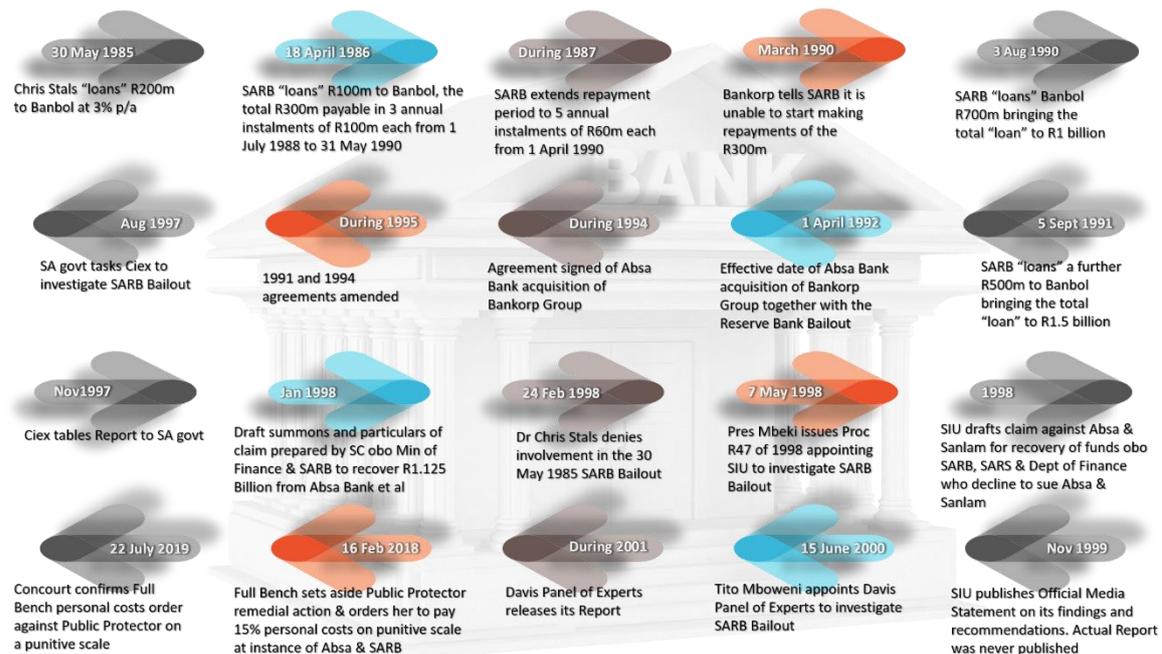


A close-up photograph of a person's hand holding a pen and writing in a spiral-bound notebook. The scene is set on a desk with a white plate and a pen nearby. The image is overlaid with a blue gradient that extends down the left side of the page.

OPINION PIECE

**The Unfinished Story:
The SA Reserve Bank Bailout
of Bankorp Group and Absa Bank
PART 2**

How it unfolded - The Timeline



INTRODUCTION

In [Part 1 of this paper](#) we dealt with the factual background to the SA Reserve Bank bailout of the Bankorp Group and Absa Bank between 1985 and 1995. We discussed the terms of each of the agreements that comprised **Package A** (1985 to 1990), **Package B** (1990 to 1992) and **Package C** (1992 to 1995).

We also touched on the ultimate finding of the Special Investigating Unit led by Judge Willem Heath, and of the Davis Panel of Experts led by Judge Dennis Davis, that the Reserve Bank bailout was a "**simulation transaction**"; in other words, a donation disguised as a loan.

Finally, we ended off by identifying internationally accepted principles of best practice for Central Bank rescue of distressed banks, which the Davis Panel of Experts found the Bankorp/Absa bailout did not meet. In this PART 2, I shall discuss the specific findings and recommendations of the Special Investigating Unit, those of the Davis Panel of Experts, and those of the Public Protector.

I shall offer my own view on the soundness of these findings and recommendations, and

discuss the recoverability of the money from those who benefited at the cost of many deserving causes in South Africa, like healthcare, housing and quality education, all of which are rights that are enshrined in the South African Constitution.

A little known (or underplayed) fact is that the Public Protector's probe of this bailout did not begin with Adv Mkhwebane. Her predecessor, Adv Madonsela, started it and issued a preliminary report. Adv Mkhwebane completed the task.

We begin with the Special Investigating Unit.

THE SPECIAL INVESTIGATING UNIT

President Thabo Mbeki mandated the Special Investigating Unit ("the SIU") led by Judge Willem Heath, by promulgation in the government gazette of 7 May 1998 under Proclamation R47 of 1998, to investigate the 1990 to 1995 transactions. This followed a 62-page Ciex Report that has, to my knowledge, never been published. Apparently, the following appears in the Ciex Report as recorded in another document:

“Ciex brought the matter [of the Bankorp bailout of R3.2 billion] to the attention of [the SA] Government in 1997 and was tasked in August of that year to make an enquiry. In reports delivered on 29 November 1997 and 8 January 1998 a full account was produced of the manner in which public money had been misappropriated. It described the nature of the illegalities, including criminal fraud by senior managers and board members, the illicit profit-making by shareholders and the roles of participating individuals and interests. Expert legal and financial opinion was included indicating that [the SA] Government might safely and legally seek recovery of sums of up to 10 billion Rand from Absa and its shareholders, and that criminal charges could be brought against the principal individuals concerned for major acts of insider-trading and false accounting.”

What were the SIU terms of reference, its findings and recommendations?

SIU TERMS OF REFERENCE

From the SIU Official Media Statement, we learn that the SIU was tasked to investigate the following primary issues:

- Whether the bailout amounted to a valid contract or whether the transactions were legally valid.
- Alternatively, even if the bailout was legally valid, whether the transactions complied properly with the terms of the contracts
- If the SIU reached the conclusion that the transactions were invalid, and that there is a legal basis for litigation, whether there are compelling reasons for **not** pursuing litigation for the recovery of the funds.

FINDINGS, ACTIONS AND RECOMMENDATIONS

The SIU concluded that the transactions **“could be challenged in civil proceedings”**.

The SIU took the view that the assistance package was **a donation** of R1.125 billion and not a loan. So, the transactions were not authorised by the South African Reserve Bank Act, as s 10 of that Act empowers the Reserve Bank to make loans not donations. This was a simulated loan. A **“simulated transaction”** has been defined by South African courts as a transaction in which the parties to the transaction endeavour to conceal its true character by, for example, calling it by a name, or giving it a shape, intended not to express but to disguise its true nature.

The SIU also took the view that if the transactions were to be set aside, the obligation to repay the benefit would rest with Sanlam which was the major shareholder in Bankorp when it was taken over by Absa Bank. Alternatively, Absa Bank would be burdened with that obligation as the ultimate beneficiary.

