



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

**Case No: 9318/2022**

<b>AFRICA COMMUNITY MEDIA (PTY) LTD</b>	<b>First Applicant</b>
<b>ANA STUDIO (PTY) LTD</b>	<b>Second Applicant</b>
<b>ALLIED LOGISTICS SOLUTIONS (PTY) LTD</b>	<b>Third Applicant</b>
<b>BANNER NEWS AGENCY (PTY) LTD</b>	<b>Fourth Applicant</b>
<b>CONDE NAST INDEPENDENT MAGAZINES (PTY) LTD</b>	<b>Fifth Applicant</b>
<b>CONTENT NATION MEDIA (PTY) LTD</b>	<b>Sixth Applicant</b>
<b>INSIGHTS PUBLISHING (PTY) LTD</b>	<b>Seventh Applicant</b>
<b>GLOBAL COMMAND AND CONTROL TECHNOLOGIES (PTY) LTD</b>	<b>Eighth Applicant</b>
<b>INDEPENDENT MEDIA SOLUTIONS (PTY) LTD</b>	<b>Ninth Applicant</b>
<b>INDEPENDENT MEDIA SA (PTY) LTD</b>	<b>Tenth Applicant</b>
<b>INDEPENDENT NEWSPAPERS (PTY) LTD</b>	<b>Eleventh Applicant</b>
<b>KATHEA COMMUNICATIONS SOLUTIONS (PTY) LTD</b>	<b>Twelfth Applicant</b>
<b>AFRICA ONLINE RETAIL (PTY) LTD</b>	<b>Thirteenth Applicant</b>
<b>ORLEANS COSMETICS (PTY) LTD</b>	<b>Fourteenth Applicant</b>
<b>WIKIDEALS (PTY) LTD</b>	<b>Fifteenth Applicant</b>
<b>TRIPPOS TRAVEL (PTY) LTD</b>	<b>Sixteenth Applicant</b>
<b>INDEPENDENT ONLINE SA (PTY) LTD</b>	<b>Seventeenth Applicant</b>
<b>AFRICAN NEWS AGENCY (PTY) LTD</b>	<b>Eighteenth Applicant</b>
<b>SAGARMATHA TECHNOLOGIES LTD</b>	<b>Nineteenth Applicant</b>
<b>ANA PUBLISHING (PTY) LTD</b>	<b>Twentieth Applicant</b>
<b>AFRICAN NEWS AGENCY PICTURES (PTY) LTD</b>	<b>Twenty-first Applicant</b>
<b>3 LAWS CAPITAL SOUTH AFRICA (PTY) LTD</b>	<b>Twenty-second Applicant</b>

<b>SGT SOLUTIONS (PTY) LTD</b>	Twenty-third Applicant
<b>AFRICA EQUITY EMPOWERMENT INVESTMENT LTD</b>	Twenty-fourth Applicant
<b>BUSINESS VENTURE INVESTMENTS NO 1581(RF) (PTY) LTD</b>	Twenty-fifth Applicant
<b>THE DR. IQBAL SURVÉ BURSARY TRUST</b>	Twenty-sixth Applicant
<b>THE SOUTH ATLANTIC ARTS AND CULTURE TRUST</b>	Twenty-seventh Applicant
<b>ESP AFRICA (PTY) LTD</b>	Twenty-eighth Applicant
<b>SIZWE AFRICA IT GROUP (PTY) LTD</b>	Twenty-ninth Applicant
<b>KALULA COMMUNICATIONS (PTY) LTD</b>	Thirtieth Applicant
<b>PARTI TRUST</b>	Thirty-first Applicant
and	
<b>THE STANDARD BANK OF SA LTD</b>	Respondent

