

Republic of South Africa

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

Before: Acting Justice HJ de Waal
Date of hearing: 29 November 2023
Date of judgment: 31 December 2023

Case No: 16589 / 23

GOLDSTAR FINANCE (PTY) LTD	1 st Applicant
LIGHTWARM TRADING (PTY) LTD	2 nd Applicant
CKP FINANCE (PTY) LTD	3 rd Applicant
WENGYAN ADVANCE (PTY) LTD	4 th Applicant
CCH MICROFINANCE (PTY) LTD	5 th Applicant
ECONSTANT (PTY) LTD	6 th Applicant
CORZILLA (PTY) LTD	7 th Applicant
MAGIFIN (PTY) LTD	8 th Applicant
CORISON TRADING (PTY) LTD	9 th Applicant
HYPER WARE (PTY) LTD	10 th Applicant
ZG ADVANCE (PTY) LTD	11 th Applicant
FUGUO MICOR LEND (PTY) LTD	12 th Applicant
CXQ MICRO LENDING (PTY) LTD	13 th Applicant
DABING (PTY) LTD	14 th Applicant
WENG XIUPING FINANCE (PTY) LTD	15 th Applicant
ZHUANG LIANGJIAN (PTY) LTD	16 th Applicant
ZHUANG HONGHUI (PTY) LTD	17 th Applicant
HELPLW (PTY) LTD	18 th Applicant
YAN YANHUI (PTY) LTD	19 th Applicant
ZHUANG JIANGRONG (PTY) LTD	20 th Applicant
WENG FENGYUN (PTY) LTD	21 st Applicant
YAN MINGHUA (PTY) LTD	22 nd Applicant
QING FENG (PTY) LTD	23 rd Applicant
ZHUANG LINGZHU (PTY) LTD	24 th Applicant
ZHAO HAIQIONG (PTY) LTD	25 th Applicant
CM FINANCE (PTY) LTD	26 th Applicant
ZHUANG XIANGHUA (PTY) LTD	27 th Applicant
YAN KUNZHONG (PTY) LTD	28 th Applicant

YANG XIAOJUAN (PTY) LTD	29 th Applicant
WENG XIU FENG (PTY) LTD	30 th Applicant
WENG QINGSHUANG (PTY) LTD	31 st Applicant
XIE SHIJIN (PTY) LTD	32 nd Applicant
YAN XIAO LONG (PTY) LTD	33 rd Applicant
SHI QIANYI (PTY) LTD	34 th Applicant
WENG KELIANG (PTY) LTD	35 th Applicant
XUE CHENG (PTY) LTD	36 th Applicant
SHI ZHONGBIN (PTY) LTD	37 th Applicant
ZHUANG LANCHUN (PTY) LTD	38 th Applicant
YS FINANCE (PTY) LTD	39 th Applicant

and

CAPITEC BANK (PTY) LTD	1 st Respondent
AMPLIFIN (PTY) LTD	2 nd Respondent

JUDGMENT

DE WAAL AJ:

Introduction

1. This is an urgent application in which the Applicants seek interim interdictory relief preventing the First Respondent (“**Capitec**”) from terminating certain services provided to them until the Second Respondent (“**Amplifin**”) find a replacement bank for the provision of the services, alternatively pending the outcome of an action to be instituted by the Applicants for final interdictory relief.
2. Urgency was not contested at the hearing of the matter. The termination date has been set for 9 January 2024. It is clear that the matter is urgent.

3. In order to understand the nature of Capitec's services and their importance to the Applicants, it is necessary to take a step back and to describe the somewhat complicated relationship between the parties in this matter.
4. The Applicants are credit providers, more particularly micro lenders. They are in the business of providing unsecured loans to customers who are then required to pay them back in instalments. In order to operate as credit providers, the Applicants must be registered in terms of the National Credit Act 34 of 2005 ("the NCA"). The registration requirement, and indeed the relationship between the Applicants and their customers, is however not an aspect which is germane to the present matter.
5. The present matter is a contractual dispute about the termination of certain Capitec services or "*facilities*", used by Amplifin to extract (or "*pull*", as the parties call it) payments which are due from the bank accounts of the Applicants' customers. After the payments have been pulled they are then transferred to the Applicants' bank accounts. The Applicants' bank accounts are all held with Nedbank.
6. The pull and transfer process is governed by the National Payment Systems Act 78 of 1998 ("the NPS Act"). The payment system is managed by the Payment Association of South Africa ("PASA"). The latter is a body recognised under the NPS Act as a payment system management body established with the object of organising, managing and regulating the participation of its members in the payment system.
7. Again, the statutory regulatory framework is of no great significance in the present matter. This is a contractual dispute with some constitutional overtones. Suffice to say, about the regulatory framework, that in order to enable the particular form of pulling of payments from customers' bank accounts desired by the Applicants, they

need a “*system operator*” and a “*bank*”, as defined in the NPS Act.¹ As things stand, Amplifin is the system operator and Capitec is the bank. Amplifin has the tools to pull outstanding amounts from the customers’ accounts but Amplifin needs Capitec because only a bank can undertake the necessary clearing (checking)² and settlement (transfer)³ activities in order to effect an electronic transfer. This is why Capitec is referred in the papers as Amplifin’s “*sponsor bank*”. There are apparently three models to engage a sponsor bank, namely through direct sponsorship, through a third-party payments provider and through a system operator. It is not necessary to go into the differences between the three. Suffice to say that the Applicants are using a system operator, i.e. Amplifin.

8. Against this brief background, it is now easier to describe the Capitec services which are the subject of the present application. They are two-fold:

8.1. Firstly, there are Capitec’s automated electronic transfer facilities (“AETs”). Although the exact characterisation of these accounts is in dispute, it is safe to say that the AETs are special (non-transactional) bank accounts, opened in the name of each of the Applicants with Capitec, which are used by Amplifin to channel payments pulled from customers’ bank accounts to the Applicants’ ordinary transactional bank accounts held with Nedbank. In other words, once the money is pulled from the customers’ bank accounts it flows through the

¹ In terms of s 1 of the NPS Act:

- ‘bank’ means a bank as defined in section 1 of the Banks Act; and
- ‘system operator’ means a person, other than a designated settlement system operator, authorised in terms of section 4 (2) (c) to provide services to any two or more persons in respect of payment instructions.

² Defined in s1 of the NPS Act as “*the exchange of payment instructions*”.

³ Defined in s1 of the NPS Act as “*the discharge of settlement obligations*”.

Applicants' non-transactional AET Capitec accounts to the Applicants' transactional Nedbank account.

