

SOUTH AFRICA / JUDGMENT

Ndudane and Others v Financial Intelligence Centre (EC/01/22) [2024] ZAWCHC 38; 2024 (5) SA 549 (WCC) (13 February 2024)

[2024] ZAWCHC 38

COURT

Western Cape High Court, Cape Town

BEFORE

Thulare

CASE / FILE NUMBER

EC/01/22

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FLYNOTES:

BANKING – Financial Intelligence Centre – Access to information – Banks terminating relationships with applicants – Applicants contending that banks treating them in discriminatory and unequal manner – Seeking information held by FIC – Banks’ risk management and compliance programmes and reports of suspicious transactions – Right to equality – Part of portfolio of evidence material to determine whether applicants unfairly discriminated against – Disclosure will help proper determination of issues in main application – FIC directed to provide applicants with the documents – Constitution, s 32(1) – Financial Intelligence Centre Act 38 of 2001, ss 40 and 41.

IN
THE HIGH COURT OF SOUTH AFRICA
(WESTERN
CAPE DIVISION, CAPE TOWN)
(Sitting
as the Equality Court)

CASE
NO: EC/01/22
In
the matter between
SIPHOKAZI

NDUDANE
1ST
APPLICANT
TCQ
FISHERIES MANAGEMENT GROUP (PTY) LTD
2ND
APPLICANT
DENNIS
HENRY GEORGE
3RD
APPLICANT
AMAVEL
MOTA MOREIRA
4TH
APPLICANT
MOTA
MOTOR COMPANY T/A MOTA LOGISTICS PTY
5TH
APPLICANT
DEMOCRACY
IN ACTION NPC
6TH
APPLICANT
AND
FINANCIAL
INTELLIGENCE CENTRE
RESPONDENT
In
re the main application between
MOHAMMED
IQBAL SURVE & OTHERS
FIRST
COMPLAINANT SECOND TO FIFTY SEVENTH COMPLAINANT
AND
ABSA
LTD & OTHERS
FIRST
RESPONDENT SECOND RESPONDENT TO TWENTY SECOND RESPONDENT
Date
of Hearing: 17 November 2023
Date
of Judgment: 13 February 2024 (to be delivered via email
to the respective counsel)

JUDGMENT**THULARE J**

[1] This is an opposed interlocutory application for access to information in which the applicants sought orders that the respondent

(FIC) be directed to provide information which was held by the FIC as set out in terms of section 40(1)(e) and section 41(d) and (e) of the Financial Intelligence Centre Act, 2001 (Act No. 38 of 2001) (FICA).

[2] The information sought by the applicants consisted of the following:

2.1 The Risk Management and Compliance Programmes of ABSA Bank Ltd, FirstRand Bank Ltd, Investec Bank Ltd, Nedbank Limited and Standard Bank of South Africa Limited who are respondent banks or accounting institutions who were cited in the main Equality Court application.

2.2 All reports of suspicious and unusual transactions made to the FIC by accounting institutions in respect of the applicants.

2.3 All reports of suspicious and unusual transactions made to the FIC by accounting institutions in respect of Sekunjalo Investment Holdings (Pty) Ltd and the entities associated with the Sekunjalo Group. The Sekunjalo Group consisted of the complainants who sought relief in the main Equality Court application.

2.4 All reports of suspicious and unusual transactions made to the FIC by accounting institutions in respect of EOH Holdings and its subsidiaries, KPMG Services Proprietary Limited South Africa, Steinhoff International Holdings NV and Tongaat Hullet Development.

[3] The FIC raised several objections in opposition to the granting of access to information. The FIC basis was as follows:

3.1 The applicants did not set out any factual or legal basis for entitlement to the information sought.

3.2 The applicants had not legal right to the information.

3.3 The application was a fishing expedition.

3.4 To the extent that the applicants relied on the constitutional rights of access to information, the principle of subsidiary prevented them from that without complying with the provisions of the Promotion of Access to Information Act of 2000 (PAIA). They applicants failed to do so.