The SIU prepared a draft summons setting out a legal basis for a claim against Sanlam and Absa Bank. It included the Reserve Bank, the Department of Finance and the South African Revenue Service as plaintiffs. Both Sanlam and Absa Bank expressed their intention **“strenuously”** to oppose the claim, and the co-plaintiffs indicated that they do not want to be cited as co-plaintiffs. So, the SA Reserve Bank was not interested in recovering public funds it had unlawfully dispensed to private institutions.

In the final analysis, the SIU decided that there are **“compelling reasons” not** to pursue litigation to recover the benefit from Sanlam and Absa Bank, the **“central fear”** being the fear of **“a run on the banks”**. It did not explain why a claim against Sanlam or the Absa Bank managing director or chief executive could not be pursued, save to say that any successful litigation would be outweighed by a negative investor confidence abroad which would not be in the public interest.

I do not believe that the systemic risk argument was well founded. Nevertheless, it is in my view an exercise in futility to express a view on

an abbreviated media statement on the findings of the SIU investigation as the actual Report could contain more detailed and plausible reasons for the recommendation against recovery of the misappropriated public funds. All it would take is for the courts to order the publication of the full SIU Report in the public interest, so that the full extent of the defalcation, and the Reserve Bank's role in facilitating it, can be discovered and recovery of the funds considered on the basis of all the facts.

It is also possible that the Report may have made some remarks about criminal culpability and/or negligence of senior officials and directors at the Reserve Bank, Absa Bank, internal and external auditors of the affected institutions and others who have benefited from the Reserve Bank's public funds largesse. It is important, in my view, that investigators and even the prosecuting authority learns of Judge Heath's precise observations in this regard directly from the SIU Report so as to appreciate the full scale of the problem.

For those reasons, I make no further comment on the SIU Official Media Statement.

THE DAVIS PANEL OF EXPERTS

The Davis Panel of Experts was appointed by the Governor of the Reserve Bank, Mr Tito Mboweni, on 15 June 2000 following the findings and recommendations of the SIU Report in October/November 1999.

It was tasked with investigating the Reserve Bank's role with regard to the financial assistance packages to Bankorp during the period 1985 to 1991, and to Absa Bank (Bankorp's new owner) during the period 1992 to 1995.

The Davis Panel did not conduct an investigation in the true sense of that term. What it did was interview seven individuals, namely

- Dr CL Stals (Governor of the Reserve Bank, 1989 to 1999)
- Dr DC Cronjé (Absa Group Chairman)
- Mr FJ du Toit (Absa Group Executive Director: Finance)
- Mr JH Shindehütte (Absa Group Executive: Finance)
- JN Wepener (Absa General Manager: Group Legal Services)
- Mr AS du Plessis (Executive Director: Sanlam) but in his personal capacity
- Mr G Hoggarth (Senior Economist: Financial Industry & Regulation Division, of the Bank of England)

The Davis Panel then reviewed documents including media reports, correspondences, Reserve Bank policy documents and statements, Counsel's opinion, the SIU Official Media Statement, and a selection of evidence given at an enquiry. This is not an exhaustive list of documents reviewed by the Panel. The list of documents it considered is listed in Annexure 4 of the Davis Panel Report.

The Reserve Bank did not make the Report of the SIU available to the Davis Panel. This raises serious questions as regards what it is exactly the Reserve Bank did not wish the Davis Panel to know or see. This is what the Panel says in this regard:

“The Panel had hoped, when it commenced its work, to have access to a comprehensive report from the Heath Unit on the assistance granted to Bankorp/ABSA following its lengthy period of investigation. However, despite requests by the Panel for a copy of a report by the Heath Unit, all that was made available was a draft summons and a media release ...”

Why did the Reserve Bank refuse to provide the Davis Panel with the SIU Report? Why does it appear as if public interest groupings have not shown any interest in having the SIU Report published for us all to see?

THE DAVIS PANEL TERMS OF REFERENCE

Specifically, the Davis Panel was instructed to determine the following issues:

- Whether the Reserve Bank, in providing financial assistance to Bankorp, had contravened the provisions of the South African Reserve Bank Act, or any other Act.
- Whether the financial policies and procedures of the Reserve Bank with regard to financial assistance had been adhered to in the provision of assistance to Bankorp.
- Whether the Reserve Bank's conduct in the provision of financial assistance to Bankorp was in accordance with internationally accepted principles of best practice.
- Guidelines and best practice with regard to possible future conduct of the Reserve Bank with regard to banks in distress.
- In the event of a finding by the Panel that the assistance to Bankorp by the Reserve Bank was *ultra vires* (beyond the powers of) the Reserve Bank, whether restitution can be claimed, and if so, the manner thereof.

FINDINGS AND IMPORTANT CONSIDERATIONS

In its [Report](#), the Davis Panel said the assistance package agreements contained a repayment provision in favour of the Reserve Bank which would have been triggered if the Bankorp bad debts written off did not reach the agreed figure of R1.635 billion. It said there was no other provision for any repayment by Bankorp of any or all of the total net interest income of R1.125 billion which accrued to Bankorp during the period of operation of the agreement.

In other words, the Davis Panel seems to take the view that there was no provision in the assistance package agreements between the Reserve Bank, on the one hand, and Bankorp, on the other, that Bankorp had to repay the R1.125 billion interest income that it earned from government bonds using public funds

obtained from the Reserve Bank at a cost of 1% per year over five years.

Put differently, the 15% interest differential that accrued to Bankorp from government bonds that Bankorp had bought, using the cumulative Reserve Bank financial assistance of R1.5 billion at a cost to Bankorp of 1% per year over five years, was a gift from the Reserve Bank to Bankorp. At the very least, this is the debate.

Right at the beginning of its Report, the Davis Panel wrote:

“Although the assistance granted to Bankorp/ABSA has been the topic of media speculation over many years and had been investigated previously, the Panel found no definitive findings emanating from these previous enquiries. Accordingly, a major objective of the Panel was to produce a comprehensive Report that would bring about closure of this issue.”

This observation by the Davis Panel that it **“found no definitive findings emanating from these previous enquiries”** is, in my view, curious in light of the SIU findings just seven months previously. Those findings are summarised above from the SIU Official Media Statement. However, because no one outside the SIU Panel, and selected members of government, has had sight of the SIU Report itself, including the Davis Panel, it is difficult to say authoritatively whether or not the SIU Report itself makes **“definitive findings”** on the Bankorp assistance packages. But, since the Davis Panel had itself not seen the full SIU Report, it is not clear how it could have reached the conclusion that the SIU Report did not make **“definitive findings”**. But if the SIU Official Media Statement is any indication, it is in my view unlikely that the SIU Report did not make **“definitive findings”**.