**AND****Case No: EC08/2023**

<b>AFRICA COMMUNITY MEDIA (PTY) LTD</b>	First Applicant
<b>ANA STUDIO (PTY) LTD</b>	Second Applicant
<b>ALLIED LOGISTICS SOLUTIONS (PTY) LTD</b>	Third Applicant
<b>BANNER NEWS AGENCY (PTY) LTD</b>	Fourth Applicant
<b>CONDE NAST INDEPENDENT MAGAZINES (PTY) LTD</b>	Fifth Applicant
<b>CONTENT NATION MEDIA (PTY) LTD</b>	Sixth Applicant
<b>INSIGHTS PUBLISHING (PTY) LTD</b>	Seventh Applicant
<b>GLOBAL COMMAND AND CONTROL TECHNOLOGIES (PTY) LTD</b>	Eighth Applicant
<b>INDEPENDENT MEDIA SOLUTIONS (PTY) LTD</b>	Ninth Applicant
<b>INDEPENDENT MEDIA SA (PTY) LTD</b>	Tenth Applicant
<b>INDEPENDENT NEWSPAPERS (PTY) LTD</b>	Eleventh Applicant
<b>KATHEA COMMUNICATIONS SOLUTIONS (PTY) LTD</b>	Twelfth Applicant

<b>AFRICA ONLINE RETAIL (PTY) LTD</b>	Thirteenth Applicant
<b>ORLEANS COSMETICS (PTY) LTD</b>	Fourteenth Applicant
<b>TRIPOS TRAVEL (PTY) LTD</b>	Fifteenth Applicant
<b>INDEPENDENT ONLINE SA (PTY) LTD</b>	Sixteenth Applicant
<b>AFRICAN NEWS AGENCY (PTY) LTD</b>	Seventeenth Applicant
<b>SAGARMATHA TECHNOLOGIES LTD</b>	Eighteenth Applicant
<b>ANA PUBLISHING (PTY) LTD</b>	Nineteenth Applicant
<b>AFRICAN NEWS AGENCY PICTURES (PTY) LTD</b>	Twentieth Applicant
<b>3 LAWS CAPITAL SOUTH AFRICA (PTY) LTD</b>	Twenty-first Applicant
<b>SGT SOLUTIONS (PTY) LTD</b>	Twenty-second Applicant
<b>AFRICAN EQUITY EMPOWERMENT INVESTMENT LTD</b>	Twenty-third Applicant
<b>BUSINESS VENTURE INVESTMENTS NO 1581 (RF) (PTY) LTD</b>	Twenty-fourth Applicant
<b>THE DR. SURVE BURSARY TRUST</b>	Twenty-fifth Applicant
<b>THE SOUTH AFRICAN ATLANTIC ARTS AND CULTURAL TRUST</b>	Twenty-sixth Applicant
<b>ESP AFRIKA (PTY) LTD</b>	Twenty-seventh Applicant
<b>SIZWE AFRICA IT GROUP (PTY) LTD</b>	Twenty-eighth Applicant
<b>PARTI TRUST</b>	Twenty-ninth Applicant
<b>KALULA COMMUNICATIONS (PTY) LTD</b>	Thirtieth Applicant
<b>WIKIDEALS (PTY) LTD</b>	Thirty-first Applicant

and

<b>THE STANDARD BANK OF SA LTD</b>	First Respondent
<b>LUNGISA FUZILE N.O.</b>	Second Respondent

**Coram:** Justice J Cloete

**Heard:** 15 February 2024

**Delivered electronically:** 19 February 2024



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## JUDGMENT IN APPLICATION FOR LEAVE TO APPEAL

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**CLOETE J:**

**Introduction**

[1] For convenience the parties are referred to as before. Standard Bank applies for leave to appeal to the Supreme Court of Appeal against the whole of my judgment and order delivered on 14 September 2023. The present application was only heard on 15 February 2024 by arrangement between the parties. The Sekunjalo Group and related entities ("SG") oppose the application. In summary Standard Bank's grounds of appeal are as follows (and I deal with each in turn hereunder):

- 1.1 The relief sought by SG was final in effect; I should have found it to be so and dismissed the applications (i.e. both High Court and Equality Court) by applying the test for final interdictory relief and concluding SG had failed to meet that test;
- 1.2 The relief I granted was in any event final in effect;
- 1.3 My order was vague and thus ineffective as well as arbitrary and thus irregular;

- 1.4 In any event SG failed to even make out a case for interim interdictory relief; and
- 1.5 There are conflicting decisions in both the High Courts and Equality Courts subsequent to the decision of the Supreme Court of Appeal (SCA) in *Bredenkamp III*<sup>1</sup> where such courts '*have wrestled*' with applications to interdict the closure of bank accounts, and it would be desirable for the SCA '*to provide certainty by clarifying when and in what circumstances a bank may provisionally be interdicted against the closing of an account of a client*'.