- 8.2. Secondly, there are Capitec's point-of-sale ("POS") facilities. These are devices used for a different way of obtaining payments. The Applicants would use Capitec's POS facilities much like a vendor would use a credit card machine to obtain payments for goods purchased. This means that payments are "*pushed*" from the customers' bank account to the Capitec AET facility and from there to the Applicants' Nedbank accounts. As I shall explain below, in their replying affidavit, the Applicants added a new contention to the effect that the POS facilities are necessary to perform a verification exercise on a potential customer's bank account details and that it is accordingly not just a nice-to-have credit card machine but a necessary component of the Applicants' business operations. This aspect was emphasized at the hearing by Mr P Louw SC, who appeared for the Applicants together with Mr R Van Rooyen SC.
9. The matter is to be decided on that basis that, if the interim interdict is not granted, the AET and POS facilities will be terminated come 9 January 2024. I shall refer to the two services collectively as the "*Capitec services*".
10. The provision of the Capitec services takes place in terms of a rather complicated contractual regime. It has no less than five components.
11. Firstly, the Applicants have concluded agreements of loan with their customers. Those agreements are not before me and they do not form part of the dispute. These agreements presumably allow the pulling of payments from the customers' bank accounts.

12. Secondly, each one of the Applicants has concluded an agreement with Amplifin (“**the Amplifin Agreement**”) for the pulling of payments. As stated, this function is performed by Amplifin (with the help of the Capitec services). The Amplifin Agreements have no fixed term. Amplifin may cancel this agreement in certain circumstances, including breach by the user or when the user poses an unacceptable risk.
13. Thirdly, each one of the Applicants has concluded an agreement with Capitec for the AET facility (“**the AET Agreement**”). This is essentially an agreement for the opening of an AET bank account. The substantive part of this agreement comprise only one page and it was accordingly referred to at the hearing as the “*one-pager*”. The AET Agreement is of indefinite duration and, contractually, no provision is made for its termination or indeed its cancellation.
14. Fourthly, there is a tripartite agreement regarding the provision of the POS services between each of the Applicants, Amplifin and Capitec (“**the Tripartite POS Agreement**”). This agreement may be terminated on 60 days’ notice.
15. Fifthly, in October 2019, the predecessors of Capitec and Amplifin concluded an Authenticated Collections Agreement (“**the AC Agreement**”) which governs their relationship. The AC Agreement remains in force. It has a five-year fixed term and can be terminated thereafter on 12 months’ notice. This means that the earliest that Capitec can terminate the AC Agreement is October 2025.
16. As I shall explain below, the third, fourth and fifth categories of agreements are relevant to this matter and the main issue is whether the duration of the AET Agreements are linked to the duration of the AC Agreement.

17. Capitec is not the only entity which can provide the required services to the Applicants and Amplify. If the Capitec services are to be terminated, there are the following options for the Applicants:
- 17.1. The Applicants could move from Amplifin to another system operator (with its own sponsor bank);
- 17.2. The Applicants could stay with Amplifin and the latter may appoint a replacement sponsor bank for them; or
- 17.3. The Applicants could switch to a different way of ensuring repayment of customer loans altogether (debit order, for instance).
18. The practicality of switching to one of these options is relevant to the issue of whether the Applicants will suffer irreparable harm if interim relief is refused. However, before dealing with that requirement and the others for interim relief, I set out the factual background together and thereafter I provide a sketch of the Applicants' case. I also need to describe the procedural history and deal with four interlocutory applications before me, one of which is for the postponement of the matter.
19. In setting out the background facts I am alive to the well-established principle which requires, in applications for interim relief, that the Court should consider the facts set out by the applicant together with any facts set out by respondent which the applicant cannot dispute. On those facts, it should then be determined whether, having regard to the inherent probabilities, the applicant should (not could) obtain final relief.⁴ This

⁴ Webster v Mitchell 1948 (1) SA 1186 (W) at 1189 read with Gool v Minister of Justice 1955 (2) SA 682 (C) at 688. where the Court stated the following regarding Webster:

principle favours the applicant in applications for interim relief. It is however subject to the more general rule that an applicant stands or falls by the factual allegations in its founding affidavit. Overall, the requirements that an applicant needs to establish in its founding affidavit are the following:

- 19.1. a *prima facie* right;
 - 19.2. a well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is eventually granted;
 - 19.3. a balance of convenience in favour of granting of the interim interdict;
 - 19.4. the absence of any other adequate ordinary remedy.⁵
20. The different requirements referred to should not be considered separately or in isolation but in conjunction with one another in order to determine whether the court should exercise its discretion in favour of the grant of the interim relief sought.⁶ At the interim interdict stage, less is required from an applicant than at the final interdict stage. It is sufficient for an applicant to show a *prima facie* case though open to some doubt.

“With the greatest respect, I am of opinion that the criterion prescribed in this statement for the first branch of the inquiry thus outlined is somewhat too favourably expressed towards the applicant for an interdict. In my view the criterion on an applicant’s own averred or admitted facts is: should (not could) the applicant on those facts obtain final relief at the trial. Subject to that qualification, I respectfully agree that the approach outlined in *Webster v Mitchell*, supra, is the correct approach for ordinary interdict applications.”

⁵ *Olympic Passenger Service (Pty) Ltd v Ramlagan* 1957 (2) SA 382 (D) at 383E-G; *Knox D’Arcy Ltd and Others v Jamieson and Others* 1996 (4) SA 348 (A) at 372E – G

⁶ *Camps Bay Residents and Ratepayers Association and Others v Augoustides and Others* 2009 (6) SA 190 (WCC) at para 9

21. With reference to balance of convenience, courts have applied the “*sliding-scale*” test. The stronger the prospects of success, the less the need for the balance of convenience to favour the applicant; the weaker the prospects of success, the greater the need for the balance of convenience to favour it.⁷
22. A court possesses a general and overriding discretion whether to grant or refuse an application for interim relief. Such discretion must be exercised judicially upon consideration of all the facts.⁸

Factual background

23. The history of the matter is to be found in the long relationship between Mercantile Bank Limited (“**Mercantile Bank**”) with what was then called Information Technology Consultants (Pty) Ltd (“**Intecon**”). In 2020 Mercantile Bank became a division of Capitec and, in that same year, Intecon became known as Amplifin. Intecon used Mercantile Bank since 2002 as a sponsor bank for the clearing and settling of debit pull transactions.
24. Capitec stepped into the shoes of Mercantile Bank and it appears that Amplifin is the same entity which was previously known as Intecon. Given this, it makes no difference that some of the contracts referred to in this judgment were entered into by Mercantile Bank and Intecon and not Capitec and Amplifin. The legal rights and obligations flowing from the contracts remain the same. In order to simply matters I

⁷ Eriksen Motors (Welkom) Ltd v Protea Motors, Warrenton 1973 3 SA 685 (A) at 691F – G

⁸ Augoustides at para 8; Chopra v Avalon Cinemas SA (Pty) Ltd 1974 (1) SA 469 (D) at 472J.

do not refer to the predecessors (Mercantile Bank and Intecon) below but merely to the current operators, i.e. Capitec and Amplifin.

