Annex Distribution (Pty) Ltd v Bank of Baroda 2017 JDR 1565 (GP)

Citation	2017 JDR 1565 (GP)
Court	Gauteng Division, Pretoria
Case no	52590/2017
Judge	Fabricius J
Heard	September 08, 2017
Judgment	September 21, 2017
Appellant/ Plaintiff	Annex Distribution (Pty) Ltd Confident Concepts (Pty) Ltd Sahara Computers (Pty) Ltd V R Laser Services (Pty) Ltd Sahara Consumables (Pty) Ltd Infinity Media Networks (Pty) Ltd Islandsite Investments One Hundred and Eighty (Pty) Ltd Koornfontein Mines (Pty) Ltd Oakbay Investments (Pty) Ltd Oakbay Resources & Energy (Pty) Ltd Optimum Coal Mine (Pty) Ltd Shiva Uranium (Pty) Ltd Tegeta Exploration and Resources (Pty) Ltd Westdawn Investments (Pty) Ltd Idwala Coal (Pty) Ltd And others
Respondent/ Defendant	Bank of Baroda

Summary

Banking — Bank account — Deactivation — Account of companies linked to Gupta family — Application for 'interim-interim' relief by account holders — SA law not making provision for 'interim-interim' interdict — Balance of convenience in favour of deactivation — Alternative remedies available to account holders — Application dismissed.

Judgment

Fabricius J,

1.

In this urgent application for "interim-interim" relief, the following was sought:

2. "Pending the final determination of the action referred to in paragraph 3 of this notice of motion, the respondent is interdicted and restrained from:

2.1 De-activating and/or closing the applicants' banking accounts held at the respondent and or from terminating the banker-customer relationship between the applicants and the respondent;

2.2 Demanding that the first to fourth applicants repay the sums owed by each

of these applicants to the respondent in terms of their loan agreements with the respondent;

2.3 In any way limiting the manner in which the banking accounts are operated by the applicants so as to ensure that the applicants are permitted to operate the banking accounts in the same manner as they did prior to the notices of termination date 6 July 2017;

3. Within 15 days of the granting of this order, the applicants shall institute an application against the respondent in terms of which the applicants seek the relief set out in paragraphs 3.1, 3.3, 3.4 and 3 .5, and the first to fourth respondents seek the relief set out in paragraphs 3.2, 3 .3, 3.4 and 3.5:

3.1 Declaring that the respondent's notices to the applicants dated 6 July 2017 to de-activate the applicants' bank accounts are invalid and

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ineffective and that 31 July 2017, or such other date after 30 September 2017 as the Court may determine, is the date for the expiry of a reasonable notice period for the respondent to de-activate and/or to close the applicants' bank accounts held at the respondent and/or terminate the banker-customer relationship between the applicants and the respondent;

3.2 Declaring that the respondent's notice to each of the first to fourth applicants to repay their loans to the respondent by 30 September 2017 is invalid and ineffective and that 31 July 2018, or such other date after 30 September 2017 as the Court may determine , is the date upon which it would be reasonable for the respondent, in the exercise of its rights to do so, to demand the repayment of the sums owed by each of the first to fourth applicants to the respondent in terms of the loans between these applicants and the respondent;

3.3 Directing that discovery of documents in the application/applications to be instituted shall take place in accordance with the provisions of Rule 3 5 of this Court's Rules".

Costs were also sought on a punitive scale including costs of two Counsel.

2.

At the hearing a Draft Order was handed up by Applicants' Counsel in terms of which the relief sought was as follows:

1. "The application in paragraph 2 of the notice of motion under the above case number (52590/17) ("the applicant") is to be argued on 7 and 8 December 2017.

2. Pending the determination (hearing and judgment) of the application which is to be argued on 7 and 8 December 2017, the respondent is interdicted and restrained from;

2.1 De-activating and/or closing the applicants' banking accounts held at the respondent and/or from terminating the banker-customer relationship between the applicants and the respondent;

2.2 Demanding that the first to fourth applicants repay the sums owed by each of these applicants to the respondent in terms of their loan agreements with the respondent; and

2.3 In any way limiting the manner in which the banking accounts are operated by the applicants so as to ensure that the applicants are permitted to operate the banking accounts in the same manner as they did immediately prior to the notices of termination dated 6 July 2017.

3. The order in paragraph 2 above shall not preclude the respondent from taking such action as it would in law be entitled to take against any of the applicants by reason of such applicant's default in relation to the express terms applicable to such applicant's banking account or loan facility, the provision of proper and sufficient notice to remedy such breach and the resultant failure by the applicant concerned to remedy the breach timeously.

4. For purposes of the hearing on 7 and 8 December 2017:

4.1 The applicants will supplement their founding papers by 21 September 2017;

4.2 The respondent will supplement its answering affidavit by 12 October 2017;

4.3 The applicants will file their replying affidavit/s by 2 November 2017;

4.4 The applicants will file heads of argument by 14 November 2017;

4.5 The court file will be indexed and paginated by 14 November 2017;

4.6 The respondent will file heads of argument by 23 November 2017;

4.7 A joint practice note will be filed by 30 November 2017.

5. The costs of this application are reserved for the determination at the hearing on 7 and 8 December 2017."

It will be noted from the relief sought, in whichever form, that the Applicants' case is based on the allegation that insufficient or unreasonable notice of termination of the relationship with the Respondent bank was given. It will also be noticed that there is no relief sought, in whatever form, that relates to the submission made in Court by

Mr J. P. Daniels SC on behalf of First to Fourth Applicants, that the relevant written agreements between Applicants and the bank, or certain clauses thereof, are invalid for being contrary to public policy. He envisaged during argument that the Court in the main hearing sometime in the future, i.e. not the "December Court", would need to decide this alleged issue, which might well also involve the hearing of oral evidence. He conceded in that particular context, that this would mean that the parties would live in a forced relationship on uncertain terms. I may immediately say that I would not grant an order that would have this effect for an indeterminate period.

The application was launched when the Respondent notified the Applicants by way of letters dated 6 July 2017, that it would sever all ties with them, close their accounts and call up all relevant loans. The Respondent subsequently extended the deadline which is now 30 September 2017.

4.

Applicants now seek this interim relief so as to make provision for the period between 1 October 2017 until the hearing of the actual interim relief on 7 and 8 December. Without this interdictory relief the first part of Applicants' case becomes moot, so it was argued.

5.

It is obvious from the wording of prayer 2 of the Notice of Motion, and prayer 2 of the Draft Order, that on 7 and 8 December 2017, the Applicants will seek interim relief pending the outcome of the application referred to in prayer 3 of the Notice of Motion, in which proceedings the Applicants seek a declaration that the deactivation of the Applicants' bank accounts are invalid and ineffective, and that the demand that they repay their loans to the bank is similarly invalid and ineffective, at least until a date upon which it would be reasonable for the Respondent, "in the exercise of its rights to do so" to demand such repayment.

The application before Court on 7 and 8 December 2017 is therefore not a review application, but one for an interim interdict. The question before me is therefore whether or not I ought to grant the Applicants' interim relief pending the decision on 7 and 8 December 2 017, and that question is obviously inextricably linked to the question: what test must a Court apply when an "interim-interim" interdict was sought?

