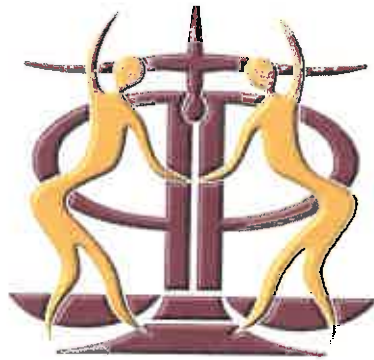


**REPORT OF THE PUBLIC PROTECTOR IN TERMS OF SECTION 182(1)(b) OF THE  
CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 1996 AND SECTION 8(1)  
OF THE PUBLIC PROTECTOR ACT NO. 23 OF 1994**



**PUBLIC PROTECTOR  
SOUTH AFRICA**

**Report No. 8 OF 2017/2018**

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***ALLEGED FAILURE TO RECOVER MISAPPROPRIATED FUNDS***

**REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF MALADMINISTRATION,  
CORRUPTION, MISAPPROPRIATION OF PUBLIC FUNDS AND FAILURE BY THE  
SOUTH AFRICAN GOVERNMENT TO IMPLEMENT THE CIEX REPORT AND TO  
RECOVER PUBLIC FUNDS FROM ABSA BANK.**

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## **Executive Summary**

***“One of the crucial elements of our constitutional vision is to make a decisive break from the unchecked abuse of State power and resources that was virtually institutionalised during the apartheid era. To achieve this goal, we adopted accountability, the rule of law and the supremacy of the Constitution as values of our constitutional democracy. For this reason, public office-bearers ignore their constitutional obligations at their peril. This is so because constitutionalism, accountability and the rule of law constitute the sharp and mighty sword that stands ready to chop the ugly head of impunity off its stiffened neck”*** *Economic Freedom Fighters v Speaker of the National Assembly & others: Democratic Alliance v Speaker of the National Assembly & others [2016] ZACC 1 at paragraph 1.*

- (i) This is the Public Protector’s report issued in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996, and section 8 (1) of the Public Protector Act No. 23 of 1994.
- (ii) The report relates to an investigation into alleged maladministration, corruption, misappropriation of public funds and failure by the South African Government to implement the CIEX report. Following a complaint lodged by Mr Paul Hoffman, the Director of the Institute for Accountability in Southern Africa on 10 November 2010.
- (iii) In the main, in his complaint to my office the Complainant alleged that CIEX Ltd (hereto referred to as CIEX), a covert UK based asset recovery agency headed by Mr Michael Oatley was contracted by the South African Government to assist in investigating and recovering misappropriated public funds and assets allegedly committed during the apartheid regime.
- (iv) The Complainant alleges that a memorandum of agreement was signed by Mr Billy Masetlha on behalf of Government of the Republic of South Africa and Mr Michael Oatley on behalf of CIEX on 06 October 1997 allowing CIEX to investigate and recover public funds on behalf of Government.

- (v) The Complainant alleges that what is of concern is part of the CIEX report that deals with the “*lifeboat*” allegedly afforded by way of an illegal gift, by the South African Reserve Bank (herein called the SARB) to Bankorp Limited, now ABSA Bank, during the apartheid regime.
- (vi) The Complainant alleges that, the Government of the Republic of South Africa and the SARB failed to implement the CIEX report and to recover misappropriated money from Bankorp Limited without providing any reasons to that effect.
- (vii) On analysis of the complaint the following issues were identified and investigated:
  - (a) **Did the South African Government improperly fail to implement the CIEX report, dealing with alleged stolen state funds, after commissioning and duly paying for same?;**
  - (b) **Did the South African Government and the South African Reserve Bank improperly fail to recover from Bankorp Limited/ABSA Bank an amount of R3.2 billion, cited in the CIEX report, owed as a result of an illegal gift to Bankorp Limited/ABSA Bank?**
  - (c) **Was the South African public prejudiced by the conduct of the Government of South Africa and the South African Reserve Bank and if so, what would it take to ensure justice?**
- (viii) The investigation process included *inter alia* meetings, interviews and correspondence with the Complainant as well as inspection of all relevant documents and analysis and application of all relevant laws, policies and related prescripts.
- (ix) Key laws and policies taken into account to determine if there had been maladministration or improper conduct by the South African Government and the

South African Reserve Bank were principally those imposing administrative standards that should have been complied with by the state organs or its officials. Those are the following:

- a. Section 195 of the Constitution which requires that certain basic standards of public administration should be adhered to by all public functionaries, such as accountability and transparency.
  - b. The White Paper on Transforming Public Service Delivery, Government Gazette No.18340 of 1997 provides for the Batho Pele Principles. The Principles seek to strengthen the quality and accessibility of government services by improving efficiency and accountability to the public.
  - c. Section 223 of the Constitution which deals with the establishment of the South African Reserve Bank, its primary objectives, powers and functions.
  - d. Section 10 and 37 of the South African Reserve Bank Act No. 90 of 1989 which provides for powers of the South African Reserve Bank and the Minister of Finance's duty in regard to enforcement of non-compliance to the Act.
- (x) Having considered the evidence uncovered during the investigation against the relevant regulatory framework, the Public Protector makes the following findings:
1. **Whether the South African Government improperly failed to implement the CIEX report, dealing with alleged stolen state funds, after commissioning and duly paying for same:**
    - (a) The allegation whether the South African Government improperly failed to implement the CIEX report, dealing with alleged stolen state funds, after commissioning and duly paying for same is substantiated;

- (b) CIEX Ltd. was paid 600 000 British Pounds for services which were never used by the South African Government. No evidence could be found that any action was taken specifically in pursuit of the CIEX report;
- (c) Failure by the South African Government was inconsistent with duties imposed by section 195 of the Constitution requiring a high standard of professional ethics;
- (d) The failure was also inconsistent with section 231 of the Constitution that requires that all Constitutional obligations must be performed diligently and without delay;
- (e) In addition the conduct was contrary to the Batho Pele Principles in that there was no value for money; and
- (f) The failure by the South African Government and constitutes improper conduct as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6 of the Public Protector Act.

**2. Whether the South African Government and the South African Reserve Bank improperly failed to recover from Bankorp Limited/ABSA Bank an amount of R3.2 billion, cited in the CIEX report, owed as a result of an illegal gift given to Bankorp Limited/ABSA Bank:**

- (a) The allegation whether the South African Government and the South African Reserve Bank improperly failed to recover from Bankorp Limited/ABSA Bank an amount of R3.2 billion cited in the CIEX report, owed as a result of an illegal gift given to Bankorp Limited/ABSA Bank between 1986 and 1995 is substantiated;
- (b) The correct amount of the illegal gift granted to Bankorp Limited/ABSA Bank is in the amount of R1.125 billion;

- (c) Two investigations into the matter established that the financial aid given to Bankorp Limited/ABSA Bank was irregular;
  - (d) The South African Reserve Bank in granting the financial aid failed to comply with section 10(1)(f) and (s) of the South African Reserve Bank Act No. 90 of 1989. The Ministry of Finance had a duty as obliged by section 37 of the South African Reserve Act of 1989 to ensure compliance of the Act by the South African Reserve Bank. The Ministry failed to comply with the obligation;
  - (e) The South African Government failed to adhere to section 195 of the Constitution by failing to promote efficient and effective public administration; and
  - (f) In the circumstances the conduct of the South African Government and the South African Reserve Bank constitutes improper conduct as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6 of the Public Protector Act.
- 3. Whether the South African public was prejudiced by the conduct of the Government of South Africa and the South African Reserve Bank and if so, what would it take to ensure justice:**
- (a) The allegations whether the South African public was prejudiced by the conduct of the Government of South Africa and the South African Reserve Bank is substantiated;
  - (b) The South African Government wasted an amount of 600 000 British Pounds on services which were never used;
  - (c) The amount given to Bankorp Limited/ABSA Bank belonged to the people of South Africa. Failure to recover the “gift” resulted in prejudice to the people of South Africa as the public funds could have benefitted the broader

society instead of a handful of shareholders of Bankorp Limited/ABSA Bank;

- (d) The conduct of the South African Government and the South African Reserve Bank goes against the ethos laid in the preamble of the Constitution and section 195 of the Constitution in respect of redressing social injustices and promoting efficiency;
  - (e) The conduct further is contrary to the Batho Pele Principles that requires redress and the view held in the *Khumalo* case requires a public functionary to arrest reported irregularities; and
  - (f) The conduct of the South African Government and the South African Reserve Bank constitutes improper conduct as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6 of the Public Protector Act.
- (xi) The appropriate remedial action that the Public Protector is taking in terms of section 182(1) (c) of the Constitution is the following:

**(1) The Special Investigating Unit:**

- (a) The Public Protector refers the matter to the Special Investigating Unit in terms of section 6(4)(c)(ii) of the Public Protector Act to approach the President in terms of section 2 of the Special Investigating Units and Special Tribunals Act No. 74 of 1996, to:
  - (aa) Re-open and amend Proclamation R47 of 1998 published in the Government Gazette dated 7 May 1998 in order to recover misappropriated public funds unlawfully given to ABSA Bank in the amount of R1.125 billion; and
  - (bb) Re-open and amend Proclamation R47 of 1998 published in the Government Gazette dated 7 May 1998 in order to investigate alleged



misappropriated public funds given to various institutions as mentioned in the CIEX report.

- (b) The South African Reserve Bank must cooperate fully with the Special Investigating Unit and also assist the Special Investigating Unit in the recovery of misappropriated public funds mentioned in (aa) and (bb).

**(2) The Portfolio Committee on Justice and Correctional Services:**

- (a) The Chairperson of the Portfolio Committee on Justice and Correctional Services must initiate a process that will result in the amendment of section 224 of the Constitution, in pursuit of improving socio-economic conditions of the citizens of the Republic, by introducing a motion in terms of section 73(2) of the Constitution in the National Assembly and thereafter deal with matter in terms of section 74(5) and (6) of the Constitution.