25. As already stated, the Applicants are credit providers who are making use of the services of Capitec and Amplifin.
26. The Applicants' founding affidavit is not deposed to by one of them but by a Mr Lijun Gao ("Mr Gao"), the operations manager of Allworth Business Solutions (Pty) Ltd ("ABS"). ABS provides consulting services to the Applicants. The Applicants have authorised Mr Gao to bring the application on their behalf. Mr Gao makes clear in the founding affidavit that he had been in contact with Amplifin's Mr Rian Swart ("Mr Swart"). That interaction would include exchanges regarding the court application.
27. In the founding affidavit, Mr Gao makes the following claims regarding the contractual arrangements between the parties:
 - 27.1. When a new to-be credit provider wishes to join the ABS "*stable*", Amplifin is informed. Amplifin then contacts the credit provider with the application forms which requires the credit provider's bank details and various information for "*know your client*" ("KYC") purposes.
 - 27.2. The completed forms are then used by Amplifin to open the AET facility with Capitec and, if required, a POS facility. The to-be credit provider has no contact with Capitec. The credit provider merely selects the services it requires and concludes an agreement with Amplifin for the provision of those services.

- 27.3. Part of the application is an account opening document with Capitec.
- 27.4. Even though Capitec is a service provider to Amplifin, the AET facilities are part and parcel of Amplifin's suite of services rendered to credit providers. The credit provider cannot obtain AET facilities from other banks (other than Capitec) whilst they have contracts with Amplifin.
- 27.5. The POS facilities are "*over and above*" the AET facilities and is governed by the Tri-partite POS Agreement between Amplifin, Capitec and the credit provider.⁹
- 27.6. The termination of the POS facility "*does not affect the AET facility at all*". The POS facility concerns different services.
28. On 28 August 2023 Capitec gave notice to some of the Applicants that it would terminate the POS facilities on 31 August 2023 and what was called "*the banking relationship*" some time later, more particularly on 28 November 2023. Regarding this notice, the following is stated in the founding affidavit by Mr Gao:

"The banking relationship can only refer to the AET facilities. Although there are two distinguishable agreements (the tripartite POS Agreement and the AET agreement), the AET facility is the foundational facility because payments by the POS system are also received into the AET facility. The closure of the AET facility is accordingly the problematic step. The POS agreement does not create a bank and client contract but is rather a payment facility."

⁹ At para 90 of the founding affidavit it is stated that the agreement is between Amplifin, Capitec and the consumer. This is clearly a mistake as the credit provider (and not the consumer) is a party to the tri-partite agreement.

29. After an exchange of correspondence between the parties' attorneys, the notice periods for both the AET and POS facilities were extended to 9 January 2023.
30. To this I must add that, at the conclusion of the hearing on 29 November 2023, I requested Mr A Cockrell SC, who appeared for Capitec with Ms K Saller, whether he would take instructions from his client on whether Capitec would extend the termination date by two months in order to allow me to compile a judgment in this matter instead of just an order with reasons to follow. In a letter dated 6 December 2023 Capitec indicated that it granted another two-month extension which means that the new effective termination date is 10 March 2024.¹⁰ I should however make clear that this extension was not taken into account for the purpose of any part of this judgment. The judgment is entirely premised on the termination date being 9 January 2023.
31. Also, subsequent to the hearing of the matter, the SCA handed down judgment in the matter of Nedbank Limited and Another v Surve and Others (160/2023) [2023] ZASCA 178 (18 December 2023), which was concerned with an interim interdict against the closure of bank account. *Prima facie*, the judgment seemed relevant and I invited the parties to make submissions in respect thereof. Both parties did so, for which I am grateful.

¹⁰ For the avoidance of doubt: I did not understand the extension to be conditional on me not delivering judgment before 9 January 2024 (which would have been a strange undertaking). Thus, even though I eventually managed to get this Judgment out before 9 January 2024, the extension until 10 March 2024 stands.

A sketch of the Applicants' case

32. In the founding affidavit, the Applicants contended that they have established a *prima facie* right on numerous grounds. I have divided the grounds into seven categories.

(i) *Capitec cannot terminate the AET facilities at all*

33. The Applicants contend that they rely on the contractual right of the Applicants to receive the required services that they contracted for from Amplifin and Capitec.

34. The Applicants contend, further, that Capitec has no contractual right to terminate the AET facilities. They say that no such right is provided for in the AET agreements and further that the termination of the POS facilities does not affect the AET relationship at all.

(ii) *Capitec cannot cancel the AET facilities for as long as it has a contract with Amplifin*

35. In the alternative to the above, the Applicants contend that it follows from the complex contractual relationships between them, Amplifin and Capitec that, for as long as Capitec and Amplifin have a contractual relationship for the rendering of collection services, Capitec's AET facilities must remain available to Amplifin's clients because absent those facilities, collections cannot be effected.

(iii) *Capitec cannot cancel the AET facilities without a good reason*

36. In the further alternative, the Applicants contend that the nature of the AET facilities is such that Capitec cannot simply terminate them without a cogent reason. Such a reason could be that the credit provider is for some reason not acceptable but then

- there must be some form for evidence to that end. If there is a concern about financial intelligence, it must at the very least be raised with the credit provider before termination.
37. In this regard, the Applicants contend that the AET facilities are not ordinary transactional banking accounts and that the rule (such as it may be) that a bank can unilaterally close a transactional account for no reason, does not apply in the case of the AET accounts.
38. The Applicants further contend that it is an implied term of the contracts between the Applicants and Capitec that the latter must provide reasons for a drastic step such as the termination of an AET facility. South African law requires the provision of reasons to justify actions taken. If the reason is not justifiable, it ought not to be given judicial sanction. If the reason is by itself unlawful, such as breaching a statute (including competition and equality legislation), it ought not to be given effect to.
39. The Applicant contend that no reason has been given for termination. Capitec has not alleged, for instance, that any of the Applicants are not compliant with the Financial Intelligence Centre Act 38 of 2001 (“FICA”).
- (iv) *Capitec as mandatory cannot revoke the mandate if it would prejudice the mandator*
40. The Applicants contend that it is an implied term of a contract of mandate that the mandatory (Capitec) can revoke its mandate only if it would not prejudice the mandator (the Applicants).

(v) *Capitec Discriminates*

41. The Applicants claim that they are all owned directly or indirectly by persons of Chinese extraction. They contend that, in the absence of an explanation to the contrary, the only reasonable conclusion is that Capitec has targeted this group because of their ethnicity.

