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A public statement on my removal as Director on the Board of Absa

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Yesterday the Absa Boards, disappointingly and unlawfully, resolved to terminate my directorship of those boards in terms of Section 71 (3) of the Companies Act.

The reason for their resolution is that they believe that I have been negligent and derelict in the performance of my duties as a director.

This arises out of my decision to take the Prudential Authority (PA) to Court, which according to Absa, has created a material and sustained conflict of interests between Absa and me, amounts to a dereliction of my duties as director and led me to neglect your duty with due diligence and care in protecting the interests of Absa.

They believe that by bringing my application against the PA, I have implied that the Absa boards acted unlawfully because they participated in the PA's conduct which I allege was unlawful. This is despite the fact that no relief is sought against Absa, and I have never stated or even implied this.

They also believe that I have been negligent and derelict in the performance of my functions as a director because my litigation against the PA has occasioned negative publicity for the institution, which has caused reputational risk and harm.

This resolution follows their decision of 12 November 2021, to terminate my roles of Lead Independent Director (LID) and Chairman of the Remuneration Committee (RemCo) for the same reasons.

On 2 November 2021, the Board presented me with a 48-hour notice that I resign as a director. The reason for this demand was that my court action against the PA had resulted in a misalignment of interests between those of the bank and mine. The boards argued that this was accentuated by the fact that, despite no relief being sought against it, the bank had decided to oppose my application for a declaratory order.

I was also advised that there was urgency to decide my future role on the boards, as there were pending meetings later in the month with the PA. On 8 November 2021, I advised the boards that I was rejecting their unreasonable demand that I resign.

Refusal to Resign

I refused to resign because to have done so would have meant succumbing to *corporate bullying and intimidation tactics* that should have no place in our society.

I was elected by shareholders who showed continued confidence in me when they re-elected me at our AGM in June 2021. Only in exceptional circumstances may the board remove one of its members, exactly in order to prevent such abuse. If I believed that such circumstances prevailed, I would have resigned without ever having been asked to do so.

Having joined the Absa Boards in May 2019 and been elected by my colleagues as the Lead Independent Director in June 2020 -- and re-elected to the same role in August 2021 -- my contribution to the boards clearly earned me the confidence and the trust of both shareholders and the boards.

It should be noted that my re-election was on the same day that the Boards decided not to formally nominate me as Chairman because they were apprehensive about jeopardising their relationship with the SARB and PA.

I was humbled to have been elected to chair the Remuneration Committee of the Board in June 2020. I was happy to bring to bear my many years of experience on this subject and many other matters concerning the business. It was a great privilege to have led the transformation of the bank's remuneration framework resulting in the company earning the accolade of winner of the 2020 South African Remuneration Awards for the first time (to my knowledge) after having registered negative feedback from shareholders in the previous years. Proudly, my final sign off as the chairman of that committee was the boards' approval of a substantial commitment to advance our agenda for fair and responsible compensation.

It is demonstrably clear that my removal from the roles of LID and Chairman of Remco had nothing to do with competency or performance. For those who may be desperately looking for an example of "another black failure" in the corporate boardroom, this is not one of them. The board, in its wisdom or lack of it, never made public the reasons for its decision to remove me from these roles, as it is required to do. So much for transparency.

Independent Non-Executive Director

I am an independent non-executive director on the board of Absa. I'm not an employee. It is my responsibility to bring my independent thinking, perspective and experience. It is to be expected that I would on occasion differ strongly with my colleague to a point of voting against or abstaining on a matter being decided.

Challenging assumptions, beliefs and viewpoints as are necessary for the company; and standing up to defend one's own beliefs and viewpoints to support the ultimate good for the enterprise are attributes that any business should look for in an independent non-executive director.

In the same way that I expected my assumptions, beliefs and viewpoints to be challenged, I had reasonable expectation of tolerance of my views where I differed with some of my colleagues.

These attributes do not provide directors with a licence to punish a person for exercising his or her legal rights, especially a person's constitutional rights of access to courts and the right to be heard, or to intimidate that person into not exercising his or her rights.

After considering the steps taken by the board so far, it appears impossible for anyone to resist the conclusion that these measures are designed to do just that. I wish to express my disappointment at this approach.

