

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case No: 81732/15

In the matter between:

OAKBAY INVESTMENTS (PTY) LTD

Applicant

and

DR STEPHEN FIRER N.O.

First Respondent

SEKUNJALO INVESTMENT HOLDINGS (PTY) LTD

Second Respondent

SEKUNJALO INDEPENDENT MEDIA (PTY) LTD

Third Respondent

DR MOHAMMED IQBAL SURVÉ

Fourth Respondent

**SECOND, THIRD AND FOURTH RESPONDENTS'
SUPPLEMENTARY ANSWERING AFFIDAVIT**

I, the undersigned,

MOHAMMED IQBAL SURVÉ,

do hereby declare under oath as follows:



1. I am an adult businessman, cited as the fourth respondent in these proceedings. I am a director of the second and third respondents, and on 16 November 2015 deposed to the answering affidavit on their and my own behalf. I am duly authorised also to depose to this supplementary answering affidavit on their behalf.

2. The facts set out in this affidavit fall within my own knowledge, unless the contrary is stated or indicated by the context, and are true and correct. Where I rely on information conveyed to me by others, I believe it to be true. Where I make legal submissions, I do so based on the legal advice received by the second and third respondents and myself from our legal representatives, which advice I believe to be correct.

3. I shall use the same abbreviations as in my answering affidavit.

4. The purpose of this affidavit is to place before this Honourable Court certain facts that arose subsequent to the close of pleadings in this matter. I respectfully say that these facts are of fundamental importance to this Honourable Court's consideration of the application, and I accordingly ask that the introduction of this further evidence be permitted. The applicant is of course entitled to reply to this supplementary affidavit, and is invited to do so. There can in the circumstances be no question of prejudice to it. On the other hand, not allowing the introduction of further



evidence that is germane to the outcome of the application would be prejudicial to the respondents. In so far as may be necessary, the respondents ask that their delivery of this supplementary affidavit after the close of pleadings be condoned.

The relevant developments

5. On 11 December 2015, Mr Nazeem Howa deposed to the replying affidavit on behalf of Oakbay, whereafter the pleadings were closed. Oakbay's heads of argument were delivered on or about 18 January 2016, and the heads of argument on behalf of the respondents on or about 4 February 2016.
6. The Option Agreement, the interpretation of which forms the subject-matter of this application, stipulates as follows in clause 6.3.4, under the heading "*Conditionality*":

"[T]he implementation of the Option shall be conditional on:

- 6.3.4.1 *the approval of the relevant competition authority as contemplated in clause 7, to the extent required; and*
- 6.3.4.2 *the Public Investment Corporation consenting, in writing, on terms acceptable to the Company, SIH and Oakbay, to Oakbay acquiring the Option Shares".*



7. Regarding the condition in clause 6.3.4.1, the advice furnished to the respondents was that the approval of either the Competition Commission or the Competition Tribunal is required in order for ownership of the option shares in SIM to be transferred to Oakbay. That is however only one of the conditions that requires fulfilment in order for the option to be capable of implementation.

8. Prior to approaching the competition authorities for their approval, I accordingly on 29 February 2016 addressed correspondence to the PIC enquiring from it whether it consented to Oakbay's acquiring 50% of the shares in SIM, as required by clause 6.3.4.2 of the Option Agreement. A copy of my letter to the PIC is attached marked "**MIS2**".

9. The Chief Executive Officer of the PIC, Dr Daniel Matjila, responded by way of a letter dated 23 March 2016, a copy of which is attached marked "**MIS3**". The PIC in this letter drew attention to clauses 9.3 and 23.13 of the term loan facility agreement in place between it and SIM, which prohibit any change of control in SIM, as the borrower, without the prior written consent of the PIC as the lender.

10. With regard to SIM's request for the PIC to indicate its position regarding the granting or otherwise of the consent required in clause 6.3.4.2 of the

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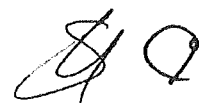
Option Agreement, the PIC advised that it had concluded it could not consider SIM's request for consent favourably.