(vi) *Capitec interferes with a contractual relationship*

42. The Applicants contend that the termination of the facilities by Capitec is aimed at unlawfully interfering in the contractual relationship between Amplifin and the Applicants.

(vii) *Capitec breaches the Competition Act*

43. In terms of s 8(b) of the Competition Act 89 of 1998 (“**the Competition Act**”), a dominant firm is prohibited from refusing to give a competitor access to an essential facility. The Applicants contend that this section is contravened by Capitec. Again, the Applicants’ contended that, absent an explanation by Capitec, the only inference that can be drawn is that the termination of the AET facilities is aimed at stifling competition by Capitec and is indeed aimed at acquiring the Applicants’ businesses.

(viii) *Apprehension of harm*

44. Turning to the requirement of a well-grounded apprehension of harm, the Applicants contend as follows:

- 44.1. The closure of the AET facilities will mean that the Applicants will not receive payment of the amounts owing to them in terms of credit agreements that have been lawfully entered into.
- 44.2. It is not possible for the Applicants to go to another service provider whilst there are contracts in place. The existing contracts have to run out and they cannot be moved to a new service provider.
- 44.3. Even if it were possible to migrate the Applicants to another service provider, it will literally take months to establish the facilities which the Applicants presently have. The alternatives to Capitec have not provided adequate services in the past and is not an option.
- 44.4. The businesses of the Applicants will be destroyed overnight if the flow of funds back into the businesses is terminated.

(ix) *No adequate alternative and the balance of convenience*

45. The Applicants contend that they have no other remedy and that the balance of convenience favour them, primarily because of the prejudice that they will suffer if the AET facilities are terminated. They contend that this prejudice outweighs any possible prejudice that Capitec may suffer. In this regard, it is argued that Capitec has not disclosed any prejudice and that there is no indication of any regulatory issue with the AET facilities that have been allocated to the Applicants.

The interlocutory applications

46. The present matter was brought as an urgent application but then postponed for hearing on a “*special*” date (29 November 2023) allocated by Acting Judge-President Goliath to the matter. A timetable was agreed for the filing of further affidavits and heads of argument.
47. As already mentioned, there are four interlocutory applications before me:
- 47.1. Capitec’s application to strike out the entire supporting affidavit filed by Amplifin, alternatively certain paragraphs thereof;
- 47.2. Capitec’s conditional application under Uniform Rule 6(5)(e) for the admission of a supplementary affidavit in answer to Amplifin’s supporting affidavit;
- 47.3. Capitec’s application under Rule 6(5)(e) for the admission of a rejoinder affidavit in response to what is alleged to be new matter in the replying affidavit of the Applicants; and
- 47.4. The Applicants application for the postponement of the application for interim relief to a date on the semi-urgent roll (in 2024) coupled with an application for so-called “*interim-interim relief*” until then.
48. I deal with each of the four interlocutories in turn.

The strike-out application

49. Amplifin filed a notice of opposition. However, in an unusual move, Amplifin then filed an affidavit in support of the relief sought by the Applicants. This prompted an application by Capitec in terms of Rule 6(15) to strike out the supporting affidavit.

50. The affidavit filed by Amplifin repeatedly explains that it is filed in support of the Applicants' application and Amplifin even asks for costs against Capitec.

51. This kind of "*supporting*" affidavit filed by a respondent has been struck out in other matters. In this regard, Capitec's counsel referred me to the following authorities in their heads of argument:

51.1 In **Kruger v Aciel Geomatics (Pty) Ltd**,¹¹ the Labour Appeal Court held that once the respondent in that matter sought the relief asked by the applicants it was no longer placing evidence before the Court but it was making itself an applicant and that "*allowing a co-respondent to file answering papers in which it seeks the relief sought by an applicant while not seeking to be an applicant in the proceedings cannot and is not permissible nor is it open to a court to allow such procedure on any grounds*".¹² The Court in **Kruger** pointed out that the filing of such an affidavit prejudiced the respondent by placing it "*in a position where it had to conduct a defence on two fronts: one against the applicants and one against a co-respondent*". It further stated that the applicants and the supporting respondent "*effectively formed a tag-team*

¹¹ (JA87/2014) [2016] ZALAC 92 (14 June 2016).

¹² Para 11.

against the respondent”.¹³ The Court held that the answering affidavit “*should have been struck off*”.¹⁴

51.2 **Aciel Geomatics** was followed by a Full Court of the Gauteng High Court in **Minerals Council of South Africa**.¹⁵ In this case, the Court held that “*it is not open to a co-respondent to claim relief unless it enters the litigation as an applicant and seeks that relief on notice of motion*”.¹⁶

51.3 The same approach was adopted in **Odendaal v MEC for Cooperative Governance and Traditional Affairs EC**,¹⁷ where Potgieter J held as follows:

“... I am in respectful agreement with the conclusion of the Labour Appeal Court in *Aciel Geomatics* that it is impermissible for a co-respondent to file answering papers which seek the relief sought by the applicant while not taking steps itself to be joined as an applicant in the proceedings. This would clearly prejudice the opposing respondent who must now contest the application on two fronts, name in respect of the applicant as well as that of the supporting respondent.”¹⁸

52. To the above I want to add that if a respondent could “*support*” an applicant, it would wreak havoc with the established basis on which factual disputes in motion proceedings are determined, **Placson Evans**, in particular. Even in applications for interim relief, such as the present one, where **Placson Evans** does not apply, the fundamental difficulty with considering a supporting answering affidavit is that it

¹³ *Ibid.*

¹⁴ Para 14.

¹⁵ **Minerals Council of South Africa v Minister of Minerals Resources and Energy** [2021] 4 All SA 836 (GP).

¹⁶ Para 63.

¹⁷ (3752/2022) [2023] ZAECQBHC 38 (15 June 2023).

¹⁸ Para 26.

allows an applicant to establish its case based on the answering affidavit (instead of the founding affidavit). This is impermissible.¹⁹

53. Despite the above difficulties, I believe that the question of whether a supporting answering affidavit filed by a respondent must be struck out must be answered in a context-specific manner. There will be circumstances where a strike-out will not be appropriate, for instance where the supporting respondent could for some or other reason not join as applicant and where the matter is not urgent and any unfairness can be cured by affording the opposing respondent an opportunity to deal with the allegations made by the supporting respondent. One must also have regard to the degree of support expressed in a so-called supporting affidavit before striking same out.

54. Turning to the present matter, Mr S Gouws, who appeared with Mr M Jacobs for Amplifin, contended that the jurisprudence referred to above does not apply in the present matter because Amplifin did not pray for the same relief as the Applicants.