3.5 In any event, the information sought was for the purpose of litigation, after the commencement of that litigation, and as such the Uniform Rules governed access to information.

3.6 The applicants failed to join the banks and other affected entities whose documents were sought.

- [4] FIC disputed that this application was brought in terms of section 21(5) of Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (Act No. 4 of 2000) (PEPUDA) as the applicants alleged. FIC indicated that there had not been any directions hearing as required by the Regulations to PEPUDA, and that this court did not have jurisdiction to entertain this application, and that even if it had the power, it would not exercise it in the light of the procedures created by PEPUDA and its Regulations. It was the Equality Court that was conferred with the jurisdiction to grant orders sought in this application as it was relied consequential and ancillary to the Equality Court complaint. The applicants alleged that the application was further brought in terms of section 40(1)(e) and section 41(d) and (e) of FICA. It was the applicants' case that these two sections relied upon permitted any person to apply for a court order in order to receive information reported, obtained or generated by the FIC. FIC's response was that the applicable legislation did not permit that access to information which included to information which was sensitive, which related to State Security, and which contained the personal information of individuals and entities, could be granted holus bonus to applicants in civil proceedings to enable them to attempt to find evidence which supported their complaints.
- [5] The applicants gave the background facts. 1st applicant was the sole director of second applicant. Investec and FNB terminated their relationship with the applicants due to reputational and business risk. 1st applicant did not receive a response to why FNB ceased their banking services. Third applicant's relationship with ABSA were exited by ABSA, which alleged that his profile did not fit within their internal policy and commitment to complying with all legal and regulatory obligations applicable to anti-bribery laws and regulation both locally and internationally, and he did not fit their risk appetite. Despite 3rd applicant's request for reasons, ABSA gave no response. 4th applicant was a sole director of 5th applicant. 4th applicant alleged that he was a sales manager of Silver Moon Trading (Pty) Ltd (Silver Moon) which instituted action against FNB. Silver Moon did not have banking facilities with FNB, whilst 4th and 5th respondents had. FNB declined to provide services to 5th applicant on the basis that Silver Moon instituted proceedings against them. FNB terminated its relationship with 4th and 5th applicants. The termination letter also referred to associated reputational and business risk. There was no response to 4th and 5th applicant's request for reasons. 6th applicant was a non-profit company established to advance, support and defend democratic principles and values in South Africa. Its mandate was also to support institutions established pursuant to Chapter 9 of the Constitution and to support constitutional democracy. 6th applicant had an account with FNB to receive donations, which were its primary source of income. FNB issued a letter to 6th applicant indicating that FNB had elected to exercise its contractual right to terminate their banking relationship. No reasons were provided, or an opportunity to answer to the reasons so given. Applicants were natural and juristic persons joined as complainants in the main complaint, who had their banking services and facilities terminated by several banking institutions and/

or the refusal by the banks to provide banking services and facilities without any reason for doing so. Save for the use of the term ‘reputational and business risk’ or ‘risk appetite’, no reasons were given for the termination and refusal to provide banking services and facilities to the applicants.

- [6] According to the applicants the information sought would show that while the applicant’s bank accounts were terminated purportedly on account of seeking to comply with the anti-money laundering laws as headlined by FICA, the respondent banking institutions had treated the applicants in a discriminatory and unequal manner when compared to other individuals and organisations which have had negative publicity during the determination of their risk appetite. Applicants case was that the reports sought were used as a compliance function to implement the compliance risk management process whereby the compliance required that a universal list of applicable regulations was determined and that the applicable laws and regulations were rated, managed and monitored by an accountable institution. Once the risk assessment was identified, control measures must be designed and implemented to ensure that the regulatory requirements were complied with. According to the applicants widely publicized evidence gathers in various investigations and enquiries by various law enforcement agencies made it clear that in multinational entities were enablers of mass looting and money laundering where state funds were siphoned out of the identified state entities and institutions. No action was taken against these entities. This brought into question of motive, uniformity and consistency by both the banks and FIC in taking such drastic steps as they took against the applicants. Applicant’s case was that FIC failed to monitor and give guidance to the implementation of FICA in line with section 4(c) as the banks were now using FICA as an excuse to discriminate and harass certain categories customers, including applicants.
- [7] The applicants’ equality court complaint included that the unilateral termination of bank accounts violated constitutional

