COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No:IR153Dec21

In the matter between:

Mohammed Iqbal Survé	First Applicant
Sekunjalo Investment Holdings (Pty) Ltd	Second Applicant
African Equity Empowerment Investment Ltd	Third Applicant
Afrinat (Pty) Ltd	Fourth Applicant
Bioclones (Pty) Ltd	Fifth Applicant
Sekpharma (Pty) Ltd	Sixth Applicant
Orleans Cosmetics (Pty) Ltd	Seventh Applicant
ESP Africa (Pty) Ltd	Eighth Applicant
Premier Fishing and Brands Ltd	Ninth Applicant
Premier Fishing SA (Pty) Ltd	Tenth Applicant
Marine Growers (Pty) Ltd	Eleventh Applicant
Talhado Fishing Enterprises (Pty) Ltd	Twelfth Applicant
Ayo Technology Solutions Ltd	Thirteenth Applicant
Health System Technologies (Pty) Ltd	Fourteenth Applicant
Global Command & Control Technologies (Pty) Ltd	Fifteenth Applicant
Kalula Communications (Pty) Ltd	Sixteenth Applicant
Kathea Communications (Pty) Ltd	Seventeenth Applicant
Sekunjalo Properties (Pty) Ltd	Eighteenth Applicant
3 Laws Capital South Africa (Pty) Ltd	Nineteenth Applicant
Cape Sunset Villas (Pty) Ltd	Twentieth Applicant
Silo Cape Waterfront (Pty) Ltd	Twenty-First Applicant
African News Agency (Pty) Ltd	Twenty-Second Applicant
South African Press Association (Pty) Ltd	Twenty-Third Applicant
Magic 828 (Pty) Ltd	Twenty-Fourth Applicant
Independent Newspapers (Pty) Ltd	Twenty-Fifth Applicant
Independent Media Consortium (Pty) Ltd	Twenty-Sixth Applicant

Sagarmatha Technologies Ltd	Twenty-Seventh Applicant
Loot Online (Pty) Ltd	Twenty-Eighth Applicant
Surve Philanthropies NPC	Twenty-Ninth Applicant
The Sekunjalo Foundation Development Trust	Thirtieth Applicant
The Doctor Iqbal Surve Bursary Trust	Thirty-First Applicant
The Social Entrepreneurship Foundation Trust	Thirty-Second Applicant
Haraas Trust	Thirty-Third Applicant
Linacre Investments	Thirty-Fourth Applicant
Kilomax Investments	Thirty-Fifth Applicant
Business Venture Investments NO 1126 (Pty) Ltd	Thirty-Sixth Applicant

and

Nedbank Ltd	First Respondent
Standard Bank of South Africa Ltd	Second Respondent
First Rand Bank Ltd	Third Respondent
ABSA Bank Ltd	Fourth Respondent
Mercantile Bank Ltd	Fifth Respondent
SASFIN Bank Ltd	Sixth Respondent
Investec Bank Ltd	Seventh Respondent
Bidvest Bank Ltd	Eighth Respondent
Access Bank Ltd	Ninth Respondent
The Competition Commission	Tenth Respondent

Panel	:	Mondo Mazwai (Presiding Member)
	:	AW Wessels (Tribunal Member)
	:	Liberty Mncube (Tribunal Member)
Heard on	:	07 & 08 March 2022
Reasons issued on	:	16 September 2022

REASONS FOR DECISION AND ORDER

Introduction

[1] This matter involves thirty-six Applicants (“the Sekunjalo Group” or “the Applicants”) seeking interim relief, in terms of section 49C of the Competition Act No 89 of 1998, as amended ("the Act") against the First to Ninth Respondents (“the Respondent Banks” or “the Respondents”).

[2] The Tenth Respondent, the Competition Commission (“the Commission”), was the subject of a joinder application brought by the Applicants under case no. IR153Dec21/JOI185Feb22.[1] The joinder application was not opposed by any of the Respondent Banks.

[3] In their interim relief application, the Applicants sought an order, pending the final determination of the complaint being investigated by the Commission:

3.1. Interdicting the First Respondent (“Nedbank”) and the Second Respondent (“Standard Bank”) from closing the bank accounts of those of the Thirty-Six Applicants who still have bank accounts with them, or in any way unilaterally changing the terms and conditions attaching to those bank accounts;

3.2. Directing the remaining Respondent Banks to restore all the bank accounts of those of the thirty-six Applicants that each has closed on the same terms and conditions that attached to those bank accounts, including all services that Standard Bank, the Third Respondent (“First Rand Bank”), and the Fourth Respondent (“ABSA”) provided to the relevant Applicants; and

3.3. Interdicting all the Respondent Banks from closing the respective Applicants’ bank accounts for any reason not sustainable in law, or unilaterally changing the terms and conditions that attach to those accounts.

[1] The joinder was brought in order to comply with Rule26(2) of the Rules for the Conduct of Proceedings which requires the Applicants to serve an interim relief application on the Commission.

Factual background

[4] We first detail the factual background surrounding this application in order to contextualise these reasons and the decision that follows.

[5] The Applicants, the Sekunjalo Group, is a group of about 200 companies, 85 of which are of scale in terms of revenue and asset value. The Sekunjalo Group is a diversified, black owned and black controlled Group with interests in Media and Publishing, ICT, Healthcare and Pharmaceuticals, Energy and Power, Asset Management and Financial Services, Biotechnology, E-commerce, Fishing and Aquaculture, Private Equity and Investments and Telecommunications.

[6] The interim relief is sought pending the final determination of a complaint lodged by the Applicants with the Commission. The essence of the complaint filed with the Commission is that the conduct of the banks in refusing to provide banking and payment services to the Applicants contravenes sections 4, 5 and 8 of the Act.

[7] The Sekunjalo Group seeks an order against ABSA, FNB, Mercantile Bank, Sasfin, Investec, Bidvest and Access Bank to restore banking and payment services, and against Nedbank and Standard Bank to stop it unilaterally terminating banking and payment services to the Applicants. It also seeks an order interdicting all the Respondent Banks from closing the respective Applicants' bank accounts for any reason not sustainable in law, or unilaterally changing the terms and conditions that attach to those accounts.

[8] The Applicants submit that their case is about:

8.1. The maintenance of the banking relationships between the Applicants and the Respondent Banks until the Commission has completed its investigation on the competition complaint that the Applicants have lodged against the banks; and

8.2. The restoration and maintenance of their bank accounts until the Commission has made a finding on whether the banks are guilty of violating the Act.

[9] In terms of harm to competition the Applicants argue that their case is that without access to banking and payment services, they would ultimately cease to trade, and

effective competition within the various markets in which they operate will be eliminated. This will reverse some of the serious transformational gains in the media, ICT, healthcare and fishing sectors where the Applicants *inter alia* operate. It is in this context that the Applicants bring the interim relief application against the Respondent Banks.

[10] In sum, the Applicants' main competition case in relation to the Respondent Banks' conduct is as follows:

10.1. First, the Respondent Banks as parties in a horizontal relationship (competitors) have coordinated their conduct in terminating or refusing (and, in the case of Standard Bank, significantly curtailing) the provision of banking and payment services to the Applicants. The timing and reasons provided therefor show that the Respondent Banks have engaged in an agreement and/or a concerted practice in contravention of section 4(1)(a) and/or 4(1)(b) of the Act.

10.2. Second, the Respondent Banks are in a vertical relationship with the Applicants. The agreements regulating the business relationship between the Applicants and the Respondent Banks contain express or implied terms which have the effect of substantially preventing or lessening competition in the markets, because they permit the Respondent Banks to cease providing banking and payment services to the Applicants. These agreements allegedly contravene section 5(1) of the Act.

10.3. Third, the Respondent Banks have refused to supply scarce services to the Applicants in circumstances where it is economically feasible to do so. This conduct amounts to an abuse of a dominant position in contravention of section 8(1)(d)(ii), alternatively section 8(1)(c) of the Act.

[11] The Respondent Banks offer a broad range of financial goods and services to millions of personal and corporate clients in South Africa. They are registered and licensed banks under the Banks Act, 1990 ("Banks Act") and are licensed financial services providers in terms of section 8 of the Financial Advisory and Intermediary Services Act, 2002 ("FAIS").

[12] The Respondent Banks contend that, at its core, this case concerns the right and ability of the banks to enforce the contractual terms that govern the subsistence and management of accounts lodged with them, where the accounts in question may cause

the bank significant reputational risk. The enforcement of these contractual terms does not constitute a contravention of sections 4, 5 or 8 of the Act.

[13] The Respondent Banks allege that the reputational risk forming the bedrock of their respective decisions to terminate/curtail the accounts of the Applicants arose from allegations of malfeasance and impropriety against the Applicants, including by a Commission of Inquiry into the Public Investment Corporation ("PIC"), chaired by the Honourable Justice Mpati ("the Mpati Commission").

[14] The Respondent Banks submit that they each engaged transparently in good faith with the Applicants, and independently of each other, raising with the Applicants numerous transactions and seeking explanations and underlying documents in respect thereof in order to assess any potential risk to the banks.

[15] The Respondent Banks submit that the Applicants' responses to those requests were inadequate or not forthcoming. The Applicants dispute this.

[16] The Respondent Banks submit that dealing with the Applicants, who are allegedly implicated in wrongdoing, is a reputational risk to them. They submit that it is this risk which explains the terminations/reviews of the Applicants' accounts rather than prohibited conduct under the Act.

[17] The Respondent Banks further rely on the Supreme Court of Appeal ("SCA") judgement of *Bredenkamp v Standard Bank of South Africa*, wherein the SCA considered the entitlement of a bank to cancel unilaterally a contract between it and its customer, including for reputational risk.

[18] The Respondent Banks conclude, with their customers, contracts which regulate the rights and obligations of the banks and its customers respectively. They contain the express or implied term that the banks may terminate the contract between itself and the client. This position was affirmed in *Bredenkamp* wherein the SCA:

18.1. reiterated the trite principle of common law that a contract of an indefinite duration, including a contract between a bank and a client, may be terminated on reasonable notice;

18.2. found that a contractual term empowering a bank to terminate a contract with a client was not constitutionally objectionable;

18.3. indicated that it would be inequitable to force a bank to remain in a contractual relationship with a customer where it considers the relationship to pose commercial, legal, or reputational risks; and

18.4. held that a bank is entitled to terminate its banking relationship with any client on reasonable notice and was not obliged to give reasons for its decision to do so.

[19] The Respondent Banks submit that the Applicants have not made out a case with regards to sections 4, 5, and 8 as the closure of the bank accounts is contractual.

[20] Furthermore, the Respondent Banks point out that they have an obligation in terms of South African law to implement sound risk management processes, procedures and controls to manage financial crime risks.

[21] Financial crime risks include the risk that a customer of the bank may be involved in money laundering or other financial crime. Regulation 39 of the Regulations Relating to Banks, promulgated in terms of section 90 of the Banks Act, specifically requires a bank to consider reputational risk in its management of risk. Regulation 39(3) provides as follows:

> *"The conduct of the business of a bank entails the on-going management of risks, which may arise from the bank's on-balance sheet or off-balance sheet activities and which may include, among others, the following types of risk:*
> *…*
> *(h) detection and prevention of criminal activities*
> *…*
> *(n) reputational risk*
> *…*
> *(aa) any other risk regarded as material by the bank."*

[22] Regulation 39(4) obliges every bank to have in place comprehensive risk management processes, practices and procedures and board approved policies to identify, monitor, appropriately mitigate and report (amongst others), the risks listed in Regulation 39(3).

[23] Regulation 36(17)(a)(iv) provides that every bank shall have in place comprehensive risk management processes and procedures to prevent the bank from being used for money laundering or other unlawful activity. The South African Reserve Bank ("SARB") is empowered to revoke any bank's licence for failure to comply with Regulation 36.

[24] The Financial Intelligence Centre Act 38 of 2001 ("the FIC Act") also stipulates that an accountable institution must implement specific controls to combat financial crime. As registered banks, the Respondent Banks fall within the definition of an accountable institution and must comply with the provisions of *inter alia* Chapter 3, Part 1 of the FIC Act.

[25] The duties under Section 21 of the FIC Act are explained under Guidance Note 7 issued by the Financial Intelligence Centre (“the FIC”) in October 2017. The Guidance Note enjoins banks to apply international best practice to maintain relevant client details. It requires that accountable institutions should apply their client identification and verification procedures to existing clients on the basis of materiality and risk. The Guidance Note further requires that banks conduct due diligence reviews of such existing relationships at appropriate times.

[26] One of the goals of the FIC Act is to detect and prevent money laundering. Money laundering, which is a criminal offence under the Prevention of Organised Crime Act 1998, is generally conduct aimed at concealing or diminishing the proceeds of crime so as to avoid or frustrate prosecution.

[27] Section 29 of the FIC Act obliges accountable institutions, such as the Respondent Banks, to report suspicious transactions to the FIC. This obligation arises *inter alia* when the Respondent Bank knows or reasonably ought to know that one of its customers has engaged or been involved in money laundering.

[28] A failure by the bank to adhere to its obligations to implement adequate financial crime controls would expose it to regulatory sanctions by the SARB. The sanctions may have, *inter alia*, harmful financial consequences.

[29] Consequently, the Respondent Banks are of the view that it is important that they be permitted to choose their clients, identify the risks that clients expose it to, and determine whether these risks justify the termination of relationships with specific clients.

[30] We turn now to detail the events leading to the closure of the Applicants accounts.

The Respondent Banks' perspectives on the closure of accounts

[31] The Respondent Banks argue that the Sekunjalo Group has been the subject of allegations of disreputable and unlawful conduct that has featured extensively in the public domain. They state that the allegations centre on the relationship and transactions between companies in the Sekunjalo Group on the one hand, principally Ayo Technology Solutions Ltd ("Ayo"), and the Public Investment Corporation ("PIC") on the other hand, from December 2017 to date.

[32] The allegations have also been the subject of a Commission of Enquiry, chaired by the Honourable Justice Mpati, and called into being by President Ramaphosa in terms of section 84 of the Constitution.

[33] The Mpati Commission has reported the allegations to be well-founded and deeply troubling. It has recommended further legal investigation and action against the PIC, Sekunjalo, AEEI and several of its subsidiaries, and other implicated individuals. The Mpati Commission's report and recommendations have generated much further adverse publicity for the Sekunjalo Group and its management.

The allegations around the Ayo-PIC deal

[34] The PIC is a state-owned financial services provider and asset manager.

[35] In May 2019, the PIC and the GEPF sued Ayo for R4.29 billion. They instituted their action in the Western Cape Division.

[36] The PIC and the GEPF in their particulars of claim allege *inter alia* that:

36.1. Ayo, represented by Dr Survé and others, made material misrepresentations, and failed to disclose material facts, to the PIC before the conclusion of the subscription-of-shares agreement. In particular, it grossly overstated its business prospects and the value of its shares.

36.2. The PIC, represented by Dr Matjila, had purported to conclude the transaction with Ayo without first obtaining the mandatory approval to do so by the PIC's Executive Committee. Moreover, the PIC concluded the transaction even though it had not done a due diligence investigation into Ayo.

[37] The Respondent Banks emphasise that they do not purport to prove or disprove the allegations. They merely seek to show, as is apparent on the face of the particulars of claim, that the PIC and the GEPF have in fact made those allegations against Ayo in court papers.

The Mpati Commission

[38] In March 2020, President Ramaphosa published a comprehensive report of the Mpati Commission of Enquiry.

[39] The Mpati Commission confirmed in its report that it enquired into the propriety and lawfulness of the PIC's transaction with Ayo, and the potential transaction with Sagarmatha Technologies Limited ("Sagarmatha"), a company controlled by Sekunjalo, following negative media reports about the PIC's engagements with these companies. As part of its enquiry into the Ayo transaction, the Mpati Commission also considered evidence relating to Premier Fishing, among other Sekunjalo Group companies.

[40] According to the Mpati Commission, the evidence before it showed *inter alia* that:

40.1. Premier Fishing is a subsidiary of AEEI and is part of the Sekunjalo Group.

40.2. Ayo approached the PIC to participate in the pre-listing private placement. Represented by Dr Matjila, the PIC subscribed for 99.8 million shares at an aggregate purchase consideration of R4,3 billion.

40.3. This purchase consideration was based on a grossly inflated and incorrect valuation of Ayo. Dr Survé performed an "outright manipulation" of the valuation numbers to achieve this inflated valuation. Dr Matjila acquiesced to and subsequently defended the inflated and manipulated valuation (see page 316 of the Report).

40.4. The Ayo transaction showed "*a marked disregard for PIC policy and standard operating procedure*". Corporate governance was absent or poor. The close relationship between Dr Matjila and Dr Survé created "*topdown pressures*" which materially contributed to the conclusion of the deal (see page 317 of the Report). From the PIC's perspective, there is *"a concentration of risk in one group, the Sekunjalo Group, and one man, Dr Surve, with no evaluation of group exposure in any scoping or appraisal documentation pertaining to the above four transaction, having taken place"*.

40.5. Several transactions utilising Ayo's ABSA account were possibly irregular and/or unlawful. This included the transactions through which the PIC paid the R4,3 billion subscription price for Ayo shares under private placement.

40.6. The Sekunjalo group of companies — including Premier Fishing — were remiss in their obligations to repay their debt to the PIC. Nonetheless, the PIC continued to loan money and invest in the companies in the sum of R1,5 billion.

40.7. According to Dr Abel Sithole, the GEPF's CEO, the PIC made material misrepresentations to the GEPF about the feasibility of the Ayo transaction.

40.8. The companies within the Sekunjalo Group are closely aligned and related. Many of the board members of the different companies are related or affiliated to Dr Survé.

[41] After evaluating the evidence, the Mpati Commission concluded that:

> *"The Ayo transaction demonstrates the malfeasance of the Sekunjalo Group, the impropriety of the process and practice of the PIC as well as the gross negligence of both the CEO and CFO."*

Other controversies

[42] In January 2020, it was reported that Ayo and AEEI had failed to file audited financial statements for the year ended August 2019, despite the JSE's rules which state that companies must submit audited accounts within four months of their financial year-end so that investors can draw timely conclusions about their prospects and performances.

It was also reported that audit firm, BDO, had severed ties with Ayo and AEEI and all other companies in the Sekunjalo Group.

[43] In August 2020, it was further reported that the JSE had fined Ayo R6.5 million for errors in its 2018 interim results. It was said at the time that these errors stemmed from the group's failure to "*subject the 2018 interim accounts and underlying documents to a critical and thorough review*".

[44] The African News Agency (which is part of the Sekunjalo Group) has also been accused of accepting payments from the State Security Agency in exchange for publishing positive news stories on former President Jacob Zuma and the State Security Agency.

[45] In January 2021, Dr Sydney Mufamadi, the chair of the High-Level Review Panel on the State Security Agency, testified before the Zondo State Capture Commission that he had received evidence that the State Security Agency had paid the African News Agency (a member of the Sekunjalo Group) R20 million in or around 2015 and 2016 for "*services rendered*", as part of a media project aimed at "*countering negative local and international perceptions of the country, [former President Jacob] Zuma and the SSA (State Security Agency)*".

[46] In January 2022, it was reported that the JSE had publicly censured AEEI over a multi-million rand share deal with SAAB Grintek Defence. According to the JSE, AEEI should have put this call option to its shareholders for approval in May 2015 in line with listing requirements but had failed to do so.

[47] The Respondent Banks argue that they took note of the above allegations.

[48] While continuing to provide products and services, some of the Respondent Banks posed questions to the Applicants and carried out reviews of their bank client relations in order to assess whether or not to continue with the relationship.

[49] After consideration of the Mpati Commission report and other matters, the Respondent Banks (save for *inter alia* Nedbank and Standard Bank at the time of hearing) closed the respective accounts, and/or have declined to open new bank accounts, having found that the bank-customer relationship with customers in the Sekunjalo Group posed intolerable reputational, commercial, and legal risks vis-à-vis:

49.1. The regulatory framework in which the banks operate;

49.2. The protocols they employ to comply with its risk-management obligations;

49.3. The fact that negative publicity concerning the Sekunjalo Group continued to proliferate, as evidenced by many articles published by major South African news organisations;

49.4. The extremely serious allegations and recommendations set out in the Mpati report — against the entire Sekunjalo Group and Doctors Survé and Matjila personally — and the further negative publicity that the Mpati report engendered;

49.5. The fact that sponsors PSG Capital, lawyers Webber Wentzel, and auditors BDO had all terminated their relationships with Sekunjalo companies; and

49.6. The fact that the JSE imposed a R6,5 million fine on Ayo for making material errors in its 2018 unaudited interim results.

[50] The Respondent Banks further argue that the fact that several of the banks decided to close their accounts with the Sekunjalo Group of companies and/or have declined to open new accounts is not surprising or suspicious. They state that the Respondent Banks have materially the same legal and risk management obligations. And because of these obligations, they would have each independently come to the reasoned conclusion that it would be intolerable for them to remain a banker of the Sekunjalo Group.