Mr Daniels SC was of the view that the traditional requirements for an interim interdict need not be shown. I merely had to find that there was a triable issue in the context of the provisions of s. 34 of the ***Constitution of South Africa***, which deals with the right to access to a Court, and to consider a "lower" threshold relating to the balance of convenience test which would involve the weighing-up of the interests of the parties. In that context I would exercise a discretion. Respondent's Counsel, Mr D. Fine SC and Mr G. Marcus SC in turn submitted that neither the ***Superior Courts Act No. 10 of 2013***, nor the ***Uniform Rules of Court***, nor the common law provided for such an "interim-interim interdict" on the basis as contended for. The application before me and the relief sought, had to be dealt with on the basis of the usual

requirements for an interim interdict. Mr Marcus in addition contended that Applicants' case had not even been properly and fully pleaded and that the Founding Affidavit did not contain a single reference to Applicants' rights, and the infringement thereof, under s. 34 of the ***Constitution***. That is so. I will deal with his submissions hereunder.

6.

Mr Daniels referred me to the decision in ***National Treasury and Others v Opposition to Urban Tolling Alliance and Others 2012 (6) SA 223 (CC)***, where in par. [31] Moseneke DCJ cautioned that a Court granting interim relief should not prejudge the issue that would be before a Court hearing a review application. Consequently he submitted it was not necessary for me at this stage to make a finding that the Applicants have a *prima facie* right in regard to setting aside of the relevant termination notices, since these would be the very questions that would be considered in December.

7.

The ***National Treasury*** decision *supra* must be read in the proper context. The hearing in December will not be subject to a Rule 53 procedure which might result in the lodging of a supplemented case record which would obviously not be before me at all, and which might entail material new matters or disputes of fact which would be best dealt with by the review Court itself. Even the relief referred to in prayer 3 of the Notice of Motion would not be subject to the Rule 53 procedure, but according to prayer 3.3 thereof would be subject to further discovery of documents in accordance with the provisions of Rule 35 of the Rules of Court. I may add at this stage that no doubt the Applicants have the provisions of Rule 35 (12) in mind. In fact, on 25 August 2017, I received a copy of the Applicants' Notice in terms of this Rule, which required the Respondent, by no later than 17h00 on 28 August 2017, to produce for inspection all the documents referred to in its Answering Affidavit of 16 August 2017. The provisions of this Rule do not apply automatically. The Rule states clearly that although the provisions of Rule 35 relating to discovery of documents applied to applications, such is subject to the proviso that the Court

direct that it be so. It is also clear that such directive is only ordered by the Court in exceptional circumstances and certainly, the nature of the Defendant's defence, the relevance of the documentation requested and the timing of such application are all factors to be considered.

See: ***Erasmus, Superior Court Practice, 2ND Edition, Vol 2 at D1/482 C***. For the present I need not determine this question, but having considered the relevance of the documentation sought, I have serious reservations in that context, inasmuch as the Respondent in its Answering Affidavit and in its approach to the present application, does not rely on the accuracy of the various serious and disturbing allegations in the media made against the Applicants as a group.

The bank does not need to establish the truth of allegations relating to "State capture by the Guptas" or the "Oakbay group" or allegations in the media that the "Gupta group" has made itself guilty, with the knowledge and assistance of highly placed officials, of corruption, money-laundering and other such-like criminal activities. It is sufficient that it relies on damage to its reputation in that context, as the banker of the Applicants.

The decision in ***Bredenkamp and Others v Standard Bank of South Africa 2010 (4) SA 468 SCA at par. [63]***, clearly supports this approach.

8.

Having considered the context of the comments made by the learned Deputy Chief Justice in the ***National Treasury*** opinion, I am not convinced that they oblige me to hold that the Applicants do not in the proceedings before me need to establish that they have a prima facie right in regard to the setting aside of the Respondent's notices, or that they do not have to fulfil the requirements for an interim interdict at this stage. In fact, in Applicants' own Founding Affidavit they rely on the requirements for the grant of interdictory relief, and allege that they have all been met in the present case. They say that this application has been brought essentially in two parts - the first seeking merely interim relief to preserve the status quo pending the outcome of proceedings which will seek to set aside the purported termination, or at least to have a reasonable, adequate and meaningful notice period imposed in which the Applicants could endeavour to establish alternative banking

relationships, or assess the various re-structuring options. In argument, a different approach was followed, and one, as I have said, that was not pleaded at all.

9.

The proceedings before me are therefore of an "interim-interim" nature, but this does not mean that I cannot and should not have regard to the requirements for an interim interdict. If there is obviously no merit in the "main" application in December, which of course is also intended to be of an "interim nature only", there is no purpose in granting an order at this stage either, quite apart from the other requirements for an interim interdict. In my view an Applicant cannot approach the Court and allege that it has an arguable case in the future, but that the Court may not have regard to the merits of that case, but nevertheless grant an interim order preserving the status quo in the meantime, irrespective of substantive law or procedural law considerations. In my view a party that seeks interdictory relief on an interim basis, must show that it has at the very least a *prima facie* right, that such right will be unlawfully infringed, that the balance of convenience is in its favour, and

that irreparable harm will result if an interim order is not granted in the meantime which would protect that right. These requirements and all other relevant authorities dealing therewith were fully discussed by this Court in ***Afrisake NPC and Others v City of Tshwane Metropolitan Municipality and Others [2014] ZAGPPHC 191 (14 March 2014)***, and in the ***National Treasury*** case, *supra*, at par. [45].

Most applications for an interim interdict are decided on the basis of the balance of convenience, which must favour the grant of an interdict, and this is an exercise that must involve weighing the harm to be endured by an Applicant if interim relief is not granted, as against the harm that a Respondent will bear, if the interdict is granted. A Court must assess all relevant factors carefully in

order to decide where the balance of convenience rests.

See: ***National Treasury*** *supra* at [par. 55]. I am also mindful of the view of that Court that the requirements for an interim interdict that have been applied since 1914 still continue to exist, subject to constitutional considerations. See par. [45].

10.

In its Founding Affidavit and the Heads of Argument on behalf of the First to Fourth Applicants, the background was described as follows: each off the first four Applicants holds a credit facility with the Respondent pursuant to a facility loan agreement. The termination letters dated 6 July 2017, notify each of the Applicants that their respective loan facilities are to be terminated on 30 September 2017. The submission to be made at the first part of the hearing would be that the termination letters result in multiple breaches of the Applicants' rights under the loan facility agreements. These are triable issues between the Applicants and the Respondent. In summary those breaches are said to be the following:

1. Firstly, the bank purported to rely upon its right to terminate for default in circumstances in which none of the respective Applicants were in default in any of their obligations;
2. Secondly, the bank purported to exercise a right to terminate upon demand, notwithstanding that that right is, at least in respect of the Second Applicant's agreement, contrary to public policy;

3. Thirdly, the bank purported to exercise its right to terminate upon demand in circumstances in which it acted either reasonably or in good faith: the exercise of this right was therefore contrary to public policy;
4. Fourthly, neither the termination letters of 6 July 2017, nor a subsequent letter of 10 August 2017, gave the Applicants reasonable notice. This represented a further breach by the bank of its contractual obligations.

However, as I have said, the relief sought relates in the main to the alleged absence of reasonable notice.

11.

It was submitted that to the extent that it was necessary for the Applicants in these proceedings to make out a prima facie right, the right at issue arose from s. 34 of the ***Constitution*** which provides the following: "Everyone has a 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". It was said that the substance of the Applicants' rights under s. 34 of the

Bill of Rights, is the right to have the disputes about the loan facility agreements and termination letters properly heard by a Court. This provision

emphasizes the rights of a party to have a justiciable dispute decided by a Court of law in a fair hearing, but I must add that it obviously entails the fact that substantive and procedural law must apply to any such hearing.

There is no doubt that this right lies at the heart of the Rule of Law. I also agree that the Applicant has a right to be heard in the context of the present proceedings which obviously will be resolved by the application of law. The substantive law put very simply in the present context is: the Applicant must show that the requirements for an interim interdict are present, failing which there would be no reason in the context of a contractual dispute to preserve the status quo against the will of the one contracting party, and contrary to the express terms of their contractual relationship, and irrespective of the question where the balance of convenience lies having regard to the harm that needs to balanced. This right to be heard must also be subject to all relevant provisions of procedural law, such as the ***Uniform Rules of Court***.

