more than R229 million, has still stolen R229

million from the client and is obliged to repay what he has stolen. He cannot point to the products of his good investment advice to argue that the client has suffered no loss from his theft.

152.6. The Wood / Regiments argument that the Fund is suffering no loss has previously been refuted by the Fund in the restraint application and the Anton Piller application. In this regard, I attach as Annexures **"PM55"**, **"PM56"** and **"PM57"** respectively,

152.6.1. an extract containing paragraphs 79 to 93 of my replying affidavit in the Anton Piller application,

152.6.2. an extract containing paragraphs 71 to 81 of my replying affidavit in the Fund's restraint application against the Regiments respondents, and

152.6.3. the confirmatory expert affidavit of Andrea Taylor of Willis Towers Watson to my replying affidavit in the restraint application.

152.7. I ask that these extracts from my two affidavits and the affidavit of Andrea Taylor be incorporated into this affidavit and I reconfirm their correctness.

153. I invite Wood -

153.1. to respond allegation by allegation to the allegations which I have made

153.1.1. in paragraphs 149 to 152.7 above,

153.1.2. in the incorporated extracts from the affidavits in the restraint and Anton Piller proceedings,

153.1.3. elsewhere in this affidavit in relation to the Wood, Regiments, Gupta money laundering scheme, and

153.2. where he disputes any particular allegation, to provide this Court with credible evidence to support his version.

Claim I: the Disgorgement Claim in Relation to the Denel Debt Commission

154. The material elements of the Denel debt disgorgement claim are the following:

154.1. While Regiments Capital's wholly owned subsidiary Regiments Fund Managers was managing a portfolio of assets of the Fund,

154.2. And while Regiments Capital had an agreement with Denel SOC Ltd that it would receive a 1% commission on Denel debt that it placed,

154.3. Regiments Capital and Regiments Fund Managers arranged (without reference to the Fund) that Regiments Fund Managers would, on behalf of the Fund, take up R400 million of Denel debt issued under its ZAR2,200,000,000 Domestic Medium Term Note Programme,

154.4. Regiments Capital thereafter took a R4 million undisclosed commission from Denel for placing this debt with the Fund,

154.5. These arrangements were effected by *inter alia* Wood and Pillay acting in the course and scope of their duties within Regiments Capital,

154.6. Regiments Capital and Regiments Fund Managers are accordingly obliged to disgorge the undisclosed R4 million commission that was procured by transactions concluded in breach of Regiments Fund Managers' fiduciary duties to the Fund.

155. I confirm that -

155.1. the records of the Fund reflect that on or around 6 November 2015, Regiments Fund Managers invested R400m of Fund monies in Denel debt under the ZAR2,200,000,000 Domestic Medium Term Note Programme,

155.2. this investment of Fund monies was made without disclosure to the Fund of any conflict of interest faced by Regiments Fund Managers in relation to the investment, and

155.3. Pillay was the Regiments Fund Managers principal primarily responsible for investments of Fund monies in the portfolio of Fund assets managed by Regiments Fund Managers.

156. I attach as Annexure **"PM58"** an email addressed by Vuyelwa Qinga of Denel to Susan Comrie of the AmaBhungane investigative journalists on 14 August 2018 recording that Regiments raised R400m for Denel under a mandate given to it in September 2015 and was paid a 100bp (1%) commission for this placement.

157. I infer that Wood was the Regiments Capital partner primarily responsible for the placement of the R400m Denel debt. In this regard, I attach the following invoices

addressed to Wood in terms of the Wood, Regiments, Gupta money laundering scheme and relating to the Regiments Capital fee for placing this Denel debt:

157.1. Invoice I00240 dated 19 November 2015 and issued by the Gupta front company Medjoul (Pty) Ltd for an amount of R2 million being 50% of the R4 million commission paid to Regiments Capital by Denel (attached as Annexure **"PM59"**), and

157.2. Invoice Reg 155 dated 21 Feb 2016 and issued by Albatime for an amount of R200,000.00 being its 5% share of the R4 million (attached as Annexure **"PM60"**).

158. I also point out that the Regiments Capital ledger summary spreadsheet in Annexure "PM10" with paginated page 977 of the delinquency application records that the total fees earned by Regiments Capital from Denel between March 2015 and February 2017 amounted to R4 million of which R2,200,000 was paid to "business development" partners.

159. I invite Wood -

159.1. to confirm or deny that the R400m referred to in the email of Vuyelwa Qinga was the R400m placed with Regiments Fund Managers acting on behalf of the Fund,

159.2. if he claims that this R400m debt was placed with an entity other than Fund, to give details of the entity with whom Regiments Capital placed the R400m debt,

159.3. to indicate whether he made any attempts to place Denel debt with parties other than the Fund, and if so, to describe the outcome of such attempts,

159.4. to offer his explanation for his failure successfully to place more than the R400 million Denel debt for which Regiments Capital was paid its commission of R4 million,

159.5. to explain what services Medjoul (Pty) Ltd played in relation to the work performed by Regiments Capital in placing this R400 million of Denel debt, and

159.6. to respond allegation by allegation to each of the remaining allegations I have made in paragraphs 154 to 158 above, and where he disputes any particular allegation, to provide this Court with credible evidence to support his version.

160. The terms of the Denel debt foisted onto the Fund are reflected in the pricing supplement attached as Annexure **"PM61"**. As appears from this pricing supplement, the maturity date of the Denel debt was 10 June 2018. As might have been anticipated by any financial advisor or asset manager who had investigated the financial sustainability of Denel at the time that Regiments foisted the Denel debt onto the Fund, Denel defaulted on its obligation to repay the debt to the Fund when the maturity date fell due. The Fund was ultimately able to recover what Denel owed it only by prevailing on the Treasury to honour Denel's obligation to the Fund.

Claim J: the Bond Churning Transactions

161. The material elements of Claim J for the purposes of the liability of Regiments Capital and Regiments Fund Managers are the following:

161.1. Regiments Fund Managers used assets of the Fund to conclude the bond churning transactions described in paragraph 41C of the particulars of claim with Regiments Securities as a counterparty.

161.2. These bond churning transactions served no legitimate portfolio management purpose and resulted in profits for Regiments Securities at the expense of the Fund.

161.3. The total cost to the Fund of the bond churning transactions was R348 577 524.66 as particularized in Annexure POC1D of the particulars of claim which has been attached as to this Annexure "PM46".

161.4. The bond churning transactions were directed, alternatively allowed to take place through the conduct of Pillay, Wood and Nyhonyha acting in the course and scope of their duties with Regiments Capital.

162. The facts alleged in paragraphs 161.1 to 161.3 above are confirmed in the expert affidavit of Tanya Tippert which is attached as Annexure **"PM62A"**.

163. I respectfully submit that it is overwhelmingly likely that

163.1. Pillay would have directed the bond churning transactions because he was the party primarily responsible for investment decisions in relation to the assets of the Fund managed by Regiments Fund Managers, and

163.2. Having regard to the repeated pattern evidenced by the bond churning transactions, Wood and Nyhonyha would either have been party to the decision to conclude these transactions or would have been aware of the transactions and allowed them to proceed as they were generating substantial income for the Regiments group.

164. I invite Wood

164.1. to respond allegation by allegation to each of the allegations contained in in paragraphs 161 to 163 above, and

164.2. where he disputes any particular allegation, to provide this Court with credible evidence to support his version.

