

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

I a true copy of the original,
this office.

Is 'n ware afskrif van die oorspronklike,
aan hierdie kantoor.

HIGH COURT
HOOGGEREGSHOF

Case no 80978/16 /2016

In the matter between:

MINISTER OF FINANCE

and

OAKBAY INVESTMENTS (PTY) LTD

OAKBAY RESOURCES AND ENERGY LTD

SHIVA URANIUM (PTY) LTD

TEGETA EXPLORATION AND RESOURCES (PTY)
LTD

JIC MINING SERVICES (PTY) LTD

BLACKEDGE EXPLORATION (PTY) LTD

TNA MEDIA (PTY) LTD

THE NEW AGE

AFRICA NEWS NETWORK (PTY) LTD

VR LASER SERVICES (PTY) LTD

ISLANDSITE INVESTMENTS ONE HUNDRED AND
EIGHTY (PTY) LTD

CONFIDENT CONCEPT (PTY) LTD

JET AIRWAYS (INDIA) LTD (INCORPORATED IN
INDIA)



Applicant

First Respondent

Second Respondent

Third Respondent

Fourth Respondent

Fifth Respondent

Sixth Respondent

Seventh Respondent

Eighth Respondent

Ninth Respondent

Tenth Respondent

Eleventh Respondent

Twelfth Respondent

Thirteenth Respondent

SAHARA COMPUTERS (PTY) LTD	Fourteenth Respondent
ABSA BANK LTD	Fifteenth Respondent
FIRST NATIONAL BANK LTD	Sixteenth Respondent
STANDARD BANK OF SOUTH AFRICA LIMITED	Seventeenth Respondent
NEDBANK LIMITED	Eighteenth Respondent
GOVERNOR OF THE SOUTH AFRICAN RESERVE BANK	Nineteenth Respondent
REGISTRAR OF BANKS	Twentieth Respondent
DIRECTOR OF THE FINANCIAL INTELLIGENCE CENTRE	Twenty-First Respondent

NOTICE OF MOTION

TAKE NOTICE that on a date to be determined by the Registrar of the above Honourable Court, the applicant intends to apply for an order in the following terms:

1. Declaring that the applicant is not by law empowered or obliged to intervene in the relationship between the first to fourteenth respondents, and the fifteenth to eighteenth respondents, as regards the closing of the banking accounts held by the former with the latter.
2. For further or alternative relief.
3. For costs of suit as against any respondent(s) entering opposition to this application, jointly and severally, the one paying the other to be absolved.

TAKE NOTICE FURTHER that the affidavit of PRAVIN JAMNADAS GORDHAN and its annexures will be used in support of this application.

TAKE FURTHER NOTICE that if you intend opposing this application you are required:

- (a) to notify the applicant's attorneys, in writing, no later than five days after delivery hereof; and
- (b) within fifteen days thereafter to deliver any answering affidavit.

TAKE NOTICE FURTHER that you are required to appoint in the notification referred to in (a) above an address referred to in Rule 6(5)(b) of the Uniform Rules of Court at which you will accept notice and service of all documents in these proceedings (preferably an email address).

TAKE FURTHER NOTICE that if no such notice of intention to oppose is given, the application will be set down for hearing on a date and at a time to be arranged with the Registrar of the above Honourable Court, not being less than ten days after service of this notice of motion.

SIGNED AT PRETORIA ON 13 OCTOBER 2016



STATE ATTORNEY

Attorney for the applicant

SALU Building

255 Francis Baard Street

Pretoria

Tel: 012 309 1575

Fax: 012 309 1649

Email: TNhlanzi@justice.gov.za

Ref: Ms T Nhlanzi

TO: THE REGISTRAR
High Court, Pretoria

AND TO: OAKBAY INVESTMENTS (PTY) LTD
First Respondent
Grayston Ridge Office Park, Block A
Lower Ground Floor,
144 Katherine street, Sandown
Sandton
Telephone: +27(0)11 430 7640
FAX: +1 0123-4567-8900
E-mail: info@oakbay.co.za

AND TO: OAKBAY RESOURCES AND ENERGY LTD
Second Respondent
89 Gazelle Avenue
Corporate Park South
Midrand

