
PUBLIC PROTECTOR
SOUTH AFRICA

Report No: 105 of 2019/20

CLOSING REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF MALADMINISTRATION AND IMPROPER CONDUCT AT THE SOUTH AFRICAN RESERVE BANK AND THE FIRST RAND BANK
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CLOSING REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF MALADMINISTRATION AND IMPROPER CONDUCT AT THE SOUTH AFRICAN RESERVE BANK AND THE FIRST RAND BANK

1. INTRODUCTION

1.1. This is my report issued in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996, (the Constitution) and section 8(1) of the Public Protector Act, 23 of 1994 (the Public Protector Act).

1.2. This report is submitted in terms of section 8(3) of the Public Protector Act, to the Complainant, Ms A Pratt.

1.3. This report relates to my investigation into allegations of maladministration and improper conduct at the South African Reserve Bank (SARB) and the First Rand Bank (First Rand).

1.4. A notice in terms of rule 42(1) of the Rules Relating to Investigations by the Public Protector and Matters Incidental thereto, 2018 dated 6 September 2019 was issued to the Complainant affording her an opportunity to make representations on the intended closure of the complaint. The Complainant responded on 30 September 2019 and the comments are incorporated in this report.

2. THE COMPLAINT

2.1 The complaint was initially lodged by Ian Levett Attorneys on behalf of the Complainant on 21 April 2016. The Complainant later submitted a revised complaint during April 2017. In essence the Complainant made the following allegations:
2.1.1 **Public Protector’s power to investigate FirstRand and the allegations against FirstRand are that:**

2.1.1.1 First Rand is a publically listed company, a bank respectively incorporated and registered in terms of the laws of the Republic and is also an authorised dealer;

2.1.1.2 The SARB issued Exchange Control Rulings to authorised dealers setting out the conditions, permissions and limits applicable to transactions in foreign exchange which may be undertaken by authorised dealers as well as details of related administrative responsibilities;

2.1.1.3 FirstRand, in exercising their powers, rights and obligations in terms of the Regulations and Exchange Control Rulings is exercising a public function and that the Public Protector is thus empowered to investigate FirstRand;

2.1.1.4 FirstRand unlawfully marketed and sold loop structures to its high wealth clients as a purported legal and legitimate way in which such clients could export funds from South Africa off-shore. This included the Complainant who was incorrectly informed and advised by FirstRand that the loop scheme devised for her was a legal and legitimate way in which she could export funds off-shore; and

2.1.1.5 The Complainant later discovered in 2003 that the loop structure devised by FirstRand was unlawful and immediately reported this to the SARB and “was effectively the whistle-blower in relation to this unlawful scheme”.

4
2.1.2 Public Protector’s power to investigate SARB and the allegations against SARB that:

2.1.2.1 SARB is a legislative entity established by section 9 of the Currency and Banking Act 31 of 1920 and its functions and powers are regulated in terms of the South African Reserve Bank Act 90 of 1989 (SARB Act);

2.1.2.2 The SARB exercises a public function and exercises the powers of a sphere of government, therefore the Public Protector is empowered to investigate the SARB;

2.1.2.3 FirstRand breached the provisions of Regulation 10(1)(C) of the Exchange Control Regulations 1961 (the Regulations) thereby committing a criminal offence;

2.1.2.4 The SARB thus had a duty to investigate these alleged offences, commonly referred to as ‘loop’ structures, in terms of the Regulations. One such ‘loop’ structure being the ‘Duisberg loop’. In addition, the Complainant advised that the SARB had an obligation to look into the economic effects which the removal of millions of Rands from the economy had on the currency of the Republic;

2.1.2.5 Although it is not clear whether the SARB investigated the ‘Duisberg loop’ structure, the SARB investigated the ‘loop’ scheme sold to the Complainant by FirstRand, and the Complainant accordingly approached the SARB for assistance in the litigation against FirstRand. The SARB however, refused to assist the Complainant, relying on section 33 of the SARB Act to avoid providing any assistance during the litigation process to the Complainant;

2.1.2.6 The Complainant alleged that she obtained a copy of the KPMG report, which the SARB commissioned, via a prosecutor who was looking into the criminality of FirstRand’s conduct during March 2016, but for this, the Complainant believes the report would not have been made public;
2.1.2.7 The SARB's refusal to provide the Complainant with a copy of the report during her litigation process allowed FirstRand to place a patently false version to the courts which allowed First Rand to escape sanction for contravening the Regulations;

2.1.2.8 That according to the KPMG report, there was a transgression of Regulation 10(1)(C) by FirstRand. The Complainant is of the view that the SARB would have confronted FirstRand with this finding, however despite this, FirstRand maintained throughout various litigation processes between the Complainant and FirstRand that the 'loop' structure they entered into on behalf of the Complainant was in fact legal;

2.1.2.9 That SARB's reliance on section 33 of the SARB Act in this manner, protected FirstRand and continues to protect the banks, allowing non-compliance with the Regulations and in so doing, jeopardizing the currency of the Republic;

2.1.2.10 That it is a matter of public interest for SARB to disclose any sanction which may have been imposed against FirstRand for their contravention of the Regulations, however, despite 10 years having passed, there is still no information about any sanction(s) taken in terms of the 'Duisberg loop' structure, among others. This refusal by SARB to reveal the sanction(s) taken in this matter as well as the one involving the Complainant, supports the suspicion that there was perhaps no sanction taken in both instances;

2.1.2.11 This failure by SARB, amounts to an abuse or unjustifiable exercise of power or unfair, capricious, discourteous or other improper conduct or undue delay to act on the part of the SARB;
2.1.2.12 That the SARB unreasonably and unjustifiably relies on section 33 of the SARB Act, which is an outdated piece of legislation that does not promote the spirit and purport of the Constitution in so far as it relates to openness and transparency;

2.1.2.13 That the Complainant has suffered prejudice due to this unbridled use of section 33 by the SARB and the consequent protection it affords banks to perpetrate indiscretions and misconduct, safe in the knowledge that their actions will never be made public;

2.1.2.14 That the instance of the 'loop' structure that the Complainant is embroiled in, is not an isolated instance;

2.1.2.15 That this contravention by the banks of the Regulations, constitutes abuse of the delegated powers provided to them as an authorised dealer; and

2.1.2.16 That this purported collusion between the banks and the SARB would constitute abuse of power (among other things) and thus needs to be investigated by the Public Protector.

3. POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR

3.1 The Public Protector is an independent constitutional institution established under section 181(1)(a) of the Constitution of the Republic of South Africa, 1996 (the Constitution) to strengthen constitutional democracy through investigating and redressing improper conduct in state affairs.

3.2 Section 182(1) of the Constitution provides that:

"The Public Protector has the power as regulated by national legislation –
(a) to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice;

(b) to report on that conduct; and

(c) to take appropriate remedial action."

