IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE LOCAL DIVISION, GQEBERHA

Case no.: 1104/2022

Date heard: 15 June 2022
Date delivered: 19 July 2022

In the matter between:

TALHADO FISHING ENTERPRISES (PTY) LTD **Applicant**

and

FIRSTRAND BANK LTD t/a FIRST NATIONAL BANK **Respondent**

JUDGMENT

BENEKE A.J.:

Introduction

1 This is an urgent application wherein the applicant company seeks to interdict the respondent bank from closing its bank accounts pending the outcome of a review of the respondent bank's decision to close those accounts.

2 At the initial appearance before Rawjee AJ, the parties agreed to an order which provided, *inter* alia, that, pending the outcome of the urgent application, the respondent would not close the applicant's bank accounts nor limit the manner in which the accounts are operated.

3 The matter came before me on 15 June 2022, with all of the elements of the urgent application remaining in issue.

Relief sought

4 Part A of the application served before me. In this part, the applicant sought the following relief:

> *"1. The applicant's non-compliance with the rules relating to service and process is condoned and this application is permitted to be considered in an urgent basis in terms of Rule 6(12) of the Uniform Rules of Court.*
>
> *2. The respondent is hereby interdicted and restrained from:*
>
> *2.1 de-activating and/or closing the applicant's banking accounts held with the respondent and more fully described in its termination notice of 18 February 2022 ("the termination notice") and/or from terminating the banker-customer relationship between the applicants and the respondent for the reason stated in the termination notice;*
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> *2.2 in any way limiting the manner in which the banking accounts described in the termination notice are operated by the applicant so as to ensure that the applicant is permitted to operate the banking accounts in the same manner as it did immediately prior to the termination notice;*
>
> *3. The aforesaid relief is prayers 2.1 and 2.2 above shall operate as an interim interdict pending the final resolution of an application to be brought for final relief set out in Part B below ("the Part B application").*
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> *4. A copy of this order together with the notice of motion and all affidavits exchanged between the parties in this application to date is to be served on the employees of the applicant by affixing a copy thereof to all notice boards or prominent spots situated at their places of work within 3 (three) days of the granting of this order.*
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> *5. The respondent is ordered to pay the costs of this application including the costs occasioned by the employment of three counsel, alternatively that costs shall be reserved for determination when determining the merits of the Part B application.*
>
> *6. Grating the applicant such further and/or alternative relief as may be just in the circumstances."*

5 Part B of the application seeks the following relief, *inter alia*:

"7. *The applicant shall within 10 (ten) days of the grant of the Order sought under Part A, launch the review application against the respondent for such final relief as the applicant deems appropriate concerning the validity or otherwise of the termination notice, failing which the relief forming the subject of Part A set out in prayers 2.1 and 2.2 above shall lapse.*"

Facts

6 The applicant is a fishing company amongst whose shareholders are companies that form part of what may conveniently be referred to as the "*Sekunjalo Group*". This is a group of companies related to one Dr Survé. Dr Survé and the Sekunjalo Group have been mentioned in the Mpati Report. This is the report of a commission set up to investigate investments by the Public Investment Corporation ("PIC").

7 The applicant, itself, is not implicated in the Mpati Report. However, other members of the Sekunjalo Group, and especially one of the applicant's shareholders (Premier Fishing), are. There has also been widespread media coverage of the alleged malfeasance by the Sekunjalo Group. The respondent determined that its relationships with the Sekunjalo Group, including the applicant – whose ultimate beneficial ownership lies within that Group, posed a significant reputational and business risk to the respondent and its stakeholders.

8 Therefore, and despite at least a decade of banker-customer relationship, the respondent, after confirming that the applicant formed part of the Sekunjalo Group, and without any consultation with the applicant, advised the applicant on 18 February 2022 that it would be terminating the applicant's bank accounts on the basis of "*associated reputational and business risks*".

