

SOUTH AFRICA / JUDGMENT

Breedenkamp and Others v Standard Bank of South Africa Ltd and Another (2009/7907) [2009] ZAGPJHC 4; 2009 (5) SA 304 (GSJ) ; [2009] 3 All SA 339 (GSJ) (30 March 2009) [2009] ZAGPJHC 4

COURT

South Gauteng High Court, Johannesburg

BEFORE

Jajbhay

CASE / FILE NUMBER

2009/7907

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SOUTH GAUTENG HIGH COURT

(HELD AT JOHANNESBURG)

Case no. 2009/7907

In the matter between:

JOHN ARNOLD BREEDENKAMP First Applicant

BRECO INTERNATIONAL LTD Second Applicant

HAMILTON PLACE TRUST Third Applicant

INTERNATIONAL CIGARETTE

MANUFACTURERS (PTY) LTD Fourth Applicant

and

STANDARD BANK OF SOUTH AFRICA LTD First Respondent

MINISTER OF FINANCE Second Respondent

Judgment

Jajbhay J

PARTIES

- [1] First applicant (“Breedenkamp”) is a businessman of substantial means. Second applicant (“Breco”) is a company registered in the British Virgin Islands of which Breedenkamp appears to be the sole director. Third applicant (“Hamilton”) is a property-owning trust registered in the British Virgin Islands of which Breedenkamp appears to be the sole trustee. Fourth applicant (“ICM”) is a company registered in South Africa of which Breedenkamp is a shareholder. Breedenkamp, Breco and ICM are described as international commodities traders. The names of Breedenkamp, Breco and a host of associated entities appear on the international sanctions lists of the USA, the EU and the UK.
- [2] First respondent (“Standard Bank” or “the bank”) is the largest of the four full-service South African banks. Public confidence in the bank’s integrity is of paramount importance. The second respondent neither supports nor opposes the application.

RELATIONSHIP BETWEEN APPLICANTS AND STANDARD BANK

- [3] The applicants hold bank accounts of various kinds at Standard Bank (“the Breedenkamp accounts”). At the heart of the application lies a decision (“the Standard Bank decision”) to close the Breedenkamp accounts and to terminate the underlying agreements (“the Breedenkamp agreements”) on notice in compliance with the bank’s General Terms. The applicants assert that the bank has no entitlement to do so. Standard Bank disagrees.

SUBSTANTIAL

FACTS

Applicants subject to US sanctions

- [4] On 25 November 2008 the US Department of Treasury’s Office of Foreign Assets Control (“OFAC”) listed Breedenkamp, Breco and certain associated entities as “specially designated nationals” (“SDNs”). This meant that they became subject to the sanctions imposed and enforced by OFAC. On the following day Standard Bank became aware of their listing and that OFAC suspected Breedenkamp of “being involved in illicit business activities including tobacco trading, arms trafficking, oil distribution and diamond extraction and of being a confidant and financial backer of Zimbabwe’s President Robert Mugabe”. Reports in publications in a number of countries during the period September 1996 to March 2009 indicate Breedenkamp’s purported notoriety at the time of the OFAC listing.

Standard Bank’s decision based on serious reputation and business risks

- [5] On 26 November 2008 Standard Bank initiated internal enquiries as to the nature and extent of its relationship with the applicants. On 3 December 2008 senior executives and managers of Standard Bank met to discuss the issue. Of particular concern to them were:

“the likely serious implications for Standard Bank, its investors and its customers of maintaining a relationship with the applicants in circumstances where domestic and foreign onlookers might reasonably believe or suspect that accounts held at Standard Bank would or could be used to facilitate unlawful and/or unethical acts. An association with a conductor and/or financier of allegedly illegal

and/or improper transactions might well undermine a bank's hard-won and fragile national and international reputation in the eyes inter alia of regulatory bodies, financial institutions, media organisations and members of the public worldwide."

- [6] According to the bank, its concerns were not idle. In not dissimilar circumstances other blue-chip financial institutions such as Barclays, Standard Chartered and Old Mutual had come in for scathing criticism in influential international publications.
- [7] In addition to the risk of harm to its reputation Standard Bank faced material business risks to its relationships with foreign banks: Standard Bank holds correspondent "nostro" accounts at financial institutions across the world; US persons – including financial institutions – are precluded from dealing with SDNs. These "covered" financial institutions have legal obligations in respect of their nostro accounts. For example they must scrutinise every payment instruction and maintain and disclose bank records to law enforcement agencies. Standard Bank funds its nostro clearing accounts with bulk funds including its own and those of multiple customers; each such account and all funds in it would or could be seized to the prejudice of Standard Bank and its non-SDN customers. Covered financial institutions may also request information from the instructing bank which, if not provided, may lead to closure of the nostro accounts. Obviously, any such loss of reputation or closure of accounts would or could have catastrophic consequences for Standard Bank's ability to conduct its business in the global economy; and given the gravity of the potential harm to Standard Bank, its investors and its customers of a seizure of funds and/or an adverse report to OFAC, Standard Bank could not send instructions to any covered financial institution anywhere in the world in any currency regarding the payment or transfer of any funds including any funds of an SDN either as remitter or beneficiary.
- [8] The applicants purported to allay these concerns by tendering not to transact through Standard Bank with any person bound by OFAC rulings or EU rules. According to Breedenkamp "the applicants will not send money to the US or EU or use Standard Bank's banking facilities to receive funds into its EU and US nostro accounts".
- [9] After deliberation regarding the OFAC-designation and the reputation and business risks it posed, Standard Bank decided at the meeting on 3 December 2008 that it would end its relationship with the applicants.