**Relief sought by SG was final in effect**

- [2] During argument counsel for Standard Bank properly conceded that: (a) it was open to me to have granted alternative relief as prayed instead of the primary (or main) relief sought; and (b) I granted alternative relief (in the form of a structural interdict for all of the reasons contained in my judgment). That is the end of this ground of appeal.

**Relief granted was final in effect**

- [3] Cut to its core, Standard Bank's argument is that the fixing of a period of 12 months (i.e. until 11 September 2024) rendered my order final in effect. (It is not necessary to deal with that portion of my order pertaining to earlier final

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<sup>1</sup> *Bredenkamp and Others v Standard Bank of South Africa Limited* 2010 (4) SA 468 (SCA).

determination of the main applications since the parties are in agreement this will not occur before 11 September 2024).

- [4] However the reasoning in my judgment, in my respectful view, demonstrates that my order was not final in effect, particularly when regard is had to paras 25 to 28 thereof.
- [5] Various developments have occurred since I granted the September 2023 order (as partly foreshadowed in para 28 of my judgment). I was informed of these from the Bar during argument. Some have been adverse to SG and some favourable to it. Again, in my respectful view, these developments serve to reinforce why the parties should be afforded the opportunity to place them, and their respective views on their implications, properly before the court at the next hearing.
- [6] This will enable that court to reach an informed decision about whether any relief should be granted to SG subsequent to 11 September 2024. I cannot take the implications of these subsequent developments into account for purposes of considering whether leave to appeal should be granted. I am bound by the four corners of my judgment.



- [7] Moreover I do not understand the legal position to be that the mere fact of a fixed duration automatically translates into final relief. It all depends on the circumstances. In *Apleni*<sup>2</sup> Vivier JA stated:

*'The interim interdicts sought would have been operative for the duration of the Appellants' detention. In this sense it would have had final effect in that nothing which may subsequently have been decided could detract from the efficacy which the orders enjoyed while they were in force. However, on the facts of the present applications the grant of interim interdicts did not involve a final determination of the rights of the parties and did not affect such determination... The grant of interim interdicts did not amount to any finding on the facts, which would only have been made, together with appropriate orders as to costs, upon the final determination of the issues between the parties. Although final in effect, the interdicts sought were thus certainly not final in substance. The fact that the determination of the issues would only have taken place after the risk of injury had passed was obviously no bar to the grant of the orders...'*

- [8] I have been unable to find any authority which has overturned this longstanding principle. The very purpose of the structural interim interdict I granted was to try to do justice to both parties pending the outcome of parallel litigation and progress with case management, as is evident from paras 25 to 28 of my judgment. It follows that this ground of appeal fails.

**Order vague and thus ineffective as well as arbitrary and thus irregular**

- [9] The *'arbitrary and thus irregular'* ground fell away as soon as counsel for Standard Bank made the concession that I was entitled to have granted alternative relief. The vague and incapable of implementation ground is founded

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<sup>2</sup> *Apleni v Minister of Law and Order and Others* 1989 (1) SA 195 (AD) at 200I-201D.

on the contention that I incorporated into the order '*a dispute between the parties relating to*' FICA.<sup>3</sup>

- [10] Standard Bank argues that by prohibiting it from closing SG's accounts for the reasons stated in its termination notices dated 25 April 2022, 7 July 2022 and 26 July 2022, my order is reasonably capable of bearing irreconcilable meanings. My response on this score is as follows.
- [11] First, as pointed out in para 29 of my judgment the notices dated 7 and 26 July 2022 did not appear to form part of the papers before me. It was not submitted during argument that I erred in this regard. Second, an ambiguity can be cured under rule 42 of the uniform rules of court but Standard Bank elected not to go this route, instead seeking to advance it as a ground of appeal without disclosing the contents of the missing letters.
- [12] Third, the effect of any inability to conduct due diligence under s 21C of FICA going forward was not Standard Bank's case before me. It relied on the inability to conduct due diligence in the past, and the purpose of interdictory relief (whether interim or final) is not to prevent past unlawful conduct. Fourth, and in any event, my order did not preclude Standard Bank from terminating SG's accounts for any reason other than those contained in its termination letters, and para 4 of my order specifically provided that the structural interim interdict

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<sup>3</sup> Financial Intelligence Centre Act 38 of 2001.



would not apply to its statutory reporting obligations contained in s 29 of FICA.