Conclusion on the Fund's Claims

165. I refer to what I have stated above and respectfully submit that Wood has no case whatsoever to the effect that -

165.1. Regiments Capital and Regiments Securities have valid defences to the claims of the Fund, and

165.2. still less, that the settlement value of R599 million calculated as set out in Annexure "PM49" overcompensates the Fund for its aggregate claims

(including interest) against Regiments Capital and Regiments Fund of R813.7 million and R825.2 million respectively.

WOOD'S FLIMSY COMPANY LAW CHALLENGES TO THE VALIDITY OF THE SETTLEMENT AGREEMENT

The Financial Assistance Complaint

166. The settlement agreement was structured and documented with regard to the corporate structure of the Regiments group and sets out a list of documents that the parties to the settlement agreement agreed were required to give sufficient certainty to the Fund that the settlement agreement would be valid, binding and enforceable. In this regard, I relied upon the expertise of the Fund's attorneys and their knowledge and experience of the proper scope and application of the relevant provisions of the Companies Act, including section 45 and on the warranties and representations made in terms of the settlement agreement.

167. In terms of clause 8.1 of the settlement agreement, Coral Lagoon and each of the Regiments respondents (including Regiments Capital and Regiments Fund Managers) warrant and represent in favour of the Fund that once the Fulfilment Date has occurred (the date on which all of the suspensive conditions have been fulfilled or waived):

167.1. all of the required shareholders and board resolutions will have been adopted;

167.2. the settlement agreement will "create valid, legally binding and enforceable obligations for each of such parties";

168. Having received the settlement agreement, Wood has sought to identify a basis on which the Companies Act could be applied to the settlement agreement so as to require a special resolution of the shareholders of Regiments Capital and in so doing give himself an effective veto over the Fund recovering anything under the settlement agreement. The only basis he has identified is his complaint that the settlement amounts to "financial assistance by Regiments Capital" under section 45 of the Companies Act to Pillay and Nyhonyha and that such "financial assistance" will not be authorised by a special resolution (given the Zara Trust shareholding in Regiments Capital). Wood then concludes that the entire settlement agreement is accordingly void and should be interdicted. He is wrong on both scores.

169. First, I am advised that Pillay and Nyhonyha are not being "financially assisted" by Regiments Capital in terms of the settlement agreement.

169.1. In terms of the settlement agreement, Regiments Capital agrees to pay the Fund the settlement amount in full and final settlement of all claims of whatsoever nature and howsoever arising (known or unknown) that the Fund (on the one hand) may have against any or all of the Regiments defendants (on the other hand) in relation to the portfolio management agreements, including without limitation all claims forming the subject matter of the Fund's action and all claims in relation to the bond churning transactions executed by Regiments Fund Managers on behalf of the Fund.

169.2. This is simply an agreed compromise of such claims and does not amount to a loan of money, a guarantee of a loan, a guarantee of an obligation or the securing of any debt or the securing of any obligation or other financial assistance to Pillay or Nyhonyha as is required by section 45 of the Companies Act. As it is clear from what is set out above, Regiments Capital is first and foremost, settling claims brought directly against it, and doing so, at a discount.

169.3. Pillay and Nyhonyha are not being "financially assisted by Regiments Capital". By reason of being party to the settlement agreement, they will enjoy its benefits, but this does not amount to Regiments Capital "financially assisting" them in their capacity as directors of the company.

169.4. The settlement agreement does envisage that financial assistance contemplated by section 45 is provided, but not by Regiments Capital. That financial assistance is provided by Coral Lagoon (Coral Lagoon is not a defendant in the Fund's action but provides a guarantee of the payment of the settlement amount). In compliance with the requirements of the Companies Act, the settlement agreement contemplates that the required special resolutions, directors' resolutions and solvency and liquidity statements will be obtained in respect of Coral Lagoon.

170. Second, it does not follow that even if "financial assistance" is present but unauthorised, that the entire settlement agreement must fail. The effect would

simply be that Regiments Capital's obligation to pay the settlement amount would be void. This is because:

170.1. The Companies Act itself (in section 45(6)) makes it clear that the voidness that attaches to an agreement or a resolution where it amounts to unauthorised financial assistance only arises "to the extent of the inconsistency".

170.2. There would be no difficulty whatsoever in implementing this settlement agreement if the obligation on the part of Regiments Capital to pay the settlement amount were void, but the obligations of the parties other than Regiments Capital were not. That is what the parties agreed. The settlement agreement includes:

170.2.1. an obligation on Regiments Capital to pay the settlement amount to the Fund (clause 4.1);

170.2.2. an obligation on Regiments Fund Managers to pay the settlement amount to the Fund (clause 4.1);

170.2.3. a provision to the effect that the obligations of Regiments Fund Managers and Regiments Capital to the Fund are owed jointly and severally, as principal obligations, to the Fund (clause 10.1);

170.2.4. a provision to the effect that the joint and several obligations owed by Regiments Fund Managers and Regiments Capital to the Fund

are not dependent on the validity of the other for their validity and their enforceability. Specifically, clause 10.2 provides as follows:

> *"10.2 The validity and enforceability of an obligation that is owed by one Regiments Defendant shall not be dependent on the validity and enforceability of any obligation that is owed by any other Regiments Defendant and an obligation that is owed by a Regiments Defendant (whether jointly and severally or otherwise) will not adversely be affected by any obligation that is owed by any other Regiments Defendant being wholly or partially invalid or unenforceable or being void, voidable or being set aside for any reason whatsoever."*

170.2.5. an obligation, in the form of a guarantee, owed by Coral Lagoon to the Fund in terms of which Coral Lagoon has an obligation to pay an amount equal to the settlement amount plus accrued interest to the Fund as a principal and independent obligation. The provisions of clause 4.3 to clause 4.5 of the settlement agreement specify this as follows:

> *"4.3 Subject only to the TSDBF performing its obligation to pay the remaining portion of the Purchase Price to Coral Lagoon in terms of clause 5.3.3.2 Coral Lagoon hereby irrevocably, as a principal and independent obligation and not merely as a surety, and on the basis of a discrete obligation*

against it, guarantees to the TSDBF the full and punctual payment to the TSDBF on the Settlement Effective Date of:

4.3.1. the Settlement Amount; and

4.3.2. any interest which has accrued on the Settlement Amount in terms of clause 4.2, collectively, the "Guaranteed Amount".

4.4. Coral Lagoon shall pay the Guaranteed Amount to the TSDBF on the Settlement Effective Date, subject to the TSDBF performing its obligation to pay the remaining portion of the Purchase Price to Coral Lagoon in terms of clause 5.3.3.2.

4.5. Coral Lagoon acknowledges that the guarantee given by it in clause 4.3 is given on the basis that it constitutes a separate obligation enforceable against it even though the TSDBF has not proceeded against or claimed from any of the Regiments Defendants under or in terms of this Agreement."; and

170.2.6. clause 19, which provides for the clauses of the settlement agreement to be severable from the other in the following terms:

"19. SEVERABILITY

Each clause of this Agreement shall be severable from the others. If any clause is found to be defective or unenforceable for any reason by any court, then the remaining clauses shall remain of full force and effect."

171. Wood's gripes are therefore disingenuous, or betray a lack of understanding of the settlement agreement, and are in any event misplaced and without merit.

