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

CASE NO: 698/2022

In the matter of:

MOHAMMED IQBAL SURVÉ First Applicant

& 42 OTHERS

and

NEDBANK LIMITED First Respondent

NEDBANK PRIVATE WEALTH STOCKBROKERS (PTY) LTD Second Respondent

Date of Hearing: 11 February 2022

Date of Judgment: 14 February 2022

JUDGMENT

FRANCIS, J

INTRODUCTION

[1] This is an application for an interim interdict lodged on an urgent basis by 43

applicants, all of whom form part of the Sekunjalo Group of Companies.

[2] All the applicants hold bank accounts with the first respondent and/or the second respondent (who will, depending on the context, be collectively referred to for the sake of convenience as “Nedbank”).

[3] On 15 November 2021, Nedbank decided to terminate the bank accounts of thirty-three of the applicants, and gave notice of such termination. For seven of the applicants, their accounts will be closed on 15 February 2022, twenty-four of the applicants’ bank accounts will be closed on 15 March 2022, and two applicants’ bank accounts will be closed on 22 February 2022. The ten remaining applicants were given notice as well on 15 November 2021 that if they did not comply with certain preconditions, Nedbank would also consider closing their accounts. I was informed during the hearing of this matter that those applicants have now also been informed that their bank accounts will be terminated with effect from 9 May 2022.

[4] One of the applicants received a letter to this effect which was handed in by Mr Ngalwana SC who appeared on behalf of all the applicants. I was advised that the remaining nine of the ten applicants had all received similar notices of termination. Mr Cockrell SC, who appeared on behalf of Nedbank, accepted the veracity of the letter handed in but could not confirm whether or not the other nine applicants had received similar letters. However, it was not disputed that these applicants had advised Nedbank that they could not comply with the conditions, and have in fact not complied with the conditions. I, therefore, for the

purpose of this judgment, accept that all the applicants have received notice at some stage from Nedbank that their accounts will be terminated.

[5] Each of the letters of termination record that Nedbank had been reviewing its banking relationship with the applicant concerned and that after the exchange of communications and representations made by the applicant, Nedbank decided to terminate the relationship. The factors that led to Nedbank's decision was stated the letter to include, *inter alia* the following:

> *"6.1 Your direct/indirect association with Dr Surve and or the Sekunjalo Group, poses reputational and association risks to Nedbank.*
>
> *6.2 The serious nature of the allegations levelled against Dr Iqbal Surve, the Sekunjalo Group and related parties and the ongoing and increased adverse media which (regardless of the substantive merits thereof or lack thereof) pose significant reputational risks and association risks to Nedbank.*
>
> *6.3 The litigation that some of the companies in the Sekunjalo Group have been involved in.*
>
> *6.4 A detailed transactional analysis of the accounts held by you were conducted and the responses received by Nedbank to queries in relation to certain transactions were found to be unsatisfactory.*
>
> *6.5 A detailed transactional analysis of the accounts held by you were*

conducted and the responses received by Nedbank to queries in relation to certain transactions were found to be unsatisfactory.

6.6 Concerns in relation to source of wealth/source of funds/nature of deposits into certain accounts which concerns have not been adequately addressed and, notwithstanding the representations received through the client engagements held, remain.

6.7 The representations made during client engagements did not dispel Nedbank's concerns in relation to the reputational and association risks that Nedbank may potentially be exposed to with a continued relationship."

[6] In respect of the sixth to thirteenth applicants, they were advised that Nedbank was reviewing the banking relationship with these applicants because of their association with the Sekunjalo Group and/or Dr Surve and the risk that this imposed. Nedbank then also stated that it was prepared to continue its banking relationship with these applicants provided that they met certain pre-conditions within certain prescribed timelines. If these pre-conditions and conditions were not duly complied with, Nedbank reserved the right to reassess its position on the continuation of banking facilities. As noted above, these pre-conditions and conditions were not met and Nedbank appears to have subsequently notified these applicants that their bank accounts will be cancelled with effect from 9 May 2022.

[7] All the applicants have been advised that their accounts will be closed when all pending entries have been processed. This means, in effect, that "*access to electronic banking would be restricted on date of closure. Any debit orders, if applicable will be returned, unpaid, post the account closure date. Any funds held in credit in the accounts would be transferred to a Nedbank suspense account, where no interest will be earned and will be held there until such time that (the applicant) provides (Nedbank) with specific instructions to transfer or withdraw the funds*".

