

**IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG LOCAL DIVISION, JOHANNESBURG**

**CASE NO:**

In the matter between:

**SOUTH AFRICAN HISTORY ARCHIVE TRUST**

**Applicant**

and

**SOUTH AFRICAN RESERVE BANK**

**First Respondent**

**GOVERNOR OF THE SOUTH AFRICAN  
RESERVE BANK, L KGANYAGO**

**Second Respondent**

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**FOUNDING AFFIDAVIT**



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I, the undersigned,

**CATHERINE MOIRA KENNEDY**

hereby make oath and state:

- 1 I am the director of the applicant, the South African History Archive Trust ("SAHA"). I have personal knowledge of this matter and I am duly authorised to bring this application on behalf of SAHA. In this regard, I attach a copy of a resolution of the Trustees of the South African History Archive Trust marked "CMK1".

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- 2 The facts set out herein are within my personal knowledge, unless stated otherwise or indicated by the context, and are to the best of my knowledge and belief both true and correct. Where I make legal submissions, I do so on the basis of advice of SAHA's legal representatives.

### THE PARTIES

- 3 The applicant is the **SOUTH AFRICAN HISTORY ARCHIVE TRUST** ("SAHA"), a non-governmental organisation constituted as a trust in terms of the laws of South Africa. It is situated at the Women's Jail, Constitution Hill, 1 Kotze Street, Braamfontein, Johannesburg. SAHA requested the information, which forms the subject matter of this application, from the first and second respondents.
- 4 The first respondent is the **SOUTH AFRICAN RESERVE BANK** ("the Reserve Bank"), the central bank of the Republic of South Africa. It is established in terms of section 223 of the Constitution and is governed by the South African Reserve Bank Act 90 of 1989 ("the Reserve Bank Act"). Its head office is situated at 370 Helen Joseph Street, Pretoria. The Reserve Bank is responsible for, amongst other things, the protection of the value of the currency of the Republic in the interest of balanced and sustainable economic growth; assisting the South African government in the formulation and implementation of macro-economic policy and informing the South African public about South African monetary policy and the South African economic situation.

- 5 The second respondent is the **GOVERNOR OF THE SOUTH AFRICAN RESERVE BANK, LESETJA KGANYAGO**, who is cited in his official capacity as the official responsible for the Reserve Bank. The second respondent is also cited in his capacity as the information officer of the Reserve Bank. He is responsible for the records that were the subject of SAHA's request for information under the Promotion of Access to Information Act 2 of 2000 ("PAIA").
- 6 The Reserve Bank's PAIA manual identifies the second respondent as the information officer for purposes of PAIA applications.

#### **THE NATURE OF THIS APPLICATION AND THE RELIEF SOUGHT**

- 7 SAHA brings this application in terms of section 78(2) read with section 82 of PAIA in response to the Reserve Bank's refusal of access to the records requested.
- 8 The records requested are as follows:

*"Copies of any and all records, or parts of records obtained by the Reserve Bank at any time, as evidence of investigations of abuses of the financial rand from the time of its introduction from 1 September 1985 to the time it was abolished in March 1995."*

- 9 SAHA lodged its request in the prescribed form on 1 August 2014 ("the request"). A copy of the request is attached hereto marked "**CMK2**." This request is one of a series of six requests which SAHA made to the Reserve Bank on 1 August 2014 ("the 2014 requests"). All of the 2014



requests relate primarily to abuses of the financial rand, corruption and foreign exchange transactions under apartheid, including loans and permissions for transfer of funds outside the country.

- 10 SAHA requested the records at issue in the present application, after consulting with the Open Secrets project, a group of South African researchers based in Cape Town who are in the process of collecting and analysing apartheid era archival material for the purpose of a book that will focus on procurement practices and public accountability during apartheid (an under-researched area of work). The records fall within the scope of the information which SAHA routinely archives and makes available to the public.
- 11 In September 2013, SAHA had made other requests for information which were refused by the Reserve Bank ("the 2013 requests"). In refusing SAHA's 2013 requests, the Reserve Bank stated that SAHA had failed to include sufficient particulars pertaining to the information and entities referred to in the request to enable it to identify the precise records sought.
- 12 Therefore, in making its 2014 requests, including the request at issue in the present application, SAHA attempted to frame its request in as clear and concise a manner as possible in order to assist the Reserve Bank in being able to identify and source the relevant records. In relation to the present request, for example, SAHA seeks only evidence obtained as part of investigations into abuses of the financial rand over a 10 year

period whereas the 2013 request asked more broadly for all records relating to any foreign exchange fraud investigations over a 15 year period.

- 13 Notwithstanding this, the Reserve Bank failed to respond to the request. This results in a statutory deemed refusal, which has necessitated the bringing of this application.
- 14 Separate applications have been launched in respect of each of the six requests dated 1 August 2014 made by SAHA to the Reserve Bank. SAHA will if appropriate, and depending in part on the responses of the Reserve Bank, seek to have these applications consolidated or heard together.

#### **JURISDICTION**

- 15 I am advised and submit that this Court has jurisdiction to hear this application by virtue of the definition of "court" in section 1 of PAIA, which provides that court includes the High Court within whose area of jurisdiction the requester is domiciled or ordinarily resident.
- 16 Moreover, this Court has jurisdiction to hear this matter by virtue of section 82(2) of PAIA which provides that the court hearing an application of the present sort may grant any order that is just and equitable including orders:

*“(a) confirming, amending or setting aside the decision which is the subject of the application concerned;*

*(b) requiring from the information officer or relevant authority of a public body or the head of a private body to take such action or to refrain from taking such action as the court considers necessary within period mentioned in the order;*

*(c) granting an interdict, interim or specific relief, a declaratory order or compensation;*

*(d) as to costs; or*

*(e) condoning non-compliance with the 180-day period within which to bring an application, where the interests of justice so require.”*

17 Clause 6.3 of the Reserve Bank PAIA Manual, which is compiled pursuant to section 14 of PAIA, states that it does not provide for any internal appeal procedures. Therefore no additional internal remedies exist that need to be exhausted before the institution of these proceedings. I attach a copy of Clause 6.3 of the Reserve Bank's PAIA manual marked "CMK3<sup>1</sup>."

18 I am advised and submit that accordingly, SAHA is entitled to bring this application in terms of section 78(2) read with section 82 of PAIA.

19 In this affidavit I address the following issues in turn:

19.1 An overview of the objectives and functions of SAHA;

<sup>1</sup><https://www.resbank.co.za/Lists/News%20and%20Publications/Attachments/4882/South%20African%20Reserve%20Bank%20Manual.pdf>

19.2 The importance of the right of access to information and the role of PAIA in giving effect to the constitutional right;

19.3 The factual background to this application;

19.4 The Reserve Bank's refusal to grant access to the records concerned, and why there is no basis in law for such refusal; and



19.5 The public interest in the disclosure of the records.

20 Before doing so, I point out that SAHA has throughout its interactions with the Reserve Bank attempted to avoid litigation and to assist the Reserve Bank in making the records accessible. To this end,

20.1 SAHA decided to lodge a fresh request in light of the Reserve Bank's complaints that SAHA's 2013 requests were overbroad and unclear.

20.2 On 26 September 2014, SAHA wrote to the Reserve Bank stating that it was willing to send researchers to the Reserve Bank to inspect the records in order to assist the Reserve Bank in identifying the records requested and to enable SAHA further to narrow its requests if necessary. I attach a copy of this letter marked "CMK4."

20.3 Notwithstanding the fact that SAHA is not required by PAIA to provide reasons to a public body such as the Reserve Bank for its request for access to the records concerned, when asked, it provided the Reserve Bank with an explanation of the nature of

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the work that SAHA does and why it had requested the specific records concerned. This is also clear from annexure CMK3.

- 21 Notwithstanding the above, the Reserve Bank has failed to comply with its obligations under PAIA, and ultimately failed even to provide a response to SAHA's request. This results in a deemed refusal of the request in terms of section 27 of PAIA.
- 22 In the circumstances, SAHA has no recourse but to approach this Court for relief.

#### **THE OBJECTIVES AND FUNCTION OF SAHA**

- 23 SAHA's founding objectives are to preserve, collect and catalogue materials of historic, contemporary, political, social, economic and cultural significance, and to encourage the accessibility of such materials to the public as a whole. I attach a copy of SAHA's trust deed marked "CMK5".
- 24 SAHA is an independent NGO dedicated to documenting and providing access to archival holdings that relate to past and contemporary struggles for justice in South Africa. SAHA was established in the late 1980's by anti-apartheid activists. Its founding mission was to promote the recapturing of South Africa's lost and neglected history and to record history in the making. Further, SAHA aims to document, support and promote awareness of past and contemporary struggles for justice



through archival practices and outreach, and the utilisation of access to information laws.

- 25 SAHA launched its Freedom of Information Programme (FOIP) in 2001. FOIP is dedicated to using PAIA as a method to test and extend the boundaries of freedom of information in South Africa. This programme further seeks to create awareness of, compliance with and use of PAIA.
- 26 Since 2001, SAHA has made over 1800 requests for information from various government departments. It has made numerous applications to the High Court arising out of refusals of such requests. SAHA has further intervened as *amicus curiae* in a number of PAIA applications.
- 27 SAHA has developed a comprehensive capacity training programme for NGOs and community based organisations on using PAIA. It has further developed resource kits, workshop guides, PAIA case study DVDs, and a dedicated online management system for the submission and monitoring of PAIA requests made by members of the PAIA Civil Society Network, a network of civil society organisations that collaborate to improve the implementation and usage of PAIA and create awareness about the Act. SAHA has also trained hundreds of activists, students, community members, NGO members, attorneys and paralegals in the use of PAIA.
- 28 The request for access to the records concerned was made in this context.

## THE IMPORTANCE OF THE CONSTITUTIONAL RIGHT OF ACCESS TO INFORMATION AND THE ROLE OF PAIA IN GIVING EFFECT TO THE RIGHT

29 Section 32 of the Constitution establishes a right of access to information held by both public and private bodies. It states that:

*"(1) Everyone has the right to have access to*

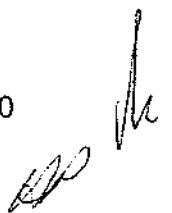
*a) any information held by the State; and*

*b) any information that is held by another person that is required for the exercise or protection of any right.*

*(2) National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the State."*

30 PAIA is the national legislation envisaged in section 32(2) of the Constitution. It was enacted in order to give effect to the right of access to information and to promote the values of openness, transparency, accountability and good governance – principles which are foundational to the Constitution.

31 The preamble of PAIA records that the system of government in South Africa before 27 April 1994 *"resulted in a secretive and unresponsive culture in public and private bodies which often led to an abuse of power and human rights violations"*. The preamble states that PAIA is enacted to *"foster a culture of transparency and accountability in public and private bodies by giving effect to the right of access to information"*.



32 Section 9(e) of PAIA describes as its object, *inter alia*, the promotion of:

*"... transparency, accountability and effective governance of all public and private bodies by including, but not limited to, empowering and educating everyone*

*(i) to understand their rights in terms of this Act in order to exercise their rights in relation to public and private bodies;*

*(ii) to understand the functions and operation of public bodies;*

*(iii) to effectively scrutinise... decision-making by public bodies that affects their rights."*

33 Public bodies are under a duty to provide access to a requested record, or part of it, unless refusal of the request is permitted or required by one or more of the grounds listed in PAIA. More specifically, section 11(1) of PAIA provides that a requester must be given access to a record held by a public body if the requester complies with all the procedural requirements in the Act and no valid ground for refusal in terms of Chapter 4 of PAIA is applicable. Notably, section 11(3) provides:

*"(3) A requester's right of access contemplated in subsection (1) is, subject to this Act, not affected by-*

*(a) any reasons the requester gives for requesting access; or*

*(b) the information officer's belief as to what the requester's reasons are for requesting access."*

34 Every request for access to information in terms of PAIA is an invocation of the section 32 right in the Constitution, and entitles the requester to access to the requested record, or part thereof, if that requestor complies with all the procedural and statutory requirements set out in the statute, unless there is a valid ground of refusal on which the private or public body may rely.

35 The Constitutional Court has repeatedly made clear that the right of access to information is fundamental to the realisation of the other rights guaranteed in the Bill of Rights.

#### **THE RESERVE BANK IS A PUBLIC BODY FOR PURPOSES OF PAIA**

36 I am advised and submit that the Reserve Bank is a public body for purposes of PAIA. A public body is defined in section 1 of PAIA as:

*“(a) any department of state or administration in the national or provincial sphere of government or any municipality in the local sphere of government; or*

*(b) any other functionary or institution when-*

*(i) exercising a power or performing a duty in terms of the Constitution or a provincial constitution; or*

*(ii) exercising a public power or performing a public function in terms of any legislation”*

37 I am advised and submit that the Reserve Bank is a public body in terms of paragraph (b) of the definition of “public body” in section 1 of PAIA.