11. According to Dr Matjila, in considering whether or not to grant the consent sought by SIM, the PIC had regard to factors that included the following:

- 11.1. the role of the PIC in the broader market economy, its undertakings in relation to competition and the requirement that it ensure that there is no anticompetitive behaviour in its and its investee companies' activities;

- 11.2. the best interest of its investment both as a funder and equity holder in SIM and ultimately the asset-holding entity Independent Media (Proprietary) Limited, the need to safeguard its expected returns, as well as the association it has taken in co-investing with SIH and Interacom Holdings Limited.

12. Having regard to these factors and the discretion the PIC is required to exercise in the matter, it concluded that it would not be in the best interest of its investment, SIM and its ultimate asset-holding company to consider SIM's request for PIC's consent favourably.

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13. The effect of the PIC's decision not to grant its consent to Oakbay's acquisition of the option shares is that Oakbay's option to acquire those shares cannot be implemented. It follows that the price to be paid for the option shares is a matter of academic interest only. Whatever the price may be, ownership of those shares cannot be transferred to Oakbay. The condition for doing so has not been fulfilled.
14. The error made (on his own admission) by the first respondent in the determination of the price for the option shares, and Oakbay's endeavour through these proceedings ultimately to achieve a more favourable price for those shares, are similarly irrelevant.
15. The relief sought by Oakbay in these proceedings is entirely academic. Even if Oakbay succeeds in these proceedings, the option granted to it cannot be implemented without the PIC's consent to such implementation, and the PIC has refused to grant such consent. The application is therefore moot.
16. It is for these reasons that Webber Wentzel, the respondents' attorneys of record, on 12 April 2016 addressed a letter to Oakbay's attorneys advising them of the PIC's refusal to give the consent upon which the implementation of the option is conditional in terms of clause 6.3.4.2 of the Option Agreement. Webber Wentzel recorded that in light of the PIC's

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position, the outcome of these proceedings is academic, and that the application itself has been rendered moot. In the circumstances, Oakbay was requested to withdraw this application. It was advised that, in the event of its failing or refusing to do so, a supplementary affidavit would be prepared and delivered, drawing this Honourable Court's attention to these developments. A copy of Webber Wentzel's letter is attached as "MIS4".

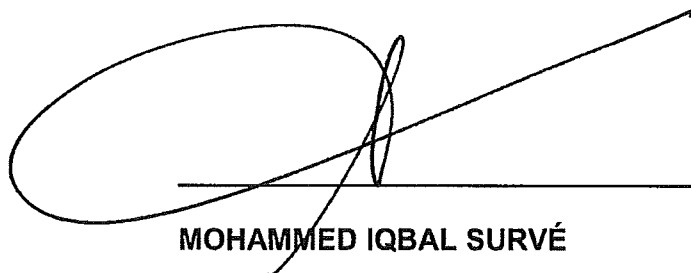
17. Oakbay's attorneys of record, Van der Merwe & Associates, responded on 15 April 2016. A copy of their letter is attached marked "MIS5". The letter has been significantly redacted, for two reasons. First, Oakbay's attorneys make reference to certain events that took place in the course of previous arbitration proceedings between Oakbay and the respondents. I am advised that arbitration proceedings are by their nature confidential. Moreover, the rules for expedited arbitration of the Arbitration Foundation of South Africa applied to the arbitration, which rules expressly provide for confidentiality. It follows that what happened during that arbitration cannot be disclosed to this Honourable Court or be made public by way of these further papers. Secondly, Oakbay's attorneys make reference to a without-prejudice communication that was sent to them by Webber Wentzel, the content of which also, so I am advised, is confidential and cannot be disclosed to this Honourable Court.



