



COMPETITION TRIBUNAL OF SOUTH AFRICA

Case no.: IR153Dec21/VAR137Oct22

In the variation application between:

ABSA BANK LTD

Applicant

and

**AFRICAN EQUITY EMPOWERMENT
INVESTMENT LTD**

First Respondent

AFRINAT (PTY) LTD

Second Respondent

BIOCLONES (PTY) LTD

Third Respondent

SEKUNJALO PROPERTIES (PTY) LTD

Fourth Respondent

MAGIC 828 (PTY) LTD

Fifth Respondent

In re the interim relief application:

Case no.: IR153Dec21

MOHAMMED IQBAL SURVÉ AND 35 OTHERS

First to Thirty-Sixth
Applicants

and

NEDBANK LIMITED

First Respondent

STANDARD BANK OF SOUTH AFRICA LIMITED

Second Respondent

FIRSTRAND GROUP LIMITED

Third Respondent

ABSA BANK LIMITED

Fourth Respondent

MERCANTILE BANK LIMITED

Fifth Respondent

SASFIN BANK LIMITED

Sixth Respondent

INVESTEC BANK LIMITED

Seventh Respondent

BIDVEST BANK LIMITED

Eighth Respondent

ACCESS BANK LIMITED

Ninth Respondent

THE COMPETITION COMMISSION

Tenth Respondent

Panel: M Mazwai (Presiding Member)
L Mncube (Tribunal Member)
A Wessels (Tribunal Member)

Heard on: 23 August 2023

Order issued on: 21 December 2023

Reasons issued on: 21 December 2023

REASONS FOR DECISION AND ORDER

INTRODUCTION

- [1] This matter concerns a variation application brought by the applicant, ABSA Bank Ltd (“Absa”) in terms of section 66(b) and 27(1)(d) of the Competition Act 89 of 1998, as amended (“the Act”).
- [2] This variation application is brought against African Equity Empowerment Investment Limited (“AEEI”),¹ Afrinat (Pty) Limited (“Afrinat”),² Bioclones (Pty) Ltd (“Bioclones”),³ Sekunjalo Properties (Pty) Limited (“Sekunjalo Properties”)⁴ and Magic 828 (Pty) Limited (“Magic 828”),⁵ all of which are entities within the Sekunjalo Group.⁶ These respondents are collectively referred to as “the five respondents”.
- [3] Absa seeks to vary the Reasons for Decision (“Reasons”) and Order issued by the Competition Tribunal (“Tribunal”) in an interim relief application which was

¹ The third applicant in the interim relief application.

² The fourth applicant in the interim relief application.

³ The fifth applicant in the interim relief application.

⁴ The eighteenth applicant in the interim relief application.

⁵ The twenty-fourth applicant in the interim relief application.

⁶ The “Sekunjalo Group” refers to a group of companies that Sekunjalo Investment Holdings (Pty) Ltd has direct, indirect or associated interest in, and is not a legal entity. Afrinat, Bioclones, Sekunjalo Properties and Magic 828 (the second to fifth respondents) are subsidiaries of AEEI (the first respondent).

brought by Mohammed Iqbal Survé⁷ and 35 other applicants against nine banks, including Absa.⁸

- [4] In its Reasons and Order, the Tribunal ordered inter alia that Absa should reinstate/restore the bank accounts, including all services that Absa provided to certain applicants which banked with Absa, save for nine of the applicants' bank accounts which Absa need not reinstate.⁹ This is because these nine applicants had voluntarily agreed with Absa to close their accounts.
- [5] Absa now seeks to vary the number of applicants whose accounts it need not reinstate from the nine mentioned to 14, on the basis that the balance of the applicants (being the five respondents in this matter) were erroneously omitted from the Reasons and Order of the Tribunal and that they had also voluntarily agreed with Absa to close their accounts. Put differently, Absa was erroneously ordered to reinstate the bank accounts of these five respondents when they had agreed to the closure of the accounts.
- [6] In order to rectify this alleged error or omission, Absa seeks a variation of the Reasons and Order to allow Absa to not reinstate/restore an additional five (previously nine) bank accounts by amending footnote 97 in paragraph 295, and paragraphs 296, 299, 345 and 360.3 of the Reasons; and by amending paragraph 1.3 of the Order to reflect that no order for reinstatement is made against Absa.¹⁰
- [7] We have decided to dismiss the application for the reasons set out below.

⁷ Chairman of Sekunjalo Investment Holdings (Pty) Ltd. The respondents all form part of the Sekunjalo Group.