AND TO: SHIVA URANIUM (PTY) LTD
Third Respondent
1A BERG STREET
Hartebeesfontein
North West. 2600
Tel: 0184679000
Fax: 018 467 9040

AND TO: TEGETA EXPLORATION AND RESOURCES (PTY) LTD
Fourth Respondent
Grayston Ridge Office Park, Block A
Lower Ground Floor,
144 Katherine Street, Sandown
Sandton
Tel: 011 542 1000
Fax: 011 262 3868

AND TO: JIC MINING SERVICES (PTY) LTD
Fifth Respondent
JIC House
16th Road
MIDRAND

AND TO: BLACKEDGE EXPLORATION (PTY) LTD
Sixth Respondent
89 Gazelle Avenue
Corporate Park South
MIDRAND

AND TO: TNA MEDIA (PTY) LTD
Seventh Respondent
52 Lechwe Street
Corporate Park South
Old Pretoria Main Road
MIDRAND
1685
TEL: 011 542 1222
FAX: 086 733 7000

AND TO: THE NEW AGE
Eighth Respondent
52 Lechwe Street
Corporate Park South
Old Pretoria Main Road
MIDRAND
1685
TEL: 011 542 1222
FAX: 086 733 7000

AND TO: AFRICA NEWS NETWORK (PTY) LTD
Ninth Respondent
Fourth Floor, Sandown Mews
88 Stella Street, Sandton,
Johannesburg
TEL: 011 542 1222
FAX: 086 733 7000

AND TO: VR LASER SERVICES (PTY) LTD
Tenth Respondent
Grayston Ridge Office Park, Block A
Lower Ground Floor,
144 Katherine Street, Sandown
Sandton

AND TO: ISLANDSITE INVESTMENTS ONE HUNDRED AND EIGHTY (PTY) LTD
Eleventh Respondent
89 Gazelle Avenue
Corporate Park South
Old Johannesburg Road
Midrand
1685

AND TO: CONFIDENT CONCEPT (PTY) LTD
Twelfth Respondent
89 Gazelle Avenue
Corporate Park South
Old Johannesburg Road
Midrand
1685

AND TO: JET AIRWAYS (INDIA) LIMITED (INCORPORATED IN INDIA)
Thirteenth Respondent
5th Floor, Bedford Centre Office Tower
Smith Road
Bedford Gardens
2008
Johannesburg

AND TO: SAHARA COMPUTERS (PTY) LTD
89 Gazelle Avenue
Corporate Park South
Old Johannesburg Road
Midrand
1685

AND TO: ABSA BANK LTD
Fifteenth Respondent
7th Floor
Barclays Towers West
15 Troy Street
Johannesburg

AND TO: FIRST NATIONAL BANK LTD
Sixteenth Respondent
6th Floor, 1 First Place
FNB Bank City
Simmonds Street
Johannesburg

AND TO: STANDARD BANK OF SOUTH AFRICA
Seventeenth Respondent
9th Floor
Standard Bank Centre
5 Simmonds Street
Johannesburg

AND TO: NEDBANK LIMITED
Eighteenth Respondent
G Block
3rd Floor Desk
135 Rivonia Rd
Sandown
Sandton

AND TO: THE GOVERNOR OF THE SOUTH AFRICAN RESERVE BANK
Nineteenth Respondent
370 Helen Joseph Street
Pretoria

AND TO: THE REGISTRAR OF BANKS
Twentieth Respondent
370 Helen Joseph Street
Pretoria

AND TO: DIRECTOR OF THE FINANCIAL INTELLIGENCE
CENTRE
Twenty First Respondent
Woodhill Centre
St. Bernard Drive
Garsfontein
Pretoria

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

Case no /2016

In the matter between:



MINISTER OF FINANCE

Applicant

And

OAKBAY INVESTMENTS (PTY) LTD	First Respondent
OAKBAY RESOURCES AND ENERGY LTD	Second Respondent
SHIVA URANIUM (PTY) LTD	Third Respondent
TEGETA EXPLORATION AND RESOURCES (PTY) LTD	Fourth Respondent
JIC MINING SERVICES (PTY) LTD	Fifth Respondent
BLACKEDGE EXPLORATION (PTY) LTD	Sixth Respondent
TNA MEDIA (PTY) LTD	Seventh Respondent
THE NEW AGE	Eighth Respondent
AFRICA NEWS NETWORK (PTY) LTD	Ninth Respondent
VR LASER SERVICES (PTY) LTD	Tenth Respondent
ISLANDSITE INVESTMENTS ONE HUNDRED AND EIGHTY (PTY) LTD	Eleventh Respondent
CONFIDENT CONCEPT (PTY) LTD	Twelfth Respondent

JET AIRWAYS (INDIA) LTD (INCORPORATED IN INDIA)	Thirteenth Respondent
SAHARA COMPUTERS (PTY) LTD	Fourteenth Respondent
ABSA BANK LTD	Fifteenth Respondent
FIRST NATIONAL BANK LTD	Sixteenth Respondent
STANDARD BANK OF SOUTH AFRICA LIMITED	Seventeenth Respondent
NEDBANK LIMITED	Eighteenth Respondent
GOVERNOR OF THE SOUTH AFRICAN RESERVE BANK	Nineteenth Respondent
REGISTRAR OF BANKS	Twentieth Respondent
DIRECTOR OF THE FINANCIAL INTELLIGENCE CENTRE	Twenty-First Respondent

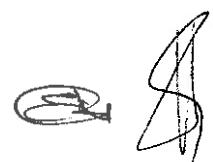
FOUNDING AFFIDAVIT

I, the undersigned,

PRAVIN JAMNADAS GORDHAN

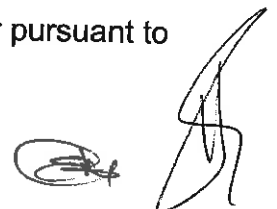
solemnly affirm that:

1. I am the Minister of Finance, and in that capacity also head of the National Treasury of South Africa, and the applicant in this matter. I was appointed to this position in December 2015 (having previously served in the same capacity for over five years from 2009 to 2014).
2. The contents of this affidavit are, save where the context indicates



otherwise, within my personal knowledge or derived from records and information under my control. They are true and correct. Where I make legal submissions this is based on advice by my legal representatives.

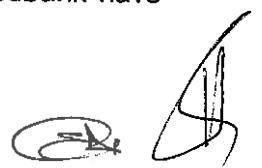
3. This is an application for declaratory relief arising from a dispute relating to powers of intervention by Government in relation to the closing of private clients' accounts by registered banks. This dispute has arisen in circumstances which have considerable importance for the operation of the banking sector of the South African economy, and its regulation by Government. The related controversy has received both national and international attention, and it is clearly in the public interest, the interest of the affected clients and relevant banks, and employees of both that it be authoritatively resolved.
4. The first to fourteenth respondents are registered companies in the Oakbay group of companies (collectively, "Oakbay"). Their names, registered offices and principal places of business within the jurisdiction of this Court are reflected in the notice of motion. To avoid prolixity these details are not repeated here.
5. The fifteenth to the eighteenth respondents are registered South African banks (collectively, "the banks"). Their names, registered offices and principal places of business are likewise reflected in the notice of motion.
6. The nineteenth respondent, the Governor of the South African Reserve Bank ("Reserve Bank"), is cited by virtue of any interest he may have in this application. The twentieth respondent, the Registrar of Banks, is cited by virtue of any interest he may have in this application, in particular pursuant to

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the provisions of sections 4 and 7 of the Banks Act 94 of 1990. The twenty first respondent, the Director of the Financial Intelligence Centre, is similarly cited pursuant to any interest he may have in the application pursuant to the Financial Intelligence Centre Act 21 of 2001 (FICA).