18. In their response, Oakbay's attorneys of record in essence make it clear that as far as Oakbay is concerned the matter should proceed on 3 June 2016. The contention is that it is not for this Honourable Court to deliberate on whether or not the PIC has granted consent, or whether any further conditions for the implementation of the Option Agreement have to be met.
19. I am advised and respectfully say that this contention is incorrect. Legal argument pertaining to it will be addressed to this Honourable Court at the hearing of the application.

Conclusion

20. I accordingly respectfully ask on behalf of the respondents that for reasons of mootness, too, the application be dismissed with costs, including the costs of two counsel.

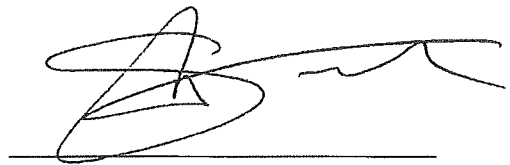


MOHAMMED IQBAL SURVÉ



I hereby certify that the deponent knows and understands the contents of this affidavit and that it is to the best of his knowledge both true and correct. This affidavit was signed and sworn to before me at ^{Claremont} ~~CAPE TOWN~~ on this the 25th day of **APRIL 2016**, and that the Regulations contained in Government Notice R.1258 of 21 July 1972, as amended, have been complied with.

SL
P



COMMISSIONER OF OATHS

Full names:

Address: **STEFANUS JOHANNES HOUGAARD**
2nd Floor, Cnr Warwick Str & Pearce Rd
Claremont

Capacity: **Commissioner of Oaths**
Practising Attorney R.S.A.



MIS 2



SEKUNJALO INDEPENDENT MEDIA PROPRIETARY LIMITED

February 29, 2016

The CEO

Dr Dan Matjila
Public Investment Corporation
Block C, Riverwalk Office Park
41 Matroosberg Road
Ashlea Gardens Extension, 6 Menlo Park
Pretoria
South Africa

Dear Sirs

We refer to our co-investment in Independent Media Proprietary Limited ("IM"), IM being the holding company for the media assets of the Independent Group. Sekunjalo Independent Media Proprietary Limited ("SIM") holds 55%, the Government Employees Pension Fund ("GEPF") holds 25% and Interacom Holdings Limited ("Interacom") holds 20% of the shares in IM.

On or about 14 November 2012, the then sole shareholder of SIM, Sekunjalo Investment Holdings Proprietary Limited ("SIH") and Dr Iqbal Survé, granted Oakbay Investments Proprietary Limited ("Oakbay") an option to acquire 50% of the shares in SIM ("the option agreement"). Oakbay duly exercised the option in writing on 23 August 2013.

Pursuant to the terms of the option agreement, the parties were required to agree the purchase price of the shares, and further agree whether Oakbay would acquire 50% of the shares from the existing shareholder of SIM or subscribe for new shares in SIM. The parties were unable to agree on these matters and these determinations were handed over to an independent expert, agreed to between Oakbay and SIM/SIH. The expert, Dr Steven Firer, delivered his final and binding determination on 23 July 2015, in terms whereof he found that: (i) the purchase price of 50% of the shares in SIM, as provided for in the option agreement, to be R729 million, (ii) that Oakbay is to acquire 50% of the shares in SIM from the existing

Reg No 2012/115186/07
Directors: Dr M Survé
Tel. 27 21 671 7058

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SEKUNJALO INDEPENDENT MEDIA PROPRIETARY LIMITED

shareholder of SIM and (iii) that the entire purchase price is allocated towards the purchase of the shares given that no loan accounts are to be acquired.

Oakbay has challenged the decision of the independent expert before the High Court in Pretoria. SIM, SIH and Dr Survé are opposing this application. Pleadings have closed and it is expected that the matter will be heard in the second half of 2016.

Now that all the essential terms of the sale pursuant to the option agreement have been determined, the implementation of the sale is subject to two conditions being fulfilled, the first being the approval of the Competition authorities if required, and secondly the approval of the Public Investment Corporation SOC Limited ("the PIC"). We have already taken advice and are advised that the approval of the Competition authorities is required for the sale.