55. I am not persuaded by that argument. Amplifin's position is very clearly stated in the supporting affidavit. Mr Adriaan Swart, who deposed to an affidavit on its behalf says in paragraphs 2.1 to 2.3 of the founding affidavit that he has read the notice of motion and that Amplifin "*supports*" the application and that because it supports the application, it is unnecessary for Amplifin to deal serially with the allegations in the founding affidavit. Mr Swart states later in his affidavit, at paragraph 13.1 that

¹⁹ Administrator, Transvaal, and Others v Theletsane and Others 1991 (2) SA 192 (A).

Amplifin “*supports the relief sought by the Applicants*” and that “*Capitec must also carry the costs of [Amplifin].*”

56. Apart from that, I have gone through the 80-page supporting affidavit filed on behalf of Amplifin and it is nothing but a supplementary founding affidavit.
57. Amplifin’s Mr Swart indeed went as far as deposing to a separate affidavit in which he confirmed the contents of both the founding and the replying affidavit filed on behalf of the Applicants. It is apparent that much of the Applicants’ replying affidavit was based on Mr Gao’s “*discussions*” with Mr Swart. Amplifin’s support resulted in a different spin to the case made in the founding papers. This demonstrates the difficulty with allowing this kind of affidavit to be introduced in motion proceedings.
58. No reason is given for why Amplifin could not have joined as a co-applicant. The Applicants’ Mr Gao was in contact with Mr Swart when the application was conceived. It is so that Capitec warned Amplifin, before the termination decision was communicated to the Applicants, that “*tipping-off*” is an offence under s60(2) of FICA. But Amplifin and Mr Swart could have discussed matters and Amplifin could have joined the Applicants’ cause *after* the termination decision was communicated.
59. All of the above caused prejudice to Capitec, which has been forced to fight on two fronts in an urgent application. Capitec could not deal with Mr Swart’s affidavit in time. If not struck out, Capitec understandably wishes to fully deal with it which will, in turn, cause a postponement of the main matter and strengthen the Applicants’ case for so-called “*interim-interim relief*”. There is clear prejudice to Capitec if the supporting affidavit is allowed in.

60. For these reasons I conclude that Amplifin's answering affidavit should be struck out in its entirety. The confirmatory affidavits deposed to by Mr Swart are struck out on the same basis.

The conditional application for the admission of a further affidavit in response to Amplifin's answering affidavit

61. My conclusion in respect of the strike-out application disposes of Capitec's conditional application to file a further affidavit in response to Amplifin's supporting affidavit. In my view, no order should be made in respect of this application.

The application for the admission of a rejoinder affidavit in response to alleged new matter in the Applicants' replying affidavit

62. The interlocutory application of Capitec to file a rejoinder application is not opposed by the Applicants. It is however not opposed on the basis that it requires that the matter be postponed and that the Applicants be given an opportunity to reply to the rejoinder affidavit and that interim-interim relief is granted. The latter is unacceptable to Capitec.
63. In my view, the application for the admission of the rejoinder application should be dismissed.
64. It took Capitec two weeks after the receiving the Applicants' replying affidavit to bring the application for the admission of the rejoinder affidavit. Capitec received the replying affidavit on 10 November 2023 and brought the interlocutory application on 24 November 2023.

65. Two weeks may not seem that long. But in the context of a tight timetable aimed at facilitating a hearing on 27 November 2023, and with the termination date being set by Capitec for 9 January 2024, Capitec took too long. The application should be dismissed on this basis alone. I should add that the alleged new matter in reply consists largely of hearsay evidence proffered by Mr Gao as advised by Mr Swart. This hearsay evidence can be dealt with in terms of the established principles, now that the affidavits of Mr Swart have been struck out.

Postponement

66. Although termed a postponement application, the fourth interlocutory is in fact for a postponement coupled with interim-interim relief.
67. My conclusions in respect of the above three interlocutory applications remove the primary motivation for the postponement application, which is that Capitec and the Applicants must be granted an opportunity to file further affidavits so that the “*full picture*” is before the Court. If there is no need for the filing of further affidavits and if the Amplifin supporting affidavit and the Capitec rejoinder affidavit is to be disregarded, as I intend to do, then there is no need for a postponement.
68. A considerable weaker argument for the postponement was that the uncertainty of “*what was before the Court*” hampered the Applicants’ legal representatives in their preparation for the hearing. This concern does not weigh with me. My rulings on the interlocutory applications essentially place the Applicants back into the position they were after they filed their replying affidavit and their heads of argument, save they now cannot rely on the impermissible supporting affidavit of Amplifin. There is no *new* material which my rulings add. It is also difficult to see how excision of

Amplifin's supporting affidavit could have hampered the Applicants with their preparation. For these reasons I do not think that a postponement is warranted.

69. I also have concerns about whether so-called interim-interim relief should be granted in the present matter.
70. Firstly, some doubt was cast on whether interim-interim relief can be granted at all in **Annex Distribution (Pty) Ltd and Others v Bank of Baroda** 2018 (1) SA 562 (GP) at para 26 where the Court held that such relief would breach the subsidiary principle in that neither the Practice Manual [of the Gauteng Division of the High Court], nor the Uniform Rules of Court nor the Superior Courts Act 10 of 2013 make any provision for the granting of "*interim-interim*" relief.
71. Secondly, interim-interim relief can only be granted if the ordinary requirements for interim relief are met. There is no lower threshold. In the circumstances of the present matter, to decide whether such relief should be granted, would require a full analysis of the evidence and the law. Given that, I believe that I should avoid a situation where the application for interim relief is heard twice, first by me and then by another Judge allocated the matter on the semi-urgent roll, six month or so from now. That would be a recipe for a messy second hearing, involving an analysis of which of my findings would bind the second Judge. It would also be a waste of judicial resources for a full-blown double hearing on the same urgent application.
72. For all these reasons the application for a postponement coupled with interim-interim relief is dismissed.

The merits

73. At the hearing of the matter, counsel for the Applicants focused primarily on:
- 73.1. The argument that Capitec cannot terminate the AET facilities for as long as the AC Agreement between itself and Amplifin remains in place and that it is common cause that this agreement, in terms of clause 3.3 thereof, is for a period of five years (ending 15 October 2024), whereafter twelve months' written notice of termination may be given by either party.
- 73.2. In the alternative that the AET facilities cannot be cancelled without good reason while the AC Agreement remained in place.
- 73.3. In the further alternative, that Capitec did not afford the Applicants reasonable notice of the termination of the AET facilities.
74. I shall deal with the above three arguments in some detail. The other contentions of the Applicants, set out above, were not abandoned at the hearing and I accordingly need to deal with them as well. I do so briefly below.
75. I do not intend to deal in detail with the application for an interim interdict in respect of the termination of the Tripartite POS Agreement. In my view no case had been made out for interim relief in respect of this agreement. The POS Agreement was concluded between Capitec, Amplifin and each Applicant. In terms of clause 4.4 thereof, any of the three parties may cancel the agreement by giving at least 60 days' written notice. Such notice was given in the present instance. No *prima facie* right has been established that the termination was unlawful. Turning to prejudice:

75.1 The argument by the Applicants that there is a link between the POS services and the AET facilities in that the former is used to verify the bank account details of potential credit providers, was not raised in the founding affidavit and cannot be considered. More particularly, it was contended that the POS service also fulfils the important preliminary function of authentication required under what is termed the “*AC-Debichack system*” or the “*TT3 authentication*”. This was entirely new. In the founding affidavit it was indeed contended that the POS Agreement is *completely separate and independent* from the AET facilities. The versions in the founding and replying affidavit are diametrically opposed to each other. I know that one favours the applicants’ version in interim proceedings but one cannot favour a replying affidavit over a founding affidavit.