THE APPLICANTS' SUBMISSIONS

[8] Dr Surve, the first applicant, deposed to the founding affidavit on behalf of all the applicants. He submitted that in August 2013, a Sekunjalo-led consortium, including union investment companies, Interacom (the China/Africa Development Fund and CCTV of China) and the Public Investment Corporation ("PIC"), together acquired Independent Media.

[9] Rival media houses saw Independent Media as a threat to their advertising circulation revenue, especially from government and they embarked on a "vicious campaign", by launching several defamatory articles focusing on Dr Surve, the PIC, and the Government Employees Pension Fund. He alleges that Nedbank has sourced negative media reports from these entities. The conduct of rival media houses was aimed at attempting to remove Independent Media as a media competitor in the business media landscape.

[10] On 17 October 2018, the President of South Africa appointed Justice Mpati, the former president of the Supreme Court of Appeal, to chair a commission of inquiry into allegations of impropriety concerning the PIC. This commission came to be known as the Mpati Commission.

[11] The Mpati Report was published publicly on 12 March 2020, having been submitted to the President earlier on 15 December 2019.

[12] Dr Surve submits further that during the course of its inquiry, the Mpati Commission investigated *inter alia* the relationship, and certain transactions concluded, between the PIC and some companies within the Sekunjalo Group. He states that in so far as the Mpati Commission's inquiry regarding the Sekunjalo Group companies are concerned, it made *inter alia* the following findings:

> "*71.1 Due diligence reports highlighting issues around independence of Board members, policies to be implemented etc. were not followed up by the PIC to ensure implementation post the deal being approved and monies having flowed.*
>
> *71.2 the "close relationship" between Dr Matjila and Dr Surve created top down pressures that the deal teams experienced to get the requisite approvals.*"

[13] According to Dr Surve, the Mpati Commission made various recommendations regarding the Sekunjalo Group companies which included conducting a forensic review of processes involved in transactions entered between the Sekunjalo

Group and the PIC with a view to determining the flow of monies out of and into the Sekunjalo Group. Recommendations were also made in order to ensure that the PIC comply with pre- and post-conditions for investments made with all companies, not only the Sekunjalo Group, and that steps be taken to recover all monies with interest due to the PIC. The commission further recommended that the regulatory and other authorities consider an investigation into whether any laws or regulations had been broken by either the PIC and/or the Sekunjalo Group; determine what legal steps, if any, should be taken to address any violations; and assess whether the movement of funds between the accounts, as indicated above, was intended to mislead investors and/or the regulators.

[14] The contents of the Mpati Report were relied on by some of the major banks in South Africa to terminate the banking facilities of some of the entities in the Sekunjalo Group, and so does Nedbank.

[15] The applicants have instituted proceedings in the Equality Court and lodged a complaint with the Competition Commission ("the Commission"). When the papers were filed in this court, proceedings in the Equality Court had not yet been instituted but I was advised during the hearing of this matter that this has now been done. The proceedings in the Commission were instituted on 17 December 2021 and an urgent application for interim relief was instituted in the Competition Tribunal ("the Tribunal") on 22 December 2021; an issue that I will return to later.

[16] The applicants have described their case in the Equality Court as being one based on discrimination on the basis of race. They allege that Nedbank, and the

other major banks, terminated the bank accounts of members of the Sekunjalo Group, and have been selective in the action taken against companies that are "white dominant businesses". They cite companies such as the Steinhoff Group, EOH Limited, and the Tongaat-Hulett Group who have all been found guilty of fraud and various other offences without their banking accounts or facilities having been terminated. The applicants submit that the actions of these companies were far more egregious than the actions or conduct attributed to the Sekunjalo Group and yet it is only the latter who has faced punitive action. The difference between the applicants and the "white" companies is that the latter companies have either admitted to wrongdoing or were found to have committed wrongdoing, and have incurred actual liability in respect of their conduct. On the other hand, according to the applicants, the Mpati report made no such findings against any of the Sekunjalo entities; certainly none that could result in any liability.

[17] The yardstick which is used by Nedbank in assessing the reputational risk that is posed to it by the Sekunjalo Group, thus, differs markedly from the one it uses in respect of the "white" companies.