Section 224 of the Constitution should thus read:

**224. (1) *The primary object of the South African Reserve Bank is to promote balanced and sustainable economic growth in the Republic, while ensuring that the socio-economic well-being of the citizens are protected.***

**(2) *The South African Reserve Bank, in pursuit of its primary object, must perform its functions independently and without fear, favour or prejudice, while ensuring that there must be regular consultation between the Bank and Parliament to achieve meaningful socio-economic transformation.***

**REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF MALADMINISTRATION, CORRUPTION, MISAPPROPRIATION OF PUBLIC FUNDS AND FAILURE BY THE SOUTH AFRICAN GOVERNMENT TO IMPLEMENT THE CIEX REPORT AND TO RECOVER PUBLIC FUNDS FROM ABSA BANK.**

**1. INTRODUCTION**

- 1.1 This is the Public Protector's report in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996 (the Constitution) and section 8(1) of the Public Protector Act No. 23 of 1994 (the Public Protector Act).
- 1.2 The report is submitted to the following persons:
- 1.2.1 His Excellency President Jacob Zuma, The President of the Republic of South Africa;
- 1.2.2 The Hon. David M Mahlobo, the Minister of State Security;
- 1.2.3 Governor Mr Lesetja E Kganyago, South African Reserve Bank Governor;
- 1.2.4 The Hon. Malusi Gigaba – the Minister of Finance;
- 1.2.5 Ms Maria Ramos, Group Chief Executive Officer Barclays Africa;
- 1.2.6 The Hon. Dr Mathole Motshekga, Chairperson of the Portfolio on Justice and Correctional Services; and
- 1.2.7 The Hon. Ms Baleka Mbete, Speaker of the National Assembly.
- 1.3 A copy of the report is also provided to the Complainant, Mr Paul Hoffman, in terms of section 8(1) of the Public Protector Act; and
- 1.4 A copy of the report is further provided to Black First Land First, in terms of section 8(1) of the Public Protector Act.

## *Alleged Failure to Recover Misappropriated Funds*

- 1.5 The report relates to an investigation into allegations of maladministration, corruption, misappropriation of public funds and failure by the South African government to implement the CIEX report and to recover public funds from Bankorp Limited/ABSA Bank.

## **2 THE COMPLAINT**

- 2.1 On November 2010, Mr. Paul Hoffman on behalf of the Institute for Accountability in South Africa (currently known as Accountability Now) lodged a complaint at the Public Protector wherein he alleged that the Government of the Republic of South Africa for failure to action in regard to matters raised in the CIEX report.
- 2.2 CIEX LTD, a covert UK based asset recovery agency headed by Mr. Michael Oatley was contracted by the South African Government to assist in investigating and recovering alleged misappropriated public funds.
- 2.3 The Complainant alleges that a memorandum of agreement was concluded between Mr. Billy Masetlha on behalf of the Republic Of South Africa and Mr. Michael Oatley on behalf of CIEX Ltd.
- 2.4 Of particular concern to the Complainant was that the CIEX report dealt with a lifeboat afforded by way of an illegal gift, by the Reserve Bank to banks which now form part of ABSA during the time of the apartheid regime.
- 2.5 Furthermore the Complainant alleges that the CIEX report states that ABSA made contingent provision for the repayment of funds utilised as a lifeboat in the reasonable expectation that the post-apartheid government would seek a proper accounting and repayment with interest, from ABSA.
- 2.6 The Complainant alleges that it is unclear why the contract between CIEX and the Government of the Republic of South Africa was suspended, nor is it in the public domain and whether the matters raised in the CIEX report have ever been addressed by Government.

2.7 The Complainant further alleged that a considerable amount of public money stands to be recovered, will serve our country well in times of austerity.

## **2.8 Background to the “lifeboat” given to Bankorp Limited/ABSA Bank**

- 2.8.1 In 1985 Bankorp Limited (now ABSA Bank) experienced financial difficulties and approached the South African Reserve Bank for financial aid.
- 2.8.2 The South African Reserve Bank granted a loan of R200 million at an interest of 3% to Bankorp Limited, the loan was repayable on or before 31 May 1990.
- 2.8.3 The loan was extended by the South African Reserve Bank on 18 April 1988 by R100 million on the same terms and conditions. The sum of R300 million was to be repaid in three equal instalments of R100 million per annum, but this was amended to create five equal instalments of R60 million commencing on 1 April 1990 and terminating on 1 April 1994.
- 2.8.4 On 19 March 1990 the South African Reserve Bank and Bankorp Limited agreed to extend the repayment of the first instalment from 1 April 1990 to 1 August 1990. When the first instalment became due, Bankorp Limited informed the South African Reserve Bank that it was unable to pay the first instalment of R60 million.
- 2.8.5 On 1 August 1990 a meeting was held between Bankorp Limited; Sankorp and or Sanlam (Sankorp and Sanlam were majority shareholders in Bankorp Limited) with the South African Reserve Bank. At the aforesaid meeting Bankorp Limited requested the South African Reserve Bank either increase their existing loan by a further R750 million or declare Trust Bank, a subsidiary in the Bankorp Group, insolvent.
- 2.8.6 As a result the South African Reserve Bank, Bankorp Limited and its major shareholders entered into a further agreement on 3 August 1990. The following was agreed to:

- 2.8.6.1 The loan of R300 million together with an additional R300 million would be made available by the South African Reserve Bank to Bankorp Limited to purchase Government Bond Stocks in the total amount of R600 million. The R300 million already advanced had to be used to purchase Government Bond Stocks.
- 2.8.6.2 A further R400 million would be provided by the South African Reserve Bank to Bankorp Limited, which amount would be reinvested with the South African Reserve Bank at an interest rate of 16% per annum.
- 2.8.6.3 The R600 million worth Government Bond Stocks and the R400 million investment would yield a guaranteed 16% interest per annum, but in terms of the agreement only 1% interest on the loan was payable to the South African Reserve Bank.
- 2.8.6.4 Both above amounts would not physically end up with Bankorp Limited, but remained with the South African Reserve Bank as security.
- 2.8.6.5 On 5 September 1991 a further amount of R500 million was provided to Bankorp Limited by the South African Reserve Bank, also not physically paid to Bankorp Limited. The parties agreed that this would be utilized to buy Government Stocks on the same terms as the R600 million.
- 2.8.6.6 This meant that an amount of R1.5 billion was loaned to Bankorp Limited at 1% interest whilst the same amount was invested either in Government Bond Stocks or an investment at the Reserve Bank yielding 16% per annum. In practice an interest differential of 15% on the amount of R1.5 billion, an annual R225 million, was made available to Bankorp Limited. This connotes that Bankorp Limited unduly benefitted from the 15% interest.
- 2.8.6.7 The agreement with the assistance would last for five (5) years resulting in R1.125 billion being made available to Bankorp Limited. These annual

payments of R225 million were made available to ABSA Bank after ABSA Bank took over of Bankorp Limited.

- 2.8.6.8 After the five (5) year period the Government Stocks and the investment with the South African Reserve Bank would be utilized to repay the R1.5 billion advanced but the R1.125 billion interest differential made available to Bankorp Limited was not repayable.
- 2.8.6.9 In 1992 ABSA Bank took over all assets and liabilities of Bankorp Limited and a new agreement was entered into with the South African Reserve Bank wherein ABSA replaced Bankorp Limited. The following Packages illustrates the two agreements:
- 2.8.6.9.1 Package A
- 2.8.6.9.1.1 On May 1985 South African Reserve Bank granted assistance to Banbol Pty Ltd. in the amount of R200 million at an interest of 3% per annum to assist Bankorp Limited. Repayment had to be completed by 31 May 1990.
- 2.8.6.9.1.2 A condition was that Sanlam (the majority shareholder at the time) had to cede Government Bonds to the South African Reserve Bank as security for the loan.
- 2.8.6.9.1.3 On April 1986 the South African Reserve Bank increased the financial aid by a further R100 million, on the same terms as above.
- 2.8.6.9.1.4 It was agreed that the total sum of R300 million would be repaid in three equal instalments of R100 million per annum, payable from 1 July 1998 until the full amount of the assistance had been repaid on or before 31 May 1990.

## *Alleged Failure to Recover Misappropriated Funds*

2.8.6.9.1.5 During 1987 the South African Reserve Bank agreed to amend the terms for the loan and it became repayable in five equal instalments of R60 million, commencing on 1 April 1990.

2.8.6.9.1.6 During 1990 the South African Reserve Bank agreed to extend the repayment date from 1 April 1990 to 1 August 1990.

### 2.8.6.9.2 Package B

2.8.6.9.2.1 On 3 August 1990 a further agreement was reached by Bankorp, Sankorp and the South African Reserve Bank.

2.8.6.9.2.2 The South African Reserve Bank advanced R300 million. A further R700 million would be provided and Bankorp had to invest the total amount of R1 billion with the South African Reserve Bank in cash (to the extent of R400 million) and in Government Bonds (to the extent of R600 million) for a period of five years at a yield of 16% on both investments. These served as security for the loan.

2.8.6.9.2.3 The loan of R1 billion incurred an interest of 1%, 15% accrued to Bankorp would be for its benefit.

### 2.8.6.9.3 Package C

2.8.6.9.3.1 The agreement was concluded in 1994 with retrospective effect to 1 April 1992, followed by the acquisition of Bankorp by ABSA.

2.8.6.9.3.2 ABSA replaced Bankorp as the beneficiary.

2.8.6.9.3.3 In 1995 a further agreement was concluded to amend the 1991 and 1994 agreements.

## *Alleged Failure to Recover Misappropriated Funds*

- 2.8.6.9.3.4 This was due to the fact that the Government Bonds that served as security for the South African Reserve Bank's loan to Bankorp/ABSA would mature before the termination of the agreement.
- 2.8.6.9.3.5 The South African Reserve Bank purchased the Government Bonds from ABSA and required ABSA to deposit the proceeds of R 1.1 billion with it and cede the deposit to the South African Reserve Bank as security for the loan extended to ABSA.
- 2.8.6.9.3.6 ABSA would earn interest on the deposit at a rate exactly equal to the rate of interest it would have received on the Government Bonds.
- 2.8.6.9.3.7 The agreement terminated on 23 October 1995 when the accumulated total of financial assistance generated in terms of Package B and C amounted to R1.125 billion.

