Navigating Reputational Risks: Cautionary Considerations for South African Banks in the Unilateral Termination of Bank-Customer Relationships

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Abstract

Bredenkamp v Standard Bank of South Africa Ltd 2010 4 SA 468 (SCA) and subsequent cases that followed this precedent exhibit that banks have the right to terminate the bank-customer relationship unilaterally. This right is usually entrenched in the contract between the bank and its customer and may also have its origin in an implied term of the contract. Some major banks in the Republic of South Africa have recently been under the spotlight for unilaterally terminating the bank-customer relationship with their customers (the Sekunjalo Group) based on reputational risks. It is alleged that in terminating the relationship, these banks unfairly discriminated against Sekunjalo Group, therefore asserting that the principle of reputational risk is not attributed similarly across customers of different racial groups. Whereas the paper does not intend to decide on such allegations of racial discrimination, the paper asserts that the unilateral termination of a bank-customer relationship is both a right and an obligation. The paper adopts a qualitative research approach in analysing the contractual nature of a bank-customer relationship, the common-law principles regarding the termination of the bank-customer relationship, and the developments in the application of the principle of reputational risk by South African banks and courts in the wake of the applications lodged by members of the Sekunjalo Group.

Keywords

Bank-customer relationship; contract; termination; reputational risks.

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1 Introduction

South African courts consider reputational risks as grounds for the unilateral termination of the bank-customer relationship.[1] This is justified when customers conducts themselves in a manner that presents possible risks to a bank's good name or business. Guided by statutory obligations,[2] common-law principles[3] and contractual rules, as will be unpacked below, banks have a right to terminate the relationship with a customer based on reputational risks, and case law suggests that courts should be reluctant to second-guess the decision.[4] This is particularly so because the bank-customer relationship is contractual in nature, and parties can establish or terminate their relationship at will.

Generally, the customer may terminate the contract summarily.[5] However, the bank must give reasonable notice of termination in line with the

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1 See *Bredenkamp v Standard Bank of South Africa Ltd* 2010 4 SA 468 (SCA) (hereinafter *Bredenkamp* SCA); *Hlongwane v Absa Bank Limited* (75782/13) [2016] ZAGPPHC 938 (10 November 2016) (hereinafter *Hlongwane*); *Minister of Finance v Oakbay Investments (Pty) Ltd; Oakbay Investments (Pty) Ltd v Director of the Financial Intelligence Centre* 2018 3 SA 515 (GP) (hereinafter *Oakbay Investments*); *Annex Distribution (Pty) Limited v Bank of Baroda* 2018 1 SA 562 (GP) (21 September 2017 (hereinafter *Annex Distribution* (21 September 2017)); *Annex Distribution (Pty) Limited v Bank of Baroda* (52590/2017) [2017] ZAGPPHC 639 (9 October 2017) (hereinafter *Annex Distribution* (9 October 2017)); and *Annex Distribution (Pty) Limited v Bank of Baroda* (52590/2017) [2018] ZAGPPHC 6 (12 March 2018) (hereinafter *Annex Distribution* (12 March 2018)); *Survé v Nedbank Limited* (698/2022) [2022] ZAWCHC 19 (14 February 2022) (hereinafter *Survé* HC); *Survé v Nedbank Limited* [2022] ZAWCHC 164 (17 June 2022) (hereinafter *Survé* EC); *Survé v Nedbank Ltd* 2022 2 CPLR 38 (CT) (hereinafter *Survé* CT); *Nedbank Limited v Survé* 2024 1 All SA 615 (SCA) (hereinafter *Survé* SCA); *Mercantile Bank, A Division of Capitec Bank Limited v Survé* 2023 3 CPLR 33 (CAC) (hereinafter *Survé* CAC); *Talhado Fishing Enterprises (Pty) Ltd v Firstrand Bank Ltd t/a First National Bank* (1104/2022) [2022] ZAECQBHC 15 (19 July 2022) (hereinafter *Talhado Fishing Enterprises*); *Africa Community Media (Pty) Ltd v Standard Bank of SA Ltd* (EC08/2023) [2023] ZAWCHC 243 (14 September 2023) (hereinafter *Africa Community Media*).

2 Legislation such as the *Financial Intelligence Centre Act* 38 of 2001 (*FIC Act*), the *Prevention of Organised Crime Act* 121 of 1998, the *Prevention and Combatting of Corrupt Activities Act* 2 of 2004, the *Banks Act* 94 of 1990, and Banking Association of South Africa 2012 https://www.banking.org.za/wp-content/uploads/2019/04/Code-of-Banking-Practice-2012.pdf (hereinafter *Code of Banking Practice*).

3 The common-law right to unilaterally terminate a bank-customer relationship was confirmed in *Bredenkamp* SCA.

4 *Annex Distribution* (9 October 2017) para 65; *Bredenkamp* SCA para 65.

5 See *Nedbank Limited v Houtbosplaas (Pty) Ltd* 2022 6 SA 140 (SCA). The appeal concerned a customer's right to summarily terminate the customer and banker's contractual relationship and close the customer's account (para 2). The court concluded that where the bank refuses to give effect to its erstwhile clients'

contractual terms,[6] or in the absence of a termination clause, reasonable notice will be determined by the nature of the customer's account.[7] The requisite for reasonable notice is also provided in the *Code of Banking Practice,* which provides that the bank will close its customer's account only after providing the customer with reasonable notice.[8]

In this context, where a bank opts to terminate the relationship unilaterally, case law suggests that it is within a bank's discretion to decide to what extent it will tolerate its reputation to be tarnished by allegations of illicit activities levelled against its customers,[9] whether or not the allegations have been proven truthful, and reasonableness does not play a role in exercising this discretion, except regarding the notice of termination.

The Supreme Court of Appeal (SCA) in *Bredenkamp v Standard Bank of South Africa Ltd*[10] (hereinafter *Bredenkamp*) set the standard for the unilateral termination of the bank-customer relationship on the grounds of reputational risks. The judgement sets out several principles South African banks have relied on when terminating relationships with their customers.[11] Over the years these principles have been challenged in courts, where customers have instituted legal proceedings to prohibit banks from closing their accounts, requiring banks to keep accounts open against the banks' wishes, much of this happening against the backdrop of extensive media coverage and political turmoil.[12]

Recently Dr Mohammed Iqbal Survé and members of the Sekunjalo Group of companies (hereinafter collectively referred to as the Sekunjalo Group) have been subject to litigation in the Equality Court,[13] the Competition Tribunal,[14] and the High Court[15] against several banks in South Africa to prevent them from closing their accounts and further to require the banks to

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instructions to close the relevant bank accounts, it has breached its obligations towards the customer (para 57). Also see *Bredenkamp v Standard Bank of South Africa Ltd* 2009 6 SA 277 (GSJ*)* (hereinafter *Bredenkamp* main application) para 29.

6 *Bredenkamp* SCA para 32; Ngidi 2020 *De Jure* 58; Ellinger, Lomnicka and Hare *Ellinger's Modern Banking Law* 207; the *Code of Banking Practice* para 7.3.2 (for banks that have adopted the *Code of Banking Practice*).

7 Ombudsman for Banking Services South Africa 2018 https://www.obssa.co.za/wp-content/uploads/2018/02/Bulletin-3-Closure-of-bank-accounts-Final-30.01.2018.pdf.

8 *Code of Banking Practice* para 7.3.2.

