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

Case no.: 1104/2022
Date heard: 11 October 2022
Date delivered: 14 March 2023

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 application for leave to appeal against an order wherein I dismissed an urgent application.

Legal principles applicable to applications for leave to appeal:

2 Section 17 of the Superior Courts Act 10 of 2013 provides that:

> "*(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that —*

(a) (i) the appeal would have a reasonable prospect of success; or

(ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;

(b) …

(c) …

(2) (a) Leave to appeal may be granted by the judge or judges against whose decision an appeal is to be made or, if not readily available, by any other judge or judges of the same court or Division.

(b) …

(c) …

(d) …

(e) …

(f) …

(3) …

(4) …

(5) …

(6) (a) If leave is granted under subsection (2)(a) … to appeal against a decision of a Division as a court of first instance consisting of a single judge, the judge or judges granting leave must direct that the appeal be heard by ***a full court of that Division****, unless they consider —*

(i) that the decision to be appealed involves a question of law of importance, whether because of its general application or otherwise, or in respect of which a decision of the Supreme Court of Appeal is required to resolve differences of opinion; or

(ii) that the administration of justice, either generally or in the particular case, requires consideration by the Supreme Court of Appeal of the decision, in which case they must direct that the appeal be heard by the Supreme Court of Appeal.

(b) …

(7) …"

3 The "*reasonable prospect of success*" test is one which had been adopted over many years.[1] The replacement by the word "*would*" of "*may*", has raised the bar of the test that now has to be applied to the merits of the proposed appeal before leave should be granted;[2] an appellant faces a higher and more stringent threshold.[3]

4 Irrespective of the prospects of success, there may nevertheless exist a compelling reason for the appeal to be heard. The subsection does not contain an exhaustive list of criteria, and each application for leave to appeal must be decided on its own facts.[4]

5 It is the applicant for leave to appeal must demonstrate that there is a compelling reason why the appeal should be heard.[5]

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1 See *Erasmus' Superior Court Prqctice*, RS 16, 2022, A2-55, and the authorities at n 4.

2 *Four Wheel Drive Accessory Distributors CC v Rattan NO* 2019 (3) SA 451 (SCA) at 463F; *The Mont Chevaux Trust (IT 2012/28) v Tina Goosen*, Unreported, LCC case no LCC14R/2014 dated 3 November 2014, cited with approval by *Minister of Police v Zamani* (ECB case no 12/2019 dated 2 February 2021) at par [4];

3 *Notshokovu v S*, Unreported, SCA case no 157/15 dated 7 September 2016, at par [2].

4 *Tansnat Durban (Pty) Ltd v Ethekwini Municipality* (unreported, KZD case no D4178/2020 dated 8 February 2021) at par [13].

5 *Tansnat Durban (Pty) Ltd v Ethekwini Municipality* (unreported, KZD case no D4178/2020 dated 8 February 2021) at par [12].

6 The substantial importance of the case to the appellant or to both the appellant and the respondent constitutes a compelling reason under this subsection why an appeal should be heard.[6]

7 Other compelling reasons include the fact that the decision sought to be appealed against involves an important question of law[7] and that the administration of justice, either generally or in the particular case concerned,[8] requires the appeal to be heard. A discrete issue of public importance which will have an effect on future matters, even where an appeal has become moot, also constitutes a compelling reason.[9]

8 As far as compelling reasons are concerned, the merits of the prospects of success remain vitally important and are often decisive.[10]

9 What is of paramount importance in deciding whether a judgment is appealable, is the interests of justice.[11]

10 In the event of the existence of conflicting judgments, it follows that it is of public importance and in the public interest that legal certainty should be obtained.[12] For this reason s 17(6)*(a)*(i) makes provision that the judge or judges granting leave must direct that the appeal be heard by the Supreme Court of Appeal if they consider that the decision to be appealed involves a question of law in respect of which a decision of the Supreme Court of Appeal is required to resolve differences

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6 *Tansnat Durban (Pty) Ltd v Ethekwini Municipality* (unreported, KZD case no D4178/2020 dated 8 February 2021) at par [13].

7 As contemplated in s 17(6)*(a)*(i) of the Act; and see *Caratco (Pty) Ltd v Independent Advisory (Pty) Ltd* 2020 (5) SA 35 (SCA) at par [2] and *Tansnat Durban (Pty) Ltd v Ethekwini Municipality* (unreported, KZD case no D4178/2020 dated 8 February 2021) at par [13].

8 As contemplated in s 17(6)*(a)*(ii) of the Act. In *Minister of Justice and Constitutional Development v Southern Africa Litigation Centre* 2016 (3) SA 317 (SCA) the Supreme Court of Appeal stated (at 330C–F).

9 *Minister of Justice and Constitutional Development v Southern Africa Litigation Centre* 2016 (3) SA 317 (SCA) at 330A–C.

10 *Caratco (Pty) Ltd v Independent Advisory (Pty) Ltd* 2020 (5) SA 35 (SCA) at par [2]; *Minister of Justice and Constitutional Development v Southern Africa Litigation Centre* 2016 (3) SA 317 (SCA) at 330C.

11 *Jacobs v Beacon Island Shareblock*, Unreported, WCC case no A258/2018 dated 6 February 2019, at par [29] regarding *Zweni v Minister of Law and Order of the Republic of South Africa* 1993 (1) SA 523 (A); *S v Western Areas Ltd* 2005 (5) SA 214 (SCA); *Philani-Ma-Afrika v Mailula* 2010 (2) SA 573 (SCA).

12 *Nova Property Group Holdings Ltd v Cobbett* 2016 (4) SA 317 (SCA) at 324D.

of opinion. See further the notes to s 17(6)*(a)*(i) of the Act s v 'A decision of the Supreme Court of Appeal is required to resolve the difference of opinion' below.

11 Ordinarily, leave to appeal against a decision of a single judge of a division of the High Court should be granted to the full court of the relevant division. Leave to appeal to the Supreme Court of Appeal should be given only after the judge granting leave to appeal is satisfied that the requirements of par (i) and (ii) of this subsection are satisfied.[13]

12 As far as questions of law are concerned, it is submitted that the test is not the difficulty or complexity of such a question, but rather whether the question of law is *res nova* or involves a matter of principle rendering it important.[14] If the law is not really controversial, the matter should be heard by the full court of the division of the High Court concerned.[15]

Grounds of Appeal

Based on allegations of a material error of fact

13 The applicant contends that I erred by finding that one of the applicant's shareholders, Premier Fishing, is implicated in the Mpati Report. The applicant contends that, although Premier Fishing was referred to in the Report, it was not implicated to the extent that it implicated the applicant. The applicant further contends that, as a result of this factual error, I held that the applicant has a problem with causation and that it was, *inter alia*, the mention of the applicant's shareholders in the Mpati Report that unbanked the applicant.

13.1 Premier Fishing is implicated in the Mpati Report. That finding is correct.

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[13] *Former Way Trade and Invest (Pty) Limited v Bright Idea Projects 66 (Pty) Limited* 2021 (12) BCLR 1388 (CC) at pars [17]–[18].

[14] *Body Corporate Pinewood Park v Dellis (Pty) Ltd* 2013 (1) SA 296 (SCA); *MEC, Western Cape Department of Social Development v BE obo JE* 2021 (1) SA 75 (SCA).

[15] *Kini Bay Village Association v Nelson Mandela Metropolitan Municipality* 2009 (2) SA 166 (SCA) at 174B–D.

13.2 I never found, nor do I think it correct to suggest, that the implication of Premier Fishing in the Mpati Report *necessarily* implicates the applicant in any malfeasance.

13.3 The evidence of the respondent, which could not be controverted by the applicant, was that the respondent cancelled the contract between the parties, not because of the truth of the allegations underlying the Mpati Report, but based on the fact of the applicant's 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's reputation itself.

13.4 In light of the above, I did not make a material error of fact in this regard.

13.5 The applicant, therefore, does not have a reasonable prospect of success on this ground.

14 The applicant had secured an interdict against the respondent in the Equality Court interdict application.

14.1 This is indeed an error. It was Nedbank against whom the interdict was secured.

14.2 The applicant contends that this error might have led me to believe that the applicant had an alternative remedy.

14.3 It is apparent from the judgment that my first and only concern was the issue of whether or the applicant had succeeded in proving a *prima facie* right which required protection; at no stage did the requirement of an alternative remedy enter into the deliberations.

14.4 Accordingly, this error of fact did not affect the outcome of the matter.

14.5 The applicant, therefore, does not have a reasonable prospect of success on this ground.

15 Fundamentally, both parties rely on a contractual provision, express or implied, that governs the termination of the contract.

15.1 The applicant relies upon the closing of certain bank accounts listed in Annexure "FA2". In this document, it is expressly stated that the relationship between the parties is governed by "*the private law principles of the law of contract*".

15.2 The exact terms of the contract are in dispute. This is evident, *inter alia*, from par 86 and 113 of the founding affidavit and Annexure "FA17", read with par 33 of the answering affidavit and Annexure "FNB3" and par 24, 25, 54, and 55 of the replying affidavit, as well as par 23 and 24 of the respondent's heads of argument regarding the implied right to cancel.

15.3 Accordingly, the finding identified by the applicant as erroneous is, in fact, not so.

15.4 The applicant, therefore, does not have a reasonable prospect of success on this ground.

15.5 The applicant contends, within this ground, that I should have found that "*FNB failed to prove that it was entitled to terminate the contractual relationship on the basis of the terms and conditions upon which it relied.*"

15.6 This contention is dealt with under the contentions related to material errors of law, and I refer the reader to that par.

16 A hearing in the form of a discussion (between the applicant and the respondent) would not have had any effect and would have been an exercise in futility.

16.1 It is contended that I erred in making this statement, as no evidence to support this statement was placed before me by the respondent's Persons of Interest Forum ("the Forum"), which took the decision to terminate the applicant's bank accounts.