12.

With reference to certain allegedly missing documentation, it was submitted in the written Heads of Argument that I am not presently in any position to adjudicate upon Applicants' contentions as to their contractual rights under the loan facility agreements, nor could I meaningfully pronounce upon the bank's contention that it was within its rights to call up the loan facilities. It was therefore not open to the bank to complain that the "interim-interim" relief might cause it to suffer prejudice since it is, at least insofar as certain missing documentary evidence is concerned, the author of its own misfortune. The Applicants' Founding Affidavit however does not support this argument inasmuch as the Applicants clearly set out the relevant contractual terms that they rely upon, and which they say have not been reasonably enforced by the bank. They in fact allege that the lawfulness of the termination notices must be decided in due course, and in the context of the transactional account they allege that reasonable notice must be given, which it has not, and in the context of the loan account agreements with the First to Fourth Applicants, they

say the bank has indeed the right to demand repayment in terms of the contracts, but that this must be done in a reasonable and on reasonable notice.

To the extent that it was necessary at this stage to demonstrate that the Affidavits disclose triable issues that merit consideration at the hearing on 7 and 8 December 2017, certain submissions were referred to that would be made on those dates and I merely summarize them hereunder:

1. The bank repudiated the loan facility agreements by purporting to terminate by reason of defaults by the Applicants, each termination letter purported to rely on two distinct bases to terminate the loan facility agreements: first, the bank's right to terminate the agreements on demand; and second, the bank's right to terminate the agreements by reasons of default by the borrower.

   It was said that the simultaneous reliance upon these two clauses results

in an inconsistency. With reference to a breach of Applicants' obligations upon which the bank relied, it was said that Applicants have attracted adverse media coverage, that the bank perceives this coverage to be detrimental to its interests and that it had on several occasions raised its concerns. It was said that there

was no evidence that any of the First to Fourth Applicants have ever attracted any adverse publicity. It was also said that there was no obligation on the part of any of the Applicant companies to report on publicity affecting the other 17 Applicants. The termination letters were defective, because they purported to rely on a non-existent default by each individual Applicant.

It is however clear from Respondent's approach that "Applicants are owned and controlled by the Gupta family and close associates, either directly or indirectly. They form part of the Oakbay group of companies and are otherwise closely affiliated". The bank annexed a schedule reflecting this close alliance with reference to shareholders and directors.

2. The termination upon demand clause is contrary to public policy. Clause 10.5 of the loan facility agreement reads as follows: "The said loan facility sanctioned at the discretion of the bank and subject to the usual proviso that same is repayable on demand at any time at the sole discretion of the bank and that the terms and conditions are subject to change without notice". With reference to the termination upon demand clause in each of the first four Applicants' agreements

it was said that upon a proper construction, such was subversive to each loan agreement in that:

2.1 It allowed the bank to terminate the relationship at any time, notwithstanding the bank's knowledge both of its stated purpose and of either its periodic nature or, in the case of the Fourth Applicant, that it was a term loan;

2.2 It allowed the bank at any time to terminate, seemingly without the need for any commercially-defensible reason. With reference to a comment made Harms JA in ***Bredenkamp and Others v Standard Bank of South Africa Ltd*** *supra* [par. 7], it was submitted that where an abuse of the bank's rights was evident, the terms of the contract between the parties became subservient to this consideration. The termination upon demand clause purported to permit the bank to "change" the terms and conditions subject to which a loan facility was granted "without notice". This had the effect of affording the bank the power to vary the terms of that contract without the consent of the other and this was contrary to public policy, and therefore unenforceable.

2.3 The exercise of the termination upon demand clause is contrary to public policy. The argument is that even if the termination upon demand clause is valid, the exercise of such clause was under the circumstances contrary to public policy. It was submitted that our Courts have accepted the

proposition that a contractual right that is valid on its face might in some circumstances be unenforceable. Reference was made to the ***Bredenkamp*** decision *supra* amongst others. The ***Bredenkamp*** decision needs to be read carefully and in my view it does stand in the way of the relief sought by the Applicants. The enforcement of the present contract does not implicate an identified constitutional value that was unjustifiably affected. No specific infringement of a human right is relied upon in these proceedings, in the context of the relief sought and even in the Founding Affidavit. The Respondent bank is subject to a number of stringent statutory and regulatory obligations. It was and is not within its power to establish the truth or otherwise of the allegations made against Applicants or as it is often put "the Guptas". In fact, it did specifically not rely on the truth of the countless allegations made against all the entities,

but has specifically relied on the subsequent damage to its reputation, and the fact that it is running major risks by relevant law enforcement agencies should it shut its eyes to all the allegations that have for a considerable period of time polluted our society. An important *dictum* in the ***Bredenkamp*** judgment is that it is not for a Court to assess whether or not a *bona fide* business decision, which on the face of it was reasonable and rational, was objectively wrong where in the circumstances no public policy considerations were involved. In the ***Bredenkamp*** decision the protagonists had been "listed" by governmental bodies. Each such listing had an objective quality, so it was submitted, in that it appears to have been made against objectively-discernible criteria. In this context it was stated in the Heads of Argument that by comparison “none of the Applicants have been publicly stigmatized in a similarly objective process”. The adverse media coverage was, so it was put, at best subjective. This impacted on whether the bank could validly rely upon alleged reputational harm. I do not agree. An objective investigation or fact-finding exercise by the bank is not required by law, and

the bank does not rely on the truth of all mentioned allegations. It need not. It relies on damage to its reputation and it does so convincingly. The ***Bredenkamp*** decision *supra* supports this approach. The relationship between client and banker must be considered. A bank is entitled to make business decisions. In this case the bank did so and no properly identifiable and pleaded constitutional value was affected. A bank, and not a Court, must decide to which extent it will allow its reputation to be tarnished by allegations of criminal activities made in the media which refer to its client and the fact that it is such client's banker.

13.

It was submitted with reference to a number of authorities in the context of an abuse of rights within a contractual relationship that there was no evidence that the bank stood to be prejudiced by the continuation of its relationship with the Applicants. Reasons given by the bank were not its true reasons, it was said, thus evidencing a lack of good faith. It was also submitted that it was improbable that each letter of

termination was the outcome of a proper assessment of the merits and demerits of each Applicant in its position as borrower. Each appears to be the product of a decision of a general application. This reflected a decision-making process that was arbitrary and unreasonable. I have dealt with this argument, and it has no merit having regard to the bank's duty.

14.

Applicants were entitled to reasonable notice:

What this constitutes is of course reliant on all relevant facts. It was said that the notice period which ultimately was in effect a period of some 10 weeks, was unreasonable for the following reasons:

1. Each of the four Applicants is a substantial commercial entity and each has recently lost banking facilities with other major South African banks. The premature termination of the loan facilities would therefore inflict significant harm. I interpose to say that the Applicants have not deemed it fit to have

instituted proceedings against the major South African banks. This of course is not without significance in the present context;

2. First and Third Applicants' loan facilities had been reviewed fairly recently and they were therefore entitled to arrange their business affairs accordingly. Termination letters presented a substantial curtailment of this period and this was manifestly unreasonable. Certain other correspondence was also referred to in this same context, but it is not necessary for present purposes to deal with all the detail. I must add that Mr Daniels argued, in the context of weighing-up of harm, that it was unlikely that another bank would be found, but that there was “a glimmer of hope". A Court does not grant an interim interdict on that basis, I may add, nor forcefully extend this relationship for another two or more years on that basis.

15.

