

Chris Moraitis

SSI

**From:** Livhuwani Tshivalule <LivhuwaniT@pprotect.org>  
**Sent:** 29 August 2016 16:23  
**To:** Johann DeJager  
**Cc:** Lesetja Kganyago; Chris Stals; Chris Moraitis; Juanita Jansen; Chris VanderWalt  
**Subject:** RE: PUBLIC PROTECTOR INVESTIGATION

"JDS"

Dear Dr De Jager

The PP is extremely worried about the conduct of the central bank. The PP does not have to get permission from the Bank in order to meet Dr Stals. This is very concerning.

The PP has responded to all your issues. If you feel that we have not yet address your questions the way you want them addressed, please reserve them for the 08 September 2016.

The PP will be expecting Dr Stals to appear before her on 08 September.

Regards

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**From:** Johann DeJager [mailto:johann.dejager@resbank.co.za]  
**Sent:** 29 August 2016 03:29 PM  
**To:** Livhuwani Tshivalule  
**Cc:** Lesetja Kganyago; Chris Stals; cmoraitis@werksmans.com; Juanita Jansen; Chris VanderWalt  
**Subject:** FW: PUBLIC PROTECTOR INVESTIGATION

Dear Livhuwami,

Note has been taken of your e-mail of today in which I am informed that the Public Protector is available to meet with Dr Stals on 8 September 2016, from 10.00 to 12.00 at the Office of the Public Protector. It is once again confirmed that the South African Reserve Bank ("Bank") is most willing to assist the Public Protector in the fulfilment of her duties as long as it is evident that these duties are exercised in terms of the Public Protector Act, 1994 (Act No. 23 of 1994 – "PP Act"), comply with relevant legal principles pertaining to administrative justice and the like, and take due cognisance of all the relevant stakeholders (which includes the stability of the financial system of the country).

Since the Bank from the outset had concerns about the legal basis for the current investigation conducted by the Public Protector (which ostensibly includes the envisaged interview with Dr Stals), it approached Adv Madonsela on more than one occasion in writing in order to obtain legal clarity in the matter. The latest letter being the one attached, which was addressed to Adv Madonsela on 15 August 2016. To date, this letter remains unanswered and the Bank remains unconvinced (for the reasons mentioned in the letter) that a legal basis exists for the current investigation by Adv Madonsela, and the involvement of Dr Stals and the Bank in the same.

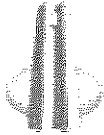
In the light of the circumstances, it would therefore be appreciated if you could assist this Office in clarifying the matter in order to enable us to deal with it as expeditiously as possible.

Your cooperation and assistance in the matter is appreciated.

Kind regards

PKN J.

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South African Reserve Bank

**Dr Johann de Jager**  
General Counsel  
Legal Services Department

P O Box 427 Pretoria 0001 South Africa  
370 Helen Joseph Street (formerly Church Street) Pretoria 0002  
Tel. +27 12 313 3596 Fax +27 12 313 4090  
E-mail: [Johann.DeJager@resbank.co.za](mailto:Johann.DeJager@resbank.co.za)

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**From:** Johann DeJager  
**Sent:** 15 August 2016 02:28 PM  
**To:** 'Livhuwani Tshivalule'  
**Subject:** RE: PUBLIC PROTECTOR INVESTIGATION

Dear Livhuwani,

Attached for the attention of the Public Protector.

Regards



South African Reserve Bank

**Dr Johann de Jager**  
General Counsel  
Legal Services Department

P O Box 427 Pretoria 0001 South Africa  
370 Helen Joseph Street (formerly Church Street) Pretoria 0002  
Tel. +27 12 313 3596 Fax +27 12 313 4090  
E-mail: [Johann.DeJager@resbank.co.za](mailto:Johann.DeJager@resbank.co.za)

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**From:** Livhuwani Tshivalule [<mailto:LivhuwaniT@pprotect.org>]  
**Sent:** 01 August 2016 03:28 PM  
**To:** Johann DeJager  
**Cc:** Juanita Jansen  
**Subject:** FW: PUBLIC PROTECTOR INVESTIGATION

Dear Mr DeJager

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Please take note of trail of emails below.

