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

Case No.:12629/2022

In the matter between:

AYO TECHNOLOGY SOLUTIONS LIMITED Applicant

and

ACCESS BANK SOUTH AFRICA LIMITED Respondent

JUDGMENT DELIVERED ELECTRONICALLY ON 13 OCTOBER 2022

MANGCU-LOCKWOOD, J

A. INTRODUCTION

[1] This is an urgent application for interim relief in Part A, pending the outcome of a review application contemplated in Part B. When these proceedings were launched the applicant sought an order directing the respondent (*"the Bank"*) to reopen bank accounts that the applicant previously held with the Bank (*"the bank accounts"*), which were closed on 31 May 2022; and interdicting the Bank from: (a) closing the bank accounts pending the final determination of the Part B proceedings, or (b) in any way limiting the operation of the bank accounts so as to ensure that the applicant is permitted to operate the bank accounts as it did immediately prior to their closure.

[2] The applicant sought the relief based, in the first instance, on the provisions of the Promotion of Administrative Justice Act 3 of 2000 (*"PAJA"*), in the first alternative on the doctrine of legality and, in the second, on the common law principles of contract.

[3] The matter came before me on the urgent roll. The respondent raised some points *in limine,* challenging the urgency of the matter and the jurisdiction of this Court to determine the matter, and the applicant also brought an application to strike out certain matter from the respondent's answering papers.

[4] After the hearing of the matter, while judgment was reserved, certain events occurred which have overtaken the case as pleaded. But first, the background facts.

B. THE FACTS

[5] The applicant is the holding company of several companies specializing in information and communications technology. Together with its subsidiaries, it is informally referred to as the Ayo Group. In turn, the Ayo Group is part of the Sekunjalo Group – also an informal but well-used descriptor – which is a group of companies in which Sekunjalo Investment Holdings (Pty) Ltd holds shares. The Sekunjalo Group is owned primarily by African Equity Empowerment Investments Limited (*"AEEI"*) and the Public Investment Corporation (*"PIC"*).

[6] As will become evident shortly, a feature of these proceedings is that the name of Dr Iqbal Surve features, and he is not a party to these proceedings. The applicant's position is that Dr Surve does not represent it or speak on its behalf, since it (applicant) is an independent corporate entity, with its own board of directors who do not include him; and he is not its shareholder.

[7] On 17 October 2018, the President of the Republic appointed a Commission of Inquiry, in terms of his constitutional powers and the Commissions Act 8 of 1947, to investigate allegations of impropriety regarding the PIC (*"the Mpati Commission"*). One of the terms of reference of the Mpati Commission was to enquire, make findings

and recommendations regarding *"[w]hether any alleged impropriety regarding investment decisions by the PIC [reported] in media reports in 2017 and 2018 contravened any legislation, PIC policy or contractual obligations and resulted in any undue benefit for any PIC director, or employee or any associate or family member of any PIC director or employee at the time"*.[1] The transactions that formed the subject of the media reports referred to in the terms of reference included the applicant as well as other companies in the Sekunjalo Group.[2]

[8] On 12 March 2020 the findings and recommendations of the Mpati Commission were made public. The Commission concluded, *inter alia*, that the PIC's interactions with, and investments in, the Sekunjalo Group were questionable. Some of the findings highlighted by the Bank are the following: (a) Generous bonuses were given to PSG Capital, the transactional advisor and sponsor for successfully listing the applicant; (b) Money was moved around in the applicant's bank accounts to create the incorrect impression of funds in bank accounts but, in reality, this was only the case at specific moments in time; (c) Dr Surve used his relationship with the then-CEO of the PIC, Dr Matjila, to make questionable investments into the Sekunjalo Group and to pressure teams within the PIC to approve deals between the Group and the PIC; (d) Dr Matjila and Dr Surve negotiated with each other to ensure the PIC bought shares for a much higher price than what the shares were worth. This was done without following internal PIC processes, and internal teams were not informed of these negotiations; (e) Dr Surve manipulated the numbers to increase the applicant's valuation from its own initial staff valuation of R2.3 billion to range between R10 billion and R15 billion, which drove up the price of the shares; (f) The Sekunjalo Investments showed a marked disregard for PIC policy and standard operating procedures.

