

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

**CASE NO.: 53829/2021**

In the matter between:

**SIPHO MILA PITYANA**

Applicant

and

**PRUDENTIAL AUTHORITY**

First Respondent

**ABSA GROUP LIMITED**

Second Respondent

**ABSA BANK LIMITED**

Third Respondent

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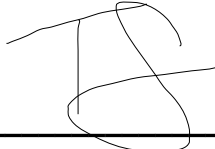
**FILING SHEET**

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**Documents filed herewith:**

1. Second and third respondents' answering affidavit, dated 22 November 2021;
2. Confirmatory affidavit of Nadine Drutman, dated 22 November 2021, and
3. Confirmatory affidavit of Alex Darko, dated 22 November 2021.

Dated at **Johannesburg** on **22 November 2021**.




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**WEBBER WENTZEL**

Second and third respondents' attorneys  
90 Rivonia Road, Sandton  
Johannesburg, 2196

Tel: 011 530 5232/ 011 530 5469

Fax: 011 530 6232/ 011 530 6469

Email: [dario.milo@webberwentzel.com](mailto:dario.milo@webberwentzel.com)/  
[tamryn.gorman@webberwentzel.com](mailto:tamryn.gorman@webberwentzel.com)  
[hoosein.mayet@webberwentzel.com](mailto:hoosein.mayet@webberwentzel.com)

Ref: D Milo/ T Gorman/ H Mayet/ 3049975

**C/O HILLS INCORPORATED**

Office B313, 1<sup>st</sup> Floor, Parkdev Building  
Brooklyn Bridge Office Park  
570 Fehrsen Street, Brooklyn, Pretoria

Tel: 087 944 1800

Fax: 086 518 0848

Email: [admin3@hillsincorporated.co.za](mailto:admin3@hillsincorporated.co.za) /  
[audrey@hillsincorporated.co.za](mailto:audrey@hillsincorporated.co.za)

Ref: A Engelbrecht/ C Bezuidenhout

To:

**THE REGISTRAR**

High Court of South Africa  
Gauteng Division, Pretoria

And to:

**HAFFEGEE ROSKAM SAVAGE ATTORNEYS**

Applicant's Attorneys

3rd Floor, 1 Bompas Road, Dunkeld West, Johannesburg

Tel: 0110173130

Fax: 086 648 0536

Email: [anton@hrsattorneys.co.za](mailto:anton@hrsattorneys.co.za)

Ref: A Roskam / HRS10832

**c/o MACROBERT ATTORNEYS**

Mac Robert Building, 1062 Jan Shoba Street  
Brooklyn, Pretoria

Tel: 012 425 3400 / 012 941 2400

Email: [wgani@macrobert.co.za](mailto:wgani@macrobert.co.za)

Ref: W Gani

And to:

**WERKSMANS ATTORNEYS**

First Respondent's attorneys

The Central, 96 Rivonia Road, Sandton

Private Bag 10015, Sandton 2146

Tel: 011 535 8000

Fax: 011 535 8600

Email: [cmoraitis@werksmans.com](mailto:cmoraitis@werksmans.com) / [cmanaka@werksmans.com](mailto:cmanaka@werksmans.com)

Ref: Mr C Moraitis/ Mr C Manaka (SOUT3267.262/#7040248V1)

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**SECOND AND THIRD RESPONDENTS' ANSWERING AFFIDAVIT**

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I, the undersigned,

**WENDY LUCAS-BULL**

state under oath:

1. I am an independent non – executive director and chairman of the Second and Third Respondents. The Second Respondent is a public company, listed on the Johannesburg Stock Exchange. The Third Respondent is a bank, wholly owned by the Second Respondent.





2. The Third Respondent's board is a subset of the Second Respondent's board. For ease of reference, I will refer to the Second and Third Respondents as "**Absa Group**" and "**Absa Bank**" respectively and collectively as "**Absa**". When I make reference to the "**Absa board**" such reference relates to both the Absa Group and the Absa Bank boards.
3. I am duly authorised to depose to this affidavit by virtue of my position as chairman of Absa.
4. Unless specifically stated otherwise, the facts contained in this affidavit fall within my personal knowledge and are, to the best of my knowledge and belief, both true and correct. Where I make legal submissions, I do so on the advice of Absa's legal representatives. I verily believe that such advice is well-founded.
5. Where I rely on information conveyed to me by others, I identify the source of that information and will file with this application the relevant confirmatory affidavits – specifically, those of Mr Alex Darko ("**Darko**") and Ms Nadine Drutman ("**Drutman**").

#### **PURPOSE AND STRUCTURE OF THIS AFFIDAVIT**

6. Absa opposes the relief sought by the Applicant, Mr Sipho Pityana ("**Pityana**") because the declaratory order that the First Respondent (the Prudential Authority, to which I will refer as "**the Authority**") acted unlawfully and in excess of its powers under the Banks Act 94 of 1990 ("**the Banks**

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**Act**") by engaging in the so-called "informal process" with Absa in connection with the identification of Absa's new chairman, is far-reaching and, if granted, will have significant consequences for Absa, its reputation and the reputation of the Absa board.

7. The effect of the declarator is not only that the Authority acted unlawfully, but also that Absa (through the Absa board) acted unlawfully by participating in the same "informal process" of which Pityana complains, because the "process" required the involvement of (and did involve) two parties.
8. Of course, there was nothing irregular or unlawful in the interactions between the members of the Absa board and the Authority. I will deal with and contextualise those interactions below for the benefit of the Court, as part of a comprehensive chronology of events which led to the decision of the Absa board not to nominate Pityana as its future chairman.
9. I will then deal with the contents of Pityana's founding affidavit on a "*per paragraph*" basis.
10. Any allegation not specifically dealt with should not be treated as admitted by Absa and should instead be considered as denied.

**CHRONOLOGY OF EVENTS LEADING TO THE DECISION NOT TO NOMINATE  
PITYANA AS THE CHAIRMAN**

11. Having served on the Absa board for almost 9 years, my tenure will come to an end in March 2022. The process to identify my successor commenced in

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September 2020. The Absa board appointed a sub-committee, led by one of our independent non-executive directors, Darko, to drive the process of identifying, interviewing and recommending the appointment of the next chairman. I will refer to this sub-committee as the "**Sub-committee**".

12. Pityana was appointed as an independent non – executive director to the Absa board with effect from May 2019. At the time, Pityana was also the chairman of AngloGold Ashanti Limited ("**AGA**"). Later, in June 2020, Pityana was also appointed as the Lead Independent director ("**LID**") of Absa. This is an important position on the Absa board, which requires the incumbent to perform roles such as serving as a sounding board to the chairman, presiding at board meetings at which the chairman is not present or is conflicted, and performing all functions that cannot be performed by the chairman due to his/her absence or a conflict of interest.
13. During the course of September 2020, and at a meeting of the board on 16 September 2020, Darko presented to the board a "roadmap" for the chairman succession process, which included an engagement with the Authority prior to any candidate being nominated for the position of chairman as contemplated in terms of section 60(6A) of the Banks Act. A copy of the extract of the minutes of that meeting is enclosed as annexure "**AA1**".
14. As appears from the minute of that meeting, Darko had already met with Mr Kuben Naidoo (the CEO of the Authority) ("**Naidoo**") who suggested that a shortlist of candidates could be furnished to the Authority, who could provide



*"comment or caution on the candidates to ensure that [Absa] did not go too far into the process ie before submitting the formal application before identifying a potential problem".*

15. There appeared to me to be no downside to sharing the shortlist of candidates with the Authority and receiving its views.
16. Pityana was present at the Absa board meeting of 16 September 2020. Following the presentation of the roadmap by Darko, no concerns or objections were raised by any member of the board, including Pityana. The roadmap included the engagement proposed by Naidoo.
17. The reason for this was obvious: since the Authority had to approve (or, in the language of the Banks Act, not object to) the appointment of the chairman of a financial institution, it would be sensible for the Authority to raise any concerns or red flags before acting in terms of section 60 of the Banks Act. That would protect both Absa and the individual candidate concerned, as a formal objection might have had adverse consequences for the candidate in future. Of course, at this stage, no-one was anticipating any objection.
18. The Absa board would obviously never propose a person for appointment as chairman who might attract an objection from the Authority. This is why the search for the next chairman was commenced well in advance, in order to enable the search agency and the Sub-committee to conduct all due diligence exercises necessary before any candidate was even placed on the shortlist.