- 38 This is so because the Reserve Bank is established by the Constitution and exercises its powers and performs its duties in terms of the Constitution; and it is governed by the South African Reserve Bank Act, in terms of which it exercises public power and performs a public function. The Act describes the primary objective of the Bank in section 3 as being to "*protect the value of the currency of the Republic in the interest of balanced and sustainable economic growth in the Republic.*"
- 39 The Bank's PAIA manual describes its functions as including the formulation and implementation of monetary policy in such a way that the primary goal of the Reserve Bank will be achieved in the interests of South Africa. The Bank also has responsibility for ensuring that the South African money, banking and financial system as a whole is sound. I attach a copy of the relevant portions of the manual marked "CMK6<sup>2</sup>."
- 40 These self-described responsibilities make clear that the Bank performs a public function. It is therefore clearly an institution *exercising a public power or performing a public function in terms of legislation.*
- 41 The Reserve Bank acknowledges it is a public body by publishing a PAIA manual in terms of section 14 of PAIA and including a request form for records requested from public bodies in the Manual.

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<sup>2</sup><https://www.resbank.co.za/Lists/News%20and%20Publications/Attachments/4882/South%20AFRican%20Reserve%20Bank%20Manual.pdf>

## THE FACTUAL BACKGROUND TO THIS APPLICATION

- 42 As stated above, the request (“**CMK2**”) was made on 1 August 2014.
- 43 No response to the request was received from the Reserve Bank within the 30 day period contemplated by section 25 of PAIA nor was a response received to three subsequent automated email reminders sent to the Reserve Bank.
- 44 On 30 September 2014, SAHA emailed the Reserve Bank indicating that it had failed to respond to the request and that SAHA wished to lodge an internal appeal. A copy of the email is attached marked “**CMK7**.”
- 45 In response, the Reserve Bank’s legal representatives stated by email that the Reserve Bank does not have an internal appeal procedure. I attach a copy of this email marked “**CMK8**”.
- 46 SAHA did not receive any further communication from the Reserve Bank in relation to the 2014 request.
- 47 However, on 2 December 2014 the Reserve Bank’s legal representatives wrote to SAHA responding to its 2013 request. I attach a copy of the letter marked “**CMK9**.” In that letter, the Reserve Bank stated that:
- 47.1 The 2013 requests had been refused.

47.2 Section 33 of the Reserve Bank Act prohibits disclosure of any information relating to the affairs of a bank (including decisions by banks pertaining to the transfer of funds for purposes of foreign exchange), the shareholders of a bank or the clients of a bank. It was therefore precluded from disclosing the information requested.

47.3 The duty of confidentiality owed by the Reserve Bank to its clients justifies the refusal of access, as contemplated by section 5 and section 37(1) of PAIA.

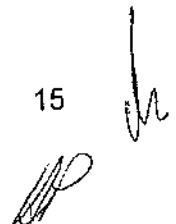
47.4 Section 34(1), 36 and 42 of PAIA are also grounds justifying the refusal of access to the records requested.

47.5 The provision of access to the records would unreasonably and substantially divert the Reserve Bank's resources as the records comprise hundreds of thousands of pages.

**THERE IS NO BASIS FOR THE RESERVE BANK'S REFUSAL OF ACCESS**

48 In failing to respond at all to the 2014 request, the Reserve Bank appears to have taken a conscious decision to ignore its obligations under PAIA.

49 I submit that all public bodies have an obligation to provide access to records requested unless they can validly rely on a ground of refusal enumerated in the statute.

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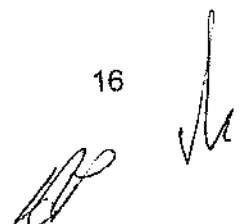
50 It is not clear whether the Reserve Bank relies on its grounds of refusal of the 2013 request, as justification for its refusal of the request at issue in this application (the 2014 request). The Reserve Bank's failure to respond at all to the 2014 request makes it impossible for SAHA to know with certainty what are the reasons why it refused the 2014 request, and to address those reasons in this application. I therefore invite the Reserve Bank, if it persists in its refusal, to indicate to this Court the grounds on which it refuses access to the records concerned, and also to explain its failure to disclose those grounds to SAHA from the outset. I reserve the right to amplify this application once the Reserve Bank has (for the first time) stated why it has refused the (2014) request.

51 I wish to point out the following about the records requested:

51.1 In drafting the 2014 request, SAHA was careful to be as specific and concise as possible in an effort to deal with the difficulties identified by the Reserve Bank in response to the 2013 requests.

51.2 The present request therefore spans a clearly defined period of ten years and relates only to records of investigations conducted into abuses of the financial rand during that period.

52 I wish to make certain preliminary submissions before I address the detail of the grounds of refusal of the 2013 request.

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- 53 First, I submit that the Reserve Bank is not entitled to rely on generalised assertions of the reasons for refusal, which amount to little more than a recitation of the terms of the relevant statute.
- 54 Second, I point out that the mere fact that the records requested might possibly contain confidential information of a third party does not absolve the Reserve Bank of the obligation to respond to the request, and to engage in a third party notification process in terms of section 47 of PAIA before deciding whether to refuse or grant the request.
- 55 In what follows, I briefly address the grounds relied on by the Reserve Bank in its 2 December 2013 letter in which it refused access to the records requested in the 2013 request, to the extent that the Reserve Bank may rely on those grounds in these proceedings.

***Section 33 of the Reserve Bank Act***

- 56 One of the provisions upon which the Reserve Bank relied in its 2 December 2014 letter, is section 33 of the Reserve Bank Act. In this regard I say the following:

56.1 Section 33 of this Act is aimed principally at ensuring confidentiality on the part of Reserve Bank directors, officers and employees. It is not a prohibition directed at the Reserve Bank itself. I am advised and submit that in any event, this general statutory prohibition (enacted in 1989 under the pre-Constitutional regime) cannot and does not override PAIA, which is legislation

which gives effect to a Constitutional right, and which governs access to information and the circumstances in which such access may and/or must be granted to a requester.

56.2 In this regard, I point out that section 5 of PAIA provides:

*"This Act applies to the exclusion of any provision of other legislation that-*

- (a) prohibits or restricts the disclosure of a record of a public body or private body; and*
- (b) is materially inconsistent with an object, or a specific provision, of this Act."*

57 I submit that section 33 of the Reserve Bank Act is a provision which prohibits or restricts the disclosure of a record of the Reserve Bank. To the extent that it has the consequence for which the Reserve Bank contends, it is materially inconsistent with an object of PAIA. PAIA therefore applies to the exclusion of section 33.

### **Section 45 of PAIA**

58 The Reserve Bank relied on section 45 of PAIA in justifying its refusal of access to the records requested in the 2013 requests. Section 45 provides:

*"The information officer of a public body may refuse a request for access to a record of the body if-*

- (a) the request is manifestly frivolous or vexatious; or*

(b) *the work involved in processing the request would substantially and unreasonably divert the resources of the public body.*"

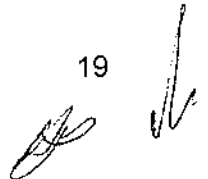
59 Any suggestion that providing access to the records presently requested would involve a substantial and unreasonable diversion of the Reserve Bank's resources is without merit. The mere fact that a request involves a large number of records does not render it unreasonable. The Reserve Bank is unwilling to disclose even one of the records requested. This strongly suggests that the volume of the records is in any event not the dominant reason or a material reason for the refusal.

60 I submit that to the extent that the Reserve Bank continues to rely on section 45 of PAIA, such reliance is without merit.

### **Section 36 of PAIA**

61 The Reserve Bank relied on section 36(1)(b) of PAIA as a ground of refusal in relation to the 2013 requests. Section 36(1)(b) refers to the potential for harm arising where the information requested involves "*financial, commercial, scientific or technical information*" the disclosure of which is likely to cause harm to the commercial or financial interests of a third party. In this regard I say the following:

61.1 I submit that in order to rely on this ground of refusal, the Reserve Bank is required to identify and explain, by reference to facts rather than a generalised assertion,



61.1.1 whether the information requested involves one or all of the types of information listed in the section (financial, commercial, scientific or technical),

61.1.2 the type of harm that may occur as a result of disclosure, and

61.1.3 the likelihood of that harm in fact arising should disclosure be made to SAHA.

61.2 If the Reserve Bank carried out this exercise in relation to the records concerned, and a likelihood of harm was found to be present, it would then be required to undertake an assessment of whether any kind of redaction or severance in terms of section 28 of PAIA would remove the risk of harm resulting to any third party. It has plainly not done so. Instead, it made a blanket refusal.

62 In the circumstances, I am advised and submit that the Reserve Bank may not validly rely on section 36 of PAIA for its refusal of access to the records requested.

### ***Section 34(1) of PAIA***

63 The Reserve Bank relied on section 34(1) of PAIA in justifying its refusal of access to the 2013 requests. This section provides:

*“Subject to subsection (2), the information officer of a public body must refuse a request for access to a record of the body if its disclosure would involve the unreasonable disclosure of*

*personal information about a third party, including a deceased individual."*

- 64 In the present case, there is no indication that the Reserve Bank has considered or applied section 34(2)(a) of PAIA, which states that a record containing personal information about a third party may not be refused in so far as it consists of information about an individual who has consented in writing in terms of section 48 of PAIA (or otherwise) to its disclosure to the applicant. Nor is there any indication that the Reserve Bank considered the definition of "*personal information*" in PAIA which excludes persons that have been deceased for more than 20 years. This is clearly a relevant consideration in light of the age of some of the records requested.
- 65 Section 47(1) of PAIA states that an information officer who is considering a record under section 34(1) of PAIA must take all reasonable steps to inform a third party to whom the record relates of the PAIA request. There is also no evidence that this has been done.
- 66 If the appropriate notices to third parties had been sent, then there is a reasonable likelihood that some, or all, of the requested records might have been released by consent under section 34(2)(a) of PAIA. Not following this process is a clear breach of the requirements of PAIA.
- 67 Moreover, to the extent that some of the personal information concerned is that of an official of a public body, section 34(2)(f) of PAIA provides that a record containing personal information about a third party may not

be refused insofar as it consists of information about an individual who is, or was, an official (that is, an employee) of a public body where the information relates to the position or functions of the individual in that capacity.

68 The Reserve Bank would also have to have considered this possibility before it could validly rely on section 34(1) of PAIA in refusing access to the records requested.

***No consideration of severance under section 28 of PAIA***

69 There is no evidence that the Reserve Bank ever considered whether any part of a record could be released, a requirement contained in section 28 of PAIA.

70 Section 28 of PAIA provides that information must be disclosed where information that may or must be refused can reasonably be severed from any part that does not contain information that may or must be refused. The requirement to sever offending information where reasonably possible is peremptory.

71 Any concerns with confidentiality owed to third parties may well have been appropriately addressed through severance, had the Reserve Bank considered this as part of its assessment of the request. Instead, it merely ignored the request and effectively refused access not only to

every one of the requested records, but also to the every part of every one of the requested records.

72 I submit that it is inconceivable that every part of every one of the records is excluded by PAIA from disclosure. I invite the Reserve Bank, if it contends that this is the case, to produce evidence on affidavit by the person(s) who considered each of the requested records and concluded that no part of any one of them could or should be disclosed.

***The duty of confidentiality to clients of the Reserve Bank***

73 In its letter of 2 December 2013, the Reserve Bank asserted that the duty of confidentiality which it owes to its clients justifies the refusal of access, as contemplated by section 5 and section 37(1) of PAIA.

74 I submit that this ground of refusal is fundamentally misconceived:

74.1 The Reserve Bank was the regulatory authority with regard to the financial rand. When it received applications and gave approvals, and when it monitored the financial rand system, it did not do so on behalf of clients. It did so in its capacity as regulatory authority. The records which it received were therefore not received on behalf of clients of the Reserve Bank, and no question of client confidentiality can arise.

74.2 When the Reserve Bank carried out its investigations into abuses of the financial rand, collecting evidence of such abuses, it was not doing so on behalf of a client of the Reserve Bank. The

records which it obtained in the course of that investigation cannot be subject to client confidentiality.

75 I submit that section 37(1) of PAIA, dealing with potential actions for a breach of confidence, is of no application in this context. I submit that the Reserve Bank does not bear a general duty of confidence to third parties when it carries out its regulatory functions.

