IN THE SOUTH GAUTENG HIGH COURT
(JOHANNESBURG)

CASE NO 09/7907
DATE 2009-07-31

In the matter between:

JOHN ARNOLD BREDENKAMP	1st Applicant
BRECO INTERNATIONAL LIMITED	2nd Applicant
HAMILTON PLACE TRUST	3rd Applicant
INTERNATIONAL CIGARETTE MANUFACTURER (PTY) LTD	4th Applicant

and

STANDARD BANK OF SOUTH AFRICA LTD	1st Respondent
THE MINISTER OF FINANCE	2nd Respondent

JUDGMENT

LAMONT: J

[1] The four applicants brought an urgent application against the two respondents. The second respondent played no role in the procedure and can for purposes of this matter be ignored. For the sake of convenience the first respondent is referred to as the bank.

[2] Each applicant has the same banker-customer relationship with the bank pursuant to contracts which for present purposes can be treated as being identical. There is an identity of interest amongst all the applicants, (except the 3rd applicant).

[3] It is not necessary to distinguish the position of the third applicant a property owning trust which owns a property in Johannesburg by reason of the fact that the bank does not propose closing the bond account until the loan has been repaid. The facts affecting one applicant affect all identically. It is convenient to refer to all in exactly the same way as "the applicant".

[4] The applicant conducts business as an International Commodities Trader. In the course of its business it uses its bank facilities pursuant to a contract concluded with the bank.

[5] On 25 November 2008, the US Department of Treasury's Office of Foreign Assets Control ("OFAC") listed the applicant as a Specially Designated National ("SDN"). In consequence of the listing the SDN became subject to economic and trade sanctions based on US foreign policy. Accompanying the listing is a statement setting out:

> " *Department of Treasury Office of Foreign Assets Control (OFAC*) *today designated four Mugabe regime cronies and a number of entities owned or controlled by two of them (see list). The financial and logistical support they have provided to the regime has enabled Robert Mugabe to pursue policies that seriously undermine democratic processes and institutions in Zimbabwe. Today's designations include John Bredenkamp a well-known Mugabe insider involved in various*

business activities, including tobacco trading, grey market arms trading and trafficking, equity investments, oil distribution, tourism, sport management and diamond extraction. Through a sophisticated web of companies, Bredenkamp financially propped up the regime and provided other support to a number of its high-ranking officials. He also has financed and provided logistical support to a number of Zimbabwean state or entities.

Today's action was taken pursuant to executive order 13469 which targets, among others, individuals and entities who provide financial and other support to the government of Zimbabwe and Zimbabwean SDN's. As a result of Treasury's action any assets of the individuals and entities designated today that are within US jurisdiction must be frozen. Additionally, US persons are prohibited from conducting financial or commercial transactions with these individuals or entities."

[6] The bank became aware of the OFAC listing the next day. It also became aware pursuant to enquiries subsequently conducted that the applicant was suspected 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"* as also of a notoriety which attaches to the applicant in that he had been reported as having been involved in a variety of activities including "busting" sanctions during the Smith regime in Rhodesia; the apartheid regime in South Africa and the Mugabe regime in Zimbabwe; of financially assisting the Mugabe regime; of dealing in arms in Rhodesia, Iran, Iraq, the DRC, Zimbabwe and South Africa; of trafficking cigarettes in Zimbabwe and South Africa; of flouting

exchange control laws; evading taxes in Zimbabwe and evading customs and excise duties and defrauding SARS in the Republic South Africa.

[7] In consequence of the information known to the bank, on 3 December 2008 the relevant personnel met to discuss the implications for the bank. The bank was concerned of the *"likely serious implications for Standard Bank, its investors and 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 a 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 world wide".* Not only was the reputation of the bank thought to be at risk but the bank also believed that it faced material risks to business relationships with foreign banks as it held "Nostro" accounts at financial institutions across the world. American citizens including financial institutions are precluded from dealing with SDN's. Dealings are widely enough defined to include the financial institutions obligations in respect of Nostro accounts. Nostro accounts are accounts where settling up between institutions which operate internationally takes place. The process is similar to the process by which settling up takes place in an automated clearing bureau nationally. The bank believed itself to possibly be at risk as financial institutions affected by the OFAC ruling were entitled to request information from it which, if not provided, could result in closure of the "nostro" accounts. A further consequence of dealing with a SDN was that such dealing might result in closure of accounts and/or seizure of the amounts standing to the credit of

such accounts. Such action could result in the closure/seizer of the entire amount standing to the bank's credit in the Nostro account.

