



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case No: 9318/2022

AFRICA COMMUNITY MEDIA (PTY) LTD	First Applicant
ANA STUDIO (PTY) LTD	Second Applicant
ALLIED LOGISTICS SOLUTIONS (PTY) LTD	Third Applicant
BANNER NEWS AGENCY (PTY) LTD	Fourth Applicant
CONDE NAST INDEPENDENT MAGAZINES (PTY) LTD	Fifth Applicant
CONTENT NATION MEDIA (PTY) LTD	Sixth Applicant
INSIGHTS PUBLISHING (PTY) LTD	Seventh Applicant
GLOBAL COMMAND AND CONTROL TECHNOLOGIES (PTY) LTD	Eighth Applicant
INDEPENDENT MEDIA SOLUTIONS (PTY) LTD	Ninth Applicant
INDEPENDENT MEDIA SA (PTY) LTD	Tenth Applicant
INDEPENDENT NEWSPAPERS (PTY) LTD	Eleventh Applicant
KATHEA COMMUNICATIONS SOLUTIONS (PTY) LTD	Twelfth Applicant
AFRICA ONLINE RETAIL (PTY) LTD	Thirteenth Applicant
ORLEANS COSMETICS (PTY) LTD	Fourteenth Applicant
WIKIDEALS (PTY) LTD	Fifteenth Applicant
TRIPOS TRAVEL (PTY) LTD	Sixteenth Applicant
INDEPENDENT ONLINE SA (PTY) LTD	Seventeenth Applicant
AFRICAN NEWS AGENCY (PTY) LTD	Eighteenth Applicant
SAGARMATHA TECHNOLOGIES LTD	Nineteenth Applicant
ANA PUBLISHING (PTY) LTD	Twentieth Applicant
AFRICAN NEWS AGENCY PICTURES (PTY) LTD	Twenty-first Applicant
3 LAWS CAPITAL SOUTH AFRICA (PTY) LTD	Twenty-second Applicant

SGT SOLUTIONS (PTY) LTD	Twenty-third Applicant
AFRICA EQUITY EMPOWERMENT INVESTMENT LTD	Twenty-fourth Applicant
BUSINESS VENTURE INVESTMENTS NO 1581(RF) (PTY) LTD	Twenty-fifth Applicant
THE DR. IQBAL SURVÉ BURSARY TRUST	Twenty-sixth Applicant
THE SOUTH ATLANTIC ARTS AND CULTURE TRUST	Twenty-seventh Applicant
ESP AFRICA (PTY) LTD	Twenty-eighth Applicant
SIZWE AFRICA IT GROUP (PTY) LTD	Twenty-ninth Applicant
KALULA COMMUNICATIONS (PTY) LTD	Thirtieth Applicant
PARTI TRUST	Thirty-first Applicant

and

THE STANDARD BANK OF SA LTD	Respondent
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AND

Case No: EC08/2023

AFRICA COMMUNITY MEDIA (PTY) LTD	First Applicant
ANA STUDIO (PTY) LTD	Second Applicant
ALLIED LOGISTICS SOLUTIONS (PTY) LTD	Third Applicant
BANNER NEWS AGENCY (PTY) LTD	Fourth Applicant
CONDE NAST INDPENDENT MAGAZINES (PTY) LTD	Fifth Applicant
CONTENT NATION MEDIA (PTY) LTD	Sixth Applicant
INSIGHTS PUBLISHING (PTY) LTD	Seventh Applicant
GLOBAL COMMAND AND CONTROL TECHNOLOGIES (PTY) LTD	Eighth Applicant
INDEPENDENT MEDIA SOLUTIONS (PTY) LTD	Ninth Applicant
INDEPENDENT MEDIA SA (PTY) LTD	Tenth Applicant
INDEPENDENT NEWSPAPERS (PTY) LTD	Eleventh Applicant
KATHEA COMMUNICATIONS SOLUTIONS (PTY) LTD	Twelfth Applicant

