HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Not reportable

Not of interest to other Judges

CASE NO: 52590/2017

ANNEX DISTRTIBUTION (PTY) LTD	First Applicant
CONFIDENT CONCEPTS (PTY) LTD	Second Applicant
SAHARA COMPUTERS (PTY) LTD	Third Applicant
VR LASER SERVICES (PTY) LTD	Fourth Applicant
SAHARA CONSUMABLES (PTY) LTD	Fifth Applicant
INFINITY MEDIA NETWORKS (PTY) LTD	Sixth Applicant
ISLANDSITE INVESTMENTS ONE HUNDRED AND EIGHTY (PTY) LTD	Seventh Applicant
KOORNFONTEIN MINES (PTY) LTD	Eighth Applicant
OAKBAY INVESTMENTS (PTY) LTD	Ninth Applicant
OAKBAY RESOURCES & ENERGY (PTY) LTD	Tenth Applicant
OPTIMUM COAL MINE (PTY) LTD	Eleventh Applicant
SHIVA URANIUM (PTY) LTD	Twelfth Applicant
TEGETA EXPLORATION AND RESOURCES (PTY) LTD	Thirteenth Applicant
WESTDAWN INVESTMENTS (PTY) LTD	Fourteenth Applicant
IDWALA COAL (PTY) LTD	Fifteen Applicant
TEGETA RESOURCES (PTY) LTD	Sixteenth Applicant

MABENGELA INVESTMANETS (PTY) LTD Seventeenth Applicant

MABENGELA RESOURCES AND ENERGY (PTY) LTD Eighteenth Applicant

KOORNFONTEIN REHABILITATION TRUST Nineteenth Applicant

OPTIMUM REHABILITATION TRUST Twentieth Applicant

and

BANK OF BARODA Respondent

Heard: 28 and 29 September 2017

Delivered: 9 October 2017

Coram: Makgoka J

Summary: Urgency – Rule 6(12) of the Uniform Rules of Court - application for interim interdict - matter specially enrolled by directive of Deputy Judge President – respondent refusing to preserve status quo until the determination of application for interim interdict – applicants' bringing an application for an interim interdict pending interim interdict – such application refused – whether such dismissal constitutes *res judicata* and whether issue estoppel applicable when applicants seek to argue the main interim application.

Application to strike out – applicants alleging that the respondent's answering affidavit contains vexatious and irrelevant matter –the overriding consideration that of prejudice.

Bank-client relationship – right of bank to close client's account – bank alleging reputational harm by being associated with the applicants- applicants alleging notices of termination of relationship invalid as being unreasonable and against public policy, and seeking to challenge them in an application for a final interdict.

Requisites for an interim interdict – whether the applicants have established such requisites.

ORDER

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1. Pending the final determination of the application referred to in paragraph 2 of this order, the respondent is interdicted from:

    1.1 de-activating and/or closing the applicants' banking accounts held with the respondent and/or from terminating the banker-customer relationship between the applicants and the respondent for the reasons stated in the termination notices dated 6 July 2017;

    1.2 demanding the first to fourth applicants to repay the sums owed by each of these applicants to the respondent in terms of their loan and overdraft agreements with the respondents for the reasons stated in the termination notices dated 6 July 2017;

    1.3 in any way limiting the manner in which the banking accounts are operated by the applicants so as to ensure that the applicants are permitted to operate the banking accounts in the same manner as they did immediately prior to the notices of terminations date 6 July 2017, subject to the respondent's terms and conditions as may be applicable from time to time;

2. Within 15 days of the granting of this order, the applicants shall launch an application against the respondent for the final relief the applicants deem appropriate concerning the validity or otherwise of the termination notices dated 6 July 2017 issued by the respondent;

3. The interim order referred to in paragraph 1 above shall lapse should the applicants fail to launch the application referred to in paragraph 2 above within the time frame stipulated in the order;

4. The respondent shall pay the costs of the application, including the costs of four counsel employed by the first to fourth applicants, and of three counsel employed by the fifth to twentieth applicants;

5. The applicants shall pay the costs of the application for the striking off, jointly and severally, the one paying the others to be absolved.

JUDGMENT

MAKGOKA, J

Introduction

[1] This is an urgent application in which the applicants seek an order in two-fold. First, that the urgent application which was enrolled for hearing on 7 and 8 December 2017 be removed from that roll and be enrolled, heard and determined prior to 30 September 2017. Second, having so enrolled the matter, that an interim interdict be granted precluding the respondent, the Bank of Baroda (the bank) from closing the applicants' bank accounts held with it, pending the determination of an application to be launched in which the applicants would challenge the validity of the notices given by the bank to close their accounts, and for such notices to be set aside, alternatively for the court to impose time frames for the closure of the applicants' accounts. By the directive of the Deputy Judge President, the matter was enrolled for argument on 28 and 29 September 2017.

The parties

[2] The applicants are all large commercial entities operating in various sectors of the South African economy. They each have a bank-client relationship with the bank. The first applicant, Annex Distribution (Pty) Ltd (Annex), the second applicant, Confident Concepts (Pty) Ltd (Confident); the third applicant, Sahara Computers (Pty) Ltd, (Sahara Computers) and the fourth applicant, VR Laser Services (Pty) Ltd (VR Laser) have loan and/or overdraft facilities with the bank in terms of facility agreements. In addition, together with each of the fifth to twentieth applicants, they have one or more trading or transactional accounts with the bank.

[3] The banks alleges that the applicants are all owned and controlled by members of the Gupta family and their close associates, either directly or indirectly, or that they form part of the Oakbay Group of companies, or are otherwise closely affiliated with this group. Although it is denied by the applicants that all of them can be characterised as above, I shall, for the present purposes, accepted the characterization of the applicants by the bank. I am satisfied, on the consideration of the detailed list of shareholders and an organogram illustrating the applicants' relationship, that the characterization is not far off the mark.

[4] The bank is an Indian international bank and was incorporated in the Republic of India in 1908. Its majority shareholder is the Government of India and its holding company in India is regulated by the Reserve Bank of that country. It has its principal place of business in South Africa in Sandton, Johannesburg. The bank's operations in South Africa consist of only two branches (one in Durban and one in Johannesburg) together with a regional office (which is attached to the Johannesburg branch). It employs a total of only 16 people across its entire South African operations. The bank does not operate as a clearing bank[1] in South Africa. Instead, it conducts a correspondent banking relationship with Nedbank, one of the country's leading commercial banks.

Background to the litigation

The main application for interim interdict

[5] As foreshadowed above, the issue in the application is the stated intention of the bank to close the applicants' accounts held with it on 30 September 2017.[2] That intention gave rise to an urgent application by the applicants on 28 July 2017, seeking in prayer 2 of the notice of motion, an interim interdict against the bank from proceeding with its intention to close the accounts, and the ancillary orders. Prayer 3 of the notice of motion made provision, upon granting of the interim interdict, for the launching of an application by the applicants in terms of which they seek orders declaring invalid, the bank's notices of terminating the bank-client relationship with

[1] A clearing bank is a bank that directly transfers funds from its own infrastructure to any third party bank account.

[2] At the conclusion of the hearing, and upon agreement of the parties, an order was made that pending the handing down of this judgment, the bank would not proceed to close the applicants' accounts.

them, and for discovery of documents in terms of rule 35(12) of the Uniform Rules of Court. The application was enrolled for 15 August 2017. The parties were in agreement that the application required a special allocation. The Deputy Judge President directed that the application be heard on 7 and 8 December 2017.

