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Our ref. AF0003

Your ref:

10 June 2015

Prof Marlene Verhoef
Institutional Registrar
Secretary of Council
North – West University

BY E – MAIL: Marlene.Verhoef@nwu.ac.za

Dear Professor,

RE: GOBODO FORENSIC AUDIT REPORT

Introduction

1. We act on behalf of Dr Theuns Eloff, the previous Vice-Chancellor.
2. We refer to:
 - 2.1. your letter of 11 May 2015 under cover of which the said forensic audit report (without annexures or exhibits) was made available to Dr Eloff on 12 May 2015;
 - 2.2. the letter from the forensic auditor dated 2 June 2015 under cover of which the annexures and exhibits were made available on Wednesday 3 June;

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Consultants: JJ Hurter Dip Proc (UP)

- 2.3. your letter of 11 May 2015 to which was annexed a resolution by Exco for the attention of Council (the latter document shall be referred to as the 'proposed resolution').
3. We shall refer to the audit report together with its annexures and exhibits as the 'Report'.
 4. On behalf of our client we express our appreciation for the opportunity to deal with the Report and related issues. Dr Eloff remains loyal to the NWU as institution. If he could therefore, as will shortly be demonstrated, assist in Council avoiding taking wrong resolutions, he gladly does so.
 5. Amongst all the reams of paper available on the matter, it should never be forgotten that the entire NWHET initiative was applauded by all concerned and could have been hugely beneficial to the NWU. The *bona fides* of the initiative and the role players promoting same, including Dr Eloff, and the absolute necessity for the NWU to make a capital contribution to the NWHET appears from many sources, but it is perhaps best to refer to the version of Mr James Botha, legal advisor well-known to yourself and Council'.¹
 6. He answers to the suggestion by the forensic auditor that the donation² seems to be wrong since money from the NWU was given to the trust:

'No, I think the management applied their minds at that stage, from what I could deduct in the meeting that I sat was establishing the trust in saying, hey, we have a trust, is not going to bring you anywhere, because that trust must have assets to gear itself. And the understanding that I got from is the university applied its mind and say this is within our strategic planning, but we can't sit with a trust that's just a shell that has no assets, so we've got to get this boat out of the harbour and we've got to make a substantial donation to get some assets into that trust so that we can go to the – well, not we, but that the trust can go to the IDC and say we have a balance sheet, we want to raise capital against that, or borrowings against that, we want to do the construction. But no financing entity or donor or investment company would have looked at the trust if it had no equity... The way I understood is that alumni and business wouldn't have looked at the trust if it had no initial start-up capital. And that's the reason why the university considered making the donation, because they couldn't go with empty – these trustees couldn't go and raise capital without a balance sheet.'

7. That management indeed applied their minds in more than one way, is demonstrated by the Minutes of the Institutional Management Committee meeting held on 19 March 2014. In attendance were Dr Eloff, Prof HD van Schalkwyk, Prof TJ Mariba, Prof ND Kgwadi³, Prof M Verhoef, Prof F van

¹ At pp11-12 Annexure G to the Report.

² We continue to use this expression for want of a better description of the money paid to NWHET. See the transcript of the consultation with Mr Jan Kitzhoff, erstwhile chairperson of the Finance Committee, which evidences the difficulty with the concept.

³ By then already appointed as the new Vice-Chancellor and currently holding that position.

Niekerk, Prof M Oosthuizen, Mr V Mothobi and Ms M Mope. The minutes *inter alia* reads as follows:

7.8 Endowment Fund

7.8.1 Noted:

• *Reiteration of the decision previously taken to end the Endowment Fund. The R5million from the endowment fund was added to another R5million from a money-market project. The R10million was given as a dowry to the North-West Higher Education Trust.*

No objection was noted by any of the attendees.

In addition, the NWU Statements of financial position as at 31 December 2013, which would have included the R10m donation mentioned in the same minutes, were received and noted.

The minutes do not reflect any query or objection by any of the attendees in relation to the financial statements.

We also point out that these minutes were adopted in May 2014 through Prof Kgwadi's signature as chairperson of the IM.

8. Amidst all of this, a few months later a furore erupted about the question whether the funds then actually made available on the authority of Dr Eloff was correctly done. The Report suggests that it was unauthorised; we consider that the finding is entirely wrong and unjustified. The donation was indeed duly authorised.
9. If our view would have been that the funding was indeed unauthorised, our client would not have hesitated at this stage to ask Council to regulate the matter by condoning the lack of authorisation on the ground, *inter alia*, that any reasonable Council would have appreciated the huge benefits the NWHET would have gathered from the initiative. But all of that has become academic: the initiative died in the course of 2014 already through no reason attributable to our client. According to our information, the trustees are prepared to return the balance of the funds irrespective of whether Council resolves that it was authorised or not.
10. We remind Council that the R10m comprised of 3rd stream income funds, ring-fenced in money market accounts. It is clear therefore that these funds were not public money, i.e. first stream income such as subsidy or class fees. This was confirmed orally to our client by the previous Executive Director; Finances and Facilities, Prof Johan Rost.