76 The Reserve Bank appears, in its reliance in this context on section 5 of PAIA, also to have misconceived the import of that section. I submit that section 5 does not mean, as the Reserve Bank appears to contend, that if other legislation restricts disclosure and is materially inconsistent with the objects and provisions of PAIA, it overrides PAIA. I submit that precisely the opposite is the case.

#### **THE PUBLIC INTEREST OVERRIDES**

77 In any event, even if there were a valid ground for refusing the request for information concerned, which I deny, I am advised and submit that the public interest in the information clearly outweighs any interest advanced for refusing access to the records.

78 Section 46 of PAIA provides:

*“Despite any other provision of this Chapter, the information officer of a public body must grant a request for access to a record of the body contemplated in section 34(1), 36(1), 37(1)(a) or (b), 38(a) or (b), 39(1)(a) or (b), 40, 41(1)(a) or (b), 42(1) or (3), 43(1) or (2), 44(1) or (2) or 45, if-*



*(a) the disclosure of the record would reveal evidence of-*

*(i) a substantial contravention of, or failure to comply with, the law; or*

*(ii) an imminent and serious public safety or environmental risk; and*

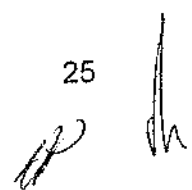
*(b) the public interest in the disclosure of the record clearly outweighs the harm contemplated in the provision in question."*

79 This general override provision is mandatory and does not vest any discretion in the information officer.

80 In other words, even if any one of the grounds of refusal relied upon in by the Reserve Bank in respect of the 2013 request was validly applicable to records referred to in the 2014 request, the Reserve Bank was nevertheless required to make the records available in the public interest. There is no evidence that the respondents considered adequately or at all, the question of the public interest contemplated in section 46 of PAIA.

### ***The Public Interest in disclosure***

81 The contents of the records are of profound public interest and importance. They form records which are relevant to past and contemporary struggles for justice in South Africa within the state banking and financing regime and are likely to reveal evidence of gross human rights violations, amounting in some instances to substantial

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contraventions of the law and in some, even to outright failures to comply with the law.

82 In many instances, the Reserve Bank is with some certainty the only institution which holds the documents requested. The Truth and Reconciliation Commission (TRC) established that a large volume of state records, particularly within the security cluster of state departments, were destroyed at the end of apartheid. It argued that all South Africans were harmed by this as "a disclosure of the past [had] been deliberately curtailed".<sup>3</sup> The Reserve Bank may in some of those instances, too, now be the sole institution to hold an important account of South Africa's history. Disclosure of the documents is therefore central to the universal principles of the right to truth and the right of access to information, and therefore in the public interest.

83 The principle of the right to truth is fundamental to challenging impunity. It is essential to ensuring that all human rights violations, including economic crimes, are not repeated. The mass destruction of records and the relative silence within the political establishment on issues related to economic crime at the end of apartheid has proven a major stumbling block to the right to truth. Very little detail is publicly known about economic crime that took place in the final decades of apartheid. While the pervasive culture of state secrecy at the time gave context to the gross violations of human rights, it also limited the flow of information

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<sup>3</sup> The South African Truth and Reconciliation Report, Volume 5, Findings and Recommendations, 1998, 226

and favoured a culture of censorship and large-scale secrecy within the public and private sector.

- 84 The corporations which have been individually named include most of the largest and most influential listed and unlisted private companies during the height of the sanctions period (1980's). This of course does not of itself suggest their involvement in malfeasance. Disclosure will create an opportunity to test how they operated at a time of heightened political and economic secrecy, and whether any of those activities were outside the ambit of the law of the time (or of today), under both national and international law.
- 85 The individuals who are named were all either found guilty of a crime or often linked in the media to an aspect of economic crime or sanctions busting. Many of these individuals either worked for the apartheid state or allegedly provided services such as facilitating the circumvention of United Nations sanctions.
- 86 At various times the v of large sums of money abroad as been illegal<sup>4</sup> Nevertheless, estimates of capital flight run to tens of billions of dollars, including through manipulation of the financial rand mechanism, which saw different exchange rates offered for different types of transactions.<sup>5</sup> Foreign investment was done according to the financial rand rate (which

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<sup>4</sup> Van Vuuren, H. 2006. *Apartheid grand corruption - assessing the scale of crimes of profit from 1976 to 1994: A report prepared by civil society in terms of a resolution of the Second National Anti-Corruption Summit for presentation at the National Anti-Corruption Forum, May 2006*. Pretoria: Institute for Security Studies: 62.

<sup>5</sup> *ibid*, 66-68.

was supposed to incentivise investment), while transfers of goods and services were done at the commercial rand rate (which was thus supposed to be protected from volatility).<sup>6</sup> This divergence allowed for the fraudulent “round tripping” of money, generating massive profits.<sup>7</sup> One estimate of the total value of the financial rand market had it as between R141 billion and R204 billion at year-end 1993,<sup>8</sup> or between about R450 billion and R650 billion at modern rand values.

87 While some abuses of the financial rand were investigated during apartheid and reported on in the media, this took place in an environment of pervasive state secrecy, censorship and overt political repression. There has been no proper accounting of this practice since the advent of the new political order in 1994 and this issue did not receive a full airing in the TRC process.

88 The result of withholding this information is to limit the public interest in the following manner:

88.1 *The public have been denied access to significant information:*  
Very little is known of the nature and extent of practices such as illegal sanctions busting and oil and weapons procurement by both the public and private sector. Most of these practices were criminalised by international instruments (for example UN Security Council Resolutions) and reflected in domestic law by a number of

<sup>6</sup> Buhlungu Sakhela et al, Eds, 2006, *State of the Nation South Africa 2005-2006*: 367.

<sup>7</sup> See e.g. <http://mg.co.za/article/1996-10-18-judgment-day-for-king-of-roundtripping>.

<sup>8</sup> Jonathan Garner, 1994, An analysis of the financial rand mechanism, *Centre for Research into Economics and Finance in South Africa*, Research Paper no. 9: iv.

South Africa's trading partners. It is unclear how much illegal profiteering, foreign exchange control violation, money laundering and corruption was facilitated by such transactions. Many of these practices were criminal even in terms of the laws of the apartheid state.

- 88.2 *The public have a limited understanding of the impact of such practice:* Greed, venality and corruption are informed by the activities of networks that are found in all societies, throughout human history. South Africa is no exception in this regard. Where access to information concerning the nature and legacy of such networks under apartheid is denied, this limits the democratic transformation of the state and our society. South Africa is a newly democratic society grappling with the implementation of a Constitutional vision of transparency and accountability. Hidden histories serve the interests of the powerful and the connected and undermine democratic consolidation. In the case of South Africa there are complex ties that bind the country's elite networks in politics and business. Where there is greater transparency and access to information, this enables informed research to take place. This better helps us better to understand our present and ensure that criminal practices such as corruption do not continue to shape our future.
- 89 A nation that has understanding of its past is better placed to avoid repeating the mistakes of the past. In this context, the importance for

the people of South Africa to have access to these state documents cannot be overemphasised.

## SECTION 80 OF PAIA

90 Section 80(1) of PAIA makes provision for what our courts have termed "a judicial peek". It provides:

*"Despite this Act and any other law, any court hearing an application, or an appeal against a decision on that application, may examine any record of a public or private body to which this Act applies, and no such record may be withheld from the court on any grounds."*

91 Should this Court wish to examine the records concerned with a view to determining whether there is any basis for refusing access to the records concerned, it is empowered to do so *mero motu*.

92 I submit that a "judicial peek" would be appropriate if there are any material disputes of fact as to what the records contain.

93 The Reserve Bank's failure to provide any reasons or facts to justify its refusal of access has made it impossible for SAHA to engage further with the facts in these founding papers. SAHA reserves its rights to deal in reply with any such facts and reasons which the Reserve Bank provides in answer to this application.


**CONCLUSION**

94 For all the reasons set out in this affidavit, I am advised and submit that:

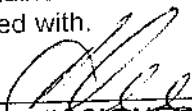
94.1 The respondents have failed to give effect to their constitutional obligations and their obligations under PAIA; and

94.2 There is no justifiable basis for the refusal of access to the information requested.

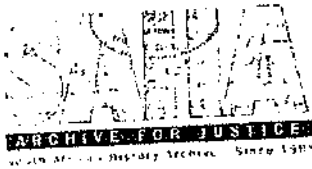
95 In the circumstances, I ask this Honourable Court for an order in terms of the notice of motion.

  
\_\_\_\_\_  
CATHERINE MOIRA KENNEDY

I hereby certify that the deponent stated that she knows and understands the contents of this affidavit, and that it is to the best of her knowledge both true and correct. This affidavit was signed and sworn to before me at SANDTON on this the 14<sup>th</sup> day of APRIL 2015. The Regulations contained in Government Notice R.1258 of 21 July 1972, as amended, have been complied with.

  
\_\_\_\_\_  
COMMISSIONER OF OATHS  
Full names: *A du Plessis*  
Address: *Constitution Hill*  
Capacity: *Attorney*

COMMISSIONER OF OATHS  
Annelie Du Plessis  
Attorney  
ProBono.Org  
1st Floor West Wing  
Women's Jail  
Constitution Hill  
1 Kotze Street  
Braamfontein



**RESOLUTION BY THE TRUSTEES OF THE SOUTH AFRICAN HISTORY ARCHIVES TRUST**  
*Pursuant to clause 9.6 of the Deed of Trust*

It is resolved that:

1. The South African History Archive Trust ("SAHA") will launch applications in its own name in the High Court of South Africa, Johannesburg, challenging various compliance issues under the Promotion of Access to Information Act, 2000 ("PAIA") including relating to certain provisions around application of exemptions, providing adequate reasons, searches for records and obligations to respond to PAIA requests submitted in consultation with researchers, including Mr Hennie van Vuuren and Professor Jane Duncan.
2. That Lawyers for Human Rights Pretoria Law Clinic be appointed to act as attorneys of record and represent SAHA in the proceedings to be instituted against respondents to be confirmed and that the said attorneys do all things necessary in the application on behalf of SAHA.
3. That Catherine Moira Kennedy be authorised to depose to such affidavits in the said proceedings on behalf of SAHA, as may be required and further Catherine Moira Kennedy be authorised to give instructions from time to time as she may deem necessary to the said attorneys in relation to the proceedings.

Signed on this the 27th day of September 2014.

TRUSTEE	SIGNATURE	DATE
VERNE HARRIS ID: 5804215085085		30/9/2014
SELLO HATANG ID: 7504285846089		27/09/2014
HORST KLEINSCHMIDT ID: 4510175466089		28.11.2014
ANTHONY MANION ID: 7604135132084		27/09/2014
MN NIEFTAGODIEN ID: 6410225158083		27/09/14

Box 31719, Braamfontein 2017, Johannesburg - Tel: +27 (0) 11 718 2560 - Fax: +27 (0) 865 001 600 - Email: info@saha.org.za - www.saha.org.za

Trustees: D Ntsebeza (Chairperson), L Callinicos, V Harris, S Hatang, H Kleinschmidt, MN Niefertagodiën, P Pigo, M Powell, C Rassool, R Saleh, A Manion (ex officio)  
 Non-Profit Trust No. 2522/93 - 031-807-NPO





TRUSTEE	SIGNATURE	DATE
DUMISA NTSEBEZA ID: 4910315121083		01/10/2014
PIERS PIGOU ID: 6705305221184		27 Sep 2014
MARLENE POWELL ID: 5907270095087		27 Sep 2014
CIRAJ RASSOOL ID: 6112275648084		28 SEPT 2014
RAZIA SALEH ID: 6208080199089		27 Sep 2014
SPIRIDOULA WEBSTER (also known as Luli Callinicos) ID: 3611100106088		2 December 2014

Box 31719, Braamfontein 2017, Johannesburg - Tel: +27 (0) 11 718 2560 - Fax: +27 (0) 863 001 600 - Email: info@saha.org.za - [www.saha.org.za](http://www.saha.org.za)

Trustees: D Ntsebeza (Chairperson), L Callinicos, V Harris, S Hatang, H Kieenschmidt, MN Ntsebeza, P Pigou, M Powell, C Rassool, R Saleh, A Manion (ex officio)

Non-Profit Trust No. 2522/93 - 031-807-NPO

**FORM A**  
**REQUEST FOR ACCESS TO RECORD OF PUBLIC BODY**  
 (Section 18 (1) of the Promotion of Access to Information Act, 2000  
 (Act No. 2 of 2000))  
 [Regulation 2]