Another curious observation by the Davis Panel is what it claims to be its **“major objective”**, namely, **“to produce a comprehensive Report that would bring**

about closure of this issue". This observation seems intended to shut the door to any other subsequent investigation that may be conceived by any other institution. It is curious for at least two reasons:

- The first is that an investigation done at the behest of a party that is implicated in the wrongdoing that is the subject of the investigation – as the Reserve Bank was found to be, both by the SIU investigation and, ironically, by the Davis Panel – cannot rationally and reasonably be regarded as a final word on the issue.
- Secondly, the Davis Panel – appointed as it was by the very institution it was meant to investigate – cannot have the power to oust an independent (including a Chapter Nine institution) from investigating the issue.

But why did the Davis Panel seem, on the face of it, so keen to shut the door on further investigation of this issue?

The Public Protector – who is a creation of the Constitution of South Africa to investigate, report on, and take appropriate remedial action in relation to any maladministration and alleged act or omission by a person in the employ of government at any level, or a person performing a public function, which results in unlawful or improper prejudice to any other person, including the public – investigated this Reserve Bank bailout issue and took the following remedial action:

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

7.1.1.1 Re-open and amend Proclamation R47 of 1998 published in the Government Gazette dated 7 May 1998 in order to recover misappropriated public funds

unlawfully given to ABSA Bank in the amount of R1.125 billion; and

7.1.1.2 Re-open and amend Proclamation R47 of 1998 published in the Government Gazette dated [7] May 1998 in order to investigate alleged misappropriated public funds given to various institutions as mentioned in the CIEX report.

7.1.2 The South African Reserve Bank must cooperate fully with the Special Investigating Unit in the recovery of misappropriated public funds mentioned in 7.1.1.1 and 7.1.1.2”

That remedial action was, rightly, set aside by the Full Bench of the Pretoria High Court at the instance of the Reserve Bank, Absa Bank and the Minister of Finance. The Public Protector appreciated the reasoning and did not seek to appeal the Full Bench decision, except for the punitive costs order that the court made against her in her personal capacity.

The Public Protector also, sensibly with respect, agreed – in a separate challenge – to another of her remedial actions being set aside which directed a Parliamentary Committee to commence a process for the amendment of s 224 of the Constitution to introduce the protection of **“the socio-economic well-being of the citizens”** dimension into the Reserve Bank’s powers and obligations.

So, why the heavy-handed approach by the Reserve Bank against the Public Protector in relation to her investigation of this issue, including not only seeking a declaratory order that the investigation by her constituted an **“abuse of her office”** (so that she never again pursues it) but also seeking (and securing) a personal costs order against her on a punitive scale? Are these drastic steps not indicative of the fact that the government will brook no peering into that Reserve Bank bailout scandal under any circumstances? Why? What exactly is it that the government does not want the

people of South Africa to know about those simulated transactions? And why are the institutions established to ask these and related questions not asking them? Why is Parliament, or at least opposition parties in Parliament, not asking these questions? Why is the media and NGOs not asking them?

Another observation by the Davis Panel that is suggestive of an intention to shut the door to any further investigation of the Bankorp/Absa Bank bailout is this:

“To conclude, the Panel considers that on all the evidence available to it, this Report has brought to light all the material discoverable facts concerning Reserve Bank assistance to Bankorp/ABSA, and that public knowledge of them should end the uncertainty and misinterpretation that has been fuelled by the absence of a rigorous investigation previously.”

Why would the Davis Panel be so keen to declare itself as the final arbiter of what constitutes **“all the material discoverable facts”** capable of being uncovered by anyone in relation to that Reserve Bank bailout of Bankorp and Absa? Why is it beyond the realm of possibility that any other independent investigation could possibly unearth more material facts and reach a different conclusion?

THE “FLAW” IN THE FORM AND STRUCTURE OF THE BAILOUT

The Davis Panel concluded that, overall, the Bankorp bailout package was **“flawed”**. It identified the following features of form and structure in that flaw, which it described as being **“of a serious nature”**:

- The length of time for which assistance, in the form of successive packages, was given.
- The willingness of the Reserve Bank to accept successive related requests for additional assistance.

- The continuing secrecy with which the assistance was covered even after the danger of systemic risk had passed.
- The use of a simulated transaction to disguise as a loan the Reserve Bank’s assistance which was, in substance, solvency support in the form of a grant or donation.
- The absence of measures to protect the interests of the Reserve Bank and taxpayers by the Reserve Bank securing a share of the equity of Bankorp in exchange for its capital contribution.
- The failure to give assistance with conditions that would protect the banking system’s depositors while penalising the shareholders and management of Bankorp. In fact, the shareholders of Bankorp benefited from the assistance.
- The Reserve Bank’s assistance had the effect of conferring benefits on Sanlam’s policyholders and pension funds and on the minority shareholders of Bankorp rather than solely on its depositors.
- The failure, for half the duration of the assistance or longer, to monitor effectively the business of the beneficiary, Bankorp.
- The failure to implement methods used successfully in other countries for alleviating banks’ bad debt problems, such as creating a special institution to administer delinquent assets.
- The conflict of interest occasioned by the then Minister of Finance (Mr B J du Plessis), who was the brother of Mr A S du Plessis, a director of Bankorp, a subsidiary of the majority shareholder (Sanlam) of Bankorp, and indeed of Bankorp itself, participating in the decision to afford this package to Bankorp.

In short, the Davis Panel concluded that the provision of the assistance to Bankorp by the Reserve Bank, using a **“simulated transaction”**, implies that the Reserve Bank acted outside its statutory powers because, by international standards as required by s 10(1)(s) of the South African Reserve Bank Act, 1989, an intervention of the kind made by

the Reserve Bank was not a function of the sort that Central Banks customarily may perform.

The Davis Panel concluded that the Reserve Bank's assistance to Bankorp in the form that it did, conferred benefits on Sanlam's policyholders and pension fund beneficiaries, as well as on the minority shareholders of Bankorp. That, said the Davis Panel, is contrary to public perception, and to the conclusions of the SIU Official Media Statement which, according to the Davis Panel, incorrectly asserted that major benefits were received by the shareholders of Absa Bank.

As regards restitution of the benefits occasioned by the Reserve Bank having acted *ultra vires* (or beyond the scope of its powers) the Davis Panel took the view that, in principle, restitution from the beneficiaries (Sanlam policyholders and pension fund beneficiaries and Bankorp minority shareholders) may be sought, but that it may be difficult and extremely costly to achieve through litigation, **“because of the difficulty of determining the exact class of beneficiaries, apportioning the enrichment and the fact that duly appointed officials of the Reserve Bank made the key decisions”**.