16.2 At par 38 of the answering affidavit, the deponent, Mr Basson, the Head of Client Desirability Management: Commercial Clients at the respondent, reports that, after serious consideration and many discussions during 2019 and 2020, a decision was made by the respondent's Forum in 2020, that the respondent would no longer bank entities within the Sekunjalo Group.

16.3 At par 65 of the answering affidavit, Mr Basson advises that the decision by the respondent to terminate its banking relationship with the applicant was taken at the level of the Forum.

16.4 At par 66 of the answering affidavit, Mr Basson advises that the applicant's request for an extension of the termination date was escalated to him, whereupon the request was considered by senior members of the Forum and, after careful consideration, the decision to terminate the applicant's accounts was confirmed.

16.5 At par 131 of the answering affidavit, Mr Basson advises that the decision to terminate the banking relationship between the parties was taken at the much more senior level of the Forum, which is why the request for an extension was escalated.

16.6 At par 132 of the answering affidavit, Mr Basson advises that Mr Ries made certain statements to the applicant without any knowledge of the true facts and the reasons taken by the Forum, at high level, to terminate the parties' relationship.

16.7 At par 135 and 218 of the answering affidavit, Mr Basson advises that he acted on the applicant's request for an extension by escalating the matter to, and placing it before, members of the Forum for consideration.

16.8 At par 162 of the answering affidavit, Mr Basson relies on the decision of *Bredenkamp v Standard Bank of South Africa Limited* 2010 (4) SA 468 (SCA), for the contention that the conduct of a hearing by the Forum prior to the termination of the applicant's accounts is not required and would amount to an "*exercise in futility*".

16.9 At par 171 of the answering affidavit, Mr Basson contends that the reason that the conduct of an enquiry or hearing would be futile is because it was the *perception* regarding the Sekunjalo Group that was harmful to the respondent's reputation, rather than the actual facts regarding that Group of companies.

16.10 At par 210 of the answering affidavit, Mr Basson advises that the decision to terminate the parties' relationship was taken at a much higher level by the Forum.

16.11 At par 212 of the answering affidavit, Mr Basson advises that it was appropriate to escalate the request for an extension to the relevant decision-makers, given that the decision was taken by the Forum.

16.12 At par 106 of the replying affidavit, Mr Moodaley advises that the applicant at no stage had access to the Forum, nor was it privy to its discussions. The applicant does not know who sits on the Forum.

16.13 At par 182 of the replying affidavit, Mr Moodaley points out that the respondent does not advise who sits on the Forum or what information served before it when it took the relevant decision.

16.14 From the above facts as found in the papers, it is apparent that the applicant is correct in its contention that there was no affidavit by anyone who sits on the Forum.

16.15 The available evidence is that (a) the initial decision to terminate the accounts of the applicant was taken at the level of the Forum and (b) the request for an extension of the time periods for the closing of the accounts was also refused at the level of the Forum.

16.16 It does not appear *from the papers* that the applicant disputes that the decisions were in fact *taken* at the level of the Forum. The argument is that there was no evidence placed before me by a member of the Forum to support the statement that "*a hearing in the form of a discussion (between the applicant and the respondent) would not have had any effect and would have been an exercise in futility*".

16.17 In *Bredenkamp and Others v Standard Bank of South Africa Ltd* 2010 (4) SA 468 (SCA) it was held at par [61] that:

"*Furthermore, a hearing in the form of a discussion would not have had any effect and would have been an exercise in futility. Bredenkamp presumably would have told the bank that the listing was not justified, and he may have produced evidence to that effect. But the bank's cancellation was not premised on the truth of the allegations underlying the listing; it was based on the fact of the listing and the possible reputational and commercial consequences of the listing for the bank.*"

16.18 I have perused that judgment and cannot find any reference to the facts that the Supreme Court of Appeal had before it which supported the abovementioned finding, except the excerpt cited above.

16.19 I am of the view that there seems to be uncontested evidence that the Forum reconsidered the closing of the accounts when the applicant approached the respondent for an extension of time, and that, again, the

Forum refused to extend the time periods or retain the accounts. It also appears uncontested that the respondent sought to shut the accounts because of the *reputation* of the Sekunjalo Group more broadly and not that of the applicant and/or the truth of the allegations relating to either.

16.20 I am, therefore, fortified in my finding that it did not matter what engagement the applicant had with the respondent or the Forum specifically, the outcome would have remained unchanged.

16.21 The applicant, therefore, does not have a reasonable prospect of success on this ground.

Based on allegations of a material error of law

17 The Court misconstrued the argument of the applicant. The Court found that the applicant relied, for its ground 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, when there is not a single reference in the applicant's papers to any ground in PAJA. The Court found that the applicant submitted that the respondent's decision was procedurally and substantively unfair and that, for this, it relied on both an administrative law review and a development of the common law so that a party who is entitled to cancel a contract has to give the other party a hearing before cancellation, when the applicant made no such argument.

17.1 I did not misconstrue the argument of the applicant.

17.2 I found that:

17.2.1 "*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.*"

17.2.2 "*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 contract has to give the other party a hearing before cancellation.*"

17.2.3 "*I am therefore of the view that PAJA does not find application...*"

17.3 The reason for the finding is to be found in par 209.1 of the applicant's replying affidavit, where it is contended that:

"*FNB's decision is reviewable at least in terms of the common law and at most, under the principle of legality or the auspices of the Promotion of Administrative Justice Act 3 of 2000. This will be established further in legal submissions*".

17.4 It is correct that the applicant did not refer to PAJA in oral argument.

17.5 I have, elsewhere in the application for leave to appeal, been accused of not dealing with all of the issues before me either in sufficient detail or at all.

17.6 In this instance, I simply dealt with an allegation on the papers.

17.7 Given that the applicant is now of the view that PAJA was irrelevant to its case, it and I are *ad idem*, and nothing more turns on the matter.

17.8 The applicant, therefore, does not have a reasonable prospect of success on this ground.

18 Reliance was placed on *Multichoice Support Services (Pty) Ltd v Calvin Electronics t/a Batavia Trading and Another* [2021] JOL 51351 (SCA) in preference to *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). However, no reasons

were furnished as to why *Multichoice Support Services* was preferable to *Bae Estates*, when the facts in both are distinguishable.

18.1 At par 26 of my judgment, I found that that the circumstances in this matter mirror those in the *Multichoice Support Services* matter, whilst at par 28 of my judgment I found that the facts in *Bae Estates* are too far removed from those in the instant matter.

18.2 This is patently why I preferred *Multichoice Support Services*: In the *Multichoice Support Services* matter, there was a contract between to private parties, which contract was terminated. In *Bae Estates*, a body corporate of a housing estate took a decision which prevented a *third party* from operating in the housing estate. The facts of the matters are not equally distinguishable, with those in *Multichoice Support Services* being far more apposite in this matter.

18.2.1 The applicant, therefore, does not have a reasonable prospect of success on this ground.

19 The *Annex Distribution* matters

19.1 It is contended by the applicant that:

19.1.1 this Court's judgment conflicts with the judgment of the High Court (Gauteng Local Division, Johannesburg) in *Annex Distribution (Pty) Limited and Others v Bank of Baroda* [2017] ZAGPPHC 639 (per Makgoka J) and the judgment of the Equality Court in the matter of *Iqbal Surve and Others v Nedbank* EC02/2022;

19.1.2 the Court erred in her preference of the judgment of Fabricius J in *Annex Distribution (Pty) Ltd and Others v Bank of Baroda* 2018 (1) SA 256 (GP) over that of Makgoka J in in *Annex Distribution (Pty) Limited and Others v Bank of Baroda* [2017] ZAGPPHC 639; and

19.1.3 even if there were reasons to prefer the judgment of Fabricius J, no such reasons are provided in the judgment.

19.2 It is correct that I preferred Fabricius J's judgment in *Annex Distribution* to the judgment of Makgoka J. I thereupon found, at par 27 of my judgment, that:

"*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.*"

19.3 I, thus, did provide reasons. I acknowledge that these reasons are rather bald.

19.4 I turn now to consider whether my preference was erroneous.

19.5 The applicant contends as follows:

19.5.1 The case made out before Makgoka J was on all fours with the applicant's case, whereas the case before Fabricius J differed in material respects from the applicant's case; and

19.5.2 The issue in the matter before Fabricius J differed markedly from the issues before Makgoka J: The matter before Fabricius J was an "interim-interim interdict", whereas before Makgoka J it was an interim interdict.

19.6 The respondent contends as follows:

19.6.1 In the judgment of Fabricius J in *Annex Distribution*, despite the application being one which was "interim-interim" in nature, the court applied the same test as it would have in an application for interim relief; and

19.6.2 In the *Annex Distribution* matter heard by Makgoka J, the relief that was sought by the applicant in Part B of the application was framed as

follows: "*Within 15 days of the granting of this order, the applicants shall launch an application against the respondent for the final relief the applicants deem appropriate concerning the validity or otherwise of the termination notices dated 6 July 2017 issued by the respondents.*" The applicants therefore did not confine the relief which they sought to a review application as they have in this case. Had they done so, such relief would not have been competent for the same reasons as were later enunciated by the court in *Multichoice Support Services*.

19.7 Upon analysis of the two respective *Annex Distribution* judgments, the following is apparent:

19.7.1 In respect of the Fabricius J decision:

(a) The applicants' case was based on the allegation that insufficient or unreasonable notice of termination of the relationship with the respondent bank was given. There was, however, no relief sought, in whatever form, that related to the submission made in court by the first to fourth applicants that the relevant written agreements between applicants and the bank, or certain clauses thereof, were invalid for being contrary to public policy. The applicants envisaged during argument that the court in the main hearing sometime in the future, *i.e.* not the court deciding the interim interdict, would need to decide this alleged issue, which might well also involve the hearing of oral evidence. The applicants conceded in that particular context, that that would mean that the parties would live in a forced relationship on uncertain terms. Fabricius J indicated that he would not grant an order that would have this effect for an indeterminate period (see [2]).

