IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

(Sitting as Equality Court)

Case No.: EC02/2022

In the matter between:

MOHAMMED IQBAL SURVÉ	First Applicant
SEKUNJALO INVESTMENT HOLDINGS (PTY) LTD	Second Applicant
AFRICAN EQUITY EMPOWERMENT INVESTMENT LTD	Third Applicant
PREMIER FISHING AND BRANDS LTD	Fourth Applicant
PREMIER FISHING SA (PTY) LTD	Fifth Applicant
PREMFRESH SEAFOODS (PTY) LTD	Sixth Applicant
MARINE GROWERS (PTY) LTD	Seventh Applicant
TALHADO FISHING ENTERPRISES (PTY) LTD	Eighth Applicant
RUPESTRIS INVESTMENTS (PTY) LTD	Ninth Applicant
DAZELLE TRADERS (PTY) LTD	Tenth Applicant
MANICWA FISHING (PTY) LTD	Eleventh Applicant
MB FISHING (PTY) LTD	Twelfth Applicant
ROBBERG SEA FREEZE (PTY) LTD	Thirteenth Applicant
3 LAWS CAPITAL SOUTH AFRICA (PTY) LTD	Fourteenth Applicant

AFRICAN NEWS AGENCY (PTY) LTD	Fifteenth Applicant
BUSINESS VENTURE INVESTEMENTS NO 1126 (RF) (PTY) LTD	Sixteenth Applicant
CAPE SUNSET VILLAS (PTY) LTD GLOBAL COMMAND AND CONTROL	Seventeenth Applicant
TECHNOLOGIES (PTY) LTD	Eighteenth Applicant
HAIFAMS INVESTMENTS (PTY) LTD	Nineteenth Applicant
JABSTER TECHNOLOGIES (PTY) LTD	Twentieth Applicant
KATHEA COMMUNICATIONS (PTY) LTD	Twenty-First Applicant
LINACRE INVESTMENTS (PTY) LTD	Twenty-Second Applicant
AFRICA ONLINE RETAIL (PTY) LTD MODJADJI AFRICAN EMPOWERMENT	Twenty-Third Applicant
CONSORTIUM LTD	Twenty-Fourth Applicant
SAGARMATHA GROUP HOLDINGS (PTY) LTD	Twenty-Fifth Applicant
SAGARMATHA TECHNOLOGIES LTD	Twenty-Sixth Applicant
INDEPENDENT MEDIA CONSORTIUM (PTY) LTD	Twenty-Seventh Applicant
SEKUNJALO CAPITAL (PTY) LTD	Twenty-Eighth Applicant
SEKUNJALO PROPERTIES (PTY) LTD	Twenty-Ninth Applicant
SILO CAPE WATERFRONT PROPERTY INVESTMENTS (PTY) LTD	Thirtieth Applicant
SIYOLO ENERGY AND AFRICAN RESOURCES (PTY) LTD	Thirty-First Applicant
THE TRUSTEES OF THE SOUTH AFRICAN INSTITUTE FOR THE ADVANCEMENT OF SOCIAL ENTREPRENEURS TRUST	Thirty-Second Applicant
SOUTH AFRICAN PRESS ASSOCIATION (PTY) LTD	Thirty-Third Applicant
SURVÉ PHILANTROPIES NPC	Thirty-Fourth Applicant

THE TRUSTEES OF THE HARAAS TRUST	Thirty-Fifth Applicant
THE TRUSTEES OF THE DR IQBAL SURVÉ BURSARY TRUST	Thirty-Sixth Applicant
THE TRUSTEES OF THE SAVNASI VILLAGE TRUST	Thirty-Seventh Applicant
THE TRUSTEES OF THE IQBAL SURVÉ FAMILY TRUST	Thirty-Eighth Applicant
THE TRUSTEES OF THE SEKUNJALO DEVELOPMENT FOUNDATION TRUST	Thirty-Ninth Applicant
THE TRUSTEES OF THE SOCIAL ENTREPREUNERSHIP FOUNDATION TRUST	Fortieth Applicant
THE TRUSTEES OF THE SURVÉ FAMILY FOUNDATION TRUST	Forty-First Applicant
KALULA COMMUNICATIONS (PTY) LTD	Forty-Second Applicant
THE TRUSTEES OF THE SOUTH ATLANTIC ARTS AND CULTURE TRUST	Forty-Third Applicant
INDEPENDENT NEWSPAPERS (PTY) LTD	Forty-fourth Applicant
and	
NEDBANK LIMITED	First Respondent
NEDGROUP PRIVATE WEALTH STOCKBROKERS (PTY) LTD	Second Respondent

Date of hearing : Tuesday 19 April 2022

Date of judgment : Friday 17 June 2022 delivered electronically

---

JUDGMENT

DOLAMO, J

INTRODUCTION

[1] This is an urgent application in terms of which the applicants seek an interim interdict in accordance with section 21(5) of the Promotion of Equality and Prevention of Unfair Discrimination Act[1] (the Equality Act) prohibiting the first and second respondents from closing the bank accounts of some of the applicants pending the final determination of the proceedings instituted in the Equality Court under case no: EC01/2022 and from closing the accounts of some of the applicants pending their joinder and/or intervention applications.