Irreparable harm if the "interim-interim" relief is not granted:

It was submitted that this was self-evident inasmuch as the first part of the relief sought would only be heard in December by which time the loan and transactional facilities will long since have been terminated. The Applicants are all large commercial entities and collectively employ some 7 600 employees across various sectors. Calling up the loans, simultaneously with terminating the transactional banking, will have a disastrous impact on their businesses. The harm suffered by the Applicants will inevitably also be visited upon their employees.

16.

Balance of convenience:

It was submitted that the bank merely alleged that it would suffer harm if the present relief was granted. Its Answering Affidavits go no further than to rely upon unsubstantiated media reports, speculative reputational harm, and the alleged risk of very serious legal risks and penalties. It was submitted that the

bank made no attempt to substantiate these allegations. Most tellingly also, so it was argued, is that the Respondent provided no explanation as to why it could tolerate this alleged

harm from July 2017 until 30 September 2017, but not also from 1 October until 7 December. The balance of convenience therefore favoured the Applicants.

17.

No other remedy:

The deponent to the Founding Affidavits stated that there were no realistic prospects that other alternative banking facilities will be secured. The Applicants therefore have no other remedy. Again, if this is so, there will be no point in any of the relief that Applicants seek.

18.

Fifth to Twentieth Applicants' argument:

In main, these applicants have associated themselves with the arguments presented on behalf of the first four Applicants. With reference to the first part of the relief sought, at this stage, it was said that for purposes of seeking an extension of the undertaking not to close their accounts pending the determination of Part A, the

Applicants have at least a *prima facie* (if not a clear) right to have access to Court and to have a legal dispute resolved by a Court, which right is guaranteed to them by s. 34 of the ***Constitution***. I agree that there are legal disputes between the parties and I have referred to the main issues. There is also the Applicants' right to have such disputes considered by a Court of law and, as I have said, this consideration depends upon the requirements of the substantive and procedural law. Applicants are before me and the substantive and procedural law will be fairly considered. In the context of the s. 34 of the ***Constitution*** argument, the following was then said: “If the closure of their accounts occurs before the interim interdict application under Part A is determined, the Applicants' relief sought under Part A and Part B will be entirely academic and irrelevant. By not obtaining an interdict preventing the closure of its accounts until the determination of the issues under Part A and Part B, the Applicants' constitutional right to have those disputes determined by a Court are violated. The Applicants' constitutional rights to have access to Court to have their disputes determined will thus have been completely denied to them".

This is a rather startling and wide-ranging submission, if not conclusion. It boils down to this, if I can give an example, if a Court does not grant interim relief pending the determination in a future hearing of certain interim issues between the parties, in a private contractual relationship, the affected parties' right to have access to Court will be violated. This startling submission loses sight of the fact that in any hearing before a Court, of whatever nature, the merits of the parties' rights to the relief sought will have to be considered by a Court, obviously both from a substantive and procedural law point of view. It cannot be

otherwise, and a failure to do so would mean that a litigant would be entitled to interim relief, pending a future hearing, even if there are no merits in the application and even if all procedural requirements have been ignored, and all that under the guise of a constitutional right to have a dispute determined by a Court. In my view the Applicants herein have misread the ambit and import of the provisions of s. 34 of the ***Constitution*** in the present context. The ***Constitution***, and in particular s. 34, does not give a litigant a right to a particular outcome.

See***: Van der Walt v Metcash Trading Ltd 2002 (4) SA 317 CC at [par.] 19***.

The context of the reasonable apprehension of irreparable harm for purposes of the immediate relief sought, the following was said:

1. If the Applicants' bank accounts are closed, they are left effectively unbanked, it will be impossible for them to conduct their businesses in the ordinary course. No commercial entity can exist and transact in the South African economy without banking facilities;
2. Any interruption to the Applicants' banking services without an alternative banker being in place (which was doubtful in the "current climate"), would result in immeasurable financial consequences for the Applicants, and will have significant, direct and material knock-on effects to thousands of people including employees, customers, suppliers, partners and affiliates of the Applicants;
3. All of the harm that the Applicants and their employees and other creditors stand to suffer will be irreversible and permanent;
4. This irreparable prejudice will occur despite the fact that the Court would not yet have had an opportunity to consider the Applicants' case in support of

the grant of an urgent interim interdict under Part A or the main relief under Part B. I do not agree with this argument at all. An application for an interim interdict is now fairly before me with affidavits and annexures of more than 1000 pages. Argument took place over a whole day. Prospects of success in future hearings were fully dealt with, and, most importantly, the nature and source of Applicants' rights that they rely on.

The balance of convenience plainly favoured the Applicants for the interim period of some 10 weeks. It was said that the Respondent had not been able to establish what, if any, prejudice it could suffer during this period. The bank's convenience and interests were unlikely to be harmed in any material way. In argument it was suggested however that because Applicants merely had to show that a “triable issue” existed, the balance of convenience consideration, only played a lesser role in these proceedings.

19.

Respondent's argument:

Mr D. Fine SC on behalf of Respondent again referred me to the proper test that must be applied in these proceedings before me, and obviously as well as in those in December, namely that stated in ***Simon N.O. v Air Operations of Europe AB and Others 1999 (1) SA 217 SCA at 228 G to H***, where the relevant test in ***Webster v Mitchell 1948 (1) SA 1186 (W) at 1189***, as modified in ***Gool v Minister of Justice and Another 1955 (2) SA 682 (C) at 688 B to F***, was again summarized:

> *"The accepted test for a prima facie right in the context of an interim interdict is to take the facts averred by the Applicant, together with such facts set out by the Respondent that are not or cannot be disputed and to consider whether, having regard to their inherent probabilities, the Applicant should on those facts obtain final relief at the trial. The facts set up in contradiction by the Respondent should then be considered and, if serious doubt is thrown upon the case of the Applicant, he cannot succeed".*

The Applicants have elected not to file any Replying Affidavit. They had the opportunity since 17 August 2017, and, I may add, if that was a procedural issue

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then, for purposes of a hearing then, nothing prohibited such a reply thereafter, even if confined to certain issues only.

20.

He also pointed out that Applicants conflated two separate sets of contract with the bank: the loan and overdraft facility agreements granted to the First to Fourth Applicants, on the one hand, and the separate transactional account agreements concluded with the Applicants, on the other. These different facilities raised different considerations.

21.

The termination of the banker-client relationship:

Applicants acknowledge, and it is indeed so, that the relationship between the parties hereto is contractual in nature. As a result, a decision to terminate that relationship is governed by the ordinary rules of contract. I may just add at this stage that as far as considerations of the balance of convenience are concerned, I will

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keep in mind that Respondent is subject to a number of statutory obligations, which are aimed at the integrity of the banking system and to prevent dishonesty and corruption amongst others.

22.

In ***Bredenkamp v Standard Bank*** *supra*, the following principles were laid down for the termination of the banker-client relationship:

1. A bank has a right to terminate a contract with its clients on the notice periods specified in their particular contract. In the absence of an express termination clause, a bank is entitled to terminate on reasonable notice.

   See also: ***Putco Ltd v TV and Radio Guarantee Company (Pty) Ltd, and Other Related Cases, 1985 (4) SA 809 (A)***, and ***Amalgamated Beverage Industries Ltd v Rond Vista Wholesalers 2004 (1) SA 538***

(SCA).

2. A bank has no obligation to give reasons for terminating this relationship. Its motives for terminating such are generally irrelevant (there may be an exception where there is found to be an abuse of rights

3. There are no self-standing rights to reasonableness, fairness or goodwill in the law of contract;

4. Even if there were however, it would be fair for a bank to exercise its contractual right to terminate its relationship with its clients on proper notice: in this regard the Supreme Court of Appeal said the following: “[57] ... the fact that the Appellants as business entities are entitled to banking facilities may be a commercial consideration, but it is difficult to see how someone can insist on opening a bank account with a particular bank and, if there is an account, to insist that relationship should endure against the will, bona fide formed of the bank".