(b) Although the proceedings were of an interim-interim nature, this did not absolve the applicants from having to establish the traditional requirements for an interim interdict, for if there was no merit in the 'main' application for an interim interdict, there would be no purpose in granting the present one either. Our law did not recognise a cause of action for an 'interim-interim' interdict

based on requirements other than the existing common-law ones (see [8] - [9], [43]).

(c) The applicability of s 34 of the Constitution was never properly raised by the applicants, and while they had at least a *prima facie* right to be heard, it was subject to the requirements of substantive and procedural law (see [12], [18], [25], [43]).

(d) On whether or not the relevant applications had a *prima facie* case, the court went into some detail. The applicants' position was taken from their founding affidavit and relayed at [10]. It seems to be remarkably similar to the instant set of facts. The court then examined what right was relied upon (see [10]) and what triable issues were raised for consideration in the future interim interdict proceedings (see [11]). These included inconsistency within the actual notice and that the termination was against public policy (see [12]). The court goes on to analyse the applicants' case, particularly in light of *Bredenkamp and Others v Standard Bank of South Africa Ltd* 2010 (4) SA 468 (SCA) (see [12]).

(e) The court summarised the position in *Bredenkamp* as follows: The banker–client relationship between the parties was of a contractual nature and the bank's decision to terminate it was governed by the ordinary rules of contract, which allowed banks to terminate their contracts with clients on proper notice (see [22.4]). The bank was under no obligation to give reasons: its motives were irrelevant, save perhaps where there was found to be an abuse of rights (see [22.2]). Banks were fully entitled terminate on the ground that the client had a bad reputation or because of business or reputational risks (see [22.5] and [22.6]).

(f) Without unnecessarily copying and pasting large portions of the judgment, the reasoning at par [25] to [28] is also apposite.

(g) In particularly, it is noteworthy that:

"*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.*"

See *Trinity Asset Management (Pty) Ltd v Grindstone Investments 132 (Pty) Ltd* 2018 (1) SA 94 (CC) at [91].

This sentiment also explains why the applicant's grounds that

- "*This Court did not merely "peek" into the arguments in Part B—it determined those arguments with finality*"; and

- "*The Court erred in not considering whether the dismissal of the applicant's application would result in irreparable harm and whether the balance of convenience weighed in favour of granting the interim interdict*"

lack any merit.

See also Fabricius J's analysis at the sub-par of [25], which also find application herein.

19.7.2 In respect of the Makgoka J decision:

(a) The first 68 par deal with special pleas, a summary of the evidence and contentions of the parties, and a brief summary of the legal principles.

(b) From par [69], Makgoka J finds that:

"*[69] A closer reading of* Bredenkamp *reveals two distinguishing features from the present case. The first is that no public policy considerations were involved in that case, whereas they are squarely raised in the present case. In this regard, it is important to observe that Harms DP (at para 65) implied that a bank's decision to close a client's account could well be subject to judicial scrutiny in circumstances where public policy considerations are involved. Here, the applicants' argument (insofar as the loan and overdraft facilities are concerned) is that the 'closure-upon demand clauses' and their enforcement in the circumstances, are against public policy, thus bringing the bank's conduct squarely within the purview of judicial scrutiny envisaged by Harms DP. The second distinguishing feature is that the appellants in* Bredenkamp *had accepted that: (a) the agreement entitled either party to terminate the relationship on reasonable notice for any reason and that this clause or the implied term did not offend any constitutional value, and was accordingly valid; and (b) due notice had been given and that a reasonable time had been allowed. The applicants in the present case dispute that reasonable notice has been given.*

[70] A public policy challenge is important, and where it is sought to be raised in pending proceedings, a court should, in my view, be slow to deny a party that right at interim stage, except in the clearest of cases. The applicants' public policy argument in respect of the loan agreements may well be rejected by a court in the application for a final relief. But can it be said at this interim stage that their argument is devoid of any merit whatsover? I do not think so.

[71] As observed by Harms DP in Bredenkamp *(para 38) our courts have always been fully prepared to reassess public policy and declare contracts invalid on that ground. He went on to explain:*

'Determining whether or not an agreement was contrary to public policy requires a balancing of competing values. That contractual promises should be kept is but one of the values. Reasonable people, irrespective of any philosophical or political bent, might disagree whether any particular value judgment was 'correct', ie, more acceptable. Didcott J, for one, believed in

relation to restraint of trade cases that the sanctity of contract trumped freedom of trade whereas AS Botha J... together with Spoelstra AJ, thought otherwise while Vermooten J agreed with Didcott J.'

[72] On the above considerations, I conclude that the first to fourth applicants have established a prima facie *right to the relief envisaged in the envisaged application for a final interdict.*"

(c) Makgoka J then went on to discuss whether or not the notice periods were reasonable, as well as the other requirements for an interim interdict.

19.7.3 The fundamental difficulty with the reliance on Makgoka J's decision in *Annex Distribution* is that, amongst the relief sought by the applicant in that case, the applicant sought, in Part B of the application, that: "*Within 15 days of the granting of this order, the applicants shall launch an application against the respondent for the final relief the applicants deem appropriate concerning the validity or otherwise of the termination notices dated 6 July 2017 issued by the respondents.*" See [87]. This is broad enough to encompass the public policy challenge to the contractual terms.

19.7.3.1 In the instant matter, the notice of motion seeks that the the applicant would launch an application "*… for such final relief the applicants deem appropriate concerning the validity or otherwise of the termination notice*". Had this been all, then perhaps Makgoka J's decision might have been preferable. However, and this is the fundamental difference, the applicant herein seeks, at par 8 of the Notice of Motion, to confine its Part B application to a *review*.

19.7.4 The decision of Makgoka J is, therefore, distinguishable.

19.7.5 It may also be that the decision of Fabricius J is distinguishable on the same basis; however, he took the trouble to analyse the present position of the courts in respect of the banker-client relationship.

19.8 In light of what is set out hereinabove, I am unable to agree that (a) the case made out before Makgoka J was on all fours with the applicant's case, whereas the case before Fabricius J differed in material respects from the applicant's case; and (b) the issue in the matter before Fabricius J differed markedly from the issues before Makgoka J: The matter before Fabricius J was an "interim-interim interdict", whereas before Makgoka J it was an interim interdict.

19.9 Accordingly, I am of the opinion that it cannot be said that I erred in preferring Fabricius J's decision in *Annex Distribution*.

19.10 As to whether or not the interdict relating to the matter Equality Court can find application, I am of the view that the basis of the interdict was that the applicant had a *prima facie* right based on the possibility of success at the Equality Court. That is not the situation here – the Part B relief herein stands no chance of success.

19.11 The applicant, therefore, does not have a reasonable prospect of success on this ground.

20 The terms of the contract between the parties

20.1 The applicant contends that I erred in:

20.1.1 placing reliance on the implied terms argued by the respondent but not pleaded in their answering affidavit;

20.1.2 finding that the respondent had a right under the common law to terminate on reasonable notice—no such case was made out by the respondent in its answering affidavit;

20.1.3 finding that the respondent had a contract, <u>which is valid</u>, that gave it the right to cancel (on whichever party's version) and that, therefore, the termination did not offend any identifiable constitutional value and was not

otherwise contrary to any other public policy consideration. In particular, the Court erred in holding the applicant to the contractual terms when the respondent failed to provide evidence that the applicant had accepted the terms and conditions of the contract;

20.1.4 seeking to enforce a contractual provision which had not been proven to have been accepted, on the strength of *Bredenkamp* in the face of the applicant's reliance on section 34 of the Constitution;

20.2 The evidence on the papers:

20.2.1 Par 5 of the founding affidavit refers to a banking relationship between the applicant and respondent and defines the accounts as those described in the termination letter. The termination letter refers to the relationship that it has with its customers being governed by the private law principles of contract, in terms of which the respondent derives its right to terminate the relationship.

20.2.2 Par 67 of the founding affidavit refers to the fact that the applicant has had a banking relationship with the respondent for over ten years, and avers that it has, itself, acted with utmost professionalism, good faith and business acumen.

20.2.3 At par 86 of the founding affidavit, the applicant avers that it requested the respondent to provide copies of the contractual instruments upon which it was relying to terminate the accounts. It is alleged that this was necessary because the applicant was unaware of any terms or conditions to which it had agreed which would entitle the respondent to terminate its banking facilities summarily. An email is attached wherein the respondent advises that there is no customer agreement for the applicant.

20.2.4 Par 91 through 95 of the founding affidavit record further, failed, attempts to secure copies of the relevant customer relationship agreements between the parties.

20.2.5 At par 104 through 107 of the founding affidavit, the applicant relies upon a provision of the Conduct Standards for Banks 3 of 2020 which states that "*a bank must … disclose to the financial customer the reasons for the refusal, withdrawal, termination or closure*". It alleges that the failure by the respondent to provide reasons, despite an undertaking to do so, is in breach of the Conduct Standards, and impugns the lawfulness of the decision. It further contends that the averment by the respondent that it had terminated the relationship because of "*associated reputational and business risks*" is vague and amounts to no explanation at all.

20.2.6 At par 113 of the founding affidavit, the applicant repeats that it is not aware of any terms and/or conditions that permit the respondent to summarily terminate the relationship, and that, to the best of the applicant's knowledge, it never agreed to grant the respondent such rights.

20.2.7 It is noteworthy that the applicant, which says of itself that it acted throughout with the utmost business acumen, does not allege that it did not agree to a contract with the respondent, but just to one with no clause allowing summary termination. It is strange that the applicant would not take the court into its confidence regarding the nature of the contract which it alleges it, in fact, concluded.

20.2.8 At par 114 of the founding affidavit, the applicant calls upon the respondent to disclose the precise basis of the decision as well as the contractual terms upon which it relies.