9 *Annex Distribution* (21 September 2017) para 12.

10 *Bredenkamp v Standard Bank of South Africa Ltd* 2010 4 SA 468 (SCA) (*Bredenkamp* SCA).

11 See footnote 1 for a list of cases that have pronounced on the principles laid down in *Bredenkamp* SCA.

12 Du Toit 2018 *Annual Banking Law Update* 65.

13 *Survé* EC; *Survé* SCA. The main applications are still pending in the High Court and the Equality Court.

14 *Survé* CT; *Survé* CAC.

15 *Survé* HC; *Talhado Fishing Enterprises*; *Africa Community Media*.

reinstate accounts that had already been closed at the time of the applications.[16] Whereas the banks build their argument on reputational risks, Sekunjalo Group alleges that they are victims of racial discrimination as white-owned companies who are customers of the banks have been subject to extensive media coverage, posing reputational and business risks to the banks, and yet their contracts have not been terminated.[17]

The paper intends to deliberate whether banks, relying on *Bredenkamp*, correctly enforce the right to terminate the bank-customer relationship unilaterally based on reputational risks. The paper establishes that for any bank, terminating the bank-customer relationship based on reputational risks is a right that falls squarely within the bank's discretion and is a regulatory obligation. The author intends to refrain from determining or arguing the merits of the case regarding the ongoing applications between the Sekunjalo Group and the relevant banking institutions. However, the author uses the issues in the applications to evaluate the principle of reputational risk as pronounced in *Bredenkamp* and further to demonstrate the extent to which banks apply the principle within the relevant legislative parameters.

2 The bank-customer relationship

2.1 The nature of the bank-customer relationship

The relationship between a bank and its customer, specifically the holder of a current account, must be viewed in terms of the general principles of the law of contract.[18] However, due to the complex nature of the relationship, it is difficult to identify the type of contract under which the relationship may be classified. As a result the bank-customer relationship is often classified as a contract *sui generis*.[19] The various descriptions that assume this characterisation are outlined in judicial authorities and literature. Fundamentally, the nature of the relationship is described as a "multi-faceted" relationship founded in various contracts.[20] De Jager states that it invariably involves various types of contracts such as mandate, loan for

16 *Survé* HC para 1; *Survé* EC paras 1-2; *Survé* CT para 3; *Africa Community Media* para 1. For ease of reference, Iqbal Survé and members of the Sekunjalo Group of companies are hereinafter collectively referred to as the "Sekunjalo Group".

17 *Survé* EC para 21. One could relate this allegation to the fact that Bredenkamp is a white male. However, Sekunjalo Group base their argument on comparison with specific customers who are white-owned entities. The allegation implies that the principle of reputational risks and *Bredenkamp* are not enforced similarly across customers of different racial groups.

18 Nagel and Pretorius 2016 *THRHR* 661.

19 Sharrock *et al Law of Banking and Payment* 115.

20 Sharrock *et al Law of Banking and Payment* 115. Also see Schulze 2002 *SA Merc LJ* 440; Ngidi 2020 *De Jure* 56; *Absa Bank Limited v Hanley* 2014 2 SA 448 (SCA) (hereinafter *Hanley*).

consumption, *depositum* and deposit-taking, all of which include aspects of private law.[21]

On the one hand the nature of the contract has been pronounced by courts as a paradigm of a debtor-and-creditor relationship.[22] The bank becomes the debtor as soon as the customer opens a bank account and deposits money into the bank account, and remains a debtor to the extent that the customer's bank account reflects a credit balance.[23] However, where the account reflects a debit balance, the roles are reversed. An overdraft facility is but one example where the roles are reversed.[24] The customer then becomes the debtor and the bank assumes the role of a creditor.

On the other hand the bank-customer relationship is based on a mandate in which the bank agrees to conduct one or more banking services on behalf of the customer.[25] A correlative description is espoused by Schoeman *et al*, who opine that in as much as the customer instructs the bank to render certain banking services when required and the bank agrees to carry out such instructions, their ensuing consensus emanates from a contract of mandate.[26] The SCA in *Absa Bank Limited v Hanley* equally held that whether the relationship relates to one or more of the services a bank performs for its customer, the agreement giving rise to these services is an agreement of mandate, since a bank undertaking to transfer funds on its customer's instructions acts as a mandatary.[27]

The nature of this relationship creates rights and duties for both parties. For instance, where a bank is mandated to effect a credit transfer, it must perform its mandate timeously, in good faith and without negligence. Under a contract of mandate the bank undertakes to execute all orders by the customer to effect a payment on condition that there are sufficient funds (or overdraft facilities) at the customer's disposal.[28] A reciprocal duty is imposed on a customer not to draw more than the amount standing to his or her credit balance or, where available, an overdraft facility limit. The relationship

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21 De Jager 2010 *SA Merc LJ* 127.

22 See *Standard Bank of SA Ltd v Oneanate Investments (Pty) Ltd* 1995 4 All SA 128 (C) 144; *Spar Group Ltd v Firstrand Bank Ltd* 2017 1 SA 449 (GP) paras 47-53; *FirstRand Bank Limited v The Spar Group Limited* 2021 5 SA 511 (SCA) para 41; Nagel *et al Commercial Law* 471.

23 Ngidi 2020 *De Jure* 56; Schulze *et al General Principles of Commercial Law* 476.

24 Nagel *et al Commercial Law* 471; Sharrock *et al Law of Banking and Payment* 117; De Jager 2010 *SA Merc LJ* 131.

25 Schulze *et al General Principles of Commercial Law* 465.

26 Schoeman *et al Introduction to South African Banking and Credit Law* 4. Also see *Di Giulio v First National Bank of South Africa Limited (*A1080/2001) [2002] ZAWCHC 33 (19 June 2002); De Jager 2010 *SA Merc LJ* 131.

26 Schoeman *et al Introduction to South African Banking and Credit Law* 4; *DA Ungaro & Sons (Pty) Limited v Absa Bank Limited* 2015 4 All SA 783 (GJ) para 25.

27 *Hanley* para 25.

28 Nagel *et al Commercial Law* 471.

further places a duty on the customer to draw his payment instructions with reasonable care to prevent forgery or alteration and to warn the bank of known or suspected fraud arising from this relationship.[29]

However, other salient features of the bank-customer relationship have been subject to concentrated discussions. The one description that has not been accepted is that the contract in the present day resembles that of a *depositum*, or agency. Authors such as Schulze,[30] De Jager[31] and Mthembu[32] distinguish and depict the possible relations between a contract of *depositum*, *mutuum* (a loan for consumption) and deposit-taking. A contract of *depositum* shares similar features to that of *mutuum* in that a depositor deposits money with a depository in exchange for an undertaking on the part of the depository that the same sum of money will be returned.[33] However, these contracts differ in that with *depositum*, the contract is gratuitous in nature and entails the safe custody of an object in the interest of the depositor.[34]

With *mutuum*, the parties agree that when money is deposited with the bank, it is deposited in the bank's interest, and the bank can utilise it. The client exchanges the ownership of the money for a personal right.[35] Although Schulze opines that banks occasionally conclude contracts of *depositum* with their customers, as of 2019 it appears that prominent South African banks have ceased to offer safe deposit boxes (as a feature of *depositum*).[36] It seems therefore that the nature of the bank-customer relationship is predominantly accepted to be that of *mutuum* and not *depositum*.