The Public Protector is requesting information as per attached summary from SARB.

SS3

She is further requesting contact details of Dr Chris Stals, Former Reserve Bank Governor.

Regards

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**From:** Zingisa Zenani [<mailto:Zingisa.Zenani@treasury.gov.za>]

**Sent:** 01 August 2016 01:02 PM

**To:** Livhuwani Tshwalule

**Subject:** RE: PUBLIC PROTECTOR INVESTIGATION

Dear Livhuwani,

I refer to your email below.

As indicated below, kindly be advised that the information is in the custody of the SARB. In order to avoid the long process of confidentiality undertakings, we are of the view that you contact the SARB directly to obtain the information. Dr De Jager, SARB's internal Legal Counsel, is the official that is dealing with the matter from their side, and has been made aware of the fact that he may be approached by the PPSA for the information.

His contact details are as follows:

Dr Johann de Jager  
General Counsel: Legal Services  
Tel: 012 313 3596  
Fax: 012 313 4090  
Email: [Johann.DeJager@resbank.co.za](mailto:Johann.DeJager@resbank.co.za)

For any queries, please feel free to contact writer hereof

Kind regards

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**From:** Livhuwani Tshwalule [<mailto:LivhuwaniT@pprotect.org>]

**Sent:** 30 July 2016 02:30 PM

**To:** Zingisa Zenani

**Subject:** RE: PUBLIC PROTECTOR INVESTIGATION

Dear Zingisa

Once again, thank you. Please take note of attached your document with our comments.

I have highlighted relevant documents in red that may be of curial assistance in our investigation.

We would really appreciate if those could be forward to us as soon as reasonably possible.

Regards

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**From:** Zingisa Zenani [<mailto:Zingisa.Zenani@treasury.gov.za>]  
**Sent:** 29 July 2016 08:58 AM  
**To:** Livhuwani Tshivalule  
**Subject:** FW: PUBLIC PROTECTOR INVESTIGATION

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Dear Livhuwani,

I refer to our instant telephone conversation.

I confirm that we met with the SARB regarding how far they can assist us in obtaining the information that was requested from Treasury by the Public Protector.

I attach herewith a list of documents that the SARB has in their possession and kindly request that you indicate if there is any document from the list, that may be of assistance to your investigation.

Kind regards

Zingisa  
012 395 6556  
072 387 5073

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PKN J.



South African Reserve Bank  
Legal Services Department

File ref. no.: 15/3

2016-08-05

Advocate TN Madonsela  
The Public Protector  
Office of the Public Protector  
175 Lunnon Street  
Hillcrest Office Park  
0083

Dear Adv Madonsela,

**Public Protector Investigation**

The meeting on 2 September 2013, between yourself, Ms Gill Marcus and Messrs Mboweni, Moraitis and the writer; as well as the subsequent letter dated 27 September 2013, addressed by Ms Marcus (in her then capacity as the Governor of the South African Reserve Bank – "SARB" or "Bank") to you, refer. A copy of this letter is hereby attached for ease of reference.

The SARB has been requested by e-mail dated 1 August 2016, received from Livhuwani Tshivalule of your office, to provide certain information related to Bankorp as well as the contact details of Dr Stals, former Governor of the Bank. As should be evident from our earlier interactions with you and your office the Bank has demonstrated its cooperation and willingness to assist the Office of the Public Protector in the fulfilment of its duties and responsibilities as envisaged in terms of the Public Protector Act, 1994 (Act No. 23 of 1994 – "PP Act"). The SARB is also cognizant of its responsibility of ensuring that, as far as may be reasonably possible, that matters of this nature are conducted in accordance with legal prescriptions and with due regard to the interests of all relevant stakeholders (of which the general public, the banks and the financial system in this country constitute important parts).