[18] The applicants, therefore, submit that they have been discriminated against on *inter alia* the basis of race. Furthermore, Nedbank's reliance on inaccurate and false media reports as the basis for terminating and denying the applicants' banking facilities, constitutes harassment and unfair discrimination, in contravention of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 ("PEPUDA"), and is unconstitutional.

[19] The applicants also challenged the right of Nedbank, and various other banks, to unilaterally terminate their banking facilities where such termination would result in the unemployment of thousands of people and impinge on the applicants' and their employees' constitutional right to trade freely in their field of choice (section 22 of the Constitution).

[20] Further constitutional rights which have been invoked in the Equality Court proceedings, include the applicants' right of freedom of association (section 18 of the Constitution), the right not to be discriminated against on the basis of *inter alia* race (section 9 of the Constitution) and the right to human dignity (section 10 of the Constitution).

[21] The applicants have lodged a competition complaint against Nedbank and eight of the major banks in South Africa as well.

[22] According to the applicants, the banks which form part of the competition complaint, are the dominant market players in the financial sector and they have colluded in an attempt to force the Sekunjalo Group of companies to stop trading by not only terminating their existing banking facilities but also by denying them access to any banking facilities completely. If they were to succeed, this would lead to a reduction in competition in certain commercial areas, including in the media sector where the Sekunjalo entities hold the majority shareholding in one of the largest media houses in South Africa.

[23] The applicants, therefore, require the Commission to investigate whether:

[23.1] Nedbank's conduct constitutes an abuse of dominance; and

[23.2] there exists a form of tacit collusion between the banks in terms whereof they are potentially abusing their market power to suppress the Sekunjalo Group businesses by refusing to provide access to essential services.

THE RESPONDENTS' CASE

[24] The respondents submit that the application is devoid of any merit, be it on procedural grounds or on the substantive merits. According to Nedbank, they are entitled to regulate and manage their reputational risk and they have the right to terminate any banking relationships based on their contractual arrangement with each of the applicants. For this proposition, they rely on the binding authority of the Supreme Court of Appeal in ***Bredenkamp and Others v Standard Bank of South Africa Limited*** **2010 (4) SA 468 (SCA)**.

[25] Each of the applicants have a bank account with Nedbank which is governed by terms and conditions to which the applicants have agreed when they opened their accounts. The relationship between the applicants and Nedbank is thus contractual in nature.

[26] All the contracts entered into with the applicants contain provisions which provide expressly or impliedly for the termination of the banking relationship on notice, either from a specified period or on reasonable notice. Where suspected fraud is concerned, no notice is required.

[27] According to the respondents, the Sekunjalo Group has been the subject of the allegations of improper and unlawful conduct for a number of years. The applicants are not victims of a widespread media conspiracy but have, instead, come under the spotlight given the serious allegations against the Sekunjalo Group and Dr Surve with whom all the applicants are associated. These allegations were eventually probed by the Mpati Commission which has generated further negative publicity for the Sekunjalo Group. According to Nedbank, the applicants have sought to downplay the findings of the Mpati Commission by suggesting that there was no adverse finding of wrongdoing against the Group. However, Nedbank submits that the findings made against Dr Surve and the Sekunjalo Group are damning. In support of this submission, Nedbank refers, for example, to the following findings in the Mpati Report:

27.1 Reference was made to the "outright manipulation" by Dr Surve of the valuation numbers to increase the Ayo valuation from his own initial staff assessment (by former CIO, Mr Malick Salie).

27.2 Board members of many of the Sekunjalo Group companies are not independent with some board members being related to Dr Surve. These board members are long-serving employees, long-time friends or are non-executive directors on Sekunjalo Group company boards and dominate the board seats in those companies.

27.3 The Ayo transaction showed "a marked disregard for PIC policy and standard operating procedure". The close relationship between

Dr Matjila and Dr Surve created "top down pressures" which materially contributed to the conclusion of the deal.

27.4 The Ayo transaction "demonstrates the malfeasance" of the Sekunjalo Group.

[28] The respondents submit further that the allegations against the Sekunjalo Group have created substantial reputational risk for Nedbank. The perception of individuals or the public generally would be negative of Nedbank if Nedbank was involved or associated with Sekunjalo given the serious allegations and/or findings against the Sekunjalo Group and Dr Surve. The bank's reputation would be undermined by the allegations, whether or not they are true; it is the perception that causes the damage.