2.2 The unilateral termination of the bank-customer relationship

The ordinary rules relating to the termination of a contract often relate to termination on agreement or consent, by notice of termination, the death or dissolution of the customer, the sequestration of the customer, the insanity of the customer, the dissolution of the bank, and the effluxion of time (in the case of a fixed deposit).[37] The focus of this paper is on termination by notice. The bank-customer relationship can be terminated unilaterally by either

29 *Firstrand Bank Ltd v Kgethile* (M370/2018) [2021] ZANWHC 63 (31 August 2021) (hereinafter *Kgethile*) paras 43-45; *Hanley* para 24.
30 Schulze 2001 *SA Merc LJ* 78.
31 De Jager 2010 *SA Merc LJ* 127.
32 Mthembu 2014 *JICLT* 14.
33 Schulze 2001 *SA Merc LJ* 81.
34 Schulze 2001 *SA Merc LJ* 80; De Jager 2010 *SA Merc LJ* 131.
35 Schulze 2001 *SA Merc LJ* 82; De Jager 2010 *SA Merc LJ* 131; Mthembu 2014 *JICLT* 18.
36 Planting 2019 https://www.dailymaverick.co.za/article/2019-05-21-out-with-the-secure-solution-banks-phasing-out-safety-deposit-boxes//. South Africans use options such as Union Vault or Max Vault to access safety deposit boxes.
37 See Sharrock *et al Law of Banking and Payment* 162-166.

party to the contract. The duration and termination of an agreement are primarily determined by establishing whether there are any explicit contractual grounds, including voluntary termination, on which the parties can depend.[38] Their grounds typically lie in the *lex commissoria*,[39] or in an implied term of the agreement.

An implied term is one implied by law in a contract of a particular nature,[40] unless expressly excluded by the parties. It has the effect that where the parties have not included a cancellation clause in their agreement, the contract can be interpreted to include an implied term. *Plaaskem (Pty) Ltd v Nippon Africa Chemicals (Pty) Ltd*[41] identifies four notable factors to consider to determine whether the parties wish for either party to terminate the relationship on notice. These include the wording of the contract,[42] the intention of the parties,[43] the nature of the contract,[44] and the surrounding circumstances of the contract.[45] Notably, in the absence of a cancellation clause the party who wishes to cancel the agreement obtains a right to cancel the contract if the breach of contract is profound in that it goes to the root of the contract or relates to an essential term of the contract.[46]

The prerogative is rooted in the essence of a contract of mandate, which incorporates the duty not to cause damage to the other party.[47] Therefore, where a customer conducts his or her business in a way that poses operational and business risks to the bank, the latter can validly argue that the customer has breached this duty, which conduct would possibly satisfy the test of seriousness and allow the bank to cancel the contract unilaterally, in the absence of a *lex commissoria*.[48] An implied term can be read into the contract because it cannot be concluded that the parties intend to be bound in perpetuity, especially against the will of either of the parties.[49]

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38 Naidoo *Termination of the Bank-Customer Relationship* 5.

39 Naidoo *Termination of the Bank-Customer Relationship* 5. In *GPC Developments CC v Uys* 2017 4 All SA 14 (WCC) para 35, the court acknowledged the explanation of the phrase *lex commissoria* as a cancellation clause which affords a contracting party the right to resile from an agreement on the ground of delay, which has also acquired a broader and more general meaning, *viz*, that of a provision conferring the right to cancel an agreement based on any recognised form of breach.

40 Schulze 2011 *Obiter* 220.

41 *Plaaskem (Pty) Ltd v Nippon Africa Chemicals (Pty) Ltd* 2014 5 SA 287 (SCA) (hereinafter *Plaaskem*).

42 *Plaaskem* para 18.

43 *Plaaskem* para 19.

44 *Plaaskem* para 21.

45 *Plaaskem* para 24.

46 Schulze 2010 *Annual Survey of South African Law* 530; Schulze 2011 *Obiter* 220; Schulze and Eiselen 2022 *TSAR* 830.

47 Schulze 2011 *Obiter* 220.

48 Schulze 2011 *Obiter* 220.

49 *Plaaksem* para 18; Schulze 2010 *Annual Survey of South African Law* 528; Schulze 2011 *Obiter* 218.

Therefore, where the parties have not inserted an express cancellation clause in the contractual agreement, the parties are not precluded from unilaterally terminating the agreement. The contractual nature of the agreement between a bank and its customer allows the bank to do so and requires the customer to be served with reasonable notice of termination. On the contrary, a customer may terminate the relationship summarily,[50] without serving the bank with notice prior to the termination.[51] Whereas several reasons can inform the unilateral termination of the relationship, the author draws explicit attention to reputational risk as grounds for termination.

2.3 The influence of Bredenkamp on the closure of bank accounts

Bredenkamp confirmed the common-law position on the unilateral termination of the bank-customer relationship. Bredenkamp was listed as a "specially designated national" by the United States Department of Treasury's Office of Foreign Asset Control on 25 November 2008.[52] The listing was based on Bredenkamp's relation with the then President of Zimbabwe, President Robert Mugabe, and allegations that he had provided financial and logistical support to the regime that has enabled the former President to pursue policies that undermined democratic processes and institutions in Zimbabwe.[53]

In addition Bredenkamp was allegedly involved in various illicit business activities, including tobacco trading, grey-market arms trading and trafficking, equity investments, oil distribution and diamond extraction.[54] The bank's concern was that if it were to retain Bredenkamp as a customer, domestic and foreign onlookers might reasonably believe that the accounts Bredenkamp held at Standard Bank could be used to facilitate the unlawful activities, and its association might well undermine a bank's hard-won and fragile national and international reputation.[55] Upon receiving the notice of termination Bredenkamp lodged an application for an interim interdict to prevent Standard Bank from closing his bank accounts.[56]

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50 *Nedbank Limited v Houtbosplaas (Pty) Ltd* 2022 6 SA 140 (SCA) para 2; *Bredenkamp* main application para 29.

51 Ngidi 2020 *De Jure* 66; Ellinger, Lomnicka and Hare *Ellinger's Modern Banking Law* 207; Naidoo *Termination of the Bank-Customer Relationship* 6; *Code of Banking Practice* para 7.3.2.

52 *Bredenkamp* SCA para 12.

53 *Bredenkamp* SCA para 14.

54 *Bredenkamp* SCA para 15.

55 *Bredenkamp* SCA para 17.

56 *Bredenkamp v Standard Bank of South Africa Ltd* 2009 3 All SA 339 (GSJ) (hereinafter *Bredenkamp* interim application).

The court a quo granted an interim interdict in favour of Bredenkamp despite a *lex commissoria* regulating the termination of the relationship.[57] According to the court Standard Bank's decision to terminate its relationship with Bredenkamp was unreasonable, unfair, not in line with constitutional values and guidelines, and based squarely on perceptions and not on facts, which perceptions might be wrong.[58]

In the main application the bank held that the *lex commissoria* was not contrary to any constitutional values and that a bank has the right to terminate the bank-customer relationship unilaterally.[59] This was because a bank has obligations to comply with national and international regulations, failing which there are serious legal consequences for a bank.[60]

On appeal the question before the SCA was whether the Bank had good cause to close Bredenkamp's accounts.[61] In dismissing the application, the SCA held that the bank had a valid contract that gave it the right to cancel, which right had been exercised in a *bona fide* manner.[62] The court held that the termination did not offend any identifiable constitutional value and was not contrary to any other public policy consideration.[63] Bredenkamp's cancellation was based purely on the fact of the listing and the possible reputational and commercial consequences of the listing for the Bank.[64]

Bredenkamp has been applied in the following selected cases wherein customers were allegedly party to illicit activities with potential impact on the reputation of banks.