The Applicants' perspectives on the closure of accounts

[51] The Applicants strongly dispute the veracity of the events leading to the closure of their accounts and/or the reasoning for the banks' reliance on these events to terminate the bank-customer relationship with them.

The Mpati Commission Report

[52] The Applicants argue that the President did not establish the Mpati Commission of Inquiry to investigate the Sekunjalo Group. The President appointed the Mpati Commission of Inquiry into allegations of impropriety regarding the PIC.

[53] The Applicants state that Mpati Commission report at paragraph 45 provided that the Premier Fishing "*transaction was merely included for the sake of completeness of the transactions that the PIC undertook within the Sekunjalo Group."* Quite clearly, Premier Fishing fell outside the terms of reference of the Mpati Commission.

[54] The Applicants state that Mpati Commission report recommended, *inter alia*, to the PIC Board to review all aspects of the transactions entered into with the Sekunjalo Group to determine whether any laws or regulations have been broken. It further recommended to the regulatory and other authorities to consider whether any laws and/or regulations have been broken by either the PIC and/or the Sekunjalo Group.

[55] The Applicants state that at most the Mpati Commission report focused on two investments that the PIC made in entities associated with the Sekunjalo Group. The Applicants aver that the recommendations for further investigation in respect of two investments by the PIC do not grant the Respondent Banks *carte blanche* to cease providing banking and payment services to all the Applicants.

[56] The Applicants further argue that whilst the Mpati Commission report made findings against the PIC, eight of the Respondent Banks are still associated with the PIC as a substantial shareholder and that the bank accounts of the PIC have not been closed by the Respondent Banks who bank the PIC.

[57] The Applicants state that if the Respondent Banks were serious about the alleged reputational risk, they would have closed the bank accounts of the PIC and disassociated with it a while ago.

[58] The Applicants say that there are no adverse findings by the Mpati Commission in its report against the Sekunjalo Group or any entity within or associated with the Group. That is why the report recommended an investigation on specific issues by the PIC and regulatory authorities as identified in the report.

[59] The Applicants argue that not a single Respondent Bank has identified any transaction which is irregular or illegal or involves money laundering.

[60] The Applicants also argue that whilst some of the Respondent Banks mention reporting transactions to the FICA, at no stage do they seek clarity from any of the group

companies in relation to these so-called reported transactions. In fact, they continued to bank the companies that they note in their answering affidavit for many years after the so-called FICA report. Had there been something irregular in these transactions, they or the FICA were duty bound to contact law enforcement authorities.

[61] Furthermore, they argue that the Respondent Banks use the articles by competitors of Sekunjalo owned by Independent Media as proof of wrongdoing and as causing reputational risk.

[62] The Applicants also allege that the Respondent Banks' own conduct demonstrates massive reputational risk. In recent times, they have all been implicated in Rand fixing allegations by the Commission.

[63] They also argue that the Respondents' reasoning of reputational risk is fatally flawed when you consider that at least 20 companies involved in at least R200 billion of corruption such as the likes of Steinhoff, EOH, Tongaat, ABB, Glencore and many others are still clients of these Respondent Banks. Not only do they provide transactional accounts, but they also provide lending facilities to the likes of Glencore and others. In contrast, some of the Respondent Banks having terminated the Sekunjalo Group accounts, which have not been proven to be involved in any fraud and corruption.

[64] The Applicants also submit that as a result of the many questions and concerns raised, they engaged a highly experienced team of Senior Counsel to review the Mpati Commission report and findings which will give comfort to the banks and also demonstrate the integrity and good governance of the Sekunjalo Group.[2]

The Commission's submission

[65] The Commission filed a submission in which it essentially confirmed that it was seized with the investigation of the complaint.

[66] It furthermore requested the Tribunal not to make definitive findings in the context of this interim relief case in relation to the concept of collective dominance, the characterisation of the issue in dispute as a contractual issue; and the characterisation

[2] At the time of this hearing, the factual findings of the report had not yet been made public. However, it appears in news articles, subsequently, that Judge Willem Heath has cleared the Sekunjalo Group of any wrongdoing. It has also been reported that the Sekunjalo Group has now approached the Western Cape High Court to formally review and ultimately set aside the Mpati Commission report.

of a "group boycott". In relation to the latter the Commission submitted that the concept of a group boycott, as developed by the US authorities, is replete with nuance and this may necessarily require that each conduct which may be viewed as constituting a group boycott be examined on a case-by-case basis.

Legal context: Interim Relief Applications

[67] The adjudication of interim relief applications is circumscribed in section 49C(2)(b) of the Act, which reads:

> "*Interim Relief … The Competition Tribunal … may grant an interim order if it is reasonable and just to do so, having regard to the following factors:*
>
> *(i) the evidence relating to the alleged prohibited practice;*
> *(ii) the need to prevent serious or irreparable damage to the applicant; and*
> (iii) *the balance of convenience*."

[68] There are three steps in this process. Upon establishing whether an applicant has a *prima facie* right to the interim relief being sought, we must also consider two other ancillary factors namely, (i) serious or irreparable harm, and (ii) balance of convenience.

[69] In *Nedschroef*,[3] the Tribunal held as follows:

> *"[23] The Tribunal has previously observed in National Wholesale Chemists (Pty) Ltd and Astral Pharmaceuticals (Pty) Ltd et al, (a case considered shortly after the Act was amended to provide for the present section 49), that: "…,In terms of section 49C(2), the Tribunal no longer has to consider whether each of the requirements has been established in isolation, but rather looks at all the factors listed in section 49C(2) as a whole to see whether a case for interim relief has been established. This feature of section 49C(2) distinguishes it from the old section 59 where interim relief could only be granted where each of the listed requirements had been satisfied. Section 49C(2) follows the approach at common law as applied by Appellate Division in the case of Eriksen Motors (Welkom) Ltd v Protea Motors, Warrenton 1973 (3) 685 (A). The court held that*

[3] *Nedschroef Johannesburg (Pty) Ltd and Teamcor Ltd and Others* Case No: 95/IR/Oct05.

in deciding whether to exercise its discretion to grant interim relief the court should not look at the prerequisites in isolation but should consider all of them in conjunction with each other. The court went on to state that these prerequisites "…are not individually decisive, but are interrelated, for example, the stronger the applicant's prospects for success the less the 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."

[24] Therefore, what the Tribunal found in NWC is that although the sections may appear similar, in terms of language used and the nature of the factors to be considered, there has been a decisive shift in the way it is to be applied. The old section required proof of each of the various constituents; the new starts off by making the threshold requirement that the granting of the order is 'reasonable and just' and then requires that the Tribunal 'has regard' to the constituent factors, not as separate building blocks, but rather as a collective set of criteria that can be weighed and balanced through the lens of what is "reasonable and just".

[25] The implication of this shift, is that an application may meet the three factors, but there may be reasons why granting the application is not reasonable and just. Conversely, an applicant may not make out a strong case on all three of the factors, but the Tribunal may nevertheless consider that an order for interim relief is nevertheless reasonable and just following and Eriksen type approach"[4] (emphasis added).

[70] The three steps must be understood holistically with each factor balanced against the other.[5]

"*Section 49C confers a discretion on the Tribunal to grant interim relief having regard to what is reasonable and just in the circumstances. The three legs of the inquiry are however considered holistically. Thus, a weak case on say irreparable harm may be counterweighted by a very strong case on the*

[4] *Nedschroef* at paras 23-25.
[5] *Natal Wholesale Chemists (Pty) Ltd and Astra Pharmaceuticals (Pty) Ltd* (98/IR/Dec00) [2001–2002] CPLR 363 (CT); York Timbers Limited v South African Forestry Company Limited (15/IR/Feb01) [2001] ZACT 19 (9 May 2001) at para 13; Anchor Zedo Outdoor CC v Passenger Rail Agency of South Africa (017616) [2013] 2 CPLR 496 (CT) at para 16; GovChat (Pty) Ltd and Hashtag Letstalk (Pty) Ltd v Facebook, Inc and Others (IR165Nov20) at para 19.

prohibited conduct. And vice versa, a weak case on prohibited conduct may be counterweighted by a strong case on irreparable harm."[6]

[71] The factors listed in section 49C(2)(b) of the Act therefore are not a list of prerequisites for the granting of interim relief. The three factors should be weighed against each other to determine what is 'reasonable and just'.

[72] This accords with our approach to interim relief applications as set out in *York Timbers*:

"*Applying this analysis to our Act means that we must first establish if there is evidence of a prohibited practice, which is the Act's analogue of a prima facie right. We do this by taking the facts alleged by the applicant, together with the facts alleged by the respondent that the applicant cannot dispute, and consider whether having regard to the inherent probabilities, the applicant should on those facts establish the existence of a prohibited practice at the hearing of the complaint referral.*

If the applicant has succeeded in doing so, we can then consider the "doubt" leg of the enquiry. Do the facts set out by the respondent in contradiction of the applicants case raise serious doubt or do they constitute mere contradiction or an unconvincing explanation. If they do raise serious doubt the applicant cannot succeed.

As far as the remaining factors in section 49C(2) are concerned viz, irreparable damage and the balance of convenience, these are not looked at in isolation or separately but are taken in conjunction with one another when we determine our overall discretion."[7]

[73] It is not our function, in interim relief proceedings, to arrive at a definitive finding of a contravention. A successful applicant is only required to make out a *prima facie* case, not to establish its case on a balance of probabilities. In this way interim relief applications under section 49C are analogous to interim interdict applications in the High Court, where applicants seek relief pending the determination of some other

[6] *GovChat (Pty) Ltd and Hashtag Letstalk (Pty) Ltd v Facebook, Inc and Others* (IR165Nov20) at para 160.
[7] *York Timbers Limited v South African Forestry Company Limited* (15/IR/Feb01) [2001] ZACT 19 (9 May 2001) at paras 64 – 66.

dispute. In this instance the Applicants seek interim relief pending the outcome of the Commission's investigation into their complaint.[8]

[74] The approach to interim relief applications has evolved through the CAC's judgements in *Business Connexion*[9] and *eMedia*.[10]

[75] In this respect *Business Connexion* (relied upon in the CAC's *eMedia* judgement) states:

> "*Unlike disputes in private law which, for the most part, concern the rights enjoyed and duties owed by individuals to one another, prohibited practices in chapter 2 concern the conduct of firms and their effect on competition in the market. Even those practices that are not defined by reference to their effects are nevertheless rendered unlawful by reason of their presumptive harmful effects upon competition. As a result, interim relief granted by the Tribunal has effects upon the state of competition in the market. Second, when the Tribunal grants an interim relief order, it is not a status quo order. The order requires that the respondent firm desist from the prohibited practice (in whole or in part). The purpose of the order is to alter the competitive relationship between firms in the market. If the interim order is to be effective, it is intended to permit of competition taking place in the market that has hitherto not taken place. That may have effects within a market or across markets, and may affect different market participants: customers, competitors and suppliers. When the Tribunal grants an interim order it alters the status quo in the market and is intended to change the way firms compete in the market, with consequences that may well resonate within and between markets.*
>
> *An interim relief order under the Act does not provide a remedy to permit a person claiming a right to enjoy the exercise of that right until the right is finally determined. Rather, the Tribunal is empowered to regulate how competition in the market is to take place for a six- or twelve-month period. That is a different competence to that of a court adjudicating a dispute of right; it is a regulatory competence to decide whether the state of competition in the market must*

[8] *GovChat (Pty) Ltd and Hashtag Letstalk (Pty) Ltd v Facebook, Inc and Others* (IR165Nov20) at para 20.
[9] Business Connexion (Pty) Ltd. v Vexall (Pty) Ltd. and another, Case Number: 182/CAC/Mar20.
[10] *eMedia* Investments (Pty) Ltd SA v Multichoice (Pty) Ltd and Another (201/CAC/Jun22).

endure, notwithstanding the evidence that a prohibited practice is taking place, or whether the Tribunal should order a change."[11]

[76] The CAC in *eMedia* further developed the jurisprudence with regard to interim relief. It found that the basis of the power to grant interim relief must also be contextualised within the jurisprudential framework of the Act and that the preamble to the Act in defines:

"the aim and object of competition law. It recognises that apartheid and other discriminatory laws and practices of the past resulted in excessive concentrations of ownership and control within the national economy, inadequate restraints against anti-competitive trade practices, and unjust restrictions on full and free participation in the economy by all South Africans. That the economy must be open to greater ownership by a greater number of South Africans."[12]

[77] The purpose of the Act is defined as promoting and maintaining competition in order-

"(a) to promote the efficiency, adaptability and development of the economy;
(b) to provide consumers with competitive prices and product choices;
…
(e) to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the economy; and
(f) to promote a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons."[13]

[78] The CAC in *eMedia* then held that it must follow that these are the guidelines to be followed when applying the provisions of the Act. The approach calls for a transformative constitutional approach and must be consistent with the scheme of the Act and apply a context-sensitive approach.

[79] It follows therefore that in granting or refusing interim relief or indeed any relief the jurisprudential and transformative context of the Act must be considered.

[11] *Business Connexion* at paras 17 – 18.
[12] *eMedia* at para 82.
[13] *eMedia* at para 83.

[80] The CAC in *eMedia* also affirms the approach to competition jurisprudence as set out in the case of *Mediclinic* where the Constitutional Court held:

> *"[3] It ought never to be acceptable for any of us, including the corporate citizens of this land, to indulge, talk less of over-indulge, in the unconscionable practice of seeking to record the highest profit margin possible by any means necessary, in wanton disregard for what that would do to the rest of humanity. Neither should the historic exclusion of some from meaningful participation, particularly in the mainstream economy, be normalised. For, this seems to be one of the most stubborn injustices of our past that require a more deliberate, intentional and systematic confrontation appropriately enabled by independent, incorruptible, efficient and effective law enforcement and justice-dispensing institutions."*
>
> *"[7] Institutions created to breathe life into these critical provisions of the Act must therefore never allow what the Act exists to undo and to do, to somehow elude them in their decision-making process. The equalisation and enhancement of opportunities to enter the mainstream economic space, to stay there and operate in an environment that permits the previously excluded as well as small and medium-sized enterprises to survive, succeed and compete freely or favourably must always be allowed to enjoy their pre-ordained and necessary pre-eminence. The legitimisation through legal sophistry or some right-sounding and yet effectively inhibitive jurisprudential innovations must be vigilantly guarded against and deliberately flushed out of our justice and economic system."*[14]

[81] In keeping with these principles, the CAC in *eMedia* then stated:

> "*This really means that the Tribunal must make a summary assessment before granting the interim relief. This assessment is only at a prima face level. It must consider the evidence as to the alleged practice. There is usually no time to delve too deeply in serious or irreparable harm but at the very least it must be assessed in the context of whether there is a prima facie right at the interim level. As long as there is clear and non-speculative evidence about possible*

[14] Competition Commission of South Africa v Mediclinic Southern Africa (Pty) Ltd and Another (CCT 31/20) [2021] ZACC 35 (15 October 2021) ("Mediclinic") at paras 3 and 7.

anti-competitive effects, then serious consideration must be given to the grant of the relief. In addition, the proper consideration of the balance of convenience applied to the facts also provides further checks and balances to ensure an equitable result."[15] (emphasis added)

[82] The CAC in *eMedia* reiterated the principles for interim relief as follows:

"*Section 49C (3) of the Competition Act equates the standard of proof as the same standard as in High Court common law interim relief. The principles are trite. If there is prima facie right, even one open to some doubt and a well-grounded apprehension of irreparable harm if the relief is not granted and ultimately granted at final relief stage, then the balance of convenience favours the grant of the relief*".[16] (emphasis added).

[83] In applying its mind, the CAC in *eMedia* found that non-speculative and objective evidence strongly pointed to a *prima facie* right.

[84] In other words, *eMedia* has evolved the jurisprudence to include a constitutional and transformative view of the provisions of the Act in considering interim relief applications. It is clear that if there is a *prima facie* right (contravention) established with reference to *clear and non-speculative evidence*; even where the establishment of that right is open to some doubt, but there is a well-grounded apprehension of harm – the Tribunal must find that it favours the granting of the interim relief application.

Is there *prima facie* evidence relating to the alleged prohibited practice under section 4?

[85] Section 4(1)(a) prohibits agreements or concerted practices by firms in a horizontal relationship that have the effect of substantially preventing or lessening competition in the market, unless a party to the alleged agreement or concerted practice can show procompetitive, efficiency or technological gains that outweigh the anti-competitive effects. Such agreements are analysed under the rule of reason which permits procompetitive/efficiency justification.

[15] *eMedia* at para 93.
[16] *eMedia* at para 95.

[86] Section 4(1)(b) prohibits agreements or concerted practices by firms in a horizontal relationship that relate to specific types of conduct listed therein, namely direct or indirect price fixing; market division (by allocating customers, suppliers, territories or specific types of goods or services) or collusive tendering. Such agreements or concerted practices are *per se* prohibited as they are presumed to be harmful to competition and no justification is permitted.

[87] Section 1(ii) defines an agreement as *"…a contract, arrangement or understanding, whether or not legally enforceable*" whereas section 1(vi) defines a concerted practice as "*…co-operative or co-ordinated conduct between firms, achieved through direct contact, that replaces their independent action, but which does not amount to an agreement*".

[88] Section 4(2) provides as follows:

> "*(2) An agreement to engage in a restrictive horizontal practice referred to in subsection (1)(b) is presumed to exist between two or more firms if-*
>
> > *(a) anyone of those firms owns a significant interest in the other, or they have at least one director or substantial shareholder in common; and*
> > *(b) any combination of those firms engages in that restrictive horizontal practice*."

[89] Section 4(2) of the Act gives rise to a presumption that an agreement exists between two or more firms if they have a substantial shareholder in common and if any combination of those firms engaged in a restrictive horizontal practice as described in section 4(1)(b). It bears emphasis that the presumption applies to section 4(1)(b) *per se* prohibitions and not to section 4(1)(a).

[90] The Applicants have brought the case under section 4(1)(a) and 4(1)(b) of the Act. For both they rely on the timing and reasons for the closure of the bank accounts. They further rely on the presumption under section 4(2) to infer an agreement under 4(1)(b) and they allege that the closure of the bank accounts amounts to fixing a trading condition in contravention of 4(1)(b)(i).

[91] Further, in reply and in argument, they relied on the banks' membership in BASA to infer an agreement under section 4(1)(b).

[92] The Applicants argue that:

92.1. There is an agreement between the Respondent Banks or a concerted practice between the Respondent Banks to terminate or refuse to provide banking and payment services to the Sekunjalo Group.

92.2. That section 4 properly interpreted includes a group boycott contravention. The Respondent Banks allegedly have decided to group boycott the Applicants by terminating or refusing to provide banking and payment services. Group boycott in the context of this case means an agreement or a concerted practice by the Respondent Banks, to terminate or refuse to provide banking and payment services to the Sekunjalo Group. In their Heads of Argument, the Applicants submitted that the question before the Tribunal is whether a collective boycott as alleged against the Respondents is prosecutable under section 4(1). However, in oral argument, the Applicants submitted that it was not necessary for the Tribunal to make this determination at interim relief stage.

The facts/evidence relied upon to prove an agreement or concerted practice under section 4(1)(a) and 4(1)(b)

[93] The Applicants submit that the Tribunal may infer an agreement from the "wholesale closure or restriction" of the Applicants' accounts or limited banking and payment services to the Applicants, and that the timing of the closures and the similarity of reasons provided for the closures or limitation or refusal to provide services indicate a contravention of section 4 of the Act.

[94] The Applicants go on to say that on the Respondents' own version the termination of the accounts was because of negative media reporting, the Mpati Commission report, the PIC litigation regarding Ayo, and the *Bredenkamp* judgement of the SCA. Further, the termination of bank accounts has happened systematically within a short period of 15 months from 26 November 2020 (in the case of Absa) to February 2022 (in the case of Nedbank). The timing of the closures is illustrated by the table annexed hereto as **Annexure "A"**.

[95] The Applicants further request that the Tribunal infer the requisite agreement from the industry association membership and the role played by influential CEOs of the banks at BASA. The board of BASA comprises the chief executive officers of ABSA, Standard Bank, Nedbank, Investec and FirstRand. Sasfin and Capitec represent the second-tier segment of the market.