7. In April 2016 it was publicly announced on behalf of Oakbay, controlled at the time by the Gupta family, that their banking accounts had been closed by the banks. Oakbay also announced that its auditors, KPMG, and its sponsor on the Johannesburg Stock Exchange, Sasfin, have similarly terminated their relationships with Oakbay.
8. According to a series of public statements by Oakbay, its executives thereafter engaged in urgent approaches to their bankers with a view to clarifying the basis on which they each took the individual decision to close Oakbay's accounts. At the same time Oakbay made public statements contending that the banks had acted irregularly, and indeed improperly, in closing the accounts.
9. Oakbay also proceeded to direct representations and demands to me as the Minister of Finance. In short, Oakbay demanded that on behalf of Government I intervene with the banks to achieve a reversal of their decisions. In a first letter to me dated 8 April 2016, Oakbay contended that "the unexplained decision of a number of banks, and of our auditors, to cease working with us", was

"the result of an anti-competitive and politically-motivated campaign designed to marginalise our businesses. We have received no justification whatsoever to explain why ABSA, FNB, Sasfin, Standard Bank and now Nedbank have



decided to close our business accounts. ... As the CEO I now hope to draw a line under the corporate bullying and anti-competitive practices we have faced from the banks.”

10. I attach a copy, marked “A”. Naturally these serious allegations were a source of concern, particularly in view of the number of jobs (7 500) stated by Oakbay to be at risk.
11. A further letter followed on 17 April 2016 (attached, marked “B”). It offered “our deepest apology and regret” if the first letter had come across other than an appeal for assistance to save jobs. It asked to be advised “about any possible assistance you are able to offer us in these trying times”. The letter was closely followed by two open letters, one to the CEOs of the banks and one in similar terms to me, on behalf of two “employee representatives”.
12. In my capacity as Minister of Finance, I was concerned to explore any respect in which I could properly, in terms of law, address the situation arising from Oakbay’s serious allegations concerning the banks, and the job losses it predicted as imminent. To that end a meeting was arranged on 24 May 2016 with Oakbay representatives, senior Treasury officials and myself. Prior to the meeting, I had taken steps to obtain independent legal advice by senior counsel in important respects relevant to the apparent issues. This advice was provided in an opinion by senior and junior counsel dated 25 April 2016. I attach a copy, marked “C”.
13. For brevity I do not repeat at length the contents of that legal advice. I ask that annexure C be regarded as incorporated herein. In short, counsel advised that the National Executive (comprising Cabinet and such individual



Ministers as may be appointed by the President) are governed by the Constitution and national legislation. They are accordingly entirely “creatures of statute” with only such powers as the law itself confers on them. Nothing in law, the opinion advised, authorised governmental intervention with the banker-client relationship arising by contract. The opinion also emphasised the obligations imposed by the Basel Committee on Banking Supervision at the Bank of International Settlements on South African banks. The Committee had imposed an international duty regarding know-your-customer (KYC) standards. I was further advised that required KYC policies and practices “not only contribute to a bank’s overall safety and soundness”, but also “protect the integrity of the banking system by reducing the likelihood of banks becoming vehicles for money-laundering, terrorist financing and other unlawful activities.” (These aspects are addressed more fully in paras 17-19 of the opinion.) These principles, I was further advised, are given effect to in domestic law by the FICA. In addition, the Banks Act imposes reporting duties, requires the Registrar of Banks under certain circumstances to disclose information reported to him to third parties, and contemplates that any concerns regarding the banking sector be communicated by the Registrar to *inter alios* the Minister of Finance (paras 19-21 of the opinion).

14. South African banks not complying with their Basel or domestic duties are furthermore subject to fines by foreign and domestic authorities, and to steps being taken against them outside and inside South Africa.



15. On 24 May 2016, following my meeting with Oakbay's CEO, Mr Nazeem Howa, I wrote to him. I attach a copy of the letter, marked "D". I again ask that it and its attached *aide memoire* be regarded as incorporated herein. My officials and I sought to provide assistance by attaching an information document explaining in outline the regulatory framework governing the banking and financial sectors. I also drew attention to sources of further information, both nationally and internationally. The letter reiterated the legal impediments to any registered bank discussing client-related matters with me or any third party. I stressed that "the Minister of Finance cannot act in any way that undermines the regulatory authorities". I encouraged Oakbay to achieve a determination of its contentions by approaching a court. Finally I requested Oakbay to desist from its attacks on the integrity of National Treasury, in the public interest.
16. Also on 24 May 2016 I received a letter from Oakbay, attached marked "E". Oakbay here significantly places on record that on its own legal advice, any legal approach by it challenging the closure of the accounts or the basis on which this had been effected "may indeed be still-borne". It is further apparent that Oakbay recognised that "as case law suggests, [any legal approach] will fail in a court of law". The letter however both asserts a continued intention by Oakbay to "appeal to you for assistance", and a suggestion that the banks had closed the accounts without "any indication of any wrongdoing on our side ... we have done nothing wrong".