[2] To the extent that some of the applicants' accounts have already been closed the applicants seek and order directing the respondents to re-open such accounts with immediate effect and to retain the contractual terms and conditions currently applicable to these accounts pending the outcome of the main Equality Court proceedings. The respondents are to be granted leave to approach the Court on the same papers duly supplemented, after the finalisation of the main Equality Court proceedings, for an order discharging the interim interdict, if so warranted.

[3] In the main Equality Court proceedings the applicants seek various forms of relief. In essence the applicants seek declaratory orders to the effect that the decisions of the respondents, who in the main application are the leading banking institutions in this country, to terminate and/or to give notices of intentions to terminate the applicants' bank

[1] Act 4 of 2000.

accounts and/or refusing to provide banking and other related services to the applicants, constitute unfair discrimination on the ground of race and on the unspecified ground of unfair competition in contravention of the Equality Act. They also challenge as unconstitutional, the respondents' reliance on the common law principle of the sanctity and freedom of contract for purposes of terminating their contracts and/or refusing to render banking services to them, without due regard to public policy as embedded in the Constitution and the jurisprudence of the Constitutional Court.

[4] Should the applicants be successful in the main Equality Court proceedings, they will seek orders directing the respondents to take specific steps to stop the alleged unfair discrimination and harassment directed them such measures are to include the reinstatement and/or maintenance of the applicants 'banking facilities and related services until such time as the respondents will have provided rational and lawful reasons acceptable to the Equality Court for the termination of those banking facilities and services. For present purposes, however, the applicants seek an order preserving and restoring the status *quo* pending the final determination of the parties' rights.

THE HISTORY OF LITIGATION:

[5] On 22 December 2022, some of the entities in the Sekunjalo Group, including 25 of the applicants in this matter, brought an urgent application in the Competition Tribunal, seeking interim orders preventing the closure of their bank accounts and directing the reopening of those bank accounts that had already been closed, pending the final determination of a complaint lodged with the Competition Commission. While this

application was pending in the Competition Tribunal and on 13 January 2022, the applicants brought an urgent application in this court. In the latter application, they sought an interdict prohibiting the closure by respondents of their banking accounts pending the final determination of a complaint lodged with the Competition Commission and another one in the Equality Court under case number EC01/2022 (the main Equality Court Proceedings).

[6] The urgent application in this court came before Francis J on 14 February 2022. The Learned Judge held that since the relief sought was to operate in the interim pending the determination of the applications in the Competition commission and in the Equality Court, which matters were within the exclusive jurisdiction of those other *fora*, the High Court lacked jurisdiction to grant the relief sought. After the dismissal of the urgent application by Francis J on 21 February 2022, the applicants launched the present application in terms of which they sought the relief referred to in paragraph 1 *supra*.

THE PARTIES

[7] The first applicant is Mohammed Igbal Survé (Survé) who is the chairman of the second applicant, Sekunjalo Investment Holding. The third to the forty-third applicants are all interrelated companies and/or subsidiaries of the second applicant, as well as Trusts, Survé being the common denominator as shareholder, directly and indirectly, director and/or interested party. For ease of reference, I shall henceforth refer to the first applicant as Survé and the rest of the applicants, unless indicated otherwise, collectively as the Sekunjalo Group or simply as the applicants.

[8] The first respondent is Nedbank Limited, a public company incorporated in terms of the Company Laws of the Republic of South Africa, which conducts business as a banking institution. The second respondent is similarly a private company incorporated in terms of the Companies Law of this country and a subsidiary of the first respondent. I shall collectively refer to the respondents as Nedbank or the Bank.

[9] The Sekunjalo Group has commercial interests in mining; the media; fishing; financial; technology and properties. It describes itself as a black owned group of companies that are Broad Based Black Economic Empowerment Act[2] compliant. It submits that it employs around 8 500 people and has a long-standing business relationship with Nedbank.

BACKGROUND

[10] The genesis of the dispute between the Sekunjalo Group and Nedbank can be traced back to events of around August 2013, when a Sekunjalo Group led consortium, which included Union investment Companies; Intercom (China Africa Development Fund and CCTV of China) and the Public Investment Corporation (PIC), acquired Independent Media (Independent Media). According to the applicants this acquisition sparked of a concerted negative media campaign and propaganda driven by rival media houses alleging that Surve, PIC and the Government Employees Pension Fund (GEPF) invested in a political as opposed to a business venture.

---

[2] Act 53 of 2003.

[11] On 17 October 2018, the President of the Republic of South Africa, exercising his powers in terms of section 84(2)(f) of the Constitution of the Republic of South Africa (the Constitution) appointed a Commission of Enquiry to investigate and report on allegations of impropriety concerning the PIC. This commission was headed by the Honourable Justice Mpati and came to be known as the Mpati Commission. According to its terms of reference the Mpati Commission was to investigate and report on 16, later extended to 17, matters relating to the governance and investment decisions of the PIC. Its terms of reference were published in Government Gazette no: 41979 on 17 October 2018. After completion of its mandate the Mpati Commission published its report on 12 March 2020.

[12] The Mpati Commission report constituted of 794 pages. Of relevance, for present purposes and to the Sekunjalo Group, in particular, is that the commission, *inter alia*, made the following observations regarding the investment decision involving PIC and Sekunjalo Group:

12.1 Due diligence reports highlighting issues around independence of board members, and policies to be implemented et cetera, were not followed by PIC to ensure implementation, post the deal being approved and monies having flowed;

12.2 The close relationship between Dr Matjila, who was the then Chief Operating officer (CEO) of the PIC, and Dr Survé created top-down pressures that the deal teams experienced to get the requisite approval.

