IN THE NORTH GAUTENG HIGH COURT, PRETORIA

[REPUBLIC OF SOUTH AFRICA]

CASE NO: 52590/2017

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

12 /03/ 2018 ....
DATE SIGNATURE

In the matter between:

ANNEX DISTRIBUTION (PTY) LTD	**First**	**Applicant**
CONFIDENT CONCEPTS (PTY) LTD	**Second**	**Applicant**
SAHARA COMPUTERS (PTY) LTD	**Third**	**Applicant**
VR LASER SERVICES (PTY) LTD	**Fourth**	**Applicant**
SAHARA CONSUMABLES (PTY) LTD	**Fifth**	**Applicant**
INFINITY MEDIA NETWORKS	**Sixth**	**Applicant**
ISLANDSITE INVESTMETS ONE HUNDRED AND EIGHTY (PTY) LTD	**Seventh**	**Applicant**
KOORNFEONTEIN MINES (PTY) LTD	**Eighth**	**Applicant**
OAKBAY INVESTMENTS (PTY) LTD	**Nineth**	**Applicant**
OAKBAY RESOURCES & ENERGY (PTY) LTD	**Tenth**	**Applicant**

OPTIMUM COAL MINE (PTY) LTD	Eleventh	Applicant
SHIVA URANIUM (PTY) LTD	Twelfth	Applicant
TEGETA EXPLORATION AND RESOURCES (PTY) LTD	Thirteenth	Applicant
WESTDAWN INVESTMENTS (PTY) LTD	Fourteenth	Applicant
IDWALA COAL (PTY) LTD	Fifteeth	Applicant
TEGETA RESOURCES (PTY) LTD	Sixteenth	Applicant
MABENGELA INVESTMENTS (PTY) LTD	eventeenth	Applicant
MABENGELA RESOURCES ENERGY (PTY) LTD	Eighteenth	Applicant
KOORNFONTEIN REHABILITATION TRUST	Nineteenth	Applicant
OPTIMUM MINE REHABILITATION TRUST	Twentieth	Applicant

And

BANK OF BARODA ("BOB") **Respondent**

JUDGMENT

MAVUNDLA J;

[1] These proceedings raise, one way the other, in my view, the question whether the Courts, with the hand of the law, should take a perigrinus with the scafful of the neck, oblige him against his will to operate its business in the Republic, be it for a limited or unspecified period?

[2] This question arises in the backdrop of the application brought by the applicants, who approached this court seeking the following order against the respondent:

[1] The applicants, who are all large commercial entities operating in various sectors of the South African economy, approached this court on urgent basis in terms of rule 6(12) seeking an interim interdict as follows:

"2. Pending the final determination of the relief sought in part B of the application under the above case number pursuant to the order of Makgoka J delivered on 9 October 2017;

2.1 The respondent is directed forthwith to cease any conduct that will have the effect of not permitting the first to twentieth applicants to operate the banking accounts held with the respondent in the same manner as they did immediately prior to the notices of determination dated 6 July 2017, subject to the respondent's terms and considerations as may be applied from time to time, as directed by Makgoka J on 9 October 2017;

2.2 The respondent is interdicted and restrained from giving effect to and or implementing in any manner its expressed intention to refuse to take deposits and or to terminate its banking operations in the Republic of South Africa to the extent that this may be in conflict with the judgment and order of Makgoka J delivered on 9 October 2017;

2.3 Directing that in the event the respondent fails to comply with the order in paragraph 2. 2 above, that it and its principal officer/ chief executive officer, Mr Manoj Jha will be ipso facto in contempt of this order and will be required to show cause within 3 days of the order as to why Mr Manoj Jha should not be committed to imprisonment for 30 days;

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3.1 Declaring that the conduct of the respondent as evidenced in its letter to the applicants date 12 February 2018 is in contempt of the judgment and order of Mkgoka J delivered on 9 October 2017, and in particular, paragraph 1.3 thereof.;

3.2 Postponing the question of an appropriate sanction in relation to such conduct for later determination;

4 Costs of suit on the scale of attorney and client, including the costs of two counsel and directing that the use of two counsel was reasonably required in the circumstances."