2.3.1 Annex Distribution v Bank of Baroda[65]

Annex Distribution v Bank of Baroda (hereinafter *Annex Distribution*) consists of three judgements. In the first application for an interim interdict, the court highlighted the *dictum* from *Bredenkamp* that the relationship between a bank and its customer is contractual, and therefore a bank is at liberty to terminate its relationship with its customer[66] amid adverse media publicity if the bank believed it to be a risk to and detrimental to its business.[67] However, the second judgement took a different stance.

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57 *Bredenkamp* interim application para 71.
58 *Bredenkamp* interim application para 32.
59 *Bredenkamp* main application paras 64, 67 and 68.
60 *Bredenkamp* main application paras 32, 50, 51, and 52.
61 *Bredenkamp* SCA para 64.
62 *Bredenkamp* SCA para 64; Schulze 2010 *Annual Survey of South African Law* 527.
63 *Bredenkamp* SCA para 64; Schulze 2010 *Annual Survey of South African Law* 527.
64 *Bredenkamp* SCA para 61.
65 *Annex Distribution* (21 September 2017); *Annex Distribution* (9 October 2017); *Annex Distribution* (12 March 2018).
66 *Annex Distribution* (21 September 2017) para 15.7.
67 *Annex Distribution* (21 September 2017) paras 7 and 18.

The court was not convinced that the potential harm to the bank's reputation had been substantiated, and as a result interdicted the bank from closing the account and terminating the bank-customer relationship.[68]

In the final decision[69] the court held that since the bank had terminated its operations in South Africa, the bank could not be expected to service the customer's account.[70] The court found the bank to have every right to terminate any business contract, including that of Annex Distribution.[71] The court concluded that the bank's right to trade or not to trade supersedes whatever right, if any, the customer might have, and as a result dismissed the application.[72]

2.3.2 Minister of Finance v Oakbay Investments (Pty) Ltd

The Gauteng High Court in *Minister of Finance v Oakbay Investments (Pty) Ltd and Others* (hereinafter *Oakbay Investments*) with reference to *Bredenkamp* confirmed that the bank may terminate its relationship with a customer at its discretion on reasonable notice to the customer, provided that the reasons for terminating the account do not violate public policy or constitutional values.[73] Except for such acknowledgement by the court, the decision does not provide development in this area. The application was based on the *Financial Intelligence Centre Act*[74] (*FIC Act*) and not on the Constitution and sought to enforce a constitutional right to access to information, in respect of which Oakbay Investments[75] sought to access information that formed the basis of the reports submitted by their banks to the Financial Intelligence Centre (FIC) in order to allow Oakbay Investments to rebut the allegations in the reports or to repel the cloud of impropriety the reports cast on them.[76]

2.3.2 Hlongwane v Absa Bank Limited

Hlongwane v Absa Bank Limited brought an application to access records relating to ABSA's decision to close Hlongwane's accounts.[77] The court dismissed the application and held that the bank's *bona fides* in closing accounts could not be questioned.[78] The Court recognised that the bank had no obligation to retain a client whose monitoring in terms of money

68 *Annex Distribution* (9 October 2017) paras 82-87.
69 *Annex Distribution* (12 March 2018).
70 *Annex Distribution* (12 March 2018) para 16.
71 *Annex Distribution* (12 March 2018) para 16.
72 *Annex Distribution* (12 March 2018) para 20.
73 *Oakbay Investments* para 56.
74 *Financial Intelligence Centre Act* 38 of 2001.
75 *Oakbay Investments* para 49.
76 *Oakbay Investments* para 38.
77 *Hlongwane* para 1. The application was brought in terms of the *Promotion of Access to Information Act* 2 of 2000.
78 *Hlongwane* para 30.

laundering measures would be more onerous than the benefit the bank would receive from banking the client.[79]

2.3.4 Survé v Nedbank

This heading encompasses a discussion of the seven applications that have been adjudicated in different courts. At the time of writing, the main applications before the Equality Court and the High Court are still pending. The matter between the Sekunjalo Group and various South African banks involves the application of the Constitution, particularly section 9, due to the nature of the allegations levelled against the banks by the Sekunjalo Group, which alleges that its banks racially discriminated against it since the principle of reputational risk was not being enforced on the Group in the same manner as it had previously been enforced in respect of white-owned customers of the same banks.

The banks used *Bredenkamp* as authority when terminating their relationship with members of the Sekunjalo Group. Like Bredenkamp, the Sekunjalo Group's reputation has been tarnished by allegations of impropriety in several controversial media reports. Although these allegations have not been proven truthful, the case law discussed herein exhibits that it is insignificant.[80]

For the sake of brevity, a reflection on the decisions in these applications is provided herein. In *Survé v Nedbank* an application for an interim interdict was lodged by forty-three members of the Sekunjalo Group of companies.[81] The court dismissed the application based on its lack of jurisdiction. However, the court made an *obiter dictum* that the SCA's decision in *Bredenkamp* loomed large in most matters involving the termination of a bank-customer relationship and, as such, should not be used uncritically or applied mechanically to any bank-client relationship.[82] As opined by Schulze and Eiselen, these comments should not be interpreted to mean that the correctness of *Bredenkamp* is being questioned.[83] They aptly argue that the correctness of the decision in *Bredenkamp* is beyond reproach.[84]

On 17 June 2022 the Western Cape High Court, sitting in *Survé v Nedbank Limited*[85] as the Equality Court, granted an interdict in favour of Sekunjalo Group, prohibiting Nedbank from closing Sekunjalo Group's accounts pending the finalisation of the main application in the Equality Court.

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79 *Hlongwane* para 30.
80 *Bredenkamp* SCA paras 19 and 63; *Oakbay Investments* para 39; *Annex Distribution* (21 September 2017) para 41.
81 *Survé* HC para 1.
82 *Survé* HC para 60.
83 Schulze and Eiselen 2022 *TSAR* 830.
84 Schulze and Eiselen 2022 *TSAR* 832.
85 *Survé* EC.

However, the SCA recently set aside this order in *Nedbank v Survé*. The SCA held that Sekunjalo Group had not established a prima facie case of racial discrimination, so the Equality Court should not have granted an interim interdict in the first place.[86] The court remarked that if Sekunjalo Group were to breach the terms of the banker-customer contract, the Equality Court order would prohibit Nedbank from exercising its contractual right to terminate the relationship.[87]

On 16 September 2022 the Competition Tribunal granted an interdict in favour of Sekunjalo Group in *Survé v Nedbank Ltd,* preventing eight banks from closing the accounts of Sekunjalo Group and requiring the banks to reopen accounts already closed. The application before the Tribunal was based on allegations of collusion between the banks.[88] The Tribunal found the banks to have acted in coordination with one another and acted unilaterally as dominant firms to abuse their dominant position.[89] The decision by the Tribunal was set aside by the Competition Appeal Court (CAC) with respect to three of the eight banks in *Mercantile Bank, a Division of Capitec Bank Limited v Survé*.