3.3 Section 182(2) directs that the Public Protector has additional powers and functions prescribed by legislation.

3.4 The Public Protector is further mandated by the Public Protector Act, 1994 to investigate and redress maladministration and related improprieties in the conduct of state affairs.

3.5 The Public Protector is also given power to resolve disputes through conciliation, mediation, negotiation or any other appropriate alternative dispute resolution mechanism.

3.6 The SARB is an organ of state. The Public Protector's power and jurisdiction to investigate and take appropriate remedial action was disputed by the SARB on the following grounds:

3.6.1 That the matter fell outside of my jurisdiction as it contravened section 6(6) of the Public Protector Act as the matter has already been considered and fully ventilated by a number of courts including the Supreme court of Appeal. The cases in question were listed as follows:

a) Ann Elizabeth Mary Pratt v First Rand Bank & M Cubed Holdings Limited High court (TPD) case no 27048/2003 before Bertelsman J on 10 September 2004;
b) Ann Elizabeth Mary Pratt v First Rand Bank & M Cubed Holdings Limited & Watermans Chartered Accountants. High court TPD case no 27048/03 before Mokgoatlheng J on 5 April 2007;

c) A Pratt v First Rand Bank Limited, High Court case no 27048/2003 before Fabricius J on 14 June 2013;

d) Pratt v First Rand Bank Limited, High Court Supreme court of Appeal case no 416/07 delivered on 12 September 2008; and

e) Ann Elizabeth Mary Pratt v First Rand Bank High court (Gauteng Division) case no 27048/03 before Tuchten J on 30 June 2016

3.6.2 That the investigation of the matter by the Public Protector is limited in so far as I had to satisfy myself in terms of section 6(9) of the Public Protector Act in this matter and ensure that there were indeed “special circumstances” which permit the investigation which was reported more than two years after the date of the incident.

4. THE INVESTIGATION

4.1 The investigation was conducted in terms of section 182 of the Constitution of the Republic of South Africa, 1996 (the Constitution), which confers upon the Public Protector, the power to investigate any alleged or suspected improper or prejudicial conduct in state affairs, to report on that conduct and to take appropriate remedial action.

4.2 Section 6(4) of the Public Protector Act, 1994, further regulates the manner in which the power conferred by section 182 of the Constitution may be exercised in respect of Government at any level. Section 7(4)(b) of the Public Protector Act provides that the Public Protector or any person duly authorised thereto by him or
her may request an explanation from any person whom he or she reasonably suspects of having information on a matter being or to be investigated.

4.3 The investigation process included exchanges of documentation between the Public Protector and officials from the SARB.

4.4 All relevant documents and correspondence were obtained and analysed. Relevant laws, policies and related prescripts as well as the reports on the cases at the various courts which dealt with the matter, were also considered and applied throughout the investigation.

4.5 Based on the analysis of the complaints including the allegations contained therein, the following issues were identified to inform and focus the investigation.

4.5.1 **Issue 1**: Whether the South African Reserve Bank acted improperly and or abused its power in dealing with Ms Anne Pratt’s complaint against FirstRand Bank.

4.5.2 **Issue 2**: Whether the Public Protector has jurisdiction to investigate the allegations of Ms Anne Pratt against the FirstRand Bank.

4.7 **The Key Sources of information**

4.7.1 **Documents**

4.7.1.1 The written complaint lodged by the Complainant with attachments dated 20 April 2016;

i. Annexure A: Exchange Control Ruling E5(C)(a);

ii. Annexure B: Exchange Control Ruling E5(A)(i)(a);

iii. Annexure C: Exchange Control Ruling A(C);

iv. Annexure D: Exchange Control Ruling A(F);
v. Annexure E: Exchange Control Liaison Committee meeting minutes dated 03 March 1999;

vi. Annexure F: Exchange Control Circular D.405 dated 30 September 2003;

vii. Annexure G: Media reports relating to the Duisberg loop;

viii. Annexure H: FirstRand emails whereby you submit that FirstRand was aware of the illegality of the Duisberg loop from as early as 2001;

ix. Annexure I: A copy of the KPMG report dated 24 March 2004;


4.7.1.2 Letter from the Complainant providing further information dated 22 April 2019 and 19 May 2016 and annexures thereto;

4.7.1.3 Ann Elizabeth Mary Pratt v First Rand Bank & M Cubed Holdings Limited High court (TPD) case no 27048/2003 before Bertelsman J on 10 September 2004;

4.7.1.4 Ann Elizabeth Mary Pratt v First Rand Bank & M Cubed Holdings Limited & Watermans Chartered Accountants, High court TPD case no 27048/03 before Mokgoatlheng J on 5 April 2007;

4.7.1.5 A Pratt v First Rand Bank Limited, High Court case no 27048/2003 before Fabricius J on 14 June 2013;

4.7.1.6 Pratt v First Rand Bank Limited, High Court Supreme court of Appeal case no 416/07 delivered on 12 September 2008; and

4.7.1.7 Ann Elizabeth Mary Pratt v First Rand Bank High court (Gauteng Division) case no 27048/03 before Tuchten J on 30 June 2016.
4.7.2 Correspondence sent and received

4.7.2.1 Letter to the SARB raising the matter dated 28 April 2016;

4.7.2.2 Reply letter from the SARB dated 6 May 2016;

4.7.2.3 Letter from the SARB dated 21 June 2016;

4.7.2.4 A discretionary notice issued in terms of the Public Protector Act to the Complainant dated 6 September 2019;

4.7.2.5 Reply to the discretionary letter from the Complainant dated 30 September 2019 and received via email on 9 October 2019.

4.7.3 Legislation and other prescripts

4.7.3.1 The Constitution of the Republic of South Africa, 1996 (The Constitution);

4.7.3.2 The Protected Disclosures Act, Act 26 of 2000 (PDA);

4.7.3.3 The Public Protector Act, 23 of 1994 (Public Protector Act);

4.7.3.4 The Currency and Banking Act 31 of 1920; and

4.7.3.5 The South African Reserve Bank Act 90 of 1989 (SARB Act).

4.7.4 Web sources consulted

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

5.1 Whether the South African Reserve Bank acted improperly and or abused its power in dealing with Ms Anne Pratt’s complaint against FirstRand Bank

*Common cause issues*

5.1.1. The background of this matter is described in the *Ann Elizabeth Mary Pratt v First Rand Bank High court (Gauteng Division) case no 27048/03* as follows:

3. "In 2001, FirstRand lent Ms Pratt R25 million. The loan was a component in a wider transaction. The transaction was designed to enable the R25 million to be exported from South Africa. Reduced to its essentials relevant for present purposes, the transaction was structured as set out below.