This justification for not pursuing restitution of the benefit is, to my mind, unconvincing for at least three reasons:

- Firstly, the Davis Panel has itself identified beneficiaries of the Reserve Bank unlawful largesse to Bankorp as being Sanlam policyholders and pension funds, on the one hand, and Bankorp minority shareholders, on the other. So, the **“difficulty of determining the exact class of beneficiaries”** cannot be a true impediment to recovering the money. In any event, Absa Bank has itself admitted that with effect from 1 April 1992 it substituted Bankorp as beneficiary of the largesse when it acquired Bankorp. This is contained in the affidavit of Maria Ramos which she filed on behalf of Absa Bank in

its review challenge of the Public Protector's SARB Bailout Report in the Pretoria High Court.

- Secondly, in any event there is such a thing in South African law as **“joint and several liability”** in delictual claims. Because the Davis Panel has already identified the beneficiaries as being located within Sanlam and Bankorp, it is for Sanlam and the new owners of Bankorp (Absa Bank, having taken over the Bankorp assets and liabilities since 1992) to do the apportionment of liability among themselves.
- Thirdly, it is not clear to me why the fact that **“key decisions”** in relation to the unlawful transaction were made by **“duly appointed officials of the Reserve Bank”** should be an impediment to recovering the unlawful benefit.

So, the reasons advanced by the Davis Panel for not pursuing recovery of the funds doled out unlawfully by the Reserve Bank to Bankorp and Absa Bank between 1985 and 1995 are simply not convincing.

The Constitutional Court in *Public Protector v South African Reserve Bank* (CCT107/18) [2019] ZACC 29; 2019 (9) BCLR 1113 (CC); 2019 (6) SA 253 (CC) (22 July 2019) has also made clear that recovery is not beyond the realms of possibility. I discuss this later.

SPECIFIC FINDINGS IN RELATION TO EACH OF THE DAVIS PANEL'S TERMS OF REFERENCE

The findings of the Davis Panel in relation of each of the Terms of Reference can be summarised as follows:

- (i) **First Term of Reference: to determine whether the Reserve Bank, in providing financial assistance to Bankorp, has contravened the provisions of the South African Reserve Bank Act, or any other Act**

The Davis Panel divided the assistance packages into two – the first set concluded in 1985 and 1986 and the second set concluded in 1990 and 1991 – and treated them differently.

It considered that the first set of agreements, concluded between the Reserve Bank and Bankorp in May 1985 and April 1986, was structured on the basis of a low interest loan. As the South African Reserve Bank Act did not preclude the Reserve Bank from charging interest at a rate lower than the market rate, the Davis Panel took the view that it could not conclude that the Reserve Bank acted outside the scope of its powers in concluding these agreements.

This is a synthetic argument. If these transactions were conducted at arms' length, it is unlikely that the Reserve Bank would have charged such a ridiculously low interest rate (at one point 3% per year and subsequently 1%); extended the period over which the funds must be repaid, from three years to five, without any interest implications; afforded an additional R1.2 billion to a bank that said it was insolvent; and declined to recover the funds due and payable to it of at least R1.125 billion in interest payments. As Judge Dennis Davis knows better than most, transactions that are done shorn of arms' length are usually hit by anti-tax avoidance provisions of the South African Income Tax Act. This arrangement between the SA Reserve Bank and the Bankorp/Absa banks was anything but an arms' length transaction.

In any event, the Davis Panel itself found that one of the reasons the arrangement did not meet the international best practice standards that were then applicable in transactions of this kind was that the financing (at 3% in 1985 and 1986) was simply too low. The prime interest rate in South Africa on 30 May 1985 was 10%, and 9% on 18 April 1986. International best practice standards require that assistance of this sort must carry a high interest rate. In addition, use of the proceeds of the very "loan" as collateral for the financing simply made a

farce of the whole thing. How that could be excused as being intra vires the powers of the Reserve Bank is, to me, just mind-boggling.

The 1985 and 1986 agreements comprised the set of agreements described by the Davis Panel as "**Package A**". The first came in the form of a letter dated 30 May 1985 in which the Reserve Bank agreed to "loan" Bankorp (through Banbol) R200 million at 3% per year payable by 31 May 1990. According to Frank Welsh, that letter was written by Dr Stals who was at that time a deputy governor at the Reserve Bank (see *Dangerous Deceits: Julian Askin and the Tollgate Scandal* (1999), Chapter Eight "Safety At Sea", pages 200 & 361, by Frank Welsh). The letter, complete with signatures, is reproduced as "Appendix D" in the book.

But, in a letter dated 24 February 1998, Dr Stals denied any involvement in the 1985 agreement and claimed to have become involved only in 1990 (see *Dangerous Deceits: Julian Askin and the Tollgate Scandal* (1999), Chapter Eight "Safety At Sea", pages 200 & 363, by Frank Welsh). Why he would deny his involvement in that agreement, in the face of what appears to be convincing evidence of his involvement, is unclear. Perhaps it is a matter that independent investigators may wish to explore.

The second agreement under the first **Package A** set, done on 18 April 1986, entailed an increase of the assistance by a further R100 million on the same terms as the first, with the full R300 million payable in three equal instalments from 1 July 1988 until paid in full by 31 May 1990.

The second set of agreements, according to the Davis Panel, were agreements concluded on 3 August 1990 and 5 September 1991 which the Davis Panel describes as falling under **Package B**.

The 3 August 1990 agreement under **Package B** entailed a further advance by the Reserve Bank to Bankorp (through Banbol) of R700

million (in addition to the R300 million advanced under **Package A**). Of the total amount of R1 billion, Bankorp was required to invest R400 million in cash with the Reserve Bank and R600 million in government bonds for a period of five years at a yield of 16% on both elements. These investments served as collateral for the R1 billion loan.

As the loan of R1 billion incurred an interest charge of 1%, a margin of 15% accrued to Bankorp, which would be for its benefit and against which Bankorp's bad debts would be written off over the five-year period.

The 5 September 1991 agreement entailed a further advance of R500 million by the Reserve Bank to Bankorp (through Banbol) at 1% interest per year, bringing the total amount of the assistance packaged to R1.5 billion. With that further advance, Bankorp was required to buy additional government bonds at a guaranteed annual return of 16% per year, paying 1% of that to the Reserve Bank and pocketing the 15% differential for its own benefit.