The CAC found that the Tribunal had drawn an inference of anticompetitive practice and rejected the banks' regulatory compliance justification.[90] On 7 August 2023 Sekunjalo Group applied for leave to appeal the CAC order in the Constitutional Court, which proceedings are still pending.[91]

On 19 July 2022 the court in *Talhado Fishing Enterprises (Pty) Ltd v Firstrand Bank Ltd t/a First National Bank*[92] held that it is unfair to impose upon a bank the obligation to retain a customer simply because other banks are not likely to accept that entity as a customer.[93] In justifying the finding that the bank had good cause to close the accounts, the court held that it had a valid contract that gave it the right to cancel.[94] Considering that Sekunjalo Group posed reputational and business risks, the bank had exercised this right in a *bona fide* manner.[95] For this reason the court dismissed the application for an interdict.[96]

Lastly, in *Africa Community Media (Pty) Ltd v Standard Bank of SA Ltd,* members of the Sekunjalo Group lodged an application for an interim

86 *Survé* SCA paras 27, 28 and 29.
87 *Survé* SCA para 13.
88 *Survé* CT para 10.
89 *Survé* CT para 4.
90 *Survé* CAC para 41.
91 *Africa Community Media* para 10.
92 Talhado Fishing Enterprises is a member of the Sekunjalo Group.
93 *Talhado Fishing Enterprises* para 24.5.
94 *Talhado Fishing Enterprises* para 24.7.
95 *Talhado Fishing Enterprises* para 24.7.
96 *Talhado Fishing Enterprises* para 29.

interdict to prevent the bank from closing their accounts pending the finalisation of the main applications in the High Court and the Equality Court. The court held that the interests of justice instead call for an interim interdict of a more limited duration, in respect of which the parties could approach the court again for an extension or discharge upon good cause shown.[97]

3 Reputational risk as a ground for termination of the bank-customer relationship

Definitions of reputational risk focus primarily on social cognition such as beliefs, impressions, knowledge and perceptions.[98] Eckert describes the most commonly accepted definition of corporate reputation as:

> The perceptual representation of a company's past actions and future prospects that describes the firm's overall appeal to all of its key constituents when compared with other leading rivals.[99]

The Basel Committee on Banking Supervision (BCBS)[100] also defines reputational risk as:

> The risk arising from negative perceptions on the part of customers, counterparties, shareholders, investors, debt-holders, market analysts, and other relevant parties or regulators that can adversely affect a bank's ability to maintain existing or establish new business relationships and continued access to sources of funding (e.g. through the interbank or securitisation markets).[101]

According to these definitions, two types of reputational risk can be deduced in the context of this discussion. One attaches to the customer's name and one attaches to the bank. In this context the reputation of the customer, especially one who is engaged or alleged to be engaged in illicit financial activities, can impact on the bank's reputation if it can easily be alleged or proved that the bank was used as a vehicle to conduct such transgressions. Furthermore, failure by the bank to minimise this risk can impact on the bank's reputation if it keeps such a customer and fails to comply with its legislative and regulatory obligations to combat such transgressions.

Likewise Zaby and Pohl[102] observe that reputation pertains to the bank's competence, integrity and trustworthiness, and that a reputation results from the perception of the group of stakeholders of a bank (i.e. its customers,

97 *Africa Community Media* para 28.
98 Eckert 2017 *Journal of Risk Finance* 147.
99 Eckert 2017 *Journal of Risk Finance* 147.
100 The Basel Committee on Banking Supervision (BCBS) is a global standard setter for the prudential regulation and supervision of banking institutions. Its mandate is to strengthen banks' regulation, supervision and practices worldwide to enhance financial stability. See Art 1 of the *BCBS Basel Committee Charter* (updated 2018) (BIS 2018 https://www.bis.org/bcbs/charter.htm).
101 BCBS 2017 https://www.bis.org/bcbs/publ/d423.pdf 4.
102 Zaby and Pohl 2019 *SAGE Open* 1.

shareholders, external creditors, employees, business partners, competitors; members of the financial community such as rating agencies, analysts, and fund managers; government and regulatory authorities; interest groups, e.g., consumer associations; and the social environment).[103] The reputation of banks is significant because it influences the relationships that banks maintain with their customers and the costs that banks are willing to incur to maintain those relationships.[104]

The unilateral termination of the bank-customer relationship based on reputational risks is both a right[105] and an obligation.[106] On the one hand it affords the contracting parties the right to terminate the agreement where the contractual relationship with either may negatively influence the other party's reputation. This affords a bank the right to choose its customers, to identify the risks the customer exposes it to, and to determine whether these risks justify refusing to offer banking products and services to a potential customer or terminating a relationship with that customer. On the other hand, against the backdrop of exercising the right to terminate the relationship based on reputational risk lies the obligation imposed on banks to implement and apply risk management measures.

Swanepoel *et al* argue that managing a company's reputation and reputational risk should be part of an effective risk management strategy and process.[107] In terms of international banking standards and domestic laws, banks are ethically and legally bound to prevent financial crimes, which include *inter alia* illicit transactions, money laundering, terrorism financing and corruption.[108] Disassociation with a customer whose conduct could harm a bank's reputation is an appropriate tool to comply with these regulatory obligations to the extent set out in paragraph five below. This was observed in *Bredenkamp* and subsequent cases discussed herein. Reliance on *Bredenkamp* does not imply that banks cannot be held accountable when they act against the relevant rules and constitutional values. This paper does not focus on such values, but the author briefly considers these in the next section of the paper.

103 Zaby and Pohl 2019 *SAGE Open* 2.

104 Buckley and Nixon 2009 *JBFLP* 39.

105 In *Bredenkamp* the court confirmed a bank's right to terminate the relationship between it and its customer unilaterally, provided that specific requirements are met. See *Bredenkamp* SCA paras 64, 67 and 68; Schulze 2011 *Obiter* 213; *Annex Distribution* (21 September 2017) para 21.

106 The obligation is informed by the fact that assessing a bank's reputation is part of the risk management strategies that individual banks have adopted, as outlined in para 5 below.

107 Swanepoel *et al* 2017 *Journal of Economic and Financial Sciences* 315.

108 Ngidi 2020 *De Jure* 57.

4 The consideration of constitutional values and obligations

South African courts have over the years pronounced on the application of the *Constitution of the Republic of South Africa* to the law of contracts,[109] which influence scholars have also explored.[110] All laws in South Africa, including the law of contract, are subject to the Constitution, and any law that is found inconsistent with it is invalid.[111] Mupangavanhu states that exercising private power in a banking relationship may lead to a clash between private law and the Constitution.[112] These are instances such as the dispute between the Sekunjalo Group and its various banks.

As stated above,[113] in the case of the Sekunjalo Group section 9 of the Constitution comes into play because the banks are accused of discrimination on racial grounds. As pointed out, the Sekunjalo Group alleges that their banks have been selective in the action taken against companies that are "white-dominant businesses", such as the Steinhoff Group, EOH Limited and the Tongaat-Hulett Group, whose accounts have not been terminated despite having been found guilty of fraud and various other offences.[114] The inference drawn from these allegations is that the banks are infringing on the Group's constitutional right to equality.