Prior to approaching the Competition Authorities for its approval, we hereby enquire from the PIC whether it consents to the following:

1. the PIC approving the sale of 50% of the shares in SIM to Oakbay as required in terms of clause 6.3.4.2 of the option agreement;
2. the PIC approving the sale, on behalf of the GEPP, as required in terms of clause 9.3(1)(a) of the loan agreement concluded between SIM and GEPP on 13 August 2013; and
3. the PIC waiving, on behalf of the GEPP, any pre-emptive rights or deemed offers which may be triggered by the sale of 50% of the shares in SIM, including but not limited to the deemed offer contained in clause 7.4.1 of the shareholders agreement in respect of IM concluded between SIM, GEPP, Intercom and IM on 13 August 2013 or the memorandum of incorporation of IM.

Reg No 2012/115196/07
Directors: Dr M Survé
Tel: 27 21 871 7058

4th Floor, Claremont Central, 8 Vineyard Street, Claremont, P O Box 2616, Clareinch, 7740, Republic of South Africa



SEKUNJALO INDEPENDENT MEDIA PROPRIETARY LIMITED

In our view, the outcome of the challenge to the independent expert's decision is irrelevant to our request herein. If the challenge is unsuccessful, the consent of the PIC would be required based on the terms set out in this letter. If the challenge is successful, the consent of the PIC would still be required; the terms of the option would have to still be determined by an independent expert.

Please let us know if you require any further information.

We request that you indicate whether you consent within 10 days of the date of this letter, should such consent not be forthcoming in writing within the aforesaid 10 day period, you would be deemed to have refused such consent.

Yours faithfully;

Dr Iqbal Survé
Executive Chairman
Sekunjalo Independent Media

Reg No. 2012/115196/07
Directors: Dr M. Survé
Tel: 27 21 671 7056

4th Floor, Claremont Central, 8 Vineyard Street, Claremont, P.O. Box 2610, Clareinch, 7740, Republic of South Africa

MIS 3



Public Investment Corporation SOC Ltd
Private Bag X187
Pretoria 0001
Republic of South Africa

23 March 2016

Dr Iqbal Surve
Executive Chairman
SEKUNJALO INDEPENDENT MEDIA

Your Reference:

DR DANIEL MATJILA

☎ 012 742 3405

✉ Daniel.matjila@pic.gov.za

Dear Sirs

SEKUNJALO INDEPENDENT MEDIA / PUBLIC INVESTMENT CORPORATION

1. We refer to your letter dated 29 February 2016, and received for our purposes on 10 March 2016. We have noted the content thereof and wish to respond as follows.
2. Clauses 9.3 and 23.13 of our term loan facility agreement prohibits any change of control on your side as the Borrower, without the prior written consent of the Lender. You have requested us to consider and indicate our position in regard to the granting or otherwise of the requisite consent.
3. In considering whether or not such consent as you have sought through your letter should be granted, we have taken various factors into account including:-
 - 3.1 the role we play in the broader market economy, the undertakings we have and continue to make regarding competition and our requirement to ensure that there is no anticompetitive behavior in our activities and those of our investee companies; and
 - 3.2 the best interest of our investment both as a funder and equity holder in the Borrower and ultimately the assets holding entity, Independent Media (Pty) Ltd, the need to safeguard our expected returns as well as the association we have taken in co-investing with yourselves and Interacom Holdings Limited