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19. The formal process - of the Authority acting in terms of the Banks Act - is triggered by the formal nomination of a candidate to the Authority for approval by way of the submission of a form known as the "BA020". The proposal made by Naidoo was that a shortlist of candidates be submitted to the Authority before any candidate was formally proposed by way of the submission of a BA020 form. At all times, Naidoo emphasised that a full due diligence would in any event be conducted once a BA020 was submitted. The first step (which Pityana refers to as the "informal process") would in no way dictate how the Authority would conduct the formal process or affect its ability to discharge its functions under section 60 of the Banks Act.
20. The consequence of the Authority raising an informal "comment or caution" would simply mean that the Absa board would have the benefit of an insight into the Authority's views on any potential candidate before the BA020 form for that candidate was submitted, if it was to be submitted at all.
21. Therefore, the informal "comment or caution" process was not a substitution for the Absa board's formal deliberations concerning the appointment of the next chairman, nor was it ever understood as a such.
22. As indicated, the Absa board was comfortable that it would be beneficial to have the view of the Authority prior to the Absa board making the final decision and then submitting the candidate to the Authority via the BA020 form.

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23. During December 2020 and in line with the roadmap presented by Mr Darko, the members of the board were invited to apply for the position of chairman.
24. On or about 2 December 2020, Pityana approached me on a confidential basis and informed me that he might resign from his chairmanship at AGA. He explained that the board of AGA was divided on a number of issues which might make his further chairmanship untenable.
25. He also disclosed to me that he had been the victim of a false sexual misconduct complaint, which was under investigation at AGA. He assured me that the complaint was unfounded and formed part of the scheme to ensure his departure from AGA. He wanted to forewarn me of these developments at AGA in the event that the allegations in question surfaced in the media. He stressed that while he was likely to resign as the chairman of AGA, he would not resign as a director as he wanted to ensure that he was vindicated and cleared of the false allegations.
26. Pityana followed our initial conversation with a call to say that AGA had investigated the sexual misconduct allegation and that a preliminary investigation report had been tabled. He told me that he had replied to the preliminary findings in the report by giving his version of events and that, as a result, both the complainant and AGA had decided that the matter would be closed and not taken further.
27. The impression created by Pityana was that his version had been accepted by AGA as truthful and that the matter had been closed off. My conclusion

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from this discussion was that Pityana's version had been accepted and in fact I said that I was happy for him. He then stepped down as chairman and director of AGA, which confirmed, in my mind, that he had been fully vindicated and for that reason no longer had to retain his seat on the board to vindicate his reputation.

28. Since Pityana shared this information on a strictly confidential basis, I could not and did not share it with the rest of the Absa board. It also did not appear necessary, since I believed that the matter had been fully resolved in favour of Pityana.
29. The Absa board members became aware of Pityana's resignation from AGA on account of the SENS announcement published by AGA on 8 December 2020. This SENS covered both Pityana's resignation of his positions as chair and non-executive director with no reasons given for the resignation.
30. Then, in January 2021, Pityana expressed an interest in the chairmanship position of Absa to the search agency (who were mandated to manage both internal and external candidates' applications). He was the only member of the Absa board to do so. In addition to Pityana, a number of external candidates were considered for the position, through the search agency. Some 68 candidates were considered by the search agency in the first round.
31. I was not concerned about any reputational risk of Pityana proposing himself for the position because I had understood from my previous discussions with him that the investigation by AGA into the complaint of sexual harassment

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had been resolved in his favour and I was not aware that a final report had been issued in which Pityana's version of events had been rejected.

32. I must stress that Pityana did not explain to me that the investigation was conducted by senior counsel, that an interim report had been followed by a final report and that he had resigned from AGA (both as chairman and director) *before* the final report had been produced.

33. On 8 April 2021, the Sub-committee held an interview with Pityana as part of the chairman succession process. During this meeting, the following questions were put to Pityana:

33.1 *"We know Sipho's public persona... Is there anything that you would want to share with us in a manner that does not come as a surprise later?"*

33.2 Pityana did not mention the allegations of sexual misconduct in response to this question.

33.3 *"In the course of this journey, is there anything that you have experienced that might be a source of some personal discomfort that you may want to share with us"*

33.4 Pityana again did not mention the sexual harassment complaint in response to this question.

33.5 *"Is there anything regarding your leaving the board of AngloGold Ashanti that we should be worried about?"*

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33.6 In response to this question Pityana answered as follows:

*"With regard to AngloGold – it is a fair question. I left at short notice. I have "non disparagement" agreements. Would have loved to share with you. I am comfortable that there is nothing about my exit that would be reason for me to not put my name forward".*

33.7 The further question put to Pityana concerned the then topical debate about whether it was appropriate to share private views in public, considering his representative role. The question was put as follows:

*"[I] would expect you to express public opinions –..... How would you feel about tempering your thoughts / comments given a Chair position at Absa".*

33.8 To this proposition Mr Pityana replied as follows:

*"As for being outspoken, one has to be circumspect. Every role that you occupy in society limits your role" (sic).*

33.9 Pityana on the same topic also said: *"... I would have rather stepped down as the chairman of the board. You must stand by what you say but must not put the company in a vulnerable position."*

34. A copy of the notes of this meeting produced by Drutman is attached as annexure "**AA2**". I have redacted portions of the note which are irrelevant to

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this application and which are sensitive in nature. I have however provided Pityana and the Authority with a full unredacted copy of the notes.

35. On 26 April 2021, a special meeting of the Absa board was held, during which one of the topics was the chairman succession process. By that time the Sub-committee had considerably narrowed down the list of potential candidates to a shortlist of two candidates (one internal and one external). Certain members of the Absa board expressed discomfort about not knowing the reason for Pityana's exit from AGA. It was agreed, however, that the Authority should be updated on those candidates who were shortlisted at that time.
36. On 28 April 2021, Absa provided an update to the Authority which included informally informing the Authority of the shortlisted candidates, including Pityana. The engagement was cordial, as appears from Drutman's contemporaneous meeting notes, attached as annexure "AA3".
37. On 3 May 2021, a further special meeting of the Absa board was held. Both Pityana as the internal candidate and a very credible external candidate were presented in the paper to the Absa board. During this meeting, it was agreed by the Absa board that, for continuity purposes, an internal candidate should be preferred over an external candidate for chairmanship, but subject to various checks on the internal candidate – namely Pityana - being conducted. This included the circumstances of Pityana's exit from AGA being fully investigated in addition to other specific matters being probed.

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38. On 4 May 2021, and in response to a request for a reference for Pityana from AGA, the search firm, Glendower, was only able to source the confirmation of service for Pityana. A copy of the confirmation of service is enclosed as annexure "AA4". AGA would only provide a confirmation of dates of service, as opposed to a reference.
39. On or about 21 May 2021, and as part of the feedback following the discussions with the PA on 28 April 2021, Naidoo advised me that Absa should investigate Pityana's exit from AGA further. Separately around the same time, Naidoo called Darko and conveyed the same message.
40. I raised this issue with Pityana, as did Darko. On 22 May 2021, I had a telephonic discussion with Pityana. I asked him to explain the circumstances of his resignation from AGA in detail. He responded by saying that he was bound by confidentiality and "non-disparagement" agreements and could not freely discuss the details of his exit from AGA.
41. However, he told me that there was an investigation and a preliminary report prepared, with which he did not agree. He explained that he had responded to the preliminary report by providing facts to counter the conclusions in the report and had produced evidence to corroborate his version. He again confirmed that on the basis of his response AGA had decided that it would not take the matter any further and he then resigned. This confirmation was consistent with what he had told me in December 2020.

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42. After my discussion with Pityana, I contacted Ms Maria Ramos ("**Ramos**") (who had replaced Pityana as the chairman of AGA) on 24 May 2021. She advised me that a serious matter had arisen prior to Pityana's resignation. She asked me what Pityana had disclosed to me, and I said that he had not disclosed much, since he felt bound by confidentiality agreements. Ramos said that she would check with AGA legal regarding the confidentiality issue, but that she could not make any disclosures to me as it was for Pityana to make the relevant disclosures.
43. Ramos then reverted to me the very next day, confirming that there was no restriction or limitation on Pityana disclosing to Absa or the Authority the circumstances that preceded his departure from AGA and, to the extent that he felt he was under an obligation of confidentiality, AGA waived any confidentiality. I relayed this to Pityana.
44. On 27 May 2021, Pityana sent me a note he had prepared for the Sub-committee. The note was to serve as his *aide memoire* at the meeting with the Sub-committee, scheduled for 29 May 2021. A copy of the note is attached as "**AA5**". I was surprised by the contents of the note, as this was the first time I learnt about the existence of the final report and the fact that, in the end, the investigator (being a senior counsel, Advocate Heidi Barnes SC ("**Barnes**")) had actually rejected Pityana's version. Until I read that note, I was not even aware that AGA had commissioned an external person to conduct an investigation. Pityana had not previously mentioned that a senior advocate was involved.