In *Bredenkamp* the SCA held that the Constitution did not introduce an overarching requirement of fairness into the law of contracts, but fairness and reasonableness play a role when public policy considerations are implicated in the Constitution.[115] This means that banks' practices when terminating relationships ought to be measured against constitutional values, especially where constitutional values are implicated. The Constitution prescribes standards such as human dignity, equality and freedom as fundamental values against which the conduct of banks must be measured, including at the termination of a relationship.[116]

As aptly argued by Mupangavanhu, in instances where the power to terminate the banking relationship infringes on constitutional rights such as the right to equality, public policy considerations will not favour the

109 *Bredenkamp* SCA; *Strydom v Nederduitse Gereformeerde Gemeente Moreleta Park* 2009 30 ILJ 868 (EqC); *Beadica 231 CC v Trustees for the time being of the Oregon Trust* 2020 5 SA 247 (CC); *AB v Pridwin Preparatory School* 2020 5 SA 327 (CC).

110 Mupangavanhu 2023 *Speculum Juris* 22-35; Coleman 2021 *PELJ* 1-68; Lubbe 2004 *SALJ* 395-423.

111 Section 2 of the *Constitution of the Republic of South Africa*, 1996 (hereinafter the Constitution).

112 Mupangavanhu 2023 *Speculum Juris* 31.

113 See para 2.3.3 above.

114 See para 1 above.

115 Rautenbach 2011 *THRHR* 514.

116 Section 1(a) of the Constitution.

termination of the bank–customer relationship.[117] Needless to say, such consideration is also warranted in respect of other constitutional rights. Without predetermining the merits of the looming Equality Court proceedings, it is argued that constitutional values and principles influence the nature of the bank-customer relationship to the extent that parties have rights afforded to them.

Specific attention is drawn to the right to equality (a right for consideration in the Sekunjalo Group's Equality Court application) and the bank's freedom of association. Section 9 of the Constitution[118] plays a critical role in affording everybody, including financial consumers, the right to equality. The Sekunjalo Group's application to the Equality Court is expected to present a development in this area. I wait in anticipation of the outcome of the Equality Court case and the academic deliberations that may follow. It has been established that banks have the right to unilaterally terminate the bank-customer relationship on reputational risks, a principle based on law and fact.

The legal ground for termination is evidenced in *Bredenkamp*, and the termination must be justified from a factual point of view. The factual analysis determines reputational risk as a lawful ground for termination. Equally, it is necessary to note that banks' contractual autonomy is informed by freedom of association[119] in that banks are free to associate or disassociate with a customer. It would be difficult to force a bank to retain a customer against its will. It is difficult to imagine how the Equality Court would rule in favour of the Sekunjalo Group without impeding a bank's freedom to contract and freedom of association. Proving discrimination in this context will be challenging for the Sekunjalo group, considering that the legislative requirements as outlined below impose on banks the obligation to enforce risk assessment measures and ultimately to terminate the relationship with the customer where necessary.

5 Legislative and policy considerations

5.1 International standards

South Africa has adopted international standards issued by international bodies such as the BCBS, the Financial Action Task Force (FATF),[120] and

117 Mupangavanhu 2023 *Speculum Juris* 32.

118 Section 9 of the Constitution provides for the right to equality.

119 Section 19 of the Constitution.

120 The Financial Action Task Force (FATF) is the global money laundering and terrorist financing watchdog responsible for setting international standards to prevent money laundering and terrorism financing. See FATF date unknown https://www.fatf-gafi.org/en/home.html.

the International Monetary Fund (IMF),[121] whose standards play an integral part in combatting financial crimes globally. The BCBS provides that adequate banking supervision entails the employment of controls and systems aimed at preventing, identifying and reporting potential abuses of financial services, including money laundering and terrorism financing.[122] This principle is aligned with the bank's obligation to employ sound risk management processes. In line with this principle, the BCBS issued *Guidelines on Sound Management of Risks Related to Money Laundering and Terrorism Financing,*[123] which incorporates money laundering and terrorism as risks within banks' overall risk management purview.[124] These guidelines should be read and adopted with the *International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation* issued by the FATF.[125]

The FATF is primarily responsible for issuing anti-money laundering and counter-terrorism financing standards aimed at promoting the effective implementation of legal, regulatory and operational measures for combatting money laundering, terrorist financing, the financing of proliferation and other related threats to the integrity of the international financial system.[126] The FATF works closely with the IMF, the United Nations and the World Bank Group to assess countries' compliance with international anti-money laundering and counter-terrorism financing standards.[127] Non-compliance with these standards has consequences such as greylisting, with implications such as a loss of investments, international relations and increased costs in international transactions.[128]

5.2 Domestic laws

5.2.1 Banks Act

Section 60B of the *Banks Act* obliges banks to establish and maintain an adequate and effective corporate governance process consistent with the nature, complexity and risks inherent in the activities and the business of the bank. Banks do this to ensure compliance with all applicable laws and

121 The International Monetary Fund (IMF) is an intergovernmental institutional body that fosters international monetary cooperation, encouraging the expansion of trade and economic growth across member countries. See IMF date unknown https://www.imf.org/en/About/Factsheets/IMF-at-a-Glance.

122 BCBS 2012 https://www.bis.org/publ/bcbs230.pdf 65.

123 BCBS 2016 https://www.bis.org/bcbs/publ/d353.pdf.

124 BCBS 2016 https://www.bis.org/bcbs/publ/d353.pdf 1.

125 FATF 2023 https://www.fatf-gafi.org/content/dam/fatf-gafi/recommendations/FATF%20Recommendations%202012.pdf.coredownload.inline.pdf?ref=the-wave.net.

126 FATF 2023 https://www.fatf-gafi.org/content/dam/fatf-gafi/recommendations/FATF%20Recommendations%202012.pdf.coredownload.inline.pdf?ref=the-wave.net 7.

127 IMF date unknown https://www.imf.org/en/About/Factsheets/Sheets/2023/Fight-against-money-laundering-and-terrorism-financing.

128 Bissett, Steenkamp and Aslett 2023 *JFC* 1542-1543.

regulations.[129] Risk management and compliance are among the essential elements of corporate governance. Empowered by section 90 of the *Banks Act*, the Minister has promulgated Regulations Relating to Banks that oblige banks to consider reputational risk in their risk management strategies.[130] Regulation 39(3) provides explicitly that the conduct of the business of a bank entails the ongoing management of risks, which may arise from the bank's on-balance sheet or off-balance sheet activities and which may include, among other things, risks such as the detection and prevention of criminal activities,[131] reputational risk,[132] risk arising from exposure to a related person,[133] and any other risk regarded as material by the bank.[134]

Regulation 50 of the Regulations Relating to Banks further requires that every bank must have in place robust structures, policies, processes and procedures to guard against the bank's being used for the purposes of market abuse such as insider trading, market manipulation, and financial crimes such as fraud, the financing of terrorist activities and money laundering.[135] These structures, policies, processes, and procedures must ensure continued compliance with all relevant legislation, must be capable of recognising suspicious customers and transactions, and must lead to reporting such suspicions.[136]

5.2.2 Financial Intelligence Centre Act

The cases discussed herein show that banks consider their obligations under the *FIC Act* when terminating relationships with customers based on reputational risks. The *FIC Act* obliges banks as "accountable institutions" to employ measures to detect and combat financial crimes, specifically money laundering, and to report suspicious and unusual transactions.[137] These measures are employed through various means, including continuous vigilance through the "customer due diligence" programme, which extends to the protection of the financial sector.[138] Through this programme, banks are obliged to establish and verify the identities of their customers,[139] to obtain additional information to establish the nature of the customer's business, the intended purpose of the business and the ownership structure of the business, to verify the source of the funds