[13] The Mpati Commission recommended, as far as the Sekunjalo Group was concerned, that the PIC board should conduct a forensic review of all the processes involved in all transactions entered into with Sekunjalo Group; ensure that the PIC obtains company registration numbers of every entity in the Sekunjalo Group to enable it to conduct a forensic investigation as to the flow of monies out of and into the group; ensure that all pre- and post-conditions for all investments made, not just those in the Sekunjalo Group, have been fully met and implemented in that effective processes and systems are in place to properly monitor investment post disbursements; take the necessary steps to recover all monies with interest due to the PIC, especially where personal or other surety was a pre-condition to approval of the investment; consider whether any laws and/or regulations have been broken by either the PIC and/or the Sekunjalo Group; determine what legal steps, if any, should be taken to address any such violations and assess whether the movement of funds between accounts as uncovered in the investigations was intended to mislead/defraud investors and/or regulators.

[14] Nedbank does not share the exculpatory prism through which the Sekunjalo Group view itself *vis-a-vis* the findings of the Mpati Commission. According to Nedbank the Sekunjalo Group has been the subject matter of serious allegations of improper and unlawful conduct which relates to controversial investments made during December 2017 by the PIC into Ayo Technology Solutions (Ayo), one of the companies in the stable of the Sekunjalo Group. The Commission found that Ayo shares were grossly over-valued as at the listing date and soon thereafter plummeted by 87%. Consequently, the Mpati Commission remarked that the Ayo transaction demonstrated the maleficence within the

Sekunjalo Group.

[15] The Mpati Commission found that board members of many of the companies in the Sekunjalo Group were not independent, with some of them being related to Survé while others were long-serving employees, long-time friends or non-executive directors who dominated the board seats in these companies; that the Ayo investment marked a disregard for PIC policy and standard operating procedures; and that the close relationship between Matjila and Survé created a top-down pressure that the teams who were handling the deal experienced to get the requisite approval.

[16] The Sekunjalo Group complained that, in the aftermath of the release of the Mpati Commission report, the major banking institutions in this country engaged in systemic and a collaborative effort to terminate services to the group and to close their bank accounts. This was done possibly to benefit the Group's competitors. According to the Sekunjalo Group ABSA Bank was the first to send termination notices to approximately 30 entities within and/or related to the Group in pursued of this discriminatory conduct. This was in August 2020. FNB followed and shortly thereafter Investec.

[17] During or about April 2021 Nedbank started reviewing the Sekunjalo Group's banking facilities and directing questions pertaining to certain transactions. Sekunjalo Group tried to placate Nedbank by writing a long letter, dated the 8 June 2021, addressing the bank's concerns. Further correspondence between Sekunjalo Group and the bank followed. During or about August 2021 communication between Sekunjalo Group and the

bank ceased.

[18] Nedbank's point of departure was that the Sekunjalo Group should have taken the Mpati Commission's report on review if it disputed its finding against the Group. The Sekunjalo Group's attitude to the report, on the other hand, was that no adverse findings were made against it: only recommendations as to further investigation into its relationship with the PIC were made and that it would therefore have been inappropriate to take the report on review.

[19] With hindsight, it would appear, Sekunjalo thought it would have been prudent to take the Mpati Commission's report on review. Realising that it was out of time for a review, and in an endeavour to address Nedbank's concerns it engaged Heath SC to independently review the Mpati Commission's report. It is not necessary, for purposes of this judgment to relay in detail the interaction between Heath SC and Nedbank, save to say that Nedbank was not keen on involvement with Heath SC and that Sekunjalo Group, in turn, refused to share Heath SC's report with Nedbank, claiming that the report was privileged.

[20] On 15 November 2021, Nedbank issued termination notices to the applicants, The termination notices conveyed to the applicants that the allegations of improprieties against the Group, the litigation in which some of the companies in the Group had been involved, namely, PIC's action to recover the money it had invested in Ayo Technologies, the adverse statements against the Group made in the Mpati Commission's report and

the unsatisfactory responses to Nedbank's transactional analysis posed a reputational risk to the Bank.

[21] The Sukunjalo Group submits that Nedbank's conduct, of issuing the termination notices, amounts to racial discrimination and contravenes, in particular, section 7 of the Equality Act. The Group also alleged that this conduct amounted to harassment. The basis for the complaint, the Sekunjalo Group submitted, is the differential treatment Nedbank meted out to it as compared to how it treated other so-called white companies that have also attracted negative publicity. According to the Sekunjalo Group the conduct of Nedbank, and the other banks that have closed the Group's bank accounts, demonstrated a discriminatory attitude, if it is compared to its conduct towards companies, such as Steinhoff Group (Steinhoff); EOH limited; and Tongaat Hulett Limited, (for lack of a better term I shall refer to these companies, unless the contrary appears from the context, collectively as the retained companies).

[22] It is common cause that Tongaat Hulett was fined approximately R118million for misrepresenting its performance in its Annual Financial Statements. The hefty fine, the applicants submit reflects the severity of the breach. Although Steinhoff has recently reached a settlement with its creditors, that was made an order of court, until recently it was steeped in various court case in this and other international jurisdictions. Authorities in Germany, in particular, have been pursuing criminal prosecutions against Steinhoff or its affiliates for the financial irregularities that came to light in December 2017 when the group's Annual Financial Statements were released. These revelations led to the free fall

of the value of Steinhoff's shares resulting in negative media reports, locally and internationally. It is further a matter of common cause that Nedbank has not taken any steps against these companies.