4. As at 1999, Ms Pratt owned 20% of the shares in Anne Pratt and Nyasulu (Pty) Limited (APN), a South African company. 10% of the shares in APN were held by Ms Nyasulu. The balance of the shares were subscribed for and held by Monument Trust Company Limited (Monument).

5. On 29 January 1999, Mr John Rice, then Ms Pratt’s accountant, presented the share certificate reflecting Monument’s shareholding in APN to Standard Bank. In its capacity as an authorised dealer, a status conferred by the Reserve Bank, the share certificate was endorsed to reflect that the shares in question were held by a non-resident of South Africa.

6. In 2000, the Fast Track Trust, an Isle of Man trust, bought the 70% of APN’s shares held by Monument for R700. These shares were then held by Fast Track in the
name of its nominee. Ms Pratt appeared to the Supreme Court of Appeal to be an astute and successful businesswoman and at least a beneficiary of and perhaps the controller of Fast Track.

7. In 2000, Ms Nyasulu sold her 10% interest in APN to Ms Pratt and the name of APN was changed to Anne Pratt & Associates (Pty) Limited (APA).

8. In 2002, Ms Pratt became the sole member of Classy Living CC (CL). Ms Pratt either lent to CL or made available to it as her member's interest the R25 million lent to her by First Rand.

9. In 2002 CL bought from Fast Track the latter's 70% interest in APA for R25 million. For reasons not explained on the papers, the designation by Standard Bank of the holder of the shares as at 1999 as a non-resident was afforded to Fast Track. No point was made of this at any stage of the litigation or before me.

10. At the request of Ms Pratt, the R25 million was then transferred from South Africa to a bank account held on behalf of Fast Track in Jersey.”