This ground of appeal thus also fails.

**SG failed to make out a case for interim interdictory relief**

- [13] During argument it was contended by Standard Bank that I applied the incorrect test in order to determine whether SG had established a prima facie right albeit open to some doubt, including one based on s 22 of the Constitution, namely freedom of trade (as well as occupation and profession). Although SG also relied on s 34 of the Constitution the law is clear that such reliance, on its own, does not provide a ground for any form of interdictory relief.<sup>4</sup>
- [14] Mindful of the approach laid down in *EFF v Gordhan*,<sup>5</sup> I was persuaded that, applying the *Webster v Mitchell*<sup>6</sup> test, on this legal issue I could not find SG had no prospect whatsoever of obtaining final relief in the pending main applications. An additional factor was that at the time I heard the urgent applications it was too early to predict whether the main applications might be referred to oral evidence or to trial. I then followed the majority decision in *Eskom*<sup>7</sup> as is apparent from para 13 of my judgment.
- [15] If anything, Standard Bank's fifth ground of appeal to which I have referred, i.e. the contention that there are conflicting decisions on interim interdictory

<sup>4</sup> *National Treasury v Opposition to Urban Tolling Alliance* 2012 (6) SA 223 (CC) at paras [49] and [50], in the context of s 33 of the Constitution pending a review.

<sup>5</sup> *Economic Freedom Fighters v Gordhan and Others* 2020 (6) SA 325 (CC) at para [42].

<sup>6</sup> *Webster v Mitchell* 1948 (1) SA 1186 (W) at 1189.

<sup>7</sup> *Eskom Holdings SOC Ltd v Vaal River Development Association (Pty) Ltd and Others* [2022] ZACC 44 at paras [241] to [251].

relief in relation to banks closing client accounts, supports my view in respect of that prima facie right rather than detracting from it (for present purposes it does not matter that I disagree with Standard Bank's contention as appears from what follows hereunder, but this is Standard Bank's own case). It is also my understanding of the law that it is not incumbent on a party seeking interdictory relief to establish every single ground relied upon in order to obtain it.

- [16] As regards the recent decision of the SCA in *Nedbank III*,<sup>8</sup> on my reading thereof the issues are distinguishable from those in the matters I was required to determine, in particular no mention is made of any reliance by SG on s 22 of the Constitution.
- [17] Having considered the lengthy submissions of counsel (because I do not set them all out does not mean I have ignored them) I am not persuaded that this ground of appeal meets the required threshold either.

### **Conflicting decisions on the application of *Bredenkamp III***

- [18] Counsel for SG argued, persuasively in my view, that Standard Bank's reliance on "conflicting" decisions in the context of my judgment is misplaced. I deal briefly with each. *Oakbay*<sup>9</sup> concerned declaratory rather than interdictory relief. *Annex Distribution I*<sup>10</sup> concerned an "interim interim" interdict.

<sup>8</sup> *Nedbank Ltd & Another v Survé and Others* 2023 JDR 4811 (SCA).

<sup>9</sup> *Minister of Finance v Oakbay Investments (Pty) Ltd and Others* 2018 (3) SA 515 (GP).

<sup>10</sup> *Annex Distribution (Pty) Ltd and Others v Bank of Baroda* 2018 (1) SA 562 (GP).