⁸ Reasons for Decision and Order, hearing bundle p 52.

⁹ The Reasons and Order followed the Tribunal's finding that there was *prima facie* evidence against the banks, including Absa, of a prohibited practice, that there was irreparable harm to Sekunjalo and that the balance of convenience favoured Sekunjalo). Certain respondent banks, namely Mercantile Bank, Standard Bank, and Access Bank, appealed the Tribunal's interim relief order to the Competition Appeal Court ("CAC") under case numbers 208/CAC/Oct22, 209/CAC/Oct22 and 210/CAC/Oct22 respectively. The appeal was upheld by the CAC on 17 July 2023. Sekunjalo subsequently, on 7 August 2023, filed an application for leave to appeal the CAC judgment and order with the Constitutional Court under case number CCT217/23, which application is yet to be heard.

¹⁰ Founding Affidavit, hearing bundle, p 14 para 4.

BACKGROUND

- [8] On 17 December 2021, the Sekunjalo Group filed a complaint with the Competition Commission ("Commission") against several banks, including Absa for refusing to provide banking services to them. It alleged that the banks were engaged in a prohibited practice in contravention of sections 4(1)(a), 4(1)(b), 5(1), 8(c), 8(1)(d)(ii) and 8(1)(d)(iii) of the Act.
- [9] The Sekunjalo Group subsequently applied to the Tribunal for interim relief pending the Commission's investigation. The Tribunal granted interim relief in favour of the Sekunjalo Group on 16 September 2022.
- [10] We interpose to mention that the extension would have lapsed on 16 March 2023. Since the Commission was still investigating the complaint, Sekunjalo applied for an extension of the interim relief, which was unopposed by the banks, and was granted by the Tribunal on 9 February 2023, to lapse on 16 September 2023. Sekunjalo applied for a further extension until December 2024 as the Commission and Sekunjalo had agreed to extend the investigation period until then.
- [11] It also bears mention that the Tribunal declined to extend the interim relief order for a further period as the CAC had set aside the Tribunal's decision to grant interim relief, following an appeal by three banks against the Tribunal's decision.¹¹ We note that Sekunjalo has appealed the CAC decision to the Constitutional Court, which application is yet to be heard. The above information is provided for the completeness of the background, and we are deciding the variation application on its merits.
- [12] In terms of the Tribunal's Reasons and Order in the interim relief application, and as indicated, the Tribunal ordered Absa to reinstate/restore all the bank accounts held by the applicants in Absa, including all services that Absa

¹¹ Decision of 18 December 2023 in *Sekunjalo Investment Holdings (Pty) Ltd and 34 others v Nedbank Limited and 8 others*, Tribunal case number IR153Dec21/Ext072Aug23.

provided, save for the accounts of nine applicants who had agreed with Absa to close the accounts. The five respondents in this matter were not excluded from the Tribunal's Order, meaning that their accounts were to be reinstated/restored.

[13] Following the Tribunal's Reasons and Order in the interim relief application, on 20 September 2022, AEEI asked Absa to restore the five respondents' accounts pursuant to the Reasons and Order.

[14] Absa declined to restore the five respondents' accounts alleging that the Tribunal found that Absa could not be compelled to restore the accounts of those entities that agreed to their Absa bank accounts being closed, and the five respondents had agreed with Absa to terminate their bank accounts. Therefore, the five respondents ought to have been excluded from the interim relief. Given that only the nine entities were excluded and not the five respondents, Absa alleged that the interim relief granted in favour of the five respondents was based on a patent and material error of fact.¹²

[15] It bears mention that the record before the Tribunal in the interim relief proceedings reflects that:

15.1 Absa provided banking services to 24 entities who were part of the Sekunjalo Group, 13 of which were applicants in the interim relief application, including the five respondents in this matter.

15.2 On 27 August 2020, Absa informed its Sekunjalo Group clients (including the five respondents) that it would terminate its banker-customer relationship with them and that their bank accounts would be closed within 60 days.¹³

¹² Absa Heads of Argument, p 5, para 7.

¹³ Absa's Answering Affidavit (interim relief application), hearing bundle pp 525 and 526, paras 102 and 105. See also Absa's Heads of Argument p 6, para 11 and Respondents' Heads of Argument p 9, para 34 and 38.