Notice of Standard Bank decision

- [10] The Standard Bank decision was communicated to Breedenkamp verbally and in writing on 8 December 2008. The applicants were in each instance afforded a period of at least 30 days to make alternative banking arrangements. After four consensual extensions of the notice period the applicants' accounts will be closed by the end of March 2009.

Applicants subject to EU and UK sanctions

- [11] On 19 January 2009, Breidenkamp, Breco, ICM and 16 associated entities were added to “the list of persons referred to in Articles 4 and 5 of Common Position 2004/161/CFSP” which served to renew restrictive measures against Zimbabwe (“the EU list”). The same names were added to HM Treasury’s “consolidated list of financial sanctions targets in the UK” (“the UK list”) on 27 January 2009.

RELIEF

- [12] In the present application, Breidenkamp together with the other applicants, seek an interim interdict that would restrain the

Standard Bank from cancelling the contracts between them that underlie the accounts listed in the Notice of Motion, pending the

finalisation of the application for the relief to be granted that is referred to in part B of the Notice of Motion.

Certain accounts not in issue

- [13] Applicants intended to interdict closure of nine accounts. Breidenkamp’s credit card account has however been closed. It appears that Breidenkamp has no entitlement to insist on any continued use of a MasterCard credit card account. Standard Bank does not propose to close Hamilton’s bond account until the loan has been repaid. The remaining seven accounts require consideration.

Conduct of accounts

- [14] The applicants conducted their accounts within the agreed credit limits, where those were applicable and strictly in accordance with their contracts. The founding affidavit of the deponent (Mr Jackson, the General Manager of the business affairs of Mr Breidenkamp and the other applicants) stated:

'The applicants at all times conducted the account strictly in accordance with their agreements with the first respondent and within the overdraft or other credit arrangements that were from time to time put in place on the accounts.'

Standard Bank’s response to this allegation is:

'It is an overstatement to say that the accounts have at all times been conducted ‘strictly in accordance with their agreements.’

- [15] Standard Bank does, however, not state any instance in which any of the accounts were not conducted strictly in accordance with the terms of the agreements between the relevant applicants and Standard Bank underlying the accounts.

Closure of accounts

[16] On 8 December 2008, an official of Standard Bank, Seedat, telephoned Breedenkamp and informed him that Standard Bank had decided to close all the accounts existing between the applicants and Standard Bank. Seedat did not give any reason for the closures but said that formal letters initiating the closures would be sent to the applicants. On the same day, Standard Bank sent four letters of cancellation to each of the four applicants. The one that was sent to Mr Breedenkamp was signed by Seedat. Each of the letters advised the applicants that:

‘... After careful consideration the bank is no longer able to continue its relationship with... The bank is closing the above- mentioned accounts to protect its interests, in line with the bank’s terms and conditions and with a Code of Banking Practice. The arrangements relating to the closure of these accounts are set out more fully hereunder.’

[17] The ‘arrangements’ that Standard Bank determined were the following: Breedenkamp’s credit card account was immediately suspended and was to be closed on 6 January 2009. All Breedenkamp’s other accounts were to be closed on 19 January 2009 but, after exchange of correspondence, Standard Bank extended the period to 30 March 2009. The overdraft facility on Breedenkamp’s current account (with account number 420946373) was suspended as from the date of the letter, 8 December 2008, and that the credit facility would be withdrawn on 6 January 2009 and the account would be closed, as mentioned above, on 19 January 2009.

[18] The current account of Breco International would also be closed on 19 January 2009. The access bond facility on the Hamilton Trust bond was immediately suspended (that is on 8 December 2008) and would be closed on 6 January 2009. The ICM money market account would be closed on 19 January 2009. Breedenkamp and the applicants did not accept the closure of their accounts.

Reason given for closure

[19] The letters informing the applicants that the accounts would be closed stated that they would be closed to protect the interests of Standard Bank without informing the applicants what those interests were. The letters also stated that Standard Bank was acting in terms of its communicated terms and conditions without identifying what those terms and conditions could be. They also made specific reference to a code of banking practice.