5.1.2. According to the above court judgement, the following diagram depicts the alleged loop structure relevant to the matter of the Complainant based on the facts described in the judgments mentioned in the paragraphs below:
5.1.3. The table below outlines the timeline of events which occurred during the course of the complaint from the engagements with my investigation team, and set out in the allegations made by the Complainant:
<table>
<thead>
<tr>
<th>Date</th>
<th>Alleged Occurrence</th>
</tr>
</thead>
<tbody>
<tr>
<td>14 May 1998</td>
<td>The Complainant purchased Anne Pratt &amp; Nyasulu (Pty) Ltd (APN) as a shelf company. APN began trading as an executive search and placement company.</td>
</tr>
<tr>
<td>01 January 1999</td>
<td>Share structure of Anne Pratt &amp; Nyasulu (Pty) Ltd set up as follows on advice of your accountant, John Rice:</td>
</tr>
<tr>
<td></td>
<td>• Momentum Trust = 70% (for R700 in value);</td>
</tr>
<tr>
<td></td>
<td>• The Complainant’s share = 20%;</td>
</tr>
<tr>
<td></td>
<td>• Ms Nyasulu = 10%.</td>
</tr>
<tr>
<td>29 January 1999</td>
<td>APN share certificate endorsed as “non-resident” by Standard Bank on request of John Rice on the Complainant’s behalf based on 70% shareholding.</td>
</tr>
<tr>
<td>03 March 1999</td>
<td>SARB held a meeting with banks [including First Rand Bank (FirstRand)]. SARB stated that loop schemes are unlawful.</td>
</tr>
<tr>
<td>08 May 2000</td>
<td>Fast Track Trust (FTT) registered in the Isle of Man in the Complainant’s favour as primary beneficiary. FTT purchased the 70% shares from Momentum Trust for R700.</td>
</tr>
<tr>
<td>31 August 2000</td>
<td>Ms Nyasulu sold her 10% shares in APN to the Complainant for R200,000.00</td>
</tr>
<tr>
<td>04 September 2001</td>
<td>The Complainant met with FirstRand (Mr Versfeld) with regard to an offshore structure. A number of agreements with regard to this structure were subsequently concluded between September and November 2001.</td>
</tr>
<tr>
<td>06 September 2001</td>
<td>Off-shore investment transaction agreement concluded with FirstRand</td>
</tr>
<tr>
<td>02 November 2001</td>
<td>The Complainant purchased Classy Living CC (shelf company).</td>
</tr>
<tr>
<td>05 November 2001</td>
<td>APN changed its name to Anne Pratt &amp; Associates (Pty) Ltd (APA).</td>
</tr>
<tr>
<td>December 2001</td>
<td>Off-shore investment transaction agreement concluded with FirstRand.</td>
</tr>
<tr>
<td>Date</td>
<td>Event</td>
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</tr>
<tr>
<td>14 December 2001</td>
<td>FirstRand requested to pay R25mil into FTT’s Ansbacher account in Jersey, UK.</td>
</tr>
<tr>
<td>14 December 2001</td>
<td>FirstRand calculated the interest portion on 14/12/2001 but in fact only transferred the R25mil on 19/12/2001. Due to a substantial change in the exchange rate during this period it resulted in a capital loss to the Complainant of R2.8mil.</td>
</tr>
<tr>
<td>19 December 2001</td>
<td>FirstRand transferred R25mil into FTT’s Ansbacher account in Jersey, UK.</td>
</tr>
<tr>
<td>14 February 2002</td>
<td>FirstRand confirmed that this scheme is compliant with exchange control regulations.</td>
</tr>
</tbody>
</table>
| 14 February 2002 to 01 March 2003 | The Complainant made various payments to FirstRand between 14/02/2002 and 01/03/2003:  
  - R114,000.00 paid for services;  
  - R479,554.79 paid interest on loan;  
  - R1,294,911.40 paid interest on loan;  
  - R2,205,000.00 paid (reason not stated);  
  - R1,430,949.01 paid (reason not stated). |
| 05 April 2002        | FTT invested R25mil into MCubed in Guernsey, UK - (Mokgoatlheng, AJ, judgement at paragraph 11).                                      |
| 13 August 2003       | Whistle-blowing to SARB by the Complainant.                                                                                        |
| 01 September 2003    | The Complainant failed to pay to FirstRand a dividend owed of R1,426,670.47. Consequently FirstRand demanded payment of R28,685,464.70 plus interest - (Mokgoatlheng, AJ, judgement at paragraph 20). |
| 16 September 2003    | SARB’s lawyer (Dawie Botha) suggested to Klagsburn that SARB may possibly join as a party in the litigation against FirstRand.       |
| 25 September 2003    | The Complainant issued summons against FirstRand seeking a declaratory order against MCubed and Watermans to declare an
<table>
<thead>
<tr>
<th>Date</th>
<th>Event</th>
</tr>
</thead>
<tbody>
<tr>
<td>30 September 2003</td>
<td>SARB directive (Circular D405) - declared loop deals unlawful.</td>
</tr>
<tr>
<td>28 January 2004</td>
<td>KPMG consult with the Complainant as part of their investigation on behalf of SARB.</td>
</tr>
<tr>
<td>11 February 2004</td>
<td>FirstRand file exception against the Complainants claim. Matter was heard before Bertelsmann, J.</td>
</tr>
<tr>
<td>24 March 2004</td>
<td>KPMG report (draft) issued to SARB.</td>
</tr>
<tr>
<td>01 June 2017</td>
<td>Bertelsmann, J hearing (interlocutory proceedings – only in respect of adjudicating over FirstRand’s exception against the Complainants particulars of claim)</td>
</tr>
<tr>
<td>10 September 2004</td>
<td>Bertelsmann, J judgment (TPD, HC Case No 27048/03) dealt only with exceptions taken by FirstRand against the Complainants particulars of claim - contract declared null and void.</td>
</tr>
<tr>
<td>12 December 2004</td>
<td>Request by Klagsburn (the Complainants lawyer) to SARB for evidence supported by KPMG report.</td>
</tr>
<tr>
<td>31 January 2007</td>
<td>Mokgoatheng, AJ hearing (the Complainants application for the agreement between her and FirstRand to be declared void ab initio). SARB requested to provide expert witness to counter evidence by Mr Ribbens of FirstRand. SARB declined to assist.</td>
</tr>
<tr>
<td>05 April 2007</td>
<td>Mokgoatheng, AJ (TPD, HC Case No 27048/03) dismissed the Complainants claim (to have the memorandum of agreement and annexures thereto declared void ab initio). Also addressed Bertelsmann, J ruling, motivating his right to over-rule Bertelsmann, J (a finding subsequently endorsed by the SCA).</td>
</tr>
<tr>
<td>17 October 2007</td>
<td>Request to SARB for KPMG report (as per paragraph 6.2 of attorney Ian Levitt’s letter to Public Protector dated 19/05/2016).</td>
</tr>
<tr>
<td>07 April 2008</td>
<td>SARB informed the Complainant that it will not intervene in her court case with FirstRand.</td>
</tr>
<tr>
<td>Date</td>
<td>Event Description</td>
</tr>
<tr>
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</tr>
<tr>
<td>08 April 2008</td>
<td>SARB confirmed it should intervene in court case in the interests of the state and public interest.</td>
</tr>
<tr>
<td>09 April 2008</td>
<td>Legal advice provided to SARB not to intervene due to its lack of intervention thus far, which in turn may place SARB in a difficult position.</td>
</tr>
<tr>
<td>23 May 2004</td>
<td>FirstRand applies to retain the R25mil back to offshore. SARB declined. Funds repatriated on 19/06/2007.</td>
</tr>
<tr>
<td>17 October 2007</td>
<td>The Complainant had a meeting with SARB and requested their support in line with the KPMG report.</td>
</tr>
<tr>
<td>07 April 2008</td>
<td>SARB informs the Complainant that they have declined not to intervene in her litigation.</td>
</tr>
<tr>
<td>09 May 2008</td>
<td>After reconsidering their initial position, SARB informed again that they will not intervene in the Complainants litigation.</td>
</tr>
<tr>
<td>12 September 2008</td>
<td>Heher, JA’s judgment (SCA Case No 416/07) in respect of the Complainants appeal against Mogoatlheng, AJ’s judgment and subsequent finding against her. The Complainant alleged that she suffered prejudice due to SARB’s non-inclusion in this court case.</td>
</tr>
<tr>
<td>30 October 2008</td>
<td>The Complainant requested SARB’s assistance in court, i.e. in defence against FirstRand’s counterclaim.</td>
</tr>
<tr>
<td>08 May 2009</td>
<td>SARB declined assistance and an expert witness in the Complainants defence against FirstRand’s counterclaim.</td>
</tr>
<tr>
<td>19 March 2010</td>
<td>The Complainant’s request to SARB for KPMG report (as per paragraph 6.2 of attorney Ian Levitt’s letter to Public Protector dated 19/05/2016).</td>
</tr>
<tr>
<td>11 September 2012</td>
<td>The Complainant’s application for separation of issues dismissed.</td>
</tr>
<tr>
<td>30 August 2012</td>
<td>The Complainant met with FirstRand CEO (Johan Burger) and requested him to do the right thing (i.e. to intervene in her favour). Burger failed to intervene.</td>
</tr>
<tr>
<td>Date</td>
<td>Event Description</td>
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<tr>
<td>19 May 2013</td>
<td>The Complainant suggested to the FirstRand CEO that he meet with her exchange control expert, Mr Bruce-Brand. Burger declined.</td>
</tr>
<tr>
<td>14 June 2013</td>
<td>Fabricius, J (TPD, HC Case No 27048/03) heard FirstRand’s replication to the Complainants amended plea in response to FirstRand’s counterclaim so as to allege that FirstRand had committed fraud in setting up her loop structure, alternatively FirstRand had exceeded its authority as authorised dealer. Judge ruled in FirstRand’s favour, i.e. the dispute over the validity of the agreement is <em>res judicata</em> since the SCA had already decided that issue.</td>
</tr>
<tr>
<td>11 September 2014</td>
<td>The Complainants appeal to SCA against Fabricius, J’s decision of 14/06/2013. Mpati, J dismissed her appeal.</td>
</tr>
<tr>
<td>03 June 2015</td>
<td>SARB declined Bruce-Brand’s request for a copy of KPMG report.</td>
</tr>
<tr>
<td>19 November 2015</td>
<td>Sheriff attached the Complainants property in execution.</td>
</tr>
<tr>
<td></td>
<td>(It is not stated which of her properties were specifically attached).</td>
</tr>
<tr>
<td>03 December 2015</td>
<td>FirstRand obtained judgment against the Complainant for R19,634,279.49 before Fabricius, J</td>
</tr>
<tr>
<td></td>
<td>Fabricius, J (TPD, HC Case No 27048/03) declined the Complainant’s application to remove and replace her plea.</td>
</tr>
<tr>
<td>30 March 2016</td>
<td>The Complainant’s application for leave to appeal the quantum order and for a postponement of her application for same was declined by Fabricius, J</td>
</tr>
<tr>
<td>17/12/2015</td>
<td>The Complainant laid criminal charges with the Special Commercial Crime Unit against FirstRand.</td>
</tr>
<tr>
<td>Early 2016</td>
<td>Section 205 Subpoena issued for KPMG report.</td>
</tr>
<tr>
<td>17 March 2016</td>
<td>The Complainant received a copy of the KPMG report from the SCCU.</td>
</tr>
<tr>
<td>Date</td>
<td>Event Description</td>
</tr>
<tr>
<td>-------------------</td>
<td>---------------------------------------------------------------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>18 March 2016</td>
<td>The Complainant called Mr Ellis (SARB). He informed the Complainant that she could have subpoenaed the information from SARB.</td>
</tr>
<tr>
<td>13 April 2016</td>
<td>The Complainant applied for an interdict preventing FirstRand from executing on its money judgement. Matter heard by Tuchten, J (date unknown).</td>
</tr>
<tr>
<td>30 June 2016</td>
<td>Judgment by Tuchten, J (TPD, HC Case No 27048/03) wherein he declined the Complainant’s application for an interdict preventing FirstRand from executing on its money judgment.</td>
</tr>
<tr>
<td>14 September 2016</td>
<td>FirstRand attached the Complainant’s property (Carrington Pointe).</td>
</tr>
<tr>
<td>03 November 2016</td>
<td>FirstRand attached the Complainant’s shares in her companies.</td>
</tr>
<tr>
<td>22 November 2016</td>
<td>SARB responded to Section 205 of SCCU and allegedly supplied false information.</td>
</tr>
<tr>
<td>14 February 2017</td>
<td>Sheriff attached the Complainant’s property (Del Prado).</td>
</tr>
<tr>
<td>17 March 2017</td>
<td>FirstRand filed for the Complainant’s sequestration.</td>
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**Issues in dispute**