20.2.9 At par 132.1 of the founding affidavit, the applicant contends that it has a *prima facie* right to hold the respondent to the terms of the contractual relationship between the parties, which the applicant contends does not entitle the respondent to terminate the accounts summarily and in circumstances where the applicant was unaware of the contract which grants the respondent that right.

20.2.10 Here, again, it is obvious that the applicant is relying on some or other contractual provision obviously at odd with that relied upon by the respondent; however, nowhere in the papers does the applicant tell the court what it understands the terms and conditions of the contract to be. This is either a terrible oversight, which makes the court's job almost impossible, or an intentional omission, which raises questions about the veracity of the allegation.

20.2.11 At par 15 of the answering affidavit, the respondent contends that the parties' relationship is governed by contract law, and the respondent has acted in terms of its contractual rights.

20.2.12 At par 31 of the answering affidavit, the respondent identifies that the applicant holds six accounts with it and, at par 32, the respondent sets out that the relationship between a bank and its customers is contractual in nature.

20.2.13 At par 33 of the answering affidavit, the respondent avers that all bank accounts which are held by its customers are governed by its general terms and conditions, a copy of which is provided. The respondent points out that these terms and conditions are widely available, including on the respondent's website.

20.2.14 At par 34 of the answering affidavit, the respondent goes on to cite clause 10 of the general terms and conditions, which clause apparently allows it to terminate relationships with its customers based on reputational risk.

20.2.15 At par 50 and 54 of the answering affidavit, the respondent alleges that the termination letter was issued in accordance with the general terms and conditions, which terms afforded the respondent the right to terminate the relationship between the parties.

20.2.16 At par 61 through 64 of the answering affidavit, the respondent points out that, in correspondence by the applicant seeking an extension of the termination date, the applicant did not dispute the entitlement of the respondent to close the accounts.

20.2.17 At par 140 of the answering affidavit, the respondent contends that the general terms and conditions govern all customer accounts whether or not there is a customer agreement in place with a particular customer.

20.2.18 At various par in the remainder of the answering affidavit, the respondent repeats that it relies upon the general terms and conditions to allow for the termination of the agreements.

20.2.19 At par 24, 25, and 54, as well as at several other par of the replying affidavit, the applicant denies both being aware of and accepting the general terms and conditions attached to the answering affidavit. At par 76, the applicant goes on to aver that, for this reason, the general terms and conditions are not binding and enforceable.

20.2.20 At par 55 of the replying affidavit, the applicant points out that there was a different customer agreement between the parties "*implemented more recently*". It avers that it has no knowledge of this.

20.2.21 At par 92 of the replying affidavit, the applicant contends that it was not necessary in the letters requesting an extension of the termination to deal with the respondent's entitlement to terminate the contracts, as the issue was pending litigation rather than the entitlement to cancel.

20.2.22 At par 187 of the replying affidavit, the applicant contends that the respondent has not provided evidence of when the applicant accepted the general terms and conditions.

20.2.23 At page 266 of the replying affidavit, the applicant contends that, shortly before 8 April 2022, it searched the respondent's website for the

general terms and conditions and was unable to find them. A formal request was then sent to the respondent.

20.3 My findings:

20.3.1 At par 10 of my judgment, I held that:

"*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."

20.3.2 At par 21 of my judgment, I held that: "*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.*"

20.3.3 At par 24.7 of the judgment, I held that: "*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).*"

20.3.4 At par 26 of the judgment, I held that: "*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.*"

20.4 The applicant's contentions:

20.4.1 The applicant contends that I found that the respondent had, in fact, proved the terms of the contract upon which it relies – either as that found in the general terms and conditions, as pleaded in the papers, or as an implied term, raised for the first time in argument.

20.4.2 The applicant contends, further, that the respondent has not proven that the general terms and conditions were agreed to by the applicant.

20.4.3 The applicant contends, additionally, that the respondent is not entitled to rely on any implied term unless it is specifically pleaded, and for this provides authority.

20.5 The respondent's contentions:

20.5.1 The respondent submitted that the applicant did not contend that the relationship between it and the respondent (whatever its terms) was not based in contract. The applicant also did not contend that the respondent did

not have the right to terminate its relationship with the applicant and to close the bank accounts. It was furthermore not the applicant's case that the respondent was compelled to be contractually bound to the applicant and to provide it with banking services in perpetuity. Had this been the case for the applicant (which it was not), such a case would have run contrary to the accepted jurisprudence in relation to the contractual nature of the relationship between a banker and its clients.

20.5.2 The respondent contended that it was the case for the applicant that, in exercising its right to terminate its relationship with the applicant and to close the bank accounts, the respondent failed to furnish reasons to the applicant for the closure of the bank accounts and failed to comply with the principles of natural justice and *audi alteram partem* when it took the decision to terminate its relationship with the applicant and to close the bank accounts. The applicant contended that, as a result, the closure of the bank accounts by the respondent was contrary to public policy.

20.5.3 The respondent submitted that I was correct in concluding that, at the heart of it, both parties relied upon a valid contractual provision, express or implied, that governed the termination of the contract between them. What was in dispute between the parties was the content of that contractual provision and the terms upon which termination of the contract between the applicant and the respondent ought to have taken place. I identified that the applicant contended that the respondent was obliged to apply the rules of natural justice to such termination because of the unique position of banks in relation to their clients.

20.5.4 The respondent contends, therefore, that I made no error in determining that the applicant accepted that in terms of the valid agreement between them, the respondent was entitled to terminate its agreement with the applicant but that the applicant contended that the respondent could only do so on good cause and having complied with the principle of *audi alteram partem*.

20.5.5 The respondent contends, further, that I correctly noted that, for the applicant to contend that the respondent could only terminate its (undisputed) contractual relationship with the respondent after it had complied with the principles of natural justice and afforded the applicant the right to make representations, would require the existence of a tacit term (presumably in the absence of an express or implied term) or the development of the common law.

20.5.6 The respondent contends, additionally, that the Learned Judge went further to assume in favour of the applicant that there was in fact such a tacit term which required the respondent only to terminate its contractual relationship with the applicant if it had good cause to do so and after having complied with the rules of natural justice. However, even having made these findings and assumptions in favour of the applicant, I correctly found that irrespective of content of the express, implied or tacit terms of the contract between the applicant and the respondent (on which I did not rule conclusively), this made no difference to my finding that the correct remedy which ought to have been followed by the applicant, if it was of the view that its contractual rights (including the possible application of the rules of natural justice and the principles of *audi alteram partem*) had been infringed, lay in contract rather than in review and that there was therefore no basis for the relief sought by the applicant in Part B and accordingly no basis for the Part A relief.

20.5.7 It was also contended that it was also not necessary for me to rule conclusively on exactly which terms governed the contractual relationship between the applicant and the respondent and the termination thereof and, therefore, whether or not the respondent had pleaded an implied term as an alternative to the express terms upon which it relied, is not relevant and takes the matter no further because, at the heart of it, there is no basis for the relief which the applicant seeks in Part B and therefore no basis for the relief that it seeks in Part A *pendente lite*.

20.6 Applicable legal principles:

20.6.1 Fundamentally, in assessing the nature and terms of the contract, I must, in an application for interim relief, consider 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.[16] 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.[17]

20.7 The respondent is correct when it avers that it was not necessary for me to decide on which version of the agreement was proved. Therefore, and despite other references in my judgment to the contract between the parties, I specifically held that "*There is, however, some dispute between the parties regarding the terms of the contracts between them*" and "*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.*"

20.8 Even if I exclude the respondent's allegations regarding a contract between the parties, what remains is an allegation by the applicant itself that there was a banking relationship between the parties. The corollary of this statement is that there must have been a contract between them. Given that the applicant is somewhat coy regarding the exact terms of this contract, I am left either to impute the usual and implied terms for banker-client relationships, or to not try to guess at all.

20.9 I chose not to guess at all. Both parties have framed the relationship in terms of contract; this includes the applicant. The applicant seeks to impute certain additional obligations over and above those contended for by the respondent. Additionally, the applicant's counsel in argument expressly disavowed any administrative law basis. All that remains upon which to base

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16 *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).

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

the relationship is contract law. And all that remains to be argued in the main review application would be whether or not that contractual relationship would (a) be open to review and (b) whether the conduct of the respondent (in terms of whichever contract is thereupon proved – bearing in mind the usual test regarding disputes of fact in applications for final relief) met the appropriate standards. This is dealt with hereinbelow.

20.10 The applicant, therefore, does not have a reasonable prospect of success on this ground.

21 The Court erred by dismissing the application on the basis that the applicant chose the incorrect cause of action; it is trite that a court cannot dismiss an application because it prefers a different cause of action to the one chosen by the parties – it must decide the application before it, and not the one it prefers.

21.1 The evidence on the papers:

21.1.1 It is apparent from the notice of motion that the applicant is seeking interim relief pending the finalisation of Part B of the notice of motion. Part B of the notice of motion is explicitly framed as a review and relies on the relevant Uniform Rule in that regard.

21.1.2 In par 5 of the founding affidavit, the applicant defines the matter as:

> "*This is an urgent application in which Talhado seeks to interdict First National Bank ("FNB") from closing its bank accounts pending the outcome of an application for final relief to review and set aside the decision of FNB to terminate the accounts.*"

21.1.3 The reference to a review is again made at par 7, 12, 103, 108 to 112, and 129 of the founding affidavit.

21.1.4 The applicant also uses language supportive of the reliance on review, rather than contractual relief, *inter alia*, in the following par of the founding affidavit:

(a) Lack of notice (par 6, 71, 76 and 111).

(b) Lack of opportunity to make representations (par 6, 103, 108, 109, and 110).

(c) Seeking to declare conduct unlawful and having it set aside (par 12).

(d) The decision defies logic (par 67)

(e) Absence of reasons (par 69, 78, 79, and 103 to 107).

(f) Termination is contrary to public policy (par 103, 117, 119 and 121).

(g) Abuse of power (par 120).