[9] In addition to the Mpati Commission findings, there were a number of negative media reports accusing Dr Surve and the Sekunjalo Group of engaging in a number of financial misdeeds. In this regard the respondent has attached to its answering affidavit

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[1] *Mpati Commission Report*, page 8, para 1.1.

[2] See for example Mpati Commission Report p26, paras 21-24; pp31-36; pp57 - 58; pp312- 326.

media reports dated between 25 November 2019 to 2 June 2021, in which various accusations are detailed regarding suspicious dealings, impropriety, share manipulation and various ongoing serious investigations against the Sekunjalo Group.

[10] The Bank states that, whatever the truth of the adverse findings and recommendations in the Mpati Report pertaining to the PIC's dealings with the Sekunjalo Group, and the media reports, they nevertheless informed its decision to terminate its banking relationships with the Sekunjalo Group and to not enter into relationship with the applicant. In particular, the Bank draws attention to the finding that, of the R4.3 billion invested by the PIC into the applicant resulting from the alleged share manipulation by Dr Surve, approximately R2 billion was invested elsewhere and is still part of the funds of the applicant.

[11] It is common cause that the result of this negative publicity was that a number of South African banks, including the respondent, terminated banking services with the companies in the Sekunjalo Group, including the applicant, citing reputational risk and contractual rights to terminate the bank accounts. This has resulted in a number of court cases across the country which have been instituted by companies in the Sekunjalo Group, challenging the termination of their banking relationships. One such case was launched in the Competition Tribunal by entities in the Sekunjalo Group against nine banks. Another notable case was launched in the Western Cape High Court sitting as the Equality Court. But more about the litigation later.

[12] The applicant has been 'unbanked' since 3 May 2021 when the First National Bank (*"FNB"*) closed its bank accounts which were first opened in November 2020. Before that, the applicant held bank accounts with ABSA until August 2020 when the latter gave notice of closure of the bank accounts. Since 3 May 2021, the applicant says it has made many attempts to secure alternative bank accounts, to no avail. It first contacted the Bank on 20 April 2021, and, in June 2021, after several communications, was informed by the Bank's CEO that the Bank did not have the "necessary risk appetite" to take the applicant as a client.

[13] The Bank explains that on 10 June 2021, it had picked up a Politically Exposed Person (*"PEP"*) alert on Dr Surve on the World Compliance screening results (*"World Compliance Report"*), when conducting a customer due diligence required in terms of the Financial Intelligence Centre Act 38 of 2001 (*"FICA"*) in respect of AEEI, which at that point was a prospective client of the Bank. The PEP alert was escalated up the Bank's hierarchy, and concerns were raised. An executive decision was taken to not proceed with establishing a banking relationship with AEEI, and to not continue a banking relationship with Afrinat - another company in the Sekunjalo Group which at that stage had a banking relationship with the Bank.

[14] The Bank has attached to its answering affidavit an email from Dr Surve dated dated 7 July 2021, attaching what he described as a 'very long letter' to the then Chief Executive Officer of the Bank, attempting to allay the concerns of the Bank pertaining to the accusations that had been levelled at the Sekunjalo Group. He wrote the letter in his *"capacity as the Chairperson of the Sekunjalo Group, a position I have been privileged to have for the last 24 years"*.

[15] On 18 March 2022 Dr Surve contacted the new CEO of the Bank, Ms Reddy, attaching a copy of a report by Judge Heath (*"Heath Report"*), whom he said he had appointed to investigate the inferences and allegations of the Mpati Commission, stating that this later report went a long way to dispelling the negative media reports previously alluded to in his very long letter, which he also attached. He made himself available for a meeting or discussion regarding any aspect of the Heath Report and the Sekunjalo Group. I should state that in response to the Bank's allegations regarding Dr Surve's correspondence to the Bank on behalf of the Sekunjalo Group, the applicant states that it bears no knowledge. There is likewise no affidavit deposed by Dr Surve in these proceedings.