<b>FOR DEPARTMENTAL USE</b>		Reference number: _____
Request received by _____		
(state rank, name and surname of information officer/deputy information officer) on		
_____ (date) at _____ (place).		
Request fee (if any):	R.....	
Deposit fee (if any):	R.....	
Access fee:	R.....	
		_____ SIGNATURE OF INFORMATION OFFICER/DEPUTY INFORMATION OFFICER

**A. Particulars of public body**

The Chief Deputy Information Officer: Dr Johan de Jager  
 Legal Services Department  
 South African Reserve Bank  
 PO Box 427  
 Pretoria South Africa 0001

Telephone: +27123133596  
 Fax: +27123134090  
 Email: [Johann.DeJager@resbank.co.za](mailto:Johann.DeJager@resbank.co.za)



**B. Particulars of person requesting access to the record**

- a) *The particulars of the person who requests access to the record must be recorded below.*
- b) *Furnish an address and/or fax number in the Republic to which information must be sent.*
- c) *Proof of the capacity in which the request is made, if applicable, must be attached.*

**Full names and surname:** South African History Archive (SAHA)  
**Identity/Passport number:** Non-Profit Trust No. 2522/93  
**Postal address:** P.O.Box 31719, Braamfontein, 2017  
**Fax number:** +27866491491  
**Telephone number:** +27117182563  
**E-Mail Address:** [foip@saha.org.za](mailto:foip@saha.org.za)

**SAHA Reference:** SAH-2014-SRB-0004

Capacity in which request is made, when made on behalf of another person:

**C. Particulars of person on whose behalf request is made**

*This section must be completed ONLY if a request for information is made on behalf of another person.*

Full names and surname:  
Identity number:

**D. Particulars of record**

- a) *Provide full particulars of the record to which access is requested, including the reference number if that is known to you, to enable the record to be located.*
- b) *If the provided space is inadequate please continue on a separate folio and attach it to this form. **The requester must sign all the additional folios.***

- o Description of record or relevant part of the record:

Copies of any and all records, or part of records **obtained by the Reserve Bank at any time, as evidence of investigations of abuses of the financial rand** from the time of its introduction from 1 September 1985 to the time it was abolished in March 1995.

- o Reference number, if available:
- o Any further particulars of record



**E. Fees**

- a) A request for access to a record, other than a record containing personal information about yourself, will be processed only after a request fee has been paid.
- b) You will be notified of the amount required to be paid as the request fee.
- c) The **fee payable for access** to a record depends on the form in which access is required and the reasonable time required to search for and prepare a record.
- d) If you qualify for exemption of the payment of any fee, please state the reason for exemption.

Reason for exemption from payment of fees:

**F. Form of access to record**

If you are prevented by a disability to read, view or listen to the record in the form of access provided for in 1 to 4 hereunder, state your disability and indicate in which form the record is required.

Disability: \_\_\_\_\_ Form in which record is required: \_\_\_\_\_

Mark the appropriate box with an "X".

**NOTES:**

- (a) Your indication as to the required form of access depends on the form in which the record is available.
- (b) Access in the form requested may be refused in certain circumstances. In such a case you will be informed if access will be granted in another form.
- (c) The fee payable for access to the record, if any, will be determined partly by the form in which access is requested.

**1. If the record is in printed form:**

Copy of record\*       Inspection of record

**2. If record consists of visual images:**

(this includes photographs, slides, video recordings, computer-generated images, sketches, etc).

view the images       copy of the images\*       transcription of the images\*

**3. If record consists of recorded words or information which can be reproduced in sound:**

Listen to the       transcription of soundtrack\*

soundtrack (audio cassette)

(written or printed document)

**4. If record is held on computer or in an electronic or machine? readable form:**

Printed copy of record\*

Printed copy derived from the record\*

copy in computer readable form\*(stiffy or compact disc)

YES

NO

\* If you requested a copy or transcription of a record (above), do you wish the copy or transcription to be posted to you?

**A postal fee is payable.**

*Note that if the record is not available in the language you prefer, access may be granted in the language in which the record is available.*

In which language would you prefer the record? **ENGLISH**

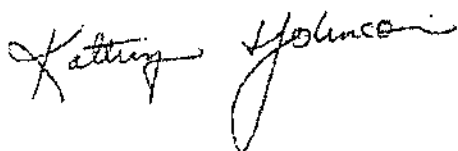
**G. Notice of decision regarding request for access**

You will be notified in writing whether your request has been approved/denied. If you wish to be informed thereof in another manner, please specify the manner and provide the necessary particulars to enable compliance with your request.

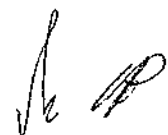
How would you prefer to be informed of the decision regarding your request for access to the record? **In writing, preferably by email.**

Signed at Johannesburg this 1st day of August 2014.

SIGNATURE OF REQUESTER / PERSON ON WHOSE BEHALF REQUEST IS MADE



Kathryn Johnson  
Freedom of Information Programme  
South African History Archive (SAHA)



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*South African Reserve Bank Manual*

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- if he or she wishes to be informed of the success of his or her request telephonically, in writing or any other manner;
- the capacity in which the request is made in the event the information is requested on behalf of somebody else.

6.3 **Remedies available if the provisions of the Act are not complied with**

The SARB does not have internal review or appeal procedures and the requester must approach a competent court of law in this regard.



# LAWYERS FOR HUMAN RIGHTS

Strategic Litigation Unit  
Anti-Winning Democracy Centre  
357 Visagie Street, Pretoria 0002

Tel (012) 320 2943  
Fax (012) 320 2949/7681  
Web [www.lhr.org.za](http://www.lhr.org.za)

By fax and email

Please quote our file reference: SL14/01/PTA

26 September 2014

ATT: Mr. N. Kirby  
Werksmans Attorney  
155 5<sup>th</sup> Street  
Sandton 2196

Fax: 011-535-8600  
Email: [nkirby@werksmans.com](mailto:nkirby@werksmans.com)  
Your Ref: Mr Kirby / Mr Moraitis/hk/SOUT3267.44/#3183509v1

Dear Mr. Kirby:

RE: PAIA REQUEST – SOUTH AFRICAN HISTORY ARCHIVES

1. Your letters dated 14 August 2014 and 26 August 2014 refer.
2. We apologise for the delay in responding to you.
3. In your correspondence, you requested reasons for the requests for information that were put to your clients by the South African History Archives ("SAHA"), whom we represent.
4. At the outset, we point out that we are of the view that the South African Reserve Bank ("the SARB") is a public body for purposes of the Promotion of Access to Information Act 2 of 2000 ("PAIA"). PAIA provides in section 11(3) that a requester's right of access is not affected by the reasons given for requesting access nor by the public body's belief as to what those reasons may be. Our clients are therefore not required by PAIA to provide any reasons the requests for information made under that Act. However, they are willing, in a spirit of collegiality and without conceding that SARB is a private body, to provide you with the following reasons:
  5. Our client is a non-profit, non-governmental organisation which seeks to archive and preserve records evidencing past and contemporary struggles for justice. Of particular importance to our client is ensuring public access to historical records relating to struggles for justice and to prevent the loss of such records. In this vein, our clients use the Promotion to Access to Information Act 2 of 2000 ("PAIA") as one of its primary tools to seek access to records.
  6. The principle focus of our client's work is the preservation and archiving of documents relating to struggles for justice. SAHA has historically demonstrated an interest in records relating to the work of the Truth and Reconciliation Commission ("the TRC"). In this particular case the records requested relate to your client's work in an attempt to make records relating to the work of the TRC more widely accessible (something which was a specific recommendation of the TRC itself).
  7. We deny that our client's requests were "vexatious" or aimed at "intimidating" your client. As a body with a clear responsibility to the South African public, we would expect that your client would be willing to assist in

endeavours to uncover corrupt practices which may have occurred in the years prior to our current democratic dispensation.

8. Our clients are of the view that the request falls squarely within the public interest considering the subject matter and the reasons for which it is being sought. Moreover, our client has taken steps, in so far as it was possible from the information available to them, to limit these requests. You will note that the requests are, wherever possible, limited both with respect to time periods and persons involved as well as with respect to types of records, as is apparent from each of those individual requests.
9. Further, our client is willing to send researchers, as they have done in the past in relation to PAIA requests submitted *inter alia* to the South African National Defence Force and the Companies and Intellectual Proprieties Commission, to inspect the records held by your client relating to these requests, in order to enable our client to further narrow their request.
10. We trust that the above information has satisfied your client's concerns in order to proceed and approve the request.
11. If you require any further information, please do not hesitate to contact us. We look forward to your response to our application.

Yours sincerely,  
LAWYERS FOR HUMAN RIGHTS  
Per:

P.P.   
DAVID COTE



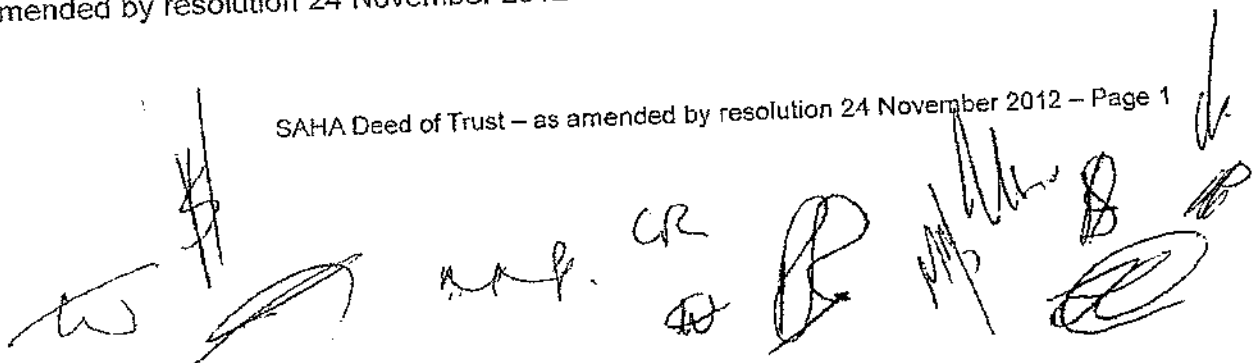


SOUTH AFRICAN  
HISTORY ARCHIVE

“SAHA”

DEED OF TRUST

Amended by resolution 28 October 2002  
Further amended by resolution 09 April 2011  
Further amended by resolution 24 November 2012



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23. ANNEXURE "B" : CURRENT TRUSTEES

1. ORIGINAL MOTIVATION

- 1.1 There is a need to collect, preserve and catalogue materials of historical and contemporary political, social, economic and culture importance.
- 1.2 There is a need to promote awareness of the importance of preserving records of contemporary events of historical significance.
- 1.3 There is a need to make the above-mentioned materials accessible to the public, to historians and to researchers.
- 1.4 There is a need to promote public awareness of recent historical events.

2. ESTABLISHMENT OF A TRUST

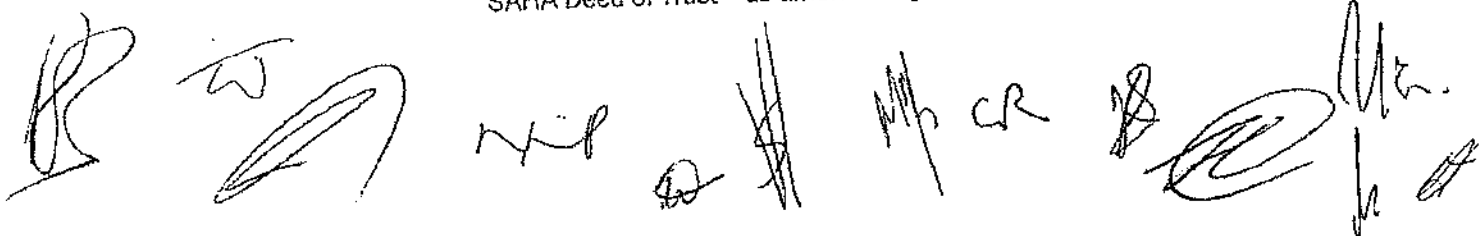
- 2.1 A trust is hereby constituted to be known as the South African History Archive ("SAHA") Trust for the purpose herein set out and otherwise on the terms and conditions of this Trust Deed.
- 2.2 SAHA is a body corporate and has an identity and existence distinct from its members and office bearers.
- 2.3 SAHA continues to exist despite changes in the composition of its trustees and director.
- 2.4 Trustees or directors have no rights in the property or other assets of the organisation solely by virtue of holding those positions.