[20] After an exchange of correspondence, on 15 January 2009, Standard Bank in a letter to Breedenkamp emphasised that it had the right, unilaterally, to cancel a contract with a client. The first paragraph of the letter reads:

‘In terms of our general terms and conditions for all accounts, we may terminate any account or facility, which may have been extended to International Cigarette Manufacturing (Pty) Ltd for any reason by giving the company written notice. As mentioned in our letter of 8 December 2008, the decision to close the company’s account was taken after careful consideration and remains the bank’s

position. Furthermore, we have given the company... requisite notice of closure.'

[21] By the middle of January 2009 it appeared that Standard Bank contended that in terms of its 'general terms and conditions for all accounts' it may terminate any account, for any reason, by giving written notice. It is significant that the author of the letter of 15 January 2009 did not refer to the 'protection of interests' or to the 'Code of Banking Practice' as support for the bank exercising the right that it contended it had, as was done in the letters of 8 December 2008.

[22] It is also of significance that the bank officials did not assert the right to cancel in terms of common law. According to the bank officials in terms of its terms and conditions, general terms and conditions for all accounts and the Code of Banking Practice it was entitled to cancel. This would appear to indicate that the right to act as it did was, in the view of Standard Bank, a contractual right that is only to be found in writing.

Wertheim Becker Attorneys.

[23] Messrs Wertheim Becker Attorneys placed themselves on record on behalf of the applicants. Their first order of business was to agree to an extension of the time periods stated in the various letters of 8 December 2008. Extensions were eventually granted until 30 March

2009. The second order of business was to obtain copies of various account opening documents, the so-called General Terms and the Code of Banking Practice. The reason why these documents were required was to search through them and to locate the contractual right asserted by the authors of the letters of 8 December 2008 and Engelberg, the author of the letter of 15 January 2009.

The Code of Banking Practice

[24] The Code of Banking Practice that was referred to in the letters of 8 December 2008 contains a caveat to the effect that none of the provisions are legally binding in any court of law, or may be used to influence the interpretation of the legal relationship between a client and a bank; or will give rise to a trade custom or tacit contract or otherwise between a client and a bank. Notwithstanding this, the authors of the letters of 8 December 2008 clearly relied on the terms of the Code as if it does constitute part of a written contract between Standard Bank and each of the applicants.

[25] Clause 4.10 of the Code deals with closure of account. It reads as follows:

'We will not close your account without giving you reasonable prior notice at the last address that you gave us.

We reserve the right, however, to protect our interests in our discretion, which might include summarily closing your account:

If we are compelled by law;

If you have not used your account for a significant period of time;

If we have reason to believe that your account is being used for fraudulent purposes.’

The Code does not in so many words or by implication state that:

a bank may not or will not invite the customer to consult with it before making a decision to cancel an account;

a bank may unilaterally cancel an account; or

a bank may do so for no reason, for a bad reason or for a good reason.

In fact, the Code does not deal, at all, with the reasons, if any, that may lead the bank to close an account on notice.

The General Terms

[26] Standard Bank also gave copies of its General Terms to the attorneys of record of the applicants. It is the applicants’ case that they never saw this document. The answering affidavit on behalf of Standard Bank says that the General Terms were adopted only in August 2005. By this time, most of the accounts were already opened. The deponent also submits that copies of the General Terms should have been brought to the attention of the various applicants. But no facts in this regard are stated and the deponent merely surmises that the provisions of the General Terms should have been brought to the attention of the applicants. The applicants deny that they received the General Terms or that they were aware of its contents and the denials cannot be questioned against the idle speculation of the deponent to the answering affidavit.

[27] Under the heading ‘Repayable on Demand’ the following is stated:

‘We may terminate any account or facility, which may have been extended to you for any reason and claim repayment of any outstanding balance by giving you written notice. Termination may be effective immediately or from a date stated in the notice. Any amounts owing to us become payable on the date stated in the notice.’

[28] None of the other account opening documents contain a similar provision.

LAUNCH OF APPLICATION

[29] After receipt of the documents containing the terms of the agreements between Standard Bank and the various applicants, the present application was launched. Insofar as the factual reasons for the cancellation of the contracts is concerned, the deponent to the founding affidavit (and later Breedenkamp in his supplementary founding affidavit) could say no more than that they were not aware of what underlies the decision of Standard Bank.