### **3. POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR**

- 3.1 The Public Protector is an independent constitutional institution established in terms of section 181(1)(a) of the Constitution to strengthen constitutional democracy through investigating and redressing improper conduct in state affairs.
- 3.2 Section 182(1) of the Constitution provides that:

*“The Public Protector has the power, as regulated by national legislation-*

*(a) to investigate, as any conduct related to state affairs, or public administration in any sphere of government, that is alleged or suspected to be improper or that would result in any impropriety or prejudice;*

*(b) to report on that conduct;*

*(c) and take appropriate remedial action. “*



- 3.3 Section 182(2) directs that the Public Protector has additional powers and functions prescribed by national legislation.
- 3.4 In the *Economic Freedom Fighters v Speaker of the National Assembly and Others: Democratic Alliance v Speaker of the National Assembly and Others* the Constitutional Court per Mogoeng CJ held that the remedial action taken by the Public Protector has a binding effect. The Constitutional Court further held that: *“When remedial action is binding, compliance is not optional, whatever reservations the affected party might have about its fairness, appropriateness or lawfulness. For this reason, the remedial action taken against those under investigation cannot be ignored without any legal consequences.”*
- 3.5 The Public Protector’s powers are regulated and amplified by the Public Protector Act, 23 of 1994 which states, amongst others, that the Public Protector has the power to investigate and redress maladministration and related improprieties in the conduct of state affairs. The Public Protector Act also confers powers to resolve the disputes through conciliation, mediation, negotiations or any other appropriate dispute resolution mechanism as well as to subpoena persons and information from any person in the republic for the purpose of an investigation.
- 3.6 The Government of the Republic of South Africa is an organ of state established in terms of section 239 of the Constitution and the complaint lodged against National Government, National Treasury and the South African Reserve Bank relates to maladministration, corruption, misappropriation of public funds and failure by the South African government to implement the CIEX Report and to recover public funds owed by Absa bank; as a result this matter falls within the jurisdiction of the Public Protector.
- 3.7 The South African Reserve Bank is an institution exercising public function in terms of section 239 of the Constitution and its established in terms of section 9 of the Currency and Banking Act No. 31 of 1920 (Act No 31 of 1920) and is governed by the South African Reserve Bank Act No.90 of 1989 (Act No 90 of 1989), as amended, as a result the South African Reserve Bank falls within the jurisdiction of the Public Protector.

- 3.8 The National Treasury is an organ of state established in terms of section 216 (1) of the Constitution and section 5 of the Public Finance Management Act No. 29 of 1999, responsible for financial matters in state affairs. The Public Protector has jurisdiction over the National Treasury.
- 3.9 The jurisdiction of the Public Protector to investigate was not disputed by the Presidency except for objecting to the intended remedial action, for the Presidency to appoint a Commission of Inquiry in terms of section 84 of the Constitution.
- 3.10 The jurisdiction of the Public Protector to investigate was disputed by South African Reserve Bank, they submitted that the Public Protector has no jurisdiction to investigate the matter as it occurred more than two years ago, out of the allowed time frame to investigate the matter and further that the said transaction took place before the Public Protector South Africa was established. The South African Reserve Bank stated that the special circumstances allowing the Public Protector to investigate the matter were not justified.
- 3.11 The South African Reserve Bank submitted that there is nothing to investigate in relation to ABSA because Bankorp Limited and ABSA Bank's liabilities to the South African Reserve Bank under various agreements were fully discharged.
- 3.12 The South African Reserve Bank stated the Reserve Bank is a creature of statute that functions independently in terms of the Constitution, read with the South African Reserve Bank Act No. 90 of 1989. It is neither part of Government nor of the National Treasury, and in the normal course of business not a functionary nor representative of either.
- 3.13 The National Treasury did not dispute jurisdiction except to submit that the complaint does not merit an investigation as the matter was investigated and concluded by the Special Investigative Unit and the Reserve Bank Governor's Panel of Experts.

- 3.14 ABSA Bank disputed jurisdiction of the Public Protector by submitting that the subject matter occurred before the office of the Public Protector came into existence. ABSA Bank submitted that the Public Protector was not in existence prior to 1994 and has no jurisdiction to make findings on events that occurred before the commencement of the Public Protector Act and before the Public Protector came into being. Thus alleged that the Public Protector has exceeded the limits of jurisdiction.
- 3.15 ABSA Bank submitted that the Public Protector can only investigate conduct that occurred on or after 1 October 1995 when the office of the Public Protector was established. In addition stated that at most the Public Protector can only investigate conduct that occurred after 25 November 1994 when the Public Protector Act came into force.
- 3.16 ABSA Bank contends that the Public Protector does not have any retrospective powers to conduct the investigation.
- 3.17 Section 223 of the Constitution establishes the South African Reserve Bank of the Republic. Section 224 of the Constitution provides that the primary object of the SARB is to protect the value of the currency in the interest of balanced and sustainable economic growth in the Republic. It must perform its functions independently and without fear, favour or prejudice, but there must be regular consultation between the Bank and Cabinet member responsible for national financial matters.
- 3.18 Section 239 the Constitution states that an organ of state means any other functionary or institution exercising a power or performing a function in terms of the Constitution, exercising a public power or performing a public function in terms of any legislation. The South African Reserve Bank is a state organ envisaged in the Constitution.
- 3.19 In the matter of the *South African Reserve Bank v Barit and Others (88570/2014) [2016] ZAGPPHC* it was confirmed that the South African Reserve Bank derives its authority and status from the provisions of section 223 of the Constitution. Furthermore it was confirmed that it is an organ of state as defined in section 239

and it is ingrained with juristic personality as stated in section 2 of the South African Reserve Bank Act No. 89 of 1998.

- 3.20 In the *Minister of Education, Western Cape and others v Governing Body Mikro Primary School 2006 (1) SA 1 (SCA)* it was pointed out that any institution exercising a public power or performing a public function in terms of any legislation is an organ of state.
- 3.21 The Public Protector thus has jurisdiction over the South African Reserve Bank; the National Treasury and the South African Government represented by the Presidency.
- 3.22 The investigation is undertaken in terms of section 6 (9) of the Public Protector Act No. 23 of 1994 which states that “*Except where the Public Protector in special circumstances, within his or her discretion, so permits, a complaint or matter referred to the Public Protector shall not be entertained unless it is reported to the Public Protector within two years from the occurrence of the incident or matter concerned*”. The section gives the Public Protector the discretion to decide on whether to investigate a matter reported to the Public Protector’s office even if it is something that happened after the establishment or coming into being of the Public Protector office. The CIEX report was commissioned on 16 October 1997 at the time when the office of the Public Protector was already established.
- 3.23 Whether the matter was reported to the Public Protector on 10 November 2010 is not a jurisdictional question but one regarding whether there are compelling circumstances to warrant the Public Protector’s discretionary power to investigate alleged improper conduct reported to him/her more than two (2) years after such conduct occurred.
- 3.24 The Public Protector applied its discretion and concluded that special circumstances do exist for necessitating a full investigation. The matter has been in the public domain for some time, and it was in the best interest of the people of the Republic that this matter be investigated and adjudicated upon.

- 3.25 In *The Public Protector v Mail & Guardian Ltd and Others 2011 (4) SA 420 (SCA) (2011) ZASCA 108; 422/10* it was stated that “*The Public Protector must not only discover the truth but must also inspire confidence that the truth has been discovered. It is no less important for the public to be assured that there has been no malfeasance or impropriety in public life, if there has not been, as it is for malfeasance and impropriety to be exposed where it exists*”.
- 3.26 The abovementioned case further states that “*The function of the Public Protector is as much about public confidence that the truth has been discovered as it is about discovering the truth*”.
- 3.27 Furthermore the judge stated in the abovementioned case that “*...enquiry was directed to the propriety of the conversion of money from public to private money. I cannot see how the circumstances of that conversion could be properly investigated with consideration to only one side of the transaction, if only to ensure that the pieces fell into place. If the conduct of the receiver of the money was indeed beyond the mandate of Public Protector, that did not make the receiver immune from furnishing information relevant to an investigation of the conduct of the payer. To erect a wall between payment and receipt, and investigate only part of the transaction, which is what the Public Protector did, was wholly artificial.*” In other words the Public Protector is mandated to follow public money wherever it may lie and fully investigate with an enquiring mind.
- 3.28 It should be noted that the Public Protector has no jurisdiction to investigate matters that took place before the coming into effect of the Public Protector Act or the establishment of the Public Protector office in 1995. It would be in contravention of the Public Protector Act for this office to investigate matters that took place before the coming into effect of the Public Protector Act or the establishment of this office in October 1995.
- 3.29 The Public Protector enjoys a discretion to investigate matters which occurred after 1995 more especially if the prejudice caused is still in existence and in addition the insurmountable public interest in the matter.

## **4. THE INVESTIGATION**

### **4.1 Methodology**

- 4.1.1 The investigation was conducted in terms of section 182 of the Constitution of the Republic of South Africa, 1996, and sections 6 and 7 of the Public Protector Act No. 23 of 1994.
- 4.1.2 The Public Protector Act confers on the Public Protector the sole discretion to determine how to resolve a dispute of alleged improper conduct or maladministration. Section 6 of the Public Protector Act gives the Public Protector the authority to investigate and report her findings regarding any complaint lodged.
- 4.1.3 The Public Protector had initially rejected to investigate the matter due to lack of evidence and unavailability of resources, after further submission from the Complainant, the Public Protector was persuaded that the matter deserves to be looked at as it cast uncertainty on the integrity of the Government of South Africa, the South African Reserve Bank and the financial services sector.
- 4.1.4 The Public Protector could not find evidence indicating the basis within which the agreement was reached, this was not the subject of the investigation. In addition the Public Protector did not investigate reasons conceded by the Government of South Africa in terminating its agreement with CIEX Ltd.

### **4.2 Approach to the investigation**

- 4.2.1 Like every Public Protector investigation, the investigation was approached using an enquiry process that seeks to find out:
- 4.2.2 What happened?
- 4.2.3 What should have happened?