- [19] In *Annex Distribution II*<sup>11</sup> the court granted an application for interim interdictory relief against a bank threatening to close the applicants' bank accounts pending the outcome of a review. The court however distinguished *Bredenkamp III* on two grounds, including that no public policy consideration was involved in that case. Likewise, for present purposes, in *Bredenkamp III* s 22 was ultimately not implicated, as is evident from the following passage of the judgment:

[30] *The second is this: although the appellants, in the part quoted from the notice of motion, recited nearly every provision of the Bill of Rights, counsel stated that they do not suggest that the exercise of the right to terminate "implicated" any constitutional principle. It is accordingly not their case that the closing of the account compromised constitutional democracy, or their dignity, freedom or right to equality and the like, and the expansive interpretation of the Bill of Rights does accordingly not arise (s 39(1)). The case is about fairness as an overarching principle, and nothing more.'*

- [20] *Annex Distribution III*<sup>12</sup> and *Talhado*<sup>13</sup> were firmly rooted in the purely contractual nature of a bank/client relationship. In *Nedbank 1*<sup>14</sup> the court dismissed SG's application for interim interdictory relief due to absence of jurisdiction. *Ayo*<sup>15</sup> did not deal with the merits of the urgent interdictory relief sought. The application was simply struck from the roll for lack of urgency. *Nedbank III* I have already dealt with.

<sup>11</sup> *Annex Distribution (Pty) Ltd and Others v Bank of Baroda* [2017] ZAGPPHC 639.

<sup>12</sup> *Annex Distribution (Pty) Ltd and Others v Bank of Baroda* [2018] ZAGPPHC 6.

<sup>13</sup> *Talhado Fishing Enterprises (Pty) Ltd v Firststrand Bank Ltd t/a First National Bank* [2022] ZAEQBHC 15.

<sup>14</sup> *Survé and Others v Nedbank Ltd and Another* [2022] ZAWCHC 19.

<sup>15</sup> *Ayo Technology Solutions Ltd v Access Bank South Africa Ltd* [2022] ZAWCHC 218.



- [21] Finally, the very recent dismissal by the Constitutional Court of SG's application for leave to appeal a Competition Appeal Court judgment would have involved the consideration of a different standard for interim interdictory relief, namely that contained in s 49C(2)(b) of the Competition Act.<sup>16</sup>
- [22] In any event, given the nature of my September 2023 order, it is my view that it would be premature for the SCA to be burdened with having to determine a matter of such constitutional importance where the hearing as to whether my order should be extended, amended or discharged will take place within the next six months or so. Whatever order the court may grant at the next hearing may or may not be appealable. Accordingly this ground of appeal also fails.

**Whether it is nonetheless in the interests of justice for leave to be granted**

- [23] Applying the interests of justice test,<sup>17</sup> I am also not persuaded to grant leave for the reasons contained in paras 5, 6, 8, 12, 14 and 22 of this judgment. To this I wish to add the following.
- [24] First, Standard Bank could have insisted on a much earlier date for this application to be heard. Instead it waited for 5 months into a 12 month period. Second, it was only when I pointed out to its counsel during argument in reply that I could not dictate to the SCA when it should entertain the appeal if leave were to be granted that – suddenly – an undertaking was forthcoming from Standard Bank, despite its dire predictions on irreparable harm, not to close

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<sup>16</sup> No 89 of 1998.

<sup>17</sup> *United Democratic Movement and Another v Lebashe Investment Group (Pty) Ltd and Others* 2023 (1) SA 353 (CC).

SG's accounts pending any SCA judgment. This is unacceptable, and in any event counsel for SG were deprived of any prior notice of this undertaking and thus the opportunity to prepare and deal properly with it.

[25] In the result the following order is made:

*The applications for leave to appeal are dismissed with costs, including the costs of two counsel where so employed in both case numbers 9318/2022 and EC08/2023.*



J I CLOETE

**Case No: 9318/2022**

For applicants in court a quo and respondents in application for leave to appeal:

Adv Vuyani **Ngalwana** SC, Adv Karabo **Mvubu**

Instructed by: Adriaans Attorneys (A Adriaans)

For respondent in court a quo and applicant in application for leave to appeal:

Adv Robin **Pearse** SC, Adv Phumlani **Ngcongo**, Adv Zanele **Ngakane**

Instructed by: Herbert Smith Freehills South Africa (J Ripley-Evans)

**Case No: EC08/2023**

For applicants in court a quo and respondents in application for leave to appeal:

Adv Muzi **Sikhakhane** SC, Adv Isaac **Shai**

Instructed by: Adriaans Attorneys (A Adriaans)

For respondent in court a quo and applicant in application for leave to appeal:

Adv Robin **Pearse** SC, Adv Phumlani **Ngcongo**, Adv Zanele **Ngakane**

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