[23] Nedbank denounced the charges of racism against it. It submitted that the allegations of racism against it were utterly devoid of merit and entirely unsubstantiated by facts. In this regard it pointed to the salutary caution by the Supreme Court of Appeal (SCA) in *Manong*[3] that, given South Africa's peculiar history racism is such a serious charge that care should be taken to ensure that such a complaint is well founded, and that a contrived charge is equally deserving of censure. It submitted that it did nothing more than to act in accordance with its rights recognised by the SCA and the Constitutional Court (CC) to terminate its banking relationship with the applicants on reasonable notice on the basis of commercial reputational risk. It certainly also disputed the allegation of harassment against it.

[24] Nedbank further disputed that its decision not to terminate the accounts of the retained companies was racially motivated. According to Nedbank each of these entities has been restructured and has acknowledged past wrongdoing. In addition, those who were implicated in wrongdoing have either resigned or have been dismissed resulting in the companies being under new management. These companies have also implemented other remedial actions, such as paying those who were affected, asserted Nedbank.

---

[3] *Manong and Associates (Pty) Ltd v City of Cape Town and Another 2011 (2) SA 90 (SCA) at para [2].*

[25] In defending its action against the Sekunjalo Group, as compared to its stance against the retained companies, Nedbank, submitted that every major news agency has reported on the serious allegations against the Group including the investment made by PIC into Ayo; that whist the Sekunjalo Group sought to downplay the findings of the Mpati Commission these were nothing short of damning; and that any suggestion that the Mpati Commission did not make adverse findings against the applicants was belied by the Group's own correspondents with Nedbank. Here reference was made to the letter addressed to Nedbank by the Group, dated the 8 July 2021 referred to *supra*, in which the Group admitted that the Mpati Commission made a finding of malfeasance against the Group but sought to justify the Group's stance in that it has rejected the report. But according to Nedbank the only way which was open to Sekunjalo Group, as stated *supra*, was to challenge the findings of the Mpati Commission by instituting review proceedings, which was not done.

[26] Nedbank submits that the allegations against the Sekunjalo Group, and the damning findings against it by the Mpati Commission, create substantial reputational risk to it. What constitute reputational risk? Relying on the *Bredenkamp*[4] judgment by the SCA, Nedbank summarised what amounts to reputational risk as follows:[5]:

> *"388. Reputational risk arises if individuals or the public generally form a negative perception of the bank because of something the bank is involved in or someone the Bank is associated with. It is the mere perception that causes*

[4] *Bredenkamp and Others v Standard Bank of South Africa Limited* 2010 (4) SA 468 (SCA).
[5] *At record page 422 paras 388 - 390.*

the damage, even if the allegations giving rise to the perception have not been proven.

389. This negative perception could be formed by clients, regulators, business counterparts, shareholders, funders, the general public and employees, both locally and internationally.

390. Reputational risk is not limited to illegal activities but also activities which the public deem morally or ethically dubious or suspicious. Reputational risk can be systematic and material to a bank and can have far-reaching consequences."

[27] What was made clear in *Bredenkamp* is that[6]:

"[14] The reason why Bredenkamp was listed by OFAC is because he was said to be a 'crony'of President Mugabe of Zimbabwe, and because he had provided financial and logistical support to the 'regime' that has enabled Mugabe 'to pursue policies that seriously undermine democratic processes and institutions in Zimbabwe'. Bredenkamp disputed these allegations. The bank did not in turn suggest that the grounds for his listing were factually correct or justified and this court, too, is not called upon to determine whether they are." (own emphasis)

[28] I digress to deal with the issue of the racial classification of the Sekunjalo Group and the retained companies, which Nedbank belatedly raised in its Heads of Arguments. Nedbank challenged the basis upon which the Sekunjalo Group characterised the

---

[6] *Bredenkamp supra,* at para [14].

retained companies as white. It argued that, save to repeatedly assert that these are white dominant businesses or white companies, the Sekunjalo Group did not put up any facts or evidence to demonstrate that this entities are in fact white. According to Nedbank it is not spelled out why these juristic entities are so racially classified: is it because of their shareholding, directorship and/or their overall B-BBEE? Without providing evidence as to why these companies are classified as white companies, it cannot be assumed that they are white.

[29] It is trite law that in application proceedings the notice of motion and the affidavits define the issues between the parties[7]. If an issue is note cognisable or derivable from this source there is little or no scope for reliance on it. It is a fundamental rule of fair civil proceedings that parties should be apprised of the case which they are required to meet[8]. Challenging the classification of the retained companies only in argument will be prejudicial to the Sekunjalo Group.

[30] In any event the Sekunjalo Group is not only relying on racial discrimination in the Main Equality Court Proceeding. The Group is also relying on the unlisted prohibited ground of unfair competition for its complaint of unfair discrimination. I shall return to this aspect later in the judgment. I however, do not have to determine whether the Sekunjalo Group has established on a balance of probabilities the racial classification of these companies. For now I need only to determine whether a *prima facie* case, although open

---

[7] *Mokesi & Others v Voges No and Others* 2016 (3) SA 370 CC at para [27].
[8] *Naidoo and Another v Sunker & Others* [2011] ZASCA 216 at para [19].

to doubt has been established. I propose to focus on whether the Sekunjalo Group has shown a violation of section 7 of the Equality Act. This is a question to be determined in due course by the Court hearing the Main Equality Court Application.