The Notice Complaints

172. Wood complains that the Regiments Capital shareholders resolution that is required by the Settlement Agreement is defective by reason of it having been short-served and by reason of it not including all of the required information.

173. It is the responsibility of the Regiments Defendants under the Settlement Agreement to ensure that all of the necessary shareholder and board resolutions that are required have been duly adopted and are effective. Having said that, I note the following:

173.1. I understand that the shareholders of Regiments Capital have received a fresh notice convening a shareholders meeting to adopt the necessary resolutions on 6 September 2019. I do not have a copy of that notice.

173.2. Accordingly, Wood's complaints in relation to the notice that is attached to his filing affidavit as (Annexure X3.4) are moot.

173.3. Wood makes much of the "personal financial interests" of Pillay and Nyhonyha in approving the Settlement Agreement in their capacity as directors of Regiments Capital and of the fact that the Regiments Capital shareholders are required to ratify ("white-wash") those directors' resolutions.

173.4. I note that there is nothing inherently clandestine or sinister seeking a ratification by shareholders in such circumstances. This is precisely what the relevant section of the Companies Act contemplates where it provides for ratification by an ordinary resolution of the shareholders following a disclosure of a personal financial interest. The relevant provision is in section 75(7)(b)(i).

173.5. Similarly, I understand that the principle of shareholder ratification of directors' interests by a meeting of shareholders following disclosure to the shareholders of such interests is a long standing principle of South African company law.

THE BALANCE OF CONVENIENCE

The Fund's Limited Opposition to the Anti-Dissipation Relief

174. Save as is set out below, the Fund does not join issue on Wood's alternative relief for an anti-dissipation order against the Regiments respondents.

175. However, the Fund emphasizes that the settlement agreement and anything done pursuant thereto cannot be said to be a dissipation of assets by the Regiments respondents. Rather, the settlement agreement is a discharge of State Capture

related liabilities of the Regiments respondents, liabilities which were created by criminal conduct of Wood acting in the course and scope of his duties with Regiments Capital and which the Regiments respondents should be required to discharge as soon as possible.

176. Moreover, Wood's Trust's interest as a shareholder in Regiments Capital is subordinate to the Fund's interest as a creditor of Regiments Capital. So his case for an anti-dissipation order cannot interfere with the Fund's right to be compensated in the terms agreed in the settlement agreement.

177. Accordingly, if the Court is inclined to grant Wood any anti-dissipation relief, the Fund asks that any such order should make it clear that it does not affect the settlement agreement and its implementation.

The Risk of Irreparable Harm Faced by the Fund if the Settlement Agreement is Interdicted

178. The potentially irreparable financial harm faced by the Fund if the settlement agreement is interdicted is a function of two factors:

178.1. the financial benefit to the Fund of the timely implementation of the Settlement Agreement, and

178.2. the potential losses that the Fund may suffer if the relief sought by the plaintiff is granted.

179. In order to quantify the former, I have assumed that the Settlement Effective Date is 15 September 2019 and that the 5 day volume weighted average price on that date of Capitec Shares is R1100 per share. On that basis, the financial benefit on 15 September 2019 to the Fund of the implementation of the Settlement Agreement would be R599 807 963.60 as set out in Annexure **"PM49"**

180. Over time, the financial benefit to the Fund of the timely implementation Settlement Agreement would be increased by the investment return the Fund would earn on this amount. If, for example, the Fund were to liquidate all the Capitec shares and invest the proceeds, it would earn an investment return on those proceeds. If, on the other hand, the Fund were to hold the Capitec Shares, it would earn dividends and whatever return it makes on selling the Capitec Shares whenever it does so. Compared with the value of the Capitec Shares on 15 September 2019, this return could either be positive or negative.

181. The settlement agreement has been concluded by the Fund on the basis that it would be able to manage this volatility after 15 September 2019 much as it manages market risk in the rest of its investment portfolio.

182. The relief sought by Wood exposes the Fund to serious risk of irreparable losses.

    182.1. First, the structure and timing of the relief sought by Wood may have the effect that it directly results in the Settlement Agreement being incapable of implementation (if, for example, Coral Lagoon is unable to deliver the Capitec shares by the time that Part B is heard). The result for the Fund would be that the Fund would suffer potential losses of as much as the financial benefits on

15 September 2019 that I have quantified above. It would also result in the Fund foregoing the subsequent investment returns. To protect itself against this risk of loss, the Fund called on Wood in Annexure "PM50" to furnish it with security for any proven liability of Wood in these circumstances for that amount plus interest calculated on that amount. The interest rate that has been used has been the prescribed rate. Wood has refused to do so.

182.2. Second, the structure of the relief sought by the Wood may have the effect that the Fund is exposed to the volatility of the Capitec share price without the Fund being able to manage its resulting exposure. The effect on the Fund would depend on the future share price and the Fund would not be able to protect itself against this volatility by selling or hedging or putting in place a stop-loss.

182.2.1. If the future share price were to decline, the Fund would lose some or all of its investment (including the cash amount it pays on the settlement effective date).

182.2.2. If the future share price were to increase and then decline, the Fund would not have been able to realise the gain and would accordingly have lost the opportunity to profit.

182.3. To further protect itself against this risk of loss, the Fund has called on Wood to furnish it with security for any proven liability of Wood in these circumstances. The estimate that the Fund has made of its potential loss is calculated using the average return that I understand has been earned on a

one year investment in the Capitec share since its listing (59%). That results in an estimated potential loss of R1 417 092 270 loss on 810 230 Capitec shares (currently valued at R891 253 000 as set out above). The loss to the Fund could be more or less. The Fund called on Wood in "PM50" to provide security for that amount plus interest calculated on that amount at the prescribed rate. Wood has failed to do so.

183. The financial risk faced by the Fund in relation to Wood's proposed Part A relief interdicting the settlement agreement, is the risk of harm that will be visited on all of the Fund's pensioners if it materialises. It is a risk of particular importance to the Fund because it is a closed fund with an elderly population of pensioners and mortality rates that increase as each year goes by. So the Fund cannot afford to be trapped with substantial investments that are subject to volatile risk against which the Fund is unable to react.

184. Moreover, given the particular age profile and financial circumstances of the Fund's pensioner population, the very delay of a year in sharing in the benefits of the settlement agreement will visit substantial harm on thousands of pensioners who are entitled to those benefits.

184.1. As pointed out above, if R500 million were distributed in the form of bonus pensions to each of the Fund's current 46 955 beneficiaries, they would each receive the equivalent of 4 months' bonus pensions.

184.2. A delay of a year before elderly people accustomed to living on less than R3,000.00 per month, receive four months' bonus pensions to which they are entitled, is, itself, material harm for those pensioners.

184.3. Moreover, given the mortality rates of the Fund's pensioner population, if realisation of the settlement agreement value in the form of bonus pensions is delayed for a year, thousands of the Fund's pensioners will have passed away before they can share in the benefits to which they are entitled.

The Absence of any Risk of Irreparable Harm Faced by Wood

185. As pointed out above, Wood has shown no risk of harm in relation to the implementation of the settlement agreement because

185.1. He has failed to make out any defence to the Fund's claims against Regiments Capital and Regiments Securities, let alone one that justifies the conclusion that he is being short-changed if these claims are settled at a discount of over R200 million; and

185.2. In any event, the assets of Regiments Capital in which Wood asserts his trust's interest as a shareholder are, in substantial part, the proceeds of crimes perpetrated by Wood, and thus incapable of supporting any legal interest Wood may assert.