[29] Based on the reputational risk posed by the applicants, Nedbank decided to terminate the accounts on reasonable notice after engaging with them in good faith over a period of time.

[30] The respondents have challenged the application on procedural grounds as well: the lack of urgency, and jurisdiction. In so far as the jurisdictional complaint is concerned, Nedbank contends that this court is precluded from granting an interdict, even if it is temporary in nature, because the Equality Court and the Tribunal are vested with the exclusive jurisdiction to determine whether interim relief should be granted.

[31] In its answering affidavit, Nedbank also took issue with the authority of Dr Surve to institute this application on behalf of the other 42 applicants. It appears,

however, that this issue was subsequently adequately addressed by the applicants and Nedbank does not appear to have persisted with this issue; certainly, it was not addressed in the heads of argument or at the hearing.

DISCUSSION

[32] It is necessary to deal with the procedural defences raised by Nedbank as this will determine if it is necessary to consider the substantive merits of the application.

URGENCY

[33] The respondents submit that there was no good reason for bringing this application on an urgent basis and, in any event, if any such urgency existed, it was self-created.

[34] The applicants aver that they were only advised in mid-November that the contracts would be terminated. They, thereafter, made representations to Nedbank and engaged with the latter in an attempt to obtain clearer reasons for Nedbank's decision. It was only on 23 December 2021 that Nedbank indicated that it was disinclined to reconsider its position. Nedbank's correspondence also came during the festive season and at a time when the applicants' attorneys had closed for the year. The notice given by Nedbank was not reasonable and the applicants will not be able to make alternate arrangements within the time period afforded to them. From the time that the applicants received notice, they also attempted to engage other banks to provide banking facilities without success. This took up some time as well.

[35] The respondents, on the other hand, are of the view that adequate notice was given to the applicants with regard to when their accounts would be closed, and opine that the effect of the closure of accounts on the applicants' businesses and their employees are unnecessarily exaggerated. The applicants have only approached twenty-eight out of the seventy banks, some of the applicants still have bank accounts with Standard Bank, and the applicants can have recourse to third party providers

[36] Finally, so argued Nedbank, the applicants have instituted proceedings in the Equality Court and the Competition Court and it is possible that they could be afforded substantial redress at these hearings in due course; as such, they have failed to satisfy the requirements for urgency in terms of Uniform Rule 6(12)(b).

[37] On balance, I am satisfied that the applicants have made out a case for urgency. They engaged in discussions with Nedbank subsequent to receiving their termination notices on 15 November 2021 and tried to make representations to Nedbank to find out the reasons for the termination. Nedbank appears to have encouraged further engagement with the applicants, although their response to the representations was lukewarm at best. However, by encouraging these engagements, this may well have contributed to the applicants not taking action immediately in the hope that something could be worked out. Certainly, during their engagements, Nedbank did not state unequivocally that the termination notices were firm and final and that despite their interaction with Nedbank, the latter would not reconsider or change the termination date.

[38] One must also consider that the period when action might have been taken fell during the festive season where, typically, legal practices are winding down, thus making it difficult to give instructions or take advice. The application was filed on 12 January 2022 and, in my view, there was no inordinate delay.

[39] Obviously, the respondents have been placed under a great deal of pressure in having to respond in the short period afforded to them - but they have done so. They have filed a comprehensive answering affidavit and extensive heads of argument. While this in itself does not determine why this court should hear the application on an urgent basis, it cannot be denied that the respondents have at least had an opportunity to exercise their right to respond *albeit* within the strictures of the time periods that have served to constrain both parties.

[40] I, therefore, find that the applicants have made out a case for urgency.

JURISDICTION

[41] The applicants submit that this court lacks jurisdiction to grant the relief sought by the applicants.

[42] In paragraph 2 of their notice of motion, the applicants seek an interim interdict preventing Nedbank from closing the bank accounts held by the applicants pending the outcome of proceedings to be instituted in the Equality Court and the final determination of the complaint lodged with the Competition Commission ("the Commission").

[43] As noted earlier in this judgment, Counsel for the applicants advised this court that proceedings have now been instituted in the Equality Court. The competition complaint was submitted to the Commission and an application was lodged in the Tribunal for interim relief prohibiting Nedbank, *inter alia*, from closing the accounts of the applicants (or at least some of them).