Answering affidavit: Reasons given

- [30] Standard Bank filed an answering affidavit in which it deals extensively with its reasons for cancelling the contracts. It appears that Standard Bank learnt that the names of Breedenkamp, Breco and ICM but not the Hamilton Trust - were placed on a sanctions list that was compiled by the United States Department of Treasury's Office of Foreign Assets Control as 'specially designated nationals'. OFAC administers and enforces economic and trading sanctions based on the foreign policy of the United States and its national security goals. The listing appeared on 25 November 2008. On 26 November 2008 a number of Standard Bank's divisions commenced internal enquiries regarding the nature and extent of the relationship with the applicants and on 3 December 2008 senior executives and managers of Standard Bank met to discuss what to do with the accounts.
- [31] In paragraph 20.5 of the answering affidavit the following is stated in order to motivate the reasons for closing the accounts:
- 'Of particular concern to them were and remain the likely serious implications for Standard Bank, its investors and its customers of maintaining a relationship with the applicants in circumstances where domestic and foreign onlookers might reasonably believe or suspect that accounts held at Standard Bank would or could be used to facilitate unlawful and/or unethical acts. An association with a conductor and/or financier of allegedly illegal and/or improper transactions might well undermine a bank's hard-won and fragile national and international reputation in the eyes inter alia of regulatory bodies, financial institutions, media organisations and members of the public worldwide.'
- [32] It must be emphasised that no objective proof for these allegations is contained in the answering affidavit. Nevertheless, the decision to terminate seems to be based squarely on perceptions and not facts.
- [33] There are essentially three reasons put forward by Standard Bank why the accounts were closed. The first is the mere fact of the OFAC designation. The second is that there is a risk that Standard Bank's reputation may negatively be affected. The third is that there are certain business risks for Standard Bank should it carry on granting banking facilities to Breedenkamp and the other applicants.
- [34] From the answering affidavit it appears that after Standard Bank became aware of the OFAC designation, it consulted newspapers and other media reports contained in the public media that are critical of Breedenkamp and his businesses and paint him as a 'Mugabe crony'. Mention is also made of the fact that the European Union issued a similar sanctions list, but that happened only after the decision had been made to cancel the accounts and it could thus not have played any role in the decision to cancel the accounts.
- [35] In the answering affidavit Standard Bank, for the first time, informed the applicants why it had decided to cancel the accounts. It was the first time that the applicants could deal with the allegations.

The replying affidavit

[36] In his replying affidavit, Breedenkamp makes the following important points:

'He is not a Mugabe crony and has in fact been imprisoned by the Mugabe regime – the regime has also revoked his Zimbabwe passport which caused him to launch an application in the High Court of Zimbabwe which he eventually won.'

[37] Breedenkamp and the other Breco companies should never have been placed on any sanctions list, taking into account the criteria upon which those lists are compiled. Breedenkamp and the Breco companies have taken steps to have their names expunged from the various sanctions lists and these procedures have not yet been completed.

Perceptions may possibly be wrong

[38] Breedenkamp also explains why the press has been hostile to him. It effectively all reduces to the simple point that he is perceived to be assisting the Zimbabwe Government – popularly called the Mugabe regime. He explains why this perception is wrong.

Policy of South Africa towards Zimbabwe

[39] Another theme that arises from the replying affidavit is that it is not against the expressed policy of the Government of the Republic of South Africa to have friendly relationships with Mr Mugabe and his government. An expert on international affairs, Professor Strydom, expresses the opinion that it is the policy of our government to support and promote trade with the de facto and de jure present government of the Republic of Zimbabwe.

Consequences of closing account

[40] A further point of contention between the parties concerns the consequences of Standard Bank closing the accounts. In the founding affidavit it is stated that once a bank closes the account of a client, thereby severing the contractual relationship between them, no other first tier bank in South Africa will accept the erstwhile client as a client of the new bank. There are only four first tier banks in South Africa. An expert banker, Nel, deposed that such is the case. His evidence is to the effect that banks will for reasons of perception refuse to open accounts whilst, in the normal course, they will not for reasons of perception close accounts.

[41] I believe that the general terms and conditions appearing as annexe B to the founding affidavit ("the general terms") are applicable for the purposes of the present enquiry. This is so for the following reasons: the applicants agreed to be bound by Standard Bank's standard terms and conditions as amended from time to time; it is Standard Bank's submission that the applicants were furnished with the general terms, if not before then at least at the time of opening Breedenkamp's foreign currency account (March 2006) and/or ICM's money market account (September 2008), when annexe B would in all likelihood have

been among the pack of documents provided by Standard Bank to Breedenkamp and further, ICM, and Breedenkamp merely “notes”

these allegations. *Plascon- Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) 623 A.

REQUIREMENTS FOR AN INTERIM INTERDICT

[42] An interim interdict is by definition a court order preserving or restoring the status quo pending the final determination of the rights of the parties. It does not involve a final determination of these rights and does not affect their final determination. The dispute in an application for an interim interdict is therefore not the same as that in the main application to which the interim interdict relates. In an application for an interim interdict the dispute is whether, applying the relevant legal requirements, the status quo should be preserved or restored pending the decision of the main dispute. At common law, a court’s jurisdiction to entertain an application for an interim interdict depends on whether it has jurisdiction to preserve or restore the status quo. It does not depend on whether it has the jurisdiction to decide the main dispute.