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Against the above background, it is therefore regarded of importance that the following matters be emphasised:

(1) The "CIEX Matter" and "Pending Matters Relating to the Reserve Bank" constituted the two matters cited on the official agenda of the Office of the Public Protector at the meeting of 2 September 2013, for discussion. Under the latter matter you enquired about the Bankorp so called lifeboat and the SARB's involvement, as well as the role of Government and ABSA in the matter, including the possibility of any recovery of the funds involved;

(2) at the end of the meeting you indicated that your provisional report into the matter had nearly been completed, (you indicated that you only needed to speak to two more persons), and that the report would be forwarded to the SARB for its comments in October 2013. To date, this report has not been received by the Bank; and

(3) subsequent to the meeting, the then Governor of the SARB addressed the letter of 27 September 2013 to you, addressing, *inter alia*, the serious legal concerns of the Bank with regard to the process followed in your investigation. To date, the SARB has not received any response to the letter and the matter remains unresolved.

Accordingly, it would be appreciated if you could as a matter of urgency indicate whether the information required from the Bank and the contact details of Dr Stals (012-9930049) are in any manner related to your investigation as referred to in this letter. If this is indeed the case, as the circumstances tend to indicate, it is regarded of the utmost importance that the concerns of the SARB regarding the validity of your investigation be addressed by your Office, before the Bank would be able to provide the required information. Furthermore, the SARB adheres to the policy of providing all its Governors and former Governors with legal and other support in matters arising from their official business when in the service of the Bank. The SARB will therefore, subject to the potential legal impediments referred to above, provide Dr Stals with all the support required by him in the matter.

Writer has in the meantime liaised with Dr Stals with regard to your request for his details. He indicated that he has no idea why you should wish to contact him, but indicated his willingness to provide his full cooperation in providing relevant information of the Bank that falls within his field of knowledge as he may be able to lawfully disclose. It is however further subject to the condition that he be adequately informed about the nature of your enquiry and

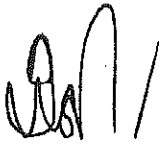
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provided sufficient time to respond, and that he be supported and assisted by the SARB (as represented by this Office) in the matter. In this regard, it should be borne in mind that Dr Stals retired from the service of the Bank some seventeen years ago and in the meantime has not had normal access to the official records of the SARB.

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Your kind cooperation and understanding in the matter is appreciated.

Yours sincerely



**Dr Johann de Jager**  
**General Counsel**

J.

PRN

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South African Reserve Bank  
Office of the Governor

By HAND

27 September 2013

Ref No.: 15/3

Advocate TN Madonsela  
Public Protector  
175 Lunnon Street  
Hillcrest Office Park  
Pretoria  
0083

Dear Advocate Madonsela

- 1 I refer to our meeting on 2 September 2013. After subsequent consultations with the legal team of the South African Reserve Bank ("SARB" or "Bank"), I wish to advise as follows.
- 2 At that meeting, you intimated that the subject-matter of your investigation is the Government's alleged decision not to implement the CIEX report, in 1999. It was then indicated to you that the CIEX report had nothing to do with the Bank and therefore the SARB could not have been expected to have taken any "decision" in respect thereof (which is the subject matter of your investigation into alleged maladministration by the Bank). In response, you indicated that your investigation against the Bank would therefore be concerned with the subject-matter of "the Davis report". That refers to a report which was prepared by a panel of experts appointed by the Bank on 15 June 2000 to "investigate the SA Reserve Bank's role with regard to the financial assistance package to Bankorp". I understood from our discussion on 2 September 2013, that your investigation would now be concerned with considering, having regard to the Davis report, whether or not there is money owed to the Government of South Africa which can be reclaimed from ABSA Bank. In this regard, as indicated to you at our meeting, you should bear in mind that neither the previous Governor (Mr Mboweni) nor me were

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involved in providing the financial assistance in question and we are therefore reliant on the Davis report.

- 3 Nevertheless, if my above understanding of the matter is correct, then the Bank is of the view that your current investigation is ultra vires because, first, it lies beyond your jurisdiction and, secondly, even if you have jurisdiction to entertain the matter, the requirements of section 6(9) of the Public Protector Act 23 of 1994 have not been satisfied. In the light of these two considerations, the SARB is of the considered opinion that your investigation into the matter is not legally justified. The basis for the contention of the Bank is set out in more detail below.