- 15.3 Before the expiry of the 60-day period, on 15 September 2020, Absa offered the five respondents an extension of the termination period by six months until 26 February 2021, on condition that the five respondents agreed that the termination of their accounts is valid and lawful.¹⁴
- 15.4 On 24 November 2020, AEEI (the first respondent), addressed a letter to Absa, advising *inter alia* that the five respondents would close their accounts with Absa on 27 November 2020.¹⁵
- 15.5 However, subsequently, on 27 November 2020, AEEI informed Absa that the accounts of its entities listed in the letter (being the five respondents' accounts) would be kept open until 26 February 2021 because closing their accounts would affect those entities' operational capabilities and banking profiles.
- 15.6 The five respondents' accounts then remained open until 26 February 2021 and were subsequently closed.

PARTIES' SUBMISSIONS

Absa

- [16] Absa seeks a variation in terms of section 66(b) of the Act on the basis that certain paragraphs in the Reasons and Order allegedly contain "*inadvertent mutual factual errors or omissions*" that were made in the course of the interim relief proceedings.¹⁶
- [17] Absa also relies on the powers of the Tribunal to make any ruling or order necessary or incidental to the performance of its functions in terms of section 27(1)(d) of the Act.

¹⁴ Absa's Answering Affidavit (Interim relief application), hearing bundle p 526, para 106. See also Absa's Heads of Argument p 6 para 12 and Respondents' Heads of Argument p 10, para 37.

¹⁵ Absa's Answering Affidavit (Interim relief application), Annexure "MR16", hearing bundle pp 27 and 28.

¹⁶ Founding Affidavit, hearing bundle p 14, para 4.

[18] In support of its variation application, Absa relies on the 24 November 2020 letter between AEEI and Absa (which served before the Tribunal in the interim relief application proceedings and is referred to above) in which AEEI confirmed that it would be terminating the bank accounts held by certain of its entities by 27 November 2020.

[19] Absa also relies on further correspondences between Absa and AEEI between 27 November 2020 and 12 February 2021 (which did not form part of the record in the interim relief application)¹⁷ alleging that AEEI had agreed to the closure of the five respondents' bank accounts with Absa by 26 February 2021. The correspondences include, *inter alia*:

19.1 a request from AEEI on 27 November 2020, for Absa to keep its accounts open until 26 February 2020. We note that this is the same letter that was before us in the interim relief hearing and which is referred to in paragraph 15.5 above.

19.2 an email from Absa to AEEI on 30 November 2020 with a list of accounts which would be closed (not before the Tribunal in the interim relief proceedings).

19.3 a request by Absa to AEEI on 12 February 2021, for confirmation of the closing date of the accounts, noting that any accounts not closed by 26 February 2021 would need to be addressed timeously (not before the Tribunal in the interim relief proceedings).

[20] Absa asks the Tribunal to consider this additional correspondence that did not form part of the record in the interim relief proceedings, as it would "*assist the Tribunal in painting a fuller picture of the facts regarding the agreement by AEEI and the four subsidiaries with Absa.*"¹⁸

¹⁷ Founding Affidavit, hearing bundle, p 18, para 14.

¹⁸ Founding Affidavit, hearing bundle, p19, para 15.

[21] We do not deal further with this new correspondence because the correspondence was clearly in Absa's possession at the time of the interim relief application. Absa concedes that due to its own oversight this correspondence was not placed before the Tribunal. Significantly, as we discuss later, Absa itself indicated during the interim relief proceedings in its answering affidavit that only nine banks agreed to close the accounts. There appears to be no ambiguity or obvious error in this regard.

The Respondents

[22] The five respondents oppose the granting of the variation application on the basis that there is no ambiguity or an obvious error in the Tribunal's Reasons and Order, that the application fails to meet the requirements of section 66(b) of the Act and that therefore there is no basis to grant the variation application in terms of section 66(b) of the Act.

[23] Furthermore, even when assuming an error, the five respondents submit that Absa has conceded that such error is attributable to it and not to the Tribunal. The Tribunal cannot amend its own order where there is no error attributable to it and the Tribunal is *functus officio*.

[24] The five respondents also contend that Absa's reliance on section 27(1)(d) of the Act must fail since there are no exceptional circumstances that warrant variation of the Tribunal's Order. Absa has not alleged any hardship or change of circumstance which would entitle it to a variation.

OUR ANALYSIS

[25] We are required to determine whether Absa has made out a case for variation of the Tribunal's Reasons and Order in terms of sections 66(b) and 27(1)(d) of the Act. Absa indicated during the hearing that although it did not argue variation in terms of section 66(c) as it did in its founding papers, it has not abandoned this argument. We will therefore deal with it briefly.