[8] The bank decided that it would not continue with the banker customer relationship with the applicant and decided to cancel the contract with the applicant. The bank communicated its decision to the applicant verbally and in writing on 08 December 2008. The bank allowed the applicant a period of at least 30 days to make alternative banking arrangements. This period was extended from time to time. Prior to the expiry of the extended period the bank discovered that the European Union ("EU") had listed the applicant. The listing of the applicant by the EU was in similar terms to the OFAC listing. The applicant on its web site stated that it was disappointed that the EU had imitated the OFAC ruling without any independent attempt to establish the correct facts. The applicant since the listing by OFAC and EU has taken steps to have the listings reversed. There is some dispute as to whether or not the steps are effective and/or ultimately will result in any reversal.

[9] It was a term of the contract pursuant to which the banker/customer relationship was established that the bank was entitled to terminate any account or facility which may have been extended to the applicant for any reason on reasonable notice. Under and in terms of the contractual term the bank needed no reason to exercise the right of termination other that its own desire to terminate.

[10] It was common cause that a reasonable time has been allowed.

[11] Accordingly the contract looked at from the perspective of the contractual terms alone could be and was lawfully cancelled at the volition of the bank.

[12] The immediate question which arises is whether or not there was any limitation on the right of the bank to exercise its volition. The parties were in agreement that there was no common law limitation. There is no need to consider the term in this context.

[13] The parties were in agreement that if the exercise of the volition offended constitutional principles then it could not be exercised. The limitation of the right to exercise the volition could be limited in two possible ways:

1. By the clause itself offending the constitution;
2. By the manner in which the clause in the particular circumstances was implemented offending the constitution.

[14] It was common cause that the clause itself did not offend constitutional values. The issue to be decided became identified as being whether or not in the particular circumstances the manner in which the bank had implemented the clause entitling it to cancel the contract offended constitutional values.

[15] The mechanism by which the constitutional values are to be determined can be by the direct or indirect approach. The parties accepted that the relevant values were to be determined by application of the process known as the indirect method.

[16] This approach is in accordance with principles set out in *Barkhuizen v Napier* 2007 (5) SA 323 CC (hereafter referred to as

Barkhuizen's case). The paragraphs in Barkhuizen's case which in my view are the authority for this approach are set out below.

> "[56] There are two questions to be asked in determining fairness. The first is whether the clause itself is unreasonable. Secondly, if the clause is reasonable, whether it should be enforced in the light of the circumstances which prevented compliance with the time limitation clause.
>
> [57] 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 sunt servanda, which, as the Supreme Court of Appeal has repeatedly noted, gives effect to the central constitutional values of freedom and dignity. Self autonomy, or 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 will 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.
>
> [58] The second question involves an enquiry into the circumstances that prevented compliance with the clause. It

was unreasonable to insist on compliance with the clause or impossible for the person to comply with the time limitation clause. Naturally, the onus is upon the party seeking to avoid the enforcement of the time limitation clause. What this means in practical terms is that once it is accepted that the clause does not violate public policy and non-compliance with it is established, the claimant is required to show that in the circumstances of the case there was a good reason why there was a failure to comply.

[59] It follows in my judgement 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 relevant situation of the contracting parties."

"[35] Under our legal order all law derives its force from the Constitution and is thus subject to constitutional control. 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 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, purpose and objects of the Bill of Rights". Section 39 (2) of the Constitution says so. All this is, by now, axiomatic. Courts are equally empowered to develop the rules of the common law to limit a right in the Bill of Rights "provided that the limitation is in accordance with Section 36 (1)"

"[28] Ordinarily constitutional challenges to contractual terms will give rise to the question of whether the disputed provision is contrary to public policy. Public policy represents the legal convictions of the community; it represents those values that are held most dear by the society. Determining the content of public policy was once fraught with difficulties. This is no longer the case. Since the advent of our Constitutional democracy, public policy is now deeply rooted in our Constitution and the values that underlie it. Indeed the founding provisions of our Constitution make it plain: our constitutional democracy is founded on, among other values, the values of human dignity, the achievement of equality and the advancement of human rights and freedoms, and the rule of law. And the Bill of Rights as the Constitution proclaims, "Is a cornerstone" of that democracy: it enshrines the rights of all people in our country and affirms the [founding] democratic values of human dignity, equality and freedom".