[96] Furthermore, the Applicants submit that:

96.1. Between May and August 2021, Mercantile Bank declined to open bank accounts for AEEI, Afrinat, Orleans, and Loot Online;[17]

96.2. On 12 November 2021, Sasfin declined to open an account for the Seventeenth Applicant, Kathea Communications (Pty) Ltd; and

96.3. On 26 July 2021, Access Bank refused to engage with the Sekunjalo Group regarding opening bank accounts.

[97] In response, the Respondent Banks argue that the timeline of when the banks gave notice or terminated the Applicants' bank accounts proves nothing in relation to an agreement or concerted practice since:

97.1. The Respondent Banks operate in a strict regulatory environment with the same or substantially similar domestic and international obligations. The Respondent Banks would therefore have similar risk-management policies; and

97.2. The information that most likely informed the termination by the various Respondent Banks would have become known to the Respondent Banks at the same or similar times, where that arose from external sources, but some of the Respondent Banks may have acted sooner or later due to the activities of the Applicants within that particular bank or due to the nuances of the particular risk-strategy of each bank.

[17] AEEI had a working capital facility with the Seventh Respondent, Investec. This facility was settled by AEEI in 2020 and then closed. The notice of termination regarding AEEI's accounts came from Investec Securities (Pty) Ltd ("Investec Securities"). AEEI's relationship is with Investec Securities and not Investec, the Seventh Respondent cited in this matter. Due to the non-citation of Investec Securities as a respondent in these proceedings, it follows that AEEI's account with Investec Securities cannot form the subject matter of this interim relief application as it is not covered by the relief sought.

[98] The Respondent Banks counter the argument regarding BASA membership by simply stating that there is no basis at all to infer from the Respondent Banks' membership of BASA that an agreement in contravention of section 4 was struck there.

[99] In addition, the Respondent Banks argue that the Applicants' complaint to the Commission does not allege that there was a group boycott in contravention of section 4(1)(a) and it is impermissible for the Applicants to seek interim relief on the basis of a complaint that has not been made to the Commission.

Facts/evidence relied upon for the presumption of an agreement (section 4(1)(b) contravention due to common shareholding - section 4(2))

[100] The Applicants submit that because the Respondent Banks have a substantial shareholder in common, this gives rise to a presumption of an agreement in terms of section 4(2) of the Act. The Applicants submit that the PIC owns 10.4% of Nedbank, 14.2% of Standard Bank, 14.7% of FirstRand, 6.24% of ABSA Bank, 13% of Capitec/Mercantile, 12% of Investec Bank, and 19.52% of Bidvest.

[101] In response, Sasfin states that the PIC does not have any shares in it, and even if it did, they are insignificant. Access Bank admits that the PIC holds an indirect shareholding in Access Bank through one of Access Bank's shareholders but denies that this gives cause to presume that Access Bank has engaged in conduct involving the other Respondent Banks in contravention of section 4(1)(b) of the Act.

[102] Simply put, the Applicants' case is that by operation of the presumption in section 4(2), the conduct of the banks in closing or limiting the Applicants' bank accounts or in the case of banks that refused to open new bank accounts, falls squarely within the prohibition set out in section 4(1)(b) of the Act, namely, directly or indirectly fixing a trading condition and/or dividing markets by allocating customers. The trading condition is that all of them ultimately refuse to bank the Applicants.

[103] The Respondent Banks note that the section 4(2) presumption may be rebutted if the practice (in this case the alleged closure of the accounts) is a normal commercial response to conditions prevailing in that market. However, in this case they state that they have not entered into an agreement or engaged in a concerted practice with any

of their competitors in relation to the provision of payment and banking services to the Sekunjalo Group. Therefore, the presumption does not arise.

[104] Again, the Respondent Banks' counter argument is simply that there is no basis at all to infer that there is an agreement or concerted practice agreed upon by the Respondent Banks to boycott the Applicants.

Our assessment: context

[105] At the outset, the Applicants framed their case on *Mediclinic* as the guiding jurisprudence in determining whether the conduct of the Respondent Banks has anti-competitive effects. The Applicants submit that, in *Mediclinic,* the Constitutional Court warned institutions such as this Tribunal never to allow what the Act exists to undo and to do, to somehow elude it in its decision-making process. They relied on the above cited passage (see paragraph 80) from the Constitutional Court judgement in *Mediclinic,* which the CAC also relied on in *eMedia* to emphasise the transformative goals of the Act, particularly those concerned with black-owned companies and giving opportunities to them to enter and participate in the mainstream economy.

[106] As reiterated by the CAC the case must be considered with due regard to context and South Africa's history, as the Act requires us to do. One of the striking features of apartheid was racial exclusion. But another, which is as pernicious as racial exclusion was economic exclusion. Economic exclusion persists in South Africa today, and it is for that reason that the Act also aims to address the legacy of economic exclusion and its premise is economic inclusion. Furthermore, the realization of equality is the core and foundational value of our Constitution. Whilst economic exclusion persists it is not possible to achieve equality.

[107] The Preamble of the Act recognizes that apartheid and other discriminatory laws and practices of the past have resulted in unjust restrictions on full and free participation in the economy by all South Africans. The high levels of economic concentration (which produce and replicate economic exclusion through practices like abuse of dominance), were also recognised in the explanatory memorandum that accompanied the Competition Act Amendment Bill in 2017.

[108] It is the Applicants position that their application for interim relief falls squarely within the Constitutional imperatives of the Act, in particular its objectives and purpose under Section 2.

[109] Section 2 of the Act states its purpose as being (i) to promote employment and advance the social and economic welfare of South Africans, (ii) to expand opportunities for South African participation in world markets and recognize the role of foreign competition in South Africa, and (iii) to promote a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons.

[110] The Commission, in its Banking Enquiry Report found that:

> *"Without a bank account and access to payment services, it would be difficult if not impossible for an individual to participate effectively in any modern economy. Today, a bank account is usually required in the formal economy in order to receive wages and Salaries, make a wide variety or routine payments, and access Savings and credit facilities. There are currently no real alternatives for individuals and business that want to participate in the formal economy... credit facilities including home loans are generally only available to those able to service the debt via transaction account."*[18]

[111] Banking plays a central role in the economic life of society. The Banking Enquiry Report found that South African retail banks operate as a tightly knit oligopoly and have traditionally managed to take advantage of this market structure by avoiding obvious price competition and that the barriers to entry are high. The Banking Enquiry Report attributed this mainly to cost structures (high fixed and common costs) that encourage or indeed require banks to achieve large scale economies; and barriers to entry, which have virtually eliminated the threat of entry. The Banking Enquiry Report argued further that banks have built on these advantages by ensuring that product differentiation and pricing complexity are both high; large information gaps and asymmetries prevail; and customer switching is very low.

[112] The assessment below relates to the Respondent Banks who have closed bank accounts to the Sekunjalo Group or have indicated their intention to do so.

[18] Commission's Banking Market Enquiry Report, Chapter 2, para 2.1.2.

[113] Given the similarities in the arguments raised by the Respondent Banks, we have dealt with them together rather than individually with each bank's response. Where there are unique issues specific to a particular bank, we indicate this and deal with those specific issues.

Our assessment of section 4

[114] Again, we repeat that in order to make out an interim relief case under section 4(1) the Applicants must *prima facie* show that there was either an agreement or a concerted practice in place between the Respondent Banks.

[115] The CAC, in *Netstar*[19] provided that an agreement arises from:

> *"the actions of or discussions among the parties directed at an arrangement that will bind them either contractually or by virtue of moral suasion or commercial interest. It may be a contract, which is legally binding, or an arrangement or understanding that is not, but which the parties regard as binding upon them. Its essence is that the parties have some kind of consensus"*[20]

[116] The CAC in *Netstar*, further held that in many cases the same evidence may be relied upon to prove an agreement and to prove a concerted practice.[21] But also cautioned that even where reliance is placed on the same evidence in support of these distinct cases it requires separate evaluation.[22]

[117] The Applicants rely on the same evidence for both.

[118] We next consider if one can in this case infer an agreement between the Respondent Banks.

[119] We were not persuaded that the Applicants have discharged the onus to show an agreement under section 4(1)(b).

[19] *Netstar (Pty) Ltd v Competition Commission South Africa and Another* 2011 (3) SA 171 (CAC
[20] *Netstar* at para 25.
[21] *Netstar* at para 25.
[22] *Netstar* at para 26.

[120] This is because in order to rely on an inference, the Tribunal, in *Thembekile Maritime Services*[23] following the approach set out in *De* Lacy[24] by the Supreme Court of Appeal has established that:

120.1. The process of inferential reasoning calls for an evaluation of all the evidence and not merely selected parts;

120.2. The inference that is sought to be drawn must be consistent with all the proven facts. If it is not, then the inference cannot be drawn; and

120.3. The proved facts should be such as to render the inference sought to be drawn more probable than any other reasonable inference, if they allow for another more or equally probable inference, the inference sought to be drawn cannot prevail.[25]

[121] This approach was recently reiterated by the CAC in *Aranda*[26] which stated that when considering a matter via inference or circumstance to prove a contravention of the Act, that:

> "*The process of inferential reasoning calls for an evaluation of all the evidence and not merely selected parts. The inference that is sought to be drawn must be consistent with all the proven facts. If it is not, then the inference cannot be drawn or it must be the a 'more natural, or plausible, conclusion from amongst several conceivable ones when measured against the probabilities'*".[27]

[122] In respect of the timing of and reasons for the closures, we cannot infer an agreement from this alone without more. The mere fact that the Respondent Banks closed their Sekunjalo Group clients' accounts for similar reasons, does not establish a *prima facie* case that the Respondent Banks reached an agreement in closing the Applicants' accounts in a manner prohibited by section 4(1)(b) of the Act.

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[23] *Competition Commission v Thembekile Maritime Services and Others* CR067May17.
[24] *South African Post Office v De Lacy & another* [2009] ZASCA 45; 2009 (5) SA 255 (SCA).
[25] *De Lacy* at para 35.
[26] *Aranda Textile Mills (Pty) Ltd and Another v The Competition Commission* (190/CAC/Dec20) [2021] ZACAC 1 (17 December 2021).
[27] *Aranda Textile Mills* at para 39.

[123] In respect of the Respondent Banks' membership of BASA, the Applicants merely allege that they 'surmised' that the decision taken to close the Sekunjalo Group accounts was taken at a BASA sub-committee meeting without any evidence for example of when meetings were held, who attended or what was discussed.

[124] The *prima facie* inference that we are asked to draw regarding an agreement to fix a trading condition through the membership to BASA is in our view not adequately substantiated in the absence of any further evidence.

[125] Further, we cannot *prima facie* infer an agreement by the Respondent Banks under section 4(2) by virtue of the PIC's common shareholding in certain of the Respondent Banks. The Applicants sought to bolster the lack of evidence of an agreement under section 4(1)(b) through the presumption. However, there is no evidence that the PIC has any direct interest in two of the banks – Sasfin and Access Bank - and therefore the presumption cannot apply in respect of Sasfin and Access Bank.[28] Insofar as the PIC has shareholding in the remainder of the Respondent Banks, this shareholding is non-controlling. There is no evidence that the PIC's shareholding is sufficiently significant to enable it to materially influence the decisions of the Respondent Banks. For example, the Applicants put forward no evidence regarding the PIC's position on the boards of the Respondent Banks to determine if the PIC could potentially have influenced, through its shareholding, the Respondent Banks' decision to close the Sekunjalo Group bank accounts but relied simply on the presumption without more.

[126] The Applicants conceded this during the hearing:

> "*MR NGALWANA SC: No, Chair, thank you, Chair. No, we're not saying that PIC controls the bank. We're saying; there is a presumption in section 4(2) of the Act that it is presumed that an agreement to engage in prohibited horizontal practices is presumed if the firms involved have a substantial shareholder in common. We don't take it any further than that, we leave it at that point. So, we're not saying the PIC controls the banks."*[29]

[127] Insofar as the Applicants claim that the Respondent Banks' conduct is by agreement to directly or indirectly fix a trading condition in contravention of section 4(1)(b), we find

[28] On the evidence lead before the Tribunal it was confirmed that the 14% shareholding of the PIC was not sufficient for the PIC to have board representation at Standard Bank. See Transcript, page 120, lines 3 to 7.
[29] Transcript, page 64, lines 8 – 15.

that the Applicants do not make out a case since there is no *prima facie* evidence to show that the closure of the bank accounts would have any effect on price-quality-quantity being the elements of a trading condition, as found by the Tribunal in *Patensie*.[30]

[128] We next consider a concerted practice under section 4(1)(a).

[129] As stated above, the Act defines "concerted practice" as "*co-operative or coordinated conduct between firms, achieved through direct or indirect contact, that replaces their independent action, but which does not amount to an agreement*".

[130] A concerted practice may *inter alia* arise out of coordination which becomes evident from the conduct of firms in a horizontal relationship outside of an agreement. The CAC in *Netstar* held that a concerted practice "*examines the conduct of the parties to determine whether it is coordinated conduct or if they are acting in concert. The absence of an arrangement between them or any belief that they are obliged to act in that fashion does not have an effect. A concerted practice is based on evidence that assesses the nature of the conduct of the firms said to be party to the practice. The absence of any arrangement between them or any belief that they are obliged to act in that fashion is immaterial.*"[31]

[131] The concept that a concerted practice may be inferred from behaviour might seem to suggest, at first glance, that interdependent oligopoly behaviour amounts to a concerted practice. However, oligopoly behaviour does not establish a concerted practice unless, given the nature of the market, the behaviour of the firms concerned cannot be explained other than by concerted behaviour.[32]

[132] As indicated, the Applicants submit that a concerted practice relating to a group boycott can be inferred from:

132.1. The closure or restriction of the accounts;

132.2. The timing of these decisions;

[30] *Competition Commission and Patensie Sitrus Beherend Beperk* (37/CR/Jun01) at para 35.
[31] *Netstar* at para 25.
[32] The CAC in *Netstar* stated that the case for a concerted practice is based on evidence that assesses the nature of the conduct of the firms said to be party to the practice, at para 26.

132.3. The similarity of reasons given; and

132.4. The membership of the banks in BASA.

[133] In terms of the nature of the market, the Applicants have without challenge stated that while there are 31 registered banks in South Africa under the supervision of the Prudential Authority, Nedbank, Standard Bank, FirstRand, ABSA and Investec have a combined share of about 90.1% in the provision of banking services in South Africa.[33] This points to an oligopoly market with fringe players. Further, the Applicants have stated without challenge that the market has high barriers to entry, including significant regulatory barriers.

[134] As discussed above, the Respondent Banks claim reputational risk as their justification for the conduct.[34] We considered this explanation (discussed more in detail below) and found it inadequate.

[135] While parallel conduct is not by itself proof of a concerted practice (such proof can only be uncovered through an investigation by the Commission), given the nature of the banking services market – the undisputed evidence of high barriers to entry and concentration – and the conduct of the banks, we find that the conduct complained of does at a *prima facie* level establish a case of a concerted practice between firms. This is because the Respondents, acting in concert, closed the bank accounts one after another without an adequate justification. For this finding it is not necessary to show that the Respondents agreed to this. As the CAC has found in regard to a concerted practice: "*The absence of any arrangement between them or any belief that they are obliged to act in an agreement between them or any belief that they are obliged to act in that fashion is immaterial*."[35]

[136] The label group boycott however can be used to describe a wide variety of business relationships and conduct. A group boycott for example may involve a concerted practice by competitors to protect their own turf and in this form the only reason is that participants would like to be spared from unwelcome competition. This is not the case

[33] The Applicants submit that the Prudential Authority in its 2020/21 Annual Report found that the banking sector is dominated by the five largest banks which collectively hold 90.1%.
[34] Similarity of conduct across banks can be compatible with oligopolistic behaviour; but tacit collusion may also explain such parallelism.
[35] *Netstar* at para 25.

that the Applicants have raised. The Applicants' case relates to a concerted practice by competitors involving a refusal to deal with the Applicants which they label as a "group boycott".

[137] In a concerted refusal to deal, which is the case at hand, the Respondent Banks, rather than protecting their own market from entry or unwelcome forms of aggressive competition, may through a concerted practice be seeking to impose terms they concertedly favour on downstream customers, in this case the Applicants.[36] Doing this does not keep anyone out of the Respondent Banks' market, but the conduct may lead to vertical exclusion (or foreclosure of downstream firms) and harm competition (as well as hinder the ability of small firms or black owned firms to participate in markets). Competitive harm may or may not arise from such a concerted refusal to deal, however such actions, for example, may very well come under the scrutiny of section 4(1)(a). Section 4(1)(a) requires us to consider whether the conduct (a concerted practice by firms in a horizontal relationship) has the effect of substantially lessening competition in a market and to weigh this effect against any efficiency reasons for the conduct.

[138] As is widely accepted, horizontal restraints (agreements or concerted practices involving competitors) that standardize terms can be problematic. If the terms (through a concerted practice) insisted upon directly implicate price – the conduct can be characterized as price fixing and can be vulnerable to section 4(1)(b).[37] But if the terms being standardized (again through a concerted practice) are far enough removed from price, whether the concerted refusal to deal with a customer or supplier will lessen competition turns on the market structure, and other factors.

[139] The conduct raised by the Applicants in this case as described, is more important to us than the label of "group boycott". If, on the basis of an analysis, a concerted practice by firms in a horizontal relationship relates to a refusal to deal with customers or suppliers on nonprice terms (or terms not related to market allocation, or collusive tendering) in a

[36] A variation of this conduct could arise if firms in a horizontal relationship, through a concerted practice or an agreement seek to impose terms they favour on buyers or suppliers. For example, firms in a horizontal relationship might agree or through a concerted practice to refuse to deal with a buyer except through a standard contract they favour, without an arbitration clause. Again, such conduct would be assessed under section 4.

[37] Consider an example in which the boycotting firms collectively (through a concerted practice or an agreement) decide to refuse to sell to downstream buyers unless the buyers pay an agreed higher price. In this instance, the target of the boycott is a customer. Such conduct can be labelled as a group boycott, the turning points for this may be presence of evidence of express coercive demands, such as *"meet our price or we will refuse to deal with you"* which can be understood as a means of enforcing a price fixing arrangement. On this fact pattern, this conduct will attract the attention section 4(1)(b).

market occupied by the concerting competitors, or in vertically related upstream or downstream markets such conduct may contravene section 4(1)(a) prohibition.

[140] The next relevant question is whether there is *prima facie* evidence that a concerted practice by the Respondent Banks in this case, has the effect of substantially lessening competition. This requires us to consider if there is *prima facie* evidence of exclusionary vertical foreclosure or consumer harm.

[141] An "exclusionary act" is defined in section 1(c) of the Competition Amendment Act, 2018 to mean an act that impedes or prevents a firm from entering into, participating in or expanding within a market. While section 1(h) defines "participate" as referring to the ability of or opportunity for firms to sustain themselves in the market.

[142] Recall the Applicants' case is that the Respondent Banks are, through a concerted practice, refusing to deal with them and this has the effect of hindering their ability to sustain themselves in the various markets that they operate in. Moreover, the Applicants are unchallenged when they state that they are a black owned firm, and they employ more than 8 500 workers with tens of thousands of dependents mostly from poor black communities.

[143] There is no dispute on the fact that no commercial transaction of substance and scale is possible without banking services. Our view is that the Applicants establish, on a *prima facie* basis, that the conduct of the Respondent Banks has the effect of impeding or preventing the Sekunjalo Group of companies from participating in or expanding within their markets. In the markets in which the Sekunjalo Group of companies participate, their exit (foreclosure) from those markets will result in a reduction in the number of firms and this constitutes, *prima facie*, evidence of a substantial lessening of competition or harm to competition in those markets.

[144] The main efficiency justification put forward by the Respondent Banks as discussed above relates to reputational risk. The banking system is the bedrock of any modern economy as it enables trading within and across borders. Reputation is therefore critical for all the various stakeholders of the banks in order for them to have confidence in the system and in the fact that their money is safe. Reputation also takes time to build, and it provides a commercial advantage for firms in the market. Because of reputation risk, it is not surprising that firms would want to put in place (either for themselves or as

regulatory requirement) reasonable risk mitigation strategies which are proportionate to the risks identified.

[145] However, even on this defense, the Respondent Banks, on a *prima facie* basis, face a serious conflict of interest. The undisputed evidence before us shows that the Respondent Banks have a selective approach in closing bank accounts of the disfavoured Sekunjalo Group of companies. The undisputed evidence before us suggests that other favoured firms accused of conduct (or who have been found to have engaged in conduct) which could be said to cause reputational risk, have not faced a similar approach by the Respondent Banks. This suggests, *prima facie*, that the conduct of the Respondent Banks is not designed to effectively attain the claimed efficiencies and is not reasonably necessary for that purpose.

[146] In light of the above assessment of the available evidence before us, the Applicants establish a prima face case of a prohibited horizontal restraint relating to a concerted refusal to deal involving the Respondent Banks under section 4(1)(a). Given the CAC's guidance in *eMedia*, we decline to limit our assessment of the Applicants' case to section 4(1)(b) just because in their complaint to the Commission they associate the group boycott allegation with only section 4(1)(b). What is important is the description of the conduct by the Applicants. In this case the description of the conduct in the complaint to the Commission, as well as the Applicants' Founding Affidavit before us. The description of the conduct is clear and sufficient for us to evaluate the horizontal restraint alleged under a rule of reason assessment.