AFRICA ONLINE RETAIL (PTY) LTD	Thirteenth Applicant
ORLEANS COSMETICS (PTY) LTD	Fourteenth Applicant
TRIPOS TRAVEL (PTY) LTD	Fifteenth Applicant
INDEPENDENT ONLINE SA (PTY) LTD	Sixteenth Applicant
AFRICAN NEWS AGENCY (PTY) LTD	Seventeenth Applicant
SAGARMATHA TECHNOLOGIES LTD	Eighteenth Applicant
ANA PUBLISHING (PTY) LTD	Nineteenth Applicant
AFRICAN NEWS AGENCY PICTURES (PTY) LTD	Twentieth Applicant
3 LAWS CAPITAL SOUTH AFRICA (PTY) LTD	Twenty-first Applicant
SGT SOLUTIONS (PTY) LTD	Twenty-second Applicant
AFRICAN EQUITY EMPOWERMENT INVESTMENT LTD	Twenty-third Applicant
BUSINESS VENTURE INVESTMENTS NO 1581 (RF) (PTY) LTD	Twenty-fourth Applicant
THE DR. SURVE BURSARY TRUST	Twenty-fifth Applicant
THE SOUTH AFRICAN ATLANTIC ARTS AND CULTURAL TRUST	Twenty-sixth Applicant
ESP AFRIKA (PTY) LTD	Twenty-seventh Applicant
SIZWE AFRICA IT GROUP (PTY) LTD	Twenty-eighth Applicant
PARTI TRUST	Twenty-ninth Applicant
KALULA COMMUNICATIONS (PTY) LTD	Thirtieth Applicant
WIKIDEALS (PTY) LTD	Thirty-first Applicant

and

THE STANDARD BANK OF SA LTD	First Respondent
LUNGISA FUZILE N.O.	Second Respondent

Coram: Justice J Cloete

Heard: 15 February 2024

Delivered electronically: 19 February 2024

JUDGMENT IN APPLICATION FOR LEAVE TO APPEAL

CLOETE J:

Introduction

[1] For convenience the parties are referred to as before. Standard Bank applies for leave to appeal to the Supreme Court of Appeal against the whole of my judgment and order delivered on 14 September 2023. The present application was only heard on 15 February 2024 by arrangement between the parties. The Sekunjalo Group and related entities (“SG”) oppose the application. In summary Standard Bank’s grounds of appeal are as follows (and I deal with each in turn hereunder):

1.1 The relief sought by SG was final in effect; I should have found it to be so and dismissed the applications (i.e. both High Court and Equality Court) by applying the test for final interdictory relief and concluding SG had failed to meet that test;

1.2 The relief I granted was in any event final in effect;

1.3 My order was vague and thus ineffective as well as arbitrary and thus irregular;

1.4 In any event SG failed to even make out a case for interim interdictory relief; and

1.5 There are conflicting decisions in both the High Courts and Equality Courts subsequent to the decision of the Supreme Court of Appeal (SCA) in *Bredenkamp III*¹ where such courts ‘have wrestled’ with applications to interdict the closure of bank accounts, and it would be desirable for the SCA ‘to provide certainty by clarifying when and in what circumstances a bank may provisionally be interdicted against the closing of an account of a client’.

Relief sought by SG was final in effect

[2] During argument counsel for Standard Bank properly conceded that: (a) it was open to me to have granted alternative relief as prayed instead of the primary (or main) relief sought; and (b) I granted alternative relief (in the form of a structural interdict for all of the reasons contained in my judgment). That is the end of this ground of appeal.

Relief granted was final in effect

[3] Cut to its core, Standard Bank’s argument is that the fixing of a period of 12 months (i.e. until 11 September 2024) rendered my order final in effect. (It

¹ *Bredenkamp and Others v Standard Bank of South Africa Limited* 2010 (4) SA 468 (SCA).

is not necessary to deal with that portion of my order pertaining to earlier final determination of the main applications since the parties are in agreement this will not occur before 11 September 2024).

[4] However the reasoning in my judgment, in my respectful view, demonstrates that my order was not final in effect, particularly when regard is had to paras 25 to 28 thereof.

[5] Various developments have occurred since I granted the September 2023 order (as partly foreshadowed in para 28 of my judgment). I was informed of these from the Bar during argument. Some have been adverse to SG and some favourable to it. Again, in my respectful view, these developments serve to reinforce why the parties should be afforded the opportunity to place them, and their respective views on their implications, properly before the court at the next hearing.

[6] This will enable that court to reach an informed decision about whether any relief should be granted to SG subsequent to 11 September 2024. I cannot take the implications of these subsequent developments into account for purposes of considering whether leave to appeal should be granted. I am bound by the four corners of my judgment.

[7] Moreover I do not understand the legal position to be that the mere fact of a fixed duration automatically translates into final relief. It all depends on the circumstances. In *Apleni*² Vivier JA stated:

² *Apleni v Minister of Law and Order and Others* 1989 (1) SA 195 (AD) at 200I-201D.

'The interim interdicts sought would have been operative for the duration of the Appellants' detention. In this sense it would have had final effect in that nothing which may subsequently have been decided could detract from the efficacy which the orders enjoyed while they were in force. However, on the facts of the present applications the grant of interim interdicts did not involve a final determination of the rights of the parties and did not affect such determination... The grant of interim interdicts did not amount to any finding on the facts, which would only have been made, together with appropriate orders as to costs, upon the final determination of the issues between the parties. Although final in effect, the interdicts sought were thus certainly not final in substance. The fact that the determination of the issues would only have taken place after the risk of injury had passed was obviously no bar to the grant of the orders...'