75.2 Apart from being new, the link and authentication argument relies, in respect of technical knowledge, on the supporting affidavit of Amplifin, which I have struck out.

75.3 In the circumstances, the argument cannot be considered because it was not raised in the founding affidavit (in fact the opposite was alleged) and because Mr Gao does not have the personal knowledge and expertise to comment thereon.

76. I now turn to deal with the three main arguments in turn.

(i) *The relationship between the AC Agreement and the AET Facilities Agreement*

77. The Applicants contend that the AET facilities of the Applicants are inextricably linked to the AC Agreement between Capitec and Amplifin. The Applicants add that the right to trade, protected by s 22 of the Constitution of the Republic of South Africa, 1996 (“**the Constitution**”) would not be promoted if Capitec’s unilateral termination of the AET facilities is allowed as this would bring the Applicants’ trade to a standstill.
78. I do not agree with this argument of the Applicants.
79. Firstly, in the founding affidavit the Applicants provided no textual basis for the alleged link between the AET Agreements and the AC Agreement. This is not surprising, as Mr Gao states in the founding affidavit that he had never seen the AC Agreement. Accordingly a textual basis for a link *could* not be established in that affidavit. The AC Agreement was only before me because it was annexed to the answering affidavit filed by Capitec.
80. Secondly, even leaving aside whether it was raised in the founding affidavit, no convincing textual basis was advanced at the hearing of the matter for the link between the two agreements. On the contrary, clauses 4,1 and 4.2 of the AC Agreement provides that it does not create a relationship between parties beyond that provided for in the agreement itself and that any party incurring an obligation towards a third party shall be solely responsible for the discharge thereof. This suggests that the AET Agreements do not plug into the AC Agreement but that they are separate, self-standing agreements. The only textual indication of a link is clause 12.6 of the AC Agreement, which provides that if the AC Agreement terminates or is cancelled, the AET bank accounts will be closed. But this clause merely recognises the reality that

none of the AET accounts will serve any purpose if the AC Agreement ends. The converse is not true. It does not follow that the termination of some of the AET accounts affects the operation of the AC Agreement. On the contrary, it is apparent that credit providers, such as the Applicants, are constantly added or removed from the platform.

81. Thirdly, clause 4.3 of the AC Agreement provides that it is non-exclusive and that Amplifin may enter into a similar relationship with a third-party financial institution to render services similar to those provided by Capitec. This indicates that Amplifin may move its clients (existing and new) to new accounts opened at a new sponsor bank. The tacit term contended for by the Applicants, i.e. that the AET facilities with Capitec last while the AC Agreement remains in place, would be inconsistent with this express term of the AC Agreement.
82. Fourthly, Capitec performs an independent assessment to Amplifin when deciding whether or not to onboard a credit provider. An AET account is only opened for a credit provider after considering the Know-Your-Customer information provided and an internal risk assessment has been performed. If Capitec and Amplifin perform their own independent processes when deciding whether or not to accept a new client, it seems logical that they will also exercise an independent discretion when it comes to the termination of those agreements (i.e. the AET and Amplifin Agreements).
83. Fifthly, I fail to see how the s 22 constitutional right to trade assists the Applicants. This right confers a *freedom* to trade, not a right to receive services from a particular

entity of choice. If the latter were to be the case, it would undermine Capitec's freedom to contract which is also deserving of constitutional protection.²⁰

84. Ultimately, one's feeling is that if all the agreements are linked (as contended by the Applicants) it is difficult to justify the selection of the longer termination period set in the AC Agreement (two years at the time of the hearing) over the shorter termination period in Tripartite POS Agreement (60 days). The different termination periods rather indicates that the agreements are all self-standing.

(ii) *The AET facilities may only be terminated for a good reason*

85. The Applicants contend that the AET facilities are not normal bank accounts and that Capitec only has the right to resile from the AET Agreements because of some consideration external such as contravention of the law or breach of contract by the Applicants.

86. I disagree again.

87. I do not believe that the AET facilities is of an entirely different nature to a transactional bank account. Clause 1.4 of the AET Agreement indeed defines the account as a "*bank account opened at the instance and request of the [credit provider with Amplifin]*". Clause 2.3 also provides that the AET account is a "*non-interest bearing bank account with no overdraft facilities*".

88. In any event, the common law referred to below does not only apply to a transactional bank account only but to any contract of indefinite duration. It accordingly does not

²⁰ Barkhuizen v Napier 2007 (5) SA 323 (CC) at paras 55 and 70

assist the Applicants to show that the AET facilities are different to a transactional bank account. They must show that the common law rule in respect of all contracts of indefinite duration is not applicable.

89. In my view the jurisprudence pertaining to the termination of a contract of indefinite duration accordingly applies to the AET Agreements as well.
90. In the leading case on the topic, Bredenkamp and Others v Standard Bank of SA Ltd 2010 (4) SA 468 (SCA), the SCA held that there is an “*implied term or common law rule*” which entitles a party to terminate an indefinite contractual relationship on reasonable notice [not reasonable grounds].²¹ The SCA stated further that, given this implied term, one cannot at the same time contend that the relationship may only be terminated on good cause as the two rules would then be in conflict.²² It makes no sense to allow termination on reasonable notice if good cause is required on top of that. It may be that cancellation on short notice, even with immediate effect, would be justified in some circumstances but that does not detract from the general right of termination on reasonable notice, when a contract is of indefinite operation.
91. The SCA has now dealt with the issue of whether reasons need to be given in respect of the termination of contracts of indefinite operation. In Survé, the SCA confirmed, that a bank is “*under no obligation to provide reasons for its decision [to close a customer’s bank account]*”.²³ No reasons need to be given because if reasonable

²¹ Bredenkamp at para 23 read with para 29. See also Putco Ltd v TV & Radio Guarantee Co (Pty) Ltd 1985 4 SA 809 (A) at 827I: “Where an agreement is silent as to its duration, it is terminable on reasonable notice in the absence of a conclusion that it was intended to continue indefinitely.”