3. OBJECTIVES OF THE TRUST

- 3.1 The main objective of the Trust is to document, support and promote greater awareness of past and contemporary struggles for justice through archival practices and outreach, and the utilisation of access to information laws.
- 3.2 It is not the objective of the Trust to make a profit or gain and the income and assets of the Trust may not be distributed to any person save for the payment of reasonable remuneration for services actually rendered in furtherance of the objects of the Trust.

4. ANCILLARY OBJECTIVES OF THE TRUST

- 4.1. In furtherance of its primary objectives the Trust shall:
  - 4.1.1 Recapture lost and neglected histories;
  - 4.1.2 Record aspects of South African democracy in the making;
  - 4.1.3 Bring history out of the archives and into schools, universities and communities

A series of approximately ten handwritten signatures in black ink, arranged horizontally across the bottom of the page. The signatures vary in style, some being more legible and others more stylized or scribbled.

- in new and innovative ways;
- 4.1.4 Extend the boundaries of freedom of information in South Africa;
  - 4.1.5 Raise awareness, both nationally and internationally, of the role of archives and documentation in promoting and defending human rights.

## 5. GALA

- 5.1 It is recorded that in 1996 SAHA established the Gay and Lesbian Archives (GALA) as a project of SAHA.
- 5.2 In 2007, GALA formed a separate and independent trust. However, the work of SAHA and GALA remains closely aligned and the organisations continue to work in close collaboration.

## 6. INTERPRETATION

In this Deed, unless the context otherwise requires, words importing the singular shall include the plural. The following expressions used in this Deed shall have the meaning hereinafter assigned to them unless the context shall clearly otherwise require:

- 6.1 "Trust Fund" : shall mean the assets or funds held and administered by the Trustees from time to time, that is to say, the Trust capital together with donations and any additions or accruals thereto, including bequests from time to time from any sources and in any form.
- 6.2 "Trust Capital" : shall mean the capital of the Trust consisting of the Trust Fund and including that part of the net income which is not distributed and is accumulated as part of the capital after deducting:
  - 6.2.1 the aggregate of the liabilities of the Trust, both actual and contingent, and
  - 6.2.2 the sum of all provisions for depreciation, renewals or diminution in value of assets or for liabilities (actual or contingent) the amount of which cannot be determined with substantial accuracy.
- 6.3 "Fund Raising Act" : shall mean the Fund Raising Act 107 of 1978 as amended from time to time.
- 6.4 "Nonprofit Organisations Act" : shall mean the Nonprofit Organisations Act 71 of 1997 as amended from time to time.
- 6.5 "Income Tax Act" : shall mean the Income Tax Act 58 of 1962 as amended from time to time.
- 6.6 "Trust" : shall mean the Trust created under this Deed of Trust.
- 6.7 "Trustees" : shall mean the signatories to this Deed as Trustees and any other persons appointed to that office in terms of this Trust Deed from time to time for so long as they hold office as such, who shall be deemed to be members of the trust for all purposes

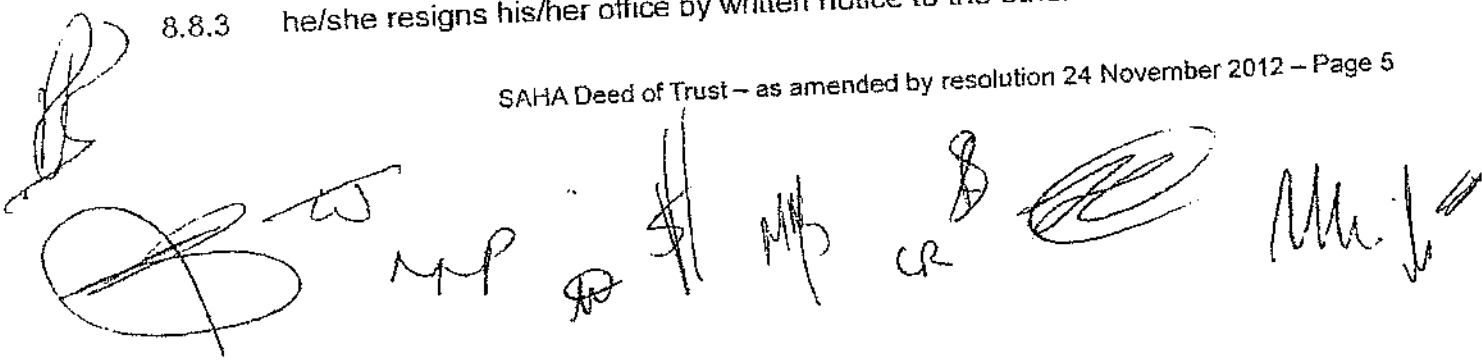
under the Fund Raising Act and the Nonprofit Organisations Act.

## 7. THE AFFAIRS OF THE BUSINESS

7.1 The affairs and business of the Trust shall be conducted from Johannesburg.

## 8. TRUSTEES PROVISIONS

- 8.1 The parties listed in Annexure A of this Trust Deed were the first Trustees of the Trust;
- 8.2 The parties listed in Annexure B of this Trust Deed are the Trustees of the Trust at the date of amendment of this Trust Deed.
- 8.3 Upon the death, permanent incapacity, removal or resignation of anyone of the Trustees, the Trustees then remaining shall, as soon as possible, appoint another Trustee to the office of Trustee, which person shall be decided upon by the remaining Trustees as they in their sole and absolute discretion may determine, it being the intention of the parties hereto that there shall always be a minimum of 5 Trustees and not more than 15 Trustees of the Trust in office. Between 2 and 4 Trustees shall serve as members of the Management Committee, as nominated by the Trustees on an annual basis.
- 8.4 Where the death, permanent incapacity, removal or resignation of one of the Trustees results in the number of remaining Trustees being less than 5, those remaining Trustees may appoint a further Trustee in the manner outlined in clause 8.3 but may take no other action in relation to the operation of the Trust until such appointment has been made, restoring the number of Trustees to at least 5;
- 8.5 The Trustees shall at any time from time to time be entitled to accept the resignation of any other Trustee;
- 8.6 The Trustees shall at any time from time to time have unlimited power of co-optation of further Trustees, subject to the maximum referred to in 8.3 above, which shall be exercised on such terms and conditions and for such period as they in their sole discretion may determine;
- 8.7 Any appointment, removal or resignation, delegation of powers or co-operation shall not be valid unless recorded in writing;
- 8.8 A Trustee shall vacate his/her office if:
- 8.8.1 he/she commits any Act of insolvency as defined in the insolvency law from time to time in force;
- 8.8.2 he/she becomes of unsound mind or is declared incapable of managing his/her own affairs;
- 8.8.3 he/she resigns his/her office by written notice to the other Trustees;

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- 8.8.4 he/she fails to attend three (3) consecutive meetings of the Trustees without the leave of the remaining Trustees;
- 8.8.4 he/she is removed from office by the decision of the majority of the remaining Trustees after he/she has been given written notice of the intention of the remaining Trustees to remove him/her and given an opportunity to address the remaining Trustees or furnish them with reasons in writing why he/she should not be removed as a trustee.

9. PROCEEDINGS OF TRUSTEES

- 9.1 A quorum for a meeting of the Trustees shall be 50 per cent of the Trustees, at least one of whom shall be a member of the Management Committee. In the event of the meeting being inquorate thirty (30) minutes after the time of commencement, it shall stand adjourned to a date which all Trustees shall be notified of in writing, but which shall be not less than seven (7) days after the date of the inquorate meeting, and at such adjourned meeting all those Trustees present shall constitute a quorum.
- 9.2 Subject to the Trustees giving effect to the terms and conditions of this Deed, administering the Trust and its affairs, they shall adopt such procedures and take such administrative steps as they shall, from time to time, deem necessary and advisable including the appointment of a management committee from amongst themselves which shall be responsible for the disbursement of monies, application by criteria for such disbursement, reporting to funders on a quarterly basis, and control an administration of activities;
- 9.3 The Trustees shall meet together for the despatch of business, adjourn and otherwise regulate their meetings as they think fit, but not less than twice a year. The date and the place of the meetings shall be as determined by the Trustees. The Chairperson shall, however, have the power to call a meeting of the Trustees when in his or her opinion circumstances justify such a step and will be obliged to do so on receipt of a written request signed by not less than three (3) Trustees specifying the business to be transacted at such a meeting. Reasonable notice will be given to Trustees of all meetings of the Trustees, which notice may be given by letter, telegram, telex, telefax, electronic mail, or orally.
- 9.4 A notice dispatched to the last address of a Trustee as made known to the Secretary of the Trust when appointed shall be valid;
- 9.5 Decisions are made by majority vote indicated by way of a show of hands;
- 9.6 A resolution in writing signed or approved by other written means, such as by email, by majority vote is valid and effectual as if it had been passed at a meeting of the said Trustees and shall be noted at the next meeting. Such a resolution is constituted at the time of the last signature or approval of the resolution and may consist of several documents in like form each signed by one or more of the Members. If a resolution is written by email, an actual signature is not required. Emails from the Trustees are sent

to the Director, who will then inform all the Trustees of the outcome of the resolution

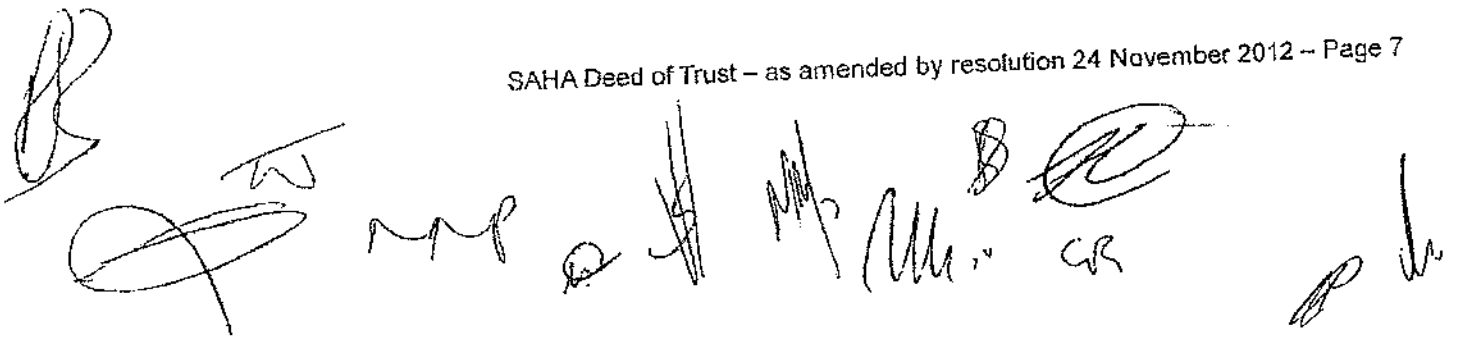
- 9.7 The Trustees shall elect from amongst their number a chairperson who shall remain in office until he/she resigns as a Trustee or as chairperson or if the remaining Trustees remove him/her from office by resolution to that effect;
- 9.8 The Director shall provide written notice to the Director of Nonprofit Organisations of the names, physical business and residential addresses of the Trustees and Director of the Trust one month after any appointment or election of such persons, even if their appointment or election did not result in any changes to the persons occupying those positions, in accordance with section 18(1)(b) of the Nonprofit Organisations Act.
- 9.9 If the chairperson is absent from any meeting the remaining Trustees shall elect a chairperson for the purposes of that meeting;

## 10 DISPENSATION OF SECURITY

- 10.1 The Trustees or any of them shall not be required to furnish security for any reason or under any circumstances whatsoever for their duties as such and accordingly no person hereby or subsequently appointed or co-opted or to whom powers are delegated shall be required to furnish security to any state or any official under the provisions of any law which may now or which may in the future be in force. Insofar as it may be necessary, the said state or other official is hereby directed to dispense with the requirement that any Trustee or subsequent Trustees shall furnish security in terms of the Trust Property Control Act or any other law.
- 10.2 If despite the provisions of clause 10.1 hereof, security is lawfully required to be furnished, then the costs of providing the same shall be borne by the Trust.

## 11 VESTING, COLLECTION, UTILISATION OF FUNDS AND CONTRIBUTIONS

- 11.1 The Trustees are hereby empowered to accept for the purposes of the Trust any gift, bequest or payment of any nature whatsoever from any person which may be given or paid to them with the intention that it form part of the Trust Fund. Any assets so accepted shall be administered and dealt with subject to the terms of this Deed of Trust. All donations of the Trust shall be irrevocable and subject to the terms and conditions of the Trust.
- 11.2 Contributions may be collected in and from any portion of the Republic of South Africa and outside its borders provided that the contributions from outside the Republic of South Africa shall be actually received in the Republic of South Africa.
- 11.3 The funds of the Trust shall be utilised solely for investment or for the objects for which it has been established.