5. A bank is also entitled to terminate the relationship with a client on a basis of reputational and business risks and Courts should be reluctant to second-guess that decision: “[65] The Appellants [claimed] that, objectively speaking, the bank's fears about its reputation and business risks were unjustified. I do not believe it is for a Court to assess whether or not bona fide business decision, which is on the face of it reasonable and rational, was

objectively "wrong" where in the circumstances no public policy considerations are involved. Fairness has two sides. The Appellants approach the matter from their point only. That, in my view, is wrong ".

6. Irrespective of whether negative publicity about the client is true, a bank is fully entitled to terminate the relationship with a client that has a bad reputation.

   I may repeat that in this case, as in the ***Bredenkamp*** decision, the bank did not seek to rely on the factual accuracy of the relevant reports, but merely on the particular reputation of its clients;

7. The fact that the client may have difficulty finding another bank does not impose any obligation on the bank to retain the client:

   > “[60] I find it difficult to perceive the fairness of imposing a bank the obligation to retain a client simply because other banks are not likely to accept that entity as a client. The Appellants were unable to find a constitutional niche or other public policy consideration justifying their demand”.

This Court recently correctly affirmed these principles in ***Hlongwane v ABSA Bank Ltd [2016] ZAGPPHC 938 (10 November 2016)***. It was held therein that the bank had no obligation to retain a client whose monitoring in terms of money laundering measures put in place would be more onerous when compared with the benefit, in terms of fees, it would receive from the client. I agree that this is a relevant consideration herein, and I

will also deal with it further in the light of the detailed allegations made by Respondent what the monitoring duties in fact entail. I do not agree with the contention that this judgment is materially distinguishable.

23.

First to Fourth Applicants' loan facilities:

On the express terms of these agreements, these Applicants have no legal right to any relief that would allow them to avoid repaying their loans, let alone "interim-interim relief" to this effect pending a hearing in December. In the Founding Affidavit the Applicants have acknowledged that these facility agreements give the bank the

express right to cancel them and to claim payment at any time. The identical termination clause is repeated in all of the loan and overdraft facility agreements and provides as follows: “Notwithstanding anything to the contrary contained herein, the credit facilities granted in terms of this agreement may be terminated by the bank in its sole discretion by written notice to that effect, either forthwith or from the date stated in such notice, in which event the facilities in question shall be deemed cancelled and any indebtedness to the bank shall become due owing and payable:

- Immediately if the facilities are terminated forthwith; or
- Otherwise on the date stated in that notice".

24.

It was said by Respondent that on 6 July the bank duly exercised its right of termination and expressly demanded that all advanced accounts be settled by not later than 30 September 2017. On that basis therefore Applicants were not entitled to “reasonable notice”. No such term could be read into this agreement as it would be in direct conflict with the express terms.

See: ***Transnet Ltd v Rubenstein 2006 (1) SA 591 (SCA) at par. 18 to 19***.

It is true that the banks had at a time extended the term of certain loans, but this extension was made subject to the terms and conditions which contain the same termination clause as the original agreement.

In any event, the notice of termination and repayment is on the facts of the matter more than reasonable notice, being almost three months.

25.

It was also contended that these Applicants did not make out any case in the Founding Affidavit or in argument to suggest that any of their constitutional rights had been breached by the bank's decision to terminate the agreements on the basis of their entitlement in terms of the contract. Bald allegations to this effect would not suffice:

See: ***Bredenkamp v Standard Bank*** *supra* at par. 49.

It was therefore contended that Applicants do not have any claim to the final relief that they seek in prayer 3.2 of the Notice of Motion, let alone a prima facie right that would merit “interim-interim relief'.

In the context of s.34 right relied on in Applicants' Heads of Argument, and during argument, Mr G. Marcus SC made the following telling submissions, which can be described as the “killer law point”, referred to in ***Trinity Asset Management (Pty) Ltd v Grindstone Investments 132 (Pty) Ltd [2017] ZACC 32 (5 September 2017) at par. 91*** where Cameron J said the following:

> “A good analogy is when an Applicant at risk of harm seeks an interim interdict. When the facts are unclear, the interdicting Court must weigh prospects, probabilities and harm. But when the Respondent, who is sought to be interdicted, has a killer law point, it is just and sensible for the Court to decide that point there and then. The Court is in effect ruling that, whatever the apprehension of harm and the factual rights and wrongs of the parties' dispute, an interdict can never be granted because the Applicant can never found an entitlement to it.”

25.1 An Applicant stands or falls by the Notice of Motion and Founding Affidavit. This well-known principle also applies to constitutional litigation.

See: ***Molausi v Voges 2016 (3) SA 370 CC at par. [27 and [28]***.

The purpose of pleading is to define the issues for the other party and the Court. And it is for the Court to adjudicate upon the disputes and those disputes alone (I underline).

The principle also applies to the development of the common law.

See: ***Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd 2012 (1) SA 256 (CC) at par. 52***.

He said that despite pleading the ordinary requirements for an interim interdict in the Founding Affidavit, Applicants sought out to make a new case in argument for "interim-interim relief”. I have referred to that.

25.2 Such a claim was unsustainable. The Founding Affidavit did not mention s. 34 of the ***Constitution*** at all. No basis was pleaded for the development of the common law requirement for an interim interdict. It

was not pleaded how such new test for interim relief would in any way deprive Applicants of the s. 34 right.

25.3 The effect of Applicants' argument would be to deprive the Respondent of its s. 34 right. In fact, nothing that was said in its Answering Affidavit would have any meaning or effect if merely a triable issue was sufficient for the relief sought.

25.4 Such an approach would also deprive Respondent of its right to be associated with the Applicants.

See: ***Cronje v United Cricket Board of South Africa 2001 (4) SA 1361 T***.

It would also deprive Respondent of its right to protect its reputation.

See: ***Media 24 Ltd v South African Securitization (Pty) Ltd 2011 (5)***

SA 329 (SCA) at paras. 42 to 49.

Respondent's right to contractual autonomy would also be infringed.

See: ***Barkhuizen v Napier 2007 (5) SA 323 (CC) at par. 57***

25.5 Also, if granted, the relief would amount to an abuse of process, because it would permit Applicants to re-litigate the same issue in due course.

See: ***Caesarstone Solot-Yam Ltd v World of Marble and Granite 2000 (CC) 2013 {6) SA 499 SCA at paras. 45 to 47***

26.

The relief, if granted, would also breach the subsidiary principle in that, as I have said, neither the Practice Manual for this Division, nor the ***Uniform Rules of Court***, nor the ***Superior Courts Act of 2013*** makes any provision for the granting of "interim-interim relief". The rights in s. 34 of the Constitution are given effect to, inter alia, by the ***Uniform Rules of Court***.

See: ***Giesecke & Devrient Southern Africa (Pty) Ltd v Minister of Safety and Security 2012 {2) SA 137 (SCA) at par. 24***.

In this context the principle of subsidiary means that where legislation gives effect to constitutional rights, it is impossible to go behind that legislation by relying on the Constitution directly. A litigant's remedy is to attack the legislation for its deficiency.

The regulatory practice of this Division was indeed criticized by Mr Daniels, but not in the Founding Affidavit or by way of the relief sought.

27.

There is in any event no self-standing right to good faith and reasonableness in contract.

See: ***Barkhuizen v Napier 2007 (5) SA 323 (CC) at par. 80; Bredenkamp supra at paras. 50 to 51; and Potgieter and Another v Potgieter N.O. 2012 (1) SA 624 SCA at paras. 31 to 32.***

28.