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45. During the Sub-committee meeting on 29 May (which I attended as an invitee), Pityana denied any sexual misconduct, highlighted his disagreement with the final report produced by Barnes (**"the Final Barnes Report"**) and emphasised that the AGA board had decided not to take the matter further.
46. The members of the Sub-committee indicated that it would be helpful to consider the reports in question given the version from Pityana that the matter was closed, and yet the Authority and the Absa board had indicated that the circumstances surrounding Pityana's departure needed to be understood. Pityana insisted that the suite of documents, (which consisted of the initial draft report (**"the Draft Barnes Report"**), his rebuttal submissions, the Final Barnes Report and Pityana's further submissions on the Final Barnes Report) should be considered. Pityana agreed to provide this suite of documents on the understanding that they would be submitted for independent legal review and advice. Pityana insisted that the evidence in support of his version had been excluded from both the Draft Barnes Report and the Final Barnes Report.
47. The Sub-committee discussed this and agreed to submit the documents to an independent legal review. It seemed prudent to do so, in order to fully understand Pityana's position - not only as someone who was interested in the chairman position, but also in his capacity as director of Absa.
48. Against that understanding (that the suite of documents would be subjected to independent legal review) Pityana's attorneys at that time (Norton Rose





Fulbright) circulated the suite of documents to the company secretary, Drutman, during the afternoon of 2 June 2021.

49. Also, on 2 June 2021, the Absa board held a full day scheduled meeting during which Darko gave a presentation on the chairman succession process. He indicated, as far as Pityana was concerned, that the search firm had obtained additional references. As pointed out above, only a certificate of service had been provided by AGA. The AGA matter was of concern on account of the paucity of information available. At that stage, the Sub-committee was only aware of what they had been told by Pityana on 29 May 2021 and in the note of 27 May 2021 and had not as yet received any further documents, including those documents that were received by Drutman in the late afternoon of 2 June.
50. Darko also indicated that the Sub-committee had received feedback from the Authority that, in relation to the external candidate (Mr Moloko) there were no issues arising, but that in respect of Pityana there was the issue of the circumstances of his departure from AGA. This was aligned to the concern raised by the Absa board.
51. The Sub-committee decided that the best way forward was to advise the Authority that it would revert, once it had reviewed the suite of documents from AGA and conducted its own review of the matter.
52. Of course, throughout, Pityana was excused from all board deliberations concerning the chairman succession process.

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53. The Sub-committee was of the view, after having regard to the suite of documents, and resultant concerns, that it may not be necessary to commission a legal review. However, because Pityana had only submitted the documents on the understanding that they were going for legal review, Absa was of the view that its prior commitment to such review needed to be honoured.
54. Absa approached two senior attorneys to conduct the legal review of the AGA suite of documents, but both advised that they were conflicted. On 15 June 2021, Absa instructed Mr Peter Harris ("**Harris**") of Harris Nupen Molebatsi Attorneys to provide a legal opinion concerning the suite of documents detailed above and specifically to opine on whether "*the findings of counsel [this being a reference to Barnes] were reasonable having regard to the facts presented and that relevant and material matters and witnesses were taken into account*".
55. Harris produced his report on 8 July 2021 ("**the Harris Report**"). The Harris Report concluded that the investigation conducted by Barnes had not taken account of all relevant evidence and that the Final Barnes Report was for this reason flawed.
56. Then, on 14 July 2021, Harris attended a meeting with the Sub-committee. On this occasion, Harris stated forcefully that no reliance could in fact be placed on the Final Barnes Report, on account of its shortcomings. The majority of the Sub-committee, which had up until then (following receipt of

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the AGA documents) been of the view not to support Pityana, were persuaded by the views expressed by Harris to support Pityana in the process going forward. Effectively, the picture that was painted by Harris at this meeting was that, to have regard to the Final Barnes Report would be unfair to Pityana, given the fact that the Final Barnes I Report was so fundamentally flawed. Harris advised the Absa board that it should not rely on the Final Barnes Report for any decision concerning Pityana, who was “innocent until proven guilty”.

57. On 16 July 2021, the Sub-committee addressed the Absa board on the substance of the AGA matter and the Harris Report recommendations. The details of the sexual harassment complaint (ie the AGA documents) and the Harris Report were not shared in full with the Absa board on account of their sensitive nature and that they had only been shared with the Sub-committee for the purposes of an independent legal review to be conducted.
58. As a result of Mr Harris’ advice, the Absa board agreed to continue with the *status quo*, (in other words, not to remove Pityana as a potential candidate) and to provide the Authority with all relevant documents (including the Harris Report) for review, in order to deal with the concerns raised by Naidoo on 29 May 2021. There were three dissenting members of the Absa board, who did not support Pityana in a process of continued consideration by the Absa board and by the Authority.

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59. Mr Moloko remained the preferred external candidate (after a detailed search and from the many candidates considered) and his details were included in the Absa board papers.
60. On 23 July 2021, Darko and I briefed the Authority on the latest outcomes of the Absa board discussions, including the work done by the Sub-committee on the AGA matter and asked that the Authority consider the AGA matter with the suite of documents to be provided by Absa to the Authority (which included the Harris Report). The documentation was submitted to the Authority later that day.
61. On 2 August 2021, I had a telephone discussion with Naidoo. He advised me that a meeting of Governors had considered the matter and that the outcome was one of concern and not of support. He indicated that the concerns stemmed from three matters:
- 61.1 there was a dispute of fact regarding Pityana's resignation from AGA, in that AGA's position (conveyed to him by Ramos) was that AGA would have taken the matter further, had Pityana not resigned, whereas Pityana cited different reasons for his resignation;
- 61.2 Naidoo also told me that the sexual harassment allegation and the Final Barnes Report raised a potential forward reputational risk for Absa; and
- 61.3 Finally, he queried why Harris had not discussed with Barnes the reasons for not interviewing the security detail, which was Pityana's major complaint.

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62. I indicated in response that I had been advised by Pityana that AGA had agreed that it and the complainant would take no further action following the Final Barnes Report and Pityana's response thereto. However, Naidoo again expressed concerns about the reputational risks of nominating Pityana for the chairman position.
63. I discussed these issues with Pityana on the same day and conveyed to him the details of my discussion with Naidoo, including the reasons Naidoo cited as the basis of the Authority's concern.
64. I also thought at this point that it may become necessary for Absa to seek senior counsel's advice, given Naidoo's concerns and conveyed this to Pityana.
65. On 3 August, the Sub-committee met and decided that it could not support Pityana and would therefore not recommend him to the Absa board.
66. Also on 3 August 2021, Pityana wrote to me, thanking me for the feedback on the chairman succession process and re-iterating his denial of any sexual misconduct while at AGA. He further recorded in that correspondence (with reference to the dispute of fact issue raised by Naidoo) that: *"contrary to Ms Ramos' insinuation to you that there was no confidentiality agreement, there clearly was and at their instance. By mutual agreement with the board we resolved to not publicly disclose the reasons for my resignation and maintain confidentiality in the interests of the company"*.

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67. He stated: *"I resigned from the Board of [AGA] prior to the conclusion of the final report of an investigation into the allegation of sexual harassment against me. I reject any suggestion that my resignation was in order to avoid possible adverse action by the board of [AGA] arising from the conclusion of such investigation"*. A copy of this letter and the attachments thereto is attached as annexure "**AA6**". The correspondence and attachments have been redacted to protect the privacy of the complainant of the sexual misconduct allegations against Pityana. Pityana and the Authority are already in possession of unredacted versions of the correspondence and its attachments.
68. On 6 August 2021, I forwarded Pityana's correspondence to the Authority, including the attachments to his correspondence. The Authority responded on the same day, indicating that, if the Absa board wished to persist with Pityana's candidacy, it should submit the BA020 form. A copy of that correspondence (which revealed a tone of frustration) (excluding the attachments to Pityana's 3 August email which are attached in AA6 above) is attached as annexure "**AA7**".
69. I pause to explain that the email I received from Pityana contained an introductory paragraph and a concluding paragraph, both of which presented a strong affront to Ramos. In forwarding the correspondence to the Authority, I deleted the first and last paragraphs (save for the first sentence in both paragraphs), as I thought it was inappropriate. I advised Pityana at the time that I would delete those portions and he agreed with this approach (and

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thanked me). The correspondence I forwarded to the Authority with the deleted portions is contained in the email chain attached above as "AA7". However, I have also enclosed the complete email as sent to me by Pityana, inclusive of the paragraphs concerning Ramos, which is attached above as "AA6".