129 Section 60B(2)(i) of the *Banks Act* 94 of 1990.
130 Regulation 39 in GN R1029 in GG 35950 of 12 December 2012 (Regulations Relating to Banks).
131 Regulation 39(3)(h) of the Regulations Relating to Banks.
132 Regulation 39(3)(n) of the Regulations Relating to Banks.
133 Regulation 39(3)(o) of the Regulations Relating to Banks.
134 Regulation 39(3)(aa) of the Regulations Relating to Banks.
135 Regulation 50(1) of the Regulations Relating to Banks.
136 Regulation 50(2) of the Regulations Relating to Banks.
137 Section 29 of the *FIC Act*.
138 BCBS 2001 https://www.bis.org/publ/bcbs85.pdf 4.
139 Section 21 of the *FIC Act*.

deposited in the customer's account, and to identify the risks associated with the customer.[140]

Banks do this to prevent or minimise the risks of being used as a vehicle for financial crimes. Upon determining that the customer's misconduct poses a reputational risk to the bank, amongst other measures such as reporting the conduct to the FIC, banks are obliged in certain circumstances to terminate the bank-customer relationship.[141] Where a financial institution fails to comply with the provisions of the *FIC Act* or the risk management and compliance programme, the FIC may impose administrative sanctions on the institution or in some instances may find the relevant person guilty of an offence[142] and liable to imprisonment for a period not exceeding 15 years or a fine not exceeding R100 million.[143]

5.2.3 Financial Sector Regulation Act

With the Twin Peaks model of regulation in place since the enactment of the *Financial Sector Regulation Act* (*FSR Act*),[144] the Financial Sector Conduct Authority (FSCA)[145] has been given the explicit mandate under the *FSR Act* to regulate and supervise the conduct of financial institutions such as banks and cooperate with other entities such as the Prudential Authority and the FIC.[146] The powers and functions of the FSCA extend beyond those regulated under the *FSR Act*. The *FIC Act* establishes the FSCA as a supervisory body in terms of item 1 of Schedule 2 to the *FIC Act*.[147] The FSCA supervises accountable institutions listed in items 4, 5 and 12 of Schedule 1 to the *FIC Act* for *FIC Act* compliance.[148] The FSCA performs onsite and offsite inspections and engages in supervisory activities at accountable institutions to test compliance with the obligations of the *FIC Act,* and takes enforcement measures against accountable institutions that fail to comply with the *FIC Act*.[149]

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140 Sections 21A-21C of the *FIC Act*.

141 Section 21E of the *FIC Act.*

142 See ss 45C, 46, 46A, 47, 48, 51 and 52 of the *FIC Act*.

143 Section 68 of the *FIC Act*.

144 *Financial Sector Regulation Act* 9 of 2017 (*FSR Act*).

145 The Financial Sector Conduct Authority (FSCA) is a market conduct regulatory authority established under s 56 of the *FSR Act*.

146 Section 58(1)(a) of the *FSR Act*.

147 Section 45(1) of the *FIC Act*; FSCA 2022 https://www.fsca.co.za/Regulatory%20Frameworks/Temp/FSCA%20AML%20CFT%20Body%20of%20Knowledge%20-%20April%202022.pdf.

148 FSCA 2022 https://www.fsca.co.za/Regulatory%20Frameworks/Temp/FSCA%20AML%20CFT%20Body%20of%20Knowledge%20-%20April%202022.pdf 1.

149 FSCA 2022 https://www.fsca.co.za/Regulatory%20Frameworks/Temp/FSCA%20AML%20CFT%20Body%20of%20Knowledge%20-%20April%202022.pdf 1.

The other objective of the FSCA is to promote the fair treatment of financial customers by financial institutions,[150] and to issue conduct standards that are aimed at ensuring that this objective is achieved.[151] The Conduct Standard issued by the FSCA in 2020[152] prescribes how banks must conduct their business. It provides in the relevant part that a bank must conduct its business in a manner that prioritises the fair treatment of financial customers.[153] Fair treatment should be apparent in other areas of the bank-customer relationship, such as the bank's refusal, withdrawal, or closure of financial products or services.

Section 9 of the Conduct Standard requires banks to, subject to applicable requirements, document, adapt and implement processes and procedures relating to the withdrawal, termination or closure of a financial product or service, amongst other things, in respect of one or more financial customers.[154] This induces a bank to issue a policy document outlining the circumstances in which it will refuse to deal with a customer or terminate its relationship with the customer and the process it will follow in deciding to refuse to deal with a customer or to terminate its relationship with the customer.[155]

Against this backdrop, the contract would contain a *lex commissoria* establishing the circumstances in which the contract would be terminated. This subjects banks to regulatory oversight to ensure that when they terminate the bank-customer relationship, they do so in a manner that conforms to the contractual terms and its regulatory obligations.

5.2.4 Conduct of Financial Institutions Bill

The National Treasury has also tabled the second draft of the Conduct of Financial Institutions Bill[156] (CoFI Bill), which is set to enhance market conduct regulation and ensure that consumers are treated fairly in the financial sector.[157] The Bill states that banks should, "after" the point of

150 Section 57(b)(i) of the *FSR Act*.

151 Conduct Standards are issued in terms of s 106 of the *FSR Act*.

152 FSCA 2020 https://www.banking.org.za/wp-content/uploads/2020/07/Conduct-Standard-3-of-2020-BANKS-Annexure-A.pdf (hereinafter the Conduct Standard).

153 Section 2(4) of the Conduct Standard.

154 Section 9(1)(b) of the Conduct Standard.

155 Section 9 of the Conduct Standard.

156 GN 519 in GG 43741 of 29 September 2020 (Draft Conduct of Financial Institutions Bill, 2020) (hereinafter CoFI Bill).

157 Section 17(1)(a) of the CoFI Bill. The FSCA has published a three-year plan which indicates the following progress: phase1 (overall design of the new framework) has been finalised; phase 2 (targeted consultation) was set to commence during the second half of 2023; and phase 3 (transitioned work) was set to continue throughout 2023 with the intention of having initial formal proposals ready in the first half of 2024. See FSCA 2022 https://www.fsca.co.za/Regulatory%20Frameworks/Regulatory

contracting a customer, continue to promote the fair treatment of the customer, including when the contract is terminated and after the contract has been terminated.[158] Furthermore, a financial institution may terminate the contractual relationship between the financial institution and a financial customer only in a fair manner and in accordance with any procedures and requirements that may be prescribed.[159]

5.2.5 Code of Banking Practice

The *Code of Banking Practice* also influences the bank-customer relationship for those banks that have adopted the Code in their business practices. Although the Code is voluntary and not applicable to all banks in South Africa or enforced in a court of law, it was issued due to the perception that banks in South Africa have taken advantage of smaller customers. This is not to suggest that members of the Bredenkamp, Annex Distribution, Oakbay Investments, Hlongwane and Sekunjalo Group are small customers. Of significance is the fact that the Code requires that banks who have agreed to be bound by the Code undertake to act fairly, reasonably and ethically towards customers.[160]

Fair, reasonable and ethical conduct could be demonstrated even when banks terminate the bank-customer relationship. Under the Code, banks undertake to provide customers with reasonable notice of the termination.[161] Additionally, banks reserve the right to unilaterally terminate the relationship where they are compelled to do so by law (or by international best practice), if customers have not used their accounts for a significant period of time, or if the bank has reasons to believe that the account is being used for any illegal purposes.[162]

6 Analysis

It is evident from this discussion that the bank-customer relationship is not only informed by the private contract between the bank and its customer but is also subject to the international standards and domestic laws discussed above. These regulatory instruments impose the obligation on banks to prevent *inter alia* financial crimes, including fraud, theft, money laundering and corruption.[163] These instruments exhibit that banks are under an obligation not to engage in or permit unlawful transactions under their

%20Frameworks%20Documents/2023%20fsca%203-year%20regulation%20plan[v2].pdf.