LEGAL QUESTIONS

[31] The issues for determination are whether the Sekunjalo Group has *prima facie* established that Nedbank has discriminated against it on the basis of race and also harassed it and, if so, whether it has satisfied the other requirements to entitle it to the interim relief sought. Before I deal with the requirements for an interim interdict it is apposite to set out in brief the salient provisions of the Equality Act.

LEGASLATIVE FRAMEWORK

[32] Section 9 of the Constitution, which provides that everyone is equal before the law and has the right to equal protection and benefits of the law, also mandated the legislature to enact national legislation to prevent or prohibit unfair discrimination and promote the achievement of equality. The National Legislation which was enacted, pursuant to the provision of section 9(4) and item 23(1) of Schedule 6 of the Constitution, is the Equality Act.

[33] The aim of, the Equality Act is to prevent and prohibit unfair discrimination and harassment; to promote equality and eliminate unfair discrimination and to prevent and prohibit hate speech. In its preamble, the Equality Act states, *inter alia*, that it endeavours to facilitate the transition to a democratic society, united in its diversity, marked by human

relations that are caring and compassionate, and guided by the principles of equality, fairness, equity, social progress, justice, human dignity and freedom.

[34] Discrimination, which is outlawed, is defined in the Equality Act as:

"any act or omission, including a policy, law, rule, practice, condition or situation which directly or indirectly- (a) imposes burdens, obligations or disadvantage on; or (b) withholds benefits, opportunities or advantages from, any person on one or more of the prohibited grounds".

[35] There are two types of prohibited grounds of discrimination: specified and unspecified. They are defined as follows:

Prohibited grounds:

The prohibited grounds that are- "(a) race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, birth and HIV/AIDS status; or (b) any other ground where discrimination based on that other ground:

(i) causes or perpetuates systemic disadvantage;

(ii) undermines human dignity; or

(iii) adversely affects the equal enjoyment of a person's rights and freedoms in a serious manner that is comparable to discrimination on a ground in paragraph (a)".

[36] Section 7 of the Equality Act, on which the applicants rely, provides that:

"7 Prohibition of unfair discrimination on ground of race

Subject to section 6, no person may unfairly discriminate against any person on the ground of race, including-

(a) the dissemination of any propaganda or idea, which propounds the racial superiority or inferiority of any person, including incitement to, or participation in, any form of racial violence;

(b) the engagement in any activity which is intended to promote, or has the effect of promoting, exclusivity, based on race;

(c) the exclusion of persons of a particular race group under any rule or practice that appears to be legitimate but which is actually aimed at maintaining exclusive control by a particular race group;

(d) the provision or continued provision of inferior services to any racial group, compared to those of another racial group;

(e) the denial of access to opportunities, including access to services or contractual opportunities for rendering services for consideration, or failing to take steps to reasonably accommodate the needs of such persons."

[37] In *Brink*[9] the CC held that section 8 of the Interim Constitution, the forerunner of section 9 of the Constitution is the product of our own particular history, that perhaps more so than other provisions in Chapter 2 of our Constitution. Our past history therefore is relevant to the concept of equality.

[38] To prohibit unfair discrimination, any person may in terms of section 20(1), institute proceedings in the Equality Court acting in his own interest, on behalf of another person who cannot act in their own name; as a member of or in the interest of, a group or class of persons or in the public interest. The proceedings may also be instituted by any association acting in the interests of its members or by the South African Human Rights Commission (SAHRC) or the Commission for Gender Equality (CGE).

---

[9] *Brink v Kitshoff NO* 1996(4) SA 197 CC.

REQUIREMENTS FOR AN INTERIM INTERDICT

[39] The requirements for an interim interdict are well established. They are:

39.1 A *prima facie* right, although open to some doubt;

39.2 A well - grounded apprehension of irreparable harm if the interim relief is not granted and the final relief is eventually granted;

39.3 The balance of convenience must favour the granting of the interim relief;

39.4 There must be no other ordinary remedy that is available to give adequate redress to the applicant.

[40] In *Eriksen Motors*[10] Holmes JA held that the granting of an interim interdict, pending the determination of the main action (or application) is an extraordinary remedy within the discretion of the court. In exercising its discretion, the court weighs, *inter alia*, the prejudice to the applicant if the interdict is withheld, against the prejudice to the respondent, if it is granted. The Learned Judge went on to hold that the foregoing considerations are not individually decisive, but are interrelated; for example, the stronger the applicant's prospects of success the less the need to rely on prejudice to himself. Conversely, the more the element of "*some doubt*" the greater the need for the other factors to favour him. I shall adopt this approach in determining whether the applicants have satisfied the requirements for an interim interdict. I start with the assessment of whether the applicants have established a *prima facie* right, even if it is open to doubt.

---

[10] *Eriksen Motors (Welkom) v Protea Motors, Warrenton and Another* 1973 (3) SA 685 (A) at 691C.