Other relevant considerations are that there is no right for asserting an entitlement to banking services as a property right. Freedom of trade as a right only applies to natural persons.

See: ***City of Cape Town v Ad Outport 2000 (2) SA 733 (C) at 747A.***

29.

The Applicants' transactional facilities:

The bank submitted that the Applicants are not entitled to compel it to provide them with transactional account facilities, against its will, until December 2017. Firstly, the Applicants had a reasonable notice, secondly, they would not suffer the irreparable harm contended for, and thirdly, the bank would rather suffer

severe prejudice should the order be granted.

30.

I agree with Mr Fine's argument that the Applicants are required to establish for purposes of obtaining the interim relief in December, and the interim relief pending that relief, that they have a prima facie right to the final relief that they seek in the main application. The final relief sought by the Applicants is to force the bank to provide them with transactional facilities for up to 24 months, at least, and perhaps

I am unable to see or appreciate any basis for this relief sought. It is clear from the ***Amalgamated Beverages Industries Ltd*** decision *supra* that there is no Rule of Law that suggests that it is implicit in a contract which may be terminated by notice, that such termination can only be effected for a valid commercial reason. One of the objects of requiring reasonable notice is to allow the receiving party sufficient time within which to regulate its affairs. A *prima facie* notice period is reasonable if a longer notice period would not place the party in a more favourable position in the circumstances. This finding is particularly apposite in the present case inasmuch as the Applicants have stated that all their major banks have closed their account, and that it is unlikely that they would be able to find a willing contractual partner under the circumstances. Respondent also alleges in the Answering Affidavit that long before the 6 July 2017 notice was delivered, the Applicants were provided with a more informal notice that the bank was considering terminating its relationship with the Applicants. In this context it was said that the following interactions took place between the bank and the Applicants prior to their formal notice:

1. The bank refused to open any new accounts for the Applicants, the Gupta family, and associated companies from at least June 2016;
2. From August 2016, the bank set about reducing its exposure by calling up loans granted to the Applicants, which at the time had an approximate value of R1.5 billion;
3. Also during this time, the bank's representatives advised the Applicants' representatives that it intended to sever ties with the group;
4. Over this period the bank succeeded in recovering approximately R1.2 billion from the Applicants.

In addition, the fact that the largest banks in South Africa and other firms chose to terminate the relationship with the Applicants in 2016 ought to have provided a clear indication that the Bank of Baroda would also consider this option. On this basis it was simply not correct for the Applicants to assert that the 6 July 2017 termination notices came out of the blue. I have of course also kept in mind in this context that the Applicants did not file a Replying Affidavit giving their version of these assertions of the bank.

31.

Mr D. Fine also pointed out that on the Applicants' own version there was little prospect that they would ever find alternative banking facilities inasmuch as they alleged in the Founding Affidavit that no other banks were prepared to do business with them. Therefore, on the Applicants' own version, whether they are afforded an additional three months' notice or a further two years notice, the prospects of finding alternative banking facilities are not likely to improve. It is therefore not reasonable for the Applicants to insist that the bank must be forced, against its will, and irrespective of its resources, to provide transactional facilities until December 2017, and then for the further period of two years. The Applicants have therefore failed to demonstrate that the notice period was not reasonable and on their own version the longer period proposed will likely not place them in a more favourable position than they would be in by 30 September 2017.

In my view this reasoning is sound and almost of its own, would defeat the purpose of a December 2017 order. I say "almost", because Mr Marcus' argument is in fact wholly destructive of Applicants' case.

32.

Apprehension of irreparable harm:

Applicants must demonstrate a reasonable apprehension that the continuance of the alleged wrong cause irreparable harm.

In this context Applicants have alleged prejudice based on three assertions. Applicants will not likely find another bank with whom to do business, if Respondent terminates their accounts, they will be unable to pay their employees and suppliers will be unable to receive payments from them, and this would bring about the Applicants' "inevitable demise".

33.

It was said that all of these allegations are without foundation. Respondent has never paid any of the Applicants' employees directly and will never be in a position to do so. It is also not in any position to pay all of the Applicants' suppliers. The Applicants themselves acknowledged that these expenses have been paid by a third party, Terbium Financial Services (Pty) Ltd, as a so-called agent “on

behalf of the Applicants". Terbium receives amounts from the Applicants and then pays the Applicants' employees and suppliers using its own banking facilities. Applicants did allege that this arrangement with Terbium will terminate on 31 August 2017, but this did not mean that the Bank of Baroda could simply take over Terbium's role. The uncontested allegations are that the bank has no infrastructural capacity to administer such payments of salary wages. The bank's operations in South Africa consist of only two branches and it employs a total of only 16 people across its entire South African operations. In these circumstances any urgent "interim-interim relief” would have no effect on whether the Applicants can pay their employees and suppliers until December 2017, or in fact thereafter. The bank will not be in the position to make these payments even if I order it to keep the Applicants' transactional accounts open.

I agree that this is a particular relevant consideration.

It was also stated that Applicants have not been truthful about the existing pay-agent arrangements inasmuch as they have failed to disclose to this Court that at least six of the Applicants have in fact concluded new pay-agent agreements before the

Applicants filed their papers in this application on 28 July 2017. I agree with Respondent's Counsel's contention that the failure to disclose this material fact is highly objectionable. Mr Daniels could not explain this in Court either. In this context it was argued, and in my view correctly so, that in addition to suffering no prejudice, the Applicants also do have a suitable alternative remedy to the relief that is being sought. The agreements with Terbium and the new pay-agents indicate quite clearly that Applicants will be perfectly capable of paying their employees and suppliers. It was said that pay-agents could also be paid from any foreign bank account held by the Applicants, other companies in the Oakbay group, off-shore companies controlled by the Gupta family and their associates, or individual members of the Gupta family. It was also possible for the Applicants to simply instruct the debtors to make payment directly to the pay-agents. The prejudice that the Applicants relied on therefore was not real. I agree with these contentions and they were not challenged by way of a Replying Affidavit in any event. In my view, they could have been and ought to have been. It cannot be expected of a Court to simply ignore the bank's assertions in this context.

34.

Substantial prejudice to the bank:

Before dealing with Respondent's contentions, I deem it important to point out that Respondent is not merely a contractual partner of the Applicants in the Private Law sphere. Its conduct and transactions are subject to a number of statutory and other legal duties under domestic, as well as international law. By virtue of its global operations, the bank is subject to a host of international and domestic legal duties to combat money laundering and other unlawful activities. These various instruments impose clear duties on the bank to put in place proper control to identify its clients, manage the risk of financial crimes risks, including money-laundering, and to report unlawful activities. It is also subject to supervision by its primary regulator the Reserve Bank of India. At international level, the Basel Committee on Banking Supervision ("Basel Committee") plays a leading role in establishing international standards for combatting money laundering and other financial crimes. The Committee's core principles require all banks to have adequate policies and processes in place to promote high ethical and professional standards in the banking

sector and to prevent the bank from being used, intentionally or unintentionally for criminal activities. The guidelines also draw specific attention to the risks that the bank faces, but fails to implement the relevant measures effectively. South Africa is also a member of the Financial Action Task Force which was

created by the G20 Group of States to establish global standards for the combatting of money laundering, terrorists financing and other threats to the international financial system. In terms of domestic legislation the bank operates in South Africa by virtue of the ***Banks Act 94 of 1990*** and the relevant regulations governing foreign banks as published in the ***Government Gazette 30627*** of 1 January 2008. Section 60 B of the ***Banks Act*** imposes the duty of the bank to establish and maintain an adequate and effective process of corporate governance to ensure that it complies with all laws and regulations applicable to it. Regulation 50 of the ***Bank Act Regulations*** further requires that every bank must have in place “robust structures, policies, processes and procedures to guard against the bank being used for purposes of market abuse such as insider trading and market manipulation, and/or financial crimes such as fraud, financing of terrorist activities and money laundering”.