17. In view of Oakbay's persistence in its stance, I sought further advice from senior and junior counsel. I attach a copy of their additional opinion, dated 29 May 2016 as annexure "F".
18. On 28 June 2016, I received a further Oakbay letter, this time from the CEO of Sahara, the fourteenth respondent, again apologising for public statements made in the media but also again pressing me "to serve the national purpose". I attach a copy marked "G".
19. The continued assertions by Oakbay that, as Minister of Finance, I should intervene in, or exert pressure upon, the banks regarding their closure of the Oakbay accounts is harmful to the banking and financial sectors, to the regulatory scheme created by law, and the autonomy of both the governmental regulators and the registered banks themselves. It is well-known that the international financial environment has been extremely difficult since 2008. The proper conduct of the financial regulatory scheme is clearly in the public interest. So too are the jobs of the affected individuals (which Oakbay has variously estimated at 6 000, 7 500 or 15 000), for which I as Minister of Finance would always have a considerable concern, as well as the serious allegations detailed above contending that the banks have acted irregularly and indeed quite improperly in terminating the accounts. As I have indicated, my encouragement to Oakbay that its contentions be established in a court of law have been resisted. Oakbay indeed placed it on record that its own "detailed" legal advice from several sources was that it had no basis to challenge the banks' decisions. (Inconsistently with this, as will become apparent, Oakbay has more recently suggested that it may well



yet seek to turn to the courts, evidently at a time of its choosing). This notwithstanding, as will be apparent from the foregoing, Oakbay has persisted in its allegations, and the dispute regarding my capacity in particular to intervene with the banks has continued.

20. Given Oakbay's failure to approach the courts, or any commitment to do so, on 28 July 2016 I wrote both to the Registrar of Banks (the twentieth respondent) and to the director of FIC (the twenty first respondent). I attach copies of these letters marked "H" and "I". I should note that I had previously received a letter from the nineteenth respondent, dated 26 April 2016, in which the Governor of the Reserve Bank raised his independent concerns regarding the deleterious effect on the banking sector of the contentions made by Oakbay. I attach a copy marked "J".
21. To my letters "H" and "I" I received the response I annex marked "K".
22. It is evident that, notwithstanding the assertion by Oakbay on 24 May 2016 that it holds the "view that we have done nothing wrong" and that "no bank has given us any indication of any wrongdoing on our side", each of the banks has considered itself under a legal duty pursuant to the international and domestic statutory instruments applying to it to report over a significant period matters regarding the conduct of Oakbay accounts such as to fall within the purview of these instruments.
23. That Oakbay itself is aware of this is apparent from the following public statement made by Mr Howa in an interview with *Carte Blanche* (an investigative television production) screened by M-Net on 19 June 2016. Mr

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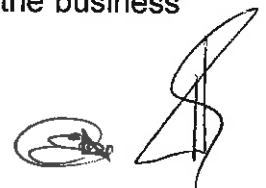
Howa divulged that one of the banks closing accounts had given the following reasons, when requested by Oakbay to do so:

“Without waiving our rights not to furnish reasons for our decision [and] without inviting any debate about the correctness of our decisions, I point out that the law, inclusive of South Africa’s Companies Act, Regulation 43 [sic], Prevention of Organised Crime Act, Prevention and Combating of Corrupt Activities Act and the Financial Intelligence Centre Act, as well as the USA’s Foreign Corrupt Practices Act and UK’s Bribery Act, prevent us from having dealings with any person or entity who a reasonably diligent (and vigilant) person would suspect that such dealings could directly or indirectly make us a party to or accessory to contraventions of that law.”