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- 4.2.4 Is there a discrepancy between what happened and what should have happened and if there is deviation does that deviation amount to improper conduct or maladministration.
- 4.2.5 In the event of improper conduct or maladministration what would it take to remedy the wrong or to place the Complainant as close as possible to where they have been but for the maladministration or improper conduct?
- 4.2.6 The question regarding what happened is resolved through a factual investigation relying on the evidence provided by the parties and independently sourced during the investigation and making a determination based on balance of probabilities. In this particular case, the factual enquiry principle focused on whether the South African Government and South African Reserve Bank failed to recover public funds owed to government by the ABSA Bank.
- 4.2.7 The enquiry regarding what should have happened, focuses on the law or rules that regulate the standard that should have been met by the government or organ of state to prevent maladministration and prejudice.
- 4.2.8 The enquiry regarding the remedy or remedial action seeks to explore options for correcting maladministration and redressing its consequences. Where a Complainant has suffered prejudice, the idea is to place him or her as close as possible to where they would have been had the Government of South Africa and the South African Reserve Bank or organ of state had complied with the regulatory framework setting the applicable standards for good administration.
- 4.2.9 The substantive scope of the investigation focused on compliance with the law and prescripts regarding a decision not to recover misappropriated funds allegedly owed by Bankorp Limited, now Absa Bank, if any by the Government of the Republic of South Africa and the South African Reserve Bank in relation to what was reported in the CIEX report.
- 4.2.10 The report in the circumstances seeks also to look into reform of the Republic's monetary system in order to realise government's commitment in improving socio economic inequalities in society and solicit an amendment to the Constitution in

respect of the South African Reserve Bank to create inclusive economic benefits to the people of the Republic.

**4.3 On analysis of the complaint, the following issues were considered and investigated:**

4.3.1 Whether the South African Government improperly failed to implement the CIEX report, dealing with alleged stolen state funds, after commissioning and duly paying for same;

4.3.2 Whether the South African Government and the South African Reserve Bank improperly failed to recover from Bankorp Limited/ABSA Bank an amount R3.2 billion, cited in the CIEX report, owed as a result of an illegal gift given to Bankorp Limited/ABSA Bank between 1986 and 1995;

4.3.3 Whether the South African public was prejudiced by the conduct of the Government of South Africa and the South African Reserve Bank and if so, what would it take to ensure justice;

**4.4 The Key Sources of Information**

**4.4.1 Correspondence sent and received**

4.4.1.1 Correspondence from the Complainant to the Public Protector, dated 10 November 2010;

4.4.1.2 Correspondence between the Public Protector and the Complainant;

4.4.1.3 Correspondence between the Public Protector and the Presidency of the Republic of South Africa;

4.4.1.4 Correspondence between the Public Protector and the South African Reserve Bank;

4.4.1.5 Correspondence between the Public Protector and the National Treasury;



- 4.4.1.6 Correspondence between the Public Protector and ABSA Bank;
- 4.4.1.7 Correspondence between the Public Protector and the South African Revenue Services;
- 4.4.1.8 Correspondence between the Public Protector and the Department of State Security;
- 4.4.1.9 Correspondence between the Public Protector and Michael Oatley; and
- 4.4.1.10 Correspondence between the Public Protector and Michael Durr.

#### **4.4.2 Documents**

- 4.4.2.1 A copy of CIEX Report titled “Operations on behalf of the South African Government, August 1997-December 1999”;
- 4.4.2.2 Bundles of documents submitted by Mr Michael Oatley;
- 4.4.2.3 Legal opinion by Adv E Bertelsmann SC dated 18 January 1997;
- 4.4.2.4 Supplementary legal opinion by Adv E Bertelsmann dated January 1998;
- 4.4.2.5 Second supplementary legal opinion by Adv E Bertelsmann dated January 1998;
- 4.4.2.6 Legal opinion by Adv Pierre le R du Toit dated February 2013;
- 4.4.2.7 A Memorandum of Agreement between the Republic of South Africa and CIEX Ltd. dated 6 October 1997;

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- 4.4.2.8 Report on the Governor's Panel of Experts to investigate the Reserve Bank's role with regard to the financial assistance package to Bankorp Limited;
  - 4.4.2.9 Special Investigating Unit Official Statement on the 'Lifeboat' case, dated 1 November 1999 and Proclamation R47 of 1998;
  - 4.4.2.10 A Memorandum from Judge Dennis Davis;
  - 4.4.2.11 Copies of the transactions between the South African Reserve Bank and Bankorp Limited/ABSA Bank;
  - 4.4.2.12 Transfer of assets between Bankorp Limited and ABSA Bank dated 14 July 1992;
  - 4.4.2.13 Annual financial statements of the South African Reserve Bank;
  - 4.4.2.14 Annual financial statements of ABSA Bank;
  - 4.4.2.15 Various media articles pertaining to Bankorp Limited/ABSA Bank 'lifeboat';
  - 4.4.2.16 Submission by Dr C L Stals to the section 417 Commission of Enquiry into affairs of Tollgate Holdings Limited;
  - 4.4.2.17 Submission by the Black First Land First;
  - 4.4.2.18 Submission by the Honourable Mr Mario G R Obriani-Ambrossini to the National Planning Commission; and
  - 4.4.2.19 South African Law Reform Commission – Discussion Paper 126 Project 125 Prescription Periods July 2011.
- 4.4.3 Interviews conducted and meetings held**

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- 4.4.3.1 A meeting held with Ms Maria Ramos appearing as both Group Chief Executive Officer of Barclays Africa and Former Director General of National Treasury on 24 May 2016;
- 4.4.3.2 A meeting held with Reverend Frank Chikane; former Director General in the Presidency on 30 May 2016;
- 4.4.3.3 A meeting held with Mr Trevor Manuel; former Finance Minister on 31 July 2016;
- 4.4.3.4 A meeting held with Mr Thabo Mbeki; former President of the Republic of South Africa on 12 May 2016;
- 4.4.3.5 A meeting with held with the Department of State Security on 3 March 2017;
- 4.4.3.6 A meeting held with Mr Stephen Mitford Goodson on 23 April 2017;
- 4.4.3.7 A meeting held with Black First Land First on 8 August 2016;
- 4.4.3.8 A meeting held with Dr Chris Stals, former Governor of the South African Reserve Bank on 8 September 2016;
- 4.4.3.9 A meeting held with Judge Dennis Davis on 22 July 2013;
- 4.4.3.10 A consultation meeting held with Judge Heath on 24 January 2013;
- 4.4.3.11 A meeting held with former South African Reserve Bank Governors, Mr Tito Mboweni and Ms Gill Marcus on 02 September 2013;
- 4.4.3.12 A consultation meeting held with Adv Williem Heath on 24 January 2013;
- 4.4.4 Legislation and other Prescripts**
  - 4.4.4.1 The Constitution of the Republic of South Africa, 1996 (the Constitution);
  - 4.4.4.2 Batho Pele Principles;

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- 4.4.4.3 The Code of Conduct for Public Servants;
  - 4.4.4.4 Promotion of Administrative Justice Act 3 of 2000;
  - 4.4.4.5 South African Reserve Bank Act No. 31 of 1920;
  - 4.4.4.6 South African Reserve Bank Act No. 29 of 1944;
  - 4.4.4.7 South African Reserve Bank Act No. 90 of 1989;
  - 4.4.4.8 Banks Act No. 94 of 1990;
  - 4.4.4.9 Special Investigating Units and Special Tribunals No. Act 74 of 1996; and
  - 4.4.4.10 International Covenant on Economic, Social and Cultural Rights – United Nations 1967.
- 4.4.5 Case Law**
- 4.4.5.1 *Economic Freedom Fighters v Speaker of the National Assembly and Others: Democratic Alliance v Speaker of the National Assembly and Others;*
  - 4.4.5.2 *The Public Protector v Mail & Guardian Ltd and Others 2011 (4) SA 420 (SCA) (2011) ZASCA 108; 422/10;*
  - 4.4.5.3 *Khumalo v MEC for Education KZN [2013] ZACC;*
  - 4.4.5.4 *South African Reserve Bank v Barit and Others (88570/2014) [2014] ZAGPPHC 950; and*
  - 4.4.5.5 *Minister of Education, Western Cape and Others v Governing Body Mikro Primary School 2006 (1) SA 1 (SCA).*
- 4.4.6 Inspection *in loco***
- 4.4.6.1 Inspection *in loco* conducted on 16 February 2016 at Webber Wentzel offices, Sandton.

**4.4.7 Websites**

4.4.7.1 [www.publicbankinginstitute.org](http://www.publicbankinginstitute.org).

**5. THE DETERMINATION OF THE ISSUES IN RELATION TO THE EVIDENCE OBTAINED AND CONCLUSIONS MADE WITH REGARD TO THE APPLICABLE LAW AND PRESCRIPTS**

**5.1 Whether the South African Government improperly failed to implement the CIEX report, dealing with alleged stolen state funds, after commissioning and duly paying for same:**

*Common cause issues*

5.1.1 It is common cause that the South African Government entered into an agreement with CIEX Ltd. on 6 October 1997.

5.1.2 The contract had the following essential terms:

***“MEMORANDUM OF AGREEMENT BETWEEN  
THE REPUBLIC OF SOUTH AFRICA  
AND  
CIEX LIMITED***

**1. PARTIES**

*1.2 This agreement is entered into between CIEX a company incorporated in and under the laws of the United Kingdom...and the Republic of South Africa...*

**2 APPOINTMENT AND DURATION**

*2.2 CIEX is hereby appointed to provide consulting services to the RSA as described below.*

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2.3 *This agreement shall be deemed to have commenced with the receipt by CIEX of the first agreed payment and shall continue in force until terminated by either party.*

2.4 *This agreement shall be reviewed monthly. Termination will be by either party..., only, the RSA shall be free to terminate this agreement immediately without further payment and without reasons given...*

### **3 OBJECTIVES, TASKING, SUPERVISION AND REPORTING**

3.1 *CIEX will work to support and enhance the efforts of the RSA and its designated officials to address the matters described in paragraph four (4) below...*

3.2 *CIEX will work in close collaboration with and under the guidance of designated officials of the RSA.*

3.3 *CIEX will report fully on its activities...*

### **4 CONSULTANCY SERVICES TO BE PROVIDED BY CIEX**

4.2 *CIEX hereby undertakes to use its best endeavours to provide intelligence (in the form of evidence to support action by the RSA) and advise (designed to assist in identifying and assessing the options for such action) in relation to the following issues and any others which may by agreement, be added:*

- i. Obtaining such restitution as is practicable for illegal subversions provided by the SARB to ABSA and other institutions;*
- ii. Stopping such illegalities, and improving control of the SARB and the banking system in general;*
- iii. Recovering misappropriated public monies and assets;*

- iv. Negotiating with the Swiss and other governments and banking authorities for help in the recovery of funds and positive support for RSA borrowing requirements;*
- v. Developing leverage with major commercial interests in RSA with a view to obtaining greater support for government social economic programmes;*

4.2 ...