[26] In terms of section 66(b) the Tribunal may vary or rescind its decision or order-

“(b) in which there is ambiguity, or an obvious error or omission, but only to the extent of correcting that ambiguity, error or omission.” (own emphasis)

[27] In *Mike’s Chicken*¹⁹, the Competition Appeal Court (“CAC”) noted that section 66 of the Act is modelled on High Court Rule 42 and the principles developed by the Courts in regard to Rule 42 provide guidance in the interpretation of section 66(b) of the Act.

[28] High Court Rule 42(1)(b) which provides for the variation of an order where there is ambiguity, or a patent error or omission is thus equivalent to section 66(b) of the Act.

[29] In *Boart*²⁰, the Tribunal described a patent error as one which “*does not reflect the intention of the judicial officer pronouncing it*” and reiterated with reference to the High Court’s decision in *First National Bank*²¹ that to obtain relief in terms of section 66(b) of the Act, the error must be attributed to the Tribunal.²²

[30] It is necessary to consider the evidence that was before the Tribunal during the hearing of the interim relief application to determine if there was ambiguity, an error or omission, as Absa contends.

[31] Absa presented *inter alia* the following factual evidence regarding the five respondents in its Answering Affidavit in the interim relief application:

31.1 In paragraph 115.2, Absa states:

¹⁹ *Mike’s Chicken (Pty) Ltd and Others v Astral Foods Limited and another* [2004] 1 CPLR 40 (CAC), at para 13.

²⁰ *Boart Longyear v Huddy (Pty) Ltd / Huddy Rock Tools (Pty) Ltd* (41/LM/Aug03) [2004] ZACT 27 (19 April 2004). (“Boart”)

²¹ *First National Bank of South Africa Ltd v Jurgens and Others* 1993 (1) SA 245 (W) 246 -247E-G.

²² *Boart*, supra, paras 22 and 23.

“On 24 November 2020, by way of a letter from AEEI’s CEO..., AEEI informed Absa that it and certain of its subsidiaries would end their banking relationships with ABSA on 27 November 2020 while other subsidiaries would accept ABSA’s conditional offer for a six-month extension to 26 February 2021.”²³ (own emphasis).

31.2 Paragraph 119 of Absa’s Answering Affidavit reflects that Afrinat, Bioclones, Sekunjalo Properties, and Magic 828 did not accept Absa’s conditional six-month extension.²⁴ (own emphasis)

31.3 Further, in paragraph 120.3 of its Answering Affidavit Absa states:

“120.3.1 Nine applicants have agreed with ABSA that ABSA’s closure of their accounts was lawful and valid.

120.3.2 Only four applicants – Afrinat, Bioclones, Sekunjalo Properties and Magic 828 – did not reach such an agreement and could now conceivably contest the legality and validity of ABSA’s closure of their accounts”.²⁵ (own emphasis)

[32] Having had regard to Absa’s submissions, the Tribunal recorded in its Reasons, *inter alia*:

“[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. 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

²³ Trial Full Bundle, p 528, Answer to the Interim Relief Application, para 115.2.

²⁴ Trial Full Bundle, pp 529 to 531, Answer to the Interim Relief Application, para 119.

²⁵ Trial Full Bundle, p 531, Answer to the Interim Relief Application, para 120.3.

valid and lawful. To the extent that ABSA interpreted its offer to be conditional, there was no meeting of minds between the parties.” (own emphasis)

“[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.” (own emphasis)

“[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.” (own emphasis)

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

...

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)” (own emphasis)

[33] In light of the above, the Tribunal made the following order against Absa:

"[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."

- [34] There is accordingly no ambiguity or error in the Reasons and Order of the Tribunal. The Tribunal's intention is clear from the language of its Reasons and Order, namely, that it intended to exclude these entities that accepted Absa's six-months offer from the interim relief and those entities are specifically named in the Reasons and Order.
- [35] Further, any omission of the five respondents from the Tribunal's Reasons and Order, is not a mutual error, nor is it an error attributable to the Tribunal as indicated in *Boart* referred to above. According to Absa, the error is because of Absa's own drafting oversight. Absa states that the drafting oversight "*arose in the context of the factual complexity of the interim relief application, its urgency and the need to prepare the answering affidavit under significant time pressure.*"²⁶
- [36] We therefore find no basis to vary on grounds of ambiguity, an error or omission under section 66(b).
- [37] Turning to section 66(c), as mentioned above, Absa indicated at the hearing that it has not abandoned its submissions under section 66(c).²⁷
- [38] Section 66(c) provides that an order may be varied if it was granted as a result of "*a mistake common to all of the parties to the proceedings*". It must be established that the parties were mistaken about certain facts.²⁸
- [39] In the application for variation, Absa refers to the oversight as an "*innocent mistake arising from the urgency in which the interim relief application was put*

²⁶ Founding Affidavit, hearing bundle p 16, para 9.