[44] The applicants rely principally on the Constitutional Court's decision in ***National Gambling Board v Premier, Kwa-Zulu Natal and Others*** **2002 (2) SA 717 (CC)** and have submitted that this court has jurisdiction to grant the interdict being sought by the applicants as it does not involve a final determination of the rights of either the applicants or Nedbank. The applicants simply seek to preserve the status *quo* until such time as the issues in the Equality Court, the Commission, and the Tribunal have been fully ventilated and determined. In this regard, the court's attention was drawn to paragraph [50] of the ***National Gambling Board*** judgment where the following is stated:

> "*[50] Whether a High Court will have jurisdiction to grant interim relief pending a matter exclusively within this court's jurisdiction does not depend on the form or effect of the interim relief. It depends on the proper interpretation of the provision and on the substance of the order: does it involve a final determination on the rights of the parties or does it affect such final determination? If it does not, the High Court will, depending on the provision that grants exclusive jurisdiction, have jurisdiction to grant interim relief.*" (footnotes omitted).

[45] From the quoted passage, it appears that the High Court may well have jurisdiction to entertain an application for interim relief even though another adjudicatory body has exclusive jurisdiction to deal with the main dispute. However, this depends on the interpretation of the relevant provision of the statute under consideration that grants exclusive jurisdiction to the adjudicatory body concerned. This is made abundantly clear if one has regard to paragraph [51] of the ***National Gambling Board*** judgment which reads as follows:

> "*[51] It does not follow that a High Court will always have jurisdiction to grant or refuse interim relief pending the decision of a matter exclusively within this court's jurisdiction. To decide whether a High Court has such jurisdiction the provisions in terms of which this Court has exclusive jurisdiction must be interpreted.*"

[46] It is, therefore, necessary to consider the relevant statutory provisions which confer on the Equality Court, Commission, and the Tribunal the jurisdiction to enquire into the matters referred to them by the applicants. If these entities have exclusive jurisdiction, the question that arises is whether they have exclusive jurisdiction to determine any interim relief that may be consequential and ancillary to the main dispute. Conversely, the question is whether or not the jurisdiction of the High Court is ousted in light of the provisions of the statutes under which the Equality Court, the Commission, and Tribunal are required to hear the matters referred to them by the applicants.

[47] Section 21 of PEPUDA deals with the powers and functions of the Equality Court and reads as follows:

"***Powers and functions of equality court***

(1) The equality court before which proceedings are instituted in terms of or under this Act must hold an inquiry in the prescribed manner and determine whether unfair discrimination, hate speech or harassment, as the case may be, has taken place, as alleged.

(2) After holding an inquiry, the court may make an appropriate order in the circumstances including –

(a) An interim order;

….

(5) The court has all ancillary powers necessary or reasonably incidental to the performance of its functions and the exercise of its powers, including the power to grant interlocutory orders or interdicts."

[48] From my reading of Section 21 of PEPUDA, the Equality Court is obliged to hear allegations of unfair discrimination referred to it and when it does so, it must exercise its powers to grant interdictory relief if requested to do so. The power to grant interdictory relief is a permissive one, as it must be, because it is not in all cases that interdictory relief will be requested by an applicant. However, in the exercise of its powers, once interdictory relief is requested by an applicant who refers, for example, an unfair discriminatory matter to it, the Equality Court is obliged to exercise its power relating to the grant of the interdict. It cannot decline to exercise its power but it must do so.

[49] In addition, one must have regard to section 169 of the Constitution in terms of which a High Court may decide any matter that is "not assigned" to another Court

by an act of parliament". I agree with the submission by Mr Cockrell that because a power to grant interdictory relief in respect of complaints of discrimination is assigned expressly to the Equality Court (i.e. it is assigned to another court by an act of parliament), the High Court does not have jurisdiction to grant the interim interdict, or a final interdict for that matter.

[50] With regard to the application before the Tribunal, twenty-five of the applicants initially referred a complaint to the Commission against Nedbank Limited ("the first respondent") and a number of the other banks major banks in South Africa.

[51] The relief sought by the applicants against the respondent is much wider than, but includes, the relief sought in this court. The applicants approached the Tribunal on an urgent basis for an order *inter alia* prohibiting the first respondent from closing any accounts of the applicants or in any way unilaterally changing the terms and conditions attaching to those bank accounts until the applicants' complaint is finally determined by the Commission, the Tribunal, or the Competition Appeal Court (as the case may be).