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11.4 No portion of the income or assets of the Trust shall accrue for the benefit of the Trustees, office bearers, or their relatives or any employee but nothing herein before contained shall limit the right of the trustees to be reimbursed in respect of any reasonable expenses incurred on behalf of the Trust or to be paid a reasonable remuneration for any services rendered on behalf of the Trust including under any contract of employment.

## 12. TAX ISSUES

If the Commissioner approves SAHA as a "public benefit organisation", and for as long as such status is renewed, then the SAHA Trust will-

12.1 in the year of assessment preceding the year of assessment in which the donation is received, distribute at least 75% of its S18A (of the Income Tax Act, 1962) donations received;

12.2 issue a receipt for the donation on which the following details are provided-

12.2.1 the reference number issued by the Commissioner;

12.2.2 the name and address of the SAHA Trust;

12.2.3 the date of receipt of the donation;

12.2.4 the amount of the donation

12.2.5 the name and address of the donor;

12.2.6 a certificate to the effect that the receipt is issued for purposes of Section 18A of the Income Tax Act, 1962 and that the donation has been or will be used exclusively for the object of the SAHA Trust;

12.3 on dissolution transfer its assets to any similar approved public benefit organisations;

12.4 not accept any donation-

12.4.1 which is revocable at the instance of the donor for reasons other than a material failure to conform to the designated purposes and;

12.4.2 conditions of such donation, including any misrepresentation with regard to the tax deductibility thereof in terms of section 18A; or

12.4.3 in circumstances where a donor has imposed conditions which could enable that donor or any connected person in relation to such donor to derive some direct or indirect benefit from the application of such donation,

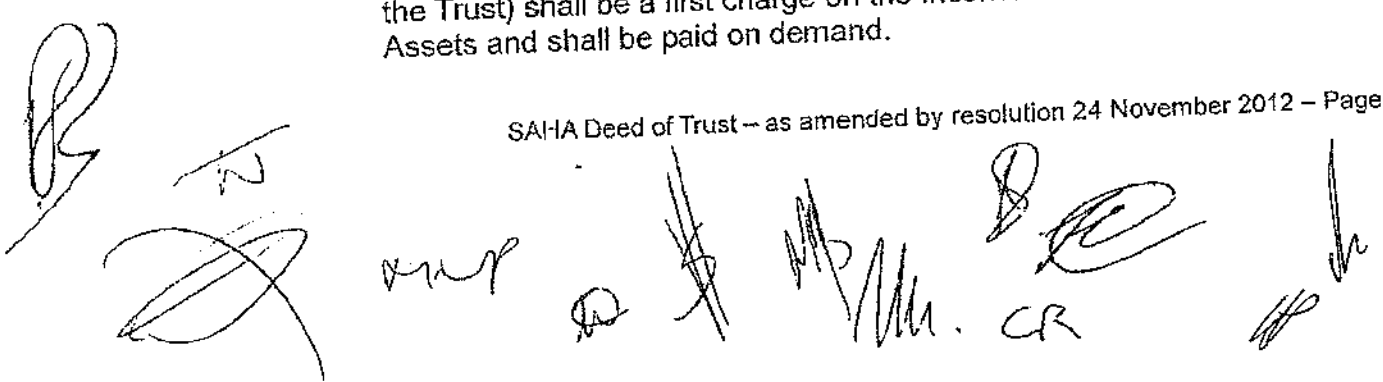
12.5 submit to the Commissioner a copy of any amendments to the Deed of Trust.



13 DUTIES OF TRUSTEES

13.1 The Director of SAHA and the members of the Management Committee accept the fiduciary responsibility of the organisation. In addition to any duties imposed upon them under law enforced from time to time, the Trustees shall have the following duties:

- 13.1.1 The Trustees shall appoint a person as Director. The Director shall have responsibility for the day to day management of the accounts of the Trust and such other responsibilities as delegated to the Director from time to time by the Trust. The Director shall be at all times subject to the direction and control of the Management Committee in the performance of their duties.
- 13.1.2 The Trustees shall take and maintain written minutes of the meetings held pursuant to the provisions of clause 9 above. An official minute book shall be retained at the Trust's principal office.
- 13.1.3 The Trustees shall, at the expense of the Trust, cause proper books of accounts to be kept, which books of account together with all other papers and documents connected with or relating to the Trust shall be kept as such place as may be agreed upon by the Trustees.
- 13.1.4 The Trustees at the expense of the Trust shall be entitled to cause accounts of the Trust to be audited by an auditor appointed by the Trustees from time to time, which auditor shall be charged with drawing up the financial statements of the Trust at the end of each and every year. The first financial statements of the Trust shall be prepared on 31 December following the date of resignation of this Trust Deed in terms of the Trust Property Control Act. The auditor may be one of the Trustees or a firm of which he is a member and he/she or his/her firm may charge their reasonable fee for such services.
- 13.1.5 The financial statement shall be prepared as at the last day of each succeeding year for this purpose every year shall commence on 1 January and shall end on 31 December of each succeeding year.
- 13.1.6 All monies received on behalf of the Trust shall be paid by the Trustees into a banking account or other account maintained by the Trustees at a registered commercial bank or building society or other financial institution in terms of the Financial Institutions (Investment of Funds) Act 1984 and all payments made on behalf of the Trust shall be drawn from such account. All withdrawals may be made on the signature of such persons as the Trustees may determine from time to time.
- 13.1.7 All charges, expenses and disbursements including reasonable travelling expenses reasonably incurred by the Trustees in or arising from their administration of the Trust (including the costs of attending meetings of the Trust) shall be a first charge on the income of the Trust and the Trust Assets and shall be paid on demand.



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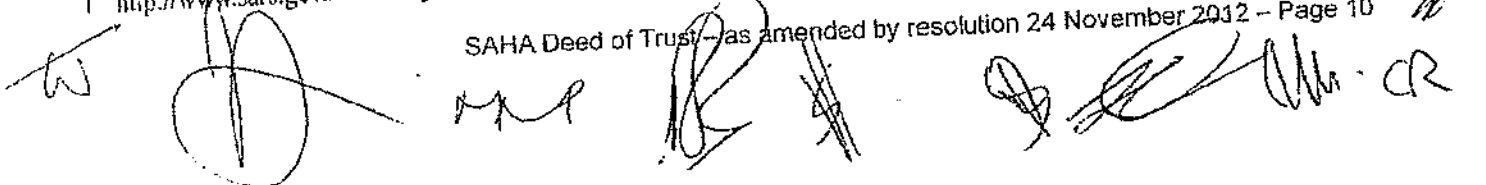
## 14 INDEMNIFICATION OF THE TRUSTEES

- 14.1. Subject to the foregoing a Trustee shall in performance of his/her duties and in the exercise of his/her power act with the care, diligence and skill which can reasonably be expected of a person who manages the affairs of another;
- 14.2 No Trustee shall be liable for any loss of the Trust arising by reason of any investment made on behalf of the Trust whether authorised in terms of the Trust Deed or not, or for negligence or fraud of any agent employed by such Trustee (although the employment of such agent was not strictly necessary or expedient) , or by any other Trustee or by reason of any mistake or omission made in good faith by any Trustee hereof or by reason of any matter or thing whosoever, except as is occasions by such Trustees own personal, willful act of dishonesty.
- 14.3 The Trustees shall be indemnified out of the Trust Assets against all claims or demands of whatever nature that may be made upon them arising out of the exercise, purported exercise or omission to exercise any of the powers conferred upon them by this Deed of Trust. Nothing herein contained shall be deemed to exempt a Trustee from or indemnify him/her against liability for breach of trust where he/she failed to show the degree of care diligence and skill referred to above.

## 15 TRADING ACTIVITY

- 15.1 SAHA will not carry on any business undertaking or trading activity, otherwise than to the extent that-
- 15.1.1 if the undertaking or activity—
    - 15.1.1.1. is integral and directly related to the sole or principal object of that public benefit organisation as contemplated in paragraph (b) of the definition of "public benefit organisation " in section 30 of the Income Tax Act 1962 (as amended)<sup>1</sup>;
    - 15.1.1.2. is carried out or conducted on a basis substantially the whole of which is directed towards the recovery of cost; and
    - 15.1.1.3. does not result in unfair competition in relation to taxable entities;
  - 15.1.2 if the undertaking or activity is of an occasional nature and undertaken substantially with assistance on a voluntary basis without compensation;
  - 15.1.3 if the undertaking or activity is approved by the Minister by notice in the *Gazette*, having regard to—
    - 15.1.3.1 the scope and benevolent nature of the undertaking or activity;
    - 15.1.3.2 the direct connection and interrelationship of the undertaking or

<sup>1</sup> <http://www.sars.gov.za/lmb/mylmb.asp?/jilc/kilc/alrg/ulrg/vlrg/72k0a#ag>



- 15.1.3.3 activity with the sole or principal object of the public benefit organisation;
- 15.1.3.4 the profitability of the undertaking or activity; and
- 15.1.3.4 the level of economic distortion that may be caused by the tax exempt status of the public benefit organisation carrying out the undertaking or activity; or
- 15.1.4 other than an undertaking or activity in respect of which item (aa) , (bb) or (cc) applies and do not exceed such amount as specified under the Income Tax Act 1962 or applicable legislation from time to time'

16. POWERS OF TRUSTEES

16.1 The Trustees in their discretion shall have plenary powers to perform all acts and execute all documents relevant to the carrying out of the objects of the Trust and the administration thereof. Without derogating from the generality of the foregoing, the Trustees shall have the power to open and operate any banking account and/or building society account and to draw and issue cheques and promissory notes and to endorse any of the same for collection. The Trustees shall determine the manner of operating the banking or other accounts of the Trust.

16.2 The Trustees shall be subject to a majority resolution, have the power to acquire, lease, renovate, restore immovable property in pursuance of the objectives of the Trust. In addition, to buy or sell and transfer Trust Assets and invest the proceeds (including dividends accruing on the Trust Fund) and sign and execute any agreement in regard thereto provided that the Trustees shall not have the power to:

16.2.1 enter into any transactions of a patently speculative nature in relation to property;

16.2.2 carry on business including inter alia ordinary trading operations in the commercial sense as well as the administration of any immovable property acquired by the Trust.

16.3 The Trustees shall have the power to:

16.3.1 hold the whole or any part of the Trust Fund or any investments made by them from time to time during the administration of the Trust in their own names or in the name of any person or institution which is nominated by them from time to time for that purpose or, in the name of the Trust; and

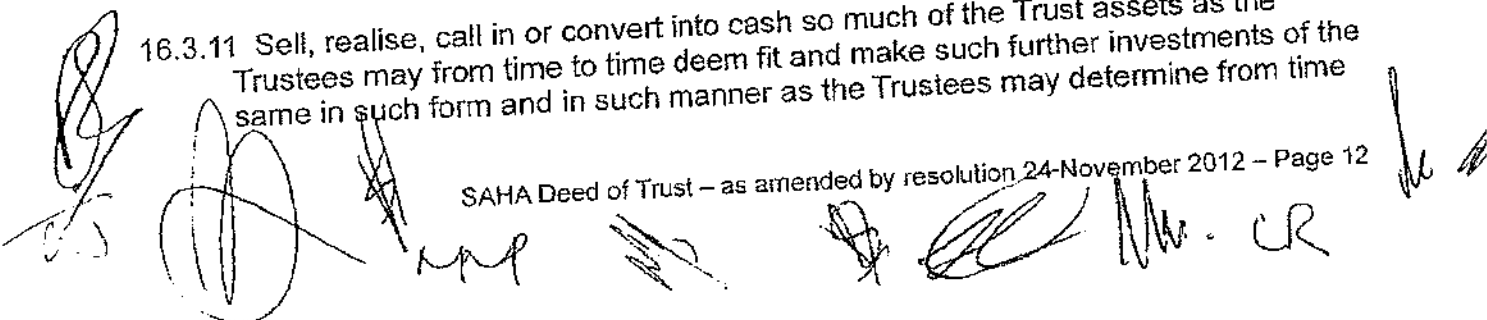
16.3.2 exercise the voting power attached to any share, stock or debenture in such manner as they may deem fit, exercise and take up or realise any rights of conversion or subscription appertaining to any or debenture forming part of the Trust;

16.3.3 From time to time to borrow such monies on such terms and conditions as they

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deem fit:

- 16.3.3.1 for the payment of any liability (including taxes payable in respect of the Trust); or
  - 16.3.3.2 which may be required from time to time for the protection or better or further investment of all or any of the Trust Assets; or
  - 16.3.3.3 generally for such other purposes in connection with all or any of the assets forming part of the Trust Fund.
- 16.3.4 Invest any funds that are not required for immediate use of the Trust, provided that investments may only be made in:
- 16.3.4.1 a financial institution as defined in section 1 of the Financial Institutions (Investment of Funds) Act, 1984;
  - 16.3.4.2 securities listed on a licensed stock exchange as defined in section 1 of the Stock Exchanges Control Act, 1985;
  - 16.3.4.3 in other prudent investments in financial instruments and assets as the Commissioner may determine after consultation with the Executive Officer of the Financial Services Board and Director of Non-Profit Organisations.
- 16.3.5 Obtain such legal advice from time to time as the said Trustees in their discretion require and in which event all costs of and in connection therewith shall be borne by the Trust.
- 16.3.6 Engage the service of financial advisers, brokers, property administrators, consultants, accountants, auditors, architects and experts of all kinds and to make payment of their fees.
- 16.3.7 Institute or defend any proceedings in any court of law or arbitration proceedings in the name of the Trust.
- 16.3.8 Decide (which decision shall be final and binding and shall not be subject to dispute or challenge) whether any monies or assets received by them from time to time as part of the Trust Assets constitutes "capital" or "income" and for the purpose they shall be entitled to make such apportionment in the Trust's account.
- 16.3.9 Apply all or any of the Trust assets or monies held by them towards payment of any tax levied on the Trust or the income of the Trust, if any.
- 16.3.10 Leave the capital of the Trust or any part thereof invested as it may be when it is handed over to them.
- 16.3.11 Sell, realise, call in or convert into cash so much of the Trust assets as the Trustees may from time to time deem fit and make such further investments of the same in such form and in such manner as the Trustees may determine from time

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to time vary any of such investments as the Trustees may determine.