(h) Requirement to follow the rules of natural justice (in addition to what is set out hereinabove, par 110).

(i) That the decision is flawed, irrational, and arbitrary (par 112 and 126).

(j) The failure to act reasonably and in good faith (par 122 *et seq*).

21.2 My findings:

21.2.1 In par 1 of the judgment, I held that: "*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.*"

21.2.2 In par 5 of the judgment, I held that:

"*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.'"

21.2.3 At par 15 of the judgment, I held that: "*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.*"

21.2.4 At par 16 of the judgment, I held that: "*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.*"

21.2.5 At par 18 of the judgment, I held that: "*A prima facie right may be established by demonstrating prospects of success on review.*[18] *The grounds of review must be strong and likely to succeed.*[19] *This means that where there are no prospects of success on review, the application for an interim interdict must fail.*[20]"

21.2.6 At par 24.9 of the judgment, and after considering the appropriateness of the claim for review, I held that: "*Fundamentally, therefore, if there is a remedy for the applicant, it would not be a review, but a contractual claim for breach of contract.*"

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

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

[20] *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).

21.3 The applicant's contentions:

21.3.1 The applicant contends that I cannot dismiss an application because I prefer a cause of action different from the parties – I must decide the applications before me.

21.3.2 For this contention the applicant relies upon authority,[21] which states that it is for the parties to define the issues in their pleadings or affidavits, and the court must adjudicate upon the issues as defined.

21.4 The respondent's contentions:

21.4.1 The respondent contends that this is not a case where I dismissed the application because I preferred a different cause of action. To the contrary, it is alleged, I assessed the legitimacy of the cause of action which the applicant itself chose (namely an application to review the decision of the respondent) and found that there was no legal basis for such cause of action. As a result, the Learned Judge correctly dismissed the application.

21.5 Applicable legal principles:

21.5.1 These are cited by the applicant, and I have referred to them above.

21.6 I was called upon to decide whether or not the applicant was entitled to an urgent interim interdict. In order to do so, I was required to determine whether the applicant had a *prima facie* right deserving of protection. A *prima facie* right may be established by demonstrating prospects of success on review.[22] The grounds of review must be strong and likely to succeed.[23] This

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[21] *Fischer and Another v Ramahlele and Others* 2014 (4) SA 614 (SCA) at [13].
[22] *SA Informal Traders Forum and Others v City of Johannesburg and Others* 2014 (4) SA 371 (CC) at [25] – [28].
[23] *Economic Freedom Fighters v Gordhan and Others; Public Protector and Another v Gordhan and Others* 2020 (6) SA 325 (CC) at [42].

means that where there are no prospects of success on review, the application for an interim interdict must fail.[24]

21.7 The reason that I was compelled to follow this analysis of the prospects of success on review, was because the applicant itself had defined its Part B relief as a review. Because of this, I had to assess whether or not there was any chance of the review succeeding. Whether or not I would have sought different relief in Part B is neither here nor there. What is important is whether or not the conduct of the respondent in terminating the relationship between the parties was, in fact, reviewable.

21.8 Any suggestion of a more preferable Part B only arose because of the analysis of the current law applicable to the relationship between banker and client.

21.9 The applicant, therefore, does not have a reasonable prospect of success on this ground.

22 I find myself compelled to state that it seems to me that what has been dealt with until now has been buckshot fired from a shotgun in the hopes that some of it will stick. The real issue is the correctness of my findings relating to the reviewability of the termination of the parties' relationship. I turn now to the grounds raised by the applicant relating to that issue.

23 The *Jockey Club* cases

23.1 It is contended that I erred in finding that the Jockey Club cases apply in a case of the abuse by the respondent of private power that approximates public power, and that, in this sense, the action of the respondent does not fall to be reviewed at the common law (as in the Jockey Club cases).

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[24] *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).

23.1.1 In this regard, it is contended that the Jockey Club cases were all related to contractual disputes where a decision to terminate a contract was the subject of review and the courts in those cases held that the applicants in those cases were entitled to review, in terms of the common law, where the contract and the nature of the relationship between the parties required the rules of natural justice to apply to that contract – that is, when a contract sets up a 'tribunal' or 'adjudicating body' or it postulates an enquiry; and

23.2 It is then contended that I erred in finding that the Forum established by the respondent was not such a tribunal or adjudicating body.

23.3 The legal position regarding the *Jockey Club* cases:

23.3.1 My findings:

(a) At par 24.4, I found that: "*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*[25]*).*"

(b) At par 26, I found 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.*"

23.3.2 Applicant's contentions:

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

(a) The applicant contends that the court's review powers do not turn on whether or not the power in question is a "*private power that approximates public power*".

(b) Rather, it is contended, all of the *Jockey Club* cases related to contractual disputes where a decision to terminate a contract was the subject of review. The courts held that they were entitled to review decisions where the contract and the nature of the relationship between the parties required that the rules of natural justice apply.

(c) The *Jockey Club* cases held that the rules of natural justice apply where the contract sets up a 'tribunal' or 'adjudicating body' or it postulates and enquiry. In this regard, the applicant relies on *Thandroyen v Sister Anunicia and Another* 1959 (4) SA 632 (N) and *Dansell v The Southern Life Association Limited* (1992) 13 ILJ 533 (C).

(d) In *Bae Estates* it was held that the name of the body is irrelevant. Rather, what is important is the effect of the decision and its implications for the subject against whom it was directed.

23.3.3 Respondent's contentions:

(a) The applicant contends that the application of the rules of natural justice in contract are a "*long standing common-law principle of law*". However, the applicant is immediately forced to concede that this broad statement must be limited and that the principles of natural justice will only apply where the contract has "*set up something of the nature of a tribunal (which may be a tribunal of one) to decide matters affecting the parties.*"[26] In other words it is only where the contract is construed as setting up a 'tribunal' or 'adjudicating body' or as 'postulating an enquiry' that the rules of natural justice apply.[27]

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[26] *Thandroyen v Sister Anunicia and Another* 1959 (4) SA 632 (N) at 639F-640A
[27] *Dansell v The Southern Life Association Limited* (1992) 13 ILJ 533 (C) at 539F-H

(b) Within this context, the applicant attempts to cast the respondent's Forum, as a 'tribunal' or 'adjudicating body' such that the rules of natural justice apply to decisions made by the respondent. This attempt by the applicant to cast the respondent's Forum is incorrect and is an artificial attempt to create a right of review within the context of the cancellation of a contractual relationship when the Supreme Court of Appeal has held that no such right of review exists. This is not a basis for this Court to grant the applicant leave to appeal against the judgment.

(c) It is precisely because the so-called *Jockey Club* cases concerned the termination of contracts in circumstances where the contracts had set up something in the nature of a tribunal to decide matters affecting parties[28] that in those cases there was a requirement for the application of the rules of natural justice and, in circumstances where those rules were not complied with, a common law right of review. The *Jockey Club* cases are clearly distinguishable from the facts of this case and at odds with the principles established in *Multichoice Support Services*.

23.3.4 The legal position:

(a) I am prepared to concede that, in regards to common law reviews generally, the court's review powers do not turn on whether or not the power in question is a "*private power that approximates public power*".

(b) The phrase "*private power that approximates public power"* was used in the *Bredenkamp* decision, about which more below, with reference to an article by Dikgang Moseneke "Transformative constitutionalism: Its implications for the law of contract" 20 (2009) *Stell LR* 3 at 11.

(c) It was the decision in *Bredenkamp* that held that a bank terminating its agreements with its clients would have to have exercised a *private power that*

[28] *Thandroyen v Sister Anunicia and Another* 1959 (4) SA 632 (N) at 639F-640A

approximates public power, in order for an attack on the decision to terminate to succeed.

(d) Without citing every one of a long line of cases, certain examples may be given of the nature of 'tribunals' set up in the *Jockey Club* cases:

(e) In *Turner v Jockey Club of South Africa* [1974] 4 All SA 52 (A) at 54; 1974 (3) SA 633 (A) at 645, it is held that

"*It is clear, I think, that the reference to "the nature of the tribunal", in its context in the passage cited, is a reference to the nature of the tribunal's constitution, i.e. according to whether it was created by statute or by contract*." [own emphasis]

(f) In *Theron en Andere v Ring van Wellington van die NG Sendingkerk in Suid-Afrika en Andere* [1976] 2 All SA 286 (A) at 301 and 319; 1976 (2) SA 1 (A) at 23 and 41, it is held that:

"*Vanweë die invloed van die Engelse reg op ons regspraak t.o.v. hierdie hele terrein, is dit insiggewend hoe die hedendaagse Engelse Hof die beslissing van 'n huishoudelike tribunaal, deur ooreenkoms geskep, benader. …DENNING, L.J., sê in sy uitspraak dat, hoewel partye by ooreenkoms huishoudelike tribunale kan skep om hulle geskille op te los,*…" [own emphasis]

(g) In *Thandroyen v Sister Anunicia and Another* 1959 (4) SA 632 (N) at 639F-640A, it was held that:

"*The principles of natural justice will apply only if the parties have imported them into their contract. Speaking generally they will not be held to have done so unless the contract has set up something in the nature of a tribunal (which may be a tribunal of one) to decide matters affecting the parties. Such a tribunal will be bound by the principles of natural justice, unless indeed the parties have in their contract provided otherwise, as they are perfectly entitled*

to do. But if the contract sets up no such tribunal, there will be no room for the application of the principles of natural justice, whether on the ground of public policy or otherwise." [own emphasis].

(h) It is, therefore, apparent to me that the line of *Jockey Club* cases relates primarily to situations where the contract between the parties has set up a tribunal (of whatever nature) to resolve disputes between the parties.

(i) Accordingly, the applicant is not correct when it contends that the *Jockey Club* cases related to all contractual disputes where a decision was taken to terminate a contract; the 'decision' in these cases were taken by tribunals *created by the agreement between the parties*.