I have to make it absolutely clear that I am not, never have been and never will be anybody's "Yes Sir" or "Yes Madame". I am an adult, with considerable years of professional experience, highly developed faculties and intellectual capabilities. I can distinguish between right and wrong. I place a high premium on ethical conduct and leadership. I take my responsibilities very seriously. To suggest otherwise is insulting.

Why a Court Review:

My reading of the reasons for the board's resolution is that my alleged neglect or dereliction of the performance of my functions all comes down to the fact that I took, or had the temerity to take, the PA to court seeking a declarator that its conduct was unlawful, and I addressed the media about this application and my reasons for believing that the PA's conduct was unlawful.

I have therefore instructed my legal team to take the decision of the boards to terminate my directorship on review with the courts.

Alignment of Interests

While the board asserts that my interests and those of Absa are misaligned, they have not advanced any plausible reason for their view. There is no misalignment for, amongst others, the following reasons:

1. I have not sought any relief against Absa. I have, for example, not sought to interdict Absa's nomination or its appointment of a new Board Chairman. I have accepted his appointment.
2. Section 60 of the Banks Act does not impose any obligations upon Absa (other than to appoint directors, the Board Chairman and other officials only after the PA has not objected to their appointment). This section imposes obligations upon the PA, which we all know is a statutory body whose function is to regulate banks. Section 60 provides rights to both the nominating bank and the nominee.
3. Therefore, as a matter of law, Absa's interactions with the PA do not render or even imply that Absa's actions are unlawful. This is the legal advice I have received. As a matter of logic, I believe it is correct.
4. I have not alleged or implied that Absa has acted unlawfully.
5. The exercise of my rights and the declarator I seek is not to the detriment of Absa. If anything, a clarification by the courts of the scope in law of the role of the various parties can only be in the best interests of all concerned, including the Absa
6. I am entitled to exercise my rights. After all, if the proper procedure set out in section 60 had been followed, I would have been entitled to refer the PA's objection to arbitration and in so doing I would have exercised my right to be heard.
7. I have been so clear in my intent to not act against the bank that I made the following suggestion to the boards:
"Insofar as you believe that the wording of the declarator implies that

Absa acted unlawfully, which I don't believe it does, I suggest that my lawyers discuss the matter with Absa's lawyers and that they try to come up with suitable wording that satisfies you that I do not seek relief that implies that Absa's conduct was unlawful. If suitable wording is agreed to, I will ask my attorneys to amend the declarator's wording in my application."

Needless to say, this invitation was not taken up.

It is my fervent view that this notion of our "misalignment of interests" was manufactured in order to justify my removal from the boards and pressure me to not proceed with my legal action.

Divergence of view and Absa's Interests

It is clear that the Absa board and I hold different views about the conduct of the regulator and possibly its implications for Absa. After all, it is public knowledge now that the board has, to my surprise, decided to oppose my application

My submission, in my application, is that the PA in its conduct, has unlawfully usurped the authority of the board whose duty it is to appoint the public officers of the bank including the Chairman.

If I am correct in this view, which I believe I am, it surely must be in the interests of Absa that its board should object to the conduct of the PA and join me in the action. I could not persuade my colleagues to this view and the board has exercised its right to not do so. That doesn't mean their decision is in the best interest of Absa; the jury is still out on that one.

My submission is also that the objection (or its intention to do so) by the PA clearly suggested to the board that the PA believes that it has in its ranks it has a director who is possibly not fit and proper or that it is not in the public interest that I could be Chairman of the board. Yet on the same day that the Board considers the PA's intention to object to me, it re-elects me as the LID.

In these circumstances, one would have expected the Absa board to want to do everything possible, including making my formal nomination in order to allow the PA to formally object thereby causing my removal as a director. To tolerate a director who is possibly not fit and proper and keep him in leadership roles of the bank can hardly be described as acting in the best interests of the bank.

This begs the question as to who has been negligent or derelict between the board and me.

Rule of Law

As a constitutionalist, I firmly believe in the rule of law. Responsible corporate citizens should believe similarly. The rule of law curtails arbitrary conduct. It provides certainty to investors about the security of their investments. This certainty stems from the assurance that no one must rely on powerful connections in order to protect their assets, but on the safeguards that the law provides.