[43] That the test is a nuanced one as appears from the judgment of Holmes, J in *Olympic Passenger Service (Pty) Ltd v Ramlagan* 1957 (2) SA 382 D in which he held:

“It thus appears that where the applicant's right is clear, and the other requisites are present, no difficulty presents itself about granting an interdict. At the other end of the scale, where his prospects of ultimate success are nil, obviously the Court will refuse an interdict. Between those two extremes fall the intermediate cases in which, on the papers as a whole, the applicants' prospects of ultimate success may range all the way from strong to weak. The expression *prima facie* established though open to some doubt seems to me a brilliantly apt classification of these cases. In such cases, upon proof of a well grounded apprehension of irreparable harm, and there being no adequate ordinary remedy, the Court may grant an interdict -- it has a discretion, to be exercised judicially upon a consideration of all the facts. Usually this will resolve itself into a nice consideration of the prospects of success and the balance of convenience -- the stronger the prospects of success, the less need for such balance to favour the applicant: the weaker the prospects of success, the greater the need for the balance of convenience to favour him. I need hardly add that by balance of convenience is meant the prejudice to the applicant if the interdict be refused, weighed against the prejudice to the respondent if it be granted.

[44] In *Fedsure Life Assurance v Worldwide African Investment Holdings (Pty) Ltd and Others* 2003 (3) SA 268 (W) Cloete J stated the requirements for an interim interdict:

“Where the right asserted on the strength of which an interim interdict is sought is not clear, the position is as follows according to *Eriksen Motors (Welkom) Ltd v Protea Motors, Warrenton, and Another* 1973 (3) SA 685 (A) at 691C-G:

“The granting of an interim interdict pending an action is an extraordinary remedy within the discretion of the Court. Where the right which it is sought to protect is not clear, the Court’s approach in the matter of an interim interdict was lucidly laid down by Innes JA in Setlogelo v Setlogelo 1914 AD 221 at

227. In general the requisites are –

a clear right which, ‘though prima facie established, is open to some doubt’;
a well grounded apprehension of irreparable injury;
the absence of ordinary remedy.

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. This is sometimes called the balance of convenience.”

[45] The foregoing considerations are not individually decisive, but are interrelated, for example, the stronger the applicant’s

prospects of success the less his need to rely on prejudice to himself. Conversely, the greater the element of ‘some doubt’,

the greater the need for the other factors to favour him. The Court considers the affidavits as a whole, and the interrelation of the foregoing considerations, according to the facts and probabilities

DEVELOPMENT OF THE COMMON LAW THROUGH THE CONSTITUTION

[46] The applicants’ prima facie right may be developed along the following lines. The contract contains a clause, express or tacit, that gives the bank the right to terminate the contract for good cause, bad cause or no cause at all. In making this assumption I have accepted for the purpose of the present application that the clauses are embodied in the contract between the parties. The basis for this contention is premised in the constitutional injunction requiring a court to develop the common law in accordance with constitutional values.

Application of the Constitution

[47] Contractual relations, because they are regulated by the common law, are not immune from constitutional control and scrutiny. It is now accepted that all law (including the common law regulating contracts) derives its force from the Constitution and is thus subject to constitutional control, *Brisley v Drotzky* 2002 (4) SA 1 SCA. Any law that is inconsistent with the Constitution is invalid and, if that law is grounded in the common law, then it must be developed so as to bring it in line with the Constitution. All courts have a constitutional obligation to develop the common law so as to bring it in line with the values that underlie the Constitution. This is the constitutional imperative contained in

section 39(2), which states that:

‘When interpreting any legislation, and when developing the common law, or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.’

THE DUTY TO ACT FAIRLY

[48] *Barkhuizen v Napier*

[2007] ZACC 5; 2007 (5) SA 323 (CC) is authority for the proposition that a party to the contract cannot, first, impose a term on another party if it would, if applied, operate unfairly and, secondly, cannot enforce a term in a manner that is unfair. In the present case the applicants

say that the provision in the contract that gives the bank a discretion to close the accounts is unfair to the extent that it is

unfettered by considerations of reasonableness or, at the very least, rationality and must be read down to permit only a termination on good cause; and in consequence or in any event, the exercise of the discretion is unfair in the circumstances of this case since it is without good cause.

The *Barkhuizen* case

[49] The contract in *Barkhuizen* was one of short-term insurance. The policy contained a clause (referred to as a time-bar clause) which provided:

‘If we [the insurance company] reject liability for any claim made under this policy we will be released from liability unless summons is served within 90 days of repudiation.’

The facts of the case are the following: The claimant’s motor vehicle suffered damage on 24 November 1999 amounting to R181

000. He notified his insurance company on 2 December 1999 and claimed the R181 000. The insurance company repudiated the claim on 7 January

2000. On 8 January 2002 (two years later) the applicant instituted action against his insurance company. This was met with a special plea that the respondent should be released from liability because the applicant had failed to serve the summons within 90 days of the repudiation. In his replication the applicant conceded non-compliance with the time-bar clause but alleged that the clause was contrary to public policy for reasons grounded in the Constitution. The applicant invoked section 34 in the Bill of Rights which provides that ‘everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court...’