rights enshrined in the Bill of Rights of the country’s Constitution. Without access to financial services such as bank accounts, numerous socio-economic rights in the Bill of Rights were curtailed and could not be meaningfully enjoyed or exercised such as the right to freedom of trade, occupation and profession (s 21), housing (s 26) health care, food, water and social security (s 27), education (s 29) and the right to equality (s 9) and human dignity (s 10). The case was that no provisions in the anti-money laundering laws and regulations required banks to unilaterally terminate accounts of customers who fulfilled the customer due diligence or Know Your Customer requirement. The banks were only required to monitor and report suspicious, unusual and cash transactions above the regulated threshold of R24 999 and above. The banks were thus overreaching ultra vires in trying to comply with FICA and related legislation by assuming the role of a law enforcement agency and a court of law entitling them to investigate, judge and punish their customers through un-banking them based on innuendo and suspicion of involvement in criminal activity. Applicants were not charged and prosecuted for any crimes. Accountable institutions were required to consider the legitimate interests and expectations of

stakeholders which included government regulatory bodies, employees, clients, owners, investors, trade unions and the community at large in the execution of their duties in the best interests of the organization over time, and this application was also in the public interest. The closure of accounts could be catastrophic as no serious business could run an operation without bank accounts. The information sought would be used to assist the Equality Court to determine the applicants' allegations of unequal treatment, unfair discrimination and persecution by the major banks in SA compared to other companies and individuals who were in the news for various regulatory and criminal violations. The provision of the documents would promote transparency amongst accountable institutions and promote fairness amongst consumers.

[8] In respect of EOH the applicants made reference to an article wherein EOH's ex-CEO Asher Bohbot was implicated in tender fraud amounting to R1.7 billion. EOH's subsidiaries (EOH Mthombo, EOH Afrika, EOH Managed Service and EOH Abantu) made unlawful and corrupt payments to unidentified persons and have furthermore been implicated in tender fraud. For KPMG reference was made to an article wherein KPMG was blasted for working for a family accused of using politicians to loot organs of State. KPMG was further allegedly involved in the business of a banking institution however that failed due to fraud. In respect of Steinhoff reference was made to a report that Germany's financial regulator had fined it R190 million for breaching financial regulations five years ago and that German authorities were pursuing two criminal trials against Steinhoff's officials. As regards Tongaat Hullet, reference was made to reports that during March 2014 and October 2018 the company's financial records were falsified, and that its former executives were facing charges of fraud, racketeering and contravention of POCA and the Financial Markets Act. Its former executives were alleged to be indicted on charges relating to manipulation of financial records of Tongaat Hullet and its subsidiary Tongaat Hullet Development. There were also reports that Tongaat Hullet approached the Johannesburg Stock Exchange for a temporary suspension of its listing as it was unable to publish its audited financial statements on time. The information was sought to help determine whether there was compliance with FICA by the banks prior to termination and what grounds were proffered by the banks therein. The applicants' case was that their termination was contrary to the principles of fairness, justice

and racial equality

[9] FIC's response was that it had no knowledge why the banks terminated their services and facilities with the applicants and that the banks should speak for themselves. FIC's position was that the assertion that the information sought would show, was a conclusion which was not backed up by evidence. FIC did not issue directions to banks to close accounts and had not done so. FIC did not take any steps against the applicants. FIC's position was that the applicants sought to obtain documents which they apparently needed to prove their case in the main application by making a 3rd party (the FIC) against which no allegation of unlawful conduct was made, a respondent- and then seeking against it a form of discovery

which was not known in our law. The application itself, and the manner in which it was advanced, constituted an abuse.