5.1.4. As stated above the SARB has disputed my jurisdiction to investigate this complaint due to the fact that this matter has been ventilated by various courts and the fact that the matter is older than two years. Therefore the first issue for my determination is whether the law empowers me to investigate this complaint against the SARB.

5.1.5. I have noted, as alluded to by the SARB that the High Court as per the cases cited in paragraph 3.6.1 has indeed considered and ventilated the same issues which form the basis of this complaint. This was confirmed by Tuchten J in *Ann Elizabeth Mary Pratt v First Rand Bank High court*, at paragraph 24 and 25 of the judgement as follows:
"24. The case came to trial before Mokgoatlheng AJ. When leading counsel for Ms Pratt opened the case, he informed the court that the parties had agreed that the result of the entire case, on the merits, was to depend on the determination of four identified issues. I shall call this the trial agreement. Quantum would therefore, if necessary, stand over for later determination.

25. The four issues are in summary and to the extent presently relevant expressed in the following four questions:

25.1. Did the transaction fall within the ambit of reg 10(1)(c)?
25.2. If so, was permission for the transaction granted by the Treasury?
25.3. If not, did the transaction contravene reg 10(1)(c)?
25.4. If so, did the contravention result in the nullity of the agreements which constituted the transaction?"

5.1.6. According to Tuchten J, the conclusion on these issues was that the transaction was indeed in the purview of Regulation 10(1)(c) and that the permission as contemplated in the Regulation had been granted.

5.1.7. The Complainant appealed this decision to the Supreme Court of Appeal (SCA) in Pratt v First Rand Bank Limited, High Court Supreme court of Appeal case no 416/07 which was dismissed.

5.1.8. In respect of the failure by the SARB to provide the Complainant with the KPMG report, this issue was also addressed in the judgement of Tuchten J in paragraph 56 to 59 as quoted hereunder:

"56. I turn to the KPMG report. This report was commissioned by the Reserve Bank to investigate Ms Pratt’s complaints that the transaction had been illegal. During January 2004 Ms Pratt participated in the KPMG investigation. She says that she believed that KPMG had compiled a report of their
investigation. Indeed it had; the report was handed to the Reserve Bank in 2004. But, Ms Pratt claims, she only obtained a copy of the report in March 2016.

57. The report reflects a number of interviews with officials who worked in FirstRand’s foreign exchange department at the relevant time. Several of them took the view that the transaction fell into a grey area or was against the spirit of the law. Versveld himself discussed the transaction with some of his colleagues. His view was that the transaction was not in conflict with the regulation.

58. Ms Pratt asserts that the content of the KPMG report shocked her and that the report confirmed her belief that FirstRand had contravened reg 10(1)(c). She claims that the report constitutes proof that FirstRand had withheld from the trial before Mokgoatlheng AJ its knowledge that the transaction contravened the regulation.

59. I do not agree. The report shows nothing more than that officials within FirstRand held different opinions on the subject. The issue always was whether the blanket permission conferred by the Reserve Bank through ruling E5A(1)(a) applied to the transaction. Nothing in the KPMG report persuades me that the officials within FirstRand who were actually involved in the transaction, including Versveld, held the view that the blanket permission did not apply to the transaction."

5.1.9. In the response received from the Complainant dated 30 September 2019, the Complainant advised at point 4 that all the issues raised by her to my office against the SARB was not properly ventilated as per her revised complaint submitted to my office around April 2017 as per point 1 of the letter dated 30 September 2019.
5.1.10. In this regard, it is necessary for my office to expand upon the explanation already provided above and the outline of the complaint as per point 8 of the reply by the Complainant.

5.1.11. Under point 12 to 46 of the Complainants’ response letter, she sets out the reasons why she holds the view that the complaint against the SARB has not been fully considered and ventilated by any court of law. I will now turn to addressing these issues in the paragraphs which follows. It should be noted, that although the points raised by the Complainant are addressed, it would not necessarily be in the same sequence as I moved between the revised complaint and her response dated 30 September 2019.

South African Reserve Bank

5.1.12. Whether, following the Complainant’s whistle-blowing against FirstRand to SARB on 13 August 2003, SARB failed to take action against FirstRand, as also recommended in the KPMG report;

5.1.13. Alternatively, that SARB failed to inform the Complainant of any action they may have taken against FirstRand. In this regard, the Complainant asserted that as a whistle-blower she had a right to know the outcome of her complaint;

5.1.14. Whether SARB failed to provide the Complainant with a copy of the KPMG report as requested on various occasions since 2004. In essence, the Complainant alleged that if SARB had provided her with the KPMG report upon her initial request, which report indicated that the aforesaid loop structure was illegal and thus null and void, she would have succeeded in her litigation against FirstRand. However, due to their failure to provide the Complainant with the KPMG report, she has suffered financial and reputational prejudice due to FirstRand’s successful litigation against her.
5.1.15. Whether SARB failed to provide the Complainant with information regarding:

a) The unwinding of the transaction;

b) Any SARB instruction to FirstRand regarding the retention or return of funds; and

c) The provision of an expert witness to refute the testimony of Mr Ribbens of FirstRand in respect of FirstRand's duty to scrutinise the documents and refer any suspicious transactions to SARB for approval.

5.1.16. Whether SARB arbitrarily applied Section 33 of the SARB Act in refusing to provide any information to the Complainant;

5.1.17. Whether SARB failed to act in terms Sections 32, 33, 34, 195, and 237 of the Constitution;

5.1.18. Whether SARB failed to protect the interests of the Complainant in terms of the Protected Disclosure Act, 2000 regarding which she had a vested interest in the KPMG report due to her status as whistle-blower;

5.1.19. Whether SARB failed to provide the Complainant with timely advice regarding the fact that the Complainant could subpoena the information she required via the courts.