Our understanding of the process

11. As Council will know, Dr Eloff learned via the media of the forensic audit to be undertaken.
12. Exco recommends the proposed resolution to Council which, if accepted in its current formulation, is likely to adversely affect the rights of Dr Eloff, by incorrectly implicating that he acted outside of his authority.
13. There is no disciplinary proceeding pending against Dr Eloff (leaving aside whether that was possible or not after he vacated office) and there is no litigation pending between any party involved or related to the R10m donation to the NWHET.
14. We urge Council to act responsibly by not coming to a decision that will further fuel perceptions created in the media even before Dr Eloff was appraised of the forensic investigation, that he is guilty of fraud. It is not in the interests of the NWU (and of course Dr Eloff) that this issue is to be fleshed out in the media again.
15. Aside from the reputational damage to the NWU and the personal humiliation of Dr Eloff who has already been castigated in the press and found guilty by the court of public opinion, before any finding was made, exciting and probably very lucrative private funding models for the NWU have been permanently destroyed by the media campaign in the latter part of 2014. In this connection we note that the attorneys for the trustees of the NWHET wrote as follows in para 7 of their letter of 2 March 2015 (exhibit 9):

'After the appointment of Prof Kgwadi as Vice-Chancellor, both the donation and the project received substantial negative publicity, which, on the face of it, originating from statements made to the press by Prof Kgwadi and other officials of the NWU. Allegations were even made in the press of theft and plundering of state funds which tainted the image of the NWHET and the good names and reputations of the trustees.'

To this must be added Dr Eloff's good name which had been tarnished by this unwarranted campaign.

16. This destruction of funding models took place against the background sketched in the 2013 Annual Report where the Finance Committee stated at p118:

'Council and management are jointly committed to managing the NWU in such a way that the sound financial position will be maintained in 2014.'

'However, it needs to be mentioned that the relatively low increase in our single largest source of income namely state subsidy and the significant increase in net bad debts will remain huge challenges in the near future.'

There is and was a need to obtain more outside funding for the benefit of the NWU. This has been set back for many years, if not for decades.

17. We make such submissions as we are able to do, given the short time to respond to a matter of considerable importance. All our client's rights are reserved to make more submissions if and when a more opportune time arises.

The position of the NWU's auditors regarding the 2013 audited financial statements

18. The making of donations is and was part and parcel of the legitimate activities of the NWU. In the NWU's *General Financial Guidelines in support of the Financial Policy* there is a reference to 'donations made':⁴

5.14 Donations/sponsorships to external parties

Donations/sponsorships to external parties must be approved by persons at the level of director or higher, and must be communicated to the relevant marketing or corporate affairs department.

19. Donations, as they appear in the books of the NWU, and as audited, amounted to the following in the period 2012-2014:

2012 Total	1 754 524.65
2013 Total	11 435 069.09
2014 Total	1 716 673.46

Grand Total 14 906 267.20

20. The vast discrepancy apparent in the 2013 financial year is attributable to the R10m donation to NWHET.
21. Most certainly part and parcel of annual audits by the external auditors would have comprised checking and pointing out any unauthorised expenditure. That was never found to be the case; as long as Dr Eloff was the Vice-Chancellor audited statements were never qualified. The only inference is that all these donations were found to be properly authorised. Most certainly the huge spike in the amount of donations in 2013 would have attracted their attention.
22. The conclusion to which the forensic auditor came, certainly reflects badly on the professional work undertaken by the NWU's external auditors (whom he did not see fit to consult). We trust that, before the Council comes to a final

⁴ This was not considered by the forensic auditor at all.

conclusion, the auditors will also be given an opportunity to prevent Council from taking a resolution which may impact on their professional integrity.

23. It should also be noted that most of the donations in 2014 took place under Prof Kgwadi's stewardship.

There is no merit in the finding that the R10m payment was unauthorised

24. It appears that the forensic auditor entirely overlooked two cardinal legal principles:

- 24.1. The profound way in which the interpretation of documents has changed from an approach of trying to give literal meaning to words in a document on the one hand, to the prevailing approach of an entire contextual exercise where background and circumstances can be fully brought into account in determining what the document conveys;
- 24.2. Policy is not strict and inflexible but may be adapted when the circumstances so require.

Interpretation of documents

25. Conventionally, interpretation of documents entailed ascertaining the intention of the draftsman or, in a contractual setting, 'the intention of the contracting parties'. These expressions have been described as misnomers, insofar as they convey or are understood to convey that interpretation involves an enquiry into the mind of the draftsman, legislature or contracting parties.⁵

26. Currently, the correct approach is:⁶

[18] ... The present state of the law can be expressed as follows: Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable,

⁵ *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) [20].

⁶ *Ibid*, [18]. This dictum was followed without qualification or correction in a remarkably high number of judgments in the past few years.

sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself' read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.

27. The policy under consideration during the forensic investigation was limited to the *Policy on Delegations and Schedule of Authorisation Levels* (the 'Policy'). A copy is not attached because Council is certainly familiar with its contents.
28. Item 2 of the 'Authorisation Levels' section thereof *inter alia* provides:
- 28.1. for the '*Acquisition of Assets (including construction contracts and leases) and/or Operating Expenses from External sources or any other means*'.
 - 28.2. that, for monetary values of between R5,000,001 and R10m, the appropriate authorised person is the Vice-Chancellor;
 - 28.3. in the column headed '*Other Requirements / Determinants*' appears the entry 'Request Open Tenders'.
29. The forensic auditor put it to interviewees that it is impossible for *donations* to fall within the ambit and scope of that provision, for it is not the acquisition of an asset.
30. The remainder of the phrase describing item 2 is then put to witnesses and the proposition made that, to qualify as an operating expense one requires an invoice; evidently no invoice was capable of procurement when a donation was made; therefore it fell outside the authorisation.
31. But this is all on the wrong track, except for the fact that the monetary level was clearly within the authorisation level of Dr Eloff. And this is where the narrow, outdated way of interpretation will lead to the wrong conclusion.
32. The second part of the phrase quoted in paragraph 28.1 above has an ostensible wider import than merely 'payment against invoice'. This interpretation was provided to the forensic auditor, but not expressly highlighted in his report. Mr James Botha, chief legal adviser of the NWU, was quizzed on this aspect by the forensic auditor. The conversation went as follows:⁷

⁷ Annexure G to the report pp 7-8