## **5. CONFIDENTIALITY**

5.1...

## **6. PROPERTY**

6.1...

## **7. PAYMENT**

*7.1 The RSA undertakes to pay to CIEX, in return for proper performance of its services under the terms of this agreement, an inclusive sum of BP 100,000 per month to cover fees and expenses, payable monthly in advance, the first payment being due from the signing of this agreement and subsequent payments being due at monthly intervals from date of this agreement's taking effect.*

*7.2 The RSA undertakes to pay CIEX a commission on allowance monies and assets successfully recovered..., according to the following scale:*

*(a) A commission of 10% will be paid on the first US\$ 100m.*

*(b) A Commission of 7.5% will be paid on any subsequent money recovered.*

## **8. DOMICILIA AND NOTICES**

8.1...

## **9. JURISDICTION**

*9.1 This agreement shall be governed by, subject to, interpreted and enforced in accordance with laws of RSA...* ”

5.1.3 It is not disputed that CIEX Ltd. submitted a report to the South African Government on 29 November 1997 and provided subsequent reports thereto and advised the South African Government how it could lawfully recover sums of misappropriated public funds.

5.1.4 The report submitted by CIEX Ltd. alerted the South African Government on misappropriation of funds and included the R3.2 billion allegedly offered to Bankorp Limited/ABSA Bank as a **“lifeboat”** and several billions of rand siphoned offshore in illicit deals.

5.1.5 CIEX Ltd advised on a blueprint for the recovery of the public funds from ABSA Bank, which captured amongst others the following:

5.1.5.1 That ABSA Bank is able to pay;

5.1.5.2 That if ABSA Bank ‘volunteers’ repayment, in an agreed schedule which is evidently consistent with the bank’s ability to pay there can be no question of risk to the bank itself and the idea of a systemic risk also falls away;

5.1.5.3 That Government accepts Judge Heath’s ruling that the **“lifeboat”** was an illegal gift and ABSA Bank is liable to repayment;

5.1.5.4 The South African Reserve Bank has a duty to ensure that banks are managed only by properly fitted persons. That some directors of ABSA Bank made large personal profits from insider trading, using their knowledge of the **“lifeboat”** secret subvention;



- 5.1.5.5 That the directors of ABSA Bank are personally liable to criminal charges for fraud as well as for breaches of the Companies Act and further that the South African Reserve Bank has the authority to declare directors of ABSA Bank unfit to act; and
- 5.1.5.6 The individuals controlling the bank must be given a choice either to be deprived of their positions, and being pursued personally with criminal charges and damages suit or arranging a voluntary repayment plan which will enhance their personal prestige and that of the bank.

*Issues in dispute*

- 5.1.4 President Thabo Mbeki submitted that CIEX Ltd. did not recover any money because the agreement was that CIEX Ltd. would locate the money, bring it back and then obtain commission on that money that they would have brought back.
- 5.1.5 President Mbeki further submitted that at some point a decision was taken to terminate the services of CIEX Ltd. due to the failure of CIEX Ltd. to recover public funds as per the Memorandum of Agreement.
- 5.1.6 President Mbeki stated that the agreement was not that CIEX Ltd. was to identify and report to Government, it was to recover the money that is all. He emphasised that, it did not matter how much work CIEX Ltd. did to identify the public funds, their task was to recover the money on the basis that they would then be paid a commission. He further submitted that on the basis of CIEX Ltd.'s failure and the amount of money that was paid, it was better to terminate the services of CIEX Ltd.
- 5.1.7 The Public Protector has noted that despite President Mbeki's assertion, the agreement with CIEX Ltd also provides at paragraph 4.1(i) of the Memorandum of Agreement provides that CIEX Ltd was also tasked to provide intelligence and

advice in relation to obtaining restitution as is practicable for illegal subversions provided by the South African Reserve Bank to ABSA Bank.

5.1.8 Therefore in terms of paragraph 4.1(i) of the Memorandum of Agreement, CIEX Ltd was not only obliged to recover the public funds but could also provide intelligence and advise on how such public funds could be recovered.

5.1.9 President Mbeki did not provide cogent reasons as to why the South African Government did not implement the CIEX report in the light of paragraph 4.1(i) of the Memorandum of Agreement

*Application of the relevant law*

5.1.10 Having established that CIEX Ltd submitted a report to the South African Government on 29 November 1997, advising it how it could lawfully recover sums of misappropriated public funds and also having established that such report was never implemented by the South African Government, the question that had to be determined was whether the failure to implement the CIEX report was improper in the circumstances.

5.1.11 Section 195(1)(b) of the Constitution provides that public administration must be governed by the democratic values and principles enshrined in the Constitution, which include that efficient, economic and effective use of resources must be promoted. The South African Government had a constitutional obligation to ensure that in its dealings with CIEX Ltd, it promoted the efficient, economic and effective use of state resources.

5.1.12 The conduct of the South African Government in entering into an agreement with CIEX Ltd to recover alleged sums of misappropriated public funds and failing to implement the CIEX Ltd report in that regard after having paid CIEX Ltd a sum of 600 000 British Pounds did not promote the efficient, economic and effective use of state resources.

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5.1.13 The payment of 600 000 British Pounds to CIEX Ltd by the South African Government was contrary to Principle 8 of the Batho Pele Principles as captured in the Batho Pele White Paper of 1997, which dictates that public services should be provided economically and efficiently in order to give citizens the best possible value for money. It is of utmost importance that Government does not waste scarce resources and that services delivered or obtained are cost-effective and efficient as possible.

### Conclusion

5.1.14 The failure to implement the CIEX report by the South African Government was inconsistent with the duties set out in section 195(1)(b) of the Constitution requiring the efficient, economic and effective use of state resources and was therefore improper.

5.1.15 The South African Government had a responsibility to process the CIEX report by virtue of it having been the one that commissioned the investigation into misappropriated public funds. The South Africa Government had an obligation to ensure that the CIEX report is processed through formal structures within government and take a decision to either accept or reject it's the findings with cogent reasons.

5.1.16 In the circumstances the South African Government's failure to implement the CIEX report was improper.

**5.2 Whether the South African Government and the South African Reserve Bank improperly failed to recover from Bankorp Limited/ABSA Bank an amount of R3.2 billion, cited in the CIEX report, owed as a result of an illegal gift given to Bankorp Limited/ABSA Bank between 1986 and 1995:**

### Common cause issues

- 5.2.1 It is not disputed that the South African Government failed to implement the CIEX report as indicated in the evidence discussed above.
- 5.2.2 It is also not in dispute that the South African Reserve Bank entered into a loan agreement with Bankorp Limited/ABSA Bank in the amount of R1.5 billion wherein a **“lifeboat”** was granted to Bankorp Limited/ABSA Bank.
- 5.2.3 Dr Chris Stals, former governor of the South African Reserve Bank, submitted that the South African Reserve Bank made a loan to Bankorp in the amount of R1.5 billion in 1990. He indicated that in order for Bankorp to provide collateral to the loan, Bankorp was required to buy Government Stock Bonds with the amount of R1.5 billion, which would yield at the time 16% interest rate.
- 5.2.4 Dr Stals indicated that Bankorp was required to pay 2% interest on the loan which was reduced to 1% at a later stage. He submitted that 16% interest rate yielded by the Government Stock Bonds would be earned by Bankorp.
- 5.2.5 Dr Stals submitted that the interest earned by Bankorp, in the amount of R225 million a year, would then be used by Bankorp to write off its bad debts.
- 5.2.6 He further submitted that loan agreement was payable after a period of five years when Bankorp will be able to sell the Government Stock Bonds or when the Government Stock Bonds come to maturity. The Government Stock Bonds were ceded to the South African Reserve Bank, but they belonged to Bankorp. Bankorp would earn the full interest on them as they were the owners of the Government Stock Bonds. He indicated that at the end of five years either Bankorp would give the South African Reserve Bank the permission to use the cession and sell the bonds or Bankorp would take the Government Stock Bonds and sell them. He submitted that Bankorp had to pay the R1.5 billion loaned at the end of the five years.
- 5.2.7 Dr Stals submitted that the South African Reserve Bank charged Bankorp 2%, later 1%, on the loan and Bankorp earned 16% on the Government Stock Bonds.

- 5.2.8 In response to the notice in terms of section 7 (9) of the Public Protector Act, the South African Reserve Bank confirmed that indeed it did provide financial assistance to Bankorp Limited/ABSA Bank in the amount of R1.5 billion. The South African Reserve Bank further confirmed that Bankorp Limited/ABSA Bank was obliged to repay the loan and the 1% interest to which meant payment in a form of the differential between the 16% interest on the Government Stock Bonds that Bankorp Limited/ABSA Bank earned on the Government Stock Bonds. Thus this meant ABSA Bank earned 15% on the interest of the Government Stock Bonds. The South African Reserve Bank stated that the differential in the interest was the *“lifeboat”* and it was used to discharge Bankorp Limited’s bad book.
- 5.2.9 It is common cause that CIEX Ltd. did not recover any misappropriated public funds but only advised the South African Government on how the money could be recovered.
- 5.2.10 It is not in dispute that the South African Government through a Proclamation No. R47 of 1998 authorised the Special Investigative Unit to conduct an investigation into the following:
- 5.2.10.1 Investigate serious maladministration in connection with the affairs of the South African Reserve Bank;
- 5.2.10.2 Investigate improper or unlawful conduct by employees of the South African Reserve Bank;
- 5.2.10.3 Investigate unlawful appropriation or expenditure of public money or property;
- 5.2.10.4 Investigate unlawful, irregular or unapproved acquisitive act, transaction; measure or practice having a bearing upon state property;
- 5.2.10.5 Investigate intentional or negligent loss of public money or damage to public property; and

5.2.10.6 investigate unlawful or improper conduct by any person which has caused or may cause serious harm to the interests of public or any category thereof which has taken place between 1 January 1985 and 31 December 1995.