In the majority judgment, Ngcobo J commenced by recording the following at paragraph 15:

‘I do not understand ... that the principle of contract *pacta servanda sunt* is a sacred cow that should trump all other considerations. ... [In the judgment *a quo*] the Supreme Court of Appeal accepted that the constitutional values of equality and dignity may, however, prove to be decisive

when the issue of the parties' relative bargaining positions is an issue. All law, including the common law of contract, is now subject to constitutional control. The validity of all law depends on their consistency with the provisions of the constitution and the values that underlie our Constitution. The application of the principle *pacta servanda sunt* is, therefore, subject to constitutional control.'

[50] The Constitutional Court recognised that the Bill of Rights represents a reliable statement of public policy. Thus, what public policy is and whether a term in a contract is contrary to public policy needs to be determined by having regard to the Bill of Rights and the values that underlie our constitutional democracy (as expressed in the Constitution). In paragraph 29 the majority held that 'a term in a contract that is inimical to the values enshrined in our Constitution is contrary to public policy and is, therefore, unenforceable.'

[51] At paragraph 30 the majority stated that:

'The proper approach to the constitutional challenge to contractual terms is to determine whether the term challenged is contrary to public policy as evidenced by constitutional values, in particular, those found in the Bill of Rights. This approach leaves space for the doctrine of *pacta servanda sunt* to operate, but at the same time allows courts to decline to enforce contractual terms that are in conflict with constitutional values even though the parties may have consented to them.'

[52] In paragraph 35, the majority continued as follows:

'Any law that is inconsistent with the Constitution is invalid. No law is immune from constitutional control. The common law of contract is no exception. And courts have a constitutional obligation to develop the common law, including the principles of the law of contract, so as to bring it in line with values that underlie our Constitution. When developing the common law of contract, courts are required to do so in a manner that promotes the spirit, purport and objects of the Bill of Rights.'

[53] In paragraph 51 of the majority judgment the Constitutional Court held as follows:

'In general the enforcement of an unreasonable or unfair time limitation clause will be contrary to public policy... Notions of fairness,

justice and equity, and reasonableness cannot be separated from public policy. Public policy takes into account the necessity to do simple justice between individuals. Public policy is informed by the concept of ubuntu. It would be contrary to public policy to enforce a time limitation clause that does not afford the person bound by it an adequate and fair opportunity to seek judicial redress.'

[54] In paragraph 57 the majority said the following:

‘The first question involves the weighing up of two considerations. On the one hand public policy, as informed by the Constitution, requires in general that parties should comply with contractual obligations that have been freely and voluntarily undertaken. This consideration is expressed in the maxim pacta servanda sunt, which, as the Supreme Court of Appeal has repeatedly noted, gives effect to the central constitutional values of freedom and dignity.

Self-autonomy, with the ability to regulate one’s own affairs, even to one’s own detriment, is the very essence of freedom and a vital part of dignity. The extent to which the contract was freely and voluntarily concluded is clearly a vital factor as it would determine the weight that should be afforded to the values of freedom and dignity. The other consideration is that all persons have a right to seek judicial redress. These considerations express the constitutional values that must now inform all laws, including the common law principles of contract.’

- [55] In *Barkuizen* there were powerful minority decisions by Moseneke DCJ (in which Mokgoro J concurred) and Sachs J. They pursued much the same theme as the majority, but took a stronger line on the validity per se of the time-bar.
- [56] Sachs J was particularly concerned with the manner in which large powerful organisations wield oppressive contractual power in a way that allows them to impose onerous and unfair contractual terms on subordinate contractual parties. He held that the particular contractual circumstances of the case should render the time-bar clause unenforceable. At paragraph 185 the learned judge left open ‘for future consideration where the onerous and unilaterally imposed terms and standard-form contracts of adhesion should in general be regarded as offensive to public policy in our new constitutional dispensation’.
- [57] That the arbitrary exercise of a power reserved to one party who contracts from a position of strength can be oppressive and unfair is also recognised in the judgment of the majority. In paragraph 59, the majority commenced by making the following point:

‘It follows in my judgment that the first enquiry must be directed at the objective terms of the contract. If it is found that the objective terms are not inconsistent with public policy on their face, the further question will then arise which is whether the terms are contrary to public policy in the light of the relative situation of the contracting parties.

.....

‘In *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA) the Supreme Court of Appeal recognised that unequal bargaining power is indeed a factor that together with other factors plays a role in the consideration of public policy. This is a recognition of the potential injustice that may be caused by inequality of bargaining powers. Although the court found ultimately that on the facts there was no evidence of an inequality of bargaining power, this does not detract from the principle enunciated in that case, namely that the relative situation of the contracting parties is a relevant consideration in determining whether a contractual term is contrary to public policy. I endorse this principle.’