[29] What public policy is and whether a term in a contract is contrary to public policy must now be determined by reference to the values that underlie our constitutional democracy as given expression by the provisions of the Bill of Rights. Thus a term in a contract that is inimical to the values enshrined in our constitution is contrary to public policy and is, therefore, unenforceable.

[30] In my view the proper approach to the constitutional challenges to contractual terms is to determine whether the term challenged is contrary to public policy as evidenced by the constitutional values, in particular, those found in the Bill

of Rights. This approach leaves space for the doctrine of *pacta sunt servanda* to operate, but at the same time allows courts to decline to enforce contractual terms that are in conflict with the constitutional values even though the parties may have consented to them."

"[15]…..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 sunt servanda* is therefore subject to constitutional control."

"[73] Public policy imports the notions of fairness, justice and reasonableness. Public policy would preclude the enforcement of a contractual term if its enforcement would be unjust or unfair. Public policy it should be recalled, "is the general sense of justice of the community," the *boni mores*, manifested in public opinion." Thus where a claimant seeks to avoid the enforcement of a time limitation clause on the basis that non-compliance with it was caused by factors beyond his or her control it is inconceivable that a court would hold the complainant to such a clause. The enforcement of the time limitation clause in such circumstances would result in an injustice and would no doubt be contrary to public policy. As has been observed, while public policy endorses the freedom of contract, it nevertheless recognises the need to do simple justice between the contracting parties."

[17] It was in this form and with these issues that this matter came before me. It required me to apply the facts to established law and determine whether or not in the particular set of circumstances there was a limitation on the right of the bank to exercise its right of cancellation by reason of a set of values

established by the constitution. Values are to be identified and applied using the indirect method.

[18] This case is different from the case which served at the time that the urgent application was heard. It is not necessary to canvas the extent to which there are differences suffice it to say that the evidence and issues are no longer the same as they were at the time the interim interdict was considered and granted. After the hearing of the urgent application an interim interdict was granted in the following terms

> "1….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 :-…."

[19] Before me relief was sought in the form of a draft order which contains the following prayers.

> "1. It is declared that the first respondent is prohibited from cancelling the account contracts between itself and the applicants in the absence of good cause.
>
> 2. The first respondent is interdicted and restrained from cancelling the account contracts unless and until good cause arises.

3. The first respondent is ordered to pay the costs of this application which include the costs of two counsel."

[20] Originally in the notice of motion the applicants sought in part B the following relief.

"9 An order reviewing and setting aside the decision of the first respondent reflected in the first respondent's letter dated 08 December 2008 whereby the first respondent purported to cancel the contracts….

10 An order that the first respondent shall maintain the accounts"

11 Declaratory orders to the effect that;

11.1. The first respondent does not have the right at common law or in terms of the agreements between the parties to cancel the contracts….

11.2. Such provision of law is *contra bonos mores* and in particular in breach of one or more or all of the following rights contained…..[in the Costitution]

11.3 Such provision of law is *contra bonos mores* unconstitutional and of no force and effect.

12…costs…"

[21] The proper place to commence the investigation is to examine the contract and the circumstances including in particular the relationship between the parties at the time the contract was concluded. If the parties had equal bargaining power and freely and

voluntary negotiated and concluded its term this will assist in the determining of weight to give to the term and the extent to which each party was able to act with dignity and freely. This in turn impacts on how the party when it contracted expected the other party to implement any particular clause.

[22] The applicant and the bank entered into a contract which is the bank's standard form contract. On the face of it, it might seem that this indicates that the parties were not in an equal bargaining position at the time of the conclusion of the contract. Equally it might seem if the terms of the contract contain provisions that allow amendment at the bank's volition that the parties did not stand equally when they contracted. The contract does contain such a term. There is a term within the general terms and conditions allowing the bank to at any time "amend all the terms and conditions by giving you written notice. Any amendment will not cancel this agreement." The party receiving the notice if it does not agree to that new term will only have the remedy of itself cancelling the contract or seeking to negotiate the term afresh.