**Pre-1994 Jurisdiction**

- 4 Your office was established, initially, under section 110 of the interim Constitution which came into effect on 27 April 1994. It was, thereafter, retained in the 1996 Constitution under section 182 and your powers are now governed by the Public Protector Act 23 of 1994.
- 5 The office of the Public Protector is a feature of the democratic Government established by, first, the interim and, then, the 1996 Constitution. It is one of the so-called "Chapter 9" institutions which are designed to strengthen constitutional democracy in the Republic of South Africa ("RSA") (see section 181 of the 1996 Constitution). Section 181(5) of the 1996 Constitution provides that the Chapter 9 institutions are accountable to the National Assembly and must report on their activities to the National Assembly once a year. The "National Assembly" to which the Chapter 9 institutions are accountable is the democratically elected National Assembly referred to in Chapter 4 of the 1996 Constitution.
- 6 The powers of the Public Protector, and hence the jurisdiction of your office, was originally prescribed in section 112 of the Interim Constitution and is now set out in sections 6 and 7 of the Public Protector Act. None of these sections vests the Public Protector with power to investigate matters which preceded the establishment of the office of the Public Protector.

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- 7 The reasons for this are clear. The Public Protector is an institution of the new constitutional dispensation in the RSA. It is an institution expressly established to support constitutional democracy in the country. It is a watchdog institution of the constitutional dispensation. The investigative powers of the Public Protector do not, therefore, apply to matters which preceded the advent of the interim Constitution and hence the creation of the office of the Public Protector.
- 8 As is evident from the Davis report, the SARB provided financial assistance to Bankorp from 1985 to 1992. In terms of the agreements facilitating the provision of that assistance, the Bank gave Bankorp a grant (by way of a net interest stream which amounted to the difference in margin between the interest rate agreed with the Bank and that applicable to the bonds under the assistance scheme).
- 9 On 1 April 1992, ABSA acquired Bankorp for R1 230 million. Although the assistance provided to Bankorp was extended to ABSA until 1995, the extension occurred pursuant to the deal that was struck when ABSA acquired Bankorp in 1992. In terms of that deal, the net asset value of Bankorp was calculated to include the value of the total net interest stream under the assistance scheme.
- 10 Given that the purchase price took into account the net asset value of Bankorp at the time, ABSA paid for the impact which the existing financial assistance had had on Bankorp as well as the expected future interest stream from the financial assistance.
- 11 Before concluding the takeover, ABSA sought and received an assurance from the Bank that the assistance package would continue on the same central financial terms and for the same period as Bankorp had agreed with the Bank.
- 12 In the Davis report, the expert panel found that had it not been for the continuation of the financial assistance to ABSA on the same terms as originally concluded with Bankorp, the transaction would ostensibly not have gone ahead. The continuation of the assistance on the original terms was therefore a condition of the transaction.
- 13 The panel concluded that because ABSA had paid for the continued assistance, it was not a beneficiary of the Bank package. In addition, it is apparent from the Davis report that the SARB retained the underlying assets (the bonds) and all that Bankorp and thereafter ABSA benefitted from was the income stream explained in 8 and 9 above.

14 In the light of these facts, it is evident that the events which have given rise to your investigation all preceded 27 April 1994. The grant was given by the Bank and paid for by ABSA before this date and therefore your jurisdiction does not extend to investigating matters related to these transactions.

15 In the circumstances, the investigation lies beyond your jurisdiction.

**Section 6(9) of the Act**

16 In the alternative to what is set out above, even if you do have jurisdiction to investigate a matter which arose prior to 1994 (which is not accepted by the SARB) or if your investigation only relates to matters which arose post-1994 (yet again, the Bank does not accept this to be the case since the underlying transaction clearly arose prior to 1994), none of the matters which you are investigating occurred within two years of your office having received the complaint which gave rise to the investigation. This means that in terms of section 6(9) of the Public Protector Act, you may only entertain this complaint in the event that special circumstances exist. Although you indicated at the meeting that the investigation was decided upon "at your discretion", the SARB did request an indication from you as to what constituted the special circumstances in this matter.