Reg No: 2005/009094/30 | FSP No: 19777 | Address: Block C Riverwalk Office Park, 41 Matrouseberg Road, Ashlea Gardens, Extension 5 Menlo Park Pretoria | Telephone +27 12 742 3400
Directors: Mr Mcebisi Jonas (Chairperson), Mr Roshan Morar (Deputy Chairperson) | Dr Daniel Matjila (Chief Executive Officer), Ms Matchapo More (Chief Financial Officer) | Ms Sandra Beswick, Mr Trueman Goba, Ms Dudu Hlatshwayo | Dr Claudia Manning, Mr Sebenzile Mngconitola, Mr Pasi Moloto, Ms Tantalwa Nyoka, Ms Linahwa Toyi, Ms Sibusiswe Zulu | Company Secretary: Ms Bongani Mathebula

(an FSB approved Financial Services Provider)



4. Having regard to the above circumstances and the discretion we are required to exercise herein, we do not believe that it would be in the best interest of our investment, the borrower company as well as the ultimate asset holding company to consider your request favorably.

5. We trust you find the above in order.

Yours sincerely

**DR DANIEL MATJILA
CHIEF EXECUTIVE OFFICER**

PUBLIC INVESTMENT CORPORATION

MIS 4

WEBBER WENTZEL

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Attention: **Mr Gert van der Merwe**
Van der Merwe & Associates Incorporated

Email address: legal2@vdmass.co.za

15th Floor, Convention Tower
Heerengracht, Foreshore
Cape Town, 8001

PO Box 3667, Cape Town
8000, South Africa

Docex 34 Cape Town

T +27 21 431 7000

F +27 21 431 8000

www.webberwentzel.com

Your reference

Mr G T van der Merwe
yvd/G168

Our reference

S Hockey / A Ismail
3000988

Date

12 April 2016

CONFIDENTIALITY NOTE: This letter contains confidential information intended only for the person/s to whom it is addressed. Any other recipient is not entitled to read the rest of this letter or disclose its contents to any person, or take copies, and is requested to notify us immediately by fax, e-mail or telephone at the numbers listed above and we will reimburse the costs of doing so.

Dear Sirs

OAKBAY INVESTMENTS (PTY) LTD / DR STEPHEN FIRER N.O. AND OTHERS – CASE NO 81732/15

1. We refer to the above application ("the application"), which is set down for hearing in the Gauteng Division of the High Court, Pretoria, on 3 June 2016. As you are aware, we act for the second, third and fourth respondents.
2. In terms of clause 6.3.4.2 of the call option agreement concluded by our respective clients, the written consent of the Public Investment Corporation ("the PIC") to the acquisition of the option shares, on terms acceptable to our clients, is a condition precedent for the implementation of the call option.
3. Our clients requested such written consent from the PIC in a letter dated 29 February 2016, a copy of which letter is attached hereto marked "A".
4. The PIC responded to our clients' aforesaid request by way of a letter from its chief executive officer, Dr Daniel Matjila, dated 23 March 2016, a copy of which letter is attached hereto marked "B". As you will see from this letter, the PIC has declined to give its consent for the acquisition by your client of the option shares.

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Partners in office at Cape Town: RB Africa AR Bowley SJ Chong KM Co man JJ Daniels MA Dlemont HJ du Preez AE Esterhuizen MJR Evans G Fitzmaurice C Gabriel S Hockey PM Holloway AV Ismail KA Jarvis S Jooste LA Kahn A Keyser CS Meyer LE Mostert RA Nelson Z Rawoot H Samsodien J Smit L Stein A Toefy PZ Vanda DM Visagie

Senior Partner: JC Eis Managing Partner: SJ Hutton Partners: RB Africa HG Alp AE Bennett DHL Booysen AR Bowley PG Bradshaw MS Burger RS Coelho KM Colman KE Coster K Couzyn JH Davies JHB de Lange MA Dlemont DA Dingley HJ du Preez CP du Toit AE Esterhuizen MJR Evans GA Fichardt JB Forman C Gabriel JP Gouws PD Grealy JM Harvey MH Hathorn S Hockey PM Holloway AV Ismail KA Jarvis S Jooste LA Kahn M Kennedy A Keyser L Marais S McCafferty MC McIntosh SJ Meltzer SM Meihuia CS Meyer AJ Mills JA Milner D Milo VM Movshovich M Mtshali RA Nelson ZH Ntshona MB Nzimande N Paige AMT Pardini AS Parry GR Penfeld NJA Robb DC Rudman JW Scholtz KE Shepherd AJ Simpson N Singh L Stein PS Stein LJ Swaine A Toefy PZ Vanda N van Dyk D Venter HG Versfeld TA Versfeld DM Visagie RH Wilson H Yudaken
Chief Operating Officer: SA Boyd