[58] On the facts of *Barkhuizen*, the Constitutional Court was unable to find that the enforcement of the time-bar had been unfair. The reason was that the stated case was so terse that it was impossible to see whether it was unfair to expect the claimant to comply with the clause. The case was, in consequence, dismissed. Throughout the judgments (ie. in both the majority and minority opinions) one finds references to the words 'fair' and 'fairness' and 'unfair' and 'unfairness'. This has prompted Professor AJ Kerr to suggest that this case (and by implication other similar cases under the development of the Constitution) be resolved according to the central concept of fairness.

APPLICATION OF BARKHUIZEN TO THE PRESENT CASE

[59] In the present case, the central question is whether it is fair in the circumstances to allow the first respondent to terminate its contracts with the applicants. In determining this question, the court will, take into account the following factors: A business

entity must, in order to carry out its objects, have one or more bank accounts. This is not simply because transactions through a bank are convenient and customary; in addition, it is because the banks operate an inter-change system that makes it all but impossible for a person to do business without operating through a bank.

[60] The bank operates within the framework of an oligopoly in which the four large banks dominate the market for banking services. It is created by statutory regulation and socio-economic factors that create barriers to entry to the market for the provision of these services. In consequence, a prospective customer has few alternatives but to bank with one of the big four banks.

[61] In their dealings with customers, the behaviour of one bank tends, understandably enough, to track the conduct of the others. As a result, the offerings of each tend to be very similar. The result is that a prospective customer has little choice on the contracts he or she must conclude in order to become a bank customer. As a result, if one bank imposes a term in the contract sanctioning termination without cause, the customer can expect the other banks to do so too.

[62] This power is exploited to impose standard form contracts on customers, the present applicants included. In the present case the contract supposedly goes so far as to permit the bank to unilaterally amend terms and conditions in the exercise of its discretion. Such powers can be exercised oppressively, and there is undeniably an element of oppression when the bank decides to terminate the contract without good cause.

[63] Banks have the capacity to make reasonable decisions and to put them into effect, if necessary, after first entertaining representations from the customer in question. Standard Bank makes something of the fact that it has an enormous customer base but this, far from making rational decision-making impossible, actually permits the bank to create an infrastructure that enables it to operate cautiously and sensibly. In the present case, the evidence shows that senior executives of the bank met twice in order to decide how to treat

the applicants following their listing by the foreign state jurisdictions.

- [64] In the present case, the bank had a range of options available to it and could have been expected to utilise them before resorting them to the drastic expedient of closing the accounts. These included a request for an undertaking, of the sort given by the applicants in the course of these proceedings, not to deal with nationals of the foreign jurisdictions; effective reporting on transactions that might be deemed controversial; special monitoring of the account pending the appeals; and so on.
- [65] Termination by a bank of an account for whatever reason creates a black mark against the customer's name. The effect is drastic, since it makes it very difficult for the customer to acquire another bank account. A bank approached by a prospective customer will naturally want an explanation for why the account was closed and, in the light of the explanation; will almost certainly refuse to grant the customer the facilities requested. This is particularly so if 'reputational risk' is the reason the previous bank closed the account. In effect, therefore, the closure of an account operates to put the customer on an informal "blacklist".
- [66] The bank, in its answering affidavit, accepts that the closure of an account on these grounds has the effect of "blacklisting"

a customer, but argues that the applicants in this case were authors of their own misfortune since they brought themselves into disrepute. This response, needless to say, makes precisely the point that the applicants seek to make: namely, that they may be authors of their own misfortune if, as a fact, they have brought themselves into disrepute but that the question whether they are or not is precisely the matter that has to be tested by reference to the principle of reasonableness; the OFAC and EU listings are, in any event, the subject of pending appeals and until they are decided, the stigmatisation of the applicants by their 'blacklisting'

is, to say the very least, premature.

- [67] The termination by the bank of the applicants' accounts is oppressive because, in the circumstances, the applicants are unable to find alternative banking facilities.
- [68] A clause which purportedly gives a powerful bank the right to simply close a bank account (and in the process destroy that party's prospects of participating in the modern commercial world) without either showing that there is good cause for doing so or giving the party a hearing if it seems as though it might be unfair, unjust and oppressive. For that reason, and under the guise of the Constitution, the common law must be developed in a manner which would prevent large commercial undertakings, such as the first applicant in this matter, from behaving as it has.