[23] The applicant submitted that the bank's bargaining position prior to the contract being concluded was such that the bank had the power to impose terms upon it. The submission is dependant upon a series of interlinked premises.

1 The manner in which the Banks Act no 94 of 1990 is structured as a fact creates a position were there are only a limited number of persons which are able to comply with the strict dictates of the Act.

2 Hence there are a limited number of banks in the market. They, by reason of their position are privileged and command power.

3 Hence the banks are able to impose terms.

[24] There is no evidence before me that in consequence of the "privileged position" created for them by the Banks Act no 94 of 1990 that banks in fact are either able to or do impose terms. There may be standard terms which are generally of application in the market but there is no evidence that these terms are invariably of application. Neither is there evidence that banks refuse to consider the particular circumstances, needs, requirements of particular individuals with whom they deal. Assuming the privileged position contended for, the premise unproven is that banks as a fact do impose terms. It is common knowledge that different customers present different profiles and risks. It is also common knowledge that different customers are treated differently e.g. as to rates of interest charged, fees charged, facilities allowed, securities required. In the normal course persons who allow different terms to different people do not readily disclose what the differences are. One would not expect publication of the extent to which different customers are treated differently. In my view, the inference cannot be drawn from the mere fact of silence on the issue that there are no variations and distinctions made between customers. In addition the banks compete with one another. That sets out the position of the bank.

[25] The position of the applicant in relation to the bank needs to be considered. On the face of it, it is a desirable entity to have as a customer. The applicant is an international commodities trader who is reputed to be of great wealth. It is a

person that does not claim in the affidavits to have been browbeaten into concluding any of the contracts. There is no claim that terms different than those which were of application and which found their way into the contracts was imposed upon the applicant. It is silent on these issues. The applicant is a multinational entity who is reputed to have the capacity of performing the acts listed by OFAC and in the publications made of and concerning the applicant from time to time. The reputation of the applicant as it appears from these sources discloses:-

1 a person of great wealth, (the applicant is reputed to have a US $350 million fortune and was stated to be the 76th richest man in England in 1996);
2 a person of great skill and insight;
3 a person operating internationally;
4 a person able to manipulate affairs;
5 a person both able and prepared so to structure its affairs as to present them to be as wished them to appear i.e. to create simulated transactions;
6 a person who is not afraid to be someone's enemy (persons who supply arms to the opponents of others are quickly seen to be an opponent of those others);
7 a person who moves amongst head of state and persons of power; and
8 a person who has committed offences in the course of its trading.

The applicant is no shrinking lily. It is a strong entity prepared to stand its ground and trade as it feels it should. The applicant chose the bank with whom it wished to contract and contracted with it on the terms appearing in the contract. The fact that there are only a

limited number of banks with whom the applicant could contract in my view has no bearing on the matter as there is no evidence establishing that the bank with which the applicant contracted was the only one with which it could contract or that it wished to contract with another bank. There is in addition no evidence that the applicant sought to contract with any different or other bank.

[26] These facts do not show that the applicant was at a bargaining disadvantage or in a position of inequality.

[27] This being so, the applicant must be treated as if it was a person of equal bargaining capacity at the time the contract was concluded. The contract must accordingly be treated as if it was concluded by contracting equals each able to require terms each required to be inserted. Each party was free to negotiate and conclude the terms ultimately agreed. It follows then that the terms within the contract must be treated on the basis they were terms agreed to and intended to be agreed to by the contracting parties. Terms which are perceived as being against the interests or limiting the rights of the applicant must be treated as if those terms were, after careful consideration agreed to by parties who were equals. Each exercised its rights of freedom and dignity to conclude a relationship governed by terms each found appropriate to govern the relationship.

[28] From the point of view of the values within the Constitution, the conduct of the applicant and the bank in concluding the contract in my view is innocuous both as to the position of the parties at the time the contract was concluded and as to the content of the contract. The terms contained within the contract represent the product of persons who were skilled enough to know what they were doing and who were able to implement their knowledge

freely. The constitutional validity of the term in question as also its implementation must be considered in this context.