[16] Ms Reddy's response of 24 March 2022 advised Dr Surve as follows:

> *"…As you are aware Access SA is currently involved as the Ninth Respondent in the application brought by yourself*[3]*, Sekunjalo Investment Holdings (Pty) Limited and 34 further applicants who form part of the Sekunjalo Group structure, for adjudication by the Competition Tribunal. It is my understanding that the hearing of the application was concluded, and that the ruling of the Competition Tribunal is currently being awaited.*
>
> *As such, it would be misplaced - at this juncture and under such adversarial circumstances - for Access SA to engage on the contents of your said letter, other than to acknowledge receipt thereof.*
>
> *Once litigation in this matter has been concluded it may be more appropriate to resume our correspondence."*

[17] On 5 May 2022, Mr Subash Dowlat, a financial advisor and consultant for various entities which include the applicant, walked into the Bank's Da Vinci branch in Sandton and enquired with the branch manager about opening an account for the applicant. He was provided with the account-opening documentation for completion, which were submitted to the Bank on 6 May 2022, fully-completed. The application forms and all other relevant forms were completed in the name of the applicant as the customer and included all its details, including a copy of the company registration documentation - the CIPC certificate. The applicant sought to open two bank accounts - a current and a foreign currency account.

[18] The completed documentation was escalated from the Da Vinci branch to the Bank's head office, where an employee at the corporate banking division was to perform Southern African Fraud Prevention Service and LexisNexis checks. The applicant disputes that LexisNexis screening was conducted at that point. Nevertheless, according to the Bank, the said employee who performed these checks failed to notify anyone regarding negative LexisNexis screening reports which were readily available at that point or to refer the adverse findings to the Bank's compliance department in compliance with the Bank's procedure.

[19] In addition to the above, when the said employee conducted a screening of the directors and related parties of the applicant, he apparently confused the names and surnames - specifically of Mr Khalid Abdulla, a director of the applicant, whom he

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[3] Dr Surve is the first applicant in the Competition Tribunal proceedings.

captured as Khalid Bundo. Mr Tatenda Bundo is the Chief Financial Officer of the applicant. As a result, the LexisNexis screening conducted did not project results that would have been obtained had the name Khalid Abdullah been captured, which would have included a PEP alert.

[20] The completed screening checks were sent back to another employee at the Bank, who similarly failed to detect the negative LexisNexis screening results.

[21] On 10 May 2022, the applicant's current account was opened by the Bank, and on 23 May 2022 a call account was opened in its name. By 31 May 2022 the applicant had transferred in excess of R55 million into the current account.

[22] On 31 May 2022 the Bank's CEO addressed correspondence to Mr Bundo of the applicant, informing him that the Bank had decided to close the two bank accounts with immediate effect (*"the termination letter"*). The termination letter read as follows:

> *"As you should be aware, the Bank is currently involved as the Ninth Respondent in the application for urgent relief brought by Dr Iqbal Surve, Sekunjalo Investment Holdings Pty Limited ('Sekunjalo') and 34 further Applicants (amongst whom your company is the Thirteenth Applicant) who form part of the Sekunjalo Group structure, for adjudication by the Competition Tribunal. The hearing of the application was concluded, and the parties involved are currently awaiting the ruling of the Competition Tribunal.*
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> *After the hearing of the Competition Tribunal was concluded I received a letter from Dr Surve in which he inter alia explored the possibility of Sekunjalo and its subsidiaries entering into a banking relationship with the Bank. I responded to him on 24 March 2022 indicating that it would be misplaced at this juncture and under such adversarial circumstances for the Bank to engage on the contents of his letter, other than to acknowledge receipt thereof.*
>
> *I furthermore indicated that once litigation in this matter has been concluded, it may be more appropriate to resume correspondence regarding the matters raised in his letter.*
>
> *I therefore find it somewhat perplexing that despite this official stance of the bank on the issue, your company proceeded to approach the Bank to open accounts and deposit monies with it.*
>
> *It is unfortunate and regrettable that my staff opened the two accounts referenced above, and I apologise for the inconvenience caused by the subsequent closure of these accounts.*

My staff will liaise with you as regards the return and transfer of the funds deposited to the accounts."

[23] There followed a long string of correspondence between the parties, resuming with a letter from the applicant's CEO (Mr Plaatjies) on 11 June 2022 and ending with a letter from the Bank dated 7 July 2022, including notification from the Bank, on 21 June 2022, of the return and transfer of the applicant's funds from the bank accounts. Because of the turn of events since the hearing of the matter, it is not necessary to set out the detail of that correspondence.