5.1.20. On 26 May 2017, the Complainant raised an additional allegation via email. Therein the Complainant alleged that SARB withheld information from the Prosecutor acting on behalf of the National Prosecuting Authority (NPA).

*The remedial action expected by the Complainant*
5.1.21. That I should issue an order that all pending litigation and the execution of judgments obtained against the Complainant be suspended until the completion of my investigation (including the attachment of her Embassy Gardens property);

5.1.22. That I indicate whether a provisional report can be issued immediately on the date on which the complaint was lodged with me;

5.1.23. That SARB revoke FirstRand’s dealer licence enabling them to deal in foreign exchange;

5.1.24. That FirstRand’s executives and directors be held accountable for their unlawful conduct in setting up this loop structure;

5.1.25. That SARB be ordered to amend its policy regarding its reliance on Section 33 of the SARB Act to align with the Constitution;

5.1.26. That the Complainant be reimbursed for the quantifiable losses and prejudice she has suffered (both direct and consequential);

5.1.27. That the Complainant be fairly compensated for the prejudice that she has suffered with which she aims to launch a Global Leadership Initiative in collaboration with Harvard University;

5.1.28. That an investigation be conducted into SARB’s handling of FirstRand’s Duisberg loop structure (a similar loop structure to the Complainants which FirstRand have been operating);

5.1.29. That FirstRand and SARB jointly apply for the various court judgments against the Complainant to be rescinded;
5.1.30. That SARB and FirstRand be ordered to issue a written apology to the Complainant;

5.1.31. That I propose legislative amendments to Section 33 of the SARB Act;

5.1.32. That SARB and the FirstRand Board review then FirstRand CEO, Johan Burger's fitness to hold office;

5.1.33. That FirstRand review the fitness of Hannes Vos (Head of FirstRand Exchange Control) to hold office;

5.1.34. That SARB review the fitness of Alexander Ellis (former Assistant General Manager of Investigations at SARB; presently senior Counsel in the SARB legal Department) to hold office;

5.1.35. That the members of the FirstRand legal team be referred to the Law Society of South Africa and relevant Bar Councils for investigation;

5.1.36. That the outcome of my investigation be referred to the Competition Commission to investigate any collusion between SARB and FirstRand with regard to this case.

Conducting an analysis of the allegations the Complainant raised in comparison with the issues addressed in the judgments referred to against the SARB;

5.1.37. The Complainant alleged that, following her whistle-blowing against FirstRand to SARB on 13 August 2003, SARB failed to take action against FirstRand, as also recommended in the KPMG report.

5.1.38. In essence, the Complainant contended that FirstRand conducted an illegal transaction in violation of Regulation 10(1)(c). As such, the "transaction whereby capital or any right to capital is directly or indirectly exported from the Republic"
was conducted without permission of Treasury. On this aspect Tuchten, J in case number 27048/03 dated 30 June 2016, (Pretoria High Court) at paragraph 42, held as follows:

"On the evidence, Mokgoatlheng AJ concluded that the transaction was indeed one falling within the purview of reg 10(1)(c). The first of the four questions was therefore answered in favour of Ms Pratt. But the second question was, crucially answered against Ms Pratt. Mokgoatlheng AJ found that the evidence before him established that permission as contemplated in the regulation had been granted..."

5.1.39. Crucial to determining whether Treasury had consented to the transaction involving the Complainant, the term “transaction” being used in reference to the loop structure, the court considered whether FirstRand had complied with the Treasury’s requirements in assessing whether a transaction may or may not be performed. Vital in this regard was the share certificate presented to FirstRand indicating that the transaction involved a “non-resident” entity. In this regard Tuchten, J held as follows at paragraph 39 of the aforesaid judgment:

"The argument for Ms Pratt in the trial court was that there was no evidence that FirstRand carefully scrutinised the transaction. But Mr Ribbens testified that as a matter of practice within FirstRand, the crucial component of the transaction was that FirstRand was presented by Ms Pratt with the share certificate duly stamped (by Standard Bank, it will be recalled) to reflect the holder of the shares as non-resident."

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1 As per paragraph 25 of Tuchten, J judgment, four questions were asked, namely:
1. Did the transaction fall within the ambit of reg 10(1)(c)?
2. If so, was permission for the transaction granted by the Treasury?
3. If not, did the transaction contravene reg 10(1)(c)?
4. If so, did the contravention result in the nullity of the agreements which constituted the transaction?
5.1.40. Regard should be had to the timeline of events depicted above. It is clear that this non-resident stamp was obtained some time prior to the Complainant ever approaching FirstRand regarding this transaction. The court thus accepted that the transaction was conducted in compliance with Treasury’s requirements, thus with Treasury’s consent and thus legally compliant.

5.1.41. Further, at paragraph 41, Tuchten, J stated as follows:

“The argument was then made, and lost, on behalf of Ms Pratt that the evidence of Mr Ribbens was inadmissible. There was no cross-examination of Mr Ribbens. No further evidence was adduced on either side”

5.1.42. The court therefore accepted these facts and ruled against the Complainant.

5.1.43. It is thus not plausible to contend that SARB should have acted against FirstRand, especially since the court found that the transaction was compliant with the law.

5.1.44. Another point to consider as grounds upon which SARB might have been required to act against FirstRand is the allegation that the Complainant raised that FirstRand concocted a fraudulent scheme. In this regard, Tuchten, J stated as follows at paragraph 45 of his judgment:

“On 11 September 2014, under case 696/13\(^2\) the appeal was dismissed and the reasoning of Fabricius J was upheld. This date is important because it was then, at the least, that Ms Pratt must have known, and therefore did know, that the existence of the order of Mokgoatlheng AJ was an insuperable bar to her entitlement to ventilate the allegation that FirstRand had devised and implemented the transaction with the fraudulent intention of circumventing reg 10(1)(c)”

\(^2\) Reported as Prat v FirstRand Bank Limited [2014] ZASCA 110.
5.1.45. Given the fact that the courts have maintained the view that FirstRand did not concoct a fraudulent scheme, no justification can be found for the contention that the SARB was obliged to act against FirstRand in this regard. Therefore, I note that there was no basis for SARB to act against FirstRand as submitted in the reply by the Complainant dated 30 September 2019.

5.1.46. Lastly, the question as to the merits of the transaction based on the considerations of "at arm's length" and "market related prices" was also dealt with by Tuchten, J at paragraph 52 onwards. For sake of brevity, it shall not be quoted here, suffice it to say that the court did not decide in the Complainants favour on this issue.

5.1.47. I cannot conclude that the transaction which the Complainant had entered into was illegal, since a court has found it not to be so as discussed above. Thus further confirming that there was no need for SARB to take any action against FirstRand at that time.

5.1.48. Alternatively, that SARB failed to inform the Complainant of any action they may have taken against FirstRand. In this regard the Complainant asserted that as whistle-blower she had a right to know the outcome of her complaint.