[2] The parties first locked horns before Makgoka J, who described them as follows: "The applicants are all large commercial entities operating in various sectors of the South African economy. They each have a bank-client relationship with the bank. The first applicant, Annex Distribution (Pty) Ltd (Annex), the second applicant, Confident Concepts (Pty) Ltd (Confident); the third applicant, Sahara Computers (Pty) Ltd, (Sahara Computers) and the fourth applicant, VR Laser Services (Pty) Ltd (VR Laser) have loan and /or overdraft facilities with the bank in terms of facility agreements. In addition, together with each of the fifth to twentieth applicants, they have one or more trading or transactional accounts with the bank.

[3] The respondent is an Indian international bank, with its major shareholder being the Government of India. It is regulated by the Reserve Bank of India. In South Africa it has its principal place of business situated in Sandton, Johannesburg. Its bank operations in South Africa are limited to two branch offices, one in Durban and

one in Johannesburg together with a regional office which is attached to the Johannesburg branch). It employs 16 people across its entire South African operations. The bank does not operate as a clearing bank in South Africa. Instead, it conducts a correspondent banking facility with Nedbank, one of South African leading commercial banks. A clearing bank is a bank that directly transfers funds from its own infrastructure to any third party bank account; vide Makgoka judgment.

[4] Makgoka J accepted allegations by the major banks in South Africa that the applicants are all owned and controlled by members of the Gupta family and their close associate, either directly or indirectly, or that they form part of the Oakbay Group of companies, or are otherwise closely affiliated with this group. This culminated in the major banks severing any business relationship with the respondent. This prompted the respondent on the 6 July 2017 to send each of the applicants a letter communicating its decision to terminate the transactional facilities in just six days' notice, on 17 July 2017 to be precise. The respondent also sought, according to the applicants, unilaterally to impose new terms upon Annex's non-fund facility.[1]

[5] The applicants then on urgent basis brought the application which served before Makgoka J who granted the following order with further ancillary reliefs:

[1] Vide annexures marked "FA 3.1" "FA 3.20".

'1. Pending the final determination of the application referred to in paragraph 2 of this order, the respondent is interdicted from:

1.1 de-activating and / or closing the applicants' banking accounts held with the respondent and / or from terminating the banker-customer relationship between the applicants and the respondent for the reasons stated in the determination notices dated 6 July 2017;

1.2 demanding the first to fourth applicants to repay the sum owed by each of these applicants to the respondent in terms of their loan and overdraft agreements with the respondent for the reasons stated in the termination notices dated 6 July 2017;

1.3. in any way limiting the manner in which the applicants operated their banking accounts prior the termination notice accounts are operated by the applicants so as to ensure that the applicants are permitted to operate the banking accounts in the same manner as they did immediately prior to the notices of termination dated 6 July 2017, subject to the respondent's terms and conditions as may be applicable from time to time.

2. 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 respondent;

3. The interim order referred to in paragraph 1 above shall lapse should the applicants fail to launch the application referred to in paragraph 2 above within the time frame stipulated in the order."

[6] It is common cause that the applicants have already complied with the Makgoka J order in that on 30 September 2017 they filed their part B application. The part B application is as yet to be heard.

[7] It is prudent to chronicle the contents of the letter of 6 June 2017 which are:

"You are aware that the firm/ group, for quite some time, has been in the news, and has been attracting adverse publicity in media, which in the opinion of the bank, is potentially risk and may affect the interests of the bank to its detriment. We have several times conveyed our bank's concern telephonically but to no avail;

In the circumstances, Bank (sic) has no option except to severe all its ties with the firm. Therefore, please be informed that:

All deposit accounts, such as savings, current and other deposit account which are in operation will be deactivated on 17 July 2017;

All advance accounts be settled not later than 30 September 207;

Non- fund based facilities should be supported by 100% cash margin in the respective current account, if any."[2]

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[2] Annexure "FA3.1- 3.20"

[8] It is common cause that the respondent subsequently informed the applicants per letter dated 12 February 2018 that:

"2. The bank is now implementing a rationalisation of its international operations, which includes the closure of the South African branch;

3. Accordingly, the bank will terminate its local branch operations with effect from 31 March 2018. As from that date it will no longer provide banking services in South Africa;

4. In order to ensure an orderly closure program the bank will cease accepting any new incremental deposits from, or on behalf of its customers, with effect from 01 March 2018."[3]