Application for an 'interim-interim' interdict

[6] The matter having been so enrolled, the bank, however, refused to provide an undertaking not to close the applicants' bank accounts on 30 September, pending the hearing in December. As a result, the applicants brought another application in which they sought an order preserving the status quo until the interim interdict was determined by the court. At that stage, the applicants had not yet filed their answering affidavit in the application for an interim interdict, which was filed after the judgment in the interim-interim application had been made. By the directive of the Deputy Judge President the application for the 'interim-interim' relief came before court (Fabricius J) on 8 September 2017. In terms of a judgment delivered on 21 September 2017 the application was dismissed. In the wake of that dismissal, the applicants launched the present application, in essence seeking to bring forward the hearing scheduled for 7 and 8 December 2017, in the light of the looming deadline of 30 September 2017 on which date the bank intended to close their bank accounts.

General observations

[7] At this early stage, I wish to make three observations. All of them are obvious, but which I feel, in the context of this application, need to be made. The first concerns the association of the applicants with the Gupta family. The second and third, concern, respectively, the nature of the hearing on 21 September 2017, and of the current hearing. I discuss these briefly.

The Gupta link

[8] As stated earlier, I proceed on the acceptance that all the applicants are either controlled by, or have association, with the Gupta family. There are serious allegations of unlawful conduct, including corruption and money-laundering against some members of that family. They also allegedly have influence over the President

of the Republic as to the appointment and removal of cabinet ministers, and appointments to key positions in state-owned entities, for financial gain. The latter allegations, by their mere existence, concern the very fundament of our nationhood and statehood. They go to the foundation and architecture of our constitutional sovereignty. Thus, there is an understandable outrage in certain sectors of the public. But, for us in our capacity as judiciary officers, when adjudicating matters involving members of this family or their associated entities, we must not allow the legitimate public outrage against that family, or even our own inclinations, to influence our judicial-making processes. Thus, this case, like any other, must be decided by the application of the law, without fear, favour or prejudice. This is an obvious point, given the explicit prescripts of section 165(2)[3] of the Constitution, but which must be made in the context of what I have stated above.

The hearing on 8 September 2017

[9] Before this court on 8 September 2017, the applicants sought an interim interdict pending the hearing of the interim interdict on 7 and 8 December 2017, which was referred to in those proceedings as an 'interim-interim interdict'. The applicants there sought to preserve the status quo until their application for an interim interdict was heard in December. But how did the need for the interim-interim relief arise? As explained earlier, the application having been set down for 7 and 8 December 2017 by the directive of the Deputy Judge President, the bank refused to furnish an undertaking that pending the determination of that application, they would not proceed to close the applicants' accounts.

[10] In my view, this was a particularly unreasonable stance on the part of the bank. If it retained the right to close the applicants' accounts before the determination of the interim application in December, and in fact did so, the relief

[3] Section 165 of the Constitution provides:
1. The judiciary authority of the Republic is vested in the courts
2. The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.
3. No person or organ of state may interfere with the functioning of the courts.
4. Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.
5. An order or decision issued by a court binds all persons to whom and organs of state to which it applies.'

sought by the applicants in the main application for an interim interdict would be rendered nugatory, and an exercise in futility. As it is often said, the proverbial horse would have bolted. Thus, the applicants were left with no choice but to approach the court on an urgent basis to seek an order that pending the determination of the application in December, the bank be interdicted from closing their accounts. That application was dismissed on 21 September 2017. But the court was not called upon to decide the parties' rights in the pending application which had been set down by for December. It could not, and did not, pronounce on the applicants' entitlement to an interim interdict, which could only be determined by the court in the December proceedings.

[11] In *National Treasury v OUTA*[4]it was held that where an interim interdict was sought pending the institution and finalization of a review application the court hearing the application for an interim 'need not determine the cogency of the review grounds.' It would not be appropriate to usurp the pending function of the review court and thereby anticipate its function. Although these observations were made in the context of an interim interdict where separation of powers was implicated, and the pending proceedings were review proceedings, I am of the view that the principles are opposite to the present case. This must be so, especially given the fact that the applicants' replying affidavit was not before court when the application for an interim-interim relief was considered. Thus, in sum, to the extent the court in the 'interim-interim' application have purported to determine the issues in the main application, its pronouncements should be regarded as *obiter*. This is addressed more fully when I consider the *res judicata*/issue estoppel argument.

[12] I make these obvious observations particularly for the public and the media. Unfortunately, some media reports on the judgment of 21 September 2017 seem to suggest that the rights of the parties concerning the closing of the applicants' bank accounts had been finally disposed of in terms of that judgment. As I demonstrate elsewhere in this judgment, that is an incorrect supposition. The order of 21 September 2017 concerned only a limited period before the determination of the

[4] *National Treasury and others v Opposition to Urban Tolling Alliance (OUTA) and Others* 2012 (6) SA 223 (CC) para 31.

main application for an interim interdict in December (now brought forward in the current hearing). Had the bank adopted a sensible and reasonable position, the proceedings on 8 September 2017 would not have been necessary, and all the confusion and uncertainty would have been avoided.

The current hearing

[13] That brings me to the nature of the current hearing. As I explain fully later, this is not a 're-hearing' of the issues dealt with on 21 September 2017, nor is this 'an appeal' against the order made in those proceedings. This is the 'December hearing' brought forward on an accelerated basis because of the order of 21 September 2017. What is purpose of this hearing? It is perhaps easy to answer that question in the negative. This hearing is not meant to determine whether the bank is ultimately entitled to close the applicants' bank accounts. The applicants seek an interim interdict preserving the status quo, pending an application to be launched, challenging the validity of the notices given by the bank to terminate its relationship with them.

Preliminary issues

[14] There are five preliminary issues to dispose of, namely:

(a) urgency;

(b) abuse of process;

(c) res judicata;

(d) issue estoppel; and

(e) application to strike out.

[15] I consider them in turn.

Urgency

[16] It was submitted on behalf of the bank that the matter is not urgent in the context of what transpired before Fabricius J and the fact that the Deputy Judge President had given a directive enrolling the matter in December. After hearing brief

submissions on this aspect, I ruled the matter to be urgent and made an order to that effect, together with the ancillary order removing the matter from the roll of 7 and 8 December 2017 and enrolling it for hearing on 28 and 29 September 2017. I had no difficulty in arriving at that conclusion. The urgency of the matter is self-evident. The bank intended to close the applicants' bank accounts on 30 September 2017.

[17] As stated elsewhere in this judgment, the December hearing would have been rendered meaningless and academic, since an interim interdict cannot be sought against past conduct.[5] In the circumstances, it is clear that were this application not heard as one of extreme urgency, the applicants would not be afforded any, let alone substantial, redress in due course.

Abuse of process

[18] The bank contends that by bringing this application, the applicants are abusing the process of this court because they seek to 're-litigate the same issue' as was argued before the court on 8 September 2017. I find it difficult to accept this proposition. An abuse of process takes place where the procedures permitted by the rules of the court to facilitate the pursuit of the truth are used for a purpose extraneous to that objective. See *Beinash v Wixley*;[6] *Lawyers for Human Rights v Minister in the Presidency*.[7] As explained earlier, the court on 8 September 2017 was not called upon to determine the main application for an interim interdict, which, by the directive of the Deputy Judge President, was enrolled for hearing in December. That hearing is taking place now, on an accelerated basis. I fail to see how that can amount to abuse. What is more, the bank is being disingenuous in advancing this argument.