9 The respondent is under a legal obligation to manage risks, including reputational risks.

10 The respondent relied on its private law contract right to terminate the accounts. There is, however, some dispute between the parties regarding the terms of the contracts between them:

10.1 The respondent put up a contract whose terms and conditions entitle it terminate its relationship with a customer if it has reason to believe that a continued relationship will expose it to reputational and business risk. The applicant contends that it did not conclude that contract which entitled the respondent to terminate the accounts unilaterally. The respondent contends, only in argument and not in the answering affidavit, that, if the terms of the contract are not as it alleges, there is, nevertheless, an implied term that the contract may be terminated on reasonable notice.

10.2 The applicant, on the other hand, contends that it is an implied term that a bank exercising a right to terminate accounts had to act reasonably and in good faith, which included the requirement that the accounts only be terminated on good cause and after the applicant was able to make representations. Where termination was disproportionate to some perceived default, the termination would be in breach of public policy and thus unenforceable.

11 The termination notice issued by the respondent in February 2022 gave the applicant two months' notice. The applicant initially only asked for an additional month to allow it to move its business and pending the outcome of certain other litigation. However, later, the applicant disputed the right of the respondent to close its accounts in the manner that it did.

12 The Sekunjalo Group has seen the progressive closure by a number of banks of the accounts of its constituent members. It has, accordingly, sought relief before the Competition Commission and Competition Tribunal, and before the Equality Court. The proceedings in both the Equality Court and the Competition Commission are still pending, and both parties are party to both of those proceedings. An order has issued out of the Equality Court interdicting the closure of the Group's accounts, including those of the applicant held with the respondent, pending the outcome of the proceedings in the Equality Court. An application for similar relief is pending before the Competition Tribunal, in respect of the proceedings before the Competition Commission.

13 The applicant, being a company with employees and which serves an international client base, cannot function if it does not have bank accounts, especially those which allow it to trade in foreign exchange. Because of the applicant's affiliation to the Sekunjalo Group, the applicant is unable to procure alternative banking services; all other banks which have been approached have declined to contract with the applicant. Nedbank, with which the applicant has a number of accounts, does not allow the applicant to trade through those accounts. Accordingly, the closure of its accounts with the respondent will mean that it will find it exceedingly difficult to trade. This will apparently result in the collapse of the company. This, in turn, will negatively affect its employees and their families.

14 The applicant and its attorneys did attempt to avoid litigation by corresponding with the respondent in order to overturn the decision. This was, however, unsuccessful. The final refusal, by the respondent's Person of Interest Forum, occurred on 6 April 2022, some two weeks before the termination was to be effective. The application was thereupon launched on 21 April 2022.

15 The applicant relies, for its grounds of review in Part B, on its contractual rights and upon the rules of natural justice, the principle of legality, and the Promotion of Administrative Justice Act 3 of 2000.

Primary Issue

16 Fundamentally, the question that must be answered in this matter is whether or not the applicant is entitled to review the decision of the respondent to terminate its bank accounts. All relief is premised on this contention.

17 The right to review an impugned decision does not require any preservation *pendente lite*. Therefore, quite apart from the right to review and set aside an impugned decision, the applicant must demonstrate a *prima facie* right that is threatened by an impending or imminent harm.[1]

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1 *National Treasury & Others v Opposition to Urban Tolling Alliance & Others* 2012 (6) SA 223 (CC) at [50].

18 A *prima facie* right may be established by demonstrating prospects of success on review.[2] The grounds of review must be strong and likely to succeed.[3] This means that where there are no prospects of success on review, the application for an interim interdict must fail.[4]

19 The court must therefore *"peek into the grounds of review raised in the main review application and assess their strength."*[5]

20 In this regard, the question to be answered is, on the facts before me, is the applicant likely to succeed in the review? This can be determined by considering the facts as set out by the applicant, together with those set out by the respondent, which the applicant cannot dispute, and whether the applicant would, on these facts, obtain final relief in the review application.[6] The facts set up in contradiction by the respondent should then be considered. If serious doubt is thrown upon the case of the applicant, he could not succeed in obtaining temporary relief, for his right, *prima facie* established, may only be open to "some doubt". But if there is mere contradiction, or unconvincing explanation, the matter should be left to trial and the right be protected in the meanwhile, subject of course to the respective prejudice in the grant or refusal of interim relief.[7]

21 Fundamentally, both parties rely on a contractual provision, express or implied, that governs the termination of the contract. Over and above this, the applicant contends that there the respondent is obliged to apply the rules of natural justice to the termination. This is so, it contends, because of the unique position of banks in relation to their clients.