[41] The Sekunjalo Group submitted that Nedbank has admitted to treating it differently to the likes of Steinhoff, Tongaat Hulett, and EOH Limited. It argued that this differential treatment amounts to racial discrimination which is in violation of its constitutional rights. Sekunjalo Group also invoked several other constitutional rights which are enshrined in the Bill of Rights and which allegedly have been infringed: the right to dignity, the right to freedom of association and the right to freedom of trade, occupation and profession. I am however of the view that a *prima facie* establishment of an infringement of any of these rights will be sufficient. I need not to deal with all these other rights for purposes of determining whether an interim interdict should be granted.

[42] Nedbank submitted that this application for an interim relief is dependent upon the merits of the main application but argued that the latter was fatally flawed. It relied heavily on *Bredenkamp suspra,* and to an extent *Annex Distribution* to assert that it is entitled to terminate the contracts with its customers on reasonable notice. It pointed out that all its agreements with the entities in the Group have clauses which granted it the right to terminate the agreements on reasonable notice. Nedbank also submitted that following on the negative publicity the Group has attracted it (Nedbank) had *bona fide* engaged with the Sekunjalo Group in an effort to address its concerns but that such engagements were in vain as the Group failed to furnish reasonable explanations for the questionable transactions it has queried.

[43] For these reasons, and applying the test for unfair discrimination set out in the Equality Act, Nedbank submitted that the applicants have failed, even on a *prima facie*

basis, to show that Nedbank has engaged in racially discriminatory conduct. Nedbank defended its continued association with the retained companies on the bases that these companies had transformed themselves and therefore no longer posed any reputational risk to it.

[44] In articulating the principles confirmed in *Bredenkamp* the Court in *Annex Distribution*[11] held that the bank has no obligation to provide reasons for terminating the contractual relationship with a client and that its motives are generally irrelevant[12]. While *Bredenkamp* and *Annex Distribution* remain good law authority for the proposition that the relationship between the bank and its client is contractual in nature and that the bank may terminate such a relationship on reasonable notice to the client.

[45] One of the grounds on which the bank may terminate the agreement it has with its client is if such a relationship poses a reputational risk and courts should be reluctant to second-guess that decision. Freedom of contract is a constitutional value that aligns with the principle that contracts freely and seriously entered into should be judicially enforced. Courts should therefore approach their task of striking down, or refusing to enforce contracts on the basis of public policy with 'perceptive restraint' *Brisley v Drotsky* [13]. In *Beadica*[14] the CC held that:

> *"[87] In our new constitutional era, pacta sunt servanda is not the only, nor the most important*

---

[11] *Annex Distribution (Pty) Ltd and 19 Others v Bank of Baroda* 2018 (1) SA 562 (GP).
[12] *Minister of Finance v Oakbay Investment (Pty) Ltd and Others* 2018 (3) SA 515 (GP) at para [56].
[13] 2002 (4) SA 1 (SCA) *Brisley supra* at para [94].
[14] *Beadica supra* at paras [87] and [88].

principle informing the judicial control of contracts. The requirements of public policy are informed by a wide range of constitutional values. There is no basis for privileging pacta sunt servanda over other constitutional rights and values. Where a number of constitutional rights and values are implicated, a careful balancing exercise is required to determine whether enforcement of the contractual terms would be contrary to public policy in the circumstances.

[88] The second principle requiring elucidation is that of 'perceptive restraint', which has been repeatedly espoused by the Supreme Court of Appeal. According to this principle a court must exercise 'perceptive restraint' when approaching the task of invalidating, or refusing to enforce, contractual terms. It is encapsulated in the phrase that a 'court will use the power to invalidate a contract or not to enforce it, sparingly, and only in the clearest of cases'."

[46] Unlike in the *Bredenkamp* and *Annex Distribution* cases where the applicants challenged the closure of their accounts on public policy grounds alone in *casu* the Sekunjalo Group has mounted a constitutional challenge based on a violation of its rights as enshrined in the Constitution. I shall for purposes of determining whether a prima facie right has been established focus on the complaint that Nedbank has racially discriminated against entities in the Group. I shall assume, without deciding, that the Sekunjalo Group is black owned while Steinhoff, Tongaat Hulett, and EOT Limited are white owned companies.

[47] Discrimination takes place where persons in the same circumstances are treated differently. In *Harksen*[15] the CC held where the equality provision of the constitution is invoked to attack a legislative provision on the ground that it differentiates between people

[15] *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC) at para [43].

or categories of people in a manner that amounts to unequal treatment or unfair discrimination the first enquiry must be directed to the question as to whether the impugned provision does not differentiate between people or categories of people. If it does so differentiate, then in order not to fall foul of the equality provision there must be a rational connection between the differentiation in question and the legitimate government purpose it is designed to further or achieve. The dicta applies with equal force to the present circumstances where the parties involved are not government entities. After all the Equality Act applies to private individuals as well.

[48] Sekunjalo Group must therefore, at the very least, show that it was treated differently to other Nedbank clients. Nedbank has admitted to differentiating between the Sekunjalo Group, on the one hand, and the retained companies, on the other hand, but denied doing so unfairly and on the bases of race. Nedbank submitted that the Sekunjalo Group has failed, even on a *prima facie* basis, to demonstrate that Nedbank has engaged in racially discriminatory conduct.