The Davis Panel took the view that the second set of agreements – **Package B** concluded on 3 August 1990 and 5 September 1991 – constituted “**simulated transactions which, in law, amounted to donations of money**”. It continued:

“Package B and C constituted simulated transactions which in law amount to donations of money. There is no legal basis by which the S A Reserve Bank could have entered into such agreements, save if the action can be brought under section 10(1)(s) of its Act. As chapter 6 concludes that the S A Reserve Bank’s assistance did not accord with good international practice in several respects, it is concluded that the assistance was *ultra vires*.

The consequence of an unlawful agreement is that it was rendered void *ab initio*. It must surely be the case that

it was rendered void *ab initio*, and not merely voidable at the instance of either of the parties, because, where one of the parties to the agreement, in the first place, was not authorised to be such a party, the agreement could never have acquired a legal existence.

That being so, the beneficiaries of the assistance packages obtained benefits from the actions of the S A Reserve Bank to which, in law, they may never have been entitled.”

Treatment by the Davis Panel of the assistance package as two sets of agreements – comprising agreements in 1985 and 1986, on the one hand, and 1990 and 1991, on the other – does not seem to accord with the Davis Panel's own description of the assistance package as comprising “**three sequential assistance packages, referred to below as package A (1985 to 1990), package B (1990 to 1992) and package C (1992 to 1995)**”.

It also ignores or leaves out of account – inexplicably – **Package C** which, on Absa Bank's own version, involves Absa Bank replacing Bankorp as beneficiary of the Reserve Bank financial assistance.

It would thus appear that the Davis Panel did not investigate the Absa Bank assistance package. This would leave independent investigators free to look into that aspect of the assistance package (described by the Davis Panel as **Package C**) subject to considerations of prescription, jurisdiction and other relevant considerations. This debt, not being a loan by the State but a “**simulated transaction**” aimed to deceive rather than to define the true nature of the transaction, arguably prescribes after 30 years from the date of publication of the Davis Panel Report in 2002 on a proper construction of s 11(a)(iv) of the Prescription Act, 1969.

(ii) Second Term of Reference: to determine whether internal policies and procedures of the Reserve Bank

with regard to financial assistance have been adhered to in the case of the Reserve Bank's assistance to Bankorp

The Davis Panel examined other instances of Reserve Bank financial assistance to distressed banks that occurred before or during the period in which assistance was given to Bankorp/Absa Bank (1985 to 1995).

It found that, although in several cases the structure and form of the Reserve Bank's assistance had features similar to those of the assistance afforded to Bankorp, taken as a whole, the assistance to Bankorp was different in that it had features which were not present in any other single case.

On the whole, the financial assistance to Bankorp/Absa Bank did not conform even to the features reportedly set out by Dr Chris Stals at the Tollgate enquiry.

(iii) Third Term of Reference: to determine whether the Reserve Bank's conduct in the provision of financial assistance to Bankorp was in accordance with internationally accepted principles of best practice

The Davis Panel reviewed internationally accepted principles of best practice for dealing with distressed banks and concluded that the methods used to assist Bankorp were flawed, both as regards providing liquidity support to Bankorp, as in the early stages of its intervention in the 1980s, and as regards providing solvency support in the early 1990s.

Specifically, the Davis Panel found a flaw in the Reserve Bank's failure to take any equity stake on the future profits of Bankorp, or attempt to protect depositors by removing Bankorp's bad debts to a special institution charged with managing them separately, or attempt to organise a merger with a sound banking institution.

The Panel also criticised the fact that the assistance was provided over a period that

was unusually long by international standards, as the Reserve Bank acceded to successive Bankorp requests for more assistance, and that despite those successive requests, the Reserve Bank only assessed adequately the risks pertaining to Bankorp when further assistance was requested in 1990.

Compounding the problem was that the additional assistance provided in 1990 and 1991 (an additional R1.2 billion) was the fact that, according to Marinus Daling (former Sanlam and Bankorp director) "**Trust Bank had been insolvent at the time of the 1990 lifeboat**". In addition, according to Kobus Roetz – former Trust Bank managing director – the assistance had been procured by fraudulent means in that the Bankorp bad and doubtful debt book submitted to the Reserve Bank in order to secure the assistance "**was a multiple of five times**" the real number.

The Davis Panel concluded under this Term of Reference that the objective of all the international examples of bank assistance practice and principles that the Panel reviewed was to protect the banking system and its depositors, and a clear recognition of the undesirability of protecting shareholders. It found that in the Bankorp/Absa Bank case no such distinction – that is, between the protection of the banking system and depositors, on the one hand, and the protection of shareholders, on the other – was apparent. In fact, said the Panel, the outcome of the assistance was to benefit shareholders. This is because "**the net asset value of Bankorp and the price they [the shareholders] received when taken over by Absa was raised by the amount of the assistance**".

(iv) Fourth Term of Reference: to determine guidelines and best practice with regard to possible future conduct of the Reserve Bank with regard to banks in distress

The Panel concluded that the Reserve Bank's practices for dealing with banks in distress are

much improved since the time of the Bankorp assistance packages, and are now in line with best practice elsewhere and, if followed consistently, should avoid the dangers encountered by many other countries with less robust approaches.

The Panel saw no need for a new set of guidelines to govern practice in this area.

However, one reform which the Panel recommended should be immediately considered, was the development of an effective and well-designed deposit insurance facility. I am not aware whether or not this has been done.

Finally, under this Term of Reference, the Panel recommended that the Reserve Bank actively reviews the means by which Central Bank principles of bank supervision and assistance to distressed banks relate to South Africa's socio-economic priority of transformation. But, with the relatively recent collapse of the VBS Bank, it is not clear to me whether the Reserve Bank has embarked on this review and, if so, to what extent. I consider that this is an enquiry that independent investigators (including opposition parties and oversight bodies in Parliament and elsewhere) may pursue with the Reserve Bank, both as a follow-up from this finding of the Davis Panel and under the general power of the Reserve Bank in terms of s 10(1)(s) of the South African Reserve Bank Act.

(v) **Fifth Term of Reference: to consider, in the event of a finding by the Panel that the financial assistance to Bankorp by the Reserve Bank was ultra vires the power of the Bank, whether restitution can be claimed, and if so, the manner thereof**

Under this Term of Reference, the Davis Panel concluded that in light of the finding that the assistance agreements were "illegal", it would not be possible for the Reserve Bank to recover any loss under the law of contract. However, said the Panel, another legal avenue

is open in such cases, namely, on the basis of unjustified enrichment enjoyed by Bankorp/Absa Bank.

It then made reference to "**allegations in the public domain about conspiracies**", and said it "**did not find any evidence which would have justified such a conclusion**". It said whether or not the Reserve Bank's previous office bearers acted with knowledge of the Bank's lack of legal capacity to enter into such agreements, there would be a compelling argument that public interest favoured restitution to a public institution which had been impoverished and which impoverishment would be for the account of the public.