[19] Before the court on 8 September 2017, the bank argued that the claim for interim-interim relief was unsustainable, among others, because the main application for an interim relief was pending, and had been enrolled for December, and if granted the relief would amount to an abuse of process because it would permit the applicants to re-litigate the same issue in due course. The bank urged the court to

[5] *City f Tshwane Metropolitan Municipality v Afriforum and another* 2016 (6) SA 279 (CC) para 55.
[6] *Beinash v Wixley* 1997 (3) SA 721 (SCA).
[7] *Lawyers for Human Rights v Minister in the Presidency and others* 2017 (1) SA 645 (CC) para 20.

dismiss the application because the application for the interim interdict was pending. Now that the December hearing is taking place (brought forward to 28 September) the bank says that the hearing should not take place because the issues have been determined in the judgment of 21 September 2017. This is circular reasoning. There is no abuse of process by the applicants. Quite the contrary, the applicants found themselves in an impossible position when the bank refused to agree to the Deputy Judge President's sensible suggestion to furnish an undertaking not to close the applicants' accounts, pending the determination of the application in December. The bank's stance is thus untenable, and its arguments in this regard are mentioned to be rejected.

Res judicata/issue estoppel

[20] The bank argues that the issues raised in this application are *res judicata*, having been determined by the court on 21 September 2017. The parties, the relief and the underlying cause of action are all identical to that which served before court on 21 September 2017. According to the bank, the claim of irreparable harm is identical to that which served before court on 8 September 2017. The cause of action is also said to be identical, as the application before that court was properly determined to be an application for an interim interdict. The applicants again claim that unless this relief is granted, they will be deprived of an effective remedy in terms of section 34 of the Constitution, which issue has been determined by the court. This too is an application for an interim interdict. Moreover, argues the bank, the applicants neglect its section 34 right to a fair hearing, as well as its further rights: not to associate or be associated with the applicants; to protect its reputation; and to contractual autonomy, freedom and dignity.

[21] Issue estoppel is a species of *res iudicata.* See *Smith v Porritt*.[8] Generally, a party will be estopped from raising issues that have been finally determined in previous litigation, even if the cause of action and relief are different. The purpose is obviously to prevent the repetition of lawsuit between the same parties, the

[8] *Smith v Porritt and Others* 2008 (6) SA 303 (SCA) para 10.

harassment of a defendant by a multiplicity of actions and the possibility of conflicting decisions by the different courts on the same issue. [9]

[22] The requirements for *res judicata* are that the same cause of action, for the same relief and involving the same parties, was determined by a court previously. In assessing whether the matter raises the same cause of action, the question is whether the judgment of 21 September 2017 involved the 'determination of questions that are necessary for the determination of the present case and substantially determine the outcome of this case.' See *Caesarstone Sdot-Yam.*[10]

[23] On behalf of the applicants, counsel submitted that there are material differences between the relief sought in the interim-interim interdict and that sought in the present proceedings. The argument is as follows. The point of focus in the application for interim-interim relief, against which the *prima facie* right was considered, was the applicants' claimed right in terms of section 34 of the Constitution. Although this was not expressly mentioned in the founding affidavit, it was squarely raised in both the written and oral submissions before court. The prima facie right of the applicants was their right of access to courts in terms of section 34, whereas in this application the focus is on their right to reasonable notice of termination. In order to test whether the s 34 right of access to court had been established the court 'looked through' to the applicants' claimed right to reasonable notice in the main application. The extent and degree to which the court was required to do so was a matter of dispute.

[24] Counsel further submitted that the irreparable harm that the applicants would suffer in the interim-interim application similarly focused on the denial of the applicants' right in terms of section 34. In other words, if the applicants were not granted an interim interdict, their meaningful access to court and their right to an

[9] *Prinsloo NO v Goldex* 2014 (5) SA 297 (SCA) para 23; *Jansen Van Rensburg and others NNO v Steenkamp* 2010 (1) SA 649 (SCA) paras 20-26.

[10] *Caeserstone Sdot-Yam Ltd v World of Marble and Granite 2000 CC and others* 2013 (6) SA 499 (SCA) paras 20-21.

effective remedy (in the event that they were ultimately successful), would be unjustifiably violated. The additional harm that would ensue to their employees, suppliers and creditors was, at best, ancillary during the hearing of the application for an interim-interim interdict. That harm arises squarely in this application.

[25] The balance of convenience enquiry in the interim-interim application also turned on section 34. If the interdict sought was not granted and the bank closed the applicants' accounts prior to the December hearing, they would be denied meaningful access to court. If the applicants ultimately were successful, they would also be denied an effective remedy. In contrast, if the interdict was granted, the bank would still be able to ventilate its dispute in the December hearing. In other words, the bank would still have a meaningful right of access to court and still be able to claim effective relief (in the event that it was successful).

[26] I agree broadly with these submissions. It be must be borne in mind that the defence of *res judicata*/estoppel is underpinned by fairness and prevention of injustice. The application of the principles of *res judicata* in the form of issue estoppel was discussed by the Appellant Division in *Kommissaris van Binnelandse Inkomste*[11] in which Botha JA rejected the proposition that the parties were bound by a general practice in respect of something not in issue in earlier proceedings and about which it was unnecessary to make a finding. The learned judge of appeal said the following at 676B:

'To allow the defence of *res judicata* in the form of issue estoppel in these circumstances, would be to go further than has previously happened, whether in cases at Provincial level or in England. It would be unfair to the Commissioner, and run counter to the considerations of fairness which underpin such a defence. The common-law requirements of the defence of *res judicata* were strictly circumscribed, precisely to avoid injustice (see e.g. *Bertram v Wood* [(1893) 10 SC 177 at 180]). Considerations of fairness are also decisive importance in the application of issue estoppel in the English case-law (see e.g. *Re State of Norway's Application (No 2)* [[1989] 1 All ER 701 (CA) at 714j]). Consequently the possibility of extending the principles of *res judicata* to any particular case of issue estoppel must be approached with great circumspection.' (Translation from Afrikaans by Heher JA in *Jansen Van Rensburg NO and others v Steenkamp* 2010 (1) SA 649 (SCA)).

[11] *Kommissaris van Binnelandse Inkomste v Absa Bank Bpk* 1995 (1) SA 653 (A).

[27] In my view, this is exactly what happened here. I have been at pains to explain the nature of the hearing before court on 8 September 2017, and the ambit of the order which permissibly could be made by that court. At the risk of repetition, I emphasise that the court there was only called upon to determine whether the applicants were entitled to an interim relief pending the determination of the main application in December, and not the merits of the pending application.

[28] As correctly submitted on behalf of the applicants, the mere fact that the judgment of 21 September 2017 dealing with the interim-interim application can, on an incorrect and strained construction, be read as dealing with the relief sought in the main application, does not result in the main application being *res judicata.* To my mind, it would be unfair and unjust for the applicants to be non-suited, and denied a hearing in the main application under circumstances which they had no control over, and were not of their making. Faced with a similar situation, the Supreme Court of Appeal (Brand JA) said the following in *Prinsloo NO v Goldex:*[12]

> '[16] The appellants' argument that the application of issue estoppel in these proceedings would result in unfairness and inequity derives from two hypotheses. First, that it was not necessary for Webster J to arrive at any final decision as to whether or not Prinsloo committed fraud in order to dismiss the trust's application to compel specific performance. Secondly, that Webster J could not and should not have decided the disputed issue of whether fraud was committed on motion proceedings without the benefits inherent in the hearing of oral evidence, including discovery of documents, cross-examination of witnesses, and so forth.
> [17] I think both these propositions are well supported by authority….'