[49] Nedbank based its denials of racially discriminatory conduct on the explanation it proffered why it had not acted against the retained companies asserting that its decision in this respect had nothing to do with race but with the reputational, legal and commercial the Sekunjalo Group posed it.Nedbank found support in the SCA judgment in *Manong*[16], referred to *supra*, where it was held that 'thus, to even begin to get off the ground the

[16] *Manong and Associates (Pty) Ltd v Minister of Public Works* 2011 (2) SA 90 (SCA) at para [56].

appellant must at the very least show that it was treated differently to other engineering consultants in relation to COT or CCT projects', to submit that Sekunjalo Group has failed to established on a *prima facie* bases the allegations of racial discrimination.

[50] There are fundamentally two problems with Nedbank's reliance on the above *dicta* from the *Manong* judgment. The first is that the SCA was dealing with proceedings for a final relief. In *casu* we are dealing with an application for an interim relief where the right sought to be protected must be established on a prima facie bases, even if it is open to doubt. Secondly, Nedbank admitted to a differential treatment between Sekunjalo Group and the retained companies albeit for non-discriminatory reasons.

[51] In Nedbank's view the retained companies no longer posed a reputational risk since their transformation. This, however, does not explain why these companies were not treated the same as the Sekunjalo Group even before their transformation this, notwithstanding the fact that they were subjected to the same, if not more, public scrutiny which carried with it reputational risk. An example here will serve to illustrate the point: following on the release of the Mpati Commission's report and the negative media reports on the Group, and at the time when Nedbank commenced with questioning and seeking answers to certain of the transactions within the Sekunjalo Group, some of which dated as far back as 2012, Steinhoff was already immersed in controversy and in a series of litigation, both national and internationally. But Nedbank never sought to cancel its agreement with Steinhoff.

[52] If Nedbank had engaged in the kind of enquiries it had with the Sekunjalo Group, prior to these companies laundering themselves, to Nedbank's satisfaction, one would have expected it to say so. But there is nothing on the papers to indicate that there were such engagements. This differential treatment, the Sekunjalo Group submitted. Was *prima facie* proof of unfair racial discrimination against it.

[53] Section 13 of the Equality Act deals with the burden of proof in cases of discrimination. This section provides that:

"Burden of Proof

(1) If the complainant makes out a prima facie case of discrimination-

(a) the respondent must prove, on the facts before the court, that the discrimination did not take place as alleged; or

(b) the respondent must prove that the conduct is not based on one or more of the prohibited grounds.

(2) If the discrimination did take place-

(a) on a ground in paragraph (a) of the definition of 'prohibited grounds', then it is unfair, unless the respondent proves that the discrimination is fair;

(b) on a ground in paragraph (b) of the definition of 'prohibited grounds', then it is unfair-

(i) if one or more of the conditions set out in paragraph (b) of the definition of 'prohibited grounds' is established; and

(ii) unless the respondent proves that the discrimination is fair."

[54] I am accordingly satisfied that the applicant has established a *prima facie* case that it has been unfairly discriminated against either on the ground of sale or on the unspecified ground of unfair competition. In my view, Nedbank has not proved its conduct was not based on the one or more of the prohibited grounds

[55] I deem it unnecessary to determine whether the applicants have made out a *prima facie* case based on the other constitutional rights allegedly violated by Nedbank. In my view it suffices if I were to find that a *prima facie* unfair discrimination case has in violation on the right to dignity been made out to meet the intended closure of the applicants accounts by Nedbank pending the final determination of the Main Equality Act Proceedings.

NO IRREPARABLE HARM

[56] On the applicants' claim that they will suffer irreversible harm if the interdictory relief is not granted, Nedbank submitted that this was not born out by the facts. In this regard Nedbank argued that the applicants' will not suffer any irreparable harm if the interdict is not granted and their complaints are upheld in due course. It submitted that the Group has not furnished evidence that it had approached and was rejected by the 70 banks operating in this country or provide adequate justification for failing to approach foreign banks with local branches.

[57] The fact that the applicants' have not shown that they have approached all of the 70 banks or foreign banks that operate in this country, that some of the entities in the

Group have accounts with Standard Bank, or are able to make use of third party payment providers or that some of the entities in the Group which have had their bank accounts with other financial institutions terminated have not been wound up or liquidated, in my view, it is no proof that the Group will not suffer irreparable harm.

[58] The reality is that once Nedbank closes the Sekunjalo Group's bank accounts it would be difficult to find another bank which will accept them as client. Evidence was led in *Bredenkamp* that the fact that an account an aspirant customer was closed by another financial institution is an important factor to consider when deciding whether or not to accept the client, though it would be the reason rather than the fact of closure that would be its concern.

[59] I highlight this evidence to emphasis the kind of harm which may befall the Grop that may not be redressed by a victory in the Main Equality Court Application. The Sekunjalo Group used Puleng one of the companies, in the Group, as an example of what can befall the entire group if their accounts were to be closed. In this respect the Group stated that:

> "*In light of all the negative media reports already surrounding the applicants, the negative commercial impact that unbanking will have on the applicants will no doubt further tarnish the applicants' reputations and this is likely to lead to the demise of several, if not all the applicants, as investors will become aware that the applicants are unbanked and therefore unlikely to operate effectively. The materially and risk of this is borne out by the events following the closure of Puleng*

Technologies (Pty) Ltd's (Puleng) bank accounts. Puleng was one of the Sekunjalo entities which was unbanked when FNB closed its banking facilities. When Puleng's bank accounts were closed with effect from 21 June 2021, about 70 employees resigned and the revenue declined from R300m to less than R10million. Puleng lost all its customers and the cybersecurity industry lost an important competitor, arguably the only transformed and black ICT cybersecurity company servicing the banks."