Financial services businesses should be even more insistent on the rule of law. After all, in addition to shareholders -- who at least have a say at Annual General Meetings (AGMs) and at regular intervals in between -- ordinary citizens entrust us with their hard-earned money that is placed with these institutions in deposits, savings and other investment instruments.

It is for this reason that this is the most highly regulated sector in our economy. The fortunes of the economy and the nation's prospects rest on its credibility and integrity. For this reason, the South African Reserve Bank (SARB) and the PA must discharge their regulatory functions lawfully and responsibly.

A charge that the SARB's PA may have acted unlawfully is not one I make lightly. It is my view that a regulator that breaks the law sets exactly the wrong tone for the respect for the rule of law; I say so having been a regulator in my previous life.

I have been taken aback by the indignation from some commentators that South Africa can ill afford to place such scrutiny on the conduct of the SARB. It almost suggests that it is acceptable to take the President to court to force him to explain a Cabinet reshuffle, reverse his unlawful decisions where required by law; it suggests that every public institution may be placed under a microscope to act within the law, **but never the SARB or in this case the PA.**

There seems to be an assertion that all shall be equal before the law, except the SARB, which must enjoy a special place above it. It is a view that I consider unacceptable and do not share.

Independence of the SARB

Advisedly, the founders of our constitution accorded the SARB the independence that enables it to be a trustworthy arbiter of societal interests including protecting the integrity of our financial institutions.

Whilst a healthy relationship between any regulator and the regulated entity is important, sufficient distance is critical for public confidence.

When the weight of an untested opinion of a Maria Ramos becomes a determining factor in the decisions of the PA, we are left to wonder whether those intent on ruling from the grave have not constituted themselves into a cabal representing some new form of capture of institutions? Those among us who are passionate about our right to self-determination as a nation are compelled to speak out about this.

Constitutional Rights

Section 34 of the Constitution provides that "everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum." This right underlies our democratic order and is foundational to the stability of an orderly society. It cannot be easily limited.

I am exercising my rights as envisaged in the Constitution and section 60 of the Banks Act, which gives expression to section 34 of the Constitution. I am entitled to do so. I would even go so far as to say I am compelled to do so, as a responsible citizen and as a constitutionalist.

The message from Absa's actions to date – removing me as the LID and Remuneration Committee – and removing me today as a director is clear: “If you take on the regulator and exercise your legal rights, you will be punished and removed”. This is unlawful because it discriminates against me and prejudices me for exercising my legal rights set out in the Constitution and the Banks Act.

The rights I enjoy in the constitution today have not always been there for many of us who were previously disenfranchised. For many years, my very citizenship was not recognised. After many years of struggle for which many sacrificed their lives, we now have the rare privilege of a constitution that defines our freedom as a nation. I'm proud to have made a contribution to this effort which I dare not exaggerate, by risking my life and sacrificing my youth to secure freedoms meant to outlive mine and my children's generations.

The expectation that I might trade these rights for a place in anybody's corporate boardroom is to misunderstand how much some of us value what they represent.

Respect for the Courts

I have taken the step of approaching the courts to resolve an issue that could easily have been dealt with by simply complying with Sec (60) of the Banks Act. Never should a director on any board take the decision to approach the courts lightly. I have done so only because alternative avenues were closed to me despite my pleadings. I'm on record with both the board and the PA about avoiding litigation.

In the final analysis, the courts are our final arbiters on legal disputes where the parties cannot resolve them on their own.

Absa is a respondent in my matter against the PA. They have given notice of their intention to oppose, as has the PA. These matters are pending before the courts. What begs an answer is: why does the bank feel it cannot wait for the courts to decide the matter? Why the mad rush to embark on all these punitive steps if they are convinced about the merits of their case?

In what way is their conduct not an indication of their lack of confidence in our judiciary? What if the courts agree with my view that the conduct of the PA is unlawful (as I believe it is)?

Absa's conduct shows disdain for the courts, rather than respect for it. It shows disdain for those who dare to raise their voice about manipulations of the Constitution and the law. Absa should be setting the tone for good corporate citizenship. Instead, it is punishing those striving to uphold it.

I cannot sit back and allow this to happen.