[29] The contract itself established a banker customer relationship between the applicant and the bank. The term within the contract allows the bank at will, subject only to giving reasonable notice, to terminate the contract. The customer in the ordinary course may summarily terminate the contract (subject to paying the outstanding debt). The contract provides the necessary framework to meet the exigencies of particular sets of facts relevant to termination by allowing the notice period to vary.

[30] The cancellation clause is a clause generally found to be acceptable.

> See: *F R Malan et al* Malan on Bills of Exchange Cheques and Promissory notes in South African Law (4th edition) page 386
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> *Joachimson v Swiss* Bank Corp [1921] 3 KB 110 (CA) at 125 to 127 *National Westminster Bank Limited v Halesowen Presswork and* A*ssemblies Limited* [1972] (1) All ER 641 (HL) 652:662
>
> P*rosperity Limited v Lloyds Bank Limited* (1923) 39 TLR 372

[31] The constitutional attack was directed to the issue of fairness. The submission was made that the bank's implementation violated the standard of fairness set by the constitution.

[32] The nature of the contract between the applicant and the bank is one in which contractual bonds of a personal nature are

created. A bank relies on the integrity of its customer to conduct its activities in accordance with the parameters created by the contract and set by society, nationally and internationally. A bank is required to ensure that it so contracts as to meet the requirements set by the regulatory authorities of the state within which it operates. It must have regard to its international position as even if international principles are not incorporated into national law by the state it deals with international entities and may face sanction in consequence of what is perceived to be misconduct. The sanction may be commercial (freezing assets, refusing to allow it to trade in a particular state) or social (labelling it as a person with which it is undesirable to deal, for example) The customer's morality and integrity are accordingly characteristics which impact on the customer/banker relationship.

[33] The applicant submits that it is fair that it has a bank account. If the account is terminated at the will of the bank no other bank will take the applicant as a customer, it was submitted. The contract itself in the cancellation clause contains provision for seamless transfer to a new bank by requiring reasonable notice to be given. The contract itself contemplates that the applicant may require a new banker at some point. The contract legislates for the expectation of a new banker being required. The probability is that it does so as the parties accept that it is necessary for the applicant to have a bank account. If the applicant does not have a bank account it is seriously hampered in its right to trade and carry on its activities. The very foundation of transactions involving transfers of money from one person to another require that the person depositing or receiving such money is able to do so through the mechanism of a bank. The inability to implement transactions to pay or receive monies in a bank account effectively excludes a person from participating in modern commercial activities. It is in

my view in general an impairment of the dignity of a respectable proper member of society, a man of integrity, to be unable to obtain banking facilities.

[34] There are a limited number of banks in the society in which we live (4 major banks). If one bank eliminates a customer that customer accordingly has limited options available to seek services of another bank to meet its commercial needs.

[35] It was submitted that the evidence establishes that in the event of one bank at will terminating the account of a customer that for that reason alone no other bank would accept the customer as a client. The bank approached by the customer, it was submitted, would refuse to contract notwithstanding the rationality or otherwise of the reason for termination.

[36] The evidence established rather that each bank will independently consider the proposed customer's data including the fact that one of the banks declined to continue the banker/customer relationship with that client and will then make a decision. The evidence of the applicant is that of Mr. Nel.

> Affidavit of Mr. Nel: "9. *Banks, when they take on new customers, are concerned with that individual's banking history. If a bank unilaterally terminates its agreement with a customer there is very little information available to other banks about why this had happened. The result of this is when banks discover that a customer's account has been unilaterally terminated it reflects badly on the customer, raises suspicion and places all other banks on enquiry. The difficulty is that banks are unable to verify the reasons for the unilateral termination. For that reason banks are extremely*

reluctant and cautious to grant a new facility to a customer were it has knowledge that a previous banks has terminated that customers account…

11. *The result is that banks are loath to accept as new customer's entities that were determined to be unacceptable customers by other banks.*

12. *Whilst there is no formal blacklist, the effect of being rejected by one bank is I would submit akin to a blacklisting."*

[37] This evidence establishes only that the fact that there has been a termination by one banker results in the other bank making enquiries. The reason enquiries are made is presumably that if the answers are satisfactory the banker will take on the customer. Why else make enquiries? The evidence itself establishes that it is not an automatic disqualification for a customer to have had his account terminated by a bank's unilateral conduct motivated by its volition. The facts upon which the witness relies for his inference are not established. Hence the inference cannot be drawn.