186. Even on his own version, Wood does not suggest that the potential harm that he asserts faces is irreparable. Instead, he announces that he will pursue company law

remedies to recover such harm. Thus in paragraph 83 of his founding affidavit he states:

> *"Should the settlement agreement be held to be enforceable I confirm that the Zara Trust will bring a claim against Mr Nyhonyha and Mr Pillay personally for the damage caused by them to Regiments Capital in concluding the settlement agreement"*

187. Of course, if the settlement agreement is held to be enforceable, Wood will have had no basis on which to interdict its implementation. But even in the unlikely event that the settlement agreement might be invalidated in Part B of Wood's application, the Fund will always have the resources to meet any liability it may have to make restitution of what it has received under the settlement agreement:

187.1. As appears from the actuarial valuation of the Fund attached as "PM2", as at 31 March 2019 the Fund's assets were valued at R13,346 million (R13.5 billion), and had earned approximately 4.90% per annum during the valuation period.

187.2. The R500 million that is the subject of the settlement agreement is about 3.7% of the Fund's assets – which is less than what the Fund's assets had earned during the valuation period.

187.3. The Fund's present value of liabilities in respect of pensioners as at 31 March 2019 was R9,552 million (R9.6 billion). It has a solvency reserve of R305 million, leaving a surplus of R3,489 million (R3.5 billion).

187.4. So, the Fund will still be around when Wood's challenge to the settlement agreement is finally determined in Part B, and will able to return all proceeds of the settlement Wood seeks to scupper with his Part A relief.

The Public Interest

188. Finally, I respectfully submit that there is a clear public interest in not interdicting implementation of the settlement agreement.

189. Recompense for State Capture is a national imperative. The South African public should not be made to wait for an additional indefinite period before it is able to witness what is possibly the most significant instance yet of compensation to victims of State Capture.

AD SERIATIM RESPONSE TO THE ALLEGATIONS OF WOOD

190. I now proceed to answer *seriatim* the allegations in Wood's founding affidavit. I do so only in relation to those averments that I consider to still require a specific response notwithstanding what is stated above. Any averment not specifically addressed is denied to the extent that it is inconsistent with what is stated elsewhere in this affidavit.

191. **AD PARAGRAPHS 1 - 30**

191.1. For the reasons set out elsewhere in this affidavit, I deny that the allegations set out by Wood are true and correct.

191.2. I admit the averments under paragraph 12.

191.3. I have pointed out the incorrect citation of Capitec and have cited it correctly in the section of my affidavit dealing below with the counterapplication.

191.4. Save as aforesaid, I note the rest of the averments under these paragraphs.

192. **AD PARAGRAPHS 31 – 41**

192.1. The judgments of Tsoka, J, Keightley J and van der Linde J speak for themselves.

192.2. I admit the averments under paragraph 31.4.

192.3. For the reasons set out elsewhere in this affidavit, I deny that the settlement agreement is void *ab initio* as alleged under paragraph 31.6;.

192.4. I deny that Wood's complaint under section 112 of the Companies Act has any prospects of success. The high-water mark of this complaint is that Wood speculates that, if he had pursued his rights to financial statements of Regiments Capital, these may have shown that the settlement agreement implicates section 112. This plainly does not make out a case against an outsider to Regiments Capital like the Fund.

192.5. the Capitec Consent has been addressed above and is addressed in more detail in relation to the Fund's counterapplication against Capitec. I deny that that the "payment mechanism" in the settlement agreement (i.e. the operation of set-off) requires any consent from Capitec.

192.6. Regiments Capital does not own 18% of Ash Brook's shareholding. It owns 59.82% of that shareholding.

192.7. I deny that the "conflict" described in paragraph 31.13 is unsalvageable. I refer to what I have stated above in relation to the relevant principles of company law in this regard.

192.8. For the reasons set out above,

192.8.1. I submit that Wood's application falls to be struck from the roll with a punitive costs order because any urgency that he now faces is entirely self-created; and

192.8.2. I deny that Wood has any basis upon which to interdict implementation of the settlement agreement pending determination of his Part B relief.

192.9. As pointed out above, the Fund does not join issue with Wood on any of his other interim relief, save for requiring that no such relief should interfere with the implementation of the settlement agreement.

192.10. Save as aforesaid, I note the rest of the averments under these paragraphs.

193. **AD PARAGRAPH 42**

193.1. I deny that the settlement agreement is void and unenforceable as alleged, or in any other respect.

193.2. The orders referred to were obtained to protect the Fund. Wood and his trust's attempt to derive the benefit of those orders is parasitic. It would be a travesty of justice to deny the Fund the benefit of the settlement agreement and force it to continue to rely on the limited protection of the orders referred to only to extend that protection to the chief o perpetrators of the State Capture crimes upon which the Fund's claims are based.

194. **AD PARAGRAPHS 43 - 46**

194.1. The settlement agreement speaks for itself. I have addressed its material terms above.

194.2. I have no knowledge of what transpired between Wood and the Regiments respondents.

195. **AD PARAGRAPHS 47 - 55**

195.1. I note and accept that Kuben Moodley and his company, Albatime, is a "mutual business associate" known to Wood and the Regiments respondents. The business relationship between Moodley and Albatime on the one hand and Wood, Pillay and Regiments on the other has been described above. It was part of the Wood, Regiments, Gupta money laundering scheme.

195.2. For the reasons set out elsewhere in this affidavit, I deny that the settlement agreement is void, unenforceable, or otherwise vitiated by any of the grounds alleged by Wood.

195.3. As for the averments relating to interactions between Wood and/or his legal representatives on one hand, and the Regiments respondents and/or their legal representatives on the other, to note those averments and record that in some instances the Fund was not copied on communications between Wood and the regiments respondents and therefore has no knowledge of the allegations.

196. **AD PARAGRAPHS 57 - 83**

196.1. The settlement agreement and the relevant provisions of the Companies Act speak for themselves.

196.2. Save as aforesaid I refer to what I have set out above and deny these paragraphs to the extent that they are inconsistent therewith..

197. **AD PARAGRAPHS 84 - 90**

197.1. For the reasons set out elsewhere in this affidavit, I deny that Wood and his trust have made out a proper case for the interdictory relief sought.

198. **AD PARAGRAPH 91**

198.1. For the reasons set out elsewhere in this affidavit, I deny the averments under this paragraph.

199. **AD PARAGRAPHS 92 - 149**

199.1. For the reasons set out elsewhere in this affidavit, I deny that the negotiation of, conclusion and implementation of the settlement agreement is a dissipatory act on the part of the Regiments respondents.

199.2. However, as stated elsewhere in this affidavit, the Fund does not join issue with Wood and his trust's application for an anti-dissipatory interdict against the Regiments respondents. The Fund's concern is only that any such order, if the Court were minded to grant it, should make it clear that the settlement agreement and its implementation are not affected.

200. **AD PARAGRAPHS 150 - 166**

200.1. the Fund does not join issue with Wood and his trust's application to compel the Regiments respondents to produce financial information.