[9] Consequent to the aforesaid letter of 12 February 2018, the applicants brought the present application. Seven of the applicants, namely the 2nd, 4th, 6th 7th, 10th, 11th and 12th applicants, have since been placed under business rescue. On the hearing of this application they were not represented, although an affidavit of the business rescue practitioner who is managing the affairs of the aforesaid seven applicants was handed in on the day of the hearing of this application. The essence of the said affidavit is that the seven respondents associate themselves with the application. I need not add

[10] According to the applicants the purposes of the application is to seek an order in terms of which the respondent is restrained from carrying out and giving

[3] Annexure 'FA3.4"

effect to that which its letters of 12 February states it will do. They contend that there are two principal remedies sought; mainly the first is an interim interdict which seeks to maintain the operation of the applicants' banking facilities pending the finalization and determination of the pending litigation between the applicants and the respondent so as to prevent frustration of the Mkgoba judgment in favour of the applicants. The application also seeks to ensure that the remedy of interim interdict granted by Makgoka J remains effective and that the effectiveness of the order is not frustrated.

A further relief sought is to direct Baroda, in the event of failing to comply with the relief aimed at preventing it from implementing its expressed intention to refuse to take deposits and or terminate its banking operations in South Africa, that Baroda and its principal officer/ chief executive officer, Manoj Jha ("Mr Jha") be *ipso facto* held in contempt of the court order and be committed to prison for a period of thirty days. The applicants further seek a declaratory that Baroda's conduct as evidenced in its letter of 12 February 2018 constitutes contempt of the judgment and order of Makgoka J. in particular paragraph 1.3 thereof.

[11] In regard to point of effectiveness of the court order, it was submitted that if the Court does not grant the relief sought, it would result in Baroda not providing the banking facilities, thus resulting in part B falling away rendering part B academic. It was submitted further that this would amount to an unjustifiable infringement of

the applicants' rights enshrined by section 34 of the Constitution to have any dispute resolved by the application of law decided in a fair public hearing before court of law. The applicants further contend that the courts are enjoined in considering whether to or not to grant an interim interdict, they are to do so in a way that promotes the objects, spirit and purport of the Constitution. The court is not required to determine the merits of and with its prospects of success in Part B, only relevant to the extent that it assist the court in determining whether or not the applicants have made out *a prima facie* right, relying on the matter of *National Treasury and Others v Opposition to Urban Tolling Alliance (OUTA) and Others* 2012 (6) SA 223 (CC) at para 45.

[12] The respondent's case in opposing the application is in particular, *inter alia*, that it does not operate a clearing bank in South Africa. It historically enjoyed a correspondent banking relationship with Nedbank which permitted funds of Baroda's customers to be transferred from Nedbank's infrastructure to third parties. The respondent has decided to exit the South African banking sector because it is not economically viable for it to remain in South Africa. Besides, Nedbank has terminated its relationship with Baroda as a result of which, Baroda is unable to provide any meaningful banking services to its customers. Baroda further cannot procure a correspondent banking relationship with the three remaining major banks and therefore pleads impossibility.

[13] It is trite that the applicants, seeking an interim bear the onus of persuading the court that:

(a) they have a *prima facie* right,

(b) they will suffer irreparable harm;

(c) the balance of convenience favours the grant of the relief;

(d) they have no other remedy.

[14] In my view, the crisp issue in this matter is whether the Courts, can direct the respondent to continue with its operations in the country against its will. I shall therefore deliberately not deal with all the issues mentioned in para [13] above. It suffices to point out that in so far as having no other remedy, in my view, the applicants certainly do have one, and that would be a damages claim against the respondent were they to prove that they have suffered damages as the result of the respondent's action to close their operations in South Africa.