[38] Affidavit of Nel: page 527 paragraph 11:-

"11 My opinion is that a responsible banker would not have cancelled banking facilities extended to the applicants on the basis of the allegations contained in the answering affidavit read with those contained in the representations made to the various foreign government agencies."

[39] This opinion suggests that the banks conduct is unfounded and irrational. Based on the earlier evidence of Nel it follows that an application for a new account at a different bank would succeed,

everything else being equal. (If the bank acted for a reason which does not warrant the action then that reason will be seen by the new bank to be such and not to be an impediment to its concluding the contract)

[40] Affidavit of Nel page 529 paragraph 14.4 and 14.5

> *"14.4 The mere fact that one bank has cancelled its relationship with one client especially if it is a business client would make all other banks extremely weary [sic] to enter into any relationship with such person. The chances of a bank opening a new bank account for an applicant against the backdrop of another bank having cancelled its contractual relationships with that applicant seem to me to be relatively remote. It is not the information contained in the answering affidavit that brings me to this view, but the hypothesis of the closure of an account by a bank.*
>
> *14.5 My answer is thus that in my view a reasonable bank would maintain a banking relationship with the applicants in the circumstance…and that a reasonable banker would in all probability not enter into a banking relationship with someone whose contract has been terminated by another bank."*

[41] As appears from what I have set out above there is an inherent conflict within the evidence provided by Nel. The earlier evidence of Nel establishes that all data concerning the proposed customer are considered by the new bank. Those facts do not found Nel's opinion set out here that the reasons why the bank sought to exercise its right to terminate the customer contract would play no

role in the consideration given by the new bank of whether or not to take on the customer.

[42] The additional difficulty with the evidence of Nel is that it does not establish that the consequence of cancellation is any more than a factor probably considered by a reasonable banker proposing to conclude the relationship.

[43] There is no evidence that the applicant has sought a banking account with any other bank and been refused same.

[44] I have in the proceeding paragraphs considered Nel's evidence in isolation. There is evidence to the contrary provided by the bank. One of the banks (ABSA) states that

> "13.2…. the reason for closure-rather than the mere factor of closure– would be of concern to ABSA."

The bank itself has provided evidence to the effect that the statements by Nel constitute a overstatement of the position and that a bank would take care to ensure compliance with its statutory and common law obligations, its duties to investors and other customers and its internal processes applicable to the opening of accounts when considering whether or not to contract. The bank's evidence is that it is the standing of the applicant which, if the applicant is unable to obtain alternative banking facilities, will be the cause of such failure.

[45] The onus rests on the applicant to establish the fact that the unilateral cancellation of the contract alone results in the applicant being unable to obtain alternative banking facilities and it has failed to do so.

[46] I find accordingly that the unilateral termination of the facilities does not result in the applicant being “unbanked”. It was accepted that if the applicant is not unbanked by the bank exercising its volition to cancel, then the Constitution does not in the present circumstances limit the bank’s right to cancel the contract. This finding disposes of the matter. I will however deal with the other matters raised by the applicant.

[47] The other submissions of the applicant were directed to demonstrate procedural unfairness and that the bank’s reliance on the reasons it gave for making the decision to terminate the contract were unfounded.

[48] Fairness judged from the bank’s perspective dictates that proper weight be given to the right of a person to contract with, and remain in contract with persons of its choice. These are personal considerations of a contracting party. These personal considerations exist in a matrix of morality set by society in the form of its laws and the Constitution. These laws may provide not only the morality but also a sanction for breach of the standards of morality so set.

[49] The bank is obliged by the provisions of the Banks Act to submit to the supervision and control of the Registrar of Banks. The Registrar of Banks has wide ranging powers of inspection supervision and control. The bank must meet and maintain various standards imposed upon it by the Banks Act relating to its structure, manner of operation, funds held and business practices.

[50] Other statutes impact on the bank’s conduct in its dealings with its customers. Banks must inter alia comply with The Prevention of Organised Crime Act No. 121 of 1998 and Financial

Intelligence Centre Act No. 38 of 2001. These acts require banks to take a variety of steps to observe and report on conduct of their customers. There are sanctions for failure to comply.