5.2.11 It is not disputed that the Special Investigating Unit's investigation, was never conducted in pursuit of the CLEX report which the South African Government paid an amount of 600 000 British Pounds for.

5.2.12 It is common cause that in the year 2000 the Governor of the South African Reserve Bank appointed a *Panel of Experts to Investigate the South African Reserve Bank's role with regard to the financial assistance package to Bankorp* (the Panel). The purpose was to determine the following:

5.2.12.1 Whether the South African Reserve Bank, providing financial assistance to Bankorp, has contravened the provisions of the South African Reserve Bank Act No. 90 of 1989, or any other Act;

5.2.12.2 Whether the financial policies and procedures of the South African Reserve Bank with regard to financial assistance have been adhered to in the case of the Bank's assistance to Bankorp;

5.2.12.3 Whether the South African Reserve Bank's conduct in the provision of financial assistance to Bankorp was in accordance with internationally accepted principles of best practice;

5.2.12.4 Guidelines and best practice with regard to possible future conduct of the South African Reserve Bank with regard to banks in distress; and

5.2.12.5 In the event of a finding by the Panel that the assistance to Bankorp by the South African Reserve Bank was *ultra vires* the power of the Bank, the consideration of whether restitution can be claimed, and if so, the manner thereof.

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5.2.13 The Panel interpreted the above terms to include the agreement between the South African Reserve Bank and ABSA Bank, concluded in 1994 as a result of the acquisition of Bankorp Limited by ABSA Bank in 1992.

5.2.14 It is not in dispute that above Panel was not constituted to conduct an investigation in pursuit of the CIEX report.

Issues in dispute

5.2.15 Dr Chris Stals disputed that Bankorp Limited/ABSA Bank owed the South African Reserve Bank as ABSA Bank made payment of the loaned amount of R1.5 billion in 1995 to the South African Reserve Bank.

5.2.16 The former Governor of the South African Reserve Bank, Mr Tito Mboweni, submitted that the Governors Executive Committee, took a decision that as far as the South African Reserve Bank is concerned the matter was closed.

5.2.17 Ms Gill Marcus, another former Governor of the South African Reserve Bank, submitted that the Governors Executive Committee adopted the Panel's report with its recommendations and that the bank was never involved with the CIEX report.

5.2.18 The South African Reserve Bank further submitted that by October 1995, all the amounts owing under the financial assistance had been paid to the South African Reserve Bank. The South African Reserve Bank insisted that all Bankorp Limited/ABSA Bank's obligations to the South African Reserve Bank were discharged.

5.2.19 The South African Reserve Bank further submitted that it had nothing to do with the CIEX report and had no obligations arising from it. Further that the South African Reserve Bank had no role in obtaining the CIEX report.

5.2.20 In response to the Public Protector's section 7(9) notice dated 20 December 2016, National Treasury submitted that there was nothing in the CIEX report that can be

regarded as a firm recommendation to Government, to instruct the National Treasury to recover funds from ABSA Bank.

5.2.21 The National Treasury further submitted that there are no grounds, based on objectively established facts, to support the recommendation that the South African Reserve Bank take steps to recover the mooted R3.2 billion or R1.125 billion from ABSA Bank.

5.2.22 In addition the National Treasury submitted that no culpability can be validly placed on the National Treasury for not pursuing the matter against ABSA Bank or anyone else.

5.2.23 The National Treasury indicated that there was no legal duty on Government and or the National Treasury to consider, accept and implement the CIEX report.

5.2.25 Ms Maria Ramos, Group Chief Executive Officer – Barclays Africa Group, submitted that since her tenure with ABSA in 2009, they do not have a provision on their books for the repayment of the loan.

5.2.26 ABSA Bank submitted that the South African Reserve Bank assistance consisted of a loan which was provided to Bankorp (interest on this loan was 1% per annum, which amount was paid), that loan was immediately used to purchase Government Stock Bonds from the South African Reserve Bank, and the yield on those bonds (16% per annum) less the 1% interest on the loan would be only be used to set-off certain bad debts owed by customers to Bankorp Limited. The Public Protector made an inspection in *loco* of the said bad debts depicting the financial state of affairs of Bankorp Limited.

5.2.27 ABSA Bank contended that in October 1995 the loan amount was repaid in full, and the proceeds from the Government Stock Bonds yields and interest on the deposit with the South African Reserve Bank had been used to set off the specified bad debts.



5.2.28 ABSA Bank argued that it paid fair value when it acquired Bankorp Limited, which value was calculated to take into account the South African Reserve Bank assistance in that ABSA Bank paid for the South African Reserve Bank assistance to Bankorp Limited and did not benefit therefrom.

5.2.29 ABSA Bank further submitted that it did not make a provision in its accounts for the repayment of the interest on the South African Reserve Bank loan to Bankorp Limited because no such liability to repay interest existed. ABSA Bank submitted that the recovery of the debt, allegedly due, has long ago prescribed in law. ABSA Bank denied any debt is due or payable by it.

5.2.30 ABSA Bank submitted that the recommendations of CIEX Ltd., as they appear from the CIEX report are mainly motivated by commercial gain which proposes coercion as a methodology.

5.2.31 The argument raised by Dr Stals and Ms Ramos on behalf of the South African Reserve Bank and ABSA Bank, respectively, cannot be sustained as two investigations by the Special Investigating Unit and the Panel into the matter established that the interest of 15% in the amount of R1.125 billion accrued to Bankorp Limited/ABSA Bank on the Government Stock Bonds was an unlawful gift.

5.2.32 The Special Investigating Unit subsequent to its investigation of the matter, found that although it believed that there is a legal basis to attack the validity of the *“lifeboat”* contract, there are other compelling reasons not to proceed with litigation in pursuit of recovery.

5.2.33 The Special Investigating Unit found those compelling reasons to include the following:

5.2.33.1 A fear of “run on the banks”, where a snow-balling of withdrawals by investors can have crippling results for the banking community.

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- 5.2.33.2 The adverse financial impact on Sanlam and ABSA Bank.
- 5.2.33.3 Uncertainty amongst local and international investors and depositors.
- 5.2.33.4 Litigation could be lengthy.
- 5.2.34 The Special Investigating Unit further found that if the transaction is to be set aside, the obligation to repay the benefit would rest with Sanlam, who as the major shareholder in Bankorp Limited, benefited from the **“lifeboat”** when Bankorp Limited was taken over by ABSA Bank, alternatively if Sanlam is found not to be liable, then ABSA Bank would be liable as the final recipient of the **“lifeboat”**.
- 5.2.35 It is also not disputed that the Special Investigating Unit formed a view that the **“lifeboat”** amounted to a donation of R1.125 billion, which donation was simulated to appear to be a loan and that such transaction was not authorised by the South African Reserve Bank Act No. 90 of 1989, as section 10 empowered the South African Reserve Bank to make loans but not donations.
- 5.2.36 On the other hand the report of the Governor’s panel of experts appointed to investigate the Reserve Bank’s role with regard to the financial assistance package to Bankorp Limited, examined instances where the South African Reserve Bank assisted distressed banks that occurred before or during the period in which assistance was given to Bankorp Limited/ABSA Bank and in several cases the structure and form of the South African Reserve Bank’s assistance had features similar to those of the assistance afforded to Bankorp Limited but taken as a whole, the assistance to Bankorp Limited was different in that it had features which together were not present in any other single case.
- 5.2.37 The Panel was of a view that the difficulties pertaining to the quantification of the enrichment and the identity of the beneficiaries render the prosecution of an enrichment claim problematic.

5.2.38 The Panel further held a view that due to the complex nature of the impact that the various packages might have of capital invested in Bankorp Limited, it is difficult to assess with accuracy the quantum of benefits derived by Bankorp shareholders.

*Application of the law*

5.2.39 Having established that the “*lifeboat*” constituted 15% of interest unlawfully accrued to Bankorp Limited/ABSA Bank on Government Stock Bonds bought by the South African Reserve Bank in favour of Bankorp Limited/ABSA Bank, which were pledged as collateral to a loan that was granted by the South African Reserve Bank, the issue remains to be determined is whether the failure by the South African Government and the South African Reserve Bank to recover the amount of R1.125 billion, which constitutes the “*lifeboat*”, was improper.

5.2.40 Section 195(1)(b) of the Constitution provides that public administration must be governed by the democratic values and principles enshrined in the Constitution, which include that efficient, economic and effective use of resources must be promoted. The South African Government and the South African Reserve Bank had a constitutional obligation duty not transact with private entities in a manner that does not promote the efficient, economic and effective use of resources. Section 237 of the Constitution further provides that all constitutional obligations must be performed diligently.

5.2.41 The South African Government and the South African Reserve Bank also had a duty in terms of Principle 8 of the Batho Pele Principles, which dictates that public services should be provided economically and efficiently in order to give citizens the best possible value for money.

5.2.42 It then follows that the unlawful gift to Bankorp Limited/ABSA Bank by the South African Reserve Bank in a form of a “*lifeboat*” did not constitute value for money as envisaged in Principle 8 of the Batho Pele Principles.

- 5.2.43 In *Khumalo v MEC for Education KZN [2013] ZACC*, the court held that a public functionary who is alerted to an irregularity or impending irregularity has a responsibility to take action to arrest such irregularity. Therefore the South African Government and the South African Reserve Bank has an obligation to recover the unlawful gift from Bankorp Limited/ABSA Bank since it has been established that the *“lifeboat”* was unlawful.
- 5.2.44 Within the meaning of section 37, the Ministry of Finance upon being aware of the *“lifeboat”* should have investigated the South African Reserve Bank financial statements for the relevant periods submitted in terms of section 32 of the Act and would have had an opportunity to conceive an opinion that the Bank has failed to comply with any provision of the Act. Consequently he/she may have by notice in writing required the board to make good or remedy the default within a specified time. If the board failed to comply, the Ministry would have applied to the Supreme Court for an order compelling the Board to rectify the default, and the Court would have made an order which it deemed fit.
- 5.2.45 Therefore in the light of the legal principles extrapolated above, the National Treasury’s contention that there are no grounds, based on objectively established facts, to support the recommendation that the South African Reserve Bank take steps to recover the mooted R3.2 billion or R1.125 billion from ABSA Bank is misconstrued.
- 5.2.46 Although ABSA Bank submitted that the matter has prescribed, the Public Protector is persuaded by the view expressed by South African Law Reform Commission Discussion Paper 126 Project 125 Prescription Periods July 2011, in that legislation dealing with prescription:

*“must endeavour to include all segments of society and pay particular heed to the socially and economically disadvantaged. To the extent that it does not, this would have to be considered as a relevant factor in evaluating whether exclusion is reasonable in an open and democratic society based on human dignity, equality and freedom”.*

5.2.47 Although the view was expressed in relation to prescription in a different context, it is equally relevant in the present circumstances. The question to be answered is whether in circumstances of the case, prescription is reasonable in an open and democratic society based on human dignity. In this regard the Public Protector is guided by the founding principles of the Constitution which presuppose social justice and the improvement of the quality of life of all citizens. Accordingly it would not be equitable and just to exclude such a claim based on prescription as it would deprive society in the improvement of living standards.