[8] I have been unable to find any authority which has overturned this longstanding principle. The very purpose of the structural interim interdict I granted was to try to do justice to both parties pending the outcome of parallel litigation and progress with case management, as is evident from paras 25 to 28 of my judgment. It follows that this ground of appeal fails.

Order vague and thus ineffective as well as arbitrary and thus irregular

[9] The *'arbitrary and thus irregular'* ground fell away as soon as counsel for Standard Bank made the concession that I was entitled to have granted alternative relief. The vague and incapable of implementation ground is founded on the contention that I incorporated into the order *'a dispute between the parties relating to'* FICA.³

³ Financial Intelligence Centre Act 38 of 2001.

[10] Standard Bank argues that by prohibiting it from closing SG's accounts for the reasons stated in its termination notices dated 25 April 2022, 7 July 2022 and 26 July 2022, my order is reasonably capable of bearing irreconcilable meanings. My response on this score is as follows.

[11] First, as pointed out in para 29 of my judgment the notices dated 7 and 26 July 2022 did not appear to form part of the papers before me. It was not submitted during argument that I erred in this regard. Second, an ambiguity can be cured under rule 42 of the uniform rules of court but Standard Bank elected not to go this route, instead seeking to advance it as a ground of appeal without disclosing the contents of the missing letters.

[12] Third, the effect of any inability to conduct due diligence under s 21C of FICA going forward was not Standard Bank's case before me. It relied on the inability to conduct due diligence in the past, and the purpose of interdictory relief (whether interim or final) is not to prevent past unlawful conduct. Fourth, and in any event, my order did not preclude Standard Bank from terminating SG's accounts for any reason other than those contained in its termination letters, and para 4 of my order specifically provided that the structural interim interdict would not apply to its statutory reporting obligations contained in s 29 of FICA. This ground of appeal thus also fails.

SG failed to make out a case for interim interdictory relief

[13] During argument it was contended by Standard Bank that I applied the incorrect test in order to determine whether SG had established a prima facie

right albeit open to some doubt, including one based on s 22 of the Constitution, namely freedom of trade (as well as occupation and profession). Although SG also relied on s 34 of the Constitution the law is clear that such reliance, on its own, does not provide a ground for any form of interdictory relief.⁴

[14] Mindful of the approach laid down in *EFF v Gordhan*,⁵ I was persuaded that, applying the *Webster v Mitchell*⁶ test, on this legal issue I could not find SG had no prospect whatsoever of obtaining final relief in the pending main applications. An additional factor was that at the time I heard the urgent applications it was too early to predict whether the main applications might be referred to oral evidence or to trial. I then followed the majority decision in *Eskom*⁷ as is apparent from para 13 of my judgment.

[15] If anything, Standard Bank's fifth ground of appeal to which I have referred, i.e. the contention that there are conflicting decisions on interim interdictory relief in relation to banks closing client accounts, supports my view in respect of that prima facie right rather than detracting from it (for present purposes it does not matter that I disagree with Standard Bank's contention as appears from what follows hereunder, but this is Standard Bank's own case). It is also my understanding of the law that it is not incumbent on a party seeking

⁴ *National Treasury v Opposition to Urban Tolling Alliance* 2012 (6) SA 223 (CC) at paras [49] and [50], in the context of s 33 of the Constitution pending a review.

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

⁶ *Webster v Mitchell* 1948 (1) SA 1186 (W) at 1189.

⁷ *Eskom Holdings SOC Ltd v Vaal River Development Association (Pty) Ltd and Others* [2022] ZACC 44 at paras [241] to [251].

interdictory relief to establish every single ground relied upon in order to obtain it.

[16] As regards the recent decision of the SCA in *Nedbank III*,⁸ on my reading thereof the issues are distinguishable from those in the matters I was required to determine, in particular no mention is made of any reliance by SG on s 22 of the Constitution.

[17] Having considered the lengthy submissions of counsel (because I do not set them all out does not mean I have ignored them) I am not persuaded that this ground of appeal meets the required threshold either.

Conflicting decisions on the application of *Bredenkamp III*

[18] Counsel for SG argued, persuasively in my view, that Standard Bank's reliance on "conflicting" decisions in the context of my judgment is misplaced. I deal briefly with each. *Oakbay*⁹ concerned declaratory rather than interdictory relief. *Annex Distribution I*¹⁰ concerned an "interim interim" interdict.

[19] In *Annex Distribution II*¹¹ the court granted an application for interim interdictory relief against a bank threatening to close the applicants' bank accounts pending the outcome of a review. The court however distinguished *Bredenkamp III* on two grounds, including that no public policy consideration

⁸ *Nedbank Ltd & Another v Survé and Others* 2023 JDR 4811 (SCA).