FACTUAL MATRIX

- [69] In the present case, it is clear; the bank's decision to close the accounts was prompted by the OFAC listing. At the time, the EU had yet to list the applicants and so this listing cannot, as far as the bank is concerned, do more than simply confirm the bank in its initial resolve. The two sets of listings are currently the subject of an appeal lodged on behalf of the applicants and other companies in the group. The outcome of these appeals cannot be predicted in these proceedings.
- [70] There exists no doubt that until the appeals have been determined; the bank can be expected to have some concern that its own supplier and customer network might in measure be compromised if the applicants trade without the applicable nationals through its agency. But the concern must be placed in context: the bank, in its dealings in South Africa, is not itself obliged to observe the OFAC or EU listing requirements. Nor, for that matter, are the applicants, since they too fall outside the jurisdiction of the regulatory bodies. The people who are liable to be sanctioned are those nationals of the jurisdiction who deal with the applicants in breach of the listing requirements. If they deal knowingly with the applicants, they must bear the consequences; and if they deal unwittingly with them, then the bank's solution is simply to notify them that the transaction constitutes a regulatory contravention.
- [71] In the present case, therefore, the facts show that the bank's decision to close the accounts was anything but reasonable; that it operates unfairly towards the applicants for all the reasons stated above; and that the exercise of power that it entails is one that, is consistent with the constitutional mandate recognised in *Barkhuizen*, cannot and should not be permitted. In these circumstances, I am satisfied that it would be right to grant an interim interdict to restrain the bank from terminating the accounts pending the determination of the main case.

THE ADMINISTRATIVE LAW CHALLENGE

- [72] I was informed at the commencement of the hearing that the applicants did not wish to pursue this challenge at this enquiry. They may well make submissions in this regard at the next enquiry when they will pursue a final order. Therefore, nothing more needs to be said concerning this part of the enquiry.

THE BALANCE OF CONVENIENCE

- [73] The balances of convenience clearly favours the applicants and, as the facts demonstrate, if the bank is allowed to terminate the contracts then the applicants will suffer irreparable harm. The practise in the industry indicates that the applicants may not enjoy this facility with any of the major banks. This will inevitably have devastating consequences on the economic future of the applicants.
- [74] I do not believe that there is serious doubt that the applicants do not have an alternate remedy within the context of the present matter.

APPLICATION TO STRIKE OUT

[75] Notice was given at the hearing of the application that Standard Bank would apply for the striking out of certain allegations and annexes on the basis that they constitute impermissible new matter in reply. It was contended that they constitute vexatious and/or irrelevant matter. These allegations were set out in paragraphs 13, 14, 15, 20.4, 20.5, 57, 58, 60 and 61 of the replying affidavit and the documents that comprised annexe RA13 to the replying affidavit. In terms of the Rule 6(15) of the Uniform Rules of Court a court has discretion in an application by any party to strike out from any affidavit any matter which is:

- a) scandalous;
- b) vexatious; or
- c) irrelevant.

[76] A court may entertain an application to strike out material from

affidavits on grounds other than those in Rule 6(15). See *Titty's Bar and Bottle Store v ABC Garage and Others* 1974 (4) SA 342 (W) at 368F-G.

[77] Irrelevant with regard to the contents of an affidavit refers to allegations which do not apply to the matter in hand and do not contribute one way or another to a decision of such matter. Vexatious in respect of an affidavit refers to allegations which may or may not be relevant but are so worded as to convey an intention to harass or annoy. Scandalous matter is allegations or matters which may or may not be relevant but which are so worded as to be abusive or defamatory. For an application to strike out allegations from an affidavit to succeed two important requirements must be satisfied:

The matter sought to be struck out must be scandalous, vexatious or irrelevant or be of a kind envisaged for example in the *Titty's Bar* case;

The court must be satisfied that if the matter is not struck out the parties seeking to have the matter struck out would be prejudiced.

[78] It was contended on behalf of Standard Bank that the allegations contained in the above paragraphs and annexes were vexatious. It is correct that there are serious allegations made out by the applicants. However within the context of the present matter I believe that in the ultimate determination, all of these facts have to be considered in their totality. In any event, the allegations set out in these paragraphs are already in the public domain. I do not deem these allegations to be vexatious. Therefore the application to have these paragraphs and annexure to be struck out is misplaced.

ORDER

1. In all of the above circumstances, I am satisfied that a proper case has been made out for an interim interdict. The first respondent is interdicted and restrained from cancelling the contracts between the applicants and the first respondent that underlie the accounts listed below or from closing the accounts, pending the finalisation of the application for relief to be granted that is referred to in part B of the applicants' notice of motion, the accounts being:
 - 1.1 a current account under account number 421016906;
 - 1.2 a current account under account number 421036559;
 - 1.3 a current account under number 420946373;
 - 1.4 a foreign currency account conducted under account number 090426509;
 - a foreign currency account conducted under account number 090369297;
 - 1.6 a current account conducted under account number 233595790;
 - 1.7 a current account under account number 728599422001
2. The first respondent is ordered to pay the costs of this application which should include the costs of the employment of two counsel.
3. Part B of this application is postponed sine die.

Judge of the High Court.

Date of Hearing: 25 March 2009

Date of Judgment: 30 March 2009

On behalf of the Applicants: Adv M Brassey SC, P Louw SC, K Hopkins, instructed by Wertheim Becker Inc.

On behalf of the First Respondent: Adv JJ Gauntlett SC, AE Bham SC, RM Pierce, instructed by Deneys Reitz.

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