16.3.12 Enter into contracts in the name of the Trust in furtherance of the interests of the Trust and to nominate one or more of them or to delegate their authority to any person selected by them for the purpose of management of the Trust and the execution of all documents or other activities of any nature relating to the carrying out of the purposes of this Trust, including documents in connection with the investment and realisation of the Trust assets which realisation shall be in whatever manner they deem fit.

16.3.13 Permit any premises owned by the Trust to be occupied free of rental or for a rental to be determined by the Trustees.

16.3.14 Engage and discharge employees and to set their terms and conditions of employment.

16.3.15 Do all things necessary to achieve the objects of the Trust.

## 17 BOOKS OF ACCOUNTS, RECORDS OR OTHER DOCUMENTS

17.1 Any books of account, records or other documents must be retained and preserved by SAHA for a period of 4 years –

17.1.1 after the date of the last entry in any book; or

17.1.2 after completion of financial transaction, acts or operations; and

17.2 Trustee may not without the written consent of the Master destroy any document which serves as proof of an investment, safe custody, control, administration, alienation or distribution of SAHA property before the expiry of a period of five years from the termination of the SAHA.

17.3 The Trust is to keep accounting records of its income, expenditure, assets and liabilities, and

17.3.1 Within six month after the end of its financial year, draw up financial statements, which must include at least

17.3.1.1 A statement of income and expenditure for that financial year; and

17.3.1.2 A balance sheet showing its assets, liabilities and financial position as at the end of that financial year.

17.4 Within two months after drawing up its financial statements, the Trust must arrange for a written report to be compiled by an accounting officer and submitted to the Trustees stating whether or not-

17.4.1 The financial statements of the organisation are consistent with its accounting records;

17.4.2 The accounting policies of the organisation are appropriate and have been appropriately applied in the preparation of the financial statements;

  
Mr. CR

17.4.3 and,  
The Trust has complied with the provisions of the Nonprofit Organisations Act and this Deed of Trust which relate to financial matters.

17.5 The Trust must, in writing, provide the Director of Nonprofit Organisations with  
17.5.1 a narrative report of its activities together with its financial statements and the accounting officer's report as set out in clause 17.4 above, within nine months after the end of its financial year; and  
17.5.2 a physical address in the Republic for service of documents and notices, and advice of any change of such address.

## 18 AMENDMENTS

18.1 A Resolution approved by at least two thirds of the Trustees then in office shall be required for any amendment to this Deed of Trust.  
18.2 Any amendments to this deed of Trust shall be submitted to the Commissioner of the South African Revenue Service.  
18.3 In addition, the Trust must send to the Director of Nonprofit Organisations a copy of the resolution and a certificate signed by a duly authorised office-bearer stating that the resolution complies with its constitution and all relevant laws.

## 19. TERMINATION OF TRUST AND DISTRIBUTION OF ASSETS

19.1 The Trust shall continue indefinitely but the Trustees shall have the right, in their sole and absolute discretion passed by two-thirds of the Trustees, to terminate the Trust.  
19.2 Upon its termination the remaining assets of the Trust, after satisfaction of its liabilities shall be given or transferred to one or more trusts or associations not for gain with objects similar to the objects of the Trust which have been approved in terms of section 30 of the Income Tax Act, 1962.  
19.3 The Trust must provide the Director of Nonprofit Organisations with at least two months' written notice of the intention of the Trustees to terminate the Trust.

## 20 DISPUTES

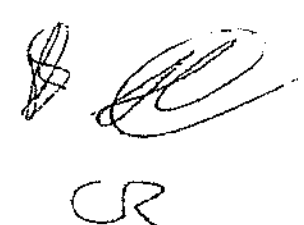

Should any question arise as to whether the interpretation of this Deed or any of the provisions hereof as to the true construction thereof or as to the administration of the Trust or otherwise howsoever, the Trustees shall have the power to decide such questions either acting on their own judgement or upon the advice of attorneys and/or counsel and any such decisions shall be final and binding on all parties affected thereby and shall be carried into effect by them.

21 COSTS

All costs of and incidental to the negotiations and finalisation of this Deed of Trust and its registration in terms of the Trust Property Control Act shall be paid by the Trust out of the Trust assets.



SAHA Deed of Trust – as amended by resolution 24 November 2012 – Page 15

  
CR

ANNEXURE "A" : ORIGINAL TRUSTEES

HORST GERHARD HERMANN KLEINSCHMIDT  
(BORN: 17/10/1945)

AND

SUSAN J BOOYSEN  
(born: 17/9/1954)

AND

JEAN DE LA HARPE  
(born: 3/9/1960)

AND

GIBSON THEMBA SIRAYI  
(born: 12/10/1953)

AND

SAM MAHOSHA MKHABELA  
(born: 23/10/1960)

AND

LULI CALLINICOS  
(born: 10/11/1936)

AND

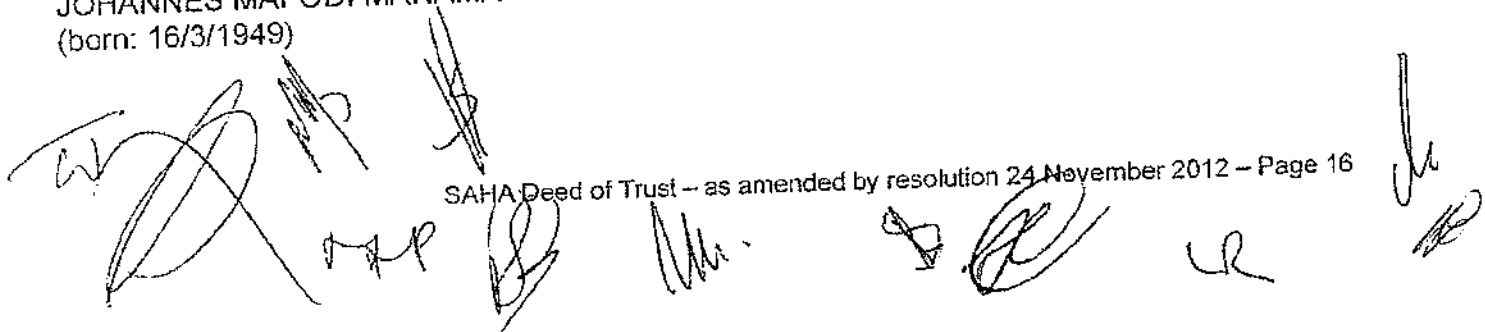
MICHELE PICKOVER  
(born: 1/8/1959)

AND

NOEL FRANCIS STOTT  
(born: 28/12/1958)

AND


JOHANNES MAFODI MANAMA  
(born: 16/3/1949)

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APPENDIX B: CURRENT TRUSTEES

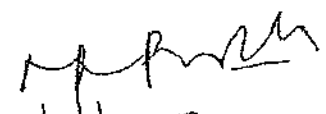
HORST GERHARD HERMANN KLEINSCHMIDT  
(born: 17/10/1945)

Signature:   
Date: 3.4.2014.

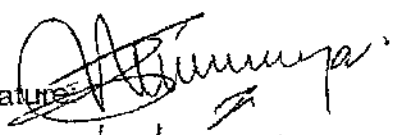
and  
SPIRIDOULA WEBSTER (also known as LULI CALLINICOS)  
(born: 10/11/1936)

Signature:   
Date: 6.12.2013

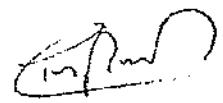
and  
MARLENE MERCER POWELL  
(born: 07/27/1959)

Signature:   
Date: 07/12/2013

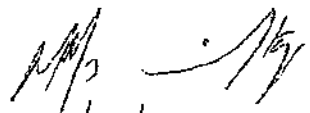
and  
DUMISA BUHLE NTSEBEZA  
(born 31/10/1949)

Signature:   
Date: 07/12/2013

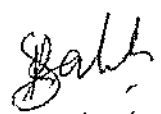
and  
CIRAJ SHAHID RASSOOL  
(born 27/12/1961)

Signature:   
Date: 07/04/2014


and  
MOHAMED NOOR NIEFTACODIEN  
(born 25/10/1964)

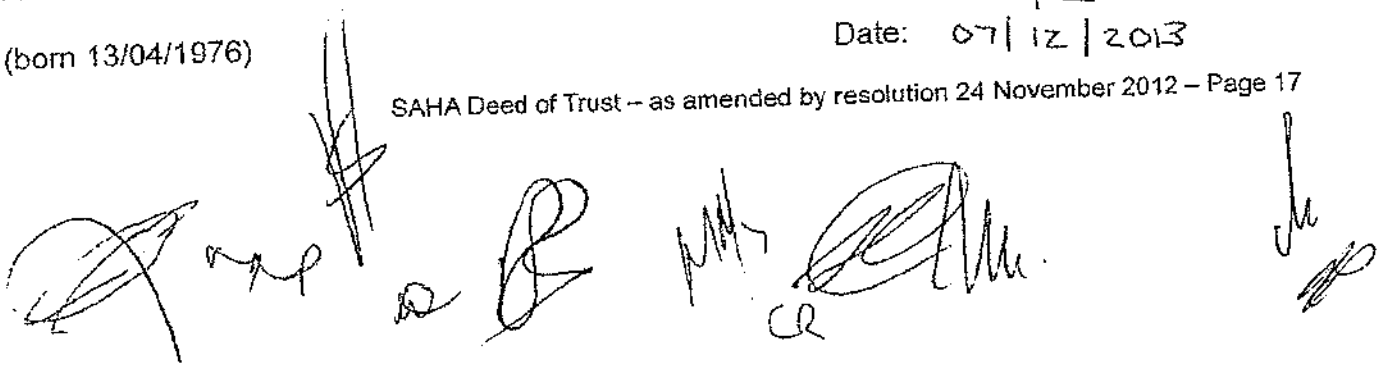
Signature:   
Date: 15/01/14

and  
RAZIA SALEH  
(born 08/08/1962)

Signature:   
Date: 15/01/2014

and  
ANTHONY ANDREW MANION  
(born 13/04/1976)

Signature:   
Date: 07/12/2013



and

VERNE SHELDON HARRIS

(born 21/04/1958)

and

PIERS ASHLEY PIGOU


(born 30/05/1967)

and


SELLO KOOS HATANG – 7504285846089

(born 28/04/1975)


(hereinafter collectively referred to as "the Trustees")

Signature: 

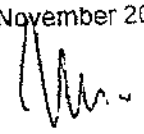

Date: 15/11/2014

Signature: 

Date: 07/12/2013

Signature: 

Date: 14/01/2014

**CHAPTER 2 – FUNCTIONS AND STRUCTURE OF THE SARB**

**2.1 Functions**

The SARB, in the pursuance of its goal, the realisation of its philosophy and the fulfilment of its responsibilities, assumes responsibility for –

- 2.1.1. formulating and implementing monetary policy in such a way that the primary goal of the SARB will be achieved in the interest of South Africa;
- 2.1.2. ensuring that the South African money, banking and financial system as a whole is sound;
- 2.1.3. assisting the South African Government, as well as other members of the economic community of Southern Africa, in the formulation and implementation of macro-economic policy; and
- 2.1.4. informing the South African community and all interested stakeholders abroad about monetary policy specifically, and the South African economic situation in general.