70. On 10 August 2021, at a private session of a scheduled Absa board meeting (from which Pityana was recused) the Absa board members were updated, and all members expressed significant discomfort with Pityana's candidacy.

71. This was a watershed meeting, during which the following issues were pertinent:

71.1 First, I provided feedback on the engagement with the Authority and the Absa board was aligned that it would be inappropriate to challenge the Authority by submitting Pityana's name in terms of a BA020 form in circumstances where the concern had been raised by the Authority and had not been satisfactorily resolved;

71.2 The Absa board also considered this to be a reputational risk for Pityana, because the Authority's formal objection to his appointment would have to be a matter of public record;

71.3 The reputational risk for Absa was regarded as significant;

71.4 The Absa board also revisited the earlier statements made by Pityana concerning the reasons for his departure from AGA, since there was a

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concern that he had not candidly and fully disclosed the circumstances of his departure from AGA when first provided the opportunity to do so;

71.5 It so happened that in terms of the annual internal governance processes, the Absa board was required to carry out the confirmation of the LID at this meeting (being the Absa board meeting closest following the Annual General Meeting). Given the evolving nature of the chair succession process, and notwithstanding concerns raised by some members of the Absa board regarding the AGA matter, the Absa board considered that it would not be appropriate to make a change to the LID at that time.

71.6 Although not unanimously, the Absa board confirmed Pityana in the LID position.

71.7 The Absa board agreed that the Sub-committee would pursue further engagements with the external candidate, Mr Moloko.

72. On 11 August 2021, I informed Pityana of the concerns expressed within the Absa board concerning his appointment as chairman. Pityana indicated that he would write to the Authority to query the basis of its decision. I explicitly requested him not to do so both verbally and by WhatsApp communication. Drutman also had a lengthy conversation with Pityana on the evening of 11 August, advising him that it would be inappropriate to engage with the Authority on this matter and asking him explicitly not to do so.

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73. Our requests were, however, ignored, because on 12 August 2021 at 07h30, Pityana's attorneys addressed a letter to the Authority, seeking written reasons for the "decision" taken by the Authority and a meeting with the Authority in order to avoid future litigation. This letter is annexure "FA6" to Pityana's affidavit.
74. On 19 August 2021, the Authority responded to Pityana's letter, advising that no decision had in fact been made by the Authority and indicating that the Absa board should submit the formal application in the form of a BA020 form, if it deemed appropriate to do so.
75. The correspondence between Pityana and the Authority, which was clearly confrontational, made me and the rest of the Absa board very uncomfortable. We decided to seek legal counsel on this issue and approached attorneys Webber Wentzel. I was also deeply concerned about the potential reputational fallout for Absa that the interactions between the Authority and Pityana could cause.
76. Webber Wentzel shortly thereafter instructed senior counsel who, in turn, advised in consultation that the criticisms in the Harris Report of the Final Barnes Report were exaggerated and, more importantly, that the advice (that as a result of the perceived procedural flaws in the Final Barnes Report it could be disregarded by the Absa board) was clearly wrong. In this regard, counsel advised that the Absa board was not required to decide whether the conclusions reached in the Final Barnes Report were correct. It was however

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required to consider whether Pityana had made a full, frank and timeous disclosure to Absa of the existence of, and investigation into, the complaint of sexual harassment against him.

77. Subsequently, on 30 August 2021, Pityana's attorneys addressed further correspondence to the Authority, in which they alleged that there was a "*substantial dispute between the Authority and the Absa board members about what was communicated to them when they interacted with you*". The letter also reserved Pityana's right to challenge "*the informal process*", as appears from Annexure "FA8" of Pityana's founding affidavit.
78. The Absa board decided, given the advice received from senior counsel concerning the Harris Report, that it would invite Pityana to a meeting to debate the issues that had arisen. This meeting was scheduled for 3 September 2021.
79. Pityana produced a memo for the Absa board prior to the meeting. This is enclosed as annexure "FA9" to the founding affidavit. He also sought insight from Drutman, regarding the topics to be debated in the meeting. Drutman provided the likely topics for discussion, as appears from annexure "FA10" to the founding affidavit.
80. During the meeting of 3 September 2021, Pityana urged the Absa board to proceed with what he called its "resolution" to nominate him for the appointment and to submit the BA020 form to the Authority.

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81. I explained that no resolution to nominate Pityana had ever been taken by the Absa board. I re-iterated the three reasons provided by the Authority as causes for concern and explained that my reading of Naidoo's email was that it was not an invitation to submit the BA020 form in respect of Pityana, but rather an expression of frustration with the back and forth with various reports and correspondence.
82. Pityana seemed to have some difficulty accepting this. For the rest, Pityana presented the content of his "speaking notes" and memorandum (which are an accurate reflection of what he said during the meeting).
83. Once he was excused from the meeting, the Absa board determined, unanimously, that it would be inappropriate to nominate Pityana as the candidate and submit the BA020 form to the Authority in respect of Pityana. The reasons for this decision were many:
- 83.1 Pityana has placed himself in an adversarial position to the Authority in a matter that was personal to him; had utilised an adversarial tone in his correspondence with the Authority and did not seem to appreciate the difficulty with that approach. He also ignored - on two occasions - my request, as chair of the Absa board, not to engage in such an approach with the Authority;
- 83.2 The proposal of Pityana would likely result in an objection by the Authority which would create a reputational risk for both Absa and Pityana. It was therefore not in the best interests of Absa to propose Pityana;

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- 83.3 Pityana's responses to the Sub-committee in the 8 April 2021 interview were not entirely candid, which only became clear on the receipt of the entire suite of AGA documents. When Pityana was questioned again in the meeting of 3 September and asked whether, on reflection, he would change any of his responses in the April interview, he remained resolute that there was no issue with his answers and no reason for concern regarding his departure from AGA that could pose any reputational risks to Absa.
84. Having regard to senior counsel's legal advice referred to above, the Absa board could not simply disregard the conclusions in the Final Barnes Report, and given all the above considerations (including that there was significant discomfort regarding his judgement as reflected in his answers to the Sub-committee and the Absa board), the Absa board determined that maintaining Pityana as a candidate would present too much of a future reputational risk.
85. The Absa board resolved at that point that Mr Moloko was the right candidate to lead Absa, having regard to the very positive feedback from all the interviews held with Mr Moloko, the very positive reference checks that were provided, his experience in financial services, his credentials and his track record, and the Absa board unanimously supported his nomination.
86. The Absa board passed a resolution that Mr Moloko would be submitted as Absa's candidate for chairmanship for formal approval by the Authority. A copy of these resolutions is attached as annexure "**AA8**".

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87. Subsequently, I informed Pityana of the fact that the Absa board had resolved to propose Mr Moloko for chairmanship, as appears from annexure "FA12" to the founding affidavit.
88. I am advised that the subsequent events canvassed by Pityana are not relevant for the purposes of the relief sought in this application. To the extent necessary, I deal with them in the *ad seriatim* response to the founding affidavit below.
89. Insofar as any specific allegation is not canvassed in my response, but is inconsistent with what I have stated above, it should be considered as denied.

### **AD SERIATIM**

#### **Ad Paragraph 1**

90. The contents of this paragraph are admitted.

#### **Ad Paragraph 2**

91. I deny that all the contents of Pityana's affidavit are true or correct. I have set out above a chronology which properly records the sequence of events and the contents of the relevant meetings and correspondence, some of which Pityana has incorrectly recorded. I also point out in the *ad seriatim* response below the paragraphs which are plainly incorrect.