[147] The Constitutional Court in *Senwes*[38] has held that the Tribunal was not precluded from determining a complaint not covered by the referral. Although the Tribunal cannot initiate a hearing, this does not mean that it cannot determine a complaint brought to its attention during the course of deciding a referral.[39] Further, the Court found that "*Confining a hearing to matters raised in a referral would undermine an inquisitorial enquiry*".[40] In *Glaxo Wellcome (Pty) Ltd and others v National Association of Pharmaceutical Wholesalers* the CAC held that Section 49B focuses on a "prohibited practice" and does not require a complainant to identify prohibited conduct with

[38] *Competition Commission of South Africa v Senwes Ltd* (CCT 61/11) [2012] ZACC 6; 2012 (7) BCLR 667(CC) (12 April 2012)
[39] *Senwes* at para 48.
[40] *Senwes* at para 50.

reference to various sections of the Act. A complainant is not required to pigeonhole the conduct complained of with reference to particular sections of the Act.[41]

[148] To conclude, we find that the Applicants have established on a *prima facie* basis, a concerted refusal to deal under section 4(1)(a)for reasons set out above, However, the Applicants do not establish a *prima facie* case of a concerted practice under a section 4(1)(b) since the Applicants proffered no *prima facie* evidence to show that the closure of the bank accounts would have an effect on any trading condition in terms of section 4(1)(b)(i), this being trading conditions that have an effect on price-quality-quantity as contemplated in *Patensie* where the Tribunal considered the necessary elements to prove a contravention of section 4(1)(b) by fixing a trading condition.[42] We also did not a find *prima facie* evidence of customer allocation.

Is there *prima facie* evidence relating to the alleged prohibited practice under section 8?

[149] Section 8(1)(c) deals the abuse of dominance through general exclusionary acts. It provides that it is prohibited for a dominant firm to engage in an exclusionary act – other than a type of "named" exclusionary act listed in section 8(1)(d) – if the anti-competitive effect of that act outweighs its technological, efficiency or other pro-competitive gain.

[150] An exclusionary act is defined as "*an act that impedes or prevents a firm from entering into, participating in or expanding within, a market*".[43]

[151] Under section 8(1)(d)(ii), a dominant firm may not engage in the exclusionary act of refusing to supply scarce goods or services to competitors or customers when supplying is economically feasible, unless the firm concerned can show technological, efficiency or other pro-competitive gains that outweigh the anti-competitive effect of its act.

[152] Under section 8(1)(d)(iii), a dominant firm may not engage in the exclusionary act of forcing a buyer to accept a condition unrelated to the object of a contract unless the firm concerned can show technological, efficiency or other pro-competitive gains that outweigh the anti-competitive effect of its act.

[41] *Glaxo Wellcome (Pty) Ltd and others v National Association of Pharmaceutical Wholesalers* at para 15.
[42] *Patensie* at para 35.
[43] Section 1(1) of the Act.

[153] Both sections 8(1)(c) and 8(1)(d) require a showing of dominance. Section 7 defines "Dominance" as:

> *"7 Dominant Firms*
> *A firm is dominant in a market if-*
>
> > *(a) It has at least 45% of that market;*
> > *(b) It has at least 35%, but less than 45% of that market, unless it can show that it does not have market power; or*
> > *(c) It has less than 35% of that market, but has market power."*

[154] Market power is defined in section 1(1) of the Act as the power of a firm to control prices, to exclude competition or to behave to an appreciable extent independently of its competitors, customers, or suppliers.

[155] The Tribunal's approach to section 8(1)(c) and 8(1)(d) is found in *South African Airways*[44]*,* in which it stated that:

> "*In summary, we find that the Act sets out the following approach to exclusionary practices.* In the first place we examine whether the conduct in question is exclusionary in nature*. In terms of section 8(c) that would be conduct that fits the definition in the Act for what constitutes an exclusionary act. In terms of 8(d) it is conduct that meets the definitions set out in the sub-paragraphs of that section. If the conduct meets the requirements of the definition, we then enquire whether the exclusionary act has an anti-competitive effect. This question will be answered in the affirmative if there is (i) evidence of actual harm to consumer welfare or (ii) if the exclusionary act is substantial or significant in terms of its effect in foreclosing the market to rivals. This latter conclusion is partly factual and partly based on reasonable inferences drawn from proven facts. If the answer to that question is yes, we conclude that the conduct will have an anti-competitive effect. Whichever species of anti-competitive effect we have, consumer welfare or likely foreclosure, we have evidence of a quantitative nature and hence we can return to the scales with a concept capable of being measured against the alleged efficiency gain.*

[44] *Competition Commission and South African Airways (Pty) Ltd* (18/CR/Mar01) [2005] ZACT 50 (28 July 2005) ("SAA").

Thus far the onus of proof in terms of both sections is on the complainant. Here the treatment of the onus in the two sections now diverges.

In terms of 8(c) we then consider whether the anti-competitive effect outweighs any efficiency justification for the conduct. If it does we can find that there has been an abuse of dominance. Here again the onus is on the complainant.

In terms of section 8(d) the burden of proof now shifts to the respondent who must prove that the efficiency justification outweighs the anticompetitive effect. If the respondent does not, then the conduct will be found to be an abuse.

It is now appropriate to answer our prior questions. An anti-competitive effect is something different to an exclusionary act. This does not make the reference to an exclusionary act somehow superfluous. It firstly signals that we are analysing an exclusionary as opposed to an exploitative abuse. Because we know we are dealing with an exclusionary as opposed to an exploitative abuse, it helps guide our analysis of the alleged anti-competitive effects of the conduct. More importantly, because some forms of exclusionary act are for the legislature more commonly associated with egregious behaviour by dominant firms these are signaled out for special mention, so that dominant firms are on their guard to be especially careful when embarking on this form of market behaviour. Finally, we would suggest that the use of the word has a "characterising" function. It signals the legislature's intention to view competitive harm as structural in nature as opposed to a test of abuse of dominance that is based solely on consumer harm."[45]

[156] What the *South African Airways* approach means in effect is that section 8(1) is a rule of reason prohibition. This means that the conduct complained of will only be prohibited if it has an anti-competitive effect. Under section 8(1)(c) an applicant must show the elements of the exclusionary conduct as well as the effects. However, under section 8(1)(d), the onus shifts to the respondent to demonstrate that the effects are outweighed by pro-competitive gains.

[45] *SAA* at paras 132 – 136.

[157] The Applicants in this case are therefore required to satisfy the critical elements of the sections namely *prima facie* evidence of the dominance of the Respondent Banks and that the conduct complained of has exclusionary effects. In terms of 8(1)(d)(ii) the onus shifts on the Respondent Banks to show that pro-competitive gains outweigh the anti-competitive effects. In terms of 8(1)(c) the Applicants have the onus of showing this. We note that an assessment of a firm's dominance is almost always done with reference to the market within which it functions.

The Applicants' submissions on dominance

[158] With regards to section 8, the Applicants allege that the Respondent Banks' closure of the bank accounts and/or their refusal to open new bank accounts constitute a refusal to supply/deal under both sections 8(1)(d)(ii) and 8(1)(c).

[159] The Applicants allege that:

159.1. Although under section 7(a) and section 7(b), the Respondent Banks each have less than the statutory dominance threshold in market shares of at least 45% or at least 35% but less than 45%, they each possess market power.

159.2. Alternatively, the Respondent Banks collectively constitute a single firm for purposes of this application or have collective dominance. This is because the five largest banks collectively constitute about 90% of the market with second and third tier banks collectively holding the balance of approximately 9%.[46]

Facts alleged/evidence of market power

[160] The Applicants rely on the following as evidence to illustrate that the Respondent Banks have market power:

160.1. The Respondent Banks are individually dominant because they behaved appreciably independently of the Applicants (as their customers).

160.1.1. The Respondent Banks are market participants in a market with extremely high barriers to entry, evidenced *inter alia* by the SARB entry

[46] Sekunjalo Heads of Argument at [8].

requirements. The banking sector is an oligopolist market and is highly concentrated.

160.1.2. Entry barriers are widely considered the most important factor in determining whether a firm's ability to exercise market power is effectively constrained. [47]

160.1.3. Customers of the Respondent Banks do not have bargaining power to undermine the exercise of market power. This is evidenced by the conduct of the Respondent Banks to terminate services in circumstances where the Applicants are going to be left unbanked.

160.1.4. While the individual Respondent Banks do not meet the market share thresholds under sections 7(a) and (b) for dominance, they meet the dominance threshold under section 7 (c), i,e., less that 35% of the market but has market power.

160.2. Alternatively, collectively as a firm the Respondents are dominant because their market shares exceed 90%.

[161] In response, the Respondent Banks argue that the mere fact that the banks have closed the Applicants' accounts does not show that the banks can act independently of their customers or competitors by, for instance, raising their prices or lowering the quality of their services while retaining market share. This simply shows that the Respondent Banks have closed the Applicants' accounts in a series of unilateral decisions (or acting independent of each other). Essentially that market power should not be assessed by reference to the conduct of a firm to one of its customers rather it should be assessed by reference to a group of customers.

[162] The Respondent Banks argue that assessing market power in relation to one customer would lead to limitless liability if a firm could be said to have "market power" under section 7(c) of the Act simply because the firm decided to end its relationship with a particular customer in the ordinary course of managing its risks and relationships.

Are the Respondent Banks Dominant?

[47] OECD "*Policy Roundtables, Evidentiary Issues in Proving Dominance*", 2006 p 7.

[163] It is common cause that none of the Respondent Banks is dominant in terms of the market share thresholds stipulated in the Act (at least 45% or at least 35% but less than 45%). The Applicants concede this. However, their submission is that the Respondent Banks have market power defined as "*the power of a firm to control prices, to exclude competition or to behave independently of its of its competitors, customers or suppliers*."[48]

[164] The CAC in *eMedia* noted that context matters. It noted that MultiChoice had a well-entrenched dominant position (which was unlikely to change), and it did not have to preserve this position at the expense of a black owned, medium sized competitor like *eMedia*.[49] Furthermore, it pointed out that there were barriers to entry and expansion in the relevant market.[50]

[165] The context in this case is that South Africa's commercial and retail banking industries comprise a large and important part of the financial sector.

[166] The Applicants point us to the Competition Amendment Bill of 2017 which demonstrated that the financial services sector is highly concentrated. They indicated that one of the priorities of the Competition Amendment Bill was to pay special attention to the impact of anti-competitive conduct on small businesses and firms owned by historical disadvantaged persons.

[167] The Applicants further point us to the Commission's Banking Enquiry Report, which focused on retail banking and payments, and conducted a comprehensive market power assessment, and found that each of the big four banks possess appreciable market power despite none possessing a market share significantly above 30% in any product category. Furthermore, the report found that the cost to customers of switching banks (including the search costs in finding an alternative) are generally enough to create a significant degree of customer captivity and so confer on banks an appreciable degree of market power. Furthermore, the oligopolistic conditions, high barriers to entry, and information asymmetries, all contributed to the banks having an appreciable degree

[48] Section 1(1) of the Act.
[49] *eMedia* at para 102.
[50] *eMedia* at para 104.

of market power over their ordinary customers and that they do exercise that market power.[51]

[168] While the Banking Enquiry Report was issued in June 2008, the Respondents did not put up any facts or evidence to counter the Commission's findings on market concentration and market power in retail banking and payment services.

[169] An assessment of market power in this context requires us to consider whether the decisions of the Respondent Banks individually are largely independent to the actions and reactions of customers or competitors or suppliers.

[170] Based on the available evidence before us (including the recent history of the industry as reflected in the Banking Enquiry Report), our view is that the Applicants establish, a *prima facie* case, that each individual Respondent Bank has market power. This is illustrated by the following:

170.1. The undisputed evidence indicating that there are high barriers to entry and therefore new entry by potential competitors is unlikely to offer an effective constraint to each Respondent Bank.

170.2. Notwithstanding the fact that individual companies belong to the Sekunjalo Group and despite the Sekunjalo Group size and commercial significance they have not been able to exercise any countervailing power against each individual bank or collectively. The Applicants, individually and as part of the Sekunjalo Group, have struggled to open bank accounts with second and third tier banks and are in danger of being unbanked by almost 100% of the banking services market. The Applicants do not have other real alternatives for banking and payment services, as we discuss below. The market position of customers provides an indication of their inability to constrain the Respondent Banks.

170.3. The banking services market is highly concentrated. The Applicants' unchallenged evidence is that Nedbank, Standard Bank, FirstRand, ABSA, and Investec collectively have a market share of about 90%. This suggests that the market is oligopolistic, with a fringe of smaller players. A combination of factors such as high concentration, high barriers to entry, and a weak position of

[51] Commission's Banking Market Enquiry Report, Chapter 2, page 82

customers, suggests that the Respondents have an appreciable degree of market power.

[171] We do not have to decide whether the Respondent Banks are collectively dominant since on the *prima facie* evidence before us they individually possess market power.

[172] We now turn to consider below, the specific relevant elements needed to show a prohibition under section 8(d)(ii).

Section 8(1)(d)(ii): Is there a refusal to supply a customer?

[173] It is common cause that the Applicants are customers (or potential customers) of the Respondent Banks.

[174] It is common cause in respect of the relevant bank accounts by the Respondent Banks respectively (as per **Annexure "A"**) that the Respondent Banks had closed certain Applicants' banks accounts, save for Nedbank and Standard Bank, who have since the hearing also closed the accounts, and/or certain of the Respondent Banks have refused to provide banking services to specific Applicants when approached. It appears further from the record that Bidvest and Mercantile respectively have an existing banking relationship each with one of the Applicants. Both banks however have refused to provide further banking services to the Sekunjalo Group when approached.

Section 8(1)(d)(ii): Are banking and payments service scarce?

[175] The Applicants state that almost 100% of the market has refused to provide banking services to them. They submit, as noted by the Commission in the Banking Enquiry Report that without a bank account and access to payment services, it would be difficult if not impossible for an individual firm to participate in any modern economy and that there are currently no real alternatives for individuals and businesses that want to participate in the formal economy other than through banks.

[176] In response, the Respondent Banks argue that banking services are not "scarce goods or services". This is because banking services are offered by approximately 70 banks in South Africa. Those services do not become "scarce" merely because the Applicants are unable to access them. Differently expressed, goods or services cannot be "scarce"

from the perspective of one purchaser if they are not "scarce" from the perspective of all other purchasers.

[177] We are not persuaded by the Respondent Banks' arguments that banking and payment services are not scarce when considered in their proper context.

[178] As the evidence shows, all the large banks as well as a number of smaller ones have closed the Applicants' banks accounts.

[179] The Commission's banking enquiry report noted "*Without a bank account, and access to payment services, it will be difficult, if not impossible for an individual to participate effectively in any modern economy. Today, a bank account is usually required in the formal economy in order to receive wages, and salaries; make a wide variety, or routine payments, and access savings, and credit facilities. There are currently no real alternatives for individuals, and business that want to participate in the formal economy. Credit facilities, including home loans, are generally only available to those able to service the debt via a transaction account*."[52]

[180] The Respondents have not seriously challenged the Applicants' submissions in relation to the role that commercial banks play in a modern economy and that players operating in such economy cannot effectively function without access to banking and payment services. Instead, the Respondents argue that the Applicants have continued operating in the markets in which they are active despite their banking services being terminated by some banks, that they have other alternatives in the form of other banks and that they can make use of third-party payment service providers.

[181] However, on the evidence before us there appear to be no economic alternatives to the Applicants. This is because Nedbank, Standard Bank, ABSA, Investec and FirstRand are the major banks in South Africa, that on the evidence before us collectively hold the bulk of the market share. Thus, there is a very high level of concentration in the hands of the large banks in South Africa. These banks have all terminated services to the relevant Applicants or are contemplating same.

[182] Furthermore, not only is the banking market highly concentrated in the hands of the largest banks, there also are high barriers to entry in the banking market including high

[52] Commission's Banking Market Enquiry Report, Chapter 2, para 2.1.2.

regulatory barriers and sunk costs. The Commission's banking enquiry report notes that most of the banks have noted that a large proportion of their costs are fixed.[53] The enquiry found that this particular cost structure (i.e., high fixed and common costs) drives concentration in banking and places certain limits on the extent of competition.

[183] The Applicants' evidence is that they have also approached second and third tier banks for banking services. These include mutual banks and local branches of foreign banks. According to the Applicants, this segment of the market represents approximately 10% of the market in terms of market share.

[184] Further, the Applicants say that the banks have also advanced as a reason for rejecting the Applicants' request for bank accounts either that they do not provide corporate banking services to large companies, or they provide such services only to listed companies. In addition, the Applicants indicate that many foreign banks with branches in South Africa have also been approached but that the Reserve Bank does not permit the opening of bank accounts with foreign banks which have branches in South Africa. So, both the large and small banks have refused to extend banking services to the Applicants.

[185] Based on the available evidence before us, the Applicants have established a *prima facie* case that banking services are a scarce service because of the undisputed evidence on high entry barriers and a lack of credible alternatives.

Section 8(1)(d)(ii): Is it economically feasible for the Respondents to supply banking and payment services to the Applicants?

[186] The Applicants rely on Sutherland and Kemp who point out circumstances where supply may not be feasible for instance due to creditworthiness or capacity constraints. Since none of these apply to the Applicants, they argue it is economically feasible for the banks to supply the banking services.

[187] Sasfin argue that it would not be feasible for it to reinstate services because of its small number of employees (it employs 36 employees) and that it would have to employ at least three additional people). the other Respondent Banks did not put up any arguments on economic feasibility but rather focused their defenses on market power

[53] Commission's Banking Market Enquiry Report, Chapter 2, para 2.4.

and scarcity. Recall that Sasfin had a banking relationship with only one of the Applicants.

[188] Sasfin's argument assumes that it has made relationship specific investments with its current customers and that it would not be economically feasible to use its current employees to service the Applicants. However, this argument overlooks the fact that Sasfin already had bank accounts with three of the Applicants (see Annexure A) which were closed in December 2021 and February 2022. Given the above, Sasfin's claims regarding feasibility appear to us to be over-broad and has not been substantiated with quantified evidence. We further note that the relevant Applicants that had bank accounts with Sasfin that had to be monitored by it have not been accused of money laundering, corruption or unlawful activities.

[189] The other Respondent Banks did not put up any meaningful arguments on the economic feasibility of providing services to the Applicants but rather focused their defenses on market power and scarcity. They too either supply or supplied banking services to the Applicants who have not been accused of money laundering, corruption or unlawful activities.

[190] For the reasons set out above, we find that the Applicants have, *prima facie,* established that it is economically feasible for each individual Respondent Bank to supply the services. First, the undisputed evidence before us illustrates that the individual Respondent Banks provided banking services to the Sekunjalo Group of companies prior to the termination. Second, we are not persuaded on the evidence before us that continuing to supply banking services to the Sekunjalo Group of companies would be impractical, as occasioned by capacity constraints of the banks or the creditworthiness of the Applicant firms.

Section 8(1)(d)(ii): Conclusion on exclusionary act

[191] Refusing to supply a scarce service to a customer when it is economically feasible is an exclusionary act. An exclusionary act as defined in the amendments to the Act, and as reiterated in *eMedia* by the CAC, includes an act that prevents a firm from entering or participating or expanding in a market. Participating in a market means the ability of or opportunity for firms to sustain themselves in the market.

[192] For the reasons set out above, the Applicants establish a *prima facie* case of an exclusionary act described in section 8(1)(d)(ii).

Section 8(1)(c): General exclusionary act

[193] The Applicants submit that the closure of the bank accounts and/or refusal to open bank accounts is a refusal to deal which amounts to an exclusionary act under section 8(1)(c) and 8(1)(d)(ii).

[194] Based on the assessment of the *prima facie* evidence under section 8(1)(d)(ii) above, and from the same evidence (and assessment) the Applicants have established a *prima facie* case of general exclusionary conduct relating to a refusal to deal under section 8(1)(c).

Our assessment of anti-competitive effects and efficiency justifications under section 8(1)d(ii) and 8(1)(c)

[195] The Respondent Banks argue that there are no allegations or evidence in the papers that the termination of the Sekunjalo Group companies' banking accounts extends, creates, or preserves market power. Further, they state that there is no attempt by the Applicants to define the relevant market or markets, and no dealing at all with how the banks conduct could cause harm to consumer welfare or foreclose rivals. Further, the Respondent Banks state that they have no incentive to engage in an exclusionary act since they do not participate in the markets in which the Applicants operate. The exit of the Applicants from those markets would not allow any of the Respondent Banks to raise prices or to exclude competitors.

[196] The Applicants rely on the following as evidence of anti-competitive effects:[54]

196.1. Almost 100% of the market has been foreclosed to the Applicants as a result of the individual Respondent Banks refusing to provide them with banking services.