[10] Section 21(5) of the PEPUDA provides:

'21 Powers and functions of equality court

- (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."

The FIC submission that the information sought by the applicants was for the purpose of litigation, after the commencement of that litigation, and as such the Uniform Rules governed access to that information, stood to be rejected. The Equality Court has the power to deal with applications for interlocutory orders as an ancillary power necessary or incidental to the performance of its functions and the exercise of its powers. This application fell within an application for such an interlocutory order. The applicants having to wait for the discovery and access provisions of PEPUDA would have been of no consequence. They would have been met by the protection of confidential information held by or obtained from the FIC by the provisions of section 41 of FICA, unless there were legal proceedings in which the FIC was a party or the disclosure and access was in terms of an order of court. The dominant purpose for the information sought was for it to be used in a lawsuit in which the applicants sought to assert their constitutional right to equality. Through this application, the applicants sought to assert their constitutional right to access information. The information sought was statutorily protected and a person in the position of the applicants could only access it if it was armed with a court order, through which it would be entitled to that access.

[11] Section 32(1)(a) and (b) of the Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996 (the Constitution) provides as follows:

"Access to information

32 (1) Everyone has the right of access to-

- (a) Any information held by the State; and
(b) Any information that is held by another person and that is required for the exercise or protection of any rights."

Section 40(1)(e) of FICA provided as follows:

"40 Access to information held by Centre

- (1) Subject to this section, the Centre must make information reported to it, or obtained by it under this Part and information generated by its analysis of information so reported or obtained, available to-
- (e) a person who is entitled to receive such information in terms of an order of a court; ..."

Section 41(d) and 41(e) of FICA provided as follows:

“41 Protection of confidential information

No person may disclose confidential information held by or obtained from the Centre except –

- (c) for the purpose of legal proceedings, including any proceedings before a judge in chambers; or
- (d) in terms of an order of court.”

Section 32(1) of the Constitution, and section 40(1)(e) read with 41(d) and

(e) are the sources of the rights of the applicants to the information that they wanted the FIC to provide to them. From my understanding of their arguments, the FIC accepted that FICA, an Act other than PAIA, could create an entitlement to information, and that this right could be enforced through the courts. It seems to me that for purposes of legal proceedings or in terms of an order of court, the FIC may disclose confidential information it held or obtained. An applicant may rely on section 40(1)(e) read with section and 41(d) and (e) of FICA to access information reported to, obtained by or generated by analysis so reported or obtained by the FIC. The provisions relied upon can mean no more. What FIC said was lacking, was an explanation of how the provisions of FICA relied upon, founded the applicants’ right to the documents sought. The FIC submitted that the applicants relied on the constitutional rights of access to information, and that the principle of subsidiary prevented them from that without complying with the provisions of the Promotion of Access to Information Act of 2000 (PAIA) and that the applicants failed to do so. This submission is without merit. In *Minister of Finance v Oakbay Investments (Pty) Ltd and Others; Oakbay Investments (Pty) Ltd v Director of the Financial Intelligence Centre* 2018

(3) SA 515 (GP) it was said at para 46:

[46] The Oakbay applicants were not unreasonable in launching the FIC application as contended by the director of the FIC. Section 41(1)(e) of the FIC Act, on which the FIC application is premised, provides the scope for the FIC to make available to any person information held by the FIC in terms of a court order.”

The information sought by the applicants is protected by statute from disclosure. The discovery of that information is allowed by section 40 read with 41 of FICA.