23.3.5 *Bae Estates*:

(a) I have already dealt with why the decision on *Bae Estates* is not preferred as decisive in this matter.

23.3.6 The position of the Forum:

(a) The evidence relating to the Forum is as follows:

(i) At par 34 of the answering affidavit, the respondent cites clause 10 of the terms and conditions relied upon it. The clause provides that the respondent may terminate the relationship with a client if it has reason to believe that a continued relationship with the client will expose it to reputational or business risk. The remainder of the terms and conditions do not refer to the Forum.

(ii) At par 38 of the answering affidavit, the respondent refers to the Forum as the entity within it which made the decision no longer to bank with entities within the Sekunjalo Group, including the applicant.

(iii) At par 65, 66, 210, 213 and 218 of the answering affidavit, the respondent again refers to the Forum as the level at which the decisions were taken to terminate the relationship with the applicant and not to grant an extension to the termination date.

(iv) The contractual basis of the relationship between the parties has, throughout, been disputed by the applicant. This is evident from, *inter alia*, par 54, 55, 162, and 187 of the replying affidavit.

(v) At par 59 and 106 of the replying affidavit, the applicant notes, or otherwise refers to, the fact that it was the Forum that made the relevant decisions.

(vi) The applicant never puts up the agreement(s) which it alleges forms the basis of the relationship between the parties.

(b) Given what is set out above, there is no *evidence* before me that Forum was (a) created by contract between the parties, and (b) to resolve disputes between them.

(c) I was therefore unable to find that the Forum was a 'tribunal' as required by the Jockey Club cases.

23.3.7 Conclusion

(a) The applicant, therefore, and without more, does not have a reasonable prospect of success on this ground.

24 The Court erred by failing to make any finding in respect of the applicant's argument that the effect of the Banks Code is to subject the respondent's decision to judicial review.

24.1 The applicant contends that I am obliged to decide all the issues before me, and not just the issues I consider to be dispositive. In support of this, the

applicant relies on *Spilhaus Property Holdings (Pty) Ltd and Others v MTN and Another* 2019 (4) SA 406 (CC) at [44] – [45].

24.2 The respondent contends that the Conduct Standard for Banks 3 of 2020 ("the Bank Code") was introduced after the decision of the Supreme Court of Appeal in *Bredenkamp*. The Bank Code does not require banks to apply the principles of natural justice and *audi alteram partem* in making a decision to terminate their relationships with customers and to close bank accounts. All that is required by the Bank Code is for banks to provide reasons for the termination of banking services. Had the legislature required banks to afford customers a hearing or a right to make representations prior to the closure of their accounts, it would no doubt have included such provisions in the Bank Code in 2020.

24.3 The respondent further contends that it has in any event provided the applicant with reasons for the closure of its accounts in compliance with the provisions of the Bank Code. That reason is that its association with entities within the Sekunjalo Group was identified as a source of reputational risk to the respondent. As the Supreme Court of Appeal held in *Bredenkamp*, the respondent is not required to interrogate negative allegations against entities within the Sekunjalo Group. It is entitled to assume that they are in fact untrue. The truth or otherwise of the allegations is not the test for a bank's ability to close the bank accounts of a customer based on the reputational risk that the relationship poses to the bank.

24.4 It is correct that I failed to make any finding in respect of the applicant's argument that the effect of the Bank Code is to subject the respondent's decision to judicial review.

24.5 If one has regard to the Bank Code, the following is apparent:

"…

"retail financial customer" means a financial customer that is –

(a) a natural person; or

(b) a juristic person, whose asset value or annual turnover is less than [R 2 million][29]

…

2. Application and general obligations

(1) Subject to subsection (3), this Conduct Standard is applicable to banks in relation to their provision of financial products and financial services.

…

(4) A bank must conduct its business in a manner that prioritises the fair treatment of financial customers.

(5) The fair treatment of financial customers by banks includes achieving at least the following outcomes:

(a) Financial customers can be confident that they are dealing with a bank where the fair treatment of financial customers is central to the bank's culture;

…

(c) financial customers are given clear information and are kept appropriately informed before, during and after the time of entering into a contract in respect of a financial product or financial service offered or provided by a bank;

…

[29] GN 294 of 1 April 2011: Determination of threshold in terms of the Act (*Government Gazette* No. 34181).

3. Culture and governance

(1) A bank must at all times –

…

(b) act … fairly … ;

…

(f) conduct its business transparently and with due regard to the information needs of its financial customers.

…

9. … withdrawal or closure of financial products or financial services by the bank

…

(2) Subject to subsection (4), a bank may not [withdraw, terminate or close a financial product or financial service in respect of one or more of its financial customers] *without providing reasonable prior notice of the withdrawal, termination or closure to the financial customer.*

(3) Subject to subsection (4), a bank must, when it [withdraws, terminates or closes a financial product or financial service in respect of one or more of its financial customers]*, disclose to the financial customer the reasons for the … withdrawal, termination or closure.*

…"

24.6 The applicant, at par 104 through 107 of the founding affidavit, relies on section 9(3) of the Banks Code, to wit, the requirement to provide reasons for the termination of the relationship between the parties. The applicant contends that the respondent advising that the relationship was terminated because of "*associated reputational and business risks*" does not meet the standard prescribed by the Banks Code.

24.7 The respondent, at par 159 of the answering affidavit, simply contends that the phrase used was sufficient to meet the requirements of the Banks Code.

24.8 In order to determine whether or not the reasons are adequate, given sections 2 and 3 of the Banks Code, one would need to consider a variety of factors, including, but not limited to: the factual context of the decision, the nature and complexity of the decision, the nature of the proceedings leading up to the decision and the nature of the functionary taking the decision. Depending on the circumstances, the reasons need not always be 'full written reasons'; the 'briefest *pro forma* reasons may suffice' . . . Whether brief or lengthy, reasons must, if they are read in their factual context, be intelligible and informative. They must be informative in the sense that they convey why the decision–maker thinks (or collectively think) that the decision is justified.[30] These reasons need not be intelligible and informative with the benefit of hindsight, however. They must from the outset be intelligible and informative to the reasonable reader thereof who has knowledge of the context of the decision. This is, therefore, an objective test.[31]

24.9 It appears to me, from the content of the Banks Code, that it imports certain terms into the contracts between the parties. Accordingly, an application thereof may have an impact on the outcome of the matter.

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[30] *Commissioner*, *SAPS v Maimela* 2003 3 All SA 298 (T); 2004 1 BCLR 47 (T); 2003 5 SA 480 (T) 485G–486C; *Koyabe v Minister for Home Affairs* 2009 12 BCLR 1192 (CC); 2010 4 SA 327 (CC) par 64 (both of these in the context of administrative decisions).

[31] *Commissioner*, *SAPS v Maimela* 2003 3 All SA 298 (T); 2004 1 BCLR 47 (T); 2003 5 SA 480 (T) 486F–H; *Koyabe v Minister for Home Affairs* 2009 12 BCLR 1192 (CC); 2010 4 SA 327 (CC) par 64 (both of these in the context of administrative decisions).

24.10 I ought, therefore, to have considered its application.

24.11 I deal with the effect of the Bank Code below.

25 The *Beadica* matter:

25.1 It is contended that I erred:

25.1.1 in failing to find that the judgment in *Beadica 231 CC and Others v Trustees, Oregon Trust and Others 2020 (5) SA 247* (CC) governed the matter before it, and to thereupon apply the principles enunciated therein to the instant matter.

25.1.2 in failing to apply binding precedent when she held that: "*The applicant also seeks to rely on Beadica 231 CC and Others v Trustees, Oregon Trust and Others 2020 (5) SA 247 (CC). … 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.*"

25.1.3 in simply dismissing the force of *Beadica* without engaging with the principles articulated therein.

25.2 The applicant contends that:

25.2.1 In *Beadica*, the Constitutional Court pointed out that *Bredenkamp* and his affected entities never suggested that any constitutional value was implicated by the bank's conduct. If that is done, then the court should determine whether the limitation of the right is fair and reasonable.

25.2.2 In this matter, the applicant relied on section 34 of the Constitution as a constitutional value implicated by the conduct of the respondent. In particular, the applicant contends that it relied on section 34 as guaranteeing it a right to the fundamental rules of natural justice.

25.2.3 The applicant cannot be held to the term entitling the respondent to terminate the relationship, because the respondent did not prove that the applicant agreed to the term.

25.2.4 Further, the term entitling the respondent to terminate the relationship is not valid because it is against public policy.

25.3 The respondent contends that:

25.3.1 Section 34 of the Constitution guarantees every person the right to have a dispute which is capable of resolution by the application of law decided in a fair public hearing before a court or, where appropriate, another appropriate tribunal. Section 34 of the Constitution does not guarantee a private party to a contract the right to the application of the rules of natural justice or *audi alteram partem* in respect of a decision by another private party to terminate that contract.

25.3.2 My judgment does not deprive the applicant of its Constitutional rights in terms of section 34. I simply require the applicant to follow a cause of action which is recognised as being capable of resolution by the application of law.

25.3.3 For the reasons set out above, in the circumstances of this case, and as has been held by the Supreme Court of Appeal in *Multichoice Support Services* this does not include a review of a decision by a private party to terminate an agreement with another private party.

25.3.4 That the Courts have recognised the importance of contractual terms having regard to considerations of public policy as infused by Constitutional values is relevant to contractual remedies which the applicant might have and does not give rise to an independent right of review on the part of the applicant.

25.3.5 The argument by the applicant accordingly takes the matter no further and does not give rise to an independent basis upon which to review the decision of the respondent.

25.4 At par 28 of the judgment, I held that "*The applicant also seeks to rely on … 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*".

25.5 The applicant's case on the papers:

25.5.1 I have already set out the portions of the papers which define the applicant's cause of action in Part B of the Notice of Motion as a *review*.