[54] We note, as correctly pointed out by the applicants that under section 8(1)(d)(ii) once the specified exclusionary act has been established, the onus to show that anti-competitive effects are outweighed by the pro-competitive gains of the exclusionary act.

196.2. The Applicants require banking and payment services to buy and sell goods and services in order to compete in their various markets that they are active in, and they will soon become unable to compete if the banks refuse to provide scarce banking and payment services to the Applicants.

196.3. The Respondent Banks' conduct will force the Sekunjalo Group's customers and suppliers to cancel their agreements with the Sekunjalo Group of companies for the provision of services and goods that are supplied to those customers or procured from those suppliers.

196.4. The Sekunjalo Group of companies are therefore likely to be forced to exit the markets in which they operate, with the result that there will be less competition in those markets.

196.5. The effect of this conduct will therefore be that it will impede or prevent firms from entering into, participating in or expanding within the markets in which they operate, and particularly a black owned firm which the Act is specifically mandated to promote.

[197] In *eMedia*, the CAC reminded the Tribunal to adopt a transformative constitutional approach, and which is consistent with the scheme of the Act and apply a context-sensitive approach. On a context sensitive approach, it singled out that the market was highly concentrated and noted that this could easily lead to exclusion. The CAC in *eMedia* stated as follows:

> *"It follows therefore that these are the guidelines this Court and indeed the Tribunal must follow when applying the provisions of the Competition Act. The approach calls for a transformative constitutional approach and must be consistent with the scheme of the Competition and apply a context-sensitive approach. This is a striking feature that must be considered in this application. Unless this transformative approach is applied even at an interim stage of proceedings, then the historical and insidious unequal distribution of wealth in South Africa will continue. Guidance can be gleaned on the proper jurisprudential application of the Competition Act by following the dictum by Jafta J in Matatiele where he explained the principles of constitutional interpretation which involves a combination of a textual approach and a structural approach. (emphasis added)*

"Any construction of a provision in a constitution must be consistent with the structure or scheme of the Constitution. This provides the context within which a provision in the Constitution must be construed."

It follows therefore that in granting or refusing interim relief or indeed any relief the jurisprudential and transformative context of the Competition Act must be considered. Professor Fox draws attention to the dictum of Moseneke J in Minister of Finance v Van Heerden, where he states that the achievement of equality goes to the bedrock of our constitutional architecture. It informs all law and against which all law must be tested for constitutional consonance.15 When interpreting any legislation, and when developing the common law or customary law, every court, tribunal, or forum must promote the spirit, purport, and objects of the Bill of Rights.

eMedia correctly submits that a scrutiny of the reasons given by the Tribunal at this interim stage shows its failure to pay sufficient attention to the context and purpose of the Competition Act. Particularly when it is evident that there are high levels of economic concentration in this basic satellite platform which can easily result in economic exclusion. MultiChoice's market share in the markets defined in the founding affidavit (including in the premium and basic satellite markets) provide clear evidence of the excessive concentration of ownership which prevail in the broadcasting industry. This point is highlighted in the 2019 article by Professor Eleanor M Fox titled, "SOUTH AFRICA, COMPETITION LAW AND EQUALITY Restoring Equity by Antitrust in a Land where Markets were Brutally Skewed". The abstract to the article provides as follows:

"In South Africa, the question is not whether to incorporate "equality" into the competition law, but how. In view of the history of heinous exclusion of all black South Africans, South Africa has long recognized inclusiveness as a competition law value. Recent amendments seek to further the equality goal. This essay argues that, within a significant space, the goals of an equitable and efficient competition law overlap. Maximizing this space requires a greater appreciation of exclusionary conduct and its harmful effects. The author next singles out the amendments that contemplate "transformation" obligations on parties to some big mergers and contracts who are seeking clearance or

exemption. She highlights the special challenges to transparency, predictability, equal opportunity, and rule of law. She argues that with hard work (which is being done) the system can be administrable, with due process, and likely to engage the creative talents of the left-out majority"[55]

[198] We have above sketched the context in which the banks operate, including high levels of concentration and high barriers to entry in the banking sector and more specifically in banking and payment services, as found in the Banking Inquiry. The Banking Inquiry found that each of the big four banks possess appreciable market power despite none possessing a market share significantly above 30% in any product category. Furthermore, the report found that among others, oligopolistic conditions, high barriers to entry, information asymmetries, switching and search costs all contributed to the banks having an appreciable degree of market power over their ordinary customers and that they do exercise that market power.[56]

[199] The Applicants made it known to us that the Sekunjalo Group is a black owned firm. They argue that as black owned firm they are being impeded from participating in the various markets in which it operates.

[200] None of the above context issues placed before us by the Applicants were disputed by the Respondent Banks.

[201] In this case, we note that unlike in *eMedia* where reference is made to the US guidance that "a*n arbitrary refusal to deal by a monopolist cannot be unlawful unless it extends, preserves or creates, or threatens to create significant market power in some market"*[57], that would unnecessarily limit what section 8, read against the amendments which include participation by historically disadvantaged persons and black owned businesses, seeks to do and undo. If the theory of harm being pursued is that the refusal to supply by a dominant firm (in terms of section 7(c)) seeks to exercise market power in way that it prevents a downstream firm from sustaining itself in a market rather than creating, extending or preserving market power of the upstream firm, then in those circumstances it is possible to find such conduct to be harmful to competition and exclusionary.

[55] *eMedia* at paras 84 – 86.
[56] Commission's Banking Market Enquiry Report, Chapter 2, page 82
[57] *eMedia* at para 115.

[202] As the CAC held in *eMedia*, if the test for an exclusionary act now includes consideration of a firm's ability to sustain itself in the market, and if it can be shown on the facts that conduct by a dominant firm prevents a firm from participating in the market, then a *prima facie* case would have been made out. Without a bank account the Applicants cannot participate and/or expand in the markets that they operate in and will be forced to exit the markets in which they participate. We also deal with the evidence before us showing the Applicants' inability to participate in the markets in which they operate, and their inability to sustain themselves, under irreparable harm.

[203] For the reasons set out above, the Applicants establish a *prima facie* case of foreclosure and therefore anti-competitive effects.

[204] The CAC in *eMedia* buttressed its reasoning in giving interim relief to *eMedia* with the following passage citing the Tribunal's decision in Bulb Man:

> *"It also follows from the above analysis that MultiChoice is engaged in an exclusionary act in refusing to allow eMedia's channels to be broadcasted on its platform and therefor this provides a further ground to uphold the appeal. The Tribunal in Bulb Man stated the legal position in applying s 8(1)(d)(ii) to a refusal to deal situation. This is the important issue to be determined in this case since it cannot MultiChoice has not been able to objectively justify its stance."*[58]

[205] The Respondent Banks rely on the justification of reputational risk as a reason for the refusal to provide the Applicants with banking and payment services under both sections 8(1)(d)(ii) and 8(1)(c).

[206] The Applicants dispute that the banking regulations relied upon by the Respondent Banks require that they close customer's banking accounts on the basis of reputational risk.

> "*There is no question that the supply of banking services to the applicants is economically feasible. The argument advanced by the banks based on "reputational risk", or their reliance on Bredenkamp or regulatory framework is simply misplaced. As we shall demonstrate below, none of the pieces of*

[58] *eMedia* at para 115.

legislation they invoke supports their position. We have demonstrated that the factual matrix in Bredenkamp is absent in this case. We have demonstrated that in any event Bredenkamp has been overtaken by Constitutional Court equality jurisprudence and by legislation."[59]

[207] The Applicants argue further that to the contrary the Respondent Banks have provided banking services to other (white owned or favoured) firms reportedly also carrying reputational risks for the Respondent Banks. They state that:

"*The respondents reasoning of reputational risk is fatally flawed when you consider that at least twenty companies involved in at least R200 billion of corruption such as the likes of Steinhoff, EOH, Tongaat, ABB, Glencore and many other are still clients of these respondents.*"[60]

[208] The efficiency or procompetitive argument put forward by the Respondent Banks relates to reputational risk based on the legislative environment in which they operate. Again, we note that because of the importance of reputation in the banking industry, it is not surprising that firms would want (or be required through regulation) to put in place reasonable risk mitigation strategies which are proportionate to the risks.

[209] On this reputational risk argument, the Applicants argue that the relevant legislative framework does not require the Respondent Banks to take very aggressive pre-emptive measures such as the closure of bank accounts but requires them to monitor, record and report suspicious transactions to the Financial Intelligence Centre and other prosecutorial bodies. The Applicants allege that the Respondent Banks' application of this justification is biased as they continue to be associated with the PIC through its shareholding in (certain of) them, and continue to provide banking services to the PIC, and in circumstances in which the Mpati Commission also made adverse findings against the PIC. The Applicants state that further evidence of this bias can be seen in the fact the Respondent Banks have continued to provide payment services to a number of white owned companies who have been found guilty of financial fraud and financial misconduct. Moreover, the Respondent Banks themselves stand accused by the Commission of price fixing in a case before the Tribunal. Their argument on this point is that a price fixing allegation is itself in an allegation of a conspiracy against the public

[59] Sekunjalo Heads of Argument at para 88.
[60] Sekunjalo Replying Affidavit at para 116.

and therefore is an allegation of corruption and is a reputational risk for the Respondent Banks.

[210] We note that a selective approach to closing down accounts of disfavoured firms while keeping accounts of favoured firms open by the Respondent Banks on the grounds of reputational risk suggests to us, on a *prima facie* basis, that such conduct is not designed to effectively attain the claimed efficiencies and is not reasonably necessary for that purpose.

[211] In our view, self-regulation as a justification to a refusal to supply a customer by the individual Respondent Banks in this case illustrates the manifest conflict of interest by the Respondents Banks. As indicated, other avenues are open to the Respondents to report to the relevant authority or authorities.

[212] The CAC in *eMedia* found that MultiChoice's explanation for the refusal to supply distribution services provided ex-post facto could not be objectively justified. It found the explanations were unpersuasive and point in the direction of a dominant firm warding off competition. In this case, we find that the Respondent Banks' explanations are unpersuasive because the evidence before us suggests that they are not applied in an unbiased way and thus not objectively justified.

Conclusion under section 8(1)(d)(ii) and 8(1)(c)

[213] As discussed earlier, under section 8(1)(d)(ii) the onus to show procompetitive gains that outweigh the anti-competitive effects of the alleged refusal to deal is on the Respondent Banks, while the onus to show any alleged anti-competitive effects of the refusal to deal under section 8(1)(c) is on the Applicants.

[214] In light of the above assessment and the available evidence before us, we find that the Applicants establish a *prima facie* case under 8(1)(d)(ii).

[215] For the reasons set out above, we find that the Applicants have done enough to establish a *prima facie* case under section 8(1)(c) and to discharge the onus of *prima facie* anti-competitive effects.

Nedbank: Is there *prima facie* evidence relating to the alleged prohibited practice under Section 8(1)(d)(iii)?

[216] In respect of Nedbank specifically, the Applicants allege that Nedbank has also contravened section 8(d)(iii) of the Act because Nedbank wants to sell its services to the Applicants on condition that the Applicants dispose of its shareholding in Premier Fishing. Nedbank was prepared to continue banking the Premier Fishing Group as there was a pending transaction wherein AEEI and the Sekunjalo Group were to divest their interests in the Premier Fishing Group. This would have reduced the risk and reputational harm to Nedbank due to the findings of the Mpati report. Specifically, the allegation is that Nedbank is forcing Premier Fishing to accept a condition unrelated to the object of providing banking services.

[217] Nedbank's response is that the condition responds to the reputational risk for Nedbank because the Sekunjalo Group will no longer own shares in the Premier Fishing group. Moreover, it argues that it has no incentive to leverage its putative market power.

Our assessment of section 8(1)(d)(iii)

[218] We note that Nedbank's response does not challenge the allegation establishing the exclusionary act but rather it seeks to put forward an efficiency or procompetitive justification. In other words, Nedbank's approach to the allegation is to state that any anti-competitive effects are outweighed by procompetitive gains of the conduct.

[219] In our assessment of the allegation under section 8(1)(d)(iii), we find that the Applicants establish a *prima facie* case of forcing a buyer to accept a condition unrelated to the object of the contract.

[220] Further, as argued above under the section 8(d)(ii) assessment, the Respondent Banks' selective approach to enforcing the rule on reputational risk demonstrates *prima facie* that the conduct of the banks in relation to the Applicants is not designed to effectively attain the claimed efficiencies and is not reasonably necessary for that purpose.

Is there *prima facie* evidence relating to the alleged prohibited practice under Section 5?

[221] The Applicants argue that:

221.1. The business relationship between the banks and the Sekunjalo Group is vertical.

221.2. The refusal to provide banking and payment services by terminating the agreements has the effect of substantially preventing or lessening competition in the various markets in which the Sekunjalo Group operates.

221.3. Thus, the agreements between the banks and the Sekunjalo Group contravene section 5(1) of the Act.[61]

[222] The Respondent Banks respond to the section 5 allegation by stating that this allegation is misconceived as there is nothing about the existence of a termination clause in a contract between a bank and an Applicant that would give rise to anti-competitive effects of the sort envisaged by section 5. The Respondent Banks also argue that the Applicants have failed to establish any harm to competition and that the CAC in *South African Breweries Ltd and others,* has stated that, "i*t must follow that some likely effect upon price, output and/or quality of product which diminishes consumer welfare should be shown to exist in order to trigger the application of section 5(1)*."[62] However, the guidance in *South African Breweries Ltd and others,* came before the 2018 Competition Amendment Act, which expanded the definition of what constitutes an exclusionary act and therefore what constitutes harm.

[223] We found that the Applicants' allegation under section 5(1) was raised conceptually and not much evidence on it was put before us to support or rebut arguments to enable us to carry out a proper *prima facie* assessment.

[61] Section 5(1) prohibits agreements between firms in a vertical relationship if that agreement will have an adverse effect on competition which cannot be efficiency justified. The onus to prove an adverse effect on competition rests on the Applicant. It follows that only once the Applicant has established a case, the burden of proof shifts to the respondent to assert its efficiency or pro-competitive gain defense. Should it fail to do so, it may be concluded that the respondent has contravened section 5(1).
[62] *Competition Commission v South African Breweries Ltd and others* at para 60.

Conclusion on evidence of a prohibited practice

[224] For the reasons set out above, we find that the Applicants establish *prima facie* that the Respondent Banks have engaged in a concerted practice involving the termination of the Applicants accounts and refusal to supply banking services (outrightly or constructively) to the Applicants amounting to a restricted horizontal practice in terms of section 4(1)(a).

[225] For the reasons set out above, we find that the Applicants establish *prima facie* a case of prohibited practice on the part of the individual Respondent Banks relating to an abuse of dominance in terms of section 8(c) (exclusionary conduct on the part of the Respondents) or section 8(d)(ii) (refusal to supply scarce services). We find that on the allegation against Nedbank under section 8(1)(d)(iii), the Applicants establish a *prima facie* case of forcing a buyer to accept a condition unrelated to the object of the contract.

[226] We do not conclude under section 5.

Irreparable harm and balance of convenience

[227] We now turn to discuss the remaining elements of section 49C of the Act, the need to prevent serious or irreparable damage to the applicant(s) and balance of convenience.

Applicants' submissions on harm and balance of convenience

[228] The Applicants argue that their interim relief application is about:

228.1. staying in the various product and service markets in which they operate;

228.2. survival for the Applicants;

228.3. succeeding in their markets as a black owned firms;

228.4. being allowed to compete freely; and

228.5. being allowed to enjoy their pre-ordained and necessary pre-eminence.

[229] As contextual background they submit that the Sekunjalo Group has sought to promote employment, and participation in the economy of South Africa over the past 26 years. The Applicants have interests in Media Publishing, ICT, Healthcare and Pharmaceuticals, Energy and Power, Asset Management and Financial Services, Biotechnology, E-commerce, Fishing and Aquaculture, Private Equity and Investments and Telecommunications. The Sekunjalo Group is also the first black empowerment group to control a large media company in South Africa. Certain of the businesses within the Sekunjalo Group import or export products or services and therefore from a banking perspective require access to merchant facilities and foreign exchange facilities.

[230] Again, as context, they submit that the Sekunjalo Group's annual revenue amounts to approximately R8.5 billion. They state that the Sekunjalo Group funds its capital growth itself through re-investments in entities within the Sekunjalo Group as well as intercompany loans. This requires the transfer of funds for purposes of intercompany loans or investments between Sekunjalo Group entities from time to time.

[231] The Applicants argue that they have either been foreclosed or are in danger of being foreclosed by 100% of the banking services market and that they do not have other real alternatives for banking and payment services. They point to the five large banks in South Africa having approximately 90%[63] of the market, as per the Prudential Authority's 2020/21 Annual Report[64], and that these five large banks have all decided to terminate their services to the relevant Applicants or may do so (specifically in the case of Standard Bank[65] and Nedbank).

[232] The Applicants further argue that if the interim relief is not granted, they are likely to be left unbanked and that no business can survive without a bank account in a modern economy. They say that they cannot effectively compete in the various markets in which they operate without banking services. The latter they say will have deleterious consequences on the public interest. The adverse public interest effects include the loss of a large number of jobs, livelihoods of tens of thousands of people and loss of

[63] The Applicants submit that the Prudential Authority in its 2020/21 Annual Report found that the banking sector is dominated by the five largest banks which collectively hold 90.1%.
[64] https://www.resbank.co.za/content/dam/sarb/publications/reports/pa-annual-reports/2021/Prudential%20Authority%20Annual%20Report%202020%202021.pdf.
[65] See paragraph 340 dealing with Standard Bank's decision to also terminate banking services to the relevant Applicants.

competitive black-owned businesses which goes against the very objects of the Act. Not granting the relief therefore will cause them serious or irreparable damage.

[233] They furthermore argue that *Mediclinic* should be the guiding jurisprudence in determining this application and that *Mediclinic* re-emphasises the centrality of the purposes of the Act in its interpretation. In that context it is manifestly reasonable and just to grant them the interim relief.

[234] The Applicants dismiss the defences of the Respondent Banks and argue *inter alia* that the regulatory framework governing the banking industry does not authorise the Respondents to contravene the Act. They argue that the banks may not terminate a banking relationship in contravention of the Act and if any termination violates the Act, the Tribunal is entitled, and duty bound to intervene.

[235] They further argue that this case is not about breach of contract but about the anti-competitive conduct of the Respondent Banks while hiding behind opaque considerations of "reputational risk" or "risk appetite" and regulatory prescripts about criminal activities that find no application in the circumstances of this case.

[236] They also allege that the Respondent Banks are selective as to who poses a reputational risk to them. They aver that unlike many of the companies that have admitted to fraud such as EOH, Tongaat Hullet and Steinhoff, that the Respondent Banks have continued their banking relationships with these companies including providing large lending facilities to them. They say that, in contrast, in the case of the Applicants none of the banks currently provide any material lending facilities to them and therefore do not face any fiscal risk in relation to the Applicants.

[237] They deny that the relief sought by them would have a severe adverse impact on the South African banking system generally. They argue that had that been the case, SARB and/or the Prudential Authority would have acted swiftly to protect the South African banking system as its custodians.

[238] The Applicants submit that they would suffer immense prejudice if they were left with no banking services.

Respondents' submissions on harm and balance of convenience

[239] The Respondents argue that the alleged harm to the Applicants is caused by the allegations that bedevil the Sekunjalo Group, which allegations have tainted the Sekunjalo Group's reputation and led to many stakeholders, including banks, refusing to do business with the Sekunjalo Group.

[240] They submit that the element of irreparable harm ought not to be countenanced by the Tribunal, because the Sekunjalo Group has failed to prove the first requirement for section 49C, as it has failed to place before the Tribunal (*prima facie*) evidence of a prohibited practice. Said another way, if there is no (*prima facie*) evidence that the Respondent Banks engaged in an alleged prohibited practice, then it cannot be said that the Sekunjalo Group has suffered any irreparable harm as a consequence of the (unproven) prohibited practices. Put another way still, any irreparable harm suffered by the Applicants is not as a consequence of the alleged prohibited practice, as none have been established by any (*prima facie*) evidence.

[241] They also argue that the Applicants have failed to identify clear competition harm if the relief was not granted and that competition law aims to protect the competitive process from harm, not an individual competitor.

[242] The Respondent Banks further argue that the Applicants will not suffer any serious or irreparable damage if the interdict is not granted and if their complaints are upheld in due course, for *inter alia* the following reasons:

242.1. The Applicants have other alternatives in that there are approximately 70 banks operating in South Africa and the Applicants could approach those other banks for banking and payment services.

242.2. Some of the Applicants have accounts with the Second Respondent, Standard Bank, which has not (at the time of the hearing) given notice of its intention to close their accounts.[66]

[66] See paragraph 340 dealing with Standard Bank's decision to also terminate banking services to the relevant Applicants.