[24] These proceedings were launched on 29 July 2022. The respondent's challenge to the urgency of the matter is that it is self-created because the applicant delayed by some two months before launching these proceedings. Further, the Bank says the applicant afforded it unreasonable time periods to note its intention to oppose and deliver answering papers, whereas it afforded itself normal time periods to deliver a reply and thereafter unilaterally set down the matter on 6 September 2022. This, in a matter raising complex and novel issues of law. Given that the applicant has been unbanked since 3 May 2021, which is the true source of the applicant's problems, the applicant, says the Bank, has failed to explain why it cannot be afforded substantial redress in due course.

[25] Linked to the challenge relating to urgency, the Bank raised the ongoing litigation against other banks, including banks with whom the applicant previously had banking relationships. The Bank stated that if that litigation was successful, the applicant would obtain the same relief that it seeks in these proceedings, and accordingly has alternative remedy. It is now convenient to discuss the ongoing litigation.

C. THE OTHER LITIGATION

[26] Two interdict applications were instituted by the Talhado Group, which is also part of the Sekunjalo Group, against FNB in the Gqeberha Division of the Eastern Cape

High Court and were dismissed. The dismissals are currently being appealed. There does not appear to be any direct link between that litigation and this application.

[27] Another relevant court case was the Equality Court case already mentioned, which was filed in January 2022 by a large group of the Sekunjalo Group entities against a number of banks. The judgment was handed down on 17 June 2022, and in terms thereof Nedbank was ordered to restore all accounts that it had terminated, and was prohibited from terminating any further accounts and from altering the terms and conditions of the contracts with the Sekunjalo entities. That matter is currently the subject of an appeal. While the applicant is the seventeeth complainant in the complaint, the Bank is not a party to those proceedings, although, according to the Bank's latest submissions, the applicant is currently seeking to join the Bank as party thereto. Furthermore, it does not appear that the applicant had bank accounts with Nedbank at the time that the proceedings were launched.

[28] The applicant states that the relief sought in this application differs materially from the relief sought in the Equality Court. The complaint in the Equality Court relates to an alleged contravention of the complainants' constitutional rights including, *inter alia*, the rights to equality, dignity and freedom of association. The primary complaint in that matter was that the Sekunjalo Group entities have been victims of racial discrimination. As a result, the applicant states that, given the limited jurisdiction of the Equality Court, it would be inappropriate to seek the relief that is sought in Part B of these proceedings. In any event, the respondent is not a party to the Equality Court proceedings.

[29] There was another interdict application launched in the High Court pending the Equality Court complaint, seeking relief similar to that sought in the Competition Tribunal, which is discussed below. It was dismissed, based on lack of jurisdiction.

[30] The last relevant litigation has become pivotal for the further conduct of these proceedings. In December 2021, a number of entities in the Sekunjalo Group, including

the applicant, lodged a complaint in the Competition Commission, and thereafter an urgent interdict application at the Competition Tribunal. In broad terms, the applicants in the interdict application sought an interdict to restore the bank accounts already closed, and to prohibit the closure of any further bank accounts pending the outcome of the complaint lodged with the Competition Commission. Although both parties in this case are parties in the Competition Tribunal interdict application, only one entity from the Sekunjalo Group, Afrinat, held a bank account with the Bank when those proceedings were launched. In those proceedings the applicant directly sought relief only against FNB with whom it held bank accounts until 3 May 2021.

[31] The applicant states that the Competition Tribunal complaint falls squarely within the limited jurisdiction of the Competition Tribunal, in terms of the Competition Act 89 of 1999. In that matter the complainants allege, *inter alia*, that the banks are abusing their market dominance and are engaging in collusive conduct. They allege that the banks appear to have orchestrated a concerted and uniform plot to unbank the Sekunjalo Group entities. This has been executed firstly, by terminating the existing bank accounts of the entities, and secondly, by refusing to provide alternative facilities where banks have already closed the bank accounts. The applicant states that it would be inappropriate to seek the relief sought in Part B of these proceedings in the Competition Tribunal.