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**Ad Paragraphs 3 to 7**

92. I note the citation of the parties and I admit the correctness of the citation of Absa Bank and Absa Group.
93. For the reasons I have detailed above, it is clear that the relief sought has significant consequences for Absa. It is incorrect to suggest that Absa has merely an "interest" in the matter. The declarator sought, if granted, would be an indictment on Absa and its conduct.
94. From Absa's perspective, the relief sought implicates it in conduct which is potentially unlawful.
95. I confirm Pityana's understanding of the constitution of the Absa board.

**Ad Paragraphs 8 and 9**

96. I note the purpose of the application but state that Pityana has not made out a case for the relief sought. As I have indicated above, the provisions of section 60 of the Banks Act do not come into effect unless and until the board of a bank proposes a person for appointment through a BA020 process.
97. Pityana was not put forward formally for the appointment as chairman at any stage – that much is common cause. I refer to what I have said above in this regard, in particular that Pityana was part of the Absa board meeting of 16 September 2020 when the informal process was discussed, and he was aware thereafter of every step of the unfolding of this process. Additionally,

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he was aware through conversations with myself and Darko that we were continuing the informal engagements with the Authority. At no time did he raise any concerns regarding the informal process with either of us, until 11 August 2021.

**Ad Paragraphs 10 to 12 and 14 and 15**

98. To the extent that the contents of these paragraphs correctly paraphrase the contents of section 60 of the Banks Act, they are admitted.

**Ad Paragraph 13**

99. While I would agree that the basis on which the Authority can object must be reasonable and rationally connected to its mandate, I disagree with the proposition that the basis of objection is in any way limited by section 33 of the FSRA (to the extent that this is suggested).

100. Section 60 of the Banks Act must be read purposively and in its entirety. On that basis, the Authority would have a rational basis for objecting to an appointment if, for example, the Authority considers that the person proposed for appointment would not meet the requirements of section 60(1A) of the Banks Act.

**Ad Paragraphs 17 to 21**

101. The contents of these paragraphs are admitted. It is to be noted that at the time of Pityana's appointment as director of Absa, the AGA issue was not

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known to the Absa board or the Authority, or even to AGA itself: the complaint had not yet arisen at that time. The recordal that the Authority “did not object” to Pityana's appointment as Absa director is, in the circumstances, meaningless.

102. I further note that the Sub-committee was formed in late 2020 and that Darko was appointed as the lead of that Sub-committee, as set out above. The Sub-committee consisted of Darko, Mark Merson, Francis Okomo-Okello and Tasneem Abdool-Samad.

#### **Ad Paragraph 22**

103. The contents of this paragraph do not correctly record the interactions between the Authority and the Absa board, in the main represented by Darko (in his position as the lead of the Sub-committee).

104. Specifically:

- 104.1 Darko engaged with Naidoo in order to update the Authority on the steps being taken by the Absa board in respect of chairman succession planning;
- 104.2 Naidoo suggested that the Absa board could share its shortlist of candidates with the Authority before proposing the candidates in terms of section 60(6A) of the Banks Act. Darko conveyed this suggestion to the Absa board at the meeting of 16 September 2020, as appears from the minutes of that meeting. The Absa board, including Pityana, were comfortable with this suggestion, as the minutes of that meeting record.

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- 104.3 It should be noted that this was prior to the expression of interest in the position by Pityana.
- 104.4 The Absa board members thought that the early consideration of the short list by the Authority was a good idea, as it would ensure that any concerns are registered before individual candidates were proposed in terms of section 60(5A) as read with section 60(6A). This was also before an external search agency was appointed to assist the Sub-committee and the Absa board with the recruitment process, including the necessary background checks.

**Ad Paragraph 23**

105. This is correct. I incorporate by reference what I have stated above regarding this important interview of 8 April 2021. Unbeknown to the Sub-committee and the Absa board, Pityana was not entirely candid and forthcoming in this interview.

**Ad Paragraph 24**

106. I deny that Pityana was told that the external candidate, Mr Moloko, was the “second choice” for the chairman position. The name of the external candidate was kept confidential from all stakeholders and throughout the process only the Absa board members (to the exclusion of Pityana) were aware of the identity of the external candidate

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107. The reason for keeping the identities of the candidates confidential is simple: this is done to protect the candidates during the process.
108. The members of the Absa board were invited to express interest in the chairman position during the course of December 2020. Sometime in January 2021, Pityana indicated his interest in the position. As I explained, he was the only Absa board member to do so. However, a number of external candidates also expressed an interest and Pityana was simply told that there were other (external) candidates being considered for the position.
109. The Absa board met on 26 April 2021. No decision as to preferred candidate was taken at that time. However, Darko was mandated to speak to the Authority regarding shortlisted candidates at that stage, as part of the informal process. This was duly done.
110. A second meeting was held shortly thereafter, and the Absa board decided in principle, at the meeting of 3 May 2021, that the appointment of an internal candidate would be preferable as it signalled to the market and stakeholders solid succession planning and continuity.
111. However, the Absa board was determined to identify the person best suited for the position and revisited the market maps and lists of external candidates on a regular basis. The shortlist of external candidates was shared with the Sub-committee and in summarised form with the Absa board (excluding Pityana). Despite the in-principle view that the appointment of an internal

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candidate would convey a positive message to the market, the Absa board did not stop engaging with the external candidates.

112. Save as aforesaid, the averments are denied.

#### **Ad Paragraph 25**

113. These allegations are factually incorrect.

114. The placement firm appointed by Absa, Drayton Glendower, contacted AGA (Ramos) for a reference check regarding Pityana and were advised that AGA could do no more than provide a certificate of tenure in respect of his service. The certificate of tenure was then provided to Drayton Glendower and in turn forwarded to Absa (I have referred to this above).

#### **Ad Paragraph 26**

115. This, too, is incorrect. The Absa board did not resolve at any stage to nominate Pityana for the chairman position.

116. More importantly, as I have detailed above, the support for Pityana in the May 2021 meeting remained conditional on further information being obtained concerning a number of issues and specific checks regarding Pityana's chairmanship of other boards, his leadership style and most importantly the circumstances of his departure from AGA.

117. The Absa board was particularly concerned to receive the details of Pityana's sudden departure from AGA and the lack of transparency in this regard was,

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in the main, ultimately the reason for the lack of unanimous support for the next steps in the process.

### **Ad Paragraphs 27 and 28**

118. The correct sequence of events is that:

118.1 Darko disclosed to Naidoo that Pityana was one of the potential candidates on 28 April 2021. The shortlisted external candidate was also discussed.

118.2 The note of the meeting with Naidoo (referred to above being annexure "AA3") confirms that no concerns with Pityana's potential candidacy were raised at that time. However, Naidoo, after doing some due diligence, subsequently telephoned both me and Darko (these were separate and individual telephone discussions) on 21 May 2021 my recall is that he conveyed that the Absa board needed to ensure that the circumstances of Pityana's departure from AGA were thoroughly investigated. He did not indicate what the actual concern was; but indicated that we must investigate fully the circumstances of the departure. The Absa board had also requested detail regarding the circumstances of Pityana's departure from AGA.

119. I cannot comment as to the contents of the discussions between Naidoo and Ramos. Naidoo advised me that Ramos, as the chairman of AGA, should be contacted to provide the details of Pityana's departure.

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120. I note, however, that despite the discussion with Naidoo at this stage, Pityana remained a potential candidate to be put up for consideration by the Authority. I say so in order to highlight that the board did not supinely react to the concern from the Authority by terminating all consideration of Pityana for the position. Instead, the Sub-committee worked with me to investigate the issues that had been raised.

**Ad Paragraphs 29 to 34**

121. I note the contents of these paragraphs in respect of which I have no personal knowledge and on which I cannot comment.

122. I note from the AGA SENS of 8 December 2020 however that there was a single announcement regarding Pityana's resignation both as chair and as board member at that time. On the other hand, Pityana repeatedly told me that there was a distinction in terms of the timing of these two decisions, with him insisting on staying on the AGA board until he was "fully exonerated".

123. I further note Pityana's crucial admission at paragraph 34 that his resignation of directorship from AGA was "in settlement of this matter" – being the sexual harassment complaint investigation.

124. This is very different from the message conveyed by Pityana in his note to me dated 27 May 2021 (referred to above and attached as annexure "AA5") where he indicated that the resignation of his directorship came on the back of the resignation of his chairmanship of the AGA board, which, was, in turn

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made untenable by the tensions occasioned by many issues – including the proposed de-listing of AGA, the conduct of the prior CEO and the investigations related thereto and the appointment of the new CEO on that board.