The Panel took the view that Absa Bank paid for the continued assistance of Bankorp by the Reserve Bank and could not be regarded as a beneficiary of Reserve Bank assistance package. It said Absa Bank paid "**fair value**" for Bankorp. It concluded:

"Due to the complex nature of the impact that the various packages might have had on the value of capital invested in Bankorp, it is difficult for the Panel to assess with accuracy the extent of the benefits derived by Bankorp shareholders. Evidence supports the conclusion that Sanlam, the major Bankorp shareholder was aware that it would have received no value, or less value, for its shareholding absent Reserve Bank assistance."

In my view, not only is this conclusion lacking in the rigour that might be expected of a high powered Panel of Experts; it is also irreconcilable with the Panel's own finding that Sanlam policyholders and pension funds, on the one hand, and Bankorp minority shareholders, on the other, were the beneficiaries of the Reserve Bank "**donation**" that is "**unlawful**" or "**illegal**" and "**ultra vires**" the Bank. So, there would seem to me to be nothing "**complex**" about the identity of those unlawfully enriched on the public purse.

The Panel's conclusion in this respect is also inconsistent with Absa Bank's own admission that it replaced Bankorp as beneficiary of the Reserve Bank donation with effect from 1 April 1992.

What is more, according to the Davis Panel, no provision was made in the assistance agreements for the repayment of the 15% interest differential on the R1.5 billion assistance package. That makes the package, as described by the Panel, a **"donation"** that the Reserve Bank was not empowered by the South African Reserve Bank Act, internationally accepted principles of best practice, or any other Act, to make. There is nothing **"complex"** about this.

There would seem to be nothing of a **"complex nature"** about the impact that the various assistance packages might have had on the value of capital invested in Bankorp either. This is because the Davis Panel tells us that the assistance packages resulted in a benefit to Bankorp shareholders, and that the nature of that benefit (or, to put it in the language of the Davis Panel, **"the impact that the various packages might have had on the value of the capital invested in Bankorp"**) came in the form that **"the net asset value of Bankorp and the price they [the shareholders] received when taken over by Absa was raised by the amount of the [unlawful, illegal and flawed] assistance"**.

There can, thus, in my view be no **"difficulty"** in assessing the accuracy of the extent of the benefits derived by Bankorp shareholders and, ultimately, by Absa Bank which, according to the Davis Panel, could not have repaid the R1.125 billion because there was no provision for its repayment in any of the assistance packages. If there was no such provision, that part of the assistance package could not have formed part of the price paid by Absa Bank for its acquisition of Bankorp.

And, if, as claimed by the Davis Panel, **"[e]vidence supports the conclusion that**

Sanlam, the major Bankorp shareholder was aware that it would have received no value, or less value, for its shareholding absent Reserve Bank assistance", that points to the fact that **"the extent of the benefits derived by Bankorp shareholders and, ultimately, by Absa"** is the amount of the Reserve Bank's **"donation"** to Bankorp which the Reserve Bank did not have the power to make. Thus, not only is the beneficiary identifiable; so, too, is the extent of enrichment, if not by Bankorp shareholders then by the new owner, Absa Bank.

The Davis Panel itself concluded, in respect of the first Term of Reference, that **"benefit which flowed to the borrower was the net interest passed on by the Reserve Bank to the borrower"**. That is the 15% interest differential between the 1% interest that had to be paid to the Reserve Bank for the R1.5 billion assistance, and the 16% interest that Bankorp (and later Absa Bank) earned from the government bonds.

Besides, the **"complex nature of the impact that the various packages might have had on the value of capital invested in Bankorp"** is in South African law no basis for not pursuing restitution. Complexity is no bar to justiciability. Other observations by the Davis Panel that independent investigators could take into account include the following:
The **"critical point"**, said the Davis Panel, is that

"the Reserve Bank then paid over all interest accruing from such [government] bonds (less a charge of 1 per cent) to Bankorp/ABSA. When the transaction is examined as whole, the true nature of the transaction amounted to a donation or grant by the Reserve Bank to Bankorp/ABSA pursuant to the provisions of the agreement, that is, an amount of R 1 125 million."
(my emphasis)

This is significant not only because it puts a (minimum) number to the extent of the benefit

or enrichment to Bankorp and, subsequently, Absa Bank, but also because the Reserve Bank had then (and now) no power to grant financial assistance to a bank except by way of a loan. The Reserve Bank had (and still has) no power to make donations to a bank that is in distress.

The Davis Panel also said

“In the case of packages B and C, the Reserve Bank and Bankorp (and later ABSA) clearly concealed the fact that the monies which passed to Bankorp/ABSA from the Bank constituted a donation rather than a loan. This could not have been contemplated by the Legislature in enacting section 10 of the [South African Reserve Bank] Act of 1989.”

This observation points to a possible deliberate deception by the Reserve Bank, Bankorp and Absa Bank with a view to Bankorp (and later Absa Bank) obtaining a benefit to which they were not by law entitled, and the Reserve Bank playing an integral part in that deception.

For that reason, and because the Reserve Bank was also not authorised by the empowering statute (the South African Reserve Bank Act) and so acted *ultra vires* (beyond the scope of its powers), the transaction was void *ab initio* (from the beginning) and the benefit recoverable.

According to the Davis Panel, the assistance to Bankorp/Absa Bank was never repaid to the Reserve Bank. I take this to refer to the amount of the benefit or enrichment: R1.125 billion.

The Davis Panel concluded that the financial assistance under **Package A** (1985 to 1990) – structured as a loan by the Reserve Bank in its capacity as lender of last resort (providing liquidity to a solvent bank) – was provided in a manner that did not meet the international best practice standards that were then applicable in transactions of this kind.

Package B (1990 to 1992), said the Davis Panel, was a grant from the Reserve Bank structured as a “**simulated transaction**” in which it appeared as a loan and did not accord with international best practice for solvency support operations because:

- a simulated transaction was used
- the Reserve Bank took no equity stake or other form of compensation for the grant assistance that it gave.