25.5.2 At par 103 of the founding affidavit, the grounds of the review are said to include (a) the failure to furnish reasons,[32] (b) the failure to apply the rules of natural justice before termination,[33] and (c) that the closure was contrary to public policy.[34]

25.5.3 At par 127 through 135, the applicant adverts to section 34 of the Constitution which entitles the applicant to have its case ventilated before the courts. Section 34 also guarantees the rules of natural justice.

25.5.4 Whilst the applicant reserved "*the right to supplement its case in relation to the relief sought*" under Part B, it did not appear to accept that there may be a need to amend the form of that relief.

25.6 Relevance of *Beadica 231 CC and Others v Trustees, Oregon Trust and Others* 2020 (5) SA 247 (CC) to the instant matter:

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[32] Expanded upon at par 104 to 107 of the founding affidavit.
[33] Expanded upon at par 108 to 112 of the founding affidavit.
[34] Expanded upon at par 113 to 126 of the founding affidavit.

25.6.1 The Constitutional Court defined the matter before it as follows:

> "*[1] This application concerns the proper constitutional approach to the judicial enforcement of contractual terms and, in particular, the public policy grounds upon which a court may refuse to enforce these terms. The extent to which a court may refuse to enforce valid contractual terms on the basis that it considers that enforcement would be unfair, unreasonable or unduly harsh is a burning issue in the law of contract in our new constitutional era.*" [own emphasis]

25.6.2 The court then went on to hold that:[35]

> "*The impact of the Constitution on the enforcement of contractual terms through the determination of public policy was profound. As was stated in Barkhuizen, it required that courts 'employ [the Constitution and] its values to achieve a balance that strikes down the unacceptable excesses of freedom of contract, while seeking to permit individuals the dignity and autonomy of regulating their own lives'. Public policy imported values of fairness, reasonableness and justice, and ubuntu, which encompassed these values, was now also recognised as a constitutional value, inspiring our constitutional compact, which in turn informed public policy. Many established doctrines of contract law are themselves the embodiment of these values, such as those concerning fraud, duress, misrepresentation, estoppel, implied terms and rectification. (See [71] – [73.)*
>
> *While abstract values provide a normative basis for the development of new doctrines, prudent and disciplined reasoning was required to ensure certainty of the law and respect for the doctrine of separation of powers. The scope for the development of new common-law rules in our law of contract was broad: constitutional values had an essential role to play in the development of constitutionally infused common-law doctrines. In developing the common law, courts must develop clear and ascertainable rules and doctrines ensuring*

[35] Taken from the headnote.

that our law of contract was substantively fair, whilst at the same time providing predictable outcomes for contracting parties. This was what the rule of law, a foundational constitutional value, required. (See [76], [78] and [81].)

A court may however not refuse to enforce contractual terms on the basis that the enforcement would, in its subjective view, be unfair, unreasonable or unduly harsh. These abstract values have not been accorded autonomous, self-standing status as contractual requirements. Their application was mediated through the rules of contract law, including the rule that a court may not enforce contractual terms where the term or its enforcement would be contrary to public policy. It was only where a contractual term, or its enforcement, was so unfair, unreasonable or unjust that it was contrary to public policy that a court may refuse to enforce it. (See [80].)"

25.7 I accept that public policy plays an important role in determining *the validity and enforceability of terms of a contract*.

25.8 In that sense, *Beadica*, very definitely would apply to the matter, if the applicant had chosen a contractual cause of action for Part B of the Notice of Motion. It did not. I have dealt with this previously herein.

25.9 Additionally, and insofar as the applicant contends that it relies on section 34 of the Constitution as guaranteeing to it the application of the rules of natural justice *by the Forum, rather than at the time of adjudication by a court*, section 34 provides that:

"*Everyone has the 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.*"

25.10 The provision takes account of the need for specialist tribunals. An example of this would be the Competition Tribunal, established in terms of the Competition Act 89 of 1998 to adjudicate on a range of matters relating to the promotion of competition. The body, thus, consists of impartial, and expert,

members who are appointed for a fixed term and who can only be removed for specific reasons.[36]

25.11 It has been held that section 34 cannot be employed to find that administrative tribunals are required to adopt the same procedures as are to be found in a court.[37] However, it has been argued,[38] on the basis that section 34 is seen as part of the broad principle of the rule of law, that the failure of a tribunal (as opposed to a court) to adhere to a minimum standard of justice would render its manner of operation unconstitutional.

25.12 I have set out hereinabove why I was unable to find that the Forum was a 'tribunal' as required by the Jockey Club cases. For the same reason, I am unconvinced that the Forum has been shown to be an "*independent and impartial tribunal or forum*" as referred to in section 34 of the Constitution.

25.12.1.1 On that basis, the applicant does not have reasonable prospects of success on appeal.

26 The matter of *Bredenkamp*:

26.1 It is contended that I erred when finding that I was constrained to apply the legal principles as set out in *Bredenkamp*. It is further contended, in this regard, that I failed to appreciate that the applicant, unlike Bredenkamp, had invoked a constitutional right when it relied on section 34 of the Constitution as a *prima facie* right to access to courts.

26.1.1 As set out by Fabricius J in *Annex Distribution* at [11]:

"*It was said that the substance of the applicants' rights under s 34 is the right to have the disputes about the loan facility agreements and termination letters properly heard by a court. This provision emphasises the rights of a party to*

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36 Cheadle *South African Constitutional Law: The Bill of Rights* (LexisNexis) 28-8(1).
37 *Hamata and Another v Chairperson, Peninsula Technikon Internal Disciplinary Committee and Others* [2000] 3 All SA 415 (C).
38 Cheadle *South African Constitutional Law: The Bill of Rights* (LexisNexis) 28-8(2).

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 applicants have 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 in the present context is, put very simply, that the applicants 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 be balanced. This right to be heard must also be subject to all relevant provisions of procedural law, such as the Uniform Rules of Court." [own emphasis]

26.1.2 Accordingly, even where the applicant relies on section 34 *for access to the court*,[39] I am still required to consider the substantive law. *Bredenkamp* forms part of this substantive law.

26.2 It is further contended that I erred:

26.2.1 in the strict application of *Bredenkamp* to the present facts, as *Bredenkamp* is distinguishable both in fact and in law from the applicant's case.

26.2.2 in finding that the principles enunciated in *Bredenkamp* should be applied while failing to consider the legislation that was enacted after *Bredenkamp*, the Conduct Standard for Banks 3 of 2020 ("the Bank Code") which is a legislative tool, specifically formulated to offer greater protection for consumers.

[39] I have already dealt with why the applicant has not shown that the Forum falls within section 34 of the Constitution.

26.2.3 in not dealing with the consequences of the Bank Code obligation for reasons on the finding in *Bredenkamp* and the respondent's decision.

26.3 Applicability of *Bredenkamp* in the absence of the Bank Code:

26.3.1 In addition to the other contentions revolving around the misapplication of *Bredenkamp* in light of the other decisions already referred to herein[40], the applicant contends that:

(a) *Bredenkamp* is distinguishable in fact and in law from the instant case, and therefore should not have found application.

(b) *Bredenkamp* is not absolute law, and should not be used uncritically or applied mechanically to any and all bank-client relationships.

26.3.2 My findings:

(a) At par 23 to 24, I held that:

"*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):

…

[40] With which I have dealt already, and to which conclusions I refer.

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."

26.3.3 I have re-read the decision in *Bredenkamp* and note the following regarding the facts:

(a) The Supreme Court of Appeal had before it some greater evidence of what caused the negative reputation under which *Bredenkamp* and his associated companies suffered.[41]

(b) Besides this, the court held that:[42]
" … the submission, that the bank's decision to close the accounts was procedurally and substantively unfair, was without basis. Procedures to establish the truth of the allegations underlying the account closures would in any event have been irrelevant since the closure was based not on the merits of the allegations, but on the fact of listing and the risks it posed for the bank. The same argument applied to the second appellant's reputation, where the bank relied on the fact of his reputation and not the truth of it. As for the objection by the appellants that in respect of the second appellant's reputation, the bank had relied on facts only determined after closure of the accounts, our case law confirmed that party has always had the right to justify a cancellation with objective facts unbeknown to that party at the time when the cancellation took place. (Paragraphs [61] and [63] at 486B - E and 486F - 487A.)" [own emphasis]

(c) It is apparent from this that the Supreme Court of Appeal did not seek to go into more than the fact of the reputation, rather than the truth of the facts giving rise to it.

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41 *Bredenkamp v Standard Bank of South Africa Ltd* 2010 (4) SA 468 (SCA) par [12] through [20].
42 Taken from the headnote.

(d) Having said that, the respondents did set out in some detail in the answering affidavit the allegations against the Dr Survé and the Sekunjalo Group, and why that causes some embarrassment and risk for it.

(e) At no time will the facts in such cases be mirror images of each other.

(f) I am, however, of the opinion that the respondent did enough to set out why there was business or reputational risk associated with doing business with the Sekunjalo Group entities.

26.3.4 The applicant therefore has no reasonable prospects of success in respect of this ground.

26.3.5 I have re-considered the legal principles assessed in *Bredenkamp*. It is apparent that, *inter alia*:

(a) The appellants in did not base their claims on the infringement of any constitutional values, accordingly the matter was about fairness as an overarching principle, and nothing more.[43]

(b) The court considered the principles of public policy and constitutional values and the impact they have on the enforcement of contractual terms.[44]

(c) The court held that the decision of *Barkhuizen v Napier* 2007 (5) SA 323 (CC) (2007 (7) BCLR 691) confirmed that a contractual term which only limited a constitutional right, as opposed to one which deprived someone of it, was not necessarily contrary to public policy, but would be so if it were unreasonable and unfair.[45] Accordingly, contracts that were prima facie unconstitutional were unenforceable. Where the enforcement of a prima facie innocent contract implicated an identified constitutional value and such value was unjustifiably affected, the term should not be enforced. Similarly, if a

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[43] Par [27] at 477D; [30] at 478B - C.
[44] Par [38] at 480E – F, [39] at 481C - D.
[45] Par [44] at 482C - D.

contract imposed a limitation on a constitutional value within the meaning of section 36 of the Constitution, the court should assess whether, at the time of enforcement, the limitations were still fair and reasonable in the circumstances.[46]

(d) It also held that it was 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.[47]

(e) It is, therefore, apparent that the scope of the investigation into in *Bredenkamp* was narrower than in the instant matter.