242.3. The Applicants may use third-party paying agents in some instances (even if this is said to increase costs), and they currently continue to trade and compete utilising those alternative service providers. The Applicants are therefore not left without options and have not established that any increased cost would be fatal to the operation of the Applicants in any relevant markets.

242.4. None of the Applicants' entities which have had their bank accounts terminated have been wound up or have been liquidated. This suggests that these entities are indeed capable of operating post the closure of their bank accounts.

[243] As far as the balance of convenience is concerned the Respondent Banks argue that the balance is in their favour as:

243.1. The Respondent Banks would be prejudiced if forced to continue providing banking services to the Applicants or to reopen banking services to the Applicants since there are valid reasons not to provide them services since the Applicants as clients fall outside of their applicable risk-parameters. This is because of the substantial reputational risk / harm that the continuation of such services entails. The risk includes the potential loss of business and revenue, increased administrative and monitoring burdens, regulatory or legislative action, including the deterioration of their relationship with regulators and correspondent banks, a loss of existing and potential client business, and an impact on/reduction in their ability to retain key employees.

243.2. Forcing the Respondent Banks to continue providing banking services to the Applicants or to reopen those services would bring the Respondent Banks squarely into conflict with Regulation 39 of the Regulations Relating to Banks, promulgated in terms of section 90 of the Banks Act, 1990. Regulation 39 specifically requires a bank to consider reputational risk in its management of risk. This will increase their legal, regulatory and reputational risks domestically and as an international counterparty in the banking system.

243.3. The Respondent Banks have to comply with international best practices and standards applicable to the banking sector. This is critical for the integrity of the banking sector and these practices and standards require them to take steps to prevent it being used for money laundering or other unlawful activities. This

could have adverse effects on relationships with correspondent banks and other stakeholders.

243.4. There are options still available to the Applicants to secure banking services while their complaint is being investigated by the Commission.

243.5. The applicable banking agreements entitle both the Respondent Banks and the Applicants to terminate them, at any time, by giving each other the requisite notice. In other words, the Applicants are not entitled to obtain banking services from the Respondent Banks as of right. If the Tribunal goes behind the terms of the banking agreement, it would, in effect, be casting banking agreements, and banking relationships in general, in disarray.

Our assessment

[244] We have above already assessed whether the Applicants have made out a *prima facie* case of a prohibited practice or practices and do not repeat those findings here.

[245] In *GovChat* the Tribunal confirmed that it has a discretion in the granting of interim relief having regard to what is reasonable and just in the circumstances: *"section 49C therefore confers a discretion on the Tribunal to grant interim relief having regard to what is reasonable and just in the circumstances."*[67] *The Tribunal went on to explain "The three legs of the inquiry are however considered holistically. Thus, a weak case on say irreparable harm may be counterweighted by a very strong case on the prohibited conduct. And vice versa, a weak case on prohibited conduct may be counterweighted by a strong case on irreparable harm"*[68] *(emphasis added).*

[246] *York Timbers* similarly states that as far as the remaining factors are concerned *"viz, irreparable damage and the balance of convenience, these are not looked at in isolation or separately but are taken in conjunction with one another when we determine our overall discretion*"[69] (emphasis added).

[67] *GovChat* at para 160.
[68] *GovChat* at para 160. Also see *Vexall (Pty) Ltd v Business Connexion (Pty) Ltd Another,* Case No. IR119Oct19 at paras 17-20.
[69] *York Timbers* at para 66.

[247] The factors listed in section 49C(2)(b) of the Act therefore are not a list of prerequisites for the granting of interim relief. The three factors should be weighed against each other to determine what in the discretion of the Tribunal is 'reasonable and just'.[70] This means that even if the Applicants' case was weak on *prima facie* evidence of a prohibited practice, that alone would not be determinative of the question of 'reasonable and just' if they make out a strong case on, for example, irreparable harm. Recall that a successful interim relief applicant is only required to make out a *prima facie* case of a prohibited practice, not to establish its case on a balance of probabilities.[71]

[248] The CAC in *eMedia* stated the following in regard to irreparable harm "*There is usually no time to delve too deeply in serious or irreparable harm but at the very least it must be assessed in the context of whether there is a prima facie right at the interim level. As long as there is clear and non-speculative evidence about possible anti-competitive effects, then serious consideration must be given to the grant of the relief. In addition, the proper consideration of the balance of convenience applied to the facts also provides further checks and balances to ensure an equitable result*."[72]

[249] The CAC in *eMedia* also gave the following guidance in applying the principles in section 49C(2) of the Act: "*In applying the three principles in s 49C(2) cognisance must be taken of whether clear, non-speculative and uncontroversial facts have been presented by an applicant from which it could be reasonably and logically inferred, on a balance of probabilities, that the alleged irreparable harm would occur*."[73]

[250] The CAC in *eMedia* furthermore advised that the Tribunal must take into account the context of the Act requirement saying that "*The jurisprudential and transformative principles apply both at interim relief stage and at final relief stage. Section 49C (3) of the Competition Act equates the standard of proof as the same standard as in High Court common law interim relief. The principles are trite*."[74]

[251] To assess if the alleged damage/harm would occur, one must have regard to the economic context and importance of having access to banking services.

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[70] Competition Law of South Africa, Phillip Sutherland, Lexis Nexis, November 2021, p 11-44 para 11.6.2.
[71] *Inter alia GovChat* at para 20.
[72] *eMedia* at para 93.
[73] *eMedia* at para 8].
[74] *eMedia* at para 95.

[252] The Commission's banking enquiry report noted "*Without a bank account, and access to payment services, it will be difficult, if not impossible for an individual to participate effectively in any modern economy. Today, a bank account is usually required in the formal economy in order to receive wages, and salaries; make a wide variety, or routine payments, and access savings, and credit facilities. There are currently no real alternatives for individuals, and business that want to participate in the formal economy. Credit facilities, including home loans, are generally only available to those able to service the debt via a transaction account*."[75]

[253] As indicated, the Respondents do not seriously challenge the Applicants' submissions in relation to the role that commercial banks play in a modern economy and that players operating in such economy cannot effectively function without access to banking and payment services. Instead, the Respondents argue that the Applicants have continued operating in the markets in which they are active despite their banking services being terminated by some banks, that they have other alternatives in the form of other banks and that they can make use of third-party payment service providers. We shall assess the issue of economic alternatives below.

[254] No commercial transaction of substance and scale is possible without access to banking services. To illustrate how dependant one is on access to and indeed proof of a bank account, the Applicants point out that you cannot finance a house, or land without having a bank account. You cannot be in gainful employment without a bank account, as the employer pays your salary into the bank account. You also cannot finance the acquisition of an asset or a business without a bank account. You can't even secure a travel visa to many countries without providing bank statements.

[255] Furthermore, firms operating in markets need access to banking facilities to pay salaries and wages to employees, purchase goods and services from suppliers and service providers, receive payments from their customers, apply for credit and loan facilities, finance acquisitions of assets / businesses, to name but a few examples of the banking services required in a modern economy to participate and expand in any market. Indeed, banking and payment services provide the lifeblood to any corporate citizen to function optimally and to effectively compete in a modern economy. Furthermore, it is axiomatic that a JSE listed company may not trade without a banking account and therefore not having a bank account of its own is not an option for listed entities.

[75] Commission's Banking Market Enquiry Report, Chapter 2, para 2.1.2.

[256] Given the above, we concur with the Applicants that access by firms to banking and payment facilities offered by banks are indispensable for any firm operating in a modern economy.

[257] Having concluded the above, one furthermore must consider the potential competition and public interest consequences of not having access to banking and payment facilities, i.e., if the Applicant firms are left unbanked.

[258] The adverse consequences of not having access to banking and payment services would include the inability of a firm to attract investment and expand in the market(s) that it operates in and apply for credit/loans, as well as the adverse reactions of customers and suppliers when confronted with transacting with a firm without banking and payment facilities. Clearly such a situation would be untenable in a fast-paced modern economic environment.

[259] As an example of how their firms may be affected by banking service terminations, the Applicants explain the actual, material harm they experienced in relation to Puleng Technologies (Pty) Ltd ("Puleng") following the termination of banking services to Puleng. Puleng is an ICT security solutions company that provides services to large organisations. After closure of the account facilities, Puleng implemented various third-party payment solutions for business continuity purposes. This however was not successful.

[260] The Applicants submit that following the termination of banking services to Puleng, they were forced to sell Puleng, a company that was doing R300 million turnover, at a loss as a consequence of having its banking facilities closed. They also explain the reactions of third parties to Puleng not having a bank account. In July 2021, Discovery terminated its contracts with Puleng for the supply of goods and services, citing its unwillingness to accept third party payment options. It said: "*Discovery, being a registered financial services provider operating within highly regulated parameters, unfortunately cannot accept any of the payment options as these may potentially expose us to legal and regulatory consequences*."[76] When Puleng sent Discovery an invoice in August 2021

[76] The Applicants provided a copy of the termination letter. See "RA3" to their Replying Affidavit.

for payment with third party banking details, Discovery refused, saying: "*we cannot accept the option to pay into the account provided that you have listed in your invoice*."[77]

[261] In the above economic context, we are satisfied that one can infer that if the Applicant firms do not have access to banking and payment services, they will be significantly hampered in operating effectively in a modern, fast-paced, technology-driven economy. This will *prima facie* affect competition in the markets that they operate in, and from a consumer perspective affect the choices of customers in the affected markets, which the Act seeks to promote.[78] We note that an interim relief applicant does not have to show evidence of exiting a market to show irreparable harm to it.

[262] Importantly, if the Applicant firms are hampered in their ability to compete in the markets that they operate in, the public interest such as the promotion of employment and retention of jobs as well as empowerment could be severely affected.

[263] It is not disputed that the Sekunjalo Group is an empowerment Group. Established in 1997, Sekunjalo Investment Holdings is a black economic empowerment entity.

[264] It is also not disputed that the Sekunjalo Group provides employment to over 8,500 people with tens of thousands of dependents, mostly from poor black communities.[79] Should Sekunjalo not have access to banking and payment services, many if not all of those jobs could be in danger of being lost, and the participation of tens of thousands of people from black communities in the economy could be in danger of being lost.

[265] In terms of the Puleng lived experience, the Applicants contend that Puleng's Chief Executive and a large number of staff resigned as a direct result of FNB terminating the firm's banking facilities in June 2021.[80] From the beginning of July 2021 cancellation notices started coming in from clients, some not citing any reason for terminating their business relationship with Puleng while others (like Discovery) citing their discomfort with transacting via third party banking facilities.[81] With the exodus of staff, including

[77] The Applicants provided a copy of that correspondence. See "RA4" to the Replying Affidavit.
[78] See Preamble of the Act: The Act has been enacted to *inter alia* "*provide for markets in which consumers have access to, and can freely select, the quality and variety of goods and services they desire*;".
[79] Sekunjalo Investment Holdings employs over 2 400 employees. The Sekunjalo Group, in total, employs over 8 500 employees.
[80] Founding Affidavit, para 251.
[81] Founding Affidavit, para 253.

senior management and technical staff, many clients felt that Puleng could no longer deliver a proper service. Many Puleng staff were poached by competitors.[82]

[266] Given the above, we conclude that it can reasonably and logically be inferred that not granting the interim relief will have significant adverse implications for the Applicant firms.

Economic alternatives of the Applicants

[267] The Applicants submit that there are 31 registered banks in South Africa under the supervision of the Prudential Authority. The Respondent Banks submit that there are approximately 70 banks operating in South Africa that the Applicants can approach for services.

[268] The Applicants further submit that Nedbank, Standard Bank, FirstRand, ABSA, and Investec collectively have 90.1% of the South African market for the provision of banking services according to the Prudential Authority.[83]

[269] ABSA, FirstRand, Nedbank and Investec have terminated the provision of banking and payment services to some of the Applicants with whom each had a banking relationship. Nedbank was poised to terminate more facilities in respect of the remaining Applicants on 15 March and 9 May 2022. As indicated above, Standard Bank placed the Applicants' facilities under review, decided not to on-board new entities within the Sekunjalo Group and has since terminated services to the relevant Applicants. The Applicants claim therefore that the bulk of the market is collectively and unilaterally refusing to provide banking and payment services to them.[84]

[270] In relation to the Applicants' alleged alternatives and whether a significant portion of the banking market is at risk of not being available to the Applicant firms, we note that Nedbank, Standard Bank, ABSA, Investec and FirstRand are the major banks in South Africa, that on the evidence before us collectively hold the bulk of the market share. Thus, there is a very high level of concentration in the hands of the large banks in South Africa. These banks have all terminated services to the relevant Applicants or are contemplating same. Other than these five large banks, relief is sought against four

[82] Founding Affidavit, paras 256-260.
[83] Trial Bundle Vol 5 at para 14 p 2387.
[84] Trial Bundle Vol 1 at paras 117- 126 pp 33-44.

more banks that have also terminated their banking services to the relevant Applicants. Therefore, on the evidence before us the bulk of the banking services market (in terms of market share) has refused to provide banking and payment services to the relevant Applicants or are contemplating not providing services.

[271] Furthermore, not only is the banking market highly concentrated in the hands of the largest banks, there also are high barriers to entry in the banking market including high regulatory barriers and sunk costs. The Commission's banking enquiry report notes that most of the banks have noted that a large proportion of their costs are fixed.[85] The enquiry found that this particular cost structure (i.e., high fixed and common costs) drives concentration in banking and places certain limits on the extent of competition. The concentration of banks produces an oligopoly structure which facilitates strategic interaction among the participants.[86]

[272] The Applicants' evidence was that they have also approached second and third tier banks for banking services. These include mutual banks and local branches of foreign banks. According to the Applicants, this segment of the market represents approximately 10% of the market in terms of market share.

[273] The Applicants state that the other banks approached have either declined to open bank accounts citing "reputational risk" or claimed not to provide the kind of banking services required, or simply never responded. They say that the banks have also advanced as a reason for rejecting the Applicants' request for bank accounts either that they do not provide corporate banking services to large companies, or they provide such services only to listed companies. In addition, the Applicants indicate that many foreign banks with branches in South Africa have also been approached but that the Reserve Bank does not permit the opening of bank accounts with foreign banks which have branches in South Africa. So, both the large and small banks have refused to extend banking services to the Applicants.

[274] Examples given of the banks that the Applicants approached include:

[85] Commission's Banking Market Enquiry Report, Chapter 2, para 2.4.
[86] Commission's Banking Market Enquiry Report, Chapter 2, para 2.4.

274.1. Magic828 Radio, a radio broadcasting and advertising company, approached Bank Zero and Standard Bank after its banking services were terminated, and no responses have been received from them;[87]

274.2. Afrinat (Pty) Ltd, a national research and development, technical advisory and manufacturer of agricultural products firm, approached Grow Bank, HBZ, Bank Zero, Nedbank, Sasfin, Mercantile, Standard Bank, Bidvest, State Bank of India and Al-Baraka. All these banks refused to provide banking services. Afrinat requires access to banking and payment services including a forex exchange facility to procure raw materials from overseas suppliers;[88] and

274.3. Bidvest has refused to open a bank account for Health System Technologies (Pty) Ltd ("HST"), a specialist provider and integrated healthcare ICT solutions company. HST provides services to all National Health Laboratory Systems.[89]

[275] The Applicant firms in our view do not in interim relief proceedings have to provide evidence of having approached every other bank in South Africa to make out a case of irreparable harm.

[276] As indicated above, the Respondent Banks also argued that the Applicants can make use of third-party payment providers, albeit at a higher cost.

[277] In terms of economic alternatives available to the Applicants, they say that it is not possible for them to continue to operate without transactional banking accounts because the scale, volume and complexity of the transactions require bank accounts.[90] In other words, third-party payment providers are not real alternatives in economic terms to the services provided by banks.

[278] The Applicants submit that (certain) customers will not agree to making payments into third party accounts and therefore it is not possible for these businesses to continue to operate without transactional banking. We have above already discussed the reaction of the market to Puleng making use of third-party payment service providers. The

[87] Founding Affidavit at paras 222-227.
[88] Founding Affidavit at paras 228-233.
[89] Founding Affidavit at paras 245-249.
[90] Replying Affidavit para 18.

Applicants contend that this led to the demise of the Puleng business which had to be subsequently sold at a loss.

[279] The Applicants further explain that in the short term, some of the companies that do not have bank accounts were able to, in the case of group investment holding companies, utilize the subsidiaries to be able to transact. This was because the subsidiaries had accounts with banks that had not yet closed their accounts. This situation has changed manifestly in that with the subsidiary accounts now being closed, in most cases it becomes extremely difficult even for investment holding companies to operate.

[280] The Applicants also argue that third-party payment providers are not effective alternatives since the cost of utilising them is prohibitive.

[281] The Applicants also say that in some cases third-party payment service providers have serious limitations and that making use of them is only applicable in a very few instances and mostly with smaller businesses or entities that do not require large scale and complex revenue and expenditure transactional facilities. For example, the Applicants submit that Orleans, an importer and distributor of cosmetics to leading retailers and beauty salons, unsuccessfully held discussions with third party service providers because they have no platform to pay overseas suppliers.[91] Furthermore, the SARB does not allow forex payments out of or into third party accounts on behalf of another company.

[282] The Respondent Banks do not challenge that making use of the services of third-party payment providers is more expensive but say that the Applicants have not shown that it would be fatal to their operation in any relevant markets. Nedbank, for example, concedes that the Applicant may not be able to use third party agents in all cases and that their costs may be higher "*Chair, we also say that it would be possible for the applicants to use third party paying agents, at least in some cases. The applicants say that will increase their costs, and that may well be correct. But, with respect, they don't say it's impossible, at least not in all cases*."[92]

[91] Founding Affidavit at paras 234-240.
[92] Transcript page 101.

[283] We find that *prima facie* the services provided by third-party payment providers are not economic substitutes for the services provided by banks and that suffices for interim relief purposes.

[284] Given the above, we conclude that the Applicants have demonstrated the general extent of the significant harm that they would suffer if the relief requested is not granted, including potential significant adverse effects on the public interest (employment and empowerment) and therefore in our view the Applicants have made out a strong case for the need to prevent serious or irreparable damage to them.

[285] Regarding the Respondent Banks' arguments regarding the harm that they would suffer if the interim relief was granted, we do not on the evidence before us find it persuasive that the banks' legislative environment is a justification for them having terminated the Applicants' banking and payment facilities or are refusing to provide them with such facilities. There is no evidence that the Applicants have been found guilty of money laundering, financing or acts of terrorism or other unlawful activities. There is also no actual and verified evidence of criminal conduct by the Applicants. Moreover, even if one were to assume some reputational harm on the side of the Respondent Banks if the interim relief is granted, this in our view would not trump the manifest harm to the Applicants, including potential serious public interest consequences, as discussed above.

[286] The Respondent Banks' stated main rationale for their unwillingness to provide banking and payment services to the Applicants, i.e., significant reputational risk, is undermined by them not having shown consistency in its application. The undisputed and non-speculative fact before us is that a number of other companies have been implicated in serious allegations of misconduct such as alleged state capture and serious allegations of corruption.[93] Concrete evidence of consistency in approach by the Respondents in relation to reputational risk would have given their stated case more weight.

[287] Regarding the assessment of the final leg of the test, the balance of convenience, the CAC in *eMedia* advised: "*In considering the balance of convenience at the interim stage, the Tribunal has to consider "which of the two parties will suffer the greater harm from the granting or refusal of interim relief, pending a decision on the merits. If there is clear and non-speculative evidence regarding the general extent of the harm that one party*

[93] Judicial Commission of Inquiry into State Capture Report: Part 1 paras 1107- 1109 p 441- 443.

would suffer if the relief requested is not granted, then the interim relief ought to be granted"[94] (emphasis added).

[288] The CAC in *eMedia* further held "*If there is a prima facie right, even one open to doubt and a well-grounded apprehension of irreparable harm if the relief is not granted and ultimately granted at final relief stage, then the balance of convenience favours the grant of interim relief*".[95]

[289] On the issue of parties' contractual rights in the context of competition law matters, competition authorities are duty bound to intervene where any conduct contravenes the provisions of the Act, and the commercial agreements between parties do not override that.

[290] We have also stated that there is no evidence that the Applicants have committed money laundering, fraud, corruption, or other unlawful or criminal activities.

[291] We further concluded that the Applicant firms have made out a strong case of the general extent of the significant harm that they would suffer if the relief requested is not granted, including potential significant adverse effects on the public interest such as employment and empowerment.

[292] Considering the transformative imperatives of the Act, as discussed in these reasons, and all of the above considerations, we conclude that the harm or prejudice that the Applicants will suffer if interim relief is not granted is greater than the prejudice which the Respondent Banks will suffer if the interim relief is granted. Therefore, the balance of convenience favours the Applicants.

[293] For completeness, we also deal below with some specific issues raised by certain Respondents.

[94] *eMedia* at para 80.
[95] *eMedia* at para 95.