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2 *SA Informal Traders Forum and Others v City of Johannesburg and Others* 2014 (4) SA 371 (CC) at [25] – [28].

3 *Economic Freedom Fighters v Gordhan and Others; Public Protector and Another v Gordhan and Others* 2020 (6) SA 325 (CC) at [42].

4 *Olympic Passenger Service (Pty) Ltd v Ramlagan* 1957 (2) SA 382 (D) at 383D-G; *Simunye Developers CC v Lovedale Public FET College and Another* (3059/2010) [2010] ZAECGHC 121 (9 December 2010).

5 *Economic Freedom Fighters v Gordhan and Others; Public Protector and Another v Gordhan and Others* 2020 (6) SA 325 (CC) at [42].

6 *MEB Energy (Pty) Ltd v Ndlambe Local Municipality and Another* (466/2020) [2020] ZAECGHC 16 (5 March 2020) (466/2020) [2020] ZAECGHC 30 (28 April 2020).

7 *Webster v Mitchell* 1948 (1) SA 1186 (W) at 1188.

22 I thank both parties for their detailed arguments on this issue. I have had an opportunity to wrestle with the current legal position in which banks and their clients find themselves. It is apparent from the able arguments of Ms Golden SC that that the banks wield considerable power and that that power is often used to ensure that the contracts which they conclude favour them almost exclusively. It is also apparent from her submissions that, perhaps, it is time that the legislature step in and ensure greater protection for the consumers who are often woefully unequal in bargaining power. The role of the legislature was recognised by Wallis AJ (as he then was) in *Den Braven SA (Pty) Limited v Pillay and another* [2008] 3 All SA 518 (D) at [34].

23 I am, however, constrained to apply the current legal principles, as set out by the Supreme Court of Appeal in the two matters of *Bredenkamp v Standard Bank of South Africa Ltd* 2010 (4) SA 468 (SCA) and *Multichoice Support Services (Pty) Ltd v Calvin Electronics t/a Batavia Trading and another* [2021] JOL 51315 (SCA).

24 Whilst *Bredenkamp* is distinguishable in some respects especially regarding the allegations regarding Bredenkamp himself, the principles (from [55] to [65]) are instructive and I apply them as follows (with apologies to Harms DP for the use of his phraseology, which ultimately suits this matter also):

24.1 The applicant's case is this: It requires bank accounts (especially forex accounts) to conduct business locally. The closing of a bank account is a serious matter. Other banks do not want to not grant the applicant banking facilities. The result of the closing of its accounts, it says, leaves them effectively "unbanked". This, however, has not been proved in respect of all available banks, but in only in respect of the limited few in the replying affidavit. This is, accordingly, a case where private power approximates public power or has a wide and public impact.

24.2 Examining these submissions, the following is apparent: The applicant accepts that in terms of the valid agreement the respondent was entitled to terminate but they contend that the respondent may only terminate on good cause and having complied with the principle of *audi alteram partem*. This would require a tacit

term or the development of the common law. I assume, without deciding, that there is such a tacit term. But, the appellant says, in this case the respondent cannot close the account with a *bona fide* reason because of consequences to them that cannot be laid at the door of the respondent.

24.3 The fact that the applicant as a business entity is entitled to banking facilities may be a commercial consideration but one cannot insist that the relationship should endure against the will, *bona fide* formed, of the respondent. The applicant also has other local accounts with Nedbank.