[29] In *Smith v Porritt* the Supreme Court of Appeal observed that relevant considerations will include questions of equity and fairness not only to the parties themselves but also to others. In the present case, there are the interests of the applicants' employees, among others, to take into consideration. See also *De Frieitas v Jonopro* [13] where Spilg J explained that where only the elements to support issue estoppel arise there is no hard-and-fast rule that a court is compelled to preclude a party from revisiting the issue. The question is not determined as a

[12] *Prinsloo NO v Goldex 15 (Pty) Ltd* 2014 (5) SA 297 (SCA).
[13] *De Frieitas v Jonopro (Pty) Ltd and others* 2017 (2) SA 450 (GJ) para 35.

matter of principle but is dealt with casuistically. Factors such as equity and fairness may in a particular case militate against applying issue estoppel.

[30] In all circumstances, I conclude that the issues are not *res judicata*. In any event, I am of the view that the application of issue estoppel in the circumstances of the case is not appropriate. It would be inequitable and unjust to the applicants.

Application to strike out

[31] The applicants seek to strike out certain paragraphs of the bank's answering affidavit on the basis that: they contain hearsay evidence; are irrelevant and vexatious; and are *sub-judice*.

[32] Applications to strike out are governed by rule 23(2) of the Uniform Rules. The rule provides that where a pleading contains averments which are scandalous, vexatious or irrelevant, a party may apply for striking out such matter. The court shall not grant the application unless it is satisfied that the applicant will be prejudiced in the conduct of his/her claim or defence if is not granted.

[33] With regard to the hearsay complaint, the paragraphs mainly concern the allegations against the Gupta family. It is said that the deponent to the bank's answering affidavit does not bear personal knowledge of those allegations. The vexatious and irrelevant complaint is directed to the veracity of the allegations contained in the so-called Gupta-leaks, which are tomes of emails allegedly demonstrating the Gupta family's influence on state machinery and appointment to key positions, both in government and state-owned enterprises.

[34] I find no merit in this submission. First, as the bank correctly pointed out, it is the applicants themselves who, in their founding affidavit, raised the question of adverse publicity by reason of association with the Gupta family. There, they claimed that not all of the applicants had been the subject of adverse publicity and they downplayed the extent of this publicity. In these circumstances, the bank was fully entitled to refute these allegations. In the circumstances I agree with the submissions

on behalf of the bank that, having raised the issue, the applicants cannot complain when that evidence is rebutted.

[35] The evidence of allegations against the Gupta family and the applicants is not tendered for the truth of its contents, but to place before court that such allegations have been made and are out there in the public domain. The applicants have totally misconstrued this point. As Nugent JA explained in *The Public Protector v Mail & Guardian:*[14]

'Courts will generally not rely upon reported statements by persons who do not give evidence (hearsay) for the truth of their contents. Because that is not acceptable evidence upon which the court will rely for factual findings such statements are not admissible in trial proceedings and are liable to be struck out from affidavits in application proceedings. But there are cases in which the relevance of the statement lies in the fact that it was made, irrespective of the truth of the statement. In those cases the statement is not hearsay and is admissible to prove the fact that it was made. In this case many such reported statements, mainly in documents, have been placed before us. What is relevant to this case is that the document exists or that the statement was made and for that purpose those documents and statements are admissible evidence.'

See also *Maharaj and others v Mandag Centre of Investigative Journalism NPC and others.*[15]

[36] For the vexatious, irrelevant and *sub-judice* arguments, counsel for the applicants sought reliance on *Minister of Finance v Oakbay.*[16] There, the Full Court struck out two paragraphs from the Minister's founding affidavit. In one of the paragraphs [para 27] reference had been made to a certificate detailing certain 'suspicious transactions' made by the Financial Intelligence Centre to the banks against various entities in the Oakbay Group and several associated individuals. The Minister sought the court to draw an adverse inference from the certificate. It is clear from the reasoning of the Full Court (paras 39 and 40) that the allegations were

[14] *The Public Protector v Mail & guardian Ltd & others* 2011 (4) SA 420 (SCA) para 14.
[15] *Maharaj and others v Mandag Centre of Investigative Journalism NPC and others* (844/2016) [2017] ZASCA 138 (29 September 2017).
[16] *Minister of Finance v Oakbay Investments (Pty) Ltd and others; Oakbay Investments (Pty) Ltd and others v Director of the Financial Intelligence Centre* (80978/2016) [2017] ZAGPPHC576 (18 August 2017).

struck off because they were irrelevant to the determination of the crisp issue in that case, namely, whether the Minister was legally empowered or obliged to intervene in a bank-client relationship where the bank wishes to close a client's bank account.

[37] In my view, the *Oakbay* case is distinguishable. In the present case, the allegations against the Gupta family and their associated entities - whether those contained in the Public Protector's report or in the so-called Gupta leaks - are not only relevant, but germane to the issue of reputational harm alleged by the bank. As stated earlier, the allegations relied on by the bank, not to prove the truth of their content, but to demonstrate that the information was already in the public domain.

[38] In any event, I see no demonstrable harm attendant upon the applicants if the allegations are not struck out. Prejudice is the over-arching consideration when a court determines an application for striking out. In this regard, Rule 6(15) of the Uniform Rules is clear: The court may not grant the application unless it is satisfied that the applicant will be prejudiced if the application is not granted. As stated earlier, the applicants introduced these allegations themselves in their founding affidavit. I therefore conclude that the applicants have not made out a case for the striking off.

The main application

[39] Having disposed of the preliminary issues, I turn now to the main application. I first set out the factual background to the agreements and the termination notices, after which I shall consider the applicants' claim for an interim interdict.

The agreements

[40] All applicants have transactional facilities with the bank. The first, second, third and fourth applicants (Annex, Confident Concepts, Sahara Computers and VR Laser) have, in addition, loan and overdraft facilities. The loan agreements were concluded on different dates. Annex has an overdraft facility of R75 million and a non-fund facility of USD 5 million. Confident Concepts has two facilities: a term loan facility for R59,6 million and a further facility of R86,5 million. Sahara Computers has an overdraft facility of R50 million. VR Laser has an overdraft facility of R30 million. The facility agreement and sanction letters each provide that those facilities,

overdrafts and terms loans are repayable on demand by bank. Each agreement expressly incorporates a 'sanction letter' which 'must be read as if specifically incorporated herein'. A clause of the sanction letter reads:

'Notwithstanding anything to the contrary contained herein, the credit facilities granted in terms of this agreement may be terminated by the bank in its sole discretion by written notice to that effect, either forthwith or from the date stated in such notice, in which event the facilities in question shall be deemed cancelled and any indebtedness to the bank shall become due owing and payable: (a) immediately if the facilities are terminated forthwith; or (b) otherwise on the date stated in that notice.'

[41] The loan and overdraft facilities in respect of each of Annex, Sahara Computers and VR Laser were extended from time to time after periods of review, subject to the standard termination clauses contained in the original sanction letters. Annex' loan facility was extended on 23 May 2017 for six months, with a view to closing the loan account. Sahara's overdraft facility was extended for another period of six months, until 20 October 2017 on 4 May 2017. VR Laser's loan facility was extended on 2 March 2017 until 26 August 2017, and the bank demanded that the loan be repaid by that date. Confident Concepts stands on a slightly different footing, because its facilities were term loans with specific repayment schedules, and according to the sanction letter and terms and conditions thereto, the facilities were not subject to renewal.

[42] On 24 May 2017, the bank requested the first to fourth applicants to provide an 'action plan' for early re-payment of the loan facilities. In the letter, the bank recorded the details of each of the loan facilities and how each had been reviewed. It demanded immediate payment from VR Laser, and in respect of Confident Concepts, it was requested to pay the total outstanding amount 'at the earliest.' In response, Annex proposed to pay the principal amount outstanding in 12 monthly instalments of R8,34 million commencing September 2017. In the last paragraph of the letter it was requested of the bank to 'advise [Annex] accordingly so that necessary arrangements may be made for the repayment of the loan.