5.2.48 Prescription must embrace societal needs, especially of those who are impoverished or economically disadvantaged. To exclude societal needs on the basis of prescription would be unreasonable.

5.2.49 The Special Investigating Unit in relation to the lifeboat found that the circumstances, mechanics and lack of safeguards to ensure saving the ailing bank by this particular *“lifeboat”* amounted to an act not customarily performed by central banks and was not authorised by the South African Reserve Bank Act No. 90 of 1989. Section 10(1)(s) provides that the bank may perform other functions of bankers and financial agents as central banks customarily may perform. The SIU opined that the transaction amounted to a donation which was simulated to appear to be a loan and that such transaction was not authorised by the South African Reserve Bank Act, as section 10 empowered the South African Reserve Bank to make loans not donations.

5.2.50 The South African Reserve Bank Act No. 90 of 1989 sets out in section 10 the powers and functions of the South African Reserve Bank. Section 10(f) provides that the bank may grant loans and advances against security. It then follows that the lifeboat was not a loan or an advance granted against security within the meaning of section 10(f) and was therefore unlawful.

5.2.51 The Special Investigating Unit’s contention not to recover based on the fear of the “run of the banks” is not sustained. The following could have been considered by

the Special Investigating Unit to avoid the “run of the banks” in light of the recovery:

5.2.51.1 Payments in instalments from ABSA Bank over an extended period of time; and

5.2.51.2 ABSA Bank repay the amount of R1.125 billion (including the associated interest charges), which represents the extent to which it unfairly benefitted from the arrangement through transferring the equivalent value in its shares to the South African Government, based on the average share price. Dividends declared as a result of the transfer of these shares to the South African Government shall be paid into the National Revenue Fund, as provided for in section 213 of the Constitution.

5.2.52 On the other hand the Panel after comparing the assistance provided by the South African Reserve Bank to other banks in similar situations around that time, found that in the case of Bankorp Limited/ABSA Bank such assistance differed materially in the following respect:

5.2.52.1 Mismanagement was not corrected early.

5.2.52.2 The assistance protected interests of shareholders and depositors.

5.2.52.3 The assistance in packages B and C did not take in form of a liquid advance, but in a form of solvency support.

5.2.52.4 Effective remedial action was not pursued for some years.

5.2.52.5 There was no effective exit provided for the South African Reserve Bank. Acquisition by ABSA Bank was neither anticipated nor instigated by the South African Reserve Bank.

5.2.53 The Panel found that intervention with the objective of averting a systemic crisis of the banking sector was justified, however by the standards of international best

practice the methods were flawed. The South African Reserve Bank's methods in providing assistance did not conform to internationally accepted principles for dealing with distressed banks.

5.2.54 The Panel viewed the assistance by the South African Reserve Bank was flawed by international standards in the following manner:

5.2.54.1 The period of the assistance was extremely long.

5.2.54.2 The South African Reserve Bank accepted successive requests by Bankorp Limited.

5.2.54.3 The South African Reserve Bank did not investigate the problems of Bankorp.

5.2.55.4 The South African Reserve Bank did not require Bankorp to reduce its balance sheet timely.

5.2.56 The Panel held that the agreements concluded from 1990 onwards between the South African Reserve Bank and Bankorp Limited and thereafter ABSA Bank were legally invalid in that the South African Reserve Bank acted outside the scope of its statutory powers.

5.2.57 The Panel established that the assistance was flawed in that there was an absence of measures to protect the interests of the South African Reserve Bank securing a share of the equity of Bankorp Limited in exchange for the capital contribution made as a grant.

5.2.58 Based on the legal framework set out above it is undeniable that the *"lifeboat"* given to Bankorp Limited/ABSA was unlawful and contravened standard methods and processes regulating financial assistance to distressed banks.

### Conclusion

*Alleged Failure to Recover Misappropriated Funds*

- 5.2.59 The South African Government and the South African Reserve Bank failed to recover misappropriated public funds from Bankorp Limited/ABSA after it was advised to do so by the CIEX report.
- 5.2.60 No evidence could be found that the South African Government and the South African Reserve Bank had to recover an amount of R3.2 billion from Bankorp Limited/ABSA Bank.
- 5.2.61 Evidence suggests that the amount to be recovered in the CIEX report from Bankorp Limited/ABSA Bank was incorrect, instead of R3.2 billion, the correct amount should have been R1.125 billion.
- 5.2.62 Evidence further indicates that the South African Reserve Bank loaned an amount of R1.5 billion to Bankorp Limited/ABSA Bank and that Bankorp Limited/ABSA Bank unduly benefitted from the interest on the Government Bond Stocks, the *“lifeboat”*, in the amount of R1.125 billion. The *“lifeboat”* was an illegal gift in a guise of a loan.
- 5.2.63 ABSA Bank did make payment of R1.5 billion to the South African Reserve Bank in October 1995.
- 5.2.64 The Special Investigation Unit and the Panel undertook through investigation of the matter and concluded that the *“lifeboat”* in the amount of R1.125 billion that was granted to Bankorp Limited/ABSA Bank by the South African Reserve Bank was not authorised by the South African Reserve Bank No. 90 of 1989, that the financial assistance was flawed and that Bankorp Limited/ABSA Bank benefitted from financial assistance that was irregular.
- 5.2.65 The Special Investigative Unit and the Panel failed to recover the misappropriated public funds from Bankorp Limited/ABSA Bank.
- 5.2.66 The South African Reserve Bank was not authorised in terms of the South African Reserve Bank Act No. 90 of 1989 and international custom and standards of



world's central banks to make gifts to private banks. The greatest care should have been taken to protect the South African Reserve Bank against loss of public funds it applied towards the assistance.

5.2.67 The Ministry of Finance failed to discharge their duties in terms of section 37 of the South African Reserve Bank Act 1989 to enforce compliance in respect of the Act.

5.2.68 The financial assistance protected the lender, the South African Reserve Bank did nothing to protect the South African Reserve Bank against a deteriorating financial position, requiring an ever higher and increasingly risky level of assistance. A **"lifeboat"** is meant to buy time for a recovery, it is not an insurance to fund ongoing and increasing deterioration.

5.2.69 The South African Reserve Bank had a responsibility to apply public funding to the benefit of the South African economy and thereby its people. The non-recovery of any repayment of the **"lifeboat"** was irregular and unjust. Consequently the South African Reserve Bank and the South African Government have a duty to recover public funds which were misappropriated.

**5.3 Whether the South African public was prejudiced by the conduct of the Government of South Africa and the South African Reserve Bank and if so, what would it take to ensure justice:**

*Common cause issues*

5.3.1 The **"lifeboat"** that was offered to Bankorp Limited/ABSA Bank belonged to the people of South Africa as it was in a form of public funds irregularly advanced to Bankorp Limited/ABSA Bank.

5.3.2 It is not dispute that failure to recover the **"lifeboat"** amounted to a loss by the public, as the **"lifeboat"** benefitted a few individuals who were shareholders of

Bankorp Limited/ABSA Bank, of funds which could have been used for the betterment of society.

- 5.3.3 The CIEX report was never deliberated upon on either by Cabinet, the South African Reserve Bank or any other legitimate structure and, that the said structure took a decision not to proceed or implement the report with rational reasons recorded for such decision. The South African Government should have properly processed the CIEX report and made a decision on it as it was alerted of the irregular financial aid by the CIEX report.
- 5.3.4 Consequently it is not in dispute that the South African Government spent 600 000 British Pounds in regard to the investigation by CIEX Ltd. of which there was no value for money in the exercise.
- 5.3.5 No attempts were made to test the speculation whether there would have been a systemic economic impact with regard to the recovery of the **“lifeboat”** by the South African Government.
- 5.3.6 It is not in dispute that the South African Government and the South African Reserve Bank did not recover from Bankorp Limited/ABSA Bank the illegal **“lifeboat”**, which consisted of public funds, given to Bankorp Limited/ABSA Bank.

Issues in dispute

- 5.3.7 The South African Reserve Bank indicated that the South African public were not prejudiced in any way because no additional amount was due by ABSA Bank to the South African Reserve Bank. The South African Government and public got the benefit of the finance provided through the sale of its bonds and paid the market related interest due and payable on the bonds. Furthermore that the general public enjoyed the benefits of a stable banking system as a result of the **“lifeboat”**.

- 5.3.8 The South African Reserve Bank further submitted that the Reserve Bank is involved in systemic risk management, increased market volatility often results in financial instability which can result in institutional distress, increased credit risks and increased insolvencies. Thus the Reserve Bank has therefore acted as lender of last resort on a number of occasions since its incorporation. By providing this assistance, central banks aim to restore confidence and thereby re-establish credibility in the failing bank/s. The assistance is provided when central banks fear that a loss of confidence in a particular institution could prompt systemic failure in the banking system.
- 5.3.9 The National Treasury submitted that it did not suffer any financial loss as a result of the arrangement, it was still required to pay interest on its bonds as with any other bondholder. It added that there was no evidence that the South African public was prejudiced by the conduct of Government or the National Treasury.
- 5.3.10 The National Treasury further submitted that due to the financial crises the country was experiencing in 1983 to 1989, the reporting systems of the South African Reserve Bank at the time were inadequate. They stated that the “*shock of adjusting to international anti-apartheid sanctions*” and the Government’s “*total strategy*” against anti-apartheid forces, was a material factor swayed the grant by the South African Reserve Bank of financial assistance to Bankorp Limited/ABSA Bank.
- 5.3.11 The National Treasury stated that the South African Reserve Bank holds the status of the lender of last resort, which status is used to achieve the objective of protecting the value of the currency in the interest of balanced and sustainable growth. They further alluded to an example in recent times where the South African Reserve Bank placed measures in place when the African Bank was placed under curatorship.
- 5.3.12 ABSA Bank submitted that any loans advanced to ABSA Bank by the South African Reserve Bank were paid in full. In addition that all their obligations were extinguished as all obligations were discharged in full.