ABSA

[294] ABSA in August 2020 decided to terminate its banker-customer relationship with all its customers who were part of the Sekunjalo Group. There were 24 such customers, 13 of those companies are Applicants in the present case.[96]

[295] ABSA argues that when it made the decision to close the relevant Applicants bank accounts[97], it did so first, and it was going alone at that stage, and that there was no scarcity of banking services and no irreparable harm or damage to the Applicants because they managed to switch bank accounts, and it means that the balance of convenience overwhelmingly favours ABSA when you apply section 49C to the allegations against it.[98] The Applicants ague that ABSA is implicated in the anti-competitive conduct that they complain of.

[296] ABSA further argues that with respect to the abovementioned 13 Applicants, nine of those voluntarily concluded agreements with ABSA that accepted the validity and lawfulness of ABSA's termination of services. They say that those Applicants agreed that they would be given an extension of time, a six-month period, to move their bank accounts, and in the course of that settlement agreement accepted the validity and legality of ABSA's termination of their services.[99] This is put into dispute by the Applicants. They argue that they did not understand the six-month extension offer to be conditional on accepting that the termination was valid and lawful. To the extent that ABSA interpreted its offer to be conditional, there was no meeting of minds between the parties. The Applicants also argue that at the time it was not yet evident that the banks would embark on an (alleged) concerted and collusive effort to unbank the relevant entities. We shall further deal with the nine Applicants in relation to which agreements were reached with ABSA under our assessment of remedies.

[297] ABSA is part of the group of the largest banks in South Africa holding the bulk of the market share. As indicated, the banking sector is furthermore characterized by high barriers to entry.

[96] ABSA Answering Affidavit at paras 101 to 103.
[97] Nine of the Applicants used to bank with ABSA.
[98] Transcript pages 171 and 172.
[99] Transcript pages 174 to 176.

[298] The Commission would no doubt investigate the role that Absa played in the alleged prohibited conduct, given that ABSA was the first to close all the accounts of the Applicants that banked with ABSA with many other banks following. ABSA's decision potentially could be regarded as a form of signaling to the rest of the market.

[299] We see no reason to exclude ABSA altogether from our discretionary decision that it would be reasonable and just to grant interim relief to the Applicants. (We have excluded from the interim relief the closure of the bank accounts of the abovementioned nine Applicants in relation to which agreements were reached with ABSA, as discussed under remedies). Even if the Applicants' case was weaker on a (*prima facie*) prohibited practice in relation to Absa, which we do not find, that may still be counter-balanced by a strong case on irreparable harm, which the Applicants in our view have made out.

Sasfin

[300] Sasfin had transactional banking accounts with four of the Applicants: (i) a transaction account, a resident Rand account and a USD customer foreign currency account for Orleans Cosmetics (Pty) Ltd; (ii) a resident Rand account and a Euro customer foreign currency account for ESPAfrika (Pty) Ltd – which accounts were never active because documents were not provided for FICA verification; (iii) a business transactional banking account and a business call deposit account for Health System Technologies (Pty) Ltd; and (iv) a transactional banking account for Magic 828 (Pty) Ltd.[100]

[301] Sasfin argues that because of its relative size as an emerging player in the market for transactional banking services in South Africa it does not have the resources to carry out rigorous ongoing compliance requirements for high risk banking customers.[101] It also submits that being such a small operation it is trying to grow its market share to compete with the established banks, and it would not make economic sense for it to turn away customers unless the cost of servicing those customers would be outweighed by the revenue that it could earn where those customers pose a high risk that it cannot within its resources manage.

[100] Sasfin Answering Affidavit at para 18.
[101] Sasfin submitted that its division is approximately seven years old, that it has only 36 employees, and 12 of those employees are employed in the foreign exchange trading division, it has only 4 500 customers, and it has only 0.1% of the market. It also says that it is currently loss-making.

[302] The Applicants, on the other hand, argue that the foreign exchange accounts applicable to Sasfin are vital to the businesses of the Applicants, including Orleans and Magic 828. Orleans and Magic 828 require access to Sasfin foreign exchange transaction services to conduct and remain in business.

[303] As indicated above, there is no evidence that the Applicants have committed money laundering, fraud, corruption, or other unlawful activities. On the other hand, the Applicants have made out a strong case of irreparable harm, including potential serious public interest ramifications. This in our view trumps the compliance costs and staff issues raised by Sasfin. It therefore is reasonable and just to grant the interim relief in relation to Sasfin.

Investec

[304] Investec submits that the relevant Respondents held no corporate banking account with it and that the actual accounts were not used to participate in any market. It submits that the relevant bank accounts that were terminated were used to pay for Dr Survé's personal expenses and personal property acquisitions or to obtain higher interest rates for the Survé applicants.

[305] The Applicants in their Replying Affidavit do not dispute Investec's version of what the relevant accounts were used for. They say that Investec's conduct implicates Dr Survé's rights to equality, human dignity, freedom of association, trade and occupation. The latter issues on the evidence before us are not issues that appear to fall within our jurisdiction.

[306] Given that the relevant accounts held with Investec seemingly were used for personal banking purposes only, the Applicants' interim relief application in relation to Investec is dismissed.

Mercantile Bank Ltd

[307] Mercantile Bank Ltd ("MBL") was cited as the Fifth Respondent in this matter. Capitec/Mercantile argued that the Sekunjalo Group has cited the wrong respondent[102]

[102] Mercantile Bank Answering Affidavit at paras 76 to 78.

since the entity cited, MBL, no longer exists. MBL was deregistered in or about December 2020.[103]

[308] Mr Riaan Klopper, the Head of Business Banking and Centralised Operations at Mercantile Bank, a division of Capitec Bank Ltd, deposed to the Answering Affidavit. He indicated that since December 2020 MBL is no longer in existence. The corporate and commercial banking services previously rendered by MBL are now provided by a division of Capitec, Mercantile Bank ("Mercantile"). Mercantile therefore is the relevant entity in this matter.

[309] As background, on 15 May 2019, the Tribunal approved a merger between Capitec and Mercantile Holdings Limited, including its subsidiary, MBL. On 31 December 2020 SARB published the notice of its consent for the transfer of all the assets and liabilities of MBL to Capitec, and cancellation of the registration of MBL as a bank with effect from 1 December 2020.[104]

[310] Capitec/Mercantile argued that in light of the wrong citation, no effective relief can be granted against it. It argued that the Applicants have not sought to correct the citation in terms of Rule 45(2) of the Rules for the Conduct of Proceedings in the Competition Tribunal ("the Tribunal Rules"), despite the nonexistence of MBL being raised in answer.

[311] The Applicants in their Replying Affidavit invited the Tribunal to, in terms of section 55 of the Act, condone any non-compliance to the extent that citation might be raised as an issue at the hearing.

[312] Capitec/Mercantile argued that the incorrect citation is not a mere "technical irregularity" that can be condoned under section 55(2) of the Act.

[313] The Applicants argued that the deponent, himself, on behalf of Mercantile says the correct party is Mercantile, a division of Capitec and therefore this is a most technical lapse and technical nicety against which the Constitutional Court in *Mediclinic* cautioned. They argued that it is the kind of technical, legal sophistry, to quote the Constitutional Court, that it says must be vigilantly guarded against, and deliberately flushed out of our justice and economic system. The Applicants asked the Tribunal to

[103] Mercantile Bank Answering Affidavit at para 2.
[104] Mercantile Bank Answering Affidavit at para read with annexure MB1.

condone this technical lapse and grant an order against the party that the deponent says is the correct party.

[314] When asked by the Chairperson in which capacity they are present in the proceedings, Ms Engelbrecht appearing for Capitec/Mercantile responded as follows: "*Chair, so we are here on the assumption or on the possibility rather that the tribunal overlooks the difficulty with citation of a party that does not exist in a sense Mercantile, that division which now forms part of Capitec, is of course in consequence of a decision first of the tribunal to allow the merger, and then the regulations under the Banks Act, what previously was Mercantile Bank Ltd now forms part of Capitec, and on the off chance the tribunal is willing to overlook the problems of juristic personality, I represent the interests of Capitec that encompass those of Mercantile*."[105]

[315] The relevant services that relate to the Application clearly are the banking services provided by Mercantile, a division of Capitec, that previously were provided by MBL prior to the abovementioned merger. Mercantile currently provides banking services, i.e., a forex trade account, to one of the Applicants, Health System Technologies (Pty) Ltd, the Fourteenth Applicant.[106]

[316] Section 55(2) of the Act provides that the Tribunal may condone any technical irregularities arising in any of its proceedings.[107] This confers on the Tribunal a wide discretion in managing and conducting its proceedings. This position was confirmed by the Constitutional Court in *Senwes* "*One of the functions of the Tribunal is to adjudicate on any conduct prohibited under Chapter 2 of the Act. In order to do so, the provisions for hearings referred to the Tribunal place an emphasis on speed, informality and a non-technical approach to its task.[...] Excessive formality would not be in keeping with the purpose of the Act".*[108] *F*urthermore, in terms of section 53 of the Act the Tribunal must conduct its hearings as expeditiously as possible and furthermore as informally as possible. Again, the Constitutional Court in *Senwes* affirms this as it states: "*This section gives the Tribunal freedom to adopt any form it considers proper for a particular hearing, which may be formal or informal. Most importantly, it also authorises the Tribunal to adopt an inquisitorial approach to a hearing.*"[109] It would in our view have not been efficient and expeditious for the Tribunal to in these specific circumstances have

[105] Transcript page 212.
[106] Mercantile Answering Affidavit at para 26.
[107] Also see Tribunal Rule 55(3).
[108] *Senwes* at para 69.
[109] *Senwes* at para 50.

required the Applicants to bring a formal amendment application to rectify the misdescription of the Respondent. This would have meant postponing the hearing for the formality of the amendment application. This would have had cost implications for all parties concerned, including all other Respondents who were ready to argue their cases before the Tribunal.

[317] Furthermore, we considered that, given that we must conduct our hearings expeditiously and informally, not requiring the formality of amendment application in these circumstances was appropriate since there was no apparent prejudice to Mercantile. Not requiring the formality of a formal amendment application to be brought did not deprive Mercantile of a fair hearing or a defence which would otherwise have been available to it. Capitec/Mercantile had answered the main application, was legally represented, and was furthermore ready to argue on behalf of Capitec encompassing Mercantile.

[318] Given the above, we condone the misdescription in the application and our order is made in relation to Mercantile Bank, a division of Capitec.

Is it reasonable and just to grant interim relief?

[319] The Respondent Banks made it abundantly clear that they do not express a view regarding the veracity or otherwise of the malfeasance allegations in the Mpati Commission Report, and that they closed the accounts simply on perceived reputational risk.

[320] The Tribunal is called upon to objectively assess, for interim relief purposes, if the state of competition in markets should be preserved or altered until the final determination of the Commission's investigation and whether in the circumstances of the case in its discretion it would be reasonable and just to grant the interim relief.

[321] In *Wilec*[110], the Tribunal found in interim relief proceedings against Allbro, based on a defence of unproven copyright claims by Allbro which were pending in the High Court, that it was reasonable and just to grant interim relief pending the final determination of

[110] *Makarenge Electrical Industries (Pty) Ltd t/a Wilec v Allbro (Pty) Ltd & Competition Commission of South Africa* IR095Oct21.

the competition complaint because the prejudice to the applicant was greater than it was to Allbro.

[322] While in contract law *Bredenkamp* may entitle the Respondent Banks to terminate a banking relationship without reasons, unilaterally, and on reputational risk (an interpretation disputed by the Applicants), this does not trump compliance by the banks with competition law.

[323] Where the exercise of a private commercial right does not cause competition harm then *Bredenkamp* and the Act may well be aligned, and the banks' closure of the bank accounts would be of no consequence competition-wise. However, where there is harm to competition then competition authorities are obligated to intervene. *Normandien*, provides a basis and authority for this. It states *"while certain conduct can conceivably constitute both a breach of contract and a prohibited practice in terms of the Act, they are certainly not dependent on one another. One cannot assume that a breach of contract necessarily constitutes a competition law violation and vice versa…this nexus between competition and contract has to be proven."*[111]

[324] The main issue of contention during the hearing was whether a prohibited practice, on a *prima facie* basis, had been established. The Respondent Banks argued that the Applicants had made no cognisable case of a prohibited practice because they (the Respondents) do not compete with the Applicants in any relevant market and therefore their closure of the bank accounts, independently of one another cannot conceivably extend, preserve, or create market power in any market in which the banks operate. Put differently this is not a case where the banks are alleged to be leveraging market power in one market to advantage themselves in another market.

[325] The Respondent Banks further submitted that the Applicants have failed to show harm to the competitive process rather than individual harm to the respective Applicants.

[326] However, since the hearing, the CAC in *eMedia* has evolved the jurisprudence on the approach to interim relief applications under section 49(C) and has reminded the Tribunal to apply a transformative constitutional and context sensitive approach, consistent with the scheme of the Act.

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111 *Normandien Farms (Pty) Ltd v Komatiland Forests (Pty) Ltd* (018507) [2014] ZACT 31 (4 June 2014) at para 19.

[327] The transformative goals of the Act, the CAC *in eMedia* found, are reinforced by the various definitions in the Competition Amendment Act *"…making them wider and ensuring closer consistency with the transformative goals of the Competition Act.*" Specifically, when considering an exclusionary act (and more broadly, at other provisions of the Act), consideration ought to be given to the meaning of participate which is defined as *"the ability or opportunity for firms to sustain themselves in the market"*.[112]

[328] In their founding affidavit, the Applicants raise squarely their sustainability as they claim that *"the continued survival of the applicants (and competition within the markets in which they operate) …Without banking and payment services, the applicants would ultimately cease to trade, effective competition within the markets in which they operate will be eliminated. This will reverse some of the transformational gains in the media, ICT, healthcare and fishing sectors."*[113]

[329] Since the Respondent Banks' rebuttal of the Applicants' case during the hearing centred primarily on competitive harm, the Respondent Banks did not seriously contest the Applicants' ability to sustain themselves in the transformative manner contemplated in *eMedia*.

[330] In regard to proving harm, the CAC in *eMedia* held that *"The balance between competition harm and commercial harm …in interim relief requires an objective approach. Competition jurisprudence requires an approach that looks beyond the entitlement of a dominant firm to decide with whom they wish to do business and that the terms of their business dealings must be unfettered."*[114]

[331] Significantly, the CAC reminds us in *eMedia* of the trite principle that *"If there is clear and non-speculative evidence regarding the general extent of the harm the one party would suffer if the relief requested is not granted, then interim relief ought to be granted", and further that "if there is a prima facie right, even one open to some doubt and a well-grounded apprehension of irreparable harm if the relief is not granted and ultimately*

[112] *eMedia* at para 90.
[113] Founding Affidavit at para 207.
[114] *eMedia* at para 96.

granted at final relief stage, then the balance of convenience favours the grant of the relief."[115]

[332] Given the guidance of the CAC in the *eMedia* judgement, as shown by our assessment on the evidence relating to the alleged prohibited practice, we were persuaded by the Applicants' evidence on harm to competition in the markets in which they operate and their inability to sustain themselves in those markets, absent the bank accounts.

[333] As shown in our assessment of the need to prevent irreparable harm and the balance of convenience, we were further persuaded by the prejudice to the Applicants without interim relief, given the extent of irreparable harm if they cannot sustain themselves in their markets.

[334] For the above reasons we conclude that in this case is it reasonable and just to grant interim relief to the Applicants.

Relief sought

[335] In essence, the Applicants sought an interdict preventing the Respondents (specifically Nedbank and Standard Bank) from closing the respective bank accounts held by the Applicants with these two banks and preventing them from unilaterally changing the terms and conditions attached to the accounts. In respect of the remaining Respondents, the Applicants seek that the Respondents be ordered to restore the bank accounts which were closed by the Respondents on the same terms and conditions as applicable prior to the closure of the accounts.

[336] The precise terms of the relief sought is:

> "*2. Pending the final determination by the Competition Commission (the Commission), the Tribunal or the Competition Appeal Court (CAC) (as the case may be), of the complaint initiated by the applicants at the Commission under Case Number 2021Dec0031 on 17 December 2021, the First and Second Respondents are prohibited from:*

[115] *eMedia* at para 95.

2.1. closing the bank accounts of the applicants, which constitute a scarce resource or service to the applicants, and
2.2. in any way unilaterally changing the terms and conditions attaching to the bank accounts that the applicants hold with the first respondent.

3. Pending the final determination by the Commission, the Tribunal or the CAC (as the case may be), of the complaint initiated by the applicants at the Commission under Case Number 2021Dec0031 on 17 December 2021, the third, fourth, fifth, sixth, seventh, eighth and ninth respondents are directed to:

3.1. restore all the bank accounts of the applicants, including all services that the second, third and fourth respondents provided to the applicants, which bank accounts and services constitute a scarce resource or service to the applicants,

3.2. restore the terms and conditions that attached to the bank accounts that the applicants held with the second, third and fourth respondents before they were closed or terminated,

3.3. desist from terminating the bank accounts of the applicants for any reason not sustainable in law, and

3.4. desist from unilaterally changing the terms and conditions that attach to the applicants' bank accounts and/or service.

4. Costs of this application in the event of opposition."

[337] The Respondent Banks resisted the relief sought generally on grounds that the relief was extraordinary as it would force them into a contractual relationship with a party that poses significant risk to them which they argued would be contrary to the Supreme Court decision in *Bredenkamp* that confirms that a bank may terminate a contractual relationship with a client if the client poses a risk to the bank (as indicated, this interpretation of Bredenkamp is disputed by the Applicants). They also raised some specific issues relevant to each of them, as we discuss below.

[338] Nedbank submits that the relief sought would bind it into an indefinite contract contrary to the *Bredenkamp* decision.[116] Nedbank also claims that certain of the accounts alleged to be held with it were not. The Ayo account (Thirteenth Applicant) is held with a Nedbank entity in Lesotho, which is a separate legal entity, and which was not before us in these proceedings.[117] We thus find it appropriate to exclude the bank accounts held by the Thirteenth Applicant from any Order as the Nedbank entity in Lesotho is not cited as a respondent to this application nor did it participate in the proceedings.

[339] Further we note that the First Applicant, Dr Surve, had accounts with Nedbank. These accounts however were of a personal nature and therefore have no apparent bearing on the ability of the Sekunjalo Group being able to compete and/or sustain itself in the markets in which it competes. Thus any personal accounts held with the Respondent Banks that are unrelated to any business activities are excluded from our Order.

[340] Recall that at the time of the hearing, Standard Bank had not closed the relevant Applicants' accounts held with it. It submitted that if interim relief were to be granted, it would place Standard Bank in an invidious position as Standard Bank would in essence be in breach of domestic or international standards imposed on it and it would result in Standard Bank facing risks of prosecution and criminal sanctions, in both South Africa and abroad. Furthermore, that granting relief would also offend the purpose of the Act to "promote the efficiency of the economy".

[341] Standard Bank also raised flaws with the relief sought by the Applicants. It pointed out that in the Notice of Motion at paragraph 2.1, the relief sought by the applicants against Standard Bank was for it not to close existing bank accounts and went no further i.e., it did not require Standard Bank to open new accounts or entertain additional services whereas the relief sought in the founding affidavit encompasses this.[118] Further, Standard Bank submitted that the relief sought in the Notice of Motion at paragraph 2.2 is sought only against Nedbank (who at the time of filing the application, like Standard Bank, were the only two banks that had not closed the Applicants' bank accounts). Standard Bank was of the view that the contradictory nature of this prayer was a fundamental flaw in the Application.

[116] Nedbank Answering Affidavit at para 29.
[117] Nedbank Answering Affidavit at para 125.
[118] Standard Bank Answering Affidavit at para 11.2.

[342] In our view, the omission in paragraph 2.2 of the Notice of Motion is an error which we can condone in terms of section 55(2) of the Act. Paragraph 2.1 expressly mentions Standard Bank, it would therefore follow that the sub-paragraph 2.2 of the Notice of Motion which only mentions Nedbank should apply to Standard Bank too. As discussed above, section 55(2) confers a wide discretion on the Tribunal in the conduct of proceedings which was affirmed by the Constitutional Court in *Senwes* when it held that "*...the provisions for hearings in the Tribunal place emphasis on speed, informality and a non-technical approach to its tas*k."[119] There is no prejudice to Standard Bank since it made its submissions regarding the flaws in the Applicants case and it is logical that paragraph 2.2 should apply to Standard Bank.