200.2. However, the Fund denies that such an application is urgent.

201. **AD PARAGRAPHS 167 - 170**

201.1. For the reasons set out elsewhere in this affidavit, I deny that the applications are urgent or semi-urgent. Any urgency, if it exists, is self-created.

202. **AD PARAGRAPHS 171 - 176**

202.1. I deny that Wood and his trust are entitled to any costs against the Fund.

202.2. For the reasons set out elsewhere in this affidavit, the applications are an abuse of the Court process and should be visited with a punitive costs order.

CONCLUSION ON WOOD'S APPLICATION

203. For the reasons set out above, the Fund respectfully asks for Wood's application against it to be dismissed with costs on the attorney and client scale.

THE FUND'S COUNTERAPPLICATION AGAINST CAPITEC

The Parties

204. The Fund is the applicant in its counterapplication ("the counterapplication").

205. Capitec is the first respondent in the counterapplication. Capitec is correctly cited in the counterapplication as Capitec Bank Holdings Limited, the public company registered and incorporated in South Africa with registration number 1999/025903/06 and having its principal address, like Capitec Bank Limited, at 1 Quantum Street, Techno Park, Stellenbosch.

206. Coral Lagoon is the second respondent in the counterapplication. Its address and description are as set out in the founding affidavit of Wood in the main application. Coral Lagoon is cited merely by virtue of the interest that it has in the counterapplication as a party to the settlement agreement and to the subscription agreement. No relief is sought by the Fund against Coral Lagoon unless it opposes the counterapplication, in which case, the Fund will seek an order of costs against it.

207. Ash Brook is the third respondent in the counterapplication. Its address and description are as set out in the founding affidavit of Wood in the main application. Ash Brook is cited merely by virtue of the interest that it has in the counterapplication as a party to the subscription agreement. No relief is sought by the Fund against Ash Brook unless it opposes the counterapplication, in which case, the Fund will seek an order of costs against it.

208. Regiments Capital is the third respondent in the counterapplication. Its address and description are as set out in the founding affidavit of Wood in the main application. Regiments Capital is cited merely by virtue of the interest that it has in the counterapplication as a party to the settlement agreement. No relief is sought by the Fund against Regiments Capital unless it opposes the counterapplication, in which case, the Fund will seek an order of costs against it.

209. Regiments Fund Managers is the fourth respondent in the counterapplication. Its address and description are as set out in the founding affidavit of Wood in the main application. Regiments Fund Managers is cited merely by virtue of the interest that it has in the counterapplication as a party to the settlement agreement. No relief is sought by the Fund against Regiments Fund Managers unless it opposes the counterapplication, in which case, the Fund will seek an order of costs against it.

The Purpose of the Counterapplication and Urgency

210. The counterapplication is to obtain declaratory relief to stop Capitec interfering with the settlement agreement by making legally unsustainable threats to the Fund, Coral Lagoon and Ash Brook.

211. The relief sought in the counterapplication is extremely urgent because it is necessary to prevent the Fund's settlement agreement with the Regiments respondents from failing.

212. As has been pointed out above,

212.1. Implementation of the settlement agreement is necessary to prevent irreparable harm to thousands of pensioners of the Fund;

212.2. the Capitec Consent is a condition, the final failure of which will lead to the failure of the settlement agreement, unless compliance with that condition is waived in terms of the settlement agreement;

212.3. the Fund is unable to carry the volatility risk under the settlement agreement in relation to the Capitec shares for an indefinite length of time and accordingly cannot allow the deadline for fulfilment of the Capitec Consent condition to be extended indefinitely;

212.4. other than the Capitec Consent, the parties do not anticipate that there will be any other suspensive conditions outstanding by 6 September 2019;

212.5. the deadline for the Capitec Consent is currently fixed at 6 September 2019;

212.6. in the circumstances the parties are negotiating an agreement to extend the deadline for fulfilment of the Capitec Consent condition. I am confident that such an extension will be negotiated and will cause an affidavit to be filed before the hearing on this aspect.

The Chronology Relevant to the Counterapplication

213. The settlement agreement was concluded on 8 August 2019. I have described in paragraph 123 above, the circumstances in which the Capitec Consent clause was included in the agreement.

214. As pointed out in paragraph 120.4 above, the 810 230 Capitec shares to be purchased by the Fund in terms of the settlement agreement represent the entire indirect interest of Regiments Capital in Coral Lagoon. The settlement agreement accordingly allows Capitec to terminate its relationship with Regiments Capital which is publicly recognised as a prominent agent of State Capture.

215. Moreover, as is pointed out more fully below,

    215.1. The only apparent restriction on Coral Lagoon's ability freely to sell its Capitec shares is clause 8.3 of the subscription agreement, which does not in any way fetter Coral Lagoon's right to sell the 810 230 Capitec shares to the Fund because the Fund is not a person who *"does not comply with the BEE Act and Codes"*. Like all of its legal obligations the Fund takes the obligations in the B-BBEE Act and Codes seriously and fully complies with them; and

    215.2. Even if clause 8.3 of the subscription agreement was interpreted not to mean what it says, but rather to mean what Capitec apparently wants it to say, it would offer no meaningful BBBEE protection to Capitec.

So it was and remains difficult for the Fund to see any *bona fide* reason for Capitec not to grant the Capitec consent.

216. The excerpt from the statement of Ian Sinton of Standard Bank to the State Capture Commission (Annexure PM19") illustrates that no self-respecting bank would want an ongoing relationship with Regiments Capital. Capitec had hitherto been unable to avoid such a relationship because of Regiments Capital's interest in Coral Lagoon to which it was contractually bound as one of its BEE partners, and the Fund's restraint order which precluded Regiments Capital from disposing of its interest in Coral Lagoon. So the reputational benefits to Capitec of allowing the settlement agreement to proceed are self-evident. For this reason, the Fund assumed (incorrectly, it transpired) that Capitec would enthusiastically support the settlement agreement.

217. Mistakenly assuming that Capitec would embrace the opportunity provided by the settlement agreement to free itself from its relationship with Regiments Capital, the Fund's legal advisors in transactional matters relating to its dispute with the Regiments respondents, Mr Roger Rudolph and Ms Kathleen Taylor of Edward Nathan Sonnenbergs Inc., held a meeting on 13 August 2019 with Mr Andre du Plessis, the CFO of Capitec, and Mr Marthinus Janse van Rensburg and Ms Yolande Mouton of the Capitec Legal Department to explain the structure and the background to the settlement agreement.

218. At the meeting of 13 August 2019, there was also a discussion of Regiments' Capital's involvement in State Capture with the Capitec representatives.

219. On 14 August 2019, Mr Rudolph addressed an email to Mr Janse van Rensburg and Ms Mouton identifying the documents of which he was aware that were relevant to the Coral Lagoon holding of Capitec shares and asking Capitec to indicate whether there were any other documents to which he should have regard. A copy of Mr Rudolph's email is attached as Annexure **"PM62"**. Capitec never responded to the request in his email.

220. Earlier on 14 August 2019, Mr Rudolph had sent an email to Mr Janse van Rensburg and Ms Mouton attaching a copy of the statement of Mr Sinton to the Zondo Commission (the relevant extracts of which have already been attached as Annexure "PM19"). He also provided two links to AmaBhungane articles about the State Capture related activities of Regiments Capital. Copies of those articles are attached as **"PM63"** and **"PM64"** respectively. The covering email of Mr Rudolph is attached as Annexure **"PM65"**.