[52] The interdict application sought before the Tribunal was lodged in terms of section 49C of the Competition Act 89 of 1998 ("the Competition Act"). In terms of this section, once a complaint is lodged with regard to a prohibited practice, the complainant may apply to the Tribunal at any time, whether or not a hearing has commenced, for an interim order in respect of the alleged prohibited practice. In the matter at hand, the applicants have complained that the conduct of the banks in providing banking and payment services to the applicants contravenes sections 4, 5, and 8 of the Competition Act. These sections of the Act deal with

the prohibition of certain horizontal and vertical restrictive practices, and the abuse of market dominance.

[53] Section 62 of the Competition Act provides that the Tribunal and the Competition Appeal Court share exclusive jurisdiction in respect of certain matters, including the interpretation and application of those sections of the said Act that deal with the prohibited practice provisions upon which the applicants' complaint is based. This would include the grant of interdicts under section 49C of the Competition Act.

[54] In my view, section 62 of the Competition Act read with section 169 of the Constitution indicates that the High Court lacks jurisdiction to hear matters dealing with the subject matter of the applicants' complaint together with any interim relief which they have sought.

[55] The applicants appear to have been alive to the exclusive jurisdiction of the Competition Tribunal with regard to the interdictory relief in relation to a prohibited practice and referred their application for such relief to the Tribunal. This application is set down to be heard before the Tribunal on 7 and 8 March 2022. During the course of this hearing, I enquired why the parties did not petition the Tribunal to hear the application for interim relief prior to the first "guillotine" date of 15 February 2022. I was advised by Mr Cockrell, who also appears for the respondents in the competition complaint, that whilst the applicants were willing to do so and had canvassed this possibility, the respondent banks, including Nedbank, refused to agree to an earlier hearing.

[56] It was further argued on behalf of the applicants that only twenty-five applicants applied to the Tribunal for urgent interdictory relief, the implication being that this court has jurisdiction, at the very least, in respect of the remaining applicants. However, this does not really alter the situation much. All the applicants have applied to the Equality Court for interdictory relief which makes the relief sought by all the applicants beyond the jurisdiction of this court. Also, the relief sought in this court is that Nedbank must be interdicted from closing the applicants' bank accounts until the finalisation of the Equality Court proceedings and the competition complaint.

[57] In summary, then, my reading of the provisions of PEPUDA and the Competition Act is that the Equality Court and the Tribunal have exclusive jurisdiction to determine the matters referred to them by the applicants, to the exclusion of the High Court.

[58] Given my finding on the jurisdictional issue, it is not necessary to consider the application further for, as the court observed in ***Makhanye v Zululand*** **2010 (1) SA 62 (SCA)** at para [54], a court is precluded from dealing with the merits of the matter brought to it if it has decided that it has no jurisdiction.

[59] Before proceeding to the issue of costs, I do not think it out of place to make a few comments in light of the invitation by the applicants not to decide this matter on any "technical" grounds but rather to consider the importance of the matters referred to the Equality Court, the Commission, and the Tribunal. These matters do indeed raise important issues of law and are of great practical importance for all the parties concerned. The applicants have categorised this case as being

one about transformative constitutionalism, a case where the private law of contract and common law, on the one hand, collides head on with constitutional values, on the other hand. Accordingly, the applicants submitted during argument, and I quote from their heads of argument, "*this court should not be distracted by technical niceties that are often the last refuge of those determined to avoid confronting the merits of an awkward legal challenge of a political and social economic type*". However, I must decline the invitation, as inviting as it is. In my view, it is precisely because of the nature of the issues that have been raised, and the arguments proffered in support thereof, that the legislature has entrusted specialist investigative and adjudicatory bodies to decide issues of the sort brought to this court.

[60] I may say, though, that the applicants were not necessarily precluded from challenging Nedbank's actions on contractual grounds. It is indeed so that the relationship between the applicants and the respondents is based on contract. As such, the SCA's judgment in ***Bredenkamp*** looms large, as it does in most matters involving the termination of a banking relationship. However, in my view, ***Bredenkamp*** should not be used uncritically or applied mechanically to any and all bank-client relationships. As the Constitutional Court remarked in ***Beadica 231 CC and Others v Trustees for the Time Being of the Oregon Trust and Others* 2020 (5) SA 247 (CC)** at para [74], a careful balancing exercise ought to be undertaken in order to determine whether a contractual term, or its enforcement, would be contrary to public policy (at para 71). Furthermore, the Constitutional Court in ***Barkhuizen v Napier* 2007 (5) SA 323 (CC)** at para 70, stated that public policy would preclude the enforcement of a contractual term if its enforcement would be unjust or unfair (at para 73).