[51] Banks are put on enquiry in respect of existing and future customers. Banks are required to be aware of the possibility of a bank account being used with impunity to commit fraud or launder monies. This enquiry differs depending on the knowledge the bank has in respect of the customer. Banks in their dealings with customers must be alert for the possibility of fraudulent conduct on their part.

See:
Columbus Joint Venture v Absa Bank Limited 2002 (1) SA 90 (SCA) at 97
Commissioner South African Revenue Service & Another v Absa Bank Limited & Another 2003 (2) SA 96 (W)

[52] Failure on the part of a bank to meet the standards of control may result in a bank being liable for losses and even criminal sanction.

[53] The banker/customer relationship should not be seen in isolation in relation only its impact upon persons within the country in which the bank operates. This is particularly so when the customer is an international entity. The bank inevitably, if it deals with an international entity, will be dealing with other international entities at the request of the customer. The bank in its dealings in the international world on behalf of the customer becomes obliged to, in my view, have regard to the impact of its actions in the international world. The need for dishonest people to set up international structures, to make use of a variety of banks

internationally for the process of laundering monies and implementing fraudulent conduct are widely known. Steps are taken on an international basis to limit the activities of such persons. In my view, even if the foreign legislation does not have the effect of law nationally, to the extent that it has an impact on the relationship between the bank and external bodies, the bank is entitled to have regard thereto. The bank is an entity which on behalf of all of its customers performs acts for them throughout the world. These acts may be compromised if other persons in other jurisdictions take steps against them.

[54] The international effect of the listing is dependant upon the listing alone and not its validity. That fact alone puts the bank at risk. The additional data supplied as part of the listing puts the bank on enquiry and creates an obligation on the bank to monitor that particular customer's account. The bank is hampered in its ability to monitor the customer's account *inter alia* by the fact that the transactions which underlie the movement of funds and the directions of the applicant are unknown to the bank except perhaps coincidentally in the form of documents accompanying bills of exchange or invoices or requests for foreign currency. Even then, the validity of invoices in question is unknown to the bank.

[55] The motivation of the bank to terminate the contract was the OFAC listing and its discovery of the nature of the applicant's reputation. Subsequent to the cancellation notice, the EU listed the applicant. The applicant is taking steps to reverse the listings. The consequence of the listings remain even though these steps have been taken. The listings presently exist and are being enforced. The effect of the listings is so wide ranging that it includes an obligation on affected banks to not even deal with their own customers hence the reference to the frozen bank account. By reason of the

international relationship and the existence of activities and accounts in affected jurisdictions the bank is at risk not only of direct sanctions and their consequences but of losing relationships it has. This can happen irrespective of the rights and wrongs of the listings and irrespective of the appeals made by the applicant.

[56] The OFAC and newspaper reports painted pictures of the character of the applicant. The OFAC reasons were set out earlier. The newspaper reports set out a variety of data establishing, in the reader's eyes, the notoriety of the applicant. It is apparent from the wide-ranging set of information which the bank obtained from public documents that the applicant was allegedly involved in a number of, what one would colloquially call, controversial activities. The applicant at times indicated that he challenged various facts published about him. The picture painted in abroad brush stroke is of an extremely wealthy applicant who dealt in arms, landmines, aircraft, guns and tobacco; a person prepared to "bust" sanctions; whose properties had been raided by various fraud offices in England; about whom investigations had been made concerning an aircraft sale and bribery; a person who had been given a diamond mine as "*the spoils of war*"; a person who has amassed a R350 million dollar fortune and who was the 76 ranked richest man in England in 1996.

[57] A bank provided with this information is immediately put on guard and required to pay particular attention to the customer's account guard against potentially unlawful activities. This creates both a burden and a risk for the bank.

[58] To the extent that the bank relied on the information which it had received concerning the listings and the given reason for the listings, the submission was that the bank was required to go

further and make its own investigation and discover the actual facts as to the relayed facts.