17 At the meeting on 2 September 2013, you indicated that the special circumstances were threefold:

- 17.1 The matter dealt with Government money;
- 17.2 it would be easy to recover; and
- 17.3 ABSA had already made provision for the claim.

18 I am advised that none of these qualify as the types of special circumstances which must exist in order to legally justify an investigation into this matter, which occurred more than two years prior to the complaint being made to your office.

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- 18.1 The fact that a case deals with Government money does not constitute a special circumstance. Many of the matters dealt with by your office most probably concern Government money.
- 18.2 It is unclear on what basis you concluded that the money would be easy to recover. As I set out in more detail below, this is directly contradicted by the findings of the Davis report.
- 18.3 You made it clear at our meeting on 2 September 2013 that you have not yet, and you do not in the future intend, to consult with ABSA in the course of your investigation. That means that at the time that you decided that there were special circumstances in the matter, you had not sought ABSA's confirmation of the allegation that it had made provision for a claim by the Bank for repayment of the assistance (without conceding that this is even a relevant consideration). As a result, you evidently made your determination on the basis of mere conjecture which was not even corroborated by the only party able to establish whether the allegation was true.
- 19 In the circumstances, we submit that your decision to proceed with the investigation was flawed as the requirements of section 6(9) were not met.
- 20 Moreover, there are compelling reasons related to the financial stability of the banking sector not to reopen matters on which reliance has been placed and which were regarded by the market as settled. These factors ought to have been taken into account when you assessed whether it was appropriate to embark on an investigation related to events which occurred more than two years before the complaint in this matter was received by your office. The relevant factors include the following.
- 20.1 As alluded to above, it was evidently a condition of the ABSA takeover of Bankorp that the assistance to Bankorp would continue until 1995 on the same terms and conditions as it was extended to Bankorp. What this meant in effect, is that ABSA bought the business of Bankorp on the understanding that it would be paid the net interest stream until 1995 and that there would

be no claim made by the Bank against ABSA in due course to repay the grant it had made to Bankorp historically.

20.2 The Davis report makes it clear that but for this arrangement, the ABSA acquisition of Bankorp would ostensibly not have taken place.

20.3 The Davis report calculated the total grant provided to Bankorp (and later to ABSA) to aggregate to R 1 295 million. If the complaint which was received by your office alleged that that amount or any amount of a similar magnitude should be recovered from ABSA, the impact of such a claim on ABSA's balance sheet and overall stability in the banking sector ought to have been considered by your office.

20.4 In the intervening period Barclays acquired a significant stake in ABSA, based on what had been the accepted position in respect of Bankorp and the assistance package. This merely demonstrates the importance of market certainty which ought to have been considered by you.

20.5 The issue of the Bankorp grant has already been extensively investigated by the panel of experts appointed in 2000 by the Bank. The Davis report concluded that whilst the Bank had acted beyond its powers in extending specified assistance packages to Bankorp, the Government would have no claim for repayment of the grant monies on the basis of contract. To the extent that there may be a claim based on enrichment, the claim would likely face a defence of estoppel. Furthermore, the panel concluded that the difficulties pertaining to the quantification of the enrichment and the identity of the beneficiaries (who were likely to have been Sanlam policy holders, bearing in mind that Sanlam was a mutual society at the time) would render any prosecution of an enrichment claim problematic.

21 These factors weigh heavily against the conclusion that any genuinely special circumstances existed to warrant the current investigation.

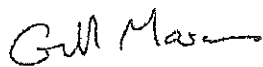
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22 In the circumstances, the SARB maintains that the requirements of section 6(9) of the Public Protector Act have not been met.