221. By 21 August 2019, the Fund had not heard back from Capitec. So Mr Rudolph addressed an email to Mr Janse van Rensburg formally requesting an opportunity to make submissions to the Capitec Board in this regard. A copy of Mr Rudolph's email is attached as **"PM66"**. In his email, Mr Rudolph wrote:

> *"The TSDBF would like your support for the implementation of the settlement agreement and would, accordingly, like to ensure that the decision that Capitec makes on both fronts is made only after the board of Capitec has considered all of the facts and circumstances that the TSDBF*

regards as relevant to such a decision, including the importance of the settlement agreement in the context of the national need for recovery of losses by victims of State Capture"

222. Unbeknownst to Mr Rudolph, two days previously, on 19 August 2019, Ms Chantelle van der Schyff of Smit Sewgoolam attorneys had written to Capitec's attorneys on behalf of Coral Lagoon, requesting that Capitec furnish the Capitec Consent by 21 August 2019, and Mr Yaseen Cariem of Van der Spuy attorneys had replied on behalf of Capitec on 21 August 2019 declining to furnish the Capitec Consent. Copies of the letters of Ms van der Schyff and Mr Cariem are attached as Annexures **"PM67"** and **"PM68"** respectively. In Mr Cariem's letter to Smit Sewgoolam,

222.1. In paragraph 9, Mr Cariem referred to unspecified "encumbrance restrictions" on Coral Lagoon in respect of its Capitec shares, and

222.2. In paragraph 11, Mr Cariem stated

> "*The Transnet Second Defined Benefit Fund ("**TSDBF**") is not compliant with the B-BBEE Act and the Codes and Coral Lagoon is accordingly prohibited from disposing of any of its CPI Shares to the TSDBF."*

223. In response to Mr Rudolph's email of 21 August 2019, at 16h57 on the same day, Mr Cariem forwarded copies of Annexures "PM67" and "PM68" to Mr Rudolph, referred to the response of Capitec in "PM68" and suggested that the Fund should

be guided accordingly. A copy of Mr Cariem's email of 21 August 2019 is attached as Annexure **"PM69"**.

224. Mr Rudolph responded to Mr Cariem's email at 17h30 on 21 August 2019. He noted Mr Cariem's email but pointed out that the Fund's request to make representations to the Capitec board in relation to the Capitec Consent still stood. A copy of Mr Rudolph's email of 21 August 2019 at 17h30 is attached as Annexure **"PM70"**.

225. Mr Rudolph's email to Mr Cariem was followed by a formal request to the Chairperson of the Capitec Board, Ms Santie Botha, that I made in a letter I addressed to her on 23 August 2019,

225.1. setting out some of the State Capture background to the Fund's claims against the Regiments respondents,

225.2. indicating how the conduct of the Regiments respondents and Wood had adversely affected the ability of the Fund to provide benefits to its pensioners and their dependents,

225.3. describing the settlement agreement and its significance, and

225.4. asking that the Fund be allowed to make representations to the Capitec Board in relation to the Capitec Consent.

A copy of my letter of 23 August 2019 is attached as Annexure **"PM71"**.

226. By 27 August 2019, the Fund had still not heard back from Capitec. So Mr Rudolph addressed a further letter to Mr Cariem in which he repeated the Fund's request for an opportunity to make representations to the Capitec Board in relation to the Capitec Consent. A copy of Mr Rudolph's email of 27 August 2019 is attached as Annexure **"PM72"**. Mr Rudolph still had not received a response to his email of 14 August 2019, requesting clarity on whether he was aware of all of the documents relevant to the Coral Lagoon holding in Capitec. So, in addition to repeating the Fund's request for an opportunity to make representations to the Capitec Board, he sought to clarify whether maybe the Fund was missing something in relation to the basis of Capitec's position that it could prohibit Coral Lagoon from disposing of shares to the TSDBF. Thus Mr Rudolph

226.1. Asked Mr Cariem if the unspecified "encumbrance restrictions" on Coral Lagoon in respect of its Capitec shares mentioned by Mr Cariem in paragraph 9 of his 21 August 2019 email to Smit Sewgoolam involved any provisions other than clause 8.3 of the subscription agreement, and sought copies of any other provisions on which Capitec might be relying in this regards; and

226.2. Called on Mr Cariem to specify the particular non-compliance with B-BBEE Act and Codes Capitec alleged against the Fund.

227. At the time of deposing to this affidavit, Capitec had still not responded directly to Mr Rudolph's email of 27 August 2019. However, I have been informed that on 27 August 2019, Capitec addressed letters to the shareholders in Ash Brook

threatening them with legal action if Coral Lagoon proceeded with the settlement agreement. This is a matter peculiarly within the knowledge of Capitec. I invite them to clarify the true facts when they file their answering affidavit to this counterapplication.

228. On 30 August 2019, Ms Botha, the Chairperson of Capitec addressed a letter to me which is attached as Annexure **"PM73"**.

The Letter from Ms Botha to the Fund on 30 August 2019

229. Ms Botha's letter is the communication which prompted the Fund to launch this counterapplication. In short, it evidenced an attitude on the part of Capitec that it preferred to maintain its relationship with Regiments Capital, a primary agent of State Capture, until such time as it could exploit the opportunity created by the Fund's litigation with the Regiments respondents to force Coral Lagoon to sell its shares to a purchaser of Capitec's choosing or otherwise to orchestrate a commercial advantage to Capitec from the situation. Quite aside from the opportunistic nature of the position adopted by Capitec, it sought to advance this position with reference to legal arguments which, I am advised, are wholly unfounded.

230. In view of the importance of the letter of Ms Botha to the Fund's decision to launch the counterapplication, I will describe its substantive content paragraph by paragraph and set out the Fund's response thereto.

231. In paragraphs 2.1 and 2.2, Ms Botha described the B-BBEE purpose of the original transaction (which is now more than 12 years old) in terms of which Capitec shares were issued to Coral Lagoon in terms of the subscription agreement.

231.1. I point out that in terms of the continuing recognition principle which applies under the Financial Sector Code, Capitec will be entitled to B-BBEE recognition in respect of the Coral Lagoon shares after their sale to the Fund;

231.2. In any event, as I detail below, clause 8.3 offers Capitec no material B-BBEE protection.

232. In paragraph 2.3, Ms Botha invoked the subscription agreement in bald terms and stated the following:

> *"In terms of the Subscription Agreement, Coral Lagoon is prohibited from disposing of any or all of the CPI Shares held by it to any entity or person who does not have the requisite level of black ownership ("Qualifying Black Person"). Since the TSDBF is not a Qualifying Black Person, a disposal by Coral Lagoon of any of the CPI Shares held by it to the TSDBF is prohibited in terms, and amounts to a material breach, of the Subscription Agreement."*

232.1. I have been advised that the subscription agreement contains no prohibition of the sort asserted by Ms Botha.

232.2. I point out that whatever Capitec may now want clause 8.3 of the subscription agreement to have provided, the phrase *"qualifying black*

person" does not appear in that clause or anywhere else in the subscription agreement.