⁹ *Minister of Finance v Oakbay Investments (Pty) Ltd and Others* 2018 (3) SA 515 (GP).

¹⁰ *Annex Distribution (Pty) Ltd and Others v Bank of Baroda* 2018 (1) SA 562 (GP).

¹¹ *Annex Distribution (Pty) Ltd and Others v Bank of Baroda* [2017] ZAGPPHC 639.

was involved in that case. Likewise, for present purposes, in *Bredenkamp III* s 22 was ultimately not implicated, as is evident from the following passage of the judgment:

[30] The second is this: although the appellants, in the part quoted from the notice of motion, recited nearly every provision of the Bill of Rights, counsel stated that they do not suggest that the exercise of the right to terminate "implicated" any constitutional principle. It is accordingly not their case that the closing of the account compromised constitutional democracy, or their dignity, freedom or right to equality and the like, and the expansive interpretation of the Bill of Rights does accordingly not arise (s 39(1)). The case is about fairness as an overarching principle, and nothing more.'

[20] *Annex Distribution III*¹² and *Talhado*¹³ were firmly rooted in the purely contractual nature of a bank/client relationship. In *Nedbank 1*¹⁴ the court dismissed SG's application for interim interdictory relief due to absence of jurisdiction. *Ayo*¹⁵ did not deal with the merits of the urgent interdictory relief sought. The application was simply struck from the roll for lack of urgency. *Nedbank III* I have already dealt with.

[21] Finally, the very recent dismissal by the Constitutional Court of SG's application for leave to appeal a Competition Appeal Court judgment would have involved the consideration of a different standard for interim interdictory relief, namely that contained in s 49C(2)(b) of the Competition Act.¹⁶

¹² *Annex Distribution (Pty) Ltd and Others v Bank of Baroda* [2018] ZAGPPHC 6.

¹³ *Talhado Fishing Enterprises (Pty) Ltd v Firstrand Bank Ltd t/a First National Bank* [2022] ZAECQBHC 15.

¹⁴ *Survé and Others v Nedbank Ltd and Another* [2022] ZAWCHC 19.

¹⁵ *Ayo Technology Solutions Ltd v Access Bank South Africa Ltd* [2022] ZAWCHC 218.

¹⁶ No 89 of 1998.

[22] In any event, given the nature of my September 2023 order, it is my view that it would be premature for the SCA to be burdened with having to determine a matter of such constitutional importance where the hearing as to whether my order should be extended, amended or discharged will take place within the next six months or so. Whatever order the court may grant at the next hearing may or may not be appealable. Accordingly this ground of appeal also fails.

Whether it is nonetheless in the interests of justice for leave to be granted

[23] Applying the interests of justice test,¹⁷ I am also not persuaded to grant leave for the reasons contained in paras 5, 6, 8, 12, 14 and 22 of this judgment. To this I wish to add the following.

[24] First, Standard Bank could have insisted on a much earlier date for this application to be heard. Instead it waited for 5 months into a 12 month period. Second, it was only when I pointed out to its counsel during argument in reply that I could not dictate to the SCA when it should entertain the appeal if leave were to be granted that – suddenly – an undertaking was forthcoming from Standard Bank, despite its dire predictions on irreparable harm, not to close SG's accounts pending any SCA judgment. This is unacceptable, and in any event counsel for SG were deprived of any prior notice of this undertaking and thus the opportunity to prepare and deal properly with it.

[25] **In the result the following order is made:**

¹⁷ *United Democratic Movement and Another v Lebashe Investment Group (Pty) Ltd and Others* 2023 (1) SA 353 (CC).

The applications for leave to appeal are dismissed with costs, including the costs of two counsel where so employed in both case numbers 9318/2022 and EC08/2023.

J I CLOETE

Case No: 9318/2022

For applicants in court a quo and respondents in application for leave to appeal:

Adv Vuyani **Ngalwana** SC, Adv Karabo **Mvubu**

Instructed by: Adriaans Attorneys (A Adriaans)

For respondent in court a quo and applicant in application for leave to appeal:

Adv Robin **Pearse SC**, Adv Phumlani **Ngcongo**, Adv Zanele **Ngakane**

Instructed by: Herbert Smith Freehills South Africa (J Ripley-Evans)

Case No: EC08/2023

For applicants in court a quo and respondents in application for leave to appeal:

Adv Muzi **Sikhakhane** SC, Adv Isaac **Shai**

Instructed by: Adriaans Attorneys (A Adriaans)

For respondent in court a quo and applicant in application for leave to appeal:

Adv Robin **Pearse SC**, Adv Phumlani **Ngcongo**, Adv Zanele **Ngakane**

Instructed by: Herbert Smith Freehills South Africa (J Ripley-Evans)