[43] Confident Concepts also responded, and pointed out that its loans were term loans. The first sanctioned in August 2015 and repayable in 12 quarterly instalments, with the last instalment payable in May 2018 and the second sanctioned in February 2016, with the last instalment payable in May 2019. Confident Concepts also pointed out that according to the sanctions letter and terms and conditions, the facility was not subject to renewal. Accordingly, Confident Concepts indicated that it would continue to make payments in accordance with the schedules agreed upon in the sanction letters.

Termination notices

[44] On 6 July 2017 bank furnished each of the applicants with termination notices, informing them that their transactional banking facilities would be terminated and deactivated completely within six business days, being 17 July 2017, whilst all the loan facilities provided to Annex, Confident, Sahara Computers and VR Laser were required to be settled by no later than 30 September 2017. There are essentially two templates followed in the termination notices. The first template is addressed to the four applicants with loan facilities, and the second template is addressed to the applicants with transactional accounts, the wording of which is essentially the same.

[45] Each notice states that: the recipient was ‘aware that the firm group’ had been reported on in the media and attracted ‘adverse publicity for quite some time’; the adverse media attention is a ‘potential risk and that it may affect the interests of the bank to its detriment; its concerns had been conveyed to the recipient several times, telephonically ‘but to no avail.’ Consequently, according to the bank, it had no alternative but to cut its ties with the individual entities by deactivating all deposit accounts that were in operation by 17 July 2017, that all advance accounts must be settled by no later than 30 September 2017, and that all non-fund based facilities should be supported by a 100% cash margin in the respective current account.

[46] After receiving the termination notices, the same day, 6 July 2017, the applicants addressed a joint letter of demand to the bank, asserting that the notices were unlawful and unreasonable, without any reasonable justification and precipitated hardship for thousands of the applicants’ employees. The applicants

requested the bank to extend the termination and deactivation notices in respect of the transactional accounts at least until 30 September 2017, being the date by which the bank required the advance facilities to be settled. In making this request, the applicants specifically recorded that the applicants did not accept that the bank was entitled to terminate any account, even on 30 September 2017. The applicants also expressly reserved their rights to challenge the lawfulness and reasonability of the termination notices.

[47] On 7 July 2017 the bank agreed to extend the effective date of its termination notices until 30 September 2017, subject to an 'action plan' for the closure of the accounts. On the same day, before the applicants had responded to the bank's proposal, the bank sent another letter in which it was further demanded that an 'undertaking from Mr Gupta, chairman and promoter of the group' that all accounts will be closed by 30 September 2017.

[48] On 11 July 2017 the applicants responded to both letters, and reiterated their non-accept of the bank's entitlement to terminate their facilities and continued to dispute the lawfulness of the termination, and of the proposed termination date. They further indicated their rejection of the conditions proposed by the bank, and sought an undertaking from bank that their respective accounts would remain open, unconditionally, until at least 30 September 2017, failing which they would launch an urgent application.

[49] On 13 July 2017, the bank responded and advised that it was only willing to extend the termination date to 30 September 2017 if it received an action plan in respect of the closure of all of the accounts, and an undertaking by 'Mr Gupta' that all accounts would be closed by 30 September 2017, as demanded in its letters dated 7 and 10 July 2017, referred to above, and that the applicants would be afforded until 31 July 2017 to comply with those two conditions, failing which the termination notices would be given effect on 14 August 2017. The applicants responded to the bank's letter on 17 July 2017, indicating their inability and unwillingness to accede to the bank's demands, because, among others, it was contended, they were unreasonable. Further correspondence between the parties yielded no solution to

the impasse, as the bank stuck to its demands stated in their letter 13 July 2017, referred to above. This culminated in the urgent application launched by the applicant on 28 July 2017.

The parties' argument on the lawfulness of the termination notices

The applicants

[50] The applicants say that the interaction with the bank, set out above, demonstrates that in relation to the loan facilities, the bank had only ever been in contact with the respective applicants to discuss the review/renewal of their facilities and to make arrangements for the reduction of exposure to the bank. At no point was the question of cancellation of their facilities considered or addressed, and the Bank never referred to 'adverse publicity' or any such allegations as the reasons for its seeking the reduction of exposure in the loan facilities. With regard to the transactional accounts, it is also said that the applicants never asked for their closure before 6 July 2017. As regards the alleged adverse media reports, such had been ongoing in respect of some applicants for some time, from at least as early as 2015. Despite this, the applicants contend, the bank has never before questioned those reports or advised the implicated applicants that it believed the adverse attention created a risk for it.

[51] In light of this, the applicants say they were surprised by the termination notices, particularly in view of the fact that the bank had not engaged them directly about its concerns, and what, in the particular circumstances applicants, would constitute a reasonable notice period. According to the applicants, the bank's reasons as set out in the termination notices are not the true reasons for the decisions taken. Those reasons, according to the applicants, are contrived, and 'smack of an ulterior motive or undue pressure being brought to bear' on the bank by third parties. Thus, so is the argument by the applicants, the bank is not acting in good faith 'as it is required to do.' In this regard, mention is made of a letter dated 1July 2017 from head of the bank's head office in Mumbai, India to the bank's Johannesburg branch. In that letter, termination of the accounts of the 'Sahara Group' is discussed, and among others, the following is stated:

'We advise you to issue suitable communication to the Group Companies/Promoters for closure of their accounts with us. The loan/overdraft facilities granted to the group and its subsidiaries should be settled by 30 September 2017, as per commitment given to the Regulator…'

[52] It is suggested that the reference to an unnamed 'Regulator' evidences pressure being brought to bear on the bank by third parties, for reasons totally unrelated to those stated in the termination letters.

The bank

[53] For its part, the bank says that it took the decision to terminate the accounts and loan facilities on the basis of the substantial risks involved in providing banking service to the Gupta family and the applicants. The so-called 'GuptaLeaks'[17] since the end of May 2017 have added fuel to the allegations of unlawful and corrupt conduct against the Gupta family. Irrespective of the truth of these allegations, the volume and seriousness of these allegations has already caused the bank significant prejudice and poses real risks to the bank. The bank has suffered reputational damage as a result of the extensive media reports and public allegations against the applicants. It also has a well-founded fear that it will suffer further reputational and commercial risks if this relationship continues beyond 30 September 2017. The bank further says that it faces substantial legal risks and mounting costs by continuing to provide banking services to the applicants, who are all classified as 'high risk' clients and 'politically exposed persons'. This imposes onerous legal duties on the bank to monitor the applicants' transactions and to report on suspicious and unusual transactions. It also exposes the bank to serve fines and other sanctions if it should in any way fail in these duties. Given these risks, the bank was merely one of a long line of banks and other firms that had decided to sever ties with the applicants and the Gupta family.

[54] With regard to the loan and overdraft facility agreements, the bank contends that the first to fourth applicants have no legal rights to any relief would allow them to

[17] A collection of approximately 100, 000 to 200, 000 emails which were leaked to investigative journalists and civil society groups, which have featured in media reports, with new allegations of unlawful conduct by members of the Gupta family.

avoid repaying their loans, since those agreements give the bank the express right to cancel these agreements and to claim repayment at any time. On the express terms of these agreements, the bank is entitled terminate the loan and overdraft facilities at any time by means of written notice, either forthwith or on the date specified in the notice, and to demand repayment of all amounts owed, either forthwith or on a date specified in that notice. Thus, it is argued, the bank duly exercised this right when it gave notice to the first to fourth applicants that it was terminating their accounts and calling up all outstanding loans.