As regards **Package C**, the Davis Panel took the view that it was a continuation of the 1990 “**simulated transaction**” solvency support arrangement the benefit of which was transferred to Absa Bank with Absa Bank’s purchase of Bankorp with effect from 1992 although signed in 1994. The Panel said in this regard:

“From 1992 ABSA received a grant for which it did not qualify since ABSA was not suffering liquidity or solvency problems. ABSA chose to buy Bankorp for purely commercial reasons. In determining the price it was willing to pay, ABSA took into account the remaining payments it would receive on transfer of the S A Reserve Bank/Bankorp agreement, although, for unknown reasons, the written agreement to transfer the benefits was not concluded until 1994. Thus, following discussions with the Reserve Bank, ABSA finalised its takeover in 1992 on the assumption that a revised agreement would be satisfactorily negotiated. Because the price was determined in that way the shareholders of Bankorp gained from the prospect of the continuing grant from the S A Reserve Bank. If the premium ABSA paid in respect of the grant was less than the discounted value of the grant, the shareholders of ABSA also gained from it. In this case, since the continuation of the grant was not needed to protect Bankorp depositors after 1992, either Bankorp shareholders

alone gained from an unwarranted (future) grant, or both ABSA and Bankorp shareholders gained.”

As regards restitution of the benefit derived by Bankorp and Absa Bank from the Reserve Bank financial assistance, the Davis Panel concluded that:

“there would be a compelling argument that public interest favoured restitution to a public institution which had been impoverished and which impoverishment would be for the account of the public. ... [S]ave for the determination as to the identity of the parties who benefited and proof of the amount of such benefits, the Reserve Bank would be legally justified in instituting an enrichment claim for its impoverishment caused by the donation of its funds to Bankorp/ABSA, in terms of which the latter parties had been enriched.”

As regards the liability of Absa Bank for restitution, the Davis Panel took the view that

“ABSA paid for the continued assistance of Bankorp by the Reserve Bank and therefore could not be regarded as beneficiaries of the Reserve Bank package.”

I have already addressed this argument.

The Davis Panel founded this conclusion on the understanding that Absa Bank had paid R1.230 billion for Bankorp the net asset value of which was placed at R1.222 billion at the time of the sale in April 1992, and that Absa Bank had made it a condition of the sale (or obtained an assurance from the Reserve Bank in this regard) that the Reserve Bank financial assistance to Bankorp remained in place on the same terms and for the same period as agreed between the Reserve Bank and Bankorp.

The Davis Panel took the view that Sanlam, as the major shareholder in Bankorp at the time of the Absa takeover, was the major beneficiary of the Reserve Bank assistance package.

PUBLIC PROTECTOR FINDINGS

The Public Protector’s findings in her [Report](#) cover essentially three aspects:

- The first is that failure of the South African government to implement the Ciex Report after paying £600,000 is inconsistent with s 195(1)(b) of the Constitution which requires efficient, economic and effective use of state resources. In this regard, the Public Protector found that this failure constitutes **“improper conduct”** as envisaged in section 182(1) of the SA Constitution and **“maladministration”** as envisaged in section 6 of the Public Protector Act.
- The second is failure of the South African government and the Reserve Bank to recover the Bankorp/Absa bailout. In this regard, the Public Protector found that this failure constitutes **“improper conduct”** as envisaged in section 182(1) of the SA Constitution and **“maladministration”** as envisaged in section 6 of the Public Protector Act.
- The third is prejudice caused to the South African public by failure of the South African government and the Reserve Bank to implement the Ciex Report and recover the funds. Also in this regard, the Public Protector found that this failure constitutes **“improper conduct”** as envisaged in section 182(1) of the SA Constitution and **“maladministration”** as envisaged in section 6 of the Public Protector Act.

The Public Protector took the view that the R1.125 billion benefit provided by the Reserve Bank to Banorp/Absa Bank was not authorised by the South African Reserve Bank Act.

This R1.125 billion benefit, as pointed out earlier, comprises annual interest of 15% on R1.5 billion worth in Government Bonds over 5 years (that is, R225 Million x 5 = R1.125 billion).

The Public Protector took the view that the Minister of Finance failed to discharge his duties in terms of s 37 of the South African Reserve Bank Act, 1989 to enforce compliance with that Act. Section 37 says

“(1) If at any time the Minister is of the opinion that the Bank has failed to comply with any provision of this Act or of a regulation made thereunder, he may by notice in writing require the Board to make good or remedy the default within a specified time.

(2) If the Board fails to comply with a notice referred to in subsection (1), the Minister may apply to the division of the Supreme Court having jurisdiction for an order compelling the Board to make good or remedy the default, and the Court may make such order thereon as it thinks fit.”

The South African Government and the Reserve Bank, said the Public Protector, have a duty to recover public funds that were misappropriated. She then took the remedial action that has now been set aside in two court judgments:

- Paragraphs 7.2 (which directed a parliamentary committee to set in motion a process which would result in the amendment of the Constitution to introduce a socio-economic dimension to the mandate of the Reserve Bank) and 8.1 (which provided for a monitoring of that process) were set aside, with the agreement of the Public Protector, by Justice Murphy in *South African Reserve Bank v Public Protector and Others* [2017] 4 All SA 269 (GP); 2017 (6) SA 198 (GP)
- Paragraph 7.1 (which provided for the re-opening and amendment of the SIU probe

for the recovery of the R1.125 billion from Absa Bank) was set aside by the Full Bench in *Absa Bank Limited and Others v Public Protector and Others* (48123/2017; 52883/2017; 46255/2017) [2018] ZAGPPHC 2; [2018] 2 All SA 1 (GP)

In my view, these remedial actions were rightly set aside. But the Public Protector's **findings** seem not to have been touched, the Minister of Finance's attempts notwithstanding. In fact, when the Reserve Bank sought to have the Public Protector's investigation of this bailout declared an abuse of her powers (so that she never again tries to investigate it) the Constitutional Court refused to do so.

The findings that remain unchallenged and which, in my view, can still validly be pursued, are the following:

- that the South African Government improperly – and inconsistently with s 195 and 231 of the Constitution, on the one hand, and s 182(1) of the Constitution and s 6 of the Public Protector Act, on the other – failed to implement the Ciex report, dealing with alleged stolen state funds, after commissioning and duly paying £600,000 to Ciex for same
- that the South African Government and the Reserve Bank improperly failed to recover R1.125 billion from Bankorp/Absa Bank arising from an illegal gift made by the Reserve Bank to Bankorp/Absa Bank between 1985 and 1995, notwithstanding a finding by two investigations that the gift had been irregular, thereby failing to comply with s 10(1)(f), s 10(1)(s) and s 37 of the South African Reserve Bank Act, 1989, s 195 of the Constitution, s 182(1) of the Constitution and s 6 of the Public Protector Act
- that the South African public was prejudiced by the conduct of the South African Government and the Reserve Bank in that these two **“wasted [£600,000] on services which were never used”** and failed to comply with s 195 of the

Constitution, s 182(1) of the Constitution and s 6 of the Public Protector Act.