5.3.13 It is contended that the views expressed by the abovementioned parties is not substantiated as it has been established that the *lifeboat* advanced to Bankorp Limited/ABSA Bank was a gift not sanctioned by any legal framework and further that the gift given to Bankorp Limited/ABSA Bank was misappropriated public funds.

Application of the law

5.3.14 The preamble to the Constitution states that the people of South Africa recognise the injustices of the past, honour those who suffered so as to heal the divisions of the past and establish a society based on democratic values; social justice and improve the quality of life of all citizens and free the potential of each person. The South African public were deprived of essential public funds that could have alleviated their socio economic conditions.

5.3.15 Section 195 of the Constitution prescribes certain basic standards of public administration, such as a high standard of professional ethics that is efficient, economic and effective use of resources. The Government of South Africa failed adhere to this duty by paying for a service which had no value for money and lacked the effectiveness of the use of resources.

5.3.16 In addition to above in *Khumalo v MEC for Education KZN [2013] ZACC* it was stated that a public functionary who is alerted to an irregularity or impending irregularity has a responsibility to take action to arrest such irregularity. The South African Government and the Ministry of Finance failed to take adequate measures addressing the irregularities pertaining to the *lifeboat*.

5.3.17 The Batho Pele principles indicate that when people do not get what they are entitled to from the public service, they have a right to redress. In addition the principles state that it is very important that public servants do not waste the scarce resources of government and that they deliver a service that is as cost-

effective and efficient as possible. Payment of 600 000 British Pounds to CIEX Ltd. was not justifiable in the circumstances.

5.3.18 The South African Government has a general obligation in terms of article 2(1) of the International Covenant on Economic, Social and Cultural Rights of the United Nations 1967, to take steps through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the Covenant by all appropriate means, including particularly the adoption of legislative measures.

5.3.19 A specific obligation by the Covenant sets out that the Republic must recognize the right of everyone to an adequate standard of living, including adequate food, clothing and housing, and to the continuous improvement of living conditions. Parties to the Covenant must take appropriate steps to ensure the realization of this right.

#### Conclusions

5.3.20 The South African Government and the South African Reserve Bank did not protect the interest of the public in regard to the irregular and unlawful **“lifeboat”** granted to Bankorp Limited/ABSA Bank.

5.3.21 The Ministry of Finance failed to exercise their obligation in terms of section 37 of the South African Reserve Bank Act of 1989 by ensuring that there is compliance of the Act by the South African Reserve Bank.

5.3.22 Evidence indicates that the South African Reserve Bank and the South African Reserve Bank had an opportunity to recover but decided not to.

5.3.23 It is evident that the status of the South African Reserve Bank as the lender of last resort has commercial benefits only in respect of the financial sector market. The benefit which involves vast amounts of public money does not improve the socio

economic conditions of ordinary citizens of the Republic but of a particular financial sector.

5.3.24 Leading authors advocating and promoting the ideology of state banks and nationalization of monetary currency believe that the notion of the lender of last resort's status that is inherent to central banks internationally would cease to exist if governments take sole power in creating money through the establishment of state banks.

5.3.25 It is in this belief that once the state takes control of creating money and credit, numerous benefits aimed at alleviating economic ails of ordinary economically disadvantaged people may be achieved, unlike our current purely commercial transaction system which only seeks to improve a particular financial sector.

5.3.26 The debate on nationalization of monetary currency and creation of state banks is one that has found its way in to our democratic society and is a debate which must reach its conclusion by the people of South Africa.

5.3.27 The Republic has an obligation in terms of the Constitution and international instruments to improve socio economic conditions of its citizens through legislative and other measures to alleviate poverty and ensure social justice for all. The South African Government must realise economic rights to its people.

5.3.28 The decision not to recover seriously prejudiced the people of South Africa, in particular the poor who would have benefited through social development programs.

## **6. FINDINGS**

Having considered the evidence uncovered during the investigation against the relevant regulatory framework, the Public Protector makes the following findings:

- 6.1 Whether the South African Government improperly failed to implement the CIEX report, dealing with alleged stolen state funds, after commissioning and duly paying for same:**
- 6.1.1 The allegation whether the South African Government improperly failed to implement the CIEX report, dealing with alleged stolen state funds, after commissioning and duly paying for same is substantiated;
- 6.1.2 CIEX Ltd. was paid 600 000 British Pounds for services which were never used by the South African Government. No evidence could be found that any action was taken specifically in pursuit of the CIEX report;
- 6.1.3 Failure by the South African Government was inconsistent with duties imposed by section 195 of the Constitution requiring a high standard of professional ethics;
- 6.1.4 The failure was also inconsistent with section 231 of the Constitution that requires that all Constitutional obligations must be performed diligently and without delay;
- 6.1.5 In addition the conduct was contrary to the Batho Pele Principles in that there was no value for money; and
- 6.1.6 The failure by the South African Government constitutes improper conduct as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6 of the Public Protector Act.
- 6.2 Whether the South African Government and the South African Reserve Bank improperly failed to recover from Bankorp Limited/ABSA Bank an amount of R3.2 billion, cited in the CIEX report, owed as a result of an illegal gift given to Bankorp Limited/ABSA Bank between 1986 and 1995:**
- 6.2.1 The allegation whether the South African Government and the South African Reserve Bank improperly failed to recover from Bankorp Limited/ABSA Bank an

amount of R3.2 billion cited in the CIEX report, owed as a result of an illegal gift given to Bankorp Limited/ABSA Bank between 1986 and 1995 is substantiated;

6.2.2 The correct amount of the illegal gift granted to Bankorp Limited/ABSA Bank is in the amount of R1.125 billion;

6.2.3 Two investigations into the matter established that the financial aid given to Bankorp Limited/ABSA Bank was irregular;

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

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

6.2.6 In the circumstances that the conduct of the South African Government and the South African Reserve Bank constitutes improper conduct as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6 of the Public Protector Act.

**6.3 Whether the South African public was prejudiced by the conduct of the Government of South Africa and the South African Reserve Bank and if so, what would it take to ensure justice:**

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

6.3.2 The South African Government wasted an amount of 600 000 British Pounds on services which were never used;



- 6.3.3 The amount given to Bankorp Limited/ABSA Bank belonged to the people of South Africa. Failure to recover the illegal gift from Bankorp Limited/ABSA Bank resulted in prejudice to the people of South Africa as the public funds could have benefitted the broader society instead of a handful of shareholders of Bankorp Limited/ABSA Bank;
- 6.3.4 The conduct of the South African Government and the South African Reserve Bank goes against the ethos laid in the preamble of the Constitution and section 195 of the Constitution in respect of redressing social injustices and promoting efficiency;
- 6.3.5 The conduct further is contrary to the Batho Pele Principles that requires redress and the view held in the *Khumalo* case, mentioned above, that requires a public functionary to arrest reported irregularities; and
- 6.3.6 The conduct of the South African Government and the South African Reserve Bank constitutes improper conduct as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6 of the Public Protector Act.

## **7. REMEDIAL ACTION**

The appropriate remedial action that the Public Protector is taking in pursuit of section 182(1)(c) of the Constitution, with a view of addressing the maladministration, is as follows:

### **7.1 The Special Investigating Unit:**

- 7.1.1 The Public Protector refers the matter to the Special Investigating Unit in terms of section 6(4)(c)(ii) of the Public Protector Act to approach the President in terms of section 2 of the Special Investigating Units and Special Tribunals Act No. 74 of 1996, to:

- 7.1.1.1 Re-open and amend Proclamation R47 of 1998 published in the Government Gazette dated 7 May 1998 in order to recover misappropriated public funds unlawfully given to ABSA Bank in the amount of R1.125 billion; and
- 7.1.1.2 Re-open and amend Proclamation R47 of 1998 published in the Government Gazette dated May 1998 in order to investigate alleged misappropriated public funds given to various institutions as mentioned in the CIEX report.
- 7.1.2 The South African Reserve Bank must cooperate fully with the Special Investigating Unit and also assist the Special Investigating Unit in the recovery of misappropriated public funds mentioned in 7.1.1.1 and 7.1.1.2.

## **7.2 The Portfolio Committee on Justice and Correctional Services:**

- 7.2.1 The Chairperson of the Portfolio Committee on Justice and Correctional Services must initiate a process that will result in the amendment of section 224 of the Constitution, in pursuit of improving socio-economic conditions of the citizens of the Republic, by introducing a motion in terms of section 73(2) of the Constitution in the National Assembly and thereafter deal with the matter in terms of section 74(5) and (6) of the Constitution:

Section 224 of the Constitution should thus read:

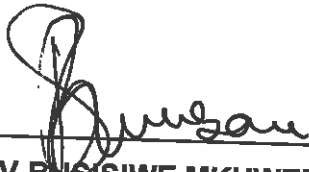
**224. (1) *The primary object of the South African Reserve Bank is to promote balanced and sustainable economic growth in the Republic , while ensuring that the socio-economic well-being of the citizens are protected.***

**(2) *The South African Reserve Bank, in pursuit of its primary object, must perform its functions independently and without fear, favour or prejudice, while ensuring that there must be regular consultation***

*between the Bank and Parliament to achieve meaningful socio-economic transformation.*

**8. MONITORING**

- 8.1 The Special Investigating Unit, the South African Reserve Bank and the Chairman of the Portfolio Committee on Justice and Correctional Services must submit an action plan with 60 days of this report on the initiatives taken in regard to the remedial action above.



ADV BUSISIWE MKHWEBANE  
PUBLIC PROTECTOR OF THE  
REPUBLIC OF SOUTH AFRICA

Date: 19, 06, 2017

*Assisted by: Mr Tebogo Kekana – Senior Investigator  
Private Office*