[343] Standard Bank further avers that the relief sought is unqualified despite the fact that there may be circumstances in which the bank is justified in closing the accounts.[120] Standard Bank raised concerns regarding imposing an obligation on it to deal with clients for whom it has no risk-appetite or to take on new customers, both of which would impinge on its autonomy and ability to carry on its business in the ordinary course, as an independent commercial entity that is active in the market. We have already dealt with reputation as a justification and concluded, for the reasons discussed, that it does not hold. We have also, as affirmed by the CAC in *eMedia*, looked beyond the entitlement of Standard Bank to decide with whom it wishes to do business, since it *prima facie* has market power and its conduct has been shown to cause harm to competition and irreparable harm to the Applicants. We have thus found these arguments by Standard Bank unpersuasive. We have found no basis to require Standard Bank (or any of the Respondents) to open new accounts or to provide additional services not previously provided. In our view, it would be far reaching to require Standard Bank to open new accounts or provide new services since no prior existing terms and conditions exist. Such an order would require commercial negotiation between the Applicants and Standard Bank which in our view is not justified in this case.

[344] ABSA which was the first to close the accounts, submits that the status quo that ought to be preserved is one where the Applicants no longer have accounts with ABSA. It submits that it was impermissible for the Applicants to ask the Tribunal to force ABSA to reopen accounts with the Applicants since this would be a reversal of the status quo without a lawful or factual basis. Such relief, ABSA submitted was not in the nature of

[119] *Senwes* at para 69.
[120] Standard Bank Answering Affidavit at para 102.

typical interim relief contemplated under section 49C as the relief sought requires the Tribunal to create commercial relationships and arrangements in circumstances where they do not exist.[121]

[345] We noted earlier, with respect to ABSA, that nine of the Applicants accepted an offer of a six-month extension of the subsistence of their accounts prior to their closure. From this it is clear, with respect to these nine accounts, that their closure was agreed to by the nine Applicants, therefore these accounts are excluded from our Order. For completeness, the nine Applicants are the Sixth, Ninth, Tenth, Eleventh, Twelfth, Thirteenth, Fourteenth, Twenty-Eighth, and Thirty-Fifth Applicants.[122]

[346] First Rand submits that the closure of the relevant bank accounts held with it arose at the very latest in July 2021. It argued, like ABSA that this was not a situation where there is a threat of imminent closure and where there is a need for intervention to maintain the status quo until the matter is finally determined, because the accounts have already been closed. In its answering affidavit, First Rand submits that it would be materially prejudiced if it were forced to re-provide banking services to the Third, Fourth, Fifth, Seventh, Eighth, Thirteenth, Twenty-Fourth and Twenty-Eighth Applicants, and this may lead to a loss of revenue, regulatory or legislative action, a loss of existing and potential client business and a reduction in its ability to retain employees.[123] It further alleges that since no allegations are made by the Applicants contesting the closure of the Third, Fourth, Fifth, Seventh, Eighth, Twenty-Fourth and Twenty-Eighth Applicants (but only against the Thirteenth), there is no issue with the closure of these accounts.[124] In reply the Applicants disputed that only one account closure was placed in dispute; the Applicants stated: "*Banking and payment services are the lifeblood of any corporate citizen. It is immaterial that the Thirteenth and other applicants did not state the termination was critical to its business.*"[125] We thus find it appropriate that our Order relates to all the accounts in dispute regarding First Rand.

[347] First Rand alleges that the Thirteenth Respondent (Ayo Technology Solutions Ltd) brought urgent proceedings in the Gauteng Division of the High Court (Part A) and in Part B sought a declarator that the termination clause was unconstitutional or unlawful, or alternatively, seeking the High Court to change the common law that enables the

[121] ABSA Answering Affidavit at para 21.
[122] ABSA Answering Affidavit at para 18.
[123] First Rand Answering Affidavit at para 100.
[124] First Rand Answering Affidavit at para 18.
[125] Replying Affidavit at para 551.

termination of a banking relationship on reasonable notice. The High Court dismissed Part A (dealing with urgency). First Rand points out that the Thirteenth Respondents has not taken any steps to proceed with Part B since the Thirteenth Respondent is presumably aware that that it has no prospects of success.[126]

[348] Mercantile Bank submits in its answering affidavit that it provides a forex trading account to Health System Technologies, the Fourteenth Applicant. It appears that this account is still open.[127] Mercantile further submits that it was approached by AEEI to open a business account and following its risk assessment, declined to open the account.[128] Mercantile submitted that it cannot restore bank accounts where no services were provided and that it would be prejudiced were it to be ordered to open a new account to a client that it considers posing reputational risk. The ongoing due diligence on high-risk clients is costly and imposes a significant risk burden.[129] It however, transpired from the papers and the hearing that Mercantile still had one account open. Accordingly, our order with respect to Mercantile relates to this account and it is to keep the account open rather than to open a closed account as per the Applicants' Notice of Motion.

[349] Sasfin added that the relief sought against it is extremely far-reaching and highly prejudicial and if it were to be granted, Sasfin would be compelled to take on additional employees at significant additional cost to ensure compliance with its risk policies. Sasfin submitted that it was the smaller of the banks and employs only has 36 employees, and 12 of those employees are employed in the foreign exchange trading division. It has only 4 500 customers, and it has only 0.1% of the market and is, in fact, as loss-making.[130]

[350] The Eight Respondent, ESP Africa, approached Sasfin for banking services, more specifically, a resident Rand account and a Euro currency account. However, it is undisputed that ESP Africa failed to provide the necessary documentation to Sasfin to enable Sasfin to comply with the "Know Your Customer" requirements in terms of FICA. ESP Africa's accounts were thus blocked by Sasfin from the outset.[131] As this account was never operational, and blocked since inception, we find it appropriate to exclude it from our Order.

[126] First Rand Answering Affidavit at paras 20 – 24.
[127] Mercantile Answering Affidavit at para 26.
[128] Mercantile Answering Affidavit at para 27.
[129] Mercantile Answering Affidavit at para 76.
[130] Transcript page 216.
[131] Sasfin Answering Affidavit at para 18.2.

[351] Access Bank provided banking services to only one of the Applicants, Afrinat (Pty) Ltd, the Fourth Applicant.[132] This account was closed on 02 July 2021. It submitted that the relief sought to interdict the closure of the account, and the relief not to change the terms and conditions in terms of which the banking services were provided, is incompetent.[133] The only relevant relief is to restore the closed bank account (and cost order). It submits in argument that this was not a competition law related matter, and further that the implication of *York Timbers* is that, where a dispute has less to do with competition law and is better characterised as a contractual dispute, it should be heard in another forum, not in the Tribunal.[134]

[352] Bidvest did not respond to the application, nor did it attend proceedings. However, the Tribunal obtained a copy of return of service from the Sheriff regarding the Founding Affidavit served by the Applicants, confirming that the Founding Affidavit was received by Bidvest. Further, the Tribunal physically delivered its notice of setdown for the hearing of this matter to Bidvest, receipt of the notice of set down was acknowledged by Bidvest. According to the Applicants, Bidvest provides banking services to Orleans Cosmetics (Pty) Ltd, the Seventh Applicant.[135]Bidvest furthermore refused to provide banking services when approached by the Applicants.[136] Bidvest had one account open at the time of the hearing. Accordingly, our order with respect to Bidvest relates to this account and it is to keep the account open rather than to open a closed account as per the Applicants' Notice of Motion.

Our assessment

[353] We have already dealt with the requirements and jurisprudence under section 49C for the grant of interim relief. In this section we reiterate the following principles which are trite and have guided our conclusions regarding the order granted.

[354] As Unterhalter J held in *Business Connexion*, the purpose of interim relief goes beyond maintaining the status quo. It is a regulatory competence in terms of which "*the Tribunal is empowered to regulate how competition is to take place for a six to twelve month period. [It is] a different competence to that of a court adjudicating a dispute of right*". It

[132] Access Bank Answering Affidavit at para 12.
[133] Access Bank Answering Affidavit at para 17.
[134] Access Bank Heads of Argument at paras 61 and 76.
[135] Founding Affidavit, para 237.
[136] Founding Affidavit, paras 124 and 232.

alters the status quo and is "*intended to change the way firms compete in the market with consequences that may well resonate between markets*".[137]

[355] We therefore find the Respondent Banks' arguments that the relief sought against the banks that had already closed the bank accounts is incompetent, contrary to the purpose of interim relief. As held by the CAC, interim relief extends beyond maintaining the status quo and empowers the Tribunal to regulate how competition is to take place for an interim period. This means the alleged status quo of closed bank accounts can be reversed in order to safeguard competition for a period of six months from the date of the interim relief order or the conclusion of the hearing into the alleged prohibited practice, whichever is the earlier.

[356] Further, to allow the Respondent Banks to unilaterally alter the previous terms and conditions of the banking services they provided, would undermine the effectiveness of the interim relief remedy. We furthermore note that the interim relief is for a limited period of time and is not final relief.

[357] Standard Bank had the accounts still open at the time of the hearing. Our order is given on that basis.

[358] Regarding relief related to (potential) requests by the Applicants for the Respondent Banks to open new bank accounts that did not previously exist, as well as regarding (potential) requests by the Applicants for the provision of additional services by the Respondent Banks that were not previously provided to them, for example, Standard Bank provided that "*In the interim no new entities would be on-boarded by Standard Bank, and any additional business requests would be carefully scrutinised"*[138] during its review of the accounts, no compelling arguments have in our view been made by the Applicants to warrant this in the circumstances of this interim relief case. Similarly, ABSA state that "*most of the Applicants never had accounts with ABSA and can thus clearly have no claim for the "restoration" of their accounts with ABSA"*[139]*.* For the sake of clarity, our Order thus excludes the opening of any new bank accounts by the relevant Respondent Banks that did not previously exist, as well as the provision of any additional services by the Respondent Banks that were not previously provided to the relevant Applicants.

[137] *Business Connexion* at para 17.
[138] Standard Bank Answering Affidavit at para 112.4.
[139] ABSA Answering Affidavit at para 18.

[359] In our view, the discrepancies raised by Standard Bank regarding the order sought in the Notice of Motion and the founding affidavit are not material, and in terms of section 55(2) we condone any technicalities in this regard for the reasons discussed above.

[360] Finally, for completeness and for purposes of our Order, we shortly summarise the accounts that are excluded from our Order:

360.1. The account held by the Thirteenth Applicant with the non-cited Nedbank Lesotho (see paragraph 338);

360.2. The personal accounts held by the First Applicant with Nedbank (see paragraph 339);

360.3. The nine Applicants, being the Sixth, Ninth, Tenth, Eleventh, Twelfth, Thirteenth, Fourteenth, Twenty-Eighth, and Thirty-Fifth Applicants, who accepted a conditional six-month extension prior to the closure of their accounts by ABSA (see paragraph 345);

360.4. The blocked account of the Eighth Applicant held with Sasfin (see paragraph 350); and

360.5. The accounts held by the First, Second, Third, Twenty-Second, and Thirty-Third Applicants with Investec (see paragraphs 304 - 306).

[361] Furthermore, we decline to grant an order in respect of the First Applicant's personal accounts, and in respect of any new bank accounts or additional services.

ORDER

1. For a period of six months from the date of this order, or the conclusion of the investigation by the Commission into the complaint filed by the Applicants under case number *2021Dec0031*, whichever is the earlier:

    1.1. Nedbank is to reinstate/restore the bank accounts including all services that it provided to the Applicants that held accounts with it, save for the exclusions detailed in paragraph 360.1 and 360.2 on the same terms and conditions as existed prior to the closure/termination of the accounts.

    1.2. Standard Bank is interdicted from closing the bank accounts of the Applicants that hold accounts with it, and in any way unilaterally changing the terms and conditions that attach to the accounts and/or services provided.

    1.3. ABSA is to reinstate/restore the bank accounts including all services that it provided to the Applicants that held accounts with it, save for the exclusions detailed in paragraph 360.3 on the same terms and conditions as existed prior to the closure/termination of the accounts.

    1.4. First Rand is to reinstate/restore the bank accounts including all services that it provided to the Applicants that held accounts with it, on the same terms and conditions as existed prior to the closure/termination of the accounts.

    1.5. Mercantile Bank, a division of Capitec Bank Ltd is interdicted from closing the bank account of Health System Technologies (Pty) Ltd, the Fourteenth Applicant, and in any way unilaterally changing the terms and conditions that attach to the account and/or services provided.

    1.6. Sasfin is to reinstate/restore the bank accounts including all services that it provided to the Applicants that held accounts with it, save for the exclusions detailed in paragraph 360.4, on the same terms and conditions as existed prior to the closure/termination of the accounts.

    1.7. There is no order pertaining to Investec.

1.8. Access Bank is to reinstate/restore the bank account including all services that it provided to Afrinat (Pty) Ltd, the Fourth Applicant, on the same terms and conditions as existed prior to the closure/termination of the account.

1.9. Bidvest is interdicted from closing the bank account of Orleans Cosmetics (Pty) Ltd, the Seventh Applicant, and in any way unilaterally changing the terms and conditions that attach to the account and/or services provided.

2. There is no order as to costs.

Ms Mondo Mazwai

16 September 2022
Date

Prof. Liberty Mncube

Signed by:Andreas Wessel Wessels
Signed at:2022-09-16 16:17:38 +02:00
Reason:Witnessing Andreas Wessel We

Mr Andreas Wessels

Case Manager	:	Kameel Pancham
For the Sekunjalo Group	:	Adv. V Ngalwana SC, Adv. F Karachi, Adv. E Richards and Adv. K Monareng instructed by Ndzabandzaba Attorneys and Refiloe Mokoena Attorneys
For Nedbank	:	Adv. A Cockrell SC and Adv. Z Minty instructed by ENSafrica
For Standard Bank	:	Adv. S Budlender SC and P Ngcongo instructed by Herbert Smith Freehills

For First Rand Bank	:	Adv. P Bosman instructed by Norton Rose Fulbright
For ABSA Bank	:	Adv. MM Le Roux SC, Adv. HW van Eetveldt, and Adv. J Chanza instructed by Webber Wentzel
For Mercantile Bank	:	Adv. MJ Engelbrecht SC and Adv. L Quilliam instructed by Werksmans Attorneys
For SASFIN Bank	:	Adv. L Kelly instructed by ENSafrica
For Investec Bank	:	Adv. K Hofmeyr SC and Adv. L Sisilana instructed by ENSafrica
For Bidvest Bank	:	No Appearance
For Access Bank	:	Adv. T Marolen instructed by Lawtons Africa
For the Commission	:	Maya Swart, Bukhosibakhe Majenge, and Luke Rennie

Annexure "A"

SEKUNJALO / BANKS RELATIONSHIP

FIRST RESPONDENT: NEDBANK LIMITED

No	Applicant		Closure date
1	First Applicant	Dr Mohammed Iqbal Surve	15 February 2022
2	Second Applicant	Sekunjalo Investment Holdings (Pty) Ltd	15 March 2022
3	Third Applicant	African Equity Empowerment Investment Ltd	15 March 2022
4	Sixth Applicant	Sekpharma (Pty) Ltd	15 March 2022
5	Ninth Applicant	Premier Fishing & Brands Ltd	9 May 2022
6	Tenth Applicant	Premier Fishing SA (Pty) Ltd	9 May 2022
7	Eleventh Applicant	Marine Growers (Pty) Ltd	9 May 2022
8	Twelfth Applicant	Talhado Fishing Enterprises (Pty) Ltd	9 May 2022
9	Fifteenth Applicant	Global Command & Control Technologies (Pty) Ltd	15 March 2022
10	Sixteenth Applicant	Kalula Communications (Pty) Ltd	15 March 2022
11	Seventeenth Applicant	Kathea Communications (Pty) Ltd	15 March 2022
12	Eighteenth Applicant	Sekunjalo Properties (Pty) Ltd	15 March 2022
13	Nineteenth Applicant	3 Laws Capital SA (Pty) Ltd	15 March 2022
14	Twentieth Applicant	Cape Sunset Villas (Pty) Ltd	15 March 2022
15	Twenty-First Applicant	Silo Cape Waterfront Property Investment (Pty) Ltd	15 March 2022
16	Twenty-Second Applicant	Africa News Agency (Pty) Ltd	15 March 2022
17	Twenty-Third Applicant	South African Press Association (Pty) Ltd	15 February 2022
18	Twenty-Fifth Applicant	Independent Newspapers (Pty) Ltd	15 February 2022
19	Twenty-Sixth Applicant	Independent Media Consortium (Pty) Ltd	15 March 2022
20	Twenty-Seventh Applicant	Sagarmatha Technologies (Pty) Ltd	15 March 2022
21	Twenty-Eighth Applicant	Loot Online (Pty) Ltd	15 March 2022
22	Twenty-Ninth Applicant	Surve Philanthropies (NPC)	15 February 2022
23	Thirtieth Applicant	Sekunjalo Development Foundation Trust	15 March 2022
24	Thirty-First Applicant	Dr Iqbal Surve Bursary Trust	15 March 2022
25	Thirty-Second Applicant	The Social Entrepreneurship Foundation Trust	15 February 2022
26	Thirty-Third Applicant	Haraas Trust	15 March 2022
28	Thirty-Fourth Applicant	Linacre Investments (Pty) Ltd	15 February 2022
28	Thirty-Sixth Applicant	Business Venture Investments 1126 (Pty) Ltd	15 March 2022

SECOND RESPONDENT: STANDARD BANK

Under review

NO	Applicant	
1	Seventh Applicant	Orleans Cosmetics (Pty) Ltd
2	Twenty-Fifth Applicant	Independent Newspapers (Pty) Ltd
3	Twenty-Eighth Applicant	Loot Online (Pty) Ltd

THIRD RESPONDENT: FIRST RAND BANK

No	Applicant		Closure date
1	Third Applicant	African Equity Empowerment Investment Ltd	21 June 2021
2	Fourth Applicant	Afrinat (Pty) Ltd	21 June 2021
3	Fifth Applicant	Bioclones (Pty) Ltd	19 July 2021
4	Seventh Applicant	Orleans Cosmetics (Pty) Ltd	25 June 2021
5	Eighth Applicant	ESP Africa (Pty) Ltd	25 June 2021
6	Thirteenth Applicant	Ayo Technology Solutions Ltd	3 May 2021
7	Fourteenth Applicant	Health Systems Technologies (Pty) Ltd	29 October 2021
8	Twenty-Fourth Applicant	Magic 828 (Pty) Ltd	19 July 2021
9	Twenty-Eighth Applicant	Loot Online	30 June 2021

FOURTH RESPONDENT: ABSA BANK

No	Applicant		Closure date
1	Fourth Applicant	Afrinat (Pty) Ltd	26 November 2020
2	Fifth Applicant	Bioclones (Pty) Ltd	26 November 2020
3	Sixth Applicant	Sekpharma (Pty) Ltd	26 February 2021
4	Ninth Applicant	Premier Fishing & Brands Ltd	26 February 2021
5	Tenth Applicant	Premier Fishing SA (Pty) Ltd	26 February 2021
6	Eleventh Applicant	Marine Growers (Pty) Ltd	26 February 2021
7	Twelfth Applicant	Talhado Fishing Enterprises (Pty) Ltd	27 February 2021
8	Thirteenth Applicant	Ayo Technology Solutions Ltd	26 February 2021
90	Fourteenth Applicant	Health Systems Technologies (Pty) Ltd	26 February 2021
10	Eighteenth Applicant	Sekunjalo Properties (Pty) Ltd	26 February 2021
11	Twenty-Fourth Applicant	Magic 828 (Pty) Ltd	26 February 2021
12	Twenty-Eighth Applicant	Loot Online (Pty) Ltd	26 February 2021
13	Thirty-Fifth Applicant	Kilomax Investments (Pty) Ltd	26 February 2021

FIFTH RESPONDENT: MERCANTILE BANK

No	Applicant		Closure date
1	Fourteenth Applicant	Health System Technologies (Pty) Ltd	Active

SIXTH RESPONDENT: SASFIN BANK

No	Applicant		Closure date
1	Seventh Applicant	Orleans Cosmetics (Pty) Ltd	22 February 2022
2	Eighth Applicant	ESP Africa (Pty) Ltd	Blocked since inception
3	Fourteenth Applicant	Health System Technologies (Pty) Ltd	24 February 2022
4	Twenty-Fourth Applicant	Magic 828 (Pty) Ltd	02 December 2021

SEVENTH APPLICANT: INVESTEC BANK

NO	Applicant		Closure
1	First Applicant	Dr Muhammed Iqbal Surve	31 May 2021
2	Second Applicant	Sekunjalo Investments Holdings (Pty) Ltd	31 May 2021
3	Third Respondent	African Equity Empowerment Investment Ltd[3]	1 May 2020
4	Twenty-Second Applicant	African News Agency (Pty) Ltd	31 May 2021
5	Thirty-Third Applicant	Haraas Trust	31 May 2021

EIGHTH RESPONDENT: BIDVEST BANK

No	Applicant		Closure date
1	Seventh Applicant	Orleans Cosmetics (Pty) Ltd	Active

NINTH RESPONDENT: ACCESS BANK

No	Applicant		Closure date
1	Fourth Applicant	Afrinat (Pty) Ltd	2 July 2021