[32] The Competition Tribunal matter was argued on 7 and 8 March 2022 and, at the time that these proceedings were launched and heard before me the judgment had not been handed down. However, after judgment was reserved here, the Competition Tribunal Ruling was handed down and the parties were permitted to deliver supplementary submissions regarding the impact thereof. The relevant parts of the Ruling read as follows:

> "For a period of six months from the date of this order[4], or the conclusion of the investigation by the Commission into the complaint filed by the Applicants under case number *2021Dec0031*, whichever is the earlier:

[4] The Ruling is dated 16 September 2022.

1.1. Nedbank is to reinstate/restore the bank accounts including all services that it provided to the Applicants that held accounts with it, save for the exclusions detailed in paragraph 360.1[5] and 360.2[6] on the same terms and conditions as existed prior to the closure/termination of the accounts.

…

1.3. ABSA is to reinstate/restore the bank accounts including all services that it provided to the Applicants that held accounts with it, save for the exclusions detailed in paragraph 360.3[7] on the same terms and conditions as existed prior to the closure/termination of the accounts.

1.4. First Rand is to reinstate/restore the bank accounts including all services that it provided to the Applicants that held accounts with it, on the same terms and conditions as existed prior to the closure/termination of the accounts.

…

1.8. Access Bank is to reinstate/restore the bank account including all services that it provided to Afrinat (Pty) Ltd, the Fourth Applicant, on the same terms and conditions as existed prior to the closure/termination of the account…"

[33] It is therefore apparent that the applicant has obtained direct relief in terms of paragraph 1.4 of the Competition Tribunal Ruling, in terms of which the First Rand Bank (FNB) is required to reinstate its bank accounts for six months pending investigation by the Competition Commission. Despite this, the applicant states in its further submissions that there remains great uncertainty about whether, and for how long, it will have bank accounts with FNB. This is because FNB may appeal or review the Ruling, and it is in any event only in place for six months. To that end, I was requested to withhold delivering this judgment by about a week while the applicant ascertained with FNB what steps it would take regarding the Competition Tribunal Ruling. But in any event, the applicant emphasized that the Ruling has no connection to the relief it seeks against the Bank in this case. I should add that the parties agree that the Ruling has no binding effect upon this Court.

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[5] An account held by the applicant held with a Nedbank entity in Lesotho.

[6] Personal accounts held by the Dr Surve with Nedbank.

[7] Nine of the applicants in the Competition Tribunal who accepted a conditional six-month extension prior to the closure of their accounts by ABSA.

[34] The Bank does not agree with the applicant's approach regarding the impact of the Competition Tribunal Ruling. It argues that the Ruling has an impact on the urgency of the applicant's application in this matter. This is because it was FNB's closure of the applicant's bank accounts on 3 May 2021 that left the applicant unbanked for about a year before it opened bank accounts with the Bank, a relationship which lasted approximately 3 weeks. And the effect of the Ruling is that it is no longer unbanked and without access to banking services. Accordingly, the basis for the applicant's application has fallen away, and the matter cannot be considered urgent. There is also no reasonable apprehension of harm if the relief sought is not granted, and the balance of convenience does not favour the granting of the relief sought in Part A of this application.

[35] The fact that the matter is not urgent is demonstrated by the applicant's request for this Court to wait for FNB to indicate its intention regarding the Ruling, says the Bank. In any event, the Bank emphasizes that, whether FNB lodges an appeal or review against the Ruling, it (the Ruling) will not be suspended unless a successful application for suspension is made to the Competition Appeal Court. Accordingly, the respondent argued that this Court should decide the matter based on the facts as they now exist, not based on what might happen in the future.

[36] There were further developments, which prompted the parties to deliver yet another set of submissions. On 3 October 2022 FNB advised the applicant that, notwithstanding its misgivings regarding the Ruling, it had elected to comply with it, including by reopening the applicant's bank accounts. Further, that if it does so decide to challenge the Ruling, whether by appeal or review, it intends to keep the applicant's bank accounts open. By 7 October 2022, the due date of the filing of an appeal of the Ruling, FNB had not lodged an appeal.