It is worth noting that the setting aside of the remedial action does not mean that the findings and the report have also been set aside. In fact, both s 182 of the Constitution and the Full Bench in *President of the Republic of South Africa v Public Protector and Others* 2018 (2) SA 100 (GP) at [100]-[105] make this clear. The Full Bench in the State Capture judgment said:

“There is nothing in the wording of the section that links the remedial action to a finding of improper conduct. It is clear from the wording of the section that the Public Protector is afforded three separate powers: (1) to investigate conduct that is alleged or suspected to be improper; (2) to report on that conduct; and (3) to take appropriate remedial action.”

So, while the remedial action about the amendment of the Constitution and the re-opening of the SIU probe have been set aside, it seems to me that the Public Protector (whoever the incumbent) would be at large still to pursue a further investigation of the Reserve Bank bailout of Bankorp and Absa Bank.

But what about prescription and the provision in s 6(9) of the Public Protector Act that says the Public Protector may only in **“exceptional circumstances”** investigate a matter that relates to events that occurred more than two years previously? This, in my view, should not be an insurmountable obstacle to a court that applies law and legal principles properly. Let us explore the question.

ARE THE FUNDS RECOVERABLE?

The starting point is the [judgment](#) of the Constitutional Court in *Public Protector v South African Reserve Bank* (CCT107/18) [2019] ZACC 29; 2019 (9) BCLR 1113 (CC); 2019 (6) SA 253 (CC) (22 July 2019), where the Chief

Justice made the following remarks with which the majority did not differ:

- **“Allegations of corruption, illegality or impropriety, especially those relating to an amount in excess of R1 billion, appear to be sufficiently serious to warrant credible closure via the medium of a thorough investigation, however old the subject matter of investigation might be. And on this both Ms Madonsela and Ms Mkhwebane fundamentally agree.”** (para 62)
- **“[I]t ought not to matter how old a serious alleged wrongdoing is. That the incident or investigation is even 30 years old ought not to clothe the Reserve Bank with an exemption or some kind of immunity from an investigation which could possibly help prevent future wrongdoing by any other important institution. The Reserve Bank itself, initiated an investigation into the lifeboat agreement many years after it had been entered into. The pursuit of a related investigation does not establish bad faith.”** (para 88)
- **“The Public Protector was about a noble constitutional and statutory assignment for the good of the public. She was exercising her section 182(1) power “to investigate any conduct in State affairs, or in the public administration . . . that is alleged or suspected to be improper or to result in any impropriety or prejudice”. Now, all the High Court lays emphasis on are her failures or apprehension of her partiality or lack of good faith. The brightly highlighted apparent corruption, fraud, illegality or impropriety involving the R1.125 billion bailout of Bankorp by the Reserve Bank has virtually disappeared into thin air. The errors of the Public Protector committed in the course of trying to get to the bottom of the Reserve Bank’s apparent wrongdoing enjoy prominence in the High Court judgment. The**

Public Protector's legitimate, albeit arguably flawed, attempt to unearth and address an apparent illegality or impropriety, which is not an attempt to improperly benefit herself or another or to corrupt the system or prejudice anybody, has been turned upside down to make her look like a dishonest constitutional office-bearer who is on a vindictive crusade against the innocent and squeaky-clean Reserve Bank." (para 104)

- "[T]he illegality, corruption or impropriety of the lifeboat agreement had already been pronounced upon by at least two Judges and an international asset recovery entity." (para 111)
- "[T]he Reserve Bank must not be handled as if, unlike all of us, it is supposed to be exempted from scrutiny and accountability regardless of what it might have done – under the ever-lurking subtle threat of potential harm to the economy or the displeasure of market forces. It must not be clothed with the mystified but real and highly undesirable mantle of untouchability or impunity. It too, like all of us, must be held transparently accountable. Otherwise the Constitution may well exclude it from investigation by all and scrutiny by courts. That it too must be investigated is evidenced by its self-initiated investigation by Davis J and others and the markets did not react negatively." (para 123)
- "Attempts to investigate the Reserve Bank, in relation to the recovery of the money, after several negative findings, cannot, however imperfect, amount to abuse of office." (para 124)
- "Genuine confidence or respect cannot be secured by an appearance of covering up or resistance to an investigation into allegations of impropriety or illegality. The Reserve

Bank should in fact be insisting on the opportunity to clear its name publicly and speedily, rather than make itself look like it seeks to almost intimidate constitutional office-bearers out of investigating it as required by the Constitution." (para 125)

Let us remind ourselves about what the Constitutional Court was called upon to decide in that case.

The question before the Constitutional Court – where I lead the team that represented the Public Protector – was whether the punitive costs order awarded against the Public Protector in her personal capacity was warranted. The majority found that it was. The minority said it was not. The propriety of the investigation, the report and the remedial action of the Public Protector were not issues that the Constitutional Court had to decide. The majority did not set its face against the observations of the Chief Justice quoted above.

CONCLUSION

What is the lesson for South Africans from that bailout scandal? Unless a whiff of scandal or criminality involving the Central Bank is thoroughly, independently and openly investigated, and remedial measures taken to ensure the stench is thoroughly removed, others may take heart from the inertia of the past and chance their own luck. At least the investigation was done in that instance, even though the recommendations seem unhinged from the reasoning in the body of the Report that I have read.

The Reserve Bank bailout scandal is to my mind an unfinished story as the money owing has never been recovered, principally because the Reserve Bank itself refused to recover it even after Senior Counsel (later a Judge of the High Court) had prepared the court papers and a charge sheet. That is money that belongs to South Africans and which can be deployed to many deserving civic projects, just as much as

the funds alleged by Mr Tokyo Sexwale to have been stolen within the Reserve Bank.

Dismissing his allegation as lacking credible evidence tends to put the cart before the horse. Mr Sexwale is not a forensic investigator or detective. It falls on the State to commission independent investigation of serious allegations of financial crimes of this sort. So, in light of the Reserve Bank's past brushes with insalubrious banking practices, it would in my view be a catastrophic abdication by all oversight bodies that have power over the Reserve Bank simply to wash their hands of these allegations based on the thin veil of absence of evidence that they themselves should be investigating.

As for the recovery of the bailout, I think, for the reasons advanced in this 2-part paper, that is an exercise worth pursuing. There need not be any systemic risk if an arrangement were reached with Absa Bank and other identified beneficiaries to pay back the money in reasonable instalments. After all, it is reported that Absa Bank had initially offered to make good on the money by funding government developmental projects. What became of that project? Why is government not pursuing it? One such project could be the establishment of a specialist privately-run bank that caters for the needs of ordinary black people who want to start businesses but lack the collateral that existing banks and so-called developmental finance institutions (like the Independent Development Corporation) tend to insist upon.