**2.2. Other functions**

Other functions of the SARB include -

- 2.2.1. issuing of bank notes and coins;
- 2.2.2. provision of an interbank settlement service;
- 2.2.3. management of gold and foreign exchange reserves;
- 2.2.4. conducting an exchange rate policy;

2.2.5. administration of the provisions of Exchange Control Regulations in South Africa on behalf of the Minister of Finance;

2.2.6. custody of cash reserves of banks;

2.2.7. banker of Government, agent and financial adviser; and

2.2.8. collection and interpretation of statistics.

### 2.3. **Structure**

#### 2.3.1. Board and Governors

The South African Reserve Act 90 of 1989 ("the SARB Act"), provides for a Board of Directors with 14 members. Among them are the Governor and three Deputy Governors of the SARB, who are appointed by the President of the Republic for five year terms. Three other directors are appointed by the President for a period of three years.

The remaining seven directors, of whom one represents agriculture, two industry and four commerce or finance, are elected by the shareholders of the SARB for a period of three years. The Governor and three Deputy Governors manage the daily affairs of the SARB, as they are the most senior executives with full-time responsibility for the SARB.

#### 2.3.2. The SARB Group

The SARB Group also includes the following:

The South African Bank Note Company (Pty) Limited.

The South African Mint Company (Pty) Limited.

The South African Reserve Bank Captive Insurance Company Limited.

4/13/2015

South African History Archive Mail - [FOIP] Notice of intention to lodge internal appeal for PAIA request SAH-2014-SRB-0004



FOIP intern <foip.intern@saha.org.za>

**[FOIP] Notice of intention to lodge internal appeal for PAIA request SAH-2014-SRB-0004**

Tue, Sep 30, 2014 at 8:45 AM

South African History Archive (SAHA) <foip@saha.org.za>

Reply-To: foip@saha.org.za

To: Johann.DeJager@resbank.co.za, Johan.Fourie@resbank.co.za

Cc: thabiso.moloto@resbank.co.za, alexander.ellis@resbank.co.za, chris.vanderwalt@resbank.co.za,

elsie.duplessis@resbank.co.za, nadine.bham@resbank.co.za

To whom it may concern,

Re: Notice of intention to lodge internal appeal for PAIA request SAH-2014-SRB-0004

South African History Archive (SAHA) submitted PAIA request SAH-2014-SRB-0004 on 2014-08-01.

In accordance with PAIA, you were obliged to respond to this PAIA request within 30 days of submission.

We have repeatedly written to you informing you of your failure to meet your statutory obligations, and requesting that you contact us urgently.

If we have not received a response to PAIA request SAH-2014-SRB-0004 by 2014-09-30, please be advised we will lodge an internal appeal with your Minister.

Yours faithfully,

Kathryn Johnson  
South African History Archive (SAHA)

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FOIP intern <foip.intern@saha.org.za>

[FOIP] FW: SAHA PAIA Request Correspondence [IWOV-Litigation.FID278027]

Tue, Sep 30, 2014 at 2:33 PM

David Cote <David@lhr.org.za>  
Reply-To: foip@saha.org.za  
To: Kathryn Johnson <kathryn@saha.org.za>, Toerien van Wyk <toerien@saha.org.za>, FOIP <foip@saha.org.za>, Nasreen Rajab-Budlender <nasreen@budlender.co.za>, Lebogang Kutumela <lkutumela@law.co.za>  
Cc: Jacob Van Garderen <Jacob@lhr.org.za>

Hi everyone,

I received the email below from Werkmans. They ask that all future correspondence regarding the access to information requests go through the attorneys.

Regards,

---

David Cote  
Lawyers for Human Rights  
357 Visagie Street  
Pretoria 0002  
SOUTH AFRICA

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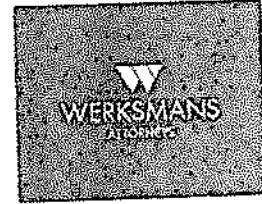
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**From:** Neil Kirby [mailto:NKirby@werksmans.com]  
**Sent:** 30 September 2014 14:21  
**To:** David Cote  
**Cc:** Patricia Erasmus  
**Subject:** RE: SAHA PAIA Request Correspondence [IWOV-Litigation.FID278027]

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This email and its attachments are private, confidential, may be subject to legal professional privilege and are only for the use of the intended recipient.

Dear Mr Cote

I refer to the above matter.

Whilst we are preparing a reply to the letter attached to your e-mail below, we would be grateful if you would advise your client to ensure that all further correspondence in this matter is directed to our offices. In this regard, our client received the attached e-mail from one Kathryn Johnson of your client today, 30 September 2014. In so far as the contents of the attached e-mail are concerned, I confirm that –

1. there is no internal appeal procedure operated by my client, which I have confirmed previously in correspondence; and

2. further requests for information should be directed to my offices.

I trust that the above is in order and that you will advise Ms Johnson of the above matters accordingly.

Kind regards



A member of the LEK Africa legal network

### Neil Kirby

Director

T: +27 11 535 8198 | F: +27 11 535 8698 | [nkirby@werksmans.com](mailto:nkirby@werksmans.com)

### Werksmans Attorneys

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**From:** David Cote [mailto:[David@thr.org.za](mailto:David@thr.org.za)]

**Sent:** 26 September 2014 16:10 PM

**To:** Neil Kirby

**Cc:** Patricia Erasmus

**Subject:** RE: SAHA PAIA Request Correspondence [IWOV-Litigation.FID278026]

**DELIVERED BY E-MAIL**

Lawyers for Human Rights  
Attention: Mr David Cote  
Per e-mail: [David@lhr.org.za](mailto:David@lhr.org.za)

**Johannesburg Office**  
155 5th Street  
Sandton 2196 South Africa  
Private Bag 10015  
Sandton 2146  
Docex 111 Sandton  
Tel +27 11 535 8000  
Fax +27 11 535 8600  
[www.werksmans.com](http://www.werksmans.com)  
[enquiries@werksmans.com](mailto:enquiries@werksmans.com)

YOUR REFERENCE: SL14/01/PTA  
OUR REFERENCE: Mr N Kirby/Mr C Moraitis/hm/SOUT3267.44/#3389396v1  
DIRECT PHONE: +27 11 535 8198  
DIRECT FAX: +27 11 535 8698  
EMAIL ADDRESS: [nkirby@werksmans.com](mailto:nkirby@werksmans.com)

2 December 2014

Dear Sirs

**REQUEST FOR A RECORD IN TERMS OF THE PROMOTION OF ACCESS TO INFORMATION  
ACT NO. 2 OF 2000 ("PAIA") – FOREIGN EXCHANGE: REQUEST 4**

- 1 We refer to the above matter, the request for information received from your client on 18 September 2013 ("the request"), your attached letter dated 16 July 2014 and your letter dated 26 September 2014.
- 2 At the outset, we wish to record that your client has failed to include sufficient particulars pertaining, *inter alia*, to the information and the specific entities referred to in the request in order to enable our client to identify the precise records sought by your client. In this regard, in terms of section 18(2)(a) of PAIA, our client is entitled to refuse the request solely on the aforementioned basis.
- 3 In addition to what is set out above, and based on the broad nature of the contents of the request, but with reference to your demand for reasons for our client's decision on the request, we advise that the following reasons support our client's decision -
  - 3.1 as previously stated in correspondence, section 33 of the South African Reserve Bank Act No. 90 of 1989 ("the SARB Act"), quoted in our client's letters dated 2 December 2013 deals with the preservation of secrecy of financial and confidential information and prohibits disclosure of any information relating to affairs of a bank (including decisions by banks pertaining to the transfer of funds for purposes of foreign exchange), the shareholders of a bank or the clients of a bank;
  - 3.2 in light of the contents of section 33 of the SARB Act, our client is precluded from disclosing the records requested by your client;

**Werksmans Inc. Reg. No. 1990/007215/21 Registered Office 155 5th Street Sandton 2196 South Africa**  
**Directors** DG Williams (Chairman) AL Armstrong BA Aronoff DA Arceiro T Bata AR Bernan NMN Bhengu L Bick GT Boesr TJ Boswell MC Brönn W Brown  
 PF Burger PG Cleland JG Cloete PFJ Coetser C Cole-Morgan D Corbett JN de Villiers GW Driver LJ du Preez RJ Feenstra S Fodor SJ Gardiner D Gewer  
 H Goolam R Gootkin ID Gouws GF Griessel D Hertz J Hollesen VR Hoslosky BB Hotz HC Jacobs TL Janse van Rensburg N Jansen van Vuuren G Johannes  
 S July J Kallmeyer SLG Kayana A Kenny BM Kew N Kirby HA Kotze S Krige P le Roux MM Lessing F Levenstein JS Lochner L Louw JS Lubbe BS Mabasa  
 PK Mabaso PM Madala MPC Manaka PJG Mason H Masondo C Moraitis KO Motshwane TA Mthiyane J Nckig JJ Niemand GA Nott BPF Olivier WE Oosthuizen  
 M Pansegrouw CP Pauw AV Pillay T Polter BC Price AA Pyzikowski RJ Raath L Rood BR Roothman W Rosenberg NL Scott LK Silberman JA Smit JS Smit  
 CI Stevens PO Steyn J Stockwell JG Theron JJ Truter KJ Trudgeon DN van den Berg HA van Niekerk FJ van Tonder JP van Wyk A Vataldis RN Wakefield  
 DC Walker D Weglinski M Wiehahn DC Willans E Wood BW Workman-Davies Consultant JM Bortz

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- 3.3 section 5 of PAIA stipulates that the provisions of PAIA apply to the exclusion of other legislative provisions that prohibit or restrict disclosure and that are materially inconsistent with the provisions of PAIA. In this regard, the provisions of section 33 of the SARB Act are undoubtedly consistent with the provisions of PAIA in so far as -
- 3.3.1 section 37(1) of PAIA stipulates, *inter alia*, that the information officer of a public body "must refuse a request for access to a record of the body if the disclosure of the record would constitute an action for breach of a duty of confidence owed to a third party in terms of an agreement";
- 3.3.2 our courts have consistently recognised the duty of confidentiality owed by banks towards their clients in relation to clients' banking affairs;
- 3.3.3 in the recent judgment of *Stevens and Others v Investec Bank Limited and Others* [2014] JOL 31828 (GSJ), the court held that "[t]here is no doubt that a banker-client relationship requires the highest *uberrimae fides* and that confidentiality is one of the essential aspects of such relationship of trust as between ... banker and client"; and
- 3.3.4 the duty of confidentiality between a bank and its clients has been held by our courts to be an implied or tacit term of the bank-client agreement arising either as a matter of law, or as representing the tacit consensus of the parties: *Densam (Pty) Ltd v Cywilnat (Pty) Ltd* 1991 (1) SA 100 (A) at 109G;
- 3.4 the records that we have assumed are sought by your client in the request contain information of the nature described in section 37(1) of PAIA. Any disclosure of such information by our client to your client would thus not only constitute a contravention of PAIA, but would also result in a contravention of section 33 of the SARB Act and the common law duty of confidentiality owed by our client to its clients;
- 3.5 in addition to the abovementioned grounds for the refusal of the request and having regard to the sweeping nature of the request, our client is precluded from disclosing the records, which are presumably referenced in the request, on, *inter alia*, the following broad bases -
- 3.5.1 access to the records obviously involves the unreasonable disclosure of personal information about a third party, including our client's customers, as contemplated in section 34 of PAIA;
- 3.5.2 as contemplated in section 36 of PAIA, the request refers to financial and commercial information of third parties, the disclosure of which would cause harm to the commercial or financial interests of the third parties, particularly in so far as such information will be accessible to potential competitors of the third parties;
- 3.5.3 having regard to section 42 of PAIA, the records, if disclosed, would materially jeopardise the economic interests and financial welfare of South Africa and the ability of the South African government to manage the economy of South Africa effectively as the information will reveal information about policies substantially affecting currency and foreign exchange in South Africa; and
- 3.5.4 in light of the excessively broad and sweeping nature of the request, our client will be required, unreasonably and substantially, to divert its resources in order, *inter alia*, to consider hundreds of thousands of documents from the period of 1 July 1976 to 1 July 1994 in order to ascertain whether or not the records, in fact, exist.



4 Our client's rights remain reserved.

Yours faithfully

Weirns Inc

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