Webber Wentzel is associated with ALN

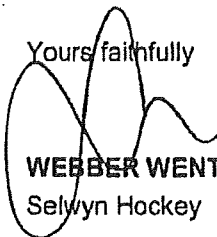
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Page 2

5. Without the requisite PIC consent, the call option cannot be implemented.
6. The outcome of the application is therefore academic, and the application itself is rendered moot. Our instructions are to call upon your client to withdraw the application, as we hereby do.
7. In the event of your client proceeding with the application, we are instructed to prepare and deliver a supplementary affidavit in the application in which our clients will draw to the Court's attention the letter from the PIC and the fact that the application has thereby been rendered moot.
8. We await to hear from you within seven days of the date of this letter.

Yours faithfully



WEBBER WENTZEL

Selwyn Hockey

Direct tel: +27214317391

Direct fax: +27214318391

Email: selwyn.hockey@webberwentzel.com





SEKUNJALO INDEPENDENT MEDIA PROPRIETARY LIMITED

February 29, 2016

The CEO

Dr Dan Matjila
Public Investment Corporation
Block C, Riverwalk Office Park
41 Matroosberg Road
Ashlea Gardens Extension, 6 Menlo Park
Pretoria
South Africa

Dear Sirs

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SEKUNJALO INDEPENDENT MEDIA PROPRIETARY LIMITED

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SEKUNJALO INDEPENDENT MEDIA PROPRIETARY LIMITED

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Yours faithfully;

Dr Iqbal Survé
Executive Chairman
Sekunjalo Independent Media

Reg No.: 2012/115196/07

Directors: Dr MI Survé

Tel: 27 21 671 7058

4th Floor Claremont Central 8 Vineyard Street Claremont P.O.Box 2810 Clareinch 7740 Republic of South Africa

"B"



Public Investment Corporation SOC Ltd
Private Bag X187
Pretoria 0001
Republic of South Africa

23 March 2016

Dr Iqbal Surve
Executive Chairman
SEKUNJALO INDEPENDENT MEDIA

Your Reference:
DR DANIEL MATJILA

☎ 012 742 3405
✉ Daniel.matjila@pic.gov.za

Dear Sirs

SEKUNJALO INDEPENDENT MEDIA / PUBLIC INVESTMENT CORPORATION

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 - 3.2 the best interest of our investment both as a funder and equity holder in the Borrower and ultimately the assets holding entity, Independent Media (Pty) Ltd, the need to safeguard our expected returns as well as the association we have taken in co-investing with yourselves and Interacom Holdings Limited

Reg. No. 2005/00394/02 | BNP 105 - 19771 | Address: Block C, Breezies Office Park, 41 Maritzburg Road, Midrand, Johannesburg 2009
 Directors: Mr. Magedi Jones (Chairperson), Mr. Roshan Mehta (Deputy Chairperson), Dr. Daniel Matjila (Chief Executive Officer), Ms. Malherbe Mokoena (Chief Financial Officer), Mr. Sindiwe Bekweke (Executive Director), Ms. Dineo Phisoana (Executive Director), Mr. D. Clodius (Executive Director), Mr. Sebachane Mphahlele (Executive Director), Ms. Tinashe Nyaka (Executive Director), Ms. Lindwe Tsoyi (Executive Director), Ms. Simone van Zyl (Company Secretary), Ms. Dungen Mafhele (Company Secretary)

For FSB approved Financial Services (Number)