²⁷ Transcript p 21.

²⁸ *Jennifer Anne Nelson v Neil Christopher Nelson*, case number:2283/2021.

together and it is a mistake that has been acknowledged by ABSA and is sought to be corrected in these processes."²⁹

- [40] As we have discussed above, this alleged mistake is not common to the parties. We therefore find no basis to grant variation in terms of section 66(c) of the Act.
- [41] Section 27(1)(d) of the Act, gives the Tribunal the broad power to "*make any ruling or order necessary or incidental to the performance of its functions in terms of this Act*".
- [42] The Constitutional Court in *Hosken*³⁰ confirmed that section 27(1)(d) of the Act has been formulated widely and confers wide powers on the Tribunal. Recently, in *Life Wise*³¹ and *Shoprite*³², the CAC and the Tribunal confirmed that the Tribunal's power to vary its own orders has been read into the discretion conferred upon it by section 27(1)(d) of the Act. The Tribunal's exercise of its discretion must be in accordance with the principles of legality, transparency and fairness as set out in the Constitution of the Republic of South Africa, 1996 and as required by the Act.
- [43] The Tribunal issued its order on the strength of the evidence placed before it by Absa. As indicated, Absa states that the error/mistake was an oversight on its part. Absa has provided no evidence of changed or exceptional circumstances to justify the variation.
- [44] As the Tribunal has previously held in *Eldan*³³ when considering a variation application in terms of section 27(1)(d), the principle of *res judicata* as espoused in the Constitutional Court's decision in *Molaudzi*³⁴ requires, in the public

²⁹ Transcript, p 23, lines 21 to 24.

³⁰ *Hosken Consolidated Investments Limited and Tsogo Sun Holdings Limited v Competition Commission* (CCT296/17) [2019] ZACC 2 (1 February 2019) at paras 76 and 77.

³¹ *Life Wise (Pty) Ltd t/a Eldan Auto Body v Competition Commission of South Africa* (197/CAC/Nov21) [2022] ZACAC 3; [2022] 1 CPLR 3 (CAC) (8 April 2022) ("*Life Wise*") at para 7.

³² *Shoprite Checkers Proprietary Limited and The Competition Commission of South Africa*, Tribunal case number: CO026May20/AME195Mar22 at para 26.

³³ *Life Wise*, *supra*, at paras 39 and 52.

³⁴ *Molaudzi v S* 2015 (8) BCLR 904 (CC).

interest, that there be certainty and predictability regarding the Tribunal's orders and decisions. This should be departed from in the interests of justice only where there are *truly* exceptional circumstances.

[45] This is because "*The rule of law and legal certainty will be compromised if finality of a court order is in doubt and can be revised in a substantive way. The administration of justice will also be adversely affected if parties are free to continually approach the court on multiple occasions in the same matter.*"

[46] In our view, Absa has not demonstrated any truly exceptional circumstances to warrant a departure from the principle of *res judicata* on the facts of this case.

[47] Accordingly, we find no reason to vary the Reasons and Order in terms of our discretion under section 27(1)(d) of the Act.

[48] For the above reasons, we conclude that the variation application must be dismissed.

COSTS

[49] The five respondents seek punitive costs against Absa alleging that the variation application is an abuse of the Tribunal's processes, is vexatious and frivolous.

[50] We find no evidence that the application is vexatious and frivolous. Accordingly, we see no reason to depart from the normal principle that costs should follow the course. The application stands to be dismissed with costs, including the costs of two counsel.

ORDER

- [1] The application is dismissed.
- [2] Absa is ordered to pay the respondents' costs of the application, including the costs of two counsel.



Ms Mondo Mazwai

21 December 2023

Date

Prof Liberty Mncube and Mr Andreas Wessels concurring

Tribunal Case Manager: Matshidiso Tseki

For the Applicant: Advocate M Le Roux SC assisted by Advocate J Chanza instructed by Webber Wentzel

For the Respondents: Advocate NH Maenetje SC and Advocate V Ngalwana SC assisted by Advocate K Monareng instructed by Refiloe Mokoena Attorneys