²² Bredenkamp at para 29.

²³ Survé para 8, footnote 1.

notice is given the question of whether there is good cause for the closure of bank accounts of indefinite duration does not arise.

92. Thus, as the law stands, good cause for termination of these contracts is not required. I was asked to develop the common law but I have some difficulties with that idea, even if it was possible for me to deviate from the SCA authorities cited above [which I do not believe I can do]. The difficulty is how to develop the common law. What would be required is for a court to devise for the parties the grounds (the good cause) on which the agreement may be cancelled. The Court will have to determine what kind of conduct would justify cancellation. Is it a contravention of a provision of the regulatory framework? Is it reputational harm or is it something else? Needless to say, a Court cannot determine for the parties on what basis a contract may be cancelled. This is why, in the case of a contract of indefinite duration, it is presumed (and it is an implied term) that the parties elected to allow termination on reasonable notice.

93. I also do not believe that the Applicants have managed to distinguish the present situation from the one dealt with by the SCA in Bredenkamp. Essentially the AET facilities are bank accounts of indefinite duration which may be terminated on reasonable notice. The right to terminate was invoked by Capitec and the reason for exercising the right does not come into it. Accordingly, the question of whether the suggestion by the Capitec that it does not have "*the risk appetite*" to accommodate the Applicants is good cause for termination, need not be answered.

(iii) *Was reasonable notice given?*

94. Because a bank does not have to show good cause or provide a good reason for the termination of the relationship with its client, the requirement of reasonable notice assumes considerable importance. Generally speaking, the notice must be reasonably sufficient to enable the client to obtain the services of a replacement bank. The period required will depend on the circumstances of the case.

95. For instance, in the recently decided matter of **Africa Community Media (Pty) Ltd and Others v Standard Bank of SA Ltd** [2023] ZAWCHC 243 (14 September 2023), Cloete J granted an interdict of defined and limited duration against the closure of bank accounts in circumstances where the bank in question essentially reneged on a previous undertaking to terminate only after assessing the complexities of each affected business (bank customer) and bank product and so as to allow each business affected a sufficient opportunity to arrange its affairs.

96. Here Capitec made no such promise. Also, contrary to the Applicants' contention in their replying affidavit, Capitec had no duty to consult with the Applicants regarding their "*requirements*" in respect of time. It was incumbent on the Applicants to show that the period of four months plus was unreasonable.

97. The Applicants also did not raise lack of reasonable notice in the founding affidavit. It was only raised when Capitec explained in its answering papers that because the AET Agreement is silent on the duration of the contractual relationship, Capitec has an implied right to terminate on reasonable notice.

98. It is impermissible to establish a *prima facie* right based on the allegations in a respondent's answering affidavit.²⁴
99. I also do not believe that there is merit in the contention that the period of notice was insufficient in the present instance. Capitec gave more than four months' notice of its intention to terminate the banking relationship. No credible evidence was presented for why this period was unreasonably short.
100. Capitec contends that it will take 3, at most 4 months for the Applicants to replace their system operator. The Applicants contend that it will take two years. The latter is not explained by Mr Gao who in any event does not have personal knowledge of the technical aspects, hence his reliance on Mr Swart. But the latter's evidence was struck out and cannot be relied upon. What one would have expected, is for the Applicants to present evidence from another system operator regarding the time required to set up AET accounts and link them to the system of pulling payments from the customers' bank accounts.
101. Alternatively, the Applicants could have presented evidence in the founding affidavit, with the assistance of Amplifin and a bank, on the time period required for a switch by Amplifin to a new sponsor bank for the Applicants. No such evidence was presented. Absent that, one is left with what appears to be little more than speculation on the part of Mr Gao on how long it will take.
102. Given the fact that the issue of unreasonable notice was not raised in the founding affidavit and no evidence was presented on the time required for a switch in that

²⁴ Theletsane *supra*.

affidavit (or for that matter in the replying affidavit), I cannot find that the Applicants established a *prima facie* case on this basis.

The other grounds raised by the Applicants

103. I now turn to deal briefly with the other grounds on which the termination of the AET facilities were assailed by the Applicants:

103.1. There could not have been an intentional interference with the contractual relationship between the Applicants and Amplifin as the contractual relationship was not breached at all. In other words, whatever the inducement (which is in any event hard to understand) neither the Applicants nor Amplifin have breached the contractual relationship between them.

103.2. I do not believe that there is authority in our law for the proposition that a mandatory may not terminate a mandate if prejudice will be caused to the mandator. I was not referred to such authority and could not find any. Certainly, as far as the relationship between bank and client is concerned, the position was comprehensively analysed and determined in **Bredenkamp**. That decision cannot be sidestepped by labelling the relationship as a contract between a mandator and mandatory.

103.3. This Court has no jurisdiction to determine whether Capitec has contravened s 8 of the Competition Act. That is an issue which should be determined by the Competition Commission. This appears to be accepted by the Applicants who contend, in reply, that "*the principles of competition*

law impact on the concept of wrongfulness in delict and the formulation of implied and tacit terms in contract and that this is the basis on which the Competition Act is relied upon". I do not believe that statutory provisions pertaining to competition law can assist in the exercise of determining the nature of a tacit or implied term between private parties, such as the Applicants and Capitec. Also, the competition law principles referred to, even if applicable, would not move the needle in the present matter. Capitec explained in its answering affidavit that unsecured lending is now a minor part of its business; that it is not dominant in the unsecured lending space; and that it does not look to expand in the area but rather to reduce its exposure. The suggestion that the termination of the AET facilities is aimed at stifling the competition by Capitec and is aimed at acquiring the Applicants' businesses is purely speculative and not supported by any facts.

103.4. I do not believe that the allegation that Capitec discriminated against the Applicants on the basis that they are linked to persons of Chinese extraction was established on the papers at all. Again, no facts are provided to support this serious claim. Allegations of racism and discrimination are not to be made lightly and must be proven on the papers.²⁵ It is only Capitec that provided factual information, which is that in the six weeks between 1 September and 18 October 2023 it agreed to onboard 3 new Amplifin users with at least one Chinese director and six new branches of existing Amplifin users with at least one Chinese director. In reply, the Applicants' Mr Gao states: "*I know the [new on-boarded entities] and I can state that*

²⁵ Survé at para 22.

there is no difference between them and any of the entities that have been off-boarded'. There is accordingly no basis for the allegation of discrimination.