[61] In this regard, it appears to me that it is fundamentally unfair and contrary to public policy for a bank to unilaterally decide to close an account, place the proceeds of any monies standing to the credit of the account holder in that bank's suspense account, and the bank then retains the interest earned on those monies. I must add that although it is not evident on the facts before me that the contract between Nedbank and the respondents contain a clause which permits Nedbank to unilaterally appropriate any interest earned on monies in a suspense account, if such a clause does exist, it and/or the enforcement thereof could arguably be unfair and contrary to public policy.

[62] The applicants, however, did not seek to challenge the terms of the contract with the bank. Indeed, the applicants expressly disavowed any challenge to the terms of the contract between themselves and the bank. In their heads of argument, for example, the applicants state that they were "*not attacking the validity of the clause in terms whereof (Nedbank) seeks to terminate the applicants' banking facilities… but instead the enforcement of a clause … where its enforcement will result in the complete unbanking of*" the applicants. If the applicants had framed their case in this court on contractual grounds, the result may well have been different.

[63] I place this possibility no higher than a hypothetical proposition because this was not the case before me. The point to be made, though, is that a court is bound by the issues as defined by the litigants; it cannot stray beyond that.

COSTS

[64] Generally speaking, in disputes between private litigants, the award of costs follows the result. The respondents submitted that this court should adhere to the general principle and, in addition, urged this court to impose costs on an attorney-client basis because of the alleged abuse of process and "forum shopping" engaged in by the applicants.

[65] The applicants, on the other hand, submitted that in the event the application was decided against them, there should be no order of costs granted against the applicants due to *inter alia* the unequal economic power differential between the parties - to use Mr Ngalwana's phrase, this was a *"David v Goliath"* battle.

[66] Costs are in the discretion of the court, a discretion that must be exercised judicially.

[67] The applicants lodged an application for interdictory relief with the Tribunal and this application is scheduled to be heard on 7 and 8 March 2022. The applicants did attempt to have the application to be heard by the Tribunal before 15 February 2022 when the first bank accounts of some of the applicants would be closed. Nedbank and the other respondent banks opposed an earlier hearing date for the Tribunal hearing and also did not support a separation of the matter in order to deal exclusively with the dispute relating to interim relief. This court is not privy to the reasons why Nedbank and the other banks adopted the stance that they did. Suffice to say, Nedbank's approach appears to be a curious one.

[68] Nedbank has all along argued that it is the Tribunal that has no jurisdiction to hear this matter. However, when there was an opportunity to expedite this matter and get it before the Tribunal, it opposed this course of action, well knowing that by the time the Tribunal heard the application for interim relief, some of the applicants' bank accounts would have been closed. This, on the face of it, appears to be somewhat cynical. It is also ironic for the respondents to accuse the applicants of "forum shopping" when the applicants approached this court in a last ditch effort for relief.

[69] Whilst it may be argued that there is no legal duty on a party to assist the other party to facilitate the latter's matter being heard, is not acceptable is for a party to frustrate, or participate in the frustration, of a matter from being heard expeditiously, especially in circumstances such as the case before me. In this matter, too, Nedbank, somewhat ironically, appears to have engaged precisely in the type of behaviour complained of by the applicants - the collective power of the banks appears to have been employed to stall the appropriate forum from timeously considering an application that is obviously of great importance to all the parties concerned.

[70] I, therefore, do not see any reason why the applicants should bear the costs of this application given the possibility that it could have been heard in the correct forum before February 2022. In the circumstances, I am of the view that costs should not necessarily follow the result.

ORDER

The application is dismissed and each party is directed to pay their own costs.

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FRANCIS J

Judge of the High Court

Appearances

For Applicants:	Adv Vuyani Ngalwana SC
	Adv Isaac Shai
	Adv Jo-Ann Moodley
	Instructed by: Adriaans Attorneys
For Respondents**:**	Adv Alfred Cockrell SC
	Adv Michael Mbikiwa
	Instructed by: ENS Africa