35.

The ***Financial Intelligence Centre Act 38 of 2002 ("FICA")*** is the primary legislation which governs the banks' responsibilities to monitor and report on money laundering and other unlawful activities. FICA also imposes extensive reporting duties on the bank and in particular, by way of s. 29, imposes the duties to report all “suspicious or unusual transactions to the Financial Intelligence Centre. Further, the ***Money Laundering and Terrorists Financing Control Regulations*** contained in ***Government Gazette 24176*** of 20 December 2002, give greater specificity to accountable institutions' duties under ***FICA***. Regulation 21 places a particular obligation on accountable institutions to obtain further information where reasonably necessary to identify:

a) Business relationships or transactions that impose a particularly high risk of facilitating money laundering and

b) The proceeds of any unlawful activity or money laundering activity”.

Regulation 21 must also be read with Guidance Notice 3A published by the Financial Intelligence Centre in March 2013. This requires a “risk–based approach”

to the identification and verification of entities and reporting in line with international standards. It specifically requires banks to identify “high risk” clients, transactions and business relationships which attract heightened information gathering and monitoring requirements. In line with the mentioned recommendations paragraph 25 of the Guidance Notes includes politically exposed persons ("PEP's") within the category of "high risk" clients who must be subjected to heightened scrutiny. These PEP's and any person acting on his or her behalf must be exposed to “enhanced due diligence” and “heightened scrutiny”. It was said that these heightened duties serve an important purpose in that, given the position and influence held by PEP's, there was a heightened risk that they may engage in transactions designed to conceal unlawful transactions and the misappropriation of public funds.

36.

The bank would be liable to substantial penalties if it failed to comply with the requirements of ***FICA*** and the applicable ***Regulations***. Severe administrative

sanctions can be imposed and the Act also specifies a range of offences which attract substantial finds and even jail terms.

37.

Given these stiff penalties for failures to comply with FICA, even inadvertently, or due to lack of resources, the logical means to avoid these risks is to terminate the banking relationship with clients that are deemed to be of unusually high risk. I agree with this contention. It is sound and it is based on the regulatory provisions that I have referred to. Such decision by a bank would also enhance the integrity of the financial system, support openness rather than subversion and enhance the Rule of Law rather than undermine it.

38.

Respondent also stated that in addition the owner's monitoring and information-gathering duties that apply to high risk clients and PEP's come at a cost. The bank has to incur substantial and administrative costs in putting in place and implementing

day-to-day monitoring of these individuals and their transactions. In addition there are other relevant statutes that could subject the bank to further risks. For instance, in terms of ***Chapter 3 of The Prevention of Organized Crime Act 121 of 1998***, it is an offence for any person to deal with any property (including funds in the bank accounts) that he or she ought reasonably to have known is the proceeds of unlawful activities. Further, ***the Prevention and Combatting of Corrupt Activities Act 12 of 2004***, prohibits any participation in corrupt activities and imposes a duty on the bank to report any corrupt activities, over and above the requirements of ***FICA***. Again, s. 34 (1) of this ***Act*** imposes a substantial penalty for an offence in that context. In addition the bank operates in more than 25 countries. Accordingly, any transaction conducted by any branch of the bank in any jurisdiction internationally, is a transaction conducted by the bank and attributable to it in every jurisdiction.

39.

The controversy surrounding the Gupta family and Applicants:

In the Founding Affidavit and the written argument the Respondent sets out in some detail the severe reputational risks due to its relationship with the Gupta family and Applicants. They obviously were not obliged to show, on any basis whatsoever, that the allegations made against these entities were true. The decision ***Bredenkamp*** *supra* makes this abundantly clear. They are however, as already said, entitled to consider the risks to its reputation and in this context said the following were the major considerations:

1. The Gupta family and the Applicants have faced very serious allegations of unlawful conduct, levelled by Cabinet members, the Public Protector (the former), investigative journalists and civil society. They annexed a

comprehensive timeline of these allegations. As I have said, these were not dealt with by the Applicants in a Replying Affidavit, and this is a significant consideration, even at this stage of the proceedings. This comprehensive timeline clearly shows that the Applicants have been the subject of media reports and damaging allegations. The bank said that irrespective of the truth of these allegations, the sheer volume and severity of them has caused

reputational, legal and business risks for the bank. I will briefly refer to the relevant considerations that Respondent had in mind:

1.1 The Gupta family is widely reported as being friends of the President and his family, including President's son. They refer in this context to the Public Protector 's report titled "The State of Capture Report", which was released to the public by way of a Court order on 2 November 2016. This report addresses alleged unlawful conduct by the President, his son, the Gupta family and several of the Applicants in these proceedings. The report refers also to alleged unlawful State contracts including references to the Eleventh Applicant and the Sixteenth Applicant. In that context irregularities also occurred at the State entity Eskom, which made illegal payments to the Sixteenth Applicant. The Minister of Mineral Resources was also implicated. There were also adverse findings in regard to the Nineteenth and Twentieth Applicants. The bank then gave substantial detail in the Answering Affidavit of allegations contained in the so-called “Gupta leaks”, which is a cache of emails allegedly sent between

members of the Gupta family, representatives of the Oakbay Group and their associates. These reports have produced almost daily allegations of corruption, money-laundering and other unlawful activities. Examples were given in the Answering Affidavit, but it is not necessary for present purposes to repeat these.

1.2 The public reacted to this report with outrage which resulted also in a no-confidence debate in the National Assembly in November 2016.

1.3 The bank suffered further negative publicity during this time and reference was made to a Fin. 24 article titled "Bank of Baroda's Conduct Appears Highly Suspicious”. This was indicative of the type of negative coverage that the bank received in the wake of the Public Protector's report.

1.4 The Respondent referred to the Minister of Finance Mr P. Gordhan's litigation against the Oakbay Group. Judgment in that case was delivered by the Full Court of this Division 18 August 2017 (Case No. 80978/16). In the course of those proceedings, the Minister disclosed a list prepared by the Financial Intelligence Centre reflecting 72 “suspicious

transactions" to the value of R 6.8 billion concluded by the Gupta family members of the Oakbay Group. These listed transactions had been reported by the Financial Intelligence Centre in terms of Section 29 of ***FICA***. This list of 72 transactions also resulted in an Opposition Party requesting the Hawks (a special unit of the police), to investigate several of the Applicants for alleged criminal activity relating to these transactions.

1.5 Since December 2015, the Applicants and the Gupta family have all been classified as "high risk", and "politically exposed persons" (PEP's). As said, this imposes duties of "enhanced due diligence" and "heightened security" to monitor the transactions of the Applicants in terms of ***FICA***.

1.6 In just a 10-month period, between September 2016 and July 2017, the Applicants engaged in no less than 36 suspicious and unusual transactions, with a combined value of over R4.25 billion, which the bank duly reported to the Financial Intelligence Centre. These transactions accounted for the overwhelming majority of the suspicious and unusual

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transactions reported by the bank during this period. The Respondent annexed a full list of these transactions to their Answering Affidavit. The bank therefore said that the substantial number of reportable transactions generated in such a short period indicates that the bank is at risk that it may inadvertently fail to detect and report on such transactions, which would expose the bank and its employees to severe penalties. The volume of the Applicants transactions had been increasing and was likely to increase further still after the State Bank of India and the Bank of India terminated the Applicants' accounts in July 2017.