[12] The question was whether the applicants had made a case for a court to order that the FIC must make information reported to it, or obtained by it under this Part and information generated by its analysis of information so reported or obtained, available to the applicants in this matter. Simply put: Have the applicants alleged or proved a legal right to have the information in possession of the FIC? It is through this application that the applicants sought a court order which entitled them to the information. The FIC’s criticism of the applicants for not asking the information directly from the FIC made no sense. It is the FIC itself which relied on the list of institutions which may have access to information held by the FIC as set

out in the early provisions of section 40, and it is the FIC which relied on the fact that the applicants are not listed there, except as and unless they are a person who is entitled to receive such information in terms of an order of court. The criticism was without merit. In my view, it was necessary for the applicants to approach the court, so that if successful, they qualify in terms of FICA as envisaged in section 40(1)(e). The section 40(1)(e) status would also pave the way for the application of section 41(d) and (e). The FIC submission that in this kind of matter the Uniform Rules of Court govern access, is unsustainable.

- [13] The respondent banks in the main application were required to comply with the regulations and guidance notes related to business risk. The Prudential Authority published Guidance Note 6 of 2022 titled “Business Risk Assessments” and this documents described what a business risk assessment was, what it entailed and how it was to be implemented by a banking institution. The applicants’ case was that compliance with the regulations and guidance notes relating to business risk was to be considered in its main case. The regulatory risk was a risk that a financial institution, including the respondent banks, may not comply with the applicable laws, regulations or supervisory requirements, or the risk that relevant statutory and legislative provisions would be excluded from its operational procedures. The parameters of regulatory risk and the manner in which a bank is required to comply was established in terms of Regulation 49(1) and (2) of the Banks Regulations published in Government Gazette No. 46159 with effect from 1 April 2022. The applicants’ case was that whether the respondent banks applied these regulations and the extent to which they were used in a discriminatory manner was to be considered in the main application. There was also the reputational risk which related to the risk that the bank might be exposed to negative publicity as a result of its own contravention of applicable statutory, regulatory or supervisory requirements by the bank or its staff during the conduct of its business. The applicants’ case was that it was for that reason that Regulation 49(2)(c) of the Banks Regulations required that a banking institution should have a compliance framework that must be given adequate resources and stature in order to ensure that non-compliance with the laws and regulations or supervisory requirements by the bank could be duly addressed. Whether and how the respondent banks applied these regulations were to be considered in the main application.

- [14] Section 42 (4) of FICA provides:

“42 Risk Management and Compliance Programme

- (4) An accountable institution must, on request, make a copy of the documentation describing its Risk Management and Compliance Programme available to –
- (a) the Centre; ...”

The FIC did not deny that it obtained the Risk Management and Compliance Programmes of the respondent banks, and it did not allege that the information and documents including the programmes related to State Security or that they were privileged. According to the applicants the information sought delved into the values of openness and visibility in the regulatory

environment and the implementation of statutory mandated processes. The applicants were of the view that this application enjoined their right to know if there had been a manifest abuse of these statutory mandated processes as a means of cloaking the violation of their constitutional rights. The applicants' case was that the respondent banks elected to arbitrarily terminate the applicant's services and facilities in order to 'de-risk' instead of improving their compliance processes. Most importantly the applicants alleged that the 'de-risking' appeared to be limited to persons of a certain race and who had no political alliances with the banking institutions and who were often referred to as political elites. This was against the background that FICA had an array of mechanisms and interventions that the banks must have in place to ensure compliance, and that these mechanisms did not include arbitrary termination of banking services and facilities. The applicants submitted that in view of the role that the banks played in modern democratic society where considerations of equity and fairness remained the guiding principles in every decision taken, considerations relating to private contractual law could not be allowed to roughshod public policy and public interest by action that was patently biased, irrational and unfair in an open and democratic society like South Africa.