23 The Bank's rights in relation to the issues arising from your investigation are reserved.

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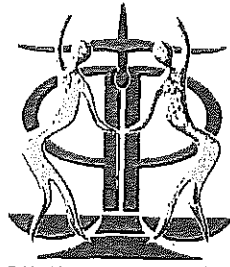
Yours sincerely



**Gill Marcus**  
Governor

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PUBLIC PROTECTOR  
SOUTH AFRICA

Accountability • Integrity • Responsiveness

MOŠIRELETSI WA SETŠHABA • MOŠIRELETSI WA SETŠHABA  
MUSIRHELELI WA VANHU • MUTSIRELEDZI WA TSHITSHAVHA  
OPENBARE BESKERMER • UMKHUSELI WOLUNTU • UMWIKELI W'OMPHAKATHI  
UMVIKELI WEMPHAKATSI • UMWIKELI WESITJHABA

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Tel: (012) 366 7108 • Fax: (012) 362 8918 • tollfree: 0800 11 20 40

julien@pprotect.org

Public Protector South Africa @PublicProtector

Date: 10 August 2016

Dr Johann de Jager

General Counsel

Legal Services Department

South African Reserve Bank

370 Helen Joseph Street

Pretoria

0002

Dear Dr De Jager,

REQUEST FOR INFORMATION REGARDING INVESTIGATION INTO  
ALLEGATIONS OF MALADMINISTRATION, CORRUPTION,  
MISAPPROPRIATION OF PUBLIC FUNDS AND FAILURE BY THE SOUTH  
AFRICAN GOVERNMENT TO IMPLEMENT THE CIEX REPORT

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1. I acknowledge receipt of your letter dated 05 August 2016, with thanks.
2. In my response hereinafter I will further address the issue of jurisdiction and others as raised in your letter dated 27 September 2013.

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3. I have noted your views regarding our jurisdiction to investigate this matter; I would like to reiterate that my office is not investigating anything that took place prior to the coming into being of my office or the coming into effect of the Public Protector Act 23, 1994 as suggested by the former South African Reserve Bank Governor her letter dated 27 September 2013.
4. The investigation is centred on the role played by the Government of the Republic of South Africa after it procure investigation services of Ciex Ltd and was furnished with the Ciex report around 1998.
5. I am not investigating the impugned "lifeboat" but the conduct of the Government of the Republic of South Africa, National Treasury and South African Reserve Bank between 1997 and 2002. Anything that transpired before the coming into being of this office or the coming into effect of the Public Protector Act 23, 1994 is not subject of this investigation.
6. I am investigating this matter in terms of section 6 (9) of the Public Protector Act 23, 1994 which state that "***except where the Public Protector in special circumstances, within his or her discretion, so permits, a complaint or matter referred to the Public Protector shall not be entertained unless it is reported to the Public Protector within two years from the occurrence of the incidents or matter concerned***".
7. The section above gives me discretion to decide on whether or not to investigate a matter reported to my office, as long as it is something that happened after the establishment or coming into being of this office. In arriving at a decision to investigate I took into account the interest of the Government, the Public and allegations that Absa had made provision for the claim.
8. I have indeed completed the provisional report and ready to issue it in the next upcoming weeks. The information required from the bank and contact details of Dr Chris Stals is indeed related to this investigation.

J.  
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9. I deem it fit to also interview, Dr Chris Stals and others cited in the Ciex report before issuing the final report. The SARB is more than welcome to assist Dr Stals during the interview.

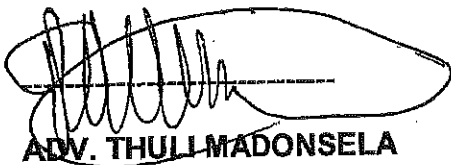
10. I must indicate that the *Davis report* is not subject of my investigation as suggested in your letter dated 27 September 2013. I am not investigating what the *Davis report* has already investigated.

11. Kindly provide contact details and physical address Dr Chris Stals so that arrangements to interview him could be made. I would appreciate if the information could be provided to my office.

12. Once again, thank you for your letter and reminding me that I have not yet responded to the former Governors letter dated 27 September.

13. For any further enquiries with regard hereto, you are at liberty to approach the Investigator in my private office, Adv Livhuwani Tshivalule on 012 366 7106 or alternatively at [livhuwanit@pprotect.org](mailto:livhuwanit@pprotect.org).

Best wishes



ADV. THULL MADONSELA

THE PUBLIC PROTECTOR  
OF THE REPUBLIC OF SOUTH AFRICA  
DATE: 10.1.08.2016

Cc: Mr Lesetja Kganyago; Governor

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