158 Section 32(2) of the CoFI Bill.

159 Section 34(1) of the CoFI Bill.

160 Schoeman *et al Introduction to South African Banking and Credit Law* 9.

161 *Code of Banking Practice* para 7.3.2.

162 *Code of Banking Practice* para 7.3.3.

163 *Kgethile* para 41.

watch.[164] This means that banks must take steps to monitor and report on the conduct of their customers, failing which there are sanctions to be imposed.

Banks do indeed have the freedom to contract, which allows them to choose with whom to contract, under which terms and when to end the relationship. Legislative measures and other measures, including the common law and soft law, determine the extent to which this freedom may be exercised. Furthermore case law as discussed above clearly depicts the circumstances under which banks are justified in exercising their freedom to contract, specifically when terminating the relationship with customers based on reputational risks. Economic reasons (including regulatory obligations) generally influence the closure of bank accounts based on reputational risks. The circumstances in *Bredenkamp* and subsequent cases are typical of such reasons, as banks cannot be seen as tools enabling money laundering or as financing terrorism.

Mechanisms to assess reputational risk include, amongst others, assessing who the customers are, their source of funds, and the possible risks they pose to a bank's business. The likelihood that a client's misconduct can be detrimental to a bank's business, particularly where the customer is alleged to be engaged in a publicly known financial misconduct in which the bank may be suspected to be implicit, is enough to give rise to the assumption that the bank's reputation is at risk. It is also enough to lead to the conclusion that the customer has breached the contract. AGAIN Bredenkamp, Annex Distributions, Oakbay Investments, Hlongwane and the Sekunjalo Group were not convicted of any financial crimes. Their accounts were closed on the basis of their banks' assessment of their reputation.

Furthermore, a customer's conduct is not the only factor to consider during risk assessments, although the literature and case law have focussed on customers' conduct as the main risk to a bank's reputation in combatting financial crimes. The BCBS correctly defined reputational risk as encompassing negative perception not only on the part of customers but also on the part of shareholders and other relevant parties or regulators.[165] Banks should also assess the practices of their clients and their possible influence and impact on their business, particularly in regard to compliance with the banking laws. There are regulatory sanctions for non-compliance. However, non-compliance with regulatory requirements can also pose a risk to a bank's good name and business.

Nonetheless, there should be constitutional considerations. The law of contract is concerned with individual autonomy, the freedom and sanctity of

164 *Kgethile* para 41.
165 BCBS 2017 https://www.bis.org/bcbs/publ/d423.pdf 4.

a contract, and public policy, which are also central to the Constitution.[166] If a constitutional right is infringed, a bank would be wrong to terminate the relationship irrespective of its freedom to contract.

A good reputation is central to a bank's business. Reputation helps customers to decide in situations where they cannot assess the quality of what they are buying before buying it.[167] Eckert identifies reputational risk (from an insurance perspective) as the risk that adverse that will most readily cause a loss of confidence in an institution's integrity.[168] Therefore, banks should be cautious not to be associated with allegations of racial discrimination or the infringement of any other constitutional rights; otherwise, efforts to protect their reputation will be futile. The termination of a banking relationship must be on reasonable notice, not contrary to public policy, and must not offend constitutional values.

7 Conclusion

To sum up, the terms of a contract establishing the bank-customer relationship usually determine how the relationship can be terminated. However, where a contract does not contain a termination clause, common law provides that the relationship can be terminated on reasonable notice. *Bredenkamp* developed an important rule regarding the termination of the bank-customer relationship. Subsequent cases that have relied on *Bredenkamp* upheld a bank's right to close accounts on the basis that the agreement that establishes the relationship constitutes a contract like any other and that the general rules of contractual interpretation apply.[169] This means that banks have a right to choose with whom to contract, and a contract cannot continue against the will of either of the contracting parties.

Although the contract between a bank and its customer is private, the conduct of banks is publicly monitored locally and internationally. Protecting banks' reputations entails severing ties with customers whose reputations pose a risk to the business of the banks, and ensuring that the conduct of banks conforms to legislative and regulatory instruments, as highlighted above.

Whereas it is accepted that the ordinary rules of contract govern the relationship between a bank and its customer, the relationship is also governed by constitutional law in that compliance with the Constitution is a

166 Mupangavanhu 2023 *Speculum Juris* 23.

167 Babiu-Hodoviu, Mehiu and Arslanagiu 2011 *Procedia Social and Behavioral Sciences* 352.

168 Eckert 2017 *Journal of Risk Finance* 150.

169 Ombudsman for Banking Services South Africa 2018 https://www.obssa.co.za/wp-content/uploads/2018/02/CIN-14-Closure-of-Bank-Accounts-Final-February-2018.pdf.

prerequisite. The court in *Oakbay Investments* expressed an opinion on the influence of the Constitution on the termination of a bank-customer relationship, stating that the termination should not infringe on public policy or constitutional values. However, one can only wait in anticipation of the development once the main applications involving the Sekunjalo Group that are pending before the Equality Court and the High Court are adjudicated.

Whereas *Bredenkamp* states that banks have a right to terminate their relationship with customers, emerging legal disputes argue that banks apply these principles loosely. Therefore, guidance must be provided, not just in the decisions in the pending cases but also with the introduction of the CoFI Bill, to ensure that the rights and obligations of banks are promoted and that consumers' rights are protected at all stages of the bank-customer relationship.

To achieve this end, "reputational risks" should be clearly defined in contracts between banks and their customers, and the procedures relating to the termination on these grounds should be clearly outlined. This could induce banks to enforce this right equally against their customers and curb “unintended” infringements of constitutional rights. Therefore, banks must be cautious in their practices.

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List of Abbreviations

BCBS	Basel Committee on Banking Supervision
BIS	Bank for International Settlements
CAC	Competition Appeal Court
CoFI Bill	Conduct of Financial Institutions Bill
CT	Competition Tribunal
EC	Equality Court
FATF	Financial Action Task Force
FIC	Financial Intelligence Centre
FIC Act	Financial Intelligence Centre Act 38 of 2001
FSCA	Financial Sector Conduct Authority
FSR Act	Financial Sector Regulation Act 9 of 2017
HC	High Court
JBFLP	Journal of Banking and Finance Law and Practice
JFC	Journal of Financial Crime
JICLT	Journal of International Commercial Law and Technology
IMF	International Monetary Fund
PELJ	Potchefstroom Electronic Law Journal
SA Merc LJ	South African Mercantile Law Journal
SALJ	South African Law Journal
SCA	Supreme Court of Appeal
THRHR	Tydskrif vir Hedendaagse Romeins-Hollandse Reg
TSAR	Tydskrif vir die Suid-Afrikaanse Reg / Journal of South African Law