[59] It is unclear to me how a bank would make such investigations. It appears to me it is virtually impossible to make such investigations. The bank does not have persons at its disposal who are able to make such investigations. The investigations are wide ranging; they involve the activities of the applicant in a variety of international domains. The investigations would require skill and expertise by a large number of people over a long time. Who would pay these costs? Would the investigations be made according to some code of investigations? Would the applicant participate? It appears to me that the bank is not required to undertake such a wide ranging investigation. It would be impractical to require it to do so.

[60] Should the bank be obliged to undertake an informal investigation? It appears to me that it is extremely difficult for the bank to undertake even an informal investigation particularly where its customer is an international one. The bank is largely in the hands of the customer to explain the transactions. Such explanations as may be given may be false. The underlying documentation which is produced as substantiating the grounds for any particular movement of monies on the account may be fraudulently created. The bank, in my view, is expected neither to undertake an investigation to establish the truth nor is it required to judge the customer on that basis.

[61] The bank is in my view entitled to rely on information which it receives to judge the calibre of its customer and make a decision whether or not the customer's character as it perceives it to be is

such that it wishes to continue to pursue the banker-customer relationship.

[62] It was submitted that the bank was to be criticised for not approaching the applicant and obtaining the applicant's version of the events. The first solution to this problem is that the applicant factually denied those things in the report which it wished to deny. These denials did not deny the general character of the applicant as a person who had participated in arms deals, sanctions busting and which had received rewards including a mine arising out of those activities. The applicant also did not deny that a variety of investigations had been conducted into the propriety and lawfulness of certain of its actions.

[63] The published facts surrounding the applicant suggest its character, integrity and morality. It allegedly is a person involved in the business of avoiding legislation prohibiting arms deals. The very mechanism by which this happens is by creating simulated transactions which make such dealings appear legitimate. An approach to the applicant to establish his version of the events is in my view not required for two reasons. The applicant if the reports are true is a wily person which would produce a plausible reason for the conduct. The bank is entitled to rely on the facts published whether they are true or not. The notoriety of the applicant has been established over a long period concerning a variety of conduct not largely denied.

[64] It is my view that the bank is entitled to take up what it believes to be a morally correct stance. Part of having the freedom to contract and maintain dignity, within the parameters avoiding discrimination is the right to choose customers based on a morality you choose to apply.

[65] The process was procedurally fair. Substantively there was a proper rationale for the decision to terminate.

[66] I find the following:-

1 The bank perceived the applicant to be a person with which it did not wish to pursue a banker-customer relationship.
2 The bank was without more, entitled to rely on the data available to it, the OFAC listing and the publication of matters concerning the applicant and the later EU listing.
3 The bank was entitled to form the view it did:-

    3.1 concerning the applicants character, morality and integrity;
    3.2 that its dealings with the applicant could cause it economic harm nationally and internationally;
    3.3 That its public image could be affected.

4 The evidence does not establish that the applicant will be unable to obtain other banking facilities.

[67] I must finally consider constitutional fairness by comparing the impact of the bank's conduct upon the applicant with the impact of the continued relationship on the bank if the bank is not entitled to cancel. If the bank is allowed to cancel then the applicant can seek banking facilities elsewhere. If the bank is not allowed to cancel the bank is compelled to continue a relationship with a person with whom it does not wish to remain in contact, which continued relationship places it at risk financially, locally and internationally. In my view this would be unfair to the bank. It would significantly invade its right of freedom to contract. It would

cause it an indignity in that it would be forced to accept a position it finds repugnant.

[68] The bank's conduct in exercising its right of cancellation of the contract was constitutionally fair. It follows that the interlocutory orders fall to be set aside and the application be dismissed with costs.

[69] It is not necessary for me to deal with the other matters such as whether the orders for specific performance are sufficiently long term to represent "perpetuity" nor whether such orders could properly be made. See for example *Golden Lions Rugby Union and another v First National Bank of SA Limited* 1999 (3) SA 576 (SCA) at 584 G to A.

[70] The costs of consequent upon the employ of senior and junior counsel were warranted having regard to the complexity, size and importance of the matter.

[71] The order which I make is:

1 Application dismissed with costs.
2 Costs are to include all costs consequent upon the employ of both senior and junior counsel. The applicants are to jointly and severally pay such costs.
3 All interlocutory orders are set aside.
4 No order is made concerning the 2nd Respondent.