104. For these reasons I conclude that the Applicants have failed to establish a *prima facie* right to the relief that they will ultimately seek, which is the invalidation of the termination of the AET facilities. The application falls to be dismissed on this basis alone.
105. I nevertheless regard it necessary to briefly express my views on the question of whether the Applicants have demonstrated that they have a reasonable apprehension of irreparable harm and whether the balance of convenience favours the granting of the interim relief sought. As stated above, it is generally necessary to assess the four requirements together. If am I wrong about the first requirement (existence of the *prima facie* right) then the other requirements and the overriding discretion come into play.
106. I accept that it is integral to the Applicants' business operations to have access to the necessary mechanism to "*pull*" outstanding amounts from their customers' bank accounts. Although the Applicants may require payment by EFT or debit order, that may not be as effective as the mechanism afforded to them by Amplifin. Capitec itself states that debit pulls are the most efficient way to collect recurring payments from clients.
107. However, the fact of the matter is that the Applicants may find a replacement system operator to Amplifin, alternatively Amplifin may find a replacement sponsor bank to Capitec.

108. The exact number of alternatives, as far as system operators are concerned, is a matter of dispute. Capitec contends that there are 63 system operators in South Africa who can provide electronic collection services (51 can provide both collection services and credit push facilities), whereas as the Applicants contend that there are only two others (Nupay and a system operator called SureSystems which was only identified in the replying affidavit).²⁶ Even though the number of other system operators are disputed it is clear that alternatives exist and can be used by the Applicants. In my view it is not significant that the Applicants may have concerns about the quality of the services provided by those alternatives. In any event, no factual explanation was given for why the services of the alternatives were not adequate. It was merely stated that there were “*problems*” and that there may be “*delays*” with these system operators which the Applicants “*cannot afford*”. These vague allegations do not establish a factual basis for the conclusion that suitable alternatives do not exist.

109. In my view, the Applicants are not contractually obliged to stick with Amplifin and they cannot be so bound if Amplifin cannot deliver the required services to them because it lacks a sponsor bank to provide AET facilities to them. As the AC Agreement is not an exclusive one, Amplifin may also enter into a relationship with a bank other than Capitec for clearing and settlement services, at least in respect of the 39 Applicants. As stated, whilst there was debate on the time it will take for Amplifin to find another sponsor bank, it was not seriously disputed that replacement can take place. Capitec indeed contends that all four of South Africa’s big banks, as well as a number of South Africa’s non-traditional banks, are able to offer the same or at least similar clearing and settling services. It was contended by Capitec in its answering

²⁶ In reply it is argued that the other system operators do not provide TT3 authentication. This was an entirely new point raised in reply and based on the supporting affidavit of Mr Swart which was struck out.

affidavit that Amplifin already transacts with FNB in respect of the AET platform. Again, given that the notice period was not raised in the founding papers, the issue of how long it will take for Amplifin to find a new sponsor bank was never pertinently addressed.

110. The case sought to be made out by the Applicants regarding the harm that they will suffer was thus open to considerable doubt. Capitec's harm, on the other hand, would lie therein that it would be locked into the banking relationship with the Applicants for a considerable period of time against its will. In this regard, the relief sought in the notice of motion is for the relationship to continue until Amplifin finds a new sponsor bank (however long that may take) or until an action to be instituted is decided. The former would be of underdetermined duration and perhaps indefinite duration (how would Capitec dispute a claim that Amplifin could not retain a replacement placement sponsor bank?). The latter would also be invasive of Capitec's rights. Interim relief pending an action to be instituted would be relief for a very long time and certainly more than two years, which is the highwater of the contractual protection argued for by the Applicants.
111. I will accept for purposes of this judgment that the Applicants has no adequate alternative remedy even though I have my doubts about that. The fact that they can change banks and system operator may be an alternative to litigating but these options are not alternative *legal remedies*. An action for damages, claiming lost profits due to unlawful termination may be such an alternative remedy but this was not raised by Capitec. Whilst the exposure to damages claims was raised by Amplifin in correspondence, I cannot take that into account.

112. The present matter is in any event the kind of case where I should, in the exercise of the overriding discretion, refuse to grant interim relief. I am a bit hesitant to venture into this terrain because there is little in the line of guidance on how the overriding discretion must be exercised. To my mind, it must relate to factors other than the four established requirements. There are two such factors in the present instance:

112.1. Firstly, the Applicants have made out no case whatsoever regarding the termination of the Tripartite POS Agreement. That agreement contains a 60-day notice period. And, on the Applicants version in reply, authentication needs to take place via the POS device in order to be given access for amounts to be pulled from a customer's account. Given the claimed link, made in the replying affidavit and at the hearing of the matter, the Applicants had to establish a *prima facie* case for challenging the termination of the Tripartite POS Agreement *and* the AET Agreement. Given that no such case can possibly be made in respect of the POS Agreement, it will serve no purpose to grant interdictory relief in respect of the AET Agreements.

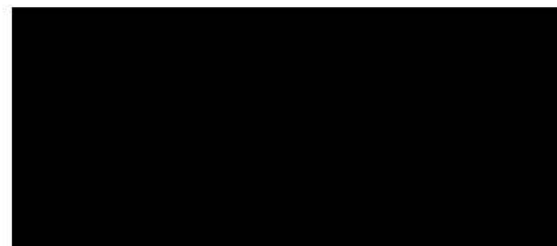
112.2. Secondly, given the decision of the SCA in Bredenkamp, the present matter should have been about how long it will take to replace the systems operator or sponsor bank. If credible evidence was presented regarding the period needed (by such alternative system operator / bank) and if the bank (Capitec in the present instance) refused to accommodate the Applicants then the granting of interim relief may have been indicated. This was however not the case brought by the Applicants and it is apparent that the period contended for by the Applicants, as per the relief sought in the notice

of motion, is far too long and detrimental to the interest of Capitec. At the hearing it was suggested that the Applicants are prepared to settle for interim relief pending an application for final relief on the existing papers, duly supplemented. Given that lack of reasonable notice was never the Applicants' case, this suggestion cannot save them. In any event, one cannot "*shoot for the moon*" in the notice of motion and then, at the hearing, lower the sights to "*the tree tops*".

113. For all these reasons, the application for interim relief must be dismissed with costs. In my view the employment of two counsel was justified in respect of the main application but not in respect of the interlocutories.

Order

114. For these reasons, I make the following orders:
- 114.1. The supporting affidavit filed by the Second Respondent is struck out and the Second Respondent shall pay the costs of the strike-out application.
- 114.2. The First Respondent's application to file a rejoinder affidavit in response to alleged new matter in the Applicants' replying affidavit is dismissed with costs.
- 114.3. The Applicants' application for the postponement of the matter coupled with interim-interim relief is dismissed with costs.
- 114.4. The Applicants' application for interim relief (the main application) is dismissed with costs, such costs to include the cost of two counsel.



H J DE WAAL AJ
Acting Judge of the High Court

Cape Town

31 December 2023

APPEARANCES

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