125. In that note, Pityana certainly did not make it clear that he had resigned from the AGA board “in settlement” of the sexual harassment investigation. Indeed, at the discussion of the Sub-committee held with Pityana on 29 May 2021, he made much of the political issues on the AGA board as a basis for his ultimate leaving of that board and also indicated that AGA and the complainant had decided not to take the harassment matter any further and that he had resigned only thereafter.
126. More importantly, in his interview with the Sub-committee on 8 April, Pityana did not indicate that his resignation from the AGA board was in settlement of any dispute. I refer to the notes of that meeting provided by Drutman (as well as Drutman’s confirmatory affidavit).
127. I maintain that the response in the interview and the note provided by Pityana is not fully reconcilable with the version he has now set out in this affidavit. There was no indication of any “settlement” in the prior versions provided by Pityana.

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**Ad Paragraphs 35 to 37**

128. The contents of AGA's 8 December 2020 SENS notice and the quoted contents of the chairman's letter are noted. It is not clear to me why these documents are considered relevant to this application, which is concerned with the question of the process followed by the Authority in its interactions with Absa.

129. To the extent that Pityana has attached these documents in order to demonstrate, in these proceedings, that his tenure at AGA was successful, I find this problematic. The issue for Absa has never been Pityana's performance within AGA, but rather the lack of candour and transparency regarding the circumstances of his departure from AGA, the fact that, despite what he told me, he did not choose to vindicate himself by remaining on the board of AGA until the complaint against him had been finally resolved, and that Pityana now chooses to focus his attention on the Authority and Absa, rather than addressing the source of the reputational risk. It is problematic that Pityana made the choice not to pursue the matter to conclusion at AGA.

**Ad Paragraphs 38 to 40**

130. I have no personal knowledge of the contents of these paragraphs. I can confirm, however, that I was provided with copies of the Draft Barnes Report and the Final Barnes Report only after the 21 May 2021 discussions with Naidoo of the Authority. In fact, they became available to the Sub-committee and myself only on the evening of 2 June 2021.

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131. I am advised that the correctness of the findings in the Draft Barnes Report and Final Barnes Report are irrelevant to these proceedings.

**Ad Paragraph 41**

132. I can confirm that on or about 2 or 3 December 2020, Pityana disclosed to me that there had been an investigation of a sexual misconduct allegation at AGA and that a preliminary investigation report had been provided. Pityana conveyed that he had provided a “factual counter” to the preliminary report and that on that basis AGA decided that neither it nor the complainant would take the matter any further and hence the matter was closed.

133. Pityana also alerted me to the fact that his resignation from the AGA chairmanship was in progress so that I was not surprised by any media statements relating to his resignation. Nothing was said at that time about Pityana’s resignation being the basis for the settlement of the matter.

**Ad Paragraphs 42 and 43**

134. It is so that Pityana advised that he could not provide details of his resignation. The withholding of the information was not on the basis of normal director confidentiality. Pityana indicated that this was on account of a confidentiality agreement (and initially referred to “non-disparagement” as well). It is disappointing, however, that he did not candidly flag to the Subcommittee that there may be serious reputational risk associated with his departure from AGA.

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135. I made contact with Ramos on 24 May 2021. I asked Ramos whether there was anything of concern that I should be worried about in terms of his departure. She indicated that there was a matter that I should be concerned about, but that Pityana must disclose all the details to me. I informed Ramos that Pityana could not share the details of his departure from AGA as he felt constrained by confidentiality undertakings.

136. Ramos undertook to revert in this regard. On 25 May 2021, Ramos confirmed that to the extent necessary, Pityana was released from any confidentiality restraints and could disclose the details of the events leading up to his departure from AGA to Absa and the Authority.

#### **Ad Paragraph 44**

137. It is correct that on 29 May 2021, Pityana met with the Sub-committee. Prior to the meeting, Pityana provided the note referred to above and attached as annexure "AA5" which was the first indication of the sexual harassment accusation issue to the committee members.

138. During the meeting, Pityana referred to his note and again re-iterated that the reason for his resignation from AGA was not the sexual harassment charge. I agree with paragraph 44 of the founding affidavit, regarding the reasons for his resignation given to the Absa Sub-committee at the time. This is markedly different from the version now stated in the founding affidavit which confirms that he resigned his directorship "*in settlement of the issue*".

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139. There is therefore an inherent conflict between paragraph 34 of the founding affidavit and paragraph 44 (which correctly accounts for what had been stated during the meeting). In other words, at the meeting of 29 May 2021, the sexual harassment complaint and the investigation was disavowed as a reason for Pityana's resignation from AGA.

#### **Ad Paragraph 45**

140. This statement does not fully disclose the circumstances in which the Subcommittee agreed to obtain a legal opinion given Pityana's denials and strong criticism of the AGA process.

141. Pityana made the AGA reports available on the understanding that there would be a further legal view obtained. The documents would not have been made available in the absence of that agreement. The view of the Subcommittee was that such a legal review was needed in any event, given Pityana's role on the Absa board.

142. I refer to what I stated above regarding the circumstances in which the decision was made to procure the Harris Report. In the meeting of 29 May, Pityana emphasised that the Final Barnes Report could not be considered in absence of his rebutting submissions. The impression created was that there was no clear outcome and that both the Final Barnes Report and the rebutting submissions had to be subjected to independent legal review and comment, in order to make any determination concerning them.

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143. The decision to obtain an independent legal review of both the Final Barnes Report, and Pityana's rebuttal document was made in the Sub-committee meeting of 29 May 2021, on the basis of Pityana's summary note of 27<sup>th</sup> May and before I or the Sub-committee had access to the full suite of AGA documents.

**Ad Paragraphs 46 to 48**

144. The Harris Report indicated that no adverse decisions could be made against Pityana on the basis of the Final Barnes Report, because the Final Barnes Report was fundamentally flawed. I agree that neither reports bear any relevance to this application.

145. Save as aforesaid, these averments are denied.

**Ad Paragraph 49**

146. These averments are not entirely correct.

147. After the review of the Harris Report and after a meeting with Mr Harris and the Sub-committee on 14 July 2021, during which Mr Harris confirmed that no adverse decisions could be taken as a result of the Final Barnes Report (as it was in his view fundamentally flawed), the majority of the Sub-committee determined that the AGA matter could not be considered an obstacle to nominating Pityana as a candidate for the chairmanship.

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148. This did not mean that either the Sub-committee or the Absa board resolved to propose Pityana only for consideration by the Authority. The majority of the Absa board maintained its confidence in Pityana and supported following the next steps in the informal process. The Absa board continued with the informal process in regard to Pityana with the Authority by updating them as to the work done on the AGA matter and that this would include submitting the Barnes Reports and the related documents, together with the Harris Report to the Authority. In other words, the existence of the Harris Report and the presentation by Harris to the Sub-committee indicated to the majority of the Absa board that the prior *status quo* should not be disturbed.

#### **Ad Paragraph 50**

149. On 23 July 2021, and after the receipt of the Harris Report, Darko and I had an online meeting with Naidoo. We advised Naidoo of the contents of the Final Barnes Report and Harris' criticism of that report and that, on this basis, the board (albeit not unanimously) decided not to upset the prior *status quo* and continue with the support for Pityana.

150. Naidoo indicated that he felt uncomfortable about the sexual harassment issue and that he would debate it internally within the Authority. He requested copies of all the relevant AGA documentation and the Harris Report and these documents were provided to Naidoo that same afternoon.

151. Save as aforesaid, these allegations are denied.

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152. It is specifically denied that Pityana ever enjoyed unanimous support of the Absa board.

#### **Ad Paragraph 51**

153. On 2 August 2021 (thus some two weeks after the receipt of all of the documents referred to in 157) Naidoo messaged Darko to say that he wished to convey the outcome of his internal discussions. Darko directed him to me.

154. Naidoo told me that a meeting of Governors of the Authority discussed the Absa chairmanship succession issue and that, in relation to Pityana, there was a sense of concern and not one of support. As already indicated, three issues of concern were raised by Naidoo:

- 154.1 The veracity of the Harris Report: Naidoo questioned why Harris had not spoken to Barnes to understand why she had not spoken to the security personnel;
- 154.2 The dispute of fact regarding the reason for Pityana's resignation: the fact that Ramos advised him that had Pityana not resigned from the AGA board, AGA would have taken the matter further, which appeared to conflict with the version that Pityana left AGA after it was already agreed that the sexual harassment complaint would not be taken any further; and
- 154.3 The very existence of the Final Barnes Report (irrespective of its conclusions) was a reputational risk for Absa.