233. She contended in paragraph 2.4 that Capitec had rights under the subscription agreement to prevent the sale by Coral Lagoon of its Capitec shares to the Fund and that it would not waive those rights because to do so would *"effectively result in Capitec agreeing to a forfeiture of the direct B-BBEE ownership credentials attributable to such CPI Shares, which would be contrary to the rationale for the Transaction* [ie the subscription agreement concluded more than 12 years ago]"

233.1. I am advised that Capitec has no such rights. I will amplify this submission below when I set out the basis for the Fund's claim for relief.

234. She contended in clause 2.5 that

> *"(... in terms of the JSE Limited Listings Requirements), the Capitec board of directors would need to obtain approval from Capitec shareholders in order to support the disposal by Coral Lagoon of its CPI Shares to the TSDBF. In doing so, the board would need to motivate such approval, having regard to their fiduciary duties towards the company and shareholders as a whole."*

234.1. Neither I, nor my legal advisers, are aware of any of the JSE Limited Listings Requirements which would require the Capitec board of directors to seek approval from Capitec shareholders in order to support the disposal of Capitec shares by Coral Lagoon to the Fund. I invite Capitec to identify the particular requirements that they have in mind.

234.2. I point out that the Capitec shares of Coral Lagoon are fully paid up. So the contention of Ms Botha would appear to be at odds both with

234.2.1. The ordinary JSE listings requirements that require listed securities to be freely transferrable, and

234.2.2. Article 10 of the MOI of Capitec Bank Holdings Ltd which provides that "*It is recorded for the avoidance of doubt that fully paid Securities shall not be subject to any lien from the Company and shall be freely transferable.*"

235. In paragraph 2.6 of her letter, she made the following extraordinary statement:

> *"It is difficult to conceive a basis for such motivation having regard to, amongst other things, the prejudice that Capitec will suffer; the company's (and the country's) imperative to advance B-BBEE; the fact that the TSDBF's claims against the various persons remains pending in the High Court; and the fact that the beneficiaries, in part, of such approval will be the very individuals who according to the TSDBF have been implicated in state capture (as per your letter)."*

235.1. Capitec appears to take the attitude that it will suffer prejudice if it is forced to terminate its relationship with Regiments Capital, a prominent agent of State Capture;

235.2. It makes common cause with Wood in casting doubt on the validity of the Fund's claims, despite the fact that the Regiments respondents have

chosen to settle these claims, and raises the spurious concern that these claims remain pending in the High Court.

235.3. I have set out above, in considerable detail above,

235.3.1. the basis for the Fund's claims against the BEE partner, to whom Capitec clings, namely Regiments Capital, and

235.3.2. the State Capture context for these claims.

235.4. I invite Capitec to specify in its answering affidavit to this counterapplication

235.4.1. which of these claims it contends to be unfounded, and on what basis it makes such a contention;

235.4.2. which particular evidence set out above showing the involvement of Regiments Capital in State Capture activities for the benefit of the Gupta family it disputes, and

235.4.3. the basis upon which it so disputes this evidence.

235.5. I take issue with the proposition in Ms Botha's letter that the beneficiaries of implementation of the settlement agreement will be agents of State Capture.

235.5.1. The beneficiaries of implementation of the settlement agreement,

235.5.1.1. In the first instance will be the Fund, which will derive a settlement value of approximately R600 million to compensate it for the losses caused to it by the State Capture related activities of Regiments Capital and its associates; and

235.5.1.2. In the second instance, will presumably be the fiscus – Coral Lagoon would realise substantial capital gains from the settlement agreement on which it would have to pay capital gains tax;

235.5.1.3. In the third instance is likely to be Transnet, which has been seeking to settle its R189 240 000 and R79 230 000 claims against Regiments Capital arising out of the latter's State Capture linked activities (see paragraph 48.1 of Wood's founding affidavit);

235.5.2. It is unlikely that after capital gains tax has been paid and the claims of the Fund and Transnet (which will also include interest) have been paid out, there will remain any cash from the purchase price paid to Coral Lagoon for the 810 230 Capitec shares representing the entire indirect interest of Regiments Capital in Coral Lagoon. However, if there is any such cash remaining, it is likely to be distributed, not to the shareholders of Regiments Capital, but rather to its creditors, like the Vantage

Capital, to whom it is indebted in amounts in excess of R100 million for development finance to it in relation to the Kgoro property development in Sandton.

235.5.3. In any event Capitec's claim that it does not want to benefit persons implicated in State Capture is plainly disingenuous as is made clear by paragraph 3 of Ms Botha's letter to which I respond below.

235.6. I invite Ms Botha to explain whether the Capitec board believes that its shareholders would want Capitec to frustrate a settlement agreement that will compensate Transnet pensioners living on less than R3000 per month for hundreds of millions of rands of losses visited on their pension fund by agents of State Capture.

235.7. Finally, I point out that the 810 230 shares at issue in the settlement agreement amount to 0.7% of the shareholding of Capitec, are fully paid up and have been held by Coral Lagoon for more than 12 years, thus entitling Capitec to B-BBEE recognition in respect of the Coral Lagoon shares after their sale to the Fund under the continuing recognition principle which applies under the Financial Sector Code. In the circumstances, the claim of any material B-BBEE prejudice is, on its face, unconvincing. Moreover, as I set out below, the terms of the subscription agreement provide Capitec with no meaningful B-BBEE protection

whatsoever. I accordingly submit that Ms Botha's appeal to concerns of B-BBEE are at best without substance.

236. In paragraph 2.7 of her letter, Ms Botha stated:

> *"The prejudice to Capitec should also be viewed in the context of Capitec being a public, listed company with private and public sector pension funds invested in it."*

236.1. I repeat that the terms of the subscription agreement provide Capitec with no meaningful B-BBEE protection whatsoever.

236.2. In view of the fact that Capitec has not even alleged any financial prejudice that it will suffer if it is unable to frustrate the settlement agreement, I respectfully submit that no weight can be given to this bald assertion.

237. In paragraph 3, Ms Botha adopted a carrot and stick approach towards the Fund. She stated:

> *"Should the TSDBF proceed to implement the Settlement Agreement and acquire certain of the CPI Shares held by Coral Lagoon without Capitec's support, Capitec will consider the TSDBF to have interfered with the contractual obligations of Coral Lagoon towards Capitec in terms of the Subscription Agreement. We accordingly encourage the TSDBF to continue to engage with Capitec with a view to finding a mutually acceptable solution that addresses both the interests of the TSDBF and the interests of Capitec and its shareholders and stakeholders"*

237.1. The stick brandished by Capitec is the threat that that implementation of the settlement agreement will implicate the Fund in interference with contractual obligations of Coral Lagoon towards Capitec in terms of the subscription agreement. I have been advised that this is a hollow threat because the settlement agreement does not interfere with any contractual obligations of Coral Lagoon to Capitec.

237.2. The carrot offered by Capitec is the invitation *"to continue to engage with Capitec with a view to finding a mutually acceptable solution that addresses both the interests of the TSDBF and the interests of Capitec and its shareholders and stakeholders"*.

237.2.1. The only possible "mutually acceptable solution" involving Capitec would be a sale of Capitec shares indirectly held by Regiments Capital in Coral Lagoon to a purchaser of Capitec's choosing on terms acceptable to Capitec and the purchaser.

237.2.2. So Capitec is clinging on to its relationship with Regiments Capital in an attempt to control the identity of the purchaser who takes transfer of the Capitec shares indirectly held by Regiments Capital and the terms on which they take transfer of these shares. Capitec thus appears to be quite happy to sustain its relationship with a prominent agent of State

Capture if, by so doing, it can orchestrate a commercial advantage for itself.