Following the losses suffered by Puleng, it had no choice but to retrench a further number of employees. Puleng has since been sold as a direct consequence of the closure of its banking facilities and inability to obtain alternative banking facilities. It simply became an unsustainable business.

With the exodus of staff, including all senior management and technical staff, many clients felt that Puleng could no longer be trusted to deliver a proper service. Pulieng's dignity as a company became completely compromised and it had to close its doors as a result. In the end, the Sekunjalo Group was forced to sell Puleng at a loss.

[60] The above demonstrate in detail the consequences of loosing Banking facilities in this modern era of technology will be catastrophic and may result in job losses. This in my view is an irreparable harm which may not be redressed by a success in the Main Equality Court Application. This brings me to the third requirement namely, where lies the balance of convenience.

BALANCE OF CONVENIENCE

[61] Nedbank has explained that it would be severely prejudiced if it is forced to continue providing banking services to the applicants, given the substantial risk of reputational harm that the continuation of such services entails, and the potential loss of revenue, increased administrative and monitoring burdens, regulatory or legislative action, a loss of existing and potential client business and an impact on its ability to retain key employees. Nedbank also pointed out that Regulation 39(4) of the Regulations Relating to Banks promulgated in terms of section 90 of the Banks Act, 1990 obliges every bank to have in place comprehensive risk management processes, practices and procedures to identify, monitor, appropriately mitigate and report (amongst others), the risks listed in Regulation 39(3).

[62] Regulation 39(4) is intended to protect the banks and will indeed protect Nedbank if the Sekunjalo Group were to engage in activities that has the potential to harm Nedbank as alleged.

[63] I agree with the submission by the Sekunjalo Group that given its long standing relationship with Nedbank and in the light of the latter's reliance on potential harm the balance of convenience is in favour of restoring, retaining the status *quo*.

NO ALTERNATIVE REMEDY

[64] Nedbank submitted that the Sekunjalo Group has alternative remedies. The Group can approach other banks for banking facilities; can make use of third-party

payment provides. It was also suggested that the Group can use the trust account(s) of their attorneys to do business.

[65] I am not persuaded that these are remedies available to the Sekunjalo Group in the circumstances. Given that Nedbank has embarked on the process of closing the Group's accounts the reason will surely play a role when the Sekunjalo Group approaches other banks and would potentially influence negatively the other banks.

[66] Using third-party payment providers is also not an option. This is so even if Ayo has stated that it intended to use this method of continuing to do business. This is made clear by the applicants who stated that they will be able to use this method by utilising its subsidiaries' banking facilities but can only do so for as long as those subsidiaries have banking facilities. This method will stop dead in its tracks if Nedbank were to close those subsidiaries bank accounts, as it intends to do.

[67] Lastly, the nature of an attorney's trust account is not intended for this kind of use. The main purpose of an attorney's trust account is to keep monies belonging to client but not to conduct business transactions on behalf of clients with that money.

[68] In the result, I am satisfied that a proper case has been made out for an interim order:

68.1 An interim interdict in terms of the provisions of section 21(5) of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

68.1.1 Prohibiting the first and second respondents (respondents) from closing the bank accounts held by the first, second, third, fourth, fifth, sixth, seventh, eighth, fourteenth, fifteenth, seventeenth, twenty-first, twenty-second, twenty-third, twenty-sixth, thirtieth, thirty-second, thirty-third and forty-fourth applicants at Nedbank (the respondents) and their related institutions pending the final determination of the proceedings instituted in the Equality Court under case number EC01/2022 (the Main Equality Court Application).

68.1.2 prohibiting the respondents from closing the bank accounts held by the ninth, tenth, eleventh, twelfth, thirteenth, sixteenth, eighteenth, nineteenth, twentieth, twenty-fourth, twenty-fifth and thirty-first applicants at Nedbank (the respondents) and its related institutions pending:

68.1.2.1 the joinder/intervention of these applicants in the Main Equality Court Application.

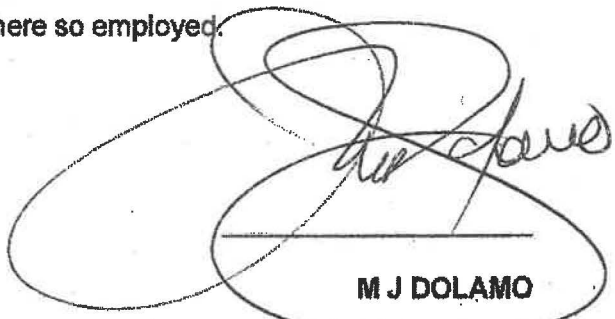
68.1.2.2 the final determination of the Main Equality Court Application.

68.2 To the extent that the respondents have already closed any bank accounts held by any of the applicants at the time of the hearing of this application, they are hereby directed and ordered to reopen such accounts with immediate effect and to retain the terms and conditions on which these accounts were operating prior to the date of their closure pending the final

determination of the proceedings in the Main Equality Court Application.

68.3 The respondents are hereby granted leave to approach the Equality Court on the same papers duly supplemented, after the finalisation of the Main Equality Court Application for an order discharging this interim interdict, if need be.

68.4 The respondents are ordered to pay the costs of this application, including the costs of 2 (two) Counsel, where so employed.



M J DOLAMO

JUDGE OF ~~THE HIGH COURT~~