5.1.49. The allegations contained in the paragraphs above, regarding the action taken by SARB; the KPMG report; information and witnesses required; section 33 confidentiality clause; protecting the Complainants' interests and the right to subpoena are closely related. Collectively they pertain to the issue of SARB's alleged failure to provide the Complainant with information and assistance, which information and assistance was, in her view, critical to the success of her civil litigation against FirstRand. Key also, is SARB's reliance on section 33 of the SARB Act in refusing to provide the Complainant with assistance and information as alleged. These allegations will be addressed collectively below.
That SARB failed to provide the Complainant with a copy of the KPMG report as requested on various occasions since 2004

5.1.50. Indeed, this allegation is probably the most important of all allegations since it is the Complainant’s contention that, had she been in possession of the KPMG report ab initio she would have succeeded in her litigation against FirstRand. For this reason this allegation will be addressed first.

5.1.51. Tuchten J considered the KPMG report issue in is judgment and stated the following at paragraph 60:

“Nothing in the KPMG report, viewed in the context of the factual matrix, persuades me that even if the report had been introduced in evidence the result of the trial before Mokgoatlheng AJ would have been any different.”

5.1.52. In short, the court held that the KPMG report would have made no difference to the outcome of the civil litigation by the Complainant against FirstRand.

Denial of information and assistance in general

5.1.53. As to Complainant’s allegation of SARB’s failure to provide her with a copy of the KPMG report, it should be noted that SARB placed reliance on Section 33 of the SARB Act in denying her access to the report.

5.1.54. In answer to the issue of the Complainant being denied assistance and information, Tuchten, J stated as follows at paragraph 68 of his judgment:
5.1.55. This in turn applies equally to all the information and assistance the Complainant required as per her allegations of SARB’s failure to provide information to her that relates to the matters.

*The subpoena issue*

5.1.56. Section 33 of the SARB Act is particularly relevant here, i.e. the non-disclosure of information by SARB *“except when required to do so before a court”*. 

5.1.57. In the allegations by the Complainant, she claimed that the SARB was responsible for informing her about her right to subpoena information. Given the fact that the Complainant had employed senior counsel and experienced legal practitioners to assist her from the outset, I am hard-pressed to agree with Complainant’s contention that her right to subpoena information was unbeknown to her (a basic procedural concept). Tuchten, J also commented on the fact that the Complainant and her counsel spoke with one voice and as such the actions by her legal counsel are tantamount to being her own. The following is stated at paragraph 54 of his judgment:

> “Counsel for FirstRand have cited with authority for the proposition that once the matter has been placed by a lay client in the hands of counsel, the lay client is bound by decisions such as these when made by counsel. I need not refer to such authority because counsel for Ms Pratt accepted that such was the position.”

5.1.58. As such, responsibility for the failure to subpoena any of the information or witnesses the Complainant required cannot be imputed to the SARB.

5.1.59. This also addressed the contention in the reply by the Complainant dated 30 September 2019 that she was not aware of which documents SARB has in their possession.
**Expert witnesses**

5.1.60. On the issue of expert witnesses, the Complainant presented the report by Mr Anthony Chait, a former non-executive director of SARB. Chait’s role within SARB ended in July 2015. It is noted that Chait’s report is dated 08 April 2016, a date preceding the hearing before Tuchten, J. In Complainant’s application before Tuchten, J she contended that FirstRand had obtained its judgments by fraud. In this regard the evidence of Mr Ribbens is key. Chait’s report is intended to rebut the testimony by Ribbens. It is unknown why this opposing evidence was not presented to the court. It is also uncertain why the Complainant failed to call any other potential expert witnesses skilled in the field of Exchange Control, such as Mr Bruce-Brand. As such, I cannot conclude that SARB’s failure to assist the Complainant, as alleged was fatal to her cause. Whether their refusal conforms to section 33 of the SARB Act will be addressed below.

5.1.61. Be that as it may, the issue of SARB’s failure to provide the Complainant with any information, assistance or witnesses has been addressed by a court of law as stated above. As such I am not at liberty to revisit those same issues.

*That SARB failed to provide the Complainant with information regarding:*

1. The unwinding of the transaction;
2. Any SARB instruction to FirstRand regarding the retention or return of funds;
3. The provision of an expert witness to refute the testimony of Mr Ribbens of FirstRand in respect of FirstRand’s duty to scrutinise the documents and refer any suspicious transactions to SARB for approval

5.1.62. Since the court has already pronounced on the fact that the Complainant was entitled and had an opportunity to subpoena any information she required from
SARB, this issue has already been adjudicated upon by a court (para 5.1.56). As such I am not at liberty to make contrary findings against the SARB.

*That SARB arbitrarily applied Section 33 of the SARB Act in refusing to provide any information to the Complainant*

5.1.63. It is SARB’s contention that their decision to refuse to provide the Complainant with any information is based on section 33. This is stated in their letters to my team dated 06 May 2016, 21 June 2016, and also by Mr Ellis in the telephonic conversation between him and the Complainant on 18 March 2016.

5.1.64. Apart from these instances, SARB also declined the Complainants requests for a copy of the KPMG report, as stated in the timeline above, during 2004, 2010 and 2015.

5.1.65. SARB also submitted that the KPMG report was provided to SARB in confidence as per the markings thereon as "*Private and Confidential"* (as seen on the first page above recipient’s address). It follows that the KPMG report was also provided to SARB on the basis of an agreement entered into between SARB and KPMG as per point 1 of that report. In addition, point 1 ("*Scope and nature of our investigation*") concluded with the following:

"*This report was prepared solely for the purposes of reporting our findings to the Reserve Bank. This report should therefore not be utilised for any other purpose. No part may be quoted, referred to or disclosed in whole or in part, by any party, without our prior written consent.**"

5.1.66. Section 33(2) makes it peremptory on the SARB and does not afford SARB a discretion in this regard to divulge any content of the KPMG report which was marked as confidential, unless it forms part of the exceptions as per the section.
5.1.67. The designation of the document as confidential, as well as section 33, however, did not leave the Complainant without recourse. As stated by the courts, she was entitled to subpoena the information. In such an instance SARB would have been obliged to provide the KPMG report, or, for that matter, any other information the Complainant required. I find no reason to expand upon this issue any further as these avenues were always available to the Complainant, who was legally represented at the time.

5.1.68. Upon consideration of these factors I cannot find that SARB's decision to decline any assistance or information to the Complainant was ill-founded or arbitrarily taken.

That SARB failed to act in terms Sections 32, 33, 34, 195, and 237 of the Constitution.