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155. As indicated above, Naidoo concluded that following the meeting of the Governors, if Absa went ahead and submitted the BA020 form, the Authority would likely object to a formal application.
156. Shortly after my conversation with Naidoo I contacted Pityana and conveyed Naidoo's concerns to him. I advised Pityana that the Authority was clearly uncomfortable, and I raised the same three reasons given by Naidoo to me.
157. Pityana responded on the dispute of facts in particular by sending me certain documentation (which is attached above as "AA6"), none of which clarified the matter. Darko also spoke to Harris who said that there was no merit in contacting Barnes as part of the review.
158. I forwarded the documentation referred to in the paragraph above to the Authority. Naidoo responded on email attached as "AA7" above.
159. Save as aforesaid, the averments in this paragraph are denied.

## **Ad Paragraph 52**

160. A scheduled board meeting was held on 10 August 2021, where I presented to a private session of the board, the details of my discussion with Naidoo.
161. I called Pityana the next day, 11 August 2021, and conveyed to him the outcome of the discussions at the Absa board meeting. I also very clearly communicated to Pityana the concerns raised by the Authority (through Naidoo).

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162. Save as aforesaid, the averments in this paragraph are denied.

**Ad Paragraph 53**

163. I confirm that the majority of the Absa board confirmed Pityana's appointment as the LID at this time, which happened to be the annual review and confirmation of roles in the usual course of business. The decision to confirm Pityana as LID was based on the factors detailed above.

**Ad Paragraphs 54 and 55**

164. The dispatch of the letter in annexure "FA6" is admitted, but the correctness of its contents is obviously not admitted.

165. Pityana did not record in his affidavit the fact that during our discussion on 11 August 2021 he indicated that he was minded to write to the Authority and seek formal reasons for the Authority's "objection". I explicitly advised Pityana not to write to the Authority and he agreed to wait so that we could discuss the matter further. Without warning, Pityana changed his mind (and undermined his agreement to wait) and proceeded to send the letter in annexure "FA6".

166. The letter in annexure "FA6" was not sent to me or anyone at Absa before it was sent to the Authority. I received a copy of the letter only after it was sent to the Authority. Needless to say, the letter did not carry Absa's approval.

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167. I immediately telephoned Naidoo to advise him of the fact that Absa is not aligned with the contents of the letter.

168. It is incorrect therefore to contend that I have never denied the contents of the letter insofar as it refers to me. The content of my discussion with Naidoo is as I have recorded it above. I did not agree with the dispatch of the letter and considered the adversarial position adopted by Pityana against the Authority to be unwarranted and demonstrative of a lack of judgment and a lack of concern for the interests of Absa. What is more, neither I nor the rest of the Absa board ever accepted or supported the contents of the letter.

169. Save as aforesaid, the averments in this paragraph are denied.

#### **Ad Paragraph 56**

170. The contents of the Authority's response are noted.

171. The response correctly noted that no decision had been taken by the Authority since there had been no nomination of Pityana by Absa as required in terms of the Banks Act. The letter from the Authority to Pityana is enclosed as "FA7" to Pityana's founding affidavit.

#### **Ad Paragraphs 57 to 60**

172. Once more, neither I nor the Absa board agreed to the contents of this letter, nor was I informed that the letter would be written at all. A courtesy copy was dispatched to me only after it was sent to the Authority.

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173. There was no opportunity for me to deal with the contents of Pityana's second letter to the Authority and indeed I do not consider it necessary to comment on its contents, save to say that I do not agree with the legal conclusions and submissions made therein.

174. In my view the letter adopted an inappropriately combative tone, considering Pityana's position as the LID of the Absa board and the requirements of that office and the requirements of any director on a board to act in the best interests of the company. Furthermore, a LID of a board of a financial institution obviously must have open channels of communication with the regulator.

175. Save as aforesaid, these averments are denied.

#### **Ad Paragraphs 61 and 62**

176. The Absa board decided to invite Pityana to a meeting where the issues arising could be debated.

177. The fact that the meeting of 3 September 2021 was convened demonstrates that no final decision had been made regarding Pityana's potential candidacy at that stage.

178. I confirm that prior to the meeting, Pityana circulated the memorandum in annexure "FA9" to the Absa board. Pityana subsequently contacted the Drutman to query what the points of discussion at the meeting would be (in

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response to her formal notice convening that meeting). Drutman guided him, in the correspondence attached to Pityana's affidavit as annexure "FA10".

179. Save as foresaid, the averments herein are denied. Needless to say, neither I nor the remaining members of the Absa board share the views expressed in Pityana's memorandum (enclosed as annex "FA9" to Pityana's founding affidavit, especially insofar as they relate to the interpretation and application of section 60(6A) of the Banks Act.

180. I specifically deny that the Absa board accepted any "decision" of the Authority or was improperly influenced by the Authority in any way. The Authority raised a concern and intimated that an objection could follow if a formal application in terms of section 60(6A) were to be made. This was a key concern for the Absa board and was made clear to Pityana during the meeting. The concern raised by the Authority was not unjustified and the manner in which Pityana responded to questions about any reputational risks his appointment as chairman might present and to questions about the circumstances of his departure from AGA ultimately heightened the concerns which the members of the Absa board held concerning his potential appointment.

181. I re-iterate that the decision not to make such an application was not taken by the Absa board until after the meeting with Pityana on 3 September 2021 during which Pityana addressed the board.

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**Ad Paragraphs 63 to 65**

182. The “speaking notes” attached as annexure “FA 11” are a fair reflection of his submissions to the Absa board.

183. However, the speaking notes do not convey the sense of concern expressed by various members of the Absa board, including myself, regarding the manner in which Pityana conducted himself vis-à-vis the Authority.

184. I further deny that this meeting was “the first time” the three issues raised by Naidoo were shared with Pityana. This is untrue, as I had conveyed these concerns to Pityana as early as 2 August 2021, as stated above. Pityana himself confirmed as much, by providing his email of 3 August 2021 attached as annexure “AA6” above.

185. It is correct that after he made his submissions and engaged with the Absa board, Pityana was excused from the meeting.

186. The Absa board then deliberated on the question of chairmanship succession. The Absa board was uniformly aligned that Pityana was not the candidate that the Absa board would be comfortable supporting as the chairman successor.

187. It is important to highlight that it was precisely because of the interactions during this meeting and the views expressed by Pityana at this meeting that the Absa board determined that Pityana was not the ideal choice for the position. As indicated, there were a number of questions posed to Pityana at

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the meeting including, whether with hindsight he would have answered differently in his interview of 8 April. His answers to the various questions were wholly unsatisfactory and indicated a lack of appreciation for the seriousness of the matter; the reputational risk to Absa; and the importance of the relationship with the Authority. He also had no appreciation for the concerns raised in regard to the fact that he sent the letters to the Authority, and the combative tone of his letters and the implicit threats in such letters. The content of Pityana's submission, his address to the Absa board and the responses to the questions caused a significant rethink of the matter and a decision not to support him as the chairman designate.

188. In addition, there was a paper presented to the members regarding the outcomes of additional recent interviews which Mr Moloko had with members of the Absa board which had been very positive and a motivation and recommendation in regard to his candidature. The members proceeded to pass a resolution to the effect that Mr Moloko would be proposed to the Authority as the candidate for regulatory approval.

189. It is clear from the above sequence that, although the view of the Authority was an important factor in the ultimate decision of the Absa board not to support Pityana's candidacy, there was a host of other factors. It was Pityana's reaction to the Authority, the way in which he answered the questions put to him, coupled with his prior lack of candour with the Subcommittee, that led the Absa board to the ultimate conclusion that Pityana's candidacy could not be supported.

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**Ad Paragraph 66**

190. The dispatch of the correspondence in annexure “FA12” is admitted. I deny that the Absa board was obliged to provide reasons for its decision not to support Pityana’s candidacy.

**Ad Paragraph 67**

191. A scheduled meeting of the Absa board was held on 15 September 2021, and at the private session, Pityana’s potential legal action against the Authority and possibly even against Absa was discussed. The Absa board members were unanimous in concluding that the Absa board should be prepared for legal action.