(f) I remain unconvinced, however, that principles in *Bredenkamp* are not apposite to the instant matter. The decision clearly explains the relationship between a bank and its clients and goes further to explain that a proper attack on the termination would need to either implicate a constitutional value or attack the term of the contract on which the termination is based.

(g) In that regard, the applicant is correct in seeking to attack the termination by alleging the implicating of constitution rights and the infringement of public policy.

(h) However, and even when applying the Constitution and the requirements of public policy, it is apparent that the appropriate cause of action under which to attack the termination is a contractual cause of action – either declaring the term of the contract invalid and unenforceable, or seeking specific performance of the specific term which included the procedural rights for which the applicant contends and which had been breached by the respondent. The appropriate cause of action is not a review.[48]

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[46] Par [47] and [48] at 483A – D.
[47] Par [65] and [66] at 487D - E.
[48] In this regard, I refer to what has already been stated about *Multichoice Support Services*, Fabricius J in *Annex Distribution*, and *Beadica*.

(i) Accordingly, and whilst the applicant may be correct in the limited application of *Bredenkamp*, the correct application of *Bredenkamp* will not result in a change of the order herein on appeal.

(j) Accordingly, the applicant has no reasonable prospects of success on appeal in respect of this ground.

26.4 Applicability of *Bredenkamp* in the face of the Bank Code:

26.4.1 The application of the Bank Code will likely result in later decisions distinguishing *Bredenkamp* from the present position, as the Bank Code now imports certain terms into the contracts between the parties.

26.4.2 However, and even when applying Bank Code to the agreement between the parties (which agreement has not actually been proved), as well as the Constitution and the requirements of public policy, it is apparent that the appropriate cause of action under which to attack the termination is a contractual cause of action – either declaring the term of the contract invalid and unenforceable, or seeking specific performance of the specific term which included the procedural rights for which the applicant contends and which had been breached by the respondent. The appropriate cause of action is not a review.[49]

26.4.3 Accordingly, and whilst the applicant may be correct in the limited application of *Bredenkamp*, the correct application of *Bredenkamp* will not result in a change of the order herein on appeal.

26.4.4 Accordingly, the applicant has no reasonable prospects of success on appeal in respect of this ground.

27 There are reasonable prospects, given the complexity of the issues, that another court would come to a different conclusion.

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[49] In this regard, I refer to what has already been stated about *Multichoice Support Services*, Fabricius J in *Annex Distribution*, and *Beadica*.

27.1 As set out hereinabove, and upon a proper analysis of the facts and the legal principles, I am of the view that the issues are not complex – they amount to a simple determination of what the appropriate cause of action would be in Part B of the Notice of Motion.

27.2 If the cause of action in Part B can never be appropriate or successful, then the applicant cannot show that it has a *prima facie* right.

27.3 In the instant matter, it has been shown that the review sought to be launched by the applicant can never be appropriate or successful. Therefore, the applicant cannot show that it has a *prima facie* right.

27.4 Accordingly, there are no reasonable prospects that another court will come to a different conclusion.

Additional grounds

28 Whether or not conflicting SCA and High Court authorities is a compelling reason for granting leave to appeal – in this case:

(a) *Multichoice Support Services (Pty) Ltd v Calvin Electronics t/a Batavia Trading and Another* [2021] JOL 51351 (SCA) and *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

(b) *Annex Distribution (Pty) Limited and Others v Bank of Baroda* [2017] ZAGPPHC 639 (per Makgoka J) and *Annex Distribution (Pty) Ltd and Others v Bank of Baroda* 2018 (1) SA 256 (GP) (per Fabricius J).

28.1 I have previously analysed both sets of cases. It is clear that the decisions relate to completely different facts and/or the legal issue are sufficiently different that they are not “conflicting authorities”.

28.2 Accordingly, and in respect of this ground, the applicant has no reasonable prospect of success on appeal.

29 Whether or not this matter raises an arguable point of law of general public importance:

(a) Whether the decision of a bank to terminate a client's bank account is subject to review;

(b) Whether the court's review powers are only limited to administrative action;

(c) Whether the rules of natural justice apply to decisions of private bodies, and if so, when;

(d) Whether the requirement for furnishing reasons renders the decision of a bank reviewable, and if so, under what circumstances;

29.1 The applicant contends that this matter raises the abovementioned issues which are arguable points of law of general public importance and/or the administration of justice which requires consideration by the Supreme Court of Appeal or the Full Court, as contemplates in section 17(6) of the Superior Courts Act 10 of 2013.

29.2 The respondent contends that:

(a) The applicant’s contention set out above appears to be a separate basis to support its application for leave to appeal. However, section 17(6) of the Act does not provide a separate or self-standing basis upon which leave to appeal may be sought. Rather, section 17(6) of the Act determines whether an appeal, in respect of which leave has already been granted in terms of section 17(1) and 17(2) of the Act, ought to be heard by the Full Court or the Supreme Court of Appeal.

(b) This consideration only arises once an applicant for leave to appeal has demonstrated that there would be a reasonable prospect of success of its appeal in terms of section 17(1)(a)(i) or another compelling reason for the appeal to be heard in terms of section 17(1)(a)(ii). Unless this threshold is met, there can be no consideration of whether or not the case in question raises questions of law of importance which justify the consideration of the Full Court or the Supreme Court of Appeal.

(c) In any event, this case does not raise arguable points of law of general public importance that require the attention of an appellate court. The Supreme Court of Appeal has already determined in *Multichoice Support Services* that there is no right of review in respect of the cancellation of a contract between private parties. There is no prospect that another court would come to another conclusion.

29.3 The legal principles:

(a) Section 17(6) of the Act provides:

"*(6)(a) If leave is granted under subsection (2)(a) or (b) to appeal against a decision of a Division as a court of first instance consisting of a single judge, the judge or judges granting leave must direct that the appeal be heard by a full court of that Division, unless they consider —*

(i) that the decision to be appealed involves a question of law of importance, whether because of its general application or otherwise, or in respect of which a decision of the Supreme Court of Appeal is required to resolve differences of opinion; or

(ii) that the administration of justice, either generally or in the particular case, requires consideration by the Supreme Court of Appeal of the decision, in which case they must direct that the appeal be heard by the Supreme Court of Appeal."

(b) The general aim of this subsection is to place a qualitative limitation on the cases coming on appeal to the Supreme Court of Appeal.[50]

(c) As far as questions of law are concerned, the test is not the difficulty or complexity of such a question, but rather whether the question of law is *res nova* or involves a matter of principle rendering it important. If the law is not really controversial, the matter should be heard by the full court of the division of the High Court concerned.[51]

(d) If one applies the sub-rule upon which the applicant relies, it becomes apparent, from the wording of the sub-rule no less, that the issues of legal importance and administration of justice only come into consideration "[i]*f leave is granted under subsection (2)(a) or (b) to appeal*."

29.4 Application of the legal principles:

(a) As I do not propose to grant leave to appeal, the sub-rule does not come into consideration.

(b) Insofar as the applicant intended to rely upon section 17(1)(a)(ii) of the Act, it was still required to show that there is a compelling reason why the appeal should be heard.[52] As far as compelling reasons[53] are concerned, the

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[50] Cf *Westinghouse Brake & Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd* 1986 (2) SA 555 (A) at 562B.

[51] *Erasmus Superior Court Practice* RS 18, 2022, A2-60 to A2-61.

[52] See also *Tansnat Durban (Pty) Ltd v Ethekwini Municipality* (unreported, KZD case no D4178/2020 dated 8 February 2021) at par [12].

[53] Such as the fact that the decision sought to be appealed against involves an important question of law (as contemplated in s 17(6)*(a)*(i) of the Act. See *Caratco (Pty) Ltd v Independent Advisory (Pty) Ltd* 2020 (5) SA 35 (SCA) at para [2] and *Tansnat Durban (Pty) Ltd v Ethekwini Municipality* (unreported, KZD case no. D4178/2020 dated 8 February 2021) at para [13]); that the administration of justice, either generally or in the particular case concerned, requires the appeal to be heard (as contemplated in s 17(6)*(a)*(ii) of the Act. See *Minister of Justice and Constitutional Development v Southern Africa Litigation Centre* 2016 (3) SA 317 (SCA) at 330C–F); and the existence of differing interpretations, concretized in two judgments, of another judgment (*Vosloo NO v The South African Medical Association NPC* (unreported, GP case no 44983/2020 dated 13 May 2022) at [3]).

merits of the prospects of success remain vitally important and are often decisive.[54]

(c) Given what has been set out hereinabove and with particular reference to the decision of *Multichoice Support Services*, I am of the view that the applicant has no reasonable prospects of success.

(d) Accordingly, I am of the view that, even on this basis, leave to appeal should be refused.

Costs

30 As a result of the wide-ranging arguments herein and, no doubt, as a result of the importance of the matter to the parties, both parties rightly appeared with at least two counsel throughout this matter. I am of the view that this was a prudent step to take. I am, therefore, satisfied that the successful party should be awarded costs of two counsel.

Order

31 In light of what is set out above, the following order shall issue:

1. The application for leave to appeal is dismissed with costs, including the costs of two counsel.

M BENEKE

JUDGE OF THE HIGH COURT (ACTING)

Appearances: For the Applicant:

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[54] *Minister of Justice and Constitutional Development v Southern Africa Litigation Centre* 2016 (3) SA 317 (SCA) at 330C; *Caratco (Pty) Ltd v Independent Advisory (Pty) Ltd* 2020 (5) SA 35 (SCA) at par [2].

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