1.7 In the application by the Minister of Finance ***(80978/2016, Minister of Finance v Oakbay Investments (Pty) Ltd and Others)***, Standard Bank's affidavit sets out a detailed list of the allegations of corruption, money-laundering and unlawful conduct that had been levelled against the Gupta family and the Oakbay Group in the media and other public fora. These were all described as "red flags" that alerted the bank to the legal and reputational risks posed by the Oakbay Group. The bank then decided to

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terminate its relationship with the Group after conducting an assessment of the relevant risks.

1.8 A similar affidavit was made by ABSA Bank which stated that "there was ... evidence of large unexplained transfers of funds between the Oakbay Companies and related parties, into other banks".

1.9 Respondent also considered the circumstances surrounding the dismissal of Finance Minister Gordhan on 30 March 2017 and the resultant protests.

1.10 Respondent annexed a list of examples as samples of adverse publicity that the Applicants (as a 'group'), had received in the media and other public fora including, as I have said, the previous Public Protector's report. Respondent stressed in this context that in the public mind, the Gupta family and the Oakbay Group of Companies were being treated as being synonymous. In addition, all of the Applicants have been classified as "high risk".

1.11 Since the last quarter of 2015, the bank performed an evaluation of the Gupta family, the Applicants and other associated companies. It concluded that, given the alleged close affiliation between the Gupta family and the President, all the account holders posed a "high risk" of involvement in money-laundering and were "politically exposed persons" ("PEP's").

1.12 It gave an example of a suspicious transaction involving the Optimum

Applicant, in the context of a transaction of an inward remittance from an offshore account. Almost $8 million was involved in this particular transaction. Obviously, as I have said, this transaction was not explained by the Applicants herein.

1.13 Since June 2016, the bank informed representatives of the Applicants that it was not prepared to open any further account for any person or entity connected with the Oakbay Group or the Gupta family. This decision was the ultimate result of the ***FICA*** based risk assessment that had then been performed and the continuous monitoring of the Applicants

thereafter. The bank's South African office had been instructed by the Head Office in India to implement a process of winding down the relationship and reduce its exposure with a view to ultimately closing all accounts. This occurred in September 2016 already.

1.14 Respondent emphasized that it was particularly alarmed by the findings in the Public Protector's report formally released on 2 November 2016. It feared that it would be unable to recover the remaining amounts still due to them by the Applicants, at that stage standing at approximately R1 billion. The reputational risk of continuing a banking relationship with the Applicants escalated substantially, as the public perception created by the report was that the bank may have been complicit in the alleged unlawful conduct of the Gupta family and the Applicants. Mr Daniels submitted that this report was irrelevant as it was under review. I do not agree. That is not the test as I have said.

1.15 Respondent also referred to the fact that the South African Reserve Bank, between 19 September and 7 October 2016, conducted a detailed

on-site inspection of the bank in order to assess its level of compliance with ***FICA***. On 19 June 2017, the Reserve Bank imposed a financial penalty on the bank of R11 million for non-compliance of certain regulatory obligations. Respondent pointed out that the Applicants execute in the order of 150 to 200 banking transactions per week, each and every one of which must be subjected to the over-side investigation prescribed under ***FICA***. This would require an average commitment of eight hours per day from a senior executive.

1.16 By way of summary, Respondent said the following in the Answering Affidavit: "To be clear, the Applicants posed a single greatest risk to the bank of breaching ***FICA*** and the other legal requirements set out above. Between the period of 16 September 2016 to 14 July 2017, the bank has made no less than 45 suspicious transaction reports to the Financial Intelligence Centre on the Applicants, including members of the Gupta family, and other companies associated with the Gupta family who have also received notice of termination of their accounts. These suspicious

transactions amount to over R4.25 billion. No less than 36 of these reports related transactions generated by the Applicants".

40.

The above is but a summary of the allegations made against the Applicants,

the “Oakbay Group” and the Gupta family. The bank can obviously not rely on the truth of such allegations, and neither does it have to. I am obviously also not in a position to comment, save to say the following: when reading details of the various allegations in the Answering Affidavit, I could not help to wonder whether, unbeknown to me, democracy and the Rule of Law had somehow been suspended *pro tanto*? Could it be possible that the future, so bright in 1994, was now only history? Do the constitutional obligations imposed upon the Prosecuting Authority as set out in Section 179 of the ***Constitution*** of the Republic still exist? Do the various investigating bodies of the Police Service referred to in Section 205 of the ***Constitution*** still remember their constitutional duty to combat and investigate

crime? I cannot give an answer in these proceedings for obvious reasons, but the mere fact that the questions that arise, gravely concerns each and every one of us.

41.

The balance of convenience:

I am of the view that the application to be heard in December and the main application has very little prospect of success in the light of the considerations referred to above, the state of the law in this particular relationship, and the harm that Respondent is very likely to suffer should it be forced, against its will, to continue with the relationship with the Applicants. There is in my view another important factor: as I have set out in some detail, the Respondent is subject to a number of statutory provisions which in the main seek to uphold the integrity of the financial system in the country. It seeks to uphold such integrity with honest transparency. On the other hand, there is the well-founded suspicion, having regard to the uncontested events that I have referred to, that the Applicants subverted the integrity of the financial system, to put it gently. I am aware of the fact that I am

unable to make conclusive findings in this regard, but it is in any event not necessary. Respondent does not rely on the accuracy of all the allegations made against the Applicants. It need not do so, and a reasonable suspicion is sufficient for it to enable it to exercise its rights. Where a contractual party, subject to specific regulatory provisions seeks to act honestly and openly to safeguard its rights, and to uphold the integrity of the relevant financial order, and the other party on the face of it seeks to undermine and subvert it to its own benefit, the balance of convenience in my view clearly favours the former.

42.

It is also clear from all the authorities pertaining to interim interdicts that a Court always retains a wide discretion to refuse an interim interdict even if all the requisites have been established. Such discretion is a judicial one which must be exercised according to law and upon established facts.

See: ***Knox D'Arcy Ltd v Jamieson 1996 (4) SA 348 A (at 361 to 362)*** and ***Hix***

Networking Technologies CC v System Publishers (Pty) Ltd 1997 (1) SA 391 A (at 401) and ***Afrisake NPC v City of Tshwane*** *supra*.

Based therefore on all the considerations that I have referred to in this judgment, factual, procedural and legal, I also, and in any event, exercise my judicial discretion against the Applicants.

43.

Summary:

1. In our law there is no recognized cause of action for an "interim-interim" interdict based on requirements other than those recognized at common law for an interim interdict;
2. Applicants have not pleaded a cause of action based on the provisions of s. 34 of the ***Constitution***;
3. The common-law requirements for an interim interdict have not been established herein;

4 The balance of convenience weighs heavily in favour of a party which seeks to uphold and preserve the integrity of the established financial system and the Rule of Law.

44.

The following order is made:

43.1 The application is dismissed;

43.2 Applicants, jointly and severally, the one paying, the others to be absolved, are to pay the costs of Respondent, including the costs of two Senior Counsel and two Junior Counsel.

JUDGE H.J FABRICIUS

JUDGE OF THE GAUTENG HIGH COURT, PRETORIA DIVISION

Case number:	52590/17
Counsel for the 1ST to 4TH Applicants:	Adv P. J. Daniels SC
Instructed by:	Vasco De Oliveira Inc
Counsel for the 5TH to 20TH Applicants:	Adv R. A. Bhana SC
	Adv F. Ismail
	Adv J. Griffiths
Instructed by:	Abba Barak Inc
Counsel for the Respondent:	Adv D. M. Fine SC
	Adv G.J. Marcus SC
	Adv C. Mcconnachie
	Adv G. Singh

Instructed by:	Mervyn Taback Inc
Date of Hearing:	8 September 2017
Date of Judgment:	21 September 2017 at 10:00