24.4 The applicant also has a problem with causation. It is the mention in the Mpati Report of the shareholders of the applicant, and its association with the Sekunjalo Group (fair or unfair) that "unbanked" it, and not the closing of the accounts. The fact that banks may not wish to provide the applicant with banking facilities is unrelated to the fact that there are only a few major banks in the country. A proliferation of banks would not have made any difference. The impact on the applicants was not caused by the decision to close the accounts; it was caused by the association with the Sekunjalo Group. It is therefore not a case of the abuse by the respondent of private power that approximates public power. In this sense, the action of the respondent does not fall to be reviewed at common law (as in the *Jockey Club* cases[8]).

24.5 It is not fair to impose upon the respondent the obligation to retain the respondent simply because other banks are not likely to accept that entity as a client. The applicant was unable to convince me of a constitutional niche or other public policy consideration justifying their demand.

24.6 The applicant also submitted that the respondent's decision was procedurally and substantively unfair. For this it relies on both an administrative law review and a development of the common law so that a party who is entitled to cancel a

[8] Commencing with *Turner v Jockey Club of South Africa* [1974] 4 All SA 52 (A); 1974 (3) SA 633 (A).

contract has to give the other party a hearing before cancellation. The applicant, further, relies on a tacit term to that effect. However, a hearing in the form of a discussion would not have had any effect and would have been an exercise in futility. Even if the applicant had produced evidence to the effect that the implications in the Mpati Report were unjustified, it must be borne in mind that the respondent's cancellation was not premised on the truth of the allegations underlying the Report; it was based on the fact of the membership of the Sekunjalo Group and the allegations in the Mpati Report, and the possible reputational and commercial consequences of that for the respondent. In this regard, the respondent did not seek to rely on the factual accuracy of the Report, but on the Sekunjalo Group' reputation itself. The respondent further, did not make any moral judgment; it made a business decision to protect its reputation.

24.7 This leaves for consideration the question whether the respondent had (in terms of the relief presently sought) good cause to close the accounts. The respondent had a contract, which is valid, that gave it the right to cancel (on whichever party's version). It perceived that the association with the Sekunjalo Group created reputational and business risks. It assessed those risks at a senior level. It came to a conclusion. It exercised its right of termination in a *bona fide* manner. It gave the applicant a reasonable time to take its business elsewhere. The termination did not offend any identifiable constitutional value and was not otherwise contrary to any other public policy consideration.

24.8 The applicant's response was that, objectively speaking, the respondent's fears about its reputation and business risks were unjustified. I, like the court in *Bredenkamp*, do not believe it is for a court to assess whether or not a *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 applicant approaches the matter from its point of view only. That, in my view, is wrong.

24.9 Fundamentally, therefore, if there is a remedy for the applicant, it would not be a review, but a contractual claim for breach of contract.

25 The matter of *Multichoice Support Services* is also distinguishable on the facts, but clarifies the legal position with regard to the cancellation of private law contracts:

> *"[14] ... First it is trite that a decision by a contracting party to cancel a contract concluded between two private parties, cannot form the subject of judicial review - the power of courts to review the lawfulness, reasonableness and procedural fairness of decisions or actions taken by public bodies. The cancellation of the agreements by MultiChoice had nothing to do with the control of administrative power, or the method of such control: judicial review of administrative action.*
>
> *[15] Second, the decision by MultiChoice to cancel the agency and installer agreements, was not "administrative action" as defined in PAJA. In Grey's Marine Nugent JA said:*
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> > "Administrative action is . . . in general terms, the conduct of the bureaucracy (whoever the bureaucratic functionary might be) in carrying out the daily functions of the State, which necessarily involves the application of policy, usually after its translation into law, with direct and immediate consequences for individuals or groups of individuals."
>
> *Neither was the decision to cancel the agreements conceivably the exercise of public power other than administrative action, that could render it subject to review in terms of the principle of legality, sourced in the rule of law, a founding value of the Constitution.*
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> *[16] Third, it was clear from the relief sought in the review application - which formed the basis of the interdict -that Calvin was not seeking the review of an administrative decision. Instead, what it sought was an order:*
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> > "1. Reviewing, setting aside the decision to terminate an agreement (Agency agreement) between the Applicant and Respondent in terms of a letter of termination dated the 30th day of September 2019.
> >
> > 2. Reviewing, setting aside and/or correcting the decision to terminate an agreement (Accredited installer Agreement) between the Applicant and Respondent in terms of a letter of termination dated the 11th day of October 2019."
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> *[17] Fourth, a simple reading of the notices of termination and the agreements reveals that what was in issue between the parties was a contractual dispute arising from the election by MultiChoice to exercise its contractual right to terminate the agreements. Clause 3.3 of the agency agreement provided:*
>
> > "MultiChoice shall be entitled in its sole discretion, at any time, and for any reason whatsoever, to terminate this Agreement without liability by providing the agent 30 days prior written notice."