[55] In light of the express terms of the agreements, there is no basis for the applicants' claim that they are entitled to 'reasonable notice'. It is thus denied that the first to fourth applicants have made out a case for an interdict. With regard to the transactional accounts, the bank submitted that: the applicants have had ample and reasonable notice of the closure of their transactional account on 30 September 2017; no irreparable harm would be suffered by the applicants if their accounts are closed on 30 September 2017; the bank will suffer severe prejudice if it is forced to continue to provide banking service to the applicants after 30 September 2017 in circumstances where, on the applicants' own version, no other bank is willing to provide these services.

[56] In any event, the applicants have had, according to the bank, an effective notice period of almost three months from the date that the initial notice of termination was given on 6 July 2017 until the date that termination would take effect on 30 September 2017. Also, long before the 6 July 2017 notices were delivered, the applicants were provided with informal notice that the bank was considering terminating its relationship with the applicants. The bank refused to open any new accounts for the applicants, the Gupta family and associated companies from at least June 2016. From August 2016, the bank set about reducing its exposure by calling up loans granted to the applicants, which at that time, had an approximate value of R1.5 billion. During this time, the bank's representatives advised the applicants' representatives that it intended to sever ties with the Oakbay group. Over this period, the bank succeeded in recovering approximately R1.2 billion from the applicants.

[57] In addition, argues the bank, the fact that the largest banks in South Africa and other firms chose to terminate their relationship with the applicants in 2016 ought to have provided a clear indication that the bank and other banks would also consider this option. In this light, the bank denies the applicants' assertion that the 6 July 2017 termination notices came without warning.

Interim interdict

[58] It is in the light of the above background that the applicants' application for an interim interdict should be considered. To recap, the applicants seek an interim interdict restraining the bank from closing their accounts, pending the determination of an application in which they will seek final relief for either the setting aside of the bank's notices of termination or for the court-imposed time periods for such termination. Accordingly, I do not have to concern myself with the merits of the applicants' contention that the notices are invalid for the reasons they proffer.

[59] This being an application for an interim interdict, I must confine myself to an enquiry whether the applicants have satisfied the requisites for an interim interdict, which are well-established and trite,[18] namely:

(a) a clear right, which though *prima facie* established, is open to some doubt (prima facie right);
(b) a well-grounded apprehension of irreparable harm;
(c) that the balance of convenience favours the granting of such interdict;
(d) and the absence of an alternative relief.

These requirements have now received the imprimatur of the Constitutional Court. See, for example, *City of Tshwane v Afriforum.*[19]

[60] An interim interdict is a court order preserving or restoring the status quo pending the determination of rights of the parties. It is important to emphasize that an interim interdict does not involve a final determination of these rights and does not

[18] See *Setlogelo v Setlogelo* 1914 AD 221 at 227.
[19] *City of Tshwane Metropolitan Municipality v Afriforum and another* 2016 (9) BCLR 1133; 2016 (6) SA 279 (CC) para 49.

affect their final determination. In *National Gambling Board*[20] the Constitutional Court explained the nature of the order as follows:

'An interim interdict is by definition a court order preserving or restoring the status quo pending the final determination of the rights of the parties. It does not involve a final determination of these rights and does not affect their final determination.' The dispute in an application for an interim interdict is therefore not the same as that in the main application to which the interim interdict relates. In an application for an interim interdict the dispute is whether, applying the relevant legal requirements, the status quo should be preserved or restored pending the decision of the main dispute. At common law, a court's jurisdiction to entertain an application for an interim interdict depends on whether it has jurisdiction to preserve or restore the status *quo.*[21]

[61] *In Eriksen Motors*[22] Holmes JA explained the approach to be adopted in applying the requirements for an interim interdict:

'In exercising its discretion the Court weighs, inter alia, the prejudice to the applicant, if the interdict is withheld, against the prejudice to the respondent if it is granted. This is sometimes called the balance of convenience. The foregoing considerations are not individually decisive, but are interrelated; for example, the stronger the applicant's prospects of success the less his need to rely on prejudice to himself. Conversely, the more the element of 'some doubt', the greater the need for the other factors to favour him. The Court considers the affidavits as a whole, and the interrelation of the foregoing considerations, according to the facts and probabilities; see *Olympic Passenger Service (Pty.) Ltd. v Ramlagan,* 1957 (2) SA 382 (D) at p. 383D - G. Viewed in that light, the reference to a right which, 'though prima facie established, is open to some doubt' is apt, flexible and practical, and needs no further elaboration.[23]

Prima facie right

[62] The question therefore is whether the applicants have established a prima facie right. In this enquiry, the accepted test is to take the facts averred by the applicants, together with such facts set out by the bank that are not or cannot be

[20] *National Gambling Board v Premier, Kwa-Zulu Natal and Others* 2002(2) BCLR 156; 2002(2) SA 715 CC.
[21] Para 49.
[22] *Eriksen Motors (Welkom) Ltd v Protea Motors Warrenton and another* 1973 (3) SA 685 (A). See also *Knox D Arcy Ltd v Jamieson and Others* 1996 (4) SA 348 (A) at 361.
[23] At 691.

disputed and to consider whether, having regard to the inherent probabilities, the applicants should on those facts obtain final relief at the envisaged application. The facts set up in contradiction by the bank should then be considered and, if serious doubt is thrown upon the case of the applicants, the applicants cannot succeed.[24]

[63] The applicant's claim to a prima facie right must be determined against their claimed right to reasonable termination. They also claim that the termination clause in each of the loan agreements, and the manner in which it was enforced by the bank in the particular circumstances of the applicants, is against public policy and unenforceable because it allows the bank to call up the loan at any time, notwithstanding the bank's knowledge of the stated purpose of the loan and of either its periodic nature, or in the case of Confident Concept, which, as explained earlier, is a term loan.

[64] Furthermore, it was submitted on behalf of the first to fourth applicants that the termination letters constitute various breaches of the applicants' contractual rights under the loan agreements. Four propositions were proffered for that submission. First, that the bank had purported to rely on its right to terminate for default in circumstances in which none of the applicants was in default of any of their obligations. Second, that the termination upon demand clause is contrary to public policy. Third, in exercising its right to terminate the agreements upon demand, the bank did not act reasonably nor in good faith, and accordingly its conduct was contrary to public policy. Fourth, that neither of the termination letters of 6 July 2017 nor the bank's attorney's letter of 10 August 2017 gave the applicants reasonable notice, which it was contended, constituted a further beach by the bank of its contractual obligations.

[65] In answer to the applicants' arguments, the bank placed heavy reliance on *Bredenkamp*. There, the following general principles governing the contractual relationship between a bank and its clients were established. The bank is entitled to terminate the relationship on reasonable notice, without any obligation to give

[24] See *Webster v Mitchell* 1948 (1) SA 1186 (W) at 1189; *Simon NO v Air Operations of Europe AB and Others* 1999 (1) SA 217 (SCA) at 228F-H.

reasons. Its motives for terminating the relationship are generally irrelevant, and that there is no self-standing right to reasonableness, fairness or goodwill in the law of contract. Further, commercial entities had no right to insist that banking relationship continue against the bank's will. A bank is entitled to terminate the relationship with a client on the basis of reputational and business risks and courts should be reluctant to second-guess that decision. A bank is fully entitled to terminate the relationship with a client that has bad reputation, irrespective whether the publicity about the client is true. The fact that a client may have difficulty finding another bank does not impose any obligation on a bank to retain the client.

[66] Significantly, despite Harms DP the appellants the fact that theappellants in that case had accepted that the agreement with the bank entitled either party to terminate the relationship on reasonable notice for any reason the learned Deputy President did 'not necessarily subscribe' to the appellants' submission that the entitlement extends to 'bad' reasons, at least by the bank, as this could amount to 'an abuse of the bank's rights.'[25] The applicants argue, on the basis of this dictum, that the bank's reasons for terminating its relationship with them has no relation to the reasons stated in the notices of termination, but on extraneous considerations and pressure brought to bear by third parties. They argue that should that turn out to be correct, the bank's reasons for termination would 'bad' reasons, constituting 'an abuse of its rights, as envisaged by Harms DP.

[67] The facts in *Bredenkamp* were briefly these. The appellants, Mr John Bredenkamp and two companies that 'belonged' to him, held a number of accounts with one of the commercial banks in South Africa. On 8 December 2008, the bank notified the appellants that it had suspended their credit card and overdraft facilities and that it intended to withdraw them on 6 January 2009. As far as the other current accounts and the foreign currency accounts were concerned, the bank requested the appellants to make alternative arrangements because these were to be closed on 19 January 2009. Later, the bank disclosed that the decision was based on the listing of Mr Bredenkamp and a number of entities owned or controlled by him as 'specially designated nationals' by the United States of America (USA) Department of

[25] Para 24, fn 10.

Treasury's Office of Foreign Asset Control. The reason why Mr Bredenkamp was so listed was because he was said to have provided financial and logistical support to the Zimbabwean government, thus enabling President Mugabe 'to pursue policies that seriously undermine democratic processes and institutions in Zimbabwe.'

[68] The *Bredenkamp* appellants' case was based on two propositions: that the benchmark for the constitutional validity of a term of a contract is fairness; and that even if a contract was fair and valid, its enforcement must also be fair in order to survive constitutional scrutiny.

[69] A closer reading of *Bredenkamp* reveals two distinguishing features from the present case. The first is that no public policy considerations were involved in that case, whereas they are squarely raised in the present case.[26] In this regard, it is important to observe that Harms DP (at para 65) implied that a bank's decision to close a client's account could well be subject to judicial scrutiny in circumstances where public policy considerations are involved. Here, the applicants' argument (insofar as the loan and overdraft facilities are concerned) that the 'closure-upon demand clauses' and their enforcement in the circumstances, are against public policy, thus bringing the bank's conduct squarely within the purview of judicial scrutiny envisaged by Harms DP. The second distinguishing feature is that the appellants in *Bredenkamp* had accepted that: (*a*) the agreement entitled either party to terminate the relationship on reasonable notice for any reason and that this clause or the implied term did not offend any constitutional value, and was accordingly valid; and (*b*) due notice had been given and that a reasonable time had been allowed. The applicants in the present case dispute that reasonable notice has been given.

[70] A public policy challenge is important, and where it is sought to be raised in pending proceedings, a court should, in my view, be slow to deny a party that right at interim stage, except in the clearest of cases. The applicants' public policy argument in respect of the loan agreements may well be rejected by a court in the application for a final relief. But can it be said at this interim stage that their argument is devoid of any merit whatsover? I do not think so.

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[26] Founding Affidavit, para 90 at page 51 of the record.

[71] As observed by Harms DP in *Bredenkamp* (para 38) our courts have always been fully prepared to reassess public policy and declare contracts invalid on that ground. He went on to explain:

'Determining whether or not an agreement was contrary to public policy requires a balancing of competing values. That contractual promises should be kept is but one of the values. Reasonable people, irrespective of any philosophical or political bent, might disagree whether any particular value judgment was 'correct', ie, more acceptable. Didcott J, for one, believed in relation to restraint of trade cases that the sanctity of contract trumped freedom of trade whereas AS Botha J... together with Spoelstra AJ, thought otherwise while Vermooten J agreed with Didcott J.'

[72] On the above considerations, I conclude that the first to fourth applicants have established a prima facie right to the relief envisaged in the envisaged application for a final interdict.

[73] With regard to the transactional accounts, I accept, for the present purposes, that the applicants and the bank did not intend for their contractual arrangements to continue in perpetuity, and that they are terminable on reasonable notice by either party. On this premise it is common cause that the applicants have a right to a reasonable notice before the bank closes their accounts. It is on the reasonableness of the notices that the parties differ. The applicants say that the bank has failed to give them such notice.

[74] It would be recalled that the applicants were initially given six business days. Later the period was extended to 23 business days in total (dependent upon certain conditions which the applicants did not meet). On 10 August 2017, in the wake of the urgent application, the notice period was eventually extended to 30 September 2017. The applicants contend that this still falls short of a reasonable notice period, it being just over two months' notice. With regard to the reasonableness of the notice of termination it is the bank's stance that the applicants have had a period of almost three months, which in its view, was reasonable in the circumstances.

[75] In determining what constitutes reasonable notice, regard must be had to the particular circumstances of each case.[27] At the very least, this requires that the notice provides a reasonable and sufficient period within which the other party may regularize their affairs.[28] In *Amalgamated Beverages Industries*[29] it was observed at 545A-C that the time at which reasonableness is to be determined is a question of the proper construction of the contract. Since one of the main objectives of reasonable notice is to provide the other party sufficient time to regulate its affairs, reasonableness will generally require a consideration of the facts and circumstances at the time that notice is given.

[76] In my judgment, given all the circumstances of the case, the time to determine reasonableness should be when the notices were given. Clearly, a period of six days cannot, by any stretch of imagination, constitute reasonable notice. Counsel for the bank did not submit otherwise, but contended that the applicants would have, up to 30 September 2017, been afforded a period of at least three months. It is arguable that even this period does not constitute reasonable notice in the circumstances. On that basis I to incline to the conclusion that the applicants have established a strong prima facie right to a reasonable notice in respect of the termination letters.

Irreparable harm

[77] As aptly observed by Jajbhay J, a business entity must, in order to carry out its objects, have one or more bank accounts. This is not simply because transactions through a bank are convenient and customary; in addition, it is because the banks operate an inter-change system that makes it all but impossible for a person to do business without operating through a bank.[30] The applicants are all large commercial entities. The first to fifteenth applicants[31] collectively employ approximately 7 652

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[27] *Putco Ltd v TV & Radio Guarantee Co (Pty) Ltd* 1985 (4) SA 809 (A) at 830I.
[28] *Plaaskem (Pty) Ltd v Nippon Africa (Pty) Ltd* 2014 (4) SA 287 (SCA) para 21.
[29] *Amalgamated Beverage Industries Ltd v Rond Vista Wholesalers* 2004 (1) SA 538 (SCA) at 545A-C.
[30] *Breedenkamp v Standard Bank of SA Ltd* 2009 (5) SA 304, [2009] 3 All SA 339 (GSJ) para 59.

[31] The sixteenth applicant, Tegeta Resources (Pty) Ltd, the seventeenth applicant, Mabengela Investments (Pty) Ltd, and Mabengela Resources and Energy (Pty) Ltd, are holding companies rather than operating companies and, as such do not have employees. The nineteenth applicant, Koornfontein Rehabilitation Trust and the twentieth applicant, Optimum Rehabilitation Trust, are statutory vehicles that are required to hold for mining rehabilitation purposes and, as such do not have employees.

employees across their various businesses, including a large number of mineworkers. It cannot be seriously argued that large scale business entities such as the applicants can survive without banking facilities. The applicants would inevitably be forced out of business. There is indubitably irreparable harm. The suggestion that the employees and suppliers of the applicants can be paid through pay agents ignore the fact that fact that it is nearly impossible to conduct business without banking facilities.

[78] This misses the point completely. The applicants need banking facilities to conduct business and generate profit for them to transact with pay agents. In other words, payment of employees and suppliers is dependent on the applicants being able to conduct business normally and effectively, including having banking facilities. Unavoidably, without such banking facilities, the applicants will be put out of business almost immediately. Perhaps, recognising this, counsel for the bank suggested that some of the applicants have overseas banking accounts which could be used for conducting business. But this suggestion suffers even more pointed criticism, for obvious and manifold reasons. For that to happen, the applicants would have to find a way to physically remove money out of the country. It is therefore not an option.

[79] As far as the bank is concerned, it argues that the allegations associated with the Gupta family has already caused it significant prejudice and poses real risks to it. The bank says that it has already suffered reputational damage as a result of the extensive media reports and public allegations against the applicants. It also has a well-founded fear that it will suffer further reputational and commercial risks if this relationship continues beyond 30 September 2017. The bank further says that it faces substantial legal risks and mounting costs by continuing to provide banking services to the applicants, who are all classified as ‘high risk’ clients and ‘politically exposed persons’. This imposes onerous legal duties on the bank to monitor the applicants’ transactions and to report on suspicious and unusual transactions. It also exposes the bank to severe fines and other sanctions should it in any way fail in these duties.

[80] The bank's claim of reputational harm does not bear scrutiny. In the first place, apart from its mere *ipse dixit*, there has not been any demonstrable and concrete evidence of reputational harm to it resulting from the applicants' association with the Gupta family. The allegations against this family have been in the public domain for a few years now.[32] The bank has not presented any evidence that any of its clients or associates, locally or internationally, have threatened to terminate their business relationship with it because of its association with the applicants or the Gupta family. In fact, there is not even an allegation to that effect. If there was any risk of reputational harm, it should have manifested itself by now.

[81] Secondly, and more instructive, is that the bank's association with Nedbank has not been affected. Nedbank is one of the four banks which terminated their relationship with the Gupta family and their associated entities during 2016. But it still maintains a relationship with the bank as a clearing bank. There is no suggestion that Nedbank has threatened to terminate its relationship with the bank.

[82] Thirdly, on 26 September 2017 the bank consented to an order in this court, requiring it to keep open the accounts of the nineteenth and twentieth applicants.[33] What these point to, is that the bank's claim of reputational harm is more speculative than real. But even if it was real, it has to be balanced against the indubitable irreparable harm that the applicants are likely to suffer if an interim interdict is not granted. In any event, if an interim interdict is granted, the risk of reputational harm will be ameliorated by the public knowledge that the bank is in an unwilling relationship with the applicants because of judicial intervention, more than anything else, pending the determination of the contractual issues between the parties.

[83] The rest of the complaints by the bank relating to increased monitoring mechanisms seem to me to be more of an administrative burden - a huge one

[32] One of the earlier, noticeable controversies concerning the Gupta family occurred as far back as April 2013, when a private chartered commercial airline from India landed at the Waterkloof Airforce Base in Pretoria, carrying 270 passengers, all of them guests scheduled to attend a Gupta family wedding at Sun City resort. Already then, the bank was having relationship with some of the applicants.

[33] In the matter between *Organisation Undoing Tax Abuse v The Trustee(s) for the Time Being of the Optimum Mine Rehabilitation Trust and others*, case number 65616/2017.

perhaps, especially in respect of an unwanted client. But that does not translate to irreparable harm as that concept is known in the context of interim interdicts.

Balance of convenience

[84] In *Cipla Medpro*[34] the Supreme Court of Appeal recognised that public interest is a relevant consideration when weighing the balance of convenience. In other words, not only the interests of the litigating parties, must be placed in the scales when weighing where the balance of convenience lies. In my view, this is such a case. The dispute transcends the parties' commercial interests. It has a direct impact on the more than 7 600 workers, the majority of whom are Black unskilled and semi-skilled workers. They face a real prospect of losing their jobs if the applicants' businesses collapse. That prospect weighs heavily with me, more than the parties' commercial interests. The balance of convenience clearly favours the granting of an interim interdict. The applicants have no alternate remedy.

Conclusion

[85] The sum total is that the applicants have met the requisites for an interim relief. In their notice of motion, the applicants have sought an order, among others, defining the type of relief it should seek for its final interdict. I do not deem it necessary for the court to make such an order. The applicants are at liberty to bring an application they deem fit in the circumstances. It should suffice for the order to make provision for the institution of proceedings for relief. Also, the relief sought in paragraph 1 of the notice of motion is too broadly stated. I think that it should be restricted by linking it to the termination notices issued by the bank on 6 July 2017, in order for the bank not to be hamstrung in its interim relationship with the applicants, which the orders sought in paragraph 1 as they stand, having that potential. These two concerns would be reflected in the order I am about to make.

Costs

[86] Finally, there remains the issue of costs. The applicants have been successful. Costs should follow the result, except for the costs of the application for

[34] *Cipla Medpro (Pty) Ltd v Aventis Pharma SA* 2013 (4) SA 579 (SCA) para 46.

the striking out, which the applicants should pay. When I made a rule regarding the urgency of the matter, I stood over the determination of costs regarding that aspect. I am of the view that no stand-alone costs order is necessary in this regard, as the argument did not occupy much time distinct from the main argument. The costs in that regard are to be included in the costs of the application, which are to be paid by the bank. It remains to be determined whether costs of more than one counsel should be allowed. In my view, the issues raised, and the extreme urgency of the application, warrant the employment of more one counsel. All parties employed more than two counsel. The first to fourth applicants employed four counsel, while the fifth to twentieth applicants employed three counsel. The bank employed four counsel, led by two senior counsel. I am therefore of the view that the appointment of three counsel by the first to fourth applicants, and three by the fifth to twentieth counsel, was prudent and warranted.

Order

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

1. Pending the final determination of the application referred to in paragraph 2 of this order, the respondent is interdicted from:

   1.1 de-activating and/or closing the applicants' banking accounts held with the respondent and/or from terminating the banker-customer relationship between the applicants and the respondent for the reasons stated in the termination notices dated 6 July 2017;

   1.2 demanding the first to fourth applicants to repay the sums owed by each of these applicants to the respondent in terms of their loan and overdraft agreements with the respondents for the reasons stated in the termination notices dated 6 July 2017;

   1.3 in any way limiting the manner in which the banking accounts are operated by the applicants so as to ensure that the applicants are permitted to operate the banking accounts in the same manner as they did immediately prior to the notices of

terminations date 6 July 2017, subject to the respondent's terms and conditions applicable from time to time;

2. Within 15 days of the granting of this order, the applicants shall launch an application against the respondent for the final relief the applicants deem appropriate concerning the validity or otherwise of the termination notices dated 6 July 2017 issued by the respondent;

3. The interim order referred to in paragraph 1 above shall lapse should the applicants fail to launch the application referred to in paragraph 2 above;

4. The respondent shall pay the costs of the application, including the costs of four counsel employed by the first to fourth applicants, and of three counsel employed by the fifth to twentieth applicants;

5. The applicants shall pay the costs of the application for the striking off, jointly and severally, the one paying the others to be absolved.

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TM Makgoka
Judge of the High Court

APPEARANCES:

For the First to Fourth Applicants:	JP Daniels SC (with him L Schäfer, CC Bester and X Hilita) Instructed by: Vasco De Oliveira Inc., Sandton De Oliveira Serrao Attorneys., Pretoria
For the Fifth to Twentieth Applicants:	AR Bhana SC (with him F Ismail and JL Griffiths) Instructed by: Abba Parak Inc., Johannesburg Ahmed Attorneys, Pretoria
For the Respondent:	D Fine SC (with him G Marcus SC, M Mgxashe and C McConnachie) Instructed by: Mervyn Taback Inc., Johannesburg Macintosh Cross & Farquharson Attorneys, Pretoria