[15] It is not disputed that:

15.1 the respondent has a total complement staff of 16 employees manning both its two branches;

15.2 the respondent does not have its own infrastructure, but relies on that on Nedbank;

15.3. Nedbank has terminated its relationship with the respondent;

15.4 The major banks have severed relationship with the respondent on account of adverse publicity.

15.5 Sahara Computers closed and was abandoned, and its assets are incorporated into the fifth respondent.[4]

15.6 the Bank of Baroda's Board resolved and approved the closure of the respondent's operations in South Africa after it took into account, *inter alia*, the adverse publicity of the Bank as the result of its association with Sahara Group / Gupta family.[5]

15. 7 the relationship between the respondent and applicants is contractual, and therefore the respondent is at liberty to terminate its relationship with the applicants; vide *Annex Distribution (Pty) Ltd and others v Bank of Baroda;*[6] *Bredenkamp and Others v Standard Bank of South Africa.* [7]

[16] The respondent without any infrastructure of Nedbank, cannot be expected to service the accounts of the applicants. Neither can the Court compel it to go belly crawling to Nedbank to demand re-installation of the infrastructure. The other

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[4] vide annexure L paginated page 390 and paginated page 786 para98.3.
[5] Vide annexure "I" at paginated page 435 of the replying affidavit; Certified Copy of the Boards Resolution No 25 dated 22 December 2017, annexure C-6 Approval for closure of South African Territory of two branches; and Executive summary of the Board Meeting.
[6] 2018 (1) SA 562 (GP).
[7] 2010 (4) SA 468 (SCA).

major banks have also turned their back against the respondent. The respondent has every right to terminate any business contract, including that of the applicants.[8]

[17] In my view, the respondent has the right to trade, which is protected by the Constitution.[9] This right entail, *inter alia*, the liberty to choose to or not to exercise it within the confines of its whims or means.; *vide Affordable Medicenes Trust v Minister of Health*[10] where the then CJ Ngcobo held that: "Construed purposively, therefore, s22 embraces both the right to choose a profession and the right to practice the chosen profession:" The decision by the respondent to exit South African banking sector, cannot, in my view, be interfered with by the Courts. Put differently, the Courts cannot compel the respondent to keep the doors of its business open for whatever duration.

[18] It is trite that a judgment must be understood in its entirety and not piecemeal or selectively. The order of Makgoka J specifically restrains the respondent from interfering with the accounts of the applicant for the reasons advanced in the letter of 6 June 2017. The reason then was the adverse publicity; *vide para [5] supra*.

[19] The respondent's decision to close its business and exit South African banking sector, is predicated on commercial consideration; *vide* para 6 supra. In my view, the Makgoka J order has nothing to do with the exit of the respondent form South

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[8] Bredenkamp and Others v Standard Bank of South Africa. supra.
[9] S22 of the Constitution of the Republic of South Africa, Act no 108 of 1996.
[10] 2006 (3) SA 247 (CC) at 276 para[66] .

Africa. It cannot therefore be said that the exit is *mala fide* and calculated to frustrate the Makgoka J order, or in contempt thereof.

[20] In the circumstances of this case, I therefor conclude that the respondent's right to or not to trade supersedes, whatever right, if any, the applicants might have. I further conclude that the balance of convenience by far outweighs that of the applicants and tilts in favour of the respondent. Consequently, I refrain to exercise my discretion in favour of the applicants and accordingly decline to grant them the relief sought.

[21] It is trite that the costs follow the event. The applicants engaged the services of two senior counsel and two juniors, who filed their heads of argument, and later a senior counsel and three juniors who also filed supplementary heads of argument and moved the application. This demonstrates the importance of the matter to the applicants. The respondent also engaged the services of senior counsel and three juniors, justifiably so, in my view.

[22] In the premises the following order is made:

1. The application is dismissed .with costs,

2. The applicants are ordered jointly and severally, the one paying the other to be absolved to pay the costs, inclusive the costs of employing senior counsel and three junior counsel.

N.M. MAVUNDLA

JUDGE OF THE HIGH COURT

DATE OF JUDGMENT	:	12 /03 / 2018
APPLICANT`S COUNSEL	:	ADV. A. R. BHANA SC
WITH	:	ADV J P DANIELS SC
AND	:	ADV C C. BESTER
AND	:	ADV L. SCHÄFER
LATER	:	ADV. A. O. COOK SC
WITH	:	A. J. DANIELS
AND	:	ADV. L.I SCHÄFER
AND	:	ADV. B. T. MORETELWE
INSTRUCTED BY	:	VASCO DE OLIVEIRA INCORPORATED
RESPONDENTS' COUNSEL	:	ADV. AZHAR BHAM SC
WITH	:	ADV JAWAID BABAMIA
AND	:	ADV KEVIN ILES
INSTRUCTED BY	:	MERVYN TABACK INC