Likewise, clause 5.4 of the installer agreement read:

> "MultiChoice shall be entitled in its sole discretion, at any time, and for any reason whatsoever, to terminate this Agreement without liability. Where MultiChoice elects to terminate this Agreement pursuant to this clause 5.4, MultiChoice will give the Accredited Installer 30 (thirty) days prior written notice to this effect."

Clause 17.5 provided:

> "Notwithstanding the above, MultiChoice shall have the right to cancel this Agreement with the Accredited Installer upon 30 days' notice for any reason whatsoever including but not limited to fraudulent activity by the Installer."

[18] Lastly, the orders directing MultiChoice forthwith to grant Calvin access to its systems, and interdicting and restraining MultiChoice from preventing Calvin from utilising its equipment or facilities or performing its obligations as a service provider, was directly at odds with what the parties had agreed upon, expressed in plain language. The effect of these orders was to nullify MultiChoice's contractual remedies, amend the agreements, and to improve Calvin's position.

[19] In the result the appeals must succeed. On a proper appreciation of the nature of dispute between the parties, and the defences raised by MultiChoice, Calvin was not entitled to any relief. ..." [Footnotes omitted]

26 I am of the view that the circumstances in this matter mirror those in the *Multichoice Support Services* matter: Here there is a dispute about the exact contractual term relevant to the termination of the accounts, as well as the exact content, interpretation, and enforcement of that term. Part B is, after all, expressly aimed at assessing the validity of the termination notice. This, read together with the principles enunciated in *Bredenkamp*, clearly point to the fact that this type of matter relates to the interpretation of contracts, rather than some or other purported exercise of public power or something equal to it. I am therefore of the view that PAJA does not find application, nor does any common law right of review, whether in terms of the *Jockey Club* cases or based upon the principle of legality.

27 I am aware that in *Annex Distribution (Pty) Ltd and Others v Bank of Baroda* [2017] ZAGPPHC 639 Makgoka J saw fit to grant an interdict. However, I am of the view that the matter of *Annex Distribution (Pty) Ltd and others v Bank of Baroda* 2018 (1) SA 256 (GP) (per Fabricius J) is more carefully considered and more appropriate in the instant matter.

28 The applicant also seeks to rely on *Trustees for the time being of the Legacy Body Corporate v Bae Estates and Escapes (Pty) Ltd and Another* [2022] 1 All SA 138 (SCA) and *Beadica 231 CC and Others v Trustees, Oregon Trust and Others* 2020 (5) SA 247 (CC). However, I am of the view that the facts in those matters are too far removed from those in the instant matter so as to make them of little assistance.

29 Given what is set out above, I am of the view that the applicant has chosen the incorrect form of relief for Part B. This means that there are no prospects of success on review. Accordingly, the application for an interim interdict must fail.

Costs

30 Both parties were ad idem that the costs should follow the result, with at least the costs of two counsel being awarded.

Order

31 Accordingly, the following order shall issue:

1. The application is dismissed with costs, including the costs of two counsel.

M BENEKE
JUDGE OF THE HIGH COURT (ACTING)

Appearances: For the Applicant:
Adv. T. Golden SC, with Adv. C. Bester and Adv. Moodley (Adv. T. Ramogale assisted in drafting the Heads of Argument)
Instructed by Adriaans Attorneys c/o Goldberg & De Villiers Inc

For the Respondent:
Adv. Bham SC, with Adv. P. Bosman
Instructed by Norton Rose Inc c/o Smith Tabata Inc