[15] The case of the applicants was that the respondent banks were required to report any suspicious transaction to the FIC [section 29 (1)]. The FIC could request additional information including supporting documentation, transaction activity and the ground for the report [section 32(2)]. The FIC could direct that the bank not proceed with the transaction that has been reported until it had made appropriate enquiries [section 34(1)]. The respondent bank had no legal obligation to freeze or terminate a banking facility. The Sekunjalo Group had their banking facilities terminated on account of purported 'reputational and business risk', just like the applicants. The Sekunjalo Group was informed that it was due to associated negative publicity which arose from the Mpati Commission and its report. The respondent banks gave these reasons notwithstanding other entities that have variously been held guilty for inter alia fraud and corruption on a massive scale. EOH, KPMG, Steinhoff and Tongaat-Tullet allegedly admitted crimes of fraud and corruption on a massive scale and had multiple criminal and civil cases pending against them. Some of them have been identified or implicated in State Capture which had been flagged as risk even by the FAFTF in its anti-money laundering and counter-terrorist financing measures South Africa- Mutual Evaluation Report, October 2021 (the FAFTF Report). Some of these entities were fined by the Financial Sector Conduct Authority (FSCA) for serious accounting irregularities and had also been censured and fined by the Johannesburg Stock Exchange (JSE).

[16] Applicants' case was that based on the obligations of the respondent banks and the FIC both in respect of local and international regulations, these companies, according to the applicants, white companies, posed a serious risk to those financial

institutions and the country's financial system. The applicants' case was that the white companies ought to have been subject to risk assessment consequences which obviously would include having their banking services terminated. To the contrary,

they have not. It was important to see how the respondent banks and the FIC assessed, approached and ‘managed’ the risk associated with these companies. The applicants sought the information that the respondent banks submitted to the FIC, in

compliance with the statutory and regulatory framework, that may have informed the termination of the applicants’ accounts to the exclusion of all others. This information would help in the determination of whether the applicants were discriminated against by the respondent banks or whether the respondent banks adopted consistent approaches in their risk management programmes, whether

the banks complied with FICA and international regulatory standard in particular as demanded by FATF and whether in the termination of the applicants’ banking services the banks relied on and/or applied their risk management and compliance programs and the applicable regulatory prescripts. The applicants allege that the disclosure of the reports will not cause prejudice to the entities mentioned as their misnomers were widely publicized. The FIC characterization of the applicants’ request for information as a fishing expedition is rejected.

[17] The court in Oakbay said at para 48 and 49:

“[48] ... There was a live dispute between the director of the FIC and the Oakbay applicants in respect of information the latter sought to access from the former. The FIC contended that the Oakbay applicants were not entitled to it. Hence it did not agree to their request. The Oakbay applicants contended that they were entitled to the information. Under these circumstances, s 41(1)(e) of the FIC Act provides the only mechanism by which the Oakbay applicants may obtain the information. For that reason, the Oakbay applicants did not bring the FIC application to vex the FIC. There is also no suggestion that the application was driven by malice.

[49] Although the FIC application is based on the FIC Act and not on the Constitution, to the extent that the application relates to access to information, it is intended to enforce an entrenched constitutional right, namely, the right of access to information. The application also relates to the exercise of statutory duties by an organ of state. The conduct of the Oakbay applicants in bringing the FIC application was therefore not unreasonable.”

[18] In my view, the constitutionally entrenched right to equality will be emaciated and hollow if constitutional institutions, upon request, may not supply information on any measures relating to the achievement of equality including where appropriate, compliance with legislation, codes of practice and programmes within their jurisdiction, in instances where such access did not threaten State

security or destabilise, in this instance, the nation’s financial system. In this case, the disclosure will help enhance the legitimacy and maintain the integrity of the financial system of our country as it may demonstrate that voluntary compliance and self-regulation is not a cover at the expense of the Black majority in that it was exploited to maintain protection based on race and superiority based on political ideology and allegiance. Non-disclosure on the other hand, will allow the foul smell of racism and white superiority to linger around major banks in the Republic. The FIC

disclosure would be in line with their duty and responsibility to promote equality. This is so particularly for complainants who are disadvantaged by the lack of access to relevant information on how risk is attended to for both black and white business. The constitutional institutions have a responsibility to assist disadvantaged complainants, and if racism exists in our financial sector, it needs the FIC to disclose, and not hide, what it obtained and held.

[19] The FIC highlighted, through underlining, the following sentence in para 30 of its heads of arguments:

“30 No allegation is made that the termination of the banking relationship between any of the applicants and any of the respondent banks was the result of reports filed with the FIC.”