[37] The applicant states that, after it received this information from FNB, it engaged the Bank with a view to reaching agreement regarding the further conduct of this matter,

and no agreement has been reached. The applicant now submits that, instead of dismissing the application, the matter should be removed from the roll, and that, if circumstances should change, the parties should be permitted to re-enroll the matter on the same papers, duly supplemented. The applicant, however, admits that it now has an alternative remedy.

[38] The Bank persists with the arguments previously made that there is no longer a basis for the interim interdict sought because the applicant is no longer unbanked, and will have access to banking facilities for at least 6 months, and if extended, 12 months. It argues that the matter should be dismissed, or in the alternative, struck off the roll for want of urgency. In either event, the Bank seeks a costs order in its favour.

D. DISCUSSION

[39] The requirements for an interim interdict are trite. The applicant must establish (a) a *prima facie* right even if it is open to some doubt; (b) a reasonable apprehension of irreparable and imminent harm to the right if the interdict is not granted; (c) the balance of convenience must favour the grant of the interdict; and (d) the applicant must have no other available remedy. If a clear right is established, there is no need to establish element of the apprehension of irreparable harm.[8]

[40] The developments subsequent to the hearing of the case have indeed overtaken this case. In my view, those developments have an impact on the degree of urgency of the case, which I have to determine upfront given that I became seized the matter on the urgent roll. The effect of the Competition Ruling, which affords the applicant relief by at least six months, is that there is no justification for the matter to be determined on the urgent roll. It indicates that the applicant may be afforded substantial redress at a hearing in due course if it still wishes to pursue a case against the Bank.

[41] I take note of the fact that the challenge to the Bank's closure of the bank accounts has not evaporated. The applicant may still wish to pursue the main relief

[8] Erasmus, *Superior Court Practice* at D6-20.

sought in Part B of this application, in due course. That, however, may also change given the fluidity of the factual matrix brought to bear by the ongoing litigation in the various *fora*. It may also change as a result of the outcome of the Competition Tribunal Ruling, given the correspondence of the Bank preceding these proceedings of 24 March 2022 and 31 May 2022, in which the Bank specifically preferred to await the outcome before engaging the applicant with regards to the opening of bank accounts. Now that matters have reached that point, it is not unreasonable to imagine that Part B may be resolved. This much is intimated in the Bank's latest submissions, although it is not definite.

[42] It is also not clear at this stage what will happen after the 6 months' relief granted by the Competition Tribunal Ruling, although I note that the period of six months may be extended by another six months in terms of section 49C(5) of the Competition Act 89 of 1998, if the conditions for such extension are met.

[43] What is clear is that the climate in which Part A was launched has materially changed, including by affording the applicant alternative relief, thus also discharging at least one of the requirements for the interim remedy sought. It is in dispute whether the remaining requirements of an interim interdict have been similarly affected. I, however, do not consider it appropriate to determine the merits of the interdict, in light of the fact that, as I have said, the urgency must be determined upfront. It is also because of the complexity of the issues raised as well as the novelty of some of the issues, even for purposes of the determination of the interim relief - a common cause issue between the parties - which render it inappropriate to deal with the matter on this roll. In part, these issues were raised by the respondent in its complaint regarding the timeframes it was afforded in dealing with this application.

[44] The applicant was specifically warned by the Bank of being awarded possible relief by the Competition Tribunal when it (the Bank) challenged, not only the urgency of the matter, but also the applicant's assertion that it did not have an alternative remedy. I do take into account that, when the Bank's challenges were raised the Competition

Tribunal Ruling had not yet been handed down. However, as the Bank predicted in its answering papers, it was always a possibility. This is why I consider it appropriate that the applicant should bear the costs for the outcome of these proceedings. The Bank has been put out of pocket for a substantial application which, in effect, has proved futile.

[45] In the result, the following order is granted;

1. The application is struck from the roll for want of urgency; and
2. The applicant is to bear the respondent's costs, including the costs of two counsel. Those costs include the costs of the hearing of 9 September 2022.

N. MANGCU-LOCKWOOD
Judge of the High Court

APPEARANCES

For the applicant:	Adv T Golden SC Adv M Bishop Adv J Moodley
Instructed by:	N Olivier Adriaans Attorneys
For the respondent:	Adv J Botha SC Adv T Pooe
Instructed by:	V Vurgarellis Lawtons Africa