24. Should Oakbay challenge the proposition that any or all of the banks was indeed bound by law to report under FICA in such terms, it is open to Oakbay in terms of section 29(4)(c) or (d) of FICA to require the banks to disclose to this Court the full contents each of the reports in question. If the banks have acted lawfully and within the parameters of their statutory duty these should evidence the bases on which each reporting bank has concluded that the dealings in question could directly or indirectly make that bank a party to or accessory to contraventions of law. Conversely, the full reports, if disclosed pursuant to FICA, would confirm whether there is any substance to the serious contentions advanced by Oakbay that the banks have acted improperly in closing the accounts.
25. Similarly, I am advised, it is open to the banks in answering this application to disclose such reports in terms of the same provisions.



26. On 25 July 2016 my office received a further letter from Mr Howa, a copy of which I attach marked "L". I responded on 10 August 2016 in the terms apparent from annexure "M", stressing the need for a satisfactory answer from Mr Howa in writing by Friday 12 August 2016. To this Mr Howa replied on 17 August 2016 (a copy of which I attach marked "N"), simply to the effect that he was "currently out of the country", and that he would not meet this timeframe. I received no further communication, until an email dated 9 September 2016, a copy of which I attach marked "O". In this Mr Howa expressed the view that it would be "preferable" again to meet, ostensibly to consider a "full file of correspondence" (which, despite my previous request, he still had not produced). He stated that the meeting would add "considerable flavour" to the correspondence. I gave careful consideration (taking into account legal advice) to the appropriateness of another meeting, for the purpose intended by Mr Howa. There has been no such further meeting. Oakbay still has failed to produce the documentation to which Mr Howa has referred, and still has not provided the satisfactory answer (referred to above).
27. Previously, on 4 August 2016, I had received a letter with an attached certificate from the Director of the FIC. I attach a copy, marked "P1" and "P2". This reflects the increasingly serious state of affairs which has arisen. This is illustrated by the number and scale of reported transactions linked to Oakbay. Just one example is the reporting of an amount of R1,3 billion as a suspicious transaction, in terms of the FICA, relating to Optimum Mine Rehabilitation Trust. Indeed, as appears from the further attached letter of 27 June 2016 (annexed, marked "Q") from attorneys acting for the business




rescue practitioners of Optimum, "with the written approval of the Department of Mineral Resources" R1,3 billion was intended to be transferred from the account closed by Standard Bank to the Bank of Baroda. For this the further approval of the Reserve Bank was sought. I am not aware as to whether the transfer to the Bank of Baroda was effected from the closed Optimum account held by Standard Bank. This is a matter that may be clarified by the Reserve Bank and Standard Bank.

28. It is important that payment of funds to a mining rehabilitation trust in principle qualifies for a tax deduction in the hands of a taxpayer. In turn the mining rehabilitation trust is exempt from tax. If those funds from the trust were to spent on anything other than genuine mining rehabilitation, it will expose the fiscus not only to the loss of tax revenue and also put the burden of mining rehabilitation on the fiscus.
29. Given the circumstances I have described, the grant of the declaratory orders sought is called for, in the public interest. The continued public assertions that registered banks within the regulatory environment in South Africa acted for no adequate reason, irregularly and indeed for improper reasons in closing accounts are harmful to the reputation for integrity of South Africa's financial and banking sectors. So too is the continued uncertainty arising from Oakbay's simultaneous disinclination itself to seek a court's ruling. That uncertainty is prejudicial, as stated, to financial stability and the standing of the South African regulatory authorities, the operation of the banking and financial sectors, the South African economy at large and the employees whose interests Oakbay invokes.




30. I accordingly ask for an order in terms of the notice of motion. I respectfully submit that it would be both in the public interest and in the interests of justice for this application to be heard and determined on as expeditious a basis as is possible. In this regard, I understand that a request will be directed to their Lordships the Judge President and the Deputy Judge President.



PRAVIN JAMNADAS GORDHAN

I certify that this affidavit was signed before me at PRETORIA on this the 13th day of October 2016 by the deponent who acknowledged that he knew and understood the contents of this affidavit, and solemnly affirmed the truth of thereof.



COMMISSIONER OF OATHS

Name:

ELEANOR DELAINE GROENEWALD
COMMISSIONER OF OATHS

Address:

EX OFFICIO
SA POLICE SERVICE LEGAL OFFICIAL
PRESIDIA BUILDING 255 PAUL KRUGER STREET
PRETORIA

Capacity:

