IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

Case no 80978/16

In the matter between:

MINISTER OF FINANCE	Applicant
and	
OAKBAY INVESTMENTS (PTY) LTD AND TWENTY OTHERS	First to twenty-first respondents

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MINISTER OF FINANCE'S HEADS OF ARGUMENT
(Enrolled for hearing on 28-29 March 2017)

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A. Introduction

1. This case concerns a pure legal question: is the Minister of Finance authorised or obliged to intervene in banker-client relationships if bank accounts are closed?

2. The bank accounts concerned in this matter are those of the Oakbay group of companies, in which the Gupta family hold a controlling interest. The banks concerned are four major commercial banks in South Africa, Absa, FNB, Standard Bank and Nedbank. Each of the parties (including the Governor of the Reserve Bank, the Registrar of Banks, and the Financial Intelligence Centre) accepts that the legal question concerned is to be answered as proposed by the Minister of Finance.

3. The only question that remains is whether the Court should grant the declaratory relief. The relief is only opposed by the Oakbay respondents, cited as first to fourteenth respondents. All other respondents either support the relief or abide it.

4. The Oakbay respondents' opposition rests on a political conspiracy theory. They contend that

   - this application is the culmination of a grand conspiracy by the Minister spanning many months (despite Oakbay itself engaging with the Minister frequently during this period for assistance);
   - the application is not serious (despite the Governor of the Reserve Bank formally expressing his concern regarding political intervention in the banking sector); and

- that the relief should not be granted – this after Oakbay has conceded the legal question (despite Oakbay strenuously opposing the application itself, refusing to withdraw its opposition, and publicly announcing its desire to meet in court the Minister's application).

5. None of Oakbay's contentions is tenable, as we shall show in addressing in what follows. For the reasons provided, we submit that the interests of justice and the public interest strongly militate in favour of granting the declaratory relief.

6. Our submissions follow the scheme set out in the above index.

B. <u>Overview of this application and the context in which it arises</u>

7. This application seeks narrow declaratory relief. It arises in unprecedented circumstances with far-reaching consequences for the national economy, the banking sector, and the national executive authority's commitment to the rule of law.

(1) <u>Factual context</u>

8. The essential facts are set out in the Minister's founding affidavit, and are not the subject-matter of any *bona fide* dispute. Indeed, the founding affidavit has not even been traversed in either of the two substantial affidavits filed on behalf of the Oakbay respondents.

9. It is therefore common cause that there has indeed been "a dispute relating to powers of intervention by Government in relations to the closing of private clients' accounts by registered banks."[1] (Oakbay merely asserts that it has conceded the correct legal position.) The circumstances in which this dispute has arisen, it is likewise common cause, "have considerable importance for the operation of the banking sector of the South African economy, and its regulation by Government."[2] It is also common cause that a controversy relating the closing of the Oakbay accounts and government intervention indeed arose.[3] This controversy received both national and international attention.[4] In the Minister's assessment the situation renders it "clearly in the public interest, the interest of the affected clients and the relevant banks, and the employees of both that it be authoritatively resolved".[5] This is in the context of extensive public statements by Oakbay attacking the integrity of the banks concerned,[6] which represent a significant part of the South African banking sector, with the latter a vital organ in the national economy.

10. Oakbay repeatedly approached the Minister.[7] Indeed, it both importuned and badgered him. The Minister describes these approaches as "representations and demands".[8] His founding affidavit sums up the engagements thus: "Oakbay demanded that on behalf of Government I intervene with the banks to achieve a reversal of their [the banks'] decision [to close the Oakbay respondents' accounts]."[9] There can be no serious suggestion that the

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[1] Record vol 1 p 10 para 3.
[2] Record vol 1 p 10 para 3.
[3] Record vol 1 p 10 para 3.
[4] Record vol 1 p 10 para 3.
[5] Record vol 1 p 10 para 3.
[6] Record vol 1 p 11 para 8.
[7] Record vol 1 p 11 para 9.
[8] Record vol 1 p 11 para 9.
[9] Record vol 1 p 11 para 9.

Minister was not subjected to pressure both unprecedented and outside the law by the Gupta-controlled Oakbay companies to intervene.

11. Yet Oakbay now attempts to create the impression in its answering papers that it did not "demand" "or even ask" that the Minister reverse the closures.[10] It alleges that it never did any of this, and that "since 24 May 2016" "the Minister has been aware that there is no dispute between the parties regarding his powers".[11] This is untrue.

12. The truth is recorded in Oakbay's own correspondence. On 17 April 2016 Oakbay explicitly seeks to "reverse the … stance taken by the [financial] institutions" (i.e. the banks, whose "stance taken" was to close the Oakbay respondents' accounts).[12] It persisted in this attempt well beyond May 2016. For instance, in a letter to the Minister dated 28 June 2016,[13] one of the Oakbay respondents explicitly "appeals to you [the Minister] regarding the reopening of Oakbay's bank accounts".[14]

13. A particularly important pressure point brought to bear by Oakbay's engagements with the Minister was the threat of job losses.[15] Oakbay stated that job losses were imminent, and that the bank accounts had to be reopened to prevent this result.[16] This threat was taken

[10] Record vol 11 p 1015 para 54.
[11] Record vol 11 p 998 para 6.
[12] Record vol 1 p 23 lines 19-20.
[13] Record vol 1 p 66.
[14] Record vol 11 p 67 lines 3-4.
[15] Record vol 1 p 12 para 10.
[16] Record vol 1 p 12 para 12.

seriously by the Minister, who took legal advice and met with Oakbay in the presence of senior Treasury officials.[17]

14. The Minister explained to Oakbay that the national and international legal regime does not permit ministerial intervention in the closure of bank accounts – least of all in the context of legal obligations imposed to protect the banking system and prevent them becoming "vehicles for money-laundering, terrorist financing and other unlawful activities".[18] Following the Minister's meeting with Oakbay's then CEO, the Minister advised Oakbay that he (the Minister) could not act as contemplated by Oakbay. The Minister therefore encouraged Oakbay to obtain authority (is such existed) for the intervention it sought not from him but from Court.[19]

15. Oakbay's response was to thank the Minister "very much for the cordial meeting this morning to discuss the decision by the four major banks operating in our country to close our bank accounts."[20] Oakbay expressly repeated "our appeal to you for assistance".[21] Oakbay's letter continued its accusation against the banks (and no-one else), describing their conduct as "intransigent".[22] The letter does not suggest anything adverse regarding the Minister, let alone a conspiracy. Instead, Oakbay's letter commends the Minister's "concern around the livelihoods of our 7 500 staff".[23] Oakbay's letter also records the

[17] Record vol 1 p 12 para 12.
[18] Record vol 1 pp 12-14 paras 13-15.
[19] Record vol 1 p 14.
[20] Record vol 1 p 51 lines 7-8.
[21] Record vol 1 p 51 lines 20-21.
[22] Record vol 1 p 52 line 3.
[23] Record vol 1 p 51 lines 30-31

Minister's "strong pedigree as liberation fighter."[24] The letter also correctly recognises the Minister's position as "political head of [South Africa's] economy".[25] The letter, whose subject matter is "Meeting on closing of Oakbay Bank Accounts",[26] concludes by repeating that Oakbay is indeed "appealing"[27] to the Minister to provide "any possible assistance".[28]

16. Despite recording in its 24 May 2016 letter that any legal recourse *by Oakbay* against *the banks* "may indeed be still-born",[29] Oakbay repeated its "appeals" to the Minister. The "appeals" were clear. They explicitly contemplate "the reopening of Oakbay's bank accounts", as *inter alia* a 28 June 2016 letter records.[30] There is accordingly no truth in the allegation that since 24 May 2016 Oakbay's stance was that ministerial intervention was neither permitted in law nor pressed by Oakbay.

17. As mentioned, this flawed factual premise is the basis for Oakbay's primary opposition to the Minister's application. Oakbay contends that the Minister's application is "both abstract and academic",[31] because (as Oakbay's main answering affidavit records what it intends to make "apparent") "the Minister has been aware that there is no dispute between the parties regarding his powers since 24 May 2016".[32] Therefore, so Oakbay argues, "[t]he Minister's application is not an application to address a contested legal point

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[24] Record vol 1 p 51 line 31.
[25] Record vol 1 p 52 line 5.
[26] Record vol 1 p 51 line 6. Oakbay's 17 April 2016 letter similarly recognises the Minister's position "as political head for the financial sector" (Record vol 1 p 23 lines 12-13).
[27] Record vol 1 p 52 line 18.
[28] Record vol 1 p 52 line 15.
[29] Record vol 1 p 51 line 14.
[30] Record vol 1 p 67 lines 2-3.
[31] Record vol 11 p 998 para 6.
[32] Record vol 11 p 998 para 6.

regarding a justiciable issue".[33] The argument is clearly inconsistent with the facts as they stand recorded in contemporaneous correspondence.

18. The Minister noted in a letter dated 10 August 2016 that it was "concerning that Oakbay still does not accept that the Minister of Finance, in law, is unable to interfere with the relations between registered banks and their clients."[34] In its response to this letter Oakbay's Mr Howa made no attempt to suggest that it had actually accepted the correct legal position.[35] Oakbay's silence on this issue further confirms the Minister's contemporaneous recordal of Oakbay's stance. Therefore the allegation in Oakbay's January 2017 answering affidavit – deposed, significantly, by his temporary successor, Ms Ragavan (not Mr Howa, whose confirmatory affidavit is fatally defective)[36] – that the Minister was "aware" of Oakbay's position "since 24 May 2016" is false. The correct factual position is that in June 2016 and thereafter Oakbay repeatedly "appealed" to the Minister to act in his capacity as "political head of [the] economy".

19. The Minister's *political* position as head of the economy was quite explicitly the basis on which Oakbay "appealed" the Minster. Politics were indeed already invoked in Oakbay's first letter to the Minister, dated 8 April 2016. This letter refers repeatedly to a "politically motivated campaign" against Oakbay.[37] Yet neither this letter nor any other letter or exchange during the rest of 2016 ever attributed any involvement in any political plot to

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[33] Record vol 11 p 998 para 6.
[34] Record vol 1 p 82 lines 18-29.
[35] Record vol 1 p 85, comprising Oakbay's 9 September 2016 eventual response to the Minister's "letter of August 10" (line 6).
[36] Record vol 14 p 1354 para 115.
[37] Record vol 1 p 21 lines 18-19; Record vol 1 p 21 lines 35-36; Record vol 1 p 22 line 4.

the Minister. Far less did Oakbay suggest that the Minister instigated any political plot, conspiracy or campaign. To the contrary, the Oakbay correspondence commends the Minister (*inter alia* for his "long history as a leader within our [South Africa's] democratic struggle");[38] describes Oakbay's correspondence as open and honest;[39] and clarifies its complaint as "corporate bullying and anti-competitive practices … from the banks".[40]

20. It is therefore inconsistent with Oakbay's own contemporaneous correspondence now to attempt to attribute a political conspiracy to the Minster. Yet this is the basis on which Oakbay seeks to oppose the application for declaratory relief. It now seeks to contend that since January 2016 the Minister has conspired against Oakbay. As the Minister's replying affidavit further confirms,[41] there is no factual basis for this latter-day fabrication.

21. The construct is also self-defeating. Were it to have any merit, then the question whether the Minister may interfere in banker-client relations in respect of the closure of bank accounts would of course not have been capable of being criticised as "academic" by Oakbay. This is because Oakbay now contends in its January 2017 answering affidavit (which took three months to gestate) that it is actually the Minister's supposed political plot which *resulted* in the closure of the bank accounts. On this scenario declaratory relief to the effect that the Minister has no power to intervene in banker-client relations and the closure of bank accounts cannot be described as "abstract and academic". If the Minister had no power to intervene, but Oakbay contends he did intervene, then the question

[38] Record vol 1 p 23 line 15.
[39] Record vol 1 p 22 line 8, Mr Howa (the author of the letter) recording his own "candour".
[40] Record vol 1 p 22 lines 5-6.
[41] *Inter alia* Record vol 14 pp 1355-1362 paras 118-143.

whether the Minister was empowered to intervene in the first place is self-evidently a compelling issue. Oakbay's conspiracy theory is therefore not only factually unfounded, but also inconsistent with Oakbay's own opposition.

22. Its self-destructiveness apart, the contention is also contrary to logic. Had the Minister conspired to *close* Oakbay's accounts, he would be the very last person to whom Oakbay would continuously "appeal" to assist in *opening* the accounts. In that event the Minister would also have been the very last person whom Oakbay would have approached (as it did) to "jointly find a way to understand the real reasons for the banks [sic] decision to unilaterally close our accounts".[42] Also in this respect Oakbay's conspiracy construct self-destructs.

23. As mentioned, this theory was for the first time advanced in Oakbay's January 2017 answering papers. By then each of the four banks, the Registrar of Banks, the Governor of the Reserve Bank and the Director of the Financial Intelligence Centre had all already filed affidavits supporting the Minister's position. Some of these respondents actively support the declaratory relief sought by the Minister, and others only abide it (as is appropriate, considering their institutional independence).

24. In the light of the volume of the papers, a short summary of each of the other respondents' position may be of assistance.

[42] Record vol 1 p 80 lines 11-12.

(2) <u>The other respondents' positions</u>

25. The Governor of the Reserve Bank adopts a neutral position.[43] He abides the Minister's application. So does the Registrar of Banks.[44] As indicated, this aptly reflects their institutional autonomy. But because of the importance of the matter, both filed affidavits explaining the legal regime – which, they point out, does not permit interference in banks' closure of bank accounts.

26. The Governor's own concern regarding the damaging effect of Oakbay's attack on the banking sector is recorded in the founding papers.[45] The Governor's letter records the importance of a healthy and effective financial system for any modern economy.[46] It identifies the specific issue of executive interference in banker-client relations regarding the closure of accounts.[47] As the Governor cautions, this may be "viewed as undue political interference in banks' operations",[48] and presents a "risk South Africa's financial stability".[49]

27. The Governor confirmed the same concerns in his affidavit.[50] His affidavit also discloses yet further attempts by Mr Howa to prevail on the Governor to intervene in the banker-client relationship, despite the Governor previously advising Mr Howa that the Reserve

[43] Record vol 7 p 605 para 6.
[44] Record vol 7 p 620 para 5.
[45] Record vol 1 p 16 para 20.
[46] Record vol 1 p 75 lines 18-19.
[47] Record vol 1 p 75 lines 27-28.
[48] Record vol 1 p 76 line 9.
[49] Record vol 1 p 76 line 12.
[50] Record vol 7 p 607 paras 17-19.

Bank had no such legal authority.[51] Yet Oakbay "continued to seek alternative forms of intervention and influence" (also involving the Reserve Bank), the Governor records.[52] These circumstances further reveal the falsity of Oakbay's attempt to deny that its importuning of the Minister to intervene with the banks amounted to extra-legal pressure.

28. The commercial banks all strongly support the declaratory relief sought.[53] Significantly they do not consider the relief as "abstract or academic". Each of them instructed its own legal team, filed separate answering papers, attended through their legal representatives the case-management meeting on 15 December 2016, and expressed the intention to present separate written and oral argument. The Deputy Judge President made directions accordingly, allocating a special hearing date, and setting the matter down for hearing by a Full Bench – because of its importance.

29. FirstRand Bank Ltd ("FNB") was first to file its affidavit. In it FNB quotes Oakbay's 24 May 2016 letter.[54] It is this letter which Oakbay subsequently sought to invoke as somehow clarifying its acceptance of the correct legal position *vis-à-vis* <u>the Minister</u> (when it actually relates to legal recourse by Oakbay against the banks). FNB describes this letter as confirming "the fact that the Oakbay respondents attempted unlawfully and improperly to get the Minister to intervene in a private banking relationship."[55] This is clearly correct.

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[51] Record vol 7 p 608 para 20.
[52] Record vol 7 p 609 para 27.
[53] Record vol 2 p 99 para 7 (FNB); Record vol 2 p 134 para 18 (Nedbank); Record vol 3 p 297 para 145 (Standard Bank, indeed asking the *extension* of the declaratory relief); Record vol 6 p 502 para 11 (Absa, similarly submitting that no member of cabinet is empowered or obliged to intervene in banker-client relations between Oakbay and its banks).
[54] Record vol 2 p 102 para 15.
[55] Record vol 2 p 102 para 16.

Oakbay accepts this. It did not deny any part of FNB's answering affidavit.[56] Thus also FNB's confirmation of the importance of banks' ability to choose their clients;[57] comply with national and international laws and standards;[58] and the need for the banking sector to comply with practices preventing banks being used for money-laundering and other unlawful activities,[59] is common cause. So, too, FNB's uncontested submission that it is indeed in the public interest to grant the declaratory order sought.[60] FNB explains that the "declaratory order will avoid such situations in future and will encourage public officials to only act in accordance with the Constitution and national legislation".[61] In short, it sees the relief sought as needed.

30. The *situations* to which FNB refers relate to the purported appointment of an inter-ministerial committee to probe banks' closing of Oakbay accounts. The President subsequently repudiated the Minister of Mineral Resources' public statements on this committee's intended *modus operandi*.[62] Legal clarity therefore indeed serves the public interest and assist the finance sector, cabinet and bankers' clients to act within the law.[63]

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[56] Record vol 11 p 1064 para 194.
[57] Record vol 2 p 107 para 30.7.
[58] Record vol 2 p 106 para 30.4.
[59] Record vol 2 p 106 para 30.5.
[60] Record vol 2 p 107 para 32.1.
[61] Record vol 2 p 109 para 32.2.7.
[62] Record vol 2 pp 140-141 paras 34-35, which form part of Nedbank's answering affidavit. Standard Bank also addresses this aspect (Record vol 3 p 277 paras 118*ff*).
[63] We draw particular attention to Standard Bank's recordal of pertinent facts occurring *after* the filing of the Minister's application at Record vol 3 pp 280-281 para 125. The statement quoted by Standard Bank in its answering affidavit (filed over a month before Oakbay's answering affidavit were due) refers to the extraordinary circumstances of this case, and the perceived absence of any law on the issue of government intervention (which, so the statement suggests, implies that there is no prohibition against government intervention).

31. Nedbank was second to file its affidavit. It, too, refers to the inter-ministerial committee, and the significant media attention resulting from it and the Gupta/Oakbay affair.[64] Also Nedbank points out that "[a]lthough [the Oakbay respondents] accept that Nedbank and the other banks have acted lawfully when they terminated the bank accounts, [the Oakbay respondents] have nonetheless requested the Minister to intervene".[65] This fact Nedbank confirms "is apparent from Annexure E to the [Minister's] founding affidavit".[66] Annexure E is Oakbay's letter of 24 May 2016.[67]

32. Nedbank also refers to annexure MB6 to its own affidavit,[68] which comprises the statement by the Deputy Minister of Finance on 16 March 2016.[69] Nedbank furthermore quotes its termination letter (which provides the reason for closing the bank accounts),[70] and refers to a statement by the Minister of Mineral Resources (which attributes the banks' closing of Oakbay's accounts to "innuendo and … media statements").[71] Oakbay, strikingly, has made a careful choice not to traverse Nedbank's affidavit.[72] Its contents are accordingly common cause. These facts do not support Oakbay's conspiracy theory.

33. Nedbank also demonstrates (with reference to the governing national and international legal regime)[73] that the declaratory relief is indeed "necessary to preserve the integrity of

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[64] Record vol 2 p 129 para 6.
[65] Record vol 2 p 133 para 17.5.
[66] Record vol 2 p 133 para 17.5.
[67] Record vol 1 pp 51-52.
[68] Record vol 2 p 135 para 21.
[69] Record vol 2 pp 172-173.
[70] Record vol 2 pp 130-131 para 11; Record vol 2 p 136 para 23.
[71] Record vol 2 p 141 para 34.4.2.
[72] Record vol 11 p 1064 para 194. Oakbay does not even advance a bald denial of the banks' affidavits.
[73] Record vol 2 pp 143-152 paras 41-69.

South Africa's financial system."[74] The legal regime summarised in Nedbank's answering affidavit is clearly incompatible with a power or duty of intervention on the part of the Minister.[75]

34. Third to file its affidavit was Standard Bank. Its extensive treatment of the legal regime governing the banking sector similarly confirms the same conclusions.[76] Standard Bank also records a significant fact. It is that Oakbay threatened Standard with urgent court proceedings on the very same day on which Oakbay wrote its 24 May 2016 letter.[77] The 24 May 2016 letter is the all-important document underlying Oakbay's allegation that the declaratory relief is abstract and academic. The relief is abstract and academic, so Oakbay now contends, because Oakbay's 24 May 2016 letter accepts that any legal action against the banks is legally still-born. Yet on the same day Oakbay threatened Standard Bank with legal action. Two months later Oakbay recorded in a letter to the Minister that Oakbay "ha[s] not decided against approaching the courts."[78]

35. Standard Bank's affidavit therefore demonstrates the difficulty in relying on any of Oakbay's different *factual* versions: they are irreconcilable.[79] Oakbay's equivocation between contradictory *legal* versions is self-defeating: it underscores the need for declaratory relief to prevent Oakbay's hedging between different versions of what it accepts to be the law. And Oakbay's repudiation of attorneys' letters sent in relation to

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[74] Record vol 2 p 142 para 37.
[75] Record vol 2 p 153 para 70.
[76] Record vol 2 pp 228-255 paras 7-73.
[77] Record vol 3 p 263 para 92.
[78] Record vol 1 p 80 line 25.
[79] Standard Bank records a further instance where Oakbay's Mr Howa's "emphatically denied" facts which the Minister of Mineral Resources already officially confirmed (Record vol 3 p 267 para 97.2).

pending or impending litigation defeats any reliance by Oakbay on the selective correspondence attached to its answering affidavit.

36. Because Oakbay disavows formal correspondence sent on its behalf as "sent in error",[80] it was indeed important for the State Attorney to obtain Oakbay's confirmation that it accepted Mr Gert Van der Merwe's advice to abide the Minister's application. Not only was the State Attorney's request for confirmation ignored, Oakbay obviously repudiated its attorneys' advice to concede the application by publicly announcing its intention to use the Minister's application to salvage its reputation.

37. The fourth and final affidavit by the banks is Absa's. Absa similarly demonstrates the need for the declaratory relief.[81] It describes the imperative of legal "certainty and clarity" as "essential",[82] and Oakbay's conduct as "deeply concern[ing]".[83] As other banks' answering affidavits do, Absa explained banks' legal obligations,[84] and how Absa sought to comply with it in closing the Oakbay accounts.[85] As did Standard Bank,[86] Absa cites a recent judgment by this Court applying the Supreme Court of Appeal's judgment which supports the Minister's position.[87]

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[80] Record vol 3 p 264 para 94.
[81] Record vol 6 p 502 para 10.
[82] Record vol 6 p 502 para 10.
[83] Record vol 6 p 501 para 8.
[84] Record vol 6 pp 507-515 paras 23-33.
[85] Record vol 6 pp 515-518 paras 34-45.
[86] Record vol 6 p 514 para 32.
[87] *Hlongwane v Absa Bank Ltd* (75782/13) [ZAGPPHC] 928 (10 November 2016), applying *Bredenkamp v Standard Bank of SA Ltd* 2010 (4) SA 468 (SCA).

38. Each of the banks expressly accept the correctness of the legal position set out in the Minister's founding papers.[88] Oakbay, too, accepts it. Indeed, as mentioned, Oakbay now resorts to its own acceptance of the legal position as rendering the declaratory relief "impermissible". This posture is inconsistent with the correct legal principles, which we now turn to summarise.

C. <u>The legal principles governing declaratory relief</u>

39. Oakbay's opposition is premised on the proposition that it is "impermissible" to seek declaratory relief which is "abstract and academic" because "there is no dispute".[89] As we shall show below, it is not factually correct that the declaratory relief sought is either abstract or academic. But first we shall show that the proposition is also *legally* incorrect. In short, both the common law and section 21(1)(c) of the Superior Courts Act 10 of 2013 (which re-enacts section 19(1)(iii) of the Supreme Court Act 59 of 1959 verbatim),[90] authorise declaratory relief in the circumstances of this case. Oakbay's legal assertions are at odds with the law, as recently reiterated.

(1) <u>Caselaw on section 21(1)(c) of the Superior Courts Act</u>

40. The correct approach to section 21(1)(c) has been repeatedly confirmed by the Supreme Court of Appeal.[91] In *Cordiant Trading CC v Daimler Chrysler Financial Services (Pty)*

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[88] Record vol 2 p 104 para 23 (FNB); Record vol 2 p 133 para 17.7 (Nedbank); Record vol 3 p 256 para 75 (Standard Bank); Record vol 6 p 506 para 20.
[89] Record vol 11 p 998 para 6.
[90] Section 19(1)(c) of the Supreme Court Act, in turn, virtually *verbatim* follows the wording of section 102 of Act 46 of 1935. It is the latter provision which Watermeyer JA applied in *Durban City Council v Association of Building Societies infra*, which we address below.
[91] E.g. *Langa v Hlophe* 2009 (4) SA 382 (SCA) at para 28, citing *Durban City Council v Association of Building Societies infra*.

Ltd.[92] Jafta JA, writing for a unanimous court, confirmed that the existence of a dispute is not a prerequisite for the exercise of a power conferred upon the High Court by the subsection".[93] What is required, however, is that "there must be interested parties on whom the declaratory order would be binding."[94]

41. Supreme Court of Appeal cases like *Cordiant* confirm the two-stage approach adopted by Watermeyer JA in *Durban City Council v Association of Building Societies*.[95] The two-stage approach involves that

(1) "the Court must be satisfied that the applicant is a person interested in an 'existing, future or contingent right or obligation'"; and then, if so satisfied,

(2) "the Court must decide whether the case is a proper one for the exercise of the discretion conferred on it".[96]

42. Jafta JA explained in *Cordiant* that the first leg of the two-stage approach focuses "only upon establishing that the necessary conditions precedent for the exercise of the court's discretion exists."[97] It is in the second leg of the enquiry that the question arises whether or not to grant the declaratory relief.[98] If the first enquiry establishes that the applicant has an interest in an existing, future or contingent right or obligation, then the court "has to exercise the discretion by deciding either to refuse or grant the order sought."[99]

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[92] 2005 (6) SA 205 (SCA).
[93] *Id* at para 16.
[94] *Ibid*.
[95] 1942 AD 27 at 32.
[96] Ibid, quoted in *Cordiant supra* at para 16 with approval.
[97] *Supra* at para 18.
[98] *Ibid*.
[99] *Ibid*.

43. Applying *Cordiant Trading*, this Court has often confirmed that "an existing dispute is not a prerequisite for a court to exercise its discretion to grant a declaratory order."[100] This is, with respect, clearly the correct legal position since at least *Ex parte Nell*.[101]

44. *Ex parte Nell* crossed the Rubicon on declaratory relief.[102] It clarified that "an existing or concrete dispute between persons is not a prerequisite for the exercise by the Court of its jurisdiction under [section 19(1)(a)(iii) of the Supreme Court Act; now section 21(1)(c) of the Superior Courts Act]."[103] It is merely the *absence* of such dispute which "may, *depending on the circumstances*, cause the Court to refuse to exercise its jurisdiction in a particular case".[104] The Appellate Division held that it is indeed more practical and in the best interests of all involved to determine a legal question without an existing dispute.[105] Steyn CJ did, however, observe that a court's competence to grant declaratory relief in the abstract does not mean that a court is not in appropriate circumstances entitled to refuse declaratory relief.[106] (In other words: in appropriate cases, a court is – in the exercise of its discretion, which must be exercise judicially – permitted to decline declaratory relief.) The rationale is important; and so is the check on a court's discretion identified in *Ex parte*

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[100] *Chairman of the Board of the Sanlam Pensioenfonds (Kantoorpersoneel) v Registrar of Pension Funds* 2007 (3) SA 41 (T) at para 25, emphasis added.
[101] 1963 (1) SA 754 (A).
[102] Van Loggerenberg *Erasmus Superior Court Practice* 2nd ed (Juta & Co Ltd, Cape Town Service 2 2016) vol 1 at A2–126: "*Ex parte Nell* reflects a marked departure" from the "view" that "the court will not… deal with, or pronounce upon, abstract or academic points of law" but require "that there must be an existing and concrete dispute between persons … before the court will act" by granting declaratory relief.
[103] *Shoba v OC, Temporary Police Camp, Wagendrift Dam* 1995 (4) SA 1 (A) at 14F.
[104] *Id* at 14F-G.
[105] *Ex parte Nell* 1963 (1) SA 754 (A) at 759*fin*-760*sup*.
[106] *Id* at 760B.

Nell. The rationale is that it is not the function of a court to act as advisor.[107] To address this concern, *Ex parte Nell* did not require that a live dispute must exist; it required simply that there must be interested parties on which the declaratory order will be binding.[108] Thus the correct check on a court's discretion is whether or not interested parties will be bound by the declarator.[109]

45. Therefore, as recent cases confirm and contemporary legal commentators clarify,[110] for over fifty years now "the past" requirement that an applicant for declaratory relief must "establish an existing dispute as to his rights or obligations" has been *passé*.[111] Now the correct question is not one of competence (or whether it is "permissible to grant declaratory relief). It is whether "the judicial exercise by [a] Court of its discretion with due regard to the circumstances of the matter before it."[112] The discretion must, moreover, be exercised in favour of granting declaratory relief where "it is only the Court that can definitively interpret the various enactments".[113]

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[107] *Id* at 760B/C.
[108] *Id* at 760B/C-C.
[109] De Ville *Judicial Review of Administrative Action in South Africa* revised 1st ed (LexisNexis, Durban 2005) at 349: because "[c]ourts do not see themselves as advisers … therefore there must be interested parties on whom the declaratory order will be binding", citing *inter alia Ex parte Nell supra* at 760B-C.
[110] E.g. Van Loggerenberg *Erasmus Superior Court Practice* 2nd ed (Juta & Co Ltd, Cape Town Service 2 2016) vol 1 at A2–126, cautioning that caselaw antedating *Ex parte Nell* "should be used with circumspection".
[111] Harms *Civil Procedure in the Superior Courts* (LexisNexis, Oct 2016 – SI 57) at A4.18.
[112] *Reinecke v Incorporated General Insurance Ltd* 1974 (2) SA 84 (A) at 95C.
[113] *Myburgh Park Langebaan (Pty) Ltd v Langebaan Municipality* 2001 (4) SA 1144 (C) at 1154C-F. *Myburgh Park Langebaan* cited *Compagnie Interafricaine de Travaux v South African Transport Services* 1991 (4) SA 217 (A) at 231B, where Corbett CJ held that the court was not only empowered to make the declaration, but that the court deciding the legal issue one way or the other is also imminently desirable. *Myburgh Park Langebaan* was cited, in turn, with approval by O'Regan J in *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* 2005 (2) SA 359 (CC) at para 106.

46. Hence Oakbay's pleaded legal contentions are misconceived, contrary to precedent, and inconsistent with contemporary courts' approach.

(2) <u>Judicial policy favours declaratory relief</u>

47. An overview of contemporary public law and the development of the declaratory order[114] demonstrates modern courts' approach to this type of relief: it is recognised as "an efficient and versatile remedy", popular with courts and "likely to become even more so".[115]

48. Writing in 1981, Baxter describes "[t]he purely declaratory order" (*viz* an order "which does no more than *declare* whether actual or pending administrative action is lawful") as "a relatively recent development in both South African and English law."[116] Declaratory relief is *not*, however, an innovation by the legislature,[117] as is sometimes suggested.[118] It was developed by the South African courts. One of the key cases in this development involves the portfolio of the Minister of Finance.

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[114] Baxter *Administrative Law* (Juta, Cape Town 1981).
[115] *Id* at 704.
[116] *Id* at 698.
[117] Joubert *The Law of South Africa* 3rd ed (LexisNexis, Durban 2012) vol 4 at para 480 and cases cited in fn 3; Cilliers *et al Herbstein & Van Winsen The Practice of the High Courts of South Africa* 5th ed (Juta & Co Ltd, Cape Town 2009) vol 2 at 1428 confirm that under the Roman-Dutch common law declaratory orders are available, "but only when there has been an interference with the right [or obligation] sought to be declared". The statutory provisions providing for declaratory relief do not exclude a court's residual common law competence to grant declaratory relief (*id* at 1429). Thus, in circumstances like the present, where there clearly "has been an interference with" the Minister's right or obligation to interfere or to abstain from interfering in banker-client relations, and where Oakbay expressly and repeatedly "appealed" to the Minister to procure the reinstatement of the closed bank accounts, a common-law case for declaratory relief is established.
[118] See e.g. Van Loggerenberg *Erasmus Superior Court Practice* 2nd ed (Juta & Co Ltd, Cape Town Service 2, 2016) vol 1 at A2–126.

49. In *Minister of Finance v Baberton Municipal Council* the Appellate Division granted a declaratory order against the Minister of Finance despite the absence of any authorising provision in the Union Act 1 of 1910.[119] Innes JA held that courts have a wide jurisdiction to grant also declaratory orders, despite explicit statutory authority.[120] Then, as now (but especially now), "[a] declaration of rights, in the administrative-law context, can be sought (either by an individual or a public authority) to determine the existence or scope of a statutory duty or to determine the public or private law rights of an individual *vis-à-vis* a public authority (or *vice versa*).[121]

50. In the administrative law context many reasons exist for relaxing the defunct requirement that a "concrete" violation of rights should exist (lest courts should pronounce on "abstract, hypothetical questions").[122] Particularly where public powers are concerned, questions of legality are a proper subject-matter for a declaratory order.[123] (This is further confirmed by this Court's Full Bench judgment in *Ex parte Prokureur-Generaal, Transvaal*. We address this judgment below. It clarifies the correct approach to the concern that courts should not act in advisory capacities.) As *Ex parte Nell* held and this Court confirmed, such concern is properly to be addressed by requiring that interested parties must exist on whom the declaratory order will be binding.[124] This simultaneously dispels any earlier suggestion (apparently advanced in some Witwatersrand Local Division decisions) that a party should simply refuse to appear before a public authority if he or she considers the

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[119] 1914 AD 335.
[120] *Id* at 355.
[121] De Ville *Judicial Review of Administrative Action in South Africa* revised 1st ed (LexisNexis, Durban 2005) at 348.
[122] Baxter *op cit* at 699-700.
[123] *Id* at 700.
[124] *Ex parte Prokureur-Generaal, Transvaal supra* at 19D-E.

power to be exercised unlawfully. This suggestion is therefore not only "a particularly clumsy prescription for social harmony" and "somewhat cynical."[125] It is also contrary to precedent.

51. The correct contemporary approach identified by academic commentators with reference to *inter alia* this Court's judgment in *Adbro Investment Co Ltd v Minister of the Interior*[126] is to give effect to a judicial policy in favour of construing a court's power to make declaratory orders liberally.[127] *Ex parte Nell* is an important loadstar. In essence, as *inter alios* Baxter confirms, "all that is required [to award declaratory orders] is that there be parties upon whom the order will be *binding*."[128]

52. This Court's judgment in *Ex parte Prokureur-Generaal, Transvaal* further confirms a judicial policy in favour of declaratory relief. The judgment demonstrates the proper approach to an application for declaratory relief at the instance of a public office-bearer seeking clarity regarding the statutory provisions governing its office. The declaratory order was granted even in circumstances where no party was immediately affected.[129] It sufficed that the declaratory order would provide future guidance to the applicant himself, his staff and the magistracy sufficed.

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[125] Baxter *op cit* at 700.
[126] 1961 (3) SA 283 (T) at 285.
[127] Baxter *op cit* at 701.
[128] *Ibid*.
[129] 1978 (4) SA 15 (T).

53. The most recent standard text on administrative law continues the post-constitutional trajectory. Hoexter refers in this regard to Constitutional Court caselaw, and describes declaratory relief as a "non-invasive", flexible remedy" which assists "in clarifying legal and constitutional obligations".[130] The "leading case" remains *Ex parte Nell*.[131] Its "only requirements" remain the existence of "interested parties on whom the order will be binding".

54. The declaratory orders' added constitutional importance, however, is that "it clarifies the legal position rather than requiring action to be taken", which has

> "advantages in a constitutional democracy … since it allows the court to state the law while leaving it to the other arms of government to decide how the law should best be observed."[132]

55. This overview of the development of declaratory relief in twentieth and twenty-first century South African law confirms what an early judgment of this Court already recognised. *Ex parte Farquhar* expressed a clear judicial policy favouring the encouragement of declaratory relief by South African courts (as is the case also in other jurisdictions), particularly in the context of the exercise of statutory powers by Government departments, Government officials, and public entities.[133]

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[130] Hoexter *Administrative Law in South Africa* 2nd ed (Juta & Co Ltd, Cape Town 2012) at 557-558, citing *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* 2005 (2) SA 359 (CC) at para 107.
[131] Hoexter *op cit* at 558.
[132] *Id* at 558-559, citing *Rail Commuters Action Group supra* at para 108.
[133] 1938 TPD 213 cited by Baxter *op cit* at 702.

(3) <u>The English approach confirms a general trend favouring declaratory relief</u>

56. Despite their initial reluctance, English courts now embrace declaratory relief.[134] It is now established as a remedy serving an important function in public law.[135] The operative test is whether a declaration is "just and convenient in all the circumstances of the case";[136] and it is the *locus standi* requirement which serves as restricting factor.[137] (As shown, this is the same criterion identified in *Ex parte Nell* as check on a court's discretion.) It is recognised that declaratory relief serves a "crucial function" in contemporary public law;[138] serves "a useful power" which over the course of the last hundred years it has become more and more extensively used";[139] and is "an innovation of a very important kind".[140]

57. Lord Woolf CJ explained the position in *Governor and Company of the Bank of Scotland v A Ltd* (a case concerning banks' duties in respect of suspicious transactions) thus

> "The wide power of the courts to give guidance to trustees is undoubted. However the court's ability to resolve disputes which could give rise to undesirable legal consequences is no longer restricted, if it ever was, to situations involving trusts. In his first Hamlyn lecture given in 1949, 'Freedom Under the Law', Sir Alfred Denning, as he then was,

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[134] Declaratory relief is provided for under section 31(2) of the Senior Courts Act, 1981. It provides

> "A declaration may be made … in any case where an application for judicial review, seeking that relief, has been made and the High Court considers that, having regard to (a) the nature of the matters in respect of which relief may be granted by mandatory, prohibiting, or quashing orders; (b) the nature of the persons or bodies against whom relief may be granted by such orders; and (c) all the circumstances of the case, it would be just and confenient for the declaration to be made".

[135] Fordham *Judicial Review Handbook* 6th ed (Hart Publishing, Oxford 2012) at 266; *Equal Opportunities Commission v Secretary of State for Employment* [1994] 1 All ER 910 (HL) at 926.

[136] Zamir & Woolf *The Declaratory Judgment* 2nd ed (Sweet & Maxwell, London 1993) at 116-117.

[137] *Equal Opportunities Commission v Secretary of State for Employment* [1994] 1 All ER 910 (HL) at 926, observing that "many of the most recent developments in public law were made in such civil actions brought to obtain declaratory relief only: see, for example, *Ridge v Baldwin* [1963] 2 All ER 66, [1964] AC 40, *Anisminic Ltd v Foreign Compensation Commission* [1969] 1 All ER 208, [1969] 2 AC 147".

[138] *Governor and Company of the Bank of Scotland v A Ltd* [2001] EWCA Civ 52; (2001) 1 WLR 751 at para 45.

[139] *Gouriet v Union of Post Office Workers* [1978] AC 435 at 501C-D.

[140] *Id* at 513G.

> identified the challenge facing the court as being to develop 'new and up-to-date machinery' (p 116). The first element of the machinery identified in the lecture was the remedy of declaratory relief. The court's power to make a declarion (or 'declaration of right' was derived from the Court of Chancery and was originally supposed to be restricted to declaratory judgments as to existing private rights (see *Guaranty Trust Company of New York v Hannay* [1915] 1 KB 536, which sets out the early history). Sir Alfred Denning saw the need to develop its scope in order to control the abuse of executive power, and over the half-century which has elapsed since his lecture it has performed a crucial function in the emergence of the modern law of judicial review. The development of declaratory relief has not however been confined to judicial review. Doctors and hospitals have increasingly been assisted by the ability of the courts to grant advisory declarations. …".[141]

58. The Woolf Report on Access to Justice already identified the need for advisory declaratory orders in the public interest, if an issue of public importance is raised, the order sought is in sufficiently precise terms, and the appropriate parties are before court.[142] English courts, too, have confirmed that "there is a plain public interest in … entertaining what has become an application for an advisory declaration";[143] and applications for declaratory relief are regularly entertained in the public interest in circumstances.[144] Even in cases where courts have cautioned that so-called "*advisory* declarations" should not be over-used, this was to emphasised their "essential purpose" – which is "to reduce the danger of administrative activities being declared illegal retrospectively" and "to assist public authorities by giving advice on legal questions which is then binding on all".[145]

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[141] *Governor and Company of the Bank of Scotland v A Ltd* [2001] EWCA Civ 52; (2001) 1 WLR 751 at para 45.
[142] Woolf Report *Access to Justice* (1996) at 252.
[143] *R (Customs and Excise Commissioners) v Canterbury Crown Court* [2002] EWHC 2584 (Admin) at para 27, per Laws LJ.
[144] See e.g. Fordham *op cit* at 269, citing *inter alia London Borough of Islington v Camp* (1999) [2004] LGR 58; and *P v P (Ancillary Relief: Proceeds of Crime)* [2003] EWHC 2260 (Fam), regarding declaratory relief clarifying a legal adviser's duties in respect of assets forming the proceeds of crime.
[145] *R (Campaign for Nuclear Disarmament) v Prime Minister* [2002] EWHC 2759 (Admin); [2003] LRC 335 at para 46.

59. Thus, in short, the English comparative experience demonstrates that declaratory orders are important and gaining in importance – particularly in public law, as they are "in the regulatory activities of the financial institutions".[146] Therefore Lord Atkin's 1919 observation that granting declaratory relief is "one of the most valuable contributions that the courts have made to the commercial life of this country" applies more than ever before.[147] Now it occurs "[f]requently, in the public law field, [that] even where a defence is abandoned, the grant of a declaration can provide clarification as to the law which will be of value in the future and so the court may be ready to grant [declaratory] relief."[148]

(4) <u>Southern African approach to declaratory relief</u>

60. The highest courts in other comparable jurisdictions adopt the same approach.[149] For instance, in *Ex parte Chief Immigration Officer, Zimbabwe* Gubbay CJ applied *inter alia* English caselaw.[150] These include Lord Denning MR's judgment in *Merrick v Nott-Bower* (in which the court concluded that despite a delay of six-and-a-half years declaratory relief

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[146] Zamir & Woolf *The Declaratory Judgment* 2nd ed (Sweet & Maxwell, London 1993) at 296.

[147] *Spettabile Consorzio Veneziano di Armarto v Northern Ireland Shipbuilding Co Ltd* (1919) 121 LT at 635, cited in *Gouriet v Union of Post Office Workers* [1977] All ER 111.

[148] Zamir & Woolf *op cit* at 140, citing *R v Nottingham Mental Health Review Tribunal, ex parte Secretary of State for the Home Department* The Times (13 March 1987); *R v Birmingham Juvenile Court, ex parte Birmingham City Council* [1988] 1 WLR 337; *R v Dartmoor Visitors, ex parte Smith* [1987] 1 QB at 115; *Grant v Knaresborough Urban District Council* [1928] Ch 310.

[149] *Southern Engineering v Council of the Municipality of Windhoek* 2011 (2) NR 385 (SC) at para 49, approving *Ex parte Nell* in Namibia. The Supreme Court further demonstrates what is generally understood as the type of circumstances in which (under the established South African and Southern African caselaw) a declarator will be inappropriate. It is "[w]here an order does no more than restate general principles of law, and does not determine any existing, future or contingent right". See, too, *Mahe Construction (Pty) Ltd v Seasonaire* 2002 NR 398 (SC) at 410G (pointing out that section 16(d) of the Namibian High Court Act 16 of 1990 is similar to section 19(1)(iii) of the South African Supreme Court Act) and *CDM (Pty) Ltd v Mineworkers Union of Namibia* 1994 NR 360 (HC) at 362H-I: "Moreover, the issue in dispute is also of considerable public importance as well as being imperative to the parties for certainty and clarity to be authoritatively determined insofar as the interpretation of s 81(6) is concerned, so that applicant and respondent or any employer and employee for that matter may be able to regulate their future conduct accordingly."

[150] 1994 (1) SA 370 (ZSC).

nonetheless may serve a useful purpose in the public interest);[151] and *Grant v Knaresborough Urban Council* (where a declaratory order was granted despite the defendant withdrawing its defence).[152]

61. Gubbay CJ also applied South African law, observing that section 14 of the High Court of Zimbabwe Act "is in virtually identical terms to the provisions of section 19(1)(c) of the South African Supreme Court Act 59 of 1959, and its precursor, section 102 of Act 46 of 1995."[153] Thus *Ex parte Nell* arose for analysis. Gubbay CJ reiterated that *Ex parte Nell* presents "a marked departure" from the previous "long series of decisions", rendering otiose the paradigm that "in the exercise of the jurisdiction conferred [to grant declaratory relief], there must be an existing and concrete dispute between the parties, albeit as to the future or contingent rights, before the Court will act under section 102."[154] Gubbay CJ confirmed, as the Supreme Court of Appeal itself subsequently did,[155] that *Ex parte Nell* "expressly held that an existing dispute was not a prerequisite for the exercise by the Court of its discretion to make a declaratory order."[156]

62. Gubbay CJ also cited, translated and applied a significant passage in *Ex parte Nell*. It reads

> "The need for such an order can pre-eminently arise where the person concerned wished to arrange his affairs in a manner which could affect other interested parties and where an

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[151] [1964] 1 All ER 717 (CA).
[152] [1928] Ch 319.
[153] *Ex parte Chief Immigration Officer, Zimbabwe supra* at 376E/F.
[154] *Id* at 376E/F-F.
[155] In *inter alia* cases like *West Coast Rock Lobster Association v Minister of Environmental Affairs and Tourism* [2011] 1 All SA 487 (SCA) at para 45; and *Cordiant Trading supra*. The most recent reported SCA judgment applying *Ex parte Nell* is *Tshwane City v Mitchell* 2016 (3) SA 231 (SCA) at para 23. It upholds declaratory relief granted by this Court despite the declarator dealing with the a "historical debt".
[156] *Ex parte Chief Immigration Officer, Zimbabwe supra* at 376F/G-G.

> uncertain legal position could be contested by one or all of them. It is more practical, and the interests of all are better served, if the legal question can be laid before a court even without there being an already existing dispute."[157]

63. Citing a number of judgments by this Court, Gubbay CJ added that it is not even a requirement for declaratory relief that there be an opponent.[158] All that is required is that there be interested parties upon whom a declaratory order is binding.[159] A Court may therefore determine an applicant's rights or duties without pronouncing on the respondent's rights or obligations.[160]

64. Applying these principles the Supreme Court of Zimbabwe held that the Chief Immigration Officer was indeed an "interested part[y] upon whom the declaratory order would be binding".[161] Therefore the question raised in the application for declaratory relief was "not purely academic but of real and practical consequence".[162] This was because the applicant in that matter "wants to be certain of the precise extent of the powers and obligations of his officers" in relation to two individuals (Mr and Mrs O'Hara).[163]

65. On the basis of these cases and principles the Supreme Court of Zimbabwe concluded that the declaratory relief should be granted. This answered the two questions raised in the appeal. The first was "Does it disable the applicant from obtaining relief in the form of a declaratory order because there is no longer a live dispute between him and the

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[157] *Id* at 376G-H.
[158] *Id* at 376H.
[159] *Id* at 376H/I.
[160] *Id* at 376H/I-I.
[161] *Id* at 376B/C.
[162] *Id* at 376B/C.
[163] *Id* at 376A/B.

O'Haras?"[164] It clearly did not. The second was whether it was "permissible to grant a party a declaratory order whose opponent has left the arena of conflict?".[165] It clearly was.

66. In short, comparative caselaw like *Ex parte Chief Immigration Officer, Zimbabwe* demonstrates the correct application of *Ex parte Nell*. It confirms that "[w]here the matter [i]s one of public importance affecting the functioning of a department of state and the rights of a number of individuals with whom that department dealt" courts do grant declaratory orders.[166]

67. Each of Oakbay's bases of opposition and even its dilatory joinder points is inconsistent with the correct legal position.

D. <u>Oakbay's bases of opposition</u>

68. The Minister's replying affidavit addresses Oakbay's answering affidavit (which argumentatively advances its grounds of opposition), exhaustively.[167] We therefore respectfully request that the replying affidavit be read separately. It shows that Oakbay's contentions are factually unfounded. In what follows we amplify the replying affidavit with reference to the relevant legal principles and precedents, to the extent that this remains necessary.

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[164] *Id* at 374G/H.
[165] *Id* at 374H.
[166] Cilliers *et al Herbstein & Van Winsen The Practice of the High Courts of South Africa* 5th ed (Juta & Co Ltd, Cape Town 2009) vol 2 at 1441.
[167] Record vol 14 pp 1320-1376.

(1) <u>First ground of opposition: Declaratory relief is "impermissible"</u>

69. As mentioned, Oakbay's first ground of opposition is that the relief is impermissible. This is, Oakbay alleges, because "no dispute" between the parties exists – a fact the Minister "has been aware" of "since 24 May 2016",[168] Oakbay claims. Oakbay argues that because "the Minister has not offered any legally cogent explanation for what is so unique about the current situation",[169] therefore "[o]n the Minister's own version, there is nothing in the Oakbay Group's situation that justifies this application".[170] On this basis Oakbay asks for the dismissal of the application.[171]

70. The first ground of opposition is legally flawed in each of its constitutive parts. Firstly, as we have shown, the existence of a dispute is not a requirement for declaratory relief. Second, as we have also shown, Oakbay itself has consistently requested the Minster to intervene well after 24 May 2016. And even after this application was lodged Oakbay failed to confirm that it would accept its attorney's advice that this application should be conceded. In the event it was and is strenuously opposed. Thirdly, the fact that the Minister's powers not *unique* to Oakbay does not defeat the Minister's application; instead, it confirms that it is in the public interest that legal certainty be obtained. It also shows that the issue is not abstract or academic: it is raised in the concrete and actual circumstances

[168] Record vol 11 p 998 para 6.
[169] Record vol 11 p 998 para 6. Oakbay however considers its own interests "a matter of national priority" (Record vol 11 p 1013 para 49).
[170] Record vol 11 p 998 para 6.
[171] Record vol 11 p 998 para 6.

of the closure of real bank accounts, to which Oakbay objects openly in public discourse – announcing also its own intended litigation.

71. It is accordingly *Oakbay*'s "own version" which is dispositive: it accepts that the Minister is indeed the executive authority responsible for the financial sector, the banking industry and the economy. The declaratory relief will indeed bind the Minister, who indeed has a direct and substantial legal interest in the legal position regarding his own powers and duties as they arise in the circumstances to which prayer 1 of the notice of motion (which formulates the declaratory relief which is sought) refers. Therefore the requirements in *Ex parte Nell* are met. There are, furthermore, no abstract, academic or hypothetical issue which warrants any exercise of the Court's discretion against granting the relief.

(2) <u>Second ground of opposition: Separation of powers</u>

72. Oakbay tentatively refers to "the separation of powers (under the Constitution)" [sic].[172] If this is to be understood as a genuine ground of opposition, then the Constitutional Court caselaw to which we have already referred is a complete answer. As mentioned, in *Rail Commuters* the Constitutional Court confirmed

> "… A declaratory order is a flexible remedy which can assist in clarifying legal and constitutional obligations in a manner which promotes the protection and enforcement of our Constitution and its values. Declaratory orders, of course, may be accompanied by other forms of relief, such as mandatory or prohibitory orders, but they may also stand on

[172] Record vol 11 p 1010 para 43.

> their own. In considering whether it is desirable to order mandatory or prohibitory relief in addition to the declarator, a court will consider all the relevant circumstances.
>
> It should also be borne in mind that declaratory relief is of particular value in a constitutional democracy which enables courts to declare the law, on the one hand, but leave to the other arms of government, the Executive and the Legislature, the decision as to how best the law, once stated, should be observed."[173]

73. There is accordingly no separation of powers problem. It is the role of the Court to declare the law.[174] This is what the Minister seeks. There is accordingly no coherence in the crass adjuration that the Minister's application may precipitate "weak-kneed political officials" approaching the courts to decide for them *how* to exercise their powers.[175] This application concerns *whether* the power or duty exists <u>in law</u>, not whether or how it is to be exercised. It requires a legal determination by the Court, not a "political judgment".[176]

74. Appealing to the Minister for "political" intervention when the law does not permit this (and in circumstances where Oakbay now claims it has long since accepted this) only serves to demonstrate the necessity for declaratory relief. And if it is so that Oakbay perceives "political officials" as "too scared"[177] to grant or refuse Oakbay's approaches, then the consequences are clear: the public interest, the interests of justice, the rule of law, and the separation of powers all militate strongly in favour of the judiciary performing its correct constitutional function. It is to declare the law. This will establish to what extent

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[173] *Supra* at paras 107-108.
[174] *Minister of Health v Treatment Action Campaign (No 2)* 2002 (5) SA 721 (CC) at para 99.
[175] Record vol 11 p 1010 para 43.
[176] Record vol 11 p 1011 para 44.
[177] Record vol 11 p 1010 para 43.

such "appeals" may or may not be entertained – lest human "weakness" or "fear" affects "sensitive political and policy matters", as Oakbay apparently prefers.

(3) <u>Third ground of opposition: Political conspiracy</u>

75. Oakbay's final defence is a fabrication. It alleges a political plot by the Minister against the Guptas.[178] Oakbay's answering affidavit also seeks to describe (under the heading "parties to the dispute") the Guptas as the "target" of this application,[179] but simultaneously complains that they are not cited.[180] This is unsurprising: no relief is sought against them.

76. What is surprising is that Oakbay now advances a conspiracy theory which finds no footing in the papers. Neither the court papers nor even the newspapers, some of which the Gupta own, provide any credible basis for this extraordinary claim. No admissible evidence supports it.[181] It is, as noted, entirely inconsistent with Oakbay's own perpetual "appeals" to the Minister and the Minister's own attempts to provide such assistance to Oakbay as he could.

77. Other than its effect on costs and the Minister's strike-out application (which we address separately below), nothing more needs be said about these scurrilous allegations – other than that the replying affidavit demonstrates that they are entirely untenable.

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[178] Record vol 11 p 1022 para 70*ff*.
[179] Record vol 11 p 1001 para 13.
[180] Record vol 11 p 999 para 9.
[181] Record vol 14 p 1341 para 75.

E. Application of the governing legal principles to the Minister's application

78. Having addressed what Oakbay incorrectly presents as ousters of the Court's jurisdiction to grant declaratory relief, the application of the correct principles can briefly be demonstrated with reference to what appears to be the closest analogous case. It is a Full Bench judgment by this Court, to which we have already referred: *Ex parte Prokureur-Generaal, Transvaal*.[182]

79. As in *Prokureur-Generaal, in casu* the applicant is clearly an interested person. For the Minister is, as Oakbay's own correspondence pertinently pointed out,[183] the responsible executive authority for the financial sector and the economy. Furthermore, the declaratory relief explicitly relates to the Minister's powers and duties.[184] Therefore, as in *Ex parte Prokureur-Generaal*,[185] there cannot be any tenable contention that the Minister is not a person interested in his own rights or obligations.

80. Furthermore, as in *Ex parte Prokureur-Generaal*, this case concerns public law powers and obligations; and the closure of bank accounts is a matter which – on the papers – occurs frequently in comparable banking sectors throughout the world.[186] Whether the Minister may interfere in such situations is therefore, as this Court held in *Ex parte Prokureur-*

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[182] *Supra* at 19G.
[183] Record vol 1 p 52 line 5.
[184] Record vol 1 p 2 prayer 1.
[185] *Supra* at 20B.
[186] See e.g. Record vol 1 p 49 lines 15-23.

Generaal, of an "exceedingly actual nature".[187] It is not in the least capable of being described as hypothetical, academic or abstract.

81. Accordingly, as in *Ex parte Prokureur-Generaal*,[188] there is therefore also in this case no basis to exercise any discretion against the Minister.

82. But even had there been any merit in Oakbay's allegation that the declaratory relief has become academic, then the correct manner to exercise the discretion *which then* <u>*still*</u> *exists* is as determined by the Supreme Court of Appeal. In *Qoboshiyane v Avusa* Wallis JA set out the correct approach thus

> "The court has a discretion in that regard and there are a number of cases where, notwithstanding the mootness of the issue as between the parties to the litigation, it has dealt with the merits of an appeal. With those cases must be contrasted a number where the Court has refused to deal with the merits. The broad distinction between the two classes is that in the former a discrete legal issue of public importance arose that would affect matters in the future and on which the adjudication of this court was required, whilst in the latter no such issue arose."[189]

83. In *Tlouamma v Speaker of the National Assembly*[190] a Full Bench of the Western Cape High Court unanimously held that the same approach applies to "mootness" in exercising a court's discretion under section 21(1)(c) of the Superior Courts Act to grant a declaratory order.[191] Oakbay explicitly invokes what it contend is the "moot" nature of this

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[187] *Id* at 20C/D, our translation ("uiters wesenlike aard").
[188] *Id* at 20E/F.
[189] *Qoboshiyane NO v Avusa Publishing Eastern Cape (Pty) Ltd* 2013 (3) SA 315 (SCA) at para 5.
[190] 2016 (1) SA 534 (WCC) at paras 101-103.
[191] *Id* at para 101.

application.[192] It contends that because it "agree[s] with the statement" set out in prayer 1 of the notice of motion, "therefore this Court need not proceed any further".[193] This is demonstrably inconsistent with the correct two-step approach. As mentioned, it provides that once the Court is satisfied that the applicant is a person interested in an "existing, future or contingent right or obligation", the court *must* go further and decide whether to exercise its discretion.

84. Applying this approach the question is whether the Minister's application for declaratory relief raises "a discrete legal issue of public importance" "that would affect matters in the future" and requires "the adjudication of this Court".[194] Clearly it does, because

- the legal issue is, as Oakbay itself concedes,[195] "narrow" (in other words, "discrete");
- the public importance of this case is overwhelming, as Oakbay itself asserted (in requesting the Minister to act in the "national interest") and as *inter alios* the Governor of the Reserve Bank confirmed;
- future matters will indeed be affected by the declaratory relief, because if it is granted the Minister will not be permitted to interfere in banks' closure of accounts pursuant to the governing legal regime;

[192] Record vol 11 p 1010 para 42.
[193] Record vol 11 p 1009 para 40.
[194] See, too, *Minister of Justice and Constitutional Development v Southern Africa Litigation Centre* 2016 (3) SA 317 (SCA) at para 23: "The usual ground for exercising that discretion in favour of dealing with it on the merits is that the case raises a discrete issue of public importance that will have an effect on future matters".
[195] Record vol 14 p 1341 para 68.

- an authoritative pronouncement by this Court is required, because the matter is *res nova*; it generates continuous "appeals" to the Minister; and it has already resulted in inconsistent conduct by two other senior cabinet members.

85. In a public law context the Constitutional Court's approach in cases like *Tulip Diamonds*[196] and the Supreme Court of Appeal's approach in *Oudekraal*[197] must necessarily also influence this Court's exercise of its discretion whether to grant declaratory relief. So must the interests of justice criterion, which is the overriding consideration in the exercise of superior courts' powers.[198] The Minister's founding affidavit demonstrates that the interests of justice indeed support granting the declaratory relief.[199] Oakbay made no coherent attempt to traverse or deny this.

86. Thus, on any approach, the declaratory order should be granted.

F. <u>The formulation of the declaratory order</u>

87. The final aspect on the merits which remains to be addressed is the terms of the declaratory order.

88. None of the other parties opposes the formulation of the declaratory relief set out in the Minister's notice of motion. It is accepted by the Governor of the Reserve Bank, the

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[196] *Tulip Diamonds FZE v Minister of Justice and Constitutional Development* 2013 (10) BCLR 1180 (CC).
[197] *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 (6) SA 222 (SCA).
[198] Section 173 of the Constitution; *Mukaddam v Pioneer Foods (Pty) Ltd* 2013 (5) SA 89 (CC) at para 42.
[199] Record vol 1 p 20 para 30.

Registrar of Banks, the Director of the Financial Intelligence Centre, each of the four commercial banks, and each of the Oakbay entities that the Minister indeed has no legal power or duty to intervene in the relationship between the banks and the Oakbay respondents in respect of the closing of their accounts. This is all that the declaratory order which the Minister seeks provides.

89. Nothing in the Constitution, the Public Finance Management Act, the Banks Act or any other legislation, regulation or common law authority authorises ministerial intervention. The Reserve Bank itself confirms that the same applies to it: there is no legal provision which entitles the Reserve Bank to interfere in the relationship between banks and their clients.[200] The Registrar of Banks similarly confirms the same in respect of himself.[201] *A fortiori*, then, the same should apply to the Minister of Finance, because if the primary regulator has no power of intervention then the political head overseeing the entire financial sector will have even less legal authority to do so.[202]

90. The application of the constitutional principle of legality in these circumstances is clear: absent expressed or implied authority, the Minister has no power to act.[203] There is no express authority. In order to infer a power in the absence of an express authorising provision, the ancillary implied power must be <u>necessary</u> in order to give effect to the

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[200] Record vol 7 p 605 para 9.
[201] Record vol 7 p 620 para 7; Record vol 7 p 627 para 32.
[202] This is a manifestation of the principle of subsidiarity, as regards which see *My Vote Counts NPC v Speaker of the National Assembly* 2016 (1) SA 132 (CC), especially para 46: "Subsidiarity denotes a hierarchical ordering of institutions, of norms, of principles, or of remedies, and signifies that the central institution, or higher norm, should be invoked only where the more local institution, or concrete norm, or detailed principle or remedy, does not avail."
[203] *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC) at para 56.

primary power expressly conferred.[204] Furthermore, in order to imply text into any legal provision (empowering or otherwise), the strict twofold test established in *Rennie NO v Gordon NNO* must be satisfied.[205] This requires that apart from being *necessary*, the words sought to be implied "must [also] be precise and obvious". There is no precise and obvious formulation to be read into any existing or non-existing empowering provision. Therefore *nihil ex nihilo*: no ancillary power can be implied where there is not even a primary power. Just as the Minister cannot procure the *opening* of a private bank account, he cannot procure the *closing* of a bank account – less still does the Minister have any power to intervene to reverse the closing of a bank account.

91. Furthermore, as the banks' affidavits have demonstrated, reading in any such power would conflict with the existing regulatory regime. It may expose both the banks and (indirectly) Government to very substantial penalties by foreign regulators, contradict the principles governing de-risking, and compromise banks' ability to participate in the international financial market. This could be disastrous for the economy.

92. Furthermore, we are not aware of any judgment anywhere in the world where a power to intervene in the closure of bank accounts has been implied. The closest a South African court has come to reading-in any provision in the Banks Act is *Alpha Bank Bpk v Registrateur van Banke*.[206] In this case the Supreme Court of Appeal considered the previous and the current Banks Act, and considered the Minister's and the Registrar's

[204] *Masetlha v President of the Republic of South Africa* 2008 (1) SA 566 (CC) at para 68.
[205] 1988 (1) SA 1 (A) at 22E-H.
[206] 1996 (1) SA 330 (A).

powers under these statutes. The Court held that there was no basis for the reading-in proposed by the applicant, because it would depart from the rest of the statutory scheme and require a drastic word-changing construction of the legislation.[207] This demonstrates the correct application of the ordinary principles regarding *vires* and reading-in as they apply in the context of financial sector legislation.

93. A most recent reported Supreme Court of Appeal judgment on the exercise of public powers by National Treasury is *National Treasury v Kubukeli*.[208] It, too, contains nothing which even remotely supports any implied power or obligation to intervene in the closure of bank accounts.

94. In *South African Reserve Bank v Shuttleworth*[209] the Constitutional Court dealt with powers of the national executive to fulfil its "responsibility to secure a stable currency within a good and prospering economy".[210] What is clear from *Shuttleworth* is that where the legislature intends to confer powers on the national executive, it does so – in that case it conferred, the Constitutional Court held, exceptionally broad powers.[211] But such powers were justified, the Constitutional Court concluded, in the context of the "exceptional significance of the issue".[212] The regulation of the banking sector and compliance with national and international regulations to keep the financial system operative likewise involve an issue of exceptional significance. In these circumstances Parliament's silence

[207] *Id* at 349H/I-I/J.
[208] 2016 (2) SA 507 (SCA).
[209] 2015 (5) SA 146 (CC).
[210] *Id* at para 71.
[211] Indeed, the Constitution itself explicitly confers powers on the Minister of Finance in certain circumstances (*id* at para 41).
[212] *Id* at para 70.

on any power of intervention on the part of the Minister of Finance is inconsistent with reading-in a power for which Parliament did not expressly provide.

95. In the light of these principles, the evident absence of any statutory empowering provision (or common-law source empowering the Minister), and each of the parties' confirmation that the Minister's proposed declaratory order accurately reflects the law, the Court is therefore asked to declare the legal position as formulated in prayer 1 of the Minister's notice of motion.

G. Ancillary procedural issues: Joinder and strike out

96. Three residual issues remain: Oakbay's allegations regarding joinder; Oakbay's strike out application; and the Minister's strike-out application. We deal with each in turn.

(1) Oakbay's first procedural point: Joinder

97. Oakbay takes the points of misjoinder and non-joinder. On the one hand, it is alleged that the Minister's citation of respondents is under-inclusive; on the other hand, Oakbay alleges that it is over-inclusive.[213] These points are, of course, merely dilatory.[214] They are correctly not taken *in limine*.

[213] Record vol 11 p 1003 para 20.
[214] *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A) at 663.

98. The Minister's declaratory relief clearly identifies only those parties in respect of whom it seeks declaratory relief regarding the closure of their bank accounts. To the extent that *other* entities' bank accounts have been closed, they are not bound by the relief sought. Therefore such other entities do not have a direct and substantial interest in the relief.[215] They are accordingly not necessary parties, their non-citation does *not* constitute non-joinder, and Oakbay is not in a position to take this point.[216]

99. To the extent that individuals whose bank accounts have not been closed are contended to be parties who should have been joined, this is contrary to law. After *National Director of Public Prosecutions v Zuma* there is no scope for any genuine suggestion that the President and anyone else who may marginally be mentioned in any of the papers or annexures should have been joined.[217]

100. On the other hand, to the extent that any of the cited respondents have not had their bank accounts closed, the answer is simply that the declaratory relief is to be restricted to the rest of the Oakbay respondents. The banks' affidavits demonstrate that the first, third, sixth, seventh, tenth, eleventh, twelfth and fourteenth respondents were banked by Standard Bank;[218] the fourth, eleventh and fourteenth respondents were banked by FNB;[219] the first, tenth, eleventh, twelfth and fourteenth respondents were banked by Nedbank;[220] and the first, second, third, sixth, seventh, eleventh, twelfth and fourteenth respondents were

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[215] *Milani v South African Medical and Dental Council* 1990 (1) SA 899 (T) at 902F-903G.
[216] *Standard Finance Corporation of South Africa Ltd (In Liquidation) v Langeberg Ko-Operasie Bpk* 1967 (4) SA 686 (A) 705A/B-706A/B; *Pillay v Harry* 1966 (1) SA 801 (D) at 804A-805G.
[217] 2009 (2) SA 277 (SCA) at paras 84-87.
[218] Record vol 3 p 223 para 2.
[219] Record vol 2 p 100 para 100.
[220] Record vol 2 p 130 para 10.

banked by Absa.[221] None of this is disputed by the Oakbay respondents.[222] Accordingly it is only the fifth, eighth, ninth, and thirteenth respondents to which any point of misjoinder might apply. To meet this point, even were it to be good, the declaratory relief may simply omit any reference to these respondents.

101. As regards the fifth respondent, however, Oakbay correctly identifies Westdawn Investments (Pty) Ltd as the intended entity.[223] To the extent that this may be necessary, this is a mere matter for formal correction. The fifth respondent demonstrably suffered no prejudice, because Oakbay's main answering affidavit deals expressly with JIC Mining Services 1979 (Pty) Ltd and Westdawn Investments (Pty) Ltd.[224] As Oakbay itself explains, the latter's trading name is virtually identical to the former – hence the citation. There has been no confusion of the actual identity of the parties. Each of the Oakbay respondents, including "JIC" (as Oakbay itself refers to "Westdene Investments (Pty) Ltd t/a JIC Mining"),[225] is well aware of the identity of the fifth respondent.[226] It would not have filed a separate answering affidavit had it been cited differently.[227]

102. The same applies to the ninth respondent. Oakbay itself identifies its formal designation as "Africa News Network (Pty) Ltd".[228] Should Oakbay persist in this point, it too is capable of being addressed by a formal amendment to be filed in due course.

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[221] Record vol 6 p 500 para 4.
[222] Record vol 11 p 1003 para 20 indeed appears to restrict the allegation of "misjoinder" to these respondents.
[223] Record vol 11 p 1004 para 25.
[224] Record vol 11 pp 1004-1005 paras 26-27.
[225] Record vol 11 p 1005 para 26.
[226] Record vol 14 p 1336 para 52.
[227] Record vol 14 p 1336 para 51.
[228] Record vol 11 p 1006 para 31.

(2) <u>Oakbay's "final procedural point": Strike out</u>

103. Oakbay's strike out application relates to two paragraphs in the Minister's founding affidavit and two annexures to the founding affidavit.[229]

104. The first paragraph is sought to be struck out on the basis that it is "patently false" that Oakbay sought the Minister's intervention regarding the banks' closure of Oakbay's bank accounts.[230] As we have shown, it is actually Oakbay's answering affidavit which is "patently false". It is contradicted by *inter alia* Sahara's CEO's letter explicitly referring to "further appeals to you [the Minister] regarding the reopening of Oakbay's bank accounts."[231] This letter was introduced in the Minister's founding affidavit, which described it as a further example of Oakbay "pressing" the Minister.[232] There is accordingly no merit in the attempt to strike out paragraph 19 of the founding affidavit. The conclusion in paragraph 19 is supported by *inter alia* paragraph 18 of the founding affidavit – which is not traversed, denied, or itself sought to be struck out.

105. The second paragraph sought to be struck out (also *in toto*) is the one introducing annexures P1 and P2. (These annexures are themselves the separate subject matter of the purported strike out application.) Oakbay's founding affidavit does not identify on what basis paragraph 27 of the Minister's founding affidavit is sought to be struck out.[233]

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[229] Record vol 11 pp 1037-1038 paras 115-115.3; Record vol 13 pp 1193-1197.
[230] Record vol 11 p 1037 para 115.1; referring to Record vol 1 p 15 para 19.
[231] Record vol 1 p 67 lines 2-3.
[232] Record vol 1 p 15 para 18.
[233] Record vol 11 pp 1037-1038 para 115.2.

Whereas paragraph 19 is alleged to be "patently false", it is not suggested on what basis paragraph 27 is suggested to be liable to being struck out. The contents of the paragraph are supported by its annexures; the annexures were indeed obtained from FIC, as FIC itself confirms (and Oakbay accepts);[234] and the FIC Act provides that such documents suffice as proof of their content in civil proceedings.[235] There is accordingly no basis for striking out paragraph 27. Oakbay correctly suggests none. It is an undeniable fact that the certificate reflects that there had been 72 reports of suspicious transactions, some of which in the amounts of billions of rands. This indeed suggests an "increasingly serious state of affairs."

106. The final target of Oakbay's purported strike-out application is what its answering affidavit describes as "annexure P".[236] The founding affidavit describes it as "the certificate purportedly issued in terms of section 39 of the FICA Act and which purports to record 72 'suspicious transaction reports' which were reported to the Financial Intelligence Centre under the FIC Act."[237] As mentioned, this certificate has a statutory status. The exercise of the statutory power to issue it has not been attacked. Nor has the certificate. Nor has the FIC Act, which authorises the certificate and provides for its evidential effect. The certificate is therefore "intact and valid".[238] Accordingly the consequences Parliament attributed to it by national legislation must be afforded to it: the certificate is admissible as evidence of its contents. Its contents indeed demonstrate the increasingly serious state of

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[234] Record vol 11 p 1038 para 115.3.
[235] Section 39 of the Financial Intelligence Centre Act 38 of 2001.
[236] Record vol 11 p 1038 para 115.3.
[237] Record vol 11 p 1038 para 115.3.
[238] *South African Reserve Bank v Shuttleworth* 2015 (5) SA 146 (CC) at para 32. See, too para 38, applying *Oudekraal* and *Kirland* in the context of financial sector legislation. The effect is that the exercise of a statutory power stands until it is successfully set aside.

affairs. The state of affairs is not abstract. The long list of suspicious transactions is quite concrete. It provides the context in which the Minister was asked to assist Oakbay to reverse the closure of its bank accounts.[239] Whether the Minister has any power or duty to do so is the subject-matter of the declaratory relief. Highly relevant to this relief is the context in which the accounts were closed. That further suspicious transaction reports followed yet more frequently even *after* the closure of the accounts is itself a highly significant fact. Yet Oakbay argues that the certificate is "irrelevant". (Significantly Oakbay does not allege that it is "patently false".) The contention is untenable.

107. Nonetheless, by contending that the certificate "has no bearing on the relief which is sought in this application",[240] Oakbay accepts that the declaratory relief may be granted even without "annexure P". On Oakbay's own approach this renders Oakbay's separate application against FIC irrelevant,[241] and renders the argumentative contentions regarding the regulatory instruments redundant.[242]

(3) <u>The Minister's strike-out application</u>

108. As mentioned, Oakbay advanced unsubstantiated allegations accusing the Minister of a political conspiracy against the Guptas. Each of these allegations is liable to be struck out

[239] Record vol 14 p 1336 para 49.
[240] Record vol 11 p 1038 para 115.3.
[241] Record vol 11 p 1039 para 118: "The Oakbay Group is of the view that the exposition provided by the Minister and the Banks on local and international Banking Law is irrelevant for purposes of the application."
[242] These comprise Record vol 11 pp 1039-1061 paras 118-186.

on the basis that they are based on hearsay, and are irrelevant, vexatious and scandalous. They prejudice the Minister in the conduct of this case and are also generally defamatory.

109. There has been no attempt to make out a case that the inadmissible and scurrilous contentions somehow qualifies for inclusion in court papers under the Law of Evidence Amendment Act.[243] As the Constitutional Court held, burdening court papers with "hearsay, opinion, speculative, scandalous and vexatious evidence is conduct that must be discouraged".[244] This is to be done by striking out the offensive material, with an appropriate costs order.

H. <u>Conclusion: Appropriate relief and costs</u>

110. Oakbay's opposition was unreasonable. By its own admission Oakbay opposed this application for extraneous purposes: to construct a conspiracy theory.

111. The declaratory relief is accepted by all parties as correctly formulated. Oakbay's acceptance of this now does not constitute a defence. Oakbay's twisting and hedging on the issue indeed point to the need for an end to be made to its prevarication. The issue is important, as the affidavits of the independent regulators as well as the banks confirm. A crucial organ in the international economy is affected. In the circumstances of this case the interests of justice clearly call for the definitive ruling of this Court. Therefore we ask that the application be granted.

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[243] Act 45 of 1988.
[244] *Helen Suzman Foundation v President of the Republic of South Africa* 2015 (2) SA 1 (CC) at para 37.

112. The unreasonableness of Oakbay's conduct in this litigation justifies a punitive costs order against it.[245] The costs order should, furthermore, include the costs of two counsel. This is justified in the light of the importance and scope of this case – for which Oakbay is entirely responsible. It rejected the Minister's invitation to withdraw its opposition.

113. Finally, the Minister's strike-out application should be granted with costs. These, too, should be on a punitive scale and should include the costs of two counsel. Oakbay's strike out application, on the other hand, falls to be dismissed with costs, including the costs of two counsel.

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10 February 2017

[245] *In re Alluvial Creek Ltd* 1929 CPD 532 at 535; *Boost Sports Africa (Pty) Ltd v South African Breweries (Pty) Ltd* 2015 (5) SA 38 (SCA) at para 27.