5.1.69. In the reply to the discretionary notice issued to the Complainant, she noted that certain sections of the Constitution were also not adhered to by the SARB. I will now turn to discuss these sections in so far as they are relevant to this investigation. Regarding section 32, access to information, the complaint in this regard is closely related to the Complainant's position as whistle-blower, as alleged. Conflicting therewith is SARB's responsibility in terms of section 33 of the SARB Act, which precludes them from providing information to any person arbitrarily which means that they may only provide information in exceptional circumstances, as provided for in the relevant section. This allegation was addressed above.

5.1.70. With regards to just administrative action as per the Constitution, it is important to note that in terms of section 33(3)(a) provision is made for the review of administrative action by a court. The allegations against SARB relate to administrative action which the complainant alleged has adversely affected her
rights. In light of the fact that her allegations have in the whole been addressed by various courts as indicated above, it is difficult to follow this argument by the Complainant.

5.1.71. Regarding access to courts in terms of section 34 of the Constitution, this section deals solely with her right to have access to court. The Complainant’s allegations are more specifically to the effect that her hearing before such courts have been unfair due to the fact that she was denied access to information and witnesses so as to properly present her case. At all times, the Complainant was represented by counsel, who should have advised her about her remedies in respect of an appeal or review in a court matter, I see no reason for me to entertain this issue.

5.1.72. Regarding basic values and principles governing public administration as per section 195 of the Constitution, the Complainant emphasised subsection (a), (g), (h) and (j). Given the fact that I am unable to make a finding of maladministration against SARB, I am similarly unable to conclude that such alleged maladministration resulted in the violation of the Complainants constitutional rights.

5.1.73. Regarding diligent performance of obligations in terms of section 237 of the Constitution, the Complainant stated that SARB cannot hide behind section 33 of the SARB Act, in order to avoid responsibility for its failure to perform its functions diligently and without undue delay. As stated above, I cannot conclude that the SARB acted improperly in its application of section 33. As such, I cannot conclude that SARB failed to adhere to section 237 of the Constitution.

That SARB failed to protect the interests of the Complainant in terms of the PDA, regarding which the Complainant had a vested interest in the KPMG report due to her status as whistle-blower
5.1.74. The PDA does not apply to this matter as the Complainant does not fall under the category of persons which it protects.

5.1.75. Furthermore, the SARB whistle blowing policy as per their website states the following under the heading “Whistle Blowing Frequently Asked Questions (FAQs):

“How will I know that anything will be done about the information I report?
…The person who made the tip-off will not be told how the investigation is progressing because these investigations are sensitive, must be kept confidential and take some time to complete.”

5.1.76. It is apparent that whistle blowing legislation in itself does not afford any rights to the whistle blower to receive information as to the issue reported on.

5.1.77. In the Complainant’s matter, the failure by SARB to assist the Complainant or provide her with any information has already been addressed by the courts. I am not at liberty to investigate issues that have already been adjudicated upon by a court of law as this is tantamount to a review of the court’s decision. As such, no finding can be made regarding the Complainant’s allegation against SARB’s failure to protect her interests as a whistle blower, whether under the PDA or otherwise.

That SARB failed to provide the complainant with timely advice regarding the fact that the Complainant could subpoena the information she required via the courts.

5.1.78. The issue in respect of any information which the Complainant could have subpoenaed has already been addressed above and I will accordingly not repeat myself in this regard.

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On 26 May 2017, the Complainant raised an additional allegation via email, therein she alleged that SARB withheld information from the Prosecutor acting on behalf of the NPA.

5.1.79. This issue falls within the purview of the NPA and it is therefore for the prosecutor on behalf of the NPA to decide what action to take if indeed the SARB officials withheld information from him/her. As such I will not be investigating this allegation as sufficient remedy already exists within the powers assigned to the prosecutor. For me to interfere in a matter resorting within the powers of the prosecutor even prior to him/her exercising his discretion in this regard would be improper.

Conclusion

5.1.80. The evidence above shows that the issues the Complainant brought before me have already been considered and ventilated by courts of law and therefore section 182(3) of the Constitution, 1996, precludes me from investigating the matters further.

5.1.81. It should be noted that while the Complainant made reference to “the Duisberg loop structure”, which was similar to the matter that she raised, I have only concentrated on the issues which directly involved the Complainant.

5.2 Whether the Public Protector has jurisdiction to investigate the allegations of Ms Anne Pratt against the First Rand Bank?

Common Cause

5.2.1 FirstRand is a publically listed company, a bank respectively incorporated and registered in terms of the laws of the Republic and is also an authorised dealer.
Issue in dispute

5.2.2 The issue for my determination is whether the law allows me to investigate the complaint against First Rand.

5.2.3 Section 182(1) of the Constitution, empowers the Public Protector to only investigate conduct in state affairs; or in the public administration in any sphere of government.

5.2.4 In the reply by the Complainant dated 30 September 2019, at points 47 to 58, the Complainant sets out her reasoning in coming to the conclusion that I do in fact have jurisdiction in respect of FirstRand.

5.2.5 In this regard, I again refer the Complainant to the judgement already referred to earlier where Tuchten, J in case number 27048/03 dated 30 June 2016, (Pretoria High Court) at paragraph 31, the learned Judge held as follows:

"I interrupt the narrative to point out that the administrative decision making involved in the conferring or withholding of permissions required by the regulations takes place in a manner markedly different from that in which administrative decisions normally are made. The authorised dealer is not the agent or delegate of the Treasury to make the required administrative decision..."

5.2.6 Therefore, FirstRand in its capacity as authorised dealer was not exercising a discretion on behalf of the public entity.

5.2.7 For this reason, as well as my explanation above regarding the lack of my jurisdiction pertaining to matters already adjudicated by a court, I will not be investigating the allegations against FirstRand as these relate to allegations against a private company and not an organ of state.
Conclusion

5.2.8 I therefore do not have jurisdiction to investigate the issues raised against FirstRand which falls outside the sphere of section 182(1) of the Constitution.

6. FINDINGS

Having regard to the evidence and the regulatory framework determining the standard the SARB should have complied with and my consideration of the Complainant's response provided to me, I make the following findings:

6.1 Whether the South African Reserve Bank acted improperly and or abused its power in dealing with Ms Anne Pratt's complaint against FirstRand Bank.

6.1.1 I make no finding in this regard as the evidence shows that the matter was ventilated before a court of law and I am thus prohibited in terms of section 182(3) of the Constitution from investigating the matter.

6.2 Whether the Public Protector has jurisdiction to investigate the allegations of Ms Anne Pratt against the FirstRand Bank.

6.2.1 I make no finding in this regard as I do not have jurisdiction to investigate the issues raised against First Rand which falls outside the sphere of section 182(1) of the Constitution.
7. I am thus satisfied that the issues brought before me have been considered and the matter is therefore finalized.

ADV BUSISIWE MKHWEBANE
PUBLIC PROTECTOR OF THE
REPUBLIC OF SOUTH AFRICA
DATE: 17/12/2019