192. On 16 September 2021, I had a call with Pityana. He asked me why the Absa board did not take up the Authority’s invitation to submit the BA020 form for him. I explained that Naidoo, through his email, did not extend an invitation in this regard but was rather drawing the proverbial line in the sand as far as the informal process was concerned.

193. I tried to impress on Pityana that the reason for not submitting the BA020 form was that the Absa board had decided to put forward Mr Moloko’s name for the chairman position. This was driven not only by the preference of Mr Moloko at that stage, but also by the fact that the Absa board had determined that proposing Pityana could not be in the best interests of Absa, or anyone else.

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**Ad Paragraph 68**

194. The receipt of the letter in annexure “FA13” is admitted. The Absa board and I considered this to be yet another example of Pityana putting his own interests ahead of those of Absa.

195. The Absa board responded by declining to give the undertaking sought. The letter of response is attached as annexure “FA17” to the founding affidavit.

**Ad Paragraphs 69 and 70**

196. I acknowledge having received a courtesy copy of the correspondence in annexure “FA14” after it was dispatched to the Authority. The correspondence makes it clear that Pityana refuses to accept that the Absa board explicitly resolved at the meeting of 3 September 2021 not to put forward Pityana as a candidate for chairmanship of Absa.

197. The undertaking sought from the Authority was ill – advised, because the Absa board had already resolved to put forward Mr Moloko as the candidate for the chairmanship. The Authority obviously could not put on hold the process it is legislatively mandated to undertake. And furthermore, by his admission Pityana appreciates that he has no right to the candidature.

**Ad Paragraphs 71 and 72**

198. The dispatch and contents of annexure “FA15” are confirmed.

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199. I deny the allegation that this was the first time that Pityana heard that he had consented to the so – called “informal process”. As I indicated, the “informal process” constituted all engagements with the Authority concerning the chairman succession process, prior to the submission of a BA020 form.
200. Pityana was well aware, since the Absa board meeting of 16 September 2020 (thus over a year ago) that Absa would provide the Authority with a shortlist of candidates.
201. Further, Pityana was aware of the engagement with the Authority and the fact that the documents provided by him (the Draft and Final Barnes Reports, and the rebutting submissions) and the Harris Report were all shared with the Authority. All of this was part of the informal process of which Pityana was fully aware and to which he never objected. He consented to the documents being submitted in a discussion with Darko.
202. It is not possible, or prudent, for a regulated entity to engage with its regulator solely on a formal basis. The engagement with the Authority was appropriate as it is clear that it would have been most detrimental to Absa and Pityana if his name were submitted in an BA020 form and the Authority then objected to the appointment without any forewarning. The early notification of the concerns was intended to avoid this very position and it could have avoided it, but for Pityana’s decision to challenge the Authority in this application.
203. For the reasons set out above, however, Pityana’s challenge is ill-advised.

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204. Save as aforesaid, the averments in this paragraph are denied.

**Ad Paragraph 73**

205. This is denied. The Absa board did not pass a resolution at any time regarding Pityana's candidature. A resolution would only have been required prior to the submission of the BA020 form to the Authority. The Authority was informally advised of the names of both candidates.

**Ad Paragraph 74**

206. I reiterate that the decision not to formally put Pityana's name forward was the result of a confluence of factors, including the Absa board's consideration of Mr Moloko as the preferred candidate.

207. The concern raised by the Authority regarding Pityana and the unresolved AGA issue was neither the sole nor the determining factor for selecting Mr Moloko over Pityana. Pityana's conduct in writing aggressive letters to the Authority, his lack of candour in the discussions with the Sub-committee and the views he expressed in the meeting of 3 September 2021 all contributed to the decision that he was and is not the appropriate person for the position.

208. Pityana's subsequent conduct (demanding that the process be halted pending his challenge of the Authority, issuing this application and even more significantly making a public statement in regard to all the details of the matter and chose to go on an active widespread media campaign which served to

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create negative reputational impact for Absa, ahead of this application) only confirmed the decision of the Absa board made on 3 September 2021.

209. Finally, I record that the Absa board's decision not to furnish Pityana with reasons for its decision not to formally nominate him does not mean that the decision was nefariously made. No reasons would have been given to an external candidate in the same position. The board was of the view that (i) it was not obliged to provide reasons; and (ii) that providing reasons would render the relationship between Pityana and the rest of the Absa board even more adversarial. This was something the Absa board wished to avoid. Unfortunately, the fact of this application made that impossible.

#### **Ad Paragraph 75**

210. I have no personal knowledge of the contents of this paragraph.

#### **Ad Paragraphs 76 and 77**

211. I deny that it was the actions of the Authority that resulted in the decision by the Absa board not to nominate Pityana. This was a factor, along with the other factors described above, which led to the Absa board's decision.

212. The nomination of Pityana could not be withdrawn, since it was never made. For the sake of clarity, the Absa board passed a resolution on 3 September not to nominate Pityana.

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213. The “formal process” was not made redundant. The formal process was followed, at the behest of the board, but only in respect of Mr Moloko.

**Ad Paragraph 78**

214. The contents of this paragraph are not for me to answer, save to record that it is not true that Pityana’s interactions with the Authority were only “through” me. Such interactions as I had with the Authority were not on behalf of Pityana. I was, at all times, acting in my capacity as the representative of the Absa board and not as a representative of Pityana.

**Ad Paragraph 79**

215. Given the view that the Absa board takes of Pityana’s candidacy, this paragraph requires no response, save to say that the Authority would not have any reason to engage with Pityana in absence of the decision by the Absa board to propose him as the chairman in terms of section 60(6A) and by way of submitting a BA020 form.

**Ad Paragraphs 80 and 81**

216. The averments herein are not directed at me or Absa and I accordingly refrain from responding thereto.

**Ad Paragraphs 82 and 83**

217. This is denied. The Authority is not confined to interacting with Absa only in terms of the sections cited by Pityana. The procedures prescribed in the

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Banks Act were not circumvented – they were in fact followed, only in respect of the other candidate, and not Pityana.

218. Pityana loses sight of the fact that the sections of the Banks Act on which he relies are only triggered once Absa decides to formally nominate a candidate to the Authority for consideration. The board of Absa decided not to nominate him, and, as Pityana correctly concedes, it was fully within its rights in so doing.

**Ad Paragraph 84**

219. I am advised that Pityana could not seek an interdict because he has no right (prima facie or otherwise) to the chairmanship.

**Ad Paragraphs 85, 86 and 87**

220. I am advised that, in the main, the contents of these paragraphs are matters for legal argument. I note only that the Absa board explicitly refrained from taking any steps which could potentially result in a finding that Pityana is not a fit and proper person.

221. To the best of my knowledge, the Authority has not (as of the date of deposing to this affidavit) concluded that Pityana is not a fit and proper person. Certainly, the Absa board has not reached any such conclusion. The board has however issued a notice in terms of section 71 of the Companies Act to Pityana on 8 November, for a meeting to be held on 23 November 2021.

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222. The taking of legal action against the Authority does not align with submissions Pityana made to the Absa board during the meeting of 3 September 2021 in which he tried to paint the picture of polite engagement with the Authority and respectful differences of opinion albeit that he had already written a confrontational letter to the Authority.

**Ad Paragraphs 88 to 90**

223. I am advised that the averments in these paragraphs are properly matters for legal argument.

224. To the extent necessary, I deny that the Authority intervened in governance related matters. Further, I deny that Absa had acted in the manner which either circumvented the legislative provisions of the Banks Act or permitted the Authority to cross the line and exceed its powers.

225. I further deny that this is an appropriate case for a declarator and that a proper case for a declarator has been made out.

**WHEREFORE** the second and third respondents pray that the application be dismissed with costs, including the costs of two counsel.

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WENDY LUCAS-BULL

I certify that the deponent has acknowledged that she knows and understands the contents of this affidavit, which was signed and sworn before me at Plettenberg Bay on **22<sup>nd</sup> November 2021**, the regulations contained in Government Notice No R1258 of 21 July 1972, as amended, and Government Notice No R1648 of 19 August 1977, as amended, having been complied with.



COMMISSIONER OF OATHS

Full names:  
Business address:  
Designation:  
Capacity:

**Perino Pama (BA, LLB, LLM)**  
**Commissioner of Oaths / Notary**  
 Attorney of South Africa  
 Mosdell Pama and Cox  
 6 High Street, Plettenberg Bay, SA  
 Admitted as a Solicitor  
 Senior Courts of England and Wales  
 Ref: 494945 on 21-05-2010  
 (Non-practising)