237.2.3. Apart from the questionable Capitec priorities evidenced by paragraph 3 of Ms Botha's letter, I point out that this paragraph gives a lie to Capitec's apparent concern that a sale of the Capitec shares would provide a benefit to Regiments Capital. Capitec clearly does not object to a sale that may benefit to Regiments Capital, only to one that may benefit Regiments Capital without affording Capitec a commercial advantage in addition to the reputational advantage of freeing itself from its twelve year relationship with Regiments Capital.

238. In paragraph 4 of her letter, Ms Botha refused the Fund's request to make detailed representations to the Board ostensibly because the members of the Board are scattered around the country. Instead, she suggested that the Fund should make representations to Mr du Plessis. The Fund declines to take up this suggestion. Mr du Plessis is welcome to have regard to the contents of this affidavit and the annexures thereto and to make his own decision as to whether it is sufficiently important to bring to the attention of the Board members of Capitec at their various locations scattered around the country.

Capitec's Threats Are Legally Unfounded

239. Capitec relies on the subscription agreement to contend that Coral Lagoon is prohibited from selling its Capitec shares to the Fund. The only provision of the subscription agreement which it could possibly be invoking in this regard is clause 8.3. As pointed out above, clause 8.3 states the following in material part:

> *"... should SPV [ie Coral Lagoon] sell, alienate, donate, exchange, encumber, or in any other manner endeavour to dispose ("sold") any of the Holdings Shares [ie Capitec shares] to any entity or person who, in Holdings' opinion,* ***does not comply with the BEE Act and Codes****, Holdings will determine the number of Holdings Shares sold and SPV will within 30 days after requested thereto by Holdings acquire an equal number of Holdings shares and cause same to be registered in SPV's name."* (emphasis added)

240. Clause 8.3 only applies if Coral Lagoon sells Capitec shares to a person who contravenes ("*does not comply with*") the B-BBEE Act and the Codes. As pointed out, the Fund has never contravened the B-BBEE Act and the Codes.

241. Furthermore, clause 8.3 does not prohibit Coral Lagoon from disposing of shares to a person who *"does not comply with the BEE Act and Codes"*. It merely provides that if Coral Lagoon does so, Capitec has a right to require that Coral Lagoon repurchases an equal number of shares in its own name. There is no breach of any obligation under clause 8.3 unless and until Coral Lagoon fails to repurchase shares in circumstances where the clause obliges it to do so. If Capitec believes

that it will not be possible for Coral Lagoon to acquire such shares, I invite them to explain why they believe that to be the case.

242. Notwithstanding the wording of clause 8.3, Capitec wants to construe it to mean something different. As is clear from Ms Botha's letter, Capitec want clause 8.3 to be rewritten as though it read

> *"...SPV [ie Coral Lagoon] [may not] sell, alienate, donate, exchange, encumber, or in any other manner endeavour to dispose ("sold") any of the Holdings Shares [ie Capitec shares] to any entity or person who, in Holdings' opinion, does not does not* ***[have the requisite level of black ownership ("Qualifying Black Person")]*** *(emphasis added)*

243. I point out that even the wording that Capitec now, with hindsight, would have wanted for the clause, would pose intractable difficulties of interpretation.

243.1. What is "the requisite level of black ownership?

243.2. Is it enough for level 1 B-BBEE status? Level 2? Level 3?

243.3. How does the clause apply to sales of Capitec shares to entities like the Fund, whose holdings of Capitec shares are contemplated by the Codes and would qualify as "mandated investments" in terms of the Codes?

244. But these difficulties do not arise because clause 8.3 is not written as Capitec might now want it to have been written. It is written in the terms that are recorded in the subscription agreement. Those terms do not prohibit any sales and apply only to sales to persons who do not "*comply with the BEE Act and Codes*". As I have

emphasized above, the Fund is not such a person. So clause 8.3 does not prohibit Coral Lagoon from selling its Capitec shares to the Fund.

245. Even if clause 8.3 could somehow be construed to mean what Capitec wants it to mean and the interpretational difficulties could be overcome, it would not avail Capitec.

245.1. On Capitec's notional interpretation, the clause would prevent Coral Lagoon from selling its Capitec shares to anyone whose B-BBEE status did not meet with Capitec's approval.

245.2. Such a clause would obviously be a restraint of trade.

245.3. In any circumstances, it would be a restraint of trade that was contrary to public policy because it would be an utterly irrational restraint of trade that offered no meaningful B-BBEE protection at all. This is because any purchaser who met Capitec's required B-BBEE status would be free, the day after the purchase of the shares, to sell them on the open market to a purchaser of his/her choice. So the only effect of the clause would be to require the intermediation of a black purchaser between Coral Lagoon and their chosen purchaser who did not meet with Capitec's approval. The Coral Lagoon shareholders could, themselves, even constitute an SPV to be that intermediate black purchaser.

245.4. An utterly irrational restraint of trade like this would be contrary to public policy and generally unenforceable.

245.5. In the specific circumstances of the present case, it would be manifestly contrary to public policy to allow Capitec to enforce the restraint of trade (on the strained interpretation it proposes)

245.5.1. to allow Capitec to procure for itself a commercial advantage out of the State Capture context that has given rise to the claims settled by the Fund in the settlement agreement;

245.5.2. to prevent the pensioners of the Fund from being compensated for losses visited on the Fund by State Capture until Capitec was satisfied that it had extracted the appropriate commercial advantage out of the situation; and

245.5.3. to do so in circumstances where Capitec's limited B-BBEE interest is the shares owned by Coral Lagoon will already be protected by the continuing recognition principle.

246. Finally, I respectfully submit that if the clause were to be interpreted as Capitec wants it to be interpreted and enforced so as to prevent the pensioners of the Fund from being compensated for losses visited on the Fund by State Capture, this would violate the pensioners' fundamental rights of access to social welfare as protected by section 27(1)(c) of the Constitution. In this regard, I refer to what I have stated above in relation to

246.1. the irreparable harm faced by pensioners of the Fund if the settlement agreement is not implemented;

246.2. the State Capture context to the claims of the Fund against the Regiments respondents, which claims have been settled under the settlement agreement; and

246.3. the absence of any rational purpose to be served by frustrating the settlement agreement in the name of clause 8.3.

Conclusion on the Counterapplication

247. For the reasons set out above, I respectfully ask for an order in the terms set out in the notice of counterapplication.

PJJ MARITZ

I hereby certify that the deponent knows and understands the contents of this affidavit and that it is to the best of the deponent's knowledge both true and correct. This affidavit was signed and sworn to before me at PRETORIA on this the 2nd day of SEPTEMBER 2019, and that the Regulations contained in Government Notice R.1258 of 21 July 1972, as amended by R1648 of 19 August 1977, and as further amended by R1428 of 11 July 1989, having been complied with.

COMMISSIONER OF OATHS
Full names:

Address:

Capacity:

COMMISSIONER OF OATHS
Chabeli Johannes Molatoli
Practising Attorney
Ex.officio
246.Protea Towers
Office 433 Pretoria 0001

COMMISSIONER OF OATHS
Chabeli Johannes Molatoli
Practising Attorney
Ex.officio
246.Protea Towers
Office 433 Pretoria 0001