It is ironic that this statement was made under the heading: NO NEXUS DEMONSTRATED BETWEEN INFORMATION SOUGHT AND THE CAUSE OF ACTION”

This statement seems to be deliberately contrary to what one ordinarily expects, which is that the applicants could only make the allegation complained of, as a fact, after they had access to the very reports that the FIC denied the applicants access to. It would be wryly amusing if it was not related to such serious allegations against the major banking institutions of the Republic, which the reports could shed light on. The respondent banks’ reliance on reputational and business risk, or that one did not fit their internal policy and commitment to complying with all legal and regulatory obligations applicable to anti-bribery laws put the reasons squarely within the provisions of FICA and related banking laws. The FIC itself drew attention to the preamble to FICA, which opens with that the legislation was enacted to establish a Financial Intelligence Centre in order to combat money

laundering activities ..., to provide for risk management and compliance programmes ...” The suggestion by the FIC that the applicants were speculating when they suggested that the termination of their banking facilities under the guise of complying with FICA was pure speculation, is not supported by the facts. The information sought to be accessed by the applicants directly related to the main reasons for termination of their banking relationship, to wit, reputational and business risk as well as legal and regulatory obligations applicable to anti-bribery laws. The information constituted vital evidence in the manner in which the applicants were treated, whether in favour of or against the applicants. I am not persuaded by the FIC argument that no nexus was demonstrated between the applicants’ cause of action in the main application, and the information which they sought to compel the FIC to divulge.

[20] The FIC’s case was that information sought included that which derived from and concerned a multitude of persons and entities other than the respondent banks, which persons and entities were not parties to the proceedings or the main application. It was argued that these persons and entities had direct and substantial interests which may be affected prejudicially by the orders sought. The report made by the accountable institutions would inevitably relate to persons who were not party to the litigation and the reports were likely to contain sensitive and confidential and personal information. These persons and institutions were not joined. In *Bowring NO v Vrededorp properties CC and Another* 2007 (5) SA 391 (SCA) at

para 21 it was said:

“[21] Though the Trust may well be right in its analysis of the effect of Vrededorp’s claim, the enquiry relating to non-joinder remains one of substance rather than form of the claim. (See e g Amalgamated Engineering Union v Minister of Labour 1949

- (3) SA 637 (A) at 657.) The substantial test is whether the party that is alleged to be a necessary party for purposes of joinder has a legal interest in the subject-matter of the litigation, which may be affected prejudicially by the judgment of the Court in the proceedings concerned (see e g Aquator (pty) ltd v Sacks and Others 1989
- (1) SA 56 (A) at 62A-F; Transvaal Agricultural Union v Minister of Agriculture and Land Affairs and Others 2005
- (4) SA 212 (SCA) paras [64] – [66].”

The subject matter of litigation in this matter was the disclosure by the FIC to the applicants, of confidential information held by the FIC. The information sought was reported information submitted by the accountable institutions for assessment and analysis by a regulatory body, the FIC. I am inclined to the argument of the applicants that it was not necessary to join every name that appeared in the report. The FIC prayer for non-joinder cannot be sustained.

[21] For these reasons, I find that the applicants have established their right to their information sought. Fairness and equity, and our constitutional values of openness and transparency, favours that the applicants be granted access to the reports which the respondent banks provided to the FIC as regards reputational and business risk as well as anti-bribery legal and regulatory framework. This is part of the portfolio of evidence that is material to determine whether the applicants were unfairly discriminated against, as they allege. The disclosure of this confidential information held by the FIC will help in the proper determination of the issues in the main application. I make the following order:

1. The application is granted.
2. The FIC is directed to provide the applicants with all the documents requested in prayers 1 to 5 of the notice of motion, within twenty (20) days of the date of this order.
3. The FIC to pay the costs, including the costs of two counsel where so employed.

DM THULARE

JUDGE OF THE HIGH COURT

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